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ABATEMENT
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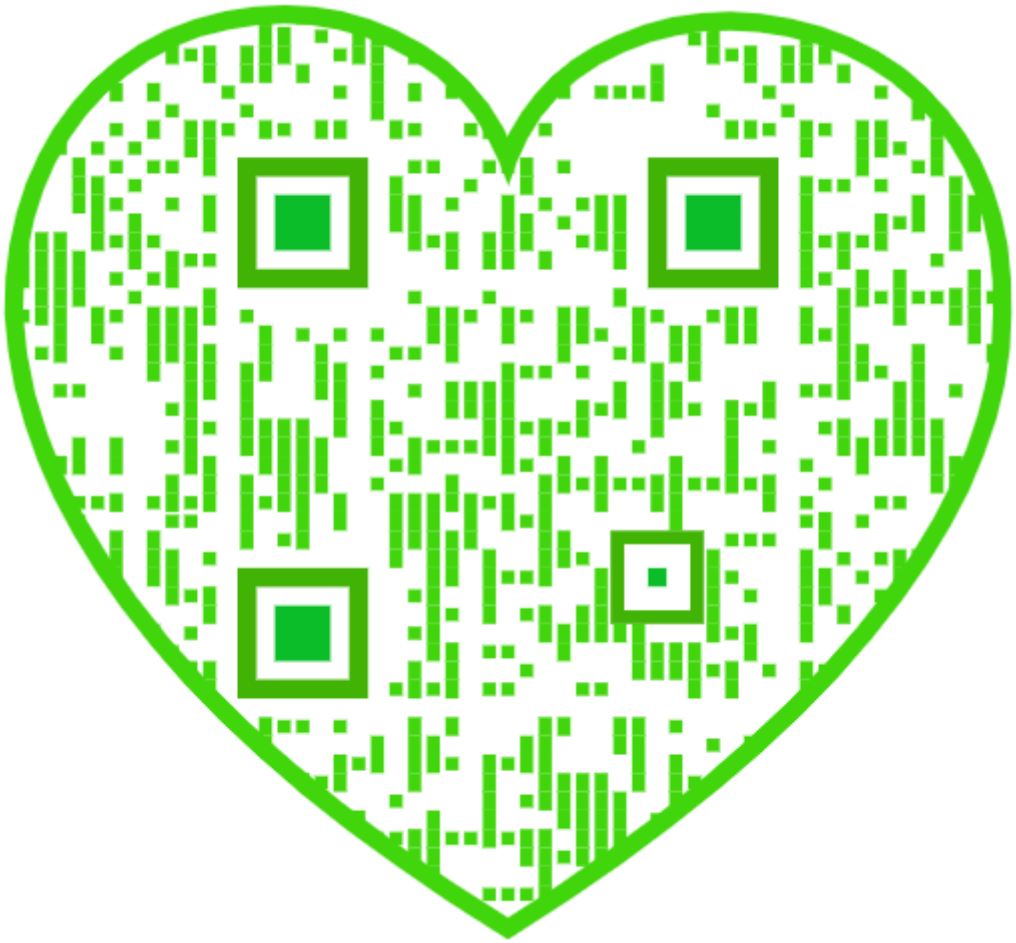

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CURRENT LAW

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Abandonment (defined, see 12 C. L. 1143, n. 22), see latest topical index.

ABATEMENT AND REVIVAL.

The scope of this topic is noted below.[1]

§ 1. Causes of Abatement, 1. The Pendency of Another Suit or Action, 1. Death of a Party, 3. Failure to Acquire Jurisdiction, 3. Misjoinder or Nonjoinder of Parties, 3. Alienation of Party's Interest, 3. Insanity, 3. Cessation of Incumbency of Official Party, 3.
§ 2. Raising Objection; Waiver, 3.
§ 3. Survivability of Causes of Action, 5.
§ 4. Effect of Abatement; Revival and Continuation of Suits, 6.

§ 1. *Causes of abatement.*[2] *The pendency of another suit or action.* See 11 C. L. 1 The pendency[3] in a court having jurisdiction[4] of a prior action, though the pleadings therein are defective,[5] is ground for the abatement[6] of a subsequent action,[7] where they are identical as to subject-matter[8] and the parties are identical

1. This topic excludes criminal prosecutions (see Indictment and Prosecution,* § 5), bills of revivor (see Equity,* § 6C), revival of judgments (see Judgments,* § 9), or of statute barred causes of action (see Limitations of Actions,* § 6) and the abatement of various writs for defects therein (see Attachment,* § 15A), enforced abatement by injunction (see Injunction,* § 2B), judgment on plea in abatement (see Judgments;* Pleading,* § 3). As to matters which, though not operating as an abatement, are ground for staying proceedings, see Stay of Proceedings.*

2. Search Note: See notes in 3 C. L. 3; 42 L. R. A. 449; 9 L. R. A. (N. S.) 1020; 70 A. S. R. 681; 82 Id. 587; 1 Ann. Cas. 365.

See, also, Abate. and R., Cent. Dig. §§ 1-357; Dec. Dig. §§ 1-70; 1 Cyc. 10-82; 1 A. & E. Enc. P. & P. 750.

3. Suit for partition in chancery is not abated by fact that notice of petition to be filed in Orphan's Court under Penn. Laws p. 648, §§ 9, 10, has been given, petition not having been filed and such notice not being a process. Brown v. Gaskill [N. J. Eq.] 70 A 665. Action is not abated by commencement of action which was dismissed prior to commencement of action at bar, where first action was commenced in state court, removed to federal court, dismissed, and a second action then brought for a less amount in state court. Bradford v. Louisville & N. R. Co. [Ga.] 65 SE 127. Where former suit has gone to judgment which is stayed pending appeal, it prevents second suit. In re Moran, 59 Misc. 133, 112 NYS 207. If prior action has been dismissed, it is no abatement though costs have not been paid; being duty of defendant in such case in absence of agreement to contrary to settle costs, and the case not falling within provisions of Civ. Code, 1895, § 5043, which provides that plaintiff cannot commence second action without paying costs, in case of dismissal or nonsuit. Graham v. Massengale Advertising Agency, 4 Ga. App. 826, 62 SE 567.

4. Naylor v. Lorimer-Scholes Co., 131 App. Div. 85, 115 NYS 159.

5. That petition in first action is demurrable is not material to determine question of whether second action is abated, such demurrability being properly raised only in first action. Commonwealth v. U. S. Trust Co. [Ky.] 117 SW 314.

6. Conlon v. National Fire Proofing Co., 128 App. Div. 270, 112 NYS 652; Fulwider v. Trenton Gas L. & P. Co., 216 Mo. 582, 116 SW 508. Under Code, § 3642, and is not good plea in bar of injunction. Hemmer v. Dunlavey [Iowa] 121 NW 1024. And not ground to impeach judgment. In re McNeil's Estate [Cal.] 100 P 1086.

7. Not abated by pendency of another action begun subsequent thereto. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315.

8. Hence, bill against defendant as administrator and as administrator de bonis non seeking removal of administration from probate court to chancery court will be abated by bill to have chancery court assume further jurisdiction of administration and require such adminstrator to file his final accounts and make final settlement. Salmon v. Wynn [Ala.] 47 S 233. Pendency of action to recover balance due on contract of sale will not abate subsequent action for fraud in inducing contract, not requiring same evidence. Standard Sewing Mach. Co. v. Kattell, 132 App. Div. 539, 117 NYS 32. Pending action to recover from

* Always begin with the latest article on the subject. Use the latest topical index.

or in privity.[9] The pendency of an action in another court in which the plaintiff in the second action might have interpleaded works no abatement.[10] There is a conflict of authority as to the effect of suits, in state and federal courts.[11]

stockholders an **assessment levied by directors** is not on same basic cause as action by receiver of corporation to recover an **assessment levied by receiver** to pay creditors. Brown v. Allebach, 166 F 488. Action to enforce **lien** is not abated by pending contract action for same **debt,** if there is no conflict in proceedings, construing Rev. St. 1902, c. 197, § 33, in light of construction of prior similar statutes (Rev. St. 1836, c. 117, § 33, Gen. St. 1860, c. 150, § 40, Pub. St. 1882, c. 191, § 46). Morrison Co. v. Williams, 200 Mass. 406, 86 NE 888. Action on debt not abated by action on bond given to release lien in action. Brown v. Kight, 63 Misc. 58, 116 NYS 592. Suit based on unconditional **contract** in writing is not abated by pendency of another suit on **open account** between same parties. Graham v. Massengale Advertising Agency, 4 Ga. App. 826, 62 SE 567. Suit on promissory **note** is not abated by cause of **action ex delicto** which may arise where vendor fraudulently makes second deed to same land. McLendon Bros. v. Finch, 2 Ga. App. 421, 58 SE 690. Action relating only to **individual interests** is not abated by pendency of another action relating entirely to **corporate matters;** hence, action by director against stockholder, relating to their joint interests and certain pledged stock of corporation and asking for sale thereof, is not abated by pendency of action by such stockholder against all directors praying for receiver, sale of corporate property, and distribution. Stokes v. Dimmick [Ala.] 48 S 66. Since action based upon distinct **statutory cause** is not abated by pendency of another action based upon mere **defensive right,** fact that water company was party to condemnation proceeding in which its private rights were involved does not necessarily abate statutory action brought by it in its capacity as tax payer, nor does it involve same issue of law. Queens County Water Co. v. O'Brien, 131 App. Div. 91, 115 NYS 495. Action in **equity** by party having ground for equitable relief distinct from his defense to pending action at law wherein he is defendant is not abated by such action at law. Eastern Oil Co. v. Coulehan [W. Va.] 64 SE 836. Proceedings to enforce **alimony** rights are not abated by pendency of **divorce** proceedings in another state between same parties. Wood v. Wood [Fla.] 47 S 560. Hence, proceeding to **revive judgment** by scire facias may be prosecuted at same time as action of **debt on judgment,** and independent concurrent remedy being sought. Bick v. Dry, 134 Mo. App. 538, 114 SW 1146. Pending suit to recover **possession** of land, together with rents, issues, and profits thereof, is not bar to proceeding to recover **compensation** for such land under § 6448, Revised Statutes. Union Sav. Bank & Trust Co. v. Baltimore, etc., R. Co., 7 Ohio N. P. (N. S.) 497. Action by trustee in bankruptcy **against preferred creditor** to recover value of goods constituting preference is not abated by pendency of another action by such trustee **against purchaser** of such goods. Cree v. Bradley's Bank [Iowa] 119 NW 614. Pendency of action against tailor for **damages** done to garment will not abate action by tailor for **services** done on garment. Sowden & Co. v. Murray, 114 NYS 164.

9. If the real issues be common to the two cases and it appear that there is such similarity in the parties as that a decree rendered in either case would be binding in the other, not necessary that all defendants be same either in name or in fact. Quinn v. Monona County [Iowa] 117 NW 1100. Pendency of action instituted at request of stockholder by directors of corporation against operating company is ground for abatement of similar equitable action instituted by such stockholder for same relief in another court of concurrent jurisdiction though such stockholder was not party to first suit. South & N. A. R. Co. v. Gray [Ala.] 49 S 347. Pendency of action by decedent's widow for his death may abate subsequent action by children, under statute giving widow right of action for six months and minor children right of action during next six months. Fulwide v. Trenton Gas, L. & P. Co., 216 Mo. 582, 116 SW 508. Action to have omitted property listed for taxation will abate subsequent action for same purpose where **each on behalf of public,** though one suit is by agent of county for county and other by agent of state for state, and one is against defendant in its individual as well as fiduciary capacity, and more land is described in second that in first, the proper proceeding being to amend the first. Commonwealth v. U. S. Trust Co. [Ky.] 117 SW 314. Where in one case parties defendant were county officials and in other case the county, the decision would be binding upon public in either case. Quinn v. Monona County [Iowa] 117 NW 1100. If the prior action affords complete remedy, although there be additional parties in first suit or they occupy different places on the record. Emry v. Chappell, 148 N. C. 327, 62 SE 411. It follows that action by partner against his copartners, and reference had therein for accounting between plaintiff and his partners and also the partnership, will abate second action between partners alone for dissolution and accounting and also for appointment of receiver. Id.

Parties held not the same. Brown v. Kight, 63 Misc. 58, 116 NYS 592. No identity of parties where sleeping car company alone is defendant in one action, and it and railway company are both defendants in other action. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. Action for personal injuries in one court against lessor of railroad held not abated by pendency of another action in another court against lessee. Logan v. Atlantic & C. Air Line R. Co. [S. C.] 64 SE 515. Foreclosure action by one in his individual capacity cannot be concluded by judgment in action against him in representative capacity. White v. Gibson, 61 Misc. 436, 113 NYS 983.

10. Since he has right to choose any

The stay of an action to await the determination of another or until the costs of a previous action are paid is elsewhere treated.[12]

Death of a party. See 11 C. L. 3—By common law all pending actions abate upon the death of the plaintiff before judgment,[13] and the same rule of abatement generally applies to statutory and equitable actions.[14] Statutes specifically provide that certain actions shall not abate by death of the plaintiff.[15]

A suit in equity is abated by the death of the defendant before decree is entered.[16] An action at law is not abated by the death of the defendant after the hearing and making of findings, though before judgment.[17] An action though by plaintiff in an official capacity under common-law authority, ordinarily abates by his death,[18] but statutes sometimes provide otherwise.[19]

Failure to acquire jurisdiction See 11 C. L. 4 by reason of defendant being sued in wrong county is ground for abatement.[20]

Misjoinder or nonjoinder of parties. See 11 C. L. 4

Alienation of party's interest. See 11 C. L. 4—In some states, no action is abated by the transfer of any interest therein.[21]

Insanity. See 11 C. L. 5

Cessation of incumbency of official party. See 11 C. L. 5—The discharge of a receiver does not necessarily abate an action wherein he is either plaintiff [22] or defendant.

§ 2. *Raising objection; waiver.*[23]—See 11 C. L. 6—A plea in abatement being a

forum which has jurisdiction of partes and subject-matter. Rochelle v. Pacific Exp. Co. [Tex. Civ. App.] 120 SW 543.

11. See note, 3 C. L. 3. Pendency of action in federal court, which has been removed from state court, will abate subsequent action in state court between same parties for same cause of action, though amount of such subsequent suit is reduced below $2,000 the jurisdictional amount. Louisville & N. R. Co. v. Newman [Ga.] 64 SE 541.

Held no abatement. Bradford v. Louisville & N. R. Co. [Ga.] 65 SE 127. Though on same matter. Brown v. Allebach, 166 F 488. Hence, action for liquidation of a claim in state court is not barred by pendency of bankruptcy proceeding. In re Buchan's Soap Corp., 169 F 1017. In this case, also, some difference in parties defendant. Logan v. Atlanta & C. Air Line R. Co. [S. C.] 64 SE 515; Bradford v. Louisville & N. R. Co. [Ga.] 65 SE 127.

12. See Stay of Proceedings, 12 C. L. 1959.

13. Welch v. Lynch, 30 App. D. C. 122; Reck v. Reck [Md. App.] 73 A 144. Personal injury action. Dillon v. Great Northern R. Co [Mont.] 100 P 960.

14 Action under § 9 of Dram Shop Act. Glasco v. Fakes, 143 Ill. App. 378. Suit for injunction. Miller v. Waltier, 165 F 359. Suit to quiet title. Bevens v. Henderson [Ind. App.] 86 NE 426.

15. Under Code Civ. Proc. § 455, action for libel does not abate. Sheibley v. Nelson [Neb.] 119 NW 1124. Death of creditor bringing action against estate does not abate such action as to other creditors filing claims who, under Civ. Code Prac. § 432, are made parties thereto, though action is not revived by representative of such deceased creditor. Duff v. Combs [Ky.] 117 SW 259.

16. Miller v. Waltier, 165 F 359. Death of defendant pending hearing on exceptions taken by him to master's report and before decree is entered abates action, in suit to foreclose mortgage. Pendleton v. Vigneauz, 166 F 935.

17. But court may enter judgment nunc pro tunc of date before defendant's death. Merchants L. & T. Co. v. Egan, 143 Ill. App. 572.

18. Held that under strict legal procedure action after death of sheriff plaintiff should have been continued in the name of the undersheriff by substitution or otherwise. Dickinson v. Oliver, 195 N. Y. 238, 88 NE 44.

19. Dickinson v. Oliver, 195 N. Y. 238, 88 NE 44.

20. Being only proper method in such case of attacking service of summons. Clark v. Evans, 138 Ill. App. 56.

21. Since by Burn's Ann. St. 1908, § 272, no action shall abate by the transfer of any interest therein, an appeal from judgment for defendant, in action for mandamus to compel permission to relator to use telephone plant and for damages, does not abate by reason of sale by relator of his telephone plant to corporation in which he has no interest except as stockholder and mortgagee. State v. Cadwallader [Ind.] 87 NE 644.

22. Interstate Trust & Banking Co. v. Dierks Lumber & Coal Co., 133 Mo. App. 35, 113 SW 1. Not abate where order of discharge contemplates continuance of such action in his name, the receiver being appointed out federal court and action being pending in state court. Peterson v. Baker [Kan.] 97 P 373.

23. Search Note: See Abate. and R. Cent. Dig. §§ 7-24, 123-126, 141-143, 147, 153-156, 168-174, 188, 205-211, 224, 237, 238, 355-357,495-512; Dec. Dig. §§ 3, 17, 40, 46, 70, 78-88; Pleading, Cent. Dig. §§ 208-236,

dilatory plea,[24] unless the objection raised is that the court has not jurisdiction over the subject-matter,[25] it must be filed at the first term,[26] and before answer[27] or other appearance,[28] and must be presented before the commencement of the trial on its merits[29] or it will be considered as waived.[30] An objection based on a defect appearing on the face of the petition must be raised by demurrer,[31] but, if the defect does not so appear, the objection must be raised, when based on the prematureness of suit[32] or on the pendency of another suit,[33] by a verified,[34] special plea in abatement,[35] or, when based on misjoinder of parties[36] or want of jurisdiction, by answer,[37] and, when based on alienation of plaintiff's interest, by motion for substitution.[38] An objection of pendency of prior action is insufficient which

427; Dec. Dig. §§ 110-111; 1 Cyc. 45-47, 80-82, 124-137; 1 A. & E. Enc. P. & P. 1, 770.

24. Bray v. Peace, 131 Ga. 637, 62 SE 1025.

25. Plea as to jurisdiction of subject-matter may be made at any time before judgment as where plea was for abatement of partition suit in district court because estate was in process of administration in county court, such not being dilatory plea. Wilkinson v. McCart [Tex. Civ. App.] 116 SW 400. May be filed even after answer. Bernstein v. Dalton Clark Stave Co., 122 La. 412, 47 S 753. Question of jurisdiction from reason that cause of action did not survive may be raised at any time. Hey v. Prime. 197 Mass. 474, 84 NE 141. Defect of want of jurisdiction, not appearing on face of petition, not waived by objection thereto being joined in answer with plea to merits. Barnett v. Colonial Hotel Bldg. Co. [Mo. App.] 119 SW 471; Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. [Mo. App.] 118 SW 500. Defendant does not waive right to object to jurisdiction by entering general appearance and including in answer every defense under New York practice controlling on federal courts in that state. Leonard v. Merchants' Coal Co. [C. C. A.] 162 F 885.

26. Under Civ. Code, 1895, § 5058. Bray v. Peace, 131 Ga. 637, 62 SE 1025. Objection that action is prematurely brought should be filed at first term. Gate City Fire Ins. Co. v. Thornton, 5 Ga. App. 585, 63 SE 638.

27. Bernstein v. Dalton Clark Stave Co., 122 La. 412, 47 S 753. Matter in abatement is waived by a plea in bar, hence plea that no tender of taxes has been made by plaintiff is waived by plea of matter in bar, in action by owner to recover lands held under tax title. Rafferty v. Davis [Or.] 102 P 305. Plea in abatement of want of jurisdiction of the person must be filed before answer. Bernstein v. Dalton Clark Stave Co., 122 La. 412, 47 S 753. Plea in abatement is waived by demurring to bill in equity. Cartwright v. West [Ala.] 47 S 93.

28. Must be filed before other steps taken when its defect appears on record. Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. [Mo. App.] 118 SW 500. Defendant may waive his right to abate action because he is sued in county in which he does not reside by voluntarily submitting his person to jurisdiction of court as where he files general demurrer to bill or moves to dissolve injunction. Clark v. Evans, 138 Ill. App. 56.

29. Bennett v. Knott [Ky.] 112 SW 849.

30. Former action pending. In re Buchan's Soap Corp. 169 F 1017; Fulwider v. Trenton Gas, L. & P. Co., 216 Mo. 582, 116 SW 508. And it would be error to dismiss an action after such waiver. Himes Supply Co. v. Parker [Ala.] 47 S 794.

31. Misjoinder of parties raised by demurrer, under Rev. St. 1899, § 598. Fulwider v. Trenton Gas, L. & P. Co., 216 Mo. 582, 116 SW 508. Raising objection by answer in such case will not avail. Id. Objection by demurrer that there is **another action pending** between same parties for same cause, under Code Civ. Proc. § 488. Queens County Water Co. v. O'Brien, 131 App. Div. 91, 115 NYS 495. Objection of **action prematurely brought** should in such case be raised by special demurrer. Gate City Fire Ins. Co. v. Thornton, 5 Ga. App. 585, 63 SE 638. As where defect of **jurisdiction** over person or subject-matter. Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. [Mo. App.] 118 SW 500.

32. Gate City Fire Ins. Co. v. Thornton, 5 Ga. App. 585, 63 SE 638.

33. Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1143, 119 NW 1079.

34. Plea in abatement must be verified. Bray v. Peace, 131 Ga. 637, 62 SE 1025. Verification of plea in abatement is mere formal matter which may be waived. Wood v. U. S. Fidelity & Guar. Co., 4 Ga. App. 671, 62 SE 97.

35. Emry v. Chappell, 148 N. C. 327, 62 SE 411. Not by notice of special defenses under plea of general issue. Muir v. Kalamazoo Corset Co., [Mich.] 15 Det. Leg. N. 1143, 119 NW 1079. Since it is not sufficient to allege such pendency in answer as defense to merits. McMahan v. Hubbard, 217 Mo. 624, 118 SW 481. Not by motion to elect made in first action, the prosecution of first action denoting abandonment of second action. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. Not by answer. Tracy v. New York, etc., R. Co. [Conn.] 72 A 156.

36. Fulwider v. Trenton Gas, L. & P. Co., 216 Mo. 582, 116 SW 508.

37. Of the person. Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. [Mo. App.] 118 SW 500. As to venue. Barnett v. Colonial Hotel Bldg. Co. [Mo. App.] 119 SW 471.

38. As where receiver has been appointed for defendant's effects, under Rev. Laws, 1905, § 4064, and not by motion to dismiss proceedings. American Engine Co. v. Crowley, 105 Minn. 233, 117 NW 428.

fails to show that a prior action [39] was pending at the time of the commencement of suit at bar,[40] and is still pending.[41] The plea must properly state the ground for abatement,[42] be not vague, indefinite,[43] or too extensive in its application.[44]

§ 3. *Survivability of causes of action.*[45]—See 11 C. L. 6—The common-law rule is that a cause of action [46] which is personal and not subject to assignment is not survivable,[47] the nature of the matter sued on, rather than the form of remedy, being the test of such survivability.[48] It is ordinarily provided by statute that a right of action is not lost by the death of any person, but survives [49] in favor of [50] or

39. Statutory objection by demurrer that there is another "action" pending is not sufficiently complied with by objection that there is another "proceeding" pending, since "proceeding" is not "action" as used in Code, construing Code Civ. Proc. 518, §§ 3333, 3334, 448. Queens County Water Co. v. O'Brien, 131 App. Div. 91, 115 NYS 495.

40. O'Leary v. Tooker, 116 NYS 664.

41. Holland v. Western Bank & Trust Co. [Tex. Civ. App.] 119 SW 694, sustaining 118 SW 218 on rehearing.

42. For sufficiency of plea in general, see Pleadings, 12 C. L. 1323. Plea of want of jurisdiction of subject-matter cannot be made to do service as plea of want of jurisdiction of person. Bernstein v. Dalton Clark Stave Co., 122 La. 412, 47 S 763.

43. In suit for personal property where petition alleges that defendant bought such property at administrator's sale at certain price, and that he was highest and best bidder, statement in unsworn answer that defendant denied such allegations but admitted that partnership, composed of himself and another, bought the property and it was delivered to them, is not sufficient. Bray v. Peace, 131 Ga. 637, 62 SE 1025.

44. Plea in abatement by two defendants going to whole suit for cause personal to one of them only is defective, plea being defective service or return. Muzroll v. Hetu [Vt.] 72 A 323.

45. Search Note: See notes in 5 L. R. A. (N. S.) 756; 13 Id. 643, 1243; 6 Ann. Cas. 513, 651; 10 Id. 725.

See, also, Abate. and R., Cent. Dig. §§ 245-357; Dec. Dig. §§ 48-70; 1 Cyc. 47-82; 18 A. & E. Enc. P. & P. 1094.

46. "Cause of action" is right to institute judicial proceedings and cannot survive in favor of deceased. Dillon v. Great Northern R. Co. [Mont.] 100 P 960.

47. Held that right to file bill to set aside will and codicils and probate was not assignable. Selden v. Illinois Trust & Sav. Bank, 239 Ill. 67, 87 NE 860. Right of person interested to contest will did not survive at common law. Id. Right to license to run employment agency is personal and nonassignable. Hannon v. Harper [Cal. App.] 98 P 685. As right of action for personal injury where action has not been brought does not survive death of party injured. Dillon v. Great Northern R. Co. [Mont.] 100 P 960. Action at law for deceit and fraud resulting in damages for depletion of estate in hands of receiver does not survive **death of wrongdoer.** Allen v. Frawley, 138 Wis. 295, 119 NW 565. Right of husband to recover damages for injury to his wife whereby her services or consortium came lost does not survive. Hey v. Prime, 197 Mass. 474, 84 NE 141. Cause of action for exemplary damages for breach of promise of marriage will not survive against heirs of estate of deceased. Johnson v. Levy, 122 La. 118, 47 S 422. Right of action does not survive to administrator where plaintiff dies pending appeal from verdict in her favor for the wrongful death of her husband, construing Rev. St. 1899, §§ 96, 97, and 762 as not affecting. Millar v. St. Louis Transit Co., 216 Mo. 99, 115 SW 621. See Assignments, 11 C. L. 291.

48. Hey v. Prime, 197 Mass. 474, 84 NE 141. Where husband brings suit because disability arising from tort has deprived him of either her services or matrimonial companionship, his right to recover rests upon ground that wrong suffered by him while personal in effect is regarded as purely consequential in character and the right abates on the death of tort feasor. Rev. Laws, c. 171, § 1, Id.

49. For survivability in case of death by wrongful act. See Death by Wrongful Act, 11 C. L. 1019.

50. Action for injury to the person survives the **death of plaintiff.** Under Miners' Act. Clark v. O'Gara Coal Co., 140 Ill. App. 207. Action to recover for damages to real estate by trespass survives, provided action be revived in name of representative. Union Sav. Bank & Trust Co. v. Western Union Tel. Co., 79 Ohio St. 89, 86 NE 478. Foreclosure action on note and mortgage will survive to personal representatives. Haines v. Perkins [Mich.] 15 Det. Leg. N. 1070, 119 NW 439. Death after assignment does not prevent assignee from recovering on judgment, the judgment at common law being chose in action upon which creditor could maintain action of debt and, under Gen. St. 1902, § 631, the assignee and bona fide owner of judgment being permitted to sue upon it in his own name. Hamilton v. New Haven [Conn.] 73 A 1. Interest of creditor suing to settle an estate survives to his personal representatives. Duff v. Combs [Ky.] 117 SW 259. Under Pub. Acts 1903, p. 149, c. 193, no right of action shall be lost to any person but shall survive in favor of decedent's executor, hence right of action of ward for land fraudulently sold by conservator survives to her executor. Appeal of Dunn [Conn.] 70 A 703. Right of action for conversion during lifetime of testatrix passes to administrator with will annexed. Devlin v. Houghton [Mass.] 88 NE 580. Right of action survives to husband for **death of wife** for damages for

against [51] the representative of the deceased. Statutes of survival do not, however, create new causes of action, but merely preserve existing rights.[52]

§ 4. *Effect of abatement; revival and continuation of suits.*[53] See 11 C. L. 7 At common law, abatement works a dismissal [54] of the original action.[55] A suit in equity may be revived [56] in the discretion of the court [57] on prompt application.[58] Statutes now generally provide for the revival of actions at law, the right thereto being measured wholly by the statute [59] generally, though not always,[60] it is essential that the action be revived in the name of the representative of the deceased before there be any continuation of the suit.[61]

Revival when authorized must be in the name of the personal representative of the deceased [62] or some other party entitled to recover therein.[63]

which she would have been entitled. Walker v. Lansing & S. Trac. Co. [Mich.] 121 NW 271. Right of husband at common law to sue for loss of services and society of his wife, where she is injured by third party, does not abate by death of wife, nor is such right restricted by Burn's Ann. St. 1901, § 285. Indianapolis & M. Rapid Transit Co. v. Reeder [Ind. App.] 85 NE 1042.

51. Death of defendant jointly liable on contract does not release his estate by Code Civ. Proc. § 758, but his representative should be made party. Hentz v. Havmeyer, 132 App. Div. 56, 116 NYS 317. Under Pub. Acts 1903, p. 149, c. 193. Appeal of Dunn [Conn.] 70 A 703. Under Abatement Act, § 11, suit shall not abate where representative of such deceased is properly brought into court, his connection with deceased or with attached property being as fully shown as though suit had been originally commenced against him. Tompkins v. Diamond, 140 Ill. App. 90. Action will survive against executors of defendant who died before bill in equity was filed where action is for money lost through negligence and misconduct of such defendant director of bank, provided such executors be joined as defendant with surviving directors. Allen v. Luke, 163 F 1018. Action for compensatory damages for breach of promise of marriage will survive. Johnson v. Levy, 122 La. 118, 47 S 422. By Rev. Laws, c. 171, § 1, actions of tort for damage to person shall not abate. Hey v. Prime, 197 Mass. 474, 84 NE 141.

52. They assume existence of and preserve right of action which injured party had before death. Dillon v. Great Northern R. Co. [Mont.] 100 P 960. See, also, Death by Wrongful Act, 11 C. L. 1019.

53. Search Note: See notes in 11 C. L. 1120. 15 L. R. A. (N. S.) 632.

See, also, Abate. and R., Cent. Dig. §§ 358-494; Dec. Dig. §§ 71-77; 1 Cyc. 82-115.

54. Frankfort Councilmen v. Herndon's Adm'r [Ky.] 118 SW 347.

55. Not of new cause of action set up in amendment, in suit to enforce tax lien where, by amendment after death of defendant, lien for additional taxes was set up and service had on personal representative of deceased defendant. Frankfort Councilmen v. Herndon's Adm'r [Ky.] 118 SW 347.

56. Action in equity may be revived. Miller v. Waltier, 165 F 359. Effect of abatement in equity does not, as in law, amount to termination of suit, but only to suspension thereof for want of parties capable of proceeding with cause, such result being a state of suspension which may be lifted on coming in of proper parties. Id.

57. Not revived when unnecessary to applicant, or when the burden cast upon other party thereby will greviously preponderate over benefits to applicant, or where laches and delay have intervened so as to place defendant at serious disadvantage and usually not where such delays have permitted a statute of limitations to run against original demand. Allen v. Frawley, 138 Wis. 295, 119 NW 565.

58. Haines v. Perkins [Mich.] 15 Det. Leg. N. 1070, 119 NW 439. Held abuse of discretion for court of equity to revive action where there had been such delay in making application as to permit the statute of limitations to have run. Allen v. Frawley, 138 Wis. 295, 119 NW 565. However, in federal courts of chancery, substitution or revivor is seldom denied for laches or limitation, if party applying therefor shows any right to order. Miller v. Wattier, 165 F 359.

59. Since no such right exists at common law. Welch v. Lynch, 30 App. D. C. 122.

60. Revivor is not necessary to continuation of suit on appeal where one of several appellants has died and suggestion of his death has been made after first submission on appeal and before resubmission on rehearing, under Rev. St. 1899, §§ 856, 857. Reed v. Colp, 213 Mo. 577, 112 SW 255. After receivership has been discharged, action by receivers may proceed in name of corporation substituted or in name of receivers as trustees by consent of corporation. Interstate Trust & Banking Co. v. Dierks Lumber & Coal Co., 133 Mo. App. 35, 113 SW 1.

61. Not take testimony before revivor. Reck v. Reck [Md. App.] 73 A 144.

62. As personal representatives in foreclosure suit upon note and mortgage. Haines v. Perkins [Mich.] 15 Det. Leg. N. 1070, 119 NW 439. Action for a partnership debt may be revived against representative of deceased partner without waiting until remedy against surviving partner is exhausted, under Code Civ. Proc. § 758. Hentz v. Havemeyer, 132 App. Div. 56, 116 NYS 317. Representatives of defendant dying pending suit have right to defend a suit relating to matter of land held by him in trust, under Code W. Va. 1906, § 4001. Conaway v. Third Nat. Bank

The procedure is usually by suggestion of death [64] which under the statutes serves as a bill of revivor,[65] and substitution of parties is thereupon ordered.[66] Any informalities in the revival proceedings are waived by answer.[67] Revivor [68] or continuance of the action is not necessarily barred as to all parties because barred as to one.[69]

Abbreviations, see latest topical index.

ABDUCTION.[70]

The scope of this topic is noted below.[70a]

That the female was of unchaste character is no defense.[71] Every essential element of the offense must be alleged in the indictment [72] and submitted by the instructions.[73] Failure to submit an issue as to which there is no evidence is harmless.[74] It is competent for the father of the female to testify that the taking was without his consent.[75] The intent is a question of fact on all the evidence [76] and any evidence bearing thereon is proper.[77]

Abetting Crime; Abide the Event; Abode, see latest topical index.

[C. C. A.] 167 F 26. Personal representatives of a deceased plaintiff should be substituted upon proper suggestion in foreclosure suit on note and mortgage. Haines v. Perkins [Mich.] 15 Det. Leg. N. 1070, 119 NW 439. As to the rights passing to the personal representative in general see Estates of Decedents, 11 C. L. 1275.

63. Haines v. Perkins [Mich.] 15 Det. Leg. N. 1070, 119 NW 439. Surviving husband who is made tenant by courtesy of law by death of his wife and acquires new and independent possession of his own, does not have right thereby to revive and continue in his own name an action in ejectment begun by her. Welch v. Lynch, 30 App. D. C. 122. The right to maintain an action to set aside a deed begun by guardian of incompetent, who dies pending action, passes to sole heir and not to administrator where there are no debts. Kamman v. D'Heur & Swain Lumber Co. [Ind. App.] 88 NE 348. Action brought by public officer in his official capacity under statutory authority may be continued in name of his successor. Dickinson v. Oliver, 195 N. Y. 238, 88 NE 44.

64. Suggestion of death of defendant, filing of copy of his will with statement of names of his devisees, and taking out of process against them within one year after appeal granted, was sufficient revivor of action, under Code Civ. Proc. § 767. Buchanan v. Boyd's Ex'r [Ky. App.] 120 SW 295.

65. Selden v. Illinois Trust & Sav. Bank, 239 Ill. 67, 87 NE 860; Haines v. Perkins [Mich.] 15 Det. Leg. N. 1070, 119 NW 439.

66. Action in equity revived by substitution of parties. Miller v. Wattier, 165 F 359. Action is not revived by mere notice to widow of defendant where neither she nor representative of defendant are made parties and no decree is taken against them, where defendant died before decree of mortgage foreclosure. Pendleton v. Vigneaux, 166 F 935.

67. As in case of foreign administrator of defendant dying pending action. Varney v. Conolly's Ex'r [Ky.] 116 SW 340.

68. Duff v. Combs [Ky.] 117 SW 259.

69. Where one of several defendants dies, plaintiff may discontinue as to deceased and proceed against surviving defendants to the extent of their liability under Code Civ. 1895, § 5041, hence, where principal and sureties on note are joined, court may proceed to judgment against sureties after death of principal. Savannah Bank & Trust Co. v. Purvis [Ga. App.] 65 SE 35.

70. See 11 C. L. 9.

Search Note: See notes in 3 C. L. 12; 14 L. R. A. (N. S.) 725; 11 Ann. Cas. 1172.

See, also, Abduction, Cent. Dig.; Dec. Dig.; 1 Cyc. 140-163; 1 A. & E. Enc. L. (2ed.) 173; 1 A. & E. Enc. P. & P. 50.

70a. This topic includes only matter peculiar to the crime of abduction, matters common to all crimes (see Criminal Law,* and Indictment and Prosecution*) being excluded. For related crimes, see the topics Kidnapping,* and Seduction.*

71. Unchaste character and previous intercourse with the defendant no defense. State v. Baldwin, 214 Mo. 290, 113 SW 1123.

72. Indictment held sufficient. State v. Baldwin, 214 Mo. 290, 113 SW 1123.

73. Instructions as to chastity of female, defining concubinage, and as to the manner of taking which would fall within the statute sustained. State v. Baldwin, 214 Mo. 290, 113 SW 1123.

74. As to whether prosecutrix was married to accused, there being no suggestion in the evidence that she was. State v. Baldwin, 214 Mo. 290, 113 SW 1123.

75. State v. Baldwin, 214 Mo. 290, 113 SW 1123.

76. Finding that abduction was for purpose of prostitution sustained by fact that defendant took female to house of prostitution, where she remained as dancing girl in hall, though he and she both testified that it was agreed she should not engage in prostitution. People v. Claudius [Cal. App.] 97 P 687.

77. Dress furnished by defendant to female for her use in dance hall admissible to show purpose of prostitution. People v. Claudius [Cal. App.] 97 P 687.

ABORTION.[78]

The scope of this topic is noted below.[79]

Abortion is an offense at common law.[79a] In legal terminology the word "abortion" is synonymous with the word "miscarriage" in its primary meaning,[80] and the offense is complete when the miscarriage is produced contrary to the statute.[81] The crime of attempting to commit abortion is complete when an instrument is used with the intention of procuring a miscarriage,[82] and the crime of using means for the purpose and with the intent to procure an abortion is committed wherever the prohibited means are used.[83] One who procures the abortion to be done is equally guilty with the person performing the act;[84] but a woman is not an accomplice of the person procuring her miscarriage, although she may consent thereto.[85] In some states the keeping of a place for the purpose of procuring abortions is indictable as a nuisance.[86] The Texas statute relating to abortion is not unconstitutional in that it does not sufficiently define or describe the offense.[87]

The indictment or information is sufficient if it follows the statute.[88] It need not specifically describe the means used where they are unknown,[89] and failure to prove affirmatively that the means used was unknown to the grand jury does not constitute a variance.[90] The state must prove the pregnancy of the woman,[91] but there is a conflict as to whether the state must negative the necessity of the miscarriage.[92] Where the evidence makes a sufficient prima facie case for the state in

78. See 11 C. L. 10.

Search Note: See notes in 5 C. L. 9; 7 Id. 8; 11 Id. 10.

See, also, Abortion, Cent. Dig.; Dec. Dig.; 1 Cyc. 170-196; 1 A. & E. Enc. L. (2ed.) 186; 1 A. & E. Enc. P. & P. 62.

79. This topic includes only matter peculiar to the offense. Matters common to all crimes (see Criminal Law,* Indictment and Prosecution*), homicide by abortion (see Homicide*), advertisements and sale of abortifacients (see Indecency, Lewdness, and Obscenity*), and prohibition of the circulation of such advertisements in the mails (see Postal Law,* § 3), are treated in separate articles.

79a. Marmaduke v. People [Colo.] 101 P 337.

80. Marmaduke v. People [Colo.] 101 P 337. Recognizance to answer charge of attempting to procure an "abortion" held to sufficiently recite statutory crime of attempt to procure a "miscarriage." Id.

81. Fact that woman died of disease for which defendant was not responsible was immaterial. Carter v. State [Ind.] 87 NE 1081.

82. Under Mills' Ann. St. § 1209, if instrument is used crime is complete whether miscarriage follows or not. Fitch v. People [Colo.] 100 P 1132.

83. State v. Wheaton [Kan.] 99 P 1132.

84. One who instigated the act, designated the person, and furnished the money for its performance, is equally guilty. Maxey v. U. S., 30 App. D. C. 63.

85. Person charged with offense may be convicted upon uncorroborated testimony of woman. Thompson v. U. S., 30 App. D. C. 352. But in prosecution for offense it is proper for court to instruct jury that they may take into consideration fact that she did consent as bearing upon her credibility. Id.

86. Acts charged in indictment held sufficient to constitute nuisance under B. & C. Comp. § 1930. State v. Atwood [Or.] 102 P 295.

87. Jackson v. State [Tex. Cr. App.] 115 SW 262.

88. Indictment that defendant administered drug to C., "who was a pregnant woman," sufficiently avers pregnancy of woman at time of attempt to produce abortion. Thomas v. State [Ala.] 47 S 257.

89. Indictment charging that defendant, with intent to procure abortion, did advise and procure woman to take certain medicines, drugs, and substances, and did use certain instruments and other means unknown and did procure miscarriage, held sufficient. State v. Longstreth [N. D.] 121 NW 1114. Indictment for attempt to procure an abortion need not name drug or instrument or aver how drug was administered or instrument was used. Thomas v. State [Ala.] 47 S 257.

90. Where evidence showed that drug, medicine or substance taken was not known, and in nature of case could not be known, and that some compound having trade mark, but components of which was unknown, was administered, such matters must also have been unknown to grand jury. Carter v. State [Ind.] 87 NE 1081.

91. Conviction of administering drug to pregnant woman with intent to procure abortion cannot be had, where evidence does not show that woman was pregnant at the time. Rev. St. 1899, § 1853 (Ann. St. 1906, p. 1280). State v. Rogers [Mo. App.] 116 SW 469.

92. See State v. Longstreth [N. D.] 121 NW 1114. State must both allege and prove that the abortion was not necessary to preserve life of the woman. Id. Under Comp. Laws 1907, § 4226, burden of negativing necessity of miscarriage is upon state, since such statute makes the absence of

this regard, the question as to who has the burden is immaterial,[93] but where the state has the burden it must, of course, make out its case.[94] Circumstantial evidence is admissible to negative the necessity of miscarriage,[95] but such necessity is not necessarily negatived by the fact that the woman was unmarried and that the defendant had illicit intercourse with her.[96] Where the act is alleged to have been committed by administering drugs or using an instrument, it is sufficient if the evidence establishes beyond a reasonable doubt that one or both were used.[97] The previous condition of the woman[98] and also her subsequent condition,[99] may be proved. Where it is manifest that the miscarriage was produced, as charged, by drugs, previous inquiries by the woman as to the mechanical methods of producing miscarriage is inadmissible.[1] Where the evidence raises an issue as to whether the woman herself caused the abortion, such issue should be submitted to the jury.[2]

The venue of the offense should be sufficient proved.[3]

Absconding Debtors, see latest topical index.

ABSENTEES.[4]

The scope of this topic is noted below.[4a]

Under proper safeguards for the protection of his interest in case of his return,[5] and subject to the limitations of the fourteenth amendment of the federal constitution,[6] the state has power to provide for the administration of estates within its jurisdiction of persons presumed, from continued absence, to be dead,[7] and may, when the person is an absentee from the state, leaving no one to represent him for many years, and cannot be found, take his property into its care and custody;[8]

such necessity an element of the offense. State v. Wells [Utah] 100 P 681.

93. Evidence, both direct and circumstantial, held to clearly establish prima facie case in behalf of state without aid of presumption that it was not necessary. State v. Longstreth [N. D.] 121 NW 1114.

94. Evidence held insufficient to negative necessity of miscarriage. State v. Wells [Utah] 100 P 681.

95. Circumstantial evidence is competent to prove absence of necessity. State v. Longstreth [N. D.] 121 NW 1114.

96. State v. Wells [Utah] 100 P 681.

97. Thomas v. State [Ala.] 47 S 257.

98. Not error to allow state to prove by woman's mother that she had never been pregnant or operated on before, doctor having testified that condition could only have been caused by instruments or childbirth. Thomas v. State [Ala.] 47 S 257.

99. On prosecution for attempt to commit abortion, doctor's examination of woman may be proved to corroborate state's theory. Thomas v. State [Ala.] 47 S 257. Physical condition 10 days subsequent to time when it is alleged operation was performed is admissible. State v. Fletcher [N. J. Law] 72 A 33.

1. Carter v. State [Ind.] 87 NE 1081.

2. Where accused, among other things, introduced proof that woman used hat pin to bring on abortion, court erred in omitting to charge jury that if abortion was result of punctures with hat pin, they should acquit. Jackson v. State [Tex. Cr. App.] 115 SW 262.

3. Since jurisdiction of court depended upon place of offense, it is material that place alleged in indictment be supported by evidence. State v. Wheaton [Kan.] 99 P 1132.

4. See 11 C. L. 10.

Search Note: See notes in 7 C. L. 9; 53 A. S. R. 179; 94 Id. 537.

See, also, Absentees, Cent. Dig. §§ 1-19; Dec. Dig. §§ 1-7; 1 Cyc. 201-209.

4a. This topic includes only the administration under statutes of the estates of absentees, the presumption of death arising from continued absence (see Death and Survivorship *), and the effect of absence to stop the running of limitation (see Limitation of Actions,* § 6E), being treated in separate articles.

5. Before distribution of estate, person entitled shall give bond. Savings Bank of Baltimore v. Weeks [Md.] 72 A 475.

6. Savings Bank of Baltimore v. Weeks [Md.] 72 A 475. Within power of state to confer jurisdiction on orphans' courts to administer estates of absentees, though they be alive, by special and appropriate proceedings applicable to that condition and distinct from the general power to administer upon the estate of deceased persons. Id. Acts 1908, p. 260, c. 125, providing for administration of estates of absentees who have been absent more than seven years, is not repugnant to constitution. Id.

7. Marks v. Emigrant Industrial Sav. Bank, 122 App. Div. 661, 107 NYS 491.

8. Savings bank deposit. Malone v. Provident Inst. for Sav. [Mass.] 86 NE 912. Under Rev. Laws, c. 144, § 4 as amended by St. 1904, p. 178, c. 206, a receiver of the property of absentee savings bank depos-

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* Always begin with the latest article on the subject. Use the latest topical index.

but letters of administration on the estate of absentee do not establish even prima facie the fact of death,[9] and payment to an administrator of such absentee, who is not in fact dead, is not good as against such person or his legal representatives.[10] The absentee, however, has no right to property sold to effect a partition,[11] though he may claim his share from coheirs.[12] In partition proceedings in Louisiana the curator ad hoc represents the absentee if he is alive,[13] and represents his interest in property if he is dead.[14]

ABSTRACTS OF TITLE.[15]

The scope of this topic is noted below.[15a]

An abstract of title is a written or printed, short, methodical summary of the documents and facts of record which affect the title to land.[16] One contracting to act for a purchaser of real estate as a conveyancer, who examines the title and advises whether it is good and marketable, is liable for failure to exercise due care.[17]

Abuse of Process; Abutting Owners; Acceptance, see latest topical index.

ACCESSION AND CONFUSION OF PROPERTY.[18]

The scope of this topic is noted below.[18a]

When an appropriation of property is made in good faith,[19] under a mistake of fact, and the taker has by labor converted it into a thing entirely different from

itor may collect and hold deposit. Id. St. 1908, p. 606, c. 590, §§ 56, 57, authorizing payment, under certain proceedings, of saving bank deposits to etate treasurer after they have remained unclaimed for more than 30 years from date of last deposit, etc., for which no claimant is known or cannot be found, is constitutional. Id. State has substantive right to take property into its charge and terminate the relations between savinge bank and depositor under conditions described in statute, and to hold property as trustee for true owner until he comes and establishes his rights. Id.

9. Marks v. Emigrant Industrial Sav. Bank, 122 App. Div. 661, 107 NYS 491.

10. Therefore bank may refuse to pay money on deposit in name of absentee to administrator unless satisfactory proof of death is offered. Marks v. Emigrant Industrial Sav. Bank, 122 App. Div. 661, 107 NYS 491.

11. Purchasers are innocent third persons. Tell v. Senac, 122 La. 1040, 48 S 448.

12, 13, 14. Tell v. Senac, 122 La. 1040, 48 S 448.

15. See 11 C. L. 11.

Search Note: See notes in 3 C. L. 15; 4 Id. 1255; 8 Id. 1699; 11 Id. 11; 22 L. R. A. 99; 12 L. R. A. (N. S.) 449; 15 Id. 160; 72 A. S. R. 315.

See, also, Abstracts of Title, Cent. Dig.; Dec. Dig.; 1 Cyc. 212-217; 1 A. & E. Enc. L. (2ed.) 210.

15a. Includes abstracts of record and the rights and liabilities of makers and examiners of abstracts. Excludes the necessity of attaching an abstract to the declaration in ejectment (see Ejectment and Writ of Entry,* § 4), rights under contract to furnish an abstract showing marketable title (see Vendors and Purchasers,* § 3), and right of abstractors to examine and copy public records (see Records and Files,* § 3).

16. McMillan v. First Nat. Bank [Tex. Civ. App.] 119 SW 709.

17. Company held to have assumed all the obligations of an attorney to his client. Glyn v. Title Guarantee & Trust Co., 117 NYS 424. Where encroachments upon property were patent upon inspection and letter was written to purchaser relative to such, held that the letter was not calculated to convey to the lay mind the true facts of case and that defendant was liable. Id.

18. See 11 C. L. 11.

Search Note: See notes in 32 L. R. A. 422; 6 A. S. R. 495; 14 Id. 53; 44 Id. 444; 52 Id. 935; 81 Id. 164; 101 Id. 913.

See, also, Accession, Cent. Dig. §§ 1-14; Dec. Dig. §§ 1, 2; 1 Cyc. 222-226; Confusion of Goods, Cent. Dig. §§ 1-16; Dec. Dig. §§ 1-15; 8 Cyc. 570-577; Improvements, Cent. Dig. §§ 1-26; Dec. Dig. §§ 1-4; 22 Cyc. 1-34; 1 A. & E. Enc. L. (2ed.) 247; 6 Id. 592; 16 Id. 62.

18a. Treats generally of accession and confusion of property. Excludes peculiar rights between particular parties (see Landlord and Tenant;* Vendors and Purchasers;* Mortgages;* Riparian Owners;* Tenants in Common and Joint Tenants*), the right to recover upon implied contract (see Implied Contracts*), the law of fixtures (see Fixtures*), the law of emblements and natural products (see Emblements and Natural Products;* Forestry and Timber*), and the adjudication of the rights of the parties with regard to improvements in particular actions (see Ejectment;* Conversion as a Tort;* Trespass*).

19. Willful trespasser can acquire no right by accession to property, no matter how much he may have enhanced its value. Werner Stave Co. v. Pickering [Tex. Civ.

the original and of greatly increased value, title passes to him, and the original owner can only recover its value at the time it was taken,[20] but, where the identity of the property is not changed, the remedy of the party making the improvements is by way of recovery for the value of such improvements.[21] When property has become intermingled in mass without fraudulent intent, the owners become tenants in common in proportion to their several interests,[22] but, where the confusion results from careless or willful conduct, the commingler,[23] or one who claims under him with notice,[24] forfeits his interest unless he can identify his property.

Right to recover value of improvements made on land of another. See 11 C. L. 12—Ordinarily, a bona fide occupant of land [25] under a void deed [26] or under color of title,[27] without notice of any superior title,[28] is, on being ousted, entitled to recover for permanent improvements [29] made by him thereon, provided he has acted in good

App.] 119 SW 333. Willful trespasser cannot recover for cutting timber of smaller size than allowed by lease and improving product. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270.

20. Trees taken by mistake from wrong tract of land and converted into staves. Werner Stave Co. v. Pickering [Tex. Civ. App.] 119 SW 333.

21. Werner Stave Co. v. Pickering [Tex. Civ. App.] 119 SW 333; Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270.

22. Intermingling sheep belonging to mortgagor with sheep covered by mortgage. Ayre v. Hixson [Or.] 98 P 515.

23. Where sheep belonging to mortgagor were, through his fault, mingled with sheep covered by mortgage and belonging to mortgagee, so that they could not be identified, former compelled to bear loss resulting therefrom. Ayre v. Hixson [Or.] 98 P 515.

24. Ayre v. Hixson [Or.] 98 P 515. Bank commingled its own collaterals to secure its own debts with collaterals to secure plaintiff's debt, so that it was impossible to distinguish between them. Held that all collaterals became property of plaintiff to secure his debt. First Nat. Bank of Decatur v. Henry [Ala.] 49 S 97. In replevin for commingled ore, evidence should have been received to ascertain whether plaintiff's property could be identified, or whether defendants were so far to blame for commingling as to prevent them from taking advantage thereof. Blurton v. Hansen [Mo. App.] 116 SW 474. See 11 C. L. 12. See, also, Ejectment (and Writ of Entry), 11 C. L. 1153; Trespass, 12 C. L. 2149; Landlord and Tenant, 12 C. L. 528. For right of recovery independent of statute, see Implied Contracts, 11 C. L. 1876.

25. On division of lands between one, who believed himself owner when in fact he was only tenant of life estate, and remaindermen, portion containing substantial improvements should be awarded to life tenant. Sayles v. Johnson, 32 Ky. L. R. 709, 107 SW 210.

26. Value of permanent improvements made by bona fide occupant under void deed for 30 years held recoverable. Faison v. Kelley, 149 N. C. 282, 62 SE 1086.

27. "Color of title" is that which has the appearance of title but is not title. Nunn v. Lynch [Ark.] 115 SW 926. One claiming claims under color of title under will is entitled to recover for betterments. Id. Person taking and holding possession of land from party who does not claim title derived from public records or otherwise is not entitled to benefits of **occupying claimant's act** as to improvements, as when one purchases from agent, unauthorized and in excess of authority. Brown v. Grady, 16 Wyo. 151, 92 P 622. One holding under tax title, void for noncompliance with Act. No. 229, Public Acts 1897, as amended, being mere **trespasser,** could not, on being ousted, recover for improvements. Cook Land Construction & Producing Co. v. McDonald [Mich.] 15 Det. Leg. N. 953, 118 NW 959.

28. In suit against corporation to set aside deeds to it alleged to have been fraudulently procured, corporation, having knowledge of interests of plaintiff and making improvements in defiance of such interests, was not entitled to recover therefor unless it should appear that value was greater than profits which it had derived. Seibel v. Higham, 216 Mo. 121, 115 SW 987. Bona fide occupant, **under betterment act,** is one who not only supposes himself true proprietor but is ignorant that his title is questioned by another claiming a better right. Brown v. Nelms [Ark.] 112 SW 373. As to **character of notice,** it is held that actual notice of outstanding title or facts, putting claimant upon inquiry, is necessary. Richmond v. Ashcraft [Mo. App.] 117 SW 689. The notice that will bar a claimant from recovering for improvements is notice of an outstanding title which the occupant has no good reason, based on the professions of the holder, to believe will not be vitalized. Id. Plaintiff who in reliance on defendant's statements that she did not want land made improvements which trebled value, entitled to recover therefor, although he had notice of outstanding title. Id. Plaintiff holding as grantee under record title is not bound to disclose title to one contemplating making improvements on land, but may rely on constructive notice of record title. Waits v. Moore [Ark.] 115 SW 931.

29. Crops of wheat and potatoes with fertilizer therefor not such permanent improvements as are contemplated by Code 1904, § 2760, permitting recovery for permanent improvements. Wright v. Johnson, 108 Va. 855, 62 SE 948.

faith.[30] If the improvements are severable, they may in a proper case be removed,[31] or their actual value recovered.[32] Where the improvements become a part of the land by accession, the measure of the recovery is the extent to which the value of the land has been enhanced.[33] One who in good faith and under color of title makes improvements on land is usually allowed to retain possession thereof until he is paid for such improvements,[34] but it is held that this doctrine will not be extended, even by way of estoppel, so as to authorize a court of equity to fix a lien upon a homestead for improvements made thereon by one in possession under a void contract of sale.[35] The time within which payment must be made may, in a proper case, be limited by the court.[36] The claimant has the burden of showing good faith in making the improvements,[37] and he must also show the permanent character of the improvements and their value.[38]

Accessories; Accident; Accommodation Papers; Accomplices, see latest topical Index.

30. Haney v. Gartin [Tex. Civ. App.] 113 SW 166. Claimant must show that he erected improvements in good faith and their value and enhanced value of land. Fain v. Nelms [Tex. Civ. App.] 113 SW 1002. Improvements erected on other land through mistaken belief that it was included in land purchased. Id. Purchase of land by appraiser at administrator's sale held to be in good faith and constituting him bona fide occupant, entitling him to recover for improvements under betterment Act March 8, 1883 (Kirby's Dig. §§ 2754-2757. Brown v. Nelms [Ark.] 112 SW 373. Possessor of real estate, knowing that he had no title, held to be in bad faith, and hence not entitled to recover value of improvements in their nature inseparable from soil, nor for those separable unless owner elects to keep them. Quaker Realty Co. v. Bradbury [La.] 48 S 570.

31. Decree of lower court, permitting purchaser at partition sale under belief he became sole owner thereby to remove inexpensive building placed thereon, acting under such belief, held proper in partition proceedings by one whose interest was not determined in original proceedings. Parkhill v. Daggett [Iowa] 119 NW 689.

32. Upon rescission for breach of condition subsequent of contract for conveyance of land in consideration of contract for support and maintenance, vendee held entitled to recover actual costs of house and fences erected by him. Mootz v. Petraschefski, 137 Wis. 315, 118 NW 865. In rescission of contract for conveyance of real estate, plaintiff was entitled to value of improvements placed by him on the land. Snarski v. Washington State Colonization Co. [Wash.] 101 P 839. Where plaintiff erected buildings upon defendant's land with money furnished by latter, under alleged but improved agreement for conveyance, plaintiff could recover value of such improvements. Wills v. Westendorf [Iowa] 118 NW 376. In arriving at **amount allowable** upon rescission of contract for conveyance of land for improvements erected by consent of both parties, ordinary rule does not apply, but reasonable costs of improvements not exceeding actual costs should be allowed. Mootz v. Petraschefski, 137 Wis. 315, 118 NW 865.

33. Occupying claimant is entitled to amount equal to actual enhancement in value of the land resulting from placing improvements thereon. Adams v. Kells [Kan.] 100 P 506. One in possession under void contract for purchase of real estate may recover for improvements made by him to extent of enhanced value of land, less profits made by him while in possession. Ford v. Stroud [N. C.] 64 SE 1.

34. Parties holding under purchase from lessee of Indiana lands held not to have such color of title as would enable them to claim benefit of betterment act (Mansf. Dig. §§ 2644, 2645 [Ind. & Ann. St. 1899, §§ 1928, 1929]). Whitney Lumber & Grain Co. v. Crabtree [C. C. A.] 166 F 738. Holder of judgment lien for taxes bid in land, lived on it and erected valuable improvements. Subsequently former owner redeemed judgment and tax sale, and caused writ of possession to be issued in ejectment suit in which plaintiff obtained his lien for taxes. Held that plaintiff was entitled to injunction against eviction until his claim for improvements was satisfied. Ross v. Kelson [Kan.] 98 P 772. Provisions of occupying claimant's act that occupying claimant shall not be evicted without payment to him of value of his lasting improvements is enforcible, although successful claimant cannot convey. See because holding under homestead entry. Wells v. Cox [Neb.] 120 NW 433.

35. Clark v. Bird [Ala.] 48 S 359. Code 1907, § 3846; applies only where possession is adverse. Id. Quere, whether such statute applies to homesteads. Id. See Homesteads, 11 C. L. 1780.

36. Rev. St. 1899, §§ 3076, 3078, must be construed together, giving court power to limit time of payment when value of land exceeds value of improvements. Pool v. Slicer, 129 Mo. App. 364, 109 SW 829. On death of tenant in dower, where heirs sue to recover the dower estate from purchasers in possession, the improvements will be deemed to have equaled the rents. Dixon v. Harris, 32 Ky. L. R. 275, 105 SW 451.

37. Must show that improvements were made in gobd faith when he had reason to believe he owned land. Faison v. Kelly, 149 N. C. 282, 62 SE 1086.

38. Evidence held not sufficient to establish value of breaking land. Adams v. Kells [Kan.] 100 P 506.

ACCORD AND SATISFACTION.

The scope of this topic in noted below.[39]

§ 1. The Accord, 13.
A. In General. 13.
B. Part Payment, 15.
C. Fraud, Mistake, and Duress, 16.
§ 2. Satisfaction or Discharge, 16.
§ 3. Pleading, Issues, and Proof, 17.

§ 1. *The accord.*[40] *A. In general.* See 11 C. L. 13—Accord is a method of discharge of a contract or cause of action, arising either in contract or tort,[41] consisting in the substitution of an agreement between the parties in lieu of such contract or cause of action.[42] An accord must be predicated upon a bona fide dispute,[43] but any claim may be compromised where there is such a dispute [44] as distinguished from a totally and clearly unfounded claim,[45] though the claim on the one hand and the liability on the other consist more in appearance than in reality,[46] provided, however, the transaction constituting the basis of the compromise be not illegal,[47] and provided, also, such transaction and the compromise itself be within the power of the contracting parties.[48] Subject to these limitations, it is of no importance, therefore, which of the parties is in the right,[49] the settlement of the dispute being of itself a sufficient consideration,[50] and where there is such a consideration the courts will make no further inquiry in this regard.[51] For the purpose of

39. Excludes composition with creditors (see Composition with Creditors *), novation (see Novation *), releases (see Releases *), except in so far as such transactions constitute accord and satisfaction. Excludes, also, the general law of payment and tender (see Payment and Tender *).

40. Search Note: See notes in 3 C. L. 18, 20, 21; 5 Id. 15, 17, 18; 7 Id. 12, 14; 18 A. S. R. 618; 51 Id. 261; 89 Id. 290; 100 Id. 390, 392; 6 Ann. Cas. 564.

See, also, Accord and Satisfaction, Cent. Dig. §§ 1-15; Dec. Dig. §§ 1-14; 1 A. & E. Enc. L. (2ed.) 408.

41, 42. Carter v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 35.

43. Kelly v. Hopkins, 105 Minn. 155, 117 NW 396. Dispute essential. Hicks Pub. Co. v. Wisconsin Cent. R. Co. [Wis.] 120 NW 512. Where both parties admit that some of the items are incorrect, it is not binding, there being in such case no bona fide dispute. Fisher v. Burroughs Adding Mach. Co. [Mich.] 16 Det. Leg. N. 353, 121 NW 756. **Liquidated demand for taxes** cannot be compromised. Commonwealth v. Southern Pac. Co. [Ky. App.] 120 SW 313.

44. If there be a question between parties about which reasonable men may well differ as to outcome, they may adjust it themselves by way of compromise. Western & S. Life Ins. Co. v. Quinn [Ky.] 113 SW 456. Dispute as to liability under insurance policy. Id. It is immaterial what the agreements giving rise to the compromised controversy really were. Ravenswood Paper Mill Co. v. Dix, 61 Misc. 235, 113 NYS 721. Fact that amount paid after deduction of disputed item is conceded to be due is immaterial. Id. Unliquidated **demand for taxes** may be compromised. Commonwealth v. Southern Pac. Co. [Ky. App.] 120 SW 313.

45. Must be some reasonable ground of controversy. Crawford v. Engram [Ala.] 47 S 712. There must be at least an appearance of right sufficient to raise possible doubt in favor of party asserting claim. Holladay-Klotz Land & Lumber Co. v. Beekman Lumber Co. [Mo. App.] 116 SW 436.

46. Langham v. Sun Pipe Line Co. [Tex. Civ. App.] 114 SW 451; Smith v. Mutual Reserve Life Ass'n, 140 Ill. App. 409. Sufficient if there be something in the nature of a claim on one hand and a possible liability on the other. Cleveland, etc., R. Co, v. Hilligoss [Ind.] 86 NE 485.

47. Board of county supervisors cannot compromise an illegal contract which they have made. Wadsworth v. Livingston County Sup'rs, 115 NYS 8.

48. Board of supervisors of county, being in a broad sense agents of the county body corporate, with designated powers which all people were presumed to know, could not compromise a contract which they had no power to make in the first instance. Wadsworth v. Livingston County Sup'rs. 115 NYS 8.

49. Ravenswood Paper Mill Co. v. Dix, 61 Misc. 235, 113 NYS 721; Cohen v. Levine, 114 NYS 840; Kelly v. Hopkins, 105 Minn. 155, 117 NW 396; Worcester Loom Co. v. Heald [N. J. Law] 72 A 421; Bartlett Oil Mill Co. v. Cappes [Tex. Civ. App.] 117 SW 485; Western & S. Life Ins. Co. v. Quinn [Ky.] 113 SW 456.

50. Worcester Loom Co. v. Heald [N. J. Law] 72 A 421. Dispute in regard to contract under which plaintiff was to find purchaser for land, which defendants had for sale. Kelly v. Hopkins, 105 Minn. 155, 117 NW 396. Defendant agreed to pay sum in settlement for injuries received by plaintiff while working for defendant. Bartlett Oil Mill Co. v. Cappes [Tex. Civ. App.] 117 SW 485. Where compensation for services was left to be settled by agreement, and in pursuance thereof debt was canceled. Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1074, 119 NW 589.

51. Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234; Worcester Loom Co.

arriving at the intention of the parties thereto in making a compromise agreement, their relations at the time it was made [52] and the purpose for which it was entered into [53] must be considered. The acceptance of a payment tendered as in full of a disputed claim constitutes a complete satisfaction,[54] and in any case the acceptance of a thing of value tendered in settlement of a disputed claim discharges such claim,[55] but a settlement does not necessarily result from the acceptance of a part payment on a liquidated claim.[56] It is sometimes held that one accepting a payment tendered in full is precluded from repudiating the settlement under the doctrine of estoppel as distinguished from accord and satisfaction.[57] A compromise agreement need not be in writing.[58] A compromise agreement will be given a reasonable interpretation with the view of giving effect to the intent of the parties,[59]

v. Heald [N. J. Law] 72 A 421; Sovereign Camp, Woodmen of the World v. Bridges [C. C. A.] 165 F 342. Whatever consideration is accepted will be considered sufficient. Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485.

52. Perry v. Dance [Ky.] 112 SW 911.

53. Perry v. Dance [Ky.] 112 SW 911. Giving of note in payment of hotel bill in order to secure release of baggage held not settlement of guest's claim against hotel keeper for property stolen from guest's room. Watt v. Kilbury [Wash.] 102 P 403.

54. Bass Dry Goods Co. v. Roberts Coal Co., 4 Ga. App. 520, 61 SE 1134; Kiler v. Wohletz [Kan.] 101 P 474; Smith v. Mutual Reserve Fund Life Ass'n., 140 Ill. App. 409; Andrews v. Haller Wall Paper Co., 32 App. D. C. 392; Wherley v. Rowe, 106 Minn. 494, 119 NW 222; Cunningham v. Standard Const. Co. [Ky.] 119 SW 765. Acceptance and cashing of check tendered as in full of all claims. Cohen v. Levine, 114 NYS 840; Galvin v. Gaussen, 11 Ohio C. C. (N. S.) 463; Cunningham v. Standard Const. Co. [Ky.] 119 SW 765; Andrews v. Haller Wall Paper Co., 32 App. D. C. 392. Acceptance of draft tendered as payment in full. Probst v. Ehrat, 140 Ill. App. 309. Defendant forwarded purchase price of goods less rebates and a sum which she claimed due her for breach of contract by plaintiff, which was accepted by plaintiff. Ravenswood Paper Mill Co. v. Dix, 61 Misc. 235, 113 NYS 721. Where aggregate amount is in dispute, payment of specified sum conceded to be due, that is by including certain items, but excluding disputed items, on condition that sum so paid shall be received in full satisfaction, will extinguish whole. Bass Dry Goods Co. v. Roberts Coal Co., 4 Ga. App. 520, 61 SE 1134. Insurance policy provided that if insured committed suicide insurer would not be liable. There being suspicion that insured did commit suicide, insurer and beneficiary settled by part payment. Sovereign Camp, Woodmen of the World v. Bridges [C. C. A.] 165 F 342. Dispute as to amount due plaintiff from defendant. Having drawn draft on defendant for amount claimed to be due by plaintiff, defendant refused to pay amount, but said it would pay amount which it conceded to be due. Thereupon plaintiff drew a draft for conceded amount, which draft was paid by defendant. Garbutt Lumber Co. v. Wilcox [Ga. App.] 64 SE 291.

55. Offer to give certain goods and cash in full settlement of debt, and acceptance and appropriation thereof by creditor, who does not offer to return same, constitutes an accord and satisfaction. Mayfield Woolen Mills Co. v. Long [Tex. Civ. App.] 119 SW 908. Where a second contract was made in settlement of a prior one, the partial performance by one party, and acceptance of its benefits by the other, places it out of the power of the latter to abandon the contract and sue for the original consideration. Hill-Ingham Lumber Co. v. Neal [Ark.] 117 SW 247. Plaintiff's remedy is confined to breach of contract of settlement. Id. Where part of goods were transferred by debtor to another, under a previous agreement, creditor having agreed to accept such goods as debtor had on hand does not render the accord and satisfaction ineffective, although creditor did not consent to transfer of goods to said third person. Mayfield Woolen Mills Co. v. Long [Tex. Civ. App.] 119 SW 908. Where party disputed that alleged contract had been made, but delivered part of goods at price claimed by other party, in full settlement, there was an accord and satisfaction of all claims. Laughman v. Sun Pipe Line Co. [Tex. Civ. App.] 114 SW 451. One buying a machine on a warranty loses his action for a breach thereof, upon buying a second and agreeing to turn the first back as part payment. Schagun v. Scott Mfg. Co. [C. C. A.] 162 F 209.

56. See post, this section, subsection B., Part Payment.

57. Auditor who accepted and cashed check containing memorandum that it was in full held estopped where he made no tender of return of money, though he tried to stop collection of check as soon as he noticed the memorandum, and also notified debtor that he did not accept check as in full. Publishers: Knapp & Co. v. Pepsein Syrup Co. [Mo. App.] 119 SW 38.

58. Boswell v. Gillen, 131 Ga. 310, 62 SE 187. Rule of court that no consent between attorneys or parties, if denied, will be enforced, if not in writing, does not apply to oral agreement to compromise a pending suit. Id.

59. Compromise agreement between city and contractor, whereby it was agreed that city might sue contractor if judgment were rendered against it for injuries caused by alleged negligent construction by contractor, held not only to authorize action by city against contractor but to acknowledge contractor's liability for any judgment that

and will not be extended so as to create an estoppel not contemplated by them.[60] Where an injured party accepts satisfaction for injuries from one of two joint tort feasors and releases that one from further liability, the other is also released.[61] And this rule is not confined to those who are strictly joint wrongdoers,[62] but embraces all persons whom the injured party might sue jointly or severally for the wrong complained of,[63] whether the party with whom the compromise was made could have been legally held in an action for damages or not.[64]

(§ 1) *B. Part payment.*[65]—See 11 C. L. 14—Part payment of a liquidated sum due, though accepted in satisfaction, does not constitute a complete discharge of the debt,[66] even though the creditor expressly agrees to accept it in full payment.[67] This rule, however, should be confined to cases strictly within it [68] and is constantly departed from upon slight distinctions,[69] as where the medium of payment is changed,[70] or where the circumstances render the agreement presumptively ad-

might be rendered against city. City of Owensboro v. Westinghouse, Church, Kerr & Co. [C. C. A.] 165 F 385.

60. Where one, for stipulated sum, agreed not to contest will, she was entitled, nevertheless, to claim her interest in estate, where will was set aside, at instance of others. Daugherty v. Gaffney, 239 Ill. 640, 88 NE 150.

61. Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co. [Mo.] 119 SW 576; Borchardt v. People's Ice Co., 106 Minn. 134, 118 NW 359. One satisfaction is bar to further proceedings on same cause of action. Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485. Contract which purports to be a satisfaction and release of a wrongdoer jointly liable with others, to be effective, must clearly show that injured party, for consideration, has surrendered to party in whose favor contract runs all claim for recompense for and on account of trespass complained of, and if it does so appear there can be no further proceeding, for right of action is forever gone. Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485. Plaintiff dismissed action as to one joint tort feasor on payment of certain sum of money. Evidence was not conclusive that money was paid in satisfaction of plaintiff's claim for damages. Borchardt v. People's Ice Co., 106 Minn. 134, 118 NW 359.

62. Employee, by accepting settlement from employer of claim for injuries, released employer's liability insurer from any liability for maintenance in insuring the employer against liability and in assisting in defense of action. Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co. [Mo.] 119 SW 576.

63. Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co. [Mo.] 119 SW 576. When plaintiff makes claim in good faith against another for injuries, and accepts compensation and gives satisfaction therefor, all persons against whom suits might be brought for such injuries are released. Borchardt v. People's Ice Co., 106 Minn. 134, 118 NW 359.

64. Borchardt v. People's Ice Co., 106 Minn. 134, 118 NW 359. It is not necessary that party making settlement was liable. Cleveland, R. Co. v. Hilligoss [Ind.] 86 NE 485.

65. **Search Note:** See notes in 3 C. L. 20, 21, 22; 11 Id. 17; 100 A. S. R. 412, 429, 430; 1 Ann. Cas. 801; 5 Id. 525.

See, also, Accord and Satisfaction, Cent. Dig. §§ 46-97; Dec. Dig. §§ 6-12; 1 A. & E. Enc. L. (2ed.) 415.

66. No consideration. Sovereign Camp, Woodmen of the World v. Bridges [C. C. A.] 165 F 342. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283. Cunningham v. Standard Const. Co. [Ky. App.] 119 SW 765; Roberts v. Banse [N. J. Law] 72 A 452. Part payment insufficient without additional consideration. Donahue v. Brooks, 143 Ill. App. 188; Bodenhofer v. Hogan [Iowa] 120 NW 659. Defendant conceded liability for a certain amount and forwarded a check for this amount. Cartan v. Thackaberry Co. [Iowa] 117 NW 953.

67. No consideration for such release. Cartan v. Thackaberry Co. [Iowa] 117 NW 953. An agreement to accept less than amount to which party is entitled, where payment is to be made in money, constitutes no defense to action instituted to recover amount of the plaintiff's original claim. Eggland v. South [S. D.] 118 NW 719. Rev. Civ. Code 1903, § 1177, amending Code 1877, § 859, and Comp. Laws 1887, § 3483, do not change common-law definition of an accord. Id. Creditor received one-half of amount of debt of one partner in full payment of his share of partnership debt, and agreed to look to other partner for balance. Held not a defense in action against first partner for balance. Ds Buhr v. Thompson, 134 Mo. App. 21, 114 SW 557. One entitled to statutory compensation cannot estop himself by receiving less amount in full compensation from afterward insisting on full payment, as when deputy sheriff entitled to receive certain salary to be paid by sheriff agreed to receive less in full payment. Bodenhofer v. Hogan [Iowa] 120 NW 659.

68. Sovereign Camp, Woodmen of the World v. Bridges [C. C. A.] 165 F 342.

69. Roberts v. Banse [N. J. Law] 72 A 452.

70. Missouri American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283. Accord and satisfaction may result though articles received are of much less value than those received, there being a legal presumption of special value to recipient. Id.

vantageous to the creditor,[71] or where there is some element recognized by the parties as the moving cause,[72] or where there is a new consideration.[73]

(§ 1) *C. Fraud, mistake and duress.*[74]—See 11 C. L. 18—An accord may be set aside for fraud or mistake,[75] provided the mistake be mutual,[76] but voluntary payments pursuant to a settlement made under a mistake of law cannot be recovered back.[77] Nor may one avoid an agreement on the ground of fraud while retaining the benefits received thereunder.[78] A threat to prosecute a claim in a civil action will not constitute such duress as to vitiate an agreement of compromise made on account of such threat.[79]

§ 2. *Satisfaction or discharge.*[80]—See 11 C. L. 19—Satisfaction and discharge results from the execution of the agreement of accord[81] unless the agreement or

71. Such as insolvency of debtor, giving of security. Cartan v. Thackaberry Co. [Iowa] 117 NW 953. Creditor accepted certain sum from one not liable therefor and agreed that such sum should be in full settlement of claim against surety. Ex parte Zeigler [S. C.] 64 SE 513. Rehearing denied, Ex parte Zeigler [S. C.] 64 SE 916. **Part payment before maturity** in settlement of debt will result in an accord and satisfaction of debt in full. Mayfield Woolen Mills Co. v. Long [Tex. Civ. App.] 119 SW 908. Creditor received payment of less sum thirty-nine days before due besides verbal waiver of right to appeal at time when he was at hospital and could not live but few weeks. Donahue v. Brooks, 143 Ill. App. 188. **Insolvency of debtor** at time of payment may sustain the accord and satisfaction on theory of benefit to creditor. Mayfield Woolen Mills Co. v. Long [Tex. Civ. App.] 119 SW 908. Debtor of defendant became insolvent and an assignment was made to plaintiff for creditors. Plaintiff sold goods to defendant, and employee of defendant forwarded check for purchase price less debt, receiving statement back, marked paid. Held to be a satisfaction in absence of fraud or that deduction was given preference over other creditors. Dobbs v. National Spice Co., 115 NYS 1076.

72. Sovereign Camp, Woodmen of the World v. Bridges [C. C. A.] 165 F 342. Dropping of appellate proceedings was moving cause, and defendant, in consequence of his full performance of honest compact, had deprived himself of his right of review. Roberts v. Banse [N. J. Law] 72 A 452.

73. Consideration must be sufficient to support an ordinary contract. Whereley v. Rowe, 106 Minn. 494, 119 NW 222. If debtor in addition to payment of part of debt, as agreed satisfaction of whole, does, at request of his creditor, some substantial thisg of detriment to his interests that he was not bound to do, upon mutual understanding that it was additional consideration for creditor's promise to accept less for larger sum, legal effect may be given to such compact if debtor has fully performed his part thereof to his detriment. Roberts v. Banse [N. J. Law] 72 A 452. Both on ground of new consideration and on that of estoppel, an agreement thus made and performed should obtain legal recognition. Id.

74. Search Note: See Accord and Satisfaction, Cent. Dig. §§ 140-145; Dec. Dig. §§ 20-22; 1 A. & E. Enc. L. (2ed.) 428.

75. If one, who consents to accept a check, is deceived as to amount due, the cashing of this check cannot be held to be an accord and satisfaction of the claim. Reed v. Engel, 237 Ill. 628, 86 NE 1110; afg. 142 Ill. App. 413. Statements by one dealing at arms' length as to what she believes another's rights to be under a contract does not constitute fraud or duress that will avoid a settlement. Bowers v. Good [Wash.] 100 P 848.

76. Where one who has the means in his possession to determine accurately the condition of the account between himself and the defendant, instead of availing himself of those means, chooses to execute a contract of settlement in ignorance of the facts, he will not be allowed to repudiate it. Brevoort v. Partridge [Mich.] 16 Det. Leg. N. 156, 120 NW 803.

77. Indorsers on dishonored check paid the holder to avoid litigation. Keazer v. Colebrook Nat. Bank [N. H.] 73 A 170.

78. Cook v. Fidelity & Deposit Co. [C. C. A.] 167 F 95.

79. Kiler v. Wohletz [Kan.] 101 P 474; Walla Walla Fire Ins. Co. v. Spencer [Wash.] 100 P 741.

80. Search Note: See notes in 11 L. R. A. (N. S.) 1018; 14 Id. 443.

See, also, Accord and Satisfaction, Cent. Dig. §§ 22-31, 116-139; Dec. Dig. §§ 3, 16-19; 1 Cyc. 313-319, 336; 1 A. & E. Enc. L. (2ed.) 420.

81. An accord in order to discharge contract or cause of action must be executed. Carter v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 35. Accord, being a promise to confer satisfaction, must be fully and actually executed and accepted in order to be satisfaction. North State Fire Ins. Co. v. Dillard [Ark.] 115 SW 154; Fritz v. Fritz [Iowa] 118 NW 769. In order that property given to creditor be an accord and satisfaction of debt, there must be delivery. Donoven v. Travers, 122 La. 458, 47 S 769. Where settlement agreement is not executed, it is not a bar to an action on the original cause of action. North State Fire Ins. Co. v. Dillard [Ark.] 115 SW 154; Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234. Where parties agreed to compromise dispute, debtor to pay sum down and certain monthly payments, the accord is unexecuted until full payment is made. Goffe v. Jones, 117 NYS 407. Further prosecution of action for death

promise, instead of the performance thereof, is accepted in satisfaction,[82] in which case the transaction really amounts to a novation.[83]

§ 3. *Pleading, issues, and proof.*[84]—See 11 C. L. 19—An accord and satisfaction must be specially [85] and sufficiently [86] pleaded. Accord, with part execution, cannot be pleaded in satisfaction,[87] but may in a proper case become available as an equitable defense.[88]

A general settlement is presumed to include all existing differences,[89] and, where a compromise agreement itself bears no date, it will be presumed to operate as of the date on which it is carried into effect.[90] Lapse of time and acquiescence strengthens a settlement,[91] and may even render it conclusive.[92] The burden of proving fraud, mistake, or undue influence, is upon the party asserting it,[93] and the evidence must be clear and satisfactory.[94] Whether or not there has been

was not precluded by unexecuted agreement to settle for sum less than that sued for. Carter v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 35. The **reason for nonperformance** is immaterial. North State Fire Ins. Co. v. Dillard [Ark.] 115 SW 154. In a proper case an unexecuted accord is available as an **equitable defense.** Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234.

Held settled by compromise: Claims for **trespass** to land, parties having made compromise and plaintiff having received deed to land. Newberry v. Chicago Lumbering Co., 154 Mich. 84, 15 Det. Leg. N. 663, 117 NW 592. Claim arising out of alleged **fraudulent representations** by vendor of land held settled by transfer of other lands to vendee. Zan v. Clark [Tex. Civ. App.] 117 SW 892. Acceptance of **rent** under agreement of reduction. Zindler v. Levitt, 132 App. Div. 397, 116 NYS 726. If parties agree upon terms by which **litigation** between them was to be settled and money is paid by one in furtherance of such agreement, the other must live up to it. Dotson v. Carter [Ky.] 112 SW 1116; Keaser v. Colebrook Nat. Bank [N. H.] 73 A 170.

82. North State Fire Ins. Co. v. Dillard [Ark.] 115 SW 154; Carter v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 35. Mutual promises are good as an accord and satisfaction of a prior obligation, if intent was to accept new promise, as satisfaction of the prior obligation. Goffe v. Jones, 117 NYS 407. When new agreement is accepted in satisfaction, the rights of parties must be determined with reference to such new agreement. Fritz v. Fritz [Iowa] 118 NW 769. Original cause of action is extinguished by performance of or **offer to perform** such agreement. Boswell v. Gillen, 131 Ga. 310, 62 SE 187.

Held settled by compromise agreement: Mortgagor's equity, under deed absolute claimed to be a mortgage, held extinguished by agreement to accept deed to part of land in full settlement of all claims. Compton v. Johnson, 240 Ill. 433, 88 NE 938. Claim for damages from collision between two vehicles. Woodward v. Neal, 113 NYS 751. Partnership dispute held settled by dissolution agreement. Fritz v. Fritz [Iowa] 118 NW 769. Defendant agreed not to sue plaintiff if the latter would repair certain fences and leave certain timber, which plaintiff had right to remove from defandant's land under prior contract. Cranor Smith Lumber Co. v. Frith [Ky.] 118 SW 307.

83. See Novation, 12 C. L. 1117.

84. Search Note: See Accord and Satisfaction, Cent. Dig. §§ 59, 83, 97, 110, 135, 150-166; Dec. Dig. §§ 25-27; 1 Cyc. 340-349; 1 A. & E. Enc. P. & P. 73.

85. Cannot be proved under general denial. Harvey v. Denver & R. G. R. Co. [Colo.] 99 P 31.

86. Consideration must be alleged. City Council of Montgomery v. Shirley [Ala.] 48 S 679. Where plea by its averments sets up defense of parol agreement on part of creditor to accept, and payment by debtor of less sum than real debt, concerning which there was no dispute, it is subject to demurrer. Scott & Sons v. Rawls [Ala.] 48 S 710. Plea averring merely payment and acceptance of less than full amount due in undisputed claim is demurrable. Id. Answer that plaintiff for certain consideration had released one jointly liable with defendant for the tort constituting the basis of the action held sufficient, though it did not allege that plaintiff had any claim against the party released, since plaintiff, by accepting benefit of alleged settlement, would be estopped to deny consideration thereof. Cleveland, etc., R. Co. v. Hilligoss [Ind.] 86 NE 485.

87. Goffe v. Jones, 117 NYS 407.

88. Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234.

89. Burrows v. Williams [Wash.] 100 P 340.

90. Undated agreement held to operate as of date of receipt of money agreed to be paid and execution of receipt therefor. Yazoo & M. V. R. Co. v. Neal [Miss.] 47 S 673.

91. Courts do not encourage the overturning of settlements voluntarily made and long acquiesced in. Burrows v. Williams [Wash.] 100 P 340.

92. Where one fails to repudiate settlement of account within reasonable time, settlement becomes binding. Ripley v. Sage Land & Imp. Co., 138 Wis. 304, 119 NW 108.

93. Usual presumption attaches that settlement was made in good faith and with a full knowledge of facts. Craigo v. Craigo [S. D.] 118 NW 712.

94. Kahn v. Metz [Ark.] 114 SW 911.

an accord and satisfaction is ordinarily a question of fact to be determined by the jury.[95] A receipt is not conclusive evidence that the thing received was accepted in full settlement,[96] nor is one necessarily bound by mere admissions and acknowledgments as to the amount due him.[97] In a suit on a compromise agreement, the terms of the contract under which the compromised claim arose are immaterial.[98] When the plaintiff in an action on a compromise agreement denies on cross-examination that he has previously sued on the original cause of action, it is proper to allow him on redirect examination to testify as to his understanding of the cross questioning as to the prior suit.[99] Papers turned over to a party in the making of a settlement are admissible as a part of the transaction,[1] and, where he fails to produce them, it will be presumed that they contain proof against him on all matters as to which they are the best evidence.[2]

ACCOUNTING, ACTION FOR.

The scope of this topic is noted below.[3]

§ 1. Nature of Remedy and Jurisdiction of Courts, 19.
§ 2. Persons Liable and Entitled to Accounting, 20.
§ 3. Practice and Procedure, 20.
§ 4. Requisites, Form, Substance, and Statement of the Account, 22.

95. Evidence held to sustain finding of settlement. Richey v. Farmers' & Merchants' Sav. Bank [Iowa] 121 NW 2. Evidence held sufficient to take case to jury on question of making and execution of accord and satisfaction. Perkins Co. v. Wilcox [Ga.] 63 SE 831. Held for jury under evidence in action on compromise agreement. Lindstrom v. Fitzpatrick, 105 Minn. 331, 117 NW 441. Whether money was paid in satisfaction of claim held for jury. Borchardt v. People's Ice Co., 106 Minn. 139, 118 NW 359. Whether part payment was received in full satisfaction or only on account held questions for a jury. Dickinson v. Hahn [S. D.] 119 NW 1034. Acceptance of **check tendered as in full** and retention of money held sufficient to take case to jury. Armstrong, Cator & Co. v. Lonon, 149 N. C. 434, 63 SE 101. Meaning of words "in full" on check given to discharged employee, to which he added words "to Mr. 19, 1904," held for jury, with reference to whether amount of check was accepted in full of all claims, including claim for wrongful discharge, or merely in full for services to such date. Millert v. Augustinian College, 36 Pa. Super. Ct. 511. Evidence held sufficient to go to jury on question of **authority of agent** to negotiate settlement. Lindstrom v. Fitzpatrick, 105 Minn. 331, 117 NW 441; Perkins Co. v. Wilcox [Ga.] 63 SE 831.

96. Receipt for check covering amount of bill less freight, the latter item being in dispute. Ramapo Foundry & Wheel Works v. Carey, 113 NYS 10.

97. Contractor held not bound by admission that certain sums were due to lien claimants, where such sum was not in fact due, and amount actually paid to lienors by owner was less than such sum. Fisher v. Burroughs Adding Mach. Co. [Mich.] 16 Det. Leg. N. 353, 121 NW 756. Where plaintiff borrowed money of defendant, gave trust deed on land as security, and later sold part of land and took note as part purchase price, which note was given to defendant in consideration of his release of so much of land sold, the fact that defendant furnished plaintiff a slip showing that note had been deducted from loan was not sufficient to constitute contract of settlement changing defendant's rights under first contract. Cotulla v. Barlow [Tex. Civ. App.] 115 SW 294.

98. Dyrenforth v. Palmer Pneumatic Tire Co., 240 Ill. 25, 88 NE 290.

99. Cross questioning attacked plaintiff's credibility, and it was proper for him to explain his denial of the prior suit by stating that he thought the cross questioning referred to whether he had previously sued on the settlement agreement. Lindstrom v. Fitzpatrick, 105 Minn. 331, 117 NW 441.

1. Checks, notes, and vouchers turned over by bank on making settlement with depositor held admissible under bank's plea of settlement in suit by depositor for accounting. Richey v. Farmers' & Merchants' Sav. Bank [Iowa] 121 NW 2. Query, whether such papers would be admissible to prove debits of plaintiff's account. Id.

2. Where, in suit by depositor against bank for accounting, the latter pleads settlement and former fails to produce vouchers and notes charged to him and turned over to him on the settlement. Richey v. Farmers' & Merchants' Sav. Bank [Iowa] 121 NW 2.

3. Includes only suits in equity to obtain an accounting and equivalent legal remedies. The liability of fiduciaries to account (see Brokers,* § 2; Agency,* § 4B; Guardianship,* § 9; Estates of Decedents,* § 11; Trusts,* § 14; and similar topics), accounting by public officers (see Officers and Public Employes,* § 9), and between partners (see Partnership,* § 7E), matters relating to stated and open accounts and actions thereon (see Accounts Stated and Open Accounts *), and discovery and inspection (see Discovery and Inspection *), are fully treated in separate articles.

§ 1. *Nature of remedy and jurisdiction of courts.*[4]—See 11 C. L. 20—Equitable jurisdiction to require an accounting depends upon the discovery sought,[5] the existence of a trust or fiduciary relation,[6] and the fact that the advantage of the accounting outweigh the disadvantages.[7] It is also essential to such jurisdiction that the real object of the suit be an accounting,[8] rather than the mere recovery of a money judgment,[9] or where the accounting is sought only by way of incidental relief.[10] The suit must, furthermore, not be based upon an account stated,[11] and an accounting must be asked for[12] and be necessary[13] in the interest of the party

4. Search Note: See notes in 3 C. L. 25.

See, also, Account, Cent. Dig. §§ 1-22, 62-70; Dec. Dig. §§ 1-8, 12; 1 A. & E. Enc. P. & P. 84, 93.

5. Tennessee Packing & Provision Co. v. Fitzgerald, 140 Ill. App. 430.

6. See topics relating to specific, trust relations. Trustee may sue for settlement of accounts. Mildeberger v. Franklin, 130 App. Div. 860, 115 NYS 903. Supreme court has jurisdiction to settle account of trustee. Id.

Trust relation held to exist so as to authorize accounting, where trustee of land paid taxes thereon in order to protect title, though original contract provided that all advances, including any sums paid for taxes on lands, were to be paid by logs delivered at agreed price. Stitt v. Rat Portage Lumber Co., 104 Minn. 347, 116 NW 643. Where there was an agreement to account for receipts of theater season. Empire Circuit Co. v. Sullivan, 169 F 1009. Where there was joint venture to buy and sell horses. Rice v. Peters, 128 App. Div. 776, 113 NYS 40. Where there were mutual accounts between woman and her deceased husband. Delaney v. O'Connor, 138 Ill. App. 566. Where tenant receives common property, either with or without consent of cotenant. Rice v. Peters, 128 App. Div. 776, 113 NYS 40. Where there was sufficient showing of indebtedness between partners, but books and accounts left question of whether there is anything due, a matter of conjecture. Donaldson v. Donaldson, 237 Ill. 318, 86 NE 604. Between representatives of estates of two deceased attorneys who were partners, as to partnership fees. Consaul v. Cummings, 30 App. D. C. 540. Between insurance company and holder of matured, tontine, dividend policy. Peters v. Equitable Life Assur. Soc., 200 Mass. 579, 86 NE 885. Where wife's agent who was employed to secure settlement with her husband, and who pretended to be her friend, was guilty of actionable fraud towards her. Dickinson v. Stevenson [Iowa] 120 NW 324.

Trust relation held not to exist so as to authorize accounting between mere creditor and debtor. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —. Between mutual insurance company and policyholder in case of fraud or wrongdoing of officers against company and in their personal interest, where there was no other and special relation of trust. Id. In case of mere bailment created by delivery to factor to sell and remit. Tennessee Packing & Provision Co. v. Fitzgerald, 140 Ill. App. 430. Where only remedy possible is money judgment against representative of decedent. Rice v. Peters, 58 Misc. 381, 111 NYS 5. In absence of contract or fraud, for what defendant has gained by securing absolute title to land by regular procedure under redemption statute, especially where validity of redemption and present validity and status of mortgage is unquestioned, and accrued profits are result of advance in value and not of any wrong on defendant's part. Barker v. Moore [N. D.] 118 NW 823. On mere option to buy stock where no consideration was advanced. Harle v. Brennig, 131 App. Div. 742, 116 NYS 51. Where one company made loan to another with agreement from other that it should remain out of competing business during pendency of loan, especially where it was no part of chartered business to make loans. Earle v. American Sugar Refining Co. [N. J. Eq.] 71 A 391.

7. Not allowed in suit by policyholder to have receiver appointed and affairs of mutual insurance company wound up. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —.

8. Relief may be equitable though it ask for money judgment. Grand Lodge A. O. U. W. v. Grand Lodge A. O. U. W. [Conn.] 70 A 617. Allowed where relief demanded was equitable proportion of certain funds, although action was based upon a contract. Grand Lodge A. O. U. W. of Conn. v. Grand Lodge A. O. U. W. of Mass. [Conn.] 70 A 617.

9. As where action is not to require accounting by trustee but for damages resulting from negligent act in performance of duty. Mersereau v. Bennett, 62 Misc. 356, 115 NYS 20. Where money judgment is only possible remedy. Rice v. Peters, 58 Misc. 381, 111 NYS 5.

10. As where accounting is merely incidental to obtaining inspection of books of account. Rice v. Peters, 58 Misc. 381, 111 NYS 5. In actions at law, mere fact that accounting is necessary is insufficient to give equity jurisdiction. Tennessee Packing & Provision Co. v. Fitzgerald, 140 Ill. App. 430.

11. Account stated is always bar to bill for accounting. Morrison v. Chapman, 63 Misc. 195, 116 NYS 522. Agreement signed by parties held to have all elements of an account stated. Mersereau v. Bennett, 62 Misc. 356, 115 NYS 20.

12. Fact that various items of expenditure were drawn into controversy by defendant's answer does not change action to one for accounting, where plaintiff does not seek accounting but claims to have performed all contract obligations. Niele v. Stokes, 61 Misc. 302, 113 NYS 704.

13. Tennessee Packing & Provision Co. v. Fitzgerald, 140 Ill. App. 430.

seeking it.[14] The occasion therefor must actually exist [15] and must affirmatively appear.[16] It is likewise essential that the amount involved be sufficient to warrant equitable interference,[17] that no adequate remedy at law exists,[18] and that there be no disputed matter of law to be determined preliminary to the accounting.[19] Any objection to such jurisdiction may be waived, however, by a participation in the suit without objection.[20]

§ 2. *Persons liable and entitled to accounting.*[21]—See 11 C. L. 21—A person may lose his right to an accounting by laches [22] or through limitations.[23]

§ 3. *Practice and procedure.*[24] *Parties.*See 11 C. L. 21—All persons necessary to a complete accounting should be joined,[25] and in some cases persons not absolutely necessary but having possible interests may be joined.[26] Necessary parties may be brought in by amendment.[27]

*Pleading.*See 11 C. L. 21—A bill for an accounting should show the existence of mutual accounts,[28] the discovery sought and the necessity therefor,[29] and plaintiff's right thereto,[30] and, also, defendant's responsibility for the wrongdoing complained

14. Accounting not allowed because defendant would be saved multiplicity of suits, where defendant is not complaining on that ground. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —.

15. Before person can have accounting of profits, it must appear that such profits exist. Earle v. American Sugar Refining Co. [N. J. Eq.] 71 A 391.

16. Failure of defendant, a mutual insurance company, to deny claims of stockholders to ownership of entire surplus, does not alone warrant equitable interference for accounting. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —.

17. Suit will be dismissed where it appears that amount involved is too small. Peters v. Equitable Life Assur. Soc., 200 Mass. 579, 86 NE 885.

18. Friedman v. Fraser [Ala.] 47 S 320; Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —. Equity will look through form of things and discover substance to assume jurisdiction and grant relief. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291. Plaintiff held to have adequate remedy under Code Civ. Proc. §§ 803, 809, to secure inspection of books. Rice v. Peters, 58 Misc. 381, 111 NYS 5. No accounting where amount due under contract of consignment of merchandise can be readily ascertained at law. Tennessee Packing & Provision Co. v. Fitzgerald, 140 Ill. App. 430. Where complainant chose not to treat transfer of patent as breach of obligation but rather to affirm transfer and hold both companies for royalty, equity would require accounting. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291.

19. No accounting had if right thereto is based upon disputed question of title until such question has been determined at law, as where defendant disputed plaintiff's right to coal royalties and claimed plaintiff had not title to such coal land. Lazarus v. Lehigh & Wilkes-Barre Coal Co., 221 Pa. 415, 70 A 817.

20. Accounting had upon motion of one party, in which both parties participated, cannot subsequently be questioned as having been made without jurisdiction. Clinton v. Winnard, 135 Ill. App. 374.

21. Search Note: See notes in 5 C. L. 23; 8 L. R. A. (N. S.) 69.

See, also, Account, Cent. Dig. §§ 23-25; Dec. Dig. §§ 9, 10.

22. But generally if sum sought is certain, transaction has not become obscure, and there has been no material loss of evidence, accounting will not be denied merely because of delay in asserting claim. Branner v. Branner's Adm'r, 108 Va. 660, 62 SE 952.

23. Under the law of the forum which in this case cuts off right of partner to have accounting in six years, unless agreement be under seal and then in 10 years, with statute as to fraud and concealment applying in proper case. Dowse v. Gaynor [Mich.] 15 Det. Leg. N. 897, 118 NW 615.

24. Search Note: See Account, Cent. Dig. §§ 26-135; Dec. Dig. §§ 11-22; 1 Cyc. 408-415; 1 A. & E. Enc. P. & P. 83.

See, also, 1 Ill. Cyc. Dig. 52; 10 Id. 18.

25. Where action at law has determined that third party selling plaintiff's property did not act for defendant, and plaintiff is unwilling to accept amount admitted by such third party, such third party may be made party to suit. Passaic Match Co. v. Hello Match Co. [N. J. Eq.] 70 A 466. It is essential to finality of accounting of trust estate that all beneficiaries be made parties. Delaney v. O'Connor, 138 Ill. App. 366.

26. Held not improper for administrator suing for accounting to join legatee of deceased legatee. Sheldon v. Whitehouse, 60 Misc. 161, 112 NYS 1079. Plaintiff may make any person defendant who claims adverse interest in controversy. Sheldon v. Whitehouse, 60 Misc. 161, 112 NYS 1079.

27. Passaic Match Co. v. Helic Match Co. [N. J. Eq.] 70 A 466.

28. Delaney v. O'Connor, 138 Ill. App. 366.

29. Tennessee Packing & Provision Co. v. Fitzgerald, 140 Ill. App. 430.

30. Bill held defective in that it failed to show complainant's connection with party to whom accounting was due. Empire Circuit Co. v. Sullivan, 169 F 1009. Bill must show plaintiff's right to fund for accounting of which suit is brought, and must set out contract relied on, where distribution of surplus funds of fraternal insurance

of,[31] and that no adequate remedy at law exists.[32] It should question the correctness of an account rendered.[33] It may request an accounting on separate and independent transactions.[34] Such bill is not demurrable because the exercise of jurisdiction appears therefrom to be within the court's discretion,[35] because it does not appear that the amount involved is sufficient to warrant equitable interference,[36] because it fails to negative every possible defense,[37] because it fails to show performance of a condition ordinarily precedent, the performance of which was prevented by neglect of the defendant,[38] or because it appears that an apportionment was made, where there is a distinct allegation of fraud in the making thereof.[39] An amended bill may be maintained for the purpose of correcting an error in a settlement in pais.[40]

Evidence.[See 11 C. L. 21]—So far as books and papers are necessary to an accounting, their production can be compelled,[41] although not generally until after plaintiff's right to an accounting has been established.[42] Partnership books of accounts, unless uncertain in their showing,[43] are ordinarily admissible as evidence in an accounting between partners.[44] An apportionment by an insurance company is considered in evidence as being prima facie correct.[45]

Decree and reference.[See 11 C. L. 22]—Plaintiff on establishing his right to an accounting is entitled to an interlocutory judgment therefor,[46] which judgment should precede the order of reference.[47] A master's report is sufficient where it substantially complies with the requirements of the decree and is clearly intelligible.[48]

company is sought. Ryan v. Knights of Columbus [Conn.] 72 A 574.

31. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —.

32. Friedman v. Fraser [Ala.] 47 S 320.

33. Morrison v. Chapman, 63 Misc. 195, 116 NYS 522.

34. As of various sums sent by principal to agent for investment and misapplied. Brock v. Wildey [Ga.] 63 SE 794.

35. Although such account can be more expeditiously and economically settled by surrogate than in supreme court where pending. Mildeberger v. Franklin, 130 App. Div. 860, 115 NYS 903.

36. As where bill does not expressly aver amount. Peters v. Equitable Life Assur. Soc., 200 Mass. 579, 86 NE 885.

37. Demurrer to petition, upon ground that it did not appear that defendant had any right, power, or authority to pay over to plaintiff any of moneys collected or held, held insufficient, it not being possible for it to appear that defendant is absolved from duty of rendering unto others that which belongs to them in right and in equity. Grand Lodge A. O. U. W. of Conn. v. Grand Lodge A. O. U. W. of Mass. [Conn.] 70 A 617.

38. Especially where there appears to be a balance over and above the amount necessary to carry out such performance, as in case where one lodge demurs to petition of another lodge for accounting upon ground that all death claims, for which they are jointly liable, have not been paid. Grand Lodge A. O. U. W. of Conn. v. Grand Lodge A. O. U. W. of Mass. [Conn.] 70 A 617.

39. Bill by holder of matured dividend tontine policy, asking accounting against insurance company, held not demurrable where fraudulent conduct by company in apportionment is charged. Peters v. Equitable Life Assur. Soc., 200 Mass. 579, 86 NE 885.

40. Branner v. Branner's Adm'r, 108 Va. 660, 62 SE 952.

41. Before referee. Moore v. Reinhardt, 112 App. Div. 707, 117 NYS 534. Application for production of books and papers so as to bring case within rule 14 of general rules of practice should show that discovery is necessary and would disclose material evidence. Id. See Discovery and Inspection, 11 C. L. 1109.

42. After interlocutory judgment. Moore v. Reinhardt, 112 App. Div. 707, 117 NYS 534.

43. Partnership books and accounts, so uncertain in their showing that no conclusions other than mere conjecture can be drawn therefrom, will not be considered in evidence in suit for accounting between partners. Donaldson v. Donaldson, 237 Ill. 318, 86 NE 604.

44. Partnership ledgers kept by bookkeeper, **admissible** as original entries in accounting between partners, since bookkeeper is regarded as agent of each partner. Schlicher v. Whyte [N. J. Err. & App.] 71 A 337. Books kept by one partner and open to inspection of others are admissible in evidence as partnership books. Donaldson v. Donaldson, 237 Ill. 318, 86 NE 604. Loose sheets of paper kept by partner are not admissible in evidence as account books. Id.

45. Peters v. Equitable Life Assur. Soc., 200 Mass. 579, 86 NE 885.

46. Judgment directing that accounts between parties be investigated and settled. Moore v. Reinhardt, 112 App. Div. 707, 117 NYS 534; Post v. Van Siclen, 117 NYS 554.

47. Post v. Van Siclen, 117 NYS 554.

48. Annexation of itemized account as schedule to report is matter of form, where

§ 4. *Requisites, form, substance, and statement of the account.*[49] See 9 C. L. 19—An account is the statement of the receipts and payments of an executor, administrator, or other trustee of the estate confided to him.[50]

ACCOUNTS STATED AND OPEN ACCOUNTS.

The scope of this topic is noted below.[51]

§ 1. Nature and Elements of the Several Kinds of Accounts, 22.
§ 2. Binding Effect, Rights and Liabilities, 23.
§ 3. Remedies on Account Stated, 23.
§ 4. Remedies on Open Accounts, 24.

§ 1. *Nature and elements of the several kinds of accounts.*[52] See 11 C. L. 22—An account stated is in effect a contract as to an agreed balance due[53] and unpaid.[54] It is an account rendered[55] to the debtor or his authorized representative,[56] upon a previously existing debt,[57] and expressly[58] or impliedly[59] acknowledged as correct.[60] Such acknowledgment may be implied from an acceptance,[61] examination, and retention of the account by the debtor,[62] and from his failure to object thereto[63] within a reasonable time.[64] An acknowledgment to be effective

figures substantially appeared in depositions annexed to report. Schlicher v. Whyte [N. J. Err. & App.] 71 A 337.

49. Search Note: See Account, Cent. Dig. §§ 109-131; Dec. Dig. § 20; Equity, Cent. Dig. § 871.

50. Mersereau v. Bennett, 62 Misc. 356, 115 NYS 20.

51. Includes the making and effect of accounts stated and the remedies thereon and on open accounts, including the action of book debt. The related topic of Accord and Satisfaction* should be consulted. Limitation of actions on accounts (see Limitation of Actions*), and the general principles of pleading (see Pleading*), are excluded.

52. Search Note: See notes in 3 C. L. 28; 27 L. R. A. 811.

See, also, Account, Action on, Cent. Dig. §§ 1-4, 31-37, 44-61; Dec. Dig. §§ 2-4, 11-12, 17-19; 1 Cyc. 471-475, 488-491, 493-501; Account Stated, Cent. Dig. §§ 1-40; Dec. Dig. §§ 1-6; 1 Cyc. 364-387; 1 A. & E. Enc. L. (2ed.) 435.

53. Naylor v. Lewiston & S. E. Elec. R. Co., 14 Idaho, 789, 96 P 573; Johnson v. Gallatin Valley Mill. Co. [Mont.] 98 P 883; Sariol v. McDonald Co., 127 App. Div. 648, 111 NYS 796.

54. When paid it becomes a settled account. McGraw v. Traders' Nat. Bank [W. Va.] 63 SE 398.

55. Rendition essential. Kahn v. Metz [Ark.] 114 SW 911.

56. May be rendered by creditor or representative delivering it to debtor or his representative. Sariol v. McDonald Co., 127 App. Div. 648, 111 NYS 796. Delivery of account to corporation succeeding partnership, though partners are officers in corporation, though not objected to, is not sufficient to bind corporation as on stated account, especially where account appears on face to be against copartnership. Stimson Mill Co. v. Hughes Mfg. Co. [Cal. App.] 97 P 322.

57. Stimson Mill Co. v. Hughes Mfg. Co. [Cal. App.] 97 P 322. Must have been previous liability. Cooper v. Upton [W. Va.] 64 SE 523. Previous transactions necessary. Johnson v. Gallatin Valley Mill. Co. [Mont.] 98 P 883; Sariol v. McDonald Co., 127 App. Div. 648, 111 NYS 796.

58. Doubleday, Page & Co. v. Shumaker, 60 Misc. 227, 113 NYS 83. Whether defendant expressly assented to account rendered held for jury. Ottofy v. Winsor [Mo. App.] 119 SW 40.

59. Doubleday, Page & Co. v. Shumaker, 60 Misc. 227, 113 NYS 83; Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co., 168 F 770. Acknowledgment need not be in writing or express words. Id. Where holder of securities, at request of owner, transferred such securities to another who paid amount claimed due from owner to such holder, an account is stated by such holder and accepted by such owner. Sprague v. Currie, 117 NYS 481.

60. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641, 15 Det. Leg. N. 926, 118 NW 484.

61. Davis v. Stephenson, 149 N. C. 113, 62 SE 900.

62. McGraw v. Traders' Nat. Bank [W. Va.] 63 SE 398; Doubleday, Page & Co. v. Shumaker, 60 Misc. 227, 113 NYS 83.

63. Morrison v. Chapman, 63 Misc. 195, 116 NYS 522. But not where delivered to corporation where against partnership. Stimson Mill Co. v. Hughes Mfg. Co. [Cal. App.] 97 P 322. Not where there was no previous debt. Cooper v. Upton [W. Va.] 64 SE 523.

64. Ottofy v. Winsor [Mo. App.] 119 SW 40; Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co., 168 F 770; Davis v. Stephenson, 149 N. C. 113, 62 SE 900. Error in computing interest held acquiesced in after lapse of nearly three years, though delay was occasioned by neglect of complainant's attorney. Ripley v. Sage Land & Imp. Co., 138 Wis. 304, 119 NW 108, citing cases pro and con. Held that account rendered became account stated by reason of debtor's failure to object for ten years and until after plaintiff's papers and evidence had been destroyed by fire. Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co., 168 F 770. Rule generally applicable in Virginia and West Virginia as between merchant and merchant, and principal and agent, that account rendered and retained for long time, though not examined, be-

must be unconditional.[65] A mutual account is one with items for and against each party.[66]

§ 2. *Binding effect, rights and liabilities.*[67]—See 11 C. L. 23—The items of an account stated are considered as prima facie correct[68] in the absence of allegation and proof of duress, fraud, error, or mistake[69] of which the debtor did not have knowledge,[70] and in which he did not acquiesce.[71] An account stated will not ordinarily be set aside after the lapse of considerable time.[72] Ordinarily a suit for an accounting is barred by an account stated,[73] but claims accruing after service of such account are not barred thereby.[74] The rendition of an unaccepted account does not estop the creditor from subsequently claiming a larger amount.[75]

§ 3. *Remedies on account stated.*[76]—See 11 C. L. 24—The right to a remedy on an account stated rests exclusively upon evidence of the alleged agreement as to the amount due.[77] While the question of express ratification of the account is for the jury,[78] there is some conflict as to the jury's right to pass upon the question of ratification implied from delay in objection to an account rendered.[79]

comes account stated, does not apply ordinarily to transactions **between banker and customer.** McGraw v. Traders' Nat. Bank [W. Va.] 63 SE 398. Receipt and retention without objection for considerable time of balanced passbook and cancelled checks does not constitute an account stated, so as to require suit for accounting upon discovery of payments made and charged on forged indorsements. Lieber v. Fourth Nat. Bank [Mo. App.] 117 SW 672. See Banking and Finance, 11 C. L. 370.

65. Not effective if any items are left for future determination. Quayle v. Ream, 15 Idaho, 666, 99 P 707. Doubleday, Page & Co. v. Shumaker, 60 Misc. 227, 113 NYS 83. Evidence held insufficient to show account stated where plaintiff testified that defendant stated that "there were some differences" between them and that he "would have to go over the books." Weidenreich v. Borine Mfg. Co., 113 NYS 702. A mere promise contingent on the happening of another event is not account stated, as where defendant promised that plaintiffs "would then get all the money coming to them." Ershowsky v. Korn, 113 NYS 478.

66. Roberts v. Neale, 134 Mo. App. 612, 114 SW 1120; Hobbs v. Crawford, 4 Ga. App. 585, 62 SE 157.

67. Search Note: See Account Stated, Cent. Dig. §§ 41-57, 60-80; Dec. Dig. §§ 7-13; 1 Cyc. 388, 450-471; 1 A. & E. Enc. L. (2ed.) 460.

68. Settlement does not create an estoppel but furnishes strong prima facie presumption that result is correct. Johnson v. Gallatin Valley Mill. Co. [Mont.] 98 P 883.

69. Poppell v. Culpepper [Fla.] 47 S 351; Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co., 168 F 770; Naylor v. Lewiston & S. E. Elec. R. Co., 14 Idaho, 789, 96 P 573; Davis v. Stephenson, 149 N. C. 113, 62 SE 900. Impeachable for fraud. The Washtenaw, 163 F 372. Account stated, being mere admission of correctness of account and not an estoppel may be impeached for mistake. Boyce v. Walker, 130 App. Div. 305, 114 NYS 166. Held no fraud or mistake where discounts were taken according to custom and shown on books to which all parties had access. Barlow v. Platt, 117 NYS 235.

Proof of fraud or mistake must be clear and satisfactory. Johnson v. Gallatin Valley Mill. Co. [Mont.] 98 P 883.

70. Johnson v. Gallatin Valley Mill. Co. [Mont.] 98 P 883; Sprague v. Currie, 117 NYS 481. As where mistake was alleged due to misstatements of plaintiff which defendant did not seek to verify for some time and bond mortgage given. Boyce v. Walker, 130 App. Div. 305, 114 NYS 166.

71. Johnson v. Gallatin Valley Mill. Co. [Mont.] 98 P 883; Sprague v. Currie, 117 NYS 481.

72. Barlow v. Platt, 117 NYS 235.

73. Mersereau v. Bennett, 62 Misc. 356, 115 NYS 20; Morrison v. Chapman, 63 Misc. 195, 116 NYS 522. Account not served until after suit begun is not bar to suit for accounting. Moore v. Reinhardt, 112 App. Div. 707, 117 NYS 534. When pleaded as bar, bill may be amended so as to attack or correct error; nor are proceedings for such correction barred by laches unless there has been such loss of evidence that injustice would likely result therefrom. Branner v. Branner's Adm'r, 108 Va. 660, 62 SE 952.

74. George v. Bekins Moving & Storage Co. [Wash.] 102 P 23.

75. Physician rendering bill to executor which was not acted upon is not estopped from rendering another and larger bill 3 years later. In re O'Bold's Estate, 221 Pa. 145, 70 A 555.

76. Search Note: See Account Stated, Cent. Dig. §§ 40, 81-99; Dec. Dig. §§ 14-20; 1 Cyc. 388-401; 1 A. & E. Enc. P. & P. 87.

77. Not upon evidence of original items of account. Naylor v. Lewiston & S. E. Elec. R. Co., 41 Idaho, 789, 96 P 573. Exclusion of evidence as to items not error. Poppell v. Culpepper [Fla.] 47 S 351.

78. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641, 15 Det. Leg. N. 926, 118 NW 484; Ottofy v. Winsor [Mo. App.] 119 SW 40.

79. Held for the jury. Davis v. Stephenson, 149 N. C. 113, 62 SE 900. Whether stated account exists by reason of lapse of reasonable time after service of account without objection is a question for jury. Baltimore & O. R. Co. v. Berkeley Springs

§ 4. *Remedies on open accounts.*[80]—See 11 C. L. 24—The account sued on should ordinarily be itemized,[81] and defects in this regard are reached by demurrer[82] or objection to the evidence,[83] but are curable by amendment.[84] Ordinarily the account should also be verified,[85] since the statutes commonly provide that a verified account to which no verified denial is filed shall be taken as true,[86] but verified denial puts plaintiff upon this proof.[87] The fact that plaintiff is suing on a verified account does not preclude him from introducing proof as in a simple action on an account.[88] The evidence should show any transfer of the account,[89] and the proof be sufficient to support the account sued on.[90] Any evidence showing how the account introduced was kept is admissible.[91] Account books are not admissible when they do not appear to have been properly kept.[92] It is within the province of the jury to determine whether the items constitute one or more accounts,[93] and to take into consideration any change in a verified account or in the verification thereto.[94] The court or referee should make a statement of the account showing the items allowed and disallowed.[95]

Accretion; Accumulations, see latest topical index.

ACKNOWLEDGMENTS.

The scope of this topic is noted below.[96]

§ 1. Nature, Office, and Necessity, 24.
§ 2. Officers Who May Take, 25.
§ 3. Taking and Making Acknowledgments, 25.
§ 4. Certificate of Acknowledgment, 26.
§ 5. Authentication of Officers' Authority, 28.
§ 6. Operation and Effect, 28.
§ 7. Defects and Invalidities, 28.

§ 1. *Nature, office, and necessity.*[97]—See 11 C. L. 25—Usually, proper acknowledgment is necessary to admit an instrument to record,[98] and hence a recorded

& P. R. Co., 168 F 770. Not for jury. Ottofy v. Winsor [Mo. App.] 119 SW 40.

80. Search Note: See Account, Action on, Cent. Dig. §§ 5-30; Dec. Dig. §§ 5-8; 1 Cyc. 476-487, 492, 493; 1 A. & E. Enc. P. & P. 90.

81. Polytinsky v. Stewart [Ala.] 48 S 395.

82. Debtor may by special demurrer to petition require each item of account sued on to be set out, but error is waived if demurrer not filed. Hobbs v. Crawford, 4 Ga. App. 585, 62 SE 157.

83. Under Rev. St. 1899, § 630 (Ann. St. 1906, p. 653), no evidence can be introduced to prove an itemized account. Mangelsdorf Bros. Co. v. Harnden Seed Co., 132 Mo. App. 507, 112 SW 15.

84. Mangelsdorf Bros. Co. v. Harnden Seed Co., 132 Mo. App. 507, 112 SW 15.

85. Both as to debits and credits so as to become self-proving under Code 1896, § 1804. Poyltinsky v. Stewart [Ala.] 48 S 395. But proof may be sufficient without this being done. Id. Fact that plaintiff could not swear to credits on account would not prevent its being offered in evidence to show debits, since credits were favorable to defendant who could not complain that plaintiff did not swear to credits voluntarily allowed him. Id.

86. Act 1901, p. 55. McNeil v. Ellis, 4 Ga. App. 530, 61 SE 1050. Under Ann. Code 1892, § 1801; but this does not apply to action on bond of agent to account for moneys received. Adams v. Fidelity Mut. Life Ins. Co. [Miss.] 49 S 119.

87. Of items not afterwards admitted by defendant. Rucker v. Brown Bros. [Ga. App.] 65 SE 55.

88. Polytinsky v. Stewart [Ala.] 48 S 395.

89. By no vague or uncertain testimony. Polytinsky v. Stewart [Ala.] 48 S 395.

90. Held sufficient though account was not such as might be verified. Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co. [Tex. Civ. App.] 120 SW 532.

91. Evidence of plaintiff's intemperate habits held admissible. Davis v. Stephenson, 149 N. C. 113, 62 SE 900.

92. Entries in memorandum book not made at time of transaction, in chronological order, or not in a book used in the regular course of business. Cahill v. Printy, 133 Ill. App. 600.

93. Roberts v. Neale, 134 Mo. App. 612, 114 SW 1120.

94. In weighing the testimony of a witness. Polytinsky v. Stewart [Ala.] 48 S 395.

95. Since supreme court will not examine account unless this is done. Stubbs v. Montezuma Lumber Co. [Colo.] 100 P 433.

96. Includes all matters as to necessity, making, sufficiency, and effect of acknowledgment of written instruments. While the necessity of acknowledgment as a prerequisite to record is included, the effect of unacknowledged instruments as notice, etc., is more fully treated in the article, Notice and Record of Title,* § 2).

97. Search Note: See Acknowledgment, Cent. Dig. §§ 1-45, 257; Dec. Dig. §§ 1-5, 7; 1 Cyc. 512, 526, 549, 551, 559, 565; 1 A. & E. Enc. L. (2ed.) 485.

98. Williams v. Butterfield, 214 Mo. 412, 114 SW 13. Probate of deed acknowledged before commissioner of affidavits in for-

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* Always begin with the latest article on the subject. Use the latest topical index.

instrument is presumed to have been properly acknowledged.[99] Acknowledgment is also essential in certain cases in order to render the instrument effective,[1] though, as a general rule, acknowledgment is not essential to the validity and effectiveness of an instrument as between the parties thereto.[2] Even where an instrument is required by statute to be acknowledged, it may be sufficient to pass an equitable interest or title though defectively acknowledged.[3]

§ 2. *Officers who may take.*[4]—See 11 C. L. 26—The officers who may take acknowledgments are specified by the statutes of the various states,[5] and, where the clerk of a county is authorized to take acknowledgments, his deputy may certify an acknowledgment in the clerk's name by himself as deputy.[6] One standing in the position of a beneficiary under a conveyance or other written instrument cannot take the acknowledgment,[7] but an acknowledgment by grantors taken before a grantor is not void.[8]

§ 3. *Taking and making acknowledgments.*[9]— See 11 C. L. 26—In some states the acknowledgment of a married woman must be taken privily and apart from her husband,[10] but a defective acknowledgment by a married woman will not invalidate an instrument to which her signature is not necessary.[11] A defective acknowledgment of an instrument by a corporation does not necessarily render the instrument void as between the parties.[12]

eign state held in accordance with Code 1883, c. 27. Cozad v. McAden [N. C.] 63 SE 944.

99. So as to render it admissible in evidence, under Code Civ. Proc. § 937, rendering acknowledged instruments so admissible. In re Pirie, 117 NYS 753.

1. Deed by married woman and her husband must be acknowledged by her on a privy examination in order to cut off homestead rights. Blume v. White [Tex. Civ. App.] 111 SW 1066. See Homesteads, 11 C. L. 1780. Deed of married woman to separate property. Williams v. Butterfield, 214 Mo. 412, 114 SW 13. Where deed of married woman is materially altered after execution and acknowledgment, it should be re-acknowledged in order to render it effective. Waldron v. Waller [W. Va.] 64 SE 964.

2. Conditional sale contract. Zacharia v. Cohen Co. [Iowa] 119 NW 136. Deed. Graves v. St. Louis, etc., R. Co., 133 Mo. App. 91, 112 SW 736. Mortgage. Ross v. Harney, 139 Ill. App. 513. Where deed was changed, with knowledge and consent of grantee, after acknowledgment, by addition of name of another grantee, and was thereafter delivered by grantor to such additional grantee, it took effect as between the parties upon such delivery. Baker v. Baker, 239 Ill. 82, 87 NE 868. **Deed improperly acknowledged** is good between parties. Burton-Whayne Co. v. Farmers' & Drovers' Bank [Ky.] 113 SW 445.

3. Equitable title passes though legal title did not pass under Rev. St. 1892, art. 794, providing commissioner's deed must be "duly acknowledged." Hardin County v. Nona Mills Co. [Tex. Civ. App.] 112 SW 822.

4. Search Note: See notes in 3 C. L. 32; 7 Id. 25; 16 L. R. A. 719; 33 Id. 332; 56 A. S. R. 798; 58 Id. 707; 3 Ann. Cas. 299; 5 Id. 461.

See, also, Acknowledgment, Cent. Dig. §§ 78-121; Dec. Dig. §§ 15-21; Evidence, Cent. Dig. § 1430; 1 Cyc. 544, 545, 549-551, 553-556; 1 A. & E. Enc. L. (2ed.) 493.

5. Under Code 1886, § 1799, mayor may take acknowledgment of conveyances. Lucas v. Boyd [Ala.] 47 S 209. Under Act. Dec. 18, 1837 (1 Gammel's Laws, p. 1433), deed to land in Texas, certified by consular agent in Louisiana, was properly certified, "consul" and "consular agents" being used interchangeably. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662.

6. Such certification is proper under Rev. St. 1908, § 684, and was also proper at common law. Halbouer v. Cuenin [Colo.] 101 P 763.

7. Acknowledgment so taken is void. Greve v. Echo Oil Co. [Cal. App.] 96 P 904.

8. Acknowledgment by stockholders of corporation of consent to deed executed by officers, taken before another stockholder, was valid, since one taking acknowledgment took no interest under deed. Greve v. Echo Oil Co. [Cal. App.] 96 P 904.

9. Search Note: See notes in 108 Am. St. Rep. 529, 561.

See, also, Acknowledgment, Cent. Dig. §§ 58-62, 122-150; Dec. Dig. §§ 9-10, 13, 22-26; 1 Cyc. 542, 544, 557-571; 1 A. & E. Enc. L. (2ed.) 525.

10. Russell v. Holman [Ala.] 47 S 205. Under Acts 1848, p. 89, c. 41 (Revisal 1905, § 2097), lease of wife's land is void as to wife when not so taken. Richardson v. Richardson [N. C.] 64 SE 510.

11. Where married woman's signature was not essential to conveyance, defects in acknowledgment as to her need not be considered. Ariola v. Newman [Tex. Civ. App.] 113 SW 157. Defective acknowledgment as to wife does not prevent deed from being used as evidence in absence of issue that land was separate property of wife or the homestead. Colville v. Colville [Tex. Civ. App.] 118 SW 870.

12. Mortgage, acknowledged as act of officers of corporation instead of as act of

Persons who may make. See 11 C. L. 80

§ 4. *Certificate of acknowledgment.*[13] See 11 C. L. 26—The purpose of the certificate of acknowledgment is to show that the instrument has in fact been acknowledged when so required by law,[14] and to establish the identity of the grantor and the genuineness of the signature,[15] but the notary is not required to certify to the ownership of the property.[16] The sufficiency of the certificate of acknowledgment is determined by the laws of the state where made,[17] and it is generally held sufficient if it shows that the requirements of the statute have been complied with in substance,[18] a mere irregularity not necessarily being fatal,[19] though it consist in the omission of a statuory requirement,[20] but the statute must be complied with at least substantially.[21] The certificate must be made before delivery of the in-

corporation, held reformable in equity. Spelden v. Sykes [Wash.] 98 P 752.

13. Search Note: See notes in 3 C. L. 33; 14 L. R. A. 815; 19 Id. 279; 4 L. R. A. (N. S.) 442; 11 Id. 643; 6 A. S. R. 642; 54 Id. 150; 2 Ann. Cas. 990, 10 Ann. Cas. 129.

See, also, Acknowledgment, Cent. Dig. §§ 151-220; Dec. Dig. §§ 29-38; 1 Cyc. 538, 571-606; 1 A. & E. Enc. L. (2ed.) 526.

14. Deed having no certificate of acknowledgment by grantor not entitled to record under Rev. St. 1889, § 2418. Williams v. Butterfield, 214 Mo. 412, 114 SW 13. Proper certificate is essential to validity of married woman's deed. Id.

15. Officer must either personally know party or have satisfactory evidence of the fact that he is identical person described in and who executed instrument. Homan v. Wayer [Cal. App.] 98 P 80. Person who is not sufficiently known to notary to allow latter to certify to his identity without proof is not sufficiently known to him to be credible witness to prove grantor's identity. Id.

16. Homan v. Wayer [Cal. App.] 98 P 80.

17. According to laws of W. Va., the following was held insufficient,—"And the said Mary L. B. White, wife of said Thomas C. White, being examined by me privily and apart from her said husband, and having the said writing explained to her, declared she had willingly executed the same and does not wish to retract it." Gillespie v. Pocahontas Coal & Coke Co., 162 F 742.

18. Certificate of notary public that president of corporation appeared before him, and acknowledged as his voluntary act and deed a conveyance duly signed, sealed, and witnessed by said corporation, entitles said instrument to record, although somewhat irregular. Powers v. Spiedel [Neb.] 121 NW 968. Omission from certificate of acknowledgment of deed that grantor "executed the instrument for the purposes and consideration therein expressed" is not fatal defect. Ariola v. Newman [Tex. Civ. App.] 113 SW 157. Certified copy of records held admissible to prove deed, although names of grantors were inserted or set out in the body of the acknowledgment, at the place in which name and style of officer taking acknowledgment should have appeared, it appearing though that certificate was signed at bottom by justice. Stephens v. Middlebrooks [Ala.] 49 S 321. Under Kirby's Dig. § 3901, making it necessary that wife join and acknowledge any instrument effecting the homestead, no certain form being prescribed, it is sufficient if it appears from certificate that she did acknowledge such instrument. Sledge & Norfleet Co. v. Craig [Ark.] 112 SW 892. Certificate of **acknowledgment of married woman** which shows that she personally appeared before two justices of the peace, who examined her privily and apart from her husband and read and fully explained the deed to her, and she acknowledged that she had willingly executed the same and did not wish to retract it, is a sufficient compliance. Saffell v. Orr [Va.] 64 SE 1057. In certifying acknowledgment of husband and wife, officer can testify both acknowledgments in one and the same certificate, provided the certificate contains all the essential parts of both certificates as required by law. Russell v. Holman [Ala.] 47 S 205.

19. Deed defectively acknowledged because "Easter" was used instead of "Ester," properly admitted as evidence. Haney v. Gartin [Tex. Civ. App.] 113 SW 166.

Curative statutes: Certificate of acknowledgment not conforming to the general statute prescribing form of acknowledgments, but showing that wife acknowledged before the officer that she executed the mortgage, if defective, was cured by Act March 20, 1903 (Laws 1903, p. 151; Kirby's Dig. § 786), declaring valid all instruments affecting real estate defective by reason of the act relating to conveyances of homesteads. Sledge & Norfleet Co. v. Craig [Ark.] 112 SW 892. Curative act not inapplicable because homestead was not correctly described in mortgage as existence of facts were admitted in the pleadings which justified a reformation of instrument so as to make it describe the land correctly. Id.

20. Failure to file as required by Laws 1907, p. 1172, c. 559, § 1, is an irregularity which is not fatal, the person being in fact a notary. In re Townsend, 195 N. Y. 214, 88 NE 41.

21. Certificate of notary stating that attesting witness stated that deed was executed and acknowledged "in his presence" by grantor is not sufficient to entitle deed executed in another state to probate in Kentucky since it does not show that it was acknowledged before him. Charleroi Timber & Canal Coal Co. v. Licking Coal & Lumber Co. [Ky.] 116 SW 682. Real Property Law (Laws 1896, p. 612, c. 547) §§ 258, 255, was not complied with where certificate of **acknowledgment by corporation** did not show who person signing

strument,[22] and it must disclose the place or venue where it was taken,[23] but it is not indispensable that this should appear from the certificate itself, as it is sufficient if it can be discovered with reasonable certainty by inspection of the whole instrument.[24] It may be presumed from lapse of time that the magistrate acted within his jurisdiction[25] and that the instrument was properly acknowledged.[26] A statutory time limit is sometimes prescribed as to suits to correct certificates of acknowledgment,[27] but, for the purpose of showing color of title,[28] the fact that an instrument was acknowledged may be shown, though the certificate of acknowledgment is defective and the time for its correction has elapsed.[29] The certificate of acknowledgment is prima facie evidence of the execution of the instrument[30] and of place of delivery,[31] and can be impeached only by evidence clearly satisfactory.[32] A certificate of acknowledgment which has been procured by fraud is ineffective.[33]

was, his residence, connection with corporation, or that board of directors so ordered. Smith v. Guarantee Dental Co., 114 NYS 867. Under Rev. St. 1895, art. 4618, a certificate of **acknowledgment by married woman** is defective unless fully explained privily and apart from husband. Blume v. White [Tex. Civ. App.] 111 SW 1066. Explanation which does not inform wife of real consideration upon which she is expected to part with her rights does not meet statutory requirements. Id. Instrument void because officer taking acknowledgment did not explain deed privily to wife, though she fully understood it from other sources. Springfellow v. Braselton [Tex. Civ. App.] 117 SW 204.

22. Where notary takes acknowledgment to mortgage but makes no certificate, he cannot after delivery of mortgage, on a subsequent day, attach certificate unless parties are again brought before him. Alford v. Doe [Ala.] 47 S 230.

23. It must appear that notary acted within territorial limits of his jurisdiction, if not, deed is inadmissible except as against grantor and his heirs. Hudson v. Webber [Me.] 72 A 184.

24. Where venue of certificate was "Suffolk SS. Boston" and grantor was described in deed as of "Waltham in the county of Middlesex and Commonwealth of Massachusetts," and grantee as of "Boston in the County of Suffolk and Commonwealth aforesaid," it was held that it sufficiently showed that the acknowledgment was taken in county of Suffolk and commonwealth of Massachusetts. Hudson v. Webber [Me.] 72 A 184 Where venue of certificate was Suffolk SS., and grantee was described as living in Waltham, Mass., this was prima facie evidence that deed was acknowledged in Suffolk county in Massachusetts. Id. Where contract purported to have been executed at "Buford, Ga.," but it did not appear from writing or attestation where attesting notary resided or received his appointment, the court would take **judicial notice** that Buford was an incorporated town in Georgia in Gwinnett County, and it would be presumed that attesting notary resided and received his appointment therein, where he had right to attest such writings. Beaty v. Sears [Ga.] 64 SE 321. Where acknowledgment was headed "The State of Alabama, Marengo County" but did not show residence of mayor who took acknowledgment, the court could take judicial notice that he was mayor of Demopolis, of Marengo County. Lucas v. Boyd [Ala.] 47 S 209. Where nothing in instrument indicated that attesting magistrate is an officer of county different from that stated in caption, there is a **presumption** that he acted within such jurisdiction. Rowe v. Spencer [Ga.] 64 SE 468.

25. Hudson v. Webber [Me.] 72 A 184.

26. When deed and its record has stood unchallenged for more than 70 years and many conveyances have been made, it will be presumed to have been properly acknowledged. Hudson v. Webber [Me.] 72 A 184.

27. Fact that certificate was correctly made, and afterwards, by mistake, the necessary words were erased, will not suffice to overcome statute. Kimmey v. Abney [Tex. Civ. App.] 20 Tex. Ct. Rep. 635, 107 SW 885.

28. For note as to defectively acknowledged tax deed as color of title, see Adverse Possession, 11 C. L. 51.

29. Where married woman's deed is relied on as color of title, evidence held admissible. Veeder v. Gilmer [Tex. Civ. App.] 120 SW 584.

30. Deed. Prewitt v. Morgan's Heirs [Ky. App.] 119 SW 174. Is evidence of signatures having been made. Russell v. Holman [Ala.] 47 S 205. Not overcome by denial that person acknowledged mortgage when such person's name appeared in certificate of acknowledgment. Gribben v. Clement [Iowa] 119 NW 596. In absence of proof of fraud or fraudulent collusion, certificate that mortgage was executed as voluntary act and deed of executing party, will prevail. Mahan v. Schroeder, 142 Ill. App. 538.

31. Where the attestion clause of deed stated that it was sealed and delivered in the presence of a notary in New York, it was prima facie proof that it was delivered in New York. New Haven Trust Co. v. Camp [Conn.] 71 A 788.

32. Evidence must fully and clearly satisfy court that certificate of officer is false and fraudulent, and even a preponderance of evidence less than sufficient to establish a moral certainty to that effect is not sufficient. Ross v. Harney, 139 Ill. App. 513. Evidence held insufficient to overcome notary's certificate of execution of mortgage. Id. **Parol evidence** is admissible to prove falsity of certificate of acknowledgment by showing want of jurisdiction of officer taking acknowledgment. Russell v. Holman [Ala.] 47 S 205.

33. Where a party forged a deed and se-

§ 5. *Authentication of officers' authority.*[34]—See 9 C. L. 25—A notary's seal is sometimes held sufficient, without a certificate that he is such officer.[35]

§ 6. *Operation and effect.*[36]—See 11 C. L. 28—A forged instrument may be rendered effective by acknowledgment by the person purporting to have executed it.[37]

§ 7. *Defects and invalidities.*[38]—See 11 C. L. 29—A defective acknowledgment may be cured by legislation.[39] In Texas, under certain circumstances, an instrument which has been recorded for ten years must be admitted as evidence although insufficiently acknowledged.[40]

*Liability for defective or false acknowledgments.*See 9 C. L. 26—A notary public and his sureties on his official bond are liable to persons injured because of his official misconduct or neglect,[41] and if the false certificate is relied on to another's loss it matters not that others contribute to the injury.[42] The grantee may be chargeable with the fraud of the officer in taking an acknowledgment.[43]

ACTIONS.[44]

The scope of this topic is noted below.[45]

cured a person other than the owner to make a fraudulent acknowledgment, the certificate was not conclusive against the true owner, as fraud vitiated the whole transaction. Smith v. Markland [Pa.] 72 A 1047.

34. Search Note: See Acknowledgment, Cent. Dig. §§ 244-254; Dec. Dig. § 39; 1 Cyc. 613-616; 1 A. & E. Enc. L. (2ed.) 535.

35. Certificate in due form, signed by notary and attested by seal giving his official designation as notary public of Cook County Ill., held sufficient to entitle deed to record in Texas. Lake v. Earnest [Tex. Civ. App.] 116 SW 865.

36. Search Note: See notes in 5 C. L. 31; 7 Ann. Cas. 249.

See, also, Acknowledgment, Cent. Dig. §§ 255-315; Dec. Dig. §§ 49-62; Evidence, Cent. Dig. §§ 1412, 1420, 1423, 1570, 1571; 1 A. & E. Enc. L. (2ed.) 555.

37. Whether signature to instrument was forgery or not is immaterial as to validity of instrument, where it is acknowledged by the person purporting to have executed it. Gribben v. Clement [Iowa] 119 NW 596.

38. Search Note: See notes in 7 C. L. 27; 108 A. S. R. 525.

See, also, Acknowledgment, Cent. Dig. § 46-57, 224-240; Dec. Dig. §§ 6, 41-47; 1 Cyc. 526-534, 607-613; 1 A. & E. Enc. L. (2ed.) 562.

39. Mortgages held not void because officer of loan association took acknowledgment, as defect had been legalized by act of legislature. Edwards v. Oil City Bldg. & Sav. Ass'n, 137 Ill. App. 522. Conveyances which were void because acknowledgment was taken by officers of corporation were made valid, no rights of third parties having intervened, by Curative Act of May 15, 1903, Hurd's Rev. St. 1905, p. 472, c. 30, §§ 43a, 43b. Garlick v. Mutual Loan & Bldg. Ass'n, 236 Ill. 232, 86 NE 236. Rev. St. 1899, § 3118 (Ann. St. 1906, p. 1778) of Missouri provides that deeds recorded a year prior to the Act 1887 (Laws 1887, p. 183) shall impart notice, though not acknowledged. Held that deed in this case did not fall within statute as not recorded in time. Williams v. Butterfield, 214 Mo. 412, 114 SW 13.

40. Under Acts 30th Leg. Tex. approved April 12, 1907 (Laws 1907, p. 308, c. 165), married woman's deed was properly admitted as proof of title. Downs v. Blount [C. C. A.] 170 F 15. Acknowledgment, defective because parties to deed did not appear to be known to officer taking acknowledgment, properly admitted as evidence under the statute. Haney v. Gartin [Tex. Civ. App.] 113 SW 166. Defective acknowledgment, if any, cured by the statute. Ariola v. Newman [Tex. Civ. App.] 113 SW 157. Deed admitted as evidence under the statute, though defective, as it had been recorded over ten years and had not been attacked in that time. Kin Kaid v. Lee [Tex. Civ. App.] 119 SW 342. Statute **held not to validate** deed of married woman void from inception because not acknowledged as required by Act April 30, 1846 (Laws 1846, p. 156). Klumpp v. Stanley [Tex. Civ. App.] 113 SW 602.

Statute is remedial in its nature, governs procedure, and applies to suits pending at time it took effect. Haney v. Gartin [Tex. Civ. App.] 113 SW 166.

41. Under Pol. Code. § 801, notary and sureties are liable. Person acknowedging must be identified to him, Civ. Code, § 1185. Under the above statutes notary was held liable for certifying to acknowledgment of person whom he did not know. Homan v. Wayer [Cal. App.] 98 P 80.

42. No official act of notary in falsely certifying acknowledgment to deed can alone result in injury to any one, for this reason statutory action does not depend on whether others contributed to injury if party relied on certificate. Homan v. Wayer [Cal. App.] 98 P 80.

43. Failure of notary to explain to married woman real consideration for the conveyance of her homestead. Blume v. White [Tex. Civ. App.] 111 SW 1066.

44. See 11 C. L. 31.

Search Note: See notes in 3 C. L. 35; 13 L. R. A. (N. S.) 591, 598; 7 Ann. Cas. 524.

See, also, Action, Cent. Dig.; Dec. Dig.; 1

A civil action is the means by which a right or cause of action is pursued in a court of justice,[46] and may ordinarily include actions demanding either equitable or legal relief, or both,[47] but it is distinct from a mere proceeding.[48] An action in rem is one taken directly against property,[49] while a personal action ordinarily includes all actions except those in rem.[50] A right of action at law is one arising from the existence of a primary right in the plaintiff and an invasion of that right by some delict on the part of the defendant.[51] The term "suit" is generally applied to any proceeding in a court of justice by which one pursues that remedy which the law affords him.[52] In the construction of statutes relating to actions, the ordinary meaning will be given to the words "commence," [53] "institute," [54] and "continue." [55] An action is pending from the time of its commencement until its final determination.[56]

An action must be based upon some substantial existing controversy,[57] and cannot be based upon plaintiff's own misconduct.[58] If, however, a right of action exists, the plaintiff's motive in bringing the action is usually of no consequence.[59] A statutory right of action depends solely upon the creative statute,[60] and may be

Cyc. 634-757; 1 A. & E. Enc. P. & P. 108; 16 Id. 873.

45. Includes only questions relating strictly to civil actions generally. Excludes causes of actions and defenses (see Causes of Action and Defenses *), forms of action (see Forms of Action *), joinder of causes of action (see Pleading,* § 2), consolidation of actions and matters relating to procedure (see Trial,* § 1), limitations of actions (see Limitations of Actions *), malicious actions (see Malicious Prosecution and Abuse of Process *), and criminal proceedings (see Indictment and Prosecution.* See, also, the topics relating to specific crimes). Excludes, also, particular kinds of actions (see such topics as Accounting, Action for;* Attachment,* etc.).

40. Means provided to put cause of action into effect. McAndrews v. Chicago, etc., R. Co. [C. C. A.] 162 F 856. Ordinary proceeding in court of justice by which one party prosecutes another for enforcement or protection of a right, redress or prevention of a wrong, or punishment of a public offense, as defined by Rev. Codes, § 8079. Clark v. Oregon Short Line R. Co. [Mont.] 99 P 298. "Action" is pursuit of a right in a court of justice without regard to form of legal proceedings as word is used in Rev. Laws, c. 13, § 32, conferring authority upon tax collector to maintain action. City of Boston v. Turner, 201 Mass. 190, 87 NE 634.

47. As used in practice act. Luddington v. Merrill [Conn.] 71 A 504.

48. As "Action" is used in the Code Civ. Proc. Queens County Water Co. v. O'Brien, 131 App. Div. 91, 115 NYS 495. "Proceeding" is insufficient when used as substitute for "action" in demurrer on ground of another action pending, the word "proceeding" not being known to the Code, though "special proceeding" is used and would imply a legal controversy. Queens County Water Co. v. O'Brien, 131 App. Div. 91, 115 NYS 495.

49. Jurisdiction of persons not being essential. Kean v. Rogers [Iowa] 118 NW 515.

50. Kean v. Rogers [Iowa] 118 NW 515.

51. As distinguished from cause of action which consists of those facts which establish the existence of the right of action. Pavelka v. St. Albert Soc. Branch No. 30 [Conn.] 72 A 725.

52. But it is not always essential that proceedings should be originally instituted in a court. Cass County v. Sarpy County [Neb.] 119 NW 685.

53. As used in Code Civ. Proc. § 26, see Webster, where defined to start, to begin, to originate, to perform the first act of. Bridges v. Koppelman, 63 Misc. 27, 117 NYS 306.

54. As used in Code Civ. Proc. § 26, it means to originate, to establish, to set up, to ordain, to found, to organize, to begin, to commence, to set on foot. Bridges v. Koppelman, 63 Misc. 27, 117 NYS 306.

55. As used in Code Civ. Proc. § 26, it means to keep up or maintain, to unite, to connect, to protract, or extend in duration, to carry onward, to extend, to prolong, to draw out at length. Bridges v. Koppelman, 63 Misc. 27, 117 NYS 306.

56. Until appeal determined or until time for appeal has passed, unless judgment is sooner satisfied under Rev. Codes, § 7188. Clark v. Oregon Short Line R. Co. [Mont.] 99 P 298.

57. Not on mere moot question as contest pending at time office is filed by electors. Johnson v. Dosland, 103 Minn. 147, 114 NW 465. Moot question where defendant has done all that it is sought to require him to do. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

58. Even though defendant be also at fault. Avery v. Central Bank [Mo.] 119 SW 1106.

59. Dalton v. Pacific Elec. R. Co., 7 Cal. App. 510, 94 P 868. But see Malicious Prosecution and Abuse of Process, 12 C. L. 638.

60. Statutory remedies on statutory rights are preclusive. State v. Mississippi Valley Trust Co., 209 Mo. 472, 108 SW 97. Right to enforce payment of taxes. City of Boston v. Turner, 201 Mass. 190, 87 NE 834.

coupled with any reasonable condition which the law-making body may see fit to impose,[61] which conditions must be strictly performed.[62] Specific demand is not ordinarily a condition precedent to the commencement of an action,[63] especially where it appears that a demand would have been fruitless.[64] The necessity of demand as an element of particular rights and causes of action is treated in topics relating to such rights and causes.[65] Objection for failure to perform conditions precedent should be raised by demurrer or special plea.[66]

While an action should not be brought until the cause of action has accrued, and in some states prematurity is incurable,[67] and may be proved under a general denial,[68] it is now common practice in other states, when the cause has accrued at the time of trial, to permit plaintiff to try the case out on its merits,[69] though he is usually required to pay the costs up to the time of the accrual and to file a supplemental pleading,[70] and the filing of answer or general demurrer after supplemental pleadings, showing the accrual of the cause of action at the time of the trial, waives objection to the prematurity of the action.[71]

The statutes must ordinarily be looked to to determine whether an action is commenced by the filing of the complaint,[72] issuance of process,[73] delivery thereof to the officer for service,[74] or the service itself.[75] In Iowa a new action may be

61. Hyde v. Southern R. Co. 31 App. D. C. 466. Requirement of notice of personal injury (Laws N. M. 1903, p. 51, c. 33,) to be given within 90 days. Welsh v. Barber Asphalt Pav. Co. [C. C. A.] 167 F 465. Without imposing similar conditions upon all similar cases. Hyde v. Southern R. Co. 31 App. D. C. 466.

62. Gulledge v. Seaboard Air Line R. Co., 148 N. C. 567, 62 SE 732. Party given right of action by local statute cannot, by resort to forum of another jurisdiction, escape performance of precedent acts which condition his right. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75.

63. Presentation of claim to debtor not essential. Welsh Bros. v. Harvey, 128 Ill. App. 329. Cause of action is not affected by failure to notify opposite party of its existence prior to suit, and fact that defendant was not notified, and its witnesses cannot recall circumstances attending cause of action, does not defeat cause of action. Chicago, etc., R. Co. v. Steckman, 125 Ill. App. 299. Prior demand on wrongdoer not essential unless so provided by statute. See Highways and Streets, 11 C. L. 1720; Master and Servant, 12 C. L. 665.

64. As shown by record. Kimball v. Farmers' & Mechanics' Bank, 50 Wash. 610, 97 P 748.

65. See Detinue, 11 C. L. 1084; Replevin, 1688; Conversion as Tort, 11 C. L. 795; Contracts, 11 C. L. 729; Specific Performance, 12 C. L. 1886, etc.

66. Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 NW 999.

67. While equity may adjust matters as of date of trial, right to maintain action at law must have existed at time of its commencement. Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 NE 53.

68. Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 NW 999.

69. Contrary to the old rule which required that such action be abated. Gribben v. Clement [Iowa] 119 NW 596. Where cause of action has matured at time of trial, a proper judgment will not be reversed merely because action was prematurely brought. Buhrmelster v. Buhrmeister [Cal. App.] 102 P 221.

70. Gribben v. Clement [Iowa] 119 NW 596.

71. As where answer or general demurrer not raising objection is filed after supplemental petition showing accrual of action at time of trial. Kansas City S. R. Co. v. Greer [Ark.] 119 SW 1121.

72. Filing of complaint with clerk of district court constitutes commencement of suit, under Code 1907, § 4853. Farmers' Oil Mfg. Co. v. Melton [Ala.] 49 S 225. Action is commenced upon filing of complaint, as affecting application of limitations in action to recover real property. Lara v. Sandell [Wash.] 100 P 166. Action other than for recovery of real property, is commenced when complaint is filed, under Rev. Codes, § 6464. Clark v. Oregon Short Line R. Co. [Mont.] 99 P 298. Statute providing that it shall commence with filing of complaint must be strictly complied with as being contrary to general rule that action commences with summons. Stewart v. Pettit [Miss.] 48 S 5.

73. General rule is that action is commenced by issuance of summons. Stewart v. Pettit [Miss.] 48 S 5.

74. With reference to priority, actions commence with delivery of summons for service. Emry v. Chappell, 148 N. C. 327, 62 SE 411; People v. Gebhardt, 154 Mich. 504, 15 Det. Leg. N. 818, 118 NW 16. Commences at time of delivery of summons to constable for service under Ann. St. 1906, p. 2134. Fabien v. Grabow, 134 Mo. App. 193, 114 SW 80. To officer charged with its service, under Burns' Ann. St. 1908, § 317, civil action is not commenced until complaint filed and summons issued thereon. Marshall v. Matson [Ind.] 86 NE 339.

75. Action is begun by service of summons. Martens v. O'Neill, 131 App. Div. 123, 115 NYS 260.

instituted by the filing of a new petition before answer,[76] and in Nebraska an action is deemed to be commenced by an appeal from the disallowance of claims by a county board,[77] but not by filing a claim with the county clerk.[78]

Additional Allowances; Ademption of Legacies, see latest topical index.
"Act of God" (defined), see 12 C. L. 976, n. 79; 977, n. 84.

ADJOINING OWNERS.[79]

The scope of this topic is noted below.[80]

Subject to the restriction that one must not wantonly, recklessly or negligently use his property in a way to injure his neighbor,[81] the owner of land has the right to improve it in his own way for any lawful purpose,[82] and, if injury results to the adjoining land by such use, it is damnum absque injuria.[83] Whether a fence or other structure is a nuisance to adjoining owners depends not only upon the necessity of the structure but also upon the purpose for which it is maintained.[84]

*Lateral support.*See 11 C. L. 31—The owner of land has a natural right[85] to have it in its natural condition supported by the adjoining land,[86] and one excavating is liable for damages to the adjacent owner's soil, whether the result of negligence or not;[87] but this right to lateral support does not extend to buildings or other superstuctures placed upon the land,[88] in the absence of any right by prescription[89] or grant[90] in the owner of the building to have it supported by the

76. The former action being considered as abandoned. Kean v. Rogers [Iowa] 118 NW 515.

77. Appeal to district court, under Cobbey's Ann. St. 1907, § 6147. Cass County v. Sarpy County [Neb.] 119 NW 685.

78. But is preliminary proceeding which may ripen into suit. Cass County v. Sarpy County [Neb.] 119 NW 685.

79. See 11 C. L. 31.

Search Note: See notes in 3 C. L. 39; 5 Id. 34; 7 Id. 29; 33 A. S. R. 446; 5 Ann. Cas. 219, 760; 10 Id. 77, 874.

See Adjoining Landowners, Cent. Dig.; Dec. Dig.; 1 Cyc. 766-793; 18 A. & E. Enc. L. (2ed.) 541.

80. Treats of relative rights and liabilities of adjoining land owners. Excludes line fences (see Fences *), except the subject of spite fences, which is treated herein. Excludes, also, easements (see Easements *), establishment and determination of boundaries (see Boundaries *), party walls (see Party Walls *), and the general law of nuisances (see Nuisance *).

81. Thompson v. Chicago, etc., R. Co. [Mo. App.] 119 SW 509. Defendant by driving piling near plaintiff's pipes injured them, and was held liable for damages caused. New York Steam Co. v. Foundation Co., 195 N. Y. 43, 87 NE 765. **Building** so constructed by owner that it fails and injures property of adjoining owners. Brent v. Baldwin [Ala.] 49 S 343. One is liable for damages of adjoining owners caused by **blasting** on his own land. Probst v. Hinesley [Ky.] 117 SW 389. Question for jury whether natural and probable result of blasting was to injure adjoining owner's property. Id.

82. Thompson v. Chicago, etc., R. Co. [Mo. App.] 119 SW 509. Erection of telephone pole beside residence of adjoining owner, Jenkins v. Louisville Home Tel. Co. [Ky. App.] 120 SW 276.

83. Jenkins v. Louisville Home Tel. Co. [Ky. App.] 120 SW 276.

84. Under Rev. St. 1902, c. 22, § 6, prohibiting malicious maintainance of fence or other structure in nature of fence over six feet high for purpose of annoying adjoining owners, one may erect on his own land a fence over six feet high when it is necessary to protect himself and family from annoyance by his neighbors; but if fence be built higher than necessary for this purpose for purpose of annoyance to neighbors, such extra height constitutes a nuisance. Healey v. Spaulding [Me.] 71 A 472. Test under statute is not whether annoyance is the sole purpose of fence, but whether it is the dominant purpose. Id.

85. Right of lateral support is not simply an easement, but an incident to the land, a right of property necessarily and naturally attached to and passing with the soil. Pettit v. Jamestown & F. R. Co., 222 Pa. 490, 71 A 1048.

86. Ceffarelli v. Landino [Conn.] 72 A 564. Railroad company in grading took away lateral support of plaintiff's land. Pettit v. Jamestown & F. R. Co., 222 Pa. 490, 71 A 1048.

87. Contos v. Jamison, 81 S. C. 488, 62 SE 867.

88. Ceffarelli v. Landino [Conn.] 72 A 564; Paltey v. Egan, 122 App. Div. 512, 107 NYS 444.

89, 90. Paltey v. Egan, 122 App. Div. 512, 107 NYS 444.

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land of the person making the excavation, and provided the work be conducted without negligence.[91] It applies to the owner of land along a highway, and if he wrongfully excavate so close as to cause the highway to cave in he is liable for any damage caused thereby.[92] Owners of city property excavating below a certain depth are sometimes required by statute to protect adjoining walls,[93] without regard to the degree of care used.[94]

Adjournments; Administration; Administrative Law, see latest topical index.

ADMIRALTY

The scope of this topic is noted below.[95]

§ 1. Jurisdiction and Courts, 32.
§ 2. Remedies and Remedial Rights, 33.
§ 3. Practice and Procedure, 33.
A. Pleading, Process, Interlocutory Orders, etc., 33.
B. Evidence, Proof, Hearing, and Decree, 34.
§ 4. Appeals and Subsequent Proceedings, 35.

§ 1. *Jurisdiction and courts.*[96]—See 11 C. L. 33—The distinguishing feature of matters subject to the jurisdiction of admiralty is their connection with maritime matters.[97] Admiralty, therefore, has jurisdiction of prize cases[98] and maritime insurance contracts,[99] but not over agreements merely collateral to such contracts.[1] Admiralty has jurisdiction of maritime torts,[2] and will even recognize rights of action therefor created by local statutes.[3] While courts of admiralty proceed, by

91. Ceffarelli v. Landino [Conn.] 72 A 564; Contos v. Jamison, 81 S. C. 488, 62 SE 867.

92. Action by administratrix for death of intestate, caused by street caving into excavation. Adlin v. Excelsior Brick Co., 129 App. Div. 713, 113 NYS 1017.

93. New York City Building Code, § 22, has force and effect of statute. Post v. Kerwin, 117 NYS 761. Word contiguous construed to contemplate nearness but with intervening spaces as between houses, and any wall is contiguous which is near enough to be disturbed by the excavation. Baxter v. New York Realty Co., 128 App. Div. 79, 112 NYS 455. Code does not apply as between a tenant and a landlord excavating near leased property. Paltey v. Egan, 122 App. Div. 512, 107 NYS 444.

94. Post v. Kerwin. 117 NYS 761.

95. Includes only admiralty jurisdiction and practice. Excludes substantive law of maritime traffic and navigation (see Shipping and Water Traffic *), and navigable waters (see Navigable Waters *).

96. Search Note: See notes in 5 C. L. 36; 11 Id. 33; 34 L. R. A. 6640; 66 Id. 193; 19 A. S. R. 227.

See, also, Admiralty, Cent. Dig. §§ 1-264; Dec. Dig. § 1-25; 1 A. & E. Enc. L. (2ed.) 645; 1 A. & E. Enc. P. & P. 251.

97. The Mackinaw, 165 F 351. Engaged in aid of navigation. The Poughkeepsie, 162 F 494. Admiralty has jurisdiction over **floating structures** the ordinary purpose of which is distinctly maritime. The Mackinaw, 165 F 351. Derrick hoist held to come within category of **vessels.** The Sallie, [D. C.] 167 F 880. Pumpboat held a vessel. Charles Barnes Co. v. One Dredge Boat, 169 F 895. Admiralty has not jurisdiction where injured structure is **bridge** so connected with shore that it immediately concerned commerce upon land, though damage principally resulted from water after fall of bridge. West v. Martin, 51 Wash. 85, 97 P 1102. Suit by city against vessel colliding with **borings under bed of navigable river** to locate aqueduct is not within admiralty jurisdiction. The Poughkeepsie, 162 F 494. Whether **warehousemen** are liable in admiralty is not finally settled. Evans v. New York & P. S. S. Co., 163 F 405.

98. Court of admiralty may determine legal title to vessel, right to possession thereof, and all other matters incident to capturing power. The Schooner Two Cousins, 42 Ct. Cl. 436.

99. St. Paul Fire & Marine Ins. Co. v. Birrell, 164 F 104. Agreement by carrier to insure cargo, where such agreement is one of elements of maritime contract of affreightment. Nash v. Bohlen, 167 F 427.

1. Action by insurance company to recover premiums under ordinary contract between insurance company and broker, whereby broker agreed to procure maritime risks on commission and be responsible for premiums. St. Paul Fire & Marine Ins. Co. v. Birrell, 164 F 104.

2. Action for injury to person on pontoon floating in navigable stream caused by moving vessel. The Mackinaw, 165 F 351.

3. Where state law gives right of action for death, a libel may be maintained in admiralty, regardless of whether the right of action be considered as a new right or merely as survival of right abated by death. The Aurora, 163 F 633. State statute giving right of action for death may be applied in admiralty where vessel on or through which death occurs belongs to state in question. Fisher v. Boutelle Transportation & Towing Co., 162 F 994; The Hamilton, 207 U. S. 398, 52 Law. Ed. 264. Burden of proving that vessel belongs to state, under statute of which the claim is made, rests upon claimant. Fisher v. Bou-

analogy, upon equitable principles,[4] they have no general, equitable jurisdiction,[5] and will not assume jurisdiction merely because of inadequacies incident to the common-law remedies.[6] In the absence of treaty stipulations, it is within the discretion of the court of admiralty to refuse to take jurisdiction of a controversy between foreign seamen and foreign vessels.[7] Admiralty will exercise its jurisdiction only so far as is necessary to determine the rights of the parties in admiralty,[8] and in limitation of liability proceedings will restrain proceedings in state courts only so far as necessary to preserve its own jurisdiction and control of the proceedings before it,[9] but, as between an admiralty court and a state court having concurrent jurisdiction, that court to which jurisdiction first attaches will hold the case [10] to the end,[11] and its action will ordinarily be conclusive on other courts.[12]

§ 2. *Remedies and remedial rights.*[13]—See 11 C. L. 84.—Where a state statute giving or creating a right gives also a lien therefor, such right may in a proper case, be enforced in admiralty by a libel in rem,[14] but where the statute creates no lien the remedy in admiralty is by libel in personam.[15] Such a right may, however, be enforced in limitation of liability proceedings, regardless of any question of lien.[16] A libel in rem will not lie for failure of a vessel to enter upon her charter.[17] The prosecution of a claim under a treaty, under which no such action lies, does not amount to an election of remedies.[18]

§ 3. *Practice and procedure.*[19] *A. Pleading, process, interlocutory orders, etc.*See 11 C. L. 84.—The libelant cannot excuse nonperformance of conditions of his contract by alleging impossibility of performance,[20] but may do so by alleging waiver and estoppel.[21] The greatest liberality is indulged in the matter of amendments in admiralty,[22] but it is within the discretion of the trial court to refuse to

telle Transportation & Towing Co., 162 F 994.

4. Davenport v. Winnisimet Co. [C. C. A.] 162 F 862.

5. See Davenport v. Winnisimet Co. [C. C. A.] 162 F 862. No jurisdiction to determine equitable title or rights between partners making conflicting claims, though property claimed consisted of vessels employed in navigation of waters under federal jurisdiction. Hulings v. Jones, 63 W. Va. 696, 60 SE 874.

6. Vessel owner who has been held liable at common law for damages resulting from collision, and who has failed to bring in other vessel under New York practice, cannot resort to admiralty for contribution. The Ira M. Hedges, 163 F 587.

7. Such jurisdiction will not ordinarily be taken unless necessary to prevent failure of justice. The Albani, 169 F 220.

8. Will not infringe on right of bankruptcy court to determine claims under bankruptcy law though admiralty court first acquired jurisdiction. The William B. Kibbee, 164 F 658. Where petitioner's right to contest and limit liability has been decided in her favor on appeal, district court has jurisdiction only to determine whether claimant is entitled to recover and if so to what extent. The Tommy, 168 F 563.

9. Held improper to restrain entry of judgment on verdict in state court for damages for injuries caused by collision. Davenport v. Winnisimet Co. [C. C. A.] 162 F 862.

10. Charles Barnes Co. v. One Dredge Boat, 169 F 895. Admiralty court rather than state court has jurisdiction over matter where there was prior action pending dealing potentially if not actually with same matter, as where libel before amendment by mistake fixed suit against float instead of against pumpboat. Id.

11. To exclusion of all other courts. The Ira M. Hedges, 163 F 587.

12. Owner of vessel who has been held liable in state court for damages occasioned by collision cannot maintain action in admiralty for contribution, especially where he has failed to avail himself of remedies permitted in state court. The Ira M. Hedges, 163 F 587.

13. **Search Note:** See Admiralty, Cent. Dig. §§ 265-340; Dec. Dig. §§ 26-39; 1 A. & E. Enc. P. & P. 249.

14. Action for death. The Aurora, 163 F 633.

15. Action for death. The Aurora, 163 F 633; Fisher v. Boutelle Transportation & Towing Co., 162 F 994.

16. The Hamilton, 207 U. S. 398, 52 Law. Ed. 264.

17. The Margaretha [C. C. A.] 167 F 794.

18. The Schooner Two Cousins, 42 Ct. Cl. 436.

19. **Search Note:** See Admiralty, Cent. Dig. §§ 349-562; Dec. Dig. §§ 40-72; 1 A. & E. Enc. P. & P. 261, 263, 269, 275.

20, 21. Gans v. Auchincloss, 168 F 460.

22. The Wildenfels [C. C. A.] 161 F 864. Defect of libel in that it did not sufficiently show excuse for nonperformance of condi-

allow an amendment introducing a new issue, after the close of the evidence and the beginning of the argument,[23] and so, also, is is within the discretion of the circuit court of appeals to refuse to allow such an amendment after the expiration of the time limit therefor fixed by the rules of the court.[24] Nor is it error for the trial court to refuse to allow the respondent to shift his ground of defense by amendment after the case has been argued and decided.[25] An amended libel relates back to the time of the filing of the original libel.[26]

All persons necessary to a complete adjustment of the controversy may come in by petition [27] or may be made parties to the original libel,[28] even though an independent libel would not lie against them,[29] and, where any creditor of the claimant desires to contest liens or claims asserted in a libel in rem, he should appear and make such contest.[30]

Service of process is sufficient if made on parties representing the owner.[31] A monition and order of attachment must be issued by a duly authorized officer,[32] and if not so issued the officer making the levy is not protected.[33]

Courts of admiralty, while having no general equitable jurisdiction,[34] generally proceed on equitable principles,[35] and in matters of practice their powers are as broad as those of equity,[36] but only matters connected with the subject of the libel can be litigated in one action.[37] Delay in bringing suit may be excused by the avoidance of the vessel liable.[38]

(§ 3) *B. Evidence, proof, hearing, and decree.*[39]—See 11 C. L. 34—A court of admiralty has power to compel the production of documentary evidence [40] upon

tions of contract held cured by amendment alleging waiver and estoppel. Gans v. Auchincloss, 168 F 460.

23. Amendment changing action from ex delictu to ex contractu. The Wildenfels [C. C. A.] 161 F 864.

24. Under admiralty rules of circuit court of appeals, motion for amendment introducing new issues should be made within fifteen days after filing of apostles. The Wildenfels [C. C. A.] 161 F 864.

25. After libel in personam had been tried and decided as such, respondent sought to defend on ground that libel should have been in rem. The Bencliff [C. C. A.] 161 F 909.

26. Amendment correction description of vessel held to relate back so as to sustain priority of libel over intervening attachment in state court. Charles Barnes Co. v. One Dredge Boat, 169 F 895.

27, 28. Evans v. New York & P. S. S. Co., 163 F 405.

29. Under equity of fifty-ninth rule, a warehouseman liable over to original respondent was proper party. Evans v. New York & P. S. S. Co., 163 F 405.

30. Insurance company succeeding to libelant's rights by subrogation. The Ethelwold, 165 F 806.

31. On party who represented owner in chartering to government and in prosecuting claim against it. United States v. Bedouin S. S. Co., 167 F 863.

32. Monition and order held void where name of clerk was signed and seal of court affixed thereto by person temporarily in charge of office, but who was neither a deputy nor even a de facto officer. Ker v. Bryan [C. C. A.] 163 F 233.

33. Levying officer is trespasser. Ker v. Bryan [C. C. A.] 163 F 233.

34. See ante, § 1, Jurisdiction of Courts.

35. Davenport v. Winnisimmet Co. [C. C. A.] 162 F 862.

36. The Washtenaw, 163 F 372. Court of admiralty may by analogy assume powers of courts of equity and bankruptcy, and may thereby permit prosecution of action in state court to judgment notwithstanding limited liability proceedings in admiralty. Davenport v. Winnisimmet Co. [C. C. A.] 162 F 862. Over **process.** The Planter, 163 F 667. The court has discretionary power to refuse to confirm a sale under its process. The Planter, 163 F 667. Sale will not be set aside at instance of persons who had chance to protect themselves, solely on ground of inadequacy of price or increased bid, where sale was otherwise regular. Id.

37. Under analogy to 59th rule. McCaldin Bros. Co. v. Donald S. S. Co., 169 F 992. Though arising under same charter party. Id. Respondent cannot in admiralty make defense of independent claim by way of **set-off,** and hence can not set off commissions earned under previous contract against freight and demurrage. Roney v. Chase, Talbot & Co., 160 F 268.

38. Libelants are not guilty of laches where they bring action in certain district and secure service upon one of two vessels claimed to be liable but refuse to go elsewhere to sue other vessel and are forced to wait several years before, by exercise of diligence, they are able to seize other vessel in waters of district. The Little, 168 F 393.

39. Search Note: See Admiralty, Cent. Dig. §§ 563-708; Dec. Dig. §§ 73-101; 1 A. & E. Enc. P. & P. 274, 283.

40. If satisfied of justice of application for discovery. The Washtenaw, 163 F 372.

due application therefor,[41] or by subpoena duces tecum,[42] but the production of such evidence will not ordinarily be required in advance of hearing.[43] Refusal of a party to produce such evidence, however, may excuse the insufficiency of the other party's answer to interrogatories.[44] The court will take judicial notice of state statutes upon sufficient preliminary allegations and proof,[45] but will not take notice of the inspectors' rules,[46] unless they appear in the record.[47] The proof may cure faults in the pleadings to which no exceptions have been taken.[48] Both parties should put on their entire proof before the case is submitted to the court for decision.[49] The general rules as to the sufficiency of evidence apply as in other courts.[50]

An insurer by taking a decree in personam and by failing to contest the claims of intervening libelants waives its right to assert a lien.[51]

The apportionment of the costs by decree is ordinarily within the discretion of the court,[52] but the costs of a contested petition for limitation of liability are usually taxed to the losing party.[53] A docket fee is only recoverable by the libelant where the court has in some way passed upon the merits of the controversy.[54] The court may on its own motion reopen an improper decree,[55] and in this connection the term of the court is continuous.[56] A commissioner is invested with full power of the court appointing him in respect to his duties,[57] and when a matter is referred to him by agreement his report will not be reviewed by the court.[58]

§ 4. *Appeals and subsequent proceedings.*[59]—See 11 C. L. 34—An appeal does not ordinarily lie from discretionary order of the court.[60] Although a trial de novo is ordinarily had on appeal in admiralty from the district court to the circuit court of appeals,[61] a finding of fact based on conflicting evidence will not be disturbed by the appellate court unless there is manifest error.[62] The circuit court of ap-

41. Application for production of books and papers should be made by affidavit, but may be supported by evidence. The Washtenaw, 163 F 372.

42. At hearing before special commissioner. The Washtenaw, 163 F 372.

43. Claimant is not entitled to order on libelant for production of books and papers in advance of hearing before special commissioner. The Washtenaw, 163 F 372.

44. Where claimant alleges inability to make further answer to libelants interrogatories without access to papers and documents in the latter's possession, and the latter refuses to produce such evidence, his exceptions to former's answers will not be sustained. The Washtenaw, 163 F 372.

45. Allegations and proof must be sufficient to raise issue in such regard. The Alligator et al., The Alligrippus et al., The Phoenix [C. C. A.] 161 F 37. Party desiring to have state statute applied has burden of proving that vessel belonged to such state. Fisher v. Boutelle Transportation & Towing Co., 162 F 994.

46. The H. B. Rawson [C. C. A.] 162 F 312.

47. May consider them where they appear in record and are referred to in testimony and briefs, although not formally introduced in evidence. The H. B. Rawson [C. C. A.] 162 F 312.

48. Nash v. Bohlen, 167 F 427.

49. Bull v. New York & Porto Rico S. S. Co. [C. C. A.] 167 F 792.

50. Evidence held insufficient to show release of owners by surety on stipulation for release of vessel and agreement to look to insurers alone. The White Seal, 166 F 640.

51. As against such libelants on fund derived from sale of vessel. The Etheiwold, 165 F 806.

52. The Indian [C. C. A.] 159 F 20; The Eva D. Rose [C. C. A.] 166 F 101.

53. Including proctor's fees. The W. A. Sherman [C. C. A.] 167 F 976. Costs are not recoverable from claimant by petitioner invoking benefit of statute for limitation of liability, where petition is not contested. Id.

54. O'Flaherty v. Hamburg-American Packet Co., 168 F 411.

55. Where entered under misapprehension of facts and upon papers improperly filed. The Eva D. Rose [C. C. A.] 166 F 101.

56. Rev. St., § 574. The Eva D. Rose, [C. C. A.] 166 F 101.

57. Tuckenbach v. Delaware L. & W. R. Co., 168 F 560.

58. Report of commissioner. Tuckenbach v. Delaware L. & W. R. Co., 168 F 560.

59. **Search Note:** See Admiralty, Cent. Dig. §§ 709-792; Dec. Dig. §§ 102-120; 1 A. & E. Enc. P. & P. 278.

60. Order requiring each party to pay costs. The Indian [C. C. A.] 159 F 20. Order giving or withholding costs. The Eva D. Rose [C. C. A.] 166 F 101.

61. Munson S. S. Line v. Miramar S. S. Co. [C. C. A.] 167 F 960. In this case the history of appeals in admiralty is reviewed in full and in a very instructive manner. [Ed.]

62. When lay days commenced under

peals on an appeal in admiralty will not sanction the common-law practice of sending cases back for a new trial,[63] and, hence, on a remand will give binding directions as to the decree to be entered,[64] and such decree may be more favorable to a party not appealing than was the original decree.[65]

Admissions, see latest topical index.

ADOPTION OF CHILDREN.

The scope of this topic is noted below.[66]

§ 1. Adoptive Acts and Proceedings, 36. § 2, Consequences of Adoption, 37.

§ 1. *Adoptive acts and proceedings.*[67] See 11 C. L. 36. The adoption of children was unknown to the common law, and exists in those states which have inherited that system of jurisprudence only by virtue of statute,[68] and the statutory mode is the measure of the power,[69] so that an adoption is void unless made in pursuance of the essential requirements;[70] and, if the adoption is not legally sufficient, equity will not grant relief,[71] but adoptive statutes, being deemed to be based upon a wise and beneficent purpose, are liberally construed,[72] and an adoption will not be declared void unless it affirmatively appear that some substantial irregularity exists.[73]

Jurisdiction of adoption proceedings is purely statutory,[74] and children ac-

charter party is finding of fact. Earn Line S. S. Co. v. Ennis [C. C. A.] 165 F 633. While finding of ultimate fact by trial court is not conclusive on appeal, it will not be set aside unless unsupported or clearly against weight of evidence. Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32.

63. Bull v. New York & Porto Rico S. S. Co. [C. C. A.] 167 F 792.

64. Remand with instructions to order reference to ascertain damages and to enter decree accordingly. Bull v. New York & Porto Rico S. S. Co. [C. C. A.] 167 F 792.

65. Munson S. S. Line v. Miramar S. S. Co. [C. C. A.] 167 F 960, following Irvin v. Hesper, 122 U. S. 256, 30 Law. Ed. 1175, and disapproving of rule laid down in The Charles Morgan, 115 U. S. 69, 29 Law. Ed. 316; The Lucile, 86 U. S. (19 Wall.) 73, 22 Law. Ed. 64; The Saratoga, 1 Woods, 75. Fed. Cas. No. 69, 5 S. Ct. 1172, 29 Law. Ed. 316; Yeaton v. U. S., 9 U. S. (5 Cranch) 281, 3 Law. Ed. 101; Hobart v. Drogan, 35 U. S. (10 Pet.) 108, 9 Law. Ed. 363; Port v. Jones, 19 Pet. 150, 15 Law. Ed. 618; and the Connemara, 108 U. S. 352, 27 Law. Ed. 751. District court directed to increase allowance of libelant, who did not appeal, for delay connected with dry docking, and to enter decree for libelant for sum first awarded, thus increased, with costs. Munson S. S. Line v. Miramar S. S. Co. [C. C. A.] 167 F 960.

Note: The case of Munson S. S. Line v. Miramar S. S. Co. [C. C. A.] 167 F 960, gives an exhaustive summary of the statutes and cases bearing upon the power, on appeal in admiralty, to render a more favorable decree in favor of one who has not appealed than was rendered originally. The final conclusion of the court, after reviewing the cases and noting their conflict, was as indicated in the text.

66. Includes procedure to adopt and the validity and effect of adoption, but under statute and by contract. Excludes conflict of laws and right of child adopted in one state to inherit in another state (see Conflict of Laws *), the apprenticing of children (see Apprentices *), the general rights and liabilities of infants (see Infants *), and the rights and liabilities of parents and persons standing in loco parentis, and mutual rights of parent and child (see Parent and Child *).

67. Search Note: See notes in 3 C. L. 46; 5 Id. 42; 11 Id. 35, 36; 12 L. R. A. (N. S.) 884; 39 A. S. R. 210.

See Adoption, Cent. Dig. §§ 1-28; Dec. Dig. §§ 1-17; 1 Cyc. 917-930, 936, 937; 1 A. & E. Enc. L. (2ed.) 726.

68. Hillers v. Taylor, 108 Md. 148, 69 A 715; Appeal of Woodward [Conn.] 70 A 453. Adoption of children is governed exclusively by statute. Leonard v. Honisfager [Ind. App.] 88 NE 91.

69. Appeal of Woodward [Conn.] 70 A 453.

70. Appeal of Woodward [Conn.] 70 A 453. Adoption not acknowledged and executed as required by statute is insufficient to confer heirship. Lamb's Estate v. Morrow [Iowa] 117 NW 1118. Where statute requires both husband and wife to join in petition, there is no adoption where wife does not join. Illinois Adoption Act, § 1. Jones v. Bean, 136 Ill. App. 545. Where articles of adoption are insufficient to accomplish the purpose, the adopted person does not become the heir of foster parents. Lamb's Estate v. Morrow [Iowa] 117 NW 1118.

71. Lamb's Estate v. Morrow [Iowa] 117 NW 1118.

72. Boaz v. Swinney [Kan.] 99 P 621.

73. Simpson v. Simpson, 9 Ohio C. C. (N. S.) 137.

74. Under Laws 1896, p. 227, c. 272, county

tually within the state may be given a status for the purpose of adoption.[75] In some states adoption proceedings partake more or less of adversary proceedings, involving questions of fact as to which either party may demand a jury.[76] Such proceedings are usually purely ex parte in character,[77] and the court is usually vested with a large discretion in the matter of adoption vel non,[78] the exercise of which is subject to review or attack only in the manner prescribed by statute,[79] and at the instance of those having a proper status for this purpose,[80] and an adoption is not necessarily involved because it might have been attacked successfully by one having such status.[81] Where the adoption is attacked for fraud, a wide latitude of investigation is indulged.[82]

The law does not countenance a bargain and sale, in the ordinary sense, of a child,[83] but, subject to considerations bearing upon the welfare of the child,[84] provision in often made by statute for the release of the care and custody of children to others.[85] A release of the care and custody of a child by contract to one who agrees and is able and qualified to raise it is deemed to be based upon a sufficient consideration,[86] and, when authorized by law, is as binding as any other contract.[87] The evidence of such a contract, however, must be clear and satisfactory,[88] and in this connection the purpose of the adoption may be considered.[89]

§ 2. *Consequences of adoption.*[90]—See 11 C. L. 37—One receiving a child by way of absolute gift becomes vested with the rights and powers of a parent and

judge and surrogate court have concurrent jurisdiction in matter of adoption. In re Ward's Estate, 59 Misc. 328, 112 NYS 282.

75. See Rev. St. Wis. 1858, c. 49, as amended by Act 1862, p. 153, c. 253. Appeal of Woodward [Conn.] 70 A 453.

76. Under Court and Practice Act 1905, c. 40, § 799, relative to jury trial on appeal, from probate court to superior court, either party to appeal by next friend of minor in adoption proceedings was entitled to jury upon issue as to whether child had been neglected and deserted by parents for more than a year. Buckley v. Hammond [R. I.] 72 A 389.

77. Leonard v. Honisfager [Ind. App.] 88 NE 91.

78. Leonard v. Honisfager [Ind. App.] 88 NE 91. Under Laws 1896, p. 227, c. 272, § 63, providing that court shall allow or sanction adoption "if satisfied" that welfare of child will be promoted thereby, the court has a discretionary power in the premises. In re Ward's Estate, 59 Misc. 328, 112 NYS 282.

79. See Gen. Laws 1896, c. 192, § 8, as amended by Court and Practice Act 1905, §§ 769-799, 1135. Buckley v. Hammond [R. I.] 72 A 389. Under Laws 1896, p. 227, c. 272, granting county judge and surrogate court concurrent jurisdiction in matter of adoption, neither of such courts can review the orders of the other. In re Ward's Estate, 59 Misc. 328, 112 NYS 282.

80. If child have parents living, they alone can interpose objection to order of adoption. Leonard v. Honisfager [Ind. App.] 88 NE 91. Where guardian is given no right to interfere with court's discretionary power in adoption proceedings, court will read no such right into statute. Id. There is no authority under Laws 1896, p. 227, c. 272, for direct attack by next of kin of decedent upon order sanctioning an adoption by him, and a portion collateral attack thereon cannot be allowed. In re Ward's Estate, 59 Misc. 328, 112 NYS 282.

81. Statutory notice was not given parents. Appeal of Woodward [Conn.] 70 A 453.

82. On cross-examination of defendant. Phillips v. Chase, 201 Mass. 444, 87 NE 755. In such suit facts immaterial in themselves are admissible if, in connection with other evidence, they throw light on the matter in hand. Id. Under Rev. Laws, c. 175, §§ 66, 67, rendering **declarations of decedents** admissible if made in good faith, etc., and of personal knowledge, declarations of decedent tending to show that her adoption of a child was procured by fraud and undue influence held admissible. Id.

83. Eaves v. Fears [Ga.] 64 SE 269.

84. Grandparents to whom child was given held able and qualified to raise it. Eaves v. Fears [Ga.] 64 SE 269.

85. Civ. Code 1895, § 2502, held not to authorize mere apprenticing of child but also release of care and custody by absolute gift. Eaves v. Fears [Ga.] 64 SE 269.

86, 87. Eaves v. Fears [Ga.] 64 SE 269.

88. Peterson v. Bauer [Neb.] 119 NW 764. Evidence held to show absolute gift of child to grandparents. Eaves v. Fears [Ga.] 64 SE 269.

89. Adoption contract whereby adult, married man, purported to adopt adult wife of another man, entered into for admitted purpose of preventing talk about the two former, held insufficient to show an adoption, even assuming that adults could legally enter into such a contract of adoption. Hillers v. Taylor, 108 Md. 148, 69 A 715.

90. Search Note: See notes in 5 C. L. 43; 17 L. R. A. 435; 8 L. R. A. (N. S.) 117; 16 Id. 199; 109 A. S. R. 674; 118 Id. 684; 4 Ann. Cas. 881; 9 Id. 780.

See, also, Adoption, Cent. Dig. §§ 29-44;

subject to a parent's liabilities,[91] and this status continues until destroyed according to law,[92] but the relation of parent and child, between the child and its natural parent, is not by adoption terminated for all purposes,[93] and the natural father cannot recover for the support of his child against a foster parent.[94] On the other hand an adopted child cannot recover for services rendered his foster parent.[95] Changes in the law of inheritance, which may be made by any law of of adoption, should not be extended by construction,[96] and should be restricted to apply between the parties to the adoptive proceedings only, unless a contrary purpose is clearly expressed.[97] A provision is an adoption agreement that the foster parent will give to the adopted child a reasonable portion of his property, such as he would if he were the actual father of such child, will not prevent such parent from disposing of his property by will in such manner as he may deem proper and reasonable.[98]

ADULTERATION.

The scope of this topic is noted below.[99]

§ 1. Legislation and Regulation, 38.
§ 2. The Offense, 39.
§ 3. Prosecutions and Penalties, 39.

§ 1. *Legislation and regulation.*[1]—See 11 C. L. 38—Statutes establishing standards of purity must, of course, conform to constitutional limitations,[2] but the determination of such standards may be delegated to administrative officers,[3] and it seems that such determination, when made, is conclusive,[4] but even if it is not conclusive, one challenging it cannot complain of its submission to a jury for redetermination.[5] Where a municipality has authority to establish standards of purity,[6] its ordinances in such regard will not be declared invalid for uncertainty

Dec. Dig. §§ 18-25; 1 Cyc. 930-935; 1 A. & E. Enc. L. (2ed.) 734.

91. Eaves v. Fears [Ga.] 64 SE 269.

92. One who has once legally made an adoption cannot shake off relation by a change of domicile. Appeal of Woodward [Conn.] 70 A 453. See Conflict of Laws, 11 C. L. 665.

93, 94, 95. McNemar v. McNemar, 137 Ill. App. 504.

96. Boaz v. Swinney [Kan.] 99 P 621.

97. Child adopted under Illinois statute (Laws 1867, p. 135) would not inherit from foster parents' deceased brother. Boaz v. Swinney [Kan.] 99 P 621.

98. Will cutting off plaintiff, who had been adopted by testator pursuant to such an agreement with sum of $1.00, and bequeathing balance of estate, $8,000, to his sister, who had been adopted at same time, sustained, in view of fact that plaintiff upon attaining his majority had left decedent some time before his death, while plaintiff's sister had remained with decedent, she, moreover, being feeble minded and less able to take care of herself than was plaintiff. Doppmann v. Doppmann, 114 NYS 620.

99. Includes validity and enforcement of regulations designed to prevent adulteration of foods, drinks and drugs. Excludes regulations other than those strictly against adulteration (see Food;* Health;* Medicine and Surgery *), taxation of adulterated articles (see Internal Revenue Laws;* Taxes *), and matters relating to interstate commerce (see Commerce *).

1. **Search Note:** See Adulteration, Cent. Dig. §§ 1-3; Dec. Dig. §§ 1-3; 1 A. & E. Enc. L. (2ed.) 739.

2. Acts 1905, p. 135, § 5 (Ann. St. 1906, § 47615), entitled "An act to create the office of dairy commissioner and to define his term of service, duties and powers," and attempting to establish a standard of purity for dairy products and providing punishment for violation of the act, held invalid as not conforming to Const. art. 4, § 28, requiring provisions of statutes to be germane to titles. City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520.

3. Grant of power to determine such facts is not grant of legislative or judicial power. Coopersville Co-operative Creamery Co. v. Lemon [C. C. A.] 163 F 145. Under Act May 9, 1904 (32 Stat. 194, c. 784 [U. S. Comp. St. Supp. 1907, p. 637]), amending "Olemargarine Act" of Aug. 2, 1886, imposing tax on adulterated butter and authorizing commissioner of internal revenue to decide substances taxable, and to make needful regulations, with approval of secretary of treasury, to carry act into effect, regulation that butter containing over 16 per cent of water, milk or cream be considered adulterated was valid. Id.

4, 5. Coopersville Co-operative Creamery Co. v. Lemon [C. C. A.] 163 F 145.

6. St. Louis City Charter, art. 3, § 26, expressly authorizes city to establish stand-

* Always begin with the latest article on the subject. Use the latest topical index.

where their meaning is plain,[7] and where they are attacked as unreasonable the allegations to such effect must be clear and unequivocal.[8] Where the authority of the municipality is subject to the limitation that the municipal regulations must not be in conflict with state laws, it is held that an ordinance is not inconsistent with the state law merely because it adds additional requirements[9] or because it imposes penalties different from those imposed by the state law,[10] but there is some conflict as to whether the standard fixed by the ordinance must conform to that fixed by the statute.[11]

§ 2. *The offense.*[12]—See 11 C. L. 38—Aside from the pure food laws,[13] the manufacture and sale of certain adulterated articles is prohibited,[14] and in this connection a label showing the true ingredients is sometimes required.[15] Usually the intent of the defendant is immaterial.[16]

§ 3. *Prosecutions and penalties.*[17]—See 11 C. L. 39—The state board of pharmacy of New York cannot sue for the penalties imposed for the sale of adulterated food.[18]

ard of purity of dairy products. City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516.

7. Ordinance fixing milk standard as "Total milk solids, 12.5 per centum by weight, butter fat 3.5 per centum by weight, water 87.5 per centum by weight," held to mean that of the 12.5 per centum of milk solids, 3.5 per centum must be butter fat, and not to require 103.5 total constituents, and hence that ordinance was not invalid for uncertainty. Ex parte Hoffman [Cal.] 99 P 517.

8. Allegation that standard fixed for milk exceeded the natural product of certain kinds of cows, and that milk sold by party charged with violating ordinance might have come from such kind of cows, held insufficient to raise issue of reasonableness of standard. Ex parte Hoffman [Cal.] 99 P 517.

9. City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516.

10. Ex parte Hoffman [Cal.] 99 P 517.

11. Ordinance prohibiting any foreign substance in milk held inconsistent with statute prohibiting such foreign substances only as are injurious to health. City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520; City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516. Fact that statute impliedly repealed provision of ordinance establishing higher standard of purity for certain product did not effect repeal of other provisions of ordinance establishing lower standard for other products. Id. Ordinance fixing higher standard than that fixed by statute held void. In re Desanta, 8 Cal. App. 295, 96 P 1027. Ordinance fixing higher standard than that fixed by statute held valid. Ex parte Hoffman [Cal.] 99 P 517.

Note: The case of City of St. Louis v. Klausmeier, 213 Mo. 119, 112 SW 516, holds that fixing of lower standard by ordinance creates no inconsistency and this doctrine is supported to a certain extent by In re Desanta, 8 Cal. App. 295, 96 P 1027. On the other hand it is strongly intimated in Ex parte Hoffman [Cal.] 99 P 517, that the fixing of a lower standard by the ordinance would create inconsistency. [Ed.]

12. **Search Note:** See note in 5 C. L. 44. See, also, Adulteration, Cent. Dig. §§ 4-14; Dec. Dig. §§ 4-6; 1 A. & E. Enc. L. (2ed.) 738.

13. Offense, under Comp. St. § 5007, of manufacturing and selling adulterated maple sugar without labelling it so as to show ingredients, is not within pure food law, Pub. Acts. 1895, No. 193, but is separate offense. Pierre Viaus Maple Co. v. Dairy & Food Com'r, 154 Mich. 73, 15 Det. Leg. N. 639, 117 NW 553.

14. Under Comp. Laws, § 5007, word "adulteration" means mixture of any foreign substance, whether wholesome or not, with maple sugar. Pierre Viaus Maple Co. v. Dairy & Food Com'r, 154 Mich. 73, 15 Det. Leg. N. 639, 117 NW 553. "Adulterated milk" as defined by Agricultural Law (Laws 1893, p. 660, c. 338) § 20, is milk containing over 88 per cent water or less than 12 per cent of milk solids. People v. Bosch, 129 App. Div. 660, 114 NYS 65. Under Public Health Law (Laws 1893, p. 1495, c. 661, added by Laws 1900, p. 1471, c. 667) as to quality of pharmaceutical preparations and excepting (§ 199) sale of cream of tartar and other enumerated articles, such enumerated articles when not sold as drugs need not conform to requirements of the act, though sale may be subject to penalty by other statutes, if adulterated. State Board of Pharmacy v. Gasau, 195 N. Y. 197, 88 NE 55. Word "chemicals" in statute is limited to chemicals used as medicines or drugs. Id.

15. Under Comp. Laws, § 5007, it was intended to prohibit manufacture and sale of adulterated maple sugar under any name without labeling product with true name and stating other ingredients and percentage thereof. Perre Vlaus Maple Co. v. Dairy & Food Com'r, 154 Mich. 73, 15 Det. Leg. N. 639, 117 NW 553.

16. Where butter contains abnormal quantity of water, violating Act May 9, 1904 (32 Stat. 194, c. 784 [U. S. Comp. St. Supp. 907, p. 637]). Coopersville Co-operative Creamery Co. v. Lemon [C. C. A.] 163 F 145. No defense for sale of adulterated milk as defined by Agricultural Law (Laws 1893, p. 660, c. 338, § 20) that defendant sold milk as given by cows. People v. Bosch, 129 App. Div. 660, 114 NYS 65.

17. **Search Note:** See Adulteration, Cent. Dig. §§ 16-32; Dec. Dig. §§ 7-13.

18. Penalties for sale of adulterated food

ADULTERY.

The scope of this topic is noted below.[19]

§ 1. The Offense, 40.
§ 2. The Indictment or Information, 40.
§ 3. Evidence, 41.
§ 4. Practice and Trial, 41.

§ 1. *The offense.*[20] See 11 C. L. 39—Adultery, as distinguished from fornication, is predicated upon the marriage of one or both of the parties to the act of intercourse.[21] As distinguished from rape it is predicated upon the consent of the parties to the act,[22] and is not an offense against the person so consenting.[23] As a general rule, the offense of adultery cannot be predicated upon a bigamous marriage, entered into innocently.[24]

§ 2. *The indictment or information.*[25] See 11 C. L. 39—The indictment should fully and plainly describe the offense,[26] but it is usually sufficient to charge the offense as defined by the statute.[27] On the other hand, the statute need not be followed literally.[28] Under the North Dakota statute the spouse of either of the guilty parties is empowered to make complaint against either or both of them.[29]

imposed by § 41 and defined by Agricultural Law (Laws 1893, p. 655, c. 338, § 164, and Laws 1903, p. 1191, c. 524). State Board of Pharmacy v. Gasau, 195 N. Y. 197, 88 NE 55. Right of board is limited to penalties accruing under Public Health Law (Laws 1893, p. 1552, c. 661, art. 11) as to pharmacy. Id.

19. Includes only the criminal offense of adultery. Excludes adultery as ground for divorce (see Divorce*), fornication (see Fornication*), rape (see Rape*), and matters common to all crimes (see Criminal Law;* Indictment and Prosecution*).

20. Search Note: See notes in 3 C. L. 49; 11 Id. 39; 48 L. R. A. 842; 68 Id. 44; 2 L. R. A. (N. S.) 1186; 113 A. S. R. 271.

See, also, Adultery, Cent. Dig. §§ 1-9; Dec. Dig. §§ 1-4; 1 A. & E. Enc. L. (2ed.) 747.

21. Sexual intercourse between two persons not husband and wife, either one or both of whom are married, is adultery in some states. State v. Anderson [Iowa] 118 NW 772. When act is committed between married man and woman who is unmarried, the man shall be deemed guilty of adultery. Act March 3, 1887, c. 397, § 3, 24 Stat. 635. (U. S. Comp. St. 1901, p. 3636.) United States v. Meyers [N. M.] 99 P 336. Sexual intercourse of married man with woman other than his wife, whether married or single constitutes the offense, under Kansas statute. Bashford v. Wells [Kan.] 96 P 663. Under Georgia statute both parties must be married. Zackery v. State [Ga. App.] 64 SE 281.

22. Conviction of adultery cannot be sustained where it appears that female with whom alleged sexual intercourse is charged did not consent thereto, and where act appears to have been against her will. Crime necessarily involves idea of consent. Nephew v. State, 5 Ga. App. 841, 63 SE 930. While consent in some instances may be procured by force to a certain degree, where force is used in inception of offense it must at least be shown that consent was finally induced thereby. Id.

23. Not felony against or upon married woman consenting to act so as to justify her husband in assaulting or killing other man to prevent commission of the act. State v. Young [Or.] 96 P 1067.

24. Where unmarried man entered into the marriage relation with a married woman, in good faith and upon reasonable grounds believing her to be unmarried. State v. Audette, 81 Vt. 400, 70 A 833.

NOTE. Knowledge of fact of marriage as an element of adultery: An innocent party to a bigamous marriage cannot as a rule be found guilty of adultery (State v. Audette, 81 Vt. 400, 70 A 833, 18 L. R. A. (N. S.) 527; Vaughan v. State, 83 Ala. 55, 3 S 530; Banks v. State, 96 Ala. 78, 11 S 404; State v. Cutshell, 109 N. C. 764, 14 SE 107; 26 Am. St. Rep. 599; Commonwealth v. Thompson, 88 Mass. [6 Allen] 591, 83 Am. Dec. 653 [reversed on retrial on showing of guilty knowledge] 93 Mass. [11 Allen] 23, 87 Am. Dec. 685), but the contrary rule prevails under the Texas statute (Fox v. State 3 Tex. App. 329, 30 Am. Rep. 144). The burden of showing guilty knowledge is usually upon the state (Banks v. State and Vaughan v. State, supra) but see State v. Cody, 111 N. C. 725, 16 SE 408. It is held that knowledge is not essential where the cohabitation is illicit (Commonwealth v. Elwell, Mass. [2 Metc.] 190, 35 Am. Dec. 398), but otherwise where fornication is not a crime (State v. Clemenson, 123 Iowa 524, 99 NW 139.—Adapted from 18 L. R. A. (N. S.) 527.

25. Search Note: See Adultery, Cent. Dig. §§ 12-18; Dec. Dig. §§ 6-8; 1 A. & E. Enc. P. & P. 305-308.

26. Indictment charging accused with committing adultery with A. C., she being at that time a married woman, to wit, the wife of one G. C., and that defendant was at the time an unmarried man, held sufficient. State v. Anderson [Iowa] 118 NW 772.

27. Defense as defined by statute is intercourse between two persons not husband and wife, either or both of whom are married, and it is sufficient to thus charge it, without alleging that act was done knowingly, willfully, maliciously or feloniously. State v. Anderson [Iowa] 118 NW 772. It is not necessary to allege that the prosecution was commenced on the complaint of the husband or wife. Id.

28. Under Revisal 1905, § 3350, making it an offense for persons not married to each other to "lewdly and lasciviously associate,

§ 3. *Evidence.*[30]—See 11 C. L. 40—The state has the burden of proving every essential element of the offense[31] beyond a reasonable doubt,[32] and where the defendant produces a certificate of marriage with the woman named in the indictment, the state must prove prior marriage to some other woman.[33] What facts will or will not constitute proof of adultery cannot be laid down,[34] but circumstantial evidence, including evidence of previous relations between the parties,[35] is admissible to prove an adulterous mind,[36] and even the offense itself.[37] Good character may be shown in defense,[38] and of itself may be sufficient to generate a reasonable doubt of guilt.[39] The woman is an accomplice within the rule requiring corroboration.[40] Under the general disability of the common law, a wife is not competent to testify against her husband on a prosecution for adultery.[41] This disability has been perpetuated by statute in some states,[42] and removed in others,[43]

§ 4. *Practice and trial.*[44]—See 11 C. L. 40—Where the statute creates distinct offenses with relation to the manner in which the offense is committed, the court should, by proper instruction, confine the issue to the offense charged.[45] Where

bed and cohabit together," an indictment charging that defendants, a man and a woman, not being married to each other, * * * did unlawfully bed and cohabit together," was sufficient. State v. Britt, 150 N. C. 811, 63 SE 1056.

29. Under Rev. Code, 1905, § 8903, it is proper for wife to make complaint against woman who had adulterous relations with her husband. State v. Wesie [N. D.] 118 NW 20.

30. **Search Note:** See Adultery, Cent. Dig. §§ 19-33; Dec. Dig. §§ 9-14; 1 A. & E. Enc. L. (2ed.) 752.

31. Burden of proof is on state to prove that both parties were married, where, as in Georgia, marriage of both is necessary to offense. Zackery v. State [Ga. App.] 64 SE 281.

32. Evidence that defendant was found in room with unmarried woman at nine o'clock at night, lamp turned low, both with shoes off, door closed, bed somewhat rumpled, and pillow indented and warm, was not sufficient proof of the offense, in absence of any showing of evil repute of the house or the woman. Lang v. State, 5 Ga. App. 176, 62 SE 711. Evidence held insufficient to support verdict. Thompson v. State, 5 Ga. App. 7, 62 SE 571; Basquez v. State [Tex. Cr. App.] 119 SW 861. Evidence held sufficient to sustain conviction. Mabry v. State, 54 Tex. Cr. App. 449, 114 SW 378.

33. Mere fact of defendant's prior illicit cohabitation with other woman and passing her off as his wife held insufficient to authorize direction of verdict of guilty, though under Pennsylvania law no ceremonial is necessary to constitute marriage defendant having testified that he had never contracted to marry such other woman. Commonwealth v. Gamble, 36 Pa. Super. Ct. 146. See Marriage, 12 C. L. 659.

34. Hillers v. Taylor, 108 Md. 148, 69 A 715.

35. Illicit relation of parties during period of eight years next preceding the action may be proved, though female was in hospital for a year during such period, such separation not being sufficient to constitute a cessation of the improper relations. State v. Brown [Iowa] 121 NW 513.

36. State v. Lamora [Or.] 99 P 417.

37. Positive evidence of the commission of adultery is rarely possible. State v. Lamora [Or.] 99 P 417. Jury must consider the conduct of the parties, their opportunities for commission of act, and all of circumstances of case, and then determine whether it should convince an unprejudicial and cautious mind of guilt of parties. Hillers v. Taylor, 108 Md. 148, 69 A 715. Where commission of adultery is sought to be inferred from circumstances, they must lead to conclusion of guilt by fair inference as a necessary conclusion. Id.

38. When evidence warrants it, court may properly state to jury the weight that they would be authorized to give to proof of good character. Webb v. State [Ga. App.] 64 SE 1001.

39. Webb v. State [Ga. App.] 64 SE 1001.

40. State v. Brown [Iowa] 121 NW 513. Evidence of female that unsigned letters alleged to have been written by defendant to her were in his handwriting was insufficient to establish letters as corroborating evidence. Id. Where female testified that she rode with defendant in the afternoon over a certain road, and that the buggy was drawn by a sorrel horse, and that she saw her daughters but concealed herself with a parasol, testimony of daughters that they saw a man and woman driving a sorrel horse about that time and place, but failed to recognize either of them, was admissible as corroborative of mother's story. Id.

41. United States v. Meyers [N. M.] 99 P 336.

42. Act 1889, Comp. Laws 1897, § 3432, makes disability statutory, and hence it is not removed by Act 1897, Comp. Laws 1897, § 3016, removing common-law disabilities. United States v. Meyers [N. M.] 99 P 336.

43. Where wife has been a witness before grand jury and minutes of her testimony are properly presented and filed, she may on trial be examined as to any and all matter within her knowledge bearing upon the defendant's guilt or innocence, and hence her testimony that her husband told her that he ought not to have stayed with woman with whom he was accused of having adulterous relations was properly admitted. State v. Perkins [Iowa] 120 NW 62.

44. **Search Note:** See Adultery, Cent. Dig. §§ 34-37; Dec. Dig. §§ 15, 16; 1 A. & E. Enc. P. & P. 308.

45. Where information alleged adultery

the offense consistes in habitual intercourse, it is not misleading to instruct that proof of a single offense is insufficient to warrant conviction.[46] As in other criminal cases, the court is seldom authorized to give binding instructions to return a verdict of guilty.[47] In Texas, when one of the parties is acquitted on a separate trial after the conviction of the other, the latter is entitled to a new trial in order to secure the testimony of the former.[48]

Advancements, see latest topical index.

ADVERSE POSSESSION.

The scope of this topic is noted below.[49]

§ 1. Estates and Property Subject to Adverse Possession, 42.
§ 2. Against Whom Available, 42.
§ 3. To Whom Available, 44.
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§ 11. Sufficiency of Possession, 59.
§ 12. Pleading, Evidence, and Instructions, 61.
§ 13. Nature of Title Acquired, 65.

§ 1. *Estates and property subject to adverse possession.*[50]—See 11 C. L. 41—As a general rule all estates in land are subject to adverse possession,[51] and easements,[52] water rights[53] and the like, may be created or acquired by adverse user or enjoyment.

§ 2. *Against whom available.*[54]—See 11 C. L. 41—In the absence of statute,[55] adverse possession will not ordinarily bar a state[56] nor divest titles or easements

by habitual intercourse without living together, it was error for court to refuse instruction that jury must find habitual intercourse without living together in order to convict, since statute provides two modes of punishment, one where parties live together and one where they do not. Calloway v. State [Tex. Cr. App.] 116 SW 575.

46. Such instruction would not mislead jury to believe that two acts would be sufficient. Marby v. State 54 Tex. Cr. App. 449, 114 SW 378.

47. Commonwealth v. Gamble, 36 Pa. Super. Ct. 146.

48. Calloway v. State [Tex. Cr. App.] 116 SW 575.

49. Includes all matters relative to acquisition of title by adverse possession. Prescriptive easements are treated in a separate article (see Easements *). For adverse possession as between cotenants (see Tenants in Common and Joint Tenants,* § 2), and as between life tenants and remaindermen (see Real Property,* § 6), reference should also be had to the topics dealing with those relations.

50. Search Note: See notes in 7 C. L. 41; 76 A. S. R. 479; 87 Id. 775; 92 Id. 844; 6 Am. Cas. 142.

See, also, Adverse Possession, Cent. Dig. §§ 7-57; Dec. Dig. §§ 6-9; 1 Cyc. 1111-1121; 1 A. & E. Enc. L. (2ed.) 874.

51. Forty-five years' exclusive, adverse possession held to bar **leasehold interest** in part of land. Cook v. Councilman [Md.] 72 A 404. Nonuse of private way for over 20 years will extinguish **easement** if coupled with adverse enjoyment. Mason v. Ross [N. J. Eq.] 71 A 141. Easement may be lost by adverse possession for 20 years. Rupprecht v. St. Mary's Church Soc., 131 App. Div. 564, 115 NYS 926.

52. An easement may [illegible] years' adverse user. Alderman v. New Haven [Conn.] 70 A 626. See Easements, 11 C. L. 1140.

53. Water rights may be acquired by 15 verse enjoyment. See Waters and Water Supply, 12 C. L. 2279. Hough v. Porter [Or.] 98 P 1083. Twenty years' use by city of water from lake in defiance of complainant held to give prescriptive right. Stock v. Hillsdale [Mich.] 15 Det. Leg. N. 1073, 119 NW 435.

54. Search Note: See notes in 11 C. L. 42; 19 L. R. A. 839; 30 Id. 335; 14 A. S. R. 635; 18 Id. 113; 76 Id. 479; 89 Id. 87; 109 Id. 609.

See, also, Adverse Possession, Cent. Dig. §§ 7-57; Dec. Dig. § 4; 1 Cyc. 1111-1116; 1 A. & E. Enc. L. (2ed.) 799.

55. Under New York statute regulating time within which state must sue to recover realty, prescriptive title to lands under water of a navigable river may be acquired against state after 40 years where state has not received rents or profits. Fulton L., H. & P. Co. v. State, 62 Misc. 189, 116 NYS 1000.

56. Since limitations do not run against state, one cannot acquire by occupancy title to parts of lots beyond high-water mark of a meandered river. Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966. Rights by limitations or prescription cannot be acquired in land title to which is **in United States.** State v. Blakely [Mo. App.] 115 SW 483. Adverse possession held not to run against locator of public land before issuance of patent, title still remaining in United States. Price v. Dennis [Ala.] 49 S 248. Code 1896, § 1813, provid-

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* Always begin with the latest article on the subject. Use the latest topical index.

as to lands devoted to public uses [57] such as railroad rights of way,[58] school lands,[59] and highways or streets,[60] though both public and private rights of way may be lost by abandonment and estoppel.[61] An owner cannot be barred while he has no right to possession [62] or capacity to sue,[63] or where for any other reason he is pre-

ing that certain certificates issued under acts of congress by register of land office shall vest legal title in holder, held not intended to benefit one claiming adversely to holder or to patentee. Id. Could not give such person title by adverse possession since it would defeat title of United States. Id. Portion of time while land belongs to United States cannot be counted in ascertaining existence of public road by prescription. Lund v. Wilcox, 34 Utah, 205, 97 P 33. Since an entryman on public land cannot put statute of limitations in motion against government, one contesting for government land can gain no advantage over his adversary because of statute of limitations while contest is pending. Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574.

57. Where public rights has once attached by sufficient acceptance of dedication of a town plat, it is not subject to divestiture by strict application of rules pertaining to adverse possession or laches obtaining in controversies between individual owners or claimants. McClenehan v. Jesup [Iowa] 120 NW 74. Limitations held to run as to surplus and private land belonging to a county and never used for or dedicated to public purposes. Hardin County v. Nona Mills Co. [Tex. Civ. App.] 112 SW 822. Lands held by board of education for sale may be adversely held. Pioneer Investment & Trust Co. v. Board of Education [Utah] 99 P 150.

58. Railway right of way, public property under statute, is not subject to adverse possession. Powell v. Atchison, etc., R. Co., 215 Mo. 339, 114 SW 1067. No part of railroad right of way over public lands granted by congress can be alienated without its consent nor lost by laches or acquiescence, and private persons encroaching thereon can acquire no rights by lapse of time. Kindred v. Union Pac. R. Co. [C. C. A.] 168 F 648. Right of way granted by Congress to Union Pacific Railway Company by Act July 1, 1862, held not subject to adverse possession being regarded as public highway and essential to performance of company's public duties. Union Pac. R. Co. v. Karges, 169 F 459. Property taken by a railway for public use cannot be taken by adverse possession save by appropriation inconsistent with such use when needed. Chicago, etc., R. Co. v. Hanken [Iowa] 118 NW 527. Doctrine applies as well to railroad depot grounds when actually occupied or condemned as to railroad right of way. Id. But **doctrine should not be applied** to depot grounds neither actually occupied nor needed, though dedicated, for depot purposes. Id. **Statute operates** against railroad corporations whose lands are held adversely, and this applies to right of way. St. Louis & S. F. R. Co. v. Ruttan [Ark.] 118 SW 705. Question is simply whether or not possession is adverse to notice of company actually or by necessary implication. Id.

59. Title to school lands cannot be acquired by adverse possession as against state. Kinney v. Munch [Minn.] 120 NW 374. Ball. Ann. Codes & St. § 4807 (Pierce's Code, § 1519), making limitations applicable to state, does not authorize acquisition of title to school lands by adverse possession. O'Brien v. Wilson, 51 Wash. 52, 97 P 1115.

60. One cannot acquire title to a public highway by possession and use of ground included therein however long continued. Taylor v. Austin [Neb.] 119 NW 1123. Obstruction of a public highway for more than 20 years will not extinguish public right of easement. Mason v. Ross [N. J. Eq.] 71 A 141. Title to an alley held not acquired by limitation. Kirby's Dig. § 5648, subd. 3, providing limitatons shall not bar abatement or removal of obstructons in streets. Kansas City S. R. Co. v. Roles [Ark.] 115 SW 375. Clause "after an order has been made" held to limit clause "or punish for its continuance" and not to prevent removal of limitation bar until an order has been made for removal or abatement of encroachment. Id. Maintenance of houses on part of public street held but a nuisance not legalized by lapse of time. Nerio v. Maestretti, 154 Cal. 580, 98 P 860. Since statute of 1887 (Sayle's Ann. Civ. St. 1897, art. 3351) title to road or street cannot be acquired by adverse possession. Perry v. Ball [Tex. Civ. App.] 113 SW 588. **Under some circumstances** a private person may acquire title to a highway by adverse possession. La Barre v. Bent, 154 Mich. 520, 15 Det. Leg. N. 822, 118 NW 6. Rule that title by adverse possession cannot be acquired in land dedicated for street **does not apply unless dedication has been accepted.** Scott v. Donora S. R. Co. [Pa.] 72 A 282. Right to maintain an encroachment on a public street may be obtained by prescription **as against adjoining or adjacent owners.** Protecting building basement. 556 & 558 Fifth Ave. Co. v. Lotus Club, 129 App. Div. 339, 113 NYS 886.

61. See Easements, 11 C. L. 1140; Highways and Streets, 11 C. L. 1720.

62. Where under a will neither a trustee nor remaindermen had any right to possession until death of a daughter who took life estate free from the trust, daughter's grantee could not assert adverse possession until that time. Breeden v. Moore [S. C.] 64 SE 604. Where lands purchased from a state were subject to the right of possession by Indians, latter could not establish title against purchaser by adverse possession, since purchaser could not obtain possession until Indian rights were extinguished. Seneca Nation of Indians v. Appleby, 127 App. Div. 770, 112 NYS 177. **Possession of mortgagor** not adverse to mortgagee or purchaser at foreclosure until expiration of period for redemption. Baumgarten v. Mitchell [Cal. App.] 101 P 43. See, also, post, § 5.

63. Prescription does not work against

vented by law from asserting his rights;[64] hence the rule that the statute will not run against remaindermen during the existence of the precedent estate.[65] Adverse possesssion against trustees bars the beneficiaries.[66]

§ 3. *To whom available.*[67]—See 11 C. L. 43—An adjoining owner,[68] an alien,[69] a foreign corporation[70] or a municipality[71] may acquire title. The question as to who may may take advantage of another's possession is subsequently treated.[72]

§ 4. *Definition and essential elements.*[73]—See 11 C. L. 43—The law favors the quieting of land titles in persons who for many years have been in possession of premises as owners, though their titles were originally defective.[74] At common

minors during infancy (Civ. Code 1895, § 3593) nor against an unrepresented estate until representation if the lapse does not exceed five years (Buchan v. Williamson, 131 Ga. 501, 62 SE 815), nor against a joint title which cannot be severally enforced because some of onwers labor under infancy (Id.). Where owner died within less than 7 years after sheriff's sale under which adverse possession was claimed and all but two heirs were minors and it did not appear when administration was granted, prescriptive title was not made out. Id. Defense of adverse possession held not maintainable where possession had its inception during plaintiff's infancy and suit was commenced within a few months of his majority. Kazeheer v. Nunemaker [Neb.] 118 NW 646. Seven year statute held to run against infants as well as adults under Laws 1893, p. 20, c. 11, § 1, but not under § 3 excepting infants. Schlarb v. Castaing, 50 Wash. 331, 97 P 289. Section 1 valid. Id. St. 1898, §§ 4211, 4212, 4215, barring actions to recover realty held by continued possession for 10 years under claim of title founded on an instrument purporting to convey the land, makes no exceptions in cases of minor plaintiffs or persons under guardianship or in cases of fraud. Steinberg v. Salzman [Wis.] 120 NW 1005.

61. Person against whom possession is asserted must not have been prevented by law from asserting his right during possessory period. Breeden v. Moore [S. C.] 64 SE 604. Occupancy **during Civil War** is not to be considered in computing period of occupancy. Moore v. Loggins [Tex. Civ App.] 114 SW 183. Where possession was sufficient to bar owner's rights prior to Civil War, character of possession thereafter was immaterial. Harris v. Iglehart [Tex. Civ. App.] 113 SW 170.

65. See Real Property, 12 C. L. 1623; Willwhite v. Berry, 232 Ill. 331, 83 NE 852; Gholson v. Desha, 32 Ky. L. R. 996, 107 SW 330. One holding under life tenant cannot hold adversely to remaindermen until after life tenants' death. Scott v. Coulson [Ala.] 47 S 60. As against devisees of estate in remainder, possession by life tenants or persons to whom life estate has been conveyed does not start prescription during lifetime of devisee of life estate. Peck v. Ayres [Kan.] 100 P 283. Possession of life tenant's grantee held not adverse to remaindermen or their trustee, there being nothing to show he claimed more than life tenant was entitled to. Breeden v. Moore [S. C.] 64 SE 604. Where life beneficiary under trust deed who had power of appointment by will conveyed the land to defendant and thereafter devised to plaintiff under power, defendant acquired at least a life interest, and his possession could not be adverse to appointee, latter's estate not beginning until expiration of life interest. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Where the life tenants of an estate tail under a will which provided that the remainder should go to his or her issue for life, with the next remainder in tail unborn issue, where not made parties to an action for the appropriation of land for street purposes, the adverse possession of the municipality for more than twenty-one years does not deprive such subsequent life tenants of title until the requisite period after their right of entry accrued. McNeely v. Cincinnati, 7 Ohio N. P. (N. S.) 441

66. Where legal title under a will was vested in trustees, adverse possession barring trustees barred devisees also. Appel v. Childress [Tex. Civ. App.] 116 SW 129.

67. Search Note: See notes in 35 L. R. A. 835; 12 L. R. A. (N. S.) 1140, 1148; 15 Id. 1120.

See, also, Adverse Possession, Cent. Dig. §§ 58-64; Dec. Dig. § 10; 1 Cyc. 1121, 1122; Railroads, Cent. Dig. § 142; 1 A. & E. Enc. L. (2ed.) 799.

68. An owner of land can perfect title by adverse possession to adjoining land by proof of same facts that would give title to any other claimant. Texas & N. O. R. Co. v. A. G. Broom [Tex. Civ. App.] 114 SW 655.

69. Kirby's Dig. § 264, allowing aliens to acquire land by purchase, will or descent, permits them to acquire land by limitation. Price v. Greer [Ark.] 116 SW 676.

70. Under Civ. Code 1901, p. 913, authorizing foreign corporations to acquire all kinds of property on complying with laws of territory, foreign corporation may acquire title to realty by adverse possession. Work v. United Globe Mines [Ariz.] 100 P 813.

71. City held to have acquired by 10 years' use right to maintain and use a ditch for carrying off water. Sturges v. Meridian [Miss.] 48 S 620.

72. See post, §§ 6, 11.

73. Search Note: See notes in 28 A. S. R. 158; 88 Id. 701; 95 Id. 671.

See, also, Adverse Possession, Cent. Dig. §§ 1-76, 387-393; Dec. Dig. §§ 1-3, 11-13; 1 Cyc. 981, 1084, 1085; 1 A. & E. Enc. L. (2ed.) 789.

74. Title may be acquired by continued adverse possession and occupation for period and under circumstances provided by statute. Skinner Mfg. Co. v. Wright [Fla.] 47 S 931. Adverse possession for 12 years

law, such occupancy raised the presumption of a grant,[75] but the subject of adverse possession is now governed largely by the statutes of the various states,[76] some of which are held to entirely supersede the common law.[77] It follows that the essen-

is complete investiture of title. Doniphan Lumber Co. v. Case [Ark.] 112 SW 208. Where defendant had long been in the peaceable and adverse possession under equitable title and plaintiff's ancestor had received the purchase price for the land 50 years before, defendant was within protection of statute of limitations, and his rights grew stronger by lapse of time. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104. Plaintiff held to have acquired title where he went into possession of land given him orally by his father, and cultivated and used it for 20 years as his own. Grimes v. Bryan, 149 N. C. 248, 63 SE 106. Where 10 acres was set apart to one of three persons who together purchased 40 acres, and he had it surveyed and remained in notorious uninterrupted possession for statutory period, claiming it as his own and paying taxes, he acquired title to the 10 acre tract. Matthews v. Tennessee Coal, Iron & R. Co. [Ala.] 47 S 78. Purchaser from one who had had open, adverse, continuous possession for 30 years held to have title. Asher v. Cress [Ky.] 115 SW 252. No recovery in ejectment where evidence showed defendant's actual occupancy for 30 years. First Baptist Soc. v. Wetherell [R. I.] 72 A 641. Where a widow entered into possession of premises under an escheat act exclusive of any other right and remained in possession continuously for 20 years exercising the usual acts of ownership, she acquired prescriptive title. Criswell v. Noble, 61 Misc. 483, 113 NYS 954. Where a grantor of land who had no record title had been in possession for 25 years and plaintiffs and their grantors deriving title from son had been in possession for over 50 years, plaintiffs had good title. Clarke v. Wollpert, 128 App. Div. 203, 112 NYS 547. That wife of original grantor did not join in deed held not fatal, she having since deceased. Id. Actual, open and adverse possession of land since 1884 with claim of absolute ownership under referee's deed in foreclosure held to give good and indefeasible title. Lewine v. Gerardo, 60 Misc. 261, 112 NYS 192. Thirty years' adverse possession held bar to **outstanding claims.** Burton-Whayne Co. v. Farmer' & Drovers' Bank, [Ky.] 114 SW 288. Adverse possession by vendor and wife for 40 years after vendee's abandonment of agreement to support them in consideration of the grant held extinguishment of **vendee's rights.** Bishop v. Van Winkle [Ky.] 117 SW 345. Exclusive and continuous occupancy and cultivation and improvement for over 20 years held bar as **against cotenant** who did not join in original conveyance. Jessup v. Witherbee Real Estate & Imp. Co., 117 NYS 276. Where certain grantees and their successors in title were for more than 20 years in full, exclusive, and actual possession of parcels of mortgaged lands without admitting mortgagees' title and without any claim for principal or interest having been made against them and without any entry by mortgage holders, and exercised all usual acts of ownership including payment of taxes and making of improvements, **mortgage** was no longer lien on any of the tracts. Shreve v. Harvey [N. J. Eq.] 70 A 671. Possession in good faith for seven years claiming title under foreclosure certificate held bar to **mortgagor's redemption,** under Bal. Ann. Code & St. § 5503. Johnson v. Bartlett, 50 Wash. 114, 96 P 833. Adverse possession for 15 years by mortgagee who entered under parol transfer by mortgagor in satisfaction of debt held to give title by analogy to Ky. St. 1909, § 2539, barring redemption after 15 years possession by mortgagee. Winburn v. Witt [Ky.] 120 SW 293. Evidence held to show mortgagee's adverse holding for 15 years. Id. Though **deeds were void** as to wives because not recorded within time prescribed by statute, title became good by limitations, where grantees had been in adverse possession for 30 years. Burton-Whayne Co. v. Farmers' & Drovers' Bank [Ky.] 113 SW 445. That a deed was so defective as not to pass title and embraced too much land held not to preclude grantee from claiming all the land by adverse possession. Hatfield v. Hatfield [Ky.] 113 SW 59. Actual continuance, adverse possession for 15 years under junior patent held superior to **senior patent** without possession. Charleroi Timber & Cannel Coal Co. v. Spaulding [Ky.] 117 SW 291. Open, notorious, adverse possession up to a certain **dividing line** for statutory period held to create boundary regardless of actual plat location. Weingarten v. Shurtleff, 51 Wash. 602, 99 P 739. Acquiescence in continuous adverse possession up to certain line for 20 years estops acquiescing party from questioning boundary. Curless v. State [Ind.] 87 NE 129. Instruction requiring line up to which premises had been occupied to be "true line," despite possession for seven years, held erroneous under Code 1895, § 3248. Williams v. Giddens [Ga.] 64 SE 64.

75. Grant presumed from acts of ownership from time out of memory. Shinnecock Hills & Peconic Bay Realty Co. v. Aldrich, 116 NYS 532. Acts of ownership exercised for sufficient length of time to raise presumption of valid grant constitutes technical adverse possession. Id. Presumption of deed may exist though jury may not believe actual execution of grant, where possession has existed in such way and for such time as to make it adverse. Cadwalder v. Price [Md. App.] 73 A 273. Where land has been held adversely for 15 years, law conclusively presumes a grant, but, if adverse holding has not been continuous for 15 years, grant may be presumed from possession and other circumstances. East Jellico Coal Co. v. Hays [Ky.] 117 SW 307.

76. Civ. Code 1901, par. 2938, barring actions after 10 years from accrual of cause of action and operation of which was postponed by legislature held retrospective as well as prospective. Work v. United Mines [Ariz.] 100 P 813.

77. Fundamentals of title by adverse pos-

tials of such possession vary in the different jurisdictions,[78] but it is generally held that the occupancy must be actual,[79] open,[80] adverse,[81] and under claims of right or title,[82] peaceable[83] and continuous[84] for the statutory period.[85] Other ele-

session in Wisconsin is embodied in the written law. Illinois Steel Co. v. Budzisz [Wis.] 121 NW 362. Title to land can be acquired by adverse possession or prescription only as provided by Comp. Laws 1907, § 2866, and not as at common law. Rio Grande Western R. Co. v. Salt Lake Inv. Co. [Utah] 101 P 586.

78. There must be open, notorious, peaceable, continuous and adverse possession for more than seven years. Jeffery v. Jeffery [Ark.] 113 SW 27. Adverse possession under § 1721, Gen. St. 1906, must be actual, continuous and adverse for full statutory period of seven years. Dallam v. Sanchez [Fla.] 47 S 871. Possession must be hostile or adverse, actual, visible, notorious and exclusive, continuous, and under claim or color of title. Stewart v. Andrews, 239 Ill. 186, 87 NE 864. Actual, adverse, open, and continuous possession for 15 years essential. Hillman Land & Iron Co. v. Marshall [Ky.] 119 SW 180. Possession must be under color taken by grantee or agent and held and claimed continuously to boundaries of deed without interruption for seven years. Haddock v. Leary, 148 N. C. 378, 62 SE 426. Prescriptive right to or over realty can be acquired only by continuous adverse user for 20 years. Lund v. Wilcox, 34 Utah, 205, 97 P 33. There must be actual, visible, notorious, distinct and hostile possession with cultivation use or enjoyment for statutory period. Hess v. Webb [Tex. Civ. App.] 113 SW 618. To defeat title and constructive possession under senior patent, junior patentee must prove actual, adverse, and continuous possession within lap of patents for 15 years before suit. Brown v. Wallace [Ky.] 116 SW 763.

79. Actual possession means the corporeal detention of the property. Wallace v. Sache, 106 Minn. 123, 118 NW 360. Evidence held to show constructive, not actual, possession of lap of patents. Brown v. Wallace [Ky.] 116 SW 763. Under Rev. St. 1895, art. 3349, defining adverse possession as actual and visible possession, etc., one claiming under junior title overlapping older survey must show actual and visible appropriation of at least part of junior survey. Lake v. Earnest [Tex. Civ. App.] 116 SW 865. Evidence insufficient. Id. **Excuses for nonoccupancy** cannot be accepted as equivalent of occupancy. Dunn v. Taylor [Tex.] 113 SW 265. Necessity of continuous use held not affected by difficulty of procuring tenants, since conditions prescribed by law must be performed. Id.

80. City's possession of land for a sewer held so open that knowledge thereof would be imputed to owner and successors in title. Alderman v. New Haven [Conn.] 70 A 626. Continued occupation and payment of taxes for 40 years held notice of adverse claim. Lake Shore & M. S. R. Co. v. Johnson [Mich.] 16 Det. Leg. N. 270, 121 NW 267. While recorded deed is notice of character and extent of claim of one in actual possession of portion of the tract, record is not notice in absence of possession. Holland v. Nance [Tex. 114 SW 346. Encroachment, by adjoining owner, by inclosure, cultivation, etc., held insufficient notice of adverse claim beyond encroachment. Downs v. Powell [Tex. Civ. App.] 116 SW 873.

81. See post, § 5, Hostility.

82. Pioneer Investment & Trust Co. v. Salt Lake City Board of Education [Utah] 99 P 150. Possession must be with intent to claim the land occupied. Holland v. Nance [Tex.] 114 SW 346. But it is not necessary that true owner should have had actual notice or that claimant should have asserted in public in so many words his claim of ownership, and claim of title may be made by acts as well as assertions. Green v. Horn, 128 App. Div. 686, 112 NYS 993. Claimant must prove not only entry and continuous occupancy but intent to claim the property. Lecroix v. Malone [Ala.] 47 S 725. Possession without claim of right or color of title is insufficient. Morgan v. Northern Pac. R. Co., 50 Wash. 480, 97 P 510. Evidence held to show that plaintiff's occupancy prior to her purchase of surface of part of the land was without intent to claim adversely and without claim of right or color of title. Id. Mere naked possession without claim of title, however long continued, cannot ripen into title. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358. Acts on land, such as cutting trees for rails or firewood and the like, do not constitute adverse possession unless done as owner or under claim of right. Demeritt v. Parker [Vt.] 71 A 833. Owners of lots abutting on a railroad right of way can acquire no title by adverse possession to portions of the right of way occupied by them as parts of their lots, and under no other claim of right. Chicago, etc., R. Co. v. Hanken [Iowa] 118 NW 527. Acquiescence in boundary, see Boundaries, 11 C. L. 427. Sister's possession claiming for herself and brother held insufficient as to brother, where he at all times recognized owner's interest and did not know sister claimed for him. Myers v. Frey [Tex.] 119 SW 1142, afg. Frey v. Myers [Tex. Civ. App.] 113 SW 592. Failure to set up claim to the land or pay taxes held fatal to title. Watkins v. Watkins [Tex. Civ. App.] 119 SW 145. Where a testator made no claim to land occupied by him and adjoining his own, and did not devise it, his devisee acquired no title from him. Baker v. Thompson, 214 Mo. 500, 114 SW 497. One who enters believing land to belong to government acquires no title by adverse possession though after discovering his mistake he continues in hostile possession for statutory period, since possession under mistake was subservient to government and, hence, not hostile to true owner, and subsequent possession was not under claim of right. McNaught-Collins Imp. Co. v. May [Wash.] 101 P 237. Answer insufficient for failure to allege possession had been adverse and under claim and color of title. McGrath v. Valentine [C. C. A.] 167 F 473. Evidence insufficient to show ad-

ments are sometimes required, such as good faith,[86] color of title,[87] or payment of taxes.[88]

§ 5. *Hostility.*[89]—See 11 C. L. 45—The possession must be hostile and inconsistent with the rights of the owner,[90] and under some statutes a declaration of ad-

verse claim of right. Ryle v. Davidson [Tex. Civ. App.] 116 SW 823. **Claim without title or possession** is insufficient. Hillman Land & Iron Co. v. Marshall [Ky.] 119 SW 180.

83. Where person in possession commenced suit to quiet title before expiration of statutory period, and conveyed to one having notice of pendency of the suit, possession was not peaceable and undisputed so as to give title. In re Richard's Estate, 154 Cal. 478, 98 P 528. Presence of surveyors on and near inclosed and occupied premises held not to conclusively establish disseisin of adverse occupant. Illinois Steel Co. v. Paczocha [Wis.] 119 NW 550.

84. See post, § 6.

85. See post, §§ 6, 7.

86. Absence of good faith in purchasing land belonging to minor heirs held to preclude prescriptive title. Gary v. Landry, 122 La. 29, 47 S 124. Title cannot be acquired by occupancy of one who has neither color of title nor claim of right made in good faith. Ramsey v. Wilson [Wash.] 100 P 177. Claim of right presumed in good faith till contrary shown. McBride v. Caldwell [Iowa] 119 NW 741. Claim under color of deed from heirs held in good faith, though grantee knew of an heir who did not join in deed, he believing such heir by reason of advancements had no further interest in estate. Id. Bona fide claimant need not believe his claim to be good or valid or think his claim good in its inception provided claim does not involve fraud or breach of trust. State v. West Branch Lumber Co. [W. Va.] 63 SE 372. Where purchaser of bank shares knew shares were acquired during marriage and that wife was dead, he was bound to know property belonged to community and was owned jointly by surviving husband and wife's minor heir. Leury v. Mayer, 122 La. 486, 47 S 839. Error or mistake of law immaterial. Id.

87. See post, § 8.

88. See post, § 9.

89. Search Note: See notes in 5 C. L. 51; 7 Id. 45; 11 Id. 46; 24 A. S. R. 388.

See, also, Adverse Possession, Cent. Dig. §§ 279-386, 498-503, 656, 660, 668; Dec. Dig. §§ 58-67, 85; 1 Cyc. 1026-1082, 1147-1149; 1 A. & E. Enc. L. (2ed.) 796.

90. Omodt v. Chicago, etc., R. Co., 106 Minn. 205, 118 NW 798. The intention with which possession is taken or held is a material factor in determining whether it is adverse and there must be an intention to claim title as owner, in derogation of the rights of the true owner. Kirby v. Kirby, 236 Ill. 255, 86 NE 259. To be adverse, possession must operate to disseise or oust some other person of his possession or right of possession. Lecroix v. Malone [Ala.] 47 S 725. Possession accompanied by usual acts of ownership is **presumed adverse** until shown to be subservient to title of another. Criswell v. Noble, 61 Misc. 483, 113 NYS 954. When physical possession has existed for statutory period, law supplies hostility and adverse intention subject only to qualification that possession was not in fact derivative from and subordinate to true title. Illinois Steel Co. v. Paczocha [Wis.] 119 NW 550. Actual, open, notorious and exclusive possession for 20 years reasonably sufficient to attract attention of owner as to invasion of his rights held "adverse." Id. In absence of evidence expressly or impliedly evincing hostile possession, presumption is that possession is in subordination to legal title. Lecroix v. Malone [Ala.] 47 S 725. Hostility may be **inferred from making of permanent improvement** or other acts indicating claim of ownership. Pioneer Investment & Trust Co. v. Salt Lake City Board of Education [Utah] 99 P 150. **Use of water** is not adverse until it becomes hostile to another's rights and interferes therewith so as to give injured person a cause of action. Davis v. Chamberlain [Or.] 98 P 154. Where prima facie claim to water is shown by adverse user for required time, onus of contesting such claim is fully carried by proof that within statutory period shortage in supply below adverse claimant did not substantially prejudice interests of other appropriators from same source. Hough v. Porter [Or.] 98 P 1083. Use of water held adverse so as to give title where continuous for 12 or 15 years and known to owner who did not consent thereto. Davis v. Chamberlain [Or.] 98 P 154. In prosecution for **obstructing highway,** defendant's requested instruction justifying his act by adverse possession held not justified by evidence, paper title being in defendant, and it being necessary that evidence show that public had acquired easement and that defendant thereafter occupied adversely. Neale v. State [Wis.] 120 NW 345. Possession not adverse where lot owner enclosed with lots **part of streets not then needed by public,** property being taxed as lots, and, aside from possession and use of whole tract for agriculture, there was nothing to show hostility to public or reason to suppose demand of public for opening streets when needed would not be respected. McClenehan v. Jesup [Iowa] 120 NW 74. Adverse possession does not run against a city in respect to a **street until it has been laid out** or dedicated to public use. Perry v. Ball [Tex. Civ. App.] 113 SW 588. Use for agricultural purposes such as grazing and cultivation by adjoining landowners of otherwise unused and unfenced **parts of right of way of a railroad** company is not inconsistent with or adverse to easement. Moran v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 192. **Husband's possession** is not adverse to wife. Watkins v. Watkins [Tex. Civ. App.] 119 SW 145. A husband cannot hold adversely to his wife's premises of which they are in joint occupancy as a family so as to pre-

verse holding must be filed.[91] A possession which is either merely permissive [92] or otherwise subordinate to the true title [93] such as possession under a lease,[94]

scribe against the wife under a void deed of bargain and sale from her. Carpenter v. Booker, 131 Ga. 546, 62 SE 983. One entitled to homestead and dower in his wife's land and whose children were owners of fee, and consequently was entitled to reside on land must do acts of most unequivocal character to obtain title by adverse possession. Kirby v. Kirby, 236 Ill. 255, 86 NE 259. In absence of clear and positive proof to contrary, in view of relationship of parties, possession of father will be held permissive rather than adverse. Id. Possession of **purchaser of a husband's curtesy rights** held not adverse to children inheriting subject to husband's curtesy. Kohle v. Hobson, 215 Mo. 213, 114 SW 952. **Possession of a widow** merely as widow and without adverse claim against husband's children, and of third person who took subject to widow's claim and acted as her agent, held not adverse to husband's heirs. Lindsey's Devisee v. Smith [Ky.] 114 SW 779. One claiming land as wife of a grantee does not have adverse possession as against grantee or his representatives. Hayworth v. Williams [Tex.] 116 SW 43. Where widow and son exchanged a homestead for other property and widow took possession of property received in exchange and expressly notified son of her repudiation of son's claim thereto, paid taxes, etc., for five years, fact that she occupied land as her homestead did not prevent statutory bar. Williamson v. Williamson [Tex. Civ. App.] 116 SW 370. **Son continuing at home** making home for his mother after death of father and moving away of other children held not to acquire title by adverse possession, his acts in making improvements and listing property for taxaton not being inconsistent with tenancy in common and a settlement and division between the brothers not including the farm though one of the brothers testified that it was understood defendant should have it for caring for the mother. Frye v. Gullion [Iowa] 121 NW 563. That community property was inventoried as estate of testator held not inconsistent with adverse character of possession of **testator's devisee,** as against half interest of testator's wife. Frey v. Meyers [Tex. Civ. App.] 113 SW 592. **Possession of servant** occupying master's house free of rent for better performance of services is not adverse to master. MacKenzie v. Minis [Ga.] 63 SE 900. Mortgagor held entitled to sue to redeem though **mortgagee** had been in possession for over 20 years, his possession not having been "adverse" in the ordinary sense as contemplated by Code Civ. Proc. § 379. Becker v. McCrea, 193 N. Y. 423, 86 NE 463. Where **foreclosure purchaser** did not know of outstanding title of heirs, and never recognized it, his possession was sufficiently adverse to start statute against heirs. Schlarb v. Castaing, 50 Wash. 331, 97 P 289. Entry by one who has given warranty deed held **ouster of grantee** where made under deed from third person, so as to start statute against him. Chatham v. Lansford, 149 N. C. 363, 63 SE 81. Entry presumed under second deed to grantor. Id. Burden on defendant to show hostile character of **possession** of strip **beyond true boundary.** Walker v. Wyman [Ala.] 47 S 1011. Evidence insufficient. Id. **Evidence held sufficient** to establish prima facie case of hostile possession. Parker v. Case [Mich.] 15 Det. Leg. N. 1122, 119 NW 1081.

91. Under Code 1896, §§ 1541, 1546, one claiming adversely without color of title must file declaration that his possession is adverse. Walker v. Wyman [Ala.] 47 S 1011. Code 1896, § 1541, requiring persons entering without color of title or bona fide claim of inheritance or of purchase to file declaration of his claim with judge of probate, held not applicable where one enters under bona fide contract of purchase or where title had already ripened in predecessor before statute became effective. Roe v. Doe [Ala.] 48 S 1033. No right to maintain water pipes in street could be acquired by time, no notice of adverse holding having been given as provided by St. 1909, § 2546, requiring notice to municipalities of adverse character of possessions of streets, public easements, etc., before running of limitations. Kevil v. Princeton [Ky.] 118 SW 363.

92. Occupation of passageway having its origin in permission expressly subject to existing rights of passage is not adverse. Flagg v. Phillips, 201 Mass. 216, 67 NE 598. Occupants of a shack, near railroad company's roundhouse held mere squatters whose possession was permissive, they having no deed and paying no taxes, one of them being an old employe of company and it having no use for premises. Northern Pac. R. Co. v. Devine [Wash.] 101 P 841. Question whether possession was adverse or permissive is one of fact. Carroll v. Rabberman, 240 Ill. 450, 88 NE 995. Evidence held to show possession was permissive so as not to ripen into title without notice to owner. Lecroix v. Malone [Ala.] 47 S 725. Instructions on law of mere permissive occupation up to a certain line held proper. Carroll v. Rabberman, 240 Ill. 450, 88 NE 995.

93. Plaintiff suing for damages to his building held to rely on hostile ownership and possession and not on possession subordinate to true owner. Chaves v. Torlina [N. M.] 99 P 690. Provision in act giving escheated property to plaintiff, that nothing therein should affect the rights of any heir, held not to preclude plaintiff from acquiring prescriptive title. Criswell v. Noble, 61 Misc. 483, 113 NYS 954. Riparian owner or his licensee maintaining a boom in a navigable river is presumed to do so under riparian rights and not under claim of ownership of bed of stream, and limitations will not run against state until after unqualified assertion of ownership of bed and notice thereof to state. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132. Person constructing boom under license from riparian owner held to have acquired

mortgage,[95] contract of sale,[96] or other agreement,[97] is not adverse. A possession commenced in subordination of the true title is presumed to continue subservient[98] and does not become hostile until notice to the owner by unequivocal act.[99]

no title by prescription though claiming to own the boom, there having been no claim of ownership of fee to bed of stream. Id.

94. Continuity of possession of a passageway held broken where claimant for part of period held servient estate as tenant of owner, his possession and user being that of landlord and could not be adverse. Sassman v. Collins [Tex. Civ. App.] 115 SW 337. Evidence insufficient to show possession was hostile, occupant holding under lease. Jones v. California & O. Land Co. [Or.] 97 P 625. Where lease for 999 years, excepting and reserving minerals with right to mine without liability for injury to surface, was duly recorded, person taking adverse possession of surface thereafter and continuing same for 21 years acquired title of estate for years only, and hence had no right, as owner, to surface support against lessor who had right to mine, ouster of lessee being insufficient to start statute against owner in absence of forfeiture of lease. St. Vincent's Roman Catholic Congregation v. Kingston Coal Co., 221 Pa. 349, 70 A 838. Possession held adverse not to lessor, but to lessee, though latter did not take possession, recording being equivalent to entry into possession so as to vest lessee with estate for years. Id. One asserting title by adverse possession thereby disclaims holding as tenant or licensee. Chaves v. Torlina [N. M.] 99 P 690. Good faith not being an essential element of adverse possession under St. 1898, § 4211, declaring that one who takes possession under a written instrument exclusive of any other right, shall be an adverse possessor, a purchaser from a tenant without notice of the tenancy, who takes and remains in possession for 10 years as exclusive owner acquires title despite § 4216, providing that whenever the relation of landlord and tenant shall have existed tenant's possession shall be deemed landlord's until 10 years after tenancy. Illinois Steel Co. v. Budzisz [Wis.] 119 NW 935. Acts 1884, p. 670, c. 502 (Code Pub. Gen. Laws 1904, art. 53, § 26), barring a landlord's claim to ground rents or reversion on failure to make demand for such rents for 20 years held not only to bar the rent but also to extinguish the reversionary interest and cast on tenant fee simple title. Safe Deposit & Trust Co. v. Marburg [Md.] 72 A 839. Act constitutional. Id. **For further discussion** of adverse possession of tenant against landlord, see 12 L. R. A. (N. S.) 1148, and post, this section, on subject of renunciation and repudiation of subservience to owner. See, also, note, 11 C. L. 46.

95. Mortgagee in possession cannot as such acquire title by his occupancy. Becker v. McCrea, 193 N. Y. 423, 86 NE 463. Purchaser at void foreclosure sale held to take possession adversely and not as mortgagee in possession, so as to start Missouri statute. Clapp v. Leavens [C. C. A.] 164 F 318.

96. Possession of purchaser under contract of sale is not adverse to vendor in absence of repudiation of his title. Tipton v. Tipton [Tex. Civ. App.] 118 SW 842. Where one takes possession of land in contemplation of thereafter receiving conveyance, his possession is not adverse without notice to the owner (Robinson v. Huffman [Ky.] 113 SW 458), otherwise if there is an absolute verbal gift followed by possession (Id.). Daughter entering on land under oral gift from father and, with husband, living there for 40 years, held to have acquired title. Id. While vendee in possession under executory contract of sale cannot deny title of his vendor (Cassin v. Nicholson, 154 Cal. 497, 98 P 190), after contract is executed so far as he is concerned, he may assert adverse possession against all the world including vendor (Id.). Purchaser in possession under executory contract of sale held a mere tenant at sufferance in whose favor limitations would not run against vendor. Glenn v. Rhine [Tex. Civ. App.] 115 SW 91.

97. Possession under agreement to pay notes before vesting of title is not adverse to vendor or latter's vendee by subsequent deed. Rankin v. Dean [Ala.] 47 S 1015. City's maintenance of sewer held none the less adverse against landowner because it began under contract with him, or assumption of existence of such contract where city claimed rights resulting therefrom and from circumstances. Alderman v. New Haven [Conn.] 70 A 626. Claim of city of right to maintain a sewer through land of an individual is effectual to create an adverse holding though foundation thereof was **in equity** based on oral agreement giving right under specified conditions which were complied with. Id.

98. Permissive possession. Flagg v. Phillips, 201 Mass. 216, 87 NE 598; Omodt v. Chicago, etc., R. Co., 106 Minn. 205, 118 NW 798. Rule applied to use of passage under railroad track. Omodt v. Chicago etc., R. Co., 106 Minn. 205, 118 NW 798. Permissive possession, whether expressly so or by implication arising from mistaken holding without intention to claim beyond true line is presumed to continue permissive until notice to holder of legal title of change to hostility. Lecroix v. Malone [Ala.] 47 S 725. Possession under lease is presumed to continue until proof of surrender or repudiation. Jones v. California & O. Land Co. [Or.] 97 P 625.

99. Theory is that owner has by his own fault neglected to assert title against hostile holding for statutory period, and, where entry is not hostile in its inception, he must have notice in order that laches as basis of limitations may be brought home to him. Lecroix v. Malone [Ala.] 47 S 725. Instructions hypothecating one's taking possession as widow and precluding title by adverse possession in absence of notice to heirs that she claimed adversely held unobjectionable. Hays v. Lemoine [Ala.] 47 S 97. Possession by doweress of land belonging to estate of deceased husband though begun in amity with heirs

If a grantor of land continues in possession, he holds either as trustee or tenant of the grantee [1] and only an explicit disclaimer of such relation and notorious assertion of right in himself will suffice to render his possession adverse to the grantee; [2] but a grantor by warranty deed is not estopped from thereafter acquiring title by adverse possession under a deed from a third person.[3] While a mortgagor's retention of possession after foreclosure is usually as quasi tenant of the purchaser and not adverse until some affirmative claim is made by him untagonistic to the purchaser,[4] his possession may be adverse if the mortgagor claims title in himself openly and notoriously.[5] The possession of a tenant in common is not adverse to cotenants until ouster.[6] The statute is not started by the mere accrual

may thereafter become hostile so as to ripen into title. Id. For jury whether widow's possession had become hostile so as to start statute. Id. Where all trustees of an express trust had died so that no one held seisin, a permissive possession could not be made adverse until appointment of new trustees, there being no one to whom notice of change of character of possession could be given. Lecroix v. Malone [Ala.] 47 S 725. For jury whether possession permissive in its inception ever became adverse. Larsen v. Sanzuri [Neb.] 119 NW 661.

Possession of tenant at will is not adverse to owner until after open repudiation of relationship either in terms or by acts necessarily evincing such intention. Original Consol. Min. Co. v. Abbott, 167 F 681. In order that a tenancy at will or at sufferance may become an adverse holding against landlord, disclaimer and disavowal must be brought home to him by clear, positive and distinct notice. Armstrong v. Wilcox [Fla.] 49 S 41. To start limitations tenant must openly and explicitly disclaim any holding under landlord and unreservedly assert title in himself with landlord's express or implied knowledge. Coquille Mill & Mercantile Co. v. Johnson [Or.] 98 P 132. **Tenancy** at will or sufferance **may become adverse** possession against landlord without surrender of possession. Armstrong v. Wilcox [Fla.] 49 S 41. Tenant's possession may become adverse to landlord when tenant without collusion attorns to a third person claiming under adverse title and pays him rent for years without objection of landlord who for that time practically abandons his claim of title, especially where circumstances in addition to open possession naturally tend to give landlord notice. Hanson v. Sommers, 105 Minn. 434, 117 NW 842. Common-law principles of § 4216 of St. 1898, with 10 years' limitation, that neither tenant nor any one claiming under him can claim adversely to landlord, is subordinate to statute rendering actual adverse possession for 10 or 20 years according to circumstances efficient to transfer title. Illinois Steel Co. v. Budzisz [Wis.] 121 NW 362. Under Wisconsin Statutes of 1898, title by adverse possession may be established as follows. (1) Actual possession prima facie proves title in possessor; (2) this is displaced by proof of outstanding legal title; (3) this displaced by actual possession for 10 years under § 4211, or 20 years under § 4213; (4) this displaced under § 4216 by proof of relation of landlord and tenant; (5) this displaced under § 4215 by proof that such relation was superseded by disseisin consisting of tenant's or his grantee's taking possession as owner under such circumstances as to bring home to owner, if he pays reasonable attention to his affairs, knowledge of defiance of his rights. Id. Relation of landlord and tenant may be turned into adverse **possession by grantee of tenant** without termination of such relation by actual surrender to owner. Id. May terminate relation and supersede adverse possession by such acts as will disseise landlord actually or constructively. Id. Wherever grantee of tenant takes possession as owner under such circumstances as to bring home to owner, if he pays reasonable attention to his affairs, knowledge of the defiance of his rights, grantee becomes trespasser (Id.), and desseisin and adverse possession under statute sets in (Id.). If owner permits condition of disseisin to continue for statutory period under § 4215, § 1898, presumption in his favor under § 4210 as holder of legal title, and under § 4216 subordinating tenant's possession to true owner, will be superseded. Id. § 4216 is mere rule of evidence prevailing only till overcome by evidence to contrary. Id. Nature of possession of tenant's grantee is referable to his deed and characteristics of occupancy, not to right of grantor. Id.

1. Spaulding v. Collins, 51 Wash. 488, 99 P 306. Possession of grantor after conveyance presumed not hostile to grantee. Waits v. Moore [Ark.] 115 SW 931.

2. Spaulding v. Collins, 51 Wash. 488, 99 P 306.

3. New title does not inure to benefit of grantee. Chatham v. Lansford, 149 N. C. 363, 63 SE 81.

4, 5. Bosley v. Stewart [Iowa] 117 NW 1103. Evidence held to sustain finding that mortgagors after foreclosure occupied property claiming title long enough to acquire title by adverse possession. Id.

6. See, also, Tenants in Common and Joint Tenants, § 2. Before possession by a tenant in common is adverse, there must be ouster or its equivalent. Sumner v. Hill [Ala.] 47 S 565. Possession of a tenant in common is not adverse to cotenants until renunciation of relation. Baumgarten v. Mitchell [Cal. App.] 101 P 43; Wilson v. Wilson, 11 Ohio C. C. (N. S.) 450. Widow's grantee held to enter under claim of ownership of fee, and not as tenant in common with heirs, claiming only unassigned dower, though widow had no

of an equitable demand [7] though in case of disavowal and renunciation of a trust respecting realty, title by adverse possession may be acquired if the renunciation is accompanied or followed by possession for the statutory period.[8]

That a possession is taken by mistake will not prevent it from being adverse provided the possessor claims the land as his own [9] and who under mistake as to the true boundary takes possession to a certain line and claims it as his own may acquire title,[10] but not one who claims only to the true line wherever it may be.[11] A mistaken recognition of title in the state is not fatal.[12] Ignorance of one's rights in lands adversely held does not prevent the ripening of title in the holder if the means of acquiring knowledge are at hand.[13]

valid deed but only right to dower. Neal v. Davis [Or.] 99 P 69. Limitations held to run against heirs from time of entry. Id. Rehearing denied. Neal v. Davis [Or.] 101 P 212. The commencement and pendency of an action to quiet title against J. D. W. if living, and if dead then against his unknown heirs, was not such notice to the known heirs of J. D. W. who were cotenants of the plaintiff, but had no actual notice of such action, that the plaintiff claimed adversely to their interest in the land, as to make the statute of limitations run against their interest in the land. Wilson v. Wilson, 11 Ohio C. C. (N. S.) 450.

7. Limitations will not run against a cestui que trust in case of breach of trust unless demand can be sued on in court of law. Depue v. Miller [W. Va.] 64 SE 740.

8. Depue v. Miller [W. Va.] 64 SE 740.

9. Wrongful intent to disseise true owner is not essential to render possession adverse. Searles v. De Ladson [Conn.] 70 A 589. Where one enters and takes possession of land as his own and performs acts of ownership, his possession is adverse and a disseisin, it being immaterial that he was mistaken and would not have entered had he known the facts. Id.

10. Where coterminous proprietors agree upon a dividing line and jointly construct a fence thereon followed by occupancy by both up to the fence, possessions are adverse each to the other. Walker v. Whyman [Ala.] 47 S 1011. But where a dividing fence is run beyond true line whether by inadvertance, ignorance or mere convenience and without intention to claim up to it as the dividing line, possesson is not adverse to adjoining proprietor. Id. Where adjoining owner held and asserted possession and title intending to claim to a particular line, his possession was adverse so as to ripen into title. Welle v. Bentley [Ark.] 113 SW 639. That a former owner did not know exact boundaries of tract, held immaterial where he claimed and held the tract as such. Bennetee v. Collins [Tex. Civ. App.] 116 SW 618. If possession was actual and adverse to owner, it is immaterial whether possessor held under mistake as to his right to possession. Williams v. Texas & N. O. R. Co. [Tex. Civ. App.] 114 SW 877. Where grantee took possession regarding side of street as true boundary, remaining in possession openly and notoriously for 14 years claiming such line as true north line, his possession extended to such line and rule, limiting possession to a line wherever it may be where one claims only to the line but makes no claim as to location of line, was inapplicable. In re City of Seattle [Wash.] 100 P 1013.

11. See, also, Boundaries, 11 C. L. 427. Landowner building a fence knowing it is not the true line, but intending when true line is established to conform to it, does not hold adversely as to land beyond true line. Carroll v. Rabberman, 240 Ill. 450, 88 NE 995. Where adjoining landowners suppose a fence to be on true line but claim only to the true line, they are not bound by supposed line but must conform to true line when ascertained. Foard v. McAnnelly, 215 Mo. 371, 114 SW 990. But where one holds possession and claims as owner up to a fence, his possession is adverse though he may believe fence is on true line. Id. Possession held by mistake and without intention to assert title beyond true boundary is not adverse and without more will never ripen into title. Webster v. Shrine Temple Co. [Iowa] 117 NW 665. Mistaken possession of more than deed covered held not adverse. Larsen v. Sanzieri [Neb.] 119 NW 661.

12. Possession may be adverse to true owner though claimant believes land is public domain and intends to buy it from the state. Sellers v. Simpson [Tex. Civ. App.] 115 SW 888. Where one enters on land believing it vacant and intending to acquire title from state and holds and claims against entire world except the state, his possession is adverse and in time ripens into title though land is in fact private property. Hoencke v. Lomax [Tex. Civ. App.] 118 SW 817. One claiming title by adverse possession for ten years against all persons, but recognizing the superior title of the United States and seeking in good faith to acquire that title, may assert such adverse possession against any person claiming as owner under a prior grant. Boe v. Arnold [Or.] 102 P 290. Whatever original character of entry on land with intent to acquire title from state, possession may subsequently become adverse as against individual owner. Hoencke v. Lomax [Tex.] 119 SW 842. Whether plaintiff's orignal entry was with intent to preempt the land held immaterial, his right to recover being dependent on his having acquired title by adverse possession since his return to the land after dispossession in forcible entry. Louisiana & T. Lumber Co. v. Kennedy [Tex. Civ. App.] 119 SW 884. One entering in belief land belongs to government **held to acquire no title** though,

The hostility must continue during the entire statutory period,[14] and any recognition of title in the owner is fatal;[15] but, if the occupant thereafter sets up a new claim of title on a new foundation, his holding may again become adverse.[16] A title which has fully ripened is not effected by subsequent recognition of rights in the prior owner.[17]

§ 6. *Continuity*[18]—See 11 C. L. 48 of possession for the full statutory period is essential.[19] An adverse possession already commenced is not interrupted by death[20]

after discovering mistake, he continued in hostile possession for statutory period. McNaught-Collins Imp. Co. v. May [Wash.] 101 P 237.

13. Appellant's ignorance of their interest held no excuse, deed to their father being of record and they thus having means of acquiring knowledge. Coe v. Sloan [Idaho] 100 P 354.

14. Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574. Where plaintiff's husband entered government land as a homestead and was defeated in a contest with a railroad company, plaintiff's possession during such contest was not adverse. Id.

15. Possession must be hostile and under claim of right without recognition of title in any one but prescriber. Wiggins v. Brewster, 131 Ga. 162, 62 SE 40. Evidence insufficient. Id. Certain conversation as to plaintiff's building encroaching on defendant's land held too casual to suspend adverse possession. Chaves v. Torlina [N. M.] 99 P 690. That before passage of an act giving escheated property to a widow, she requested an heir not to interfere with her and heir replied he would not, so long as she lived, held not a fatal recognition. Criswell v. Noble, 61 Misc. 483, 113 NYS 954. **Taking lease** held abandonment of any claim of lessee to adverse possession. Northern Pac. R. Co. v. George, 51 Wash. 303, 98 P 1126. Evidence sufficient to authorize finding that occupant did not take a lease and thus recognize owner. Illinois Steel Co. v. Paczocha [Wis.] 119 NW 550. Where one is already in possession at time of execution of an instrument not under seal by which he acknowledges himself tenant of another, he is not estopped thereby to set up adverse possession against the other. Lake Shore & M. S. R. Co. v. Johnson [Mich.] 16 Det. Leg. N. 270, 121 NW 267. Recognition of outstanding interest by **division of profits** held interruption of hostility. Paton v. Robinson [Conn.] 71 A 730. Where plaintiff recognized an outstanding interest by division of rents and profits, his possession was not adverse as to such interest. Id. Where wife acted with husband in transaction for purchase of part of land claimed adversely by her, paid money, and wrote letter for husband agreeing to pay balance on **contract of purchase**, such conduct as effectively limited her claim to adverse possession as husband's though she did not sign contract. Morgan v. Northern Pac. R. Co., 50 Wash. 480, 97 P 510. Adverse possession of devisees of community property as against widow held not distroyed by **acceptance of deed** from her, it being merely sought to avoid any possible question that might arise because of grantor being testator's widow. Frey v. Meyers [Tex. Civ. App.] 113 SW 592. Possessor's acceptance of deeds under which he entered held not recognition of company's rights "except that part upon which track of railroad is laid." St. Louis & S. F. R. Co. v. Ruttan [Ark.] 118 SW 705. That on settlement of suit to quiet title defendant accepted from plaintiff a conveyance of lands not embraced in the suit, held not necessarily a recognition of plaintiff's title so as to deprive defendant of benefit of adverse possession of such lands. Price v. Greer [Ark.] 116 SW 676. Adverse possession not stopped by possessor taking deed from one other than plaintiff who claimed part of tract in dispute. Bryant v. Prewitt [Ky.] 117 SW 343. Where person in possession **disclaimed title** before statute had run, his possession was not thereafter adverse or under color of title. McBurney v. Glenmary Coal & Coke Co. [Tenn.] 118 SW 694.

16. Criswell v. Noble, 61 Misc. 483, 113 NYS 954.

17. Held unaffected by negotiations for purpose of quieting title. Stiles v. Granger [N. D.] 117 NW 777. Acts in recognition of title in original owner after seven years occupancy and payment of taxes held important only as showing character of prior possession. Price v. Greer [Ark.] 118 SW 1009. Taking of leases of water rights held not to divest title already acquired by prescription. Strong v. Baldwin 154 Cal. 150, 97 P 178.

18. Search Note: See notes in 7 C. L. 49. See, also, Adverse Possession, Cent. Dig. §§ 226-278; Dec. Dig. §§ 44-57; 1 Cyc. 1000, 1009-1024, 1146, 1148; 1 A. & E. Enc. L. (2ed.) 834.

19. Possession must be continuous and uninterrupted. Horn v. Bates [Ky.] 114 SW 763. Possession must be not only adverse and peaceable but continuous for 10 years. Louisiana & T. Lumber Co. v. Kennedy [Tex. Civ. App.] 119 SW 884. Interruption by writ of possession under which owner took possession held fatal to claimant's title though claimant regained possession. Riley v. Roach [Ky.] 118 SW 321. Running of statute held not interrupted by foreclosure of tax lien and plaintiff's purchase thereunder. Sellers v. Simpson [Tex. Civ. App.] 115 SW 888. Evidence insufficient to show continuous adverse possession. Dunn v. Taylor [Tex.] 113 SW 265. For jury whether defendant's possession of a coal mine had been continuous. Gordon v. Park [Mo.] 117 SW 1163.

20. Where adverse possession commences before owner's death, running of statute will not be interrupted by such death or infancy of heirs. Lewine v. Gerardo, 60 Misc. 261, 112 NYS 192. Minority of heirs held not to check statute, ancestor being alive when adverse possession began.

or coverture [21] of the owner. A landlord's possession is not interrupted by removal of his tenant if within a reasonable time the landlord reenters or places another tenant in possession.[22] The court will not assume that admitted breaks in the continuity of possession by successive occupants were of such short duration as to be immaterial.[23]

Tacking. See 11 C. L. 48—Where claimant relies on the possessions of successsive occupants, he must show that the occupancy was continuous.[24] Privity is a condition precedent to the tacking of possessions.[25] Privity between successive occupants has relation merely to physical possession independently of any claim of title or attempted transfer thereof,[26] the only qualification to the possession being that it must be such as to exclude the true owner.[27] Privity exists between an occupant and members of his family continuing to occupy after his death,[28] and a life tenant's possession may be tacked to his grantor's for the benefit of remaindermen.[29] Constructive and actual possessions may be tacked in proper cases.[30] A permissive pos-

Armstrong v. Wilcox [Fla.] 49 S 41. See, also, Real Property, 12 C. L. 1623; Limitations of Actions, 12 C. L. 609. Adverse possession of husband's community interest begun in 1878, held to continue to run unaffected by his death. Appel v. Childress [Tex. Civ. App.] 116 SW 129.

21. Coverture after commencement of running of statute will not interrupt it. Hoencke v. Lomax [Tex. Civ. App.] 118 SW 817.

22. Mahoney v. Southern R. Co. [S. C.] 64 SE 228. Uses to which land was put may be considered in determining whether intervals between occupancies were reasonably required for change of tenants. Dunn v. Taylor [Tex.] 113 SW 265. Breaks of four, five, six or 12 months held too great to be disregarded as reasonable times allowed for changes of occupancies. Id.

23. Claimant must show facts from which conclusion of continuity may be affirmatively deduced. Dunn v. Taylor [Tex.] 113 SW 265.

24. Dunn v. Taylor [Tex.] 113 SW 265. Mere evidence that certain persons had applied to witness for permission to occupy the premises during intervals between proven occupancies and tenancies held insufficient to establish fact of possession. Id. Mere proof that tract had been occupied by several persons during 10 years held insufficient without connecting possession of the occupants. Chicago, etc., R. Co. v. Erskine [Neb.] 118 NW 1098.

25. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358. No privity between grantees in separate grants of land and of timber. Id. Failure to prove privity between successive possessors held fatal to title by adverse possession. Moore v. Loggins [Tex. Civ. App.] 114 SW 183. On question of plaintiff's right to maintain a water pipe line, plaintiff held in privity with his predecessor though latter had conveyed premises in trust to secure a debt, where he retained possession and use of property, and owned entire beneficial interest therein. Collins v. Gray, 154 Cal. 131, 97 P 142. Evidence held to show privity of estate between successive wrongful holders requisite to allowance of privilege of tacking. Hanson v. Sommers, 105 Minn. 434, 117 NW 842.

26. Illinois Steel Co. v. Paczocha [Wis.] 119 NW 550. Possession and voluntary transfer thereof are physical facts provable by eye or ear witnesses or any other evidentiary fact or conduct. Id.

27. If possessions join by delivery from predecessor to successor, owner cannot become seised, but after 20 years becomes barred by § 4207 St. 1898, irrespective of § 4215, barring action to recover the land by 10 years' possession under §§ 4211, 4212, or 20 years under §§ 4213, 4214. Illinois Steel Co. v. Paczocha [Wis.] 119 NW 550. Only essential to transfer is that predecessor passes possession to successor by mutual consent as distinguished from abandoning possession generally and another entering without relation to him. Id. Evidence held to sustain finding of privity. Id.

28. Illinois Steel Co. v. Paczocha [Wis.] 119 NW 550. Possession of ancestor and heir may be tacked to show 20 years' possession so as to raise presumption of a grant or 10 years' possession essential to title by adverse possession. Bardin v. Commercial Inurance & Trust Co. [S. C.] 64 SE 165.

29. Where a grantor had been in adverse possession and conveyed to his daughter for life remainder to daughter's heirs, daughter's possession inured to benefit of her heirs. Charles v. Pickens, 214 Mo. 212, 112 SW 551.

30. Vendor's possession for mere grazing of land in a larger enclosure, but with vendee's right to segregate and forbid grazing any time, held constructive possession of vendee and not an adverse possession by vendor, allowing tacking thereof onto vendor's prior actual possession. Files v. Railroad Lands Co. [La.] 48 S 763. Under Act March 18, 1899, providing that unimproved and uninclosed land shall be deemed in possession of person who pays taxes, under color of title, one who pays taxes under color can subsequently take actual possession and tack it to his previous constructive possession (King v. Campbell [Ark.] 116 SW 899); but his actual possession must be open, notorious, and adverse, and he must either have color of title or take actual possession of entire tract (Id.), and there must be no break in either the constructive or the actual possession (Id.). Possession of part of tract under mere oral agreement to sell held not tackable. Id.

session cannot be tacked [31] nor the rights of a mere squatter who had abandoned the land.[32]

§ 7. *Duration.*[33]—See 11 C. L. 49—The possession must continue for the full statutory period,[34] the duration varying in the different states.[35] The period begins only when possession is taken [36] and the commencement of an action to recover the land arrests the statute.[37]

§ 8. *Color of title* [38]—See 11 C. L. 49 is essential under the statutes and holdings of some states.[39] It is a technical term, meaning that which is title in appearance but not in fact.[40] To constitute color, the title claimed must be founded on some

31. Prior possession of tenant at will who recognized rights of owner. Original Consol. Min. Co. v. Abbott, 167 F 681.

32. Right of appropriator of water cannot be tacked to that of mere squatter on public lands who had abandoned them (Hough v. Porter [Or.] 98 P 1083); but squatter may even by parol transfer his claim and interest whatever it may be, and rights of transferee may relate back to first appropriation (Id.).

33. **Search Note:** See Adverse Possession, Cent. Dig. §§ 148-225, 271; Dec. Dig. §§ 39-43, 54; 1 Cyc. 1001-1009, 1023, 1024; 1 A. & E. Enc. L. (2ed.) 834.

34. Claimant must show that for full statutory period occupancy was continuous, uninterrupted and adverse. Stone v. Perkins, 217 Mo. 586, 117 SW 717. Where required period was 15 years but after 11 years plaintiff recognized an outstanding interest by dividing profits, his occupation was not sufficiently long. Paton v. Robinson [Conn.] 71 A 730. Evidence held not sufficient to show actual and exclusive possession for full period of 10 years. Butler v. Smith [Neb.] 120 NW 1106.

35. Eight years' actual possession insufficient. Hamilton v. Steele [Ky.] 117 SW 378. Thirteen years insufficient under 15-year statute. Vermillion v. Nickell [Ky.] 114 SW 270. Possession since 1890 held insufficient in point of time. Webber v. Gillies, 112 NYS 397. Possessions when tacked held insufficient. Kahrman v. Pennsylvania R. Co. [N. J. Law] 69 A 977.

36. Under tax deed limitations run only from date of possession under deed. Yellow Poplar Lumber Co. v. Thompson's Heirs 108 Va. 612, 62 SE 358.

37. Date of filing of complaint marks commencement of action. Lara v. Sandell [Wash.] 100 P 166. Service of summons in ejectment held to arrest statute though form of action was subsequently changed to suit to redeem. Butler v. Smith [Neb.] 120 NW 1106. Commencement of suit before payment of taxes for seven successive years held to break constructive possession of unimproved land created by payment of taxes thereon. Sibly v. England [Ark.] 119 SW 820. Judgment for recovery of land by tenant in common arrests statute in favor of cotenants not suing from time action was commenced. Cassin v. Nicholson, 154 Cal. 497, 98 P 190.

38. **Search Note:** See notes in 5 C. L. 53; 11 Id. 50, 51; 4 L. R. A. (N. S.) 776; 11 Id 772; 13 Id. 627; 15 Id. 1178; 83 A. S. R. 701; 1 Ann. Cas. 761.

See, also, Adverse Possession, Cent. Dig. §§ 65, 66, 387-503, 656, 600, 668; Dec. Dig. §§ 12, 68-85; 1 Cyc. 1055, 1082-1105, 1131-1133, 1147-1149; 1 A. & E. Enc. L. (2 ed.) 846.

39. Naked trespasser measuring off 160 acres of land and claiming and occupying it for statutory period may acquire title. Texas & N. O. R. Co. v. Broom [Tex. Civ. App.] 114 SW 655. Either actual or constructive occupancy under color of title must be shown. Baker v. Thompson, 214 Mo. 500, 114 SW 497. A widow in possession even without muniment of title may acquire title by prescription adverse to heirs, if her occupancy is open, notorious, visible, and accompanied by acts unequivocally conveying to heirs information that she is holding in defiance of their title instead of insubordination to them. Creswell v. Noble, 61 Misc. 483, 113 NYS 954. Statute of limitations, § 6, requires possession under claim or color of title made in good faith, for seven successive years; but while good faith is essential element of title, holder need not be ignorant of fact that someone else claims title through another source but only that his title from whatever source obtained has been obtained in good faith. Kirby v. Kirby, 236 Ill. 255, 86 NE 259. To acquire title by adverse possession, it is not necessary that the possession and claim of ownership be made under any muniment of title, but there must be a claim of ownership and such acts under possession as show that the party in possession in fact claimed title to the land. Id. Proof of deed from husband and wife to another altered and re-recorded after death of wife so as to correct description which for certain reasons failed to convey title, grantee later redeeming to husband only after wife's death held insufficient to establish title to adverse possession against children. Id. Section 73, of general tax law (Comp. Laws, § 389) entitling tax purchaser to possession and giving him title after five years' adverse holding held reversed by implication by Pub. Acts 1897, p. 296, Act No. 229, § 142, prohibiting purchaser from taking possession until after six months from giving notice to parties in interest; hence one going into possession under invalid tax title without giving any notice enters unlawfully and **does not acquire title** by adverse possession. Cook Land, Construction & Producing Co. v. McDonald [Mich.] 15 Det. Leg. N. 953, 118 NW 959.

40. United States v. Casterlin, 164 F 437; Whitney Lumber & Grain Co. v. Crabtree [C. C. A.] 166 F 738. Color is any writing purporting to convey title by appropriate words and describing land. Dunnington v. Hudson, 217 Mo. 93, 116 SW 1083.

written instrument, proceeding or law purporting to transfer title or the right to possession;[41] but a deed need not necessarily be executed to the occupant, provided

Verbal agreement to sell held not color. King v. Campbell [Ark.] 116 SW 899. Possession under **parol gift** is adverse to donor and if continued for 15 years establishes title as against him and all claiming under him. New Haven Trust Co. v. Camp [Conn.] 71 A 788. 20 years' possession under oral gift held to give title. Grimes v. Bryan 149 N. C. 248, 63 SE 106.

Tax deed regular on face but based on void assessment is sufficient color under statute 1906 § 591, quieting tax titles after four years' possession by purchaser. Florida Finance Co. v. Sheffield [Fla.] 48 S 42. Void tax deed sufficient color. Lara v. Sandell [Wash.] 100 P 166. Invalid tax deed held adequate as foundation for title under Rev. Codes 1905, § 4928, relating to possession and payment of taxes for 10 years. Stiles v. Granger [N. D.] 117 NW 777. Tax deed executed on sale after prior tax sale sufficient. Demmington v. Hudson, 217 Mo. 93, 116 SW 1083. Duly recorded and regular tax deed held sufficient under five-year statute. Callen v. Collins [Tex. Civ. App.] 120 SW 546. Tax deed held color of title under seven-year statute Hurd's Rev. St. 1908, c. 83, § 6. Illinois Cent. R. v. Cavins, 238 Ill. 380, 87 NE 371. Void tax deed sufficient if property can be identified from description. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358. **Defectively acknowledged tax deed** as color see 11 L. R. A. (N. S.) 780.

Deed held color not being a mere quitclaim. McBride v. Caldwell [Iowa] 119 NW 741. Deed from divorced wife who had legal title and power to convey subject to homestead held abundant color regardless of validity of divorce decree. Donnelly v. Tregaskis, 154 Cal. 261, 97 P 421. Grantee in possession believing he is owner of land conveyed holds under color of title. In re City of Seattle [Wash.] 100 P 1013. One in actual possession under void grant describing land in controversy may hold and prescribe under 10-year statute to extent of boundaries of grant if he asserts possession thereunder. Harris v. Iglehart [Tex. Civ. App.] 113 SW 170. Deed by widow owning only half interest, purporting to convey entire title **held to give color.** Coe v. Sloan [Idaho] 100 P 354. Under three-years statute, married woman's deed not properly acknowledged. Veeder v. Gilmer [Tex. Civ. App.] 120 SW 584. Deed not void on face but referring as part of description to another deed void on face. Works v. United Globe Mines [Ariz.] 100 P 813. Deed from third person, taken by one who has already given deed of warranty. Chatham v. Lansford, 149 N. C. 363, 63 SE 81. Deed may be color though not signed by all owners of the land. Hansen v. Owens [Ga.] 64 SE 800. Deed of persons purporting to convey as heirs of a decedent held not on face to indicate conveyance of less than whole tract. Id. A husband cannot claim benefit of **deed to wife as color,** as against wife and those claiming under her. Poole v. Oliver [Ark.] 117 SW 747. **Executor's deed** held color without production of order of sale or will conferring power to sell. Dodge v. Cowart, 131 Ga. 549, 62 SE 987. **Administrator's deed** selling homestead for debts held color. Steinberg v. Salzman [Wis.] 120 NW 1005.

Sheriff's certificate of foreclosure sale held color. Goetter v. Moore [Wash.] 101 P 365. Certificate of foreclosure sale and sheriff's deed delivered under order of confirmation held color. Johnson v. Bartlett, 50 Wash. 114, 96 P 833.

Decree of partition. Carpenter v. Fletcher, 239 Ill. 440, 88 NE 162. **Report of commissioners** in partition found among an allottee's papers and restored to records on proof of its genuineness held properly admitted to show color of title. Hill v. Lane, 149 N. C. 267, 62 SE 1074.

Will held sufficient color. Daniels v. Dingman [Iowa] 118 NW 373.

Order or decree: Under Laws 1893, p. 20, c. 11, § 1, requiring adverse possessor to have connected title from some person authorized to sell land under order or decree of court, sale is "authorized" when directed by order or decree valid on face, order valid both against collateral and direct attack not being essential to color. Schlarb v. Castaing, 50 Wash. 331, 97 P 289. Order of court apparently determining rights of parties is "judgment or decree" whether valid, voidable, or void. Id. Under Limitation Act, § 4 (Hurd's Rev. St. 1898, c. 83) barring action after seven years' possesion under decree of court, mere color of title is not sufficient, a prima facie title being required. Carpenter v. Fletcher, 239 Ill. 440, 88 NE 162. Possession under decree assigning dower in partition suit in which certain persons were not parties and hence not bound held not prima facie title so as to bar them. Id.

41. United States v. Casterlin, 164 F 437; Matthews v. Tennessee Coal, Iron & R. Co. [Ala] 47 S 78. Receipt not purporting to convey lands described could not be looked to for purpose of extending one's possession to boundaries of lands described. Id. One claiming under three or five-year statute must show deed embracing land within its calls. Lake v. Earnest [Tex. Civ. App.] 116 SW 865. One claiming under deeds calling for connection 950 varas from corner of a survey held to have neither title nor color of title under 3 year statute. McCaleb v. Campbell [Tex. Civ. App.] 116 SW 111. Mistake in description held not fatal to color where obvious, and where what was intended to be conveyed was clear. Moore v. Loggins [Tex. Civ. App.] 114 SW 183. Deed of quarter section held not color beyond the quarter and up to path to which claimant had cultivated. Walker v. Wyman [Ala.] 47 S 1011. Deed held to so exclude land in controversy as not to be color of title. McGraw v. Crosby, 129 Ga. 780, 59 SE 898. Report of appraisers and judgment setting aside years' support to widow held insufficient as color description of land being defective. Hawes v. Elam, 131 Ga. 323, 62 SE 227. Possession of one who claimed solely under a will which did not in fact embrace the land in

it is for his benefit,[42] and an instrument may be color of title though absolutely void.[43] Under some statutes deeds must be recorded or registered in order to constitute color of title.[44] A grantee's possession is presumptively referable to his deed.[45] The construction of deeds as the basis of adverse possession is for the court and not for the jury.[46]

§ 9. *Payment of taxes.*[47]—See 11 C. L. 51—Under statutes making the payment of taxes an element of adverse possession,[48] claimant must have paid the taxes[49] for

dispute held insufficient to give title. Baker v. Thompson, 214 Mo. 500, 114 SW 497.

42. Divorced wife could claim benefit of prior joint possession under tax deed to husband. Callen v. Collins [Tex. Civ. App.] 120 SW 546. Though divorce and unexecuted order for partition prevented title to whole tract from vesting in community by adverse possession, wife acquired title to half. Id. An instrument must purport to convey the title to the claimant or those with whom he is in privity. Howell v. Henry [Ala.] 47 S 132.

43. Instrument regular on face is sufficient. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358. Deed may be sufficient as color though actually conveying nothing. Criswell v. Noble, 61 Misc. 483, 113 NYS 954. Deed from wife to husband, though void. Atlantic Coast Line R. Co. v. Williams, 5 Ga. App. 647, 63 SE 671. Where deed described lands entered on by purchaser, possession was adverse under color however groundless the title. Green v. Horn, 128 App. Div. 686, 112 NYS 993. Where purchaser under guardian's sale went into possession in good faith under deed and claim of right and title and he and grantees maintained possesion and paid taxes continuously for 25 years, grantees became owners to extent of paper title though guardian's deed was void. Hamilton v. Witner, 50 Wash. 689, 97 P 1084. Adverse possession under boundary line agreement held conclusive on occupants and privies where continued for 15 years regardless of validity of such agreement. Warden v. Addington [Ky.] 115 SW 241.

Held not color: Void link in chain of title held fatal to color under three-year statute. Wall v. Lubbock [Tex. Civ. App.] 118 SW 886. **Patent** issued on location and survey made subsequent to valid and subsisting survey and appropriating of same land held void and insufficient as color under three-year statute. Keith v. Guedry [Tex. Civ. App.] 114 SW 392. Purported state **sale of school land** while another valid sale is in force held not color under three-year statute. Pohle v. Robertson [Tex.] 115 SW 1166.

44. Where registration was void for insufficient ackuowledgment, deed was insufficient as color under Act Feb. 13, 1895 (Laws 1895, p. 54, c. 38) requiring registration as prerequisite to color. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930. Under Acts 1895, p. 54, c. 38 (Shannon's Code § 4456) requiring registration of deeds under which possession for seven years is held, registration of deeds with defective certificates of acknowledgment is insufficient. Byrd v. Phillips [Tenn.] 111 SW 1109. Deed by foreign corporation doing business in Texas executed over its corporate seal and signed and acknowledged by two directors, when recorded, held a "deed duly registered" under five-year limitation statute of Texas, so as to constitute a sufficient foundation for proof under said statute in trespass to try title. Chambliss v. Simmons [C. C. A.] 165 F 419. Possession after record of a deed held not connectable with possession before deed was recorded so as to establish title under five-year statute. Dunn v. Taylor [Tex.] 113 SW 265. Under five-year statute, not only must deed be properly acknowledged and certified for record, but record must show such fact. Callen v. Collins [Tex. Civ. App.] 120 SW 546. Insufficient where certificate of acknowledgment as shown on record was defective though deed was in fact properly acknowledged. Id. Waiving consideration as to effect of Code 1895, on necessity of recording deed as to constructive possession in case of a deed executed prior thereto, record was not necessary to constitute color of title so that possession of part of tract described would include all. Dodge v. Cowart, 131 Ga. 549, 62 SE 987.

45. McBride v. Caldwell [Iowa] 119 NW 741.

46. Fuelling v. Fuesse [Ind. App.] 87 NE 700.

47. **Search Note:** See Adverse Possession, Cent. Dig. §§ 504-532; Dec. Dig. §§ 86-95; 1 Cyc. 1106-1111; 1 A. & E. Enc. L. (2ed.) 831.

48. Payment of taxes necessary under five year statute Rev. St. 1887, § 4043. Swank v. Sweetwater Irr. & P. Co., 15 Idaho, 353, 98 P 297. Adverse claimant must prove and court must find payment of taxes for five years continuously or that property was exempt or has never been assessed. Id. 1878 amendment to Code Civ. Proc. § 325, making payment of taxes an element of adverse possession, held inapplicable to title acquired prior thereto. Strong v. Baldwin, 154 Cal. 150, 97 P 178.

49. Five and ten year statute inapplicable where possessor had neither paid taxes nor set up any claim to the land Watkins v. Watkins [Tex. Civ. App.] 119 SW 145. Purchaser at tax sale may stop limitations by subsequent payment of taxes. Dunnington v. Hudson, 217 Mo. 93, 116 SW 1083. Title under five-year statute held not maintainable where for some of the years taxes were paid on some undefined part of land claimed under the deed. Hoencke v. Lomax [Tex.] 119 SW 842. Where by mistake or oversight of appellant's agent, and contrary to instructions, agent purchased the land at tax sale instead of paying taxes in usual manner, and appellant paid all subsequent taxes and did not procure tax certificate, purchase was void and operated as **"pay-**

the time and in the manner prescribed thereby,[50] and the fact that he is prevented from so doing is no excuse.[51] Payment of taxes alone without possession or color of title is not sufficient.[52]

§ 10. *Area of possession.*[53]—See 11 C. L. 51—When a possession is without color of title, it extends only to the land actually occupied,[54] in the absence of controlling statute;[55] but actual possession of a part of land claimed under some written in-

ment" of taxes within Codes, § 4928, requiring possession and payment of taxes. Stiles v. Granger [N. D.] 117 NW 777. Payment of tax judgment and costs by purchaser at tax sale **held not payment** of taxes under statute barring title of owner not in possession where he does not pay taxes for 30 years. Dunnington v. Hudson, 217 Mo. 93, 116 SW 1083. Railroad company listing part of a lot not part of its right of way with state board of equalization having no authority to assess same held not to have paid taxes, lot having been assessed as such to owners by local assessor having jurisdiction. Rio Grande Western R. Co. v. Salt Lake Inv. Co. [Utah] 101 P 586. Plaintiff held not entitled to land under Act March 18, 1899, providing that uninclosed and unimproved land shall be deemed in possession of person paying taxes where he has color of title, he and defendant having agreed that plaintiff's agent should pay taxes until plaintiff and defendant adjusted their differences respecting the land. Chatfield v. Iowa & Ark. Land Co. [Ark.] 114 SW 473.

50. Payment of taxes under rendition of different tracts held insufficient under five-year statute. Sharpe v. Kellogg [Tex. Civ. App.] 116 SW 401. Payment of taxes before sale to enforce them is sufficient, though after April 10, when lands become delinquent. Price v. Greer [Ark.] 116 SW 676. Under Kirby's Dig. § 5057 giving title by payment of taxes for seven years provided three payments are made after passage, it is sufficient if three payments are made after passage of the act, though three full years have not expired from first of such payments. Price v. Greer [Ark.] 116 SW 676. Bar complete if seven years have elapsed from date of first payment, if seven payments have been made in succession, three of which were made after passage of statute. Id. Seven years adverse possession and payment of taxes is sufficient under Bal. Ann. Codes & St. § 5503 (Pierce's Code, § 1160), though seven years have not elapsed since first payment of taxes. Lara v. Sandell [Wash.] 100 P 166.

51. Occupation and payment of taxes for four years and offer of occupant to pay for fifth and last year, but **refusal** thereof **by tax collector** because payment had been made by original owner, held not sufficient under Code Civ. Proc. § 325. Glowner v. De Alvarez [Cal. App.] 101 P 432. To acquire title by possession and payment of taxes for 7 years under Hurd's Rev. St. 1908, c. 83, § 6, claimant must pay taxes, and if **land is not subject to taxation** or is not assessed, title cannot be acquired short of 20 years. Illinois Cent. R. Co. v. Cavins, 238 Ill. 380, 87 NE 371.

52. Payment without actual possession insufficient. Scroggins v. Nave [Ky.] 119 SW 158. Payment without possession insufficient under five-year statute. Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602. Where by reason of not having color of title one who has paid taxes on an entire tract recovers only the portion actually occupied, he is entitled to a decree for taxes paid on the portion to which he acquired no title. Langhorst v. Rogers [Ark.] 114 SW 915.

53. Search Note: See notes in 5 C. L. 56; 21 L. R. A. 829.

See, also, Adverse Possession, Cent. Dig. §§ 523-594; Dec. Dig. §§ 96-103; 1 Cyc. 1122-1134; 1 A. & E. Enc. L. (2ed.) 861.

54. Langhorst v. Rogers [Ark.] 114 SW 915; Poole v. Oliver [Ark.] 117 SW 747; King v. Campbell [Ark.] 116 SW 899. Under Rev. St. 1895, art. 3344. Simpson Bank v. Smith [Tex. Civ. App.] 114 SW 445. Entry without color of title on land in actual possession of another held not to oust first possessor except as to land actually inclosed by second. Meade v. Ratliff [Ky.] 118 SW 271. Under rule limiting possession to possesio pedis, unless it is under written color of title, an instrument, to operate as color, must purport to convey title to claimant or those with whom he is in privity. Howell v. Henry [Ala.] 47 S 182. Verbal contract of sale and delivery to vendee of former owner's deed to vendor held insufficient. Id. Where one through mistake includes in an enclosure part of an adjoining tract not intending to claim adversely to true owner, such possession does not extend to portion not enclosed and cannot ripen into title. Holland v. Nance [Tex.] 114 SW 346. Where actual possession remained the same, fact that possessor procured deed to entire tract and placed it on record did not extend possession. Id.

55. Owner of land by merely encroaching on adjoining land can acquire title to no more than he actually occupies (Texas, etc., R. Co. v. Broom [Tex. Civ. App.] 114 SW 655), but if he distinctly designates and measures off adjoining land he may acquire title to tract thus outlined by thereafter claiming the whole and occupying and cultivating part of such tract (Id.). Immaterial lines and corners were not fixed as a surveyor might have fixed them. Id. Rule that person in actual possession of a few acres is entitled under statute to 160 acres applies only where there is assertion and claim to the 160 acres. Williams v. Texas & N. O. R. Co. [Tex. Civ. App.] 114 SW 877. Evidence sufficient to entitle adverse possessor to 160 acres under Rev. St. Tex. 1895, arts. 3343-3349, it being shown among other things he always claimed 160 acres and had tract surveyed 7 or 8 years before suit. Lewis v. Dillingham [C. C. A.] 167 F 779. Evidence held to warrant finding that plaintiff intended to hold adversely 160

strument is in law coextensive with the boundaries therein defined,[56] if the whole is claimed [57] and no one else occupies adversely.[58] Where color of title must be relied on, one cannot prescribe beyond the calls of his grant,[59] and where several tracts are conveyed by a grantor who does not have title to all, actual possession of what the grantor owned will not extend constructively to what he did not own.[60] Where

acres of the land in controversy including improvements. Louisiana & T. Lumber Co. v. Kennedy [Tex. Civ. App.] 119 SW 884. Though defendant showed himself entitled to 160 acres of land by prior occupancy of himself and predecessor and open and notorious claim therefor, he was not entitled to particular tract claimed at trial, his acts and claim of ownership to that particular tract not having subsisted for the requisite length of time. Smith v. Simpson Bank [Tex. Civ. App.] 113 SW 568.

56. Where occupant or those under whom he claims enter into possession under claim of title founded upon some written instrument as being a conveyance of the premises, and there is continuous occupation of some part of the land included in the conveyance, he or they will be deemed to have been in possession of the whole of such premises if not in the adverse possession of any one else. Kingston v. Guck [Mich.] 15 Det. Leg. N. 998, 118 NW 967; Hillman Land & Iron Co. v. Marshall [Ky.] 119 SW 180; Haddock v. Leary, 148 N. C. 378, 62 SE 426. Instruction proper. Mahoney v. Southern R. Co. [S. C.] 64 SE 228. Possessor need not occupy or cultivate some particular part of tract each year where he holds under color of title. Id. Actual possession of part of land for statutory period before entry on land by another under adverse patent held to give title to entire tract. Daniel v. Middleton [Ky.] 116 SW 721. Actual possession under deed extends in law to limits of boundary described, whether claim or defense is under first or second section of act of 1819 (2 Laws 1715-1820, p. 483, c. 28). Kittel v. Steger [Tenn.] 117 SW 500. Where grantee under deed conveying by definite boundaries entered into possession of land within such boundaries inclosing a few acres and maintaining such inclosure openly and adversely for over 7 years, possession extended to limits of boundaries. Id. Tenant's possession held to extend to boundaries of grant under which landlord claimed. Harris v. Iglehart [Tex. Civ. App.] 113 SW 170. Possession under will, registration of which was destroyed, without restoration of record as allowed by statute, held not to extend to detached portion not actually occupied, despite Rev. St. 1895, art. 3344, making possession under duly registered instrument other than a deed coextensive with boundaries specified in instrument. Wall v. Lubbock [Tex. Civ. App.] 118 SW 886. Rule that grant from commonwealth invests senior patentee with constructive seisin of all land included in grant until disturbed by actual entry of an adverse claimant, and is then affected only to extent of dispossession, is inapplicable to case of junior patentee or claimant, where contiguity of original boundary has been severed anterior to title or color under which he claims. Hot Springs Lumber & Mfg. Co. v. Sterrett, 108 Va. 710, 62 SE 797. Where purchaser of land took without notice of **unrecorded prior deed** of a strip for a ditch and right of way, amount of land for ditch and way was determinable by use and occupancy, and not by calls of deed. Swank v. Sweetwater Irr. & P. Co., 15 Idaho, 353, 98 P 297. Actual possession extends to several **contiguous tracts** included in deed in absence of adverse possession by others. Barry v. Madaris [Ala.] 47 S 152. Where same grantor conveys to same grantee by separate deeds separate but contiguous tracts, which are thereafter dealt with and deeded by grantee and successors as one tract, acts of dominion over any part of the land are referrable to the whole in any event after the two descriptions are merged in one. Kingston v. Guck [Mich.] 15 Det. Leg. N. 998, 118 NW 967. Where one takes title to unoccupied land adjacent to that on which he lives and to which he claims the fee, his possession by operation of law extends to the outside boundaries of the newly acquired tract. Northup's Trustees v. Sumner's Trustee [Ky.] 116 SW 699. Where one entered on certain land as naked trespasser and thereafter obtained a grant for much more than was included in his enclosures, his subsequent possession, for statutory period, of land within inclosures extended to boundaries of grant vesting title to entire tract. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930. Possession of person having paper title to a designated lot of land laid out by official survey and **traversed by a stream,** and who has actual possession of one side of stream, extends to boundaries of lot. Dodge v. Cowart, 131 Ga. 549, 62 SE 987.

57. Grantee occupying only part of land conveyed must claim to boundaries in order to acquire title by adverse possession to whole tract. Haddock v. Leary, 148 N. C. 378, 62 SE 426.

58. Actual possession under deed does not extend constructive possession to portions actually occupied by others. Buck v. Louisville & N. R. Co. [Ala.] 48 S 699. Where plaintiff in ejectment relied on color of title to extend his possession to tracts not by him actually occupied, but evidence tended to show defendant had had actual possession of such tracts, held for jury whether plaintiff or defendant had superior title. Barry v. Madaris [Ala.] 47 S 152.

59. Possession under three and five year statute must be under deed, and one cannot prescribe beyond calls of deed. Runkle v. Smith [Tex. Civ. App.] 114 SW 865. That complainant and his grantors took title to certain lots according to recorded plat of village held not to preclude assertion of title by adverse possession beyond lot lines. Triece v. South Haven, 154 Mich. 129, 15 Det. Leg. N. 696, 117 NW 555.

60. Rule held inapplicable, evidence tending to show actual possession of parcels in

title to trees or minerals has been severed by conveyance from title to the surface of the soil, adverse possession of the surface does not include possession of the trees or the minerals.[61] The presumption is that one claims all the land covered by his paper title.[62]

§ 11. *Sufficiency of possession.*[63]—See 11 C. L. 53—The sufficiency of acts to constitute an adverse possession depends on the facts in each case, considered in the light of the statute.[64] Unimproved and unoccupied land is presumed to be in the

dispute as well as other parcels conveyed. Lyon v. McGowin [Ala.] 47 S 342. Where a deed purports to convey more than the grantor owned, the grantee's possession of only so much as the grantor owned will not give constructive possession of the remaining land embraced in the description of the deed, actual possession of some part in dispute being essential to bar owner. Byrd v. Phillips [Tenn.] 111 SW 1109.

61. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358. Owner of trees could not tack his possession thereof to possession of owner of land, each owner holding by separate conveyance. Id.

62. Presumption is not conclusive. May be rebutted by proof occupant did not claim beyond a certain line. Haddock v. Leary, 148 N. C. 378, 62 SE 426.

63. Search Note: See Adverse Possession, Cent. Dig. §§ 77-147; Dec. Dig. §§ 14-38; 1 Cyc. 982-999, 1024-1026; 1 A. & E. Enc. L. (2ed.) 822.

64. Actual fencing and inclosure of tract not necessary. Wallace v. Sache, 106 Minn. 123, 118 NW 360. Ordinary use and taking of ordinary profits will suffice. Id. Sufficient that possessor enters and possesses land as if it were his own. Alderman v. New Haven [Conn.] 70 A 626. Laws 1891, p. 76 (art. 3346, Rev. St. 1895), declaring in effect that a possession by inclosure of 5,000 acres or more shall not be the peaceable and adverse possession required by 10 year statute unless inclosure is a substantial fence or one-tenth be cultivated, or unless land is actually occupied, applies though claim is asserted under recorded deeds. Dunn v. Taylor [Tex.] 113 SW 265. Adverse possession may consist of the continuous **submerging of land** by construction and maintenance of dam across stream. Simons v. Munch [Minn.] 120 NW 373. Statutes authorizing boards of county commissioners to grant licenses for construction of dams across streams navigable for logs and lumber are for benefit of public and do not have effect of limiting easement to that purpose as to owners of submerged land. Id. "Title" as used in former opinion refers not to fee of land but to right to maintain dam. Id. **In case of a mine** severed from surface ownership, surface owner must show actual, notorious, exclusive, continuous, peaceable possession of the mine, independently of possession of surface, same as a stranger. Gordon v. Park [Mo.] 117 SW 1163. Actual possession is shown by opening and operation of mine, and possession is continuous if operations are carried on at such seasons as nature of work permits or custom requires, if there is some evidence to connect the operations. Id.

Acts held sufficient [See, also, post, Evidence, 11 C. L. 1346]: Inclosure, erection of building, receipt of rents and profits, etc. Green v. Horn, 128 App. Div. 686, 112 NYS 993. Planting of trees and exercising dominion up to fence separating lots from railroad right of way, having continued for over 20 years. Pittsburg, etc., R. Co. v. Jellison [Ind. App.] 86 NE 501. Marking and designating 160 acres, fencing and cultivating part thereof, claiming all, and occupying land for 15 years. Texas & N. O. R. Co. v. Broom [Tex. Civ. App.] 114 SW 655. Possession, cultivation, and payment of taxes for some 15 years. Stiles v. Granger [N. D.] 117 NW 777. Forty years' occupancy and improvement of disputed tract as part of certain lots, having been actual, open, continuous, hostile, positive and accompanied by intention to claim adversely. Buck v. Monks, 106 Minn. 535, 118 NW 1118. Possession under color of title and claim of ownership to well-marked boundary for more than 50 years. Conley v. Breathitt Coal, Iron & Lumber Co. [Ky.] 113 SW 504. Daughter's and her husband's possession of land for 40 years after parol gift from father. Robinson v. Huffman [Ky.] 113 SW 458. Actual, continuous and exclusive possession and use of premises, payment of taxes and improvement for 13 years. Hardin County v. Nona Mills Co. [Tex. Civ. App.] 112 SW 822. Open adverse possession for more than 7 years under color of title. Langhorst v. Rogers [Ark.] 114 SW 915. Proof of inclosure, occupancy and improvement, beyond actual lot line, held sufficient to establish title by adverse possession to part of street between actual and claimed line. Triece v. South Haven, 154 Mich. 129, 15 Det. Leg. N. 696, 117 NW 555. Where in 1860 property was partitioned and W took possession of his share, improved it and continued in possession since, he had complete title. Hayward Lumber Co. v. Bonner [Tex. Civ. App.] 120 SW 577. Where holder of a tax title to a survey gave his son-in-law 160 acres which included dwelling house and 40 acres of cultivated land, and donee took possession and cultivated land for 13 years, and then sold to defendant who continued occupancy for 3 years more, and both occupants had openly claimed 160 acres, defendant was entitled to so much land though he was not entitled to particular tract claimed on trial. Smith v. Simpson Bank [Tex. Civ. App.] 113 SW 568.

Cutting hay, timber, etc.: Cutting and removal of hay from salt meadow land held sufficient under Code Civ. Proc. § 370, providing that land is deemed to have been possessed where usually "cultivated" or "improved." Shinnecock Hills & Peconic Realty Co. v. Aldrich, 116 NYS 532. Possession from 1883 to 1907 under invalid tax

possession of the holder of the legal title,[65] but naked color of title derived from a sheriff's void sale will not draw to it constructive possession where actual possession is not taken of any part of the premises,[66] and, if possession under color of

title, cutting cordwood, extensive lumbering, seeding, and harvesting of hay, held sufficient, most of land being unfit for cultivation. Kingston v. Guck [Mich.] 15 Det. Leg. N. 998, 118 NW 967. Under Code Civ. Proc. 1892, § 103, making use for supply of fuel, for timber for purposes of husbandry, or ordinary use of an occupant sufficient, possession held adverse and continuous where land was continuously used for supply of fuel and timber the ordinary uses for which it was fitted, though not cultivated or inclosed. Bardin v. Commercial Insurance & Trust Co. [S. C.] 64 SE 165.

Inclosures: Fence on three sides of land and a river on fourth held sufficient inclosure when land was actually used to show appropriation subject to Rev. St. 1895, art. 3346. Dunn v. Taylor [Tex.] 113 SW 265. That a river was not a perfect barrier against stock held not conclusive against claim of possessor of land thereon. Id. High bluff of river repaired in low places so as to turn away stock held a natural barrier and sufficient to show adverse possession, when completing inclosure in connection with fences. Doniphan Lumber Co. v. Case [Ark.] 112 SW 208. Evidence held to show defendants had acquired title under 10-year statute by inclosure and use. Appel v. Childress [Tex. Civ. App.] 116 SW 129.

Payment of taxes: Where land was vacant, payment of taxes under color of title for seven years held sufficient under Ball. Ann. Codes & St. § 5504 (Pierce's Code § 1162). Goetter v. Moore [Wash.] 101 P 365. Evidence held to show occupation and payment of taxes so as to give title under 5-year statute. Cleveland & Sons v. Smith [Tex. Civ. App.] 113 SW 547.

Held insufficient [See, also, post, Evidence, 11 C. L. 1346]: Where lands were wild and uncultivated and it did not appear claimant or his ancestor was in actual possession or complied with statutory requirements. Dallam v. Sanchez [Fla.] 47 S 871. Where plea of adverse possession was addressed to an entire league of land, but only possession proved was that of tenants under leases of undefined portions of the league and tenants did not extend possession beyond parcels occupied by houses, fields and improvements, plea was not sustained though leases contained agreements by tenants to occupy and hold possession of league. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. Where evidence did not show 10 years' possession by purchaser of interest of an heir prior to purchase, nor that cultivation and possession of part of tract was under claim of ownership of entire tract, and was not clear as to any inclosure accompanied by use, enjoyment or cultivation of any part of tract by one acquiring title from purchaser, adverse possession was not established as against the other heirs. Hess v. Webb [Tex. Civ. App.] 113 SW 618. Mere **maintenance of a corn crib** on part of tract. Chicago, etc., R. Co. v. Erskine [Neb.] 118 NW 1098. Construction and **maintenance of reservoir,** where same had been used to reclaim adjacent lands years ago but such use had been abandoned and pipes rendered unfit for use, reservoir being thenceforth used only to water claimant's stock in common with stock belonging to others. Dean v. Dunn [Cal. App.] 99 P 380. Mere proof that a **railroad was built,** without evidence as to possession of any particular tract or purchase, or condemnation, or width of right of way fixed by charter. Nashville, etc., R. v. Proctor [Ala.] 49 S 377. Mere **"scrambling" possession.** Cohn v. Smith [Miss.] 49 S 611. **Occasional acts of trespass** for purpose of **cutting timber,** without residence or cultivation. Lackawanna Lumber Co. v. Kelley, 221 Pa. 238, 70 A 724. Evidence in ejectment held to show defendant was not a trespasser holding merely casually, but in possession under bona fide claim of title. Allen v. Phillips [Ark.] 112 SW 403. Cutting cordwood, lumbering, seeding and cutting hay held more than mere trespass, land being generally unfit for cultivation. Kingston v. Guck [Mich.] 15 Det. Leg. N. 998, 118 NW 967. Cutting of timber and firewood at intervals held mere trespasses. Hillman Land & Iron Co. v. Marshall [Ky.] 119 SW 180. Occasional cutting of timber, ties or logs, held insufficient. Boyer v. Lengel [Pa.] 73 A 323. **Payment of taxes and cutting timber.** Stone v. Perkins, 217 Mo. 586, 117 SW 717. Visiting land unfit for cultivation, paying taxes, cutting timber, etc. Himmelberger-Harrison Lumber Co. v. McCabe [Mo.] 119 SW 357. Owner not chargeable with laches. Id. Cutting rail, post, timber and firewood. Langhorst v. Rogers [Ark.] 114 SW 915. **Inclosure without use.** Appel v. Childress [Tex. Civ. App.] 116 SW 129. Inclosure of land insufficient under statute requiring cultivation, use or enjoyment. Dunn v. Taylor [Tex.] 113 SW 265. **Possession of adjoining** tract claiming part of land not occupied, under deed from third person, without putting anything on land to give notice to owner holding under elder patent, held ineffectual as to land embraced by such patent. Bowling v. Breathitt Coal, Iron & Lumber Co. [Ky.] 120 SW 317. Cultivation of small strip in connection with adjoining land held insufficient as notice to owner that 160 acres was claimed. Collen v. Collins [Tex. Civ. App.] 120 SW 546.

65. Butler v. Smith [Neb.] 120 NW 1106. Possession held to be in owner of equity of redemption and not in plaintiffs. Herbage v. McKee [Neb.] 117 NW 706. That a vendor continued to graze on land sold in common with his other land, but at mere sufferance of grantee, held not to prevent existence of constructive possession in vendee tackable to vendor's prior actual possession. Files v. Railroad Lands Co. [La.] 48 S 763.

66. Herbage v. McKee [Neb.] 117 NW 706.

title is discontinued before the expiration of the statutory period, the constructive possession will follow the true title and not the color of title.[67] The possession of a tenant inures to the benefit of the landlord,[68] and where the tenant thereafter acquires title he may assert the landlord's rights.[69] So, also, a grantor's possession of the surface of mineral lands inures to the benefit of his grantee of the minerals therein, as against third persons,[70] and as against the latter the possession of one who claims the soil may be relied on by a claimant of timber thereon.[71] The possession of one who merely claims to hold for himself and another inures only to the benefit of the possessor to the extent of half the property in the absence of contract or tenancy.[72]

§ 12. *Pleading, evidence and instructions.*[73]—See 11 C. L. 54—Adverse possession must be specifically pleaded,[74] and the plea must include all the essential elements of such defense,[75] but a plea of title in defendant has been held to admit proof of title by adverse possession.[76] A reply to a plea of limitations setting out permissive possession under executory contract of sale need not allege the terms of such contract or the vendor's performance thereof.[77] The ordinary rules of pleading apply.[78]

*Evidence.*See 11 C. L. 54—The burden is on the party setting up adverse possession,[79] and proof of the essential elements of such possession must be clear and cogent;[80] but it is ordinarily sufficient for claimant to bring himself within the gen-

67. Stone v. Perkins, 217 Mo. 586, 117 SW 717.

68, 69. Harris v. Iglehart [Tex. Civ. App.] 113 SW 170.

70. McBurney v. Glenmary Coal & Coke Co. [Tenn.] 118 SW 694.

71. Where a claimant, holding a deed but showing no title in his grantor, conveys the timber to A for 12 years and afterwards conveys to B the land "except the pine trees, etc., heretofore deeded away to A for 12 years" and B enters in good faith and remains in exclusive possession for more than seven years. B's possession is not adverse to A, but in trespass by one claiming title from state defendant may set up such possession of B as establishing prescription in A. Moore v. Ensign Oscamp Co., 131 Ga. 421, 62 SE 229.

72. Frey v. Meyers [Tex. Civ. App.] 113 SE 592. Person for whom possessor claimed to hold acquired no title. Id. Meyers v. Frey [Tex.] 119 SW 1142.

73. Search Note: See Adverse Possession, Cent. Dig. §§ 66, 636-701; Dec. Dig. §§ 110-117; 1 Cyc. 1140-1155; 1 A. & E. Enc. L. (2ed.) 886.

74. Pleading held insufficient. Perry v. Ball [Tex. Civ. App.] 113 SW 588.

75. Answer in ejectment that defendant and his grantors had been in the actual, open notorious, and exclusive possession of the premises for more than 20 years, and had been the actual owners during said time, held insufficient for failure to allege that possession was adverse or under claim of title. McGrath v. Valentine [C. C. A.] 167 F 473. Under five-year statute regulating possession under recorded deed, person setting up title by adverse possession need not specifically aver that his deed is not forged. Work v. United Globe Mines [Ariz.] 100 P 813. Allegation that cross complainant held under recorded deed from certain grantors named held sufficient. Id.

76. Neal v. Davis [Or.] 99 P 69. Allegation sufficiently certain to meet requirements of B. & C. Comp. § 329. Id.

77. Glem v. Rhine [Tex. Civ. App.] 115 SW 91.

78. Adverse use of water and prior appropriation held not inconsistent defenses. Hough v. Porter [Or.] 98 P 1083. Judgment for defendant on pleadings held not authorized where reply denied averment of title and plaintiff's pleadings did not contain any admission of facts essential to adverse possession. Neal v. Davis [Or.] 99 P 69.

79. Hayworth v. Williams [Tex. Civ. App.] 117 SW 1197; Dunn v. Taylor [Tex.] 113 SW 265; Original Consol. Min. Co. v. Abbott, 167 F 681; Kirby v. Kirby, 236 Ill. 255, 86 NE 259. Under plea of adverse user of water, showing of continuous application of water for beneficial use by upper proprietor for more than 10 years makes prima facie case and opponent must overcome such showing. Hough v. Porter [Or.] 98 P 1083.

80. Evidence held sufficiently clear and cogent to require submission to jury of question of adverse and hostile possession. Parker v. Case [Mich.] 15 Det. Leg. N. 1122, 119 NW 1081. Must be established by clear and positive proof. Adverse possession under § 1721, Gen. St. 1906. Dallam v. Sanchez [Fla.] 47 S 871.

Evidence sufficient to show title by adverse possession. Coe v. Sloan [Idaho] 100 P 354; McBurney v. Glenmary Coal & Coke Co. [Tenn.] 118 SW 694; Stephenson v. Austin, 217 Mo. 355, 116 SW 1090; Bryant v. Prewitt [Ky.] 117 SW 343. To prima facie show title by adverse possession. Northup's Trustees v. Sumner's Trustees [Ky.] 116 SW 699. To show adverse possession under deed giving color of title. Cadwalader v. Price [Md.] 73 A 273. To show adverse possession for 52 years. Roe v. Doe [Ala.] 48 S 1033. For more than ten years. Lewis v. Dillingham [C. C. A.] 167 F 779. To

eral provisions of the statute, the owner being required to show exceptions.[81] The competency and weight of the evidence are governed by the ordinary rules.[82] The

show adverse possession of part of alley by lot owner for statutory period so as to partially extinguish easement of lot owner on other side of alley. Rupprecht v. St. Mary's Roman Catholic Church Soc. 131 App. Div. 564, 115 NYS 926. To show defendant had acquired title by adverse possession to certain land claimed by plaintiff by virtue of purchase from heirs and under a patent. Combs v. Cornett [Ky.] 114 SW 1193. To show ancestor's possession under claim of ownership for 30 years. Potter v. Long, 217 Mo. 607, 117 SW 724. To show possession of one of plaintiff's grantors so as to make out successive possessions for 20 years. Sparkman v. Jones, 81 S. C. 453, 62 SE 870. To sustain finding that plaintiff's grantors held title acquired by adverse possession both under five and ten year statute. Hoencke v. Lomax [Tex. Civ. App.] 118 SW 817. To establish title by adverse possession in purchaser at foreclosure and his grantee. Mears v. Somers Land Co. [N. D.] 121 NW 916. Actual possession by purchaser held inferable from evidence. Id. To show title in tenant in common as against cotenant. Misenheimer v. Amos [Mo.] 120 SW 602. To warrant finding that defendants and predecessors had been in continuous open and adverse possession sufficiently long to give title. Hatfield v. Hatfield [Ky.] 113 SW 59. To sustain findings that plaintiff's predecessors each held the land adversely, that there was privity between them, and that the land held was the land in dispute. Bennette v. Collins [Tex. Civ. App.] 116 SW 618. Evidence, in case where person in adverse possession conveyed land but retook possession after a year, held sufficient to sustain finding that vendor and those claiming under him acquired title by adverse possession. Southern Pine Co. v. Pigott [Miss.] 47 S 381.

Evidence insufficient to show title by adverse possession. Lecroix v. Malone [Ala.] 47 S 725; Larzelere v. Wood, 136 Wis. 541, 117 NW 1013; Wiggins v. Brewster, 131 Ga. 162, 62 SE 40. Of entire tract to which possessor had no color of title. Langhorst v. Rogers [Ark.] 114 SW 915. To a certain boundary alleged to have been established by acquiescence. Lizer v. Clubine [Iowa] 118 NW 409. For title under three or five-year statute. Lake v. Earnest [Tex. Civ. App.] 116 SW 865. To establish defendant's and his predecessors' possession under color of title for seven years or for 20 years without color of title. Gillespie v. Powell [Ga.] 64 SE 80. To show that certain possessions were on land located under a particular entry. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930. To sustain verdict for defendant relying on adverse possession. Wilson v. Jernigan [Fla.] 49 S 44. Defendant's admissions held insufficient to establish title in others by adverse possession. Jeffery v. Jeffery [Ark.] 113 SW 27. Allegation in trial amendment by plaintiff in partition setting up claim for rents, that defendant had been in exclusive possession since a specified year, held not evidence of fact of exclusive possession on issue of limitations pleaded by defendant and denied by supplemental petition. Hess v. Hebb [Tex. Civ. App.] 113 SW 618. Evidence held to warrant finding against adverse possession. Gardner v. Montague, 108 Va. 192, 60 SE 870.

81. Contention that plaintiffs were minors. Armstrong v. Wilcox [Fla.] 49 S 41.

82. Testimony that years ago witness conversed with defendant's predecessor who did not then make any claim to the land, held subject to rejection, though uncontradicted, predecessor being dead. Appel v. Childress [Tex. Civ. App.] 116 SW 129. That land was not inventoried after death of predecessor and his wife held not conclusive defendant's predecessors did not claim the land. Id.

Held admissible: Held error to exclude testimony that witness knew C. claimed property as her own and so claimed it until her death. Hays v. Lemoine [Ala.] 47 S 97. In action to determine adverse claims, assessment rolls held properly admitted to show that common source had acquired title by adverse possession. Taylor v. McGowen, 154 Cal. 798, 99 P 351. That evidence tending to show possession under a written instrument, and claim of right against all the world also tended to show fraud on part of grantor which court, in determining equitable issues in the case, had already determined did not exist, held not to render it inadmissible. Cassin v. Nicholson, 154 Cal. 497, 98 P 190. On issue whether possession was in possessor's own right or that of another, evidence that possessor held bond for title was admissible. Wiggin v. Brewster, 131 Ga. 162, 62 SE 40. Defendants held entitled to show that before limitations ran plaintiff agreed that a particular line should be boundary, for purpose of showing plaintiff did not claim possession beyond that line. Haddock v. Leary, 148 N. C. 378, 62 SE 426. Payment of taxes held competent on question whether state had parted with title. Bardin v. Commercial Insurance & Trust Co. [S. C.] 64 SE 165. In action involving proceeds of land bought by decedent as a gift for his daughter, conveyed to her by defective deed after she took possession, and occupied by her for 50 years, evidence tending to show a present and executed gift was material. New Haven Trust Co. v. Camp [Conn.] 71 A 788. Fact deed was made held relevant to show daughter entered under claim of title in herself. Id. Evidence daughter never saw or read void deed or knew its terms, that her father never claimed the land and that daughter continued to occupy claiming as owner, held admissible. Id. Evidence that a river used as a barrier to turn stock was generally thus used also above and below land in dispute held admissible to show notice to owner of adverse holding. Dunn v. Taylor [Tex.] 113 SW 265. Where defendant relied on adverse possession and attempted to connect himself with a chain of title, held not error to permit him to show that a certain deed was in fact executed about three years after it was dated. Id. Evidence that defect in connection with ac-

acts and declarations of the claimant while in possession may be shown.[83] While declarations or admissions made after a title has ripened cannot operate to divert that title,[84] claimant's declarations made after the alleged statutory period may be admissible on the issue whether the possession was in fact adverse.[85] Continuation of a possession once shown will not be presumed in the face of evidence to the contrary.[86]

Instructions.[See 11 C. L. 57]—If there is evidence on the issue of adverse possession, the question should ordinarily be submitted to the jury;[87] otherwise not.[88] In-

knowledgment of married woman's deed was only in certificate and that deed was in fact properly acknowledged held admissible to show bona fides of claimant's title, though action to correct certificate was barred. Veeder v. Gilmer [Tex. Civ. App.] 120 SW 584. Evidence for plaintiff that witness had acted as attorney for defendant's predecessor and had negotiated for purchase or lease of the land, and that he had given a deed to his principal only to protect improvements, held admissible to negative claim of ownership. Hyman v. Grant [Tex Civ. App.] 114 SW 853. Evidence that a grantor remained in possession after conveyance to defendant, and surrendered her possession to plaintiff telling him land belonged to him, held admissible to show break in possession under which defendant claimed. Pardue v. Whitfield [Tex. Civ. App.] 115 SW 306.

Held inadmissible: Where plaintiff claimed by adverse possession evidence that his father had told him the land belonged to plaintiff's mother held not admissible to establish adverse possession, but only to show character and extent of father's possession. Jeffery v. Jeffery [Ark.] 113 SW 27.

83. Where the possession has been consistent with or in submission to the title of the real owner, nothing but clear unequivocal and notorious disclaimer and disavowal of the title of such owner will render the possession, however long continued, adverse. Kirby v. Kirby, 236 Ill. 255, 86 NE 259. Slight evidence of statements by parent inconsistent with claim of adverse possession against children held entitled to greater weight than in case parties occupied different relationship. Id. Evidence that one in whose favor adverse possession is claimed made statements inconsistent with such possession is competent evidence. Such statements by husband by possession of land through right to homestead and dower held admissible against widow claiming fee in opposition to children of wife through whom husband was entitled to dower and homestead. Id. Declarations of parent residing on land through dower and homestead derived through wife, inconsistent with intention to claim adverse possession, held to prevent running of statute against children. Id. Declarations of ownership by person in possession are strongest proof of adverse possesion and always admissible. Texas & N. O. R. Co. v. Broom [Tex. Civ. App.] 114 SW 655. Declarations by one under whom defendant claimed as to extent of his claim held admissible, though he was living. Id. Declarations made long after possessor had parted with land and in regard to claim against another part of plaintiff's land held properly excluded. Id. Possessor's declarations in disparagement of his title held admissible. Hill v. Bean, 150 N. C. 436, 64 SE 212. Held competent for defendant in ejectment who had shown possession in one under whom he claimed to also show acts and declarations on part of such person characterizing his possession. Godley v. Barnes [Ga.] 64 SE 546. Could show that such person sued in assumpsit one who had boxed for turpentine trees on the land, though defendant in assumpit was stranger to title of plaintiff in ejectment. Id. Record in such case would not be admissible as conclusive adjudication of title (Id.), or as proving truth of plaintiff's allegations therein (Id.), nor would mere fact of rendition of judgment be relevant (Id.), or be part of plaintiff's assertion of title (Id.). If declaration in assumpsit action was otherwise admissble as an assertion or act characterizing possession as adverse, and description of land, though general might have been applied to the land involved in ejectment suit, it was competent to show by parol that trees boxed were on land claimed in ejectment. Id. On issue of permissiveness of possesion, statement by defendant's husband in her presence that himself and wife had no home held admissible. Chambers v. Morris [Ala.] 48 S 687. Objection to one's testimony on ground that declarations as to character of possession is admissible only when made by occupant held removed by evidence that he authorized his mother's possession for a consideration. Illinois Steel Co. v. Pacozocha [Wis.] 119 NW 550. Actual possession cannot be shown by a **tenant's declaration** acknowledging tenancy, the testimony being hearsay. Dunn v. Taylor [Tex.] 113 SW 265.

84. See ante, § 5.

85. Carroll v. Rabberman, 240 Ill. 450, 88 NE 995.

86. Where person put in possession stayed only three months. Stone v. Perkins, 217 Mo. 586, 117 SW 717.

87. Though plea of limitations insufficiently describes or identifies the particular portion of land occupied, question of adverse possession must be submitted if the evidence sufficiently describes and identifies such portion. Williams v. Texas & N. O. R. Co. [Tex. Civ. App.] 114 SW 877. **Question for jury.** Hightower v. Borden [Ky.] 112 SW 675; Kraus v. Birnbaum, 132 App. Div. 567, 116 NYS 916; Rushing v. Lanier [Tex. Civ. App.] 111 SW 1089; Foard v. McAnnelly, 215 Mo. 371, 114 SW 990; Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602. Whether uncleared portion of land had

structions must be unambiguous,[89] and must properly define adverse possession.[90] They must be justified by the law[91] and the evidence,[92] and must otherwise conform to the usual rules.[93]

been occupied, there being evidence it had been put to such use as it was susceptible of. Chambers v. Morris [Ala.] 48 S 687. Issue of adverse possession by several cotenants against another cotenant. Honea v. Arledge [Tex. Civ. App.] 120 SW 508. Where there was considerable evidence tending to prove adverse possession, but there was also some evidence to the contrary. Koltermann v. Chilvers [Neb.] 117 NW 405. Prescription, which necessarily involves good faith, is a mixed question of law and fact. Error, under the facts of the case to direct a verdict in favor of defendant. Moore v. Ensign-Oscamp Co., 131 Ga. 421, 62 SE 229.

88. Held error to submit issue of adverse possession, plaintiff having introduced no evidence thereof. Hightower v. Borden [Ky.] 112 SW 675. Submission of question of adverse possession for 20 years held error, there being no evidence of adverse possession for such time as could raise prescriptive right. Fuelling v. Fuesse [Ind. App.] 87 NE 700. Evidence that defendant's predecessor recognized as his tenant one who by mistake ran his fence 50 or 60 rods into 1,000 acre tract in dispute, and who said he would give up the land, held insufficient to raise issue of adverse possession. Ryle v. Davidson [Tex. Civ. App.] 116 SW 823. Instruction submitting issue of adverse possession against cotenant held justified by evidence. Honea v. Arledge [Tex. Civ. App.] 120 SW 508.

89. Instructions that subsequent actual possession of one who took possession as widow would not of itself be notice that she claimed adversely held misleading. Hays v. Lemoine [Ala.] 47 S 97. Charge in ejectment held calculated to mislead jury into belief that if plaintiff's grantor was in possession of any one of several tracts, whether the one in dispute or not, it would be sufficient to make a prima facie case despite evidence of adverse possession in defendant. Barry v. Madoris [Ala.] 47 S 152. Instruction held calculated to lead jury to believe that possession for seven years under color of title would not avail against holder of prior outstanding. Godley v. Barnes [Ga.] 64 SE 546. Instruction to find for plaintiff "on this issue" held not objectionable as requiring finding for plaintiff on entire case in case of finding for him as to adverse possession. Brummer Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602.

90. Charge to find for defendants if they had had peaceable and adverse possession for ten years and such possession had been open, notorious, etc., held sufficient, though not defining peaceable and adverse possession separately and in language of statute. Stoker v. Fugitt [Tex. Civ. App.] 113 SW 310. Where court properly defined adverse possession, instruction defendant had title if he claimed the land or cultivated, used, or enjoyed it for 15 years under such possession held proper though word "claiming" was not in statute. Texas & N. O. R. Co. v. Broom [Tex. Civ. App.] 114 SW 655. Instruction omitting word "consecutive," in describing number of years required for title by adverse possession, is erroneous. Hays v. Lemoine [Ala.] 47 S 97. Charge requiring cultivation, use, "and" enjoyment, held error, statute requiring only cultivation, use, "or" enjoyment. Hess v. Webb [Tex. Civ. App.] 113 SW 618. Where in ejectment for a coal mine court instructed on usual elements of adverse possession, it should have granted request to define "continued" possession. Gordon v. Park [Mo.] 117 SW 1163.

91. Instruction requiring occupancy to "true line" regardless of possession for seven years held erroneous. Williams v. Giddens [Ga.] 64 SE 64. Instruction to find generally for defendant, if one of plaintiff's predecessors did not claim to west line of tract in dispute, held properly refused. Bennette v. Collins [Tex. Civ. App.] 116 SW 618. Where defendant claimed title by adverse possession and contended that an alleged recognition of title in plaintiff by payment of rent referred to another tract, instruction authorizing verdict for him on mere finding he had not recognized plaintiff's title held properly refused. City of Manchester v. Duggan [N. H.] 70 A 1075.

92. Charge placing burden of proof on defendant to prove title by adverse possession held properly refused as assuming plaintiff had made prima facie case in ejectment. Barry v. Madoris [Ala.] 47 S 152. Charges that if plaintiff's ancestor purchased from person in actual possession verdict should be for plaintiff, unless defendant's predecessor had had adverse possession for 10 years held properly refused as pretermitting evidence that the one through whom defendant claimed had been in actual possession, claiming as bona fide purchaser under prior deed or at least holding same as color of title. Code 1896, § 1541. Id. Where in ejectment jury might find from evidence that defendant had acquired title by adverse possession to a few acres of land sued for before plaintiff procured deed, charge to return verdict for plaintiff if jury was reasonably satisfied that land in dispute was any part of description to which plaintiffs had record title held properly refused. Cochran v. Kinbrough [Ala.] 47 S 709. Charge hypothecating nonrecovery on defendant's adverse possession held properly refused, evidence showing mere permissive use of part of land and there being no evidence of disseisin as to such part. Lecroix v. Malone [Ala.] 47 S 725. Instruction hypothecating possession in defendant's predecessor for 20 years held properly refused, evidence being undisputed that he had possession only 13 years. Carroll v. Rabberman, 240 Ill. 450, 88 NE 995. Held error to submit to jury question of reasonableness of breaks in continuity of successive possessions, there being no evidence as to how long the intervals were. Dunn v. Taylor [Tex.] 113 SW 265.

§ 13. *Nature of title acquired.*[94] See 11 C. L. 57—The title acquired by adverse possession is an absolute [95] and marketable one,[96] assertable in all actions, legal or equitable.[97] Of course adverse possession or prescription can confer no right to maintain a nuisance,[98] and claimant will be confined to the rights he actually acquired.[99]

Advice of Counsel, see latest topical index.

AFFIDAVITS.[1]

The scope of this topic is noted below.[2]

Who may take. See 12 C. L. 58—A notary public, who is an attorney at law, and clerk in a law office, may take affidavits if not interested in the proceedings in which such affidavits are to be used,[3] and, where there is no statute forbidding an attorney of record to take an affidavit of his client to be used in the case, the court may, considering the circumstances thereof, allow such an affidavit to stand.[4]

93. Instruction, that if C. had possession from 1875 to 1885, and also in 1901, presumption was she had possession from 1885 to 1901, held objectionable as referring a question of law to jury. Hays v. Lomoine [Ala.] 47 S 97. Instruction hypotheticating adverse possession held not on weight of evidence. Texas & N. O. R. Co. v. Broom [Tex. Civ. App.] 114 SW 655. Refused instruction as to what would constitute adverse possession, and the effect of a third person's cutting timber without possessor's knowledge, held sufficiently covered by other instructions. Hill v. Bean, 150 N. C. 436, 64 SE 212. In view of other charges, held not reversible error to refuse to charge that adverse use must be continuous for 10 years excluding time during which, on account of infancy, limitations did not run. Cockrell v. Dallas [Tex. Civ. App.] 111 SW 977.

94. Search Note: See note in 18 L. R. A. 146.

See, also, Adverse Possession, Cent. Dig. §§ 595-635; Dec. Dig. §§ 104-109; 1 Cyc. 1135-1140; 1 A. & E. Enc. L. (2ed.) 883.

95. Adverse possession for statutory period results in perfect title, which becomes a vested right as though evidenced by writing. Neal v. Davis [Or.] 99 P 69. Adverse holder acquires fee, and legal effect is not merely to bar remedy of owner of paper title. Safe Deposit & Trust Co. v. Marburg [Md.] 72 A 839. If a decedent held adverse possession of land for 50 years under a deed, she acquired absolute title thereto which passed under her will. New Haven Trust Co. v. Camp [Conn.] 71 A 788. Title by adverse possession will sustain suit to quiet title. Work v. United Globe Mines [Ariz.] 100 P 813. Since adverse possession vests title, **no accounting** lies against person whose possesion has ripened under statute. Steinberg v. Salzman [Wis.] 120 NW 1005. Person in possession for 10 years under administrator's deed not accountable to heirs, though guilty of fraud not discovered until after 10 years and shortly before suit, and though under St. 1898, § 4222, an action for fraud does not accrue until discovery of fraud. Id.

96. Title by adverse possession is marketable and purchasers are required to accept same where fact of adverse possession is clear. Safe Deposit & Trust Co. v. Marburg [Md.] 72 A 839.

97. Purchaser at foreclosure sale could plead limitations under Missouri statute against mortgagor's bill to redeem, his possession having been adverse. Clapp v. Leavens [C. C. A.] 164 F 318. Title by adverse possession may be set up against a purely equitable demand, such title being respected in courts of equity as well as in courts of law. Depue v. Miller [W. Va.] 64 SE 740. Title acquired by renunciation of a trust accompanied by possession of the land. Id.

98. Though defendant might have acquired right to maintain a dam, held no incidental right to create a nuisance by its maintenance was thereby conferred. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100.

99. City held limited to use of substantially amount of water used by it during period it acquired water rights by prescription. Stock v. Hillsdale [Mich.] 15 Det. Leg. N. 1043, 119 NW 435. City held not entitled to enlarge ditch, right to maintain which it had acquired by prescripton, or to increase flow of water. Sturges v. Meridian [Miss.] 48 S 620.

1. See 11 C. L. 58.

Search Note: See notes in 3 C. L. 65; 5 Id. 60; 7 Id. 58; 31 L. R. A. 422; 16 L. R. A. (N. S.) 703; 1 Ann. Cas. 653; 7 Id. 49.

See, also, Affidavits, Cent. Dig. Dec. Dig. 2 Cyc. 1-37; 1 A. & E. Enc. P. & P. 309; 10 Id. 854.

2. Includes general matters relating to affidavits of facts as distinguished from oaths (see Oaths *). Excludes matters relative to contents of affidavits in particular proceedings (see Attachment,* § 6; Continuance and Postponement,* § 3, and similar topics), affidavits of merits (see Affidavits of Merits of Claim and Defense *), and verification of pleadings (see Verification *).

3. Where such person is in office of solicitor if complaint in suit for separate maintenance, but is not interested as counsel, he may take affidavit instituting contempt proceedings for failure to pay temporary allowance. MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848.

4. Taking of affidavit on which attachment issued by attorney of record, though a breach of rule of practice, was a mere

* Always begin with the latest article on the subject. Use the latest topical index.

Form and requisites. See 11 C. L. 58—The affiant must sign his affidavit,[5] and if he fails to do so the defect cannot be cured by amendment.[6] It is also necessary that the affiant, at the time of tendering the affidavit to the officer, use language signifying that he consciously takes upon himself the obligation of an oath.[7] Every affidavit should show upon its face that it was taken within the jurisdiction of the officer who certified it,[8] and, if he is authorized to act outside of the county of his appointment, such fact should be noted in jurat of an affidavit taken by him outside of such county.[9] The jurat must be signed by an officer with the addition of his official seal[10] but need not always give the date on which the affidavit was made.[11] To be entitled to consideration in any judicial proceedings, an affidavit must be traversable and must lay the foundation for a charge of perjury if false.[12]

Admissibility of affidavit in evidence and effect thereof. See 11 C. L. 58—The ex parte affidavit of a person not a witness cannot be used as independent evidence.[13]

AFFIDAVITS OF MERITS OF CLAIM OR DEFENSE.[14]

The scope of this topic is noted below.[15]

An affidavit of defense is purely a statutory requirement.[16] In disposing of a rule for judgment for want of a sufficient affidavit of defense, nothing is before the court except plaintiff's statement and defendant's affidavit in reply thereto,[17] and judgment cannot be entered for want of a sufficient affidavit of defense where the declaration itself is defective.[18] On a motion to strike a plea for want of an affi-

irregularity which had been waived, and hence warrant based thereon and judgment thereafter entered were not void. Vreeland v. Pennsylvania Tanning Co., 130 App. Div. 405, 114 NYS 1002. Act of plaintiff's attorney in returning answer as a nullity, because affidavit of verification was taken by defendant's attorney of record, held not authorized as affidavit was not void. Zichermann v. Wohlstadter, 60 Misc. 362, 113 NYS 403.

5. Affidavit for attachment which is sworn to but not signed is void as affidavit. Davis v. Sherrill [Tex. Civ. App.] 113 SW 556.

6. Where purported affidavit for attachment is not signed by affiant, it is not an affidavit, and cannot be amended. Davis v. Sherrill [Tex. Civ. App.] 113 SW 556.

7. If officer so understands, and immediately signs jurat, this will amount to such concurrence of act and intention as will constitute legal swearing. Mitchell v. Measury [Ga.] 64 SE 275.

8. Under Laws 1892, p. 1704, c. 683, § 85, as amended by Laws 1894, p. 186, c. 68, authorizing notaries to take affidavits in county where appointed, the affidavit is void where jurat shows it to have been sworn to in county other than that for which notary was appointed. Robinson v. Cooper, 62 Misc. 517, 115 NYS 599.

9. Where venue indicated that affidavit was taken in county of New York, and the jurat that officer was appointed for Kings County, the affidavit was void. Robinson v. Cooper, 62 Misc. 517, 115 NYS 599.

10. Paper purporting to be affidavit of publication of notice of an action was insufficient where no name was subscribed to jurat. Deputy v. Dollarhide [Ind. App.] 86 NE 344.

11. Affidavit to bill for injunction may be treated as having been made on day bill was filed. Ebann v. Brown, 139 Ill. App. 213.

12. Affidavit is deficient where all material facts are sworn to on information and belief without setting forth sources of information. Eytinge v. Ter. [Ariz.] 100 P 443. When courts and judicial officers are asked to act upon affidavits founded on information and belief, they must be furnished with source of information in order that they may draw their own conclusions. Penn Oil & Supply Co. v. Cohn, 116 NYS 124.

13. Western Union Tel. Co. v. Gillis [Ark.] 117 SW 749.

14. See 11 C. L. 59.

Search Note: See notes in 3 C. L. 67; 5 Id. 62.

See, also, Pleading, Cent. Dig. §§ 149-155, 302-320; Dec. Dig. §§ 75, 151-161; 1 A. & E. Enc. P. & P. 338.

15. Treats generally of affidavits of merits of claim or defenses filed in support of the pleadings, the relief sought, or the defense claimed as distinguished from affidavits filed on motions to set aside defaults (see Defaults,* § 3), or on motions for continuances (see Continuance and Postponement,* § 3). Affidavits in support of particular relief are also excluded (see Attachment,* § 6; Garnishment,* § 9, and like topics), as are also matters relative to affidavits generally (see Affidavits *), and verification of the pleadings (see Verification *).

16. In action at law where answer is unverified, defendant should serve and file an affidavit of merits. Ziegler v. Smith, 115 NYS 99.

17. To these trial court is confined in determining whether rule for judgment in case should be discharged or made absolute. Bernhardt v. Taylor [Pa.] 72 A 620.

18. Rosenblum v. Stolzenberg, 36 Pa.

* Always begin with the latest article on the subject. Use the latest topical index.

davit of defense, the grant or refusal of a counter motion for leave to file an affidavit instanter is within the court's discretion,[19] and, if judgment be entered before the affidavit of defense is filed, the validity of such judgment will not be affected by the subsequent filing of the affidavit, even upon the same day.[20] The right in Pennsylvania to take judgment for the amount admittedly due and to proceed on the remainder cannot be invoked when a rule for judgment for the whole claim has been taken for want of a sufficient affidavit of defense.[21]

An affidavit of defense must be accorded a fair and liberal interpretation,[22] and where, it fairly set forth facts sufficient to show prima facie a good defense, it is not to be subjected to a close, technical examination as in the case of a special plea demurred to,[23] as it is offered to prevent a summary judgment, and for that purpose the showing of a defense with certainty to common intent is sufficient,[24] all that is required being that the facts alleged shall be sufficient to indicate a substantial legal defense made in good faith.[25] Ordinarily, however, every matter of defense must be set forth specifically and with such detail as to show clearly its relation to the plaintiff's claim,[26] and the affidavit must be as explicit and specific as

Super. Ct. 644; Zeller v. Wunder, 36 Pa. Super. Ct. 1.

19. No abuse of discretion in refusing to grant counter motion where affidavits offered state no defense. Reed v. New York Nat. Exchange Bank, 135 Ill. App. 170.

20. Where rule of court provided that affidavit of defense must be filed within fifteen days from filing of rule to file affidavit of defense, and judgment is entered on 16th day for want of affidavit, such judgment will not be disturbed though affidavit is filed later the same day. Western National Bank v. Cotton, Oil & Fibre Co., 35 Pa. Super Ct. 47.

21. Faux v. Fitler [Pa.] 72 A 891. Court cannot be convicted of error in not making an order permitting plaintiff to take judgment for part of his claim. Gross v. Ricchezza, 37 Pa. Super. Ct. 441.

22. If facts stated will, by any fair and reasonable construction, constitute defense to action within scope of defensive pleas, it is right of defendant to have case tried by jury. Patterson v. Barrie, 30 App. D. C. 531. In an action by payee against maker of promissory notes, an affidavit of defense, which, though confusing, averred that notes were given in partnership venture which had been violated by payee, was sufficient to send case to jury. Faux v. Filter [Pa.] 72 A 891. Where affidavit of defense denied that defendant had contracted to fill plaintiff's property with number of cubic yards of earth alleged by plaintiff, such affidavit was a sufficient denial of liability to furnish the less amount indicated by difference between amount actually filed in and amount stated by plaintiff. Bigham v. Wabash-Pittsburg Terminal R. Co. [Pa.] 72 A 318.

23. Stern v. Dwyer, 35 Pa. Super. Ct. 132.

24. In action on book account for merchandise, affidavit of defense as to claim of set-off, arising from failure of plaintiff to deliver merchandise according to their agreement and damage sustained by reason of shutting down of defendant's factory, held sufficient. Stern v. Dwyer, 35 Pa. Super. Ct. 132. In action on open book account for furniture, affidavit of defense is sufficient which specifically denies purchase on book account, but specifically avers that there was a contract with plaintiff to furnish certain rooms for less sum than claimed and that plaintiff failed to comply with his contract. Schaefer v. Lange, 37 Pa. Super. Ct. 617. In action for foodstuffs sold and delivered, affidavit of defense is sufficient which avers that goods were ordered but not such goods, and that they were so unsound, so unfit for household consumption, so unmerchantable, so filled with sand or grit and so sour, that they were wholly useless and worthless. Gross v. Ricchezza, 37 Pa. Super. Ct. 441. In action for breach of contract, where statement alleges nondelivery and market price, an affidavit of defense, which denies that there was any market price at place named at time delivery should have been made, meets the issue as to damages and is sufficient to prevent summary judgment on motions. Connilleau v. Rogers, Holloway & Co., 162 F 998. In action to recover for goods sold and delivered, affidavit of defense held sufficient to prevent judgment. Zeller v. Wunder, 36 Pa. Super. Ct. 1.

25. Patterson v. Barrie, 30 App. D. C. 531, following Dobbins v. Thomas, 26 App. D. C. 157.

26. Held insufficient in an action to recover purchase price of books. Patterson v. Barrie, 30 App. D. C. 531. Where last indorser on note sues prior indorser, an affidavit of defense not denying making and indorsing of note and insufficiently denying attached copy, without demanding inspection of original, and not denying that plantiff is holder of note, or that note at maturity was presented at place named in note for payment, or that said note was protested, is insufficient. Burns v. Armstrong [Pa.] 72 A 255. Affidavit of defense of usury should state, if within defendant's power to so state, the date, amount, and rate of interest of each of alleged usurious notes, when they matured, and also amount of usury. King v. Curtin, 31 App. D. C. 23; King v. Curtin, 31 App. D. C. 28. Affidavit

the nature of the circumstances reasonably admit,[27] and what it does not state must be regarded as not existing;[28] but the affidavit is sufficient if the denials are as specific as the statement of claim.[29] Where the plaintiff has his rule for judgment for want of a sufficient affidavit of defense discharged merely to accelerate the trial, the court, in its discretion, may grant a second rule for judgment.[30] The action of the trial court in refusing to enter judgment for want of a sufficient affidavit of defense will not be disturbed except for manifest error.[31]

Affirmations, see latest topical index.

AFFRAY.[32]

AGENCY.

The scope of this topic is noted below.[33]

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of defense insufficient to meet requirements of 73rd rule. King v. Curtin, 31 App. D. C. 23; King v. Curtin, 31 App. D. C. 28. Affidavit of defense in action for services and attendance of physician on certain alleged days held insufficient to raise issue as to correctness of plaintiff's allegations in regard to number and dates of visits. Sprisler v. McFetridge, 37 Pa. Super. Ct. 607. Affidavit in action for physician's services held insufficient to raise issue as to excessiveness of charges. Id. Affidavit of defense, averring that one partner had demanded accounting from other of the partnerships assets received by him and that it was found that such other partner was indebted to partnership fund, was not a distinct averment that there had been a final settlement of partnership account and property. Eureka Knitting Co. v. Snyder, 36 Pa. Super. Ct. 336.

27. Affidavit of defense in action against surety on administrator's bond, 16 years after audit of administrator's account, averring that surety was informed, believed, and expected to be able to prove that claim for which suit was brought had been paid in full by administrator. and stating that defendant could not give time, place, and manner of settlement, because same was secretly done between plaintiff and administrator, held sufficient. Commonwealth v. Magee [Pa.] 73 A 347. Where two persons were sued for work done, four years after its completion, and no statement was filed until nearly 20 years after action was brought, an affidavit by one of defendants that he had been informed and believed that within 6 months after work was done it was paid for by other defendant, held sufficient. Leiby v. Lutz [Pa.] 73 A 345.

28. Will be assumed that affidavit is made as strong as facts will permit. Eureka Knitting Co. v. Snyder, 36 Pa. Super. Ct. 336.

29. Held that affidavit of defense was as specific as statement of claim for services and money expended which failed to set forth character of labor and trouble expended, amount of personal time consumed, rate at which compensation is claimed and purposes for which money was expended. Kinney v Citizens' Building & Loan Ass'n, 37 Pa. Super. Ct. 425.

30. As where defendant, after discharge of first rule, ruled the case out for arbitration for the purpose, in the opinion of the court, of keeping the case off the trial list. Pence v. Poet, 221 Pa. 434, 70 A 832.

31. Act of April 18, 1874, P. L. 64, allowing writ of error to refusal of such judgment, should be confined to plain errors of law. Philadelphia Typewriter & Supply Co. v. Smith, Hutton & Kirk Co., 37 Pa. Super. Ct. 149.

32. No cases have been found for this subject since the last article. See 5 C. L. 64. Includes only matters relating to the common law offense. Topics dealing with related offenses such as Assault and Battery,* should be consulted. Matters common to all crimes (see Criminal Law;* Indictment and Prosecution *) are excluded.

* Always begin with the latest article on the subject. Use the latest topical index.

§ 1. *The relation between the parties. In general.* See 11 C. L. 60—Agency is the legal relation founded on the express or implied contract of the parties, or created by law, by virtue of which the agent is employed and authorized to act for the principal [34] as his representative.[35] An "attorney in fact" is a special or private attorney appointed for some particular or definite purpose not connected with proceedings at law.[36]

(§ 1) *A. Competency to act as agent or to employ agents* [37]—See 11 C. L. 61 depends primarily on contractual capacity [38] or on corporate power,[39] and, secondarily, on compliance with licensing and other regulations concerning particular agencies.[40]

(§ 1) *B. Creation and existence of the relation.*[41]—See 11 C. L. 62—The relation must usually rest upon a contract between the parties,[42] express or implied,[43] and the usual elements of a contract must be present.[44] The agent's authority may rest in parol [45] in the absence of express statutory provisions to the contrary.[46] Between private parties, authority to execute a contract under seal can be conferred only by an agreement under seal,[47] but this rule does not apply where powers are conferred by statute on public officials.[48] Whether a particular contract is one of agency,[49]

33. Agency resulting by operation of law from certain relations, as in the case of partnership (see Partnership,* § 4A), marriage (see Husband and Wife,* § 7A), and other particular kinds of agencies (see Attorneys and Counselors,* § 8; Brokers;* Corporations;* Factors;* Insurance,* § 4), and the liability of a principal to prosecution for criminal acts of his agent (see Criminal Law,* § 4), are elsewhere treated, as is analagous matter properly pertinent to the relations of master and servant (see Master and Servant*), or independent contractor (see Independent Contractors*).

34. Harkins v. Murphy [Tex. Civ. App.] 112 SW 136. Agent is one who undertakes to transact some business or manage some affair for another by the authority and on account of the latter and to render an account of it. Echols v. State [Ala.] 48 S 347.

35. Leaving instruments in the hands of an agent for delivery does not create an escrow, possession by the agent being possession by principal. Watson v. Chandler [Ky.] 119 SW 186.

36. Harkins v. Murphy [Tex. Civ. App.] 112 SW 136.

37. Search Note: See Principal and Agent, Cent. Dig. §§ 13-15; Dec. Dig. §§ 4-6; A. & E. Enc. L. (2ed.) 939.

See, also, Clark & S. Agency, §§ 17-32.

38. See Infants, 12 C. L. 140; Incompetency, 11 C. L. 1885. **Married woman** competent to appoint agent for management of separate estate. Baker v. Thompson, 214 Mo. 500, 114 SW 497. See, also, Husband and Wife, 11 C. L. 1838.

39. See Corporations, 11 C. L. 810.,

40. See Licenses;* Insurance,* § 4 (duty of filing appointment); Brokers;* Frauds, Statute of,* § 6.

41. Search Note: See note in 15 L. R. A. (N. S.) 324.

See, also, Principal and Agent, Cent. Dig. §§ 1-51; Dec. Dig. §§ 1-29; 1 A. & E. Enc. L. (2ed.) 948; 30 Id. 105; 22 Id. 1084.

See, also, Clark & S. Agency, §§ 2, 40-54.

42. One who sent telegram on his own account was not agent of another, though latter requested that it be sent. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553.

43. Robinson v. Bank of Winslow, 42 Ind. App. 350, 85 NE 793. Agency may be created by written or spoken words or by conduct. Campbell v. Order of Washington [Wash.] 102 P 410; Ankeny v. Young Bros. [Wash.] 100 P 736. Competent for board of directors by mutual understanding to make one member the agent of the board in management of corporate property, and no formal vote or record is necessary, as agency may be implied from conduct and circumstances. York v. Mathis, 103 Me. 67, 68 A 746.

44. Minds of principal and agent must meet to create agency. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Contract of agency employing sales agent held complete, definite and certain. Aberfelder v. J. G. Mattingly Co. [Ky.] 120 SW 352.

45. Contract employing agent to find purchaser for land need not be in writing. Forester-Duncan Land Co. v. Evatt [Ark.] 119 SW 282.

46. Authority to sell land must be in writing. Schaeffer v. Mutual Ben. Life Ins. Co. [Mont.] 100 P 225. See, also, Frauds, Statute of, 11 C. L. 1609.

47, 48. Peterson v. New York, 194 N. Y. 437, 87 NE 772.

49. Person, through whom plaintiff's orders to buy and sell stocks on margins were executed by defendant, held latter's agent, not mere customer. Welch v. Corey, 201 Mass. 165, 87 NE 477. In action against broker for conversion, evidence held to show person with whom customers dealt was broker's agent. Mullen v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078. Broker asked price of land, and owner made a price, less commissions to broker, which broker accepted. Held, broker became

or an option,[50] or a sale,[51] or a conditional sale,[52] or a joint adventure,[53] or a conveyance,[54] and whether the relation created is that of principal and agent, or master and servant,[55] or employer and independent contractor,[56] and, where an agency is found to exist, the question whom the agent represented,[57] depends upon the terms of the contract and the particular facts and circumstances, the existence of which is usually a jury question,[58] though the question, whether, upon a given state of facts, the relation created is that of agency, or some other relation, is a question of law.[59]

A power of attorney is to be construed with reference to the same rules as those governing the construction of other written instruments.[60] Thus, its construction will be controlled by the language used in connection with the intention of the donor, and the object sought to be accomplished, under the general doctrines of

owner's agent for sale of land. Rodman v. Manning [Or.] 99 P 657. Evidence held to show that one stockholder, in negotiating for sale of stock held by several others was acting in representative capacity and was accountable as agent. Merrill v. Sax [Iowa] 118 NW 434. One employed to sell stock of corporation, on commission, and who is required to report all sales and forward all moneys received to corporation is "agent," within meaning of Rev. Laws 1905, § 5078, defining larceny by agent. State v. Phillips, 105 Minn. 375, 117 NW 508. Plaintiffs made arrangement with broker whereby latter used plaintiffs' name and credit in buying and selling glue, plaintiffs to receive commissions on all sales. Held, broker was plaintiffs' agent. Deane v. American Glue Co., 200 Mass. 459, 86 NE 890.

50. Contract construed as agency to sell property, not as option. Metschan v. Swensson [Or.] 99 P 277.

51. Correspondence construed as agreement by defendants to handle shipment as agents for plaintiffs, on commission, and not as sale to defendants. Sligh v. Kuehne Commission Co. [Mo. App.] 115 SW 1065. Contract between manufacturer and jobber of proprietary medicine, which transferred title, but purported to be contract of agency, held sale not agency, intent being to evade law under which such sales would be void as in restraint of trade, owing to restrictions on right of resale. Dr. Miles Medical Co. v. Park & Sons Co. [C. C. A.] 164 F 803. Tailor who receives deposit on suit, and who refuses to deliver suit except on payment of balance and refuses, also, to return deposit, is not purchaser's agent, within meaning of embezzlement statute. Code 1907, § 6831. Echols v. State [Ala.] 48 S 347.

52. Contract construed as conditional sale, not agency. Poirier Mfg. Co. v. Kitts [N. D.] 120 NW 558. Contract construed as agency for sale of flour, not as conditional sale. Barteldes Seed Co. v. Border Queen Mill & Elevator Co. [Okl.] 101 P 1130.

53. Contract between agent and owner of land that agent should have, as compensation for finding buyer, the amount in excess of certain sum received for land is agency. Contract, not joint adventure. Manker v. Tough [Kan.] 98 P 792.

54. Instrument, in form power of attorney, held in fact a deed of land to grantee, under custom whereby land, after location of certificate but before issuance of patent, was transferred in this manner. Sims v. Sealy [Tex. Civ. App.] 116 SW 630.

55. Every servant is an agent, but converse is not true. McKenna v. Stayman Mfg. Co., 112 NYS 1099.

56. Relation between one with whom contract was made and an alleged undisclosed principal held not principal and agent, but independent contractor and employer. McKenna v. Stayman Mfg. Co., 112 NYS 1099. One employed to haul and deliver coal, under directions from dealer, held dealer's servant or agent, not independent contractor. Dealer liable for his acts in delivering short tons. City of Newark v. East Side Coal Co., 74 N. J. Law, 68, 70 A 734. Evidence held to show that one was independent contractor and not agent. McElroy v. Glenn Kline Lumber Co., 37 Pa. Super. Ct. 393.

57. Employe who prevented purchaser at auction sale from taking goods held to have been acting as agent of auctioneer not of receiver. Smith v. Hurley [R. I.] 72 A 705. Stockholders authorized one of their number to negotiate sale of stock and agreed to pay all expenses. Held, such person was their agent, and not the agent of the buyer as well, so that he was authorized to exact commission from buyer. Merrill v. Sax [Iowa] 118 NW 434. Where insurance agent had policy rejected by his company and told applicant he could get insurance in another company and applicant told him to go ahead, and policy was then applied for in another company, agent was acting for applicant not for second company. Michigan Mut. Life Ins. Co. v. Thompson [Ind. App.] 86 NE 503. Where defendant recommended certain sales agent to plaintiff, such agent became plaintiff's agent, when employed, and plaintiff must suffer loss caused by agent's dishonesty, in absence of fraud on defendant's part. Slaughter Co. v. Standard Sewing Mach. Co., 148 N. C. 471, 62 SE 599.

58. See post, § 2H.

59. Whether, upon a given state of facts, a person is or is not an agent of another is a question for the court. Michigan Mut. Life Ins. Co. v. Thompson [Ind. App.] 86 NE 503.

60. McClanahan v. Breeding [Ind.] 88 NE 695.

agency.[61] In case of doubt, construction should be against the donor, when third persons are interested, but a strained construction should not be employed to defeat the manifest intention or embrace authority not intended.[62] Where addressed to matters of statute or substantive law, such statute or law becomes a part of the power.[63] Parol evidence is incompetent to vary the terms of a power of attorney.[64]

Intermediaries and dual agencies. See 11 C. L. 62—An agent cannot act for both parties to a contract or transaction [65] at the same time,[66] unless they consent,[67] but a broker, knowing of a customer, has a right to contract with an owner of property for a commission in case of sale.[68]

Subagents. See 11 C. L. 63—Authority of an agent to appoint a subagent must exist in order that the principal may be bound,[69] but such authority may be implied.[70] One without authority to do an act cannot employ another to do it.[71] Authority involving judgment or discretion cannot be redelegated.[72]

(§ 1) *C. Implied agency from relation of parties.*[73]—See 11 C. L. 63—For certain purposes incidental to the relation, one person may be the implied agent of another to whom he sustains a particular relation.[74]

(§ 1) *D. Evidence of agency.*[75]—See 11 C. L. 63—The fact of agency may be established by inference from facts and circumstances of the agent's acts and dealings for the principal,[76] acquiesced in by the principal,[77] and by proof of a course of

61. Construction should effectuate intention and object. McClanahan v. Breeding [Ind.] 88 NE 695.

62. McClanahan v. Breeding [Ind.] 88 NE 695.

63. McClanahan v. Breeding [Ind.] 88 NE 695. Power of attorney given by voters to certain persons to sign, file, and present remonstrances against granting of liquor licenses, construed, in connection with Burns' Ann. St. 1908, § 8332, as continuing power, not limited to one remonstrance or two years during which such remonstrance was effective and not against public policy. Id.

64. Welke v. Wackershauser [Iowa] 120 NW 77.

65. See, also, post, § 4A. Contract by agent for both void for fraud. Larson v. Thoma [Iowa] 121 NW 1059.

66. Broker not guilty of wrongdoing as to his principal, where after he had ceased his efforts to interest a purchaser, he afterwards accepted an agreement from buyer to pay him a commission if he bought; buyer liable on such agreement. Siegel v. Rosenzweig, 129 App. Div 547, 114 NYS 179.

67. The rule that an agent cannot act for both parties is for protection of principals, and, if they consent to his acting for both, he may do so and collect compensation from both. Fryer v Harker [Iowa] 121 NW 526.

68. Larson v. Thoma [Iowa] 121 NW 1059.

69. Local agent of insurance company has no power to appoint another as its agent. Michigan Mut. Life Ins. Co. v. Thompson [Ind. App.] 86 NE 503. Agent of buyer of staves, for inspection, has no authority which he can delegate, and principal not bound by any attempted delegation, not known to him. Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401.

70. Real estate agent held to have power to employ subagent to assist in making sale. Fisk v. Waite [Or.] 99 P 283. National bank had power to employ agent to look after property which was security for debt and such agent had authority to employ another to take care of it. Ricker Nat. Bank v. Stone [Okl.] 97 P 577.

71. Crane & Co. v. Long [Ala.] 49 S 227.

72. New v. Germania Fire Ins. Co. [Ind.] 85 NE 703.

73. **Search Note:** See note in 65 A. S. R. 683.

See, also, Principal and Agent, Cent. Dig. §§ 26-33; Dec. Dig. § 14; 1 A. & E. Enc. L. (2ed.) 957.

See, also, Clark & S. Agency, §§ 73-96.

74. See Husband and Wife, § 7A; Partnership, § 4A, and like topics. **Each partner is agent** for all other partners as to partnership transactions. Schlicher v. Whyte [N. J. Err. & App.] 71 A 337. In accounting between partners, **bookkeepers employed by firm** were agents for each partner to keep his account with the firm, and entries in favor of firm and against partner were competent as admissions. Id. **Agency of husband for wife must be proved;** will not be presumed. Henderson v. State [Tex. Cr. App.] 117 SW 825.

75. **Search Note:** See notes in 7 C. L. 64, 65; 3 Ann. Cas. 621.

See, also, Principal and Agent, Cent. Dig. §§ 36-41; Dec. Dig. §§ 19-23; 1 A. & E. Enc. L. (2ed.) 967.

See, also, Clark & S. Agency, §§ 63-71.

76. On issue whether one was telegraph operator and agent of telegraph company at certain place, testimony that such person was seen at work there was admissible. Markley v. Western Union Tel. Co. [Iowa] 122 NW 136. Proof that person was in charge of telegraph company's office at certain place is prima facie proof of his agency for company. Id.

77. On issue whether power of attorney was executed, proof that alleged donee had made deeds under it which donor had never disaffirmed, and that donor had conveyed

dealing between the principal and agent[78] in regard to similar matters.[79] Where it is alleged that a corporate agent had power to do a certain act, officers of the corporation may testify that he had no such power.[80] Decisions dealing with the sufficiency of the evidence to show agency in particular cases will be found in the note.[81]

The fact of agency cannot be established by proof of declarations or admissions by the alleged agent,[82] though the stringency of this rule has been greatly relaxed

other lands himself and had revoked the power, was sufficient, with lapse of 50 years, to take issue to jury. Loughridge v. Ball [Ky.] 118 SW 321. Authority of agent may be proved by testimony from witnesses as to what agent did, in what capacity he was seen to act, and what principal allowed him to do. Sariol v. James McDonald Co., 127 App. Div. 648, 111 NYS 796.

78. Issue being authority of agent to make contract for principal to pay commissions, evidence that agent had made similar previous contracts and that principal had paid commissions thereunder was competent. Gieger v. Levin, 113 NYS 1016.

79. Trover by senior mortgagee against junior mortgagee of chattels, which had been taken by third person under assignment of junior mortgage. Proof that third person had acted as junior mortgagee's agent in collecting other debts was admissible to show agency in transaction in issue. Henderson Law Co. v. Hinson [Ala.] 47 S 717.

80. Where defendant in suit by corporation alleged that agent of corporation had power to do certain act, it was proper to allow officers of corporation to testify that he had no such power. Dolvin v. American Harrow Co., 131 Ga. 300, 62 SE 198.

81. **Evidence sufficient to show agency:** Evidence of agency held for jury. Lyons v. Hammond Elevator Co., 139 Ill. App. 495. Evidence warranted finding that one to whom money was advanced was defendant's agent. White v. Ballard County Bank [Ky.] 117 SW 294. Evidence showed agency of person who sold defendant's hay. Beasore v. Stevens [Mich.] 15 Det. Leg. N. 1063, 119 NW 431. Evidence held to show that person who undertook to prepare deeds was buyer's agent. Hardy v. Ward, 150 N. C. 385, 64 SE 171. Evidence held to show authority in agent to sign defendant's name to note. Eoff v. Citizens' Bank [Ark.] 112 SW 213. Evidence held to show that one contracting for installation of furnace acted as authorized agent for legal owners of property; lien authorized. Beach v. Huntsman, 42 Ind. App. 205, 85 NE 523. Evidence held to show agency and authority of husband to place wife's property in charge of one charged with embezzling it. Henderson v. State [Tex. Cr. App.] 117 SW 825. Evidence held sufficient to take to jury issue whether one who made contract was defendant's agent. Short & Co. v. Johnson [Ark.] 116 SW 658. Evidence held to show agency and authority of one who made loan for plaintiff and collected interest and received payment. Jolly v. Huebler, 132 Mo. App. 675, 112 SW 1013. Evidence warranted finding that foreman of seller of materials had authority to act for seller in promising to repair and return materials taken, especially where seller subsequently recognized foreman's act. Richards v. Shepherd [Ala.] 49 S 251. Recitals in deed executed by attorney in fact, and in letters, and testimony of one that he had seen power of attorney, held prima facie evidence of authority of attorney to convey. Mulford v. Rowland [Colo.] 100 P 603. Proof of payment by wife of interest on note given by herself and husband warrants finding of payments by both. Brethauer v. Schorer [Conn.] 70 A 592.

Evidence insufficient to show agency: Evidence held not to show relation of principal and agent between connecting carriers. Southern Exp. Co. v. Saks [Ala.] 49 S 392. Proof of general understanding, six years before, that plaintiff's brother should send him telegram if anything should happen to their mother, was insufficient to show agency of sendor for plaintiff, so that latter could sue for failure to deliver. Howard v. Western Union Tel. Co. [Ala.] 49 S 1036. Plaintiff could not recover for brick sold to defendant by another who bought from plaintiff, first buyer not acting as defendant's agent. Greenville Lumber Co. v. National Pressed Brick Co., 133 Mo. App. 217, 113 SW 236. Where plaintiff claimed that acts of officers and soldiers of Costa Rican government, whereby its plantation was injured, were instigated by defendant, defendant could not be held liable on theory that Costa Rican government acted as defendant's agent, government having acted in its political capacity. American Banana Co. v. United Fruit Co. [C. C. A.] 166 F 261.

82. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853; Crone & Co. v. Long [Ala.] 49 S 227; Ayer & Lord Tie Co. v. Young [Ark.] 117 SW 1080; Fireman's Fund Ins. Co. v. Kelley [Ky.] 116 SW 790; Superior Drill Co. v. Carpenter, 150 Mich. 262, 14 Det. Leg. N. 693, 114 NW 67; Logan v. Agricultural Soc. [Mich.] 16 Det. Leg. N. 192, 121 NW 485; Smith v. Pullman Co. [Mo. App.] 119 SW 1072. Declarations of alleged agent not competent to show agency or extent of authority. Mulford v. Rowland [Colo.] 100 P 603; Nicholas v. Oram [N. J. Law] 71 A 54; Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223. Declarations and acts of alleged agent incompetent to prove agency without independent proof of agency. Union Naval Stores Co. v. Pugh [Ala.] 47 S 48. Declarations of one that he was defendant's agent was not evidence of fact against defendant. Yoshimi v. U. S. Express Co. [N. J. Law] 73 A 45. License or agency cannot be proved by declarations of licensee or agent. Prouty v. Nichols [Vt.] 72 A 988.

in its application to corporations which can act only through agents.[83] Where the agency is prima facie shown by other competent evidence, proof of declarations by the agent is competent in corroboration.[84] An agent is a competent witness to testify to the fact of agency [85] and the scope of his authority.[86]

(§ 1) *E. Estoppel to assert or deny agency* [87]—See 11 C. L. 86—may arise from conduct of a party.[88]

(§ 1) *F. Termination of relation.*[89]—See 11 C. L. 66—Where the relation is simply that of agency,[90] and the contract does not specify any period of its continuance, it may be terminated at will by either party.[91] In a continuous transaction or ne-

83. Smith v. Pullman Co. [Mo. App.] 119 SW 1072.

84. Agent's declarations that he was agent competent when there was other proof of agency. Missouri Valley Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93. Declarations incompetent to prove agency, but are circumstance to be considered on question in connection with other facts. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767. Admission of declarations of agent not error, where party complaining himself brought out on cross-examination facts tending to show agency. Id. Declarations of an alleged agent may be received provisionally as verbal acts indicating that he was acting on another's behalf, leaving it to subsequent proof to establish his connection as agent. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223. Declarations of person with whom customers of broker dealt incompetent to show his agency for broker, though competent to supplement previous evidence tending to show such agency. Mullen v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078. Proof of payment of taxes by agent not proof of authority; but admission not error when there was evidence aliunde of agency. Union Naval Stores Co. v. Pugh [Ala.] 47 S 48.

85. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223. Agent may testify directly to his authority, though declarations are incompetent. Bender v. Ragan [Wash.] 102 P 427. Declarations of agent not competent, but his testimony is competent, to prove agency. Lefkowitz v. Iba, 114 NYS 29. Rule that declarations of agent are incompetent does not exclude agent as witness to fact of agency. Wales v. Mower [Colo.] 96 P 971.

86. Testimony of agent as to scope of authority competent in action against principal by third person. Rainey v. Kemp [Tex. Civ. App.] 118 SW 630. Agent himself, knowing facts, may testify to his agency and the extent of his authority. Ayer & Lord Tie Co. v. Young [Ark.] 117 SW 1080. Agent may testify to his authority and as to what he did as agent. Hill v. Bean, 150 N. C. 436, 64 SE 212.

87. Search Note: See Principal and Agent, Cent. Dig. §§ 42-45; Dec. Dig. § 25; 1 A. & E. Enc. L. (2ed.) 1195.

See, also, Clark & S. Agency, §§ 55-60.

88. See, also, Estoppel.

Estoppel shown: Evidence sufficient to support finding that defendant held person out as agent so as to be responsible for his acts. McIntyre v. Smyth, 108 Va. 738, 62 SE 930. One who signed and took possession of property under lease, reciting that certain persons were agents to rent property, was estopped to deny their agency. Benton v. Stokes, 109 Md. 117, 71 A 532. One who obtains saloon license in his own name and permits others to conduct the business in his own name and deposit receipts to his credit makes them his agents, and he is liable for money lost in gaming carried on in the place. Cartwright v. McElwain [Ky.] 116 SW 297. Instruction to effect that holding out as agent must have been with principal's knowledge approved. McIntyre v. Smyth, 108 Va. 738, 62 SE 930. Where seller promptly disavowed agent's unauthorized act in taking certain order by letter to agent, but did not notify buyer but shipped car of oil as ordered, seller did not ratify agent's act, but was estopped to assert that order was unauthorized. Sterling-Hurd Oil Co. v. Big Four Ice, Light & Cold Storage Co. [Tex. Civ. App.] 116 SW 397.

No estoppel: Creditor of firm, by asking one partner to talk to the other concerning settlement, does not make former his agent so as to be estopped to deny false statements made by such partner to the other. Cerney v. Paxton & Gallagher Co. [Neb.] 119 NW 14.

89. Search Note: See notes in 7 C. L. 68, 70; 23 L. R. A. 707; 1 L. R. A. (N. S.) 577; 6 Id. 885; 7 A. S. R. 279; 110 Id. 854.

See, also, Principal and Agent, Cent. Dig. §§ 52-75; Dec. Dig. §§ 29-46; 1 A. & E. Enc. L. (2ed.) 1215.

See, also, Clark & S. Agency, §§ 151-192.

90. Option agreement and contract to pay 10 per cent commission on sale were executed at same time to same person, construed together as contract of agency only, not sale, and agency, not being coupled with an interest, could be revoked at any time. Mitchel v. Gray, 8 Cal. App. 423, 97 P 160.

91. The principal may revoke and the agent may renounce, at will, the latter's appointment, in the absence of any agreement that it shall continue for a definite time. Moore v. Security Trust & Life Ins. Co. [C. C. A.] 168 F 496. Insurance agency held not to contemplate any period of existence of agency. Id. A contract by a life insurance company, whereby it turns over its property and business to a rival company and incapacitates itself to continue its insurance business, is not a breach of a contract appointing agents, which does not specify the term of existence of the appointment. Id.

gotiation, the authority of an agent does not expire with the performance of one act, however important that act may be.[92] Where the contract provides for the manner of and cause for termination of the relation, its terms control.[93] A contract of agency which leaves the agent free to terminate the relation on reasonable or specified notice must be held to give the principal the same right in the absence of express contrary provisions.[94] Death of the principal revokes the authority of the agent,[95] unless the agency was coupled with an interest.[96]

Notice of revocation See 11 C. L. 67 must be given third persons, in order to affect them.[97]

§ 2. *Rights and liabilities of principal as to third persons. A. Actual or implied authority to bind principal.*[98]—See 11 C. L. 67—Acts of the agent within the scope of the authority actually conferred upon him are binding upon the principal.[99] Acts relating to matters not properly incident to the management of the ordinary

92. Wolcott v. Hayes [Ind. App.] 88 NE 111.

93. Contract provided that it could be terminated at certain time if agent's sales for spring and fall seasons did not equal certain amount. "Season" meant season in salesman's territory. Walfsheimer v. Frankel, 130 App. Div. 853, 115 NYS 958. Agent or servant being employed for three years, provided he proved **"satisfactory"** to employer, latter had right to discharge agent if dissatisfied, whether or not he had reasonable ground for dissatisfaction. MacKenzie v. Minis [Ga.] 63 SE 900. Ordinarily any breach of duty undertaken by agent is **good cause** for his discharge. Armstrong v. National Life Ins. Co. [Tex. Civ. App.] 112 SW 327. Contract providing that insurance agent should receive renewal premiums for 10 years if contract was terminated subsequent to one year and he should forfeit all rights if guilty of certain acts, and could be discharged at any time for **"good cause," on notice,** construed; terminable any time after one year, with premiums; terminable for any act mentioned with forfeiture of rights. Id. Letter from principal to agent stating that it was necessary to terminate the contract of agency, "notice of which is hereby given," held **sufficient notice under contract** providing for termination by notice. Nelles v. MacFarland [Cal. App.] 99 P 980.

94. Newhall v. Journal Printing Co., 105 Minn. 44, 117 NW 228.

95. Lancaster v. Springer, 239 Ill. 472, 88 NE 272; Maxwell v. Harper, 61 Wash. 351, 98 P 756. Agency to deliver property to donees is revoked by death of donor before delivery. Trubey v. Pease, 240 Ill. 513, 88 NE 1005. Death of grantor of power of attorney to convey land revokes power. Lalor v. Tooker, 130 App. Div. 11, 114 NYS 403. Death of principal revokes authority of agent to make deed. Wall v. Lubbock [Tex. Civ. App.] 118 SW 886. Deed executed by attorney-in-fact, under power of attorney, after death of principal, is void, whether or not agent had notice of death of principal. Dallam v. Sanchez [Fla.] 47 S 871.

96. Agent for beneficiary under life policy had paid out money at her request, and received from her a power of attorney to collect money dus on policy and apply same on amount due him for expenditures. Held, he received power coupled with an interest which was not revoked by donor's death. Babrowsky v. U. S. Grand Lodge of the Order of Brith Abraham, 129 App. Div. 695, 113 NYS 1080.

97. Evidence held to show that defendant, who paid money to plaintiff's agent, had no notice of revocation of agent's authority. Bennett Piano Co. v. Scace, 130 App. Div. 281, 114 NYS 324.

98. **Search Note:** See notes in 5 C. L. 73; 18 L. R. A. 663; 20 Id. 695; 27 Id. 401; 4 L. R. A. (N. S.) 843; 7 Id. 817; 10 Id. 1118; 16 A. S. R. 493; 29 Id. 93; 35 Id. 593; 1 Ann. Cas. 676, 723; 3 Id. 570; 4 Id. 135; 8 Id. 327; 9 Id. 1198; 10 Id. 421.

See, also, Principal and Agent, Cent. Dig. §§ 245-494; Dec. Dig. §§ 91-137; 1 A. & E Enc. L. (2ed.) 985, 1136.

See, also, Clark & S. Agency, §§ 193-224.

99. Agent of machinery company held to have had authority to contract for delivery of machine on buyer's premises. Northwestern Thresher Co. v. Kubicek [Neb.] 118 NW 94. Principal bound where he admitted agent's authority and knowledge of promises made by agent. Carroll v. Farley, 113 NYS 478. Administrator of estate holding power of attorney from heirs to settle and adjust claims, etc., had power to compromise claim with defendant for trespass in cutting timber, and to waive forfeiture for failure to remove timber in time. Newberry v. Chicago Lumbering Co., 154 Mich. 84, 15 Det. Leg. N. 663, 117 NW 592. **Payment to authorized agent** is payment to principal. Cooper v. King [Ga. App.] 64 SE 288. Where agent had authority to collect note, payment to him was satisfaction of note and mortgagee and mortgagee's remedy was action against agent for money had and received. Wales v. Mower [Colo.] 96 P 971. One who employed attorneys to prosecute suit made them his agents; payment of judgment to them bound him as principal. Compher v. Missouri & K. Tel. Co. [Mo. App.] 119 SW 493. Where agent to sell was under contract to pay for goods shipped direct from factory, he had authority to collect payment from buyer, and such payment to agent released buyer from liability to seller. Diebold Safe & Lock Co. v. Dunnegan [Mo. App.] 115 SW 1051.

business of the principal,[1] outside the scope of the agent's actual authority,[2] or done after his authority has terminated,[3] and not impliedly [4] or apparently [5] authorized, or subsequently ratified [6] by the principal, are not binding upon him. Such authority may be implied as is reasonably necessary and proper to carry into effect the main power conferred,[7] and an agent has also implied power to follow the usual

1. The authority of an agent does not extend to any matter or transaction which is not properly incident to the management of the ordinary business of his principal. Farmers Co-op. Shipping Ass'n v. Adams Grain Co. [Neb.] 122 NW 55. Agent of corporation organized to buy and sell grain and live stock has no power to speculate in grain and mess pork on Chicago board of trade, and corporation not bound by such acts not having given actual authority. Id. Only such powers as are incident and pertinent to the business which the agent is empowered to transact. Blair v. National Shirt & Overalls Co., 137 Ill. App. 413. Power to lease and manage a farm gives no authority to indorse a check not connected with the business of the farm. Califf v. First Nat. Bank, 37 Pa. Super. Ct. 412.

2. To bind principal for purchases by agent, authority to make particular purchases must be shown; agency for other purpose not enough. Crone & Co. v. Long [Ala.] 49 S 227. Agent not shown to have authority to make contract leasing property of principal. Bonnazza v. Schlitz Brew. Co. [Mich.] 15 Det. Leg. N. 846, 118 NW 604. Evidence held to show that special agent had no authority to take order taken. Sterling-Hurd Oil Co. v. Big Four Ice, Light & Cold Storage Co. [Tex. Civ. App.] 116 SW 397. Principal not bound by agent's guaranty of performance by third persons of provisions of oil lease on land, when power of attorney expressly provided that agent could not bind principal by any warranty whatever. Williamson v. Deavey [Tex. Civ. App.] 114 SW 195. Agent of telegraph company had no authority to receive message for transmission after office had closed and to promise to deliver before opening hour next morning, rules for closing and opening being reasonable. Western Union Tel. Co. v. Cobb [Tex. Civ. App.] 118 SW 717. Evidence held to show that brewing company's agent had no power to grant to defendant agency for sale of company's goods for definite time and that he did not attempt to do so. Uihlein v. Caplice Commercial Co. [Mont.] 102 P 564. Where vendor makes written contract for sale of chattels, it does not, by sending blank notes to bank for execution by purchasers, authorize bank to accept notes in escrow or upon any conditions not specified in contract. Watt v. Davison [Neb.] 118 NW 562. Authority given branch store manager to incur and pay bills for various items of expense in connection with conduct of business did not give him power to buy goods for sale, especially where contract provided that he should sell only goods entrusted to him by employer. Keyes & Co. v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201. Cashier told personal creditor that he would deposit amount of debt in bank for creditor's benefit, but failed to do so, but creditors checks on supposed deposit were paid. Bank failed. Creditor liable to bank for overdrafts, and bank not liable to him as depositor for amount cashier promised to deposit. Langlois v. Gragnon [La.] 49 S 18. Power of attorney to act for principal, and to execute papers, etc., held not to confer power to sign principal's name and acknowledge it, as though principal himself were personally executing it. People v. Shanley, 117 NYS 845. Agreement by landlord's agent that tenant could remain in possession of premises part of a month without payment of rent unenforcible unless specially authorized. Johnson v. Hulett [Tex. Civ. App.] 120 SW 257. Letter from mother to son, authorizing him to sell stock for certain amount and deposit proceeds in bank which would aid in making sale and pay 4 per cent, did not authorize son to deposit money until debt owed by him to bank was paid and as collateral for his loan. Guarantee Title & Trust Co. v. Gillespie [Pa.] 72 A 703. Drayman employed to take shipper's goods to depot for shipment has no authority to enter into contract limiting liability of carrier, and shipper is not bound thereby where he did not learn of it until long after shipment. Benson v. Oregon Short Line R. Co. [Utah] 99 P 1072. General agent for rental and care of property can bind his principal only by contracts within scope of his authority. Instruction making any contract made by him binding on principal erroneous. National Loan & Inv. Co. v. Bleasdale [Iowa] 119 NW 77. Act of agent of municipal corporation, beyond his authority, cannot bind the municipality in its private corporate capacity. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93. Where street commissioner issued permit to property owner to build vault under alley, which was prohibited by ordinance, his act was of no force, and city was not estopped to deny its validity, though he had accepted bond and compensation. Id.

3. Where owners of bonds placed them in hands of committee for sale before certain date, sale after that date conveyed no title, being unauthorized. Smith & Co. v. Collins [C. C. A.] 165 F 148. Where bonds were placed in hands of committee to sell up to certain date, a sale after date was unauthorized and passed no title to persons who knew of instrument authorizing sale and were bound by its terms. Collins v. Smith, 158 F 872.

4. See post, this section.

5. See post, § 2B.

6. See post, § 2D.

7. William Cameron & Co. v. Blackwell [Tex. Civ. App.] 115 SW 856. Every delegation of power, unless expressly limited, carries with it the incidental power to do whatever is reasonably necessary and proper to effectuate the power granted. Birge-Forbes Co. v. St. Louis & S. F. R. Co. [Tex. Civ. App.] 115 SW 333. Agent for

and customary mode of conducting the business entrusted to him.[8] Implied authority to contract for medical services has been held to grow out of an emergency requiring such action.[9] A mere agent or attorney in fact, who is not an attorney at law, cannot ordinarily represent his principal in judicial proceedings.[10] Personal acts of the agent, not done in his representative capacity, are not binding on the principal,[11] and a creditor who elects to give credit to the agent rather than to the principal, with knowledge of the facts, cannot hold the principal for the debt, though he receives the benefit.[12] An agent has no power to use the subject-matter of his agency for his own benefit.[13]

Acts of a subagent.—An act of a subagent, within the scope of the authority of the agent, may be adopted by the latter.[14]

(§ 2) *B. Apparent authority and unauthorized or wrongful acts of agent.*[15]—See 11 C. L. 69—The principal is bound by all acts of the agent within the apparent scope of his authority,[16] apparent authority being such as he appears to have by

buying and shipping cotton held to have authority to bind principal by contract to store cotton on railroad platform at his own risk from fire. Id. Sale agent of grain company to buy and sell grain had implied power to order copy of investigation and report of interstate commerce commission relative to grain rates, since knowledge of rates was essential in dealing in grain. Law Reporting Co. v. Elwood Grain Co. [Mo. App.] 115 SW 475. Agent having authority as to matters covered in account has power to bind principal by account stated by him. Such authority need not be in writing. Sariol v. James McDonald Co., 127 App. Div. 648, 111 NYS 796. Superintendent of trucking had **no implied authority** to offer reward for recovery of property stolen from employer. Rubenstein v. Frost, 116 NYS 681. One employed to drive horses in races has no implied power to receive a purse won in a race; payment to driver not payment to owner. Snow v. Wathen, 112 NYS 41. Not extended beyond what is given in terms and what is necessary and proper to the carrying out of the authority given. Califf v. First Nat. Bank, 37 Pa. Super. Ct. 412.

8. Aqueduct commissioners, under Laws 1883, p. 666, c. 490, would have power to make contract under seal, if this was customary. Peterson v. New York, 194 N. Y. 437, 87 NE 772. Authority to do an act clothes the agent with apparent authority to do the things usual and necessary for the accomplishment of the act authorized. McDonald v. Pearre Bros. & Co., 5 Ga. App. 130, 62 SE 830. Agent to negotiate sale has power to employ attorneys to close title. Egan v. De Jonge, 113 NYS 737. Where commercial traveler has power to receive and transmit orders but not to close contracts, he has authority to transmit the buyer's instructions to the seller as to mode of shipment, by sea insured, it being customary for wholesalers to ship goods in this way when so instructed. McDonald v. Pearre Bros. & Co., 5 Ga. App. 130, 62 SE 830.

9. Where stranger struck by train required immediate medical attention, conductor of train had implied authority, growing out of emergency, to employ surgeon and bind company for his services. Bonnette v. St. Louis, etc., R. Co. [Ark.] 112 SW 220.

10. Party must appear personally or by attorney at law in Texas. Harkins v. Murphy [Tex. Civ. App.] 112 SW 136.

11. Failure of a personal warranty of the agent does not entitle a buyer to rescission of a contract of sale with the principal. Jesse French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150.

12. Hazelhurst Lumber Co. v. Carlisle Mfg. Co. [Ky.] 112 SW 934.

13. Agent, authorized to sell, has no power to pledge principal's property for his own debt. Morsch v. Lessig [Colo.] 100 P 431. Agent with power to rent property and collect rents has no power to apply rent on his own board bill, owed to lessee. National Loan & Inv. Co. v. Bleasdale [Iowa] 119 NW 77.

14. New v. Germania Fire Ins. Co. [Ind.] 85 NE 703.

15. Search Note: See notes in 14 L. R. A. 234; 41 Id. 650; 11 L. R. A. (N. S.) 122; 16 Id. 786; 22 A. S. R. 189; 88 Id. 779.

See, also, Principal and Agent, Cent. Dig. §§ 254-494, 528-618; Dec. Dig. §§ 98-137, 147-162; 1 A. & E. Enc. L. (2ed.) 985.

See, also, Clark & S. Agency, §§ 208-210.

16. McDonald v. Pearre Bros. & Co., 5 Ga. App. 130, 62 SE 830; Treat v. Smith, 139 Ill. App. 262; West Side Hospital v. Eiger, 139 Ill. App. 645; Cooper v. Ratliff [Ky.] 116 SW 748; Winslow Bros. & Co. v. Staton, 150 N. C. 264, 63 SE 950; Farmers' & Merchants' Bank v. Germania Life Ins. Co., 150 N. C. 770, 64 SE 902; Birge-Forbes Co. v. St. Louis & S. F. R. Co. [Tex. Civ. App.] 115 SW 333. Agent, acting within scope of apparent authority, though outside scope of actual authority, may bind principal by acts affecting innocent third parties. Fruit Dispatch Co. v. Gilinsky [Neb.] 128 NW 45. Acts of agent within scope of apparent authority binding on principal. Public need not inquire as to power of apparent general agent. Eagle Fire Co. v. Lewallen [Fla.] 47 S 947 Principal is responsible to third persons not only for acts and statements of the agent within his actual authority but also for those within the scope of his apparent authority. Howe v. Martin [Okl.] 102 P 128.

reason of the authority actually exercised by him,[17] with the knowledge and acquiescence of the principal,[18] the basis of the binding force of apparent authority being estoppel to deny authority which the principal has caused or allowed the agent to exercise.[19] This estoppel must be based on conduct of the principal;[20] apparent or implied authority cannot be assumed from acts and declarations of the agent alone.[21] Authority conferred upon an agent, whether general or special, is to be construed as including only the usual means appropriate to the end.[22] Even

17. Where dealings between parties were such as to show apparent authority in defendant's chauffeur to contract for supplies and work on automobile, and defendant accepted benefits of contract, he was liable to plaintiff for their value. Lozier Motor Co. v. Ziegler, 115 NYS 134. Where husband had represented wife in all transactions concerning notes, she was bound by his action, in suit on notes in denying any knowledge of counterclaim, part of which was allowed, and could not subsequently hold bank accountable for full amount of notes. Schroeder v. State Bank [Iowa] 121 NW 505. Where agent sold machinery, took notes and mortgage in payment, collected some notes and started foreclosure, he had apparent general authority to make settlement whereby mortgaged and other property was taken for debt. Northwest Thresher Co. v Dahlgren, 50 Wash. 325, 97 P 228. Seller shipped engine consigned to itself, care of its agent, and agent employed assistant, unloaded and set up engine, and gave it test. Held, he was acting within authority; principal liable for fire caused by agent's negligence. Aultman & Taylor Mach. Co. v. Gay, 108 Va. 647, 62 SE 946. Agent for sale of machinery and twine, authorized to make contracts, settlements, collect balances, etc., has power to enter into contract with customer relieving him of excess of twine bought by him, by authorizing shipment to different persons. Herpolsheimer v. Acme Harvester Co. [Neb.] 119 NW 30. Where owner of trunk required express company to deliver it, and maid was authorized to deliver trunk to express company, maid had authority to make contract as to carriage including limitation of liability contained in receipt. Wright v. Fargo, 59 Misc. 416, 112 NYS 358. Driver for express company, who collected goods for shipment, had authority to bind company by statement, that package was properly addressed and would reach its destination, made when receiving it. Magnus v. Platt, 62 Misc. 499, 115 NYS 824. Local insurance agent took additional premium with knowledge that insured carried other insurance, and promised to indorse consent of company to additibnal insurance on policy, but failed to do so. Held, this was waiver of provision requiring written consent indorsed on policy. Eagle Fire Co. v. Lewallen [Fla.] 47 S 947.

18. Apparent authority means such authority as the acts or declarations of the principal, not the agent, give the agent the appearance of possessing. Farmers' Co-op. Shipping Ass'n v. Adams Grain Co. [Neb.] 122 NW 55. Silence of principal, who has knowledge of acts of agent in buying goods for sale, is evidence of authority to make like purchases in future, before notice of want of authority. Keyes & Co. v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201. Where agent was held out as such by principal, with authority to loan and collect money, payment to agent, who had note and trust deed and delivered them to debtor, was payment to principal, and latter must bear loss from agent's conversion. Jolly v. Huebler, 132 Mo. App. 675, 112 SW 1013. That defendant accepted and filled certain orders sent in by one did not show that he was authorized to accept orders so as to bind defendant, especially at prices less than those quoted by defendant. Harris v. Santee River Cypress Lumber Co. [R. I.] 72 A 392.

19. Stockbrokers, having entrusted to an employe apparent authority to deal with customers, could not show want of actual authority. Kilmer v. Hutton, 131 App. Div. 625, 116 NYS 127. The authority of an agent is enlarged by implication as to third persons if the principal allows him to act as agent beyond his authority without objection. Keyes & Co. v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201. In such case the principal is bound by estoppel to those who deal with the agent as such within the apparent scope of his authority, and are not aware of any want of authority. Id. Where principal had knowledge that branch store manager was buying goods for sale on account, it was bound to give notice to seller within reasonable time that agent had no authority to buy, or it would be bound by agent's acts. Id. Grain company estopped to deny authority of agent to contract by mail for copy of testimony and report by commerce commission where it entrusted agent with power to receive, open and answer letters for company. Law Reporting Co. v. Elwood Grain Co. [Mo. App.] 115 SW 475. Principal who holds out agent as having authority to collect principal of loan, knowing agent to be lax and possibly dishonest, must suffer loss if agent absconds and fails to account. Campbell v. Sowans [Utah] 100 P 397.

20. It is the prior conduct of the principal that affords ground to infer the continuance of the agency in the particular business. Keyes & Co. v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201. Apparent authority must be assumed from some act of the principal, holding the agent out as authorized to do the act in question. Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065.

21. Apparent or implied authority cannot be assumed from acts and declarations of the agent alone. Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065.

22. Ricker Nat. Bank v. Stone [Okl.] 97 P 577. Agent has no authority to use prin-

general discretion must be exercised in a reasonable manner and cannot be resorted to to justify acts which the principal could not be presumed to intend.[23] The apparent authority of an agent is to be gathered from all the facts and circumstances in evidence and is a question of fact for the jury.[24] One dealing with an agent is bound to make reasonable inquiry as to his authority [25] especially where the agency is special [26] or limited,[27] or where there are circumstances calculated to put him on inquiry,[28] and cannot rely on an agent's apparent authority when he has notice of a limitation upon the agent's powers.[29] An agent cannot bind his principal in matters where he is adversely interested [30] or where he is secretly acting for the other party to the transaction,[31] and a third person is presumed to know the agent's lack of authority in such cases.[32] Secret instructions to the agent, unknown to a third

cipal's bank deposit to "kite" checks for his own benefit. Farmers' & Merchants' Bank v. Germania Life Ins. Co., 150 N. C. 770, 64 SE 902.

23. Ricker Nat. Bank v. Stone [Okl.] 97 P 577. Agent for bank to look after cattle-security for debt had apparent authority to employ man to take charge, but not to promise that bank would pay a debt owed him by other employers. Id.

24. Ricker Nat. Bank v. Stone [Okl.] 97 P 577. That agent of mortgagee has not possession of note and mortgage is not conclusive evidence of want of authority to collect principal. Existence of such authority is question of fact depending on all the evidence. Campbell v. Gowans [Utah] 100 P 397. Agent held to have apparent authority to collect principal. Id.

25. There is no presumption that those assuming to act as agents are such in fact, and none that what those who are private agents may do is within their authority. Whalen v. Gleeson [Conn.] 71 A 908. One dealing with an agent is bound to a knowledge of the agent's authority. William Cameron & Co. v. Blackwell [Tex. Civ. App.] 115 SW 856. One dealing with one who does business as factor is bound to take notice of his agency. Winslow Bros. & Co. v. Staton, 150 N. C. 264, 63 SE 950. Persons dealing with an agent are bound to know the extent of his authority. Rogers Grain Co. v. Tanton, 136 Ill. App. 533.

26. One dealing with special agent is under duty of informing himself as to agent's authority. Sterling-Hurd Oil Co. v. Big Four Ice, Light & Cold Storage Co. [Tex. Civ. App.] 116 SW 397. One dealing with a special agent is bound to ascertain the scope of his authority and, if he does not, deals with the agent at his peril. Schaeffer v. Mutual Ben. Life Ins. Co. [Mont.] 100 P 225.

27. One dealing with agent, especially where power appears limited, must ascertain his authority and deals with him at his own peril. Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059.

28. One receiving, from an agent, property of the principal in pledge for debt of third person, is put on inquiry. Interstate Securities Co. v. Third Nat. Bank, 35 Pa. Super. Ct. 277. The payee of a check, on its face the check of a municipal corporation, is charged with notice of a possible want of authority of the municipal agent or officer to bind the municipality, and cannot recover on the check or retain the proceeds without showing that the execution of the paper was duly authorized. City of Newburyport v. Fidelity Mut. Life Ins. Co., 197 Mass. 596, 84 NE 111. Prima facie and on its face check was issued without authority where insurance company receives check drawn by municipal treasurer in payment of latter's individual debt (Id.), irrespective of the question whether or not there was an ordinance prohibiting the act (Id.). Principle applicable if no such ordinance. Id.

29. Persons relying on promises or stipulations by agents waiving written provisions of contracts do so at their own peril. Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059. Where one dealing with salesman had direct notice from clause in contract that agent had no power to make agreements not contained therein, he had no right to rely on such attempted oral stipulation by agent. Id. Agent who sold machine to defendant signed printed contract which stipulated that no conditions not therein stated would bind seller, and defendant read and signed same contract. Agent signed separate paper stating certain conditions of sale, of which seller had no notice. Defendant liable on original contract. Advance Thresher Co. v. Roger [La.] 49 S 709.

30. Agent cannot bind principal in matter where he is adversely interested. Langlois v. Gragnon [La.] 49 S 18. Where agents of owner of land were acting, at time they made admissions concerning his claims, and when they moved a fence, for parties adversely interested, their admissions and act could not affect owner. William Cameron & Co. v Blackwell [Tex. Civ. App.] 115 SW 856.

31. Persons who know that agent acting for them is also acting for the other party to the transaction cannot claim that the other is bound by such agent's acts. William Cameron & Co. v. Blackwell [Tex. Civ. App.] 115 SW 856.

32. Where circumstances are such that interests of agent and principal are necessarily adverse, party dealing with agent is bound to take notice that agent cannot bind principal. Langlois v. Gragnon [La.] 49 S 18. Bank presumed to have notice that agent had no authority to use principal's deposit to "kite" checks for his own benefit. Farmers' & Merchants' Bank v. Germania Life Ins. Co., 150 N. C. 770, 64 SE 902.

person, will not affect the binding force of acts within the agent's apparent authority.[33]

Unauthorized and tortious acts.[See 11 C. L. 71]—The principal is responsible for wrongful and tortious conduct of the agent in the course of his employment and within the apparent scope of his authority.[34] The principal is of course not liable where such acts are unauthorized and outside the course and scope of the agent's employment.[35] Misrepresentations and fraud of an agent, while acting for the principal, with authority,[36] makes the latter responsible[37] and invalidates a contract for the principal which was induced thereby,[38] though the principal was per-

33. Where agent had apparent authority to make purchase, principal was liable notwithstanding secret instructions to agent to buy from another. Mississippi Valley Const. Co. v. Abeles & Co. [Ark.] 112 SW 894. Purchaser not affected by secret instructions or communications to agent as to conditions on which deed was to be delivered. Thornton v. Pinckard [Ala.] 47 S 289. Where oral contract made by agent was within scope of his apparent authority, it was immaterial that agent had instructions to make written contract, when other party had no notice of limitation on his powers. Gooding v. Moore, 150 N. C. 195, 63 SE 895. Where company authorized auditor to settle claim of servant for injuries, and servant had no knowledge of any limitation on auditor's power, an agreement made with auditor to pay servant sum of money and care for him until well, was binding on company. Maloney v. Hudson River Water Power Co., 117 NYS 601. Where agent delivered contract for exchange of property, in violation of secret instructions from principal, but other party had notice of agent's authority, and not of secret instructions, agent's act bound principal. Hawes v. Birkholtz, 114 NYS 765.

34. Principal liable if agent was acting for him, within scope of employment, though act unauthorized. Wallace v. John A. Casey Co., 132 App. Div. 35, 116 NYS 394. One who sends another to levy under distress warrant, which he sues out, is liable for acts done while executing their authority. Jones v. Parker, 81 S. C. 214, 62 SE 261. Slander uttered by manager of foreign corporation, with general powers, while engaged in adjusting account with person of whom slanderous words were spoken, such words relating to matter in hand, made corporation liable. Payton v. People's Credit Clothing Co. [Mo. App.] 118 SW 531. Principal may be liable although not a joint tort feasor. Epstein v. Gordon, 114 NYS 438. In action by patron of theater for tort of usher, it was held that question of whether the servant was acting within scope of his authority was for jury. Id.

35. Insurance company not liable for slanderous statements by solicitors, unauthorized and not within scope of their employment. Kane v. Boston Mut. Life Ins. Co., 200 Mass. 265, 86 NE 302. Mere fact that insurance solicitors slandered plaintiff, while employed by defendant, would not make defendant liable, where there was no proof that statements were in course and within scope of solicitors' employment. Id. Agents of corporation authorized to collect bills had no authority to arrest debtor's wife, and corporation would not be liable unless it ratified their act. Powell v. Champion Fibre Co., 150 N. C. 12, 63 SE 159. Note given for benefit of plaintiff, as compromise in bastardy proceedings, was not invalidated by unlawful agreement by plaintiff's guardian and attorney that she would not testify in prosecution against putative father for rape, when plaintiff had no knowledge of such agreement. Griffin v. Chriswisser [Neb.] 120 NW 909. Arrest held not within scope of authority of detective. Kehoe v. Marshall Field & Co., 114 Ill. App. 140. A principal is not liable for the malicious acts of its agent not within the scope of his authority. Equitable Life Assur. Soc. v. Lester [Tex. Civ. App.] 110 SW 499.

36. Mistaken misrepresentation by one in charge of property, but who had no power to sell or make such representations, was not fraud of owner, who afterwards sold to person to whom agent made such representation. Rothstein v. Isaac, 124 App. Div. 133, 108 NYS 896.

37. Principal responsible for misrepresentations of agent in making sale of books. Tait v. Locke, 130 Mo. App. 273, 109 SW 105. Where agent had power to sell automobile, principal was bound by his representations as to quality and condition of car which induced the sale. Washburn v. Rainer Co., 130 App. Div. 42, 114 NYS 424. Owner of land is responsible for representations made by subagent in course of employment, while selling land. Nelson v. Title Trust Co. [Wash.] 100 P 730. Principal responsible for agent's representations made while acting within scope of authority, negotiating exchange of property. Shapbell v. Boyd [Cal. App.] 98 P 69. Misrepresentations as to matter entrusted to agent's management. Crook v. International Trust Co., 32 App. D. C. 490.

38. Fraud of authorized agent invalidates contract made for principal. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945. Fraud of insurance agent authorized to solicit and obtain insurance, in obtaining premium note, invalidates note. Id. Principal liable for fraud of agent who misrepresents facts in selling land; such fraud would be ground for rescission if action brought in time. Smith v. Gray [Wash.] 100 P 339. Vendees entitled to rescind where vendor's agent concealed agency and fact that he would receive commission and represented himself to vendees as joint purchaser with them. Houts v. Scharbauer, 46 Tex. Civ. App. 605, 19 Tex. Ct. Rep. 556, 103 SW 679.

sonally innocent [39] and the agent violated instructions.[40] The general rule is that a principal may recover the value of his property from a third person to whom it has been transferred by an agent acting without authority.[41] But where an agent is vested with apparent authority and held out by the principal as having authority to use labor and materials of his principal, the principal cannot recover therefor from an innocent third person, though the agent acted wrongfully.[42] Where an act is that of an agent or manager to whose charge the general management of the particular business, in the conduct of which the act complained of was done, the principal is liable in a proper case [43] for punitive as well as for compensatory damages, even though the agent may have violated general instructions of the principal.[44] For personal negligence of an agent, he is primarily and the principal only secondarily liable and an exoneration of the agent exonerates the principal.[45]

(§ 2) *C. Particular kinds of agencies.*[46]—Agency may be general or special. It is special when both the end and the means are specific.[47] It is the duty of one dealing with a special agent to ascertain the extent of his authority before dealing with him,[48] otherwise he deals with such agent at his peril, and the principal will not be bound by acts exceeding the agent's actual authority.[49] Buying and selling agents have no power to deal except upon terms fixed by the principal.[50] General authority as salesman does not include implied authority to sell goods upon extraordinary terms.[51] An agent authorized to sell property has no implied authority to assign to one with whom he makes a contract the rents from the property pending negotiations or until the final transfer.[52] Agent employed to sell real estate,

39. An innocent principal cannot assert any rights or retain any benefit upon a contract procured by the fraud of his agent. Reitman v. Fiorillo [N. J. Err. & App.] 72 A 74. Principal responsible for false representations made by selling agent acting within scope of his employment or authorized to make them regardless of whether agent or principal knew of falsity of representations. Wimple v. Patterson [Tex. Civ. App.] 117 SW 1034. Principal cannot retain property conveyed to him by reason of agent's false representations and at same time repudiate responsibility for fraud. Shopbell v. Boyd [Cal. App.] 98 P 69.

40. Principal is responsible for fraudulent or wrongful act of agent, done in course of his employment, though agent violates express instructions in doing it. Brown v. American Tel. & T. Co. [S. C.] 63 SE 744.

41, 42. Wilcox-Rose Const. Co. v. Evans [Cal. App.] 98 P 83.

43. Rose v. Imperial Engine Co., 127 App. Div. 885, 112 NYS 8.

44. Liability for punitive damages sustained where agent wrote libelous letter. Rose v. Imperial Engine Co., 127 App. Div. 885, 112 NYS 8.

45. Judgment for agent and against principal cannot be sustained. Bradley v. Rosenthal, 154 Cal. 420, 97 P 875.

46. See 11 C. L. 72; also such subjects as Brokers, 11 C. L. 446; Insurance, 12 C. L. 252; Factors, 11 C. L. 1454; Attorneys and Counselors, 11 C. L. 332.

Search Note: See Principal and Agent, Cent. Dig. §§ 245-494; Dec. Dig. §§ 91-137; 1 A. & E. Enc. L. (2ed.) 1003; 6 Id. 223. See, also, Clark & S. Agency, §§ 225-287.

47. Authority to surrender note and receive payment, special agency. Robinson v. Bank of Winslow, 42 Ind. App. 350, 85 NE 793.

48. See, also, ante, § 2B.

49. Bank liable for money paid to agent to collect note, who endorsed check received in payment without authority, and kept money. Robinson v. Bank of Winslow, 42 Ind. App. 350, 85 NE 793.

50. Buying agent has no power to pay more than price authorized by his principal. Mahan v. Rankin [Or.] 102 P 608. Special agent to sell land has no authority to receive payment before completion of sale or to accept a payment on terms not specially authorized by his principal. Schaeffer v. Mutual Ben. Life Ins. Co. [Mont.] 100 P 225. Agent in charge of ranch and stock sales had no authority to bind principal by agreement that note given for price of mules should be paid for by breaking land for another, who was to pay principal. Gunter v. Robinson [Tex. Civ. App.] 112 SW 134. Contract between parties jointly interested in land construed and held not to confer on one as agent power to sell land and contract for delivery of deed prior to time agreed upon by parties for selling and transferring title. Walsh v. Colvin [Wash.] 101 P 1085.

51. Salesman has no implied authority to promise to procure customers for buyer and guarantee payment of accounts. Beck v. Freund, 117 NYS 193. Agent to sell land has no authority to agree to give abstract and guaranty policy. Sattler v. Oliver, 138 Ill. App. 210.

52. Contract, allowing vendee rents after certain date, unenforcible when transfer was not made until several months later. Gund Brew. Co. v. Tourtelotte [Minn.] 121 NW 417.

and not authorized to execute a contract of sale or conveyance, is only an agent to find a buyer.[53] An agent authorized to deliver deed has power to receive payment.[54] Under authority to convey, an agent cannot sell otherwise than for cash, unless specially authorized, and cannot transfer as a gift.[55] Power to sell land as though it were the agent's own was held to confer authority to sell on credit, and dispose of proceeds as he saw fit.[56] Authority by one cotenant to another to negotiate a sale of the property includes authority to contract to pay a broker a commission to find a buyer.[57] An agent authorized to rent is empowered to make the usual covenant for repairs,[58] and has authority to give the tenant notice to quit.[59] An authority to buy cannot properly be inferred from an authority to sell.[60] Authority to collect a debt does not authorize acceptance of anything but money.[61] Authority to collect certain notes does not confer authority to collect all notes of a series.[62] Special authority to collect a note does not authorize the agent to endorse the check given in payment.[63] Authority to reloan money implies authority to collect the debt about to mature.[64] An agent who has authority to make a deposit in a bank has no implied authority to draw it out.[65] An agent as such has no power to mortgage his principal's property or indorse or issue accommodation paper binding upon the principal.[66] Such acts must be specially authorized.[67] An agent authorized to make a contract has no authority to subsequently consent to its rescission.[68]

(§ 2) *D. Ratification by principal.*[69]—See 11 C. L. 74—Ratification, as it relates to the law of agency, is the express or implied adoption of the acts of another by one for whom he assumes to act,[70] and, when shown, is equivalent to original authority,[71] the act ratified being binding upon the principal [72] and the third person.[73]

53. Manker v. Tough [Kan.] 98 P 792.

54. Babson v. Cox, 32 App. D. C. 542.

55. General power of attorney did not authorize execution of quitclaim deed for "$1 and other considerations." Welke v. Waekershauser [Iowa] 120 NW 77.

56. Neill v. Kleiber [Tex. Civ. App.] 112 SW 694.

57. Lee v. Conrad [Iowa] 117 NW 1096.

58. Authority to rent held to include authority to make lease with such conditions as are customary in leases and to bind principal thereby; hence, principal authorizing agent to agree to make such repairs as was necessary to secure tenant held liable for value thereof. White v. Clow, 135 Ill. App. 464.

59. Benton v. Stokes, 109 Md. 117, 71 A 532.

60. Keyes & Co. v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201.

61. Power to collect a debt does not confer authority to receive property in lieu of money in payment. Stringfellow v. Braselton [Tex. Civ. App.] 117 SW 204. Agent to collect rent has no power to accept any but cash payment. National Loan & Inv. Co. v. Bleasdale [Iowa] 119 NW 77.

62. Winer v. Bank of Blytheville [Ark.] 117 SW 232.

63. Robinson v. Bank of Winslow, 42 Ind. App. 350, 85 NE 793.

64. Wales v. Mower [Colo.] 96 P 971.

65. Second Nat. Bank v. Gibboney [Ind. App.] 87 NE 1064.

66, 67. Roberts v. Little [N. D.] 120 NW 563.

68. Fuller v. Samuels, 137 Ill. App. 536.

69. **Search Note:** See notes in 7 C. L. 82; 4 L. R. A. (N. S.) 431; 6 Id. 311; 15 Id. 693; 5 A. S. R. 109, 618; 59 Id. 638.

See, also, Principal and Agent, Cent. Dig. §§ 618-669; Dec. Dig. §§ 163-176; 1 A. & E. Enc. L. (2ed.) 1181.

See, also, Clark & S. Agency, §§ 97-150.

70. A contract made in the name of and for the benefit of one person cannot be made the contract of another by ratification. In re Roanoke Furnace Co., 166 F 944.

71. Beagles v. Robertson [Mo. App.] 115 SW 1042; Ankeny v. Young Bros. [Wash.] 100 P 736. Subsequent ratification has retrospective effect and is equivalent to prior command. Campbell v. Gowans [Utah] 100 P 397.

72. Vendor, who ratifies contract of sale and agreement to repurchase at fixed price after one year at purchaser's option by delivering deed and agreement and receiving price, cannot thereafter repudiate agency of one who made contract to repurchase. Van Name v. Queens Land & Title Co., 130 App. Div. 857, 115 NYS 905. Ratification with knowledge relates back to the time when the agent's acts were performed and binds the principal as if original authority had existed. Robinson v. Bank of Winslow, 42 Ind. App. 350, 85 NE 793.

73. Other party to contract made with agent could not withdraw after notice of ratification by agent's principal, except on grounds entitling him to rescind. Owens v. National Hatchet Co. [Iowa] 121 NW 1076. Where insurance broker procured excessive insurance on plaintiff's property and requested cancellation of a policy, which insurer refused, insured could ratify broker's act in overinsuring, and hold insurer, property being destroyed. Boutwell v. Globe &

Ratification may be implied from circumstances,[74] or subsequent acts or conduct of the parties,[75] such as the acceptance by the principal of the benefits derived from the agent's unauthorizd acts,[76] bringing suit on the agent's contract,[77] or failure to repudiate or object to the agent's acts[78] promptly[79] or within a reasonable time,[80]

Rutgers Fire Ins. Co., 193 N. Y. 323, 85 NE 1087.

74. Ratification of agent's acts in negotiations leading to alleged accord and satisfaction held for jury. Perkins Co. v. Wilcox [Ga.] 63 SE 831.

75. Where loan by executive committee of political party was reported to national convention and it acquiesced therein, this amounted to ratification of loan. Siff v. Forbes, 117 NYS 143. Where selling agent made preliminary contract with buyer but broke off negotiations on buyer's refusal to sign formal contract, and selling corporation's president told buyer that agent's action was final, agent's contract was binding on seller. Bittrick v. Consolidated Imp. Co., 51 Wash. 469, 99 P 303. Question being whether third person, who took mortgaged chattels under assignment of junior mortgage, was agent of junior mortgagee, letters by latter to attorney of senior mortgagee, who claimed goods or damages containing admission of responsibility, was competent to show ratification. Henderson Law Co. v. Hinson [Ala.] 47 S 717. Whether one partner ratified purchases made by other held for jury. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641, 15 Det. Leg. N. 926. 118 NW 484.

No ratification: Insurance company could not be held to have ratified acts of solicitors in making slanderous statements against another, where superintendent of agencies disapproved of them, by letter, though company took no positive action and though it received some business which slandered person lost, no knowledge of this by company being shown. Kane v. Boston Mut. Life Ins. Co., 200 Mass. 265, 86 NE 302. Where payee of note sent agent to collect it, and agent received check, indorsed it and kept proceeds, payee's action in claiming check and suing bank was repudiation, not ratification, of agent's act in endorsing it. Robinson v. Bank of Winslow, 42 Ind. App. 350, 85 NE 793. Agent's unauthorized contract for construction of skidway, not ratified by use of skidway, this being necessary in operation of mill. Ayer & Lord Tie Co. v. Young [Ark.] 117 SW 1080.

76. One who accepts fruits of compromise by agent, with full knowledge, ratifies and is bound by it. Beagles v. Robertson [Mo. App.] 115 SW 1042. Where agent for collection took notes in settlement, acceptance of notes by principal was ratification of unauthorized act, and maker of notes could not complain. Billingsley v. Benefield [Ark.] 112 SW 188. Evidence held to show ratification of agent's act in accepting composition with debtor, principal having received and kept cash and notes. Warshawsky v. Bonewur, 130 App. Div. 250, 114 NYS 665. Accord and satisfaction between debtor and creditor's agent ratified where creditor received and appropriated goods and money sent by agent and received by him in settlement. Mayfield Woolen Mills Co. v. Long [Tex. Civ. App.] 119 SW 908. Acceptance by insured of agent's check for unearned premium was ratification of agency for insured. Swing v. Kaufman, 115 NYS 143. Principal ratified contract of sale by agent by retaining order and notes given by buyer. Hansen v. Rolison [Mich.] 16 Det. Leg. N. 62. 120 NW 574. Where property sold conditionally was accepted and used by buyer, it was immaterial that the written contract was signed by an agent for buyer, whose authority was not proved. In re Cohen, 163 F 444. If insurance company rejects policy applied for through one not its agent, applicant could not recover premium from company, but if company should accept premium and issue policy, it would thereby ratify act of person procuring policy, though not an authorized agent. Michigan Mut. Life Ins. Co. v. Thompson [Ind. App.] 86 NE 503. Ratification by adopting and acting on contract by agent. Gehm v. Chicago & N. R. Co. 143 Ill. App. 658.

77. Corporation ratified act of agent in illegal transaction when it kept fruits thereof and brought suit on note which was part of it. Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 NW 1007. Landlord, declaring in petition that she made lease and gave notice to quit, thereby ratifies her agent's acts in doing so. Benton v. Stokes, 109 Mo. 117, 71 A 532. Though plaintiff first learned at trial of action on note that payor claimed that payee's agent had made special agreement as part consideration, he could not proceed and rely on note without being bound by such special agreement, if made; could not deny agent's authority. Owensboro Wagon Co. v. Wilson & Co. [Kan.] 101 P 4.

78. Principal must repudiate or disaffirm an unauthorized act if he desires not to be bound thereby. Lowe v. Benz [Minn.] 119 NW 249. Bond was executed and placed in hands of attorney with instructions not to deliver to obligee if principal was prosecuted for shortage for which bond was given as security. Bond was delivered prior to prosecution. Surety took deed given by principal and had it recorded, and did not object to delivery of bond. Held, surety ratified act of attorney in delivering bond, attorney being special agent. Manchester Building & Loan Ass'n v. Graham [N. J. Law] 72 A 959. Where owners of bonds placed them in hands of committee to be sold up to certain day and bonds were sold after time allowed, and owners, knowing of such sale gave no notice and made no objection until after bonds had been used by buyers, they were estopped to object to sale, and in effect ratified it. Smith & Co. v. Collins [C. C. A.] 165 F 148.

79. Principal is bound to repudiate unauthorized act promptly, when he knows of it; if he fails to do so, he cannot afterwards

what is a reasonable time being, in a particular case, a question for the jury.[81] There can be no ratification without full knowledge of all material facts.[82] A principal cannot accept and ratify an unauthorized contract by receiving benefits thereunder in so far as it is beneficial to him, and disaffirm as to the balance of it,[83] and this rule applies, though knowledge by the principal of all the terms and conditions of the contract be not shown.[84] But acceptance of the benefits of a contract, made for a lawful consideration and apparently valid, is not a ratification of unlawful conditions made by the agent and unknown to the principal.[85] A contract contrary to public policy cannot be ratified.[86] A ratification cannot be effective unless the principal, at the time of ratifying, has the power to do the act ratified.[87] Ratification by a corporation cannot be inferred from acts of the very officer who did the unauthorized act.[88]

(§ 2) *E. Undisclosed agency.*[89]—See 11 C. L. 78—Where a simple contract, or

repudiate it. Standard Leather Co. v. Allemannia Fire Ins. Co. [Pa.] 73 A 192; Schaefer v. Dickinson, 141 Ill. App. 234. On issue whether owner of land knows of and acquiesced in execution of deed by attorney-in-fact, long lapse of time between its execution of deed and institution of suit should be considered. Eastham v. Hunter [Tex.] 114 SW 97.

80. Where one assumes to act for another without authority, latter must disaffirm within reasonable time or he will be bound. Ankeny v. Young Bros. [Wash.] 100 P 736. Where one, without authority, assumes to make a contract for another as principal, the principal will be presumed to have ratified the same if he does not, within a reasonable time, after all essential facts in regard thereto are known to him, disavow it. Hartwell v. Loveland [Kan.] 97 P 432.

81. Whether principal has disavowed unauthorized act within reasonable time is for jury, under all facts. Hartwell v. Loveland [Kan.] 97 P 432.

82. Foddrell v. Dooley, 131 Ga. 790, 63 SE 350; Gund Brew. Co. v. Tourtelotte [Minn.] 121 NW 217. No ratification without full knowledge of terms of contract. Beck v. Freund, 117 NYS 193. Where sale agents made unauthorized agreement assigning rents from certain date, in contract of sale, principal, by accepting contract and completing transfer, did not ratify assignment of rents when he knew nothing about it could assume that agent had not done an unauthorized act. Gund Brew Co. v. Tourtelotte [Minn.] 121 NW 217. Letter from laundry company's attorneys, notifying owner of blankets to call and get them and pay charges, not ratification of act of agent who delivered blankets without collecting and then retook them, and comm'ttted an assault. Steinman v. Baltimore Antiseptic Steam Laundry Co., 109 Md. 62, 71 A 517. Owner of land held not to have ratified quitclaim deed executed by attorney in fact, where, at time she assented to it, it appeared she was very ill and had taken morphine, and not competent to know or appreciate what she was doing. Welke v. Wackershauser [Iowa] 120 NW 77. Where agent authorized to accept delivery of notes unconditionally accepts delivery upon conditions, principal does not ratify by accepting notes without knowledge of conditions. Watt v. Davison [Neb.] 118 NW 562. Evidence held insufficient to show ratification by municipality of agent's unauthorized act in drawing check on former to pay individual debt of latter. City of Newburyport v. Fidelity Mut. Life Ins. Co., 197 Mass. 596, 84 NE 111.

83. Could not accept benefits of sale of trees and refuse to be bound by agreement to replace, made as part of sale. Meyers v. Fogarty [Iowa] 119 NW 159. Principal cannot affirm action of agent in making sale and at same time escape responsibility for agent's representations as to property sold. Schultheis v. Sellers [Pa.] 72 A 887. Where principal accepts benefits of agent's contract, he must also assume burdens. Buckeye Saw Mfg. Co. v. Rutherford [W. Va.] 64 SE 444. Corporation cannot affirm act of manager in selling treasury stock in part, and disaffirm as to condition that buyer might rescind. Mulford v. Torrey Exploration Co. [Colo.] 100 P 596. Principal cannot ratify fraud of agent by accepting note the fruit of such fraud, and claim to be a good-faith holder, because the agent failed to acquaint him with the circumstances under which he procured the note, principal being led to believe it was received in regular course of business. First Nat. Bank v. Shaw [Mich.] 16 Det. Leg. N. 345, 121 NW 809.

84. Mayers v. Fogarty [Iowa] 119 NW 159.

85. Griffin v. Chriswisser [Neb.] 120 NW 909.

86. Where seller gave chauffeur secret discount on goods, in violation of Pen. Code, § 384r, buyer could not be held to have ratified contract, it being contrary to public policy. General Tire Repair Co. v. Price, 115 NYS 171.

87. Lease executed by agent without written authority, and, hence, void (Rev. Code, § 1667), would not be ratified by person who owned premises at time lease was made, but who had parted with title at time he attempted to ratify. Dobbs v. Atlas Elevator Co. [S. D.] 117 NW 128.

88. Agent cannot himself ratify his own act. In re Roanoke Furnace Co., 166 F 944.

89. Search Note: See notes in 7 C. L. 85; 13 L. R. A. (N. S.) 152; 55 A. S. R. 916; 8 Ann. Cas. 1026.

See, also, Principal and Agent, Cent. Dig.

one not under seal, is made by an agent in his own name for the benefit of an undisclosed principal, either the agent or principal may sue [90] or be sued [91] thereon, parol evidence being competent to show who was the real party in interest,[92] unless the written contract itself expressly provides that none but the party therein named shall be liable.[93] But in the case of negotiable instruments,[94] specialities,[95] and contracts under seal,[96] parol evidence is incompetent to vary their express terms,[97] and hence only the parties thereto can sue or be sued thereon. Though an undisclosed principal cannot be held on a negotiable instrument given by the agent, suit

§§ 495-527; Dec. Dig. §§ 138-146; 1 A. & E. Enc. L. (2ed.) 1139, 1168.

See, also, Clark & S. Agency, §§ 457-464; 528-542.

90. Either may sue. Anderson v. Stewart, 108 Md. 340, 70 A 228; Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp. [Va.] 64 SE 56. **Undisclosed principal may sue.** Battey v. Lunt, Moss & Co. [R. I.] 73 A 353; Cleveland, etc., R. Co. v. McNutt, 138 Ill. App. 66; Block v. Meridian [C. C. A.] 169 F 516; Wilcox-Rose Const. Co. v. Evans [Cal. App.] 98 P 83; Clubb v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 110. Real party in interest may sue though contract is made by agent in his own name. Cole v. Utah Sugar Co. [Utah] 99 P 681. Undisclosed principal may sue on contract made by agent with telegraph company. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Undisclosed principal may sue for failure to deliver message to his agent, where message is sent by his agent. Western Union Tel. Co. v. Walker [Ala.] 48 S 102. Undisclosed principal of sender of telegram may sue for delay in delivery, but cannot recover damages for mental anguish, Western Union Tel. & T. Co. v. Potts [Tenn.] 113 SW 789. Where agent bought goods in own name and directed contract to be made in name of partnership, explaining that this was for convenience in shipping and handling, he was, as to one to whom contract was sent, an undisclosed principal. Anderson v. Stewart, 108 Md. 340, 70 A 228. Evidence held to show sale by plaintiff to defendant, not sale by plaintiff to his agent and by the latter to defendant. Painter Fertilizer Co. v. Dupont [Fla.] 47 S 928. **Agent may sue** on contract made in his own name. Clubb v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 110.

91. See, also, post, § 3, for liability of agent. **Where agent signs contract, he is bound** as well as his principal. Eddy v. American Amusement Co. [Cal. App.] 99 P 1115. Party making contract as principal may be sued by other party, though he is in fact only **agent.** Fitzpatrick v. Manheimer [Mich.] 16 Det. Leg. N. 457, 122 NW 83. One dealing with agent of undisclosed principal **may elect to hold principal,** if election is made within reasonable time after disclosure. Mississippi Valley Const. v. Abeles & Co. [Ark.] 112 SW 894. **Principal liable** for debts incurred by agent for his benefit though agent contracted in his own name. Cooper v. Ratliff [Ky.] 116 SW 748. **Suit can be maintained against undisclosed principals** on written contract. Coaling Coal & Coke Co. v. Howard, 130 Ga. 807, 61 SE 987.

92. Oral evidence competent to show that one signing contract in own name acted as another's agent. Battey v. Lunt, Moss & Co. [R. I.] 73 A 353; Eddy v. American Amusement Co. [Cal. App.] 99 P 1115. In an action by an undisclosed principal on a contract made in the name of the agent, the agency may be proved by parol. Anderson v. Stewart, 108 Md. 340, 70 A 228. Where contract is in writing, parol evidence is admissible to show that agent was acting for principal. This does not vary, but explains transaction. Black v. Meridian [C. C. A.] 169 F 516. One who enters into contract with another and causes it to be reduced to writing in the name of his agent may be identified by parol evidence as real party in interest, liable thereon. Pleins v. Wachenheimer [Minn.] 122 NW 166.

93. Paramount rule that terms of written contract cannot be varied by parol applies in such case. Western Sugar Refining Co. v. Helvetia Swiss Fire Ins. Co., 163 F 644. Where clause of insurance policy provided that "capital stock and funds of said company [insurer named] shall alone be answerable to the demands thereupon under this policy," suit could not be maintained against another company as undisclosed principal. Id.

94. Undisclosed principals cannot be held liable in a suit on a negotiable instrument Coaling Coal & Coke Co. v. Howard, 130 Ga. 807, 61 SE 987. This is also the rule where the words "as agent" or "as trustee," occur after the maker's signature, the principal not being disclosed. Id.

95. Rule permitting party to sue undisclosed principal on written instrument does not apply when instrument is specialty. Whether fire insurance policy is "specialty" doubted, but point not decided. Western Sugar Refining Co. v. Helvetia Swiss Fire Ins. Co., 163 F 644.

96. Undisclosed principal cannot be sued where contract is under seal. Coaling Coal & Coke Co. v. Howard, 130 Ga. 807, 61 SE 987. Where agent contracts by **deed** in his own name, principal cannot sue upon it. Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp. [Va.] 64 SE 56. Where **lease,** under seal, was signed by lessee and another, as agent, agent alone, not undisclosed principal, could sue thereon for rents, though lessee knew who owner was before commencement of term. Buge v. Newman, 61 Misc. 84, 113 NYS 198.

97. Where an instrument is under seal, it cannot be shown by parol that the apparent parties to it merely acted as agents for others. Peterson v. New York, 194 N. Y. 437, 87 NE 772.

may be maintained against the principal for the original consideration.[98] In an action by an undisclosed principal on a contract made by the agent, the defendant is entitled to be placed in the same position at the time of the disclosure of the principal as if the agent had been the real contracting party,[99] and may in such action use, as a set-off a claim against the agent,[1] or may prove payment to the agent, without knowledge of the agency, as a defense.[2]

A party to a contract has a right to know with whom he deals unless he consents to deal with an agent in behalf of an undisclosed principal.[3] He has a right to rely upon representations made as to the identity of the other party to the contract, and if deceived by such representations he has a right to rescind.[4]

(§ 2) *F. Notice through agency.*[5]—See 11 C. L. 77—Notice to or knowledge of an agent[6] or a subagent,[7] given to or acquired by him in the course of his employment, and relating to matters within the scope of his actual or apparent authority,[8]

98. Notes signed "as trustee," signer and others receiving consideration. All undisclosed principals could be sued in original consideration. Coaling Coal & Coke Co. v. Howard, 130 Ga. 807, 61 SE 987.

99. Anderson v. Stewart, 108 Md. 340, 70 A 228; Painter Fertilizer Co. v. Dupont [Fla.] 47 S 928. If agent delivers property to carrier in his own name, not disclosing his principal, the latter is bound by any legal contract made by carrier with agent, but, if goods are received as those of principal, no special contract with the agent is binding on the principal, unless known to or ratified by him. Wellborn v. Southern R. Co. [Ga. App.] 64 SE 491. In California, where principal employs secret agent, who sells fruit in his own name, principal cannot recover from innocent vendee goods sold by agent as his own. Guggenheime & Co. v. Youell [Wash.] 101 P 711.

1. Liability of agent to other party could be set off against claim by principal on agent's contract. Deane v. American Glue Co., 200 Mass. 459, 86 NE 890. Where buyer from agent had no knowledge of agency, but dealt with him as principal, buyer could, in action by owner for price, set off claim by buyer against agent. Winslow Bros. Co. v. Staton, 150 N. C. 264, 63 SE 950. Action for price of mule sold to defendant by plaintiff's agent for debt due defendant from agent. Defendant could show that agent was in business of selling mules for himself, and that he had no notice of agency. Id.

2. Where agent, really acting for plaintiffs, sold glue to defendants and failed to disclose agency, and defendants paid agent, without knowledge of agency, plaintiffs as principals could not recover from defendants, agent not having exceeded authority. Deane v. American Glue Co., 200 Mass. 459, 86 NE 890. Payment to member of partnership with whom defendant supposed he was doing business relieved him. Plaintiff could not afterwards recover, being undisclosed principal. Brodzak v. Robinson, 114 NYS 113.

3, 4. New York Brokerage Co. v. Wharton [Iowa] 119 NW 969.

5. **Search Note:** See notes in 21 L. R. A. 340; 24 A. S. R. 228; 3 Ann. Cas. 980.

See, also, Principal and Agent, Cent. Dig. §§ 670-690; Dec. Dig. §§ 177-182; 1 A. & E. Enc. L. (2ed.) 1144.

See, also, Clark & S. Agency, §§ 474-490.

6. Notice of certain facts to certain person not binding on corporation unless such person shown to be corporate agent. Bunker v. Manchester Real Estate & Mfg. Co. [N. H.] 71 A 866. Broker who effects insurance for commissions on premiums paid on policies accepted by insurer, but who is not regularly employed by insurer, is not agent of latter so that notice of change of ownership of property insured would be notice to company. American Steam Laundry Co. v. Hamburg Breman Fire Ins. Co. [Tenn.] 113 SW 394. Buyer of land dealt with another as seller though he knew that third person was to convey title. Held, such other was not buyer's agent, and buyer was not bound by his knowledge of prior unrecorded deed. Tucker v. Gibson [Kan.] 101 P 633. Vendor, offering tax title of third person, was told purchaser would not accept unless quitclaim from certain person, record owner, was obtained. Vendor learned that such person had conveyed to plaintiff. Held, notice to vendor of plaintiff's claim was not notice to vendee, vendor not being vendee's agent. Riley v. Robinson, 128 App. Div. 178, 112 NYS 753.

7. Where authorized agent of insurance company employs clerk, and clerk solicits insurance and issues policy, knowledge by him of facts material to risk, acquired while so doing, is notice to the company. Springfield Fire & Marine Ins. Co. v. Price [Ga.] 64 SE 1074.

8. Notice to insurance adjuster of facts concerning issuance of policy, and waiver of them by him, was notice to, and waiver by, company. Arispe Mercantile Co. v. Queen Ins. Co. [Iowa] 120 NW 122. Notice to local insurance agent that insured carried additional insurance was notice to company, agent having general powers to issue policies, etc., including power to consent to additional insurance. Eagle Fire Co. v. Lewallen [Fla.] 47 S 947. Bill of lading made out to shipper's order, with instruction to notify certain person of arrival, makes such person consignor's agent to receive notice of arrival. Hardin Grain Co. v. Chicago & A. R. Co., 134 Mo. App.

and before the transaction is concluded,[9] is notice to the principal,[10] whether actually communicated to him or not,[11] unless the agent has a personal interest in the subject-matter adverse to that of the principal,[12] or unless the matter in question is one involving the good faith and conduct of the agent toward the principal.[13] Knowledge acquired before the commencement of the agency is sometimes imputable to the principal.[14]

(§ 2) *G. Mode of executing authority.*[15]—See 11 C. L. 79—If it is doubtful from the circumstances, or the instrument executed, whether grantor intended to execute a power possessed by him, it will not be held that the act or conveyance was an execution of the power.[16] But if the intent to execute the power and convey the principal's interest, be clear, it will be so construed, regardless of informality in its execution.[17]

681, 114 SW 1117. Agent of railroad company to inspect and take up cross ties was entrusted by vendor with duty of measuring, inspecting and taking up such ties for him; held notice to agent while so engaged of claims and rights of true owner was notice to vendor. Black & Sons v. Johnson [W. Va.] 64 SE 626. Agent authorized to sell goods and collect for them used printed form furnished by seller containing provision that quality of goods was warranted for limited time, and that defective goods would be made good or replaced, if notice of defects was given. Held, notice of defects to agent was notice to principal. Buckeye Saw Mfg. Co. v. Rutherford [W. Va.] 64 SE 444. Where brokers were instructed to procure insurance to a certain amount, and procured some policies which companies cancelled, notice of cancellation to brokers, before they had ceased to act for insured, was notice to latter. Northern Assur. Co. v. Standard Leather Co. [C. C. A.] 165 F 602.

Principal not bound: Where transfer company was in habit of hauling goods for consignee, company was consignee's agent only as to goods actually hauled. Notice to company of arrival of goods was not notice to consignee, unless expressly communicated to consignee. Hockfield v. Southern R. Co., 150 N. C. 419, 64 SE 181. Though arrangement had been made between parties to pay debt by conveying land, yet previous authority to notary before whom deed was acknowledged to collect the debt would not authorize him to take the deed, and notice to him that deed was intended as mortgage, and that married woman, one of grantors, was not examined privily, was not notice to creditor. Stringfellow v. Braselton [Tex. Civ. App.] 117 SW 204.

9. Notice to agent respecting matter within scope of his authority is notice to principal if given before transaction is ended or soon enough to be effective. Black & Sons v. Johnson [W. Va.] 64 SE 626.

10. Knowledge of general agent, knowledge of company. Lindquist v. Northwestern Port Huron Co. [S. D.] 117 NW 365. Notice to salesman that partner had retired from firm was notice to his principal. Straus, Gunst & Co. v. Sparrow & Co., 148 N. C. 309, 62 SE 308. One who admits agency of another in purchasing land for him is bound by agent's knowledge of title in third person. Harrell v. Broocks [Tex. Civ. App.] 113 SW 961. Locator of public land is agent of entryman and latter is bound by locator's knowledge as to land. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930. Purchaser of land through agent who has notice of facts is not bona fide purchaser, notice to agent being notice to principal. Sykes v. Speer [Tex. Civ. App.] 112 SW 422. Principal is bound only by such knowledge as the agent, acting in the matter, possessed. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. **Notice to an agent of an undisclosed principal,** where he is acting within the scope of his agency, is constructive notice to his principal. Street Lumber Co. v. Sullivan, 201 Mass. 484, 87 NE 905.

11. Buckeye Saw Mfg. Co. v. Rutherford [W. Va.] 64 SE 444.

12. When an agent is acting adversely to the interests of his principal, his knowledge, gained while so engaged, will not be imputed to his principal. President of lessor corporation executed lease to lessee corporation for latter's benefit, knowing unlawful purpose of lease. His knowledge not imputable to lessor. Brooklyn Distilling Co. v. Standard Distilling & Distributing Co., 193 N. Y. 551, 86 NE 564. Notice to agent of condition of title of land not notice to principal, where agent had personal interest in part of purchase price, and sold land to his principal. La Brie v. Cartwright [Tex. Civ. App.] 118 SW 785.

13. Agent for buyer of staves, entrusted with duty to inspect, had no power to bind principal by receiving notice of fraudulent or improper inspection. Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401.

14. Where agent of payee of note received a payment from the maker with knowledge of latter's insolvency, payee was bound by notice, though agent acquired knowledge previous to commencement of agency. Wright v. Hooker [Tex. Civ. App.] 118 SW 765.

15. Search Note: See notes in 22 A. S. R. 726; 50 Id. 110.

See, also, Principal and Agent, Cent. Dig. §§ 91-95; Dec. Dig. §§ 56-60; 1 A. & E. Enc. L. (2ed.) 1035.

See, also, Clark & S. Agency, §§ 288-347.

16. Neill v. Kleiber [Tex. Civ. App.] 112 SW 694.

(§ 2) *H. Remedies, pleadings, procedure and proof.*[18]—See 11 C. L. 79—The agent cannot ordinarily maintain an action for a known principal.[19] To bind an undisclosed principal, he must be sued. Property of the principal cannot be taken and sold in satisfaction of a judgment against the agent.[20]

*Pleading.*See 11 C. L. 79—Where the cause of action is based on acts of an agent, the agency,[21] and facts showing responsibility of the principal [22] must be alleged. An allegation that a contract was made with a party is the same in law as an allegation that it was made with the agent of the party.[23] Where a contract appears on its face to have been made by an agent personally, a complaint based thereon must allege the making of it by the principal through the agent.[24] An express allegation that the principal with knowledge of all the facts ratified the act of the agent is sufficient without alleging the manner of ratifying.[25]

Burden of proof and sufficiency of evidence.[26]—The burden is upon one seeking to hold a principal for the act of an alleged agent to prove the agency,[27] and that the act relied upon was within the scope of the agent's authority.[28] Where it is proved that an act authorized by a power of attorney is done pursuant to the power,

17. Deed executed by attorney in fact referred to power of attorney but gave wrong date, and was signed by attorney individually. Held, sufficient to pass principal's interest, he having asserted no interest for several years. Neill v. Kleiber [Tex. Civ. App.] 112 SW 694. Deed held to convey principal's interest where executed by attorney in fact, though such attorney was therein described as party of first part, and though he signed as attorney in fact for principal instead of signing principal's name, by himself. Mulford v. Rowland [Colo.] 100 P 603.

18. Search Note: See note in 13 L. R. A. (N. S.) 211.

See, also, Principal and Agent, Cent. Dig. §§ 391-429, 691-735; Dec. Dig. §§ 119-124, 183-199; Bills and Notes, Cent. Dig. § 1394; 16 A. & E. Enc. P. & P. 890.

See, also, Clark & S. Agency, §§ 448-561.

19. Rev. 1905, § 2631, authorizing recovery against carrier for refusal to receive shipment, does not authorize suit by shipper's agent for use of shipper, agent not being "party aggrieved." McRackan v. Atlantic Coast Line R. Co., 150 N. C. 331, 63 SE 1042.

20. Cooper v. Ratliff [Ky.] 116 SW 748.

21. Allegation that defendant "used" one for fraudulent purpose is not an allegation of agency. Graves v. Horton [Ga.] 65 SE 112.

22. Complaint held to state cause of action against carrier for negligence of gateman in depot, acting as carrier's agent, in misdirecting plantiff to his train. Louisville & N. R. Co. v. Cannon [Ala.] 48 S 64.

23. Reply setting up contract with agent not departure from complaint alleging contract with party. Colt v. Lawrenceburg Lumber Co. [Ind. App.] 88 NE 720.

24. Complaint held not to show liability of defendant to plaintiff on assignment signed only by one as agent. Lawson v. Sprague, 51 Wash. 286, 98 P 737. Declaration alleging making of contract by agent for principal, and that principal paid consideration and received property in return, etc., held sufficient to show contract for undisclosed principal. Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp. [Va.] 64 SE 56.

25. Mahon v. Rankin [Or.] 102 P 608.

26. See 11 C. L. 79. See, also, ante, § 1D.

27. Burden on one asserting agency of person with whom he dealt to prove it. Jolly v. Huebler, 132 Mo. App. 675, 112 SW 1013. Mortgagor who pays principal of loan to one for mortgagee, such person not having securities in his possession, has burden of showing that payment was made to agent of mortgagee. Campbell v. Gowans [Utah] 100 P 397. **Evidence insufficient** to show alleged agency. Maas v. Dunmyer [Okl.] 96 P 591. In action to recover for goods sold, evidence insufficient to show agency of person who bought goods for defendant. Stark v. Solomon, 114 NYS 133. In action for price of goods sold defendant, defense being payment, defendant's testimony that he paid to one who was plaintiff's collector was insufficient to show agency of collector. Howard & Childs Co. v. Conaty, 116 NYS 614. Evidence, in suit to foreclose trust deed, held to show that agent who negotiated loan and collected interest and principal was mortgagee's, not mortgagor's, agent. Campbell v. Gowans [Utah] 100 P 397. **Evidence held not to show that defendants were undisclosed principals,** liable on agreement signed by another. Coates v. Posner, 117 NYS 807.

28. Burden on buyer to show that salesman had authority to make contract whereby he could return goods within 90 days if he could not sell them with reasonable effort. Dr. Shoop Medicine Co. v. Mizell & Co. 148 N. C. 384, 62 SE 511. Burden on mortgagee to show that owner's husband, as agent, had authority to execute mortgage. Roberts v. Little [N. D.] 120 NW 563. One claiming under conveyance executed by purported agent must show authority of agent to act; mere fact that he did act is not proof of authority. Travers v. Barrett [Nev.] 97 P 126. Agent of carrier contracting to carry goods safely to destination, a point beyond its own lines, must be shown to have authority to make such contract. Lake Erie & W. R. Co. v. Seeley [Ind. App.] 86 NE 1002.

one who asserts that the power was revoked before the act was done has the burden of proving such revocation.[29]

Evidence, admissibility. See 11 C. L. 80—Declarations and admissions of an agent are competent against the principal only when there is other proof of the agency [30] and when they are made in the course of the agent's employment and relate to matters then being done by the agent,[31] such matters being within the scope of his auth-

Evidence sufficient, aside for agent's own statement, to prove his authority, to make contract in suit. Kessler & Co. v. Parelius [Minn.] 119 NW 1069. Evidence held to show that one who collected rents on piano was plaintiff's agent with authority to make such collection. Bennett Piano Co. v. Scace, 130 App. Div. 281, 114 NYS 324. Authority of one employing man for defendant held not to have been shown, so as to make defendant liable as master to one employed. Nichols v. Oram [N. J. Law] 71 A 54. Persons who made contract for sleeping accommodations for passenger on train held to have had authority to bind company. Smith v. Pullman Co. [Mo. App.] 119 SW 1072. Evidence held to show that agent who sold coal had express authority to warrant it as free from incumbrances. North American Commercial Co. v. North American Transportation & Trading Co. [Wash.] 100 P 985.

Evidence insufficient to show authority of agent to indorse checks; hence, defendant not relieved where it sent checks, which plaintiff's agent indorsed, appropriating proceeds. Dowdall v. Borgfeldt & Co., 113 NYS 1069. Agent of corporation held not to have authority to accept notes as payment of claim. American Car & Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 70 A 867.

29. Foddrell v. Dooley, 131 Ga. 790, 63 SE 350.

30. Where there is other prima facie proof of agency, declarations of agent while acting within scope of his authority are competent. Mulford v. Rowland [Colo.] 100 P 603.

Held competent: Husband's admissions against wife's interest competent when he was acting as her agent. Baker v. Thompson, 214 Mo. 500, 114 SW 497. Where broker testified that he acted for both parties in transaction, though paid by plaintiff, letter from him to plaintiff, stating that defendant had rejected samples, and requested him, broker, to have plaintiffs send others, was competent as admission by defendant. Webster v. Moore, 108 Md. 572, 71 A 466. Acts of persons at hotel desk, who put plaintiff out forcibly, were prima facie chargeable to defendant, and their conversations while so engaged could be proved, where defendant himself testified that he was running hotel as proprietor. Pakas v. Hurley, 61 Misc. 228, 114 NYS 142.

Held incompetent: Statements of son not binding on mother, it not being shown that he was her agent. Bartley v. Redmon's Adm'x [Ky.] 115 SW 831. Wife's declarations incompetent against husband when there was no proof of her agency for him. Hayes v. Funk [Kan.] 99 P 1131. Letter written on defendant's letter head by alleged agent incompetent to prove agency of writer for defendant, latter not being connected with it in any way. Deane v. American Glue Co., 200 Mass. 459, 86 NE 890. Expressions of personal malice by one not shown to be defendant's agent, inadmissible in action for false imprisonment and malicious prosecution. Little v. Rich [Tex. Civ. App.] 118 SW 1077. Tax list, not signed or sworn to by taxpayer, but by another as agent, inadmissible against taxpayer without proof of agency and authority of person who signed it. Whalen v. Gleeson [Conn.] 71 A 908. Where goods shipped were refused by consignee because of delay in delivery, what agent of initial carrier told shipper as to what he could do with goods, on being informed of rejection by consignee, was inadmissible against connecting carriers. Missouri K. & T. R. Co. v. Carpenter [Tex. Civ. App.] 117 SW 900. Letter written by son of defendant, recommending that discharged man be not employed by other members of association, did not make defendant liable to discharged employe, without proof of son's agency. Willner v. Silverman, 109 Md. 341, 71 A 962.

31. Agent's admissions competent only when made in course of transactions for principal, and connected with or related thereto. Blanchard-Carlisle Co. v. Garritson [Ind. App.] 87 NE 151. Declarations of agent or officer incompetent against corporation, unless made within scope of authority and as part of act being done in course of employment. Union Naval Stores Co. v. Pugh [Ala.] 47 S 48. What carrier's agent said at time about cattle being placed in quarantine pens **competent** against carrier in action for damages for such act. St. Louis, etc., R. Co. v. Adams [Tex. Civ. App.] 118 SW 1155. Declarations of agent of carrier, while engaged within the scope of his authority in trying to locate lost goods, were competent against carrier in action for loss. Fein v. Weir, 129 App. Div. 299, 114 NYS 426. Declarations of railroad yard policeman as to condition of yard, while he was performing duties with regard to horses which were under his care, were competent against company. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767.

Held incompetent: Statement by officer of corporation, day after accident, as to its cause, incompetent against corporation. Rapp v. Easton Transit Co. [N. J. Law] 72 A 38. Statement by agent after close of transaction in which he acted as agent, incompetent against principal. Farmers' Bank v. Wickliffe [Ky.] 116 SW 249. Declarations long after transaction in question inadmissible. St. Louis, etc., R. Co. v. Adams [Tex. Civ. App.] 118 SW 1155. Declarations of an agent relating only to a past transaction are incompetent. Case Plow Works v. Pulsifer [Kan.] 98 P 787. Declarations

ority.[32] As has already been observed, neither the fact of agency nor the extent of an agent's authority can be shown by proof of acts and declarations of the agent,[33] but this rule does not make the agent an incompetent witness to testify to these matters.[34] A power of attorney is competent evidence for the party claiming under it.[35] An admission of the party sought to be bound, tending to show the agency, is competent.[36] The party sought to be bound may introduce evidence to show the status and authority of the alleged agent.[37]

Questions of law and fact.[See 11 C. L. 30]—Both the fact of agency,[38] and the extent of the agent's authority[39] are questions for the jury, unless the facts are undisputed, or unless they depend solely upon construction of a written instrument.[40]

of motorman, after accident, as to how it occurred, incompetent against railway company. Morse v. Consolidated R. Co. [Conn.] 71 A 553. Declaration of driver of team, after accident, as to ownership, not explanatory of accident or of his own possession, incompetent. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853. Trustee, under trust deed, cannot, as agent, affect principal's rights by making admissions as to past transactions. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417. One employed to negotiate for and buy property has no authority to bind principal by statements made after deed has been executed and transaction closed. Woolsey v. Haynes [C. C. A.] 165 F 391. Statement of manager prior to making alleged settlement, as to condition of other party, not competent to impeach settlement on ground of such party's incompetency, not being part of res gestae. Wells v. Royer Wheel Co. [Ky.] 114 SW 737.

32. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853. Declarations of agent competent against principal only when made while acting as such, within scope of authority. Taplin v. Marcy, 81 Vt. 428, 71 A 72. Admissions and declarations of agent **inadmissible** without proof of authority to make them. E. C. Fuller Co. v. Pennsylvania R. Co., 61 Misc. 599, 113 NYS 1001. Alleged admission by agent **incompetent** unless agent has been connected with transaction to which it relates and his authority in matter shown. Blanchard-Carlisle Co. v. Garritson [Ind. App.] 87 NE 151. Statements of employe **not competent** when nature of authority and duties was not shown. Corkran v. Taylor [N. J. Law] 71 A 124. When authority of agent was not shown to extend to affairs of certain office, his declarations concerning transactions at that office was **not competent** against principal. Yashimi v. U. S. Express Co. [N. J. Law] 73 A 45. Agents for care and rental of land, which was in actual possession of tenants, could not bind owner by **unauthorized** admissions that he claimed only to certain line, nor by act of moving fence. William Cameron & Co. v. Blackwell [Tex. Civ. App.] 115 SW 856. Where order taken by agent showed on its face that acceptance by seller was necessary, authority of agent being limited to recommendation of acceptance, what agent said before signing order could not bind seller. Bronson v. Weber Implement Co. [Mo. App.] 116 SW 20. Declaration of ranch manager, while barn was burning, that he had set fire which later spread to barn, was **incompetent** against ranch owner, being mere narration of past event. Johnson v. McLain Inv. Co. [Kan.] 100 P 52. Authority of claim agent of express company sufficiently shown; statements by him in discussing claim **competent** against company. Hill v. Adams Exp. Co. [N. J. Law] 71 A 683. Declarations and admissions of an agent of a corporation are **competent** against the corporation when they relate to matters as to which he has authority to act, and give information, and when made while he is acting as agent, with authority, and when relating to matters then being done. Case Plow Works v. Pulsifer [Kan.] 98 P 787.

33. See ante, § 1D. Authority of agent cannot be established by his own acts and declarations. Farmers' Co-op. Shipping Ass'n v. Adams Grain Co. [Neb.] 122 NW 55.

34. See ante, § 1D. Where plaintiff claimed that defendant bought goods through third person, as agent, third person could testify that defendant promised to pay for goods. Taplin v. Marcy, 81 Vt. 428, 71 A 72.

35. Downs v. Stevenson [Tex. Civ. App.] 119 SW 315.

36. Statement by plaintiff to defendant that certain person was plaintiff's representative, and that what he said "goes," was admission tending to show general authority. Beck v. Freund, 117 NYS 193.

37. Where plaintiff sought to recover damages for failure to deliver goods claimed to have been bought from agent, but did not clearly prove agent's authority, defendant was properly allowed to show status and authority of person claimed to be agent. Harris v. Santee River Cypress Lumber Co. [R. I.] 72 A 392.

38. Whether person who issued policy was company's agent for jury. Fireman's Fund Ins. v. Kelley [Ky.] 116 SW 790. Whether person was present at scene of building operations as agent of defendant corporation held for jury. Loh v. Broadway Realty Co. [N. J. Law] 71 A 112. Whether "correspondent" of defendant, to whom defendant paid salary and who occupied an office maintained by defendant, was agent of defendant, a broker, held for jury. Quinlan & Co. v. Holbrook [C. C. A.] 162 F 272. Telegram received by addressee and answer sent by his chief clerk, who was with him at time. Whether answer sent under instructions of addressee was for jury. St. Louis, etc., R. Co. v. Clark [Ark.] 119 SW 825.

39. Facts are for jury where agent's authority is disputed. Mahon v. Rankin [Or.]

§ 3. *Rights and liabilities of agent as to third persons.*[41]—See 11 C. L. 81—An avowed agent for a disclosed principal incurs no personal contractual liability to third persons by reason of acts done within the scope of his employment [42] although he may expressly assume personal liability.[43] The burden is ordinarily upon the party asserting personal liability to prove such promise of the agent.[44] But, obligations assumed by an agent in his own name toward one who deals with him on his own credit, even though in the course of dealings for the benefit of the principal, bind the agent alone,[45] and the burden is upon the agent to show that the principal is liable.[46] Where an agent induces another to enter into a contract by means of false representations, the agent does not become personally liable on the contract,[47] but he, as well as his principal,[48] is liable in tort if he knew that his representations were false.[49] If he honestly believed his representations to be true he is not liable

102 P 608. Whether one had authority as agent of owner to sell property, for jury. Boswell v. Thompson [Ala.] 49 S 73. Whether one who committed trespass was acting as authorized agent of corporation, for jury. Union Naval Stores Co. v. Pugh [Ala.] 47 S 48. Whether persons assuming to act for defendant were acting within real or apparent scope of their authority, for jury. Campbell v. Order of Washington [Wash.] 102 P 410. Whether defendant's agent had power to give plaintiff contract for exclusive sale of goods in certain territory held for jury. De Laval Separator Co. v. Sharpless [Iowa] 120 NW 657. Whether husband was acting as general or special agent for wife for jury, error for court to intimate an opinion in charge. Garbutt Lumber Co. v. Prescott, 131 Ga. 326, 62 SE 228. Whether branch store manager had so conducted business, with knowledge of his principal, that he had implied authority to buy goods for sale, held for jury. Keyes & Co. v. Union Pac. Tea Co., 81 Vt. 420, 71 A 201. Whether certain person was agent for sale of trees, and whether he had authority to agree to replace trees that failed to grow within 5 years, held for jury. Moyers v. Fogarty [Iowa] 119 NW 159.

40. Error for court to pass on authority of agent as shown by two letters, where there was other evidence on question; should have submitted issue to jury. Taplin v. Marcy, 81 Vt. 428, 71 A 72.

41. Search Note: See notes in 7 C. L. 88; 28 L. R. A. 433; 50 Id. 644; 51 Id. 261; 4 L. R. A. (N. S.) 363; 12 Id. 946; 22 A. S. R. 508; 3 Ann. Cas. 219; 6 Id. 556.

See, also, Principal and Agent, Cent. Dig. §§ 451-491; Dec. Dig. §§ 128-136; 1 A. & E. Enc. L. (2ed.) 1119, 1161.

See, also, Clark & S. Agency, §§ 562-627.

42. Blount v. Tomlinson [Fla.] 48 S 751. When contract is signed by one as agent, and he does no act inconsistent with his relation as agent, he cannot be held as principal. Davis v. Lee [Wash.] 100 P 752. If agent, supervising making of improvements, disclosed his principal, and other party extended credit to principal and not to agent, agent was not personally liable for labor and materials. Lambert v. Phillips [Va.] 64 SE 945. Where from written part of contract and circumstances it appeared that person making sale was acting as agent for father, he was not personally liable on contract. Cuneo v. Wimberly [Tex. Civ. App.] 115 SW 673. Plaintiff sold goods to C, on C's responsibility, thinking that one who personally ordered goods—the defendant—was C. Defendant not liable for goods, even though he represented himself to be C. Turchin Sheffield Plate & Sterling Silver Co. v. Baugh, 117 NYS 137. Where deposit on sale was left with attorney for seller, as buyers knew, agent was not personally liable for sum deposited, subject-matter not being as represented. Levine v. Field, 114 NYS 819. Lessee signed lease and owner later signed, negotiations having been with agent who agreed premises would be ready at certain date. Lessee knew who owner was. Held, could not, on repudiating lease because premises were not ready, recover money paid on lease from agent. Finnegan v. Geoghegan, 111 NYS 656. Note was signed by corporation, by its president and secretary, and by certain others as "trustees." Parol evidence competent to show that they signed as agents for corporation only. Knippenberg v. Greenwood Mining & Mill Co. [Mont.] 101 P 159.

43. Blount v. Tomlinson [Fla.] 48 S 751. Agent may, by form of contract and signature, make himself personally liable. Contract reading "I, W. H. P., treasurer of" certain company, do hereby agree, etc., signed by W. H. P., made him personally liable. Gavazza v. Plummer [Wash.] 101 P 370. Agent of disclosed principal is liable to buyer for damages for breach of unauthorized warranty of goods sold by him. Luckes v. Meserole, 132 App. Div. 20, 116 NYS 350.

44. Blount v. Tomlinson [Fla.] 48 S 751.

45. Clark v. National Steel & Wire Co. [Conn.] 72 A 930.

46. Blount v. Tomlinson [Fla.] 48 S 751.

47. Wimple v. Patterson [Tex. Civ. App.] 117 SW 1034.

48. Where owner and his agents made false representations concerning violin, buyer had separate cause of action against owner and agents for damages. Dahlstrom v. Gemunder, 117 NYS 576. Where agent misrepresents material fact, in prosecuting business for principal, and other party relies thereon to his damage, agent and principal are both liable in tort. Willard v. Key [Neb.] 120 NW 419.

49, 50. Wimple v. Patterson [Tex. Civ. App.] 117 SW 1034.

either on the contract or in tort.[50] Where one, acting for another, and holding himself as having authority, enters into a contract with another, he will be liable if he had in fact no authority;[51] but if his want of authority was known to both, or unknown to both, there being a mutual mistake, he will not be personally liable.[52] Where an agent assumes to act for another without authority and the principal refuses to be bound by the contract made by the agent, one who paid money to the agent may recover it from him.[53] In such action the burden is on the agent to show that he acted with authority and paid the money over to his principal.[54] The failure of an agent to disclose to his adversary instructions or information received by him from his principal for his own guidance has in it no element of fraud or bad faith.[55] An agent who pays over money belonging to another, after notice and demand, is a proper party defendant in an action to recover it.[56]

The authorities are said to be in conflict as to the liability of an agent to third persons for nonfeasance,[57] that is, for the failure of an agent to perform a duty owed by him to his principal.[58] Failure to perform a duty owed third persons generally is misfeasance for which he is personally responsible.[59] Some courts hold him liable only for misfeasance.[60] An agent of a known principal cannot sue upon debts due the principal,[61] nor can he enforce obligations taken in his own name for consideration given by the principal.[62]

Undisclosed agency. See 11 C. L. 62—Where the agency is undisclosed,[63] the agent may be held personally liable,[64] or the person dealing with him, on discovery of the

51. Sourwine v. McRoy Clay Works, 42 Ind. App. 358, 85 NE 782.

52. Corporate agent, contracting for medical services for servant of corporation, not personally liable, where he believed he had authority, and was not guilty of fraud or misrepresentation. Sourwine v. McRoy Clay Works, 42 Ind. App. 358, 85 NE 782.

53. Money paid agents on unauthorized sale of land may be recovered. Simmonds v. Long [Kan.] 101 P 1070. Though defendant sold building as agent, he was liable to purchaser for money paid, property not having been delivered, and money having been paid to him personally. Klotz v. Gordon, 117 NYS 240. Where account was assigned to agents, and check given, as part payment of price of property sold by agents and principal refused to ratify sale, agents were not liable to buyer for cash value of account and check, but were only bound to return account and check. Mitchell v. Chick [Mo. App.] 118 SW 517.

54. Simmonds v. Long [Kan.] 101 P 70.

55. Armstrong v. Campbell [Iowa] 118 NW 898.

56. In suit to recover money paid to trustee of bankrupt by agents of bankrupt, with notice of plaintiffs' rights and after demand by plaintiffs' agents were proper parties defendant. Gardner v. Planters' Nat. Bank [Tex. Civ. App.] 118 SW 1146.

57. Minnis v. Younker Bros. [Iowa] 118 NW 532.

58. Hagerty v. Montana Ore Purchasing Co. [Mont.] 98 P 643.

59. Failure of mining superintendent to maintain shaft in safe condition made him liable to one injured by reason thereof. Hagerty v. Montana Ore Purchasing Co. [Mont.] 98 P 643. For personal negligence agent is primarily and principal secondarily liable. Judgment for agent releases principal. Bradley v. Rosenthal, 154 Cal. 420, 97 P 875.

60. Agent of nonresident owner of property, to rent same and collect rents, not liable to person injured by falling on ice formed on walk by water from hydrant, it not appearing that agent knew conditions. Minnis v. Younker Bros. [Iowa] 118 NW 532.

61. Agents for sale of goods, who were obliged to account to principal for proceeds, could not maintain action against buyer for price in their own name. Chapman & Co. v. McLawhorn, 150 N. C. 166, 63 SE 721.

62. Where agents leased owner's property and took notes to themselves from lease for rents as well as other indebtedness, notes were without consideration as to rents, these being owned by owner. Roberts v. Feringer [Tex. Civ. App.] 115 SW 149.

63. Evidence held not to show that plaintiffs knew that defendants were acting merely as agents. Cohen v. Barry, 111 NYS 668.

64. See, also, ante, § 2E. Where an agent conceals the fact of his agency and enters into a contract in his own name, he may be treated as principal by the party with whom he deals and may be held liable on the contract as though he were party in interest. Whitney v. Woodmansee, 15 Idaho, 735, 99 P 968. One who sues out distress warrant in his own name as landlord, neither tenants nor magistrate having notice of his agency, is estopped to set up that he was mere agent, as against persons suing him for assault. Jones v. Parker, 81 S. C. 214, 62 SE 261. Where defendant gave personal obligation to ship and insure delivery of plaintiff's watch, defendant was liable thereon though he was in fact acting for an undisclosed principal. Schmerler v. Barasch, 113 NYS 745.

agency, may, at his election proceed against the principal;[65] but having proceeded against the principal, with full knowledge of his rights, he cannot thereafter maintain an action against the agent.[66]

§ 4. *Mutual rights, duties and liabilities.*[67] *A. In general.* See 11 C. L. 62—The mutual rights and duties of principal and agent depend largely upon the terms of their contract.[68] The relation is a fiduciary one, requiring from the agent the utmost good faith,[69] even though he acts gratuitously.[70] Thus, it is his duty to make a full disclosure of all facts concerning any transaction in which he acts for his principal.[71] While dealings between principal and agent are not prohibited, the agent must act in entire good faith,[72] and the burden is upon him to show fair dealing.[73] He cannot deal in or speculate with the subject-matter of the agency for his own benefit, without the principal's knowledge and consent,[74] nor can be represent both parties to a transaction, without their knowledge and consent,[75] and he must ac-

65. See, also, ante, § 2E. Where agent contracts in his own name, he is personally liable, and principal, when discovered, can also be held, at election of other party. Bryant Lumber Co. v. Crist [Ark.] 112 SW 965. One dealing with agent of an undisclosed principal may, at his election, proceed against either the agent or the principal. Murphy v. Hutchinson [Miss.] 48 S 178.

66. Murphy v. Hutchinson [Miss.] 48 S 178.

67. **Search Note:** See notes in 2 L. R. A. (N. S.) 657; 13 Id. 267; 6 A. S. R. 37; 80 Id. 555; 8 Ann. Cas. 570; 11 Id. 276.

See, also, Principal and Agent, Cent. Dig. §§ 76-161, 178-193; Dec. Dig. §§ 47-77, 79, 80; 1 A. & E. Enc. L. (2ed.) 1058.

See, also, Clark & S. Agency, §§ 348-447.

68. Contract of agent to loan money provided that he should use such care and skill as he used in transacting his own business of like character. Held, he was not liable to principal for loss of loan caused by failure to detect flaw in title of borrower to security, where he examined titles, for himself in his business. Goodwin v. Kraft [Okl.] 101 P 856. Contract with sales agent provided that principal could decide when plant should be operated and what quantity of goods should be sold. Held, this gave power only to temporarily suspend sales, not to wholly withdraw goods from market. Oberfelder v. J. S. Mattingly Co. [Ky.] 120 SW 352.

69. Lord v. Smith, 109 Md. 42, 71 A 430.

70. An agent who acts gratuitously is not relieved from the ordinary obligation upon agents to act in good faith and to account for all profits made out of subject-matter of agency. Merrill v. Sax [Iowa] 118 NW 434. Agreement of stockholders to pay expense of sale of stock to be negotiated by another was sufficient to support agreement by him to use best efforts in their behalf; he was not mere gratuitous agent. Id.

71. Agent owes principal utmost good faith and must reveal all facts known to him, and will not be allowed to gain any advantage by his own negligence or breach of duty. Little v. Herzinger, 34 Utah, 337, 97 P 639. Agent to buy goods abroad is under duty, if he cannot procure goods desired, to so inform his principal; he cannot buy inferior goods and ship them as compliance with order without becoming liable in damages to his principal. Lissberger v. Kellogg [N. J. Law] 73 A 67.

72. Hemenway v. Abbott, 8 Cal. App. 450, 97 P 190.

73. Hemenway v. Abbott, 8 Cal. App. 450, 97 P 190. Where one is general agent for another, and has same power practically as guardian of an infant, a conveyance from principal to agent is presumptively fraudulent, and the presumption must be overcome by proof or conveyance cannot stand. Smith v. Moore, 149 N. C. 185, 62 SE 892. Where one appointed attorney-in-fact for owner of lands took half interest for management, and later sold lands, retaining half interest, and then repurchased lands, such deed and transaction was prima facie fraudulent and burden was on agent to show good faith in suit by owner to cancel her deed. Snow v. Hazelwood [C. C. A.] 157 F 898.

74. Agent owes principal utmost fidelity, and is not allowed to make any profit for himself, to the detriment of his principal, out of the business in which he is employed. Lord v. Smith, 109 Md. 42, 71 A 430. Land-selling agent occupies fiduciary relation to owner; cannot buy and conceal his interest in purchase. Butler v. Agnew [Cal. App.] 99 P 395. Rule disqualifying agent from representing principal in any matter, where his personal interests are opposed to his principal's interests, applies in any case where there is danger that agent may use his powers for his own advantage. McCloskey v. Goldman, 62 Misc. 462, 115 NYS 189. Agent cannot purchase principal's property, when to do so would be inconsistent with his duties as agent; if he does, he holds as trustee for principal. Enslen v. Allen [Ala.] 49 S 430. Agent to sell employed another to assist him in making sale, agreeing to divide commission. Held, subagent had no right to buy himself without making full disclosure. Fisk v. Waite [Or.] 99 P 283. That agent, who made contract for hauling and logging, had an interest in equipment of contractor, for use of which contractor paid him monthly rental, did not give agent personal interest in contract, so as to make it a fraud on his principal. Dayton Lumber Co. v. Stockdale [Tex. Civ. App.] 118 SW 805. A selling agent cannot without the knowledge and consent of the principal become

count to his principal for all profits made by him at the principal's expense,[78] as well as for all sums secretly paid to him by the other party,[77] and the principal may be subrogated to securities obtained by the agent in dealing for his own advantage.[78] Fraud of the agent makes him liable in damages to the principal [79] and invalidates a contract made by him [80] so that it may be rescinded at the instance of the principal.[81] An agent who violates instructions is liable to his principal for damages resulting therefrom.[82]

purchaser. Fidelity Trust Co. v. Poole, 136 Ill. App. 266.

75. Agent cannot act for both parties without their knowledge and consent. Arthur v. Porter [Tex. Civ App.] 116 SW 127. An agent cannot act for two parties having conflicting interests in the subject-matter of the agency without the consent of both. Cameron & Co. v. Blackwell [Tex. Civ. App.] 115 SW 856. Under an ordinary contract to sell land for the highest price obtainable, it is unlawful for the agent, without the consent of the principal, to accept compensation from the buyer. Akin v. Poffenberger [Tex. Civ. App.] 116 SW 615. Broker may act for both parties, with their knowledge and consent. Arthur v. Porter [Tex. Civ. App.] 116 SW 127. Agent need not inform principal of dual agency if principal already knows. Id.

76. Agent, not allowed to make profit for himself at expense of principal, is trustee as to profits gained by fraud or deception. Lomita Land & W. Co. v. Robinson, 154 Cal. 36, 97 P 10. Agent authorized to sell property cannot secretly make profit for himself out of transaction, but is bound to account for full price received especially where authorized to sell for best price obtainable. Merrill v. Sax [Iowa] 118 NW 434. Where agent for owner induced third person to take title, buying from owner for $500 and then sold to another for $900, paying medium of transaction $10, agent was liable to owner for profits. Forrester-Duncan Land Co. v. Evatt [Ark.] 119 SW 282. Where brokers sold out several accounts of one dealing with them, knowing that one was carried for plaintiff, realizing profit on plaintiff's account only, and keeping enough to pay themselves, paying balance to agent, plaintiff could recover from brokers the rest of his profits. Conklin v. Raymond, 127 App. Div. 663, 112 NYS 77. Stockholders who acted for corporation and induced it to buy land, without disclosing fact that they were to share in profits, were liable to corporation for profits so made. Colonizers' Realty Co. v. Shatzkin, 129 App. Div. 609, 114 NYS 71. Where brokers induced owner to make exchange of property, by means of false representations, brokers were liable to owner for all profits made by them in deal. Mabry v. Randolph, 7 Cal. App. 421, 94 P 403. Where owner lists property for sale at certain price, and broker finds purchaser at that price, broker is not liable to owner for money received by broker from broker for purchaser, who had agreed to divide commission. Law v. Ware, 238 Ill. 360, 87 NE 308.

77. Where agent to purchase makes secret agreement with vendor for commission, buyer may recover from agent amount of commission. Commercial Club v. Davis [Mo. App.] 118 SW 668. Agent, arranging exchange of land, was not entitled to retain boot money unless principal agreed thereto after full disclosure of facts by agent. Wells v. Cochran [Neb.] 120 NW 1123.

78. Where agent deals for his own advantage with money of principal, latter is entitled to be subrogated to all benefits of agent's contracts. Choctaw, O. & G. R. Co. v. Sittel [Okl.] 97 P 363.

79. Agent of buyer induced him to pay certain price for land representing it as worth the price, and concealing fact that he would receive increased commission from seller. Held, buyer had cause of action for deceit against agent. Clinkscales v. Clark [Mo. App.] 118 SW 1182. Where an agent to purchase represents to his principal that land is more valuable than he believes it to be, and the principal relies on these representations, he (principal) may recover damages from agent and coconspirators. Wiruth v. Lashmett [Neb.] 117 NW 887.

80. Secret agreement, by agent, against principal's interest, is not enforcible. Egan v. De Jonge, 113 NYS 737.

81. Where agent for sale of land buys himself and conceals from owner fact that he can sell to another for a higher price, he is guilty of fraud for which sale can be rescinded. Rodman v. Manning [Or.] 99 P 657. Where agent took deed in his own name, and sold to another at an inadequate price, the second vendee knowing of the fraud and participating therein the sale was set aside at instance of principal. Foster v. Winstanley [Mont.] 102 P 574. Where agent induced another to take land in her name, the two agreeing to purchase jointly and divide the commission, the contract was unlawful and court would not enforce it at instance of agent against other purchaser. Butler v. Agnew [Cal. App.] 99 P 395.

82. Agent liable who delivered real estate contract in violation of instructions. Hawes v. Birkholz, 114 NYS 765. Damages recoverable were amount of judgment against principal for breach of contract, he having refused to perform, and counsel fees in that action and in unsuccessful action by agent for commissions. Id. Where insurance agent failed to follow instructions to cancel reinsurance, and property burned, agent was liable to company for amount it had to pay, over and above amount it would have had to pay had instructions been followed. Queen City Fire Ins. Co. v. First Nat. Bank [N. D.] 120 NW 545. Where agents, instructed not to deliver machinery except after payment, allowed purchaser to take machines without previous settlement, they became liable to principal as for breach of contract. Case Threshing Mach.

(§ 4) *B. Accounting, settlement, and reimbursement.*[83]—See 11 C. L. 84.—The agent must of course account to the principal for all moneys or property coming into his hands as agent,[84] and must also account for all profits made by him through a breach of any duty owed to his principal,[85] even though the principal has suffered no loss in the transaction through the fraud of the agent.[86] An agent's account should be a detailed statement.[87] A waiver of an itemized weekly statement of expenses is not a waiver of an accounting at some time.[88]

The agent may recover from the principal money properly paid in his behalf,[89] and the principal may recover excessive advances to the agent.[90] A principal who

Co. v. Folger, 136 Wis. 468, 117 NW 944.

83. Search Note: See notes in 1 C. L. 63; 8 Am. Cas. 570.

See, also, Principal and Agent, Cent. Dig. §§ 162-177, 224-228; Dec. Dig. §§ 78, 85; A. & E. Enc. L. (2ed.) 1086.

See, also, Clark & S. Agency, §§ 370, 371, 417-429.

84. Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1074, 119 NW 589. All profits made or advantage gained by an agent in the execution of his agency belong prima facie to his principal. Wells v. Cochran [Neb.] 120 NW 1123. Money received by agent, and forfeited by prospective buyer, belongs to principal. Metschan v. Swensson [Or.] 99 P 277. Principal may recover from agent moneys received for principal's use, to which agent has no claim. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042. Where purchaser makes payment, and then makes default, broker is not entitled to any part of the amount forfeited but this belongs to the seller. Burnett v. Potts, 236 Ill. 499, 86 NE 258. Where agent buys land at judicial sale for principal, he is bound to turn over to principal all that he acquired. Sale v. Pulaski Stave Co. [Ky.] 117 SW 404. In suit for accounting held that plaintiff was proprietor of business and defendant was confidential clerk and agent. Lord v. Smith, 109 Md. 42, 71 A 439. Where broker did not report or turn over entire price received for property, principal was entitled to recover balance of price, and broker was not even entitled to retain commission. Schleifenbaum v. Rundbaken [Conn.] 71 A 899. Where goods are sold by importer "in bond, actual duty," refunds of duties belong to purchaser, and importer becomes agent for their collection, and limitation does not begin to run against action for their recovery until purchaser has knowledge of refunds to importer so he can make demand for them. Schmid v. Dohan [C. C. A.] 167 F 804. Where agent, selling stock on commission, transferred his own stock, and kept proceeds, he was guilty of larceny under Rev. Laws 1905, § 507, 8, since he was employed to sell company's stock and payment to him was payment to company, and he was bound to forward money to it. State v. Phillips, 105 Minn. 375, 117 NW 508.

85. See, also, ante, § 4A. The agent is bound to account for profits gained by him by failure to disclose to the principal facts which it was his duty to disclose to enable the principal to deal with the other pary to the best advantage. Leonard v. Omstead [Iowa] 119 NW 973. Where agent, making exchange of lands, concealed price at which land could be acquired and himself took land at less price and transferred to third persons at profit, he was bound to account to principal for profits so made. Id. Where an agent, purchasing bonds for his principal receives shares of stock, and fails to account to his principal for the stock, he becomes liable for the stock as a trustee. Bone v. Hayes, 154 Cal. 759, 99 P 172. Where agent authorized to buy land for principal, buys himself at certain price, paying principal's money, and conveys to principal at higher price, he is liable to principal for difference in price. Whitehead v. Linn [Colo.] 102 P 286. Stockholders authorized one of number to negotiate sale of stock, they to pay expenses. He made contract with buyer, but before delivery exacted extra sum for himself. Held, he was accountable to other stockholders whom he represented for their share of such extra sum. Merrill v. Sax [Iowa] 118 NW 434. One employed to sell stock cannot resist demand for accounting as to sum exacted by him personally from buyer on ground that plaintiffs did not offer to pay him reasonable compensation, their agreement requiring only payment of expenses. Id. Where an agent misrepresents the price at which he buys property for his principal, the latter may maintain an action to recover the excess paid the agent over the actual price without tendering back the property received by him, the action not being for rescission. Lawrence v. Kilgore, 154 Cal. 310, 97 P 760.

86. If agent profits by fraud, he must account though principal is satisfied with his bargain. Leonard v. Omstead [Iowa] 119 NW 973. Where stockholders authorized one of number to procure sale of stock, and he made contract with buyers at certain price, but later exacted further sum for himself before he would deliver, he could not defeat suit by others for accounting as to such extra sum by setting up that only buyer was injured. Merrill v. Sax [Iowa] 118 NW 434.

87, 88. Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1074, 119 NW 589.

89. Where agent had certain repairs made on his personal credit, he had right to pay for them, after termination of his employment, and could compel his principal to reimburse him for such payments. Schafer v. Sherwood, 61 Misc. 642, 113 NYS 1068. Plaintiffs, as agents for defendants, procured insurance and paid premiums, as part of their employment. Held, request by defendants that plaintiffs make such payment would be implied. Sterling v. Chelsea Marble Works, 62 Misc. 626, 115 NYS 1096.

has become liable through an unauthorized act of his agent is entitled to indemnity against the latter,[91] unless he has ratified the unauthorized act.[92]

Where an agent takes title to land for his principal, and gives a warranty deed thereof at the principal's request, and is afterwards sued for breach of warranty, and notifies the principal, who refuses to defend, the agent has a cause of action against the principal for the amount of the judgment, and for expenses and counsel fees paid by him.[93]

Moneys collected by an agent for collection belong to the principal and can under certain circumstances be recovered by him in the hands of third persons.[94] When moneys in the hands of the agent, belonging to the principal, are stolen, and the agent pays the amount stolen to the principal in payment of his obligation, the agent is subrogated to the rights of the principal to the money stolen.[95] In an action by the agent to recover the money, it cannot be urged by the person who stole it, or by anyone liable to the principal for or on account of it, that the action should have been brought by the principal.[96]

(§ 4) *C. Compensation of agent.*[97]—See 11 C. L. 84—The right to compensation,[98] and the amount thereof,[99] usually depend upon the terms of the agency contract, and no other compensation than that specified can be recovered, even for extra services.[1] In the absence of an express contract, a reasonable amount may be recovered,[2] but there can be no recovery upon a quantum meruit where there is an express contract.[3] No compensation can be recovered until it is due,[4] and unless

90. Action will lie for recovery of advances made to salesman after termination of his employment. Freudenberg v. Cooper, 61 Misc. 314, 113 NYS 493.

91. Bradley v. Rosenthal, 154 Cal. 420, 97 P 875.

92. Principal who ratifies an unauthorized act, thereby releases the agent from liability for exceeding his powers. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042.

93. Shearer v. Guardian Trust Co. [Mo. App.] 116 SW 456.

94, 95, 96. Fitzpatrick v. Letten [La.] 49 S 494.

97. Search Note: See notes in 4 C. L. 92; 5 L. R. A. (N. S.) 469.

See, also, Principal and Agent, Cent. Dig. §§ 194-244; Dec. Dig. §§ 81-90; 1 A. & E. Enc. L. (2ed.) 1095.

See, also, Clark & S. Agency, §§ 348-369.

98. Landlord told tenant to employ man to cultivate crop. Held, landlord liable for wages of man employed. Meadows v. Hudson [Ark.] 119 SW 269. Broker not entitled to commission for procuring sale where he failed to inform principal that pending deal would make him liable for commission, principal supposing sale to be of different nature. Skinner Mfg. Co. v. Douville [Fla.] 49 S 125. Contract between general and subagent for insurance construed and held that subagent's right to commissions on renewal premiums ceased when contract between company and principal agent terminated. Nelles v. Mac Farland [Cal. App.] 99 P 980.

99. Contract construed as entitling agent to portion of commission out of notes given for machinery and paid. Ord Hardware Co. v. Case Threshing Mach. Co. [Neb.] 119 NW 682. Evidence held to warrant jury in finding that plaintiffs were to receive $1 per acre on lands listed prior to contract with defendant and thereafter sold, and one-half profits on lands listed and sold by either party after making of contract. Dickinson v. Hahn [S. D.] 119 NW 1034. Contract construed as providing for 10 per cent of rentals collected by agent as compensation for renting and looking after land, not 10 per cent of all rentals received by principal during employment. Prouty v. Perry [Iowa] 120 NW 722. Where contract provided that certain sum advanced monthly was to be charged to salesman's commission account, principal could not recover from salesman excessive amount advanced over commisions earned, in absence of express provision therefor. Wolfsheimer v. Frankel, 130 App. Div. 853, 115 NYS 958.

1. Where the agent is employed at a fixed salary or rate, and the principal imposes upon him, or he performs additional duties, with larger powers, no extra compensation can be recovered unless there is an agreement therefor or some custom supports such recovery. Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1074, 119 NW 589.

2. $1,000 as compensation to one acting as agent and attorney excessive, where he collected $2,000 in rents, and services were not extraordinary. 20 per cent allowed as agent, and $200 as attorney's fees. Nickell v. Nickell [Ky.] 118 SW 966.

3. Prouty v. Perry [Iowa] 120 NW 722. Agreement with agent of stockholders to pay expenses of sale excludes any implied agreement to pay other compensation. Merrill v. Sax [Iowa] 118 NW 434.

4. Right of agent to commission held to rest on completed sale; sale to become effective only on happening of contingency did not entitle him to commission. Reis v. Automatic Mail Delivery Co., 115 NYS 168. Salesman not entitled to commissions on orders which were canceled, there being no

the agent has fully performed,[5] but the principal cannot defeat the right to a commission by revoking the agent's authority after he has performed the services agreed upon.[6] Fraud or bad faith of the agent prevents the recovery of compensation.[7] An agent may recover commissions from both parties to a transaction if they know of and do not object to the dual agency.[8]

(§ 4) *D. Remedies, pleading, procedure and proof.*[9]—See 11 C. L. 85—Decisions dealing with these matters in actions by the agent to recover compensation,[10] and to recover for breach of contract by the principal,[11] in actions by the principal to compel the agent to account,[12] to recover damages for fraud,[13] negligence,[14] and

"sale" in such case. Wolfsheimer v. Frankel, 130 App. Div. 853, 115 NYS 958. Where a contract with a broker provides for a sale realizing a specified amount net to the seller, the broker to have any surplus as compensation, the broker is not entitled to any compensation until the seller has received the specified net sum, unless a sale is prevented by the seller. Burnett v. Potts, 236 Ill. 499, 86 NE 258.

5. General agent, desirous of appointing plaintiff local agent for machines, was told of prospective buyers, and, with agent of plaintiff, took an order with understanding that agency contract should be executed same day, which was done, and that plaintiff should have commission. Held, plaintiff entitled to commission. Lindquist v. Northwestern Port Huron Co. [S. D.] 117 NW 365.

6. Principal could not revoke agency of broker, so as to defeat right to commission, after broker had procured purchaser ready and able to buy, to whom principal later sold. Peach River Lumber Co. v. Montgomery [Tex. Civ. App.] 115 SW 87.

7. Agent who acts adversely to principal, or fails to disclose facts which would influence his conduct, commits fraud on principal and forfeits right to compensation. Broker who failed to report entire price received forfeited right to commission. Schleifenbaum v. Rundbaken [Conn.] 71 A 899. **Broker does not forfeit right to commissions** for sale of property because of having exhibited to intending buyer pieces of property belonging to several different owners. Lemon v. Macklem [Mich.] 16 Det. Leg. N. 456, 122 NW 77.

8. Arthur v. Porter [Tex. Civ. App.] 116 SW 127.

9. **Search Note:** See Principal and Agent, Cent. Dig. §§ 162-193; Dec. Dig. §§ 78, 79; 16 A. & E. Enc. P. & P. 911.

See, also, Clark & S. Agency, §§ 372-381.

10. **Parties:** Where contract was with two persons jointly to pay them for services, and one of them was to receive money as medium only, he could not alone sue on contract. Weinfeld v. Bergner & Co., 114 NYS 284. **Evidence held to sustain verdict for plaintiff** in action for commissions on sales to party introduced by plaintiff to defendant. Clark v. Chilton Paint Co., 111 NYS 655. Whether payment of $100 was settlement in full or to apply on commissions, held **for jury.** Dickinson v. Hahn [S. D.] 119 NW 1034. **Variance** between complaint alleging that plaintiff agreed to procure contract for defendant, for certain compensation, and proof that she used her influence to procure it, fatal to recovery. Seavey v. Ansonia Mfg. Co., 111 NYS 661. **Complaint** held to show transactions, during life of agent's contract so that he was entitled to commissions thereon. Searles v. Halstead & Co., 130 App. Div. 693, 115 NYS 405. Where **pleadings** showed that agent was entitled to commissions not to exceed 20 per cent of amount of purchase price paid in cash, and **judgment** was for larger sum than 20 per cent of amount paid as shown in pleadings, it was erroneous. Duval v. Advance Thresher Co. [Neb.] 119 NW 957. **In suit by one agent against alleged coagent** for profits from deal by defendant, plaintiff has burden of showing right to profits arising from joint agency. Evidence insufficient. Bruhns v. Seymour [Iowa] 121 NW 1016.

11. On breach of duty by an agent, the principal **may recover in assumpsit** for breach of an implied promise **or in case** for breach of an implied duty. Fidelity Trust Co. v. Poole, 136 Ill. App. 266. Where agent sues principal for breach of contract of agency, **burden is upon principal to establish fraud of agent** relied on as cause for terminating agency. Evidence insufficient. Oberfelder v. J. G. Mattingly Co. [Ky.] 120 SW 352.

12. Where agent employed to canvass for insurance refused to pay over premium collected by him from applicant, **trover was not proper remedy,** since he was not bound to turn over identical money received, and also might have right to set-off for commission. Hazelton v. Locke [Me.] 71 A 661. **Petition** by principal against agent for accounting for various sums sent agent for investment and misapplied by agent is **not multifarious** because several remittances may have been separate transactions. Brock v. Wildey [Ga.] 63 SE 794. **Burden is upon the agent,** claiming that the principal agreed to his retention of profits, to prove such agreement. Wells v. Cochran [Neb.] 120 NW 1123.

Evidence: Defendant claimed $245 note was indorsed to him as commission for securing loan of $950, and plaintiff claimed he endorsed it for collection. Proof as to value of property mortgaged to secure loan was admissible to show probability of agreement to pay so large a commission. Leasure v. Bole [Iowa] 120 NW 643. In action for accounting for proceeds of note which defendant claimed as commission for securing loan and which plaintiff claimed to have indorsed to defendant for collection, whether money loaned was that of defendant or third person, **held for jury.** Id.

Agency and fraud shown: Evidence sufficient to show that one who acquired land

violation of instructions,[15] and in actions to rescind for fraud of the agent,[16] are given in the notes.

Agistment; Agreed Case, see latest topical index.

AGRICULTURE.

The scope of this topic is noted below.[17]

§ 1. Regulation, 97.
§ 2. Cropping Contracts, Products and Crop Liens, 98.
§ 3. Agricultural Societies, 99.

§ 1. *Regulation.*[18]—See 11 C. L. 86—Some of the matters with respect to which the states regulatory power has been exercised are, the prevention of noxious weeds,[19] the labeling of commercial feeds,[20] the employment of persons already under contract with another to do agricultural labor,[21] the establishment of stock-law districts,[22] and the fostering of agricultural societies and exhibits.[23] To procure the publication of false government crop reports is punishable under the federal laws,[24]

was acting as grantor's agent and was guilty of fraud in concealing true price. Leonard v. Omstead [Iowa] 119 NW 973.

Agency not shown: Where owners of claims agreed to transfer them to one by written contract, they were bound by contract and could not later claim that such person was their agent, so as to compel him to account for profits on sale to another. Townsend v. Dilsheimer, 50 Wash. 294, 97 P 53. One who performed services in settling differences between corporation promoters **held not agent** of plaintiffs so as to be liable to them as trustee for stock received by him. Cranney v. McAllister [Utah] 101 P 985.

13. Burden on plaintiff seeking to recover on ground of fraud of agent, to show fraud; instructions erroneous. Smith v. Brigham, 106 Minn. 91, 118 NW 150.

14. Evidence held to sustain judgment for defendant in action by plaintiff for damages for negligence of defendant as agent in collecting accounts. Wood v. Manufacturer's Commercial Co., 113 NYS 3.

15. In action against agent for accounting for loss sustained through alleged violation of instructions in holding wheat, price having fallen, **evidence** held to show that agent was authorized to act as he did. Iona Warehouse Co. v. Van Buren, 50 Wash. 375, 97 P 291.

16. Old man gave power of attorney to woman in whose house he lived, and later made deed of property to her. **Evidence held not to show fraud** or duress or undue influence, and deed upheld. Hemenway v. Abbott, 8 Cal. App. 450, 97 P 190. Where no continuing trust or agency relation was shown between plaintiff and defendants, but it appeared that defendants had acted as agents for another in negotiations with plaintiff, and that such negotiations had ended when defendants bought the property, **plaintiff was not entitled to conveyance from defendant.** Mackel v. Nolan [Cal. App.] 97 P 1123.

17. It includes the regulation of agriculture generally and societies and exhibitions organized for the promotion thereof. Leasing on shares and landlord's lien for rent of agricultural lands (see Landlord and Tenant*), the status of crops as property and rights therein generally (see Emblements and Natural Products*), the inspection of grain (see Inspection Laws*), regulations of agricultural products designed mainly to secure purity of food supply (see Food;* Adulteration*), and statutes requiring the tagging and branding of fertilizers (see Commerce,* § 2B), are treated elsewhere.

18. Search Note: See Agriculture, Cent. Dig. §§ 1-3, 6, 13, 14, 51; Dec. Dig. §§ 1-3, 7-9.

19. Evidence held to show defendant guilty of such negligence as to be in law deemed to have intentionally permitted Canada thistle to mature on land occupied by him in violation of Criminal Code, § 40. People v. Warning, 142 Ill. App. 181.

20. Sale of unlabelled wheat middlings held to be in violation of the provisions of Acts 1907, p. 354, c. 206 prohibiting sale of any concentrated commercial feeding stuff without label. State v. Weller [Ind.] 85 NE 761. Not necessary to allege that wheat-middlings do not come within any exception of statute, wheat middlings being especially mentioned. Id.

21. Entire Act of General Assembly December 17, 1901 (Acts 1901, p. 63), as amended by Act August 2, 1903 (Acts 1903, p. 91), relating to employment or contracting with tenant, cropper or person under contract with another, is not repugnant to provision that act shall not contain matters foreign to title, by fact that contains words "or to disturb in any way said relation." Pearson v. Bass [Ga.] 63 SE 798. Such statute does not include more than one subject matter in providing that penalty may be enforced by civil or criminal process, in providing for making certain defenses by one charged with violation of terms of act in suit for damages. Id.

22. Proceedings for establishment of stock-law district held not void and hence not assailable by common-law certiorari. Cushman v. Blount County Ct. of Com'rs [Ala.] 49 S 311.

23. See post, § 3, Agricultural Societies.

24. Procuring statisticians of department of agriculture to make false reports re-

but the mere obtaining of information in advance of the publication of such reports is no offense.[25]

§ 2. *Cropping contracts, products and crop liens.*[26] See 11 C. L. 87—As in the case of other contracts, cropping contracts must be certain in their stipulations and terms,[27] and must be construed according to the intent of the parties as expressed.[28] Ordinarily, a cropper's contract whereby one agrees to cultivate the land of another and is to receive as compensation therefor a share of the crop grown constitutes a contract of employment,[29] and confers upon the cropper no title to the crop raised.[30] Where a cropping contract is broken by the owner of the land and the crop is harvested by him, the cropper may recover the difference between the value of his share and the cost of production.[31]

Liens. See 11 C. L. 88—In some states a special lien is given by agricultural supplies furnished under specific contract,[32] in addition to the more general lien for supplies furnished without such a contract,[33] and it is held that the latter lien may attach for supplies actually furnished, though pursuant to a specific contract made in another state.[34] A supply lien is superior to a mortgage on the crop,[35] except as to such portions of the crop as are exempted from the operation of the lien.[36] A

garding cotton crop is an offense under Rev. St. U. S. 5440, relating to conspiracy to defraud the United States. Haas v. Henkel, 166 F 621.

25. Conspiracy to obtain cotton crop statistics in advance of official publication. Haas v. Henkel, 166 F 621.

26. **Search Note:** See notes in 1 C. L. 95; 5 Id. 95.

See, also, Agriculture, Cent. Dig. §§ 15-51; Dec. Dig. §§ 10-16.

27. Contract whereby one party was to plant corn upon land of the other to be paid for by one-half market price of corn but not specifying time held void for uncertainty. Stoneking v. Long, 142 Ill. App. 203.

28. When plaintiff under cropping contract, assumed half of living expenses of defendant's family, expenses for defendant's son who thereafter became member of defendant's family could be recovered. Feland v. Berry [Ky.] 113 SW 425. In cropping contract under terms of which defendant was to have tobacco barn built, plaintiff to attend to building, labor to be at reasonable price, held that defendant was to furnish materials, plaintiff being only required to superintend construction and to hire workmen. Id.

29. Where one contracts with owner to make a crop on latter's land, he to furnish land, team and implements, the other to furnish labor, crop to be divided, relation of employer and employe is created. Adams v. State [Ala.] 48 S 795. Contract to farm on shares, one party to furnish land and team, the other to furnish labor, constitutes contract for hiring under Code 1907, § 4743. Vandergrift & Son v. Hawkins [Ala.] 49 S 754. Contract whereby one party was to plant corn upon land of another to be paid for by one-half market price of corn, and also to plant other crops, held to be a severable contract wherein agreement to plant corn was a hiring. Stoneking v. Long, 142 Ill. App. 203.

30. One working farm as mere employe has no title to crops raised, although compensation to be in kind, and consequently cannot execute a valid mortgage thereon. Vandergrift & Son v. Hawkins [Ala.] 49 S 754.

31. Contact for rental of farm on shares so far partakes of nature of contracts for personal services as to make it just to take into consideration the principles by which action for breach of contracts for services are governed. Crews v. Cortez [Tex.] 113 SW 523. Where cropping contract is broken by owner of land, cropper may recover his share of the crop if harvested by owner, less such sums as those thrown out of employment could by reasonable diligence have earned thereafter, but all other expenses including those for hired help which cropper would have incurred in performing his part of the contract should be deducted from value of his share because he would have realized only difference between value of his share and cost of production. Id. Expenses incurred by owner not chargeable. Id.

32. Act No. 66, p. 114, Laws La. 1874, providing for recordation of contracts giving a lien for advances covers only the sum named in the contract. Iberville Planting & Mfg. Co. v. Monongahelia Coal Co. [C. C. A.] 168 F 12.

33. For general lien see Civ. Code La. art. 3217. Ibewill Planting & Mfg. Co. v. Monongahela Coal Co. [C. C. A.] 168 F 120.

34. Contract for delivery of coal for use on Louisiana plantation made in Pennsylvania, but delivery made in Louisiana and notes taken for purchase price there made, held sufficient to bring seller within protection of Rev. Civ. Code La. art. 3217, which gives furnisher of supplies to any farm or plantation a privilege on the crops. Iberville Planting & Mfg. Co. v. Monongahela Coal Co. [C. C. A.] 168 F 12.

35. Lien for supplies to which crop was actually applied is superior to mortgage given to another for supplies but not reciting that fact under Civ. Code La. Art. 3217. Lowenberg v. Lewis-Herman Co. [Miss.] 48 S 517.

36. Lien, under Act No. 66, p. 114, of 1874, for advances, will not attach to that

domestic employed on a farm does not come within the statute giving a lien for the wages of farm laborers.[37] Landlord's liens for rent and advances are treated elsewhere.[38]

A creditor who pays superior lienholders may be subrogated to their rights.[39] Crops subject to a lien for supplies may be attached by the lienholder in the hands of a third party.[40] A complaint in an action to enforce a laborer's lien must state the facts upon which the right to recover is predicated,[41] but an amendment in this regard may be allowed even after judgment by default.[42]

§ 3. *Agricultural societies.*[43]—See 11 C. L. 89—Agricultural associations incorporated under certain statutes are public agencies of the state, and their property is public property.[44] If, however, they are incorporated as private corporations their property is subject to execution,[45] and even where they are public corporations, they are subject to the same liability for negligence as are private corporations.[46] It is held that a statute prohibiting the sale of any article within a certain distance from the fair ground of any agricultural society without its permission is unconstitutional in not being a valid exercise of police power.[47] A misnomer of an agricultural corporation will not invalidate a conveyance made to it, if it appears that it was the corporation intended.[48]

Aider by Verdict, etc.; Aid of Execution; Alibi, see latest topical index.

part of the crop needed for seed and put aside in good faith. Dunlap v. Berthelot, 122 La. 531, 47 S 882.

37. Woman employed on farm to do ordinary housework and to assist in cooking for farm laborers is not a "farm laborer" within Rev. Codes 1905, § 6277. Lowe v. Abrahamson [N. D.] 119 NW 241.

38. See Landlord and Tenant, 12 C. L. 528.

39. Where factor to protect his privilege given by factor's contract under Act No. 66, p. 114, Laws La. 1874, directly paid off claims of laborers having a superior privilege, he was within protection of Rev. Code La. art. 2161, providing that subrogation takes place of right for benefit of him who, being himself a creditor, pays another creditor whose claim is preferable, and was subrogated to laborers' privileges as against other lien claimants. Iberville Planting & Mfg. Co. v. Monongahela Coal Co. [C. C. A.] 168 F 12.

40. When crops subject to lien for supplies have been delivered by tenant to another than the landlord, the remedy of the latter to have his lien declared and enforced is by attachment under Kirby's Dig. §§ 5040, 5041. Ferniman v. Nowlin [Ark.] 120 SW 378.

41. Complaint of day laborers that they had done work for owner of threshing outfit and praying judgment against owner of outfit and against owner of wheat does not state cause of action or show superior lien as against that of creditor of owner of wheat obtained by garnishment. Young v. Shockey [Kan.] 101 P 631.

42. Under Civ. Code, § 3061, providing for lien to any one performing work in, about or upon a threshing machine to extent of his services, held that complaint for claims, incomplete in not fully developing facts essential to relief, could be amended after judgment on default. Lemon v. Hubbard [Cal. App.] 102 P 554.

43. Search Note: See Agriculture, Cent. Dig. §§ 1, 4-12; Dec. Dig. §§ 4-6; 2 A. & E. Enc. L. (2ed.) 18.

44. Association incorporated under St. 1880, p. 62, c. 69. Sixth Dist. Agricultural Ass'n v. Wright, 154 Cal. 119, 97 P 144. Statute authorizing such association to form among its members a private corporation and to issue capital stock and to accept transfers of association property is an attempted gift of public property and therefore void. Act Feb. 18, 1895 (St. 1895, p. 14, c. 8) amending Act 1891 (St. 1891, p. 38, c. 126). Id.

45. Under St. 1859, p. 104, c. 110, expressly authorizing agricultural societies to sell, lease and dispose of their lands at pleasure, the lands of a society organized under such act, not being a public corporation, could be sold under execution. Denike v. Santa Clara Valley Agricultural Soc. [Cal. App.] 98 P 687.

46. Society organized under Comp. Laws 1897, § 5953, et seq., held liable for injuries caused by breaking of seat in bleacher. Logan v. Agricultural Soc. [Mich.] 16 Det. Leg. N. 192, 121 NW 485.

47. Section 7006 of Rev. St. of Ohio which provides that "whoever establishes a temporary place of business for the sale of any article whatsoever or offers for sale any such article * * * within one-fourth of a mile of the fair ground of any agricultural society, while the fair of such society is being held therein, unless he had obtained the written permission of the board of such society" and imposing a penalty for the violation thereof, is an unconstitutional exercise of power by the legislature. Markley v. Ohio, 12 Ohio C. C. (N S.) 81.

48. Conveyances to association in Sixth agricultural district organized as "Agricultural District Number Six," but designated in deed as "District Agricultural Association Number Six of California," held valid. Sixth Dist. Agricultural Ass'n v. Wright, 154 Cal. 119, 97 P 144.

ALIENS.

The scope of this topic is noted below.[49]

§ 1. Who are Aliens, 100.
§ 2. Disabilities and Privileges, 100.
§ 3. Immigration, Exclusion, and Expulsion, 101.
A. Admission and Exclusion, 101.
B. Registration and Certificate, 102.
C. Deportation and Procedure Incident Thereto, 102.
D. New Trial and Appeal from Order of Deportation, 103.
§ 4. Naturalization, 103.

§ 1. *Who are aliens.*[50]—The naturalization of a father naturalizes his minor children,[51] but the naturalization of the husband does not change the status of the wife, who has not actually gained admission into the United States.[52]

§ 2. *Disabilities and privileges.*[53]—See 11 C. L. 90.—Except as limited by treaty,[54] a state may deny to aliens the privilege of inheriting land,[55] or may grant it upon such conditions as it sees fit.[56] In Indiana an alien not residing in the state and who has not made a declaration of citizenship cannot take by purchase but only by devise and descent,[57] but in Arkansas aliens may obtain title to land by the operation of the statute of limitations.[58] An alien who has not declared his intention of becoming a citizen of the United States cannot, under the homestead laws, acquire title to government land.[59] Ordinarily, an alien may maintain suits to vindicate his rights and redress his wrongs, including actions for personal injuries[60] and for wrongful death,[61] but if the state statute grants such rights to citizens only, a treaty preserving the right of aliens to resort to the courts will not usually be construed to extend such rights to an action for wrongful death.[62]

49. Includes the rights and liabilities of aliens, the law of naturalization, and the regulation of immigration. Excludes citizenship (see Citizens*), and the right to vote (see Elections,* § 2).

50. See 11 C. L. 90. See, also, Citizens, 11 C. L. 627.

Search Note: See note in 22 L. R. A. 148. See, also, Aliens, Cent. Dig. § 13; Dec. Dig. §§ 1, 2; 2 Cyc. 85, 87, 88; 2 A. & E. Enc. L. (2ed.) 65.

51. Hence, burden of showing that a person is an alien is not sustained merely by showing that he was brought to America at the age of five years by his father, without any showing that the latter was not thereafter naturalized. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

52. If petition of husband has effect of naturalizing nonresident wife who is not herself entitled to admission it will be denied. In re Rustigian, 165 F 980.

53. See note, 11 C. L. 91, as to right of alien to locate mining claim.

Search Note: See notes in 3 C. L. 140; 7 Id. 100; 11 Id. 91; 16 L. R. A. 277; 22 Id. 148; 31 Id. 85, 146, 177; 54 Id. 934; 3 L. R. A. (N. S.) 473; 7 Id. 659, 813; 11 Id. 799; 12 A. S. R. 93; 7 Ann. Cas. 594; 8 Id. 77.

See, also, Aliens, Cent. Dig. §§ 21-67, 78; Dec. Dig. §§ 3-17; 2 Cyc. 88-97, 104-110; 2 A. & E. Enc. L. (2ed.) 65; 10 A. & E. Enc. P. & P. 278.

54. Statute, providing that nonresident alien who has not declared his intention of becoming a citizen can only take by devise and descent and not by purchase, held to be in conformity with art. 5 of treaty between United States and Swiss Confederation of November 8, 1855 (11 Stat. 587). Lehman v. State [Ind. App.] 88 NE 365.

55. Lehman v. State [Ind. App.] 88 NE 365. Aliens, resident or nonresident, could not inherit from resident citizens, under Laws 1845, c. 115, p. 94. Criswell v. Noble, 61 Misc. 483, 113 NYS 954.

56. Lehman v. State [Ind. App.] 88 NE 365.

57. Burns' Ann. St. 1894, § 3333. Such an alien can hold and convey only for period of five years, at end of which period lands escheat to state. Lehman v. State [Ind. App.] 88 NE 365.

58. Under Kirby's Dig. § 264, providing that aliens may take lands either by purchase, by will, or by descent, an alien may obtain title to land by operation of the statute of limitations. Price v. Greer [Ark.] 116 SW 676, rehearing [Ark.] 118 SW 1009.

59. Deed given by alien to public lands occupied by him held a nullity. Call v. Los Angeles Pac. Co., 162 F 926.

60. Italian subject injured in mine was entitled to sue for damages. Squilache v. Tidewater Coal & Coke Co. [W. Va.] 62 SE 446.

61. See note, 11 C. L. 91. Nonresident aliens may maintain an action under Code Civ. Proc. Cal. § 377, providing that, when the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against person causing death. Kaneko v. Atchison, etc., R. Co., 164 F 263.

62. Nonresident alien relatives have no right under treaty of Nov. 18, 1871 (17 Stat. 845), between the United States and Italy, to bring action for death of Italian subject. Maiorano v. Baltimore & O. R. Co., 213 U. S. 268, 53 Law. Ed. ——. Treaty between United States and Italy of Feb. 26, 1871 (17 Stat. 845) guaranteeing protection and se-

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§ 3. *Immigration, exclusion, and expulsion. A. Admission and exclusion.*[63]—See 11 C. L. 92—Congress has power to exclude undesirable aliens from admission to the United States,[64] and among the classes which in the exercise of such power are excluded are persons afflicted with contagious or loathsome diseases,[65] prostitutes,[66] and aliens under contract to perform labor.[67] A previously acquired domicile does not entitle an alien to re-enter the United States, if within the classes excluded by statute,[68] but aliens once admitted to the continental territory of the United States or to any of its dependencies will not be prevented from going from the one to the other.[69] Statutes prohibiting the landing of aliens do not apply where such landing is made through necessity.[70] A statute imposing a penalty for failure to furnish a manifest of alien immigrants does not contemplate incorrect information furnished in good faith.[71] The offense of bringing in aliens whose admission is forbidden is completed at the port of entry.[72]

The decision of the officials of the department of commerce and labor in such cases constitutes due process of law,[73] but such officials must grant an actual hearing in good faith and must receive pertinent testimony offered by the applicant,[74] although the applicant is not entitled as of right to be present, either in person or by counsel, at the taking of the testimony or to be informed of the nature thereof.[75] Where the plain intent of an exclusion statute is to make a violation of its terms

curity to persons and property of citizens of Italy (art. 3), and preserving right to resort to courts (art. 23), does not give an Italian subject, who has never been in United States and has no property here, the right to maintain an action for wrongful death, given by statute only to citizens of state. Fulco v. Schuylkill Stone Co., 163 F 124, afd. 169 F 98.

63. Search Note: See notes in 7 C. L. 101. See, also, Aliens, Cent. Dig. §§ 70-90; Dec. Dig. §§ 18-28; 5 A. & E. Enc. L. (2ed.) 1101; 7 Id. 83; 15 Id. 1025.

64. It was within power of congress to enact the provision of Act of March 3, 1903 (32 Stat. 1213, c. 1012), § 9, making it unlawful to bring into the United States any alien afflicted with a loathsome or dangerous contagious disease and providing for a penalty therefor. Oceanic Steam Nav. Co. v. Stranahan, 29 S. Ct. 671.

65. Oceanic Steam Nav. Co. v. Stranahan, 29 S. Ct. 671. The provisions of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1907, p. 391), excluding alien immigrants afflicted with contagious or loathsome diseases, **applies to Chinese** as well as to other aliens. In re Lee Sher Wing, 164 F 506. Son afflicted with trachoma could not be brought into the United States by his father, a Chinese merchant, already domiciled within the United States, and who, under Chinese Exclusion Acts, would have been entitled to bring in his son. Id.

66. Ex parte Petterson, 166 F 536.

67. Hepher v. U. S., 213 U. S. 103, 53 Law. Ed. —.

68. United States v. Watchorn, 164 F 152. See, also, Ex parte Crawford, 165 F 830. Act Feb. 20, 1907, c. 1134, 34 Stat. 905 (U. S. Comp. St. Supp. 1907, p. 402) includes all aliens, whether domiciled in the United States or not. Ex parte Petterson, 166 F 536. Prostitute not entitled to re-enter, although having previously acquired domicile. Ex parte Petterson, 166 F 536.

69. Rule 4 of the regulations of the bureau of immigration and naturalization of the department of commerce and labor, relating to admission and exclusion of aliens, and providing that the provisions of the immigration act do not apply to aliens who have once been duly admitted to the United States or to any waters, territory, or other place subject to the jurisdiction of the United States, proceeding to or from the continental territory of the United States, has reference only to aliens who have been admitted and are proceeding from the dependencies to the continent or vise versa. United States v. Watchorn, 164 F 152.

70. Act March 3, 1903, c. 1012, § 18, 32 Stat. 1217, prohibiting officers, owners, and agents of any vessel from permitting any alien to land, does not apply to seamen landed and placed in hospital because of illness of such a nature as would prevent them from departing with vessel. Niven v. U. S. [C. C. A.] 169 F 782.

71. Immigration Act Feb. 20, 1907, § 15, c. 1134, 34 Stat. 903 (U. S. Comp. St. Supp. 1907, p. 398), providing that master of vessel, who fails to furnish manifest of aliens containing information therein specified, shall pay to collector of customs $10 for each alien concerning whom such information is lacking, does not apply to incorrect information furnished in good faith. United States v. Four Hundred and Twenty Dollars, 162 F 803.

72. Indictment under Act Feb. 20, 1907, c. 1134, § 8, 34 Stat. 900 (U. S. Comp. St. Supp. 1907, p. 394), for bringing in alien child, dismissed as not brought in proper jurisdiction, where child was landed at New York and later brought into another district. United States v. Capella, 169 F 890.

73, 74. In re Can Pon [C. C. A.] 168 F 479.

75. Investigation held to be so conducted as not to deprive 15-year-old Chinese boy, born in the United States, detained upon re-

punishable by a civil penalty, it will be so construed,[76] but where the offense is expressly denominated a crime it will be considered as such, regardless of the fact that it is punishable by a civil penalty merely.[77] An indictment for permitting landing of aliens in violation of the statute must definitely allege that the offense charged does not come within the scope of the statutory exceptions,[78] but matters in mitigation need not be alleged,[79] nor need the statute under which the indictment is drawn be specified.[80] Where the testimony against the defendant in a suit for penalties for importing aliens, is undisputed, the court may properly direct a verdict for the government.[81]

Under some of the acts jurisdiction over the subject-matter is retained for certain purposes, such as deportation, even after the alien has been admitted,[82] but the power of congress in such regard does not extend to regulations which constitute a usurpation of the police power of the state.[83] An alien arrested on the border for attempting to enter the United States, but who has not actually entered,[84] is subject to disposition by the immigrant inspector, and is not entitled to a hearing before a federal court or commissioner as in deportation proceedings,[85] but the inspector must, in such case, return the alien to the country from which he tried to enter.[86]

(§ 3) *B. Registration and certificate.*[87]—See 9 C. L. 87

(§ 3) *C. Deportation and procedure incident thereto.*[88]—See 11 C. L. 94—One lawfully within the United States is not subject to deportation,[89] but such is not

turning from visit to China, of due process of law. In re Can Pon [C. C. A.] 168 F 479.

76. Because the statute empowers the secretary of commerce and labor to exact a penalty for bringing in such alien when medical examination shows that alien was afflicted with such disease at time of embarkation, and which might at that time have been discovered, it is not thereby open to objection that it defines a criminal offense, and authorizes a purely administrative officer to determine whether the crime has been committed. Oceanic Steam Nav. Co. v. Stranahan, 29 S. Ct. 671. Actions to enforce penalties for bringing in aliens afflicted with disease are not necessarily governed by rules of criminal procedure. Oceanic Steam Nav. Co. v. Stranahan, 29 S. Ct. 671.

77. Though section 4 of immigration act (Act Feb. 20, 1907, c. 1134, 34 Stat. 900 [U. S. Comp. St. Supp. 1907, p. 393]), providing that it shall be a misdemeanor to prepay transportation or assist or encourage importation of contract laborers, merely provides for civil penalty, congress by using word "misdemeanor" intended to define a crime, and, hence, conspiracy to commit acts contained within terms of statute are indictable and punishable under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), forbidding conspiracy to commit offense against United States. United States v. Tsokas, 163 F 129.

78. Allegation that Chinaman was landed under no necessity is broader than exceptions in statute (Act Sept. 13, 1888, §§ 9 and 10, 25 Stat. 478, c. 1015 [U. S. Comp. St. 1901, p. 1316]), and is sufficient. United States v. Graham, 164 F 654.

79. Criminal offense is confined to question of landing or permitting to be landed, and anything pertaining to ultimate departure of alien under exception in statute need not be pleaded. United States v. Graham, 164 F 654.

80. Indictment for importing Chinamen, drawn under Act May 6, 1882, c. 126, 22 Stat. 58, as amended by Act July 5, 1884, c. 220, 23 Stat. 115 (U. S. Comp. St. 1901, p. 1305), held good, although such statute superseded by §§ 9 and 10, Act of Sept. 13, 1888, c. 1015, 25 Stat. 478 (U. S. Comp. St. 1901, p. 1316). United States v. Wood, 168 F 438.

81. Suit to recover penalties for importing aliens for purpose of performing labor, Act March 3, 1903, §§ 4, 5. Hepner v. U. S., 213 U. S. 103, 53 Law. Ed. —.

82. Keller v. U. S., 213 U. S. 138, 53 Law. Ed. —.

83. Not within power of congress to enact provisions of Act Feb. 20, 1907 (34 Stat. 898, c. 1134), § 3, fixing punishment for mere keeping, maintaining, supporting, or harboring, for purpose of prostitution, any alien woman within three years after entry, since jurisdiction of such offense is relegated to police power of state. Keller v. U. S., 213 U. S. 138, 53 Law. Ed. —.

84. Determination in habeas corpus proceedings that petitioner had not entered held conclusive in subsequent proceedings by habeas corpus in another federal district. Lui Lum v. U. S. [C. C. A.] 166 F 106.

85. Lui Lum v. U. S. [C. C. A.] 166 F 106.

86. Chinaman arrested for attempting to enter United States from Canada should have been returned to Canada. Lui Lum v. U. S. [C. C. A.] 166 F 106.

87. Search Note: See Aliens, Cent. Dig. § 97; Dec. Dig. § 29.

88. Search Note: See Aliens, Cent. Dig. §§ 84, 93-96; Dec. Dig. § 82.

89. Minor who came to the United States

the effect of the acquisition of a domicile, where the original entry was unlawful.[90] The statutory period during which an alien, who has been previously domiciled in the United States, may be deported for practicing prostitution dates from the time of re-entry.[91] Proceedings to deport are civil, not criminal, in nature,[92] and the applicant may be compelled to testify.[93] The verification of a petition for a writ of habeas corpus in a deportation case may be made by the applicant's attorney,[94] but on such proceedings the rulings of the secretary of commerce and labor are conclusive in all cases of alien immigrants.[95]

(§ 3) *D. New trial and appeal from order of deportation.*[96]—See 11 C. L. 95—The decision of the appropriate immigration or customs officer on a question of exclusion or deportation is final if adverse to admission,[97] unless reversed on appeal to the secretary of commerce and labor.[98] Such an appeal lies as a matter of right,[99] and opens all questions of fact[1] and evidence.[2]

§ 4. *Naturalization.*[3]—See 11 C. L. 95—Only such aliens as, by federal statute, have been given the right to become naturalized citizens of the United States can be naturalized by the courts,[4] and this right has been conferred only upon white persons and persons of African descent.[5] An alien woman domiciled in the United States and married to an alien cannot be naturalized although otherwise qualified.[6] Naturalization laws should be literally construed,[7] although not so as to override

from China for the purpose of joining his father who was a merchant lawfully domiciled in the United States, and who thereafter, during his majority, labored and studied in the United States, was entitled to remain, his entry being rightful. United States v. Foo Duck, 163 F 440. Fact that after majority he worked as a laborer did not deprive him of his right. Id.

90. No defense to a deportation order by the department of commerce and labor. Ex parte Crawford, 165 F 830.

91. United States v. Hook, 166 F 1007. Prostitute who, after living in United States for several years, returned to Canada of which country she was a citizen, was properly deported upon her return, where evidence showed that she was an inmate of a house of prostitution within three years after such re-entry. Id.

92. Tom Wah v. U. S. [C. C. A.] 163 F 1008.

93. Chinese person, against whom deportation proceedings are pending, may be called as a witness by the United States and be compelled to answer questions relative to the pending issue. Tom Wah v. U. S. [C. C. A.] 163 F 1008.

94. Rev. St. § 754 (U. S. Comp. St. 1901, p. 593). United States v. Watchorn, 164 F 152.

95. Notwithstanding 34 Stat. 907, c. 1134 (U. S. Comp. St. Supp. 1907, p. 407), giving circuit and district courts concurrent jurisdiction. Ex parte Crawford, 165 F 830.

96. Search Note: See Aliens, Cent. Dig. §§ 93-95; Dec. Dig. § 32.

97. Where a person of Chinese descent seeks admission on ground that he is a native-born citizen, a decision of the inspector that he is not is a decision of a competent tribunal and is final and conclusive in the absence of abuse of discretion. In re Tang Tun [C. C. A.] 168 F 488. Evidence held to show that hearing upon which deportation order was based was not summary or arbitrary and that finding was therefore conclusive. Id. Finding of United States commissioner that witnesses before him in deportation case are not entitled to credit should not be reversed by an appellate court. Hong Yon v. U. S. [C. C. A.] 164 F 330. Federal courts have authority to examine the record and the evidence, upon which the assistant secretary of commerce and labor predicated his authority to issue a warrant of deportation, for sole purpose of ascertaining whether evidence showed beyond doubt that case was beyond purview of immigration statutes and not provided for by them. Ex parte Petterson, 166 F 536.

98. United States v. Watchorn, 164 F 152.

99. Exclusion of testimony favorable to applicant was a deprivation of right of appeal conferred by statute. In re Can Pon [C. C. A.] 168 F 479.

1. In re Can Pon [C. C. A.] 168 F 479.

2. Applicant was entitled to introduce all material evidence heard before local officials. In re Can Pon [C. C. A.] 168 F 479. Omission of testimony of witness on the whole favorable to applicant to effect that applicant was born within United States should have been considered on appeal. Id.

3. See note, Naturalization by Accession of Territory, 5 C. L. 587, n. 10.

Search Note: See note in 3 C. L. 145.

See, also, Aliens, Cent. Dig. §§ 117-161; Dec. Dig. §§ 60-72; 2 Cyc. 110-118; 6 A. & E. Enc. L. (2ed.) 19; 14 A. & E. Enc. P. & P. 307.

4. In re Buntaso Kumagai, 163 F 922.

5. Act Feb. 18, 1875, c. 80, 18 Stat. 318 (U. S. Comp. St. 1901, p. 1333). In re Buntaro Kumagai, 163 F 922. Japanese, though honorably discharged from U. S. army, does not come within terms of statute. Id.

6. In re Rionda, 164 F 388.

7. In re Symanowsski, 168 F 978.

or annul the immigration laws,[8] but the rules regulating procedure must be rigidly followed.[9] The act requires that the applicant be a person of good, moral character [10] and fit for citizenship,[11] who has resided in the United States for the required time,[12] and declared his intention of becoming a citizen thereof in the manner and form required by the act.[13] The right of the applicant must be matured at the time of his petition,[14] and such petition must be filed with a court having jurisdic-

8. It is no part of intended policy of Rev. St. § 1994 (U. S. Comp. St. 1901, p. 1268), or of naturalization laws, that they should annul or override the immigration laws. In re Rustiglan, 165 F 980. If marital status makes it impossible to deal with husband and wife separately, it is more consistent with the welfare of citizens of United States to deny admission to both if wife is ineligible, than to admit both. Id.

9. Court may not, in the exercise of assumed discretionary power, admit an alien to citizenship who has failed to establish his right by the kind of evidence which statute demands. United States v. Nisbet, 168 F 1005. Court could not receive and give consideration to depositions in favor of an applicant who has been a resident for five years, statute authorizing such depositions only in case where applicant has been a resident in state or district for less than five years. Id.

10. Applicant who had habitually, knowingly and willfully, violated Sunday closing law for three years and who stated that he intended to continue doing so after he was naturalized, has not behaved as a man of good moral character, and application should be denied. United States v. Hrasky, 240 Ill. 560, 88 NE 1031.

11. Discretion vested in courts to determine fitness for citizenship is a legal, not a personal discretion, and, if abused, is subject to review. United States v. Hrasky, 240 Ill. 560, 88 NE 1031. Citizenship will not be extended to one who has no knowledge of the constitution or of the institutions of the United States and who instead of availing himself of privilege to prepare himself by study, asserts his right to citizenship and who shows that he will hold his allegiance lightly. In re Meakins, 164 F 334. No fixed rule can be laid down as to fitness for citizenship. Practical test is whether evidence, considered as a whole, justifies conclusion that applicant will make a good citizen. That applicant has no accurate knowledge of federal constitution and form of government, not necessarily fatal to application. State v. Seventeenth Dist. Ct. [Minn.] 120 NW 899.

12. Five years. In re Schneider, 164 F 335. In order to comply with Naturalization Act, June 29, 1906, c. 3592, § 4, subd. 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 422), requiring court to be satisfied that applicant has continuously resided within the United States for five years, it is not necessary that applicant have been physically present throughout the entire five years. Id. **Evidence** held insufficient to show that applicant had complied with requirements of Naturalization Act of June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 421), relating to residence for five years. In re Kestelman, 165 F 265. Evidence of witnesses held sufficient to show that enlisted man in navy retained his domicile. In re Schneider, 164 F 335.

13. An application that merely claims a right to be naturalized, and does not announce applicant's intention of becoming a citizen, nor renounce his former allegiance, is insufficient under Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 420). In re Poirot, 168 F 456. Section 100, Organic Act of Hawaii (Act April 30, 1900, c. 339, 31 St. 161), providing that a previous declaration of intention to become citizens of the United States shall not be required of persons who have resided in islands for 5 years prior to act, held repealed by Act June 29, 1906, c. 3592, 32 St. 596 (U. S. Comp. St. Supp. 1907, p. 419), providing that naturalization cannot be had except by first making declaration of intention two years prior to admission. United States v. Rodiek [C. C. A.] 162 F 469. Certified transcript of court record, showing that applicant had declared his intention of becoming a citizen in due form, is admissible in **evidence** of fact of making such declaration although original record has been lost. United States v. Brelin [C. C. A.] 166 F 104. Declaration of intention by **mistake** renouncing allegiance to France instead of to Empire of Russia could not be amended so as to date back to time made. In re Lewkowicz, 169 F 927. Validity of declaration by **minor** construed under Rev. St. §§ 2165 and 2167 (U. S. Comp. St. 1901, pp. 1329, 1332), and not under Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 95). In re Symanowsski, 168 F 978. Declaration by alien 19 years old sufficient under Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329). United States v. George [C. C. A.] 164 F 45. All that is necessary, under Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329), is a declaration on oath that it is the present intention of declarant to become a citizen, and his present intention to renounce allegiance to his foreign sovereign at some future time. In re Symanowsski, 168 F 978. Declaration made one day before attaining majority, ratified by applying for citizenship after reaching full age. Id. Canadian subject who, after declaration of intention, returned to Canada with intention of remaining there, returned and remained in the United States for five years, could not base his petition upon his declaration, since such act showed an **abandonment of intention** to become a citizen. In re Cameron, 165 F 112.

14. United States v. Van Der Molen, 163 F 650. Provision of Naturalization Act June 29, 1906, c. 3592, § 4, cl. 2, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 421), requiring petition for naturalization to be filed not less than two years after the declaration of intention is mandatory. Id. Petition filed less

tion in the premises,[15] and must state the name of the vessel upon which he arrived.[16] The applicant must, except in special cases,[17] be vouched for by two witnesses[18] whose names have been posted for the statutory period.[19] A decree granting naturalization has all the effect of a judgment,[20] and imports validity, although the record does not show that all the legal requisites have been complied with,[21] and the original record cannot be corrected by a certificate of citizenship which is not sustained by any record entry of the court.[22] Such a certificate is subject to attack[23] at the suit of the government,[24] represented by the district attorney.[25] A federal district court has jurisdiction to entertain such a suit though the certificate attached was issued by a state court,[26] but, the jurisdiction of the two courts being concurrent only, the federal court will not review the findings of the state court upon the question of the latter's jurisdiction under local law.[27]

ALIMONY.

The scope of this topic is noted below.[28]

§ 1. Nature and Purpose of the Allowance, 106.
§ 2. Jurisdiction and Power to Award, 106.
§ 3. Stage or Condition of the Divorce Proceedings, 102.
§ 4. Reasons for and Against Allowances, 107.
§ 5. Amount, Character and Duration, 108.
§ 6. Procedure and Practice, 109.
§ 7. The Decree; Its Enforcement and Discharge, 110.
§ 8. Alimony in Suits for Annulment, 113.

than two years after declaration of intention gives court no jurisdiction although two years would have elapsed when hearing had. Id.

15. An alien residing in one county of a judicial circuit cannot be admitted to citizenship by the circuit court of another county in the same circuit. United States v. Wayer, 163 F 650. Provision of Naturalization Act June 29, 1906, c. 3592, § 3, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 420), relates only to aliens resident within territorial jurisdiction of court of admission. United States v. Schurr, 163 F 648.

16. In re Kestelman, 165 F 265. Where government disproved prima facie that applicant did not arrive at time he claimed he did, burden shifts upon him to show that he did. Id.

17. Rev. St. § 2166 (U. S. Comp. St. 1901, p. 1331), relating to naturalization of honorably discharged soldiers of the United States, and requiring proof of residence and good moral character "as now provided by law" not being repealed and containing no provision as to the number of witnesses required, a petition supported by one witness merely was sufficient. In re Loftus, 165 F 1002.

18. United States v. Daly, 32 App. D. C 525.

19. Act June 29, 1906, 34 Stat. 596, c. 3592 (U. S. Comp. St. Supp. 1907, p. 420). Witness whose name had not been posted for 90 days could not be substituted for one of original witnesses whose name had been properly posted but who failed to qualify. United States v. Daly, 32 App. D. C. 525.

20. Cannot be corrected at a subsequent term to that at which rendered. In re O'Sullivan [Mo. App.] 117 SW 651. Nor can it be attacked except in manner and for causes for which judgments of a court of record can be assailed. Id. Decree of naturalization will not be set aside on mere fact that the witnesses were mistaken in stating that they had personal knowledge of applicant's residence, where the fact of such residence is not disputed. United States v. Rose, 166 F 999.

21. Need not show requisite previous declaration of intention to become a citizen. In re Symanowsski, 168 F 978.

22. In re O'Sullivan [Mo. App.] 117 SW 651.

23. Certificate cancelled because applicant not resident in county of which court had jurisdiction. United States v. Wayer, 163 F 650.

24. United States v. Nisbet, 168 F 1005.

25. It is the duty of the United States district attorney, and not of bureau of immigration and naturalization, to prosecute proceedings for cancellation of certificates of naturalization. Naturalization Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1907, p. 427). United States v. Andersen, 169 F 201.

26. When state court received depositions of witnesses instead of examining them in open court as required by 34 Stat. 599 (U. S. Comp. St. Supp. 1897, p. 424). United States v. Nisbet, 168 F 1005.

27. United States v. Anderson, 169 F 201.

28. Includes temporary and permanent allowance in connection with suits for divorce. Excludes allowances for benefit of widow out of estate of her deceased husband (see Estates of Decedents,* § 5D), division of property on divorce, and support of children (see Divorce,* § 6), and effect of antenuptial agreements on division of property, and allowance for separate maintenance without divorce (see Husband and Wife,* § 11).

* Always begin with the latest article on the subject. Use the latest topical index.

§ 1. *Nature and purpose of the allowance.*[29]—See 11 C. L. 96.—Alimony, in its origin, was the method by which the spiritual courts of England forced the duty of maintenance owed by the husband to the wife during such time as they were legally separated,[30] and, in modern jurisprudence, it is the allowance made to a woman on a decree of divorce for support out of her husband's estate.[31] Temporary alimony is an allowance ad interim, including counsel fees, in a proper case, and is interlocutory in character.[32]

§ 2. *Jurisdiction and power to award.*[33]—See 11 C. L. 97.—The power of the court to allow alimony or counsel fees rests primarily upon the existence of the relation of husband and wife,[34] and, in order for the court to act, the wife must appear as a party.[35] The power of the court to award alimony pendente lite is either derived from the statute[36] or it is incidental to the statutory jurisdiction to entertain actions affecting the marriage relation,[37] but, in either case, the power of the court to make such an allowance is dependent upon the necessity therefor.[38]

§ 3. *Stage or condition of the divorce proceedings.*[39]—See 11 C. L. 98.—As a general rule alimony cannot be allowed after a decree for a divorce has been entered,[40] and the same rule applies with reference to allowance for attorney's fees.[41] On the

29. Search Note: See notes in 3 C. L. 146; 5 Id. 102; 7 Id. 104; 3 L. R. A. (N. S.) 192.

See, also, Divorce, Cent. Dig. §§ 605-609, 642, 643, 658-664; Dec. Dig. §§ 209, 221, 231-234; 14 Cyc. 748 761, 767-771.

30. Anderson v. Norvell-Shapleigh Hardware Co., 134 Mo. App. 188, 113 SW 733.

31. Anderson v. Norvell-Shapleigh Hardware Co., 134 Mo. 188, 113 SW 733. Alimony is an allowance made to the wife out of the husband's estate or income upon a decree of separation. Kiser v. Kiser, 108 Va. 730, 62 SE 936. Alimony is an allowance to the wife upon the termination of the marital relations by divorce. Wallace v. Wallace [N. H.] 72 A 1033.

32. Stalvey v. Stalvey [Ga.] 64 SE 91.

33. Search Note: See notes in 3 C. L. 148; 68 A. S. R. 375; 71 Id. 88; 2 Ann. Cas. 819.

See, also, Divorce, Cent. Dig. §§ 587-593; Dec. Dig. §§ 200-202; 14 Cyc. 745-746.

34. Phillips v. Peacock, 132 App. Div. 520, 117 NYS 625. Where there has been a final decree of divorce and no appeal taken, the relation of husband and wife does not exist and therefore no counsel fee will be allowed in an action to set aside the decree. Lake v. Lake, 194 N. Y. 179, 87 NE 87. Question of fact whether there is an existing marriage is addressed to the court hearing the motion for alimony, and is to be determined by it on that motion in same manner as any other question of fact is determined. Ex parte Joutsen, 154 Cal. 540, 98 P 391.

35. Court has no power to direct payment of alimony on application of trustee for the wife under separation agreement. Phillips v. Peacock, 132 App. Div. 520, 117 NYS 625.

36. Code Civ. Proc. § 1769 authorizes court to require husband to pay money necessary to prosecute or defend an action. Lake v. Lake, 194 N. Y. 179, 87 NE 87. Counsel fees in an action to set aside a valid judgment of divorce not allowable under the statute. Id.

37. Lake v. Lake, 194 N. Y. 179, 87 NE 87. In an action to set aside a valid judgment of divorce, the court has no inherent jurisdiction to award counsel fees. Id.

38. Held that the circumstances of the case did not show necessity for an allowance for counsel fees. Lake v. Lake, 194 N. Y. 179, 87 NE 87. Wife has burden of establishing necessity for allowance for counsel fees. Id.

39. Search Note: See notes in 3 C. L. 148; 77 A. S. R. 228; 3 Ann. Cas. 51; 6 Id. 683.

See, also, Divorce, Cent. Dig. §§ 568, 587, 688, 610-612, 638, 641, 644, 657, 663; Dec. Dig. §§ 182, 210, 222, 234; 14 Cyc. 571, 750, 761, 769; 2 A. & E. Enc. L. (2ed.) 93.

40. Where husband secured divorce in Kansas and service was made upon the wife by publication, a copy of which was received by wife in Georgia, held since she did not appear to defend and as there was no indication of fraud on part of husband, that such divorce would be recognized and would be a bar to alimony. Joyner v. Joyner, 131 Ga. 217, 62 SE 182.

41. Demand for attorney's fees for defending wife in the divorce proceedings is enforcible only as alimony and must be allowed in divorce suit or not at all as it cannot be made the foundation of an independent suit against the husband. Hamilton v. Salisbury, 133 Mo. App. 718, 114 SW 563. Suit having been determined adversely to wife and no allowance for counsel fees having been made, the husband is not liable to the attorneys employed by the wife. Stockman v. Whitmore [Iowa] 118 NW 403. After determination of divorce case upon its merits adversely to wife, court loses its power to award attorney's fees. Id. Where wife was in court of her volition and appeal was dismissed by her without consent or advice of her attorneys and contrary to their opinion, an independent action will not arise in favor of attorneys for fees against husband. Id. **In suit to set aside divorce decree** on nonjurisdictional grounds, the court has no jurisdiction either inherently or under Code Civ. Proc. § 1769, to award the wife counsel fees. Lake v. Lake, 194 N. Y. 179, 87 NE 87.

other hand, in some states, alimony, with the exception of a small allowance as suit money, can be awarded only upon a decree of divorce.[42]

§ 4. *Reasons for and against allowances.*[43]—See 11 C. L. 98—The allowance of temporary alimony is usually within the court's discretion,[44] and may be made even though the wife be adjudged the guilty party,[45] but usually such an allowance must be predicated upon a prima facie case [46] and upon the necessity therefor.[47] In the matter of permanent alimony, the mere legal liability of a husband to support his wife should not be enforced after she has deserted him,[48] but alimony under certain conditions may be awarded to a wife against whom divorce is decreed,[49] such allowance being within the sound discretion of the court,[50] which discretion, however, should not be exercised in favor of guilty wife when there are no mitigating

42. Wallace v. Wallace [N. H.] 72 A 1033.

43. Search Note: See notes in 3 C. L. 149; 54 L. R. A. 369; 15 L. R. A. (N. S.) 1034.

See, also, Divorce, Cent. Dig. §§ 614-624, 646-650, 668-672; Dec. Dig. §§ 212, 213, 224, 225, 237, 238; 14 Cyc. 752-755, 762; 2 A. & E. Enc. L. (2ed.) 99.

44. Within discretion of trial court and will not be interfered with unless discretion is clearly abused. Robertson v. Robertson [Mo. App.] 119 SW 533. Where trial court granted temporary alimony and counsel fees, pending suit for divorce instituted by husband on grounds of desertion and cruel treatment, but no cruel treatment being shown on part of wife, and evidence being conflicting as to whether wife deserted husband or he deserted her, the appellate court cannot say that trial judge abused his discretion. Woodruff v. Woodruff, 131 Ga. 451, 62 SE 526. Under the conflicting evidence, there was no abuse of discretion in awarding temporary allowance and attorney's fees. Stinson v. Stinson, 131 Ga. 488, 62 SE 579. Evidence being conflicting as to cause of separation, whether wife voluntarily quit husband, or was forced to leave him because of threats of personal violence, held judge did not abuse discretion in allowing alimony and counsel feee to wife. Aiken v. Aiken, 131 Ga. 578, 62 SE 820. Held that there was no abuse of discretion by court in awarding temporary allowance and attorney's fees under the pleadings and evidence. Hill v. Hill, 131 Ga. 657, 62 SE 1031. No abuse of discretion in granting temporary alimony and attorney's fees. Ellis v. Ellis [Ga.] 63 SE 1102; Odum v. Odum [Ga.] 64 SE 470.

45. Power of court to order and enforce an allowance for alimony pendente lite, although an adjunct of the action of divorce, is an independent proceedings standing upon its own merits. Is in no way dependent upon the merits in the issue in the divorce suit or in any way effected by final decree upon those merits. Robins v. Robins [Mo. App.] 119 SW 1075. The statutory rule that "the guilty party shall forfeit all rights and claims under and by virtue of the marriage" precludes the allowance of permanent alimony to offending wife but does not apply to allowance of suit money. Id. Where plaintiff's petition in divorce contained a formal application for suit money, it was a sufficient foundation for an order allowing the same, though such order was made after final hearing. Id. The court in entering a decree refusing a divorce may at the same time make absolute a rule on libelant, the husband, to pay reasonable alimony pendente lite and counsel fees. King v. King, 36 Pa. Super. Ct. 33.

46. Error to grant temporary alimony where bill of complaint showed on its face that desertion had not been for statutory period. Hahn v. Hahn, 136 Ill. App. 301. Right to temporary alimony and attorney's fees held established. Standley v. Standley, 143 Ill. App. 278.

47. Order awarding wife temporary alimony and counsel fees set aside on appeal, it appearing that wife was not in need of such. Ashbrooke v. Ashbrooke, 116 NYS 1100. Where wife had property of the value of $5,000, which was unincumbered, held that it was error to allow alimony pendente lite. Rutledge v. Rutedge [Mo. App.] 119 SW 489. Fact that husband was worth $100,000 did not change the situation, it appearing that wife had enough for present necessities, as the court could, as provided by statute, award wife alimony in the final determination of the suit if she is found to be the innocent and injured party. Id. Right of the wife to alimony pendente lite is no longer absolute, where she has sufficient property in her own right to conduct or defend the action. Robertson v. Robertson [Mo. App.] 119 SW 533.

48. Especially when the wife has as large an estate as the husband and during married life husband paid all expenses. Wilkins v. Wilkins [Neb.] 120 NW 907.

49. This is done upon theory that wife directly or indirectly assists in the accumulation of the property acquired during the marriage relation, and that she should receive a just proportion of what she has helped to earn. Wilkins v. Wilkins [Neb.] 120 NW 907.

50. Pryor v. Pryor [Ark.] 114 SW 700. Where wife was guilty of gross misconduct but husband had not been free from fault and wife had through frugality and thrift helped materially to accumulate property, alimony may be allowed. Ecker v. Ecker [Okl.] 98 P 918. Under Mansf. Dig. Ark. § 2565 (Ind. T. Ann. St. 1899, § 1853), providing that, when decree of divorce is granted, court shall make such order touching alimony as under circumstances and nature of case may be reasonable, the court may decree alimony to wife against whom divorce is granted. Id.

circumstances.[51] In some states the right to alimony is made to depend upon the status of the parties with reference to which of them is plaintiff and which defendant.[52]

§ 5. *Amount, character and duration.*[53]—See 11 C. L. 98—The allowance or nonallowance of alimony, its amount and duration are matters within the discretion of the trial court.[54] In the matter of temporary allowances, each case must be governed by the circumstances and condition in life of the parties,[55] and such amount should be allowed as will meet the reasonable necessities of the wife's support [56] together with counsel fees sufficient to enable her to prosecute her side of the case.[57] Permanent alimony may be allowed, although the husband may not have property, either at the time of the filing of the libel for divorce, or at the time of the trial, if it appears that he has an earning capacity.[58] In making a permanent award, the means of the wife [59] and her station in life,[60] and the estate and ability of the husband,[61] will be considered. It is also held that the expense of conducting the suit to its end in the usual course may be considered.[62]

51. Ecker v. Ecker [Okl.] 98 P 918. Where husband alleged as ground for divorce willful and malicious desertion and cruel and barbarous treatment which endangered his life and verdict was returned in his favor as to both questions, held that court could not make an order for permanent alimony under Act of May 8, 1854, P. L. 644 and June 25, 1895, P. L. 308. Parker v. Parker, 35 Pa. Super. Ct. 341. In Missouri if divorce is granted to husband because of wife's fault, it is error to allow wife permanent alimony. Elliott v. Elliott, 135 Mo. App. 42, 115 SW 486.

52. Under New Hampshire statute, when the wife is libelant, her expenses are properly considered in determining the amount of alimony, but wife as libelee is not entitled to an allowance for her support. Wallace v. Wallace [N. H.] 72 A 1033.

53. **Search Note:** See notes in 2 L. R. A. (N. S.) 232; 3 Id. 923; 4 Id. 909; 1 Ann. Cas. 224; 10 Id. 393.

See, also, Divorce, Cent. Dig. §§ 613, 632-634, 645, 653, 654, 665, 675-682, 697-699; Dec. Dig. §§ 211, 215, 219, 223, 227, 229, 235, 240-242, 247; 14 Cyc. 749, 756, 760, 762, 764-766, 772-781, 788, 796; 2 A. & E. Enc. L. (2ed.) 111, 120.

54. Jones v. Jones, 37 Pa. Super. Ct. 442. $10 per week, as alimony pendente lite, held not unreasonable under the circumstances. Id.

55. As what might be a proper allowance in one instance might be unjustifiable and oppressive in another. Rutledge v. Rutledge [Mo. App.] 119 SW 489. Temporary allowance of $40 per month and $300 suit money and attorney's fees properly allowed, where husband was possessed of property amounting to several hundred thousand dollars and wife owned house worth $35,000, which was mortgaged and would only rent for $75 per month, and carriages and horses to the value of $1,300. Id. Where wife was old and infirm, no longer capable of labor, and without means of support, $150 temporary alimony to enable her to employ counsel and pay costs of litigation, was not excessive. Kiser v. Kiser, 108 Va. 730, 62 SE 936. Eight dollars per month and $25 attorney's fees as temporary allmony allowance. Harrison v. Harrison [Ga.] 65 SE 126.

56. Voluntary payment by husband of $25,000, together with $5,000 counsel fees, held sufficient under the circumstances, though husband's income was many times such amount. Gould v. Gould, 61 Misc. 120, 114 NYS 331.

57. Allowance is wholly prospective and cannot include compensation for professional services rendered upon plaintiff's credit before allowance was granted. Gould v. Gould, 61 Misc. 120, 114 NYS 331. Under the circumstances $5,000 counsel fees appeared to be reasonable and adequate. Id. Where wife sued for divorce and husband filed a cross complaint, held that wife was entitled to $75 attorney's fees as suit money in wife's defense to the cross bill of husband. Craig v. Craig [Ark.] 117 SW 765.

58. Johnson v. Johnson, 131 Ga. 606, 62 SE 1044.

59. Where wife was recipient of income sufficient for her support and much larger than could be derived from property of her husband and the husband paid to her before separation entire amount of income derived from her property during marriage relations, held that alimony was properly refused. Wilkins v. Wilkins [Neb.] 120 NW 907.

60. Alimony may sometimes be one-third or even one-half of husband's income, if that result is reasonably necessary. Gould v. Gould, 61 Misc. 120, 114 NYS 331.

61. Where husband owned 160 acres of land and considerable personal property, which was unincumbered, but was indebted in an amount equal to value of personalty, held that $20 per month for maintenance of child and $2,500 in gross to wife was reasonable. Laycock v. Laycock [Or.] 98 P 487. Forty dollars per month alimony is not out of proportion to the wants of wife and four children or to the circumstances of the husband, when it appears that he is employed at an annual salary of $1,800 for which he works about six months and has no one else dependent upon him for support. Hanagriffe v. Hanagriffe, 122 La. 1012, 48 S 438. Where each of the parties

Agreement of parties.[See 11 C. L. 100]—It is held that it is not competent for a husband and wife to make a valid agrement as to alimony, during the pendency of a suit of divorce, independently of the sanction of a decree for divorce,[63] but, on the other hand, it is held that an independent agreement for payment of alimony, which has been fairly entered into in contemplation of an immediate divorce, is valid,[64] though the court in awarding alimony is not bound by such agreement in the matter of the amount.[65]

§ 6. *Procedure and practice.*[66]—[See 11 C. L. 100]—An application for temporary alimony must have as a basis some proper action which will result in a final judgment and terminate the interim,[67] and such an application cannot be supplied by subsequently filing a separate suit for permanent alimony.[68] As long as an application by the husband for divorce is on file, the wife has a right to apply for temporary alimony and have a hearing thereon.[69] While on an application for alimony the fact of marriage, if denied, must be proved,[70] yet, where it is practically the only fact in issue on said motion, the proof should not be required to go beyond establishing a fair probability that the petitioner will maintain her allegations.[71] The right to temporary alimony is established if probable grounds are shown.[72] A hearing may be had on the question of temporary alimony under an application for temporary and permanent alimony,[73] and where an action is brought for divorce and permanent alimony, it is within the discretion of the court either to grant or refuse temporary alimony.[74] An order for temporary allowance may be made at any time after the filing of the original complaint and prior to the termination of the action.[75]

Appeal and review.[See 11 C. L. 101]—Where there is error in granting alimony the remedy is by appeal,[76] and error in granting an order for alimony pendente lite can

was more than 60 years old, wife worth $1,300, and husband $6,200, $800 alimony too small, $1,500 allowed on appeal. Lawler v. Lawler [Mich.] 16 Det. Leg. N. 305, 21 NW 294. Fifty dollars per month and costs and $150 attorney's fees, where husband was worth between $5,000 and $10,000, considered reasonable alimony. Wetherington v. Wetherington [Fla.] 49 S 549.

62. Wallace v. Wallace [N. H.] 72 A 1033.

63. Contract purporting to satisfy a judgment for alimony not in existence and conditioned on judgment for divorce being granted is void as against public policy. Wilson v. Fahnestock [Ind. App.] 86 NE 1037.

64, 65. Pryor v. Pryor [Ark.] 114 SW 700.

66. Search Note: See notes in 3 C. L. 152; 9 A. R. A. (N. S.) 993; 10 Ann. Cas. 558.

See, also, Divorce, Cent. Dig. §§ 594-604, 626-631, 651, 652, 673, 674; Dec. Dig. §§ 203-207, 214, 226; 14 Cyc. 746, 747, 756, 763, 764.

67. Judge of superior court cannot on mere application for temporary alimony, without more, and with no foundation on which to base it, either by way of suit for divorce or permanent alimony, grant temporary alimony prayed, and order funds of husband in bank to be paid over by bank to wife. Stalvey v. Stalvey [Ga.] 64 SE 91.

68. Stalvey v. Stalvey [Ga.] 64 SE 91.

69. Odum v. Odum [Ga.] 64 SE 470. Fact that husband filed application for divorce in county having no jurisdiction to grant divorce or on grounds on their face insufficient to authorize divorce, and that wife did not plead want of jurisdiction in court or insufficiency of grounds alleged, would not defeat her right to apply for temporary alimony as long as application was on file. Id.

70. Hochreiter v. Hochreiter, 138 Ill. App. 373. To justify alimony pendente lite, marriage must be admitted or proved. Ex parte Joutsen, 154 Cal. 540, 98 P 391. Question of marriage is to be determined on motion for alimony in same manner as any other question of fact is determined. Id.

71. Evidence held sufficient to establish proof of common-law marriage and therefor not error for court to allow temporary alimony and solicitor's fees. Hochreiter v. Hochreiter, 138 Ill. App. 373.

72. Grounds held sufficient to establish right to temporary alimony and solicitor's fees. Standley v. Standley, 143 Ill. App. 278. Bill for divorce which shows upon its face that desertion has not been for statutory period of two years will not support decree for temporary alimony and counsel fees. Hahn v. Hahn, 136 Ill. App. 301.

73. Lewis v. Lewis [Ga.] 63 SE 1114.

74. Civ. Code 1895, § 2475, provides that whenever an action for divorce is brought by either party the judge is authorized to grant wife temporary alimony including expenses of litigation. Harrison v. Harrison [Ga.] 65 SE 126.

75. Ex parte Joutsen, 154 Cal. 540, 98 P 391.

76. The decree is not void where court had power to allow alimony to a wife against whom a divorce was granted on account of her misconduct. Pryor v. Pryor [Ark.] 114 SW 700.

be reviewed only by appeal from the order,[77] but it has been held that an order increasing alimony pendente lite is not appealable.[78] Where the evidence is sufficient to warrant a decree of alimony, an appellate court will not disturb such decree because of conflicts in the evidence,[79] and an order allowing temporary alimony will not be disturbed except for manifest abuse of discretion,[80] nor will the action of the trial court, as to the amount allowed to pay the expenses of defending a suit for divorce, as a rule be reviewed.[81]

§ 7. *The decree; its enforcement and discharge.*[82]—See 11 C. L. 101—It is held in Oklahoma that the court is without authority to decree absolutely a certain and specific sum of money, or a certain specific portion of the property, as alimony,[83] but may decree alimony in a continuous allotment of sums, payable at regular intervals.[84] In most states it is held that a decree for alimony is more than a judgment debt,[85] but in some it is treated as a mere debt.[86] A decree for alimony in gross which provides that such is given in lieu of all dower rights operates to cancel an antenuptial contract providing for the payment of a gross sum in place of dower.[87] The wife has a vested right in alimony which has become due,[88] but alimony cannot be recovered after the death of the husband.[89]

*Actions on decrees for alimony.*See 11 C. L. 102—A decree for alimony is such a judgment or decree as the federal constitution and statutes require shall be given full faith and credit in other states,[90] and may be enforced by action in another state when it is final in its nature,[91] but not where it is subject to modification by the court rendering it.[92] In such an action the decree sued on will be interpreted according to the law of the state where it was rendered.[93]

77. If granted without proof of marriage. appeal from the order, and not habeas corpus, is the proper proceeding. Ex parte Joutsen, 154 Cal. 540, 98 P 391.

78. Civ. Proc. Act, § 330 (Comp. Laws, § 3425), prescribing what orders and judgments may be appealed, does not embrace such order. Kapp v. Kapp [Nev.] 99 P 1077.

79. Wetherington v. Wetherington [Fla.] 49 S 549.

80. Robertson v. Robertson [Mo. App.] 119 SW 533; Woodruff v. Woodruff, 131 Ga. 451, 62 SE 526; Stinson v. Stinson, 131 Ga. 488, 62 SE 579; Aiken v. Aiken, 131 Ga. 578, 62 SE 820; Hill v. Hill, 131 Ga. 657, 62 SE 1031; Ellis v. Ellis [Ga.] 63 SE 1102; Odum v. Odum [Ga.] 64 SE 470; Jones v. Jones, 37 Pa. Super. Ct. 442.

81. It is largely within discretion of trial court and where it does not appear that wife has been hampered in making her defense or is financially unable to pay expenses necessarily incurred, its action will not be reviewed. Wilkins v. Wilkins [Neb.] 120 NW 907.

82. **Search Note:** See notes in 3 C. L. 153; 5 Id. 107; 7 Id. 111, 113; 11 Id. 105; 19 L. R. A. 811; 24 Id. 433, 629; 34 Id. 665; 62 Id. 974; 9 L. R. A. (N. S.) 1071, 1168; 37 A. S. R. 763; 102 Id. 700; 2 Ann. Cas. 915; 3 Id. 295, 579; 4 Id. 299; 5 Id. 469, 940; 6 Id. 825; 8 Id. 700; 9 Id. 90; 10 Id. 547; 11 Id. 523.

See, also, Divorce, Cent. Dig. §§ 635-639, 655, 656, 684-696, 722-753; Dec. Dig. §§ 216-218, 243-246, 255-277; 14 Cyc. 759, 760, 782-788, 794-802; 15 Id. 379.

83. Ecker v. Ecker [Okl.] 98 P 918.

84. Court without authority to decree a division of husband's property and to vest in wife title to one-half his estate or a specific sum of money as alimony. Ecker v. Ecker [Okl.] 98 P 918.

85. See Ex parte Kinsolving, 135 Mo. App. 631, 116 SW 1068.

86. Courts of Missouri treat it as mere debt. Ex parte Kinsolving, 135 Mo. App. 631, 116 SW 1068. Court cannot imprison husband for contempt for refusing to obey order directing payment of alimony as imprisonment for debt is abolished in Missouri. Id.

87. Long v. Barton, 142 Ill. App. 606.

88. Cannot be divested of such by any subsequent action of court or legislature. Krauss v. Krauss, 127 App. Div. 740, 111 NYS 788.

89. Decree for alimony for the life of the wife is not enforcible after the husband's death. Barnes v. Klug, 129 App. Div. 192, 113 NYS 325.

90. Chamberlain v. Britton, 136 Ill. App. 200.

91. Decree awarding alimony to wife being final, without modification, an action may be maintained thereon. Mayer v. Mayer, 154 Mich. 386, 15 Det. Leg. N. 760, 117 NW 890. If the holding be limited to case in which final award of alimony has been made in a sister state, with no power reserved in the court, in the decree itself or inherent in the court under the law, to modify or amend the decree as to amount, its authority should be said to remain unshaken. Id.

92. Mayer v. Mayer, 154 Mich. 386, 15 Det. Leg. N. 760, 117 NW 890. A decree for alimony of one state providing for future monthly payments, which by its own terms is subject to be revoked or modified as to

Subjection of property.[See 11 C. L. 103]—Judgments for alimony may generally be made a lien on real property,[94] but alimony as such is not a lien that will defeat a conveyance by the husband made without fraud.[95] Liability for alimony may be enforced also by attachment[96] or sequestration[97] of personalty.

Attachment of the person; contempt proceedings.[See 11 C. L. 104]—Contempt proceedings will lie upon failure to pay alimony,[98] but such proceedings will not lie for failure to execute the bond to secure payment of alimony.[99] A contempt in failing to pay alimony is not a contempt committed in the presence of the court for which is may deal with the husband summarily.[1] A demand for the amount due[2] and an order to pay, or show cause, properly made by the court[3] are usually requi-

the amount to be paid thereunder by the court rendering such decree, is not such a decree as is enforcible in another state under the full faith and credit clause of the constitution of the United States, or upon principals of comity. Cureton v. Cureton [Ga.] 65 SE 65.

93. Where statute of foreign state provided that "when a divorce is granted the court shall make provision for guardianship, custody, support and education of the minor children of the marriage, and may modify or change any order in this respect whenever circumstances render such change proper," an action cannot be maintained on a decree of such state awarding alimony for children's support. Mayer v. Mayer, 154 Mich. 386, 15 Det. Leg. N. 760, 117 NW 890. Where it has been decided in one state that "where, upon a divorce obtained by wife, on ground of husband's adultery, the decree requires him to pay her a certain annual allowance, this allowance is not effected by her subsequent marriage, nor should it be reduced on that account." Such decision will be followed and applied in another state in an action on decree for alimony rendered in the former state. Chamberlain v. Britton, 136 Ill. App. 290.

94. Judgment in divorce suit, in which alimony awarded was declared a specific lein upon certain specified land owned by defendant, held to authorize enforcement thereof by an ordinary execution and sale thereunder. Maki v. Maki, 106 Minn. 357, 119 NW 51. Under Nebraska statute, alimony may become **lien on homestead** though the title thereto is in the husband, and wife's right to assert and enforce such a lien and to a decree canceling a deed executed in utter disregard of her homestead rights was not lost because of accepting alimony in lieu of her interest in husband's property. Kimmerly v. McMichael [Neb.] 120 NW 487.

95. Where land was acquired subject to deed of trust which was assumed as part of purchase price of property, fraud not being proven, a conveyance by husband to highest bidder for the same was valid and not liable to be defeated because of judgment of alimony. Prather v. Hairgrove, 214 Mo. 142, 112 SW 552. While living apart from wife, husband became owner of tract of land. which he sold and conveyed as single man. Afterwards wife obtained divorce and was allowed alimony. Held that as no fraud was imputed to grantee that wife had no right to sue grantee to set aside conveyance but her remedy was to set aside judgment awarding divorce and alimony. Kessinger v. Schrader [Kan.] 98 P 236. Deed of trust will not be cancelled on the ground that prior to divorce wife's signature was obtained to the deed of trust by fraud for the purpose of defrauding wife of her claim for alimony, where it is shown that party who secured the deed of trust was not a party to the fraud. Linck v. Linck, 214 Mo. 464, 113 SW 1096.

96. Wages of husband who has remarried is not exempt under Rev. St. 1899, § 3162, as amended in 1903 (Laws 1903, p. 195 [Ann. St. 1906, p. 1797]), as § 4327a enacted in 1903 (Laws 1903, p. 240 [Ann. St. 1906, p. 2376]) takes away exemption right granted by § 3162 as against an execution for alimony. Anderson v. Norvell-Shapleigh Hardware Co. [Mo.] 113 SW 733. Recovery of costs is sufficient to sustain an attachment issued for alimony, though no alimony is recovered. Lankford v. Lankford [Ky.] 117 SW 962.

97. Upon failure to give a bond or pay the alimony as the decree directs, the wife is entitled to an order causing the husband's personal property and the rents and profits of his real estate to be sequestered to enforce payment of such alimony. Code Civ. Proc. § 1772. People v. Walsh, 116 NYS 839.

98. When it appears that payment cannot be enforced by means of sequestration proceedings or by resorting to the security. People v. Walsh, 116 NYS 839. Failure to pay alimony subjects delinquent party to imprisonment until he complies with the order or shows his reason for not doing so. Zippe v. Zippe, 143 Ill. App. 638. Husband may be punished for contempt for failure to pay alimony. Carper v. Carper [Miss.] 48 S 186.

99. People v. Walsh, 116 NYS 839.

1. Is a constructive contempt, and an affidavit showing failure of husband to pay alimony, and affording him an opportunity to show cause why he should not be punished, is required to invest the court with jurisdiction. In re McCarty, 154 Cal. 534, 98 P 540.

2. Krauss v. Krauss, 127 App. Div. 743, 111 NYS 790.

3. Order should recite that defendant owed a specified amount as accrued alimony and that he was in contempt for failure to pay such amount and that his refusal and failure to pay such alimony defeated and prejudiced plaintiff's rights and that commitment would issue unless amount

site to institute contempt proceedings. It is held that if within husband's power to pay alimony he may be imprisoned until he complies,[4] but that if unable to pay he cannot be imprisoned,[5] but on the other hand it is held that one cannot purge himself of contempt in failing to pay alimony by showing his inability to pay,[6] his remedy in such case being by motion to be released from imprisonment.[7] In any event it is incumbent upon the defaulting party to prove such excuse.[8] Where the aggregate of payments exceed the amount of alimony which was to have been paid in monthly instalments, an action for contempt will not lie.[9] Where there is a special statute providing for contempt proceedings for failure to pay alimony, proceedings under another statute will not lie,[10] and, in the absence of a statute authorizing attachment for nonpayment of permanent alimony, the remedy by proceedings as for contempt is not open.[11] In Missouri it is held that contempt will not lie for failure to pay alimony.[12] In New York imprisonment for contempt in failing to pay alimony as required in the decree cannot be for a longer period than three months if the amount of alimony does not exceed five hundred dollars.[13] Whether a conveyance was fraudulent and made to defeat alimony cannot be determined in proceedings for contempt.[14]

Vacating or modifying. See 11 C. L. 105—A decree for alimony in case of divorce a vinculo made without reserve, although payable in instalments, is final,[15] and cannot be changed after enrollment, in the absence of statutory authority or a reservation of power in the decree itself.[16] Such modification may, however, be made when authorized by statute[17] or power to do so is reserved in the decree,[18] and the

was paid within certain time. Krauss v. Krauss, 127 App. Div. 743, 111 NYS 790.

4. Ex parte Joutsen, 154 Cal. 540, 98 P 391.

5. As imprisonment for debt has been abolished. Ex parte Joutsen, 154 Cal. 540, 98 P 391. Pecuniary inability or other misfortune over which the accused has no control is a complete defense, as where accused was hopelessly insolvent and his income fell far short of his expenses, an order committing him to jail in default of payment of $100 instanter should not have been made. Holcomb v. Holcomb [Wash.] 102 P 653.

6. Cahzin v. Cahzin, 112 NYS 525.

7. Cahzin v. Cahzin, 112 NYS 525.

8. If, since making of original order, husband has become unable to pay alimony required by it, it is incumbent upon him to prove that fact, and it is not necessary for wife to allege his ability to comply with original order. In re McCarty, 154 Cal. 534, 98 P 540. If defendant did not comply with decree because he could not, on account of matters subsequent to its entry, it was for him to show it. Zippe v. Zippe, 143 Ill. App. 638.

9. Where wife was awarded $120 per month but acted upon an agreement which allowed her $5,000 and $40 per month for a certain time and after that an increase of $10 per month, held that as she had the right at any time to enforce the decree that as the payments made now exceeded amount due on monthly instalments that contempt would not lie. Clark v. Clark, 130 App. Div. 610, 115 NYS 500.

10. Code Civ. Proc. § 1773 provides for such proceedings, therefore proceedings under § 2268 were void. Stewart v. Stewart, 127 App. Div. 672, 111 NYS 736. Under Code Civ. Proc. § 1773 commitment cannot issue until after notice to show cause, but, if order is issued without notice, the fact that defendant paid the alimony does not debar him of his right to have the order vacated on appeal. Id.

11. Mayer v. Mayer, 154 Mich. 386, 15 Det. Leg. N. 760, 117 NW 890. Pub. Acts 1899, p. 360, No. 230, authorizing such proceedings in divorce suits, is not applicable to an action brought to enforce a decree of alimony based upon a foreign judgment. Id.

12. As the courts of such state treat judgment for alimony only as a judgment debt and as imprisonment for debt is abolished, such proceedings will not lie. Ex parte Kinsolving, 135 Mo. App. 631, 116 SW 1068.

13. Held that party was properly discharged as he had served the required time. People v. Walsh, 116 NYS 339.

14. Ex parte Kinsolving, 135 Mo. App. 631, 116 SW 1068.

15, 16. Mayer v. Mayer, 154 Mich. 386, 15 Det. Leg. N. 760, 117 NW 890.

17. Power is given courts to alter allowance of alimony at any time when it is deemed proper. Kirby's Dig. § 2683. Pryor v. Pryor [Ark.] 114 SW 700. Under Code Civ. Proc. § 1771, where decree allowed wife alimony for maintenance of herself and children and also required her to live in the same county as husband, held, that it being made to appear that she could better herself by moving to New York, that the decree should be modified so as to permit her to do so. De Lamoutte v. De Lamoutte, 129 App. Div. 283, 113 NYS 321.

18. Where petition was for alimony alone, under § 5702, and allowance which was

fact that such alimony was granted upon an agreement entered into between the parties does not alter the case;[19] but, while a former decree of court allowing a wife permanent alimony in a lump sum remains unimpeached, she will not be permitted after exhausting the amount awarded her to maintain a new and independent action for a new allowance.[20] Remarriage of the wife does not ipso facto relieve the husband from payment of alimony allowed by the original decree,[21] and she cannot on such account be deprived of any payments which are due by any subsequent action of the court[22] or legislature.[23] A decree for alimony which has been procured through fraud and undue influence of the husband may be modified in a subsequent proceeding.[24]

§ 8. *Alimony in suits for annulment.*[25]—See 11 C. L. 105—Alimony may be awarded for the purpose of defending an action brought to annul a marriage as illegal,[26] even in the absence of statute providing therefor.[27] Such allowance may be made at any stage of the case.[28]

ALTERATION OF INSTRUMENTS.

The scope of this topic is noted below.[29]

§ 1. Nature, Kinds, and Materiality of Alterations, 113.
§ 2. Effect of Alteration, 114.
§ 3. Curing or Ratifying Alterations, 115.
§ 4. Pleading, Practice, and Evidence, 115.

§ 1. *Nature, kinds and materiality of alterations.*[30]—See 11 C. L. 106—An altera-

granted contained a provision for payment in monthly instalments, with reservation in decree of the right of either party, in the event of changed circumstances, to apply to the court for a modification or termination thereof, an application by husband for termination of allowance will be granted, where it appears that subsequent to the making of allowance she obtained a divorce and married another man who is abundantly able to support her in her former state. Madden v. Madden, 11 Ohio C. C. (N. S.) 238.

19. Decree is not entirely dependent upon the agreement and therefore the power to subsequently alter cannot be controlled by it. Pryor v. Pryor [Ark.] 114 SW 700.

20. Hribal v. Hribal, 11 Ohio C. C. (N. S.) 404.

21. Chamberlain v. Britton, 136 Ill. App. 290.

22. Order annulling the alimony provision nunc pro tunc as of the date of remarriage of wife is erroneous. Krauss v. Krauss, 127 App. Div. 740, 111 NYS 788.

23. Laws 1904, p. 885, c. 339, amending § 1771, so as to provide that court must annul provisions for alimony on showing that she has remarried, held not applicable to decrees passed before such act. Krauss v. Krauss, 127 App. Div. 740, 111 NYS 788.

24. Where husband threatened wife that if she did not agree to amount of alimony suggested by him he would defame her character and by fraudulent methods induced her to do as he ordered, held it was proper to modify original decree so as to allow additional alimony. Holt v. Holt [Okl.] 102 P 187. Fact that wife on institution of such proceedings neither tendered nor offered to return monthly or other payments under property settlement, contract and decree, did not preclude or estop her from bringing and maintaining such proceedings, where the necessities of the wife are shown to have absorbed such payments. Id.

25. **Search Note:** See notes in 21 L. R. A. 677; 5 Ann. Cas. 380.

See, also, Husband and Wife, Cent. Dig. §§ 1084-1088, 1093; Dec. Dig. §§ 295, 298; 21 Cyc. 1604, 1607.

26. Under Code, § 3183, alimony may be awarded to wife sued by husband for annulment of marriage on ground that wife had husband living. Ricard v. Ricard [Iowa] 121 NW 525.

27. Temporary alimony. Ricard v. Ricard [Iowa] 121 NW 525. In suit at the instance of husband to annul an illegal marriage, court may make and enforce an order requiring him to pay reasonable allowance for maintenance and support of his wife and offspring of such marriage, and, also, a reasonable allowance for suit money to enable her to defend. Hunt v. Hunt [Okl.] 100 P 541.

28. Hunt v. Hunt [Okl.] 100 P 541. Court may open up question of awarding such alimony **at subsequent term.** Ricard v. Ricard [Iowa] 121 NW 525.

29. Includes matters relating to the materiality and effect of alterations of instruments, except alterations as affecting the rights of holders of negotiable instruments (see Negotiable Instruments *). For alteration of records, see Judgments,* § 4; Records and Files.* For criminal alterations, see Forgery.*

30. **Search Note:** See notes in 3 C. L. 155, 156; 7 Id. 116; 2 L. R. A. (N. S.) 217; 2 Am. Cas. 331.

* Always begin with the latest article on the subject. Use the latest topical index.

tion is material when it changes the legal effect of the instrument,[31] but not when the legal effect of the instrument remains the same after the alteration as it was prior thereto.[32] Whether the mutilation of a written instrument constitutes a material alteration depends upon whether a material part of the instrument is thereby destroyed or detached.[33] As between the original parties to an instrument, the addition of a new party as a surety is immaterial.[34] Failure to insert a provision which the parties agreed should be inserted is not a fraudulent alteration.[35]

§ 2. *Effect of alteration.*[36]—See 11 C. L. 106—An unauthorized material alteration by parties or privies invalidates the instrument as against all nonconsenting parties[37] affected thereby,[38] regardless of any question of actual fraud.[39] An alteration by a stranger is a mere spoliation[40] and will not prevent a recovery, upon the contract in accordance with its original terms,[41] by a party without whose consent such spoliation is made.[42] This rule applies to alterations by a surety without his principal's knowledge or consent,[43] and to an unauthorized alteration by an attorney,[44] though in the latter case a presumption of the client's knowledge and consent may arise from slight circumstances.[45] The relative rights of persons claiming under the same instrument must be determined with reference to their lack of notice of the alteration or their innocence of participation therein.[46] The alteration of an instrument does not affect its operation as an executed contract,[47] and a for-

See, also, Alteration of Instruments, Cent. Dig. §§ 1-92; Dec. Dig. §§ 1-12; 2 Cyc. 143-171, 175-225; 2 A. & E. Enc. L. (2ed.) 184, 222.

31. Benton v. Clemmons [Ala.] 47 S 582. Change of date thus extending the term. St. Louis Gunning Advertising Co. v. Baptiste, 135 Mo. App. 503, 116 SW 438.

32. Condition added that vendor shall make good title is implied in every contract of sale, and hence its addition does not constitute material alteration. Provenzano v. Glaesser, 122 La. 378, 47 S 688. Addition of superfluous description of land covered by mortgage held immaterial. Bayse v. McKinney [Ind. App.] 87 NE 693; Benton v. Clemmons [Ala.] 47 S 582. **Retracing** in ink figures originally written in pencil held not material alteraton. Tutwiler v. Burns [Ala.] 49 S 455.

33. Where agreement modifying terms of bill of exchange is glued thereto, it becomes part thereof, and cannot be lawfully detached therefrom without maker's consent. Bothell v. Schweitzer [Neb.] 120 NW 1129. Cutting off figures on edge of plat which formed no part of plat, but had been placed there after plat was made, held immaterial alteration. Adams v. Lorraine Mfg. Co. [R. I.] 71 A 180.

34. Addition of name of a third party as surety on mortgage note held immaterial so far as concerned enforcibility of note against principal and the foreclosure of the mortgage. Souza v. Lucas [Cal. App.] 100 P 115.

35. Plaintiff agreed to sign indemnity bond provided his liability limited to certain amount. Limiting clause was omitted. Bindsell v. Federal Union Surety Co., 130 App. Div. 775, 115 NYS 447.

36. Search Note: See notes in 16 L. R. A. 468; 35 Id. 464; 4 A. S. R. 25, 17 Id. 97, 86 Id. 80.

See, also, Alteration of Instruments, Cent. Dig. §§ 112-215; Dec. Dig. §§ 14-24; 2 Cyc. 175-225; Evidence, Cent. Dig. §§ 1429, 1539, 1579; 2 A. & E. Enc. L. (2ed.) 185.

37. Benton v. Clemmons [Ala.] 47 S 582, alteration of rental contract expressed in note. Houston v. Davis [Ala.] 49 S 869. Radical changes were made in a subscription contract by defendant's associates without his consent. Owensboro Seating & Cabinet Co. v. Miller [Ky.] 113 SW 423. Interlineation by vendee whereby the words: "Surveyed for the B. B. B. & C. R. R. Co. in Franklin County, Texas," were inserted in contract of sale. Pope v. Taliaferro [Tex. Civ. App.] 115 SW 309.

38. Original parties to note are not affected by addition of new party as surety. Souza v. Lucas [Cal. App.] 100 P 115. Erasure of surety's name held to release all sureties who signed after such surety and before such erasure. Hilliboe v. Warner [N. D.] 118 NW 1047.

39. Cashier of defendant bank changed check drawn on another bank and made his own bank the drawee. Whitesett v. People's Nat. Bank [Mo. App.] 119 SW 999.

40, 41. Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768, 97 P 919. Instrument not invalidated by alteration by stranger. Benton v. Clemmons [Ala.] 47 S 582.

42, 43. Union Oil Co. v. Mercantile Refining Co. 8 Cal. App. 768, 97 P 919.

44. Lanum v. Patterson, 143 Ill. App. 244.

45. Alteration made by attorney in client's presence is presumed to have been made with latter's knowledge. Lanum v. Patterson, 143 Ill. App. 244.

46. Innocent party, for whose benefit deed held in escrow was changed and delivered as so changed, held entitled to recover from one who purchased with notice that his title was derived through the forged deed. Robbins v. Locust Mountain Savings & Loan Ass'n, 37 Pa. Super. Ct. 49.

47. Alteration of deed does not affect title passed thereby. Waldron v. Waller

tiori this is true where the alteration is made by a stranger.[48] The alteration of a mortgage note does not necessarily affect the validity of the mortgage.[49]

§ 3. *Curing or ratifying alterations.*[50] See 9 C. L. 98—The re-execution of an instrument after its alteration renders it effective as altered,[51] and in some cases re-execution is essential in order to validate the alteration.[52] Ordinarily, however, failure to disavow an alteration after notice thereof and of the fact that innocent persons are acting upon the faith of the instrument as altered will operate as an estoppel.[53]

§ 4. *Pleading, practice and evidence.*[54] See 11 C. L. 107—The presumption is that an alteration was made before the execution of the instrument,[55] unless it is of a suspicious character.[56] In the latter case the burden of explaining the alteration is upon the party seeking to enforce or use the instrument,[57] and so also where it appears that the alteration was made after the execution of the instrument.[58] Every presumption is indulged against the despoiler of an instrument.[59] The admission of an altered instrument in evidence does not of itself settle the issue of the bona fides of the alteration.[60]

[W. Va.] 64 SE 964. Only effect of such an alteration is to deprive the party chargeable therewith of benefits of an executory nature. Id.

48. After delivery of deed the words "and to the children of Hosea B. Young, by his first marriage," were written in by unauthorized third person. Young v. Young [Mich.] 16 Det. Leg. N. 228, 121 NW 264.

49. Suit by chattel mortgagee to recover property from purchaser with notice, held not affected by alteration of mortgage note, the action not being upon the note. Van Eps v. Newald [Wis.] 120 NW 853.

50. Search Note: See note in 12 L. R. A. 140.

See, also, Alteration of Instruments, Cent. Dig. §§ 93-111; Dec. Dig. § 13; 2 Cyc. 171-174; 2 A. & E. Enc. L. (2ed.) 259, 262.

51. Where grantee inserted name of additional grantee, and grantor redelivered deed after such alteration, the deed became effective as grant to both grantees. Baker v. Baker, 239 Ill. 82, 87 NE 868.

52. Deed should be redelivered where parties desired to make it cover additional property. Waldron v. Waller [W. Va.] 64 SE 964.

53. Where surety who knew that goods were being delivered on faith of bond as altered by cosurety failed to repudiate it. Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768, 97 P 919.

54. Search Note: See notes in 3 C. L. 157; 5 Id. 112.

See, also, Alteration of Instruments, Cent. Dig. §§ 216-270; Dec. Dig. §§ 25-30; 2 Cyc. 226-254, 256; 2 A. & E. Enc. L. (2ed.) 269, 270.

55. German-American Bank v. Manning, 133 Mo. App. 294, 113 SW 251.

56. Where words are in different writing than erased words. German-American Bank v. Manning, 133 Mo. App. 294, 113 SW 251. Where there is no evidence in record explanatory of rubber stamp indorsement or blue pencil marks on check, it cannot be considered on appeal. Kramer v. Grant, 60 Misc. 10, 111 NYS 709.

57. Defendant made alterations in corporation's books in regard to transactions with stockholders. Nowell v. McBride [C. C. A.] 162 F 432. Evidence held to sustain finding that burden of explaining alteration in note had not been sustained. In re Cleary's Estate [Wis.] 121 NW 146.

58. Alleging alterations in a written instrument. Bills of lading issued by defendant and upon which plaintiff made loans, were altered after leaving defendant's agent's hands. Franklin Trust Co. v. Philadelphia, B. & W. R. Co., 222 Pa. 96, 70 A 949. Note was altered extending payment and reducing rate of interest and stating that interest had been paid to certain date. Kalteyer v. Mitchell [Tex.] 117 SW 792. Party asserting that alteration was made with **consent of parties** has burden of proving such consent. Pope v. Taliaferro [Tex. Civ. App.] 115 SW 309. Possession of bond by obligee while alteration is made therein, together with fact that action is commenced on bond in its altered form, is sufficient to sustain finding that alteration was made by or with consent of obligee. Hilliboe v. Warner [N. D.] 118 NW 1047. Party who asserts alteration in original contract pursuant to **course of business** between parties thereto must bear burden of showing that minds of parties met upon such modification. Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co., 105 Minn. 483, 117 NW 825. Burden is not borne by proof of ambiguous transactions from which one party might infer that original contract was still in force and the other that it had been changed. Id.

59. Where plaintiff who received check of defendant with words "in full to date" erased the words and cashed the check. He could not show that check was not intended as full payment to date. Dove v. Fansler, 132 Mo. App. 669, 112 SW 1009.

60. Court, sitting as a jury, may still pass upon time of alteration as issue of fact, and may find that alteration was made after delivery of instrument. German-American Bank v. Manning, 133 Mo. App. 294, 113 SW 251.

A bill for the reformation of an altered instrument must set out facts sufficient to show that the case is one entitled to equitable cognizance.[61]

AMBASSADORS AND CONSULS.[62]

The scope of this topic is noted below.[63]

While there is a distinction between a consul and a consular agent, where it is apparent that a statute uses the terms interchangeably they will be so construed.[64] Appeals from consular courts are usually assimilated to those from United States circuit and district courts.[65]

Ambiguity; Amendments, see latest topical index.

AMICUS CURIAE.[66]

The scope of this topic is noted below.[67]

The office of an amicus curiae is to advise the court as such and not to represent any of the parties to the proceeding in which he is appointed,[68] and hence he may be appointed in ex parte proceedings,[69] and, so long as he really appears and acts for the guidance of the court, it is immaterial in what manner he appears[70] or in what form he gives his advice;[71] but an appearance under the guise of an amicus curiae cannot be sustained when it is in fact an attempted appearance for one not a party to the proceeding[72] and even when properly appointed an amicus curiae cannot act for or as the representative of any of the parties,[73] as by taking exceptions to the court's rulings[74] or by applying for a rehearing.[75] Any member of the bar may be accepted as amicus curiae.[76]

Amotion; Amount in Controversy; Ancient Documents, see latest topical index.

61. Lanum v. Patterson, 143 Ill. App. 255. Bill held insufficient where it stated no facts to show that alteration was innocently or mistakenly made, or was a willful one or one amounting to a spoliation merely, and also failed to allege ignorance as to facts. Id.

62. See 11 C. L. 108.

Search Note: See notes in 21 L. R. A. 75; 45 Id. 481, 579.

See, also, Ambassadors and Consuls, Cent. Dig.; Dec. Dig.; 2 Cyc. 260-278; 20 A. & E. Enc. L. (2ed.) 794; 7 Id. 6.

63. Includes all matters relating to the diplomatic and consular representatives of nations.

64. Under statute March 17, 1841, authorizing acknowledgment before consul, acknowledgment before consular agent held valid. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662.

65. Act June 30, 1906, providing for review of United States Court in China, held to recognize distinction between legal and equitable proceedings, so that appeal would not lie in the former class. Toeg v. Suffert [C. C. A.] 167 F 125.

66. See 11 C. L. 108.

Search Note: See, also, Amicus Curiae, Cent. Dig.; Dec. Dig.; 2 Cyc. 281-284; 6 A. & E. Enc. P. & P. 723.

67. Includes appearance for the purpose of advising the court, as distinguished from appearance under statute or order of court for the purpose of representing parties to the suit (see Guardians ad Litum and Next Friends*), and from assignment of counsel for indigent parties (see Attorneys and Counselors,* §§ 7, 11B; Indictment and Prosecution,* § 10A).

68. In re Arszman, 40 Ind. App. 218, 81 NE 680.

69. Appeal from action of county commissions in proceedings for liquor license in which no remonstrance was filed. In re Arszman, 40 Ind. App. 218, 81 NE 680. See, also, State v. Gorman [Ind.] 85 NE 763.

70. Appearance of prosecuting attorney as though representing party to divorce suit. Yeager v. Yeager [Md. App.] 87 NE 144.

71. Plea of res adjudicata in divorce suit held merely to invoke the inherent power of court to investigate divorce cases, so that there was no error in refusing to strike out such plea. Yeager v. Yeager [Ind. App.] 87 NE 144. May examine witnesses and make argument in proper case, as in appeal from refusal of liquor license. In re Arszman, 40 Ind. App. 218, 81 NE 680.

72. Appearance of attorney general in proceedings for liquor license could not thus be sustained. State v. Gorman [Ind.] 85 NE 763.

73. It is not the office of an amicus curiae to become prosecutor to put into shape objections dictated by the court, and which the court itself had no authority to make in the absence of objection by some party in interest. In re Stitzel's Estate, 221 Pa. 227, 70 A 749.

74. In re Arszman, 40 Ind App. 218, 81 NE 680; In re Stitzel's Estate, 221 Pa. 227, 70 A 749.

ANIMALS.

The scope of this topic is noted below.[77]

§ 1. Property in Animals, 117.
§ 2. Personal Injuries Inflicted by Animals, 117.
§ 3. Injuries to Property by Animals Trespassing or Running at Large, 119.
§ 4. Liability for Killing or Injuring Animals, 120.
§ 5. Contracts of Agistment, 120.
§ 6. Estrays and Impounding, 121.
§ 7. Regulations as to Care, Keeping, Protection and Health, 122. Interstate Transportation; Quarantine; Inspection, 123.
§ 8. Marks and Brands, 124.
§ 9. Cruelty to Animals, 124.
§ 10. Crimes Against Property in Animals, 124.

§ 1. *Property in animals.*[78] —See 11 C. L. 109—The ownership of the dam carries title to the offspring.[79] Under the laws of Georgia, a dog is such property as is subject to levy and sale for the debts of its owner.[80] Domestic deer are, at common law, the subject of property,[81] and, while it is within the power of the legislature to prohibit their killing for certain seasons of the year, fish and game laws will not be construed to apply to them during the open season.[82]

§ 2. *Personal injuries inflicted by animals.*[83] —See 11 C. L. 109—Those who maintain vicious animals[84] are liable for injuries inflicted by them where they knew,[85] or by the exercise of ordinary care could have known, that such animals were vi-

75. Bayou Terre Aux Boeuf Drainage Dist. Com'rs v. Baker [La.] 48 S 654.

76. Appearance by prosecuting attorney in divorce suit treated as appearance by amicus curiae. Yeager v. Yeager [Ind. App.] 87 NE 144.

77. Includes all matters arising from property in animals. Wild game and the relative rights of the state and individuals therein are treated in the topic Fish and Game Laws.* As to carriage of live stock and its care in transit, see Carriers,* §§ 15-21, and as to live stock insurance, see Insurance.*

78. **Search Note:** See notes in 3 C. L. 159; 17 L. R. A. 81; 40 Id. 503, 687; 47 A. S. R. 546; 67 Id. 28.

See, also, Animals, Cent. Dig. §§ 1-12, 39, 264; Dec. Dig. §§ 1-3, 20; 2 Cyc. 304-309; 2 A. & E. Enc. L. (2ed.) 342.

79. Dunning v. Crofutt [Conn.] 70 A 630. **Increase of mortgaged animals** belongs to the mortgagor in Oregon, since in that state mortgage is only a lien and does not transfer title. Ayre v. Hixson [Or.] 98 P 515.

80. Vaughn v. Nelson, 5 Ga. App. 105, 62 SE 708.

81. Dieterich v. Fargo, 194 N. Y. 359, 87 NE 518.

82. Forest, fish and game law (Laws 1908, pp. 328, 328, c. 130), regulating killing and transportation of deer during certain seasons has no application to domestic deer during the open season, but prohibits the killing even of domesticated deer during the closed season. Dieterich v. Fargo, 194 N. Y. 359, 87 NE 518.

83. **Search Note:** See notes in 5 C. L. 114; 7 Id. 120; 62 L. R. A. 132; 2 L. R. A. (N. S.) 1188; 4 Id. 947; 6 Id. 1164; 11 Id 748; 16 Id. 445; 16 A. S. R. 631; 36 Id. 831; 1 Ann. Cas. 205; 3 Id. 1070; 4 Id. 127; 5 Id. 877; 10 Id. 302, 865.

See, also, Animals, Cent. Dig. §§ 223-275; Dec. Dig. §§ 66-76; 2 Cyc. 367-392, 415-420; 2 A. & E. Enc. L. (2ed.) 351, 366, 21 A. & E. Enc. P. & P. 886.

84. Whether dog was really vicious or merely playful has no bearing on the question of liability, if injury resulted from fright at dog's ferocious appearance. Merritt v. Matchett, 135 Mo. App. 176, 115 SW 1066. "Vicious propensity" is not confined to disposition on part of dog to attack every person he might meet, but includes as well such natural fierceness or disposition to mischief as might occasionally lead him to attack human beings without provocation. Id.

85. McGurn v. Grubnau, 37 Pa. Super. Ct. 454. Under common-law rule, where there is no knowledge of the evil propensities of the dog, there is no liability. Alexander v. Crosby [Iowa] 119 NW 717. It is not necessary that a precisely similar injury should have actually been committed by the animal; knowledge that animal's disposition is such that it is likely to commit an injury similar to that complained of is sufficient. Emmone v. Stevane [N. J. Err. & App.] 73 A 544.

Admissibility of evidence: Error to exclude defendant's admission that he had asked a friend to keep dog tied up so that it would injure no one. Domm v. Hollenbeck, 142 Ill. App. 439. Habits and propensities of domestic animals, being matters of common knowledge, may not be proven by expert testimony tending to show that after a certain age animals of certain kinds become vicious, for the purpose of showing that owner had knowledge of the animal's vicious propensity. Johnston v. Mack Mfg. Co. [W. Va.] 64 SE 841.

Proof of knowledge: Proof of habitual acts of ferocity or mischief is proof of a ferocious or mischievous nature, and warrants inference that owner knew of such propensities. Merritt v. Matchett, 135 Mo. App. 176, 115 SW 1066. Evidence held sufficient to support findings that dog which injured plaintiff belonged to defendant, and that defendant had knowledge of his vicious nature. King v. Muldoon, 116 NYS 308. Evidence held sufficient to show

cious,[86] although not personally the owners thereof[87] nor of the premises upon which kept.[88] The common law makes a distinction in respect to such knowledge as between animals ferae naturae and domestic animals.[89] The burden is upon the one injured to show that the owner had notice of the vicious disposition of the animal.[90] A statute creating an absolute liability on the part of the owner of a dog for damages done by him, regardless of knowledge or negligence on the part of the owner, contemplates compensatory damages merely.[91] Where the statute expressly defines

scienter. O'Rourke v. Finch [Cal. App.] 99 P 392. Evidence held to show that bailor had knowledge of vicious propensities of dog entrusted to bailee. Emmons v. Stevane [N. J. Err. & App.] 73 A 544. Evidence held insufficient to show that defendant had knowledge that horse driven by plaintiff, his employe, was a kicker. Haneman v. Western Meat Co., 8 Cal. App. 698, 97 P 695. That defendant knew dog which frightened plaintiff's horse was vicious, not shown. Field v. Morrison, 142 Ill. App. 454. In action for personal injuries caused by boar, evidence held insufficient to show that boar was vicious and that defendant had knowledge of it. Johnston v. Mack Mfg. Co. [W. Va.] 46 SE 841. Evidence held insufficient to show that defendant had knowledge that jackass by which plaintiff was injured was vicious. Donahue v. Scott Transfer Co., 141 Ill. App. 174. Evidence insufficient to show that owner had knowledge of vicious nature of horse by which plaintiff was bitten. Corcoran v. Kelly, 61 Misc. 323, 113 NYS 686.

86. Owner of bull owes to all persons the common-law duty of exercising due care to protect them, not only from known viciousness but from mischievous acts of such animal, which might reasonably be expected from its natural disposition and propensities. Peterson v. Conlan [N. D.] 119 NW 367. Where vicious disposition has been established, there is no presumption that animal will not display it towards its keeper as well as towards a stranger. Emmons v. Stevane [N. J. Err. & App.] 73 A 544.

Sufficiency of evidence: Testimony of witnesses acquainted with a horse alleged to be vicious and unruly as to disposition before and after accident alleged to be caused by such viciousness was material and relevant as to the disposition of the horse on the day of the accident. Putnam v. Phoenix Preferred Acc. Ins. Co. [Mich.] 15 Det. Leg. N. 980, 118 NW 922. Testimony, that mare was valued at $250, relevant as bearing on question whether she was unruly or vicious. Id. Knowledge of servant in charge of a dog in regard to suspicious actions, which might lead one to suspect that the dog is afflicted with rabies, is the knowledge of the master. Buck v. Brady [Md. App.] 73 A 277. Evidence held to show that livery stable keeper could, by reasonable care, have ascertained that horse hired to plaintiff was vicious and liable to runaway. Conn v. Hunsberger [Pa.] 73 A 324. Owner of dog afflicted with rabies held liable where he released it after having been warned by servant that dog might be mad. Buck v. Brady [Md. App.] 73 A 277. In action for injuries sustained in runaway caused by dog biting horse, it was not sufficient proof of scienter that dog had on previous occasions been seen to run out and bark at passing horses. Muller v. Schufeldt, 114 NYS 1012. In suit for damages for bite of mad dog, opinion evidence of three physicians, admissible on question as to whether dog was suffering from rabies, admissible, although the different parts of the experiments were not performed by the same persons, where they made up a connected whole. Buck v. Brady [Md. App.] 73 A 277.

87. Defendant in suit for damages for injuries inflicted by vicious dog held liable although he did not own dog but had previously given it to member of his family. McGurn v. Grubnau, 37 Pa. Super Ct. 454. Manager of store held liable for injuries inflicted by dog belonging to driver of delivery wagon. Merritt v. Matchett, 135 Mo. App. 176, 115 SW 1066. At common law, one who harbors a dog knowing him to be vicious, as well as the owner in possession, is liable for injuries committed by him. Alexander v. Crosby [Iowa] 119 NW 717. Evidence that dog was owned by defendant's son and kept on defendant's premises not sufficient to show that defendant owned or harbored dog. Muller v. Schufeldt, 114 NYS 1012. **Under statute imposing liability for all damage** upon owner of dog except when person injured is doing an unlawful act, one who merely harbors a dog is not liable unless he had previous knowledge of its vicious character. Code, § 2340. Alexander v. Crosby [Iowa] 119 NW 717.

88. Lawful occupant of premises liable for injuries inflicted by dog owned by member of his household, he being legally recognized head of family and as such responsible for domestic animals kept on premises by his knowledge or consent. McGurn v. Grubnau, 37 Pa. Super. Ct. 454.

89. At common law, the keeper of animals of the class ferae naturae was presumed to have knowledge of their vicious propensities and was liable as an insurer, but as domestic animals are not presumed to be vicious the keeper is liable only when such animals are vicious and he knew it. Emmons v. Stevane [N. J. Err. & App.] 73 A 544. Owners of wild beasts in their nature vicious are, under almost all circumstances, liable for injuries caused by them, as knowledge of their vicious propensities is presumed, but knowledge of the vicious propensity of domestic animals must be shown. Johnston v Mack Mfg. Co. [W. Va.] 64 SE 841.

90. Donahue v. Scott Transfer Co., 141 Ill. App. 174. Plaintiff's ignorance of animal's vicious propensity and defendant's knowledge thereof must be alleged and proved. Haneman v. Western Meat Co., 8 Cal. App. 698, 97 P 695.

91. Puls v. Powelson [Iowa] 121 NW 1.

the acts for which the owner shall be liable, no liability results for injuries caused by acts not specified.[92] No recovery may be had for an injury by an animal if such injury is occasioned by provocation on the plaintiff's part.[93] Negligence cannot be predicated upon merely allowing an animal to run at large where there is no law prohibiting it,[94] nor can recovery be had as for an aggravated trespass if the person injured was not entitled to the possession of the premises where the injury occurred.[95] Where the liability is based upon a contract relation between the person injured and the owner of the animal, scienter need not be shown,[96] but, as the bailor impliedly warrants that an animal furnished by him it suitable for the purpose for which hired, he is liable on the breach of such warranty for injuries occasioned by the animal,[97] and must give warning if he knows that the animal is dangerous.[98]

§ 3. *Injuries to property by animals trespassing or running at large.*[99]—See 11 C. L. 110—In order to create liability for allowing animals to run at large,[1] the owner must know or have reason to believe that such animals are likely to cause damage,[2] and such damage must be the result of the owner's negligence although the animals were running at large in violation of statute.[3] In Michigan one need not fence against a neighbor's cattle,[4] even though by local authorization they are permitted to run at large in the public highways.[5] Where the statute provides for the service of notice in case of damage done by animals in breaking through a law-

92. Code Supp. 1907, § 2340, as amended by Acts 30th, Gen. Assem. p. 90, c. 81, imposing liability only for damages done while dog was worrying, maiming, or killing a domestic animal, or attacking or attempting to bite any person, owner not liable for injuries sustained in runaway caused by mere barking of dog in highway. Miles v. Schrunk [Iowa] 117 NW 971.

93. Bite by jackass due to provocation by servant. Donahue v. Scott Transfer Co., 141 Ill. App. 174. Statutes defining liability of owners or keepers for acts of dogs and unrestricted in their terms, embodying no exceptions, are subject to implied limitation that the one injured cannot recover if he has knowingly and willfully provoked the dog in a manner calculated to cause the dog to bite. Kelley v. Killourey [Conn.] 70 A 1031.

94. So much of Code 1906, § 2730, as relates to running at large of bulls, buck, sheep, and boars, applies only in counties where adopted by vote. Johnston v. Mack Mfg. Co. [W. Va.] 64 SE 841.

95. Peterson v. Conlan [N. D.] 119 NW 367.

96. Breach of implied warranty of livery stable keeper in furnishing horse suitable for hauling delivery wagon. Conn v. Hunsberger [Pa.] 73 A 324.

97. Conn v. Hunsberger [Pa.] 73 A 324.

98. Owner of an animal having vicious habits which are directly dangerous is bound to disclose them to a bailee, if he had knowledge thereof. Emmons v. Stevane [N. J. Err. & App.] 73 A 544.

99. Search Note: See notes in 14 L. R. A. 196; 22 Id. 55; 39 Id. 674; 12 L. R. A. (N. S.) 912; 16 Id. 647; 97 A. S. R. 287; 8 Ann. Cas. 1072.

See, also, Animals, Cent. Dig. §§ 143-222, 276-422; Dec. Dig. §§ 47-65, 77-102; 2 Cyc. 358-451; 2 A. & E. Enc. L. (2ed.) 352; 21 A. & E. Enc. P. & P. 886.

1. Workhorse hitched to wagon in street and eating oats, but not tied, is not an animal running at large within rule that one who negligently permits an animal to run at large is liable for damages caused by it. Corcoran v. Kelly, 61 Misc. 323, 113 NYS 686.

2. Evidence held insufficient to show that owner of dog had knowledge that it was afflicted with rabies at time it bit plaintiff's cow. Van Etten v. Noyes, 128 App. Div. 406, 112 NYS 888. Owner is not liable for harm done by trespassing dog, unless it appears that he had knowledge of its vicious propensities or was chargeable with such knowledge. Id. Evidence as to the habits and vicious propensities of a dog is admissible to prove that the dog had attacked certain sheep on a particular occasion. Rumbaugh v. McCormick [Ohio] 88 NE 410.

3. That owner permits cattle to run at large upon a public highway in violation of statute does not render him liable for damages in the absence of a natural causative connection between the violation of the statute and the injury. Anderson v. Nesbitt [Ind. App.] 88 NE 523. Owner not liable for injuries to horse frightened by his cattle grazing in highway. Id.

4. In Michigan the common-law rule prevails that one is under no obligation to fence against his neighbor's cattle, and that he may ordinarily recover in trespass against the owner of cattle who trespass upon his lands. Collins v. Lundquist, 154 Mich. 658, 15 Det. Leg. N. 895, 118 NW 596.

5. A local authorization, as provided for by statute Comp. Laws 5606 et seq., permitting cattle to run at large in highways does not impose upon landowners the obligation of fencing against cattle so running at large, nor does it deprive them of the remedy in trespass. Collins v. Lundquist, 154 Mich. 658, 15 Det. Leg. N. 895, 118 NW 596.

ful fence, such notice is not required where no fence is involved,[6] but, where a duty to fence rests upon the plaintiff, a failure to do so may be a defense to the action.[7] Instructions in such actions must conform to the usual rules as to being within the evidence.[8]

§ 4. *Liability for killing or injuring animals.*[9]—See 11 C. L. 111—The liability of railroads for killing stock is fully treated elsewhere.[10] A bailee is liable for injuries to an animal under his care occasioned by his negligence,[11] but, if the owner be present or by agent and has an opportunity to warn defendant, he must do so.[12] A town may by statute be made liable for sheep killed by dogs for a failure of the selectmen to investigate such killing.[13] Statutes providing for the erection of barriers at places where ice is cut are not designed for the protection of cattle running at large.[14] The right of action for injuries caused by negligence is in the owner of the animal at the time of the injury, and does not pass to his successors in title.[15] Instructions must conform to the evidence.[16]

§ 5. *Contracts of agistment.*[17]—See 11 C. L. 112—Only ordinary care is required

6. Under Rev. Code Civ. Proc. § 831, providing for service of notice in case of damage by animals breaking through a lawful fence, or by swine, it is not necessary to serve notice where no question of a fence is involved. Bradey v. Mueller [S. D.] 118 NW 1035.

7. Where crops were at different times injured by trespassing animals, defendant may plead and prove a particular defense extending to such damages as are the result of plaintiff's failure to maintain fences. Meyer v. English [Neb.] 119 NW 255.

8. In an action for damages to grazing lands caused by sheep injuring water tanks thereon and by herding scabby sheep, where the evidence showed that there were seven surveys that could have been used in connection with the tanks, a charge that the evidence showed that those surveys were alleged to have been damaged was not contrary to the evidence, although only two of the surveys were actually entered by the sheep. Tippett v. Corder [Tex. Civ. App.] 117 SW 186.

9. **Search Note:** See notes in 11 C. L. 111; 15 L. R. A. 249; 6 L. R. A. (N. S.) 911; 16 Id. 647; 16 A. S. R. 631; 36 Id. 831; 1 Am. Cas. 193; 3 Id. 275, 591; 8 Id. 419.

See, also, Animals, Cent. Dig. §§ 115-140, 172-174, 251-254, 282, 286, 287, 375-379; Dec. Dig. §§ 4345, 52, 73, 84 96; 2 Cyc. 414-436; 2 A. & E. Enc. L. (2ed.) 346, 8 Id. 443.

10. See Railroads, 12 C. L. 1542.

11. Master held liable for injuries to horse left in his care to be shod, and which ran away through negligence of employe. Rimmer v. Wilson, 42 Colo. 180, 93 P 1110. Where defendant's stable boy in charge of mare struck at her after she had finished drinking to make her return to stall whereby she slipped and was injured, court's finding of no negligence, having the effect of a jury verdict, was not error. Poncelier v. Palace Livery Co. [Ala.] 47 S 702. No negligence, where horse injured by breaking loose in stall was shown to have been tied and taken care of by defendant, in manner customary in livery stables. Bigger v. Acree [Ark.] 112 SW 879.

12. Where bailee's employe negligently unhitched horse from buggy without retaining hold on reins, and horse ran away and was injured, evidence held sufficient to sustain finding that owner's agent had no opportunity to give warning. Rimmer v. Wilson, 42 Colo. 180, 93 P 1110.

13. Under statute making it the duty of the town selectmen to investigate killing of sheep by dogs within the town, and to decide whether or not sheep have been killed by dogs within the town, and making the town liable if selectman fails to perform his duty, if the selectman reports that he is unable to determine the question, he fails to perform his duty and action will lie against the town. Pub. St. 1906, §§ 5639 and 5644. Otis v. Bridport, 81 Vt. 493, 70 A 1061.

14. Pub. Acts 1899, p. 342, No. 221, providing for erection of barriers where ice is being cut, was not designed to protect cattle allowed to wander upon ice unattended in search of water. Richards v. Waltz, 153 Mich. 416, 15 Det. Leg. N. 541, 117 NW 193.

15. Since for negligence he who is responsible for the negligent act is responsible to him to whom the wrong is done, and if it be an injury to property the right of action is in the then owner, and not in his successors in title, one who bought cattle contaminated by the Texas tick from one who was the owner when they became so contaminated has no cause of action against the one who contaminated the cattle. Eshleman v. Union Stockyards Co., 222 Pa. 20, 70 A 899.

16. Where the only evidence in an action for killing dogs was that of defendant, who testified that dogs did not belong to plaintiff, there was no error in striking out instruction relating to defendant's right to kill plaintiff's dogs in case they were destroying his property. Sims v. Hall, 135 Mo. App. 603, 117 SW 103.

17. **Search Note:** See notes in 3 C. L. 162; 17 L. R. A. 792; 50 Id. 720; 12 L. R. A. (N. S.) 310.

See, also, Animals, Cent. Dig. §§ 40-69; Dec. Dig. §§ 21-26; 2 Cyc. 315-323 367, 380; Contracts, Cent. Dig. § 893; 2 A. & E. Enc. L. (2ed.) 3; 19 Id. 429.

of an agister in the care of stock entrusted to him,[18] and whether such care has been exercised is a question of fact.[19] A stable keeper's lien is inferior to the title of a purchaser for value and without notice.[20] Where the contract provides that the agister shall feed and care for animals and to return them in as good condition as when they were entrusted to him, he must, in the absence of fraud, bear losses occasioned by disease.[21] A contract of agistment may be incorporated with another contract so that the entire contract must be performed before recovery can be had thereon.[22]

§ 6. *Estrays and impounding.*[23]—See 11 C. L. 112—A municipality may, under its welfare clause, enact an ordinance prohibiting the running at large of cattle within the corporate limits,[24] regardless of whether the county in which such city is situated has adopted the provisions of the stock law or not.[25] Such an ordinance is directed against the estray and creates no liability for damages in the owner.[26] It is operative only within the corporate limits,[27] and, that other territory has been included, does not affect its operation within such limits,[28] but an addition to a precinct where the stock law is in force does not extend its operation to such addition.[29] Ordinances providing for the impounding of cattle running at large[30] are within the police power,[31] and the legislature may make it a misdemeanor to allow cattle to run

18. McBride v. Wallace [N. D.] 117 NW 857.

19. Injury to mare in wire corral held due to agister's negligence. Id. It was not reversible error to instruct jury as to the different degrees of care and negligence, but served to more dearly define the degree of care imposed upon the agister as to barb wire fences (McBride v. Wallace [N. D.] 117 NW 857); nor to exclude testimony as to defendant's reputation as a careful man, since, regardless of reputation, he may have been negligent in the particular case (Id.).

20. Where a stable keeper parts with possession of a horse upon which he has a lien for keep, the title of a purchaser of the horse for value and without notice is superior to the lien of the stable keeper. Moore v. Whitehead, 8 Ohio N. P. (N. S.) 60.

21. Where lease of sheep bound lessee to herd, feed, and generally care for them as for his own property, and to return them in as good condition as when he got them, he assumes losses through disease in the absence of fraud on lessor's part as to the health of the sheep. Power & Bro. v. Turner, 37 Mont. 521, 97 P 950. Under contract whereby defendant was to herd, feed, and generally care for sheep, owner was under no obligation to undertake treatment of disease among such sheep. Id.

22. Contract for pasturing stock and for cultivation of certain fields.. Bouvier v. Brass [Ariz.] 100 P 799.

23. **Search Note:** See notes in 3 C. L. 163; 8 A. S. R. 271; 272, 90 Id. 211; 1 Ann. Cas. 993, 9 Id. 284.

See, also, Animals, Cent. Dig. §§ 193-222, 423-440; Dec. Dig. §§ 58-65, 103-110; 2 Cyc. 358-366, 375, 449, 452-456; 2 A. & E. Enc. L. (2ed.) 378; 16 Id. 4; 8 A. & E. Enc. P. & P. 16.

24. Acts 1889, p. 1003, § 5, providing that municipality in question "shall have power to pass and enact all laws and ordinances which may seem to them proper and just, not repugnant to the laws of this state and the United States." Stone v. Tallulah Falls, 131 Ga. 452, 62 SE 592; Southwestern Sheep Co. v. Thompson, 2 Ga. App. 211, 62 SE 1002.

25. Geer v. Thompson, 4 Ga. App. 766, 62 SE 500; Southwestern Sheep Co. v. Thompson, 5 Ga. App. 211, 62 SE 1002.

26. Ordinance providing that it shall be unlawful for stock to run at large and for the impounding thereof is directed against the animal and no liability for damages attaches to the owner thereby. Ordinance under Act Oct. 1, 1903, Acts 1903, p. 365. Jones v. Hines [Ala.] 47 S 739.

27. No civil liability attached to owner who lived outside city for damage caused by hog that had wandered within corporate limits and damaged garden. Jones v. Hines [Ala.] 47 S 739.

28. McKenzie v. Newlon [Ark.] 117 SW 553.

29. Change made by the court of county commissioners in boundaries between two precincts, one of which had adopted stock law and the other not, did not make the law operative in that part of the precinct where the law was not previously in force. Shook v. Scott [Ala.] 47 S 734.

30. Animals are running at large if found within limits covered by impounding law, without being under the control of anyone. An instruction that if owner exercised ordinary care in restraining animal from running at large, but without fault on his part it escaped and he made diligent search for it, the animal cannot be said to have been running at large, is erroneous. McKenzie v. Newlon [Ark.] 117 SW 553.

31. Ordinance under Kirby's Dig. §§ 5450, 6451, authorizing impounding of cattle found running at large, held valid exercise of the police power. McKenzie v. Newlon [Ark.] 117 SW 653. The legislature or the county commissioners, when the power is conferred upon them, may forbid stock running at large in the county or any town-

at large within counties of a certain class, and may provide that such law shall become effective, if, upon the application of a certain number of freeholders, the commissioners find that the county is within the class to which the act applies.[32] The inclusion of extraneous issues in an election for the adoption of the stock law renders the election invalid.[33] Counties or townships that have adopted the stock law need not build a common fence but may declare certain boundaries to be such fences.[34] That an animal escapes without fault on the part of the owner, constitutes no violation of a stock law, prohibiting the running at large of cattle.[35] The owner of an animal impounded must pay the charge prescribed by the ordinance for its keep,[36] and must compensate the owner of the premises according to statute.[37] He cannot recover the possession of such an animal in trover if the impounding ordinance is valid.[38] The statute regulating the sale of impounded animals must be strictly complied with.[39]

§ 7. *Regulations as to care, keeping, protection and health.*[40]—See 11 C. L. 118 Although the keeping of an animal having an infectious or contagious disease is not culpable per se,[41] in some states the sale of such an animal is prohibited by statute.[42] A municipality may regulate the care and keeping of animals within the corporate

ship thereof. State v. Mathis, 149 N. C. 546, 63 SE 99.

32. An act, making it a misdemeanor to allow cattle to run at large in certain counties and to become effective, if, upon the application of ten or more freeholders, the county commissioners find that the county is one of the class to which the act applies, is not open to the objection that it amounts to a delegation of legislative power to such freeholders, they being merely an agency for the purpose of determining when the law should become effective (State v. Storey, 51 Wash. 630, 99 P 878), nor that it is discriminatory, since it applies to the entire state (Id.), nor is it open to the objection that judicial power is conferred upon such commissioners (Id.).

33. Where on election to determine whether stock law should be adopted, a ballot was had on what should constitute a legal fence and as to whether geese should be included, the inclusion of such extraneous elements rendered the election void and required order establishing such district to be annulled. Crosswhite v. Colbert County Com'rs Ct. [Ala.] 49 S 870.

34. No defense to prosecution for violation of stock law that there was no fence that would prevent cattle from adjoining county not within stock law district from trespassing. State v. Mathis, 149 N. C. 546, 63 SE 99.

35. Laws 26th Leg. 1899, p. 220, c. 128, as amended by Laws 28th Leg. 1905. Texas & P. R. Co. v. Webb [Tex.] 114 SW 1171.

36. Under an impounding ordinance, officer can only charge amount prescribed by the ordinance for keeping of animal while in pound. McKenzie v. Newlon [Ark.] 117 SW 553.

37. Upon taking up an animal found trespassing, the owner of the animal is not entitled to its possession unless he compensates the owner of the premises according to statute. Rev. St. 1899, c. 163 (Ann. St. 1906, p. 4617). Cummings v. Ellis [Mo. App.] 119 SW 512.

38. Geer v. Thompson, 4 Ga. App. 756, 62 SE 500.

39. Where it appears that hogs impounded were not sold in accordance with the law relating to sale of impounded animals, a judgment for the owner for title and possession should be rendered subject to lien for defendant's damages as found by the court. Whitaker v. Miller [Tex. Civ. App.] 117 SW 882.

40. **Search Note:** See notes in 26 L. R. A. 638, 6 L. R. A. (N. S.) 922; 15 Id. 554; 93 A. S. R. 77; 97 Id. 242.

See, also, Animals, Cent. Dig. §§ 30-35, 79-96, 145-147, 193, 329-333; Dec. Dig. §§ 4, 15-17, 28-36, 49, 60, 91, 92; 2 Cyc. 309, 330-340, 398, 437-443, 451; 2 A. & E. Enc. L. (2ed.) 380; 21 A. & E. Enc. P. & P. 886.

41. Eshleman v. Union Stockyards Co., 222 Pa. 20, 70 A 897. Hence keeping upon one's premises of animals having an infectious disease although adjoining premises contain other animals which are likely to become infected is not unlawful unless the owner knows the cattle are diseased and is guilty of negligence in the manner of keeping them. Id. No liability attached to stockyards company for keeping cattle infected with Texas ticks in absence of showing of negligence. Id.

42. Under Kirby's Dig. § 1636 contract of sale of glandered mule held void. Compagionette v. McArmick [Ark.] 120 SW 400.

NOTE. Police power to destroy diseased animals without compensation: While statutes authorizing the destruction of diseased animals usually provide for compensation, such regulations are held to be constitutional as a valid exercise of the police power for the abatement of a public nuisance, although there is no provision for compensation (Newark, etc., R. Co. v. Hunt, 50 N. J. Law, 308, 12 A 697; Houston v. State, 98 Wis. 481, 74 NW 111; 42 L. R. A. 39; City of New Orleans v. Charouleau, 121 La. 890, 46 S 911; 126 Am. St. Rep. 332; 18 L. R. A. [N. S.] 368), or where, under the statute, it is determined that the owner is not entitled to compensation (Livingston v. Ellis County, 30 Tex. Civ. App. 19, 68 SW 723).—Adapted from 18 L. R. A. (N. S.) 368.

limits,[43] and may, as an incident to such control, impose a license tax,[44] but such tax must be reasonable.[45] Police regulations relating to the keeping of poultry within cities must be definite and certain.[46] Federal regulations for the suppression of disease among cattle do not as a rule supersede state statutes, regulating the control of cattle within the state jurisdiction.[47]

Interstate transportation; quarantine; inspection.[See 11 C. L. 115]—Duties imposed on carriers of live stock are elsewhere treated.[48] A state may, in the exercise of its police power,[49] enact laws to prevent diseased animals from entering its borders, but such laws must be reasonable [50] and must not interfere with commerce into or through the state beyond what is necessary for its self-protection.[51] Regulations made by the secretary of agriculture pursuant to statute, relative to the transportation of cattle from a quarantined district and making violations thereof criminal, are quasi legislative, and derive their force from a strict compliance with the authority conferred by the statute.[52] They are made for the protection of the cattle at the destination and no for the cattle transported.[53] Indictments based upon the violation of such regulations must set out in detail facts showing that they are in exact compliance with the statute.[54] Indictments for the violation of quarantine

43. Regulations requiring dogs to be muzzled are within the police power of the municipality and will not be questioned unless clearly inconsistent with the expressed will of congress. Police regulation under Act of 1887, 24 Stat. at L. 386, c. 49, punishing owner of unmuzzled dogs, held not in conflict with act of 1878, 20 Stat. at L. 173, c. 322 (U. S. Comp. St. 1901, p. 397). French v. District of Columbia, 32 App. D. C. 106.

44. Ex parte McCoy [Cal. App.] 101 P 419.

45. An ordinance passed by a board of supervisors imposing a license for pasturing sheep within the county held void as being unreasonable, and adopted for raising revenue and not for regulation of sheep business. Ex parte McCoy [Cal. App.] 101 P 419. A statute imposing a tax on dogs and making such tax a charge upon the land where the dogs are kept when they are kept there without the knowledge or consent of the landowner is void. Rev. St. § 2833 as amended by 98 Ohio Laws, p. 87. Merick v. Giens, 79 Ohio St. 174, 86 NE 880.

46. Police regulation, prohibiting keeping of poultry in any square or block which has 75 per cent of its territory improved, without obtaining consent of 75 per cent of residents within radius of 100 feet from boundaries of premises upon which fowls or pigeons are to be kept, held fatally defective because of indefiniteness. District of Columbia v. Keen, 31 App. D. C. 541.

47. In passing the Animal Industry Act, Act May 29, 1884. c. 60, 23 Stat. 31 (U. S. Comp. St. 1901, p. 299), and by making it the duty of the commissioner of agriculture to prepare rules and regulations for the suppression of diseases among cattle and to invite co-operation in such regard by the states, it was not the intention of congress to override state control of cattle within its jurisdiction, and such act apart from the action of a state has no binding force upon the state. Eshleman v. Union Stockyards Co., 222 Pa. 20, 70 A 899. There was consequently, under statute, no authority to sustain a cause of action against a stockyards company for injuries to plaintiff's cattle caused by Texas fever produced by contamination from Texas ticks from cattle in defendant's care. Id.

48. See Carriers, § 16.

49. Statute making it unlawful to bring into the state sheep infected with scab or other infectious or contagious disease and providing a punishment therefor is not an attempt to regulate interstate commerce, but is a reasonable exercise of the police power of the state. Rev. St. 1899, § 2090, as amended and re-enacted by Sess. Laws 1905, § 4, c. 98, p. 150. Patrick v. State [Wyo.] 98 P 588.

50. Act May 28, 1907 (Acts 1907, p. 1048), relating to the prevention of contagious and infectious diseases, being in conformity with acts of congress and regulations of the commissioner of agriculture and being a quarantine measure and a rightful exercise of the police power, is valid. Kansas City S. R. Co. v. State [Ark.] 119 SW 288.

51. The state has the right to prevent animals suffering from contagious or infectious diseases from entering its borders so long as such laws do not interfere with transportation into or through the state beyond what is necessary for its self-protection. Patrick v. State [Wyo.] 98 P 588.

52. United States v. Louisville & N. R. Co., 165 F 936.

53. The regulations of the department of agriculture relative to where cattle may be unloaded south of the quarantine line have reference to interstate shipments and are for the protection of other cattle at the destination and not for the cattle in transit. International & G. N. R. Co. v. McCullough [Tex. Civ. App.] 118 SW 558. Railroad company held liable for unloading northern cattle south of the quarantine line into pens infected with ticks. Id.

54. Indictment based upon Act March 3, 1905, c. 1496, 33 Stat. 1264 (U. S. Comp. St. Supp. 1907, p. 925), giving secretary of agriculture power to establish quarantine districts, and charging a shipment of southern cattle from quarantined district to one not quarantined without having cars and way-

laws must not charge separate offenses.[55] It is no defense to a prosecution for bringing diseased animals into the state that the action is brought in another county than that in which the animals first entered.[56] Before a state inspector can take charge of cattle for the purpose of dipping them he must have complied with all the prerequisites prescribed by the statute.[57]

§ 8. *Marks and brands.*[58]—See 11 C. L. 116—A brand properly recorded is in some states made prima facie evidence of ownership.[59] When a brand has been recorded, no one else can record the same brand or one similar thereto.[60]

§ 9. *Cruelty to animals.*[61]—See 11 C. L. 116—Laws for the prevention of cruelty to animals are a proper exercise of the police power.[62] Such laws extend to dogs although they are not recognized as property.[63] The killing of a sheep-killing dog is not within the statute,[64] nor is the killing one's own dog if done in a humane manner.[65] The condition of an animal found in the sole care of the defendant may raise a presumption of cruelty.[66]

§ 10. *Crimes against property in animals.*[67]—See 11 C. L. 117—Larceny of animals prosecuted under general statutes is elsewhere treated.[68] In many states it is

bill marked with word "Southern cattle" as required by rules and regulations duly made and promulgated by the secretary of agriculture on March 30, 1907, fatally defective in not setting forth in detail facts showing that such regulations had been legally promulgated as required by the statute. United States v. Louisville & N. R. Co., 165 F 936.

55. Indictment based upon violation of quarantine law, Act May 28, 1907 (Acts 1907, p. 1043), does not charge more than one offense in charging an unlawful transporting, an unlawful receiving and an unlawful unloading. Kansas City S. R. Co. v. State [Ark.] 119 SW 288.

56. Under a statute prohibiting the bringing into any part of the state diseased sheep, the fact that such sheep are brought into an interior county does not deprive the courts of such county of jurisdiction on the theory that the offense was committed in the county where the sheep first entered. Patrick v. State [Wyo.] 98 P 588.

57. Under Sess. Laws 1905, p. 219, c. 133, § 4, providing for the inspection, quarantine and dipping of cattle, to authorize the inspector to proceed, he must first inspect the herd and find that the cattle are infected or have been exposed to infection, and second give the owner instructions as to the manner of dipping the cattle. Deeters v. Clarke [S. D.] 121 NW 788. Injunction granted forbidding county cattle inspector from dipping cattle where it appeared that no inspection had been made or instructions given as to dipping cattle by owner himself. Id.

58. **Search Note:** See notes in 11 C. L. 116; 11 L. R. A. (N. S.) 87.

See, also, Animals, Cent. Dig. §§ 5-25; Dec. Dig. §§ 6-13; Larceny, Cent. Dig. § 136; 2 Cyc. 324-330; 15 A. & E. Enc. L. (2ed.) 825.

59. Brown v. Moss [Or.] 101 P 207. Comp. Laws 1897, § 67. Territory v. Caldwell [N. M.] 98 P 167.

60. B. & C. Comp. § 4202. Brand held not so similar when recorded as to render it ineffective as prima facie evidence. Brown v. Moss [Or.] 101 P 207. B. & C. Comp. § 4201, requires a certificate of fraud to be recorded in full and mere entry of a memorandum of its contents not sufficient. Id.

61. **Search Note:** See Animals, Cent. Dig. §§ 97-114; Dec. Dig. §§ 38-42; 2 Cyc. 341-353; 3 A. & E. Enc. L. (2ed.) 443; 5 A. & E. Enc. P. & P. 695.

62. Act Aug. 21, 1871, §§ 1, 2, prohibiting and punishing cruelty to animals as within authority delegated to municipality by congress. Johnson v. District of Columbia, 30 App. D. C. 520.

63. The dog is an animal within the meaning of § 6951, providing penalties in cases of cruelty to animals, and one torturing or unnecessarily abusing a dog is liable under this statute, notwithstanding the dog had not been brought within the realm of property by returning him for taxation and paying the tax on him when due; and the statutory provisions against dogs running at large do not relieve against prosecutions for torture and unnecessary abuse. Mick v. Ohio, 8 Ohio N. P. (N. S.) 54.

64. A dog which makes a practice of killing sheep may, without liability under the statute relating to cruelty to animals, be killed even after it has escaped from the place where it attacked the sheep. Miller v. State, 5 Ga. App. 463, 63 SE 571.

65. An owner, or one who has the owner's consent, may kill his own dog by some swift and comparatively painless method without liability under the statute relating to cruelty to animals. Miller v. State, 5 Ga. App. 463, 63 SE 571.

66. That mule was found in defendant's sole care in a bruised and beaten condition raised a presumption that defendant was guilty in prosecution for cruelty to animals. Tally v. State, 5 Ga. App. 480, 63 SE 543.

67. **Search Note:** See notes in 3 C. L. 159; 17 L. R. A. 81; 40 Id. 503, 687; 47 A. S. R. 546; 67 Id. 288.

See, also, Animals, Cent. Dig. §§ 26-29, 123-140, 310-313; Dec. Dig. §§ 14, 45, 87; 2 Cyc. 354-358, 427-436; 2 A. & E. Enc. L. (2ed.) 345.

68. See Larceny, 12 C. L. 557

made a criminal offense to kill or injure animals belonging to another.[69] If malice is essential, it must be toward the owner of the animal [70] and must be established beyond a reasonable doubt.[71] Willfulness must be shown as in other criminal prosecutions.[72] Procedure as to the degree of proof required,[73] as to stating a single offense,[74] and as to sentence and punishment, is governed by the ordinary rules.[75] An affidavit for the malicious shooting of a horse cannot be amended so as to lay the ownership of the horse in another.[76] A justifiable defense of one's property is a defense to a prosecution for killing a dog.[77] Expert evidence as to habits and pedigree is inadmissible in a prosecution for killing a dog, unless the defendant had knowledge of such facts.[78]

ANNUITIES.[79]

The scope of this topic is noted below.[80]

An annuity is usually defined as a yearly sum of money granted by one person to another in fee for life or years, charging the person of the grantor only,[81] but when created by will its payment is often made a charge on lands devised to a third

69. Poisoning horse of another. 1 Mill's Ann. St. § 1409 (Rev. St. § 1874). Jaynes v. People [Colo.] 99 P 325. Mutilating horse. Comp. Laws, § 11581. People v. Minney [Mich.] 15 Det. Leg. N. 1094, 119 NW 918. Killing dog. Rev. St. 1887, § 7153. State v. Churchill, 15 Idaho, 645, 98 P 853. Shooting dog. Penal Code, art. 680. Caldwell v. State [Tex. Cr. App.] 115 SW 597.

70. In a prosecution for mutilating a horse, malice is an essential ingredient of the crime, and such malice must be towards the owner or custodian of the animal and not towards the animal. Prosecution under Comp. Laws, § 11581, for cutting tongue off horse. People v. Minney [Mich.] 15 Det. Leg. N. 1094, 119 NW 918. Not essential to show expressed malice; but malice required may be shown by the character of, and the circumstances surrounding, the crime. Id.

71. In prosecution under Rev. St. 1887, § 7153, for malicious killing, maiming or wounding of dog, state must show beyond a reasonable doubt malice against owner of the dog, or that killing or wounding was done in a manner to raise a presumption of malice. State v. Churchill, 15 Idaho, 645, 98 P 853. Evidence held insufficient to show malice in killing of dogs, worrying defendant's cattle. Id.

72. In a criminal prosecution for shooting a dog under Penal Code, art. 680, defendant was entitled to introduce evidence tending to show that he killed the dog in the necessary protection of his sheep. Caldwell v. State [Tex. Cr. App.] 115 SW 597.

73. Evidence held to sustain conviction for killing a calf. State v. Barton, 214 Mo. 316, 113 SW 1111.

74. In a prosecution for illegally marking a hog, where the indictment charged theft as well, objection that two separate offenses were charged would not lie where only one count was submitted to jury. Gibbs v. State, 54 Tex. Cr. R. 631, 114 SW 795.

75. One prosecuted for poisoning the horse of another, under 1 Mills' Ann. Stat. § 1409 (Rev. St. § 1874), providing that if any person shall unlawfully, wantonly, willfully, or maliciously kill the horse of another he shall be guilty of a misdemeanor or a felony according to value of property and where damage exceeds $100 shall, on conviction, be punished by imprisonment from one to ten years, may properly be sentenced thereunder notwithstanding 1 Mills' Ann. St. § 1424, providing for punishment of acts preventing or hindering herding. Jaynes v. People [Colo.] 99 P 325.

76. White v. State [Miss.] 48 S 611.

77. Where trespassing dogs are chasing and frightening hogs and cattle, the owner of the premises in attempting to remove them has a right to act upon appearances; he is justified in using such force as a reasonably prudent man under like circumstances would use in protecting his stock from apparent impending danger. State v. Churchill, 15 Idaho, 645, 98 P 853.

78. Evidence of experts as to traits and character of the particular breed of dogs to effect that they would not harm domestic animals is inadmissible where evidence is direct and not circumstantial, unless it appears that defendant had knowledge of such traits. State v. Churchill, 15 Idaho, 645, 98 P 853. Evidence as to traits, pedigree, habits, and reputation of dog killed, is not applicable in criminal prosecution for malicious killing of dog, unless knowledge of such facts is brought home to defendant. Id.

79. See 11 C. L. 117.

Search Note: See notes in 3 C. L. 165, 166; 47 L. R. A. 614; 63 Id. 616; 6 L. R. A. (N. S.) 591; 10 Ann. Cas. 339.

See, also, Annuities, Cent. Dig.; Dec. Dig.; 2 Cyc. 458-471; 2 A. & E. Enc. L. (2ed.) 386.

80. Includes all matters as to the creation and payment of annuity by deed or will. The topic of Wills,* § 5D, should also be consulted as to interpretation of language as creating an annuity. Annuity options in insurance policies are treated in the topic Insurance,* § 13.

81. White v. Marion [Iowa] 117 NW 254; Lynch v. Huston [Mo. App.] 119 SW 994. Annuity distinguished from rent charge, which is charged upon land. Id. That

person,[82] and, in such case, it may be collected either by proceedings against the devisee or by lien against the land charged,[83] and an action against the devisee's estate to recover on the implied liability will not preclude an action on the lien.[84] Where an annuity created by will is not confined to the income of the estate, it is payable out of the corpus if need be.[85]

As a general rule, an annuity is not apportionable, unless the grant shows a clear intention that it shall be.[86]

Another Suit Pending; Answers; Antenuptial Contracts and Settlements; Anti-Trust Laws, see latest topical index.

APPEAL AND REVIEW.

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grantee rented land and applied rent to annual payments of annuity with consent of annuitant not change of character of obligation. Id. Reservation in deed of life estate in land conveyed by grantor and wife, from which rents and profits were received to amount of $400 or $500, not an annuity. White v. Marion [Iowa] 117 NW 254.

82. Devisee accepting farm on condition of paying annuity to testator's wife, bound by conditions imposed. Stringer v. Gamble [Mich.] 15 Det. Leg. N. 1030, 118 NW 979. Devisee personally liable upon contract express or implied and land charge with performance while annuitant lived. Id. Estate of devisee liable for past due payments. Id.

83. Stringer v. Gamble [Mich.] 15 Det. Leg. N. 1030, 118 NW 979. **Limitations** applicable to foreclosing mortgage liens applicable to suit to enforce lien to pay annuity. Id. Recovery allowed for payments not 15 years past due at commencement of suit. Id.

84. Stringer v Gamble [Mich.] 15 Det. Leg. N. 1030, 118 NW 979. Where in probate proceeding judgment for portion of annuity was only recoverable because of limitations, such judgment was not res judicata of condition unperformed or sum secured by lien. Id.

85. In re Van Valkenburgh's Will, 60 Misc. 497, 113 NYS 1108.

86. Unless granting instrument shows contrary intention. Lynch v. Huston [Mo. App.] 119 SW 994. In case of annuity to be paid to widow in lieu of dower, or to minor children, annuity may be apportioned so that she or they will receive proportionate amount for year in which either may die. Id. Deed conveying land in consideration of payment to grantor of sum annually upon first day of March until death, "when all payments cease," referred to time of death instead of time of payment and

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§ 1. *The right in general. A. Constitutional and statutory provisions; policy of the law.*[2]—See 11 C. L. 119—Within the constitutional and organic law,[3] the legis-

showed intention that payments continue to grantor's death and that annuity be apportioned upon grantor's death before time of payment. Id.

1. All strictly revisory proceedings, as distinguished from supervisory remedies (see Mandamus;* Prohibition, Writ of,* and like topics) are included herein, excepting proceedings in criminal cases (see Indictment and Prosecution,* § 17), certiarari (see Certiorari*) and the review of proceedings before justices of the peace (see Justices of the Peace,* § 5). Appeals to courts of original jurisdiction in various special proceedings are more fully treated in the topics dealing with such proceedings. See Estates of Decedents,* § 16; Eminent Domain,* § 18; Wills,* § 4K, and other like topics. Bills of review (see Equity,* § 15) and other legal or equitable methods for opening or correcting judgments (see Judgments,* § 5), the effect of judicial error (see Harmless and Prejudicial Error*), and the modes of saving the right to question such errors (see Saving Questions for Review*) are treated in separate topics.

2. Search Note: See note in 5 Ann. Cas. 860.

See, also, Appeal and Error, Cent. Dig. §§ 3-7, Dec. Dig. § 2; 2 Cyc. 507, 521-523; 2 A. & E. Enc. P. & P. 13; 7 Id. 823.

3. Const. art. 5, § 9, giving supreme court jurisdiction to review on appeal any decision of district court or judges thereof, does not authorize direct appeal from every such decision. Maples v. Williams, 15 Idaho, 642, 98 P 848; Utah Ass'n of Credit Men v. Budge [Idaho] 102 P 390. Const. art. 5, §§ 13, 20, held not to confer any absolute or unqualified right of appeal from order or judgment of probate court, but on contrary they grant discretionary power to legislature to withhold or confer such right. In re Sharp, 15 Idaho, 120, 96 P 563. Laws 1907, p. 467, § 119, providing that an appeal shall be allowed from appellate to supreme court in all cases where judgment of trial court is reversed and case remanded for new trial provided appellant stipulates in writing at time of praying for appeal that final judgment may be entered in supreme court against him if such appeal is not prosecuted with effect, held unconstitutional as special legislation in that parties are not entitled to same rights and subject to same burdens in supreme court. Hayward v. Sencenbaugh, 235 Ill. 580, 85 NE 939. Determination of facts by supreme court in such case under stipulation signed by one party only would be unconstitutional infringement on right to jury trial, though parties agreed in trial court to waive jury. Id. Const. art. 6, §§ 2, 11, does not give supreme court appellate jurisdiction either directly or through intermediate courts, in all cases other than those in which original jurisdiction is conferred upon it, but clause "and appellate jurisdiction in all other cases" in § 2 means merely that in all other cases than those in which it has original jurisdiction its jurisdiction, when it has jurisdiction, shall be appellate jurisdiction only. Drainage Com'rs

lature has exclusive power to grant [4] or withdraw [5] the right of review of judicial proceedings, or to affix such conditions to its exercise as it may see fit.[6] The right is favored in law,[7] but, being purely statutory,[8] cannot be extended or denied by the courts.[9] The right may exist independently of the question whether appellant is entitled to the relief sought to be obtained thereby.[10]

(§ 1) *B. Waiver, election, transfer, or extinguishment.*[11] See 11 C. L. 120—A waiver,[12] or election to treat a proceeding as valid,[13] will deprive the party of his

v. Harms, 238 Ill. 414, 87 NE 277. Const. art. 6, § 12, giving circuit court such appellate jurisdiction as is or may be provided by law, gives it no right to entertain any appeal not provided for by statute. Id. Constitutional provision authorizing appeal requires legislation to make it effective, since terms, conditions, and rules under which appeal may be taken and cause transferred to appellate court, must be provided by statute. Id. Right of appeal is not absolute, but appeals are only allowed under such regulations as may be prescribed by law (const. art. 8, § 15). State v. District Court [Mont.] 99 P 139.

4. Grant subject of legislative discretion. Randolph v. Indianapolis [Ind.] 88 NE 949. Under Const. art. 5, § 13, legislature has power to provide proper system of appeals and to specify orders and decisions directly appealable. Utah Ass'n of Credit Men v. Budge [Idaho] 102 P 390.

5. Unless right is constitutional, statute granting it may be repealed. Moberly v. Roth [Okl.] 102 P 182.

6. Louisville & N. R. Co. v. Daniel [Ky.] 119 SW 229; In re Water Com'rs of White Plains, 116 NYS 495.

7. Statutes giving right to be liberally construed in furtherance of justice, such construction as will work forfeiture of right not being favored. Price v. Western Loan & Sav. Co. [Utah] 100 P 677.

8. Drainage Com'rs v. Harms, 238 Ill. 414, 87 NE 277; Dean v. Dean, 239 Ill. 424, 88 NE 149; Smith v. Long [Ind. App.] 88 NE 356; Hall v. Hall, 200 Mass. 194, 86 NE 363; Thomas v. Elliott, 215 Mo. 598, 114 SW 987; Millar v. St. Louis Transit Co., 216 Mo. 99, 115 SW 521; State v. Broaddus, 216 Mo. 336, 115 SW 1018; Drainage Dist. No. 4 v. Wabash R. Co., 216 Mo. 709, 116 SW 549. In condemnation proceedings. In re Water Com'rs of White Plains, 116 NYS 495. Right of appeal is given by § 91, Practice Act 1907, and not by § 118 which merely directs to what court certain appeals may be taken. Damon v. Barker, 239 Ill. 637, 88 NE 278. Right cannot be conferred by consent. Sumner v. Hill [Ala.] 47 S 565. Appeals for purpose of obtaining trials de novo are unknown to the common law and can be prosecuted only where they are expressly given by statute. Drainage Com'rs v. Harms, 238 Ill. 414, 87 NE 277. From determination of value by board or court of tax, equalization acting within its jurisdiction. Clay County v. Brown Lumber Co. [Ark.] 119 SW 251.

9. Since statute provides for no appeal from order of court of common pleas removing school directors for failure to provide proper school accommodations, supreme court can consider such an appeal only as being before it on certiorari, and can look into record only so far as necessary to ascertain whether court below exceeded its jurisdiction or its proper legal discretion. In re Slippery Rock Tp. School Dist., 222 Pa. 538, 71 A 1085. Appeals are not matters of right unless given by statute, and where right is withheld, supreme court will not grant it in another form, as by mandamus. Mitchell v. Bay Probate Judge [Mich.] 16 Det. Leg. N. 2, 119 NW 916.

10. Heath & Co. v. Com. [Ky.] 113 SW 69.

11. Search Note: See note in 45 A. S. R. 271.

See, also, Appeal and Error, Cent. Dig. §§ 39-46, 953-1017; Dec. Dig. §§ 12, 153-168; 2 Cyc. 525, 643-660; 7 A. & E. Enc. P. & P. 869.

12. Where after appeal was docketed it was agreed that appellant would dismiss and pay judgment if appellee would pay costs of appeal which was done, and, judgment discharged, appellant surrendered right to further prosecute appeal. Board of Com'rs v. Clark [Ind. App.] 87 NE 1059. Common pleas will give effect to an express waiver of appeal in a lease by striking appeal if application is timely made but only when it appears in justice record that judgment was based on lease containing such waiver. Schneider v. Bates, 37 Pa. Super. Ct. 432.

13. Evidence de loirs the record is admissible in supreme court to show that since judgment was rendered appellant has so dealt with subject-matter of suit as to preclude him from further asserting his alleged right on appeal. Thomas v. Booth-Kelly Co. [Or.] 97 P 1078.

Held to preclude appeal: Compliance with order on demurrer to file new complaint as to one defendant only. Kinard v. Jordan [Cal. App.] 101 P 696. Compliance with ruling granting leave to amend upon terms. Pappe v. Post [Okl.] 101 P 1055. Remission of part of verdict by plaintiff pursuant to order of court denying new trial on condition of such remittitur. Harrington v. Butte, A. & P. R. Co. [Mont.] 101 P 149. Fact that plaintiff stood by and made no opposition to dissolution of his sequestration on bond, and, after release of property, ruied sheriff to show cause why he should not be held personally liable for accepting an insolvent surety on said bond. Connell v. Barber [La.] 49 S 730. Conveyance by plaintiff to defendant, after judgment dismissing suit for injunction to restrain maintenance of dam, of part of premises alleged to have been damaged held to have amounted to release to defendant of all claim for injunctive relief as against entire premises, including any injury thereto, and to require dismissal of appeal. Thomas v. Booth-Kelly Co. [Or.] 97 P 1078. Surrender of possession of premises by vendee before issuance of execution, in compliance with judgment cancelling contract of sale, ordering restitution to vendor, and providing that execution

right to review. The effect of an abandonment or dismissal of a perfected appeal is treated in a subsequent section.[14]

(§ 1) *C. Pendency of a former appeal.*[15]—See 11 C. L. 120—There can be no review while a former proceeding for one identical in scope and operation is pending.[16] There may, however, be more than one appeal in the same case, when orders are made at different times which finally dispose of the subject-matter of those orders.[17] In some states appeal and error may be concurrently prosecuted.[18] In Louisiana a devolutive appeal may be taken after a suspensive appeal has been dismissed.[19]

§ 2. *The remedy for obtaining review.*[20] *A. Appeal and error* See 11 C. L. 121 are the common remedies, the former to review equitable causes,[21] and the latter

issue to evict vendee in case possession was not surrendered. Comeaux v. West [Kan.] 97 P 381. Fact that decree ordered restitution and authorized execution for that purpose held not to amount to duress. Id. Under Greater New York Charter, § 1409, subd. 3, one who has executed undertaking to obey order of filiation can appeal only from the allowance fixed therein. People v. Culkin, 128 App. Div. 317, 112 NYS 702. Plaintiff sued two defendants jointly for tort, and judgment was rendered against one defendant and in favor of the other. Plaintiff appealed only from judgment in favor of said one defendant, and took judgment against the other. Held that, since taking judgment against one of two tort feasors sued jointly constitutes bar to taking judgment against the other, appellate court had no jurisdiction and appeal should have been dismissed. Cameron v. Kanvich, 201 Mass. 451, 87 NE 605. Voluntary acceptance of benefits conferred upon him by the decree by a party against whom an error has been committed operates as a release of errors, and may be pleaded in bar to his assignment of errors. Schaeffer v. Ardery, 238 Ill. 557, 87 NE 343. Paying award in condemnation proceedings and taking possession of property. Macfarland v. Poulos, 32 App. D. C. 558. Where defendant accepted benefit of order purging him from contempt and discharging him from attachment on certain conditions, held that he could not attack conditions imposed. Krauss v. Krauss [N. J. Err. & App.] 70 A 305. Acceptance of benefit of part of decree, unless benefit is absolute right which reversal would not affect. McKain v. Mullen [W. Va.] 64 SE 829. Enforcing favorable portion of judgment. McKee v. Goodrich [Neb.] 121 NW 577. Tender of **return of benefits** accepted does not operate to revive right. McKain v. Mullen [W. Va.] 64 SE 829.

Held not to preclude appeal: Payment of judgment. Lindenhorn v. Vogel, 131 App. Div. 75, 115 NYS 962, rvg. 110 NYS 970. Judgment in action to recover money was rendered in favor of a claimant substituted as defendant on suggestion of original defendant. Latter then paid money into court and court paid it over to substituted defendant. Held that plaintiff was not thereby deprived of his right to appeal. Wood Mercantile Co. v. McAdoo [Ala.] 49 S 856. Decree held increase of assessment void and restrained collection of taxes extended on such increase, but provided that it should not be construed as preventing collection of taxes levied on original assessment conceded to be due. Held that acceptance of taxes conceded to be due by collector did not operate as release of errors, since right to them did not arise out of decree and was not conferred by it. Schaeffer v. Ardery, 238 Ill. 557, 87 NE 343. Fact that after dismissing main action court also dismissed garnishment proceedings at plaintiff's request held not to preclude him from appealing from such order of dismissal. Loveday v. Parker, 50 Wash. 260, 97 P 62. Giving of stay bond by judgment defendant pursuant to Ball. Ann. Codes & St. §§ 5205, 5206, held not to require dismissal of subsequent appeal on theory that by giving bond defendant assumed unconditional obligation to pay judgment which he was bound to perform regardless of result of appeal and hence that appeal did not present live question. Hampton v. Buchanan, 50 Wash. 39, 96 P 518.

14. See § 11G, post.

15. **Search Note:** See Appeal and Error, Cent. Dig. §§ 47-60, 1895; Dec. Dig. §§ 13-16; 2 Cyc. 523-532.

16. Mere granting of permission to take a suspensive appeal which is not perfected does not bar the taking of a subsequent devolutive appeal on the merits from the main judgment. Reynolds v. Egan [La.] 48 S 940.

17. In condemnation proceedings, appeal from final order distributing fund held proper, former appeal being merely from finding that appellant had no interest in the property, and there being but one record. Chicago & N. W. R. Co. v. Glos, 239 Ill. 24, 87 NE 881.

18. Appeal and error may be concurrently prosecuted, and appellant may, in a case which is rightly appealable after he has taken and perfected an appeal, prosecute error to the judgment appealed from before his appeal has been dismissed or abandoned. Jenney v. Walker [Ohio] 88 NE 123.

19. Must appear that it was a devolutive appeal, and that it was granted in conformity with an order of appeal regularly issued, and devolutive appeal cannot be taken from order of appeal which lower court has dismissed. Durel v. Murphy [La.] 49 S 1013.

20. **Search Note:** See Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. §§ 3-5; 2 Cyc. 507-523; 2 A. & E. Enc. P. & P. 26, 706; 7 Id. 850.

21. Decree in equity cannot be reviewed by writ of error. Thompson v. Travelers' Ins. Co. [C. C. A.] 161 F 867. Rule applicable to review of judgments of courts of Indian Territory by federal court of appeals. Act Cong. March 3, 1905, c. 1479, § 12; 33 St. 1081. Keeley v. McCombs [Okl.] 102 P 186. Where parties treat action at law as suit in equity

judgments at law.[22] Statutory provisions as to which method shall be adopted in particular cases are, of course, controlling.[23] The suing out of a writ of error is sometimes held to be the commencement of a new action.[24] Bankruptcy proceedings are specially reviewable under the act.[25]

(§ 2) *B. Certification or reservation.*[26]—See 11 C. L. 121—Provision is sometimes made for the certification to the appellate court before final judgment of certain questions of law for preliminary adjudication.[27] Certification from one appellate court to another is treated in subsequent sections.[28]

and proceed with it as such before master in chancery without objection, they cannot have appeal dismissed. Locust v. Caruthers [Okl.] 100 P 520.

Held reviewable by appeal only: Judgment in favor of intervener directing payment of his claim out of funds in hands of receiver appointed in mortgage foreclosure suit. Shook v. Dozier [C. C. A.] 168 F 867. Judgment in favor of intervener for damages for tort in similar suit. Nashville R. & L. Co. v. Bunn [C. C. A.] 168 F 862. Proceedings in federal courts in exercise of customary jurisdiction of probate courts. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. [C. C. A.] 165 F 162; Locust v. Caruthers [Okl.] 100 P 520. Order imposing fine for violation of injunction to reimburse party injured by violation. Heller v. National Waistband Co. [C. C. A.] 168 F 249. Writ of error will lie only where fine is punitive, to vindicate authority of court. Id.

22. Judgment in action at law reviewable only on writ of error and not on appeal. Kibler v. Gulf Land & Lumber Co. [C. C. A.] 166 F 861; International Paper Co. v. Chaloux [C. C. A.] 165 F 436. Rule applicable to review of judgments of U. S. court for China. Act June 30, 1906, c. 3934, § 3, 34 St. 815. Toeg v. Suffert [C. C. A.] 167 F 125; Price v. U. S. [C. C. A.] 169 F 791.

Held reviewable only on writ of error: Adjudication of bankruptcy based on verdict of jury. Lennox v. Allen-Lane Co. [C. C. A.] 167 F 114. Proceeding to take land for public uses by condemnation. Murhard Estate Co. v. Portland & Seattle R. Co. [C. C. A.] 163 F 194. Adjudication of supreme court of Philippine Islands dismissing upon grounds of law an application for registration of land. Carino v. Insular Government of the Phillippine Islands, 212 U. S. 449, 53 Law. Ed. —.

23. Where there was no money judgment, and neither franchise nor freehold was involved, held that writ of error and not appeal was proper remedy to obtain review of judgment dismissing complaint on demurrer and dissolving injunction. Healey v. Zobel [Colo.] 101 P 56. Supreme court held to have no jurisdiction to entertain appeal where judgment did not relate to a franchise or freehold and no money judgment was rendered, proper remedy being by writ of error. Independent Peerless Pattern Co. v. Johnson [Colo.] 100 P 1129. Judgments of district court on appeal from order of city council granting license to sell intoxicants are reviewable in supreme court on appeal. Laws 1905, p. 657, c. 174. Mutter v. Daniels [Neb.] 118 NW 109. Writ of error is not confined to review of proceedings in the course of the common law, but extends to decisions rendered in exercise of equitable powers of court of law, or in course of its statutory or summary jurisdiction, provided they result in final disposition of the matter and have not rested in discretion. Defiance Fruit Co. v. Fox [N. J. Err. & App.] 70 A 460. Final judgment rendered in course of the common law may be reversed on error if it results from erroneous decision of interlocutory matter not in the course of the common law, provided such decision did not lie in discretion. Id.

24. Axel v. Kraemer, 75 N. J. Law, 688, 70 A 367. Though cause of action accrued prior to enactment of Sess. Laws 1902, p. 43, c. 3, permitting failure of corporation to pay license tax to be pleaded in bar of any action by it, held that writ of error sued out after passage of said act would be dismissed for failure of plaintiff to pay said tax. Ohio-Colorado Min. & Mill. Co. v. Elder [Colo.] 99 P 42.

25. See Bankruptcy, 11 C. L. 383.

26. **Search Note:** See note in 31 L. R. A. 392.

See, also, Appeal and Error, Cent. Dig. § 24; Dec. Dig. § 8; 2 Cyc. 522; 3 A. & E. Enc. P. & P. 918.

27. **Maine:** On case reported to law court, court should consider only such evidence as is competent, relevant, and legally admissible, unless otherwise stipulated. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A 567. On report, court must decide questions on record before it. Id.

Massachusetts: Full court as appellate tribunal, on its law side, has jurisdiction only of questions of law, and has no jurisdiction on reported case, even by agreement of parties, to determine what verdict jury should have rendered. Rev. Laws, c. 173, § 105, c. 156, §§ 6, 7. Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947. Only questions of law can be reported. Wyeth v. Cambridge Board of Health, 200 Mass. 474, 86 NE 925. Question of discretion, such as allowance of amendment, cannot be reported. Commonwealth v. National Contracting Co., 201 Mass. 248, 87 NE 590. Justice of superior court has power to report case after verdict, though motive is to present for determination questions which losing party has by accident or mistake failed to save for review, and his discretion in this regard will not be disturbed in the absence of abuse. Strong v. Carver Cotton Gin Co. [Mass.] 88 NE 582. Report from superior to supreme court construed to mean that, in event of certain holding, verdict for defendant was to be set aside, and verdict for certain sum was to be entered on each count as of date of trial, and judgment entered on verdicts with interest on each and one set of costs. Fitzgerald v. Worcester & S. St. R. Co., 200 Mass. 105, 85 NE 911.

Rhode Island: Suit in equity held not ready for final decree within meaning of

(§ 2) *C. The common remedies,*[29] See 11 C. L. 122 appeal or error, must, if adequate or applicable, be invoked rather than certiorari,[30] prohibition,[31] mandamus,[32] or injunction,[33] or a motion to vacate the judgment below.[34]

§ 3. *The parties.*[35] *A. Persons entitled to review* See 11 C. L. 122 include only those who are parties [36] of record [37] aggrieved [38] by the decree or judgment, and in

Court and Prac. Act 1905, § 338, and hence to have been improperly certified by superior court to supreme court. Brice v. Trustees [R. I.] 72 A 643. Where it appears that question of doubt certified up no longer exists, case will be remanded without opinion thereon. Taylor v. Kane [R. I.] 72 A 865.

Wyoming: Only constitutional questions may be presented to supreme court for decision on reserved questions from district court. McGarvey v. Swan [Wyo.] 96 P 697. Will not consider validity of special assessment from constitutional standpoint solely upon allegation that same was levied according to area without regard to benefits, in absence of showing as to procedure adopted and followed in levying assessment. Id. Since Laws 1903, p. 9, c. 7, relating to sewer assessments, leaves procedure to be regulated by ordinance, held that, in absence of showing in petition as to such regulations, would be assumed that whatever notices or hearings were necessary to make proceedings valid as due process of law were provided for, and that such provisions were complied with, except, perhaps, as to hearing and inquiry on question of benefits. Id.

28. See §§ 4E, 15B, post.

29. **Search note:** See Appeal and Error, Cent. Dig. §§ 34-38; Dec. Dig. § 10.

30. See, also, Certiorari, 11 C. L. 591. Douglas v. Hamilton [Ark.] 120 SW 387; Anglo-Californian Bank v. California Super. Ct., 153 Cal. 753, 96 P 803; Tattenham v. California Super. Ct. [Cal.] 100 P 248; Detroit Lumber Co. v. The Petrel [Mich.] 15 Det. Leg. N. 1034, 119 NW 1072; State v. Second Judicial Dist. Ct. [Mont.] 101 P 961; Baker v. Newton [Okl.] 98 P 931. One entitled to appeal may not allow right to lapse and then obtain review by writ of review. State v. Second Judicial Dist. Ct. [Mont.] 101 P 961. Fact that after granting of new trial one of parties obtaining it died and no representative of his estate was appointed, so that there was no one on whom notice of appeal from order could be served, held not to authorize supreme court to grant relief under its supervisory jurisdiction by way of certiorari. State v. Second Judicial Dist. Ct. [Mont.] 99 P 139.

31. See, also, Prohibition, Writ of, 12 C. L. 1430. In re Dahlgren, 30 App. D. C. 588; In re Quaker Realty Co., 122 La. 43, 47 S 369. Where is right of appeal, prohibition will not lie even though jurisdiction does not exist. California Fruit Growers' Ass'n v. Los Angeles County Super. Ct. [Cal. App.] 97 P 769; State v. Pierce County Super. Ct., 50 Wash. 650, 97 P 778. Prohibition held to lie to prevent superior court from proceeding under writ of review to compel city to make return of its action in revoking liquor licenses, where licenses in question would expire before case could be heard on appeal, remedy by appeal being inadequate. Id.

32. See, also, Mandamus, 12 C. L. 642. State v. Indiana State Board of Medical Registration & Examination [Ind.] 87 NE 139; Braun v. Campbell, 137 Wis. 401, 119 NW 112.

Mandamus held to lie to compel trial court to issue pending appeal from order denying motion for new trial, commission to take testimony of nonresident witness, who was only witness on material point and was under sentence of death. Gas & Elec. Co. v. San Francisco Super. Ct. [Cal.] 99 P 359. Remedy by appeal held inadequate to reach defect in service of summons not apparent of record. State v. Ninth Judicial Dist. Ct. [Mont.] 99 P 291.

Mandamus will not lie to compel county court to enter judgment or decree in divorce proceeding different from the one entered by it. Lindsey v. Carlton [Colo.] 96 P 997. To review action of court on application for entry of judgment nunc pro tunc. Montgomery v. Viers [Ky.] 114 SW 251. To compel trial judge to receive certain evidence. Pratt v. McCoy [La.] 49 S 640. Appeal is proper remedy when the judgment is not absolutely void. State v. Myatt, 122 La. 974, 48 S 425. To compel dismissal of suit in which temporary injunction had been issued, etc. State v. Huron [S. D.] 120 NW 1008. To review adjudication of fact or of mixed law and fact. In re Riggs, 214 U. S. 9, 53 Law. Ed. —.

33. See, also, Injunction, 12 C. L. 152. Injunction against maintaining action cannot be made to serve purposes of appeal. Turner v. Patterson [Tex. Civ. App.] 118 SW 565.

34. Judge in term time entered minute of his finding upon calendar, which was immediately carried to appearance docket and record entry made of same. Held that, even if subsequent entry of formal judgment in vacation was irregularity, it did not render judgment void, and remedy was by motion and not by appeal. Burke v. Burke [Iowa] 119 NW 129.

35. **Search Note:** See 11 C. L. 303; 15 L. R. A. (N. S.) 436; 119 A. S. R. 740

See, also, Appeal and Error, Cent Dig. §§ 899-952; Dec. Dig. §§ 136-152; 2 Cyc. 626-642; 2 A. & E. Enc. P. & P. 151; 7 Id. 856.

36. **Held entitled to appeal:** Plaintiff who withdrew his appearance, where there was no dismissal as to him, and case proceeded to trial on merits, and judgment was rendered against him. Lambert v. Rice [Iowa] 120 NW 96. Where, in action against city, a citizen and taxpayer appeared as party defendant before judgment and submitted to jurisdiction of court without objection from any party, and court recognized him as interested party and permitted him as such party to appeal, held that supreme court could not say that appeal so taken was upon face of record so manifestly outside its jurisdiction as to require granting of motion to dismiss. Nichols v. Ansonia [Conn.] 70 A 636.

Held not entitled to appeal: One not party to action below. Jones v. Yantis [Ky.] 113 SW 111. Person not party to proceeding for prohibition order. Douglas v. Hamilton [Ark.] 120 SW 387. Codefendant not served with process and not appearing in action. Nathan Mfg. Co. v. Edna Smelting & Refining Co., 130 App. Div. 512, 114 NYS 1037. Senior judgment creditor who was not party of record to proceedings by judgment debtor to quash levy under junior judgment, from order denying his motion to quash writ. Cable v. Magpie Min. Co. [S. D.] 119 NW 174. Purchaser at partition sale who was not party to suit from order setting aside sale or failing to confirm it. Thomas v. Elliott, 215 Mo. 598, 114 SW 987.

37. Where judgment against defendant firm, appeal cannot be taken by persons composing firm. Greenstein v. First Nat. Bank [Ala.] 47 S 1036. Order in insolvency proceedings against bank requiring plaintiff to show cause why it should not be required to pay over to receiver certain sum in its hands belonging to insolvent, held to make it a party to record in so far as such collateral proceeding was concerned, so that it was entitled to appeal from such order. Anglo-Californian Bank v. California Super. Ct., 153 Cal. 753, 96 P 803.

38. Since no one but an interested party may appeal, appellant must show by record that he is interested party and that he has been prejudiced by judgment appealed from. Leach v. Bixby [Neb.] 120 NW 427. In order to obtain relief on appeal, an intervener may not assail sufficiency of plaintiff's petition, alleging only cause of action against defendant, unless he also shows that judgment dismissing intervenor's petition was erroneous and prejudicial. Id. No one aggrieved by order vacating void order. Bodenstein v. Saul, 117 NYS 349.

Held to be parties aggrieved: Stockholder who instituted proceedings to administer assets of bank, in which receiver was appointed, by decree directing receiver to pay certain certificates of deposit to intervenor. Kavanagh v. Bank of America, 239 Ill. 404, 88 NE 171. Receiver of bank, by decree directing him to pay certain certificates of deposit. Id. Vendor of shares of stock, by judgment evicting his vendee. Succession of Desina [La.] 49 S 23. Plaintiff by judgment against one joint defendant and in favor of the other, or by judgment in his favor for less amount than that claimed. Cameron v. Kanrich, 201 Mass. 451, 87 NE 605. Landlord of one who sells liquor under tax certificate, if permitted to intervene in proceedings for cancellation of certificate. In re Jennings, 130 App. Div. 645, 115 NYS 457. Where complaint in action for dissolution of partnership and for appointment of receiver alleged that all defendants were members thereof, and asked relief against all of them, held that, even if one of them had not signed articles of copartnership he was aggrieved by decree appointing receiver. Marshall v. Matson [Ind.] 86 NE 339. Statutory right of administrator to appeal from order settling his accounts cannot be affected by any order revoking his letters. In re McPhee's Estate [Cal.] 97 P 878. Appellants held entitled to appeal from decree which was not such as they prayed for and was entered over their objection, though it was in some respects apparently not unsatisfactory to them. Rosenthal v. Board of Education, 141 Ill. App. 134, **afd.** 239 Ill. 29, 87 NE 878. A party in whose favor a decree has been rendered may prosecute writ of error when decree was rendered without jurisdiction. Wellington v. Wellington, 137 Ill. App. 394. Though nonresident distributee is disqualified to act as administrator of estate of decedent, has such an interest as entitles him to appeal to circuit court, and writ of error to supreme court. Butcher's Heirs v. Kunst [W. Va.] 64 SE 967. Where records show title in one who is defendant in foreclosure suit in order to bar his interest in land and he pleads title in fee, issues being fully tried and adjudicated against him, he may appeal, though he made conveyance to third party before suit, which conveyance was not recorded until afterward, there being no motion for substitution. Doyle v. Hays Land & Investment Co. [Kan.] 102 P 496. Where, after commencement of action of replevin, it was entered to use of certain firm, held that fact that latter gave replevin bond in behalf of original plaintiff was sufficient to create presumption that latter still retained an interest which justified an appeal by him. Anderson v. Sewart, 108 Md. 340, 70 A 228.

Held not to be parties aggrieved: Defendant by judgment striking out plaintiff's appeal and awarding costs against him for failure to answer interrogatories before trial. Carlstedt v. Rohsenberger [Ind. App.] 85 NE 996. Defendants, by dismissal of plaintiff's petition in mandamus proceedings at defendant's request. Whitridge v. Pope [Md. App.] 73 A 288. Defendant, by order overruling motion to eliminate certain statements as to facts from opinion as not sustained by evidence where judgment was rendered in his favor. Commercial Nat. Bank v. Kilinsky [Iowa] 120 NW 476. Plaintiffs who, in action to quiet title, admitted that they could not show title to certain of the tracts in question, by judgment in so far as it related to such tracts. Flannigan v. Towle [Cal. App.] 96 P 507. A defendant in action to enjoin building fence around land over which plaintiffs claimed right of way, who claimed no interest in land but was merely employed by his codefendant to build said fence, by judgment for plaintiffs, though he was thereby prevented from performing his contract, his remedy being against his codefendant. Smith v. Hagan [Colo.] 101 P 402. Executor, by decree of distribution, unless he is one of the distributees. Blaney's Estate, 37 Pa. Super. Ct. 76. Appellant not interested in trust fund could not object to distribution of same. Routledge v. Eimendorf [Tex. Civ. App.] 116 SW 156. Guardian of orphan child, by order granting petition to adopt him. Leonard v. Honisfager [Ind. App.] 88 NE 91. Ward held only party aggrieved by orders of probate court directing and confirming sale of her lands by conservator during her lifetime. Appeal of Dunn [Conn.] 70 A 703. Where exceptions to refusal to vacate judgment on writ of entry did not show that petitioner had any interest in the premises, and hence did not show that he was harmed by ruling, held that they would be overruled. Gordon v. Gordon, 200 Mass. 216, 85 NE 1053. Insolvent corporation held to have no substantial interest in funds in hands of its receiver so as to entitle it to be heard on appeal with reference to allowances from

proceedings not inter parties, or which may affect others than parties, persons having a litigable interest [39] affected detrimentally may appeal. It has been held that an appeal taken by one not aggrieved may be adopted by the party aggrieved.[40] On the death of a party before the appeal is perfected, his personal representatives may ordinarily be substituted as parties appellant or respondent, provided the cause of action survives.[41]

funds in receiver's hands. Haight & Freese Co. v. Weiss [C. C. A.] 165 F 430. Defendant paid funeral expenses of decedent in consideration of conveyance to him of wife's dower interest in land. Subsequently he presented claim for amount so paid to estate which was allowed, and same refunded to him. Held that he thereby abandoned purchase of dower interest, and hence had no ground for reversal of judgment in action to settle estate. Compton v. Lancaster [Ky.] 114 SW 260. Widow conveyed dower interest to defendant in consideration of payment of husband's funeral expenses. In action to settle estate, she did not ask to have such conveyance set aside nor deny allegation that she had abandoned her homestead interest in property. Held that, though she was not liable for said funeral expenses, she had no standing to ask reversal of judgment in said action. Id. One entitled to collect upon foreclosure against two tracts cannot complain of judgment specifying order of sale. Stern v. Marcuse, 128 App. Div. 169, 112 NYS 653. County judge held to have no right to appeal from judgment in favor of county. Kirby's Dig. § 1493. Sumpter v. Buchanan [Ark.] 113 SW 809. Executor of ward and not her heirs at law held to have right to appeal from orders of probate court, made during ward's lifetime, directing and confirming sale of her property by her conservator. Appeal of Dunn [Conn.] 70 A 703.

39. Beneficiaries of an estate have no appealable interest in a judgment against administrator in his personal capacity. Gilbane v. Hawkins [R. I.] 72 A 723. One claiming as devisee under will held entitled to bill of exceptions on appeal from order of distribution, though she did not appear at hearing. In re Benner's Estate [Cal.] 99 P 715. Next friend may sue out writ of error for insane person whose conservator fails to act. Steele v. Wynn, 139 Ill. App. 428. Persons enjoined in action to which they were not parties may appeal by making themselves parties by motion to set aside judgment or order complained of. Tattenham v. San Francisco Super. Ct. [Cal.] 100 P 248. On judgment fixing fees of receiver after final account, which contained item under first appointment which had been set aside by third person who had obtained it, such third person was interested party and might appeal. In re E. D. Burguiers Planting Co., 122 La. 602, 48 S 121. Taxpayer has no such personal interest in suit to restrain public officers from exchange of public lands on ground of mere technical illegality as will spport appeal from Hawaiian to federal supreme court. McCandless v. Pratt, 211 U. S. 437, 53 Law. Ed. 271. Acts 1891, p. 70 (Rev. St. 1899, § 806), giving any "party to the suit aggrieved" the right to appeal from interlocutory judgments in actions of partition which determine rights of parties, and repealing Rev. St. 1899, § 2246, giving right to appeal from final judgment to "every person aggrieved" held not to have taken away from anyone aggrieved right to appeal from final judgment given him by repeal section, though he was not party to suit. Thomas v. Elliott, 215 Mo. 598, 114 SW 987.

40. Though prosecuting witness in bastardy proceedings may not be entitled to appeal, state may ratify and adopt appeal taken by her. Wimberly v. State [Ark.] 119 SW 668.

41. See, also, post, § 3B. For effect of death after perfecting of appeal, see post, § 11G, Abatement. Right of defendant to appeal from judgment for plaintiff is not defeated by death of plaintiff, but duty devolves upon defendant to take necessary steps to revive action or appeal by procuring appointment of administrator and making him party to suit on appeal as provided by Gen. St. 1902, §§ 317, 617, 621, 622. Hamilton v. New Haven [Conn.] 73 A 1. Death of a party does not bar writ of error on behalf of the interests represented when fact could have been presented by plea in abatement and successors substituted. Steele v. Wynn, 139 Ill. App. 428. On death of party after judgment, his heirs or personal representatives must be made parties to vacation appeal subsequently taken, and notified of its pendency. Burns' Ann. St. 1908, § 677. Swing v. Hill [Ind. App.] 88 NE 721. Rule held applicable to appeal from judgment for defendants in action at law to recover personal judgment against each of them based upon personal liability for debts of partnership of which they were members. Id. Term "taken," as used in Burns' Ann. St. 1908, §§ 677, 679, held to have particular reference to time of giving notice to appellee. Brulletts Creek Coal Co. v. Pomatto [Ind.] 88 NE 606, rvg. [Ind. App.] 85 NE 993. Attempted appeal in vacation against appellee, who has died since rendition of judgment and before service of notice, is ineffectual. Id. Death of appellee after term time appeal was granted and bond filed, but before transcript was filed, held not to require dismissal. Id. Where complainant recovered judgment for tract of land and died, whereupon defendant filed copy of judgment with clerk of court of appeals within two years, appeal was not subject to dismissal because appellant's statement did not designate devisees of deceased plaintiff as appellees, instead of deceased plaintiff and his executors. Buchanan v. Boyd's Ex'r [Ky.] 120 SW 295. Suggestion of plaintiff's death, filing of copy of will with names of devisees, and taking out of process against them, held a revivor of action against them in appellate court, which, having been done within one year after granting of appeal, was in time. Id. Act March 3, 1875, c. 137, § 9, 18 St. 473, authorizing personal representative of deceased party to appeal or bring writ of error after filing duly certified copy of his appointment, held intended to apply to cases where there is no formal revivor, and not to require filing copy of appointment in case where suit was revived

(§ 3) *B. Necessary or proper parties*[42]—See 11 C. L. 125 to be joined or brought in[43] include all persons who may be affected by a reversal.[44] Among them are all codefendants[45] who are joint in interest,[46] and coparties[47] who decline to join in the review. In some jurisdictions joinder of all coparties is not required,[48] and in

in names of representatives on motion in open court, and appeal allowed them on petition. Conaway v. Third Nat. Bank [C. C. A.] 167 F 26.

42. Search Note: See note in 5 Ann. Cas. 630.

See, also, Appeal and Error, Cent. Dig. §§ 1795-1876; Dec. Dig. §§ 321-336; 2 Cyc. 756-789.

43. Duty of appellate court to bring in absent necessary parties. Talbott v. Curtis [W. Va.] 63 SE 877.

44. See, also, post, § 6D. All those adversely interested in judgment. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114. All parties to suit or proceeding who appear from record to have interest in order, judgment, or decree, challenged. Lewis v. Sittel [C. C. A.] 165 F 157. All persons interested in judgment must be made parties to vacation appeal. Swing v. Hill [Ind. App.] 88 NE 721. If interest of those made parties will be injuriously affected by reversal or modification without reopening of case as to other parties as to whose interests judgment has become final by failure to appeal, appeal will be dismissed. Board of Com'rs v. Lemley [Okl.] 101 P 109. Writ of error dismissed where plaintiffs in error could prevail only on theory that defendants below, who were not made parties, were liable to plaintiff instead of plaintiff in error. Id.

Held necessary parties: One affected by preliminary injunction appealed from. City of Detroit v. Guaranty Trust Co. [C. C. A.] 168 F 608. Defendants whose interests would be adversely affected by reversal. Board of Com'rs v. Lemley [Okl.] 101 P 109. Parties affected by assessment of damages and benefits in proceedings for establishment of drainage ditch are necessary parties to appeal from such assessment, and failure to serve notice of appeal on any of the petitioners for the district is fatal. In re Farley Drainage Dist. No. 7 [Iowa] 120 NW 83. Acts 32d Gen. Assem. 1907, p. 100, c. 95, authorizing boards of supervisors to employ counsel to represent district on appeals from their orders, held not to change rule. Id.

Held not necessary parties: Lessors in action by lessees in oil and gas lease for partition of their interests thereunder. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859. Trustee of real property for benefit of minor heirs, who was appointed in divorce proceeding but never appeared therein. Lowe v. Lowe [Wash.] 101 P 704. On appeal from judgment which inures to the benefit of certain corporations, officers not personally interested, though made parties to judgment. Hester v. Greenwood [Ind.] 88 NE 498. Parties to record who were not parties to judgment, on appeal taken in term time from a judgment for landowner who alone contested establishment of highway by user under Burns' Ann. St. 1908, § 7663. Pitser v. McCreery [Ind.] 88 NE 303.

45. See, also, post, § 6D. Petition in error by two of three defendants against whom judgment was rendered jointly for specified sum, to which other defendant was not made party, dismissed. Strange v. Crismon [Okl.] 98 P 937.

46. Joint judgment debtor must be made party. Lewis v. Sittel [C. C. A.] 165 F 157. One of two parties having a joint interest in subject-matter of decree must make other party to appeal therefrom, though one appears as plaintiff and other as a defendant. Taylor v. Leesnitzer, 31 App. D. C. 92. Where judgment was rendered against one of three defendants and a separate judgment was rendered in favor of each of the other two defendants, held that the latter were neither necessary nor proper parties to an appeal by the unsuccessful defendant. Town of Windfall City v. First Nat. Bank [Ind.] 87 NE 934. Not necessary to determine whether appeal can be considered as term time appeal where appellant has also taken necessary steps to make it a vacation appeal. Id. Where case was tried below on theory that bank and trustee in deed of trust were cross complainants in cross complaint filed on bank's behalf, held that cross complainants were properly made appellants, and fact that it might be assumed that they had filed cross complaint, which was in a sense an original action, changed general rule as to making of coparties, and it was sufficient to make all other parties appellees who were interested in maintaining judgment, or who had standing to appeal therefrom. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417.

47. See, also, post, §6D. In vacation appeals, appellant must make all his coparties to the judgment coappellants, giving them proper notice of the appeal. Belk v. Fossler [Ind.] 85 NE 990. Test is that all parties entitled to appeal from the judgment must be made coappellants. Id. Where assignment of errors assails whole judgment, all those who were coparties with party taking appeal should be made appellants and properly served with notice, even though same judgment was in some particulars in their favor. Id. In such case one made an appellant who is interested in preserving judgment instead of reversing it may protect his interest by refusing to join and asking that judgment be affirmed. Id. Judgment was recovered by plaintiffs against all of the defendants, and in favor of all of the other defendants against defendant L, who appealed. Held that other defendants were properly made appellants. Id. Must make all coparties co-appellants. Lake Shore Sand Co. v. Lake Shore & M. S. R. Co. [Ind.] 86 NE 754; Hernly v. Pierce [Ind. App.] 86 NE 443.

48. Fact that all of defendants aggrieved did not appeal held not to affect rights of those who did, since statute gives right to appeal to part of several coparties. Marshall v. Matson [Ind.] 86 NE 339. Burns' Ann. St. 1908, §§ 675, 676, authorizing appeals without joining all coparties in certain cases, held limited in their operation to appeals taken under Rev. St. 1881, § 638 (Burns' Ann. St. 1908, § 679) and not to apply to appeal from interlocutory order ap-

some a severance may be had.[49] Making too many appellees is not a jurisdictional defect.[50] Successors in title or interest may be substituted or brought in.[51] In Louisiana there can be no failure of parties where the appeal is taken in open court.[52]

§ 4. *Adjudications which may be reviewed, either generally or in one of two appellate courts. A. Statutes*[53] may provide for the review of any proceeding, affix conditions, or withdraw the right.[54]

(§ 4) *B. Reviewableness may be dependent on the general form or character of the adjudication.*[55]—See 11 C. L. 126—The decision must amount to the judgment[56]

pointing appraisers in condemnation proceedings under Acts 1905, p. 61, c. 48, § 5 (Burns' Ann. St. 1908, § 933). Lake Shore Sand Co. v. Lake Shore & M. S. R. Co. [Ind.] 86 NE 754. Under Code Civ. Proc. 1895, § 1721, any and every party aggrieved may appeal without joining anyone else, whether judgment against him is joint or several. Spokane Ranch & W. Co. v. Beatty, 37 Mont. 342, 96 P 727. Where one of two defendants whose joint interest is affected by judgment appeals and other does not, will be presumed that latter is satisfied with judgment. Id.

49. Actual notice of severance is essential to any proceeding which detaches necessary party. City of Detroit v. Guaranty Trust Co. [C. C. A.] 168 F 608. In order to work severance of necessary party by allowance in open court of appeal in which he is not joined, he must be actually present at time of such allowance. Id.

50. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417.

51. See, also, ante, § 3A. On death of plaintiff after judgment and before appeal is perfected, duty devolves upon defendant to revive action or appeal by procuring appointment of administrator and making him party, as provided by Gen. St. 1902, §§ 317, 617, 621, 622. Hamilton v. New Haven [Conn.] 73 A 1. In event of assignment of judgment before death of plaintiff, defendant should procure assignee to be made party plaintiff to action or party to appeal under Gen. St. 1902, §§ 617, 621, 622, 631. Id. On death of codefendant, held necessary to make his heirs or personal representatives parties to vacation appeal. Burns' Ann. St. 1908, § 677. Swing v. Hill [Ind. App.] 88 NE 721. Rule held to apply to appeal from judgment for defendants in action at law to recover personal judgment against each of them for debts of partnership of which they were members. Id. Where defendant, against whom personal money judgment was rendered, died after judgment and before appeal was perfected, held that his representative should have been made party instead of his heirs. Hernly v. Pierce [Ind. App.] 86 NE 443. Decedent's real representatives held necessary parties to appeal in action in which he recovered land. Buchanan v. Boyd's Ex'r [Ky.] 115 SW 222.

52. Since all parties to case not appellant are appellees. Guy v. McDuffie [La.] 49 S 222.

53. See 11 C. L. 126. See, also, § 1A, ante.

Search Note: See notes in 20 A. S. R. 173; 3 Ann. Cas. 685.

See, also, Appeal and Error, Cent. Dig. §§ 3-7; Dec. Dig. § 2; 2 Cyc. 507, 521-523.

54. Writ of error appropriate proceeding for review in supreme court of judgment of district court on questions of law alone, since no exception can be taken thereto under Court and Prac. Act, § 2, and, hence, is not duty of clerks to certify papers to superior court on claim of jury trial. Vrooman v. Arnold [R. I.] 72 A 661. Appeal does not lie from Baltimore city court to court of appeals on order overruling motion to quash proceedings of commissioners for opening streets. Lauer v. Baltimore [Md. App.] 73 A 162. Municipal court act was not intended to cut off plaintiff's right of appeal in cases where the court has directed verdict for defendant. Hoff v. Parmelee Co., 140 Ill. App. 458. Only such orders of the municipal court as are specified by municipal court act are appealable. Campbell v. Abbott, 60 Misc. 93, 111 NYS 782; Friedberger v. Stulpnagel, 59 Misc. 498, 112 NYS 89; Great Northern Moulding Co. v. Bonewur, 128 App. Div. 101, 112 NYS 466. Municipal court's order granting motion to vacate attachment is not appealable. Bellas, Hess & Co. v. Livingston, 113 NYS 544. Orders of municipal court directing substituted service of summons is not appealable. Bank of Long Island v. Gregory, 132 App. Div. 93, 116 NYS 309.

55. Search Note: See notes in 45 A. S. R. 271; 3 Ann. Cas. 510; 5 Id. 176; 9 Id. 631; 10 Id. 38.

See, also, Appeal and Error, Cent. Dig. §§ 329-890; Dec. Dig. §§ 66-135; 2 Cyc. 586-625; 2 A. & E. Enc. P. & P. 52; 7 Id. 832.

56. Mere recitation of record that nonsuit has been entered will not support appeal. Wizell Live Stock Co. v. McCaskill Co. [Fla.] 49 S 501. Order for judgment not appealable. In re Nikannis Co. [Minn.] 121 NW 212. In absence of express statutory provision to contrary no appeal will lie from intermediary orders, nor from rulings and decisions not expressed in a final judgment, and hence appeal will be dismissed as premature where court merely announced his decision orally, and no formal written judgment was entered either before or after appeal. Robertson v. Shine, 50 Wash. 433, 97 P 497. Decision of court on issue raised by demurrer not appealable, but remedy is to appeal from judgment entered on decision. Mann v. Press Pub. Co., 117 NYS 779. Order on demurrer in municipal court not appealable. Schumer v. Kohn, 111 NYS 728; Watson v. Duryea, 117 NYS 348. Technical phrase "Ideo consideratum est" is not necessary to constitute such a judgment as will support a writ of error, its absence being merely defect of form which may be cured by amendment in appellate court. Tomlinson v. Armour & Co., 75 N. J. Law, 748, 70 A 314. Appeal from judgment which had previously been properly set aside, dismissed. McIntosh v. Southern Engine & Boiler Works

of the court as such on matters of law or fact as opposed to matters of discretion,[57] and it must have reached a finality,[58] become of record,[59] been against appellant's

[Ky.] 114 SW 1193. No appeal lies from order which has been abrogated by resettled order. Pepe v. Curti, 114 NYS 415

57. No appeal lies from decision on matter of discretion. Myers v. Circuit Court [W. Va.] 63 SE 201. Held that supreme court would not compel allowance of appeal from action of trial court in referring exception to merits, matter being largely discretionary, and question involved being one to be determined from the evidence. Saint v. Martel [La.] 49 S 582. Refusal of single justice to postpone entry of judgment pending application for reargument after decision on appeal held not appealable. Powers v. Sturtevant, 200 Mass. 519, 86 NE 789. While question of whether court shall modify order made by it is addressed to its discretion and not subject to review, appellate court has control when order moved to be resettled fails to recite all papers used upon the application. Tuska v. Jarvis, 61 Misc. 224, 113 NYS 767.

58. Ayers v. Anderson-Tully Co. [Ark.] 116 SW 199; Smith v. Long [Ind. App.] 88 NE 356; Wizell Live Stock Co. v. McCaskill Co. [Fla.] 49 S 501. Rule applies to appeal from mandamus. Carter v. Warnock [Fla.] 49 S 186. Common-law rule that writ of error does not lie except to final judgment applies, under Mills' Ann. St. § 1727, to an appeal as well as to a writ of error. Burlington & C. R. Co. v. Colorado E. R. Co. [Colo.] 100 P 607. No appeal can be taken from interlocutory judgments, orders, or decrees unless specfally authorized by statute. Chicago Terminal Transfer R. Co. v. Preucil, 236 Ill. 491, 86 NE 117. In absence of statutory provision to contrary, no appeal lies from interlocutory order of judge made at chambers. School District No. 8 v. Eakin [Okl.] 100 P 528. Appeal from interlocutory judgment is only permissable from supreme court. Fox. v. Fox, 128 App. Div. 876, 113 NYS 121. Code Civ. Proc. § 1340 provides for appeal only from final judgment of county court. Id. Review of interlocutory judgment of county court is only by appeal from final order or by motion in the appellate court for new trial under Code Civ. Proc. § 1001, in which case only questions of law are presented. Id.

What constitutes finality: Judgment or decree is final when it fixes finally rights of parties in action in which it is rendered, and leaves nothing further to be done before such rights are determined. Burlington & C. R. Co. v. Colorado E. R. Co. [Colo.] 100 P 607. Final decree is one which settles all matters in litigation between parties so that affirmance thereof will end suit and leave nothing for lower court to do but execution of decree. Maas v. Lonstorf [C. C. A.] 166 F 41. Decree may be final and appealable within meaning of federal statute where immediate sale or transfer of property is ordered, or where execution is directed to issue forthwith or at demand of one of parties for collection of a judgment in the cause, though by same decree court makes reference to master for judicial action upon another part of the controversy between same parties. Id. Rule held not to apply to decree directing conveyance of property and referring case to master for accounting as to rents and profits, where no time was fixed within which conveyance was to be made, and execution of that portion of conveyance was therefore reserved until further order of court. Id: Test of finality is not necessarily whether whole matter involved in action is concluded, but whether particular proceeding or action is terminated by the action. Bristol v. Brent [Utah] 99 P 1000. Decree is not final unless upon its affirmance nothing remains but to execute it. Chew v. Philadelphia, 35 Pa. Super. Ct. 66. As general rule no order is final which may not be enforced by rule or execution. Bennett v. Knott [Ky.] 112 SW 849. Judgment failing to dispose of all parties to controversy is not final. Texas Co. v. Beddingfield [Tex. Civ. App.] 114 SW 894; Williams v. Bell & Co. [Tex. Civ. App.] 116 SW 837. Can be no appeal until there has been complete disposition of cause as to all parties, except where great hardship or a denial of justice will result. Foote v. Yarlott, 238 Ill. 54, 87 NE 62. Formal disposition of cause as to all defendants not essential to appeal by plaintiff. Smith v. Slaughter, 138 Ill. App. 46.

Held final and reviewable:. Direction of verdict. Meeks v. Meeks, 5 Ga. App. 394, 63 SE 270. Decree awarding an accounting between widow and estate of her deceased husband. Delaney v. O'Connor, 138 Ill. App. 366. Order confirming judicial sale. Bank of Pine Bluff v. Levi [Ark.] 118 SW 250. Judgment in ejectment for recovery of immediate possession, without deciding whether or not defendant is entitled to reimbursement for improvements, as required by statute, and, if found to be so entitled, without ascertaining value of improvements. Brown v. Norwell [Ark.] 115 SW 372. Proceedings to enforce demand against water craft, pursuant to Comp. Laws, §§ 10788-10836, were dismissed at close of claimant's case and judgment awarded in favor of defendant on ground that at time of giving notice of his claim owners of craft were indebted to contractor. Held final judgment on merits, and appealable under §§ 10823-10827. Detroit Lumber Co. v. The Petrel [Mich.] 15 Det. Leg. N. 1034, 119 NW 1072. Decree in equity purporting to settle finally and definitely merits of entire controversy, though court retained jurisdiction in aid of details of execution in accordance with adjudicated rights of parties. Harrison v. Clarke [C. C. A.] 164 F 539. Decree finally adjudicating rights of parties and finding defendant liable to plaintiff for a specified sum, and for certain additional sum for each article manufactured and sold under a patent in addition to specified number, and referring case to master for purpose of determining number of articles so manufactured and sold, and retaining jurisdiction for purpose of entering such further order and decree as case might require. Fould de Grasse v. Gossard Co., 236 Ill. 73, 86 NE 176, rvg. 138 Ill. App. 375. Judgment in favor of principal defendant, though not in terms disposing of interest of two other defendants, their interest being merely an action against principal defendant on warranty in deed from it to them and conditional only in event

plaintiff should recover title to land in question from it, and hence judgment in favor of principal defendant being practical disposition of cause in their favor. Lee v. British-American Mortg. Co. [Tex. Civ. App.] 115 SW 320. Judgment in action against principal and sureties on his bond, though it referred to principal and one surety only, since, assuming that action was dismissed as to one surety, other would not be released thereby. Carlton v. Krueger [Tex. Civ. App.] 115 SW 619, rehearing 115 SW 1178. Judgment in action against surety and heirs of deceased surety, though it did not mention said heirs, where it expressly provided that plaintiff should take nothing by his suit. Id. Decree provided that it should be void if defendants procured restraining order within ten days. Held, that immediate appeal by defendants before expiration of ten days was waiver of condition contained in decree, and had effect of at once making same absolute and final. Moore Printing & Typewriter Co. v. National Sav. Trust Co., 31 App. D. C. 452.

Held not final: Order setting aside award of damages in action for libel. Billings v. Charlotte Observer [N. C.] 64 SE 435. Order in condemnation proceedings determining that petitioner had power to condemn. Burlington & C. R. Co. v. Colorado E. R. Co. [Colo.] 100 P 607. Order discharging rule for judgment against garnishee on his answers to interrogatories. Brendlinger v. Riegel, 37 Pa. Super. Ct. 474. Order confirming award of arbitrators. Appeal is from judgment on award. Code Civ. Proc. § 2381. In re Picker, 130 App. Div. 88, 114 NYS 289. Order vacating award of arbitrators. Smith v. Long [Ind. App.] 88 NE 356. Order increasing alimony pendente lite. Kapp v. Kapp [Nev.] 99 P 1077. Refusal to quash an execution. Noojin v. U. S. [C. C. A.] 164 F 692. Refusal to dismiss appeal. Wilcox v. White [R. I.] 72 A 392. Order confirming commissioner's report and finding drainage district duly established. Damon v. Barker, 239 Ill. 637, 88 NE 278. Order made on petition for appeal from assessment of taxes by Philadelphia, requiring that the proceedings shall be under Act of April 19, 1889, P. L. 37. Chew v. Philadelphia, 35 Pa. Super. Ct. 66. Decree of court of appeals of District of Columbia affirming decision of commissioner of patents on appeal is not appealable to federal supreme court under 27 Stat. 434, 436, since it does not preclude contest in court under Rev. St. §§ 4914, 4915. Frasch v. Moore, 211 U. S. 1, 53 Law. Ed. 65. Judgment in action to recover interest on timber adjudging plaintiff's claims but leaving question for damages for jury. Moore v. Rowland Lumber Co. [N. C.] 63 SE 953. Order in foreclosure proceeding over which court still retains jurisdiction. Chicago Title & Trust Co. v. Thomson, 139 Ill. App. 158. Judgment in ejectment, where court merely decides question as to ownership of land, without awarding immediate possession, and retains control of proceedings for purpose of adjudicating rights of parties with reference to claim of betterments, as required by statute. Brown v. Norvell [Ark.] 115 SW 372. School land was leased for 50 years with agreement that rent should be fixed by appraisal every 10 years, lessees sued to set aside certain appraisal. Held that decree setting aside appraisal, and determining that rental was not fixed by lease, and providing that determination of rental value for ensuing ten years be reserved for further consideration of court until after final disposition of appeal therein allowed, was not final. Rosenthal v. Board of Education, 239 Ill. 29, 87 NE 878, afg. 141 Ill. App. 134. Usual course of proceedings by supreme court of Hawaii upon exceptions, without entering or directing judgment. Hutchins v. Bierce, 211 U. S. 429, 53 Law. Ed. 267. Overruling an exception taken under Hawaii Rev. Lawe 1905, § 1862, et. seq., which does not bring up whole case. Cotton v. Hawaii, 211 U. S. 162, 53 Law. Ed. 131. Judgment disposing of controversy between appellants, but not of issue between one of them and appellee. Williams v. Bell & Co. [Tex. Civ. App.] 116 SW 837. Judgment in action on joint and several obligation, so long as it remains pending as to some of defendants. People v. Jamison, 141 Ill. App. 406. Judgment awarding partition and apportioning share of various parties, and appointing referees to make partition and make accounting of rents and profits, with directions to report findings to court. Skallberg v. Skallberg [Neb.] 121 NW 979. In suit to compel conveyance of undivided interest in realty and for accounting of rents and profits and royalties, decree determining rights and equities of parties, and directing conveyance of said undivided interest to complainant, but not fixing time when it should be made, and adjudging that complainant was entitled to part of rents, etc., and referring case to master for accounting. Maas v. Lonstorf [C. C. A.] 166 F 41. Since decree fixed no time for conveyance, execution of that portion of it was as effectually reserved until further order of court as though court had specifically so stated. Id.

59. Appeal taken before judgment is entered of record will be dismissed as premature, though judgment is subsequently entered nunc pro tunc as of date prior thereto. Pedley v. Werdin [Cal.] 99 P 975. No appeal from order of appellate division affirming judgment of principal court until judgment on order has been entered. Moore v. Board of Education [N. Y.] 88 NE 645. Ruling on demurrer not appealable unless judgment has been entered thereon. Ernst v. Rathgeber, 114 NYS 51. Refusal of trial court to approve bond for removal to federal court not reviewable where no order was entered thereon. Browning v. Moses, 60 Misc. 111, 111 NYS 651. Entry must purport to be an actual judgment conveying the judgment or sentence of the law as distinguished from a mere memorandum, note, or recital that a judgment has been or will be rendered. Fauber v. Keim [Neb.] 120 NW 1019. Must be final order or judgment rendered and formally entered upon record of trial court, a mere memorandum of the trial judge being insufficient. Id. Journal entry merely reciting submission of cause and that "the court finds for the defendant and judgment of dismissal. Plaintiff excepts to findings and judgment," held not to show final judgment. Id. Entry "demurrer to replication sustained" does not import judgment so as to support appeal. Long v. Holley [Ala.] 47 S 655. Journal entry by clerk to effect that decree was granted for plaintiff as prayed and judgment was rendered against defendant for costs held an appealable adjudication, so that appeal would

consent,[60] and not due to his default.[61] Decisions other than the foregoing are reviewable under various statutes if they determine the "merits" or "principles of the cause," "deny a rightful mode of trial," "in effect discontinue the cause" or "prevent judgment," [62] or if they affect substantial rights.[63] Whether the judgment in

not be dismissed though taken before judgment was formally entered. Owens v. National Hatchet Co. [Iowa] 121 NW 1076. Where order denying defendants' motion for new trial on plaintiffs consenting to reduction of judgment was made and entered in minutes of court, held that defendants had immediate right of appeal therefrom, and that appeal was not premature because at time it was taken judgment as reduced had not been made or entered. Code Civ. Proc. § 939, subd. 3. O'Rourke v. Finch [Cal. App.] 96 P 784. Where judgment maintaining exception of no cause of action has been rendered, and suit dismissed, appeal taken before judgment hae been signed is premature. Mitchell v. Shreveport Creosoting Co. [La.] 49 S 655. Minute entry by clerk reciting that court maintained exception of no cause of action does not show appealable judgment. Id. Statutory right of appeal from orders in term time granting an injunction cannot be defeated by act of clerk in copying order into minute book instead of into what he regards as a regular book for entry of such orders, nor by failure or delay of clerk in copying such orders into records of court. Meredith v. Aurora, etc., R. Co., 142 Ill. App. 475.

60. Voluntary nonsuit not appealable. Netzow Mfg. Co. v. Baker [Mo. App.] 119 SW 450; Hoss v. Palmer [N. C.] 63 SE 171. Appeal does not lie from judgment by confession. Code 1896, § 477. Winkler Brokerage Co. v. Courson [Ala.] 49 S 341. Action of state board of equalization in dismissing appeal from assessment to which petitioner consented not reviewable. Borough of Kenilworth v. Board of Equalization of Taxes [N. J. Law] 72 A 966. Where allegations of bill as to conclusions of law drawn from, or provisions of law applicable to facts alleged are not correct as matter of law, an erroneous decree entered in accordance with such allegations may be assigned as error and reversed on appeal by interested party against whom decree pro confesso was entered. Lybass v. Ft. Myers [Fla.] 47 S 346.

61. Default judgment is not appealable. Stern v. Marcuse, 128 App. Div. 169, 112 NYS 653; McNiece v. Sapan, 112 NYS 1117; Anderson v. Thorps, 113 NYS 730; Davies v. Myers, 113 NYS 9; Goldstein v. Rosenthai, 113 NYS 1012; Liebling v. Borg, 113 NYS 549; Merritt & Chapman Derrick & Wrecking Co. v. Koronsky, 113 NYS 744; Goldman v. Brooklyn Heights R. Co., 129 App. Div. 657, 114 NYS 182; Jefferson Bank v. Montifiore Realty Co., 114 NYS 862; Pepe v. Curti, 114 NYS 415; Lindenborn v. Vogel, 131 App. Div. 75, 115 NYS 962; Martin v. Lefkowitz, 62 Misc. 490, 115 NYS 64. Judgment in attachment proceedings and order denying vacation of same are appealable when defendant was served with neither summons nor notice of entry of judgment, and he appeared only for purpose of moving to vacate. Hotel Touraine v. Waite, 61 Misc. 54, 113 NYS 19. On return day defendant appeared, joined issue and moved dismissal for insufficiency of petition, and motion was denied and case proceeded, plaintiff introducing proof and defendant standing mute, final order entered for plaintiff. The fact that original order was entered prior to proof rendered none the less a ruling on case, hence the judgment was not in default and final order is appealable. Altschuler v. Lipschitz, 113 NYS 1058. Demurrer to complaint was sustained, and, plaintiffs having failed to amend or plead further, action was dismissed on motion after expiration of time for amending. Held that judgment was not one by default and was appealable, plaintiffs not being bound to ask leave to amend. Rayburn v. Abrams [Wash.] 100 P 751.

Contra: Appeal lies from default judgment. Lemon v. Hubbard [Cal. App.] 102 P 554. Rev. St. 1887, § 4838, gives right to appeal to district court from any final judgment of probate court in civil action whether in contested case or upon default for want of an answer. Smith v. Clyne, 15 Idaho, 254, 97 P 40.

62. Held appealable: Order of appellate division resettling judgment in action by vendee to reform contract of sale added to judgment affirming dismissal of complaint provision that it should not bar action by vendee either for specific performance or for recovery at law of amount paid by vendee upon execution of the contract with certain disbursements. Held that, though order was unauthorized to extent that it authorized suit for specific performance because vendee had previously abandoned right to bring such a suit, it was not appealable, since it was not order finally determining a special proceeding, and appeal was not from judgment which it purported to amend. Whalen v. Stuart, 194 N. Y. 495, 87 NE 819. Action was brought against nonresident and summons served by publication. Garnishment proceedings were also instituted. Held that, since main action was one in rem, order dismissing garnishment in effect terminated action. Bristol v. Brent [Utah] 99 P 1000.

Held not appealable: Order overruling plea to jurisdiction over persons of defendants held not to in effect dispose of case. Civ. Code 1901, § 1214. London-Glasgow Development Co. v. Powers [Ariz.] 100 P 454. Order permitting withdrawal of exceptions to referee's report and demand for jury is not order involving question of law, determining the action, or preventing judgment which may be appealed. Clark's Code, § 548. Greenlee v. Greenlee [N. C.] 64 SE 763. Denial of temporary injunction held not to have involved determination of sufficiency of amended complaint so as to have in effect determined action, and hence not to be appealable under Ball Ann. Codes & St., § 6500, subd. 6. Masvero v. Campbell & Co. [Wash.] 100 P 1024.

63. Held appealable: Order in divorce proceedings directing conveyance of property to trustee for benefit of minor heirs. Lowe v. Lowe [Wash.] 101 P 704. Entry of subsequent interlocutory and final judgments

a common-law case tried by consent by the court without a jury is reviewable depends on whether the statute authorizes such a method of trial.[64] Under the various statutes, the appealability of orders and adjudications in interlocutory,[65] provisional,[66] extraordinary,[67] and special[68] proceedings depends upon their finality

cannot defeat right of party to appeal from orders affecting his substantial rights which were foundation of judgments. Feist v. Weingarten Bros., 111 NYS 848. Where Greater New York Charter (Laws 1897, p. 630, c. 378) § 1476 provides summary proceeding for revocation of theatrical license without appeal and Code Civ. Proc. § 1356 provides for appeal from order affecting substantial rights though § 1361 provides no appeal where specially denied, by statute, summary proceedings under § 1476 were appealable under § 1356, where court appointed referee which was not authorized under § 1476. In re City of New York, 116 NYS 353.

64. There being no law under which, in common-law case, facts may be tried to court without jury in district court, where case is so tried by stipulation, judgment is not reviewable in circuit court of appeals. United States v. Louisville & N. R. Co. [C. C. A.] 167 F 306. No question of law can be reviewed on writ of error except those arising on process pleadings or judgment, unless facts are found by a jury by general or special verdict, or are admitted by parties on case stated. Erkel v. U. S. [C. C. A.] 169 F 623. Under Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570), where there is no written stipulation waiving jury, none of the questions decided can be re-examined on writ of error. Id. Cal. Code Civ. Proc. § 631, permitting oral waiver, held not to apply in federal court. Id. Where, by consent, an action in district court triable by jury under Rev. St. § 566 is tried by the court, findings of fact and application of legal conclusions thereto are not reviewable. United States v. St. Louis, etc., R. Co. [C. C. A.] 169 F 73. Rev. St. §§ 647, 700, providing for review of cases tried after waiver of jury, relates exclusively to circuit courts and no similar provision exists with regard to district courts. Id. Case tried without jury may be reviewed under Rev. Code 1906, § 7229, where entire evidence is presented. Massey v. Rae [N. D.] 121 NW 75.

65. Order allowing temporary alimony: Order increasing alimony pendente lite not appealable, not being among those enumerated in Civ. Prac. Act. § 330 (Comp. Laws, § 3425) and not being final. Kapp v. Kapp [Nev.] 99 P 1077.

66. Receivership proceedings: Order appointing receiver in suit by stockholder of corporation for removal of directors, for cancellation of stock fraudulently issued, and for appointment of receiver pending the action, is appealable. California Fruit Growers' Ass'n v. Los Angeles Super. Ct. [Cal. App.] 97 P 769. Though appointment of receiver for corporation was originally for purpose of preserving its property pending action by stockholder for removal of directors, etc., held that order for sale of part of such property made necessary by circumstances subsequently arising was so far independent of suit itself as to make it substantially a final decree for purposes of appeal. Id. Order in insolvency proceedings instituted by state against bank requiring plaintiff to pay over to receiver certain sum in its hands belonging to insolvent held final adjudications of plaintiff's claim that it had right to retain money until rights of third persons, claiming interest therein, had been determined or to pay it into court to abide such determination, and hence in effect a final judgment against plaintiff in collateral proceeding growing out of main action, and appealable though there had been no final decree in such main action. Anglo-Californian Bank v. California Super. Ct., 153 Cal. 753, 96 P 803. Order held final determination of rights of one of said third persons who had intervened in proceedings to compel payment to receiver, and that plaintiff was not deprived of his right to appeal therefrom because it was made before day set for hearing of intervener's petition and without any such hearing. Id. Order to pay money to receiver is final and appealable. Burnham v. Barrett, 137 Ill. App. 119. Decree allowing compensation to receiver for himself and solicitor which requires evidence to establish is interlocutory and not appealable. Terry Lumber Co. v. Mildred Park Amusement Co., 143 Ill. App. 202. Where receiver procured dismissal of writ of error from appellate court to review order procuring receiver's report and discharging him on ground that same was not final, held that he could not thereafter, on appeal to supreme court from judgment committing him for contempt for failure to obey order directing him to pay over certain money, contend that former order was final and appealable. People v. Zimmer, 238 Ill. 607, 87 NE 845. Judgment fixing fees of receiver after filing of final account containing item in his favor for fees under first appointment which had been set aside, after first appointee filed general opposition to account is interlocutory judgment binding on all parties and is appealable. E. D. Burgurieres Planting Co., 122 La. 602, 48 S 121. Order dismissing petition for order to suspend receiver's sale until receiver files an account is interlocutory and not appealable. Hilliard v. Sterlingworth R. Supply Co. [Pa.] 73 A 191. Order made in vacation sustaining exceptions to motion to vacate order appointing receiver and dismissing such order, held not appealable under Sayles' Ann. Civ. St. 1907, art. 1383, authorizing appeals from interlocutory orders appointing receivers, said order not being one appointing receiver though original appointment was void. Texas & O. Lumber Co. v. Applegate [Tex. Civ. App.] 114 SW 1169. Decree refusing to appoint special receiver not appealable. Stafford v. Jones [W. Va.] 64 SE 723.

Injunctions: Order refusing to vacate or modify temporary injunction not appealable. Ots v. San Francisco Super. Ct. [Cal. App.] 101 P 431. Temporary injunction granted on notice is appealable. Id. Statutory right to appeal from order made in term time granting injunction cannot be defeated by failure or delay of clerk in copying same in-

to records of court. Meredith v. Aurora, etc., R. Co., 142 Ill. App. 475. Motion to dissolve in lower court is not essential to right to appeal from order granting injunction. Id. Trial courts discretion in granting or continuing temporary injunction is legal and subject to review. Swan v. Indianola [Iowa] 121 NW 547. Under Wilson's Rev. & Ann. St. 1903, c. 66, art. 22, § 561 (par. 4759), party who procures temporary injunction may appeal from order dissolving or modifying same. Pioneer Tel. & T. Co. v. Chelsea [Okl.] 102 P 83. Order of district judge at chambers refusing to dissolve or modify temporary injunction previously granted during his absence by county judge is not appealable. School District No. 8 v. Eakin [Okl.] 100 P 528. Acts 1907, p. 206, c. 107, held to provide for appeal only from final order of judge wherein temporary injunction is granted or refused, and not to authorize appeal from order refusing to grant temporary injunction after hearing on order to show cause. Berger v. DeLoach [Tex. Civ. App.] 113 SW 557. Order held in effect one granting temporary injunction, though it expressly stated that injunction was refused, and hence to be appealable. City of Marshall v. Allen [Tex. Civ. App.] 115 SW 849. Court of civil appeals has jurisdiction of appeal from order of district judge in vacation granting temporary injunction restraining execution of judgment of county court. Texas & P. R. Co. v. Butler [Tex. Civ. App.] 114 SW 671. Order denying temporary injunction held not appealable under Ball. Ann. Codes & St. § 6500, subd. 3, in absence of finding by court that party against whom it was issued was insolvent. Masoero v. Campbell & Co. [Wash.] 100 P 1024. Act March 3, 1891, as amended by Act June 6, 1900, authorizing appeal to circuit court of appeals where upon hearing in equity in district or circuit court, or by judge thereof in vacation, an injunction is granted or continued, or a receiver appointed by an interlocutory order or decree in a cause in which an appeal from final decree may be taken to circuit court of appeals, construed, and held that "hearing in equity" as there used does not mean final hearing or trial or merits, statute expressly authorizing appeals from interlocutory orders, which are such as settle some intervening matter relating to cause. Taylor v. Breese [C. C. A.] 163 F 678. Temporary restraining order held an injunction within meaning of statute, and to have been granted upon a hearing in equity, and hence to be appealable. Id. Order granting temporary injunction held to have been made upon a "hearing in equity." Northern Pac. R. Co. v. Pacific Coast Lumber Mfrs.' [C. C. A.] 165 F 1. Order of court of equity staying further proceedings in action at law between same parties and involving same issues held order granting an injunction within meaning of Act March 3, 1891, § 17, 26 St. 828, as amended by Act April 14, 1906, c. 1627, 34 St. 116, and to be appealable. Griesa v. Mutual Life Ins. Co. [C. C. A.] 165 F 48. Where, in response to order to show cause why injunction should not issue, defendants present admissible opposing affidavits and letters but court refuses to read or hear them, and orders injunction until further order of court, there is hearing in equity. Shubert v. Woodward [C. C. A.] 167 F 47. Statute gives court of appeals jurisdiction to review such orders "in any cause," and hence appeal lies to that court from temporary injunction though jurisdictional questions alone are involved. Northern Pac. R. Co. v. Pacific Coast Lumber Mfrs. [C. C. A.] 165 F 1.

67. Mandamus: Appeal is statutory method of reviewing denial of petition for mandamus. Court & Prac. Act 1905, § 328. Fiske v. Vaughn [R. I.] 72 A 530. Rule that appeal lies only from final judgment applies in mandamus. Carter v. Warnock [Fla.] 49 S 186. Ruling sustaining demurrer to petition for mandamus and dismissing action before making motion for writ is final and appealable order. Gay v. Haggard [Ky.] 118 SW 299.

68. General right of appeal from final judgments does not apply to special proceedings. Randolph v. Indianapolis [Ind.] 88 NE 949. Order of county court confirming decision of commissioners in **highway proceedings** not reviewable as to necessity of proposed highway or amount of damages. Highway Law, § 89 (Laws 1890, c. 568). In re Wegstaff, 129 App. Div. 591, 114 NYS 226. Order quashing report of viewers for uncertainty, order setting aside report of viewers for uncertainty for excessive allowance of damages, for not commencing work at place mentioned in notice, and an order discharging a rule to show cause why an appointment of viewers should be revoked, are not final orders and not appealable. Perry v Tp. Road, 36 Pa. Super. Ct. 131. No appeal from action or decision of board or tribunal conducting statutory proceedings for improvement of streets or highways and assessment of costs. Randolph v. Indianapolis [Ind.] 88 NE 949. Under Act 1905, p. 292, c. 129, § 11 (Burns' Ann. St. 1908, § 8716), as to assessments for street improvements, declaring that report of appraisers is final, no appeal lies from such report. Id. Order setting aside report of appraisers appointed to assess benefits for street improvements is not final judgment. Id. Is order in exercise of jurisdiction and incident to principal proceeding administrative in character, wherefore unappealable. Id. Under Kirby's Dig. § 1428 as to appeals in **drainage proceedings**, final order approving assessment or dismissing whole proceeding is alone appealable, and order changing route of ditch and requiring reassessment and report, is not. Williamson v. Rutherford [Ark.] 120 SW 402. Under Act May 16, 1907, § 19 (Laws 1907, p. 304) giving county court "final jurisdiction" in **proceedings to contest local option election,** no appeal lies from its judgment in such a case. Saylor v. Duel, 236 Ill. 429, 86 NE 119. Act is not in conflict with U. S. Const. amend. 14, as abridging privileges and immunities of citizens, or as depriving one of life, liberty or property without due process of law, or as denying equal protection of the law. Id. Nor is it special legislation within meaning of Const. art. 4, § 22. Id. No appeal lies to circuit court from judgment of justice of peace on verdict of jury assessing damages to land owners in **condemnation proceedings** under farm drainage act (Hurd's Rev. St. 1908, c. 42), since act provides that such judgment shall be final and conclusive, notwithstanding general statute allowing appeals from justice in other cases. Drainage Com'rs v. Harms, 238 Ill. 414, 87 NE 277.

and effect, and the same is true of orders in contempt proceedings.[69] Decisions by nonjudicial boards or tribunals are reviewable only by statute.[70] Rulings relating to pleadings,[71] and process,[72] and matters of practice before and at the trial,[73] are

69. Decree adjudging person guilty of contempt and providing for punishment unless he comply with court's order is interlocutory, and not appealable. Code 1906, § 139. Nutt v. State [Miss.] 49 S 145. Appeal lies from decree denying and dismissing complainant's petition that respondents be adjudged guilty of civil contempt. Jastram v. McAuslan [R. I.] 71 A 454. Judgment of circuit court fining one for contempt for violating injunction against infringement of patent is reviewable in circuit court of appeals by writ of error. Continental Gin Co. v. Murray Co. [C. C. A.] 162 F 873. Judgment holding one guilty of contempt for disobeying order made in action at law, being for protection of rights in litigation of party thereto, is not final or reviewable. International Paper Co. v. Chaloux [C. C. A.] 165 F 436. Such judgment not being final, order for enforcing which it was made could not be regarded as final. Id.

70. Applicant for certificate to practice medicine may appeal to circuit or superior court from **action of board of medical examiners** refusing to give him examination or to grant him certificate. Burns' Ann. St. 1908, § 8405. State v. Indiana State Board of Medical Registration & Examination [Ind.] 87 NE 139. A review of proceedings before State board of medical examiners by district court is "special proceeding" from which appeal lies under Rev. Codes, §§ 7098, 7099. State v. District Court of Second Judicial Dist. [Mont.] 101 P 961. Appellate division has jurisdiction to review determinations of **board of railroad commissioners.** In re Buffalo Frontier Terminal R. Co., 131 App. Div. 503, 115 NYS 483. Appeal to district court under Mills' Ann. St. § 802 from order of **board of county commissioners** disallowing claim against county is not a special proceeding, but proceeding is a civil action, and final judgment of district court is reviewable by supreme court under const. art. 6, § 2. Washington County v. Murray [Colo.] 100 P 588. Allowance by commissioners of part of claim against county in full payment thereof held not such a definite and certain order of disallowance of balance as to authorize appeal from such disallowance under Mills' Ann. St. § 802. Id. Appeal from decision of board or officer valuing property for taxation is purely statutory and must be to statutory tribunal. Clay County v. Brown Lumber Co. [Ark.] 119 SW 251.

71. Judgment for defendant entered on plaintiff's refusal to join issue on denial of motion for judgment by default for want of sufficient plea and **affidavit of defense** is final judgment as to plaintiff, and appealable. Smith v. Woman's Medical College [Md.] 72 A 1107.

Rulings on motions to make more definite and certain: Order requiring complaint to be made more definite and certain and in default thereof that it be stricken out "involves the merits of the action or some part thereof" and "determines the action and prevents a judgment from which an appeal might be taken" within meaning of Rev. Laws 1905, § 4365, subds. 3, 5, and appealable. Lovering v. Webb Pub. Co. [Minn.] 120 NW 688. Order requiring answer of defendant to be more specific is not appealable. Dawkins v. Columbia Elec. St. R., L. & P. Co. [S. C.] 63 SE 746.

Rulings on demurrers: Interlocutory decree overruling demurrer to cross bill not appealable. Code 1907, § 2838. Thomas v. Thomas [Ala.] 49 S 1027. Decree of chancellor sustaining demurrers to respondent's cross bill and dismissing same held not appealable under Code 1907, § 2838. Aston v. Dodson [Ala.] 49 S 856. Held not final within meaning of Code 1907, § 2837. Id. Code 1896, § 427, gives right of appeal from decree on pleas and demurrers, but no right from decrees on demurrers to cross bills. Sumner v. Hill [Ala.] 47 S 565. Judgment entered on plaintiff's declining to plead further after sustaining of demurrer to complaint, is final and appealable. Ellis & Co. v. Brannen [Ala.] 49 S 1034. Order sustaining demurrer is not appealable. Code Civ. Proc. § 939. Litch v. Kerns [Cal. App.] 97 P 897. Order sustaining demurrer to petition reciting that petitioners excepted to ruling and declined to plead further and adjudging that defendants recover their costs, held not final or appealable. People v. Scott County Board of Education of Dist. No. 24, 236 Ill. 154, 86 NE 206. Judgment for costs against losing party is not final determination of the case. Id. Defendant may appeal from order overruling demurrer to bill of complaint. Stinson v. Ellicott City & Clarksville Co. [Md.] 71 A 527. Payment of $10 and costs, imposed by Code Pub. Gen. Laws 1904, art. 16, § 154, on party whose demurrer is overruled, held not condition precedent to right to appeal from such order, so that failure was not ground for dismissal. Id. Word "decree" as used in Acts 1907, p. 497, No. 340, § 2, regulating chancery decrees is not confined to final decrees, but is broad enough to include order overruling demurrer, and hence such an order is appealable. Moody v. Macomber [Mich.] 16 Det. Leg. N. 36, 120 NW 358. Said act held not to have repealed Comp. Laws 1871, c. 176, § 143, allowing appeals from such orders. Id. Application for appeal from decree overruling demurrer to settle principles of the cause held properly refused, where there were no principles to be settled, and appeal would only have resulted in vexatious delay and expense. Delta & Pine Land Co. v. Adams [Miss.] 48 S 190. Record returned to writ of error recited that court having heard argument on demurrer to declaration and duly considered same did order that same be sustained with costs, there being no more formal entry of judgment, nor any award of specific sum for costs. Held that, after joinder in error and argument on merits, judgment was sufficient in substance for purposes of review, and would be treated as amended with respect to matters of form. Tomlinson v. Armour & Co., 75 N. J. Law, 748, 70 A 314. Where demurrer is overruled subsequent to filing of amended pleading omitting the matter demurred to, remedy, if any, is by motion in trial court to correct.

generally not reviewable except under express statutory provisions, or where they in effect finally determine the action or involve substantive rights on the merits. Dismissals [74] and nonsuits [75] are usually reviewable only when determinative of the ac-

judgment overruling demurrer rather than by appeal. Ullman v. Tanner, 127 App. Div. 808, 111 NYS 844. Judgment in favor of either party on demurrer to declaration is final and reviewable. Tomlinson v. Armour & Co., 75 N. J. Law, 748, 70 A 314. Decision of court on issue of law raised by demurrer to pleading not appealable, but remedy is to appeal from judgment entered on decision. Mann v. Press Pub. Co., 117 NYS 779. Order on demurrer in municipal court not appealable. Schumer v. Kohn, 111 NYS 728; Watson v. Duryea, 117 NYS 348. Order merely sustaining demurrer to complaint without finally determining action in any way is not appealable, it not being one which in effect determined action. Giant Powder Co. v. Oregon W. R. Co. [Or.] 101 P 209. Rulings on demurrers which, if complied with would result in submitting immaterial issue to jury, are appealable. Probate Court v. Fitz-Simon [R. I.] 71 A 641. No writ of error from judgment merely overruling demurrer. Ritchie County Bank v. Ritchie County Ct. [W. Va.] 63 SE 1098.

Rulings on motions to strike: Refusal to strike claim for damages from complaint not reviewable since defendant could object to proof of same or charge of same if not recoverable. North Alabama Coal, Iron & R. Co. v. Jones [Ala.] 47 S 144. Judgment reciting that plaintiff's motion to strike part of amended answer was sustained, that court upon its own motion ruled that petition did not state cause of action that plaintiff refused to plead further and that, on defendant's motion, cause was dismissed, there being no appearance of demurrer was not final or appealable. Bick v. Umstattd [Mo. App.] 117 SW 642. Order refusing motion to strike portions of answer as frivolous, not appealable. McCandless v. Mobley, 81 S. C. 303, 62 SE 260.

Rulings as to amendments: Order refusing to permit filing of amended petition not final or appealable. Poor v. New South Brew. & Ice Co., 33 Ky. L. R. 1088, 112 SW 618. Order overruling motion asking permission to withdraw amended petition which had already been stricken from files is not order from which proceeding in error lies. Divine v. Harmon [Okl.] 101 P 1125.

72. Order quashing summons, not being one of orders enumerated in Rev. St. 1887, § 4807, subd. 3, is not appealable but can only be reviewed on appeal from judgment. Maple v. Williams, 15 Idaho, 642, 98 P 848.

73. Administrative order joining parties, directing compliance with order, appointing trustees, and ordering hearing before reference, is not immediately appealable. Ex parte Ferguson [S. C.] 64 SE 750. Order denying **motion that clerk return moneys deposited** with him as tender is not appealable, such deposit not being proper tender and clerk a mere stakeholder not within purview of court as such. Campbell v. Abbott, 60 Misc. 93, 111 NYS 782. Order denying **motion to amend findings** of fact and conclusions of law not appealable. In re Wikannis Co. [Minn.] 121 NW 212. Order denying **motion to correct record** is not appealable. Levy v. Spier, 113 NYS 841. Order **striking case from docket** not reviewable. Loflin v. Ayres [C. C. A.] 164 F 841. Order denying an **application for adjournment** to procure witness affects substantial right and is appealable. Code Civ. Proc. § 8139, subd. 4, § 1347. Damsky v. Dochterman, 61 Misc. 597, 114 NYS 170; Harde v. Purdy, 62 Misc. 232, 114 NYS 814. Upon denial of application for postponement, better practice is to proceed with trial and appeal from judgment or to suffer default and move to reopen, but under certain circumstances appeal will be heard directly from the order. Id.

74. **Held appealable:** Order dismissing for want of prosecution. Ellis & Co. v. Brannen [Ala.] 49 S 1034. Order reciting that case had been heard on motion to have amended petition treated as petition that court overruled motion and plaintiff declining to plead further, it was adjudged that action be abated. Frankfort Board of Councilmen v. Herndon's Adm'r [Ky.] 118 SW 347. Order dismissing complaint for noncompliance with order for discovery, since it, in effect, determines action and prevents judgment which might be appealed. Code Civ. Proc. § 1347, sub. 5. Banes v. Rainey, 130 App. Div. 465, 114 NYS 986.

Held not appealable: Order dismissing bill as to one defendant on hearing of plea stating her interest in premises. Foote v. Yarlott, 238 Ill. 54, 87 NE 62. Order dismissing action for defendant's failure to have judgment entered on verdict in its favor, it not being final, or among those enumerated by Rev. Codes, § 7098, enumerating appealable orders. Hovey v. Northern Pac. R. Co. [Mont.] 101 P 146. Unnecessary order entered on ruling on a motion to dismiss. Abrashkov v. Ryan, 130 App. Div. 492, 114 NYS 973. Dismissal of bill under equity rule 68 without hearing evidence on part of defendant held improperly assigned as error since action of trial did not become final until made so by court in passing upon exceptions to it. Thomas v. Borden, 222 Pa. 184, 70 A 1051.

75. **Held not appealable:** Voluntary nonsuit. Netzow Mfg. Co. v. Baker [Mo. App.] 119 SW 450. Submitting controverted fact determinative of case to jury does not render nonsuit thereupon taken by plaintiff involuntary and appealable where there was substantial evidence in support of plaintiff's contention. Id. Judgment of voluntary nonsuit after overruling of motion to amend complaint where judge ruled plaintiff could not recover punitive damages. Hoss v. Palmer [N. C.] 63 SE 171. Ruling as to damages only affects quantum of damages and should be excepted to and reviewed on appeal from final determination. Id. Under Code 1896, § 614, as amended by Act Feb. 2, 1903 (Acts 1903, p. 34), no appeal lies unless nonsuit is taken or necessitated by adverse rulings, either as to pleadings or matters presentable by bill of exceptions. Long v. Holley [Ala.] 47 S 655. Nonsuit not taken because of adverse rulings where, after sustaining of demurrer, plaintiff secured leave to

tion and refusals to make such orders are not reviewable.[76] Judgments for costs[77] or denying costs,[78] and orders relating to the taxation of costs,[79] or the giving of security for costs,[80] are not separately reviewable, in the absence of statutory provision to the contrary. Rulings on motion for a new trial are usually held not appealable in the absence of a statutory provision to the contrary.[81] In general an ex parte order is not appealable; the remedy is to have it set aside.[82] Orders after

amend and then informally announced he would take nonsuit. Id.

76. Order denying motion to dismiss complaint on ground of laches. Berkowitz v. Brewery, 113 NYS 919. Denial of motion to dismiss petition in condemnation proceedings. Chicago Terminal Transfer R. Co. v. Preucil, 236 Ill. 491, 86 NE 117.

Held appealable: Bringing up case on exceptions to municipal courts, order overruling plea in abatement and by appeal from order overruling motion to dismiss, held proper practice. St. 1906, p. 310, c. 342. Potter v. La Pointe Mach. Tool Co. [Mass.] 88 NE 418.

77. **Held appealable:** Order adjudging contempt and imposing costs as penalty. Ball. Ann. Codes & St. § 5811. Drainage Dist. No. 1, v. Costello [Wash.] 101 P 497. Rule that writ of error will not be from judgment for costs only applies only where awarding of costs is discretionary, and not where it is contended that they should have been awarded to a party under a proper construction of positive law. Scatcherd v. Love [C. C. A.] 166 F 53.

Held not appealable: Order awarding costs. Bonnell v. Campbell, 143 Ill. App. 251. Judgment for costs, unaccompanied by finding on merits or order dismissing action. Benjamin v. Chicago, I. & L. R. Co., 140 Ill. App. 312. Mere judgment for costs and costs cannot be considered as affecting right to appeal. Galvin v. Shafer [Ky.] 113 SW 485. Judgment for costs alone where merits not adjudicated, though entered for defendant after verdict. Mitchell v. St. Petersburg & G. R. Co. [Fla.] 47 S 794. Remedy for excessive taxation is by motion for retaxation. Loewer v. New York Taxicab Co., 115 NYS 127. Since justice of city court has power to revise or recall his decision, appeal from order imposing costs on ground that memorandum did not mention costs is frivolous. Orlando v. Palladino, 61 Misc. 103, 112 NYS 1118.

78. **Held not appealable:** An order refusing to tax costs. Great Northern Moulding Co. v. Bonewur, 128 App. Div. 101, 112 NYS 466. That part of order sustaining demurrer which refuses to tax costs. Id. Denial of motion for damages and costs to patentee in proceedings for contempt for infringement. Cazier v. Mackie-Lovejoy Mfg. Co. [C. C. A.] 168 F 701.

79. Order of municipal court denying retaxation of costs not appealable. Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811; Averbuck v. Hochlick, 63 Misc. 327, 117 NYS 187.

80. **Held appealable:** Order retaxing costs amounting to $260.15. Linforth v. San Francisco Gas & Elec. Co. [Cal. App.] 99 P 716.

Held not appealable: Order for security for costs with stay until filed. Clark v. Bay Circuit Judge, 154 Mich. 483, 15 Det. Leg. N. 811, 117 NW 1051. Order denying motion to give security for costs. Chapman v. Preszburg, 115 NYS 160.

81. **Held appealable:** Order granting new trial for newly-discovered evidence. Caseri v. Wogelsong, 114 NYS 882. Where upon defendant's application for new trial plaintiff refrained from moving but acquiesced, and one defendant thereupon objected, error in granting new trial at a subsequent day, there being no proper motion therefor, was appealable and hence not reviewable by certiorari. First Nat. Bank v. Richardson [La.] 49 S 485. Order denying motion for new trial based on granting of motion to dismiss appeal to district court made on trial of cause in that court. In re Burkleo [Minn.] 120 NW 526. Order granting new trial. Gen. St. 1906, § 1691. Mizell Live Stock Co. v. McCaskill Co. [Fla.] 49 S 501. Upon entry of order granting new trial, party aggrieved may, under Gen. St. 1906, § 1695, prosecute writ of error without waiting for final judgment, or, under § 1693, may wait until final judgment, and then sue out writ of error assigning as error granting of motion for new trial. Hainlin v. Budge [Fla.] 47 S 825. Right of appeal from order granting new trial given by Act Feb. 25, 1907 (Laws 1907, p. 313), if not previously exercised, is merged in right of appeal from final judgment when such judgment is rendered and thereafter right of separate appeals from order and judgment does not exist. Oldland v. Oregon Coal & Nav. Co. [Or.] 99 P 423. Prior to passage of said act, such an order was regarded as intermediate and interlocutory and reviewable under B. & C. Comp. § 557, upon appeal from final judgment, and said section is still in force notwithstanding Act of 1907. Id. Where notice of appeal embraced appeal from order granting new trial and also appeal from judgment rendered on such new trial, held that appeal would not be dismissed as double but so much of notice as related to order granting new trial would be treated as surplusage. Id.

Held not appealable: Order in effect setting aside verdict and granting new trial. Dooley v. Burlington Gold Min. Co. [Ariz.] 100 P 797. Refusal to grant new trial. Brinsfield v. Howeth [Md. App.] 73 A 289. Order denying motion for new trial not made upon settled case as required by rules of practice. Hamburger v. Lipschitz, 111 NYS 696.

82. Proper practice is to move to vacate and appeal from order of denial of vacation. Stewart v. Stewart, 127 App. Div. 672, 111 NYS 736. Order vacating ex parte order denying motion to open default on ground that previous order to open default had been disregarded. Speiser v. Greitzer, 113 NYS 815. Under Code 1904, c. 121, requiring court or judge in vacation to examine ex parte fiduciary accounts confirm and cor-

judgment are generally reviewable if they newly determine rights,[83] as in the case of orders on motions to vacate or modify judgment,[84] or to open defaults.[85] Ordinarily an appeal will not lie from a part of a judgment [86] unless it is severable.[87] Decisions of lower appellate or intermediate courts are reviewable in cases usually prescribed by statute [88] if they possess finality.[89] Error will not lie to a judgment

rect same, and § 2699, that report be taken to be correct except so far as surcharged or falsified in suit in proper time, except to executor's account could not appeal from order confirming same. Owens v. Owens' Ex'r [Va.] 63 SE 990.

83. Special order made after final judgment affecting said judgment, although not dependent upon it, is appealable. Magee v. Solano County Super. Ct. [Cal. App.] 101 P 532. Special order after judgment directing the payment of money levied upon under the judgment and sold on execution sale is appealable under Code Civ. Proc. § 939, subd. 3. Id. Order of superior court requiring sureties on undertaking, on appeal after money judgment in attachment suit, to justify before 29 days from filing of exception to their sufficiency, in special order made after final judgment and is appealable under Code Civ. Proc. § 963, even if made without jurisdiction. Holt v. James [Cal. App.] 101 P 1065. Appeal lies to court of appeals without permission from order of appellate division for distribution of surplus moneys arising upon foreclosure of mortgage by action, such orders not being made in the action, even though entitled therein, but in special proceedings commenced after action is ended by a final judgment. Velleman v. Rohrig, 193 N. Y. 439, 86 NE 476.

84. **Held appealable:** Order overruling motion to set aside void judgment. Baldridge v. Baldridge [Ky.] 117 SW 253. Order overruling motion to vacate judgment of dismissal and for costs is special order after final judgment, appealable under Rev. St. 1899, § 806. State v. Riley [Mo.] 118 SW 647. Judgment on motion to vacate judgment in lieu of writ of error coram nobis. Id. Order, vacating judgment in proceedings under Kirby's Dig. §§ 4431-4437, to vacate judgment rendered at former term which is equivalent to independent action for that purpose. Ayers v. Anderson-Tully Co. [Ark.] 116 SW 199. Order vacating judgment or granting new trial at same term as when judgment rendered, where appellant consents to judgment absolute on affirmance. Kirby's Dig. § 1188. Statute inapplicable to order rendered at prior term. Id. Order setting aside of decree of three years' standing, from which there had been no appeal on ground of no jurisdiction, to extent of determining jurisdiction in original decree. Gartman v. Ligthner [Ala.] 49 S 412. Order denying petition to vacate judgment held a "final order made after judgment which affects a substantial right" within Ball. Ann. Codes & St. § 6500, subd. 7 (Pierce's Code, § 1048). Kath v. Histogentic Medicine Co., 50 Wash. 454, 97 P 464.

Held not appealable: Order vacating decree of divorce. Botts v. Botts, 142 Ill. App. 216. Order refusing to set aside judgment of dismissal for failure to prosecute. Ellis & Co. v. Brannen [Ala.] 49 S 1034. Judgment overruling motion to set aside judgment by confession. Code 1907, § 2846. Baggett v. Alabama Chemical Co. [Ala.] 47 S 102. No trial or decision on issue of fact resulting in judgment, and in absence of statute motion is not reviewable unless void for want of jurisdiction. Id. Order refusing to set aside judgment of dismissal for failure to prosecute. Ellis & Co. v. Brannen [Ala.] 49 S 1034.

85. **Held appealable:** Order denying motion to open default judgment. Kramer v. Horowitz, 111 NYS 697. In municipal court. Laws 1902, p. 1563, c. 580, § 257. Browning v. New York Leasing Co., 111 NYS 704; Davies v. Myers, 113 NYS 9.

Held not appealable: Order opening default judgment. Kramer v. Horowitz, 111 NYS 697. Order vacating and setting aside default of defendant, made before entry of any judgment in the action, it not being one of the interlocutory orders mentioned in Code Civ. Proc. § 963, and not being an order after judgment. Savage v. Smith [Cal.] 97 P 821. Order setting aside judgment against garnishee and permitting him to answer. Darby v. French [Ky.] 112 SW 1132. Final order in default in a summary proceeding in municipal court. Browning v. New York Leasing Co., 111 NYS 704. Order denying motion to vacate default judgment and dismiss case is not order refusing to reopen default judgment such as would be appealable under municipal court act. Friedberger v. Stulpnagel, 59 Misc. 498, 112 NYS 89.

86. Supreme court without power under Rev. Codes 1905, § 7229, to review case tried without jury unless entire judgment is before it for final disposition. Tronsrud v. Farm Land & Finance Co. [N. D.] 121 NW 68.

87. Where different parts of decree are severable, appeal may be taken from either part without affecting decision made as to other. City of Centralia v. Norton & Co., 140 Ill. App. 54. That part of judgment foreclosing mortgage on land which orders personal judgment for deficiency is appealable. Homestead Land Co. v. Stropahl [Wis.] 121 NW 892.

88. On reversal without remand by appellate court of judgment in favor of city for $100 penalty and costs in favor of city for violation of ordinance, held that further appeal to supreme court would not lie in absence of certificate of importance. City of Chicago v. West Side Metal Refining Co., 237 Ill. 347, 86 NE 744. No appeal lies to court of appeals from judgment of circuit court on appeal from justice of peace, if justice had jurisdiction. Benton v. Stokes [Md.] 71 A 532. Where trial court has no power to grant extra allowance of costs, court of appeals may review order granting it, but when the power exists the amount to be granted is discretionary with courts below, and appellate division is court of last resort. MacDonnell v. Buffalo Loan, Trust &

rendered pursuant to directions given on remand,[90] but the contrary is true of a judgment rendered pursuant to a direction to make new findings of fact and conclusions of law and enter judgment thereon.[91]

(§ 4) *C. Reviewableness may depend on character or value of action, subject-matter, or controversy.*[92]—See 11 C. L. 135—The action or proceeding must be such as is covered by the statute relating to appeals[93] and in order to be reviewable by civil

Safe Deposit Co., 193 N. Y. 92, 85 NE 801. Under Code Civ. Proc. § 1336, held that where appellate division reverses an interlocutory judgment, and an order at special term is subsequently entered thereon, unsuccessful party must appeal to appellate division, though in case of affirmance he may appeal directly to court of appeals from judgment of special term. McNamara v. Goldman, 194 N. Y. 315, 87 NE 440. Error cannot be prosecuted to a judgment rendered on appeal from the determination by a justice of the peace on a motion to discharge an attachment. Greenhow v. Harrison, 12 Ohio C. C. (N. S.) 128. Judgment of court of civil appeals vacating order of district court dissolving temporary injunction against execution of county court judgment, final and not appealable to supreme court. Whether proceedings were properly commenced before district judge or not. Texas & P. R. Co. v. Butler [Tex.] 116 SW 360. Where circuit court reverses order of inferior court sustaining demurrer and overrules and remands case, it is not appealable. Ritchie County Bank v. Ritchie County Ct. [W. Va.] 63 SE 1098. No appeal from or writ of error to judgment or order of circuit court on appeal from county court, in respect to erroneous assessment of property involving only question of valuation. Id. 28 Stat. at L. 639, c. 145, § 11, and 33 Stat. at L. 1081, c. 1479, § 12, confer full appellate jurisdiction over court of appeals in the Indian Territory in circuit court of appeals for eighth district, and in the absence of statutory authority further review by federal supreme court is precluded. Laurel Oil & Gas Co. v. Morrison, 212 U. S. 291, 53 Law. Ed. —. Jurisdiction of circuit court of appeals is in no way measured or limited by its appellate jurisdiction over district or circuit courts. Id. Authority of federal supreme court to review judgments of supreme court of Hawaii rests entirely upon 31 Stat. 158, c. 339, § 86, as amended 33 Stat. 1035, c. 1465, § 3. Cotton v. Hawaii, 211 U. S. 162, 53 Law. Ed. 131.

89. Judgment of circuit court on appeal by remonstrators from decision of board of county commissioners in proceedings for improvement of highways, affirming decision and ordering that case be certified back to board with instructions to proceed therewith as required by law, held final and appealable to supreme court. Burns' Ann. St. 1901, § 644; Burns' Ann. St. 1908, §§ 671, 1393; Acts 1907, p. 137, c. 96. Hall v. McDonald [Ind.] 85 NE 707. Judgment of district court reversing judgment of justice of the peace held appealable. Radil v. Sawyer [Neb.] 120 NW 957. Order of circuit court on appeal reversing judgment of magistrate and ordering new trial on ground of insufficiency of evidence held not appealable since it did not determine any of rights of parties. Pace & Co. v. Atlantic Coast Line R. Co. [S. C.] 64 SE 915. Judgment of county court failing to dispose of one defendant on appeal from justice court held not appealable to court of appeals. Ingraham v. Rudolph [Tex. Civ. App.] 119 SW 906. Where appeal from judgment or order of county court appointing or refusing to appoint administrator has been allowed by, and docketed in, circuit court and appellant has right of appeal, order dismissing appeal as improvidently awarded will be treated as final judgment reviewable by writ of error. Butcher's Heirs v. Kunst [W. Va.] 64 SE 967. Judgment of highest court of state affirming, on third appeal, judgment of trial court on verdict for plaintiff held only final judgment appealable to federal supreme court, where on first appeal order granting removal to federal court reversed and remanded and on second appeal judgment directing verdict reversed. Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 Law. Ed. —. Not material that state supreme court regarded itself bound by previous appeals and declined to again consider questions on appeal. Id. Judgment of supreme court of Hawaii affirming on writ of error a judgment in ejection below is final and appealable to federal supreme court. Spreckels v. Brown, 211 U. S. 208, 53 Law. Ed. —. Decision of court of appeals of District of Columbia, affirming decision of commissioner of patents as to registration of trademark and certifying decision to commissioner, is not final and appealable to federal supreme court. Atkins & Co. v. Moore, 212 U. S. 285, 53 Law. Ed. —. Same held true of similar judgment in interference proceedings. Johnson v. Mueser, 212 U. S. 283, 53 Law. Ed. —.

90. Noyes v. Clarke, 141 Ill. App. 442.

91. On remand because of uncertain findings. Utah Ass'n of Credit Men v. Home Fire Ins. Co. [Utah] 102 P 631.

92. Search Note: See note in 1 L. R. A. (N. S.) 1083.

See Appeal and Error, Cent. Dig. §§ 110-328; Dec. Dig. §§ 33-65; 2 Cyc. 540-586; Courts, Cent. Dig. §§ 499-791; Dec. Dig. §§ 210-254; 11 Cyc. 801-843; 2 A. & E. Enc. P. & P. 36.

93. Action to determine, upon reference by surveyor general, rights of respective parties to purchase school land from state is special proceeding appealable to supreme court. Const. art. 6, § 4; Code Civ. Proc. § 52. Risdon v. Prewett [Cal. App.] 97 P 73. Judgment in mandamus to compel levy of school tax held not appealable to supreme court under const. and Mills' Ann. Code, § 388, there being no money judgment and no franchise or freehold involved. Brady v. People [Colo.] 101 P 340. Action to recover less than $1,000, in which injunction and other relief not incident to recovery of money were sought, held within provision of stat-

remedies must be civil in its nature.[94] Jurisdiction because of the subject-matter usually prevails over that dependent on the amount, and the existence of one jurisdictional predicate makes others needless.[95] An appeal to a court of intermediate appeal [96] or a failure to move for a transfer of the cause therefrom [97] is ordinarily regarded as a waiver of the right to a review of questions reviewable only by the court of last resort. Where the court of last resort has jurisdiction because of a particular question is involved, it ordinarily may decide the entire controversy.[99] In Louisiana, appeals on reconventional demands lie to the court having jurisdiction of the main demand.[99]

Particular jurisdictional facts. See 11 C. L. 136—Among the criteria prescribed by various statutes to determine appealability are the existence of a constitutional [1]

ute authorizing appeals to supreme court "in all other cases" than actions ex contractu where amount involved is less than $1,000, and cases sounding in damages where judgment is less than $1,000. Freundschaft Lodge No. 72, D. O. H. v. Alchenburger, 235 Ill. 438, 85 NE 653. That supreme court has by constitution original jurisdiction in mandamus in certain cases does not confer appellate jurisdiction in such cases. People v. McCullough, 239 Ill. 552, 88 NE 177. Action brought by leave of court against receiver for allowance of claim to be paid in due course of administration is civil action within jurisdiction of court of common pleas, and either party may appeal under Rev. St. § 5226 to circuit court. Webb v. Stasel [Ohio] 88 NE 143. Whether action is for "recovery of money only," and hence not appealable, is not to be determined by pleader's conclusions, or prayer of petition, but by consideration of whether from facts pleaded any relief is necessary, other than judgment for money. Hague v. Estate of Hague, 11 Ohio C. C. (N. S.) 406.

Divorce: Actions for divorce are suits in equity and hence supreme court has exclusive appellate jurisdiction in such cases. Const. art. 6, § 4. Stewart v. Torrance [Cal. App.] 98 P 396. Appeal from decree allowing counsel fees and alimony in divorce case lies to superior court and not to supreme court. Act May 5, 1899 (P. L. 248). Hartje v. Hartje, 222 Pa. 371, 71 A 538.

94. Action to recover penalty for violation of safety appliance act is civil action reviewable at instance of U. S. on writ of error. United States v. Louisville & N. R. Co. [C. C. A.] 167 F 306. Application of executrix to abate judgment assessing fine against her testator in his lifetime in criminal case held in effect civil suit, so that United States could appeal from order granting said application. United States v. New York Cent. & H. R. R. Co. [C. C. A.] 164 F 324. In proceedings by state against corporation for violation of anti-trust statute, state may appeal, action being civil proceeding, although statute makes acts sought to be restrained criminal. Wolf v. State Board of Medical Examiners [Minn.] 121 NW 395. Appeal in scire facias to court of civil appeal insufficient to confer jurisdiction on court of criminal appeals. Thomas v. State [Tex. Cr. App.] 119 SW 846.

95. Entry of judgment for costs against sureties on cost bound in action of ejectment may be reviewed, though amount is less than $200. Hamilton v. Winter, 50 Wash. 689, 97 P 1084.

96. Appealing to appellate court and submitting case for decision upon errors which that court may lawfully consider is waiver or abandonment of any assignment of error which it may not pass upon and which are reviewable only on direct appeal to supreme court. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595. One appealing case involving questions of which appellate court has no jurisdiction to, that court thereby waives such questions and cannot insist on further appeal from appellate to supreme court that latter shall consider such questions. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. Validity of statute. Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611. Constitutional question. Haas Elec. & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248. Freehold. Bennett v. Millard, 239 Ill. 632, 88 NE 165. Fact that case came to supreme court through appellate court held not to preclude consideration of question as to constitutionality of statute regulating practice in appellate court, since that question did not arise until after case reached appellate court. Clowry v. Holmes, 238 Ill. 577, 87 NE 303.

97. Defendant held not entitled to question constitutionality of statue in supreme court, where he did not, on plaintiff's appeal to appellate court, apply for transfer of case to supreme court on ground that constitutional question was involved. Commissioners of Vermillion Special Drainage Dist. v. Shockey, 238 Ill. 237, 87 NE 335. Defense of homestead waived where appellees did not apply for order transferring case from appellate to supreme court on ground that freehold was involved, or otherwise question jurisdiction of appellate court, but submitted case in that court for hearing on merits. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

98. Where supreme court has jurisdiction because constitutional question is involved. Pittsburg, etc., R. Co. v. Peck [Ind. App.] 88 NE 27. Where validity of statute is involved, jurisdiction of supreme court is not confined to determination of its validity, but it must decide all questions of law on which character of judgment must depend. Texas & P. R. Co. v. Webb [Tex.] 114 SW 1171.

99. Brooks-Scanlon Co. v. Booty [La.] 49 S 479.

1. Question must be real and not colorable only, and to determine whether such is case court will look beyond briefs, pleadings, and records. Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 SW 1108. Question must be fairly debatable. Boylan v. Chicago Title

question particularly pointed out,[2] set up,[3] necessary to a decision,[4] and adversely or prejudicially decided, or a question involving the validity [5] or construction [6] of stat-

& Trust Co., 240 Ill. 413, 88 NE 981. Appellate court has no jurisdiction where constitutionality of statute is involved. Botts v. Botts, 142 Ill. App. 216; Baumeister v. Fink, 141 Ill. App. 372. Appeal involving construction of state constitution not within jurisdiction of appellate court. Fitch v. Lewistown, 137 Ill. App. 570. Case involving constitutionality of statute transferred from appellate to supreme court, former having no jurisdiction. Inland Steel Co. v. Yedinak [Ind. App.] 86 NE 503; Pittsburgh, etc., R. Co. v. Peck [Ind. App.] 87 NE 153. Where constitutional question presented, appellate court cannot take jurisdiction on ground that question has been settled by supreme court. Thus preventing decision of supreme court and review by federal supreme court. Pittsburg, etc., R. Co. v. Peck [Ind. App.] 88 NE 627. Court of appeals has no jurisdiction of case turning on constitutional question. Walker v. Dunham [Mo. App.] 115 SW 1086; Emery v. St. Louis & S. F. R. Co. [Mo. App.] 116 SW 491.

Constitutional question involved: Whether filing of petition in bankruptcy by defendant and order of bankruptcy court enjoining prosecution of action subsequently instituted against him in state court in another state were bar to latter action, state court holding that they were not, held to draw into question authority exercised under the U. S. within meaning of Const. art. 6, § 12. Beekman Lumber Co. v. Acme Harvester Co., 215 Mo 221, 114 SW 1087.

No constitutional question involved: Argument that court did not correctly construe mechanics' lien law. Boylan v. Chicago Title & Trust Co., 240 Ill. 413, 88 NE 981. Assignment that court erred in taking case from jury thereby violating Const. § 28. art. 2, and also erred in instructing for defendant thereby depriving plaintiff of property rights in violation of Const. § 30, art. 2. Davis v. Thompson, 209 Mo. 192, 107 SW 1067. Case held merely to involve question whether proposed submission to voters of question whether saloons should be closed on Sunday was one of public policy within meaning of Hurd's Rev. St. 1905, p. 967, c. 46. People v. Cannon, 236 Ill. 179, 86 NE 215. Whether, in case where injunction is only an incident to main subject of litigation, party enjoined is, on motion to assess damages on injunction bond, entitled to recover his attorney's fees for defending suit, or whether he actually employed an attorney. Wabash R. Co. v. Flannigan, 218 Mo. 566, 117 SW 722. Supreme court does not acquire jurisdiction where constitutional question has been settled by previous decisions. Pittsburgh, etc., R. Co. v. Peck [Ind.] 87 NE 644; Pittsburg, etc., R. Co. v. Peck [Ind.] 88 NE 939, 627; Boylan v. Chicago Title & Trust Co., 240 Ill. 413, 88 NE 981; Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 SW 1108.

2. Must be preserved for review on record. People v. Chicago, 238 Ill. 146, 87 NE 307. Allegations of petition to show statute, repugnant to constitution, too vague and indefinite to raise question. Henslee v. McCarty, 131 Ga. 244, 62 SE 66. Must point out particular section of constitution relied on, it being insufficient to say in general terms that act complained of is in violation of the constitution. Wabash R. Co. v. Flannigan, 218 Mo. 566, 117 SW 722; Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 SW 1108. Is insufficient to merely state that judgment is in violation of certain section of constitution, but there must be some rational connection between the facts of the case and the section of the constitution invoked. Wabash R. Co. v. Flannigan, 218 Mo. 566, 117 SW 722. Mere recital in brief of clauses of constitution alleged to be violated, without argument, is insufficient. Hartzler v. Metropolitan St. R. Co., 218 Mo. 562, 117 SW 1124.

3. Question must be preserved for review on the record. People v. Chicago, 238 Ill. 146, 87 NE 307. Question must have been raised below. Haas Elec. & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248. Appeal on trial court's refusal to compel witness to answer does not raise constitutional question when nothing in the abstract shows objection on constitutional grounds by witness. Lyons v. Hammond Elevator Co., 139 Ill. App. 495. Question held waived where defendant failed to raise it by answers or instructions. Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 SW 1108. Where order of county court appealed from expressly recited that statute in question was constitutional, held that it must be concluded that question of its constiutionality was raised in trial court, there being nothing to contrary in the record. In re McWhirter's Estate, 235 Ill. 607, 85 NE 918. Question held raised too late when first raised in motion for new trial. Hartzler v. Metropolitan St. R. Co., 218 Mo. 562, 117 SW 1124. Where question first arose on motion after judgment, was timely presented in motions for new trial and in arrest. Wabash R. Co. v. Flannigan, 218 Mo. 566, 117 SW 722. In divorce action where answer alleged as defense foreign judgment of divorce, and reply alleged such judgment void as contravening constitutional provisions, constitutional question was properly raised, it being impossible to raise it earlier. Hanks v. Hanks, 218 Mo. 670, 117 SW 1101. Where point in litigation cannot be decided without construing particular clause in the constitution, appeal must be taken to supreme court whether such question is raised or not. Wabash R. Co. v. Flannigan, 218 Mo. 566, 117 SW 722.

4. Question of constitutionality of statute authorizing verdict by nine jurors not involved, where verdict was unanimous. Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 SW 1108. Is not sufficient to say that constitutional question is involved, but such question must be actually involved, and must be preserved for review upon the record. People v. Chicago, 238 Ill. 146, 87 NE 307.

5. Where construction placed on statute by court of appeals puts it in conflict with federal constitution, supreme court has jurisdiction to review same on error. Albertype Co. v. Gust Feist Co. [Tex.] 114 SW 791. Judgment of court of civil appeals affirming

utes, a case involving the revenue[8] or taxes,[8] or assessments,[9] a case involving freeholds[10] or title to,[11] or liens upon,[12] or the use and enjoyment of,[13] real property,

judgment of county court on appeal from justices court is final, except where the case involves the validity of a statute, in which case it is reviewable by the supreme court. Rev. St. 1895, arts. 940, 996. Texas & P. R. Co. v. Webb [Tex.] 114 SW 1171.

6. Construction of statutes and whether question thereon is properly presented are solely within jurisdiction of supreme court. Under Burns' Ann. St. 1901, § 1337h, and 1337a, as amended by 1337f, does not change this law. Sandy v. Morgan County Com'rs [Ind. App.] 85 NE 722.

7. Under Const. art. 6, § 12 (Ann. St. 1906, p. 219), and Const. Amend 1884, § 5, (Rev. St. 1899, p. 93; Ann. St. 1906, p. 244), giving supreme court jurisdiction of cases involving construction of revenue laws, law for construction must be state law as distinguished from provisions of special charter. State v. Adkins [Mo.] 119 SW 1091. Makes no difference where law is found, whether under title "revenue" or other title, so long as it relates to subject-matter of revenue. Id. Revenue must be directly and primarily concerned, not incidental. Id. Term "revenue law" covers and includes laws relating to disbursement of revenue and its preservation, as well as provisions relating to assessment, levy and collection of it. Id. Revenue laws looking to general practice in circuit courts or before justices of the peace, although pertaining to collection of taxes, are not involved in constitutional sense. Id. County Depository Act (Rev. St. 1899, §§ 6811-6829, Ann. St. 1906, pp. 3344-3348), relating to preservation and disbursement of county funds and providing for payment of warrants, relates to revenue within constitutional provision. Id. Whether bank depository of county and public school funds, selected by court, is entitled to receive certain other funds, does not involve construction of revenue law where issue can be determined from interpretation of court's order. State v. Patterson, 129 Mo. App. 281, 108 SW 1127.

8. Court of appeal held to have no jurisdiction. under Const. art. 6, § 4, of appeal from judgment directing issuance of writ of mandate to compel county treasurer to pay warrant, where question of validity or organization of protection district and of tax by which fund drawn upon was raised, and case transferred to supreme court. Keech v. Joplin [Cal. App.] 101 P 417. Inheritance tax cases are appealable directly to supreme court from county court, regardless of whether revenue is directly involved. Inheritance tax law as amended 1901, §§ 21½, 11½. People v. Sholem, 238 Ill. 203, 87 NE 390.

9. Word assessment as used in Const. art. 6, § 4, held to refer to assessments relating to public taxation or to raise funds for local public improvements and not to include assessments or calls made by a private corporation to collect subscriptions to its capital stock, or to compel its stockholders to contribute to its treasury additional sums in proportion to their ownership of paid up stock. Bottle Min. & Mill. Co. v. Kern, 154 Cal. 96, 97 P 25.

10. "Freehold" as used in statute means freehold in sense defined by common law, and does not include mere right to that which in equity will entitle party to freehold. Streator Independent Tel. & T. Co. v. Interstate Independent Tel. & T. Co., 142 Ill. App. 183. Appellate court has no jurisdiction of case involving freehold. Showed transfer to supreme court. Schlosser v. Warren Com'rs, 136 Ill. App. 525. Where freehold involved, appellate court will dismiss appeal on its own motion. Id. Questions involved, as affecting jurisdiction, are determined by assignments of error. Lewis v. Lewis, 237 Ill. 416, 86 NE 635. Fact that freehold was involved in issue raised by minor defendants in partition held not to give supreme court jurisdiction on complainant's appeal, there being no cross errors assigned on behalf of minors and no reason appearing why any should be, decree being final in their favor as well as against them, and appellants having no right to insist upon assignment of errors on behalf of minors upon decree apparently favorable to them. Id.

Freehold involved: Where one party gains or loses title as necessary result of judgment or when title is so put in issue that its determination is necessary. Poll v. Cash, 137 Ill. App. 529. Where title to real estate subjected to sale may be controverted. Atherton v. Hughes, 239 Ill. 632, 88 NE 199. Where complainant filed bill for divorce and asking for conveyance to him of property which he alleged he had conveyed to defendant in trust, and defendant alleged that property had been conveyed to her absolutely. McComb v. McComb, 238 Ill. 555, 87 NE 353. Where effect of decree setting aside deed was to absolutely cancel title to land in which grantee claimed freehold though setting aside of deed was incidental to main relief. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132. Where homestead rights are involved. Gillespie v. Fulton Oil & Gas. Co., 236 Ill. 188, 86 NE 219. Bill to construe will, where question of whether a party has life estate is to be determined. Poll v. Cash, 137 Ill. App. 529. Where existence of perpetual easement is in issue. Haigh v. Lenfesty, 141 Ill. App. 409; Powers v. Heffernan, 138 Ill. App. 12. Suit to recover penalty for obstructing highway, where necessary to determine whether public has perpetual easement in said highway. The People v. Johnson, 142 Ill. App. 496. Petition for certiorari involving existence of new highway. Bennett v. Millard, 239 Ill. 332, 88 NE 165. Whether highway has been legally laid out. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595.

Freehold not involved: In action of forcible entry by heirs of lessor against lessee for failure to pay rent, since title could not be inquired into for any purpose in such action, and lessee could not litigate therein validity of will under which third person claimed title to premises. Thomas v. Olenick, 237 Ill. 167, 86 NE 592 In partition suit where assignments of error do not question action of court in determining estates of parties in land, but relate only to existence or adjustments of liens. Lewis v. Lewis,

or a franchise [14] or title to office,[15] or the legality of fines or penalties,[16] or conflict between decisions of courts of concurrent jurisdiction,[17] or a minimum [18] or maxi-

237 Ill. 416, 86 NE 635. Where amended pleadings conceded conveyance of land and sought merely to recover balance of purchase price, though decree found that deed was delivered to and vested title in defendant, which was not really controverted. Crowley v. McCambridge, 237 Ill. 222, 86 NE 725. Personal action against owner of freehold, although fixing lien thereon. Jones v. Bean, 136 Ill. App. 545. Proceeding in equity to restrain interference with telephone wires where relation of parties was that of licensees mutually using poles. Streator Independent Tel. & T. Co. v. Interstate Independent Tel. & T. Co., 142 Ill. App. 183. Proceeding by administrator to sell real estate to pay claims, where only effect of decree is to subject lands to sale for payment of claims, since payment would relieve lands from all effects of decree. Atherton v. Hughes, 239 Ill. 632, 88 NE 199. Where ownership of lands of decedent admitted by pleadings and findings of master not objected to, and contention of appellants is that letters of administration were void and claims were not valid, being barred by laches wherefore decree was void. Id. Farm drainage act (Hurd's Rev. St. 1908, c. 42) providing for proceedings before justice of peace to assess damages to owners of land taken does not give justice power to decide any question involving freehold, and hence freehold is not involved in such proceeding, and provision that his decision shall be final does not violate constitution provision giving appeal to supreme court in cases involving freehold. Drainage Com'rs v. Harms, 238 Ill. 414, 87 NE 277.

11. Court of appeals has jurisdiction where title to land is involved, regardless of amount in controversy. Warden v. Addington [Ky.] 115 SW 241. Supreme court must look to judgment to see if case involves title to real estate Brannock v. Magoon, 216 Mo. 722, 116 SW 500.

Title involved: Suit to establish lost deed in chain of title. Thomas v. Scott, 214 Mo. 430, 113 SW 1093. Suit to set aside deed in chain of title as fraudulent. Id. Suit to declare resulting trust in real estate and for decree divesting title from one person and vesting it in another. Brannock v. Magoon, 216 Mo. 722, 116 SW 500. In action by lessor of oil and gas well for royalties due under lease where answer put in issue lessor's title and denied that well was on lessor's land. Central Kentucky Natural Gas Co. v. Stevens [Ky. App.] 120 SW 282.

Title held not involved: An action is for recovery of land taken by a railroad company without condemnation proceedings, and for damages for injury to the land not appropriated. Pratt v. Saline Valley R. Co., 130 Mo. App. 175, 108 SW 1099. Where petition only asks lien on real estate not constituting homestead, and judgment decreed lien, directed sale and barred dower. Brannock v. Magoon, 216 Mo. 722, 116 SW 500. In case of pure trespass on land though title is incidentally involved and must be shown on trial. Hill v. Hopson [Mo.] 120 SW 29. No jurisdiction if suit merely to restrain threatened trespass by road overseer who pleads title in county. Id.

12. Court of appeals has jurisdiction lien upon land involved, regardless of amount of money in controversy. Delano v. Saylor [Ky.] 113 SW 888. Since, prior to Acts 1908, c. 30, there was no provision for lien on land of one refusing to pay his share of cost of division fence, but only personal liability, action to recover $40 on such a claim instituted before such act went into effect, did not involve title to, interest in, or lien upon, realty. Jackson v. Holbrook [Ky.] 113 SW 415.

13. Court will entertain appeal from refusal of circuit court to dissolve temporary injunction affecting use and enjoyment of real property, though value of realty involved be less than $100. Code 1906, § 4038. Harvey v. Elkins [W. Va.] 64 SE 247.

14. Naturalization proceedings by an alien involves elective franchise, so that supreme court has jurisdiction under Hurd's Rev. St. 1908, c. 110, § 118. United States v. Hrasky, 240 Ill. 560, 88 NE 1031. Case held to involve merely question whether proposed submission to voters of question whether saloons should be closed on Sunday was one of public policy within meaning of Hurd's Rev. St. 1905, p. 967, c. 46, and not elective franchise. People v. Cannon, 236 Ill. 179, 86 NE 215. Franchise involved in appeal to determine propriety of judgment in action of quo warranto ousting drainage district and drainage commissioners. The People v. O'Connor, 142 Ill. App. 446.

15. Court of appeals has jurisdiction of case involving right to office though only $45 in controversy. St. 1909, § 950, Russell's St. § 2784. Rieder v. Newport [Ky.] 119 SW 1188.

16. Supreme court has jurisdiction of appeal from judgment for penalty in a recognizance given in felony case, though such penalty is less than $4.500. State v. Shockley, 216 Mo. 356, 115 SW 966.

17. In determining whether decision of court of civil appeals on questions of law overrules decisions of supreme court and other decisions of courts of appeal so as to give supreme court jurisdiction to review same on writ of error, such decision must be taken as a whole. Galveston, etc., R. Co. v. Herring [Tex.] 113 SW 521. Held no such conflict, and hence that supreme court had no jurisdiction. Id. Conflict between decision and decisions subsequently overruled held not to give supreme court jurisdiction. Id.

18. Appeal from judgment for $500 due on stock subscription held properly taken to court of appeal under Const. art. 6 as amended. Burke v. Maze [Cal.] 101 P 440. Supreme court has no jurisdiction on error to review judgment of appellate court affirming judgment of trial court for less than $1,000. Hurd's Rev. St. 1908, c. 37, § 25. People v. Crowe, 240 Ill. 348, 88 NE 796. Hurd's Rev. St. 1908, c. 110, § 121. People v. Mc Cullough, 239 Ill. 552, 88 NE 177. Under Laws 1907, p. 468, § 121, appeal lies from appellate to supreme court without certificate

mum [19] amount, "claimed," [20] "involved," [21] "in controversy," [22] "in dispute," [23] or

of importance only where sum or value in controversy "exceeds $1,000," and hence does not lie where judgment is for $1,000, particularly in view of St. § 91. Atton v. South Chicago City R. Co., 236 Ill. 507, 86 NE 277. Writ of error will not lie from supreme court to review judgment of appellate court affirming judgment for $1,000. Dale v. Modern Woodmen of America, 237 Ill. 499, 86 NE 1065. Action to foreclose mechanic's lien not being within jurisdiction of justice of peace, right of appeal is not controlled by Acts 1903, p. 280, c. 156, and appeal lies to appellate court though judgment is for less than $50. Strebin v. Myers [Ind. App.] 85 NE 784. Supreme court held to have no jurisdiction where amount in controversy was less than $100, in absence of certificate of trial judge. Code, § 4110. Adamson v. Funke [Iowa] 119 NW 700. Power to certify case involving less than $100 should be exercised by trial court with judicial discretion, and not as matter of grace or courtesy to party applying therefor. McLaughlin v. Bradley [Iowa] 118 NW 389. Statute limiting right to review in supreme court to civil actions where amount in controversy exceeds $100 was repealed by Laws 1907, p. 406, c. 256, and that limitation now applies only to civil actions for recovery of money. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859. Under Civ. Proc. § 734, action involving less than $200 is not reviewable by court of appeals though tried together with one properly appealable, where actions were based on separate pleadings and separate verdicts and judgments were rendered. Sealey v. Combs [Ky.] 118 SW 972. Court of appeals has no jurisdiction of appeal in controversy involving right of attorney for plaintiff recovering $250 judgment to one-half of same for services. Varney v. Connolly's Ex'r [Ky.] 116 SW 340. Under Const. art. 85, supreme court has jurisdiction where amount claimed exceeds $2,000 exclusive of interest. Succession of Drysdale, 122 La. 37, 47 S 367. Has no jurisdiction unless exceeds $2,000. Nick v. Bensberk [La.] 48 S 986. Parties may not confer such jurisdiction by agreeing that the amount in controversy shall be changed from $50 to $51. Switzer v. Benny [Miss.] 48 S 401. Appellate jurisdiction of federal supreme court over decisions of the supreme court of Hawaii is same as conferred over state courts by Rev. St. § 709, and in addition all cases where smount involved exceeds $5,000. 31 Stat. 158 as amended 33 Stat. 1035. Cotton v. Hawaii, 211 U. S. 162, 53 Law. Ed. 131. 26 Stat. 286, c. 517, § 14, repealing all acts inconsistent with §§ 5 and 6, does not abrogate the limitation with regard to amount in dispute provided by 24 Stat. 505, c. 359, in appeal or error from circuit court sitting as a court of claims. Reid v. U. S., 211 U. S. 529, 53 Law. Ed. —. Under Rev. St. 1895, art. 996, court of appeals has no jurisdiction of appeal from county court where case originated in justice's court and amount involved was less than $100. Miller v. Black [Tex. Civ. App.] 120 SW 559.

Determination of amount: Whether a case involves more than $50.00, and therefore can be appealed from justice court to the superior court, is to be determined from the summons and the cause of action thereto attached. Barnes v. Vandiver, 5 Ga. App. 162, 62 SE 994. Several creditors having claims of less than $200 each filed joint petition against common debtor and third person to whom it was alleged that he had transferred his stock of goods in violation of bulk sales law. Court held that transfer was fraudulent, and subjected property to extent of $1,000 to payment of claims. Held that amount in controversy was $1,000. Singletary v. Boener-Morris Candy Co. [Ky.] 112 SW 637. Where liability of each nine delinquents is $900, court of appeals has jurisdiction of appeals. Chicago Bldg. & Mfg. Co. v. Peterson [Ky.] 118 SW 384. Plaintiff cannot make cause unappealable by making remittitur after verdict in trial by jury or after judgment in trial by court. Trenchard v. New Orleans R. & L. Co. [La.] 48 S 575. Court of appeals held to have jurisdiction of appeal from order overruling motion to tax costs amounting to more than $200 against adverse party, though action was for recovery of $100 only. Missouri, K. & T. Co. v. Million [Tex. Civ. App.] 115 SW 655. Under Act July 1, 1902, 32 Stat. 691, 695, c. 1369 (U. S. Comp. Stat. Supp. 1907, p. 214), § 10, as to jurisdiction when real estate in controversy exceeds $25,000, where pleadings show no allegation of joint ownership and joint possession, and controversy with each defendant relates to separate lot and judgment is rendered separately, measure of jurisdiction on writ of error is not value of whole land but of each part separately. Tupino v. La Companla De Tabacos, 29 S. Ct. 610. Where complaint alleges joint entry and ouster, and answer takes issue without setting up separate claims to distinct parcels by separate defendant, resulting in judgment against all defendants jointly, measure of appellate jurisdiction is whole value of land. Id. Jurisdictional amount for appeal from supreme court of Hawaii to federal supreme court is sufficiently shown by affidavits in the record as to value of land involved. Spreckels v. Brown, 212 U. S. 208, 53 Law. Ed. —.

Counterclaim: Court of appeals has jurisdiction of judgment for $137 where defendant in good faith set forth counterclaim for $500, and had reasonable grounds to believe it had cause of action on such claim. City of Louisville v. Cain [Ky.] 119 SW 763. Supreme court held to have no jurisdiction of appeal in expropriation case, where was not contended that value of property involved exceeds $1,250 and defendant's claim for damages was manifestly without foundation and no attempt was made to sustain it by proof. Texas & P. R. Co. v. Railsback [La.] 49 S 975. Where on appeal from a judgment of $1,250, appellant claims that reversal would allow presentation to jury of his claim of set-off amounting to $11,750, amount in controversy is sufficient to give federal supreme court jurisdiction. Harten v. Loffler, 212 U. S. 397, 53 Law. Ed. —.

19. Appeal from order sustaining demurrer to mandamus issued on relation of exeo-

"recovered," including or excluding costs,[24] and interest,[25] according to the terms

utrix having estate in possession in excess of $4,500, and directing probate court to allow appeal from order, appointing an administrator pendente lite, held not within jurisdiction of court of appeals. State v. Imel [Mo. App.] 118 SW 97. Court of appeals would have no jurisdiction of appeal from judgment of circuit court directing probate court to grant appeal from judgment involving dispute as to rightful possession of property valued at $35,000, and hence has no jurisdiction over same subject by writ of prohibition against circuit court or judge thereof. State v. Mosman [Mo. App.] 115 SW 1041.

20. Only when no trial of issue of fact in court below that resort can be had to pleadings to determine amount involved. Hurd's Rev. St. 1908, c. 37, § 25. People v. Crowe, 240 Ill. 348, 88 NE 796.

21. In determining jurisdiction where trial of issue of fact, supreme court will not look to pleadings or evidence but will be controlled by amount of judgment. Hurd's Rev. St. 1908, c. 37, § 25. People v. Crowe, 240 Ill. 348, 88 NE 796. Total amount of legacies to those interested in securing probate rather than total value of estate determines jurisdictional amount necessary to appeal from court of appeals of District of Columbia on decree denying probate. Morgan v. Adams, 211 U. S. 627, 53 Law. Ed. —.

22. Amount in controversy as used in Burns' Ann. St. 1908, § 1392, subds. 14, 18, is determined by the judgment exclusive of costs and interest rather than from pleadings. Rupel v. Ohio Oil Co. [Ind.] 88 NE 508. Court of appeals without jurisdiction in action by town marshal to recover salary where amount in controversy is only $126, though affirmance of decision would entitle marshal to salary for full term of office in excess of jurisdictional amount. Town of Beaver Dam v. Stevens [Ky.] 118 SW 320. Plaintiff sued for possession of logs, or their value, alleged to be $500, with $100 damages for their detention. Jury allowed plaintiff $55, and judgment was rendered for that amount. Held that amount in contest on appeal was $55, and court of appeals had no jurisdiction. Otter Creek Lumber Co. v. Marritt [Ky.] 112 SW 855. In drainage proceedings petitioners claimed $250 for attorney's fees and appealed from order allowing $100, and overruling objection to manner of assessing costs. Record showed amount of costs each party was adjudged to pay, but not amount would have had to pay had appellant's contention been sustained. Held that amount in controversy in so far as attorney's fees were concerned being $150, and court being unable to determine what other amount, if any, was in controversy, appeal would be dismissed. Hill v. Pettitt, 33 Ky. L. R. 1041, 112 SW 646. Act May 5, 1899 (P. L. 248), providing that if plaintiff recovers damages amount thereof shall be conclusive proof of amount in controversy, but if he recovers nothing amount claimed shall govern, was intended to include both cases, involving title or possession of personal or real property, and those involving payment of money. Spring City Brick Co. v. Martin Brick Mach. Mfg. Co., 221 Pa. 385, 70 A 774. Plaintiff sued to recover back money paid on purchase price of machine, and defendant sued plaintiff on note given for balance of purchase price. By agreement the two actions were tried together in plaintiff's suit, and defendant recovered verdict for less than $1,500. Held that judgment settled entire controversy, and was one for payment of money, and therefore appealable to superior, and not to supreme, court. Id. Jurisdiction of appellate court can not be made to rest upon amount involved in garnishment proceeding, since such proceeding is merely ancilliary to main action which is controlling in determining jurisdictional amount. Simmeng v. Pennsylvania Fire Ins. Co. [Tex.] 112 SW 1044. "Original amount in controversy" as used in Const. Art. 4, § 4, and Ball. Ann. Codes & St. § 4650 (Pierce's Code, § 4330) means amount in actual dispute from beginning before action was brought, and does not include claims for attorney's fees which are merely incidental to the suit. Fidelity & Deposit Co. v. Faben, 51 Wash. 308, 98 P 764. Supreme court held not to have jurisdiction of appeal in action for $87.15 and $125 as attorney's fees incidental to prosecution of the suit. Id. In action to foreclose mechanics' lien and to recover amount of lien claim, where it was held that there was no lien, supreme court held to have no jurisdiction to review action of lower court in reducing plaintiff's claim from $112 to $88, amount in controversy being less than $200. Hall v. Cowen, 51 Wash. 295, 98 P 670. Where complaint demanding $225 was amended so as to demand only $105, held that supreme court had no jurisdiction of appeal, amount in controversy being less than $200. Flick v. Showalter, 51 Wash. 345, 99 P 9. Where judgment goes for defendant in action of claim and delivery, value of property alleged in complaint is test of jurisdiction, provided demand for such amount appears to have been made in good faith. Gilbert Co. v. Husted, 50 Wash. 61, 96 P 835.

23. Allegation that property involved is worth about $2,000 held not sufficiently certain to fix minimum amount of court's jurisdiction. Succession of Lynch [La.] 49 S 1002. Value of right claimed by appellant and of which he was deprived by judgment appealed from determines whether appeal is to supreme court or to court of appeals. State v. Mosman [Mo. App.] 115 SW 1041.

24. Words "exclusive of costs," as used in Gen. St. 1901, § 5019, subd. 3, mean such costs as are provided for by statute, and which may be computed and taxed by clerk, and do not include allowance of attorney's fees to prevailing party, amount of which must be judicially determined by court, such as allowance provided for in Id. § 3410, in case of recovery on insurance policy. Phenix Ins. Co. v. Stahl [Kan.] 96 P 854.

25. Interest awarded by judgment for damages over amount sued for is an element of damages and not "interest" within Sayle's Ann. Civ. St. 1897, art. 996, subd. 3, such as is excluded in computing amount of judgment appealable to court of civil appeals. Pecos & N. T. R. Co. v. Faulkner [Tex. Civ. App.] 118 SW 747.

of the statute. Whether the action is legal or equitable,[26] or the right to a jury trial,[27] is sometimes the test. Probate [28] and administration,[29] orders, and lunacy [30] or curatorial [31] proceedings, are generally appealable under special statutes, if at all. Federal review of state or territorial decisions, or the right to a further appeal from the circuit court of appeals to the United States supreme court, or the right of direct appeal to it, depends upon the existence [32] of a real, meritorious [33] federal question,[34] properly raised,[35] necessarily involved,[36] and finally decided ad-

26. Actions for divorce are suits in equity and, hence, supreme court has exclusive appellate jurisdiction in such cases. Const. art. 6, § 4. Stewart v. Torrance [Cal. App.] 98 P 396. Appellate court will not grant mandamus to compel trial court to settle bill of exceptions in such a suit refused as not presented in time, though an appeal to appellate court is under consideration, as to do so would be invasion of province of supreme court. Stewart v. Torrance [Cal. App.] 98 P 396. Action to set aside default entered in foreclosure proceeding, and to have decree of foreclosure entered therein vacated and declared null and void, held clearly one in equity. Litch v. O'Connor, 8 Cal. App. 498, 97 P 207. Under Acts 1907, p. 233, c. 82, § 7, giving court of civil appeals jurisdiction of appeals in chancery cases, with certain exceptions, said court, and not supreme court, held to have jurisdiction of application for supersedeas of interlocutory order directing issuance of mandatory injunction directing officers of corporation to permit stockholder to examine books, and supersedeas granted by supreme court discharged. Brown v. Crystal Ice Co. [Tenn.] 113 SW 360. Court of civil appeals, and not supreme court, held to have jurisdiction of appeal from decree adjudging rights of certain parties in water of stream in suit to enjoin its diversion. Mattox v. Bristol [Tenn.] 113 SW 381.

27. Under Rev. St. § 5226, authorizing appeals from judgment or final order of common pleas court to circuit court in cases where right to jury trial in common pleas did not exist, held that action to recover damages for filling and obstructing public ditch so as to cause water to overflow plaintiff's land, thereby annually damaging his crops, held not appealable, though prayer for damages was followed by one for injunction. Fisher v. Bower, 79 Ohio St. 248, 87 NE 256. Appealability of action brought to assert right of subrogation depends upon right of either party to demand trial by jury under Rev. St. § 5130, since by Rev. Laws, § 5226, appeal may not be taken in actions in which trial by jury may be demanded. Smith v. Folsom [Ohio] 88 NE 546.

28. St. 1907, p. 753, c. 410, providing method of appealing from all judgments, orders, or decrees of any of superior courts of state, held to provide for appeals from probate orders. In re McPhee's Estate, 154 Cal. 385, 97 P 878. Order of county court refusing to set aside probate of will is final and appealable to circuit court. Dean v. Dean, 239 Ill. 424, 88 NE 149. Order of circuit court setting aside probate of will, rendered on appeal, on ground of want of notice is interlocutory. Id. Order dismissing petition to probate will is final and appealable. Greene v. Hitchcock, 139 Ill. App. 408. Under Rev. Laws, c. 162, § 8, supreme judicial court has jurisdiction of appeal from decision of probate court under St. 1906, p. 97, on petition of husband alleging that his wife has deserted him where neither that statute nor Rev. Laws, c. 162, § 18, c. 142, § 11 and c. 86, § 28 expressly provide for jurisdiction in another court. Rivett v. Rivett, 198 Mass. 136, 84 NE 303.

29. Order of orphans' court directing in absolute and unconditional terms payment of certain sum by administrator to attorney for professional services rendered estate and distributees held final and appealable. Flater v. Weaver, 108 Md. 668, 71 A 309. Order of probate court denying petition for discovery against administratrix not appealable, being merely incidental to main proceeding. Mitchell v. Bay Probate Judge [Mich.] 16 Det. Leg. N. 2, 119 NW 916. After appeal and affirmance of order, the appeal lies from redistribution by orphan's court on questions passed upon in original adjudication and not raised at original appeal or in readjudication proceedings. Hoffman's Estate, 37 Pa. Super. Ct. 548.

30. Decree, disallowing claim of committee of certain incompetents for their support in suit to compel committee to account and for partition, is interlocutory decree. Hess v. Hess, 108 Va. 483, 62 SE 273.

31. Appeal will not lie from order of probate court appointing a curator. Smith v. Young [Mo. App.] 117 SW 628. Appeal will lie from judgment of probate court refusing to vacate appointment of a curator. Id.

32. Federal supreme court on appeal from circuit court may decide local questions only, omitting federal questions which gave circuit court jurisdiction, or may decide federal questions adversely to parties claiming benefit. Siler v. Louisville & N. R. Co., 213 U. S. 175, 53 Law. Ed. —.

33. Claim that ten days' statutory notice of action for settlement of estate is unreasonable as to nonresidents is held frivolous. Goodrich v. Ferris, 214 U. S. 71, 53 Law. Ed. —.

34. Appeal upon constitutional question can be taken directly to federal supreme court from circuit court. North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 Law. Ed. 195. May be heard by supreme court without resort to certificate and may be decided on its merits. Id. Under 26 Stat. 826, c. 517, § 5, question may be decided on its merits by supreme court on appeal although question of jurisdiction alone has been certified up. Id. Where action involves both constitutionality and validity of a federal statute and also the construction and effect of state statutes, etc., defeated party may, at his election, appeal to circuit court of appeals, instead of to supreme court. Hooper v. Remmel [C. C. A.] 165 F 336.

versely to appellant.[37] Review is direct to the supreme court if there is a question of the jurisdiction of a United States court as such.[38]

Writ of error lies from federal supreme court to highest court of state where decision in state court depended upon construction of federal law and is adverse to same right claimed thereunder. Miller v. Illinois Cent. R. Co., 168 F 982. Circuit court of appeals not deprived of jurisdiction of appeal from fact that constitutional questions are involved, where other questions presented. In re Can Pon [C. C. A.] 168 F 479.

Held federal question: Adjudication of state court as to effect of judgment of court of sister state when given full faith and credit entitled to under federal constitution. American Exp. Co. v. Mullins, 212 U. S. 311, 53 Law. Ed. —. Adjudication by highest court of state as to right of trustee in bankruptcy to avoid preference under state law, and that there was power to determine preference, without previously ascertaining existence under bankruptcy act of individual creditors, although state court applied state law in testing existence of preference. Miller v. New Orleans Acid & F. Co., 211 U. S. 496, 53 Law. Ed. 300. Denial by state court of force and effect of territorial statute specially claimed under federal constitution and laws. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —.

Held not federal questions: Complaint referring to judgment of state court primarily as fixing amount of plaintiff's claim raises no question of "full faith and credit" appealable to federal supreme court from circuit court of appeals under 26 Stat. at L. 826, 828, c. 517, § 6. Bagley v. General Fire Extinguisher Co., 212 U. S. 477, 53 Law. Ed. —. Decision by state court as to validity of legislation under constitution of sister state, whether right or wrong, where validity of constitution was not questioned. Smithsonian Inst. v. St. John, 214 U. S. 19, 53 Law. Ed. —. Judgment sustaining demurrer to petition demanding money judgment for $500 based on statute of sister state where appeal on ground that court erred in determining statute to be penal and unenforcible. Carey v. Schmeltz [Mo.] 119 SW 946. Determination by state court of validity of legislation delegating power to commission under state constitution. Welch v. Swasey, 214 U. S. 91, 53 Law. Ed. —. Claim by one, according to his interpretation of a statute, that excessive duty or tax has been demanded by executive officers. American Sugar Ref. Co. v. U. S., 211 U. S. 155, 53 Law. Ed. 129. Authority to construct log boom in navigable stream entirely within state under state statute. North Shore Boom & Driving Co. v. Nicomen Boom Co., 212 U. S. 406, 53 Law. Ed. —. Due process of law clause of the U. S. Const. is not violated by tax sale made under a state law providing that tax deed shall be prima facie evidence of sufficiency of notice, and that possession under such deed may meet requirements of state statute of limitations. Elder v. Wood, 208 U. S. 226, 52 Law Ed. 464. Federal supreme court having declared validity of state statute as properly construed, no constitutional question is raised by circuit court enjoining official action under different construction of the statute, particularly where appellees do not deny validity but only application of statute. Knop v. Monongahela River Consol. C. & C. Co., 211 U. S. 485, 53 Law. Ed. 294. Action of circuit court in enjoining official action under state statute, unless some question as to relation between statute and federal constitution is involved. Id. Appointment of receiver for corporation convicted of violating state laws upon record of conviction and without further hearing. Waters Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —.

35. Jurisdiction of federal supreme court to review proceedings of state courts is not that of a general reviewing court in error but is limited to federal questions specially set up in state court. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Record must show that some federal question was raised or suggested before assignment of error in supreme court. Honolulu Rapid Transit & L. Co. v. Wilder, 211 U. S. 144, 53 Law. Ed. 124. No federal question raised by refusal of state court to permit removal to federal court where record fails to show that question was raised in state supreme court, and court could not have considered it if it had, since time for appeal had expired. Chesapeake & O. R. Co. v. McDonald, 29 S. Ct. 546. Federal supreme court has no jurisdiction of writ of error to state courts where only suggestion of federal question involved was put forward after highest state court on second appeal had affirmed judgment rendered below in strict compliance with its mandate. Bonner v. Gorman, 213 U. S. 86, 53 Law. Ed. —. Compliance with mandate only question open to and determined by highest court. Id. Objection, upon constitutional grounds, to form of action raised first on motion for new trial is too late to be considered as federal question on appeal. American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 Law. Ed. 208. While it is too late to raise federal question for first time on rehearing in highest court of state, such question will be reviewed by federal supreme court if so raised and considered. McCorquodale v. Texas, 211 U. S. 432, 53 Law. Ed. 269. Order reciting that case came on for rehearing and motion was overruled insufficient to show that federal question was considered. Id. Denial of motion for rehearing by state court of appeals on ground that no federal question is raised is conclusive on federal supreme court as to fact of such question having been presented, and affidavits presented in support of motion cannot be basis for writ of error from supreme court. Smithsonian Inst. v. St. John, 214 U. S. 19, 53 Law. Ed. —.

36. No jurisdiction where federal question unnecessary to determination of case and judgment based on grounds broad enough to sustain it. Rogers v. Jones, 29 S. Ct. 635. Judgment of state court does not involve federal question appealable to federal supreme court when record shows that it can stand upon grounds independent of question of federal rights. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Judgment of state court based upon sufficient independent grounds not within fed-

(§ 4) *D. Reviewableness may depend on the parties,*[39]—See 5 C. L. 146 as in case of actions to compel performance of duty by public officers,[40] or actions to which political subdivisions of the state,[41] or state officers[42] are parties.

(§ 4) *E. Certificate or reserved questions and reported cases.*[43]—See 11 C. L. 142 Certification of questions by courts of original jurisdiction to appellate courts,[44] and by intermediate appellate courts to the court of last resort,[45] are fully treated in other sections.

§ 5. *Courts of review and their jurisdiction*[46]—See 11 C. L. 142 exist by force of

eral objections will not be reviewed by federal supreme court. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Federal question must not be colorable or fraudulent merely for obtaining jurisdiction. Siler v. Louisville & N. R. Co., 213 U. S. 175, 53 Law. Ed. —.

37. Judgment of circuit court of appeals upon a complaint referring to judgments of state court presents no question for appeal to federal supreme court under 26 Stat. at L. 826, 828, c. 517, § 6, where defendant was not party to or bound by judgments as such. Bagley v. General Fire Extinguisher Co., 212 U. S. 477, 53 Law. Ed. —. Refusal of state court to permit plea raising federal question does not necessarily involve decision of such question, as when plea was not timely filed and was bad as to certain counts. Western Union Tel. Co. v. Wilson, 213 U. S. 52, 53 Law. Ed. —. Order of highest state court reciting that case came on for rehearing and motion was overruled is insufficient to show that federal question was considered warranting review by federal supreme court. McCorquodale v. Texas, 211 U. S. 432, 53 Law. Ed. 269.

38. Act March 3, 1891, c. 517, § 5, 26 St. 827, authorizing appeals from circuit court direct to supreme court in any case in which "the jurisdiction of the court is in issue" limits such appeals to cases where jurisdiction of federal court as a federal court is put in issue, or where there is an issue as to whether jurisdiction of defendant was ever obtained by proper process, and unless one of such issues is raised case is reviewable by circuit court of appeals. Alton Water Co. v. Brown [C. C. A.] 166 F 840. Demurrer merely challenging inherent chancery powers of trial court over parties and subject-matter held not to raise such issues. Id. Supreme court has jurisdiction to review cases in which question of jurisdiction alone is involved and which are duly certified for decision. Commercial Mutual Acc. Co. v. Davies, 213 U. S. 245, 53 Law. Ed. —. Judgments of circuit court of appeals in cases where jurisdiction rests entirely upon diversity of citizenship are not appealable (26 Stat. at L. 826, 828, c. 517, §6), although federal question may have been raised at trial. Bagley v. General Fire Extinguisher Co., 212 U. S. 477, 53 Law. Ed. —.

39. **Search Note:** See Appeal and Error, Cent. Dig. §§ 126; Dec. Dig. § 37.

40. Necessity of county superintendent of schools to bring mandamus to county auditor to enforce claim for expenses in visiting schools did not make action one to compel performance of duty of public officer appealable from appellate court under Hurd's Rev. St. 1988, c. 37, § 25. People v. McCullough, 239 Ill. 552, 88 NE 177.

41. City of St. Louis held, under Const. art. 9, §§ 20, 22, 23, a political subdivision of the state, so that supreme court had, under Const. art. 6, § 12, jurisdiction of appeal to which it was party. Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159.

42. Road overseer and members of county court not "state officers" within constitution so as to confer jurisdiction to supreme court in case where they are parties. Hill v. Hopson [Mo.] 120 SW 29.

43. **Search Note:** See Appeal and Error, Cent. Dig. §§ 1768-1794; Dec. Dig. §§ 407-320; 2 Cyc. 740-756.

44. See § 2B, ante.

45. See § 15B, post.

46. As to original jurisdiction of appellate courts see, also, Jurisdiction, 12 C. L. 458.

Search Note: See Appeal and Error, Cent. Dig. §§ 61-99; Dec. Dig. §§ 17-23; 2 Cyc. 533-538; Courts, Cent. Dig. §§ 499-791; Dec. Dig. §§ 210-254; 11 Cyc. 801-843. Supreme court has only such jurisdiction as is conferred on it by constitution. Livesley v. Krebs Hop Co. [Or.] 97 P 718. Jurisdiction of supreme court on habeas corpus conferred to appellate jurisdiction. Const. 1898, art. 93. State v. Patterson, 122 La. 215, 47 S 511. While court of appeals of District of Columbia has appellate jurisdiction of decisions of commissioner of patents as defined by statute, it has no original jurisdiction to supervise administration of that office, and on reversal of decision as to priority cannot direct further proceedings before commissioner. De Ferranti v. Lindmark, 32 App. D. C. 6. Jurisdiction of United States court of appeals for Indian Territory to review judgments of United States courts conferred on supreme court of state of Oklahoma by Enabling Act, § 18 (Act June 16, 1906, c. 3335; 34 Stat. 277). Moberly v. Roth [Okl.] 102 P 182; Friend v. Roth [Okl.] 102 P 185; Friend v. Roth [Okl.] 102 P 186. Supreme court of state of Oklahoma possesses and took all jurisdiction of supreme court of territory, except as otherwise provided by constitution, and it has same power and right of territorial court to review decisions to determine if previous decision was erroneous in declaring territorial statute invalid. State v. Chaney [Okl.] 102 P 133. If erroneous decision should be everruled. Id. Authority of supreme and appellate courts defined by statutes pursuant to Const. art. 7, and neither court may confer jurisdiction on the other. Pittsburg, etc., R. Co. v. Peck [Ind. App.] 88 NE 627. After reversal, court of appeals cannot order new trial for newly-discovered evidence, but, since its jurisdiction is appellate only, propriety of new

statute or organic law, and consent of parties will not confer jurisdiction.[47] Jurisdiction over the person may be conferred by a general appearance;[48] but not jurisdiction over the subject-matter.[49] As between several intermediate courts, or courts of intermediate and final appeal, jurisdiction nearly always depends on one of the criteria mentioned in the preceding section.[50] Appellate jurisdiction must be supported by sufficient original jurisdiction to pronounce the judgment being reviewed.[51] There is a conflict of authority as to whether an appeal will lie from a void order.[52] Jurisdictional questions may be raised on appeal.[53] Every court necessarily has jurisdiction in every case before it to decide whether it has authority to hear and determine the cause,[54] but the highest state court ordinarily has power to determine the jurisdiction of the inferior courts.[55]

§ 6. *Bringing up the cause.*[See 11 C. L. 143]—The section dealing with dismissal should also be consulted for the effect of irregularity or delay in bringing up the cause.[56, 57]

trial must appear from record before court at time of reversal. Baltimore & O. R. Co. v. State, 107 Md. 642, 72 A 340.

47. Sumner v. Hill [Ala.] 47 S 565; Barde v. Wilson [Or.] 102 P 301. Parties cannot confer jurisdiction by agreeing that amount in controversy shall be changed from $50 to $51. Switzer v. Benny [Miss.] 43 S 401. Jurisdiction of appellate court is dependent upon commencement of error proceedings within time fixed by statute, and parties cannot by stipulation at later date confer jurisdiction on court. Radil v. Sawyer [Neb.] 120 NW 957.

48. For effect of appearance as dispensing with necessity of service of notice of appeal, see § 6D, post. Where on appeal defendant entered general appearance without reference to special appearance below, held that he thereby conferred jurisdiction on supreme court, and on reversal and remand lower court became vested with full and complete jurisdiction to carry out such mandate. Columbia & P. S. R. Co. v. Moss [Wash.] 102 P 439.

49. Since county court had exclusive original jurisdiction of proceeding to establish highway, and circuit court could acquire jurisdiction of subject-matter only by appeal taken in manner prescribed by statute, held that appearance of petitioners in circuit court on appeal by objector did not give latter court jurisdiction where appeal was not taken in time. Sidwell v. Jett, 213 Mo. 601, 112 SW 56.

50. See § 4C, ante.

51. No jurisdiction on appeal where lower court had none. Finn v. Walsh [N. D.] 121 NW 766. Jurisdiction of court of appeals limited to cases of which trial court had jurisdiction. Sloan v. McMillin [Tex. Civ. App.] 113 SW 587. Where lower court had no jurisdiction to make order complained of, supreme court acquires none on appeal. Magic City Realty Co. v. Schneckenberger [Neb.] 118 NW 567. Matter beyond jurisdiction of justice of peace cannot be considered by circuit court on appeal from judgment of justice. Snyder v. Crutcher [Mo. App.] 118 SW 489; Beth v. St. Louis & S. F. R. Co. [Mo. App.] 116 SW 1111; Jarrett v. McIntyre, 134 Ill. App. 581. Where circuit court has no jurisdiction of appeal from justice court because of insufficiency of record, appeal will be heard in supreme court only where record perfected by certiorari. McPhail v. Blann [Miss.] 47 S 666. Where circuit court erroneously entertained jurisdiction of appeal, held that further appeal to supreme court was subject to same infirmity and would be dismissed. Renicker v. Davis [Ind.] 85 NE 964. Where district court had no jurisdiction of appeal in drainage proceeding, held that supreme court had no jurisdiction of further appeal to it. Appeal of Head [Iowa] 118 NW 884. Court of appeals had no jurisdiction where probate court had none and cause was appealed to circuit court which tried case anew. In re Wood's Estate [Mo. App.] 120 SW 635. On appeal from county court, the circuit court acquires only such jurisdiction as county court had. Price v. Madison County Bank [Ark.] 118 SW 706.

52. Held not appealable. Singo v. McGehee [Ala.] 49 S 290; Gartman v. Lightner [Ala.] 49 S 412. Order of municipal court vacating judgment and dismissing action. Lasker v. Guterman, 115 NYS 114. No appeal lies from judgment rendered before case stood for trial, or from void judgment, until motion is made in court in which it was rendered to set it aside. Civ. Code Proc. §§ 516, 517, 763. Baldridge v. Baldridge [Ky.] 117 SW 253.

Held appealable: Default judgment void in part because granting relief not within issues submitted by petition. Jarmine v. Swanson [Neb.] 120 NW 437. Judgment void because not rendered in term time. Baker v. Newton [Okl.] 98 P 931. That judgment is void will not prevent its reversal. In re Dahlgren, 30 App. D. C. 588.

53. Fact that one who appeals to district court from refusal of local boards to review his assessment for taxation is nonresident and not liable to be taxed does not prevent district court from taking jurisdiction of appeal. Shirk v. Monmouth Board of Review, 137 Iowa, 230, 114 NW 884.

54. Determination, judicial action and within power whether correct or not. Pittsburg, etc., R. Co. v. Peck [Ind. App.] 88 NE 627; Id. [Ind. App.] 88 NE 939.

55. Supreme court may determine jurisdiction of other courts including appellate court. Pittsburg, etc., R. Co. v. Peck [Ind.] 88 NE 627; Id. [Ind. App.] 88 NE 939. That writ of error granted to judgment of county court by circuit court was not perfected in

(§ 6) *A. General nature and mode of practice.*[58] See 11 C.L. 143—The appropriate remedy for review,[59] and matters relating to the transmission and filing of the record on appeal,[60] are discussed in other sections. Appeals must be single.[61] The right of review being purely statutory,[62] the statutes granting it must be complied with.[63] The proceedings for appeal must in some way show the order or judgment appealed from,[64] and by whom the appeal is taken.[65]

(§ 6) *B. Time for instituting and perfecting.*[66] See 11 C. L. 144—Proceedings for review must be taken [67] within the time prescribed by statute,[68] which ordinarily

time held no ground for dismissing writ of error subsequently granted by supreme court to circuit court, but that supreme court had jurisdiction to determine whether circuit court had jurisdiction. Louisa County v. Yancey's Trustee [Va.] 63 SE 452.

56, 57. See § 11G, post.

58. Search Note: See Appeal and Error, Cent. Dig. §§ 1932-1997; Dec. Dig. §§ 358-368; 2 Cyc. 806-816.

59. See § 2, ante.

60. See § 10, post.

61. Where defendants appeared specially by same attorney, and in same hour moved separately to set aside attempted service, each motion involving same question, and no other, and motions were heard at same time and disposed of in one order to which neither party made objection, appeal from the order is not double. Venner v. Great Northern R. Co. [Minn.] 121 NW 212. An appeal from a judgment and from two orders denying motion for new trial made on same grounds after judgment is not double. Sucker State Drill Co. v. Brock [N. D.] 118 NW 348.

62. See § 1A, ante.

63. State v. Broaddus, 216 Mo. 336, 115 SW 1018; Drainage Dist. No. 4 v. Wabash R. Co., 216 Mo. 709, 116 SW 549. Statutes giving right of appeal are to be liberally construed in furtherance of justice, such a construction as will work forfeiture of right not being favored. Price v. Western Loan & Sav. Co. [Utah] 100 P 677. Case brought to appellate court from municipal court being new suit in appellate court, held that statute regulating its disposition in that court was regulation of practice in that court and not regulation of practice in municipal court, and subject to requirements of Const. Art. 6, § 29, requiring all laws relating to appellate court or governing practice therein to be general and of uniform operation. Clowry v Holmes, 238 Ill. 577, 87 NE 303.

64. Appeal held one from interlocutory order denying motion to dismiss petition in condemnation proceedings only, and not from final judgment. Chicago Terminal Transfer R. Co. v. Preucil, 236 Ill. 491, 86 NE 117. Where after appeal from order granting new trial case was remanded in order that application might be made to amend order so that it would state ground upon which it was made, and order was amended and record of proceedings duly returned to supreme court, held that appeal was from order as amended. Powers-Simpson Co. v. Delehunt, 105 Minn. 334, 117 NW 503. Order sustaining motion to dismiss exceptions to ratification of resale of mortgaged premises under power was passed June 4, 1908. On same day resale was finally ratified and confirmed. Held that an appeal "from the order of court dated June 4, 1908," would be treated as taken from both orders, since they covered by one transaction, and being evidently concurred in execution might have been made effective by one signing. Werner v. Clark, 108 Md. 627, 71 A 305.

65. Appeal will not be dismissed on ground that it does not appear in whose behalf it was taken, where the word "defendant" is used in the motion to designate a party in both his individual and representative capacity, it being broad enough to include both. Ansley v. Stuart [La.] 48 S 953. Appeal will not be dismissed on ground that it was granted to attorneys instead of defendant, where, logically and grammatically, defendant was the "mover." Ansley v. Stuart [La.] 48 S 953. Where order granting appeal recited that an attorney prayed an appeal, which was granted with 90 days for filing bill of exceptions, but record showed defendants appeared by such attorney and that they filed bill of exceptions, appeal was granted to defendants, not the attorney. Johnson v. West [Ark.] 117 SW 770. Fact that attorneys signed order for appeal as attorneys for plaintiff instead of for plaintiffs held mere clerical misprision, and not to show that purpose was to appeal for legal plaintiff only and not for equitable plaintiffs, to whose use suit had been previously entered, and that appeal would be treated as taken for use of all the plaintiffs. Anderson v. Stewart, 108 Md. 340, 70 A 228.

66. Search Note: See notes in 49 L. R. A. 226; 15 L. R. A. (N. S.) 589; 3 Ann. Cas. 630; 7 Id. 393.

See, also, Appeal and Error, Cent. Dig. §§ 1877-1931; Dec. Dig. §§ 337-357; 2 Cyc. 789-805; 2 A. & E. Enc. P. & P. 237; 7 Id. 872.

67. Failure to pay register's fee within time limited for perfecting appeal is failure to perfect appeal in time, whether appeal is regarded as having been taken under Comp. Laws § 552, or Pub. Acts 1907, p. 497, No. 340. Lum v. Fairbanks [Mich.] 15 Det. Leg. N. 886, 118 NW 578.

68. Alabama: Code 1896, § 436, allowing year from rendition of judgment in which to appeal held repealed by adoption and promulgation of Code of 1907, leaving in lieu thereof § 2868 of latter requiring appeals to be taken within 6 months. Poull & Co. v. Foy-Hays Const. Co. [Ala.] 48 S 785. Appeal held part of remedy and not vested right, so that Code 1907, § 10, continues in force limitation of one year as to all appeals from judgments rendered before adoption of said code. Id. Code 1896, § 458, subd. 6, requiring appeal from probate court upon any issue as to insolvency of an estate, or

issue as to allowance of claim against insolvent estate, to be taken within 30 days after determination of such issue, held not to apply to appeal from order for sale of realty upon application of personal representatives, to pay debts of decedent. Curtis v. Hunt [Ala.] 48 S 598.

California: Appeal from judgment not taken until more than six months after entry thereof cannot be considered. Code Civ. Proc. § 939. Houghton Co. v. Kennedy, 8 Cal. App. 777, 97 P 905; Hellman v. Longley, 154 Cal. 78, 97 P 17; Green v. Gavin [Cal. App.] 101 P 931. Appeal from order denying new trial taken 61 days after entry of such order will be dismissed. Hellman v. Longley, 154 Cal. 78, 97 P 17. Review of evidence cannot be had on appeal from judgment unless appeal is taken within time limited by code for that purpose. Long v. Cramer Meat & Packing Co. [Cal.] 101 P 297.

Colorado: Mills' Ann. Code, § 401, providing that writ of error shall not be brought after expiration of three years from rendition of judgment complained of is statute of limitations, and writ must be prosecuted within time therein specified. McVicker v. Rouse [Colo.] 98 P 807. Writ of error is not brought within requirements of said section until summons to hear errors has been issued by clerk of supreme court, as required by Id. § 404, or issuance has been waived. Id.

Georgia: Party to application for writ of quo warranto desiring to except to decision of judge of superior court must carry same to supreme court by bill of exception within 10 days after decision of such court in session. Gillis v. Snow [Ga.] 64 SE 326. Where decision rendered Oct 30, and bill of exceptions certified Nov. 16, 1908, while supreme court in session in meantime, writ of error must be dismissed. Id.

Idaho: Rev. Codes, § 4807, subd. 1, requiring appeals to be taken in 60 days, applies to final judgment in action on special proceeding commenced in the court where same is rendered. Walker v. Elmore County [Idaho] 102 P 389. Not applicable to appeal from judgment rendered on appeal from inferior court or tribunal. Id. Statement on motion for new trial appearing in record properly certified and made part thereof will not be stricken from transcript though appeal is taken more than 60 days after entry of judgment, but may be considered for purpose of determining whether trial court committed any errors of law during trial. Havlick v. Davidson, 15 Idaho, 787, 100 P 91.

Illinois: Appeal from refusal to dissolve injunction must be taken within thirty and perfected within sixty days. Hurd's St. 1905, p. 234, § 52. Kerz. v. Galena Water Co., 139 Ill. App. 598. Writ of error to municipal court must be sued out within thirty days after judgment. Benjamin v. Chicago, I. & L. R. Co., 140 Ill. App. 312. When writ of error is not sued out in proper time, appellate court is without jurisdiction. Id.

Indiana: Appeals must be taken and perfected within one year from final judgment. Brulletts Creek Coal Co. v. Pomatto [Ind.] 88 NE 606.

Iowa: Where appeal is not perfected within six months from entry of judgment as required by code, § 4110, errors in record other than those disclosed by motion for new trial cannot be considered. Mueller Lumber Co. v. McCaffrey [Iowa] 118 NW 903. Where appeal from order overruling motion for new trial was taken within six months from making thereof, held that if there was any error in overruling motion which was reviewable on appeal, supreme court could reverse on that ground though errors in directing verdict and entering judgment could not be reviewed because appeal was not taken until more than 6 months after date of such judgment. Powers v. Des Moines City R. Co. [Iowa] 121 NW 1095. Under Code, § 3931, where judgment is rendered against an attaching plaintiff, he must immediately announce his intention to appeal and must perfect his appeal within two days thereafter, or discharge of attachment will be final, and this rule applies to attachment by garnishment. Conkling v. Young [Iowa] 120 NW 353. Held that appeal would not be dismissed because not taken until last day allowed therefor and no supersedeas bond was filed, though another party was thereby compelled to perform decree, since latter could have appealed and appellant was not required to file supersedeas bond unless he saw fit. Jefferson v. Century Sav. Bank [Iowa] 120 NW 308.

Kansas: Petition in error filed more than year after ruling complained of will be dismissed. Ashmore v. American Surety Co. [Kan.] 99 P 1132. Order overruling demurrer made and entered more than one year before filing of record in supreme court cannot be considered. Hawkins v. Brown [Kan.] 97 P 479.

Kentucky: Appeal more than two years after judgment is barred. Nickell v. Nickell [Ky.] 118 SW 966.

Louisiana: Const. art. 101, requiring appeals thirty days after judgment, though not establishing rule for action of court in exercise of supervisory jurisdiction, conferred by art. 94, serves as guide in latter class of cases, where no sufficient reason appears for unusual delay. In re Lindner, 122 La. 683, 48 S 150.

Michigan: Writs of error dismissed where not issued until more than two years after entry of judgments. Comp. Laws, § 10, 492. Bliss v. Tyler & Son [Mich.] 16 Det. Leg. N. 357, 121 NW 756.

Missouri: Under Rev. St. 1899, § 2931, writ of error in divorce proceedings must be taken within 60 days, whether it is sought to review the judgment of divorce, or any order as to alimony, or the custody of the children. Elliott v. Elliott [Mo. App.] 115 SW 486. Rev. St. 1899, § 2932, held to relate to writs of review only, and not to be applicable to writs of error. Id. Appeal from county court to circuit court not taken within 10 days after rendition of judgment held too late. Sidwell v. Jett, 213 Mo. 601, 112 SW 56.

Montana: Appeal taken more than year after entry of judgment appealed from dismissed. Rev. Codes, § 7099. Kaufman v. Cooper [Mont.] 98 P 504, rehearing denied, [Mont.] 98 P 1135.

Nevada: Appeal from judgments must be within one year under Comp. Laws, subd. 1, § 3425. Luke v. Coffee [Nev.] 101 P 555.

Ohio: Time within which proceeding in error may be commenced in supreme court to reverse judgment rendered in circuit court on appeal from court of common pleas

in action by railroad company under Rev. St. § 244-16 to vacate order of railroad commission fixing rates is governed by § 6723, and is brought in time if commenced within four months from date of rendition of judgment in circuit court. Railroad Commission of Ohio v. Hocking Valley R. Co., 79 Ohio St. 419, 87 NE 548. Provision of §§ 244-16, par. d, providing that appeal or writ of error must be taken within 60 days held to apply exclusively to appeals or writs of error for review judgment of court of common pleas in circuit court. Id.

Oklahoma: Under Act Cong. March 3, 1905, c. 1479, § 12, 33 St. 1081 (U. S. Comp. St. 1907, p. 208), providing that appeals and writs of error shall be taken from federal courts in Indian Territory to federal court of appeals of said territory in same manner that cases are taken by appeal or writ of error from federal circuit courts to circuit court of appeals, and Act Cong. March 3, 1891, c. 517, § 11, 26 St. 829 (Comp. St. 1901, p. 552), relating to appeals to circuit court of appeals, held that appeal must be taken within six months from date of entry of judgment sought to be reviewed. Porter v. Brook [Okl.] 97 P 645; Bickford v. Bruce [Okl.] 97 P 648; Utterback v. Rock Island Plow Co. [Okl.] 97 P 649; Lewis v. Sittel [C. C. A.] 165 F 157. Phrase "in the same manner" held to include the element of time. Porter v. Brook [Okl.] 97 P 645; Bickford v. Bruce [Okl.] 97 P 648; Utterback v. Rock Island Plow Co. [Okl.] 97 P 649. Act March 3, 1905 held to have repealed Mansf. Dig. § 1726, by implication. Porter v. Brook [Okl.] 97 P 645; Bickford v. Bruce [Okl.] 97 P 648; Utterback v. Rock Island Plow Co. [Okl.] 97 P 649. Judgment in federal court of Indian Territory, rendered less than 6 months before admission of state, may be reviewed by state supreme court where appeal within 6 months after entry of judgment. Moberly v. Roth [Okl.] 102 P 182; Friend v. Roth [Okl.] 102 P 185; Friend v. Roth [Okl.] 102 P 186. Proceeding in error must be commenced within one year. Court of Honor v. Wallace [Okl.] 102 P 111. Petition in error was filed and summons in error issued two days before expiration of one year after rendition of judgment appealed from. Service of summons which was served after expiration of year was quashed, and alias summons was not issued and served until after expiration of 60 days after issuance of first summons. Held that proceedings was not commenced within year from date of rendition of judgment appealed from as required by Wilson's Rev. & Ann. St. 1903, § 4748. School Dist. No. 39 v. Fisher [Okl.] 99 P 646. Under Wilson's Rev. & Ann. St. 1903, c. 66, art. 22, § 550 (par. 4748), proceedings for appeal must be commenced within one year. McMurty v. Byrd [Okl.] 101 P 1117. Proceeding deemed commenced from date of summons, where served within reasonable time thereafter. Id. Supreme court has no jurisdiction to review final order where over one year intervenes between order and filing of petition in error Okl. St. 1893, § 4452, mandatory. Tennison v. Engle [Okl.] 101 P 1132. On appeal from dissolution of temporary injunction, petition in error in order to confer jurisdiction must be filed within 30 days from date of order. No extension. Wilson's Rev. & Ann St. 1903, c. 66, art. 22, § 561 (par. 4759). Pioneer Tel. & T. Co. v. Incorporated Town of Chelsea [Okl.] 102 P 83. Petition in error for purpose of reviewing order of district judge made in chambers dissolving a garnishment will be dismissed where it is filed with clerks of supreme court more than 30 days after the making of such order. First Nat. Bank v. Spink [Okl.] 97 P 1019. Any proper party may appeal from any final order of corporation commission within one year from date same is made, word "manner" as used in const. art. 9, § 20, including "time." Atchison, etc., R. Co. v. Love [Okl.] 99 P 1081; Kansas City S. R. Co. v. Love [Okl.] 100 P 22.

Utah: Appeal must be taken within six months from judgment. Comp. Laws 1907, § 3301. Warnock Ins. Agency v. Peterson Real Estate Inv. Co. [Utah] 101 P 699.

Virginia: Under Code 1904, § 3454, as to appeal from interlocutory decrees, party is not bound to appeal at time of rendition but may do so within year after final decree is rendered provided other requisites of appeal exist. Hess v. Hess, 108 Va. 483, 62 SE 273.

Washington: Fifteen-day limitation for taking appeals prescribed by Ball. Ann. Codes & St. § 6502 (Pierce's Code, § 1050) applies to interlocutory orders, and 90-day limitation prescribed by same section to final judgments and final judgments which determine the action, such as an order denying petition to vacate a judgment. Kath v. Histogenetic Medicine Co., 50 Wash. 454, 97 P 464. Under Laws 1907, p. 338, c. 153, § 51, relating to appeals in eminent domain proceedings instituted by cities, appeal from order, made on motion of city, to set aside judgment and verdict in such a proceeding and to dismiss proceeding for want of jurisdiction must be taken within 30 days. City of Tacoma v. Birmingham Co., 50 Wash. 683, 97 P 971. Pierce's Code, § 8698, requiring appeals from tax judgments to be taken within 30 days after rendition of judgment, held to apply to judgment of dismissal in equitable action to vacate tax foreclosure judgment, though plaintiffs also sought to have title to premises in question quieted in them. McCausland v. Bailey, 51 Wash. 183, 98 P 327. Laws 1903, c. 59, § 4, p. 74, limiting time for appeal from tax foreclosure judgment, does not apply to equitable action by owner to set aside such foreclosure. Gould v. Knox [Wash.] 101 P 886. Fact that order dismissing garnishment was not reviewable because appeal as to it was taken too late held to require dismissal of appeal as to other orders as to which it was taken in time. Loveday v. Parker, 50 Wash. 260, 97 P 62.

Wisconsin: Where time within which appeal may be taken from judgment foreclosing mortgage on land has expired, deficiency judgment rendered in accordance therewith cannot be reviewed on appeal. Homestead Land Co. v. Stropahl [Wis.] 121 NW 892.

Federal courts: Time for appeal to federal supreme court from an adjudication that bankruptcy court has jurisdiction to declare bankruptcy on a claim for unliquidated damages is governed by Rev. St. § 1008 and 26 Stat. at L. 826, 827, c. 517, §§ 4, 5, limiting time to two years rather than by the 30-days limitation of rule 36, general orders in bankruptcy. Frederic L. Grant

runs from the date when an appealable order or judgment, legally sufficient, becomes a finality on the record,[69] and is computed according to the rules applicable to other procedure.[70] Statutes sometimes provide for an extension of time for good cause shown,[71] but an appeal cannot ordinarily be taken after such time by consent of parties.[72] Persons under disability are generally permitted to appeal within a specified time after such disability is removed.[73]

Shee Co. v. W. M. Laird Co., 212 U. S. 445, 53 Law. Ed. —. Hearing of motion and proceedings thereon constitutes a "hearing in equity" within Act April 14, 1906, § 7 (34 Stat. 116) in case of interlocutory order, and appeal must be taken within thirty days from entry of such order. Root v. Mills [C. C. A.] 168 F 688.

69. Time to appeal commences to run from moment of actual entry of judgment. Code Civ. Proc. § 936. Pedley v. Werdin [Cal.] 99 P 975. Code Civ. Proc. §§ 941a, 941b, 941c, as amended by Laws 1907, p. 753, c. 410, did not become operative until 60 days after their approval, and hence could not apply to appeal taken within that time. Id. Judgment held final on merits immediately upon its entry notwithstanding technical omissions which could have been corrected on motion at any time, so that unsuccessful party was not entitled to review of alleged errors at trial six years thereafter though such corrections were not made until then, and hence mandamus would not issue to compel judge to sign bill of exceptions for that purpose. Besser v. Alpena Circuit Judge [Mich.] 15 Det. Leg. N. 1081, 119 NW 902. Under Pub. Acts 1907, Act No. 340, p. 497, § 2, limiting time for taking appeal from decree in chancery an order overruling demurrer is included in word "decree" and limitation runs from filing thereof rather than from expiration of time to answer. Bliss v. Tyler [Mich.] 16 Det. Leg. N. 229, 121 NW 292. Time for appealing from dismissal of petition for intervention filed after entry of void judgment dates from such dismissal of petition, and not from date of void judgment. Shold v. Van Treeck [Neb.] 117 NW 113. Statute runs against time for taking appeal from date of entry of judgment rather than from date of decision. Collins v. Davis, 114 NYS 792. Plaintiff held to have acquiesced in validity of judgment as originally entered, so that time ran from original entry. Lally v. New York, etc., R. Co., 132 App. Div. 66, 116 NYS 470. Year from "rendition" of judgment within which appeal must be taken therefrom under Comp. Laws, §§ 3425, 3426, begins to run from date when court makes its oral decision and orders judgment to be entered accordingly, and not from entry of judgment by clerk. Central Trust Co. v. Holmes Min. Co. [Nev.] 97 P 390. Judgment non obstante verdicto having been reversed and judgment entered on the verdict, right of appeal dates from such entry. McGeehan v. Hughes [Pa.] 72 A 856. Judgment in federal court in action at law held final when entered though blank was left for inserting amount of costs when taxed, so that time for suing out writ of error commenced to run when such judgment was entered and not from date of order taxing costs and directing clerk to insert amount thereof. Allis-Chalmers Co. v. U. S. [C. C. A.] 162 F 679.

Effect of motion for new trial: Errors presented by motion for new trial may be reviewed where appeal is taken from order overruling such motion within six months from its rendition though more than six months from rendition of judgment in the cause. Code §§ 4110, 4106. Mueller Lumber Co. v. McCaffrey [Iowa] 118 NW 903. Fact that such errors appear in record and hence could be taken advantage of on appeal under Code, § 3755, had no such motion been filed held not to change rule. Id. Under Rev. St. 1899, § 808 (Ann. St. 1906, p. 775), requiring appeals at term when decision rendered, when various motions are made, continued to following terms and decided, until finally and order for new trial is made, appeal from such order is seasonable if made at that term. Chandler v. Gloyd, 217 Mo. 394, 116 SW 1073. Case was tried by judge of another division called in by regular judge. Term was adjourned to next regular term pending motion for new trial, which motion was then overruled by same judge who had again been called in. At subsequent term motion was again overruled by regular judge. Held that appeal should have been taken at term at which motion was first overruled. State v. Fidelity & Deposit Co. [Mo. App.] 117 SW 618. In case of filing or serving of proper notice of motion for new trial within time allowed by statute or enlarged by order of court, appeal may be taken within 6 months after disposition of such motion. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114. Time runs from disposition of motion. Warnock Ins. Agency v. Peterson Real Estate Inv. Co. [Utah] 101 P 699. Unless disposition of motion for new trial is incorporated in record by bill of exceptions, time for appeal runs from entry of judgment. Id.

Effect of motion to vacate judgment: Though motion to open judgment, and consideration thereof by court, may operate even when denied to extend time for exercise of existing rights relating to taking of appeal, it will not serve to revive rights lost before motion is made. In re Dalands [Conn.] 70 A 449. Motion to reopen judgment and for finding of fact made after time fixed by Gen. St. 1902, §§ 790, 793. for filing notice of appeal and request for finding. held not to extend time or revive lost rights. Id.

70. Under Act March 3, 1891, c. 517, 26 St. 829 (U. S. Comp. St. 1901, p. 552), § 11, requiring appeals within 6 months, where last day is Sunday, it is not excluded, and appeal cannot be taken on next day. Meyer v. Hot Springs Imp. Co. [C. C. A.] 169 F 623.

71. In the absence of proper showing, appellate court will not consider application for extension but will leave matter to trial court. Bliss v. Tyler [Mich.] 16 Det. Leg. N, 229, 121 NW 292.

72. Jurisdiction of appellate court is de-

(§ 6) *C. Affidavits and oaths.*[74] See 11 C. L. 146—An affidavit of good faith is required in some states.[75]

(§ 6) *D. Notice, citation or summons.*[76] See 11 C. L. 147—Timely [77] and regular [78] service [79] by appellant on the adverse parties,[80] or those of them whose rights

pendent upon commencement of error proceedings within time fixed. Radil v. Sawyer [Neb.] 120 NW 957.

73. Appeal prosecuted by infant within 12 months after he became of age held in time under Civ. Code. Prac. § 391. Turner v. Middlesboro [Ky.] 117 SW 422.

74. Search Note: See Appeal and Error, Cent. Dig. §§ 1941-1959, 1993-1996; Dec. Dig. §§ 361, 367; 2 Cyc. 808-812; 2 A. & E. Enc. P. & P. 234.

75. On appeal in bastardy proceedings, state need not make affidavits. Kirby's Dig. §§ 7777, 7778. Wimberly v. State [Ark.] 119 SW 668. Local Improvement Act, § 96 (Hurd's Rev. St. 1908, c. 24, § 602), providing for writs of error on behalf of property owners affected by confirmation of assessments, requires that there be filed with each application an affidavit of certain facts. City of Greenville v. Miller, 239 Ill. 323, 87 NE 1113. Sec. 96 passed long after c. 37, § 213, and not affected by provisions therein which would render § 96 nugatory. Id. Chapter 110 § 118, does not specify manner of suing out writ of error and, hence, does not involve § 96. Id. Filing of affidavit is essential to authority of court to grant appeal, and without it appeal is void. State v. Broaddus, 216 Mo. 336, 115 SW 1018. Supreme court acquires no jurisdiction where no affidavit. Shemmell v. McKinney, 214 Mo. 692, 114 SW 1083. Short method. Wright v. Seiffle, 214 Mo. 694, 114 SW 1083. Affidavit that appeal is taken "because defendant is aggrieved" by the judgment is sufficient within statute requiring averment that affiant "believes" party appealing to be aggrieved. Yost v. Silvers [Mo. App.] 119 SW 971. Affidavit by attorney acting as agent which describes affiant as attorney is sufficient without describing him as agent. Id.

76. Search Note: See Appeal and Error, Cent. Dig. §§ 2099-2174; Dec. Dig. §§ 396-430; 2 Cyc. 852-876; 2 A. & E. Enc. P. & P. 209; 7 Id. 881, 887, 889; 9 Ann. Cas. 731.

77. Appeal dismissed for failure to exercise due diligence, where summons was not served until seven months after it was issued and placed in hands of sheriff, and within one week of time set for hearing. Birmingham v. Rice [Ark.] 118 SW 1017. Appeal dismissed, where it was not lodged in supreme court until three days before expiration of time to appeal, summons was immediately issued but not served, and six months thereafter an alias summons was issued and served, no explanation being offered why it was not served earlier. Claiborne v. Leonard [Ark.] 114 SW 917. Actual notice to parties within one year is essential. Burns' Ann. St. 1901, § 645. Brouilletts Creek Coal Co. v. Pomatto [Ind. App.] 85 NE 993. Summons must be issued within time fixed by statute for perfecting of error proceeding. Radil v. Sawyer [Neb.] 120 NW 957. Cannot issue summons nunc pro tunc after such time. Id. Notice of appeal from municipal court more than 20 days after entry of judgment is too late. Municipal Court Act, § 311. Collins v. Davis, 114 NYS 792. Notice of appeal must be served at time prescribed by statute, to give appellate court jurisdiction. Barde v. Wilson [Or.] 102 P 301. Right to hear not to be conferred by consent of parties or waiver of rule by court. Id. Where abstract showed verdict rendered Nov. 9, by mistake for Dec. 9, with journal entry of motion to set aside judgment Dec. 19, and oral notice of appeal, from recital and presumption that court performed its duty as to rendering judgment on day of verdict (B. & C. Comp. § 201, as amended Laws 1907, p. 312, § 4), oral notice of appeal was not given on date of verdict as required by B. & C. Comp. § 549. Id. Where decree filed out of term time, 10 days allowed for service of notice of intention to appeal does not commence to run until notice of filing of decree. Martin v. Hutto [S. C.] 64 SE 421. Supreme court held to have acquired no jurisdiction where notice of appeal was not given until more than 15 days after entry of order appealed from. Ball. Ann. Codes & St. § 6502 (Pierce's Code, § 1050). Loveday v. Parker, 50 Wash. 260, 97 P 62. Appeal becomes inoperative by intervention of term of appellate court between allowance of appeal and issuance of citation, unless citation is waived. Nazima Trading Co. v. Martin [C. C. A.] 164 F 838.

78. Notice must be served in manner prescribed by statute. Barde v. Wilson [Or.] 102 P 301. Notice is not a "process" within Rev. Codes 1905, § 6738, and need not be served with statutory formality. Gooler v. Eidness [N. D.] 121 NW 83. Under Rev. Codes 1905, §§ 7205 and 7332, service of notice may be by mail where server and person served reside in different places between which there is communication by mail. Id.

79. Appellate court acquires jurisdiction of subject-matter when appeal is granted and authenticated copy of record is filed in that court, service of notice or summons not being necessary for that purpose. Claiborne v. Leonard [Ark.] 114 SW 917. Supreme court has jurisdiction in absence of such notice and can dismiss upon that ground. Birmingham v. Rice [Ark.] 118 SW 1017. Where notice was served on adverse party and it and undertaking were duly filed, held that appeal was properly perfected. Stewart v. Burbridge [Cal. App.] 101 P 419. Supreme court has no jurisdiction on writ of error until summons to hear errors has been issued by clerk of said court and served, as required by Mills' Ann. Code, § 404, unless issuance thereof has been waived by defendant in error. McVicker v. Rouse [Colo.] 98 P 807; Brady v. People [Colo.] 101 P 340. In absence of motion to dismiss upon that ground, due notice of appeal is presumed. MacFarland v. Paulos, 32 App. D. C. 558. Supreme court has no jurisdiction where no notice of appeal served. Saar v. Carson [Iowa] 118 NW 1007. Court of civil appeals acquires jurisdiction of a writ of error only upon service thereof. Carney v. Menefee [Tex. Civ. App.] 118 SW 1083.

80. See, also, ante, § 3B, as to who are

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APPEAL AND REVIEW—Cont'd.

will be affected by a reversal,[81] of such notice of appeal, citation, or summons as necessary parties. Is necessary to serve only parties who appear from record to be adverse. Portrero Nuevo Land Co. v. All Persons Claiming, etc. [Cal.] 101 P 12. Can look only to record. O'Rourke v. Finch, 8 Cal. App. 263, 96 P 784. Adverse party is party who appears by record to be adverse, and record to be considered for that purpose is record of proceedings in which the appeal is taken. McKenzie v. Hill [Cal. App.] 98 P 55. After final judgment and issuance of execution, garnishees were examined in supplementary proceedings and ordered to pay certain sum on the judgment. Held that judgment debtor, who was not served and did not participate in supplementary proceedings, was not adverse party on whom notice of appeal by garnishee from such order must be served. Id. Motion for new trial was made by all of several defendants and denied. One of said defendants alone appealed. Held that appeal was not defective for failure to serve other defendants, plaintiff being adverse party under such motion. O'Rourke v. Finch, 8 Cal. App. 263, 96 P 784. Defaulting defendants are not adverse parties to other defendants, where there is no joint relation alleged between them and judgment against each is several and independent. Potrero Nuevo Land Co. v. All Persons Claiming, etc. [Cal.] 101 P 12. Judgment in suit to quiet title, under St. Ex. Sess. 1906, p. 81, c. 59, must be several and independent within meaning of this rule. Id. Adverse party as used in Code Civ. Proc. 1895, § 1724, means anyone having an interest in opposing the object sought to be accomplished by the appeal, and not merely party served with notice of intention to move for new trial. Spokane Ranch & W. Co. v. Beatty, 37 Mont. 342, 96 P 727. Decree in action to determine water rights held not to give prior appropriator right to take certain water permanently so that certain defendants not served with notice of appeal could only be detrimentally affected by any modification thereof, and, hence, failure to serve them required dismissal. Id. Failure to serve notice of appeal by one defendant upon his codefendant, against whom action was dismissed, is not ground for dismissing appeal on motion of plaintiff, when appellant does not rely on dismissal as error and respondent has not appealed from order of dismissal. O'Keefe v. Beecher [N. D.] 117 NW 353. Every necessary party must either make general appearance within year following rendition of judgment or summons must issue within that time and service be had upon defendant in error. Strange v. Crimson [Okl.] 98 P 937. Notice to county court held not necessary prerequisite to appeal from its judgment. Baker v. Newton [Okl.] 98 P 931. Every party whose interest in subject-matter of the appeal is adverse to or will be affected by reversal or modification of judgment appealed from is an "adverse party" within meaning of Rev. Code Civ. Proc. § 441, whether he appears on face of record as plaintiff, defendant, or intervenor. Crouch v. Dakota, etc., R. Co. [S. D.] 117 NW 145. Appeal will be dismissed if notice is not served on all those adversely interested in judgment. Walker Bros. v. Skilris, 34 Utah, 353, 98 P 114. Not necessary to serve party in default. First Nat. Bank v. Fowler, 51 Wash. 638, 99 P 1034. Not necessary to serve parties who made no appearance below. McDougall v. Bridges [Wash.] 100 P 835.

Death of a party: See, also, ante, § 3A. On death of party after judgment his heirs or personal representatives must be made parties to vacation appeal subsequently taken, and notified of its pendency. Burns' Ann. St. 1908, § 677. Swing v. Hill [Ind. App.] 88 NE 721. On death intestate of plaintiff in personal injury action after rendition of judgment in his favor and after defendant had filed petition in error and bond, held that plaintiff's right passed to his wife and children, under Rev. St. 1895, art. 1689, and, in absence of any administration or any necessity therefore, they were proper parties on whom to serve citation, and hence they could accept service or waive service thereof. Binyon v. Smith [Tex. Civ. App.] 112 SW 138.

Service on attorney: Attorneys for defendant who appealed, who were also attorneys for defendant who did not appeal, accepted service as attorneys for latter of notice of appeal by former served by themselves. Held that such service and fact that said attorneys had possession of said notice until same was filed was sufficient notice to defendant not appealing in view of Laws 1899, p. 76, c. 49, authorizing denial of motion to dismiss appeal where alleged defect does not affect substance of appeal or right to appeal. Sipes v. Puget Sound Elec. R. Co., 50 Wash. 585, 97 P 723. Fact that attorneys for defendant who appealed were also attorneys for codefendant who did not appeal held not to have debarred them as attorneys for appellant from serving themselves with notice of appeal as attorneys for other defendant, there being no conflict of interest between their clients. Id.

81. See, also, ante, § 3B, as to who are necessary parties. Laborers secured personal judgment against contractor and judgment establishing lien on property as against owners. Owners appealed but contractor did not. Held unnecessary to serve notice of appeal on contractor under Code Civ. Proc. § 940, since personal judgment against him could not be affected by reversal, and reversal of judgment establishing lien could not harm him because if affirmed he would be liable over to owners. Quist v. Sandman, 154 Cal. 748, 99 P 204. In vacation appeals appellant must make all of his coparties parties to the judgment co-appellants, giving them proper notice of appeal. Belk v. Fossler [Ind.] 85 NE 990. Failure to serve notice on one whose interests could not be affected held not ground for dismissal. Capital Food Co. v. Globe Coal Co. [Iowa] 120 NW 704. Part of several coparties may appeal, but in such case must serve notice of appeal on those not joining therein, and file proof thereof with clerk of supreme court. In re Downs' Will [Iowa] 119 NW

the practice requires,[82] distinctly specifying the order or judgment appealed from [83] and the action in which it was rendered,[84] is generally required, and the notice [85] with proof of service [86] is sometimes required to be filed. In some states, notice of intention to appeal is required to be filed with the clerk of the lower court,[87] and such filing is sometimes made to take the place of service.[88] In some states the no-

703. While failure to serve coparties does not prevent supreme court from acquiring jurisdiction if there is notice of appeal which is sufficient as to adverse parties, it will, on proper objection, refuse to entertain appeal if parties not served might be prejudicially affected by reversal of the judgment. Id. Appeal by some of defendants in will contest from judgment setting aside will dismissed for failure to serve codefendant not appealing, where latter would take more as heirs than under the will. Id. Held further that it could not be presumed that their shares as heirs would be lost to them in such case by probating of alleged prior will. Id. Court will not speculate as to possibilities whereby would be to their interest to have will sustained. Id. Entry contemplated by Code, § 290, requiring clerk of district court to enter in his appearance docket so much of service of original notice as to show what parties were served and manner and time of service, is not necessary to charge an appealing party with notice as to who are parties to case entitled to notice on his appeal. Id. Code, § 4111 construed and held to require service of notice of appeal on such coparties only as may be prejudicially affected by a reversal, so that omission to serve coparty, who would not be so affected, is not jurisdictional, and appeal will not be dismissed on that ground. Sullivan v. Sullivan [Iowa] 117 NW 1086. Failure to serve codefendants held not ground for reversal where they would be entitled to larger part of premises than awarded them by decree if appellant prevailed. Id. Grantee appealing from judgment against him in suit to set aside conveyance as in fraud of creditors need not serve notice on grantor, although he was made party to the proceedings. Westcott v. Sioux City [Iowa] 119 NW 749. Where rights of all parties were so interwoven that determination of rights of one would necessarily determine those of others, held that notice of appeal from judgment sustaining demurrer to complaint going to merits must be served on all defendants whether they joined in demurrer or not. Dillavou v. Dillavou [Iowa] 120 NW 628. Ball. Ann. Codes & St. §§ 6503, 6504, construed and held that, where in action against two defendants judgment was rendered in favor of plaintiff against one of them and against plaintiff and in favor of the other defendant for costs, failure of defendant against whom judgment was rendered to serve notice of appeal on other defendant did not require dismissal, since latter had no substantial interest in said appeal. Sipes v. Puget Sound Elec. R. Co., 50 Wash. 585, 97 P 723; Wilson v. Puget Sound Elec. R. Co., 50 Wash. 596, 97 P 727. Held that in any event such failure did not affect substance of appeal or right to appeal and hence, under Laws 1899, p. 79, c. 49, did not require dismissal of appeal. Sipes v. Puget Sound Elec. R. Co., 50 Wash. 585, 97 P 723; Wilson v. Puget Sound Elec. R. Co., 50 Wash. 596, 97 P 727.

82. Appeal from taxation of costs by clerk in vacation must be in writing. Coney v. Maling [Me.] 71 A 887. Notice sufficient under Laws 1899, p. 228, and Laws 1901, p. 77, amending previous strict rule, when containing title of cause, names of parties, and notifying adverse party of appeal, etc. Anderson v. Phegley [Or.] 102 P 603.

83. Notice held to have sufficiently described judgment, record showing that it was entered on date therein specified. Gilbert Co. v. Husted, 50 Wash. 61, 96 P 835.

84. Notice should enable court by fair construction or reasonable intendment, without resort to any other evidence than that afforded by transcript, to determine that appeal is taken from judgment or decree in a particular case. B. & C. Comp. § 549. Keady v. United Ry. Co. [Or.] 100 P 658. Undertaking on appeal may be examined in order to identify judgment or decree sought to be reviewed. Id. Notice of appeal held to sufficiently identify judgment, when aided by undertaking and construed in connection with transcript, though transcript did not contain any reference to volume and page of journal where judgment was recorded, reference to volume and page in notice being disregarded as surplusage. Id.

85. Stewart v. Burbridge [Cal. App.] 101 P 419.

86. Ball. Ann. Codes & St. § 6504, requires proof of service of notice on prevailing party to be filed within 5 days of service thereof but is not necessary that proof of service upon coparties with appellant, not prevailing parties, be filed within that time. Sipes v. Puget Sound Elec. R. Co., 50 Wash. 585, 97 P 723.

87. Failure to file notice of intention to appeal from judgment granting divorce in office of clerks of trial court within 10 days after rendition of judgment, as required by Wilson's Rev. & Ann. St. 1903, held to require dismissal. LaDue v. LaDue [Okl.] 100 P 513.

88. St. 1907, p. 753, c. 410, held not to violate const. art. 1, § 13, relating to due process of law, because not requiring service of notice of appeal, said constitutional provision having no application to notices of appeal. In re McPhee's Estate, 154 Cal. 385, 97 P 878. Method of procedure in taking appeal held matter for determination of legislature which has power to dispense with service of notice. Id. Since statute provides for filing of notice within specified time, respondent, who is constructively in court during pendency of action, is bound to take notice of its actual filing within that time. Id. Statute held not in conflict with Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in its title. In re McPhee's Estate, 154 Cal. 385, 97 P 878. Title held not rendered misleading by use of word "alternative." Id. Construction of act as to whether

tice must specify the reasons of appeal.[89] Oral notice in open court is usually sufficient.[90] Appearance before the expiration of the time allowed for appeal ordinarily cures failure to serve notice.[91] Issuance and service of an alias notice may be allowed in some states for good cause shown.[92] Where several cases have been consolidated, a single notice is ordinarily sufficient.[93] Clerical errors in the notice may be disregarded when not prejudicial to the adverse party.[94]

(§ 6) *E. Application for leave to appeal,*[95]—See 11 C. L. 149 or for writ of error, made within the time and in the manner[96] prescribed by law, is necessary in some jurisdictions. Practice varies as to the necessity of an accompanying assignment of error.[97]

(§ 6) *F. Allocatur, order for or allowance of appeal; certificate.*[98]—See 11 C. L. 149—Allowance of an appeal or writ of error[99] by the proper judge[1] is necessary

it repeals by implication or is in conflict with other statutory provisions held to have no bearing on question whether it violates said constitutional provision. Id. Rules of practice relating to appeals in suits to quiet title under St. Ex. Sess. 1906, p. 78, c. 59, being under § 12 of said act, those applicable to other civil actions, appeal may be taken in alternative method provided by St. 1907, p. 753, c. 410, in which case service of notice on adverse parties is unnecessary. Potrero Nuevo Land Co. v. All Persons Claiming, etc. [Cal.] 101 P 12.

89. Reasons of appeal stated in form of interrogations instead of allegations of error held not properly stated, but considered where not objected to on that ground. McCaskey Register Co. v. Kenna [Conn.] 71 A 898.

90. Party desiring to appeal may give notice by himself or attorney in open court at time of rendition of judgment. B. & C. Comp. § 549. Barde v. Wilson [Or.] 102 P 301. Where appeal is taken in open court, citation or notice is unnecessary. Guy v. McDuffie [La.] 49 S 222.

91. Under Rules of supreme and appellate courts, § 9 (55 N. E. IV), filing of brief on merits is entry of appearance in appellate court. Jefferies v. Orndorf [Ind. App.] 88 NE 958.

92. Failure to serve notice on appellees as required by rule 36 held not to affect jurisdiction of supreme court, which will, for good cause shown, permit issuance and service of alias notice. Shold v. Van Treeck [Neb.] 117 NW 113.

93. Where four separate actions were consolidated, though four separate judgments were entered under different titles. First Nat. Bank v. Fowler, 51 Wash. 638, 99 P 1034.

94. Where error in citation is due to inadvertence of clerk and is corrected by him without authority, appellate court may in its discretion adopt the correction and refuse to dismiss. Moulton v. Cornish, 32 App. D. C. 533. Appeal should not be dismissed because of insertion of wrong date in notice as to when judgment appealed from was rendered, where it clearly appears from record that respondent was not misled or prejudiced. Price v. Western Loan & Sav. Co. [Utah] 100 P 677. Record held to clearly show that appeal was intended to be from order denying new trial, mistake as to date thereof in notice of appeal being clerical mistake. Mitchel v. Gray, 8 Cal. App. 423, 97 P 160.

95. Search Note: See Appeal and Error, Cent. Dig. §§ 1941-1961, 1989-1992; Dec. Dig. §§ 360-362, 366; 2 Cyc. 808-812; 2 A. & E. Enc. P. & P. 203.

96. Prayer for appeal may be made and signed by attorney or agent. Boqua v. Marshall [Ark.] 114 SW 714. Prayer for appeal by defendants held to have included a defendant not named therein who did not sign it. Id. One styling himself interpleader in pleadings and so designated in orders and decree held not to fall within designation of parties praying appeal, where prayer for appeal recited that appeal was prayed by defendants and summons issued pursuant to prayer omitted his name. Id.

97. Only grounds of appeal set out in petition of appeal considered. Lembeck v. Lembeck [N. J. Err. & App.] 71 A 240. Reasons not assigned in reasons for reversal stated at conclusion of petition of appeal not considered. Parker v. Travers [N. J. Err. & App.] 71 A 612. Review of decree of an orphan's court cannot be demanded as matter of right where petition in error neither avers error in matter of law apparent upon face of record nor new matter which has arisen since the decree. Groff's Estate, 36 Pa. Super. Ct. 140. Petition for writ of error is in nature of a pleading and must state clearly and distinctly the errors relied on to reverse judgment. Washington S. R. Co. v. Cheshire [Va.] 65 SE 27. Assignment of error in petition complaining of refusal of requested instructions held insufficient under Code 1904, 3464, and Rule 2. Id. Only questions set forth by writ of error and assignments accompanying it may be considered. Green County v. Thomas, 211 U. S. 598, 53 Law. Ed. —. Where petition did not assign error upon overruling of motion for new trials, amendment setting up such error could not be allowed when not filed until year after date of judgment. Bennett v. National Supply Co. [Kan.] 102 P 511. Specification in brief of error in overruling motions for new trials, which was not assigned in petition in error, cannot be treated as amendment of petition. Id.

98. Search Note: See Appeal and Error, Cent. Dig. §§ 1784, 1932-1941, 1949, 1953, 1977-1992; Dec. Dig. §§ 358-360, 365, 366; 2 Cyc. 806, 807, 812-814; 2 A. & E. Enc. P. & P. 207; 7 Id. 878, 883.

99. Appellate court may grant certificate of importance in case of fourth class which

unless the appeal or writ of error is of right.[2] In Louisiana a devolutive appeal cannot be taken from an order of appeal which the district court has dismissed.[3]

(§ 6) *G. Bonds, security, payment of costs.*[4]—See 11 C. L. 150—Supersedeas bonds[5] and liability upon appeal bonds[6] are treated in other sections. Except in certain specified cases[7] the appellant[8] is ordinarily required to furnish a bond or undertaking,[9] running to such parties as may be affected by the appeal,[10] which

by Chicago municipal court act can be reviewed only by writ of error sued out from appellate court. Laws 1907, p. 226; Laws 1907, p. 444, § 119, construed. Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 NE 740. No appeal, where amount in controversy less than $100, unless trial judge certifies that cause is one in which appeal should be allowed. Code, § 4110. Wood & Sons v. Griffith [Iowa] 119 NW 745. Certification of case in which there were no doubtful questions of law held abuse of discretion. Id. Appeal from decree overruling demurrer is not matter of right, but is discretionary with trial court. Day v. Tucker [Miss.] 48 S 742. Code 1906, § 34. State Fire Ins. Co. v. Morrison [Miss.] 48 S 178. Is abuse of discretion for chancellor to allow appeal from such decree where it can serve no purpose except to delay cause. Day v. Tucker [Miss.] 48 S 742. Where constitutional question is raised, appellate term in affirming judgment may grant leave to appeal to appellate division. Star Co. v. Moore, 62 Misc. 304, 114 NYS 753.

1. Writ of error to be granted by judge who heard cause or justice of supreme court as required by statute. Hardee v. Brown [Fla.] 47 S 834.

2. Allowance of appeal by county court not necessary. Baker v. Newton [Okl.] 98 P 931. Interlocutory judgment overruling demurrer to complaint was entered at special term. Appellate division reversed judgment, and sustained demurrer with leave to amend, but without directions in regard to entry of final judgment. Interlocutory judgment was entered on such order, and, plaintiff failing to amend, final judgment was entered on motion at special term dismissing his complaint on merits, which was unanimously affirmed by appellate division. Held unnecessary to obtain leave to appeal to court of appeals under Code Civ. Proc. § 191, subd. 2, since judgment, though literally within terms of that statute, was not within its spirit, judgment of special term on remand being in effect that of appellate division, and appellate division having affirmed its action. McNamara v. Goldman, 194 N. Y. 315, 87 NE 440.

3. Order of appeal did not state whether suspension or devolutive appeal was granted. District court thereafter dismissed appeal on ground that surety on appeal bond was insolvent, no right to furnish another bond being reserved. Appellant thereafter furnished another bond without obtaining another order of appeal, and without notice to court by whom appeal had been dismissed. Held that supreme court would dismiss appeal. Durel v. Murphy [La.] 49 S 1013.

4. **Search Note:** See notes in 8 L. R. A. (N. S.) 1054; 10 Ann. Cas. 804.

See Appeal and Error, Cent. Dig. §§ 1998-2098, 3127; Dec. Dig. §§ 369-395; 2 Cyc. 816-851; 1 A. & E. Enc. P. & P. 963; 2 Id. 318.

5. See § 7, post.

6. See § 17, post.

7. **Fiduciaries:** Receivers appealing in interest of their trust are exempt from obligation to give bond, being parties in trust capacity within Rev. St. 5228, and having already given bond for performance of their duty. Smith v. Folsom [Ohio] 88 NE 546. No bond is required where appellant is executor. Burns' Ann. St. 1908, §§ 687, 2980. Jeffries v. Orndorf [Ind. App.] 88 NE 958.

Public officers: Rev. St. § 1001, excepting U. S. departmental officers from obligation to furnish bonds on appeal to specified federal courts, applies to appeals to District of Columbia court of appeals although that court is not mentioned in the statute. Garfield v. U. S., 32 App. D. C. 109.

Municipalities: Counties, cities and other municipal corporations are relieved from necessity of giving bond. Rev. St. c. 110, § 72. Wetzel v. Hancock, 143 Ill. App. 178. County is not exempt. Midland County v. Slaughter [Tex. Civ. App.] 118 SW 762.

Poor litigants: In order to sustain appeal in forma pauperis under Sayles' Ann. Civ. St. 1897, art. 1401, record must affirmatively show that proof of inability to pay costs was made before county judge or the court trying the case when such court was in session, and that an order or judgment was entered of record showing that action taken was action of court. Sanders v. Benson [Tex. Civ. App.] 114 SW 435. Appeal dismissed, where it did not affirmatively appear that proof was made before judge while court was in session. Id. Where affidavit in lieu of appeal bond is void or was made before officer not authorized to administer oath or attest documents, defect is jurisdictional. Green v. Hewett [Tex. Civ. App.] 118 SW 170. Statute authorizing affidavit to be made before county judge of county where appellant resides does not comprehend county judges of other states. Id. Where no contest and trial court not in session, affidavit is sufficient if made before officer authorized and approved by county judge. Id. Where affidavit is merely defective or has omission which may be waived or established by evidence objection must be taken within reasonable time to be available. Id. Defect waived by failure to raise until after reversal of judgment appealed from. Id. Under Rev. St. 1895, art. 7, subd. 2, authorizing clerks of foreign courts to take affidavits, affidavit taken before clerk of court in foreign state is not void for failure to show that clerk was of court of record, nor because not verified by county judge. Id.

8. Bond held united in its effect to judgment against defendant, and insufficient to perfect appeal by interpleader from judgment against him, so that latter could not be considered. Hotchkiss v. Vanderpoel Co., 139 Ill. App. 325.

9. Appeal dismissed where no undertaking was filed to perfect it. Stewart v. Burbridge

must be executed,[11] approved,[12] and filed in the manner prescribed. When the filing and approval is an integral part of the transfer of the cause, it must be done within the time prescribed.[13] In a joint appeal the bond must be executed by all of the appellants.[14] As a rule but a single bond is required where several actions

[Cal. App.] 101 P 419. Whether cost bond shall be required is matter solely for determination of legislature. In re McPhee's Estate, 154 Cal. 385, 97 P 878. No cost bond necessary on appeal taken under St. 1907, p. 753, c. 410, providing new and alternative method of appeal. Id. Is sufficient if appeal can be sustained under either new or old method, and hence, where appellant filed sufficient notice, appeal would be sustained as taken under new method, though he attempted to take it under old method and filed bond which was insufficient for that purpose. Mitchell v. California & O. S. S. Co., 154 Cal. 731, 99 P 202. Rule that party having more than one remedy for review must elect between them and will be bound by election has no application, since there is but one remedy for asserting which two methods are provided. Id.

10. Bond on appeal from court of ordinary should be made payable to appellee rather than ordinary. Civ. Code 895, § 4466. Mattox v. Embry, 131 Ga. 283, 62 SE 202. Bond on appeal from judgment against plaintiff in trespass to try title, where defendant cites warrantors to defend, must run to warrantors as well as defendants, they being parties by Sayles' Ann. Civ. St. 1897, art. 5252. Appel v. Childress [Tex. Civ. App.] 116 SW 129. Where transcript and record are changed after appeal so as to include another appellee, presumption is that bond, of which there is only a memorandum entry in transcript, ran only in favor of appellee at first named. Taylor v. Leesnitzer, 31 App. D. C. 92.

11. Bond showing on its face that it was executed by defendant in his name as an individual, and reciting date of judgment appealed from, is at least sufficient to support appeal by him individually, though judgment be against him both in his individual and in representative capacity. Ansley v. Stuart [La.] 48 S 953. Objection that bond was dated prior to decree cannot be raised by one who has indorsed the bond "satisfactory to be reapproved." Lewis v. Luckett, 32 App. D. C. 188. Bond is sufficient, if given on behalf of appellant, when signed by the surety alone. Fidelity & Deposit Co. v. Seattle, R. & S. R. Co., 50 Wash. 391, 97 P 453. Fact that bond did not contain name of surety in body thereof, and was not signed by appellant but by surety alone, held not to render it insufficient to perfect an appeal in term. Majenica Tel. Co. v. Rogers [Ind. App.] 87 NE 165. Is not necessary that undertaking be signed by appellant (B. & C. Comp. § 550) and hence joint appeal was not defective because undertaking was signed by surety and only one of appellants. Elliott v. Bozarth [Or.] 97 P 632.

12. Where bond was marked and filed by prothonotary in court below without objection, objection will not lie on appeal that it was not approved by him, presumption of approval arising from such marking and filing. Ripka v. Mutual Fire Ins. Co., 36 Pa. Super. Ct. 517.

13. Under Burns' Ann. St. 1908, § 2978, on appeals from circuit court in cases involving estates of decedents, bond must be filed within ten days after decision complained of is made, unless court to which appeal is prayed shall direct appeal to be granted on filing of bond within year, and, where bond is not filed within time fixed by court, appeal will be dismissed. W. B. Mumford Co. v. Terry [Ind. App.] 87 NE 253. Filing of bond within time prescribed jurisdictional. Hillman v. Galligher [Tex. Civ. App.] 113 SW 321. Where under statute term of court might have been continued, and did continue, more than eight weeks, and appellant was resident of county where cause was tried, held that appeal would be dismissed where he did not file bond within 20 days after date of notice of appeal, as required by Sayles' Ann. Civ. St. 1897, art. 1387. Id. Appeal dismissed for failure to file bond until more than 40 days after service of notice of appeal where term might have continued more than eight weeks. Western Union Tel. Co. v. Parsley [Tex. Civ. App.] 114 SW 156. Unless it affirmatively appears that term may not by law continue more than eight weeks, a showing that bond was filed within 20 days after expiration of term is insufficient to give jurisdiction of appeal. Carney v. Wenefee [Tex. Civ. App. 118 SW 1083. Where statute is disregarded, parties are not entitled to benefit of statute permitting new bond in lieu of defective one Estes v. Estes [Tex. Civ. App.] 118 SW 174. Rev. St. 1895, art. 1384, construed, and held that provision giving nonresident 30 days in which to file bond applies only in cases where, the term continuing longer than 8 weeks, the time begins to run from date of judgment, and not where time does not begin to run until adjournment. Nash v. Noble [Tex. Civ. App.] 114 SW 848. Under B. & C. Comp. § 549, subd. 4, permitting amendment or performance of "other act," where notice of appeal given, "other act" is filing of undertaking, omission of which may be supplied on application. Hanley v. Stewart [Or.] 102 P 2. Where undertaking was filed after time fixed and without leave in mistaken reliance on order extending time in which to perfect appeal, held that appeal would not be dismissed but permission to file new undertaking would be granted. Quartz Gold Min. Co. v. Patterson [Or.] 96 P 551. Omission to give bond at time of taking appeal is not ground for dismissal provided bond is filed within reasonable time thereafter, particularly where appellee has not been prejudiced by delay. Corcoran v. Kostrometinoff [C. C. A.] 164 F 685.

14. Where several parties join in praying an appeal, and it is allowed on condition that they execute a bond, condition must be literally complied with or appeal will be defective both as to those who do and those who do not join therein. Hotchkiss v. Vanderpoel Co., 139 Ill. App. 325. Distinct judgments were rendered against defendant and an interpleader and an appeal prayed by them was "allowed upon filing an appeal bond."

have been consolidated [15] or in the event of an appeal from several orders in the same case.[16] The amount,[17] sureties,[18] and terms and conditions of the bond,[19]

Bond filed was sufficient to perfect an appeal by defendant only. Held that defendant's appeal would be considered, though that of interpleader could not be. Id.

15. Though separate judgments were entered under different titles. First Nat. Bank v. Fowler, 51 Wash. 638, 99 P 1034.

16. Only one undertaking need be filed, whatever may be number of appeals taken at same time. Rev. Codes, § 7170. In re Kappler's Estate [Mont.] 100 P 228. Where appeal from judgment and order denying new trial is consolidated into one record, only one undertaking is required. Gassert v. Strong [Mont.] 98 P 497. Undertaking reciting that appeal is from "the judgment and amended judgment" held to show but one appeal from the amended judgment which took place of original one, reference to latter being mere surplusage. Id. Undertaking held sufficient to support appeal both from judgment and from order denying motion for new trial. Kaufman v. Cooper [Mont.] 98 P 504, rehearing denied [Mont.] 98 P 1135. But one undertaking is required to perfect appeal from final judgment and from order granting new trial, but such undertaking must refer to each of such appeals, and, if it merely recites appeal from judgment, appeal from order is ineffectual and may be dismissed. Sucker v. State Drill Co. v. Brock [N. D.] 120 NW 757.

17. Amount in discretion of court if not arbitrarily exercised. Fitzpatrick v. Letten [La.] 49 S 494. Where case was nonsuited and plaintiff is not condemned for any amount nor ordered to deliver property. Id. Where it develops that costs are much larger than had been anticipated, an additional suspensive appeal bond may be accepted in trial court's discretion if timely offered. Id. Judge must fix amount of security in devolutive appeal when appeal is of such a character as requires his signature. Succession of Lynch [La.] 49 S 1002. Bond should be large enough to secure costs. Fitzpatrick v. Letten [La.] 49 S 494. Burden of proof is on party seeking dismissal for inadequacy of appeal bond. Id. When appellant gave bond for amount fixed by court, appeal cannot be dismissed though amount inadequate. Id. Where judge was ill and fixed bond on appeal by insolvent from sustaining of opposition to respite, at amount to cover debts rather than costs, and offered to change same, but appeal was perfected, supreme court would grant mandamus for reduction of amount. Perkins v. His Creditors [La.] 49 S 137. Where more than month after refusal of district court to order increase in amount of bond given for devolutive appeal and more than two months after appeal was lodged in court of appeal case was set down for hearing in latter court and called for argument, and it appeared that no steps had been taken to procure review of ruling, held that it was proper to deny application for mandamus to compel district court to order increase and for stay of proceedings in meanwhile, and to order argument to be proceeded with, appellee having been guilty of laches. Lindner v. Stock [La.] 49 S 734. Situation not changed in that regard by reason of fact that court granted continuance to enable appellee's counsel to prepare argument. Id. District court refused to order increase in amount of devolutive appeal bond, and thereafter court of appeal refused to issue mandamus to compel increase because of laches. Held that prohibition would not issue from supreme court to prohibit court of appeal from exercising its jurisdiction to proceed with hearing and determination of case, thus ignoring its judgment, proper procedure being to procure review in supreme court of court of appeal's judgment. Id. Discretion of probate court to fix bond exclusive, under Pub. Acts, 1901, No. 92, § 670, p. 133. Stevens v. Kirby [Mich.] 16 Det. Leg. N. 207, 121 NW 477. That part of an estate used by consent of legatees for benefit of one of them should be deducted from amount of bond on appeal from order for accounting. Id. Where several appeals are taken at same time and but single undertaking is filed, penalty must be sufficient in amount to support all of them, and the references must be so made to each of them that the penalty may be properly appointed. In re Kappler's Estate [Mont.] 100 P 228. Undertaking on appeals from three orders in penal sum of $300 held insufficient under Rev. Codes, §§ 7100, 7101, it being essential that there be undertaking in that sum for each appeal, except in case of appeals from final judgment and order granting or denying new trial taken at same time, in which case one undertaking in penalty of $300 is sufficient under Id. § 7107. Id. In suit to foreclose contracts constituting equitable lien on mining property, where court fixed value of amount of use of land which was included in undertaking, it was not defective because failing to secure performance of assessment work required by U. S. Laws to save property from forfeiture pending appeal. Anderson v. Phegley [Or.] 102 P 603.

18. Necessary party to appeal incompetent as surety. Pearce v. Haas, 122 La. 376, 47 S 687. District court has jurisdiction to inquire into solvency of surety, and to dismiss appeal in case surety is not sufficiently responsible. Durel v. Murphy [La.] 49 S 1013. Where exception is made to sureties under Civ. Code Proc. § 1335, and they intentionally fail to justify, they are discharged from liability. Riddle v. McFadden, 60 Misc. 569, 112 NYS 498. Validity of undertaking, respondent having excepted to sureties and sureties intentionally failed to justify, must be tested by action on undertaking rather than motion in action. Id.

19. Undertaking on appeal from judgment to effect that appellant will pay all damages and costs which may be awarded against him on appeal or on dismissal thereof, not exceeding $300, is sufficient. Havlick v. Davidson, 15 Idaho, 787, 100 P 91. Undertaking which was sufficient to sustain appeals from judgment and from order denying new trial held sufficient to sustain appeal from order after appeal from judgment was dismissed because not taken in

are largely regulated by statute. Defects may ordinarily be cured by the filing of an amended or substituted bond.[20]

(§ 6) *H. Entry below*[21]—See 11 C. L. 152 is sometimes required.[22]

§ 7. *Transfer of jurisdiction; supersedeas and stay.*[23]—See 11 C. L. 152—Transfer of jurisdiction is accomplished when the appeal is fully perfected.[24]

Supersedeas See 11 C. L. 153 of the judicial power of the lower court results with the transfer of jurisdiction [25] if the appeal be from the judgment, except as neces-

time. Kaufman v. Cooper [Mont.] 98 P 504, rehearing denied [Mont.] 98 P 1135. Undertaking on three appeals reciting that appellant will pay all damages and costs which may be awarded against him on said appeals, etc., not exceeding $300, "otherwise this obligation to become null and void; otherwise to remain in full force and effect," held rendered nugatory as indemnity for costs in any amount by last two clauses, since in whatever sense "otherwise" is used instrument is meaningless. In re Kappler's Estate [Mont.] 100 P 228.

20. Rev. Codes 1905, § 7224. Signed by sureties only and defective justification. Sucker State Drill Co. v. Brock [N. D.] 119 NW 348. Where undertaking is not a nullity, defects therein may be cured by filing a new undertaking. Gassert v. Strong [Mont.] 98 P 497. Where appeal bond void because not running to warrantors made parties in trespass to try title, court will permit new bond to be filed. Appel v. Childress [Tex. Civ. App.] 116 SW 129. Mistake as to date of judgment in undertaking held not ground for dismissal in view of Laws 1907, § 3319, authorizing supreme court to permit filing of new undertaking. Price v. Western Loan & Sav. Co. [Utah] 100 P 677.

21. Search Note: See Appeal and Error, Cent. Dig. §§ 2175-2182; Dec. Dig. §§ 431-433; 2 Cyc. 876-879.

22. Where writ of error returnable before supreme court is issued by clerk of circuit court, it need not be formally filed in circuit court, but original writ should be returned to supreme court. Hardee v. Brown [Fla.] 47 S 834.

23. Search Note: See notes in 10 C. L. 282; 67 A. S. R. 714.

See, also, Appeal and Error, Cent. Dig. §§2191-2281; Dec. Dig. §§ 431-492; 2 Cyc. 876-916, 965-979; 2 A. & E. Enc. P. & P. 323; 7 Id. 899

24. Appeal properly perfected removes case wholly from lower court and places it in higher tribunal. Steele v. Hohenadel, 141 Ill. App. 201. Case is pending in appellate court instantly upon filing and approval of appeal bond. Id. Appeal allowed by trial court regarded as pending in appellate court when appeal bond is executed and filed as provided in order of appeal. Merrifield v. Western Cottage Piano & Organ Co., 238 Ill. 526, 87 NE 379. Notice of appeal in term does not alone give appellate court jurisdiction unless followed by filing of bond in lower court, and filing in appellate court of transcript and assignment of errors naming all parties to the judgment. Berkey v. Tipton L., H. & P. Co. [Ind. App.] 85 NE 724, 84 NE 1095.

25. Injunction which merely has effect of preserving subject of litigation in statu quo is not suspended by an appeal, but a mandatory injunction cannot be enforced pending a duly perfected appeal. Clute v. San Francisco Super. Ct. [Cal.] 99 P 362. Trial court has no jurisdiction to file additional findings and render another judgment thereon pending appeal from original judgment, and this rule is not affected by fact that said appeal is subsequently dismissed. Pashgian v. Stephenson [Cal. App.] 100 P 1075. Where suit against maker and indorser of note resulting in judgment against indorser and nonsuit against maker is appealed by plaintiff, entire case is brought up and judgment against indorser is suspended until appeal is terminated. Turnell v. Carter [Ga. App.] 64 SE 114. At common law, writ of error was itself supersedeas, and by suing out such a writ defendant could stop all proceedings in execution of judgment without giving security. Chicago & N. W. R. Co. v. Garret, 239 Ill. 297, 87 NE 1009. When appeal is perfected jurisdiction of court below ceases, and appeal becomes stay of all proceedings to enforce execution of the judgment or decree. Merrifield v. Western Cottage Piano & Organ Co., 238 Ill. 526, 87 NE 379. Trial court held to have no authority to permit amendment of execution pending appeal from order denying motion to recall and quash execution and sustaining motion to vacate order setting aside default as to one defendant. Id. On filing and approval of appeal bond question whether order appealed from is final and appealable is transferred to appellate court for its decision. Id. Appeal from order, striking amended and supplemental petition, held not to have affected pleadings, as they stood before said petition was filed, or issues raised thereby. Wapello State Sav. Bank v. Cotton [Iowa] 122 NW 149. Lower court held to have no power to strike out judgment on motion made after it was enrolled, after appeal had been taken, bond given, and necessary affidavit made to stay execution, and transcript of record transmitted to and received by court of appeals. United R. & Elec. Co. v. Corbin [Md.] 71 A 131. Where order is appealed, court loses jurisdiction over it for any purpose, and cannot amend it or set it aside. Robinson v. Helena L. & R. Co. [Mont.] 99 P 837. Where appeal perfected from judgment, district court was without authority to amend judgment by inserting provisions for costs. Butte Northern Copper Co. v. Radmilovich [Mont.] 101 P 1078. Judgment entered in municipal court of Erie county after appeal is perfected to supreme court is without effect since under Laws 1908, p. 1163, c. 387, § 552, appellant is entitled to new trial in supreme court and on perfecting appeal the action is at once removed to that court, notwithstanding ten days, provided by Code Civ. Proc. 3071, after filing returns of lower court before action shall be deemed at issue in appellate court

sary to preserve rights pending review;[26] but ordinarily the judgment continues valid, binding, and efficient[27] so that it may be enforced,[28] unless a special order superseding it be allowed.[29] The mere prosecution of an appeal from an order dis-

has not expired. Miller v. Buffalo, 129 App. Dlv. 833, 113 NYS 1056. Where appeal is perfected, authority of court to allow alteration or completion of some act relating to filing of proper undertaking necessarily ceases. Hanley v. Stewart [Or.] 102 P 2. Where writ of error bond filed, county court lost jurisdiction of case, and could not thereafter make nunc pro tunc order requiring statement of evidence as part of record as required by Rev. St. 1895, art 1346, where process by publication and no answer filed. McLane v. Kirby [Tex. Civ. App.] 116 SW 118. Refusal to hear evidence offered in support of supplemental answer filed after judgment had been rendered and appeal perfected held proper. Cofield v. Britton [Tex. Civ. App.] 109 SW 493. Where case is settled after appeal is perfected, contention that district court is without jurisdiction to enforce attorney's lien since no judgment has or even will be filed and case has not been remanded is not tenable since district court has jurisdiction to enforce lien on verdict. In re Nethaway [Minn.] 121 NW 418. After appeal to supreme court from interlocutory order continuing preliminary restraining order until hearing, disposition of order and all questions incident thereto are necessarily involved in ruling carried to supreme court. Combes v. Adams, 150 N. C. 64, 63 SE 186. Trial judge has no power to entertain motion to set aside restraining order because of newly-discovered evidence, subsequent thereto. Id. Since after supreme court acquires jurisdiction it has full power over whole case with regard to all things appearing on record, restraining order of chancellor to preserve status quo pending appeal is determinable and should not be made to extend beyond reasonable time in which application may be made to supreme court or one of judges thereof for temporary injunction in aid of appellate jurisdiction. Hampton v. Hickey [Ark.] 114 SW 707. Is not error for court to proceed with condemnation matter after appeal has been noted, where from filing of amended petition and prosecuting proceeding it appears that such appeal has been abandoned. Columbia Heights Realty Co. v. McFariand, 31 App. D. C. 112.

26. Sole effect of appeal from order appointing guardian and awarding custody of child is to suspend operation of decree pending determination of appeal. Steele v. Hohenadel, 141 Ill. App. 201. Superior court held to have jurisdiction, pending appeal from order denying motion for new trial, to issue commission to take testimony of nonresident witness for use on new trial in case of reversal, where witness is only witness on material point and is under sentence of death. Code Civ. Proc. §§ 946, 1049, 2020. 2021. Gas & Elec. Co. v. San Francisco Super. Ct. [Cal.] 97 P 359. Question in such case is not whether testimony would be material to issue tried, but whether it will be material on new trial and under such amendment as circumstances would warrant court in allowing. Id. Court and Practice Act 1905, § 331, requiring justice of superior court to make orders for protection of parties until determination of appeal, does not authorize justice to require security where writ of ne exeat quashed. Jastram v. McAuslan [R. I.] 72 A 531.

27. Appeal from judgment of probate court to court of common pleas does not operate to annul or vacate such judgment, but merely suspends execution or enforcement of judgment appealed from during pendency of appeal. Rev. St. §§ 5235, 6411. Jenney v. Walker [Ohio] 88 NE 123. Where, after appeal from probate court to court of common pleas, appellant commences proceeding in error in common pleas court to obtain reversal of judgment appealed from, and before trial appeal is dismissed and abandoned, it is error to dismiss proceeding in error without other reason that that appeal extinguished judgment, it being permissible to prosecute appeal and error concurrently. Id.

28. Without supersedeas, appeal never suspends execution of an order. In re Brady, 169 F 152. Where by reason of motion for rehearing bankrupt fails to appeal within statutory time from adjudication in bankruptcy and subsequently appeals but without taking supersedeas, such appeal is no defense to rule to compel filing of schedules but the rule may be reputed to allow parties in interest to move to dismiss appeal. Id. Since appeal by guardian from personal judgment against him in favor of ward without giving supersedeas bond would not have stayed enforcement of judgment, held that it was no defense to liability on bond that he could have appealed without giving it. Hands v. Haughland [Ark.] 112 SW 184.

29. Where it appears that injunction prohibitory in form is mandatory in effect, appellate court may issue writ of supersedeas to stay contempt proceedings. Clute v. San Francisco Super. Ct. [Cal.] 99 P 362. Proceedings for punishment for contempt for violation of mandatory injunction stayed by supreme court on condition that appellant file undertaking required by Code Civ. Proc. §§ 943, 945. Id. Denial of supersedeas has not the effect of affirming judgment in municipal court, where order is entered specifically denying such effect. Hydraulic Engineering Works v. Wittenberg Matzoh Co., 141 Ill. App. 180. Municipal court act § 23, par. 3, providing that if, upon application to supreme or appellate court, or any judge thereof, for supersedeas, same shall be denied, judgment or order shall stand affirmed, and no further proceedings shall be had in supreme or appellate court with respect thereto, unless such court or judge denying supersedeas, shall otherwise order, held to regulate practice in appellate court, and hence to be in conflict with Const. art. 6, § 29, requiring such laws to be general and of uniform operation. Clowry v. Holmes, 238 Ill. 577, 87 NE 303. Under Hurd's Rev. St. 1908, c. 41, § 14, providing that decree of divorce deprive party at fault of dower in hands of other party and c. 110, § 106, providing that no writ of error operate as supersedeas, unless so ordered, doctrine of lis pendens had no application to writ of

missing a bill for an injunction does not operate as an injunction, or preclude the doing of the acts sought to be enjoined.[30] In Louisiana, subject to certain statutory limitations,[31] the allowance of a suspensive appeal is largely discretionary.[32]

Bond.[See 11 C. L. 154]—Filing within a specified time[33] of a bond[34] running to

error. Chicago & N. W. R. Co. v. Garrett, 239 Ill. 297, 87 NE 1009. Under Civ. Code Prac. § 747, appeal does not stay proceedings on judgment until supersedeas is issued, though supersedeas bond has been given. Asher v. Cornett, 32 Ky. L. R. 1173, 108 SW 242. Where appellate division may not decide on motion for appeal to court of appeals for some time, special term may grant stay of proceedings on applicant giving bond. Hart v. Clark & Co., 60 Misc. 366, 113 NYS 451. Where trial term of city court set aside verdict and granted new trial, stay pending appeal to determine if such action was authorized was proper, no prejudice resulting therefrom. Huntington v. Rodgers, 116 NYS 580. Where statute makes no provisions for supersedeas or stay or matter of right, trial court may allow such relief in its discretion and certiorari will not lie to review such action. Palmer v. Harris [Okl.] 101 P 852. Circuit court on dismissal of bill and dissolution of temporary injunction granted to restrain collection of taxes has discretionary power to grant supersedeas continuing status quo pending appeal on giving of bond to protect state. Western Union Tel. Co. v. Wright, 168 F 558.

30. Cardoza v. Baird, 30 App. D. C. 86.

31. Party is ordinarily entitled to suspensive appeal except in cases enumerated in Code Prac. arts. 580, 1059, Civ. Code, art. 1160. Succession of Drysdale, 122 La. 37, 47 S 367. In action between heirs at law and executors of will where sequestration is ordered and court renders judgment for heirs, executors are entitled to suspensive appeal after giving proper bond. Id. No suspensive appeal from judgment refusing to remove executor. Succession of Platz, 122 La. 14, 47 S 119. Setting aside sequestration granted ex officio by judge ancillary to and in aid of proceeding gives no right of suspensive appeal. Id. Suspensive appeal cannot be taken from order vacating order of appeal and directing execution, after right to suspensive appeal from original judgment is lost. Reynolds v. Egan, 122 La. 47, 47 S 371.

32. Suspensive appeal does not lie in all cases from order dissolving injunction and dismissing appeal, but right thereto depends upon facts of each particular case. Le Blanc v. Michel, 122 La. 339, 47 S 632. Where candidate given nomination by special tribunal and opposing candidate appealed to courts, resulting in adverse judgment and suspensive appeal, and such candidate removed to another parish and instituted injunction suit against secretary of state to prevent placing of nominated candidate's name on ballot, when such injunction was set aside because of no jurisdiction, judge was not compelled to grant suspensive appeal. Id.

33. Parties appealing from judgment of supreme court of Arizona to federal supreme court have 60 days after rendition of judgment, exclusive of Sundays, in which to give security and suspend judgment. U. S. Rev. St. §§ 1007, 1012, 1909. Sandoval v. U. S. Fidelity & Guar. Co. [Ariz.] 100 P 816. Sixty days held not to have commenced to run until date rehearing was denied by supreme court. Id. Since Act May 19, 1897 (P. L. 67) fixes no time within which bond must be given and approved except that it must be given within three weeks of entry of judgment or decree to supersede an execution issued or distribution ordered, held that where appeal was perfected in time it would not be quashed because bond was not filed and approved until after six months from judgment appealed from, there being no question involved as to whether approval of bond superseded any process. Hanhauser v. Pennsylvania & N. E. R. Co., 222 Pa. 240, 71 A 4.

34. Held that neither prayer for appeal from order modifying consent decree nor allowance of appeal operated as supersedeas, but that filing and approval of bond had that effect. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717. Judgment not superseded by appeal from state to federal supreme court where bond was not filed nor copy thereof lodged for adverse party as required by U. S. Rev. St. § 1007. North Shore Boom & Driving Co. v. Nicomen Boom Co. [Wash.] 101 P 48. Decisions of federal courts held binding in determining question whether appeal from state to federal supreme court operated as supersedeas. Id. Appellant held not required to file supersedeas bond unless he saw fit. Jefferson v. Century Sav. Bank [Iowa] 120 NW 308. Kirby's Dig. § 1349, providing that guardians shall not be required to give supersedeas bonds, but that all orders against them as such shall be superseded by the appeal, does not apply to decree of probate court adjudging guardian to be indebted to ward in certain sum, such judgment being one against him personally. Hands v. Haughland [Ark.] 112 SW 184.

Terms of bond: Bond to stay execution pending appeal from judgment in replevin need not provide for taking of judgment against surety on motion in case of failure of appellant to pay. Code Civ. Proc. § 943. United States Fidelity & Guar. Co. v. More [Cal.] 101 P 302. Supersedeas bond under Wilson's Rev. & Ann. St. 1903, § 4744, by which obligors held themselves firmly bound until obligee in amount specified "for payment of which," "we bind our heirs and personal representatives" binds obligors personally though word "ourselves" omitted. Ryndak v. Seawell [Okl.] 102 P 125.

Sureties: Wilson's Rev. & Ann. St. 1903, § 4919, requiring any ministerial officer taking security to require offered surety to make affidavit of qualifications and indorse upon or attack affidavit to undertaking, is directory, and failure of surety to so qualify on supersedeas bond does not invalidate bond. Id.

Approval: Wilson's Rev. & Ann. St. 1903, § 4747, requiring clerk to indorse approval upon any undertaking under said section, is directory. Id. Failure to indorse bond until after judgment affirmed by appellate court does not invalidate. Id.

such parties as may be affected by the appeal,[35] and in an amount fixed by the court [36] or by statute,[37] is usually requisite to a supersedeas.

The effect See 11 C. L. 164 of a supersedeas is simply to suspend the judgment [38] and stay proceedings,[39] and not to vacate or dissolve such judgment [40] or writs incident to the suit.[41] The lower court loses its power only in respect to those things which might trench on the appellate functions.[42]

35. Where necessary party was not joined, and bond did not run to her, held that appellate court could not permit filing of additional bond and issuance of citation to her after time for appealing had expired. Taylor v. Leesnitzer, 31 App. D. C. 92.

36. Is essential to efficacy of undertaking to stay execution of judgment in action of replevin pending appeal that amount thereof be fixed by court or judge thereof. Code Civ. Proc. § 943. United States Fidelity & Guar. Co. v. More [Cal.] 101 P 302. Where it appeared that party appealing from mandatory injunction directing delivery of real and personal property requested trial court to fix amount of undertaking to stay proceedings, required in such case by Code Civ. Proc. §§ 943, 945, held that it was duty of court to comply with request, and that contempt proceedings against appellant for violation of injunction should not have been entertained until he had been given opportunity to give such undertaking. Clute v. San Francisco Super. Ct. [Cal.] 99 P 362. Statutory discretion of the trial judge in fixing amount and conditions of bond may be reviewed by proper motion containing allegations of fact sufficient to show abuse of such discretion. State v. Palmer [Fla.] 48 S 638. Supersedeas and cost bond for $1,000 held not fatally defective because there was no order fixing amount thereof, where judgment appealed from was for $43 and costs. Gilbert Co. v. Husted, 50 Wash. 61, 96 P 835.

37. Code Prac. art. 575, requiring appellant to give his obligation for sum exceeding by one-half amount of judgment rendered to suspend execution of judgment pending appeal is imperative. Reynolds v. Egan, 122 La. 47, 47 S 371. In fixing amount of bond, interest should be computed to date of rendition of judgment. Id. District court has jurisdiction to determine sufficiency of bond. Id.

38. Supersedeas held not to have conferred any affirmative right, but to have prevented court from entering any further order in execution of decree appealed from, its power being confined to preservation of existing status. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717. Appeal from order appointing administrator held to have suspended such order. Zimmer v. Saier [Mich.] 15 Det. Leg. N. 1077, 119 NW 433. Suspensive appeal from judgment, dismissing main action where no conservatory writ is thereby dissolved, can suspend nothing save running of delay within which judgment appealed from would otherwise become unappealable, and appeal from judgment dismissing intervention can have no greater effect. Filhiol v. Schmidt, 122 La. 701, 48 S 157.

39. Where order of appeal is in form and bond sufficient, appellate court has jurisdiction, not court a qua. Reynolds v. Egan, 122 La. 47, 47 S 371. Where error is committed by court a qua in authorizing execution to issue, remedy is by writ of prohibition. Id. In action between heirs at law and executors of will, where sequestration was ordered, suspension appeal by executors from judgment thereafter rendered in favor of heirs held to have effect of maintaining sequestration. Succession v. Drysdale, 122 La. 37, 47 S 367. Where plaintiff's cause of action attached and judgment rendered in his favor but appealed by defendant who gave undertaking to stay execution and judgment rendered for plaintiff in attachment action but reversed by appellate division and appealed to court of appeals, lien of attachment was not annulled and, pending appeal to court of appeals, action could not be maintained on undertaking. Milliken v. Fidelity & Deposit Co., 129 App. Div. 206, 113 NYS 809. Though action commenced before undertaking to stay execution on judgment of appellate division was filed. Id. Code Civ. Proc. § 3343, subd. 12, provides that warrant of attachment be annuled where final judgment for defendant, but that stay shall suspend effect of annulment, and reversal shall revive warrant. Id. Appeal operates as supersedeas from date of service and filing though not perfected until expiration of time for objections to sufficiency of sureties. Anderson v. Phegley [Or.] 102 P 603. Where one defendant perfected appeal before sale in suit to foreclose equitable mortgage on mining property, sheriff should have continued sale until expiration of time for objections to sureties, and in default of objections should have released property. Id. Sale under foreclosure decree and order confirming same after perfection of appeal are invalid. Id. After new trial was granted defendant applied for order fixing amount of undertaking for stay of proceedings pending appeal from such order, and such order was made. Held error to thereafter permit plaintiff to enter voluntary dismissal before appeal was perfected and before time within which to appeal had expired. Anderson v. Horlick's Malted Milk Co., 137 Wis. 569, 119 NW 342.

40. Booker v. Blythe [Ark.] 118 SW 401.

41. Supersedeas stays proceedings only from filing of bond, and, though it prevents further proceedings under an execution already issued, does not interfere with what has already been done. Sandoval v. U. S. Fidelity & Guar. Co. [Ariz.] 100 P 816.

42. Under Code Civ. Proc. § 949, giving of $300 undertaking pursuant to § 941 on appeal from order denying motion to vacate order directing issuance of execution and refusing to vacate execution stayed proceedings on such order in so far as could be any proceedings thereon, but not proceedings on judgment or execution. Weldon v. Rogers, 154 Cal. 632, 98 P 1070. Suspensive appeal by defendant from order to deliver to sheriff, pendente lite, certificates of stock involved in main demand, held not to have effect of staying action by plaintiff upon main demand. Ansley v. Stuart [La.] 48 S 953.

§ 8. *Appearance, entry, and docketing above* [43]—See 11 C. L. 155 are generally essential,[44] and, where appellant fails to enter the appeal, the appellee may ordinarily do so for the purpose of moving to dismiss.[45, 46]

§ 9. *Perpetuation of proceedings and evidence for the reviewing court.* (*Record on appeal.*) *Scope and terminology.*See 11 C. L. 156—The "record proper," sometimes designated as the "fundamental record," "judgment roll," or "common-law record," includes those matters which are at common law of record ex propria vigore. The "secondary record" includes the various means by which matters not part of the record proper are made of record by bill of exceptions, settled case, abstract, approved motion for new trial, etc. The "entire record" or "record on appeal" comprises all that is transmitted to the reviewing court, including both record proper and secondary record.

(§ 9) *A. What the record proper must show.*[47]—See 11 C. L. 156—That which is a part of the record proper must appear by such record, and its omission cannot be supplied by the secondary record.[48] The facts essential to jurisdiction of the court below [49] and of the appellate court [50] must appear. The record proper should also

43. Search Note: See, also, Appeal and Error, Cent. Dig. §§ 2175-2190; Dec. Dig. §§ 431-435; 2 Cyc. 876-885; 2 A. & E. Enc. P. & P. 321.

44. Cross assignment of error not considered, where defendant in error did not enter **appearance** or file brief. Mulford v. Rowland [Colo.] 100 P 603. Where, in case transferred from superior to supreme court on exceptions by defendant, neither defendant nor his trustee in bankruptcy, who had notice, appeared, held that exceptions would be overruled. Head & Dowst Co. v. New England Breeders' Club [N. H.] 70 A 248. Appeal to be **docketed** seven days before call of cases of district to which it belongs. Supreme Court rule 5 (53 SE V). Foy v. Gray, 148 N. C. 436, 62 SE 523. Upon appeal to district court from probate court on issues of law alone, district court should docket and dispose of case according to issues presented by such appeal. Smith v. Clyne, 15 Idaho, 254, 97 P 40.

45, 46. Motion under supreme Court rule No. 17 (53 S. E. VII) to docket and dismiss for failure to file transcript in time granted. Fowle v. Mitchell, 149 N. C. 581, 62 SE 311.

47. Search Note: See Appeal and Error, Cent. Dig. §§ 2282-2331; Dec. Dig. §§ 493-515; 2 Cyc. 1025-1053; 2 A. & E. Enc. P. & P. 260.

48. Whittington v. Woods [Mo. App.] 116 SW 1065; In re Moore's Estate [Mo. App.] 119 SW 451. Appeal dismissed where the abstract of the record was taken from bill of exceptions. Crane v. Crane [Mo. App.] 111 SW 884. Failure of record proper to show filing of motion for new trial not supplied by fact that bill of exceptions shows such filing. Gray v. Missouri Pac. R. Co. [Mo. App.] 115 SW 1062; City of Macon v. Jaeger, 133 Mo. App. 643, 113 SW 1138; Phoenix Stone & Lime Co. v. Huggins [Mo. App.] 116 SW 458; Rife v. Reynolds [Mo. App.] 117 SW 652; Davis v. Foster [Mo. App.] 118 SW 1191. Motion to make petition more specific not open to consideration where not shown by record entry in abstract that such motion was filed or ruled on, recital in bill of exceptions that such motion was filed being insufficient. Ewing v. Vernon County, 216 Mo. 681, 116 SW 518. Recital of bill of exceptions that answer was "refiled" does not show answer to have been withdrawn and refiled, since such recital has no place in bill. Id. That bill of exceptions is part of record cannot be shown by recitals in bill. Hanks v. Hanks, 218 Mo. 670, 117 SW 1101; Walsh v. Patterson [Mo. App.] 115 SW 1027; Davis v. Foster [Mo. App.] 118 SW 1191. Statement in bill of exceptions as to what court said were grounds on which decision was based held of no consequence, it being necessary to determine such grounds from record. Thomas v. Elliott, 215 Mo. 598, 114 SW 987. Order overruling demurrer to evidence not reviewable when only in bill of exceptions. Ray v. Pollock [Fla.] 47 S 940. Statement in certificate to bill of exceptions that a judgment was rendered held insufficient to supply defect of record resulting from failure to set out in record proper the judgment appealed from. Ford v. McIntosh [Okl.] 98 P 341. Under rule 53 (20 S. W. XV), rulings on special exceptions to petition are improperly shown by bills of exceptions. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236 Where demurrer is presented by record, ruling thereon may be reviewed though demurrer is also included in bill of exceptions. Junkins v. Sullivan [Md. App.] 73 A 264. Agreed statement of facts not being intrinsically part of record does not become so by act of clerk in including same in certified transcript, which recites that same was filed in case. Truesdale v. Board of Com'rs [Colo.] 99 P 63.

49. American Soda Fountain Co. v. Mason [Tex. Civ. App.] 119 SW 714. Is no presumption on appeal from judgment that process was served where no evidence of such service appears in record. Baldridge v. Baldridge [Ky.] 117 SW 253; Duff v. Combs [Ky.] 117 SW 259. Where record does not show case within jurisdiction of circuit court, circuit court of appeals will notice fact. Yeandle v. Pennsylvania R. Co. [C. C. A.] 169 F 938. On appeal from county court on case originating in justice's court, must show jurisdiction of former court. Joy v. Hatfield [Tex. Civ. App.] 120 SW 569. Where, on appeal from judgment of county court on appeal from justice's court, statement of facts showed that transcript of proceedings

show all papers constituting a part of the judgment roll,[51] a final [52] order or judgment below,[53] and, in some jurisdictions, the making of motions for a new trial,[54] and in arrest of judgment,[55] due and timely authentication and filing of a bill of exceptions,[56] and the taking of all steps necessary to bring up the case for review.[57]

had and judgment rendered in justice's court was filed in county court, held that there was sufficient showing that county court had jurisdiction, it being unnecessary that transcript from justice's court be otherwise embodied in transcript to court of appeals. Missouri, K. & T. R. Co. v. Milliron [Tex. Civ. App.] 115 SW 655. Must show that appeal bond was filed in original appeal from justice to circuit court. Humphreys v. McFarland [Miss.] 48 S 182; Johnson v. Marshall [Miss.] 48 S 182; Donald Bros. Mercantile Co. v. Marsh [Miss.] 48 S 230.

50. Roberson v. First State Bank [Tex. Civ. App.] 118 SW 173. That some question was involved authorizing appeal direct to supreme court. People v. Cannon, 236 Ill. 179, 86 NE 215. Amount involved. Nick v. Bensberg [La.] 48 S 986. Existence of federal question. Honolulu Rapid Transit & L. Co. v. Wilder, 211 U. S. 144, 53 Law. Ed. 124.

51. Must affirmatively show plea and issue thereon. Good v. Chester [W. Va.] 63 SE 615. Since amended pleadings take place of original where judgment roll shows amended pleadings, court will presume that pleadings contained in transcript certified by clerk to be correct are those which constitute judgment roll. Armstrong v. Henderson [Idaho] 102 P 361. Date of filing petition where material should appear in transcript. Milem v. Freeman [Mo. App.] 117 SW 644.

52. Newberger Cotton Co. v. Watts [Miss.] 49 S 146; Skallberg v. Skallberg [Neb.] 121 NW 979.

53. Must contain copy of judgment or order appealed from. Saar v. Carson [Iowa] 118 NW 1007; Hale v. Jefferson County [Mont.] 101 P 973; Union Pac. R. Co. v. Colfax County [Neb.] 122 NW 29; Ford v. McIntosh [Okl.] 98 P 341; Olentine v. Powell [Okl.] 100 P 556. Order overruling of demurrer to evidence. Ray v. Pollock [Fla.] 47 S 940. Notice of appeal from order of certain date, but with no statement as to nature of order or copy thereof attached to record, presents no question. Rosenstein v. New York, etc., R. Co., 113 NYS 547. In absence of written order denying motion for new trial, copy of minute entry must be embodied in statement upon appeal from such order to confer jurisdiction on supreme court. Kirman v. Johnson [Nev.] 96 P 1057, former opinion [Nev.] 93 P 500. Paper sent up by lower court indorsed "On motion to settle statement," appearing to be order amending statement on motion for new trial by modifying language used in findings and decree copied into statement, held at most to indicate that court had previously made order modifying decree and was correcting proposed statement on motion for new trial accordingly, and not order modifying findings and decree, and hence not open to consideration by supreme court even if properly before it which it was not. Id. Duty of restoring destroyed orders, as authorized by St. 1906, Ex. Sess., p. 73, c. 55, rests on party seeking to appeal therefrom, so as to enable him to furnish court with copy of order appealed from as required by Code Civ. Proc. § 951. In re Heywood's Estate, 154 Cal. 312, 97 P 825. Appellant held guilty of inexcusable lack of diligence in procuring restoration of orders. Id.

54. City of Macon v. Jaeger, 133 Mo. App. 643, 113 SW 1138; Gray v. Missouri Pac. R. Co. [Mo. App.] 115 SW 1062; Phoenix Stone & Lime Co. v. Huggins [Mo. App.] 116 SW 458; Whittington v Woods [Mo. App.] 116 SW 1065; Davis v. Foster [Mo. App.] 118 SW 1191; In re Moore's Estate [Mo. App.] 119 SW 451. Rev. St. 1899, § 813 (Ann. St. 1906, p. 783). Rife v. Reynolds [Mo. App.] 117 SW 652. Abstract of record must show from record proper not only filing of motion but ruling of court thereon. Barham v. Shelton [Mo.] 119 SW 1089.

Contra: Under Rev. St. 1887, §§ 4443, 4820, notice of intention to move for new trial is not made part of record on appeal, and it is not necessary that record show service of same. Naylor v. Lewiston & S. E. Elc. R. Co., 14 Idaho, 789, 96 P 573.

55. Whittington v. Woods [Mo. App.] 116 SW 1065; In re Moore's Estate [Mo. App.] 119 SW 451.

56. That bill was filed. Gray v. Missouri Pac. R. Co. [Mo. App.] 115 SW 1062; Phoenix Stone & Lime Co. v. Huggins [Mo. App.] 116 SW 458; Hanks v. Hanks, 218 Mo. 670, 117 SW 1101. Order granting leave to file bill. Whittington v. Woods [Mo. App.] 116 SW 1065. Order fixing time for filing bill. Davis v. Foster [Mo. App.] 118 SW 1191. Where abstract of record proper fails to show that bill was filed in time, or order of record granting leave to file it in vacation, nothing but record proper can be considered. Shemwell v. McKinney, 214 Mo. 692, 114 SW 1083; Walsh v. Patterson [Mo. App.] 115 SW 1027; Shemwell v. McKinney, 214 Mo. 692, 114 SW 1083. Where bill is not filed during term at which appeal is allowed, must appear from abstract of record proper that order was made of record during term extending time for filing bill thereafter, and that bill was actually filed within time thus extended, or within time extended by such further competent extensions as may be made. Walsh v. Patterson [Mo. App.] 115 SW 1027. Unless it affirmatively appears in abstract that time was extended during term, it will be conclusively presumed that no such extension was granted, and that extension granted in vacation was void. Goodhart, Hartman Co. v. Kinney [Mo. App.] 118 SW 679. Granting of leave during term to file bill after close of term must be shown by order book entry. Brown v. Am. Steel & Wire Co. [Ind. App.] 88 NE 80. Cannot be shown by statement in bill itself. Rose v. State [Ind.] 87 NE 103. Assignments based on alleged exceptions will not be considered where printed book shows no bill of exceptions signed by trial judge. Negley v. New York Life Ins. Co. [N. J. Err. & App.] 70 A 129.

57. Affidavit for and order granting leave to appeal. Whittington v. Woods [Mo. App.] 116 SW 1065. Supreme court has no juris-

While at law every presumption is in favor of the judgment, and error must be made affirmatively to appear,[58] in equity the prevailing party must preserve the evidence supporting the decree, unless the decree recites or finds the specific facts proved,[59] and in some states a similar rule obtains on appeal from inferior courts.[60]

(§ 9) *B. What is part of record proper; necessity of secondary record.*[61]—See 11 C. L. 158—The office of the bill of exceptions or other secondary record is to make of record that which is not part of the record proper,[62] and it is necessary except to review errors apparent on the face of the judgment roll.[63] The record proper con-

diction where abstract of record proper fails to show affidavit for appeal or to state substance thereof. Shemwell v. McKinney, 214 Mo. 692, 114 SW 1083; Wright v. Seiffie, 214 Mo. 694, 114 SW 1083. Statement in abstract that record proper of circuit court showed that, during same term in which motion for new trial was overruled, defendant filed affidavit for appeal, and on that affidavit court made order allowing appeal to court of appeals, held sufficient to confer jurisdiction on that court, though neither affidavit nor statement of its contents appeared in abstract. State v. Broaddus, 216 Mo. 336, 115 SW 1018. On certiorari presumed in support of order allowing appeal that there was sufficient affidavit. Id. On appeal in forma pauperis, record must affirmatively show that proof of inability to pay costs was made in manner prescribed by statute. Sanders v. Benson [Tex. Civ. App.] 114 SW 435. Where printed record failed to show that appeal had ever been taken to supreme court, held that latter court was without jurisdiction and case would be stricken from docket. Pence v. Wabash R. Co. [Iowa] 119 NW 596.

58. See post, § 9D.

59. Where evidence is taken in open court, it must be preserved by certificate of evidence or specific facts incorporated in decree. Buettner v. Glos, 240 Ill. 9, 88 NE 280; Lister v. Glos, 236 Ill. 95, 86 NE 180. Decree in suit to quiet title found that complainant was owner and in possession of premises at specified date prior to commencement of suit, and was owner of premises at time of filing bill. Held that, since decree must find specific facts and not merely recite evidence of such facts, failure of decree to state that complainant was in possession of premises when bill was filed was fatal in absence of certificate of evidence even though there was presumption that her possession continued. Id. In absence of record evidence to support decree, it must be reversed. Leiberman v. Bowden [Tenn.] 119 SW 64. Complainants in mechanic's lien case must establish case in supreme court as well as in court below. Doetsch v. Wetlaufer [Mich.] 121 NW 746.

60. On appeal from municipal court in New York: In re Moore's Estate [Mo. App.] 119 SW 451.

61. Search Note: See note in 15 L. R. A. 798.

See, also, Appeal and Error, Cent. Dig. §§ 2332-2479, 2955; Dec. Dig. §§ 516-555; 2 Cyc. 1053-1093; 2 A. & E. Enc. P. & P. 268.

62. Matters of exception, such as proceedings at trial, result thereof, rulings on motion for new trial, etc., must be preserved by bill of exceptions. City of Macon v. Jaeger, 133 Mo. App. 643, 113 SW 1138. Writ of error to review action commenced in common pleas dismissed where no bill of exceptions supporting assignments of error. Dovi v. Gehlhaus Co. [N. J. Law] 72 A 69. Record on appeal from judgment of district court on appeal from justice's court must be made up in same way as in cases originating in district court, and hence it is not necessary to embody whole record in bill of exceptions. Rev. Codes, §§ 6806, 7096. Mettler v. Adamson [Mont.] 99 P 441.

63. On appeal from judgment on judgment roll alone, judgment will be affirmed where findings are within issues and fully support judgment. Galvin v. Fannen, 154 Cal. 774, 99 P 183. Where appeal is on judgment roll alone, objection that finding of fact was outside of the issues will not be considered. Peck v. Noee, 154 Cal. 351, 97 P 865. On appeal from probate to district court on question of law alone, appellant may present such questions as arise upon the pleadings or files in the action or appear from the docket of the court, though no statement has been prepared, settled, or filed. Rev. St. 1887, § 4839. Smith v. Clyne, 15 Idaho, 254, 97 P 40. Under Rev. Codes, § 7112, record on appeal from order of district court dismissing action appealed from justice's court which contained copies of complaint, answer, judgment, and notice of appeal, held sufficient to justify review of judgment. Nettler v. Adamson [Mont.] 99 P 441. Where record contains all papers properly constituting part of judgment roll, held that its character was not destroyed by fact that it also contained papers not part of record because not incorporated therein by bill of exceptions. Id. In equity case tried and appealed under Rev. Codes 1905, § 7229, statement of the case is not necessary to review of questions appearing on record proper, such as whether conclusions of law are warranted by findings. Brandenburg v. Phillips [N. D.] 119 NW 542. Where bill of exceptions was quashed, held that nothing remained for consideration except pleadings and decree. Walker v. Burtless [Neb.] 118 NW 113.

Bill of exceptions held unnecessary: To review errors appearing on record. Morgan Creek Drainage Dist. Com'rs v. Hawley, 240 Ill. 123, 88 NE 465. On writ of error from federal supreme court to district court presenting sole question of jurisdiction where it can add nothing to the record. Frederic L. Grant Shoe Co. v. Laird Co., 212 U. S. 445, 53 Law. Ed. —. Ruling on demand for jury trial in equity case. It being in nature of challenge to jurisdiction of trial judge to try case on facts. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104. To review ruling of circuit court dismissing appeal from probate court where record stated grounds for dismissal. Esmond v. Esmond, 142 Ill. App.

sists of the summons,[64] pleadings,[65] and judgment.[66] In some states it also includes an appearance,[67] orders for judgment,[68] and orders granting appeals.[69] Stipulations,[70] petitions for the removal of causes to the federal courts,[71] bills of particulars,[72] depositions,[73] the evidence,[74] affidavits,[75] pleadings not permitted to be filed,[76] proceedings on a former trial,[77] exceptions,[78] the opinion,[78] and minutes [80] of

233. On appeal from decree distributing decedent's estate record, in its nature a judgment roll, will ordinarily be sufficient without bill of exceptions; but, where determination has depended wholly or in part on facts established by evidence, appellant may have so much of said evidence as is pertinent embodied in bill. In re Benner's Estate [Cal.] 99 P 715. Though where return is made, petition or affidavit for writ of review can serve no useful purpose on appeal unless embodied in bill of exceptions, where there is interposed demurrer, effect of which for the time is to adopt allegations of petition as the return, petition, upon sustaining of demurrer and rendition of judgment of dismissal, is substituted as and for the record in lieu of which it is accepted, and may be brought up and considered, not as the petition, but as the return, and therefore a part of the judgment roll without a bill of exceptions. Stoner v. Los Angeles City Council, 8 Cal. App. 607, 97 P 692.

64. Where appeal from interlocutory order appointing receiver in vacation was taken and transcript filed before return day named in summons, held that there could have been no opportunity for defendants to appear within meaning of Burns' Ann. St. 1908, § 691, providing that summons and return shall form no part of record where all the defendants appear, and hence summons and return formed part of record. Marshall v. Matson [Ind.] 86 NE 339.

65. Verified complaint. Marshall v. Matson [Ind.] 86 NE 339. Deeds and tax receipts made exhibits to complaint. McMillan v. Morgan [Ark.] 118 SW 407. Insurance policies sued, made exhibits to complaint, where their execution was admitted by answer, and they were read in evidence and properly identified. North State Fire Ins. Co. v. Dillard [Ark.] 115 SW 154. Answer filed at rules. Towner v. Towner [W. Va.] 64 SE 732. Demurrer. Junkins v. Sullivan [Md. App.] 73 A 264. Breimeyer v. Star Bottling Co. [Mo. App.] 117 SW 119. Demurrer to bill contained in the body of answer thereto, but not filed by any order in cause, or in any way called to attention of court, will be treated as fugitive paper. Cross v. Gall [W. Va.] 64 SE 533. No bill of exceptions necessary to preserve ruling on demurrer. Morrison v. St. Louis & S. F. R. Co. [Ark.] 112 SW 975; Fall v. Hornbeck, 132 Mo. App. 588, 112 SW 41. Ruling on demurrer and motion to strike parts of answer. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104. Rulings on special exceptions. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236.

66. Does not belong in bill of exceptions. Hanks v. Hanks, 218 Mo. 670, 117 SW 1101.

67. Becomes part of record by act of filing and is unnecessary to incorporate it in bill of exceptions. Hine Bros. v. Adams, 139 Ill. App. 92; Ostrobramy v. Barczaitis, 139 Ill. App. 94.

68. Order determining provisions of judgment on subject of costs. Jones v. Broadway Roller Rink Co., 136 Wis. 595, 118 NW 170. Orders dismissing and reinstating causes Poppell v. Culpepper [Fla.] 47 S 351. Bill of exceptions not necessary to make order, sustaining motion to dismiss action, part of record. Rev. Codes, § 6806. Mettler v. Adamson [Mont.] 99 P 441. Is final decision of court disposing of action so that same is deemed excepted to. Rev. Codes, § 6784. Id.

69. Hanks v. Hanks, 218 Mo. 670, 117 SW 1101.

70. Written stipulation of facts or mode of proof. Backes v. Schlick [Neb.] 117 NW 707. Stipulation waiving proof of an issue, defense must be preserved on the record. Cadillac Automobile Co. v. Boynton, 240 Ill. 171, 88 NE 564.

71. Ruling with respect to it cannot be reviewed unless it is made part of record by bill of exceptions. Comp. Laws 1907, § 3197. Neesley v. Southern Pac. Co. [Utah] 99 P 1067.

72. Peterson v. Mayer, 142 Ill. App. 257.

73. Lew Moy v. U. S. [C. C. A.] 164 F 322. Certified copy of deposition can only be considered when incorporated in statement of facts pursuant to Acts 1907, c. 24, § 5. Dealy v. Shepherd [Tex. Civ. App.] 116 SW 638.

74. Colby v. Reams [Va.] 63 SE 1009. In absence of finding of facts, a special verdict, or a request for ruling, and a bill of exceptions, evidence is no part of record. Continental Gin Co. v. Murray Co. [C. C. A.] 162 F 873. Fact that judgment recited that cause was heard upon affidavits, which were not, however, specifically identified, and that parties agreed to print affidavits in record, held not to take case out of general rule. Id.

75. McDonell v. McDonell [Cal.] 101 P 40; Harrison v. Bell [Ga.] 64 SE 688; Jones v. Middle Georgia Cotton Mills, 131 Ga. 52, 61 SE 977; McDonald v. Downing [Wash.] 100 P 834. Affidavits of newly-discovered evidence. Bentley v. Hurlburt, 153 Cal. 796, 96 P 890; Crocker v. Steidl [Neb.] 118 NW 1083. Affidavits filed in support of motion to set aside service of process. Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 99 P 1046. Affidavit as to orders of trial court attached to brief. Murphy v. Lyon, 127 App. Div. 448, 112 NYS 152. Affidavits not part of record unless appeal is from judgment against defendant who claims not to have been served with summons. London v. Attis, 116 NYS 28. Affidavits submitted on hearing must be incorporated in bill of exceptions to review grant of temporary alimony and counsel fees, or be attached as exhibit thereto duly and properly identified, or be embodied in approved brief of evidence and brought up as part of record. Harrison v. Harrison [Ga.] 65 SE 126.

76. Petition. United States Fidelity &

the trial court, entries in the clerk's register,[81] and copies of the stenographer's notes,[82] are held not a part of the record proper in the absence of a statutory provision to the contrary, but must be brought up by a proper bill of exceptions or by some method corresponding thereto, or they will not be considered.[83] Statutes in some states permit instructions to be made of record without a bill of exceptions,[84] but in the absence of statute they must be brought in by bill of exceptions or its equivalent.[85] In some states papers used on an appeal from an appeal, or from certain orders, may be identified by certificate of the trial judge.[86] Motions and orders thereon are not a part of the record and must be incorporated therein by

Guar. Co. v. Rainey [Tenn.] 113 SW 397. Fact that petitions were filed in creditor's suit at term following that in which final decree was announced without order of chancellor held not to have made them part of record particularly in view of fact that chancellor declined to permit them to be filed. Id. Matters in petition which has been disallowed may be sufficiently embodied in decree to present them to appellate court, but in such case decree must fully recite nature and character of petition with its material averments, together with relief sought, and action of chancellor thereon, mere recital of filing thereof being insufficient. Id. Refusal to permit defendant to file demurrer and additional pleas not considered where such papers are not brought up by bill of exceptions. Stringfellow v. Coons [Fla.] 49 S 1019. Where proffered amendment is disallowed, it cannot be specified as record though it has been marked "filed" by clerk. Schaeffer v. Central of Georgia R. Co. [Ga. App.] 64 SE 1107.

77. Record of former proceeding for establishment of private road. Fitzmaurice v. Turney, 214 Mo. 610, 114 SW 504.

78. Must be preserved by bill of exceptions. Kirkwood v. School Dist. No. 7 [Colo.] 101 P 343; Brown v. Kennedy, 138 Ill. App. 607; Tarr v. Crump [Mo. App.] 118 SW 488.

79. Lomita Land & W. Co. v. Robinson, 154 Cal. 36, 97 P 10; In re Hite's Estate [Cal.] 101 P 448; Winnicott v. Orman [Mont.] 102 P 570; Price v. Western Distillery Co., 114 NYS 714; Commonwealth v. Brownell, 35 Pa. Super. Ct. 249. Cannot look to opinion for purpose of ascertaining facts upon which finding was based though bill of exceptions states that particulars will be found in such opinion and refers thereto. Pacific Sheet Metal Works v. Californian Canneries Co. [C. C. A.] 164 F 980. Opinion of city court may be examined to determine what principle governed court in arriving at its decision. Harde v. Purdy, 62 Misc. 232, 114 NYS 814.

80. Minutes of judge on his docket, or indorsed on wrapper or files. Fowles v. Bentley [Mo. App.] 115 SW 1090.

81. Bromberg v. People, 136 Ill. App. 602.

82. Can only be considered when incorporated in statement of facts pursuant to Acts 1907, p. 510, c. 24, § 5. Dealy v. Shepherd [Tex. Civ. App.] 116 SW 638. Longhand transcript of evidence cannot be considered when not incorporated into bill of exceptions as required by Burns' Ann St. 1908, § 657. Rector v. Druley [Ind.] 88 NE 602.

83. See, also, post, § 9D.

84. Instructions given and refused are part of record without bill of exceptions. Acts 1903, c. 193. Butt v. Iffert [Ind.] 86 NE 961. In order to make instructions part of record without bill of exceptions, they must be filed in open court. Burns' Ann. St. 1908, § 558, subd. 6 Acts 1903, p. 338, c. 193. Indianapolis & W. R. Co. v. Ragan [Ind.] 86 NE 966. Record must affirmatively show that they were so filed. Id. Instructions given and refused held not open to consideration where, aside from order directing filing, there was nothing in transcript to show that they were actually filed with clerk of lower court. Id. Instructions not reviewable where neither instructions given or those requested were numbered and signed. Supreme Tent K. of M. of W. v. Ethridge [Ind. App.] 87 NE 1049. Instructions refused held not part of record where bill of exceptions failed to show that they were signed by party or his attorney, as required by Burns' Ann. St. 1908, § 561, but merely recited "above instructions refused, and exceptions by defendant." Mace v. Clark [Ind. App.] 85 NE 1049. Statute providing how instructions and exceptions thereto shall be made part of record must be substantially complied with. Id. Must be identified by order of court or be contained in bill of exceptions. Latham v. Lindsay, 33 Ky. L. R. 985, 112 SW 584.

85. North Birmingham Lumber Co. v. Sims [Ala.] 48 S 84; Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171; Robinson v. Helena L. & R. Co. [Mont.] 99 P 837.

86. On appeal from order of district court dismissing appeal from justice court, held unnecessary to incorporate, in a bill of exceptions, documents used upon hearing of motion to dismiss; but that certificate of trial judge identifying papers used on hearing below was sufficient compliance with Rev. St. 1887, § 4819, requiring copy of such papers to be furnished supreme court. Libby v. Spokane Valley Land & W. Co., 15 Idaho, 467, 98 P 715. Certificate held to show that undertaking on appeal from justice's court to district court was used by trial court upon hearing of motion to dismiss such appeal, so that same was properly certified to supreme court on further appeal to it from order granting said motion. Id. Document denominated "exceptions to an order" of district court dismissing appeal from justice's court, and in general form of bill of exceptions, held not strictly a bill of exceptions, but merely certificate of trial judge identifying papers used by him on hearing of motion to dismiss, so that it was unnecessary to serve same on counsel for respondent. Id.

bill of exceptions or otherwise,[87] in the absence of a statutory provision to the contrary,[88] nor are statements made in a motion to be considered as statements made by the record.[89] In Georgia a petition for certiorari is not a part of the record until it has been sanctioned.[90] In chancery cases the appeal carries up the entire record and all proceedings,[91] and a bill of exceptions is unnecessary and improper,[92]

87. See, also, post, § 9D. St. Louis & S. F. R. Co. v. McCollum [Okl.] 101 P 1120. Proper method of authenticating papers on appeal from order is by bill of exceptions certified to by judge, and not by certificate of clerk. Muzzy v. McEwen Lumber Co., 154 Cal. 685, 98 P 1062. Motion and rulings not made part of the record by bill of exceptions will not be considered. Ghost v. U. S. [C. C. A.] 168 F 841. In federal courts question of how matter may be included in record not determined by state but by federal statute and common-law or prevailing practice. Id. Copies of affidavit to procure substitution of defendants, notice of application or substitution, order of substitution, justice's docket, notice of appeal to district court, plaintiff's reply, and motion to dismiss action, held not part of record where not identified by bill of exceptions or otherwise, and stricken from record on motion. Mettler v. Adamson [Mont.] 99 P 441. Motion **to dissolve temporary injunction** and order thereon. Green v. Yeager [Okl.] 99 P 906. **Motion to strike pleading** from files and decision thereon. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595. Propriety of court's action on motion to strike pleading not considered on appeal from judgment on judgment roll alone. Gish v. Ferrea [Cal. App.] 101 P 27. **Motions to dismiss and to reinstate causes** based upon matters in pais. Poppell v. Culpepper [Fla.] 47 S 355. Rulings or orders granting or refusing **motions to direct verdict.** Beebe v. Minneapolis, etc., R. Co., 137 Wis. 269, 118 NW 808. Motion **to vacate** and modify **judgment** cannot be considered where it is not preserved in transcript by bill of exceptions so as to make it part of record. Davis v. Lammers [Okl.] 100 P 514. Motion to vacate and set aside judgment and order of court thereon. Wilson's Rev. & Ann. St. 1903, § 4606. Devault v. Merchants' Exch. Co. [Okl.] 98 P 342. Motion to strike void judgment, order thereon, and exceptions taken. Lasseter v. Zapf [Fla.] 48 S 749. Motion **for new trial.** Booth v. St. Louis, etc., R. Co., 217 Mo. 710, 117 SW 1094. Notice of intention to move for new trial is not part of judgment roll, and hence in order that supreme court may be properly appraised that motion was made, manner of giving, filing, and serving of notice, and proceedings had in respect thereof, such matters must be made to appear by bill of exceptions. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114. Motion to vacate verdict and grant new trial and for judgment non abstante. Stoddard v. Fox, 15 Idaho, 704, 99 P 122. Order denying new trial. Warnock Ins. Agency v. Peterson Real Estate Inv. Co. [Utah] 101 P 699. Order granting new trial. St. Louis & S. F. R. Co v. McCollum [Okl.] 101 P 1120. Motion for new trial, its presentation, and exception to ruling thereon. Davis v. Ogden [Wyo.] 97 P 1074.

88. Motions which may properly be made orally may be part of record without bill of exceptions, as may motions in writing (Acts 1903, p. 339, c. 193, § 3), but when motion required by statute to be in writing is not shown to have been so made, it will not be sufficient to state it in bill of exceptions, nor can it be held that court erred in overruling it. Nichols v. Central Trust Co. [Ind. App.] 86 NE 878. Motion for new trial held made part of record by statute. Chicago, I. & L. R. Co. v. Cobler [Ind.] 87 NE 981. Motion for new trial held part of record without bill of exceptions so that it should have been transcribed under praecipe calling for complete record. Pere Marquette R. Co. v. Strange [Ind.] 85 NE 1026. St. 1898, § 3070, providing that on appeal from judgment court, may review any intermediate order involving the merits and necessarily affecting the judgment, appearing upon the record transmitted, whether same is excepted to or not, and that it shall not be necessary to take any exception or settle bill of exceptions to obtain review of any alleged error which would without bill of exceptions appear on face of record, applies only to orders which are part of record proper without appearing in bill of exceptions, and does not apply to rulings or orders granting or refusing motions to direct verdict. Beebe v. Minneapolis, etc., R. Co., 137 Wis. 269, 118 NW 808.

89. Recital in motion for new trial that exceptions were taken to instructions at the time they were given is not sufficient proof of that fact, such motion, though part of the record, being nothing more than a statement of one of the parties, and not a journal entry, nor a finding of the court that the exceptions were taken. Knopp v. Chicago, etc., R. Co. [Iowa] 117 NW 970.

90. Court cannot review refusal to sanction application for certiorari unless petition incorporated in bill of exceptions or otherwise verified as part thereof. Gossett v. Atlanta, 5 Ga. App. 357, 63 SE 143.

91. Evidence, affidavits, and other proceedings are part of record. Locust v. Carruthers [Okl.] 100 P 520. Proceedings in federal courts in exercise of customary jurisdiction of probate courts are proceedings in equity within this rule. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. [C. C. A.] 165 F 162. Verified complaint and all affidavits read in evidence on ex parte application for appointment of receiver are part of record without a bill of exceptions. Burns' Ann. St. 1908, § 663. Marshall v. Matson [Ind.] 86 NE 339.

92. Bill of exceptions brings up only questions of law. Jackson v. Ensign, 199 Mass. 116, 85 NE 527. Where decree was not founded on oral evidence, bill is not necessary except to preserve evidence or rulings not part of record proper. Leiberman v. Bowden [Tenn.] 119 SW 64. Not necessary to bring evidence, affidavits and other proceedings therein upon the record. Locust v.

though oral evidence must be reduced to writing and brought up in some form.[93] Statutes sometimes dispense with the necessity of exceptions or a case made in special proceedings.[94] An understanding with the court relieving party of taking exceptions to rulings does not dispense with noting exceptions in the bill of exceptions.[95] Matters not properly a part of the record cannot be incorporated therein by specifying them as grounds of a motion for a new trial.[96] Recitals in the record proper of matters which are no part of such record are unavailing to supply omissions from the secondary record.[97]

(§ 9) *C. Form, requisites and settlement of secondary record.* 1. *The bill of exceptions.*[98]—See 11 C. L. 161—The office of a bill of exceptions is to bring on the record such matters as are not already parts of the record in the case.[99] It must be prepared and authenticated in the manner prescribed by statute and the rules of

Caruthers [Okl.] 100 P 520. Proceedings in federal courts in exercise of customary jurisdiction of probate courts are proceedings in equity within this rule. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. [C. C. A.] 165 F 162. Conformity acts do not apply to proceedings to secure review of decisions of federal courts, which are governed by acts of congress and rules and practice of federal courts Id. Subsequent to passage of Act March 3, 1905, c. 1497, § 33 St. 1081 (Comp. St. Supp. 1907, p. 208), appeals and writs of error, and proceedings therefor and therein, to review decisions of federal courts of Indian Territory, were governed by provisions of that act and the practice in the federal courts, and not by statutes of Arkansas or practice in its courts. Id.

93. Oral testimony held not preserved by copying into transcript what purported to be testimony taken in open court by agreement of parties and consent of court, and reported by stenographer, even though authenticated by stenographer's certificate, unless same was treated as depositions and filed and identified as such. Rowe v. Allison [Ark.] 112 SW 395.

94. On appeal in mandamus proceedings tried by court, whole record will be reviewed, and no formal bill of exceptions is necessary. Pope v. Whitridge [Md. App.] 73 A 281. But rulings complained of must be distinctly presented by written objections filed or by proper notations in record. Id.

95. Certificate of trial judge that all rulings were deemed excepted to by party over whose objection they were made, without the formality of an exception, is insufficient to preserve exceptions not incorporated in bill of exceptions. Kelly v. Wheeler [S. D.] 119 NW 994.

96. Motion cannot be used to incorporate anything into the record, or any exceptions to anything done by the court, and cannot take place of bill of exceptions. Cox v. Cooley [Ark.] 114 SW 929; Cammack v. Southwestern Fire Ins. Co. [Ark.] 115 SW 142. Misconduct of counsel, not set forth in bill of exceptions, not reviewable though set forth in motion for new trial and affidavits thereon which are incorporated in bill of exceptions. Blackwell v. Metropolitan St. R. Co. [Mo. App.] 119 SW 456.

97. Matters which are not by statute authorized to be made part of record except by a case made or bill of exceptions cannot be brought to supreme court on a certificate of the clerks, and errors assigned thereon. Ahren-Ott Mfg. Co. v. Condon [Okl.] 100 P 556. Cannot consider contract, not made part of any pleading, copied into record independent of any statement of facts. Griffith v. Reagan [Tex. Civ. App.] 114 SW 1167. Exceptions to judgment cannot be preserved by journal entry. Kirkwood v. School Dist. No. 7 [Colo.] 101 P 343. Recitals in clerk's common-law record will not save exceptions. Brown v. Kennedy, 138 Ill. App. 607. Showing in record proper that exceptions were taken to ruling insufficient. Tarr v. Crump [Mo. App.] 118 SW 488. Fact that depositions are in transcript does not make them part of record. Lew Moy v. U. S. [C. C. A.] 164 F 322. Affidavit considered on trial is not sufficiently identified by being included in record proper before clerk's signature. Harrison v. Bell [Ga.] 64 SE 688. Affidavit relative to newly-discovered evidence for which new trial was sought not considered because not embodied in a bill of exceptions, though copy thereof was contained in transcript. Crocker v. Steidl [Neb.] 118 NW 1083. Affidavits and documents brought into transcript of record as independent papers under certificate of filing by clerk, not considered. Jones v. Middle Georgia Cotton Mills, 131 Ga. 52, 61 SE 977. Recital in transcript that motion to vacate sheriff's sale was made held not to authorize review of ruling thereon. Hanks v. Miller, 142 Ill. App. 486. Copy of motion to vacate judgment contained in transcript of record will be stricken on motion. Devault v. Merchants' Exch. Co. [Okl.] 98 P 342. Charges not set out in bill of exceptions not reviewable though appearing elsewhere in record. North Birmingham Lumber Co. v. Sims [Ala.] 48 S 84.

98. **Search Note:** See Exceptions, Bill of, Cent. Dig.; Dec. Dig.; 3 Cyc. 23-53; 2 A. & E. Enc. P. & P. 253; 3 Id. 374.

99. To show proceedings not otherwise apparent of record. Rule 53. Alvord Nat. Bank v. Waples-Platter Grocer Co. [Tex. Civ. App.] 118 SW 232. Office of bill is to afford appellate court history of proceedings below and it is not judicial action in case in sense of adjudging or enforcing the rights of parties litigent. Decatur Waterworks Co. v. Foster [Ala.] 49 S 759. Properly contains only matter of exception. Ewing v. Vernon County, 216 Mo. 681, 116 SW 518.

court,[1] and should include all matters essential to a review of the questions involved [2] which were presented to the trial court,[3] set out in clear, orderly and coherent form.[4] It may include matters preliminary to trial.[5] Unnecessary or immaterial matters should not be included.[6] Condensation into narrative form is usually required.[7] Exhibits and documentary evidence must be properly authenticated and identified as a part of the bill.[8] Inanimate articles can properly be brought into the bill only by describing the same.[9] Each exception must be separately stated.[10] In some jurisdictions separate bills must be settled as to each al-

1. Thomas v. Price [Fla.] 48 S 17. Ann. St. 1906, §§ 728-735, relating to preparation and filing of bills, should be construed in pari materia, and liberally construed in aid of bill. State v. Taylor, 134 Mo. App. 430, 114 SW 1029. Longhand transcript of evidence not in compliance with statute cannot be regarded as bill of exceptions containing evidence. Rector v. Druley [Ind.] 88 NE 602. Must be properly signed by counsel. Moore v. Griner, 131 Ga. 364, 62 SE 222. Court will not of its own motion raise question of a defect. Conlon v. Chicago G. W. R. Co., 139 Ill. App. 555.

2. Should give all facts bearing upon decision. Hainlin v. Budge [Fla.] 47 S 825. Bill containing clear statement of ruling objected to with succint recital of substance of evidence and proceedings necessary to advise court of pertinency or materiality of matters sought to be reviewed is sufficient. Acts 1903, p. 340, c. 193, § 5. Dillman v. Chicago, I. & L. R. Co. [Ind. App.] 88 NE 873. On appeal from order denying application for allowance of attorney's fees for services rendered executor prior to probate of will, held proper to incorporate will and codicil in bill of exceptions, appeal having been submitted on all records, files and papers in the cause. In re Hite's Estate [Cal.] 101 P 448. In action for use and occupation, bill reciting that plaintiff moved for directed verdict for reason that it indisputably appeared that defendant had occupied and used as tenant plaintiff's property, but failing to set out any facts showing that defendant had used and occupied said property, held insufficient. Gerhardt v. Boettger, 75 N. J. Law, 916, 70 A 173. Bill containing neither motion for new trial or in arrest, on any call for such motions, nor any exceptions to overruling thereof, held not open to consideration. Reed v. Colp, 213 Mo. 577, 112 SW 255. Bill otherwise sufficient is not vitiated because it contains more than is necessary, such as matters that are properly of record. Jonesboro, etc., R. Co. v. Brookfield [Ark.] 112 SW 977.

3. What court stenographer told court occurred in jury room when sent to read testimony should not be included. Quinn v. Metropolitan St. R. Co., 218 Mo. 545, 118 SW 46.

4. Proposed bill duly settled will not be rejected because of few erasures therein, particularly where it appears from record that as originally drafted it was correct in form, and erasures were made by trial court at suggestion and request of party complaining. Kelly v. Wheeler [S. D.] 119 NW 994. Where corrected bill contains erasures or interlineations or exhibit thereto, proper practice is to require such portions to be rewritten, or to note that changes were made by judge before signing. Stewart v. Mundy, 131 Ga. 586, 62 SE 986. Marginal notes written with pen or typewritten record held no ground for striking out part of record on which they appeared on ground that they were intended by judge as nullification of statements in bill of exceptions, it not being shown that notes were made by judge, and their appearance clearly indicating that they were not. St. Louis, etc., R. Co. v. Reed [Ark.] 115 SW 150. Grounds of objection which are foundation of exceptions should be stated. Enos v. Rhode Island Suburban R. Co. [R. I.] 70 A 1011. Specify particulars in which evidence is insufficient or particular errors of law relied on, or it will be disregarded. McNish v. Wolven [S. D.] 119 NW 999. Bill held to sufficiently specify particulars in which evidence was alleged to be insufficient. Tilton v. Flormann [S. D.] 117 SW 377.

5. Such as consolidation of actions. Defiance Fruit Co. v. Fox [N. J. Err. & App.] 70 A 460.

6. Bill setting out all the evidence too voluminous. B. & C. Comp. § 171. Oldland v. Oregon Coal & Nav. Co. [Or.] 102 P 596. Fact that motion to set aside judgment and grant new trial for insufficiency of evidence was denied held not to require incorporation of all the evidence in bill of exceptions where no motion for directed verdict, since such judgment discretionary and not reviewable. Id.

7. Should state substance of proceedings only and not insert them verbatim. Newport News & Old Point R. & Elec. Co. v. Nicolopoolos [Va.] 62 SE 443.

8. Failure to attach letters of administration does not render the bill incomplete, where administrator testified as to his appointment and to his acting as administrator, and no objection was taken thereto. Cincinnati Traction Co. v. Kettler, 11 Ohio C. C. (N. S.) 516. Statement that evidence is found in book marked "A" which is certified to by court and contains statement in conclusion that defendant excepted to refusal to set aside verdict and prayed that its bill of exceptions be made part of record sufficiently identifies and makes evidence part of record. Norfolk & W. R. Co. v. Rhodes [Va.] 63 SE 445. Where recites that transcript of judgment or other paper introduced in evidence is attached to and made part thereof, such paper must be identified by some mark or number referred to in bill. Weaver v. Schumpert [C. C. A.] 168 F 43.

9. Morgantown Mfg. Co. v. Hicks [Ind. App.] 86 NE 856.

10. Must be stated separately and clearly. Ct. & Prac. Act 1905, § 490. Cataract City Milling Co. v. Meunier [R. I.] 69 A 602. Re-

leged error.[11] In the absence of statute or rule to the contrary, a joint bill may be settled on behalf of several appellants.[12] As a general rule where proceedings in a cause occur at different terms, the proceedings at each term should be embodied in a separate bill.[13] A respondent or defendant in error desiring to assign error is often required to file a cross bill.[14] Skeleton bills, that is bills providing for the subsequent copying by the clerk into and as a part of them of certain of the evidence, are allowed in some states.[15] In some states the bill must show on its face that it was presented, signed, and filed in due time[16] while in others such a showing is deemed an essential part of the record proper.[17] The bill will be construed most strongly against the party making it.[18] Objections that evidence is not properly incorporated or identified may be waived by act of the parties.[19]

Settlement, signing and filing. See 11 C. L. 184—The bill must be prepared by appellant[20] and presented[21] during the term[22] or within the time limited by stat-

quirement is for benefit of opposing counsel, as well as that of court, so as to enable him to prepare his brief for argument of case. Enos v. Rhode Island Suburban R. Co. [R. I.] 70 A 1011. Exception to rulings upon ground that court erred "in admitting or refusing to admit certain evidence," when in fact rulings were confined to refusal to admit evidence, held insufficient. Id. Grouping of eight rulings, shown on different pages of transcript of testimony in one exception, held not compliance with statute. Id.

11. Unless bills are connected by express reference to each other, or by the use of words which fairly import such connection, they will be considered as separate and distinct, and the court will look to and consider only the evidence set out in each exception in passing on it. Modern Woodmen of America v. Cecil, 108 Md. 357, 70 A 331. Bill embracing several distinct questions to witness and showing by note after each question that it was objected to, objection sustained and exception noted with recital at conclusion stating that to such rulings defendant duly excepted and prays court to sign, etc., is insufficient since ruling on each question should form subject of separate exception. Junkins v. Sullivan [Ind. App.] 73 A 264.

12. A coappellant may manifest fact of error by a bill of exceptions filed by his coparty. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417.

13. Where new trial granted, and party waits for final judgment to appeal. Hainlin v. Budge [Fla.] 47 S 825.

14. Proceeding authorized by Act Aug. 22, 1905 (Laws 1905, p. 84) whereby bill may be amended to develop whole truth of case in no sense a cross bill. Bryant v. Anderson, 5 Ga. App. 517, 63 SE 638.

15. Directions to clerk in original bill to copy certain of the evidence held sufficiently specific to identify with certainty evidence which was to be copied, bill having attached to it stenographer's transcript of evidence duly certified by him and having been approved by judge. Nashville Lumber Co. v. Howard County [Ark.] 115 SW 936.

16. Filing cannot be alone shown by file mark thereon by clerk of lower court. Rector v. Druley [Ind.] 88 NE 602. Statement on margin of bill disclosing time of its presentation is not within statutory requirements. Indianapolis & W. R. Co. v. Hill [Ind.] 86 NE 414. Under Acts 1908, p. 336, c. 225, correct practice requires bills not signed during term to show signing 30 days after term or other time agreed on. Buena Vista Extract Co. v. Hickman, 108 Va. 665, 62 SE 804.

17. See ante, § 9A.

18. Is to be regarded as pleading of party aggrieved. Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171. Most strongly against party taking exception. Union Naval Stores v. Pugh [Ala.] 47 S 48. Where bill stated that defendant moved to exclude testimony of certain witness concerning agency of certain person for defendant on ground that declarations and actions of "the alleged witness" were not proof of agency, held that court could not indulge in intendment that word "agent" was intended to be used instead of "witness," but would uphold ruling denying motion since no declarations of witness were offered in evidence. Id.

19. Stipulation attached to bill that proposed bill might be settled, allowed, signed, and filed, signed by attorney for appellant who was also attorney for latter's codefendants, held binding on them, though not in terms stipulating for them. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114. Stipulation purporting to be signed by appellee's attorney held binding on him, where there was nothing in record to show that he repudiated it, or that he did not sign it unless court took judicial notice that signature was not his. Id. Respondent held not entitled to have bill stricken from files as not complying in form with statutory requirements where it was settled in that form at instance of her counsel. Dornsife v. Ralston [Or.] 97 P 713.

20. Cannot be prepared by successful party, and mandamus will not lie to compel judge to sign bill tendered by him. Louisville Home Tel. Co. v. Gordon [Ky.] 117 SW 315.

21. Failure to file bill fatal. Burn's Ann. St. 1908, § 657. Rector v. Druley [Ind.] 88 NE 602. Assignment complaining of ruling sustaining objection to evidence not considered where it did not appear that bill of exception to such ruling was filed by clerk of lower court. Jordan v. James [Tex. Civ. App.] 115 SW 872. Where draft bill of exceptions was presented to trial judge for allowance within time prescribed by rule

ute, rule or order,[23] or an extension of such time duly allowed [24] before the expira-

17 of circuit court, held that it was sufficient though presentation was made by the clerk. Costello v. Ferrarini, 165 F 379.

22. Rule at common law. Brown v. American Steel & Wire Co. [Ind. App.] 88 NE 80.

23. Arkansas: Judgment affirmed where it appeared from record that no bill was filed within time fixed by circuit court and was no error apparent on face of record. Knights of Pythias v. Bond [Ark.] 113 SW 793.

California: Where objection that bill in equity case was not presented in time depends upon question of fact, finding of trial court presents question for review on the appeal, and not for collateral consideration. Stewart v. Torrance [Cal. App.] 98 P 396.

Georgia: Must be tendered to judge within time allowed by law. Moore v. Griner, 131 Ga. 364, 62 SE 222. Bill held presented too late to bring up order sustaining demurrer and dismissing petition. Waller & Co. v. Clarke [Ga.] 64 SE 1096. Where bill of exceptions to judgment refusing interlocutory injunction recites presentation within 30 days after rendition of judgment and nothing from either record or bill to show presentation within 20 days, court is without jurisdiction to entertain writ of error. Curtis v. Mansfield [Ga.] 64 SE 327. Rulings occurring at trial cannot be complained of in bill filed more than 30 days after expiration of term at which trial was had, unless exceptions pendente lite have been duly preserved. R. B. Oliver Co. v. Smith [Ga. App.] 64 SE 1007.

Illinois: Bill not filed within time specified by order will be stricken. Benson v. Fitzgerald, 140 Ill. App. 388. One who, before time of filing bill has expired, stipulates to include same in record, is not thereafter estopped to object that bill was not filed in time. Id.

Indiana: Bill not presented for approval within time fixed held not properly in record. Brown v. State [Ind. App.] 87 NE 157. Time may be given by court to party taking exceptions to prepare and file bill of exceptions showing rulings and exceptions, but not beyond the term, unless by special leave of court. Burns' Ann. St. 1908, § 656. Rose v. State [Ind.] 87 NE 103; Brown v. American Steel & Wire Co. [Ind. App.] 88 NE 80. Trial court has no authority, except that granted by statute, to give time extending beyond term. Nichols v. Central Trust Co. [Ind. App.] 86 NE 878. Power to grant time extending beyond term must be exercised at time of rulings excepted to or at time of ruling upon motion for new trial. Id. Signing of bill presented after expiration of time granted extending beyond term gives it no vitality. Id. Statute expressly provides that rulings which constitute causes for new trial and the exceptions thereto, if such rulings are assigned as causes for new trial, are carried forward by such motion to time of ruling thereon, when time may be given by court within which to prepare and file bill containing such rulings and exceptions. Rose v. State [Ind.] 87 NE 103; Brown v. American Steel & Wire Co. [Ind. App.] 88 NE 80. Leave to file bill after ruling on motion for new trial must be granted on day when ruling is made, and bill filed pursuant to leave subsequently granted will not be considered. Theobald v. Clapp [Ind. App.] 87 NE 100; Nichols v. Central Trust Co. [Ind. App.] 86 NE 878; Rose v. State [Ind.] 87 NE 103; Brown v. American Steel & Wire Co. [Ind. App.] 88 NE 80.

Kentucky: Statutory provision as to time of filing is mandatory, and bill not filed in time will be disregarded. Louisville & Atlantic Coal Co. v. Morris [Ky.] 116 SW 330. Unsuccessful party is entitled to take 60 days given him by statute in which to prepare his bill, particularly where order is entered giving him that length of time, and mandamus will not lie at instance of successful party to compel settlement of bill tendered by successful party before expiration of that time. Louisville Home Tel. Co. v. Gordon [Ky.] 117 SW 315.

Missouri: Bill filed out of time will not be considered. Baird v. Baird [Mo. App.] 113 SW 216; Doolittle v. Ward [Mo. App.] 116 SW 1121. Court has no authority to permit bill to be filed and incorporated in record after time for filing has expired. State v. Taylor, 134 Mo. App. 430, 114 SW 1029. Bill of exceptions to matters occurring at trial need not be filed until after motion for new trial is overruled, even though that should not be until succeeding term. Akins v. Humansville, 133 Mo. App. 502, 113 SW 687. Fact that order extending time for filing bill until following term was entered on day motion for new trial was filed held not to change rule or require filing until after motion was decided. Id.

Rhode Island: Bill dismissed where it and transcript of evidence, etc., were not filed in time. Nugent v. Cook [R. I.] 70 A 865. At time fixed for filing bill of exceptions and transcript of testimony, stenographer had not completed same, stenographer assumed that attorney would procure extension of time, and attorney that stenographer would, and neither did so. Held that it was duty of attorney to attend to matter, and that failure to file in time was not due to accident, mistake, or unforeseen cause authorizing relief under Court & Prac. Act 1905, § 473, though stenographer had procured prior extension of time. Jackvony v. Colaluca [R. I.] 72 A 289.

Texas: Bill filed more than 20 days after adjournment of court not to be considered. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236. Acts 1907, p. 509. c. 24, as to filing of statements of fact within 30 days after adjournment of term, does not include bills of exceptions which are governed by Acts 1907. p. 446, c. 7. Id.

Utah: Bill filed after statutory time is a nullity. Warnock Ins. Agency v. Peterson Real Estate Inv. Co. [Utah.] 101 P 699. Statute controls trial court as to time and method of making bill, it not being part of judgment roll. Id.

Virginia: Code 1904, § 3385, as to tendering to judge, signing in certain time, etc., held literally complied with. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358.

24. Indiana: Extension of time discretionary with judge and reviewable only for abuse. Bivens v. Henderson [Ind. App.] 86 NE 426. Where record shows that application for additional time was made and granted, and that no unreasonable time was

tion of the time originally limited.[25] The bill must be approved,[26] as and for a bill,[27] by the judge who presided at the trial[28] in such manner as to authenticate it[29] within the time allowed by law[30] or stipulation of the parties,[31] or an exten-

given, will be presumed that proper showing was made. Id. Burn's Ann. St. 1908, § 661, contemplates but one extension, and order granting second extension is invalid. Brown v. American Steel & Wire Co. [Ind. App.] 88 NE 80. Failure to object or except to second extension held not waiver of appellee's right to thereafter object to court's action, since validity of order depended on power of court to make it and not on consent of parties. Id. Application for extension is not adversary proceeding, and no notice thereof need be given to adverse party, nor need bill be submitted for his inspection, nor is written verified petition necessary. Bivens v. Henderson [Ind. App.] 86 NE 426.

Kentucky: Under Civ. Code Proc. § 334, where it does not appear that opposing counsel or party consented to extension of time beyond day fixed in succeeding term, but order granting extension saved an exception in his favor, such extension was unauthorized and bill would not be considered on appeal. Woolsey v. Kennon [Ky.] 117 SW 943.

Michigan: Party has right to settle bill within 20 days after denial of motion for new trial without any extension of time. Comp. Laws, § 10504. Harper v. Murphy [Mich.] 15 Det. Leg. N. 1085, 119 NW 913. Order extending time to settle bill expired before entry of order denying motion for new trial. Court denied motion for further extension of time for settling bill made within four days thereafter, denial being tantamount to refusal to settle a bill. Held error and that mandamus would issue to compel granting of such extension. Comp. Laws §§ 10242, 10248, 10504, 205, and Rule 47. Id Held that writ would not be denied on ground that relator was guilty of laches in not bringing on motion for new trial earlier, motion not having been dismissed and opposite party not having attempted to hasten submission, and relator not being responsible for delay of judge. Id. Nor would writ be denied on ground that failure of relator to file supersedeas bond as required by Comp. Laws § 10355 deprived court of jurisdiction to settle bill, that statute relating only to stay of proceedings. Id.

Missouri: Judge in vacation cannot extend time unless time was previously extended during term. Goodhart, Hartman Co. v. Kinney [Mo. App.] 118 SW 679. Where trial court heard evidence which satisfied it that order on first day extending time was not entered by oversight of clerk, it could permit filing of bill by nunc pro tunc order made during term, though order not based on written memorandum. Barr v. Quincy, etc., R. Co. [Mo. App.] 120 SW 111. Order extending time "until" the following term held to extend it no longer than day of beginning of following term. Akins v. Humansville, 133 Mo. App. 502, 113 SW 687.

South Dakota: Recital in order extending time that it was made for good cause shown held conclusive on appeal in absence of evidence on which it was based. City of Chamberlain v. Quarnberg [S. D.] 119 NW 1026.

25. Weeks' Hardware Co. v. Weeks [Mo. App.] 115 SW 490. Acts 1905, p. 45, c. 40. Nichols v. Central Trust Co. [Ind. App.] 86 NE 878; Brown v. American Steel & Wire Co. [Ind. App.] 88 NE 80. Must procure extension at term when judgment rendered, and court cannot thereafter enter nunc pro tunc order permitting filing. Louisville & Atlantic Coal Co. v. Morris [Ky.] 116 SW 330. Court held to have no authority to enter order nunc pro tunc extending time where no minute or memorandum shown to have been of record in cause upon which such order could be based. State v. Taylor, 134 Mo. App. 430, 114 SW 1029. Order held not an order nunc pro tunc correcting record as to length of extension of time but merely order making record show minutes of judge as well as record proper made up by clerk, and to be of no effect. Weeks Hardware Co. v. Weeks [Mo. App.] 115 SW 490. Where application is not made until after expiration of time originally granted, court or judge cannot be given jurisdiction to grant extension by agreement of parties. Nichols v. Central Trust Co. [Ind. App.] 86 NE 878; Brown v. American Steel & Wire Co. [Ind. App.] 88 NE 80.

26. Must be signed, sealed and allowed by judge. Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171. Where not certified by judge, appeal fails. Elders v. Bancroft-Whitney Co. [Ga. App.] 64 SE 714. Stipulation that either party might use transcript of evidence on appeal and that it should be taken to be whole evidence adduced without certificate from judge held to preclude either party from complaining if it was given effect according to its terms and evidence regarded as properly before court, though court could refuse to consider it. Houtz v. Union Pac. R. Co. [Utah] 99 P 997.

27. Longhand extension of notes certified by official stenographer but not certified or approved as bill of exceptions, held insufficient. Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171.

28. Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171; Carr v. Middle States Coal Co. [W. Va.] 63 SE 334. Code 1887, § 3335 (Code 1904, p. 1793). Colby v. Reams [Va.] 63 SE 1009. Bill complaining of overruling of motion for new trial must be signed and certified to by him though his term of office has expired in the meantime, and his successor has no power to certify it. Western & A. R. Co. v. Chatsworth Lumber Co., 5 Ga. App. 815, 63 SE 937. Where case was tried before judge of another district sitting for regular judge, held that it was duty of former, under Rev. Code Civ. Proc. § 299, to settle and certify bill where presented to him within time as fixed or extended by regular judge. Northwestern Port Huron Co. v. Zickrick [S. D.] 117 NW 685.

29. Bill does not prove itself. Breimeyer v. Star Bottling Co. [Mo. App.] 117 SW 119.

sion thereof duly granted,[32] and the approved bill filed[33] within the time pre-

Must be certified to be full and complete transcript of evidence at trial. Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171. Evidence held sufficiently certified where bill recited demurrer to evidence followed by direction to insert transcript of evidence which was signed by judge and attested by clerk, and was followed by transcript certified to by clerk. Milton's Adm'x v. Norfolk & W. R. Co., 108 Va. 752, 62 SE 960. Certificate held sufficient to make bill part of record notwithstanding its careless language, that heing its plain intent. Hotchkiss v. Vanderpoel Co., 139 Ill. App. 325. Bill not properly authenticated raises no question on appeal. Shepherd v. Adams Ex. Co. [W. Va.] 64 SE 720. Court's certificate to clerk, properly recorded, is essential to valid bill. Id. Need not be under seal. Carr v. Middle States Coal Co. [W. Va.] 63 SE 334.

30. Alabama: Must be signed within thirty days unless term is extended by order of court. Acts 1900-1, § 10, p. 830. Central of Georgia R. Co. v. Ashley [Ala.] 49 S 388. Written agreement that judge might sign bill within thirty days from adjournment of term dated May 23, 1907, shows that bill signed June 3, 1907, was filed during then pending term of court. Pell City Mfg. Co. v. Swearinger [Ala.] 47 S 272. When date of signing does not appear, it will be presumed to be date of filing and this together with recital that it was signed within time validates it. Crabtree v. Nolen [Ala.] 49 S 309. Bill not timely signed cannot be considered. Central of Georgia R. Co. v. Ashley [Ala.] 49 S 388. Bill signed within statutory time after ruling on motion for new trial may be considered on review of such ruling although too late as to main trial. Id. Bill will not be dismissed because it was signed after appeal was taken. Decatur Waterworks Co. v. Foster [Ala.] 49 S 759. Act of signing bill is an authentication only of the memorial of the proceedings below, and, when properly authenticated, it becomes part of record of supreme court. Id.

District of Columbia: "Term" within which bill must be settled under Rule 54, § 2, is trial rather than judgment term. Howard v. International Trust Co., 32 App. D. C. 8. Will not be considered when settled and signed after expiration of time permitted. Jennings v. Philadelphia B. & W. R. Co., 31 App. D. C. 173. Bill not timely settled will be stricken on motion and judgment affirmed. Howard v. International Trust Co., 32 App. D. C. 8. Dating of bill as of day of signature, although time of settlement has expired, when apparently mere inadvertenance on the part of trial judge, may be considered as execution now for then. District of Columbia v. Blackman, 31 App. D. C. 229. Is not improper for trial court to retain bill presented in proper time for time necessary to enable him to determine its correctness, and his approval and settlement of it could have been entered nunc pro tunc. Id.

Florida: Bill should be made up and signed a term of court at which trial is had unless further time allowed. Circuit court rule 97. Hailiu v. Budge [Fla.] 47 S 825. Gen. St. 1906, § 1696, as to procurement of bills of exceptions in derogation of common law and to be strictly construed. Id.

Illinois: Bill not signed in time specified by order will be stricken. Benson v. Fitzgerald, 140 Ill. App. 388. Bill, though "O. K.'d" by opposing counsel and handed to clerk of court is not in custody of court and cannot be signed by court, nunc pro tunc, after having lost jurisdiction by lapse of time. Lindquist v. State Bank, 138 Ill. App. 446.

Michigan: Party has right to settle bill within 20 days after denial of motion for new trial without any extension of time. Comp. Laws § 10,504. Harper v. Murphy [Mich.] 15 Det. Leg. N. 1085, 119 NW 913.

Nebraska: Judge is not authorized to settle bill more than 100 days from adjournment of term at which cause was tried, decree entered and motion for new trial overruled, and bill so allowed will be quashed on motion. Waker v. Burtless [Neb.] 117 NW 349.

Oklahoma: Bill signed after term at which judgment was rendered without consent of parties, or express order of court to that effect made during term, cannot be considered as part of record. Western Inv. Co. v. Mayberry [Okl.] 99 P 652.

Utah: Trial court without authority to allow bill after statutory time for filing except as time is extended in statutory manner. Warnock Ins. Agency v. Peterson Real Estate Inv. Co. [Utah] 101 P 699.

Virginia: Where bill signed Nov. 26th and record shows court in session as late as Oct. 28th, this shows bills signed within 30 days from end of term as provided by Acts 1908, p. 336, c. 225. Buena Vista Extract Co. v. Hickman, 108 Va. 665, 62 SE 804.

Federal Courts: Order of circuit court at end of term that all things not acted on stand continued held to reserve court's control over draft bill which had been presented but not acted on so that it might be allowed at next term, circuit court rule 17 not limiting time for allowance. Costello v. Trerrarini, 165 F 379. Where bill was drawn up and presented to judge for settlement prior to allowance of appeal, and was settled and signed by him during term in which judgment was rendered, held that he was not without jurisdiction to settle same because he did not do so until after appeal had been allowed, supersedeas bond filed, and citation issued. Cook v. Klonos [C. C. A.] 164 F 529.

31. Ordinarily bill may be settled after expiration of time by consent of counsel. Jennings v. Philadelphia B. & W. R. Co., 31 App. D. C. 173. But such consent must be express and is not implied from failure to object upon such ground. Id.

32. Alabama: Extension cannot be effected by mere agreement of counsel. Practice rule 30. Central of Georgia R. Co. v. Ashley [Ala.] 48 S 981. Judge may allow extension of time, not exceeding six months, in his discretion. Code 1896, § 620. Id. Rule not changed by Code 1896, p. 1200, practice rule 30. Id.

Montana: Refusal held not abuse of discretion under the circumstances. Carrier

scribed by law.[34] Provision is often made for amendment in case of errors or omissions.[35] Delay in settlement due to the fault of the judge will not result in dismissal.[36] Service on the adverse party of the bill [37] or of a notice of the filing

v. Emmett County Circuit Judge [Mich.] 15 Det. Leg. N. 1042, 119 NW 575.

Nebraska: Judge held to have no authority, after expiration of 80 days from adjournment of the term of court sine die, to extend time. Bressler v. Wayne County [Neb.] 118 NW 1054.

Ohio: Where exhibits are found to be missing from bill when it is offered for signature, time for signing should be extended under the statute, rather than to go to upper court with incomplete bill, or attempt to make it complete by subsequently attaching exhibits without consent or knowledge of trial judge.

Rhode Island: The Herancourt Brewing Co. v. Frank, 11 Ohio C. C. (N. S.) 505. Extension of time for signing defendant's bill held not to have extended time for signing plaintiff's bill, and latter dismissed. Where not signed within time fixed by statute though within time fixed by court for signing defendant's bill. First Baptist Soc. v. Wetherell [R. I.] 71 A 66.

Federal Courts: After expiration of term at which judgment was rendered, bill cannot be allowed, signed, and filed as of date of trial in absence of consent of parties or of previous order of court reserving power to do so, unless there are extraordinary circumstances which are sufficient to except the case from the general rule. Dalton v. Gunnison [C. C. A.] 165 F 873. Delay necessarily caused by inability of court stenographer to make transcript of notes of evidence and exceptions within term or time allowed by order of court held extraordinary circumstances bringing case within exception to rule, so that it was duty of judge to settle and allow bill after expiration of extension. Id.

33. Is duty of exceptor, and not of judge to file bill after judge signs it. State v. Taylor, 134 Mo. App. 430, 114 SW 1029. Bill in action at law, when settled and allowed, is filed in office of clerk of circuit court where it remains as part of record, and on appeal clerk is required, on appellant's application therefor, to make certified copy thereof for transmission to supreme court. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 101 P 330. Document purporting to be bill of exceptions and appearing to have been duly settled by judge of circuit court treated as such, though no indorsement that same was filed in circuit court as such, where no motion in lower court or supreme court to strike out bill or to strike same from abstract. Lumley v. Miller [S. D.] 119 NW 1014. Bill allowed, signed and sealed in open court, does not become part of record until filed with clerk. Benson v. Fitzgerald, 140 Ill. App. 388.

34. Bill stricken from transcript where latter showed that bill was not settled and filed until after hearing of motion for new trial. Wood v. Tanner, 15 Idaho, 689, 99 P 123, rehearing denied, 15 Idaho, 689, 99 P 1053.

35. For amendment after transmission of record to revlewing court see post, § 10D. Is competent to correct bill, but to justify such correction must be some written memorandum, memorial paper, or other minute of transaction by which to make amendment, since record imports absolute verity and cannot be contradicted by parol. Morgantown Mfg. Co. v. Hicks [Ind. App.] 86 NE 856. Stenographer's shorthand notes are such a memorandum as will warrant amendment of record to correspond thereto. Id. In order that exception may be included in original bill of exceptions by way of amendment, it must appear from record of cause, either in bill itself, or stenographer's notes, or some paper in case, that such exception was made and saved at the time, and such correction cannot be based on memory of judge, nor on parol proof, nor on affidavits. Reed v. Colp, 213 Mo. 577, 112 SW 255. Held that bill of exceptions could not be amended after settlement and filing by correcting nunc pro tunc record entries overruling motions for new trial and in arrest so as to show that exceptions were saved to such rulings. Id. Court held not authorized to make such amendment in reliance on mere argument and deduction from standing rule that it was not necessary to save exceptions to such rulings, but that they would be deemed saved. Id. Record entry amending bill held to show that amendments were made in reliance on said rule. Id. Amendment held to have had effect of merely extending time for filing bill of exceptions after time fixed for filing it had passed, which was not permissible. Id. Court has no jurisdiction, without good cause shown and without fixing new time for settlement, as provided by Rev. Code Civ. Proc. § 306, to allow amendment where it has effect of settling new bill after time allowed by law. Tilton v. Flormann [S. D.] 117 NW 377. Where statement in respondent's additional abstract that, eight months after bill of exceptions was settled, trial court permitted it to be amended over objection and without any cause being shown, by inserting therein specifications of particulars in which evidence was insufficient to support findings, was not controverted, held that it would be taken as true, and specifications so allowed by said amendments would be stricken out and disregarded. Id. While trial court can amend bill of exceptions nunc pro tunc in matters not of substance, substantial error or omission cannot be corrected by it after time to settle has expired. Warnock Ins. Agency v. Peterson Real Estate Inv. Co. [Utah] 101 P 699. Bill cannot be amended after expiration of term in absence of showing of extraordinary circumstances. Bidwell v. Amsinck [C. C. A.] 166 F 752.

36. Where bill is presented to judge in time, his delay in signing and filing same will not deprive appellant of benefit thereof. Burns' Ann. St. 1908, § 660, Indianapolis & W. R. Co. v. Hill [Ind.] 86 NE 414; Jefferies v. Orndorf [Ind. App.] 88 NE 958;

thereof [38] in sometimes required. In some states provision is made for authentication by affidavit of bystanders if the judge refuses to sign [39] or for the establishment of the bill in the appellate court.[40] The court need not sign an incorrect

Brown v. American Steel & Wire Co. [Ind. App.] 88 NE 80. Failure to settle in time, due solely to delay of judge, not ground for dismissal where he finally signed it nunc pro tunc. District of Columbia v. Blackman, 32 App. D. C. 32.

37. Contention that bill could not be considered because not served as provided by Code Civ. Proc. § 650 not considered, where facts necessary to determine case were all alleged in complaint, were not denied by answer, and were found to be true. Burke v. Maze [Cal. App.] 101 P 438. Service should be made upon attorney of record rather than party. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114. Bill must be served after it is signed and certified, and motion to dismiss will be sustained where entry of service or acknowledgement thereof on bill antedates judge's certificate. Grow v. Hunter, 5 Ga. App. 817, 63 SE 938. Acknowledgment of paper purporting to be bill of exceptions, followed by waiver of all other and further service thereof, entered on paper before bill is certified, does not amount to service of same paper after it has been certified. Id. Mere statement entered on bill and signed by counsel for plaintiff in error that he has served copy of bill and certificate of court on counsel for defendant, without any affidavit of such service, is insufficient. Advance Lumber Co. v. Moreland [Ga] 65 SE 86. Statement signed by member of bar who did not appear to be an attorney of record in case. Brantley v. McArthur [Ga.] 64 SE 326. Held that want of proper service could not be cured by filing in supreme court of affidavit of counsel who made entry to effect that statement therein contained was true. Advance Lumber Co. v. Moreland [Ga.] 65 SE 86; Brantley v. McArthur [Ga.] 64 SE 326.

38. In absence of contrary showing, proper notice to opposing counsel required by rule 55 is presumed to have been given. District of Columbia v. Blackman, 31 App. D. C. 229. Is discretionary with judge to settle bill without such notice having been given. Jennings v. Philadelphia, B. & W. R. Co., 31 App. D. C. 173. Plaintiff's motion to dismiss defendant's bill for want of notice of filing thereof, or for lack of notice of the hearing thereon, under provisions of superior court rule 31, held without merit, where it appeared that plaintiff's attorney, after ascertaining that bill had been filed, and prior to allowance, sent note to presiding judge containing all his objections to its allowance, and that judge considered and acted on same, judge being justified under circumstances in believing that plaintiff did not desire any other or further hearing. Williams v. Smith [R. I.] 71 A 841.

39. Arkansas: Matter sought to be made part of bill by affidavits of bystanders must be presented to judge and disallowed by him. Kirby's Dig. §§ 6225, 6226. Cox v. Cooley [Ark.] 114 SW 929. Bill certified by bystanders in accordance with statute must, in absence of controverting affidavits, be taken as representing true state of record. Boone v. Holder [Ark.] 112 SW 1081.

Missouri: Bill may be authenticated by bystanders, where judge refuses to sign it because he deems it untrue, and indorses such cause upon bill. Ann. St. 1906, § 730. State v. Taylor, 134 Mo. App. 430, 114 SW 1029. Party is not entitled to have bystanders' bill until judge has refused in statutory manner to sign bill presented. Id. After judge has rejected bill as untrue, he may refuse to permit filing of bystander's bill if he considers same untrue as well. Ann. St. 1906, § 733. Id. In such case exceptor may procure affidavits concerning its integrity, which adverse party may combat by counter affidavits, and thus create issue to be determined by appellate court on such affidavits. Id.

Texas: Attempted authentication by two bystanders, under Kirby's Dig. § 6226, is insufficient where it does not appear that bill was first presented to circuit judge and was rejected by him. Ayer & Lord Tie Co. v. Greer [Tex. Civ. App.] 113 SW 209.

40. Alabama: Appellant failing to establish his bill in supreme court under rules provided in case of trial courts, neglect or failure to sign cannot by motion expunge erasures made by trial court before signing. Horton v. Louisville & N. R. Co. [Ala.] 49 S 423.

Missouri: Upon refusal of judge to permit filing of bystanders' bill, exceptor may procure affidavits concerning its integrity, which adverse party may combat by counter affidavits, and thus create issue to be determined by appellate court on such affidavits. Ann. St. 1906, § 733. State v. Taylor, 134 Mo. App. 430, 114 SW 1029.

Rhode Island: Under Court & Prac. Act. 1905, § 492, burden of ascertaining whether exceptions are stated clearly and separately is on trial justice. Enos v. Rhode Island Suburban R. Co. [R. I.] 70 A 1011. No exception to allowance of bill by trial justice is permitted by statute, but only remedy of party aggrieved by his failure to act upon bill, or to return same, or to his disallowance of, alteration of, or refusal to alter bill, is to establish truth of exceptions before supreme court upon petition stating the facts, under Court & Prac. Act 1905, § 494. Id. Where eight rulings were grouped in one exception, but it appeared, on proceeding to establish truth of exceptions, that eight exceptions were in fact taken, held that appellant would be allowed to set out same properly by amendment. Id. Scope of inquiry cannot be restricted by form of prayer of petition, but supreme court will endeavor to ascertain truth of exceptions. Hopkins v. Richmond [R. I.] 72 A 220; Enos v. Rhode Island Suburban R. Co. [R. I.] 70 A 1011. Immaterial exceptions should be eliminated rather than at later stage of case. Id. Since truth of exception was not affected by action of trial justice in striking reference to affidavits supporting it, petition to establish truth of such exception based on such action dismissed. Campbell v. Campbell [R.

bill.[41] In some states, if he deems the bill as presented incorrect, he is required to indorse his refusal thereon, and then make out and file what he deems a proper bill.[42] Mandamus will issue to compel the signing and certification of a truthful bill presented in time;[43] but the appellate court will not overrule the statement of the trial judge as to what were the facts[44] or require him to certify any facts not resting in his knowledge,[45] nor, as a general rule, can he be compelled in an equity case to allow bills that do not preserve the evidence on the merits.[46]

(§ 9C) 2. *The settled case or statement of facts.*[47]—See 11 C. L. 168—The settled case or statement of facts must be made up in the manner prescribed by law,[48] and should contain such matters as are necessary to a review of the rulings complained of,[49] an abridgment or condensation into narrative form being frequently required.[50] Matters shown by the record proper need not, ordinarily, be included.[51]

I.] 71 A 359. Act of justice in striking from exception reference to affidavits supporting same pursuant to agreement claimed to have been made under compulsion held proper. Id.

South Dakota: Where trial judge refuses to settle and certify bill of exceptions, same may be presented to supreme court for proof or settlement under Rev. Code Civ. Proc. § 298. Northwestern Port Huron Co. v. Zickrick [S. D.] 117 NW 685.

41. Object of having bill submitted to judge for allowance is to insure that questions raised shall be truly and clearly stated, and bill should not be allowed unless they are so stated. Cataract City Milling Co. v. Meunier [R. I.] 69 A 602. Where, on mandamus to compel certification, it appeared that matters which judge declined to certify were absolutely immaterial to consideration of error attempted to be assigned by bill and that judge could have stricken same under Code 1895, § 5528, par. 2, as mere surplusage, held that it would be directed that counsel present bill with such immaterial matter omitted in accordance with direction of judge, and that thereupon the judge certify same. Attaway v. Parker [Ga. App.] 65 SE 61. Where judge finds bill presented to him incorrect, he is not bound to assume initiative and send for exceptor or his counsel, nor is it his duty to return bill to exceptor within time limit with reasons for refusing to sign same indorsed thereon. Ann. St. 1906, § 729. State v. Taylor, 134 Mo. App. 430, 114 SW 1029. Judge held not to have failed in his duty because he waited to hear from counsel, and did not notify him until after expiration of time for filing bill, counsel not having made any inquiry in regard to matter. Id.

42. Has no right to qualify bill of exceptions presented by appellant without his consent. Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602.

43. Losing party entitled to one bill as matter of right, and mandamus will issue irrespective of merits of exceptions taken. Seaboard Air Line R. v. Reid [Ga. App.] 63 SE 1130. But where one writ of error granted and second bill of exceptions sought to review extraordinary motion for new trial or other similar procedure, is refused by trial judge, reviewing court will examine errors complained of and will not grant mandamus nisi if points presented are wholly unmeritorious. Id.

44. Will not compel signing of bill returned to counsel for correction under Civ. Code 1895, § 5545, unless objections specified are removed. Campbell v. Foute [Ga. App.] 64 SE 292.

45. Attaway v. Parker [Ga. App.] 65 SE 61.

46. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104.

47. Search Note: See Appeal and Error, Cent. Dig. §§ 2480-2572; Dec. Dig. §§ 556-578; 3 Cyc. 53-76; 3 A. & E. Enc. P. & P. 879; 18 Id. 725; 20 Id. 557.

48. Where stenographer's minutes are not numbered line and page, appellats court will not examine reference thereto but will remit for correction. Smith v. Herring-Hall-Marvin Safe Co., 113 NYS 572. Appellant's paper books should show that action was begun below and should contain abstract of proceedings or copy of docket entries, although fact that action was brought may be assumed from fact that it was assigned a certain number in lower court. McCleery v. Stoup, 32 Pa. Sup. Ct. 42. Statement of plaintiff's claim must be printed in appellant's paper book, as provided by rule 25. Quigley v. Traders' Mut. Fire Ins. Co., 35 Pa. Super. Ct. 51.

49. Printed case submitted with briefs must show that judgment has been rendered by lower court. Badewitz v. West Jersey & S. R. Co. [N. J. Err. & App.] 71 A 248. Printed case must show transcript of judgment below. Campbell, Morrell & Co. v. Lehocky [N. J. Err. & App.] 71 A 694. Printed case must show return to writ. Id. Appellant's statement in his paper book of question involved should be such as to enable court to obtain immediate view of nature of controversy. Ripka v. Mutual Fire Ins. Co., 36 Pa. Super. Ct. 517. Under Gen. St. 1902, c. 52, § 761, plaintiff can appeal from nonsuit only on ground that evidence made a prima facie case, and must submit at own expense a statement of whole evidence, not a summary. Lynahan v. Church [Conn.] 72 A 726. Statement of facts not technically incomplete because insufficient to support judgment in opinion of appellate court. Fletcher v. Ozone Lumber Co. [La.] 49 S 158.

50. Brief of evidence should be succinct, concise statement of only so much of evidence as is material to consideration of errors complained of. Civ. Code 1895, § 5488. Albany & N. R. Co. v. Wheeler [Ga. App.] 64 SE 1114. Brief consisting of full sten-

In some states certain exceptions may be reserved in the statement of facts instead of by bill of exceptions.[52] Except where the statute provides for the authentication by the stenographer of his transcript,[53] or for use on appeal of the statement on

ographic report of evidence, including excluded evidence, objections, and rulings of court, and verbatim copy of interrogatories and answers, and of documentary exhibits thereto, held fatally defective. Knox v. Lexington Terminal Co. [Ga. App.] 64 SE 1134. Brief containing copies of documentary evidence held insufficient. Oconee Oil Refining Co. v. Planters' Oil Co. [Ga. App.] 65 SE 144. Stenographic report of evidence insufficient. Russell v. Hammock, 4 Ga. App. 519, 61 SE 1054; Rexford v. Bleckley, 131 Ga. 678, 63 SE 337. Purported brief consisting largely of wholly immaterial evidence, interspersed with objections to testimony, statements and argument of counsel, testimony to which objections were sustained or overruled, and colloquies between counsel and court, held insufficient. Wright v. Johnson [Ga. App.] 65 SE 60. Arguments of counsel, objections, and rulings form no proper part of brief of evidence and their incorporation cannot be taken as authenticating facts stated. Lockwood v. Muhlberg [Ga.] 64 SE 655. To convert full stenographic report into narrative form is not a compliance with the law, but abridgment and condensation are as essential as approval of trial judge. Albany & N. R. Co. v. Wheeler [Ga. App.] 64 SE 1114. Under Gen. St. 1901, § 5033, case made may be very brief and may be devised mainly for abridging record and lessening expenses of review. Doyle v. Hays Land & Inv. Co. [Kan.] 102 P 496. Summary of lengthy documents sufficient. Id. Under Rule 6, printed case is required to be mere abridgement of what is necessary for decision, and costs for printing case which does not comply therewith will not be allowed. Rule 44. Johanson v. Webster Mfg. Co. [Wis.] 120 NW 832; Sparks v. Wisconsin Cent. R. Co. [Wis.] 120 NW 858; Steinberg v. Salzman [Wis.] 120 NW 1005. Printed case, containing whole testimony in extenso, question and answer, held violation of rule. Swanke v. Herdemann [Wis.] 120 NW 414. Laws 30th Leg. p. 509, c. 24, providing for statement of facts in narrative form, etc., and repealing Laws 29th Leg. p. 220, c. 112, held not to control making of statements in appeals taken before it went into effect, even though no statement had been perfected therein before it went into effect, but that such appeals were governed by previous law. Missouri, K. & T. R. Co. v. Waggoner [Tex.] 115 SW 1172. Laws 29th Leg. p. 220, c. 112, §§ 3, 4, held to have required filing of stenographer's transcript of testimony with clerk below. Id. Act 30th Leg. is directory, and rights are not necessarily lost by failure to follow it. Id. Though disregard of statute ought generally to be held ground for disregarding statement, rule may be relaxed under particular circumstances, as where statement contains all that statute requires, and fact that it contains much that observance of it would exclude is due to confusion incident to recent change in law. Id. Statement of facts, which, instead of being in narrative form as required by Laws 1907, p. 510, c. 24, § 5, consists of stenographer's notes in full, containing questions and answers, will be stricken on motion. Ivy v. Ivy [Tex. Civ. App.] 112 SW 110; Poitevent v. Scarborough [Tex. Civ. App.] 117 SW 443; Wharton v. Chunn [Tex. Civ. App.] 115 SW 887; Murphy & Co. v. Dunman [Tex. Civ. App.] 120 SW 240. Motion to strike statement overruled pro forma, where same result would follow whether statement was considered or not and judgment was based upon finding of fact not excepted to. McLendon v. Bumpass [Tex. Civ. App.] 114 SW 462.

51. Documents properly specified and transmitted as parts of record need not be embraced in brief of evidence. Norman, Timmons & Co. v. Smith, 131 Ga. 69, 61 SE 1039.

52. Exception to admission of evidence may be reserved in statement of facts when latter agreed to by parties. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236. Parties excepting to ruling permitting introduction of testimony over objection may reserve their exceptions in statement of facts, right not being predicated upon the "stenographer's act," so that repeal of that act did not affect right to continue former practice. Kansas City S. R. Co. v. Rosebrook-Josey Grain Co. [Tex. Civ. App.] 114 SW 436.

53. Where reporter died after judgment and before his notes had been translated or evidence certified, held that party was not entitled to new trial to make available his right to appeal, though time for certification had not expired. Dumbarton Realty Co. v. Erickson [Iowa] 120 NW 1025. Right to appeal in equity cases given by Const. art. 5, § 4, is right to prosecute appeal according to the reasonable rules and regulations imposed by legislative authority, and hence that which is essential to hearing de novo in appellate court must be preserved of record in manner prescribed by statute. Id. Under Laws 1905, p. 534, c. 320, evidence may be made part of record by obtaining certified transcript thereof from official stenographer and filing same with clerk of district court where trial occurred and by giving notice of such filing to adverse parties or their attorneys of record. Bliss v. Brown [Kan.] 96 P 945. Adverse parties, if they find transcript incorrect, may, within 15 days after it has been filed, suggest amendments thereto and present same, after five days' notice to adverse party, to judge who tried case for settlement, after which it will become part of record. Id. If no such objections are made to transcript within 15 days after it is filed with clerk, it will become part of record without further action. Id. After evidence has been made part of record, it must be included in every transcript of the record of the action. Id. Party preparing transcript may, without waiting for expiration of 15 days, upon notice to adverse parties or their attorneys of record, present same for settlement to judge who tried case, and, if adverse party consents thereto,

motion for a new trial,[54] the case must be settled and approved by the trial judge[55] within the time limited by law or rule,[56] or an extension thereof duly granted.[57]

settlement will be deemed same in effect as if done at suggestion of other party. Id. Certificate of stenographer is sufficient to authenticate transcript of evidence in first instance. Id. If subsequently settled by judge, his certificate is sufficient to authenticate it as full, true, and complete transcript, and transcript of record which includes settled transcript of evidence certified by clerk, in form prescribed by rules of supreme court, will be deemed sufficient to confer jurisdiction on that court. Id. Under P. L. 1905, p. 259, for transmission of stenographer's notes as state of case to supreme court, practice of returning whole case should be confined to those cases arising on motions of nonsuit, directed verdict, or where necessary to determine if there is any evidence, or whether there is an entire insufficiency of evidence, as case may be, to justify trial court in its rulings. Paonessa v. Ruh [N. J. Law] 73 A 113. Appeal may be quashed where notes of testimony in equity case have not been certified by either official stenographer or trial judge. Thomas v. Borden, 222 Pa. 184, 70 A 1051.

54. In absence of showing on bill of exceptions or record that any of grounds for motion for new trial were approved, only question on review is consistency of verdict with law and evidence. National Fire Ins. Co. v. Van Giessen [Ga.] 64 SE 655. As general grounds of motion for new trial complaining that verdict is contrary to evidence without evidence to support it, etc., contain no recital of fact requiring certification by trial judge, they need not be approved by him in order to be considered, and hence lack of such approval furnishes no cause to strike original motion for new trial, or amended and properly approved motion therefor, or to dismiss appeal. Courson v. Pearson [Ga.] 64 SE 997. To "allow" grounds of motion is not equivalent to approving them. Gay v. Peak, 5 Ga. App. 583, 63 SE 650. Ground of motion for new trial should be complete in itself or rendered so by exhibit to motion. Lay v. Nashville, etc., R. Co., 131 Ga. 345, 62 SE 189. Mere statement in brief of evidence that certain mortality tables were introduced is not sufficient to raise judicial cognizance of such tables, though printed as appendix to official reports of state. Southern R. Co. v. Wright [Ga. App.] 64 SE 703. Grounds of motion for new trial excepting to admission of writings will not be considered unless substance of writings appears in motion or exhibit attached thereto, incorporation of copies of writings in brief of evidence being insufficent. Rossiter, MacGovern & Co. v. Carrollton Elec. L. Co., 5 Ga. App. 393, 63 SE 233. Where examination of witness containing several questions and answers is set forth in one ground of motion for new trial, and same objection is made to all said questions and answers, and some of them are not clearly open thereto, action of lower court in overruling same will not be disturbed. Gillis v. Bowman [Ga.] 64 SE 1096. Where no motion for new trial is made, evidence should be embodied in bill of exceptions or attached as exhibit and properly identified or contained in brief approved by trial judge and made part of record. McCarty v. Penn Mut. Life Ins. Co., 131 Ga. 724, 63 SE 224. In suit on insurance policy where case tried on agreed statement of facts resulting in judgment for defendant, exception to judgment and embodiment of what purports to be copy of agreement is insufficient. Id. Where bill of exceptions was settled and ordered filed, held that it, including the certificate, became part of record to be used on motion for new trial, and, motion having been overruled on such record, trial court had no authority to allow amendment of certificate so as to make it designate document as bill of exceptions instead of statement on motion for new trial, at least without setting aside order denying motion, which could not be done after an appeal had been taken therefrom. Robinson v. Helena L. & R. Co. [Mont.] 99 P 837.

55. Brief of evidence not approved by trial judge held fatally defective. Knox v. Lexington Terminal Co. [Ga. App.] 64 SE 1134; Sparks Mercantile Co. v. Stone Tobacco Co. [Ga. App.] 64 SE 718. Certificate by municipal judge that statement of facts is correct statement of questions of law involved is sufficient under clause 6, § 23, Municipal Court Act. Lange v. Cole, 140 Ill. App. 545. Certificates of clerk and judge held in conformity to rules and in form sufficient to make exhibit attached to petition in error good either as transcript of record or as a case made. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859. Settled case cannot be carried up by stipulation. Must be indorsed and allowed by court as required by § 317, Municipal Court Act, or settled by appellate court under § 319, where judge is disqualified. Middleman v. Stevenson, Raldiris & Co., 61 Misc. 322, 113 NYS 762. Municipal Court Act, § 319, authorizing appellate court to receive affidavits and examine witnesses as to testimony below, applies only where trial judge is disqualified, and not where he merely fails to make return. Landis v. Levin, 113 NYS 541. Where judgment, bill of exceptions, and statement of facts were all of same date, and unmistakably were made up and signed by judge at same time, in open court, and certified by clerk, held that fact that judge signed his name both at end of bill of exceptions and at end of statement of facts immediately following it, instead of merely signing at end of record, did not preclude consideration of statement of facts. Savage v. Cauthorn [Va.] 64 SE 1052. Statement of facts simply authenticated by affidavit of stenographer, who reported case at trial, stricken on motion because not certified by trial judge. Adams v. Columbia Canal Co., 51 Wash. 297, 98 P 741.

56. California: Whether there has been such laches and delay in settlement of statement as would warrant trial court in dismissing proceeding held primarily question for trial court. Curtin v. Ingle [Cal. App.] 98 P 868. Where no motion had been

A party will not be prejudiced by delay due solely to the fault of the trial judge.[58] It is generally provided that the proposed case,[59] with notice of settlement,[60] be served on the adverse party within a specified time,[61] or an extension thereof duly

made below to dismiss proceeding, and it was still pending there and not abandoned, held court of appeal was bound to assume that appellant had been guilty of no inexcusable neglect in that proceeding. Id. On motion to dismiss appeal for failure to file statement in time, conflict in evidence on point must be resolved in favor of appellant and action of court below in settling statement. Risdon v. Steyner [Cal. App.] 99 P 377.

Georgia: Where term order allows movant for new trial to present brief of evidence at hearing and file same within 10 days thereafter, order for filing after hearing is necessarily merely directory, and if brief be filed by time bill of exceptions is certified, and is part of record, supreme court will consider and pass upon such assignments of error as depend upon evidence. Mitchell v. Masury [Ga.] 64 SE 275.

Kansas: Motion for new trial was overruled and time for preparing case made permitted to expire without action. Subsequent motion for new trial on ground of newly discovered evidence was overruled, and case was served and settled. Held that case-made presented no question except whether error was committed in overruling second motion. Kelley v. Kelley [Kan.] 99 P 1134.

New Jersey: Act April 12, 1905 (P. L. 1905, p. 259), allowing judge of district court to certify transcript of proceedings and testimony made by stenographer as a state of the case to be used on hearing of appeal, limits time within which certification may be done and transcript filed to period of 15 days after judgment, and such period may not be extended by district court. Ervin v. Wohlfert [N. J. Law] 70 A 153.

New York: Whether to open default in failing to file and serve printed case will not lie in appellate court after trial court has entered order declaring appeal abandoned under general rule of practice 35, and where case is settled but appellant is unable to obtain signature of judge within ten days, he should move in trial court for extension or, after default, move in trial court to reopen, and if unsuccessful appeal from latter order. Baylor v. Levy, 113 NYS 802.

Missouri: Motion to strike statement because not filed with clerk below in time may be met by proof that it was so filed. Missouri, K. & T. R. Co. v. Waggoner [Tex.] 115 SW 1172.

Texas: Act May 25, 1907, held to require statement to be filed within thirty days from final judgment of term, whether statement was made by agreement of parties or by court under § 14 or by stenographer at court's direction, under § 5. Knox v. McElroy [Tex. Civ. App.] 118 SW 1142. Where exception to admission of evidence is reserved in statement agreed to by parties, statement should be filed within time for filing bill of exceptions. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236. Statement not timely filed will be ignored. Knox v. McElroy [Tex. Civ. App.] 118 SW 1142. Loss of depositions excuse for failure to file statement of facts within time prescribed. Dealy v. Shepherd [Tex. Civ. App.] 116 SW 638. Unexcused delay of 9 months where statement might have been filed by reasonable diligence prevents consideration, though filed over a month before submission of case. Id.

57. New Jersey: P. L. 1902, p. 565, providing that state of case shall be agreed upon or settled within 15 days, unless judge shall grant further time, does not require entry of order extending time, and settling of case by court after 15 days will, in absence of anything appearing to contrary, be presumed to have been done within further grant of time authorized by statute. Syring v. Zelenski [N. J. Law] 71 A 1119.

Oklahoma: After he has ceased to sit as court, judge pro tempore has no power to extend time for making and serving case-made action tried before him, but extension can only be granted by regular district judge who is in fact in possession of the office. City of Shawnee v. Farrell [Okl.] 98 P 942. Wilson's Rev. Ann. St. 1903 (§ 4742) c. 66, art. 22, § 544. Horner v. Goltry & Sons [Okl.] 101 P 1111.

Washington: Under Ball. Ann. Codes & St. § 5062 (Pierce's Code, § 679), providing that time for filing proposed statement of facts may be extended for good cause shown by order of court made on notice to adverse party, any reasonable notice is sufficient, sufficiency of notice in matter of time being primarily for trial court to determine. Galler v. McMahon, 51 Wash. 473, 99 P 309. Determination that service of notice in forenoon of hearing at 3 P. M. was sufficient held not abuse of discretion. Id. Ball. Ann. Codes & St. § 4886a (Pierce's Code, § 362), providing for three days' notice of motion in certain cases held to apply only to hearings or proceedings before judgment. Id.

58. Where judge labored under misapprehension as to day upon which time expired. Texas & G. R. Co. v. First Nat. Bank [Tex. Civ. App.] 112 SW 589.

59. Where court recognized statement presented by appellant within statutory time as correct, it should have been approved, though not presented to opposing counsel in time or approved by them. Laws 1907, p. 509, c. 24, merely directory. Ferris Press Brick Co. v. Hawkins [Tex. Civ. App.] 116 SW 80.

60. Code Civ. Proc. §§ 650, 659, subd. 2, construed and held that provision of latter section for five days' notice on presentation of proposed statement and amendments to judge, where proposed amendments are not adopted, held not to apply where proposed statements and amendments are delivered to clerk for judge. Curtin v. Ingle [Cal.] 99 P 480.

61. Case-made must be served within three days after judgment or order appealed from is entered, or within extension of time allowed by judge or court within said time. Wilson's Rev. & Ann. St. 1908, §§ 4741, 4742. Bettis v. Cargile [Okl.] 100

granted [62] within the time originally fixed.[63] Filing below is also sometimes required.[64] The lower court has no authority to eliminate matters as not worthy of consideration by the appellate court,[65] though it has been held that settlement may be refused where the proposed case is insufficient to present the only question sought to be reviewed.[66] A party who has in good faith attempted to comply with the statute should be given an opportunity to correct errors and supply omissions.[67] In some states the court is required to himself prepare a statement where he deems the one presented to him incorrect.[68] Mandamus will lie to compel the approval of a correct statement [69] served in time,[70] or the preparation of a statement by the trial judge where it is his duty to do so.[71] In New York, errors and omissions

P 436; Devault v. Merchants' Exch. Co. [Okl.] 98 P 342. Denial of application for relief from default for failure to serve statement on appeal in time, based on showing of illness of counsel, held not abuse of discretion, where illness was of long standing, and was no showing that other attorneys connected with case were not able and willing to prepare it. Utah-Nevada Co. v. De Lamar [Cal. App.] 100 P 884. Want of knowledge on part of attorney concerning prohibition of statute in relation to extension of time held not to be result of mistake, surprise, or inadvertence, authorizing relief from default. Id.

62. While under Rev. Codes 1905, § 7068, trial court may enlarge time for serving statement of case and stay proceedings pending such service, supreme court has no such authority. Aultman-Taylor Mach. Co. v. Clausen [N. D.] 121 NW 64. Time for serving case-made cannot be extended by stipulation of parties not approved by court or judge. Bettis v. Cargile [Okl.] 100 P 436.

63. London & Lancashire Fire Ins. Co. v. Cummings [Okl.] 99 P 654.

64. Statement of facts will not be considered where it does not appear ever to have been filed by district clerk. Thomas v. Matthews [Tex. Civ. App.] 112 SW 120. Statement not bearing file mark not to be considered, though no motion to strike. Belt v. Cetti [Tex. Civ. App.] 118 SW 241.

65. Allowance of amendment of case by striking out exceptions on ground that they were not worthy of consideration by appellate court held improper, it not being province of trial court to determine what exceptions are or are not proper to be presented to appellate court. Brauer v. New York City Interboro R. Co., 129 App. Div. 384, 113 NYS 705. Amendment striking out exception as argumentative held improperly allowed for same reason. Id.

66. Where plaintiff fails to submit at his own expense complete statement of evidence upon which nonsuit was based, superior court may deny motion to state evidence produced for purposes of appeal. Cottle v. New York, etc., R. Co. [Conn.] 72 A. 727.

67. Where there is a serious omission in proposed statement or it is not in proper form, party proposing it should himself be required to supply defect, and, in absence of bad faith or such gross neglect as will amount to bad faith, proposed statement should not be stricken until after said party has been given opportunity to correct defects and supply omissions pointed out. Ball. Ann. Codes & St. § 5058. State v. Steiner, 51 Wash. 239, 98 P 609. Where party proposing statement had in good faith attempted to comply with statute, held that mandamus would lie directing vacation of order striking proposed statement. Id.

68. Where fails to make and file statement within time prescribed, court of appeals may, under Rev. St. 1895, arts. 1015, 1382, extend time, or may by mandamus compel him to act. Applebaum v. Bass [Tex. Civ. App.] 113 SW 173. Trial judge not bound to prepare statement where not notified of counsel's failure to do same, and appellant's statement not submitted until day before expiration of time so that judge had no time to make statement. Ferris Press Brick Co. v. Hawkins [Tex. Civ. App.] 116 SW 80. Where judge certified statement as correct statement made by him upon disagreement of counsel, held error to refuse to consider appellant's motion to correct same or to allow court stenographer to be sworn in support thereof. Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602.

69. Ferris Press Brick Co. v. Hawkins [Tex. Civ. App.] 116 SW 80. In mandamus proceedings to compel judge to sign and certify a case as one containing all evidence offered or received at trial or pertinent to specific questions sought to be raised, burden is on moving party to satisfy supreme court that his proposed case in fact contains all the evidence. State v. Quinn [Minn.] 120 NW 1088. Trial judge's certificate that case does not conform to truth is final, unless overcome by competent proof, and it is not his duty to affirmatively point out wherein it is incomplete. Id.

70. Order denying motion to amend proposed case after time limited for service thereof, or to extend time and permit new case to be proposed, is discretionary, and is not reviewable in mandamus proceedings to compel allowance and settlement of the case. State v. Quinn [Minn.] 120 NW 1088.

71. Ferris Press Brick Co. v. Hawkins [Tex. Civ. App.] 116 SW 80. Judge does not fail to perform duty to make up and file statement of facts in event of disagreement of parties until expiration of 30 days allowed him by law for so doing. Applebaum v. Bass [Tex. Civ. App.] 113 SW 173. Duty to make up and file statement within 30 days in event of disagreement of parties is not discharged by lapse of that period, but continues until he actually performs it, failure to file it within that time

may be corrected by resettlement on motion.[72] Motions respecting a case prior to its settlement should be made in the trial court.[73]

(§ 9C) 3. *Abstracts.*[74] See 11 C. L. 170—Where the practice of abstracting prevails, an appellant should file,[75] in due time,[76] an abstract containing all that is necessary to a presentation of the matters he wishes to urge [77] and made up in the

being equivalent to refusal before its expiration, and hence mandamus will lie to compel him to do so though 30 days has expired. Id.

72. On resettlement of case, trial justice may act on his own knowledge and recollection as to what occurred at trial. Jenkins v. Bishop, 117 NYS 630. Where affidavits of movant were not contradicted, held that he was entitled to prevail and have case resettled, at least so far as not inconsistent with recollection of trial judge. Id. Although record shows decision filed without jurisdiction being apparently more than fourteen days after trial, order may be made by appellate court for resettlement, unless stipulation is made amending record. Barnes v. Summit Silk Mfg. Co., 113 NYS 977.

73. Motion to dismiss for failure to make and serve case. Shubert Theatrical Co. v. Ziegfeld, 113 NYS 801. Matters of settlement of case and exceptions must be determined below. In re Burwell's Estate, 128 App. Div. 911, 112 NYS 1123.

74. Search Note: See Appeal and Error, Cent. Dig. §§ 2573-2620, 3126; Dec. Dig. §§ 579-592; 3 Cyc. 77-92; 2 A. & E. Enc. P. & P. 313.

75. Duty of preparing sufficient abstract devolves upon plaintiff in error. Madison Bank v. Price [Kan.] 98 P 222. Appeal dismissed for want of prosecution where no abstract served or filed by either party, etc. Meyer v. Chicago, etc., R. Co. [S. D.] 117 NW 1037. Decree affirmed where counsel did not prepare abstract of record, particularly where right on merits. Zimmerman v. Brinkmeyer [Iowa] 121 NW 1021. Where failure to file abstract was due to serious illness of appellant's counsel, held that he would be relieved from his default. Quartz Gold Min. Co. v. Patterson [Or.] 96 P 551.

76. Delay excused where failure to file was due to sickness of counsel and overcrowding of printer with work. Barham v. Shelton [Mo.] 119 SW 1089. Alleged oral stipulations extending time for filing abstract not considered, where counsel differ in their recollections regarding same. Rev. Pol. Code, § 699. Bunday v. Smith [S. D.] 121 NW 792. Motion to strike amended abstract because not filed in time held made too late, where abstract was filed two months before time for submission, and no motion to strike was interposed until after record had been certified, and appellee had prepared in part his argument based on such amended abstract. Aga v. Harbach [Iowa] 117 NW 669.

77. Matters not in abstract not considered. North State Fire Ins. Co. v. Dillard [Ark.] 115 SW 154. Woolner Distilling Co. v. Peoria & E. R. Co., 136 Ill. App. 479; Cahill v. Printy, 138 Ill. App. 600; Robinson v. Yetter, 143 Ill. App. 172; Ennis v. Tucker [Kan.] 96 P 140. Should be sufficient to enable court to pass on questions involved without recourse to record. International Hotel Co. v. Flynn, 141 Ill. App. 502; York v. Scott, 140 Ill. App. 178. Appeal dismissed where brief and abstract were wholly unintelligible when considered together, and so in conflict that if one was true other was false. Dawson v. Ash Grove White Lime Ass'n, 134 Mo. 220, 113 SW 718. Abstract which fails to certify evidence or exceptions, or to preserve pleadings or evidence, or to point out errors complained of, is too defective to be considered. Buck v. Casper, 140 Ill. App. 278. Abstract stating substance of pleadings, setting out all of the instructions, printing evidence, and showing that assignments of error were duly reserved in motion for new trial, held sufficient compliance with rule 9. McDonough v. Williams [Ark.] 112 SW 164. Where court directed verdict in personal injury action on ground of insufficiency of evidence, it was only necessary to set out pleadings and facts in abstract to show that defendant's liability was for jury. Oliver v. Ft. Smith L. & Trac. Co. [Ark.] 116 SW 204. Must show **jurisdictional facts.** Lane v. Niagara Fire Ins. Co. [Mo. App.] 116 SW 440. Where case originates in justice court, must show that cause proceeded to judgment and that appeal was prosecuted to circuit court. Id. Record entry in supplemental abstract ineffective to cure defect. Id. Where decree in former suit was not set out in bill of complaint in haec verba, but was attached thereto as an exhibit, and **exhibits to bill** were not abstracted by appellant, held that supreme court could not say whether such decree was consent decree or not. Patterson v. Northern Trust Co., 238 Ill. 601, 87 NE 843. In reviewing rulings admitting **evidence,** court looks only to the abstract. Work v. Fidelity Oil & Gas Co. [Kan.] 98 P 801. Provision of Rule 10a exempting plaintiff in error from necessity of abstracting all the evidence to support claim on his part that it does not show or tend to show certain fact is an exception in his favor, and he should take care not to abuse privilege thereby accorded him. Madison Bank v. Price [Kan.] 98 P 222. Such provision does not restrict claim of plaintiff in error to one fact or finding, and he may, in good faith and in a proper case, make claim that several of large number of essential facts or findings of fact are unsupported by the evidence without being obliged to abstract all the evidence to support it. Id. In all except extreme cases of palpable bad faith defendant in error should meet such claim by promptly furnishing counter abstract, cost of which, or of so much as was unnecessarily required, may be taxed to plaintiff if it finally appears that such claim, or substantial portion thereof, was not reasonably well founded. Id. Supreme Court rule 9 not complied with where abstract of transcript does not set out substance of

manner required by law or rule.[78] Unnecessary matter should be omitted[79] and that included condensed as far as possible.[80] The court is not bound to go to the

testimony, but merely states counsel's conclusion. Jett v. Crittenden & Co. [Ark.] 116 SW 665. Motion to strike abstract because it showed on its face that it did not contain all the evidence denied where it purported to contain it all, though reference was made therein to certain immaterial exhibits which were described but not copied. Coldren Land Co. v. Royal [Iowa] 118 NW 426. In appeal under short form, abstract must contain copy of **judgment** or concise statement of it. State v. Southwestern Mach. Co. [Mo. App.] 116 SW 1065. Copy in transcript insufficient. Id. Mere statement of counsel in abstract that certain **order** was made, without setting out such order, is insufficient, Sheridan v. Post [Mo. App.] 119 SW 500. No reversal of decree can be allowed where abstract fails to disclose tenor of exceptions and disposition of them by court. Cahill v. Printz, 138 Ill. App. 600. Must show **that rulings and exceptions were preserved in bill of exceptions.** Thompson v. Ruddick, 213 Mo. 561, 111 SW 1131; Groves v. Terry [Mo.] 117 SW 1167. Where abstract does not point out what bill contains, case will be treated as though no bill of exceptions had been filed. Gilchrist v. Bryant, 213 Mo. 442, 111 SW 1128. Recital in abstract where nothing to determine parts in bill of exceptions insufficient not to be considered. State v. Adkins [Mo.] 119 SW 1091. Appeal will not be dismissed for failure of abstract to show that rulings and exceptions were so preserved, since appeal lies without bill of exceptions where review is sought on record proper only. Thompson v. Ruddick, 213 Mo. 561, 111 SW 1131. Where abstract not showing **filing of bill of exceptions,** or record of entry of filing, held insufficient to permit consideration of bill. Hanks v. Hanks, 218 Mo. 670, 117 SW 1101. Where abstract of record on page 9 showed filing of bill of exceptions on Sept 27, 1906, on page 57 showed abandonment by defendant of part of answer with agreement to consider evidence as far as applicable after which followed "second bill of exceptions" containing defendant's evidence and on page 73 showed judge's signature and usual recital dated Sept. 27, 1906, signing and filing of bill sufficiently appears and extraneous matter on page 57 would not justify refusal to consider. Elliott v. Delaney, 217 Mo. 14, 116 SW 494. Abstract stating that **appeal** was "duly" taken will be deemed a concession that statutory formalities have been complied with. Canal Const. Co. v. Woodbury County [Iowa] 121 NW 556. Should contain order granting appeal, but failure will not result in dismissal where copy in transcript. Booth v. St. Louis, etc., R. Co., 217 Mo. 710, 117 SW 1094. Failure to abstract order granting appeal held not ground for dismissal, where certified copy of judgment and order granting appeal was filed with clerk of supreme court. Coleman v. Roberts, 214 Mo. 634, 114 SW 39. Where abstract does not contain affidavit of appeal or statement of contents but fact is shown on face of record proper, it is sufficient. Elliott v. Delaney, 217 Mo. 14, 116 SW 494.

78. Rule 19 prescribing size of page and method of binding typewritten abstracts should be complied with. O'Keefe v. Beecher [N. D.] 117 NW 353. Fact that abstract was not indexed held not to render it imperfect for failure to comply with rule requiring index, where it was composed only of five pages and was printed in fair type, rule ending with reason thereof. Gilchrist v. Bryant, 213 Mo. 442, 111 SW 1128. Abstract of record held to conform, so far as it went to requirements of Rev. St. 1899, § 813 (Ann. St. 1906, p. 783). State v. Broaddus, 216 Mo. 336, 115 SW 1018. Abstract held insufficient. Breimeyer v. Star Bottling Co. [Mo. App.] 117 SW 119. Technical objections to abstract held not ground for dismissal of obviously meritorious appeal. Webb v. Pacific Mut. Life Ins. Co. [Mo. App.] 119 SW 491. Held that appeal would not be dismissed though abstract did not comply with rules in many respects, where pleadings were properly abstracted, and certified copy of judgment and order granting appeal were filed with clerk of supreme court, since in such case court could determine whether judgment could be permitted to stand on face of pleadings and judgment. Coleman v. Roberts, 214 Mo. 634, 114 SW 39. Presentation of evidence held insufficient under rule 9. Kempner v. Broyles [Ark.] 112 SW 219.

Must differentiate between record proper and matter of exception. Thompson v. Ruddick, 213 Mo. 561, 111 SW 1131; City of Macon v. Jaeger, 133 Mo. App. 643, 113 SW 1138; Groves v. Terry [Mo.] 117 SW 1167; Barham v. Shelton [Mo.] 119 SW 1089. Otherwise court will hold that there is no bill of exceptions and review only errors appearing in record proper. Smith v. Thomas [Mo. App.] 115 SW 504; Heltzell v. McDowell [Mo. App.] 115 SW 1056.

79. Abstract held to contain unnecessary matter. Fish v. Fish, 235 Ill. 396, 85 NE 662.

80. Where supreme court rule 14 requiring testimony to be condensed disregarded, and abstract contained many pages of testimony and arguments, no attention would be given to points raised which could not be decided without reading such evidence. Mooney v. Chicago, 239 Ill. 414, 88 NE 194. Abstract consisting almost entirely of pleadings, reports of commissioners, and other formal matter printed in full with title of case repeated in full in each instance, jurats set out in ipissimis verbis and testimony by question and answer, without abridgment, stricken on motion. Leathers v. Aberlander [Iowa] 117 NW 30. Printed copy of entire record without abridgment or condensation is not an abstract within meaning of rule 10a. See this case for model of proper abstract. Hills v. Allison [Kan.] 100 P 651. Is proper and preferable for abstract to set out record facts in abbreviated, narrative form instead of by literal copy. State v. Broaddus, 216 Mo. 336, 115 SW 1018. Where no attempt was made to comply with rule 7 by reducing testimony to narrative form, or eliminating those parts having no bearing on decision of case, and specifications were scattered

record in search of matters not abstracted [81] but may do so for the purpose of sustaining the judgment.[82] Service on the adverse party is sometimes required.[83] Errors or omissions may sometimes be supplied by filing a supplemental abstract.[84] In some states, if a respondent is not satisfied with an abstract furnished by appellant, he may file one of his own [85] or propose amendments,[86] and statements in appellant's abstract will be taken as conclusively true unless he does so.[87] In some states a denial of the correctness of appellant's abstract may result in compelling him to substantiate it by certification of a transcript of the evidence when an examination thereof is necessary to determine the controversy as to what it contains.[88] The insufficiency of the abstract does not deprive the appellate court of jurisdiction otherwise conferred,[89] and where jurisdiction exists its decision as to such sufficiency is not open to collateral attack.[90]

through entire evidence instead of being placed together followng title, held that court would disregard everything except judgment roll. O'Keefe v. Beecher [N. D.] 117 NW 353.

81. Files v. Law [Ark.] 115 SW 373; Dunbar v. Bell [Ark.] 119 SW 670; Finley v. New Cache La Poudre Irr. Co. [Colo.] 98 P 173; Reavely v. Harris, 239 Ill. 526, 88 NE 238; Cahill v. Printz, 138 Ill. App. 600; City of Dixon v. Allemand, 136 Ill. App. 449; Woolner Distilling Co. v. Peoria & E. R. Co., 136 Ill. App. 479. Will not go to full typewritten transcript in first instance to search out what is record proper or record entries, and what is contained in a bill of exceptions. Groves v. Terry [Mo.] 117 SW 1167. Where instrument on which peremptory instruction was based not set out, presumed to be correct. Baker v. Cazort [Ark.] 112 SW 890. To determine correctness of findings where abstract insufficient. Nunn v. Lynch [Ark.], 115 SW 926. To determine correctness of instructions not set out. Chicago Pneumatic Tool Co. v. Sims [Ark.] 119 SW 1118. To determine whether name of grantor appears in deed not abstracted. Runyan v. Snyder [Colo.] 100 P 420. Where abstract on error to review ruling on demurrer to complaint did not set forth complaint or its substance or show judgment complained of, held that writ would be dismissed pursuant to Rule 14. Purdy v. Geary [Colo.] 100 P 426.

82. City of Dixon v. Allemand, 136 Ill. App. 449; Woolner Distilling Co. v. Peoria & E. R. Co., 136 Ill. App. 479.

83. Matter of service of printed abstract held to be governed by rule 29, providing for service at least 30 days before day assigned for hearing, rule 37 going no farther than to provide result of failing to file abstract in clerk's office within 30 days before beginning of second term after appeal is taken. Culbertson v. Salinger [Iowa] 117 NW 6.

84. Bill of exceptions to be considered though no record entry abstracted showing motion for new trial or extension of time for filing bill where such matters shown by supplemental abstract filed in time. Ewing v. Vernon County, 216 Mo. 681, 116 SW 518; Harkreader v. Vernon County, 216 Mo. 696, 116 SW 523. Supplemental abstract not to be noticed when presented at hearing on appeal without consent. Phoenix Stone & Lime Co. v. Huggens [Mo. App.] 116 SW 458. Where original abstract is so faulty as to authorize dismissal of appeal, no leave should be granted to file supplementary abstract after adverse party has served brief or other writing calling attention to defects. Barham v. Shelton [Mo.] 119 SW 1089. Rule governing time of filing additional abstracts or amendments to abstract held not to be hard and fast one, and circumstances held such that it should not be enforced. Culbertson v. Salinger [Iowa] 117 NW 6.

85. In order to have matters going to jurisdiction of appellate court considered if not included in abstract, defendant in error must file additional abstract. Lyons v. Hammond Elevator Co., 139 Ill. App. 495.

86. Motion to strike amendment because it contained immaterial matters denied where amendment presented some matters material to disposition of case not disclosed in appellant's abstract. Collins v. Collins [Iowa] 117 NW 1089. Motion to strike appellee's amendment to appellant's abstract because not filed in time denied where sufficient excuse was shown for slight delay. Id. Motion to strike appellee's amended abstract on ground that it was unnecessary, not in proper form, and was not filed within 10 days after service of the abstract denied where it was very brief, easily comprehended, and caused no delay in submission of case. Coldren Land Co. v. Royal [Iowa] 118 NW 426.

87. Unless brought into question by counter abstract. State v. Broaddus, 216 Mo. 336, 115 SW 1018. Where answer in abstract was general denial, and no counter or additional abstract was filed, held that respondent could not contend that trial answer contained plea of contributory negligence. MacDonald v. Metropolitan St. R. Co. [Mo.] 118 SW 78.

88. Not necessary unless correctness of abstract is challenged with sufficient particularity to require the supreme court to determine controversy thereon. Code § 4122, and Rule 32. Howerton v. Augustine [Iowa] 121 NW 373. Mere denial of correctness of appellant's abstract is insufficient to compel production. Id.

89. If there is otherwise sufficient in record to confer jurisdiction, though it may justify dismissal of appeal. State v. Broaddus, 216 Mo. 336, 115 SW 1018.

90. If appellate court has jurisdiction of cause, has jurisdiction to pass on sufficiency

§ 9) *D. Sufficiency of entire record to present particular questions. (Presumptions on appeal.)*[91]—See 11 C. L. 171—The appellate court will look to the entire record[92] but to nothing outside of it.[93] Every presumption favors the correctness of

of abstract, and neither its judgment on that question nor on merits is open to collateral attack, its decision in such case, if wrong, being only error. State v. Broaddus, 216 Mo. 336, 115 SW 1018. Supreme court on certiorari cannot quash judgment of court of appeals in cause of which it had jurisdiction on ground that there is error in the judgment. Id.

91. **Search Note:** See Appeal and Error, Cent. Dig. §§ 2867-2967, 3667-3806; Dec. Dig. §§ 671-717, 900-939; 3 Cyc. 155-181, 266-325; 2 A. & E. Enc. P. & P. 420.

92. In passing on form of decree of court having jurisdiction where rights of third parties are not involved. Cornelius v. Washington Steam Laundry [Wash.] 100 P 727. To determine whether amount in controversy is sufficient to give it jurisdiction. Gilbert Co. v. Husted, 50 Wash. 61, 96 P 835. Will not ignore that which record discloses if it will prevent reversal of judgment. Federal Life Ins. Co. v. Kerr [Ind. App.] 85 NE 796.

93. Central of Georgia R. Co. v. Ashley [Ala.] 48 S 981; Blair v. Williams [Ala.] 49 S 71; O'Rourke v. Finch, 8 Cal. App. 263, 96 P 784; Taylor v. Leesnitzer, 31 App. D. C. 92; Spencer v. Dell, 55 Fla. 790, 46 S 729; Thomas Bros. Co. v. Price [Fla.] 48 S 262; Conlon v. Chicago G. W. R. Co., 139 Ill. App. 555; Biles v. Wolf [Miss.] 49 S 267; Vance v. McGinley [Mont.] 101 P 247; O'Donnell v. Caspary, 113 NYS 771; Beinert v. Tivoli & Co., 62 Misc. 616, 116 NYS 4; Russell v. Oregon R. & Nav. Co. [Or.] 102 P 619; Wright v. Deaver [Tex. Civ. App.] 114 SW 165; Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114. Matters not appearing from record of judgment sought to be reviewed not considered though sought to be made to appear by supplemental petition filed in appellate court, and record of order in certain other proceeding not appealed from. Butcher's Heirs v. Kunst [W. Va.] 64 SE 967. Statements of changed conditions since making of record not considered. The People v. Small, 142 Ill. App. 422. Evidence which has been stricken will not be considered to sustain judgment. Creem v. Fidelity & Casualty Co., 116 NYS 1042. In passing on error as to exclusion of evidence, reference cannot be had to allegation of pleading properly stricken. Necker v. Zuercher [Tex. Civ. App.] 118 SW 149. Cannot consider matters presented in argument merely. Boyd v. Boyd, 130 App. Div. 161, 114 NYS 361; City of Houston v. Bammel [Tex. Civ. App.] 115 SW 661. Statements in brief unsupported by anything in record will not be considered. Mount Nebro Anthracite Coal Co. v. Martin [Ark.] 111 SW 1002; Central of Georgia R. Co. v. Ashley [Ala.] 48 S 981; St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 665; Millsap v. Balfour, 154 Cal. 303, 97 P 668; Glover v. Newsome [Ga.] 65 SE 64; Haas Elec. & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248; Chicago & N. W. R. Co. v. Chicago Mechanics' Institute, 239 Ill. 197, 87 NE 933; Vance v. McGinley [Mont.] 101 P 247. Record in another case filed with record on appeal in action involving title to land not considered where it did not appear that same land was involved in both cases. Burton-Whayne Co. v. Farmers' & Drovers' Bank [Ky.] 113 SW 445; Burton-Whayne Co. v. Farmers' & Drovers' Bank [Ky.] 114 SW 288. Matters not appearing of record cannot be shown by ex parte affidavits. Jeremy v. Matsch, 106 Minn. 543, 118 NW 1008; Nahe v. Bauer, 117 NYS 635; Merrill v. Hexter [Or.] 96 P 865; Griffith v. Reagan [Tex. Civ. App.] 114 SW 1167; Gilbert Co. v. Husted, 50 Wash. 61, 96 P 835; Townley Bros. v. Crickenberger [W. Va.] 63 SE 320. Affidavits setting out facts in support of motion by appellant to reverse and remand for failure and inability of trial judge to make, sign, and file statement of facts, held not open to consideration, Rev. St. 1895, art. 998, not being applicable. Rush v. Thompson & Co. [Tex. Civ. App.] 113 SW 546. Cannot consider statement of counsel in motion for rehearing which is not borne out by record. Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633. Assignment of error assuming that to be fact which has no existence in record is without merit. Atlantic Coast Line R. Co. v. Adum, 5 Ga. App. 780, 63 SE 1126. Assignment that court erred in overruling demurrer to complaint presents no question for review where demurrer was overruled by circuit court of another county prior to change of venue. Romona Olitic Stone Co. v. Shields [Ind.] 88 NE 595. Assignment of error in federal supreme court cannot bring into record new matter not considered in state court. Waters Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Memorandum opinion of trial judge attached to general order granting new trial cannot be looked to for limiting scope of order or restricting review. Winnicott v. Orman [Mont.] 102 P 570.

Exceptions: Evidence de liors the record is admissible in supreme court to show that since judgment was rendered appellant has so dealt with subject-matter of suit as to preclude him from further asserting his alleged right on appeal. Thomas v. Booth-Kelly Co. [Or.] 97 P 1078. Though record did not show that exceptions to master's report had been overruled, or that plaintiff's appeal was from anything except final decree, held that where it was stated in defendant's brief that exceptions had been overruled, and case was argued on assumption that such was fact, and that questions arising therefrom were saved to plaintiff, case would be considered on that basis. Wilson v. Puffer Mfg. Co., 200 Mass. 261, 86 NE 317.

Judicial notice: On appeal from order distributing award made to unknown owners in condemnation proceedings, court may inspect public records to learn that assessment to pay awards for taking land for street purposes had been made with view to upholding of lower court's order directing payment of awards. In re City of New

the rulings below,[94] and the regularity of proceedings there had,[95] and accordingly

York, 117 NYS 855. Court cannot take judicial notice of width of lot for purpose of determining distance of certain point from certain street in support of instruction as to such distance which was not based on any evidence. Gessner v. Metropolitan St. R. Co., 132 Mo. App. 584, 112 SW 30. Appellate court cannot take judicial notice of ending of term of lower court though they will of its beginning. Breimeyer v. Star Bottling Co. [Mo. App.] 117 SW 119. Court cannot take judicial notice of existence of streets in municipalities. Vonkey v. St. Louis [Mo.] 117 SW 733. Circuit court of appeals may take notice of facts outside record disclosing moot character of case, rendering decision unnecessary. Keely v. Ophir Hill Consol. Min. Co. [C. C. A.] 169 F 601.

94. Falk v. Kimmerle [Fla.] 49 S 504; Davis v. Horne [Fla.] 49 S 505; Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922; Watt v. Decker [Idaho] 101 P 253; Unger v. Mellinger [Ind. App.] 88 NE 74; Ansley v. Stuart [La.] 48 S 953; Phelps v. Conqueror Zinc Co., 218 Mo. 572, 117 SW 705; Toole v. Weirick [Mont.] 102 P 590. Error will not be presumed, but must affirmatively appear from record. Pierce v. Pierce [Wash.] 101 P 358; Lindly v. Lindly [Tex.] 113 SW 750. Burden is on excepting party to point out error committed. City of Manchester v. Duggan [N. H.] 70 A 1075. Ordinarily where law requires some issue of fact as condition precedent to lower court's right to enter particular decree, such facts are presumed, and complaining party has burden of rebutting presumption. Fagan v. Fagan [Tex. Civ. App.] 120 SW 550. Where record silent court could not assume facts stated by appellant on objection as conceded by respondent, or that evidence was offered in aid of objection. San Domingo Gold Min. Co. v. Grand Pac. Gold Min. Co. [Cal. App.] 102 P 548. Where record does not show reason for ruling, will be sustained on any theory possible. Fulwider v. Trenton Gas. L. & P. Co., 216 Mo. 582, 116 SW 508. Where motion to quash affidavit and dismiss proceedings did not disclose any reason for so doing and none was presented on appeal, presumed in support of refusal that it was for some reason that did not present cause for so doing. Campbell v. State [Ind.] 87 NE 212. Where record is silent as to reason for rulings, fair presumption supports judgment. Cottle v. New York, etc., R. Co. [Conn.] 72 A 727. Must presume, until contrary appears, that orphans' court properly exercised its powers in allowing commissions to executor. In re Watt's Estate, 108 Ind. 696, 71 A 316. Where court made no findings of fact or conclusions of law, and rendered judgment for defendant, and all material allegations of complaint were denied by answer, held that it could not be said that error in overruling demurrer to part of answer was prejudicial, since court might have found allegations of complaint untrue, and error would not be presumed. Adams v. Columbia Canal Co., 51 Wash. 297, 98 P 741. On objection that lower court had no jurisdiction of garnishment affidavit because not properly sworn to where record showed affidavit sworn to before "W." whom record also showed was superior court clerk, it will be presumed that lower court took judicial notice that "W." clerk of court was same person. Bloch v. Crumpacker [Ind. App.] 88 NE 875. Presumed that district court made proper holding that justice's judgment was valid and discharged garnishee on ground that debt owing by him was exempt, though judgment did not so recite. Simmons v. Dolan [Iowa] 119 NW 690. That court was misled into making order inferred from his subsequent order abrogating its effect. Wallace v. Wallace [Iowa] 119 NW 752. Where impossible to determine from record on appeal from order denying motion to resettle case on appeal from judgment whether case was correctly settled, order cannot be disturbed. Acme Rubber Mfg. Co. v. Buckley, 117 NYS 629. Letters to agent respecting loan assumed to refer to one in controversy in absence of anything in record to show that they referred to different one. Wales v. Mower [Colo.] 96 P 971. In action for personal injuries by street car passenger where no question is made as to his right to ride on platform, and defendant obtains exclusion of testimony that he was there at conductor's direction, it must be presumed that he was rightfully on platform. Vogel v. Bahr, 130 App. Div. 732, 115 NYS 284. Record not showing that contract was made in state it will be presumed that there was no violation of General Corporation Law § 15, as amended Laws 1901, p. 267, inhibiting foreign corporation to sue on contract unless authorized to do business in state. Paraffine Paint Co. v. Tarbox, 114 NYS 54. Order of corporation commission is presumed on appeal to be just, reasonable, and correct, until presumption is overcome by facts in record. Const. art. 9, § 22. Atchison, etc., R. Co. v. State [Okl.] 100 P 11. In action for injuries caused by being struck by trolley wire which railroad for which plaintiff was employed was using, in absence of authority for such use, which was excluded, it cannot be presumed that it was used illegally, or under such conditions as rendered defendant liable for torts of user. Booth v. St. Louis, etc., R. Co., 217 Mo. 710, 117 SW 1094. Where statement in record certified to by sheriff who was ordered to open poll on creation of school district that notice was given, it will be presumed in absence of contrary showing that officer did duty and published notices as required by law. Taylor v. Cundiff [Ky.] 118 SW 379. When record is silent as to service of necessary notice below, appellate court will not presume service in support of judgment. Notice of expiration of time for redemption from tax sale. Wetherbee v. Johnston [Cal. App.] 101 P 802. Held that, in absence of showing in record to contrary, there was no presumption that court was in session two days after date when decree was entered at which time motion for new trial was filed.. Breimeyer v. Star Bottling Co. [Mo. App.] 117 SW 119.

95. Pine Tree Lumber Co. v. Central Stock

the record, to present an alleged error, must not only show the ruling complained of,[96] and, unless the error is one apparent on the face of the record proper,[97] objection and exception thereto [98] and the grounds therefor,[99] and the taking of such

& Grain Exch. 140 Ill. App. 462. In absence of express showing to contrary, it will be presumed that proper and essential officials were present and performed their functions in trial court, transcript showing that trial was at proper time and place Broaddus v. Russell [Ala.] 49 S 327. Presumption of performance of duty by ordinary as to returning papers to clerk. Norman, Timmons & Co. v. Smith, 131 Ga. 69, 61 SE 1039. Presumption that minutes were kept and properly approved by judge, unless contrary appears. Reynolds v. Egan, 122 La. 47, 47 S 371. Presumably judge in entering judgment for plaintiff in action of replevin on his minute book actually pronounced judgment, not only against all the defendants of record, but also against sureties on delivery bond, as required by Rev. St. 1899, § 4476, and in absence of showing by record, evidence that judgment was not so pronounced must be presumed that clerk entered judgment actually pronounced. Kreisel v. Snavely [Mo. App.] 115 SW 1059. An appeal in local option election contest, presumed in support of action of commissioner's court in ordering election that it knew population of certain town, on which its right to act depended. Cofield v. Britton [Tex. Civ. App.] 109 SW 493.

96. Hanks v. Miller, 142 Ill. App. 486; Dayton Lumber Co. v. Stockdale [Tex. Civ. App.] 118 SW 805. Where no copy of order of railroad commission sought to be set aside or statement of its contents is included in briefs or record, supreme court will assume it was no broader than averments of complaint seeking to set it aside. Chicago I. & T. R. Co. v. Railroad Commission [Ind.] 87 NE 1030. Upon appeal from "the judgment and order" where after order refusing dismissal defendant stood mute and final order was entered for plaintiff, it will be presumed that appeal is from final order and not from nonappealable order refusing dismissal, fact that final order, in effect a judgment in the case is called a "judgment" being immaterial. Atlschuler v. Lipschitz, 113 NYS 1058. Where, so far as record disclosed, only judgment against appellant was for sum taxed as defendant's costs, held that it would be presumed that it was from that judgment that appeal was prosecuted. Bell v. Thompson, 8 Cal. App. 483, 97 P 158. Where record clearly shows what was intended by court and parties, party cannot be deprived of right of exception by inapt words of court in ruling or by clerk in recording. Honey v. Guillaume [Ind.] 88 NE 937.

Must show that ruling was made. Thomas Bros. Co. v. Price [Fla.] 48 S 262; Hawlick v. Davidson, 15 Idaho, 787, 100 P 91; Ansley v. Stuart [La.] 48 S 953; Blumert v. Hoes, 124 App. Div. 547, 111 NYS 823. Where judgment was entered against one defendant and three defendants moved for new trial whereupon order denying motion of one is entered, appeal by three from judgment and order against "them" raises no question, since such judgment and order appear of record. Hall v. Butte Elec. R. Co. [Mont.] 101 P 965.

Must show that question was ruled on below. Myers v. Holton [Cal. App.] 98 P 197; Atwood v. Jarrett [Conn.] 71 A 569; Dallam v. Sanchez [Fla.] 47 S 871; Peacock v. Thompson, 240 Ill. 610, 88 NE 1049; Wilson v. Dallas [Neb.] 121 NW 1128; Ecker v. Ecker [Okl.] 98 P 918; Moore v. Kirby [Tex. Civ. App.] 115 SW 632; Chicago, etc., R. Co. v. Clements [Tex. Civ. App.] 115 SW 664; Boardman v. Woodward [Tex. Civ. App.] 118 SW 550; Jenness v. Simpson, 81 Vt. 109, 69 A 646; Duskey v. Green Lake Shingle Co., 51 Wash. 145, 98 P 99; Apker v. Hoquiam, 51 Wash. 567, 99 P 746.

97. Errors apparent on judgment roll or record proper will be reviewed though not excepted to and though there was no motion for new trial below. Baker v. Hammett [Okl.] 100 P 1114.

98. Must show objection. Central Consol. Mines Corp. v. Mills [Colo.] 100 P 410; Dallam v. Sanchez [Fla.] 47 S 871; Hogsett v. Northern Texas Trac. Co. [Tex. Civ. App.] 118 SW 807; In re City of Seattle [Wash.] 100 P 1013.

Must show exception. Cox v. Cooley [Ark.] 114 SW 929; United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 P 901; Central Consol. Mines Corp. v. Mills [Colo.] 100 P 410; Hotchkiss v. The Vanderpoel Co., 139 Ill. App. 325; Hix v. Nolin, 139 Ill. App. 438; Hanks v. Miller, 142 Ill. App. 486; Keller v. Jersey, 142 Ill. App. 514; Starks v. Kirchgraber, 134 Mo. App. 211, 113 SW 1149; Schneider v. Winkler, 74 N. J. Law, 71, 70 A 731; Dunlap v. Flowers [Okl.] 96 P 643; Ecker v. Ecker [Okl.] 98 P 918; Elwert v. Marley [Or.] 101 P 671; Sipe v. Pennsylvania R. Co., 222 Pa. 400, 71 A 847; Burns v. Pennsylvania R. Co., 222 Pa. 406, 71 A 1054; Patton v. Allegheny L. & T. Co., 36 Pa. Super. Ct. 296; Hogsett v. Northern Texas Trac. Co. [Tex. Civ. App.] 118 SW 807; Van Eps v. Newald [Wis.] 120 NW 853; Dimond Bros. v. Beckwith, Quinn & Co. [Wyo.] 98 P 889; Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75. Exception must be properly preserved in bill. Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171. Under supreme court, rule 21, case will not be heard unless there shall be put in record, as required by rule 19(2), the summary of exceptions taken at the trial and those taken in ten days thereafter to the charge, and those not so put in will be deemed abandoned. Ullery v. Guthrie, 148 N. C. 417, 62 SE 552.

99. Rulings on evidence not considered where grounds of objection below not shown. Fain v. Ennis, 4 Ga. App. 716, 62 SE 466; Walker v. Texas & N. O. R. Co. [Tex. Civ. App.] 112 SW 430; Haring v. Shelton [Tex. Civ. App.] 114 SW 389; McMillion v. Cook [Tex. Civ. App.] 118 SW 775. Only grounds of objection which bill of exceptions shows were made below can be considered. McCrorey v. Thomas [Va.] 63 SE 1011. After plaintiff had announced close of his evidence and demurrer thereto

other steps as are necessary to save the question for review[1] and to bring up the appeal,[2] but so much of the evidence[3] and proceedings below[4] as to exclude every

had been argued, court permitted him to introduce bill of lading. No objection was made that it was not pleaded, nor was any reason given, nor was there any application for a continuance, and record merely recited "objections by defendant." Held tantamount to no objection, and that matter could not be reviewed. Holland v. Atchison, etc., R. Co., 133 Mo. App. 694, 114 SW 61. Exceptions not considered where bill of exceptions did not point out ground of exceptions and there was nothing pointed out in transcript to show grounds. Wilkins' Adm'r v. Brock, 81 Vt. 332, 70 A 572. Bill should show what the exceptions are, but if it does not, and transcript is referred to for them, will be noticed only in so far as they are specifically pointed out in brief. Id. Exception to admission of evidence will not be considered, where no ground stated for the exception in record, bill, or brief. Cataract City Milling Co. v. Meunier [R. I.] 69 A 602.

1. That court erred in applying law to facts found not considered where no propositions of law submitted. Keller v. Jersey, 142 Ill. App. 514.

Must show that question was raised below. Atwood v. Jarrett [Conn.] 71 A 569; Adams v. Rome, 131 Ga. 784, 63 SE 289; Shuler v. American Benev. Ass'n, 132 Mo. App. 123, 111 SW 618; National Bank v. Thomas, 220 Pa. 360, 69 A 813; Rippy v. Southern R. Co., 80 S. C. 539, 61 SE 1010; Schneider v. Schneider [Tex. Civ. App.] 118 SW 789; Jenness v. Simpson, 81 Vt. 109, 69 A 646; Cornelius v. Washington Steam Laundry [Wash.] 100 P 727; Southern R. Co. v. King [C. C. A.] 160 F 332. Every matter purporting to be evidence copied in record in chancery case presumed used in evidence below, unless record clearly shows contrary. Dallam v. Sanchez [Fla.] 47 S 871. Where record on appeal from probate to district court discloses that no issue of fact was tendered below, appeal can only be considered as one upon questions of law, though notice of appeal stated that it was taken upon questions of both law and fact. Smith v. Clyne, 15 Idaho, 254, 97 P 40. Affidavits on motion to vacate judgment will not be considered in absence of showing that they were before trial court, especially where there is no showing that trial court did not consider other evidence in making ruling. Hallowell v. Darling, 32 App. D. C. 405. Fact that opinion of lower court referred to in order sustaining demurrer did not mention certain point held not to prove that it was not there presented, opinion not purporting to state what points were presented in argument. Burke v. Maguire, 154 Cal. 456, 98 P 21.

Must show request, where a request is necessary to save the question. Cox v. Cooley [Ark.] 114 SW 929; Healey v. Zobel [Colo.] 101 P 56; Dunlap v. Flowers [Okl.] 96 P 643; Patton v. Allegheny L. & T. Co., 36 Pa. Super. Ct. 296; In re City of Seattle [Wash.] 100 P 1013.

Must show motion for new trial, adverse ruling thereon, and exception thereto, where such motion is essential to save question. Thomas Bros. Co. v. Price [Fla.] 48 S 262; Yarber v. Chicago & A. R. Co., 235 Ill. 589, 85 NE 928; Hix v. Nolin, 139 Ill. App. 438; Tokheim Mfg. Co. v. Stoyles, 142 Ill. App. 198; Gschwendtner v. Gebhardt, 142 Ill. App. 260; Myers v. Buell, 142 Ill. App. 467; Hawkins v. Brown [Kan.] 97 P 479; Burrow v. Maxon [Ky.] 112 SW 661; City of Macon v. Jaeger, 133 Mo. App. 643, 113 SW 1138; Wilbrandt v. Laclede Gaslight Co., 135 Mo. App. 220, 115 SW 497; Tarr v. Crump [Mo. App.] 118 SW 488; Wilson v. Dallas [Neb.] 121 NW 1128; Cayouette v. Raddant Brew. Co., 136 Wis. 634, 118 NW 204; Davis v. Ogden [Wyo.] 97 P 1074. Actions by son for personal injuries and by mother for damages resulting to her from son's injuries were consolidated and tried together, and verdicts rendered in favor of both. In disposing of son's case, on appeal, nothing was said about mother's case, as abstract and brief failed to mention that appeal had been taken therein. Record showed that such was case, however, but did not set out any motions for new trial or bill of exceptions in mother's case, and her case was not referred to in motions or bill in son's case. Were two motions for new trial in record, each bearing caption in son's case, and bill of exceptions also bore the two captions. Held too late to correct any error in record in mother's case, since court was not asked to consider appeal therein, and judgment would be affirmed pro forma. St. Louis Southwestern R. Co. v. Wells [Ark.] 113 SW 49. Only grounds of exception to refusal to grant motion which will be considered are those which record shows were alleged below as grounds for motion. Cataract City Milling Co. v. Meunier [R. I.] 69 A 602. Where trial court stated in certificate authenticating record that ground of new trial was "the evidence fails to support judgment," and appellee made assignment in brief as enumerated in Rev. Codes, § 6794, that evidence was insufficient to justify decision and it was argued on merits, it will be presumed that trial court intended to state statutory assignment on certificate. Foster v. Winstanley [Mont.] 102 P 574. Where opposing counsel does not require reasons for new trial to be specified in writing, will be presumed that every reason argued on appeal was argued below. Illinois Valley R. Co. v. Harenski, 132 Ill. App. 423. Motion, and not brief, of evidence must show rulings complained of. Lockwood v. Muhlberg [Ga.] 64 SE 655. Verification of grounds of motion may appear from bill of exceptions, record, or approval of trial judge. Gay v. Peak, 5 Ga. App. 583, 63 SE 650. Fact that record did not properly show that motion was made and ruled on held immaterial where all errors assigned were reviewable without such motion. Neesley v. Southern Pac. Co. [Utah] 99 P 1067.

2. In the absence of motion to dismiss on that ground, it will be presumed that there was due notice of appeal although record is silent. Macfarland v. Poulos, 32 App. D. C. 558. Where record fails to show that

party to appeal was party below, it will be presumed that he was included by inadvertence. Id. Where transcript shows that appeal bond was filed but does not set it out, such bond will be presumed to be complete in all respects. Taylor v. Leesnitzer, 31 App. D. C. 92. In absence of bill of exceptions, held that it could not be said that qualification of appellant's bill of exceptions by court was not done with his consent. Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602.

3. Questions depending on the evidence cannot be reviewed where such evidence is not in the record. Central of Georgia R. Co. v. Ashley [Ala.] 48 S 981. Where evidence not preserved by proper bill of exceptions. London v. Hutchens [Ark.] 114 SW 919; Barringer v. Bratcher [Ark.] 118 SW 1015; Truesdale v. Board of Com'rs [Colo.] 99 P 63; Jones v. Middle Georgia Cotton Mills, 131 Ga. 52, 61 SE 972; Harrison v. Bell [Ga.] 64 SE 688; Harrison v. Harrison [Ga.] 65 SE 126; Russell v. Hammock, 4 Ga. App. 519, 61 SE 1054; Huntley Mfg. Co. v. Nixon Grocery Co. [Ga. App.] 64 SE 279; Milne Mfg. Co. v. Cowart [Ga. App.] 64 SE 1002; Wright v. Johnson [Ga. App.] 65 SE 60; Oconee Oil Refining Co. v. Planters' Oil Co. [Ga. App.] 65 SE 144; Johnson v. Amacher [Ind.] 86 NE 1014; Rector v. Druley [Ind.] 88 NE 602; Ferguson & Palmer Co. v. Ferguson's Adm'r [Ky.] 114 SW 297; Spurr v. Spurr [Minn.] 121 NW 121; Adams v. Bank of Meadville [Miss.] 48 S 831; Robbins v. Robbins [Mo. App.] 119 SW 1075; Londis v. Levin, 113 NYS 541; Wortham v. John [Okl.] 98 P 347; Ceaser v. Ceaser [Okl.] 98 P 916; Applebaum v. Bass [Tex. Civ. App.] 113 SW 173; Hall v. First Nat. Bank [Tex. Civ. App.] 115 SW 293; Oppermann v. Petry [Tex. Civ. App.] 115 SW 300; Cunningham v. Lakin, 50 Wash. 394, 97 P 447; Malfa v. Crisp [Wash.] 100 P 1012; Pierce v. Pierce [Wash.] 101 P 358; Spreckels v. Brown, 212 U. S. 208, 53 Law. Ed. —. In absence of bill of exceptions, error cannot be assigned on matter which such bill should contain nor can judgment be reversed for failure to submit question to jury. Chess v. Vockroth, 75 N. J. Law, 665, 70 A 73. Where neither party furnishes abstract of evidence, or any record of proceedings had or rulings made at trial, every presumption will be indulged, and every doubt solved, in favor of regularity and propriety of judgment. Hambro Distilling & Distributing Co. v. Price & Co. [Iowa] 119 NW 541. Where transcript does not contain all the evidence, presumed omitted portion authorized action of court. Garig v. Truth Printing & Pub. Co. [La.] 49 S 632. In equity appeals, whole case below must be brought up in order to give supreme court jurisdiction to interfere. Ness v. Bothell [Wash.] 101 P 702. Consolidation of cases below and stipulation that evidence in one shall be considered in other makes one case in effect, and, on appeal, entire evidence in both must be brought up in order to warrant a review of the facts. Id. Where abstract contains but a small portion of the evidence, questions depending upon the evidence will not be reviewed. Eddy Hotel Co. v. Ford Heating & Plumbing Co. [Ark.] 119 SW 270. Where did not appear that all evidence bearing on defendant's removal to certain city before certain date was shown by bill of exceptions, and no part of transcript of testimony on that question was before supreme court, held that court could not say as matter of law that she had made such removal as to constitute change of domicile. Smith v. Stannard, 81 Vt. 319, 70 A 568. On confirmation of default, where only part of testimony is reduced to writing, effect is eame as though none was preserved. Fletcher v. Ozone Lumber Co. [La.] 49 S 158. Where inferable from certificate of statement of facts that it did not contain all material facts adduced, it should be stricken. Thoma v. Galveston Dry Goods Co. [Tex. Civ. App.] 119 SW 715. Fact that documentary evidence was not marked filed held not to show that it was not considered, nonfiling being imputable to clerk and appellant whose duty is was to see that record was properly prepared. Ansley v. Stuart [La.] 48 S 953. Where there is no bill of exceptions, court cannot examine evidence or instructions, and hence in such case it cannot be said from a "consideration of the whole case" that an erroneous ruling was harmless. Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922. Order based on affidavits not made part of record by statement of facts or bill of exceptions cannot be reviewed. McDonald v. Downing [Wash.] 100 P 834. Where district court quashed portion of bill of exceptions, and there was nothing in record to show what portion was quashed and what portion considered, held that evidence would not be considered. Union Pac. R. Co. v. Colfax County [Neb.] 122 NW 29. Where bill of exceptions is too voluminous in setting out all evidence, questions depending on rulings on evidence will not be examined. Oldland v. Oregon Coal & Nav. Co. [Or.] 102 P 596. Where there is no statement of facts or bill of exceptions, and no fundamental error, and assignments relate to matters which cannot be revised without such statement and bill, judgment will be affirmed. Green v. Cook [Tex. Civ. App.] 113 SW 776. Will not consider errors not presented by bill of exceptions. Borys v. Bernhard Milling Co., 138 Ill. App. 88; Ferguson & Palmer Co. v. Ferguson's Adm'r [Ky.] 114 SW 297; Tilton v. Gates Land Co. [Wis.] 121 NW 331. Where no bill of exceptions, only record proper can be considered. Morgan Creek Drainage Dist. v. Hawley, 240 Ill. 123, 88 NE 465; State v. Shockley, 216 Mo. 356, 115 SW 966; Weeks Hardware Co. v. Weeks, 135 Mo. App. 20, 115 SW 490; Smith v. Thomas [Mo. App.] 115 SW 504. Where bill not filed by authority of court. Goodhart, Hartman Co. v. Kinney [Mo. App.] 118 SW 679. Where no statement of facts or bill of exceptions in record, court can only look to pleadings and judgment. Loeper v. Loeper, 51 Wash. 682, 99 P 1029. Where on appeal in contempt proceedings no evidence was presented by bill of exceptions, held that it could not be determined whether judgment which defendants were charged with violating was within issues presented supported by evidence. Smith v. Schlink [Colo.] 99 P 566. Whether proceeding to establish private road was barred by former proceeding for same purpose held not open to consideration, on appeal from judgment of circuit court on appeal from county court, where bill of

fair intendment in support of such rulings, and the record must affirmatively show that it contains all such matters.[5] In the notes will be found applications of this

exceptions contained no evidence showing that there had ever been such a former proceeding, though record in county court showed that motion to dismiss on that ground was filed. Fitzmaurice v. Turney, 214 Mo. 610, 114 SW 504. In suit on liquor dealer's bond, where bond not in statement of facts and it did not appear from such statement that bond exhibited to clerk as witness and introduced in evidence had been executed by parties to suit as sureties, appellate court could not regard bond set out in petition as supplying omission. Hillman v. Gallagher [Tex. Civ. App.] 120 SW 505. Where record did not contain copy of will, trial court's construction thereof presumed to be correct. Robertson v. Schard [Iowa] 119 NW 529. Where record did not disclose terms of lease, held that contention that, on forfeiture of lease, lumber on premises became property of lessor would not be sustained, since forfeiture of property is not presumed. Mueller Lumber Co. v. McCaffrey [Iowa] 118 NW 903. Where deed not in bill of exceptions, objections that recitals were inconsistent could not be considered. Sloss-Sheffield Steel & Iron Co. v. House [Ala.] 47 S 572. Stipulation that copies of statutes and decisions of another state introduced in evidence might be attached to record in lieu of originals held not to warrant supreme court in looking to such statutes and decisions as were cited in argument, where there was no bill of exceptions showing what statutes and decisions were before lower court. Union Cent. Life Ins. Co. v. Dukes [Ky.] 113 SW 454. Recitals of judgment conclusive as to whether evidence heard where record on appeal from judgment which was entered under warrant of attorney with power to confess judgment is silent. First Nat. Bank v. White [Mo.] 120 SW 36. No presumption that mortgagor had wife on March 27, 1906, where record shows spouse on March 25, 1905, so as to render former mortgage void within Kirby's Dig. § 3901, requiring jounder of both husband and wife in instrument affecting homestead. Jett v. Crittenden & Co. [Ark.] 116 SW 665. No presumption of certificate admitting will to probate, where after affidavits, record merely states "Here follows certificate" without setting it forth. Larabee v. Larabee, 240 Ill. 576, 88 NE 1037.

4. Where record fails to show when action was commenced, question of laches in bringing action cannot be considered. Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95. Where record incomplete, appeal dismissed. Cosey v. Smith, 32 App. D. C. 193. Action of court in advancing cause not reviewable where bill of exceptions did not show that it was not reached and tried in its regular order. Bonney v. McClelland, 138 Ill. App. 449. Quashing of attachment held not reviewable where motion to quash and answer thereto were not preserved in bill of exceptions. Harris v. Fox [Okl.] 99 P 651. Assignment relating to fees allowed receivers not considered, where record did not contain auditor's report on receivers' account, or anything by which nature and value of their services could be determined. Consaul v. Cummings, 30 App. D. C. 540. Where it does not appear what portion of record was stricken out, objection on that ground cannot be considered. Smith v. Detterweich, 116 NYS 896. Ground of motion to dismiss levy because alleged fi. fa. did not follow judgment on which it was based held not open to consideration, where there was no specification as to variance claimed to exist, and neither judgment nor petition was before supreme court, and it was not shown that they were placed before trial court. Young v. Germania Sav. Bank [Ga.] 64 SE 552. Party complaining that certain act, deemed essential to validity of proceeding in circuit court, was not done, must show, either by producing full transcript of record of circuit court, or by his abstract in some unequivocal form, that record in circuit court fails to show that it was done. Pullis v. Somerville, 218 Mo. 624, 117 SW 736. Appellant's statement in brief that "the record does not show that the referee ever took the oath" held merely statement that neither short transcript nor abstract filed by him so showed, and not to refer to record of circuit court. Id. Order of district court dismissing appeal from probate court on ground that it was not perfected in time sustained where transcript failed to show that it was so perfected by filing required undertaking within time prescribed. Watt v. Decker [Idaho] 101 P 253. Refusal of district court to permit appellant from probate court to file amended undertaking sustained, where transcript did not contain original undertaking or copy thereof and it could not therefore be determined whether it was capable of amendment. Id. Presumed that amendment at subsequent term of order allowing appeal to appellate court so as to allow appeal to supreme court was correct and in accordance with law, where no bill of exceptions taken at time showing that court did not have any minute, memorial paper, or memorandum in writing authorizing correction of error, though it did not affirmatively appear that he had. Chicago & N. W. R. Co. v. Glos, 239 Ill. 24, 87 NE 881. Contention that validity of judgment in justice court against claimant in garnishment proceedings could not be raised on special appeal to circuit court, but only by certiorari, not determined, where affidavit of claimant upon which special appeal was based was not included in record. Dunkley v. McCarthy [Mich.] 16 Det. Leg. N. 403, 122 NW 126.

5. In testing rulings on admission of evidence, certificate of court that record contains all evidence necessary to full understanding of enumerated exceptions is conclusive, and supreme court must assume that no other evidence on specific points enumerated was offered or received. Hoskins v. Scott [Or.] 96 P 1112. Where, however, court's action in overruling motion for nonsuit or in refusing to direct verdict is called in question, unless record itself dis-

rule to rulings of the lower court relating to jurisdiction,[6] process,[7] venue,[8] parties,[9]

closes that it contains all the evidence, every presumption must be indulged in favor of the verdict. Id.

Necessity of recital or certificate: Must show that contains all evidence necessary to review of question. Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171; Stoddard v. Fox, 15 Idaho, 704, 99 P 122; Barnes v. Loomis, 199 Mass. 578, 85 NE 862; Regan v. McHugh, 78 Ohio St. 326, 85 NE 559; Carter v. Cummings-Wilson Co., 34 Utah, 315, 97 P 334; City of Chicago v. Troy Laundry Mach. Co. [C. C. A.] 162 F 678. Certificate of stenographer that evidence contained in case made was correct transcript of all his notes of all evidence, held unauthorized and not to supply requirements of rule that case made must contain specific averment that record contains all evidence introduced at time. Wagner v. Sattley Mfg. Co. [Okl.] 99 P 643. That bill of exceptions contains all the evidence can be shown only by certificate of trial judge. Regan v. McHugh, 78 Ohio St. 326, 85 NE 559.

Sufficiency of certificate or recital: Certificate and decree held to sufficiently show that transcript contained all the evidence. Turpin v. Beach [Ark.] 115 SW 404. Bill purporting to set out tendencies of evidence concluding with recital that "upon this evidence being substantially all given on trial" does not show that bill contains all evidence. Schwab & Co. v. Hall [Ala.] 47 S 137. Certificate of clerk on appeal from order held insufficient as failing to show that transcript contained transcript of all papers used on hearing of motion. Muzzy v. McEwen Lumber Co., 154 Cal. 685, 98 P 1062. Where certificate of clerk certified foregoing pages as correct transcript of all proceedings had, documents filed and evidence adduced of the cause instituted in the court "and now in the record thereof," quoted words modified "cause" and certificate was insufficient. Houlton v. McGuirk, 122 La. 359, 47 S 681. Certificate of stenographer attached to transcript of his notes reciting that it contained full and correct transcript of "the testimony taken and the oral proceedings had on the trial" held insufficient to show that bill of exceptions contained all the evidence, word "testimony" not being synonymous with evidence. Carter v. Cummings-Nielson Co., 34 Utah, 315, 97 P 334. Order of judge settling bill of exceptions held insufficient to show that it contained all the evidence. Id. Bill of exceptions not open to charge that it does not contain all evidence adduced, where it purports to embody evidence and order of court making bill part of record describes it as containing "all the evidence," such description not being inconsistent with terms of bill and presumed to rest on knowledge of court obtained from other sources. Jackson v. Wheeling Terminal R. Co. [W. Va.] 64 SE 450. Judge's certificate held to sufficiently certify that papers and orders set forth in transcript were all those used in proceeding in question. In re Davis' Estate, 8 Cal. App. 355, 97 P 86. Bill of exceptions held to sufficiently show that it contained all the evidence though not expressly so stating. Brady v. Florence & C. C. R. Co. [Colo.] 98 P 321. In view of recitals in abstract, held that court would not be justified in finding that it did not contain all the evidence. Dalton v. United R. Co., 134 Mo. App. 392, 114 SW 561. Statement in case made "And the foregoing contains true and correct copies of all pleadings in said cause and a true, full, complete and correct statement and recital of all evidence offered and introduced," etc., sufficient averment that case made contains all evidence. Chicago, etc., R. Co. v. Davis [Okl.] 101 P 1118.

6. In absence of bill of exceptions or of facts in common-law record clearly showing lack of jurisdiction, every presumption is in favor of jurisdiction. Pine Tree Lumber Co. v. Central Stock & Grain Exch., 140 Ill. App. 462. Will not be presumed on appeal from judgment of contempt that district judge acted outside his jurisdiction. State v. Walker [Kan.] 97 P 862. Where action at law is tried to court without jury, and jurisdictional facts are properly alleged in complaint, and there is general finding in favor of plaintiff, and no objection is made to jurisdiction at the trial, appellate court cannot look into evidence contained in bill of exceptions to ascertain whether jurisdiction was properly proven at the trial. Hill v. Walker [C. C. A.] 167 F 241.

7. On appeal from order appointing receiver, presumed, in absence of showing in record to contrary, that all necessary parties had been actually or constructively served with process. Baker v. Baker, 108 Md. App. 269, 70 A 418. Presumed that motion to rescind order for publication of process submitted on petition and answer was set down for hearing by movant, he having sole right to have matter so submitted. Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 A 442. It being province of affidavit of publisher to show dates of publication, held that, in absence of affidavit from transcript, would be assumed that decree pro confesso was entered upon a proper affidavit. Lybass v. Ft. Myers [Fla.] 47 S 346. Appeal from judgment valid on its face does not authorize consideration of whether service of summons was defective, where defect does not appear of record. State v. Gallatin County Ninth Judicial Dist. Ct. [Mont.] 99 P 291. In absence of contrary evidence, will be presumed that correction of obvious clerical error in return of service of summons was made prior to delivery to officer. Cox v. American Ins. Co. [Mo. App.] 119 SW 476.

8. Ruling on plea of privilege to be sued in certain county involving question of fact, not considered where was no statement of facts and no finding of fact in record. Lumpkin v. Blewitt [Tex. Civ. App.] 111 SW 1072.

9. Contention that indispensable party was not joined, not considered where evidence not in record. Edmondson v. McGinnis [Ala.] 47 S 62. Where appellant was described as an intervener but there was nothing in record to show any intervention on her part other than that her name was

pleadings,[10] matters preliminary to trial,[11] motions and affidavits,[12] entry and open-

included with others in motion to modify decree, held that it would be assumed that she became party in some proper way where appellee did not raise the question. Brown v. Traul [Iowa] 119 NW 149. Where record is silent, presumption obtains in favor of regularity of court's procedure in substitution of parties, and that sufficient and proper showing was made. State Bank v. Carroll, 81 Neb. 484, 116 NW 276.

10. Where the record fails to contain the pleadings, their sufficiency cannot be reviewed. Anglo-American Authors' Ass'n v. Slutsky, 61 Misc. 222, 113 NYS 763. Sufficiency of pleadings will not be reviewed where not indicated in the abstract. Goodhart, Hartman Co. v. Kinney [Mo. App.] 118 SW 679. Where record is silent as to contents of a plea of privilege, the presumption is in favor of trial court's ruling. Gardner v. Planters' Nat. Bank [Tex. Civ. App.] 118 SW 1146. Where no bill of exceptions, presumed that judgment dismissing intervener's petition was correct. Leach v. Bixby [Neb.] 120 NW 427. As trial without an issue, where not waived, would be erroneous, will not unnecessarily be assumed that parties not answering a cross complaint or defaulted for failure to do so were in court for purposes of a trial on such complaint. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417. In proceeding to establish claim against decedent's estate, where record did not show that claimant's original pleading prayed for allowance of claim or was filed within time limited by statute, held that it could not be presumed that such was case, amended pleading having been filed after such time, and judgment having been rendered against claimant. Whitmire v. Powell [Tex. Civ. App.] 117 SW 433. Construction placed on pleading by trial court will be adhered to where from its plain terms it is susceptible of such construction. Flowers v. Poorman [Ind. App.] 87 NE 1107. Presumed, in absence of showing to contrary, that sufficient cause was shown to warrant court, under rules, in permitting defendants to file supplemental affidavit of defense. Sulzner v. Cappeau Lemley & Miller Co. [Pa.] 72 A 270. Where allegation of petition that parcel of land sold on mortgage foreclosure was not divisible was not denied, and it was sold as whole, presumed that petition and mortgage filed as exhibit so described it as to enable court to determine that it was indivisible, though no proof appeared to have been taken on question. West v. McDonald [Ky.] 113 SW 872. Every presumption to be indulged in, in favor of ruling of trial court on construction of pleading. Apperson v. Lazro [Ind. App.] 88 NE 99. Where defendant did not demur to petition, held that every presumption would be indulged that the evidence supplied the defective allegation thereof. Thomasson v. Mercantile Town Mut. Ins. Co., 217 Mo. 485, 116 SW 1092.

Rulings on motions: Ruling on **motion to strike** not considered where no bill of exceptions. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595. Not considered where neither motions nor pleas involved are in bill of exceptions. Hodges v. Wallace [Ala.] 47 S 1005. Not considered where neither motion nor exception to ruling was preserved in bill of exceptions. Starks v. Kirchgraber, 134 Mo. App. 211, 113 SW 1149. Motion to strike out amended petition, which in effect conceded that it stated cause of action, but was based on ground that it was departure from cause of action stated in original petition, held not equivalent to a demurrer, and not open to consideraton in absence of bill of exceptions. Bick v. Dry, 134 Mo. App. 589, 114 SW 1145. One defendant in partition filed a disclaimer, and another defendant as her next friend filed answer alleging that she had an interest and was old and infirm, and that disclaimer was procured by fraud and undue influencc. Held that refusal of court to strike said answer would not be reversed on plaintiff's appeal where record did not show that court did not hear evidence as to defendant's mental condition, etc., it being presumed that he made sufficient inquiry. Lindly v. Lindly [Tex.] 113 SW 750. Error in overruling motion to require reply to be made **more definite and certain** held not open to consideration, where reply was amended, and amended reply, which was held sufficient, was not contained in record. Hawkins v. Brown [Kan.] 97 P 479.

Rulings on demurrers: Charge may be considered as curing overruling of demurrer though not shown by bill of exceptions. Western Union Tel. Co. v. Pauley [Ala.] 47 S 654. Overruling of demurrer not reviewable where demurrer not in record. Alabama Chemical Co. v. Niles [Ala.] 47 S 239; Horan v. Gray & Dudley Hardware Co. [Ala.] 48 S 1029; Central of Georgia R. Co. v. Ashley [Ala.] 49 S 388; Farmers' & Merchants' Bank v. Sharum [Okl.] 97 P 555. Ruling sustaining demurrer to count as amended, not considered, where record did not show in what amendment consisted. Reach v. Quinn [Ala.] 48 S 540. Overruling of demurrer to count refiled after amendment, not reviewable where record does not disclose amendment which might have cured defects. Mascot Coal Co. v. Garrett [Ala.] 47 S 149. Presumed that demurrer on which no unequivocal ruling is shown was abandoned. Central of Georgia R. Co. v. Ashley [Ala.] 48 S 981. Where defendant files three pleas, first two being general issue and third a special plea, which is demurred to, though record shows no action thereon and judgment recites issue joined on pleadings, demurrer will be presumed abandoned, and that issue was joined on third plea. Southern R. Co. v. Melton [Ala.] 47 S 1008. When record silent as to disposition of demurrer, default judgment warrants presumtion that it was overruled. Smith v. Clyne [Idaho] 101 P 819. Demurrer not shown to have been directly passed upon deemed overruled, where case proceeded on merits. Pope v. Whitridge [Md. App.] 73 A 281. Defendant held entitled to nothing on his appeal by reason of plaintiff's demurrers to his pleas where record did not affirmatively show judgment of court thereon. Cefalu v. Dearborn & Warfield [Ala.] 49 S 1030. Where plaintiff's entry styled "interlocutory judgment on demurrer" has rather the incidents of

ing of defaults,[13] depositions,[14] proceedings at the trial in general,[15] admission,[16] ex-

order than a judgment, if no point is based on discrepancy on appeal, it may be disregarded on presumption. Spitz v. New York Taxicab Co., 62 Misc. 492, 115 NYS 247. Any error found in bill in equity will be presumed as supporting decree sustaining demurrer thereto, although this ground was not specified in motion while other and untenable grounds were so stated. Depue v. Miller [W. Va.] 64 SE 740. Where demurrer containing general and special grounds is sustained and petition dismissed, there is no presumption that ruling is based on any particular ground, but judgment will be treated as sustaining entire demurrer upon all grounds, and affirmed if proper on any ground. McClaren v. Williams [Ga.] 64 SE 65. Where record discloses number of demurrers to separate counts of complaint and judgment shows only ruling on single demurrer to entire complaint, overruling of various demurrers reviewable, since court cannot read judgment entry contrary to plain recital to put trial court in error. Alabama Chemical Co. v. Niles [Ala.] 47 S 239.

Amendments: Court bound by record in determining whether answer was amended. Wright v. Deaver [Tex. Civ. App.] 114 SW 165. No presumption of allowance of amendment where record showed application, but record silent as to action thereon. Leggat v. Palmer [Mont.] 102 P 387. Whether refusal to allow amended petition was abuse of discretion not considered where amendment was not made part of record. Thornbury v. Bolt [Ky.] 116 SW 1177. Refusal to allow amendment not ground for reversal where record did not show reason therefor urged below. Nichols v. Central Trust Co. [Ind. App.] 86 NE 878. Where was no offer or request to amend lien notice below, assumed that formal defect therein was not pointed out or that lien was held sufficient. Cornelius v. Washington Steam Laundry [Wash.] 100 P 727. Though complaint might have been amended so as to withstand demurrer without setting up different cause of action, held that it would be presumed on appeal from order sustaining demurrer thereto that plaintiff did not offer to amend, in absence of showing in record to contrary. Mullarky v. Young [Cal. App.] 100 P 709. Plaintiff held not entitled to complain that he was not given opportunity to amend on sustaining of demurrer to complaint, where record did not show that request to amend was made. Healey v. Zobel [Colo.] 101 P 56. Where finding as to nature of cause of action originally stated, on which allowance of amendment was based, depended on matters outside record, and circumstances under which it was made were not reported, held that it would be presumed that court was satisfied as to matter before allowing amendment. Herlihy v. Little, 200 Mass. 284, 86 NE 294. If necessary to support court's action in allowing amendment to declaration, will be presumed that court inquired de hors pleadings and found that amended declaration declared on same cause as original. Davis' Adm'x v. Rutland R. Co. [Vt.] 71 A 724. In absence of evidence, cannot be presented against action of court in refusing to allow amendment that there was such proof or offer of proof as would have made allowance obligatory. Nichols v. Central Trust Co. [Ind. App.] 86 NE 878.

11. Refusal to order **removal of cause** to federal court on ground that petition showed on its face that federal court had no jurisdiction not reviewable where petition was not in record. Neesley v. Southern Pac. Co. [Utah] 99 P 1067. Refusal to **transfer cause to equity** not reviewable in absence of bill of exceptions, it appearing from record proper that case was heard upon evidence and instructions, and it being impossible to say in their absence that different result would have been reached had transfer been made. Ayer & Lord Tie Co. v. Greer [Ark.] 113 SW 209. Where no bill of exception reserved to refusal of **continuance,** ruling not considered though excepted to. El Paso & N. E. R. Co. v. Sawyer [Tex. Civ. App.] 119 SW 107; Carter v. Kieran [Tex. Civ. App.] 115 SW 272.

12. Must show motion, overruling of which is complained of. Dayton Lumber Co. v. Stockdale [Tex. Civ. App.] 118 SW 805; Hanks v. Miller, 142 Ill. App. 486. Order and motions to vacate it not considered, where record did not show whether order was ever executed or what became of motions to vacate. Hotchkiss v. Vanderpoel Co., 139 Ill. App. 325. Error does not lie to overruling of motion for allowance of compensation for services rendered, where motion was heard on evidence and no bill of exceptions is offered containing evidence. Pedretti v. Pedretti, 11 Ohio C. C. (N. S.) 504. Will be presumed that every proper reason for arresting judgment was presented, where motions were made verbally and reasons were not specified. Henning v. Sampsell, 236 Ill. 375, 86 NE 274. Where denial of motion for judgment non obstante verdicto is assigned as error, motion should be set forth at length in paper book. Philadelphia v. Bilyeu, 36 Pa. Super. Ct. 562. On appeal in action to abate dam, overruling of plaintiff's motion requiring maintenance of proper flood gates must be presumed to have been rightfully determined on proper evidence. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100. Where motion is made on several grounds and order sustaining it is general in terms, order will be sustained if it can be upon any of the grounds of the motion. In re Fleming's Estate [Mont.] 98 P 648.

13. Bill of exceptions containing motion to set aside default and evidence submitted on hearing thereof should show that no other evidence was introduced, or state that it contains all the evidence introduced on such hearing. Milbourn v. Baugher [Ind. App.] 86 NE 874. Where it appeared from order setting aside default that affidavits other than one set out in transcript were used at hearing and filed, held that it would be presumed that said affidavits contained sufficient showing to justify order. Wood v. Johnston, 8 Cal. App. 258, 96 P 508. Presumed in absence of showing to contrary that court correctly found as fact that there had been an appearance at time default and decree were entered against them for failure to appear, and

hence that such default and decree were properly set aside as having been inadvertently entered. Gray v. Carroll [Iowa] 120 NW 1035. Order setting aside plaintiff's default for failure to answer cross complaint presumed to have been properly made, unless it appears from record that were no grounds upon which it could have been made. Wood v. Johnston, 8 Cal. App. 258, 96 P 508.

14. Failure to pass on motion to suppress held not ground for reversal where record did not affirmatively show that motion was called to court's attention or that depositions were introduced in evidence or used at trial. Bidwell v. Sinclair [Okl.] 99 P 653. Where record fails to show that trial court passed on exceptions to depositions, presumed that they were waived. Vermillion v. Nickell [Ky.] 114 SW 270. Where trial was to court and all evidence was not certified up, held that admission of deposition in evidence would not be reviewed since court might have disregarded it and based findings on other evidence which was sufficient to support them. Mundt v. Commercial Nat. Bank [Utah] 99 P 454.

15. Presumed, in support of order staying action on note until plaintiff had exhausted other securities, that court found that allegations of cross bill, that plaintiff would not thereby be delayed or inconvenienced in collection of debt, were true. Chemical Nat. Bank v. Kiam [Tex. Civ. App.] 113 SW 948. Record need not state reason why another judge was called in to act for regular one, but it will be presumed to have been for legal reason unless record shows contrary. State v. Fidelity & Deposit Co. [Mo. App.] 117 SW 618. In absence of showing to contrary, presumed that supernumery judge, who presided at trial and signed bill of exceptions, lawfully held court in place of regular judge, though record shows term organized by regular judge. North Alabama Trac. Co. v. Daniel [Ala.] 48 S 50. Refusal to consolidate case with another one not reviewed, where record of latter was not before court and was nothing in record to show that consolidation was necessary. Adams v. Mineral Development Co. [Ky.] 112 SW 624. Assignments that court erred in denying jury trial, and in acting on motion without a trial and without either party having opportunity to announce ready for trial, overruled where no statement of facts or bills of exception, nor anything of record showing that court acted in manner complained of. Kruegel v. Johnson [Tex. Civ. App.] 112 SW 774. Must be presumed, in absence of bill of exceptions to trial by chancellor without jury, that jury was waived. Leiberman v. Bowden [Tenn.] 119 SW 64. Where order restoring lost files is sufficient on its face, it cannot be questioned unless evidence upon which it is based is preserved by bill or exceptions. Heywood & Morrill Rattan Co. v. Jacobson, 140 Ill. App. 317. Where bill of exceptions does not purport to contain all the evidence, presumed that motion to compel attorney for defendant to prove his authority was properly overruled. Merriweather v. Sayre Min. & Mfg. Co. [Ala.] 49 S 916. Supreme court will not presume error in allowing introduction of additional evidence after case had been argued and taken under advisement in absence of showing as to what such additional evidence was. Burke v. Burke [Iowa] 119 NW 129. Where motion for rehearing by chancellor not contained in record and nothing to show it was called to his attention, it is not reviewable. Marx v. District Grand Lodge No. 7 I. O. B. B. [Ala.] 47 S 207. Where order of reference was made by judge of division other than that in which action was pending, held that in absence of showng to contrary, it would be presumed that judge making order did so at request of proper judge, and that order was regular. Alexander v. Wellington [Colo.] 98 P 631.

Selection of jurors: Where record does not affirmatively show that party exhausted his peremptory challenges, presumed that jury was competent and impartial and satisfactory to him. Johnson v. Waterloo [Iowa] 119 NW 70. Refusal to permit attorneys to consult as to peremptory challenges not ground for reversal where bill of exceptions failed to show that other jurors would have been stricken from list if conference permitted. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62.

Argument and conduct of counsel: Appellant not entitled to complain that he was not allowed opening and closing argument below, where was nothing in record to show whether he did have them or not, or whether he asked for them or not. Hotchkiss v. Vanderpoel Co., 139 Ill. App. 325. Opening statement cannot be considered when not incorporated or preserved in bill of exceptions. Frisby v. St. Louis Transit Co., 214 Mo. 567, 113 SW 1059. Misconduct not considered where not properly brought into record. Chicago, etc., R. Co. v. Ross, 136 Ill. App. 518; Louisville R. Co. v. Gaar [Ky.] 112 SW 1130; Kentucky Wagon Mfg. Co. v. Duganics [Ky.] 113 SW 128; Blackwell v. Metropolitan St. R. Co. [Mo. App.] 119 SW 456; State v. Second Judicial Dist. Ct. 37 Mont. 590, 97 P 1032; Houston v. Cincinnati, Milford & Loveland Trac. Co., 11 Ohio C. C. (N. S.) 365. Not reviewable where it did not appear in record other than as set forth in motion for new trial. Cox v. Cooley [Ark.] 114 SW 929. Argument of plaintiff's counsel held not ground for reversal where lower court was of opinion that defendant's counsel had in his argument made comments upon other testimony which made argument objected to proper, and such other testimony was not in record. Hogan v. Detroit United R., 154 Mich. 478, 15 Det. Leg. N. 830, 118 NW 140. Presumed that jury followed instruction to disregard improper remarks. International & G. N. R. Co. v. Alleman [Tex. Civ. App.] 115 SW 73. Presumption that error in improper argument was corrected cannot be indulged, where it appears that it was not, and, on motion to set aside verdict, question whether argument was based on inference which could be properly drawn from evidence was transferred to supreme court with statement in terms that verdict was to be set aside unless argument was justifiable. Robinson v. Monadnock Paper Mill [N. H.] 71 A 864.

Remarks and conduct of court: Assignment that court stated in presence of jury that certain motion was made for delay, where record did not show that statement

clusion[17] and sufficiency[18] of evidence, dismissals,[19] rulings on demurrers to evi-

was made. Sipe v. Pennsylvania R. Co., 222 Pa. 400, 71 A. 847. Remarks of court not considered where not made part of record. State v. Second Judicial Dist. Ct., 37 Mont. 590, 97 P 1032; Texas & N. O. R. Co. v. Broom [Tex. Civ. App.] 114 SW 655; Dimond Bros. v. Beckwith, Quinn & Co. [Wyo.] 98 P 889. In absence of showing that judge was absent from court room during argument, his continued presence throughout trial will be presumed. Beans v. Denny [Iowa] 117 NW 1091.

16. Presumption is that evidence was properly admitted and burden is upon appellant to show contrary by record. Steele v. Bryant [Ky.] 116 SW 755. Admission of evidence will not be considered unless evidence and rulings preserved by proper secondary record. Hutto v. Stough [Ala.] 47 S 1031; Title Guaranty & Surety Co. v. Nichols [Ariz.] 100 P 825; Cochran v. Bugg, 131 Ga. 588, 62 SE 1048; People v. Waite, 237 Ill. 164, 86 NE 572; Steele v. Bryant [Ky.] 116 SW 755; Jordan v. Le Messurier [Mich.] 15 Det. Leg. N. 1007, 118 NW 952; Foster v. Winstanley [Mont.] 102 P 574; Southwell v. Church [Tex. Civ. App.] 111 SW 969; Ivy v. Ivy [Tex. Civ. App.] 112 SW 110; Sullivan v. Solis [Tex. Civ. App.] 114 SW 456; Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 117; Moore v. Kirby [Tex. Civ. App.] 115 SW 632; Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602; Knox v. McElroy [Tex. Civ. App.] 118 SW 1142; Adams v. Columbia Canal Co., 51 Wash. 297, 98 P 741; Dimond Bros. v. Beckwith, Quinn & Co. [Wyo.] 98 P 889. Rule applies in action for mandamus. Louisville Home Tel. Co. v. Gordon [Ky.] 117 SW 315. Full copy of the writing, admission or rejection of which is assigned on error, must be printed in paper book. Allentown v. Ackerman, 37 Pa. Super. Ct. 363. Rulings will be sustained in absence of clear showing of error. Falk v. Kimmerle [Fla.] 49 S 504. In suit by state for collection of taxes, assignment, complaining of admission of memorandum showing adjustment of taxes with certain persons on ground that said persons were representatives of certain city and memorandums referred to city taxes and hence were not admissible to show payment of state taxes, overruled where record did not show that such was case. State v. Quillen [Tex. Civ. App.] 115 SW 660. Objection to question on ground that witness had not been shown to possess requisite knowledge not considered, where neither answer nor showing previously made as to his knowledge was given in abstract or brief. Title Guaranty & Surety Co. v. Nichols [Ariz.] 100 P 825. Will not consider objections or exceptions to parts of testimony unless same are specifically and particularly pointed out by bill of exceptions, or in brief or assignment of errors, and brought to court's attention. Fuller v. Margaret Min .Co. [W. Va.] 63 SE 206. Where it was stipulated that in consolidated actions evidence in one case should be read in others, properly certified copies of such evidence will be accepted on appeal as if read at trial although record is silent as to such reading. Leiberman v. Borden [Tenn.] 119 SW 64. Where transcript states that contract was introduced in evidence and was correctly set forth in pleading but contract is not included in transcript, it may be assumed on appeal that contract set forth in petition is same as introduced in evidence. St. Louis, etc., Co. v. Fenley [Tex. Civ. App.] 118 SW 845. Exception to admission of irrelevant evidence will not be sustained where nothing in record to show that it harmed excepting party. Casavan v. Sage, 201 Mass. 547, 87 NE 893.

17. Presumption in favor of correctness of ruling and error must affirmatively appear. Biggins v. Gulf, etc., R. Co. [Tex.] 118 SW 125. Materiality of excluded evidence not shown. Miles v. St. Louis, etc., R. Co. [Ark.] 119 SW 837. Where evidence was competent for another purpose, held that it would not be assumed that adverse party consented to its consideration on issue not raised by pleadings. Heise v. Chicago G. W. R. Co. [Iowa] 119 NW 371. Presumption as to regularity will not authorize presumption that judgment offered in evidence, to which only one objection was made, was rejected for some reason not disclosed by record, or that other evidence showing invalidity was offered. O'Bryen v. Hays Land & Inv. Co. [Kan.] 102 P 501. Cannot be held that evidence was erroneously excluded where record fails to show that it was ever offered. Pfister v. Milwaukee Free Press Co. [Wis.] 121 NW 938; Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960. Rulings not considered in absence of proper secondary record. Cochran v. Bugg, 131 Ga. 588, 62 SE 1048; Ivy v. Ivy [Tex. Civ. App.] 112 SW 110; Knox v. McElroy [Tex. Civ. App.] 118 SW 1142; Dimond Bros. v. Beckwith, Quinn & Co. [Wyo.] 98 P 889.

Excluded evidence must be shown by proper secondary record. Tidwell v. Southern Engine & Boiler Works [Ark.] 112 SW 152; Stringfellow v. Coons [Fla.] 49 S 1019; McElwaney v. MacDiarmid [Ga.] 62 SE 20; Olympia Min. Co. v. Kerns, 15 Idaho, 371, 97 P 1031; Indianapolis Tract. & T. Co. v. Rowe [Ind App.] 87 NE 653; Stevenson v. Moore [Ky.] 118 SW 951; Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 NE 355; Deane v. American Glue Co., 200 Mass. 459, 86 NE 890; Sharp v. Missouri Pac. R. Co., 213 Mo. 517, 111 SW 1154; Shandy v. McDonald [Mont.] 100 P 203; Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345; Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100; Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166; McMillion v. Cook [Tex. Civ. App.] 118 SW 775; Hatzfeld v. Walsh [Tex. Civ. App.] 120 SW 525. Rule that exclusion will not be considered in absence of statement of facts has been held to apply, where excluded evidence was, in any possible state of the evidence, of the most material character, and afford, if true, a complete defense to the action. Ivy v. Ivy [Tex. Civ. App.] 112 SW 110. Where impeaching evidence, erroneously excluded, was not in record, held that court could not say that defendants were not prejudiced by its rejection. Archbold v. Joline, 114 NYS 169.

Necessity of showing other evidence: Record should set forth sufficient proper evidence to show error. Hackbarth v.

Gordon [Tex. Civ. App.] 120 SW 591. Enough to show materiality of excluded evidence. Wallach v. MacFarland, 31 App. D. C. 130. Where record did not contain copy of building contract or specifications. held that exclusion of evidence as to custom to do work in particular way could not be held erroneous since burden was on appellant to show error and custom could not prevail against contrary provision of the contract. Scheerer & Co. v. Deming, 154 Cal. 138, 97 P 155. Where all evidence is not incorporated in bill of exceptions, rulings will not be disturbed in absence of clear showing of error. Falk v. Kimmerlie [Fla.] 49 S 504.

18. Is incumbent on appellants claiming that evidence is insufficient to affirmatively show wherein it is insufficient. Runyan v. Snyder [Colo.] 100 P 420. Where there is conclusive documentary evidence contrary to findings, it must be assumed that such evidence was wholly disregarded. Mc Laughlin v. Rosenbloom, 114 NYS 10. Not reviewable in absence of proper secondary record. Vance Redwood Lumber Co. v. Durphy, 8 Cal. App. 664, 97 P 702; Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171; Jennings v. Shertz [Ind. App.] 88 NE 729; Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104; Pettis v. McLain [Okl.] 98 P 927; Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 117; Bean v. Bird [Tex. Civ. App.] 115 SW 121; International & G. N. R. Co. v. Hood [Tex. Civ. App.] 118 SW 1119; Knox v. McElroy [Tex. Civ App.] 118 SW 1142; Silverstone v. Totten, 50 Wash. 447, 97 P 491; Adams v. Columbia Canal Co., 51 Wash. 297, 98 P 741; Hoffman v. Lincoln County, 137 Wis. 353, 118 NW 850. Presumed that evidence supported verdict or findings where evidence not properly made part of record. Murphy v. Stelling, 8 Cal. App. 702, 97 P 672; Finly v. New Cache La Poudre Irr. Co. [Colo.] 98 P 173; J. P. Williams Co. v. Pensacola, St. A. & G. S. S. Co. [Fla.] 48 S 630; Richardson v. Ruddy, 15 Idaho, 488, 98 P 842; Pine Tree Lumber Co. v. Central Stock & Grain Exch., 238 Ill. 449, 87 NE 539; Zippe v. Zippe, 143 Ill. App. 638; Hambers Distilling & Distributing Co. v. Price & Co. [Iowa] 119 NW 541; In re East [Iowa] 122 NW 153; Union Cent. Life Ins. Co. v. Dukes [Ky.] 113 SW 454; Gambrell v. Gambrell [Ky.] 113 SW 885; Delano v. Clark, 199 Mass. 540, 85 NE 847; Wilson v. Puffer Mfg. Co., 200 Mass. 261, 86 NE 317; Seabury v. Michaelis, 106 Minn. 544, 119 NW 65; Backes v. Schlick [Neb.] 117 NW 707; Hanks v. Hanks, 218 Mo. 670, 117 SW 1101; Kirkpatrick v. Kirkpatrick [Neb.] 119 NW 1118; Bell v. James, 128 App. Div. 241, 112 NYS 750; Lingler v. Wesco, 79 Ohio St. 225, 86 NE 1004; Goode v. Pierce [Tex. Civ. App.] 112 SW 688; Kruegel v. Johnson [Tex. Civ. App.] 112 SW 774; Sullivan-Sanford Lumber Co. v. Cline [Tex. Civ. App.] 114 SW 175; Williams v. Robertson [Tex. Civ. App.] 115 SW 887; Bradshaw v. Lyles [Tex. Civ. App.] 119 SW 918; Garza v. Cotton [Tex. Civ. App.] 120 SW 212; Wilder's Ex'r v. Wilder [Vt.] 72 A 203; Lawridsen v. Lewis, 50 Wash. 605, 97 P 663; Clambey v. Copeland [Wash.] 100 P 1031; Pierce v. Pierce [Wash.] 101 P 352. Where in chancery case there is no bill of exceptions and no oral testimony before court, and no recitals of evidence in the judgment, will be conclusively presumed that evidence sustains degree so far as it is possible for a decree, based on the complaint, to be sustained by evidence. Rowe v. Allison [Ark.] 112 SW 395. Such presumption does not prevail, where decree is without the issues, or complaint does not state cause of action. Id. Where no bill of exceptions, case must be determined upon face of record, since if decree is not responsive to issues it is void, and if it is responsive will be presumed that it is sustained by evidence. Id. Where oral testimony heard in chancery case was not preserved by bill of exceptions, presumed that it supported decree. Stuckey v. Lockard [Ark.] 112 SW 747. Where records and documents on which decree of chancellor was based were not made part of record by bill of exceptions, held that same could not be considered and would be presumed that decree was warranted by evidence. Brown v. Nelms [Ark.] 112 SW 373. Where findings in equity case are defective, will be presumed that evidence supports judgment where evidence is not brought up. Gould v. Austin [Wash.] 100 P 1029. Evidence, given before master in equity case, cannot be considered on appeal where not attached to or made part of his report, sending up minutes of evidence incorporated or referred to having no effect whatever. Child v. Pinney, 81 Vt. 314, 70 A 566. In such case conclusions of master must stand, where facts detailed by master tend to cast no doubt on validity of his conclusions. Id. An appeal from default judgment presumed that whatever proofs were necessary to support it were duly presented and taken, and only question is were allegations of complaint sufficient to authorize it. Neimeer v. Claiborne [Ark.] 112 SW 387.

Must show all the testimony. Schwab & Co. v. Hall [Ala.] 47 S 137; North State Fire Ins. Co. v. Dillard [Ark.] 115 SW 154; Turpin v. Beach [Ark.] 115 SW 404; Cannon v. Lunsford [Ark.] 115 SW 940; Board of Directors v. Powell [Ark.] 117 SW 753; Runyan v. Snyder [Colo.] 100 P 420; Tetreault v. Smedley Co. [Conn.] 71 A 786; Stoddard v. Fox, 15 Idaho, 704, 99 P 122; Kennard v. Curran, 239 Ill. 122, 87 NE 913; Dahl v. Macdonald Engineering Co., 141 Ill. App. 187; Lasle v. Preston, [Mich.] 16 Det. Leg. N. 236, 121 NW 286; Welcome v. Berkner [Minn.] 121 NW 882; Davies v. Boyers [Mo. App.] 120 SW 631; Schmidt v. Beiseker [N. D.] 120 NW 1096; Martin Lumber Co. v. Forsythe [Okl.] 96 P 635; Carter v. Cummings-Nielson Co., 34 Utah, 315, 97 P 334; Mundt v. Commercial Nat. Bank [Utah] 99 P 454; Lew Moy v. U. S. [C. C. A.] 164 F 322. Where there was no claim of an excessive verdict if permanent injuries were properly considered, and certificate to bill of exceptions did not show that it contained all the evidence necessary to consider the question, presumed that verdict was supported by evidence of probative force. Haney v. Pinckney [Mich.] 15 Det. Leg. N. 1130, 119 NW 1099. Where all evidence is not brought before supreme court in equity case, decree will be presumed to be correct. Lowery v. Lowery [Iowa] 118 NW 749. Appellant's inability to present

dence,[20] nonsuits,[21] the direction of a verdict,[22] instructions,[23] findings,[24] verdict,[25]

the entire record does not change rule. Id. Supreme court cannot, on appeal from decree in equity case, reverse and order new trial because some of the testimony material to the issues as presented has been lost or destroyed without fault of appellee, it having no authority to entertain original action for new trial. Id. Sufficient if it appears inferentially that bill of exceptions contains all evidence. Board of Directors v. Powell [Ark.] 117 SW 753. When bill of exceptions shows affirmatively that judgment is erroneous and no evidence which could be supplied by presumption would sustain judgment, judgment will be reversed, though bill falls to show all evidence. Id. No presumption of evidence in conflict with facts agreed upon by parties, where bill of exceptions did not contain all evidence. Id. Where it affirmatively appears that omitted evidence only went to one issue, presumption does not apply to whole case. North State Fire Ins. Co. v. Dillard [Ark.] 115 SW 154. Where abstract purports and appears to contain all the evidence, and any deficiency in that regard has not been pointed out, cannot be presumed that omitted evidence was competent and sufficient to support judgment. Henry Inv. Co. v. Semonian [Colo.] 100 P 425.

19. Order refusing to set aside dismissal of proceedings not reviewed where evidence upon which hearing was had is not preserved by bill of exceptions. London v. Hutchens [Ark.] 114 SW 919. Will not reverse action of court in dismissing case of his own motion unless examination of whole record fails to show any ground to support it. Loose v. Cooper [Iowa] 118 NW 406.

20. Assignment complaining of action of court in sustaining demurrer to evidence and directing verdict held not open to consideration where record did not properly show that it contained all evidence. Wagner v. Sattley Mfg. Co. [Okl.] 99 P 643. Fact that transcripts of proceedings in certain other actions which were introduced in evidence were not in record held not to preclude judgment overruling demurrer to evidence, where record affirmatively showed that they were read in evidence and contained all the rest of the evidence, and their legal effect could be determined as well from appellee's petition as by reading them. Hawkins v. Brown [Kan.] 97 P 479. Rule, that where appellant assigns for error refusal of demurrer to plaintiff's case he must set out the whole of the evidence in haec verba in his abstract, held not to apply where defendant is willing to stake his case on undisputed word of his adversary and where it is not shown or alleged that there was other evidence omitted from abstract which would supply or tend to supply apparent lack of evidence on part of plaintiff to support the issue. Haggard v. Walker, 132 Mo. App. 463, 111 SW 904.

21. Denial of nonsuit on ground that case was not made out not reviewable in absence of bill of exceptions. Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171.

22. Presumption that plaintiff's version of transaction was correct where judgment directed for plaintiff. Dreeland v. Pascoe [Mont.] 102 P 331. To entitle plaintiff to reversal of directed verdict, record must disclose that there was evidence from which jury would have been warranted in finding proven every fact essential to plaintiff's recovery, and also show no proved and undisputed fact which would prevent his recovery. Kelley v. Torrington [Conn.] 71 A 939. Where answer presented good defense, and evidence was not in record, held that it would be presumed that defendant's proof fully sustained defense and that action of court in giving peremptory instruction in its favor was proper. Commonwealth v. Standard Oil Co., 33 Ky. L. R. 1074, 112 SW 632. In absence of statement of facts, cannot be held that it was error to refuse to direct verdict. Griffith v. Reagan [Tex. Civ. App.] 114 SW 1167. Bill of exceptions held insufficient to present error in denying motion for directed verdict where it did not show facts requiring direction. Gerhardt v. Boettger, 75 N. J. Law, 916, 70 A 173. Whether affirmative charge should have been given cannot be determined where bill of exceptions does not purport to set out all the evidence. Penry v. Dozier [Ala.] 49 S 909. Judgment should not be reversed for error in directing verdict unless record affirmatively shows that it contains all the evidence upon which the direction was given. Regan v. McHugh, 78 Ohio St. 326, 85 NE 559. Assignment that court erred in overruling defendant's motion, made when evidence was all introduced, to take case from jury, cannot be considered when bill of exceptions neither recites nor otherwise shows that it contains all the evidence. City of Chicago v. Troy Laundry Machinery Co. [C. C. A.] 162 F 678. Where bill of exceptions does not purport to set out all the evidence, it will be presumed in support of court's action in giving general charge that evidence was undisputed. Gambill v. Cooper [Ala.] 48 S 691. Where complaint alleged both general and special damages, and trial court certified that bill of exceptions contained all evidence necessary to understanding of enumerated points and that entire transcript of testimony was thereto attached but certain pages of testimony alluded to did not in fact appear in record, held that it would be presumed in determining propriety of overruling motions for nonsuit and directed verdict that some evidence was adduced to show general damages. Hoskins v. Scott [Or.] 96 P 1112.

23. Bill of exceptions held to show that contention that charges were asked in bulk was unfounded. Birmingham R., L. & P. Co. v. Camp [Ala.] 49 S 846. Complaint in brief of charge alleged to have been given at plaintiff's request not considered where bill of exceptions failed to show that such was fact. McVay v. White & Sons [Ala.] 48 S 344. Modification of instructions not considered where bill of exceptions did not show that they were in fact modified. People's Bank v. Stewart [Mo. App.] 117 SW 99. Correctness of instruction as to counterclaim not considered, where counterclaim

was not in record. Parker Land & Imp. Co. v. Ayers [Ind. App.] 87 NE 1062. Where record fails to show judgment, or anything concerning it, instructions as to measure of damages will not be reviewed. McKinnon Boiler & Mach. Co. v. Central Michigan Land Co. [Mich.] 16 Det. Leg. N. 17, 120 NW 26. Where instructions relative to particular branch of case are not complained of, will be presumed that it was properly explained with sufficient instructions. McGourty v. De Marco, 200 Mass. 57, 85 NE 891. Bill of exceptions held insufficient to present question whether instructions were erroneous, where no facts set out therein from which it could be determined whether it was erroneous. Gerhardt v. Boettger, 75 N. J. Law, 916, 70 A 173. Though perusal of whole printed case should show negatively that there was failure to submit certain question to jury, argument that there was error in such failure will not be successful, since it will be presumed, in absence of instructions to contrary, that court submitted all disputed questions of fact. Chess v. Vockroth, 75 N. J. Law, 665, 70 A 73. Assignment not to be considered where neither petition nor brief of evidence points out in what respect instruction is erroneous. Columbia Amusement Co. v. Pine Beach Inv. Corp. [Va.] 63 SE 1002. Where counsel did not point out in what respect variance was material, and court could not discover that it was material, held that it could not be assumed that refusal of court to instruct in regard to it was error. McDuffee's Adm'x v. Boston & M. R. Co., 81 Vt. 53, 69 A 124. Where record fails to disclose any instructions written, numbered, and signed, by plaintiff, and requested to be given as required by statute, all instructions given must be taken to have been given by court on its own motion. Indianapolis Traction & Terminal Co. v. Rowe [Ind. App.] 87 NE 653. Where charge did not authorize jury to consider any damages not proven, cannot presume that they did so in absence of anything in record showing that they might have. Missouri, K. & T. R. Co. v. Craig [Tex. Civ. App.] 114 SW 850. No presumption that instructions were harmful as inapplicable to evidence, when no controversy concerning proposition of law announced which was correct. Cincinnati, etc., R. Co. v. Cook [Ind. App.] 88 NE 76.

Necessity of showing instructions refused or excepted to: Alleged errors in the giving or refusing of instructions will not be reviewed where the instructions given or refused are not properly made part of the record. Cox v. Cooley [Ark.] 114 SW 929; Bray Clothing Co. v. McKinney [Ark.] 118 SW 406; St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 665; Chicago Mill & Lumber Co. v. Cooper [Ark.] 119 SW 672; Big Kanawha Leasing Co. v. Jones [Colo.] 102 P 171; Jarrett v. McIntyre, 134 Ill. App. 581; McClure v. Putnam, 142 Ill. App. 497; Latham v. Lindsay [Ky.] 113 SW 878; Gambrell v. Gambrell [Ky.] 113 SW 885; Rogers v. Zumbiel [Ky.] 114 SW 323; Hubbard v. Allyn, 200 Mass. 166, 86 NE 356; Tennien v. Chase, 201 Mass. 497, 87 NE 901; Wellman v. Metropolitan St. R. Co. [Mo.] 118 SW 31; Davis v. Stephenson, 149 N. C. 113, 62 SE 900; Hill v. Lane, 149 N. C. 267, 62 SE 1074; Ford v. Stroud, 150 N. C. 362, 64 SE 1; Brown v. Southern R., Carolina Division [S. C.] 64 SE 522; Ivy v. Ivy [Tex. Civ. App.] 112 SW 110; Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 117; Williams v. Robertson [Tex. Civ. App.] 115 SW 887; Petty v. Morgan [Tex. Civ. App.] 116 SW 141; Fuller v. Margaret-Min. Co. [W. Va.] 63 SE 206. Though no statement of facts, court will consider charge which, taken in connection with pleadings and verdict, is manifestly erroneous. Petty v. Morgan [Tex. Civ. App.] 116 SW 141.

Necessity of showing entire charge: Error cannot be predicated on the giving, refusing or modifying of instructions unless the entire charge is properly incorporated into the record. Arkansas L. & G. R. Co. v. Kennedy [Ark.] 111 SW 1125; Files v. Law [Ark.] 115 SW 373; Karatofsky v. Fybush Bros. [Ark.] 118 SW 1009; District of Columbia v. Coale, 30 App. D. C. 143; Barco v. Taylor, 5 Ga. App. 372, 63 SE 224; Hawkins v. Studdard [Ga.] 63 SE 852; Reavely v. Harris, 239 Ill. 526, 88 NE 238; Russell & Co. v. McGirr, 134 Ill. App. 428; Louis Smith v. John Slaughter, 138 Ill. App. 46; Hotchkiss v. Vanderpoel Co., 139 Ill. App. 325; Springer v. Baker, 139 Ill. App. 476; Aygarn v. Rogers Grain Co., 141 Ill. App. 402; Patton v. Allegheny L. & T. Co., 36 Pa. Super. Ct. 296; Corneau v. Hurley [S. D.] 117 NW 371. Whole of charge, including instructions requested and refused, or such part thereof as will illustrate point upon which objecting party relies, must be incorporated in bill of exceptions in order to be reviewed. Rev. Codes §§ 6746, 6785, 6784, 6806, construed. Robinson v. Helena L. & R. Co. [Mont.] 99 P 837.

Necessity of showing evidence: Giving or refusing of instructons will not be reviewed where propriety of court's action depends on evidence unless evidence is properly incorporated in record. Duffy v. Wilson [Colo.] 98 P 826; Wallach v. Mac Farland, 31 App. D. C. 130; Patrick v. McAleenan, 136 Ill. App. 563; Hoffbaur v. Morgan [Ind.] 88 NE 337; Mace v. Clark, 42 Ind. App. 506, 85 NE 1049; Monson v. Carlstrom [Iowa] 119 NW 606; Modern Woodmen of America v. Cecil, 108 Md. 357, 70 A 331; Phelps v. Conqueror Zinc Co., 218 Mo. 572, 117 SW 705. Where instructions were manifestly wrong under any state of evidence, reversal must follow although evidence is not set forth. Hoffbaur v. Morgan [Ind.] 88 NE 337. Refusal of instructions may be considered though evidence is not in record, where record shows that they were not refused because not applicable to evidence. Butt v. Iffert [Ind.] 86 NE 961. Evidence not having been brought up, federal supreme court will not disturb ruling of supreme court of Hawaii that error in instructions was harmless. Spreckels v. Brown, 212 U. S. 208, 53 Law. Ed. ——. Where evidence was not in record, held that appellate court could not say that giving of certain instructions was reversible error. Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555.

24. See, also, "sufficiency of evidence," ante this section. Assignments questioning findings not open to consideration, except as involved in other assignments, where findings not in record. Lake v. Earnest [Tex. Civ. App.] 116 SW 865. Propriety of finding

judgment and relief granted,[26] costs,[27] and the granting or denial of a new trial.[28]

that plaintiff did not practice duress not open to consideration, where record contained no finding of subordinate facts and no statement of legal principles applied in reaching its conclusion. Atwood v. Garrett [Conn.] 71 A 569. Where findings sustain judgment, in absence of statement of facts or bill of exceptions, there is no question for review. Crowe & Co. v. Brandt, 50 Wash. 499, 97 P 503. In absence of evidence cannot be determined whether court erred in refusing to amend findings. Peterson v. Lundquist, 106 Minn. 339, 119 NW 50. Where transcript on appeal by garnishee did not contain record in main action on which garnishment was based, held that conclusion of court as to validity of proceedings therein was not reviewable. Caldwell Banking & Trust Co. v. Porter [Or.] 97 P 541, former opinion [Or.] 95 P. 1. Finding in proceedings for collection of collateral inheritance tax that amount directed by testator to be expended for tomb was reasonable held not subject to review where record did not show exact amount reserved for that purpose. Morrow v. Durant [Iowa] 118 NW 781. Presumed that trial court found facts sufficient to sustain its general finding. Halbouer v. Cuenin [Colo.] 101 P 763. Under Sayles' Ann. Civ. St. 1897, art. 1331, facts necessary to support judgment but not embraced in special issues submitted and verdict are presumed to have been found by court. Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831. No presumption that findings were made in term when so dated, it actually appearing that they were made in vacation. Wilson v. Cellin [Colo.] 102 P 21. Land was deeded to defendant subject to life estate in grantors. In suit by one of said grantees, after death of other, against defendant to recover rents, defendant pleaded certain advances to one of said as off-set. Court overruled demurrer to evidence, and found for defendant. Held that it would be presumed that court found for defendant on his off-set rather than on theory that surviving grantor had no estate in premises. Poteet v. Daniel, 133 Mo. App. 679, 113 SW 1139. There being nothing in the abstract to overcome findings of master in chancery, they will be sustained. Edwards v. Oil City Bldg. & Sav. Ass'n, 137 Ill. App. 522. Presumed that court took into consideration fact of railroad's lack of promptness in delivering lumber in arriving at conclusion that it was not tendered by plaintiff to defendant within reasonable time. Harlow v. Parsons Lumber & Hardware Co. [Conn.] 71 A 734. Conclusions frequently partake of nature of both law and fact, and any doubt as to which class finding belongs should be resolved in favor of judgment. Butler v. Agnew [Cal. App.] 99 P 395. Where no exceptions are taken to findings, appellate court will construe them liberally rather than overturn judgment based thereon. Lauridsen v. Lewis, 50 Wash. 605, 97 P 663.

25. See, also, "sufficiency of evidence," ante this section. All reasonable presumptions indulged in favor of general verdict. South Shore Gas & Elec. Co. v. Ambre [Ind. App.] 87 NE 246. Presumed that jury found facts necessary to sustain verdict under instructions. Convey v. Finn, 130 App. Div. 440, 114 NYS 864. Presumed that verdict was based upon findings of fact made sole issue by instructions. Fowler v. Anderson, 132 App. Div. 603, 116 NYS 1092. Presumed that jury assessed damage according to case proved and instructions given. St. Louis, etc., R. Co. v. Hutson [Tex. Civ. App.] 120 SW 213. It appearing from record on appeal in proceedings to assess damages resulting from location of railroad over land that plaintiff had never acquired title to one of two tracts described in his notices will be presumed that jury took into account only appropriation of right of way through other one. Hall v. Wabash R. Co. [Iowa] 119 NW 927. In action for value of gravel taken from plaintiff's land held that, if deed under which plaintiff claimed title was defective in form, would be presumed in support of verdict in his favor that jury found that he had title by adverse possession. Indianapolis Coal Trac. Co. v. Dalton [Ind. App.] 87 NE 552. Presumed that verdict was rendered in accordance with directions given by presiding justices. Mansfield v. Tenney, 202 Mass. 312, 88 NE 892. Where court instructed jury to allow defendant sum claimed by him by way of set-off, held that it must be assumed that they did so. Jordan v. Walker, 154 Mich. 394, 15 Det. Leg. N. 777, 117 NW 942. Must be assumed that jury understood instructions. Watts v. Murphy [Cal. App.] 99 P 1104. Will not be presumed that jury disregarded instruction as to a measure of damages and allowed interest. Collins v. Gleason Coal Co. [Iowa] 118 NW 36. Cannot be presumed that jury might have disregarded instruction as to a measure of damages on which there was undisputed evidence, and followed one on which there was no evidence. Jonesboro, etc., R. Co. v. Cable [Ark.] 117 SW 550. Where jury returned verdict in accordance with charge, will be presumed that it was filed as required by law. Carter v. Kieran [Tex. Civ. App.] 115 SW 272. Exceptions to verdict as contrary to law not considered where no evidence in record and evidence not specified as material to understanding of errors complained of. Ford v. Commercial Industrial Co. [Ga.] 63 SE 1120. Whether assessment of benefits resulting from extension of street was excessive, held not open to consideration, where none of evidence on which it was based was before court. Wallach v. MacFarland, 31 App. D. C. 130. Contention that certain items in account were unjust and excessive held not open to review where record failed to show what items were allowed and what items rejected in arriving at verdict. Steele v. Crabtree [Iowa] 120 NW 720.

26. Judgment refusing to foreclose trust deed as against entire tract instead of against part thereof not included in certain other conveyances, not disturbed where record did not contain copy of deed of trust or show when it was executed with reference to such other conveyances. Nelson v. Brown [Tex. Civ. App.] 111 SW 1106. Presumption in favor of regularity of judgment of court of general jurisdiction, in

absence of showing one way or the other in record. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27. Where on appeal in contempt proceedings abstract of record did not contain pleadings in action in which judgment which defendants were charged with having violated was rendered, held that it could not be determined what the allegations of pleadings were or what issues were thereby presented and whether judgment was within issues. Smith v. Schlink [Colo.] 99 P 566. Where merely pleadings and judgment presented for review, every inference in favor of judgment will be indulged in. Montague v. Kolkmeyer & Co. [Mo. App.] 120 SW 637. Where judgment could be rendered on findings, where such findings are uncontroverted and there is no statement of facts in record, judgment will be affirmed. McLean v. Gulf & I. R. Co. [Tex. Civ. App.] 118 SW 578. In absence of statement of facts, every presumption must be indulged in favor of correctness of orders and judgment complained of, though skeleton record presents features indicating gross injustice at trial. Dilley v. Jasper Lumber Co. [Tex. Civ. App.] 114 SW 878. Recital in bill of exceptions that final judgment was rendered and that plaintiff excepted thereto pendente lite is not sufficient to present question whether court erred in granting said judgment, but does present question whether court erred in refusing to allow amendment to petition, provided same is properly assigned. Schaeffer v. Central of Georgia R. Co. [Ga. App.] 64 SE 1107. On appeal from order reviving dominant judgment where neither transcript nor bill of exceptions contain pleadings in case in which such judgment was rendered, will be presumed that they were sufficient to sustain said judgment, and defense of coverture first interposed in revivor proceedings cannot be considered. American Freehold Land Mortgage Co. v. Smith [Neb.] 120 NW 1113. Presumed in support of judgment awarding interest under contract uncertain in its terms in that regard that uncertainty was removed by evidence where evidence was not brought up. Vance Redwood Lumber Co. v. Durphy, 8 Cal. App. 664, 97 P 702. Decree on oral evidence, not of record, is presumed correct, no error appearing on face of record. Barringer v. Bratcher [Ark.] 118 SW 1015. Affirmance duty of appellate court where trial court filed no conclusions and judgment could be rendered on any theory of evidence. Guerra v. Rodriguez [Tex. Civ. App.] 120 SW 593; Appel v. Childress [Tex. Civ. App.] 116 SW 129; Spalding v. Aldridge [Tex. Civ. App.] 110 SW 560. There being no conclusions of the judge, all issues upon which there was evidence must be taken as resolved in favor of the judgment. Webb County v. Hasie [Tex. Civ. App.] 113 SW 188. On appeal from judgment for plaintiff in action on policy of health insurance providing for indemnity only in case of illness beginning after policy had been in force for 60 days, presumed that court found that illness commenced after such period, where was evidence authorizing such a finding, and no conclusions. General Acc. Ins. Co. v. Hayes [Tex. Civ. App.] 113 SW 990. Also presumed, under similar circumstances, that court found that assured was confined to his house and regularly attended by physician, which was condition precedent to liability. Id. Judgment for defendants should be affirmed, if among defenses which were interposed there was any one which was valid, or if there be any other sufficient reason under law for sustaining judgment. State v. Esswein, 11 Ohio C. C. (N. S.) 225. Where facts were found from which court might have legitimately inferred waiver, held that would be presumed in support of decree that he did so. Van Dyke v. Cole, 81 Vt. 379, 70 A 593. In action on fire insurance policy where competent under petition to show waiver of notice of loss, it would be presumed in support of judgment that waiver was proved. Wicecarver v. Mercantile Town Mut. Ins. Co. [Mo. App.] 117 SW 698. Where findings as made did not support judgment of court of claims unanimously affirmed by appellate division, but there was evidence which would have warranted court in making additional findings which would be sufficient to do so, held that court of appeals would infer or assume such findings in support of judgment. Ostrander v. State, 192 N. Y. 415, 85 NE 668. Where in case tried without jury court does not file conclusions of fact, will be assumed that it found every fact necessary to support judgment rendered to be established by evidence, if there is any testimony in record tending to sustain such facts. Kansas City So. R. Co. v. Albers Commission Co. [Kan.] 99 P 819. Where decree ordering partition and appointing commissioners concluded, "if fair division can be made, they shall report fact to court," there would be no presumption that land was capable of partition, and that court so determined in partition decree, where no affirmative finding. Fagan v. Fagan [Tex. Civ. App.] 120 SW 550. Though in trespass to try title there was no finding that grantor in deed intended to act under certain power of attorney, held that it would be presumed in support of judgment that court made such finding, evidence afforded by deed being conclusive in favor thereof. Neill v. Kleiber [Tex. Civ. App.] 112 SW 694. Since garnishment proceedings could not be maintained unless supported by main action, held that it would be presumed on appeal by garnishee from judgment against it that court took judicial notice of record of such action without proof, there being no objection below that such action was not proved. Caldwell Banking & Trust Co. v. Porter [Or.] 97 P 541, former opinion [Or.] 95 P 1. Under Sayles' Ann. Civ. St. 1897, art. 1331, finding will be presumed where necessary to sustain judgment. Lowrence v. Woods [Tex. Civ. App.] 118 SW 551. Will be presumed that trial judge found on conflicting evidence facts to support judgment. Morrison v. Tuska, 113 NYS 611. Where record is silent as to facts and conclusions of fact, it will be presumed that court found facts to support judgment. Schneider v. Schneider [Tex. Civ. App.] 118 SW 789. Where findings sufficient to support judgment, it will be presumed to have been based thereon. Lowrence v. Woods [Tex. Civ. App.] 118 SW 551. Supreme court may draw necessary inferences from findings to support judgment, and must construe findings to support judgment where such a

construction is not unreasonable. Lomita Land & W. Co. v. Robinson, 154 Cal. 36, 97 P 10. Nothing to contrary appearing, decree will be presumed to be founded upon pleadings of record. Towner v. Towner [W. Va.] 64 SE 732. In absence of record or contrary showing, will be presumed that pleadings filed and evidence introduced supported judgment. Tharp v. Tharp's Trustee [Ky.] 119 SW 814. Where only record is certified copy of judgment regular on its face, record will be presumed sufficient to support judgment. Goodhart, Hartman Co. v. Kinney [Mo. App.] 118 SW 679. Where judgment entry recited case as tried on issue joined on certain numbered pleas, it must be presumed that there were no other issues in case. Provident Sav. Life Ins. Soc. v. Pruett [Ala.] 47 S 1019. Other pleas presumed abandoned. Id. Where transcripts on appeal from justice's court to county court and from county court to court of appeals failed to show that plaintiff claimed interest below, and charge in county court failed to authorize its recovery, held that it would be presumed that there was no pleading authorizing its recovery, though brief stated that interest was claimed in county court. Morris v. Smith [Tex. Civ. App.] 112 SW 130. Presumed that judge used usual technical language and that order containing new word is clerical error where word obviously intended is of different meaning. King County Drainage Dist. No. 1 v. Costello [Wash.] 101 P 497. Presumed that trial court in partition proceedings knew character of services rendered by attorneys, and their value. Donaldson v. Allen, 213 Mo. 293, 111 SW 1128. Where judgment was rendered against one of two defendants only, presumed, in absence of showing to contrary, that dismissal was had as to one, or that such antecedent steps were taken as to render judgment against one proper. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27. Where decree in compliance with verdict of jury in action to abate mill dam as nuisance, court will not review correctness, evidence adduced not being contained on record. Edmondson v. McGinnis [Ala.] 47 S 62. In absence of showing in record to contrary, presumed that bridge was part of public street and that street railway's use thereof was based on its franchise right to use street itself. Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969. Where evidence entitled plaintiff to at least nominal damages because of lessened earning capacity, and there was no assignment of error attacking verdict as excessive, held that even if evidence did not authorize recovery of any specific sum because thereof, would be presumed in support of judgment that if jury found in favor of plaintiff because of such lessened capacity they found only nominal damages. St. Louis S. W. R. Co. v. Niblack [Tex. Civ. App.] 117 SW 188. Decree, dismissing petition as to all defendants, affirmed though one of defendants did not answer but testified for plaintiff, where no claim was made that plaintiff was entitled to judgment against such defendant for want of answer, and record did not affirmatively show that original notice was served on him. Goldsmith v. Goldsmith & Bro. [Iowa] 117 NW 1077. In action to reform contract for sale of land and for specific performance, held that, if description of property in contract was uncertain, it must be presumed, on appeal on judgment roll, that abstracts referred to in contract contained all that was claimed by respondent. House v. McMullen [Cal. App.] 100 P 344. Where distribution of estate of decedent was made in accordance with will, and no objection was made that court disregarded widow's election, held that it would be presumed that she elected to take under will, though record did not expressly disclose whether she made any election or not. In re Vogt's Estate, 154 Cal. 508, 98 P 265. On appeal from judgment for plaintiff in determining whether plaintiff's own evidence shows that he was guilty of contributory negligence, his evidence will be taken as true, and, when subject to different inferences, that most favorable to him will be adopted. Strong v. Grand Trunk Western R. Co. [Mich.] 16 Det. Leg. N. 39, 120 NW 683. In suit to foreclose mechanic's lien, held that it could not be determined that error of trial court in including nonlienable items in decree was cured by application of payments made on such decree to such items where state of record was such that it was impossible to separate lienable from nonlienable items. Haas Elec. & Mfg. Co. v. Springfield Amusement Park Co., 236 Ill. 452, 86 NE 248. Where, in action to establish claim against estate of decedent, judgment was rendered against claimant, held that it could not be presumed that said claim, when presented to and disallowed by administrator, was duly verified. Whitmire v. Powell [Tex. Civ. App.] 117 SW 433. In action on long and complicated account tried to court, the account should be stated so that reviewing court may have basis for intelligent action, and be able to determine what items were allowed and what disallowed, and, if this is not done and evidence is conflicting supreme court will not go through record and state account and ascertain upon which side balance falls. Stubbs v. Montezuma Lumber Co. [Colo.] 100 P 433. In absence of contrary proof, presumed that court required necessary steps to be taken before entering judgment. Biles v. Wolf [Miss.] 49 S 267.

27. Assignment of error in refusal of evidence to support motion for taxation of costs not considered where evidence is not set forth in bill of exceptions. Unknown Owner v. State [Tex. Civ. App.] 118 SW 803. Appellate court held not able to determine correctness of apportionment of costs where record did not show amount each party would have had to pay if appellant's contention had been correct. Hill v. Pettitt, 33 Ky. L. R. 1041, 112 SW 646. Failure to apportion costs where verdict was partially adverse will not be reviewed in absence of showing that costs were incurred on count favorably decided. Steele v. Andrews [Iowa] 121 NW 17. Where no reason stated for taxing costs otherwise than against unsuccessful party as required by Sayles' Ann. Civ. St. 1897, art. 1438, sufficiency of such reasons would not be passed on. Lumpkin v. Williams [Tex. Civ. App.] 119 SW 917. Court cannot presume in such case that was sufficient cause. Id.

28. Must show that motion was made.

(§ 9) *E. Conclusiveness of record and effect of conflicts therein.*[29] See 11 C. L.

Havlick v. Davidson, 15 Idaho, 787, 100 P 91. Error founded on motion cannot be considered, where motion is not properly preserved in transcript. Roberts v. Smith [Ind. App.] 87 NE 37. Denial of motion cannot be reviewed when not set out in bill of exceptions. Basenberg v. Lawrence [Ala.] 49 S 771. Overruling of motion not reviewable where no statement of facts. Carter v. Kieran [Tex. Civ. App.] 115 SW 272. Order dismissing motion affirmed, where there was nothing in transcript to support appeal therefrom and record contained no bill of exceptions. Galvin v. Fannen, 154 Cal. 774, 99 P 183. Where nothing in record to show motion not properly made and passed upon, will presume it was properly made. Leggett v. Evans [Idaho] 102 P 486. Denial of motion not considered, where no proper brief of evidence. Knox v. Lexington Terminal Co. [Ga. App.] 64 SE 1134. Where only question discussed was overruling motion, and bill of exceptions containing reason for new trial was not properly in record, held that no question was presented. Brown v. State [Ind. App.] 87 NE 157. Ruling dependent on evidence not reviewable where evidence not in record. Petty v. Petty, 42 Ind. App. 443, 85 NE 995; In re Roberts' Estate [Ind. App.] 88 NE 870; Kelley v. Kelley [Kan.] 99 P 1134; Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104. In absence of evidence, presumed that court was justified in ordering plaintiff to remit large part of judgment or submit to new trial. State v. District Ct. [Mont.] 99 P 139. Ruling on motion for new trial for newly-discovered evidence not reviewable in absence of bill of exception or statement of facts showing that affidavits were called to attention of trial court. Colville v. Colville [Tex. Civ. App.] 118 SW 870; Ayers v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 116 SW 612. Newly-discovered evidence, upon which amended motion is based, not considered where affidavits of movant and counsel not properly identified or embodied or referred to on motion. Leathers v. Leathers [Ga.] 63 SE 1118. Essential that exception to denial of motion should be preserved in bill of exceptions and embodied in abstract in order to raise question. City of Dixon v. Allemand, 136 Ill. App. 449. Grounds of motion, not certified, not to be considered. Dodge v. Cowart, 131 Ga. 549, 62 SE 987. Presumption of correctness and regularity of proceedings peculiarly applicable to orders granting new trials. Hainlin v. Budge [Fla.] 47 S 825. Presumed that overruling of motion was correct, where nothing to contrary is shown by the record. Rose v. State [Ind.] 87 NE 103. Refusal to grant new trial presumed to be on sufficient grounds, nothing to contrary appearing on record. Santos v. Holy Roman Catholic and Apostolic Church, 212 U. S. 463, 53 Law. Ed. —. Unless contrary affirmatively appears from record, presumed that notice of intention to move for new trial was served and filed in time. State v. Second Judicial Dist. Ct. [Mont.] 99 P 139. Held that order denying motion would be affirmed on ground that lower court had no jurisdiction, where record did not show that necessary party was served with notice of motion or participated in proceedings. Niles v. Gonzalez [Cal.] 100 P 1080. If notice of intention to move for new trial has not been served or is imperfect, respondent must object at time statement is settled or motion for new trial is heard and have his objection noted and incorporated in statement or bill of exceptions, and if this is not done will be presumed that notice and service were sufficient. Naylor v. Lewiston & Elec. R. Co., 14 Idaho, 789, 96 P 573. Where order granting new trial is general, it will not be reversed if there is any ground stated in motion upon which it can be sustained. Angus v. Wamba, 50 Wash. 353, 97 P 246. Where motion was made upon two grounds, one of which was insufficiency of evidence, and order granting it did not specify on which ground it was based, held that such order was not open to review since it might have been based on insufficiency of evidence in which case it would have been discretionary. Best v. Seattle, 50 Wash. 533, 97 P 772. Where order granting motion, made upon minutes and bill of exceptions, was general in its terms, held that in order to obtain reversal appellant was bound to show that it was not authorized by either the bill or the minutes. Sanden v. Northern Pac. R. Co. [Mont.] 102 P 145. Where application is made on minutes in absence of bill of exceptions, court presumed to have considered all pleadings, records, minute entries, and evidence, and to have determined motion on case thus presented. Id. Where motion on several grounds was granted without stating any reasons therefor, held that supreme court could not, acting solely on affidavits of parties and witnesses, reverse trial court by holding that it considered but one ground for such motion and granted it on that ground only and that it erred in not signing and entering order reciting that fact pursuant to appellant's motion to that effect. Best v. Seattle, 50 Wash. 533, 97 P 772. Where motion is granted without assigning reasons and without imposing terms, presumed that it was granted for errors not requiring imposition of terms. Frost v. Meyer, 137 Wis. 255, 118 NW 811. Granting new trial held not reviewable where record contained only verdict and motion for new trial, since under Comp. Laws 1907, § 3298, court could have granted new trial on his own motion for reasons therein stated, and there was nothing to show that he did not. McKinney v. Carson [Utah] 99 P 660. Where motion to vacate judgment on ground that action had been defended in defendants' names, without their authority and consent was denied, and there was evidence from which court might have found that defense was made with their consent, presumed that court so found. Emerson v. McDonell, 137 Wis. 263, 118 NW 814.

29. Search Note: See Appeal and Error, Cent. Dig. §§ 2850-2866; Dec. Dig. §§ 662-670; 3 Cyc. 152-155; 2 A. & E. Enc. P. & P. 296.

185—The record imports absolute verity [30] providing it is properly certified,[31] and cannot be impeached by affidavits [32] nor collaterally attacked by motion to dismiss the appeal. In case of conflict, that part of the record whose appropriate function is to present the particular matter prevails.[33]

§ 10. *Transmission of record to reviewing courts. A. Form and contents of transcript or return.*[34] See 11 C. L. 185—The transcript includes both the record proper and the secondary record, and, generally, all of such records should be included,[35] excluding extraneous and needless matter.[36] In some states the parties

30. See, also, ante, § 9D. Columbia Brewery Co. v. Forgey [Mo. App.] 120 SW 625. Where record shows that party was represented by attorney on whom service of notice of appeal was made or who accepted service, service must be held sufficient, and record cannot be contradicted. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114. Record certified by clerk is conclusive except as errors are corrected by him on request of supreme court. Warnock Ins. Agency v. Peterson Real Estate Inv. Co. [Utah] 101 P 699. Court is bound by record, and if it does not speak truth counsel should have it corrected. Langhorst v. Rogers [Ark.] 114 SW 915. Record as it stands is binding, and must govern rights of parties, remedy in case it is not in accordance with trust being elsewhere than by appeal. Cronin v. Berry, 200 Mass. 563, 86 NE 953. Record on appeal from police court to superior court construed. Id. Is not impeachable in appellate court by any evidence outside record itself. Le Clair v. Hawley [Wyo.] 98 P 120. Cannot be contradicted by parol under guise of correcting it. Morgantown Mfg. Co. v. Hicks [Ind App.] 86 NE 856. May not be disputed by oral statements of counsel. Krug v. Peale, 35 Pa. Super. Ct. 1. Will not be falsified on unsupported statement in brief. Putnam v. Morgan [Fla.] 48 S 629. Where parties do not agree that point relied on was called to attention of trial court, record controls. United States v. Leerburger [C. C. A.] 160 F 651. In testing rulings on admission of evidence, certificate of court that record contains all evidence necessary to understanding of exceptions is conclusive. Hoskins v. Scott [Or.] 96 P 1112. Recital by judge in body of bill of exceptions to effect that judgment was by consent held conclusive necessitating an affirmance. Raulerson v. Harvey, 130 Ga. 873, 62 SE 19.

31. Certification by court that instruction was duly excepted to is conclusive. Allen v. Standard Box & Lumber Co. [Or.] 96 P 1109.

32. Columbia Heights Realty Co. v. MacFarland, 31 App. D. C. 112. Affidavits will not be received either to contradict or support record. Meredith v. Aurora, E. & C. R. Co., 142 Ill. App. 475.

33. Allegation of petition held to control mere recital of record as to exhibit. Pease v. Globe Realty Co. [Iowa] 119 NW 975. Order making record which is not correct upon its face will be reversed. Hattendorf v. New York City R. Co., 130 App. Div. 488, 114 NYS 1113. Record made up by resettled order incorrectly stating that motion was made and entered at trial term when in fact it was made at chambers after close of trial term. Id. Record cannot be contradicted or varied by recitals in bill of exceptions. Arkansas, L. & G. R. Co. v. Kennedy [Ark.] 111 SW 1125. Certificate of trial judge to case made imports only truthfulness of previous statements in case, and recitals therein cannot control contrary showing in record. Bettis v. Gargile [Okl.] 100 P 436. Court of appeals cannot allow any force to unexplained minute kept by judge as against record proper. Weeks Hardware Co. v. Weeks, 135 Mo. App. 20, 115 SW 490. Transcript must show all evidence, and if there is conflict between certificate of clerk to transcript and the decree in this regard, latter controls. Turpin v. Beach [Ark.] 115 SW 404. Where record of judgment differed in its recitals from recitals in case made, which was certified by trial judge for purpose of appeal, and court thereafter denied motion to correct judgment and reaffirmed its correctness, held that record of judgment would conclusively prevail as to matter in question. Hunley v. Adams [Kan.] 96 P 798. On appeal judgment entry is sole expositor of rulings on pleadings, and where there is conflict between recitals in bill of exceptions and judgment entry as to rulings on demurrer, latter controls. Penry v. Dozier [Ala.] 49 S 909. Appellate court must look to order of trial court as to time permitted for filing amendments rather than to clerk's certificate thereof. Campbell v. Timmerman, 139 Ill. App. 151. On a variance between agreed statement of facts and bill of exceptions, former controls. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 118 SW 759. Statement of facts showing that objection to question was not made until after it was answered held to control, where bill of exceptions did not affirmatively show whether objection was made before or after answer. Houston, etc., R. Co. v. Roach [Tex. Civ. App.] 114 SW 418. Assignment complaining of exclusion of evidence not considered, where bill of exceptions showed that said evidence was excluded, and statement of facts, agreed to and signed by counsel for both parties and approved by judge, showed that it was admitted, it being impossible to determine which was correct. Helsley v. Moss [Tex. Civ. App.] 113 SW 599. Minute entry that certain documentary evidence was introduced will prevail over clerk's certificate that transcript omitting such documents contains all evidence. Ansley v. Stuart [La.] 48 S 953.

34. Search Note: See Appeal and Error, Cent. Dig. §§ 2621-2693, 3126; Dec. Dig. §§ 593-611; 3 Cyc. 92-105; 2 A. & E. Enc. P. & P. 258, 290.

35. Under Rev. St. 1895, art. 1411, requir-

indicate by praecipe or otherwise what shall be included.[37] Transcripts should be made up in strict accordance with the rules of the appellate court and the statute.[38] In the absence of a statutory provision to the contrary,[39] copies rather than

ing transcript of full copy of proceedings and art. 1413, as to omissions, clerk must include all proceedings unless parties agree to omission. Baum v. McAfee [Tex. Civ. App.] 117 SW 883. Clerk powerless to determine what transcript should contain. Id. Transcript is sufficient if its contents show jurisdiction and so much of record as is necessary for consideration of questions presented for determination. Transcript held sufficient. Kaw Valley Drainage Dist. v. Union Pac. R. Co. [C. C. A.] 163 F 836. Under Rev. St. 1899, § 813 (Ann. St. 1906, p. 783), short transcript is only required to contain copy of judgment and the order granting the appeal. State v. Broaddus, 216 Mo. 336, 115 SW 1018. Filing in appellate court of short transcript containing statutory essentials confers jurisdiction on that court, provided judgment shows on its face that it is one of which such court has jurisdiction, and provided order granting appeal shows on its face that trial court had jurisdiction to make it. Id. In case such facts do not appear on face of judgment and order as shown by short transcript, they may be supplied by the abstract. Id. Under Court & Practice Act 1905, § 490, it is trial court's duty to determine how much of transcript is to be filed, and either party aggrieved by such allowance may bring question before supreme court by petition under § 494, but not by motion. Smith v. Hurley [R. I.] 72 A 705. Clerk of superior court in sending transcript to supreme court should be guided by order of superior judge and should send only papers directed. Clark v. Saco-Pettee Mach, 150 N. C. 88, 63 SE 153. Under Wilson's Rev. & Ann. St. § 4739, in actions instituted by petition in error, plaintiff in error filed must file original case made in court below or transcript of record of that court. King v. Horse Chief Eagle [Okl.] 101 P 1135. Statute mandatory. Id. Inasmuch as bill of exceptions is original paper in case and part of record, court will order that it be returned to the files, upon being informed that it has been taken away with intention of withdrawing it permanently, notwithstanding it was ordered and paid for by party who has withdrawn it. Yaekle v. Jaeger, 8 Ohio N. P. (N. S.) 400. Photographs filed as exhibits and intended to be used on appeal should be filed with transcript of evidence in circuit court and certified by clerk. Southern R. Co. v. Schmidt [Ky.] 118 SW 324. Photographs properly certified by stenographer not to be stricken because not certified by clerk of circuit court with transcript in absence of suggestion that they are not true exhibits. Id.

36. Transcript of appeal from probate to circuit court need not show entire proceedings in estate, but only such part thereof as is necessary to review of ruling complained of. Esmond v. Esmond, 142 Ill. App. 233. In suit by city against water company where insurance companies intervened, whereupon both city and water company filed pleas in abatement for misjoinder of parties, which was sustained and intervenors dismissed, it was not necessary for review of such ruling that transcript contain plea of water company. Hartford Fire Ins. Co. v. Houston [Tex.] 116 SW 36. Rules of court do not become part of transcript by being appended thereto together with clerk's certificate that they are true copies when no action pertaining to such rules was ever taken. Steele v. Wynn, 139 Ill. App. 428.

37. Acts 1903, p. 340, c. 193, § 7 (Burns' Ann. St. 1908, § 667), as to indicating portions or whole of transcript wished for in praecipe, did not repeal § 690, requiring clerk upon appellant's request to transmit transcript of record to clerk of supreme court, or portion thereof as directed in writing. Cleveland, etc., R. Co. v. Morrey [Ind.] 88 NE 932. Praecipe held to have in effect required clerk to make complete transcript of all papers and proceedings in case after specified date, so that transcript made out in obedience thereto was sufficient to authorize consideration of alleged error in overruling demurrer, and in overruling motion for new trial, which motion is made part of record by statute. Chicago, I. & L. R. Co. v. Cobler [Ind.] 87 NE 981. Since, in absence of praecipe directing clerk to certify to certain portions of record, it is his duty to make complete transcript of all the proceedings, which he may do upon the oral or written request of the party, where transcript comes to appellate court without a praecipe, will be presumed that oral request was given to clerks for full and complete transcript. Scott v. Lafayette Gas Co., 42 Ind. App. 614, 86 NE 495. Certificate of clerk affirmatively showing that record contains transcript of all of proceedings below is sufficient without praecipe, though statute requires praecipe to be copied in transcript immediately before certification. Cleveland, etc., R. Co. v. Morrey [Ind.] 88 NE 932. Where appeal is granted by lower court and appellant desires to bring up partial record only, must file, within 90 days after appeal is granted, schedule directing parts of record to be copied. Wilhoite v. Hukle [Ky.] 114 SW 326. Schedule filed several months previously on sustaining of demurrer to counterclaim from which no appeal was perfected held insufficient to support subsequent appeal from judgment, interlineation therein being void. Id. Where notice of matter to be included in abridged transcript under Acts 1903, c. 35, p. 67, is served on appellee, he must designate wherein such matter is insufficient or be deemed to acquiesce. Leiberman v. Bowden [Tenn.] 119 SW 64. Consent of parties to a limited or abridged transcript is not necessary to give appellate court jurisdiction. Id.

38. St. 1907, p. 750, c. 408, relative to method of preparing transcript held not to violate Const. art. 1, § 13, relating to due process of law because it does not provide for service of notice filed with clerk that appellant intends to appeal, and requiring that a transcript be made up. In re McPhee's Estate, 154 Cal. 385, 97 P 878.

the original files should be sent up.[40] There should be separate transcripts on appeal from separate judgments in separate cases tried together, where there has been no consolidation;[41] but one transcript is ordinarily sufficient on a joint appeal[42] or in the case of original and cross appeals.[43] Defects and omissions may be curable by amendment,[44] or they may limit review,[45] or be ground for dismissal.[46]

Statute not in conflict with Const. art. 4, § 24, providing that every act shall embrace but one subject which shall be expressed in its title. Id. Title of cause shown in transcript sufficient where same as title in complaint. Armstrong v. Henderson [Idaho] 102 P 361. Rulings on evidence not considered where transcript embodying bill of exceptions containing all the evidence was not indexed, and briefs did not indicate in what part of bill questions and rulings thereon could be found. Dauphiny v. Buhne, 153 Cal. 757, 96 P 880.

39. Under Laws 1907, p. 512, c. 24, § 15, original statement of facts must be sent up with record, and copy cannot be considered in absence of showing that original has been waived by parties. Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 117; Texas & P. R. Co. v. Stoker [Tex.] 113 SW 3; Redland Fruit Co. v. Sargent [Tex. Civ. App.] 113 SW 330; Hall v. First Nat. Bank [Tex. Civ. App.] 115 SW 293; Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 123; Wallace v. Reed Bros. [Tex. Civ. App.] 117 SW 1019; Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153. Statement stricken on motion, where it was copied and included in transcript instead of original being filed in court of appeals. Williams v. Robertson [Tex. Civ. App.] 115 SW 887. Appellate court cannot assume that what purports to be statement of facts is true copy thereof. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153. Statute held to apply to courts having no official stenographer as well as to those that have. Bean v. Bird [Tex. Civ. App.] 115 SW 121; Id. [Tex. Civ. App.] 117 SW 177. Particularly in view of Court Civ. App. Rule 46, and District & County Court Rule 47, requiring agreements altering course of procedure, etc., to be made in presence of court or reduced to writing. Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 123. Rule applies on appeal from county court. St. Louis, etc., R. Co. v. Wall [Tex.] 118 SW 131; Missouri, K. & T. R. Co. v. Rogers [Tex. Civ. App.] 116 SW 624.

Contra: Rule held not to apply on appeal from county court. Butler v. Beard [Tex. Civ. App.] 116 SW 115; Olivarri v. Western Union Tel. Co. [Tex. Civ. App.] 116 SW 392; Houston & T. C. R. Co. v. Rogers [Tex. Civ. App.] 117 SW 1053; Houston & T. C. R. Co. v. Rogers [Tex. Civ. App.] 116 SW 393; Farris v. Gilder [Tex. Civ. App.] 115 SW 645. Under said c. 24, the original statement of facts is not record of trial court, but of appellate court, and hence Sayles' Ann. Civ. St. 1897, art. 2306, providing for use of certified copies in all cases where originals would be evidence has no application thereto. Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 123. Title of act held not to contain more than one subject, in contravention of Const. art. 3, § 35. Texas & P. R. Co. v. Stoker [Tex.] 113 SW 3. Purported copy of statement of facts accompanying transcript should be considered, unless opposing party interposes an objection before case is submitted. Bean v. Bird [Tex. Civ. App.] 117 SW 177, overruling former opinion, 115 SW 121. Royal Ins. Co. v. Texas & G. R. Co. [Tex.] 116 SW 46; Hall v. First Nat. Bank [Tex.] 116 SW 47; Houston & T. C. R. Co. v. Rogers [Tex. Civ. App.] 117 SW 1053; Houston & T. C. R. Co. v. Rogers [Tex. Civ. App.] 116 SW 393. Does not necessarily follow that copy could not be considered, since only objections which appellee could interpose would be additional cost of transcript and lack of authenticity of copy, which objections might be waived by him, and first of which, if urged, might be overcome by adjudging additional expense against appellant. Texas & P. R. Co. v. Stoker [Tex.] 113 SW 3.

40. Under Burns' Ann. St. 1908, § 690, 691, no original entry, paper or document in a cause may be incorporated in transcript, but they must be copied therein, and, if so incorporated, they will be disregarded, only exception being that created by Id. § 657, under which original bill of exceptions containing the evidence may be so incorporated. Marshall v. Matson [Ind.] 86 NE 339. Where praecipe was copied into transcript immediately before certificate of clerk as required by Burns' Ann. St. 1908, § 667, held that transcript was sufficient, regardless of whether Id. § 690, requiring praecipe to be appended to transcript had been repealed or was still in force. Pere Marquette R. Co. v. Strange [Ind.] 85 NE 1026. Fact that clerk in preparing transcript of record attached to petition in error incorporated therein part of original files in case instead of copies held no ground for dismissal. Henschell v. Union Pac. R. Co. [Kan.] 96 P 857. Affidavits or other papers filed in appellate court but not copied into and made part of transcript filed with clerk (as required by rule 10) will not be considered. Fowler v. Brady [Md. App.] 73 A 15. Stipulation to include original bill of exceptions in the record applies to bill as restored by court, original being lost. Heywood & Morrill Rattan Co. v. Jacobson, 140 Ill. App. 319.

41. Mobile Imp. & Bldg. Co. v. Stein [Ala.] 48 S 368.

42. Elliott v. Bozorth [Or.] 97 P 632.

43. Under Court of Appeals, rule 17, and Code Pub. Gen. Laws 1904, art. 5, § 42, Whetridge v. Pope [Md. App.] 73 A 288 Where defendants in mandamus reserved exceptions and plaintiffs appealed, exceptions should have been included in record. Id. If for good reason not ready, writ of diminution seasonably applied for would remedy defect. Id.

44. See, post, § 10D.

45. See, ante, § 9D.

46. See, post, § 11G.

A party cannot object to a record which he himself files [47] nor can he complain when the opposite party furnishes the entire record for his use.[48] The sufficiency of the record as filed in the appellate court must be determined by that court.[49]

(§ 10) *B. Authentication and certification.*[50]—See 11 C. L. 187—The approval of the secondary record [51] and the sufficiency of the certificate to show that all matter essential to review is included [52] are elsewhere treated. The transcript must be properly authenticated, either by the judge,[53] the clerk [54] of the trial court, showing its completeness and verity.[55] The certificate is conclusive as to the completeness of the transcript.[56] The clerk may add nothing to the transcript unless authorized.[57]

47, 48. Southern R. Co. v. Schmidt [Ky.] 118 SW 324.

49. Tedford v. Lichtenstein, 129 App. Div. 35, 113 NYS 258.

50. Search Note: See Appeal and Error, Cent. Dig. §§ 2694-2720; Dec. Dig. §§ 612-618; 3 Cyc. 105-111; 2 A. & E. Enc. P. & P. 283.

51. See, ante, § 9C.

52. See, ante, § 9D.

53. Transcript held insufficient to present any question where evidence and exhibits were in no way certified as having been used in trial below and transcript contained no findings of fact. Quartz Gold Min. Co. v. Patterson [Or.] 96 P 551. Where transcript lacks certificate of allowance signed by trial justice required by Court and Prac. Act, 1905, § 492, record is incomplete and will be returned to trial court. Antoine v. Smith [R. I.] 72 A 1104. Parties cannot by agreement substitute their narrative of what orders, decrees, or judgments were rendered, and exceptions reserved thereto, for properly authenticated copy of those proceedings required by Rev. St. 1895, art. 1411, to be incorporated in transcript. Carlton v. Krueger [Tex. Civ. App.] 115 SW 619, rehearing [Tex. Civ. App.] 115 SW 1178. Agreement held not entitled to consideration under Id. art. 1414, concerning record in an agreed case, it not purporting to comply with provisions thereof. Carlton v. Krueger [Tex. Civ. App.] 115 SW 619. Where trial judge certified portions of record long after appeal and after he had ceased to be member of trial court, appellate court may quash. Mitchell v. Edeburn, 37 Pa. Super. Ct. 223.

54. Authenticated copies of record within Municipal Court Act, § 22, are copies certified by clerk to be complete. Arthur v. Doyle, 141 Ill. App. 432. Clerk may refuse to certify case which fails to include facts of record materially effecting right to appeal and jurisdiction of court. People v. Culkin, 128 App. Div. 317, 112 NYS 702. Record of fact of execution of undertaking which limited right of appeal from order of filiation to that portion fixing the allowance for support of bastard. Id. Appeal not dismissed because of absence of clerk's certificate, where certificate was made but was inadvertently lost in numerous handlings in office of clerk of supreme court or in office of one of attorneys. Farmer v. First Nat. Bank [Ark.] 114 SW 1182. Bill of exceptions of proceedings before a county board not identified either by certificate of county clerk or of clerk of district court as being part of record held not sufficiently authenticated to be considered. Union Pac. R. Co. v. Colfax County [Neb.] 122 NW 29. Assignment that judgment was not sustained by evidence held not open to consideration, where bill of exceptions purporting to contain evidence was not certified by clerk. Rice v. Sharp [Neb.] 117 NW 96. Motion for new trial held not open to consideration though included in transcript, where clerk did not certify to transcript as transcript of record of cause in full, but certified only to parts of record not including said motion. Roberts v. Smith [Ind. App.] 87 NE 37.

55. When transcript contains only such papers and entries as can be made part thereof by copying same therein, certificate of clerk should not follow form set out in Burns' Ann. St. 1908, § 667, but words "or the originals" should be omitted. Marshall v. Matson [Ind.] 86 NE 339. When original bill of exceptions containing the evidence is embraced in transcript, certificate should show that fact. Id. Where, on appeal from ex parte order appointing receiver, praecipe called for transcript of complaint and all affidavits filed, and clerk certified that transcript contained copies of all papers and entries required by the praecipe, and no affidavit appeared in record except verified complaint, held that supreme court must say that only evidence given at hearing was such complaint. Id. Certificate recited that transcript contained "full, true, and correct copies, or the originals," of all papers, etc., "required by the foregoing praecipe." Praecipe only required copies, and not originals, of papers, etc., held that certificate sufficiently showed that all papers and entries were copies, since that was what praecipe required. Id. Certificates of clerks and judge held in conformity to rules and in form sufficient to make exhibit attached to petition in error good either as transcript of the record or as a case made. Beardsley v. Kansas Natural Gas Co. [Kan.] 96 P 859. Certificate which merely states that same contains correct transcript of record and true and correct recital of all papers in cause is fatally defective, but it should state that it contains "a correct transcript of record of judgment" in case "and true and correct recital and copy of" all papers, etc. Globe & Rutgers Fire Ins. Co. v. Dewallen [Fla.] 47 S 795; Keen v. State [Fla.] 47 S 924. Motion to dismiss on ground that certificate attached to transcript was insufficient to show what papers were considered in making ruling in question denied where before motion was submitted new certificate sup-

(§ 10) *C. Transmission, filing and printing.*[58]—See 11 C. L. 189—The transcript must be filed [59] and transmitted to the reviewing court [60] within the time prescribed by the rule or statute,[61] or an extension thereof duly granted [62] before the expira-

plying defects was filed. Knutsen v. Phillips [Idaho] 101 P 596.

56. Clerk's certificate to transcript imports absolute verity. Marshall v. Matson [Ind.] 86 NE 339. Certificate of clerk of trial court to record brought to appellate court, made up and signed by him, is a verity as to him, and cannot be impeached, modified or changed by his ex parte affidavit. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358.

57. Where praecipe specifying particular parts of record desired did not call for motion for new trial, held that motion was not made part of record by act of clerk in embracing and certifying it with transcript. Roberts v. Smith [Ind. App.] 87 NE 37.

58. Search Note: See Appeal and Error, Cent. Dig. §§ 2721-2774, 3126; Dec. Dig. §§ 619-633; 3 Cyc. 111-133; 2 A. & E. Enc. P. & P. 276.

59. Supreme court cannot hear case de novo where no translation or transcript of shorthand notes of evidence is filed in clerk's office as required by statute. Fitzgerald v. Praisley [Iowa] 119 NW 166. Translation held not to have been "filed." Id. Payment of $5 fee on filing transcript with register of trial court as required by Pub. Acts 1907, p. 498, Mo. 340, § 5, is mandatory and jurisdictional. Thompson v. McKay, 154 Mich. 228, 15 Det. Leg. N. 697, 117 NW 624. Provision requiring such payment held not unreasonable. Id. Failure to pay register's fee within time limited for perfecting appeal is failure to perfect appeal in time, whether appeal is regarded as having been taken under Comp. Laws, § 552 or Pub. Acts 1907, p. 497, No. 340. Lun v. Fairbanks [Mich.] 15 Det. Leg. N. 886, 118 NW 578.

60. Under Laws 1907, p. 509, c. 24, the original statement of facts does not become record of office of clerks of trial court, though it is required to be filed with him, and it is not his duty, but that of appellant, to transmit it to court of appeals, and hence certiorari will not lie to require clerk to send up such original statement. Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 123. Nor will certiorari lie to compel its transmission to court of appeals where it is in hands of appellant, or where it is wrongfully withheld by the appellee or the clerk. Id. Held that in any event certiorari would not lie where no excuse was offered for failure to file original statement with transcript except construction placed upon said law changing proceedings on appeal, and, though said statute had been previously so construed by both court of appeals and supreme court, no effort was made to have original filed until after case had been submitted and decided. Id. Civ. Code Prac. § 741, providing that appellee may file authenticated copy of record in office of clerk of court of appeals with same effect as if filed by appellant, held to carry with it necessary implication that record has been completed in court below, and not to give appellee right to file incomplete transcript and then supplement it by subsequently filing bill of exceptions. Louisville Home Tel. Co. v. Gordon [Ky.] 117 SW 315.

61. Alabama: Appeal was taken April 2, 1908, during Nov. term 1907, and, under Code 1907, § 2870, was returnable the first Monday beyond 20 days after April 2, 1908. Appeal was docketed and transcript filed in supreme court Dec. 14, 1908, the beginning of the Nov. term, 1908. Held that appeal would be dismissed, no excuse being shown for the delay. Southern R. Co. v. Abraham Bros. [Ala.] 49 S 801.

Arkansas: Motion for affirmance pursuant to rule 7 for failure to file authenticated copy of record within 90 days as prescribed by Kirby's Dig. § 1194, denied, where within 5 days after service of notice of motion and before hearing thereon appellant presented authenticated copy of record to clerk of supreme court and prayed an appeal from him, which was granted. North State Fire Ins. Co. v. Dillard [Ark.] 111 SW 1003.

California: Provision of Court of Appeal Rule 2, that, when proceeding for settlement of bill of exceptions or statement is pending, 40 days within which transcript must be filed shall not begin to run until settled and authenticated statement or bill of exceptions has been filed, held not to apply where there was no such settlement pending within 40 days after perfecting of appeal. Curtin v. Ingle [Cal. App.] 98 P 868. Since transcript cannot be served and filed until statement is settled, held that, where said statement had not been settled and delay was not due to inexcusable neglect of appellant, it could not be said that he had been guilty of inexcusable neglect in failing to file transcript. Id. Motion to dismiss for failure to file transcript in time denied in case where extension would have been granted had application been made to court of appeal, particularly where rule invoked did not seem primarily designed to deal with such a case. Id. Held that, though supreme court has power to dismiss appeal where there has been failure to proceed with proper diligence to procure settlement of statement, such neglect being equivalent to failure to file transcript in time, is better practice to require objection to be made in first instance in lower court where proceeding for settlement is pending, ruling thereon being reviewable by appeal. Curtin v. Ingle [Cal.] 99 P 480. Provision of Court of Appeal Rule 2, that, when party appealing from judgment has given notice of motion for new trial before perfecting said appeal, time for filing and serving printed transcript shall not commence to run until such motion is decided or proceeding dismissed for want of prosecution, held not to apply where notice of motion was not given until after appeal was perfected. Curtin v. Ingle [Cal. App.] 98 P 868. In any event appellant held not entitled to benefit of said provision where more than 40 days had elapsed since motion was denied and no transcript had been filed. Id. Where there is no authority for motion for

new trial; filing of motion does not bring case within exception of rule 2, so as to extend time. In re Heywood's Estate, 154 Cal. 312, 97 P 825. Pendency of attempt to obtain new trial held not to have excused delay in filing transcript, where counsel did not claim ignorance of decisions to effect that such motion would not lie in such case, or that failure was due to belief that pendency of motion extended time. Id.

District of Columbia: Where transcript is not filed in appellate court for more than 40 days after appeal, and no extension of time applied for or obtained, appeal in an action at law will be dismissed. Rule 15. Gros v. Norment, 30 App. D. C. 574.

Georgia: Return term for all ordinary bills of exceptions is first term of supreme court which begins after expiration of 30 days from filing of such bills in clerk's office of court below. Earnhart v. Atlanta & W. P. R. Co. [Ga.] 65 SE 138. Contention that first term did not arrive until papers were filed in office of clerk of supreme court held untenable. Earnhart v. Atlanta & W. P. R. Co. [Ga.] 65 SE 138. Bill of exceptions was delivered to deputy clerk of lower court and by him marked filed on Sept. 2, 1908. It was not filed in office of clerk of supreme court until Feb. 20, 1909, after circuit to which case would have belonged had been concluded, and after docket for entire term had been closed, and it was then docketed with cases for next term. Held that, when case was reached at second term, it would be stricken from docket and dismissed on motion. Earnhart v. Atlanta & W. P. R. Co. [Ga.] 65 SE 138. Fact that clerk certified that delay was due to fact that bill was mislaid by deputy, who was ill, and not on duty when it was filed, and of unsound mind, held not to prevent dismissal. Id.

Idaho: Under rule 23 (96 P x), transcript must be served upon adverse party and filed in supreme court within 60 days after appeal is perfected. Armstrong v. Henderson [Idaho] 102 P 361. Under rule 25 (96 P x), time trial court holds bill of exceptions or statement prior to settlement and filing, and time attorney for respondent retains transcript before certifying, shall be excluded in determining time. Id.

Illinois: Where essentially faulty transcript is not corrected within time for filing, it will not be considered. Arthur v. Doyle, 141 Ill. App. 432. Nothing appearing in restorations of lost transcript to show that it is restoration, it must be treated as original of date of its actual filing rather than date of lost original. Bromberg v. People, 136 Ill. App. 602.

Indiana: Filing of transcript within one year is essential to perfecting appeal under Burns' Ann. St. 1901, § 645. Brouilletts Creek Coal Co. v. Pomatto [Ind. App.] 85 NE 993. Transcript filed in time allowed by Burns' Ann. St. 1908, § 2978. Jeffries v. Orndorf [Ind. App.] 88 NE 958.

Louisiana: Transcript filed more than three days after return day, under Code Prac. art. 594, must be dismissed on motion. Bourdreaux v. Bourdreaux, 122 La. 433, 47 S 758.

Maryland: Where transcript of record not transmitted within 3 months pursuant to Code Pub. Gen. Laws 1904, art. 5, § 6, such fact is prima facie evidence of appellant's default. Maryland, D. & V. R. Co. v. Hammond [Md.] 72 A 650. Failure held due to appellant's negligence, where he failed to ascertain when record was made out and pay for it in time for transmission. Id. Appeal must be dismissed where it does not appear, from affidavit and correspondence filed with court, that by proper diligence correct record could not have been made up and transmitted in time. Estep v. Tuck, 109 Md. 528, 72 A 459. Affidavit held not to show diligence. Id. Stipulation as to what record should contain, not agreement for delay in transmission, since, if appellant could not agree within reasonable time, he could direct what papers be copied and what omitted. Id.

Montana: Appeal will be dismissed where transcript is not filed within time allowed by rules. Courtney v. Mc Grath [Mont.] 97 P 1134.

New York: Filing of clerk to make return within thirty days on appeal from Municipal court is more or less contingent upon other matters provided for in Munic. Court Act. § 317, and in § 318, hence a failure of appellant to cause timely filing of return gives no absolute right of dismissal to respondent, who should accept notice of settlement of case and appear, in failure of which appellant may proceed in his absence. Pakas v. Hurley, 114 NYS 140.

South Dakota: Appeal dismissed for want of prosecution where original record was not filed, etc. Meyer v. Chicago, etc., R. Co. [S. D.] 117 NW 1037.

Texas: Transcript need not be filed until service of writ of error. Carney v. Menefee [Tex. Civ. App.] 118 SW 1083.

Federal courts: Appeal dismissed where transcript was not filed until nearly five months after return day, term of appellate court intervened at which appeal should have been heard, time was not extended, and no excuse for delay was shown. Nazina Trading Co. v. Martin [C. C. A.] 164 F 838.

62. Under B. & C. Comp. § 553, subd. 2, where appellant discovers that it will be difficult to file transcript within 30 days, he may on application secure extension. Hanley v. Stewart [Or.] 102 P 2. Under Court and Practice Act 1905, § 71, providing for filing of transcript not later than 40 days from date of request to stenographer, etc., and § 72 as to extension of time, latter section is for enlargement of time previously granted in § 71. Hart Wood & Lumber Co. v. Sea View R. Co. [R. I.] 72 A 1104. Agreement of attorneys to file later was "good cause shown" within meaning of Rev. St. 1895, art. 1015, and court should grant leave to file if not interfering with orderly business of court. Smalley v. Paine [Tex.] 116 SW 38. Statute mandatory. Id. "May" in statute held to mean "must," and statute is mandatory. Id. It is no ground for extension of time on appeal from order overruling demurrer that if defendant moves to reopen his default, under the order while appeal is pending, he is placed in inconsistent position of asserting rights under the order, and at the same time contesting its legality, or if he fails to move to reopen default he is guilty of laches. McMahon v. Myers, 112 NYS 1028. Defendant held not entited to 20 days' extension on

tion of the statutory period.[63] Delay is sometimes excused and relief against the same granted if a valid excuse is shown,[64] nor will dismissal result from delay due to the fault of the adverse party or the clerk.[65] As a general rule the filing of the transcript by one of two appellants inures to the benefit of the other.[66] Rules of court generally require the transcript to be printed in a specified manner.[67]

(§ 10) *D. Amendment and correction.*[68]—See 11 C. L. 190—Until the record is sent up, the lower court has full power to correct it.[69] After it is filed in the appellate court, the practice in some states is to make corrections in the appellate court,[70] while in others the appellate court disclaims such power,[71] and the record

ground that previous appeal was pending, and if decided favorably to him it would be unnecessary to print record in this appeal. Id.

63. Where application for extension of time was filed with clerk before expiration of time for filing, and matter was called to clerk's attention as one to be acted on in open court, and on first day's session thereafter court granted application, held that delay was computed from day application was filed, and transcript was filed in time, though said session was held after expiration of time originally fixed. Succession of Watt, 122 La. 952, 48 S 335. Transcript was filed within time extended by order of court. Order of extension was not entered within time as originally fixed, but was subsequently entered nunc pro tunc pursuant to an order to that effect. Held that transcript was filed in time. Quartz Gold Min. Co. v. Patterson [Or.] 96 P 551. Under Court and Practice Act 1905, §§ 71, 72, 490, held that where an order of extension was made before expiration of period, but was lost in transmission to clerk, loss would not prejudice rights of person obtaining order. Hart Wood & Lumber Co. v. Sea View R. Co. [R. I.] 72 A 1104.

64. Court may in its discretion relieve parties who have not complied with rules, but will not do so where has been long delay and there is utter absence of excuse or extenuation, particularly where case involves settlement of case in bankruptcy affecting numerous parties. Nazima Trading Co. v. Martin [C. C. A.] 164 F 838. Plaintiff caused notice of appeal and undertaking to be served. He then delivered them to associate counsel, who sent them to clerk to be filed. They were mislaid and no memorandum of their delivery to clerk was made in register. Counsel believing that they had never been filed perfected new appeal. Held that, since counsel failed to make careful inquiry to ascertain whether original papers had in fact been filed, plaintiff was not innocent third party who, relying on absence of notice which record alone afforded, was injured by failure of clerk to perform duty required of him by law, and original appeal having been perfected and no transcript filed within time prescribed by B. & C. Comp. § 549, subd. 4, right to take second appeal was lost. Harrington v. Snyder [Or.] 101 P 392. Held that appeal would not be dismissed for failure to file transcript during term to which appeal was returnable, where citation of appeal was not served on appellee until after expiration of term to which appeal was returnable, and it did not appear that appellant was to blame for delay. Prince v. Prince [Ala.] 49 S 873.

65. Not where due solely to negligence or failure of proper officer to prepare transcript. Bree Bros. v. Firestine [Neb.] 120 NW 935. Under Code Pub. Gen. Laws 1904, art. 5, § 40, providing that appeals be not dismissed for delay of clerk or appellee, etc., negligence is not to be attributed to clerk, for failure to make up record promptly, but must be attributed in absence of explanation to appellant. Estep v. Tuck, 109 Md. 528, 72 A 459. Appellant has burden of proving that delay was due to negligence of clerk or appellee. Maryland, D. & V. R. Co. v. Hammond [Md.] 72 A 650; Estep v. Tuck, 109 Md. 528, 72 A 459. Motion to dismiss not considered where did not clearly appear from affidavits in support thereof whether delay was fault of register or of appellant. Pleasants v. McKenney, 109 Md. 277, 71 A 955.

66. Where transcript filed, clerk cannot be required to issue certificate to one of appellees that record has not been brought up by one of appellants, but remedy, if any, is by motion to dismiss. Rojas v. Seeger, 122 La. 218, 47 S 532.

67. Where supreme court rule 25, requiring decree appealed from and docket entries to be printed in paper book, is disregarded, no review can be had. North Mountain Water Supply Co. v. Troxell [Pa.] 72 A 621. Plaintiff must print his praecipe, writ and declaration in. Updegraff v. Snyder, 36 Pa. Super. Ct. 30.

68. Search Note: See note in 67 L. R. A. 179. See, also, Appeal and Error, Cent. Dig. §§ 2775-2849; Dec. Dig. §§ 634-661; 3 Cyc. 134-152; 2 A. & E. Enc. P. & P. 301; 7 Id. 893.

69. For amendments in trial court see section dealing with particular part of record amended. Where lower court has, in exercise of its discretion, refused to amend its record on motion, such refusal cannot be controlled by mandamus. Hansen v. De Vita [N. J. Law] 72 A 60.

70. Failure to file answer to amendment to complaint pursuant to leave given held not ground for reversal of judgment in favor of defendant on theory that certain finding was thereby left without support, since record could still be made to conform to order permitting amendment, and judgment on appeal might direct lower court to cause amendment to be filed. Cummings v. Roeth [Cal. App.] 101 P 434. Where according to certificate of clerk below printed record contained incomplete transcript of bill of exceptions as actually settled by trial judge, objections to introduction of certain evidence and exceptions

will be returned for correction [72] or the amendment made below and brought up [73]

to overruling same having been omitted, held that motion of appellants to supply said omission would be granted, and said certificate filed in court of appeals would be considered. Flannigan v. Towle, 8 Cal. App. 229, 96 P 507. Under express provisions of Gen. St. 1902, § 801, application to supreme court to rectify appeal will be dismissed unless party making it has, previous to the notice thereof to opposite party, requested court or judge allowing appeal to make correction applied for, and this though there is no answer to application as required by Prac. Book, p. 270, § 14. McWilliams v. McNamara [Conn.] 70 A 1043. Where on appeal from court of limited jurisdiction transcript has been filed and bond approved, appeal may not be dismissed for any informality or insufficiency in transcript without giving appellant reasonable opportunity to cure defect. Esmond v. Esmond, 142 Ill. App. 233. Where record is complete, errors cannot be corrected by granting rule of diminution with directions to send up true record. Hansen v. De Vito [N. J. Law] 70 A 668. Motion to amend notice of appeal from Surrogate Court by adding necessary parties is motion under Code Civ. Proc. § 2573, authorizing appellate court to bring in necessary parties, rather than under § 1303 authorizing amendment and correction. In re Mark's Will, 128 App. Div. 775, 113 NYS 104. Motion in court of civil appeals to bring up original statement of facts in lieu of copy incorporated in transcript is motion to perfect record because of omission of original statement of facts under Act May 25, 1907 (Laws 1907, p. 509, c. 24). Wallace v. Reed Bros. [Tex.] 116 SW 35. Such a motion is in time when filed before submission of case. Id. Where statement of facts not subject to consideration for failing to show filing on trial court, appellant should be permitted to correct record and show filing. Belt v. Cetti [Tex. Civ. App.] 118 SW 241. Where clerk fails to prepare transcript as required by rules, appellant may be permitted to file a proper transcript nunc pro tunc. Nail v. First Nat. Bank [Tex. Civ. App.] 118 SW 1034. Failure to fasten transcript at top and to incorporate assignments of error therein. Id. Upon suggestion of counsel supreme court may direct clerk of trial court to correct bill of exceptions. Warnock Ins. Agency v. Peterson Real Estate Inv. Co. [Utah] 101 P 699. Appellate court will allow such defects in transcript to be cured and omissions to be supplied as are not fatal to its own jurisdiction. Kaw Valley Drainage Dist. v. Union Pac. R. Co. [C. C. A.] 163 F 836.

71. Sufficiency of record silent as to cause of nonsuit could not be supplied on appeal to show that it was caused by adverse rulings. Long v. Holley [Ala.] 47 S 655. Court of appeals must accept record of trial court as made, and cannot correct it. Weeks Hardware Co. v. Weeks, 135 Mo. App. 20, 115 SW 490. Review must be based upon record as made below, and upon which order denying motion for new trial was predicated, and supreme court cannot add anything to record made up by district court. Shandy v. McDonald [Mont.] 100 P 203. On writ of error supreme court has no power to amend record of circuit court except in matters of form. Hansen v. De Vito [N. J. Law] 70 A 668. Laws 1905, p. 322, c. 28, authorizing supreme court to supply omissions or make corrections in case-made under certain circumstances, does not authorize supreme court to supply omissions or make corrections in record of trial court, but this may be done only by proceedings in trial court. Bettis v. Gargile [Okl.] 100 P 436. Supreme court has no control over records of any inferior court except in exercise of its appellate or supervisory jurisdiction, and hence cannot settle bill of exceptions taken upon trial or proceeding in district court, nor amend or correct one allowed in such court, nor inquire into correctness of bill appearing regular on its face. Le Clair v. Hawley [Wyo.] 98 P 120. Record on writ of error to federal court cannot be amended there, to show federal jurisdiction. Yeandle v. Pennsylvania R. Co. [C. C. A.] 169 F 938.

72. Where record is incomplete, it will be remitted for correction. Anglo-American Authors' Ass'n v. Slutsky, 61 Misc. 222, 113 NYS 763. Where material documentary evidence is omitted. City of New York v. Blumberg, 113 NYS 515. Where record fails to disclose date of judgment. Collins v. Davis, 111 NYS 703. Where fails to show compliance with Municipal Court Act (Laws 1902, p. 1501, c. 580) § 34, requiring orders and papers on which substituted service was granted to be filed 6 days before return day of summons. Thompson v. Rawlston, 116 NYS 13. Where ordinance on which cause of action was based, and without which appeal could not be determined, and which record showed was received in evidence, was not attached to record, and was no certified copy thereof in return. City of New York v. Blumberg, 113 NYS 515. Orders appealed from were part of record, but moving papers and affidavits in support thereof were not being annexed. Rosenstein v. New York, etc., R. Co., 111 NYS 718. Where record is faulty in mere clerical work of numbering pages and lines. Smith v. Herring-Hall-Marvin Safe Co., 113 NYS 572. Nothing appearing of record to show disqualification of municipal judge or inability to make return of evidence, in absence of such return record will be remitted for resettlement. Londis v. Levin, 113 NYS 541. Mere general allegation of defect is not sufficient to require remission of return to allow amendment, but moving papers must clearly point out error or omission. Pakas v. Hurley, 114 NYS 140. Where petition to open judgment was demurred to on several grounds, and demurrer was sustained without giving any reasons therefor, held that record would be remitted to lower court for purpose of having such reasons made part of it. Hanhauser v. Pennsylvania & N. E. R. Co., 222 Pa. 240, 71 A 4. Where clerk of superior court including in transcript papers struck from files by superior judge, supreme court on motion for certiorari would remand record to clerk with directions to certify transcript in accord-

on leave,[74] or by certiorari.[75] A trial court has jurisdiction to correct the record after appeal has been perfected.[76] Unnecessary amendments,[77] or amendments proposed too late,[78] or which present matter not open to consideration in the appellate court,[79] or which would not change the result,[80] will not be allowed. It is within the discretion of the appellate court to allow supplemental bills of exception to be filed after expiration of time for filing original bill.[81] Matters not properly

ance with order of superior court. Clark v. Saco-Pettee Mach. Works, 150 N. C. 88, 63 SE 153. Where affidavits used in arguments before superior court, supreme court on motion for certiorari would direct clerk to make copies of such affidavits and attach to transcript. Order without prejudice to adverse party to make motion on record as might be advised. Id.

73. Error in sending up as part of record copy of transcript of testimony and charge, which copy was not certified to by trial judge, was cured by sending upon discovery of error, of original transcript properly certified, same result being reached as would have been reached by more formal proceeding of suggestion of diminution of record. Ripka v. Mutual Fire Ins. Co., 36 Pa. Super. Ct. 517. Where recital in record as to date of rendition of decree is wrong, party may procure its amendment in appropriate manner. Poole v. Oliver [Ark.] 115 SW 952. Appellate court will not grant certiorari to correct errors in records of proceedings in lower court, but motion to correct nunc pro tunc should be made below. Owen v. Harriott, 42 Ind. App. 604, 86 NE 446.

74. Where court of appeals had no jurisdiction and hence was precluded from taking any steps in cause except to transfer it to supreme court, leave granted by it to apply to lower court for amendment of bill of exceptions could confer no additional validity or legality on action of lower court in amending bill. Reed v. Colp, 213 Mo. 577, 112 SW 255.

75. Where record of case appealed to court of appeal is incomplete by reason of absence of testimony not reduced to writing, certiorari is not available to remedy defect. Fletcher v. Ozone Lumber Co. [La.] 49 S 158.

76. Held that, after appellant's substituted abstract and his brief and argument had been filed, district court had authority, on appellee's motion, and upon proper notice and showing, to correct its record. Kvamme v. Barthell [Iowa] 118 NW 766. Record remains in trial court for correction in matters of substance after writ of error has been sued out, proper practice being for lower court to amend and to certify up record so amended, which it may do without certiorari from supreme court. Hansen v. De Vito [N. J. Law] 70 A 668. May make alteration in bill of exceptions, provided amendment is duly made, properly certified and filed in supreme court before decision on merits has been rendered. Ferrari v. Beaver Hill Coal Co. [Or.] 102 P 175.

77. Certiorari will not lie to compel amendment of bill of exceptions, where amendment does not change sense and meaning of matter sought to be amended. but only phraseology. Morgantown Mfg. Co. v. Hicks [Ind. App.] 86 NE 856. On petition for certiorari to bring up portions of record alleged not to have been embodied in transcript, held that it did not appear that same were necessary to presentation of petitioner's appeal. Curtis v. Wilfley [C. C. A.] 165 F 893. On petition for certiorari to bring up portions of record alleged not to have been embodied in transcript on appeal from decree adjudging petitioner in contempt, held that it did not appear that anything bearing on certain feature of case had been omitted. Id. Where record in transcript showed that petitioner appeared in contempt proceedings and waived citation, held that certiorari would not be granted to bring up part of record alleged to have been omitted from transcript, showing that he demanded copy of citation. Id. Where record in transcript showed that, though witness testified without having been sworn, he was later sworn in open court and testified that he had read transcript of his former testimony and that same was correct, held that certiorari would not issue to bring up part of record alleged to have been omitted, showing that said witness was examined without having been sworn. Id.

78. Application to supreme court for mandamus to compel circuit court to amend its record after a judgment has been pronounced on such record by supreme court upon proceedings in error, in which such record was brought up and errors assigned thereon by him, will be denied. Hansen v. De Vita [N. J. Law] 72 A 60.

79. Motion to stay appeal to supreme court from judgment of circuit court on appeal from county court pending institution of mandatory proceedings against county court to correct its record, denied, since if record was amended it would present to supreme court matter not before county court and not passed on by it. Sidwall v. Jett, 213 Mo. 601, 112 SW 56.

80. Request for continuance for purpose of having record corrected so as to show that bill of exceptions was filed in time, denied, where court was satisfied that no error had been committed below. Ward v. McPherson [Ark.] 113 SW 42.

81. Neither Civ. Code 1895, § 5536, subsec. 1, nor Acts 1905, p. 84, authorizes making of entirely new brief of evidence, causing it to be filed in superior court as part of record after bill of exceptions has been signed and case brought to supreme court, and the causing of such a brief to be transmitted to supreme court as part of record, to be taken in lieu of evidence contained and certified in bill of exceptions, and such a brief cannot be considered. Jackson v. Georgia, S. & F. R. Co. [Ga.] 63 SE 841. Appellant may not file corrected or supplemental abstract of record to cure error pointed out in respondent's brief. Davis v. Foster [Mo. App.] 118 SW 1191.

in the record may be stricken [82] by the appellate court.[83] Ordinarily, amendments are allowed only for the purpose of correcting mistakes or supplying omissions in the record as transmitted to the reviewing court, and not to supply new or extraneous matter.[84]

§ 11. *Practice and proceedings in appellate court before hearing. A. Joint and several appeals; consolidation, severance.*[85]—See 11 C. L. 193—Parties having separate claims with no joint or common rights cannot prosecute a joint appeal.[86]

(§ 11) *B. Original and cross proceedings.*[87]—See 11 C. L. 193—The cross assign-

82. Statement of facts stricken where inferable from cerificate that it did not contain all material facts adduced. Thomas v. Galveston Dry Goods Co. [Tex. Civ. App.] 119 SW 715. Where no proper exceptions were taken to findings of fact and conclusions of law, and no error was predicated on exclusion of testimony, held that motion to strike statement of facts would be granted. Crowe & Co. v. Brandt, 50 Wash. 499, 97 P 503. Fact that giving of instructions was insufficiently presented held no ground for striking bill of exceptions from record. Hotchkiss v. Vanderpoel Co., 139 Ill. App. 325. Document which is part of record below and which has been properly certified to supreme court as part of record on appeal, such as a bill of exceptions or statement on motion for new trial, may not be stricken out however defective it may be for any reason appearing on its face, but it must remain in the record, the effect to be given it being a matter for determination upon the hearing of cause on merits. Robinson v. Helena L. & R. Co. [Mont.] 99 P 837. Defendant's bill of exceptions in support of motion for new trial was prepared, in conformity to statutory requirements, as a bill of exceptions, and was entitled and served as such. Was so designated in acknowledgment of service, and plaintiffs had amendments incorporated in it. Certificate of settlement designated it as "statement on motion for new trial." Held that though, since passage of Act Feb. 26, 1907, there was no provision authorizing statement of case to be used as basis of motion, defect was not such as to require bill to be stricken from the files. Id. Appellant's motion to strike from files appellee's amendment to appellant's abstract because containing matter not proper to be considered, overruled, part of amendments being entirely proper and necessary in correction of record, and unnecessary portion being too small to justify imposition of penalty. Balderston v. Cudahy Packing Co. [Iowa] 117 NW 986. Though findings of fact could not be reviewed because of insufficient exceptions, held that statement of facts would not be stricken for all purposes, but would be retained for purpose of reviewing errors relating to manner of trial and introduction of testimony. Warehime v. Schweitzer, 51 Wash. 299, 98 P 747. Where bill of exceptions is too voluminous in setting out all evidence, it will not be stricken from files, but questions presented will not be examined in so far as dependent upon rulings on evidence. Oldland v. Oregon Coal & Nav. Co. [Or.] 102 P 596. Admission made or record could not be stricken on appeal as made by mistake. Stephenson v. Austin, 217 Mo. 355, 116 SW 1090.

83. Appellate court is the judge of sufficiency of record, and case on appeal will not be stricken by trial court upon motion. Waldo v. Schmidt, 62 Misc. 71, 115 NYS 1023.

84. Before transcript may be amended by stipulation under rule 25, it must affirmatively appear that omitted or amended matter was in record below as thus agreed upon, and that omission is merely from transcript and not from record. Chatfield v. Iowa & A. Land Co. [Ark.] 112 SW 875. If report of evidence upon exceptions to order of nonsuit does not contain essential evidence actually introduced at trial, it may be amended by presiding justice to include such evidence, but, if evidence was not thus actually introduced, fact that it was omitted because of understanding that proposition to be proved by it was admitted does not authorize report to be amended to include such evidence, unless by consent. Moore v. Archer [Me.] 71 A 863. Judge in opinion on overruling motion for new trial referred to general charge which was not in record, and supreme court ordered clerk to transmit entire charge. It appeared from certificate that charge transmitted in accordance with such order had been written out by stenographers after order was made, and was then agreed upon by counsel as correct, original charge having been lost or mislaid. Held that charge so transmitted could not be considered. Godley v. Barnes [Ga.] 64 SE 546. Only record or portion thereof already existing when case brought up can be thus required to be transmitted. Id. Bill to amend record to permit filing of appeal bond and bill of exceptions contended to have been ordered dismissed where no proper evidence of order. Wesley Hospital v. Strong, 233 Ill. 153, 84 NE 205. Order must be shown by note or memorandum from records or quasi records or minutes of judge, etc., not by recollection of witnesses. Id. Private memorandum by attorney insufficient. Id. Decree enjoining judgment until creditor should stipulate for vacation and entry of another, judgment with order of appeal not to be sustained being merely effecting indirectly that which could not be done directly. Id.

85. Search Note: See Appeal and Error, Cent. Dig. §§ 59, 60, 3197; Dec. Dig. §§ 15, 16, 816; 2 Cyc. 531, 532; 3 Cyc. p. 211.

86. From decree disallowing claims on fund. Commonwealth v. Union Surety & Guar. Co., 37 Pa. Super. Ct. 167.

87. Search Note: See Appeal and Error, Cent. Dig. §§ 48-58, 3053-3057, 4285; Dec. Dig. §§ 14, 747, 1090; 2 Cyc. 525-530, 1010-1012.

ment of errors,[88] and the necessity of a cross appeal to entitle the appellee to raise specific objections,[89] are treated in other sections. A cross appeal may ordinarily be taken by one of several appellees against the others,[90] or against the appellant.[91] An appellee failing to take a cross appeal cannot thereafter maintain an independent appeal from the judgment.[92] The cross appeal must be timely.[93]

(§ 11) *C. Amendment of parties.*[94]—See 11 C. L. 193—Amendment and substitution may be allowed in case of the death of a party.[95] So, too, necessary parties who have been omitted may be brought in by way of amendment.[96] Misnomer may also be cured by amendment.[97]

(§ 11) *D. Calendars, trial dockets, terms.*[98]—See 11 C. L. 194—The necessity of docketing appeals in the appellate court has been treated in a previous section.[99] Provision is sometimes made for expediting certain classes of cases.[1]

(§ 11) *E. Forming issues; pleading, assigning, and specifying error.* 1. *In general.*[2]—See 11 C. L. 194—The assignment of errors is in effect a pleading tendering an issue of law.[3] Filing in the appellate [4] or lower court [5] is generally re-

88. See post, § 11E 3.

89. See post, § 13B.

90. Cross petition in error may always be filed by defendant in error against other defendants in error. Kingfisher County Com'rs v. Lemley [Okl.] 101 P 109.

91. Cross appeal can only be granted as against the appellant who brings original appeal to appellate court. Hessig v. Hessig's Adm'r [Ky.] 113 SW 851. Since parties not before appellate court are not affected by cross appeal, and one desiring to have judgment reviewed as against them must take an original appeal, which he may do notwithstanding pendency of appeal between other parties. Id.

92. Since appellee seeking relief from judgment can do so, under Kirby's Dig. § 1225, only by cross appeal. Howell v. Jackson [Ark.] 111 SW 999. Decree, in suit to restrain stopping of certain ditch and construction of certain other ditches dissolving temporary restraining order in so far as it related to closing of ditch and making it perpetual as to construction of other ditches, held single one, one order being dependent on other, so that, where, on appeal by defendants from so much thereof as injured them, plaintiffs took no cross appeal, they could not subsequently appeal from balance of decree. Id.

93. Cross appeal not filed until after submission of case not considered. Reid v. Yazoo & M. V. R. Co. [Miss.] 47 S 670.

94. Search Note: See, also, Appeal and Error, Cent. Dig. §§ 1868-1876; Dec. Dig. § 336; 2 Cyc. 784-789.

95. For effect of death of party before appeal is perfected see ante, § 3A. For effect of death after appeal is perfected see post, § 11G, Abatement.

96. Motion under Code Civ. Proc. § 2573, authorizing appellate court to bring in necessary parties on appeal from surrogate, is premature until appeal is perfected by service on parties in surrogate proceedings. In re Mark's Will, 128 App. Div. 775, 113 NYS 104. Prosecution and amendment of writs of error from court of appeals of Indian Territory to federal court was governed by rules and practice of circuit court of appeals of the eighth circuit under Act March 3, 1895, c. 1479, § 12, 33 St. 1081 (Comp. St. Supp. 1907, p. 208) subsequent to March 3, 1895, and not by Mansf. Dig. Ark. c. 40 (Ind. T. Ann. St. 1899, c. 17). Lewis v. Sittel [C. C. A.] 165 F 157. In absence of proof of reasonable diligence to obtain consent of a joint judgment debtor to writ of error until more than three months after expiration of time for suing out writ, held that court of appeals of Indian Territory did not abuse its discretion or commit any error of law, under practice prescribed by Arkansas statute or rules and practice of circuit court of appeals, by denying application to join omitted debtor as party plaintiff and dismissing writ. Id. Where necessary party was not joined, and supersedeas bond did not run to her, held that appellate court could not permit filing of additional bond and issuance of citation to her after time for appealing had expired. Taylor v. Leesnitzer, 31 App. D. C. 92.

97. Naming decedent as appellee instead of successor in interest in assignment of errors held mere misnomer, which could not affect substantial rights and could be amended under Burns' Ann. St. 1908, § 678. Brullette Creek Coal Co. v. Pomatto [Ind.] 88 NE 606, rvg. [Ind. App.] 85 NE 993.

98. Search Note: See, also, Appeal and Error, Cent. Dig. §§ 3189-3196; Dec. Dig. §§ 808-814; 3 Cyc. 203-210; 2 A. & E. Enc. P. & P. 361.

99. See ante, § 8.

1. Hearing of case involving constitutionality of statute not advanced as involving important public interests, where it was not shown that any person outside small local district was interested in questions involved, and in ordinary routine cases were disposed of within 6 months after filing. Road Imp. Dist. No. 1 v. Glover [Ark.] 111 SW 1125.

2. Search Note: See Appeal and Error, Cent. Dig. §§ 2968-2982, 2990-2996, 2999, 3000, 3011, 3039-3052, 3058-3064, 3084-3089; Dec. Dig. §§ 718, 719, 722, 742-746 751-754; 2 Cyc. 980-985, 1003-1005, 1010; 2 A. & E. Enc. P. & P. 920.

3. North Mountain Water Supply Co. v. Troxell [Pa.] 72 A 621; Lowenstein v. Bache, 37 Pa. Super. Ct. 426. Since assignment of errore upon the record stands as

quired. Service on the opposite party is also sometimes provided for.[6] In some states the assignment must be made on the record itself,[7] or in appellant's brief.[8] In Georgia errors may be assigned on exceptions pendente lite either in the bill of exceptions[9] or in the appellate court at any time before the argument is begun. Errors not assigned will not ordinarily be considered[10] though the court may re-

pleadings in supreme court, it is necessary, and, if case is submitted for final decision without one, appeal will be dismissed. Village of East Peoria v. Lake Erie & W. R. Co., 237 Ill. 93, 86 NE 634. Questions involved, as determining jurisdiction, are determined by assignments of error. Lewis v. Lewis, 237 Ill. 416, 86 NE 635.

4. Filing within one year is essential to, perfecting appeal under Burns' Ann. St. 1901, § 645. Brouilletts Creek Coal Co. v. Pomatto [Ind. App.] 85 NE 993. Where record fails to show filing, appeal will be dismissed. Lowenstein v. Bache, 37 Pa. Super. Ct. 426. Printing purported assignment in paper book does not cure defect. Id. Omission to file is not mere formal defect which appellate court is at liberty to disregard. Id.

5. Statute requiring filing with clerk of trial court before taking out transcript held mandatory. Newman v. Satterwhite [Tex. Civ. App.] 118 SW 1145.

6. Rules do not require transcript to show service of copy of assignment on defendant in error or counsel. Thomas v. Price [Fla.] 48 S 17.

7. Fact that duly authenticated bill of exceptions contains no assignment of errors is not conclusive that none were presented, though rule requires assignment of errors to be part of bill. Thomas v. Price [Fla.] 48 S 17. Since court may refuse to settle bill when no assignment of error is presented, it may be presumed in absence of contrary showing that assignment was presented to judge with bill, especially where no exception to bill. Id. Failure to make assignment part of bill of exceptions not ground for striking. Id. Errors of law not appearing on judgment roll cannot be reviewed without specifications duly settled in statement of the case. McLaughlin v. Thompson [N. D.] 120 NW 554. Paper purporting to contain specifications of error left with trial judge after settlement of statement of the case does not become part of such statement unless so ordered by the judge, and must be disregarded. Id. Where no specification of errors therein, statement of the case will be disregarded. Rev. Code 1905, § 7058. Id. Where settled statement of case in action properly triable to jury contains no specification of errors, same must be disregarded. Code 1905, § 7058. State v. Barnes County School Dist. No. 50 [N. D.] 120 NW 555. In such cases review is restricted to errors, if any, appearing on face of judgment roll proper. Id. Abstract must contain specification of errors relied on. Landis Mach. Co. v. Konantz Saddlery Co. [N. D.] 116 NW 333. Contention that abstract did not contain any assignment of errors and hence same could not be considered held untenable where bill of exceptions contained full statement of errors relied on, with exception of assignment that court erred in overruling motion for new trial, which was made in assignment of errors in the abstract. City of Chamberlain v. Quarnberg [S. D.] 119 NW 1026. Where no assignments of error copied into transcript, errors presented in brief cannot be considered unless shown by the record. Engleman v. Missouri K. & T. R. Co. [Tex. Civ. App.] 118 SW 1089. While it is usual and proper to incorporate assignments of error in record, in absence of objection assignments properly filed and certified might be considered though not so incorporated. Newman v. Satterwhite [Tex. Civ. App.] 118 SW 1145.

8. See post, § 11F.

9. Exceptions pendente lite not considered where error not assigned thereon in bill of exceptions or elsewhere. Schaeffer v. Central of Georgia R. Co. [Ga. App.] 64 SE 1107.

10. Knapp & Co. v. San Joaquin Cigar Co. [Cal. App.] 101 P 929; Paton v. Robinson [Conn.] 71 A 730; Monroe Nat. Bank v. Catlin [Conn.] 73 A 3; Neal v. Davis Foundry & Mach. Works, 131 Ga. 701, 63 SE 221; Fould de Grasse v. H. W. Gossard Co., 236 Ill. 73, 86 NE 176, rvg. 138 Ill. App. 375; People v. Chicago, 238 Ill. 146, 87 NE 307; Guy v. McDuffie [La.] 49 S 222; Merrill Trust Co. v. Hartford [Me.] 72 A 745; Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1074, 119 NW 589; Minneapolis Threshing Mach. Co. v. Peters [Minn.] 120 NW 1134; Fearon v. Mullins [Mont.] 98 P 650; Foster v. Winstanley [Mont.] 102 P 574; Toole v. Weirick [Mont.] 102 P 590; Axel v. Kraemer, 75 N. J. Law, 688, 70 A 367; Prime v. Yonkers, 131 App. Div. 110, 115 NYS 305; Noble State Bank v. Haskell [Okl.] 97 P 590; Canole v. Allen, 222 Pa. 156, 70 A 1053; Nelson v. Brown [Tex. Civ. App.] 111 SW 1106; Young v. State Bank [Tex. Civ. App.] 117 SW 476; Ft. Worth L. & P. Co. v. Moore [Tex. Civ. App.] 118 SW 831; San Pedro, etc., R. Co. v. Salt Lake City Board of Education [Utah] 99 P 263; Green County v. Thomas, 211 U. S. 598, 53 Law. Ed. —; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —; Russel v. Huntington Nat. Bank [C. C. A.] 162 F 868; Ajax Forge Co. v. Morden Frog & Crossing Works [C. C. A.] 164 F 843. Length of judicial day. Hoffman v. Lincoln County, 137 Wis. 353, 118 NW 850. Failure to join party. Isaacks v. Wright [Tex. Civ. App.] 110 SW 970. Competency of witness. Curtis v. Hunt [Ala.] 48 S 598. Rule that statement of facts will not be stricken for failure to except to findings but will be retained for purpose of reviewing error on part of trial court in excluding evidence offered has no application where there are no assignments of error based on alleged error in excluding evidence. Pederson v. Ulbrich, 50 Wash. 211, 96 P 1044. Refusal of instructions. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. Direction of

view them in its discretion,[11] but jurisdictional defects,[12] and fundamental errors apparent of record,[13] and, in some jurisdictions, obvious errors,[14] may be reviewed though not assigned. As a general rule, where a motion for a new trial is necessary to preserve errors at the trial, the denial of such motion must also be assigned.[15] Assignments must name all the parties [16] and must be directed against the persons in whose favor the alleged erroneous rulings were made.[17] An unnecessarily large number of errors should not be assigned.[18] The right to amend assignments depends on the statutes and rules of court in the various jurisdicitons.[19]

(§ 11E) 2. *Proper parties to assign error.*[20]—See 11 C. L. 196—Only parties to the appeal [21] who are aggrieved [22] can assign error.

verdict. Walker v. Texas & N. O. R. Co. [Tex. Civ. App.] 112 SW 430. Finding of commissioner. Young v. Young [Va.] 63 SE 748. That verdict is contrary to and against weight of evidence. Drake Standard Mach. Works v. Brossman, 135 Ill. App. 209. That plaintiff was entitled to new trial for newly-discovered evidence. Crocker v. Steidl [Neb.] 118 NW 1083. Jurisdiction of special term to grant new trial on ground of inadequacy of damages. Hunt v. Long Island R. Co., 130 App. Div. 828, 115 NYS 478. Ruling on arrest of judgment. Hausler v. Com. Elec. Co., 240 Ill. 201, 88 NE 561.

Rulings on pleadings: Overruling demurrer. Tennessee Coal, Iron & R. Co. v. Burgess [Ala.] 47 S 1029; Birmingham R. L. & P. Co. v. Hinton [Ala.] 48 S 546. Carrying demurrer back to complaint and sustaining it. Neyens v. Flesher [Ind.] 88 NE 626. Allowance of amendment. Southern Mut. Life Ins. Ass'n. v. Durdin [Ga.] 64 SE 264. Variance. City of Chicago v. Wieland, 139 Ill. App. 197.

Findings and judgment: Decree must be assumed to be correct when not assigned as error. In re Johnston's Estate, 222 Pa. 514, 71 A 1053. No question presented by exceptions to conclusions of law where no independent assignment of error questioning said conclusions or either of them. Celtic Savings & Loan Ass'n No. 3 v. Curtis [Ind. App.] 87 NE 660. In personal injury action where there was no assignment of error attacking verdict or judgment on ground that plaintiff was not injured, as claimed by defendant's negligence, presumed that she was entitled to recover. Dallas Consol. Elec. St. R. Co. v. Motwiller [Tex. Civ. App.] 112 SW 794.

11. Monroe Nat. Bank v. Catlin [Conn.] 73 A 3. Where departure from established rules and procedure manifests clear disregard of public policy, or is in violation of express statutory provisions, error will be noticed, though not assigned. Permitting husband to testify against wife. Canole v. Allen, 222 Pa. 156, 70 A 1053.

12. Harper v. Harper, 148 N. C. 453, 62 SE 553.

13. Ft. Worth L. & P. Co. v. Moore [Tex. Civ. App.] 118 SW 831. Defect of parties below. Russell v. Bell [Ala.] 49 S 314. Sufficiency of petition to state cause of action. Steger Piano Mfg. Co. v. MacMaster [Tex. Civ. App.] 113 SW 337; Montgomery v. Peach River Lumber Co. [Tex. Civ. App.] 117 SW 1061. Appeal is itself sufficient assignment of error to judgment. Ullery v. Guthrie, 148 N. C. 417, 62 SE 552.

14. Admission of evidence. New York Life Ins. Co. v. Rankin [C. C. A.] 162 F 103. Misconduct of counsel. Alaska Treadwell Gold Min. Co. v. Cheney [C. C. A.] 162 F 593.

15. Questions as to finding against plaintiff in error rendering judgment against him, absence of evidence to support findings and refusal to set aside garnishment. Bennett v. National Supply Co. [Kan.] 102 P 511. Where only matters open to review on record presented are sufficiency of pleadings to support judgment, and sufficiency of findings to support judgment and conclusions, and sufficiency of pleadings is not questioned, and no error is assigned to overruling of motion for new trial, there is nothing left for consideration. Wolf v. Sneve [S. D.] 121 NW 781.

16. Assignment entitled "L. V. Estate of S., deceased, S., Administrator," held to sufficiently designate defendant, and to confer jurisdiction. Light v. Schneck's Estate [Ind. App.] 86 NE 442. Where appellees were described by names which they signed to petition whereby proceeding was commenced, and by which they appeared and became parties below, held that they could not have appeal dismissed because their initials were used instead of full Christian names as required by rules. Hall v. McDonald [Ind.] 85 NE 707. Appellees held not entitled to dismissal on ground that name "C, executor" was insufficient to make him party to vacation appeal in his representative capacity, where he was described in same manner in their complaint. Hiatt v. McColley [Ind.] 85 NE 772.

17. Plaintiff sued Philip M. and thereafter filed amended complaint naming Peter M. as defendant, Philip not being named therein or made party thereto. Thereafter Peter M. demurred, and from order sustaining demurrer plaintiff appealed, assignment of errors naming Philip M. as appellee, and Peter M. not being named therein. Held that appeal could not be sustained on theory that Philip was answering to name of Peter, there being nothing in record to show that fact, or that they were one and the same person. Berkey v. Tipton L., H. & P. Co., 42 Ind. App. 301, 85 NE 724, 84 NE 1095. Peter M. and Pbilip M. are not idem sonans and cannot be presumed to represent one and the same person. Id.

18. Sixty-one errors violent presumption and not necessary to assign every one in order to secure reversal. Hoopes v. Crane [Fla.] 47 S 992.

19. Vague and insufficient assignments cannot be cured by amendment in supreme court. Taylor v. Wright [Ga.] 64 SE 656.

20. Search Note: See Appeal and Error,

(§ 11E) 3. *Cross errors.*[23]—See 11 C. L. 197—The appellee may take advantage of any error to support the judgment,[24] but as a general rule the appellee cannot be heard as to errors which he does not raise by cross assignment.[25] Cross assignments will not be considered unless germane to the questions raised by the appeal.[26] Cross assignments must be filed within the time prescribed,[27] and are

Cent. Dig. §§ 2983-2989, 2560-3613; Dec. Dig. §§ 720, 721, 877-884; 2 Cyc. 1003; 3 Id. 233-256.

21. Where error was assigned by certain bank and W. as trustee for said bank, held that it would be assumed that it was in his trust rather than his individual capacity that latter described himself as appellant, proceedings showing that he was actively prosecuting in trust capacity. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417.

22. Party cannot assign errors with reference to other parties not complaining thereof. Kennard v. Curran, 141 Ill. App. 621. Appellant from denial of petition in intervention cannot except as to judgment rendered against defendant who does not appeal. Armour Car Lines v. Summerour, 5 Ga. App. 619, 63 SE 667. Neither of two defendants in whose favor separate judgments were rendered held entitled to assign errors on appeal by their unsuccessful codefendant from judgment against him, they not being necessary or proper parties to the appeal, and hence having been improperly joined. Town of Windfall City v. First Nat. Bank [Ind.] 87 NE 984. Drainage commissioners who appeal in their individual capacity cannot assign as error that district was not properly served with process. People v. O'Connor, 239 Ill. 272, 87 NE 1016. Defendant held not entitled to predicate error on exception to refusal of instructions asked by plaintiff. Dawson v. Ash Grove White Lime Ass'n, 134 Mo. App. 220, 113 SW 718. In trespass to try title where appellant as warrantor impleaded, he was entitled to defend title and assign error to exclusion of deed in plaintiff's chain of title. Cleveland v. Shaw [Tex. Civ. App.] 119 SW 883. Where receiver in bankruptcy showed no reason why he should have been allowed to intervene in proceedings in state court for appointment of receiver for partnership, held that he could not complain of supposed errors as to one of the partners. Southwell v. Church [Tex. Civ. App.] 111 SW 969.

23. **Search Note:** See Appeal and Error, Cent. Dig. §§ 3053-3057; Dec. Dig. § 747; 2 Cyc. 1010-1012.

24. Respondent may have benefit of his exceptions to rulings in support of a judgment which would otherwise yield to appellant's exceptions, and may also take advantage of any fatal defect in plaintiff's case not required to be brought to trial court's attention for ruling and exception in order to save point for ruling on appeal. Fleming v. Northern Tissue Paper Mill, 135 Wis. 157, 114 NW 841. Respondent is not, however, entitled to benefit of exceptions taken below, as on appeal by him, for purposes of a new trial as a matter of right, nor to consideration of motion made but not passed on below. Id. Findings of fact not being essential, under Code, § 4107, to review of a judgment or order, when made they may be assailed by appellee as not warranted by evidence in order to sustain the judgment. Commercial Nat. Bank v. Gilinsky [Iowa] 120 NW 476.

25. Seyfried v. Knobiauch [Colo.] 96 P 993; People v. Sholem, 238 Ill. 203, 87 NE 390. Striking out appellee's plea in reconvention on exception. Mitchell v. Rushing [Tex. Civ. App.] 118 SW 582. Admission of evidence. Coats v. Chicago, etc., Ry. Co., 239 Ill. 154, 87 NE 929. Refusal of instructions. The Union Nat. Bank v. Griswold, 141 Ill. App. 464. Alleged errors in conclusions of law. State v. Carey [Ind. App.] 87 NE 670. Decree in favor of appellant. Crowley v. McCambridge, 237 Ill. 222, 86 NE 725. Fact that freehold was involved in issue raised by minor defendants in partition held not to give supreme court jurisdiction on complainants' appeal, there being no cross errors assigned on behalf of minors and no reason appearing why any should be, decree being final in their favor as well as against them, and appellants having no right to insist upon assignment of errors on behalf of minors upon decree apparently favorable to them. Lewis v. Lewis, 237 Ill. 416, 86 NE 635. In suit to construe will assignment that court erred in holding that certain fund should be turned over to trustees for benefit of certain association held to entitle appellate court to determine whether circuit court had properly disposed of such fund, and, upon holding that it had not, to determine what disposition should be made of it, though city, which appeared and set up rights of public therein, did not assign cross errors. Mason v. Bloomington Library Ass'n, 237 Ill. 442, 86 NE 1044.

26. Can only be assigned or predicated upon questions presented in lower court or rulings of latter which arise out of or are connected with the judgment on which appellant bases his appeal. Town of Windfall City v. First Nat. Bank [Ind.] 87 NE 984. Appeal by one defendant from judgment against it held not to necessarily bring up separate judgments against other defendants. Id. Separate judgments were rendered in favor of each of two defendants and against the other. Held that on appeal by latter complainant could not, by cross assignment, question propriety of judgments in favor of other two defendants, and thereby make cross assignment serve as an independent appeal by it from such independent judgments. Id. Creditor's bill was brought to set aside numerous distinct conveyances and sales to different persons. Appellate court found in favor of all defendants except one, and against him, and he appealed. Held that decree had effect of several different decrees, and that appeal brought up only decision against

sometimes required to be served on all parties affected thereby.[28] In some states cross assignments may be incorporated in the brief under specified conditions.[29]

(§ 11E) 4. *Specifications and averments.*[30]—See 11 C. L. 197—Assignments of error must be definite and specific.[31] Applications of this rule to assignments re-

him with which none of other defendants were concerned, and hence cross errors complaining of judgment in favor of other defendants would not be considered. Walker v. Montgomery, 236 Ill. 244, 86 NE 240. One cannot appeal by assigning cross errors in appeal taken by party not affected by matters with which such cross errors are concerned. City of Centralia v. Norton & Co., 140 Ill. App. 54. Where on petition from, and supersedeas to decree, partial appeal only is allowed involving certain sums to be paid plaintiff, and court erroneously permits retention of portion of same fund, such error cannot be corrected on cross assignment of error by plaintiff claiming such sum, but will only be corrected on independent appeal by plaintiff. Dent v. Pickens [W. Va.] 64 SE 258. Cross assignment complaining of sustaining of exception to pleas and cross bill of defendant, setting up fraud on part of broker and another not parties to suit, and striking out same, held not open to consideration where said parties were not made parties to plaintiff's appeal, and plaintiff did not complain of judgment in their favor, and defendant prosecuted no cross appeal. Farris v. Gilder [Tex. Civ. App.] 115 SW 645. Where only one of several plaintiffs appealed, held that cross assignments not affecting appellant's interest in judgment appealed from would not be considered. Gilmer's Estate v. Veatch [Tex.] 117 SW 430. Appellee or defendant in error cannot raise questions by cross error or assignment in appellate court in absence of appeal or writ of error raising such questions but can only be heard in support of order, decree or judgment below. Shawnee County Com'rs v. Hurley [C. C. A.] 169 F 92. Appellee is entitled to have considered cross assignments which fundamentally attack the maintenance of appellant's action. Murphey v. Brown [Ariz.] 100 P 801. Held proper on plaintiff's appeal to consider cross assignment complaining of the sustaining of a demurrer to plea to jurisdiction. Id. Contestee appealed from order adjudging county seat election void and ordering new election. Appellate court held that election was valid and resulted as contended by contestants. Held that judgment was properly rendered declaring that town was county seat, as contended by contestant where latter filed cross assignments of error, though they did not perfect appeal. Durham v. Rogers [Tex. Civ. App.] 20 Tex. Ct. Rep. 834, 106 SW 906.

27. Not considered where not filed until after submission of case. Reid v. Yazoo & M. V. R. Co. [Miss.] 47 S 670. Cross assignments raising question that petition did not state cause of action held open to consideration though not filed in trial court as required by rule 101. Farenthold v. Tell [Tex. Civ. App.] 113 SW 635.

28. San Pedro, etc., R. Co. v. Board of Education [Utah] 99 P 263.

29. Cross assignments not considered, where they were not copied in record and brief was not filed in lower court. Dist. Court rule 101. City of San Antonio v. Alamo Nat. Bank [Tex. Civ. App.] 114 SW 909. Cross assignments set out in brief not considered where none of briefs filed in court of appeals contained certificate of clerk of trial court showing that it was copy of brief filed in his office, and date of filing, as required by district and county court rule 1. Farris v. Gilder [Tex. Civ. App.] 115 SW 645.

30. Search Note: See Appeal and Error, Cent. Dig. §§ 2997-3038, 3058-3064, 3074-3089; Dec. Dig. §§ 723-742, 750-754; 2 Cyc. 985-1002, 1010.

31. Whitaker v. Mastin, 143 Ill. App. 195; Hoag v. Nanstad [Wis.] 121 NW 125; Chesapeake Transit Co. v. Mott [C. C. A.] 169 F 543; Norfolk & W. R. Co. v. Gardner [C. C. A.] 162 F 114. Only points raised by specifications can be considered. Greve v. Echo Oil Co., 8 Cal. App. 275, 96 P 904. Assignment with no reasons presented to support is waived. Bloch v. Crumpacker [Ind. App.] 88 NE 875. Need not set forth reasons why action of court is claimed to be erroneous, but is enough to specifically point out particular ruling complained of. Missouri K. & T. R. Co. v. James [Tex. Civ. App.] 120 SW 269. Should be so complete of themselves as not to require reference to other parts of record. North Mountain Water Supply Co. v. Troxell [Pa.] 72 A 621. Assignment must refer to page of appendix where matter may be found. Foringer v. New Kensington Stone Co. [Pa.] 72 A 797. Rule that assignment must point out whether exception is based upon errors of law or fact applies only where decision complained of involves questions of law and fact, and not where question of law alone. Meeks v. Meeks, 5 Ga. App. 394, 63 SE 270. Not applicable where judgment complained of consisted in sustaining or overruling motion, demurrer or similar pleading in which specific propositions involved in judge's action have been particularly set forth. Id. Assignment held not defective as mere recital of fact instead of positive averment. Simplex R. Appliance Co. v. Western Rawhide & Belting Co. [Ind.] 88 NE 682.

Held too general. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Rev. St. 1905, art. 1018. City of San Antonio v. Alamo Nat. Bank [Tex. Civ. App.] 114 SW 909. To raise question of abuse of discretion in failing to submit issue to jury in equity cause. Lawrence v. Lawrence [S. C.] 63 SE 690. That court allowed testimony of witness to be withdrawn, where substance of evidence not apparent and no means of knowing if same was harmful. Mitchell v. Masury [Ga.] 64 SE 275. That court erred in overruling motion to set aside judgment for reason that it was against law and evidence. Texas Land & Irr. Co. v. Sanders [Tex. Civ. App.] 113 SW 558. That court erred in overruling exceptions of appellant, and con-

specting pleadings,[32] the admission and exclusion of evidence,[33] instructions,[34] of

firming the verdict. Wallach v. MacFarland, 31 App. D. C. 130. Assignment held in effect that court erred in refusing to direct verdict and hence not sufficiently specific. Canerdy v. Port Huron, etc., R. Co. [Mich.] 16 Det. Leg. N. 85, 120 NW 582. Assignment to refusal to grant motion not considered, where did not set forth exact language of motions or order of court thereon, and did not show that any exception was taken or allowed. Sipe v. Pensylvania R. Co., 222 Pa. 400, 71 A 847. Assignment to refusal to grant change of venue not considered, where neither order of court nor exception thereto was set forth in assignment. Id. Assignment to dismissal of exceptions to sheriff's sale and refusal to set aside is improper where exceptions are not set forth. Seltzer v. Boyer [Pa.] 73 A 438. Assignment to dismissal of exception to administrator's account must set out exception in its exact words. In re Johnston's Estate, 222 Pa. 514. 74 A 1053. Specification that there was no evidence that sale had not been confirmed by court held not to reach finding that confirmation had been refused. In re Richards' Estate, 154 Cal. 478, 98 P 528.

Assignments held sufficiently specific. Corcoran v. Kostrometinoff [C. C. A.] 164 F 685. Statement in bill of exceptions that plaintiff excepts and assigns direction of verdict as error raises question whether particular verdict was demanded as matter of law under pleadings and evidence. Meeks v. Meeks, 5 Ga. App. 394, 63 SE 270.

32. Assignment that court erred in sustaining demurrer to petition is sufficiently specific. Johnson v. Desmond Chemical Co., 152 Mich. 84, 15 Det. Leg. N. 138, 115 NW 1043. On appeal from judgment on demurrer assignment should set out which of grounds set out in the demurrer will be relied on, since Revisal 1905, § 475, requires demurrer to specify grounds thereof. Ullery v. Guthrie, 148 N. C. 417, 62 SE 552. Where assignment of error in sustaining demurrer is general embodying errors claimed as to several rulings if either of the grounds of demurrer or either of counts is sustainable, ruling will be upheld. Thompson v. Nashville, etc., R. Co. [Ala.] 49 S 340. Assignment that "the court erred in overruling the demurrer to the second and third paragraphs" of the answer held sufficient where demurrer to each paragraph separately was overruled generally, though assgnment could only be upheld if both paragraphs were insufficient. Johnson County Sav. Bank v. Kramer, 42 Ind. App. 548, 86 NE 84. Assignment to ruling on demurrer to be supported must be good as to all included counts. Brent v. Baldwin [Ala.] 49 S 343. Where defendant files joint and several demurrer to each and every of several replications, he is entitled to same rights as though he had filed separate demurrer to each and assignment based on order overruling such demurrer will be held good if any one of such replications is found to be bad. Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922. Assignment that complaint does not state facts sufficient to constitute cause of action tests complaint with all the strictness of demurrer below on same grounds. Mutual Reserve Life Ins. Co. v. Ross, 42 Ind. App. 621, 86 NE 506. Error assigned in refusing to permit filing of amended answer is properly abandoned on plaintiff conceding sufficiency of original answer to put in issue matter sought to be raised by amendment. Smith v. Lurty, 108 Va. 799, 62 SE 789.

Assignments held insufficient: That specified paragraph of complaint does not state facts sufficient to constitute cause of action. Ziegler v. Tunkhouser, 42 Ind. App. 428, 85 NE 984. Assignments to refusal to sustain general and special exceptions to petition. Holland v. Riggs [Tex. Civ. App.] 116 SW 167. Assignment to refusal to sustain exception to answer, for failure to show exactly what portion of answer was objected to. Adams v. Gary Lumber Co. [Tex. Civ. App.] 117 SW 1017.

33. Under rule 26 "when error assigned is to admission or rejection of evidence, specifications must quote questions or offers, rulings thereon, and testimony or evidence admitted, if any, together with reference to page of paper book where matter may be found in its regular order in printed evidence, notes or of trial." Kalin v. Wehrle, 36 Pa. Super. Ct. 305; Brouse v. Oliger, 36 Pa. Super. Ct. 399. Assignment must not only disclose admission of evidence, but that same was made over objection of complaining party at that time. Cochran v. Bugg, 131 Ga. 588, 62 SE 1048.

Assignments held insufficient. Stelzer v. Condon [Iowa] 118 NW 39; State v. Malony, 81 S. C. 226, 62 SE 215. That court erred in admitting three law books and to introduce in evidence three cases reported therein. Lay v. Nashville, etc., R. Co., 131 Ga. 345, 62 SE 189. Failure to set out evidence admitted either literally or in substance. Stoner v. Patten [Ga.] 63 SE 897. Dodge v. Cowart, 131 Ga. 549, 62 SE 987; Cochran v. Bugg, 131 Ga. 588, 62 SE 1048; Jackson v. Buice [Ga.] 63 SE 823; Mitchell v. Masury [Ga.] 64 SE 275; Winnett v. Carnegie Natural Gas Co., 37 Pa. Super. Ct. 204. Failure to specify alleged improper evidence. Sanzenbacher v. Santhuff [Mo.], 119 SW 395. Failure to show of whose testimony the complaint is made. Sims v. Sims, 131 Ga. 262, 62 SE 192. Failure to specify particular evidence or to specify grounds of objection. McElwaney v. Mac Diarmid [Ga.] 62 SE 20. Failure to show that any objection was made when testimony was offered. Hawkins v. Studdard [Ga.] 63 SE 852; Foddrell v. Dooley, 131 Ga. 790, 63 SE 350. Failure to set forth full substance of evidence ruled out. C. C. A. rule 11. Garrett v. Pope Motor Car Co. [C. C. A.] 168 F 905.

34. Should point out particular objections relied on. City of Baltimore v. Maryland [C. C. A.] 166 F 641. Must set out part referred to tolidem verbis. Rule 11 C. C. A. Norfolk & W. R. Co. v. Gardner [C. C. A.] 162 F 114. Must quote charge verbatim. Rule of court XV. Shannon v. Cohlhepp, 37 Pa. Super. Ct. 241. Where whole charge is assigned as error it must

sufficiency of the evidence,[35] orders,[36] verdict,[37] findings,[38] judgments,[39] and rulings

be set forth. Mitchell v. Edeburn, 37 Pa. Super. Ct. 223.

Assignments held sufficient. Pelham Mfg. Co. v. Powell [Ga. App.] 64 SE 1116. Assignment "for errors in charge," where jury instructed to find for plaintiff upon whole evidence. Woodridge v. Brown, 149 N. C. 299, 62 SE 1076.

Assignments held insufficient. City and County of Denver v. Magivney [Colo.] 96 P 1002; Millen & S. W. R. Co. v. Allen, 130 Ga. 656, 61 SE 541; Wirsing v. Smith, 222 Pa. 8, 70 A 906. Failure to set forth instructions refused. C. C. A. Rule 11. Garrett v. Pope Motor Car Co. [C. C. A.] 168 F 905. Refusal to give requested instruction in case pending in federal court of appeals of Indian Territory at time of admission of state of Oklahoma will be disregarded by Oklahoma supreme court unless said instruction is set out in totidem verbis in assignment of errors as required by rule 13 of said federal court. Dunlap v. Flowers [Okl.] 96 P 643. Failure to state in what respect court erred. C. C. A. Rule 11. Garrett v. Pope Motor Car. Co. [C. C. A.] 168 F 905. Criticism of charge as a whole. Atlantic Coast Line R. Co. v. Jones [Ga.] 63 SE 834. That instructions were in general way too favorable to plaintiffs. Larson v. Thoma [Iowa] 121 NW 1059. That instruction given was wrong or instruction refused was right. Thunborg v. Pueblo [Colo.] 101 P 399. Mere statement that it is bad law. Sharp v. Missouri Pac. R. Co., 213 Mo. 517, 111 SW 1154. That court erred in giving "the following instructions" followed by extended abstract of printed record of entire charge, containing large number of distinct propositions. Stevens v. Sandnes [Minn.] 121 NW 902. That "court erred in charging the jury as follows, especial attention being given to those portions of the charge inclosed in brackets," quoting whole charge. Wirsing v. Smith, 222 Pa. 8, 70 A 906. That court separately erred in refusing to give requested charges numbered, etc. Southern R. Co. v. Nowlin [Ala.] 47 S 180. Assignment excerpt from charge, where quoted excerpt is only a fragment of a sentence to effect that if jury should find certain facts, without stating their legal effect or significance and concluding with word, "etc." Boswell v. Gillen, 131 Ga. 310, 62 SE 187. Assignment complaining of paragraph of charge which contained more than one proposition of law and presented more than one issue, for failing to indicate which part of such paragraph was objected to. Adams v. Gary Lumber Co. [Tex. Civ. App.] 117 SW 1017. General assignment not good where portion of charge contains several distinct propositions, one or more of which are correct in the abstract, since it does not show whether exception is taken to correct or erroneous portion. Chandler v. Mutual Life & Industrial Ass'n, 131 Ga. 82, 61 SE 1036. Question whether case was submitted on erroneous theory not open to consideration where error is not assigned on any particular part of charge. Putnam v. Phoenix Preferred Acc. Ins. Co. [Mich.] 15 Det. Leg. N. 980, 118 NW 922. Assignment that court erred in refusing charge asked does not raise questions whether requested instruction being erronous, court erred in not submitting issue in some form. Clevenger v. Blount [Tex. Civ. App.] 114 SW 868; Hess v. Webb [Tex. Civ. App.] 113 SW 618; Laughman v. Sun Pipe Line Co. [Tex. Civ. App.] 114 SW 451. Failure to submit issue not ground for reversal, where no error was assigned to charge because of its omission, and special charge requested on subject was incorrect. Rev. St. 1895, art. 1018. Buchanan v. Burnett [Tex. Civ. App.] 114 SW 406. Assignment to refusal to instruct as requested held not to raise question of refusal to instruct on material issue. McKinney v. Carson [Utah] 99 P 660.

35. Particulars wherein evidence is insufficient must be specified. Rule 26. Houtz v. Union Pac. R. Co. [Utah] 99 P 997. Assignment that court erred in denying motion for new trial held not to raise question of insufficiency of evidence. Blue Creek Land & Live Stock Co. v. Anderson [Utah] 99 P 444. Court of appeals will not refuse to consider assignments though they merely attack judgment as unsupported by evidence, where findings do not support judgment. Belt v. Cetti [Tex. Civ. App.] 118 SW 241. Exceptions that decision of magistrate was opposed to overwhelming preponderance of testimony held implied admission that there was some evidence to support it. May v. Augusta & A. R. Co., 80 S. C. 552, 61 SE 1019.

Assignments held insufficient. Goodwin v. Burton [Tex. Civ. App.] 118 SW 587. That verdict is not justified by evidence and contrary to law. Chicago, etc., R. Co. v. Anderson [C. C. A.] 168 F 901. Assignment to "entry of judgment." Keeley v. Ophir Hill Consol. Min. Co. [C. C. A.] 169 F 598. Under Rule 22, requiring a condensed recital of evidence alleged to be insufficient to sustain a finding, a reference to certain facts testified to and other facts not testified to together with conclusions of counsel is not sufficient. Rule requires substance of what witnesses said to be set forth, and court will draw its own conclusions. Ireland v. Huffman [Ind.] 88 NE 508. In absence of specifications of particulars, objection that verdict is not sustained by evidence not considered. Rev. Codes 1905, § 7058. Flora v. Mathwig [N. D.] 121 NW 63.

36. General assignment to refusing of temporary injunction sufficient. Peginis v. Atlanta [Ga.] 63 SE 857.

37. Assignment that the verdict is contrary to law raises question whether it is contrary to law as contained in court's charge, but nothing more. Cowperthwait v. Brown [Neb.] 117 NW 709.

38. Where case submitted to court for trial on all issues without jury, assignment to findings and rulings of court on merits of case held too general to raise any question. Nashville, etc., R. Co. v. Central of Georgia R. Co. [Ga.] 63 SE 823

39. Where plaintiff in error assigns for error in supreme court that appellate court erred in affirming judgment, every question

on motions for new trial,[40] will be found in the notes. The assignment should be accurate.[41] Distinct errors must not be grouped in one assignment.[42] A joint assignment by several parties must be good as to all who unite in it,[43] and an assign-

reviewable in supreme court under errors assigned in appellate court is properly raised. Van Cleef v. Chicago, 240 Ill. 318, 88 NE 815.

Assignments held insufficient: General assignment to entire judgment. Taylor v. Wright [Ga.] 64 SE 656. That court erred in rendering judgment. Theobold v. Clapp [Ind. App.] 87 NE 100. Exception to decision of court in giving decisions in favor of petitioner and against respondent, and granting prayer of said petition. Fales v. Fales [R. I.] 70 A 965. That court erred in concluding under facts found that defendant was guilty of negligence and that plaintiff was not guilty of contributory negligence, and in entering judgment for plaintiffs, held to present more than one distinct proposition and not to separately present any ground of error under either of them. Pecos & N. T. R. Co. v. Ball [Tex. Civ. App.] 114 SW 403. Assignment on appeal from grant of preliminary injunction must set out decree appealed from, and is insufficient when merely alleging that court erred in granting preliminary injunction because mandatory. North Mountain Water Supply Co. v. Troxell [Pa.] 72 A 621.

40. Assignment to overruling motion because verdict is contrary to law and evidence too general. Hicks v. Stewart [Tex. Civ. App.] 118 SW 206. Assignment that court erred in overruling motion without specifying which of several such motions was meant held to properly call in question ruling on motion for new trial of that trial resulting in judgment appealed from. Bivens v. Henderson, 42 Ind. App. 562, 86 NE 426. Assignment that court erred in overruling defendant's motion "on the grounds and for the reasons therein stated," held insufficient under rule 11, requiring each error to be particularly specified. Alexander v. Wellington [Colo.] 98 P 631. Assignment that court erred in overruling motion for reasons assigned therein held too general, where motion was based on several grounds. Walker v. Texas & N. O. R. Co. [Tex. Civ. App.] 112 SW 430. Assignment that court erred in denying motion "upon several grounds alleged in the notice thereof" held insufficient to present question that damage awarded was excessive which was one of grounds for motion. Ellering v. Minneapolis, etc., R. Co. [Minn.] 119 NW 507. Assignment to overruling motion brings up every exception saved by complaining party during progress of trial. Chicago, etc., R. Co. v. Davis [Okl.] 101 P 1118. Assigning overruling of motion held to present all questions properly assigned as grounds for motion, since ruling forming basis, grounds, or cause for new trial, cannot be independently assigned as error. Teeple v. State [Ind.] 86 NE 49. Sufficiency of evidence to support decision of trial court may be raised under assignment to overruling of motion for new trial. Strebin v. Myers, 42 Ind. App. 381, 85 NE 784.

41. Assignment mistaking question sought to be reviewed cannot be considered. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. Assignment not considered where it quoted ruling upon one question, and gave answer of witness to another question, under another ruling not assigned as error. Sipe v. Pennsylvania R. Co., 222 Pa. 400, 71 A 847. Assignment as to ruling in one designated court presents no question as to an error which may have been committed in another court. State v. Cadwallader [Ind.] 87 NE 644. Pending motion for change of venue demurrers were filed to certain paragraphs of complaint. Venue was changed and demurrers were sustained by court to which case was transferred. Held that assignment that "the court erred" in sustaining the demurrers was sufficient as against objection that it did not direct assignment to specific court in which ruling was had. Id. Assignments to instruction calling court's attention to subsequent assignment referring to entirely different portion of charge present no question. San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 26. Assignment in equity cause that master erred in report not to be considered, since appellate court reviews action of trial court on master's report and not action of master per se. Braxton v. Liddon, 55 Fla. 785, 46 S 324. Where evidence not specified in petition admitted to rebut claim that plaintiff was injured, error in instruction permitting consideration of such evidence was error as to instructions and not reviewable on assignment as to evidence. Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418.

42. Assignment complaining of several rulings as to distinct questions not to be considered. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100; McCormick v. Jester [Tex. Civ. App.] 115 SW 278; O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. Assignment presenting two distinct questions not aided by fact that it is followed by two propositions intended to explain each of the points presented. Kaack v. Stanton [Tex. Civ. App.] 112 SW 702. Single assignment complaining of refusal to give several charges not germane to each other but presenting distinct and several propositions of law not considered. Missouri, K. & T. R. Co. v. Nelser [Tex. Civ. App.] 118 SW 166. Assignment to refusal of court to give lengthy charge embracing number of district rules and evidently intending to present various phases of law applicable to issue not in compliance with rules. Southwestern Tel. & T. Co. v. Younger [Tex. Civ. App.] 120 SW 530. Several errors in regard to admission and exclusion of evidence should not be grouped in one assignment, since if any of rulings complained of are correct, assignment must be overruled. Vaughan's Seed Store v. Stringfellow [Fla.] 48 S 410; Hammond v. A. Vetsburg Co. [Fla.] 48 S 419.

43. Roe v. Doe [Ala.] 48 S 49; Davis v. Vandiver & Co. [Ala.] 49 S 318; Kime v. Vetter [Ind.] 88 NE 497; State v. Merchants'

ment embracing several rulings will not be sustained unless all constitute reversable error.[44] Assignments must be directed to reviewable rulings or judgments.[45] In Indiana matters which are grounds for a new trial cannot be assigned as independent errors.[46] In Georgia a direct bill of exceptions to rulings pendente lite must assign errors both to such rulings and also to a final verdict or judgment.[47] The assignment to the judgment may, in such case, be in general terms.[48]

(§ 11E) 5. *Demurrers, pleas, and replication.*[49]—See 11 C. L. 202—The necessity of pleas to raise particular objections is treated in a subsequent section.[50] The answer to an appeal must be filed within the prescribed time.[51] By statute in some states the fact that a plea of release of errors is adjudged bad or is not sustained does not deprive defendant in error of the right to join in error.[52]

(§ 11) *F. Briefs and arguments.*[53]—See 11 C. L. 202—Briefs must be filed[54]

Bank, 81 Neb. 704, 120 NW 157. Where pleadings and findings disclosed that appellants were husband and wife, held that they might assign errors jointly though their exceptions to conclusions of law and their motion for new trial were several. McNew v. Vert [Ind. App.] 86 NE 969. Where practically all parties below were parties to joint appeal, and appellees themselves presented and argued some of questions claimed not to be open to consideration, held that assignments claimed not to affect all appellants jointly would be considered, in view of Mills' Ann. St. § 2423, providing for liberal construction of statutes relating to appeals, and discretionary power of court to notice errors apparent of record notwithstanding failure to comply with statute. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. [Colo.] 98 P 729.

44. Not where one was not open to objection because not excepted to, or not properly objected to. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Where giving of several instructions is complained of in single assignment, all must be erroneous to make same available. Parker Land & Imp. Co. v. Ayers [Ind. App.] 87 NE 1062.

45. Assignment to opinion of court is improper. Seltzer v. Boyer [Pa.] 73 A 438. On trial by court without jury. Schorb v. Haurand [N. J. Err. & App.] 71 A 242.

46. Assignments that court erred in submitting case to jury for trial and in refusing to submit it to court for trial held to present no question. Kelley v. Bell [Ind.] 88 NE 58. May assign and discuss overruling of petition to remove case to federal court as independent error and error in support of motion for new trial without thereby waiving error assigned in overruling motion for new trial. Hercules Torpedo Co. v. Smith [Ind. App.] 87 NE 254.

47. Potts v. Prior, 131 Ga. 198, 62 SE 77. Direct bill of exceptions will not be considered unless there is at least a general exception to final judgment. Jones v. Poole, 5 Ga. App. 113, 62 SE 711. No merit in motion to dismiss bill of exceptions on ground that error was not assigned on verdict and judgment where it appeared from recitals that there was direct and specific exception and assignment of error to direction of verdict, as well as exception and assignment of error to ruling of court in striking answers. Duggan v. Monk, 5 Ga. App. 206, 62 SE 1017. Defendant reserved exceptions pendente lite to overruling of demurrer to petition. Verdict was rendered for plaintiff, and defendant's motion for new trial was dismissed for failure to file brief of evidence in time. Defendant filed his main bill of exceptions within due time excepting to dismissal of motion and assigning error upon his exceptions pendente lite. Held that court would pass on questions presented by exceptions pendente lite irrespective of whether dismissal of motion was proper or improper. Court having erroneously overruled demurrer, whole trial following was improper. Collins v. West, 5 Ga. App. 429, 63 SE 540.

48. Potts v. Prior, 131 Ga. 198, 62 SE 77.

49. Search Note: See Appeal and Error, Cent. Dig. §§ 3065-3073; Dec. Dig. § 749; 2 Cyc. 1007-1009.

50. See post, § 11H.

51. Answer to appeal praying for amendment of judgment appealed from should be filed in supreme court 3 days before cause set down for argument. Not considered when filed 1 day before. Union Sawmill Co. v. Arkansas S. E. R. Co. [La.] 49 S 173.

52. Laws 1907, p. 444, § 109. Schaeffer v. Ardery, 238 Ill. 557, 87 NE 343.

53. Search Note: See note in 9 Ann. Cas. 166.

See, also, Appeal and Error, Cent. Dig. §§ 3090-3110, 4253-4262; Dec. Dig. §§ 755-774, 1075-1079; 2 Cyc. 1013-1024; 3 Id. 387-389; 3 A. & E. Enc. P. & P. 710.

54. Appeal dismissed for want of prosecution where no briefs were served or filed by either party, etc. Meyer v. Chicago, etc., R. Co. [S. D.] 117 NW 1037. Appeal dismissed for failure to file brief, where no answer was made to motion to dismiss, and no excuse offered for failure to comply with rule. Longbotham v. Abercrombie [Tex. Civ. App.] 114 SW 428. Judgment presumed correct in absence of brief or argument. Schwan v. Peterman [La.] 49 S 486. Failure of appellee to file brief justifies a reversal. State v. Huff [Ind.] 87 NE 141. Affirmance without costs where respondent filed no brief. Hoffman v. Hoffman [Mich.] 15 Det. Leg. N. 1031, 118 NW 990. Cross assignment of error not considered where defendant in error did not enter appearance or file brief. Mulford v. Rowland [Colo.] 100 P 603. Failure of appellant to file briefs not ground for dismissal where counsel appear and argue case orally.

within the time prescribed,[55] and a failure to do so is ordinarily ground for dismissal, or pro forma affirmance or reversal,[56] unless excused for good cause shown,[57] or unless there is fundamental error apparent of record.[58] Ordinarily all parties on the same side of the controversy should unite in a single brief.[59] Statutes and rules of court prescribing the form and contents of the brief must be complied with.[60] Among the common requirements is a summary of so much of the record as presents the errors relied on[61] with reference to the record for verification,[62]

Havlick v. Davidson, 15 Idaho 787, 100 P 91. Where appellee expressly waived filing of appellant's brief below, and agreed that same might be filed direct by clerk of supreme court, making no provision as to time of filing, held that submission would not be postponed to give counsel for appellee time to prepare brief. Connor v. Zachry [Tex. Civ. App.] 115 SW 867.

55. Rose v. Arford [Ind.] 88 NE 302; Schafer v. Beecher [Or.] 101 P 899. Time prescribed by rule 15. Horn v. Jones [Mo. App.] 114 SW 545. No dismissal because appellant's brief filed day too late. Campbell v. Order of Washington [Wash.] 102 P 410. Where appellee expressly waived in writing service of appellant's brief and agreed that same might be filed direct by clerk of court of civil appeals, no provision being made as to when same should be filed, or as to giving notices of filing, held that filing at any time before case was submitted in that court was sufficient. Connor v. Zachry [Tex. Civ. App.] 115 SW 867. Held that brief would not be stricken on motion for failure to file same below five days before filing of transcript as provided by Rev. St. 1895, art. 1417, or for failure to give notice of filing. Id. Where relief sought by motion to strike brief depends on issue of fact, facts relied on should be supported by evidence presented in some form appropriate to proceeding, particularly where no notice of motion is required to be given, and opposite party may have no knowledge thereof. Id. Alleged oral stipulation extending time not considered where counsel differ in their recollections regarding same. Bunday v. Smith [S. D.] 121 NW 792. Motion to dismiss must be determined by status of case when motion is heard. Spedden v. Sykes, 51 Wash. 267, 98 P 752.

56. See post, § 11G.

57. Death of counsel's parents sufficient excuse for delay when such delay is without prejudice to other party. W. E. Caldwell Co. v. Steckel [Iowa] 121 NW 376. Delay excused where cause of failure was sickness of counsel and overcrowding of printer with work. Barham v. Shelton [Mo.] 119 SW 1089. Failure to file copy of brief, in lower court five days before filing transcript in court of appeals as required by Rev. St. 1895, art. 1417, held not ground for dismissal where appellant showed good excuse. Missouri, K. & T. R. Co. v. Milliron [Tex. Civ. App.] 115 SW 655. Engagements in causes in other courts no excuse. Flanagan v. Jones [Or.] 102 P 301. Motion to permit appellant to file briefs after time because of general agreement with counsel that latter would always waive filing of briefs in cases in which he represented appellee denied, it appearing that said counsel only represented appellee for purpose of presenting motion, and had no authority to, and did not undertake to waive filing, and that appellant was not misled because he never had any information that said counsel represented appellee and never requested that filing be waived until after expiration of time. Chicago, etc., R. Co. v. Crenshaw [Tex. Civ. App.] 112 SW 117. Pressure of business in attorney's office no excuse, and delay in printer's office will not excuse failure to apply for extension of time. Schafer v. Beecher [Or.] 101 P 899.

58. Motion to dismiss for failure of appellant to file briefs in time denied where record showed want of jurisdiction of lower court, which required reversal. Chicago, etc., R. Co. v. Crenshaw [Tex. Civ. App.] 112 SW 117.

59. Where more than one counsel appears on same side though representing different parties. Kelly v. Fahrney, 239 Ill. 317, 87 NE 1112.

60. Rule 19, prescribing size of page and method of binding typewritten briefs should be complied with. O'Keefe v. Beecher [N. D.] 117 NW 353. Must be folioed. Landis Mach. C. v. Konantz Saddlery Co. [N. D.] 116 NW 333. Under Rule 24, brief may be followed by argument which must be confined to discussion and elaboration of points contained in brief. Kelley v. Bell [Ind.] 88 NE 58. Where brief stated that exception to certain instruction was considered under "point fifth," but there was no consideration of it under that point, unless contained in exception to another instruction, held that exception would not be considered. Drown v. New England Tel. & T. Co., 81 Vt. 358, 70 A 599. Though briefs did not strictly comply with rules, held such substantial compliance that assignments of error would be considered. Hercules Torpedo Co. v. Smith [Ind. App.] 87 NE 254. Appeal dismissed where brief and abstract were wholly unintelligible when considered together, and so in conflict that if one was true other was false. Dawson v. Ash Grove White Lime Ass'n, 134 Mo. App. 220, 113 SW 718.

61. Indiana: Under supreme court rule 22, brief must contain concise statement of so much of the record as fully presents the errors relied on and the exceptions thereto. Teeple v. State [Ind.] 86 NE 49. Rulings not considered where apppellant's brief did not show that they were properly presented by the record. Zehner v. Milner [Ind.] 87 NE 209. Overruling demurrer to paragraph of answer not considered, where appellant's brief did not set out answer or its substance, or demurrer or its substance, or the ground therefor. State v. Lukens [Ind. Ap.] 87 NE 246. Right to question overruling of objection to petition of persons

a separate assignment or statement of the contentions or alleged errors,[63] and a

signing petition for highway improvements to be reinstated on appeal to circuit court as original petitioners, and overruling of motion to strike said petition and reinstatement of such persons, held waived where brief did not comply with rule in that it failed to set out petition, or objections thereto, or motion to strike, or order of reinstatement, or substance thereof. Hall v. McDonald [Ind.] 85 NE 707. Statement in brief, with reference to transcript containing marginal notes of pleadings, instructions, etc., on which error was predicated, held sufficiently to comply with rule. Holt v. Myers [Ind. App.] 88 NE 80. Where no error was predicated on original complaint in condemnation proceedings, held that it was not such a part of record as was necessary to present any of errors relied on, and hence was not necessary for appellant to set it out in his brief. Indianapolis & W. R. Co. v. Hill [Ind.] 86 NE 414. Errors in excluding evidence not considered, where brief did not contain concise statement of the record presenting the question, nor give page of record where evidence could be found, nor name of witness. Ellison v. Flint [Ind. App.] 87 NE 38. Objections to instructions not considered where all instructions given not set out. Ellison v. Ryan [Ind. App.] 87 NE 244. Appellant's brief need not set out all instructions given, but is sufficient to set out those criticised, it being duty of appellee to show if other instructions cured error. Simplex R. Appliance Co. v. Western Rawhide & Belting Co. [Ind.] 88 NE 682. Where appellant's brief contains neither instructions given or those complained of or substance thereof, no question as to same was presented. Southern Indiana R. Co. v. Drennen [Ind. App.] 88 NE 724. Questions presented upon conclusions of law not considered, where neither special finding of facts, nor its contents were set out in brief and it contained no statement of what conclusions of law were, nor their substance, nor how many there were. State v. Lukens [Ind. App.] 87 NE 246. Rulings discussed not considered, where none of them were identified as rulings designated in motion for new trial through reference to any particular causes stated in said motion, and there was no reference to particular pages and lines in transcript where exceptions to rulings could be found. Ellison v. Ryan [Ind. App.] 87 NE 244. Brief held defective in that it did not sufficiently state reasons assigned in support of motion for new trial. Id. Evidence set forth by appellant will be accepted as correct in absence of corrections or additions by appellee. Simplex R. Appliance Co. v. Western Rawhide & Belting Co. [Ind.] 88 NE 682; Wysong v. Sells [Ind. App.] 88 NE 954. Where appellant made effort in good faith to comply with rule, and substantially complied therewith, held that defects therein would be disregarded. Teeple v. State [Ind.] 86 NE 49. Whether ruling and exception thereto were sufficiently set out held immaterial, where appellees cured defect, if any, by copying order book entry of ruling and appellant's exception thereto in their brief. Id. Appellant held to have waived errors by failing to comply with rule where more than two months before expiration of time to appeal appellee filed brief calling attention to failure. Ellison v. Ryan [Ind. App.] 87 NE 244.

Michigan: Simple case in which facts were found by circuit judge disposed of on merits, notwithstanding appellant made no statement of facts in his brief as required by rule 40. St. James v. Erskine [Mich.] 15 Det. Leg. N. 1087, 119 NW 897.

Montana: Exceptions to admission or rejection of evidence not considered where neither such evidence nor its substance quoted. Nichols v. Williams [Mont.] 100 P 969.

Oregon: Under rule 8 (91 P IX) providing that in equity cases brief contain portion of evidence deemed material, etc., attorney is allowed discretion as to what is necessary and form of printing. Litherland v. Morton Cohn Real Estate & Inv. Co. [Or.] 102 P 303.

62. Where court looks only to abstract in reviewing rulings as to admission of evidence, reference to pages of record is insufficient. Work v. Fidelity Oil & Gas Co. [Kan.] 98 P 801. Rulings on evidence not considered where transcript embodying bill of exceptions containing all the evidence was not indexed, and briefs did not indicate in what part of bill questions and rulings thereon could be found. Dauphiny v. Buline, 153 Cal. 757, 96 P 880.

63. As to sufficiency of assignments to raise particular questions, see, also, ante, § 11 E4.

Florida: Since it is duty of appellant to make errors clearly appear unless error complained of is so glaring or patent that no argument is needed to demonsrate it, counsel should call attention to specific grounds on which it is based, stating his reasons therefor, and citing authorities relied on to support same. Atlantic Coast Line R. Co. v. Dees [Fla.] 48 S 28.

Illinois: Assignment of error in sustaining exceptions to a bill is waived when argument fails to point out in what particular the ruling was erroneous. Jones v. Bean, 136 Ill. App. 545. Where sufficiency of amended statement of cause of action was challenged but plaintiff in error did not point out in brief wherein it failed to meet statutory requirements, supreme court would not enter upon independent investigation for purpose of determining whether alleged error existed. Morton v. Pusey, 237 Ill. 26, 86 NE 601. Where it is alleged that instructions are erroneous, brief must point out in what error consists. Melch v. Pottinger, 237 Ill. 192, 86 NE 627.

Kansas: Error in exclusion of evidence not considered where brief did not specify portions of such testimony to which objection was made. Work v. Fidelity Oil & Gas Co. [Kan.] 98 P 801.

Missouri: Since repeal of statute requiring assignment of error, rule 17 of Kansas City Court of Appeals requiring assignment in brief is no longer in force. State v. Hughes, 135 Mo. App. 131, 115 SW 1069.

Montana: Court confined to consideration of questions arising upon specifications of error in appellant's brief. Lehane v. Butte

Elec. R. Co., 37 Mont. 564, 97 P 1038. Clearly setting forth contention in separate paragraph in brief held sufficient statement that it was relied on for reversal. Gehlert v. Quinn [Mont.] 98 P 369.

Nebraska: Since under Laws 1907, p. 496, c. 162, § 4, no other assignments of error than those thereby required to be inserted in the brief are necessary, where brief particularly sets out error in giving specified instruction, such error will not be disregarded because in typewritten assignments of error filed by appellant only specification of such error was that made to group of instructions of which instruction complained of was one. First Nat. Bank v. Adams [Neb.] 118 NW 1055.

North Carolina: Exceptions not set out in briefs deemed abandoned. Smith v. Alphin 150 N. C. 425, 64 SE 210.

North Dakota: Errors deemed abandoned where assignments not set out in brief in manner prescribed by Rule 14 Pendroy v. Great Northern R. Co. [N. D.] 117 NW 531. In such case is optional with supreme court whether it will notice alleged errors. Schmidt v. Beiseker [N. D.] 120 NW 1096.

Oklahoma: Where brief fails to separately set forth and number errors as provided by rule 25, appeal will be dismissed Mahaney v. Union Ins. Co. [Okl.] 101 P 1054. Brief should clearly state manner in which controverted points arise, facts which constitute ground work of the legal dispute, and governing propositions of law. Ferguson v. Union Nat. Bank [Okl.] 99 P 641. Is not sufficient to assert in general terms that ruling of trial court is wrong, but counsel should support same with argument and citation of authority if possible. Id.

Pennsylvania: Questions sought to be raised by assignments of error should be set forth in appellant's statement of the questions involved. Henning v. Keiper, 37 Pa. Super. Ct. 488.

South Dakota: Where appellants specified as error making of certain findings and refusal to make others favorable to them, and in specifications called attention particularly to points wherein they claimed evidence was insufficient to support findings, and also specified certain rulings at trial claimed to be erroneous, but did not in their brief call attention to such insufficiency of evidence or errors, held that court was only called upon to consider whether findings of fact supported relief granted by judgment. Weitzel v. Leyson [S. D.] 121 NW 868. Findings of trial court binding where there are no specifications relied on to justify disregard of same. Id.

Washington: That appellant's brief contains no assignment of errors is not ground for dismissal. Spedden v. Sykes, 51 Wash. 267, 98 P 752.

Assignments, statement and proposition under the Texas rule.

Assignments: Assignments not copied into the brief will not be considered. Kirby v. Blake [Tex. Civ. App.] 115 SW 674; McLean v. Stith [Tex. Civ. App.] 112 SW 355. Rule requiring assignments to be copied not complied with where, under heading "Second and third assignments of error submitted together as a proposition," but one assignment was copied. Houston & T. C. R. Co. v. Quebedeaux [Tex. Civ. App.] 119 SW 1158. Assignments in brief will be disregarded where they are not true copies of the assignments as they appear in record. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 115 SW 882. Objection to evidence in proposition not referred to in assignment as copied in brief not considered. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. Assignments which were not copied in brief but were grouped and followed by several propositions held not open to consideration. Kruegel v. Johnson [Tex. Civ. App.] 112 SW 774. Assignments not properly briefed not considered. Bartlett Oil Mill Co. v. Cappes [Tex. Civ. App.] 117 SW 485. Rulings on evidence not considered where neither assignments, propositions, statements, nor arguments thereunder showed that any bill of exceptions was taken to any of the rulings complained of. Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602. Assignment that court erred in telling jury to find against appellant in specified item, and failing to point out in assignment, proposition or statement thereunder, part of charge referred to is insufficient. Briggs v. New South Lumber Co. [Tex. Civ. App.] 117 SW 885. Assignment to charge not considered where charge as copied in assignment was so incomplete that it was impossible to say what instruction was given predicated on hypothetical facts recited in charge. Walker v. International & G. N. R. Co. [Tex. Civ. App.] 117 SW 1020. Assignments presenting different and distinct subjects cannot be grouped. Rule 29. Bryant v. Northern Texas Trac. Co. [Tex. Civ. App.] 115 SW 880; Texas Land & Irr. Co. v. Sanders [Tex. Civ. App.] 113 SW 558; Kirby v. Blake [Tex. Civ. App.] 115 SW 674; Frazier v. Lambert [Tex. Civ. App.] 115 SW 1174; Munroe v. Munroe [Tex. Civ. App.] 116 SW 878; Scott v. St. Louis S. W. R. Co. [Tex. Civ. App.] 117 SW 890; Lowrance v. Woods [Tex. Civ. App.] 118 SW 551; Brunner Fire Ins. Co. v. Payne [Tex. Civ. App.] 118 SW 602; Johnson v. Hulett [Tex. Civ. App.] 120 SW 257; Freeman v. Puckett [Tex. Civ. App.] 120 SW 514. Assignments embracing inconsistent propositions of law. Combest v. Wall [Tex. Civ. App.] 115 SW 354. Assignments improperly grouped not considered though followed by appropriate propositions and statements. Steely v. Texas Imp. Co. [Tex. Civ. App.] 119 SW 319. Propositions cannot take place of valid assignments. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. Assignments to admission of evidence insufficient, where all were presented in group, each presented different question, and propositions were presented as under the four assignments. Brunner Fire Ins. Co. v. Payne [Tex. Civ. App.] 118 SW 602. Breaking up assignment and copying its subdivisions separately in brief with propositions under each is not in compliance with rule. St. Louis, etc., R. Co. v. Adams [Tex. Civ. App.] 118 SW 1155. Assignments, not numbered from first to last in their consecutive order, as required by rule 29, not considered. Bryant v. Northern Texas Trac. Co. [Tex. Civ. App.] 115 SW 880. Rules as to presenting assignments are directory and may be waived by the court. Mitchell v. Rushing [Tex. Civ. App.] 118 SW 582.

Propositions: The particular point or points sought to be made by an assignment

must be stated in the form of a proposition or propositions. Court of civil appeals rules 30, 31. Assignment not followed by proposition will not be considered. El Paso & N. E. R. Co. v. Gutierrez [Tex. Civ. App.] 111 SW 159; Sullivan v. Solis [Tex. Civ. App.] 114 SW 456; Missouri, K. & T. R. Co. v. Lasater [Tex. Civ. App.] 115 SW 103; McCormick v. Jester [Tex. Civ. App.] 115 SW 278; McKallip v. Collins Bros. [Tex. Civ. App.] 118 SW 546; Boardman v. Woodward [Tex. Civ. App.] 118 SW 550; O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. An assignment which is not in itself a proposition and is not followed by a proposition will not be considered. Texas Land & Irr. Co. v. Sanders [Tex. Civ. App.] 113 SW 558; Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662; De Hoyos v. Galveston, etc., R. Co. [Tex. Civ. App.] 115 SW 75; Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315; Birge-Forbes Co. v. St. Louis & S. F. R. Co. [Tex. Civ. App.] 115 SW 333; Kirby v. Blake [Tex. Civ. App.] 115 SW 674; International & G. N. R. Co. v. Garcia [Tex. Civ. App.] 117 SW 206; Herman v. Allen [Tex. Civ. App.] 118 SW 794; City of Ft. Worth v. Williams [Tex. Civ. App.] 119 SW 137; Louisiana & T. Lumber Co. v. Kennedy [Tex. Civ. App.] 119 SW 884. Assignment containing more than one proposition cannot be submitted as a proposition, but must be followed by one or more pertinent propositions. Houston & T. C. R. Co. v. Quebedeaux [Tex. Civ. App.] 119 SW 1158. Assignment, presenting several distinct propositions of law and not in itself a proposition, not considered. Hess v. Webb [Tex. Civ. App.] 113 SW 618; Louisiana & T. Lumber Co. v. Kennedy [Tex. Civ. App.] 119 SW 884. Portion of assignment not germane to other assignments with which it is grouped cannot be treated as proposition to such other assignments. Kirby v. Blake [Tex. Civ. App.] 115 SW 674. Assignment submitted as proposition held merely statement that court erred in refusing to allow plaintiff to read certain answers of witness to special cross interrogatories, and not open to consideration. De Hoyos v. Galveston, etc., R. Co. [Tex. Civ. App.] 115 SW 75. Simply labeling an assignment a proposition does not make it one. International & G. N. R. Co. v. Garcia [Tex. Civ. App.] 117 SW 206. Proposition not germane to assignment will not be considered. Texas Land & Irr. Co. v. Sanders [Tex. Civ. App.] 113 SW 558; Sims v. Sealy [Tex. Civ. App.] 116 SW 630; Munroe v. Munroe [Tex. Civ. App.] 116 SW 878; Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Proposition that party is restricted in his recovery to allegations of petition and relief prayed for held not germane to assignment that court erred in rendering judgment for more land than was sued for. Hildebrandt v. Hoffman [Tex. Civ. App.] 113 SW 785. Proposition that survey without a concession or order of survey would not be legal appropriation of land or notice to anyone that it was appropriated held not pertinent to assignment that copies of record from surveyor's office were improperly admitted in evidence. Sullivan v. Solis [Tex. Civ. App.] 114 SW 456. Proposition that it is not competent to establish heirship by hearsay evidence held not germane to assignment that finding of heirship was not supported by the evidence. Id. Where reason stated in assignment, other reasons may be urged in proposition germane to assignment. Missouri, K. & T. R. Co. v. James [Tex. Civ. App.] 120 SW 269. Assignment not properly presented where proposition was general and abstract and was not followed by statement. San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716. Where assignment entirely lost sight of in propositions and statement following, it is considered abandoned. Id. Multifarious proposition not considered. De Hoyos v. Galveston, etc., R. Co. [Tex. Civ. App.] 115 SW 75; Broussard v. South Texas Rice Co. [Tex. Civ. App.] 120 SW 587. Proposition having no basis in bill of exceptions not considered. Sullivan v. Solis [Tex. Civ. App.] 114 SW 456. Appellants are confined to objections raised by propositions. Ariola v. Newman [Tex. Civ. App.] 113 SW 157; Young v. State Bank [Tex. Civ. App.] 117 SW 476. Particular objection to admission of evidence considered abandoned when not mentioned in brief. San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716. Failure to join party not considered, when not presented by brief, but first raised in written argument. Isaacks v. Wright [Tex. Civ. App.] 110 SW 970. Proposition held insufficient to raise objection that charge was on weight of evidence. Stubbs v. Marshall [Tex. Civ. App.] 117 SW 1030. Assignment to charge as authorizing double recovery considered, though point was not presented by proper proposition. Keystone Mills Co. v. Chambers [Tex. Civ. App.] 118 SW 178.

Statements: Rule 31 of court of civil appeals requires that there shall be subjoined to each proposition a statement of such proceedings contained in the record as will be necessary and sufficient to sustain and support the proposition, with reference to pages of the record. An assignment not followed by a sufficient statement will not be considered. Cox v. Combs [Tex. Civ. App.] 111 SW 1069; Texas Land & Irr. Co. v. Sanders [Tex. Civ. App.] 113 SW 558; Texas Cent. R. Co. v. Pool [Tex. Civ. App.] 114 SW 685; Missouri, K. & T. R. Co. v. Lasater [Tex. Civ. App.] 115 SW 103; McCormick v. Jester [Tex. Civ. App.] 115 SW 278; Birge-Forbes Co. v. St. Louis & S. F. R. Co. [Tex. Civ. App.] 115 SW 333; Kirby v. Blake [Tex. Civ. App.] 115 SW 674; Starkey v. Western Union Tel. Co. [Tex. Civ. App.] 115 SW 853; McCollum v. Buchner's Orphans' Home [Tex. Civ. App.] 117 SW 886; McKallip v. Collins Bros. [Tex. Civ. App.] 118 SW 546; Boardman v. Woodward [Tex. Civ. App.] 118 SW 550; Brunner Fire Ins. Co. v. Payne [Tex. Civ. App.] 118 SW 602; St. Louis & S. F. R. Co. v. Lane [Tex. Civ. App.] 118 SW 847; Downs v. Stevenson [Tex. Civ. App.] 119 SW 315; San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716; Chicago, etc., R. Co. v. Clay [Tex. Civ. App.] 119 SW 730; Louisiana & T. Lumber Co. v. Kennedy [Tex. Civ. App.] 119 SW 884; Atchison, etc., R. Co. v. Smythe [Tex. Civ. App.] 119 SW 892; Missouri, K. & T. R. Co. v. James [Tex. Civ. App.] 120 SW 269; Haupt v. Cravens & Co. [Tex. Civ. App.] 120 SW 541; Broussard v. South Texas Rice Co. [Tex. Civ. App.] 120 SW 587. Statement must be made in reference to whole of that

which is in record having a bearing on the proposition. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Assignments may be disregarded where statements are based on supposed statement of facts, or stenographer's record of evidence not in record. Dealy v. Shepherd [Tex. Civ. App.] 116 SW 638. Assignment based on bill of exceptions not referred in statement not considered. Sullivan v. Solis [Tex. Civ. App.] 114 SW 456; Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149. Failure to indicate page of transcript containing bill of exceptions forming basis for assignment or to give substance thereof renders statement insufficient. Downs v. Stevenson [Tex. Civ. App.] 119 SW 315. Mere reference to pages of record is insufficient. Galveston .H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787; Walker v. International & G. N. R. Co. [Tex. Civ. App.] 117 SW 1020; St. Louis & S. F. R. Co. v. Lane [Tex. Civ. App.] 118 SW 847; Louisiana & T. Lumber Co. v. Kennedy [Tex. Civ. App.] 119 SW 884. Several assignments each complaining of admission of different testimony were grouped, and sole proposition thereunder was that material and relevant testimony should have been admitted. Statement cited bill of exceptions, giving numbers and pages, which bills only stated that testimony was offered and excluded. Did not state any fact to show in what error consisted. Only one bill stated objection on which evidence was excluded. Held that assignments would not be considered. Frazier v. Lambert [Tex. Civ. App.] 115 SW 1174. References to record cannot take place of statements in support of assignments. Johnson v. Hulett [Tex. Civ. App.] 120 SW 257; San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716. Assignment to admission of evidence "as set out in defendant's bill of exceptions," improper. Id. Statement following assignment to overruling **motion for continuance** held insufficient, where it did not show grounds of motion and motion itself was not set out, mere reference to pages of record being insufficient. Texas & N. O. R. Co. v. Powell [Tex. Civ. App.] 112 SW 697. Where there is no statement in brief of any evidence introduced in support of amendment to complaint, presumed in support of motion denying continuance, that none was introduced without examining statement of facts. Chicago, etc., R. Co. v. Clements [Tex. Civ. App.] 115 SW 664. Statement under assignment as to allowance of amendment of **pleading,** insufficient where no showing of request for amendment and refusal, or under what circumstances request was made or other fact indicating error. Gray v. Fuller [Tex. Civ. App.] 117 SW 919. Assignment as to rulings on special exceptions to petition followed by statement which does not point out portions of petition excepted to, and does not set out substance of petition as required, will not be considered. Munroe v. Munroe [Tex. Civ. App.] 116 SW 878. Statement following assignment as to plea in abatement, which did not inform court of facts pleaded or evidence adduced under such plea, held insufficient. Gray v. Fuller [Tex. Civ. App.] 117 SW 919. Statement following assignment, as to answer to plea of abatement, insufficient where plea not copied and no statement of substance, etc. Id. Statement, "See plaintiffs' first amended petition," insufficient. Broussard v. South Texas Rice Co. [Tex. Civ. App.] 120 SW 587. Where complaint is made of **admission or rejection of evidence,** enough of evidence bearing on proposition to explain and support it must be set out. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787; Brunner Fire Ins. Co. v. Payne [Tex. Civ. App.] 118 SW 602. Statement in support of proposition which merely copied objection and referred to bill of exceptions held not to show enough to disclose that any injury resulted from admission of evidence complained of. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. Proposition, under assignment complaining of admission of evidence tending to show value, that it is error to permit witness to testify to market value unless he is shown to be legally qualified to testify as to whether there is market value of article in question at particular place and time, held mere abstraction, and not open to consideration, where not shown by statement referred to in support of it that witness did testify as to such value. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 117 SW 459. Assignment, complaining of sustaining of objections to answers contained in deposition of witness not considered, where answers were not shown either in assignment or subjoined statement, and there was no reference to bills of exception taken to ruling sustaining objection. Starkey v. Western Union Tel. Co. [Tex. Civ. App.] 115 SW 853. **Sufficiency of evidence:** Where it is assigned as error that finding of fact is not sustained by evidence, is incumbent on appellee to point out particular evidence sustaining it, if there is any. Cox v. Combs [Tex. Civ. App.] 111 SW 1069. Assignment that verdict is unsupported by evidence not considered where brief contained merely conclusions of fact and no recital of evidence, and refers to entire statement of facts to support such conclusions. Adams v. Hamilton [Tex. Civ. App.] 116 SW 1169. Court of appeals held not able to say that **remark of counsel** was outside of evidence, where there was no statement showing lack of such evidence subjoined to proposition under assignment. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. Where requested **instruction** did not confine jury to contract pleaded and there was no statement annexed to proposition under assignment, held that it could not be said that its refusal was error, since there might have been evidence of other contracts between the parties. Id. Assignments complaining of refusal to give instructions, not considered, where was no statement properly showing that evidence authorized giving of said instructions. Hess v. Webb [Tex. Civ. App.] 113 SW 618. Where giving or refusing of special charge is complained of, it is not sufficient to set out the charge or its substance, but where it undertakes to apply law to facts proved, enough of evidence bearing upon proposition to explain and support it should also be given. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. Where propriety of charge depends on whether there was evidence to support it, assignment complaining thereof cannot be considered

statement of points and authorities.[64] Matters not argued[65] will ordinarily be

where statement does not set out or refer to such evidence. Nagle v. Simmank [Tex. Civ. App.] 116 SW 862. Assignment that court erred in giving special charge and in overruling specified paragraph of motion for new trial, where special charge is not copied in statement and there is no reference on record. Briggs v. New South Lumber Co. [Tex. Civ. App.] 117 SW 885. Assignments to specified portions of charge are sufficient without further specification. Texas Cent. R. Co. v. Johnson [Tex. Civ. App.] 111 SW 1098. Where assignments to specified portions of charge themselves contained reasons for objections made, held that they would be considered, rejecting all such reasons not carried forward by appropriate propositions. Id. Statement in support of assignment complaining of **direction of verdict** for defendant held insufficient where it merely referred to evidence supporting one of several defenses interposed, since evidence supporting others might have required such direction. Walker v. Texas & N. O. R. Co. [Tex. Civ. App.] 112 SW 430. Statement in support of assignment complaining of direction of verdict, to effect that testimony was conflicting and strongly in support of plaintiff's cause of action, held insufficient. Id. Assignment complaining of overruling of **motion for new trial** on ground that uncontradicted evidence showed that plaintiff was not entitled to recover should be followed by statement of all evidence on subject, or at least all tending to sustain verdict. Louisiana & T. Lumber Co. v. Kennedy [Tex. Civ. App.] 119 SW 884.

64. Errors or points not contained in appellant's statement of points waived. Rule 22. Kelley v. Bell [Ind.] 88 NE 58.. Assignments of errors not included in statement of points and authorities not considered. Theobald v. Clapp [Ind. App.] 87 NE 100. Point made on argument not considered where not made in brief. O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59. Brief containing copy of master's report (90 pages) including abstract, and appendix of 94 pages and appellees' brief, contained no statement of points and authorities, but extensive copy of evidence, stricken from files. Rule 15. Kelley v. Fahrney, 239 Ill. 317, 87 NE 1112.

65. Barry v. Madaris [Ala.] 47 S 152; Scott & Sons v. Rawls [Ala.] 48 S 710; City Council of Montgomery v. Bradley [Ala.] 48 S 809; Montgomery Trac. Co. v. Park [Ala.] 48 S 812; Atlantic Coast Line R. Co. v. Dothan Mule Co. [Ala.] 49 S 882; McCamey v. Wright [Ark.] 119 SW 841; H. C. Capwell Co. v. Blake [Cal. App.] 98 P 51; Boothroyd v. Larimer County Com'rs, 43 Colo. 428, 97 P 255; Kirkwood v. School Dist. No. 7 [Colo.] 101 P 343; Dunham v. Cox [Conn.] 70 A 1033; Garfield Memorial Hospital v. MacFarland, 31 App. D. C. 447; Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922; Neal v. Davis Foundry & Mach. Works, 131 Ga. 701, 63 SE 221; Western & A. R. Co. v. Blackford, 131 Ga. 784, 63 SE 289; Louisville & N. R. Co. v. Barnwell, 131 Ga. 791, 63 SE 501; Jordan v. Farmers' & Merchants' Bank, 5 Ga. App. 244, 62 SE 1024; Scott v. Lumaghi, 236 Ill. 564, 86 NE 384; Farrenkoph v. Holm, 237 Ill. 94, 86 NE 702; People v. Chicago, 238 Ill. 146, 87 NE 307; Drum v. Capps, 240 Ill. 524, 88 NE 1020; Snow v. Merriam, 133 Ill. App. 641; Bauman v. Stoller, 139 Ill. App. 393; Wiltz v. Classen, 139 Ill. App. 499; Wicker v. Alton, 140 Ill. App. 135; City of Marseilles v. Heister, 142 Ill. App. 299; Strafford v. Republic Iron & Steel Co., 142 Ill. App. 461; Campbell v. State [Ind.] 87 NE 212; Johnson v. Amacher [Ind.] 86 NE 1014; Cleveland, Cincinnati, etc., R. Co. v. Beale, 42 Ind. App. 588, 86 NE 431; Lindsey v. Hewitt, 42 Ind. App. 573, 86 NE 446; Slattery v. South Bend [Ind. App.] 86 NE 860; Nesbitt v. Nesbitt [Ind. App.] 86 NE 867; Cleveland, Cincinnati, etc., R. Co. v. Cyr [Ind. App.] 86 NE 868; Theobald v. Clapp [Ind. App.] 87 NE 100; Parker Land & Imp. Co. v. Ayers [Ind. App.] 87 NE 1062; Perry v. Acme Oil Co. [Ind. App.] 88 NE 859; Ramage v. Wilson [Ind. App.] 88 NE 862; Cole v. Thompson, 134 Iowa, 685, 112 NW 178; Goldsmith v. Goldsmith & Bro. [Iowa] 117 NW 1077; Lamb's Estate v. Morrow [Iowa] 117 NW 1118; Morrow v. Durant [Iowa] 118 NW 781; Hamilton County v. Hollis [Iowa] 119 NW 978; Swift & Co. v. Redhead [Iowa] 122 NW 140; Jones v. New Orleans G. N. R. Co., 122 La. 354, 47 S 679; Webster v. Moore, 108 Md. 572, 71 A 466; Kendrick v. Warren Bros. Co. [Md.] 72 A 461; Pinkerton v. Randolph, 200 Mass. 24, 85 NE 892; Lewis v. Coupe, 200 Mass. 182, 85 NE 1053; Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624; Jellow v. Fore River Shipbuilding Co., 201 Mass. 464, 87 NE 906; Swift v. Boyd, 202 Mass. 26, 88 NE 439; Everson v. General Fire & Life Assur. Corp. 202 Mass. 169, 88 NE 658; Ex parte Roberts [Mass.] 88 NE 927; Quirk v. Everett, 106 Minn. 474, 119 NW 63; Ellering v. Minneapolis, etc., R. Co. [Minn.] 119 NW 507; Wickstrom v. Swanson [Minn.] 120 NW 1090; Northwest Thresher Co. v. Anderson [Minn.] 120 NW 1134; Hartzler v. Metropolitan St. R. Co., 218 Mo. 562, 117 SW 1124; Feldman v. Kiefer [Mo. App.] 119 SW 44; Nichols v. Williams [Mont.] 100 P 969; Montgomery v. Miller [Neb.] 120 NW 197; Lavin v. Public Service R. Co. [N. J. Law] 71 A 58; Holt v. United Security Life Insurance & Trust Co. [N. J. Err. & App.] 72 A 301; Rushing v. Seaboard Air Line R. Co., 149 N. C. 158, 62 SE 890; Smith v. Moore, 149 N. C. 185, 62 SE 892; Condor v. Secrest, 149 N. C. 201, 62 SE 921; Midgette v. Branning Mfg. Co., 150 N. C. 333, 64 SE 5; Schmidt v. Beiseker [N. D.] 120 NW 1096; Noble State Bank v. Haskell [Okl.] 97 P 590; Choctaw, O. & G. R. Co. v. Sittel [Okl.] 97 P 363; Ferguson v. Union Nat. Bank [Okl.] 99 P 641; Owens v. Laurens Cotton Mills [S. C.] 64 SE 915; Barksdale v. Charleston & W. C. R. Co. [S. C.] 64 SE 1013; Senn v. Connelly [S. D.] 120 NW 1097; Bolte v. Equitable Fire Ass'n [S. D.] 121 NW 773; San Pedro, etc., R. Co. v. Salt Lake City Board of Education [Utah] 99 P 263; Blue Creek Land & Live Stock Co. v. Anderson [Utah] 99 P 444; Morris v. Salt Lake City [Utah] 101 P 373; McDuffee's Adm'x v. Boston & M. R. Co., 81 Vt. 53, 69 A 124; Fuller v. Margaret Min. Co. [W. Va.] 63 SE 206; Hoffman v. Lincoln

deemed waived; but fundamental errors may be considered though not properly presented in the brief.[66] Briefs should not discuss matters outside of the record.[67] Admissions in the brief [68] or argument [69] are binding on the party making them and assignments of error expressly waived will not be considered.[70] Supplemental briefs [71] and amendments [72] are generally permitted to be filed in proper case, but new points first raised in the reply [73] or supplemental brief will not be considered.[74] Disrespectful or otherwise objectionable language may be stricken.[75]

(§ 11) *G. Dismissal and abatement of appeal, and reinstatement of the same.*[76]—See 11 C. L. 208—An appeal or writ of error may be dismissed for want of jurisdiction,[77] or of a litigable right,[78] or of a real controversy [79] properly saved be-

County, 137 Wis. 353, 118 NW 850; Olson v. Rice [Iowa] 119 NW 84.

Sufficiency of argument: Must specifically insist upon particular grounds of error assigned. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Must point out particular error relied on. Kaufman v. Cooper [Mont.] 98 P 1135, former opinion 98 P 504. Assignment objecting to hypothetical question as being inaccurate statement of facts which evidence tended to establish not considered where argument did not point out particular defects. Reed v. Syracuse [Neb.] 120 NW 180. Only reasons presented in argument in support of assignments considered. Young v. State Bank [Tex. Civ. App.] 117 SW 476.

66. Supreme court may of its own motion interpose objection of want of jurisdiction over subject-matter at any stage though not raised by pleadings and only incidentally in brief of plaintiff in error. Allott v. American Strawboard Co., 237 Ill. 55, 86 NE 685. Though supreme court may give appellee benefit of points apparent upon record, and not presented in brief, to prevent reversal, it is not bound to do so. Where instructions treated as properly in record by appellee, court need not search same for error. Indianapolis & W. R. Co. v. Branson [Ind.] 88 NE 594.

67. Chicago & N. W. R. Co. v. Chicago Mechanics' Ins., 239 Ill. 197, 87 NE 933.

68. Where appellant stated in brief that only certain question was involved, other assignments deemed waived. Rosenthal v. Rosenthal, 154 Mich. 533, 15 Det. Leg. N. 833, 118 NW 18. Relators in mandamus held bound by theory of case as disclosed by petition, argument and brief. State v. Schnitger, 16 Wyo. 479, 95 P 698. Where averments of pleadings are appropriate to declaration in tort and appellant so designates his purpose in his brief, appellate court will not search for other intendment on his part to support cause of action. Hasbrouck v. Armour & Co. [Wis.] 121 NW 157.

69. Party who in opening argument concedes correctness of decree in particular respect cannot contend to contrary in reply argument. Dashner v. Dashner [Iowa] 120 NW 975.

70. Assignments withdrawn by additional brief filed will not be considered. Montgomery Trac. Co. v. Park [Ala.] 48 S 812.

71. Is no authority under rules or practice of federal circuit court of appeals for filing additional briefs at or after the hearing without special leave of court upon sufficient ground shown. Detroit United R. v. Nichols [C. C. A.] 165 F 289. Under rule 21 (55 NE v.) providing for briefs and reply after which no additional briefs would be received, though additional authorities might be cited, appellee could not raise question that instructions upon which reversal was based were not properly in record for first time in document styled "Additional Points and Authorities." Indianapolis & W. R. Co. v. Branson [Ind.] 88 NE 594.

72. Held that, under supreme court rule 38, amendment incorporating into appellant's brief an entirely new and distinct proposition, pointing out error not theretofore noticed or relied on, and offered on eve of submission of case, would not be allowed over objection. Stubbs v. Marshall [Tex. Civ. App.] 117 SW 1030.

73. Murphy v. Stelling, 8 Cal. App. 702, 97 P 672; Morton v. Pusey, 237 Ill. 26, 86 NE 601; Pirolo v. W. J. Turnes Co., 238 Ill. 210, 87 NE 354; Ardolino v. Reinhart, 128 App. Div. 339, 112 NYS 641. Where reply brief submits new matter, remedy is by application to strike rather than by motion for leave to file rejoinder. Ardolino v. Reinhart, 128 App. Div. 339, 112 NYS 641.

74. Question not raised in original brief cannot be raised by filing additional citations of authority. American Car & Foundry Co. v. Inzer [Ind. App.] 86 NE 444.

75. Dunbar v. Bell [Ark.] 119 SW 670. Brief for rehearing held to contain disrespectful language in violation of supreme court rule 51. Rahles v. Thompson & Sons Mfg. Co., 137 Wis. 506, 119 NW 289.

76. Search Note: See notes in 2 Ann. Cas. 794; 11 Id. 966.

See, also, Appeal and Error, Cent. Dig. §§1837-1863, 1928-1931, 2064-2070, 2173, 2174, 2472-2479, 2618, 2620, 2691-2693, 2772-2790, 3086-3089, 3104, 3108-3188; Dec. Dig. §§ 330-334, 356, 395, 430, 554, 592, 611, 633, 641, 753, 773-807; 2 Cyc. 769-782, 803, 804, 873, 1010, 1093; 3 Cyc. 112, 133-152, 182-203; 2 A. & E. Enc. P. & P. 335; 7 Id. 901.

77. As to the jurisdiction of appellate courts and adjudications which may be reviewed see ante, §§ 4, 5. Brady v. People [Colo.] 101 P 340; Thomas v. Olenick, 237 Ill. 167, 86 NE 592; Gottmanshausen v. Wolfing, 127 Ill. App. 485, see 224 Ill. 270, 79 NE 611; Laurel Oil & Gas Co. v. Morrison, 212 U. S. 291, 53 Law. Ed. —; Mammoth Min. Co. v. Grand Cent. Min. Co., 213 U. S. 72, 53 Law. Ed. —. Appeal taken under authority of unconstitutional statute. Hayward v. Sencenbaugh, 235 Ill. 580, 85 NE 939. Appeal from circuit court in case where latter erroneously entertained jurisdiction of appeal from county commissioners. Renicker v. Davis [Ind.] 85 NE 964. Where record fails to show that

lower court acquired jurisdiction on appeal to it. Murphy v. Hutchinson [Miss.] 47 S 666; Lane v. Niagara Fire Ins. Co. [Mo. App.] 116 SW 440; Joy v. Hatfield [Tex. Civ. App.] 120 SW 569. Where no transcript from justice's court in record on appeal from county court on appeal from justice's court so that it could not be determined whether there had ever been a final judgment in justice's court. American Soda Fountain Co. v. Mason [Tex. Civ. App.] 119 SW 714. Where case originated in justice court and was no bond in record on appeal from justice's court to circuit court. Humphreys v. McFarland [Miss.] 48 S 182; Johnson v. Marshall [Miss.] 48 S 182. Where record failed to show any judgment rendered on appeal bond filed in justice court where action was originally brought. Donald Bros. Mercantile Co. v. Marsh [Miss.] 48 S 230. Where appeal to court of civil appeals presented to criminal court of appeals. Thomas v. State [Tex. Cr. App.] 119 SW 846. Case stricken from supreme court docket where appeal should have been taken to court of appeals. Mattox v. Bristol [Tenn.] 113 SW 381. Decision of appellate court not appealable to supreme court. City of Chicago v. West Side Metal Refining Co., 237 Ill. 347, 86 NE 744. Writ of error to supreme court to review decision of court of appeals. Galveston, etc., R. Co. v. Herring [Tex.] 113 SW 521.

Nonappealable judgment: As to what judgments are appealable, see ante, § 4. Aston v. Dodson [Ala.] 49 S 856; London-Glascow Development Co. v. Powers [Ariz.] 100 P 454; Savage v. Smith, 154 Cal. 325, 97 P 821; Litch v. Kerns, 8 Cal. App. 747, 97 P 897; Maple v. Williams, 15 Idaho, 642, 98 P 848; Rosenthal v. Chicago City Board of Education, 141 Ill. App. 134, afd. 239 Ill. 29, 87 NE 878; Noyes v. Clarke, 141 Ill. App. 442; Benton v. Stokes, 109 Md. 117, 71 A 532; In re Nikannis Co. [Minn.] 121 NW 212; Hovey v. Northern Pac. R. Co. [Mont.] 101 P 146; Kapp v. Kapp [Nev.] 99 P 1077; Whalen v. Stuart, 194 N. Y. 495, 87 NE 819; Gatto v. Flannagan [N. Y.] 87 NE 1119; Germania Life Ins. Co. v. Lilliendahl, 193 N. Y. 663, 87 NE 1119; Glenty v. Knights of Columbus, 193 N. Y. 681, 87 NE 1119; Gunderson v. Roebling Const. Co., 193 N. Y. 673, 87 NE 1120; Neale v. Walter [N. Y.] 87 NE 1123; Hamburger v. Lipschitz, 111 NYS 696; Browning v. New York Leasing Co., 111 NYS 704; Campbell v. Abbott, 60 Misc. 93, 111 NYS 782; Liebling v. Borg, 113 NYS 549; Anderson v. Thorps, 113 NYS 730; Merritt & Chapman Derrick & Wrecking Co. v. Koronsky, 113 NYS 744; Speiser v. Greitzer, 113 NYS 815; Levy v. Speir, 113 NYS 841; Berkowitz v. Brewery, 113 NYS 919; Goldstein v. Rosenthal, 113 NYS 1012; Pepe v. Curti, 114 NYS 415; Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811; Jefferson Bank v. Montiflore Realty Co., 114 NYS 862; Martin v. Lefkowitz, 62 Misc. 490, 115 NYS 64; Lasker v. Guterman, 115 NYS 114; Chapman v. Preszburg, 115 NYS 160; Tronsrud v. Farm Land & Finance Co. [N. D.] 121 NW 68; Fisher v. Bower, 79 Ohio St. 248, 87 NE 256; School District No. 8 v. Eakin [Okl.] 100 P 528; Giant Powder Co v. Oregon Western R. Co. [Or.] 101 P 209; Lawrence v. Lawrence [S. C.] 63 SE 690; Pace & Co. v. Atlantic Coast Line R. Co. [S. C.] 64 SE 915; Berger v. De Loach [Tex. Civ. App.] 113 SW 557; Texas & O. Lumber Co. v. Applegate [Tex. Civ. App.] 114 SW 1159; Masoero v. Campbell & Co. [Wash.] 100 P 1024; Cazier v. Mackie-Lovejoy Mfg. Co. [C. C. A.] 168 F 701. Judgment not signed. Mitchell v. Shreveport Creosoting Co. [La.] 49 S 655. No formal written judgment. Robertson v. Shine, 50 Wash. 433, 97 P 497. Appeal taken before judgment was entered of record. Pedley v. Werdin [Cal.] 99 P 975. Appeal from judgment which had previously been set aside. McIntosh v. Southern Engine & Boiler Works [Ky.] 114 SW 1193; Tuska v. Jarvis, 61 Misc. 224, 113 NYS 767. Appeal from order abrogated by resettled order. Pepe v. Curti, 114 NYS 415. Appeal from default judgment. Stern v. Marcuse, 128 App. Div. 169, 112 NYS 653; Davies v. Myers, 113 NYS 9. Appeal from void judgment. Wertheimer v. Ridgeway [Ala.] 47 S 569; Singer v. McGehee [Ala.] 49 S 290. Where right to appeal is not questioned, appeal to determine whether property improved was assessable for benefits will be determined though appeal does not lie, question being one of public interest. Lauer v. Baltimore [Md. App.] 73 A 162.

Judgment or order appealed from not final. See ante, § 4B. Thomas v. Thomas [Ala.] 49 S 1027; Brown v. Norvell [Ark.] 115 SW 372; Burlington & C. R. Co. v. Colorado Eastern R. Co. [Colo.] 100 P 607; Mizell Live Stock Co. v. J. J. McCaskill Co. [Fla.] 49 S 501; Wikle v. Jones, 131 Ga. 37, 61 SE 1124; Albany & N. R. Co. v. Dunlap Hardware Co. [Ga. App.] 63 SE 1124; Chicago Terminal Transfer R. Co. v. Peucil, 236 Ill. 491, 86 NE 117; Damon v. Barker, 239 Ill. 637, 88 NE 278; People v. Jamison, 141 Ill. App. 406; Botts v. Botts, 142 Ill. App. 216; Smith v. Long [Ind. App.] 88 NE 356; Darby v. French [Ky.] 112 SW 1132; Fauber v. Keim [Neb.] 120 NW 1019; Skallberg v. Skallberg [Neb.] 121 NW 979; Fox v. Fox, 128 App. Div. 876, 113 NYS 121; Wilcox v. White [R. I.] 72 A 392; Williams v. Bell & Co. [Tex. Civ. App.] 116 SW 837; Cotton v. Hawaii, 211 U. S. 162, 53 Law. Ed. 131; Atkins & Co. v. Moore, 212 U. S. 285, 53 Law. Ed. —-; Johnson v. Muesen, 212 U. S. 283, 53 Law. Ed. —-; Noojin v. U. S. [C. C. A.] 164 F 692; Lofiin v. Ayres [C. C. A.] 164 F 841; Maas v. Lonstorf [C. C. A.] 166 F 41. Bill of exceptions sued out to order consolidating two cases with third one for trial, where no final decision or judgment in any of such cases as is reviewable by direct bill. Duke v. Hill [Ga.] 63 SE 823.

No federal question. McCorquodale v. Texas, 211 U. S. 432, 53 Law. Ed. 269; North Shore Boom & Driving Co. v. Nicomen Boom Co., 212 U. S. 406, 53 Law. Ed. —-; Western Union Tel. Co. v. Wilson, 213 U. S. 52, 53 Law. Ed. —-; Chesapeake & O. R. Co. v. McDonald, 29 S. Ct. 546; Smithsonian Inst. v. St. John, 214 U. S. 19, 53 Law. Ed. —-; Rogers v. Jones, 29 S. Ct. 635.

Jurisdictional amount not involved. See ante, § 4C. Atton v. South Chicago City R. Co., 236 Ill. 507, 86 NE 277; Dale v. Modern Woodmen of America, 237 Ill. 499, 86 NE 1065; Adamson v. Funke [Iowa] 119 NW 700; Otter Creek Lumber Co. v. Marritt [Ky.] 112 SW 855; Hill v. Pettitt, 33 Ky. L. R. 1041, 112 SW 646; Jackson v. Holbrook [Ky.] 113 SW 415; Varney v. Connolly's Ex'r [Ky.] 116 SW 340; State v. Hingle [La.] 49 S 485; Succession of Lynch [La.] 49 S 1002; Fidelity & Deposit Co. v. Faben, 51 Wash. 308, 98 P 764; Flick v. Showalter, 51 Wash. 345, 99 P

low,[80] for abatement of the appeal[81] or want of capacity to prosecute it,[82] where rendered unnecessary by reason of the disposition of the appeal of the adverse party,[83] for want of prosecution,[84] for defects of procedure in bringing up the

9; Tupino v. La Compania General De Tabacos, 29 S. Ct. 610.

78. For waiver of the right to appeal, see ante, § 1B.

Appeal dismissed: Right to appeal waived. Macfarland v. Poulos, 32 App. D. C. 558. Where controversy was settled before appeal was taken. Fitzgerald v. Paisley [Iowa] 119 NW 166. Where appellee understood that agreement made after judgment was settlement of entire controversy and appellant after discovering that fact did not refund money received pursuant to said agreement. Id. Where after judgment of dismissal plaintiff so dealt with premises as to release all right to injunctive relief sought to defendant. Thomas v. Booth-Kelly Co. [Or.] 97 P 1078. Where right to appeal waived by acquiescence in judgment. Elwert v. Marley [Or.] 99 P 887. Where defendant waived right to appeal from judgment enjoining him from interfering with certain wharfage rights by leasing from plaintiff's grantee, pending appeal, right to moor houseboat on premises in dispute. Id. Fact that lessor represented that lease would not affect right to appeal held not to prevent dismissal, since it amounted merely to expression of opinion as to matter of law. Id. Waiver by voluntary compliance with judgment. Comeaux v. West [Kan.] 97 P 381. Order appealed from complied with. Harrington v. Butte, A. & P. R. Co. [Mont.] 101 P 149. Where judgment paid. Webb City v. Tibbs [Mo. App.] 116 SW 1135. Where appellant had complied with and accepted benefits of decree appealed from. Krauss v. Krauss [N. J. Err. & App.] 70 A 305. Appeal waived by acceptance of benefits or part of decree. McKain v. Mullen [W. Va.] 64 SE 829. Where plaintiff sued two defendants jointly for tort, and judgment was rendered against one and in favor of other and he took judgment against former, and appealed from judgment in favor of latter. Cameron v. Kanrich, 201 Mass. 451, 87 NE 605.

79. For discussion of what questions will be reviewed see post, § 13B.

Appeal dismissed: Frivolous appeal. Orlando v. Palladino, 61 Misc. 103, 112 NYS 1118. Appeal raising merely matters determined on former appeal. In re Kehler [C. C. A.] 162 F 674. Where determination of lack of jurisdiction by circuit court is clearly right, appeal to federal supreme court will be dismissed as frivolous. Steele v. Culver, 211 U. S. 26, 53 Law. Ed. 74. Where case is merely collusive and colorable and involves no real or substantial controversy. Carlson v. Helena [Mont.] 101 P 163. Only moot question presented. Munger's Laundry Co. v. Rankin, 8 Cal. App. 448, 97 P 95; Hannon v. Harper [Cal. App.] 98 P 685; People v. Hall [Colo.] 100 P 1129; Cardoza v. Baird, 30 App. D. C. 86; Baird v. Atlanta, 131 Ga. 451, 62 SE 525; State v. Boyd [Ind.] 87 NE 140; Brown v. Dicus [Ind.] 87 NE 716; Brown v. Moore [Ind.] 87 NE 974; State v. Twenty-First Judicial Dist. Democratic Committee [La.] 48 S 1005; Kemper County Supr's v. Neville [Mass.] 48 S 727; State v. Ross [Neb.] 121 NW 1135; Harrison v. Bryan, 148 N. C. 315, 62 SE 305; Bachman v. Thompson [Okl.] 98 P 426; Powell v. Territory [Okl.] 100 P 514; Hodges v. Schafer [Okl.] 100 P 537; Albright v. Erickson [Okl.] 102 P 112; Miller v. Ury [Okl.] 102 P 112; National Surety Co. v. Stephens, 50 Wash. 397, 97 P 449; Keely v. Ophir Hill Consol. Min. Co. [C. C. A.] 169 F 601. Where every question presented was presented and finally decided on former appeal. Olympia Min. Co. v. Kerns, 15 Idaho, 371, 97 P 1031. Where only questions were such as might have been raised on former appeal by appellee and hence were concluded by judgment therein. Hensley v. Davidson Bros. [Iowa] 120 NW 95.

80. For necessity of record showing that proper steps were taken to save question, see ante, § 9D. For discussion of what steps must be taken, see Saving Questions for Review, 12 C. L. 1763. Question not formally raised. Philadelphia v. Mason, 37 Pa. Super. Ct. 478. Question not saved by proper exception. International Savings & Trust Co. v. Printz, 37 Pa. Super. Ct. 134. Appeal on points not raised at previous appeal from orphan's court. Hoffman's Estate, 37 Pa. Super. Ct. 548. No motion for new trial. Ahren-Ott Mfg. Co. v. Condon [Okl.] 100 P 556. Where record showed that motion for new trial was not filed in time, and same was stricken from files and no exception was reserved to such action nor any additional motion for new trial filed, and subsequently court entered order reciting that motion for new trial was overruled and exceptions saved, and there were no other questions presented by record properly reviewable without having been first assigned in motion for new trial. Pottawatomie County Com'rs v. Grace [Okl.] 99 P 653. Where was direct bill of exceptions but no exception to the final judgment. Jones v. Poole, 5 Ga. App. 113, 62 SE 711; Morris v. Dougherty [Ga.] 63 SE 1114. Fact that sufficiency of evidence to sustain findings could not be inquired into because findings were not excepted to, held not to require dismissal since appellant might challenge sufficiency of findings to sustain judgment. Hector v. Hector, 51 Wash. 434, 99 P 13.

81. For what results in abatement see Abatement, post this section. Knowles v. Harrington [Colo.] 101 P 403; People v. Wells, 140 Ill. App. 235; Harney v. Fayette County Fiscal Court [Ky.] 113 SW 108; Galvin v. Shafer [Ky.] 113 SW 485; Venner v. Great Northern Ry. Co. [Minn.] 121 NW 212; Myher v. Myher [Mo. App.] 113 SW 689; Millar v. St. Louis Transit Co., 216 Mo. 99, 115 SW 521; State v. Fields [Or.] 101 P 218.

82. Where it appears that appellant's right to further prosecute the appeal has ceased. Civ. Code Prac. § 757. Harney v. Fayette County Fiscal Court [Ky.] 113 SW 108. Failure of corporation plaintiff in error to pay license tax. Ohio-Colorado Min. & Mill. Co. v. Elder [Colo.] 99 P 42.

83. Defendant's appeal where new trial ordered as to all issues on plaintiff's appeal. Hawk v. Pine Lumber Co., 149 N. C. 16, 62 SE 754.

84. Appeal dismissed: For laches. Kellogg

case,[85] failure to make or file a proper record,[86] assigning error,[87] or failure to file

v. Kottke, 37 Mont. 610, 101 P 1134. Where appellant failed for more than year after record was filed to file brief, argument, or assignment of error, or to present case orally. Kastner v. Adams [Ariz.] 100 P 440. Where appellant did not attempt to prosecute appeal with diligence or good faith. Starkweather v. Thornington's Estate [Mich.] 16 Det. Leg. N. 397, 122 NW 116. Delay in prosecuting appeals held unreasonable and inexcusable, in view of Code Civ. Proc. § 57, giving precedence to appeals in probate cases. In re Heywood's Estate, 154 Cal. 312, 97 P 825. Where appeal was taken from order denying new trial after expiration of year from date of judgment, and proper diligence was not shown in prosecuting same. Wood v. Tanner, 15 Idaho, 689, 99 P 123. Rehearing denied, 99 P 1053. Where original record was not filed and no abstracts or briefs were served or filed by either party. Meyer v. Chicago, etc., R. C. [S. D.] 117 NW 1037.

Held not ground for dismissal: Delay in filing statement of facts and briefs due to delay in prosecuting mandamus proceedings to compel certification of such statement, following which an order extending time was entered. First Nat. Bank v. Fowler, 51 Wash. 638, 99 P 1034. Appellants held not guilty of laches. Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist. [Idaho] 102 P 481; Leggett v. Evans [Idaho] 102 P 486.

85. Wrong remedy: For discussion of what is proper remedy in particular cases see ante, § 2. Appeal instead of writ of error. Kibler v. Gulf Land & Lumber Co. [C. C. A.] 166 F 861; Lennox v. Allen-Lane Co. [C. C. A.] 167 F 114; Toeg v. Suffert [C. C. A.] 167 F 125; Murhard Estate Co. v. Portland & Seattle Ry. Co. [C. C. A.] 163 F 194; Independent-Peerless Pattern Co. v. Johnson [Colo.] 100 P 1129. Writ of error instead of appeal. Nashville R. & L. Co. v. Bunn [C. C. A.] 168 F 862; Shook v. Dozier [C. C. A.] 168 F 867; Kelley v. McCombs [Okl.] 102 P 186.

Failure to appeal in time: For discussion of what is proper time in which to appeal see ante, § 6B. Hellman v. Longley, 154 Cal. 78, 97 P 17; Green v. Gavin [Cal. App.] 101 P 931; Benjamin v. Chicago, I. & L. R. Co., 140 Ill. App. 312; W. R. Mumford Co. v. Terry [Ind. App.] 87 NE 253; Ashmore v. American Surety Co. [Kan.] 99 P 1132; Lum v. Fairbanks [Mich.] 15 Det. Leg. N. 886, 118 NW 578; Bliss v. Tyler [Mich.] 16 Det. Leg. N. 229, 121 NW 292; Bliss v. Tyler [Mich.] 16 Det. Leg. N. 357, 121 NW 756; Kaufman v. Cooper [Mont.] 98 P 504, rehearing denied [Mont.] 98 P 1135; Elliott v. Elliott, 135 Mo. App. 42, 115 SW 486; State v. Fidelity & Deposit Co. [Mo. App.] 117 SW 618; Central Trust Co. v. Holmes Min. Co. [Nev.] 97 P 390; Luke v. Coffee [Mo.] 101 P 555; Aultman-Taylor Mach. Co. v. Clausen [N. D.] 121 NW 64; Porter v. Brook [Okl.] 97 P 645; Bickford v. Bruce [Okl.] 97 P 648; Utterback v. Rock Island Plow Co. [Okl.] 97 P 649; First Nat. Bank v. Spink [Okl.] 97 P 1019; Kiowa County School Dist. No. 39 v. Fisher [Okl.] 99 P 646; McMurty v. Byrd [Okl.] 101 P 1117; Moberly v Roth [Okl.] 102 P 182; Friend v. Roth [Okl.] 102 P 185; Friend v. Roth [Okl.] 102 P 186; City of Tacoma v. William Birmingham Co., 50 Wash. 683, 97 P 971; McCausland v. Bailey, 51 Wash. 183, 98 P 327; Allis-Chalmers Co. v. U. S. [C. C. A.] 162 F 679.

Joint or several appeal: See ante, § 11 A. Appeal dismissed where in answer to bill in chancery two parties defendant file what was in reality joint answer part of which was stricken on exception by complainant and only one defendant appealed, wherefore court was unable to adjudicate rights and interests of defendant not appealing. Rawls v. Carlton [Fla.] 48 S 46. Four separate actions were consolidated, but four separate judgments were rendered under different titles. Held that motion to dismiss because there was but one bond and one notice of appeal would be denied because, if for no other reason, matter was treated as but one case in application to supreme court for mandamus to compel certification of facts. First Nat. Bank v. Fowler, 51 Wash. 638, 99 P 1034.

Application for leave to appeal: For necessity and sufficiency of application see ante, § 6 E. Appeal will not dismissed for manifest clerical error in motion for appeal as shown by judgment. Ansley v. Stuart [La.] 48 S 953.

Allowance of appeal: For necessity and sufficiency of order of allowance see ante, § 6 F. Devolutive appeal taken from order of appeal which had been dismissed by district court. Durel v. Murphy [La.] 49 S 1013.

Notice of appeal: For necessity and sufficiency of notice, see ante, § 6 D. No notice of appeal. Gaar v. Carson [Iowa] 118 NW 1007; Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co. [Tex. Civ. App.] 120 SW 532. No summons issued or general appearance. Court of Honor v. Wallace [Okl.] 102 P 111. No summons to hear errors issued or served, and service not waived. Mcvicker v. Rouse [Colo.] 98 P 807. Failure to file notice of intention to appeal in office of clerk. La Due v. La Due [Okl.] 100 P 513. Notice or summons not timely served. Birmingham v. Rice [Ark.] 118 SW 1017; Claiborne v. Leonard [Ark.] 114 SW 917; Beasley v. Cottrell [Miss.] 47 S 662; Nazima Trading Co. v. Martin [C. C. A.] 164 F 838. Oral notice not given at time of rendition of judgment. Barde v. Wilson [Or.] 102 P 301. Failure to serve necessary party. Dillavou v. Dillavou [Iowa] 120 NW 628; In re Downs' Will [Iowa] 119 NW 703; Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P 727; Crouch v. Dakota, etc., R. Co. [S. D.] 117 NW 145; Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114. Burden is on party moving to dismiss for failure to serve adverse parties to show from record that party not served was adverse. Potrero Nuevo Land Co. v. All Persons Claiming, etc. [Cal.] 101 P 12.

Defect of parties: For discussion of what persons are entitled to appeal and who are necessary and proper parties see ante, § 3. Appellant not party below. MacFarland v. Paulos, 32 App. D. C. 558; Jones v. Yantis [Ky.] 113 SW 111; Thomas v. Elliott, 215 Mo. 598, 114 SW 987. Appeal by Max F. Altis from default judgment against Melody Altis in action where latter was defendant on service of summons on former. London v. Altis, 116 NYS 28. No judgment against appellant. Id. Appellant or plaintiff in error

not aggrieved. Sumpter v. Buchanan [Ark.] 113 SW 809; Smith v. Hagan [Colo.] 101 P 402; Commercial Nat. Bank v. Gilinsky [Iowa] 120 NW 476; Stern v. Marcuse, 128 App. Div. 169, 112 NYS 653. Though statute gives no right to county commissioners to appeal from judgment of court of common pleas in favor of tax payer on appeal from order of board of revision affirming action of couny board raising valuation of personal property, held that supreme court would not quash such an appeal, but, under general power to examine and correct errors of inferior courts conferred on it by Act June 16, 1836 (P. L. 784), would treat it as a certiorari. Schmuck v. Hartman, 222 Pa. 190, 70 A 1091. Defect of parties. Taylor v. Leesnitzer, 31 App. D. C. 92; Hernly v. Pierce, 42 Ind. App. 603, 86 NE 443; Lake Shore Sand Co. v. Lake Shore & M. S. R. Co. [Ind.] 86 NE 754; In re Farley Drainage Dist. No. 7 [Iowa] 120 NW 83; Strange v. Crimson [Okl.] 98 P 937; Kingfisher County Com'rs v. Lemley [Okl.] 101 P 109; Gilbane v. Hawkins [R. I.] 72 A 723; Lewis v. Sittel [C. C. A.] 165 F 157; City of Detroit v. Guaranty Trust Co. [C. C. A.] 168 F 608.

Bonds; failure to give and defects therein: For the necessity and sufficiency of appeal bonds see ante, § 6G. No undertaking filed. Stewart v. Burbridge [Cal. App.] 101 P 419. Under Rev. St. 1887, § 4823, dismissal for failure to file undertaking is an affirmance of the judgment appealed from unless order of dismissal is expressly made without prejudice to another appeal. West v. Dygert, 15 Idaho, 350, 97 P 961. In such case second appeal from same judgment will be dismissed, judgment having become final and res adjudicata. Id. Failure to file bond, in time. Hillman v. Gallagher [Tex. Civ. App.] 113 SW 321; Western Union Tel. Co. v. Parsley [Tex. Civ. App.] 114 SW 156; Nash v. Noble [Tex. Civ. App.] 114 SW 848; Estes v. Estes [Tex. Civ. App.] 118 SW 174. Where it does not appear affirmatively that bond was timely filed. Carney v. Menefee [Tex. Civ. App.] 118 SW 1083. Insufficient undertaking. In re Kappler's Estate [Mont.] 100 P 228; Sucker State Drill Co. v. Brock [N. D.] 120 NW 757. Where party appealing from decree which jointly affects two parties does not give supersedeas bond to secure both. Taylor v. Leesnitzer, 31 App. D. C. 92. Amount of bond not fixed by court. Succession of Lynch [La.] 49 S 1002. Surety incompetent. Pearce v. Haas, 122 La. 376, 47 S 687. District court has jurisdiction to dismiss appeal in case surety on bonds is not sufficiently responsible. Durel v. Murphy [La.] 49 S 1013. Dismissal in trial court for failure of sureties to qualify binding on appellate court, particularly where acquiesced in by appellant's failing to make an appearance. Craig v. Wegmann [La.] 48 S 569. Appeal in forma pauperis, where record did not affirmatively show that proof of inability to pay costs was made in manner required by statute. Sanders v. Benson [Tex. Civ. App.] 114 SW 435. Omission to give bond at time of taking appeal is not ground for dismissal provided bond is filed within reasonable time thereafter, particularly where appellee has not been prejudiced by delay. Corcoran v. Kostrometinoff [C. C. A.] 164 F 685. That surety upon appeal bond is also surety on certiorari bond is not ground for dismissal of writ of error issued upon bill of exceptions. Bush v. Roberts, 4 Ga. App. 531, 62 SE 92.

Docketing: For necessity of docketing see ante, § 8. Where appeal not docketed seven days before call of cases in district to which it belonged (Supreme Court Rule 5; 53 SE V), appellee could obtain dismissal at any time before docketed (Rule 17; 53 SE VII). Foy v. Gray, 148 N. C. 436, 62 SE 523.

86. For discussion of what record must show and manner of preparing same, see ante, §§ 9, 10. Failure of record to show jurisdiction. Roberson v. First State Bank [Tex. Civ. App.] 118 SW 173. Failure of record to show that appeal had ever been taken. Pence v. Wabash R. Co. [Iowa] 119 NW 596. Where abstract of record proper did not show affidavit for an appeal, or state substance thereof. Shemwell v. McKinney, 214 Mo. 692, 114 SW 1083; Wright v. Seiffle, 214 Mo. 694, 114 SW 1083. Final order complained of not in record. Union Pac. R. Co. v. Colfax County [Neb.] 122 NW 29; Hale v. Jefferson County [Mont.] 101 P 973. Provisions of supreme court rule 38, relative to dismissal for failure to print and serve record, does not apply to appeals from actions under Comp. Laws, §§ 10823, 10824, on claims against water craft, since in such hearing is de novo and either party may take additional testimony. Detroit Lumber Co. v. Petrel [Mich.] 16 Det. Leg. N. 187, 121 NW 274. Where record presented no order or judgment of trial court for review. Ford v. McIntosh [Okl.] 98 P 341. For failure of record to show any judgment or decree, or anything from which an appeal could be taken. Gaar v. Carson [Iowa] 118 NW 1007. Failure to show final judgment. Newberger Cotton Co. v. Watts [Miss.] 49 S 146. Appeal from order overruling motion for new trial where record did not show that any such motion was ever made or that any order was made overruling it. Harlick v. Davidson, 15 Idaho, 787, 100 P 91. Where record did not show any such judgment as that appealed from. Hall v. Butte Elec. R. Co. [Mont.] 101 P 965. Record insufficient to present questions sought to be reviewed. Lynahan v. Church [Conn.] 72 A 726; Cosey v. Smith, 32 App. D. C. 193; Schaeffer v. Central of Georgia R. Co. [Ga. App.] 64 SE 1107; In re Moore's Estate [Mo. App.] 119 SW 451; Tedford v. Lichtenstein, 129 App. Div. 35, 113 NYS 358; Rosenstein v. New York, etc., R. Co., 113 NYS 547. For noncompliance with rule 9, and because record did not contain motion for new trial or bill of exceptions. St. Louis Southwestern R. Co. v. Wells [Ark.] 113 SW 49. Appeal on partial record, where failed to file proper schedule within 90 days after appeal was granted. Wilhoite v. Huckle [Ky.] 114 SW 326. Failure to transmit record in time. Maryland, D. & V. R. Co. v. Hammond [Md. App.] 72 A 650; Estep v. Tuck, 109 Md. 528, 72 A 459; Savannah Elec. Co. v. Tuck [Ga.] 63 SE 800.

Defects in transcript: For discussion of sufficiency of transcript, see ante, § 10. Failure to file transcript in time. Southern R. Co. v. Abraham Bros. [Ala.] 49 S 801; Gros v. Norment, 30 App. D. C. 574; Rojas v. Seeger, 122 La. 218, 47 S 532; Beasley v. Cottrell [Miss.] 47 S 662; Courtney v. McGrath [Mont.] 97 P 1134; Gagnon v. Fagan, 37 Mont. 606, 101 P 1134; Fowle & Son, v. Mitchell, 149 N. C. 581, 62 SE 311; Harrington

v. Snyder [Or.] 101 P 392; Hanley v. Stewart [Or.] 102 P 2; Nazina Trading Co. v. Martin [C. C. A.] 164 F 838. Statute as to filing transcript disregarded. Boudreaux v. Boudreaux, 122 La. 433, 47 S 758. Failure to pay $5 fee on filing transcript with register of trial court. Thompson v. McKay, 154 Mich. 228, 15 Det. Leg. N. 697, 117 NW 624. Failure to pay fee within time for perfecting appeal. Lum v. Fairbanks [Mich.] 15 Det. Leg. N. 886, 118 NW 578. Transcript insufficient. Arthur v. Doyle, 141 Ill. App. 432. Certificate fatally defective. Globe & Ruthgers Fire Ins. Co. v. Lewallen [Fla.] 47 S 795; Keen v. State [Fla.] 47 S 924. Record not printed. Travis v. Metropolitan Trust Co., 169 F 1022. Noncompliance with rule requiring evidence to be printed in paper book. Quigley v. Trader's Mut. Fire Ins. Co., 35 Pa. Super. Ct. 51. Failure to print praecipe, writ, and declaration. Updegraff v. Snyder, 36 Pa Super. Ct. 30. Motion to dismiss on ground that certificate attached to transcript was insufficient to show what papers were considered in making ruling in question denied, where, before motion was submitted, new certificate supplying defects was filed. Knutsen v. Phillips [Idaho] 101 P 596.

Bills of exceptions: For requisites and sufficiency of bill of exceptions, see ante, § 9C1. No bill of exceptions properly signed tendered to judge within time allowed by law. Moore v. Griner, 131 Ga. 364, 62 SE 222. Where only error discussed was overruling of motion for new trial, and bill of exceptions containing reasons for new trial was not presented for approval within time fixed. Brown v. State [Ind. App.] 87 NE 157. Exceptions not timely tendered for sealing by trial court. Mifflin Township Poor Dist. v. Schuylkill Co. Poor Dist., 37 Pa. Super. Ct. 611. Failure to file bill and transcript of evidence in time. Nugent v. Cook [R. I.] 70 A 865. Bill not certified. Elders v. Bancroft-Whitney Co. [Ga. App.] 64 SE 714. Bill not certified in time. Yow v. Sullivan, 131 Ga. 479, 62 SE 639. Bill not allowed by trial judge or established before supreme court within time fixed by statute. First Baptist Soc. v. Wetherell [R. I.] 71 A 66. Bill signed by successor of judge. Scott v. State, 5 Ga. App. 812, 63 SE 936. Not served on necessary parties. Martin v. Wrightsville, 131 Ga. 52, 61 SE 1110. No proper record of proof of service. Brantley v. McArthur [Ga.] 64 SE 326. No affidavit of service. Advance Lumber Co. v. Moreland [Ga.] 65 SE 86. Where either entry or acknowledgment of service antedates judge's certificate. Grow v. Hunter, 5 Ga. App. 817, 63 SE 938. Failure of clerk of lower court to transmit bill of exceptions to clerk of supreme court in time. Earnhart v. Atlanta & W. P. R. Co. [Ga.] 65 SE 138. Fact that delay was due to its having been mislaid by deputy clerk with whom it was filed, who was ill and of unsound mind, and not on duty at the time, held not to prevent dismissal. Id. Where there is no proper bill of exceptions and no errors which are reviewable in its absence. Muzzy v. McEwen Lumber Co., 154 Cal. 685, 98 P. 1062; Truesdale v. Montrose County Com'rs [Colo.] 99 P 63; Gossett v. Atlanta, 5 Ga. App. 357, 63 SE 143; Stoddard v. Fox, 15 Idaho, 704, 99 P 122; Dovi v. Charles Gehlhaus Co. [N. J. Law] 72 A 69; Ceasar v. Ceasar [Okl.] 98 P 916; Harris x. Fox [Okl.] 99 P 651; Green v. Yeager [Okl.] 99 P 906; Davis v. Lammers [Okl.] 100 P 514; St. Louis & S. F. R. Co. v. McCollum [Okl.] 101 P 1120. Motion to dismiss overruled, though date of trial court signing bill of exceptions did not appear, it being presumed to be date of filing. Crabtree v. Nolen [Ala.] 49 S 309.

Settled case or statement of facts: For requisites and sufficiency of settled case or statement of facts, see ante, § 9C2. Failure to file translation or transcript of shorthand notes of evidence. Fitzgerald v. Paisley [Iowa] 119 NW 166. Notes of testimony in equity case not certified by either official stenographer or trial judge. Thomas v. Borden, 222 Pa. 184, 70 A 1051. Transcript of stenographer's notes not certified and filed in time. Ervin v. Wohlfert [N. J. Law] 70 A 153. Case made, signed and settled out of time. City of Shawnee v. Farrell [Okl.] 98 P 942. Order extending time within which to prepare and serve case-made not granted until after expiration of time allowed by court for preparing and serving same. London & Lancashire Fire Ins. Co. v. Cummings [Okl.] 99 P 654. Case-made not served within time provided by law. Bettis v. Cargile [Okl.] 100 P 436. Proceeding by petition in error and case-made, where neither original case-made nor certified copy thereof is filed with petition in error. Divine v. Harmon [Okl.] 101 P 1125; King v. Horse Chief Eagle [Okl] 101 P 1135. Case-made failed to show that any judgment or final order was rendered by trial court, and did not contain copy of such judgment or order. Olentine v. Powell [Okl.] 100 P 556. Where printed case submitted with briefs did not show that any judgment had been rendered by lower court. Badewitz v. West Jersey & S. R. Co. [N. J. Err. & App.] 71 A 248. Where printed case submitted with briefs failed to show any transcript of judgment below. Campbell, Morrell & Co. v. Lehocky [N. J. Err. & App.] 71 A 694. Where printed case submitted with briefs showed no return to writ of error. Id. Where there is no proper settled case or statement of facts, and no errors which are reviewable in its absence. St. Louis & S. F. R. Co. v. McCollum [Okl.] 101 P 1120; Ahren-Ott Mfg. Co. v. Condon [Okl.] 100 P 556; Devault v. Merchants' Exch. Co. [Okl.] 98 P 342.

Defects in abstract: For necessity and sufficiency of abstracts, see ante, § 9C3. Insufficient abstract. Finley v. New Cache La Poudre Irr. Co. [Colo.] 98 P 173; Purdy v. Geary [Colo.] 100 P 426; Crane v. Crane [Mo. App.] 111 SW 884. Failure to file abstract in time. Bunday v. Smith [S. D.] 121 NW 792. Appeal under short form where abstract does not contain copy of judgment or concise statement of it. State v. Southwestern Mach. Co. [Mo. App.] 116 SW 1065. Where brief and abstract were wholly unintelligible when considered together, and were so in conflict that, if one was true, other was false. Dawson v. Ash Grove White Lime Ass'n, 134 Mo. App. 220, 113 SW 718. If plaintiff in error fails to comply with rule respecting abstracts, court may, in its discretion, dismiss proceeding in error or affirm judgment, but defendant in error may not demand dismissal or affirmance as matter of right because of such failure. Hills v. Allison [Kan.] 100 P 651. Technical objections to abstract held not ground for dismissal of

and serve a proper brief [88] within the time prescribed,[89] or failure of a majority of the court to agree on a decision within the time limited by law.[90] Pro forma affirmance [91] or reversal [92] is sometimes ordered instead on the same grounds, pro-

obviously meritorious appeal. Webb v. Pacific Mutual Life Ins. Co. [Mo. App.] 119 SW 491.

87. Questions sought to be reviewed not properly assigned. Failure to file assignment of error. Lowenstein v. Bache, 37 Pa. Super. Ct. 426; Nashville, etc., R. Co. v. Central of Georgia R. Co. [Ga.] 63 SE 823; Taylor v. Wright [Ga.] 64 SE 656; Village of East Peoria v. Lake Erie & W. R. Co., 237 Ill. 93, 86 NE 634; State v. Merchants' Bank, 81 Neb. 704, 120 NW 157.

88. For necessity and sufficiency of briefs see ante, § 11F. Failure to file. Longbotham v. Abercrombie [Tex. Civ. App.] 114 SW 428. Want of sufficient brief. Ferguson v. Union Nat. Bank [Okl.] 99 P 641. Brief not in proper form. Mahaney v. Union Ins. Co. [Okl.] 101 P 1054. Where no questions presented because of failure to prepare brief in accordance with rules. State v. Lukens [Ind. App.] 87 NE 246. Motion to dismiss for failure to file briefs in time must be determined by status of case when motion is heard. Spedden v. Sykes, 51 Wash. 267, 98 P 752. Failure to file briefs not ground for dismissal where counsel appear and argue cause orally. Havlick v. Davidson, 15 Idaho, 787, 100 P 91. That appellant's brief contains no assignment of errors not ground for dismissal. Spedden v. Sykes, 51 Wash. 267, 98 P 752.

89. Horn v. Jones [Mo. App.] 114 SW 545; Horner v. Goltry [Okl.] 101 P 1111; Bunday v. Smith [S. D.] 121 NW 792; Ft. Worth & R. G. R. Co. v. Windham [Tex. Civ. App.] 120 SW 248. Not dismissed because filed day too late. Campbell v. Order of Washington [Wash.] 102 P 410. Motion to dismiss must be determined by status of case when motion is heard. Spedden v. Sykes, 51 Wash. 267, 98 P 752.

90. Where majority of court could not agree within six months after submission of cause, within which time Const. art. 7, § 5, requires decision to be rendered. Grand Lodge A. O. U. W. v. Hobbie [Okl.] 100 P 540.

91. Where abstract of record proper failed to show filing of motions for new trial and in arrest of judgment, filing of affidavit for appeal and order granting appeal, and order granting leave to file bill of exceptions at next term. Whittington v. Woods [Mo. App.] 116 SW 1065. On appeal from order granting defendant new trial on ground that court erred in permitting case to go to jury, where record does not show character of petition on which trial had, nor what verdict and judgment in fact was. Harder v. St. Louis Transit Co. [Mo.] 119 SW 948. Judgment in common-law action tried by district court without jury pursuant to stipulation, there being no law under which facts may be so tried. United States v. Louisville & N. R. Co. [C. C. A.] 167 F 306. Where objections cannot be considered in absence of evidence and evidence has been stricken. Pafhausen v. State [Miss.] 47 S 897. Where only grounds of assignment of errors relate to exceptions to register's report improperly filed. McGuire v. Appling [Ala.] 47 S 700. Though motion for new trial was properly denied in case submitted on agreed statement of facts which it was stipulated were to be regarded as finding of court since motion will not lie in such case, appeal from order denying such motion should not be dismissed, but proper practice is to affirm it. Quist v. Sandman, 154 Cal. 748, 99 P 204. Exceptions overruled where no appearance by excepting party. Head & Dowst Co. v. New England Breeders' Club [N. H.] 70 A 248. Where trial court abused discretion in certifying that appeal should be allowed in case not otherwise appealable. Wood v. Griffith [Iowa] 119 NW 745.

Frivolous appeal: Motion to affirm as delay case denied where attorneys for appellee failed to indorse record as required by Civ. Code Prac. § 759. Latham v. Lindsay, 33 Ky. L. R. 985, 112 SW 584. Fact that attorney for appellee filed long brief on motion to affirm as delay case, held to indicate that was debatable question. Id.

Bill of exceptions: For matters relating to preparation of bills of exception see ante, § 9C1. Knights of Pythias of North America v. Bond [Ark.] 113 SW 793. Where no sufficient bill of exceptions and no question reviewable in its absence. London v. Hutchens [Ark.] 114 SW 919; Cox. v. Cooley [Ark.] 114 SW 929; Brown v. Kennedy, 138 Ill. App. 607; Louisville & Atlantic Coal Co. v. Morris [Ky.] 116 SW 330; City of Macon v. Jaeger, 133 Mo. App. 643, 113 SW 1138; Bick v. Day, 134 Mo. App. 589, 114 SW 1145; Hanks v. Hanks, 218 Mo. 670, 117 SW 1101; Montague v. Kolkmeyer & Co. [Mo. App.] 120 SW 637; Green v. Cook [Tex. Civ. App.] 113 SW 776. Where bill of exceptions failed to show motion for new trial, adverse ruling thereon, and exception and only questions were such as should properly be embraced in such motion. Davis v. Ogden [Wyo.] 97 P 1074.

Settled case or statement of facts: For matters relating to preparation of settled case, etc., see ante, § 9C2. Where questions presented depend upon construction of evidence, and is no proper brief of evidence. Milne Mfg. Co v. Cowart [Ga. App.] 64 SE 1002; Knox v. Lexington Terminal Co. [Ga. App.] 64 SE 1134; Oconee Oil Refining Co. v. Planters' Oil Co. [Ga. App.] 65 SE 144. Assignments not open to consideration because no proper statement of facts. Williams v. Robertson [Tex. Civ. App.] 115 SW 887; Green v. Cook [Tex. Civ. App.] 113 SW 776. Where statement of facts stricken for noncompliance with statute. Murphy & Co. v. Dunman [Tex. Civ. App.] 120 SW 240. Where no error on record and no case on appeal signed and settled by counsel and judge pursuant to statute. Table Rock Lumber Co. v. Branch, 150 N. C. 110, 63 SE 171; Hoss v. Palmer, 150 N. C. 17, 63 SE 171.

Abstract: For matters relating to preparation of abstract see ante, § 9C3. No abstract. Zimmerman v. Brinkmeyer [Iowa] 121 NW 1021. Failure to comply with rule 9 in preparation of abstract. Baker v. Cazort [Ark.] 112 SW 890. Abstract insufficient

vided the record affirmatively shows that the appellate court has jurisdiction.[93] Where an appeal is taken both from an appealable and a nonappealable order, the latter may be disregarded.[94] Appellants are generally entitled to dismiss as of course at any time before hearing on payment of costs,[95] but such dismissal has been held not to affect appellee's right to a hearing on cross assignments of error [96] or to prevent dismissal on his motion.[97] Dismissal of an appeal carries with it a temporary restraining order in the nature of a supersedeas.[98] In some states on dismissal of an appeal the cause may, under certain circumstances, be entered as pending on writ of error.[99] In Georgia where a direct bill of exception fails, the ap-

to present questions sought to be reviewed. Kempner v. Broyles [Ark.] 112 SW 219; Cahill v. Printy, 138 Ill. App. 600; Springer v. Baker, 139 Ill. App. 476; Buck v. Casper, 140 Ill. App. 278; International Hotel Co. v. Flynn, 141 Ill. App. 532. Where abstract insufficient to present question, and record proper is sufficient to support same. Rife v. Reynolds [Mo. App.] 117 SW 652.

Transcript: For matters relating to proper preparation of transcript see ante, § 10. Where only question raised was sufficiency of evidence to support verdict, and transcript did not contain all evidence. Davies v. Boyers [Mo. App.] 120 SW 631. If transcript is so defective that it presents no question for decision, court on final hearing for that reason affirm judgment, but it cannot dismiss the appeal, since appeal is taken by serving and filing notice and undertaking, followed by filing abstract or transcript within time prescribed. Quartz Gold Min. Co. v. Patterson [Or.] 96 P 551. Motion for affirmance pursuant to rule 7 for failure to file authenticated copy of record within 90 days as prescribed by Kirby's Dig. § 1194, denied, where, within 5 days after service of notice of motion and before hearing, appellant presented authenticated copy of record to clerk of supreme court and prayed an appeal from him, which was granted. North Star Fire Ins. Co. v. Dillard [Ark.] 111 SW 1003.

Failure to assign error: For necessity of assigning error and sufficiency of assignments see ante, § 11E. Where only matters open for review on record are not assigned as error or complained of. Wolf v. Sneve [S. D.] 121 NW 781. Where no proper submission of agreed statement of facts on which case was tried, and no assignment of error in bill of exceptions. McClarty v. Penn Mut. Life Ins. Co., 131 Ga. 724, 63 SE 224.

Briefs: For necessity and sufficiency of briefs see ante, § 11F. No brief or appearance. Schwan v. Peterman [La.] 49 S 486. Failure to file brief in time. Schafer v. Beecher [Or.] 101 P 899.

92. Failure of trial judge to file conclusions of law after request, where **no statement of facts.** Werner Stave Co. v. Smith [Tex. Cix. App.] 120 SW 247. Failure to file statement of evidence as part of record required by Rev. St. 1895, art. 1346, in default judgment not rendered void. McLane v. Kirby [Tex. Civ. App.] 116 SW 118.

Briefs: For necessity and sufficiency of briefs, see ante, § 11F. Failure of appellee to file brief justifies reversal. State v. Huff [Ind.] 87 NE 141; Cobe v. Malloy [Ind.] 88 NE 620; Wysong v. Sells [Ind. App.] 88 NE 954; International Text Book Co. v. Busick, 143 Ill. App. 417. Failure to file brief in time. Rose v. Arford [Ind.] 88 NE 302.

93. In order to entitle appellee to affirmance on certificate, must appear from transcript that appellate court has jurisdiction. Sloan v. McMillin [Tex. Civ. App.] 113 SW 587. Since jurisdiction of court of appeals is confined to cases of which trial court has jurisdiction, transcript must show that latter court had such jurisdiction. Id. When judgment of trial court is for sum below original jurisdiction of that court, and transcript fails to show how case came there, appellate court has no jurisdiction. Id. Since statute requires bond to be filed within specified time after adjournment of court, or when by law term may continue more than eight weeks, within specified time after notice of appeal is given, held that, where record contained copy of bond with date of its approval, but did not show, when court adjourned, how long term could have continued, nor when notice of appeal was given, court could not determine whether bond was filed in time, and hence it did not affirmatively appear that court of appeals had jurisdiction, and motion would be denied. Id.

94. Appeal from order confirming award and from judgment on award. In re Picker, 130 App. Div. 88, 114 NYS 289. That appeal is taken both from order denying motion for new trial, which is not appealable, and from a final judgment, does not vitiate the appeal. Price v. Western Loan & Sav. Co. [Utah] 100 P 677.

95. May dismiss as matter of course. San Pedro, etc., R. Co. v. Salt Lake City Board of Education [Utah] 99 P 263. Board of supervisors of a county have authority to order dismissal of a writ of error prosecuted at its instance. People v. Wells, 140 Ill. App. 235.

96. Does not deprive respondent of right to be heard upon his assignment of cross errors, or deprive court of powers to pass on and correct any error so assigned, or if necessary, to affirm, reverse, or modify judgment. San Pedro, etc., R. Co. v. Salt Lake City Board of Education [Utah] 99 P 263.

97. Fact that plaintiff in error directed dismissal of writ of error held not to prevent dismissal on defendant's motion. Bliss v. Tyler [Mich.] 16 Det. Leg. N. 357, 121 NW 756.

98. Restraining order in nature of supersedeas granted pending appeal from denial of temporary injunction. Masoero v. Campbell & Co. [Wash.] 102 P 423.

99. Code, § 388a, providing that whenever supreme court shall dismiss appeal for lack

pellate court may, in its discretion, permit the official copy of the bill retained below to be refiled as exceptions pendente lite.[1] A motion to dismiss [2] or affirm,[3] specifying the grounds relied on,[4] and made within the time fixed by the rules [5] and after notice,[6] together with proper proof of the grounds alleged therefor [7] is essential. A motion to affirm on certificate in Texas must be accompanied by a certified copy of the judgment.[8] Matters involving the merits will not ordinarily be considered on motion to dismiss.[9] A motion to dismiss for irregularities in perfecting the appeal is waived by filing a brief on the merits.[10]

Abatement See 11 C. L. 214 of an appeal may result from lack of capacity to prosecute it,[11] or from acts inconsistent with an intention to further prosecute it,[12] or

of jurisdiction, in cases where jurisdiction would attach if action had come up on writ of error, it shall be entered as pending on error, held not to apply where appellee has entered no appearance and hence jurisdiction of his person has not been obtained. Brady v. People [Colo.] 101 P 340. Where was no money judgment, and neither a franchise nor a freehold was involved, held that clerk would be directed to dismiss appeal from judgment dismissing complaint on demurrer and dissolving an injunction for want of jurisdiction, and to enter case as pending on writ of error. Healey v. Zobel [Colo.] 101 P 56.

1. Leave granted. Savannah Elec. Co. v. Tuck [Ga.] 63 SE 800. Leave granted no hardship being imposed on defendants and language of order such as to make question of appealability by exceptions directly difficult to determine. Wikie v. Jones, 131 Ga. 37, 61 SE 1124.

2. Mere suggestion not considered where no motion. Shepard v. Parker [Ala.] 47 S 1027. To justify dismissal for informality in order of appeal or bond, appellees must file special plea to dismiss avering informality relied on, and grounds of dismissal will not be supplied by court on suggestion in brief, particularly where parties have entered into an agreement to facilitate the appeal, and appellee asks for amendment of the judgment. Succession of Watt, 122 La. 952, 48 S 335.

3. Motion to affirm for failure to file transcript will not be considered when not accompanied by docket fee, it not being properly filed. Gordon v. Park [Mo.] 117 SW 1163.

4. Where facts are not shown by record, grounds of motion must be pleaded. Civ. Code Prac. §§ 757, 758. Buchanan v. Boyd's Ex'r [Ky.] 115 SW 222. Motion to dismiss appeal from judgment for recovery of land by one since deceased for failure to join parties who succeeded to decedent's interest, denied, there being nothing to show who such parties were, and it not being proper to adjudge matters involved before necessary parties are before court or facts necessary to determination of case are shown. Id.

5. Motion filed more than three days after filing of transcript is too late only where grounds for dismissal existed within such three days. Key v. McCall, 122 La. 978, 48 S 426. Under Code Prac. art. 594, requiring transcript to be filed within three days, motion to dismiss need not be filed within three days after the filing. Boudreaux v. Bourdreaux, 122 La. 433, 47 S 758. Where appeal not docketed in time but motion to dismiss deferred until call of case when appeal had been docketed, right of dismissal was lost. Foy v. Gray, 148 N. C. 436, 62 SE 523.

6. Motion overruled where no notice of motion given as required by rule 15. Noble v. Indianapolis Trac. & T. Co. [Ind. App.] 87 NE 696. Motion to dismiss under rule 3 for failure to file transcript need not be served. Adams v. Rogers [Nev.] 101 P 317.

7. Grounds of motions not self-sustaining, and if based on matters dehors, record should be supported by evidence aliunde. Thomas v. Price [Fla.] 48 S 17. Proof of necessary facts by affidavit is sufficient to warrant action, if such affidavits are not disputed. Bliss v. Tyler [Mich.] 16 Det. Leg. N. 357, 121 NW 756. Affidavits not open to consideration on motion where no notice of time and place of taking same was given to adverse party as required by supreme court rule 1. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358. Is error to dismiss for failure to file transcript in time where motion is supported by affidavit of counsel instead of certificate of clerk as required by Supreme Court Rule 3, particularly where there is no showing of facts required by said rule. Adams v. Rogers [Nev.] 101 P 317.

8. Sloan v. McMillin [Tex. Civ. App.] 113 SW 587.

9. New matter has no place in motion which must be confined to objections apparent on face of record. Bethel & Redding Lime Co. v. New York, etc., R. Co. [Conn.] 72 A 728. Motion will be denied where it involves merits. In re Sharp's Estate [Cal. App.] 100 P 1071. On motion to dismiss appeal from probate to district court, sufficiency of complaint to authorize judgment rendered cannot be considered. Smith v. Clyne, 15 Idaho, 254, 97 P 40. Correctness of judgment on motion to dismiss in court below cannot be tested by motion to dismiss in appellate court, but only remedy is by appeal. Succession of Desina [La.] 49 S 23.

10. Motion to dismiss for reason that brief fails to set out substance of pleadings which present questions sought to be reviewed. Raley v. Evansville Gas & Elec. L. Co. [Ind. App.] 86 NE 863.

11. Failure of corporation plaintiff in error to pay license tax ground for dismissal. Ohio-Colorado Min. & Mill. Co. v. Elder [Colo.] 99 P 42. Where pending appeal by plaintiff in action by taxpayer, suing for

from the death of a necessary party before the appellate court acquires jurisdiction.[13] Death after the appeal is perfected does not result in abatement,[14] providing that there is a final judgment or other surviving right.[15]

himself and other taxpayers of county, against fiscal court and county jailer to enjoin court from paying out money to care for court house, and to compel jailer to care for it, plaintiff removed from county, held that appeal would be dismissed under Civ. Code Prac. § 757, providing for dismissal where appears that appellant's right to further prosecute appeal has ceased. Harney v. Fayette County Fiscal Court [Ky.] 113 SW 108. Appeal not dismissed where, pending appeal from judgment denying relief in suit to foreclose mortgage, mortgagee conveyed premises to stranger, verbally agreeing to refund purchase price if property was sold in pending suit and not purchased by grantor. Shields v. Simonton [W. Va.] 63 SE 972. Under Burns' Ann. St. 1908, § 272, transfer of interest by appellant pending appeal is no ground for dismissal, but action may be continued in name of original party, or court may allow transferree to be substituted. State v. Cadwallader [Ind.] 87 NE 644. In any event, in mandamus to compel defendant to permit use of his telephone plant and connections by relator, and for damages, affidavit showing that after judgment for defendant, appellant sold and delivered possession of his telephone plant to a corporation, and had no other interest than that he was stockholder therein and mortgagee, did not show such transfer of interest as to warrant dismissal. Id.

12. Matters in controversy fully compromised and settled. People v. Wells, 140 Ill. App. 235. Where judgment paid pending writ of error. Knowles v. Harrington [Colo.] 101 P 403. Payment of judgment pending appeal from judgment quashing execution. Myher v. Myher [Mo.] 113 SW 689. Appeal from order granting peremptory writ of mandamus, where pending appeal appellant did everything required of him by writ. State v. Fields [Or.] 101 P 218. Payment to prevent levy of execution is compulsory and will not abate pending proceedings in error to vacate judgment so paid. Freight v. Wyandt [Kan.] 99 P 611. Mere offer of settlement which appellant refuses to accept does not require dismissal of pending appeal. Loveday v. Parker, 50 Wash. 260, 97 P 62. Plaintiff obtained judgment establishing its right to maintain pipe line across defendant's land, for damages for interference therewith, and enjoining further interference. Defendant's motion for new trial, which was directed to entire judgment, was denied and he appealed from denial of motion and from judgment. Held that fact that after appeals were taken defendant parted with his interest in the land and relinquished his interest in the pipe line was no ground for dismissing appeals, since he still had right to appeal from money judgment and denial of motion. Rubio Canon Land & W. Ass'n v. Everett, 154 Cal. 29, 96 P 811. Personal service after order of trial court setting aside previous service upon attorney does not constitute waiver of appeal from order perfected before second service. Venner v. Great Northern R. Co. [Minn.] 121 NW 212.

13. See ante, § 3A.

14. Death of appellee after granting of term time appeal and after bond was filed, but before filing of transcript, held not to have abated appeal but merely to have transferred judgment to his representatives or heirs. Burns' Ann. St. 1908, § 678. Bruiletts Creek Coal Co. v. Pomatto [Ind.] 88 NE 606, rvg. [Ind. App.] 85 NE 993. Where appeal perfected within period provided by statute, appellate court's jurisdiction dates from day transcript was filed with assignment of errors, and application to substitute administrator as appellee should be granted. Id. No material difference whether failure to appoint administrator until after sufficient time to bar new appeal was mere coincidence was caused from sinister motives or in exercise of lawful right. Bruiletts Creek Coal Co. v. Pomatto [Ind.] 88 NE 606. Where death of one of several appellants was suggested after first submission of appeal to supreme court but before resubmission on rehearing, held that a revivor was not an indispensible step to continuation of suit in supreme court. Rev. St. 1899, §§ 856, 857 (Ann. St. 1906, pp. 805, 806). Reed v. Colp, 213 Mo. 577, 112 SW 255. Where suggestion of death of one of several appellants was made after first submission of appeal and before second submission on reargument, but no steps were taken to enter appearance of personal representative, held that it would be assumed that revivor had been abandoned. Id. Action for personal injuries held not to have abated by death of plaintiff after rendition of judgment in his favor and after defendant had perfected error proceedings by filing petition and approved bond. Rev. St. 1895, art. 973. Binyon v. Smith [Tex. Civ. App.] 112 SW 138. Writ of error is perfected by filing petition and bond. Rev. St. 1895, art. 1402. Id. Under Code 1906, § 3900, court may hear case on writ of error to review judgment of circuit court dismissing appeal from judgment of county court appointing administrator, notwithstanding death of plaintiff in error pending writ, without regard to such death. Butcher's Heirs v. Kunst [W. Va.] 64 SE 967.

15. Death of appellant abates appeal to federal supreme court from order of circuit court denying relief by habeas corpus. Johnson v. Tennessee, 29 S. Ct. 651. Plaintiff died pending her appeal from order granting defendant new trial in action for damages for alleged wrongful death of her husband. Held that her administrator could not be made party and action revived in his name. Rev. St. 1899, §§ 762, 96, 97 (Ann. St. 1906, pp. 743, 369, 370). Millar v. St. Louis Transit Co., 216 Mo. 99, 115 SW 521. Appeal in election contest held to have abated by death of appellant pending appeal, though his estate would be liable for costs in absence of reversal. St. 1903, §§ 1596a, 10. Galvin v. Shafer [Ky.] 113 SW 485.

Reinstatement. See 11 C. L. 214—The court may reinstate an appeal after dismissal where justice requires it.[16]

(§ 11) *H. Raising and waiver of defects.*[17]—See 11 C. L. 214—Nonjurisdicitonal defects are waived by failure to object at the proper time[18] or by proceeding with the case on the merits[19] or by other conduct inconsistent with an intention to take advantage thereof,[20] but jurisdictional defects cannot be waived and may be raised at any time.[21] The practice on motions to dismiss is treated in a previous section.[22]

§ 12. *Hearing.*[23]—See 11 C. L. 215—Written request for permission to make an

16. If case is regularly assigned and counsel duly notified and case is dismissed for lack of prosecution, it will not be reinstated except for providential cause. Rule 22. Sasser v. Pierce [Ga. App.] 64 SE 1100. Court may, in its discretion, reinstate during same term case which upon its call on calendar has been dismissed for want of prosecution if it appears that failure to prosecute was due to no fault of counsel, but to fact that notice required by Rule 20 was not sent or was lost in mail. Id. After dismissal for failure to timely perfect appeal, reinstatement may be made on showing that such failure was without laches, as where necessary papers were in hands of officers of court and mislaid until time had expired. Interstate Lumber & Mill Co. v. Nevada Amusement Co. [Nev.] 101 P 549. Dismissal for failure to file transcript in time vacated, though attention was not promptly called to error in granting it and though good cause was not properly shown, on condition that appellant within 15 days present record for filing, and make affidavit that appeal was taken in good faith. Adams v. Rogers [Nev.] 101 P 317. Unsworn statement of counsel for appellant made in absence of counsel for respondent not proper method to establish "good cause" for vacating dismissal within Supreme Court Rule 3. Id.

17. Search Note: See note in 4 Ann. Cas. 304.

See, also, Appeal and Error, Cent. Dig. §§ 1868-1876, 1924, 1925, 2064-2070, 2168-2174, 2472-2479, 2618, 2620, 2775-2849, 3086-3089, 3096, 3097, 3101, 3104-3110, 3126, 3127, 4253-4262; Dec. Dig. §§ 336, 355, 395, 429, 430, 554, 592, 634-661, 753, 754, 766, 770-774, 1075-1079; 2 Cyc. 784-789, 802, 873-876, 1010, 1021-1023, 1093; 3 Cyc. 134-152, 387-389.

18. Appellate court will adjudicate on the merits notwithstanding irregularities in bringing up cause, when all parties are before it and have not raised the question. Converse v. Hindes, 139 Ill. App. 370. Question of propriety of appeal not having been raised will be ignored, though verdict was rendered as to defendants appearing and not as to defendant in default, there having been no severance. First Nat. Bank v. Miller, 139 Ill. App. 608. Objection to irregularities in bringing up case are waived unless filed 48 hours before opening hour on day set for hearing. Court Civ. App. rule 8. International & G. N. R. Co. v. Hood [Tex. Civ. App.] 118 SW 1119. Copying statement of facts into record instead of sending up original record or required by Gen. Laws 1907, c. 24, is an irregularity that may be so waived. Id. Failure to serve notice of perfecting appeal waived by accepting copies of record and of appellant's brief. Lum v. Fairbanks [Mich] 15 Det. Leg. N. 886, 118 NW 578. Objection that original statement of facts did not accompany record, but was copied therein, waived where not taken before submission of cause. Royal Ins. Co. v. Texas & G. R. Co. [Tex.] 116 SW 46; Texas & P. R. Co. v. Stoker [Tex.] 113 SW 3; Hall v. First Nat. Bank [Tex.] 116 SW 47; Bean v. Bird [Tex. Civ. App.] 117 SW 177, overruling former opinion [Tex. Civ. App.] 115 SW 121; Houston & T. C. R. Co. v. Rogers [Tex.. Civ. App.] 117 SW 1053; Houston & T. C. R. Co. v. Rogers [Tex. Civ. App.] 116 SW 393.

19. Objection that suretles on defendant's appeal bond from justice to circuit court should have been joined on appeal to supreme court waived by submission on merits. Shepherd v. Parker [Ala.] 47 S 1027. Insufficiency of register's certificate to transcript waived by submission on merits. Crittenden v. Chancey [Ala.] 49 S 811. Even if bond was insufficient to perfect appeal in term, held that full appearance of appellee by filing brief on merits would give court jurisdiction of his person, and appeal would be treated as one taken in vacation. Majenica Tel. Co. v. Rogers [Ind. App.] 87 NE 165. Common joinder in error amounts to admission by defendant in error that what is returned as record of judgment below is in truth the record thereof, so that after such joinder neither party can of right allege diminution or have a certiorari. Tomlinson v. Armour & Co., 75 N. J. Law, 748, 70 A 314. Motion to dismiss for failure to serve notice is waived by appearing, filing brief and arguing the merits. Karns v. State Bank & Trust Co. [Nev.] 101 P 564. Appellee's right to have appeal dismissed for failure to perfect appeal by failing to pay register's fee within time limited for perfecting appeal held not waived by urging that hearing of case be expedited, counsel having no knowledge, and not being required to learn, of such failure. Lum v. Fairbanks [Mich.] 15 Det. Leg. N. 886, 118 NW 578.

20. Indorsing appeal bond "satisfactory to be reapproved" waives objection that it was dated prior to decree appealed from. Lewis v. Luckett, 32 App. D. C. 188. Objection that bill of exceptions was not filed in time may be urged by one who before expiration of term of filing stipulated to include same in record. Benson v. Fitzgerald, 140 Ill. App. 388.

21. See ante, § 5.

22. See § 11 G, ante.

23. Search Note: See Appeal and Error, Cent. Dig. §§ 3197-3246; Dec. Dig. §§ 815-828; 3 Cyc. 210-212.

oral argument,[24] and notice of argument,[25] are sometimes required. A reargument may be ordered where a majority of the justices are unable to agree on a decision.[26] Counsel for parties who have not appealed will not be heard against the decree.[27] A continuance to procure correction of the record may be allowed in proper case.[28]

§ 13. *Review. A. Mode of review; review proper or trial de novo.*[29]—See 11 C. L. 216—Judgments at law are reviewable for matter of law only[30] as found in the record and bill of exceptions.[31] Equitable decrees and orders are usually reviewed de novo.[32] A trial de novo is frequently provided for on appeals in certain special

24. Either party on request is entitled to oral argument, but such request must be put in writing or print and filed with clerk as separate paper so that he may put cause on list of cases for oral argument, request at end of reply brief not called to clerk's attention being insufficient. Great Western R. Co. v. Ackroyd [Colo.] 98 P 726.

25. In computing ten days' notice required by supreme court rule 8, day of service should be excluded and first day of term included. Village of Exclsior v. Minneapolis & St. P. Suburban R. Co. [Minn.] 120 NW 526.

26. Where two justices vote for reversal and one for affirmance, case will be ordered reheard by full court. Merck v. Merck [S. C.] 64 SE 514. Where only three of justices who heard appeal were on bench when decision was to be rendered, and they were divided in opinion, held that it was necessary to order reargument, since it requires concurrence of three justices to reverse judgment. Vlasservitch v. Augusta & A. R. Co. [S. C.] 64 SE 913.

27. On appeal from decree sustaining validity of testamentary trust counsel for executors cannot be heard against decree, his clients not having taken appeal. Fitchie v. Brown, 211 U. S. 321, 53 Law. Ed. 202.

28. On such an application court always considers diligence of applicant. Poole v. Oliver [Ark.] 115 SW 952. Motion of appellant for continuance denied for lack of diligence. Id. Motion denied where correction would not change result. Ward v. McPherson [Ark.] 113 SW 42. Stay denied where correction proposed would present matter not open to consideration. Sidwell v. Jett, 213 Mo. 601, 112 SW 56.

29. Search Note: See Appeal and Error, Cent. Dig. §§ 3617-3666; Dec. Dig. §§ 885-899; 3 Cyc. 257-265.

30. Lavin v. Public Service R. Co. [N. J. Law] 71 A 58; Wilber v. Gillespie, 127 App. Div. 604, 112 NYS 20; Sugden v. Peiser, 112 NYS 1084; Lieberman v. Bowden [Tenn.] 119 SW 64. Proceeding to establish lost boundary corners not triable de novo. Leathers v. Oberlander [Iowa] 117 NW 30. Proceeding on application by pharmacist for permit to sell intoxicants held special proceeding so that in absence of provision that trial should be as in equity case action of court could only be reversed for abuse of discretion. In re Moore [Iowa] 118 NW 879. On writ of error only questions of law apparent on record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact. Pacific Sheet Metal Works v. California Canneries Co. [C. C. A.] 164 F 980; Continental Gin Co. v. Murray Co. [C. C. A.] 162 F 873. Writ of error from federal supreme court to supreme court of Philippine Islands brings up only questions of law. Santos v. Holy Roman Catholic & Apostolic Church, 212 U. S. 463, 53 Law. Ed. ——. Evidence is not part of record on appeal in road proceedings and cannot be considered although printed in appellant's paper book. Perry Township Road, 36 Pa. Super. Ct. 131.

31. See § 9, ante.

32. Creamer v. Bivert, 214 Mo. 473, 113 SW 1118; Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104; Liberman v. Bowden [Tenn.] 119 SW 64. Divorce case. Lowery v. Lowery [Iowa] 118 NW 749. Action for specific performance of contract to convey land on evidence of trial court, triable de novo under Ballinger's Ann. Codes & St. § 6520 (Pearce's Code, § 1068). Cushing v. Heuston [Wash.] 102 P 29. Reviewing court not bound by findings of fact. Id. Suit for injunction held to have been disposed of on merits as well as on ground of want of jurisdiction, so that it was one to be heard de novo. Detroit Realty Co. v. Barnett [Mich.] 16 Det. Leg. N. 107, 120 NW 804. Appeal brings up questions of fact. Pacific Sheet Metal Works v. California Canneries Co. [C. C. A.] 164 F 980; Continental Gin Co. v. Murray Co. [C. C. A.] 162 F 873. Issues of fact as well as of law are before court for review. Jolly v. Huebler, 132 Mo. App. 675, 112 SW 1013. Supreme court has right to review evidence. Derry v. Fielder, 216 Mo. 176, 115 SW 412; First Nat. Bank v. Fry, 216 Mo. 24, 115 SW 439; Glascock v. Glascock, 217 Mo. 362, 117 SW 67. Supreme court will determine controverted questions from evidence in record. Prac. Act §§ 119, 120, 122; Hurd's Rev. St. 1908, § 110. Nix v. Thackaberry, 240 Ill. 352, 88 NE 811. Where testimony is taken by deposition, case will be judged on its merits. Northup's Trustees v. Sumner's Trustee [Ky.] 116 SW 699. May consider competent proof offered and excluded, or reject incompetent proof received over objection. Hanson v. Neal, 215 Mo. 256, 114 SW 1073; Jones v. Thomas, 218 Mo. 508, 117 SW 1177. Error of justice in denying jury trial waived, where defendant elected to appeal and have trial de novo instead of resorting to certiorari. New Jersey Soc. for Prevention of Cruelty to Animals v. Atkinson [N. J. Law] 69 A 976. Is duty of supreme court under constitution to determine whether findings were such as were called for by evidence. Campbell v. Gowans [Utah] 100 P 397. Supreme court has same discretionary power in reference to suit as trial court, except where limited by statute, and hence may, in proper case, deem pleadings amended to conform to facts presented

proceedings,[33] or from inferior courts or tribunals,[34] or where the case is submitted on an agreed statement of facts.[35] Subject to limitation to the issues as originally made,[36] the rules of pleading and practice are the same as in ordinary actions where there is a formal retrial by a court of general superior jurisdiction.[37]

by record. Hough v. Porter [Or.] 98 P 1083. Garnishee, in proceedings purporting to be founded on judgment and writ of fieri facias may show on trial de novo in court of appeal that such judgment was obtained by default against an unrepresented minor. Johnson v. Murphy [La.] 49 S 1007. Appeal in admiralty opens whole case for trial de novo. Munson S. S. Line v. Miramar S. S. Co. [C. C. A.] 167 F 960. Fact that one party did not appeal does not prevent direction of decree more favorable to him. Id.

33. On appeal in mandamus where issues of fact determined by lower court without jury, appellate court is not restricted to review of rulings but may determine upon whole record whether order appealed from is correct. Whitridge v. Pope [Md. App.] 73 A 288. Appeal from decree in re amount of license fee collectable from a telephone company is, under Act Apr. 17, 1905, P. L. 183, an appeal as from ordinary case in equity and brings up entire record. Delaware & Atlantic Tel. & T. Co. License Fees, 37 Pa. Super. Ct. 151. While findings of trial court are to be regarded as if established by jury where they are inferences drawn from practically undisputed testimony, it is duty of appellate court to examine evidence and determine if findings are warranted. Id.

34. Rev. St. c. 88, § 79, providing that whenever exceptions are taken to ruling and decision of single justice as to liability of a trustee the whole case may be re-examined and determined by law court and remanded for further disclosure or other proceedings as justice requires, applies alike to scire facias and original proceedings in trustee process, and, when exceptions taken in action of scire facias founded on original trustee process indicate that whole case is to be considered, law court has authority to correct any error in judgment rendered below, whether of law or fact. Thompson v. Shaw [Me.] 71 A 370. When bill of exceptions in action of scire facias founded upon an original trustee process indicates that whole case is to be considered by law court, exceptions need not specify extent to which law court may examine the case. Id. Cases brought before circuit court by appeal must be tried de novo and proceed to a final determination. Miller v. Wabash R. Co. [Ind.] 85 NE 967. Trial in circuit court on appeal from county court in proceedings to establish private road is de novo, and appeal brings up only record proper. Fitzmaurice v. Turney, 214 Mo. 610, 114 SW 504. On review of judgment of municipal court, appellate court must disregard testimony to which exceptions were taken. Haas v. Read, 117 NYS 106. Circuit court on appeal from municipal court without affidavit for trial de novo provided for by St. 1898, § 3768, must, in rendering judgment pursuant to Id. § 3769, act solely upon evidence upon which court below acted, not considering any evidence ruled out, or any conjecture as to evidence which might have been given in answer to questions not permitted. Luckow v. Boettger [Wis.] 121 NW 649. Upon appeal or writ of error from supreme court of Philippine Islands, federal supreme court will review facts under Act July 1, 1902, § 10. Strong v. Repide, 213 U. S. 419, 53 Law. Ed. —.

Appeals in probate proceedings: Rev. St. 1887, § 4844, construed, and held that, where appeal is taken from probate to district court on question of law alone, district court has jurisdiction only to review issues of law presented by the appeal, and upon reversing probate court cannot order retrial in district court, but must remand cause for further proceedings. Smith v. Clyne, 15 Idaho, 254, 97 P 40. Where probate court has not passed on issue of fact, it cannot, through mistaken opinion of the law, force district court to do so. Id. New trial as contemplated by said section implies that cause has been once tried, and, if there was no issue of fact and no trial of same below, can be no new trial on appeal. Id. If, however, issue of fact was tendered below, on reversal on appeal taken on question of law alone, district court may order new trial in said court, unless issues of law dispose of case and finally determine controversy. Id. Where county court has acted and refused to admit will to probate, on appeal to circuit court trial is de novo confined to order appealed from. Dean v. Dean, 239 Ill. 424, 88 NE 149.

35. Appellate court will try case de novo disregarding judgment below as to law. Goodwin v. Kraft [Okl.] 101 P 856.

36. On appeal from order of board of supervisors denying petition for establishment of drainage district though district court tries case de novo, it must do so on issue before such board, and can make no order which board could not have made on same record. Harshorn v. Wright County Dist. Ct. [Iowa] 120 NW 479. On appeal from district to superior court, jurisdiction of latter is wholly appellate, and it can only render such judgment to try such issues as district court could. Hall v. Hall, 200 Mass. 194, 86 NE 363. Though case commenced in district court is tried de novo on appeal to supreme court, such trial must be had on pleadings and evidence presented to district court and certified in record brought up on appeal, and new issues cannot be framed or new evidence introduced. State v. Lincoln Medical College, 81 Neb. 533, 118 NW 122.

37. On appeal from justice of peace, circuit or superior court has same power to allow amendments as justice would have had. Holland v. Hummell [Ind. App.] 87 NE 662. Case in superior court on appeal from district court is mere continuation of original case, and, though amendments may be allowed on appeal, must be such in so far as they affect any question of jurisdiction, as could have been made in district court. Hall v. Hall, 200 Mass. 194, 86 NE 363. Jurisdiction of district court being limited to $1,000, held that superior court on appeal from dis-

In Connecticut a party may, on motion made within a specified time [38] and served on the adverse party,[39] procure a correction of findings in the appellate court.[40] The facts stated in the application will be taken as true unless the adverse party answers within a specified time.[41] Unnecessary corrections will not be made.[42]

(§ 13) *B. General scope or objects of review.*[43]—See 11 C. L. 217—Unnecessary points [44] or abstract questions [45] will not be decided. Accordingly, errors which

trict court had no authority to allow amendment increasing ad damnum from $1,000 to $2,000. Id. Rev. Laws, c. 173, § 97, providing that, with certain exceptions, on appeal to superior court case shall be tried and determined as though originally commenced there, held not to authorize such an amendment. Id. On appeal from probate to circuit court, affidavit to claim against estate of decedent may be amended. Wagoner Undertaking Co. v. Jones, 134 Mo. App. 601, 114 SW 1049. If identity of cause of action on ground of defense is preserved, petition or answer may be amended on appeal from county court to district court. Segear v. Westcott [Neb.] 120 NW 170.

38. Motion under Gen. St. 1902, § 797, to have evidence and rulings made part of record and to have finding corrected by supreme court must be made within one week after party seeking correction has received notice that finding has been filed. Root v. Lathrop [Conn.] 70 A 614; Greist v. Gowdy [Conn.] 71 A 555. Any extension of time must be made by court, and party cannot extend it by first proceeding under Id. §§ 794, 795, 796, to have finding corrected by lower court. Root v. Lathrop [Conn.] 70 A 614. Defendant first proceeded under earlier sections to procure correction of finding below. One of the corrections asked for was made and other denied. He then, more than one week after finding was filed but within week after correction was made and finding refiled, made motion under § 797. Held that court was not bound to certify evidence, but, having done so, supreme court would consider time as having been extended by court on its own motion, which it had right to do. Id. Judge's order of certification construed as extension of time, which he is authorized to grant under § 797. Greist v. Gowdy [Conn.] 71 A 555.

39. Service of application under Gen. St. 1902, § 801, to rectify finding on one of several counsel for same party is service on all. Bristol v. Pitchard [Conn.] 71 A 558.

40. In lieu of motion below to correct findings and exceptions, provided for in Gen. St. 1902, §§ 795, 796, evidence and rulings may, under § 797, within one week after filing of finding, be filed and certified, and claims for correction therein set forth in assignments of error on appeal. Greist v. Gowdy [Conn.] 71 A 555. Cannot proceed both under Gen. St. 1902, §§ 794, 795, 796, to obtain correction of finding by trial court and under § 797 by motion to have evidence and rulings made part of record and to have supreme court correct finding. Root v. Lathrop [Conn.] 70 A 614.

41. Application under Gen. St. 1902, § 801, to rectify finding taken as true for failure to answer within seven days. Prac. Book 1908, p. 270, § 14. Bristol v. Pitchard [Conn.] 71 A 558.

42. Application denied though admitted to be true by failure to answer, where none of corrections were necessary to support or calculated to strengthen appellants' claims. Bristol v. Pitchard [Conn.] 71 A 558.

43. Search Note: See note in 11 Ann. Cas. 552.

See, also, Appeal and Error, Cent. Dig. §§ 3247-3376, 3402-3449; Dec. Dig. §§ 836-861; 3 Cyc. 220, 221, 223; 2 A. & E. Enc. P. & P. 363; 7 Id. 846.

44. Baird v. Atlanta, 131 Ga. 451, 62 SE 525; Martindale v. Rochester [Ind.] 86 NE 321; Cooper v. Brown [Iowa] 122 NW 144; Hancock County Sup'rs v. Imperial Naval Stores Co. [Miss.] 47 S 177; Adams v. Bullock & Co. [Miss.] 47 S 527; Sarasohn v. Kamaiky, 193 N. Y. 203, 86 NE 20; Lantry-Sharpe Contracting Co. v. McCracken [Tex. Civ. App.] 117 SW 453; Roanoke R. & Elec. Co. v. Young, 108 Va. 783, 62 SE 961; State v. Engle, 50 Wash. 207, 96 P 1045; Malfa v. Crisp [Wash.] 100 P 1012. Errors not going to merits of case. Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95. Questions not affecting right of respondent to recover judgment appealed from. Jones v. Seattle, 51 Wash. 245, 98 P 743. Will not pass on **constitutional questions** where case can be determined on other grounds. State v. Parker [Fla.] 49 S 124; Cleveland, etc., R. Co. v. Hollowell [Ind.] 88 NE 680; Sanden v. Northern Pac. R. Co. [Mont.] 102 P 145; Karns v. State Bank & Trust Co. [Nev.] 101 P 564; State v. Boston & M. R. R. [Vt.] 71 A 1044; State v. Railroad Commission of Washington [Wash.] 100 P 179. Matters not necessary to decision of appeal will not be determined if not so presented that determination would be final. Pons v. Yazoo & M. V. R. Co., 122 La. 156, 47 S 449.

Questions held unnecessary to decision and not decided. Other assignments of error, where particular error requires reversal. Pelham Mfg. Co v. Powell [Ga. App.] 64 SE 1116; Wabash Elec. Co. v. Blue Springs [Neb.] 122 NW 21; Gulf, etc., R. Co. v. Farmer [Tex.] 115 SW 260; McCormick v. Jester [Tex. Civ. App.] 115 SW 278; Bucher v. Wisconsin Cent. R. Co. [Wis.] 120 NW 518. Other questions, where held that trial coult had no jurisdiction. Finn v. Walsh [N. D.] 121 NW 766. Other assignments, where peremptory instruction improperly refused. Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969. Assignments complaining of proceedings at trial after demurrer was improperly overruled. General Supply & Const. Co. v. Lawton, 131 Ga. 375, 62 SE 293. If general demurrer to declaration be improperly sustained as to one of two counts, it is unnecessary to consider other count in connection

with the error assigned. Hudson v. Mississippi Cent. R. Co. [Miss.] 48 S 289. Refusal to give affirmative charge, where reversal necessarily followed from determination that court erred in overruling demurrer to complaint. Sloss-Sheffield Steel & Iron Co v. Sharp [Ala.] 47 S 279. Where action was held to have been brought within one year, whether the six year or one year limitation applied. Central of Georgia R. Co. Sturgis [Ala.] 48 S 810. Respondent's contention that jurisdiction over nonresidents could not be obtained by constructive service in particular form of action, where he prevailed below and, hence, had no interests at stake. Hutchins v. Wertheimer, 51 Wash. 539, 99 P 577. Whether U. S. courts have jurisdiction of infringement of trade mark or act of unfair competition committed wholly in foreign country, where it was shown that acts complained of were not wholly performed outside U. S. Eagle Oil Co. v. Vacuum Oil Co. [C. C. A.] 162 F 671. Where judgment of lower court and disposition of case on appeal were not prejudicial to an appellant, whether lower court had no jurisdiction over his person. In re Buerstetta's Estate [Neb.] 119 NW 469. Sufficiency of count of complaint, where all testimony competent thereunder was admissible under another good count. Henderson Law Co. v. Hinson [Ala.] 47 S 717. Overruling of count and sustaining demurrers to pleas, where court gave general affirmative charge with respect to other count. Tennessee Coal, Iron & R. Co. v. Burgess [Ala.] 47 S 1029. Rulings on pleadings, where pleas which survived demurrer were sufficient to admit all essential testimony. Stewart v. Southern R. Co. [C. C. A.] 168 F 685. Assignment concerning questions raised by demurrer to original declaration, where case was tried on amended declaration which was not demurred to and stated cause of action. Washington-So. R. Co. v. Cheshire [Va.] 65 SE 27. Sufficiency of demurrers where defendant's exceptions to conclusions of law based on special findings of facts presented same questions. Shank v. Trustees of McCordsville Lodge No. 338, I. O. O. F. [Ind. App.] 88 NE 85. Other grounds of demurrer, where petition properly dismissed for misjoinder of parties. Hearn v. Clare, 131 Ga. 374, 62 SE 187. Whether certain facts, if properly presented, would have constituted defense to action, where it was not shown that such facts were cause of injury complained of. Cram v. Chicago, B. & Q. R. Co. [Neb.] 122 NW 31. Whether certain evidence was admissible, where verdict could not have been different had it been excluded. Carscallen v. Coeur D'Alene & St. Joe Transp. Co., 15 Idaho, 444, 98 P 622. Question of evidence as to damage, where judgment for defendant affirmed. Smith & Co v. Russell Lumber Co. [Conn.] 72 A 577. Whether evidence as to damages was admissible under complaint, where plaintiff was not entitled to recover on case made by her below. Mitchell v. Henderson, 37 Mont. 515, 97 P 942. Statutory presumption that indorsee of note was bona fide holder being sufficient to authorize finding, competency of other evidence introduced to show that fact. Cole Banking Co. v. Sinclair, 34 Utah, 454, 98 P 411. Objection to evidence offered in condemnation proceedings for purpose of showing ownership of fee, where appellant, who made it, did not claim any title or interest in fee, and hence had no standing to make it. Chicago & N. W. R. Co. v Glos, 239 Ill. 24, 87 NE 881. Assignments attacking judgment for refusal to sustain exceptions to master's report, where it appeared that findings and conclusions of court were made without regard to such report. United States & Mexican Trust Co. v. Delaware Western Const. Co. [Tex. Civ. App.] 112 SW 447. Assignments as to instructions, where judgment refusing new trial affirmed upon ground that evidence demanded verdict for defendant. Watson v. Southern R. Co. [Ga.] 64 SE 549. Where defendant's motorman recklessly ran into plaintiff and jury properly found for plaintiff, whether it was error to instruct that plaintiff was guilty of negligence as matter of law. Bladecka v. Bay City Trac. & Elec. Co. [Mich.] 15 Det. Leg. N. 965, 118 NW 963. Merits of case will not be considered on defendant's cross appeal, where plaintiff entitled to nonsuit. McPherson v. Seattle Elec. Co. [Wash.] 101 P 1084. That order overruling motion for new trial could not be considered because no notice of appeal therefrom was served or filed, in view of question submitted to jury and their finding thereon. Dackich v. Barich, 37 Mont. 490, 97 P 931. Appellee's objection to manner in which appeal was perfected, where upon appellant's own theory of case same should not be reversed. Martin Lumber Co. v. Forsythe [Okl.] 96 P 635. Whether or not certain documents should have been inserted in bill of exceptions, where they were absolutely immaterial and without prejudice to appellant's rights. In re Hite's Estate [Cal.] 101 P 448. That ruling on motion to make complaint more definite and certain could not be considered because not preserved in record by bill of exceptions, where ruling was correct. Dackich v. Barich, 37 Mont. 490, 97 P 931. Defendant's appeal will be dismissed as unnecessary where new trial was ordered as to all issues on plaintiff's appeal. Hawk v. Pine Lumber Co., 149 N. C. 16, 62 SE 754. Assignments as to other issues, in view of holding that one issue was properly submitted to jury. Macafee v. Higgins, 31 App. D. C. 355. Effect of statute, where all proceedings were had prior to its enactment. Nofziger Lumber Co. v. Waters [Cal. App.] 101 P 38. Reasonableness of ordinance enacted under authority of void statute. Henderson v. Galveston [Tex.] 114 SW 108. Validity of ordinance in action for violation thereof, where was formal defect in complaint justifying sustaining of demurrer. City of Cannelton v. Collins [Ind.] 88 NE 66. Whether district court had no power or discretion to vacate order appointing receiver, where immediately upon vacation of such order plaintiff amended complaint and made second motion for appointment of receiver which was properly denied after hearing. Jacobs v. Jacobs Mercantile Co., 37 Mont. 321, 96 P 723. Where trust deed to grantor's wife valid as to other creditors so that entire surplus proceeds of foreclosure sale were properly paid to her, whether subsequent homestead declaration filed by grantor was valid. Godfrey Frank & Co. v. Doughty [Miss.] 47 S 643. Where contract whereby plaintiff granted defendant exclusive option to purchase or sell for her certain land was incapable of specific enforce-

ment, and hence could not form valid claim to interest in such land, held that in suit to quiet title as against defendant's claim of an interest under such contract it was unnecessary to determine whether plaintiff's conduct caused defendant to cease efforts to sell property. Jolliffe v. Steele [Cal. App.] 98 P 544. Where evidence supported finding that there was dispute as to boundary line, and hence oral agreement fixing it was valid, whether such agreement would have been valid had there been no dispute. Wells v. Bentley [Ark.] 113 SW 639. Whether agreement for survey of boundary line was arbitration agreement so as to make finding of arbitrators thereby appointed binding, where finding of court that line was as fixed by such survey was sustained by evidence. Holland v. Coleman [Ky.] 114 SW 305. In action against city and contractor for personal injuries sustained by reason of defective sidewalk, error, if any, in dismissing action against contractor was no ground for reversal of judgment against city, since it was primarily liable. Jones v. Seattle, 51 Wash. 245, 98 P 743. Validity of other titles as against each other, in suit to quiet title, where tax title of one of defendants was superior to all other titles pleaded. Hahn v. Hill Inv. Co. [Kan.] 100 P 484. In action to recover value of property sold by defendant as sheriff under execution, and which plaintiff claimed to own, plaintiff's contention that sale was irregular, since, if property belonged to plaintiff, admitted taking by defendant was a conversion, and if not, irregularity did not concern him. Burrell v. Collins [Cal. App.] 99 P 211. Whether mortgagor seeking to redeem was bound to tender money to cover certain items claimed by mortgagee, where tender clearly insufficient as to other items. Murry v. Strother [Ala.] 48 S 72. Whether compliance with statute as to notice of expiration of period to redeem from tax sale and of intention to take out tax deed was jurisdictional, where notice was given. Bandow v. Walven [S. D.] 120 NW 881. In suit by contractors and others to foreclose mechanic's liens, owner deposited amount claimed by contractors, in court. Held that on appeal by owner distribution of sum awarded contractors among lien claimants obtaining personal judgments against them was immaterial on appeal by owner, his only interest in sum deposited being to have returned to him balance thereof after deducting amount found due contractors. Los Angeles Pressed Brick Co. v. Higgins, 8 Cal. App. 514, 97 P 414. Whether commissioners of election and county court had right to go behind poll lists and returns and examine ballots, where circuit judge held that he had right to do so and proceeded accordingly, appeal being only for purpose of procuring re-examination of his judgment. Catlett v. Knoxville, S. & E. R. Co. [Tenn.] 112 SW 559. Whether certain ballots were void in view of fact that decision would not affect result of election. Id. Other questions in suit for partition where evidence failed to show complainant's right thereto. Dallam v. Sanchez [Fla.] 47 S 871. Rights of parties in action by pledgor of notes secured by trust deed foreclosed by pledgee, who purchased property to have title decreed in plaintiff and for accounting, where plaintiff at trial accepted conveyance of property covered by trust deed. Nevius v. Moore [Mo.] 120 SW 43. Whether testatrix was of sound mind, where will not executed as required by statute. Schofield v. Thomas, 236 Ill. 417, 86 NE 122. Burns' Ann. St. 1908, § 703, providing that appellate court shall not reverse proceedings any further than to include first error, implies duty to reverse on first error. Southern R. Co. v. McNeeley [Ind. App.] 88 NE 710. Though special demurrer raised valid objections to paragraphs of petition, court will not remand case without passing on merits because such demurrer was overruled, since defendant also raised exceptions going to merits which are sustained. Louisville & N. R. Co. v. Holland [Ga.] 63 SE 898. On appeal from order granting motion for new trial, all the grounds assigned in motion will be considered, though order was founded upon but one in which there was no error. Whitsett v. People's Nat. Bank [Mo. App.] 119 SW 999.

45. Chicago R. Equipment Co. v. National Hollow Brake-Beam Co., 239 Ill. 111, 87 NE 872; Chicago, I. & L. R. Co v. Railroad Commission [Ind.] 87 NE 1030; Woodruff v. People, 193 N. Y. 560, 86 NE 562; Albright v. Erickson [Okl.] 102 P 112; Miller v. Ury [Okl.] 102 P 112; Johnson v. Scott [Tex. Civ. App.] 111 SW 167; Keely v. Ophir Hill Consol. Min. Co. [C. C. A.] 169 F 601. Where only question involved has become abstract, jurisdiction will not be retained to settle merely an incidental question of costs. State v. Boyd [Ind.] 87 NE 140. Moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered for any reason, cannot have any practical legal effect upon a then existing controversy. Ex parte Steele, 162 F 694. When there is real controversy whether there are two judges of a district, and, if so, as to their respective power in removing and appointing officials, a case actually made concerning it cannot be treated as a moot case because judges agreed in advance as to steps actually taken to present the issue. Ex parte Steele, 162 F 694. Motion to dismiss on ground that action was sham, collusive, and merely colorable, denied. Carlson v. Helena [Mont.] 101 P 163.

Questions held abstract, and not decided. Where order granting change of venue is proper under existing legislation, it will be affirmed regardless of its propriety at time it was filed. People v. Syracuse, 128 App. Div. 702, 113 NYS 707. Sustaining of demurrer to special defense, where at trial defendant admitted all of the allegations of the complaint, thereby admitting that there was nothing in specific denials in answer, and admitting away his defense. Cameron v. Huntrach, 15 Idaho, 568, 98 P 1080. Where defendant recovered nothing on his cross action, assignments complaining of overruling objections to cross bill, and of charge on that branch of case. Beaumont Rice Mills v. Campbell [Tex. Civ. App.] 113 SW 971. Rulings on evidence, where judgment proper in any event. Morris v. Parry, 218 Mo. 701, 118 SW 430. Alleged error in overruling motion to continue attachment lien and to direct sheriff to retain possession of property pending appeal, where after denial of motion de-

fendant sold the property. Draper v. Hoope, 135 Ill. App. 388. Issue as to attachment, where defendant, whose lumber was attached, sold it before trial of case in appeal to circuit court without obtaining release. Booker v. Blythe [Ark.] 118 SW 401. Though defendant affected by costs, question could have been reached by motion to retax. Id. Power of federal court to grant order for disinterment of body of assured, in order that autopsy might be held for purpose of discovery, after such disinterment and autopsy. Griesa v. Mutual Life Ins. Co. [C. C. A.] 169 F 509. Where actions at law and equity were submitted to trial court at nearly same time and involved same question, determination in law action affirmed by court of appeals required dismissal of appeal in equity suit. Keely v. Ophir Hill Consol. Min Co. [C. C. A.] 169 F 601. Offer of debtor in supreme court to suffer judgment to be rendered against him for amount claimed by his adversary, with costs, puts an end to litigation, and it is not necessary for him to pay or tender same into court. United States Fidelity & Guar. Co. v. Rainey [Tenn.] 113 SW 397. Contention that appeal in creditor's suit should not be dismissed in such case, because appellants were made defendants as representative of certain class of creditors whose rights would thereby be defeated, held untenable, where bill did not show that such was fact, particularly where decree granting appeal showed that they prayed same individually. Id. Bill in equity to establish lost deed which would convey no estate. Morris v. Parry, 218 Mo. 701, 118 SW 430. Where appellant dies after appealing in actions which abate on his death. Hannon v. Harper [Cal. App.] 98 P 685. Appeal after judgment paid and discharged. Clinton County Com'rs v. Clark [Ind. App.] 87 NE 1059. Judgment sought to be reviewed paid while appeal pending. Knowles v. Harrington [Colo.] 101 P 403. Right to license to sell liquor in territory, where after case was tried below territory became state, constitution of which absolutely forbade sale of liquor. Conly v. Overholser [Okl.] 98 P 331; Bachman v. Thompson [Okl.] 98 P 426; Hodges v. Schafer [Okl.] 100 P 537. Whether or not unlawful sale of intoxicants in Oklahoma prior to its admission as state constituted common nuisance for which injunction would lie under statute upon relation of county attorney, in name of territory, and without bond. Powell v. Territory [Okl.] 100 P 514. Case involving granting of liquor license which has expired. Brown v. Dicus [Ind.] 87 NE 716; Brown v. Moore [Ind.] 87 NE 974; Ververka v. Fullmers [Neb.] 118 NW 1097. Where liquor license expired pending appeal from erroneous order refusing to issue writ of mandamus to compel its revocation, held that, though no writ would issue, relator was entitled to reversal of judgment with costs and a judgment for costs in lower court. State v. Wausau, 137 Wis. 311, 118 NW 810. Where case not submitted in time to decide rights of parties to office. Salter v. St. Louis & S. F. R. Co. [Miss.] 47 S 897. Appeal in quo warranto proceedings to obtain possession of office, dismissed, where term of office in dispute had expired and appellee had thereupon voluntarily delivered office to relator, and abstract question was not of general interest, since statute which gave rise to controversy had been repealed. State v. Boyd [Ind.] 87 NE 140. Right of mayor to vote as member of city council, where he had ceased to hold office and no longer claimed right. People v. Hall [Colo.] 100 P 1129. Appeal from peremptory writ of mandamus directing political committee to recanvass returns of primary election, where before hearing election was held and relator's opponent was elected and commissioned and qualified. State v. Twenty First Judicial Dist. Democratic Committee [La.] 48 S 1005. Issue which involves restraining of act already accomplished. Cardoza v. Baird, 30 App. D. C. 86. Where subject-matter of injunction has been consummated pending appeal. Kemper County Sup'rs v. Neville [Miss.] 48 S 727. Where pending appeal from judgment for defendants in action to enjoin issuance and payment of certain warrants, same were issued and paid, there being no restraining order. National Surety Co. v. Stephens, 50 Wash. 397, 97 P 449. Whether employer was entitled to temporary injunction restraining employe from violating contract not to engage in certain business in certain territory for 12 months after quitting plaintiff's employment, where said 12 months had expired before submission of case to supreme court. Jewel Tea Co. v. Stewart [Iowa] 120 NW 962. Appeal from judgment dismissing action to enjoin former employe from violating agreement not to solicit work for rival company within six months after term of his employment with plaintiff, where appeal was not taken until after said six months had expired, and no claim for damages was made. Munger's Laundry Co. v. Rankin, 8 Cal. App. 448, 97 P 95. Action by attorney general in name of territory to enjoin carrier from demanding and collecting certain freight rates on theory that they were in violation of common-law rule, requiring reasonable rates, where pending appeal territory became a state and adopted a constitution providing for corporation commission and giving it power to regulate rates. Chicago, etc., R. Co. v. Territory [Okl.] 97 P 265. Similar action to enjoin collection of alleged unreasonable rates as in violation of conditions imposed by act of congress, granting railroad in question right of way through territory and reserving to congress right to fix rates until territory became a state. Chicago, etc., R. Co. v. Territory [Okl.] 97 P 267. Plaintiff sued to restrain trespass by agents of municipality on land illegally taken for street and for damages. Pending suit, street was legally laid out. Held that on appeal from decree only questions before court were amount of damages suffered by plaintiff before filing of bill and extent to which defendants were liable. Pinkerton v. Randolph, 200 Mass. 24, 85 NE 892. Appeal from order, granting peremptory writ of mandamus, dismissed, where, after it was taken, defendant did everything required of him thereby. State v. Fields [Or.] 101 P 218. Appeal from order granting writ of mandamus requiring printing of certain names on ballots as candidates of certain party for certain offices, where election had already been held and controversy settled by obedience to writ, and in meantime legislature had passed law covering question. State v. Ross [Neb.] 121 NW 1135. What other de-

may not arise on a retrial [46] or which have been abandoned or waived,[47] will be ignored. Only the judgment [48] or that part of it [49] appealed from is reviewable. The court is not bound to consider the case on any other theory than that on which it is presented,[50] though it may sometimes do so.[51] Only matters affecting the

fenses might be interposed to excuse violation of statute, where defendant was given benefit of only defense actually interposed by it. Cram v. Chicago, B. & Q. R. Co. [Neb.] 122 NW 31. Questions not raised by evidence. Glover v. Ehrlich, 62 Misc. 245, 114 NYS 992. Action on contract whereby defendant agreed not to sell certain goods during certain length of time, where said time had expired and defendant was no longer engaged in business. Independent-Peerless Pattern Co. v. Johnson [Colo.] 100 P 1129. Court is not called upon to fix rights and obligations of parties to alleged contract unless decision on those points is invoked incidently and in aid of present controversy as arising under that contract. Illinois Cent. R. Co. v. St. Louis & S. F. R. Co. [La.] 49 S 976. On appeal from order appointing appraiser to ascertain amount of inheritance tax, supreme court will go no further than to ascertain, if there is any property subject to appraisment. In re Douglas County [Neb.] 121 NW 593. Validity of act making corporations and others liable for injuries to employes considered only in so far as it related to employes, where defendant sued thereunder was corporation. Ozan Lumber Co. v. Biddie [Ark.] 113 SW 796.

46. Lyden v. Spohn-Patrick Co. [Cal.] 100 P 236; Buchner v. Malloy [Cal.] 100 P 687; Indianapolis & W. R. Co. v. Hill [Ind.] 86 NE 414; Baker v. Baker [Ind. App.] 86 NE 864; Butt v. Iffert [Ind.] 86 NE 961; South Shore Gas & Elec. Co. v. Ambre [Ind.] 87 NE 246; Olson v. Rice [Iowa] 119 NW 84; Scurlock v. Boone [Iowa] 120 NW 313; Larson v. Thoma [Iowa] 121 NW 1059; Hines v. Stanley-G. I. Elec. Mfg. Co., 199 Mass. 522, 85 NE 851; Fitzpatrick v. Manheimer [Mich.] 16 Det. Leg. N. 457, 122 NW 83; People's Bank v. Stewart [Mo. App.] 117 SW 99; Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857; Davis' Adm'x v. Rutland R. Co. [Vt.] 71 A 724; Newport News & Old Point R. & Elec. Co. v. Nicolopoolos [Va.] 63 SE 443. Question raised upon selection of jury under statute no longer in force. Illinois Cent. R. Co. v. State [Miss.] 48 S 561. Contention that judgment should be reversed because complaint was not amended by inserting true name of defendant sued under fictitious name, in view of necessity of reversal and remandment for further proceedings when amendment might be made. Fox v. Monahan, 8 Cal. App. 707, 97 P 765. Weight or sufficiency of evidence not to be decided where judgment reversed for new trial for reasons not affecting merits. Wilson v. Collin [Colo.] 102 P 21. Uncertainty of evidence as to amount of damages. Williams v. Texas & N. O. R. Co. [Tex. Civ. App.] 114 SW 877.

47. Where instruction laid down certain rule, and appellant contended for same rule on appeal, held that it would be regarded as law of the case on appeal and not discussed. Wright v. Northrup [Iowa] 118 NW 437. Question whether matters were proper subject of counterclaim need not be considered where waived. Dreeland v. Pascoe [Mont.] 102 P 331. Where objection to offer of defendant city to show that obligation did not rest on it to shovel more than five feet of sidewalk was sustained on statement of plaintiff's counsel that he did not raise any point in reference thereto, held that it would be assumed on appeal that city was not negligent in failing to keep walk clean for greater width. Cupp v. Elmira, 126 App. Div. 539, 110 NYS 742. Judgment in favor of plaintiff correcting deed as to description of land, and reserving rights of plaintiff as to rents and revenues, which has been in the meanwhile enforced by plaintiff, will not be amended at plaintiff's instance on defendant's appeal so as to nullify sale and to decree to plaintiff rents and revenues claimed. Coleman v. Thibodeux, 119 La. 474, 44 S 269. Assignments of error to discharge of third person sought to be joined as party defendant are to be considered though cause tried on subsequent amended answer. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841.

48. As to determination of what judgment is appealed from see ante, § 6A. Defendant held not entitled to reversal of second decree on ground that court erred in refusing to allow appeal from first decree claimed to be final, since, if first decree was final, it could not be reviewed on appeal from second one. McCullough v. McCullough, 238 Ill. 50, 87 NE 69. Where several interlocutory orders are made in case and only certain ones are appealed from, appellate court is confined to orders mentioned in appeal. City of Miami v. Miami Realty, Loan & Guar. Co. [Fla.] 49 S 55. Where, in replevin for several articles, court finds for plaintiff as to part of them and for defendant as to rest, he should enter order in nature of two judgments, one for plaintiff and one for defendant and, where he does so, appeal by plaintiff from judgment in favor of defendant carries to appellate court only question as to property given to defendant. Cronin v. Barry, 200 Mass. 563, 86 NE 953. But where judgment is improper in that it contains no express determination as to property not given to defendant, appeal by plaintiff may carry up whole case. Id.

49. Where appellant did not appeal from certain instruction, held that its correctness would not be inquired into. McWilliams v. McNamara [Conn.] 70 A 1043. Where complainant did not appeal from part of decree charging defendant with value of certain furniture, held that his contention that amount so charged was less than value thereof as conceded in answer would not be considered. Parker v. Travers [N. J. Err. & App.] 71 A 612.

50. Jones v. Kepford [Wyo.] 100 P 923.

51. In order to finally dispose of cases on appeal is occasionally incumbent on court to adopt procedure not requested below, and if mode selected impels speedy enforcement of right, or induces hasty redress of a

party or parties appealing will be passed upon,[52] except that, in some states, where parties stand upon the same ground and their rights are involved in the same question and equally affected by the same decree or judgment, the rights of all will be settled though all do not appeal.[53] An exception is also made in certain cases as to parties under disability.[54] As a general rule, no question not properly saved below,[55] preserved and presented in the record,[56] properly assigned [57] and briefed and

wrong, and, as a correct exposition of the law, is appropriate to the facts involved, it is controlling and should be adapted, though legal principal applied may not have been suggested by either party. Patty v. Salem Flouring Mills Co. [Or.] 100 P 298.

52. Williams v. Grimm [Ky.] 112 SW 839; Bennett v. Knott [Ky.] 112 SW 849; Singletary v. Boener-Morris Candy Co. [Ky.] 112 SW 637; Van Arsdale & Osborne v. Greer County Olustee School Dist. No. 35 [Okl.] 101 P 1121. Insufficiency of damages awarded complainant not considered where he did not appeal from decree. McElroy v. McCarville [R. I.] 71 A 646. Plaintiff held not entitled to complain that exceptions to report of referee should not have been considered because filed too late where he did not appeal. Snyder v. Crutcher [Mo. App.] 118 SW 489. Plaintiff not entitled to judgment for attorney's fees where did not ask for it below and did not appeal. Des Moines Life Ins. Co. v. Clay [Ark.] 116 SW 232. In action against defendant and another whether it was error to dismiss complaint as to latter cannot be considered on defendant's appeal from judgment against it for plaintiff. Moore v. Coney Island & B. R. Co., 117 NYS 604. In action to quiet title to realty and to enforce specific performance of contract whereby one of defendants agreed to purchase same, held that, on appeal by purchaser from judgment for plaintiff, court need not pass on regularity of administrator's sale under which plaintiff claimed title, administrator and all persons interested in estate, who were only persons who could question plaintiff's title, having been made parties and not having appealed. Wiley v. Verhaest [Wash.] 100 P 1008. On appeal from order of board of supervisors denying petition for establishment of drainage district, district court held to have no authority to establish another drainage district for benefit of certain intervenors who did not appeal. Hartshorn v. Wright County District Ct. [Iowa] 120 NW 479. Decree cannot be modified in plaintiff's favor on defendant's appeal. Rankin v. Schultz [Iowa] 118 NW 383. Plaintiff's contention that court would have been justified in refusing to allow defendants' claims of recoupment not considered on defendants' appeal. Butts v. Gunby, 135 Mo. App. 28, 115 SW 493. Supreme court will make no decree in favor of one of several defendants who does not appeal, though otherwise would have done so. Feuerstein v. Richter, 154 Mich. 312, 15 Det. Leg. N. 751, 117 NW 740. Correctness of adverse ruling declaring act unconstitutional not to be considered where respondent did not appeal therefrom. Shull v. Missouri Pac. R. Co. [Mo. App.] 119 SW 1086. Judgment cannot be amended or reversed as between appellees. Lee v. Powell Bros. & Sanders Co., 122 La. 639, 48 S 134; Corbitt v. Hanson [La.] 49 S 995. Coparties seeking relief against each other must present their claims by cross appeal. San Pedro, etc., R. Co. v. Salt Lake City Board of Education [Utah] 99 P 263. Errors against appellee not considered where he does not prosecute cross appeal. People v. Grace, 237 Ill. 265, 86 NE 628; Work v. Fidelity Oil & Gas Co. [Kan.] 98 P 801; Shawnee County Com'rs v. Jacobs [Kan.] 99 P 817; Feland v. Berry [Ky.] 113 SW 425; Chaves v. Torlina [N. M.] 99 P 690; Turner v. Mills [Okl.] 97 P 558. Where appeal is taken from part of judgment only, if respondent desires review of matters not coming within appeal as taken by appellant, he must take cross appeal. San Pedro, etc., R. Co. v. Salt Lake City Board of Education [Utah] 99 P 263. Refusal to cancel lease not reviewable where plaintiff in error did not appeal therefrom and no cross appeal was prosecuted from that part of order by defendant in error. Worthman v. John [Okl.] 98 P 347. In action to determine adverse claims to land, decision that tax deed relied on by one of the defendants was void on its face held conclusive in absence of cross appeal by defendant from such decision. Burleigh v. Hecht [S. D.] 117 NW 367. Where defendant in error desires reversal in part of judgment of circuit court, that is a modification of it, cross petition in error is proper, but where he simply wishes to urge grounds for reversal of trial court other than those on which judgment of reversal by circuit court was placed, cross petition is wholly unnecessary. Ardorey v. Shell, 77 Ohio St. 218, 82 NE 1075. Where appellant appeals from whole judgment, respondent is not required to take cross appeal, but may present errors on which he relies by cross assignment. San Pedro, etc., R. Co. v. Salt Lake City Board of Education [Utah] 99 P 263.

53. Though, as general rule, decree will not be disturbed as to parties not appealing, held that rule would not be applied in case involving water rights as to parties who did not appear voluntarily in first instance, but in response to order of court requiring all persons interested to be made parties. Hough v. Porter [Or.] 98 P 1083.

54. Where record shows error as to minor defendant, decree will be reversed though no appeal on his part. Glade Coal Min. Co. v. Harris [W. Va.] 63 SE 873. Is duty of appellate court to protect infant's interests, and he will be given the benefit of every defense of which he could have availed himself and which might have been interposed in trial court. Id.

55. See Saving Questions for Review, 12 C. L. 1763.

56. See § 9, ante.

57. See § 11E, ante.

argued,[58] and no questions which do not harm the person appealing or objecting[59] will be considered, but fundamental errors and jurisdictional defects, if apparent on the face of the record, will be reviewed though never before urged.[60]

(§ 13) *C. Restriction of review to rulings and issues below.*[61]—See 11 C. L. 220 Review proper is, of course, strictly confined to the rulings made and the issues joined and decided below,[62] though excluded evidence may be considered under certain circumstances,[63] and in some states the appellate court may, in its discretion, allow a review of certain decrees for new matter discovered after their rendition.[64] All the evidence properly admitted may be considered though part of it was disregarded below.[65] As a general rule the theory of the case acquiesced in below will be adhered to,[66] and a correct ruling will be sustained though wrong or deficient reasons were given therefor below.[67]

(§ 13) *D. The extent of the review and the questions reached are determined by the character and effect of the order or judgment.*[68]—See 11 C. L. 220—As a general rule, an appeal from the main or final judgment takes up all intermediate orders or proceedings[69] but not those subsequent to it.[70] In some states it does not take

58. See § 11F, ante.

59. See Harmless and Prejudical Error, 11 C. L. 1690.

60. See Saving Questions for Review, 12 C. L. 1763.

61. **Search Note:** See notes in 3 Ann. Cas. 545; 8 Id. 487.

See, also, Appeal and Error, Cent. Dig. §§ 3402-3434; Dec. Dig. §§ 851-856; 3 Cyc. 221.

62. See Saving Questions for Review, 12 C. L. 1763.

63. Evidence excluded from jury held in case so that supreme court might consider it in weighing contention that there was no element of mental anguish shown. Western Union Tel. Co. v. Arant [Ark.] 115 SW 136.

64. Is discretionary to allow review of decree of orphan's court for new matter discovered after decree which by reasonable diligence could not have been found or used before, in exercise of which discretion unreasonable delay without excuse is matter to be considered. Groff's Estate, 36 Pa. Super. Ct. 140.

65. Though pertinent affidavits and admissions offered in opposition to application for injunction are disregarded by trial court, they must be considered where only question is whether order is sustained by the admissible evidence in the record. Shubert v. Woodward [C. C. A.] 167 F 47.

66. See Saving Questions for Review, 12 C. L. 1763.

67. See Harmless and Prejudicial Error, 11 C. L. 1690.

68. **Search Note:** See note in 9 Ann. Cas. 951.

See, also, Appeal and Error, Cent. Dig. §§ 1765-1767, 3450-3486; Dec. Dig. §§ 863-867.

69. Under Const. art. 6, § 9, where appeal taken from appealable order court has jurisdiction to review all orders and decisions properly objected to. Utah Ass'n of Credit Men v. Budge [Idaho] 102 P 390. Validity of substituted service, on appeal from judgment of municipal court rendered on substituted service of summons. Bank of Long Island v. Gregory, 132 App. Div. 93, 116 NYS 309. Chancellor's refusal to strike amendment to bill. Harper v. Raisin Fertilizer Co. [Ala.] 48 S 589. Order dismissing bill as to one defendant on hearing of her plea stating her interest in premises. Foote v. Yarlott, 238 Ill. 54, 87 NE 62. Denial of motion to dismiss petition in condemnation proceedings. Chicago Terminal Transfer R. Co. v. Preuil, 236 Ill. 491, 86 NE 117. Rulings on demurrer to pleadings. Kendrick v. Warren Bros. Co. [Md.] 72 A 465. Order denying motion to correct record. Code Civ. Proc. § 1316. Levy v. Spier, 113 NYS 841. On appeal from judgment of nonsuit court will review not only action of court in disposing of motion, but also such errors of law as occurred during trial when properly excepted to and made part of record by bill of exceptions. Spongberg v. First Nat. Bank, 15 Idaho, 671, 99 P 712. Under Court & Prac. Act 1905, § 497, providing that exceptions to decisions or rulings prior to trial are open to revision after verdict or final decision on the merits, exceptions from order refusing to dismiss an appeal from municipal court to superior court dismissed as premature, since there could be no final judgment until reasons of appeal were determined. Wilcox v. White [R. I.] 72 A 392.

70. Subsequent order denying motion to set aside decree. Nowell v. International Trust Co. [C. C. A.] 169 F 497. Does not bring up order overruling motion, made after final judgment and after appeal had been prayed for, to set aside all proceedings subsequent to order of reference because master was not legally appointed regular master, and because judge had no authority to continue him as special master after change of venue had been taken from him. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132. Substituted answer, filed after judgement, cannot be considered. Hartkemeyer & Co. v. Griffith [Iowa] 121 NW 372. So much of judgment as declared plaintiff's attorney to be entitled to reasonable fee to be taxed as costs. Bennett v. Knott [Ky.] 112 SW 849. Allowance of attorney's fee to plaintiff as part of his costs not open to review on appeal by interplead-

up appealable interlocutory orders,[71] unless they involve the merits or necessarily affect the judgment.[72] An appeal from an interlocutory order brings up only the order itself as it stood at the time it was made [73] and nothing subsequent.[74] Ap-

er where was no appeal from judgment making such allowance. Grooms v. Mullutt, 133 Mo. App. 477, 113 SW 683. Failure of judge to make up and file statement of facts within time prescribed by law cannot be reviewed by assignment of error, predicated on ex parte affidavit of counsel incorporated in record, on appeal from judgment, it not being one of matters which court of appeals is authorized to review on appeal by Rev. St. 1895, art. 1014, nor a matter apparent of record within meaning of that section, nor a jurisdictional question within meaning of Id. art. 998. Applebaum v. Bass [Tex. Civ. App.] 113 SW 173. Error apparent of record as used in statute means a prominent error, either fundamental in character, or one determining question upon which the very right of the case depends. Id. Held further that there is ample remedy to restore to record statement not filed in time under Rev. St. 1895, arts. 1015, 1382, authorizing court of appeals, for good cause shown, to extend time, or by mandamus to compel judge to act. Id. See, also, Rush v. Thompson & Co. [Tex. Civ. App.] 113 SW 546.

71. Overruling of demurrer to bill. Reck v. Reck [Md. App.] 73 A 144. Order overruling plea in abatement. MacKenzie v. MacKenzie, 141 Ill. App. 126. Granting of preliminary injunction cannot be assigned for error on appeal from decree making it perpetual, but it is open for review only upon appeal taken in manner provided in 3 Starr & C. Ann. St. 1896, p. 3171, c. 110, par. 107, relating to appeals from interlocutory orders. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132. Order dissolving attachment being appealable, under Code Civ. Proc. § 963, is not reviewable on appeal from judgment. Code Civ. Proc. § 956. Kennedy v. Merickel, 8 Cal. App. 378, 97 P 81. That part of judgment foreclosing mortgage on land which orders personal judgment for deficiency is appealable, and, where not appealed from, cannot be reviewed on appeal from judgment entered after confirmation of the sale. Homestead Land Co. v. Stropahl [Wis.] 121 NW 892. Statute giving appeal from order appointing receiver pendente lite, held that rule that court will not appoint receiver until defendant has been heard, unless necessity is of most stringent character, can only be enforced upon appeal from order appointing receiver. Baker v. Baker, 108 Md. 269, 70 A 418. On appeal from dismissal of exceptions to sheriff's sale on foreclosure against married woman, appointment of committee ad litem for insane defendant and refusal of motion to set aside such appointment cannot be reviewed where no appeal taken from such decree or dismissal. Seltzer v. Boyer [Pa.] 73 A 438. Failure to appeal from order continuing case settled without consideration, when continued in order to determine right of plaintiff's attorney to contingent fee held waiver of question of right of attorney to remedy, precluding defendant from raising it on subsequent judgment determining amount to which plaintiff was entitled at beginning of action. Bloch v. Bloch, 116 NYS 339.

72. On appeal from judgment entered of plaintiff's declining to plead further on demurrer to complaint being sustained, propriety of sustaining demurrer may be reviewed. Ellis & Co. v. Brannen [Ala.] 49 S 1034. Order overruling plea to jurisdiction over persons of defendants held reviewable. Code Civ. Proc. par. 1213. London-Glasgow Development Co. v. Powers [Ariz.] 100 P 454. Under Rev. St. 1887, § 4824, on appeal from judgment, court may review any intermediate order or decision if expected to which involves merits or necessarily affects judgment, except decision from which direct appeal might have been taken under § 4807, subd. 3. Maple v. Williams, 15 Idaho, 642, 98 P 848. Order for inspection and copy of documents made under Code Civ. Proc. § 368 (Gen. St. 1901, § 4816) is reviewable after judgment. Atchison, etc., R. Co. v. Burks [Kan.] 96 P 950. Upon appeal from judgment only those intermediate orders specified in notice of appeal which necessarily affect judgment are reviewable. Code Civ. Proc. § 1316. Kalvin v. Meyers, 117 NYS 141. Order denying motion to strike part of answer not reviewable upon appeal from judgment dismissing complaint for want of prosecution. Id. Only those so specified will be considered. Duerr & Co. v. Craven, 114 NYS 784.

73. On appeal from judgment sustaining demurrer, court need not decide matter not presented by demurrer. Miles v. Sledge [Ala.] 47 S 595. On appeal from order dismissing cause for want of prosecution only action or order of court in dismissing cause can be considered, and not prior rulings on demurrers to pleadings. Ellis & Co. v. Brannen [Ala.] 49 S 1034. On appeal from order sustaining demurrer to petition questions not applicable to issues presented by pleadings will not be considered. Kirchner v. Wapsinonoc School Tp. Directors [Iowa] 118 NW 51. On appeal for order dissolving temporary injunction, case cannot be tried on merits except in so far as is necessary to determine whether such injunction should be continued in force. Jewel Tea Co. v. Stewart [Iowa] 120 NW 962. Appeal from injunction pendente lite brings up jurisdiction of trial court and question of whether injunctional relief was properly granted, but not merits of controversy. Harding v. Corn Products Refining Co. [C. C. A.] 168 F 658. Where temporary restraining order issued pending final hearing of case to enjoin exercise of power of sale in mortgage, merits of case will not be considered before facts are found or issues made and submitted. Martin v. Kirkpatrick, 149 N. C. 400, 63 SE 68. Order for examination, not having been appealed from, is not before the court on appeal from order taking costs of reference to take disposition. In re Malcom, 129 App. Div. 226, 113 NYS 666.

74. On appeal from decree sustaining demurrer to bill but refusing to dismiss bill

peals from the grant or refusal of a new trial,[75] or from orders made after judgment,[76] reach only those matters which entered into the order itself. In some states, however, an appeal from the order on a motion for a new trial, rather than an appeal from the judgment, reaches the facts,[77] and only matters urged as grounds for a new trial can be reviewed.[78] Ordinarily, on appeal from a default judgment after a writ of inquiry, the only questions open to consideration are those relating to damages.[79] In Georgia final orders or judgments are reviewable by direct bill of

or strike amendment, supreme court can only consider motions to dismiss bill as amended and to strike amendment, there having been no decree on the motion to dismiss the original bill before the filing of the amendment. Harper v. Raisin Fertilizer Co. [Ala.] 48 S 589. On appeal from order granting injunction restraining keeping of disorderly house, cannot consider answer to merits filed after issuance of injunction. Gen. Laws 1907, p. 207, c. 107. Jelinek v. State [Tex. Civ. App.] 115 SW 908. On appeal from interlocutory order dissolving injunction, answers of defendants, filed after order made and not considered below, will not be considered, though copied in transcript. Builder's Supply Co. v. Acton [Fla.] 47 S 822.

75. Jones v. Jacksonville Elec. Co. [Fla.] 47 S 1. Objection to form of judgment in action to rescind contract for fraud based on insufficiency of allegation of offer to restore consideration cannot be raised on appeal from order denying new trial. Davis v. Butler, 154 Cal. 623, 98 P 1047. On appeal from order denying new trial, only such matters may be considered as are made grounds upon which superior court is authorized to grant or deny the motion. Bone v. Hayes, 154 Cal. 759, 99 P 172. Erroneous overruling of demurrer to complaint is not one of such matters. Id. Where cause of action is set forth as against one defendant, neither its insufficiency as against another, nor any defects of form can be considered on plaintiff's appeal from order denying new trial. Id. Neither sufficiency of complaint, nor sufficiency of findings to support judgment is reviewable on appeal from order denying motion for new trial. Merced Bank v. Price [Cal.] 98 P 383; Arroyo Ditch & W. Co. v. Baldwin [Cal.] 100 P 874. Conclusions of law are always merged in, and superseded by, the judgment, and, even if necessary thereto, can be reviewed only on appeal from judgment or from order made under Code Civ. Proc. §§ 663, 663½, authorizing vacation of judgment which is inconsistent with findings, and not on appeal from order denying motion for new trial. Mentone Irr. Co. v. Redlands Elec. L. & P. Co. [Cal.] 100 P 1082. On appeal from order granting new trial solely upon errors of law, appellate court is limited in its review to errors appearing in record exclusive of sufficiency of conflicting evidence to justify the decision. Winchester v. Becker, 8 Cal. App. 362, 97 P 74. Failure to find upon material issue is error of law within this rule. Id. If there is no evidence upon an issue which is essential to the judgment, a finding upon such issue is error of law within this rule, and hence appellate court may look into bill of exceptions to see if such a finding has any support in the evidence. Id. Failure to find upon material issue is error of law, and is reviewable on appeal from order denying motion for new trial. Merced Bank v. Price [Cal.] 98 P 383. On appeal from order denying motion for new trial, court may look into bill of exceptions to determine whether evidence is sufficient to sustain findings and whether any prejudicial errors of law occurred at trial. Id. Sufficiency of complaint to state cause of action will not be considered on appeal from order denying new trial. Naylor v. Lewiston & S. E. Elec. R. Co., 14 Idaho, 189, 96 P 573.

76. Order in supplementary proceedings is not reviewable upon technical grounds in appeal from order in contempt proceedings for disregard of former. Goldreyer v. Shatz, 114 NYS 339. After time for appealing original case has expired, question of sufficiency of evidence to support judgment cannot be raised on appeal from refusal to reopen case for newly-discovered evidence. Catts v. Catts, 37 Pa. Super. Ct. 598. On appeal from order opening judgment on municipal lien where trial court did not strike the lien and defendant does not appeal from refusal to strike, appellate court in affirming, order will not strike lien. Philadelphia v. Mason, 37 Pa. Super. Ct. 478. Right to object to decision of court and service thereof is involved in motion to set aside judgment and is waived by neglect to appeal from such order. Lally v. New York, etc., R. Co., 132 App. Div. 66, 116 NYS 470.

77. In order for appellate court to review sufficiency of evidence to sustain verdict or finding, motion for new trial upon that ground must be presented to and acted upon by trial court, which motion, and the order thereon and exception thereto should be evidence to appellate court by proper bill of exceptions, and fact that trial was by judge without jury, and that finding and judgment were excepted to, does not change rule. Manatee County State Bank v. Wade [Fla.] 47 S 927. Appeal from order denying motion on minutes for new trial brings up to supreme court, though not to court of appeals, question whether there was any evidence, on which to go to jury, weight of evidence, and all errors of law, provided motion is made on such ground or grounds. Smith v. Long Island R. Co., 129 App. Div. 427, 114 NYS 228. On appeal solely from order denying motion for new trial, appellate court can consider only the weight of evidence. Orefice v. Savarese, 61 Misc. 88, 113 NYS 175. On appeal from judgment, court cannot pass on weight of evidence, but review is confined to exceptions. Thornton v. Interurban St. R. Co., 128 App. Div. 872, 113 NYS 127.

78. See Saving Questions for Review, 12 C. L. 1763.

79. Right of recovery established by de-

exceptions,[80] while other rulings must be preserved by exceptions pendente lite or a motion for a new trial.[81]

(§ 13) *E. Restriction to contents of record.*[82]—See 11 C. L. 222—Except as to matters judicially noticed and fundamental or jurisdictional errors, appellate review is ordinarily confined to matters apparent from the record, and matters aliunde will not be considered.[83]

(§ 13) *F. Rulings peculiar to province of trial court.* 1. *Discretionary rulings in general.*[84]—See 11 C. L. 223—A discretionary ruling is not absolute but will be reviewed only for abuse or to prevent manifest injustice.[85] This rule has been applied to rulings on motion for change of venue,[86] motions for continuance,[87] orders

fault judgment, though necessary to execute writ of inquiry. Hall v. Nix [Ala.] 47 S 335.

80. Rulings sustaining or overruling demurrer or allowing or disallowing amendments to pleadings cannot be made grounds of motion for new trial, but direct exceptions must be filed thereto in order to obtain review thereof. Hawkins v. Studdard [Ga.] 63 SE 852. Order sustaining demurrer to petition and directing that it be dismissed if not amended within 30 days held final order, no motion to reinstate having been made during term, so that exceptions pendente lite could not be filed thereto. Waller & Co. v. Clarke [Ga.] 64 SE 1096. Direction of verdict for plaintiff on first trial of suit for total divorce held reviewable by direct bill of exceptions. Rorie v. Rorie [Ga.] 64 SE 1070.

81. Where court alleged to err in consolidating case for trial, proper practice is to file exceptions pendente lite. Duke v. Hill [Ga.] 63 SE 823. Exception to judgment rendered on motion to strike paragraph of defendant's answer must be preserved in bill of exceptions pendente lite, unless bill of exceptions certified within 30 days from day judgment is made. Kelly v. Malone, 5 Ga. App. 618, 63 SE 639. Ruling cannot be reviewed by motion for new trial. Id.

82. Search Note: See note in 9 C. L. 205.

See, also, Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. §§ 671, 672; 3 Cyc. 155.

83. See ante, § 9D.

84. Search Note: See Appeal and Error, Cent Dig. §§ 3807-3892; Dec. Dig. §§ 940-986; 3 Cyc. 325-345; 2 A. & E. Enc. P. & P. 409.

85. Jones v. Springfield Trac. Co. [Mo. App.] 118 SW 675; Anderson v. Salt Lake & O. R. Co. [Utah] 101 P 579. Refusing request not made within time provided by law, especially where request does not show on its face a reason for delay, and record does not show that party was denied opportunity to prove any such reason. Moxham & Ferndale Bridge, 36 Pa. Super. Ct. 298. Making and enforcing rules of court. In re Rubenstein, 129 App. Div. 326, 113 NYS 554. Construction of its rules by trial court. Frost v. Pennington [Ga. App.] 65 SE 41. Dismissal of petition by client for collection of money held by attorney praying that in default thereof attorney be punished. Goss Printing Press Co. v. Todd, 202 Mass. 185, 88 NE 780. Character and form of evidence necessary to show disqualification of officer so as to warrant appointment of elisor to make jury list. Wellcome v. Berkner [Minn.] 121 NW 882. Overruling motion to set aside judicial sale. Sparks v. City Nat. Bank [Okl.] 97 P 575. Permitting stay of order pendente lite upon filing of bond. Severns v. English, 19 Okl. 567, 101 P 750. Rendition of default judgment on failure to answer interrogatories filed pursuant to Code 1896, § 1850, where proof of motion covered every fact necessary to give court jurisdiction. Hall v. Nix [Ala.] 47 S 335. Awarding of treble damages for infringement of patent. Fox v. Knickerbocker Engraving Co. [C. C. A.] 165 F 442. Resettlement of order by special term. Boskowitz v. Sulzbacher, 128 App. Div. 537, 112 NYS 890. Refusal to allow appeal frim justice's court to be docketed. McClintock v. Life Ins. Co., 149 N. C. 35, 62 SE 775. Refusal to remove receiver. Hilliard v. Sterlingworth R. Supply Co., 221 Pa. 503, 70 A 819. Allowance and amount of receiver's compensation. Sullivan Timber Co. v. Black [Ala.] 48 S 870. Appointment of administrator by county court. Butcher's Heirs v. Kunst [W. Va.] 64 SE 967. Fixing amount of security to be given by administrator. In re McPhee's Estate [Cal. App.] 101 P 530. Requiring executor to give bond where will directs that he need not do so. Schnurman's Executrix v. Biddle & Co. [Va.] 64 SE 977. Order revoking letters of administration for failure to give additional security. In re McPhee's Estate [Cal. App.] 101 P 530. Fixing commissions of executor within statutory limits. In re Watt's Estate, 108 Md. 696, 71 A 316. Allowance of temporary alimony and counsel fees in divorce suit. Wand v. Wand, 142 Ill. App. 247; Wood v. Wood [Fla.] 47 S 560; Robertson v. Robertson [Mo. App.] 119 SW 533; Wilkins v. Wilkins [Neb.] 120 NW 907. Discretion vested in court to determine whether alien may become citizen is not arbitrary, but judicial, and is reviewable if abused. United States v. Hrasky, 240 Ill. 560, 88 NE 1031. Circumstances under which discretion was exercised may be reviewed to determine if there was abuse. In re Barhum's Estate, 129 App. Div. 418, 114 NYS 33. Discretionary order of single justice at chambers not treated as discretionary will be reversed. Hite v. Dell [N. J. Law] 73 A 72. No discretion involved in correction of entry of judgment which concededly does not speak judgment of court, but correction is in such case an imperative duty when no innocent third person will suffer thereby. O'Bryan v. American Inv. & Imp. Co., 50 Wash. 371, 97 P 241.

86. Denial of motion. Kirkwood v. Sum-

relating to pleadings,[88] the consolidation of actions,[89] to the granting or refusal to grant a temporary injunction,[90] or to the continuing [91] or dissolution [92] of such an

mit County School Dist. No. 7 [Colo.] 101 P 343; W. A. Jordan Co. v. Sperry Bros. [Iowa] 119 NW 692; Hinton v. Atchison & N. R. Co. [Neb.] 120 NW 431; Horton v. Haines [Okl.] 102 P 121.

87. Pine Bluff & W. R. Co. v. McCaskill [Ark.] 114 SW 208; American Standard Jewelry Co. v. Hill [Ark.] 117 SW 781; Leathers v. McGuire [Ga.] 63 SE 626; Leathers v. Leathers [Ga.] 63 SE 1118; Leverett v. Tift [Ga. App.] 64 SE 317; Southern R. Co. v. Brock [Ga.] 64 SE 1083; Frost v. Pennington [Ga. App.] 65 SE 41; Rankin v. Caldwell, 15 Idaho, 625, 99 P 108; Morgan v. Whalen, 113 NYS 609; Warelime v. Schweitzer, 51 Wash. 299, 98 P 747; Cicerello v. Chesapeake & O. R. Co. [W. Va.] 64 SE 621; Levy v. Larson [C. C. A.] 167 F 110. Refusal held abuse of discretion. Morrow v. Sneed [Tenn.] 114 SW 201.

88. Refusal to allow objection to bill in equity on ground of multifariousness, where raised by answer. Barnes v. American Brake-Beam Co., 238, Ill. 582, 87 NE 291. Denial of motion to elect between counts of petition. Mellon v. Fulton [Okl.] 98 P 911. Refusal to reopen case and permit filing of answers after time. Clark v. Saco-Pettee Mach. Co., 150 N. C. 372, 64 SE 178. Granting motion to file supplemental complaint. Merced Bank v. Price [Cal.] 98 P 383. Refusal or allowance of reply to answer setting up new matter. Tarr v. Crump [Mo. App.] 118 SW 488.

Bills of particulars: Granting or withholding. Loewenthal v. Globe & Rutgers Ins. Co., 116 NYS 454. Whether additional particulars should or should not be ordered, and whether those furnished were or were not all that plaintiff could reasonably be required to furnish. Hines v. Stanley-G. I. Elec. Mfg. Co., 199 Mass. 522, 85 NE 851.

Motions to make more specific: Overruling motion. Leimgruber v. Leimgruber [Ind.] 86 NE 73; Hughes v. Orangeburg Mfg. Co., 81 S. C. 354, 62 SE 404; Simons v. Cissna [Wash.] 100 P 200. Refusal to permit filing of motion out of time. Horton v. Haines [Okl.] 102 P 121. Though trial court has some discretion in ruling on such motions, appellate court will not hesitate to correct ruling on such motions where clearly erroneous. McCrary v. Lake City Elec. L. Co. [Iowa] 117 NW 964. Where defendant procured order requiring plaintiff to make his petition more specific though it was already sufficient, held that he could not complain that plaintiff appealed though appeal could have been avoided by amendment complying with order. McCrary v. Lake City Elec. L. Co. [Iowa] 117 NW 964.

Motions to strike: Denial of motion. W. A. Jordan Co. v. Sperry Bros. [Iowa] 119 NW 692; Simons v. Cissna [Wash.] 100 P 200. Granting of motion to strike out pleading is not discretionary within this rule. Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922.

Allowance or refusal to allow amendments. Mount Nebo Anthracite Coal Co. v. Martin [Ark.] 111 SW 1002; Morrison v. St. Louis & S. F. R. Co. [Ark.] 112 SW 975; St. Louis, etc., R. Co. v. Holmes [Ark.] 114 SW 221; Buchner v. Malloy [Cal.] 100 P 687; United States Fidelity & Guar. Co. v. People [Colo.] 98 P 828; Harrison v. Carlson [Colo.] 101 P 76; Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922; Rankin v. Caldwell, 15 Idaho, 625, 99 P 108; Havlick v. Davidson, 15 Idaho, 787, 100 P 91; Reynolds v. Phillips, 142 Ill. App. 482; Holland v. Hummell [Ind. App.] 87 NE 662; Mansfield v. Malloy [Iowa] 118 NW 290; McLaughlin v. Bradley [Iowa] 118 NW 389; Burke v. Burke [Iowa] 119 NW 129; Matson v. Chicago, etc., R. Co. [Kan.] 102 P 254; Anderson v. Stewart, 108 Md. 340, 70 A 228; Institution For Sav. v. Puffer, 201 Mass. 41, 87 NE 562; Commonwealth v. National Cont. Co., 201 Mass. 248, 87 NE 590; Darrow v. Braman, 201 Mass. 469, 88 NE 5; Newberry v. Chicago Lumbering Co., 154 Mich. 84, 15 Det. Leg. N. 663, 117 NW 592; Patterson v. Melchior, 106 Minn. 437, 119 NW 402; Freasier v. Harrison [Mo. App.] 118 SW 108; Lowenstein v. Missouri Pac. R. Co. [Mo. App.] 119 SW 130; Dempster v. Oregon Short Line R. Co., 37 Mont. 335, 96 P 717; D. J. O'Brien Co. v. Omaha Water Co. [Neb.] 118 NW 1110; Eppley v. Kennedy, 131 App. Div. 1, 115 NYS 360; Coleman v. Coleman, 148 N. C. 299, 62 SE 415; Hockfield v. Southern R. Co., 150 N. C. 419, 64 SE 181; Kuchler v. Weaver [Okl.] 100 P 915; Tindal v. Sublett [S. C.] 63 SE 960; Goodney v. International & G. N. R. Co. [Tex. Civ. App.] 113 SW 171; McComick v. Jester [Tex. Civ. App. 115 SW 278; Benson v. Oregon Short Line R. Co. [Utah] 99 P 1072; Gerber v. Gerber [Wash.] 100 P 735. Reviewable where court refused to exercise discretion because of supposed lack of authority. Hernan v. American Bridge Co. [C. C. A.] 167 F 930. Refusal held abuse. Siegel-Campion Live Stock Commission Co. v. Holly [Colo.] 101 P 68. Imposing terms upon granting leave to amend clear abuse. Pappe v. Post [Okl.] 101 P 1055.

89. Order overruling motion to consolidate cases for trial. Butler v. Secrist [Neb.] 120 NW 1109. Order consolidating local actions resulting in change of venue in one of them from county where lands in question are situate, or cause of action arose, is not discretionary, affects substantial rights of parties and is reviewable on error. Definance Fruit Co. v. Fox [N. J. Err. & App.] 70 A 460.

90. Granting temporary injunction. Builders' Supply Co. v. Acton [Fla.] 47 S 822; City of St. Marys v. Sweat [Ga.] 63 SE 1121; Montgomery v. Jackson [Ga.] 65 SE 140; Grand Rapids Elec. R. Co. v. Calhoun Circuit Judge [Mich.] 16 Det. Leg. N. 123, 120 NW 1004; Severns v. English, 19 Okl. 567, 101 P 750; Delaware & Hudson Co. v. Olyphant Borough [Pa.] 73 A 458; State v. Huron [S. D.] 120 NW 1008. Will not interfere with action of trial court in denying injunction where evidence is substantially conflicting, particularly where judge has inspected premises at request of the respective parties. McCarty v. Bunker Hill & Sullivan Mining & Concentrating Co. [C. C. A.] 164 F 927. Injunction will be dissolved when it appears from entire record

injunction, rulings on motions to reinstate cases dismissed for want of prosecution,[93] rulings as to the order in which cases shall be assigned for trial,[94] rulings as to whether certain question shall be tried by a jury when a jury trial is not a matter of right,[95] rulings in regard to the selection of jurors,[96] rulings at the trial generally,[97] the determination of questions preliminary to the admission of evidence,[98] rulings in respect to the examination of witnesses,[99] the admission of expert

that it was improvidently granted, and only questions of law were involved. Swan v. Indianola [Iowa] 121 NW 547. Denial will not be interfered with where good faith of application is denied and equities are not clear. Stuckey & Tiller Co. v. Priest [Fla.] 47 S 811.

91. Builders' Supply Co. v. Acton [Fla.] 47 S 822.

92. Hatch v. Raney [Cal. App.] 100 P 886; Long v. Newman [Cal. App.] 102 P 534; Builders' Supply Co. v. Acton [Fla.] 47 S 822; Clark v. Deadwood [S. D.] 117 NW 131.

93. Overruling motion. Loose v. Cooper [Iowa] 118 NW 406.

94. Frost v. Pennington [Ga. App.] 65 SE 41. Advancing or refusing to advance cause. Bonney v. McClelland, 138 Ill. App. 449.

95. Refusal to submit issues of fact to jury in action demanding equitable relief. Bristol v. Pitchard [Conn.] 71 A 558. Lawrence v. Lawrence [S. C.] 63 SE 690.

96. Mode of impaneling jury. Goff v. Kokomo Brass Works [Ind. App.] 88 NE 312. Overruling challenge for cause. Hinton v. Atchison & N. R. Co. [Neb.] 120 NW 431. Sustaining challenge. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. In action by employe of one railroad company against another railroad company to recover for personal injuries, refusal to permit examinations of jurors to determine whether they were stockholders or employes of plaintiff's employer held not ground for reversal, where there was nothing to show that latter was interested in or in any way connected with litigation, or would be affected by verdict. Clay v. Western Maryland R. Co., 221 Pa. 439, 70 A 807.

97. Granting motion for stay of proceedings until payment of costs of former trial. Brinsfield v. Howeth [Md. App.] 73 A 289. Requiring plaintiff to give security for costs. Smith v. Wisconsin Veterans' Home Trustees [Wis.] 120 NW 403. Refusal to grant defendant, in proceedings to determine compensation to be paid for change of grade of street, separate jury, held not abuse of discretion, though evidence would have sustained much larger verdict. In re City of Seattle [Wash.] 100 P 330. Denial of separate trials in condemnation proceedings. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. Refusal to allow oral examination of defendant's actuary before trial, under St. 1898, § 4096, in order to enable plaintiff to plead. Ellinger v. Equitable Life Assur. Soc. 138 Wis. 390, 120 NW 235. What constitutes reasonable time within which to have a commission returned. Fell v. McIlhenny [La.] 48 S 991. Orders enlarging time for taking testimony in equity causes, where special cause shown. Braxton v. Liddon, 55 Fla. 785, 46 S 324. Refusal to suppress deposition where witness failed to answer material question. Missouri, K. & T. R. Co. v. Davis [Tex. Civ. App.] 116 SW 423. Exclusion of depositions after careful inquiry. Valleroy v. Knights of Columbus, 135 Mo. App. 574, 116 SW 1130. Admitting testimony at former trial of witness who had left state. Wimberly v. State [Ark.] 119 SW 668. Refusal to strike out testimony received without objection. Caldwell v. U. S. Exp. Co., 36 Pa. Super Ct. 465. Exclusion of evidence on motion after admission without objection. Hatzfeld v. Walsh [Tex. Civ. App.] 120 SW 525. Allowing or refusal to allow jury to view premises. Crane v. Congleton & Bro [Ky.] 116 SW 341; Lydston v. Rockingham County L. & P. Co. [N. H.] 70 A 385; Murhard Estate Co. v. Portland & Seattle R. Co. [C. C. A.] 163 F 194. Giving or refusal of cautionary instructions. Penney v. Johnson, 142 Ill. App. 634. Refusing extension of time for filing extensions to charge. Soules v. Brotherhood of American Yoemen [N. D.] 120 NW 760. Refusal of court to make additions to findings on motion, where questions presented by proposed additions were not included in original statement of questions sought to be reviewed. City of Bridgeport v. Bridgeport Hydraulic Co. [Conn.] 70 A 650. Allowing exhibits to be taken into jury room. Suiter v. Chicago, etc., R. Co. [Neb.] 121 NW 113. Master's rulings as to order of procedure not appealable if full opportunity to present case has been given each party. Holden v. Thurber [R. I.] 72 A 720.

98. Whether certain evidence is too remote. Barry v. McCollom [Conn.] 70 A 1035; Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793; Jenkins v. Weston, 200 Mass. 488, 86 NE 955; In re Winch's Estate [Neb.] 121 NW 116; Goodlett v. Trans-Missouri Mining & Development Co [Neb.] 121 NW 444; Fitch v. Martin [Neb.] 122 NW 50; More-Jonas Glass Co. v. West Jersey & S. R. Co. [N. J. Err. & App.] 72 A 65; Worcester Loom Co. v. Heald [N. J. Law] 72 A 421. Rulings as to relevancy of testimony. McClintock v. Charleston & W. C. R. Co. [S. C.] 64 SE 1009; McCrary v. Southern R. Co. [S. C.] 65 SE 3. Receiving evidence of conceded fact. In re Mason's Will [Vt.] 72 A 329. Determination as to whether photograph offered in evidence was sufficiently verified. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. Whether sufficient foundation has been laid for admission of secondary or parol evidence of contents of writing. Wehring v. Modern Woodmen of America [Minn.] 119 NW 245. Ruling on diligence as affecting right to introduce secondary evidence. Robinson v. Singerly Pulp & Paper Co. [Md.] 72 A 828. Discretion as to admission of secondary evidence it is not an arbitrary one, but one subject to revision Dyer v. McWhirter [Tex. Civ. App.] 111 SW 1053. In condemnation proceedings held that rejection of evidence as to sales of other lands

testimony,[1] the qualification of experts,[2] the admission of proof of experiments,[3] the physical examination of plaintiff in a personal injury action,[4] the order of proof[5] and the argument of counsel,[6] the submission of questions to the jury for special findings,[7] the refusal to direct a verdict[8] or to grant a nonsuit,[9] or to vacate a voluntary dismissal,[10] rulings on motions to reopen a case,[11] for a rehear-

could not be disturbed unless manifestly wrong, offer of such proof presenting primary question of competency. American States Security Co. v. Milwaukee Northern R. Co. [Wis.] 120 NW 844.

99. Exclusion of witnesses. Atlanta Terra Cotta Co. v. Georgia R. & Elec. Co. [Ga.] 64 SE 563. Allowing witness to remain in court though others were excluded under the rule. Matthews' Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 459. Permitting witness who had violated rule to testify. Hendelman v. Kahan, 50 Wash. 247, 97 P 109. Competency of witnesses. Yergy v. Helena L. & R. Co. [Mont.] 102 P 310. Competency of nonexpert witness to express opinion. Fearon v. Mullins [Mont.] 98 P 650; McDonough v. Williams [Ark.] 112 SW 164; Turner v. American Security & Trust Co., 213 U. S. 257, 63 Law. Ed. —. Allowing infant witness to testify. Applebaum v. Bass [Tex. Civ. App.] 113 SW 173. Form of questions asked witnesses. McLaughlin v. Bradley [Iowa] 118 NW 389. Form of questions asked adverse hostile witness. Ryan v. Oshkosh Gaslight Co. [Wis.] 120 NW 264. Form of hypothetical questions to experts. Scurlock v. Boone [Iowa] 120 NW 313. Determining scope, fullness, and distinctness of hypothetical questions. Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793. Allowing leading questions. Birmingham R., L. & P. Co. v. Pritchett [Ala.] 49 S 782; Merriweather v. Sayre Min. & Mfg. Co. [Ala.] 49 S 916; Falk v. Kimmerle [Fla.] 49 S 504; Minchew v. Nahunta Lumber Co., 6 Ga. App. 154, 62 SE 716; Peebles v. O'Gara Coal Co., 239 Ill. 370, 88 NE 166. Extent and scope of cross-examination. Sloss-Sheffield Steel & Iron Co. v. House [Ala.] 47 S 572; Simeoli v. Derby Rubber Co. [Conn.] 71 A 646; Indiana Union Trac. Co. v. Pheanis [Ind. App.] 85 NE 1040; McBride v. McBride [Iowa] 120 NW 709; Rutherford v. Iowa Cent. R. Co. [Iowa] 121 NW 703; Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651; Barrineau v. Charleston Consol. R., Gas & Elec. Co., 81 S. C. 20, 61 SE 1063; Anderson v. Salt Lake & O. R. Co. [Utah] 101 P 579; Horton v. Seattle [Wash.] 101 P 1091; Kinnane v. Conroy [Wash.] 101 P 223. Refusing on cross-examination to allow question in effect already answered. United Order of the Golden Cross v. Hooser [Ala.] 49 S 354.

1. United States Smelting Co. v. Parry [C. C. A.] 166 F 407.

2. Atlantic Coast Line R. Co. v. Dees [Fla.] 48 S 28; Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793; Theobald v. Shepard Bros. [N. H.] 71 A 26; Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418; Fowlie's Adm'x v. McDonald, Cutler & Co. [Vt.] 72 A 989; Clinchfield Coal Co. v. Wheeler's Adm'r., 108 Va. 448, 62 SE 269.

3. Denial of leave to suspend wires over model of telephone pole. Drown v. New England Tel. & T. Co., 81 Vt. 358, 70 A 599. Whether conditions were sufficiently similar to make photograph of experiment of any value in aiding jury to pass on issue. Field v. Gowdy, 199 Mass. 568, 85 NE 884.

4. Denial of application. Atlantic Coast Line R. Co. v. Dees [Fla.] 48 S 28. Refusal to allow third physical examination. Murphy v. Southern Pac. Co. [Nev.] 101 P 322.

5. Wilson v. Jermigan [Fla.] 49 S 44; Jackson v. Buice [Ga.] 63 SE 823; Miller v. Leib, 109 Md. 414, 72 A 466; McIntyre v. Smyth, 108 Va. 738, 62 SE 930. Admission on rebuttal of testimony which is properly part of case in chief. Crosby v. Portland R. Co. [Or.] 101 P 204, former opinion [Or.] 100 P 300. Granting or refusal of leave to introduce evidence in rebuttal which is not strictly in rebuttal. City of Marseilles v. Heister, 142 Ill. App. 299; Cleveland Seed Co. v. Moore, 142 Ill. App. 615. Order of examination of witnesses. Minchew v. Nahunta Lumber Co., 5 Ga. App. 154, 62 SE 716.

6. Right to open and close. O'Connor v. Kleiman [Iowa] 121 NW 1088. Latitude allowed in drawing deductions from evidence. Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777. Allowing reading of authorities. St. Louis Southwestern R. Co. v. Ross [Tex. Civ. App.] 119 SW 725. Refusing to grant mistrial because of argument. Atlantic Coast Line R. Co. v. Jones [Ga.] 63 SE 834; Behrens v. Mountz, 37 Pa. Super. Ct. 326.

7. Refusal to submit particular questions of fact to jury for purpose of having jury render special verdict thereon. Prye v. Kalbaugh, 34 Utah, 306, 97 P 331. Refusal to submit special findings or special verdict to jury. Matthews v. Spokane, 50 Wash. 107, 96 P 827. Form of special issues to be submitted. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. Trial courts may exercise considerable measure of discretion in application of special verdict law (St. 1898, § 2858), and, unless they thus prejudicially invade a statutory right, § 2898, providing that there shall be no reversal except for error affecting substantial rights, should be applied. Sufferling v. Heye [Wis.] 121 NW 251.

8. Central of Georgia R. Co. v. Mote, 131 Ga. 166, 62 SE 164. Where evidence conflicting. Chicago, etc., R. Co. v. Anderson [C. C. A.] 168 F 901.

9. Cataract City Milling Co. v. Meunier [R. I.] 69 A 602.

10. Anderson v. Shields, 51 Wash. 463, 99 P 24.

11. Chandler Bros. v. Higgins [Ala.] 47 S 284; Casey v. Richards [Cal. App.] 101 P 36; Consaul v. Cummings, 30 App. D. C. 540; Stewart v. Mundy, 131 Ga. 586, 62 SE 986; Cutter-Tower Co. v. Clements, 5 Ga. App. 291, 63 SE 58; Schwitters v. Springer, 236 Ill. 271, 86 NE 102; German American Bank v. Owens, 143 Ill. App. 211; Burke v. Burke [Iowa] 119 NW 129; Carr v. Way [Iowa] 119 NW 700; Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729; Spencer v. Alki Point Transp.

ing [12] to set aside judgments [13] or to open defaults,[14] the taxation and apportionment of costs,[15] and the allowance of counsel fees [16] in certain cases, the granting [17]

Co. [Wash.] 101 P 509; Bellingham v. Linck [Wash.] 101 P 843.

12. Refusal to rehear primary election contest. In re Foy [Pa.] 73 A 324. Chancellor's action in overruling motion for rehearing after final decree. Marx v. District Grand Lodge No. 7, I. O. B. B. [Ala.] 47 S 207.

13. Hallowell v. Darling, 32 App. D. C. 405; Dunn v. Lawrence, 106 Minn. 541, 118 NW 1118; Poff v. Lockridge [Okl.] 98 P 427; Catts v. Catts, 37 Pa. Super. Ct. 598. Vacation of dismissal entered by clerk pursuant to rule of court. Poppell v. Culpepper [Fla.] 47 S 351. Order vacating order authorizing receiver to execute note and to commence action. Stenbom v. Brown-Corliss Engine Co., 137 Wis. 564, 119 NW 308. Making absolute a rule to open judgment. Zajaczkowski v. Jawer, 36 Pa. Super. Ct. 324. Where case heard on agreed statement of facts, and motion to vacate judgment heard on affidavits with no oral evidence, appellate court will examine record as if never examined by trial court and will exercise discretion same as trial court. Council Imp. Co. v. Draper [Idaho] 102 P 7.

14. Cass v. Hutton [Cal.] 99 P 493; Utah-Nevada Co. v. De Lamar [Cal. App.] 100 P 884; Mutual Reserve Life Ins. Co. v. Ross, 42 Ind. App. 621, 86 NE 506; Milbourn v. Baugher [Ind. App.] 86 NE 874; Carton v. Day [Mich.] 16 Det. Leg. N. 234, 121 NW 295; In re Dunn's Estate [Minn.] 119 NW 57; Knupp v. Miller, 133 Mo. App. 256, 113 SW 725; Harvey v. Gillies, 117 NYS 204; Aaron v. Holmes [Utah] 99 P 450; Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539. Held that court acted well within its discretion in setting aside default and permitting appellant to answer, and should not be permitted to impeach or undermine its previous ruling by statement inserted in certificate to statement of facts months afterward. Starr v. Long Jim [Wash.] 100 P 194. Discretion to relieve against default is not arbitrary, and erroneous exercise thereof is reviewable. Voorhees v. Geiser-Hendryx Inv. Co. [Or.] 98 P 324. Order reopening default will be reversed where motion is manifestly dilatory. American Pin Co. v. Tepfer, 127 App. Div. 939, 111 NYS 1027. While appellate court will go far to reverse order denying motion to reopen default, it will impose unusually severe terms when defendant's conduct warrants the suspicion that his object is delay. Van Hoven v. Faust Co., 11 NYS 837.

15. See, also, Costs, 11 C. L. 886. Taxing of costs in trespass to try title to recover land purchased at tax sale, etc. Patton v. Minor [Tex. Civ. App.] 117 SW 920. Allowing costs in action against administrator and guardian for accounting. Anderson v. Silcox [S. C.] 63 SE 128. Costs in equity cases. Mills v. Britt [Fla.] 47 S 799 Apportionment of costs in equity case. Converse v. Deep River [Iowa] 117 NW 1078. Denial of costs in suit to foreclose mortgage. Waymire v. Shipley [Or.] 97 P 807. Giving or withholding of costs in admiralty. The Eva D. Rose [C. C. A.] 166 F 101.

16. Allowance of counsel fees by court of equity in receivership proceedings. Weiss v. Haight & Freese Co. [C. C. A.] 165 F 432. Amount of attorneys fees to be allowed in suit by stockholder of corporation against officers and directors for misappropriation of funds. Zeckendorf v. Steinfeld [Ariz.] 100 P 784.

17. Kramm v. Stockton Elec. R. Co. [Cal. App.] 101 P 914; Jones v. Jacksonville Elec. Co. [Fla.] 47 S 1; Chancey v. Williams [Fla.] 47 S 811; Livingston v. Taylor [Ga.] 63 SE 694; Cox v. Grady [Ga.] 64 SE 262; Magness v. Modern Woodmen of America [Iowa] 118 NW 386; State Security Bank v. Burns [Iowa] 120 NW 626; Welsh v. Milton Water Co., 200 Mass. 409, 86 NE 779; Minneapolis Threshing Mach. Co. v. Peters [Minn.] 120 NW 1134; Brinton v. Thomas [Mo. App.] 119 SW 1016; Wells v. Cochran [Neb.] 120 NW 1123; Billings v. Charlotte Observer, 150 N. C. 540, 64 SE 435; Gooler v. Eidness [N. D.] 121 NW 83; Citizens' State Bank v. Chattanooga State Bank [Okl.] 101 P 1118; Hall v. Northwestern R. Co. of South Carolina, 81 S. C. 522, 62 SE 848; Olson v. Humbird Lumber Co., 48 Wash. 136, 92 P 897; Murhard Estate Co. v. Portland & Seattle R. Co. [C. C. A.] 163 F 194. On ground that judgment was based on misunderstanding and misconstruction of agreed statement of facts. Groves v. Terry [Mo.] 117 SW 1167. On theory that jury was misled by instruction. Loveland v. Rand, 200 Mass. 142, 85 NE 948. Less disposed to reverse orders granting new trials than those refusing to do so. Parker v. Britton, 133 Mo. App. 270, 113 SW 259; Varney v. Hutchinson Lumber & Mfg. Co. [W. Va.] 63 SE 203. Granting new trial on question of law is not discretionary, but subject to review. Manker v. Tough [Kan.] 98 P 792; Loftus v. Metropolitan St. R. Co. [Mo.] 119 SW 942. Where it is plain that new trial was granted for alleged error of law committed by trial court, supreme court will review question of law so presented. Oconto Brew. Co. v. Cayouette [Wis.] 120 NW 497. Granting new trial on erroneous theory as to legal effect of evidence after two concurrent verdicts with no error of law warrants reversal or abuse of discretion. Gregory v. Georgia Granite R. Co. [Ga.] 64 SE 686. Granting new trial to allow introduction of evidence omitted through oversight held abuse of discretion. Parker v. Britton, 133 Mo. App. 270, 113 SW 259.

First grant of new trial. Wood v. Wood [Ga.] 64 SE 467. Not distrubed where verdict not demanded by law and evidence, though given upon single ground. Cox v. Grady [Ga.] 64 SE 262. Will not consider reasons for first grant of new trial where verdict not absolutely supported by evidence. Van Giesen v. Queen Ins. Co. [Ga.] 64 SE 456. Rule applies though presiding judge ceases to hold office and order is entered by successor. Id.

For insufficiency of evidence. Wehner v. Bauer [Cal. App.] 101 P 417; McKone v. Schott [Conn.] 72 A 570; Alton v. Chicago, etc., R. Co. [Minn.] 120 NW 749; Crawford v. Kansas City Stockyards Co., 215 Mo. 394, 114 SW 1057; Morris v. Missouri Pac. R. Co. [Mo. App.] 117 SW 687; Cronin v. Bien-

or denial[18] of a motion for a new trial, and the amendment of the grounds of such motions.[19]

enzucht, 113 NYS 546; Billings v. Charlotte Observer, 150 N. C. 540, 64 SE 435; Angus v. Wamba, 50 Wash. 353, 97 P 246; Best v. Seattle, 50 Wash. 533, 97 P 772. Unless evidence plainly and palpably supports verdict. Hoven v. Gewin [Ala.] 49 S 676; Woodroof v. Hall [Ala.] 47 S 570; Sherrer v. Enterprise Banking Co. [Ala.] 49 S 779; Powers-Simpson Co. v. Delehunt, 105 Minn. 334, 117 NW 503. Where is substantial conflict of evidence. Farrell Co. v. Ihrig, 50 Wash. 281, 97 P 52. Order setting aside verdict not contrary to evidence, reversed. Convey v. Finn, 130 App. Div. 440, 114 NYS 864; Sturenberg v. Spero, 116 NYS 737. On appeal from order granting new trial on ground that plaintiff's evidence did not make case for jury, court must assume as facts of case all that evidence in plaintiff's behalf tended to prove. Bird v. Blackwell, 135 Mo. App. 23, 115 SW 487. Ruling that there is no evidence to support verdict may be reviewed, since court does not in such case weigh evidence. Crawford v. Kansas City Stockyards Co., 215 Mo. 394, 114 SW 1057. Order held to show that motion was sustained on ground that there was no evidence and that instruction in nature of demurrer to evidence should have been sustained. Id. Assigning of reason for sustaining motion is not a mere form, and party should not be deprived of right of review by use of incorrect form of expression. Id.

Grant by different judge: Judge who did not preside at trial has not that discretion in relation to grant or refusal of new trial upon the evidence, with which appellate court is reluctant to interfere. Monahan v. National Realty Co., 4 Ga. App. 680, 62 SE 127.

18. Chandler v. Mutual Life & Industrial Ass'n, 131 Ga. 82, 61 SE 1036; Merchants' & Miners' Transp. Co. v. Corcoran, 4 Ga. App. 654, 62 SE 130; Central of Georgia R. Co. v. Mote, 131 Ga. 166, 62 SE 164; Kelly v. Malone, 5 Ga. App. 618, 63 SE 639; Beaty v. Sears [Ga.] 64 SE 321; Western & A. R. Co. v. Cotter [Ga.] 64 SE 474; National Fire Ins. Co. v. Van Giesen [Ga.] 64 SE 655; McManus v. Thing, 202 Mass. 11, 88 NE 442; Bowen v. Webb, 37 Mont. 479, 97 P 839; Lehane v. Butte Elec. R. Co., 37 Mont. 569, 97 P 1038; Fearon v. Mullins [Mont.] 98 P 650; Billings v. Charlotte Observer, 150 N. C. 540, 64 SE 435; Tindal v. Sublett [S. C.] 63 SE 960; Bittrick v. Consolidated Imp. Co., 51 Wash. 469, 99 P 303; Alaska-Theadwell-Gold Min. Co. v. Cheney [C. C. A.] 162 F 593; Murhard Estate Co. v. Portland & Seattle R. Co. [C. C. A.] 163 F 194. On ground of accident. Meadows v. Hudson [Ark.] 119 SW 269. For misconduct of counsel. Jordan v. Le Messurier [Mich.] 15 Det. Leg. N. 1007, 118 NW 952. On ground that verdict was excessive. Southern R. Co. v. Brock [Ga.] 64 SE 1083; Lincoln v. Central Vermont R. Co. [Vt.] 72 A 821; Wirsing v. Smith, 222 Pa. 8, 70 A 906. Denial of motion on ground that verdict was excessive reversed. Johnson v. Great Northern R. Co. [Minn.] 119 NW 1061. For inadequacy of damages. Schmidt v. Chicago, etc., R. Co. [Minn.] 122 NW 9. Allowing deduction of interest erroneously authorized by charge, and thereupon refusing new trial. Seaboard Air Line R. Co. v. Bishop [Ga.] 63 SE 1103. Whether jury in fact considered certain evidence which they were instructed to disregard on particular issue held for trial court. City of Manchester v. Duggan [N. H.] 70 A 1075. Reviewing court cannot look beyond order disposing of motion and recitals of bill of exceptions showing exercise of discretion to inquire as to failure of exercising discretion. Merchants' & Miners' Transp. Co. v. Corcoran, 4 Ga. App. 654, 62 SE 130. Oral disapproval of verdict not indicative of failure to exercise discretion. Id. Where trial court gives reasons for refusing to set aside verdict, there is clearly an exercise of discretion. Lincoln v. Central Vermont R. Co. [Vt.] 72 A 821. New trial granted where refusal showed failure to exercise discretion, and other errors. Livingston v. Taylor [Ga.] 63 SE 694. Abuse of discretion may be reviewed if properly appealed. Luke v. Coffee [Nev.] 101 P 555.

For newly-discovered evidence. Kenny v. Kennedy [Cal. App.] 99 P 384; Poppell v. Culpepper [Fla.] 47 S 351; Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729; Jaenicke v. Fountain City Drill Co., 106 Minn. 442, 119 NW 60; McAlpine v. Millen [Minn.] 120 NW 1134; Blake v. Royal Ins. Co., 133 Mo. App 16, 112 SW 1000; Stern v. Volz [Or.] 98 P 148; Palmer v. Schurz [S. D.] 117 NW 150; Kaack v. Stanton [Tex. Civ. App.] 112 SW 702; Kenway v. Hoffman, 51 Wash. 105, 98 P 98.

For insufficiency of evidence. Irwin v. Judge [Conn.] 71 A 572; Kinlen v. Metropolitan St. R. Co., 216 Mo. 145, 115 SW 523; Moore v. Rowland Lumber Co., 150 N. C. 261, 63 SE 953; Manning v. Portland Steel Ship Bldg. Co. [Or.] 96 P 545; Lincoln v. Central Vermont Co. [Vt.] 72 A 821. Where is sufficient evidence to support verdict. Johnson v. Perkins, 4 Ga. App. 633, 62 SE 152; Grand Lodge of Georgia Free & Accepted Masons v. O'Shields [Ga.] 63 SE 621; Morrow v. Bank of Southwestern Georgia [Ga.] 63 SE 627; Bradford v. Brand [Ga.] 64 SE 688; Mallett v. Watkins [Ga.] 64 SE 999; Georgia So. & F. R. Co. v. Oliver [Ga. App.] 64 SE 1007; Southern R. Co. v. Forrest [Ga.] 65 SE 93. In so far as it depends on question of fact, if supported by substantial evidence Kelly v. Cummens [Iowa] 121 NW 540. Where verdict not palpably against weight of evidence. Joy v. Koch [Minn.] 121 NW 634; Leonard v. Clark [Minn.] 119 NW 485. Lyon v. McGowin [Ala.] 47 S 342. Where evidence is conflicting. Southern States Portland Cement Co. v. Helms [Ga. App.] 64 SE 494; Saginaw Mill. Co. v. Mower, 154 Mich. 620, 15 Det. Leg. N. 889, 118 NW 622; Farmers' & Merchants' Bank v. Germania Life Ins. Co., 150 N. C. 770, 64 SE 902; Galvin v. Tibbs, Hutchins & Co. [N. D.] 119 NW 39. Evidence must be viewed as jury must have viewed it, in light of instructions. St. Paul's Episcopal Church v. Fields [Conn.] 72 A 145. Question whether justice requires new trial held one of fact, and exception to refusal to grant new trial presents no question for review if there is competent evidence, or if evidence is not

(§ 13F) 2. *Questions of fact.*[20]—See 11 C. L. 227—Rulings, such as upon motion for continuance, motion to dissolve injunction, and the like, involve questions of fact, but, being deemed to rest primarily on discretion, are treated elsewhere.[21] Generally speaking, questions of fact will not be reviewed,[22] unless decision below

reported, but, if it appears that there was no competent evidence to support it finding fails. St. Pierre v. Foster & Co. [N. H.] 70 A 289. Where no motion at trial for judgment of nonsuit or directed verdict. Oldand v. Oregon Coal & Nav. Co. [Or.] 102 P 596. Ruling will not be disturbed if as reasonable men jury could have found such verdict. Wilson v. Jernigan [Fla.] 49 S 44. Will not be reversed unless, after allowing all reasonable presumptions of its correctness, preponderance of evidence against verdict is as decided as to clearly convince appellate court that it is wrong and unjust. Id. Where on second trial after reversal jury found for same party on substantially same evidence, and was evidence to authorize it. Southern R. Co. v. Scott [Ga.] 65 SE 143.

19. Denial of motion to amend. Soules v. Brotherhood of American Yoemen [N. D.] 120 NW 760.

20. Search Note: See Appeal and Error, Cent. Dig. §§ 3893-4028; Dec. Dig. §§ 987-1024; 3 Cyc. 345-383; 2 A. & E. Enc. P. & P. 390.

21. See § 13f, 1, ante.

22. American Ins. Co. v. Dannehower [Ark.] 115 SW 950; Brown & Co. v. McKnight [Ark.] 118 SW 409; South Georgia R. Co. v. Niles, 131 Ga. 599, 62 SE 1042; Cowart v. Powell, 5 Ga. App. 43, 62 SE 664; Hercules Mfg Co.. v. Robinson, 5 Ga. App. 43, 62 SE 672; Atlanta Skirt Mfg. Co. v. Garrett, 5 Ga. App. 819, 63 SE 920; Pendley Brick Co. v. Hardwick & Co. [Ga. App.] 64 SE 664; Fraser v. Harper House Co., 141 Ill. App. 390; Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40; Emrich Furniture Co. v. Byrnes [Ind. App.] 87 NE 1042; Sieberts v. Spangler [Iowa] 118 NW 292; Zimbleman v. Finnegan [Iowa] 118 NW 312; Ferringer v. Crowley Oil & Mineral Co., 122 La. 441, 47 S 763; Sires v. Clark, 132 Mo. App. 537, 112 SW 526; Montgomery v. Wise [Mo. App.] 120 SW 100; Supreme Commandery, U. O. G. C. v. Donaghey [N. H.] 72 A 419; Hogan v. Rosenthal, 127 App. Div. 312, 111 NYS 676; Bard v. Gluck, 113 NYS 487; Endres v. International R. Co., 129 App. Div. 785, 114 NYS 631; Free v. Champion Fibre Co., 150 N. C. 736, 64 SE 772; Farmers' & Merchants' Bank v. Germania Life Ins. Co., 150 N. C. 770, 64 SE 902; Peterson v. Conlan [N. D.] 119 NW 367; Eaton v. Blackburn [Or.] 96 P 870; Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76; Columbia, N. & L. R. Co. v. Laurens Cotton Mills [S. C.] 61 SE 1089; Slawson v. Equitable Fire Ins. Co. [S. C.] 62 Se 782; Grand Fraternity v. Melton [Tex.] 117 SW 788; Simpson Bank v. Smith [Tex. Civ. App.] 114 SW 445; Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 116 SW 365; Ziehme v. Miller [Tex. Civ. App.] 117 SW 1010; Equitable Life Assur. Soc. v. Kitts' Adm'r [Va.] 63 SE 455; Redd v. Carnahan [W. Va.] 64 SE 138; Baker v. Robbins, 51 Wash. 467, 99 P 1; Neel v. King County [Wash.] 102 P 396; Norfolk & W. R. Co. v. Gardner [C. C. A.] 162 F 114; Murhard Estate Co. v. Portland & Seattle R. Co. [C. C. A.] 163 F 194; Waters Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Verdict unless unmistakably wrong. Labreque v. Hill Mfg. Co. [Me.] 71 A 1023. Verdict not so palpably wrong as to shock conscience of court. Suell v. Derricott [Ala.] 49 S 895. Before appellate court can consider question of negligence as matter of law must determine that facts are undisputed and that one inference can be drawn from them by reasonable men, and it should be reluctant to draw inference contrary to verdict. Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40. Verdict resting upon opinion evidence of experts will not be given same weight as one resting upon facts, particularly when such evidence is concerning cause of condition, which condition is itself established by opinion of experts. Bucher v. Wisconsin Cent. R. Co. [Wis.] 120 NW 518. Verdict plainly against law as applied to facts found will be reversed. City of Portsmouth v. Houseman [Va.] 65 SE 11. Where evidence is so unsatisfactory that it is difficult to arrive at correct conclusion, new trial will be awarded. Finkelstone v. Lanzky, 112 NYS 1109.

Damages. Central of Georgia R. Co. v. Morgan [Ala.] 49 S 865; Zetsche v. Chicago, etc., R. Co. 238 Ill. 240, 87 NE 412; Miller v. Kelly Coal Co. [Ill.] 88 NE 196; West Chicago Street R. Co. v. Muttschall, 131 Ill. App. 639; Eckels v. Cooper, 136 Ill. App. 60; Chicago, B. & Q. R. Co. v. Sample, 138 Ill. App. 95; Olson v. Brundage, 139 Ill. App. 559; Hagen v. Schlueter, 140 Ill. App. 84; Holliday & Co. v. Highland Iron & Steel Co. [Ind. App.] 87 NE 249; Louisville & N. R. Co. v. Pedigo [Ky.] 113 SW 116; German Ins. Bank v. Martin [Ky.] 114 SW 319; Louisville & N. R. Co. v. Daniel [Ky.] 115 SW 804; Western Union Tel. Co. v. Hiller [Miss.] 47 S 377; Mississippi Cent. R. Co. v. Turnage [Miss.] 49 S 840; Barree v. Cape Girardeau, 132 Mo. App. 182, 112 SW 724; Orefice v. Sevarese, 61 Misc. 88, 113 NYS 175; McCherry v. Snare & Triest Co., 130 App. Div. 241, 114 NYS 674; Beaumont, etc., R. Co. v. Olmstead [Tex. Civ. App.] 120 SW 596; Matthews v. Spokane, 50 Wash. 107, 96 P 827; Tilton v. Gates Land Co. [Wis.] 121 NW 331; Toledo, etc., R. Co. v. Kountz [C. C. A.] 168 F 832; Blackwell v. Metropolitan St. R. Co. [Mo. App.] 119 SW 456. Excessive verdict based upon misunderstanding or ignoring of evidence must be corrected. Wellman v. Metropolitan St. R. Co. [Mo.] 118 SW 31. Excessiveness of damages to be determined in light of instructions given though limiting recovery to actual damages, though court erred in not submitting question of punitive damages. Burns v. Alabama S. V. R. Co. [Miss.] 47 S 640. Unless result of passion, prejudice, sympathy, or other improper motive. Gomez v. Scanlan [Cal.] 102 P 12; Merchants' & Miners' Transp. Co. v. Corcoran, 4 Ga. App. 654, 62 SE 130; Seaboard Air Line R. Co. v. Miller, 5 Ga. App. 402, 63 SE 299;

is wholly unsustained by the evidence, the wording of the rule varying somewhat in the various jurisdictions.[23] Every presumption favors the correctness of the

Chicago & N. W. R. Co. v. Chicago Mechanics' Institute, 239 Ill. 197, 87 NE 933; City of Waukegan v. Sharafinski, 135 Ill. App. 436; Eckels v. Cooper, 136 Ill. App. 60; Chicago City R. Co. v. Crauf, 136 Ill. App. 66; Chicago City R. Co. v. Donnelly, 136 Ill. App. 204; Illinois Steel Co. v. Paige, 136 Ill. App. 410; Foley v. Everett, 142 Ill. App. 250; Harper v. Black Diamond Coal Co., 142 Ill. App. 594; Baker v. Fritts, 143 Ill. App. 465; Cincinnati, etc., R. Co. v. Cook [Ind. App.] 88 NE 76; Eilerman v. Farmer [Ky.] 118 SW 289; Illinois Cent. R. Co. v. Smith [Ky.] 118 SW 933; Burch v. Bernard [Minn.] 120 NW 33; Olson v. Pike [Minn.] 120 NW 378; Schmidt v. Chicago, etc., R. Co. [Minn.] 122 NW 9; Barree v. Cape Girardeau, 132 Mo. App. 182, 112 SW 724; Partello v. Missouri Pac. R. Co., 217 Mo. 645, 117 SW 1138; Herndon v. Springfield [Mo. App.] 119 SW 467; Olmstead v. Noll [Neb.] 117 NW 102; Piering v. Dunham Mfg. Co., 113 NYS 713; Choctaw, O. & G. R. Co. v. Burgess [Okl.] 97 P 271; Hickey v. Booth [R. I.] 72 A 529; Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787; San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716; McCrorey v. Thomas [Va.] 63 SE 1011; Goshorn v. Wheeling Mold & Foundry Co. [W. Va.] 64 SE 22; Pfister v. Milwaukee Free Press Co. [Wis.] 121 NW 938. Verdict not presumed based on passion. Yergy v. Helena L. & R. Co. [Mont.] 102 P 310. Requiring large remittitur not proof of passion or prejudice. Foley v. Everett, 142 Ill. App. 250. Excessive verdict will be set aside. Olson v. Nilson, 142 Ill. App. 436; Billings v. Charlotte Observer, 150 N. C. 540, 64 SE 435. Or reduced. St. Louis, etc., R. Co. v. Freeman [Ark.] 116 SW 678; St. Francis Levee Dist. Directors v. Powell [Ark.] 117 SW 763; Ferringer v. Crowley Oil & Mineral Co., 122 La. 441, 47 S 763. Where manifestly excessive, will set it aside or order remittitur. Weinert v. Merchants' & Shippers' Warehouse Co., 127 App. Div. 826, 112 NYS 123; Shapiro v. Leahy Bldg. Co., 112 NYS 1090; Missouri, K. & T. R. Co. v. Lee [Tex. Civ. App.] 119 SW 144. Verdict not to be set aside as excessive unless plainly so. Setterstorm v. De Dietrich Import Co. [N. J. Law] 73 A 65; Hoppock v. Easton Transit Co. [N. J. Law] 72 A 453. Columbia Amusement Co. v. Pine Beach Inv. Corp. [Va.] 63 SE 1002; Starnes v. Pine Woods Lumber Co., 122 La. 284, 47 S 607. Court will exercise great caution and discretion. Montgomery Trac. Co. v. Knabe [Ala.] 48 S 501. Clearly inadequate verdict. Set aside. Corley v. Yazoo-Mississippi Delta Levee Com'rs [Miss.] 49 S 266; Lozier Motor Co. v. Ziegler, 115 NYS 134; National Fowler Bank v. Burch [Ga. App.] 64 SE 282.

23. If there is any substantial evidence to support it. Central of Georgia R. Co. v. Dothan Mule Co. [Ala.] 49 S 243; Central of Georgia R. Co. v. Ashley [Ala.] 49 S 388; Davies v. Angelo, 8 Cal. App. 305, 96 P 909; Myers v. Holton [Cal. App.] 98 P 197; De Gottardi v. Donati [Cal.] 99 P 492; Hannan v. Hannan [Colo.] 96 P 780; Richner v. Plateau Live Stock Co. [Colo.] 98 P 178; Lewis v. Smith [Colo.] 101 P 762; Valdosta Mercantile Co. v. White [Fla.] 47 S 961; Lowe v. Crawford, 131 Ga. 182, 61 SE 1125; Sims v. Sims, 131 Ga. 262, 62 SE 192; Charles v. Valdosta Foundry & Mach. Co., 4 Ga. App. 733, 62 SE 493; Lee v. Winkles, 131 Ga. 577, 62 SE 820; Dub v. Bryson, 5 Ga. App. 211, 62 SE 1001; Jordan v. Farmers' & Merchants' Bank, 5 Ga. App. 244, 62 SE 1024, Clark v. State, 131 Ga. 693, 63 SE 132; Georgia S. & F. R. Co. v. Ransom, 5 Ga. App. 740, 63 SE 525; Leathers v. McGuire [Ga.] 63 SE 626; Seaboard Air Line R. Co. v. Bishop [Ga.] 63 SE 785; Jackson v. Buice [Ga.] 63 SE 823; Johnson v. J. F. Stapleton Co. [Ga.] 63 SE 827; Atlantic Coast Line R. Co. v. Jones [Ga.] 63 SE 834; Gorham v. Bankston, 5 Ga. App. 812, 63 SE 939; Seaboard Air Line R. Co. v. Bishop [Ga.] 63 SE 1103; Bank of Covington v. Piper [Ga.] 63 SE 1121; Kries v. Fuller E. Callaway Co., 5 Ga. App. 849, 63 SE 1124; Allen v. Terrell [Ga.] 64 SE 680; Georgia Coast & P. R. Co. v. McFarland [Ga.] 64 SE 897; Jones v. Bank of Waynesboro [Ga. App.] 65 SE 43; Farrar Lumber Co. v. Johnstone & Co. [Ga. App.] 65 SE 60; Chandler v. Griffin [Ga.] 65 SE 128; Valley Lumber Co. v. McGilvery [Idaho] 101 P 94; Lamb v. Licey [Idaho] 102 P 378; Leggett v. Evans [Idaho] 102 P 486; Carroll v. Rabberman, 240 Ill. 450, 88 NE 995; Marion Elec. L. & St. R. Co. v. Whitlock, 137 Ill. App. 38; Boys v. Bernhard Milling Co., 138 Ill. App. 88; Doyle v. Cavanaugh, 139 Ill. App. 359; Hubbell v. Heidrich, 142 Ill. App. 404; Thompson v. Beatty [Ind.] 86 NE 961; Emrich Furniture Co. v. Byrnes [Ind. App.] 87 NE 1042; Indiana Union Trac. Co. v. Pheanis [Ind. App.] 85 NE 1040; Miller v. State, 42 Ind. App. 630, 86 NE 493; Ellison v. Ryan [Ind. App.] 87 NE 244; Cochran v. Shirley [Ind. App.] 87 NE 993; Rankin v. Lingo [Iowa] 117 NW 274; Hixon v. Shanor [Iowa] 118 NW 890; Rogers v. Smith [Iowa] 120 NW 625; Leasure v. Boie [Iowa] 120 NW 643; Mittelstadt v. Modern Woodmen of America [Iowa] 121 NW 803; Cumberland Tel. & T. Co. v. Shirley [Ky.] 112 SW 1109; Harbison & Walker Co., Southern Dept., v. White [Ky.] 114 SW 250; Thornbury v. Bolt [Ky.] 116 SW 1177; White v. Ballard County Bank [Ky.] 117 SW 294; Levy v. New Orleans R. & L. Co. [La.] 48 S 887; Macbeth v. Minnesota & Western Land Co. [Minn.] 121 NW 425; Bailey v. Metropolitan St. R. Co., 133 Mo. App. 473, 113 SW 680; Grimes v. Cole, 133 Mo. App. 522, 113 SW 685; Baker v. Thompson, 214 Mo. 500, 114 SW 497; Landers v. Quincy, etc., R. Co., 134 Mo. App. 80, 114 SW 543; Winfrey v. Ragan [Mo. App.] 117 SW 83; Wellman v. Metropolitan St. R. Co. [Mo.] 118 SW 31; Bradford v. Chicago, etc., R. Co. [Mo. App.] 119 SW 32; Afflick v. Streeter [Mo. App.] 119 SW 28; Yost v. Silvers [Mo. App.] 119 SW 971; Miller v. Missouri Fire Brick Co. [Mo. App.] 119 SW 976; Cope v. Shoemate [Mo. App.] 119 SW 503; Leliane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038; Ettien v. Drum [Mont.] 101 P 151; Debus v. Armour & Co. [Neb.] 120 NW 1110; O'Connor v. Witte [Neb.] 121 NW 244; Shirley v. Minden

[Neb.] 121 NW 431; Racine-Sattley Co. v. Hansen [Neb.] 121 NW 573; Goos v. Chicago, B. & Q. R. Co. [Neb.] 121 NW 963; Hobbs v. Blanchard & Sons Co. [N. H.] 70 A 1082; Orefice v. Saverese, 61 Misc. 88, 113 NYS 175; Bosoian v. Hubbard, 129 App. Div. 637, 113 NYS 1084; Henderson-Snyder Co. v. Polk, 149 N. C. 104, 62 SE 904; Choctaw, O. & G. R. Co. v. Burgess [Okl.] 97 P 271; Chicago, etc., R. Co. v. Broe [Okl.] 100 P 523; Chicago, etc., R. Co. v. Mitchell, 19 Okl. 579, 101 P 850; Bird v. Webber [Okl.] 101 P 1052. Determine if there is competent evidence to support the verdict. Shaw v. Shaw, 36 Pa. Super. Ct. 122; Engle v. Luzerne County Gas Co., 36 Pa. Super. Ct. 311; Nugent v. Aldrich [R. I.] 73 A 305; Donnelly v. Swartz [R. I.] 72 A 868; Barksdale v. Charleston & W. C. R. Co. [S. C.] 64 SE 1013; Miller v. McConnell [S. D.] 120 NW 888; Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95; McDaniel v. Staples [Tex. Civ. App.] 113 SW 596; Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 115 SW 57; Hall v. Cook [Tex. Civ. App.] 117 SW 449; Central City Loan & Inv. Co. v. Vincent [Tex. Civ. App.] 117 SW 912; Missouri, K. & T. R. Co. v. Jones [Tex. Civ. App.] 117 SW 1000; Weatherford, etc., R. Co. v. White [Tex. Civ. App.] 118 SW 799; Lincoln v. Central Vermont R. Co. [Vt.] 72 A 821; Chesapeake & O. R. Co. v. Williams, 108 Va. 689, 62 SE 796; McIntyre v. Smyth, 108 Va. 738, 62 SE 930; Metropolitan Life Ins. Co. v. De Vault's Adm'x [Va.] 63 SE 982; Norfolk & P. Trac. Co. v. O'Neill [Va.] 64 SE 948; Duskey v. Green Lake Shingle Co., 51 Wash. 145, 98 P 99; Thorp v. Ramsey, 51 Wash. 530, 99 P 584; In re City of Seattle [Wash.] 100 P 330; Snarski v. Washington State Colonization Co. [Wash.] 101 P 839. Verdict will be set aside if unsupported by any competent evidence. Lenander v. Graves [Colo.] 100 P 403; Quayle v. Ream, 15 Idaho, 666, 99 P 707; Mitchell Lime Co. v. Nickless [Ind. App.] 85 NE 728; Milem v. Freeman [Mo. App.] 117 SW 644; Ward v. Ward, 130 App. Div. 27, 114 NYS 326; International & G. N. R. Co. v. Brice [Tex. Civ. App.] 111 SW 1094; Pennington v. Redman Van & Storage Co., 34 Utah, 223, 97 P 115. Finding based on mere conjecture or guess cannot stand. Johanson v. Webster Mfg. Co. [Wis.] 120 NW 832; Heinbach v. Doubleday, Page & Co., 130 App. Div. 34, 114 NYS 278; Jock v. Columbia & P. S. R. Co. [Wash.] 102 P 405. Verdict against two or more tort feasors should be set aside when unwarranted by evidence as against one defendant. Finley v. Southern R. Co. [Ga. App.] 64 SE 312. Cannot contend that there is no evidence to support verdict, though there may be none as to a particular item of damage submitted, where other items were also submitted and was no contention that verdict was excessive. DeLeval Separator Co. v. Sharpless [Iowa] 120 NW 657. Bare scintilla of evidence is not sufficient, but there must be substantial evidence having logical and reasonable tendency to prove the fact. Theobold v. Shepard Bros. [N. H.] 71 A 26. Finding or verdict as to what witness intended by language used must be based upon some reasonable understanding of such language or it cannot stand. Id. Rule that it is not every sort of evidence which will support a verdict cannot be applied so as to justify finding on appeal against credibility of witness who is unable to remember facts without reference to an official report theretofore made by him. Miller v. State, 42 Ind. App. 630, 86 NE 493. Where findings are in conflict with each other and general verdict, and some are not supported by evidence, such doubt is raised as to correctness of result as will warrant reversal and remand. Chicago I. & L. R. Co. v. Stepp [Ind. App.] 88 NE 343. Whether there is any evidence is question of law. International & G. N. R. Co. v. Vallejo [Tex.] 113 SW 4, rehearing denied [Tex.] 115 SW 25. Supreme court will not take judicial notice of fact that a landlord and tenant do not stand on an equal footing before a jury, and if tenant wins verdict it affords fair ground for relief that finding has some substantial support in evidence, and is also demonstration of fair minded character of jury. Scovel v. Pfeffer [Iowa] 117 NW 684.

The weight of the evidence is not reviewable. Birmingham R. L. & P. Co. v. Jung [Ala.] 49 S 434; Tebbs v. Wiseman [Ark.] 112 SW 196; St. Louis, etc., R. Co. v. Richardson [Ark.] 112 SW 212; Harris v. Coledezky [Conn.] 70 A 614; Rastetter v. Peoria R. Co., 142 Ill. App. 417; Beach v. Huntsman, 42 Ind. App. 205, 85 NE 523, former opinion [Ind. App.] 83 NE 1033; Conrad v. Hansen [Ind.] 85 NE 710; Model Clothing House v. Hirsch, 42 Ind. App. 270, 85 NE 719; Whiteley Malleable Castings Co. v. Wishon, 42 Ind. App. 288, 85 NE 832; Vandalia R. Co. v. McMains, 42 Ind. App. 532, 85 NE 1038; Thompson v. Beatty [Ind.] 86 NE 961; Pittsburg, etc., Co. v. Lynch [Ind. App.] 87 NE 40; Indianapolis Tract. & T. Co. v. Rowe [Ind. App.] 87 NE 653; Iowa Life Ins. Co. v. Haughton [Ind. App.] 87 NE 702; Emrich Furniture Co. v. Brynes [Ind. App.] 87 NE 1042; Cincinnati, etc., R. Co. v. Cook [Ind. App.] 88 NE 76; Unger v. Mellinger [Ind. App.] 88 NE 74; Burton v. Neill [Iowa] 118 NW 302; McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459; Cumberland Tel. & T. Co. v. Shirley [Ky.] 112 SW 1109; Bauer Cooperage Co. v. Shelton [Ky.] 114 SW 257; Southern R. Co. v. Adkin's Adm'r [Ky.] 117 SW 321; Miller v. Leib, 109 Md. 414, 72 A 466; Jellow v. Fore River Shipbuilding Co., 201 Mass. 464, 87 NE 906; Putnam v. Phoenix Preferred Acc. Ins. Co. [Mich.] 15 Det. Leg. N. 980, 118 NW 922; Crawford v. Kansas City Stockyards Co., 215 Mo. 394, 114 SW 1057; Moore v. Normal School Board of Regents, 215 Mo. 705, 115 SW 6; Carlton v. Monroe, 135 Mo. App. 172, 115 SW 1057; Miller v. Missouri Fire Brick Co. [Mo. App.] 119 SW 976; Nichols & Shephard & Co. v. Steinkraus [Neb.] 119 NW 23; Kokoll v. Brohm & Buhl Lumber Co., [N. J. Law] 71 A 120; Wade v. Cornish [Okl.] 99 P 643; O'Malley v. Rhode Island Co. [R. I.] 70 A 915; Equitable Life Assur. Soc. v. Kitts' Adm'r [Va.] 63 SE 455; Metropolitan Life Ins. Co. v. De Vault's Adm'x. [Va.] 63 SE 982. In reviewing ruling directing or refusing to direct verdict, court does not pass on weight of evidence, but examines into it only for determining law as applied to undisputed or conceded facts. Law v. Smith, 34 Utah, 394, 98 P 300. Where evidence in record is all one way,

its effect becomes a matter of law, and the court will weigh it, even in favor of right of an appellant to recover. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417. Is duty of appellate court, unlike supreme court, to consider and weigh the evidence, and to reverse judgment not sustained by evidence. Society of St. Stephen the Martyr v. Sikorski, 141 Ill. App. 1. Duty of appellate court as to reviewing weight of evidence in municipal court is same as its duty with regard to other nisi prius courts and is not abrogated by municipal court acts. Chicago City R. Co. v. Grossheim, 141 Ill. App. 77.

Credibility of witnesses will not be passed on by reviewing court. Birmingham R. L. & P. Co. v. Jung [Ala.] 49 S 434; St. Louis Southwestern R. Co. v. Pearson [Ark.] 114 SW 211; Red River Levee Dist. No. 1 v. Russell [Ark.] 114 SW 213; Scovell v. Pfeffer [Iowa] 117 NW 684; Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961; Moore v. Normal School Board of Regents, 215 Mo. 705, 115 SW 6; Miller v. Missouri Fire Brick Co. [Mo. App.] 119 SW 976; Bowen v. Webb, 37 Mont. 479, 97 P 839; Fitch v. Martin [Neb.] 122 NW 50; Puczko v. Kovacs, 112 NYS 1037; Gaebler v. Brooklyn Heights R. Co., 114 NYS 585; Shaw v. Shaw, 36 Pa. Super. Ct. 122; Stiff v. Havens [R. I.] 69 A 553; West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228; Williams v. Hennefield [Tex. Civ. App.] 120 SW 567; Equitable Life Assur. Soc. v. Kitts' Adm'r [Va.] 63 SE 455; Metropolitan Life Ins. Co. v. DeVault's Adm'x. [Va.] 63 SE 982. Testimony changed to meet defects pointed out on reversal arouses suspicion and demands closest scrutiny and if dishonest cannot be allowed to sustain verdict. Brennan v. New York, 130 App. Div. 267, 114 NYS 578.

Unless so contrary to evidence as to denote passion or prejudice. See, also, last preceeding note, Damages. Bank of Latham v. Milligan [Iowa] 118 NW 404; Supreme Lodge, K. P. v. Bradley [Ky.] 117 SW 275; Miller v. Missouri Fire Brick Co. [Mo. App.] 119 SW 976; Blum v. Nebraska-Iowa Creamery Co. [Neb.] 117 NW 104. Will be set aside where special findings show jury influenced by mistake or improper conditions. Tate v. Missouri Pac. R. Co., 143 Ill. App. 289.

Unless manifestly against the weight of the evidence. Montgomery Trac. Co. v. Knabe [Ala.] 48 S 501; Houston v. Davis [Ala.] 49 S 869; Donelson v. East, etc., R. Co., 235 Ill. 625, 85 NE 914; Drum v. Capps, 240 Ill. 524, 88 NE 1020; Village of Odin v. Nichols, 133 Ill. App. 306; Boester v. Kuhlengel, 136 Ill. App. 17; Fairview Fluor & Lead Co. v. Conkle, 136 Ill. App. 53; Chicago City R. Co. v. Crauf, 136 Ill. App. 66; Chicago City R. Co. v. Greinke, 136 Ill. App. 77; Brink's Chicago City Exp. Co. v. Brophy, 136 Ill. App. 145; Chicago City R. Co. v. Donnelly, 136 Ill. App. 204; Mayer v. McCann, 136 Ill. App. 501; Lane v. Trimble, 137 Ill. App. 23; Womacks v. Miller, 137 Ill. App. 508; Illinois & Texas Oil Co. v. Boyer, 137 Ill. App. 518; Wabash R. Co. v. Kiely, 137 Ill. App. 525; Laughlin v. Inman, 138 Ill. App. 40; Rogers & Co. v. Leach, 138 Ill. App. 44; Chicago, B. & Q. R. Co. v. Sample, 138 Ill. App. 95; Cowie v. Kinser, 138 Ill. App. 143; Chicago City R. Co. v. Phillips, 138 Ill. App. 438; Chicago Consol. Trac. Co. v. Kinane, 138 Ill. App. 636; Eckels v. Edison, 139 Ill. App. 75; Doyle v. Cavanaugh, 139 Ill. App. 359; Page v. Smith, 139 Ill. App. 441; Grubic v. Western Tube Co., 139 Ill. App. 470; Hagen v. Schlueter, 140 Ill. App. 84; Champlin v. Baltimore, etc., R. Co., 140 Ill. App. 94; Slater v. Pomeroy, 140 Ill. App. 118; Fries v. Deichmann, 140 Ill. App. 121; Wicker v. Alton, 140 Ill. App. 135; Donelson v. East St. Louis & Surburban R. Co., 140 Ill. App. 185; Settles v. Threlkeld, 140 Ill. App. 275; Heywood & Worrill Rattan Co. v. Jacobson, 140 Ill. App. 319; Crane v. Schaefer, 140 Ill. App. 647; Chicago City R. Co. v. Kastrzewa, 141 Ill. App. 10; Siegel, Cooper & Co. v. Metropolitan Amusement Ass'n, 141 Ill. App. 89; Herman v. Wroughton, 141 Ill. App. 353; Langlois v. Langlois, 142 Ill. App. 303; Gardner v. Ben Steele Weigher Mfg. Co., 142 Ill. App. 348; Brooks v. Brierton, 142 Ill. App. 369; Banfill v. Heister, 142 Ill. App. 500; Howell v. Cincinnati, etc., R. Co., 142 Ill. App. 502; Allen v. Springfield Consol. R. Co., 142 Ill. App. 510; Bussert v. Coleman, 142 Ill. App. 613; Niederer v. Gridley, 143 Ill. App. 88; Viney v. Bird, 143 Ill. App. 116; Trogdon v. Vandalia R. Co., 143 Ill. App. 230; Olson v. Kelly Coal Co., 143 Ill. App. 269; Frazier v. Garrison, 143 Ill. App. 474; Chicago City R. Co. v. McKeon, 143 Ill. App. 598; Northwest Thresher Co. v. Anderson [Minn.] 120 NW 1134; Fresno Home Packing Co. v. Turle, 60 Misc. 79, 111 NYS 839; Travis v. Haan, 128 App. Div. 77, Sup. 112 NYS 463; Ershowsky v. Korn, 113 NYS 478; Weil v. Auerbach, 113 NYS 743; West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228; Bradshaw v. Farnsworth [W. Va.] 63 SE 755. Unless flagrantly against evidence. Paducah Trac. Co. v. Baker [Ky.] 113 SW 449; Supreme Lodge, K. P. v. Bradley [Ky.] 117 SW 275; Eagle Distillery v. Hardy [Ky.] 120 SW 336; Bruner v. Seelbach Hotel Co. [Ky.] 117 SW 373. Verdict will not be disturbed as flagrantly against weight of evidence where there are two or three witnesses on each side whose testimony is diametrically opposed. Louisville & N. R. Co. v. Veach's Adm'r [Ky.] 112 SW 869. Verdict will be set aside when manifestly against weight of evidence. Kyle v. Slaughter [Ala.] 48 S 343; Dick v. Swenson, 137 Ill. App. 68; Springfield Consol. R. Co. v. Milan, 137 Ill. App. 435; West Side Hospital of Chicago v. Eiger, 139 Ill. App. 645; Trotier v. East St. Louis & Suburban R. Co., 140 Ill. App. 189; Lauth v. Harrison-Switzer Milling Co., 140 Ill. App. 199; Vandergrift v. Clark Hotel Co., 140 Ill. App. 256; Halpin v. Duffy, 149 Ill. App. 436; The Union Nat. Bank v. Griswold, 141 Ill. App. 464; Blood v. Illinois Steel Co., 142 Ill. App. 243; American Home Circle v. Mastinsek, 143 Ill. App. 177; Walker v. Montgomery, 143 Ill. App. 216; King v. Consolidated Coal Co., 143 Ill. App. 306; Pipes v. American Car and Foundry Co., 143 Ill. App. 319; Klocik v. American Car & Foundry Co., 143 Ill. App. 472; Cofield v. Black Lake Lumber Co. [La.] 49 S 650; Pollatschek v. Larner, 112 NYS 1024; Scott v. Barker, 129 App. Div. 241, 113 NYS 695; Giltman v. Brooklyn Heights R. Co., 129 App. Div. 654, 113 NYS 1046; Grand Fraternity v. Melton [Tex.] 117 SW 788; International & G. N. R. Co. v. Brice [Tex. Civ. App.] 111 SW 1094.

Verdict based on conflicting evidence. Birmingham R., L. & P. Co. v. Pritchett [Ala.] 49 S 782; Johnson v. Miller [Ala.] 49 S 858; McDonough v. Williams [Ark.] 112 SW 164; Tebbs v. Wiseman [Ark.] 112 SW 196; Union Sawmill Co. v. Felsenthal Land & Townsite Co. [Ark.] 112 SW 205; St. Louis, etc., R. Co. v. Coalson [Ark.] 112 SW 739; Louisiana & A. R. Co. v. Hobbs [Ark.] 113 SW 46; Hamiter v. Brown [Ark.] 113 SW 1014; St. Louis S. W. R. Co. v. Phoenix Cotton Oil Co. [Ark.] 115 SW 393; St. Louis S. W. R. Co. v. Cobb [Ark.] 115 SW 939; Rock Island Plow Co. v. Rankin Bros. [Ark.] 115 SW 943; Scott v. Moore [Ark.] 116 SW 660; Ayer & Lord Tie Co. v. Martin [Ark.] 117 SW 1081; Still v. San Francisco & N. W. R. Co., 154 Cal. 559, 98 P 672; Donati v. Righetti [Cal. App.] 97 P 1128; Henderson v. Perrott [Cal. App.] 99 P 543; Rio Grande Western R. Co. v. Boyd [Colo.] 96 P 781; Big Five Tunnel Ore Reduction & Transp. Co. v. Johnson [Colo.] 99 P 63; Graves v. Davenport [Colo.] 100 P 429; Keefer v. Amicone [Colo.] 100 P 594; Masterson v. Monk [Colo.] 101 P 341; Gillett v. Young [Colo.] 101 P 766; Jones v. Jacksonville Elec. Co. [Fla.] 47 S 1; Skinner Mfg. Co. v. Wright [Fla.] 47 S 931; Davis v. Horne [Fla.] 49 S 505; Ward v. Williams, 131 Ga. 104; 61 SE 1036; Benton v. Allen [Ga.] 63 SE 626; Livingston v. Taylor [Ga.] 63 SE 694; Savannah Elec. Co. v. Elarbee [Ga. App.] 64 SE 570; Atlantic Coast Line R. Co. v. Odum, 5 Ga. App. 780, 63 SE 1126; Meetze v. Potts [Ga. App.] 64 SE 672; Central of Georgia R. Co. v. Manchester Mfg. Co. [Ga. App.] 64 SE 1128; Mock v. First Nat. Bank [Ga. App.] 64 SE 1134; Wolff v. Turner [Ga. App.] 65 SE 41; Western & A. R. Co. v. Henderson [Ga. App.] 65 SE 48; Citizens' Bank of Madison v. Shaw [Ga.] 65 SE 81; Church v. Van Housen, 15 Idaho, 249, 97 P 36; Carscallen v. Coeur D'Alene & St. Joe Transp. Co., 15 Idaho, 444, 98 P 622; Anderson v. Great Northern R. Co., 15 Idaho 513, 99 P 91; Whitney v. Woodmansee, 15 Idaho, 735, 99 P 968; Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381; Mercer County v. Wolff, 237 Ill. 74, 86 NE 708; Elgin, J. & E. R. Co. v. Lawlor, 132 Ill. App. 280; Citizen's Ins. Co. v. Helbig, 138 Ill. App. 115; Chicago Consol. Trac. Co. v. Kinane, 138 Ill. App. 636; Whiteley Malleable Castings Co. v. Wishon, 42 Ind. App. 288, 85 NE 832; Cleveland, etc., R. Co. v. Cyr [Ind. App.] 86 NE 868; McReynolds v. Smith [Ind.] 86 NE 1009; Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723; Wolcott v. Hayes [Ind. App.] 88 NE 111; Indiana Union Trac. Co. v. Thomas [Ind. App.] 88 NE 356; Paul Mfg. Co. v. Racine [Ind. App.] 88 NE 529; Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063; Mansfield v. Mallory [Iowa] 118 NW 290; Murphy v. Chicago G. W. R. Co. [Iowa] 118 NW 390; Hubbard v. Montgomery County [Iowa] 118 NW 912; Erks v. Ewers [Iowa] 119 NW 603; Security Sav. Bank v. Smith [Iowa] 119 NW 726; DeLaval Separator Co. v. Sharpless [Iowa] 120 NW 657; Burk v. Reese [Iowa] 121 NW 1016; State Bank of Commerce v. Riley-Leonard Live Stock Co. [Kan.] 99 P 1135; Missouri, etc., R. Co. v. Schmuck [Kan.] 100 P 282; Connor v. National Roofing & Supply Co. [Ky.] 113 SW 122; Latham v. Lindsay [Ky.] 113 SW 878; Louisville & N. R. Co. v. Bell's Adm'r [Ky.] 114 SW 328; Kentucky & I. Bridge & R. Co. v. Singheiser [Ky.] 115 SW 192; Ohio Valley Tie Co. v. Harvey's Adm'r. [Ky.] 116 SW 278; Citizens' Fire Ins. Co. v. Lockridge [Ky.] 116 SW 303; Southern R. Co. v. Adkins' Adm'r [Ky.] 117 SW 321; Stevenson v. Moore [Ky.] 118 SW 951; Chesapeake & O. R. Co. v. Meyer [Ky.] 119 SW 183; Thomas v. Charles [Ky.] 119 SW 752; Police Jury v. Texas & P. R. Co., 122 La. 388, 47 S 692; State v. Joyce [La.] 49 S 219; Victoria Acetylene Co. v. Cushing [Me.] 71 A 1015; Barrett v. New England Tel. & T. Co., 201 Mass. 117, 87 NE 565; Jellow v. Fore River Shipbuilding Co., 201 Mass. 464, 87 NE 906; Strong v. Carver Cotton Gin Co., 202 Mass. 209, 88 NE 582; Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1074, 119 NW 589; Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1143, 119 NW 1079; Block v. Great Northern R. Co., 106 Minn. 285, 118 NW 1019; Arko v. Shenango Furnace Co. [Minn.] 119 NW 789; Stevens v. Sandnes [Minn.] 121 NW 902; Mitchell v. McGee [Miss.] 48 S 234; Landrum v. St. Louis & S. F. R. Co., 132 Mo. App. 717, 112 SW 1000; Almond v. Modern Woodmen of America, 133 Mo. App. 382, 113 SW 695; Sloan v. Chitwood, 217 Mo. 462, 116 SW 1086; Sims v. Hall, 135 Mo. App. 603, 117 SW 103; Phelps v. Conqueror Zinc Co., 218 Mo. 572, 117 SW 705; Knight v. Kansas City [Mo. App.] 119 SW 990; Dempster v. Oregon Short Line R. Co., 37 Mont. 335, 96 P 717; Fearon v. Mullins [Mont.] 98 P 650; Landis v. Watts [Neb.] 117 NW 705; Continental Lumber Co. v. Munshaw & Co. [Neb.] 118 NW 1057; Crocker v. Steidl [Neb.] 118 NW 1083; Acken v. Tinglehoff [Neb.] 119 NW 456; Fink v. Busch [Neb.] 120 NW 167; Fisher v. Chambers [Neb.] 120 NW 981; Wenninger v. Lincoln Trac. Co. [Neb.] 121 NW 237; Advance Thresher Co. v. Vinckel [Neb.] 121 NW 431; Young v. Rohrbough [Neb.] 121 NW 585; Modlin v. Jones & Co. [Neb.] 121 NW 984; McClatchey v. Anderson [Neb.] 122 NW 67; Murphy v. Southern Pac. Co. [Nev.] 101 P 322; Hoppock v. Easton Transit Co. [N. J. Law] 72 A 453; Setterstorm v. De Dietrich Import Co. [N. J. Law] 73 A 65; In re Hammond, 112 NYS 296; Harrison v. Argyle Co., 128 App. Div. 81, 112 NYS 477; Fischer v. Motor Boat Club of America, 61 Misc. 66, 113 NYS 56; Teitelbaum v. Somerling, 113 NYS 528; Resnick v. Joline, 113 NYS 918; Henry v. Stanley Hod Elevator Co., 129 App. Div. 613, 114 NYS 38; Wehn v. Interborough Rapid Transit Co., 117 NYS 731; Bertolami v. United Engineering & Con. Co., 117 NYS 826; Chicago, etc., R. Co. v. Mashore [Okl.] 96 P 630; Wade v. Cornish [Okl.] 99 P 643; McMaster v. City Nat. Bank [Okl.] 101 P 1103; Jennings v. Trummer [Or.] 96 P 874; Crosby v. Portland R. Co. [Or.] 100 P 300, rehearing denied [Or.] 101 P 204; Jones v. Longerbeam [S. D.] 119 NW 1000; Olson v. Day [S. D.] 120 NW 883; Quinn v. Chicago, etc., R. Co. [S. D.] 120 NW 884; Bowman v. Saigling [Tex. Civ. App.] 111 SW 1082; Missouri, K. & T. R. Co. v. James [Tex. Civ. App.] 112 SW 774; Texas & P. R. Co. v. Boleman [Tex. Civ. App.] 112 SW 805; Alexander v. Brillhart [Tex. Civ. App.] 113 SW 184; Texas Cent. R. Co. v. Estes [Tex. Civ. App.] 113 SW 547; Houston Ice & Brew. Co. v. Sharp & Co. [Tex. Civ. App.] 114 SW 180;

findings below,[24] and such presumption is strengthened by the approval of the trial judge [25] or by concurrence of several verdicts on successive trials,[26] or the concur-

South Texas Tel. & T. Co. v. Tabb [Tex. Civ. App.] 114 SW 448; Missouri, K. & T. R. Co. v. Craig [Tex. Civ. App.] 114 SW 850; Hill v. Houser [Tex. Civ. App.] 115 SW 112; Starkey v. Western Union Tel. Co. [Tex. Civ. App.] 115 SW 853; Graves v. Bullen [Tex. Civ. App.] 115 SW 1177; Keck v. Woodward [Tex. Civ. App.] 116 SW 75; Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418; Freeman v. Davis [Tex. Civ. App.] 117 SW 186; International & G. N. R. Co. v. Williams [Tex. Civ. App.] 118 SW 758; Williams v. Hennefield [Tex. Civ. App.] 120 SW 567; Chesapeake & O. R. Co. v. Williams, 108 Va. 689, 62 SE 796; Warwick v. Hitchings, 50 Wash. 140, 96 P 960; Shepard v. Minneapolis Threshing Mach. Co., 50 Wash. 242, 97 P 57; Ottomeir v. Hornburg, 50 Wash. 316, 97 P 235; Murray v. Seattle Elec. Co., 50 Wash. 444, 97 P 458; Pelton v. Smith, 50 Wash. 459, 97 P 460; National Bank of Commerce v. Gougar, 51 Wash. 204, 98 P 607; Goerig v. Peterson [Wash.] 101 P 829; Rosenberg v. McKinney, 138 Wis. 381, 120 NW 230; Ford v. Freeman [Wis.] 120 NW 234; Pittsburg R. Co. v. Sullivan [C. C. A.] 166 F 749; Levy v. Larson [C. C. A.] 167 F 110; Kinney v. Hanley, 169 F 1021. Supreme court will not go further than to determine whether successful party has given sufficient legal evidence to justify verdict in his favor regardless of adversary's evidence, except in so far as same may tend to support successful party's case. Dickinson v. Hahn [S. D.] 119 NW 1034, rvg., 19 S. D. 525, 104 NW 247. Where evidence is not conflicting, it will be reviewed for purpose of ascertaining what it established. Stearns v. Hazen [Colo.] 101 P 339.

24. Birmingham R., L. & P. Co. v. Jung [Ala.] 49 S 434; Fisher v. Frank, 8 Cal. App. 472, 97 P 95. Evidence must be given its strongest probative force. Wells v. Bentley [Ark.] 113 SW 639. Evidence of successful party must be taken as true. Kirkpatrick v. Aetna Life Ins. Co. [Iowa] 117 NW 1111; Muller v. Shufeldt, 114 NYS 1012; Miller v. Missouri Fire Brick Co. [Mo. App.] 119 SW 976; Goldberg v. Hageman & Co., 60 Misc. 107, 111 NYS 679; Roberts v. Neale, 134 Mo. App. 612, 114 SW 1120. Evidence must be viewed in light most favorable to findings of jury. St. Louis, etc., R. Co. v. Brabbzson [Ark.] 112 SW 222. Must take view of evidence most favorable to successful party. Priest v. Hodges [Ark.] 118 SW 253; Heitman v. Pacific Elec. R. Co. [Cal. App.] 102 P 15; Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 NE 877. Every conflict in evidence must be resolved in favor of successful party, and that conclusion which most favorable view of evidence will warrant must be drawn in support of judgment. San Antonio Irr. Co. v. Deutschmann [Tex.] 114 SW 1174. Where there are no findings of fact or conclusions of law in record, evidence must be considered from standpoint most favorable to successful party, and judgment affirmed if substantial evidence to support it. New York Life Ins. Co. v. McDearmon, 133 Mo. App. 671, 114 SW 57. Written opinion copied into bill of exceptions will not be treated as equivalent of findings of fact and conclusions of law, law making no provisions for such opinion. Id. Any reasonable inference consistent with verdict should be adopted. Grand Fraternity v. Melton [Tex. Civ. App.] 111 SW 967; Schnur v. Phillips, 116 NYS 562. Court will sustain in favor of verdict every inference of fact that can be deduced from the evidence when considered in light most favorable to contention of successful party. Cameron v. Lewiston, etc. R. Co., 103 Me. 482, 70 A 534. Evidence given at trial not to be considered in aid of special interrogatories submitted to supply omission therein or rebut presumption in favor of general verdict. Emrich Furniture Co. v. Byrnes [Ind. App.] 87 NE 1042. Evidence on appeal from judgment of municipal court affirming judgment of justice court held sufficient to require an affirmance where, fairly considered, with such inferences as might be legitimately drawn therefrom, was such that from it justice might have found facts necessary to support action. Egbert v. Minneapolis, etc., R. Co., 106 Minn. 23, 117 NW 998.

25. Verdict approved by trial judge will not be disturbed. Atlantic Coast Line R. Co. v. Dees [Fla.] 48 S 28; Waligora v. St. Paul Foundry Co. [Minn.] 119 NW 395; Patterson v. Melchior, 106 Minn. 437, 119 NW 402; Gerhart v. Metropolitan St. R. Co., 132 Mo. App. 546, 112 SW 12; Moore v. Normal School Board of Regents, 215 Mo. 705, 115 SW 6; Dempster v. Oregon Short Line R. Co., 37 Mont. 335, 96 P 717; Bowen v. Webb, 37 Mont. 479, 97 P 839; Kaufman v. Cooper [Mont.] 98 P 504, rehearing denied [Mont.] 98 P 1135; McDonnell v. Minneapolis, etc., R. Co. [N. D.] 118 NW 819; Choctaw, O. & G. R. Co. v. Burgess [Okl.] 97 P 271; Rea v. Media, etc., R. Co., 221 Pa. 129, 70 A 554; O'Malley v. Rhode Island Co. [R. I.] 70 A 915; Hannan v. Caproni [R. I.] 71 A 593; Williams v. Smith [R. I.] 72 A 1093; Anderson v. Salt Lake & O. R. Co. [Utah] 101 P 579; Roanoke R. & Elec. Co. v. Young, 108 Va. 783, 62 SE 961; Ryan v. Oshkosh Gaslight Co. [Wis.] 120 NW 264; Schwind v. Chicago, etc., R. Co. [Wis.] 121 NW 639. Where judge who presided at trial did not hear motion for new trial, but it was heard by his successor, rule with reference to weight of opinion of trial judge upon the facts has no application. Monahan v. National Realty Co., 4 Ga. App. 680, 62 SE 127.

Verdict supported by evidence and approved by trial judge will not be disturbed. Wilson v. Jernigan [Fla.] 49 S 44; Atlanta, B. & A. R. Co. v. Smith [Ga.] 64 SE 1073; Nelson Vitrified Brick Co. v. Mussulman [Kan.] 99 P 236. McDonald v. Yoder [Kan.] 101 P 468; Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961; Anthony v. Russia Cement Co. [R. I.] 72 A 868.

Verdict on conflicting evidence approved by trial judge will not be disturbed. Key West Elec. Co. v. Alcalde [Fla.] 49 S 545; Millwood v. Lawrence [Ga.] 63 SE 1121; Fred Wagner v. Whitefield [Ga. App.] 64 SE 493; Frost v. Pennington [Ga. App.] 65 SE 41; United States Health & Acc. Co. v.

rent finding of two lower courts.[27] The foregoing rules apply to the findings of the trial judge in law cases,[28] and to the findings of referees,[29] auditors,[30] masters,[31]

Krueger, 135 Ill. App. 432; City of Waukegan v. Sharafinski, 135 Ill. App. 436; Ames v. Snively [Kan.] 96 P 943; Caley v. Mills [Kan.] 100 P 69; Harviston v. United R. Co. [Mo. App.] 119 SW 481; Wilcox v. Rhode Island Co. [R. I.] 70 A 913; Williams v. Shaw [R. I.] 71 A 207; Riley v. Rhode Island Co. [R. I.] 71 A 592; Lynch v. Rhode Island Co. [R. I.] 71 A 593; Sullivan v. O'Loughlin [R. I.] 72 A 220; Oates v. Union R. Co. [R. I.] 72 A 724; Stubbs v. Marshall [Tex. Civ. App.] 117 SW 1030; Williams v. Bartz [Wash.] 100 P 186.

26. Second verdict on same facts. Valdosta Mercantile Co. v. White [Fla.] 47 S 961. Where two juries have agreed on amount of damages. Chicago Union Trac. Co. v. Mee, 136 Ill. App. 98. Where two juries have agreed, court will be slow to set aside verdict as against weight of evidence. Crane v. Schaefer, 140 Ill. App. 647. Where two juries have determined main issue same way, verdict for money should not be sent back for new trial if it can be avoided. Alternative new trial or remittitur ordered. Norden v. Duke, 129 App. Div. 158, 113 NYS 494. Where two juries have reached same conclusion and same has been each time sustained by trial court. Atchison, etc., R. Co. v. Lloyd [Kan.] 100 P 271. Third verdict in favor of same party will not be set aside as against weight of evidence unless evidence clearly insufficient to support it. Souchek v. Karr [Neb.] 120 NW 210. Second concurring verdict on same state of the evidence set aside as not being supported by, and as contrary to weight of evidence. Brink v. North Jersey St. R. Co. [N. J. Law] 71 A 1120. A verdict based upon improbable, contradictory and unreasonable testimony and reluctantly approved by trial court solely because three juries had found same, cannot be sustained no matter how many juries have found it. Atchison, etc., R. Co. v. Wiley [Tex. Civ. App.] 118 SW 1127. Under Civ. Code Prac. § 341, providing that not more than two new trials shall be granted to a party on ground that verdict is not sustained by evidence, where have been three verdicts upon substantially same evidence for same party, third verdict will not be disturbed because not supported by, or clearly against weight of the evidence. Louisville & N. R. Co. v. Daniel [Ky.] 115 SW 804, rehearing denied [Ky.] 119 SW 229. Rule held to obtain although either or both of first two verdicts were set aside for errors of law appearing in record. Louisville & N. R. Co. v. Daniel [Ky.] 115 SW 804, rehearing denied [Ky.] 119 SW 229. Where first verdict was reversed on appeal because not supported by evidence, and second was set aside by trial judge on same ground, third will not be disturbed. Mobile & O. R. Co. v. Morrow's Adm'r [Ky.] 112 SW 639. Trial in which jury disagrees will not be considered in determining number of verdicts. Louisville & N. R. Co. v. Daniel [Ky.] 115 SW 804, rehearing denied [Ky.] 119 SW 229. Statute does not preclude setting aside any number of verdicts for errors of law prejudical to appellant, or when verdict is so excessive as to make it plain that it was result of passion or prejudice. Id. Construction extending statute to protect third verdict from objection on that ground although new trials were granted previously on question of law is held to violate no constitutional right. Louisville & N. R. Co. v. Daniel [Ky.] 119 SW 229, former opinion [Ky.] 115 SW 804.

27. See, also, post, § 13G. Findings of fact of district court and circuit court of appeals. Manson v. Williams, 213 U. S. 453, 53 Law. Ed. —-; Page v. Rogers, 211 U. S. 575, 53 Law. Ed. —-. Verdict approved by trial and appellate courts. El Paso & S. W. R. Co. v. Vizard, 211 U. S. 608, 53 Law. Ed. —-. Findings of two lower courts. Gray v. Noholoa, 214 U. S. 108, 53 Law. Ed. —-. Findings of territorial supreme court conclusive in federal supreme court against any contention that assessment was made according to front foot rule rather than basis of benefits. English v. Arizona, 29 S. Ct. 658. Magistrate's findings of fact sustained by circuit court not disturbed where there was some evidence to support them. May v. Augusta & A. R. Co., 80 S. C. 552, 61 SE 1019. Finding of ordinary, supported by sufficient evidence, and approved by judge of superior court on certiorari, will not be disturbed. Plemmons v. Keith [Ga.] 65 SE 143.

28. Entitled to same weight as verdict of jury. Robinson v. Cowan [Ala.] 47 S 1018; Dodge v. Irvington Land Co. [Ala.] 48 S 383; Rapport & Bro. v. Birmingham R. L. & P. Co. [Ala.] 49 S 674; Montgomery v. Patterson [Ala.] 49 S 1027; Cefalu v. Dearborn [Ala.] 49 S 1030; Stewart v. Wood [Ark.] 111 SW 983; Boqua v. Brady [Ark.] 119 SW 677; Midland Valley R. Co. v. Morgan Bolt & Nut Mfg. Co. [Ark.] 120 SW 396; Burney Tailoring Co. v. Cuzzort [Ga.] 65 SE 140; Merchants L. & T. Co. v. Egan, 143 Ill. App. 572; Collins v. Collins [Iowa] 117 NW 1089; Andres & Co. v. Schlueter [Iowa] 118 NW 429; Smidt v. Benenga [Iowa] 118 NW 439; Dallas County v. Thornley [Iowa] 118 NW 530; Steele v. Crabtree [Iowa] 120 NW 720; Orr v. Kenworthy [Iowa] 121 NW 539; Robbins v. Selby [Iowa] 121 NW 674; Egan v. Smith [Iowa] 121 NW 1028; Morrison v. Dwyer [Iowa] 121 NW 1064; Van Jellico Min. Co. v. Rollins, 32 Ky. L. R. 1190, 108 SW 235; Arndell v. Malusky [Ky.] 112 SW 640; Feland v. Berry [Ky.] 113 SW 425; Holland v. Coleman [Ky.] 114 SW 305; Stull v. U. S. Health & Acc. Ins. Co. [Ky.] 115 SW 234; Walker v. Ganote [Ky.] 116 SW 689; Northrup's Trustees v. Sumner's Trustee [Ky.] 116 SW 699; McCormick v. Moore, 134 Mo. App. 669, 114 SW 40; Lieber v. Fourth Nat. Bank [Mo. App.] 117 SW 672; Segear v. Westcott [Neb.] 120 NW 170; Stanisics v. Hartford Fire Ins. Co. [Neb.] 120 NW 435; Foster County State Bank v. Hester [N. D.] 119 NW 1044; Philadelphia Typewriter & Supply Co. v. Smith Co., 37 Pa. Super. Ct. 149; Mason v. Rodriguez [Tex. Civ. App.] 115 SW 868; Richmond Standard Spike

& Iron Co. v. Chesterfield Coal Co. [C. C. A.] 160 F 832.

Findings on questions of fact conclusive. Arkansas Cent. R. Co. v. Jansen [Ark.] 119 SW 648; Bone v. Hayes, 154 Cal. 759, 99 P 172; United Inv. Co. v. Los Angeles Interurban R. Co. [Cal. App.] 101 P 543; Greist v. Gowdy [Conn.] 71 A 555; McNiff v. Waterbury [Conn.] 72 A 572; H. W. Metcalf Co. v. Martin [Fla.] 47 S 921; J. M. High Co. v. Adams Exp. Co., 5 Ga. App. 863, 63 SE 1125; In re Moore [Iowa] 118 NW 879; Oliver v. Kneedler [Iowa] 119 NW 525; Morris v. Morris [Kan.] 101 P 1020; Ross v. Thomas [Ky.] 118 SW 943; Webster v. Howcott, 122 La. 365, 47 S 683; Succession of Gabisso, 122 La. 824, 48 S 277; Nissen v. Farquhar [La.] 48 S 885; State v. Joyce [La.] 49 S 218; Coulston v. Baltimore, 109 Md. 271, 71 A 990; Pope v. Whitridge [Md. App.] 73 A 281; Porter v. Howes, 202 Mass. 54, 88 NE 445; Allen v. Masser [Mich.] 16 Det. Leg. N. 435, 122 NW 88; Diamond Rubber Co. v. Hans, 105 Minn. 249, 117 NW 504; Bernick v. McClure [Minn.] 119 NW 247; Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. [Mo. App.] 118 SW 500; Bradbury v. Donnell [Mo. App.] 119 SW 21; Foust v. Lee [Mo. App.] 119 SW 505; Bisenius v. Randolph [Neb.] 118 NW 127; In re McShane's Estate [Neb.] 120 NW 1018; Supreme Commandery W. O. G. C. v. Donaghey [N. H.] 72 A 419; Peanessa v. Ruh [N. J. Law] 73 A 113; Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 NE 504; Huber v. Klebold Press, 112 NYS 203; Norden v. Duke, 129 App. Div. 158, 113 NYS 494; Morgan v. Whalen, 113 NYS 609; Bascombe v. Marshall, 129 App. Div. 516, 113 NYS 991; McCormack v. O'Connor, 62 Misc. 297, 114 NYS 1030; Bank of Long Island v. Gregory, 116 NYS 309; Marler-Dalton-Gilmer Co. v. Wadesboro Clothing & Shoe Co., 150 N. C. 519; 64 SE 366; In re McCahan's Estate, 221 Pa. 186, 70 A 711; Snyder v. Smyth [Pa.] 73 A 6; Gay v. Chambers, 37 Pa. Super. Ct. 41; George Norris Co. v. Levin's Sons, 81 S. C. 36, 61 SE 1103; Thames v. Rouse [S. C.] 62 SE 254; Lewis v. Cooley, 81 S. C. 461, 62 SE 868; Smith v. Moore, 149 N. C. 185, 62 SE 892; Autry v. Reasor [Tex.] 113 SW 748; Waggoner v. Tinney [Tex.] 115 SW 1155; Savage v. Umphries [Tex. Civ. App.] 118 SW 893; Canedy v. Skinner, 50 Wash. 501, 97 P 497; Larzelere v. Wood, 136 Wis. 541, 117 NW 1013; Hoag v. Nanstad [Wis.] 121 NW 125; Mammoth Min. Co. v. Grand Cent. Min. Co., 213 U. S. 72, 53 Law. Ed. ——; Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 53 Law. Ed. ——; Ceballos & Co. v. U. S., 214 U. S. 47, 53 Law. Ed. ——. Errors cannot be assigned on matters of blended law and fact. Schord v. Haurand [N. J. Err. & App.] 71 A 242. Presumption that court has properly determined questions of fact applies not only to its conclusions from disputed facts but, also to its inferences reasonably to be drawn from undisputed facts. Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co., 105 Minn. 483, 117 NW 825. On error to review judgment in action at law tried to court without jury, law of case must be determined from a finding by trial court of ultimate facts in issue, and inferences of fact to establish an ultimate fact in issue cannot be supplied by appellate court from evidence recited in findings of facts which are merely evidential in character, in absence of finding of the ultimate fact. South Chicago Elevator Co. v. United Grain Co. [C. C. A.] 165 F 132. Where action at law is tried by court without jury, and there are no special findings, general finding is conclusive as to all questions of fact. Schmid v. Dehan [C. C. A.] 167 F 804. Allegations of petition cannot be considered to supplement findings and work reversal of judgment warranted by evidence. Montgomery v. Peach River Lumber Co. [Tex. Civ. App.] 117 SW 1061. Where conclusions of fact of trial court are not acquiesced in on appeal, they may be revised in proper case from statements of facts. Maury v. McDonald [Tex. Civ. App.] 118 SW 812. Memorandum of facts, though filed by trial justice voluntarily, and without request of either party, stands on same footing as report of findings of fact made under Rev. Laws, c. 159, § 23, and will not be set aside unless plainly wrong. Howe v. Howe, 199 Mass. 598, 85 NE 945. Opinion of trial judge analyzing facts and applying law not "special finding" of facts within Rev. St. § 700 (U. S. Cong. St. 1901, p. 570), as to review by appellate court to determine if facts found support judgment. Keeley v. Ophir Hill Consol. Min. Co. [C. C. A.] 169 F 598. Decision of trial judge as to whether there was sufficient evidence to go to jury on particular issue must prevail unless shown by record to be clearly wrong. Scheifelbein v. Fidelity & Casualty Co. [Wis.] 120 NW 398; Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102; Murphy v. Herold Co., 137 Wis. 609, 119 NW 294. Where trial court finds that evidence is insufficient to warrant finding on particular issue, court of appeals cannot render judgment upon contrary finding unless evidence is such as to warrant such contrary finding as matter of law. Beall v. Chatham [Tex. Civ. App.] 117 SW 492. Legal conclusions of trial court from evidence before it are conclusive. Kaufman v. Alexander [Ind.] 88 NE 502. Court's findings of law based upon its findings of fact are reviewable. Carlson v. Carlson [Cal. App.] 101 P 923. So called findings of fact held merely court's conclusions of law in judicial function of construing written contract from its own terms, and hence not entitled to presumption indulged in favor of findings of fact. Western Lime & Cement Co. v. Copper River Land Co., 138 Wis. 404, 120 NW 277. Finding of fact that subject-matter in regard to which engineers were allowed to give opinions as experts was such as to make expert testimony admissible held unimportant, question being one of law. Keefe v. Sullivan County R. R. [N. H.] 71 A 379. Where question whether defendant was guilty of contributory negligence as matter of law is extremely close, considerable reliance must be placed on decision of trial court. Lind v. Uniform Stave & Package Co. [Wis.] 120 NW 839. Where case is tried on agreed statement of facts reserving to court right to draw reasonable inferences of fact from facts stated, inquiry on appeal is whether there is any evidence warranting finding, question being analogous to that arising on exceptions to verdict or finding of court upon all the evidence; but, where there is no such reserved right to draw inferences, question is whether upon facts agreed on plaintiff is entitled to recover as matter of law. Cunningham v. Connecti-

cut Fire Ins. Co., 200 Mass. 333, 86 NE 787. In view of Gen. St. 1902, § 697, requiring court to take judicial notice of public statutes of the several states as printed by authority of state enacting same, held duty of supreme court to consider statutes of foreign state as they really were, regardless of erroneous finding of fact on the subject by lower court. Appeal of Woodward [Conn.] 70 A 453. Rule giving great weight to findings of fact does not preclude fullest investigation of evidence to ascertain if general finding is consistent therewith. Berry v. Colborn [W. Va.] 64 SE 636. Findings reversed where court overlooked conclusive documentary evidence. McLaughlin v. Rosenbloom, 114 NYS 10. Supreme court may set aside judgment of court below based upon question of fact if clearly wrong. Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 53 Law. Ed. ——. Finding not authorized by pleadings is not controlling. Galvin v. McConnell [Tex. Civ. App.] 117 SW 211. Findings not binding when result of mistake or if evidence justifies different result. Grace v. Gill [Mo. App.] 116 SW 442. On appeal to supreme court from judgment of circuit court given under St. 1898, § 3769, on appeal from municipal court, circuit court's determination as to facts should not be disturbed unless contrary to clear preponderance of evidence. Luckow v. Boettger [Wis.] 121 NW 649. Determination by circuit court of issues of fact by application of wrong rules of law is not, however, supported by such presumption of correctness. Id. Although judge is not disqualified by relationship to attorney, where finding of fact was upon close conflict of testimony, appellate term may exercise its right under municipal court act § 326 and direct new trial to avoid suspicion of unfairness. Zambetti v. Garton, 113 NYS 804.

If there is any substantial evidence to support them. Postal Tel. Cable Co. v. Beal [Ala.] 48 S 676; Hoffman-Marks Co. v. Spires, 154 Cal. 111, 97 P 152; Aydelotte v. Billing, 8 Cal. App. 673, 97 P 698; Mackel v. Nolan [Cal. App.] 97 P 1128; In re Hall's Estate, 154 Cal. 527, 98 P 269; Bone v. Hayes, 154 Cal. 759, 99 P 172; Bollinger v. Bollinger, 154 Cal. 695, 99 P 196; Rambo v. Armstrong [Colo.] 100 P 586; Mills v. Britt [Fla.] 47 S 799; Hixon v. Callaway, 5 Ga. App. 415, 63 SE 518; Bowers v. Cottrell, 15 Idaho, 221, 96 P 936; Priest v. Dodsworth, 143 Ill. App. 225; Ziegler v. Funkhouser, 42 Ind. App. 428, 85 NE 984; Hill v. Kerstetter [Ind. App.] 86 NE 997; rehearing denied [Ind. App.] 87 NE 965; Unger v. Mellinger [Ind. App.] 88 NE 74; Wise v. Wise [Ind. App.] 88 NE 309; Colt v. Lawrenceburg Lumber Co. [Ind. App.] 88 NE 720; Honey v. Guillaume [Ind.] 88 NE 937; Smidt v. Benenga [Iowa] 118 NW 439; Andres & Co. v. Schlueter [Iowa] 118 NW 429; Dallas County v. Thornley [Iowa] 118 NW 530; Pardnos v. Century Fire Ins. Co. [Iowa] 119 NW 133; Charles City v. Security Trust & Sav. Bank [Iowa] 120 NW 114; Orr v. Kenworthy [Iowa] 121 NW 539; Schloeman v. Harris [Iowa] 121 NW 1021; Egan v. Smith [Iowa] 121 NW 1028; Morrison v. Dwyer [Iowa] 121 NW 1064; Missouri Pac. R. Co. v. Stone [Kan.] 101 P 666; Buck Stove & Range Co. v. Vickers [Kan.] 101 P 668; Arndell v. Malusky [Ky.] 112 SW 640; Feland v. Berry [Ky.] 113 SW 425; Holland v. Coleman [Ky.] 114 SW 305; Northrup's Trustees v. Sumner's Trustee [Ky.] 116 SW 699; Thomason v. Kansas City S. R. Co., 122 La. 995, 48 S 432; Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 NE 877; Mastrangelo v. Boston El. R. Co., 201 Mass. 338, 87 NE 599; Masonic Education & Charity Trust v. Boston, 201 Mass. 320, 87 NE 602; Mastenbrook v. U. S. Acc. Ass'n, 154 Mich. 16, 15 Det. Leg. N. 697, 117 NW 543; McFarlan v. McFarlan [Mich.] 15 Det. Leg. N. 1103, 119 NW 1108; Hamilton v. Deinzer [Mich.] 16 Det. Leg. N. 437, 122 NW 104; In re Nethaway [Minn.] 121 NW 418; Perkins v. Gibbs [Minn.] 121 NW 605; Christians v. Christians [Minn.] 121 NW 633; Donaldson Bond & Stock Co. v. Houck, 213 Mo. 416, 112 SW 242. Findings by court where evidence to support them. Charles v. Pickens, 214 Mo. 212, 112 SW 551; Grooms v. Mullett, 133 Mo. App. 477, 113 SW 683; Poteet v. Daniel, 133 Mo. App. 679, 113 SW 1139; McCormick v. Moore, 134 Mo. App. 669, 114 SW 40; Anheuser-Busch Brew. Ass'n v. Southern Bowling Ass'n, 134 Mo. App. 312, 114 SW 90; Forbes v. Groves, 134 Mo. App. 729, 115 SW 451; Diebold Safe & Lock Co. v. Dunnegan, 135 Mo. App. 135, 115 SW 1051; Pittsburg Bridge Co. v. St. Louis Transit Co., 135 Mo. App. 579, 116 SW 467; Sheridan v. Post [Mo. App.] 119 SW 500; Seaver v. Ray [Mo. App.] 119 SW 527; Collard v. Burch [Mo. App.] 119 SW 1009; Cushing v. Hartwig [Mo. App.] 120 SW 109; Nichols v. Williams [Mont.] 100 P 969; Defiance Fruit Co. v. Fox [N. J. Err. & App.] 70 A 460; Lavin v. Public Service R. Co. [N. J. Law] 71 A 58; Somers v. Steelman [N. J. Law] 71 A 119; Mundy v. Fountain [N. J. Err. & App.] 71 A 693; Young v. Spagnuola [N. J. Law] 72 A 28; Specht v. Central Pass. R. Co. [N. J. Err. & App.] 72 A 356; Susquehanna Coal Co. v. South Amboy [N. J. Err. & App.] 72 A 361; Tuckerton R. Co. v. State Board of Assessors [N. J. Err. & App.] 72 A 361; Pecos Valley Immigration Co. v. Cecil [N. M.] 99 P 695; Lampy v. Freedman, 60 Misc. 70, 111 NYS 685; Groening v. Wolf, 115 NYS 158; Sheldon v. George, 132 App. Div. 470, 116 NYS 969; Lipscomb v. Allen [Okl.] 102 P 86; Fry's Estate, 35 Pa. Super. Ct. 446; Catlett v. Charleston & W. C. R. Co., 81 S. C. 327, 62 SE 315; Anderson v. Silcox [S. C.] 63 SE 128; Greenville-Carolina Power Co. v. U. S. Fidelity & Guar. Co. [S. C.] 64 SE 518; Greenville Carolina Power Co. v. U. S. Fidelity & Guar. Co. [S. C.] 64 SE 964; former opinion [S. C.] 64 SE 518; Carlson v. Stuart [S. D.] 119 NW 41; Fosmark v. Equitable Fire Ass'n [S. D.] 120 NW 777; Springman v. Hawkins [Tex. Civ. App.] 113 SW 966; Bean v. Bird [Tex. Civ. App.] 117 SW 177, former opinion [Tex. Civ. App.] 115 SW 121; Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153; Gulf, etc., R. Co. v. Thomas [Tex. Civ. App.] 118 SW 730; Thigpen v. Russell [Tex. Civ. App.] 118 SW 1080; Walker Bros v. Skliris, 34 Utah, 353, 98 P 114; Pioneer Investment & Trust Co. v. Salt Lake City Board of Education [Utah] 99 P 150; Utah Ass'n of Credit Men v. Home Fire Ins. Co. [Utah] 102 P 631; Davis' Adm'x v. Rutland R. Co. [Vt.] 71 A 724; Smith v. Scott, 51 Wash. 330, 98 P 763; Carney v. Vogel [Wash.] 100 P 1027; Hall v. Western Union Tel. Co. [C. C. A.] 162 F 657; Pacific Sheet Metal Works v. California Canneries Co. [C. C. A.] 164 F 980. Sufficiency of evidence must be tested solely upon the accredited testimony. St. Louis, etc., R. Co.

v. Hambright [Ark.] 113 SW 803. In reaching evidence with view of ascertaining its sufficiency, supreme court must be guided by means furnished by law for measuring effect of production or withholding of certain evidence. Bone v. Hayes, 154 Cal. 759, 99 P 172. Reversed where no evidence to support it. Tracy v. New York, etc., R. Co. [Conn.] 72 A 156; Idaho Placer Min. Co. v. Green, 14 Idaho, 294, 94 P 161; Maryland Casualty Co. v. Ballard County Bank [Ky.] 120 SW 301; Tipton v. Christopher, 135 Mo. App. 619, 116 SW 1125; Gartner v. Novick, 113 NYS 479; Kohn v. Nassau Elec. R. Co., 117 NYS 231. Although there is some evidence in support of judgment, appellate court cannot treat it as supported when erroneous ruling as to burden of proof precludes presumption that evidence was properly weighed. B. Petzoldt Co. v. Cohn, 114 NYS 165. Where it is evident from entire record that under no possible view could there be a recovery for amount decreed, judgment will be reversed. Quitman Lumber Co. v. Turner [Miss.] 48 S 819. Finding that witness is qualified as expert supported by facts adduced from his testimony is based on evidence and not reviewable as arbitrary. Lincoln v. Central Vermont R. Co. [Vt.] 72 A 821.

The weight of the evidence will not be passed on. Boqua v. Brady [Ark.] 119 SW 697; Ackman v. Potter, 239 Ill. 578, 88 NE 231; Stebin v. Myers, 42 Ind. App. 381, 85 NE 784; Keesling v. Keesling, 42 Ind. App. 361, 85 NE 837; Ellison v. Flint [Ind. App.] 87 NE 38; Zehner v. Milner [Ind.] 87 NE 209; Campbell v. State [Ind.] 87 NE 212; Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215; Robbins v. Selby [Iowa] 121 NW 674; Powers v. Johnson [Minn.] 120 NW 1021; Pittsburg Bridge Co. v. St. Louis Transit Co., 135 Mo. App. 579, 116 SW 467; State v. Innes [Mo. App.] 118 SW 1168; O'Connor v. Lamerdin, 113 NYS 546; Little v. Herzinger, 34 Utah, 337, 97 P 639. Transmission to supreme court of stenographer's notes as state of case (under P. L. 1905, p. 259) confers no authority to weigh evidence. Paonessa v. Ruh [N. J. Err. & App.] 73 A 113.

Credibility of witnesses will not be passed on. Allen v. Bryant [Cal.] 100 P 704; Wolcho v. Rosenbluth & Co. [Conn.] 71 A 566; Pittsburg Bridge Co. v. St. Louis Transit Co., 135 Mo. App. 579, 116 SW 467; Davies v. Boyers [Mo. App.] 120 SW 631.

Unless manifestly against the weight of the evidence. Fulton v. Norris [Ala.] 49 S 1028; City of Chicago v. Marsh, 238 Ill. 254, 87 NE 319; Pinney v. Smith, 136 Ill. App. 129; Eggert v. Cleveland, 138 Ill. App. 434; Campbell v. Heuer, 139 Ill. App. 631; Beckley v. Morton, 140 Ill. App. 301; Branstetter Motor Co. v. Silverberg, 140 Ill. App. 451; Marlitt Deutscher Frauen Verein v. Mueller, 140 Ill. App. 621; Stull v. U. S. Health & Ac. Ins. Co. [Ky.] 115 SW 234; Powers v. Johnson [Minn.] 120 NW 1021; Gassert v. Strong [Mont.] 98 P 497; In re Sizer's Will, 129 App. Div. 7, 113 NYS 210; Driskill v. Rebbe [S. D.] 117 NW 135; Peever Mercantile Co. v. State Mut. Fire Ass'n [S. D.] 119 NW 1008; McCormick v. Jester [Tex. Civ. App.] 115 SW 278; Dietrich v. Pederson, 51 Wash. 191, 98 P 611; King County v. Whittlesey [Wash.] 100 P 320; Daubner v. McFarlin, 136 Wis. 515, 117 NW 1002; Illinois Steel Co. v. Paczocha [Wis.] 119 NW 550; Raulf v. Chicago Fire Brick Co., 138 Wis. 126, 119 NW 646; Hintz v. Wald, 138 Wis. 41, 119 NW 821; In re Jacobs' Will [Wis.] 121 NW 126; In re Cleary's Estate [Wis.] 121 NW 146; In re Heber's Will [Wis.] 121 NW 328. Findings of court not disturbed unless clearly against weight of evidence after every reasonable doubt is resolved in its favor. Finding of jury not disturbed if any evidence in support. Ott v. Boring [Wis.] 121 NW 126. Preponderance of evidence warranting reversal must be such as is manifest and convincing after considering trial court's advantage in hearing the evidence as given by witnesses and resolving all reasonable doubts in favor of finding. Ott v. Boring [Wis.] 121 NW 126. Judgment based on conflicting evidence to be given much weight but set aside where clearly unsupported by proof. Holyrod v. Milland, 142 Ill. App. 392. Municipal court act, Laws 1902, p. 1583, c. 580, § 326, authorizes reversal of judgment when contrary to weight of evidence. Cairo Thread Works v. Lubell, 111 NYS 664.

Findings based on conflicting evidence. Montgomery Lodge No. 596, B. P. O. E. v. Massie [Ala.] 49 S 231; Rapport & Bro. v. Birmingham R., L. & P. Co. [Ala.] 49 S 674; Montgomery v. Patterson [Ala.] 49 S 1027; Bank of Bisbee v. Graf [Ariz.] 100 P 452; Jordan v. Muse [Ark.] 115 SW 162; Clay County v. Thornton [Ark.] 119 SW 246; Mason v. Gates [Ark.] 119 SW 246; Kettner v. Shippey, 8 Cal. App. 342, 96 P 912; Miller v. Scoble, 8 Cal. App. 344, 97 P 93; Fisher v. Frank, 8 Cal. App. 472, 97 P 95; Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 P 316; Stimson Mill Co. v. Hughes Mfg. Co., 8 Cal. App. 559, 97 P 322; Bank of Mendocino v. Brown, 8 Cal. App. 566, 97 P 533; Laurence v. Kilgore, 154 Cal. 310, 97 P 760; Houghton Co. v. Kennedy, 8 Cal. App. 777, 97 P 905; Brooks v. Ardizzone [Cal. App.] 98 P 393; Madison v. Octave Oil Co., 154 Cal. 768, 99 P 176; Risdon v. Steyney [Cal. App.] 99 P 377; Gerety v. O'Sheenan [Cal. App.] 99 P 545; Noyes v. Schlegel [Cal. App.] 99 P 726; Stewart v. Douglass [Cal. App.] 100 P 711; Ward v. Sherman [Cal.] 100 P 864; Arroyo Ditch & W. Co. v. Baldwin [Cal.] 100 P 874; Casey v. Richards [Cal. App.] 101 P 36; United Inv. Co. v. Los Angeles Interurban R. Co. [Cal. App.] 101 P 543; Berger v. Horlock [Cal. App.] 101 P 918; Wales v. Mower [Colo.] 96 P 971; Rude v. Sisack [Colo.] 96 P 976; Fleming v. Wells [Colo.] 101 P 66; Mackey v. Wilson [Colo.] 101 P 334; Guldman v. Wilder [Colo.] 101 P 759; City of Bridgeport v. Bridgeport Hydraulic Co. [Conn.] 70 A 650; Wolcho v. Rosenbluth & Co. [Conn.] 71 A 566; Robinson v. National Fraternal League [Conn.] 71 A 1096; McCallum v. McClarren, 15 Idaho, 374, 98 P 200; Greider v. Chicago & E. I. R. Co., 140 Ill. App. 246; Leimgruber v. Leimgruber [Ind.] 86 NE 73; Miedreich v. Lauenstein [Ind.] 86 NE 963; Stauffer v. Martin [Ind. App.] 88 NE 363; O'Malley v. Quigg [Ind.] 88 NE 611; Lunde v. Cudahy Packing Co. [Iowa] 117 NW 1063; In re Moore [Iowa] 118 NW 879; W. A. Jordan Co. v. Sperry Bros. [Iowa] 119 NW 692; Wood & Sons v. Griffith [Iowa] 119 NW 745; Steele v. Crabtree [Iowa] 120 NW 720; Egan v. Smith [Iowa] 121 NW 1028; Rogers v. Crandall [Iowa] 121 NW 1092; Low v. Wilson, 77 Kan. 852, 95 P 1135; Taylor v. Adams [Kan.]

99 P 597; Ward v. Hall, 33 Ky. L. R. 1015, 112 SW 600; Oates v. Yeargin [Ky.] 115 SW 794; In re Corby's Estate, 154 Mich. 353, 15 Det. Leg. N. 798, 117 NW 906; Lee v. Conran, 213 Mo. 404, 111 SW 1151; Sparks v. Jasper County, 213 Mo. 218, 112 SW 265; Haxton v. Gilsonite Const. Co., 134 Mo. App. 360, 114 SW 577; Abbott v. Whitener Grocery Co., 135 Mo. App. 706, 116 SW 1067; Tipton v. Christopher, 135 Mo. App. 619, 116 SW 1125; Ford v. Fidelity Storage, Packing & Moving Co. [Mo. App.] 119 SW 520; Heidmann v. Noxon [Neb.] 119 NW 257; Segear v. Westcott [Neb.] 120 NW 170; Powers v. Bohuslav [Neb.] 120 NW 942; Turley v. Thomas [Nev.] 101 P 568; Joerg v. Public Service R. Co. [N. J. Law] 71 A 1126; Shapiro v. Leahy Bldg. Co., 112 NYS 1090; Bartlett v. Reich, 113 NYS 48; Altes v. Blumenthal, 113 NYS 574; Bryant v. Settel, 113 NYS 947; Galli v. Scatena, 114 NYS 901; Prime v. Yonkers, 131 App. Div. 110, 115 NYS 305; Eager v. Seeds [Okl.] 96 P 646; Lookabaugh v. Bowmaker [Okl.] 96 P 651; Standard Lumber Co. v. Miller & Vidor Lumber Co. [Okl.] 96 P 761; King v. King, 36 Pa. Super. Ct. 33; Funderburg v. Augusta & A. R. Co., 81 S. C. 141, 61 SE 1075; Butler v. Anderson [Tex. Civ. App.] 107 SW 656; Haring v. Shelton [Tex. Civ. App.] 114 SW 389; Jesse French Piano & Organ Co. v. Costley [Tex. Civ. App.] 116 SW 135; James v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 116 SW 642; Mueller v. Bell [Tex. Civ. App.] 117 SW 993; Texas Midland R. Co. v. Geraldon [Tex. Civ. App.] 117 SW 1004; McKallip v. Collins Bros. [Tex. Civ. App.] 118 SW 546; Watson v. City Nat. Bank [Tex. Civ. App.] 119 SW 915; Henker v. Lindsay, 34 Utah, 298, 97 P 329; Little v. Herzinger, 34 Utah, 337, 97 P 639; Berg v. Ruby Min. Co., 50 Wash. 698, 96 P 683; Scott v. Young, 50 Wash. 700, 96 P 1038; Northwest Thresher Co. v. Dahlgren, 50 Wash. 325, 97 P 228; Judson v. Tide Water Lumber Co., 51 Wash. 164, 98 P 377; Stewart v. Davies [Wash.] 100 P 176; Smith v. Gray [Wash.] 100 P 339; Cornelius v. Washington Steam Laundry Wash.] 100 P 727; Smyth v. Lance [Wash.] 100 P 995; Springfield Shingle Co. v. Edgecomb Mill Co. [Wash.] 101 P 233; Bock v. Sorenson [Wash.] 102 P 428; Baker v. Jackson [W. Va.] 64 SE 32; Poole v. Tannis, 137 Wis. 363, 118 NW 188; Moehlenpah v. Mayhew [Wis.] 119 NW 826; Yount v. Strickland [Wyo.] 101 P 942. Finding on conflicting affidavits. Stauffer v. Martin [Ind. App.] 88 NE 363; Horton v. Haines [Okl.] 102 P 121. Rule applies in case of conflict in inferences reasonably deducible from evidence. Mentone Irr. Co. v. Redlands Elec. L. & P. Co. [Cal.] 100 P 1082. Judgment reversed where supreme court was satisfied that decision was based on ground that testimony preponderated in favor of plaintiffs and overlooked rule requiring establishment of agreement in question beyond a reasonable doubt, which was not done. Enos v. Anderson, 40 Colo. 395, 93 P 475. Where facts are undisputed, and inferences to be deduced from them leave no room for reasonable doubt as to their legal effect, will pass upon and determine principles of law that must control when applied to them. Little v. Herzinger, 34 Utah, 337, 97 P 639.

29. Where evidence to sustain them. Sykes v. Thornton [Pa.] 72 A 1063. Unless contrary to clear preponderance of evidence. Anderson v. Savoy, 137 Wis. 44, 118 NW 217; Phalen v. Hershey Lumber Co., 136 Wis. 571, 118 NW 219; Ott v. Boring [Wis.] 121 NW 126; Mellon v. Fulton [Okl.] 98 P 911. Findings approved by court not disturbed. Tonopah Lumber Co. v. Nevada Amusement Co. [Nev.] 97 P 636; People's Trust Co. v. Schenck, 195 N. Y. 398, 88 NE 647; Foy v. Gray, 148 N. C. 436, 62 SE 523; Speer v. Huidekoper, 221 Pa. 448, 70 A 802; McGraw v. Hilton, 221 Pa. 568, 70 A 851; McManus v. Watson [Pa.] 72 A 1067; Lemma v. Blanding [Wis.] 120 NW 842; Witt v. Merz [Wis.] 121 NW 885; Canner v. Webster Tapper Co. [C. C. A.] 168 F 519; In re Sweeney [C. C. A.] 168 F 612. Where in action at law reference and referee are agreed upon by both parties, his findings of fact, when approved by judge, are conclusive of support by substantial evidence. Bader v. Chicago Mill & Lumber Co., 134 Mo. App. 135, 113 SW 1154. Appellate court may, however, set aside his erroneous conclusions of law, and apply law as it finds it to facts found by him. Id. Findings of referee, under St. 1898, § 2865, have effect of special verdict or review by trial court, and are not to be disturbed on review except clearly against weight of evidence, but not as forceful as verdict of jury which is not disturbed if any evidence to support. Ott v. Boring [Wis.] 121 NW 126.

30. Findings of auditor approved by court below will not be disturbed except for plain mistake. Pratt's Estate, 35 Pa. Super. Ct. 110. Except to correct clear mistake or palpable error. Whiteside v. Whiteside, 35 Pa. Super. Ct. 481; Blaney's Estate, 37 Pa. Super. Ct. 76. Findings of fact by auditing judge of orphan's court, confirmed by court in banc, not disturbed in absence of manifest error. In re McCahan's Estate, 221 Pa. 186, 70 A 711. Notwithstanding Act June 16, 1836 (P. L. 1835-36, p. 683), requiring supreme court on appeal from orphan's court to hear, try, and determine the merits of the case and decree according to the justice and equity thereof, finding of fact by auditing judge, confirmed by court, will not be disturbed unless no evidence to support it, or it is so clearly erroneous that to uphold it would work injustice. In re Barnes' Estate, 221 Pa. 399, 70 A 790.

31. Finding of court on report of master conclusive. Rivers v. Atlantic Coast Lumber Corp., 81 S. C. 492, 62 SE 855. Where order referring case to master does not require report of evidence, his findings of fact must be treated as final. Stewart v. Joyce, 201 Mass. 301, 87 NE 613. Master's findings not disturbed, unless plainly wrong. Atherton v. Emerson, 199 Mass. 199, 85 NE 530. Overruling exceptions to master's findings on conflicting evidence will not be interfered with. Manowsky v. Stephan, 233 Ill. 409, 84 NE 365. Master's report is not entitled to same weight and effect as finding of jury. Larson v. Glos, 235 Ill. 584, 85 NE 926. Entitled to same weight as special verdict of jury. Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007; Richardson v. Harsha [Okl.] 98 P 897. Findings not disturbed if any evidence reasonably tending to support them. Richardson v. Harsha [Okl.] 98 P 897; Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007; Hope v. Bourland [Okl.]

commissioners,[32] and special tribunals.[33] They are also applied to findings in equity cases,[34] though, strictly speaking, while entitled to considerable weight,[35] such findings are not conclusive if the appeal is triable de novo.[36]

98 P 580; Turner v. Mills [Okl.] 97 P 558; Choctaw, O. & G. R. Co. v. Sittel [Okl.] 97 P 363. Where whole case referred by consent, findings not disturbed unless contrary to preponderance of evidence. Locust v. Caruthers [Okl.] 100 P 520. Findings on conflicting evidence approved by chancellor, not disturbed unless manifestly against weight of evidence. Keuper v. Mette's Unknown Heirs, 239 Ill. 555, 88 NE 218; Edwards v. Oil City Bldg. & Sav. Ass'n, 137 Ill. App. 522; Barber v. Barber [R. I.] 71 A 641. Findings of master concurred in by court presumptively correct, and should be permitted to stand, unless some obvious error or mistake has intervened either in application of law or in consideration of evidence. City of Memphis v. Postal Tel. & Cable Co. [C. C. A.] 164 F 600; Guarantee Gold Bond Loan & Sav. Co. v. Edwards [C. C. A.] 164 F 809; Cimotti Unhairing Co. v. American Fur Refining Co. [C. C. A.] 168 F 529; Jefferson Hotel Co. v. Brumbaugh [C. C. A.] 168 F 867. Exception to finding, and assignment of court's ruling against it, held to impose on appellate court duty of determining whether was any legal evidence to support finding. McSherry Mfg. Co. v. Dowagiac Mfg. Co. [C. C. A.] 163 F 34. Findings confirmed by court not conclusive upon federal supreme court in cases involving constitutionality of legislation. Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 Law. Ed. —.

32. Findings of commissioner while not as conclusive as verdict of jury to be given great weight. Townley Bros. v. Crickenberger [W. Va.] 63 SE 320; Baker v. Jackson [W. Va.] 64 SE 32; State v. King [W. Va.] 63 SE 468. Rule peculiarly applicable where findings approved by lower court. Townley Bros. v. Crickenberger [W. Va.] 63 SE 320. Findings of commissioner and court in proceedings for establishment of lost boundary corners on conflicting evidence. Leathers v. Oberlander [Iowa] 117 NW 30. Judgment on settlement of accounts by commissioner not disturbed, where he did not give any of items in his report nor method whereby he arrived at his conclusion, and it was impossible to ascertain true state of such accounts from record. Cotton v. Cotton's Ex'x. [Ky.] 115 SW 783.

33. Findings of fact of secretary of interior in action before him to disbar attorneys from practicing before department. Garfield v. U. S., 32 App. D. C. 109. Interior department's finding of fact on land contest, in absence of clear mistake, especially where reinforced by judgment of state court. Whitcomb v. White, 214 U. S. 15, 53 Law. Ed. —. Will not disturb findings of board of supervisors on valuation for assessment, sustained by quarterly and circuit courts, upon mere suspicion of unfairness. Thomas v. Jackson County Sup'rs [Ky.] 119 SW 209. Award of commissioners in condemnation unless grossly inadequate or unequal. In re Croton River Dam, 129 App. Div. 707, 114 NYS 75. Award of commissioners in condemnation where supported by evidence. In re Water Supply in City of New York, 114 NYS 68. Telephone rates established by state commission, if not based upon arbitrary conjecture, are presumed correct although established upon insufficient data. Railroad Commission v. Cumberland Tel. & T. Co., 212 U. S. 414, 53 Law. Ed. —. Official action of mayor of city under power to remove officers "for cause" can be reviewed only where there has been arbitrary exercise of power and cause alleged for removal is unreasonable and insufficient in law, and supreme court cannot pass on weight or sufficiency of evidence. Dunn v. Taunton, 200 Mass. 252, 86 NE 313. Findings of commissioner in proceedings to deport Chinese persons should not be reversed. Hong Yon v. U. S. [C. C. A.] 164 F 330.

34. Chancellor's findings of fact conclusive. West v. Daniels [Fla.] 49 S 154; Powers v. Bridgeport Oil Co., 238 Ill. 397, 87 NE 381; Klussman v. Weseling, 238 Ill. 568, 87 NE 544; Haigh v. Lenfesty, 239 Ill. 227, 87 NE 962; Ackman v. Potter, 239 Ill. 578, 88 NE 231; Farrenkoph v. Holm, 142 Ill. App. 336; Storm v. Brown, 143 Ill. App. 252; Philip Carey Mfg. Co. v. Weygandt, 143 Ill. App. 297; Flagg v. Phillips, 201 Mass. 216, 87 NE 598; Cogan v. Cogan, 202 Mass. 58, 88 NE 662; Stabler v. Clark [Mich.] 15 Det. Leg. N. 834, 118 NW 605; Wilson v. Brown [Miss.] 47 S 545; Blair v. Kingman Implement Co. [Neb.] 117 NW 773; Manst v. Pennsylvania & M. St. R. Co., 219 Pa. 568, 69 A 80; Rahn Tp. School Dist. v. Lehigh Coal & Nav. Co., 221 Pa. 141, 70 A 551; People's Bank of California v. Stroud [Pa.] 72 A 341; Sharkey v. Locke [Pa.] 72 A 1064; McCaskey v. Potts [W. Va.] 64 SE 908; Thorndyke v. Alaska Perseverance Min. Co. [C. C. A.] 164 F 657; The Carroll [C. C. A.] 167 F 112. Findings depending on weight of evidence and credit of witnesses, where evidence is such that reasonable men may differ as to its effect. South Penn Coal Co. v. Male [W. Va.] 64 SE 925. Where propriety of decree is dependent solely on facts, it will be affirmed, where it appears from consideration of all proofs that it has done substantial justice and equity between the parties. Cimino v. Smith [Fla.] 49 S 545. While findings are to be regarded as if facts established by jury, where they are inferences drawn from practically undisputed testimony, it is duty of appellate court to examine evidence and determine if findings are unwarranted. Delaware & Atlantic Tel. & T. Co's. License Fees, 37 Pa. Super. Ct. 151. Under Const. art. 5, § 4, and Code Civ. Proc. 1902, § 11, subd. c, supreme court cannot review facts found by jury in chancery case where verdict is not set aside. Tindal v. Sublett [S. C.] 63 SE 960.

If any substantial evidence to support them. West v. Burks [Ark.] 118 SW 397; Lindsley v. McIver [Fla.] 48 S 628; Chicago Wire Chair Co. v. Kennedy & Wright Co., 141 Ill. App. 196; Carter v. Catchings [Miss.]

(§ 13) *G. Rulings and decisions on intermediate appeals.*[37] See 11 C. L. 235 Where an intermediate appeal is had, the findings of fact therein are usually final, review in the court of last resort being confined to questions of law,[38] and to ques-

48 S 515; Butts v. Gunby, 135 Mo. App. 28, 115 SW 493; Conrad v. Conrad, 36 Pa. Super. Ct. 154; Morgan v. Morgan [Vt.] 73 A 24; Rochester German Ins. Co. v. Schmidt [C. C. A.] 162 F 447.

Unless manifestly against weight of evidence. Mount Nebo Anthracite Coal Co. v. Martin [Ark.] 111 SW 1002; Robertson v. Robinson [Ark.] 112 SW 883; Blackburn v. Cherry [Ark.] 113 SW 25; Farmer v. First Nat. Bank [Ark.] 115 SW 1141; Craig v. Craig [Ark.] 117 SW 765; Bank of Pine Bluff v. Levi [Ark.] 118 SW 250; Plunkett v. Mountain Park Land Co. [Ark.] 119 SW 272; Craig v. Hedges [Ark.] 119 SW 645; Compagionette v. McArmick [Ark.] 120 SW 400; High v. Jasper Mfg. Co. [Fla.] 49 S 156; Price v. Jester, 137 Ill. App. 565; Peets v. Peets [Mich.] 16 Det. Leg. N. 26, 120 NW 571; Plaza Hotel Co. v. Dines [Mo. App.] 116 SW 1121; Prime v. Yonkers, 131 App. Div. 110, 115 NYS 305; Stelting v. Bank of Sparta, 136 Wis. 369, 117 NW 798. Finding will not be sustained where contrary to clear weight of evidence. Westbrook v. Potter's Sons' Trustees, 33 Ky. L. R. 1071, 112 SW 635.

Where evidence is conflicting. Souter v. Witt [Ark.] 113 SW 800; Smith v. Rucker [Ark.] 114 SW 1181; Magill Lumber Co. v. Lane-White Lumber Co. [Ark.] 119 SW 822; Wetherington v. Wetherington [Fla.] 49 S 549; J. I. Kelley Co. v. Pollock [Fla.] 49 S 934; Later v. Haywood, 15 Idaho, 716, 99 P 828; Jones v. Thie [Iowa] 119 NW 616; Wiburg & Hannah Co. v. Walling & Co. [Ky.] 113 SW 832; Lakes v. Drew [Ky.] 114 SW 294; Wilson v. Barrett [Ky.] 115 SW 812; Preston v. Vanhoose [Ky.] 116 SW 279; Travie v. Taylor [Ky.] 118 SW 988; Huffman v. Huffman, 217 Mo. 182, 117 SW 1; Jones v. Plummer [Mo. App.] 118 SW 109; Frank v. Firestone, 116 NYS 700; Hohenstein v. Perelstine, 37 Pa. Super. Ct. 540; Learned v. Iman, 50 Wash. 701, 97 P 449; Johnson v. Johnson, 50 Wash. 702, 97 P 452. In suit for specific performance of oral contract, rule that where there is substantial conflict in evidence judgment of trial court will not be reversed must be read and considered in light of rule that, to entitle one to specific performance in such case, evidence must establish contract and its terms clearly and satisfactorily, and mere preponderance of evidence is insufficient to sustain verdict. Prairie Development Co. v. Leiberg, 15 Idaho, 379, 98 P 616.

Where mind is left in doubt as to truth. Westbrook v. Potter's Sons' Trustee, 33 Ky. L. R. 1071, 112 SW 635; Arndell v. Malusky [Ky.] 112 SW 640; Wilson v. Hardman [Ky.] 112 SW 672; Crabtree v. Murray [Ky.] 114 SW 263; Phillips v. Williams [Ky.] 114 SW 1191; Eversole v. Holliday [Ky.] 114 SW 1195; Lowe v. Maynard [Ky.] 115 SW 214; White & Sons v. Ayer & Lord Tie Co. [Ky.] 116 SW 349; Rathfon v. Gaines [Ky.] 118 SW 937.

35. Semper v. Englehart [Iowa] 118 NW 318; Howell v. Union Grocery Co. [Ky.] 113 SW 912; Walker v. Ganote [Ky.] 116 SW 689; Northup's Trustees v. Sumner's Trustee [Ky.] 116 SW 699; Wheeler v. James [Ky.] 120 SW 350; Richter v. Poe, 109 Md. 20, 71 A 420; Phillips v. St. Louis Union Trust Co., 214 Mo. 669, 113 SW 1065; Creamer v. Bivert, 214 Mo. 473, 113 SW 1118; First Nat. Bank v. Fry, 216 Mo. 24, 115 SW 439; Sommer v. Ross [Ky.] 116 SW 1181; Glascock v. Glascock, 217 Mo. 362, 117 SW 67; Jones v. Thomas, 218 Mo. 508, 117 SW 1177; Collins v. Harrell [Mo.] 118 SW 432; Ball v. Reyburn [Mo. App.] 118 SW 524; Southwest Missouri R. Co. v. Big Three Min. Co. [Mo. App.] 119 SW 982; Nevius v. Moore [Mo.] 120 SW 43; Katz v. Ish [Neb.] 121 NW 239.

36. Walker v. Ganote [Ky.] 116 SW 689; Sommer v. Ross [Ky.] 116 SW 1181; Glascock v. Glascock, 217 Mo. 362, 117 SW 67; Nevius v. Moore [Mo.] 120 SW 43. Not bound by findings of trial judge. Venable v. School Committee of Pilot Mountain, 149 N. C. 120, 62 SE 902; Zweigart v. Reed [Mo.] 119 SW 960. Findings on conflicting evidence do not necessarily require supreme court's approval, particularly where evidence is taken by deposition. Campbell v. Gowans [Utah] 100 P 397. Court of appeals, after reading record, will make up its own independent judgment and determine for itself whether facts authorize judgment. Howell v. Union Grocery Co. [Ky.] 113 SW 912. Court must examine all evidence and base conclusions on its own view thereof. Barrie v. United R. Co. of St. Louis [Mo. App.] 119 SW 1020. Appellate division has right to look into evidence and review facts. Stokes v. Stokes, 128 App. Div. 838, 113 NYS 142. Reversed where clearly unauthorized by evidence. Johnson v. Stansell [Miss.] 48 S 619.

37. Search Note: See Appeal and Error, Cent. Dig. §§ 4263-4352; Dec. Dig. §§ 1080-1095; 3 Cyc. 389-395.

38. Illinois: Appellate court's decision on questions of fact conclusive on supreme court. Ingraham v. Harmon, 229 Ill. 168, 62 NE 256; Siltz v. Springer, 236 Ill. 276, 85 NE 748; Donelson v. East, etc., R. Co., 235 Ill. 625, 85 NE 914; Smith v. Chicago, etc., R. Co., 236 Ill. 369, 86 NE 150; Martewicz v. Mohr & Sons, 236 Ill. 143, 86 NE 202; Bartlett v. Lumaghi Coal Co., 237 Ill. 372, 86 NE 587; Commercial L. & T. Co. v. Mallers, 237 Ill. 119, 86 NE 728; Peebles v. O'Gara Coal Co., 239 Ill. 370, 88 NE 166; Carter v. Cairo, V. & C. R. Co., 240 Ill. 152, 88 NE 493; Curtis v. Cleveland, etc., R. Co., 240 Ill. 218, 88 NE 548; Melch v. Pottinger, 237 Ill. 192, 86 NE 627; Van Cleef v. Chicago, 240 Ill. 318, 88 NE 815; Craney v. Union Stockyard & Transit Co., 240 Ill. 602, 88 NE 1046. Affirmance by appellate court is conclusive on supreme court on questions of fact. Bullis v. Chicago, 235 Ill. 472, 85 NE 614; Knox v. American Rolling Mill Corp., 236 Ill. 437, 86 NE 90; Jacobsen v. Heywood & Morrill Rattan Co., 236 Ill. 570, 86 NE 110; Hagen v. Schleuter, 236 Ill. 467, 86 NE 112; Mann v. Illinois Cent. Trac. Co., 236 Ill. 30, 86 NE 161; Hampton v. Chicago & A. R. Co., 236

tions litigated in the intermediate court.[39] Provision is sometimes made for a rehearing under certain circumstances in the court of last resort.[40]

Ill. 249, 86 NE 243; Johnson v. Coey, 237 Ill. 88, 86 NE 678; Peterson v. Pusey, 237 Ill. 204, 86 NE 692; Dukeman v. Cleveland, etc., R. Co., 237 Ill. 104, 86 NE 712; Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 NE 740; Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 NE 745; Smythe v. Parish & Co., 237 Ill. 419, 86 NE 754; Ford v. Hine Bros. Co., 237 Ill. 463, 86 NE 1051; Peterson v. Elgin, Aurora & So. Trac. Co., 238 Ill. 403, 87 NE 345; Savage v. Chicago & J. Elec. R. Co., 238 Ill. 392, 87 NE 377; Eblin v. American Car & Foundry Co., 238 Ill. 176, 87 NE 385; Gascoigne v. Metropolitan West Side El. R. Co., 239 Ill. 18, 87 NE 883; Miller v. Kelly Coal Co., 239 Ill. 626, 88 NE 196; Reavely v. Harris, 239 Ill. 526, 88 NE 238; Town of Cicero v. Grisko, 240 Ill. 220, 88 NE 478. On appeal from appellate court sustaining trial court's refusal to direct verdict for plaintiff, supreme court is confined to question did evidence with all inferences legitimately drawn therefrom fairly tend to establish liability. Wilkinson v. Aetna Life Ins. Co., 240 Ill. 205, 88 NE 550. Proviso of Laws 1907, p. 468, § 120, that in actions of law where appellate court reverses judgment of trial court without awarding trial de novo, as result wholly or in part of finding the facts different from finding of trial court, and in cases where justices of appellate court are divided in opinion on law or facts, supreme court may review both law and facts, construed, and held that both parts of proviso apply only to cases where decision of appellate court is based on finding of facts differing from finding of trial court, that being only kind of cases with which section as whole purports to deal. Reinhardt v. Chicago Junction R. Co., 235 Ill. 576, 85 NE 605. Exception of second class of cases mentioned in proviso from operation of rule that appellate court's findings shall be final and conclusive held to violate Const. art. 4, § 2, in that it discriminates between parties. Id. Hence findings of appellate court are conclusive under provisions of § 122, in case where it reversed without remanding and with finding of facts though court was not unanimous. Id. Proviso having been held unconstitutional as a whole, law stands as it did prior to passage of practice act of which section forms part, and where appellate court reverses without remanding, and recites its finding of ultimate facts in its judgment, such judgment is conclusive as to all matters of fact though justices are divided in opinion. Mozeiko v. Lehigh Valley Transp. Co., 235 Ill. 324, 85 NE 618; Kehoe v. Marshall Field & Co., 237 Ill. 470, 86 NE 1054; Huermann v. McDoel, 239 Ill. 80, 87 NE 913. Supreme court cannot review evidence to determine whether findings are supported or consider evidentiary facts to determine whether ultimate conclusion of fact is sustained. Stone & Co. v. Ferry, 239 Ill. 606, 88 NE 186. Will reject evidentiary facts as surplusage. Id.

New York: Unanimous affirmance by appellate division is conclusive on court of appeals on questions of fact. Ostrander v. State, 192 N. Y. 415, 85 NE 668; In re Thayer's Estate, 193 N. Y. 430, 86 NE 462; Pennsylvania Steel Co. v. Title Guarantee & Trust Co., 193 N. Y. 37, 85 NE 820; Haffey v. Lynch, 193 N. Y. 67, 85 NE 817; Finucane v. Warner, 194 N. Y. 160, 86 NE 1118; Saranac Land & Timber Co. v. Roberts, 195 N. Y. 303, 88 NE 753; People v. Public Service Commission, 195 N. Y. 157, 88 NE 261; Smyth v. Brooklyn Union El. R. Co., 193 N. Y. 335, 85 NE 1100. Where findings made at special term are consistent with each other and with conclusions of law upon which judgment is based. Whalen v. Stuart, 194 N. Y. 495, 87 NE 819. Where findings are inconsistent, appellant seeking to reverse judgment based thereon is entitled to benefit of those most favorable to him. Id. Court of appeals may determine whether findings support legal conclusions and judgment founded thereon. Becker v. McCrea, 193 N. Y. 423, 86 NE 463. Where order of appellate division affirming judgment entered on verdict for plaintiff was not unanimous, held that exception by defendant to denial of motion to dismiss complaint properly presented questions of negligence and contributory negligence to court of appeals. Lynch v. Elektron Mfg. Co., 195 N. Y. 171, 88 NE 48. One appealing from judgment of appellate division affirming by divided court a judgment of the supreme court has burden of establishing her theory and claim, based on question of fact, as matter of law and beyond any question of fact. Kelly v. Beers, 194 N. Y. 49, 86 NE 980. Court of appeals cannot deal with facts on appeal from judgment of appellate division reversing trial term on law and facts, but they must be settled in supreme court. Tousey v. Hastings, 194 N. Y. 79, 86 NE 831. Is question of fact where facts proved without dispute require exercise of reason and judgment, so that one reasonable mind may infer that controlling fact exists and another that it does not. Id. Where order of appellate division reversing judgment of special term is silent as to grounds upon which it is based, court of appeals must take facts as found by trial court, and examine case upon assumption that appellate division predicated reversal solely upon questions of law. Code Civ. Proc. § 1338. Ball v. Broadway Bazaar, 194 N. Y. 429, 87 NE 674; Preston v. Aetna Ins. Co., 193 N. Y. 142, 85 NE 1006; Lenox v. Lenox, 195 N. Y. 359, 88 NE 571. Judgment reversing judgment entered on verdict and order denying motion on minutes for new trial will not be amended so as to read "reversed upon the law and not upon the facts," since status of appeal to court of appeals would in no way be affected thereby. Gross v. Kathairo Chemical Co., 129 App. Div. 411, 113 NYS 243.

Texas: Jury's finding of fact cannot be disturbed by supreme court on appeal from affirmance by court of civil appeals in absence of error of law or procedure. Bowman v. Saigling [Tex.] 119 SW 295.

39. Supreme court can review decision of appellate court only as to errors properly assigned in that court, and upon which that court had jurisdiction to pass. Town of

(§ 13) *H. Effect of decision on former review of the same case.*[41]—See 11 C. L. 237—The binding effect of a decision on appeal on a retrial in the lower court,[42] and the effect of appellate decisions as precedents in other cases,[43] are treated elsewhere. All matters necessarily decided,[44] and everything that might have been raised, but

Scott v. Artman, 237 Ill. 394, 86 NE 595. Where no cross error was assigned in appellate court to ruling that defense was not open to consideration because not pleaded, held that it was not open to review on appeal to supreme court by appellee in appellate court. Commercial L. & T. Co. v. Mallers, 237 Ill. 119, 86 NE 728. Where order remanding case on reversal by appellate court of judgment in plaintiff's favor was struck out on plaintiff's motion, held that he could not complain, on appeal to supreme court, that cause was not remanded. Henning v. Sampsell, 236 Ill. 375, 86 NE 274. Questions not raised in appellate court not considered in supreme court. Smythe v. Parish & Co., 237 Ill. 419, 86 NE 754; Esmond v. Esmond, 142 Ill. App. 233; Nagle v. Keller, 237 Ill. 431, 86 NE 694; Bennett v. Knott [Ky.] 112 SW 849. Assignment not to be considered by supreme court where different from that urged in court of civil appeals. Missouri, K. & T. R. Co. v. Briscoe [Tex.] 119 SW 844. Writ of error to court of civil appeals not to be considered by supreme court where no motion for rehearing in former court within prescribed time. Myers v. Frey [Tex.] 119 SW 1142.

40. Supreme court will grant rehearing in case properly appealed to court of appeal only where error appears upon face of opinion of latter court, or when doubtful or important question is presented upon which supreme court desires to hear further argument. Burke v. Maze [Cal.] 101 P 440. In case properly appealed to supreme court and referred by it to court of appeals for hearing and decision, supreme court will order rehearing if upon examining record it finds that anything deserving consideration has been overlooked in deciding case, or any of the facts misconceived in material particulars, though opinion of court of appeal may be correct on its face. Id.

41. Search Note: See notes in 34 L. R. A. 321; 6 Ann. Cas. 791.

See, also, Appeal and Error, Cent. Dig. §§ 4353-4379; Dec. Dig. §§ 1096-1099; 3 Cyc. 395-403; 2 A. & E. Enc. P. & P. 373.

42. See post, § 15F.

43. See Stare Decisis, 12 C. L. 1903.

44. Holberg v. Foucar [Ark.] 119 SW 653; Hubbard v. Lee [Cal. App.] 102 P 528; Cummings v. Consaul, 30 App. D. C. 540; Valdosta Mercantile Co. v. White [Fla.] 47 S 961; McKinnon v. Johnson [Fla.] 48 S 910; Bank of Commerce v. New York Life Ins. Co., 131 Ga. 312, 62 SE 179; Stark v. Cummings [Ga.] 63 SE 857; Olympia Min. Co. v. Kerms, 15 Idaho, 371, 97 P 1031; Kempton v. Funk, 139 Ill. App. 387; Davis v. Munie, 140 Ill. App. 171; Noyes v. Clarke, 141 Ill. App. 442; Dukeman v. Cleveland, etc., R. Co., 142 Ill. App. 622; Inman Mfg. Co. v. American Cereal Co. [Iowa] 119 NW 722; In re Blackman's Estate [Iowa] 120 NW 664; Hallowell v. McLaughlin Bros. [Iowa] 121 NW 1039; Missouri Pac. R. Co. v. Stone [Kan.] 101 P 666; Buck Stove & Range Co. v. Vickers [Kan.] 101 P 668; Sinclair's Adm'r v. Illinois Cent. R. Co. [Ky.] 112 SW 910; White & Sons v. Ayer & Lord Tie Co. [Ky.] 116 SW 349; Loughridge v. Ball [Ky.] 118 SW 321; Louisville & N. R. Co. v. O'Nan's Adm'r [Ky.] 119 SW 1192; Osborn v. Froyseth [Minn.] 119 NW 1135; Young v. Ruhweddel, 132 Mo. App. 721, 112 SW 993; Grady v. St. Louis [Mo.] 119 SW 949; In re Cook's Estate, 194 N. Y. 400, 87 NE 786; Barkley v. South Atlantic Waste Co., 149 N. C. 287, 62 SE 1073; Chasmar-King Supply Co. v. Dowd, 150 N. C. 790, 64 SE 1134; Oklahoma City Elec. Gas & P. Co. v. Baumhoff [Okl.] 96 P 758; Chicago, etc., R. Co. v. Broe [Okl.] 100 P 523; Cornelius v. Ferguson [S. D.] 121 NW 91; Missouri, K. & T. R. Co. v. Redus [Tex. Civ. App.] 118 SW 208; Teakle v. San Pedro, etc., R. Co. [Utah] 102 P 635; Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109; Akin v. Bradley Engineering & Machinery Co., 51 Wash. 658, 99 P 1038; Menasha Wooden Ware Co. v. Nelson [Wash.] 101 P 720; Sound Inv. Co. v. Bellingham Bay Land Co. [Wash.] 102 P 234; Roth v. Mutual Reserve Life Ins. Co. [C. C. A.] 162 F 282; Crotty v. Chicago G. W. R. Co. [C. C. A.] 169 F 593. Opinion of supreme court, on subsequent appeal to appellate court. Union Cent. Life Ins. Co. v. Burnett, 136 Ill. App. 187; Butz v. Murch Bros. Const. Co. [Mo. App.] 117 SW 635. Holding by appellate court that paragraph of complaint was sufficient conclusive on subsequent appeal to supreme court after retrial. Chicago, I. & L. R. Co. v. Cobler [Ind.] 87 NE 981. Decision of appellate court not binding upon it on subsequent appeal where it has since been reversed by supreme court. Chicago & Eastern Illinois R. Co. v. Jennings, 138 Ill. App. 415. Rule held applicable on appeal to supreme court of state of Oklahoma where former decision was made by territorial supreme court, present court being successor of former one. Oklahoma City Elec., Gas & P. Co. v. Baumhoff [Okl.] 96 P 758. Parties not satisfied with decision of supreme court on transfer of case to it should seasonably apply for rehearing, and, if they do not, questions of law then decided will not be re-examined upon a subsequent transfer, especially when equity and justice do not require it. Kidd v. New York Security & Trust Co. [N. H.] 71 A 878. Where judgment overruling motion for new trial is reversed and remanded, decision is final only as to questions decided. Hixon v. Callaway, 5 Ga. App. 415, 63 SE 518. Record on former appeal may be looked to for purpose of ascertaining what facts and questions were before court so as to see to proper application of rule. Oklahoma City Elec., Gas & P. Co. v. Baumhoff [Okl.] 96 P 758.

Decision held law of case: That circuit court had jurisdiction of controversy. Breckenridge County v. Rhodes [Ky.] 112 SW 624. That complaint was sufficient.

Treat v. Grand Canyon R. Co. [Ariz.] 100 P 438. That bill stated good cause of action. Seymour v. Goodwin [N. J. Err. & App.] 72 A 123. Sufficiency of answer. Bayse v. McKinney [Ind. App.] 87 NE 693. As to sufficiency of certain pleas. Provident Sav. Life Ins. Soc. v. Pruett [Ala.] 47 S 1019; Dolvin v. American Harrow Co., 131 Ga. 300, 62 SE 198. Striking portions of plea. Id. Construction of pleadings. Austin v. Collier, 131 Ga. 295, 62 SE 196. That pleadings presented certain question. Chesapeake & O. R. Co. v. Morgan [Ky.] 112 SW 859. As to admissibility of evidence. Chase v. Woodruff [Wis.] 120 NW 499. As to instructions. Lexington R. Co. v. Woodward [Ky.] 118 SW 965; Austin v. Collier, 131 Ga. 295, 62 SE 196; Langhorn, Johnson & Co. v. Wiley [Ky.] 115 SW 759; Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 118 SW 116. That certain question was for jury under the evidence. McDonough v. Williams [Ark.] 112 SW 164; City of Chicago v. Gathman, 139 Ill. App. 253; Hanson v. Cline [Iowa] 118 NW 754; Doherty v. Des Moines City R. Co. [Iowa] 121 NW 690; Wall's Ex'r v. Dimmitt [Ky.] 117 SW 299; O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59; O'Neill v. Northern Assur. Co. [Mich.] 15 Det. Leg. N. 1121, 119 NW 911; McQuisten v. Detroit Citizen's St. R. Co. [Mich.] 16 Det. Leg. N. 416, 122 NW 107; Anderson v. Pitt Iron Min. Co. [Minn.] 121 NW 915; Travis v. Haan, 128 App. Div. 77, 112 NYS 463; Chase v. Woodruff [Wis.] 120 NW 499. Weight and effect to be given evidence. Hruby v. Sovereign Camp Woodmen of the World [Neb.] 120 NW 427. That certain defense was not sustained by evidence, where evidence no stronger on second trial. Seabrook v. Coos Bay Ice & Cold Storage Co. [Or.] 102 P 175. Holding that contention that verdict should have been directed was not tenable. Anderson Carriage Co. v. Pungs, 153 Mich. 580, 15 Det. Leg. N. 591, 117 NW 162. Decision reversing decree sustaining demurrer and dismissing bill held to settle law applicable to facts proved in accordance with allegations of bill. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521. As to whether defendant was entitled to judgment on establishing facts alleged in answer. Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 NW 1007. Where evidence on first trial was sufficient to have sustained verdict, but case was reversed on other grounds, held that verdict for same party on substantially same evidence on second trial would be sustained. St. Louis, etc., R. Co. v. Inman [Ark.] 112 SW 179. Presumed that all questions respecting amount of judgment or regularity of proceedings upon which judgment for costs was based were litigated on former appeal from such judgment so that question could not be further litigated. **Bell** v. Thompson, 8 Cal. App. 483, 97 P 158. Rule as to what fraud will authorize attack on judgment. Uecker v. Thiedt, 137 Wis. 634, 119 NW 878. As to measure of damages. Kuhn v. Eppstein, 239 Ill. 555, 88 NE 174. **Question of damages.** Anderson Carriage Co. v. Pungs, 153 Mich. 580, 15 Det. Leg. N. 591, 117 NW 162. As to construction of bond sued upon. Landt v. McCullough, 130 Ill. App. 515. As to validity of provisions of contract. Houtz v. Union Pac. R. Co. [Utah] 99 P 997. Question as to validity of provision of contract held properly before court on former appeal. Id. Holding on former appeal that there was no evidence on particular issue held to necessarily imply holding that evidence was properly before court. Id. Whether contract sued on was within statute of frauds. Schmidt v. Beiseker [N. D.] 120 NW 1096. That corporation could not show that it was insolvent prior to certain date. Bohn v. Boone Building & Loan Ass'n [Iowa] 118 NW 383. As to estate received by devisee under will. Steele v. Korn, 137 Wis. 51, 120 NW 261, former opinion, 137 Wis. 51, 118 NW 207. That plaintiff was entitled to railroad crossing at particular place. Illinois Cent. R. Co. v. Wilson [Ky.] 113 SW 905. Verdict on second trial for less sum than that held not excessive on former appeal, though injury was shown to be greater, cannot be held excessive. Langhorn, Johnson & Co. v. Wiley [Ky.] 115 SW 759. Reversal on sole ground that judgment was personal instead of in rem amounts to affirmance of remaining questions which then cannot be raised at subsequent appeal. Jackson's Adm'rs v. McHargue [Ky.] 118 SW 944. Where judgment of district court, affirmed on appeal, received fair interpretation, held that supreme court would not undertake to enforce it upon theory not previously propounded, and rendered impracticable by action and acquiescence of proponent. Succession of Filhiol [La.] 49 S 138.

Decision held not law of case: As to plaintiff's right to interest. Appleton Waterworks Co. v. Appleton, 130 Wis. 395, 117 NW 816. Decision on demurrer to bill seeking to charge trustee for losses due to failure to sell certain securities held not to prevent decree exonerating trustee on subsequent appeal. Scoville v. Brock, 81 Vt. 405, 70 A 1014. Holding on demurrer that if, as alleged in bill, oratrix had no adequate remedy at law she might appeal to court of equity, held not conclusive on question whether she had such remedy, it appearing on hearing that she had under foreign laws which were applicable. Weed v. Hunt, 81 Vt. 302, 70 A 564. Sole question determined on first writ of error to judgment dismissing action held validity of plaintiff's appointment as administrator, so that defendant might prosecute second writ of error to review questions not open to consideration on hearing of first writ. Alaska-Treadwell Gold Min. Co. v. Cheney [C. C. A.] 162 F 593. Decision that instrument was deed and not a will held not to have decided whether grantor intended to thereby make complete gift of property to grantee. In re Hall's Estate, 154 Cal. 527, 98 P 269. Where, on appeal from judgment and order denying motion for new trial, insufficiency of evidence was assigned as ground for reversal and supreme court refused to consider evidence because of insufficiency of statement and bill of exceptions, and judgment was reversed because of insufficiency of findings with directions to make new findings upon evidence already introduced, and enter judgment accordingly, held that on subsequent appeal from new findings and judgment, decision

was not,[45] is the law of the case on another appeal in the same case, provided the issues and evidence are substantially the same,[46] and, as a general rule, this is true whether the former decision was right or wrong,[47] unless in exceptional cases[48] or where a contrary rule is prescribed by statute.[49]

§ 14. *Provisional, ancillary and interlocutory relief*[50]—See 11 C. L. 239 may sometimes be granted pending final determination if circumstances so require.[51]

on former appeal was not res adjudicata as to sufficiency of evidence. Later v. Haywood, 15 Idaho, 716, 99 P 828.

45. Davis v. Munie, 140 Ill. App. 171; Breckenridge County v. Rhodes [Ky.] 112 SW 624; Illinois Life Ins. Co. v. Wortham [Ky.] 119 SW 802; In re Cook's Estate, 194 N. Y. 400, 87 NE 786. Where appellee on former appeal from order setting aside verdict failed to show any ground for sustaining such order, and order was reversed with direction to enter judgment on verdict, held that he could not thereafter himself appeal and rely upon errors at trial which would have justified setting aside verdict. Hensley v. Davidson Bros. [Iowa] 120 NW 95. Where error in regard to burden of proof and right to open and close was not presented to or passed upon by court on first appeal, similar ruling on second trial held no open to review on second appeal. Stringfield v. Louisville R. Co. [Ky.] 113 SW 513. Error in failing to make person party to original bill cannot be raised for first time on second appeal. Manternach v. Studt, 240 Ill. 567, 88 NE 1000.

46. Not where facts are materially different. Prefumo v. Russell [Cal. App.] 101 P 24; Tice v. Chicago, etc., R. Co., 142 Ill. App. 577; Crotty v. Chicago, G. W. R. Co. [C. C. A.] 169 F 593. Decision sustaining demurrer to original complaint held not law of case as to sufficiency of amended complaint. Waaler v. Great Northern R. Co. [S. D.] 117 NW 140. Rule cannot be extended to include case where new complainant asserts for defendants rights which defendants asserted in former case against others who are now made co-defendants with him. Chicago Title & Trust Co. v. Danforth, 137 Ill. App. 338. Decision as to necessity for submission to jury is not law of case on subsequent appeal from order setting aside verdict on practically same evidence, questions on appeal not being same. Kramm v. Stockton Elec. R. Co. [Cal. App.] 101 P 914. Where, in action against administratrix personally for improvements made upon realty of intestate it was held that evidence was insufficient to show that agent actually making contract had authority from defendant, held that fact that on second trial it appeared that property in question had been set off to administratrix as dower did not require different disposition of question, evidence regarding agency being same. Kimball Bros. Co. v. Fitzgerald [Neb.] 118 NW 1076. Decision binding as to facts though nonsuit entered and on retrial plaintiffs were transferees of former plaintiffs. Bartley v. Sallier, 120 La. 743, 45 S 593.

47. Illinois Cent. R. Co. v. Wilson [Ky.] 113 SW 905; Akin v. Bradley Engineering & Machinery Co., 51 Wash. 658, 99 P 1038; Menasha Wooden Ware Co. v. Nelson [Wash.] 101 P 720; Appleton Waterworks Co. v. Appleton, 136 Wis. 395, 117 NW 816; Steele v. Korn, 137 Wis. 51, 120 NW 261, former opinion, 137 Wis. 51, 118 NW 207.

48. Will review and reverse former decisions only where satisfied that gross or manifest injustice has been done thereby, or where mischief to be cured far outweighs any injury that may be done in the particular case by overruling prior decision. Oklahoma City Elec., Gas & P. Co. v. Baumhoff [Okl.] 96 P 758.

49. Under Code 1896, § 3840, supreme court is not concluded by former opinion which misconceives law, but such decision will be overruled. Smith v. Smith [Ala.] 47 S 220.

50. **Search Note:** See Appeal and Error, Cent. Dig. §§ 3487-3559; Dec. Dig. §§ 868-876; 3 Cyc. 224-231.

51. Supreme court may issue temporary injunction in aid of appellate jurisdiction to preserve status quo pending determination of appeal. Hampton v. Hickey [Ark.] 114 SW 707. Granting or dissolution of such injunction discretionary. Mabry v. Kettering [Ark.] 117 SW 746. Though under Const. art. 7, § 6, supreme court has no jurisdiction to issue any writ in an original proceeding, it has, as incident to its appellate jurisdiction, such inherent powers as are necessary to enable it effectually to exercise such jurisdiction. Livesley v. Krebs Hop Co. [Or.] 97 P 718. Appellate court has power, as incidental to its jurisdiction, to issue restraining order when necessary to aid or protect its appellate jurisdiction, but not merely for protection of a party from damage or hardship. Livesley v. Krebs Hop Co. [Or.] 97 P 718. Order granted restraining enforcement of judgment pending appeal from decree dissolving preliminary injunction and dismissing suit to enjoin enforcement of such judgment. Id. Where after appeal from order dissolving temporary injunction restraining execution sale, upon bond for costs without supersedeas, sheriff seized property under order of sale, held that court of civil appeals could issue temporary injunction until appeal disposed of. Hubbart v. Willis State Bank [Tex. Civ. App.] 119 SW 711. Such injunction expires with disposition of case. Id.

Bonds: B. & C. Comp. § 420, applies to temporary restraining order issued by supreme court in aid of its appellate jurisdiction, and such order should be allowed only upon filing of undertaking provided for in Id. § 419. Livesley v. Krebs Hop Co. [Or.] 97 P 718. Liability of sureties on bond given to procure restraining order from supreme court pending appeal for interest, on sum of which appellee was deprived by issuance of order, held to cover only period between issuance of said

§ 15. *Decision and determination. A. Affirmance or reversal.*[52] See 11 C. L. 239 Assuming the existence[53] and proper acquisition of appellate power,[54] the appellate review, within the proper limitations thereof,[55] will ordinarily lead to affirmance, reversal or modification, according to the absence or presence of error,[56] prejudicial to the party complaining thereof.[57] A profitless reversal will not be granted.[58] An affirmance is not necessarily precluded by the fact that pending the appeal the sub-

order and time of its dissolution on affirmance of judgment. Chicago, A. & N. R. Co. v. Whitney [Iowa] 121 NW 1043. Appellant procured restraining order from supreme court pending appeal on giving bond to pay all damages resulting therefrom. Motion to dissolve order was denied and judgment was thereafter affirmed. Held that no recovery could be had on bond for attorney's fees incurred on motion for dissolution. Id. Bond held not to cover expenses and attorney's fees in preparing motion for dissolution incurred before it was given. Id. Held further that, restraining order being merely ancillary to appeal, no recovery could be had for counsel fees incurred in presenting main case on appeal. Id. Question of amount of fees and expenses to be allowed held for jury in any event, so that it was error for court to direct verdict for specific amount, though only testimony as to value was offered by plaintiff. Id.

52. Search Note: See notes in 17 A. S. R. 264; 96 Id. 124, 136; 9 Ann. Cas. 900; 10 Id. 80.

See, also, Appeal and Error, Cent. Dig. §§ 4428-4631, 4658, 4659; Dec. Dig. §§ 1124-1180; 3 Cyc. 412-470; 7 A. & E. Enc. P. & P. 44.

53. See ante §§ 4, 5.

54. See ante, §§ 6, 11.

55. See ante, § 13.

56. That judgment is void will not present reversal. In re Dahlgren, 30 App. D. C. 588. Ordering nonsuit on evidence is equivalent to reversal. Tussey v. Owen, 147 N. C. 335, 61 SE 180. If declaration did not state cause of action against any of the defendants, held that reversal of judgment in plaintiff's favor was proper, regardless of motion pursuant to which remanding order was vacated. Kenning v. Sampsel, 236 Ill. 375, 86 NE 274. Where appellate court cannot know what effect, if any, erroneous charge limiting effect of evidence had upon jury, case must be reversed. Louisville & N. R. Co. v. Price [Ala.] 48 S 814. Plaintiff sued two defendants for alleged joint negligence. Evidence showed that whatever negligence there was was exclusively that of one of them and there was issue as to whether he was the agent of the other. Court erroneously instructed that if alleged agent was in fact such agent, could be no recovery against him. Jury found in favor of agent and against other defendant. Held that verdict could not be sustained as against other defendant upon theory that in so far as it was in favor of agent it was based on erroneous instruction, since whether based upon correct or incorrect instructions principal was injured, and hence case would be reversed and remanded for new trial. Bradley v. Rosenthal, 154 Cal. 420, 97 P 875. Where complainant fails to request decree below as to portion of property not claimed adversely by defendant in ejectment, relief will be granted on appeal only upon payment of costs. McBurney v. Glenmary Coal & Coke Co. [Tenn.] 118 SW 694. Heavy terms imposed on reversal of order refusing to open default, in view of previous defaults, etc. Van Hoven v. Faust Co., 111 NYS 837. Where each party before court got what he was entitled to, held that judgment would be affirmed though it did not settle rights of third persons who should have been made parties but were not, judgment not in any way affecting any rights they might have. Poluckie v. Wegenke, 137 Wis. 433, 119 NW 188. On affirmance of judgment of nonsuit, because of failure of proof to conform to allegations of complaint, court need not send case back for new trial; plaintiff being entitled to sue over if he had cause of action. Elie v. Cowles & Co. [Conn.] 73 A 258. Where order dissolving temporary restraining order to prevent dissolution of corporation, under Rev. 1903, § 1195, is affirmed, supreme court will not dismiss cause, but will remand for lower court to supervise dissolution, under § 1203; § 1201, making directors trustees to wind up corporate business after dissolution, not ouster of court's authority. White v. Kincaid, 149 N. C. 415, 63 SE 109.

57. See Harmless and Prejudicial Error, 11 C. L. 1690.

58. Judgment not reversed because attachment was unauthorized, where was no motion to discharge same, and to reverse for that reason alone would involve nothing but costs. Ballou v. Skidmore [Ky.] 113 SW 441. In replevin action for diamond ring by husband against mother-in-law, where wife became actual defendant, no reversal would be had because no judgment against mother-in-law, it being manifest that she dropped out in lower court and that wife was actual defendant. Lee v. Patterson [Miss.] 45 S 980. Defendant's motion to set aside verdict for plaintiff was denied. Subsequently plaintiff's motion to set it aside for inadequacy of damages was granted, and new trial was ordered, and defendant appealed. Held that in view of fact that defendant also desired new trial, order would not be reversed. Hunt v. Long Island R. Co., 130 App. Div. 828, 115 NYS 478.

De minimis non curat lex: Error of $1 in amount of verdict too small to require reversal. Gambrell v. Gambrell [Ky.] 113 SW 885.

Nominal damages: Failure to assess nominal damages no ground for reversal. New York, etc., R. Co. v. Rhodes [Ind.] 86 NE 840; Cook v. Fidelity & Deposit Co. [C. C. A.] 167 F 95.

ject-matter of the controversy has been transferred to another.[59] Pro forma affirmance is governed by the same considerations as dismissal, and is treated in connection therewith.[60] Except in equity cases,[61] reversal or affirmance must ordinarily be entire,[62] unless the judgment is severable,[63] or a partial reversal is authorized by

59. Contention that judgment for plaintiff for money due should not be affirmed because claim assigned to another, not maintainable, where personal representatives of assignee parties at their own request were present and asked affirmance. Ives v. Newbern Lumber Co., 147 N. C. 306, 61 SE 70.

60. See ante, § 11G.

61. Freeland v. Williamson [Mo.] 119 SW 560.

62. Judgment erroneous as to one of several defendants must be reversed as to all. Eckels v. Henning, 139 Ill. App. 660; Willner v. Silverman, 109 Md. 341, 71 A 962; Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1; Guenther v. Moffett [N. J. Law] 71 A 153. Judgment against joint defendants reversed when liability was submitted on improper grounds, although there was evidence of liability properly submitted as to one of them, it being impossible to determine upon what verdict was based. Genovesia v. Pelham Operating Co., 130 App. Div. 200, 114 NYS 646. In action in trespass to try title and for damages for cutting timber on land in dispute, all defendants, except one, disclaimed title, and judgment was entered against them for damages. Other defendant claimed title by adverse possession, and court erroneously directed verdict against him on that issue., Held that reversal on that ground required reversal as to all defendants. Since, if said defendant had title, plaintiff was not entitled to damages against other defendants. Williams v. Texas & N. O. R. Co. [Tex. Civ. App.] 114 SW 877. Where in action against corporation and officer thereof liability is largely interdependent, new trial rendered necessary by stockholder of plaintiff corporation sitting as juror must be as to both defendants, although original judgment was against one only. Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 683, 64 SE 883. Where general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand, but new trial must be awarded upon all the issues of fact. Cerney v. Paxton & Gallagher Co. [Neb.] 119 NW 14. Where entire judgment for stated sum of money is in part erroneous on face of judgment roll, court has discretionary power to reverse it altogether. Lyden v. Spohn-Patrick Co. [Cal.] 100 P 236. New trial granted generally on all issues in exercise of discretion, though error affected only portion where facts would be more fully developed and questions more clearly presented, and injustice might be done unless new trial was granted. Hawk v. Pine Lumber Co., 149 N. C. 10, 62 SE 752. Where no admission of anything due and liability of defendant was litigated, and where on new trial defendant may give further proof of nonliability, judgment must be reversed as an entirety. Adams v. Carter [Miss.] 47 S 409. New trial on entire issue ordered, where in action for breach of contract questions of liability and amount of recovery were submitted in same issue, and instruction as to latter was incorrect. Wilkinson v. Dunbar, 149 N. C. 20, 62 SE 748. In action for default in payment of tax collected, where no admission of any amount due but recovery of spefied sum without penalty and plaintiff coerced payment and then appealed from entire judgment for disallowance of penalty, judgment as whole must be dismissed, since court could not affirm as to judgment and reverse as to penalty. Adams v. Carter [Miss.] 47 S 409. Where two causes of action are joined and court below is without jurisdiction as to one, if it is impossible to separate the verdict, new trial will be granted. Telzer v. Brooklyn Union El. R. Co., 61 Misc. 59, 113 NYS 18. Where court in awarding excessive damages did not award against two defendants for total found due, but awarded separate recoveries, and there was nothing in evidence by which correct amount each defendant was liable for could be ascertained, cause must be remanded for new trial. Houston & T. C. R. Co. v. Rogers [Tex. Civ. App.] 117 SW 1053.

63. Within supreme court's discretion to restrict new trial to issue or issues affected by error, where distinct. Rushing v. Seaboard Air Line R. Co., 149 N. C. 158, 62 SE 890. Where was verdict for plaintiff on each of four separate counts of complaint, in which damages awarded under each count were separately stated, held that reversal of judgment as to one count because based on unconstitutional statute did not require reversal as to others. George v. Chicago, etc., R. Co., 214 Mo. 551, 113 SW 1099. Where on appeal demurrer to first count of complaint was held to have been properly overruled, but it was held that demurrer to second count should have been sustained, held that upon remand it would not be necessary to retry issues raised by first count, but that court might, after disposing of issues arising out of second count, give judgment in accordance with findings already made upon issues arising out of first count, and such findings as might be made on issues arising out of second count. Fox v Monahan, 8 Cal. App. 707, 97 P 765. In action for accounting involving numerous transactions, where error is shown only with reference to one particular transaction, which is so distinct from rest that its effect upon the account can be readily examined into and determined, case may be remanded for further proceeding, with respect to such transaction only, and judgment affirmed in all other respects. Leeman v. Page [Kan.] 100 P 504. In action for damages and abatement of coal chute as nuisance as causing noise and dust and obstructing street, where relief for noise and dust was properly denied, but refusal of relief for obstruction of street was error, held that such error should not cause reversal of whole case, but that judgment would be allowed to stand without preju-

statute.[64] A judgment may, however, be modified and affirmed,[65] or the case remanded solely for the determination of issues not previously decided.[66] A reversal of a several judgment does not inure to the benefit of one not appealing.[67] Orders subsequent to and dependent upon the decision reversed are necessarily vacated by such reversal.[68] Concurrence of a majority of the court as constituted at the time of the decision is necessary to a reversal,[69] and, hence, where the court is equally divided in opinion, the judgment will be affirmed, either by operation of law[70] or by an affirmative order of court under its practice rules.[71] An affirmance does not necessarily sustain all the trial court's findings of fact.[72] The decision should be based on the facts as they exist at the time it is rendered.[73] The judgment of the

dice to new trial as to obstruction in street. Gray v. Charleston & W. C. R. Co., 81 S. C. 370, 62 SE 442. In action for damages and penalty for failure to adjust claim, under 24 Stat. 81, judgment sustained as to damages, though judgment as to penalty could not be sustained under Code Civ. Proc. 1902, § 145, requiring action to be tried in county where cause arose. Riley v. Southern R. Co., 81 S. C. 387, 62 SE 509. Where in action against several joint tort feasors there was no pleading by one defendant claiming contribution and no right asserted on appeal, judgment would be affirmed as to such defendant though reversed as to others. Wimpel v. Patterson [Tex. Civ. App.] 117 SW 1034.

64. Neither Code 1906, § 1574, authorizing reversal as to punishment and affirmance as to conviction in criminal case, nor § 4945, authorizing reversal of judgment as to damages, applies to judgment entered for failure to pay over taxes collected in civil case at law. Adams v. Carter [Miss.] 47 S 409.

65. See post, § 15C.

66. Breck v. U. S. Title Guaranty & Indemnity Co., 128 App. Div. 311, 112 NYS 756. Where testimony is insufficient to enable court to determine particular question, supreme court may determine other questions and remand case to court below with permission to take further testimony and enter supplemental decree determining question not decided. Hough v. Porter [Or.] 98 P 1083. On reversal of judgment for plaintiff in suit to quiet title under conveyance of homestead in which grantor's husband, with whom she was not living, did not join, held that case would be remanded for determination of question as to circumstances under which separation occurred on which necessity of joinder depended, cause not having been tried with reference to that aspect of case. Levis-Zukoski Mercantile Co. v. McIntyre [Miss.] 47 S 666. Judgment affirmed and remanded for accounting to ascertain amount of taxes and interest which plaintiffs should be required to pay. Halbouer v. Cuenin [Colo.] 101 P 763.

67. Judgment establishing lien against two parties held to have become final as to one of them who did not appeal, so that reversal of judgment against one who appealed did not affect judgment against the other. Exposition Amusement Co. v. Empire State Surety Co., 49 Wash. 637, 97 P 464, former opinion, 49 Wash. 637, 96 P 158.

68. Reversal of order renders necessary reversal of other orders dependent upon its validity. Schmitz v. Wyckoff, 128 App. Div. 326, 112 NYS 683. Reversal of order dismissing complaint necessarily implies reversal of judgment thereon. Banes v. Rainey, 130 App. Div. 465, 114 NYS 986.

69. Where only three justices who heard appeal were on bench when decision was to be rendered, and they were divided in opinion, held that reargument was necessary. Vlasservitch v. Augusta & A. R. Co. [S. C.] 64 SE 913.

70. Scott v. Jordan [Ga.] 63 SE 1115; In re Wells' Estate [Iowa] 120 NW 713; Wapello State Sav. Bank v. Colton [Iowa] 122 NW 149; Lawrence v. Vinkemulder [Mich.] 16 Det. Leg. N. 397, 122 NW 88; Dunkley v. McCarthy [Mich.] 16 Det. Leg. N. 403, 122 NW 126; where one disqualified and other two disagree. Binder v. Langhorst, 139 Ill. App. 493.

71. Unless there is a concurrence of majority of participating justices in support of at least one material ground of error, judgment must be affirmed of necessity. In re McNaughton's Will, 138 Wis. 179, 118 NW 997, rehearing denied 138 Wis. 179, 120 NW 288.

72. De Bow v. Wollenberg [Or.] 97 P 717, former opinion [Or.] 96 P 536.

73. Decree presently applicable not modified because inapplicable at time suit was brought. Turley v. Thomas [Nev.] 101 P 568. Objection that stock directed to be delivered to plaintiff was in a pool, not considered, since pool agreement has now expired. Turley v. Thomas [Nev.] 101 P 568. In appeal from action of replevin by husband against wife, where husband died pending appeal, from judgment for wife, wife by death inherited ring and became owner subject only to his debts or bequests, and, there being no debts or will shown, held that wife should retain ring and judgment would be affirmed, regardless of whether she was originally entitled to it. Lee v. Patterson [Miss.] 45 S 980. Where tenant was entitled to injunction against landlord, but lease expired pending appeal, case must be remanded for jury's assessment of damages, if demanded, injunctive relief being no longer proper. Greenblatt v. Zimmerman, 132 App. Div. 283, 117 NYS 18. In mandamus to compel installation of candidates for directors in corporation alleged to have been elected, where terms of certain candidates had expired when right was decided by court of appeals, writ will not be refused, but cause remanded for further proceedings so that pleadings may be amended and writ issued in favor of those entitled to same. Pope v. Whitridge [Md.] 73 A 281.

appellate court becomes effective immediately on its rendition.[74] On reversal of the decree of an intermediate appellate court, the case may be remanded to such court rather than to the court of first instance, where its ruling precluded a consideration of the merits.[75]

(§ 15) *B. Transfers and removals, certifications and reservations.*[76]—See 11 C. L. 242—Certification and reservation by a trial court to a reviewing court is elsewhere treated.[77] An appeal to a court of primary jurisdiction which should have been taken to a court of final appeal may be transferred by the former to the latter,[78] and vice versa.[79] Transfer or certification in case of failure of judges to

74. Covenant of warranty held breached when supreme court adjudged title to land to be in third person, so that vendee was not required to await filing of mandate in lower court before suing vendor for breach. Beach v. Nordman [Ark.] 117 SW 785.

75. If appeal was improperly dismissed by appellate court, held that on further appeal to supreme court order of dismissal would be reversed and case remanded to appellate court with directions to consider and determine it on merits, but if dismissal was proper supreme court would simply enter judgment of affirmance. Rosenthal v. Chicago Board of Education, 239 Ill. 29, 87 NE 878. Appellate court reversed without remanding on ground that lower court had no jurisdiction of subject-matter. Held that supreme court, on holding that lower court had jurisdiction, would remand case to appellate court to enable it to consider other errors assigned on record in that court. Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 NE 1085.

76. **Search Note:** See Courts, Cent. Dig. §§ 1288-1323; Dec. Dig. §§ 483-488; 11 Cyc. 992-995.

77. See ante, § 2B.

78. Appeal to court of appeal in equity case transferred to supreme court pursuant to Const. art. 6, § 4. Litch v. O'Connor, 8 Cal. App. 489, 97 P 207. Appellate court on adjudging that appeal should have been brought in supreme court shall direct clerk to transmit record and files to supreme court. § 102 Practice Act. Schlosser v. Warren Highway Com'rs, 136 Ill. App. 525. Appellate court should transfer actions designated by statute although judgment was rendered in trial court before statute went into effect. Action undetermined in appellate court when § 102 Practice act went into effect. Id. Where appellate court heard case over which it had no jurisdiction because freehold was involved, held that on further appeal to supreme court judgment would be reversed and cause remanded to appellate court with directions to order it transferred to supreme court. McComb v. McComb, 238 Ill. 555, 87 NE 353. Where after cause was transferred to appellate court by supreme court, appellees filed briefs properly presenting constitutionality of statute, which was not presented at time of transfer and hence not passed on by supreme court, held that case would be transferred to supreme court. East Chicago Co. v. East Chicago, 42 Ind. App. 383, 85 NE 783.

79. Where case which should have been appealed to district court of appeal was improperly appealed to supreme court, and was formally submitted upon briefs in latter court, held that submission would stand, but that case would be transferred to proper court. Bottle Min. & Mill. Co. v. Kern, 154 Cal. 96, 97 P 25. Appeal transferred from supreme to appellate court. People v. Cannon, 236 Ill. 179, 86 NE 215. Decision of supreme court transferring cause to appellate court after latter court had transferred to supreme court whether right or wrong is law of case and settles question of jurisdiction. Pittsburg, etc., R. Co. v. Peck [Ind.] 88 NE 939, rvg. 88 NE 627. Conclusively confers jurisdiction on appellate court under law as construed by supreme court unless supreme court for good cause sets transfer aside on application of aggrieved party. Pittsburg, etc., R. Co. v. Peck [Ind.] 88 NE 939. Under Acts, 1901, p. 565, c. 247, supreme court, on transfer by appellate court because of constitutional question, has jurisdiction as if cause had been originally appealed to it and may retransfer on determining that constitutional question is not involved. Id. Act repeals so much of Act Feb. 28, 1891 (Acts 1891, p. 44, c. 37), § 25 as amd. by Acts 1893 p. 31, c. 32, as to transfers as is inconsistent with it. Id. In Act Feb. 28, 1891 (Acts 1891, p. 44, c. 37), § 25, as amended by Acts 1893, p. 31, c. 32, providing for transfers, with words "and the action of such court in making such transfer shall be final" the words "such court" apply to supreme court and retransfer is final. Id. Where case appealed to supreme court does not disclose any question enumerated in Burns' Ann. St. 1908, § 1392, cl. 1, as to appeals directly, it must be transferred to appellate court. Id. Where question is raised in appellate court after transfer, retransfer is proper. Id. Supreme court may determine whether party raising question for first time in appellate court waived right to have same considered in supreme court. Id. On deciding adversely to party, supreme court may retransfer to appellate court. Id. Burns' Ann. St. 1908, § 1394, cl. 1, authorizing transfer on two judges believing that ruling precedent of supreme court is erroneous, does not authorize retransfer on ground that constitutional question is involved after supreme court had transferred on ground that such question was not involved, which question was conclusive. Id. Court of appeals having no jurisdiction to pass on constitutionality of statute, held that where case was transferred to that court from supreme court it would be conclusively presumed that no such question was involved. Pittsburg, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28.

agree,[80] or in case of difficulty or importance,[81] or conflicting decisions,[82] or on constitutional questions,[83] is sometimes provided for. On certification for the determination of particular questions, the certificate should specify the questions for decision,[84] and only the questions so certified will be considered.[85] A statutory right of removal from one court to another may be waived.[86]

Appeal to supreme court will be transferred to appellate court where jurisdictional amount not involved. Nick v. Bensberg [La.] 48 S 986. State v. Hingle [La.] 49 S 485. Ordered that appeal be transferred to court of appeal provided appellant or his attorney made oath that it was not taken for delay, and that if oath was not made appeal be dismissed. Texas & P. R. Co. v. Railsback [La.] 49 S 975. Appeal was taken to supreme court on ground that constitutional question was involved, appellant contending that charter provision was valid. Supreme court refused to take jurisdiction on ground that provision had previously been held unconstitutional, and transferred case to court of appeals. Held that constitutional question was not before latter court, but it would decide case on theory that provision was void. Dickey v. Orr, 132 Mo. App. 416, 111 SW 910. Appeal in action against railroad for damages for killing horse was transferred to supreme court by court of appeals on ground that constitutionality of statute requiring maintenance of cattle guards was involved. Supreme court returned case to court of appeals on ground that constitutional question was not involved because not raised in trial court. Held that court of appeals was not precluded from holding that action was common-law one based on violation of statute. Shell v. Missouri Pac. R. Co., 132 Mo. App. 528, 112 SW 39.

80. Under Acts 1901, p. 569, c. 247, § 15, where cause submitted to entire appellate court and four judges do not concur in result, case must be transferred to supreme court. Scholz v. Schneck's Estate [Ind. App.] 88 NE 638; Daily v. State, 42 Ind. App. 690, 86 NE 498; Truelove v. Truelove [Ind. App.] 86 NE 1000.

81. Federal supreme court will not answer question certified from circuit court of appeals which presents no distinct issue of law but rather calls for decision on whole case. Gustave Jahn v. Steamship Folmina, 212 U. S. 354, 53 Law. Ed. —. Questions of mixed law and fact determinative of whole case cannot be considered by supreme court on certificate from circuit court of appeals. Chicago, B. & Q. R. Co. v. Williams, 29 S. Ct. 514.

82. Under Burns' Ann. St. 1908, § 1394, if in any case two of the judges of the appellate court are of opinion that a ruling precedent of supreme court is erroneous, the case, with written statement of reasons for such opinion, must be transferred to supreme court. Crawford & McCrimmon Co. v. Gose [Ind. App.] 87 NE 709. Burns' Ann. St. 1908, § 1394, providing for filing of petition for rehearing in appellate court, and for transfer to supreme court on application of losing party when such petition is overruled on ground that decision is conflict with certain specified ruling precedents of that court is remedial statute and to be liberally construed. United States Cement Co. v. Cooper [Ind.] 88 NE 69. Appellant is losing party though judgment of trial court is reversed, where reversal is based on misconduct of appellee's counsel, and ruling by appellate court upon other points renders new trial unavailing. Id. Application for transfer from appellate to supreme court can be based only on ground that opinion of appellate court contravenes a ruling precedent, or that new question of law is directly involved and decided erroneously. Acts 1901, c. 247, § 10. Cleveland, etc., R. Co. v. Van Natta [Ind. App.] 88 NE 716. Power of certifying a question from court of appeals to supreme court under Const. Amend. 1884, § 6, rests solely upon determination of one of appellate judges that the decision is contrary to precedent and is not right which may be invoked by litigant. Barnett v. Colonial Hotel Bldg. Co. [Mo. App.] 119 SW 471. Court of appeals must determine for itself last previous ruling of supreme court on question involved and follow it, and it cannot decide case in manner admittedly contrary to last ruling, following previous ruling claimed to have been impliedly overruled thereby, and then certify case to supreme court as contrary to last ruling of that court. Houck v. Cape Girardeau Waterworks & Elec. L. Co., 215 Mo. 475, 114 SW 1098. Mandamus granted to compel certification of questions because of conflict between decision of court of civil appeals. Keeling v. Willson [Tex.] 116 SW 1199.

83. Certification of constitutionality of statute not to be resorted to where decision can be reached without decision as to constitutionality of law in question. Wimberly v. Georgia S. & F. R. Co., 5 Ga. App. 263, 63 SE 29. Where all objections to legislative act had been settled by supreme court decisions, appellate court will refuse to certify any of such questions, especially where no request to have decisions reviewed. Young v. State, 4 Ga. App. 827, 62 SE 558.

84. Where case is certified from court of appeals to supreme court because one or more justices dissent from decision, certificate should specify the very question for decision as it has arisen between the parties in the particular litigation, and should in itself present all that is necessary to decision thereof, clerks being required to send up record in such case only when ordered by supreme court. Pohie v. Robertson [Tex.] 115 SW 1166. Certificate held not based either on conflict of decision or dissent, court of appeals having made no decision. Id. Certificate held insufficient to present question. Id. Certified question considered though there had been no decision and though certificate was indefinite, where certificate showed difference between judges and court could see precise state question from record which accompanied certificate, and cause had been

(§ 15) *C. Remand or final determination.*[87]—See 11 C. L. 245—On reversal the ordinary practice is to remand for a new trial.[88] As a general rule, however, where the court has all the facts before it and it appears that but one result could legally and justly be rendered on a new trial, judgment absolute may be rendered,[89] or the

set down for argument and submitted without objection. Id. Certificate setting forth question as being upon alleged conflict of statute with Bill of Rights provision forbidding taking of property without due process authorzes supreme court to consider statute in light of constitutional provision directing such legislation. Dupree v. State [Tex.] 119 SW 301.

85. Snyder v. Baird Independent School Dist. [Tex.] 113 SW 621.

86. Where plaintiff in error failed to appear when case was regularly reached in state supreme court, and it was regularly submitted for determination in said court, held that he thereby elected to proceed in state court, and waived his right to thereafter move to have case transferred to federal court under Oklahoma enabling act (Act June 16, 1906, c. 3335, § 16, 34 St. 276) as amended by Act March 4, 1907, c. 2911, § 1, 34 St. 1286, providing for transfer of certain cases pending in federal court of appeals of Indian Territory at time of admission of Oklahoma as a state. Choctaw, O. & G. R. Co. v. Sittel [Okl.] 97 P 362.

87. **Search Note:** See notes in 2 L. R. A. (N. S.) 362; 8 Ann. Cas. 873; 11 Id. 865.

See, also, Appeal and Error, Cent. Dig. §§ 4573-4620; Dec. Dig. §§ 1175-1178; 3 Cyc. 450-459.

88. Haughton v. Aetna Life Ins. Co., 42 Ind. App. 527, 85 NE 1050, modifying 42 Ind. App. 527, 85 NE 125. New trial may be granted though appellate court has power to modify judgment. New York Cornice & Skylight Works v. Zipkin, 114 NYS 58. Where supreme court considered that defendant had not been guilty of negligence, but its action in so determining and ordering judgment for defendant might be construed as implied finding that plaintiff's injury was due to negligence of third person not made party, held that case would be remitted to lower court with directions to grant new trial and cause such third person to be made party defendant. Taylor v. Lumb Knitting Co. [R. I.] 70 A 1008. Reversal of judgment for plaintiff on ground that facts proved did not entitle her to recover held not to entitle defendant to have mandate instructing lower court to direct verdict in his favor, plaintiff being entitled to new trial. Gen. St. 1902, §. 802. Fay v. Hartford & S. St. R. Co. [Conn.] 71 A 734. Where averments of complaint and answers to interrogatories did not show negligence in manner complained of, but did show state of facts that might sustain action on ground that defendant was negligent in other particulars, held that, on reversal of judgment for plaintiff, new trial would be granted with leave to amend. Vigo Cooperage Co. v. Kennedy, 42 Ind. App. 433, 85 NE 986. Where evidence furnishes no substantial basis for amount of verdict or for a reduction thereof, new trial should be granted. Abrashkov v. Ryan, 130 App. Div. 429, 114 NYS 973. New trial ordered rather than reduction of recovery, where evidence of conversion of most of articles alleged to have been converted was not clear. Belfer v. Diedrick, 117 NYS 206. Where final disposition cannot be made for reason that case was dismissed at close of plaintiff's evidence, new trial may be granted under Rev. Codes, 1905, § 7229, in interests of justice. Massey v. Rae [N. D.] 121 NW 75. Where action instituted before adoption of Supreme Court Rule 27 (56 SE V) general reversal of judgment of circuit court on appeal alleging error in refusal to direct verdict and also to grant new trial did not have same effect as if verdict had been directed by circuit court and effect was to send case back for new trial. German American Ins. Co. v. Southern R. Co. [S. C.] 62 SE 1115. Where it appears that question of fact raised by evidence was not submitted to jury, new trial will be granted. Bryan v. Straus Bros. & Co. [Mich.] 16 Det. Leg. N. 292, 121 NW 301. Setting aside judgment and remanding case for trial de novo proper where for best interests of justice. Fletcher v. Ozone Lumber Co. [La.] 49 S 158. Where were grounds justifying new trial, and verdict was set aside and complaint dismissed on merits which defendant admitted was not justified, held that judgment would not be reversed with reinstatement of verdict, but case would be sent back for new trial. Frahm v. New York & Q. C. R. Co., 116 NYS 292. Where suit dismissed on exception referred to and not tried on merits, judgment of reversal must remand cause for trial on merits. Saint v. Martel, 122 La. 93, 47 S 413. Confessed error in instruction held to require new trial Valleroy v. Knights of Columbus, 135 Mo. App. 574, 116 SW 1130. Where it is impossible to determine upon which of several claims judgment was rendered, new trial will be granted on reversal for failure to render judgment equal to tender in court. Heller v. Katz, 62 Misc. 266, 114 NYS 806.

89. Irwin v. Deming [Iowa] 120 NW 645; Pullman Co. v. Caviness [Tex. Civ. App.] 116 SW 410. Prac. Act, § 110 (Hurd's Rev. St. 1908, c. 110). Prentice v. Crane, 240 Ill. 250, 88 NE 654. Where under supreme court's decision plaintiff cannot recover in any ovent. Cooper v. Brown [Iowa] 122 NW 144. On reversal for fatal variance, where limitations had run against cause of action which proofs tended to establish. Fisher v. Radford, 153 Mich. 385, 15 Det. Leg. N. 49, 117 NW 66. Judgment dissolving restraining order rendered under Rev. 1905, § 1542, authorizing rendition of judgment warranted by record. Griffin v. Southern R. Co., 150 N. C. 312, 64 SE 16. Where evidence was fully developed at trial and plaintiff was not entitled to recover, held that dismissal would be directed on reversal of judgment in his favor. Swaboda v. Throgmorton-Bruce Co. [Ark.] 115 SW 380. Where, in action for broker's commissions, appellate court found that

appellate court will otherwise do what the lower court should have done,[90] or remand the case with specific directions as to the disposition thereof,[91] particularly

broker was not procuring cause of sale, judgment was properly reversed without remand. Stone & Co. v. Ferry, 239 Ill. 606, 88 NE 186. Upon appellate court finding facts conclusive against plaintiff's right of recovery, remand is unnecessary. Curtis v. Cleveland, etc., R. Co., 240 Ill. 218, 88 NE 548. Though sale of mortgaged premises, made under vacated decree of foreclosure and without subsequent decree having been entered, was void, held that, since case was tried de novo on appeal and all evidence was before supreme court, decree of foreclosure might be entered there. B. & C. Comp. § 555. Waymire v. Shipley [Or.] 97 P 807. Where plaintiff could not obtain any advantage by new trial, on reversal of judgment for him, complaint will be dismissed. Coleman v. Bruch, 112 App. Div. 716, 117 NYS 582. Where claim of plaintiff cannot be sustained on reversal of judgment in his favor, court will direct dismissal. Kernodle v. Elder [Okl.] 102 P 138. When plaintiff has recovered judgment on an alleged written contract, which in fact imposes no obligation on defendant, appellate court in reversing an order refusing new trial will dismiss complaint. Booth v. Milliken, 127 App. Div. 522, 111 NYS 791. Where decree for contestants in will contest was reversed because evidence was insufficient to support it, held that supreme court on holding that second verdict for contestants was unsupported by evidence would reverse without remanding. Crumbaugh v. Owen, 238 Ill. 497, 87 NE 312. May enter final judgment for plaintiff in error where findings below fully protect every substantial right of defendant in error. Green County v. Thomas, 211 U. S. 598, 53 Law. Ed. ---. Where court directed jury to allow defendant's set-off, held that on reversal of judgment for plaintiff on defendant's appeal, judgment would be rendered for defendant for amount of such set-off, plaintiff not having appealed. Jordan v. Walker, 154 Mich. 394, 15 Det. Leg. N. 777, 117 NW 942. On reversal of judgment for minor plaintiff, who was too young to testify, on ground that there was no evidence to support it, held that case would not be remanded to enable evidence of plaintiff, who had since become old enough to be a competent witness, to testify, it being improbable that his testimony would be reliable under the circumsances. International & G. N. R. Co. v. Vallejo [Tex.] 115 SW 25, former opinion [Tex.] 113 SW 4. Where action to quiet title was brought by executrix without authority, held that supreme court on reversal would dismiss bill, and refuse remand to enable amendment by bringing of action on her individual capacity, where cause submitted to chancellor on pleadings and proof and complainant did not offer to amend in court below. Gulf Coke & Coal Co. v. Appling [Ala.] 47 S 730. Rehearing granted and final judgment rendered as prayed, where object for which case was remanded would thereby be accomplished. Wilkin v. Owens [Tex.] 117 SW 425, former opinion [Tex.] 114 SW 104.

90. Rev. St. 1895, art. 1027. Lewright v. Walls [Tex. Civ. App.] 119 SW 721; McClary v. Trezevant [Tex. Civ. App.] 112 SW 954. Where cause fully developed in trial court and uncontradicted evidence fails to establish cause of action. Missouri, K. & T. R. Co. v. Davis [Tex. Civ. App.] 118 SW 234. Where on appeal from order denying motion to reopen default both affidavits tending to excuse default and testimony at inquest, tending to show that plaintiff failed to establish a case, are before appellate court, it will review record and if satisfied that judgment is without merit will order default reopened. Davies v. Myers, 113 NYS 9. Supreme court not authorized to make order transferring case from chancery court to district court, though such case improperly brought in equity, order being for chancery court. Town of Woodville v. Jenks [Miss.] 48 S 620.

91. Court of appeals may direct any order necessary for proper adjudication of cause, and may give any direction to court below consistent with law and justice of case, including final disposition of cause. Finley v. Southern R. Co. [Ga. App.] 64 SE 312. Power will not be used unless lower court improperly used or neglected to use discretion. Id. Court of appeals has power to give directions necessary to focusing issues in case and ending litigation. Civ. Code 1895, § 5586. Fudge v. Kelly [Ga. App.] 64 SE 316. Power to remit for any purpose must carry with it authority to determine in what manner and for what purpose submission is made. In re Buffalo Frontier Terminal R. Co., 131 App. Div. 503, 115 NYS 483. Upon reversing appeal from probate court on issues of law alone, district court should remand cause with instructions to proceed according to its decision and judgment. Rev. St. 1887, § 3925, Const. art 5, § 20. Smith v. Clyne, 15 Idaho, 254, 97 P 40, Where there was no dispute as to facts, but only as to rule of law applicable thereto, held that on reversal case would not be remanded for new trial, but would be sent back with instructions to enter the proper judgment. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 98 P 509. Ordinarily reversal upon hearing de novo terminates the litigation, the opinion indicating character of decree to be entered but whenever essential to effectuate justice supreme court may remand to trial court for such further proceedings as circumstances of particular case require. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906. On reversal for failure to sustain plea of privilege to be sued in particular county, held that case would be remanded with directions to sustain plea and to enter order changing venue. Johnson v. Lanford [Tex. Civ. App.] 114 SW 693. Held that demurrer to equitable defense in action at law should not have been sustained, but that it should have been treated as motion to transfer to chancery court, and that cause would be reversed with directions to make such transfer. Crawford County Bank v. Bolton [Ark.] 112 SW 398. Where complaint did

not state cause of action within jurisdiction of court of equity, and objection was properly raised by demurrer, held that decree for plaintiff would be reversed, though cause of action at law was stated, and case would be remanded with directions to transfer it to court of law. Rowe v. Allison [Ark.] 112 SW 395. Defendant moved court to change answers to certain special interrogatories, or, in the alternative, for a new trial. Motion to change answers was granted, and alternative motion was not passed on. Held that, where granting of first motion was held erroneous, court might look into record sufficiently to discover whether, in any view of case, other motion was worthy of consideration, and, if not, remand case so as to end litigation, since, under St. 1898, § 3071, new trial is required to follow reversal only when necessary. Fleming v. Northern Tissue Paper Mill, 135 Wis. 157, 114 NW 841. Held that case would be remanded to give lower court opportunity to pass on motion for new trial. Id. On appeal from order refusing nonsuit which should have been granted as of right, plaintiff is not entitled to new trial under Ballinger's Ann. Codes & St. § 5071 (Pierce's Code, § 707) as for error in law occurring at trial, but only to reversal and order granting nonsuit. McPherson v. Seattle Elec. Co. [Wash.] 101 P 1084. Where case was pending before jury when nonsuit was erroneously granted, held that case would be reversed and remanded with directions to set aside nonsuit and proceed with cause in accordance with opinion, though on record plaintiff would have been entitled to peremptory instruction. Gracey v. St. Louis, 213 Mo. 384, 111 SW 1159. Where judgment reversed for error in sustaining general demurrer, case remanded with directions to allow amendment to cure defect pointed out by special demurrer. Wilson v. Central of Georgia R. Co. [Ga.] 63 SE 1121. Where case has been to court three times and there is error on record, judgment will be reversed but issues restricted and directions given for summary disposition of question remaining. Fudge v. Kelly [Ga. App.] 64 SE 316. Where on reversal of judgment of dismissal facts cannot be charged but amount due remains to be ascertained, interlocutory judgment will be entered for plaintiff and case remitted to ascertain amount of judgment. Weyand v. Randall, 131 App. Div. 167, 115 NYS 279. Supreme court in remanding partition proceeding for erroneous rule of valuation may formulate scheme of partition for lower court. Parrott v. Barrett, 81 S. C. 255, 62 SE 241. Fact that court in instructing jury made mistake in fixing date from which interest should be allowed held not to require retrial, but judgment would be reversed and case remanded with directions to enter judgment for amount found due with interest from proper date. Pelton v. Smith, 50 Wash. 459, 97 P 460. Error in directing verdict for defendant after jury had properly returned verdict for plaintiff held not to require new trial, but judgment reversed and case remanded with directions to enter judgment upon first verdict. Bell v. Old [Ark.] 113 SW 1023. Where judgment in favor of plaintiff in action against insurance company was improperly rendered because action was prematurely brought in that policy had not been surrendered for cancellation as required by its terms, held that it would be reversed and cause remanded with directions to order judgment in plaintiff's favor conditioned on his delivering policy to defendant within 30 days, or depositing it with clerk of court within that time and notifying defendant, and in case of nonperformance of said condition to render judgment dismissing action with costs. Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 NW 999. Though contract sued on was not established and defendant's consent to partial assignment of claim against it to plaintiff was not established, held that, defendant having acknowledged its indebtedness to plaintiff in certain sum and offered to confess judgment for that amount, judgment for plaintiff in excess of that amount would be reversed with directions to enter new judgment for that amount, all costs accruing after tender to plaintiff to be taxed to him. City of Pueblo v. Dye [Colo.] 96 P 969. Where verdict specially found amount plaintiff was entitled to recover under correct rule of damages, held that on reversal of judgment for less amount new trial was not necessary, but case would be reversed with directions to enter judgment for proper amount. Pettingill v. Goulet, 137 Wis. 285, 118 NW 845. Where plaintiff's right to recover was conclusively established by defendant's own evidence, and finding for defendant on his counterclaim was sustained by evidence, held that on reversal of judgment for defendant new trial was not necessary or proper within meaning of St. 1898, § 3071, but cause would be remanded with directions to enter proper judgment. Rosenberg v. McKinney, 138 Wis. 381, 120 NW 230. On petition for ad interim injunction and perpetual injunction where decree on interlocutory hearing granted injunction prayed for which was excepted to as unauthorized, direction is given that decree be amended so as not to grant perpetual injunction. Unity Cotton Mills v. Dunson, 131 Ga. 258, 62 SE 179. Where judgment in replevin was defective in form for failure to provide for payment of value of property if possession could not be had, but verdict contained all elements essential to entry of proper judgment, held that on reversal, new trial would not be ordered, but case would be remanded with directions to enter proper judgment. Duffy v. Wilson [Colo.] 98 P 826. Where findings are condemned because made by application of wrong rules of law and right of matter does not clearly appear from evidence, case on reversal will be remanded to trial court to find facts proceeding in light of correct legal principles. Luckow v. Boettger [Wis.] 121 NW 649. Where is no finding on material fact, and evidence in record is not directed to its ascertainment, case will be remanded with instructions to make finding upon such issue, and render judgment accordingly. Jobst v. Hayden Bros. [Neb.] 121 NW 957. In suit to cancel contract of sale lower court correctly found for defendant on issue of fraud and undue influence, and rendered judgment in its favor. Also found that there was mutual mistake as to

if the case was heard below upon an agreed statement,[92] or by the court without a jury,[93] or where the parties have so stipulated.[94] This power will not, however, be exercised in a doubtful case,[95] or where the result may be changed by further evidence,[96] or by an amendment of the pleadings,[97] or where the case was not fully

subject-matter, which finding was relevant to issues, though not ultimate issuable conclusion of fact set forth in complaint. Held that judgment would be reversed and case remanded for trial, upon supplemental complaint, whether there was negligence or acquiescence on part of party seeking relief. Moehlenpah v. Mayhew [Wis.] 119 NW 826. Where cause must be reversed and remanded for new trial on original cause of action, ancillary proceeding of attachment must also be remanded with instructions to sustain attachment if judgment for plaintiff obtained and otherwise to dissolve. Hogg v. Thurman [Ark.] 117 SW 1070. Since responsibility of employer for acts of superintendent under employer's liability act differs in some material respects from his common-law liability for conscious suffering before death, held that, where complaint sought to recover both under statute and at common-law in separate counts, and new trial was granted as to count under statute, verdict on other count being allowed to stand, new trial would not be limited to questions of damages. Dulligan v. Barber Asphalt Pav. Co., 201 Mass. 227, 87 NE 567. Under Comp. Laws 1907, § 3304, where findings are uncertain and insufficient, case will be remanded with directions to vacate findings and judgment, make findings of fact on all issues, to separately make conclusions of law on facts found and enter judgment accordingly. Utah Ass'n of Credit Men v. Home Fire Ins. Co. [Utah] 102 P 631. Where in suit to restrain defendant from interfering by operation of splash dams with use of water for power purposes, court could not determine from pleadings and evidence whether dams could be changed or modified and extent to which could be modified so as not to interfere with floating of logs, held that on reversal case would be remanded with directions to determine such questions. Trullinger v. Howe [Or.] 99 P 880.

92. On modification of judgment final judgment may be rendered. Granger v. Empire State Surety Co., 132 App. Div. 437, 116 NYS 973.

93. May render final judgment on reversing judgment in case tried without a jury. Taylor v. Welsh, 138 Ill. App. 190. Where evidence on ejectment case tried by court shows title in plaintiff and conclusions of trial court are properly presented, judgment for plaintiff will be rendered on reversal of judgment for defendant. Vary v. Sensabaugh [Ala.] 47 S 196. On appeal in equity case, supreme court may render judgment which equity and justice would require, after considering evidence. Jones v. Thomas, 218 Mo. 508, 117 SW 1177. Where demurrer to complaint challenging jurisdiction of chancery court was improperly overruled, held that supreme court would determine whether complaint stated cause of action at law, since case would not be remanded for transfer to court of law unless complaint stated cause of action at law or could be made to by proper amendments. Rowe v. Allison [Ark.] 112 SW 395. Where conclusions of law in case tried to court without jury are erroneous, is duty of court of appeals to render such judgment as trial court should have rendered under the law. First Nat. Bank v. McElroy [Tex. Civ. App.] 112 SW 801. Where no right to jury trial, supreme court may direct entry of particular judgment or decree, or give directions which will have that effect. Prentice v. Crane, 240 Ill. 250, 88 NE 654.

94. See, also, Stipulations, 12 C. L. 1962. Appellate division reversed judgment for plaintiff on law and facts, and granted new trial. Plaintiff appealed to court of appeals, stipulating that in case of affirmance judgment absolute should go against him. Held that court of appeals would render judgment absolute against him instead of dismissing appeal. Tousey v. Hastings, 194 N. Y. 79, 86 NE 831.

95. Venire de novo will be granted where appellate court cannot satisfactorily determine facts from evidence, and attempt to do so might result in injustice. Buck v. McKeesport [Pa.] 72 A 514. Final judgment not rendered on reversal where would be impracticable to determine proper amount with justice to both parties and without determining question of fact, but case remanded. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149. Where it was impossible from evidence to determine value of property in controversy upon which result depended, held that case would be remanded for further inquiry on that subject. Griswold v. Szwanek [Neb.] 118 NW 1073.

96. Where record indicates that other evidence may be obtained. Dunn v. Taylor [Tex.] 113 SW 265; Paris & G. N. R. Co. v. Robinson [Tex. Civ. App.] 114 SW 658. Where evidence shows plaintiff entitled to damages in some amount which can be determined on another trial, cause will be remanded. Police Jury v. Texas & P. R. Co., 122 La. 388, 47 S 692. On defendant's appeal plaintiff confessed error in that there was failure of proof on his part, and in action of court in overruling motion for new trial. Held that judgment would not be reversed without remand on theory that on retrial court would consider points relied on for reversal as ruled against appellant and rule accordingly, thus requiring another appeal, since on retrial case would be for trial de novo and respondent might introduce additional testimony, etc. City of St. Louis v. Sessinghaus, 216 Mo. 349, 115 SW 965. Where judgment for plaintiff is reversed because evidence is insufficient to sustain it, judgment will not be rendered by appellate court for defendant unless it affirmatively appears from the record that plaintiff could not present a different case on new trial. Fuller v. Margaret Min. Co. [W. Va.] 63 SE 206. On reversal court of civil appeals cannot render judgment upon evidence excluded at trial but must remand. Savage v. Umphries [Tex. Civ. App.] 118

tried below.[98] The appellate court has no power to remand except for matter appearing upon the record at the time of reversal or affirmance.[99] In many instances where the error can be corrected by the appellate court, the judgment will be modified so as to eliminate the error and as thus modified be affirmed,[1] especially where

SW 893. Reversal on account of erroneously excluded evidence does not warrant judgment on such evidence in appellate court. Id. On reversal of judgment for defendant for failure of proof held that judgment non obstante would not be granted since on new trial defendant might be able to supply defect in his proof. Rieck v. Daigle [N. D.] 117 NW 346. In personal injury action where evidence is such that verdict should be set aside, appellate court will reverse and remand case for new trial, unless evident that plaintiff cannot present better case. Hoylman v. Kanawha & M. R. Co. [W. Va.] 64 SE 536.

97. Where petition disclosed cause of action defectively stated, but objections thereto were made for first time by objections to evidence, which were sustained, held that, in interests of justice, judgment for defendant would be reversed and case remanded with leave to plaintiff to amend. Scruggs v. Endom [La.] 49 S 630. On appeal from decree of single justice in equity suit, where defendant made motion to be allowed to file supplemental answer in bar, held that decree would be vacated and case remitted for hearing on questions whether he should be allowed to file such answer, and, if filing was allowed, for further hearing upon matters set up therein, preserving to parties right to appeal. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 199 Mass. 488, 86 NE 660. Though, where were no exceptions below to evidence or to sufficiency of averments of bill, appellate court may, under Code Pub. Gen. Laws 1904, art. 5, § 36, decree according to proof, whether allegata and probata correspond or not, held that, where bill was filed and evidence offered on theory that court was authorized to restore property of divorced wife, purchased by her and conveyed to herself and her husband, apart from theory that she was coerced or unduly influenced into having conveyance so made, case would be remanded so that bill might be amended so as to allege coercion and undue influence, and parties might have opportunity to present evidence on that issue. Reed v. Reed, 109 Md. 690, 72 A 414. If necessary to accomplish ends of justice, supreme court may give leave to amend pleadings, or introduce additional evidence. Prentice v. Crane, 240 Ill. 250, 88 NE 654. Where amended petition stated a case for damages in excess of trial court's jurisdiction but original petition was not of record on appeal, case remanded for trial upon original petition, if it is within trial court's jurisdiction, or upon a proper amendment thereof. International & G. N. R. Co. v. Flory [Tex. Civ. App.] 118 SW 1116.

98. On reversal of judgment for defendant in action for conversion against purchaser of mortgaged chattels from mortgagee held that appellate court could not render judgment against said purchaser for its value, where lower court did not find its value. Adams-Burks-Simmons Co. v. Johnson [Tex. Civ. App.] 113 SW 176. Cause must be remanded for new trial in action for broker's compensation where issue of fact raised as to lots included in contract and such question was not passed upon, a general verdict being rendered. Mitchell v. Rushing [Tex. Civ. App.] 118 SW 582. Where defendant in trespass to try title was entitled to value of improvements, but evidence as to amount to which he was entitled was insufficient to sustain judgment in his favor, and amount to which he was entitled could not be determined from record, held that on reversal court of appeals could not render judgment which lower court should have rendered, but cause would be remanded to ascertain proper amount. Fain v. Nelms [Tex. Civ. App.] 113 SW 1002. Circuit court in error case has no power to render final judgment except in case of finding of controlling facts by trial court, or where conceded. Gilson v. Carrel, 79 Ohio St. 433, 87 NE 1136; Jones v. Fronfield, 79 Ohio St. 435, 87 NE 1137. New trial ordered for purpose of determining question of laches, which was not determined and was essential to decision. Duson v. Roos [La.] 49 S 590.

99. Cause not remanded for determination of right of appellee to reimbursement for expenses incurred, where no evidence in record that he had incurred any. Kirby v. Wylie, 108 Md. 501, 70 A 213.

1. Damages awarded in excess of amount claimed. Rexford v. Bleckley, 131 Ga. 678, 63 SE 337. Where amount recovered excessive. Georgia, F. & A. R. Co. v. Stanton & Co., 5 Ga. App. 500, 63 SE 655; Nelson Bennett Co. v. Twin Falls Land & W. Co., 14 Idaho, 5, 93 P 739. Order striking out pleading on account of scandalous and irrelevant matter therein modified so as to apply only to objectionable matter. Tierney v. Helvetia Swiss Fire Ins. Co., 129 App. Div. 694, 114 NYS 139. Order granting leave to amend modified so as to require payment of costs. Audley v. Townsend, 131 App. Div. 79, 115 NYS 145. Judgment of municipal court awarding specified sum instead of possession of chattels or their value in the alternative may be modified to cure error. Dunn v. Field, 113 NYS 485. Decree foreclosing contract modified so as to provide for payment of surplus into court to await determination of rights of bondholders under certain mortgages who were not represented in proceedings. Schmidt v. Gaukler [Mich.] 16 Det. Leg. N. 97, 120 NW 746. Where municipal court improperly dismisses cause without costs under Laws 1902, p. 1561, c. 580, judgment may be modified by striking words "without cost" and inserting "with costs." Eppoletto v. Zuhr, 60 Misc. 86, 111 NYS 565. Where judgment setting aside deed of incompetent to her husband erroneously annulled marriage, pleadings not authorizing such relief, held that it would be reformed so as to eliminate objectionable portion. Holland v. Riggs [Tex. Civ. App.] 116 SW 167. Per-

the error is merely formal or clerical,[2] or a mere matter of computation,[3] but a judgment will not be modified on affirmance where to do so would embarrass respondent in proceeding against persons secondarily liable.[4] Mere excessiveness in amount may usually be cured by requiring a remittitur as a condition of affirmance,[5] and the same is true of other errors where the amount recovered by reason

manent judgment granted inadvertently amended so as to be merely interlocutory. City of Brunswick v. Williams, 131 Ga. 426, 62 SE 230. In suit by vendor in possession to quiet title to land because of vendee's default, judgment was properly rendered for defendant on his tendering amount due into court. Allegation of supplemental petition that plaintiff had planted crop on land was improperly stricken. Before hearing on appeal plaintiff had gathered said crop. Held that judgment would be affirmed provided defendant would consent to modification giving to plaintiff crop on land when tender was made. McCullough v. Rucker [Tex. Civ. App.] 115 SW 323. Judgment modified to give plaintiff true fractional portion of valuation of property damaged, to which he was entitled. Aultman & Taylor Mach. Co. v. Gay, 108 Va. 644, 62 SE 946. Appellee having introduced demand below foreign to the bill and failed to have it eliminated in final decree may have decree modified to that extent but must pay costs. Towner v. Towner [W. Va.] 64 SE 732. Where judgment in action to recover land was defective in failing to sufficiently describe land, but was otherwise proper, and defect could be corrected from record, held that judgment would be affirmed with directions to enter judgment containing proper description. Latham v. Lindsey [Ky.] 113 SW 878. School district purchased land from one having only life estate and after expiration thereof person entitled to reversion recovered judgment therefor. Held that error in adjudging that school district should not remove improvements until specified sum allowed as rent had been paid did not require reversal, error being one which could be corrected on record on return of case. Trustees of Common School Dist. No. 31 v. Isaacs' Guardian [Ky.] 115 SW 724. Judgment in action on attachment bond for amount of damages assessed instead of judgment by penalty of bond to be satisfied by payment of damages assessed may be corrected. Rev. St. 1899, §§ 865, 866. State v. Reynolds [Mo. App.] 117 SW 653. Where time allowed by judgment for commencement of work of removing obstruction from river had elapsed by reason of appeal, held that on affirmance case would be remanded with directions to enter supplemental order as modification of original order allowing same length of time from date of such order. Ami Co. v. Tide Water Lumber Co., 51 Wash. 171, 98 P 380; Judson v. Tide Water Lumber Co., 51 Wash. 164, 98 P 377. Judgment for defendants in action by widow to recover crop made by husband on defendants' land with their consent, but without rent reserved, modified so as to allow her $50 as year's support and costs. Sessoms v. Tayloe, 148 N. C. 369, 62 SE 424.

2. In ordering remittitur for erroneous inclusion of certain items in judgment, appellate court may add to final sum an amount omitted from judgment below through clerical error. Coates v. Nyack, 128 App. Div. 886, 112 NYS 617.

3. Where only error is miscalculation. Rogers & Co. v. Emilio, 114 NYS 111. Verdict in excess of statutory limit of liability. Baum v. Daniels [Tex. Civ. App.] 118 SW 754; Keeley v. Great Northern R. Co. [Wis.] 121 NW 167. Where judgment in excess of what law would under pleadings permit. The Andrews Heating Co. v. Abbott, 143 Ill. App. 526. Where plaintiff's were entitled to recover, but verdict was too large by specified amount. Rucker v. Brown Bros. [Ga. App.] 65 SE 55. Error as to interest. Watkins v. Angotti [W. Va.] 63 SE 969. Where judgment was rendered under Act May 31, 1893, P. L. 185, for plaintiff for more than was admitted by defendant to be due. United Oil Cloth Co. v. Dash, 32 Pa. Super. Ct. 155. Findings of fact by referee have same force and effect as special verdict, and, when judgment is entered thereon for sum in excess of amount due, and excess can be readily determined from such findings, judgment will not be reversed but will be modified and district court directed to enter judgment for amount due. Lee v. Haizlip [Okl.] 99 P 806. Where record affords certain proof of excessive verdict, judgment of correct amount may be entered. McIntyre v. Smyth, 108 Va. 738, 62 SE 930. In action of replevin error in calculating damages for detention to date of entry of judgment instead of date of filing complaint, held not to require new trial where verdict found damages at specified rate per month. Compressed Air Mach. Co. v. West San Pablo Land & W. Co. [Cal. App.] 99 P 531.

4. Defendant died after entry of judgment against him and denial of motion for new trial, and administrator was substituted in his place. Held that, on affirmance of judgment it would not be modified so as to direct that it be paid in due course of administration, since judgment would become final as of date of entry, and modification might embarrass respondent in proceeding against sureties. Hendry v. Irvine [Cal. App.] 99 P 408.

5. St. Louis, etc., R. Co. v. Brabbzson [Ark.] 112 SW 222. Aluminum Co. v. Ramsey [Ark.] 117 SW 568; Price v. Greer [Ark.] 118 SW 1009; Mutual Life Ins. Co. v. Chambliss, 131 Ga. 60, 61 SE 1034; Seaboard Air Line R. v. Bishop [Ga.] 63 SE 1103; Freeman v. Matthews [Ga. App.] 64 SE 716; Quandt v. Ernst, 143 Ill. App. 299; Helms v. Appleton [Ind. App.] 85 NE 733; Nesbitt v. Nesbitt [Ind. App.] 86 NE 867; Canfield v. Chicago, etc., R. Co. [Iowa] 121 NW 186; Swift & Co. v. Redhead [Iowa] 122 NW 140; Western Union Tel. Co. v. Bodkin [Kan.] 101 P 652; Putz v. St. Paul Gaslight Co. [Minn.] 121 NW 1109; Southern R. Co. v. Curtis [Miss.] 49 S 269; State

thereof may be determined.[6] A party may also sometimes prevent a reversal by voluntarily abandoning a part of the relief claimed.[7] As between remand or dismissal of the case, the cause will be remanded.[8] In some states the case may be remanded on motion for further proceedings before determination of the questions involved.[9]

(§ 15) *D. Findings, conclusions and opinions on which decision is predicated.*[10]—See 11 C. L. 248—It is usually not the province of an appellate court, except where the trial is de novo, to make findings of fact,[11] but courts of intermediate re-

v. Flarsheim [Mo. App.] 119 SW 17; Yergy v. Helena L. & R. Co. [Mont.] 102 P 310; Ord Hardware Co. v. Case Threshing Mach. Co. [Neb.] 119 NW 682; Armstrong v. Auburn [Neb.] 122 NW 43; Berry v. Chester [Okl.] 100 P 519; St. Louis S. W. R. Co. v. Long [Tex. Civ. App.] 113 SW 316; St. Louis S. W. R. Co. v. Allen [Tex. Civ. App.] 117 SW 923; Houston & T. C. R. Co. v. Rogers [Tex. Civ. App.] 117 SW 1053; Tatum v. Kincannon [Tex. Civ. App.] 119 SW 113; City of Ft. Worth v. Williams [Tex. Civ. App.] 119 SW 137; Goggan v. Garner [Tex. Civ. App.] 119 SW 341; Nethery v. Nelson, 51 Wash. 624, 99 P 879; Nelson v. Western Steam Nav. Co. [Wash.] 100 P 325; Olson v. Erickson [Wash.] 102 P 400; Bruner v. Kansas Moline Plow Co. [C. C. A.] 168 F 218. Remittitur as condition to reversal of order granting new trial proper where previously accepted by plaintiff on denial of new trial which order was afterward set aside. Chandler v. Gloyd, 217 Mo. 394, 116 SW 1073. Where plaintiff offers to remit excess damages. Texas & P. R. Co. v. Graffeo [Tex. Civ. App.] 118 SW 873. Erroneous item deducted from judgment pursuant to remittitur filed by counsel, and judgment as reduced affirmed. Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777. Order granting new trial because of excessive verdict unless defendant paid reduced amount within specified time modified to permit new trial unless plaintiff remits excessive amount. Hall v. Northwestern R. Co., 81 S. C. 522, 62 SE 848; Jackson v. Southern Cotton Oil Co., 81 S. C. 654, 62 SE 854.

Held not curable by remittitur: Where question of punitive damages was improperly submitted to jury and was no means of excluding such damages. Taber v. Seaboard Air Line R. Co., 81 S. C. 317, 62 SE 311. Judgment in excess of amount endorsed on summons. American Audit Co. v. Miller, 11 Ohio C. C. (N. S.) 368. Verdict held so excessive that only proper course was to grant new trial. Johnson v. Great Northern R. Co. [Minn.] 119 NW 1061.

6. Admission of evidence. Greve v. Echo Oil Co., 8 Cal. App. 275, 96 P 904. Rejection of evidence. Hill v. Walker [C. C. A.] 167 F 241. Erroneous instruction. Clapp v. Vatcher [Cal. App.] 99 P 549; Siltz v. Springer, 236 Ill. 276, 85 NE 748; Schwitters v. Springer, 236 Ill. 271, 86 NE 102; Eaton v. Blackburn [Or.] 97 P 539, former opinion [Or.] 96 P 870. Special findings inconsistent with verdict. Francis v. Brock [Kan.] 102 P 472.

Held not curable by remittitur: Award of damages held not separable so that case was remanded for new trial notwithstanding offer to remit item based on erroneous instruction. Beauchamp v. Williams [Tex. Civ. App.] 115 SW 130.

7. Where lower court erroneously held that appellee had acquired title to whole tract of land by adverse possession, while evidence showed that he had only acquired title to part of it, location of which could not be determined on appeal, held that on reversal and remand, appellee might, if he so elected, decline such portion, and have a decree accordingly. Langhorst v. Rogers [Ark.] 114 SW 915. Plaintiff sued for penalties for several breaches of liquor dealer's bond in selling to plaintiff's minor son. Held that, where evidence clearly showed one breach, and no defense sufficient to defeat recovery therefor was shown on reversal for judgment for defendant, judgment would be rendered for plaintiff for penalty for one breach where he expressly abandoned any claim to recover for others. Carlton v. Krueger [Tex. Civ. App.] 115 SW 1178.

8. Where inquiry below was confined to effect of higher rate, on reversing decree enjoining enforcement of lower rate of telephone tolls established by a state commission, case will be remanded rather than dismissed by federal supreme court. Railroad Commission v. Cumberland Tel. & T. Co., 212 U. S. 414, 53 Law. Ed. —.

9. Motion to remand granted and case remanded with leave to defendants to put in further testimony and leave to complainant to reply thereto. Barthel v. Crippen [Mich.] 16 Det. Leg. N. 23, 120 NW 15. Question of remanding chancery suit for introduction of further testimony on behalf of appellant alleged to have been discovered after perfecting of appeal will be reserved until the hearing of the appeal. Barthel v. Crippen, 154 Mich. 499, 15 Det. Leg. N. 825, 118 NW 2. Motion to remand for purpose of obtaining decision on supplemental petition for rehearing on motion for new trial denied, appellant not having prosecuted appeal with diligence or in good faith. Starkweather v. Thorington's Estate [Mich.] 16 Det. Leg. N. 397, 122 NW 116. Where new evidence was discovered by appellant pending appeal from order denying new trial, held that, on application, supreme court would return record to circuit court with directions to entertain application for extension of time within which to move for new trial on that ground, if time fixed by statute had expired, and to hear and determine such motion. Fuller & Johnson Mfg. Co. v. Child [S. D.] 117 NW 523.

10. **Search Note:** See Appeal and Error, Cent. Dig. §§ 4380-4427; Dec. Dig. §§ 1100-1123; 3 Cyc. 403-412.

11. Circuit court, in error case, has no

view are often required to make such findings.[12] A written opinion is not always required.[13] In some states a decision must be rendered within a specified time.[14] An opinion of the appellate court is not such a final judgment or decree as will support a plea of former adjudication.[15]

(§ 15) *E. Modifying or relieving from appellate decree.*[16]—See 11 C. L. 249—An appellate court may at any time amend its judgment to conform to the decision actually made.[17] The power to bring forward a case decided at a previous term, and not remitted to another court, is discretionary.[18] A petition to recall a mandate will be denied where it asks the same relief as that sought by a petition for a rehearing previously denied.[19]

(§ 15) *F. Mandate and retrial.*[20]—See 11 C. L. 249—Filing of the mandate in the lower court transfers jurisdiction to that court.[21] Notice of filing is sometimes

power to make finding of facts which calls for review by supreme court, or conclusively binds court of common pleas. Gilson v. Carrel, 79 Ohio St. 433, 87 NE 1136; Jones v. Fronfield, 79 Ohio St., 435, 87 NE 1137. Will not make finding where evidence is not such as to show fact as matter of law. Edwards v. Gates [Tex. Civ. App.] 120 SW 585.

12. Appellate court must find ultimate and controlling facts, and not the evidentiary facts. Kehoe v. Marshall Field & Co. 237 Ill. 470, 86 NE 1054. Practice Act 1907, § 120 (Laws 1907, p. 443). Stone & Co. v. Ferry, 239 Ill. 606, 88 NE 186. Finding that defendant in error was not guilty of wrongs and injuries averred in declaration held finding of ultimate and controlling facts. Kehoe v. Marshall Field & Co., 237 Ill. 470, 86 NE 1054. General Order in Bankruptcy, 36, § 2, held not to require circuit court of appeals, of its own motion, to ascertain and determine in advance of its decision upon an appeal in bankruptcy whether question is raised upon which party is entitled to allowance of appeal to supreme court, but if such right is claimed it should be called to court's attention in advance of decision, with request for findings in event of an adverse finding on question alleged to be appealable. Knapp v. Milwaukee Trust Co. [C. C. A.] 162 F 675.

13. Burns' Ann. St. 1908, § 1401, does not provide for any written opinion by appellate court where judgment is affirmed. Cleveland, etc., R. Co. v. Van Natta [Ind. App.] 88 NE 716. Where judgment affirmed by appellate court and instructions approved without being set out, court would not on petition for rehearing make abstract of such instructions so that sufficiency might be determined in case of application for transfer. Id. Court of civil appeals is not required to file written opinion in affirmed cases not appealable to supreme court. Wright v. Hooker [Tex. Civ. App.] 118 SW 765; Markus v. Thompson [Tex. Civ. App.] 111 SW 1074.

14. Appeal dismissed where majority of court could not agree on question within six months after submission of cause, within which time Const. art. 7, § 5 requires decision to be rendered, one judge being disqualified and others equally divided. Grand Lodge A. O. U. W. v. Hobbie [Okl.] 100 P 540.

15. Lambert v. Rice [Iowa] 120 NW 96.

16. **Search Note:** See note in 2 Ann. Cas. 675; 3 Id. 939.

See, also, Appeal and Error, Cent. Dig. §§ 4632-4641; Dec. Dig. § 1185; 3 Cyc. 472-477.

17. Where clerk of supreme court in writing up judgment of affirmance by mistake made it provide for recovery of costs below as well as on appeal when it was not intended to disturb ruling of chancellor as to costs below, and mistake was not discovered, when record was approved, held that judgment would be corrected on motion to conform to opinion. Mt. Nebo Anthracite Coal Co. v. Martin [Ark.] 112 SW 882. Where mandate of reversal instead of affirmance was entered by inadvertence, held that court would of its own motion correct error and direct entry of judgment which was intended. Poole v. Tannis, 137 Wis. 363, 118 NW 864. Judgment reversing judgment entered on verdict and order denying motion on minutes for new trial will not be amended so as to read "reversed upon the law and not upon the facts," since status of appeal to court of appeals would not be affected thereby. Gross v. Kathairo Chemical Co., 129 App. Div. 411, 113 NYS 243.

18. Proceeding somewhat analogous to application for rehearing. Harwood v. West Randolph [Vt.] 72 A 1076.

19. Eldridge v. Hoefer [Or.] 96 P 1105.

20. **Search Note:** See notes in 17 A. S. R. 264; 96 Id. 124; 7 Ann. Cas. 116.

See, also, Appeal and Error, Cent. Dig. 4642-4723; Dec. Dig. §§ 1186-1222; 3 Cyc. 578-499; 13 A. & E. Enc. P. & P. 835.

21. Where remittitur has been regularly issued and transmitted to district court, appellate court thereby loses jurisdiction. Nystrom v. Templeton [N. D.] 117 NW 473. But remittitur irregularly, erroneously, or inadvertently issued does not deprive appellate court of jurisdiction, but it may recall same after it has been sent down and filed, and same is true where mistake is on part of clerk of appellate court, and is not discovered until after remittitur has been issued and filed. Id. Clerk notified defendant's counsel that new trial had been granted on reversal when in fact it had been granted as to minor issue only counsel was thereby misled and did not apply for reargument. Judgment was immediately entered below without giving defendant notice or opportunity to apply for recall of

required.[22] The mandate is conclusive on the court below, which must implicitly follow its directions.[23] An unqualified reversal of a judgment leaves the case as

remittitur to enable him to apply for rehearing. Held that prohibition would not issue to restrain lower court from vacating judgment, but matter would be left to its discretion. Id. Where supreme court obtained jurisdiction by general appearance, and under Ballinger's Ann. Codes & St. § 6521 (Pierce's Code, § 1069) reversed and remanded cause for new trial, lower court became vested with complete jurisdiction, notwithstanding defects in process served. Columbia & P. S. R. Co. v. Moss [Wash.] 102 P 439. Under Rev. 1905, § 604, as to motions for new trial for newly-discovered evidence on appeal, supreme court may entertain motion for new trial for newly-discovered evidence, after opinion is filed but before it is certified down, but, after such certification, motion must be made below. Smith v. Moore, 150 N. C. 158, 63 SE 735. Trial court cannot, after judgment has been affirmed by appellate division, with adjudication that one of its findings was unsupported by evidence, and after plaintiffs have stated that they will appeal from judgment of affirmance strike out such finding by nunc pro tunc order as inadvertently made. Ward v. Ward, 117 NYS 697. Striking not for purpose of opening judgment and granting new trial but to alter record for court of appeals from that acted on by appellate division. Id.

22. No notice necessary where more than two terms of trial court intervene between date of judgment and filing. Drovers' & Mechanics' Nat. Bank v. Northern Coal & Coke Co. [Ky.] 119 SW 151.

23. Chicago R. Equipment Co. v. National Hollow Brake-Beam Co., 239 Ill. 111, 87 NE 872, afg. 141 Ill. App. 572; Prentice v. Crane, 240 Ill. 250, 88 NE 654; Baum v. Hartmann, 143 Ill. App. 346; Gracey v. St. Louis [Mo.] 119 SW 949; Davis v. Davis [Vt.] 72 A 993; Dent v. Pickens [W. Va.] 64 SE 258. Decision of supreme court reversing judgment and remanding case with directions is binding on lower court, even though erroneous, remedy being by petition for rehearing. Baum v. Hartmann, 238 Ill. 519, 87 NE 334. Scheme of partition formulated for lower court must be carried out and not treated as suggestion. Parrott v. Barrett, 81 S. C. 255, 62 SE 241. Held that, though it was not expressly stated in remanding order that injunction should be made permanent under certain circumstances, such was clear and necessary implication from language used. Chicago R. Equipment Co. v. National Hollow Brake-Beam Co., 239 Ill. 111, 87 NE 872, afg. 141 Ill. App. 572. Where case was reversed and remanded with directions to render judgment for plaintiff on the verdict as rendered, held that power of lower court was confined to obeying directions, and could not consider questions raised by defendant. Aetna Ins. Co. v. Missouri Pac. R. Co., 132 Mo. App. 608, 112 SW 31. Judgment ordering reformation of record plat and dismissing action to declare title held in conformity with mandate declaring true plat but refraining from adjudication of title on account of insufficiency of evidence. Mason v. Gates [Ark.] 119 SW 70. Refusal to direct verdict held proper where such course would have been in face of opinion of appellate court rendered in an earlier stage of the litigation. Kehoe v. Rutherford [N. J. Err. & App.] 70 A 352. Where plaintiffs, suing life insurance society to avoid an increase in premiums, agreed to a continuance on condition principally that no further premiums be paid pending suit, and judgment for plaintiffs was reversed on appeal, on remand trial court properly allowed society's motion for judgment, such agreement not entitling plaintiffs to a determination fixing a rule for future assessments and dividend credits. Jones v. Provident Sav. Life Ass'n Soc., 150 N. C. 377, 64 SE 166. After direction of verdict for defendants by supreme court on merits, held irregular to permit intervention of other parties. Harrell v. Hagan, 150 N. C. 242, 63 SE 952. Mandate directing recommittal of report to master to find certain fact held not to preclude master in his discretion from hearing additional evidence. Scoville v. Brock, 81 Vt. 405, 70 A 1014. Finding of master exonerating defendant trustee for loss due to failure to dispose of certain securities held not beyond his authority as inconsistent with ruling of supreme court on demurrer to bill. Id. In action by widow for construction of will where appellate court held she could only sell to pay charges against estate, judgment setting aside principal judgment that plaintiff might use principal of estate for support, with further adjudication that plaintiff only took life estate, was proper. Bradshaw v. Baker [Ky.] 116 SW 261. Supreme court reversed decree dismissing bill in equity with directions that bill be reinstated and injunction awarded, with leave to defendant to move court below to open case for further testimony. Held that in again dismissing bill after reopening case and hearing further testimony lower court did not exceed its authority. Hannum v. Media, etc., R. Co., 221 Pa. 454, 70 A 847. Opinion of supreme court in litigation over claims to boom sites held to justify lower court in granting injunctive relief. State v. Nicomen Boom Co. [Wash.] 102 P 394. On appeal from formal decree entered by single justice in pursuance of rescript from full supreme judicial court, only question is whether decree properly conforms to rescript. Attorney General v. New York, etc., R. Co., 201 Mass. 370, 87 NE 621. Motion held not proper one for leave to file supplemental answer, and not to have set up such specific facts as should have been set up to entitle party to open case for new trial by reason of new matters of defense arising after trial and decision of issues previously raised. Attorney General v. New York, etc., R. Co., 201 Mass. 370, 87 NE 621. Motion held to have been addressed to discretion of court which was rightly exercised in denying it. Id. Where petition held to state cause of action and judgment on demurrer reversed, no retrial where defendant answered, court properly referred case to commissioner on issues of fact, and, judgment on merits being adverse to plain-

though no judgment had ever been rendered,[24] except as to matters adjudicated on the appeal, as to which the decision is the law of the case,[25] in so far as the issues

tiff, remedy was by appeal, and not by rule to show cause why court should not enter judgment in conformity with mandate. Barnett v. Cook [Ky.] 116 SW 792. Trial court held to have kept within ruling of supreme court in admission of certain evidence. Anderson Carriage Co. v. Pungs, 153 Mich. 580, 15 Det. Leg. N. 591, 117 NW 162. In case of general order reversing judgment and remanding without specific directions, further proceedings must be determined from nature of case. Prentice v. Crane, 240 Ill. 250, 88 NE 654. Where judgment reversed on merits and cause remanded without specific directions, only proceeding is to enter decree in accordance with opinion. Id. If upon remand for new trial lower court has proceeded in substantial conformity to directions of appellate court, its actions will not be questioned on second appeal. Oklahoma City Elec. Gas & P. Co. v. Baumhoff [Okl.] 96 P 758. Judge of circuit court cannot in any way alter judgment of higher court, nor can he exercise any discretion to do otherwise than perform the mere ministerial act of executing judgment of higher court. Moore v. Chattanooga Elec. R. Co. [Tenn.] 109 SW 497. Improper for court of chancery to determine effect of mandate. Davis v. Davis [Vt.] 72 A 993. Where judgment was reversed and remanded with directions to enter judgment for specified amount, held that trial court had no authority to enter judgment for interest in addition to amount so specified. German-American State Bank v. Sullivan, 50 Wash. 42, 96 P 522. Where judgment reversed on writ of error with costs of appeal, held that circuit court could not direct that certain of costs abide event. Berthold v. Burton, 169 F 495. Where on reversal on writ of error costs were adjudged against certain party, and judgment was made judgment of court below, held that such judgment was beyond control of latter court, regardless of final result of case. Scatcherd v. Love [C. C. A.] 166 F 53. To attack judgment of trial court for fraud after affirmance, permission of appellate court must be obtained. Kath v. Brown Histogenetic Medicine Co. [Wash.] 102 P 424. Motion in supreme court of Oklahoma to dismiss and hold for naught mandate of federal circuit court of appeals in case appealed to it from federal court of Indian Territory, on ground that neither of said courts had jurisdiction of subject-matter, denied without prejudice, it appearing that moving party would have adequate remedy after remand to trial court. Lewis v. Sittel [Okl.] 100 P 553. Decree framed by supreme court, which superior court is directed to enter as framed, is in effect decree of supreme court. Jastram v. McAuslan [R. I.] 71 A 454.

24. Ball v. Rankin [Okl.] 101 P 1105. Judgment set aside on appeal is entirely destroyed, and rights of parties as to issues tried are left as if no such judgment had been entered. Lawler v. Merritt [Conn.] 72 A 143. Reversal of order setting aside verdict, but omitting to set case for trial, reinstates verdict, and municipal court cannot thereafter set aside verdict and set case for retrial. Murphy v. Jolin, 116 NYS 715. Upon reversal of judgment and order denying new trial, a new trial is necessary, and judgment upon prior judgment roll, remittitur and opinion of supreme court is error. Davis v. Le Mesnager [Cal.] 101 P 910. Where on appeal in equity case order overruling exceptions to particular finding of fact was reversed and case remanded for proceedings, not inconsistent with opinions, held that, on filing of procedendo, case was before district court precisely as though originally submitted, court being fully advised in premises and decision announced though not entered of record. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906. Where at time defendant interposed exceptions to award because of misconduct of arbitrators, he appealed from award, and judgment against him was reversed and case remanded for new trial, held that it was thereafter immaterial what disposition was made of exceptions, so far as it affected subsequent trial. Burns v. Pennsylvania R. Co., 222 Pa. 406, 71 A 1054. Upon reversal, judgment ceases to be lien on defendant's property, under Code Civ. Proc. § 1321, unless reversal is appealed. Clinton v. South Shore Natural Gas & Fuel Co., 61 Misc. 339, 113 NYS 289. Order vacating on appeal order resettling conflicting orders is not vacation of conflicting orders. Feist v. Weingarten Bros., 115 NYS 539. By motion to determine which of conflicting orders shall stand, party waives any implied vacation. Feist v. Weingarten Bros., 115 NYS 539.

25. Lacroix v. Malone [Ala.] 47 S 725; Cummings v. Consaul, 30 App. D. C. 540; Bank of Commerce v. New York Life Ins. Co., 131 Ga. 312, 62 SE 179; Manternach v. Studt, 240 Ill. 464, 88 NE 1000; Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604; Louisville & N. R. Co. v. O'Nan's Adm'r [Ky.] 119 SW 1192; Young v. Ruhweddel, 132 Mo. App. 721, 112 SW 993; Cape Girardeau, etc., R. Co. v. Southern Illinois & Missouri Bridge Co., 215 Mo. 286, 114 SW 1084; Barnes v. Plessner [Mo. App.] 119 SW 457; Kirkwood v. Smith, 112 App. Div. 758, 117 NYS 686; People v. Ahearn, 117 NYS 810; Akin v. Bradley Engineering & Mach. Co., 51 Wash. 658, 99 P 1038; Wittler-Corbin Mach. Co. v. Martin [Wash.] 101 P 494. Judgment of appellate court remains law of case on remand, notwithstanding adjudication is another case by superior tribunal that judgment was erroneous. District of Columbia v. Brewer, 32 App. D. C. 388. Decree of superior court entered under mandate of appellate court awarded without jurisdiction, and pursuant to judgment of supreme court subsequently reversed, will be reversed. Foote v. Yarlott, 238 Ill. 54, 87 NE 62.

Decision held law of case: That action was brought in name of proper plaintiff. Gambill v. Cooper [Ala.] 48 S 691. That plaintiff could not maintain action. Olympia Min. Co. v. Kerns, 15 Idaho, 371, 97 P 1031. Judgment on motion to strike parts of pleading, which is equivalent to demurrer and goes to merits. Wapello State

Sav. Bank v. Cotton [Iowa] 122 NW 149. Where petition held deficient in certain particulars and errors cured by amendment, held error to sustain demurrer and dismiss action. Johnson v. Babcock Bros. Lumber Co. [Ga.] 63 SE 621. That question was for jury under evidence. Boyd v. Taylor, 202 Mass. 213, 88 NE 777; McQuisten v. Detroit Citizen's St. R. Co. [Mich.] 16 Det. Leg. N. 416, 122 NW 107. Instructions approved should be used on retrial. Louisville & N. R. Co. v. Payne [Ky.] 118 SW 352. Where judgment is reversed for insufficiency of evidence, verdict should be directed on second trial where evidence is substantially the same. Crumbaugh v. Owen, 238 Ill. 497, 87 NE 312; Block v. Great Northern R. Co., 106 Minn. 285, 118 NW 1019; Anderson v. Union Stockyards Co. [Neb.] 120 NW 1124. Where supreme court sent case back for new trial on ground that weight of evidence indicated cause of death wholly unconnected with any negligence of defendant, held that, evidence at second trial being substantially same, it was error to charge that there was no evidence pointing to such extraneous cause. Brink v. North Jersey St. R. Co. [N. J. Law] 71 A 1120. That justice's judgment was valid. Simmons v. Dolan [Iowa] 119 NW 690. That title to property was in defendant. Young v. Chandler [Me.] 71 A 652. That deed was procured by fraud. Prentice v. Crane, 240 Ill. 250, 88 NE 654. That action of trustees converted defendant's tenure of office from one for indefinite period to one for year. Wapello State Sav. Bank v. Colton [Iowa] 122 NW 149. That plat properly designated waters proposed to be appropriated by boom company. State v. Nicomen Boom Co. [Wash.] 102 P 394. As to liability of sureties on guardian's bond. Baum v. Hartmann, 238 Ill. 519, 87 NE 334. Affirmance of decree in suit to falsify and surcharge trustees' accounts held to render same a finality, both with respect to items to which attention of court was called and all accounts which trustees had settled prior to institution of suit, including item not mentioned in bill or brought to court's attention, but which might have been. Miller v. Smith [Va.] 64 SE 956. Where, on overruling of demurrer to complaint defendant refused to plead further, but stood upon demurrer, held that affirmance of judgment thereupon entered against him precluded him from setting up any further defense on return of case to lower court. Hunt v. Phillips [Ky.] 115 SW 758. On remand from supreme to appellate court with orders to dismiss the appellate, decree becomes void. Gottmanhauser v. Wolfing, 127 Ill. App. 485, see 224 Ill. 270, 79 NE 611.

Decision held not controlling: As general rule, question arising on former appeal will be deemed res adjudicata only when it must have been fairly presented to court as necessary to decision of case and directly considered and decided. Ables v. Ackley, 133 Mo. App. 594, 113 SW 698. Issues left undetermined may be litigated. McKinnon v. Johnson [Fla.] 48 S 910. Ruling on former appeal held merely that defendant had waived objection to competency of witness, and not that she was competent. Ables v. Ackley, 133 Mo. App. 594, 113 SW 698. Adjudication in ejectment that defendant had no paper title held not to preclude him from establishing title by adverse possession. McKinnon v. Johnson [Fla.] 48 S 910. An issue made by pleadings not incidental or essential to determination of subject-matter of action, relating to distinct and separate matter and which record shows was left undetermined, though it might have been adjudicated, is not concluded by judgment. Brennan v. American Sulphur & Min. Co. [Colo.] 100 P 412. Judgment that mineral lease to defendant was valid and lease to plaintiff was invalid held not to have determined plaintiff's right to damages for defendant's acts in ousting him and converting his personalty, that question not having been litigated or in any matter involved. Id. Doctrine of law of case presupposes error in enunciation of principle of law applicable to facts of case under review. Allen v. Bryant [Cal.] 100 P 704. Doctrine is rarely applied to matters of evidence as distinguished from rulings on questions of law, and sufficiency of evidence to justify decision must be determined by trial court, and is not controlled by opinion of appellate court that similar evidence on former trial was insufficient to sustain similar decision. Id. Trial court is not controlled by conclusion as to matters of fact to be determined from evidence. Prentice v. Crane, 240 Ill. 250, 88 NE 654. Decision held not to have passed on fact questions as finality, so that after remand case stood for trial unaffected by appeal except as to questions of law decided, and was open to consideration on merits. Steele v. Crabtree [Iowa] 120 NW 720. Decision of appellate division that upon certain issue verdict for plaintiff was against weight of evidence held not to warrant exclusion of competent evidence on same issue on second trial. Sticht v. Buffalo Cereal Co., 195 N. Y. 70, 87 NE 801. Where there is no suggestion on appeal that there was question of fact for jury, reversal as contrary to evidence is no authority for trial court to dismiss new action on substantially same testimony. Blair v. Minzesheimer, 116 NYS 890. Where partition decree was entered without defense on part of guardian of infant party or report that guardian was unable to make defense as required by Civ. Code Prac. § 36, subsec. 3, such objection could be raised in trial court after decree and order confirming sale had been affirmed. Palmer v. Husbands [Ky.] 119 SW 762. Statement in opinion that question of misrepresentation in procuring policy should have gone to jury held not to require jury to pass on materiality of testimony. Fidelity Mut. Life Ins. Co. v. Miazza [Miss.] 48 S 1017. Statement in opinion that it could hardly be doubted that insurer would not have insured deceased if he had disclosed character of illness held not to preclude finding if no material misrepresentation. Fidelity Mut. Life Ins. Co. v. Miazza [Miss.] 48 S 1017. In action on life and accident policy where construction assumed by defendant and proceeded on by appellate court, resulting in reversal and remand, plaintiff on new trial may contend for different construction, when not committed to that adopted by defendant. McAuley v. Casualty Co. of America [Mont.] 102 P 586. Question of construction not raised on first appeal. Id.

and evidence are in legal effect the same,[26] and, where rights or property have been parted with, the party who gave them up is entitled to restitution,[27] though the contrary has been held as to purchasers of land at a sale pursuant to a judgment subsequently reversed.[28] As a general rule a party may amend his pleadings after remand [29] and introduce additional evidence.[30] On reversal of an order substitut-

26. Doctrine does not apply where evidence at second trial is substantially different from that offered on former one. Allen v. Bryant [Cal.] 100 P 704. Trial court bound by decision only to extent that it must follow it if same state of facts appears on retrial. Williams v. Butterfield, 214 Mo. 412, 114 SW 13. Supreme court held that record deed was not notice to subsequent purchaser because it was not acknowledged and hence not entitled to record, and remanded case in order that defendant might have opportunity of introducing any other evidence and of showing that purchaser had actual notice. Held that defendant was not thereby precluded from introducing original deed with acknowledgment on it duly certified by recorder of deeds, or from showing that record itself disclosed existence of such acknowledgment. Id. Judgment that denial of new trial was erroneous in that verdict was contrary to evidence held not to prevent recovery on new trial where pleadings and evidence were substantially different. Austin v. Central of Georgia R. Co., 8 Ga. App. 775, 61 SE 998. Where, upon remandment, cause is dismissed or plaintiff suffers nonsuit, and new action is brought upon same cause of action in another form, principles of law announced by appellate tribunal will not necessarily control in decision of case in new forum. Jones v. Supreme Lodge K. of H., 236 Ill. 113, 86 NE 191. Order modifying temporary injunction is not res adjudicata even after it is affirmed by supreme court, but whole subject matter may be retried and reviewed on final hearing. Kuchler v. Weaver [Okl.] 100 P 915.

27. Where judgment or decree is reversed by final judgment on appeal, a party is in general entitled to restitution of all things lost by reason of the judgment in the lower court and courts will, where justice requires it, place him as nearly as may be in the condition in which he stood previously. Ward v. Sherman [Cal.] 100 P 864. Restitution may be directed and provided for in the original suit itself (Code Civ. Proc. § 957), or may be sought in separate action instituted for that purpose. Id. In an action for restitution defendant must account for property received under reversed judgment, rule governing extent of his liability being that applicable to a trustee, and he not being liable for losses where he has acted in good faith and with common care and diligence. Id. Judgment awarding ranch and personalty thereon was reversed. It appeared that he conducted business of ranch with care and diligence, with exception of one unauthorized expenditure, and that expense properly incurred over amount received by him exceeded sum so expended. It also appeared that he had returned to plaintiff all the property received by him except so much thereof as had been properly used or lost by reason of circumstances for which he was not responsible. Held that judgment for defendant was proper. Id. Where defendant sold ranch awarded him by judgment, which was subsequently reversed, and property was returned to plaintiff, held that latter had no right to recover purchase price also. Id. Rights of purchaser in good faith relying upon decree of court of equity affecting title to property before writ of error, will be protected though decree is reversed. Chicago & N. W. R. Co. v. Garrett, 239 Ill. 297, 87 NE 1009. Where pending appeal without supersedeas from foreclosure decree mortgagee purchased property at foreclosure sale, held that on reversal of decree mortgagee was bound to make restitution of premises, which could properly be done by disclaiming any title under sheriff's deed. National Surety Co. v. Walker [Iowa] 117 NW 1114. Though appellant fails to supersede erroneous judgment which is later executed, appellate court should reverse it, and, if it appears equitable and just, appellant should be permitted to seek restoration. In re Jones' Estate [Neb.] 120 NW 439. Declaration of forfeiture pending appeal from perpetual injunction restraining same is subject to result of appeal. Chicago R. Equipment Co. v. National Hollow Brake Beam Co., 141 Ill. App. 572.

28. As general rule reversal of judgment does not affect title or possession of purchaser at sale made thereunder before such reversal, though he may be the plaintiff or a party to the action. Turner v. Middlesboro [Ky.] 117 SW 422. Rule held to have no application to sale of infant's land not bought by bona fide purchaser. Id. Strangers to divorce decree granted wife, who in good faith acquired title to wife's property, whether with or without notice of writ of error sued out without supersedeas, held not affected by reversal of decree, and title not affected by reversal. Chicago & N. W. R. Co. v. Garrett, 239 Ill. 297, 87 NE 1009.

29. Green v. Massee & Felton Lumber Co. [Ga. App.] 65 SE 44; Prentice v. Crane, 240 Ill. 250, 88 NE 654; Ebelhar v. German-American Security Co.'s Assignee [Ky.] 119 SW 220; Ball v. Rankin [Okl.] 101 P 1105; St. Louis, etc., R. Co. v. Alverson [Tex. Civ. App.] 114 SW 673. Where case is remanded for further proceedings according to law, trial court may, and it is its duty to permit such amendment of pleadings as justice requires, and its action in so doing will not ordinarily be disturbed. Smith v. Schlink [Colo.] 99 P 566. If court commits error in such case, its action may be reviewed on appeal or error, if exceptions to rulings are duly preserved. Id. Where case sent back for new trial, power of circuit court to grant amendments is same as if there never had been a trial. Taylor v. Atlantic Coast Line R. Co., 81 S. C. 574, 62 SE 1113. Action may substitute new cause of action. Manhattan Rolling Mill v. Dellon, 116 NYS 583; German American Ins. Co. v. Southern

ing an improper party, the proper party may be given a reasonable opportunity to plead.[31] Provision is sometimes made that a retrial must be had within a specified time after remand.[32]

§ 16. *Rehearing and relief thereon.*[33]—See 11 C. L. 252—After final decision, a motion for rehearing may, in the discretion of the court, be entertained to correct error or oversight of the court,[34] but a rehearing will not be granted where the re-

R. Co. [S. C.] 62 SE 1115. To conform pleadings to proof. Hanson v. Cline [Iowa] 118 NW 754; Louisville & N. R. Co. v. Hurst [Ky.] 116 SW 291. Where decree is reversed because not authorized under allegations of bill complainant. Schmitt v. Weber, 239 Ill. 377, 88 NE 268. In action by father for wrongful death of son held proper to allow amendment adding name of mother as party plaintiff. Bracken v. Pennsylvania R. Co., 222 Pa. 410, 71 A 926. May amend to cure jurisdictional defect. Yeandle v. Pennsylvania R. Co. [C. C. A.] 169 F 938. No objection to allowance of amendment to declaration that motion was made after rescript had been sent from supreme judicial court, and that new counts stated liability differently from original count, it being found that it was liability of defendant growing out of its failure to perform its contract, in whatever form it might exist, that was intended to be enforced when action was brought. Commonwealth v. National Cont Co., 201 Mass. 248, 87 NE 590. Assignees of bank permitted to file amended pleading as to disposition of deposit garnished, which might be applied on debt. Wallace v. Estill County Deposit Bank [Ky.] 116 SW 351. Upon remand with opinion that plaintiff has right to damages up to time of trial, he may file amended petition, not based upon supersedeas bond, for such damages although they might have been recorded upon original petition. Cumberland Tel. & T. Co. v. Cartswright Creek Tel. Co. [Ky.] 119 SW 793. To justify filing of amendment after remand of cause heard de novo on appeal, matters must have arisen subsequent to decree, or things happened pending proceedings, which could not have been considered at trial, or owing to some other contingency which reasonable foresight could not well have guarded against. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906. Where equity case was reversed solely on ground that court erred in overruling exceptions to particular finding of fact by referee, held that it was error to overrule motion to strike amendment eliminating paragraph of reply relating to another matter. Id. Code, § 3600, authorizing amendment which does not substantially change claim or defense by conforming pleadings or proceedings to facts proved held to have no application in such case. Id. P. S. § 1317, authorizing chancery court, after mandate has been filed in cause determined by supreme court to permit amended pleadings and hearing by master of additional evidence, and § 1318, providing for same proceedings as in original action after filing of master's report, do not authorize permission for filing of amended pleadings to losing party after mandate from supreme court has been filed in case heard on merits. Sheldon v. Clemons [Vt.] 72 A 687. Amendment for failure to plead a cause of action can be allowed only upon payment of all costs and disbursements before date of granting relief. Audley v. Townsend, 131 App. Div. 79, 115 NYS 145. Where judgment is reversed or not supported by complaint motion to amend will be granted only on payment of all costs since service of answer. Woolsey v. Brooklyn Heights R. Co., 129 App. Div. 410, 113 NYS 245.

30. Prentice v. Crane, 240 Ill. 250, 88 NE 654. Where equity case is remanded for proceedings not inconsistent with opinion, trial court has discretionary power, upon proper showing to grant leave to permit introduction of evidence omitted through inadvertence. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906. Permission to introduce additional evidence after reversal is not matter of right and should seldom be granted except where evidence has been discovered, since submission or acts have occurred pending the proceedings vitally affecting relief to be granted. Id. Held not abuse of discretion, under circumstances, to permit introduction of evidence to take place of evidence held incompetent. Id. Held not error for court to receive such evidence without referring case back to referee. Id.

31. Peninsular Naval Stores Co. v. Cox [Fla.] 49 S 191.

32. Under Rev. Codes 1905, § 7228, requiring trial within one year after remand, delay beyond that period, if not sufficiently excused, warrants dismissal. Bessie v. Northern Pac. R. Co. [N. D.] 121 NW 618. Neither admission of service of notice of trial nor appearance at preliminary call of calendar constitutes waiver of right to demand dismissal for failure to bring new trial within statutory time after remand. Id.

33. **Search Note:** See Appeal and Error, Cent. Dig. §§ 3209-3246; Dec. Dig. §§ 830-835; 3 Cyc. 212-219; 18 A. & E. Enc. P. & P. 1; 2 Id. 382.

34. Applications for rehearing cannot be made as matter of right, and are not entered upon records unless justices, in their discretion, think they ought to be. Powers v. Sturtevant, 200 Mass. 519, 86 NE 789. If, after receiving application for reargument, justices do not recall rescript, or otherwise suggest postponment of action by lower court, application to single justice to postpone entering judgment is addressed to his discretion, and refusal is no ground for bill of exceptions. Id. Rehearing granted and final judgment rendered as prayed, where object for which case was remanded would thereby be accomplished. Wilkin v. Owen [Tex.] 117 SW 425, former opinion [Tex.] 114 SW 104. Portion of opinion covering question not argued orally on appeal or tried out below withdrawn and motion de-

sult would not be changed,[35] or to permit the making of a motion which can be made below,[36] or to consider points not raised on the hearing,[37] and as a general rule amendments to the record will not be allowed on such an application.[38] The petition must be filed by a party to the suit[39] within the time fixed by statute or rule[40] and before jurisdiction is lost,[41] and must specify the points relied on.[42] The necessity for service is governed by statute and the rules of court.[43] Approval by one or more of the justices is sometimes required.[44] Affidavits filed in support of the application will not be considered as evidence on the hearing.[45] On rehearing the original decision may be modified.[46]

§ 17. *Liability on bonds, and damages and penalties for delay.*[47]—See 11 C. L. 264

nied. Southern R. Co. v. Adkins' Adm'r [Ky.] 119 SW 820.

35. In re McNaughton's Will, 138 Wis. 179, 120 NW 288. Will not consider question which has become immaterial since original hearing. State v. Clausen, 51 Wash. 689, 101 P 835. That chief justice in opinion affirmed nonsuit on ground not raised by pleadings or motion held not ground for rehearing, where he also relied on insufficiency of evidence in which view another of the justices concurred, result of which was an affirmance of the judgment though two justices dissented. Hughes v. Southern R. Co. [S. C.] 63 SE 5. Granting of rehearing for error in reversing judgment for error in refusing instructions which were not properly in record would not aid appellee where question was presented by properly preserved objections by appellant to admission of evidence as well as refusing instructions. Indianapolis & W. R. Co. v. Branson [Ind.] 88 NE 594.

36. Order to docket application for rehearing is based on error of law in previous decision. Smith v. Moore, 150 N. C. 158, 63 SE 735.

37. State v. Birmingham [Ala.] 48 S 843; Hamilton v. Hamilton [Iowa] 118 NW 375; Kirman v. Johnson [Nev.] 96 P 1057; Van Dyke v. Cole, 81 Vt. 379, 70 A 1103. Point or question not presented in original brief. Superior Court Rules 22, 23 (55 NE v, vi). Indianapolis & W. R. Co. v. Branson [Ind.] 88 NE 594; Cleveland, etc., R. Co. v. Lynn [Ind.] 86 NE 1017; City of Garrett v. Winterich [Ind. App.] 88 NE 308. Questions not presented by appellant in his original presentation of the case and overlooked by court. Toledo & C. Interurban R. Co. v. Wilson [Ind. App.] 88 NE 864. Where laches was pleaded and argued in brief, contention that one of plaintiffs was minor and not affected by laches could not be first raised on motion for rehearing. Stuckey v. Lockcord [Ark.] 112 SW 747. After submission and decision on appeal from a decree of sale in probate, it is too late to apply for alternative remedy of mandamus on rehearing. Gartman v. Lightner [Ala.] 49 S 412.

38. Where appellee's motion to affirm on certificate was denied for deficiencies in original certificate on motion for rehearing appellee was not entitled to file amendments curing defects, where no excuse for same offered. Sloan v. McMillin [Tex. Civ. App.] 116 SW 624. New affidavits which form no part of return on appeal cannot be used on reargument to strengthen respondents' position. Mannion v. Steffens, 115 NYS 1087.

39. Amicus curiae has no standing to apply for rehearing. Bayou Terreaux Boeuf Com'rs v. Baker [La.] 48 S 654.

40. Supreme court rule 7 allowing 40 days from filing of opinion or rendition of judgment within which to file motion for rehearing supersedes general rule as to judgments, becoming final at expiration of term at which they are rendered, and provisions of Code Civ. Proc. § 602, et seq., apply only in cases brought under original jurisdiction of court. State v. Lincoln St. R. Co., 80 Neb. 333, 118 NW 326. Under Act 1896, p. 149, No. 100, three days are allowed for filing petition for rehearings in court of appeals. Act not abrogated. Hargis v. Ozone Lumber Co., 122 La. 126, 47 S 432.

41. Supreme court cannot grant rehearing after original decree has become final. Bayou Terre Aux Boeuf Com'rs v. Baker [La.] 48 S 654.

42. Must point out wherein court erred in result reached upon original hearing, and general statements or assertions that decision is erroneous will not suffice. Hanley v. Mason, 42 Ind. App. 312, 85 NE 732. Petition giving no reason, argument, or authority in support of any of its specifications, held to present no question for consideration and dismissed. Id.

43. Cause being pending until expiration of 60 days from filing of opinion of court, within which time losing party has statutory right to file petition for rehearing, no notice of filing such petition is necessary. Hanley v. Mason, 42 Ind. App. 312, 85 NE 732.

44. Under rule 53 (53 SE xi), petition for rehearing resting on error in opinion requires approval of one or more justices before it can be docketed for consideration. Smith v. Moore, 150 N. C. 158, 63 SE 735. Mere application for rehearing, not ordered docketed by justice to whom presented does not put cause in supreme court so as to give it jurisdiction of motion for new trial for newly-discovered evidence. Id.

45. Anse La Butte Oil & Mineral Co. v. Babb, 122 La. 415, 47 S 754.

46. Where on petition for rehearing it appears that plaintiff has an unsettled claim against defendant arising since suit was brought, which may effect defendant's recovery on counterclaim allowed on appeal, opinion will be modified so as to remand for determination of such matter. Inman Mfg. Co. v. American Cereal Co. [Iowa] 121 NW 177.

47. **Search Note:** See notes in 6 L. R. A. (N. S.) 1021; 38 A. S. R. 702; 67 Id. 197; 5 Ann. Cas. 90.

See, also, Appeal and Error, Cent. Dig. §§ 4717-4811; Dec. Dig. §§ 1217-1247; 2 Cyc.

Liability on the bond is alternative,[48] becoming absolute upon affirmance of the judgment.[49] The conditions and extent of liability on such a bond depends upon the terms of the bond.[50] The usual rules of pleading apply.[51] The only defense which a surety on an appeal bond can interpose after affirmance of the judgment is one which wholly or partially discharges him from liability.[52] The fact that the

924; Costs, Cent. Dig. §§ 983-1003; Dec. Dig. §§ 260-263; 11 Cyc. 236, 243; 1 A. & E. Enc. P. & P. 1011.

48. Appeal bond is absolute undertaking to pay followed by condition avoiding obligation if judgment is paid otherwise. Sweeney v. Metropolitan Surety Co., 129 App. Div. 22, 113 NYS 126.

49. "Condemnation money" mentioned in conditions of bond under Wilson's Rev. & Ann. St. 1903, § 4744, subd. 1, is found against defendant where judgment of lower court is affirmed by appellate court, and it is unnecessary that judgment of supreme court be for a specific sum of money in order to fix liability. Ryndak v. Seawell [Okl.] 102 P 125. On affirmance of judgment, surety on supersedeas bond becomes liable to same extent as principal obligor, and issuance of execution against principal on judgment recovered in supreme court is not necessary in order to charge surety. Sandoval v. U. S. Fidelity & Guar. Co. [Ariz.] 100 P 816. Liability of surety on supersedeas bond held to have become fixed on date rehearing was denied by supreme court. Id. Plaintiff, who was surety on executor's bond, executed bond indemnifying surety on supersedeas bond given to perfect executor's appeal from judgment against him. Judgment appealed from was affirmed. Held that liability of surety on supersedeas bond was primary and operated to benefit of surety on executor's bond, since latter would be relieved from all liability if judgment could be collected from former or from executor, and contribution could not be demanded from executor's surety by supersedeas surety, and hence plaintiff in his capacity as surety on executor's bond was not entitled to enjoin collection of judgment from surety on supersedeas bond. Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116. Nor was plaintiff entitled to enjoin collection of such judgment in his capacity as indemnitor even though estate of former cosurety on executor's bond, beneficiaries of which estate were also beneficiaries under testatrix's will, were liable to plaintiff in his capacity as executor's surety for contribution, indemnity bond being independent obligation on which estate was not liable. Id.

50. Bond is to be enforced according to its intent as shown by language thereof. Schaefer v. American Bonding & Trust Co., 137 Ill. App. 168. An appeal bond to pay "costs, interest and damage" does not cover interest on money held in escrow. Id. Measure of recovery against principal by surety on supersedeas bond who pays judgment is amount paid by him, with interest and costs, and same is true where principal has expressly contracted to indemnify him for any loss sustained. Sandoval v. U. S. Fidelity & Guar. Co. [Ariz.] 100 P 816. Plaintiff was surety on supersedeas bond, on defendants' appeal to territorial supreme court, where judgment was affirmed. Defendants appealed to federal supreme court. Before supersedeas on latter appeal plaintiff paid judgment, taking security from appellee for repayment in case of reversal. Held that before decision by federal supreme court plaintiff was not entitled to recover from defendants amount so paid, but could recover reasonable expenses incurred in adjusting matter with appellee with interest thereon, for which it held no security. Id. Fact that it did not appear that defendant was insolvent and unable to pay judgment held not to limit liability of surety to such damages as might result from delay in collecting it. Egan v. Chicago G. W. R. Co., 163 F 344. Where only judgment rendered was against certain corporation, and appeal was prosecuted from that judgment, held that contention in action on supersedeas bond that bond was not given to supersede said judgment was without merit. Mershman v. Robert Field Co. [Ky.] 112 SW 1119.

51. Complaint in action by surety on stay bond against judgment defendants to recover amount of judgment paid by said surety under indemnity contract held to sufficiently allege that defendants had not paid judgment at time surety paid it. Sandoval v. U. S. Fidelity & Guar. Co. [Ariz.] 100 P 816. Complaint held to sufficiently allege as against general demurrer that amount sued for had not been paid by defendants to surety at time of commencement of action. Id. Petition on supersedeas bond against principal and sureties held not demurrable for failure to allege that money judgment was rendered by appellate court. Ryndak v. Seawell [Okl.] 102 P 125. Nonpayment is not necessary allegation of complaint, but payment must be pleaded as a defense. Sweeney v. Metropolitan Surety Co., 129 App. Div. 22, 113 NYS 126. In action on undertaking to stay execution pending appeal, answer by defendant surety, alleging that prior to entry of judgment, attachment was issued by third person and levied on plaintiff's cause of action was sufficient to admit proof that cause was one arising on contract and found in county. Milliken v. Fidelity & Deposit Co., 129 App. Div. 206, 113 NYS 809. Subject to attachment under Code Civ. Proc. § 648. Id. Proof proper to show that attachment became merged and constituted lien on judgment rendered against plaintiff on such undertaking. Id.

52. In replevin defendant recovered judgment for return of property, damages and costs. Plaintiff executed supersedeas bond but did not perfect appeal. In suit on said bond surety pleaded and proved offer to return property in substantially same condition as when taken. Held good defense to extent of value of property fixed by judgment in replevin action. Ervin v. Montgomery [Neb.] 120 NW 903. Liability of surety on appeal bond held not enlarged by rendition of judgment for amount for which judgment was given below with interest.

principal executes the bond to secure his release from imprisonment for contempt for failure to obey the order appealed from has been held not to preclude recovery on the bond.[53] Mere notice of a desire to rescind cannot relieve the surety unless the bond or the statute so provides.[54] Summary judgment on the bond may be taken only when authorized by statute[55] or by the terms of the bond.[56] The surety may pay the amount for which he is liable as soon as the principal is in default, and may then proceed against the principal or his cosureties for indemnity or repayment.[57] The principal is not ordinarily entitled to recover, on behalf of

Wabaska Elec. Co. v. Blue Springs [Neb.] 122 NW 21. On appeal to district court from county court, judgment was rendered for appellee by consent, it being stipulated that said judgment should be in full payment of certain other claim by appellee against appellant. Held that surety was thereby released, stipulation being that act for which it had become bound should not be performed. Id. Holding that judgment appealed from was valid held res adjudicata in subsequent action on supersedeas bond. Mershman v. Robert Field Co. [Ky.] 112 SW 1119. Judgment of circuit court affirming judgment of probate court adjudging guardian to be personally indebted to ward, which was not appealed from, held not open to collateral attack in action on supersedeas bond given on such appeal. Hands v. Haughland [Ark.] 112 SW 184.

53. Fact that guardian failing to pay judgment against him in favor of ward was imprisoned for contempt by order of probate court until he executed bond. Hands v. Haughland [Ark.] 112 SW 184.

54. After signing and delivery of bond it could only be rescinded by mutual agreement of parties and officer or court having jurisdiction over it, or by competent court on showing sufficient ground to invalidate. Meck v. State [Ind.] 88 NE 299.

55. Code Civ. Proc. § 942, providing for ex parte judgment against sureties on undertakings given to stay proceedings upon appeals "from a judgment or order directing the payment of money," held not to authorize such judgment on undertaking given on appeal from order denying motion to vacate order directing issuance of execution and refusing to vacate execution. Weldon v. Rogers, 154 Cal. 632, 98 P 1070. Order directing issuance of execution held unauthorized in so far as it purported to direct payment of money. Id. Supersedeas undertaking ordered by supreme court is enforcible only by action, and not by summary ex parte judgment under Code Civ. Proc. § 942. Id. Where state statutes authorize summary judgment against sureties on appeal or supersedeas bond, federal circuit and district courts in that state may render such judgment. Egan v. Chicago G. W. R. Co., 163 F 344. In view of Code Iowa 1897, § 4140, authorizing supreme court on affirming judgment to render judgment on appeal bond on motion in case damages can be ascertained without an issue and trial, and of fact that it is not practice of federal appellate court, on affirming judgment in action at law to render judgment anew, but that practice is to remand case with directions, held that, under conformity act (Rev. St. § 914), circuit court sitting in Iowa had power, on affirmance and remand, to enter summary judgment against surety on supersedeas bond for amount of judgment with interest and costs. Id. Persons signing supersedeas bonds as sureties become connected with suits in which they are given in such manner as to subject themelves to jurisdiction of court in which suit is pending and to summary judgment upon their undertakings when amount of their liability can be determined without an issue and trial. Id. Fact that plaintiff had taken steps to collect judgment from defendant by intervening in receivership proceedings against defendant held not election of remedies precluding him from obtaining summary judgment against surety on supersedeas bond. Id.

56. Where bond to stay execution pending execution on judgment in replevin was invalid and hence did not operate as supersedeas, held that there was no consideration for provision therein that judgment might be taken against surety on motion on failure of appellant to pay, which provision was not required by statute. United States Fidelity & Guar. Co. v. More [Cal.] 101 P 302. Since, under Code Civ. Proc. § 943, bond to stay execution pending appeal from judgment in replevin need only be conditioned that appellant will obey order of appellate court, held that there was no consideration for further provision that surety would allow judgment to be taken against it on motion if appellant did not pay, and hence judgment so taken was void and payment thereof by surety could not be made basis of recovery by it over against appellant on contract of indemnity. Id. Indemnity contract held not to authorize recovery under such circumstances, particularly in view of Civ. Code, § 2778, providing that upon indemnity against liability person indemnified is entitled to recover upon becoming liable. Id. Ex parte judgment against judgment defendant on undertaking to stay proceedings on appeal from order denying motion to quash execution, rendered on affirmance of said order, held void where he did not sign undertaking, and no new proceeding or action was commenced against him and no process had been serve on him. Weldon v. Rogers, 154 Cal. 632, 98 P 1070.

57. Under statute execution could not issue on judgment affirmed by territorial supreme court until 10 days after entry thereof. Under federal statutes on appeal to federal supreme court, appellant might at any time within 60 days after entry of judgment obtain supersedeas by filing bond. Held that after allowance of appeal to federal supreme court and after expiration of 10 days from entry of judgment, surety on

the surety who does not complain, money improvidently paid by the latter in satisfaction of a void judgment.[58]

Damages and penalties for delay See 11 C. L. 255 are allowed in some states.[59, 60]

§ 18. *Costs* See 11 C. L. 255 on proceedings for review are elsewhere treated.[61]

APPEARANCE.

The scope of this topic is noted below.[62]

§ 1. General; Special; What Constitutes Each, 302. Special Appearance, 304.
§ 2. Who May Make or Enter, 304.
§ 3. Effect, 305. Withdrawal or Vacation, 306.

§ 1. *General; special; what constitutes each.*[63] *General appearance.* See 11 C. L. 256—As a general rule, an appearance for any other purpose than to question the

supersedeas bond given on appeal to territorial supreme court had right to pay judgment, though 60 days from entry of judgment had not elapsed, and having done so could recover amount thereof from principal. Sandoval v. U. S. Fidelity & Guar. Co. [Ariz.] 100 P 816. Fact that mandate of territorial supreme court had not been sent down at date of said payment held immaterial. Id. Civ. Code 1901, tit. 8, c. 1, par. 418, providing for revocation of license of surety company for failure to pay any final judgment within 30 days after its rendition, held to confer no authority on governor to revoke license for such failure so that fact payment was made by reason of his threat to do was immaterial, particularly where forfeiture had already been incurred when it was made. Id.

58. Held not entitled to do so either under Civ. Code § 1559, authorizing third party to sue on contract made for his benefit, or under Code Civ. Proc. § 1050, Civ. Code § 2846, authorizing surety to sue to compel principal to fulfil obligation for which surety has bound himself. More v. Churchill [Cal.] 101 P 9. Equity will not entertain suit on ground that only by such action can surety be prevented from suing on indemnity bond given him by principal, since principal has defense at law to such action if brought. Id.

59, 60. Code Civ. Proc. § 957. Bell v. Camm [Cal. App.] 102 P 225; Galvin v. Mutual Sav. Bank, 6 Cal. App. 402, 92 P 322. Ten per cent damages allowed. Pendley Brick Co. v. Hardwick & Co. [Ga. App.] 64 SE 664; Pate-Smith Co. v. H. B. Claflin Co. [Ga. App.] 64 SE 710; Central of Georgia R. Co. v. Manchester Mfg. Co. [Ga. App.] 64 SE 1128; Atlantic Coast Line R. Co. v. Smith [Ga. App.] 65 SE 44; St. Louis S. W. R. Co. v. Poyner [Tex. Civ. App.] 109 SW 1004; Carter v. Kieran [Tex. Civ. App.] 115 SW 272. Damages allowed where no appearance by brief or counsel and no fundamental error on record. Montgomery v. Buckskin Breeches Co. [Tex. Civ. App.] 116 SW 139. One per cent on judgment allowed. Reed v. Light, 138 Ill. App. 611. Penalty of $500 imposed appeal from appellate to supreme court. Smythe v. Parish & Co., 237 Ill. 419, 86 NE 754. On affirmance of judgment which had been superseded, appellees held entitled to penalty of 10 per cent. Mansf. Dig. § 1311 (Ann. St. 1899, § 813). Choctaw, O. & G. R. Co. v. Sittel [Okl.] 97 P 363. Damages not allowed. Georgia Coast & P. R. Co. v. McFarland [Ga.] 64 SE 897; Schmidt v. Beiseker [N. D.] 120 NW 1096. Damages will not be awarded where judgment is large and intricate questions of law are involved, although appeal is without merit. Chicago Union Trac. Co. v. Mee, 136 Ill. App. 98. Additional costs authorized by Act of May 19, 1897, P. L. 67, not allowed where contentions of appellant are bona fide though vexatious. Kline v. Polish Nat. Catholic Church, 33 Pa. Super. Ct. 578. Rule as to allowance of additional costs is absolute where there is no showing of good faith, as where no argument was made in support of a new trial and no further steps taken after the taking of the appeal. Ebert v. Kaufmann, 34 Pa. Super. Ct. 487. Damages will not be awarded under Ball. Ann. Codes & St. § 6522 (Pierce's Code, § 1070) where appeal is prosecuted in apparent good faith, though there may be little merit in appeal itself. Ferrandini v. Bankers' Life Ass'n, 51 Wash. 442, 99 P 6. Civ. Code Prac. § 746, providing that on affirmance of, or dismissal of appeal from, a judgment for payment of money, the collection of which, in whole or in part, has been superseded, 10 per cent damages on amount superseded shall be awarded appellant, held not to apply where appellant gave supersedeas bond but no supersedeas was issued as required by § 747. Asher v. Cornett, 32 Ky. L. R. 1173, 108 SW 242. Under Civ. Code Prac. § 764, providing for 10 per cent damages on affirmance of superseded judgment, such damages are recoverable on affirmance of superseded judgment for recovery of personalty or its value. Cunningham v. Clay's Adm'r [Ky.] 116 SW 299. Right not affected by fact that judgment is in alternative. Id. Damages under Civ. Code Prac. § 764 must be entered by circuit court on entry of mandate of court of appeals. Id.

61. See Costs, 11 C. L. 886.

62. Includes only appearance as conferring jurisdiction. Excludes waiver of nonjurisdictional defects by failure to make timely objection. See Saving Questions for Review.* The topic Jurisdiction,* should also be consulted, and, so also, topics dealing with various particular proceedings. See such topics as Attachment;* Garnishment,* etc.

63. **Search Note:** See note in 4 Ann. Cas. 290.

See, also, Appearance, Cent. Dig. §§ 1, 12-

jurisdiction of the court is general.[64] Thus, a general appearance may be effected by demurring to the declaration or complaint [65] or by otherwise pleading to the merits,[66] or by motion with regard to the pleadings,[67] or by motion for change of venue,[68] or by motion to set aside the verdict [69] or judgment,[70] or by appearance at a term subsequent to judgment and consenting to set judgment aside,[71] or by motions or stipulations with reference to ancillary proceedings,[72] or by demanding a jury and setting a case and later resetting it,[73] or by filing interrogatories,[74] or by entering upon a trial of the merits.[75] In some states it is held that, where one prosecutes

54; Dec. Dig. §§ 1, 4-10; 3 Cyc. 502-511, 525; Equity, Cent. Dig. § 306; 2 A. & E Enc. P. & P. 588-662.

64. MacKenzie v. MacKenzie, 141 Ill. App. 126; Herpolsheimer v. Acme Harvester Co. [Neb.] 119 NW 30. Appearance, taking depositions, continuance, and leave to plead. Kingman-St. Louis Implement Co. v. Bentley Bros. Hardware Co. [Mo. App.] 118 SW 500. Continuance and resetting cause. Columbia Brewery Co. v. Forgey [Mo. App.] 120 SW 625.

65. Greer v. Newbill [Ark.] 117 SW 531; Dunbar v. Bell [Ark.] 119 SW 670. Defendant demurred generally to complaint, and did not raise question of jurisdiction. Bunting v. Hutchinson, 5 Ga. App. 194, 63 SE 49. General demurrer is equivalent to pleading to merits. Carter v. Smith & Sons, 5 Ga. App. 804, 63 SE 932. To demur generally to petition as presenting no cause of action is to plead to merits of case and it is not error for the court to refuse to dismiss a petition on a subsequent motion of the demurrants on the ground that they have not been served with process. Emmett & Co. v. Dekle [Ga.] 64 SE 682. Demurrer for improper joinder of parties plaintiff. Davis v. Public Service Corp. [N. J. Law] 72 A 82. Where defendant filed **demurrer out of time,** and plaintiff's attorney indorsed thereon "this may be filed as of proper date," there was such appearance by plaintiff that he cannot object to court's jurisdiction by subsequent plea. Moyer v. Chicago, etc., R. Co. 168 F 105.

66. Answer to merits. Dunbar v. Bell [Ark.] 119 SW 670; Wicecarver v. Mercantile Town Mut. Ins. Co. [Mo. App.] 117 SW 698; Hendricks v. Calloway, 211 Mo. 536, 111 SW 60. Oral answer to merits. Kutyn v. Cohen, 116 NYS 636. In addition to appearing specially and moving to quash the service as insufficient, defendant filed a general denial. Thomasson v. Mercantile Town Mut. Ins. Co., 217 Mo. 485, 116 SW 1092. Or where an answer contains a general denial as well as objection to jurisdiction. Id. Where party pleads to merits and no question as to jurisdiction of court is made, though at same time exception to jurisdiction is taken and demurrer is filed. Carter v. Smith & Sons, 5 Ga. App. 804, 63 SE 932. By filing affidavit of defense and thereafter a plea on behalf of defendants, not naming them, but under caption which included their names. Roscoe v. Browne, 35 Pa. Super. Ct. 646. Affidavits filed which were good defense if true. MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848. Defendants to bill appeared and filed plea to bill and moved to dismiss or dissolve the preliminary injunction. Champion v. Hannahan, 138 Ill. App. 387. Cross bill filed and prayer made for equitable relief. Original Consol. Min. Co. v. Abbott, 167 F 681. Held general appearance where defendant filed answer in two counts, first challenging court's jurisdiction, the second a general denial of petition and later filed amended answer disclaiming general appearance. Lohoefener v. Mercantile Town Mut. Ins. Co. [Mo. App.] 118 SW 515.

67. Authorized attorney, having been granted an extension of time in which to plead, and such stipulation having been filed, thereby appears generally and subjects his client to jurisdiction of court. Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 99 P 1046. Where one moves successfully for bill of particulars. Hotchkiss v. The Vanderpoel Co., 139 Ill. App. 325.

68. Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496.

69. Hotchkiss v. Vanderpoel Co., 139 Ill. App. 325; Waymire v. Shipley [Or.] 97 P 807.

70. Attack on the judgment by motion containing both jurisdictional and nonjurisdictional grounds. Barnett v. Holyoke Mut. Fire Ins. Co. [Kan.] 97 P 962.

71. Court is invested with jurisdiction to set aside previous judgment and enter another, unless prohibited by statute ([Hurd's Rev. St. 1908, c. 24, § 562] § 56 of local improvement act). People v. Noonan, 238 Ill. 303, 87 NE 367.

72. Motion to vacate attachment without confining appearance to that purpose. Italian Importing Co. v. Spodaro, 63 Misc. 320, 117 NYS 135. After judgment was rendered, defendant appeared for purpose of quashing writ of garnishment, and contested a motion to amend sheriff's return. Stubbs v. McGillis [Colo.] 96 P 1005. Stipulation for discharge of garnishee, although made after judgment in district court, constituted general appearance in action. Herpolsheimer v. Acme Harvester Co. [Neb.] 119 NW 30.

73. Defendant acted through his attorney. Gulf, etc., R. Co. v. Shield [Tex. Civ. App.] 120 SW 222.

74. Service of interrogatories upon relator held general appearance, under 2 Balliner's Ann. Codes & St. § 4886, providing "A defendant appears in an action, when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance." State v. Clallam County Super. Ct. [Wash.] 100 P 155.

75. City of Pueblo v. Dye [Colo.] 96 P 969; Townsend v. Gregory, 132 Ill. App. 192. Taking part in trial on the question of assessment of damages and cross-exam-

an appeal, he thereby enters his appearance and will be before the court on return of the case [76] for all purposes, as though he had entered his appearance when the mandate is filed.[77] On the other hand, it is held in Indiana that taking an appeal from the interlocutory order appointing the receiver is not an appearance.[78]

A general appearance can be effected only by the voluntary act of the party or his counsel.[79]

Special appearance. See 11 C. L. 258—A party may appear specially to object to the jurisdiction of the court,[80] as where an order is sought vacating some proceeding undertaken in an unauthorized manner,[81] or to set aside a judgment for nonservice of process.[82] A special appearance need not always be designated as such,[83] but, after appearing, the party must confine his defense to matters for which a special appearance may be made,[84] unless such matters have to be presented by a plea in abatement, and such a plea is, under the practice of the court, allowed to be filed together with pleas to the merits.[85] A special appearance is not rendered general by the sustaining of a demurrer to a plea in abatement filed on such special appearance,[86] and the rule is the same where a motion made on special appearance is overruled.[87]

§ 2. *Who may make or enter.*[88] See 11 C. L. 259—Appearance may be made by a duly authorized [89] attorney at law.[90]

ining on primary merits of case, held general appearance, although defendant did not plead to declaration. Hotchkiss v. Vanderpoel Co., 139 Ill. App. 325.

76. Lower court had no jurisdiction of appellant as he was summoned to appear in different county than one in which he resided. Asher v. Cornett [Ky.] 113 SW 131. Even where judgment is reversed on ground that trial court had not acquired jurisdiction of person of defendant. Foster-Milburn Co. v. Chinn [Ky.] 120 SW 364.

77. Pendleton v. Pendleton [Ky.] 112 SW 674; Columbia & P. S. R. Co. v. Moss [Wash.] 102 P 439.

78. Marshall v. Matson [Ind.] 86 NE 339.

79. Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 99 P 1046. Where one manages case for, or advises or aids his codefendant in trial, this alone does not constitute a voluntary appearance so as to give court jurisdiction of former. Nathan Mfg. Co. v. Edna Smelting & Refining Co., 130 App. Div. 518, 114 NYS 1037.

80. Carter v. Smith & Sons, 5 Ga. App. 804, 63 SE 932; MacKenzie v. MacKenzie, 141 Ill. App. 126; Herpolsheimer v. Acme Harvester Co. [Neb.] 119 NW 30. Court rule, providing that, if one appears specially and fails, such appearance will become general, is void. Davidson Bros. Marble Co. v. U. S., 213 U. S. 10, 53 Law. Ed. —. Appearance for purpose of raising question of jurisdiction and removing case to federal court. Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 53 Law. Ed. —.

81. In re Hle's Estate [Cal.] 101 P 8; Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 99 P 1046.

82. Friedberger v. Stulpnagel, 59 Misc. 498, 112 NYS 89; Thomson v. Patek, 138 Ill. App. 418. Where party on applying for removal to federal court, reserved right to except to the jurisdiction of court on ground that no citation had ever been served. Gouner v. Missouri Valley Bridge & Iron Co. [La.] 49 S 657.

83. Where administrator with will annexed moved to dismiss petition to revoke probate for failure to issue required citation, and did not designate his appearance as special. In re Hite's Estate [Cal.] 101 P 8.

84. Denial of jurisdiction. MacKenzie v. MacKenzie, 141 Ill. App. 126.

85. See Jurisdiction, 12 C. L. 458; Pleadings, 12 C. L. 1323. Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. [Mo. App.] 118 SW 500; Barnett v. Colonial Hotel Bldg. Co. [Mo. App.] 119 SW 471.

86. Holcomb v. Kelly, 114 NYS 1048.

87. Motion to quash attachment for insufficiency of proceedings. United States Oil & Gas. Well Supply Co. v. Gartlan [W. Va.] 64 SE 933.

88. **Search Note:** See notes in 3 C. L. 302; 11 Id. 259.

See, also, Appearance, Cent. Dig. §§ 2-11, Dec. Dig. §§ 2, 3; 3 Cyc. 512-514; 2 A. & E. Enc. P. & P. 665.

89. Evidence held to show attorney's authority to appear. Tausick v. Tausick [Wash.] 100 P 757. Where one has appeared through attorneys upon motion to vacate injunction, and in affidavit filed in connection therein had designated himself as defendant, he cannot set up that he never appeared in action. Carney v. Twitchell [S. D.] 118 NW 1030. Fact that defendant was an office associate of an attorney and that both were employed by same collection agency held insufficient to justify inference of attorney's authority to appear for defendant. Thomson v. Patek, 235 Ill. 341, 85 NE 603.

90. Such appearance is equivalent to personal service of summons. Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 102 P 1.

§ 3. *Effect.*[91] —See 11 C. L. 259—A general appearance ipso facto[92] confers jurisdiction of the person,[93] and hence waives objections based on lack of process,[94] defects therein,[95] service thereof,[96] or return of service.[97] A general appearance likewise waives objections based on the venue of personal actions[98] or lack of proper allegations in regard to venue.[99] It also waives informality in revivor proceedings,[1] or irregularities in orders for examination in supplementary proceedings.[2] Jurisdiction of the subject-matter, however, cannot be conferred by appearance,[3] and hence, where the service of a writ or process is essential to confer jurisdiction of the

91. Search Note: See notes in 70 L. R. A. 701; 16 L. R. A. (N. S.) 177; 50 A. S. R. 737. See, also, Appearance, Cent. Dig. §§ 55-165; Dec. Dig. §§ 12-29; 3 Cyc. 514-525, 527, 529-535; Divorce, Cent. Dig. §§ 266, 267; Equity, Cent. Dig. § 306; 2 A. & E. Enc. P. & P. 639.

92. No order of court essential to confer jurisdiction where party enters general appearance. Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 99 P 1046.

93. Thomasson v. Mercantile Town Mut. Ins. Co., 217 Mo. 485, 116 SW 1092; Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496; Hendricks v. Calloway, 211 Mo. 536, 111 SW 60; Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co. [Mo. App.] 118 SW 500; Columbia Brewery Co. v. Forgey [Mo. App.] 120 SW 625; MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848; Original Consol. Min. Co. v. Abbott, 167 F 681; Champion v. Hannahan, 138 Ill. App. 387; People v. Noonan, 238 Ill. 303, 87 NE 367; Columbia & P. S. R. Co. v. Moss [Wash.] 102 P 439; Townsend v. Gregory, 132 Ill. App. 192; Bernstein v. Dalton Clark Stave Co., 122 La. 412, 47 S 753; City of Pueblo v. Dye [Colo.] 96 P 969; Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 102 P 1. **Appearance by trustee in bankruptcy in state court** to contest garnishment proceedings therein by bankrupt's creditor against persons having funds of bankrupt held to give state court jurisdiction of such trustee. Gardner v. Planters' Nat. Bank [Tex. Civ. App.] 118 SW 1146.

Appearance by appealing confers jurisdiction of the appellant's person on remand of the case. Asher v. Cornett [Ky.] 113 SW 131; Foster-Milburn Co. v. Chinn [Ky.] 120 SW 364; Pendleton v. Pendleton [Ky.] 112 SW 674; Columbia & P. S. R. Co. v. Moss [Wash.] 102 P 439.

94. Booth v. State, 131 Ga. 750, 163 SE 502; Objections based on lack of notice are waived. Robinson v. Sea View R. Co. 169 F 319.

95. Groom v. Bangs, 153 Cal. 456, 96 P 503. Young v. Germania Sav. Bank, 5 Ga. App. 130, 62 SE 999; Deck v. Wright, 135 [Mo. App.] 119 SW 1004; Freeland v. Williamson [Mo.] 119 SW 560; Browning v. Moses, 60 Misc. 111, 111 NYS 651. Summons showed fatal defect upon its face in that it did not state any place for service of defendant's answer or other pleadings. Bellingham v. Linck [Wash.] 101 P 843. Defendant after appearing and filing answer objected to jurisdiction on ground that he was brought into court upon an alias summons irregularly made. See Municipal Court Act (Laws 1902, p. 1498, c. 580, § 26). Smith v. Levine, 113 NYS 982. Objection to **writ of scire facias sur** municipal lien and to failure to produce such writ in evidence held waived by appearance. Scranton v. Koehler, 36 Pa. Super. Ct. 95.

96. Stubbs v. McGillis [Colo.] 96 P 1005; Carter v. Smith & Sons, 5 Ga. App. 804, 63 SE 932; Booth v. State, 131 Ga. 750, 63 SE 502; Bunting v. Hutchinson, 5 Ga. App. 194, 63 SE 49; Young v. Germania Sav. Bank, 5 Ga. App. 130, 62 SE 999; Freeland v. Williamson [Mo.] 119 SW 560; Hayes v. Blaker [Mo. App.] 119 SW 1004; Lohoefner v. Mercantile Town Mut. Ins. Co. [Mo. App.] 118 SW 515; Wicecarver v. Mercantile Town Mut. Ins. Co. [Mo. App.] 117 SW 698; Kulyn v. Cohen, 116 NYS 636; People v. Dobbins, 113 NYS 1076; Bohnhoff v. Kennedy, 129 App. Div. 32, 113 NYS 133; Golden v. Averill [Nev.] 101 P 1021; Waymire v. Shipley [Or.] 97 P 807; Werner Stave Co. v. Smith [Tex. Civ. App.] 120 SW 247. Service of **citation** on plaintiff on intervention held waived by plaintiff's appearance thereto. Hart v. Hunter [Tex. Civ. App.] 114 SW 882.

97. Thomasson v. Mercantile Town Mut. Ins. Co., 217 Mo. 485, 116 SW 1092.

98. Suit on certificate of deposit in this state, which was payable in Hong Kong, and payment refused. Objection that instrument sued on was payable in another jurisdiction waived by appearance and objection that complaint failed to state cause of action. Dollar v. International Banking Corp. [Cal. App.] 101 P 34.

99. Also a defect in a complaint. Failure to allege citizenship of defendant in district. Campbell v. Johnson [C. C. A.] 167 F 102. Failure of petition to allege defendant's residence cured by appearance and pleading to merits without protestation for lack of jurisdiction. Bunting v. Hutchinson, 5 Ga. App. 194, 63 SE 49.

1. Varney v. Connolly's Ex'r [Ky.] 116 SW 340.

2. Mistake in name of person sought to be examined. Simon v. Underwood, 61 Misc. 369, 115 NYS 65.

3. Carter v. Smith & Sons, 5 Ga. App. 804, 63 SE 932; Julian v. Kansas City Star Co., 209 Mo. 35, 107 SW 496. Statute provided that all suits against counties must be brought in circuit court, and defendant entered appearance in justice court. Wetzel v. Hancock, 143 Ill. App. 178. Where question involved is jurisdiction of subject-matter, it is not affected by appearance for purpose of submitting demurrer to complaint for defect of parties, as well as want of jurisdiction. Riley v. Southern R. Co., 81 S. C. 387, 62 SE 509.

subject-matter, such service is not waived by appearance;[4] but, where the jurisdiction of the subject-matter depends upon the existence of certain facts, a general appearance may operate as an admission of such facts.[5] A defect in service upon a nonresident defendant is not cured or waived by the appearance of codefendants.[6]

A special appearance does not confer jurisdiction.[7]

Withdrawal or vacation. See 9 C. L. 236—A party will not be allowed to withdraw his appearance where the other party has been lulled into a feeling of security thereby[8] especially where the purpose of such withdrawal is to make a defense not available at the time of such appearance.[9]

Appellate Courts and Jurisdiction; Application of Payments; Apportionment Laws, see latest topical index.
Appointments (defines), see 12 C. L. 1137, n. 45.

APPRENTICES.[10]

The scope of this topic is noted below.[11]

The number of "actual working days,"[12] as specified in a contract of apprenticeship, means that the service shall continue through a term or period within which there are that number of working days.[13] As a general rule the master is entitled to the entire earning capacity of the apprentice.[14]

4. Service of writ of garnishment is essential to jurisdiction of subject-matter and is not waived by garnishee's appearance. Cole v. Utah Sugar Co. [Utah] 99 P 681.

5. Under St. 1898, § 3701, justice's jurisdiction to issue attachment depends upon existence of such facts and not upon preliminary showing thereof, and hence where defendant enters general appearance in the case, and does not object to attachment affidavit, justice has jurisdiction not only to render personal judgment, but also to continue to entertain the attachment proceeding. Givans v. Searle, 136 Wis. 608, 118 NW 202.

6. Day Lumber & Mfg. Co. v. Citizens' Bank [Miss.] 48 S 727.

7. Where no summons was served within required time, but was thereafter issued and served nunc pro tunc. Radil v. Sawyer [Neb.] 120 NW 957. Appearance, solely for the purpose of attacking the sufficiency of process, does not, if unsuccessful, submit party so appearing to jurisdiction of court generally. United States Oil & Gas Well Supply Co. v. Gartlan [W. Va.] 64 SE 933.

8. Defendant served notice of appearance on assumption that supplemental summons was in proper form, but could have discovered the defect had the paper been examined carefully when served. Bohnhoff v. Kennedy, 129 App. Div. 32, 113 NYS 133.

9. Statute of limitations. Bohnhoff v. Kennedy, 129 App. Div. 32, 113 NYS 133.

10. See 11 C. L. 262.

Search Note: See notes in 4 L. R. A. (N. S.) 49; 5 Id. 1154; 18 A. S. R. 626.

See, also Apprentices, Cent. Dig.; Dec. Dig.; 3 Cyc. 539-564; 2 A. & E. Enc. L. (2ed.) 488.

11. Treats of apprentices as such. Rights and liabilities of apprentices, considered generally as servants, are treated in the topic Master and Servants.*

12. "Actual" held to limit "working days" to those so known in this particular trade as distinguished from "working days" as they are generally understood. Robeson v. Whitney [N. J. Err. & App.] 71 A 255.

13. Exclusive of Sundays and holidays, and not to mean days upon which apprentice should actually perform work for the master. Robeson v. Whitney [N. J. Err. & App.] 71 A 255.

14. NOTE. Master's right to earnings of apprentice: In general the master is entitled to the entire earning capacity of the apprentice (Foster v. Stewart, 3 Maule & S. 191; King v. Wantage, 1 East, 601; King v. Bradford, 1 Maule & S. 151), although the master is not privy or assenting to his earning it (Easley v. Craddock, 4 Rand. [Va.] 426). A third party is liable to the master for the value of the apprentice's earnings where he has deserted the master before entering the second employment (Hill v. Allen, 1 Ves. Sr. 83; Carson v. Watts, 3 Dougl. K. B. 350), and the apprentice cannot maintain action for such wages (Bright v. Lucas, 2 Peake, N. P. Add. Cas. 121). The third person is also liable to the master where apprentice has temporarily quitted the master's services with consent (Meriton v. Hornsby, 1 Ves. Sr. 48), or has been forcibly withdrawn (Barber v. Dennis, 1 Salk. 68; Anonymous, 12 Mod. 415; Eades v. Vandeput, 5 East, 39, note), or enticed away from such service (Lightly v. Clouston, 1 Taunt. 112). Where the apprentice was actually under the master's control at the time he left his service, the third party's liability attaches irrespective of whether he knew (Munsey v. Goodwin, 3 N. H. 272) or did not know the fact of apprenticeship, (Conant v. Raymond, 2 Aik. [Vt.] 243; Bowes v. Tibbets, 7 Me. 457; James v. Le Roy, 6 Johns. [N. Y.] 274, Anthon, N. P. 159), and is not terminated by payment to the apprentice himself (Bardwell v. Purrington, 107 Mass. 419). This is distinguished from the case of a hired servant where the second employer is not liable to the first in the absence of knowledge of the employment (James v. LeRoy,

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* Always begin with the latest article on the subject. Use the latest topical index.

ARBITRATION AND AWARD.

The scope of this topic is noted below.[15]

§ 1. The Remedy in General, 307.
§ 2. The Submission and Agreements to Submit, 307. Effect, 308.
§ 3. The Arbitrators and Umpire, 309.
§ 4. Hearing and Procedure Before Arbitrators, 309.
§ 5. The Award; Requisites; Validity, and Effect, 310. Effect, 310. Enforcement of Award, 310. Review of Award, 310.
§ 6. International Disputes, 311.
§ 7. Statutory Arbitration Between Employers and Employes, 311.

§ 1. *The remedy in general.*[16] See 11 C. L. 262—Arbitration is a matter depending upon consent and agreement to arbitrate,[17] but a statutory arbitration is nevertheless, a judicial proceedings.[18]

§ 2. *The submission and agreements to submit.*[19] See 11 C. L. 262—At common law, generally, a submission could be made by parol,[20] but an exception to the rule prevailed when the title to land was involved.[21] The submission should be filed when so required by statute,[22] and proper notice should be given.[23] Mere failure

6 Johns. [N. Y.] 274, Anthon, N. P. 159). But, irrespective of his knowledge or ignorance of the appreniceship, the second master ie not liable to the first where by unauthorized assignment working a breach of trust the apprenticeship has been suspended (Futrell v. Vann, 30 N. C. [8 Ired. Law] 402; Randall v. Rotch, 12 Pick. [Mass.] 107), and before the master has exercised his right to reclaim the apprentice (Ayer v. Chase, 19 Pick. [Mass.] 556). In such a case it is the apprentice's right to abandon the assignee and whatever wages he may earn in the service of another are his own (Ayer v. Chase, 19 Pick. [Mass.] 556), but while the apprenticeship is in force the master may recover money which has come into the apprentice's hands as wages (Foster v. Stewart, 3 Maule & S. 191). An older English decision is to the effect that a de facto apprenticeship is suffijcient to entitle the master to the earnings of the apprentice while in the service of another (Barber v. Dennis, 1 Salk. 68, 6 Mod. 69), but this is antagonistic to more recent decisions to the effect that action for harboring an apprenice will not lie unless there is a valid contract of apprenticeship (Gye v. Felton, 4 Taunt. 876; Cox. v. Muncey, 6 C. B. [N. S.] 375; De Francesco v. Barnum, L. R. 45 Ch. Div. 430), and in New York it is categorically laid down that a valid contract is essential to an action against the second employer (Barton v. Ford, 35 Hun [N. Y.] 32). In England it is held that the wages of an apprentice who enlists in the army or navy belong to the master (Barber v. Dennis, supra; Anonymous, supra; Carson v. Watts, 3 Dougl. K. B. 350, but in New York it is held that enlistment under any circumstances dissolves the apprenticeship and that the wages of the apprentice thereafter belong to himself (Johnson v. Dodd, 56 N. Y. 76). The right to apprentice's earnings does not usually extend to the personal reprcsentative of the master (Kennedy v. Savage, 2 Browne [Pa.] 178). Adapted from 5 L. R. A. (N. S.) 1156.

15. Treats of arbitraton and award generally. Excludes arbitration and awards having a distinctive character by reason of the particular nature of the controversy. See such topics as Associations and Societies,* § 2; Fraternal Mutual Benefit Associations,* § 4; Exchanges and Boards of Trade;* Insurance,* § 20; Building and Construction Contracts,* § 8. This topic retains, however, arbitration of international disputes and statutory arbitration between employers and employes.

16. **Search Note:** See notes in 35 L. R. A. 294; 70 Id. 170.

See, also, Arbitration and Award, Cent. Dig. §§ 1-26, 29; Dec. Dig. §§ 1-4, 8; 3 Cyc. 581-617.

17. Where proceeding was before a court of ordinary which had no jurisdiction of subject-matter, and whose judgment was therefore void for want of jurisdiction, such judgment could not be treated as a valid and binding award by an arbitrator, there having been no consent or agreement to arbitration. Dix v. Dix [Ga.] 64 SE 790.

18. In re Picker, 130 App. Div. 88, 114 NYS 289.

19. **Search Note:** See notes in 15 L. R. A. 142; 2 L. R. A. (N. S.) 672; 2 A. S. R. 566; 18 Id. 619; 1 Ann. Cas. 31.

See, also, Arbitration and Award, Cent. Dig. §§ 27-130; Dec. Dig. §§ 5-25; 3 Cyc. 595-616; 2 A. & E. Enc. L. (2ed.) 539.

20. Walden v. McKinnon [Ala.] 47 S 874.

21. Exception has been distinctly recognized and enforced by decision in Alabama. Walden v. McKinnon [Ala.] 47 S 874. Submission to arbitration in parol makes award inoperative upon title. Id.

22. Where parties entered into agreement to submit dispute to arbitration of two persons named who were authorized to choose third arbitrator in case they failed to agree, held that such agreement was defective for failure to name all arbitrators as required by Code Civ. Proc. §§ 1283-1285 which requires clerk to enter names of arbitrators in his register. Joshua Hendy Mach. Works v. Gray [Cal. App.] 99 P 1110.

23. Where contract between city and water company provided that, if city desired to purchase plant, the value should be determined by arbitrators, notice of appointment of arbitrators to secretary and superintendent of water company was sufficient notice to all assigns of the original com-

to object to a court's jurisdiction of the subject-matter will not operate as an agreement to submit the matter in controversy to the court as an arbitrator.[24]

Effect. See 11 C. L. 263

Submissions of disputes to arbitrators are favored by the law,[25] but an agreement to submit to arbitration cannot be used to close access to the courts of law,[26] and a common-law or naked submission may be revoked at any time before the award is made,[27] but the formality of the revocation must follow and conform to the formalities of the submission,[28] and where a submission is made under a rule of court, its revocation rests within the sound discretion of the court.[29] In any case a revocation to be effective must be made, not only before the submission is made a rule of court, but also before the award is published.[30] If the agreement to arbitrate is a part of a contract into which the parties have entered, it can be revoked only by mutual consent.[31] The determination of subsidiary or ancillary matters by arbitrators may, by contract, be required as a condition precedent to action, or rather as an element of any cause of action upon or under the contract,[32] and in such case action cannot be maintained without such submission;[33] but otherwise an agreement to arbitrate will not preclude resort to the courts in the first instance,[34] the remedy for breach of the agreement to arbitrate being by action for

pany. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555. Not necessary to give notice to mortgagee of water company in arbitration proceedings beween city and such water company. Id.

24. Dix v. Dix [Ga.] 64 SE 790.

25. Horne v. Welsh, 35 Pa. Super. Ct. 569.

26. Not competent for parties to stipulate that determination of the question of ownership of property by arbitration should be a condition precedent to the plaintiff's right of action. Dunton v. Westchester Fire Ins. Co. [Me.] 71 A 1037. Where agreement attempted to leave to arbitrator the decision whether there had been any violation of contract with the stipulation that his decision was to be final, this was not an agreement as to some preliminary subsidiary or ancillary matter in aid of an action in law or a suit in equity, but an attempt to wholly oust courts of jurisdiction of respecting subject-matter. Bauer v. International Waste Co., 201 Mass. 197, 87 NE 637.

27. Although parties agree that it shall not be revoked. In such submission court has nothing whatever to do with same until after award is filed and it is therefore left within control of either party. Heritage v. State [Ind. App.] 88 NE 114. Right of either party to a naked submission, to revoke it at any time before an award is made, is recognized. Horne v. Welsh, 35 Pa. Super. Ct. 569. A naked executory agreement (not under authority of statute or rule of court) made after the arising of a dispute, to submit the same to arbitration is revocable at will of either party, in advance of the actual carrying out of the agreement by arbitration and award thereon. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398.

28. Where agreement to arbitrate was in writing under seal and writing which purported to revoke the submission was not under seal, held that such notice was ineffective to revoke. Horne v. Welsh, 35 Pa. Super. Ct. 569.

29. Heritage v. State [Ind. App.] 88 NE 114.

30. Submission to arbitration cannot be revoked after award of arbitrators has been prepared and signed by them, and parties have been notified that it is ready for delivery upon payment of fees and expenses of arbitrators, even though the award be not sealed as required by terms of submission. Ivins v. Ivins [N. J. Law] 72 A 94.

31. Where parties to a contract made such provision, the fact that one of the parties served written notice on arbitrator of revocation of his appointment did not work a revocation. Frederck v. Margwarth, 221 Pa. 418, 70 A 797. Where contract provided that final settlement should be made according to award of arbitrator, held that such agreement was of the essence of the contract, and could not be revoked, but actual or tendered compliance was a condition precedent to recovery thereon. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398.

32. Dunton v Westchester Fire Ins. Co. [Me.] 71 A 1037, Bauer v. International Waste Co., 201 Mass. 197, 87 NE 637.

33. Submission as mode by which amount of damage may be ascertained or by which liability can be fixed. Lawrence v. White, 131 Ga. 840, 63 SE 631.

34. Harlow v. Oregonian Pub. Co. [Or.] 100 P 7. When agreement for arbitration is merely collateral to and independent of other provisions of contract, such arbitration is not a condition precedent to right to sue for breach of such provisions. In such cases the remedy for refusal to arbitrate is by action for breach of that agreement. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398. Where rental contract contained provision that in case of disagreement as to rights and duties of parties or construction of contract such dispute should be referred to arbitrators but also contained provision that lessor should not be deprived of the

damages for such breach,[35] and so also an action for damages will lie for breach of an agreement to arbitrate where such agreement constitutes one of the main considerations of the contract.[36]

§ 3. *The arbitrators and umpire.*[37] See 11 C. L. 264—The jurisdiction of arbitrators in statutory arbitration proceedings is a special jurisdiction,[38] and it is only by a substantial compliance with all the requirements of the statute that it attaches.[39] When an arbitrator has made and delivered his award, the special power conferred upon him ends,[40] but, if the award is incomplete, it is competent for him to finish his work by making a full and complete award.[41]

§ 4. *Hearing and procedure before arbitrators.*[42] See 11 C. L. 264—Hearings by statutory arbitrators are within statutes relating to judicial proceedings.[43] The parties have a right to a hearing,[44] and equal opportunity should be afforded each party to be represented by counsel,[45] but neither party is entitled to be present when the arbitrators are deliberating on their award.[46] The arbitrators have plenary power to decide questions of admissibility, competency, and weight of evidence,[47] are themselves competent witnesses before the board,[48] and are not confined to testimony from witnesses under oath.[49] The submission of a pending cause to an arbitrator waives all defects or omissions in the pleadings.[50] All the proceedings, hearings, and deliberations, must be participated in by all the members,[51] unless such requirement is waived by the parties.[52] Where the parties are present,

right to resort to courts for enforcement of any rights under contract, the lessor could bring suit without submitting to arbitration. Lawrence v. White, 131 Ga. 840, 63 SE 631.

35. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398.

36. Where one newspaper contracted with another for sale of rights in newspaper route and contract provided that in case of separation and inability to agree as to settlement arbitrators should decide. Harlow v. Oregonian Pub. Co. [Or.] 100 P 7.

37. **Search Note:** See Arbitration and Award, Cent. Dig. §§ 131-155, 191-214, 244; Dec. Dig. §§ 26-30, 36-40, 47; 3 Cyc. 617-634, 655-663, 809, 810; 2 A. & E. Enc. L. (2ed.) 632.

38. Joshua Hendy Mach. Works v. Gray [Cal. App.] 99 P 1110

39. Under Code Civ. Proc. §§ 1283-1285, it is necessary, to entitle arbitrators to act, that they be named in submission agreement filed with clerk, who must enter their names in his register. Joshua Hendy Mach. Works v. Gray [Cal. App.] 99 P 1110.

40. Frederick v Margworth, 221 Pa. 418, 70 A 797.

41. Provided agreement is still in force. Frederick v. Margwarth, 221 Pa. 418, 70 A 797.

42. **Search Note:** See note in 8 Ann. Cas. 510.

See, also, Arbitration and Award, Cent. Dig. §§ 156-190, 204, 215-243; Dec. Dig. §§ 31-35, 42-46; 3 Cyc. 619, 620, 636-649, 651-655, 658, 721-727.

43. Arbitrators sit as court, or at least perform statutory judicial function and therefore such arbitration is regulated by Code of Civ. Proc. § 6, providing that no court shall be open or transact business on Sunday. In re Picker, 130 App. Div. 88, 114 NYS 289.

44. Segal v. Fred, 105 Minn. 126, 117 NW 225. Where two arbitrators with power to choose a third disagreed, and thereupon appointed third arbitrator and without notice to the parties and opportunity to be heard two of the arbitrators made the award, such award must be set aside as parties had right to hearing. Bray v. Staples, 149 N. C. 89, 62 SE 780.

45. In re Picker, 130 App. Div. 88, 114 NYS 289.

46. Fair opportunity to present claim to arbitrators, which party is entitled to, and to be present to meet claim of adversary, does not include right to be present when arbitrators are making their award. Segal v. Fred, 105 Minn. 126, 117 NW 225.

47. Under submission to determine value of waterworks plant, arbitrators had such power. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555.

48. They are not excluded from use of their expert knowledge in waterworks proceedings. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 157 119 NW 555.

49. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555.

50. Therefore it was open to defendant to urge statute of frauds as a defense before arbitrator though it was not pleaded. Darrow v. Braman, 201 Mass. 469, 88 NE 5.

51. Heritage v. State [Ind. App.] 88 NE 114.

52. Where there were three arbitrators and work was done principally by two, and third arbitrator knew work was being done by others, and complaining party was with arbitrators at different times consulting and advising with them and did not object, such party waived right to object, as it was his duty to see that commission conducted their labors according to agreement and law. Heritage v. State [Ind. App.] 88 NE 114.

their failure to object to the misconduct of the arbitrators generally constitutes a waiver of objection on account thereof.[53]

§ 5. *The award; requisites; validity, and effect.*[54] See 11 C. L. 265—Unless otherwise provided by statute or agreement,[55] the award must be the unanimous decision of the arbitrators,[56] and must be final and complete,[57] but must be confined to the terms of the submission.[58]

Effect. See 11 C. L. 265—An invalid award does not affect the parties or their rights in the subject-matter of the arbitration,[59] but, where an award is shown to have been made,[60] every presumption is indulged in its favor,[61] and it is as final and conclusive between the parties as the judgment of any other tribunal having jurisdiction to decide the question,[62] unless reserved by the arbitrators for revision by the court.[63]

Enforcement of award. See 11 C. L. 266—In the absence of successful attack, the party in whose favor an award is made is entitled to judgment thereon,[64] but the parties are competent to agree among themselves that one award shall be set off against another and judgment entered only for the difference.[65]

Review of award. See 11 C. L. 267—Although an award may be vacated for certain

53. Counsel being present and no objection being taken, exceptions to the award based upon misconduct of arbitrators were properly dismissed. Burns v. Pennsylvania R. Co., 222 Pa. 406, 71 A 1054

54. Search Note: See notes in 58 L. R. A. 181.

See, also, Arbitration and Award, Cent. Dig. §§ 245-519; Dec. Dig. §§ 48-89; 3 Cyc. 664-721, 728-809; 2 A. & E. Enc. L. (2ed.) 719; 3 A. & E. Enc. P. & P. 126.

55. Majority of an arbitration commission may make a report, either by written agreement of submission and under Burns' Ann. St. 1908, §§ 882, 898. Heritage v. State [Ind. App.] 88 NE 114.

56. No provision having been made for an award by majority of arbitrators in common-law arbitration, an award by two of three arbitrators is not binding on parties to chancery suit for an accounting and appointment of receiver. Lattin v. Gamble, 154 Mich. 177, 15 Det. Leg. N. 684, 117 NW 575.

57. Where arbitrator, through mistake, failed to consider and decide part of the dispute submitted to him, the award was invalid because incomplete. Frederick v. Margwarth, 221 Pa. 418, 70 A 797.

58. Where parties at hearing agreed that matter in controversy should be submitted to arbitrators whose award should be made judgment of court and by such agreement voluntarily enlarged scope of controversy, the award was within powers conferred and was not invalid because not confined to that set up in complaint. Snell v. Chaham, 150 N. C. 729, 64 SE 870.

59. Parties are relegated to their original status. Bray v. Staples, 149 N. C. 89, 62 SE 780. Where one party was never given an opportunity of appearing before arbitrators, and they made no award in writing and proceedings were irregular and indefinite, in absence of proof of receipt of award or ratification of proceedings there was no legal arbitration and proceeding could not be interposed as bar. Ruandt v. Ernest, 143 Ill. App. 299.

60. Must be shown that there was a submission, what was submitted, and what the award was. Id.

61. Its invalidity must be shown by clear and satisfactory evidence. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555; Rolfe v. Patrons' Androscoggin Mut. Fire Ins. Co. [Me.] 72 A 732.

62. Written award responsive to submission to decide value of waterworks plant is on its face final and conclusive between parties. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555. Award is final judgment, both at law and in equity, and cannot be classed with contracts sealed or unsealed. Olson v. Oregon Water Power & R. Co. [Or.] 97 P 538. Where, under rule of court, a controversy is submitted to arbitrator upon whose report judgment is to be final, the award is final as to all questions of law and fact. Darrow v. Braman, 201 Mass. 469, 88 NE 5. Valid award having been made the controversies of the parties are merged in such award, and hence where defendant had not repudiated award, plaintiff could not sue on contract but must sue on award. Spiess' Adm'x v. Bartley [Ky.] 113 SW 127. Has same effect and is deemed and taken to be as available in law as the verdict of a jury. Burns' Ann. St. 1908, §§ 875, 898, so provide. Smith v. Long [Ind. App.] 88 NE 356. Award duly made and published that certain stock belonged to estate of testator, and was given to father by son to reduce advancement account, had force of judgment. Harris' Estate, In re [Vt.] 72 A 912.

63. Darrow v. Braman, 201 Mass. 469, 88 NE 5.

64. Webb v. Parker, 130 App. Div. 92, 114 NYS 489.

65. Where parties entered into separate statutory arbitrations and later entered into agreement that one award should be set off against other, it was held that such awards be set off as per agreement and that defendant be perpetually enjoined from entering judgment upon awarde in her favor against plaintiffs. Webb v. Parker, 130 App. Div. 92, 114 NYS 489.

causes,[66] the burden of proof is upon the party who would impeach it to show the grounds for such impeachment[67] by clear and convincing evidence.[68] Testimony of arbitrators as to what transpired in the hearing and deliberation will not be received to impeach their award.[69] Where controversy is submitted to an arbitrator upon whose report judgment is to be final, an award will not be reviewed by the court unless questions are specifically referred to the court for the purpose of revision.[70] When an award, required by the submission to be sealed, has been filed in court without seals, it is not improper for the court to permit seals to be afterwards affixed.[71]

Appeals from awards or judgments thereon are regulated by the statutes of the various states.[72] The practice in the several states is not uniform as to the appealability of a judgment vacating an award.[73, 74, 75]

§ 6. *International disputes.* See 3 C. L. 366

§ 7. *Statutory arbitration between employers and employes.* See 11 C. L. 268

Architects, see latest topical index.

ARGUMENT AND CONDUCT OF COUNSEL.

The scope of this topic is noted below.[76]

§ 1. Right of Argument and Order of Same, 311. The Right to Open and Close, 312.
§ 2. Opening Statement, 313.
§ 3. Kind, Extent, and Mode of Argument or Comment During Trial, 313. Statements of Law and Reading from Decisions or Papers Pertinent to Other Cases, 314. Comments on Pleadings and Evidence and Scope of Argument in Relation Thereto, 314. Comments on Witnesses, Parties and Counsel, 315. Comments on Instructions and Special Interrogatories, 316. Appeals to Passion, Prejudice and Sympathy, 317.
§ 4. Conduct and Demeanor During Trial, 318.
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§ 1. *Right of argument and order of same.*[77]—See 11 C. L. 269—Counsel have the right to present their views to the court[78] and to make an argument even when

66. As specified by Burns' Ann. St. 1908, § 492. Smith v. Long [Ind. App.] 88 NE 356.

67. Rolfe v. Patron's Androscoggin Mut. Fire Ins. Co. [Me.] 72 A 732.

68. Evidence held insufficient to overcome presumption of validity of award. Rolfe v. Patron's Androscoggin Mut. Fire Ins. Co. [Me.] 72 A 732. Where award on its face did not show that all members did not participate in hearings, burden was on complaining party to show that they did not. Heritage v. State [Ind. App.] 88 NE 114. Evidence held insufficient to show such undervaluation of waterworks plant as to warrant setting aside award on ground of arbitrary and fraudulent action. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555.

69. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555.

70. Where arbitrator stated that his findings were not to be final if upon facts reported they were manifestly erroneous, but also stated that he made his report more full by discussion of facts presented by dedendant, held that in so doing there was nothing to indicate that he did not intend to rest his award upon his own judgment of the law, and that therefore it was not open for the court to decide any question of law. Darrow v. Braman, 201 Mass. 469, 88 NE 5.

71. Ivins v. Ivins [N. J. Law] 72 A 94.

72. In **New York** an appeal may be taken from a judgment entered upon an award, as from an order or judgment in an action. Code of Civ. Proc. § 2381. In re Picker, 130 App. Div. 88, 114 NYS 289. Where it was objected that party could not be heard to object to entry of judgment upon award because he neither moved to vacate it under Code Civ. Proc. 2374 nor to modify or correct it under § 2375, the omission to make motion for independent relief would not deprive party of his right to raise objections upon motion to confirm report and to review judgment upon the same ground. Id. Objections which may be thus taken, however, are only those which might have been taken by an independent motion to vacate, correct or modify. Id.

73, 74, 75. In **New York** appeal may be taken from order vacating award. In re Picker, 130 App. Div. 88, 114 NYS 289. Judgment vacating award is not final and is not appealable. Smith v. Long [Ind. App.] 88 NE 356.

76. Treats of argument and conduct of counsel in civil cases, including harmless and prejudicial error in such connection, but excludes saving questions for review (see Saving Questions for Review*). Excludes argument and conduct of counsel in criminal cases (see Indictment and Prosecution,* § 10B).

77. Search Note: See notes in 7 C. L. 258; 51 L. R. A. 513.
See, also, Trial, Cent. Dig. §§ 267-269½.

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*Always begin with the latest article on the subject. Use the latest topical index.

trial is had without a jury,[79] but refusal to allow argument in the latter case is not necessarily prejudicial error.[80] While it is improper to submit argument in the absence of the opposing counsel,[81] error in such connection is in some cases harmless.[82]

The right to open and close. See 11 C. L. 269.—The plaintiff has the right to open and close in the first instance.[83] Upon a timely application,[84] however, the court will exercise its sound discretion [85] and permit that party to open and close the argument upon whom rests the burden of proof of the whole case.[86]

273, 274; Dec. Dig. §§ 106-108, 112; 2 A. & E. Enc. P. & P. 699; 15 Id. 181.

78. When honestly believed. Palmer v. Blanchard [N. H.] 71 A 628.

79. Better practice to permit argument. In re Ayers' Estate [Neb.] 120 NW 491.

80. Not reversible error when no prejudice appears. In re Ayers' Estate [Neb.] 120 NW 491.

81. Taylor v. Fisher, 122 La. 155, 47 S 448. Improper for counsel to submit further argument without knowing that further conference of arbitrators was impossible and to privately express or intimate his opinion to arbitrator chosen by his client. Lattin v. Gamble, 154 Mich. 177, 15 Det. Leg. N. 684, 117 NW 575.

82. Not reversible error though made after case submitted unless prejudice be shown to have resulted. Taylor v. Fisher, 122 La. 155, 47 S 448.

83. Oexner v. Loehr, 133 Mo. App. 211, 113 SW 727. Since the law recognizes fact that it is harder to build than to tear down. Albany Phosphate Co. v. Hugger Bros., 4 Ga. App. 771, 62 SE 533. Ordinarily reversible error unless waived to deprive plaintiff having burden of proof of his right to open and close. Nagle v. Schnadt, 239 Ill. 595, 88 NE 178.

84. Under Code, § 3701, request to change order should be made at close of all testimony. Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604.

85. O'Connor v. Kleiman [Iowa] 121 NW 1088; Kirkwood v. School Dist. No. 7 in Summit County [Colo.] 101 P 343. Discretion not disturbed unless clear abuse and prejudice. Oexner v. Loehr, 133 Mo. App. 211, 113 SW 727. Where burden on plaintiff is slight and his evidence when introduced is not controverted, court's exercise of discretion in permitting defendant to open and close will not be disturbed. Id.

86. Under Code, § 3701. O'Connor v. Kleiman [Iowa] 121 NW 1088. As such burden of proof is determined in light of court's ruling. Albany Phosphate Co. v. Hugger Bros., 4 Ga. App. 771, 62 SE 533. General rule that plaintiff has right to open and close does not apply when burden of proof is shifted by evidence. Oexner v. Loehr, 133 Mo. App. 211, 113 SW 727. Insisting in lower court that burden is on other party constitutes **waiver of right** to open and close. Nagle v. Schnadt, 136 Ill. App. 417. Reversible error to deprive party holding affirmative of issue of this substantial right unless substantial justice was done. Id. **Where case is tried on mistaken theory** on part of both parties that burden of proof rested on a certain one, permitting him to open and close argument, is not reversible error. Nagle v. Schnadt, 239 Ill. 595, 88 NE 178. Where only objection **on probate of will** is the offering of second will, the party introducing such second will has right to open and close. Green v. Hewett [Tex. Civ. App.] 118 SW 170. Where active management of will contest is left to counsel of one of two contestants by agreement or without objection, held proper for court to permit such counsel to make the closing argument. Jenkins v. Weston, 200 Mass. 488, 86 NE 955.

Plaintiff held to have right: Where defendant pleads general issue. Albany Phosphate Co. v. Hugger Bros., 4 Ga. App. 771, 62 SE 533. Where defendant fails to make such admissions as make out prima facie case for plaintiff. Fletcher v. McMillan [Ga.] 64 SE 268. Where defendant, while impliedly admitting in amended answer the contract sued on, fails to withdraw his general denial filed previously thereto or to admit other matters essential to plaintiff's recovery. Id. Where landowner plaintiff in appeal to district court from award in railroad condemnation proceedings. Ellering v. Minneapolis, etc., R. Co. [Minn.] 119 NW 507. Where burden of showing amount due under lease was on plaintiff. Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604. In personal injury action, where one paragraph of answer was a traverse and the other a plea in justification. Stringfield v. Louisville R. Co. [Ky.] 113 SW 513. Where in suit on note defendant pleads general denial and alleges that he is indorser and not maker. Oexner v. Loehr, 133 Mo. App. 211, 113 SW 727.

Defendant held to have right. Priest v. Dodsworth, 143 Ill. App. 225. When defendant pleads by way of confession and avoidance. Cases cited. Albany Phosphate Co. v. Hugger Bros., 4 Ga. App. 771, 62 SE 533; Oexner v. Loehr, 133 Mo. App. 211, 113 SW 727. Where defendant admits facts alleged by plaintiff which show prima facie case and seeks to avoid such case by introduction of new facts. Albany Phosphate Co. v. Hugger Bros., 4 Ga. App. 771, 62 SE 533. Where only question was damages to be awarded respondent. Kirkwood v. Summit County School Dist. No. 7 [Colo.] 101 P 343. Under Rev. Civ. Codes 1907, § 6796, where it was stipulated at close of plaintiff's evidence, that if plaintiff was entitled to judgment it should be for specified sum, and defendant relied on counterclaims. Power & Bro. v. Turner, 37 Mont. 521, 97 P 950. Where defendant admitted signing note sued on and issue was on consideration. O'Connor v. Kleiman [Iowa[121 NW 1088. Where in suit to recover damages for libel, the defenses were justification and privilege, and though the plea of justification was defective. Wright v. John-

§ 2. *Opening statement.*[87]—See 11 C. L. 270—The opening statement[88] of counsel should be confined to the issues of the case to be presented.[89] It may be available to show a fact as admitted,[90] but is rarely so conclusive upon the party making it as to warrant judgment being rendered thereon,[91] unless there is no possibility of a proper recovery,[92] and in this connection it will be considered in connection with the pleadings,[93] and taken as true.[94]

§ 3. *Kind, extent, and mode of argument or comment during trial.*[95]—See 11 C. L. 270—Argument is a discourse of reasoning tending and intended to establish a position and to induce belief.[96] Its control rests largely, as a matter of duty,[97] in the discretion of the trial court,[98] which discretion will not ordinarily be disturbed.[99] This discretion must not, however, be exercised arbitrarily.[1] Considerable latitude of expression is allowed counsel on anything that is a proper subject of argument[2] or comment,[3] but greater care of expression is required in a close case,[4] and the closing argument should not introduce new matter unless a reply thereto be permitted.[5]

son [Ga. App.] 65 SE 60. In trespass to try title where only issue is that of improvements in good faith, burden was on defendants under Sayles' Ann. Civ. St. 1897, art. 1299. Fain v. Nelms [Tex. Civ. App.] 113 SW 1002. In suit on accident insurance policy where there was no evidence to refute presumption of death by accident. Fenton v. Iowa State Traveling Men's Ass'n [Iowa] 117 NW 251.

87. Search Note: See Trial, Cent. Dig. §§ 270, 367, 388, 395; Dec. Dig. § 109.

88. Held that under order of trial court, statement made after directed verdict on opening statement should be considered as made before. Barto v. Detroit Iron & Steel Co. [Mich.] 15 Det. Leg. N. 912, 118 NW 738.

89. In re More's Estate, 153 Mich. 695, 15 Det. Leg. N. 609, 117 NW 329. Improper to state that party had wife and five children, such statement being calculated to unduly arouse sympathy of jury. Spring Valley Coal Co. v. McCarthy, 136 Ill. App. 473.

90. Admission by counsel in opening statement may be sufficient to carry question of ownership to jury in absence of sufficient evidence. Frisby v. St. Louis Transit Co., 214 Mo. 567, 113 SW 1059.

91. Improper to dismiss suit upon opening statement of counsel, especially in code states, such statement not being part of the record. Sullivan v. Williamson [Okl.] 98 P 1001.

92. Hornblower v. George Washington University, 31 App. D. C. 64.

93. Pleadings considered with opening statement in determining whether judgment should be rendered thereon. Roberts v. Colorado Springs & I. R. Co. [Colo.] 101 P 59.

94. Taken as true in determining whether judgment should be rendered thereon. Roberts v. Colorado Springs & I. R. Co. [Colo.] 101 P 59.

95. Search Note: See note in 46 A. S. R. 23. See, also, Trial, Cent. Dig. §§ 272-309; Dec. Dig. §§ 111-128; 2 A. & E. Enc. P. & P. 708-750.

96. Rahles v. Thompson & Sons Mfg. Co., 137 Wis. 506, 119 NW 289.

97. Power and duty of court to keep argument within due bounds. Englund v. Mississippi Valley Trac. Co., 139 Ill. App. 572.

98. Atlantic Coast Line R. Co. v. Jones [Ga.] 63 SE 834; St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 665. Determining proper and improper argument. Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777.

99. Ruling not ordinarily disturbed on appeal. Crosby v. Seaboard Air Line R. Co., 81 S. C. 24, 61 SE 1064. Ruling not disturbed unless it constitutes clear abuse of discretion or prejudice results. Shaffer v. Coleman, 35 Pa. Super. Ct. 386. Refusal to withdraw juror and continue cause not disturbed unless manifest prejudice and abuse. Behrens v. Mountz, 37 Pa. Super. Ct. 326. Held, in action against seller for failure to deliver staves, not error to refuse to permit counsel to argue that dead cull would be of no commercial value, that notice of objectionable culling to inspector of plaintiff would be notice to plaintiff itself, or to refer to evidence of witness to effect that reason defendant did not sooner repudiate contract was because plaintiff owed them. Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401.

1. Should keep counsel fairly within record. Cinkovitch v. Thistle Coal Co. [Iowa] 121 NW 1036. Court's ruling held to augment error. Pickford v. Hudson, 32 App. D. C. 480.

2. Counsel may argue that his client should recover large damages. Chicago City R. Co. v. Donnelly, 136 Ill. App. 204.

3. Remark which is nothing more than an assent to a motion is not objectionable as where counsel remarked "if the defendand had not asked that instruction, the plaintiffs would probably have asked it." Billings v. Snohomish, 51 Wash. 135, 98 P 107. Conduct though annoying and reprehensible, if not prejudicial, is not grounds for new trial. Schwitters v. Springer, 236 Ill. 271, 86 NE 102. Remarks of counsel held harmless especially as opposing counsel had full opportunity to reply thereto. Village of Odin v. Nickols, 133 Ill. App. 306.

4. Weber v. Chicago, B. & Q. R. Co., 142 Ill. App. 550; Kerr v. National Fulton Brass Mfg. Co. [Mich.] 15 Det. Leg. N. 985, 118 NW 925. Parlin & Orendorff Co. v. Scott,

Statements of law and reading from decisions or papers pertinent to other cases. See 11 C. L. 270—Counsel should not misstate the law [6] or speak slightingly of decisions of the supreme court of the state,[7] nor is it ordinarily in his province to state the rules of law [8] although it is not improper to make a statement as to what he believes to be the law.[9] It is not improper for counsel, in the absence of the jury, to read judicial decisions to the court,[10] or, in the jury's presence, to read law which is embodied in the instructions given.[11] While it is ordinarily improper for counsel to read law books to the jury,[12] this matter is in the sound discretion of the court provided no harm results therefrom.[13] It is improper to read testimony taken in another trial and which is not in evidence.[14]

Comments on pleadings and evidence and scope of argument in relation thereto. See 11 C. L. 271—The argument of counsel must be confined to the record.[15] Counsel, in argument, may advert to facts in evidence and to inferences which may fairly be drawn therefrom [16] or from the pleadings;[17] but he must confine him-

137 Ill. App. 454. Where evidence is contradictory, it is especially important that counsel do not indulge in prejudicial remarks. Chicago Union Trac. Co. v. Faurot, 136 Ill. App. 347.

5. Abuse of discretion to permit plaintiff to introduce new matter into case in closing argument when defendant will have no opportunity to reply thereto. Hight v. Harding [Ark.] 113 SW 47. Counsel could not object that opposing counsel made statements not proper as closing argument, where court said that if proper he would be given opportunity to reply, of which offer he did not seek to avail himself. Thomas v. Fos, 51 Wash. 250, 98 P 663. It is within discretion of court to permit counsel who opens to make second address, though his first address be not replied to, but, when this is permitted, it is error to refuse to permit other counsel to reply thereto. Silber v. Public Service R. Co. [N. J. Law] 73 A 232.

6. Improper for counsel to state that party had legal right to demand that another submit to personal examination when no such right existed. Missouri, K. & T. R. Co. v. Rogers [Tex. Civ. App.] 117 SW 939. Error to improperly state law of case upon question of damages. Chicago City R. Co. v. Reddick, 139 Ill. App. 160.

7. As where counsel states that he does not care what supreme court has held as to what evidence is competent to prove insanity. Crumbaugh v. Owen, 238 Ill. 497, 87 NE 312. Reference to supreme court decision in another case, reflecting thereon, and challenging counsel to permit him to read it, held incurable error. Weber v. Chicago B. & Q. R. Co., 142 Ill. App. 550.

8. Ruthruff v. Faust, 154 Mich. 409, 15 Det. Leg. N. 783, 117 NW 902. Held not proper to argue whether defendant's damages should be deducted from amount claimed by plaintiff. Id. Improper for counsel to state what, under evidence, party would have been required as matter of law to have done. St. Louis, etc., R. Co. v. Woodruff [Ark.] 115 SW 953.

9. Chicago Consol. Trac. Co. v. Kinane, 13 Ill. App. 636. Counsel may properly state his view of the law as applicable to the facts as claimed by him to be proven. Charrier v. Boston & M. R. [N. H.] 70 A 1078. Counsel's expression of his view of the law pressed in good faith is not grounds for reversal, as where he requests opposing counsel to try case according to the facts. City of Pittsburg v. Newell [Pa.] 72 A 793. Erroneous statement of proposition of law is not sufficient for reversal where court neither expressly nor tacitly confirms it. Charrier v. Boston & M. R. [N. H.] 70 A 1078.

10. Counsel read law and facts. Western Union Tel. Co. v. Benson [Ala.] 48 S 712.

11. Counsel read constitutional provision embodied in instruction given. Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363.

12. Chesapeake & O. Ry. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363.

13. St. Louis S. W. R. Co. v. Ross [Tex. Civ. App.] 119 SW 725. Permitting reading of facts of another reported case which could not have improperly influenced jury held not error. Id.

14. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109.

15. Cinkovitch v. Thistle Coal Co. [Iowa] 121 NW 1036. Statement of matters outside the record is reversible error if indulged in after admonition. Kentucky Wagon Mfg. Co. v. Dunganics [Ky.] 113 SW 128.

16. Not make improper use of testimony in argument. Hogan v. Detroit United R., 154 Mich. 478, 15 Det. Leg. N. 830, 118 NW 140.

Argument held proper: Not outside evidence. Piper v. Boston & M. R. Co. [N. H.] 72 A 1024. Where confined to evidence in case and a temperate criticism on devious course which evidence tended to show plaintiff had taken. Hobbs v. Hobbs [N. H.] 72 A 290. Argument directing jury's attention to an established opportunity to obtain knowledge testified to, as that when party recovered he "would go down and see how far they dragged him." Piper v. Boston & M. R. Co. [N. H.] 72 A 1024. Comment upon party's chastity, it being involved in the action on will contest. O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59. Arguing of a conclusion which is borne out by the evidence as that foreman's conduct in the face of apparent danger to which his attention was directed almost amounted to criminality. Casey v. Kelly-

self to the issues,[18] and should not make, as of his own or the jury's knowledge,[19] statements outside of the evidence,[20] or not sustained by evidence,[21] nor should the argument be based upon incompetent evidence [22] or upon that which has been excluded.[23] A fortiori, counsel should not misrepresent the evidence.[24]

Comments on witnesses, parties and counsel.[See 11 C. L. 273]—While counsel may draw any proper inferences from the evidence,[25] or comment on the manner of a

Atkinson Const. Co., 240 Ill. 416, 88 NE 982. Remarks of counsel which simply show his own conclusions on the evidence and not statements of fact, as where counsel remarked that plaintiff was simple minded and that he did the work trusting that defendant would pay, etc., that parties were not on an equal footing, that it would be fraud to give verdict for defendant. Prye v. Kalbaugh, 34 Utah, 306, 97 P 331. Statement by counsel of what in his opinion under the evidence ordinary prudence would have required a party to have done. St. Louis, etc., R. Co. v. Woodruff [Ark.] 115 SW 953. True statement that it was an unusual case, being based on facts. Koosa & Co. v. Warten [Ala.] 48 S 544. Statement by counsel that he did not see how evidence can be reconciled when in fact it was in direct conflict. Fillingham v. Michigan United R. Co., 154 Mich. 233, 15 Det. Leg. N. 704, 117 NW 635. Argument urging counsel's view of conflicting evidence. Scheer v. Detroit United R. [Mich.] 15 Det. Leg. N. 1119, 119 NW 1084. Comment on variance between evidence and pleading as bearing on credibility of party as witness. Buckeye Brew. Co. v. Eymer [Mich.] 16 Det. Leg. N. 427, 122 NW 124. Comment on fact that pleas were contradictory and in conflict with subsequent admissions. Rucker v. Brown Bros. [Ga. App.] 65 SE 55. Reference to fact that party had introduced no evidence. American Steel Foundries v. Kistner, 136 Ill. App. 48. Reference to party's failure to produce letters demanded and to draw inferences therefrom. Hill v. Houser [Tex. Civ. App.] 115 SW 112. Argument as extensive as the evidence admitted without restriction, though evidence was improperly admitted, if it was not objected to. Kinnane v. Conroy [Wash.] 101 P 223. Remark of plaintiff's counsel that plaintiff was only man in state who could do this work, such remark being justified by plaintiff's testimony that he knew of no one in the state who did as heavy work as he did. Theobald v. Shepard Bros. [N. H.] 71 A 26.

17. Counsel may comment on failure of defendant to either admit or deny account in verified plea. Rucker v. Brown Bros. [Ga. App.] 65 SE 55.

18. Statement of counsel's conclusions from the evidence as to resulting mental anguish, since no recovery may be had therefore. Gulf, etc., R. Co. v. Dickens [Tex. Civ. App.] 118 SW 612.

19. Statement of matters not in proof as of his own personal knowledge. Southwestern Tel. & T. Co. v. Taylor [Tex. Civ. App.] 118 SW 188. Counsel's personal experience as a standard of measurement for conduct. Freeman v. Wilkes-Barre & Wyoming Valley Trac. Co., 36 Pa. Super. Ct. 166. Extraneous matters which counsel or jury may know. Rafter v. Chicago City R. Co., 139 Ill. App. 81.

20. Boone v. Holder [Ark.] 112 SW 1081; Atlantic Coast Line R. Co. v. Jones [Ga.] 63 SE 834; Chicago Union Trac. Co. v. Faurot, 136 Ill. App. 347; Parlin & Orendorff Co. v. Scott, 137 Ill. App. 454; Stein v. Brooklyn, etc., R. Co., 62 Misc. 309, 114 NYS 791; Fruman v. Wilkes-Barre Valley Trac. Co., 36 Pa. Super. Ct. 166. Matters pleaded but withdrawn before trial and not in evidence. Keniston v. Todd [Iowa] 117 NW 674. Unsupported statements made during examination of witness. In re More's Estate, 153 Mich. 695, 16 Det. Leg. N. 609, 117 NW 329. In action for injury to negro, fact not in evidence as statement that negro coach passed depot while white coach stopped. St. Louis, etc., R. Co. v. Briggs [Ark.] 113 SW 644. Statement outside the evidence, and relevant facts, and going to outside matters having local significance which may appeal to the jurors. Burk v. Reese [Iowa] 121 NW 1016. Suggestion to jury of arbitrary amount in which damages are laid in declaration. Quinn v. Philadelphia Rapid Transit Co. [Pa.] 73 A 319. Argument of improper conclusion from evidence **held not ground for reversal.** Gascoigne v. Metropolitan, etc., R. Co., 143 Ill. App. 547. Where to show improbability of voucher being mislaid in baby shoe, counsel exhibited such shoe to jury, though it had not been introduced as an exhibit, but jury could not have possibiy been misled thereby. Alpena Tp. v. Mainville, 153 Mich. 732, 15 Det. Leg. N. 605, 117 NW 338.

21. Robinson v. Monadnock Paper Mill [N. H.] 71 A 864; Cumberland Tel. & T. Co. v. Quigley [Ky.] 112 SW 897.

22. St. Louis, etc., R. Co. v. Buckner [Ark.] 115 SW 923.

23. Wicks v. Wheeler, 139 Ill. App. 412. Improper to discuss matter which court has instructed jury to disregard other than to refer to instruction. Hight v. Harding [Ark.] 113 SW 47. Where evidence as to cause of indebtedness was excluded, argument as to such cause was improper. Brinton v. Thomas [Mo. App.] 119 SW 1016. Reassertion of fact in evidence, which court distinctly told counsel was excluded, is reversible error. Barr v. Quincy, etc., R. Co. [Mo. App.] 120 SW 111.

24. Misstatement of evidence or admitted facts. Neff v. Cameron, 213 Mo. 350, 111 SW 1139. False statement that doctor had testified that injury did not result as alleged. Ferguson v. Truax, 136 Wis. 637, 118 NW 251.

25. Statement that items make testimony of party absolutely worthless not improper when a reasonable comment in view of evidence. City of Pittsburg v. Newell [Pa.] 72 A 793. Where testimony is conflicting,

witness on the stand,[26] it is improper to make imputations, unsupported by the evidence, upon the parties,[27] witnesses,[28] or opposing counsel,[29] or upon a party's right to make objections,[30] or his failure to produce witnesses.[31] It is likwise improper for counsel to refer favorably to his client's character where it is not an issue,[32] or to make favorable reference to his client's instructions in regard to the case.[33] There is conflict as to the right to comment upon a party's exercise of a privilege.[34]

Comments on instructions and special interrogatories. See 11 C. L. 274—It is proper for counsel to read an instruction to the jury and to urge them to obey it.[35]

counsel may refer to interest of witnesses. St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 665. Not improper to severely criticise party as to his veracity and habits of life, if warranted by the evidence. Adams v. Hamilton [Tex. Civ. App.] 116 SW 1169.

26. Although it may involve the appearance of the witness. Southern R. Co. v. Wright [Ga. App.] 64 SE 703.

27. As imputations on character and good faith of defendant. Cinkovitch v. Thistle Coal Co. [Iowa] 121 NW 1036. Denouncement of party as one who used criminal laws for collection of debt. Keniston v. Todd [Iowa] 117 NW 674. Indecent references to the defendant in coarse and vituperative language held grounds for reversal. Weinstein v. Asinof, 113 NYS 996. Improper to urge jury to act on their personal knowledge of a party's character. Georgia R. & Elec. Co. v. Dougherty, 4 Ga. App. 614, 62 SE 158. In action for malicious prosecution, prejudicial references to crime for which plaintiff had been indicted and afterwards released. Pickford v. Hudson, 32 App. D. C. 480. Continued intimation in will case that beneficiary was dissolute person held improper where founded on no evidence. Parker v. Wainwright, 139 Ill. App. 458.

28. Burk v. Reese [Iowa] 121 NW 1016.

Held improper to make unsupported imputations on character and good faith of witnesses. Cinkovitch v. Thistle Coal Co. [Iowa] 121 NW 1036. Improper for counsel to obtrude upon jury his opinion of veracity of a witness, as statement that party had been before counsel himself when he was judge and that he would not believe such party under oath. Rangenier v. Seattle Elec. Co. [Wash.] 100 P 842. To make implication in questions asked without foundation that witness was nervous. Weber v. Chicago, B. & Q. R. Co., 142 Ill. App. 550. To discuss collateral matters so as to discredit witness. Pickford v. Hudson, 32 App. D. C. 480. To state that doctor had testified falsely for a money consideration. Ferguson v. Truax, 136 Wis. 637, 118 NW 251. Improper to say that if witness had told the truth he would have lost his job **but not reversible error** where verdict appears reasonable. Southern Pac. Co. v. Hart [Tex. Civ. App.] 116 SW 415.

Held not improper to comment on witness's refusal to answer question, when witness refused because he misunderstood court's ruling. Hurst v. Mechlin [Ky.] 119 SW 807.

29. Bitter reflection on opposing counsel. Burk v. Reese [Iowa] 121 NW 1016. Remark "You have made every boy cry that has been on the stand trying to make him tell a lie" held prejudicial. Farrington v. Cheponis [Conn.] 73 A 139. Remarks calculated to make work of opposite counsel ineffective by making him ludicrous are improper. Parlin & Orendorff Co. v. Scott, 137 Ill. App. 454. Private conversation had with opposing counsel to the effect that proper way to win a difficult case was to dwell on immaterial matters and ignore those material, and that he followed that practice. Kentucky Wagon Mfg. Co. v. Duganics [Ky.] 113 SW 128.

30. Ivy v. Ivy [Tex. Civ. App.] 112 SW 110. Improper in argument to call attention to fact that opposite counsel has during trial been objecting and has been frequently overruled as calling jury's attention to rulings of the court with which they were not concerned. Neff v. Cameron, 213 Mo. 350, 111 SW 1139. Objections made to incompetent evidence and insistence on having case tried according to law are not proper subjects of comment. Phillips v. Chase, 201 Mass. 444, 87 NE 755.

31. Reference to fact that witnesses were present and not used, when not in evidence. American Steel Foundries v. Kistner, 136 Ill. App. 48. Statement that plaintiff did not dare call her physician as a witness for they knew he would testify, as he has testified in this case that she was pushed off the car. Steezler v. Metropolitan St. R. Co., 210 Mo. 704, 109 SW 666. Statement in contemptuous manner concerning application for continuance, of what absent witness would testify to if present and reflections on such absent witness and the fact of his absence. Wellman v. Metropolitan St. R. Co. [Mo.] 118 SW 31.

Inference from failure to produce evidence in party's possession. See Evidence, 11 C. L. 1346.

32. Improper to refer favorably to character of decedent whose character is not in issue, as in action for death of intoxicated man permitted to alight at dangerous place, counsel should not state that decedent was not a drunkard or defendant would have proved it, his general character for sobriety not being in issue. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109.

33. Statement that client told him to be perfectly honest with jury, etc. Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604.

34. Party's privilege to exclude certain competent evidence may be commented on. Phillips v. Chase, 201 Mass. 444, 87 NE 755. Attorney making adverse comments to jury on plaintiff's refusing to allow physician to testify on confidential matter is guilty of misconduct which is ground for new trial. Kiehlhoefer v. Washington Water Power Co., 49 Wash. 646, 96 P 220.

35. Chesapeake & O. R. Co. v. Rowsey's Adm'r, 108 Va. 632, 62 SE 363.

Appeals to passion, prejudice and sympathy.[See 11 C. L. 274]—Considerable latitude allowed to counsel in their appeals to the jury,[36] and they may indulge in oratory,[37] but they will not be allowed to make appeals based on matters outside of the case [38] and calculated to arouse the passion, prejudice or sympathy of jury, are improper.[39] Thus it is improper to contrast the financial condition of the parties [40] or to appeal to race prejudice.[41]

36. Pickford v. Hudson, 32 App. D. C. 480. Language though not in good taste, if not prejudicial and there is an honest attempt on part of counsel to correct any wrong effect, is not reversible error. Groat v. Detroit United R. Co. 153 Mich. 165, 15 Det. Leg. N. 395, 116 NW 1081. Statements not reversible error merely because extravagant. O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59. That salutary rule that error will be presumed, where trial judge fails to take action with reference to unfair comment on evidence by counsel, does not apply to mere desultory remark of character made by counsel in this case. Cincinnati Trac. Co. v. Jennings, 7 Ohio N. P. (N. S.) 462. Reference by plaintiff's counsel to fact that defendant railroad company had settled claims similar to one sued on held not improper, where defendant's counsel elicited the testimony as to such settlements. Johnson v. Union Pac. R. Co. [Utah] 100 P 390.

37. Flights of eloquence and pathos are permissible in discussion of tragedy. Atlantic Coast Line R. Co. v. Jones [Ga.] 63 SE 834. Figures of speech are not improper. Cinkovitch v. Thistle Coal Co. [Iowa] 121 NW 1036.

38. Where outside issues are discussed and harm may fairly be inferred to have resulted. Chicago City R. Co. v. Reddick, 139 Ill. App. 160.

39. Parlin & Orendorff Co. v. Scott, 137 Ill. App. 454; Englund v. Mississippi Valley Trac. Co., 139 Ill. App. 572. Where issues are plain and simple there can be nothing to justify attempt to excite or appeal to passion or prejudice on part of jury. Chicago Union Trac. Co. v. Faurot, 136 Ill. App. 347.

Argument held improper: Inflamatory language. Cinkovitch v. Thistle Coal Co. [Iowa] 121 NW 1036. Statement that "You will never find an employee working for any corporation that ever told anything unfavorable against his employee." Metcalf v. St. Louis & S. F. R. Co. [Ala.] 47 S 158. Adverse comment on fact that change of venue was taken. Neff v. Cameron, 213 Mo. 350, 111 SW 1139. Statement that case had once been tried and determined in favor of plaintiff and reversed by the supreme court on a technicality. Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604. Statement that plaintiff won in trial in lower court and defendant appealed to court where being tried. Adams v. Fisher [Neb.] 120 NW 194. Argument that plaintiff's claim was a dishonest one and "jobbed out." Robinson v. Monadnock Paper Mill [N. H.] 71 A 864. Direct appeal to jury to allow damages as punishment upon telegraph company for failure to perform a duty, where no punitive damages could be allowed. Western Union Tel. Co. v. Smith [Tex. Civ. App.] 113 SW 766.

Held ground for reversal: Argument that plaintiff's claim was dishonest and "jobbed out." Robinson v. Monadnock Paper Mill [N. H.] 71 A 864.

Held not ground for reversal: Although grossly improper. Eckels v. Donohue, 137 Ill. App. 106. "Waving of bloody shirt." West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228. Statement that "the defendant makes part of his money by selling liquors to boys and causing them to become drunk" although highly improper, in view of apparently unprejudiced verdict. Rude v. Fakes, 143 Ill. App. 456. Statement that party was afraid to go before jury where he refused to try cause with all jurors, remark being voluntarily withdrawn. Crosby v. Seaboard Air Line R. Co., 81 S. C. 24, 61 SE 1064. Statement that "You will believe M. as against a multitude of interested witnesses such as these," though extravagant. Beck v. Ann Arbor R. Co. [Mich.] 16 Det. Leg. N. 141, 120 NW 983. Appeal to sympathy of jury and for them to do something that will "perhaps make it safer for me, and your boy and mine, and everybody else that has occasion to deal with these people." Swift & Co. v. Martine [Tex. Civ. App.] 117 SW 209. Statement of counsel after objection to question had been overruled that he would rather withdraw question than give any show for appeal. Chesapeake & O. R. Co. v. Hoffman [Va.] 63 SE 432. Statement by attorney for plaintiff that defendant was intentionally drunk, with idea of postponing trial. Cannon v. Dean, 80 S. C. 557, 61 SE 1012. Remark that if party was not telling truth company would have searched to procure and have procured witnesses to contradict him is improper. Louisville & N. R. Co. v. Payne [Ky.] 118 SW 352. Statement that "Counsel's contention that you cannot find for plaintiff, unless your verdict is based on prejudice against railroad companies, is an insult to your integrity. We want no verdict based on prejudice. We want the same regard for law in this case as prompted another judge in this country to fine a corporation $29,000,000" held highly improper, but not ground for reversal where reasonable verdict indicated that jury were not influenced thereby. Louisville & N. R. Co. v. Brown [Ky.] 113 SW 465.

40. Alaska-Treadwell Gold Min. Co. v. Cheney [C. C. A.] 162 F 593. Statement that plaintiff has not money to procure proof as defendant has. Southwestern Tel. & T. Co. v. Taylor [Tex. Civ. App.] 118 SW 188. Improper to say "The plaintiff is not rich. He was not born with a silver spoon in his mouth. He cannot sit in a richly adorned chair with silver and gold piled about his plate. He cannot ride in fine chariots. He does not have millions like the defendant, made from the labor of other men." United States Cement Co. v. Cooper [Ind.]

§ 4. *Conduct and demeanor during trial.*[42]—See 11 C. L. 275—It is improper for counsel to ask questions, the purpose of which is to get incompetent,[43] prejudicial,[44] or excluded matter before the jury,[45] or to read from a medical book as part of a question asked,[45] or to comment upon the fact that the defendant is protected by insurance [47] or otherwise.[48] Irregularity in the mode of submitting exhibits to the jury is not necessarily ground for reversal.[49]

§ 5. *Excuses for impropriety.*[50]—See 11 C. L. 275—While improper remarks by one counsel are ordinarily no excuse for improper remarks by the opposing counsel,[51] argument is sometimes permitted as being in reply that otherwise would not be permissible.[52]

§ 6. *Objections and rulings.*[53]—See 11 C. L. 275—Alleged misconduct cannot be reviewed on appeal unless an objection is seasonably interposed, a ruling obtained, and an exception taken,[54] and unless the ordinary steps are taken to perfect the appeal and present the matter to the reviewing court.[55]

88 NE 69. Remark that defendant would lose nothing by verdict as he was simply representing some rich estate though prejudicial held not ground for new trial, under instructions. Lund v. Upham [N. D.] 116 NW 88.

41. St. Louis, etc., R. Co. v. Briggs [Ark.] 113 SW 644. Argument that negro is entled to same rights as white man is **not improper,** being merely an argument for justice. Texas & N. O. R. Co. v. McCoy [Tex. Civ. App.] 117 SW 446.

42. **Search Note:** See notes in 7 C. L. 263; 6 Ann. Cas. 224.

See, also, Trial, Cent. Dig. § 271; Dec. Dig. § 110; Jury, Cent. Dig. §§ 561-582; Dec. Dig. § 136.

43. Kerr v. National Fulton Brass Mfg. Co. [Mich.] 15 Det. Leg. N. 985, 118 NW 925. Question, which counsel knows cannot be answered, as to party or matter in no way connected with action or touched on by evidence. Frahm v. Siegel-Cooper Co., 116 NYS 90.. Suggestions in questions asked jurors and witnesses that action was brought because defendant was plaintiff's competitor. Liebler v. Carrel [Mich.] 15 Det. Leg. N. 976, 118 NW 975.

44. Questions containing prejudicial references held improper yet not prejudicial error. Savage v. Hayes Bros. Co., 142 Ill. App. 316.

45. Parlin & Orendorff Co. v. Scott, 137 Ill. App. 454.

Held error: Repetition of attempt to get excluded matter before jury. Kerr v. National Fulton Brass Mfg. Co. [Mich.] 15 Det. Leg. N. 985, 118 NW 925. Repetition of questions as to matter already excluded. Lawson v. Wells Fargo & Co., 113 NYS 647; Frahm v. Siegel-Cooper Co., 116 NYS 90. Repetition of questions after objection sustained. Schwitters v. Springer, 236 Ill. 271, 86 NE 102. Improper to unduly urge in presence of jury or to repeat questions ruled out. Chesapeake & O. R. Co. v. Grigsby [Ky.] 115 SW 237.

46. Held incurable error. Etzkorn v. Oelwein [Iowa] 120 NW 636. Reversible error to permit counsel to read from medical books, on cross-examination of medical expert. Foley v. Grand Rapids & I. R. Co. [Mich.] 16 Det. Leg. N. 246, 121 NW 257.

47. Improper to state to jury during their examination matters such as to cause inference that defendant employer was protected by insurance. Kentucky Wagon Mfg. Co. v. Duganics [Ky.] 113 SW 128. Improper to ask questions and make comments implying that defendant is protected by insurance, but not reversible error in this case and possibly not prejudicial. Passage v. Stimson Mill Co. [Wash.] 101 P 239. In action for injuries, questions by plaintiff's counsel designed to bring before jury the fact that defendant was insured against liability sought to be enforced, held not prejudicial. Owensboro Brick & Sewer Pipe Co. v. Glenn, 32 Ky. L. R. 803, 106 SW 1195.

48. Statement that defendant was bonded for $60,000, held improper but not grounds for reversal under instructions. Lund v. Upshaw [N. D.] 116 NW 88.

49. Handing exhibits to jury without permission of court, held harmless. Wilson v. Faxon, 63 Misc. 561, 117 NYS 361.

50. **Search Note:** See notes in 7 C. L. 264.

See, also, Trial, Cent. Dig. § 310; Dec. Dig. § 129.

51. Since two wrongs do not make a right. Pickford v. Hudson, 32, App. D. C. 480.

52. Statements held mainly replies to remarks by opposing counsel and conclusions and comments thereon, and not such as to mislead or prejudice jury. City of Ft. Worth v. Williams [Tex. Civ. App.] 119 SW 137. Statement of plaintiff's counsel that all that was sought was recovery of debt and that if after judgment defendant should pay debt plaintiff would be willing to surrender property recovered held to be justified as a reply to argument of defendant's counsel to effect that plaintiff was trying to defraud defendant out of $1,200 worth of property for a $60 judgment. Adams v. Hamilton [Tex. Civ. App.] 116 SW 1169. Cross-examination **held no excuse** for the improper argument. St. Louis, etc., R. Co. v. Buckner [Ark.] 115 SW 923.

53. **Search Note:** See note in 7 Ann. Cas. 229.

See, also, Trial, cent. Dig. §§ 312-314; Dec. Dig. § 131; 2 A. & E. Enc. P. & P. 753.

54. See Saving Questions for Review.

55. See Appeal and Review, § 9.

§ 7. *Action of court or counsel curing objections.*[56]—See 11 C. L. 276—It is the duty of the court to take proper action to cure errors in connection with argument and conduct of counsel.[57] Unless argument or conduct of counsel is such as to preclude the rendition of a fair verdict,[58] the harmful effect thereof may be obviated by withdrawal,[59] reprimand,[60] sustaining objection,[61] instructions,[62] or by

56. See, also, Harmless and Prejudicial Error, 11 C. L. 1690.

Search Note: See Trial, Cent. Dig. §§ 315, 316; Dec. Dig. §§ 132, 133; 2 A. & E. Enc. P. & P. 751.

57. Where counsel make statements of fact during trial of cause and within hearing of jury, which are prejudicial and incompetent or not at issue, it is duty of judge to interpose and correct wrong without waiting to be reminded of it by opposing counsel, and in default of so doing, or if wrong be one that could not be nullified and therefore required that the jury be discharged and the cause continued and it does not manifestly appear to the reviewing court that no prejudice in minds of jury resulted from statements, the judgment must be reversed. Dayton Folding Box Co. v. Ruehlman, 11 Ohio C. C. (N. S.) 493. Reviewing court will not undertake to proportion blame for improper argument provoked by counsel for other side, but where objection is made to such argument, it is a duty which is not merely discretionary on part of trial court to interpose and admonish offender and instruct jury to disregard what has been said, and failure so to do is ground for new trial. The Cincinnati Gas & Elec. Co. v. Coffelder, 11 Ohio C. C. (N. S.) 289. Duty of trial judge to check improper conduct or to so charge jury as to relieve prejudice possible to result from improper conduct, even though not requested to do so. Southern R. Co. v. Wright [Ga. App.] 64 SE 703. Duty of court to reprimand counsel and instruct jury to disregard statements of facts not in evidence. Boone v. Holder [Ark.] 112 SW 1081. Duty of court to correct statement outside evidence. Neff v. Cameron, 213 Mo. 350, 111 SW 1139.

58. Impropriety may be so flagrant as to be incurable, notwithstanding apology of attorney and instructions of court. Eckels v. Donohue, 137 Ill. App. 106. Abuse may be so flagrant that no admonition of court will cure it. Alaska-Treadwell Gold Min. Co. v. Cheney [C. C.] 162 F 593. Error cannot aways be cured by reprimand. Weber v. Chicago B. & Q. R. Co., 142 Ill. App. 550. Injury may not always be cured by withdrawal of remark. Chicago City R. C. v. Reddick, 139 Ill. App. 160.

Held not cured: Statement that there was a suppression of evidence. Freeman v. Wilkes-Barre & Wyoming Valley Trac. Co., 36 Pa. Super. Ct. 166. Statement outside evidence that employe of defendant "went to plaintiff's house and tried to settle this case without my knowledge," where defendant claimed to be under no liability. Stein v. Brooklyn, etc., R. Co., 62 Misc. 309, 114 NYS 791. Reading from medical work to jury. Etzkorn v. Oelwein [Iowa] 120 NW 636. Use of advertisement as means of attacking parties' reputation for truth and veracity, held not cured by withdrawal of remarks. King v. Chicago, etc., R. Co., 138 Iowa, 625, 116 NW 719.

59. Where prompt and reasonable and verdict shows that jury were not inflamed. Texas Midland R. Co. v. Geraldon [Tex. Civ. App.] 117 SW 1004.

Held cured: Where inflamatory language was used in describing work and treatment of miners in general by defendant. Cinkovitch v. Thistle Coal Co. [Iowa] 121 NW 1036. Remarks made in argument cured by withdrawal and disclaimer that they should be considered other than as the opinion of counsel and his statement that he did not wish the jury to consider anything he might say that was not supported by the record. St. Louis etc., R. Co. v. Pell [Ark.] 115 SW 967.

60. Rude v. Fakes, 143 Ill. App. 456; Schwitters v. Springer, 236 Ill. 271, 86 NE 102.

Cured: Statement that witness had offered in presence of jury to submit to personal examination. Fillingham v. Michigan United R. Co., 154 Mich. 233, 15 Det. Leg. N. 704, 117 NW 635. Repetition of questions as to excluded matter, there being no further repetition. Lawson v. Wells Fargo & Co., 113 NYS 647. Error in referring to evidence stricken out cured by court's calling counsel's attention to it and no further reference being made thereto. Scheer v. Detroit United R. [Mich.] 15 Det. Leg. N. 1119, 119 NW 1084.

61. Where court, in presence of jury, sustained objection to statement that witness would lose his job if he testified otherwise. St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 665. Error in asking improper questions and discussing them with court held cured by sustaining of objection. Chesapeake & O. R. Co. v. Grigsby [Ky.] 115 SW 237.

62. Cured: Inflammatory language. Swift & Co. v. Martine [Tex. Civ. App.] 117 SW 209. Where counsel stated matters not in evidence. Cumberland Tel. & T. Co. v. Quigley [Ky.] 112 SW 897. Error in giving personal opinion upon veracity of witness. Raugenier v. Seattle Elec. Co. [Wash.] 100 P 842. "Waving of bloody shirt." West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228. Statement that defendant was bonded. Lund v. Upshaw [N. D.] 116 NW 88. Statement of decision of former trial and statement that his client told him to be perfectly honest with the jury. Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604.

Instructions held sufficient to cure: Instruction "that the statements made by counsel do not constitute evidence in the case, and you are not to consider them as evidence." Passage v. Stimson Mill Co. [Wash.] 101 P 239. Instruction to disregard. American Steel Foundries v. Kistner, 136 Ill. App. 48. Reference to matter not involved in issue of negligence cured by

two or more of such methods combined,[63] or by other curative acts of counsel,[64] parties,[65] or court.[66] Instructions designed to remove the prejudicial effect of improper argument or conduct of counsel are generally presumed to have been heeded by the jury,[67] but no presumption of cure of error in such regard will be indulged where the contrary appears.[68]

Army and Navy; Arraignment and Pleas, see latest topical index.

specific instruction on question of negligence. Hawkins v. Great Northern R. Co. [Minn.] 119 NW 1070. Improper statement as to measure of damages cured by proper instructions as to true measure. Modlin v. Jones & Co. [Neb.] 121 NW 984. Admonition for jury to disregard argument not supported by evidence where counsel had stated matter not supported by evidence. Cumberland Tel. & T. Co. v. Quigley [Ky.] 112 SW 897. Verbal instruction at time where written instruction was not requested. Southern Pac. Co. v. Hart [Tex. Civ. App.] 116 SW 415. Error in stating to jury result of formal trial cured by instruction that such result had nothing to do with case where no request was made to withdraw jury, and where error was statement of result of former trial. Bates v. Davis, 57 Misc. 557, 109 NYS 1094. Where counsel making prejudicial remark was stopped and jury cautioned not to lend weight to it. Lund v. Upham [N. D.] 116 NW 88. Admonition of court not to consider any statement of counsel outside the record. St. Louis, etc., R. Co. v. Pell [Ark.] 115 SW 957. Instruction that race had nothing to do with case cured error in counsel making an appeal on strength of fact that client was a negro. Texas & N. O. R. Co. v. McCoy [Tex. Civ. App.] 117 SW 446. Improper remark during trial that party might agree that insurance company's doctor waited on plaintiff in personal injury action held cured by court's instruction that it was improper. Kentucky Wagon Mfg. Co. v. Duganics [Ky.] 113 SW 128. Arguments by counsel prejudicial to defendant held not ground for new trial, where court instructed jury not to consider any argument other than that going to the pecuniary loss, as where counsel dwelt on mental anguish and loss of companionship which were not grounds of recovery. Chicago, etc., R. Co. v. Trippett [Tex. Civ. App.] 111 SW 761. Statement of matters not in evidence could be cured by instruction to effect that case must be decided upon the testimony which has been detailed upon the witness stand. Thomas v. Fos, 51 Wash. 250, 98 P 663.

Instructions held insufficient to cure: Mere statement of court that "the answer is in evidence" held insufficient to cure error of counsel in misstating a matter admitted in answer. Neff v. Cameron, 213 Mo. 350, 111 SW 1139. Statement of decision in court from which case was appealed held not cured by instruction where court at time reprimanded counsel for making objection to statement. Adams v. Fisher [Neb.] 120 NW 194.

63. If court interfere and counsel promptly withdraw remark, error will generally be deemed to be cured. Alaska-Treadwell Gold Min. Co. v. Cheney [C. C. A.] 162 F 593. Grossly improper questions in connection with opposing expert testimony held cured by **apology and instruction.** Eckels v. Donohue, 137 Ill. App. 106. **Withdrawal and instruction.** City of Ft. Worth v. Williams [Tex. Civ. App.] 119 SW 137. Error, if any, in advising jury to apply the Golden Rule, cured by withdrawal and proper instruction. International & G. N. R. Co. v. Morin [Tex. Civ. App.] 116 SW 656. Where court remarked that he wished he had excluded evidence on which it was based, and counsel thereupon withdrew his remark and court instructed jury not to consider such evidence. Almond v. Modern Woodmen of America, 133 Mo. App. 382, 113 SW 695. Withdrawal and instruction to disregard where attorney called witness liar on cross-examination. Behrens v. Mountz, 37 Pa. Super. Ct. 326. Remark that company preferred to employ negroes to whites cured by withdrawal and instruction to disregard. St. Louis S. W. R. Co. v. Browning [Tex. Civ. App.] 118 SW 245. Cured by sustaining of **objection and withdrawal.** Keniston v. Todd [Iowa] 117 NW 674. Cured by **warning and instruction** to not be influenced in any way by any improper remarks of counsel, where verdict did not appear to be excessive. Shaffer v. Coleman, 35 Pa. Super. Ct. 386. Remarks outside the record cured by immediate **withdrawal and reprimand** of court. Wellman v. Metropolitan St. R. Co. [Mo.] 118 SW 31.

64. Language not in good taste may be cured by honest attempt on part of counsel to cure. Groat v. Detroit United R., 153 Mich. 165, 15 Det. Leg. N. 395, 116 NW 1081.

65. Error may be cured on appeal by a remittitur by appellee as where judgment for $10,000 was reduced to $8,000. Spring Valley Coal Co. v. McCarthy, 136 Ill. App. 473. Error of counsel in reading to jury interrogatories propounded to defendant and stating to jury that they were taken as confessed held cured by plaintiff's permitting defendant to go on the stand afterward and testify as to such matters. Clevenger v. Blount [Tex. Civ. App.] 114 SW 868.

As to cure of error generally by remittitur of damages, see Harmless and Prejudicial Error, 11 C. L. 1090, 1174. As to remittitur as condition of affirmance, see Appeal and Review, 11 C. L. 118, 247.

66. Cured by court's attempt to restore order and obviate any prejudicial effect of remarks made by attorney during controversy over cross-examination. McDonough v. Williams [Ark.] 112 SW 164.

67. International & G. N. R. Co. v. Alleman [Tex. Civ. App.] 115 SW 73.

68. Where court stated that judgment was to be set aside unless argument was justifiable. Robinson v. Monadnock Paper Mill [N. H.] 71 A 864.

ARREST AND BINDING OVER.

The scope of this topic is noted below.[69]

§ 1. Occasion or Necessity for Warrant, 321.
§ 2. Privilege from Arrest, 322.
§ 3. Complaint, Affidavit or Information to Procure Warrant, 322.
§ 4. The Warrant and Its Issuance, 323.
§ 5. Making Arrest, and Keeping and Disposing of Prisoner, 323.
§ 6. Preliminary Hearing, Binding Over, or Discharge, 325.
§ 7. Custody Awaiting Indictment for Trial, 326.

§ 1. *Occasion or necessity for warrant.*[70]—See 11 C. L. 278—A peace officer may usually arrest without a warrant for an offense committed in his presence or view,[71] or, under some statutes, upon the request of any person in whose view the offense is committed.[72] An officer may also arrest without a warrant if he knows that a felony has been committed and has reasonable grounds to believe that the person arrested committed it,[73] but this rule does not usually extend to misdemeanors,[74] and a fortiori an officer without a warrant has no authority to forcibly enter private premises on suspicion that a misdemeanor is being committed or may be committed.[75] In the absence of constitutional limitations,[76] however, the legislature has power to authorize an officer to make an arrest without a warrant for either a felony or misdemeanor, whether the offense be committed in or out of the presence of the arresting officer,[77] and the right of particular officers to arrest without warrant is generally regulated by statute and is, in such case, limited to the terms of the statute.[78] A statute, providing that a warrant may be executed by any of-

69. This topic is confined to arrest on charge of crime. Excludes civil arrest (see Civil Arrest *), admission to bail (see Bail, Criminal *), proceedings after binding over (see Indictment and Prosecution *), and civil liability for unlawful arrest (see False Imprisonment *). Excludes, also, any primary treatment of purpose to lawfully arrest, and resistance to unlawful arrest as justification for assault (see Assault and Battery *), or homicide (see Homicide,* § 5).

70. **Search Note:** See notes in 84 A. S. R. 679; 9 Ann. Cas. 623.

See, also, Arrest, Cent. Dig. §§ 144-160; Dec. Dig. §§ 61-64; 2 A. & E. Enc. L. (2ed.) 869.

71. Officer who discovers person keeping intoxicating liquor at his place of business, contrary to law, may arrest him without warrant. Jenkins v. State, 4 Ga. App. 859, 62 SE 574.

72. Under Code Cr. Proc. 1895, art. 247, which provides that any person may arrest without warrant a person who commits an offense against the public peace in his presence or within his view, an arrest by an officer who was directed to arrest by person in whose presence the offense was committed was proper arrest. James v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 116 SW 642.

73. Where robbery and burglary had been committed and person arrested was found near by, officer had right to take him to station for examination. Gisske v. Sanders [Cal. App.] 98 P 43.

74. To justify arrest without warrant for the commission of offense of destroying matter which is or may be required in evidence, defined in Pen. Code, § 110, the crime must be actually committed or attempted in presence of officer. Stearns v. Titus, 193 N. Y. 272, 85 NE 1077.

75. Held, that police had no right to enter private athletic club without a warrant. Fairmont Athletic Club of Greater New York v. Bingham, 61 Misc. 419, 113 NYS 905.

76. Const. 1901, art. 1, § 5, is against issuance of warrant without affidavit and not against making of an arrest without a warrant. Childers v. State [Ala.] 47 S 70; Suell v. Derricott [Ala.] 49 S 895.

77. Bessemer City Charter (Loc. Laws 1900-1901, pp. 444-462) § 25, authorizes and empowers the municipality by ordinance to empower police officers of the city "to make arrests either with or without warrant." Held, that there was no conflict between this provision and the general statute, Code 1896, § 5211, but that charter merely extended the right of police officers to arrest without warrant in cases of misdemeanor. Childers v. State [Ala.] 47 S 70.

78. Under Rev. St. § 7129, employe of railway company who was commissioned police officer had authority to arrest passenger who was drunk. Erie R. Co. v. Reigherd [C. C. A.] 166 F 247. Arrest of merchant in his own store without warrant by officer in whose presence no offense had been committed was not justified by Code Cr. Proc. 1895, tit. 5, c. 1, or by ordinance No. 561 of the city of El Paso. Gold v. Campbell [Tex. Civ. App.] 117 SW 463. Municipal peace officer is generally authorized, within the jurisdiction of a municipality, to arrest one who has violated an ordinance of the city in his presence, or who is endeavoring to escape. See Pen. Code 1895, § 896, and numerous decisions. King v. State [Ga. App.] 64 SE 1001. The federal statutes authorize any civil officer having

* Always begin with the latest article on the subject. Use the latest topical index.

ficer to whom it is directed or into whose hands it may come, does not authorize an arrest by an officer to whom no warrant is directed and into whose hands no warrant has come.[78]

A private person See 11 C. L. 279 may ordinarily without a warrant arrest a person for a crime committed in his presence or for a felony, although not committed in his presence,[80] where he has reasonable grounds to believe that the person arrested committed it.[81] In the latter case, and a fortiori where one is known to be guilty of a felony, his arrest is not merely a matter of right but is a positive duty.[82]

§ 2. *Privilege from arrest.*[83] See 11 C. L. 279

§ 3. *Complaint, affidavit or information to procure warrant.*[84] See 11 C. L. 278

Where an affidavit is required as the basis of a prosecution, it must be made before such officer as the statute prescribed,[85] and must state a criminal offense [86] in order that a warrant may issue. A complaint or affidavit in its description of the offense is not void where it follows the statutory designation of such offense,[87] even though such description would be insufficient in an indictment.[88] The complaint is not void merely for failure to give the middle name or initial of the accused,[89] and if defective on this account may be amended before trial.[90] A complaint on information and belief made before a police court charging a misdemeanor may be sufficient when it is taken into consideration that such magistrate has an opportunity to examine other witnesses besides complainant,[91] but it is held that an affidavit averring merely that affiant has cause to believe and does believe the accused guilty, etc., is insufficient.[92] A complaint which is authority for the issu-

authority under the laws of any state to summarily arrest a deserter from the United States army. Under Act Cong. June 18, 1898, c. 469, § 6, 30 Stat. 484 (U. S. Comp. St. 1901, p. 817) a constable may arrest deserter without warrant in any part of state. State v. Pritchett [Mo.] 119 SW 386.

79. White's Ann. Code Cr. Proc., § 258, as amended by Acts 29th Leg. 1905, p. 385, c. 162. Little v. Rich [Tex. Civ. App.] 118 SW 1077.

80. So provided by Code Cr. Proc. § 183. People v. Governale, 193 N. Y. 581, 86 NE 554. When person arrested is in actual commission of the crime or is arrested on pursuit immediately after its commission, it is not necessary for private person to inform him of the cause of arrest and require him to submit. Id.

81. Cr. Code Prac. §§ 37, 38. Commonwealth v. West [Ky.] 113 SW 76. Under Alabama statute authorizing arrest for felony without warrant where person making arrest has reasonable grounds to believe that person arrested committed it, former must have information from credible sources and of such character as would require issue of warrant. Suell v. Derricott [Ala.] 49 S 895.

82. State v. Jones [Ark.] 120 SW 154.

83. **Search Note:** See Arrest, Cent. Dig. § 142; Dec. Dig. § 60; 7 A. & E. Enc. L. (2ed.) 6; 20 Id. 794.

84. **Search Note:** See Criminal Law, Cent. Dig. §§ 415-434, 441-443; Dec. Dig. §§ 208-214.

85. Code 1907, § 7359, provides that, where person disposes of intoxicating liquors in violation of § 7357, affidavit shall be made before justice of the peace or judge of the county court, and warrant issued by the same. Held that affidavit made before judge of city court of Bessemer and warrant issued by him were void. Herring v. State [Ala.] 48 S 476.

86. Affidavit, charging one with offense of criminal libel, held sufficient to justify issuance of warrant. Michael v. Bacon, 5 Ga. App. 331, 63 SE 228. Affidavit charging the offense of "misdemeanor" is sufficient to support an accusation. Although affidavit is general in its nature, the accusation may amplify and describe the offense. Hunter v. State, 4 Ga. App. 579, 61 SE 1130.

87. Affidavit that affiant had probable cause for believing and did believe that within 12 months before the filing of the complaint "D" did to hinder, delay, or defraud affiant, remove and sell or dispose of lint cotton on which affiant held a landlord's lien for advances made to "D" during year 1906, with knowledge of existence thereof which offense had been committed within the county against the peace and dignity of the state, etc. McDaniel v. Cain [Ala.] 48 S 52.

88. McDaniel v. Cain [Ala.] 48 S 52.

89. Under Rev. Laws Mass. 1902, c. 218, §§ 19, 67, omission of middle name is inconsequential. O'Halloran v. McGuirk [C. C. A.] 167 F 493.

90. City of Topeka v. Durein [Kan.] 97 P 967.

91. Not necessary that complainant should know all the facts constituting the offense. Ex parte Blake [Cal.] 102 P 269.

92. Affidavit, which avers that affiant "has cause to believe and does believe that in his opinion" the accused unlawfully, etc., is not sufficient to support a mittimus issued thereon. Chappell v. State [Aa.] 47 S 329.

ance of the warrant of arrest is functus officio after the examination of the charge and the taking of testimony and the commitment of the accused.[93]

§ 4. *The warrant and its issuance.*[94]—See 11 C. L. 280—Some warrants are mere notices,[95] and the office of any warrant is merely to bring the accused before the court.[96] Hence a warrant is unnecessary when the accused in already before the court.[97] What officers or courts have jurisdiction to issue warrants is generally determined by statute,[98] as is also the manner of signing.[99] In order to authorize the issuance of a warrant, a showing is usually required as to the commission of a crime [1] and as to reasonable grounds to believe that the accused committed it.[2] A warrant is not invalid because it contains surplusage.[3] In some states a warrant gives no right to a private person to make an arrest.[4]

§ 5. *Making arrest, and keeping and disposing of prisoner.*[5]—See 11 C. L. 280 An officer having express authority under a warrant to arrest a person has also the implied authority to call to his assistance such aid as is necessary to make the arrest,[6] and some statutes make it the duty of every private citizen, when required, to assist in making an arrest.[7] When a private citizen is authorized to make an ar-

93. Fact that wife of accused made complaint is of no consequence on a motion to set aside information. People v. Gregory, 8 Cal. App. 738, 97 P 912.

94. Search Note: See Criminal Law, Cent. Dig. §§ 435-458; Dec. Dig. §§ 215-220½; 30 A. & E. Enc. L. (2ed.) 82; 22 A. & E. Enc. P. & P. 1071.

95. Summons from magistrate's court is not commencement of criminal prosecution, being merely intended as a notice. In re Hart, 131 App. Div. 661, 116 NYS 193.

96. People v. Jeratino, 62 Misc. 587, 116 NYS 1121.

97. If defendant has been brought before court without warrant, there is then no necessity for its issuance. People v. Jeratino, 62 Misc. 587, 116 NYS 1121. Defective warrant having been issued but defendant having voluntarily appeared and no objections having been made, defect in warrant did not effect validity of judgment. State v. Cale, 150 N. C. 805, 63 SE 958. Where complaint was insufficient, defendant being under recognizance, no new warrant was necessary. City of Topeka v. Durein [Kan.] 97 P 967. Where accused was arrested without a warrant, such fact did not render conviction void although warrant should have been issued. People v. Jeratino, 62 Misc. 587, 116 NYS 1121.

98. City magistrates of New York City held to have power to issue summons in criminal cases. Ackermann v. Berriman, 61 Misc. 165, 114 NYS 937. Under the laws of Oklahoma when the grand jury returns into district court an indictment for misdemeanor, such court is without power to issue a warrant but must transfer case to the court having jurisdiction, and warrant must then be issued by court to which case is transferred. Ex parte Wade [Okl. Cr. App.] 100 P 35.

99. Cr. Code 1896, § 5208, provides that warrant must be signed by magistrate, with his name and initials of office or the same must in some way appear from the warrant. Held that warrant signed "J. W. Jones" and nothing more to indicate that he was an official was involved. Reach v. Quinn [Ala.] 48 S 540.

1. Under Code Cr. Proc. §§ 148-150 it, must appear from depositions of prosecutor and his witnesses that a crime has been committed, and hence when it did not appear that crime of perjury had been committed and magistrate was not justified in issuing warrant. People v. Corrigan, 129 App. Div. 62, 113 NYS 504. Valid warrant cannot be based upon affidavit which affirmatively shows that no criminal offense has been committed. Michael v. Bacon, 5 Ga. App. 331, 63 SE 228.

2. Ex parte Heacock, 8 Cal. App. 420, 97 P 77.

3. Warrant charging offense of selling spirituous liquor as having been committed unlawfully, willfully, and "feloniously," is not vitiated by word "feloniously," and such word can be treated as surplusage, as offense was fixed as misdemeanor by statute, (Revisal 1905, § 3291). State v. Shine, 149 N. C. 480, 62 SE 1080. Words "guilty of a second offense" in warrant charging unlawful sale of spirituous liquor may be treated as surplusage. Id. Under Revisal 1905, § 1468, superfluous words may be stricken out. Id. Warrant returnable to county court of St. Clair County "at Pell City," a place where court could not legally sit, is not void, but words "at Pell City" will be considered mere surplusage. Pell City Mfg. Co. v. Swearinger [Ala.] 47 S 272.

4. Cr. Code Prac. §§ 37, 38, provides that private person can make an arrest only where he has reasonable grounds to believe that a felony has been committed and the felon is at large, or where he is ordered by a magistrate to arrest one committing an offense in magistrate's presence. Commonwealth v. West [Ky.] 113 SW 76.

5. Search Note: See notes in 11 C. L. 282; 7 L. R. A. (N. S.) 274; 44 A. S. R. 136, 8 Ann. Cas. 250.

See, also, Arrest, Cent. Dig. §§ 165-173; Dec. Dig. §§ 66-70; 2 A. & E. Enc. L. (2ed.) 841.

6. Lansdon v. Washington County [Idaho] 102 P 344.

7. Refusal to do so in Alabama is a misdemeanor. Suell v. Derricott [Ala.] 49 S 895.

rest, his rights and powers are the same as those of an officer.[8] While an officer is not bound to exhibit his warrant to the person whom it authorizes him to arrest until asked for, he must have the warrant in his possession,[9] and, in making the arrest, he should, if there is a reasonable opportunity to do so, inform the accused of the intention to arrest him and of the offense charged, unless the accused already knows such facts.[10] When a person is arrested without a warrant, in the actual commission of the offense, it is not necessary to inform him of the cause of his arrest.[11] Neither an officer nor a private citizen is ever authorized to use any more force than is necessary to make the arrest.[12] An officer has no right to shoot one whom he is attempting to arrest for the violation of a municipal ordinance, even though such person will otherwise escape,[13] but one authorized to make an arrest for felony may use such force as reasonably seems necessary, even to the extent of taking life.[14] Every person has the right to resist an illegal arrest,[15] whether attempted by an officer or a private individual,[16] and in resistance to use as much force as is necessary for such purpose.[17] Under certain circumstances, an officer has the right to search a suspected person for concealed weapons, although a formal arrest has not been made.[18] It is the duty of an officer, when arresting a person without a warrant, to take him immediately before a magistrate for a judicial ascertainment of his probable guilt,[19] and, if the arrest is under a warrant, to exercise reasonable diligence in bringing the person arrested before a judicial officer authorized to examine, commit, or receive bail.[20] Money belonging to a prisoner which is taken from him on arrest must be returned to him after conviction.[21] The regularity of an arrest is waived by a plea of gulity.[22]

8. He is entitled to same defense as officer as justification of a homicide committed in making arrest. Suell v. Derricott [Ala.] 49 S 895.

9. O'Halloran v. McGuirk [C. C. A.] 167 F 493.

10. Commonwealth v. West [Ky.] 113 SW 76.

11. Code 1896, § 5212, dispenses with necessity under such circumstances. Rutledge v. Rowland [Ala.] 49 S 461. Fact that person arrested might also have been arrested for another offense is no reason why he should be informed, as Code 1896, § 5212, presumes that when one is arrested in actual commission of an offense, he is arrested for that offense. Id.

12. Suell v. Derricott [Ala.] 49 S 895.

13. Holmes v. State, 5 Ga. App. 166, 62 SE 716.

14. Commonwealth v. West [Ky.] 113 SW 76; Richards v. Burgin [Ala.] 49 S 294. Code 1896, § 5210, provides that an officer in executing a warrant of arrest must inform defendant of his authority, and, if required, must show warrant. Held that in order to justify killing it must appear that statutory requirements were complied with. Id.

15. Holmes v. State, 5 Ga. App. 166, 62 SE 716.

16. Where private individual joined officers in a felonious attempt to make illegal arrest, accused was justified in shooting him if it reasonably appeared that it was necessary under the circumstances. Holmes v. State, 5 Ga. App. 166, 62 SE 716.

17. Where officer in attempting to make illegal arrest shot at accused, held that accused was justified in shooting, it reasonably appearing that his life was in danger. Holmes v. State, 5 Ga. App. 166, 62 SE 716. Citizen whom it is attempted unlawfully to arrest may resist even to the extent of killing officer. Perdue v. State, 5 Ga. App. 821, 63 SE 922.

18. Where crime had been committed and officer found person near by who refused to answer officer as to his name and business, it was proper for officer to search him for concealed weapons before taking him to police station. Gisske v. Sanders [Cal. App.] 98 P 43.

19. Rutledge v. Rowland [Ala.] 49 S 461. Section 12 of the charter of Jacksonville (Acts 1890-91, p. 511) was not intended to deprive a citizen of this right, but provides for case where officer makes arrest in Mayor's absence and has no application where mayor himself orders the arrest. Id. Must be taken before magistrate without unreasonable delay. Schoette v. Drake, 139 Wis. 18, 120 NW 393. Exigency of case may authorize officer to imprison accused temporarily and for a reasonable time. Pen. Code 1895. §§ 899, 901. King v. State [Ga. App.] 64 SE 1001. When police officer had taken prisoner to office of magistrate for purpose of making complaint, held that he was justified in detaining his prisoner during such time as was reasonably required for officer to advise magistrate, temporarily absent, that his presence was required. Venable v. Huddy [N. J. Law] 72 A 10.

20. Moses v. State [Ga. App.] 64 SE 699. Where officer imprisoned accused without reasonable cause, the latter in using force to resist such imprisonment was not necessarily guilty of resisting an officer. Id.

21. Where money was used as an exhibit and after conviction was turned over to

§ 6. *Preliminary hearing, binding over, or discharge.*[23] See 11 C. L. 282 Whether a preliminary examination is requisite before the filing of the information is determined by statute.[24] Such an examination may be waived.[25] The examination must be conducted substantially in the manner prescribed by statute,[26] but merely directory provisions need not be followed.[27] When the jurisdiction of one committing magistrate has attached, an order by another magistrate admitting accused to bail is without force.[28]

In order to hold the accused and put him on trial, a reasonably clear case must be made out against him,[29] and the burden is on the state to show that the prisoner is the party charged with the crime.[30] A confession may be received and considered by the examining magistrate in connection with other evidence as proof tending to show that an offense has been committed.[31]

Unless the magistrate has authority to punish,[32] he can only bind the prisoner

clerk by order of trial court, it was not necessary to bring suit for same but clerk should pay money in accordance with the order of its owner. United States v. Parker, 166 F 137.

22. Erie R. Co. v. Reigherd [C. C. A.] 166 F 247.

23. Search Note: See Criminal Law, Cent. Dig. §§ 459-492; Dec. Dig. §§ 221-241.

24. Held that at time information was filed, the law of Missouri did not require a preliminary examination before the filing of the information as Act April 15, 1907 (Laws 1907, p. 243) had not taken effect. State v. Harvey, 214 Mo. 403, 114 SW 19. Where a prosecution for murder was begun by complaint under Rev. St. 1899, § 2441 (Ann. St. 1906, p. 1478) prior to the enactment of Laws 1905, p. 133 (Ann. St. 1906, § 2476a), and accused waived preliminary examination, it was not necessary to accord a preliminary examination because the information was filed subsequent to the enactment of law of 1905 which accorded a preliminary examination. State v. Sassaman, 214 Mo. 695, 114 SW 590. Rev. St. 1899, § 2476a (Ann. St. 1906, p. 1487, amended by Laws 1907, p. 243) providing for a preliminary examination in felony cases did not become effective until July 14, 1907, and therefore does not apply to felony case begun before date law became effective. State v. Moran, 216 Mo. 550, 115 SW 1126. Where information had been quashed, state had no right to file another information and try defendant for a distinct offense for which he had never been committed, for under Const. art. 1, § 13, defendant had right to another preliminary hearing. State v. Jensen, 34 Utah, 166, 96 P 1085. The requirement of a preliminary examination is **not jurisdictional** and its mission is a mere error, and not available on habeas corpus after conviction. Buckley v. Hall, 215 Mo. 93, 114 SW 954.

25. Where accused had waived a preliminary examination before Laws 1905, p. 133 (Ann. St. 1906, § 2476a) went into effect, it was not necessary to allow preliminary examination. State v. Sassaman, 214 Mo. 695, 114 SW 590.

26. Under Rev. Justices' Code, § 124, providing manner of transfer of cause from one justice to another, it will be presumed in absence of any showing to the contrary that the proceedings were in manner prescribed by statute. State v. Carlisle [S. D.] 118 NW 1033. Where statute provided that in case of change of place of preliminary examination is granted the cause shall be transferred to the next nearest justice, "unless the parties otherwise agree," the fact that transcript of first justice failed to affirmatively show that parties had not agreed does not vitiate proceedings before second justice. Id.

27. St. 1898, § 4786, requiring examining magistrate to examine the complainant is directory only. Lundstrum v. State [Wis.] 121 NW 883.

28. Pippin v. State [Ala.] 47 S 266.

29. Strict proof is not required, it being only necessary to show that offense has been committed, and that there is probable cause to believe prisoner guilty. Sickles v. State, 7 Ohio N. P. (N. S.) 338. The examining magistrate is warranted in acting if there is evidence tending to show the commission of an offense and the criminal connection of the accused therewith, from which may be inferred a reasonable probability of the accused guilt. Ex parte Driggs [Cal. App.] 102 P 542.

Evidence held sufficient to justify committing magistrate to bind accused over to answer a felony charge. Ex parte Evans [Kan.] 97 P 1134. "Probable case" held sufficiently established to justify holding accused to answer charge of murder. Ex parte Heacock, 8 Cal. App. 420, 97 P 77. Evidence of murder held sufficient. Lundstrom v. State [Wis.] 121 NW 883. On a prosecution for perjury in registering as voter, held that magistrate had sufficient cause to commit when it was made to appear that defendant had made two affidavits, in one of which he swore that he was born in England and in the other that he was born in San Francisco. People v. Coombs [Cal. App.] 98 P 686.

Evidence held insufficient to warrant issuance of commitment holding accused to answer the charge of rape. People v. Harrison, 117 NYS 477.

30. Where person arrested for extradition under executive warrant denied that he was party described in warrant, the burden was on state. Statement in return of officer not sufficient evidence. Barnes v. Nelson [S. D.] 121 NW 89.

31. Lundstrom v. State [Wis.] 121 NW 883.

32. It is a matter of discretion with a

over to the proper court.[33] The offense must be properly designated or described in the commitment,[34] but an order of commitment which is too general may be aided by other matter.[35] The conclusion of a commiting magistrate is in no sense a judgment,[36] and is no bar to further prosecution.[37] Authority of an examining magistrate to take down the testimony of witnesses in writing and certify same to the proper court is sometimes conferred by statute.[38] In Alabama the returning of a process by a justice to the circuit court, without having held a preliminary examination, will be treated as a report that a preliminary investigaiton is then pending before him,[39] and such magistrate may thereafter conduct a preliminary hearing of the accused without issuing a new process.[40]

§ 7. *Custody awaiting indictment for trial.*[41]—See 7 C. L. 271

Arrest of Judgment; Arrest on Civil Process, see latest topical index.

ARSON:[42]

The scope of this topic is noted below.[43]

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*The crime.*See 11 C. L. 283—The offense of burning the dwelling house of another[44] relates to the security of the habitation and not to that of property.[45] The

mayor in a trial for violation of an ordinance where imprisonment is prescribed whether he bind the defendant over to the grand jury, or proceed to try him on the merits. Rev. St. § 1536-879. King v. New London, 8 Ohio N. P. (N. S.) 34.

33. Unless one accused of violating Rev. St. § 4405, governing sale of drugs by registered pharmacists, waive a jury in writing, the magistrate has no authority to punish, and can only bind the prisoner over to the proper court. Sickles v. State, 7 Ohio N. P. (N. S.) 338.

34. "It appearing to me that the offense of committing a lewd and lascivious act upon the body of a child under the age of 14 years has been committed," etc., sufficiently designates the offense defined by Pen. Code § 288, and meets the requirements of Pen. Code § 872. People v. Gregory, 8 Cal. App. 738, 97 P 912.

35. Where docket of justice of the peace showed merely a finding that a crime had been committed, its character not being stated, an order that defendant be held to answer charge as filed against him in the district court was sufficient where information charged same offense as that described in warrant. State v. Demming [Kan.] 100 P 285.

36, 37. State v. Nast, 209 Mo. 708, 108 SW 563.

38. Because of failure of legislature to enact the provision of the Dummy Code or § 1463 of Code 1892, there is in Mississippi no authority to do so. Scott v. State [Miss.] 46 S 251.

39, 40. Pippin v. State [Ala.] 47 S 266.

41. Search Note: See Criminal Law, Cent. Dig. §§ 258, 501-508; Dec. Dig. § 241; 2 A. & E. Enc. L. (2ed.) 866; 16 A. & E. Enc. P. & P. 818.

42. See 11 C. L. 283.

Search Note: See notes in 32 L. R. A. 647; 68 Id. 41, 55, 71; 4 L. R. A. (N. S.) 417; 16 Id. 285; 71 A. S. R. 266, 267; 101 Id. 21; 1 Ann. Cas. 621; 8 Id. 630.

See, also, Arson, Cent. Dig.; Dec. Dig.; 3 Cyc. 984-1011; 2 A. & E. Enc. L. (2ed.) 917; 2 A. & E. Enc. P. & P. 823.

43. Treats of common-law crime of arson and the statutory substitutes therefor and modifications thereof, and all other crimes by fire, whether denominated arson or not. Excludes matters common to all crimes (see Criminal Law *). Excludes, also civil liability for negligent setting of fires (see Fires,* § 1; Railroads,* § 11J; Explosives and Inflammables;* Negligence *), and regulations intended to prevent fires (see Fires,* § 3).

44. "Another's house" at common law meant another's to occupy. Peinhardt v. State [Ala.] 49 S 831. Neither husband nor wife can be guilty of offense by burning the dwelling house which they jointly occupy as home, regardless of the status of the title. Kopcyznski v. State, 137 Wis. 358, 118 NW 863. Rule that husband or wife cannot be under any circumstances properly charged with offense of burning dwelling house which they jointly occupy as their habitation does not apply where it is the habitation of but one; the other, though marital relations still exist, having left the same to reside elsewhere. Id. Under the statute the legal identity of husband and wife does not prevent a husband who burns his wife's house from being guilty of arson, as the house belonging to wife is the property of "another" under Gen. St. 1901, § 2046. State v. Shaw [Kan.] 100 P 78.

NOTE. Liability of one spouse for burning property of the other: Married man can

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* Always begin with the latest article on the subject. Use the latest topical index.

corpus delicti consists of the burning of the house and the fact that a criminal agency was the cause of the burning.[46] One who aids, abets, or procures the burning of a building may be prosecuted as a principal offender.[47] The statutory crime of willfully burning property with intent to defraud an insurance company is complete, though the policy be void.[48]

Indictment and prosecution. Indictment or information. See 11 C. L. 284—An indictment is sufficient if it charges an offense defined by the statute,[49] and for this purpose it is usually sufficient if the charge is laid in the words of the statute.[50] The building burned must be so described as to clearly identify it,[51] and as ownership is alleged only to identify the property,[52] it is proper to allege the dwelling to be that of him who occupies it as a habitation, though he may have no property right therein,[53] and this rule has been applied even under a statute relative to the offense of burning one's own house.[54]

Evidence, presumptions and burden of proof. See 11 C. L. 284—In order to convict, the corpus delicti must be proven beyond a reasonable doubt.[55] Where noth-

commit the crime of arson by burning the home of his wife with whom he is not living and from which he has been excluded or excluded himself. Kopcyznski v. State 137 Wis. 350, 118 NW 863. At common law a wife cannot be guilty of arson in burning the dwelling house of her husband, nor a husband in burning the dwelling house of his wife, which they jointly occupy as their residence. Clark, Cr. Law, 2nd. Ed., p. 253; McLain, Crim. Law, § 521; May, Crim. Law, Ed. 3, § 252; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302. It seems that a wife, because of her relationship to her husband, cannot he guilty of the offense in burning the husband's dwelling, even though at the time living separate from him. Rex v. March, C. C. 1 Moody, 182. The offense is against the habitation and not against the property. 2 East P. C. 1034; 4 Bl. Comm. 220; Snyder v. People, supra; State v. Toole, 29 Conn. 342; 1 Bishop, New Crim. Law, § 577. Under statutes giving married women the right to own and control separate real estate, the same as if sole, the husband may commit arson in burning the house of his wife although dwelling with her at the time. The statute, however, makes the offense one against the property. Garret v. State, 109 Ind. 527, 10 NE 570. So also may a wife in this jurisdicion be guilty of arson in burning her husband's barn. Emig v. Daum, 1 Ind. App. 146, 27 NE 322. The holding in the case of Snyder v. People, under a statute substantially the same as the one in the principal case, is to the effect that a husband, living with his wife and having a rightful possession jointly with her, of a dwelling house which she owns and they both occupy, is not guilty of arson in burning such dwelling house.—From 7 Mich. Law. R. 510.

45. Idea is that the house of such other is his to occupy as a habitation. Kopcyznski v. State, 137 Wis. 358, 118 NW 863. Arson at the common law was an offense against the possession rather than the property. Peinhardt v. State [Ala.] 49 S 831. Under St. 1898, § 4399, the crime is the same as that at common law. Kopcyznski v. State, 137 Wis. 358, 118 NW 863.

46. West v. State [Ga. App.] 64 SE 130.

47. Conviction may be had if accused personally or in conjunction with others feloniously burned the building or if by aiding and abetting he procured others to feloniously, willfully, and maliciously burn the building. Goldberger v. People [Colo.] 101 P 407.

48. Offense is complete, though policy be invalid, if defendant believed it to be valid, and burned the property with intent to collect on policy. People v. Morley, 8 Cal. App. 372, 97 P 84.

49. Indictment charging burning of abandoned dwelling house held sufficient under Code 1906, § 1040, though there was no allegation that any one lived therein either by day or night or that the burning was in either day or night. Banks v. State, [Miss.] 47 S 437.

50. Indictment under Act June 14, 1898 (P. L. p. 329), § 126, charging that the defendant did "willfully and maliciously aid, counsel, procure, and consent to the setting fire to and burning of certain goods, etc., which at the time were insured against loss or damage by fire, with intent to prejudice," certain insurance companies mentioned, held sufficient, without any more specific averment that fire actually occured. State v. Brand [N. J. Err. & App.] 72 A 131.

51. People v. Laverty [Cal. App.] 100 P 899.

52. State v. Sprouse, 150 N. C. 860, 64 SE 900.

53. That title was in person who set the fire makes no difference. Kopcyznski v. State, 137 Wis. 358, 118 NW 863. Indictment charging accused with burning building belonging to S. held sufficient, where it was shown that building though belonging to another, was rented to S. who was using it as a granary. State v. Sprouse, 150 N. C. 860, 64 SE 900.

54. Indictment, under Code 1907, § 6301, is defective where it charged that defendant burned or set fire to a storehouse of another when in fact it was occupied by the defendant who was in possession under a lease. Peinhardt v. State [Ala.] 49 S 831. Ownership under the statute means occupancy and, therefore, the indictment must show such ownership or it will be defective. Id.

55. Corpus delicti held established prior

ing appears but the mere fact of destruction by fire, the presumption is that the fire was the result of accidental, natural, or providential cause,[56] and the burden is, therefore, on the state to prove, first, a burning,[57] and second, that it was a criminal burning.[58] The prosecution need not prove the ownership alleged, provided the house is otherwise described sufficiently for the purpose of identification and such identification is sustained by the evidence.[59]

Admissibility. See 11 C. L. 284—Inculpatory statements made by a codefendant in the defendant's presence and not denied by him [60] are admissible under the general rules of criminal evidence.[61] Evidence that the accused consented to a settlement with the insurance companies of the fire loss upon a basis of one-half of the adjusted amount of the loss held admissible as tending to show a guilty mind on the part of the accused [62] and to the same end, evidence that several months before the fire invoices were stamped "paid" which were not in fact paid is also admissible.[63]

Weight and sufficiency. See 11 C. L. 285—A conviction may be had upon circumstantial evidence alone.[64] Confession alone, uncorroborated by other evidence of the corpus delicti, will not sustain a conviction.[65]

Instructions See 9 C. L. 256 must be applicable to the issues.[66]

Punishment. See 9 C. L. 257

ASSAULT AND BATTERY.

The scope of this topic is noted below.[67]

§ 1. Nature and Elements of Criminal Offense, 328. Aggravated Assault, 329.
§ 2. Defenses, 329.
§ 3. Indictment, 329.
§ 4. Evidence; Instructions; Verdict; Punishment, 330.
§ 5. Civil Liability, 332. Defenses, 332. Pleading, 333. The Evidence, 333. The Instructions, 334.

§ 1. *Nature and elements of criminal offense.*[68]—See 11 C. L. 285—An assault consists in an offer to do bodily harm, made by a person who is in a position to execute it,[69] an essential element being a reasonable apprehension of immediate physi-

to introduction of certain confessions. People v. Morley, 8 Cal. App. 372, 9784.

56, 57. West v. State [Ga. App.] 64 SE 130.

58. Evidence held insufficient to establish the corpus delicti. West v. State [Ga. App.] 64 SE 130.

59. People v. Laverty [Cal. App.] 100 P 899.

60. See People v. Morley, 8 Cal. App. 372, 97 P 84.

61. See Indictment and Prosecution, 12 C. L. 1.

62, 63. State v. Brand [N. J. Err. App.] 72 A 131.

64. Circumstantial evidence held sufficient to warrant submission to jury. State v. Allen, 149 N. C. 458, 62 SE 597. Evidence held sufficient to support verdict. Brown v. State [Ga. App.] 64 SE 1119.

65. Fact that there were some tracks, apparently made during the night, in the public road, going by the house that was burned and by residence of prosecutor and that there had been no fire about the house in afternoon or early part of the night of the burning, was not sufficient to corroborate accused's confession so as to establish corpus delicti. West v. State [Ga. App.] 64 SE 130.

66. Where indictment expressly charged that defendant "in the nighttime set fire to and burned," and the statute provided different punishment for burning in the night, it was error to refuse to instruct that if it was not dark when fire was set, could not be convicted, since under the indictment state must show that both setting and burning occurred in nighttime. Rist v. State [Miss.] 47 S 433. Instructions held proper. Brown v. State [Ga. App.] 64 SE 1119. Instruction that if jury had reasonable doubt as to the identity of a corpse found in the fire as that of a certain person they should acquit was properly refused, regardless of whether defendant and such person were jointly indicted. Goldberger v. People [Colo.] 101 P 407.

67. It excludes assaults with particular felonious intent (see Rape,* § 1C, and like topics), assaults with deadly weapon (see Homicide,* § 4), and liability of employers for assault by their servants (see Master and Servant,* § 4). Measure of damages for assault is likewise excluded (see Damages,* § 5A).

68. Search Note: See notes in 14 L. R. A. 226; 15 Id. 853; 2 L. R. A. (N. S.) 603; 14 Id. 209; 713; 5 Ann. Cas. 999.

See, also, Assault and Battery, Cent. Dig. §§ 68-88; Dec. Dig. §§ 47-61; 2 A. & E. Enc. L. (2ed.) 953.

69. Held to constitute assault: Cursing

* Always begin with the latest article on the subject. Use the latest topical index.

cal injury.[70] If the assault is consummated by the infliction of physical injury it is an assault and battery.[71]

Aggravated assault. See 11 C. L. 288—Assault with a deadly weapon[72] or with felonious intent[73] is elsewhere treated. An assault upon a female[74] by an adult male[75] constitutes an aggravated assault in Texas, but the mere improper solicitation does not.[76]

§ 2. *Defenses.*[77]—See 11 C. L. 286—An assault and battery may be justified in defense of property,[78] but not ordinarily in the forcible recaption thereof.[79] As a general rule, a parent has the right to protect child from any assault,[80] but cannot take the part of the child in an altercation in which the latter is in the wrong.[81] Only so much force as is reasonably necessary may be used,[82] and cruel and unreasonable chastisement of a child by one in loco parentis is an assault and battery.[83] No provocation which does not occur in the defendant's presence, or at the immediate time of the difficulty, can be pleaded by the defendant in justification.[84]

§ 3. *Indictment.*[85]—See 11 C. L. 286—The indictment need not allege an intent to injure.[86] The indictment may charge the assault to have been made by different weapons although there is a slight lapse of time intervening.[87] Where, upon an indictment for assault with a dangerous weapon, it is established that the assault if committed at all was with a dangerous weapon, no conviction for assault and

and drawing back brick as if intending to strike. Rutherford v. State, 5 Ga. App. 482, 63 SE 570. One who shoots with a pistol in the direction of another, situated within range of pistol, not intending to hit him, is guilty of an assault. Edwards v. State, 4 Ga. App. 849, 62 SE 565. Trespasser who draws pistol without justification on one in charge of property is guily of assault. Ryan v. Ter. [Ariz.] 100 P 770.

70. Movement, however threatening which does not produce fear of physical harm, is not assault. Henry v. Cherry [R. I.] 73 A 97.

71. In resenting opprobrious words, defendant knocked complaining witness down with a brickbat inflicting wound from which he was unconscious for two or three days. Held assault and battery. Bedford v. State, 5 Ga. App. 461, 63 SE 515.

72. See Homicide,* § 4.

73. See Rape,* § 1C; Robbery,* and like topics.

74. It is aggravated assault upon woman to fondle or lay hand upon her without her consent, and intent under such circumstances would be presumed, and such presumption must be overcome to justify acquittal. Combs v. State [Tex. Cr. R.] 116 SW 595. Placing of hand on prosecutrix's breast held to constitute aggravated assault. Id. Evidence held insufficient to support conviction of aggravated assault. Hubbard v. State [Tex. Cr. R.] 119 SW 846.

75. Where on prosecution for aggravated assault prosecutrix testified that she knew accused like any other boy and again testified that he was the man that assaulted her, the evidence was insufficient as it did not show accused to be an adult. Hartsell v. State [Tex. Cr. R.] 116 SW 1159.

76. Nor does it constitute simple assault, and fact that female hurt herself on fences as she was leaving accused premises does not make it aggravated assault though accused was following her at the time. Loid v. State [Tex. Cr. R.] 116 SW 807.

77. Search Note: See notes in 5 C. L. 270; 14 L. R. A. 317; 50 Id. 644; 67 Id. 565; 3 L. R. A. (N. S.) 702; 8 Id. 1223; 12 Id. 1155; 14 Id. 753; 15 Id. 1272; 1 Ann. Cas. 888.

See, also, Assault and Battery, Cent. Dig. §§ 89-102; Dec. Dig. §§ 62-70; 2 A. & E. Enc. L. (2ed.) 977; 23 Id. 973.

78. In trial for assaulting commissioners who were working over line, defendant was entitled to justify on ground of defense of property it appearing that he was in actual possession of the land. State v. Cleveland [Vt.] 72 A 321. Where reasonable force is used in ejecting trespasser, such trespasser has no right to resist. Ryan v. Territory [Ariz.] 100 P 770.

79. Where plaintiff was in possession of mining claim and defendant relying on ownership assaulted plaintiff, in order to get possession, held that such fact was no jusification for assault. Hickey v. U. S. [C. C. A.] 168 F 536.

80. Kimberly v. State, 4 Ga. App. 852, 62 SE 571.

81. Parent held guilty of assault. Kimberly v. State, 4 Ga. App. 852, 62 SE 571.

82. Surgeon who had charge of patient had no right to assault another surgeon before asking him to leave room. People v. Reycraft [Mich.] 16 Det. Leg. N 175, 120 NW 993.

83. Whipping held excessive and unreasonable. People v. Green [Mich.] 15 Det. Leg. N. 1090, 119 NW 1087.

84. Jackson v. State, 4 Ga. App. 852, 62 SE 539, following Cole v. State, 2 Ga. App. 734, 59 SE 24, and Walker v. State, 117 Ga. 323, 43 SE 737.

85. Search Note: See, Assault and Battery, Cent. Dig. 106-126; Dec. Dig. §§ 73-80; 2 A. & E. Enc. P. & P. 838.

86. Saye v. State, 54 Tex. Cr. R. 430, 114 SW 804.

87. State v. Nieuhaus, 217 Mo. 332, 117 SW 73.

battery or simple assault can be had.[88] A conviction may be had of a lessor offense under an indictment or information charging a greater offense which includes the latter.[89]

§ 4. *Evidence; instructions; verdict; punishment.*[90] See 11 C. L. 287—Threats[91] and other acts and declarations of accused showing animus are admissible if made before[92] or immediately after the assault,[93] as is subsequent possession of weapons[94] or evidence relating to the condition of the complaining witness after the assault;[95] but subsequent acts are ordinarily confined to those which are part of the res gestae.[96] Where defendant pleads self-defense, evidence tending to show that defendant had no reason to believe himself in imminent danger is admissible.[97] Evidence that victim of the assault is proceeding against the defendant for damages suffered in consequence of it, are admissible in mitigation of punishment.[98] Collateral transactions,[99] such as an assault unconnected with that charged, are inadmissible.[1] Defendant may not state whether he did any more

88. Where defendant admitted hitting plaintiff with revolver, such act constituted an assault with dangerous weapon, therefore he could not be convicted of lesser offense. Hickey v. U. S. [C. C. A.] 168 F 536.

89. See, generally, Indictment and Prosecution, 12 C. L. 1. Conviction of assault, with a dangerous weapon by shooting at complaining witness with a firearm with intent to injure him, properly had under indictment charging the crime of shooting at another with a firearm with intent to kill. State v. Bednar [N. D.] 121 NW 614.

90. **Search Note:** See notes in 2 Ann. Cas. 234; 11 Ann. Cas. 99.

See, also, Assault and Battery, Cent. Dig. §§ 127-170; Dec. Dig. §§ 81-100; 2 A. & E. Enc. L. (2ed.) 1002; 2 A. & E. Enc. P. & P. 354.

91. Testimony of prosecutor that he sold his crop for less than it was worth because he was advised that defendant would kill him if he remained on the place was admissible. Vanhooser v. State [Tex. Cr. R.] 113 SW 285. On a trial for aggravated assault, evidence that accused said that if prosecutor had come to his place on a certain errand instead of his son he would have killed him was admissible. Roch v. State [Tex. Cr. R.] 120 SW 448.

92. Letter written by defendant some two years before alleged assault was properly admitted to show ill feelings. People v. Reycraft [Mich.] 16 Det. Leg. N. 175, 120 NW 993.

93. Evidence that, after defendant had shot prosecutor, he smoked cigarettes and made no effort to go where prosecutor was, was admissible on a trial for aggravated assault. Roch v. State [Tex. Cr. R.] 120 SW 448.

94. Where two persons were charged with assault regardless of human life, it was error to exclude evidence of witness to the effect that about half hour after the shooting one of defendants gave him two revolvers, one loaded and the other not. De Blazio v. State [Wis.] 121 NW 131.

95. Not error to permit physician who attended complaining witness after he was stabbed to testify as to nature and extent of wound, together with his treatment of the same. Stevens v. State [Neb.] 122 NW 58.

96. It being state's theory that defendant and son were acting in conjunction in the difficulty, evidence that son after assault on prosecutor ran him out of the house was admissible. Vanhooser v. State [Tex. Cr. R.] 113 SW 285. Evidence that just prior to assault defendant's son made certain remarks to prosecutor was admissible. Id. Difficulty having ended, evidence that defendant shook his fist in prosecutor's wife's face and made certain remarks was not admissible as part of res gestae. Id. Evidence that defendant hit prosecutor's wife while son was assaulting prosecutor was admissible as part of res gestae, it being claimed that defendant and son were acting together. Id. In trial for aggravated assault, statement made by defendant, immediately after the shooting, that he fired up in the air to frighten prosecutor who was advancing upon him with a knife, was admissible as part of res gestae. Humphrey v. State [Tex. Cr. R.] 116 SW 570. Remarks made by third person to plaintiff in the presence and hearing of defendant immediately prior to assault and almost contemporaneously therewith are admissible. Haines v. People, 138 Ill. App. 49. But conversation between defendant and another prior to difficulty and out of presence of plaintiff not admissible. Id. In prosecution for aggravated assault on female by fondling her in an indecent manner, testimony as to what prosecutrix said to her mother two weeks after assault is inadmissible. Saye v. State, 54 Tex. Cr. R. 430, 114 SW 804.

97. Where one charged with assault and stabbing with intent to wound pleads self-defense, the state may prove relative size and physical strength of parties together with weakened condition of complaining witness. Stevens v. State [Neb.] 122 NW 58.

98. Testimony admissible for consideration of jury in mitigation of fine. Caldwell v. State [Ala.] 49 S 679.

99. Stevens v. State [Neb.] 122 NW 58.

1. Where defendant was charged with assaulting a woman on a public street, evidence that on same evening, in same neighborhood, he attempted to assault another

than was necessary in defense of his person.[2] Defendant is entitled by way of justification to prove the general reputation of the prosecuting witness in the community where he resided as a violent, quarrelsome, and dangerous man,[3] and the prosecution is entitled to contradict such testimony by the evidence of competent witness.[4] Where the proof shows an assault and battery, a prima facie case is made out,[5] and the defendant must show justification.[6] Cases dealing with the sufficiency of the evidence will be found in the notes.[7]

Instructions.[See 11 C. L. 287]—An instruction must not deprive defendant of the right to have his proofs as to reputation considered.[8] Where the defendant claimed the assault was justifiable, it was not error to charge that defendant should have requested plaintiff to leave before beginning the assault.[9] Instructions which are applicable to the issue should not be refused,[10] and instructions which unwarrantably raise the standard of self-defense as applied to assault and battery should not be given.[11] An instruction should not be given unless there is evidence on which to predicate it,[12] nor unless the matter is in issue,[13] nor should instructions be given

woman, is inadmissible. Commonwealth v. House [Pa.] 72 A 804, reversing 36 Pa. Super. Ct. 363.

2. Question was one for the determination of jury from surrounding facts and circumstances in evidence. Haines v. People, 138 Ill. App. 49.

3. Stevens v. State [Neb.] 122 NW 58. But is not entitled to prove specific acts occurring more than ten years previous to alleged assault, with which defendant had no concern. Id.

4. Stevens v. State [Neb.] 122 NW 58.

5, 6. Badger v. State, 5 Ga. App. 477, 63 SE 532.

7. Evidence held sufficient: Evidence held sufficient to support verdict. Thompson v. Shelverton, 131 Ga. 714, 63 SE 220. Evidence held sufficient to support conviction of simple assault. Malone v. State [Tex. Cr. App.] 113 SW 530. Evidence held sufficient to go to jury as to whether defendant assisted another in commission of offense of secret assault. State v. Walker, 149 N. C. 527, 63 SE 76. Testimony of plaintiff that defendant struck him and testimony of officer that defendant told him that he struck plaintiff. Brown v. State [Ind.] 85 NE 965. In prosecution for assaulting an officer who attempted to enter defendant's saloon in order to see if Sunday ordinance was being violated, held that testimony of defendant was sufficient to show his guilt. Dotterer v. State [Ind.] 88 NE 689. Where one witness testified that accused kicked prosecutor in head while down and physician who examined wounds testified that one or two of wounds could have been caused by man's shoe, held sufficient to sustain conviction. Warren v. State [Ark.] 114 SW 705. Evidence held sufficient to authorize finding that defendant apparently intended present assault with brick upon person of prosecutor. Rutherford v. State, 5 Ga. App. 482, 63 SE 570.

8. Instruction that "if upon the other hand you are satisfied in view of all the evidence in the case, that defendant is guilty, then fact that he previously had a good reputation is not a defense," was erroneous. Commonwealth v. House [Pa.] 72 A 804, reversing 36 Pa. Super. Ct. 363.

9. Held that charge did not assume that defendant began by assaulting plaintiff but was said in explanation of claim that assault was justifiable and necessary in defense of patient. People v. Reycraft .Mich.] 16 Det. Leg. N. 175, 120 NW 993.

10. Charge that if defendant cut complaining witness under a bona fide belief that he was in impending danger to life or limb, and that if he had under all circumstances reasonable cause to believe that he was in immiment danger at time cutting was done, it would be immaterial whether there was such danger or not, was erroneously refused. Caldwell v. State [Ala.] 49 S 679. Instructions that if jury should find and believe from the evidence that defendant saw prosecutor draw knife and attempt to use same on defendant's son and if they should further find that defendant did not go on premises for purpose of raising a difficulty and knew nothing of any intention to attack prosecutor, that they should find defendant not guilty, should have been given. Vanhooser v. State [Tex. Cr. R.] 113 SW 285. Prior declarations of witnesses in conflict with their testimony as to the identity of the assailant should be called to the attention of the jury. Commonwealth v. House [Pa.] 72 A 804, reversing 36 Pa. Super. Ct. 363.

11. Held that instructions would have been good had defendant been on trial for unlawful killing or assault with intent to murder but was inapt as instruction in an action for assault and battery. Caldwell v. State [Ala.] 49 S 679. Instructions on law of self-defense held erroneous because too limited. Aycock v. State [Tex. Cr. App.] 115 SW 590.

12. Instruction that sending of cards introduced in evidence to parties other than defendant, or members of her immediate family, did not justify the assault, was erroneous as assuming such cards were so sent when such fact did not appear. De Silva v. State [Miss.] 47 S 464. Charge upon subject of opprobrious words as justification was erroneous, because not justified by evidence that opprobrious words were used. Threats of personal violence not necessarily opprobrious or abusive. Kimberly v. State, 4 Ga. App. 852, 62 SE 571.

13. Where, on a trial for aggravated as-

which invade the province of jury.[14] The instructions should submit all the issues,[15] and should be as full as the facts of the case warrant.[16]

The verdict See 11 C. L. 288 must be definite.[17]

Punishment. See 11 C. L. 288

§ 5. *Civil liability.*[18]—See 11 C. L. 288—Any application of unlawful force to another,[19] or any touching by one person of the person of another in rudeness or in anger gives a right of action.[20] Where two persons engage voluntarily in a fight, either can maintain an action against the other.[21] While the injury must be intenionally inflicted,[22] yet, if inflicted by violence, the law presumes a wrongful intent,[23] and the intent is immaterial, if the act is not justified or excusable or with the assent of the person upon whom the act is committed.[24]

Defenses. See 11 C. L. 289—A trespasser may if necessary be forcibly ejected[25] by one in possession, and one who is owner of land cannot plead as a defense, ejectment of person as trespasser, when such property is in possession of another than the owner;[26] but neither this nor any other justification will avail if unnecessary and excessive force be used,[27] whether the force used was excessive being for the

sault, facts showed that party assaulted was dealt almost a deadly blow which broke his arm and inflicted serious injury, it was not error to refuse to submit issue of simple assault. Halsford v. State [Tex. Cr. R.] 120 SW 193. Where conviction was for aggravated assault, court did not err in refusing to give instructions on Pen. Code 1895, art. 717, providing that instrument or means by which homicide is committed should be taken into consideration in determining whether party assaulting intended to kill. De Silva v. State [Miss.] 47 S 464.

14. Error to assume that defendant had made an assault and battery upon prosecutrix. De Silva v. State [Miss.] 47 S 464.

15. Held that court erred in not directing jury that if there was no specific intent to kill and serious bodily injury was inflicted, or if assault was committed with a deadly weapon under circumstances not amounting to an intent to murder, then the defendant would only be guilty of aggravated assault. Henderson v. State [Tex. Cr. R.] 115 SW 45.

16. In a trial for aggravated assault on a female by fondling her in an indecent manner, held that instructions were not as full as ought to have been. Saye v. State, 54 Tex. Cr. R. 430, 114 SW 804.

17. Held that jury should have stated whether they found accused guilty of aggravated assault or simple assault. Aycock v. State [Tex. Cr. App.] 115 SW 590.

18. Search Note: See notes in 5 C. L. 274; 1 Ann. Cas. 899; 11 Id. 1175.

See, also, Assault and Battery, Cent. Dig. §§ 1-67; Dec. Dig. §§ 1-46; 3 Cyc. 1066-1109; 2 A. & E. Enc. L. (2ed.) 989; 2 A. & E. Enc. P. & P. 862.

19. Luttermann v. Romey [Iowa] 121 NW 1040.

20. Hyde v. Cain [Ala.] 47 S 1014.

Held to constitute assault: Publicly searching saleswoman's pocket by manager for money. Kress v. Lawrence [Ala.] 47 S 574. Forcible exclusion of a person from entrance of passenger car. Deragon v. Sero, 137 Wis. 276, 118 NW 839.

Held not to constitute assault: Where one having delivered laundry, without collecting, returned and in reaching for laundry his knee came in contact with plaintiff's knee causing no pain but she suffered a subsequent hemorrhage from shock, held that facts were insufficient to justify recovery for assault and battery. Steinman v. Baltimore Antiseptic Steam Laundry Co., 109 Md. 62, 71 A 517.

21. Each may have an action and recover full damages for injuries received. Morris v. Miller [Neb.] 119 NW 458.

22. Luttermann v. Romey [Iowa] 121 NW 1040. Under a complaint for assault and battery, recovery cannot be had for injury caused by negligent act. Biggins v. Gulf, etc., R. Co. [Tex.] 118 SW 125.

23, 24. Luttermann v. Romey [Iowa] 121 NW 1040.

25. Where collector persisted in coming to home of defendant, held that under the circumstances defendant was justified in using force which he did in ejecting him. Slater v. Taylor, 31 App. D. C. 100.

26. Father who owns land upon which is situated a dwelling, which with his permission is occupied by his son, is without right to enter upon such premises for purpose of ejecting third person who was there on invitation of son. Cowperthwait v. Brown [Neb.] 117 NW 709. Fact that son is in poor health and father contributed to his support is immaterial. Id.

27. Where plaintiff and defendant entered into a fight, and during the fight defendant chewed and lacerated one of plaintiff's fingers, held that such act constituted excessive force. Yount v. Strickland [Wyo.] 101 P 942. Beating boy seven years of age with a stick and causing dog to bite him, although boy at the time was trespasser, as such abuse was unnecessary and excessive. Bernadsky v. Erie R. Co. [N. J. Err. & App.] 70 A 189. Where one had entered premises of another for purpose of notifying him of straying of his stock, and landowner thereupon ordered him to depart, his failure to do so instantly, unaccompanied with any threats or violence toward landowner, did not justify latter in using deadly weapon to eject him. Glassey v. Dye [Neb.] 119 NW 1128. Where plaintiff

jury.[28] One who has entered willingly into the difficulty [29] or who provokes the assault by trespass [30] or who otherwise is the aggressor [31] cannot justify the assault on the ground of self-defense. The fact that a peace officer thinks he is acting within his authority is no defense for an assault in exceeding such authority.[32] Verbal abuse is no justification,[33] though it may be shown as extenuating the assault.[34]

Pleading. See 11 C. L. 289—The petition must allege all the elements of the tort;[35] but an allegation of the assault carries with it the allegation of illegality.[36] It is not essential that the declaration state the injury with any inducement of the defendant's motive or intent [37] or of the circumstances under which the injury was committed.[38] Justification must be pleaded.[39] A plea son assault demesne must show the facts constituting justification.[40]

The evidence. See 11 C. L. 289—Business relations between the parties out of which the difficulty grew may be shown [41] and circumstances bearing on provocation and premeditation are admissible.[42] Plaintiff may exonerate himself as to alleged provocation.[43] Threats by plaintiff are not ordinarily admissible in the absence of proof of aggression by him.[44] Matters relating to irrelevant collateral matter not

trespassed upon defendant's land but did not attempt to assault defendant, held that defendant was not justified in shooting plaintiff. Newcome v. Russell [Ky.] 117 SW 305. Where passenger who had been removed to another car for disorderly conduct sustained a broken jaw by reason of blow delivered by brakeman, held that under the circumstances such violence was unnecessary and constituted assault and battery. Norfolk & W. R. Co. v. Brame [Va.] 63 SE 1018. Error for court to instruct that defendant "had right to repel force by force, and in so doing to use such force as defendant then believed was reasonably necessary under the existing circumstances." Doyle v. Cavanaugh, 139 Ill. App. 359.

28. Stucker v. Thompson, 139 Ill. App. 145.

29. In an action for assault and battery in arresting plaintiff for violating a town ordinance, defendant, mayor of the town, could not invoke such defense, he having accepted challenge of plaintiff to go outside corporation. Rutledge v. Rowland [Ala.] 49 S 461.

30. Where one who had distress warrant broke locks in order to make distress, he could not plead self-defense as justification of assault upon wife of party who occupied the house. Jones v. Parker, 81 S. C. 214, 62 SE 261. Fact that wife came in house with axe would not justify assault. Id.

31. Where it appeared from evidence that defendant was aggressor, a verdict for defendant on theory that he acted in self-defense is erroneous. Vaughan v. McDaniel [Ark.] 117 SW 533.

32. Assault of peace officer upon person who was attempting to meet wife at entrance of passenger car is not justified because he thought he was enforcing lawful rules made by his superior officer, plaintiff having notified him of his intention. Deragon v. Sero, 137 Wis. 276, 118 NW 839.

33. Being material only on question of damages. Rohrback v. Pullman's Palace Car Co., 166 F 797; Norfolk & W. R. Co. v. Brame [Va.] 63 SE 1018.

34. Norfolk & W. R. Co. v. Brame [Va.] 63 SE 1018.

35. Petition, which contained averments to the effect that defendant willfully and maliciously with force and violence pushed and shoved plaintiff across room to door and out of door to ground, a distance of six feet, and as result plaintiff's leg was broken and knee crushed and to his damage in sum of $5,000, states cause of action for damages for assault and battery. Luttermann v. Romey [Iowa] 121 NW 1040.

36. Luttermann v. Romey [Iowa] 121 NW 1040.

37, 38. Wells v. Boston & M. R. Co. [Vt.] 71 A 1103.

39. Not admissible under general denial. Fink v. Busch [Neb.] 120 NW 167.

40. When pleadings did not contain allegation that plaintiff would have beat or ill treated defendant if he had not immediately defended himself, and averments were conclusions, unsupported by facts, plea was insufficient. Smith v. Wickard, 42 Ind. App. 508, 85 NE 1030.

41. Where plaintiff was assaulted while removing potatoes from certain land, a contract for which he claimed to have assigned to defendant as security for loan and defendants claimed that it was a sale and that they were engaged in reasonable effort to secure their property from trespasser, held whether assignment was absolute or given as security was material fact and that testimony was admissible to show its character. Robinson v. Stimer, 154 Mich. 244, 15 Det. Leg. N. 709, 117 NW 634.

42. Evidence of conversations between plaintiff and defendant prior to the assault is admissible to prove whether the assault was the result of a sudden heat of passion or was premeditated and malicious. Yount v. Strickland [Wyo.] 101 P 942.

43. Error not to allow plaintiff to prove by other witnesses that another person made the insulting remarks in reference to defendant. Renfro v. Barlow [Ky.] 115 SW 225.

44. Rutledge v. Rowland [Ala.] 49 S 461.

connected with the parties to the action are inadmissible.[45] Clothing which plaintiff had on at time of assault is admissible in evidence.[46] Plaintiff may exclude other possible causes of the injury sued for[47] and defendant is not entitled to show other possible causes long subsequent to the assault.[48] The burden of proof is on defendant to show innocence of the intent,[49] and an assault having been shown, the burden is on him to show justification.[50] He may give in evidence any opprobrious words used by the plaintiff to him in order to justify his conduct.[51] Unnecessary averments need not be proved.[52] A party may not state in terms whether he used more force than was necessary.[53]

The instructions See 11 C. L. 290 must be construed as a whole,[54] must declare the law applicable to every phase of the case,[55] must be applicable to the issue,[56] and

45. Letters written between members of families of plaintiff and defendant but not by or to either of them were not admissible to show mitigating circumstances. Wirsing v. Smith, 222 Pa. 8, 70 A 906. Whether plaintiff was drinking at time. Rutledge v. Rowland [Ala.] 49 S 461. In an action for assault and battery in arresting plaintiff, fact that the mayor was in certain saloon some weeks after alleged assault is irrelevant. Id. Evidence that plaintiff had handcuffs is irrelevant, the handcuffs having been taken away before the assault. Id. Evidence that plaintiff had knocked down a marshal who was not a party to the suit is not admissible. Id.

46. Immediately after encounter plaintiff's hat was picked up and was introduced in evidence upon the trial, showing that rent would be over or near point of injury on plaintiff's head. Held that admission was not erroneous. Morris v. Miller [Neb.] 119 NW 458.

47. In action for assault and battery in arresting plaintiff, evidence was properly admitted for purpose of showing whether there was anything in calaboose which might have caused injury. Rutledge v. v. Rowland [Ala.] 49 S 461.

48. In action for assault and battery in arresting plaintiff, evidence of difficulty with mayor nearly month after not admissible to show physical condition. Rutledge v. Rowland [Ala.] 49 S 461.

49. Luttermann v. Romey [Iowa] 121 NW 1040.

50. Johnson v. Daily [Mo. App.] 118 SW 530.

51. Thompson v. Shelverton, 131 Ga. 714, 63 SE 220. Jury must determine, in view of character of provocation and nature and extent of battery, whether such opprobrious words amount to a justification, or only to mitigation of damages. Id.

52. Under Code, § 3639, such averments need not be proved. Luttermann v. Romey [Iowa] 121 NW 1040. Where action was to recover for assault and battery and it was alleged that assault was committed for purpose of having sexual intercourse with plaintiff, held that such intent need not be proven in order to recover. Id.

53. Defendant being asked question whether he used more force than necessary, answered that he did. Held that such question and answer was objectionable. Hubbard v. Louisville, etc., R. Co., 32 Ky. L. R. 1337, 108 SW 331.

54. Instructions on self defense held sufficient when so construed. Morris v. Miller [Neb.] 119 NW 458. Instructions on defense of home by wife held correct as a whole. Jones v. Parker, 81 S. C. 214, 62 SE 261. Instruction that right to arrest without warrant never carries with it right to incarcerate without a hearing. Held that use of word "never" when taken in connection with the rest of charge was correct. Rutledge v. Rowland [Ala.] 49 S 461. Held that there was not such a conflict between instructions as to mislead jury. Johnson v. Daily [Mo. App.] 118 SW 530.

55. Where from weight of evidence it was apparent that defendant assaulted plaintiff first, self-defense instruction should have been qualified by a provision to the effect that if defendant brought on difficulty by first attacking plaintiff they could not find for defendant, on ground of self-defense. Renfro v. Barlow [Ky.] 115 SW 225.

56. Not error to refuse to give instructions relevant to defense of justification, when such defense is neither alleged nor proved. Fink v. Busch [Neb.] 120 NW 167. Though complaint alleged that the assault and battery was committed with intent of having sexual intercourse, the court erred in instructing jury if acts were done with intent and purpose of obtaining sexual intercourse then plaintiff would be entitled to recovery, such instruction being erroneous as leading jury to believe it was necessary to find such intent in order to allow recovery for the assault and battery alleged. Luttermann v. Romey [Iowa] 121 NW 1040. Instruction, that if assault was committed words spoken by defendant (which were not actionable per se) might be considered in connection with that, was erroneous. Galvin v. Starin, 116 NYS 919. In action for assault and battery in arresting plaintiff for carrying concealed weapons in violation of an ordinance, instructions that if jury was reasonably satisfied that plaintiff d'd commit the offense that defendants had right to arrest him without warrant was properly refused as action was not for false imprisonment and plea did not set such up as a defense. Rutledge v. Rowland [Ala.] 49 S 461. After counsel for defendant had handed court request for instructions as to law of self-defense, counsel stipulated that certain matter should be withdrawn and that injury to plaintiff was to be limited to effect of certain blows in case jury found such blows were struck, but defendant neither withdrew such re-

must not ignore or exclude a defense,[57] or assume facts in issue.[58] Such instructions only should be given as are justified by the evidence.[59] The failure of the court to define "maliciously," which is used several times in its charge to the jury, is not error; the defendant not having made a request for such definition.[60]

Assignment of Errors, see latest topical in dex.

ASSIGNMENTS.

The scope of this topic is noted below.[61]

§ 1. Rights Susceptible of Assignment, 335. Contracts for Personal Services or Otherwise Appurtenant to Persons or Specific Property, 336. Assignments of Future Earnings, 337. Contingent Interests and Expectancies, 337.

§ 2. Requisites and Sufficiency of Express Assignments, 337.

§ 3. Constructive or Equitable Assignments, 339.

§ 4. Construction, Interpretation and Effect, 340.

§ 5. Enforcement of Assignment and of Rights Assigned, 342.

§ 1. *Rights susceptible of assignment.*[62] See 11 C. L. 291.—The validity of the assignment of a chose in action is now generally recognized, unless the assignment be expressly forbidden by the terms of the original obligation sought to be assigned, or be contrary to public policy.[63] Generally the thing assigned must have

quest nor offered to withdraw plea of self-defense. Held not error to charge jury relative to law of self-defense. Thomas v. Williams [Wis.] 121 NW 148.

57. Instruction that if jury believed evidence they must find the issue in favor of plaintiff was erroneous as it deprived defendant of his defense, that he used only such force as was necessary to eject plaintiff who he claimed was a trespasser. Hyde v. Cain [Ala.] 47 S 1014.

58. Fact that defendant testified that he had no fear did not justify charge that under the law plaintiff was entitled to recover because there was no defense shown and that defendant had no fear of immediate danger. Stucker v. Thompson, 138 Ill. App. 145.

59. Held that evidence justified instruction which submitted the hypothesis of defendant bringing on and provoking difficulty, in which case he could not invoke right of self-defense. Johnson v. Daily [Mo. App.] 118 SW 530. An instruction that defendant might use such force as was necessary in self-defense is erroneous, it not appearing that the plaintiff in any wise attacked or threatened the defendant. Glassey v. Dye [Neb.] 119 NW 1128.

60. Thomas v. Williams [Wis.] 121 NW 148.

61. Includes the assignment of choses in action other than commercial paper. Excludes the transfer of commercial paper (see Negotiable Instruments,* § 2C, and § 5), the transfer of personal property (see Sales*) and the effect on pending actions of transfer of plaintiff's interest (ses Abatement and Revival,* § 1), assignments for creditors (see Assignments for Benefit of Creditors*), assignments in fraud of creditors (see Fraudulent Conveyances), matters peculiar to assignments of particular claims, obligations or liabilities (see such topics as Pledges,* § 5; Mortgages,* § 9; Patents,* § 8; Landlord and Tenant,* § 2; Liens,* §§ 1, 2; Judgments,* § 10), champerty and maintenance (ses Champerty and Maintenance*), assignments as collateral (see Pledges*), assignment as payment (see Payment and Tender,* § 1), and notice of assignment as affecting priority (see Notice and Record of Title*). Excludes also assignments of wages in so far as the relation of master and servant is particularly concerned (see Master and Servant,* § 2).

62. Search Note: See notes in 3 C. L. 328; 7 Id. 278, 279; 14 L. R. A. 512; 15 Id. 813; 44 Id. 177; 88 A. S. R. 201; 94 Id. 229; 1 Ann. Cas. 853; 4 Id. 423; 5 Id. 64; 6 Id. 444, 765; 7 Id. 423, 502; 10 Id. 636.

See, also, Assignments, Cent. Dig. §§ 1-60; Dec. Dig. §§ 1-30; 4 Cyc. 6-27; 2 A. & E. Enc. L. (2ed.) 1014; 5 Id. 764.

63. Now recognized at common law, though not in ancient times. Joseph Dixon Crucible Co. v. Paul [C. C. A.] 167 F 784. All choses in action subject to existing equities under § 3077, Civ. Code, 1895. Southern Mut. Life Ins. Ass'n v. Durdin [Ga.] 64 SE 264.

Held assignable.

Contract for future delivery of personal property and not dependent upon future dealings with property so sold between parties, provided assignee stands ready vendor from his obligation to make deliveries on credit and offers payment, assignment not being prohibited by language of contract. In re Niagara Radiator Co., 164 F 102. **Contract of purchase** from broker. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70. **Contract to explore mineral land** though it made no mention of assigns or right to assign, under Civ. Code, art. 2448, providing that all things of value may be subject of sale. Anse La Butte Oil & Mineral Co. v. Babb, 122 La. 415, 47 S 754. **Contract of sale** where consent to assignment secured. Sheridan v. Reese, 122 La. 1027, 48 S 443. An **option** contract for sale of land given to a person, "his heirs and assigns," although assignable, is not re-assignable. Wheeling Creek Gas Coal & Coke Co. v. Elder, 170 F 215. Beneficiary's **interest un-**

a severable existence [64] and be impersonal [65] and be survivable in nature.[66] In order that a contract may be assigned, its subject-matter must be certain.[67]

Contracts for personal services or otherwise appurtenant to persons or specific property. See 11 C. L. 291—An executory contract for personal services, founded on personal trust or confidence, is not assignable [68] unless the other party consent to the assignment.[69]

der contract whereby wife agreed with husband in consideration of his transfer to her of all his property to pay to assignor of plaintiff $100 per year until $500 was paid beginning one year after death of husband, but in case of assignor's death at any time the said sum or any unpaid portion thereof to cease absolutely and not in any event to be paid to his heirs. Fearnley v. Fearnley [Colo.] 98 P 819. **Bond** for title. Burney Tailoring Co. v. Cuzzort [Ga.] 65 SE 140. **Conditional sale:** Receipt containing promise by maker to pay certain sum in stated instalments and reserving title in vendor until full payment, although it contains no words of negotiability, under Civ. Code 1895, § 3682. Walker v. Carpenter, 5 Ga. App. 427, 63 SE 576. By common law, **balance due and to become due building contractor.** Spengler v. Stiles-Tull Lumber Co. [Miss.] 48 S 966. **Certificate of deposit** though marked "non-transferable" on its face, such phrase having effect merely to make it non-negotiable. Dollar v. International Banking Corp. [Cal. App.] 101 P 34. Debt evidenced by non-negotiable **receiver's certificate** of indebtedness issued by receiver of street car company, reciting that company was indebted to holder and payable to registered holder. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750. Written **subscription to capital stock** of corporation, under 31 Stat. 1256, c. 854, providing that everything of a liquidated character may be assigned. Crook v. International Trust Co., 32 App. D. C. 490. Earned **salary** of public officer. Wilkes v. Silvers, 8 Cal. App. 659, 97 P 677. **Claims for wages** of laborers. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193. Laborer's and materialman's **right to enforce obligations of sureties on public contractor's bond.** Title Guaranty & Trust Co. v. Puget Sound Engine Works [C. C. A.] 163 F 168. **Grantee's claim for taxes** paid by him and which should, under Mill's Ann. St., § 3774, have been paid by grantor. Rambo v. Armstrong [Colo.] 100 P 586. Survivable **claim for tort** affecting property according to present American doctrine. Remmers v. Remmers, 217 Mo. 541, 117 SW 1117. **Judgment** being chose in action. Manson v. Peaks, 103 Me. 430, 69 A 690.

Held not assignable.

At common law, no **claim for tort** to person or property. Remmers v. Remmers, 217 Mo. 541, 117 SW 1117. Claim for personal injuries growing out of tort. Perkins v. Sunset Tel. & T. Co. [Cal.] 103 P 190. Unliquidated claim for damages for assault and battery and false imprisonment prior to judgment, although to attorney for fee, being void as against public policy. Tyler v. Superior Court [R. I.] 73 A 467. Right of action for personal injuries. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. **Allowance of alimony** to be paid in futuro, being an exception based on special grounds. Id. **Right to contest will** within one year after probate as conferred by Hurd's Rev. St. 1908, c. 148, § 7. Selden v. Illinois Trust & Sav. Bank, 239 Ill. 67, 87 NE 860. Grantor's or his heir's **right to re-enter for breach of conditions subsequent,** nor does it pass by a conveyance. O'Donnell v. Robson, 239 Ill. 634, 88 NE 175. **Time certificate** stipulating that it is non-transferable, and payable only to person named in face. Barringer v. Bes Line Const. Co. [Okl.] 99 P 775.

64. Water privilege not severable from land and hence not assignable. Whittlesey v. Porter [Conn.] 72 A 593.

65. Right to laborer's lien on logs given by § 5678, B. & C. Comp., when lien not recorded, is not assignable. Alderson v. Lee [Or.] 96 P 234.

66. As general rule, survivability and assignability are convertible terms, and where right of action is so entirely personal that party in whom it exists cannot by contract place it beyond his control, it will not survive. Selden v. Illinois Trust & Sav. Bank, 239 Ill. 67, 87 NE 860. Personal right to use land not assignable not being inheritable. Field v. Morris [Ark.] 114 SW 206. Nonsurvivable torts affecting persons or family relations not assignable. Remmers v. Remmers, 217 Mo. 541, 117 SW 1117.

67. Option to purchase giving amount and means by which area and location of tract could be exactly ascertained held to be sufficient. Wilkins v. Hardaway [Ala.] 48 S 678.

68. Contract requiring high degree of trust and confidence with no provision as to time limitation or as to binding effect on heirs and assigns. Harlow v. Oregonian Pub. Co. [Or.] 100 P 7.

Held personal: Contract between father and two sons that in consideration of conveyance of farm to them they would build and settle on the land, and jointly care for their parents, with defeasance clause effective in case of noncompliance. Epperson v. Epperson, 108 Va. 471, 62 SE 344. Contractor's agreement to construct and equip canning factory, which work required skill and experience. Johnson v. Vickers, 139 Wis. 145, 120 NW 837. Contract to handle subscription matters for newspaper. Harlow v. Oregonian Pub. Co. [Or.] 100 P 7.

Held not personal: Contract giving party exclusive right to drill on property and in case of success to pay certain amount per acre for land, the undertaking not requiring personal skill and attention, within art. 2000, Civ. Code. Anse La Butte Oil & Mineral Co. v. Babb, 122 La. 415, 47 S 754.

69. Johnson v. Vickers, 139 Wis. 145, 120 NW 837; Harlow v. Oregonian Pub. Co.

Assignments of future earnings.[See 11 C. L. 292]—The assignment of the unearned salary of a public officer is contrary to public policy,[70] and though this rule of public policy does not ordinarily apply to the future earnings of any other than a public officer,[71] statutes prohibiting assignment of such earnings are usually held constitutional [72] unless clearly unreasonable and discriminating [73] or an abridgment of personal liberty,[74] but such statutes will be reasonably construed.[75] As a general rule an assignment of future earnings must be predicated upon a present employment.[76]

Contingent interests and expectancies.[See 11 C. L. 293]—Contingent interests and expectancies are assignable in equity [77] if coupled with a present interest.[78]

§ 2. *Requisites and sufficiency of express assignments.*[79]—[See 11 C. L. 293]—An assignment need not be formal if the intention to assign be clear.[80] It may be sufficient though it states no consideration,[81] contains no date,[82] or does not fully set out the contract assigned [83] or is not attached thereto,[84] provided such contract is sufficiently identified. An assignment of a chose in action implies generally some kind of a definite written acknowledgment,[85] although in most cases a parol as-

[Or.] 100 P 7. Right to object waived by consent. Sheridan v. Reese, 122 La. 1027, 48 S 443. Acceptance of benefits of nonassignable personal contract may constitute implied consent or waiver of objections thereto. Harlow v. Oregonian Pub. Co. [Or.] 100 P 7.

70. See Officers and Public Employes, 12 C. L. 1131.

71. Cox v. Hughes [Cal. App.] 102 P 956.

72. Burns' Ann. St. 1908, § 7987, prohibiting assignment of future wages and imposing penalty, held constitutional. Chicago & E. R. Co. v. Ebersole [Ind.] 87 NE 1090. Reasonable restrictions may be placed upon assignment of future wages, and hence St. 1908, p. 714, c. 605, §§ 7, 8, requiring such assignments to secure loans less than $200 to have written consent of employer and like consent of wife, if assignor be married, and that assignment be recorded, is constitutional, being proper exercise of police power. Mutual Loan Co. v. Martell, 200 Mass. 482, 86 NE 916. Not unlawful discrimination though it cannot apply to national banks. Id. Not unlawful discrimination against small lenders. Id.

73. Act May 13, 1905 (Laws 1905, p. 80), § 3, making assignment of wages or salary as security for loan tainted with usury invalid, is unconstitutional as not providing that it shall likewise apply to other usurious contracts. Massie v. Cessna, 239 Ill. 352, 88 NE 152.

74. Act May 13, 1905 (Laws 1905, p. 79), § 1, providing that assignment of wages or salary shall be invalid unless in writing, acknowledged, served on debtor within three days, and in case of married person also signed and acknowledged by the wife or husband, is unconstitutional as an abridgment of personal liberty. Massie v. Cessna, 239 Ill. 352, 88 NE 152.

75. Acts 1890, p. 194, c. 124, prohibiting assignment of future wages and providing that act shall not apply to employe engaged by common carrier in interstate commerce, held not to apply to employes of such carrier engaged in intrastate commerce. Chicago & E. R. Co. v. Ebersole [Ind.] 87 NE 1090.

76. Cox v. Hughes [Cal. App.] 102 P 956.

77. Sternberg & Co. v. Lehigh Valley R. Co. [N. J. Law] 73 A 39; Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

78. Mere naked possibility is not assignable. Cox v. Hughes [Cal. App.] 102 P 956. Expectancy or interest in land which their mother owned in fee during the mother's life, subject to her use for life, and though with her consent, being against public policy. Assignment of child's expectancy or interest in land owned by mother in fee held invalid as against public policy, though made with her consent. Spears v. Spaw [Ky.] 118 SW 275.

79. Search Note: See notes in 3 C. L. 330, 331.

See, also, Assignments, Cent. Dig. §§ 61-84, 112-129; Dec. Dig. §§ 31-46, 53-70; 4 Cyc. 29-35, 37, 39-44, 58, 59, 61-63, 81, 110-112; 2 A. & E. Enc. L. (2ed.) 1052.

80. Strickland & Co. v. Lesesne [Ala.] 49 S 233. Formality required at common law is not essential, and assignment may be made either legally, equitably, in writing, by parol, or otherwise. Id. No particular language required. Barnes v. Sim, 80 Neb. 211, 117 NW 881. Informal language showing intention sufficient and hence delivery of insurance policy with written statement of desire to change beneficiary to proposed assignee and statement that if change was not made during his lifetime assignor desired money to be paid to such person, held assignment, where assignor wrote insurance company informing them of desired change. Southern Mut. Life Ins. Ass'n v. Durdin [Ga.] 64 SE 264.

81, 82. Hickman v. Chaney [Mich.] 15 Det. Leg. N. 1003, 118 NW 993.

83. May omit consideration, etc., in contract. Barnes v. Sim, 80 Neb. 211, 117 NW 881.

84. Assignment of contract to convey land, naming parties to contract, held sufficient though not attached to contract. Hickman v. Chaney [Mich.] 15 Det. Leg. N. 1003, 118 NW 993.

85. Memoranda not dated, not in itself an assignment, not describing thing alleged

signment may be entirely sufficient,[86] and an assignment may be valid though the indorsement by which it is purported to be made is invalid,[87] and even though there be no indorsement,[88] except in cases where indorsement is required by statute.[89] An assignment which is in the nature of another instrument must conform with the statutory requirements in regard to such instrument.[90] It is important that the assignment be definite and intelligible in its nature [91] and with regard to the persons concerned,[92] and the thing assigned,[93] and must be more than a mere promise to assign.[94] As between the assignor and assignee, an agreement or concession may be a sufficient consideration for the assignment.[95] An assignment without consideration may be valid as against the debtor [96] or other obligor.[97] A re-assignment may become effective although the consideration received on assignment be not returned.[98] While the validity of an assignment does not depend upon the consent of one not subject to prejudice thereby,[99] consent of the parties is essential to the assignment of a contract personal in its nature.[1] Such consent may be implied from acts showing acquiescence.[2] That the consent of the parties

to have been assigned, and not such as to entitle them to rank of original entries, are insufficient. Little v. Berry [Ky.] 113 SW 902.

86. Sufficient in equity. Little v. Berry [Ky.] 113 SW 902. Where formula of Keeley Cure was transferred to corporation for consideration and there was long continued use under claim of ownership acquiesced in by owner. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132. Assignment of certificate of deposit. McAleer v. McNamara [Iowa] 117 NW 1122. Re-assignment of claims assigned to bank is commonly made by **mere delivery** or return of papers. Selleck v. Manhattan Fire Alarm Co., 117 NYS 964.

Statute of frauds: See Frauds, Statute of, 11 C. L. 1609.

87. As where corporation's indorsement of negotiable paper is ultra vires so that it incurs no liability thereby. Winer v. Bank of Blytheville [Ark.] 117 SW 232.

88. As between assignor and assignee, indorsement is unnecessary so long as it appears that assignment was in fact made. Galbreath v. Wallrich [Colo.] 102 P 1085.

89. Required under § 876, Code 1896, in order to effect assignment of contract. Bohanan v. Thomas [Ala.] 49 S 308.

90. Assignment of life insurance policies to trustee to be named in will held invalid and not cured by acquiescence of trustee, where it was not acknowledged as required by statute relative to wills. Frost v. Frost, 202 Mass. 100, 88 NE 446. Assignment of salary will not construe as mortgage where not in compliance with statutory requirements relating to mortgages as regards acknowledgment. State v. Hurlburt [Conn.] 72 A 1079.

91. Written assignment, definite in terms, without reserving control in assignor, intended to convey title of money in hands of agent, held sufficient. Yeiser v. Broadwell [Neb.] 119 NW 473.

92. Order addressed to no one in particular but generally to any one for whom plaintiff might be employed or who owed him money held too indefinite or uncertain to be binding on any one. Dugane v. Hvezda Pokroku No. 4 [Iowa] 119 NW 141.

93. Must set apart chose in action to payment of specified liability. Little v. Berry [Ky.] 113 SW 902. Assignment by assignee assigning "within contract" and describing land held sufficient when considered in light of first assignment. Hickman v. Chaney [Mich.] 15 Det. Leg. N. 1003, 118 NW 993.

94. Letter promising to turn over notes at some future time held not an assignment of notes. Strickland & Co. v. Lesesne [Ala.] 49 S 233.

95. Agreement to save bondsmen harmless is sufficient consideration for assignment of chattel mortgage given to protect sureties on appeal bond. Powell v. Tinsley [Mo. App.] 119 SW 47. Extension of time on indebtedness to bank and further advances held consideration for assignment of proceeds of cattle about to be shipped. Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 118 NW 282. Discharge of owner from his liability to contractor held consideration for assignment arising from acceptance of order. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 138.

96. He not being affected by assignment. Doty v. Moore [Tex. Civ. App.] 113 SW 955. Where assignee holds legal title to demand. King v. Miller [Or.] 97 P 542.

97. Consideration or lack of consideration for assignment of contract for sale of land does not concern vendor. Hickman v. Chaney [Mich.] 15 Det. Leg. N. 1003, 118 NW 993.

98. Daly v. Seaman, 130 App. Div. 432, 114 NYS 1089.

99. Assignment of bill of lading does not depend upon consent of buyer. Manufacturers' Commercial Co. v. Rochester R. Co., 117 NYS 989. Assent of debtor not essential to give validity to assignment of balance due and to become due on building contract. Spengler v. Stiles-Tull Lumber Co. [Miss.] 48 S 966.

1. Consent to assignment of contract to build canning factory by acceptance of work held insufficient where acceptance was by committee not authorized to represent subscribers. Johnson v. Vickers, 139 Wis. 145, 120 NW 837.

2. Galbreath v. Wallrich [Colo.] 102 P 1085.

was the inducing cause of the assignment is a sufficient consideration for such consent.[3] Assignment of a debt may be made by an order on the debtor,[4] but in such case acceptance of the order by the debtor is essential.[5] An assignment may be valid against the assignor though procured by fraud of a third party, where the assignee is innocent,[6] and may be valid as against the debtor though in fraud of creditors.[7] It is essential to the validity of an assignment that the assignor have the right [8] and capacity [9] to make it, that the assignee have the right to accept it,[10] and that it be delivered to and accepted by the assignee [11] whose identity must be capable of being definitely determined therefrom.[12] The assignee must, moreover, have a legal entity at the time of the assignment.[13]

Notice to the debtor See 11 C. L. 293 is essential to the validity of the assignment of a claim or chose in action,[14] as between the assignee and debtor,[15] but not as between assignee and assignor.[16] Notice to a debtor garnishee is sufficient though given after service of the garnishment summons.[17]

Record See 11 C. L. 294 is usually essential only as notice, except where otherwise provided by statute.[18]

§ 3. *Constructive or equitable assignments.*[19]—See 11 C. L. 294—No particular

3. Fact that consent given was cause inducing assignee to take assignment contract is sufficient consideration for assent to assignment of contracts between railroad and others. Galbreath v. Wallrich [Colo.] 102 P 1085.

4. Debtor being owner of building and money assigned being balance due on building contract. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 138.

5. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 138; Duzane v. Hvezda Pokroku No. 4 [Iowa] 119 NW 141.

6. Radovsky v. Fall River Sav. Bank, 196 Mass. 557 82 NE 693.

7. Since his duty is merely to pay the money owing to the one having the legal title to the demand, and not to assume to determine who in equity is entitled to it. King v. Miller [Or.] 97 P 542.

Rights of creditors: See Fraudulent Conveyances, 11 C. L. 1620.

8. Must not previously have assigned away all his interest. Remillard v. Robinson [Minn.] 121 NW 217; Newberry v. Chicago Lumbering Co., 154 Mich. 84, 15 Det. Leg. N. 663, 117 NW 592; Schwab v. Oatman, 129 App. Div. 274, 113 NYS 910. Judgment held sufficiently assigned by administrator. Manson v. Peaks, 103 Me. 430, 69 A 690. Contractor cannot make valid order on owner for more than amount due. Carboy v. Polstein Realty & Const. Co., 62 Misc. 302, 114 NYS 838. Agreement to stand good that certain minor heirs shall upon becoming of age assign their interest in no way constitutes such assignment as will affect such interests, though such agreement be indorsed upon valid assignment of interests of two adult heirs. Assignment of money belonging to principal defendant is void if made after service of garnishment summons. Hellard v. Nance [Ky.] 114 SW 277. But not where it appears that such money did not belong to defendant though it was assigned in payment of indebtedness for which he was jointly liable with assignor. State Bank of West Union v. Swinney, 135 Mo. App. 1, 115 SW 494.

9. McKay v. Peterson [Tex. Civ. App.] 113 SW 981.

10. National bank may take absolute assignment of claim for collection. King v. Miller [Or.] 97 P 542.

11. Especially essential where provided for and where not even notice of assignment was given assignee until after assigned claims were levied on by attaching creditor. Nixon v. Joshua Hendy Mach. Works, 51 Wash. 419, 99 P 11.

12. Assignment to trustee to be named in will held to be invalid. Frost v. Frost, 202 Mass. 100, 88 NE 446.

13. Either as person, partnership, or corporation. Wheeling Creek Gas. Coal & Coke Co. v. Elder, 170 F 215.

14. Lambert v. Morgan [Md.] 72 A 407.

15. Assignment does not become operative until such notice. American Bridge Co. v. City of Boston, 202 Mass. 374, 88 NE 1089. Otherwise debtor may settle with his creditor at any time. Brackett's Adm'r v. Boreing's Adm'r [Ky.] 115 SW 766. Where corporation debtor is not notified of assignment of claim of its president against it for services until after such president has released his claim to corporation, no recovery can be had by assignee. Dial v. Inland Logging Co. [Wash.] 100 P 157.

16. Notice held unnecessary, contest here being between assignee and one standing in shoes of assignor. In re Cincinnatti Iron Store Co. [C. C. A.] 167 F 486.

17. If given before answer by garnishee, since the garnishment could not reach anything except what was due and owing to the defendant. Steltzer v. Condon [Iowa] 118 NW 39. See Garnishment, 11 C. L. 1637.

18. Assignment of contract for sale of standing timber and extension of time for removal thereof must be recorded under Tennessee statute as being a contract conveying interest in land. Childers v. Wm. H. Coleman Co. [Tenn.] 118 SW 1018.

19. Search Note: See notes in 3 C. L. 332; 7 Id. 281; 2 L. R. A. (N. S.) 83.

See, also, Assignments, Cent. Dig. §§ 85-111; Dec. Dig. §§ 47-52; 4 Cyc. 43, 45-58;

form of words is necessary to constitute a constructive or equitable assignment, any act showing such intention being sufficient.[20] An assignment of a portion of a debt or claim is valid,[21] but is enforcible against the debtor only in equity.[22]

§ 4. *Construction, interpretation and effect.*[23]—See 11 C. L. 296—The assignee immediately succeeds to all the rights and interests of the assignor,[24] so as to be protected against any subsequent act of the assignor or debtor,[25] and against all subsequent claimants,[26] and such priority is not waived by permitting a subsequent

2 A. & E. Enc. L. (2ed.) 1059; 7 A. & E. Enc. P. & P. 730.

20. Instrument sufficient which shows intention of transferring or appropriating fund or chose in action to assignee for valuable consideration. Colehour v. Bass, 143 Ill. App. 530. Equitable assignment of an account or obligation. Wheless v. Meyer & Schmid Grocer Co. [Mo. App.] 120 SW 708.

Held assignment: Written acknowledgment of indebtness and agreement to pay it out of fund in litigation and authorizing and consenting to entry of such order by court whenever same shall be applied for. Colehour v. Bass, 143 Ill. App. 530. To third party paying claim. Barry v. Curley, 202 Mass. 42, 88 NE 437. Revenues to be earned under contract to conduct circus for four days. Brindze v. Atlantic City Policemen's Beneficial Ass'n [N. J. Eq.] 72 A. 435.

Held not assignment: There being no evidence showing necessity of invoking equitable rule, and burden thereof being on party seeking to invoke aid of equity. McGregor v. Putney [N. H.] 71 A 226. Contract between two creditors of one debtor whereby one creditor agrees that debt owing to third creditor may be preferred if purchased by other creditor, so as to effect transfer of first party's debt or of bankruptcy dividends subsequently declared thereon. Stires v. First Nat. Bank [Neb.] 119 NW 258. **Draft** drawn by creditor upon his debtor in favor of third person, whether accepted or not, where not drawn upon particular fund. Croyle v. Guelich, 35 Pa. Super. Ct. 356. Mere giving of **check** and its receipt in ordinary way, even though check is drawn for exact amount of drawer's balance. Poland v. Love [C. C. A.] 164 F 186. Mailing of check to payee does not operate to assign funds in bank to extent of such check, where drawer of check withdraws all his funds before check presented. Smith v. Nelson [S. C.] 65 SE 261. Giving of check does not assign amount thereof in bank, where drawer stops payment. Hamilton Nat. Bank v. Franklin, 140 Ill. App. 608.

21. Taneyhill v. Baltimore & O. R. Co., 7 Ohio N. P. (N. S.) 487; Trexler v. Kuntz 36 Pa. Super. Ct. 362.

22. See post § 5, Enforcement of Assignment and of Rights Assigned.

23. Search Note: See notes in 3 C. L. 334; 66 L. R. A. 760; 5 L. R. A. (N. S.) 565; 7 Id. 534; 14 Id. 1025; 2 A. S. R. 472; 28 Id. 744; 56 Id. 339; 71 Id. 31.

See, also, Cent. Dig. §§ 130-192; Dec. Dig. §§ 71-116; 4 Cyc. 63-91; 2 A. & E. Enc. L. (2ed.) 1079.

24. May assert same rights. Ewald v. Ortnysky [N. J. Eq.] 71 A 179. Where bond for title is assigned. Burney Tailoring Co. v. Cuzzort [Ga.] 65 SE 140. On an assignment of the right to receive payment with notice to the buyer that assignee may maintain an action to recover the price from the buyer. Schwab v. Oatman, 129 App. Div. 274, 113 NYS 910. Assignee of subsequent mortgage may assert estoppel against prior mortgagee. Powell v. Tinsley [Mo. App.] 119 SW 47. Where physician's claims were agreed to by executor, wife of decedent to whom such claims were assigned was entitled to recover from executor full amount of claims. Bente v. Sullivan [Tex. Civ. App.] 115 SW 350. Assignee of lease and option to purchase is entitled to complete purchase at price agreed in manner agreed and in absence of express agreement need account to assignor for rebate on purchase price. Pollard v. Sayre [Colo] 98 P 816. Assignee of contract for sale of real estate has full power to enforce rights thereunder and may sue to recover money paid on contract, though purchaser and assignee act for benefit of third party who furnished the money. Osborne v. Hughes, 128 App. Dv. 128, 112 NYS 572. Holder of non-negotiable certificate of indebtedness issued by receiver of corporation is substituted for original holder so that he has right to share in distribution and can compel registration of transfer to him. McCarty v. Crawford, 238 Ill. 38, 86 NE 750. Transferee of secret formula acquires all rights of discoverer. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132.

Equitable assignment vests assignee with title to proceeds of assigned obligation, since equity treats that as done which should have been done. Wheless v. Meyer & Schmid Grocer Co. [Mo. App.] 120 SW 708. Equiable assignee is enitled to immediate specific performance of assignment as soon as proceeds come into existence in hands of assignor. Id.

25. King v. Miller [Or.] 97 P 542. Debtor cannot set up an attempted revocation of the assignment after suit has been begun thereon. Id. After acceptance of assignment by debtor, he cannot be released by assignor or pay out money assigned other than in accordance with assignment, hence cannot use fund to pay other liens under building contract. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 138. Assignment prior in time is superior in right to a subsequent assignment. Manufacturers' Commercial Co. v. Rochester R. Co., 117 NYS 989. Priority not affected by fact that assignment was given for pre-existing debt. Id. Assignment of bill of lading held prior to assignment of proceeds. Id.

26. Brindze v. Atlantic City Policemen's Beneficial Ass'n [N. J. Eq.] 72 A 435. One becoming a creditor of assignor after assignment of bond for title has not right to subject land to payment of his claim.

assignee who has acknowledged the prior assignment to take possession of the property.[27] Where notice to debtor is required, assignments take priority in the order in which notice is given.[28] Priority does not, however, extend to moneys not specifically covered by the assignment,[29] and an assignment is subject, moreover, to all equities existing at the time of the assignment [30] and notice thereof.[31] An assignment will be given a reasonable construction in determining what is included [32] according to the rules of construction applicable to contracts in general,[33]

Burney Tailoring Co. v. Cuzzort [Ga.] 65 SE 140. Order assigning compensation due or to become due given by contractor and accepted by owner has priority over claims of subsequent creditors. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 138. Service cannot be had on nonresident by garnishment of claim assigned by him before commencement of action. Nixon v. Joshua Hendy Mach. Works, 51 Wash. 419, 99 P 11. Proper assignment of money in hands of agent takes precedence over subsequent attachment. Yeiser v. Broadwell [Neb.] 119 NW 473. Assignment of building contract is good as against subsequent lien holders, such as subcontractors, materialmen, and laborers subsequently serving notice of lien on owner. Spengler v. Stiles-Tull Lumber Co. [Miss.] 48 S 966.

27. But such subsequent assignee is bound to account to prior assignee of bill of lading for purchase price. Manufacturers' Commercial Co. v. Rochester R. Co., 117 NYS 989.

28. Moneys due on building contract and notice to owner. Trexler v. Kuntz, 36 Pa. Super. Ct. 352. Claim or chose in action. Lambert v. Morgan [Md.] 72 A 407. Income of trust estate and notice to trustee, which notice may be by filing assigned claims in court. Id. Assignment of balance due on building contract takes precedence over liens, notice of which is subsequently served on owner as provided under § 3074, Code 1906. Spengler v. Stiles-Tull Lumber Co. [Miss.] 48 S 966.

29. Manufacturers' Commercial Co. v. Rochester R. Co., 117 NYS 989.

30. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750; American Bridge Co. v. City of Boston, 202 Mass. 374, 88 NE 1089; Webster v. Abbott, 117 NYS 949. Under Code § 3044 authorizing assignment of non-negotiable instruments. Quarton v. American Law Book Co. [Iowa] 121 NW 1009. Non-negotiable mortgage and bond. Newman v. Overbaugh, 116 NYS 369. Mortgage and accompanying bond. Hochberger v. Ludvigh, 116 NYS 696. Judgment on negotiable instrument. Selden v. Williams, 108 Va. 542, 62 SE 380. Assigned judgment may be set aside, vacated or reversed. King v. Miller [Or.] 97 P 542. Assignment of contract of purchaser from broker. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70. In taking assignment of written instrument to purchase bonds, assignee is bound to inquire of subscribers whether they have any defense. Real Estate Trust Co. v. Riter-Conley Mfg. Co. [Pa.] 72 A 695. Option contract for leasing certain oil lands held subject to defense of fraud and mistake, not being assignable at common law or by statute. York v. Scott, 140 Ill. App. 178. Purchaser of lumber is not liable to assignee of seller where the buyer, by reason of rejection of goods, was under no obligation to seller. Grant v. Sicklesteel Lumber Co. [Mich.] 15 Det. Leg. N. 1145, 119 NW 1092.

31. Debtor may set up any defenses existing at time of notice to him. American Bridge Co. v. City of Boston, 202 Mass. 374, 88 NE 1089. Debtor may set up equities against an assigned judgment provided such equities existed at time of assignment or before notice thereof, judgment in case at bar being on notes deposited as collateral security and makers not being estopped in suit thereon by assignee by reason of their failure to defend a chancery suit by bank. Selden v. Williams, 108 Va. 542, 62 SE 380. Where defense to note given for purchase price of land was that payee had after sale cut timber therefrom. Carlton v. Smith, 33 Ky. L. R. 647, 110 SW 873. Trespass is not defense to assignment of purchase price note where there is no showing that such trespass occurred before assignment, and that payee was insolvent at time of assignment, or before maker had notice of it. Id.

32. May be construed in light of prior assignment. Hickman v. Chaney [Mich.] 15 Det. Leg. N. 1003, 118 NW 993. Includes only such matters as may be fairly implied from language used, and hence "account" does not include claim for injuries to goods. Blue Grass Canning Co.'s Assignee v. Illinois Cent. R. Co. [Ky.] 119 SW 769. Assignment of money due contractor from city held to include not only money paid directly by city, but also assessments on property owners collected by city. Helms v. Delaware County Trust, Safe Deposit & Title Ins. Co., 35 Pa. Super. Ct. 542. Assignee cannot refuse payment for thing assigned on grounds of injury to business which assignee might have anticipated as result of assignment of contract with railroad company to furnish ties, since purchaser cannot successfully complain that vendor did not perform some act agreed upon which did not affect rights of former in or title to article purchased. Galbreath v. Wallrich [Colo.] 102 P 1085.

33. The general terms of an assignment will not be controlled by the specific terms when the contrary manifestly appears as in case of the unintentional omission of one of several contracts from the specific description. Anse La Butte Oil & Mineral Co. v. Babb, 122 La. 412, 47 S 754. Under Cobbey's Ann. St. 1907, § 1326, where assignee knew assignor misunderstood contract, the former was bound by construction acted on by latter. Barnes v. Sim, 80 Neb. 211, 117 NW 881. As to general rules for construction of contracts, see Contracts, 11 C. L. 729.

and an assignment of a money demand will not be construed as an assignment of a contract or other interest,[34] nor will an assignment of a contract of sale be construed as a sale.[35] The owner's acceptance of a contractor's order is an equitable assignment only of the balance due.[36] An assignment is construed as a warranty that the non-negotiable contract assigned is genuine, but not necessarily that it will be fulfilled.[37] However, the assignee may generally have recourse against the assignor in case of an express indorsement,[38] and an indorsement "without recourse" does not necessarily preclude recourse against the assignor.[39] An invalid assignment conveys no rights,[40] and an assignment contrary to public policy cannot even carry a valid warranty.[41] The effect of the assignment of a contract which by its express terms is nonassignable is merely to give the assignee a cause of action against the assignor.[42] In the absence of an express agreement, the assignee of a personal contract is not liable on the covenants of his assignor,[43] but the assignee of any other contract is ordinarily liable for those obligations identified therewith.[44] The effect of an assignment of a secured claim as an assignment of the security is treated elsewhere.[45]

§ 5. *Enforcement of assignment and of rights assigned.*[46]—See 11 C. L. 297—At common law the assignee of a chose in action, could maintain an action at law thereon only in the name of his assignor,[47] and though in most of the states there are statutes either requiring the assignee to sue in his own name [48] or giving him

34. Assignee of balance due on building contract holds no relation to persons furnishing labor and material. Spengler v. Stiles-Tull Lumber Co. [Miss.] 48 S 966. Assignee of money due or to become due on contract is not liable for material furnished under contract. National Surety Co. v. Maag [Ind. App.] 86 NE 862. Assignment of money demand is not an assignment of lumber sold and giving rise to such demand. Grant v. Sicklesteel Lumber Co. [Mich.] 15 Det. Leg. N. 1145, 119 NW 1092.

35. Title to ties sold does not vest in assignee of right to receive payment. Manufacturers' Commercial Co. v. Rochester R. Co., 117 NYS 989. Assignment of contract to sell land is not sale of land so as to relieve vendor from payment of taxes. Western Lime & Cement Co. v. Copper River Land Co., 138 Wis. 44, 120 NW 277.

36. Carboy v. Polstein Realty & Const. Co., 62 Misc. 302, 114 NYS 838. Oral acceptance not binding on owner for amount of order in excess of sum due. Id.

37. Contract to furnish tles. Galbreath v. Wallrich [Colo.] 102 P 1085.

38. In suit against payee where assignor indorses "transfers, sells and assigns." Walker v. Carpenter, 5 Ga. App. 427, 63 SE 576.

39. Words "without recourse to the assignor," have no fixed legal significance except in connection with negotiable instruments. Koch v. Hinkle, 35 Pa. Super. Ct. 421.

40. No right to redeem from mortgage. Whittlesey v. Porter [Conn.] 72 A 593.

41. Spears v. Spaw [Ky.] 118 SW 275.

42. Bonds-Foster Lumber Co. v. Northern Pac. R. Co. [Wash.] 101 P 877.

43. Although assignment of contract for sale of land was made and accepted with knowledge that the contract contained provision that stipulation in it were "to apply and bind the heirs, executors, administrators, and assigns of the respective parties" assignee could not be held for balance of unpaid purchase price. Hugel v. Habel, 117 NYS 78. Though assignment was made and accepted with knowledge of provisions of contract assigned. Anderson v. New York & H. R. Co., 116 NYS 954.

44. In case of sale of building contract by receiver, purchaser became liable for contractor's debt thereunder and his agreement to protect subcontractor where amount realized was sufficient for payment thereof. Buffalo Glass Co. v. Assets Realization Co., 117 NYS 1087. Assignee of lease is liable to lessor for rents reserved in lease if he agree to pay same, or privity of estate between him and lessor be established, but not otherwise, and to constitute such privity of estate assignee must acquire legal title for term or take possession of premises, such possession being of itself sufficient unless he shows that he is merely an undertenant. Comley v. Ford [W. Va.] 64 SE 447.

45. See such topics as Liens, §§ 1, 2; Mortgages, § 9; Pledges, § 5.

46. **Search Note:** See, Assignments, Cent. Dig. §§ 189-238; Dec. Dig. §§ 116-139; 4 Cyc. 91-112; Parties, Cent. Dig. § 8.

47. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. For use of assignee. Joseph Dixon Crucible Co. v. Paul [C. C. A.] 167 F 784. Assignee had right to enforce remedies in name of assignor to control any action instituted to enforce the chose, the assignor not being permitted to interfere with action so as to hinder or defeat rights of assignee. Boqua v. Marshall [Ark.] 114 SW 714.

48. Under Code (pp. 574, 575, Ann. St. 1906), abolishing forms of action and providing that real party in interest shall prosecute. Tennant v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. Assignee

the right to do so [49] at his option,[50] the common-law rule still prevails to such extent as it has not been so modified,[51] and in cases not so covered by the statute the assignee must still sue in the name of his assignor [52] or must resort to a court of equity, as where the assignment is for only a part of a claim.[53] In any case equity will usually protect the rights of the assignee [54] by entertaining a suit in his own name,[55] or by permitting him to intervene in a suit wherein the court has control of the fund assigned,[56] and will not drive him to his remedy at law where the remedy in equity is more convenient and adequate;[57] but where the contract assigned is of an inherently indivisible nature, the assignee thereof cannot enforce it even in equity [58] unless he is entitled to the whole of it. The right of an assignee to maintain an action in his own name is absolute where the debtor has recognized the assignment by promising to pay the assignee,[59] and where the assignee has the legal title he need not disclose any representative capacity in which he may be acting.[60] A pendente lite assignee,[61] or the assignees of a judgment after-

of grantee's claim against grantor for unpaid taxes under Mills Ann. Code, § 3, requiring action to be brought in name of real party in interest. Rambo v. Armstrong [Colo.] 100 P 586.

49. Rev. Laws, c. 173, § 4, where all conditions necessary to create liability have been performed and conveyance simply worked transfer of right to receive payment. Wood v. Farmer, 200 Mass. 209, 86 NE 297. In suit against subscriber for subscription to capital stock of corporation, under c. 854, 31 Stat. 1256, so providing with regard to all liquidated claims. Crook v. International Trust Co., 32 App. D. C. 490.

50. Substitution of assignee as plaintiff is optional in those states where it is authorized by statute. King v. Miller [Or.] 97 P 542.

51. Common-law rule in force as to causes of action not assignable under statute, for which see Kirby's Dig. §§ 509, 5999, 6000. Boqua v. Marshall [Ark.] 114 SW 714. When assignment is made by indorsement but not otherwise, under Code 1896, § 876. Bohanan v. Thomas [Ala.] 49 S 308. Assignee cannot maintain action in his own name where cause of action is for trespass or trover, under Rev. St. Fla. 1892, § 981, providing that "any civil action at law may be maintained in the name of the real party in interest. This shall not be deemed to authorize the assignment of a thing in an action not arising out of contract." Joseph Dixon Crucible Co. v. Paul [C. C. A.] 167 F 784. In view of § 509 Kirby's Dig. which provides that "agreements and contracts in writing for the payment of money or property or for both money and property shall be assignable" and § 5999 which provides that any action, with certain named exceptions must be prosecuted in name of real party in interest, and also § 6000 which provides that "where the assignment of a thing in action is not authorized by statute, the assignor must be a party plaintiff or defendant." Boqua v. Marshall [Ark.] 114 SW 714. Nineteenth section of Prac. Act (P. L. p. 540) held not to apply to assignment of split claims. Sternberg & Co. v. Lehigh Val. R. Co. [N. J. Law] 73 A 39.

52. Assignee of equitable claim assigned by means of draft must sue in name of assignor to his own use. Croyle v. Guelich, 36 Pa. Super. Ct. 356. Assignee may sue in name of assignor to enforce nonassignable right, since assignor is deemed in law to be owner. Boqua v. Marshall [Ark.] 114 SW 714. Assignee with only equitable title may sue in name of assignor, but for own use. Bohanan v. Thomas [Ala.] 49 S 308.

53. Trexler v. Kuntz, 36 Pa. Super. Ct. 352; Taneyhill v. Baltimore & O. R. Co., 7 Ohio N. P. (N. S.) 487; Sternberg & Co. v. Lehigh Val. R. Co. [N. J. Law] 73 A 39; City of Pueblo v. Dye [Colo.] 96 P 969; Van-Schoick v. Van Schoick [N. J. Law] 69 A 1080; Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606.

Parties: In suit in equity by assignee of part of a claim, the owners of other parts should be made parties. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606.

54. Courts will protect assignee against acts of assignor and of debtor after he has had notice of assignment and hence it was immaterial whether assignee was properly substituted as plaintiff because in any event he had right to control action. King v. Miller [Or.] 97 P 542. Will enforce assignment of contingent interest. Sternberg & Co. v. Lehigh Val. R. Co. [N. J. Law] 73 A 39.

55. Tennant v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

56. Colehour v. Bass, 143 Ill. App. 530.

57. Trexler v. Kuntz, 36 Pa. Super. Ct. 352.

58. Where assignee of option attempts to enforce it against vendor. Wheeling Creek Gas Coal & Coke Co. v. Elder, 170 F 215.

59. Promised to pay upon proof of legal assignment. Townsend v. Gregory, 132 Ill. App. 192.

60. Although he may be mere agent or trustee or has agreed to hold proceeds for assignor or for other parties, and while it may be true that where plaintiff sues in representative capacity as executor, assignee for benefit of creditors, trustee of express trust and like, he must disclose for whom he is trustee. King v. Miller [Or.] 97 P 542.

61. Statute of North Carolina expressly authorizes the prosecution of a suit by a pendente lite assignee of the demand in

wards reversed generally has the right to have the action continued in the name of the assignor for his benefit,[62] or he may have his remedy against the assignor.[63] An action by an assignee may continue in his name even after a pendente lite re-assignment by him to the original assignor.[64] Suit cannot be maintained by an assignee on an assignment not executed until after suit is commenced.[65] A person not a party to an assignment contract may in certain exceptional cases enforce it.[66] In federal court, the right of action of an assignee is determined in accordance with the law of the forum,[67] though in some cases the assignee may maintain his action in a federal court when the assignor cannot do so.[68] An action at law cannot be maintained in a federal court upon an oral promise to pay the assignee of a written instrument where it does not appear that the promisor had knowledge of such assignment.[69] For an assignment to have any effect as a defense by debtor in an action by the assignor, the debtor must allege that plaintiff is not the real party in interest and has no title to claim sued on.[70] A court of law will not even recognize a partial assignment as a defense to an action by the assignor against the debtor.[71]

No supplemental petition is necessary after the assignment of a pending cause of action.[72] A party relying upon an assignment must allege it.[73] Where fraud is relied on, all the elements thereof must be alleged.[74] Under the practice in some states the validity of an assignment of an assignable instrument can be put in issue only by a verified denial.[75] The burden is upon a party alleging an assignment to prove it when it is put in issue;[76] but fraud or undue influence in the procurement of the assignment is a matter of affirmative defense as to which the party attacking the assignment has the burden,[77] and so also as to the defense of lack of capacity in the assignor.[78] The assignor's compliance with the assigned contract must ordinarily be shown.[79] Whether a trust relation results from an as-

the name of the original plaintiff, his assignor. City of Greensboro v. Southern Paving & Const. Co. [C. C. A.] 168 F 880.

62. King v. Miller [Or.] 97 P 542. May enforce claim upon which judgment is based, since he is in same position after reversal as any other purchaser pendente lite, and entitled to same rights and remedies, and under B. & C. Comp. § 38, action does not abate by assignment. Id.

63. King v. Miller [Or.] 97 P 542.

64. Watkins v. Angotti [W. Va.] 63 SE 969.

65. Not being authorized under Rev. Laws, 1902, § 4, c. 173, providing that assignee of non-negotiable chose in action may maintain an action thereon in his own name. Bowen v. New York Cent. & H. R. R. Co., 202 Mass. 263, 88 NE 781.

66. As where assignee receives money or property on promise to pay or deliver same to third person. Howes v. Scott [Pa.] 73 A 186.

67. Joseph Dixon Crucible Co. v. Paul [C. C. A.] 167 F 784; City of Greensboro v. Southern Paving & Const. Co. [C. C. A.] 168 F 880.

68. Assignee of notes of city payable to bearer may sue thereon in federal court even though assignor could not have done so, regardless of whether notes were first negotiated to citizen of state other than that of maker or not, being exception to rule of judiciary act (25 St. 433) declaring that assignee of chose in action cannot sue in federal court unless his assignor could have done so. Citizens' Sav. Bank v. Newburyport [C. C. A.] 169 F 766.

69. Recourse should be had to equity. Manufacturers' Commercial Co. v. Klots Throwing Co. [C. C. A.] 170 F 311.

70. Selleck v. Manhattan Fire Alarm Co., 117 NYS 964.

71. Thiel v. John Week Lumber Co., 137 Wis. 272, 118 NW 802; City of Pueblo v. Dye [Colo.] 96 P 909.

72. Where assignee elects to continue action in name of original plaintiff. King v. Miller [Or.] 97 P 542.

73. Johnson v. Vickers, 139 Wis. 145, 120 NW 837.

74. Reply alleging fraud in assignment set up as defense must also allege that defendant intended such fraud. Cox v. Stillman, 59 Misc. 248, 112 NYS 328.

75. Assignment of note by corporation could not be questioned by makers, under Kirby's Dig. § 517. Winer v. Bank of Blytheville [Ark.] 117 SW 232.

76. Johnson v. Vickers, 139 Wis. 145, 120 NW 837. Must prove execution and delivery. McKay v. Peterson [Tex. Civ. App.] 113 SW 981.

77. McKay v. Peterson [Tex. Civ. App.] 113 SW 981. In suit by assignee to recover possession of assigned notes. Id.

78. McKay v. Peterson [Tex. Civ. App.] 113 SW 981.

79. Butterick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 139. But on showing substantial compliance assignee is entitled to recover balance due less amount necessary to complete work, under building contract. Id.

signment must be determined upon the merits of the particular case,[80] and parol evidence is admissible in such connection.[81] A judgment between the assignor and the debtor in an action to which the assignee is not a party is not conclusive on the assignee.[82]

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

The scope of this topic is noted below.[83]

§ 1. Nature of Transaction in General, 345.
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§ 3. Right to Make a General Assignment and to Join Therein, 346.
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§ 15. Accounting, Settlement and Discharge or Failure of Trust, 350.
§ 16. Rights of Creditors Under a Void Assignment, or After Assignee's Discharge, 350.

§ 1. *Nature of transaction in general.*[84] See 11 C. L. 300—A transfer of the title to and the possession and control of substantially all the property of a debtor to an assignee in trust to convert it into money and distribute it among the creditors of the assignor is usually essential to constitute a general assignment for the benefit of creditors,[85] and a conveyance of his property by a debtor directly to his creditors for their benefit does not constitute a general assignment because it raises no trust.[86] No instrument is held to constitute an assignment for the benefit of creditors unless it clearly appears either that the grantor intended it should so operate [87] or that such was its necessary legal effect.[88] A common-law assignment for the

80. Assignment and re-assignment considered and trust relation held not created. Daly v. Seaman, 130 App. Div. 432, 114 NYS 1089.

81. Where city contractor assigns in writing to his surety money due him, which writing shows no consideration, and it is conceded that such surety is not entitled to all such money. Helms v. Delaware County Trust, Safe Deposit & Title Ins. Co., 35 Pa. Super. Ct. 542.

82. Involving debt assigned and offset thereto. Webster v. Abbot, 117 NYS 949.

83. This topic treats only of voluntary general assignments for benefit of creditors. Involuntary proceedings under state laws (see Insolvency*) and under the federal act (see Bankruptcy*) are excluded. As to fraudulent or preferential transfers to creditors other than by general assignment, see Fraudulent Conveyances.* As to general compositions without transfer of property to a trustee, see Composition with Creditors.*

84. **Search Note:** See notes in 24 L. R. A. 369; 37 Id. 337

See, also, Assignments for Benefit of Creditors, Cent. Dig. §§ 1-31, 36-38; Dec. Dig. §§ 1-17, 22; 4 Cyc. 120, 121, 125-127; 3 A. & E. Enc. L. (2ed.) 5, 6.

85. Such acts are necessary to constitute general assignment under § 3a (4) of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]) Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283. Where debtor intended to make, and in fact executed, a general assignment for benefit of creditors in usual form of such assignment and assignee sent out notice of a meeting of creditors in which he stated assignment was "made to me" and acknowledged and ratified his appointment by his acts, it was a general assignment for benefit of creditors within federal statute. Griffin v. Dutton [C. C. A.] 165 F 626.

86. Where debtor conveyed about three-fourths of its property and proceeds of any sale it should make of the other fourth, which consisted of real estate of which the assignor retained possession and rights of use, control, and disposition, to its principal creditor, in consideration of latter's discharge of debtor's obligation to it and creditors agreement to pay all other obligations of debtor out of proceeds of property conveyed, it was not general assignment. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283.

87. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co., [C. C. A.] 165 F 283.

88. Instrument conveying part of debtor's estate to chief creditor for benefit of such creditor and the other creditors, held not to constitute an assignment for benefit of creditors. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283.

benefit of creditors in Illinois is not void because it does not comply with the "bulk sales act." [89] In some states it is provided by statute that every assignment in contemplation of insolvency, and with the design to prefer one creditor to the exclusion of others, shall operate as an assignment of all the property of the debtor for the benefit of his creditors.[90]

§ 2. *Statutory provisions and conflict of laws.*[91] See 11 C. L. 801—Though the national bankruptcy act suspends a state statute in reference to voluntary assignments for the benefit of creditors,[92] yet, a common-law assignment for the benefit of creditors is valid in Illinois so far as the statutes of that state are concerned.[93] It has been held in North Dakota that the Wisconsin statute, providing that, when a resident of that state has made an assignment for the benefit of creditors, the proceeding thereunder shall be under the jurisdiction of the circuit court, is a state bankruptcy or insolvency law,[94] and that a deed of assignment executed in accordance with the provisions of such statute has no extraterritorial effect on real estate situated in the former state.[95]

§ 3. *Right to make a general assignment and to join therein.*[96] See 7 C. L. 286

§ 4. *Filing, recording or registering; qualification of assignee; removals and substitution.*[97] See 11 C. L. 801—In Nebraska a deed of assignment for the benefit of creditors is not entitled to record unless properly witnessed and acknowledged.[98]

89. Not void because no attempt was made to comply with "Bulk Sales Act," Laws 1905, p. 284, as such act is unconstitutional. Pogue v. Rowe, 236 Ill. 157, 86 NE 207.

90. Ky. St. 1909, § 1910 (Russell's St., § 2104) is not applicable to a transfer of notes in Ohio to a Kentucky creditor with intent to prefer such creditor as the transaction was valid where it took place, it will be treated as valid in Kentucky. Fawcett's Assignee v. Mitchell, Finch & Co. [Ky.] 117 SW 956.

91. Search Note: See note in 2 A. S. R. 24. See, also, Assignment for Benefit of Creditors, Cent. Dig. §§ 75-88; Dec. Dig. §§ 18-23; 4 Cyc. 193-195; 3 A. & Enc. L. (2ed.) 18, 48.

92. National bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418). Pogue v. Rowe, 236 Ill. 157, 86 NE 207. Assigned estate within purview of national bankruptcy act of July 1, 1898 not controlled by Pennsylvania insolvency Act of June 4, 1901, P. L. 404. Peckham's Assigned Estate, 35 Pa. Super. Ct. 330.

93. Assignee under such assignment may maintain replevin for property assigned against officer levying execution thereon under an execution against the assignor. Pogue v. Rowe, 236 Ill. 157, 86 NE 207. A bona fide common-law assignment for the benefit of creditors stands as a valid transfer of the property described as conveyed therein until assailed by some one claiming rights against it under the provisions of the bankruptcy law. Thompson v. Shaw [Me.] 71 A 370.

NOTE. Validity of common-law assignments: The Bankruptcy Act July 1, 1898, c. 541, U. S. Comp. St. 1901, p. 3418, suspended the state statutes in reference to voluntary assignments for the benefit of creditors. Harbaugh v. Costello, 184 Ill. 110, 56 NE 363, 75 Am. St. Rep. 147. Accord: Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178; 51 NE 129, 70 Am. St. Rep. 258; In re Curtis, 91 F 737. The right of a debtor to make a common-law assignment exists independent of statute. Lucy v. Freeman, 93 Minn. 274, 101 NW 167. The right of a debtor to make a common-law assignment will be regarded as existing in each of the states of the union, unless shown to be expressly prohibited. J. Walter Thompson Co. v. Whitehead, 185 Ill. 454, 56 NE 1106, 76 Am. St. Rep. 51. Such assignments are valid as far as the state statues of Illinois are concerned. Howe v. Warren, 154 Ill. 227, 40 NE 472; Pogue v. Rowe, 236 Ill. 157, 86 NE 207. The title vests in the assignee upon the execution of the instrument. Brennan v. Wilson, 71 N. Y. 502; Weber v. Mick, 131 Ill. 520, 23 NE 646. The assignment passed the title to the assignee and he could maintain replevin for same. Kimball v. Mulhern, 15 Ill. 205; Nimmo v. Kuykendall, 85 Ill. 476; Pogue v. Rowe, supra.—From 7 Mich. L. R. 427.

94. St. Wis. 1898, c. 80, with acts amendatory thereof and supplemental thereto, which provides that, when a resident of that state has made assignment for benefit of creditors, proceedings thereunder shall be under jurisdiction of circuit court, and that assignee may be removed, and creditors may elect a successor, and for discharge of the debts of the assignor, is a state bankruptcy or insolvency law. Adams v. Hartzell [N. D.] 119 NW 635.

95. Adams v. Hartzell [N. D.] 119 NW 635.

96. Search Note: See Assignments for Benefit of Creditors, Cent. Dig. §§ 87-104, Dec. Dig. §§ 24-27, 30; 4 Cyc. 129-134; 3 A & E. Enc. L. (2ed.) 22.

97. See, also, Assignments for Benefit of Creditors, Cent. Dig. §§ 462-483, 658-724; Dec. Dig. §§ 163-170, 200-214; 4 Cyc. 156-158, 227-230; 3 A. & E. Enc. L. (2ed.) 32, 66, 148.

98. Where deed of assignment was not witnessed and was improperly acknowl-

§ 5. *Meaning and effect in general.*[99] See 11 C. L. 302—An assignment works a change of ownership, not only in the legal title, but in the interests represented by it,[1] and passes the equitable ownership of all the assigned property to the creditors.[2] The rights of each are fixed as of the date of the assignment,[3] and each owns such a proportionale part as the debt due him bears to the aggregate of the indebtedness.[4]

§ 6. *Legality and equitableness.*[5] See 9 C. L. 270—An intent to defraud creditors, especially such creditors as have not assented to the provisions of a common-law assignment for their benefit, is not to be inferred from successful efforts to compromise the claim of the creditors after such assignment is made.[6] Where all of the assignor's property not exempt from attachment and execution is conveyed to be divided pro rata among all creditors who should assent thereto and reasonable time for such assent is given, it is, if bona fide, a valid assignment of the property described as conveyed therein.[7]

Reservation of property. See 11 C. L. 302—In some states the debtor is entitled to reserve a certain amount of property for himself.[8]

Preferences. See 11 C. L. 302—In the absence of legislation preferring depositors over other general creditors in the distribution of the funds in the hands of the assignee of an insolvent, no such preference exists.[9] Under the South Dakota statute there cannot be any preferences as to the creditors to be paid.[10]

§ 7. *Property passing to and rights of assignee therein.*[11] See 11 C. L. 303—An

edged, it was void. Talmage v. Minton-Woodward Co. [Neb.] 118 NW 1099.

99. Search Note: See notes in 26 L. R. A. 593; 15 L. R. A. (N. S.) 827.

See, also, Assignments for Benefit of Creditors, Cent. Dig. §§ 484-657, 1084-1103; Dec. Dig. §§ 171-199, 357-363; 4 Cyc. 208-225, 282-285; 3 A. & E. Enc. L. (2ed.) 55.

1. Hence gas company could not refuse to furnish gas to assignee because bills for gas incurred by assignor remained unpaid, under Rev. Laws, c. 58, §§ 16, 17. Cox v. Malden & Melrose Gaslight Co., 199 Mass. 324, 85 NE 180.

2. Peckham's Assigned Estate, 35 Pa. Super. Ct. 330; In re Prudential Trust Co.'s Assignment [Pa.] 72 A 798.

3. Act May 8, 1907 (P. L. 192) giving preference to depositors in a trust company in event of insolvency does not apply to defeat other creditors under an assignment for benefit of creditors executed prior to approval of act. In re Prudential Trust Co.'s Assignment [Pa.] 72 A 798. Where claim of one of the creditors was reduced after assignment by sale of real estate on which creditor had judgment and by proceeds of fire insurance policy in which he had interest, nevertheless, he had right to such share in remaining part of assigned estate as the pro rata share based on the entire amount of his claim stood on the day of assignment. Peckham's Assigned Estate, 35 Pa. Super. Ct. 330.

4. In re Prudential Trust Co.'s Assignment [Pa.] 72 A 798.

5. Search Note: See notes in 3 C. L. 339; 5 Id. 287; 41 L. R. A. 707; 30 A. S. R. 816; 34 Id. 856; 58 Id. 74.

See, also, Assignments for Benefit of Creditors, Cent. Dig. §§ 99-461; Dec. Dig. §§ 28-162; 4 Cyc. 132-144, 146-191, 196-209; 3 A. & E. Enc. L. (2ed.) 55, 71.

6. Thompson v. Shaw [Me.] 71 A 370.

7. Held that there was nothing in assignment itself or in situation or conduct of parties to justify claim that assignment was fraudulent or void as to assignor's creditors. Thompson v. Shaw [Me.] 71 A 370.

8. Where assignor was induced to, and did, forego selection of specific articles of personal property under his claim for exemption in lieu of homestead, as provided by statute in Ohio, because of representations made to him by assignee that he would have to wait until property was sold and order of court obtained, and that he would then be paid his exemption, actual selection, under such circumstances, is waived or excused, and cannot be held abandonment or forfeiture of assignor's right to have claim paid out of proceeds of sale, formal demand having been made before distribution. In re Kraus, 79 Ohio St. 314, 87 NE 176.

9. Act April 26, 1844 (P. L. 419), Act April 16, 1850 (P. L. 477), and Act May 13, 1876 (P. L. 161), does not embrace trust company denied right to engage in banking, therefore, depositors of such company have no preference by reason of such acts in funds assigned for benefit of creditors. In re Prudential Trust Co.'s Assignment [Pa.] 72 A 798.

10. Where one who was indebted much more than fair value of his goods, transferred title to his son without consideration, but son stipulated that he would dispose of goods and pay proceeds to such of his father's creditors as he saw fit, transfer was not assignment for benefit of creditors. Hall v. Feeney [S. D.] 118 NW 1038.

11. Search Note: See notes in 7 C. L. 288; 11 Id. 303; 23 L. R. A. 578; 30 Id. 124; 59 Id. 673.

See, also, Assignments for Benefit of Creditors, Cent. Dig. §§ 512-614, 714, 723½,

assignee for the benefit of creditors is a trustee,[12] and represents the trust property.[13] He acquires no better title to the property than the assignor himself had,[14] and he cannot bind the assigned estate by an executory contract having no relation to the obligations of the assignor,[15] and a power of attorney given to him gives him no authority to execute a deed to real estate not conveyed by the deed of assignment.[16] Under the Missouri statute an assignee may call into question the validity of a prior transfer by his assignor as collateral security.[17]

§ 8. *Liability of assignee; bond.*[18]—See 11 C. L. 304—When a common-law assignment has been lawfully made and a nonassenting creditor by trustee process attaches the property in the assignee's hands, such assignee will not be held chargeable for sums paid by him, prior to the service of the writ, to the bona fide creditors of the assignor in settlement of their just demands.[19] Nor will he be held chargeable for property returned by him to the assignor prior to the writ, unless he returned it for the purpose of defrauding the nonassenting creditors.[20] The fact that an assignee cannot bind the assigned estate, by an executory contract having no relation to the obligations of the assignor, does not prevent him incurring a personal liability where another has acted upon the faith of his promise.[21] Though an assignee makes an accounting in a federal court in a bankruptcy proceeding against the assignor, the surety on assignee's bond is not bound by the federal court's decision unless it has acquired jurisdiction over such surety.[22]

§ 9. *Collection of assets and reduction to money.*[23]—See 11 C. L. 304—An assignee of a bank for the benefit of creditors may apply a bank deposit to the payment of a debt due the bank by the depositor.[24] The West Virginia statute pertaining to sales of property under deeds of trust to secure creditors does not apply to a deed of assignment for payment of debts.[25]

725-746; Dec. Dig. §§ 173-194, 215-222, 265, 266; 4 Cyc. 211, 214, 216, 218-225, 232, 233; 3 A. & E. Enc. L. (2ed.) 35, 98.

12. B. F. Roden Grocery Co. v. MacAfee [Ala.] 49 S 402.

13. But counsel for assignee cannot, when claims of creditors have no priority, give preference to one creditor without consent of other creditors. B. F. Roden Grocery Co. v. MacAfee [Ala.] 49 S 402.

14. Where goods were obtained by the assignor, title remaining in the vendor or where goods were obtained on the credit of another, the assignee had no title to the goods. Ovid Carriage Co. v. Parsille [Mich.] 16 Det. Leg. N. 424, 122 NW 99.

15. Assignee derives all his power from the assignment which is both the guide and measure of his duty. Standard Audit Co. v. Robotham, 62 Misc. 466, 115 NYS 152.

16. Held that deed of assignment made in Wisconsin with power of attorney which did not convey certain real estate in North Dakota did not give assignee authority to convey such land. Adams v. Hartzell [N. D.] 119 NW 635.

17. Under Rev. St. 1899, § 365 (Ann. St. 1906, p. 472), every general assignee is given power to prosecute such actions for property and make such defense as a trustee in a deed of trust or an attachment or executing creditor could prosecute or make. Held that assignee had right to bring action to determine validity of transfer of pianos to bank. Grand Ave. Bank v. St. Louis Union Trust Co., 135 Mo. App. 366, 115 SW 1071.

18. Search Note: See Assignments for Benefit of Creditors, Cent. Dig. §§ 733, 799-803, 1185-1195; Dec. Dig. §§ 258-262, 407-415; 4 Cyc. 240, 241, 285-288; 3 A. & E. Enc. L. (2ed.) 121.

19. Assignee owes no contractual duty to such creditors of the assignor as did not assent to the assignment. Thompson v. Shaw [Me.] 71 A 370.

20. Thompson v. Shaw [Me.] 71 A 370.

21. Where assignee was sued for services in rendering statement of the account of his assignor and claimed that the judgment settling his account discharged him from liability, it was held that the answer was demurrable as it was not shown that he did not incur debt as individual or that contract was one which bond assigned estate. Standard Audit Co. v. Robotham, 62 Misc. 466, 115 NYS 152.

22. Though assignee makes such accounting, if surety has not had proper notices, it is a good defense. Cohen v. American Surety Co., 129 App. Div. 166, 113 NYS 375.

23. Search Note: See notes in 58 A. S. R. 90.

See, also, Assignments for Benefit of Creditors, Cent. Dig. §§ 747-795; Dec. Dig. §§ 223-251; 4 Cyc. 234-241; 3 A. & E. Enc. L. (2ed.) 113, 114; 2 A. & E. Enc. P. & P. 865.

24. Wallace v. Estill County Deposit Bank [Ky.] 116 SW 351.

25. Trustees under deed made exclusively for the benefit of creditors held not bound by provisions of Code W. Va. 1906, § 3053, and private sale made by such trustees was

A claim acquired against the assignor after the assignment cannot be set-off against the assignee.[26]

§ 10. *Administration of trust in general.*[27]—See 11 C. L. 805—The assignee has a right to employ others to assist him in the execution of the trust,[28] for whose acts, however, he becomes in law fully responsible.[29] He cannot, while the trust fund is administered by the court, bind the court and the beneficiaries as to the disposition of it.[30] If, when he is without funds, necessity arises for expenditures to protect the estate from spoliation, he may either make them himself, trusting to being allowed for them in the passing of his accounts,[31] or he may resort to the court for authority to engage others to do it upon the credit of the fund.[32] When a common-law assignment has been lawfully made, and creditors have been seasonably notified of the assignment, and have had an opportunity to assent thereto, then no special duty rests on either the assignor or assignee to secure such assent.[33]

§ 11. *Debts and liabilities of the estate.*[34]—See 11 C. L. 806—Where a common-law assignment for the benefit of creditors created a trust for the benefit of a tax collector for unpaid taxes of the assignor, a demand made by the tax collector upon the assignor and the bringing of a suit to enforce the trust is sufficient assent to the trust to enable the enforcement of the claim.[35]

§ 12. *Presentment and allowance of claims.*[36]—See 11 C. L. 806—Only creditors who were such at the time of the assignment are entitled to participate in the proceeds of the estate.[37] Presentment of a claim to the assignee within six months of the time when such claim accrued does not operate to extend the time provided by statute within which an action for such claim must be brought.[38]

§ 13. *Classes and priorities of debts.*[39]—See 11 C. L. 807—Where a common-law assignment for the benefit of creditors conveyed the property to the assignee in trust to pay claims entitled to priority under the national bankruptcy law, a claim of a tax collector for unpaid taxes on the property assigned is within the trust.[40]

valid. Conaway v. Third Nat. Bank [C. C. A.] 167 F 26.

26. Richardson v. Anderson, 109 Md. 641, 72 A 485. A debtor of an assignor liable when the assignment was executed as an accommodation indorser of a promissory note of the assignor, not yet due being required to pay it after the assignment, cannot set off the amount paid against the trust estate. Id.

27. Search Note: See notes in 23 L. R. A. 578; 54 Id. 343.

See, also, Assignments for Benefit of Creditors, Cent. Dig. §§ 633, 725-867; Dec. Dig. §§ 215-295; 4 Cyc. 232-246, 258-261; 3 A. & E. Enc. L. (2ed.) 113, 114.

28. When common-law assignment has been lawfully made, assignee has right to employ counsel, and if assignment provides, he may lawfully pay out of trust funds in his hands all reasonable and necessary counsel fees. Thompson v. Shaw [Me.] 71 A 370.

29. Thompson v. Shaw [Me.] 71 A 370.

30. Where court and certain creditors were not parties to a stipulation between counsel for the assignee and counsel of one other creditor, giving such creditor a preference, the stipulation was not binding. B. F. Roden Grocery Co. v. MacAfee [Ala.] 49 S 402.

31, 32. Standard Audit Co. v. Robotham, 62 Misc. 466, 115 NYS 152.

33. Thompson v. Shaw [Me.] 71 A 370.

34. Search Note: See Assignments for Benefit of Creditors, Cent. Dig. §§ 875-880, 960-1035; Dec. Dig. §§ 298, 330-340; 4 Cyc. 262, 263, 274-276; 3 A. & E. Enc. L. (2ed.) 134.

35. Held that estate was liable for such claim as tax collector had assented to the trust. City of Boston v. Turner, 201 Mass. 190, 87 NE 634.

36. Search Note: See Assignments for Benefit of Creditors, Cent. Dig. §§ 868-959; Dec. Dig. §§ 296-329; 4 Cyc. 261-273; 3 A. & E. Enc. L. (2ed.) 134.

37. Where on date of assignment it appeared that assignor was indebted to bank on promissory note indorsed by third person and after assignment note became due, bank accepted renewal note made by assignor to order of indorser and old note was surrendered to indorser, it was held that indorser's executor had right to prove old notes against assigned estate. Peckham's Assigned Estate, § 35 Pa. Super Ct. 330.

38. Presentment of claim to assignee for money lost at gaming does not extend time within which action must be brought as provided by Rev. Stat. § 4270. Burrows v. Hussong, 12 Ohio C. C. (N. S.) 93.

39. Search Note: See Assignments for Benefit of Creditors, Cent. Dig. §§ 900-912½; Dec. Dig. §§ 308-310; 4 Cyc. 267-269; 3 A. & E. Enc. L. (2ed.) 143.

40. Not necessary that the tax collector

§ 14. *Satisfaction and discharge of debts and claims.*[41]—See 7 C. L. 292

§ 15. *Accounting, settlement and discharge, or failure of trust.*[42]—See 11 C. L 307—Where an assignee purchases claims against the assignor at a discount, he should only be allowed the amount actually paid for the claims,[43] and, if he has purchased the assignor's equity in the estate, he should not be allowed compensation for administering the estate.[44] On the hearing of exceptions to the final report of an assignee, only such matters as pertain to his administration of the estate in his hands can be investigated.[45]

§ 16. *Rights of creditors under a void assignment, or after assignee's discharge.*[46]—See 7 C. L. 292—In proceedings in the county court under the statute of Nebraska, relating to assignments for the benefit of creditors, the deed of assignment being void, the order of the county court allowing claims of creditors does not amount to a judgment,[47] and the distribution of the assigned estate and the discharge of the assignee under the orders of the county court in such proceedings do not amount to a judicial exhaustion of the property of the assignor.[48]

ASSISTANCE, WRIT OF.[49]

The scope of this topic is noted below.[50]

A notice to redeem from a tax sale is not sufficient process to give the court jurisdiction to issue a writ of assistance,[51] nor can an application for such a writ be considered as a continuation of the tax sale proceedings where it is neither entitled nor filed therein and does not refer thereto.[52] An order for a writ of assistance made when the court has not acquired jurisdiction to make it is void and of no effect.[53] A writ of assistance will not be awarded against a stranger who innocently purchases property pending foreclosure of which he has no actual knowledge, and when the statutory lis pendens notice has notice has not been filed.[54]

assent in writing to the assignment which provided that assignment was for "creditors" as a tax is not a debt and therefore tax collector was not technically a "creditor." City of Boston v. Turner, 201 Mass. 190, 87 NE 634.

41. Search Note: See note in 2 Ann. Cas. 274.

See, also, Assignments for Benefit of Creditors, Cent. Dig. §§ 929-959; Dec. Dig. §§ 319-329; 4 Cyc. 266, 267, 270-273.

42. Search Note: See Assignments for Benefit of Creditors, Cent. Dig. §§ 1104-1184; Dec. Dig. §§ 364-406; 4 Cyc. 246-257; 3 A. & E. Enc. L. (2ed.) 151.

43, 44. In re Heath [Mo. App.] 117 SW 125.

45. Validity of transfer by assignor to assignee of former's equity in property can only be attacked for fraud in its procurement in a proceeding instituted for that purpose. In re Heath [Mo. App.] 117 SW 125.

46. Search Note: See Assignment for Benefit of Creditors, Cent. Dig. §§ 1036-1083, 1176-1183; Dec. Dig. §§ 341-356, 398-406; 4 Cyc. 247, 250, 251, 276-281.

47. Where deed of assignment was not witnessed nor properly acknowledged, proceedings under Cobbey's St. 1907, c. 4, §§ 3500-3545, were void. Talmage v. Minton-Woodward Co. [Neb.] 118 NW 1099.

48. Assignee took no title to the property and while the property was in his hands it was subject to be levied upon by attachment or execution and after it had been sold before the funds had been distributed they might have been reached by the process of garnishment. Talmage v. Minton-Woodward Co. [Neb.] 118 NW 1099.

49. See 9 C. L. 274.

Search Note: See notes in 5 C. L. 292; 93 A. S. R. 154; 10 Ann. Cas. 1042.

See, also, Assistance, Writ of, Cent. Dig.; Dec. Dig.; 4 Cyc. 289-298; 2 A. & E. Enc. P. & P. 975.

50. Treats only of the right to and practice under the writ of assistance. As to writ of entry in the foreclosure of mortgages on land, see Foreclosure of Mortgages on Land,* § 4. As to writ of possession in ejectment, see Ejectment,* § 6. As to notice to redeem as a condition to the right of a tax sale purchaser to a writ of assistance, see Taxes,* § 13. As to statutory remedies of a tax sale purchaser to oust the former owner, see Taxes,* § 14B.

51, 52, 53. G. F. Sanborn Co. v. Johnson, 148 Mich. 405, 111 NW 1091.

54. Cole v. Lee [Fla.] 49 S 1017.

ASSOCIATIONS AND SOCIETIES.

The scope of this topic is noted below.[55]

§ 1. Definition, Nature and Organization, 351.
§ 2. Internal Relations, Rights and Duties, 351.
§ 3. The Association and Persons not Members, 352.
§ 4. Actions and Litigation, 353.
§ 5. Dissolution and Termination, 354.

§ 1. *Definition, nature and organization.*[56] See 11 C. L. 808—While an unincorporated association cannot as such take title to land, title may be taken in trustees for its benefit.[57]

Laws prohibiting the wearing of emblems or insignia of a certain class of associations [58] do not necessarily violate constitutional provisions relative to local laws granting special privileges or immunities.[59]

§ 2. *Internal relations, rights and duties.*[60] See 11 C. L. 809—Purchase of a ticket conferring membership privileges is not conclusive of intent to become member.[61] The rights of members between themselves and the association, and among themselves, are governed by the constitution and by-laws.[62] Associations may adopt reasonable rules for the government of their members and enforce compliance therewith;[63] but members cannot be punished for violation of invalid regulations,[64] nor can an expulsion be sustained where it is neither disciplinary nor in accordance with any regulation.[65] A member can be expelled only in the manner prescribed by the association's constitution,[66] and an attempted expulsion in any other manner is

55. This article treats of only voluntary unincorporated associations and membership corporations organized for purposes not pecuniary. Reference should be had to such topics as Building and Loan Associations;* Combinations and Monopolies;* Corporations;* and Joint Stock Companies.* Matters relating to fraternal associations (see Fraternal Mutual Benefit Associations*), religious societies (see Religious Societies*), exchanges and boards of trade (see Exchanges and Boards of Trades*) and trade unions (see Trade Unions*), are fully treated in separate articles.

56. **Search Note:** See note in 5 C. L. 292.

See, also, Associations, Cent. Dig. §§ 1-3, 45, 46; Dec. Dig. §§ 1-4, 22-24; 4 Cyc. 304-307; Clubs, Cent. Dig. §§ 1-3; Dec. Dig. §§ 1-3; 7 Cyc. 259; 25 A. & E. Enc. L. (2ed.) 1131.

57. Unincorporated associations may take title to realty in trustees. Richardson v. Harsha [Okl.] 98 P 897. Deed to Indians in trust for tribe of which they were captains to be held and used by tribe as communal property, held valid. Ruddick v. Albertson, 154 Cal. 640, 98 P 1045.

58. Act March 28, 1907, P. L. 35, held not in violation of Const., art. 111, § 3, relative to titles of acts. Commonwealth v. Martin, 35 Pa. Super. Ct. 241.

59. Act March 28, 1907, P. L. 35, held not contrary to Const. art. 111, § 7, c. 27. Commonwealth v. Martin, 35 Pa. Super. Ct. 241.

60. **Search Note:** See notes in 7 C. L. 294; 49 L. R. A. 353; 4 L. R. A. (N. S.) 718, 728; 6 Id. 433; 14 Id. 114, 142; 7 A. S. R. 160; 18 Id. 301; 59 Id. 198; 68 Id. 856; 114 Id. 24.

See, also, Associations, Cent. Dig. §§ 4-35; Dec. Dig. §§ 5-18; 4 Cyc. 301-312; Clubs, Cent. Dig. §§ 1, 4-6; Dec. Dig. §§ 4-10; 7 Cyc. 260-263; 25 A. & E. Enc. L. (2ed.) 1132, 1134, 1138, 1143.

61. Where purchaser supposed it merely admitted him to society's fair. Tarbell v. Gifford [Vt.] 72 A 921.

62. Ranken v. Probey, 131 App. Div. 328, 115 NYS 832. By-laws are regarded as contract of members with each other and their rights as members are determinable thereby in conduct of business affairs of association. Gaines v. Farmer [Tex. Civ. App.] 119 SW 874. By-law requiring four-fifths vote to appropriate sum in excess of $50 held inapplicable to contract for exchange of realty and giving note and mortgage. Kelley v. Sullivan, 201 Mass. 34, 87 NE 72.

63. Louisville Board of Fire Underwriters v. Johnson [Ky.] 119 SW 153. By-law of association of underwriters that no member should take agency of company already having agent in city held valid and reasonable. Id.

64. Association of employers could not enforce penalty against member for violation of order not within its power to make. McCord v. Thompson-Starrett Co., 129 App. Div. 130, 113 NYS 385. Equity will restrain negotiation of notes given by members of an employers' association to secure obedience of regulations, where negotiation is attempted as forfeiture for disobedience of unlawful regulations. Sackett & Wilhelms' Lith. & Print. Co. v. National Ass'n of Employing Lith., 61 Misc. 150, 113 NYS 110.

65. Alleged acceptance of an advertisement for a program without contract with advertiser for payment therefor, held not to justify expulsion, such action not being disciplinary nor in accordance with any regulation of society. Stahl v. Romanian Young Men's Ass'n [N. J. Law] 71 A 1114.

66. Gill v. Ladies' Catholic Benevolent Ass'n, 36 Pa. Super. Ct. 458.

absolutely void.[67] The right to vote is usually confined to regular members[68] in good standing.[69] Association property is owned and controlled by the members collectively as an association, and not by individual members or officers;[70] but the entire membership and property of a society cannot be transferred to another organization by mere majority vote in the absence of authority in the constitution or by-laws.[71]

For grievances a member must usually resort to the remedies afforded by the association before resorting to the courts,[72] but a member need not resort to the appeal provided for by constitutional regulations regarding expulsion, where he has been expelled in a manner not authorized by the constitution.[73] A member cannot recover damages for expulsion where he could have recovered them in a former action for reinstatement and costs.[74] Where the expulsion of a member is void, he need not, after one refusal, tender his dues when it is manifest that they will not be accepted.[75]

§ 3. *The association and persons not members*[76]—See 11 C. L. 809—Liability can be fastened on members of voluntary associations only by reason of their acts of the acts of their agents[77] duly authorized in the premises,[78] and within the powers of the association.[79] Ageny to act for the association must be proved and cannot be implied from the fact of association;[80] but unauthorized agreements may be ratified by the society.[81] Members who sign a note for an obligation of the association

67. Member may disregard it entirely and need not appeal to supreme council as provided in case of expulsions in manner prescribed by constitution. Gill v. Ladies' Catholic Benevolent Ass'n, 36 Pa. Super. Ct. 458.

68. Qualification of voters at special election of directors of society for prevention of cruelty to animals, under provisions of Laws 1908, p. 1210, c. 77, determined. Pope v. Whitridge [Md. App.] 73 A 281. Persons who had given donations but not for purpose of becoming members, and who were not carried on society books as members, held not entitled to vote. Id. Notations on society books held presumably to have terminated membership of certain persons. Id. Statute held not to require payment of $5 annually as condition to becoming active member. Id. Though ordinarily **honorary members** have no share in active management, one who had been member for over 20 years, but had become honorary member, and had made large donations and voted before without objection, held entitled to vote. Id.

69. Certain transactions held not sufficient payment or tender of dues so as to entitle members to vote. Pope v. Whitridge [Md. App.] 73 A 281. Tender at customary place where books were kept, etc., held sufficient though president had ordered payment elsewhere shortly before. Id.

70. President holding title as trustee could not prevent conveyance to a church desired by both equitable owner and society as a whole. Richardson v. Harsha [Okl.] 98 P 897. Member of club or society has only a joint right to use and enjoy club property during membership and no less than whole membership can dispose of such property. Manning v. Canon City [Colo.] 101 P 978.

71. In absence of evidence of purpose of society, by-law giving majority power as to all questions except purchase or sale of realty held insufficient. Hill v. Rauhan Aarre, 200 Mass. 438, 86 NE 924.

72. Bookmaker expelled from track of turf association. Rabb v. Trevelyan, 122 La. 174, 47 S 455.

73. Gill v. Ladies' Catholic Benevolent Ass'n, 36 Pa. Super. Ct. 458.

74. Schmidt v. Weyell, 60 Misc. 370, 113 NYS 630.

75. Gill v. Ladies' Catholic Benevolent Ass'n, 36 Pa. Super. Ct. 458.

76. **Search Note:** See notes in 5 C. L. 295; 109 A. S. R. 372.

See, also, Associations, Cent. Dig. § 29; Dec. Dig. § 19; 4 Cyc. 304-307; Clubs, Cent. Dig. § 1; Dec. Dig. § 11; 25 A. & E. Enc. L. (2ed.) 1132.

77. President merely appointing committee to confer with plaintiff for leasing premises, but not being present when members voted to accept lease, held not liable. Meriwether v. Atkin [Mo. App.] 119 SW 36.

78. Contract between International Printing Pressmen and Assistants' Union, and United Typothetae of America held not binding owing to want of authority in directors of union to execute same. Barnes & Co. v. Berry [C. C. A.] 169 F 225.

79. Policemen's beneficial association held to have power to contract with an amusement company to furnish show grounds, pay license and sell tickets for show to be conducted by company, for division of revenue. Brindze v. Atlantic City Policemen's Beneficial Ass'n [N. J. Eq.] 72 A 435. The necessity of the services of an officer implies power to pledge the credit of the members therefor. As where duties of secretary were such that failure to perform them would subject society to pecuniary loss. Ranken v. Probey, 131 App. Div. 328, 115 NYS 832.

80. Meriwether v. Atkin [Mo. App.] 119 SW 36.

81. Receiving benefits by political party of unauthorized borrowing of money by

become individually liable thereon.[82] When an association is organized for pecuniary profit,[83] the members become partners[84] and their individual liability is determined by the rules governing the liability of partners,[85] and the liability of principals for the acts of their agents.[86] Charitable associations are often held exempt from liability for negligence of servants.[87] Members of an unincorporated society may sue for libel as individuals having a common interest in the business injuriously affected.[88]

§ 4. *Actions and litigation.*[89]—See 11 C. L. 310—Assumpsit will not lie against an unincorporated beneficial association in its collective name for an obligation of the organization.[90] In the absence of statute or by-law,[91] according to strict practice and principle suit must be by or against all the members,[92] and the association cannot be sued in the name of its officers;[93] but under a more liberal practice, suit may be brought in the name of individual members as representatives of the whole membership,[94] and the proper method of bringing an unincorporated association before the court is to join, as parties defendant, persons who are alleged to be and are proper representatives of the class, describing the class to which the members belong.[95] A resolution requiring the members bringing the suit to give security is

executive committee held ratification. Siff v. Forbes, 63 Misc. 319, 117 NYS 143. That defendant was present at subsequent meeting when minutes were approved held no ratification. Meriwether v. Atkin [Mo. App.] 119 SW 36.

82. Held individually liable regardless of their intentions as to liability or belief as to law. Evans v. Lilly & Co. [Miss.] 48 S 612. Immaterial that names were followed by abbreviations indicating offices signers held in association. Id.

83. Is so organized when purpose is to carry on some business in which profits are expected. Ranken v. Probey, 131 App. Div. 328, 115 NYS 832.

84. Ranken v. Probey, 131 App. Div. 328, 115 NYS 832.

85. Ranken v. Probey, 131 App. Div. 328, 115 NYS 832. See Partnership, § 4.

86. Ranken v. Probey, 131 App. Div. 328, 115 NYS 832. See Agency, § 2.

87. New Orleans fire insurance patrol held not a charitable institution so as to be immune from liability for negligence of servants. Coleman v. Fire Ins. Patrol, 122 La. 626, 48 S 130. New York Zoological Society created under Laws 1895, p. 778, c. 435, and Laws 1902, p. 418, c. 146, and controlling, for scientific and educational purposes, premises owned by city with power to appoint, control and remove employes, held not exempted from liability for injury to employe due to negligence of another employe in permitting escape of steam from boiler, on theory it was a charitable institution for public benefit. Gartland v. New York Zoological Soc., 61 Misc. 643, 113 NYS 1087.

Asylums and hospitals: As to the liability of asylums and hospitals, see Asylums and Hospitals, § 3.

88. National Shutter Bar Co. v. Zimmerman & Co. [Md. App.] 73 A 19.

89. Search Note: See notes in 2 L. R. A. (N. S.) 739; 3 Ann. Cas. 28, 699; 6 Id. 833; 7 Id. 645.

See, also, Associations, Cent. Dig. §§ 36-43; Dec. Dig. § 20; 4 Cyc. 312-314; Clubs, Cent. Dig. § 8; Dec. Dig. § 12; 7 Cyc. 260; 20 A. & E. Enc. P. & P. 272; 22 Id. 228.

90. Maisch v. Order of Americus [Pa.] 72 A 528.

91. Where note was signed in name of an unincorporated association by its treasurer, plaintiff could at his option bring action against individual members as at common law, or against president or treasurer under Code Civ. Proc. § 1923. Peckham v. Wentworth, 116 NYS 781. Under Civ. Code Prac. § 25, allowing suit by representatives where it is impracticable to bring all parties before court, one or more members of a lodge held entitled to sue in name of and for benefit of lodge without order of court and without tendering with petition any order or direction of lodge, it appearing they were acting with consent of other members. Payne v. McClure Lodge No. 539 [Ky.] 115 SW 764.

92. Action must be against all members unless articles otherwise prescribe. Farmers' Mutual v. Reser [Ind. App.] 88 NE 349. Though articles authorized bringing of actions against trustees, complaint was insufficient where it failed to show trustees were sued as such, or to explain why they were made defendants. Id. Proper method of suing in Pennsylvania where under statute members are not individually liable is by bill in equity against some of members and all others having same interest, and compelling defendants to require payment out of society's treasury. Maisch v. Order of Americus [Pa.] 72 A 528. Action for recovery of land is properly brought by principal officers of association where property was originally conveyed to them and their successors. Rhodes v. Maret [Tex.] 119 SW 1139.

93. Voluntary labor association held not suable in name of president in absence of statutory authority. Vance v. McGinley [Mont.] 101 P 247.

94. Action by secretary and three members held authorized where society was composed of about 160 members. Klein v. Rand, 35 Pa. Super. Ct. 263.

95. Building trades' council and six unions

unavailable to the defendant,[96] and in the absence of objection by members the court will assume that such security has been given.[97] An averment that an association was organized for pecuniary profit, if unchallenged, is sufficient to admit proof of such purpose in its formation as would authorize contracts imposing liability on members beyond fees and dues.[98] The constitution and records of the association are admissible in evidence in proper cases.[99] A judgment against a society is conclusive of the liability of those who were members when the liability was created.[1]

§ 5. *Dissolution and termination.*[2] See 11 C. L. 810—Where a subordinate division of an association severs its connection with the main body,[3] property rights usually depend upon the constitution and regulations of the association.[4]

ASSUMPSIT.

The scope of this topic is noted below.[5]

§ 1. Nature, Form and Propriety of Action, 354.
§ 2. The Common Counts, 355.
§ 3. Declarations, Pleas and Defenses, 356.
§ 4. Evidence, 356.

§ 1. *Nature, form and propriety of action.*[6] See 11 C. L. 810—The breach of all parol or simple contracts is remediable by action of assumpsit.[7] Except in the case of money had and received,[8] assumpsit will not lie in the absence of an express or implied promise,[9] or in any case in which any other matter other than such a contract must be litigated,[10] nor will it lie to recover anything except money.[11]

not properly joined as parties defendant by mere allegation that John Doe and Richard Roe and others whose names and residences are unknown were members of such associations and participated in acts complained of. Reynolds v. Davis, 198 Mass. 294, 84 NE 45.

96, 97. Klein v. Rand, 35 Pa. Super Ct. 263.

98. Ranken v. Probey, 131 App. Div. 328, 115 NYS 832.

99. That paper offered was found and kept in association's archives and acted under as its constitution held sufficient to admit it in suit to enforce liability of members after judgment against society. Tarbell v. Gifford [Vt.] 72 A 921. Immaterial constitution was not recorded in society's books. Id. Proof that a book offered in evidence was the one in which record of all meetings of society were kept held sufficient to make it admissible to show society's organization and doings. Id.

1. Tarbell v. Gifford [Vt.] 72 A 921.

2. **Search Note:** See note in 14 L. R. A. (N. S.) 683.

See, also, Associations, Cent. Dig. §§ 44-47; Dec. Dig. §§ 21-25; 4 Cyc. 346, 351-358, 360; Clubs, Cent. Dig. § 9; Dec. Dig. §§ 13, 14; 7 Cyc. 264; 25 A. & E. Enc. L. (2ed.) 1141.

3. Resolution of majority of lodge "We sever our connection with the order, etc.," together with organization of new lodge, and later organization and incorporation of same held evidence of intention to withdraw from lodge, and that by such action they ceased to be members of lodge. Alchenburger v. Fruendschaft Lodge No. 72, D. O. H., 138 Ill. App. 204.

4. Where constitution of lodge provided that when charter of subordinate lodge was surrendered, officer in charge of funds, etc., should deliver same to certain state officer who should keep same separate from all others for certain period within which time on petition of five or more former members charter together with effects might be returned, five or six members of lodge a majority of whose members withdrew and formed another are entitled to funds of lodge in preference to withdrawing members when they receive charter as per constitution. Alchenburger v. Freundschaft Lodge No. 72 D. O. H., 138 Ill. App. 204.

5. Treats of the remedial law of assumpsit, and excludes the substantive aspect of contracts, express (see Contracts *), or implied (see Implied Contracts *). Excludes, also, waiver of tort and suit in assumpsit (see Election and Waiver,* § 2A).

6. **Search Note:** See notes in 5 C. L. 297; 2 L. R. A. (N. S.) 563; 4 Id. 363, 1198; 11 Id. 234; 13 Id. 273.

See, also, Assumpsit, Action of, Cent. Dig. §§ 1-58; Dec. Dig. §§ 1-9; 4 Cyc. 319-336; Action, Cent. Dig. §§ 196-215; Dec. Dig. § 28; 2 A. & E. Enc. P. & P. 987.

7. Whether verbal or written, or express or implied, or for the payment of money, or for the performance or omission of any other act. Clark v. Van Cleef [N. J. Eq.] 71 A 260.

8. Action for money had and received is exception to general rule that assumpsit must be based upon contract, express or implied. Williams v. Smith [R. I.] 72 A 1093.

9. Would not lie by landlord against purchaser of crop from tenant, where purchaser had not promised to keep out rent and landlord had no right of property or of posses-

§ 2. *The common counts.*[12] See 11 C. L. 811—While the remedy under the common counts is a broad and liberal one, yet there must always be something to connect the party sought to be charged with the transaction upon which the suit is based.[13] The scope of the common counts has been enlarged rather than restricted in modern times,[14] but even under such enlarged scope they can be used only when they will appraise the defendant of the nature of the plaintiff's claim,[15] and when they will not do this they must be accompanied by a special count.[16] Where, however, nothing remains to be done but the payment of money, the common counts may be used alone,[17] without a special count.[18]

Use and occupation of land. See 9 C. L. 278

Goods sold and delivered. See 5 C. L. 298

Money had and received. See 9 C. L. 278—The count for money had and received is sometimes declared to be an exception to the rule that assumpsit lies only upon a contract, express or implied.[19] It lies to recover money[20] received by the defendant which in equity and good conscience he should pay to the plaintiff.[21] Money paid under an illegal as distinguished from a merely invalid contract cannot be recovered as money had and received.[22]

sion in the crop. Wicks v. Wheeler, 139 Ill. App. 412.

10. Will not lie to enforce a contract between husband and wife, unless such right has been given by statute, since equitable considerations, such as fairness of contract, etc., are necessarily involved. Kimball v. Kimball [N. H.] 73 A 408. Assumpsit will not lie to recover rent received under an adverse holding of the land out of which the rent arises, even by the rightful owner, since such a suit necessarily involves title to land which cannot be tried in assumpsit. Swanson v. Brown [Ala.] 49 S 675.

11. Will not lie for the value of property carried away and wrongfully converted, unless there is a showing that defendant converted such property into money. Woodruff v. Zaban [Ga.] 65 SE 123.

12. Search Note: See Assumpsit, Action of, Cent. Dig. §§ 14-26; Dec. Dig. § 5; 4 Cyc. 326-330; 14 A. & E. Enc. P. & P. 47.

13. St. Clair Foundry v. People's Bank, 136 Ill. App. 41.

14. Applebaum v. Goldman [Mich.] 16 Det. Leg. N. 213, 121 NW 288.

15. Where goods were purchased and paid for but part of them were not delivered, the common counts will not lie to recover the value of the part undelivered. Applebaum v. Goldman [Mich.] 16 Det. Leg. N. 213, 121 NW 288.

16. Applebaum v. Goldman [Mich.] 16 Det. Leg. N. 213, 121 NW 288.

17. Woolner Distilling Co. v. Peoria & E. R. Co., 136 Ill. App. 479; Peterson v. Pusey, 141 Ill. App. 578. Where contract has been performed, and it only remains for contract price to be paid, recovery may be had under common counts. Peterson v. Pusey, 237 Ill. 204, 86 NE 692; Lord v. Henderson [W. Va.] 64 SE 134. All terms of contract had been performed. Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843. Work done and accepted by other party. Miller v. Cosmic Cement, Tile & Stone Co., 109 Md. 11, 71 A 91. Defendant agreed that he would pay to plaintiff sum of money upon transfer of title to land by third person, who held it in trust for plaintiff. Snow v. Merriam, 133 Ill. App. 641. Where special assessment has been levied and collected by city and nothing remains to be done except to pay it to the part entitled to it, assumpsit will lie to compel city to pay it over. Conway v. Chicago, 237 Ill. 128, 86 NE 619.

18. No special count on contract is necessary where nothing remains to be done thereunder except payment of money. Lord v. Henderson [W. Va.] 64 SE 134; Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843.

19. Williams v. Smith [R. I.] 72 A 1093.

20. Property was reduced to money after it was received but before action was brought. Devlin v. Houghton, 202 Mass. 75, 88 NE 580.

21. Fox v. Monahan, 8 Cal. App. 707, 97 P 765; Harty v. Teagan, 150 Mich. 75, 14 Det. Leg. N. 609, 113 NW 594; Montgomery v. Wise [Mo. App.] 120 SW 100. Where plaintiff's agents represented that they paid more for mine than they did, count for money had and received lies for difference between purchase price and price paid. Sandoval v. Randolf [Ariz.] 95 P 119. Money obtained by fraud or embezzlement. Williams v. Smith [R. I.] 72 A 1093. Where draft was drawn on commission men against shipment of cattle, drawer relying on drawee's promise to honor it, action for money had and received could be maintained against drawee, on his dishonor of draft on presentment. Bank of Laddonia v. Bright-Coy Commission Co. [Mo. App.] 120 SW 648. Count for money had and received **will not lie** against a city to recover a portion of a special assessment allowed as a rebate, such money not being money had and received. Conway v. Chicago, 237 Ill. 128, 86 NE 619. Proof that plaintiff sustained loss through the negligent acts of defendant is not sufficient to maintain action for money had and received. Strahl v. Fink, 116 NYS 352. Plaintiff was to receive stock in corporation for money paid, but corporation was not formed. Sherwin v. Sternberg [N. J. Law] 71 A 117.

22. Contract void as against public policy. Ryan v. Allen, 138 Ill. App. 52.

Money paid.[See 9 C. L. 312]—Assumpsit lies where one at another's request,[23] or under an implied request,[24] or as another's surety,[25] pays or lays out money for the benefit of such other.[26]

Work, labor and materials.[See 11 C. L. 312]—Assumpsit for work and labor lies where the plaintiff performs such services for the defendant at the latter's request [27] and accepted by him.[28]

§ 3. *Declarations, pleas and defenses.*[29]—[See 11 C. L. 312]—It is sometimes required by statute that the declaration in assumpsit shall be a concise statement of plaintiff's claim and must fully set forth the ground on which he seeks to recover.[30] It is held that the common-law form is sufficient, notwithstanding such statutory requirement,[31] but the contrary is also held.[32] Under the Missouri code it is sufficient to state facts from which a promise to pay will be implied.[33] An averment of a promise to pay as soon as possible is not too indefinite,[34] and that money earned by the plaintiff was collected and appropriated by defendant is sufficient to sustain the action,[35] and so, also, where all that remains is to pay the amount due, declaration need not aver that architect's right to inspect work had been waived.[36] In assumpsit for the value of goods stored in a warehouse, it is essential to aver that storage charges were tendered defendant.[37] Where an unnecessary contract, is set out is becomes a material part of the declaration and cannot be rejected as surplusage.[38] Where the averments afford sufficient basis for suit, the declaration may be amplified by amendment.[39]

Pleas.[See 11 C. L. 313]—In Florida the plea of nonassumpsit is inadmissible to the common counts.[40] Pleas of set-off and counterclaim are treated elsewhere.[41]

Variance.[See 11 C. L. 313]

§ 4. *Evidence.*[42]—[See 11 C. L. 313]—A note is not admissible in evidence under

23. Assumpsit lies for money paid, laid out, and expended at defendant's request. Teter v. Teter [W. Va.] 63 SE 967; Clark v. Van Cleef [N. J. Eq.] 71 A 260.

24. Volker v. Fisk [N. J. Eq.] 72 A 1011.

25. Teter v. Teter [W. Va.] 63 SE 967.

26. Money lent. Clark v. Van Cleef [N. J. Eq.] 71 A 260.

27. Express contract for labor done and performed for defendant at its special instance. John King Co. v. Louisville & N. R. Co. [Ky.] 114 SW 308. Where action was on an express assumpsit under a written contract, the fact that pleadings were changed so as to place plaintiff's reliance upon the abrogation of the written contract and the substitution of a parol contract in lieu thereof, did not change the form of the action so as to require its transfer to equity. Id.

28. Work was not finished in time specified by contract but defendant accepted benefits thereof. Kendrick v. Warren Bros. Co. [Md.] 72 A 461.

29. **Search Note:** See Assumpsit, Action of, Cent. Dig. §§ 59-62, 79-152; Dec. Dig. §§ 10, 17-24; 4 Cyc. 339-357; 2 A. & E. Enc. P. & P. 992.

30. Procedure act of 1887. Plunkett v. Hammett, 36 Pa. Super. Ct. 590.

31. Count for money had and received held sufficient. Miller v. Abrahamson [Cal. App.] 99 P 534.

32. Declaration for money had and received held not sufficient under Rev. Code, § 6532, requiring facts to be stated, to sustain action for fraud. Truro v. Passmore [Mont.] 100 P 966.

33. Bick v. Clark, 134 Mo. App. 544, 114 SW 1144.

34. In absence of proof by plaintiff that it was possible for defendant to pay. Pinney v. Smith, 136 Ill. App. 129.

35. Allegation that money was earned by plaintiff's assignors as their share of commissions, from sale of certain realty and was collected by defendants and appropriated to their own use, is sufficient in an action for money had and received, but is not model pleading. Fox v. Monahan, 8 Cal. App. 707, 97 P 765.

36. Action for work and labor performed. Boyce v. Expanded Metal Fire Proofing Co., 136 Ill. App. 352.

37. The Union Nat. Bank v. Griswold, 141 Ill. App. 464.

38. Contract was within statute of frauds. Crosby v. Bouchard [Vt.] 71 A 835.

39. Suit for $400 cash may afford sufficient basis for suit for money had and received, which may be properly amplified by amendment setting forth in detail circumstances of transaction. Bass v. West Wholesale Grocery Co., 5 Ga. App. 746, 62 SE 1004.

40. Under rules of practice the plea of "never was indebted" is the proper plea. Poppell v. Culpepper [Fla.] 47 S 351.

41. See Set-off and Counterclaim, 12 C. L. 1821.

42. **Search Note:** See Assumpsit, Action of, Cent. Dig. §§ 153-155; Dec. Dig. § 25; 4 Cyc. 358.

a common count without proof of the signature of the maker,[43] and likewise is not admissible under a special count declaring thereon without proof of the averments of such special count.[44] In assumpsit for work not finished within the time required by the contract, the plaintiff may show its acceptance by the defendant [45] and the value thereof.[46]

Assumption of Obligations; Assumption of Risk, see latest topical index.

ASYLUMS AND HOSPITALS.

The scope of this topic is noted below.[47]

§ 1. Corporations or Societies and Their Officers, 357.
§ 2. Establishment and Maintenance of Institutions and Support of Inmates, 357.
§ 3. Liability of Institutions or Officers for Injuries to Inmates and Others, 358.

§ 1. *Corporations or societies and their officers.*[48]—See 11 C. L. 818—Where a legislative act makes an appropriation to a private institution and at the same time provides for a managing board, such institution becomes a public one.[49]

§ 2. *Establishment and maintenance of institutions and support of inmates.*[50] See 11 C. L. 814—The establishment of asylums for citizens who, by reason of age, infirmity or other cause, are unable to take care of themselves, is, by the common consent of civilized countries, a public purpose and within the general legislative power.[51] Whether, therefore, a particular statute establishing an asylum is valid or not depends upon whether or not such asylum is a public one [52] and whether the act creating it conforms to constitutional limitations,[53] which latter question is usually determinable under the general rules relative to the validity and interpretation of statutes in general.[54]

While hospitals may be so conducted in certain localities as to become a nuisance, they are not necessarily nuisances per se;[55] but a maternity hospital for the purpose of producing abortions is a nuisance per se, and the location is not material.[56]

43, 44. Newton v. Clarke, 138 Ill. App. 196.

45, 46. Kendrick v. Warren Bros. Co. [Md.] 72 A 461.

47. Includes all matters relating to the organization, maintenance, and regulation of such institutions. The commitment of persons thereto (see Infants,* §§ 2, 3; Insane Persons,* § 4), gifts to such institutions (see Charitable Gifts *), the liability of physicians and surgeons for malpractice, the negligent homicide by in the practice of medicine or surgery, and the regulation of such practice (see Medicine and Surgery,* §§ 1, 2, 3), and the liability of railroad companies and other employers for negligent treatment of injured employes (see Master and Servant,* § 3A), are fully treated in separate articles. For the rights, duties and liabilities of officers of public asylums and hospitals, reference should also be had to the topic Officers and Public Employes,* §§ 9-13.

48. Search Note: See notes in 38 L. R. A. 211.

See, also, Asylums, Cent. Dig. § 1; Dec. Dig. §§ 1, 2; Hospitals, Cent. Dig. §§ 1, 2, 5-10; Dec. Dig.; 15 A. & E. Enc. L. (2ed.) 757, 761.

49. Appropriation was made to certain inmates of Woman's Relief Corps Home Association, and a board of directors to be appointed by governor was provided for. Directors of Woman's Relief Corps v. Nye, 8 Cal. App. 527, 97 P 208. Appropriation held not void under Const. art. 4, § 22, providing that with certain exceptions no money shall be appropriated or drawn from state treasury for use or benefit of any corporation. Id.

50. Search Note: See notes in 41 L. R. A. 324; 5 L. R. A. (N. S.) 1028.

See, also, Asylums, Cent. Dig. §§ 2-4; Dec. Dig. §§ 3-6; Hospitals, Cent. Dig. §§ 3, 4, 11, 12; Dec. Dig.; 15 A. & E. Enc. L. (2ed.) 761.

51. Directors of Woman's Relief Corps v. Nye, 8 Cal. App. 527, 97 P 208.

52. See ante, § 1.

53. Act creating asylum for ex-army officers and certain female relatives of veterans held valid. Directors of Woman's Relief Corps v. Nye, 8 Cal. App. 527, 97 P 208.

54. See Statutes, 12 C. L. 1919; Constitutional Law, 11 C. L. 689.

55. Plaintiffs bring suit to restrain defendants from using their premises, located in a residence district, as a lunatic asylum, on grounds that it will constitute a nuisance. Heaton v. Packer, 131 App. Div. 812, 116 NYS 46.

56. Indictment against defendants as pro-

A law making the estates of insane persons, committed to a state hospital, liable for their maintenance,[57] or that a county must pay a certain sum each for maintaining insane persons therefrom is constitutional,[58] and is in pari materia with an act appropriating a sum for the maintenance of such institution,[59] and the fact that such institution has sufficient money for its maintenance does not excuse the payment required by counties.[60] In the absence of a statutory liability, however, a poor district cannot be held liable beyond its contract for the expenses of a pauper committed by it to an insane asylum, merely because it has been reimbursed from such pauper's estate for amounts paid by it to the asylum.[61] In determining whether an appropriation is for a particular institution, the circumstances must be considered.[62]

§ 3. *Liability of institutions or officers for injuries to inmates and others.*[63] See 11 C. L. 314.—Charitable institutions are generally held exempt from liability for negligence resulting in injuries to patients[64] or employes.[65] It is held, however, that the sole basis of the exemption of such institutions from liability for the acts of their employes is the nature of the employment in which such employes are engaged, they generally being independent contractors,[66] and hence where the relation of master and servant really exists the institution will be liable.[67] Liability for failure to perform acts required by law cannot, however, be predicated upon the relation of master and servant, being of itself an independent liability.[68]

ATTACHMENT.

The scope of this topic is noted below.[69]

§ 1. Definition, Nature and Distinction, 359.
§ 2. In What Actions it Will Issue, 359.
§ 3. Right to and Grounds for the Writ, 359.
§ 4. Attachable Property, 360.
§ 5. Procedure in General, 361.
§ 6. Affidavit and Its Sufficiency, 362.

prietors of such a hospital sufficient under B. & C. Comp. § 1930. State v. Atwood [Or.] 102 P 295.

57. Const. art. 7, § 1, providing that such institutions shall be fostered by state is not violated by such a law. Kaiser v. State [Kan.] 102 P 454.

58. Payment should be made by persons responsible for the support of lunatic, if they were able, otherwise by county from which they were sent. State v. Lewis [N. D.] 119 NW 1037.

59. Sum appropriated should be supplemented to extent of payments required of persons responsible for support, or, on their not being able, by counties. State v. Lewis [N. D.] 119 NW 1037.

60. Mandamus to compel county auditor to transmit to superintendent of asylum three warrants in the sum of $50 each. State v. Lewis [N. D.] 119 NW 1037.

61. P. L. 1836, p. 539, making estate of pauper liable, held not applicable. State Hospital for Insane v. Danville & Mahoning Poor Dist., 36 Pa. Super. Ct. 77.

62. Legislature created school for dependent children to be located at "Home for the Friendless," a public charitable institution, and an appropriation was made to the home, ample to maintain both institutions. Held such appropriation was intended for both. State v. Barton [Neb.] 122 NW 64.

63. Search Note: See Asylums, Cent. Dig. § 5; Dec. Dig. § 7; Hospitals, Cent. Dig. § 13; Dec. Dig. § 7.

64. Neither state nor officials derive any profit or benefit from funds, and to allow them to be paid out for injuries inflicted by employes would be contrary to law and public policy and would in time wreck all charitable institutions in state. Ketterer's Adm'r v. State Board of Control [Ky.] 115 SW 200. Defendant's employe who was not a competent person beat an inmate, causing death of latter. Id. Charitable corporation not liable for death of inmate who under direction of one of defendant's employes was washing windows on third story and fell. Cunningham v. Sheltering Arms, 61 Misc. 501, 115 NYS 576.

65. Plaintiff's hand was injured by reason of defective ironing machine which defendant had negligently permitted to be out of order. Whittaker v. St. Luke's Hospital [Mo. App.] 117 SW 1189.

66. Kellogg v. Church Charity Foundation, 128 App. Div. 214, 112 NYS 566. Basis of exemption is not absence of profit or benefit to the institution, or the trust character of the funds out of which the damages would have to be paid, or any exception to rule of respondeat superior. Id.

67. Liable for person injured by ambulance driven by defendant's servant. Kellogg v. Church Charity Foundation, 128 App. Div. 214, 112 NYS 566.

68. Kellogg v. Church Charity Foundation, of Long Island, 128 App. Div. 214, 112 NYS 566. A hospital is not liable for the performance of an autopsy by the coroner, where it merely notifies the coroner of the death, as required by law, and takes no part in the autopsy by suggestion or otherwise. Darcy v. Presbyterian Hospital, 130 App. Div. 496, 114 NYS 1052.

69. This topic covers the entire subject of attachment, whether original or ancillary, but excludes garnishment (see Garnish-

§ 7. Attachment Bond or Undertaking, 363.
§ 8. The Writ of Warrant, 364.
§ 9. The Levy or Seizure, 364. Indemnifying Bonds, 365.
§ 10. Return to the Writ, 365.
§ 11. Custody, Sale, Redelivery, or Release of Attached Property, 365.
§ 12. Forthcoming Bonds and Receipts, 366.
§ 13. Lien or Other Consequences of Levy, 367.
§ 14. Conflicting Levies and Liens, and Hostile Claims, 367.
A. Priorities in General, 367.
B. Procedure, 368.
§ 15. Enforcement and Dissolution, Vacation, or Abandonment of Attachment, 369.
A. Release or Abatement, 369.
B. Validity and Grounds for Setting Aside, 369.
C. Procedure, 370.
§ 16. Other Remedies, 372.
§ 17. Wrongful Attachment, 372.

§ 1. *Definition, nature and distinction.*[70] See 11 C. L. 315—Attachment is a purely statutory remedy,[71] and while attachment statutes are to be liberally construed in order to render the remedy effective,[72] where a failure to observe a statutory requirement constitutes a jurisdictional defect the courts cannot disregard it.[73]

§ 2. *In what actions it will issue.*[74] See 11 C. L. 316—Under statutes confining the remedy to causes of action arising ex contractu, contractual relations must exist in order to authorize issuance of the writ, but the character of a claim arising out of contract is not affected by the fact that tortious elements are involved.[75] A statute providing for attachments in favor of a particular class of creditors is class legislation.[76]

§ 3. *Right to and grounds for the writ.*[77] See 11 C. L. 316—The right to an attachment usually depends upon an accrued cause of action,[78] and is sometimes made to depend upon the sufficiency of other security.[79] In most states the right depends upon the existence of certain specified facts or circumstances.[80]

Insolvency. See 9 C. L. 283

Absconding of debtor. See 9 C. L. 283

Removal of property from the state. See 11 C. L. 316—Where an attachment is

ment *), except in so far as the latter proceeding is merely a method of making the levy in the former. The general principles of process and the service thereof (see Process *), pleading (see Pleading *), venue (see Venue and Place of Trial *), and judicial sales (see Judicial Sales *), are relegated to topics devoted specifically thereto. Exemption and homestead laws, except so far as applicable peculiarly to attached property, are also excluded (see Exemptions;* Homestead *), as is also practice peculiar to justice's courts (see Justices of the Peace,* §§ 3, 4, 5). Attachments suffered in fraud of creditors is also excluded (see Fraudulent Conveyances,* § 1).

70. Search Note: See Attachment, Cent. Dig. §§ 1-7, 40-42; Dec. Dig. §§ 1, 2, 15; 4 Cyc. 395-404; 3 A. & E. Enc. L. (2ed.) 181, 184.

71. See 11 C. L. 315.

72. Cole v. Utah Sugar Co. [Utah] 99 P 681.

73. Service of writ. Cole v. Utah Sugar Co. [Utah] 99 P 681.

74. Search Note: See notes in 30 L. R. A. 465; 59 Id. 954; 13 L. R. A. (N. S.) 696; 76 A. S. R. 800.

See, also, Attachment, Cent. Dig. §§ 8-39, Dec. Dig. §§ 4-14; 4 Cyc. 439-444, 446-452, 3 A. & E. Enc. L. (2ed.) 187.

75. Stewart v. Blue Grass Canning Co. [Ky.] 117 SW 401, rehearing denied, 120 SW 375.

76. P. L. 1901, § 431, providing for attachments by subcontractors and material men, held contrary to Const. art. 3, § 7. Trexler v. Kuntz, 36 Pa. Super. Ct. 352.

77. Search Note: See notes in 3 C. L. 356; 19 L. R. A. 665; 1 L. R. A. (N. S.) 778.

See, also, Attachment, Cent. Dig. §§ 43-45, 54-121, 871-876; Dec. Dig. §§ 16, 21-48; 4 Cyc. 405-407, 410-438; 3 A. & E. Enc. L. (2ed.) 195.

78. Anderson v. Thero [Iowa] 118 NW 47.

79. A debt secured by a mortgage executed by one non compos mentis is not a "secured claim," within B. & C. Comp. § 296, providing for attachment in an action on an unsecured claim. Bowman v. Wade [Or.] 103 P 72. Rev. Codes 1909, § 4303, provides that the clerk must issue an attachment upon receiving an affidavit setting forth inter alia that debt is not secured by mortgage or lien. Knutsen v. Phillips [Idaho] 101 P 596.

80. See the succeeding subdivisions of this section. "Residence" and "domicile" as used in exemption statutes have the same meaning as when used in attachment statutes making certain grounds for attachment depend upon residence. McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 115 SW 1028. Under Ann. St. 1906, p. 2239, authorizing attachment **for rent when due and after demand,** and providing for demand on person in possession when tenant is absent, where premises were wholly unoccupied and no demand made, attachment could not issue. Sessinghous v. Knoche [Mo. App.] 118 SW 104. Under Laws 1902, p. 1513, c. 580, § 74, subd. 2, defendant must be a resident, in order to warrant an attack on **ground that defendant is concealing himself** in order to avoid service. Hotel Touraine v. Waitt, 61 Misc. 54, 113 NYS 19.

based upon this ground, other grounds are immaterial,[81] but intent to defraud is usually an element of such ground itself.[82]

*Nonresidence.*See 11 C. L. 316—One of the most common grounds for attachment is that the debtor is a nonresident of the state in which action is commenced.[83]

*Attachment against corporations.*See 11 C. L. 317

*Fraud.*See 11 C. L. 317—Under the statutes making fraudulent conveyances ground for attachment, the fraud may be inferred from the act of transfer.[84]

*Liability criminally incurred.*See 11 C. L. 317

*Liability for necessaries.*See 11 C. L. 317—Money had and received or money loaned does not fall within the class of "necessaries" as a legal basis for attachment.[85]

§ 4. *Attachable property.*[86]—See 11 C. L. 317—Under the various statutes all personal properties[87] of the debtor,[88] and interests therein[89] are attachable, including evidences of debt[90] and monetary claims.[91] The interest of a mortgagee in the

81. Where attachment is based on Ann. St. 1906, p. 474, authorizing it when one is about to remove his property with intent to defraud creditors, the debtor's insolvency is immaterial. Simmons Hardware Co. v. Fighting the Flames Co., 135 Mo. App. 266, 115 SW 467.

82. Where insolvent corporation was organized to exhibit through several states, proof that it was about to remove its property from the state does not show intent to defraud creditors within Ann. St. 1906, p. 474. Simmons Hardware Co. v. Fighting the Flames Co., 135 Mo. App. 266, 115 SW 467. Ann. St. 1906, p. 474, authorizing attachment only when one is about to remove his property out of state, with intent to hinder, delay or defraud creditors. Held **"intent" means "purpose,"** but proof of intent independent of removal is necessary. Id.

83. Under Sayles' Ann. Civ. St. 1897, art. 186, authorizing attachment when plaintiff makes affidavit that defendant "is not a resident of this state," an attachment will not be quashed on the ground that the complaint shows that defendant is temporarily in the state. Hull v. Parry [Tex. Civ. App.] 118 SW 561. Attachment **against husband to compel support of wife** held proper where husband had an interest in land and left the state and remained away for a year leaving his wife destitute. Pendleton v. Pendleton [Ky.] 112 SW 67. Code 1906, § 131, authorizing attachment **against partnerships** by partnership creditors contemplates that where some of the partners reside out of the state attachment cannot be sustained on the ground of nonresidence. Barney v. Moore-Haggerty Lumber Co. [Miss.] 48 S 232. "Rules and regulations" in Civ. Code 1895, § 4527, providing for issuance of attachments **against foreign corporation** under the same rules and regulations as in other cases, means the manner in which attachments may issue and not the grounds. Panamore v. Alexander [Ga.] 64 SE 660. A foreign corporation doing business in the state transferred its stock to a nonresident for the benefit of a domestic corporation which as beneficial owner of the stock converted the assets of the foreign corporation. Held a court of equity in the state might, at instance of a domestic creditor, enforce, by foreign attachment against the domestic corporation the liability of the nonresident holder of the foreign stock for the unpaid stock. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751. Such a suit is not an interference with the domestic affairs of the foreign corporation. Id.

84. Under Ann. St. 1906, p. 474, authorizing attachment where one has fraudulently conveyed or assigned his property with intent to hinder and defraud creditors, proof of fraud is essential but **fraud in law** arising from transfer in violation of statutes against fraudulent conveyances is sufficient. Simmons Hardware Co. v. Fighting the Flames Co., 135 Mo. App. 266, 115 SW 467.

85. Doran v. Collins, 8 Ohio N. P. (N. S. 169.

86. Search Note: See notes in 3 C. L. 357, 358, 359; 25 L. R. A. 645; 26 Id. 593; 55 Id. 796; 64 Id. 501; 13 L. R. A. (N. S.) 757; 14 Id. 1234; 16 Id. 1026; 52 A. S. R. 474; 2 Ann. Cas. 349; 7 Id. 755; 9 Id. 440; 11 Id. 669, 910. See, also, Attachment, Cent. Dig. §§ 122-192; Dec. Dig. §§ 49-65; 4 Cyc. 554-571; 3 A. & E. Enc. L. (2ed.) 209.

87. Shares of corporate stock are personal property subject to attachment. Pease v. Chicago Crayon Co., 235 Ill. 391, 85 NE 619.

88. Private property of the heirs cannot be attached in a suit against the succession. Laborde v. Ubarri, 29 S. Ct. 552.

89. Under a contract for the construction of a railroad by the terms of which the railroad company was to make advancements and have title, material for work placed on ground by contractor until after completion of the work and certificate of the railroad engineer, the contractor had an attachable interest in machinery and material delivered on the premises subject to the right of the railroad company to have it used in fulfilling the contract, etc. Knickerbocker Trust Co. v. O'Rourke Engineering Const. Co., 74 N. J. Law, 53, 70 A 735.

90. Under Ann. St. 1906, pp. 486, 2151, a note is subject to attachment issued out of justice court. Tipton v. Christopher, 135 Mo. App. 619, 116 SW 1125.

91. Money cannot be attached unless it is absolutely due to debtor at time of levy. Herrmann v. New York, 130 App. 531, 114 NYS 1107. Where a building contract provided for payment of contractor when work was completed but 85 per cent was to be paid as work progressed. Held remaining 15 per cent was not a debt due the contractor which could be attached prior to completion of the work. Id. Where contract for sale of land by estimated acreage provided for resurvey and final settlement based thereon where resurvey has not been made, it cannot be said that it will show an

mortgaged premises is not attachable.[92] A tax is not liable to attachment against a city.[93] Instrumentalities and subjects of interstate commerce as subjects of taxation are treated elsewhere.[94]

§ 5. *Procedure in general.*[95]—See 11 C. L. 818—An immaterial change in the name of a party in the title of the cause is harmless.[96] Amendments are sometimes expressly authorized in attachment proceedings.[97] An amendment of the complaint in the principal cause does not affect the attachment proceeding.[98]

*Jurisdiction.*See 11 C. L. 818—In order to issue a valid attachment, the court must, of course, acquire jurisdiction to do so,[99] and the allegation of the grounds of the attachment are usually held to be jurisdictional.[1] Where the attachment issues from a court of inferior jurisdiction, the record must show that jurisdiction exists.[2] For the purposes of attachment, a debt which has been merged in a judgment has its situs in the state where the judgment was rendered.[3] In the federal courts an attachment is but an incident to a suit, and unless the suit can be maintained, the attachment must fall.[4] Where the defendant is not served and does not appear, no jurisdiction of his person can be acquired by attachment of his property.[5]

*Necessity of issuance of summons and service thereof.*See 11 C. L. 819—Service by publication must comply with statutory requirements.[6]

underestimate so as to constitute an indebtedness subject to attachment. McFadden v. Innes, 60 Misc. 543, 112 NYS 912. Seller of land held to have no claim against his vendee which was subject to attachment. Id.

92. Pettus v. Gault [Conn.] 71 A 509.

93. Hedge v. Des Moines [Iowa] 119 NW 276.

94. See Commerce, § 2A, subd. State Burdens on Foreign Commerce.

95. **Search Note:** See notes in 11 C. L. 318; 20 L. R. A. 446; 49 Id. 223.

See, also, Attachment, Cent. Dig. §§ 193-203, 659-778; Dec. §§ 66-76, 204-224; 4 Cyc. 464-469, 813-830.

96. Use of "railroad" in one place and "railway" in another in attachment proceedings against a corporation held not a material change in the name. Panamore v. Alexander [Ga.] 64 SE 660.

97. Code Pub. Gen. Laws 1904, art. 9, § 28, expressly provides that the affidavit, short note, declaration, voucher, pleadings and all other papers, may be amended in the same manner and to the same extent as the proceedings in any other action. Kendrick v. Warren Bros. Co. [Md.] 72 A 461. Under Ann. St. 1906, p. 674, authorizing the court to correct mistake in name of a party, it may erase name of corporation defendant in petition, affidavit, bond, writ and return and substitute other individuals. Glover Commission Co. v. Abilene Milling Co. [Mo. App.] 116 SW 1112.

98. Amendment of complaint in action in which attachment is issued to cure a defect does not postpone plaintiff to one acquiring rights before amended complaint was filed where there is no defect in the attachment affidavit. Dengler v. Krell-French Piano Co. [Ky.] 119 SW 757.

99. Under Rev. Codes, § 6993, an action in justice court can be commenced only by filing a complaint or copy or statement of bill, and a justice cannot issue an attachment unless a complaint of some sort is filed. Shandy v. McDonald [Mont.] 100 P 208.

1. Under Laws 1902, p. 1519, authorizing attachment against a resident who keeps himself concealed to avoid service of summons, original papers must show whether defendant is a resident or nonresident. Hotel Touraine v. Walter, 61 Misc. 54, 113 NYS 19. Bill to enjoin corporation from selling property until taxes due had been paid held not an attempt to obtain an attachment in chancery without necessary allegations of grounds. Delta & Pine Land Co. v. Adams [Miss.] 48 S 190.

2. In proceedings in justice court, under Ann. St. 1906, p. 2130, the record must show that the justice has jurisdiction in the attachment proceeding. Sawyer v. Burns [Mo. App.] 121 SW 321.

3. Debt cannot be attached in state of judgment debtor's residence where judgment thereon has been rendered in another state. Heyle v. Taylor, 64 Misc. 31, 117 NYS 916.

4. "Unless the suit can be maintained" means "unless the court has jurisdiction over the person of the defendant." Laborde v. Ubarri, 29 S. Ct. 552.

5. Heyle v. Taylor, 64 Misc. 31, 117 NYS 916.

6. Where in a suit in an attachment in a state court of New York after levy on property in the state an order was made for service by publication on defendant as a nonresident in accordance with the state statutes, such service was sufficient to give federal court to which cause was removed jurisdiction to render judgment, enforcible against the attached property though no proof was made that defendant owned property in the state. Mercantile Nat. Bank v. Barron, 165 F 831. Statute does not require the name of the garnishee to appear in the title of the cause in the publication notice to defendant nor need a description of the attached property be set out in such notice. Pine Tree Lumber Co. v. Central Stock & Grain Exch., 140 Ill. App. 462. Notice held sufficient. Id. Complaint held to show that defendant had property in the state and hence there was compliance, with Rev. Codes, 6840, requiring affidavit for constructive service to show such fact. Hemmi v. Grover [N. D.] 120 NW 561.

§ 6. *Affidavit and its sufficiency.*[7] *Necessity.* See 11 C. L. 319

Formal requisites. See 11 C. L. 319—The affidavit must be signed by the affiant.[8] It may be verified before plaintiff's attorney of record.[9] An affidavit appropriately styled sufficiently identifies the cause of action though it does not refer to the petition,[10] but it must state the Christian name of the defendant debtor unless otherwise authorized by statute.[11]

Averments in general. See 11 C. L. 319—The statements required in the affidavit must be in the language of the statute or in language of the same meaning.[12] Whether the grounds may be stated on information and belief depends upon the terms of the statute.[13] Where such statements are allowed the source of the information must usually be set forth.[14] Where the grounds are required to be shown to the satisfaction of the court, an affidavit is sufficient if the statements

7. Search Note: See notes in 3 C. L. 361; 31 L. R. A. 422; 14 L. R. A. (N. S.) 1126, 1135; 11 Ann. Cas. 27.

See, also, Attachment, Cent. Dig. §§ 204-350; Dec. Dig. §§ 77-127; 4 Cyc. 469-526; 3 A. & E. Enc. P. & P. 3.

8. Purported affidavit not signed by affiant is no affidavit. Davis v. Sherrill [Tex. Civ. App.] 113 SW 556. Under Rev. St. 1895, arts. 6, 186, the requirement as to signing by affiant in mandatory. Id.

9. Affidavit made before plaintiff's attorney of record as notary is not void. No code provision forbidding it. Vreeland v. Pennsylvania Tanning Co., 130, App. Div. 405, 114 NYS 1002.

10. An affidavit appropriately styled and numbered, stating that it is made at the instance of plaintiff and filed among the papers of the suit, sufficiently identifies the suit. White Day Furniture Co. v. First State Bank [Tex. Civ. App.] 114 SW 1159.

11. An initial is insufficient and such defect cannot be afterwards amended. McGrew v. Steiner [N. J. Law] 71 A 1122.

12. Knutsen v. Phillips [Idaho] 101 P 596; Myers v. McCormick [Va.] 63 SE 427. Affidavit following the language of code held sufficient. George Norris Co. v. Lavin's Sons, 81 S. C. 36, 61 SE 1103. An affidavit in attachment under Rev. St. § 5522, where the defendant is a nonresident, in order to give jurisdiction, must contain statements showing nature of plaintiff's claim that it is just, the amount which the affiant believes the plaintiff ought to recover, and that the defendant is a nonresident of this state. Gilbert v. Burke, 11 Ohio C. C. (N. S.) 282. Under Rev. Codes 1909, § 4, the affidavit must be liberally construed and held sufficient if language used is substantially equivalent to the language used in Rev. Codes 1909, § 4303. Knutsen v. Phillips [Idaho] 101 P 596. Under statute providing that the affidavit shall state **that attachment is not sued out to injure or harass** defendant, it need not add the words "or either of them" where there is more than one, since under Rev St. 1895, art. 3268, the singular includes the plural. Doty v. Moore [Tex.] 112 SW 1038. Under Rev. Codes 1905, § 6942, the affidavit need not set forth the **cause of action.** Hemmi v. Grover [N. D.] 120 NW 561. Under Code 1904, § 2961, an attachment may issue on a claim of "damages for breach of contract." Myers v. McCormick [Va.] 63 SE 427. Need not show that defendant has **property in state** subject to attachment. Hemmi v. Grover [N. D.] 120 NW 561.

Sufficient: An affidavit which alleges that defendant is about to remove his property from the county with intent to defraud his creditors justifies a justice in issuing an attachment and gives him jurisdiction of property seized in the county under the writ when followed by service provided in Code Civ. Proc. § 932. Curtis-Baum Co. v. Lang [Neb.] 120 NW 178. An affidavit for attachment which avers that "Stephen J. Burke, plaintiff, being first duly sworn, says that the claim sued upon is for money paid by him for the use and benefit of the defendant and upon contract, and that said claim is just;" and "affiant believes that he ought to recover the sum of $105, together with interest, from the 17th day of August, 1895, "is in compliance with the first three provisions of § 5522. Gilbert v. Burke, 11 Ohio C. C. (N. S.) 282. In an attachment proceeding where the affidavit alleges that the defendant has repudiated the contract upon which the claim in suit is based and refuses to carry out his agreement, the action is one on contract in the sense in which that word is used in the statute, and a motion to discharge the attachment on the ground that no breach of the contract has occurred will not lie. Roosfield v. Glasgow, 11 Ohio C. C. (N. S.) 392.

Insufficient: Where the affidavit partially follows the language of the statute in regard to the debt not being secured, and fails to state that it is not secured by "pledge of personal property" and contains no statement equivalent thereto. Knutsen v. Phillips [Idaho] 101 P 596. Affidavit that attachment was not sued out to injure or harass defendants was fatally defective for failure to negative that it was not sued out to injure or harass one or less than all as required by Sayles' Ann. Civ. St. 1907, art. 187. Doty v. Moore [Tex. Civ. App.] 113 SW 955. Where affidavit did not state that attachment was not sued out to "injure or harass" defendants "or either of them" as required by statute (Sayles' Ann. Civ. St. 1901, art. 187), it was not cured by an affidavit that it was not sued out to "injure" defendants or either of them. Id.

13. That defendant is disposing or is about to dispose of his property, etc., must be stated positively. Hemmi v. Grover [N. D.] 120 NW 561. **Nonresidence** must usually be stated as a fact. See post this section, subd. Nonresidence.

14. Must be set forth. Brandly v. American Butter Co., 130 App. Div. 410, 114 NYS 896.

therein contained are such as a prudent person would act upon,[15] and in construing such an affidavit all the inferences will be indulged that can reasonably be made from the facts stated.[16] Whether an affidavit states more than one ground of attachment is a question of construction,[17] and so also as to whether the averments are inconsistent.[18] Under the practice in some states the affidavit may be aided by the complaint,[19] but in other states it is held improper for the complaint to state the grounds of the attachment and any such statement may be disregarded as surplusage.[20] A slight variance between the amount alleged in the complaint and the amount stated in the affidavit is not a fatal variance.[21] Under some statutes, the affidavit may be amended,[22] but it is held that the failure of the affidavit to allege a material fact cannot be cured by evidence that affiant in fact swore to such fact.[23]

Averments as to nonresidence. See 11 C. L. 320—Such averments must usually be as of the affiant's own knowledge.[24] An averment that the defendant is a non-resident, when aided by an allegation that the defendant is a corporation under the laws of another state, is equivalent to a statement that it is a nonresident corporation,[25] and so also an averment that a named corporation is not incorporated under the laws of the state but is doing business therein.[26] Statutory exceptions exempting certain classes of corporations from attachment must be negatived by the affidavit for an attachment against a corporation.[27]

§ 7. *Attachment bond or undertaking.*[28] *Necessity.* See 11 C. L. 320—Under some of the statutes an attachment may issue in certain cases without bond.[29]

15. Under Code Civ. Proc. § 636. Brandly v. American Butter Co., 130 App. Div. 410, 114 NYS 896.

16. Brandly v. American Butter Co., 130 App. Div. 410, 114 NYS 896. Affidavit for attachment against a foreign corporation held sufficient under Code Civ. Proc. § 1780. Id.

17. An affidavit which states in the language of the statute that debtors "have sold, assigned, transferred, secreted or otherwise disposed of, or are about to sell, assign, transfer, secreted or otherwise, dispose of their property with intent to cheat, or defraud their creditors" states but one ground for attachment. McCarthy Bros. Co. v. McLean County Farmers' Elevator Co. [N. D.] 118 NW 1049. Use of disjunctive conjunction "or" in subd. 4, § 6938, Rev. Codes 1905, is not to connect two grounds for an attachment, but such subdivision states one ground only consisting of the different phases of fact pertaining to that one ground. Id.

18. The averment in an affidavit for attachment that the defendant has property which he conceals is inconsistent with an averment that the action is for "necessaries," and is not sufficient to sustain a judgment when it develops that the claim is not one for necessaries. Doran v. Collins, 8 Ohio N. P. (N. S.) 169.

19. Where petition for attachment under Civ. Code Proc. § 194, allowing attachments in actions for money due on contract set out a copy of the contract and alleged the grounds of attachment, the affidavit was not bad because not stating that the money was due on contract. Wilson v. Barrett [Ky.] 115 SW 812. As to averment of nonresidence of corporation. Edwards Mfg. Co. v. Ashland Sheet Mill Co., 11 Ohio C. C. (N. S.) 479.

20. Insufficient statement of grounds in grounds sufficiently. Hemmi v. Grover [N D.] 120 NW 561. Fact that affidavit and complaint are not verified same day does not require that they be construed together and that complaint shall control in case of variance. Id.

21. That petition shows exact amount sued for to be a certain sum and affidavit states that it is $2 less is not a material variance. White Day Furniture Co. v. First State Bank [Tex. Civ. App.] 114 SW 1159.

22. Under St. 1898, §§ 3701, 3702, jurisdiction of a justice to entertain attachment depends upon the existence of certain facts and if the affidavit is not sufficient it may be amended and if not objected to, jurisdictional facts are admitted. Givans v. Searle, 136 Wis. 608, 118 NW 202. See, also, ante, p. 361, n. 97.

23. Where attachment was against several defendants, failure to allege that it was not taken out to injure or harass anyone or less than all of defendants, the averment being merely that it was not taken out to injure or harass defendants could not be cured on motion to quash by evidence that affiant in fact swore to the fact omitted. Doty v. Moore [Tex. Civ. App.] 113 SW 955.

24. Nonresidence must be stated as a fact and not upon information and belief. Gilbert v. Burke, 11 Ohio C. C. (N. S.) 282; Hemmi v. Grover [N. D.] 120 NW 561.

25. Edwards Mfg. Co. v. Ashland Sheet Mill Co., 11 Ohio C. C. (N. S.) 479.

26. State's ground for attachment under Civ. Code 1895, § 4527. Parramore v. Alexander [Ga.] 64 SE 660.

27. Exceptions contained in Rev. St. § 5521 subd. 1. Edwards Mfg. Co. v. Ashland Sheet Mill Co., 11 Ohio C. C. (N. S.) 479.

28. Search Note: See Attachment, Cent. Dig. §§ 351-387, 1180-1306; Dec. Dig. §§ 128-139, 330-354; 4 Cyc. 527-540; 3 A. & E. Enc.

Formal requisites. See 11 C. L. 320

Terms. See 11 C. L. 321—In determining the amount of the bond, the value of property attached, and other circumstances are to be considered,[30] but interest to accrue is not to be considered.[31]

Liabilities on bond. See 11 C. L. 321—Attorney's fees incurred in the defense of the attachment constitute an element of liability under the attachment bond.[32]

Actions on bonds. See 11 C. L. 321—An action on an attachment bond is ex contractu,[33] and the complaint must allege breach of the conditions of the bond.[34] Where the plaintiff in such an action claims attorney's fees, he has the burden of proving the value of such services,[35] but he need not prove that he has actually paid such fees, proof of liability therefor being sufficient.[36] Set-off and counterclaim in such action is controlled by the general rules.[37] The judgment should be for the penalty of the bond to be satisfied by payment of damages assessed with interest from date of judgment.[38]

§ 8. *The writ or warrant.*[39] See 11 C. L. 321

§ 9. *The levy or seizure.*[40] See 11 C. L. 322—In some states where real property is attached, it is required that lis pendens be filed,[41] and special provision is also made as to levies on certain kinds of personalty.[42] An officer who fails to make a levy is liable for damages sustained.[43]

29. Against defendant foreign corporation in action for recovery of money lost in scheme of chance, commonly called bucket shop. Baker v. Morehead & Co., 7 Ohio N. P. (N. S.) 384.

30. In an action for damages amounting to over $9,000 where over $900 cash and over $175,000 in certificates and bonds of par value of $140,000 subject to a debt of $100,000 were attached and a bond of but $250 given additional security should be required because of serious consequences of tying up so much property, and extent of litigation. Isenburger v. Roxbury Distilling Co., 163 F 133.

31. Hemmi v. Grover [N. D.] 120 NW 561.

32. State v. Reynolds [Mo. App.] 117 SW 653. See post, § 17.

33. State v. U. S. Fidelity & Guar. Co., 135 Mo. App. 169, 115 SW 1081. Under Ann. St. 1906, p. 1652, relative to interest as damages, an action on bond for **wrongful attachment is ex contractu and plaintiff is entitled to interest** as a matter of right, with attorney's fees and expenses State v. Flarsheim [Mo. App.] 119 SW 17.

34. In action on bond conditioned as required by Ann. St. 1906, p. 482, for payment of damages, complaint must allege failure to pay such damages. State v. Reynolds [Mo. App.] 117 SW 653.

35. State v. Flarsheim [Mo. App.] 119 SW 17.

36. Marks v. Massachusetts Bonding & Ins. Co., 117 NYS 1019.

37. In an action on an attachment bond, defendant is entitled under the statute relative to set off, to set off the judgment recovered on the merits by the attaching creditor and assigned to him. State v. U. S. Fidelity & Guar. Co., 135 Mo. App. 160, 115 SW 1081. For the general rules of set-off and counterclaim, see Set-off and Counterclaim, 12 C. L. 1821.

38. State v. Reynolds [Mo. App.] 117 SW 653.

39. Search Note: See note in 5 C. L. 308, See, also, Attachment, Cent. Dig. §§ 388-451; Dec. Dig. §§ 140-158; 4 Cyc. 540-552; 3 A. & E. Enc. L. (2ed.) 208; 3 A. & E. Enc. P. & P. 38.

40. Search Note: See Attachment, Cent. Dig. §§ 452-523, 585-598; Dec. Dig. §§ 159-176, 184; 4 Cyc. 571-606; 627-630; Sheriffs and Constables, Cent. Dig. § 128-136, 254-329; Dec. Dig. §§ 90-92, 127-151; 3 A. & E. Enc. P. & P. 54.

41. Under Burns' Ann. St. 1908, § 330, providing that where a sheriff seizes real estate he shall file **written notice to be recorded in lis pendens, record** requires him to file such notice as well where real estate is situated in the county where action is pending as where action is pending in another county. First Nat. Bank v. Farmers' & Merchants' Nat. Bank [Ind.] 86 NE 417. The fact that Acts 1877, p. 54, c. 24, related solely to actions, affecting title to land, furnishes a sufficient explanation for words "In certain cases" and the same do not evince an intent in conflict with the view that it is necessary to file such notice. Id. Objection that Code § 74, if construed to require notice of attachment of land to be filed in county where land is located as well as in county where action is commenced, conflicts with Burns' Ann. St. 1908, § 956, providing that order of attachment binds property in the county subject to execution and becomes a lien thereon from time of its delivery to the sheriff, and the further objection that property levied on is in custody of the law and not subject to mortgage are answered by Code § 79, providing that until proper notice has been filed the seizure shall not operate as constructive notice against bona fide purchasers. Id.

42. Civ. Code § 2969, provides that before **mortgaged chattels** may be taken the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest. Souza v. Lucas [Cal. App.] 100 P 115. Under Code Civ. Proc. § 648, permitting levy of attachment on **notes** and § 649, re-

Indemnifying bonds. See 11 C. L. 322

§ 10. *Return to the writ.*[44] See 11 C. L. 323—A return is not materially defective for not stating that property attached was levied on as that of the attachment defendant.[45] It is discretionary with the trial court to permit the return to be amended to show the date of levy,[46] and it is proper to permit it to be amended to show by what officer the writ was served.[47] In New York where property is attached in the hands of a third person, statutes provide for a certificate as to such property.[48]

§ 11. *Custody, sale, redelivery, or release of attached property.*[49] See 11 C. L. 323—In Missouri a justice has no jurisdiction to appoint a receiver for attached property.[50] Statutes, making provision for expenses of a sheriff in keeping attached property, do not apply where a claimant has possession,[51] and to entitle a claimant to compensation he must bring himself within the terms of the statute.[52]

A bona fide purchaser acquires perfect title[53] as of the date of levy,[54] but he acquires only the right, title and interest of the defendant in attachment.[55] Where the defendant holds title to the goods under conditional sale from the plaintiff, the plaintiff must quitclaim to him prior to sale under the attachment.[56] Where attached property is sold as perishable pending bankrupcty proceedings, the purchaser is protected by the provisions of the Bankruptcy act.[57] Where an attach-

quiring attachment to be made by taking actual custody thereof, where notes were not within the jurisdiction and were never in the possession of the sheriff, they cannot be attached by service of copy of the warrant on the maker. McFadden v. Innes, 60 Misc. 543, 112 NYS 912.

43. Under Kirby's Dig. § 360, where a sheriff fails to seize property, and the debtor sells it, the sheriff is liable on his bond to plaintiff in attachment. McKinney v. Blakeley [Ark.] 112 SW 976.

44. **Search Note:** See Attachment, Cent. Dig. §§ 1148-1179; Dec. Dig. §§ 318-329; 4 Cyc. 606-621 3 A. & E. Enc. P. & P. 62.

45. Where it shows levy on property described in the writ, it is presumed to be property of defendant. McLane v. Kirby [Tex. Civ. App.] 116 SW 118.

46. McLane v. Kirby [Tex. Civ. App.] 116 SW 118.

47. Where return is signed by officer as deputy constable instead of as deputy sheriff. Kramer v. Lilley [Tex. Civ. App.] 118 SW 735.

48. Instrument addressed to city marshal, certifying that bank had set aside a certain sum of a depositor's balance, etc., held not a certificate of amount, nature and description of property within Laws 1902, p. 1516, so as to authorize the marshal to sue therefor under such law. Lazarus v. Union Bank, 116 NYS 710.

49. **Search Note:** See Attachment, Cent. Dig. §§ 600-632, 637-658; Dec. Dig. §§ 186-190, 192-203; 4 Cyc. 653-719, 721-724; 7 Id. 53, 54; 3 A. & E. Enc. P. & P. 60.

50. Ann. St. 1906, p. 2151, expressly denies to a justice such authority. Tipton v. Christopher, 135 Mo. App. 619, 116 SW 1125.

51. Civ. Code Proc. § 219, making provision for allowance to the sheriff for keeping attached property, applies where the sheriff takes property from possession of the claimant, and no provision is made for allowance to a claimant of attached live stock for keeping same. Samples v. Rogers [Ky.] 119 SW 199.

52. One who is permitted to retain possession of attached live stock without giving bond required by Civ. Code Proc. § 214, authorizing the sheriff to deliver attached property to person in whose possession it is found upon giving bond, may not recover from plaintiff when attachment is vacated for keeping the stock. Samples v. Rogers [Ky.] 119 SW 199.

53. Purchaser of property sold under Comp. Laws 1897, § 2716, who was a bona fide purchaser, has a perfect title. Jones v. Springer [N. M.] 103 P 265.

54. Haiback v. Hamilton Ice Mfg. Co. [N. J. Err. & App.] 72 A 86. Sale after such date by defendant in writ passes no title. Id. Under Rev. Laws 1902, c. 167, providing that property subject to execution may be taken upon the original writ in any action and held as security for the judgment, the purchaser at execution sale acquires the interest of the debtor at date of attachment and his rights are superior to subsequent mortgages. Gerrity v. Wareham Sav. Bank, 202 Mass. 214, 88 NE 1084.

55. In attachment issued out of justice court. Tipton v. Christopher, 135 Mo. App. 619, 116 SW 1125. Creditors who attach and buy interest of debtor under a title bond stand in his shoes. Martin v. Turner [Ky.] 115 SW 833.

56. Where an attachment for purchase money of personal property to which plaintiff in attachment has reserved title is served by seizure of the property before the property can be levied on and sold under final judgment and execution, plaintiff must quitclaim it to the defendant. Johnson v. Wood Stove Co. [Ga. App.] 64 SE 287. Such reconveyance is not necessary before issuance of attachment and seizure of the property. Id.

57. Where a state or territorial court sells attached property, as perishable during pen-

ment judgment is void, the sale thereunder is void.[56] Where third persons have rights in the property, a sale may be temporarily enjoined upon proper assurance being given.[59]

§ 12. *Forthcoming bonds and receipts.*[60]—See 11 C. L. 323—In some states sureties on a forthcoming bond must be freeholders[61] or householders.[62] The fact that property of a surety consists of stock in the defendant, a corporation, does not disqualify him.[63] Failure to approve a bond until after attachment was released does not affect the rights of the attaching creditor.[64] A bond is not void because it contains conditions in excess of those required.[65]

The liabilities of the parties rest in the terms of the bond,[66] which may even authorize judgment without notice.[67] An execution sale following an attachment is conclusive on the parties to the redelivery bond as to the value of the property.[68] In New York a claimant has an immediate right to possession upon service of a redelivery bond,[69] and the fact that possession is delayed,[70] or that the bond is destroyed, does not affect the liability of the sureties.[71]

dency of bankruptcy proceedings against the debtor of which the court or officer making the sale or purchaser had no notice, the trustee must take the proceeds in lieu of the property. Jones v. Springer [N. M.] 103 P 265. Purchaser is protected by proviso following § 67f of the Bankruptcy Act. 30 Stat. 565. Id.

58. Sawyer v. Burris [Mo. App.] 121 SW 321.

59. Where attachment sued out against nonresident railroad company is levied upon one of its freight cars standing idle on the spur track of another company which has a right to loan and send it beyond the limits of the state, held it was proper to enjoin its sale conditioned upon the giving of bond to return the car to the proper officers of court after the contract right to use the car had expired. Southern R. Co. v. Brown, 131 Ga. 245, 62 SE 177.

60. **Search Note:** See Attachment, Cent. Dig. §§ 633-636; Dec. Dig. § 191; 4 Cyc. 677-709; 13 A. & E. Enc. L. (2ed.) 1129; 6 A. & E. Enc. P. & P. 647.

61. One whose rights depended on quitclaim deed and possession and who was not shown to have acquired title from government held a freeholder and qualified to go eurety on the bond. Goldfield Mohawk Min. Co. v. Frances-Mohawk Mining & Lumber Co. [Nev.] 102 P 963.

62. One keeping house with a servant doing the cooking in a house where he made his home which he rented from a corporation bearing his name and in which he owned a controlling interest is a "householder" qualified to act as surety on the bond. Goldfield Mohawk Min. Co. v. Frances-Mohawk Mining & Lumber Co. [Nev.] 102 P 963.

63. The fact that property of sureties for discharge of an attachment against a corporation consisted of stock of defendant did not disqualify them. Goldfield Mohawk Min. Co. v. Frances-Mohawk Mining & Lumber Co. [Nev.] 102 P 963.

64. Failure to approve a bond given to release an attachment until after attachment was released would not bar an action thereon by the attaching creditor as formal approval by plaintiff's attorney was for protection of officer making the levy. Dakich v. Barich, 37 Mont. 490, 97 P 931.

65. Bond given to discharge an attachment, which substantially complies with Gen. St. 1901, § 4664, is not void because containing conditions in excess of those required. Kaill v. Bell [Kan.] 99 P 593.

66. **Bond given to release attachment** construed and held to bind makers to pay any judgment recovered by plaintiff if defendant did not do so. Dakrich v. Barich 37 Mont. 490, 97 P 931. An obligor in a bond given to release an attachment under Wilson's Rev. & Ann. St. 1903, § 4404, conditioned that defendant will perform the judgment, is absolutely liable on the bond for the amount of the judgment whether the attachment was rightfully or wrongfully issued, and is precluded by the bond from controverting the grounds of attachment. Moffitt v. Garrett [Okl.] 100 P 533. Under a **bond for suspension of attachement** proceedings on condition that the surety discharge any judgment rendered against the principal, the surety is liable **though the principal failed to interpose a defense,** in the absence of fraud or collusion. Andres & Co. v. Schlueter [Iowa] 118 NW 429. A **redelivery bond** conditioned to redeliver to the sheriff the property attached or pay the value thereof is not satisfied by tendering to the sheriff a portion of the property and offering to pay the value of the remainder though the remainder was sold because perishable. Jones v. Short [Or.] 101 P 209. Liability on a redelivery undertaking is limited to the value of the property attached less the amount realized by sale by the sheriff of a portion thereof or if such value exceeds the judgment, the amount thereof remaining unpaid. Id.

67. Judgment may be rendered against a surety without notice where he has, by his bond of record conditioned as provided by statute for the satisfaction of any judgment against the principal, consented that judgment be so entered. Andres & Co. v. Schlueter [Iowa] 118 NW 429.

68. Jones v. Short [Or.] 101 P 209.

69. Right of claimant of goods in attachment to take them on his claim of ownership is immediate and in order to enable plaintiff to sue on claimant's bond it is not necessary that marshal should have actually delivered goods to claimant. Ehrlich v. Skamberg, 116 NYS 602.

Action on the bond must be brought within the period prescribed,[72] and, in some states must be brought by the real party in interest.[73] The complaint must conform to the general rules of pleading,[74] but the fact that it describes the bond as a statutory one when it is in fact a common-law bond is immaterial where the bond is set out.[75] The evidence must identify the bond as the one given.[76] The Iowa statute relative to priority of liability upon judgments in actions on bonds does not apply to judgments in actions on forth coming bonds.[77]

§ 13. *Lien or other consequences of levy.*[78]—See 11 C. L. 324—An attachment is a lien on the property to secure the satisfaction of any judgment that may be recovered.[79] Such lien is created when the attachment is made[80] and is merged in the judgment rendered in the case.[81] One who asserts that the lien has been set aside by an adjudication in bankruptcy has the burden of proving it.[82]

§ 14. *Conflicting levies and liens, and hostile claims. A. Priorities in general.*[83]—See 11 C. L. 325—An attachment reaches only the debtor's interest in the property, at the date of the levy,[84] and acquires no greater rights than the debtor had,[85] and is subject to all prior liens.[86] As a general rule, attachments take precedence as between themselves in the order of their priority in time.[87]

70. Where claimant of goods attached obtained a right to immediate possession by service of bond, the fact that possession was hindered or delayed by bankruptcy proceedings did not affect liability of sureties. Ehrlich v. Sklamberg, 116 NYS 602. That receiver in bankruptcy required claimant to give a bond for his protection did not affect liability of sureties. Id.

71. Where a claimant of goods in attachment actually received them under a bond approved by plaintiff's attorney, the subsequent destruction of the original bond before or after claimant obtained possession did not relieve the sureties from liability. Ehrlich v. Sklamberg, 116 NYS 602.

72. An action on a claimant's bond, given under Laws 1902, p. 1517, must be brought within the time specified. Berner v. Walker, 63 Misc. 262, 116 NYS 615.

73. Where bond to release an attachment ran to the attachment creditor and sheriff upon principal's failure to pay judgment against him, the attachment creditor was the proper party in interest to sue on the bond. Dakich v. Barich, 37 Mont. 490, 97 P 931.

74. Complaint on bond given to release an attachment held sufficiently definite and certain. Dakich v. Barich, 37 Mont. 490, 97 P 931.

75. Dakich v. Barich, 37 Mont. 490, 97 P 931.

76. In action on bond given to release an attachment, evidence sufficient to show that the bond sued upon was the same as the bond given. Dakich v. Barich, 37 Mont. 490, 97 P 931.

77. Code § 3779, requiring judgment against principal and surety to recite order of liability, is to enable the officer to first exhaust the property of those first liable as provided by § 3966, and does not apply under §§ 3907, 3908, relating to entry of judgment against surety on bond given to discharge an attachment. Andres & Co v. Schlueter [Iowa] 118 NW 429.

78. **Search Note:** See note in 50 L. R. A. 714.

See, also, Attachment, Cent. Dig. §§ 518 599; Dec. Dig. §§ 175-185; 4 Cyc. 572-574, 605, 606, 622-630, 632-652; 3 A. & E. Enc. L. (2ed.) 216; 18 A. & E. Enc. P. & P. 1164.

79. Under Rev. Codes, § 4302, an attachment regularly issued becomes a lien on the property "as security for the satisfaction of any judgment that may be recovered." It is therefore such a provisional remedy as reaches out and lays hold upon the property by proceeding in rem, and subjects it to payment of the debt, for which the action was brought. Potletch Lumber Co. v. Runkel [Idaho] 101 P 396.

80. Under Bankruptcy Act., 30 Stat. 565, providing that attachments against a person who is insolvent at any time within 4 months prior to the petition filed are void, the lien of the attachment is created when the levy is made and does not depend on judgment. Jackson v. Valley Tie & Lumber Co., 108 Va. 714, 62 SE 964. In such case the debtor must not only be insolvent but the insolvency must have existed at the time the lien attached. Id.

81. In an action aided by attachment upon the entry of judgment, the attachment lien is merged in that of the judgment and thereafter is mere incident to the judgment and ceases to exist when judgment becomes dormant. Lincoln Upholstering Co. v. Baker [Neb.] 118 NW 321.

82. Adjudication in bankruptcy held not to set aside the lien of an attachment. Causey Lumber Co. v. Connor [Ga. App.] 65 SE 194.

83. **Search Note:** See notes in 3 C. L. 368, 369; 17 L. R. A. 84; 6 L. R. A. (N. S.) 624.

See, also, Attachment, Cent. Dig. §§ 535-580; Dec. Dig. §§ 179-182; 4 Cyc. 623-652; Lis Pendens, Cent. Dig. § 41; 3 A. & E. Enc. L. (2ed.) 223.

84. An attachment of an interest that defendant owned in land at a time he had no title does not attach to a title subsequently acquired. Sullivan v. Graham [Tex. Civ. App.] 117 SW 171.

85. Pasquay v. Keithley, 139 Ill. App. 548

86. Under Comp. Laws, § 3225, where property attached in the hands of a third person, such person is liable to the plaintiff for any property or credits in his hands be-

Between attachments and conveyances in general. See 11 C. L. 325—A bona fide sale takes precedence over subsequent attachments against the seller,[88] and so, also, as to prior assignments,[89] and it is immaterial that the purchase money was paid a person other than the person named as buyer;[90] but a claimant cannot rely on title acquired from a third person after levy of the execution and filing of the claim,[91] nor can the attaching creditor attack a prior sale on grounds personal to debtor.[92] The title acquired by the purchaser at a sale in bankruptcy is conclusive as against subsequent attachments against the bankrupt.[93]

(§ 14) *B. Procedure. In general.*[94] See 11 C. L. 326—Claimants of attached property may usually intervene in the attachment proceedings,[95] the allowance of such intervention being, under some of the statutes, discretionary with the court,[96] but the intervener occupies the position of a plaintiff in replevin,[97] and must recover upon the strength of his own title,[98] as to which he has the burden of proof.[99]

longing to defendant after his own rights, if any, are satisfied. Persing v. Reno Stock Brokerage Co. [Nev.] 96 P 1054. Is inferior to mortgage liens. Adams v. Bank of Meadville [Miss.] 48 S 831. Chattel mortgage filed within time provided by law, though after issue of attachment, but delivered and accepted before levy, is prior thereto. Fenby v. Hunt [Wash.] 101 P 492.

87. Where an attachment, by a carter upon property bona fide owned by a thief, for services rendered in carting stolen goods, was prior in time to an attachment by the owner of the stolen goods, it was also prior in law and equity, though carter had been guilty of such negligence as to render him liable to the owner of the stolen goods. Hoopes & Townsend Co. v. Ebel, 37 Pa. Super. Ct. 459. Injunction would not lie in such case to prevent carter from enforcing his judgment. Id.

88. Evidence sufficient to show that a bill of sale was valid and prior to suing out of a writ of attachment. McComb v. Jud sonia State Bank [Ark.] 120 SW 844. A bill of sale, regular on its face, is prima facie evidence of title and in the absence of a finding of fraud an intervener in attachment is entitled to verdict where he claims under such bill of sale. Burke v. Sharp [Ark.] 115 SW 145. Property held to have been sold to a bona fide purchaser prior to attachment levy and therefere not subject Consignees Favorite Box Co. v. Speer, 5 Ga. App. 156, 62 SE 1006; Consignee's Favorite Box Co. v. Meers, 5 Ga. App. 155, 62 SE 1000. Where a lumber company hauled ties and piled them upon railroad right of way where they were inspected, accepted and marked and certificate of invoice issued, such delivery passed title as against a subsequent attachment by a creditor of the lumber company. McDonald v. Clearwater Shortline R. Co., 164 F 1007. A prior unrecorded deed passing title in good faith takes precedence of an attachment if such deed be recorded prior to any deed based upon such attachment. Mahoney v. Salsbury [Neb.] 120 NW 144. Where an intervener claimed under a bill of sale governed by Missouri laws, a charge that if his agent took possession of the property within such time as he could reach it, it was within a reasonabe time as contemplated by law, held not bad as declaring what was a reasonable time. Burke v. Sharp [Ark.] 115 SW 145.

89. A written assignment of money in custody of an agent, intended to convey title thereof to the assignee made in definite terms and without reservation, gives the assignee priority over a creditor of the assignor attaching such funds in the hands of the agent subsequent to assignment. Yeiser v. Broadwell [Neb.] 119 NW 473.

90. An intervener's right to property attached, where he claims under a bill of sale, is not defeated because the purchase money was furnished by another. Burke v. Sharp [Ark.] 115 SW 145.

91. Strickland v. Jones, 131 Ga. 409, 62 SE 322.

92. Statute of frauds. Pasquay v. Keithley, 139 Ill. App. 548.

93. Conclusive as res adjudicata upon all parties to bankruptcy proceedings, and owners of claims subsequently accruing have no statutes to attach it. Preston v. Newcomb, 149 Mich. 512, 14 Det. Leg. N. 501, 113 NW 29

94. Search Note: See Attachment, Cent. Dig. §§ 936-1147; Dec. Dig. §§ 280-317.

95. Fact that an intervener has some other adequate remedy for protection of his rights is no bar to his right to intervene, if he has a statutory right to intervene. Potlatch Lumber Co. v. Runkel [Idaho] 101 P 396. Under Rev. Codes, § 4111, authorizing intervention by one who has "an interest in the matter in litigation, or in the success of either of the parties, or an interest against both," the owner or claimant of property attached may intervene for the purpose of asserting his right and title to the property. Id. Under Kirby's Dig. § 6002, authorizing a trustee to sue without joining the beneficiary, one who took title in his own name to property paid for with another's money could intervene in attachment of the property as belonging to another. Burke v. Sharp [Ark.] 115 SW 145.

96. Under fraudulent debtor' act March 17 1869, P. L. 8, and May 24, 1887, P. L. 197. Sailor Planing Mill & Lumber Co. v. Moyer, 35 Pa. Super. Ct. 503. Order allowing intervention is interlocutory and hence no appeal lies therefrom. Id.

97. State Bank of West Union v. Keeney, 134 Mo. App. 74, 114 SW 553.

98. Cannot recover unless he could have recovered in replevin at time of interplea. State Bank of West Union v. Keeney, 134 Mo. App. 74, 114 SW 553.

The intervener cannot therefore, attack the plaintiff's action [1] or complain of irregularities therein,[2] and interveners claiming title under transfer by the defendant after the attachment can only question the validity and justness of the plaintiff's debt.[3] In detinue against a sheriff, a plea justifying under several writs does not set up distinct defenses.[4] In such proceeding the plaintiff cannot raise the question of the duty of the sheriff to first exhaust other goods of the debtor.[5] In Florida the valuation placed upon the property by the sheriff is controlling where no issue as to value is raised by a claimant.[6] The right to enjoin an attachment sale has already been considered in a prior section.[7] In a suit by the beneficiary of a trust deed to set aside an attachment sale of the property covered by the trust deed, a defense of payment of the debt secured by the trust deed precludes any defense based upon the laches of the grantor in assailing the attachment,[8] nor is laches in attacking such sale available to the defendants where they go further than mere defense of their title and ask for affirmative relief based on such title.[9] A decree vacating an attachment will not be reversed for errors in the findings of the trial court relative to the sufficiency of the attachment affidavits, where such court's findings of fraud in the attachment proceedings are sufficient to sustain the decree.[10]

§ 15. *Enforcement and dissolution, vacation, or abandonment of attachment. A. Release or abatement.*[11]—See 11 C. L. 327—An attachment may be released, dissolved, or abated, for irregularities [12] or by the execution of a statutory bond,[13] or by filing statutory exemptions,[14] or by failure to take subsequent proceedings required by law.[15]

(§ 15) *B. Validity and grounds for setting aside.*[16]—See 11 C. L. 327—An attachment may be dismissed if excessive,[17] and dissolved if it appears that the cause

99. Under Civ. Code Proc. § 29, providing for intervention by one claiming the property attached, an intervener has the burden to prove ownership where the property formerly belonged to defendant. Brown v. Johnson [Ky.] 116 SW 273. Evidence sufficient to show that attached property belonged to an interpleader. Collin County Nat. Bank v. Harris [Ark.] 119 SW 662.

1. Intervener is restricted to the protection of his own interests. Sailor Planing Mill & Lumber Co. v. Moyer, 35 Pa. Super. Ct. 503. Where attachment sued out under the fraudulent debtors' act is levied upon property (land) of the defendant and such land is claimed by another, the question whether the right of the creditor to sue out the attachment was barred at the time he proceeded to do so cannot be raised by claimant in the trial of the claim case. Strickland v. Jones, 131 Ga. 409, 62 SE 322.

2. Cannot complain if the court permits amendment of petition, affidavit, bond, writ and return. Glover Commission Co. v. Abilene Milling Co. [Mo. App.] 116 SW 1112.

3. Could not object to court's action in permitting amendment of return to show date of levy. McLane v. Kirby [Tex. Civ. App.] 116 SW 118.

4. If any attachment is good, the property cannot be taken from him. Gillespie v. Mc Cleskey [Ala.] 49 S 362. In detinue for goods seized by the sheriff under several writs where there was no rule by which it could be ascertained that any distinct part of the property was liable to one and not to the other, a charge that there were two forms of verdict held not erroneous as directing the jury to find according to one or the other of the forms. Gillespie v. McCleskey [Ala.] 49 S 362.

5. Gillespie v. McCleskey [Ala.] 49 S 362.

6. Where the officer levying the writ affixes a value to the property and a claim is interposed but no issue as to value is raised in the claim proceeding on general verdict against the claimant, the statute authorized judgment against him for the value fixed by the officer. Valdosta Mercantile Co. v. White [Fla.] 47 S 961.

7. See ante, § 9.

8, 9, 10. Southern Pine Lumber Co. v. Ward, 208 U. S. 126, 52 Law. Ed. 426.

11. Search Note: See Attachment, Cent. Dig. §§ 900-924, 929-985; Dec. Dig. §§ 253-259, 261-279; 4 Cyc. 676, 774, 800-812; 3 A. & E. Enc. L. (2ed.) 230.

12. See post, this section, subsections 15B and 15C.

13. See ante, § 12, Forthcoming Bonds and Receipts.

14. See generally Exemptions; Homesteads.

15. See ante, § 5, Procedure in General; § 13, Liens and Other Consequences of Levy.

16. Search Note: See Attachment, Cent. Dig. §§ 782-803; Dec. Dig. §§ 226-235; 4 Cyc. 769-775; 3 A. & E. Enc. L. (2ed.) 230; 3 A. & E. Enc. P. & P. 65.

17. Levy of attachment property dismissed as excessive where $100,000 worth of property was levied on for less than $200 debt. Penwick Shipping Co. v. Clarke Bros. [Ga.] 65 SE 140.

of action sued upon did not accrue until after the attachment issued,[18] but will not be quashed for uncertainty because of a slight variance between the affidavit and petition.[19] An attachment issued upon inconsistent grounds is not void but only voidable.[20] In Massachusetts an attachment of land is dissolved by the debtor's death before seizure, followed by the granting of administration within the period prescribed.[21] Where an attachment is dissolved under the Bankruptcy Act by proceedings thereunder, the costs thereof are a preferred claim.[22] In the absence of statutory provisions to such effect, the appointment of a receiver to take possession of the attached property is not ground for dissolving the attachment;[23] but a state legislature has power, so far as the courts of such state are concerned,[24] to make a receivership ground for dissolution in cases where the property can be held under laws of the state for the benefit of creditors who prove their claims there.[25]

(§ 15) *C. Procedure.*[26]—See 11 C. L. 327.—Where it is sought to discharge an attachment by traverse of facts alleged, the traverse must be as direct and explicit as if it were an answer to a complaint.[27] The question of ownership of real estate cannot be adjudicated on a motion to dissolve.[28] An objection to a motion to discharge that another motion is pending is of no merit where the earlier motion is denied before the later one is granted.[29] Under a rule that a defendant may apply for an order discharging an attachment whenever he shall have appeared he is not required to make such application at the time of his appearance.[30] In Ohio a motion to discharge may be made at any time before judgment.[31] In New York a

18. Where amended complaint showed that cause of action sued upon did not accrue until after attachment issued. Thomas v. Ellison [Tex.] 116 SW 1141.

19. Attachment should not be quashed for uncertainty in amount sued for where petition alleges a bond on defendant's part to pay plaintiff the reasonable value of certain plans and in affidavit to petition, plaintiff swore that defendant was indebted to him for $1,050 and prayer alleges $1,000. Hall v. Parry [Tex. Civ. App.] 118 SW 561.

20. Doran v. Collins, 8 Ohio N. P. (N. S.) 169.

21. Pub. St. 1882, c. 161, re-enacted in Rev. Laws 1902, c. 167, was designed to prevent interference with orderly settlement of estates and bring all property into control of representatives. Institution for Sav. v. Puffer, 201 Mass. 41, 87 NE 562. Under such statute an attachment was dissolved where application for administration was made within a year, though decree appointing administrator four years after death recited that it was made on a petition after the year, where such petition was a supplemental one. Id.

22. Under Bankruptcy Act July 1, 1898, c. 541, § 6413, providing for priorities and Pub. Laws R. I., p. 61, c. 984, declaring that every common-law assignment shall be effectual to dissolve an attachment placed upon the property not more than four months prior to the assignment and that costs of attachment shall be a preferred claim against the assigned estate, held, where an attachment is dissolved by bankruptcy proceedings, the costs thereof are a preferred claim. In re Iroquois Mach. Co., 166 F 620.

23. Receivership was not ground for dissolution prior to enactment of Rev. Laws, c. 167, §§ 126, 127. Borden v. Enterprise Transportation & Transit Co., 198 Mass. 590, 85 NE 110.

24. Rev. Laws, c. 167, §§ 126, 127, relative to dissolution of attachments by appointment of receiver by "any court of competent jurisdiction in this commonwealth," held presumptively inapplicable to federal courts. Borden v. Enterprise Transportation & Transit Co., 198 Mass. 590, 85 NE 110.

25. Borden v. Enterprise Transportation & Transit Co., 198 Mass. 590, 85 NE 110.

26. **Search Note:** See note in 3 Ann. Cas 186.

See, also, Attachment, Cent. Dig. §§ 779, 804-899; Dec. Dig. §§ 225, 236-252; 4 Cyc. 769, 775-800.

27. Must deny every statutory ground alleged in the procuring affidavit in direct and explicit terms. Bowman v. Wade [Or.] 103 P 72.

28. The issue of fact in such proceedings is not whether the debtor owns the property nor whether his grantee has an unimpeachable title. Mahoney v. Salsbury [Neb.] 120 NW 144.

29. Objection that the court should not grant a motion to discharge an attachment because another motion to dissolve it was pending. Goldfield Mohawk Min. Co. v. Frances Mohawk Mining & Lumber Co. [Nev.] 102 P 963.

30. Statute provides that whenever a defendant shall have appeared in an action he may apply for the order. Goldfield Mohawk Min. Co. v. Frances-Mohawk Mining & Lumber Co. [Nev.] 102 P 963.

31. Defendant may at any time, before judgment under Rev. St. § 6522, move for discharge of an attachment under which his property has been taken, although he has previously given bond for its discharge under § 6513. William Edwards Co. v. Goldstein [Ohio] 88 NE 877.

motion to vacate may be made at any time before appropriation of the property to the judgment,[32] and where a motion to vacate is not supported by affidavits, the plaintiff may remedy any defects in the original papers which do not go to the jurisdiction.[33] The statutes of New York requiring the moving papers to specify irregularities do not apply to a motion to vacate an attachment against a national bank.[34]

Evidence.[See 11 C. L. 829]—On motion to vacate, an affidavit on information and belief need not be regarded as undisputed evidence.[35] Whether the grounds of the attachment are supported must be determined from the evidence in the particular case.[36]

Judgment and decree or order.[See 11 C. L. 829]—An attachment is released by the order granting the motion to dissolve regardless of the grounds therefor,[37] and an order dissolving an attachment vacates all proceedings touching the property.[38] Where the defendant is not personally served and does not appear, the judgment binds only the property attached.[39] Where no special judgment is taken against property attached, errors in rulings on issues relative to the grounds of attachment are immaterial.[40] In Arkansas where the ground of attachment is not denied, if judgment is rendered for plaintiff, the attachment must be sustained.[41] In Kentucky in an action against joint debtors where joint property is attached under an order against one, if judgment be rendered against all and the attachment sustained, the whole of the property may be subjected to the judgment.[42] Recovery of costs in the main suit is sufficient to sustain the attachment.[43] A judgment sustaining

32. Under Rev. St. U. S. § 5242, prohibiting issuance of attachment against a national bank by a state court prior to judgment where attachment issued in the New York Supreme Court, the bank could move to vacate though issue had been joined since, under Code Civ. Proc. § 682, such motion could be made at any time before appropriation of the property to a judgment. McBride v. Illinois Nat. Bank, 128 App. Div. 503, 112 NYS 794.

33. Under Code Civ. Proc. § 683, providing that defendant may move to vacate the warrant either upon papers upon which it was granted, or upon affidavits in which case the affidavits may be opposed by new proof by plaintiff. Held where defendant presents no affidavits plaintiff could supply defects in moving papers which relate to substance of the claim but he cannot remedy jurisdictional defects. Brandley v. American Butter Co., 60 Misc. 547, 112 NYS 1030.

34. A motion to vacate an attachment because the "warrant was illegally issued against the property of defendant, a national bank, not located in this state," is sufficient under Rev. St. U. S. § 5242 prohibiting issuance of attachment by a state court, against a national bank before judgment, Gen. Rules Proc. 37, requiring moving papers to specify irregularities, being inapplicable. McBride v. Illinois Nat. Bank, 128 App. Div. 503, 112 NYS 794.

35. Affidavit of defendant's attorney that defendant is not a foreign corporation. George Norris Co. v. Levin's Sons, 81 S. C. 36, 61 SE 1103.

36. Evidence that the constable, when he levied the attachment, simply marked certain goods as "attached" but made no further effort to take possession of them, notwithstanding the expressed willingness of the defendants that sufficient goods should be taken to satisfy the claim, does not support charge in the affidavit that the defendants were about to dispose of their property with intent to defraud their creditors, although it appears that the defendants did soon afterward make an assignment for the benefit of their creditors. Speaks v. Lisey & Co., 7 Ohio N. P. (N. S.) 389.

37. Theo Ascher Co. v. Jack, 134 Mo. App. 511, 114 SW 1111.

38. Ann. St. 1906, p. 501, expressly so provides. Theo Ascher Co. v. Jack, 134 Mo. App. 511, 114 SW 1111. Where an attachment was dissolved and dissolution affirmed, the sheriff was entitled to possession of the property pending appeal, but such possession did not transfer the lien of the attachment to an execution on a judgment rendered in favor of attachment plaintiff in main action. Adams v. Overboe, 105 Minn. 295, 117 NW 496.

39. Heyl v. Taylor, 64 Misc. 916, 117 NYS 916.

40. Henderson v. Phillips [Ga. App.] 65 SE 40.

41. Where in action aided by attachment on ground of defendant's nonresidence no affidavit or verified answer is filed denying the ground, in rendering judgment for plaintiff Kirby's Dig. § 414 expressly provides that the attachment be sustained. Weibel v. Beakley [Ark.] 119 SW 657.

42. Under Civ. Code Proc. § 209, in action against two nonresidents where one was legally served, even if attachment of joint property was void as to the other because he was not served, the entire joint property could be subjected to judgment against both. Stewart v. Blue Grass Canning Co. [Ky.] 117 SW 401.

43. Lankford v. Lankford [Ky.] 117 SW 962.

an attachment and adjudicating the property subject thereto can be set aside only on a direct proceeding for that purpose,[44] but a judgment on a motion to discharge an attachment, on the ground that the attached property was exempt, is not res judicata in a subsequent direct proceeding to subject such property to the judgment rendered in the action in which the attachment was issued.[45]

Appeal.[See 11 C. L. 330]—Proceedings to obtain appellate review are controlled by the statutes.[46] An order dissolving an attachment is final and appealable.[47] Under a provision that an annulment by judgment for defendant is suspended by a stay of proceedings, an attachment is not annulled by reversal of judgment where a further appeal is taken from the judgment of reversal.[48] Where the main cause is reversed and remanded, the attachment must also be remanded with instructions to sustain it if judgment be for the plaintiff on new trial.[49]

§ 16. *Other remedies.*[50]—[See 11 C. L. 331]—Supplementary proceedings generally are treated elsewhere.[51]

§ 17. *Wrongful attachment.*[52]—[See 11 C. L. 331]—In some states damages may be allowed on the discharge of the attachment.[53] Damages for a wrongful attachment by a vendor against the vendee cannot be recovered in an action by the latter against the former for wrongful dispossession, where it appears from the plaintiff's own pleadings that he was not dispossessed until after the attachment and until the effect thereof had been overcome by him.[54] An action for wrongful attachment must be brought within the period prescribed.[55] To justify a levy on goods held by a mortgagee, the officer must show that the plaintiff is a creditor of the mortgagor and entitled to question the validity of the mortgage.[56] In North Dakota the fact that the claimant made no demand or verified claim is a defense to the sheriff only when property of a third person is in the hands of defendant under such circumstances as to raise a presumption that he owns it.[57] A sale under an invalid attachment may sometimes be enjoined.[58] The attachment itself is a good defense to an action by a fraudulent transferee against the officer.[59]

44. Jessup v. Atchison, etc., R. Co. [Kan.] 100 P 472.

45. Shelby v. Ziegler [Okl.] 98 P 989.

46. The filing of a petition in error within the required time together with an undertaking for retention of the attached property is a sufficient compliance with Rev. St. § 5563b. Edwards Mfg. Co. v. Ashland Sheet Mill Co., 11 Ohio C. C. (N. S.) 479.

47. Sallor Planing Mill & Lumber Co. v. Moyer. 35 Pa. Super. Ct. 503.

48. Under Code Civ. Proc. § 3343, an attachment was not annulled by reversal of judgment in the attachment action where an appeal to the court of appeals was taken from the judgment of reversal. Milliken v. Fidelity & Deposit Co., 113 NYS 809.

49. Hogg v. Thurman [Ark.] 117 SW 1070.

50. **Search Note:** See Attachment, Cent. Dig. §§ 755-778; Dec. Dig. §§ 221-224; 4 Cyc. 829, 830; Contempt, Cent. Dig. §§ 58-80; Dec. Dig. §§ 20-26; 9 Cyc. 43-69.

51. See Supplementary Proceedings, 10 C. L. 1765. See, also, Creditors' Suit, 11 C. L. 936.

52. **Search Note:** See notes in 3 C. L. 376; 5 Id. 317, 318; 68 A. S. R. 266; 86 Id. 400; 10 Ann. Cas. 954.

See, also, Attachment, Cent. Dig. §§ 1307-1402; Dec. Dig. §§ 355-384; 4 Cyc. 831-887; 3 A. & E. Enc. L. (2ed.) 245.

53. Under Kirby's Dig. § 381, recovery of proceeds of attached property sold, under process pending appeal, may be so allowed. Hines v. Stephens [Ark.] 119 SW 664.

54. Such attachment was not, under such circumstances, a breach of contract. World's Fair Min. Co. v. Powers [Ariz.] 100 P 957.

55. Act of marshal of New York City in levying under a warrant of attachment in good faith was an official act and not a trespass and was barred after one year under Code Civ. Proc. § 385, and Laws 1902, p. 1577. Kirschberg v. Coghlan, 62 Misc. 629, 115 NYS 1078.

56. Where a sheriff takes goods from a mortgagee who has as authorized by the mortgage taken them from the mortgagor. McRae v. Lachmann, 8 Cal. App. 241, 96 P 505.

57. Rev. Codes 1905, § 6951, applies to cases where property of a third person is levied on while in possession of defendant under such circumstances as to raise a presumption that it is owned by him. Probstfield v. Hunt [N. D.] 118 NW 226. Under such statute no demand or verified claim of title by the owner is required where property of a wife levied on under attachment against her husband is in possession of a third person with whom it is stored in name of the husband by owner of house which husband had leased and lived in with his wife, and left the house unoccupied wlthout paying rent. Id.

58. Where levy was under attachment is-

Pleading. See 11 C. L. 331—An action for wrongful and malicious levy upon exempt property is one for abuse of process and not for malicious prosecution.[60]

Evidence and questions of fact. See 11 C. L. 332

Damages. See 11 C. L. 332—The measure of damages recoverable are such as naturally and reasonably result from the wrongful attachment,[61] the extent of which the complaining party has the burden to prove.[62] Attorney's fees are an element to be considered.[63] The rule that interest on the value of personalty wrongfully attached may be allowed as damages does not apply to wrongful attachment of land.[64] Exemplary damages are recoverable in some states.[65]

Attempts, see latest topical index.

ATTORNEYS AND COUNSELORS.

The scope of this topic is noted below.[66]

§ 1. Admission to Practice and License Taxes, 373.
§ 2. Duties, Privileges, and Disabilities, 374.
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A. Attorneys General, 398.
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§ 1. *Admission to practice and license taxes.*[67] See 11 C. L. 333—Attorneys at law[68] engage in practice[69] not as a matter of right but as a privilege,[70] and such

sued on inconsistent grounds. Doran v. Collins, 8 Ohio N. P. (N. S.) 169.

59. Attachment is a good defense to action by fraudulent transferee against a sheriff for seizing it though the fraudulent transfer preceded the attachment. Hart v. Clarke & Co., 194 N. Y. 403, 87 NE 808.

60. That plaintiff acted under advice of counsel is no defense but may be shown in mitigation of damages. Grimestad v. Lofgren, 105 Minn. 286, 117 NW 515.

61. For wrongful attachment of a stock of merchandise, the measure of damages is the difference between the cash value at time of seizure and value at time of attachment was quashed with interest. Rainey v. Kemp [Tex. Civ. App.] 118 SW 630. Depreciation in value of goods is an element of actual damages. Id. As to damages for wrongful taking and detention of property generally, see Damages, § 5E.

62. Where defendant did not, as permitted by statute, ask for release of property from an excessive levy, it could not be assumed on appeal that he was legally damaged by the levy. Anderson v. Thero [Iowa] 118 NW 47.

63. Attachment was brought against a foreign corporation and sustained on that ground but action on the merits was dismissed and appealed and appeal dismissed. Held, since the attachment was used to secure jurisdiction, attorney's fees in defending action on merits was proper element of damages for wrongful attachment. Fixel v. Tallman, 116 NYS 639.

64. Attachment does not deprive owner of use of land. Tilton v. Gates Land Co. [Wis.] 121 NW 331.

65. One sued for wrongful attachment is not relieved from liability for exemplary damages because he acted on advice of counsel unless he made full disclosure. Rainey v. Kemp [Tex. Civ. App.] 118 SW 630.

66. Treats of matters relative to attorney at law as such. Excludes arguments and conduct of counsel (see Arguments and Conduct of Counsel;* in criminal cases, see Indictment and Prosecution,* § 10B; on appeal, see Appeal and Review,* § 11F), the right to appoint special prosecutors and the assignment of counsel to indigent prisoners (see Indictment and Prosecution,* § 10A), amicus curiae (see Amicus Curiae*), champerty and maintenance (see Champerty and Maintenance*), matters peculiar to justice's courts (see Justice's Courts,* § 4), and liability with reference to abstracts of title (see Abstracts of Title*). Contempt of court (see Contempt*) is also excluded except as ground for disbarment or suspension.

67. **Search Note:** See notes in 18 L. R. A. 409; 21 Id. 701; 10 L. R. A. (N. S.) 289; 11 Id. 557; 12 Id. 614; 10 Ann. Cas. 198.

See, also, Attorney and Client, Cent. Dig. §§ 1-20, 41; Dec. Dig. §§ 1-11, 28; 4 Cyc. 900-904; 3 A. & E. Enc. L. (2ed.) 283.

68. Persons acting professionally in legal formalities, negotiations, or proceedings, by warrant or authority of their clients, may be regarded as attorneys at law. In re Duncan [S. C.] 65 SE 210.

69. The practice of law embraces prepa-

privilege may be surrounded with whatever restrictions the legislature may in reason prescribe.[71] As a requisite of admission it is usually required that the candidate present evidence that he is a person of good moral character.[72] A large discretion as to the determination of the candidate's proficiency may be vested in a board of examiners.[73]

§ 2. *Duties, privileges and disabilities.*[74] See 11 C. L. 333—An attorney is an officer of the court,[75] and the court may exercise its summary jurisdiction to compel him to perform his duties as such an officer.[76] The duties of an attorney as an officer are largely controlled by statute,[77] but, whatever the source of his duties, he owes the duty of good faith to and honorable dealing with the judicial tribunals before which he practices.[78] It is unprofessional for an attorney to refuse to receive or acknowledge the receipt of a proper notice,[79] to testify for his client,[80] or act in an official capacity in connection with the case.[81] A contract between a layman and an attorney whereby the former agrees to hunt up and bring to the attorney persons having causes of action for personal injuries, in consideration of a division of the fees, is against public policy,[82] and such action by an attorney is often prohibited by statute.[83] It is not necessarily against public policy, however, for an

ration of pleadings and other papers incident to actions and special proceedings, management of such actions and proceedings in behalf of clients before judges and courts and, in addition, conveyancing, preparation of all kinds of legal instruments, and, in general, all advice to clients, and all action taken for them in matters connected with law. In re Duncan [S. C.] 65 SE 210.

70. In re Thatcher [Ohio] 89 NE 39; Danforth v. Egan [S. D.] 119 NW 1021; State v. Rossman [Wash.] 101 P 357. Practice of law though lawful occupation is not natural right or right guaranteed by the constitution. State v. Rossman [Wash.] 101 P 357. Without statutes on subject of admission to practice, person could not practice as attorney without license from court. Danforth v. Egan [S. D.] 119 NW 1021.

71. State v. Rossman [Wash.] 101 P 357.

72. In re Wilson [Kan.] 100 P 75. Honesty, probity and good moral character, are necessary qualifications for admission to bar. Commonwealth v. Roe [Ky.] 112 SW 683. In action under Rev. Laws, c. 165, § 45, where defendant was accused of **false representation of self as attorney,** a letterhead construed and held to warrant finding that purpose of such letterhead was to advertise defendant as attorney doing law and collection business. Commonwealth v. Grant, 201 Mass. 458, 87 NE 895. Lawyer who was citizen of Tennessee during year of 1906, and who practiced law in that state for six months of that year and then practiced law and maintained an office in Georgia, was liable to **professional tax** imposed by general tax act upon every practitioner "doing business in state." White v. Hixon [Ga.] 64 SE 648.

73. Discretion not abused. Mitchell v. State Law Exam'rs [Mich.] 15 Det. Leg. N. 1052, 119 NW 587. Legislative intent, as expressed by Comp. Laws, §§ 1123. 1124, was to require proficiency of at least 70 per cent in each subject upon which examination was had, and Rule 4 of law board examiners is not in violation of statute. Id.

74. **Search Note:** See notes in 3 C. L. 377; 2 Ann. Cas. 836.

See, also, Attorney and Client, Cent. Dig. §§ 21-46; Dec. Dig. §§ 14-33; 4 Cyc. 897, 898, 918-926; 3 A. & E. Enc. L. (2ed.) 291.

75. Commonwealth v. Roe [Ky.] 112 SW 683; In re Shay, 118 NYS 146; In re Wilson [Kan.] 100 P 75; In re Henry, 15 Idaho, 755, 99 P 1054; In re Egan [S. D.] 117 NW 874. Attorneys constitute a part of equipment of judicial system for administration of justice. Crane v. Gurnee [N. J. Eq.] 71 A 338; People v. Barrios, 237 Ill. 527, 86 NE 1075.

76. Independent of statute, courts have inherent right to control and regulate official conduct of their officers and inflict punishment upon them for misconduct. Commonwealth v. Roe [Ky.] 112 SW 683. Summary authority over attorneys given by common law, and conferred by statute. In re Malcom, 129 App. Div. 226, 113 NYS 666.

77. In re Shay, 118 NYS 146.

78. In re Thatcher [Ohio] 89 NE 39. His high vocation is to correctly inform court upon law and facts of case and aid it in arriving at correct conclusions and doing justice. Id. Intentional misstatement of law by attorney in partition proceedings disapproved. Barr v. Sofranski, 130 App. Div. 183, 115 NYS 533.

Presumption is that all members of bar at all times act in good faith with courts. Older v. San Francisco Super. Ct. [Cal. App.] 102 P 829.

79. Bonney v. McClelland, 138 Ill. App. 449.

80. Domm v. Hollenbeck, 142 Ill. App. 439. Practice discountenanced and counsel recommended to withdraw. Wicks v. Wheeler, 139 Ill. App. 412.

Competency of attorney as witness. See Witnesses, § 4A.

81. In taking depositions. Huntington Consol. Lime Co. v. Powhatan Coal Co. [Ind. App.] 87 NE 1047. See Depositions, § 3.

82. Holland v. Sheehan [Minn.] 122 NW 1.

83. Under Code Civ. Proc. § 74, attorney is prohibited in general from giving or promising to give a valuable consideration to any person as an inducement to placing

attorney to guaranty the payment of a claim or even to assume payment thereof, in order to induce the creditor to institute proceedings thereon.[84]

An objection to a foreign attorney's right to appear in a case when first raised on motion to retax costs is raised too late.[85]

§ 3. *Suspension and disbarment. Jurisdiction and grounds.*[86]—See 11 C. L. 384 As incident to the power of admission, courts possess the inherent power of disbarment,[87] and such power is sometimes conferred by statute upon tribunals not strictly courts but which exercise judicial powers.[88] The power to disbar may be curtailed by legislation,[89] but it is not necessarily taken away by a statute vesting in another court exclusive jurisdiction in the matter of admissions to practice.[90] Statutes imposing the punishment of disbarment are highly penal in their character and are to be strictly construed,[91] and the power of disbarment should be exercised with great moderation and judgment,[92] but the court will not hesitate to exercise its power in a proper case,[93] and, since removal is primarily for the protection of the public,[94] it is not always essential that the wrongdoing be intentional,[95] nor will dis-

in his hands a demand for the purpose of bringing an action thereon. In re Shay, 118 NYS 146. Only exception is by proviso that prohibition does not apply to agreement for division of compensation between attorneys. Id.

84. Where attorney in interest of certain clients and for his own pecuniary profit desired debtor to be put in bankruptcy and solicited creditors to execute petition to that end, in consideration of which attorney agreed to pay such creditor's claim, such agreement was not invalid as against public policy, and could not be pleaded by attorney as defense in action by creditors. Bernard v. Fromme, 116 NYS 807. Even if such contract were illegal, parties were not in pari delicto so as to preclude creditor from suing attorney for amount of claim. Id.

85. Baldauf v. Peyton, 135 Mo. App. 492, 116 SW 27.

86. Search Note: See notes in 3 C. L. 378; 5 Id. 320, 322; 11 Id. 335; 18 L. R. A. 401; 2 A. S. R. 847, 850; 45 Id. 71; 114 Id. 839; 5 Ann. Cas. 990; 6 Id. 582; 8 Id. 847; 10 Id. 544, 887.

See, also, Attorney and Client, Cent. Dig. §§ 47-84; Dec. Dig. §§ 34-61; 4 Cyc. 905-917; 3 A. & E. Enc. L. (2ed.) 300; 6 A. & E. Enc. P. & P. 708.

87. State v. Rossman [Wash.] 101 P 357; In re Egan [S. D.] 117 NW 874. Courts at common law were possessed of inherent power to disbar attorneys guilty of unprofessional conduct. Garfield v. U. S. 32 App. D. C. 109. Court has inherent power to require common honesty and decency of its officers and may disbar for continued course of immorality or dishonesty such as to bring distrust and reproach upon administration of justice. In re Wilson [Kan.] 100 P 75. May disbar on proper proof. Commonwealth v. Roe [Ky.] 112 SW 683. Right of courts to expel unworthy attorneys is as much **law of land,** and of as much dignity as such, as any law found in constitution or statutes. Danforth v. Egan [S. D.] 119 NW 1021. Supreme court has inherent **jurisdiction** of proceedings to disbar attorney resulting as an incident of its organization of court, as well as from its power to admit to bar. In re Thatcher [Ohio] 89 NE 39. Disbarment is judicial act. Id. Rev. St. § 563 is not an attempted enlargement of jurisdiction of courts named, in contravention of constitution, but is regulative provisions recognizing already existing powers of these courts. Id.

88. Under Act Cong. July 4, 1884 (23 Stat. 101, c. 181, U. S. Comp. St. 1901, p. 2321) secretary of interior has power to disbar from practice in his department. Garfield v. U. S., 32 App. D. C. 109.

89. In re Ebbs, 150 N. C. 44, 63 SE 190.

Statute construed: Rev. 1905, § 211, restricts inherent power to disbar attorneys for conviction of crime in another jurisdiction. In re Ebbs, 150 N. C. 44, 63 SE 190. Notwithstanding statutory restriction, courts have ample powers for protection when its officers are guilty of fraud or misconduct in discharge of official duties. Id.

90. Gen. St. 1901, § 397, conferring jurisdiction upon districts courts as to the proceedings is not repealed by Laws 1905, c. 67, p. 101, vesting the supreme court alone with power of admission to practice. In re Wilson [Kan.] 100 P 75.

91. State v. Quarles [Ala.] 48 S 499.

92. Commonwealth v. Roe [Ky.] 112 SW 683; In re Thatcher [Ohio] 89 NE 39.

93. When attorney is clearly guilty of misconduct, courts should not hesitate, because of sympathy, to protect themselves from scandal and contempt and the public from prejudice by disbarring an attorney. In re Thatcher [Ohio] 89 NE 39.

94. In re Hobbs [N. H.] 73 A 303. Question presented on disbarment proceedings is not merely one of discipline or punishment, but primarily the fitness of accused to continue to practice as attorney. In re Bauder, 128 App. Div. 346, 112 NYS 761. Removal of attorney for commission of offenses enumerated by Code Civ. Proc. § 67 is primarily to rid profession of an unworthy practitioner, and also to warn other members of the profession. In re Clark, 128 App. Div. 348, 112 NYS 777. Admission to the bar amounts in Ohio to a voucher by the supreme court that the holder of the certificate is a man of good moral character and will deal honestly and faithfully with his clients, and the public have a right to rely thereon. In re Morehouse, 8 Ohio N. P. (N. S.) 179.

95. In re Hobbs [N. H.] 73 A 303.

barment proceedings, based upon charges made by a client, be affected by the withdrawal of the charges by the client[96] or by the repayment of money misappropriated;[97] nor is it a defense as a matter of law that the practice complained of has long been acquiesced in,[98] or that the offense charged was committed while the attorney was appearing for himself as a party.[99] The most general ground for disbarment is unprofessional conduct,[1] such as disrespectful conduct towards the court,[2] appropriation of clients' funds,[3] extortion,[4] taking unfair advantages of clients,[5] contracting for the procurement of causes of action,[6] presenting false or

96. In re Rockmore, 117 NYS 512.

97. Disbarment not to be used to affect collection of claims against attorney. In re Rockmore, 117 NYS 512.

98. Proceedings before secretary of interior. Garfield v. U. S., 32 App. D. C. 109.

99. Where charge was professional misconduct in making sham pleas and false affidavits. In re Bauder, 128 App. Div. 346, 112 NYS 761.

1. Power of disbarment can be exercised only where attorney's conduct unfits him to be member of profession. State v. Rossman [Wash.] 101 P 357. Conduct violative of ordinary standard of professional obligation and honor is unprofessional and disreputable. Garfield v. U. S., 32 App. D. C. 109. In order to justify disbarment it is not necessary that attorney's offense should constitute contempt or crime, or that he be convicted of crime or contempt before disbarment. In re Thatcher [Ohio] 89 NE 39. Real question in disbarment proceedings is whether respondent is fit person to be longer allowed privileges of attorney, whether he has shown himself by lack of appreciation of ethical standards and by unworthy conduct to be no longer worthy of recognition as officer of courts. Id. Attorney's action in permitting guardian ad litem to receive settlement money without giving security in disregard of Civ. Code Proc. § 474, would call for severe censure, if not disciplinary action. In re Hart, 131 App. Div. 661, 116 NYS 193. Attorney presenting claim against state to legislature, with knowledge that appraisement had been changed and altered, and was fraudulent, was guilty of gross unprofessional conduct and breach of professional ethics. State v. Fisher [Neb.] 117 NW 882, motion for rehearing overruled Id. [Neb.] 119 NW 249. Where attorney as justice of peace performs judicial duties in manner indicating willful disregard of modes of criminal procedure, and is guilty of gross carelessness in handling funds, the facts constitute cause for his removal. In re Hobbs [N. H.] 73 A 303.

2. Attorney may criticise judgments and conduct of judges in decent and respectful manner but should not degrade or intimidate judge or bring office into contempt by publication of libelous matter imputing impeachable offenses. In re Thatcher [Ohio] 89 NE 39. Person claiming protection of Const. art. 1, § 11, as to freedom of speech, must also be held responsible for abuse of privilege. Id.

3. New York City Ass'n of Bar v. Chappell, 131 App. Div. 69, 115 NYS 868; Commonwealth v. Roe [Ky.] 112 SW 683. Evidence held to show wrongful detention of client's money justifying disbarment. In re Wilson [Kan.] 100 P 635. Order of permanent disbarment warranted, where proof satisfies court of truth of charges of misconduct involving moral turpitude in failing to account for money collected for clients or proceeds from sales passing through his hands, or in borrowing from and failing to repay to client money which he knew belonged to trust fund. In re Mengert, 8 Ohio N. P. (N. S.) 355. Fact that client called many times at office of her attorney for money which had been paid into his hands for her is inconsistent with claim by attorney that after he collected money she loaned it to him and loan was not yet due; and his retention of money for more than four months in face of her repeated demands upon him for it constitutes misconduct in office, justifying judgment that he be suspended from the practice for one year and that he pay costs of prosecution. In re Morehouse, 8 Ohio N. P. (N. S.) 179. Disbarment ordered where attorney is guilty of misappropriation of moneys collected, making sham answers and false affidavits in legal proceedings, etc. In re Bauder, 128 App. Div. 346, 112 NYS 761. Conduct of attorney in collecting and appropriating alimony of poor client, his fraud in enforcing payment of such alimony, his immoral conduct as shown by plea of guilty to indictment in criminal court, etc., held to warrant disbarment. People v. Barrios, 237 Ill. 527, 86 NE 1075. Wrongful detention of clients' money in real estate transaction sufficient ground for disbarment though legal services were not called for and matter was purely a **transaction collateral to law practice.** In re Wilson [Kan.] 100 P 635. Remedy under St. 1903, § 104, by way of **suspension not exclusive** of remedy by way of disbarment. Commonwealth v. Roe [Ky.] 112 SW 683.

4. Evidence of deception by attorney in causing suit to be instituted on promissory note in hope of securing fee held to sustain charges for disbarment. In re Thatcher [Ohio] 89 NE 39. Attorney employed to bring civil action for assault upon infant, who threatened criminal prosecution and notoriety until defendant settled for $2,500, whereupon criminal action was dropped, was guilty of blackmail and such unprofessional conduct as warranted disbarment. In re Hart, 131 App. Div. 661, 116 NYS 193. Moral turpitude of threatening guilty person of prosecution for crime to obtain money is as great as to threaten innocent person. Id. Evidence held to show service of magistrate's summons with no intention of criminal prosecution but merely to compel compromise of threatened civil action. Id.

fictitious affidavits to the court,[7] or conviction of crime.[8] Generally the causes enumerated by statute for the suspension or revocation of an attorney's license do not include disbarment for other causes not specified.[9] A disbarred attorney who subsequently procures admission in a sister state is guilty of such fraud or deceit as will merit disbarment[10] and it is also a fraud upon the public for a disbarred attorney to procure his election to the office of a public attorney.[11] Misconduct which may be corrected by the trial court is not cause for disbarment.[12] Disbarment deprives the party disbarred of every privilege to which his license entitled him,[13] and

5. Procurement of conveyance and fees from mentally incompetent client, where client practically rendered penniless, ground for disbarment. In re Egan [S. D.] 117 NW 874. Evidence held to show receipt of property from client for attorney's own benefit and not to indemnify bondsmen of such client on criminal charge or under agreement to account. Id. Evidence held to show client incompetent. Id. Attorney, guilty of purchasing bounty-land warrants from client before their issue at inadequate price, disbarred. Garfield v. U. S., 32 App. D. C. 109; Id., 32 App. D. C. 143. Attorney, guilty of misconduct in procuring property from his client without sufficient consideration, and procuring divorce by accepting evidence of opposite party, suspended for one year. State v. Richardson, 122 La. 1064, 48 S 458. Where attorney sought to induce client charged with murder to execute notes to raise money, and client hired other counsel whereupon attorney wrote that client without his assistance would hang, that "he had better get busy," etc., conduct was highly improper and unprofessional. Ex parte Hittson [N. M.] 99 P 689.

6. Under Code Civ. Proc. § 74, attorney contracting to pay person part of compensation received from cause of action procured by such person is guilty of such misconduct as to justify disbarment. In re Shay, 118 NYS 146.

7. Presentation of false and fictitious affidavits on motion for new trial ground for disbarment. In re Duncan, 81 S. C. 290, 62 SE 406. Disbarment ordered especially since it also appeared that such attorney had previously been subjected to similar proceedings for malpractice. Id. Conduct of attorney in causing execution of false statement, forging persons name and procuring false and untruthful jurat to such statement while reprehensible, was not cause for disbarment, since no attempt to mislead or deceive court by such spurious affidavit. In re Watson [Neb.] 119 NW 451 Evidence held to show that attorney wrongfully signed **appeal bond** with name of client, without authority, justifying disbarment. People v. Maloney, 240 Ill. 96, 88 NE 287.

8. Attorney guilty of barratry as defined by statute may be disbarred, since barratry was **crime** at common law. State v. Rossman [Wash.] 101 P 357. Before attorney can be suspended or removed under B. & C. Comp. § 1067, subd 1, he must have been convicted of felony or misdemeanor as terms are defined in statute. State v. Biggs [Or.] 97 P 713. Conspiracy to suborn perjury not crime in state and neither felony or misdemeanor within statute for removal or suspension on account of conviction alone. Id. Under Rev. St. 1887, § 4002, subd. 1, attorney may be removed if convicted of **crime involving moral turpitude.** In re Henry, 15 Idaho. 755, 99 P 1054. "Moral turpitude is an act of baseness, vilness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." Id. Larceny as a crime involving "moral turpitude." Id. Under B. & C. Comp. § 1067, subd. 1, as to suspension and removal of attorneys, a judgment of conviction is conclusive **evidence** against defendant where crime of which attorney has been convicted is felony or misdemeanor involving moral turpitude. State v. Biggs [Or.] 97 P 713. Under Rev. St. 1887, §§ 4002, 4003, **court in which conviction is had** need not be court of record. In re Henry, 15 Idaho, 755, 99 P 1054. St. 1907 (Pub. Laws, p. 1342) c. 941, § 1, as to disbarment of attorney convicted of crime, applies only to conviction in state. In re Ebbs, 150 N. C. 44, 63 SE 190. Rev. 1905, § 211, is similarly construed as to word "convicted." Id. Unnecessary under B. & C. Comp. § 1067, subd. 1, that conviction be in domestic court. State v. Biggs [Or.] 97 P 713.

Constitutionality of statutes: Statute making conviction of crime disqualification to hold office of attorney does not add cruel or unusual punishment, nor can it be said to be an additional punishment. In re Henry, 15, Idaho, 755, 99 P 1054. Where attorney was guilty of barratry as defined by statute, the taking away of his right to practice violated no right guaranteed by constitution. State v. Rossman [Wash.] 101 P 357.

9. In re Egan [S. D.] 117 NW 874; Commonwealth v. Roe [Ky.] 112 SW 683.

10. Fraud or deceit, in violation of Wilson's Rev. & Ann. St. Okl. 1903, par. 227, c. 7, § 5. In re Mosher [Okl.] 102 P 705. Schedule to constitution § 33, providing that licensed attorneys in territory should be eligible to practice in state without examination, construed and held to authorize inquiry into moral qualifications, or disbarment of attorney admitted in territory. Id.

11. Danforth v. Egan [S. D.] 119 NW 1021.

12. Want of decorum of attorney in stating that opponent should be shot could be corrected by trial court. In re Thatcher [Ohio] 89 NE 39. Where deposition showed misconduct of attorney in ordering defendant in that action to leave office while deposition was taken, such deposition might be stricken by trial court. Id.

13. Not only privileges of court disbar-

an attorney practicing law after an order of disbarment is punishable as for a contempt.[14] The court, in its discretion, may usually suspend instead of disbarring,[15] and in some cases of professional misconduct will merely censure[16] the offending attorney.

Procedure. See 11 C. L. 337—Disbarment proceedings are usually held to be special,[17] civil proceedings,[18] though they are sometimes held to be quasi criminal.[19] But while such proceedings are not actions and need not necessarily be instituted by service of process,[20] they must constitute due process of law.[21] Disbarment proceedings may be barred by limitations,[22] or the court may refuse to take cognizance thereof on account of matter in the nature of grounds for abatement.[23] Two attorneys jointly charged with acts warranting disbarment may be tried together.[24] Where no jury is demanded, none is required,[25] and in many states the guilt is determined by a reference.[26] Where the proceeding is considered of a criminal na-

ring him, but all courts. Danforth v. Egan [S. D.] 119 NW 1021.

14. See Contempt, § 1B.

15. Suspension for two years ordered where attorney guilty of unprofessional conduct was youthful and might profit from experience. Ex parte Hittson [N. M.] 99 P 689. Attorney held guilty of misconduct in profession but not of such nature to justify disbarment, wherefore suspension for six months ordered. In re Davis [Minn.] 121 NW 1133. Attorney guilty of contracting to pay certain person's portion of compensation secured in prosecuting negligence cases procured by such persons in violation of Code Civ. Proc. § 74, suspended for one year instead of being disbarred, violations of section being common. In re Shay, 118 NYS 146. Serious effect of disbarment of attorney past middle life with family dependent considered and sentence reduced to suspension. State v. Fisher [Neb.] 117 NW 882. Where from evidence suspension of justice of peace would work such reforms in his character that he would be of good moral character, trustworthy and capable of properly performing the duties of an attorney, suspension for term was decreed, rather than disbarment. In re Hobbs [N. H.] 73 A 303.

16. In proceedings to disbar secretary of bar association for instituting proceedings to disbar another attorney, where such proceedings were admitted to be partly malicious, conduct disapproved but no punishment inflicted. In re Cooksey [Kan.] 100 P 62.

17. State v. Rossman [Wash.] 101 P 357. Not an action. In re Wilson [Kan.] 100 P 75.

18. **Not criminal.** In re Bauder, 128 App. Div. 346, 112 NYS 761; In re Erbs, 150 N. C. 44, 63 SE 190; Garfield v. U. S. 32 App. D. C. 109. In nature of civil proceeding. In re Ebbs, 150 N. C. 44, 63 SE 190; Keithley v. Stevens, 238 Ill. 199, 87 NE 375, afg. 142 Ill. App. 406. Under Ball. Ann. Codes & St. §§ 4776, 4777 (Pierce's Code, §§ 3198, 3199), proceeding for disbarment is special in nature of civil action. State v. Rossman [Wash.] 101 P 357.

19. Proceedings for disbarment under statutes, on information in name of state, while not strictly criminal are quasi criminal. State v. Quarles [Ala.] 48 S 499.

20. Notice served upon accused pursuant to Gen. St. 1901, § 400, need not be process In re Wilson [Kan.] 100 P 75. Objection that notice to accused was not process held purely technical and Const. Kan. §§ 1, 17, as to due process of law not violated. Id.

21. Due process of law requires specific charges, due notice, an opportunity to make specific answers, to cross examine witnesses, adduce testimony in contradiction and an opportunity for argument upon law and facts. Garfield v. U. S., 32 App. D. C. 153. Fact that charges were founded on depositions taken ex parte and without knowledge of accused was not denial of due process of law. Garfield v. U. S., 32 App. D. C. 109. Secretary of Interior does not violate due process of law by making ex parte investigation of statement alleged as defense, that practice of which accused were guilty had been acquiesced in by department. Id. Investigation was solely for purpose of acquiring information as to conduct of inferiors. Id. Secretary of interior held to have acted in excess of jurisdiction in disbarring attorney where other charges were considered than those which accused was cited to answer and depositions were taken without notice to accused. Garfield v. U. S., 32 App. D. C. 153. Taking of **depositions** of client as to unprofessional conduct without notice to accused attorney which depositions were considered by secretary of interior in disbarring accused, held not denial of due process of law, it appearing that accused was furnished with copy of same and made no objection to their use. Garfield v. U. S., 32 App. D. C. 143.

22. Under Wilson's Rev. & Ann. St. Okl. 1903, par. 234, c. 7, § 12, providing that actions for suspension or removal be brought within one year after act charged was committed, which became effective Nov. 16, 1907, cause of action was not barred when proceedings were instituted Oct. 1, 1908. In re Mosher [Okl.] 102 P 705.

23. Court will not take cognizance of accusations against an attorney who has instituted disbarment proceedings against the informant, especially where the charges relate to the same subjects which are being investigated in the pending disbarment proceeding. In re Cooksey [Kan.] 97 P 1134.

24. Refusal of separate trial not error. In re Wilson [Kan.] 100 P 75.

25. State v. Rossman [Wash.] 101 P 357.

26. Reference ordered to determine if at-

ture, the information should disclose that defendant is amenable to the proceeding and the facts constituting the misconduct of which complaint is made,[27] but, where the proceedings are considered to be civil in nature, the rules of evidence in criminal cases are held inapplicable.[28] In any case, however, the presumption of innocence obtains,[29] and the evidence must be clear and satisfactory in order to warrant disbarment.[30] Admissions of the accused which bear upon his motive in doing the things complained of are admissible against him when such motive is material.[31] Conversations between associate attorneys in connection with the conduct of one of them are not privileged on disbarment proceedings based on such conduct where they do not affect the client's interests.[32] A record of conviction in a criminal action in another jurisdiction is not conclusive evidence in a disbarment proceeding,[33] but is admissible upon a charge of unprofessional conduct, though such conviction be not itself ground for disbarment.[34] Under a statute making conviction of a crime absolute ground for disbarment, no defense is admissible where such a conviction is proved,[35] and a demurrer to the evidence in such a case does not admit guilt of a crime shown thereby.[36] A license conditioned upon the absence of fraud in a certain transaction in course of litigation is forfeited by a finding of fraud, though the time for appeal from the judgment based on such finding has not expired.[37] An affirmative defense must be sustained by sufficient evidence.[38] In the absence of statutory provisions as to costs, the court may order each party to pay his own costs.[39] A judgment of disbarment based on one of several separate charges may be sustained on appeal though the rest of the charges fail.[40] A supreme court will take judicial notice of a judgment of disbarment.[41] Where a judgment of disbarment has been entered and remains unimpeached, the attorney so punished can not recover damages against the parties procuring the same on the theory of malicious prosecution and abuse of process.[42]

torney was guilty of unprofessional conduct where misappropriation of moneys charged. In re Rockmore, 117 NYS 512.

27. State v. Quarles [Ala.] 48 S 499. In proceeding for disbarment under Acts 1900-1, p. 2227, § 1, and Code 1896, § 590, subd. 6, information held insufficient in failing to allege that defendant was attorney at law. Id.

28. Though proceeding partakes somewhat of that nature. In re Watson [Neb.] 119 NW 451.

29. Where evidence not sufficient to establish either guilt or innocence of charges made against attorney, beyond reasonable certainty, proceedings dismissed. In re Newby [Neb.] 117 NW 691.

30. Culpability of attorney must be established by clear preponderance of evidence. In re Newby [Neb.] 117 NW 691. In re Watson [Neb.] 119 NW 451. Evidence held sufficient to justify disbarment. In re Wilson [Kan.] 100 P 75. In proceedings to disbar attorney for presenting false affidavits to court, evidence held to sustain conviction. In re Duncan, 81 S. C. 290, 62 SE 406. Findings of commissioner fully sustained by evidence. People v. Barrios, 237 Ill. 527, 86 NE 1075.

31. Motive of secretary of bar association in institution of disbarment proceedings against another attorney, such proceedings being charged to have been inspired by malice and being the basis of disbarment proceedings against such secretary. In re Cooksey [Kan.] 100 P 62.

32. Statements as to existence and use of false affidavit alleged to have been procured by one of associates. In re Watson [Neb.] 119 NW 451.

33. Disbarment proceedings being in their nature civil as distinguished from criminal. In re Ebbs, 150 N. C. 44, 63 SE 190.

34. In re Ebbs, 150 N. C. 44, 63 SE 190.

35. St. 1907, c. 941, § 1. In re Ebbs, 150 N. C. 44, 63 SE 190.

36. In re Ebbs, 150 N. C. 44, 63 SE 190.

37. In re Egan [S. D.] 117 NW 874.

38. On charge of making false affidavits, defense that original affidavit had been stolen by prosecuting attorneys held false. In re Duncan, 81 S. C. 290, 62 SE 406.

39. State v. Fisher [Neb.] 117 NW 882. Rev. Pol. Code, § 694 and Rev. Code Civ. Proc. §§ 291, 415, construed, and, in disbarment proceeding where reference had, compensation of commissioner should be paid by county, and fees of clerk of courts for certified copies of record and exhibit, fees of sheriff, witnesses and cost of depositions, should be taxed against accused. In re Egan [S. D.] 119 NW 42. Item "copy of transcript for accusers" not authorized by statute and should be neither charged against accused or county. Id.

40. In re Wilson [Kan.] 100 P 75.

41. Danforth v. Egan [S. D.] 119 NW 1021.

42. Declaration held not to state cause of action. Keithley v. Stevens, 142 Ill. App. 406, afd. 238 Ill. 199, 87 NE 375. Judgment of disbarment conclusive, even if false evi-

Reinstatement.[See 7 C. L. 323]—Reinstatement may be allowed in a proper case,[43] and mandamus lies to compel reinstatement where the order of disbarment is void,[44] but the election of a disbarred attorney to the office of a public attorney does not of itself reinstate him.[45]

§ 4. *Creation and termination of relation with client.*[46]—[See 11 C. L. 337]—The existence of the relation is usually a question of fact,[47] which the party having the affirmative of the issue must prove [48] by proper evidence.[49] Power to appoint,[50] good faith [51] and legality of purpose,[52] are essential elements of a valid appointment. A retainer is to be strictly construed against the attorney,[53] and, the relationship of attorney and client being one of trust and confidence, it need not be continued where distrust arises, and the efficiency of the attorney is seriously impaired,[54] and a contract for no specified period of time is terminable at the will of either party,[55] provided payment for the services rendered is made.[56] The relation

dence was introduced by attorney's opponents. Id. Payment of witness' fees and commissioners' fees by citizens procuring disbarment of attorney, proper. Id.

43. In re Hobbs [N. H.] 73 A 303. Where attorney was disbarred upon charges of unprofessional conduct of most reprehensible character and in some instances of commission of criminal offenses, application for reinstatement after two years would be denied though supported by petition of many laymen and lawyers vouching as to his showing of uprightness. In re Clark, 128 App. Div. 348, 112 NYS 777.

44. Where proceedings to disbar attorney from practicing before secretary of interior did not constitute due process of law. Garfield v. U. S., 32 App. D. C. 104.

45. Danforth v. Egan [S. D.] 119 NW 1021.

46. **Search Note:** See notes in 7 C. L. 323; 11 Id. 338; 23 L. R. A. 707; 119 A. S. R. 1035.

See, also, Attorney and Client, Cent. Dig. §§ 17, 85-87, 94-131; Dec. Dig. §§ 62-76; 4 Cyc. 926-932, 952-956; 3 A. & E. Enc. L. (2ed.) 316, 409; 20 A. & E. Enc. P. & P. 1008.

47. Employment of counsel held question of fact. Brooks v. Brierton, 142 Ill. App. 369.

Evidence sufficient to warrant finding of employment of attorney to procure charter for insurance business and that work was satisfactory. Wayte v. Red Cross Protective Soc., 166 F 372. Attorney held authorized under evidence to appear for divorced woman, so as to give court jurisdiction. Tausick v. Tausick [Wash.] 100 P 757.

Evidence insufficient: Relationship of attorney and client not shown. In re Malcom, 129 App. Div. 226, 113 NYS 666. Fact that attorney was office associate of two defendants and employed by same collection agency would not justify inference of authority to appear for these defendants in suit against them. Thomson v. Patek, 235 Ill. 341, 85 NE 603. Evidence in conflict but relation held not proved. Brooks v. Ardizzone [Cal. App.] 98 P 393; In re Malcom, 129 App. Div. 226, 113 NYS 666. Where release executed. Merchant's Nat. Bank v. Manning, 139 Ill. App. 277. Evidence held not to show attorney's employment, in action for services, but that attorney only acted as stakeholder of sum deposited by defendant in anticipation of assignment of lease. Cohen v. Gertner, 116 NYS 712.

48. Release between attorney and client construed and held to contain no express or implied agreement for future employment. Merchants Nat. Bank v. Manning, 139 Ill. App. 277.

49. Questions as to payment for work held proper for purpose of disclosing relation of attorney and client. Baker v. Baker [Cal. App.] 100 P 892. Question of attorney, if he was acting for client, to ascertain if relation existed held not improper as calling for conclusion. Id.

50. Receivers, in insolvency proceedings or proceedings under receiverships, have the right to obtain services of counsel and select the counsel without the sanction of the court. Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 S 162.

51. The appointment of an attorney who was a brother of an administrator could not be considered fraudulent and collusive, when nearly all of the heirs had previously contracted with such attorney for the prosecution of the claims involved. Pennebaker v. Williams [Ky.] 120 SW 321.

52. Where collection of claim against government was mainly dependent upon proper presentation to congress, employment of attorney to prosecute such claim held not invalid, as a lobbying contract. Pennebaker v. Williams [Ky.] 120 SW 321.

53. In re Robbins, 61 Misc. 114, 112 NYS 1032.

54. Price v. Western Loan & Sav. Co. [Utah] 100 P 677. Evidence held to show discord between officers of building association and its general attorney, operating to detriment of business and justifying discharge of attorney. Id.

55. Contract lacked essential element of mutuality and was terminable at will of either party. Price v. Western Loan & Sav. Co. [Utah] 100 P 677. Suitor may discharge his attorney either with or without reason at any time during the progress of litigation. Schouweiler v. Allen [N. D.] 117 NW 866; In re Robbins, 61 Misc. 114, 112 NYS 1032; Lederer v. Goldston, 117 NYS 151; Jeny v. Merkle, 128 App. Div. 832, 112 NYS 1106. Agreement of general employment, terminable by either party at any

may also be terminated by the rendition of the services contracted for,[57] or by the death of one of the parties to the contract.[58] The continuance of an attorney's employment for a corporation may be limited by the by-laws curtailing the power of the trustees to contract.[59] The attorney is sometimes held to be entitled to notice of his discharge even where he failed to perform the services or was negligent in performing the same,[60] but such notice is not necessary where the relation is terminated ipso facto because of the deceitful attitude of the attorney.[61] The court can pass upon the question of termination of the relationship only when it is presented for determination in the due course of litigation.[62]

Substitution.[See 11 C. L. 339]—In a proper case the client may apply to the court for a substitution of attorneys,[63] and on such an application, if the amount of compensation is disputed, or if the question of the existence of the attorney's lien is controverted, the court has ample power to determine such issues in a summary manner.[64] The question whether the substitution shall be conditioned upon the payment of fees usually depends upon whether the client has received any benefit.[65] An appeal from the denial of a motion for substitution usually involves only the question as to whether the order should be unconditional or conditioned upon the payment of fees,[66] and this question must be determined with reference to whether the client has received any benefit from the attorney's services.[67]

§ 5. *Rights, duties, and liabilities between attorney and client. Loyalty and good faith.*[68]—[See 11 C. L. 339]—The relation between attorney and client is one of

time, is not within **statute of frauds** as agreement not to be performed in one year. Mellow v. Fulton [Okl.] 98 P 911.

56. See post, § 7.

57. Employment to represent party to action is single employment. Felt v. Mitchell [Ind. App.] 88 NE 723. Termination of litigation entirely by dismissal necessarily ended authority of attorney. Wawrzyniakowski v. Hoffman & Billings Mfg. Co., 137 Wis. 629, 119 NW 350. At common law, authority of attorney to represent his client in an action ceases upon its final determination, and entry of judgment and rule is especially true as to attorney for defeated party. Tobler v. Nevitt [Colo.] 100 P 416. Agreement of attorney to defend persons in criminal proceedings completed where prosecuting officer agreed to enter nolle prosequl of remaining indictments at next term. Lizotte v. Dioska, 200 Mass. 327, 86 NE 774.

58. Attorney cannot act for representatives or successors in interest to deceased client without new retainer. In re Robbins, 61 Misc. 114, 112 NYS 1032. Representatives need not continue employment, but might employ other counsel. Id. Termination of employment of a law partnership because of the death of a member is waived where client consents to substitution. Troy v. Hall [Ala.] 47 S 1035.

59. Where by-law of corporation provided that attorney hold office at pleasure of trustees, attorney with knowledge of such by-law could not hold office for one year, and trustees' employment for that period merely fixed maximum term of service. Rebadow v. Buffalo Sav. Bank, 63 Misc. 407, 117 NYS 282.

60. Coker v. Oliver, 4 Ga. App. 728, 62 SE 483.

61. Contract of employment to protect and sell land terminated ipso facto where client in fact owned no land, it being held adversely which fact was known by attorney. Palmes' Adm'rs v. Howard [Ky.] 112 SW 1110.

62. Where defendant sought to set aside judgment which had been paid through supplementary proceedings, attorney for plaintiff could not be granted motion showing that he no longer represented his client and praying for instructions as to future procedure in the case. Milovich v. American Servian Soc., 61 Misc. 399, 115 NYS 851.

63. Where attorney will not proceed according to the wishes of his client nor consent to withdraw from action. Sedgwick County School Dist. No. 116 v. School Dist. No. 141 [Kan.] 99 P 620. Appearance of attorney for garnishee defendant as attorney for principal defendant to vacate judgment rendered, without substitution of attorneys, disapproved. Taber v. Donovan [Mich.] 16 Det. Leg. N. 300, 121 NW 481.

64. Lederer v. Goldston, 63 Misc. 322, 117 NYS 151. Court cannot ignore issues as to compensation and without consent of parties or sufficient cause being shown direct substitution of attorney upon condition that bond be given to former attorneys in security for services rendered. Id.

65, 66. Jeny v. Merkle, 128 App. Div. 833, 112 NYS 1106.

67. Substitution in partition proceedings granted without payment of fees. Jeny v. Merkle, 128 App. Div. 833, 112 NYS 1106.

68. Search Note: See notes in 7 C. L. 327; 11 Ill. 341, 342; 52 L. R. A. 883; 11 L. R. A. (N. S.) 1153; 12 Id. 1005; 88 A. S. R. 158; 1 Ann. Cas. 247.

See, also, Attorney and Client, Cent. Dig. §§ 217-263; Dec. Dig. §§ 105-125; 4 Cyc. 956-969; 3 A. & E. Enc. L. (2ed.) 332, 379.

trust and confidence,[69] and the strictest fidelity to his retainer must be observed by the attorney.[70] This obligation of fidelity is a continuing one,[71] and requires the disclosure of all facts involving the client's interest,[72] the attorney having the duty of proving his good faith, if the transaction is questioned.[73] Representation of adverse interests is, of course, entirely precluded,[74] but the fact that an attorney acted for client in certain matters, but was never consulted as to boundary line of his client's lots, with other facts has been held not to preclude the attorney from subsequently acquiring adverse possession to a strip of land adjoining the client's lots.[75] The duties of an attorney do not necessarily end with the rendition of judgment in a case which he has been employed to prosecute.[76]

Diligence.[See 11 C. L. 840]—A client may recover damages from his attorney[77] for the negligence of the latter in the conduct of the business for which he was employed,[78] but an attorney is not liable to a client merely because he advises the compromise of a case which the client thinks he might have won.[79]

69. Crane v. Gurnee [N. J. Eq.] 71 A 338; In re Egan [S. D.] 117 NW 874.

70. Crane v. Gurnee [N. J. Eq.] 71 A 338; In re Thatcher [Ohio] 89 NE 39. Utmost good faith required. In re Egan [S. D.] 117 NW 874; Hames v. Stroud [Tex. Civ. App.] 112 SW 775. **Compromise by minor's attorney** which was approved by court held not in fraud of client, especially in view of Sayles' Ann. Civ. St. 1897, art. 3498u, authorizing such a compromise, though such compromise eventually resulted to the attorney's benefit. Hart v. Hunter [Tex. Civ. App.] 114 SW 882. An **attorney as creditor,** should above all other creditors be held to strictest responsibility for fair, equitable, dealing with his clients. Johnson v. Tennessee Oil, etc., Co. [N. J. Eq.] 69 A 788.

71. Cannot make use of knowledge acquired from client, or acquire interests adverse to client or those claiming through him even after confidential relations cease. Sanford v. Flint [Minn.] 122 NW 315.

72. Where attorneys represented client in selling oil rights, it was their duty to advise such client of all circumstances, propositions and actions taken, bearing on the value of her interest and affecting the desirability of selling the same. Snow v. Hazlewood [C. C. A.] 157 F 898.

73. Where no evidence that liability of additional contracts was explained to client and that former contract for compensation was shown not to be binding, additional contracts did not operate to extend liability of client. Lynch v. McDonald [Cal.] 102 P 918. Where attorneys were empowered to sell and prosecute client's oil rights, reserving half interest in proceeds, and succeeded in selling their client's interest, retaining their own without her knowledge, and otherwise concealed facts so that attorney's profits were largely in excess of client's, such sale was prima facie fraudulent and placed burden of proof on attorneys to prove same legitimate. Snow v. Hazlewood [C. C. A.] 157 F 898. Sale held fraudulent. Id. See, also, post, this section, subd. Dealings between attorney and client.

74. On application by administratrix for leave to compromise right of action for decedent's wrongful death, where it appeared that her attorney was employed by corporation liable for death, such attorney's affidavit as to expediency of settlement can not be accepted by court. In re Stanley, 62 Misc. 593, 116 NYS 1126. One retaining attorney to secure for her the administration of her deceased husband's estate under Rev. St. § 6005, is not entitled to information acquired by her counsel in prior professional relations concerning execution of will by brother of her husband in which he devised his property to his mother, notwithstanding fact that such knowledge and its consequent legal advantage to plaintiff if known, might have enabled her, under § 5943, to prevent beneficiary thereof from taking under the will for failure to probate it until after the mother's rights were forfeited, and have saved her expense of litigating by reason of probate thereof. Long v. Bowersox, 8 Ohio N. P. (N. S.) 249.

75. Sanford v. Flint [Minn.] 122 NW 315.

76. Duty of attorneys of record in Indian case to render reasonable services after judgment that roll upon which clients will be paid shall be complete and just. Ottowa & Chippewa Indians Mich. v. U. S., 42 Ct. Cl. 518.

77. See, also, post, § 6.

78. In action against partner for rescission of purchase of partnership, recovery of purchase price including surrender of note, and an accounting, attorney held not negligent in pleading such note. Lane v. Storke [Cal. App.] 101 P 937. In action for malpractice for negligent management of case, evidence held to show that attorney was employed to persuade disposition of indictment without trial, and not to examine indictment for flaws, wherefore all services expected were performed. Cleveland v. Cromwell, 128 App. Div. 237, 112 NYS 643. In action for damages for breach of express contract where attorney was alleged to have failed to record assignment of liquor tax license and power of attorney authorizing surrender of same, whereby another subsequent assignee was enabled to collect moneys due upon surrender of said license, evidence held to be preponderate in favor of defense that plaintiff retained first assignment and power of attorney, and verdict set aside as against weight of evidence. Stuart v. Walkup, 114 NYS 483.

79. Priest v. Dodsworth, 143 Ill. App. 225.

Dealings between attorney and client See 11 C. L. 340 will be closely scrutinized [80] especially where property is acquired by the attorney,[81] and, where the transaction is attacked the onus of proving no undue advantage rests on the attorney.[82] The right, however, to attack a transaction as in violation of the trust relation between attorney and client, is personal to the client,[83] and dealings obviously fair and just will be upheld even as against the client.[84]

Accounting to client. See 11 C. L. 340—It is the duty of an attorney to notify his client within a reasonable time, of money collected,[85] and to pay the same to the client [86] on demand.[87] When intrusted with the money of his client, an attorney must be able to furnish an itemized statement of his expenditures if requested,[88] and generally it is an attorney's duty, when discharged, to turn over all papers in his possession to his client.[89] In some states special statutes penalize the fraudulent misapplication of money.[90]

80. Dyrenforth v. Palmer Pneumatic Tire Co., 240 Ill. 25, 88 NE 290; Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042; In re Nethaway [Minn.] 121 NW 418. Upon complaint of a client. Palmes' Adm'rs v. Howard [Ky.] 112 SW 1110.

81. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042.

82. Palmes' Adm'rs v. Howard [Ky.] 112 SW 1110; Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042; Priest v. Dodsworth, 235 Ill. 613, 85 NE 940. Agreement for increased compensation after confidential relation had commenced. In re Nethaway [Minn.] 121 NW 418. Transaction cannot be sustained if attorney fails to disclose opinion as to value of property. Crocheron v. Savage [N. J. Err. & App.] 73 A 33. Where transaction between attorney and client is attacked by latter, proof of actual fraud is not necessary to obtain relief. Palmes' Adm'rs v. Howard [Ky.] 112 SW 1110. Attorney's services as to tract of land purchased, which was known by such attorney to be held adversely, and conduct in accepting salary for term of years held such abuse of confidence as to warrant recovery of salary. Id. Evidence not sufficient to show good faith in execution of **mortgage by client to attorney.** Phipps v. Willis [Or.] 99 P 935, afg. 96 P 866. Attorney cannot maintain **purchase from client** unless he can demonstrate that he made full communication not only of all that he knew, but also, of all he believed respecting property, its character and value. Crocheron v. Savage [N. J. Err. & App.] 73 A 33. Not necessary to find that attorney was guilty of intentional wrongdoing. Id. Where attorney was sole legal advisor of aged client and prepared will and codicil whereby he became recipient of specific legacy and sole beneficiary under residue clause, receiving thereunder nearly two-thirds of estate, and was also otherwise benefited a presumption of under influence was raised. In re Cooper's Will [N. J. Eq.] 71 A 676. Evidence held to show that testatrix had sufficient mental capacity, understood value of property, nature of will, etc., wherefore benefits accruing to attorney were not result of fraud or undue influence. Id.

83. Attorney's purchase of property at partition sale cannot be attached by stranger. Merritt v. Graves [Wash.] 100 P 164.

84. Dryenforth v. Palmer Pneumatic Tire Co., 240 Ill. 25, 88 NE 290. Relation creates no absolute incapacity. Id. Contract fairly made is not avoidable at client's election. Id. No misrepresentations of attorney in dealing with clients shewn by evidence. Hames v. Stroud [Tex. Civ. App.] 112 SW 775. Oral agreement held not void for want of consideration, constructive fraud or undue influence. In re Nethaway [Minn.] 121 NW 418. Where client conveyed land to attorney as security for fees and afterwards orally relinquish right to reconveyance, held that attorney's adverse possession was sufficient to defeat right to reconveyance. Porter v. Howes, 202 Mass. 54, 88 NE 445.

85. Spencer v. Smith [Ind. App.] 87 NE 154.

86. Duty of attorney to turn over collection, made in ordinary course of business, to his client and not to a third person. In re Martin & Co., 167 F 236. Where attorney was employed to collect note of third person and later such third person employed such attorney for bankruptcy proceedings, after which note was paid, money collected was properly turned over to client who employed him, and attorney did not by reason of his knowledge of bankrupt condition of payor become liable to trustee in bankruptcy for amount of note. Id. Matter not litigated upon theory of fraud. Id.

87. Spencer v. Smith [Ind. App.] 87 NE 154.

88. Pallace v. Niagara, Lockport & Ontario Power Co., 131 App. Div. 453, 115 NYS 340. Where attorney was employed to secure franchises for corporation by corporation's general counsel, expending therein large sums of money, oral statement to corporation's counsel of sums expended did not excuse attorney from accounting to real client. Id.

89. Filion v. Stewart [Wash.] 101 P 370. Where attorney was employed to foreclose chattel mortgage and client had no interest in bill of sale, property or foreclosure, but attorney was agent or trustee for mortgagee who was really interested client and clearly entitled to bill of sale without any payment of money, the amount of her

A client may compromise or dismiss. See 11 C. L. 341—The right of a client to compromise or settle a claim as affected by the attorney's claim for fees is treated in a subsequent section,[91] as is also the attorney's right to compromise or settle his client's claims.[92]

§ 6. *Remedies between the parties.*[93] See 11 C. L. 342—In an action by a client against his attorney for negligence, the declaration or complaint must allege all the elements of the negligence charged,[94] the damage sustained,[95] and the connection between such negligence and such damage,[96] and the burden of proof upon the issues thus raised is upon the plaintiff.[97] Limitations as to actions for malpractice are sometimes held applicable to suits against attorneys.[98]

The summary power of the courts to control its officers [99] may be exercised to compel an attorney to perform his duties to his client,[1] and in some states an attorney may be suspended for wrongfully withholding a client's money,[2] though it is sometimes held unusual and irregular for a creditor to appeal to a court in his own interest for the collection of a debt from an attorney.[3] Summary proceedings are inapplicable where the relation of attorney and client does not exist,[4] and the su-

bid being less than the amount due her, such attorney was not authorized to deliver bill of sale to client being actually due to mortgagee. Id.

90. Where no allegations of embezzlement or fraudulent misapplication of money, complaint did not bring action within that provided by Rev. Code Civ. Proc. § 157 subd. 2, against attorneys. Jones v. Winsor [S. D.] 118 NW 716. Action for excess compensation paid. Id.

91. See post, § 7.

92. See post, § 8.

93. Search Note: See note in 1 Ann. Cas. 603.

See, also, Attorney and Client, Cent. Dig. §§ 264-291; Dec. Dig. §§ 126-129; 4 Cyc. 969-979; 3 A. & E. Enc. P. & P. 104.

94. Long v. Bowersox, 8 Ohio N. P. (N. S.) 249.

95. Under Civ. Code § 3301, providing that no damages be recoverable for breach of contract which are not clearly ascertainable both in nature and origin, complaint in action against attorney for breach of contract of employment, stating that thereby litigation terminated unfavorably, was held not to state cause of action. Lane v. Storke [Cal. App.] 101 P 937. In action against attorney for breach of contract of employment where no allegation of damage for attorney's failure to proceed with bankruptcy proceedings and no "detriment proximately caused" (Civ. Code § 3300) by defendant, complaint failed to state cause of action. Id.

96. In an action for malpractice against attorney pleader must allege (1) relation between parties; (2) pertinent facts which disclose dereliction of duty by defaulting party and support complaint of injury; (3) negligence with reference to such facts of character to suggest that injury may have flowed therefrom; and (4) allegations of damages constituting proximate result of negligence alleged; and unless connecting between successive propositions and elements be apparent from statement of them, pleading must inform the court by additional averments how one element flows into another. That is, the nexus must be obvious or specially pleaded. Long v. Bowersox, 8 Ohio N. P. (N. S.) 249.

97. As to negligence. Priest v. Dodsworth, 235 Ill. 613, 85 NE 940. There is a presumption of discharge of duty until contrary appears. Id. Dismissal erroneously entered after allegations and proof that attorneys failed to draw contract for plaintiff's employment for one year, such contract having been held terminable at will. Stein v. Kremer, 112 NYS 1087.

98. Rev. St. § 4983, prescribing one year's limitation for bringing of action for malpractice, applies to attorneys at law as well as physicians and surgeons. Long v. Bowersox, 8 Ohio N. P. (N. S.) 249.

99. See ante §§ 2, 3.

1. Owing to the private and confidential relationship between attorneys and clients, courts have undertaken to deal summarily with breaches of duty and privilege by solicitors. Crane v. Gurnee [N. J. Eq.] 71 A 338. Where employment of person is so connected with his professional character as to afford presumption that his character formed ground of his employment by his client, court will exercise summary jurisdiction to compel execution of trust. In re McIntosh, 112 NYS 513. Where attorney acted in all respects in professional character for nonresident client and had sole charge of her interests, he should be compelled to turn over a sum collected on a chattel mortgage taken as trustee, minus a reasonable attorney's fee. Id. Refusal of attorney to file records with clerk of appellate court until fees were paid might be enforced summarily. In re Bergstrom & Co., 116 NYS 245.

2. Ky. St. 1903, § 104, affords client a speedy and effectual remedy for collection of money withheld. Commonwealth v. Ros [Ky.] 112 SW 683.

3. Petition for order for payment of moneys collected and misappropriated or that in default thereof attorney should be punished properly dismissed in discretion of court. Goss Print. Press Co. v. Todd, 202 Mass. 185, 88 NE 780. Other remedies provided by statute. Id.

4. Crane v. Gurnee [N. J. Eq.] 71 A 338;

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pervisory power of the court will not be extended to review a voluntary payment by a client from moneys in his possession to an attorney for services rendered.[5]

§ 7. *Compensation and lien.*[6]—See 11 C. L. 343—Provisions in notes[7] and mortgages[8] for stated attorney's fees, and their enforcement are elsewhere treated.

The compensation of an attorney is governed by the agreement, express or implied, with his client,[9] and an attorney is as free to make contracts with clients as to compensation as are other individuals to make contracts generally,[10] and to the same extent an attorney is bound by whatever contract he makes,[11] but unconscionable bargains will not be enforced,[12] or those entered into through duress.[13] An attorney, moreover, will not be allowed to make use of the relation existing to extort an unreasonable contract for compensation,[14] and the presumption is against the validity of such agreements,[15] the attorney having the burden of proving the fairness of the same.[16] Whether a particular agreement was entered into is usually a question of fact,[17] and so, also, the determination of whether an agreement has been modified or abrogated.[18] Where a contract is proved, the question of compensation becomes a matter of construction,[19] and, while an attorney may be entitled to compensation, in the nature of a retainer, beyond the value of services actually rendered,[20] he is not entitled to extra compensation for services within the

In re McIntosh, 112 NYS 513. Does not extend to business transaction. In re Malcom, 129 App. Div. 226, 113 NYS 666.

5. Motion by executor to compel refund of money paid for services rendered. In re Hess, 118 NYS 171.

6. **Search Note:** See notes in 3 C. L. 382, 383, 5 Id. 327; 7 Id. 334, 335; 2 L. R. A. (N. S.) 261; 3 Id. 379; 5 Id. 390; 11 Id. 630; 14 Id. 1095, 1101; 15 Id. 729; 8 A. S. R. 158; 51 Id. 251; 55 Id. 438; 79 Id. 178; 1 Ann. Cas. 299; 8 Id. 709; 9 Id. 625; 10 Id. 842.

See, also, Attorney and Client, Cent. Dig. §§ 292-427; Dec. Dig. §§ 130-192; 4 Cyc. 979-1023; 3 A. & E. Enc. L. (2ed.) 414, 447; 3 A & E. Enc. P. & P. 104.

7. See Negotiable Instruments, §§ 2A, 3A.

8. See Foreclosure of Mortgages on Land, § 6G.

9. In re Shay, 118 NYS 146.

10. Mellow v. Fulton [Okl.] 98 P 911. Attorney being under no obligation to defend parties had right to exact terms upon which he was willing to undertake defense. Hames v. Stroud [Tex. Civ. App.] 112 SW 775.

11. Tong v. Orr [Ind. App.] 87 NE 147.

12. An unconscionable bargain is a fraud, such as no man in his senses and not under delusion would make on one hand, and such as no honest and fair man would accept on the other. Ball v. Reyburn [Mi. App.] 118 SW 524. Written contract agreeing to pay attorney $500 in suit to enjoin lowering of street grade upon which client's property abutted not so unconscionable as to be set aside. Id. Where attorneys secured price of $394,750 for patents which company was willing to sell for $250,000, a fee of 10 per cent of purchase price was not so unconscionable as to be unenforceable, though time consumed in sale was less than month. Dryenforth v. Palmer Pneumatic Tire Co., 240 Ill. 25, 88 NE 290.

13. Letter held not to constitute threat of litigation so that compromise agreement to pay attorney's compensation could be said to have been entered into through duress or undue influence. Dyrenforth v. Palmer Pneumatic Tire Co., 240 Ill. 25, 88 NE 290.

14. Tong v. Orr [Ind. App.] 87 NE 147.

15. Agreement for compensation of an attorney made after litigation has been pending for years held voidable as being constructively fraudulent. Boyle v. Read, 138 Ill. App. 153.

16. Attorney has burden of proving fairness of contract, adequacy of consideration and that no undue advantage was taken. Boyle v. Read, 138 Ill. App. 153.

17. Finding of agreement by client to pay reasonable value of attorney's services held sustained by evidence. In re Nethaway [Minn.] 121 NW 418. Where there was no express agreement to pay retainer and services actually performed had been paid for, a finding of implied agreement to pay such retainer was properly stricken as unsupported by evidence. Buckles v. Northeast Kansas Tel. Co. [Kan.] 99 P 813.

18. No special formula or set of words to be used in abrogating or modifying contract. Tong v. Orr [Ind. App.] 88 NE 308, denying rehearing of 87 NE 147. Client's expression of satisfaction with work accomplished and his statement that attorney should be well paid held not to abrogate original contract of employment. Gillilland v. Brantner [Iowa] 121 NW 1047.

19. Contract for services of lawyer as evidenced by letter held to provide for specified compensation if client's representation that only two questions were involved on appeal were true, but that if additional work was required, extra compensation might be recovered. Bond v. Sandford, 134 Mo. App. 477, 114 SW 570.

20. Under a general employment, an attorney is entitled to compensation beyond services actually rendered, for debarring

terms of his contract.[21] Where the discharge of an attorney is without cause or where both parties are responsible for a condition of affairs rendering it absolutely necessary in the interests of business that the attorney be discharged, the attorney may recover for the services already performed under his contract.[22] A dispute between the client and the attorney may be compromised, subject to the principles applicable to contracts generally.[23] The compensation paid by a corporation at different times when the services of an attorney are required is not in a proper sense a salary,[24] but, under an order of court appointing a receiver, attorneys have been held employes of a railroad and entitled to the preference provided in such order over claims of mortgage bondholders.[25] In some states an attorney employed by a wife in a divorce action may hold the husband liable for the reasonable value of his services.[26] In some states an attorney cannot be required to act, without compensation, as counsel for indigent defendants in criminal cases,[27] but in other states it is held otherwise.[28]

The compensation of public attorneys is considered in a subsequent section.[29]

Contingent fees. See 11 C. L. 345—The modern tendency is to restrict the doctrine of champerty and maintenance in its application to contracts for contingent fees, such contracts generally being held valid,[30] and sometimes being expressly authorized by statute.[31] An administrator may be authorized to contract for the collection of a doubtful claim against the government on a contingent fee basis,[32] providing the compensation be reasonable,[33] and part owners of such a claim may, by their conduct, be estopped to complain of the contract.[34] A stipulation in a contingent fee contract, restricting the client's right to compromise the claim, is not necessarily invalid,[35] and even if held invalid it will not necessarily vitiate the rest of the contract.[36] Under a valid contingent fee contract, the attorney has an ab-

himself by implied agreement from accepting employment from other persons whose interests are antagonistic to those of his client. Mellon v. Fulton [Okl.] 98 P 911.

21. Services of attorney for railroad were of nature so similar to regular duties that such attorney could not in absence of express contract recover for same, in addition to his regular salary. Willard v. Pennsylvania Co., 140 Ill. App. 306. An attorney employed to do all that is necessary to perfect appeals is not entitled to extra compensation for signing appeal bonds as surety. Id.

22. Price v. Western Loan & Sav. Co. [Utah] 100 P 677. Discharge conditioned on payment or security for payment. Schouweiler v. Allen [N. D.] 117 NW 866; In re Robbins, 61 Misc. 114, 112 NYS 1032. Right to change attorneys can be exercised only upon payment to the attorney of the amount due him. Lederer v. Goldston, 63 Misc. 322, 117 NYS 151.

23. Letter of acceptance held sufficient signing of compromise agreement to pay attorney's compensation, within statute of frauds. Dyrenforth v. Palmer Pneumatic Tire Co., 240 Ill. 25, 88 NE 290. Contract held taken out of statute under principle of part performance. Id.

24. Salary is fixed sum to be paid by year or periodically, for services. Rebadow v. Buffalo Sav. Bank, 63 Misc. 407, 117 NYS 282.

25. Where order provided for payment of current debts to operators and employes, attorneys were within such term though paid by fees. Seaboard Air Line R. Co. v. Continental Trust Co., 166 F 597.

26. Rev. St. 1899, § 2926 (Ann. St. 1906, p. 1683). Hamilton v. Salisbury, 133 Mo. App. 718, 114 SW 563. Demand only enforcible as alimony. Id. See Alimony.

27. Such is rule in Indiana. Clay County Com'rs v. McGregor [Ind.] 87 NE 1.

28. See Clay County Com'rs v. McGregor [Ind.] 87 NE 1.

29. See post § 11.

30. Baltimore, etc., R. Co. v. Trennepohl [Ind. App.] 87 NE 1059. Agreement made after judgment to pay half of recovery held valid. Id.

31. Under Laws 1901, p. 46 (Ann. St. 1906, § 4937-2), it is lawful for an attorney to contract, either before or after suit is brought with client for percentage of proceeds to be obtained. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042.

32. Pennebaker v. Williams [Ky.] 120 SW 321.

33. Contingent fee of 50 per cent for prosecuting doubtful claim against government held reasonable. Pennebaker v. Williams [Ky.] 120 SW 321.

34. Where part owners permitted and intrusted prosecution of claim to one person, they could not complain of contingent fee contract entered into by administrator of such owner. Pennebaker v. Williams [Ky.] 120 SW 321.

35. Stipulation that client shall not compromise suit without attorney's consent is not invalid as legal conclusion. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042. Evidence held not to show that contract was adverse to client's interests. Id.

36. Stipulation restricting right of com-

solute right to his proportion of the demand,[37] provided the claim is collected [38] and not abandoned,[39] that is, provided he has fully performed his contract,[40] and, when the client settles the claim without the attorney's consent, the attorney may collect the full amount of his fee,[41] but a defendant, having notice of an attorney's rights, who pays the judgment rendered to the clerk of court with the attorney's consent, cannot be held liable for the fee,[42] and payment of the judgment to the attorney's agents who have an interest in the fees is binding on the attorney.[43] A defendant who has rendered himself liable to the attorney by settlement in disregard of the attorney's contingent interest cannot, however, depend on the ground of fraud between the attorney and his client.[44] A client cannot be held liable for a contingent fee on the ground that his conduct caused the loss of the suit, unless it appears that the suit would not otherwise have been lost.[45] The amount to which the attorney is entitled of the contract depends upon the terms.[46] A client attacking a contingent fee contract on the ground that his signature was procured by unfair methods has the burden of proving such allegations.[47]

Quantum meruit. See 11 C. L. 345—An express contract fixing the amount of fees precludes any question as a quantum meruit,[48] unless the express contract is superseded by an implied one.[49] In the absence of express contract, an attorney is entitled to what his services are reasonably worth [50] as upon an implied contract.[51]

promise held separable. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042.

37. Coker v. Oliver, 4 Ga. App. 728, 62 SE 483.

38. Attorneys employed on contingent fee are not entitled to anything until client's claim is collected in whole or in part. Troy v. Hall [Ala.] 47 S 1035.

39. Abandonment of case before termination of suit would deprive attorney of compensation. Troy v. Hall [Ala.] 47 S 1035. Abandonment of case by firm of attorneys, if unauthorized, was held acquiesced in by silence and inaction of member of firm employed for contingent fee, so that latter was not entitled to compensation. Id.

40. Contract not performed by proof of successful termination of litigation against one claimant, where land awarded to third person. Shaw v. Threadgill [Tex. Civ. App.] 115 SW 671.

41. Coker v. Oliver, 4 Ga. App. 728, 62 SE 483. Client will be presumed to have collected claim in full. Id.

42, 43. Compher v. Missouri & K. Tel. Co. [Mo. App.] 119 SW 493.

44. Carter v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 35.

45. Wilbur v. Lane [Tex Civ. App.] 115 SW 298.

46. Where attorney was employed to collect damages on payment of fee equal to 50 per cent of sum collected and settlement was effect, the defendant agreeing to pay $1,500 and further to pay the fee agreed upon, attorney was entitled to half of sum paid client, not sum equal to client's. Schmitz v. South Covington & C. St. R. Co. [Ky.] 114 SW 1197. Where attorney notified defendant of contract entitling him to 35 per cent of recovery, and parties settled suit, defendant paying plaintiff certain sum and agreeing to pay fee which she might be compelled to pay attorney, sum which attorney was entitled to recover should be determined by treating sum paid to plaintiff as 65 per cent. Boyd v. Chase & Son Mercantile Co., 135 Mo. App. 115, 115 SW 1052. Contract for employment of attorney in eminent domain proceedings construed and held to provide for equal division of award after deduction of assessment levied, and where client sold all her property to city, without being compelled to pay any assessment, attorney was entitled to 50 per cent of gross award. In re Edgecombe Road, 128 App. Div. 432, 112 NYS 845. Attorney entitled to interest on half of award from time property vested in city. Id. Agreement by guardian of devisees employing attorney to appear in eminent domain proceedings which had been instituted against devised lands, whereby attorney was to receive 10 per cent of award as confirmed, entitled attorney only to 10 per cent of surplus after incumbrances and back taxes were paid pursuant to confirmation order. Wendell v. Binninger, 117 NYS 616.

47. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042. Averments that contingent fee contract was secured by fraud and duress unsupported by proof. Id.

48. Where there is an express contract and stipulated amount for an attorney's fee, no evidence of reasonableness of same is necessary. Carhart v. Allen [Fla.] 43 S 47. Amount stipulated in mortgage. Id.

49. Action of client in paying compensation in excess of that agreed upon will justify finding of agreement to pay reasonable value of services rendered. Tong v. Orr [Ind. App.] 87 NE 147. Where attorney appointed to fight friendly suit at agreed price but friendly nature of suit ceased and client instructed to fight to finish, such instruction justified finding that services were rendered upon request and implied undertaking to pay reasonable value thereof. Id.

50. Mellon v. Fulton [Okl.] 98 P 911.

51. Evidence held to support finding that services were rendered under such circum-

Allowance of fees by court or taxation as costs.[See 11 C. L. 346]—The allowance of attorney's fees as costs is treated elsewhere,[52] as is also the allowance of such fees as damages [53] and in particular actions or proceedings,[54] or as constituting a part of a penalty.[55] The court may withhold the compensation allowed an attorney until he has fully performed his duties in connection with the case.[56] Generally an attorney who acts for himself is not entitled to a counsel fee against his adversary.[57] The value of services rendered may be fixed by the court on substitution of attorneys.[58]

The amount of allowance by court.[See 11 C. L. 347]—The amount allowed should be reasonable,[59] and in this connection an agreement between the parties may be considered,[60] but is not conclusive.[61] Allowances will not be disturbed on appeal where they are purely discretionary [62] or where the value of the services is purely a qustion of fact.[63]

Proceedings to recover.[See 11 C. L. 348]—The statute of limitations does not run against an attorney's claim for services until the action or suit in which he is employed has terminated.[64] Action for services may be maintained by the individual member of a firm where the employment is individual,[65] but where the services constitutes firm business, though performed by individual members, the firm is the property to sue for the compensation therefor.[66] Recovery for services ren-

stances as would imply performance with assent and request of client wherefore she was bound to pay reasonable value for same. Niederer v. Gridley, 143 Ill. App. 88.

52. See Costs, § 8.

53. See Damages, § 2.

54. See Foreclosure of Mortgages on Land, § 6G; Receivers, §§ 4B, 4D; Estates of Decedents, § 19D; Wills, § 4L; Mechanic's Liens, § 9D; Partition, § 3. See, also, Alimony; Eminent Domain, § 17; Bankruptcy, § 14H.

55. For obstructing highways, see Highways and Streets, § 16; for maintaining a nuisance, see Nuisance, § 4B, and see, also, Intoxicating Liquors, § 8.

56. In claim before court of claims in favor of Indians where lands have been ceded to government, a portion of attorney fee, allowed by court, may be withheld until services of attorneys subsequent to judgment shall have been rendered. Ottawa and Chippewa Indians of Michigan v. U. S., 42 Ct. Cl. 518.

57. Ordinary v. Connolly [N. J. Eq.] 72 A 363.

58. See ante, § 4, subd. Substitution.

59. Counsel fee of $1,000 held not excessive where counsel appeared and performed services at reference, as to fact of service of process and also appeared in proceedings to punish defendant for civil contempt. Dollard v. Koronsky, 61 Misc. 392, 113 NYS 793. Referee's finding, as to reasonable value of services in several mechanic's lien suits, at $200 held sustained by evidence. Mellon v. Fulton [Okl.] 98 P 911. Where parties to divorce were furnished ample means by decree, allowance of $2,500 held reasonable. Sullivan v. Sullivan [Wash.] 100 P 321. Reasonableness of "term fees" and charges for consultations for jury where 1,500 office consultations charged and large amount of litigation carried on. Graham v. Dillon [Iowa] 121 NW 47.

60. Court should never tax as costs an amount in excess of that agreed upon as attorney's fee. Baldauf v. Peyton, 135 Mo. App. 492, 116 SW 27.

61. When amount agreed on is excessive, it may be reduced by court. Baldauf v. Peyton, 135 Mo. App. 492, 116 SW 27. Parties may agree with their attorneys as to fees to be paid and generally such agreement will be accepted as fixing amount when taxing costs. Id. Where a jurisdictional act provides that the court shall award claimants a proper attorney's fee, a contract between the parties and attorneys fixing the rate of compensation is immaterial. Ottawa & Chippewa Indians of Michigan v. U. S., 42 Ct. Cl. 518.

62. Bowker v. Haight & Freese Co. [C. C. A.] 170 F 67. Allowances from fund in court by courts of equity are largely discretionary and are presumptively correct. Weiss v. Haight & Freese Co. [C. C. A.] 165 F 432. Charge of $50 per day for watching litigation of great magnitude, in which client was greatly interested, not so excessive as to be disturbed when awarded against client's estate. Warren v. Sheehan [Mich.] 16 Det. Leg. N. 157, 120 NW 810. Charge of $25 for settling a decree not excessive. Id.

63. In re Nethaway [Minn.] 121 NW 418. Compensation of attorney as evidenced by verdict based on conflicting evidence will not be disturbed on appeal. Brooks v. Brierton, 142 Ill. App. 369. Question of attorney's fees submitted to jury when sustained by competent evidence will not be disturbed on appeal. Thorp v. Ramsey, 51 Wash. 530, 99 P 584.

64. Until judgment rendered. Felt v. Mitchell [Ind. App.] 88 NE 723. Contract of employment of partnership not terminated by dissolution of firm by assumption of judicial office by one partner so as to start running of statute of limitations. Id.

65. Evidence held to show individual employment of attorney and that partner had no interest in fee. Stewart v. Beggs [Fla.] 47 S 932.

66. If two persons form a copartnership

dered may be dependent upon an accounting by the attorney of the sums disbursed in connection with the employment.[67] A dismissal rendered necessary by the conduct of the attorney is a complete defense to an action for services,[68] but where a client has received the benefit of an attorney's services he cannot escape liability therefor on the ground that the contract of employment was invalid.[69]

A showing of the services rendered in connection with actions need not itemize each separate charge in preparing such actions for trial.[70] Where a bill seeks not only to establish liability for attorney's services but also to fix a lien therefor, a demurrer to the entire bill cannot be sustained where it points out objections to the lien only.[71] In actions for attorney's fees, the usual rules of evidence apply as to relevancy and materiality,[72] and as to the admissibility of admissions and declarations.[73] Questions of fact should be submitted to the jury[74] under proper instructions,[75] unless the evidence is without conflict.[76] An attorney who accepts

to practice law, and firm is entitled to emoluments of firm and each of constituent members, firm would be real party in interest and might maintain action in firm name for services performed by firm or any of its members. Thorp v. Ramsey, 51 Wash. 530, 99 P 584.

67. Where attorney was employed by general counsel of corporation to aid in securing franchises, he was entitled to adequate compensation for the valuable services rendered, but recovery could only be allowed after accounting of large sums disbursed. Pallace v. Niagara, Lockport & Ontario Power Co., 131 App. Div. 453, 115 NYS 340.

68. Action on quantum meruit. Douglass v. Downend, 11 Ohio C. C. (N. S.) 390.

69. Payment of attorney's compensation can not be avoided by corporation by pleading the invalidity of the contract of employment. Rebadow v. Buffalo Sav. Bank, 63 Misc. 407, 117 NYS 282. Officers of corporation estopped to set up that employment was ultra vires. Wayte v. Red Cross Protective Soc., 166 F 372.

70. Motion directed against bill of particulars requiring itemizing of claim by making separate charge for each step in preparation for trial and trial of actions properly denied. Thorp v. Ramsey, 51 Wash. 530, 99 P 584.

71. Leahart v. Deedmeyer [Ala.] 48 S 371.

72. In action to recover fees from client who settled judgment in disregard of attorney's contingent right to portion of amount recovered, evidence of real value of property taken in settlement was immaterial. Coker v. Oliver, 4 Ga. App. 728, 62 SE 483. In action for fee for procuring certain land for client, where fee was contingent on such procurement, and land was awarded to third person, evidence of quitclaim deed by client executed as compromise to occupant for damages sustained by being deprived of land in sequestration proceedings was inadmissible. Shaw v. Threadgill [Tex. Civ. App.] 115 SW 671. Letters offered to contradict contract to pay for legal services held incompetent and immaterial, since they showed no intention not to pay for services. Tiffany v. Morgan [R. I.] 73 A 465. Evidence offered to contradict contract to pay for legal services, to effect that client made his headquarters at attorney's office, was immaterial, not being inconsistent with intention to pay for services rendered. Id.

73. In action for legal services evidence that client stated that he intended to pay for services was properly admissible as declaration against interest. Tiffany v. Morgan [R. I.] 73 A 465. Action of client in making payments to attorney in excess of price agreed upon operates as admission against interest. Tong v. Orr [Ind. App.] 87 NE 147. In action against executor for services rendered decedent, letters and statements of deceased offered to show that plaintiff was employed merely as advertisement, with no intention of receiving compensation, were rightly excluded as self serving statements, made to third parties and hence hearsay. Tiffany v. Morgan [R. I.] 73 A 465.

74. Compensation of counsel. Brooks v. Brierton, 142 Ill. App. 369. **Termination of relation** of attorney and client. Id. Who was blamable for termination of relation, is question of fact. Id. In action for compensation, evidence held to justify court in submitting issue to jury of whether there had been an **accounting and settlement** between the parties and an agreement by client to pay certain sum. Ottofy v. Winsor [Mo. App.] 119 SW 40.

75. Where modification of instruction in no manner changed or nullified positive instruction that a recovery for services of one member of firm could not be had where neither firm nor member were employed, instructions though somewhat involved were not prejudicial. Thorp v. Ramsey, 51 Wash. 530, 99 P 584. In action for contingent fee where client claimed he had not agreed to advance costs unless his debtor had property out of which judgment could be satisfied, instruction that plaintiff had burden of establishing that judgment could be satisfied held proper. Blankenship v. Cowling, 31 App. D. C. 626. In action for legal services, modified instruction that question of express promise to pay for such service was question of veracity, that jury could consider all evidence of case, including client's habits of mind and business, was correct. Tiffany v. Morgan [R. I.] 73 A 465.

76. Where client objected to account for services as shown by testimony for both sides, such issue was improperly submitted

a contract signed by a president of a corporation as officer and stockholder could not complain that no personal judgment is rendered thereon.[77] Where a defendant fails to appeal from the granting of a motion to permit an attorney to continue an action to determine his fee, after settlement of the case, he waives his right to question th attorney's remedy.[78]

Evidence as to value of services. See 11 C. L. 349—In determining the reasonableness of a fee, it is proper to consider the benefit received by the client,[79] the authority of the attorney to render the service,[80] the client's statement of the terms of employment,[81] the records and files in the cause,[82] the nature and extent of business in connection with which the charge was made,[83] and the opinions of other attorneys,[84] and the court may also make use of its own knowledge of the subject.[85] It has been held not error to allow the jury to examine account books used by an attorney to refresh his memory while testifying.[86]

Lien. See 11 C. L. 349—An attorney may by his contract of employment reserve a lien for his services,[87] but aside from contractual rights, an attorney generally has a lien upon the papers and property of his client in his hands, for the legal fees earned.[88] This lien is often specifically provided for by statute,[89] but such statutes usually substantially re-enact and provide for the attorney's lien as it existed at common law,[90] and statutes merely provide security for the attorney's fes,[91] without otherwise affecting the client's right to contract with reference to his cause of action.[92] The applicability of lien statutes is, of course, a question of

to jury. Ottofy v. Winsor [Mo. App.] 119 SW 40.

77. Attorney knew that president held nearly all of corporation's stock, and was authorized to act for it. Lynch v. McDonald [Cal.] 102 P 918.

78. Bloch v. Bloch, 131 App. Div. 859, 116 NYS 339.

79. Stewart v. Beggs [Fla.] 47 S 932.

80. Evidence held to show that services rendered by third person to assist plaintiff were authorized and that plaintiff was entitled to money expended for same. MacDonald v. Johns, 115 NYS 695.

81. Evidence of client's casual statement to another attorney of terms of employment of plaintiff attorney held admissible, not being a privileged communication, or to be excluded because of public policy. Coker v. Oliver, 4 Ga. App. 728, 62 SE 483.

82. Competent whether attorney was sole attorney in cause or not. Thorp v. Ramsey, 51 Wash. 530, 99 P 584.

83. Where attorney had charge for services rendered defendant as receiver. Graham v. Dillon [Iowa] 121 NW 47.

84. Attorneys are competent witnesses to value of services of an attorney when they appear to possess knowledge of usual compensation paid for services at time and place rendered. State v. Flarsheim [Mo. App.] 119 SW 17. The testimony of attorneys as to the value of services rendered is competent, but not conclusive. Graham v. Dillon [Iowa] 121 NW 47. Evidence by one attorney as to reasonable value of his personal or individual services held proper where services by both plaintiffs were intermingled. Thorp v. Ramsey, 51 Wash. 530, 99 P 584. In action for cancellation of insurance policy, attorneys' fees, etc., opinion evidence of reasonable value of attorney's services held admissible. Mutual Life Ins. Co. v. Chambliss, 131 Ga. 60, 61 SE 1034.

85. Value of services in procuring dissolution of injunction. Chicago Wire Chair Co. v. Kennedy & Wright Co., 141 Ill. App. 196.

86. Graham v. Dillon [Iowa] 121 NW 47.

87. Where lease is assigned with power to collect rents, the **assignee may contract** to give lien to attorney for services in suing for rents. Jackson v. Erkins, 116 NYS 385. Where under assignment of leases as collateral assignor was obliged to reimburse assignee for proceedings brought under such leases, and such leases were subjected to attorney's lien, payment of indebtedness did not release collateral. Id. Where a contract gives an attorney a lien on the sum collected, he can lawfully hold such portion of sum as his fee would amount to under the contract, if he performs the obligation assumed. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042.

88. In re Bergstrom & Co., 116 NYS 245. Where attorney entitled to lien obtains possession of papers of client or collects money from adverse party, he may retain papers or money until compensation is paid or satisfied. Brown v. Morgan, 163 F 395. Attorney's lien does not apply to copies of printed records required to be filed in courts, and which were received by attorney for that purpose. In re Bergstrom & Co., 116 NYS 245.

89. Code 1907, § 3011, held not retroactive so as to affect pending litigation. Leahart v. Deedmeyer [Ala.] 48 S 371.

90. Attorney's lien under Iowa Code 1897, § 321, as construed by Iowa decisions, is declaratory of common law, with additional provision for notice on judgment docket. Brown v. Morgan, 163 F 395.

91. Boyle v. Metropolitan St. R. Co., 134 Mo. App. 71, 114 SW 558.

92. May settle without attorney's consent. Boyle v. Metropolitan St. R. Co., 134 Mo. App. 71, 114 SW 558.

construction.[93] The statutory lien has been held inapplicable where attorneys sue for a poor person,[94] or where an attorney for a taxpayer recovers funds illegally appropriated by a county.[95] In some states an attorney has a lien upon a judgment or decree for his services rendered in obtaining the same,[96] while in other states such a lien can be predicated only upon fees and disbursements taxable in the case.[97] Unless otherwise provided by statute, such a lien does not attach until the judgment is rendered.[98] Only the attorney who appears for the party can assert the statutory lien to the proceeds of the proceedings,[99] and the lien attaches only to the proceeds obtained in the particular proceeding.[1] Notice is usually requisite in order to fix an attorney's lien,[2] though this requirement may be waived.[3] The lien may attach to a fund created by the attorney's services,[4] or to a fund created by a settlement,[5] payment after actual or constructive notice of the lien being at the payor's peril.[6] An attorney's lien is superior to the rights of the parties to set off judgments recovered by them respectively against each other.[7]

93. Statutory arbitrations provided by Code Civ. Proc. § 17, are special proceedings within § 66 providing for attorney's lien. Webb v. Parker, 130 App. Div. 92, 114 NYS 489.

94. Provisions of New York Code Civ. Proc. § 66, for protection of attorneys not available where personal injury action in admiralty was in forma pauperis. O'Flaherty v. Hamburg-American Packet Co., 168 F 411. An attorney of one who is suing as a poor person, especially in a personal injury case, is not entitled to the same protection as in ordinary cases. Id.

95. An attorney of a taxpayer who institutes a suit on behalf of all taxpayers of a county, and receives money illegally appropriated, can not assert a lien thereon for his services and recover judgment against the county. Marion County v. Rives [Ky.] 118 SW 309. Attorney must look to taxpayers for his compensation. Id. St. 1909, § 489 (Russell's St. § 1806), as to payment of fees from fund before distribution of estate, property held in joint tenancy, coparcenary, etc., held inapplicable as money recovered went into county treasury and only incidentally benefited taxpayers. Id.

96. Fuller v. Clemmons [Ala.] 48 S 101.

97. Does not extend to general claim for compensation. Tyler v. Superior Ct. [R. I.] 73 A 467.

98. Not until entry of judgment. Tyler v. Superior Ct. [R. I.] 73 A 467. Under St. 1894, § 6194, subd. 3, whereby attorney had no lien on cause of action where damages were unliquidated, until judgment was entered, fact that verdict was rendered held to entitle attorney to lien. In re Nethaway [Minn.] 121 NW 418.

99. Proceeds of report in condemnation proceedings. In re Robbins, 61 Misc. 114, 112 NYS 1032. Defendant's contention that judgment ought not to be restrained because it appeared from answer that certain attorneys had lien on judgment held without merit, since lien must be asserted by attorneys themselves. Kaufman v. Cooper [Mont.] 101 P 969.

1. Where attorney was employed to represent client in condemnation proceedings designated in retainer, which was special proceeding, statutory lien attached only to proceeds of report in such proceeding. Code Civ. Proc. § 66, not entitled to lien on subsequent report on different condemnation proceedings. In re Robbins, 61 Misc. 114, 112 NYS 1032.

2. Right to impose lien dates from time of service of notice. Abbott v. United R. [Mo. App.] 119 SW 964. In absence of specific provision in attorney's lien act (Act Feb. 25, 1901; Acts 1901, p. 46) as to manner of service of notice, general provisions of statutes (Rev. St. 1899, § 998; Ann. St. 1906, p. 879 and Rev. St. 1899, § 995, as amended by Acts 1903, p. 115; Ann. St. 1906, p. 876) require personal **service on corporation.** Id. Notice must be served on officer or agent designated by law. Id. Notice by mail insufficient. Id. Reference to existing pending suit in deed held not sufficient **notice to grantee.** Bendheim v. Pickford, 31 App. D. C. 488. Under Code Civ. Proc. § 66, it is **unnecessary** for attorney to give **notice to other party.** Webb v. Parker, 130 App. Div. 92, 114 NYS 489. Fact that party to arbitration agreement providing for set-off of awards did not know of attorney's lien and that attorney did not give notice held immaterial. Id.

3. Although notice not served as required by law, acts of defendant corporation held to conclusively show receipt of same before settlement, and action based on such notice whereby objection that notice was not personally served was waived. Abbott v. United R. [Mo. App.] 119 SW 964. Corporation estopped to deny notice. Id.

4. Where attorneys instituted suit in name of nonresident, insolvent contractor, and established fund inuring to benefit of such insolvents' creditors, his subcontractors, the attorneys would be entitled to an attorney's lien which could equitably exist against fund created. Jefferson Hotel Co. v. Brumbaugh [C. C. A.] 168 F 867. If suit by subcontractor, all would have to contribute and equity may look to result obtained. Id. Where eminent domain proceedings were instituted, attorneys had lien on fund created by the special proceeding (Code Civ. Proc. § 66). Wendell v. Binninger, 117 NYS 616.

5. O'Flaherty v. Hamburg-American Packet Co., 168 F 411. Under Code Civ. Proc. § 66, attorney's lien attaches to settlement. In re Kaufman, 113 NYS 525.

6. O'Flaherty v. Hamburg-American

*Loss of lien.*See 11 C. L. 851—Under statutory provisions a release of the lien may be secured by the execution of a bond,[8] but otherwise an attorney can not be deprived of his lien by a summary order of the court.[9] Intention, actual or constructive, is an essential element of a waiver of a lien.[10] A principal attorney can not enforce his lien for a portion of a settlement which has been paid to his authorized agents,[11] but a principal attorney's lien is not defeated by the receipt of the amount of the decree for distribution by associate counsel also having a lien.[12]

*Enforcement of lien.*See 11 C. L. 851—Statutes sometimes permit the adjustment of a lien upon the abstract controversy upon summary application,[13] but in general no court may attempt the adjustment of an ordinary common-law lien or take from lienor his qualified property in chattels without an action.[14] An attorney's lien may be enforced by a suit in equity the same as other liens,[15] and from the

Packet Co., 168 F 411. Settlement agreement by parties undertaking to limit attorney's fee was not binding as to attorney, he not being party to same, and having notified defendant of lien. Boyd v. Chase Mercantile Co., 135 Mo. App. 115, 115 SW 1052. Where after reference, order fixed amount of lien, both at common law and by Code Civ. Proc. § 66, attorneys had lien on judgment secured by their efforts, which was unaffected by settlement between parties. Knickerbocker Inv. Co. v. Voorhees, 128 App. Div. 639, 112 NYS 842. Where sum due remained unpaid, attorneys were entitled to have cancellation and satisfaction of judgment vacated, so as to allow enforcement of judgment to satisfy lien. Id. Vacation of cancellation of undertaking to obtain temporary injunction was properly refused where attorneys had no interest in enforcement of undertaking, and had no lien for service rendered. Id. On settlement of judgment by parties without notice to attorneys who recovered same, order canceling undertaking for costs on appeal should be vacated. Id. Undertaking was given to stay execution of judgment, without which attorney might have collected judgment and order canceling same did not show consent of attorneys to cancellation. Id. Where attorney notified defendant in action of his contract entitling him to 35 per cent of cause of action, pursuant to Laws 1901, p. 46, as to attorneys' liens, defendant's agreement, in settlement entered into, to pay plaintiffs whatever they might be required to pay attorney, could not affect such attorney's right to recover. Boyd v. Chase Mercantile Co., 135 Mo. App. 115, 115 SW 1052.

7. Set-off will destroy judgment to which lien is attached. Webb v. Parker, 130 App. Div. 92, 114 NYS 489. Attorney's lien statutes (Laws 1901, p. 46; Ann. St. 1906, §§ 4937—1, 2) give attorney lien which, when properly presented, is superior to defendant's right to set off demand wholly unrelated to matter out of which sprung client's cause. State v. U. S. Fidelity & Guar. Co., 135 Mo. App. 160, 115 SW 1081. Where cause and set-off are related to same matter, lien only attaches to surplus adjudged plaintiff. Id.

8. Statutory bond, sufficient and regular, operates as matter of law to release lien. Jamison v. Ranck [Iowa] 119 NW 76. Under Code, § 322, persons interested may secure release of attorney's lien by execution of bond in sum double amount claimed. Id. Provision of Code, § 322, requiring filing of bill of particulars of services rendered by attorney is not limitation or condition upon right to secure release of lien by giving bond. Id.

9. Order conditioned to give security to attorney where client stood upon legal rights rendering action by attorney necessary for compensation. In re Rubel, 117 NYS 63.

10. No waiver of lien by agreement that client collect money on verdict and pay attorney after collection. In re Nethaway [Minn.] 121 NW 418.

11. Where nonresident attorneys employed assistant firm of resident attorneys who were in fact their agents, latter in scope of their employment were authorized in affecting a settlement which was agreed to by the parties, and the nonresident attorneys could not thereafter enforce their lien for a portion of the settlement. Thompson v. Missouri Pac. R. Co., 134 Mo. App. 591, 113 SW 1142.

12. Suit by principal counsel against associate counsel. Fuller v. Clemmons [Ala.] 48 S 101.

13. Only lien which can be adjusted in surrogate's court upon summary application is lien established by Code Civ. Proc. § 66, upon client's "cause of action, claim or counterclaim." In re Robinson's Estate, 59 Misc. 323, 112 NYS 280. Such lien attaches to "verdict, report, decision, judgment or final order." Id. Such lien is not upon property of tangible or chattel nature, but is limited to abstract controversy. Id.

14. Disallowance of lien by surrogate upon application of testamentary trustee would be deprivation of property without due process of law. In re Robinson's Estate, 59 Misc. 323, 112 NYS 280. Surrogate has no jurisdiction to ascertain or enforce a common-law lien upon books and papers, or other property, unless as possible incident to substitution of attorneys in proceeding. Id.

15. Brown v. Morgan, 163 F 395. Suit by principal counsel against associate counsel to enforce lien on proceeds of claim received by latter. Fuller v. Clemmons [Ala.] 48 S 101. District court has jurisdiction to entertain equitable proceedings to enforce attorney's lien. Rev. Laws 1905, § 2289, subd. 2. In re Nethaway [Minn.] 121 NW 418. Though action in which serv-

very nature of the proceeding a jury trial cannot be demanded as of right,[16] but where an attorney's lien is released by a statutory bond and his claim becomes an ordinary demand for compensation, in no way calling for exercise of equity powers, an attorney is entitled to a jury trial.[17] Where a fund secured by a decree is paid into the registry of the court, the more orderly procedure by an attorney to enforce his lien is by petition to the chancellor instead of an original bill,[18] but, where the fund is shown to be in the hands of associate attorneys for distribution, a bill in equity is proper.[19] A bill to enforce the lien need not be filed at the term of court at which the original decree is rendered, there being no purpose to alter or disturb that decree.[20] In order to establish his right to a lien, the attorney must bring himself within the terms of the statute,[21] and show that he has fully performed the services as agreed upon.[22] In seeking to establish his lien as against a purchaser, an attorney has the burden of proving that defendant purchased the property with notice of his lien.[23] Where an arbitration agreement provides for a set-off of the awards secured, and an attorney had a lien on the award secured for his client, it is his duty to resort to his client in the first instance for his compensation.[24] The question of amount may be submitted to a referee,[25] or, when not disputed, the court may find the value of services from facts before it.[26] The expenses of a suit, where the establishment of an attorney's lien is merely ancillary, are properly chargeable to the client.[27] A liquidated claim for compensation can not be enlarged by adding interest.[28]

The right of an attorney as such to have an execution issued on the judgment ceases when he ceases to represent the judgment creditor, even though he holds an assignment of the judgment,[29] his remedies in the latter case being only such as are available to an assignee of the judgment.[30]

§ 8. *Authority of attorney to represent client. Creation, proof, and termina-*

ices rendered had been settled and dismissed. Id. Whether attorney be regarded as equitable assignee of judgment to extent of compensation for recovering same, or as equitable owner to extent of his lien, of the amount evidenced by the judgment, in either case judgment creditor is trustee of attorney to that extent and equity is the proper forum in which to enforce the lien. Brown v. Morgan, 163 F 395. Possibly relief could be given in more summary manner, but this is no objection to suit in equity where rights of all parties may be fully protected. Id.

16. No abuse of discretion where trial court changed its mind and tried case itself, though same had been submitted to jury. In re Nethaway [Minn.] 121 NW 418.

17. Jamison v. Ranck [Iowa] 119 NW 76. No waiver of jury trial. Id.

18. Fuller v. Clemmons [Ala.] 48 S 101.

19. Where existence of lien is admitted, and fund representing decree is in hands of associate attorneys "for proper distribution subject to lien," such facts considered with other averments are sufficient to import equity to bill. Fuller v. Clemmons [Ala.] 48 S 101.

20. Fuller v. Clemmons [Ala.] 48 S 101.

21. Held within statute. Boyle v. Metropolitan St. R. Co., 134 Mo. App. 71, 114 SW 558.

22. Agreement to pay certain fee for services in will contest, contingent upon success, but excepting personal liability of one signer and stipulating that fee be paid from funds secured from estate, created lien on such funds. Ingersoll v. Coram, 211 U. S. 335, 53 Law. Ed. 208. Evidence held to show performance of contract to defeat will, where suit was compromised and more property was received by contestants than would have come by inheritance. Id. Proof insufficient to show attorney's lien. Dent v. Pickens [W. Va.] 64 SE 258.

23. Where purchase of land was made through an agent. Bendheim v. Pickford, 31 App. D. C. 488.

24. Attorney must exhaust remedies against client, prove insolvency or show that remedy against client is futile before he can enforce lien on award. Webb v. Parker, 130 App. Div. 92, 114 NYS 489.

25, 26. In re Kaufman, 113 NYS 525.

27. Where attorney had lien on certain land of client and creditor brought suit to reform his mortgage to include such land, resulting in decree for creditor but saving the attorney's lien which was made certain, principal relief was subjection of land to lien of creditor's mortgage, and expenses were properly chargeable to client. Warren v. Sheehan [Mich.] 16 Det. Leg. N. 157, 120 NW 810.

28. Where compensation of attorney was made certain by decree establishing his prior lien. Warren v. Sheehan [Mich.] 16 Det. Leg. N. 157, 120 NW 810.

29. Alexander v. Munroe [Or.] 101 P 903.

30. Alexander v. Munroe [Or.] 101 P 903. See Judgments, § 10.

tion of authority.[31]—See 11 C. L. 852—Except in cases prescribed by statutes,[32] the presumption is generally indulged that the appearance of an attorney is authorized,[33] though an attorney may be required to exhibit his authority when it is seriously challenged.[34] An attorney is also prima facie presumed to be acting in a representative capacity when he takes any steps in a case in which he has appeared as an attorney.[35] An attack upon the authority of an attorney should ordinarily be by motion, in order that the matter may be determined by the presiding judge and not mingled with the merits of the case.[36] Where the mode of attack is prescribed by statute, it must be followed.[37] When necessary, a plaintiff may call defendant's attorney as his own witness to prove that such attorney acted in that capacity at a certain time.[38]

*Scope of authority.*See 11 C. L. 853—The powers of an attorney are determined in a large measure by the purpose of his employment,[39] and he has implied authority to do anything necessarily incidental to the discharge of the purpose for which he was retained, but beyond this his power ceases.[40] The authority delegated may be determined from the evidence,[41] but a client's liability can not be extended by

31. Search Note: See notes in 7 C. L. 337, 343; 11 Id. 259; 21 L. R. A. 848; 33 Id. 515; 3 L. R. A. (N. S.) 72; 13 A. S. R. 297; 57 Id. 914; 93 Id. 169; 3 Ann. Cas. 441.

See, also, Attorney and Client, Cent. Dig. §§ 88-93, 132-216; Dec. Dig. §§ 77-104; 4 Cyc. 932-951; 3 A. & E. Enc. L. (2ed.) 345.

32. Code Civ. Proc. § 740, providing that an offer or acceptance of judgment subscribed by attorney must have annexed thereto affidavit to effect that he is duly authorized to make it in behalf of party, applies to causes in municipal court, since Municipal Court Act, § 20 (Laws 1902, p. 1496, c. 580) provides that code be applicable to proceedings in municipal court if not in conflict with provisions of act. Miller v. Allen, 131 App. Div. 172, 115 NYS 253.

33. Rosenthal v. Forman, 115 NYS 282; Duff v. Combs [Ky.] 117 SW 259. Record showing appearance by attorney constitutes prima facie evidence of authority. Underfeed Stoker Co. v. American Ship Windlass Co., 165 F 65. Being an officer of the court, authority is presumed. Brown v. French [Ala.] 49 S 255. Authority of attorney to appear and confess judgment is presumed until contrary is shown. Lowellville Coal Min. Co. v. Zappio [Ohio] 89 NE 97.

34. Where authority impeached by affidavit of alleged client lawyer could not continue case upon mere assertion and unauthenticated statement of alleged client. Rosenthal v. Forman, 115 NYS 282.

35. Clear recitals requisite to prove attorneys as acting for themselves on motion for appeal, especially when not parties to judgment appealed from. Ansley v. Stuart [La.] 48 S 953.

36. Brown v. French [Ala.] 49 S 255.

37. Authority can be attacked only in manner prescribed by Rev. St. 1895, art. 272, 273. Hess v. Webb [Tex. Civ. App.] 113 SW 618. **Defendant cannot attack** authority of plaintiff's attorney by way of defense. Id.

38. Logan v. Agricultural Soc. [Mich.] 16 Det. Leg. N. 192, 121 NW 485.

39. Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 SE 887; Lanum v. Patterson, 143 Ill. App. 244.

40. Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 SE 887; Lanum v. Patterson, 143 Ill. App. 244; Brown v. Spiegel [Mich.] 16 Det. Leg. N. 43, 120 NW 579. Attorney employed to present and collect claim is impliedly authorized to state to debtor what claim is. James v. Boston El. R. Co., 201 Mass. 263, 87 NE 474. Attorney for prevailing party in an action is empowered under his employment as attorney to enforce collection of judgment rendered by **having execution issued.** Tobler v. Nevitt [Colo.] 100 P 416. Attorney of legal owner of land has no power or authority to bind his client by a **disclaimer** of any character. State v. King [W. Va.] 63 SE 468. Attorney receiving note merely to obtain judgment thereon has no implied **authority to alter note.** Lanum v. Patterson, 143 Ill. App. 244. Counsel ostensibly employed merely in matter of appointment of new trustee to administer trust estate, and to invest that new trustee with title to estate, had no **authority to confer jurisdiction** on court to administer whole trust after appointment of new trustee. State v. Muench, 217 Mo. 124, 117 SW 25. Suit for alienation of affections being purely for damages does not contemplate **filing of notice of lis pendens** and it would require express direction of client to bind her by same. Linck v. Linck, 214 Mo. 464, 113 SW 1096.

41. No particular formula of words is necessary to show authority. Teich v. San Jose Safe Deposit Bank, 8 Cal. App. 397, 97 P 167. Authority of attorney to settle default judgments held question of fact. Fetz v. Leydendecker [Mich.] 16 Det. Leg. N. 408, 122 NW 100. Where nonresident attorneys employed **assistant resident attorneys** who were in fact their agents, latters' employment contemplated taking part and advising client as to settlement and securing same. Thompson v. Missouri Pac. R. Co., 134 Mo. App. 591, 113 SW 1142.

Evidence held sufficient: To authorize attorney to contract for printing brief. Tyrrel v. Milliken, 135 Mo. App. 293, 115 SW 512. No limitation of authority that price

the unauthorized statements of his attorney,[42] and a person suing for services rendered at the instance of an attorney has the burden of establishing the client's liability.[43] Usually, an attorney cannot without express authority compromise or release a claim of his client,[44] and a compromise agreement executed in excess of an attorney's power is nugatory.[45] Where, however, the attorney is specially authorized to compromise, his acts, if within such authority, will bind his client,[46] and in some states, such agreements are authorized by statute.[47] An attorney is not authorized to make a contract on his client's behalf which is illegal or void as against public policy.[48]

Generally the knowledge of the attorney is imputable to his client,[49] and no-

be only $1 per page, but admonition to this effect in letter, construed to suggest that best terms possible be secured. Id. Evidence held to support finding that employment of attorney was general. Mellon v. Fulton [Okl.] 98 P 911. Stipulation as to redemption of property from tax sale pending suit to establish equitable mortgage held authorized under evidence. Teich v. San Jose Safe Deposit Bank, 8 Cal. App. 397, 97 P 167.

Evidence held insufficient: Evidence held to show nonliability of client for sums promised by attorney in separation agreement. Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065.

42. Where contract expressly reserved right to client as to whether assistant counsel should be employed, attorney had no general authority by virtue of his employment to employ assistant at client's expense. Gillilland v. Brantner [Iowa] 121 NW 1047. Though client knew of services of assistant attorney in resisting motion for new trial, which services were not called for by his contract such client, under facts of case, had right to presume services to be performed under agreement with his attorney. Id. Where attorney contracted for services of assistant with client's consent and at specified compensation, such contract could not be abandoned or enlarged without the client's consent. Id. Where defendant in divorce action executed written statement of terms by which attorney might conclude separation agreement, such client's liability in agreement executed could not be extended by attorney's unauthorized statements. Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065. Under attorney's original retainer to represent client in divorce action, he had no authority to make a contract binding his client to pay certain sum of money to wife. Id.

43. In action for services as stenographer rendered upon the employment of attorney retained by defendant, evidence insufficient to establish that defendant was liable. Parkus v. Credit Clearing House, 115 NYS 98.

44. State v. King [W. Va.] 63 SE 468; Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234. Cannot make valid **acceptance of less than full amount of claim.** Happel v. New York, 117 NYS 627; Heath & Co. v. Com. [Ky.] 113 SW 69. Attorney cannot execute **release of judgment** by accepting something not sued for in satisfaction thereof. Heath & Co. v. Com. [Ky.] 113 SW 69.

45. Where administratrix had been appointed with no power to compromise suit for wrongful death, defendant city in relying upon attorney's affidavit of authority was not exonerated, but public records should have been examined and compromise agreement was nugatory. Happel v. New York, 117 NYS 627.

46. Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234.

Authority held shown: Specially authority held clearly shown. Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234. Contention that client was coerced or unfairly treated by attorneys not supported by evidence. Id. Admission of offer of compromise by attorney of defendant shown by other evidence to have been authorized. Neindorf v. Van De Voorde [Iowa] 120 NW 84.

Attorney held not authorized: Agreement between an attorney for an assignee for the benefit of creditors, and the attorney for a creditor has been held not binding as to the other creditors not parties to the agreement. Roden Grocery Co. v. MacAfee [Ala.] 49 S 402.

Doctrine of privileged communications does not preclude proof of special authorization of compromise by attorney. Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234.

47. Code 1907, § 2988 (592). Roden Grocery Co. v. MacAfee [Ala.] 49 S 402. Agreement between attorneys of parties in pending litigation, settling controversy is binding and will be enforced. Id. Under Sayle's Ann. Civ. St. 1897, art. 3498v, providing that attorney of record may compromise suit for minor and, when same is approved by court, decree is binding, compromise agreement held valid and binding. Hart v. Hunter [Tex. Civ. App.] 114 SW 882.

48. Attorneys authorized to settle bastardy proceedings could not agree not to prosecute crime involved, if any. Griffin v. Chriswisser [Neb.] 120 NW 909.

49. Client not permitted to reap advantage secured to him by fraudulent act of attorney. Penney v. Johnston, 142 Ill. App. 634. Evidence of what attorney said or did within scope of employment may be used against client, such evidence differing in weight but not in competency from client's own words. James v. Boston Elevated R. Co., 201 Mass. 263, 87 NE 474. **Rule inapplicable** in case where client acting honestly and in good faith upon information from attorney, institutes criminal proceedings against another. Denney

tice to an attorney is binding upon his client.[50] Likewise the knowledge of the client is attributable to the solicitor.[51] Where there are a number of clients, the attorney must be the agent of all to bind all.[52]

An attorney generally has power, without express authority, to do all acts necessary or incidental to the prosecution or management of the suit which affect the remedy as distinguished from the cause of action,[53] and concessions of attorneys of record bind their clients in all matters relating to the trial and progress of the cause,[54] and so, also, the neglect of the attorney is the neglect of the client in matters pertaining to the conduct of the case.[55] Statutes sometimes specifically authorize an attorney to bind his client in any of the proceedings of an action,[56] and under such statutes an attorney under general retainer may appear or admit

v. Johnston, 142 Ill. App. 634. Knowledge of attorney of withdrawal of member of partnership not chargeable to plaintiffs where attorney was not their agent for that purpose, though occupying position of general counsel. Vietor v. Spalding, 202 Mass. 234, 88 NE 846.

Instruction as to knowledge of attorney being knowledge of client, whether acting within scope of authority or not, held misleading. Lanum v. Patterson, 143 Ill. App. 244.

50. Notice to attorney **held sufficient** in absence of disclaimer of relationship. Duff v. Combs [Ky.] 117 SW 259. Notice to general counsel of corporation as to matter in which he is authorized to act for employer is notice to latter. Vogemann v. American Dock & Trust Co., 131 App. Div. 216, 115 NYS 741. Where corporation admitted that its attorney was general counsel, it should have proved, if such was fact, that such attorney had no authority to receive notice in its behalf. Id. Notice of suit. Id. Where attorney represented defendants by consent and had authority to give or receive notice of entry of judgment, notice to such attorney was notice to defendants. Emerson v. McDonnell, 137 Wis. 263, 118 NW 814. Notice to an attorney employed in a particular litigation **held not notice to client** of matters not pertaining to that litigation. Vogemann v. American Dock & Trust Co., 131 App. Div. 216, 115 NYS 741. Where action absolutely ended by entry of order of dismissal, client was not bound by person who acted as attorney in receiving notice of subsequent proceedings. Wawrzyniakowski v. Hoffmann & Billings Mfg. Co., 137 Wis. 629, 119 NW 350. Where authority of attorney cannot survive entry of order of dismissal except for purposes of order, i. e., to receive notice of entry, notice of second wholly unauthorized order and judgment to such attorney would be received when he was without authority to represent client, and hence would not be notice to such client. Id.

51. Knowledge of client in partition proceedings would be, in law, knowledge upon part of her solicitor. McNemar v. McNemar, 143 Ill. App. 184.

52. In suit to set aside judgments of probate court establishing claims against estate of decedent as obtained by fraud, attorney for one claimant, and for administrator, will not be presumed to be attorney for other claimants, so that by such attorney's advice such claims were fraudulently established. McDaniel v. Traylor, 212 U. S. 428, 53 Law. Ed. ——. Frequently attorney may act for many persons at the same time, with respect to transactions between or by them, in which all may have interest, without authority, under such agency extending to every transaction growing out of work performed, and in such cases the extent of authority may be determined by parol. Alderson v. Lee [Or.] 96 P 234.

53. Brown v. Spiegel [Mich.] 16 Det. Leg. N. 43, 120 NW 579. In action by landlord for restitution of demised premises, **signing of petition** to justice of peace by counsel for plaintiff was both appropriate and sufficient. Benton v. Stokes, 109 Md. 117, 71 A 532. General authority to commence suits will warrant an attorney in **attaching property,** and render the client responsible for damages. Brown v. Spiegel [Mich.] 16 Det. Leg. N. 43, 120 NW 579. Stipulation as to dissolution of attachment and that damages incurred might be set off against plaintiff's claim as within power of plaintiff's attorney. Id. An attorney who sues for money due his client has authority to receive the same and a **tender to attorney** is equal to a tender to client. Carroll v. Burgin [Ala.] 48 S 667. Where party obligated himself under bonds to deliver property, seized in detinue, to plaintiff, tender to attorney of record of such plaintiff was insufficient. Id. Evidence of **attorney's declarations at bankruptcy sale** held not admissible to affect client's title to property on theory of estoppel. Asheville Supply & Foundry Co. v. v. Machin, 150 N. C. 728, 64 SE 887.

54. Floyd v. Kulp Lumber Co., 222 Pa. 257, 71 A 13. Counsel for defendant in criminal cases may stipulate as to admission of competent evidence, in nature of letters without calling persons to whom they were written. Holmes v. State [Neb.] 118 NW 99.

55. Parker v. Britton, 133 Mo. App. 270, 113 SW 259. Held abuse of discretion to allow new trial to plaintiff where his failure to secure more than a nominal verdict was due to his attorney's neglect in regard to production of evidence. Id.

56. Under B. & C. Comp. § 1058, attorney has authority to bind client in any of proceedings in action or suit by agreement filed with clerk or entered upon journal of court. Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 99 P 1046.

service of process whereby the jurisdiction of the person of his client is conferred.[57] In New York the court may compel an attorney to disclose his client's address when such information is essential to the progress of the case,[58] such power ceasing, however, upon the termination of the attorney's professional relationship with his client.[59] It is held that an attorney has no power, merely by virtue of his retainer the trial court,[60] or because of his lien,[61] to appeal an action in his client's name.

Unauthorized acts of an attorney may be ratified,[62] and such a ratification releases the attorney for liability for exceeding his powers.[63]

§ 9. *Rights and liabilities to third persons.*[64]—See 11 C. L. 854—Where an attorney in good faith secures the allowance of a claim for his client out of a fund or appropriation, he will not be personally liable if the claim as allowed is greater than his client is entitled to, even though such excess is due to the client's fraud.[65] An attorney's liability for assistance furnished him by a third party depends upon the terms of the contract of the parties,[66] as construed in the light of the acts of the parties[67] and of existing statutes.[68]

57. Under B. & C. Comp. § 1058, attorney under general retainer may admit in writing service of process whereby jurisdiction of person of client is conferred. Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 99 P 1046. Under B. & C. Comp. § 63, voluntary appearance by duly appointed attorneys of foreign corporation is equivalent to personal service. Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 102 P 1.

58. In re Malcom, 129 App. Div. 226, 113 NYS 666. Attorneys should be required to disclose address of clients when object in seeking information is in connection with pending litigation. O'Connor v. O'Connor, 62 Misc. 53, 115 NYS 965. Examination of attorney to discover address of client is examination as witness, and in such case attorney is subject to same punishment as other witnesses, for contumacy. In re Malcom, 129 App. Div. 226, 113 NYS 666. **Expenses of reference** to examine attorney as witness concerning address of certain persons, who were proved not to have been his clients, cannot be charged to attorney. Id. Where attorney had previously appeared for certain parties, and deposition was ordered to procure addresses of such clients, they being necessary parties to action, evasive attitude of such attorney and attitude of regarding information as privileged justified charge of costs of reference. In re Malcom, 60 Misc. 324, 113 NYS 255.

59. Where relationship discontinued, attorney cannot be compelled to disclose late client's address to enable pursuit with new proceedings. In re Malcom, 129 App. Div. 226, 113 NYS 666; Levy v. Coy, Hunt & Co., 117 NYS 949.

60. Not authorized to appeal to reverse judgment and to bind client for payment for transcribing evidence to be used on review. Tobler v. Nevitt [Colo.] 100 P 416. Where no appeal by clients in action involving construction of testamentary trust, counsel for executors had no right to appear and be heard against such decree. Fitchie v. Brown, 211 U. S. 321, 53 Law. Ed. 202.

61. Where an order sustained exceptions to title of certain real estate sold on execution under plaintiff's judgment, attorney for plaintiff had no right to appeal merely because of his lien at client's expense and against his consent. Nixon v. Ossenbeck [Ky.] 112 SW 645.

62. Where evidence in action to vacate judgment showed that action had been defended and appealed with defendants' consent, defendants would be bound by judgment rendered in action so defended and appealed. Emerson v. McDonnell, 137 Wis. 263, 118 NW 814. **Settlement** by attorney, if unauthorized, was ratified by suit for portion of proceeds. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042. Acceptance of compromise by client is ratification of settlement made in his behalf, and is binding. Id. Unauthorized act of attorney in taking **appeal** from justice was ratified when client prosecuted appeal. Hines v. Stephens [Ark.] 119 SW 664. Where client did not know of services of assistant attorney rendered after appeal taken until same were performed, there could be no acquiescence or ratification binding upon him. Gillilland v. Brantner [Iowa] 121 NW 1047.

63. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042. Where attorney's unauthorized settlement was ratified, he could not be held liable by deprivation of his fee. Id.

64. Search Note: See Attorney and Client, Cent. Dig. §§ 27-30, 32-39, 88-93, 132-216; Dec. Dig. §§ 19-22, 24-26, 77-104; 4 Cyc. 920-924, 932-951; 3 A. & E. Enc. L. (2ed.) 401.

65. Claim against commonwealth for printing. Commonwealth v. Bacon, 33 Ky. L. R. 935, 111 SW 387.

66. Liability for use of papers in pressing French spoliation claims. Earle v. Myers, 207 U. S. 244, 52 Law. Ed. 191.

67. In action for accounting as to fees received in prosecution of French spoliation claims, which attorney agreed to divide in consideration of exclusive use of certain papers, the estate of such attorney held required to account for fees received

§ 10. *Law partnerships and associations.*[69]—See 11 C. L. 354—The dissolution of a law partnership may be rendered necessary when a member is unable to devote the time to the business which the partnership agreement requires.[70] Ordinarily, the dissolution of a law partnership has reference only to new business.[71]

§ 11. *Public attorneys. A. Attorneys General.*[72]—See 11 C. L. 355—In the exercise of his common-law powers as the chief law officer of the state,[73] an attorney general may institute proceedings to enjoin nuisances where the interest of the state demands it,[74] or advise the state's prosecuting attorney,[75] and usually the attorney general has the management and control of a civil litigation of the state,[76] though his power in this regard may be limited by statute.[77] The attorney general is usually the proper relator in quo warranto proceedings,[78] and it has been

by administrator after attorney's death, where accounting has been treated by both parties as covering whole period. Earle v. Myers, 207 U. S. 244, 52 Law. Ed. 191.

68. Agreement of attorney for Indians for associate counsel to prosecute claims against government construed in light of existing statutes and held to render principal attorney liable for $10,000 unless fees should have to be collected under existing legislation in which case the associates would have to look out for themselves. Dudley v. Owen, 31 App. D. C. 177. Fees having been allowed in full under act of congress associates held entitled to $10,000 from principal attorney. Id.

69. Search Note: See Attorney and Client, Cent. Dig. § 43; Dec. Dig. § 30; 4 Cyc. 925; 3 A. & E. Enc. L. (2ed.) 473.

70. Where partnership agreement contemplated that defendant should devote substantially all of his time and energy to law business, on defendant's election to office of justice of peace requiring services every week day in year, plaintiff was justified in terminating partnership. Stiles v. Bradley, 117 NYS 637. Plaintiff by consenting to election and going on official bond was not estopped to terminate relation. Id.

71. Felt v. Mitchell [Ind. App.] 88 NE 723. Dissolution of law firm does not dissolve relation of partners to their clients and clients may look to either or both for performance of duties growing out of relation of attorney and client. Id. Option to terminate employment is with client. Id. If client is willing to intrust survivor with further management of litigation in which firm was employed, survivor must complete unfinished contract for benefit of partnership without compensation unless otherwise agreed. Id. Where attorneys act as copartners and accept retainer, the contract is joint, and neither can be released from obligations assumed by act or agreement between themselves. Id.

NOTE. Apportionment of profits to surviving partner: It is said in Roth v. Boles, [Iowa] 115 NW 930, that upon dissolution of a law partnership equity demands some notable apportionment of the profits in excess of the contract share to the active partner closing out the business. Where the dissolution is by reason of death of a partner, the rule as to partnerships generally is undoubtedly otherwise, but it is intimated in Denver v. Roane, 99 U. S. 358, 25 Law. Ed. 478 that, in professional partnerships where the profits are solely the result of professional skill and labor, there may be reason for applying a different rule than in ordinary commercial partnerships. This dictum is cited with approval in Little v. Caldwell, 101 Cal. 553, 36 P 107, 40 Ann. St. Rep. 89, and Lamb v. Wilson, 3 Neb. (Unof.) 496, 92 NW 167 although the exact point was not in issue in either case as pointed out in Justice v. Lairy, 19 Ind. App. 272, 49 NE 459, 65 Am. St. Rep. 405. No compensation other than the contract share is due to a surviving partner closing out a law business where the contract clearly provides for an apportionment of profits under such contingency (Osmet v. McElvath, 68 Cal. 466, 9 P 731, 58 Am. Rep. 17) and a surviving partner is not entitled to compensation for services in collecting claims already due the firm (Starr v. Case, 59 Iowa, 491, 13 NW 645). The matter of compensation to surviving partners in partnerships generally is exhaustively discussed in 17 L. R. A. (N. S.) 399, et. seq.—[Ed.].

72. Search Note: See notes in 1 L. R. A. (N. S.) 826; 15 Id. 603

See, also, Attorney General, Cent. Dig.; Dec. Dig.; 4 Cyc. 1024-1036; 3 A. & E. Enc. L. (2ed.) 475.

73. Office of attorney general existed at common law. Respass v. Com. [Ky.] 115 SW 1131; State v. Ehrlick [W. Va.] 64 SE 935.

74. Respass v. Com. [Ky.] 115 SW 1131. Attorney General alone has commonlaw power of instituting proceedings in interest of state to enjoin nuisances. Id.

75. State v. Ehrlick [W. Va.] 64 SE 935.

76. In absence of statutory limitation. State v. Ehrlick [W. Va.] 64 SE 935. Under Code 1907, § 636, attorney general is authorized to institute and prosecute in name of state all suits and other proceedings at law or in equity, necessary to protect rights and interests of state. State v. Burke [Ala.] 48 S 1035.

77. Under Wilson's Rev. & Ann. St. Okl. 1903, § 6567, attorney general has no power to bring suit in name of state, or prosecute or defend same in district courts of state, in any civil or criminal cause in which state may be party or interested, except when requested by governor or either branch of legislature. State v. Huston [Okl.] 97 P 982.

78. State R. Commission v. People [Colo.]

held that mandamus by a state to compel a county judge to reinstate criminal cases on his docket can be instituted only by the attorney general.[78] Other specific duties of attorneys general are prescribed by statute, such as the examination of drainage district bonds by the attorney general,[80] the enforcement by lien of regulations enacted in the exercise of the police power[81] and the representation of state boards,[82] but his authority is not ordinarily extended to matters in which the state is only indirectly interest.[83] An attorney general given full control of certain litigation by legislative enactment, with provision that the same shall be brought to speedy termination, must be presumed to have implied authority to discontinue an action improperly brought.[84] An attorney general may usually employ private counsel to assist him in a proper case,[85] the matter of fees being regulated by statute.[86]

(§ 11) *B. District and state or prosecuting attorneys.*[87] See 11 C. L. 356—A constitutional office of prosecuting attorney may not be abolished by the legislature.[88] The power of appointment to fill a vacant office of county attorney must be exercised pursuant to statute.[89] A disbarred attorney cannot qualify for the office of state's attroney.[90]

98 P 7. Must determine if public office or franchise has been usurped and whether public welfare will be promoted by proceedings to oust usurper. Id. As to general consideration of parties in quo warranto proceedings, see quo warranto § 3.

79. State v. Burke [Ala.] 48 S 1035.

80. Laws 30th Leg. 1907, p. 78, c. 40. Hidalgo County Drainage Dist. No. 1 v. Davidson [Tex.] 120 SW 849. Attorney general is not required to pass upon bonds until actually printed and signed as required by statute. Id.

81. Determination of legislature that natural springs of state be subject to regulation and manner of enforcement of such regulation, by authorizing injunction suit by attorney general (Laws 1908, p. 1221, c. 429) not an unreasonable exercise of police power. People v. New York Carbonic Acid Gas Co., 128 App. Div. 42, 112 NYS 381. Where conditions justify regulation of springs, legislature may determine manner of enforcement of regulations. Id.

82. In mandamus against state veterinary board to compel issuance of certificate of registration as veterinary surgeon, attorney general alone is authorized to represent board. Jennings v. State Veterinary Board [Mich.] 16 Det. Leg. N. 101, 120 NW 785. Attorney general has no right to be substituted as attorney for forest, fish and game commission where attorney is employed by such commission in an action. People v. Santa Clara Lumber Co., 60 Misc. 150, 113 NYS 70.

83. Burns' Ann. St. 1908, § 9269, neither expressly or impliedly invest state with power to appear through attorney general and contest granting of liquor license in proceeding for that purpose, the proceeding to obtain license being neither suit by or against state. State v. Gorman [Ind.] 85 NE 763. Governmental interest of state insufficient. Id.

84. State v. Southern R. [S. C.] 62 SE 1116. Under act Feb. 22, 1904 (24 Stat. p. 665), directing test action as to certain consolidation and lease of certain railroads, attorney general was given entire freedom as to nature of action to be brought, though issue were to be brought to speedy judicial determination. Id.

85. Criminal cause. State v. Petrich, 122 La. 127, 47 S 438.

86. Under Ky. St. 1903, § 114, auditor may employ such assistance and attorneys as are necessary to aid attorney general, fees being fixed by governor and auditor. Ray v. James [Ky.] 112 SW 641. Word "assistance" in statute evidently means "assistants." Id. Under statute it is a condition precedent to payment of fees for assistant to attorney general, that they shall be fixed by auditor and governor. Id. Fee should be agreed upon at time of employment. Id. No duty to pay fees until agreed upon and payee designated. Id. Complaint insufficient. Id.

87. Search Note: See District and Prosecuting Attorneys, Cent. Dig. Dec. Dig.; 23 A. & E. Enc. L. (2ed.) 271; 17 A. & E. Enc. P. & P. 1.

88. Where office of prosecuting attorney provided for by by Const. art. 7, § 17, it cannot be abolished by legislature. State v. Walton [Or.] 99 P 431.

89. Where const. art. 5, § 21, provides for election of county attorney where no resident district attorney, and Sayles' Ann. Civ. St. 1897, art. 1541, provides for filling vacancy in such office by commissioner's court, appointment of county attorney by county judge in vacation was unauthorized and void. Moore v. State [Tex. Cr. App.] 119 SW 858. Appointee was usurper. Id.

90. Disbarred attorney cannot qualify for and hold office of state's attorney, being deprived of right to appear in courts. Danforth v. Egan [S. D.] 119 NW 1021. Cannot appear in courts of his own state, and other states if aware of disbarment will refuse permission. Id. Since Const. art. 21, § 3, requires state's attorney to "faithfully discharge duties of office," dis-

Where statutory grounds of recusation of a district attorney are exclusive,[91] a recusation on any other ground is void,[92] and an information filed by attorney appointed in his place is a nullity.[93] Usually, private counsel may be employed to assist a district attorney in the trial of criminal causes,[94] though the duty of providing assistant counsel rests primarily with the legislature,[95] and the employment is subject to statutory limitations.[96] The employment of assistant counsel in special cases is frequently provided for by statute, as in cases of the employment of special counsel by state,[97] or county [98] boards, or to assist the prosecuting attorney,[99] and where an appointment amounts to the creation of a public office it can be made only in such manner as such offices can be created.[1] Where an official certification is essential to the employment of special counsel, an officer making such certification should not thereafter accept an appointment as such special counsel.[2] While constitutional duties can not be abridged by the legislature,[3] the powers and duties of prosecuting district or county attorneys are generally prescribed by statute, and usually include the prosecution of violations of criminal

barred attorney cannot hold such office and perform duties by deputy. Id. Word "attorney" when applied to law refers only to parties licensed to practice. Id. Where office is designated as state's "attorney" in constitution and statutes, the intent is that office could not be held by a person, no matter how "learned in the law," if he has not been admitted to practice as an "attorney" and licensed as such. Id. Where disbarred attorney had been guilty of violation of legal ethics, he is not "learned in the law," within such a requirement as a qualification of the office of state's attorney, since such offense will be presumed to have been due to ignorance. Id. Disbarred attorney allowing name to go on election ballot perpetrated fraud on people, regardless of whether judgment of disbarment was unjust. Id.

91. Grounds of recusation prescribed by Acts 1877, p. 35, No. 35, are exclusive. State v. Boasberg [La.] 50 S 162.

92. Recusation of district attorney in prosecution for violation of anti-race track law, merely because attorney believed no law had been violated, held a nullity, such matter not ground specified by statute. State v. Boasberg [La.] 50 S 162.

93. State v. Boasberg [La.] 50 S 162.

94. State v. Petrich, 122 La. 127, 47 S 438.

95. In criminal causes. Clay County Com'rs. v. McGregor [Ind.] 87 NE 1.

96. County reform law, § 27 (Acts 1899, p. 352, c. 154, Burns' Ann. St. 1908, § 5944) does not invade inherent powers of court, but provides reasonable limitations upon exercise of implied discretionary authority of courts to appoint counsel to aid in case by submitting to representative body of voters and taxpayers to what extent state shall be aided in prosecuting criminal offenses. Clay County Com'rs v. McGregor [Ind.] 87 NE 1. County reform law § 27 (Acts 1899, p. 352, c. 154; Burns' Ann. St. 1908, § 5944), preventing binding obligations of court in excess of moneys appropriated by county to support of court does not deprive court of inherent powers, or compel rendition of legal services without just compensation. Id.

97. Under Ballinger's Ann. Codes & St. § 3031 (Pierce's Code, § 4474), state board of dental examiner's authority to employ private counsel is not dependent upon consent of prosecuting attorney. Stern v. State Board of Dental Exam'rs, 50 Wash. 100, 96 P 693. Purpose of statute requiring prosecuting attorney's consent to employment of private counsel to assist in violations of dental act is manifest. Id. Where assistant private counsel participates, consent of prosecuting attorney will be implied. Id.

98. County commissioners without power to make contract for employment of special counsel to represent board in particular litigation, notwithstanding such contract would be in furtherance of interests of county. State of Ohio v. Hamilton County Com'rs, 8 Ohio N. P. (N. S.) 281.

99. Nothing in constitution restricting power of legislature to provide deputies for prosecuting attorney, as provided by Gen. Laws 1903, Sp. Sess. Laws 32. State v. Walton [Or.] 99 P 431.

1. Office of special attorney of a state controlling county prosecutions for the sale of intoxicating liquors is public office with governmental functions, powers and duties, and hence can be created only by legislature. State v. Butler [Me.] 73 A 560. Pub. Laws 1905, p. 95, c. 92, § 8, providing for appointment of special attorney by governor, is unconstitutional since creation of office is left to discretion of governor. Id.

2. Where district attorney applied to county judge for assistant counsel in criminal case pursuant to County Law (Laws 1892, p. 1786, c. 686), § 204, whereby certification of such judge rendered value of services a county charge and same judge later accepted position which he had authorized (being allowed to practice in that county), such county judge acted officially and personally in same transaction and such course was disapproved. People v. Sanducci, 195 N. Y. 361, 88 NE 385.

3. Where duties of prosecuting attorney provided for by constitution art. 7, § 17. State v. Walton [Or.] 99 P 431.

laws,[4] enforcement of liquor laws,[5] and similar duties,[6] but a county attorney cannot of his own motion make the state or county a party to a suit.[7] In its relation to public prosecutions, the office of county attorney has been held of a quasi judicial character,[8] and in some states a district attorney has absolute power to enter a nolle prosequi upon his official responsibility, without the approval of the court,[9] but a county attorney will not be allowed to interfere with the exclusive functions of the county fiscal court.[10] An illegally appointed county attorney has no power to file information and institute criminal proceedings in a court.[11] A county attorney cannot be required to perform duties other than those required by law.[12] Official duties may be performed by a deputy,[13] and where private, assistant counsel is employed, a district attorney being present may intrust to his associate the exclusive conduct of the case.[14] A prosecuting attorney cannot complain of instructions to the grand jury where they do not specifically or otherwise clearly refer to him.[15]

Statutory proceedings for the removal of county attorney for failure to perform his statutory duties must be in strict conformity with the statutory requirements.[16]

The compensation of prosecuting attorneys and similar officers is usually provided for by statute,[17] and often takes the form of a percentage of the fines and

4. Prosecuting attorney of county has authority independent of attorney general to institute and prosecute all criminal actions and proceedings cognizable in courts of his county. Stern v. State Board of Dental Exam'rs, 50 Wash. 100, 96 P 693. Prosecuting attorney has duty of prosecuting all criminal laws of state. Id. But has no such power or authority as to civil proceedings on part of state beyond that expressly conferred by statute. Code 1889, c. 120, § 6 (Code 1906, § 3778). State v. Ehrlick [W. Va.] 64 SE 935.

5. Code tit. 12, c. 6, as to intoxicating liquors considered and Code, § 2446, as to mulct tax construed, whereby it is county attorney's duty to see that provisions of chapter relating to mulct tax are enforced. Tennant v. Kahlemeier [Iowa] 120 NW 689. County attorney required to see that mulct tax is levied, assessed and collected, and if not complied with, it is his duty to enforce prohibitory law. Id. Provisions of mulct law when complied with will operate as bar to prohibitory law, equivalent to license for sale of liquors, but not county attorney's duty to see that such bar is created. Id. Prosecuting attorney not required by statute to prosecute violations of liquor laws. Gilliam v. Ohio, 7 Ohio N. P. (N. S.) 482.

6. On **habeas corpus to determine sanity of prisoner** committed to state insane asylum district attorney of county securing commitment, must defend such commitment. People v. Chanler, 116 NYS 62. Code Civ. Proc. § 2038, requiring notice to district attorney of county where asylum is located, does not relieve attorney securing commitment. Id.

7. In suit for injunction against city to prevent interference with removal of gravel, county attorney had no authority to make county or state party to suit. Goar v. Rosenberg [Tex. Civ. App.] 115 SW 653.

8. In re Moegenberg [Neb.] 120 NW 1132. County attorney as public prosecutor must exercise discretion to distinguish between guilty and innocent, and to refrain from prosecuting persons whose guilt is so doubtful that justice will not be subserved by prosecutions. Id.

9. Presumed to act under heavy sense of obligation for enforcement of law. Lizotte v. Dloska, 200 Mass. 327, 86 NE 774.

10. Where jurisdiction of fiscal court to fix county judge's salary is exclusive, county attorney cannot agree that order of such fiscal court be set aside or held for naught. Monroe County Ct. v. Miller [Ky.] 116 SW 272.

11. Moore v. State [Tex. Cr. App.] 119 SW 858.

12. Dubuque County v. Fitzpatrick [Iowa] 121 NW 15. Estimating and correcting monthly reports of justices and constables not part of county attorney's duty. Id.

13. Signing and filing of information by deputy is act of principal and satisfies Const. art. 1 § 9, requiring warrants to be issued only on probable cause supported by oath. State v. Walton [Or.] 99 P 431.

14. State v. Petrich, 122 La. 127, 47 S 438.

15. Courts' instructions to grand jury and comments thereon held not so certain and specific against prosecuting attorney as to raise presumption of unlawful interference with his official duties. State v. Spokane County Superior Ct. [Wash.] 100 P 978.

16. Proceedings for the removal of county attorney for failure to enforce a statutory duty are penal in character, and the statute involved must be strictly construed for failure to enforce mulct tax (Code § 2446). Tennant v. Kuhlemeier [Iowa] 120 NW 689.

17. Under statute county attorney cannot receive salary over $1,500 per year. Dubuque County v. Fitzpatrick [Iowa] 121 NW 15. Under statutes, largest amount legally payable for compensation of deputy to county attorney is $1,000. Id.

forfeitures recovered,[18] provision usually being made also for expenses incurred by the attorney,[19] and services outside of his regular duties,[20] but the regular or stated compensation is exclusive so far as regular duties are concerned,[21] and agreements to the contrary are invalid.[22] It is against public policy for a county attorney to become financially interested in civil suits depending on facts that might warrant criminal prosecutions,[23] and such practice is sometimes expressly prohibited by statute,[24] though it is held that such officer may recover his lawful and necessary expenditures for the benefit of his client.[25] In some states a county attorney may sue to recover compensation allowed by a county board.[26]

In some states an attorney cannot be compelled to render gratuitous assistance in the prosecution of criminals,[27] and if he accepts an appointment to such duties by the court he is bound by the limitations upon the court's power to allow compensation.[28]

(§ 11) *C. Municipal attorneys.*[29]—See 11 C. L. 359—A municipal attorney can be appointed only in the manner provided by law,[30] but a court will not inquire

18. Ky. St. 1903, §§ 123, 124, fixing fee of county attorneys at percentage of fines and forfeitures recovered, entitles them to no interest in damages awarded on affirmance of judgment for commonwealth on appeal. Commonwealth v. French [Ky.] 114 SW 255. Saving clause of anti-trust act of 1903 (L 1903, p. 119, c. 94) held not to have effect of keeping alive act of 1899 (Laws 1899, p. 246, c. 146) as to all violations of such act committed before former act took effect, wherefore prosecuting attorneys were not entitled to ¼ of penalties secured as compensation. State v. Brady [Tex.] 118 SW 128, rvg. [Tex. Civ. App.] 114 SW 895. Where statutes fix compensation of county attorney at percentage of fines and forfeitures recovered, governor's pardon cannot relieve the judgment debtor of liability for such fees. Commonwealth v. French [Ky.] 114 SW 255.

19. County attorney is entitled to sums expended in collecting taxes in counties other than his own. Rogers v. Slaton [Ky.] 113 SW 509. For sums paid associate counsel. Id. In absence of statute to such effect, county commissioners are not bound to furnish the county attorney with a **library**. State v. Major, 50 Wash. 355, 97 P 249.

20. For personal services in looking after litigation in federal courts. Rogers v. Slaton [Ky.] 113 SW 509.

21. County attorney is not entitled to extra compensation for services rendered county. Rogers v. Slaton [Ky.] 113 SW 509. Collection of taxes by proceedings in state courts is part of his duty. Id.

22. Order of fiscal court, authorizing proceedings to collect back taxes and that county attorney be paid one-fourth of sums recovered, construed as attempt to pay extra compensation for such services. Rogers v. Slaton [Ky.] 113 SW 509. Such order held not an enlargement of compensation of attorney to be elected. Id. Contract whereby board of supervisors sought to secure compensation provided by law for county attorney and that provided for his deputy to be entirely paid to county attorney held void. Dubuque County v. Fitzpatrick [Iowa] 121 NW 15. That such attorney accepted compensation less than was due under contract, held no defense to **action to recover back amount illegally paid.** Rogers v. Slaton [Ky.] 113 SW 509.

23. Representing woman in affiliation proceedings. In re Moegenberg [Neb.] 120 NW 1132.

24. Cobbey's Ann. St. 1907, § 9554. In re Moegenberg [Neb.] 120 NW 1132. Where unlawful carnal knowledge of insane woman constitutes felony, and woman becomes pregnant resulting in affiliation suit, neither county attorney nor deputy is entitled to receive fee for representing such woman, such fee being within Cobbey's Ann. St. 1907, § 9554. Id. Good faith of attorney is not justification for receipt of fees. Id.

25. In re Moegenberg [Neb.] 120 NW 1132.

26. Former county attorney deprived of office rent and salary through misapplication of county funds may sue county in district court to recover on claims allowed by county board, for which funds were not available. Strong v. Thurston County [Neb.] 120 NW 922. Failure of county attorney to institute proceedings to abolish fiscal system, by which county funds were misapplied and his salary delayed, held not to estop him from asserting his right to compensation due. Id.

27. Such is rule in Indiana. Clay County Com'rs v. McGregor [Ind.] 87 NE 1.

28. Clay County Com'rs v. McGregor [Ind.] 87 NE 1. Acceptance held voluntary and not requirement of services without compensation in violation of Constitution art. 1, § 21. Id. Since County Reform Law (Acts 1899, p. 352, c. 154) § 27 (Burns' Ann. St. 1908, § 5944) prohibits court from contracting beyond existing appropriation available for the purposes of the contract, in an action against board of county commissioners for legal assistance in prosecution of criminal cases, complaint must allege an existing unexpended appropriation sufficient to cover such expense. Id.

29. Search Note: See Municipal Corporations, Cent. Dig. §§ 290-414; Dec. Dig. §§ 123-174; 28 Cyc. 399-481.

30. Bonner v. Jennings [Pa.] 73 A 449. One receiving a temporary appointment by a borough council in the exercise of its implied power at a time when no permanent office of borough attorney exists, cannot, after the expiration of his temporary term, lay claim to the regular office,

into the reasons influencing a city council in selecting a city attorney,[31] nor will the court interfere on account of mere irregularities.[32] A city attorney's duties are usually prescribed by charter,[33] and cannot be performed by others.[34] Where a city ordinance prohibits the payment of extra compensation to its officers for services rendered the city, a city attorney cannot recover for services rendered at the request of a special committee of the council [35] as distinguished from the council itself.[36]

Attorneys for the Public, see latest topical index.

AUCTIONS AND AUCTIONEERS.[37]

The scope of this topic is noted below.[38]

Title passes to the bidder when the property is knocked down to him,[39] and at any time before the bid is accepted, the bidder may withdraw his offer to purchase or the owner his offer to sell.[40] An announcement or advertisement that certain property will be sold at auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received.[41] Where goods are sold in separate lots, refusal of the bidder to take one lot does not justify refusal to deliver the others,[42] and the auctioneer is liable for conversion if he refuses to deliver.[43] The liability of one who refuses to accept the goods after a successful bid cannot be enforced by the auctioneer [44] nor is such person liable for commissions on a resale.[45] Where one buys land at an auction sale without knowledge of an incumbrance, he may repudiate the sale and recover back the purchase price, on learning of the incumbrance.[46] In a suit to compel the buyer to accept, tender

created after his temporary appointment, without being duly elected thereto. Id. Character of temporary attorneyship held not changed by execution of bond required of regular attorney. Id.

31. Orrick v. Fort Worth [Tex. Civ. App.] 114 SW 677.

32. In proceedings to recover office, court will not interfere on account of mere irregularities in appointment of incumbent. Orrick v. Fort Worth [Tex. Civ. App.] 114 SW 677.

33. Charter of Ansonia (Sp. Laws 1901, p. 1051, et seq.) construed and held to impose upon city's corporation counsel the power and duty to represent city in all actions wherein city is interested, except as otherwise provided. Nichols v. Ansonia [Conn.] 70 A 636. Power and duty of corporation counsel as agent of city to decide if defense to action should be made could only be limited and controlled by city itself acting through aldermen. Id.

34. Mayor is authorized to employ additional counsel in certain cases, but not to supersede corporate attorney in exercise of his charter duties. Nichols v. Ansonia [Conn.] 70 A 636. Where under charter, city attorney was to prosecute criminal violations of city ordinances, council could not designate another to perform such duties. Dadmun v. San Diego [Cal. App.] 99 P 983. Charter of San Diego, art. 3, c. 5, § 2, providing that council control litigation of city, held applicable to civil actions, wherefore counsel had no authority to authorize prosecuting attorney to prosecute violations of city ordinances in place of city attorney. Id. Action of city council in appointing special prosecutor to prosecute violations of city ordinances, unauthorized and void, creating no office or liability for employment. Id.

35. MacLear v. Newark [N. J. Err. & App.] 73 A 503. Ordinance could not be evaded on ground that committee was authorized by resolution, unapproved by mayor, to employ counsel. Id.

36. MacLear v. Newark [N. J. Err. & App.] 73 A 503, distinguishing Klemm v. Newark, 61 N. J. Law, 112, 38 A 692, on ground that pleadings in latter case alleged that special services were rendered at the request of the city council itself, which allegation was admitted by demurrer.

37. See 11 C. L. 360.

Search Note: See notes in 3 C. L. 394; 20 L. R. A. 503, 545; 39 Id. 678; 57 Id. 784.

See, also, Auctions and Auctioneers, Cent. Dig.; Dec. Dig.; 4 Cyc. 1037-1056; 3 A. & E. Enc. L. (2ed.) 487.

38. Includes matters relating generally to auction sales. Such topics as Execution,* § 11, Judicial Sales,* § 5, and the like, should also be consulted.

39. Smith v. Hurley [R. I.] 72 A 705.

40. Plaintiff bid certain sum on property. Auctioneer told him that he would not consider the raise over the previous bidder, it being too insignificant, and struck property off to previous bidder. Anderson v. Wisconsin Cent. R. Co. [Minn.] 120 NW 39.

41. It is not offer to sell, which becomes binding, even conditionally, on owner when bid is made. Anderson v. Wisconsin Cent. R. Co. [Minn.] 120 NW 39.

42, 43. Smith v. Hurley [R. I.] 72 A 705.

44. Auctioneer held neither owner nor trustee of express trust. Van Praag & Co. v. Weinberger, 114 NYS 871.

45. Van Praag v. Weinberg, 63 Misc. 324, 117 NYS 223.

* Always begin with the latest article on the subject. Use the latest topical index.

is not necessary where the buyer denies the contract.[47] Where a statute provides that an auctioneer must be given authority in writing, a sale is not binding on the one whose property is sold or the adjudicatee, where the authority of auctioneer is not so given,[48] and there can be no ratification.[49] Auctioneers are in some states required to be licensed and the license is revocable for misconduct[50] in a proper proceeding,[51] but a sale made by a person not licensed, is good.[52] The auction business is not a nuisance per se[53] but it may be so conducted as to become a nuisance.[54]

Audita Querela; Australian Ballots; Automobiles; Autrefois Acquit; Baggage, see latest topical index.

BAIL, CIVIL.

The scope of this topic is noted below.[55]

§ 1. Right to Bail, and Jurisdiction to Grant, 404.
§ 2. Rights and Liabilities on Bail Bonds and Recognizance, 404.

§ 1. *Right of bail, and jurisdiction to grant.*[56] See 11 C. L. 360—A bond required to be given in a ne exeat proceeding is bail in a civil case.[57]

§ 2. *Rights and liabilities on bail bonds and recognizance.*[58] See 11 C. L. 361 The statute of Illinois makes it a condition precedent to the right of recovery upon a bail bond that a writ of capias ad satisfaciendum shall issue and be returned non est inventus.[59]

Discharge. See 11 C. L. 361—A defendant by giving bail does not waive questions as to the regularity and sufficiency of the papers upon which the order of arrest was granted.[60]

BAIL, CRIMINAL.

The scope of this topic is noted below.[61]

§ 1. Authority to Take and Right to Give Bail, 405.
§ 2. Making of Recognizance and Sufficiency Thereof, 406.
§ 3. Fulfillment or Forfeiture; Discharge; Rights and Liabilities of Sureties, 407.
§ 4. Enforcement of Bond or Recognizance, 408.
§ 5. Remission of Forfeiture and Return of Deposits Made in Lieu of Bail, 409.

46. Duty to look into all circumstances is not as strict in an auction as a sale by contract, as buyer has not the opportunity to do so. Sohns v. Beavis, 118 NYS 139.

47. Reinach v. Jung, 122 La. 610, 48 S 124.

48. Under Civ. Code, art. 2606. Reinach v. Jung, 122 La. 610, 48 S 124.

49. It must be a complete act of adjudication, and cannot be made good some time afterward by an offer to supply that which should have been given in the first place. Reinach v. Jung, 122 La. 610, 48 S 124.

50. Greater New York Charter. (Laws 1897, p. 13, c. 378) § 34, as amended by Laws 1907, p. 941, c. 431. In re Rosenthal, 118 NYS 241. Evidence held insufficient to show fraud on auctioneer. Id. **On certiorari** to review action of president of board of aldermen in cancelling auctioneer's license, it is unnecessary to present in full evidence taken on hearing. Id.

51. Though it may be forfeited in a criminal prosecution for unfair dealings in the conduct of his business, no such penalty can be imposed in a civil suit. Gilly v. Hirsh, 122 La. 966, 48 S 422.

52. Even though the act of selling subjects the auctioneer to a penalty. Van Praag & Co. v. Weinberg, 63 Misc. 324, 117 NYS 223.

53. Gilly v. Hirsh, 122 La. 966, 48 S 422.

54. Gilly v. Hirsh, 122 La. 966, 48 S 422. Auctioneer, engaged in selling goods similar to those dealt in by a merchant next door, kept a number of employes standing about, who molested and interfered with customers who were looking into his neighbor's show window, and otherwise interfered with his neighbor's business. Id.

55. The law of arrest in civil cases, including the bond given on discharge of insolvent debtor from body execution, where that practice obtains (see Civil Arrest *) and bail in criminal cases (see Bail, Criminal *), are treated in separate articles.

56. **Search Note:** See Bail, Cent. Dig. §§ 1-13; Dec. Dig. §§ 1-4; 3 A. & E. Enc. L. (2ed.) 592, 598; 3 A. & E. Enc. P. & P. 160.

57. Cochran v. People, 140 Ill. App. 596.

58. **Search Note:** See note in 45 L. R. A. 334.

See, also, Bail, Cent. Dig. §§ 14-137; Dec. Dig. §§ 5-38; 5 Cyc. 10-63; 3 A. & E. Enc. L. (2ed.) 596, 615; 3 A. & E. Enc. P. & P. 177.

59. There being no proof that a writ of capias had been issued and returned non est inventus as required by Rev. St. c. 16, § 20, no recovery could be had. Cochran v. People, 140 Ill. App. 596.

60. Although bail has been given defendant may move to vacate order of arrest within time prescribed by Code Civ. Proc.

* Always begin with the latest article on the subject. Use the latest topical index.

§ 1. *Authority to take and right to give bail.*[62] See 11 C. L. 361—The object of bail is to secure the prisoner's attendance.[63] The allowing of bail is a judicial act;[64] but the taking of a bail bond by a justice of the peace, acting as judge and clerk of his own court, is a clerical act.[65] It will be presumed that the court acted within its legitimate power in giving or refusing bail.[66] An order to the sheriff to accept bail may be given orally by the court.[67] The admission to bail, except in capital cases where the proof is evident or the presumption great,[68] is usually a constitutional right which the accused can claim.[69] Whether bail should be allowed after commitment for a capital offense, because of the serious and probably fatal injury to the health of the prisoner, is a matter resting on the sound judicial discretion of the court.[70] Prior to the perfecting of an appeal, the jurisdiction to give bail rests in the lower court,[71] but after the appeal is perfected the appellate court has jurisdiction.[72] On an appeal from a decision of the court discharging a

§ 567. Marks v. Goetchius, 69 Misc. 143, 112 NYS 1009.

61. Matters relating to arrest and binding over (see Arrest and Binding Over *), appeal bond in criminal cases (see Indictment and Prosecution,* § 17E), and bail in civil cases (see Bail, Civil *), are treated in separate articles.

62. Search Note: See notes in 1 Ann. Cas. 12; 5 Id. 153; 6 Id. 951; 9 Id. 619.

See, also, Bail, Cent. Dig. §§ 138-212; Dec. Dig. §§ 39-53; 5 Cyc. 63-92; 3 A. & E. Enc. L. (2ed.) 654, 664, 666; 3 A. & E. Enc. P. & P. 195.

63. Ex parte Ruef, 8 Cal. App. 468, 97 P 89. Bail is exacted for the purpose of securing attendance of defendant at court at all times when his presence may be lawfully required, and his rendering himself in execution in any judgment that may be pronounced against him. Ex parte McClellan [Okl. Cr. App.] 97 P 1019.

64. Held that sheriff had no right to take bail for appearance of person charged with a crime without an order of court therefor. State v. Simpson, 122 La. 309, 47 S 622.

65. Justice acting in such capacity has no right to collect fee for taking bail bond until it has been finally adjudged that defendant was liable for same. State v. Cooper [Tenn.] 113 SW 1048.

66. Where court ordered accused who was under bail into custody and afterwards offered to allow bail, in absence of any showing to contrary, presumption is that no error was committed, and that court thought bond given was insufficient. State v. Lance, 149 N. C. 551, 63 SE 198.

67. Bond taken under such order is binding on surety. State v. Bertrand, 122 La. 856, 48 S 302.

68. Proof showing the defendant's guilt held to be evident. Ex parte King [Tex. Cr. App.] 118 SW 1032. Where evidence shows that proof of guilt is not evident or presumption of guilt is not great, accused in a capital case is entitled to bail. Ex parte Holland [Okl. Cr. App.] 100 P 50. Prisoner held entitled to bail under Wilson's Rev. & Ann. St. 1903. Id. If there is reasonable doubt as to the guilt of the defendant of a capital offense, he is entitled to bail. Ex parte Smith [Okl. Cr. App.] 99 P 893. Burden is upon accused to show that he is entitled to bail. The necessary sufficiency depends upon the circumstances of each case. Ex parte Nathan [Fla.] 50 S 38. Purpose of constitutional provision that "all persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great," is to secure the right of bail in all cases except those in which the facts and circumstances show with reasonable certainty that accused is guilty of a capital offense. Id. Where testimony is of less probative force than is necessary under circumstances of case to show evident guilt or a great presumption of guilt of a capital offense, or where the proof establishes only a probability of guilt, bail should be allowed. Id. Person charged with being accessory before the fact to murder held entitled to bail as the proof was not evident and presumption great. Id.

69. Under Const. U. S. Amend. 8, and Cal. Const. art. 1, § 6, admission to bail is constitutional right except in capital cases. Ex parte, Ruef, 8 Cal. App. 468, 97 P 89. Under constitution of United States and the constitution of California, the legislature cannot prescribe such burdensome rules as to sureties and right to qualify as such that a prisoner would be deprived of his constitutional right to be admitted to bail upon giving sufficient sureties (Id.) and which no court or judge can properly refuse (Id.).

70. When it is made clearly to appear, by testimony of competent, reputable physicians who have examined physical condition of prisoner at time application is made, that there is strong ground for opinion that continued confinement would cause disease from which prisoner is then suffering to terminate fatally, he should be released on bail. Ex parte Watson [Okl. Cr. App.] 99 P 161; Ex parte Smith [Okl. Cr. App.] 99 P 893. Where prisoner was suffering with pneumonia and other ailments, caused by his imprisonment and likely to be aggravated by continuance of such confinement and that it would probably terminate fatally, it was good cause for admitting him to bail. Ex parte Watson [Okl. Cr. App.] 99 P 161. Where physician testified that accused was in a greatly weakened condition, with one lung almost consumed by tuberculosis and unless given fresh air would not live many days, he was entitled to bail. Ex parte Smith [Okl. Cr. App.] 99 P 893.

71. Before filing petition in error in appellate court, only question of excessive

writ of habeas corpus, the federal circuit court of appeals may, in its discretion, grant or refuse bail,[73] but an inferior federal court which has discharged a writ of habeas corpus has no power to admit the prisoner to bail pending an appeal from its judgment.[74] Where, on appeal, the accused is found to be entitled to bail, but the record is silent as to those particulars which should determine the amount of the bail bond, the cause will be remanded in order that the bail may be fixed by the lower court.[75] A recognizance may be taken on stay of execution conditioned on defendant surrendering himself in execution at the time and place fixed by the sentence or on a day named in the order.[76]

§ 2. *Making of recognizance and sufficiency thereof.*[77] See 11 C. L. 362 The amount of bail is largely discretionary with the trial court,[78] and, in fixing the amount, the sole purpose which should guide the court should be to cause the appearance of the accused to answer the charge against him.[79] The accurate description required in an indictment or information is not essential in a bail bond.[80] It is not necessary that it should state whether the accused was charged by information or indictment;[81] but is must designate the court before which the accused is bound to appear.[82] A bail bond given by a surety company differs in no way, so far as its legal status is concerned, from the bond of an individual.[83] A statutory undertaking for bail is not a common-law recognizance or bond,[84] but is a statutory contract to pay money under certain conditions,[85] and must contain substantially all of the material elements of the form prescribed.[86] The accused is entitled to have his sureties examined in accordance with the law.[87] Whether a surety is qualified or not usually depends upon statutory provisions.[88] When the

bail will be considered. Ex parte Tyler [Okl. Cr. App.] 102 P 716.

72. Appellate court will on proper showing make all necessary orders relating to bail. Ex parte Tyler [Okl. Cr. App.] 102 P 716.

73. Under rule 33 of circuit court of appeals (150 Fed. XXXVI), providing that prisoner may for good cause shown be detained in custody or be enlarged on recognizance, prisoner who has been indicted for crime in one district of United States and apprehended in another is not entitled to bail as matter of right. Ex parte Green, 165 F 557.

74. Paragraph 2 of rule 33 of the circuit court of appeals (150 Fed. XXXVI) held not to confer such right, although construction of paragraph is doubtful. Ex parte Ronchi, 165 F 558.

75. Ex parte Blake [Miss.] 47 S 783.

76. Rev. St. 1899, § 2695 (Ann. St. 1906, p. 1589) authorizes bail in such case. State v. Stevens, 134 Mo. App. 115, 114 SW 1113.

77. **Search Note:** See note in 7 C. L. 351.

See, also, Bail, Cent. Dig. §§ 213-288; Dec. Dig. §§ 54-73; 5 Cyc. 92-114; 3 A. & E. Enc. L. (2ed.) 680-686; 3 A. & E. Enc. P. & P. 208.

78. Criminal court of appeals will not reduce bail unless excessive. Held that case did not warrant interference. Ex parte McClellan [Okl. Cr. App.] 97 P 1019; Ex parte Houghton [Okl. Cr. App.] 97 P 1021. Bail is not to be deemed excessive simply because particular person charged is unable to give bail required. Ex parte Mcclellan [Okl. Cr. App.] 97 P 1019. Where five informations were filed against accused, each charging him with illegal sale of intoxicating liquor, an order admitting accused to bail in sum of $500, on each charge was not excessive. Ex parte Houghton [Okl. Cr. App.] 97 P 1021. But an order fixing bail in the sum of $1,000 each on three subsequent charges for the same offense is excessive. Five hundred dollars on each charge held sufficient. Id.

79. Ex parte Houghton [Okl. Cr. App.] 97 P 1021.

80. Bond sufficiently describes an offense known to the law which charges defendant with "violating Act 1908, No. 87, p. 105, known as the 'Concubinage Act.'" State v. Bertrand, 122 La. 856, 48 S 302.

81. Trial v. State [Tex. Cr. App.] 118 SW 714.

82. Where there are two district courts in the same county having jurisdiction of the offense, bail bond which failed to designate court was defective under Code Cr. Proc. 1895, art. 309, subd. 5, as amended by Act April 17, 1899 (Gen. Laws 1899, p. 111, c. 74). Granberry v. State [Tex. Cr. App.] 116 SW 594.

83. Ex parte Marrin, 164 F 631.

84, 85. Malheur County v. Carter [Or.] 98 P 489.

86. Undertaking which did not show upon its face jurisdiction to take it; nor that any order had been entered, by any judicial officer having jurisdiction, holding accused to answer for a specific charge; nor that the sureties contracted that he would appear to answer a stated charge, but only that he appeared generally, is void, as it does not comply with the requirements of B. & C. Comp. §§ 1505, 1643. Malheur County v. Carter [Or.] 98 P 489.

87. Ex parte Ruef, 8 Cal. App. 468, 97 P 89. Witnesses may be examined and the sureties placed under oath. District attor-

circumstances indicate bad faith on the part of the indemnitors, it is within the discretion of the court to refuse to accept the recognizance.[89] When there is a word, the use of which is commonly employed to designate a particular criminal offense, the use of such word is sufficient when used in a recognizance to show that an infraction of that particular public law is meant.[90] While a recognizance given under a statute may be entered into in writing,[91] it must be executed or acknowledged by the principal and surety in the presence of the magistrate taking the same.[92] For the purpose of an application to reduce bail after information is filed, the court must assume that the defendant is guilty of the offense charged.[93] Where one has secured his liberty by giving a bond in a sum fixed by a general order without objecting to the amount, he or his sureties will not be allowed to question the validity of the bond on the ground that such general order had become inoperative by statute.[94]

§ 3. *Fulfillment of forfeiture; discharge; rights and liabilities of sureties.*[95] See 11 C. L. 803—It is at all times in the discretion of the court, at any stage of the criminal trial, to call the defendant and forfeit his recognizance.[96] Ordinarily an accused on bail may go where he pleases if his sureties do not object,[97] and if he fails to appear and answer an offense his sureties may arrest him,[98] as they are bound at their peril to see that the accused obeys the court's order.[99] If the principal fails to appear and respond to the accusation as required by the conditions of the bail bond, the bond is forfeited,[1] and the surety is liable.[2] The mere appearance of a defendant and then departing without leave of court does not release the surety.[3] Neither the fact, that the district attorney did not notify the

ney should be allowed to bring witnesses and cross-examine sureties. Id.

88. Under Pen. Code, § 1279, it is sufficient if surety is a resident of the state and is either a householder or freeholder. Ex parte Ruef, 8 Cal. App. 468, 97 P 89. Under Pen. Code, § 1279, it is within discretion of court whether a surety who is not resident where bail is offered shall be accepted or not. Id. Under Pen. Code, § 1279, it makes no difference whether sureties are relatives or not. Id.

89. Sureties rejected where it appeared that one of sureties declared that he would make no effort to produce accused in court and had been fully indemnified against loss, and it also appeared that it was intended to substitute the recognizance and indemnity for person of accused and thereby enable him to flee from justice. United States v. Lee, 170 F 613.

90. Recognizance conditioned for the appearance of accused to answer upon "a charge of attempt to procure an abortion" sufficiently designated crime under Mills' Ann. St. § 1209, which used word miscarriage instead of abortion. Marmaduke v. People [Colo.] 101 P 337.

91. Cr. Code, § 324. Thomsen v. State [Neb.] 118 NW 330.

92. Writing left by principal in magistrate's office, purporting to have been signed by principal and surety, was not sufficient. Thomsen v. State [Neb.] 118 NW 330.

93. Ex parte McClellan [Okl. Cr. App.] 97 P 1019; Ex parte Houghton [Okl. Cr. App.] 97 P 1021.

94. Burns' Ann. St. 1908, § 1995, requires that order fixing amount of bail shall be made on first day of each term. Held that bond in sum fixed by general order which had become inoperative by reason of statute was binding upon sureties under the circumstances. Axtell v. State [Ind. App.] 86 NE 999.

95. **Search Note:** See notes in 14 L. R. A. 605; 5 L. R. A. (N. S.) 402; 3 Ann. Cas. 930; 6 Id. 616; 8 Id. 1020.

See, also, Bail, Cent. Dig. §§ 289-334, 350-369; Dec. Dig. §§ 74-76, 79, 80; 5 Cyc. 115-128, 131-134; 3 A. & E. Enc. L. (2ed.) 708, 717; 3 A. & E. Enc. P. & P. 234.

96. Commonwealth v. Harvey, 222 Pa. 214, 70 A 1093.

97. Especially when accused submits himself to jurisdiction of the court upon return of an indictment. State v. Hetland [Iowa] 119 NW 961. Whereabouts of accused is the concern of his sureties alone. State v. Boasberg [La.] 50 S 162.

98. Chesapeake & O. R. Co. v. Vaughn [Ky.] 115 SW 217. Where manner in which sureties may arrest their principal is provided by statute, terms of statute must be complied with. Gray v. Strickland [Ala.] 50 S 152. Code 1907, § 6351, provides that the surety must have a certified copy of the undertaking to authorize him to arrest his principal. Held that this statute was not cumulative but exclusive of the common-law remedy. Id.

99. United States v. Lee, 170 F 613.

1. State v. Bertrand [La.] 49 S 199.

2. Where surety did not produce the body of the principal in court within time required by statute and made no showing relieving him from that responsibility, he was liable. State v. Bertrand [La.] 49 S 199.

3. Condition of recognizance was that defendant would appear and "not depart the

accused of the day upon which he proposed to move the case for trial;[4] nor the imprisonment of the accused in another state,[5] and the failure of the district attorney to institute proceedings to obtain his release,[6] is a sufficient excuse for failure to comply with the terms of the recognizance as regards either principal or surety. A recogizance which stipulates that the accused "shall not depart the court without leave" makes the sureties liable although the information first filed is afterwards suspended by the filing of another.[7] Where the law provides that a sheriff who fails to take a sufficient bail bond shall stand as a special bail, a person who pays money to the sheriff to be forfeited in case accused does not appear for trial cannot recover such money from the sheriff, he having paid the money into court.[8] The sureties on a bail bond are jointly and severally liable.[9] A surety on a bond, which is illegal, is not liable.[10] If the principal is taken into custody by the proper officer, he is no longer in the custody of his sureties, who are thereby discharged.[11] Where the sureties covenant that they will pay a certain amount to the state for each day of imprisonment adjudged if the accused fails to surrender himself in execution of the judgment of imprisonment, a pardon relieves the sureties from liability.[12] As to what disposition shall be made of forfeited bail is usually provided for by statute.[13]

§ 4. *Enforcement of bond or recognizance.*[14]—See 11 C. L. 364—Under a statute providing that forfeitures, not specifically granted or otherwise appropriated by law, when recovered, shall be paid into the treasury of the proper county, the action may be brought in the name of the county where the accused was required to appear, though the bond is made to the state.[15] A statutory undertaking for bail to be enforcible must have been taken in substantial compliance with the terms of the statute authorizing it,[16] and if not so taken it cannot be enforced as a common-law undertaking.[17] The complaint[18] should sufficiently show the authority

said court without leave;" therefore, his departure without leave of court was a breach. Commonwealth v. Harvey, 222 Pa. 214, 70 A 1093.

4. There being no statutory requirements that such notice be given, it was duty of accused to attend every day of the term. Leano v. Leano, 60 Misc. 520, 113 NYS 1115.

5. Where defendant, who was at large on bail in a federal court, voluntarily went into another state and was there convicted of another crime, the surety was liable. United States v. Marrin, 170 F 476.

6. No defense to forfeiture of defendant's bail. United States v. Marrin, 170 F 476.

7. Recognizance was such that it not only required the accused to answer the indictment but also not to depart the country without leave; therefore, sureties were liable because of nonappearance of accused to answer second information charging same offense. State v. Fillingham, 214 Mo. 368, 113 SW 1057.

8. Code 1906, § 1464, provides that if sheriff neglects to take sufficient bail, he will be held as special bail. Cooper v. Rivers [Miss.] 48 S 1024.

9. Trial v. State [Tex. Cr. App.] 118 SW 714.

10. Where sheriff had order to take bond on certain charge but bond was taken with reference to a different charge, the bond was illegal and surety was not bound. State v. Simpson, 122 La. 309, 47 S 622.

11. Where accused was present at rendition of verdict and judgment of court on verdict, there was implied order of court that sheriff take custody of accused, and granting of new trial and making of order of court that he be held under the bond did not revive the sureties' liability. Miller v State [Ala.] 48 S 360.

12. Commonwealth v. Hargis [Ky.] 120 SW 294.

13. Under Pub. St. 1901, c. 256, § 2, cash bail forfeited in a prosecution for driving automobile at prohibited rate belongs to the county (Rockingham County v. Chase [N. H.] 71 A 634), and the justice of the peace is not entitled to recoup from money he received for forfeiture of recognizances the costs incurred in the prosecutions (Id.).

14. Search Note: See note in 10 Ann. Cas. 293.

See, also, Cent. Dig. §§ 335-349, 370-423; Dec. Dig. §§ 77, 81-95; 5 Cyc. 126, 136-155; 3 A. & E. Enc. L. (2ed.) 722; 3 A. & E. Enc. P. & P. 238.

15. B. & C. Comp. § 358. Malheur County v. Carter [Or.] 98 P 489.

16. Malheur County v. Carter [Or.] 98 P 489.

17. Sureties are entitled to stand on their contract according to its terms. Malheur County v. Carter [Or.] 98 P 489.

18. Where complaint did not show occasion for taking bond, nor allege that any criminal proceedings had been commenced or was pending against accused, nor that any examination had been had before an officer qualified by law to hold an examination or admit to bail, nor that it was

and jurisdiction of the court to take the recognizance,[19] and should allege that defendant was charged with a crime,[20] that an examination was had,[21] and that he was held to answer the charge.[22] Though a proceedings on a scire facias taken on a recognizance in a criminal cause is a mere continuance of an existing proceedings to enforce the collection of a confessed debt, it partakes of the nature of a civil action and will be governed by the same rules.[23] A demurrer to a writ of scire facias on a recognizance for want of facts is not limited to the recognizance or writ but goes to the record.[24] In some states it is not necessary in a proceedings to forfeit a bail bond, to show that accused was arrested.[25] A surety who has received money from the principal to meet liability in case of a forfeiture of the bond has no real interest in the result of an action to enforce payment.[26] It is a good defense to a recovery on a bail bond that the accused was unable to attend court because of an unavoidable casualty.[27] Where the judgment[28] on forfeiture of bail bond recites that the principal stands charged by information and the bond states by complaint, it is an immaterial variance.[29] The court is without jurisdiction to enter judgment upon a recognizance where it appears that the return of the sheriff upon a scire facias was not made as provided by statute.[30] A surety who has an interest in the suit may appeal from a judgment rendered against him.[31] In Pennsylvania, the quarter sessions' decree of forfeiture is conclusive in proceedings in the common pleas.[32]

§ 5. *Remission of forfeiture and return of deposits made in lieu of bail.*[33] See 11 C. L. 364—The court is sometimes given discretionary power to remit the forfeiture,[34] but such discretion will not be exercised when the default is willful[35] or

adjudged that there was probable cause for believing accused guilty of some specific charge, nor that he was held to answer any charge, nor that he was held to bail or required to put in bail, nor that there was any breach of the undertaking, nor that the undertaking was filed with the clerk of the circuit court, it was demurrable. Malheur County v. Carter [Or.] 98 P 489. Complaint sufficient which shows that bond in suit was executed to secure release of principal therein, who was held to answer to a charge of felony, that amount of bond was fixed by order of court, that principal failed to appear for trial, and that judgment of forfeiture was entered before commencement of action. Axtell v. State [Ind. App.] 86 NE 999.

19. Malheur County v. Carter [Or.] 98 P 489. In Oregon the rule is that facts conferring jurisdiction must be alleged, that is, all facts requisite to show jurisdiction of the person in the manner prescribed by law. Id.

20, 21, 22. Malheur County v. Carter [Or.] 98 P 489.

23. State v. Stevens, 134 Mo. App. 115, 114 SW 1113.

24. Where it appeared from the record and files in the original cause that the state was entitled to forfeiture, judgment was allowed to stand, regardless of defects or mistakes in the writ. State v. Stevens, 134 Mo. App. 115, 114 SW 1113.

25. Under Code Cr. Proc. 1895, art. 443, it is immaterial whether the capias was valid. Trial v. State [Tex. Cr. App.] 118 SW 714.

26. Surety cannot raise technical defenses such as could have been raised by the defendant. State v. Bertrand, 122 La. 866, 48 S 302.

27. Where accused was out of the state and was accidentally shot, thereby being unable to attend court, it was a good defense. Hargis v. Begley, 33 Ky. L. R. 1020, 112 SW 602.

28. Judgment need not state whether accused was charged by information or indictment. Trial v. State [Tex. Cr. App.] 118 SW 714.

29. Trial v. State [Tex. Cr. App.] 118 SW 714.

30. Where statute provided that service should be made at least five days before first day of term, and return of sheriff was made six days before, court did not have jurisdiction. People v. Moore, 143 Ill. App. 382.

31. Where sheriff was unwilling to accept surety offered unless amount called for by bond was deposited in bank to surety's credit, and deposit being made, judgment was thereafter rendered against surety and, where it appeared that sheriff looked to surety to satisfy bond and it did not appear that money in question was furnished by accused or still on deposit, the surety has an interest in prosecuting appeal. State v. Simpson, 122 La. 309, 47 S 622.

32. Commonwealth v. Harvey, 222 Pa. 214, 70 A 1093, afg. 36 Pa. Super. Ct. 235.

33. Search Note: See Bail, Cent. Dig. §§ 254-256, 328-334, 350-369, 424; Dec. Dig. §§ 73, 79, 80, 96; 5 Cyc. 114, 126-128, 131-134, 155, 156; 3 A. & E. Enc. L. (2ed.) 723; 3 A. & E. Enc. P. & P. 241.

34. Court of common pleas committed no error in refusing to exercise the discretion given by act of December 9, 1873 (2 Smith's Laws, p. 86), where ground of relief was that when bill of indictment against de-

the principal does not appear until after the time allowed by statute to remit such forfeiture.[36] The defendant is not entitled to a return of a deposit made in lieu of bail, where, owing to defendant's failure to appear, the state has lost rights by reason of the forfeiture.[37] If the claim for the remission of the forfeiture is not made in the court below, it cannot be raised on appeal.[38]

BAILMENT.

The scope of this topic is noted below.[39]

§ 1. Definition and Mode of Creation, 410.
§ 2. Rights and Liabilities as Between Bailor and Bailee, 411.
§ 3. Rights and Liabilities as to Third Persons, 414.

§ 1. *Definition and mode of creation.*[40]—See 11 C. L. 365.—Bailment is purely a matter of contract[41] but a quasi or constructive contract is sufficient.[42] Thus where money has been obtained from another through fraud, misrepresentation, deceit, etc., there is a bailment,[43] and where goods have been sold and the vendor retains possession, he holds such goods as a simple bailee.[44] It is often difficult to determine whether a given transaction is a bailment or sale, the distinguishing characteristic being whether title passes thereby.[45]

fendant was presented to and ignored by grand jury, he was present and remained in court until following day. Commonwealth v. Harvey, 222 Pa. 214, 70 A 1093. Fact that it was the practice in court of common sessions to regard report of grand jury ignoring a bill of indictment as ipso facto a discharge of defendant and to treat an entry upon records of the court of such action by the grand jury as leave for him to depart might be considered by court of common pleas as a reason for moderating or remitting the forfeiture, but it was not required to do so. Id. Will not exercise discretion to allow creditor to recover sum deposited by defendant with surety as indemnity. United States v. Marrin, 170 F 476. Application under Code Cr. Proc. §§ 597, 598, for remission of forfeiture of deposit of money made instead of bail, under § 586, is addressed to discretion of court. Leano v. Leano, 60 Misc. 520, 113 NYS 1115. Under Code Prac. § 518, it was within power of court to set aside judgment of forfeiture where it was shown that accused who was in another state was prevented from attending court by reason of being accidentally shot. Hargis v. Begley, 33 Ky. L. R. 1020, 112 SW 602.

35. Where defendant went into another state, knowing that authorities of such state were looking for him, and he was apprehended, the default was willful, and sureties held liable. United States v. Marrin, 170 F 476.

36. Lapse of time is counted from day judgment of forfeiture is rendered in district court and not from date judgment is handed down in supreme court. State v. Bertrand [La.] 49 S 199.

37. Where defendant did not appear at time set for trial but was arrested some time after and tried and found not guilty, he was not entitled to return of money, as the state had lost opportunity to produce witnesses which they could have produced at time first set for trial. Leano v. Leano, 60 Misc. 520, 113 NYS 1115.

38. Code, § 5519, provides for remission of forfeiture, but where claim is not made in the court below it cannot be raised in appeal. State v. Sandy, 138 Iowa 580, 116 NW 599.

39. This topic includes only the general rules and cases arising from such relations as that between storekeeper and customer around which no body of law has gathered as to permit of topics dealing therewith. The rights and liabilities arising from particular bailments are more fully treated in topics appropriate thereto. See Animals,* § 5; Agistment; Carriers;* Inns, Restaurants, and Lodging Houses;* Warehousing and Deposits,* and like topics.

40. **Search Note:** See notes in 3 C. L. 400; 47 L. R. A. 305; 2 A. S. R. 711; 94 Id. 216.

See, also, Bailment, Cent. Dig. §§ 1-24, 103-116; Dec. Dig. §§ 1-4, 22, 23; 5 Cyc. 161-169, 199-207; 3 A. & E. Enc. L. (2ed.) 733, 741; 7 Id. 299; 9 Id. 279; 19 Id. 912.

41. Where plaintiff delivered goods to public truckman who in turn left them over night on truck in defendant's stable, held that the relation of bailee and bailor did not exist between plaintiff and defendant and that plaintiff was not liable because goods were taken by stranger. Cohen v. Koster, 118 NYS 142.

42, 43. Leonard v. State [Tex. Cr. App.] 120 SW 183.

44. Schwab v. Oatman, 129 App. Div. 274, 113 NYS 910. Where invoice had been delivered to vendee and vendor had transferred right to collect purchase price to bankers, vendor was simple bailee. Id.

45. **Held sale:** Contract to furnish fertilizer to defendant, title to remain in plaintiff, proceeds to belong to plaintiff but above a certain amount to go to defendant and defendant to assume all liability. Coweta Fertilizer Co. v. Brown [C. C. A.] 163 F 162. Where one leaves a cow with another to double in two years. Vandeymark v. Corbett, 131 App. Div. 391, 115 NYS 911. Where one gave his grain to his employes to be delivered to elevator and upon de-

* Always begin with the latest article on the subject. Use the latest topical index.

§ 2. *Rights and liabilities as between bailor and bailee.*[46] See 11 C. L. 365 Measure of damages for loss, injury, or conversion is elsewhere treated,[47] as are such general matters as limitations,[48] verdicts, and the like.[49] A bailee is liable for the loss or depreciation, through his negligence, of the property bailed.[50] He is obliged to dispose of the bailed property according to the instructions of the bailor,[51] or as provided by the contract of bailment,[52] and where the contract of hiring designates no place for the redelivery of the thing hired, it is his duty to return it to the home of the bailor.[53] If he refuses and neglects to redeliver the thing bailed on demand, when it is his duty to do so, he converts it to his own

livery they were asked whether grain was for sale or storage, and replied storage, and grain was mingled with other wheat and credit given owner on books as sale, which owner did not repudiate, it was held sale and valid as against unrecorded mortgage. Fischbach v. Garrison Milling & Elevator Co. [Colo.] 102 P 895.

Held bailment: Contract for rental of steam shovel for a certain time at end of which time lessee agreed to buy at stated price, but failed to do so, instead, continued to pay same rental and lessor paid taxes. McEwen v. Totten [C. C. A.] 164 F 837. Contract whereby wagon company shipped wagons to dealer, title to remain in company until sold, and dealer to receive, when sold, freight expenses, and commission, and company to receive list price and have power to cause return of wagons. Franklin v. Stoughton Wagon Co. [C. C. A.] 168 F 857. Where bank in order to finance bankrupt's importations paid for goods through its foreign representative and invoices and bill of lading to the order of bank was sent to bank with foreign draft, whereupon bank handed invoices and bill of lading to bankrupt who in return gave trust receipt to bank which among other things provided that property was to be held as bank's property, bankrupt having right to sell. In re Roboulin Fils & Co., 165 F 245. Contract between mercantile company and bankrupt providing that bankrupt should take goods, pay all expenses, such as clerk hire, etc., and at close of term return amount as per invoice and pay mercantile company a certain percentage on all sales. Walther v. Williams Mercantile Co. [C. C. A.] 169 F 270. Where A., as owner, employed B. to saw into lumber, for A.'s use and benefit, a quantity of pine timber and for that purpose intrusted B. with timber, the relation of bailor and bailee is created, and bailment is of both timber and lumber. Chaffin v. State, 5 Ga. App. 368, 63 SE 230.

46. Search Note: See notes in 3 C. L. 401; 5 Id. 343, 344, 345; 7 Id. 355; 11 Id. 366; 29 L. R. A. 92; 52 Id. 106; 57 Id. 680; 3 L. R. A. (N. S.) 348; 6 Id. 828; 10 Id. 314, 756; 12 Id. 632; 14 Id. 1089; 38 A. S. R. 779; 1 Ann. Cas. 23, 96; 3 Id. 470; 4 Id. 1085; 8 Id. 91.

See, also, Bailment, Cent. Dig. §§ 25-90, 117-133; Dec. Dig. §§ 6-20, 24-34; 5 Cyc. 170-198, 212-220; 3 A. & E. Enc. L. (2ed.) 742.

47. See Damages, § 4F.

48. See Limitations of Actions.

49. See Verdicts and Findings.

50. Held negligent: In action for injuries to certain horses and loss of others, evidence held to sustain finding that horses were hired by defendant and that he was liable. Lintott v. San Francisco Const. Co. [Cal. App.] 101 P 1064. Where bailee claimed that money had been stolen, evidence held sufficient to show that the money had been delivered to him and that he had lost it through his negligence. Wilmot v. Vannah [N. H.] 72 A 207. Where bailee was to keep bailor's automobile in his garage and not allow it to be taken from garage at night without written order, evidence held sufficient to justify jury in finding that bailee was negligent. Wilson v. Wyckoff, 117 NYS 783. Fact that chauffeur was bailee's servant was no excuse. Id. Evidence, though meager, held sufficient to support verdict that blacksmith negligently injured horse left to be shod. Johnson v. Perkins, 4 Ga. App. 633, 62 SE 152.

Held not negligent: In action for failure to return horse which was shot because of broken back, evidence held not to show that horse was injured by bailee's negligence. Tichenor-Grand Co. v. Weingarten, 116 NYS 634. Where stable boy in charge of mare, after she had finished drinking, "shooed" her to make her return to stall, and in turning she slipped and broke her thigh bone, held, under the facts, not negligence. Ponceler v. Palace Livery Co. [Ala.] 47 S 702. Evidence held sufficient to overcome presumption of liability of bailee of horse arising from failure to return horse to bailor. Collins v. Star Co., 112 NYS 1055, afg. 117 NYS 1131. In action for loss of goods left with defendant to be cleaned by him, evidence held so uncertain as to require granting of new trial after verdict for defendant. Plesser v. Appel, 113 NYS 1034. In an action for conversion of books delivered to bailee to be bound, evidence held insufficient to support verdict for bailor. Cohn v. Wolff, 115 NYS 122.

51. Purchaser of goods, who refused to accept same but agreed to reship and failed to do so, was held liable for loss of goods by fire. Luntz v. Berry, 35 Pa. Super. Ct. 204. Fact that charges were due bailee did not justify his failure to ship goods, he not having notified bailor that he would not ship. Id.

52. Where contract for rent of typewriter provided that rental should not terminate until return of machine but also provided that machine should not be removed from bailee's residence without permission of bailor, held that notice to bailor terminated contract and that machine was held subject to bailor's order. Cutter-Tower Co. v. Clements, 5 Ga. App. 291, 63 SE 58.

use.[54] So an unauthorized sale by a mere naked bailee is a conversion,[55] but a deviation from the contract of bailment only in the form of a negligent omission, as distinguished from an affirmative act indicating the bailee's wrongful assumption of control, is not a conversion.[56] Where the bailee is a firm, its members are liable jointly and severally for misappropriation of the goods.[57] A bailee of past due United States bonds may return similar bonds or pay the face value of the bonds with interest.[58]

When the bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee who consequently is liable only for gross negligence.[59] On the other hand, if the bailment is for the sole benefit of the bailee, he is bound to use extraordinary care and is liable for slight negligence,[60] but what constitutes such negligence as would charge him for loss depends upon the circumstances of the case.[61] A bailee for hire is liable for injuries to property if he does not use ordinary diligence and care,[62] and he cannot by special contract relieve himself against his own fraud or negligence.[63] But, if the subject-matter of the bailment has been injured by accident or some other means wholly without his fault, he is not liable.[64] Where the repair of a machine is for the mutual benefit of the parties, the repairer becomes a bailee for hire and is responsible for only ordinary care.[65] If the compensation is not expressly fixed, he is entitled to reasonable remuneration, commensurate with the degree of care required.[66] A bailor of property impliedly warrants that it is fit and suitable for the purpose for which it is hired.[67] A bailee for hire, in order to maintain his

53. Cumberland Tel. & T. Co. v. Taylor [Ind. App.] 88 NE 631.

54. Instruction held proper. Cumberland Tel. & T. Co. v. Taylor [Ind. App.] 88 NE 631. Cannot be held liable for conversion unless it appears that he assumed and exercised dominion or control over property, and, having possession, refused to deliver it to the owner. Cohen v. Koster, 118 NYS 142.

55. Taylor v. Welsh, 138 Ill. App. 190.

56. Bailees' omission to place horse in barn at night, as they had agreed, with result that it escaped or was stolen from pasture, does not give right of action for conversion. Rosenberg v. Diele, 61 Misc. 610, 114 NYS 24.

57. Where firm had misappropriated goods delivered to them by bank upon execution of trust receipts, bank was entitled in bankruptcy proceedings to file claim of 20 per cent against firm and balance against one of members of firm. In re Coe, 169 F 1002.

58. Baglin v. Title Guaranty & Surety Co., 166 F 356.

59. Evidence held insufficient to support verdict for bailor when evidence indicated that money was taken by burglars. Di Dio v. Robino, 116 NYS 702.

60. Evidence held insufficient to warrant a finding that sickness and death of bailor's horse was caused by negligence of bailee. Apczynski v. Butkiewicz, 140 Ill. App. 375.

61. In action against gratuitous bailee wherein court refused to charge "gross negligence" and "slight care" but told jury that bailee for hire is bound to exercise a higher degree of care than gratuitous bailee and that in view of circumstances jury should determine whether bailee had exercised reasonable care in protection of property, held not error to refuse requested instruction. Booth v. Litchfield, 62 Misc. 279, 114 NYS 1009.

62. When bailee did not return horse on the day it was hired but returned it next morning when no one was around, he was held liable for injuries to horse. Brannan v. Haldeman, 35 Pa. Super. Ct. 286. Where hirer of horse worked the horse after he was injured and after being requested not to do so by owner, he was liable for permanent injury to horse though it was not apparent that the injury was caused in the first place by his negligence. Cumberland Tel. & T. Co. v. Taylor [Ind. App.] 88 NE 631. Evidence held insufficient to establish negligence of livery stable keeper for injuries to bailor's horse. Bigger v. Acree [Ark.] 112 SW 879.

63. Notice in guest's room in hotel that trunks were stored at owner's risk did not relieve against negligence of proprietor. Hoyt v. Clinton Hotel Co., 35 Pa. Super. Ct. 297.

64. Where theatrical costumes were delivered to bailee to be cleaned and he used the best process known to the trade and materials used in cleaning were ignited in some unaccountable way which resulted in destruction of costumes, it was a sufficient defense. Gingerbread Man Co. v. Schumacher, 35 Pa. Super. Ct. 652. Held not liable for injury to horse. Darby Candy Co. v. Hoffberger [Md.] 73 A 565.

65. Where party bought automobile which did not give satisfaction and was returned for repairs, the repairer was bailee for hire and was not liable because of destruction of automobile by fire, in absence of proof that he did not exercise ordinary care. Ford Motor Co. v. Osburn, 140 Ill. App. 633.

66. Compensation of trust company relative to administration of decedent's estate. In re Butman's Estate, 130 App. Div. 156, 114 NYS 533.

lien is bound to prove that he has altered, repaired, or enhanced the value of the article at the request or with the consent of the owner,[68] and cannot sustain his refusal to deliver on a demand for payment of more than reasonable charges.[69] A bailee of property in storage cannot, himself, enforce his lien, either by public or private sale,[70] but only by judicial authority.[71] He has no right to pledge the bailed property without the consent of the bailor.[72] The process under which the bailee is justified in surrendering the property of his bailor must be valid;[73] and, when it is taken out of custody by valid, legal process, he must, within a reasonable time, give notice to the bailor.[74] Where one has come into possession wrongfully he is presumptively liable for missing goods.[75]

Where two parties deposit money with a bailee under an illegal agreement, either party may bring an action against the bailee to determine question of ownership.[76] Where the bailee tortiously converts or negligently permits the destruction of the goods and suit is brought specifically for the loss, the details of the contract of bailment are immaterial and should be treated merely as matter of inducement[77] and strict adherence to details as pleaded should not be required in the introduction of the testimony.[78] If the pleadings allege conversion, evidence as to conduct of bailee is admissible.[79] The bailor for hire has the burden of proving want of reasonable and proper care by bailee,[80] and also casual connection between bailee's acts or omissions and the injury complained of.[81] When it is proven or admitted by the pleadings that the bailee received money from the bailor upon the promise to safely keep and return it on demand, and such demand is made and refused, the contract and its breach is prima facie established.[82] Upon proof that the property was injured while in the possession of bailee,[83] or that he failed to return it, a presumption of negligence arises.[84] But the rule does not apply where the goods would deteriorate or perish from internal defects or natural causes,[85] or

67. Livery stable keeper so impliedly warrants horse let for hire. Conn v. Hunsberger [Pa.] 73 A 324. Duty of livery stable keeper to ascertain the disposition of his horses which he keeps for hire. Id.

68. Evidence held not to support verdict for bailee. Strauss v. Keyes, 117 NYS 951.

69. Judgment for bailee reversed because excessive. Strauss v. Keyes, 117 NYS 951.

70. Where bailee did not proceed under or in accordance with statute in respect to unclaimed property or by judicial authority, sale of goods constituted a conversion. Van Buren Storage & Van Co. v. Mann, 139 Ill. App. 652.

71. Van Buren Storage & Van Co. v. Mann, 139 Ill. App. 652.

72. Morsch v. Lessig [Colo.] 100 P 431.

73. Surrender by bailee of bonds which belonged to a corporation, under attachment against secretary of such corporation for personal debt, was a conversion. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801.

74. Failure to do so renders bailee liable in an action for conversion. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801.

75. Where trunk was found in possession of defendant, such possession being without authority and unexplained, it was unlawful, and plaintiff was entitled to recover damages sustained by reason of loss of articles. Hoff v. Frank Parmelee Co., 140 Ill. App. 458.

76. Held that, where husband and wife had deposited money to abide an action for divorce, such agreement being illegal, wife could maintain action to decide ownership without husband being a party. Levine v. Klein, 58 Misc. 389, 111 NYS 174.

77, 78. Kansas City So. R. Co. v. Rosebrook-Josey Grain Co. [Tex. Civ. App.] 114 SW 436.

79. Pleadings held to allege conversion. Pregent v. Mills, 51 Wash. 187, 98 P 328.

80. Darby Candy Co. v. Hoffberger [Md.] 73 A 565.

81. Evidence held insufficient to connect alleged negligence of bailee with injury to horse which he had hired. Darby Candy Co. v. Hoffberger [Md.] 73 A 565. In action for storage of automobile, evidence held not to support counterclaim that bailee had negligently damaged machine. Wyckoff v. Landsden Co., 112 NYS 1052. Where horse is delivered to blacksmith to shoe, and shortly afterwards horse is found still in possession badly cut, presumption of negligence on part of bailee arises, which will authorize liability to be fixed on him unless rebutted to satisfaction of jury. Johnson v. Perkins, 4 Ga. App. 635, 62 SE 152.

82. Evidence held sufficient to sustain verdict against saloon-keeper who was bailee of money. Wickstrom v. Swanson [Minn.] 120 NW 1090.

83. Apczynski v. Butkiewicz, 140 Ill. App. 375.

84. Yazoo & M. V. R. Co. v. Hughes [Miss.] 47 S 662; Berger v. St. Louis Storage & Commission Co. [Mo. App.] 116 SW 444. Same rule applies whether bailment is gratuitous or not. Pregent v. Mills, 51 Wash. 187, 98 P 328.

85. Where instructions did not recognize

have been destroyed by fire.[86] The question as to what extent a bailee has relieved himself from liability by the posting of notices,[87] reasonableness of explanation offered,[88] and whether his care of the property has been negligent,[89] are matters for the jury.

§ 3. *Rights and liabilities as to third persons.*[90]—See 11 C. L. 369—A contract of bailment whereby possession is given to another than the owner with the right to sell in the usual course of trade, in consideration of a certain percentage on sales, is not requried to be filed or recorded in Michigan in order that it may be valid as to creditors of bailee.[91] A third person has no right to hold bailed property because of nonpayment of debts of bailee,[92] and a purchaser[93] or pledgee[94] of property from a mere naked bailee is liable to the bailor. Where parties claim the property in the hands of a bailee in absolute adverse rights, not founded in any privity of title or any common contract, the bailee cannot compel such parties to interplead with each other.[95] Where property held by bailee is injured by the negligence of a third person, the negligence of the bailee, if any, cannot be imputed to the bailor so as to estop recovery from third person.[96]

BANKING AND FINANCE.

The scope of this topic is noted below.[97]

§ 1. **The Occupation in General; Regulation, Supervision, Control, 415.**

§ 2. **Associated or Incorporated Bankers; Corporate Existence in General, 415.** Transfer of Stock, 415. General Powers, 416. Personal Liability and Duty of Officers and Directors, 416. Powers of Officers and Right to Represent the Bank, 416. Winding Up, 418. Stockholders' Individual Liability, 420.

§ 3. **National Banks; Officers and Examiners, 421.**

§ 4. **Savings Banks, 423.**

§ 5. **Loan, Investment, and Trust Companies, 423.**

§ 6. **Deposits and Repayment Thereof; Checks, Drafts, Certificates, Receipts, Credits, 424.**

§ 7. **Circulating Notes, 432.**

§ 8. **Loans and Discounts, 432.**

§ 9. **Collections, 432.**

§ 10. **Offenses Against Banking Laws, 433.** Receipt of Deposits When Bank is Insolvent, 434.

fact that meat in storage will spoil, but that presumption was that meat was damaged by negligence of bailee, held instructions were erroneous. Patterson v. Wenatchee Canning Co. [Wash.] 101 P 721.

86. Held that, in absence of proof as to circumstances of fire, defendant was improperly held to be prima facie negligent, since destruction of property by fire is entirely consistent with ordinary care. Yazoo & M. V. R. Co. v. Hughes [Miss.] 47 S 622.

87. Where cotton was ginned and left on plot, as was custom, and there were notices about the gin stating that company would not be liable after cotton was ginned, it was error to give peremptory instructions for bailor. Batesville Gin Co. v. Whitten [Miss.] 48 S 616.

88. In action to recover money deposited for safe keeping, reasonableness of explanation held question for jury. Pregent v. Mills, 51 Wash. 187, 98 P 328.

89. Whether bailee exercised sufficient caution in leaving money deposited with him in charge of barkeeper who was in his employment. Pregent v. Mills, 51 Wash. 187, 98 P 328. Evidence in an action against keeper of garage for breach of contract under which he was not to allow automobile to leave garage without written order, held sufficient to make question of negligence one for the jury. Wilson v. Wyckoff, 117 NYS 783.

90. Search Note: See note in 92 A. S. R. 547.

See, also, Bailment, Cent. Dig. §§ 91-102, 134-140; Dec. Dig. §§ 21, 35; 5 Cyc. 207-212, 220-223; 3 A. & E. Enc. L. (2ed.) 761, 763.

91. Walther v. Williams Mercantile Co. [C. C. A.] 169 F 270.

92. Landlord cannot justify refusal to give bailed property to bailor because of nonpayment of rent. Yudelman v. Louis, 115 NYS 126.

93. Third person who purchased bailed property from mere naked bailee who had no authority to sell was liable to bailor. Taylor v. Welsh, 138 Ill. App. 190.

94. Pledgee of goods pledged by vendor who held such goods as bailee of vendee could not retain possession of goods as against vendee. Schwab v. Oatman, 129 App. Div. 274, 113 NYS 910. Where there was no evidence that bailor knowingly allowed bailee to hold himself out as owner, pledgee had no right to property as against bailor. Morsch v. Lessig [Colo.] 100 P 431.

95. New Jersey Title Guarantee & Trust Co. v. Rector [N. J. Eq.] 72 A 968.

96. Where liveryman hired out horse and wagon to his employe which was injured by street car. Currie v. Consolidated R. Co. [Conn.] 71 A 356. Where owner of livery stable let out a horse and buggy and horse was killed at grade crossing by concurrent negligence of railroad company and bailee, negligence of bailee did not prevent bailor from recovering from railroad company. Gibson v. Bessemer & Lake Erie R. Co., 37 Pa. Super. Ct. 70.

97. This topic treats particularly and exclusively of banks and banking and other

§ 1. *The occupation in general; regulation, supervision, control.*[98]—See 14 C. L. 370—When the repeal of a general banking law is merely revisory, the status of a bank organized thereunder prior to such revision is not changed thereby,[99] nor, if such bank is already in existence, can subsequent requirements as to preliminaries to organization to be made to relate to it.[1] In Oklahoma the general statute requiring every corporation to adopt a code of by-laws within a prescribed time does not apply to banking corporations.[2] In the exercise of its right to regulate banks, a state may establish a guaranty fund to protect depositors in case of insolvency,[3] and it may require the verification of reports as to the bank's condition to be made under oath.[4] The comptroller of the currency has authority to compel a bank to make up a deficiency in its capital stock, and his decision as to such deficiency is final.[5] Making loans of money on collateral security constitutes an act of banking.[6]

§ 2. *Associated or incorporated bankers; corporate existence in general.*[7]—See 11 C. L. 370—Many matters common to all corporations are elsewhere treated.[8]

*Transfer of stock.*See 11 C. L. 370—While a transfer upon the books is essential

departments of finance closely connected therewith or related thereto, such as loan, investment and trust companies. Other subjects more or less closely connected with the subject of finance are treated elsewhere, except in so far as they incidentally come under the present topic. See such topics as Brokers;* Corporations;* Exchanges and Boards of Trade;* Interest;* Joint Adventures;* Joint Stock Companies;* Negotiable Instruments;* Non-negotiable Paper;* Partnership;* Usury.* The taxation of banks is also treated elsewhere. See Taxes.*

98. Search Note: See notes in 25 L. R. A. 824; 15 Id. 477; 5 L. R. A. (N. S.) 874; 10 Ann. Cas. 903.

See, also, Banks and Banking, Cent. Dig. §§ 1-25; Dec. Dig. §§ 1-21; 5 Cyc. 431-434; 3 A. & E. Enc. L. (2ed.) 789.

99. Act May 26, 1908 (Sess. Laws 1907-8, p. 125, c. 6, art. 1), being intended as a substitute for all former acts relating to banks, repeals Wilson's Rev. & Ann. St. 1903, §§ 242-300, and Act Mar. 16, 1903 (Sess. Laws, 1903, p. 83, c. 41), Act Mar. 13, 1905 (Sess. Laws 1905, p. 84, c. 7), Act Dec. 17, 1907 (Sess. Laws 1907-8, p. 145, c. 6, art. 2), and Act Feb. 12, 1908 (Sess. Laws 1907-8, p. 152, c. 6, art. 3), merely extends provisions of former law without changing its general policy or affecting corporations formed under it. Smock v. Farmers' Union State Bank [Okl.] 98 P 945.

1. Where incorporators filed articles of incorporation under law as existing prior to passage of House Bill No. 615, approved May 26, 1908 (Sess. Laws 1907-8, p. 125, c. 6, art. 1), providing that no articles shall be filed unless incorporators have first been approved by bank commissioner, it was held that bank was already in existence, and since act did not repeal the charter the bank commissioner could be compelled by mandamus to issue his certificate showing that bank had been organized and that it was authorized to transact a general banking business. Smock v. Farmers' Union State Bank [Okl.] 98 P 945.

2. Wilson's Rev. & Ann. St. 1903, § 962, requiring every corporation organized thereunder to adopt code of by-laws within one month after filing articles, has no application to banking corporations. Smock v. Farmers' Union State Bank [Okl.] 98 P 945.

3. Act of Dec. 17, 1907 (Laws 1907-8, p. 145, c. 6, art. 2) as amended Feb. 12, 1908 (Laws 1907-8, p. 153, c. 6, art. 3), establishing a depositor's guaranty fund to insure depositors against loss in case of bank's insolvency, is not unconstitutional as being a deprivation of property without due process of law under Const. art. 2, § 7 (Noble State Bank v. Haskell [Okl.] 97 P 590), nor does it constitute an impairment of the obligation of contracts in violation of Const. art. 2, § 15 (Id.), nor is it in violation of Const. art. 2, § 2 (Burns' Ed. § 11), which provides that "all persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry" (Id.), nor is it a taking for private or public use within Const. art. 2, §§ 23, 24 (Id.), nor does it embrace more than one subject in title, as provided by Const. art. 5, § 57 (Id.).

4. Acts 1905, p. 184, c. 109, requiring reports by banks to be verified, contemplates a verification under oath. State v. Trook [Ind.] 88 NE 930.

5. Thomas v. Gilbert [Or.] 101 P 393.

6. Loan made by sugar refining company not for its own benefit in the course of its own business, but consisting in buying bill of exchange under corporation act April 21, 1896 (P. L. p. 278), was banking. Earle v. American Sugar Refining Co [N. J. Eq.] 71 A 391.

7. Search Note: See notes in 3 C. L. 406; 5 Id. 351; 7 Id. 362; 3 L. R. A. (N. S.) 428; 4 Id. 279, 597; 10 Id. 928; 8 A. S. R. 605; 47 Id. 142, 584.

See, also, Banks and Banking, Cent. Dig. §§ 26-288, 833-878; Dec. Dig. §§ 22-118, 213-231; 5 Cyc. 433-492, 557-573; 3 A. & E. Enc. L. (2ed.) 791, 795, 843; 3 A. & E. Enc. P. & P. 251.

8. See Corporations.

to pass complete legal title to the stock, a transfer merely of the certificate vests the equitable title as between the parties.[9] In Kansas the statute imposes upon the bank the duty to make such transfer upon its books, unless the registered holder is indebted to it or unless the bank is insolvent or its capital stock impaired,[10] and where the transferee has no adequate legal remedy, such a transfer may be compelled in equity.[11] A bank that has knowledge of its stockholder's failing mental condition is bound to such knowledge if it permits a transfer by him.[12]

General powers. See 11 C. L. 370—A bank organized under the laws of Kentucky may, in the absence of statute, transact business within the scope of its authority in other states.[13] In the absence of express legislative authority, the power to establish branch banks does not follow by implication as an incident to the right to do a banking business.[14] A bank may, however, have as many agents as its needs may require[15] and the state may authorize the establishment of branches.[16] It is within the power of a bank to borrow money without executing a written obligation therefor.[17] That a bank has authority to enter into a contract does not give implied authority to extend it.[18]

Personal liability and duty of officers and directors. See 11 C. L. 371—The officers of a bank cannot deprive its stockholders of their charter rights relative to the liquidation of the bank.[19] Directors of national banks owe common-law duty to diligently and honestly discharge their trust,[20] and are liable to the stockholders for losses sustained through their negligence and misconduct.[21]

Powers of officers and right to represent the bank. See 11 C. L. 371—The scope of authority of the officers may be limited by the bank's by-laws[22] or by statute.[23]

9. Hill v. Kerstetter [Ind. App.] 86 NE 858.

10. Madison Bank v. Price [Kan.] 100 P 280. If bank is solvent and capital stock unimpaired, bank has no discretion and may be compelled to make transfer although transferrer is former cashier of bank and transfers stock to competitor of bank. Id.

11. Madison Bank v. Price [Kan.] 100 P 280.

12. Bank that had knowledge that owner of stock was an invalid and that stock offered to be transferred as security for loan by another belonged to her was bound to make inquiries as to her mental condition when she signed transfer. Groff v. Stitzer [N. J. Eq.] 72 A 970.

13. Kentucky bank may acquire and hold property, transfer of which would, had it taken place in Kentucky, have amounted to a preference of creditors, but being valid under laws of Ohio, where took place, it will be upheld in Kentucky. Fawcett's Assignee v. Mitchell, Finch & Co. [Ky.] 117 SW 956.

14. Nothing in Ky. St. §§ 538 to 598 inc. (Russell's St. §§ 2121-2135, 2137-2156, 2158-2161, 2166-2187) authorizing amendment of charter so as to allow bank to establish branch. Bruner v. Citizens' Bank [Ky.] 120 SW 345.

15. Bruner v. Citizens' Bank [Ky.] 120 SW 345.

16. Banking act (Sess. Laws 1907, c. 225, p. 518) construed to authorize establishment of branch banks. State v. Engle, 50 Wash. 207, 96 P 1045.

17. Where cashier borrowed money and executed note therefor, which note was void as being in violation of Rev. St. 1899, § 1281, providing that no bills payable shall be made without consent of board of directors, bank was nevertheless liable for amount so borrowed. Union Nat. Bank v. Lyons [Mo.] 119 SW 540. Rev. St. 1899, § 1281 (Ann. St. 1906, p. 1048), providing that no bills payable shall be made except with the consent of board of directors, merely makes a note given by cashier in violation thereof void, and does not prevent a recovery of money borrowed and received by the bank in an action in assumpsit. Id.

18. Where banks named as depositories of public moneys continued relation after expiration of term and city brought suit on contract rate of interest for time banks continued relation after expiration of term, contract was not extended by tacit reconduction. City of New Orleans v. Liquidators of Louisiana Nat. Bank [La.] 49 S 274.

19. Dreifus v. Colonial Bank & Trust Co. [La.] 48 S 649.

20, 21. Allen v. Luke, 163 F 1018.

22. Trustees of a savings bank had no authority to appoint an attorney for the term of one year where by-laws provided that such attorney should hold at the pleasure of the trustees. Rebadow v. Buffalo Sav. Bank, 63 Misc. 407, 117 NYS 282. Invalidity of contract cannot be pleaded by bank for purpose of avoiding payment where services have been performed. Id.

23. Rev. St. 1899, § 1294 (Ann. St. 1906, p. 1054), prohibiting cashier from indorsing, selling, pledging, or hypothecating any notes, bonds, or other obligations received by the bank for money loaned until he is first authorized by the board of directors to do so, does not prohibit cashier from

The cashier of a bank is usually its manager, and may, while acting as such,[24] transfer its assets as collateral,[27] or to misapply its funds.[28] Nor can the officers surrender the right of the stockholders to control the bank's liquidation.[29] A bank is bound by the acts of its officers acting as agent or representative of the bank within the scope [30] or apparent scope of their authority [31] when the persons dealing with such officers have no notice that they are acting beyond their authority,[32] and is also bound by their acts, the authority for doing which it is estopped to deny;[33] but it is not bound by their acts for which no authority exists either

borrowing money in usual course of business and giving note therefor. Union Nat. Bank of Lyons [Mo.] 119 SW 540. Where cashier borrowed money in usual course of business and hypothecated note owned by bank as collateral therefor, although such hypothecation was made without authority and was void, it would not nullify contract of loan. Id. Section 30 of the act entitled "An act to authorize free banking," passed Mar. 21, 1851, and amended in 76 O. L., 72, enumerating and defining certain acts of officers and others "of any banking company" as penal, although worded in general language, is limited in its operation to banks organized under that act. State of Ohio v. Gibbs, 7 Ohio N. P. (N. S.) 345.

24. General authority of cashier of private banker to transact business ceasing upon banker's failure, delivery of note by him after banker's failure was made without authority. Casale v. Guion, 116 NYS 294.

25. May collect debt. Security Sav. Bank v. Smith [Iowa] 119 NW 726.

26. Where bank cashier in making loan or stock knew that ownership was in another and that such owner was an invalid, the bank was put upon inquiry. Groff v. Stitzer [N. J. Eq.] 72 A 970. Bank not bound by knowledge of its bookkeeper and assistant cashier that a certain firm for which was also bookkeeper was insolvent. Morris v. First Nat. Bank [Ala.] 50 S 137.

27. Bank of Gloster v. Hindman [Miss.] 50 S 65.

28. Manager of private bank conducted by partnership had no authority to make payments on notes purporting to be firm notes but in fact being individual obligations of one of members alone, where such payment would amount to payment of partner's individual debts out of bank's funds. Blake v. Third Nat. Bank [Mo.] 118 SW 641.

29. That bank in a friendly suit asked court for appointment of receiver was not a renunciation of its rights to a liquidation independently of court. Dreifus v. Colonial Bank & Trust Co. [La.] 48 S 649.

30. Statements by cashier of bank whose duty it was to know the credit of its customers, that check drawn upon it was good, and indorsement made by him that on return properly indorsed it would be paid, estopped bank as against a bona fide holder from denying want of funds to pay it and that it would be paid when indorsed. Milmo Nat. Bank v. Cobbs, [Tex. Civ. App.] 115 SW 345. In an action against a bank for repairs and storage of an automobile used by vice president in attending to bank's business, bank was liable since vice president had been authorized by board of directors to employ all persons necessary in the business of the bank. Seadale v. Montgomery, 113 NYS 600. Bank cashier had no authority under by-laws to make verbal agreement extending to lessee, who had rented room from bank for use as billiard and pool room, right to install moving picture show, it not appearing that board of directors had consented to such action on cashier's part, such matter being under by-laws defining cashier's duties within director's control. Dycus v. Traders' Bank & Trust Co. [Tex. Civ. App.] 113 SW 329. Although president may direct acts of teller, he is not the principal of the latter, but an agent of the corporation and may bind it by acts within scope of his authority. Ex parte Rickey [Nev.] 100 P 134. Receipt of deposit by receiving teller of a private bank binds banker. Id.

31. Where cashier told sureties on note that it would proceed to enforce its rights against the only available real estate the maker had and that they need not bring action themselves, and they relied upon such agreement, the bank was estopped to deny authority of cashier to make the agreement. Security Sav. Bank v. Smith [Iowa] 119 NW 726. Cashier of a savings bank, having power to negotiate a loan and execute papers therefor, has implied power to take an assignment of a mortgage to protect bank's interest as against debtor's attaching creditors. Gerrity v. Wareham Sav. Bank, 202 Mass. 214, 88 NE 1084.

32. Where cashier's power to do a certain act depends upon a condition precedent which is prescribed by a public statute, all persons are bound to take notice thereof. Union Nat. Bank v. Lyons [Mo.] 119 SW 540. Power of cashier to indorse, sell, pledge, or hypothecate paper held by bank without previous authority of the board of directors. Rev. St. 1899, § 1294. Id.

33. Bank bound by act of cashier who procured conveyance to bank of property mortgaged to secure its debt, and guaranteed reconveyance if redeemed within one year, bank having received benefit of such transaction. Porter v. Farmers' & Merchants' Sav. Bank [Iowa] 120 NW 633. Authority of bank cashier to fill out employer's certificate of correctness of bookkeeper's account as prerequisite for renewal of fidelity bond could not be questioned when bond had been executed on account thereof, bank having through long usage permitted cashier to act in such matters. National Bank v. Equitable Trust Co. [Pa.] 72 A 794.

by virtue of their office or their agency,[34] nor by acts unauthorized to the knowledge of the persons dealing with them.[35] The bank is not bound by representations made by its officers in their own behalf,[36] and one who deals with a bank cashier in a matter wherein the cashier's interests are adverse to the bank is chargeable with notice of the cashier's want of authority.[37] A depositor may ratify the unauthorized acts of the cashier relative to his deposit.[38] The burden is upon the one relying on the officer's authority to show that he had it.[39]

Winding up.[See 11 C. L. 372]—Under the California statute the commissioners may order a bank into involuntary liquidation, if they unanimously[40] find that it is unsafe for the bank to continue business.[41] The statute applies to banks organized prior to its adoption and supersedes the general insolvency act.[42] In some states a bank may wind up its affairs under the supervision of the bank commissioners,[43] and may transact business incident thereto.[44] Under the Louisiana

34. Bank not bound by stipulation of discount clerk in suit to which it was not a party, to effect that he was holder of bond and mortgage assigned to him for use of bank, where he had executed an unrecorded assignment thereof to bank. Slade v. Bennett, 118 NYS 278.

35. Defendant bank in action for reimbursements for losses sustained by plaintiff arising from stock alleged to have been bought through bank president's misrepresentations could show that plaintiff had knowledge of character of stock alleged to have been misrepresented. Day's Committee v. Exchange Bank [Ky.] 116 SW 259.

36. Bank not liable for false and fraudulent representations as to financial standing of a certain corporation made by its officers on their own behalf and not in their official capacity. Simons v. Cissna [Wash.] 100 P 200.

37. Where cashier indebted to plaintiff promised to deposit amount of debt to plaintiff's credit but failed to do so and nevertheless allowed plaintiff to draw on bank, bank's liquidators might recover amount so paid from plaintiff. Langlois v. Gragnon [La.] 49 S 18.

38. Depositor, by alleging in complaint in action against bank for balance of account that certificate had been deposited to his credit, ratified cashier's unauthorized acts in indorsing depositor's name to certificate and crediting him with interest thereon, although he made no memorandum on books of bank securing deposit or credit therefor. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 98 P 509.

39. Burden in action to recover money paid on check was on bank to show that cashier of maker's bank had authority to draw such check. Farmers' & Merchants' Bank v. Germania Life Ins. Co., 150 N. C. 770, 64 SE 902. Evidence consisting of seal of bank and of testimony of vice-president held sufficient to show that he and cashier had authority to execute assignment of promissory note. Stone v. Gray [Cal. App.] 103 P 155.

40. Although St. 1903, p. 365, c. 266, as amended by St. 1905, p. 304, c. 296, declares that commissioners shall unanimously decide that it is unsafe for the bank to continue business, fact that there is a vacancy in one of commissionerships does not suspend the power of commissioners. People v. Bank of San Luis Obispo, 154 Cal. 194, 97 P 306.

41. Finding by such commissioners that the bank is insolvent is a sufficient compliance with the requirement that they shall find that it is unsafe for bank to continue business. People v. Bank of San Luis Obispo, 154 Cal. 194, 97 P 306. All that is necessary to sustain judgments ordering bank into involuntary liquidation under Act Mar. 24, 1903 (St. 1903, p. 365, c. 266, as amended Mar. 20, 1905, St. 1905, p. 304, c. 296) is that it appeared to commissioners and that they unanimously decided that it was unsafe for defendant bank to continue to transact business, that they notified the governor and attorney general of their action, that he commenced the action and that as a matter of fact bank was insolvent, and it was not necessary that the commissioners have power to take charge of bank pending proceedings. Id.

42. Act of Mar. 24, 1903 (St. 1903, p. 365, c. 266, as amended Mar. 20, 1905, St. 1905, p. 304, c. 296), prescribing the duties and powers of the board of bank commissioners and providing that if it shall find that a bank is conducting its business in an unsafe manner the commissioners shall take possession and notify the governor and attorney general, applies to every banking corporation doing business in the state, even if organized prior to adoption of such act. People v. Bank of San Luis Obispo, 154 Cal. 194, 97 P 306. As far as banking corporations are concerned, such act supersedes provisions of general insolvency act and is applicable in all cases of insolvency of such corporations. Id.

43. Under bank commission act (St. 1895, p. 172, c. 167), a bank in process of liquidation may continue the management of its affairs under direction of commissioners. Merced Bank v. Price [Cal.] 98 P 383.

44. Bank in course of liquidation may, under bank commission act (St. 1895, p. 172, c. 167), make an absolute transfer of a note and mortgage payable to it. Merced Bank v. Price [Cal.] 98 P 383. Where bank commissioners were supervising the winding up of an insolvent bank and had knowledge that the bank transferred a certain note and mortgage in the due course of liquidation, it will be presumed that they sanctioned such transaction as done in process of liquidation. Id. Bank owning

statute liquidation may be had by the consent of the stockholders [45] independently of the courts, and such right is not subject to surrender by the officers of the bank.[46] In some states the directors must be made parties to a proceeding for the appointment of a receiver.[47] The petition must be in proper form [48] and must set forth facts justifying the appointment.[49] The appointment may be made on the filing of the bill or at any time afterwards.[50] and is not subject to collateral attack [51] although made ex parte and without prayer for process.[52] The administration of the receiver is for the benefit of the stockholders as well as for the creditors.[53] He may ratify or repudiate unauthorized acts of the bank officers,[54] and may in the exercise of his duty to collect all the available assets [55] bring actions therefor subject to the ordinary defenses.[56] That a receiver has been appointed does not prevent the creditors from suing the stockholders on their liability.[57] An

note and mortgage subject to lien of third party and equally interested with him in collection thereof may commence action thereon in its own name. Id. Under St. 1895, p. 177, c. 167, § 12, giving board of bank commissioners power of limiting number of employes and their salaries when engaged in winding up insolvent bank, board of directors of bank may fix such salaries anywhere within limits so made. Bank of Mendocino v. Brown, 8 Cal. App. 566, 97 P 533.

45. Rev. St. § 687, and art. 9 thereof, providing for liquidation with assent of stockholders, contemplates assent of three-fourths of stock represented at meeting, and not three-fourths of entire stock. Dreifus v. Colonial Bank & Trust Co. [La.] 48 S 649.

46. Where a bank in a friendly suit asks court for appointment of receiver, it does not thereby renounce its rights to a liquidation independently of the court, since officers of the bank are without authority to surrender rights of stockholders under charter to control liquidation of bank. Dreifus v. Colonial Bk. & T. Co. [La.] 48 S 649.

47. Directors must be made parties under Comp. Laws, § 3212, providing that injunction shall not be granted without due notice of application, and notice to show cause why receiver should not be appointed is not sufficient. Golden v. Averill [Nev.] 101 P 1021.

48. Petition asking for appointment of receiver and for judgment allowing state bank examiner in charge of bank to retain money out of assets of bank to pay debt claimed by state is not subject to criticism that no final judgment is asked or relief prayed for. Booth v. State, 131 Ga. 750, 63 SE 502.

49. Bill for appointment of receiver, charging that fraudulent conduct of bank's directors and managers had made it insolvent, set out a condition of things that justified immediate appointment of a receiver under Ann. Code 1892, § 574. Benjamin v. Staples [Miss.] 47 S 425.

50. Such appointment must prevail as against third party whose attachment was filed after receiver took charge under process issued on bill. Benjamin v. Staples [Miss.] 47 S 425.

51. Where bill of creditors and depositors for appointment of receiver sets forth necessity for immediate appointment of a receiver under Ann. Code 1892, § 574, and such receiver is appointed and takes possession, such proceeding cannot be attacked collaterally by a third person holding an attachment levied subsequent to the appointment of such receiver. Benjamin v. Staples [Miss.] 47 S 425.

52. Benjamin v. Staples [Miss.] 47 S 425.

53. Buist v. Williams, 81 S. C. 495, 62 SE 859.

54. Where cashier has employed funds of bank to pay his own indebtedness on a bond purchase, receiver of bank may make election to ratify unauthorized purchase of bonds by cashier who represented to vendor that he purchased for bank, or may repudiate transaction and sue to recover the money, but not both. Davenport v. Walker, 132 App. Div. 96, 116 NYS 411.

55. Judgment against sureties on bond of defaulting treasurer of savings bank constitutes an asset of bank. Bank Com'rs v. Watertown Sav. Bank [Conn.] 70 A 1038. Note given by bondsmen on defaulting cashier's bond is an asset, and defense of want of consideration cannot be set up as against receiver. People's Bank v. Stroud [Pa.] 72 A 341. May bring action against each stockholder individually in a separate action. Conway v. Owensboro Sav. Bk. & T. Co., 165 F 822. Double **liability of stockholders** in insolvent bank imposed by Ky. St. 1903, § 547, is not an asset subject to administration by receiver under Ky. St. 1903, § 616, since it necessarily constitutes a trust fund which may be administered in a court of equity by creditors suing for benefit of all without a prior judgment at law. Conway v. Owensboro Sav. Bank & Trust Co., 165 F 822.

56. Defense that bank had assumed note sued on subject to contemporaneous parol agreement made by its predecessor that defendant was to have election at end of given time to take mining stock for which note was given or to rescind contract could be set up against receiver in suit on note. Paulson v. Boyd 137 Wis. 241, 118 NW 841. It is no defense to an action or notes by receiver that officers had agreed to accept substitute securities for notes from defendant where such substitution paper had not been presented prior to failure. Fowler v. Peet, 170 F 620.

57. It makes no difference that stockholders are not parties to proceedings under which receiver was appointed. Buist v. Williams, 81 S. C. 495, 62 SE 859.

act creating a preference to the assets of an insolvent trust company does not apply to assignments made prior to its passage.[58] The state is entitled to a preference as to the assets of a bank that was a state depository.[59] One who sustains fiduciary relations to a deposit is not entitled to a preference where such deposit is not regarded as special.[60] No preference is created by a loan through clearing-house certificates,[61] where there is no fraud and the bank has derived the benefit therefrom.[62] Presentation of the pass book is a sufficient exhibition of a claim for accrued interest against an insolvent savings bank.[63] Attorney fees for the appointment of receiver should be paid from the funds realized for the creditors before distribution among them.[64] An injunction restraining the receiver from proceeding against those secondarily liable tolls the statute of limitations as to the right to make distribution.[65]

Stockholders' individual liability. See 11 C. L. 373—Under the Kentucky statute, the individual liability of stockholders may be adjudicated either in an equitable suit by one creditor for the benefit of all or in a suit brought by the receiver against each stockholder separately.[66] One who has ceased to be a stockholder may be estopped to set up such fact by allowing his name to remain upon the books.[67] Under certain circumstances the liability may subsist although the stockholders have become the holders of other stock issued in place of that originally held.[68] Stockholders sued upon their liability in receivership proceedings are entitled to

58. Act of May 8, 1907 (P. L. 192), establishing an order of preference in distribution of assets of an insolvent trust company among creditors, does not apply to a distribution under an assignment made prior to its passage. In re Prudential Trust Co.'s Assignment [Pa.] 72 A 798.

59. Nothing in act creating state depositories or amendatory acts that modifies right of state to priority of payment out of assets of insolvent bank that is state depository, as against individual creditors and depositors. Booth v. State, 131 Ga. 750, 63 SE 502.

60. Even though bank had knowledge of fiduciary character of fund. Butcher v. Butler, 134 Mo. App. 61, 114 SW 564.

61. Where bank upon verge of insolvency issued its notes and collaterals for clearing house certificates to be used by it as money, such transaction was in nature of a loan, and although amount of collateral exceeded amount of debt, no such trust as is prohibited by Civ. Code 1895, § 2695, par. 1, was thereby created (Booth v. Atlanta Clearing House Ass'n [Ga.] 63 SE 907), nor did such transaction create a preference of creditors under Civ. Code 1895, § 1979, the consideration passing being a present one (Id.).

62. Where bank upon verge of insolvency issued notes and collaterals to clearing house association for clearing house certificates, creditors of bank could not, upon ground of illegality in absence of fraud, set aside such contract and recover collateral, the bank having derived the benefit therefrom. Booth v. Atlanta Clearing House Ass'n [Ga.] 63 SE 907.

63. Where statute requires the creditors of insolvent to exhibit their claims, it is a sufficient compliance for the depositors to present their passbooks to the receiver of a savings bank in order to make a claim for accrued interest. Bank Com'rs v. Watertown Sav. Bank [Conn.] 70 A 1038.

64. Buist v. Williams, 81 S. C. 503, 62 SE 859.

65. In a proceeding to secure the distribution of a fund paid into court by original stockholders of reorganized insolvent bank, on condition that if they had made overpayment excess should be returned to them, held that receiver's right to have fund distributed to creditors was not barred by statute of limitations where such payment was made within six years after appointment of receiver and six years had not elapsed since fund was paid, during which time receiver was restrained from proceeding against those secondarily liable. State v. Germania Bank, 106 Minn. 446, 119 NW 61.

66. Stockholders' individual liability under Ky. St. 1903, § 547, may be adjudicated either in a suit in equity by one creditor for benefit of all, or in suit brought by receiver against each stockholder separately. Conway v. Owensboro Sav. Bank & Trust Co., 165 F 822. Evidence held to show that all remedies against stockholders primarily liable for stock issued prior to reorganization of insolvent bank had been exhausted. State v. Germania Bank, 106 Minn. 446, 119 NW 61.

67. Where retention of name on books was solely due to neglect of duty by officers, no estoppel arose. Kimball v. Opsey [C. C. A.] 164 F 830.

68. Where an insolvent bank was reorganized by order of court and new stock issued and it was provided that the liability of the original stockholders should subsist, such original stockholders were liable on an assessment of their stock as stockholders and not as mere transferrers. State v. Germania Bank, 106 Minn. 446, 119 NW 61.

credit for the net sum realized in such proceedings after deducting expenses.[69] Creditors of an insolvent bank may sue the stockholders upon their liability, although a receiver has been appointed for collection of assets[70] and under the California statute the absence of the stockholder from the state does not toll the statute of limitations on such liability.[71]

§ 3. *National banks; officers and examiners.*[72] *Powers and liabilities of bank and officers.* See 11 C. L. 874—A national bank has power under the banking laws to intrust to its agents such authority as is required to meet all of the legitimate demands of its authorized business,[73] but such authority must be reasonable.[74] It may in certain cases incur liability exceeding the amount of paid in capital stock,[75] and, where it has received property under an ultra vires agreement, it must nevertheless account therefor.[76] Although not permitted to loan money in real estate,[77] a national bank may, nevertheless, enforce a mortgage held as collateral security.[78] Only the federal government may question the validity of the act of a national bank in taking a mortgage on real estate[79] or in making loans in excess of the amount allowed by statute.[80] The by-laws of a national bank as to issuance of new stock certificates do not preclude a court of equity from ordering issue of new certificates.[81] The common-law duty rests upon the directors of national banks to diligently and honestly discharge their trust aside from the provisions of the national banking act defining their duties.[82] They are liable to the

69. Stockholders in a suit to enforce their statutory liability are not liable for fees of attorneys employed by creditors to prosecute their action against the bank or against the stockholders. Buist v. Williams, 81 S. C. 495, 62 SE 859. Stockholders sued on their stock liability are entitled to credit for the net sum realized from the receivership of the bank after deducting the expenses of the administration. Id.

70. Buist v. Williams, 81 S. C. 495, 62 SE 859.

71. Code Civ. Proc. § 351, excluding from period of statute of limitations time during which defendant has been absent from state, does not apply in action to enforce stockholder's liability, Code Civ. Proc. § 359, expressly providing that such former section shall not apply to actions of that character. King v. Armstrong [Cal. App.] 99 P 527.

72. Search Note: See notes in 3 C. L. 415; 7 Id. 368; 11 Id. 318; 25 L. R. A. 546; 58 Id. 82; 3 Ann. Cas. 1155.

See, also, Banks and Banking, Cent. Dig. §§ 879-1127; Dec. Dig. §§ 232-288; 5 Cyc. 573-604; 21 A. & E. Enc. L. (2ed.) 319; 3 A. & E. Enc. P. & P. 260.

73. Agent of bank appointed for purpose of seeing that bank's funds were applied to feeding certain cattle upon which it had a mortgage had authority to hire foreman at a stipulated wage per month. Ricker Nat. Bank v. Stone [Okl.] 97 P 577.

74. Could not bind bank to pay large amount owing to foreman by his previous employers. Ricker Nat. Bank v. Stone [Okl.] 97 P 577.

75. Power of national bank to incur liability exceeding amount of paid in capital stock in case of moneys deposited or collected is broad enough to include a bond given to secure deposits of county money. Rev. St. U. S. § 5202 (U. S. Comp. St. 1901, p. 3494). Gratiot County Sup'rs v. Munson [Mich.] 16 Det. Leg. N. 435, 122 NW 117.

76. Bank could not defend in action by depositor for deposit by pleading that it made with him an ultra vires contract to pay out the money to a third person upon production and deposit of collaterals for his benefit, when evidence showed that it paid out money without taking up collaterals agreed upon. First Nat. Bank v. Henry [Ala.] 49 S 97.

77. Transfer of depositor's account to president and cashier of national bank for purpose of real estate investment nugatory in absence of showing that officers were depositor's agents, statute prohibiting national banks from lending on real estate security. Short v. Butler [Mo. App.] 117 SW 114.

78. Might enforce bond and mortgage held as collateral in name of employe. Slade v. Bennett, 118 NYS 278.

79. Judgment of foreclosure obtained by national bank through which defendants in suit in trespass to try title claimed. Taylor v. Davidson [Tex. Civ. App.] 120 SW 1018.

80. That loan made by national bank was in violation of Rev. St. § 5200 (U. S. Comp. St. 1901, p. 3494), forbidding loan to single borrower of amount more than one-tenth of capital stock actually paid in, could not be set up by holder of second mortgage on property already mortgaged to bank, such holder having knowledge thereof. The Seattle [C. C. A.] 170 F 284.

81. By-law of national bank enacted pursuant to act of congress, providing that a new certificate of stock shall not be issued until the old certificate has been produced and canceled, could not prevent a court of equity from ordering cancellation of certificate held and claimed by trustee upon removal and directing bank to issue new one. Letcher's Trustee v. German Nat. Bank [Ky.] 119 SW 236.

82, 83, 84. Allen v. Luke, 163 F 1018.

stockholders for losses sustained through their negligence or misconduct.[83] A cause of action based upon such duty survives against their executors,[84] and a complaint thereon must set forth facts essential to a recovery.[85]

Rights and liabilities of stockholders. See 11 C. L. 374—A stockholder has a right to inspect the books and papers of the bank for legitimate purposes,[86] and may compel the officials to allow such an examination.[87] A stockholder ceases to be such upon giving the written notice of withdrawal provided for by statute, and his liability does not extend to the time of appraisement.[88] One who is not a stockholder may be liable as such if he has permitted his name to remain upon the books after ceasing to be stockholder.[89] One holding stock in a national bank as trustee is not personally liable as a stockholder.[90] An assessment cannot be made upon one who has ceased to be a stockholder.[91]

Enforcement of stockholders' liability. See 11 C. L. 375—An absolute sale and transfer of stock of a national bank by a holder cannot subsequently be avoided and the transferor held liable for an assessment unless is appears that at the time of the transfer the bank was insolvent and that the transferor knew it.[92]

Receivers. See 11 C. L. 375

State interference and powers of state courts. See 9 C. L. 333—An attachment cannot be legally issued under the statutes of the United States against a national banking association prior to judgment by any state, county, or municipal court.[93]

Usury by national banks. See 9 C. L. 333—A cause of action for the penalty for receiving usurious interest by a national bank arises immediately upon its payment and mutual application by the creditor and debtor.[94] The federal statute does not apply to a recovery of the principal by an innocent holder.[95] A state stat-

85. Not necessary to allege formal vote of defendants sued as directors for losses on loans sustained through their negligence authorizing or approving such loans. Allen v. Luke, 163 F 1018. Complaint charging directors with liability for losses through loans made by them held to set out facts with sufficient fullness. Id.

86. May inspect for purpose of suit against directors of the bank. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893.

87. State courts have jurisdiction to compel officials of national banks to allow stockholders to inspect records. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893.

88. Act July 12, 1882, c. 290, § 5, 22 Stat. 163 (U. S. Comp. St. 1901, p. 3458), providing that upon amendment of articles of association of national bank a stockholder not assenting to amendment may withdraw by giving written notice within thirty days after approval, and providing for appraisal of value of stock. Kimball v. Apsey [C. C. A.] 164 F 830.

89. Stockholder who had given written notice of withdrawal as provided for by statute (Act July 12, 1882, c. 290, § 5, 22 Stat. 163 [U. S. Comp. St. 1901, p. 3458]), but whose name was retained upon stock book because of failure to have appraisers appointed, was not thereby estopped to deny that he was a stockholder. Kimball v. Apsey [C. C. A.] 164 F 830.

90. Rev. St. U. S. § 5152 (U. S. Comp. St. 1901, p. 3465) is not confined to express trusts under deeds, wills, or orders of court, but extends to one holding stock in national bank as trustee for his minor children, although stock purchased with his own money. Fowler v. Gowing [C. C. A.] 165 F 891.

91. Receiver of national bank could not collect assessment upon stock of one who had given notice of withdrawal as provided for by statute but who still retained stock and whose name was still carried upon books, he not being estopped to deny his liability. Kimball v. Apsey [C. C. A.] 164 F 830.

92. Where petition to make defendant liable for assessment in national bank stock did not allege insolvency of national bank at time of transfer, and where no evidence was introduced to show that transferrer had knowledge of insolvency, a verdict for defendant was properly directed. Vandagrift v. Rich Hill Bank [C. C. A.] 163 F 823.

93. Rev. St. U. S. § 5242 (U. S. Comp. St. 1901, p. 3517). McBride v. Illinois Nat. Bank, 128 App. Div. 503, 112 NYS 794.

94. Two year statute of limitations begins to run upon cause of action for twice interest paid under Rev. St. U. S. § 5198 (U. S. Comp. St. 1901, p. 3493), at time of payment of usurious interest with knowledge and consent of debtor, even though principal and legal interest remains unpaid. McCarthy v. First Nat. Bank [S. D.] 121 NW 853.

95. Under Rev. St. U. S. §§ 5197, 5198 (U. S. Comp. St. 1901, p. 3493), a bank which is the innocent holder for value of a bond and mortgage tainted with usury may nevertheless recover the principal due. Slade v. Bennett, 118 NYS 278.

ute dispensing with the requirement that the complainant must pay the principal and legal interest before he can obtain relief under the state laws applies to national banks.[96]

§ 4. *Savings banks.*[97] See 11 C. L. 375—The courts will not interfere with reasonable rules made by a savings bank pursuant to statute for the regulation of its business without substantial reason therefor.[98] A savings bank depositor is not deprived of his right to his deposit although he has lost his passbook.[99] In the absence of negligence, a savings bank is not liable for a payment of deposits to the wrong person, where the by-laws as incorporated in the contract with the depositor provides that a payment made upon presentation of the passbook shall discharge the bank,[1] but the bank may refuse to pay when the book is not presented.[2] A deposit in a savings bank may be assigned to a trustee and such assignment is not rendered invalid by an express reservation of the power of revocation.[3] Although the statute prohibits a savings bank from taking an assignment of a mortgage, if such assignment is made in good faith, it is nevertheless valid.[4] The depositors in the savings department of an insolvent trust company are entitled to share in the distribution of the general assets in the same way and to the same extent as the company's other creditors,[5] but, where securities are set aside for the benefit of savings bank depositors, such fund must bear the expense incident to its administration.[6]

§ 5. *Loan, investment and trust companies.*[7] See 11 C. L. 375—A trust company is liable to its client for a breach of trust relative to its employment.[8] Where

96. Rev. St. U. S. § 5198, relating to usury by national banks, provides no remedy where usurious interest has been charged but not paid, but does prescribe a penalty, the forfeiture of the entire interest, and such penalty being the same as that under Code 1907, § 4623, the statute abrogating requirement of complainant to offer to do equity by paying principal and legal interest before obtaining relief under state statute applies to usury by national banks as well as to others. First Nat. Bank v. Clark [Ala.] 49 S 807.

97. Search Note: See notes in 5 C. L. 356; 7 Id. 371; 69 L. R. A. 317; 105 A. S. R. 728; 1 Ann. Cas. 100, 904; 2 Id. 259.

See, also, Banks & Banking, Cent. Dig. §§ 1128-1214; Dec. Dig. §§ 289-309; 5 Cyc. 604-612; 24 A. & E. Enc. L. (2ed.) 1140.

98. Rule requiring passbook to be presented when money is drawn. Rosenthal v. Dollar Sav. Bank, 61 Misc. 244, 113 NYS 787.

99. Although the banking law provides that no savings bank may make a payment except upon production of the passbook, the absence of such passbook does not destroy depositor's right to the deposit, and such deposit may be recovered when loss and ownership of the book are undisputed. Kenney v. Harlem Sav. Bank, 61 Misc. 144, 114 NYS 749.

1. Evidence held to show that defendant bank was not negligent in making payment to one who presented passbook and answered identification questions, although such party had wrongfully obtained possession of such book, by-law of bank incorporated in contract of deposit providing that payment where book was presented should discharge book. Kenney v. Harlem Sav. Bank, 61 Misc. 144, 114 NYS 749.

2. Under rule of the bank and of § 122 of the banking law (Laws 1892, p. 1899, c. 689), providing that passbook must be produced upon any withdrawal of deposits, bank was justified in refusing to honor an assignment of a savings bank deposit of husband and wife made by husband where wife refused to deliver the passbook. Rosenthal v. Dollar Sav. Bank, 61 Misc. 244, 113 NYS 787. Even though bank's by-law required that no deposits should be withdrawn unless passbook is presented, valid gift of funds deposited might be made with bank's consent by order upon bank. Candee v. Connecticut Sav. Bank [Conn.] 71 A 551.

3. McEvoy v. Boston Five Cents Sav. Bank, 201 Mass. 50, 87 NE 465.

4. Under limitations as to investments imposed by Rev. Laws 1902, c. 113, § 26, cl. 1. Gerrity v. Wareham Sav. Bank, 202 Mass. 214, 88 NE 1084.

5. Capital stock, being in the nature of collateral security, is for benefit of all the creditors. Bank Com'rs v. Security Trust Co. [N. H.] 71 A 377.

6. Bank Com'rs v. Security Trust Co. [N. H.] 71 A 377. By enactment of Pub. St. 1901, c. 165, § 18, legislature did not intend to create two separate institutions of such trust companies as were engaged in a savings bank business, but did intend that the securities set apart under such section should be treated as a fund for the special benefit of the depositors in the savings department. Id.

7. Search Note: See note in 72 A. S. R. 206.

See, also, Banks and Banking, Cent. Dig. §§ 1215-1223; Dec. Dig. §§ 310-317; 5 Cyc. 612, 613; 19 A. & E. Enc. L. (2ed.) 477.

8. Where trust company, employed by plaintiff to collect a deficiency judgment,

a trust company has no banking powers, the statute relating to the double liability of stockholders in banks does not apply.[9] A receiver of a trust company under a stockholder's bill is not superseded by a receiver appointed at the instance of the attorney general by another court, under the Pennsylvania act creating a banking department of the commonwealth.[10] Trust companies that are, under the laws by virtue of which they were organized, neither banks of issue nor of discount and deposit are not subject to a statute giving preferences to bank depositors.[11]

§ 6. *Deposits and repayment thereof; checks, drafts, certificates, receipts, credits.*[12]—See 11 C. L. 375—Checks are negotiable instruments, and rights and liabilities between drawer, drawee, and indorsers, not involving the bank, are accordingly elsewhere treated.[13] While failure to present a check paid through a clearing house and found not good, within the time prescribed by its rules, is not per se a payment, it may be treated as paid, and recovery thereon had by the member holding the check as of a payment made under a mistake of fact.[14] A banking custom which is contrary to the rules applying to commercial paper does not bind the bank as a bona fide holder.[15]

*Relation of banker and depositor.*See 11 C. L. 376—The relation between the bank and the depositor is that of debtor and creditor,[16] although the fund deposited belongs to the public.[17] The relation arises when the deposit is placed to the credit

allowed its secretary to purchase such judgment upon which more than principal was subsequently realized without apprizing plaintiff of the fact, such action constituted a breach of trust and company was liable to plaintiff for amount. Fidelity Trust Co. v. Poole, 136 Ill. App. 266.

9. Act of May 11, 1874 (P. L. 135), imposing a double liability upon stockholders of banks, banking companies, and other banking institutions, does not apply to a trust company incorporated under Act of April 29, 1874 (P. L. 73), and supplemental acts, since under latter act trust company had no banking powers. De Haven v. Pratt [Pa.] 72 A 1068. Corporations intended to be reached by Act May 11 1874 (P. L. 135), imposing double liability on stockholders of banks, banking companies, and other banking institutions, are those that do business as banks, that is, those that are engaged in loaning and discounting moneys as banks do. Id. Words "trust companies" used in Act May 11, 1874 (P. L. 135), imposing on stockholders in banks, banking companies, saving fund institutions, trust companies and all other corporations engaged in a banking business, a double statutory liability, has reference to trust companies organized before passage of Act April 29, 1874 (P. L. 73), with power to engage in banking. Id.

10. Jones v. Lincoln Sav. & Trust Co., 222 Pa. 325, 71 A 209.

11. Trust companies created under general corporation act of April 29, 1874 (P. L. 73), and deriving their privileges and powers from the act of 1889 and other supplementary statutes, are neither banks of issue nor of discount and deposit, and Act of April 26, 1844 (P. L. 419), April 16, 1850 (P. L. 477), and May 3, 1876 (P. L. 171), giving a preference to bank depositors, do not apply. In re Prudential Trust Co.'s Assignment [Pa.] 72 A 798.

12. Search Note: See notes in 3 C. L. 420, 425; 5 Id. 357, 360; 12 L. R. A. 492; 15 Id. 134, 305; 16 Id. 516; 17 Id. 580; 21 Id. 440; 23 Id. 111, 164; 24 Id. 737; 27 Id. 426, 636; 31 Id. 454; 32 Id. 373, 769; 34 Id. 532; 36 Id. 675; 52 Id. 790; 70 Id. 959; 1 L. R. A. (N. S.) 246, 252, 790, 1110; 5 Id. 886; 7 Id. 694, 744; 8 Id. 944; 10 Id. 754, 1052; 12 Id. 355; 15 Id. 519, 1100; 16 Id. 918; 4 A. S. R. 202; 17 Id. 807, 889; 19 Id. 609; 47 Id. 389; 75 Id. 42, 43; 80 Id. 865; 94 Id. 641; 111 Id. 419; 118 Id. 348; 1 Ann. Cas. 632; 2 Id. 117, 206, 539; 6 Id. 189, 774, 818, 939; 6 Id. 632; 7 Id. 819; 8 Id. 116; 10 Id. 899, 988; 11 Id. 245.

See, also, Banks and Banking, Cent. Dig. §§ 289-538, 725-737; Dec. Dig. §§ 110-155, 188-195; 5 Cyc. 459-463, 478, 513-522, 527-656; 3 A. & E. Enc. L. (2ed.) 822; 5 Id. 801, 1028; 6 Id. 113; 18 Id. 831.

13. See Negotiable Instruments.

14. Citizens' Cent. Nat. Bank v. New Amsterdam Nat. Bank, 128 App. Div. 554, 112 NYS 973. Under the rule of the New York Clearing House Association, providing that checks paid through the clearing house and found not good should be returned before 3 o'clock on the same day, the bank to which such a check is returned is not entitled to refuse payment thereof when the return is not made until after 3 o'clock, providing an attempt to return check promptly has been made and that there has not been in the meantime any change to its detriment. Id.

15. Bank which is the last indorsee on a check is under no obligation to follow custom of banks to look to its immediate indorser for repayment. Choteau Trust & Banking Co. v. Smith [Ky.] 118 SW 279. Since it would thereby be deprived of its election as to which of parties to the paper it wishes to sue. Id. Failure of bank to follow such custom cannot be held to be evidence of a fraudulent conspiracy to defeat equities of maker. Id.

16. Money deposited in a bank ceases to be the money of the depositor and becomes the money of the bank; the bank is not the custodian thereof. In re Prudential Trust Co.'s Assignment [Pa.] 72 A 798.

17. Deposit by a town supervisor of funds

of the depositor.[18] The bank must keep careful account with the depositor [19] and must act in accordance with the terms of the contract of deposit,[20] which may be made with depositors as joint owners.[21] By implied condition, the state may terminate the relation when conditions warrant it.[22] In West Virginia an account rendered and retained does not become an account stated, as between banker and depositor.[23]

Repayment of deposits.[See 11 C. L. 877]—A bank is under an absolute obligation to repay deposits [24] to the person entitled thereto,[25] but such duty is conditioned upon the existence of deposits in its hands.[26] Payment must be made on the depositor's direction,[27] otherwise it is liable to the depositor for payments so made.[28]

belonging to town with a private banker without any agreement that funds should be kept separate or that banker should not use them in usual course of his banking business creates relation of debtor and creditor and gave supervisor no lien upon such funds as against other creditors. In re Nichols, 166 F 603.

18. When bank accepts depositor's check, charges him therewith and places proceeds to payee's credit, relation arises between bank and payee. Second Nat. Bank v. Gibboney [Ind. App.] 87 NE 1064. When deposit is made and amount and date thereof entered in passbook, it constitutes an admission that bank is indebted to party in whose name deposit is made. Id. Deposit made by brother of owner of money in her name created relation of debtor and creditor between bank and owner of money, although deposit not made by her personally and although signature was made by brother. Id. Deposit slip made out in customary form, being mere acknowledgement that amount had been received, did not change character of special deposit as created by contemporaneous agreement between parties. Fort v. First Nat. Bank [S. C.] 64 SE 405. Where a corporation had a deposit in defendant company not subject to check except upon condition, in spite of which fact it issued check to plaintiff for full amount, fact that defendant issued passbook to plaintiff on deposit of check did not bind defendant, where it had given prompt notice on discovery of the fact. Republic Life Ins. Co. v. Hudson Trust Co., 130 App. Div. 618, 115 NYS 503.

19. Bank employes charged checks more than once and embezzled money represented thereby for period of three years. Held question for jury whether bank had exercised due care. Brown v. Lynchburg Nat. Bank [Va.] 64 SE 950. And this in spite of fact that depositor by making comparison of vouchers and list thereof might easily have discovered fact of embezzlement. Id.

20. Where certificate of deposit acknowledged receipt of funds from probate judge deposited under Pub. St. 1882, c. 144, § 16 (Rev. Laws, c. 150, § 23), to accumulate for benefit of cestui qui trust, and provided that ten days' notice should be given for a reduction or discontinuance of interest, neither one day's notice given to cestui qui trust nor a letter to the register of probate was a sufficient compliance with the terms of the certificate. Cole v. New England Trust Co., 200 Mass. 594, 86 NE 902.

21. Bank account may be so arranged that two persons shall be joint owners thereof during their mutual lives, survivor to take upon death of other. Kelley v. Beers, 194 N. Y. 49, 86 NE 980. Account made out to "K. B. or S. K., her daughter, or the survivor of them," held sufficient to vest title in both as joint owners in connection with other facts disclosing intention. Id. Order made by original depositor to add name of daughter as owner and creditor with full authority for each or either to draw held sufficient to show joint ownership in connection with other facts disclosing intention. Kelley v. Beers, 194 N. Y. 60, 86 NE 985.

22. St. 1907, p. 292, c. 340 (St. 1908, p. 606, c. 590, §§ 56, 57), providing that state may take charge of deposits in savings banks or trust companies that have remained unclaimed for thirty years and of which no claimant is known or of which the depositor cannot be found, is constitutional. Malone v. Provident Inst. [Mass.] 86 NE 912.

23. As between banker and depositor, some superior equity must intervene in order to preclude the latter from objecting to an illegal and unauthorized charge against him. McGraw v. Traders' Nat. Bank [W. Va.] 63 SE 398.

24. Payment by bank on forged paper does not affect depositor's right to money deposited by him. McNeeley Co. v. Bank of North America, 221 Pa. 588, 70 A 891. Where deposit slip was made out in wrong name but teller entered amount in passbook, holder of book may recover regardless of fact that bank's records show that deposit was entered to credit of person in whose name deposit slip was made out. Schwartz v. State Bank, 116 NYS 701.

25. Banking Law, §§ 227-238 (Laws 1899, p. 923, c. 451, as amended by Laws 1901, pp. 375, 1243, cc. 171, 503), providing that one claiming to own a lost certificate of deposit may maintain an action to enforce payment thereof, but making no provision for right of third parties in the certificate is unconstitutional as being in contravention of freedom of contract. In re Ellard, 62 Misc. 374, 114 NYS 827.

26. Hamilton Nat. Bank v. Franklin, 140 Ill. App. 608.

27. Contract between a bank and its customer is to pay the customer's checks or bills to person designated by the customer, and to none other. Califf v. First Nat. Bank, 37 Pa. Super. Ct. 412. Relation existing between bank and depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor.

A bank may lawfully pay out or transfer money on a depositor's account by oral order.[29] The giving of a check does not operate as an equitable assignment of the deposit,[30] but in Kentucky a check is an absolute appropriation of the amount for which it is drawn.[31] Where a check is marked paid and charged to the depositor's account, it is in legal effect paid and cannot subsequently be charged to the indorser,[32] and, where it pays a check under the mistaken belief that the drawer has funds on deposit, it cannot recover the amount so paid from the holder;[33] but payments of overdrafts on depositor's order may be recovered from the depositor[34] as may payments made on checks drawn by the depositor's agents, where the bank is not chargeable with the agent's lack of authority to draw such checks.[35]

Forged or altered checks and drafts. See 11 C. L. 377.—Under the implied contract between the banker and the depositor that the bank will pay the depositor's checks to the persons to whom payment is ordered, it is the duty of the bank to see that the signatures of such payees are genuine,[36] and such duty is the same in law whether the check is made payable to a fictitious or nonexisting person through the drawer's negligence or is made payable to an existing payee.[37] The bank is liable for payments made on a depositor's forged signature,[38] and as far as the

Seaboard Nat. Bank v. Bank of America, 193 N. Y. 26, 85 NE 829. Where bank made check on deposit and delivered it to one who was not in fact the depositor, it was liable therefor to one who cashed such check. Gallo v. Brooklyn Sav. Bank, 129 App. Div. 698, 114 NYS 78.

28. Bank liable for amount of check presented by payee's special agent who endorsed same without authority and converted money, bank knowing that endorsement was made by agent and making no effort to ascertain scope of agency. Robinson v. Bank of Winslow, 42 Ind. App. 350, 85 NE 793. By custom, contract is that when banker receives the deposit he agrees with depositor to pay it out on presentation of his checks in such sums as those checks may specify, and to the person presenting them, and with the whole world the banker agrees that whoever shall become owner of such check shall upon presentation thereof become the owner and entitled to receive the amount specified in the check, provided the drawer shall at the time have the amount on deposit. Rauch v. Bankers Nat. Bank, 143 Ill. App. 625.

29. Money belonging to F. was by mistake credited to plaintiff's account. Plaintiff agreed with F. that account should be transferred and gave him check intended to be drawn upon bank where money was deposited but was by mistake drawn upon another bank. Upon presentation of check by F., cashier altered check to conform to facts and transferred accounts. In action by plaintiff to recover deposit, evidence held to show that transfer was by agreement of parties and valid. Whitsett v. People's Nat. Bank [Mo. App.] 119 SW 999. That such transfer has in fact been made may be proved by circumstantial evidence. Id.

30. Even though check was given for exact amount of drawee's balance. Poland v. Love [C. C. A.] 164 F 186. Where defendant, after issue of a check which was mailed by payee and later lost in mails, drew out deposit from bank, such mailing did not operate as an assignment of funds in bank. Smith v. Nelson [S. C.] 65 SE 261.

31. Commonwealth v. Kentucky Distilleries & Warehouse Co. [Ky.] 116 SW 766. Depositor not required to list for taxes amount of outstanding checks. Id.

32. Consolidated Nat. Bank v. First Nat. Bank, 129 App. Div. 538, 114 NYS 308.

33. Money paid by plaintiff for coupons payable at plaintiff's bank on mistaken belief that drawer had funds could not be recovered from the holder. Citizen's Bank of Norfolk v. Schwarzschild & Suizberger Co. [Va.] 64 SE 954.

34. In action by bank to recover overdraft, evidence as to amount thereof held insufficient to support verdict. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114. Where a bank allowed a firm to overdraw in order to meet pay roll on orders signed by defendant, who on being sued on the orders pleaded general denial and non est factum, evidence that defendant was merely surety on notes taken in consequence of such overdrafts was not admissible. People's Bank v. Stewart [Mo. App.] 117 SW 99.

35. Bank holding principal's account may recover for checks signed by principal's agents as kiting checks for their own benefit, where it has no knowledge and is not chargeable therewith that such checks were kiting checks. Farmers' & Merchants' Bank v. Germania Life Ins. Co., 150 N. C. 770, 64 SE 902. Evidence held to show that bank was not chargeable with such knowledge. Id.

36. Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 NE 740. Applies to payments made by banker through clearing house. Id. Payment by defendant on forged endorsement of payee upon reliance on guaranty of prior indorser held breach of duty. Id.

37. Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 NE 740.

38. Risk of paying out money on forged signature of depositor is one that banker must assume. Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84. Bank is liable for payment of check made on unauthorized indorsement. Ellery v. People's Bank, 114 NYS 108. That

rights of the depositor are concerned, such payment is of no effect.[39] Where a bank guarantees a signature, it is liable thereon although the signature is a forgery.[40] In Illinois a bank is not liable for the payment of a forged indorsement in the absence of evidence that the drawer had sufficient funds in the bank when the check was presented or that it had accepted such check.[41] A depositor cannot recover against the bank unless the payment was to his detriment,[42] nor where the forged check was in effect payable to bearer and was paid to the holder in due course.[43] A loss arising through the impersonation of the payee to the drawer and an indorsement forged by such impostor falls upon the one through whose fault it occurs.[44] Although it has been held that the depositor may assume that the bank has ascertained the genuineness of the indorsements before making payment,[45] it is the duty of the depositor to examine his passbooks and vouchers within a reasonable time,[46] and to give prompt notice to the bank upon discovery that payment

an endorsement has been forged to a check by depositor's agent does not make bank liable for payment thereof where depositor has given agent a general power of attorney to draw in his name. Snyder v. Corn Exch. Nat. Bank, 221 Pa. 599, 70 A 876.

39. McNeeley Co. v. Bank of North America, 221 Pa. 891, 70 A 891. When a bank pays a check made payable to order, and indorsement is forged or unauthorized, it is the same as if payment had not been made, and amount due depositor is not thereby affected. Califf v. First Nat. Bank, 37 Pa. Super. Ct. 412.

40. Bank that presented pension checks bearing forged signatures of payees, thereby warranted genuineness of such signatures and was liable thereon in suit by United States to recover amounts paid by it. United States v. National Exch. Bank, 29 S. Ct. 665, rvg. National Exch. Bank v. U. S., 151 F 402. Bank which guarantees prior endorsement on check is liable thereon if one of such indorsements is forged. Boardman v. Hanna, 164 F 527.

41. No action accrued against bank to payee of checks collected from payee's customers by payee's agent who forged payee's indorsement and embezzled proceeds, where there was no evidence that bank had sufficient funds of drawer when check was presented or that it had accepted such checks by certification or otherwise. Rauch v. Bankers Nat. Bank, 143 Ill. App. 625. Prior to act of June 5, 1907, a bank was only liable to holder of check if it had sufficient bankable funds to pay the same on deposit subject to drawer's order. Id.

42. Where depositors' agent forged payee's name to check sent him by depositors to pay claim of third party, and, to make up a shortage to depositors, deposited proceeds of such forged check to their credit, depositors could not recover against bank for payment of the forged check, since they had not been harmed and still retained their claim against agent. Andrews v. Northwestern Nat. Bank [Minn.] 117 NW 621. Fact that entire transaction is based on credit instead of actual cash payments not material. Id.

43. Where payee's signature was forged and forger knew that parties whose names were forged as payees never would have any interest in the checks, a bank that discounted such checks acquired good title thereto since legal effect was the same as if checks were payable to bearer, and plaintiff, the drawee, having paid them to a holder in due course, could not recover upon ground that payee's signatures were forged. Trust Co. of America v. Hamilton Bank, 127 App. Div. 515, 112 NYS 84.

44. Where an imposter obtained a check by using name of another, which check was cashed by plaintiff on strength of defendant's guaranteed indorsement, but for which plaintiff later reimbursed drawer and brought suit against defendant as indorser, held that drawer was the party through whose fault loss occurred, and as plaintiff bank stood in his place, loss should fall upon it. Central Nat. Bank v. National Metropolitan Bank, 31 App. D. C. 391. Where B assumed the name of A, and procured the issuance and delivery to him of a genuine check drawn in the name of A, which he endorsed with the name of A, innocent holders of the check, including the bank upon which it was drawn and which paid it upon presentation, are not liable to the drawer on the theory that the endorsement of the name of A thereon was a forgery and the transaction involving its issuance void. Winters Nat. Bank v. Roberts, 8 Ohio N. P. (N. S.) 294.

45. On settlement of depositor's bank book and return of vouchers, he is not bound to examine the latter to see that indorsements are correct; he may assume that bank has ascertained their genuineness before paying. Califf v. First Nat. Bank, 37 Pa. Super. Ct. 412.

46. Brown v. Lynchburg Nat. Bank [Va.] 64 SE 950. Duty of depositor to examine account and vouchers does not extend to examination of signatures of payees on checks to see if they are genuine. Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 NE 740. Plaintiff, desirous of loaning his money, sent two checks to his agent upon receiving what purported to be deeds of trust and abstracts of title to real estate to secure the loans. Agent forged supposed borrower's indorsements to checks and cashed them, after which they were eventually paid by bank upon which drawn. Upon agent's suicide, plaintiff made inquiries and learned of fact of forgery, after which he promptly notified bank. Held

has been made upon forged or unauthorized signature,[47] but failure to examine the passbook and vouchers will estop the depositor only when the bank has not been negligent [48] and where the depositor's negligence is directly connected with the forgery [49] or has contributed to such payment.[50]

Set-off of debts due bank against deposit. See 11 C. L. 378—The bank or its assignee for the benefit of creditors [51] is entitled to set off a debt due to it against a debtor's deposit, where the latter has been received in the course of business,[52] when such debt is due and demand therefor has been made,[53] but cannot offset a demand not due.[54] Where the debt exceeds the deposit, the bank is under no

that he was not guilty of negligence in not learning of forgery sooner although bank had made statement and returned check, and might consequently recover against bank. Lieber v. Fourth Nat. Bank [Mo. App.] 117 SW 672. Where deposit was made by brother of owner of money, and bank book placed in his custody by owner of money, fact that owner of money so left passbook and made no inquiries for a year and a half constituted no estoppel to claim against bank for checks paid on signature forged by brother. Second Nat. Bank v. Gibboney [Ind. App.] 87 NE 1064. Where deposit was made by depositor's brother, who after passbook had been delivered to depositor retained possession of book for safe keeping and afterwards drew out money on forged checks, which checks after payment were retained by bank and not returned to depositor, nor were statements of account made to her, through which facts depositor did not discover fact of forgery for one year and a half, held that these facts did not show negligence on depositor's part as a matter of law, and that bank was liable for the money so paid. Id.

47. Since only remedy of bank for payments made on forged paper is against forger, it is depositors' duty promptly to notify bank of fact of forgery. McNeely Co. v. Bank of North America, 221 Pa. 588, 70 A 891. Whether or not bank could have recovered had it been promptly notified is not material. Id. Notice held to be given with reasonable promptness. Califf v. First Nat. Bank, 37 Pa. Super. Ct. 412. Delay of three months a bar to recovery of money paid by bank on indorsement forged by plaintiff's clerk. McNeely Co. v. Bank of North America, 221 Pa. 588, 70 A 891.

48. Depositor is estopped from claiming against the bank for payments made on forged paper through failure or delay in examining his bank book and vouchers only when the bank has not been negligent. New York Produce Exch. Bank v. Houston [C. C. A.] 169 F 785.

49. If bank is negligent in paying on forged paper, the depositor will be estopped from claiming against it only by his own negligence directly connected with forgery. New York Produce Exch. Bank v. Houston [C. C. A.] 169 F 785.

50. If one is fraudulently induced to deliver to a person who is not entitled to it, a check made payable to another person who is not entitled to payment of it, his negligence in suffering the fraud to be practiced upon him cannot be found to be a direct and proximate cause of a payment made by the banker upon whom the check is drawn upon a forged indorsement of the name of the payee without any investigation as to the genuineness of the indorsement. Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 NE 740. Where plaintiff's check given as loan was cashed at defendant bank by one who purported to be borrower's agent, upon forged signature, evidence that he failed to examine vouchers or to make inquiry when informed that supposed borrower knew nothing of loan held not to show negligence precluding recovery. Califf v. First Nat. Bank, 37 Pa. Super. Ct. 412.

51. But if no application of the deposit has been made to credit of debtor, assignee cannot pay out such deposit to creditors. Wallace v. Estill County Deposit Bank [Ky.] 116 SW 351.

52. As where deposit was the result of a mistake. Mingus v. Bank of Ethel [Mo. App.] 117 SW 683. Where an agent's name was by mistake inserted in waybill covering carload of hogs consigned to market, as owner, and proceeds sent under his name to bank to which he was indebted, bank could not apply such proceeds to indebtedness as against true owner of money. Id.

53. So held although debtor intended a preference within bankruptcy act. Irish v. Citizens' Trust Co., 163 F 880. Under a contract, between a member of a clearing house association and a nonmember, by which the latter could clear through the member, the member was entitled to hold bills receivable to pay any checks that under the rules of the association the member should be obliged to redeem. Upon the insolvency of the nonmember, the member paid all checks presented in the morning exchange following the day it received notice of the nonmember's insolvency as required by the clearing house rules, and reimbursed itself from the bills receivable. In an action by the receiver for the amount of bills receivable sold by the member, it was held that the member was entitled to retain such amount. Davenport v. National Bank of Commerce, 127 App. Div. 391, 112 NYS 291.

54. Note not due when charged could not be set off against bankrupt's deposit, and being a preference could be recovered by trustee in bankruptcy. Irish v. Citizens' Trust Co., 163 F 880. Bank holding an obligation against nominal directors of an unincorporated railway company could charge such obligation against a deposit made by them as a condition precedent to incorporation, although such deposit was

obligation in the absence of instructions to apply the deposit to its payment.[58] Where the bank has knowledge that the deposit belongs to the ward, it cannot apply it to the guardian's personal indebtedness,[56] although deposited to the guardian's individual account.[57] A special deposit cannot be charged with debts due the bank by the depositor.[58] A national bank holding a certificate of deposit in another national bank, of which it is the correspondent, may, in case of insolvency, apply to such certificate whatever funds belonging to the insolvent is in its possession.[59]

Set-off of deposits against debts due bank. See 11 C. L. 378—A bank is not required to apply money in its hands belonging to an indorser to a check held by it.[60] The bank may be estopped from offsetting the depositor's indebtedness to it when sued for the deposit.[61]

Deposits received after insolvency. See 11 C. L. 378—The court has discretion to require a depositor making a claim against a bank which received his check for deposit after closing its doors and obtaining money from drawee, which money was held by receiver, to litigate his claim by intervening in the proceeding in which the receiver was appointed.[62]

General and special deposits. See 11 C. L. 379—Where the deposit is general, the bank need not return the identical money, but only its equivalent;[63] in the case of a special deposit, the bank is a mere custodian and must return the identical deposit.[64] A deposit is presumed to be general, and the one who claims it is not has the burden of showing that fact.[65] A special deposit cannot be applied in a

made to evade the railroad law, the bank having no knowledge of such illegal purpose. People v. Public Service Commission, 127 App. Div. 480, 112 NYS 133.

55. When a note of a depositor becomes due and payable, the bank holding such note is under no obligation, in the absence of instructions from the depositor, to apply the deposit to the payment of the note where the amount of the note exceeds that of the deposit. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 98 P 509.

56. Bank cannot apply proceeds of check for a ward's share of estate to guardian's personal indebtedness although check was made payable both to ward and guardian, where bank knew that money belonged to ward. First Nat. Bank v. Greene [Ky.] 114 SW 322.

57. A bank cannot apply money deposited as money of ward to pay guardian's personal debts to the bank, although such money has been deposited to guardian's individual account, where the bank knew what portion of the money belonged to the ward. First Nat. Bank v. Greene [Ky.] 114 SW 322.

58. Where depositor gave check to president of bank and notified him that its purpose was to meet outstanding checks to same amount, deposit was special, and bank after receiving deposit charged it with balance of judgment due bank, whereby outstanding check went to protest, bank was liable to holder of protested check for amount thereof. First Nat. Bank v. Barger [Ky.] 115 SW 726.

59. Lucas County v. Jamison, 170 F 338.

60. May look to drawer for collection. Camas Prairie State Bank v. Newman, 15 Idaho, 719, 99 P 833.

61. Where indorser of a certificate of deposit was assured by bank that it would be paid, bank was thereby estopped from interposing a set-off of amount of depositor's overdrafts, since indorser relying upon bank's statement failed to protect himself against depositor who was his assignor. Old Nat. Bank v. Exchange Nat. Bank, 50 Wash. 418, 97 P 462. Such right extends to a subsequent holder. Id.

62. De Forrest v. Coffey, 154 Cal. 444, 98 P 27.

63. General deposit is where bank is given custody of the money deposited with intention expressed or implied that bank is not to be required to return identical money, but only its equivalent. Legal title to money passes to bank, and depositor must rely on obligation of bank to repay him. Butcher v. Butler, 134 Mo. App. 61, 114 SW 564. That money was deposited to insure payment for drilling a well, bank to recognize party to drill the well as the beneficial owner only when the work was completed, and that until then the depositor should have no control over deposits, did not make such deposit special. Id. That such deposit was entered by bank as a "trust fund account" did not change character of such general account. Id.

64. Butcher v. Butler, 134 Mo. App. 61, 114 SW 564.

65. Butcher v. Butler, 134 Mo. App. 61, 114 SW 564. Where one makes a deposit to pay a certain note held by the bank and instructed bank to apply it to the note, which bank failed to do to depositor's knowledge, he was held to have acquiesced in the entry of his money as a general credit, and upon liquidation could only share as a general creditor. Peterson v. Grapser [Iowa] 118 NW 411.

manner not contemplated by the contract,[66] and if it does so the bank is liable for the actual loss incurred.[67]

Specific deposits. See 9 C. L. 838

Trust funds. See 11 C. L. 879—Where the bank is chargeable with knowledge that its cashier is misappropriating trust funds deposited with it, it is liable therefor,[68] but in the absence of such knowledge a mere suspicion that improper use of the proceeds of a check drawn upon the trust fund may be made does not justify a dishonor of the check.[69] Where trust funds have been mingled with other money of the bank to the bank's knowledge, the lien of the holder will attach to all the funds of the bank as a preferred claim.[70] Money paid to a depositor while the bank in a going concern, although in fact insolvent, is not thereby impressed with a trust in favor of creditors, although the depositor was induced to withdraw his deposit by rumors of the bank's insolvency.[71] If such alleged trust fund, whether of public moneys or not, has been dissipated, there can be no preference.[72]

66. First Nat. Bank v. Barger [Ky.] 115 SW 726. Where depositor made a deposit of a certain amount to the credit of a third party, to be protected for depositor's benefit by compress receipts or bills of lading sufficient to cover the amount, said receipts to be deposited by third party in like manner as other similar accounts, and contemporaneously took third party's note for a similar amount, the effect of the transaction was that of a loan by depositor to third party and that bank was under obligation to depositor to protect deposit by taking receipts from third party, or that bank agreed to hold either the money or the receipts or receipts for so much of amount as bank let third party have, and this being special deposit, bank could not pay out money to third party without taking collateral therefor without becoming liable to depositor therefor. First Nat. Bank v. Henry [Ala.] 49 S 97. Vendor who had made written contract for sale of threshing machine, to be paid for by notes, did not, by sending blank notes to a bank for purpose of securing signatures of purchaser, give bank real or apparent authority to accept notes in escrow under agreement that machine should be given a trial not specified in the contract. Watt v. Davlson [Neb.] 118 NW 562.

67. Where special deposit was made payable to third party upon production and deposit of collateral, and bank paid out such deposit without taking collateral, evidence as to shrinkage in collateral not material. First Nat. Bank v. Henry [Ala.] 49 S 97. Bank liable to vendee for money deposited with it as forfeit for purchase of land, and paid to vendor by it contrary to terms of contract upon vendor's inability to give title. Hunter v. Wallace [Tex. Civ. App.] 121 SW 180. Where purchaser of land deposited purchase price with defendant bank upon agreement with bank and vendor that enough of deposit should be retained to pay a mechanic's lien then in process of litigation, but bank subsequently allowed vendor to check out entire amount whereby purchaser was compelled to pay such lien, it was held that deposit was special to extent of such lien claim, and bank was liable to purchaser therefor. Fort v. First Nat. Bank [S. C.] 64 SE 405. Lien claim being in litigation to knowledge of all parties, and if judgment should be recovered they were bound to know that it would include incidental costs and fees, bank's liability could not be limited to amount of original claim exclusive of costs. Id. Payments by bank, which was depository of receiver's funds not subject to payment except upon order of court, made without authority made bank liable. American Nat. Bank v. Fidelity & Deposit Co., 131 Ga. 854, 63 SE 622.

68. Lowndes v. City Nat. Bank [Conn.] 72 A 150. Where directors negligently allowed cashier to have complete control whereby he was enabled to issue wortbless checks in name of company of which he was manager, which were paid by bank and subsequently taken up by him in exchange for checks drawn upon account carried by him as administrator, the bank was liable for funds so misappropriated. Id. Where the cashier was administrator of an estate and as such carried a trust account and drew checks on such account to take up overdrafts on another account, which transaction resulted in a detriment to estate and a benefit to bank in having worthless overdrafts made good, such amounts were recoverable from bank. Id.

69. Bank is under no duty to supervise a trust account, and it may, in absence of knowledge, presume that a depositor who presents a check in proper form is acting in the course of a lawful exercise of his rights, and suspicion that improper use of proceeds is made will not justify a dishonor of such check. Lowndes v. City Nat. Bank [Conn.] 72 A 150.

70. State funds deposited by state treasurer without authority of law to bank's knowledge, and by it mingled with other funds, constituted a preferred claim upon insolvency of bank. State v. Bruce [Idaho] 102 P 831.

71. Where a depositor withdrew his money by check, receiving the actual cash, and immediately bought New York exchange therewith, the money so paid over on check was not impressed with a trust in favor of creditors when the bank soon afterwards closed its doors, and the depositor was entitled to be subrogated to the rights of the drawee on the draft in collateral held by it. Livingstain v. Columbia Banking & Trust Co., 81 S. C. 244,

Certification.[See 11 C. L. 380]—Where a check is certified at the request of the drawer, the latter is not discharged, but otherwise where the certification is done at holder's request.[73] The certification of a check is equivalent to an acceptance,[74] and the bank is liable thereon although the check is a forgery.[75] Such acceptance cannot be revoked by the drawer.[76]

Slander of credit and damages for refusal to pay check.[See 11 C. L. 380]

Action to recover deposits.[See 11 C. L. 380]—No action to recover a deposit lies where the transaction by which the deposit was created is illegal.[77] Personal notice to a savings bank is, under the Massachusetts statute, required in an action by the state to recover funds belonging to an absentee.[78] The county attorney may maintain an action to recover interest on unauthorized deposits of public funds.[79] Where the account is joint, both depositors must join.[80] The complaint must allege facts essential to a recovery.[81] The issue of whether the account has been transferred is one for the jury.[82] The ordinary rules as to admissibility of evidence apply.[83] Estoppel and waiver constitute a defense,[84] although no express agreement to waive is shown.[85]

62 SE 249. In order that a preferred claim may exist for public moneys deposited, it must appear that the deposit was a wrongful act on the part of either the depositor or the bank, that the bank knew the deposit to be of public funds, and that the estate of the bank has been enlarged and that the money can be traced and shown to be part of the bank's funds at the time of the distribution. Lucas County v. Jamison, 170 F 338. Funds need not be identified by "ear marks," but must be traced into the estate and there found by an augmentation of the estate. Id.

72. Lucas County v. Jamison, 170 F 338. Where such fund was left to credit of insolvent bank in another bank on payment to it of overdraft by insolvent, and obtained by receiver, it might be recovered from him as a preferred claim. Id.

73. Negotiable Inst. Act April 4, 1902, § 188 (P. L. p. 614). Times Square Automobile Co. v. Rutherford Nat. Bank [N. J. Err. & App.] 73 A 479. Where holder had check given in payment of automobile certified, drawer was discharged and bank could thereafter refuse payment on ground that sale was brought about by fraudulent representations. Times Square Automobile Co. v. Rutherford Nat. Bank [N. J. Err. & App.] 73 A 479.

74. Blake v. Hamilton Dime Sav. Bank Co., 79 Ohio St. 189, 87 NE 73. Indorsement on check presented for deposit to drawee's credit, that upon return, properly indorsed, it would be placed to his credit, was an acceptance, and not a certification. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345.

75. Bank that has certified as good a forged signature to a check, which plaintiff in good faith in the ordinary course of business and with exercise of due caution has paid, is liable for amount thereof. Adam v. Manufacturers' & Traders' Nat. Bank, 63 Misc. 403, 116 NYS 595.

76. Where certified check had been received by a bank for deposit and it has credited depositor therewith, it is a bona fide holder and may enforce payment, notwithstanding it may, before payment to depositor, have received notice that check was fraudulently obtained by the depositor. Blake v. Hamilton Dime Sav. Bank Co., 79 Ohio St. 189, 87 NE 73.

77. Where defendant bank credited plaintiff bank with a certain sum in order that it might make up its reserve fund when making its report to the state officials, but without intending to create any indebtedness, plaintiff bank could not recover amount thereof, such transaction being illegal. Kentucky & Indiana Bank v. Globe Bk. & T. Co. [Ky.] 116 SW 792.

78. In action by state to recover deposit of absentee depositor, unheard of for more than thirty years, under St. 1908, p. 606, c. 590, §§ 56, 57, such notice is required by Rev. Laws, c. 162, § 30. Malone v. Provident Inst. for Sav. [Mass.] 86 NE 912.

79. County prosecuting attorney has authority to maintain action against banks for recovery of interest on authorized deposits made by county treasurer from public funds in his hands. State of Ohio v. Kilgour, 8 Ohio N. P. (N. S.) 81.

80. Joint account of husband and wife, originally in wife's individual name. Murphy v. Franklin Sav. Bank, 131 App. Div. 759, 116 NYS 228.

81. Complaint alleging that plaintiff had deposited in defendant's bank a certain sum on open account, that payment was subsequently refused, that no part of the money had been paid plaintiff, stated a good cause of action, since relation of debtor and creditor exists. Levy v. Larson [C. C. A.] 167 F 110.

82. In an action to recover deposit, issue as to whether or not account had been transferred should have been submitted to jury. Whitsett v. People's Nat. Bank [Mo. App.] 119 SW 999.

83. In suit on lost certificate of deposit, evidence as to books and bookkeeping, methods of bank are admissible in connection with evidence of bank officers that no such deposit had been received. Wagner v. Valley Nat. Bank [Iowa] 118 NW 523. Evidence that certificates were consecutively numbered, and that no number was missing admissible. Id. Passbook admis-

§ 7. *Circulating notes.*[86]—See 5 C. L. 363—A statute exempting national banks from the operation of the general tax on circulation extends only to such national banks as represent state banks.[87]

§ 8. *Loans and discounts.*[88]—See 11 C. L. 381—In making loans upon collateral which to the bank's knowledge belongs to another than the applicant, the duty rests upon the bank to ascertain the scope of the agent's authority.[89] The officers of a bank taking over a loan made by its predecessor are chargeable with knowledge that the loaning bank had misapplied money collected on collaterals.[90] and such knowledge binds the bank.[91]

Drafts with bill of lading attached. See 11 C. L. 381

§ 9. *Collections.*[92]—See 11 C. L. 381—The deposit of an uncertified check is deemed to be for collection.[93] A bank holding a draft or bill for collection is the agent of the indorser,[94] and is not liable if it accounts for the proceeds, even though the indorsement which made the collection possible was a forgery.[95] The bank may collect through an agent.[96] A bank owes to its correspondent the duty to exercise due

sible as part of transaction where there was evidence under plea of settlement that passbooks, checks, and notes held by bank had been delivered to plaintiff. Richey v. Farmers' & Merchants' Sav. Bank [Iowa] 121 NW 2.

84. Where money was deposited to plaintiff's credit by mistake and later transferred to real owner by oral agreement between owner and plaintiff, evidence held to show that by his conduct plaintiff had waived his right to object to validity of such transfer. Whitsett v. People's Nat. Bank [Mo. App.] 119 SW 999. Depositor, having knowledge that his account had been transferred to another, can by his conduct and acquiescence waive his right to recover such deposit, although there is no consideration for such waiver. Id.

85. Whitsett v. People's Nat. Bank [Mo. App.] 119 SW 999.

86. Search Note: See notes in 10 L. R. A. (N. S.) 526; 12 Id. 607, 610.

See, also, Banks and Banking, Cent. Dig. §§ 738-832; Dec. Dig. §§ 196-212; 3 A. & E. Enc. L. (2ed.) 771.

87. Fact that circulation of a national bank falls below 5 per cent of its capital does not, under U. S. Rev. St. § 3411 (U. S. Comp. St. 1901, p. 2248), providing that outstanding circulation of any bank, association, corporation, company, or person shall be free from taxation when reduced to an amount not exceeding 5 per cent of its capital, exempt it from payment of half-yearly tax of one-half of one per cent imposed by U. S. Rev. St. § 5214 (U. S. Comp. St. 1901, p. 3500), since U. S. Rev. St. § 3411 was made applicable in order to give national banks representing state banks benefit of presumption of loss or inability to retire from circulation of state bank when 95 per cent thereof had actually been retired. Merchants' Nat. Bank v. U. S., 214 U. S. 33, 53 Law. Ed. —.

88. Search Note: See notes in 3 C. L. 426; 16 L. R. A. 223; 16 L. R. A. (N. S.) 626.

See, also, Banks and Banking, Cent. Dig. §§ 653-724; Dec. Dig. §§ 176-187; 5 Cyc. 522-527; 3 A. & E. Enc. L. (2ed.) 841.

89. Where bank cashier in making loans on stock knew that ownership was not in party applying for loan, but in another who to his knowledge was an invalid, bank was put upon inquiry as to such owner's mental condition. Groff v. Stitzer [N. J. Eq.] 72 A 970. It is bank's duty to use reasonable care to ascertain whether or not a father applying for a loan upon security of his child's property to bank's knowledge is acting bona fide and whether child is actuated by own free will. Lane v. Reserve Trust Co., 10 Ohio C. C. (N. S.) 512.

90. Where a bank collected money on collateral and did not apply it to indebtedness but to interest, and subsequently sold the notes to its successor, the officers remaining the same, held that knowledge of the officers was knowledge of bank succeeding in interest to loaning bank. Buse v. First State Bank, 105 Minn. 323, 117 NW 490.

91. Where bank collected money on collaterals and applied it to interest at 20 per cent per annum instead of to principal, and thereafter sold notes for which the collateral was given to its successor, held that successor had knowledge that a smaller amount only was due, and was liable to the maker for the amount paid by him over what was actually due. Buse v. First State Bank, 105 Minn. 323, 117 NW 490.

92. Search Note: See notes in 7 C. L. 384; 7 L. R. A. 852; 25 Id. 200; 27 Id. 248; 32 Id. 715; 1 L. R. A. (N. S.) 246; 2 Id. 194; 3 Id. 1167, 1179; 14 A. S. R. 583; 77 Id. 613; 86 Id. 775; 5 Ann. Cas. 658; 6 Id. 52; 8 Id. 372.

See, also, Banks and Banking, Cent. Dig. §§ 539-652; Dec. Dig. §§ 156-175; 5 Cyc. 493-512; 3 A. & E. Enc. L. (2ed.) 802.

93. In absence of special agreement, the deposit to his credit of an uncertified check by holder is deemed to be for collection and not for payment, and if there be no funds to meet it bank may cancel the credit. Blake v. Hamilton Dime Sav. Bank Co., 79 Ohio St. 189, 87 NE 73.

94. Where bank was merely drawer's agent for collection according to custom between parties to allow credit but to charge back if not paid, held that right to stop payment existed. Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 718. 64 SE 885.

95. National council of the Knights & Ladies of Security v. Hibernian Banking Ass'n, 137 Ill. App. 175.

96. Where a corporation had pledged cer-

diligence in notifying it of the dishonor of checks drawn upon it.[97] Notes deposited with a bank for collection and not accounted for may be set off in a suit by the bank on a note notwithstanding the statute of limitations.[98] A national bank may take an absolute assignment of a claim for collection and agree to pay part of the proceeds to another.[99]

§ 10. *Offenses against banking laws.*[1]—See 11 C. L. 382—The federal statutes make it an offense for an officer of a national bank to wilfully misapply the funds of the bank,[2] or to make a false report with intent to deceive an examiner [3] or an officer of the association,[4] or to falsify the books of the bank.[5] A statute forbidding bank officials to loan to themselves more than a certain amount of the capital stock is applicable only to officers, agents, and directors of banks of issue.[6] Indictment under the federal statute for misapplication of funds by an officer of a national bank need not allege that bank was one organized under laws of United States,[7] nor that it was doing business when the offense was committed [8] and it is sufficient

tain contracts on which instalments were due as collateral security on its notes and made collections thereof through bank, corporation was agent of bank holding such contracts and was under obligation to pay to it all proceeds thereof to extent of note made by its receiver in bankruptcy. In re Merrill, 162 F 590.

97. If bank is in exercise of due diligence in notifying its correspondent, it will not be liable to drawer for failure to protest check on day on which it was received, there being no indorsers. Whitman v. First Nat. Bank, 35 Pa. Super. Ct. 125. Bank held to have done all it was required to do when it made efforts to induce drawer to make check drawn upon itself good by paying overdraft, and notified correspondent by telegraph of dishonor on same day and protested it on following day. Id.

98. Where defendant placed certain notes with plaintiff for collection and alleged that such notes had been collected but not accounted for, she could set off the amount of such notes against the claim for a note held by plaintiff, notwithstanding the statute of limitations. Bank of Latham v. Milligan [Iowa] 118 NW 404.

99. King v. Miller [Or.] 97 P 542.

1. Search Note: See notes in 5 C. L. 365; 31 L. R. A. 124; 4 Ann. Cas. 246.

See, also, Banks and Banking, Cent. Dig. §§ 5-8, 24, 25, 121-124, 210-217, 958-976; Dec. Dig. §§ 7-11, 19, 20, 21, 61, 62, 84, 85, 256, 257; 5 Cyc. 433, 434, 485-487, 581-588; 3 A. & E. Enc. P. & P. 256.

2. Money collected by bank clerk and converted to his own use was, as between him and the bank, funds belonging to the bank, and its embezzlement came within Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497). Spencer v. U. S. [C. C. A.] 169 F 562.

3. The comptroller of the currency is not an agent appointed to examine the affairs of a national bank within Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), relating to false entries made by officers of national banks made with intent to deceive any agent appointed to examine the affairs of such association or to defraud bank, since such comptroller may only receive and publish the report, and an indictment based upon such theory does not charge an offense. United States v. Corbett, 162 F 687.

Nor would it have availed to have charged that the false entries were made with intent to deceive one of examiners appointed under § 5240, Rev. St., because government could not have shown any statute under which report sent to comptroller is shown or delivered to examiner. Id. Nor could such indictment charge an intent to injure bank, since such report must have been intended to injure or defraud bank, and detriment would have been merely speculative. Id. Rev. St. 5209 (U. S. Comp. St. 1901, p. 3497) was not violated by an entry made by cashier in report to comptroller of the currency of an accommodation note made by responsible party to make good officer's individual overdrafts and discounted by bank and entered as ordinary loan and discount, since as between maker and bank it was a valid obligation. Hayes v. U. S. [C. C. A.] 169 F 101. Entry of note made by irresponsible party with intent to magnify bank's assets would constitute violation of statute even though paper was in actual existence. Id.

4. Report voluntarily made, as well as one required by Rev. St. U. S. § 5211, is within Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497) forbidding any officer or agent of national bank to make any false entry in any report of the associaton with intent to deceive any officer of the association. Harper v. U. S. [C. C. A.] 170 F 385.

5. Harper v. U. St. [C. C. A.] 170 F 385.

6. Thornton v. State, 5 Ga. App. 397, 63 SE 301. Penal Code 1895 § 214, which provides: "Any officer, agent, or director of a bank or banking association of this state who shall violate provisions of §§ 1934, 1948, and 1949 of the civil code, or either of them, forbidding bank officials to loan to themselves more than 25 per cent of capital stock, shall be punished by imprisonment," is applicable only to officers, agents, and directors of banks of issue. Id.

7. Indictment charging defendant as cashier of a certain "national banking association" was not, under Rev. St. §§ 5208, 5209, fatally defective for failure to allege that national banking association specified was organized under laws of the United States. Geiger v. U. S. [C. C. A.] 162 F 844.

8. Indictment against national bank cashier for misapplication and abstraction

if it appears that the funds misapplied were those of the bank.[9] An indictment for making false statements to deceive an officer of the association must show the nature of the statement[10] and by whom made.[11] An immaterial departure from the language of the statute does not render the indictment defective.[12] An indictment under the Kentucky statute for making a false report of the condition of the bank is sufficient if it simply negatives the truth of the statements made, and it need not allege that the report was sworn to.[13] Under a statute making it larceny for an officer of a trust company to become indebted to the company, guilty intent may be inferred from the mere fact of indebtedness.[14] Instructions must not be misleading.[15]

Receipt of deposits when bank is insolvent.[See 11 C. L. 383]—A statute making a bank official, who receives deposits knowing that the bank is insolvent, guilty of embezzlement, is constitutional.[16] The bank must be shown to be[17] actually insolvent[18] to the knowledge of its officers.[19] The deposit of a check[20] and its en-

of bank funds need not allege that bank was doing business when offense was committed. Geiger v. U. S. [C. C. A.] 162 F 844.

9. In prosecution for misapplication and abstraction of funds of national bank by cashier, under Rev. St. 5209, by appropriating to his own use proceeds of check deposited to take up a certain note, it was not necessary to allege that the bank was still the owner of note (Geiger v. U. S. [C. C. A.] 162 F 844), nor to allege who was the payee of check, since check came into defendant's possession as cashier and loss was the loss of bank (Id.).

10. An indictment under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497) charging an attempt to deceive an officer of the association, which sets out false entry by cashier as to his liability to bank to comptroller of currency made on a certain date and date as to which condition of bank was given, is sufficient to show that the report was one under Rev. St. § 5211, and sets out report sufficiently. Harper v. U. S. [C. C. A.] 170 F 385.

11. Averment in an indictment under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497), charging that defendant on a certain date, "who was then and there the duly elected, qualified, and acting cashier of the first national bank of M., a corporation duly organized and existing under and by virtue of the laws of the United States," made certain false entries with intent to deceive the president, shows sufficiently that the defendant was cashier of a bank doing a banking business. Harper v. U. S. [C. C. A.] 170 F 385.

12. Indictment under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497) for making false entries in a report of the association good although words "of the association" were omitted. Harper v. U. S. [C. C. A.] 170 F 385. Special presentment under Civ. Code 1895, § 1948, which fails to allege that bank is bank of issue, is fatally defective. Thornton v. State, 5 Ga. App. 397, 63 SE 301.

13. Under Ky. St. § 593. Anderson v. Com. [Ky.] 117 SW 364.

14. In a prosecution of an officer of a trust company under Rev. Laws 1905, § 5078, subd. 2, making it larceny for such officer to become indebted to company, guilty intent may be inferred from mere fact of indebtedness. State v. Barnes [Minn.] 122 NW 4. Indictment of officer of trust company for being indebted to company under Rev. Laws 1905, § 3045, held sufficient where it charged that company was organized under Laws 1883, c. 107, p. 133, and laws amendatory thereof, such law having been reenacted under Rev. Laws 1905, § 3045. State v. Barnes [Minn.] 122 NW 11.

15. In a prosecution under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497) for making false statements with intent to deceive president of national banking association, instruction upon deceiving "the president and the comptroller and other officers of the bank" held not misleading when taken in connection with remainder of charge. Harper v. U. S. [C. C. A.] 170 F 385.

16. St. 1907, p. 414, c. 189, making any banker or any officer, agent, or clerk of any bank receiving deposits, knowing that bank is insolvent, guilty of embezzlement, is constitutional. Ex parte Pittman [Nev.] 99 P 700.

17. Conversations between third party and secretary of state as to postponement of examination of bank, and not connected with defendant, are not admissible as to insolvency of bank. State v. Salmon, 216 Mo. 466, 115 SW 1106. Reports of bank examiner are competent as to solvency of bank. Id. Outside interest of some of bank officers pledged to their associates for purpose of strengthening bank, but only as a moral obligation, may be considered by others on question of whether bank is solvent. Ellis v. State, 138 Wis. 513, 119 NW 1110.

18. Term "unsafe or insolvent" as used in § 4541, St. 1898, does not mean insolvent in limited sense of inability to pay indebtedness in ordinary course of business. Ellis v. State, 138 Wis. 513, 119 NW 1110. A bank is insolvent when the fair cash value of its assets, realizable within a reasonable time, in case of liquidation by the proprietors, as ordinarily prudent persons would ordinarily close up their business, is equivalent to its liabilities, exclusive of stock liability. Id. Banks did not violate St. 1898, § 4551, forbidding receiving

try to the depositor's credit is a receipt of a deposit within the meaning of the statute,[21] but such check must be drawn upon the bank in which deposited.[22] A deposit to meet an existing overdraft is not within the statute.[23] The Nevada statute contemplates an actual receipt by the officer charged,[24] while in Wisconsin it must be shown that the accused acted for the bank.[25] The Missouri statute making the failure of the bank prima facie evidence of knowledge on the part of the officers applies to all banks.[26] Indictments under such statutes must allege facts within the exact terms of the statute,[27] but the character of the deposit need not be alleged.[28] Instructions must not comment on the evidence.[29]

deposits by insolvent bank when assets realizable in reasonable time were greater than liabilities. Id.

19. In a prosecution under Code 1906, § 1169, making it a crime for an employe of a bank to receive deposits knowing or having good reason to believe the establishment to be insolvent, without informing depositor of such condition, the fact of knowledge of insolvency or his having good reason to believe therein must be established, and if nonexistence of such material elements were due to employe's negligence, such employe cannot be convicted. Stewart v. State [Miss.] 49 S 615. That bank was insolvent and accused was ignorant of it through negligence is not sufficient. Id. In prosecution under Code 1906, § 1169, making it a criminal offense for an employe of a bank to receive deposits, knowing or having good reason to believe bank to be insolvent, without informing depositor of such condition, instruction to find accused guilty if his failure to know of bank's condition was due to his failure to use reasonable diligence in making inquiry as to bank's condition, if such inquiry would have afforded him good reason to believe bank insolvent, held error. Id.

20. Receiving check for deposit constitutes a receiving of deposits within meaning of St. 1898, § 4541, forbidding receiving of money for credit of depositor with knowledge or good reason to know that bank was unsafe or insolvent. Ellis v. State, 138 Wis. 513, 119 NW 1110.

21. Deposit of check upon bank and entry of balance thereof to credit of depositor is a receipt of a deposit within meaning of statute relating to receipt of money by banker knowing that bank is insolvent. State v. Salmon, 216 Mo. 466, 155 SW 1106.

22. Evidence as to whether check was drawn on bank in which deposited or not is material upon question as to whether it was a deposit of a check or of money, and check itself is the best evidence for such purpose. State v. Salmon, 216 Mo. 466, 115 SW 1106.

23. Deposit must be such as will create a credit, relation of debtor and creditor between parties, or that of bailor and bailee, or principal and agent. Ellis v. State, 138 Wis. 513, 119 NW 1110.

24. Act Mar. 29, 1907 (St. 1907, p. 414, c. 189), penalizing every officer of any bank who receives a deposit, knowing that bank is insolvent, does not apply to act of assent to reception of deposit. Ex parte Rickey [Nev.] 100 P. 134. Word "receives" involving an affirmative act and not including an assent to reception involving mere passive acquiescence, president of bank was not punishable where actual receipt was by receiving teller. Id. Indictment charging that accused was president of an incorporated state bank, that he feloniously, by and through receiving teller, received a deposit knowing that bank was insolvent, does not charge accused with receiving deposit under St. 1907, p. 414, c. 189. Id.

25. Indictment under St. 1898, § 4541, forbidding receiving of money for deposit when bank is unsafe or insolvent, that charged receiving of deposits of money and check, that accused was, at time of receiving deposits, president of the bank and the money was accepted and received into the bank on deposit, sufficiently shows that accused acted for the bank. Ellis v. State, 138 Wis. 513, 119 NW 1110.

26. Rev. St. 1899, § 1945 (Ann. St. 1906, p. 1320), providing that the failure of "such" bank shall be prima facie evidence of knowledge on part of officers that bank was insolvent or in failing circumstances when money was received for deposit, applies to all classes of banking institutions, private and incorporated. State v. Salmon, 216 Mo. 466, 115 SW 1106.

27. Allegation, under Kirby's Dig. p. 1814, prohibiting receipt of deposits when bank is insolvent, that check deposited was accepted by defendant in lieu of money was not equivalent to allegation that it was a draft circulating as money. State v. Smith [Ark.] 120 SW 156. Indictment for receiving deposit when bank is insolvent, under Act Feb. 12, 1901 (Kirby's Dig. p. 1814), is insufficient where it merely alleges that check deposited by person named was one drawn by B. in favor of Y., neither alleging in terms that check was indorsed by payee nor that it was an obligation which circulated as money. Id. An indictment under Act Feb. 12, 1901 (Kirby's Dig. p. 1814) for receiving deposits when bank is insolvent, charging that deposit was received from person named, must be understood as meaning that deposit was made by such person for his own account and was so accepted. Id. An indictment under Act Feb. 12, 1901 (Kirby's Dig. p. 1814) for receiving deposits when bank is insolvent is sufficient where it gives name of drawee of check received, of payee and of amount, although date is not stated. Id.

28. Act Feb. 12, 1901 (Kirby's Dig. p. 1814), prohibiting receipt of deposits when bank is insolvent, makes no distinction between general and special deposits, and it is unnecessary to allege in an indictment the particular character of the deposit, sufficient to allege that funds were deposited. State v. Smith [Ark.] 120 SW 156.

29. Instructions as to knowledge of

BANKRUPTCY.

The scope of this topic is noted below.[30]

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§ 1. *The Bankruptcy act; amendments, and general orders.*[31] —See 11 C. L. 384

The object of the bankruptcy act is the relief from his debts of an honest debtor taking advantage of its provisions,[32] and the distribution of his assets among his creditors.[33] It is a federal measure and the construction thereof by the federal courts is binding on state courts.[34] The effect of general orders[35] and their construction are treated in the notes.[36]

banker that bank was insolvent held erroneous as commenting on evidence. State v. Salmon, 216 Mo. 466, 115 SW 1106.

30. Includes matters arising under the national bankruptcy acts. Excludes voluntary assignments (see Assignments for Benefit of Creditors *) and involuntary proceedings under state laws (see Receivers;* Insolvency *).

31. Search Note: See note in 45 L. R. A. 177.

See, also, Bankruptcy, Cent. Dig. §§ 1-6; Dec. Dig. §§ 1-8.

32. Hardie v. Swafford Bros. Dry Goods Co. [C. C. A.] 165 F 588.

33. Intent of bankruptcy law is to make equal distribution of assets of insolvent person among his creditors and to prevent preferences and favoritism. Whitwell v. Wright, 115 NYS 48.

34. In determining questions arising under bankruptcy law, state courts are

§ 2. *Supersession of state laws.*[37]—See 11 C. L. 884—While the bankruptcy act operates to suspend [38] and to emasculate [39] all state insolvency laws, the New Jersey statute for the relief of persons imprisoned on civil process is not a general insolvency law in conflict with the national bankruptcy act.[40]

§ 3. *Occasion for proceeding and acts of bankruptcy. A. In general.*[41]—See 9 C. L. 344—Involuntary proceedings must be commenced within four months from the time the alleged act of bankruptcy was committed.[42] A "transfer" within the meaning of the act means any manner of disposition whatever, whether by affirmative acts or by mere acquiescence.[43] The words "insolvent" and "insolvency" as used throughout the bankruptcy act must be construed as defined therein.[44] In determining the question of insolvency, within such definition, all available assets of the alleged bankrupt must be considered,[45] the test being the insufficiency of debtor's assets, exclusive of such as he may have conveyed, transferred, concealed or removed, with intent to defraud, hinder or delay his creditors,[46] to discharge his liabilities.[47]

(§ 3) *B. Disposition of property with intent to hinder, delay or defraud creditors.*[48]—See 11 C. L. 884—The fact that a disposition of property hinders, delays or defrauds creditors, does not render such disposition an act of bankruptcy in the absence of an actual intent to accomplish such result;[49] but where a conveyance or transfer is made with such intent,[50] the act of bankruptcy is complete,

guided by utterances of federal courts. Stuart v. Farmers' Bank, 137 Wis. 66, 117 NW 820.

35. General orders 12 and 30 relate to practice only and do not announce any rule as to the effect of a discharge in bankruptcy. United States v. Peters, 166 F 613.

36. General orders Nos. 12 and 30 and § 9a of the bankruptcy act are in pari materia and should be construed together. United States v. Peters, 166 F 613.

37. Search Note: See note in 3 C. L. 435. See, also, Assignments for Benefit of Creditors, Cent. Dig. § 88; 4 Cyc. 180; Bankruptcy, Cent. Dig. §§ 7-9, 11-37, 134; Dec. Dig. §§ 9, 11-37; 5 Cyc. 24.

38. Bankruptcy act suspends state statute as to voluntary assignments. Pogue v. Rowe, 236 Ill. 157, 86 NE 207. State courts are without jurisdiction to grant relief under insolvency laws suspended by bankruptcy act. Hickman v. Parlin-Orendorf Co. [Ark.] 115 SW 371. Merger of respite proceedings into cession of property under La. Civ. Code, art. 3098, is unauthorized, in view of bankruptcy act. Duffy v. His Creditors, 122 La. 600, 48 S 120.

39. Suspension of state statute as to voluntary assignments renders it inoperative in so far as it invalidates common-law assignments for the benefit of creditors, and common-law assignment is valid unless attacked under bankruptcy law. Pogue v. Rowe, 236 Ill. 157, 86 NE 207. As to persons and subjects within purview of bankruptcy act 1898, the Pennsylvania insolvency act, June 4, 1901, P. L. 404, never became operative. Peckham's Assigned Estate, 35 Pa. Super. Ct. 330.

40. Gen. St. 1895, p. 1726, restrains use of debt as basis of imprisonment but does not discharge same and is subject to federal act. Maroney v. La Barre [N. J. Err. & App.] 70 A 156.

41. Search Note: See note in 11 Ann. Cas. 449.

42. In re Perry Aldrich Co., 165 F 249. A corporation, which has been in the hands of a state receiver for more than four months previous to the filing of an involuntary petition, may be adjudicated a bankrupt for acts of bankruptcy committed within such four months. In re Sterlingworth R. Supply Co., 164 F 591.

43. Bankruptcy Act 1898, § 1, subd. 25. In re Tupper, 163 F 766. Acquiescence in transfer by legal proceedings may constitute fraudulent transfer as defined by Bankruptcy Act 1898, § 1, subd. 25. Id. As to allowance of preference through legal proceedings on a specific act of bankruptcy, see post, this section, subd. D.

44. In re Golden Malt Cream Co. [C. C. A.] 164 F 326.

45. Notes and accounts of bankrupt not shown to be uncollectible must be considered in determining insolvency. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921.

46. Tumlin v. Bryan [C. C. A.] 165 F 166.

47. Tumlin v. Bryan [C. C. A.] 165 F 166. Inability to pay debts as they mature does not of itself constitute insolvency. First Nat. Bank v. Abbott [C. C. A.] 165 F 852. Evidence held to sustain finding of master that corporation was not insolvent at time of filing of petition. In re Hartwell Oil Mills, 165 F 555.

48. Search Note: See Bankruptcy, Cent. Dig. §§ 57, 66, 69-79; Dec. Dig. § 57.

49. In re McLoon, 162 F 575; In re Tupper, 163 F 766.

50. Conveyance by bankrupt without knowledge of her insolvency held not made with intent to defraud. In re McLoon, 162 F 575. Conveyance by bankrupts to their wives held to have been made in comtem-

without regard to the question of insolvency,[51] though the alleged bankrupt's knowledge or lack of knowledge of his insolvency at the time of the transfer may be considered on the issue of intent.[52]

(§ 3) *C. A preferential transfer while insolvent.*[53]—See 11 C. L. 385—Preference is an act whereby a creditor is enabled to obtain or does obtain a greater percentage of his claim than that obtained by other creditors of the same class.[54] Hence a preferential transfer by a partner of individual assets to either an individual or a firm creditor does not constitute an act of bankruptcy by the firm,[55] nor can a transfer of individual property by a partner to an individual creditor be made the basis of an individual adjudication against the partner, at the instance of firm creditors;[56] but such an adjudication may be predicated upon a preferential transfer by the partner to a firm creditor.[57] Intent to prefer is necessary in order to render a preferential transfer an act of bankruptcy,[58] but such intent may be inferred from the circumstances of the transfer,[59] nor is it necessary that the debtor shall have done affirmative acts in bringing about the transfer.[60]

(§ 3) *D. Suffering or permitting, while insolvent, the obtaining of a preference through legal proceedings.*[61]—See 11 C. L. 385—Affirmative action on the part of the debtor is not necessary to render a submission to a preference through legal proceedings an act of bankruptcy.[62]

(§ 3) *E. General assignment and the appointment of a receiver or trustee.*[63] See 11 C. L. 385—A general assignment for the benefit of creditors[64] though invalid[65]

plation of insolvency and without present consideration, and with intent to hinder, delay and defraud their creditors. Henkel v. Seider, 163 F 553.

51. That alleged bankrupt is not insolvent at time of transfer is immaterial. In re Larkin, 168 F 100.

52. In re McLoon, 162 F 575.

53. Search Note: See Bankruptcy, Cent. Dig. § 57, 72-79; Dec. Dig. § 58.

54. Mills v. Fisher & Co. [C. C. A.] 159 F 897. As to effect of preferences with reference to trustee's title to property, see post, § 10E.

55, 56, 57. Mills v. Fisher & Co. [C. C. A.] 159 F 897.

58, 59. In re Tupper, 163 F 766.

60. Acquiescence in transfer by legal proceedings may constitute an act of bankruptcy even under bankruptcy act 1898, § 3, subd. 2. In re Tupper, 163 F 766. As to allowance of preference through legal proceedings as specific act of bankruptcy, see post, this section, subd. D.

61. Search Note: See Bankruptcy, Cent. Dig. §§ 81, 82; Dec. Dig. § 59.

62. Mere acquiescence in judgment which will constitute a lien on property may constitute act of bankruptcy under bankruptcy act 1898, § 3, subd. 3. In re Tupper, 163 F 766. Under Bankruptcy Act 1898, § 3, subd. 3, providing that it is an act of bankruptcy for one to suffer a creditor to obtain a preference through legal proceedings, and to fail to discharge such preference at least five days before "final disposition" of the property affected by such preference, the term "final disposition" refers to any manner of disposition whatever, including failure to take steps to discharge a judgment lien until one day before it would become final and absolute. Id.

63. Search Note: See Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.

64. Canner v. Webster Tapper Co. [C. C. A.] 168 F 519; Griffin v. Dutton [C. C. A.] 165 F 626.

Evidence held to sustain direction to find that alleged bankrupt committed act of bankruptcy both individually and as member of partnership by making general assignment for benefit of creditors. Lennox v. Allen-Lane Co. [C. C. A.] 167 F 114. Evidence insufficient to show a general assignment for the benefit of creditors within § 3a(4) of the bankruptcy act. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283.

Held general assignment for benefit of creditors, it appearing that she executed a form of assignment and that the assignee acted thereunder, though the instrument executed could not be found and was not produced in evidence. Griffin v. Dutton [C. C. A.] 165 F 626.

Held not a general assignment: Conveyance of a part of debtor's assets to a creditor and agreement to convey proceeds of sale of remainder upon sale thereof in consideration of creditor canceling its debt and agreeing to pay other creditors from proceeds of property conveyed held not a general assignment for benefit of creditors within § 3a(4) of the bankruptcy act. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283. Resolution adopted by stockholders, providing for appointment of commission to sell property of corporation and to wind up its affairs and settle its debts, unless before sale the debts of the corporation could be arranged for, held not a general assignment for the benefit of creditors. In re Hartwell Oil Mills, 165 F 555.

65. Conner v. Webster Tapper Co. [C. C. A.] 168 F 519. If intended as general assignment. Griffin v. Dutton [C. C. A.] 165 F 626.

and repudiated by the creditors[66] constitutes an act of bankruptcy, as does also the appointment of a receiver because of insolvency,[67] but where the receivership is not because of insolvency, the question whether the debtor was actually insolvent or not is immaterial.[68] It seems that the act of insolvency by appointment of a receiver is complete when the receivership is established.[69]

(§ 3) *F. Admitting insolvency in writing and willingness to be adjudged a bankrupt.*[70]—See 11 C. L. 385—The admission must be made in some form purporting to be in pursuance to the provisions of the bankruptcy law[71] and must indicate a willingness to be adjudged a bankrupt.[72] There seems to be some conflict, or at least confusion, as to the effect of the filing of a voluntary petition in bankruptcy in the name of a partnership by one or less than all of the members thereof,[73] but it seems settled that the admission of insolvency in such case is not binding upon the nonassenting partners who come in and contest it.[74] The real question in this connection, furthermore, would seem to relate rather to the necessity of an allegation of bankruptcy by the partnership.[75] Whether the board of directors has the power to admit the insolvency of a corporation and to agree to its adjudication as a bankrupt depends upon their powers as conferred or limited by the various statutes, charters or by-laws.[76] Such power, if possessed by the directors, cannot

66. Repudiated for fraud inducing creditor's assent thereto. Canner v. Webster Tapper Co. [C. C. A.] 168 F 519. Creditors may repudiate assignment for fraud inducing their assent thereto and then allege such assignment as act of bankruptcy. Id.

67. New River Coal Land Co. v. Ruffner Bros. [C. C. A.] 165 F 881. Appointment of receiver of corporation at instance of stockholder charging fraud and mismanagement rendering insolvency imminent held not to have been made because of its insolvency and hence not an act of bankruptcy. In re Perry Aldrich Co., 165 F 249.

68. In re Perry Aldrich Co., 165 F 249.

69. Though receivers have not qualified or taken possession of property. In re Perry Aldrich Co., 165 F 249.

70. Search Note: See Bankruptcy, Cent. Dig. § 57; Dec. Dig. § 62.

71. Resolution of directors of corporation authorizing attorney to appear for it in bankruptcy proceedings and to agree in its behalf to appointment of receivers and give its assent to all things necessary for that purpose does not constitute an act of bankruptcy. In re Southern Steel Co., 169 F 702.

72. Mere admission of insolvency which does not express willingness to be adjudged bankrupt does not constitute an act of bankruptcy. Conway v. German [C. C. A.] 166 F 67.

73. See In re Junck, 169 F 481.

Note: A petition in the name of a firm by one or less than all of the members thereof is involuntary as regards, for certain purposes at least, the nonassenting members. Medsker v. Bonebrake, 108 U. S. 66, 27 Law. Ed. 654, decided under former act. See, also, In re Murray, 96 F 600. In the case of a nonassenting partner, the procedure is the same as in an involuntary case; hut as to creditors the petition is voluntary and hence a creditor cannot raise an issue as to the solvency of the partnership. In re Carleton, 115 F 246, 249. Hence the petition cannot be objected to on the ground that it alleges no act of bankruptcy by the firm, and the better rule seems to be that in such case the ordinary averment that the firm has not sufficient assets to pay its obligations and is willing to submit its property for distribution, is sufficient, and the filing of such a petition by one of the partners is of itself considered equivalent to an act of bankruptcy. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 857, 46 Law. Ed. 1113; In re Forbes, 128 F 137. This conclusion has been doubted because under the act of 1867 it was explicitly provided that the filing of such a petition constituted an act of bankruptcy, whereas there is no such provision in the present act. See In re Ceballos & Co., 161 F 445. The real question, however, in this connection is as to the necessity of an allegation in the petition of an act of bankruptcy by the partnership.—In re Junck, 169 F 481.

74. In re Junck, 169 F 481.

75. See post, § 5, subds. B, C.

76. Where power to wind up corporation is reposed by statute in stockholders, the directors cannot admit the insolvency of the corporation and bind it by an expression of willingness to have it adjudged a bankrupt. See B. & C. Comp. Or. § 5070. In re Quartz Gold Min. Co., 157 F 243. In absence of statute in New York and of any restrictive by-laws prohibiting directors from making general assignment for benefit of creditors, they may admit insolvency of corporation and express its willingness to be adjudged a bankrupt. In re Lisk Mfg. Co., 167 F 411. That directors residing in distant state were not notified of meeting held not to render resolution invalid. Id. Corporation held to have ratified resolution of directors admitting insolvency and willingness to be adjudged bankrupt by failure of new board of directors during several months to move to vacate receivership obtained by petitioning creditors. Id.

be delegated,[77] nor can it, aside from any question of delegation by the directors, be exercised by any other officer,[78] and if attempted to be exercised by such an officer his act cannot be validated by the ratification of the directors where they themselves have no authority to exercise such power.[79]

§ 4. *Persons who may be adjudged bankrupts and who may petition.*[80] *Who may be adjudged bankrupt.*See 11 C. L. 385—The bankruptcy act specifically designates who may be adjudged an involuntary bankrupt, with reference to both natural persons [81] and corporations,[82] and only one within such designation can commit an act of bankruptcy [83] or be adjudged a bankrupt.[84] The character of the alleged bankrupt with reference to whether within the statutory designation [85] must be determined as of the time the alleged act of bankruptcy was committed.[86] The jurisdiction of the bankruptcy court, or at least its right to act, also attaches as of such date,[87] and having so attached cannot be defeated by the subsequent acts of the debtor.[88] A partnership may be adjudicated as a distinct entity.[89]

*Who may petition.*See 11 C. L. 386—An involuntary petition may be filed only by creditors having provable claims,[90] but if otherwise provable an unliquidated claim is sufficient,[91] and the provability, in this connection, of a claim for breach of con-

77. Letter written by attorney in pursuance to authority from directors of corporation admitting its insolvency and willingness to be adjudicated bankrupt held not an act of bankruptcy, directors having no authority to delegate such power. In re Southern Steel Co., 169 F 702. Letter of attorney acting for corporation admitting insolvency and willingness to be adjudged bankrupt held not authorized by resolution authorizing attorney to appear for it in bankruptcy proceedings and to agree in its behalf to appointment of receivers and hence not an act of bankruptcy, even if directors had had power to delegate authority to commit such act of bankruptcy. Id.

78. In re Burbank Co., 168 F 719. Officer of corporation has no general power to admit its insolvency and willingness to be adjudged bankrupt. In re Southern Steel Co., 169 F 702.

79. In re Burbank Co., 168 F 719.

80. **Search Note:** See notes in 5 C. L. 369; 10 Id. 1101; 18 A. S. R. 598; 11 Ann. Cas. 359.

See, also, Bankruptcy, Cent. Dig. §§ 17, 18, 38-40, 50, 51, 53, 55, 56, 86, 87, 99-108; Dec. Dig. §§ 41-43, 67-77; 5 Cyc. 281, 283-286, 302-304, 411, 412, 559.

81. "Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil * * * owing debts," etc. 30 Stat. 547. Olive v. Armour & Co. [C. C. A.] 167 F 517.

82. "Any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits * * * owing debts," etc. 30 Stat. 547. In re Georgia Manufacturing & Public Service Co., 166 F 964.

83. Olive v. Armour & Co. [C. C. A.] 167 F 517. Farmer, being exempt, does not commit act of bankruptcy by making general assignment for benefit of creditors. Id.

84. Olive v. Armour & Co. [C. C. A.] 167 F 517. Court has no jurisdiction to adjudicate as a bankrupt a corporation not principally engaged in a business rendering it subject to such adjudication. In re New England Breeders' Club, 165 F 517. Natural person engaged chiefly in tilling the soil cannot be adjudged an involuntary bankrupt. Olive v. Armour & Co. [C. C. A.] 167 F 517.

85. Alleged bankrupt held a **farmer.** Olive v. Armour & Co. [C. C. A.] 167 F 517. Alleged bankrupt held "engaged principally in farming," and hence not subject to involuntary bankruptcy, though he operated an extensive dairy business. Gregg v. Mitchell [C. C. A.] 166 F 725.

Corporations: A corporation organized for purpose of catching, preserving and marketing fish is principally engaged in manufacturing, and hence subject to adjudication. In re Alaska American Fish Co., 162 F 498. Corporation held principally engaged in manufacture of paper though also operating waterworks and electric light plant. In re Georgia Manufacturing & Public Service Co., 166 F 964. Building corporations are not subjects of adjudication. In re New York Tunnel Co. [C. C. A.] 166 F 284.

86. Olive v. Armour & Co. [C. C. A.] 167 F 517. Avocation of alleged bankrupt after committing alleged act of bankruptcy is not controlling. Id.

87. In re Adams & Hoyt Co., 164 F 489.

88. In re Adams & Hoyt Co., 164 F 489. Institution of dissolution proceedings in state court by corporation that has committed act of bankruptcy. Id.

89. Mills v. Fisher & Co. [C. C. A.] 159 F 897; Lacey v. Cowan [Ala.] 50 S 281; In re Junck, 169 F 481.

90. Bankruptcy act 1898, § 59b. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 53 Law. Ed. —.

91. Requirements of act are satisfied if claim is provable at any time in the proceedings, though not provable at inception thereof. Bankruptcy Act 1898, §§ 59b, 63a, 63b, construed together. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 53 Law. Ed. —. Claim for damages for breach of warranty of personalty sold held sufficient. Id.

tract, is not affected by the fact that the same transaction may involve also a claim for a tort arising from fraud.[92] Any creditor holding a liquidated claim against the alleged bankrupt[93] may appear as a petitioning creditor,[94] though he purchased the claim for the purpose of appearing as a petitioning creditor,[95] received an independent consideration for joining in the petition,[96] or holds his claim as assignee without financial interest therein,[97] but a claim cannot be split and parts of it assigned to different persons in order to qualify them as petitioning creditors.[98]

A partner may file a petition on behalf of himself and the partnership,[99] and in such case the proceedings are voluntary as to the partnership and its creditors,[1] but not as to the nonassenting partners,[2] and the latter cannot be adjudicated against their will,[3] nor can the partnership where it is not before the court, be adjudicated against the consent of nonassenting partners who have not been adjudicated.[4] On the other hand, the nonassenting partners cannot prevent an adjudication of the partnership as an entity,[5] except by disproving the act of bankruptcy charged[6] or by showing himself solvent and claiming his right under the bankruptcy act to close up the affairs of the partnership,[7] and in any case, except upon disproof of the act of bankruptcy, the nonassenting partners must file their individual schedules.[8]

§ 5. *Procedure for adjudication. A. In general.*[9]—See 11 C. L. 386—A proceeding in bankruptcy is a proceeding in rem,[10] equitable in its nature,[11] and the filing of the petition operates as an injunction restraining all persons from intermeddling with the bankrupt's property;[12] but it does not deprive a creditor of the

92. Breach of warranty. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 53 Law. Ed. ——.

93. Claim of a creditor for money loaned is liquidated. In re Halsey Elec. Generator Co., 163 F 118. Under Const. Cal. art. 12, § 3, relative to liability of stockholders for debts of corporation, depositors in savings bank may file petition against a stockholder. In re Brown [C. C. A.] 164 F 673. Liability of directors of savings bank under Const. Cal. art. 12, § 3, where funds of such bank have been misappropriated during his term of office, is as determined by state decisions, fixed and contractual, and the bank's depositors and creditors may join in an involuntary petition against such director. Id.

94. In re Halsey Elec. Generator Co., 163 F 118.

95. In re Bevins [C. C. A.] 165 F 434.

96. Bernard v. Fromme, 116 NYS 807. Contract whereby attorney for petitioning creditors agrees, in consideration of creditor joining in the petition, to pay such creditor's claim in full is not against public policy, or as tending to defeat intention of bankruptcy act. Id.

97. Assignees are, in respect to such claims, trustees of their respective assignors. In re Halsey Elec. Generator Co., 163 F 118.

98. In re Halsey Elec. Generator Co., 163 F 118. Petition of creditor that he may be joined as petitioning creditor denied, it appearing that he had assigned a portion of his claim to one of the original petitioners. Id.

99. In re Junck, 169 F 481.

1. Answer in intervention by creditor should be stricken. In re Junck, 169 F 481.

2, 3, 4, 5, 6. In re Junck, 169 F 481.

7. In which event he must take upon himself the settlement of partnership business, reporting to the court the residium of assets remaining to be distributed among partnership creditors. In re Junck, 169 F 481.

8. If nonconsenting partners have a surplus of assets after discharge of individual liabilities, it must be applied to firm debts to the extent that firm assets are insufficient. In re Junck, 169 F 481.

9. **Search Note:** See notes in 23 L. R. A. 33; 44 Id. 177; 46 Id. 541; 50 Id. 33; 66 Id. 769; 12 L. R. A. (N. S.) 1173; 10 L. R. A. (N. S.) 305; 15 Id. 372; 16 Id. 656.

See, also, Bankruptcy, Cent. Dig. §§ 11-155; Dec. Dig. §§ 11-100; 5 Cyc. 242-259, 281-319, 411-414.

10. Johnson v. U. S. [C. C. A.] 163 F 30.

11. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283; First Nat. Bank v. Abbott [C. C. A.] 165 F 852. The court of bankruptcy, save in matters where a jury is required, is in the strictest sense a court of equity, is always open, and has no terms. Ex parte Steele, 162 F 694. Under general order No. 37, rules of equity practice prescribed by supreme court must be followed as near as possible. Id.

12. Equal in rank to seizure by attachment on execution. Dittemore v. Cable Mill Co. [Idaho] 101 P 593. Defendant liable for sale under execution of bankrupt's property after filing of petition, regardless of whether or not he had reasonable cause to believe preference was thereby intended. Id.

right to sue on his claim,[13] nor does it of itself stay pending actions,[14] but where brought within four months prior to the filing of the petition [15] it may upon application be stayed [16] either by the state court [17] or by the court of bankruptcy,[18] provided the cause of action is on which is dischargeable in bankruptcy [19] and the judgment is not necessary to enable the plaintiff to proceed against third parties.[20] The granting of a stay rests in the discretion of the court,[21] which should consider the particular circumstances of each case,[22] and refusal of state court to stay action commenced therein does not deprive the bankruptcy courts of jurisdiction to grant a stay,[23] but the bankruptcy court has no power to stay an action pending in a state court in another district,[24] nor will a stay be granted where the bankruptcy proceedings have been abandoned.[25] The power to stay may be exercised to protect the debtor pending the determination of his discharge,[26] but the court may take any proper step to protect the creditor in view of the contingency of debtor's failure to secure a discharge.[27] Where no stay is obtained, actions may be prosecuted to judgments,[28] which becomes conclusive [29] and may be enforced against

13. Under Act 1898. Nonotuck Silk Co. v. Pritzker, 143 Ill. App. 644.

14. Nonotuck Silk Co. v. Pritzker, 143 Ill. App. 644. Mere adjudication does not operate as stay against prosecution of a claim. Maas v. Kuhn, 130 App. Div. 68, 114 NYS 444. See generally, Stay of Proceedings.

15. Courts of bankruptcy will not ordinarily stay a suit in the state court which was brought more than four months prior to the filing of the petition. New River Coal Land Co. v. Ruffner Bros. [C. C. A.] 165 F 881.

16. Maas v. Kuhn, 130 App. Div. 68, 114 NYS 444.

17. Prosecution of dischargeable claims may be stayed upon application to state court. Maas v. Kuhn, 130 App. Div. 68, 114 NYS 444.

18. Courts of bankruptcy have jurisdiction to stay proceedings, pending bankruptcy, upon claims which are provable. In re Mustin, 165 F 506.

19. In re Mustin, 165 F 506. Actions in a state court which is in good faith based upon a claim that the bankrupt obtained property under false pretenses cannot be stayed pending bankruptcy proceedings, the liability not being one dischargeable in bankruptcy. Action for alleged deceit in obtaining money by representing that the bankrupt has no indebtedness, whereas, he is insolvent. In re Lawrence, 163 F 131.

20. An action in state court against bankrupt should not be stayed where a judgment against bankrupt is essential to right of creditor to proceed against surety. Bankrupt gave bond conditioned upon his paying any judgment obtained against him in the action. Order granting stay reversed. In re Mercedes Import Co. [C. C. A.] 166 F 427.

21. Matter of stay rests within the discretion of the bankruptcy court. Nonotuck Silk Co. v. Pritzker, 143 Ill. App. 644. The power of a court of bankruptcy, in its discretion to stay a proceeding in a state court and the exercise thereof, will not be disturbed on appeal except for abuse. New River Coal Land Co. v. Ruffner Bros. [C. C. A.] 165 F 881. Court in which action against bankrupt is pending may stay the suit pending obtension of discharge, but is not required to do so, but can proceed to judgment. Feigenspan v. McDonnell, 201 Mass. 341, 87 NE 624.

22. Stay of sale by receiver of state court denied where it appears that court fully considered advisability thereof, that it is ordered to cease the state receivership, that it has been advertised to a considerable extent, and that the sale will not be detrimental to the interests of the general creditors. In re Sterlingworth R. Supply Co., 165 F 267.

23. Denial of application to state court to stay proceedings therein against bankrupt, pending bankruptcy, does not deprive courts of bankruptcy of the power to stay such proceedings. New River Coal Land Co. v. Ruffner Bros. [C. C. A.] 165 F 881.

24. District court cannot restrain plaintiff located in another district from prosecuting garnishment action in state court against property of alleged bankrupt in such district. Injunction held no bar to action in state court. Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 SW 1087.

25. Defendant pleaded adjudication as basis for stay of garnishment suit in state court. Held that evidence failed to show adjudication but that adjudication was refused and proceedings abandoned. Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 SW 1087.

26. Power to stay extends to right of judgment creditor under N. Y. Code Civ. Proc. § 1391, as amended by Laws 1908, p. 433, c. 148, to take on execution 10 per cent of debtor's salary, where the judgment was recovered before the adjudication of the debtor. In re Van Buren, 164 F 883.

27. Judgment creditor being entitled, under N. Y. Code Civ. Proc. § 1391, as amended by Laws 1908, p. 433, c. 148, to take 10 per cent of debtor's salary on execution, bankruptcy court may, on staying the enforcement of the judgment, impound such 10 per cent until determination of application for discharge. In re Van Buren, 164 F 883.

28. Maas v. Kuhn, 130 App. Div. 68, 114 NYS 444.

29. Where trustee fails to apply for stay of action pending in state court and permits it to go to judgment, claim is thereby

property not passing to the trustee.[30] An adjudication pending an action by a receiver to recover property belonging to the bankrupt does not deprive the state court of jurisdiction of that action.[31] While the adjudication does not deprive the state court of jurisdiction to determine the existence of liens against the property of the bankrupt,[32] it should retain jurisdiction only so far as necessary to determine the rights of the parties before it,[33] and, where the actions to enforce liens are brought within four months of the filing of the petition, the bankruptcy court has power to stay them and assume exclusive jurisdiction over the property involved.[34] The filing of a petition not followed by adjudication does not, however, place the property of the bankrupt in custodia legis [35] so as to render proceedings against it in state courts void.[36] The order staying proceedings in the state court does not operate as a dismissal thereof.[37] It should be directed to the litigants only [38] and is, in the absence of review, conclusive,[39] and disobedience thereof may be punished as for contempt.[40] The inherent effect of bankruptcy proceedings upon liens acquired in legal proceedings is treated in a subsequent section.[41] It is held that the doctrine that the proceedings constitute a caveat to all the world, and operate as an injunction, is not without limitation.[42]

liquidated and provable in the amount of judgment. In re Buchan's Soap Corp., 169 F 1017. Where trustee fails to stay action pending in state court, the judgment therein is binding and the claim cannot again be liquidated in bankruptcy court. Id.

30. Current wages of bankrupt which cannot be applied to payment of his general debts. Maas v. Kuhn, 130 App. Div. 68, 114 NYS 444.

31. Judgment in favor of receiver instead of trustee in bankruptcy, who intervened, held proper. Springer v. Ayer, 50 Wash. 642, 97 P 774.

32. Bankruptcy law does not operate to take jurisdiction to determine existence of liens against property of bankrupts from courts which otherwise would have jurisdiction. Murphy v. Brown [Ariz.] 100 P 801. State court appointed receiver of insolvent corporation who converted its assets into cash. Lessor of corporation claimed proceeds under lien for rent due and to become due. Subsequently corporation is adjudicated bankrupt. Held that adjudication did not oust state court which retained jurisdiction to determine lessor's claim to proceeds and order payment thereof to him if he is found entitled thereto. I. Trager Co. v. Cavaroc Co. [La.] 48 S 949. Sale of assignee for benefit of creditors, confirmed by trustee of assignor pursuant to order of referee and payment of purchase price by assignee to trustee, does not deprive state court of jurisdiction to determine lien claims against the property, it not appearing that the property was relieved of lien by order of referee. Murphey v. Brown [Ariz.] 100 P 801.

33. Where funds of insolvent corporation in hands of receiver appointed by state court are claimed by lessor under lien for rent due and to become due, the court should upon subsequent adjudication retain jurisdiction only to determine lessor's right thereto and the question of priority as between lessor and claims arising out of receivership, to enforce lessor's lien, if found to exist, and should they turn balance of property over to trustee in bankruptcy and relegate other claimants to bankruptcy court for settlement of their demands. I. Trager Co. v. Cavaroc Co. [La.] 48 S 949.

34. Court of bankruptcy has power to restrain proceedings to foreclose liens on property of the bankrupt commenced within four months of bankruptcy, though validity of liens is not questioned and lienors object to administration thereof in bankruptcy proceedings. In re Dana [C. C. A.] 167 F 529. Court of bankruptcy has power at the instance of a creditor to stay proceeding commenced within four months of the adjudication against bankrupt involving its entire property and may take charge of the property involved, notwithstanding such suit is brought for the enforcement of liens. New River Coal Land Co. v. Ruffner Bros. [C. C. A.] 165 F 881.

35. Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 SW 1087.

36. Filing of petition not followed by adjudication does not operate to place debtor's property in custodia legis, so as to render void proceedings in state court against it. Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 SW 1087.

37. Stay of proceedings in state court does not operate as a dismissal thereof, but stays the proceedings so long as the injunction is in force. New River Coal Land Co. v. Ruffner Bros. [C. C. A.] 165 F 881.

38. Should not be directed to court or judge thereof except in case of imperative necessity. In re Dana [C. C. A.] 167 F 520.

39. Order of referee holding claim provable and staying proceedings thereon pending bankruptcy is conclusive in the absence of review thereof. In re Mustin, 165 F 506. That an order staying proceedings on a provable debt pending bankruptcy is erroneous is no defense to contempt proceedings for disobedience of the order. Id.

40. Disobedience of order of referee staying proceedings on provable claims pending bankruptcy is punishable as for contempt of court. In re Mustin, 165 F 506.

41. Sec § 10C.

42. As where state court, without notice

Bankruptcy courts are not courts of limited jurisdiction.[43] Their jurisdiction, however, is limited territorially with reference to the bankrupt's residence or principal place of business.[44] The schedules should contain a list of all the creditors of the bankrupt,[45] with the places of their residence,[46] which the bankrupt must make a reasonable effort to ascertain,[47] and, if not known, that fact should be definitely stated.[48] A debt should be listed in the name of its present owner,[49] but, where bankrupt has no knowledge of change of ownership, it is sufficient if the debt is scheduled in the name of the original owner.[50] Where the schedules are sufficient on their face, they are not subject to collateral attack,[51] and they cannot be regarded as self-serving declarations.[52] Failure of involuntary bankrupt to file schedules within required time renders him subject to punishment for contempt.[53]

(§ 5) *B. Voluntary proceedings.*[54]—See 11 C. L. 387—A voluntary petition need not allege an act of bankruptcy,[55] and a petition by one or less than all of the members of a partnership in his or their own name or names and in the name of the partnership is voluntary, so far as concerns the petitioner or petitioners and the partnership, as an entity on the one hand and the creditors on the others.[56]

of bankruptcy proceedings, orders sale of property of bankrupt under attachment against him. Jones v. Springer [N. M.] 103 P 265.

43. In re Marion Contract & Const. Co., 166 F 618.

44. Bankruptcy courts have jurisdiction to adjudge as bankrupt persons who have, for the greater portion of the preceding six months, had their principal place of business or their residence or domicile within their respective territorial jurisdiction. In re Pennsylvania Consol. Coal Co., 163 F 579. Three months and three days residence held to confer jurisdiction, being greater portion of six months. Longley Bros. v. McCann [Ark.] 119 SW 268.

Corporations: The principal place of business of a corporation must be determined as a question of fact, the authority conferred by its charter not being controlling. In re Pennsylvania Consol. Coal Co., 163 F 579. Fact that **foreign corporation** did not comply with the laws of the state wherein it is alleged to have its principal place of business as a prerequisite to its right to do business therein is immaterial. In re Perry Aldrich Co., 165 F 249. Maine corporation whose office and place of business in Massachusetts has been in receiver's hands for more than three months when petition was filed held not to have had its principal place of business in Massachusetts for the greater part of six months preceding the filing of the petition. Id. Facts considered and principal place of business of a corporation held to be in Pennsylvania though its coal mines are located in West Virginia and its charter designates a place in that state as its principal place of business, and though the statute was not complied with in changing the place of business to Pennsylvania. In re Pennsylvania Consol. Coal Co., 163 F 579. **Where affairs of two corporations are intermingled** so that it is impossible to separate their interests, the court may entertain a petition against both though one of them may be located without the district. In re Alaska American Fish Co., 162 F 498.

45, 46. Lutz v. Kalmus, 115 NYS 230.

47. Lutz v. Kalmus, 115 NYS 230. Question of diligence in ascertaining correct residence of creditor enters into the question of the sufficiency of the schedules only in so far as it affects the good faith of the debtor's statement that the creditor's address is unknown. Id. Whether he has made a reasonable effort presents a **question of fact.** Id.

48. Where bankrupt in schedules makes positive statement that present residence of creditor is unknown, it is a sufficient compliance with bankruptcy law, though he adds thereto the former location of creditor, which is in fact erroneous, it appearing that he was acting in good faith. Lutz v. Kalmus, 115 NYS 230.

49. Lutz v. Kalmus, 115 NYS 230. Bankrupt gave notes for $12,000 to a creditor. Creditor subsequently died and notes were divided between her daughters, and bankrupt, so notified, made payments to daughters from time to time. Subsequently he filed petition in bankruptcy scheduling estate of creditor. Held schedule insufficient for discharge of debt to daughters. Fible v. Crabb, 33 Ky. L. R. 1027, 112 SW 576.

50. Debt held properly scheduled in name of firm as creditor, though one member thereof died before bankruptcy and claim was then owned by the surviving partner, bankrupt having no knowledge of such change of ownership. Lutz v. Kalmus, 115 NYS 230.

51. Cannot be attacked by affidavits in a collateral proceeding to have judgments discharged by the bankruptcy proceedings canceled of record. Lutz v. Kalmus, 115 NYS 230.

52. In re Strang, 166 F 779.

53. In re Schulman, 164 F 440.

54. Search Note: See Bankruptcy, Cent. Dig. §§ 38-49; Dec. Dig. §§ 38-51.

55. In re Junck, 169 F 481.

56. In re Junck, 169 F 481. See ante, § 4, subd. Who May Petition.

A voluntary petition must be based on a debt or debts not provable in a prior proceeding.[57]

(§ 5) *C. Involuntary proceedings.*[58] *Jurisdiction and general consideration.* See 11 C. L. 387—In proceedings against one or less than all of the members of a partnership, the partnership cannot be adjudicated.[59] Where one or less than all of the members of a partnership file a petition in the name of the firm, the proceedings are involuntary as against the nonassenting partners.[60] Where two involuntary petitions are filed in different districts, the court first obtaining jurisdiction will retain it,[61] unless manifest grounds of inconvenience be shown.[62] Creditors whose claims are not provable in bankruptcy cannot contest an involuntary petition.[63]

The petition. See 11 C. L. 387—The petition must sufficiently state the claims of the petitioning creditors,[64] and must definitively [65] allege some act of bankruptcy specified in the bankruptcy law,[66] and that the alleged bankrupt is within the statutory designation of those who may be adjudged.[67] A petition should not be dismissed where one act of bankruptcy is sufficiently alleged, though others alleged are insufficient.[68] An involuntary petition by a partnership may be verified by one of the partners,[69] and such a petition by corporation may be verified

57. Where a bankrupt obtained no discharge and filed a subsequent petition, a judgment obtained on a debt provable in the first proceeding cannot be made the basis of the second. In re Schnabel, 166 F 383.

58. **Search Note:** See Bankruptcy, Cent. Dig. §§ 12, 58-60, 98-146, 152-155; Dec. Dig. 78-100.

59. Lacey v. Cowan [Ala.] 50 S 281.

60. In re Junck, 169 F 481. See, also, ante, § 4, subd. Who May Petition.

61. Will be accorded exclusive jurisdiction. In re Pennsylvania Consol. Coal Co., 163 F 579.

62. In re Pennsylvania Consol. Coal Co., 163 F 579. Burden of showing inconvenience is upon creditors petitioning for the vacation of the adjudication, made in the court which first acquired jurisdiction. Id. Evidence held not to show inconvenience. Id.

63. Tort creditors whose claims are not provable in bankruptcy. In re New York Tunnel Co. [C. C. A.] 166 F 284.

64. Where creditor's claims are stated so as to give bankrupt a full and clear understanding of what the debts are, the statements thereon are sufficient. "Open account aggregating $311.25 with interest from Dec. 19, 1906," held sufficient. Conway v. German [C. C. A.] 166 F 67.

65. Petition alleging that, while insolvent, alleged bankrupt transferred property to creditors with intent to prefer is demurrable for indefiniteness. Conway v. German [C. C. A.] 166 F 67. General allegation that alleged bankrupt paid out money in settlement of his debts and thereby made preferences among creditors is too vague to justify an adjudication on ground of preferences. Mills v. Fisher & Co. [C. C. A.] 159 F 897.

66. **Fraudulent disposition of property:** A petition, under § 3 subd. 1, of the bankruptcy act, predicated upon a judgment, which becomes a lien upon real property as a transfer, must allege that it was permitted for the purpose of hindering, delaying and defrauding creditors. In re Tupper, 163 F 766.

Preferential transfers while insolvent: Petition held demurrable for failure to allege insolvency at time of preferential act. In re Hammond, 163 F 548. Petition alleging preferential payments held demurrable for failure to recite the particular payments and to allege that the payments were made with intent to prefer the creditors to whom they were made. Id.

Suffering obtention of preference through legal proceedings: Petition predicated upon a transfer of property by way of security by permitting a judgment to become a lien thereon must allege that it was done for the purpose of preferring the creditor in whose favor the judgment was taken. In re Tupper, 163 F 766. Petition held demurrable for failure to allege that judgments suffered to be entered against the bankrupt were not vacated within five days before a sale or final disposition. In re Hammond, 163 F 548.

Admission of insolvency and willingness to be adjudged bankrupt: Mere allegation that alleged bankrupts have admitted their inability to pay their debts is an insufficient allegation of an act of bankruptcy. Conway v. German [C. C. A.] 166 F 67.

67. Where the alleged bankrupt is a corporation, its character must be sufficiently alleged. In re Marion Contract & Const. Co., 166 F 618. Petition against natural person must allege that he is not a wage earner or a person engaged chiefly in tilling the soil. Conway v. German [C. C. A.] 166 F 67.

Demurrer lies for failure to allege that alleged bankrupt is not wage earner and is not chiefly engaged in cultivation or tillage of soil. Conway v. German [C. C. A.] 166 F 67.

68. Where one act of bankruptcy is properly stated, the petition should not be dismissed for insufficiency of others. Conway v. German [C. C. A.] 166 F 67.

69, 70. Walker v. Woodside [C. C. A.] 164 F 680.

by its president.[70] Amendments should be allowed freely in furtherance of justice,[71] and when allowed relate back to the time of filing the petition,[72] but acts of bankruptcy committed more than four months prior to the amendment cannot be included therein when not referred to in original petition.[73] An answer to an application to amend must state matter germane to the proposed amendment.[74]

Defenses.[See 11 C. L. 387]—The fact that one of the members of a firm is solvent is no defense against a petition against the firm and the insolvent members.[75]

Evidence.[See 11 C. C. 387]—The insolvency of the alleged bankrupt at the time of the commission of the act of bankruptcy must be established by competent evidence.[76]

(§ 5) *D. Exemption of bankrupt from arrest.*[77]—[See 9 C. L. 347]—The bankruptcy act provides for the release of a bankrupt imprisoned for debt, pending the bankruptcy proceedings,[78] regardless of whether or not the debt is dischargeable,[79] the release from arrest prior to the discharge being merely interlocutory,[80] and final determination of the question whether his release should be permanent being had after his discharge is granted, when it can be determined whether the debt upon which the arrest was based is or is not dischargeable.[81] Upon release of the bankrupt pending bankruptcy proceedings, he cannot be required to give bail.[82]

(§ 5) *E. Adjudication.*[83]—[See 11 C. L. 388]—No answer being interposed [84] or on the alleged bankrupt failing to comply with orders of the court relative to the pleadings,[85] an order of adjudication may be entered by the court, or in the ab-

71. Where there is no doubt of the existence of conditions rendering administration in bankruptcy necessary, the petition may be amended so as to properly set forth such conditions. Ryan v. Hendricks [C. C. A.] 166 F 94. Insufficiency in **statement of creditors' claims** may be cured by amendment. Denial of motion to permit amendment held error. Conway v. German [C. C. A.] 166 F 67. Failure of petition to adequately aver the **character of alleged bankrupt** corporation is not jurisdictional to extent that it may not be cured by amendment. In re Marion Contract & Const. Co., 166 F 618. Denial of motion to permit amendment held error, there being no contention that alleged bankrupt belonged to exempted class. Conway v. German [C. C. A.] 166 F 67.

72. Ryan v. Hendricks [C. C. A.] 166 F 94.

73. Walker v. Woodside [C. C. A.] 164 F 680. Where none of grounds of demurrer to amended petition went to objection that new acts of bankruptcy were alleged, there was a **waiver of objection.** Id.

74. Answer denying indebtedness to creditors and their right to file petition and assailing good faith of creditors held matter to be disposed on trial of issues raised by answer to petition and not germane to application to amend as to formal matters. Conway v. German [C. C. A.] 166 F 67.

75. In re Solomon, 163 F 140.

76. Finding of insolvency by state court held not controlling in bankruptcy proceedings, state court having after commencement of such proceedings amended its findings so as to show facts on which they are based which do not come within the term as defined in the bankruptcy act. In re Golden Malt Cream Co. [C. C. A.] 164 F 326. Finding by state court of insolvency does not establish insolvency in bankruptcy proceedings where based on facts not coming within the term as defined in the bankruptcy act. Id. Order of state court appointing receiver of corporation on petition charging insolvency does not establish insolvency within meaning of bankruptcy act, the term being differently defined by the state laws. Id.

77. **Search Note:** See Bankruptcy, Cent. Dig. §§ 619-622; Dec. Dig. § 392.

78. United States v. Peters, 166 F 613.

79. United States v. Peters, 166 F 613. Dischargeability of debt cannot be adjudicated until a discharge has been granted bankrupt. Id.

80. United States v. Peters, 166 F 613.

81. If debt is dischargeable, bankrupt will be released from arrest therefor. United States v. Peters, 166 F 613. If after discharge of bankrupt it is determined that discharge did not embrace debt for which he was arrested, he will be remanded to custody. Id.

82. Bankrupt discharged from arrest for debt pending bankruptcy proceedings cannot be required to give bail. United States v. Peters, 166 F 613.

83. **Search Note:** See Bankruptcy, Cent. Dig. §§ 60, 131, 141-144; Dec. Dig. 100.

84. Where, on petition by one partner, remaining partners fail to show that no act of bankruptcy was committed and also fail to claim right to administer partnership affairs, an adjudication of the partnership follows. In re Junck, 169 F 481.

85. Where the alleged bankrupt fails to comply with an order respecting the perfection of its pleading, the district court has power, upon its failure to appear in response to an order to show cause why it

sence of the judge from the district by the referee to whom the matter is referred by the clerk.[86] Reference by the clerk while the judge is within the district does not render the adjudication void.[87] Adjudication may be made without issuance of process on same day the petition is filed, where the bankrupt appears and admits the allegations of petition.[88] The adjudication places the property of the bankrupt in the custody of the bankrupcty court,[89] which thereafter has exclusive jurisdiction thereof.[90] The adjudication put the bankrupts into bankruptcy as against the world, for the purpose of administering whatever assets there may be,[91] is binding upon all creditors who had notice,[92] and is not subject to collateral attack,[93] except for matter going to the jurisdiction of the court,[94] which latter defects, however, if clearly[95] and affirmatively appearing on the record,[96] may be raised by creditors not entitled to contest the adjudication on its merits[97] and regardless of any question of laches, waiver, or estoppel.[98] The adjudication is also binding upon the bankrupt and creditors, as to all matters determined,[99] but does not establish the facts upon which such adjudication is founded, no matter how necessary to the adjudication, except as against parties entitled to be heard.[1] A fortiori such adjudication is not determinative of matters not necessarily determined thereby.[2] The adjudication cannot be attacked by a creditor who has filed his claim in the proceedings[3] or by one who does not offer to plead thereto.[4]

should not be adjudicated a bankrupt, to make an order adjudicating it a bankrupt. Young & Holland Co. v. Brande Bros. [C. C. A.] 162 F 663.

86. Gilbertson v. U. S. [C. C. A.] 168 F 672. Deputy clerk of district court has power to sign order of reference. Id.

87. Reference by clerk though judge is within district, while erroneous and avoidable on review, does not render adjudication void or subject to collateral attack. Gilbertson v. U. S. [C. C. A.] 168 F 672.

88. In re Western Inv. Co., 170 F 677.

89. Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 SW 1087.

90. State courts cannot acquire jurisdiction. Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 SW 1087. Where the bankruptcy court through its receiver has possession of property, one claiming the property can obtain relief only in the federal court. State courts have no jurisdiction. John Hofman Co. v. Murphy, 116 NYS 506.

Effect on proceedings in state courts. See ante, § 5A, post, § 10C.

91. Manson v. Williams, 213 U. S. 453, 53 Law. Ed. —.

92. Where adjudication is not appealed from it becomes final as against parties to record and creditors chargeable with notice of the pendency of petition. In re Marion Contract & Const. Co., 166 F 618. Knowledge of directors of bank of proceedings pending against corporation held chargeable to bank. Id. Leave to contest adjudication will not be granted after adjudication to one who had notice of the petition and did not appear and object. Id.

93. Reference by clerk while judge is in district held not to justify collateral attack. Gilbertson v. U. S. [C. C. A.] 168 F 672. Evidence that recital in order of reference of the absence of the judge was untrue held inadmissible in a collateral proceeding. Id.

94. Gilbertson v. U. S. [C. C. A.] 168 F 672. Recital in order of reference that judge is absent from district does not affect the jurisdiction of the court, but relates only to the course of procedure and is not open to collateral attack. Id.

95. Where the corporation might or might not be within the act, the adjudication cannot be attacked by creditors having no standing to contest it. In re New York Tunnel Co. [C. C. A.] 166 F 284.

96. Adjudication against tunnel company will not be vacated at the instance of creditors having no standing to contest it, on the ground that the corporation is not subject to adjudication, unless its character as such corporation appears on the face of the record. In re New York Tunnel Co. [C. C. A.] 166 F 284.

97. In re New York Tunnel Co. [C. C. A.] 166 F 284.

98. Laches, waiver or estoppel cannot cure lack of jurisdiction of the court to adjudicate a corporation bankrupt. In re New England Breeders' Club, 165 F 517.

99. Adjudication held conclusive, on collateral attack, of appointment of receiver under state laws on account of insolvency, such appointment having been the act of bankruptcy charged. Hecox v. Rollestone [C. C. A.] 164 F 823.

1. Manson v. Williams, 213 U. S. 453, 53 Law. Ed. —. Adjudication against two persons as partners held not to establish partnership and property rights as against trustees of one of alleged partners who were not heard, though they filed answer and denial on such issues. Id.

2. Adjudication of a partnership does not necessarily establish the relative rights of the partners in the capital invested in the business, since partnership might be one of profits only. Manson v. Williams, 213 U. S. 453, 53 Law. Ed. —.

3. Creditor who files claim acquiesces in the adjudication. In re New York Tunnel Co. [C. C. A.] 166 F 284.

4. Creditor not offering to plead to peti-

The adjudication of a partner operates to dissolve the partnership [5] but where the partnership is not adjudicated partnership assets cannot be administered under an adjudication against less than all of the members individually, unless the members not adjudicated consent to such administration.[6]

§ 6. *Procedure after adjudication.*[7]—See 11 C. L. 389—The court has power in its discretion to refer the proceedings to any referee within its territorial jurisdiction having due regard to the convenience of the parties.[8] After adjudication of a partnership upon the petition of one or less than all of the partners, the nonjoining partners may be compelled to file individual schedules.[9]

§ 7. *Protection and possession of the property pending the appointment of trustees; receivers.*[10]—See 11 C. L. 389—The appointment of a receiver is authorized only in cases where it is absolutely necessary for the preservation of the estate,[11] and, where the necessity therefor does not appear, a receivership cannot be predicated upon the mere consent of the bankrupt [12] particularly where the appointment is opposed by intervening creditors,[13] but, being made, it cannot be attacked in a collateral proceeding [14] by parties not interested otherwise than as adverse claimants of property in his possession.[15] A receiver being appointed the district court of another district has power to appoint an ancillary receiver where necessary to preserve property of the bankrupt located therein.[16] A referee has power to appoint a receiver pending adjudication,[17] but this power should be exercised only in cases of absolute necessity where no other means of protection is obtainable [18] and then only upon due notice.[19] An unauthorized appointment will not be permitted to delay or affect the trial of the issues between the petitioning and intervening, opposing creditors.[20] The application for the appointment of a receiver should be based on pleadings alleging its necessity.[21] The receiver is not invested with the title to the property of the bankrupt,[22] he is a mere custodian [23] entitled only to possession of such property as is an asset of the estate.[24] He may, however, take possession of premises leased by the bankrupt.[25] He must in such

tion in bankruptcy is not in position to object that he was not given opportunity to do so. In re Western Inv. Co., 170 F 677.

5. Hardy v. Weyer, 42 Ind. App. 343, 85 NE 731.

6. Mills v. Fisher & Co. [C. C. A.] 159 F 897; Lacey v. Cowan [Ala.] 50 S 281. See ante, § 4.

7. **Search Note:** See notes in 65 L. R. A. 353; 16 L. R. A. (N. S.) 341; 10 Ann. Cas. 742.

See, also, Bankruptcy, Cent. Dig. §§ 148-163; Dec. Dig. §§ 101-117.

8. In re Western Inv. Co., 170 F 677.

9. In re Junck, 169 F 481; In re Solomon, 163 F 140.

10. **Search Note:** See Bankruptcy, Cent. Dig. §§ 148-163; Dec. Dig. §§ 101-117.

11. Faulk & Co. v. Steiner [C. C. A.] 165 F 861; Dunlap Hardware Co. v. Huddleston [C. C. A.] 167 F 433. Appointment on application of creditors joined in by the bankrupt, no objection being made thereto. In re Huddleston, 167 F 428.

12. Faulk & Co. v. Steiner [C. C. A.] 165 F 861.

13. Faulk & Co. v. Steiner [C. C. A.] 165 F 861. Provisions of the bankruptcy act for the protection of the bankrupt cannot be waived by him if they also serve to protect the creditors. Id.

14. Ross v. Stroh [C. C. A.] 165 F 628.

15. Claimants of property in the hands of receiver, whose only interest consists of their claim of the ownership of such property, cannot collaterally attack the official status of the receiver or the proceedings leading to his appointment. Ross v. Stroh [C. C. A.] 165 F 628.

16. Bankruptcy Act, § 1. In re Dunseath & Son Co., 168 F 973.

17. Faulk & Co. v. Steiner [C. C. A.] 165 F 861.

18. Showing held insufficient. Faulk & Co. v. Steiner [C. C. A.] 165 F 861.

19, 20, 21. Faulk & Co. v. Steiner [C. C. A.] 165 F 861. Showing of facts rendering receivership necessary held insufficient. Id.

22. Has no title or authority regarding such property. In re Rubel, 166 F 131.

23. Making him party to foreclosure proceedings would merely operate to cut off such right of temporary possession as he had acquired. Freehold Const. Co. v. Bernstein, 60 Misc. 363, 113 NYS 368.

24. The right of the receiver to possession of a reward claimed by the bankrupt from the federal treasury department depends upon whether or not the claim of the bankrupt is an asset of the estate. In re Ghazal, 163 F 602.

25. In re Rubel, 166 F 131. Is not rendered a trespasser by continuing in possession after service of notice to quit. Id.

case pay a reasonable rental for the period he is in possession [26] which rental is determined without regard to the unexpired lease of the bankrupt.[27] A receiver may in a proper case when authorized by the court continue the business of the bankrupt [28] in which event he may adopt the assignable contracts of the bankrupt [29] and may be authorized by the court to borrow money [30] and issue receiver's certificates therefor.[31] Where the receiver continues the business after he is satisfied that it can be conducted only at a loss, he will be surcharged [32] and as it is the duty of the receiver to account for all assets coming into his possession [33] he may also be surcharged with the value of property not accounted for.[34] Charges of misconduct against the receiver cannot be predicated on acts done pursuant to the orders of the court.[35]

When a court of bankruptcy has, through its officers, such as referees, receivers, or trustees, taken possession of property as belonging to the bankrupt, it has ancillary jurisdiction to determine adverse claims thereto [36] and its possession cannot be disturbed by process from another court.[37] Property in the hands of a bankruptcy receiver as such [38] cannot, therefore, be seized upon a writ issued from a state court; [39] but a receiver may be sued as an individual [40] or in his official capacity,[41] the power to sue him as receiver, however, being limited to cases wherein leave of the court appointing him has been obtained,[42] except in cases arising out of some act or transaction connected with carrying on the business of the bankrupt.[43] The power of a receiver to sue does not extend beyond actions which may be brought within the territorial limits of the district in which his appointment

26. In re Youdelman-Walsh Foundry Co., 166 F 381. Fact that bankrupt was in possession part of month and landlord has provable claim for entire month, including period of receiver's possession, does not relieve receiver. Id.

27. Receiver does not become tenant under bankrupt's lease. In re Youdelman-Walsh Foundry Co., 166 F 381.

28. Where necessary to preserve assets. In re Restein, 162 F 986.

29. Contract for delivery of ore upon credit to bankrupt held adoptable by receiver where he offers to pay cash on delivery. In re Niagara Radiator Co., 164 F 102.

30, 31. In re Restein, 162 F 986.

32. In re Consumers' Coffee Co., 162 F 786. Where a receiver continued the business of a bankrupt as a going concern, after he is satisfied that it can be operated only at a loss, he will be surcharged with the loss sustained from the time that it satisfactorily appears that it can be operated only at a loss. Id. Can be surcharged with such loss only as is sustained after he is satisfied that the business cannot be operated except at a loss. Id.

33. In re Consumers' Coffee Co., 162 F 786.

34. Proceeds of sale of stock and fixtures, for which he did not account. In re Consumers' Coffee Co., 162 F 786. Cannot be surcharged with supplies on hand at the time he went into possession and which were used up in continuing the business. Id.

35. Order of sale of property against which claims for liens were preferred required receiver to pay lienholders amount of their claims out of the proceeds subject to right of persons interested to question such amounts. Claimant asserted lien which was contested and found invalid. Held receiver not guilty of misconduct for failure to pay him amount of his claim. In re Roberts [C. C. A.] 166 F 96.

36, 37. Murphy v. John Hofman Co., 211 U. S. 562, 53 Law. Ed. —-.

38. Fact that property was not included in schedules did not indicate that receiver held in private capacity as bailee of bankrupt, where it appeared that it was omitted from schedules on account of a dispute as to title thereto. Murphy v. John Hofman Co., 211 U. S. 562, 53 Law. Ed. —-.

39. Replevin. Murphy v. John Hofman Co., 211 U. S. 562, 53 Law. Ed. —-. Claim and delivery will not lie for property in actual or constructive possession of receiver, being in custody of federal court. Yegen v. Northern Pac. R. Co. [N. D.] 121 NW 205.

40. Bankruptcy court has no power to stay a suit in state court against receiver in his individual capacity, though suit relates to matters arising out of his administration of bankrupt estate. In re Kalb & Berger Mfg. Co. [C. C. A.] 165 F 895.

41. In re Kalb & Berger Mfg. Co. [C. C. A.] 165 F 895.

42. Suit on contract for storage of machinery belonging to estate stayed. In re Kalb & Berger Mfg. Co. [C. C. A.] 165 F 895.

43. Suit in state court against receiver in his official capacity when brought without leave may be stayed unless it arises out of some act or transaction connected with carrying on business of bankrupt. Contract for storage of machinery belonging to state held not carrying on business of bankrupt. In re Kalb & Berger Mfg. Co. [C. C. A.] 165 F 895.

was had,[44] the remedies for the protection of property of the bankrupt located without the district being available only to an ancillary receiver appointed by the court of the district in which the property is located.[45] The bankruptcy court cannot take cognizance of a dispute between the bankrupt and the receiver concerning unallowed government claims, the allowance of which is discretionary with the officers of the government,[45a] nor can the court, where such officers are not parties, make a binding order excepting them from the operation of an injunction restraining all persons from turning the bankrupt's property to anyone except the receiver.[45b]

§ 8. *Creditors' meetings; appointment of trustee; removals.*[46] See 11 C. L. 389 Notice of the first meeting of creditors should be given all creditors,[47] and failure to do so may be made the basis of an order setting aside the proceedings had at the meeting.[48] The trustee is ordinarily elected by the creditors of the bankrupt[49] and should be a resident of the district wherein the proceedings are pending.[50] His removal from the district does not, however, justify his removal as trustee, where the change of residence does not interfere with the performance of his duties.[51] The fact that a creditor is an employee of a bankrupt[52] or a stockholder,[53] or director of the bankrupt corporation,[54] does not deprive him of his right to vote for the trustee, and the fact that one of three trustees of the bankrupt may be made defendant in a suit by the remainder does not disqualify him.[55] The adjournment of the election of the trustee so as to hear objections to claims otherwise entitled to vote vests in the discretion of the referee.[56]

44. Receiver appointed in one district cannot maintain action in another district to receive assets in hands of strangers. In re Dunseath & Son Co., 168 F 973. Receiver appointed in one district cannot by summary proceeding restrain state officers in another district. Id. Cannot by summary proceeding recover assets of bankrupt from strangers in another district. Id.

45. In re Dunseath & Son Co., 168 F 973.

45a. Before a reward claimed by the alleged bankrupt from the treasury department is paid over, the bankruptcy court cannot determine the right to possession thereto as between the alleged bankrupt and his receiver. In re Ghazal, 163 F 602.

45b. A receiver was appointed pending determination of the issue of bankruptcy and an order issued requiring all persons to turn property over to the receiver. The alleged bankrupt claimed a reward from the treasury department, which was allowed and turned over to the collector to be paid to the claimant. Held that the bankruptcy court had no jurisdiction on a motion by the alleged bankrupt, to which neither the secretary of the treasury nor the collector were made parties, to make an order excepting the treasurer and collector from the order requiring the property of the alleged bankrupt to be turned over to the receiver. In re Ghazal, 163 F 602. Disputes between the alleged bankrupt and the receiver as to the right to possession of rewards claimed by the bankrupt from the treasury department cannot be determined on a motion to except the secretary of the treasury from the operation of an order restraining the turning over of property to any one but the receiver. Id.

46. Search Note: See notes in 55 L. R. A. 33, 344; 69 Id. 771; 1 L. R. A. (N. S.) 202; 3 Id. 702; 8 Id. 961; 9 Id. 112; 13 Id. 629; 14 Id. 507, 1025.

See, also, Bankruptcy, Cent. Dig. §§ 168-192; Dec. Dig. §§ 118-134; 5 Cyc. 244, 319-322, 334-338.

47. In re Evening Standard Pub. Co., 164 F 517.

48. Where first meeting of creditors is held without notice to one who on appeal from adjudication was held entitled to rights of creditor until his claim was disproved and whose rights as such creditor were ignored, he having no knowledge of such meeting, the election of trustee will be vacated and a new meeting ordered. In re Evening Standard Pub. Co., 164 F 517.

49. In re Seider, 163 F 138.

50. In re Seider, 163 F 138.

51. A trustee who has an office within the district of appointment, but subsequently moves his residence to another district, is not subject to removal where the change of residence does not interfere with the performance of his duties. In re Seider, 163 F 138.

52, 53, 54. In re Syracuse Paper & Pulp Co., 164 F 275.

55. That one of three trustees of bankrupt corporation is director thereof and may be made defendant in suit by trustees does not disqualify him. Action may be brought by remaining trustees, making co-trustee defendant. In re Syracuse Paper & Pulp Co., 164 F 275.

56. In a contest over the election of trustee, referee is not required to adjourn meeting to try oral objection to claims in support of which no proof is offered. Objections held properly overruled. In re Syracuse Paper & Pulp Co., 164 F 275.

Examination of bankrupt. See 8 C. L. 348—The bankrupt may be compelled to appear for examination [57] and to produce [58] and submit his books of account,[59] though they contain evidence tending to incriminate him,[60] the court, however, protecting him against their use in criminal proceedings.[61] The issuance of a writ of habeas corpus ad testificandum for the presence of a bankrupt who is in custody rests in the discretion of the trial court;[62] which should be exercised according to the circumstances of each particular case.[63] Any creditor may examine the bankrupt [64] as to matters relating to his property and indebtedness,[65] regardless of whether or not his claim has been filed.[66] The bankrupt must answer all questions clearly [67] and truthfully,[68] and may be punished as well for testifying evasively,[69] as where he testifies falsely,[70] though he may not be punished for testifying falsely as to immaterial matters [71] resulting in no injury to the creditors or the estate,[72] nor should he be punished for giving false testimony which he afterwards corrects by testifying truthfully.[73]

§ 9. *Compositions.*[74] See 11 C. L. 390—A composition settlement entered into in good faith and for the best interest of the creditors, and confirmed by the court,[75] operates to discharge all debts listed in the proceedings,[76] and exhausts the jurisdiction of the court over the assets of the bankrupt.[77] On application to approve a composition agreement, the court is concerned only with such property as comes into the estate as an asset for distribution.[78] The composition will not be set aside at the instance of a creditor who, through error, participated therein on the basis

57. In re Sorkin, 166 F 831.

58. In re Harris, 164 F 292.

59. Bankrupt punished for contempt in failing to obey orders of referee requiring him to appear for examination and submit his books of account. In re Sorkin, 166 F 831.

60. In re Harris, 164 F 292. Trustee or receiver of bankrupt takes books as agent of bankrupt. Id.

61. Order requiring production of books should provide for their use only in civil proceedings and arrange for precautions against their use in criminal prosecutions. In re Harris, 164 F 292.

62. Creditors are not entitled thereto as matter of right. In re Thaw [C. C. A.] 166 F 71.

63. Where it appears that the alleged bankrupt is in custody of the state as a person adjudged insane and no issue is raised as to his sanity or insanity, and it does not appear that he has capacity or that his testimony is absolutely necessary, the writ is properly quashed. In re Thaw [C. C. A.] 166 F 71.

64, 65. In re Rose, 163 F 636.

66. Filing of his claim is not a prerequisite of the creditor's right to examine the bankrupt. In re Rose, 163 F 636.

67. In re Schulman, 167 F 237.

68. In re Gordon, 167 F 239.

69. Bankrupt committed for contempt for answering evasively questions relating to large portion of assets for which he failed to account. In re Schulman, 167 F 237.

70. In re Gordon, 167 F 239.

71. Motion to punish for contempt denied where bankrupt testified that he had no money in his pocket but it afterward developed that he had $100 in bills which it was found belonged to third person. In re Gordon, 167 F 239.

72. In re Gordon, 167 F 239.

73. Where bankrupt testifies falsely but after rigid examination admits the falsity and testifies truly, he should not be punished for contempt. In re Gordon, 167 F 239.

74. Search Note: See note in 100 A. S. R. 394.

See, also, Bankruptcy, Cent. Dig. §§ 575-577, 585-616, 618; Dec. Dig. §§ 374-389.

75. In re Seligman, 163 F 549. Fact that, a year before the bankruptcy, the bankrupt made a statement to a creditor, which while untrue is not materially false and does not appear to have been made for the purpose of obtaining credit, will not justify the court in refusing to confirm a composition settlement agreed to by all creditors but one and apparently made in good faith and for their best interest. Id. As to what statements are ground for denial of discharge, see post, § 22B.

76. Composition settlement confirmed and executed operates to discharge bankrupts. In re Cooper Bros., 166 F 932. **Debts not listed** in bankruptcy proceedings are not affected by composition settlement. Smith v. Rucker [Ark.] 114 SW 1181.

77. Creditor of bankrupt corporation claimed lien securing part of its claim. Its entire claim was allowed as an unsecured claim. Subsequently in pursuance of composition settlement, securities of re-organized bankrupt corporation were tendered and refused. Held that in suit to enforce its lien, to which reorganized corporation is not a party, a petition to impound such securities pending such suit will be denied. York Mfg. Co. v. Merchants' Refrigerating Co., 168 F 108.

78. Not concerned with deals to raise funds for payment of claims outside the proceedings. Funds raised with which to pay attorney's fees, referee's fees, etc. In re Linderman, 166 F 593.

of a part of his claim only,[79] nor will it, on the ground of fraud, be set aside at the instance of a creditor who under a secret agreement has received an unlawful preference,[80] nor will a composition be set aside where subsequent proceedings in bankruptcy have been instituted against the bankrupt and it appears that the interests of the innocent creditors can best be protected therein;[81] but preferential notes of bankrupt fraudulently given in pursuance of a composition agreement are void as between the parties[82] and are not rendered valid by the fact that they were given after the settlement was effected.[83] A composition settlement made by one partner in behalf of the partnership and himself and the partnership does not release the remaining partners as to debts upon which they were severally liable.[84] Where the evidence supports the adjudication, a clause of a composition agreement providing for a provisional order will not be approved.[84a]

§ 10. *Property and rights passing to the trustee. A. Particular kinds of property.*[85] See 11 C. L. 390—Except in so far as the rights of creditors have become fastened thereon under provisions of state laws,[86] the trustee is by operation of law[87] vested with the title[88] and right to possession[89] of all transferrable[90] or distributable[91] assets owned by the bankrupt[92] prior to the adjudication,[93] and within the

79. In absence of fraud. In re Cooper Bros., 166 F 932. In absence of fraud, creditor who consented to composition settlement on basis of part of his claim cannot, after settlement, obtain relief as to remainder thereof. Id.

80. In re Sacharoff, 163 F 664.

81. By disallowance of fraudulent preferences made on composition of former proceedings. In re Sacharoff, 163 F 664.

82. In re Sacharoff, 163 F 664. Note given creditor by bankrupt to induce creditor to consent to composition offer whereby such creditor receives secret preference. Dicks v. Andrews [Ga.] 64 SE 788.

83. Note dated in advance and left with third party to be delivered to creditor after composition. Dicks v. Andrews [Ga.] 64 SE 788.

84. Bankrupt firm was liable to bank, both jointly and jointly and severally. Composition offer by one partner for himself and partnership was accepted and confirmed, bank expressly reserving all other rights. Held bank entitled to prove claim against estate of remaining partner, less amount received under composition agreement. In re Coe, 169 F 1002.

84a. In re Linderman, 166 F 593.

85. Search Note: See note in 7 C. L. 398, 399; 10 Ann. Cas. 243.

See, also, Bankruptcy, Cent. Dig. §§ 193-239, 625, 656-678; Dec. Dig. §§ 137-149.

86. See post, §§ 10C, 10D.

87. In re Burke, 168 F 994. No other act than his appointment and qualification is required to vest title in trustee, and he need not intervene in pending action by or against bankrupt in order to be entitled to fruits of such action if bankrupt be successful. Kessler v. Herklotz, 132 App. Div. 278, 117 NYS 45.

88. Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 NW 926.

89. Bankrupt's possession of property is vested by operation of law in trustee. In re Burke, 168 F 994.

90. Trustee is vested with all property which, prior to filing petition, bankrupt could by any means have transferred. Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 NW 926.

91. Adjudication operates to transfer distributable assets of bankrupt to trustee. In re Baum [C. C. A.] 169 F 410.

92. Claimant who paid for goods shipped to another on bankrupt's credit and charged the payment to bankrupt's account held to have no claim against trustee by reason of his acceptance of goods shipped, it appearing that at the time of shipment claimant mailed bills of lading to bankrupt and thereby parted with any title he may have had. In re Kessler & Co., 165 F 508. Fact that draft for value of goods shipped was not sent with bill of lading but was retained by claimant upon learning of bankruptcy proceedings and sent to petitioner to collect for claimant's account held not to affect trustee's title to consignment. Id. Transaction between creditor and bankrupt held to create neither chattel mortgage nor pledge and title to the subject-matter held to pass to trustee. In re Gebbie & Co., 167 F 609. One claiming under executory contract for the purchase of fish to be caught held to have no title thereto as against trustee in bankruptcy though he paid therefor in advance. In re Alaska Fishing & Development Co., 167 F 875. **Property pledged,** but the possession of which was retained by bankrupt, and which was subject under state law to execution and attachment, held to pass to trustee. In re Millbourne Mills Co., 162 F 988. Trustee succeeds to the bankrupt's interest in **securities assigned as collateral** by bankrupt. Slade v. Bennett, 118 NYS 278. Trustee is a necessary party to suit to cancel such assignment. Id. All **rights of action** in favor of the bankrupt vest in the trustee, under Bankruptcy Act July 1, 1898 (30 Stat. 549; U. S. Comp. St. 1901, p. 3426). Kessler v. Herklotz, 132 App. Div. 278, 117 NYS 45. Property right in **stock exchange seat** held to vest in trustee of bankrupt member during latter's life, subject to rules of exchange as to sale or transfer, notwithstanding personal nature of such membership. Wrede v. Clark, 117 NYS 5, rvg.

court's jurisdiction,[94] the trustee's title thereto relating back to the time of the filing of the petition.[95] This includes life insurance policies having a surrender value [96] under which beneficiaries may be changed at the will of the insured,[97] except as otherwise provided by the local laws,[98] also rewards allowed by the proper officials of the federal government but not paid over,[99] unexpired leases of the bankrupt,[1] membership in stock exchanges,[2] as well as a cause of action in favor of the bankrupt whether arising upon contract [3] or for unlawful taking or detention of [4] or injury to property of the bankrupt,[5] also rights under contracts of the bankrupt [6] and the funds growing out of the execution thereof.[7] He may take

113 NYS 609. Brick plant erected on leased premises held **trade fixture** and removable by trustee, notwithstanding lease providing that additions, improvements, etc., should be surrendered to lessor, stockholders and directors of lessor and lessee being the same and money used in erection of plant being furnished by creditor. Montello Brick Co. v. Trexler [C. C. A.] 167 F 482. Claimant held not to have title to **property purchased with borrowed money,** but merely a claim against bankrupt for money loaned with which to purchase such property. In re Sassman, 167 F 419. **Rescission after bankruptcy,** on ground that credit was obtained on false representations of solvency denied, it appearing that creditor did not rely entirely upon representation and was guilty of laches after learning of their falsity. In re Sweeney [C. C. A.] 168 F 612.

93. Property acquired by bankrupt after adjudication does not pass to trustee. Life estate in property devised to bankrupts. Hackett's Ex'rs v. Hackett's Trustee [Ky.] 118 SW 377.

94. Statutory transfer to assignee in bankruptcy in Ireland held without effect in Arizona. In re Delehanty's Estate [Ariz.] 95 P 109.

Comity: Involuntary assignment in Ireland to bankruptcy assignee recognized in Arizona, as between bankrupt and assignees in absence of local creditors, so far as concerned personalty, but not recognized as to realty, the assignment not being acknowledged or required by laws of state. Mills v. Fisher & Co. [C. C. A.] 159 F 897.

95. In re Niagara Radiator Co., 164 F 102.

96. Partly paid up life insurance policies with usual contingencies and provisions for changing beneficiaries and as to surrendering policies and receiving benefits thereof are treated as assets of a bankrupt. In re Whelpley, 169 F 1019. In New York a policy payable to bankrupt's wife if living at time of his death, under which bankrupt may change beneficiaries without her consent, which provides for payment to him when he reaches a specified age and has a present cash surrender value, is property of bankrupt's estate to the extent of the surrender value at time of filing petition. In re Wolff, 165 F 984. Where part of premium has been paid by wife, trustee entitled to surrender value less proportion thereof that payments by wife bear to entire premiums paid. Id. An insurance policy payable to bankrupt's estate and having a cash surrender value passes, unless redeemed, to the trustee, under Act 1898, § 70a. Remley v. Traveler's Ins. Co. [Minn.] 121 NW 230. Money borrowed by bankrupt on policy must be deducted from cash surrender value. In re Wolff, 165 F 984.

97. In re Wolff, 165 F 984; In re Whelpley, 169 F 1019.

98. Relative rights of creditors and beneficiaries are controlled by statute. See Rev. Laws, c. 118, § 73. Bailey v. Wood [Mass.] 89 NE 149.

Exemptions of insurance policies. See post, § 16.

99. Reward by secretary of treasury for information leading to seizure of smuggled goods made but not paid over is property of claimant and passes to his trustee in bankruptcy. In re Ghazal, 169 F 147.

1. Trustee may adopt unexpired lease as an asset of the estate. In re Rubel, 166 F 131.

2. Wrede v. Gilley, 61 Misc. 530, 113 NYS 609.

3. Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 NW 926. Trustee alone has power to proceed against stockholders of bankrupt corporation to recover stock subscriptions. Demurrer to complaint of creditor sustained, action being brought during pendency of bankruptcy proceedings. Herf & Frerichs Chemical Co. v. Brewster [Tex. Civ. App.] 117 SW 880.

4. Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 NW 926.

5. Cause of action arising from malicious attachment of corporate property held to pass to trustee. Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 NW 926. Bankrupt corporation commenced action for malicious attachment of its property. Held cause of action passed to trustee and could not be maintained by bankrupt. Id. Cause of action in bankrupt for fraud in procuring his property can be maintained only by trustee. Remmers v. Remmers, 217 Mo. 541, 117 SW 1117.

6. Trustee held to have succeeded to rights of bankrupt under executory contract by virtue of adoption thereof by receiver. In re Niagara Radiator Co., 164 F 102.

7. Trustee of bankruptcy pending suit to cancel oil lease operated oil wells and paid lessors royalty stipulated for in lease. Upon judgment canceling lease and claim of lessor to fund produced by oil, it is held that, in absence of other evidence, royalties paid would be taken as reasonable value of oil in place in ground, and no damage being done to land by trustee's operation of wells lessor is not entitled to such fund. In re St. Louis & Kansas Oil & Gas Co., 168 F 934. Judgment canceling oil lease was entered by state court. Pend-

possession of property rented by the bankrupt but must pay rent therefor.[8] He does not however take title to property of third parties in possession of bankrupt,[9] nor is he vested with any rights in property previously transferred by the bankrupt[10] unless such transfers are void under the provisions of the bankruptcy act[11] or as made in fraud of creditors.[12] Money advanced by a creditor with a view to a compromise settlement between the bankrupt and his creditors does not pass to the trustee.[13]

Property fraudulently conveyed.[14]—The power of the trustee to attack fraudulent conveyances, whether made by bankrupt or through third persons,[15] is conferred by the bankruptcy act[16] as well as by the laws of many of the states.[17] The

ing litigation lessee's trustee was directed to enter upon and continue operation of oil wells. Held that trustee's possession pendente lite was that of trespasser under claim of title. Id.

8. Tenancy of bankrupt held one for a year and trustee held entitled to possession to the end of term on payment of monthly rental. In re Schwartzman, 169 F 399.

9. Bank advanced sums to bankrupt for importation of cherries, bills of lading for which were delivered to bank, which upon turning them over to bankrupt took a trust receipt whereby bankrupt held cherries in storage as property of bank and agreed to account to bank for proceeds of sale. Held bank has title as against trustee though trust receipts were not recorded. In re Reboulin Fils & Co., 165 F 245. See, also, post, § 10B. Claimant of property in possession of trustee who claims under latent or undisclosed title has burden of showing superior right. In re Burke, 168 F 994.

Property held under lease: Lease conveying personal property for purpose of enabling grantee to obtain credit held not as against trustee and creditors to pass title from lessee though property was delivered to lessor, no credit having been given on strength thereof. Nylin v. American Trust & Sav. Bank [C. C. A.] 166 F 276.

Property held in trust: Contract under which vendee holds property or proceeds thereof in trust for vendor followed by delivery to vendee creates a trust and not a chattel mortgage or conditional sale, and in North Carolina may be enforced against trustee whether recorded or not. Walter A. Wood Co. v. Eubanks [C. C. A.] 169 F 929.

Property held under bailment for sale: Contract under which wagon company retained full control of disposition of wagons including power to direct return thereof on shipment elsewhere and which regulated manner of sale thereof by bankrupt and fixed price of such sale so as to realize to bankrupt freight expenses and commission held one of bailment, under which wagon company was entitled to possession of wagons as against trustee. Franklin v. Stoughton Wagon Co. [C. C. A.] 168 F 857. Bankrupt dealt in patent pens under license requiring him to sell at fixed retail price and to return all pens not sold. Held that, as to pens on hand and not paid for, trustee is bound by the license and must either return them or sell them at the retail price and pay therefor according to terms of license. In re Spitzel & Co., 168 F 156.

10. Under agreement whereby corporation transferred its assets to third party, the business to be operated by such third party and profits to be paid to unsecured creditors, made at time when corporation was believed to be solvent, the assets so transferred belong to creditors and upon subsequent bankruptcy of corporation do not pass to trustee. Gill v. Bell's Knitting Mills, 128 App. Div. 691, 113 NYS 90. Assignments as security for money loaned held valid as against trustee, though not recorded, where he represented no creditors who had fastened lien upon subject-matter thereof. In re Cincinnati Iron Stove Co. [C. C. A.] 167 F 486. Assignment of choses in action as security for money loaned held valid as against trustee, though notice thereof was not given to those liable thereon. Id.

11. See post, § 10E.

12. See following subdivision.

13. In re Smyth, 167 F 871. Creditor entitled to unpaid portion thereof though it filed proof of debt for entire amount loaned under belief that it had all been paid out to creditors. Id.

14. See 11 C. L. 391. See, also, Fraudulent Conveyances.

15. Where the bankrupt conveyed property to a third person to secure a debt and the third person conveyed to defendant who paid the debt, the transfer is in effect a conveyance by the bankrupt and is void under the bankruptcy act. Parker v. Travers [N. J. Err. & App.] 71 A 612. Transfer from mother to daughter set aside though made for the purpose of discharging indebtedness of mother to daughter growing out of mother's possession after termination of her estate therein of property belonging to daughter as remainderman. Id. Deed from husband to wife more than four months previous to filing of bankruptcy petition, but not recorded until shortly before such filing, held to be fraudulent transfer where both husband and wife in meantime represented to creditors that property belonging to husband. Prescott v. Galluccio, 164 F 618. Under circumstances of previous note, mortgage given to wife by purchaser of property from wife held to belong to estate of bankrupt husband. Id. Held that entire transaction was such that purchaser was acting as a dummy in a sham sale which was null and void. In re Siegel, 164 F 559.

16. Trustee may avoid fraudulent transfers. Prescott v. Galluccio, 164 F 618. Under the bankruptcy act, trustee may attack any conveyances of the bankrupt which are declared void as against the trustee by some positive provision of the act. In re Hickerson, 162 F 345.

17. Rev. St. Idaho, 1887, § 3396, held to

cause of action accrues to the trustee upon his appointment,[18] and the return of an execution nulla bona is not essential to its maintenance.[19] The trustee cannot avoid a fraudulent transfer participated in by the sole creditor of the bankrupt,[20] or any transfer made in good faith and for a present consideration.[21] The fact, however, that the transfer was made to pay an honest debt does not validate it if in fact made with intent to defraud creditors,[22] which intent may be inferred from circumstances surrounding the transaction.[23] The bill in an action by a trustee to set aside a fraudulent transfer should allege that the property of the bankrupt is insufficient to pay his debts in full.[24]

(§ 10) *B. Nature of trustee's title in general and rights remaining in bankruptcy.*[25]—See 11 C. L. 392—Except as to transfer made in fraud of creditors[26] and those rendered invalid by the provisions of the bankruptcy act[27] and as to rights vesting in trustee by virtue of the fact that he represents the general creditors of the bankrupt estate,[28] the trustee is vested with no better title than that held by the bankrupt at the time of the filing of the petition[29] or upon the date of the

empower trustee to attack as fraudulent a chattel mortgage given by the bankrupt but not recorded for a year nor up to five days before the filing of the petition, the bankrupt remaining in possession of the stock mortgaged. In re Hickerson, 162 F 345. Trustee may sue under Rev. Laws 1902, c. 118, § 73, to recover from beneficiaries and assignees of **insurance** such amounts as bankrupt may have paid in premiums in fraud of his creditors. Bailey v. Wood [Mass.] 89 NE 149. In such an action, recovery may be had though it be not presently enforcible and may, by reason of the contingent nature of the rights of beneficiaries or assignees who may never receive anything on the policies, never become enforcible, the trustee having right, despite contingent nature of defendant's liability, to have his claim against them settled. See Rev. Laws 1902, c. 159, § 3, cl. 7, relative to creditor's bills. Id. In such a suit insurance company is not a necessary party, and trustee may protect himself either by making company liable or by giving statutory notice. Id.

18. Action by trustee to set aside a fraudulent conveyance of property by bankrupt is not a cause of action arising before the adjudication in bankruptcy or appointment of trustee, under Code Civ. Proc. § 3268, subd. 4, authorizing defendant in such action to demand security for costs. Riker v. Gwynne, 116 NYS 10.

19. Riker v. Gwynne, 116 NYS 10.

20. Creditor held legal title as security for loan and transferred to defendant who paid balance due on loan. Parker v. Travers [N. J. Err. & App.] 71 A 612. Fact the conveyance was made in payment of an honest debt is immaterial if transferee participated in procuring transfer to defraud creditors of transferror. Id.

21. In re Farmers' Supply Co., 170 F 502. Mortgage given by bankrupt to secure accomodation indorsers held given in good faith and not in contemplation of, or in fraud of, bankruptcy act nor with intent to hinder, delay and defraud creditors. Id.

22. Parker v. Travers [N. J. Err. & App.] 71 A 612. Evidence held sufficient to show that transfer was made to hinder, delay and defraud creditors, though made to discharge an honest debt. Id.

23. Though denied by alleged bankrupt. In re Larkin, 168 F 100. Evidence held to sustain findings of master that conveyance of real estate by bankrupt shortly before filing of petition was merely colorable without consideration and made with intent to defraud creditors. Visanska v. Cohen, 165 F 552.

24. However, where no objection to bill was made, this error may be cured by the proof and by amendment. Prescott v. Galluccio, 164 F 618.

25. Search Note: See note in 9 Ann. Cas. 544.

See, also, Bankruptcy, Cent. Dig. §§ 193, 194, 228, 237, 238, 240-246, 451-455; Set-off § 123; Dec. Dig. §§ 150-157.

26. See ante, § 10A.

27. See post, § 10E.

28. See post, §§ 10D, 10E.

29. Pridmore v. Puffer Mfg. Co. [C. C. A.] 163 F 496; Bennett v. Aetna Ins. Co., 201 Mass. 554, 88 NE 335. Takes subject to liens, equities and burdens to which it was subject in hands of bankrupt. Union Brew. Co. v. Interstate Bank & Trust Co., 240 Ill. 454, 88 NE 997. Bankrupt purchased carbonator at an agreed price to be paid in cash when installed by the vendor. Carbonator was shipped, but bankrupt was in the hands of a receiver when it arrived. It was never installed and was not unpacked when trustee was appointed. Held that bankrupt never had title to the property and that trustee was not entitled to it as against the vendor. Pridmore v. Puffer Mfg. Co. [C. C. A.] 163 F 496. Bankrupt purchased machinery to be paid for in cash on delivery. Machinery was shipped, but while in possession of the railroad company bankrupt went into the hands of a receiver who took possession thereof, but the same was not unpacked when the trustee in bankruptcy was appointed. Held that bankrupt never had title and that vendor was entitled to the possession of the machinery. Id. Is **not subsequent purchaser** in good faith. Walter A. Wood Co. v. Eubanks [C. C. A.] 169 F 929. The trusee takes only such rights as the bankrupt had, and is not an innocent purchaser or lien creditor. In re Fish Bros. Wagon Co. [C. C. A.] 164 F

adjudication,[30] nor are his rights in the contracts of the bankrupt greater than were those of the bankrupt.[31] He does not take title as against creditor exercising the right to reseind a sale for fraud.[32] The bankrupt retains title, free from the rights of creditors whose claims are provable,[33] to all property not available to the trustee. Property held in trust for bankrupt, not passing to the trustee, is not by conveyance to bankrupt after his discharge rendered subject to debts thereby discharged, though trustees purposely delayed the conveyance.[34] When pending bankruptcy proceedings property of the bankrupt is sold as perishable by order of court in attachment proceedings, a bona fide purchaser without notice at the attachment sale takes a good title, and the trustee's only resort is to the proceeds of such sale.[35] The trustee's discharge terminates his authority over the property.[36]

(§ 10) *C. The trustee takes title free from liens.*[37]—See 11 C. L. 393—The trustee takes title to the bankrupt's property free from all liens created within four months of the filing of the petition,[38] and where recordation is essential to the existence of the

553. No title to **property held in trust** by bankrupt. Ferguson v. Bauernfeind [Wis.] 121 NW 647. Transaction held a lease to bankrupt and not a sale, thus entitling lessor to reclaim **property covered by lease** from trustee. McEwen v. Totten [C. C. A.] 164 F 837. Trustee held to have acquired no rights under levy made by bankrupt on cash register leased to judgment debtor, the bankrupt having knowledge of character of judgment debtor's possession and that cash register was held by him under conditional sale contract. In re Greek Manufacturing & Enterprising Co., 167 F 424. **Assignments and pledges** held with authority of officers of corporation and binding on trustee. In re Cincinnati Iron Store Co. [C. C. A.] 167 F 486. Where a corporation takes property subject to existing chattel mortgages and subsequently is adjudicated bankrupt, the trustee cannot question the validity of the mortgages because of defects in recordation thereof. In re Columbia Fireproof Door & Trim Co., 168 F 159. Under Code Civ. Proc. § 2469, title to a judgment debtor's **property covered by supplementary proceedings** vests in the receiver appointed in such proceedings as of date of service of order of examination, and, if such order antedates the bankruptcy proceedings more than four months, such receiver's title is not affected by the bankruptcy proceedings, though his appointment takes place within such period. Wrede v. Clark, 117 NYS 5. Receiver's rights held not affected by his laches in failing to have the property sold. Wrede v. Clark, 117 NYS 5, rvg. Wrede v. Gilley, 61 Misc. 53, 113 NYS 609.

30. Bennett v. Aetna Ins. Co., 201 Mass. 554, 88 NE 335.

31. Under conditional sale. Bryant v. Swofford Bros. Dry Goods Co., 29 S. Ct. 614. Bankrupt sold interest in partnership for $1,000 cash and $1,000 in one year if vendee was satisfied with the enterprise. Before lapse of year partner sued for dissolution and accounting. Held trustee of seller who thereafter filed petition in bankruptcy could not recover the $1,000 at end of year. Hardy v. Weyer, 42 Ind. App. 343, 85 NE 731.

32. Where intermediate giving of order for goods and its delivery, bankrupt without knowledge of creditor, by giving mortgages and assigning his choses in action, placed himself in such position that he could not pay therefor, and immediately after delivery disclosed to his creditors his insolvent condition, so that bankruptcy proceedings followed, it was held that the act of bankrupt in accepting the delivery amounted to such fraud as entitled seller to rescind and recover shipment from the trustee. Haywood Co. v. Pittsburgh Industrial Iron Works, 163 F 799.

33. Robertson v. Schard [Iowa] 119 NW 529.

34. Robertson v. Schard [Iowa] 119 NW 529.

35. Jones v. Springer [N. M.] 103 P 265.

36. Cannot, after discharge, convey property which came into his hands as assignee in bankruptcy. Richards v. Northwestern Coal & Min. Co. [Mo.] 119 SW 953. Fact that deed executed by assignee in bankruptcy after his discharge recited that it was executed to correct former deed gave it no additional force or effect, especially where former deed did not refer to or undertake to convey property covered by second deed. Id.

37. Search Note: See Bankruptcy, Cent. Dig. §§ 234, 236, 270, 286-344; Dec. Dig. §§ 187-218.

38. Provision invalidating all levies, judgments, attachments or other liens obtained within four months of filing of petition applies to voluntary as well as to involuntary proceedings. Longley Bros. v. McCann [Ark.] 119 SW 268. Creditor issued execution against debtor which was returned unsatisfied. Subsequently a receiver was appointed in **supplementary proceedings** and took possession of certain of debtor's property. Held that the return of the execution operated to extinguish the lien of the creditor, and the receiver's lien being within four months of the filing of the petition, the trustee is entitled to possession of the property in the hands of the receiver. In re Matthews & Sons, 163 F 127. Trustee is entitled to property in the hands of a state court receiver appointed within the four months period. Hecox v. Rollestone [C. C. A.] 164 F 823. Under New York statute, title vests in receiver appointed in supplementary proceedings, and hence, if receivership antedates bankruptcy proceedings, the trustee in bank-

lien, the four months's period commences to run only from the date of recordation.[39] His title, however, is subordinate to any valid liens [40] acquired more than four months prior to the time the petition is filed,[41] or any lien acquired within four months of the filing of the petition, but at a time when the bankrupt was solvent.[42] There is some conflict in the state courts as to the inherent effect of bankruptcy proceedings upon liens attaching within four months prior thereto, it being held on the one hand that the liens [43] are ipso facto destroyed, and on the other that the trustee alone can invoke the provision of the act relative to the vacation of liens,[44] and such would also seem to be the effect of the holdings that the trustee is subrogated to liens already obtained by creditors.[45] Local laws are controlling on the question as to what constitutes a lien to which the trustee is subrogated.[46] Where a lienor releases his lien in order to enable the bankrupt to dispose of the property, he is liable to the estate for any loss thereby incurred by the creditors.[47]

ruptcy takes no title. Wrede v. Clark, 117 NYS 5, rvg. Wrede v. Gilley, 61 Misc. 530, 113 NYS 609. Rule applied as against creditor claiming property under alleged **conditional sale contract.** Reardon v. Rock Island Plow Co. [C. C. A.] 168 F 654. **Garnishment** held within provision vacating liens acquired within four months. Longley Bros. v. McCann [Ark.] 119 SW 268. Garnishment proceedings under Act June 4, 1901, § 28, P. L. 431, by subcontractor or material man, held within provision of bankruptcy act invalidating liens obtained within four month's period by "legal proceedings." Fairlamb v. Smedley Const. Co., 36 Pa. Super. Ct. 17.

39. Where record is essential to validity of chattel mortgage as against creditors, time runs from date of record. In re Hickerson, 162 F 345. Purchase contract not recorded until within few months of bankruptcy under which vendor exercised right to take possession of business upon nonpayment of instalment of purchase price held invalid as against trustee representing creditors whose claims were created before recordation of contract. McElvain v. Hardesty [C. C. A.] 169 F 31. Recordation of bill of sale executed for more than four months prior to bankruptcy after bankruptcy has intervened is unavailing. In re Burrlage Bros., 169 F 1006.

40. Agreement by bankrupt giving bank lien on proceeds of sale of cattle in consideration of advances to be used in purchase of cattle held not invalid as against trustee because not recorded. Gardner v. Planters' Nat. Bank [Tex. Civ. App.] 118 SW 1146.

41. In re Maher, 169 F 997. Creditor commenced garnishment proceeding more than four months prior to bankruptcy. Garnishee held more than enough to satisfy claim in suit. Bankrupt gave bond to dissolve garnishment depositing $1,000 with sureties to protect them against loss. Held creditor acquired lien under Laws Ga. 19 Ct. p. 55. Id. That judgment filed more than four months prior to bankruptcy was stayed by supercedeas does not render it ineffective as against bankruptcy proceedings. Stay does not operate to vacate judgment. Booker v. Blythe [Ark.] 118 SW 401. As against bankruptcy on intermediate attachment and judgment, lien of attachment is created when levy is made. Jackson v. Valley Tie & Lumber Co., 108 Va. 714, 62 SE 964. Bankruptcy proceedings do not affect the prior lien of a mortgage on property covered by it or prevent judgment against proceeds of sale of mortgaged property to which lien has been transferred. Copper Belle Min. Co. v. Costello [Ariz.] 100 P 807. Mortgagee may hold as against trustee in bankruptcy, even though he takes possession of boat within four-month period, where his mortgage was taken prior to commencement of such period. Woods v. Klein [Pa.] 72 A 523. **Equitable lien** of railroad company on unmined coal for advances to coal company. Hurley v. Atchison, etc., R. Co., 213 U. S. 126, 53 Law. Ed. —.

42. Lien of attachment levied within four months of bankruptcy. Jackson v. Valley Tie & Lumber Co., 108 Va. 714, 62 SE 964. Where trustee moves to abate attachment proceedings commenced within four-month period, the burden is on him to show insolvency of bankrupt at time of levy. Id.

43. Adjudication ipso facto dissolves garnishment proceedings in a state court, and authorizes a dismissal on the motion of the garnishee. Hobbs v. Thompson [Ala.] 49 S 787, Mayfield, J., dissenting and citing Bank of Commerce v. Elliott, 109 Wis. 648, 85 NW 417; Two Rivers Mfg. Co. v. Beyer, 74 Wis. 210, 42 NW 232, 17 Am. St. Rep. 131; In re McCartney, 109 F 621.

44. Causey Lumber Co. v. Connor [Ga. App.] 65 SE 194. Adjudication cannot be pleaded by debtor in abatement of attachment. Id. Burden of showing that a lien has been discharged by the court of bankruptcy is upon the party asserting such discharge. Id. Where claimant of property attached as property of bankrupt gives bond for release of attachment, the subsequent bankruptcy of attachment defendant does not operate to release sureties on bond, though claimant failed to prove title thereto. Ehrlich v. Sklamberg, 116 NYS 602.

45. The lien acquired through an assignment for creditors, valid under state law, may, when it is to the advantage of the estate, be retained by the trustee for the benefit of the creditors. In re Fish Bros. Wagon Co. [C. C. A.] 164 F 553.

46. What constitutes lien of creditor to which trustee is subrogated must be determined under laws of state whereunder lien is claimed. Reardon v. Rock Island Plow Co. [C. C. A.] 168 F 654.

47. Retiring partner took mortgage on

(§ 10) *D. Property held under mortgage or contract of sale.*[48] See 11 C. L. 394 The validity of chattel mortgages[49] or conditional sale contracts,[50] as between the trustee and parties claiming under the respective instruments, depends entirely upon the question of whether or not local laws with reference thereto have been complied with,[51] and where the local statutes are silent on the question, their validity is governed by the general laws applicable thereto,[52] under which the petition in bankruptcy and the subsequent adjudication do not operate as a lien in favor of the trustee as against a vendor under an unrecorded bill of sale,[53] and an unrecorded contract is invalid only in so far as it affects the intervening rights of innocent third persons;[54] but such is not the rule where the vendor attempts to retain a lien after title is vested in the purchaser.[55] Where the bankruptcy court obtains from the vendor possession of notes and accounts upon faith of a bona fide stipulation by the receiver made with the approval of the court that they are the proceeds of goods covered by a contract of conditional sale, and still holds to such possession, the trustee is estopped to dispute the fact so stipulated.[56]

firm property to indemnify him against loss by reason of partnership debts upon which he was surety. Subsequently released mortgage to enable partnership to sell property and apply proceeds toward payment of debts. Held liable to trustee in bankruptcy of partnership to extent that proceeds of sale did not pay debts. In re Stoddard Bros. Lumber Co., 169 F 190.

48. Search Note: See Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.

49. Chattel mortgage held invalid as against trustee for failure to record. In re Goldsmith, 168 F 779. Chattel mortgage for present consideration held void for unreasonable delay in filing under Laws N. Y. 1897, c. 418, p. 536. In re Shieblen, 165 F 363. Under Rev. St. Idaho, 1887, rendering unrecorded chattel mortgage void as to creditors, and authorizing attack thereon "by any person interested in so doing," trustee may have attack mortgage withheld from record until few days before bankruptcy of mortgagor. In re Hickerson, 162 F 345. Mortgage not recorded pursuant to requirements of state laws and thereby rendered invalid as to subsequent creditors does not entitle creditor to proceeds of sale of mortgaged property until all subsequent creditors are paid in full. In re Claussen & Co., 164 F 300.

50. Unrecorded conditional sale contract under which vendee was to sell property, the proceeds of sale to go to vendor, held invalid as against trustee of vendee. In re Burke, 168 F 994. Under Civil Code Ga. § 2776, unrecorded conditional sale contract, though valid between the parties, is invalid as against trustee of vendee. Id. Under Civ. Code Ga. § 2776, unattested conditional bill of sale, though valid between parties is invalid as against trustee of vendee in whose possession property was held at time of bankruptcy. Id. Trustee subrogated to rights of creditors to lien obtained within four months of bankruptcy held entitled to possession of property as against one claiming under alleged conditional sale contract. Reardon v. Rock Island Plow Co. [C. C. A.] 168 F 654.

51. Local law followed as to whether contract of conditional sale is valid without record. Bryant v. Swofford Bros. Dry Goods Co., 29 S. Ct. 614. Validity of conditional sale contracts, under which adverse claimant claims title, will be determined in accordance with the laws of the state in which the contract was made. In re Burke, 168 F 994. In construing state statutes defining property rights, rulings of supreme appellate tribunal will be followed. Id. Decisions of highest state courts with reference to validity of unrecorded chattel mortgages will be followed by court of bankruptcy. Walter A. Wood Co. v. Eubanks [C. C. A.] 169 F 929. Statutes giving lien under conditional sale contract are strictly construed. In re Burke, 168 F 994.

52. In re Gray, 170 F 638. Contract held valid though not recorded, laws of Indian Territory not requiring recordation. Id.

53. In re Hager, 166 F 972. Vendor under unrecorded conditional sale contract has right thereto as against trustee in bankruptcy. Id. Conditional sale contract entered into in Indian Territory before it became state of Oklahoma held not invalid as against trustee in bankruptcy though not recorded after territory became a state and though laws thereafter passed required recordation. In re Gray, 170 F 638.

54. Intervenor held entitled to notes, accounts, etc., taken by bankrupt for sale of fertilizers, under contract to that effect made with bankrupt, subject to intervening rights of innocent third persons. In re McGehee, 166 F 928. Creditor, claiming title to property in possession of bankrupt under conditional sale, held under Georgia statutes to be entitled thereto as against creditors whose claims antedated the conditional sale contract though it was never recorded. In re Pickens Mfg. Co., 166 F 585.

55. Transaction held not bona fide conditional sale. Pontiac Buggy Co. v. Skinner, 158 F 858. As a security or lien, the contract is void as to the bankrupt's estate, unless filed. Id.

56. Bryant v. Swofford Bros. Dry Goods Co., 29 S. Ct. 614.

(§ 10) *E. Preferential transfers and payments.*[57]—See 11 C. L. 395—Transfers or payments made by an insolvent[58] of or out of his assets[59] nor exempt from execution[60] or otherwise unavailable to the trustee,[61] within four months prior to the filing of the petition in bankruptcy,[62] with intent to prefer,[63] and to a creditor having reasonable cause to believe the bankrupt insolvent or having knowledge of such insolvency[64] or that a preference was intended,[65] and the effect whereof is

57. Search Note: See notes in 7 C. L. 406; 3 Ann. Cas. 280.

See, also, Bankruptcy, Cent. Dig. §§ 247-344; Dec. Dig. §§ 158-218; 5 Cyc. 346, 347, 363-372, 415.

58. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921. In order that **a payment by bankrupt firm** may be recovered as a preference, it must appear that the firm and also its individual members were insolvent at time of payment. Tumlin v. Bryan [C. C. A.] 165 F 166.

Evidence held to show that bankrupt was solvent at time of making alleged preferential transfer. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921. Evidence held insufficient to show insolvency at time of alleged preferential transfer, it appearing that insolvent condition was created by withdrawals, assignments and injudicious transfers after time of alleged preferential payments. In re Neill-Pinckney-Maxwell Co., 170 F 481. Buyers of business for $3,900 who had only $500 in cash at time of purchase and gave notes for balance of purchase price, who in course of business lost their capital and created further indebtedness, held obviously insolvent at time of making alleged preferential transfer. McElvain v. Hardesty [C. C. A.] 169 F 31. Arrangement with bank for overdrafts in view of contract requiring considerable outlay of money before alleged bankrupt would receive payments thereunder held not evidence of insolvency. McDonald v. Clearwater S. L. R. Co., 164 F 1007. Insolvency of corporation at time of giving bank security for past and future overdrafts held not shown. Id.

Instructions indicating that intent to prefer and reasonable cause for creditor to believe preference was intended justifies recovery by trustee, irrespective of bankrupt's insolvency, held erroneous. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921.

59. Bankrupt upon selling business transferred unexpired liquor license and the consideration therefor was turned over to brewery company which advanced license money and procured license for bankrupt. Held that consideration never belonged to bankrupt and payment was in no sense preferential. Sharp v. Simonitsch, 107 Minn. 133, 119 NW 790. Transfer of possession of business by corporation to individuals, under contract whereby individuals were to operate business for one year and pay percentage of sales to corporation and at end of year surrender possession of business to corporation, held not a sale so as to constitute surrender of possession a preferential transfer. Walther v. Williams Mercantile Co. [C. C. A.] 169 F 270.

60. Exempt property cannot be made the subject of a preference, and when transferred by bankrupt it cannot be recovered by the trustee. Vitzthum v. Large, 162 F 685.

61. Chattel mortgage, in so far as it covers property owned by claimants under unrecorded conditional sale contracts, held, in the absence of notice in mortgagor of claimants' rights, valid, though invalid preferential as to other property of bankrupt. In re Hager, 166 F 972.

62. Alleged preferential transfer must have taken place within four-month period. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921; In re Boner, 169 F 727.

63. Intent of debtor to prefer may be inferred from nature and consequences of his act. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921. Intent to prefer held shown by evidence. Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95. Evidence that an insolvent corporation, out of the only moneys it had on hand, made payments only to its officers and to a single creditor, held sufficient to show an intent on the part of the bankrupt to make a preferential payment. Irish v. Citizen's Trust Co., 163 F 880. Evidence held to show an intent to prefer on the part of the bankrupt. First Nat. Bank v. Abbott [C. C. A.] 165 F 852.

Saving questions: Questions relative to necessity of showing intent to prefer and with reference to evidence and instructions on such matter cannot be raised on appeal in absence of motion for directed verdict below. Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95.

64. Evidence held to show creditor had **reasonable cause to believe bankrupt insolvent** at time preferential payment was made. Wright v. Skinner Mfg. Co. [C. C. A.] 162 F 315. Evidence held to show reason on part of corporation's agent to believe that debtor was insolvent. Matthews v. Joannes Bros. Co. [Mich.] 16 Det. Leg. N. 241, 121 NW 272. Bank took chattel mortgage on debtor's stock which it withheld from record until five days before petition in bankruptcy was filed. Held, that it had reasonable cause to believe that bankrupt was insolvent when mortgage was recorded. In re Hickerson, 162 F 345. Creditor held not to have reasonable cause to believe debtor bankrupt at time of making payment or that preference was intended. Irish v. Citizens' Trust Co., 163 F 880. Mortgagee who withheld mortgage from record until few days before bankruptcy of mortgagor held to have had reasonable cause to know of debtor's failing condition at time of execution of mortgage and of debtor's insolvency when mortgage was recorded. In re Hickerson, 162 F 345. Evidence held to show that creditor had **knowledge of bankrupt's insolvency.** Hess v. Hamm Brew. Co. [Minn.] 121 NW 232. Evidence held to show cred-

itor's knowledge of debtor's insolvency. Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95. Creditor taking possession of all of bankrupt's property in payment of his debt held chargeable with knowledge of bankrupt's insolvent condition. McElvain v. Hardesty [C. C. A.] 169 F 31. Vendor of business took promissory notes for all but $500 of the purchase price with knowledge that the cash payment represented vendees' entire assets. Contract of sale provided for restoration of business to vendor upon nonpayment of any note. Contract was not recorded until within four months of bankruptcy. Held that, at time of recordation and subsequent taking of possession by vendor, latter had reasonable cause to believe bankrupts insolvent. Id. Representative of creditor examined bankrupt's books and found assets largely in excess of debts. A week later bankrupt's stock was destroyed by fire, but fully covered by insurance, part of which was transferred to creditor. Held that creditor had no knowledge of bankrupt's insolvent condition. In re Neill-Pinckney-Maxwell Co., 170 F 481. Mere proof that creditor was anxious about his claim and desired security does not establish that he had knowledge of bankrupt's insolvent condition. Sharpe v. Allender [C. C. A.] 170 F 589. For discussion of effect of agreement not to record chattel mortgage, as tending to show knowledge in creditor of bankrupt's insolvent condition sec, In re Hickerson, 162 F 345.

65. Creditor must have reasonable cause to believe preference was intended. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921; Stuart v. Farmers' Bank, 137 Wis. 66, 117 NW 820; In re Burlage Bros., 169 F 1006. Mere intent on part of bankrupt to prefer is insufficient. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921.

Held charged with notice: Evidence held to show reason on part of corporation's agent to believe that corporation was receiving preferential transfer. Matthews v. Joannes Bros. Co. [Mich.] 16 Det. Leg. N. 241, 121 NW 272. Vendor of business sold almost entirely on credit, who took possession of business upon nonpayment of instalment of purchase price within four months of bankruptcy, held to have received a voidable preference. McElvain v. Hardesty [C. C. A.] 169 F 31. Held that creditor had reasonable cause to believe preference was intended, though proof indicated that, at time of transfer, creditor was informed by reliable parties that bankrupt was perfectly solvent, it appearing that course of dealing and experience of creditor with bankrupt were such as to exclude any other belief. First Nat. Bank v. Abbott [C. C. A.] 165 F 852. Proof that loans were made by brother-in-law of bankrupt from time to time without record thereof, and that, few weeks before bankruptcy, creditor secured from bankrupts negotiable note secured by trust deed which did not show creditor's connection therewith, held to establish prima facie case of reasonable cause to believe that preference was intended. In re Sanger, 169 F 722. Peculiar nature of transactions, leading to giving of alleged preference, held to establish prima facie reasonable cause for creditor to believe preference was intended. Id. Creditor of bankrupt corporation, who as treasurer thereof made payment to himself while bankrupt was obviously insolvent, held to have reasonable cause to believe preference was intended. Evans v. Claridge, 137 Wis. 218, 118 NW 803. Evidence held to show that creditor had reasonable ground to believe that preference was intended, it appearing that his claim was paid in full by transfer of only remaining asset of bankrupt, and transaction being carried on under extraordinary circumstances and concealed from other creditors. Whitwell v. Wright, 115 NYS 48. Creditor employed as bookkeeper by bankrupt held to have reasonable cause to believe preference was intended. In re Friedman, 164 F 131. Embarrassing financial condition of bankrupt together with persistent efforts to collect debt, together with statement of bankrupt that property he transferred was only asset available, held sufficient to give reasonable cause for belief that preference was intended. Brewster v. Goff, 164 F 127. Refusal of further credit to bankrupt together with urgent importunities for payment and unusual method of payment held to show reasonable cause for belief that preference was intended. Brewster v. Goff Lumber Co., 164 F 124. Transaction whereby one creditor receives one-third of his claim with the result that other creditors get nothing held to raise conclusive presumption that preference was intended by bankrupt. Id. Bankrupt's apparent need of money and unusual character of transfer held to show reasonable cause for transferee to believe preference was intended. In re Bailey, 166 F 982.

Held not charged with notice: That creditor had reasonable cause to believe that a preference was intended. Getts v. Janesville Wholesale Grocery Co., 163 F 417. Evidence held insufficient to show that bank, in receiving security for past and future overdrafts, had reasonable cause to believe a preference was intended. McDonald v. Clearwater S. L. R. Co., 164 F 1007. Evidence held insufficient to show that creditor had reasonable cause to believe preference was intended. In re Friedman, 164 F 131. Creditor receiving assignment as security for his debt held not to have received voidable preference, being assured, at time of transfer by persons in best position to know, that bankrupt's embarassed condition was only temporary. In re Wolff Co., 164 F 448. Mere temporary failure of debtor to pay debts promptly as they fall due is insufficient to prove that creditor with knowledge of default has reasonable cause to believe that what he then obtains is intended as a preference. First Nat. Bank v. Abbott [C. C. A.] 165 F 852. Mere grounds of suspicion that debtor is insolvent and intends a preference do not establish that creditor who receives transfer had reasonable cause to believe a preference was intended. There must be proof of reasonable grounds for such belief. Id.

Instruction that, if defendant knew of circumstances as would ordinarily produce belief in mind of careful and prudent man that preference was intended, jury may find that defendant had reasonable cause to believe preference was intended, held

to give to one creditor a larger percentage of his claim than is received by other creditors of the same class,[66] are voidable at the instance of the trustee.[67] The mere fact that the creditor was aware of the bankrupt's insolvent condition does not render the transfer preferential [68] unless the circumstances are such that a preference would be the natural result of the transfer,[69] in which event evidence of express intent is unnecessary.[70] Facts which would put a reasonable man upon inquiry may be considered in determining whether the creditor had reasonable cause to believe that a preference was intended,[71] and the creditor is chargeable with such knowledge as reasonable inquiry would disclose [72] though it has been

proper. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921.

66. Effect of alleged preference must be to give creditor a greater percentage of his debt than any other preferred creditor. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921. Transfer by insolvent whereby one creditor receives a larger percentage of his claim than other creditors of same class constitutes preference. Kahn & Bro. v. Bledsoe [Okl.] 98 P 921. Agreement made by bankrupt and principal creditors at time when both bankrupt and creditors believed it solvent, whereby business was transferred to third party to operate for benefit of creditor which could in no manner result in preference being obtained by any creditor, held not preferential. Gill v. Bell's Knitting Mills, 128 App. Div. 691, 113 NYS 90.

67. Evidence held to show that **chattel mortgage withheld from record** until few days before bankruptcy of mortgagor was a preferential transfer. In re Hickerson, 162 F 1345. **Transfer of property to accommodation maker** of note to bankrupt to protect him against loss, within four months of bankruptcy, constitutes preference. In re Bailey, 166 F 982. Transfer of property to accommodation maker of note to bankrupt, in apparent pursuance of previous agreement that amount of note would be taken in trade, held a preference, property transferred being different from that ordinarily used by accommodation maker and in larger quantities than necessary for his present use. Id. Evidence held to sustain finding that trustee appropriated funds of estate to his own use and that **payment by trustee to himself** as trustee within four months of his own bankruptcy was preferential. Block v. Rice, 167 F 693. Payment made by bankrupt to his brother two days before bankruptcy, in **repayment of loan** made for specific purpose and to be returned if not used for that purpose, held preferential, the bankrupt, though not using funds for purpose designated, having mixed them with his general funds and appropriated them to other uses. In re Kearney, 167 F 995. **Payments made by bankrupt to his attorney,** with the four-month period, for services previously rendered, so far as their preferential character is concerned, stand upon the same ground as the claims of other creditors. In re Shiebler & Co., 163 F 545. **Note by corporation to another corporation,** both having officers and directors in common. Second corporation indorsed note and discounted it at defendant bank. Subsequently second corporation, while both were insolvent, paid note and deducted sum thereof from account it was owing first corporation, defendant bank having knowledge of its insolvency and an intent to prefer. Held a preferential payment and voidable. Mason v. National Herkimer County Bank, 163 F 920. **Trust deed executed by corporation** within four months prior to its bankruptcy to secure notes issued to secure personal indebtedness of its managing officer and principal stockholder held void as against its creditors under Bankr. Act July 1, 1898, c. 541, § 67E, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449). American Wood Working Mach. Co. v. Norment [C. C. A.] 157 F 801. Preferential **payments void under law of state where property is situated** are void under the bankruptcy act if made within four months of the adjudication. Preference held voidable under § 48 of the stock corporation law of New York (Laws 1892, p. 1838, c. 688). Wright v. Skinner Mfg. Co. [C. C. A.] 162 F 315. **Conveyance to third party** and application of proceeds to payment of creditor's claim in pursuance of arrangement for payment of such creditor, set aside as constituting preferential payment. Brewster v. Goff, 164 F 127. Bankrupt conveyed to third person and proceeds applied to creditors' claim in pursuance of arrangement for payment of creditor; third person conveyed to another after issuance of order restraining sale of the property. Both conveyances set aside as preferential at suit of trustee. Id. Transferee of property of bankrupt in hands of third person, taking after issuance of order restraining sale by such third person, takes nothing by virtue of the conveyance. Id.

68. Tumlin v. Bryan, 165 F 166. It must appear that a preference was intended and that creditor had reasonable cause to believe it was intended. Id.

69. Creditor having knowledge of bankrupt's insolvent condition and payment being made under circumstances showing that preference is the natural result thereof, no proof is required to show that creditor had reasonable cause to believe preference was intended. Hess v. Hamm Brew. Co. [Minn.] 121 NW 232.

70. Where circumstances show that the necessary result of a payment is to give a preference, no evidence of express intent to prefer is required. Hess v. Hamm Brew. Co. [Minn.] 121 NW 232.

71. Facts which would put ordinary person on inquiry and tend to disclosure of insolvency must be considered in determining whether preference was intended. Brewster v. Goff Lumber Co., 164 F 124.

72. On question whether creditor receiving preferential transfer had reasonable

held that the mere fact that creditor knew of the existence of such conditions do not establish knowledge of an intent to prefer.[73]

The four months period is computed from the time of payment[74] or transfer,[75] or, where recordation is necessary, from the time the instrument evidencing the transfer is recorded,[76] and the theory that the transfer was pursuant to a previous agreement is unavailable where such agreement was merely conditional and never became operative in law.[77] A transfer made to secure a debt previously otherwise secured is not preferential,[78] nor can the setting off of mutual debts as between the bankrupt and his creditor[79] in good faith[80] or a transfer, by way of security,[81] or conveyance,[82] made for a present consideration, or the repayment of

cause to believe bankrupt insolvent he is charged only with such information as could be obtained by reasonable inquiry. In re Wolf Co., 164 F 448. Not charged with knowledge which could be ascertained by examination of bankrupt's books. Id.

73. That facts were such as to put a reasonably prudent man on inquiry is not sufficient. Stuart v. Farmers' Bank, 137 Wis. 66, 117 NW 820.

74. Payments made within four months of bankruptcy on invalid assignment of accounts made a year prior thereto held preferential. In re Shiebler, 165 F 363.

75. Property preferentially transferred within four months prior to the filing of the petition may be recovered by the trustee notwithstanding it was transferred pursuant to an agreement made more than four months before the petition was filed. Vitzthum v. Large, 162 F 685. A real estate mortgage given nearly two years before bankruptcy of mortgagor to secure future advances is not invalid as a preference under the bankruptcy act. Claridge v. Evans, 137 Wis. 218, 118 NW 198.

76. Where the preference is in the form of an instrument requiring recordation, four-month period does not commence to run until the instrument is actually recorded. Mortgage recorded a year after its execution and delivery. In re Hickerson, 162 F 345. Purchase contract under which vendor exercised right to take possession of business upon nonpayment of instalment of purchase price held to constitute preference where not recorded until within four months of bankruptcy, regardless of date of execution. McElvain v. Hardesty [C. C. A.] 169 F 31.

77. Where trust deed was delivered, not to be filed or used at once but to be held for future use, and was not used until within four months prior to filing of petition in bankruptcy. Page v. Rogers, 211 U. S. 575, 53 Law. Ed. —. Quaere whether insolvent debtor may make secret agreement to convey a substantial portion of his assets to a favored creditor, keep such agreement secret for more than four months, and then execute it in fraud of other creditors, in favor of creditor then having reasonable cause to believe he is receiving a preference. Page v. Rogers, 211 U. S. 575, 53 Law. Ed. —, citing In re Broadway Sav. Trust Co., 81 C. C. A. 58, 152 F 152, and Wilson Bros. v. Nelson, 183 U. S. 191, 46 Law. Ed. 147.

78. Payment to seller who has an inchoate lien for the purchase price of goods sold cannot constitute a preference. In re Lynn Camp Coal Co., 168 F 998. Seller of material to mining company who has inchoate lien for purchase price under state laws, who accepts mortgage on such property within four months of bankruptcy, does not thereby receive a preference. Id. Where claimant is entitled to notes, accounts, etc., in hands of bankrupt under conditional contract, fact that within four months of filing petition bankrupt gave claimant writing indicating that bankrupt holds them in behalf of claimant does not give the transaction the character of a preference. In re McGehee, 166 F 928.

79. Rule applied where bank applied deposit of bankrupt toward payment indorsed and discounted at the bank by the bankrupt. Booth v. Prete, 81 Conn. 636, 71 A 938. Set-off of mutual debts between bankrupt and creditor not a transfer within § 1, subd. 25, Bankruptcy Act, nor is it a preferential transfer within § 60a. Id. Setting off deposit of bankrupt against his overdue note does not constitute a preferential transfer though note is secured by chattel mortgage. Hooks v. Gila Valley Bank & Trust Co. [Ariz.] 100 P 806.

80. Set-off must be made in good faith. Evidence held insufficient to show that it was not. Booth v. Prete, 81 Conn. 636, 71 A 938. Fact that set-off was made before petition was filed, immaterial. Id.

81. A bona fide transfer to secure a loan made at the time cannot be vacated as a preference. McDonald v. Clearwater S. L. R. Co., 164 F 1007. Agreement by bankrupt giving bank lien on proceeds of sale of cattle in consideration of advances with which to purchase such cattle does not constitute a preference. Gardner v. Planters' Nat. Bank [Tex. Civ. App.] 118 SW 1146. A conditional sale contract, under which stoves were delivered, accepted and used by the bankrupt in buildings erected by him, cannot be assailed as a preference though made within four months of the filing of the petition in bankruptcy. In re Cohen, 163 F 444. Transfer by a mother to her son for the purpose of raising funds with which to pay her creditors, without knowledge of her insolvent condition, held not a transfer with intent to prefer a creditor, the son not being a creditor at the time of the transfer, the purpose of the transfer being to secure him for payments to creditors which he was to make in her behalf. In re McLeon, 162 F 575. Mortgage given to accommodation indorsers of notes of bankrupt held based on present consideration. In re Farmers' Supply Co., 170 F 502. Evidence held insufficient to show

funds held by bankrupt in trust,[83] be assailed as preferential, but it is not necessary that the favored party have a claim provided against the bankrupt's estate in order to create a preference.[84] In determining whether a bankrupt is insolvent other causes of action in the trustee for the recovery of alleged preferential payments cannot be considered.[85] The trustee's right to the property may be based solely on a state law,[86] as where a state statute renders individual property of a partner equally liable for partnership debts and a partner in a bankrupt firm has made a preferential transfer.[87] Demand by the trustee is not a condition precedent to his right to recover property covered by preferential transfer,[88] but, unless assailed by him, the transfer will stand.[89] The validity of securities challenged as preferential may be determined before they have been converted into money.[90]

§ 11. *Collection, reduction to possession and protection of property. A. Discovery.*[91]—See 5 C. L. 386

(§ 11) *B. Compelling surrender by bankrupt.*[92]—See 11 C. L. 397—Bankruptcy courts have summary jurisdiction to compel the surrender of property withheld by the bankrupt.[93] The correct proceedings to compel the bankrupt to surrender property is by petition,[94] making definite averments upon the subject [95] and offering a definite issue,[96] to which petition the bankrupt is entitled to reply,[97] and upon the issue thus raised both parties have the right to offer evidence.[98] In the absence of fraud or concealment, the court should not order a surrender which appears to be physically impossible,[99] even though such impossibility arises after the filing of the report and findings showing the bankrupt's possession.[1] The pro-

new consideration for mortgage based on disaffirmance of sale of goods to bankrupt for misrepresentations and new sale thereof to him upon his execution of mortgage assailed. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921.

82. Transfer of property by bankrupt held to have been made pursuant to contract therefor and to constitute a bona fide sale of the property and not a preference, though payment therefor was made before delivery. Mills v. Virginia-Carolina Lumber Co. [C. C. A.] 164 F 168. Delivery of property by bankrupt held made pursuant to contract whereby title thereto passed to purchaser who had made advance payments thereon, and not to constitute a preference. Id.

83. Ferguson v. Bauernferind [Wis.] 121 NW 647.

84. Contingent liability as guarantor for bankrupt is sufficient. Moody v. Chicago Title & Trust Co., 138 Ill. App. 233.

85. Other causes of action to recover preferential transfers cannot be considered in determining insufficiency of bankrupt's estate to pay his debts. Coer v. Bradley's Bank of Mystic [Iowa] 119 NW 614. Evidence of such commencement of action thereon inadmissible. Id.

86. Miller v. New Orleans Acid & F. Co., 211 U. S. 496, 53 Law. Ed. 300.

87. Miller v. New Orleans Acid & F. Co., 211 U. S. 496, 53 Law. Ed. 300. Trustee for bankrupt firm may assume prosecution of pending suit by firm creditors to avoid preference by partner. Id. Not necessary to show existence of other individual creditors in order to authorize firm's trustee to prosecute suit instituted in state court by partnership creditors to avoid preference by partner, even though in event of preferred creditor being only individual creditor and therefor entitled on distribution in bankruptcy proceedings to have property covered by transfer returned to him, since state court has no jurisdiction to determine matters of distribution under bankruptcy law. Id.

88. Moody v. Chicago Title & Trust Co., 138 Ill. App. 233.

89. An assignment to a trustee for the benefit of the creditors of the assignor, if made in good faith, stands as a valid transfer of property described therein until assailed by some one claiming rights against it under the bankruptcy law. Thompson v. Shaw [Me.] 71 A 370.

90. This practice is preferable because it informs parties of their interest before property is sold. In re Quinn [C. C. A.] 165 F 144.

91. Search Note: See Bankruptcy, Cent. Dig. §§ 389-409; Dec. Dig. §§ 233-243.

92. Search Note: See Bankruptcy, Cent. Dig. §§ 148-155, 164-184, 624; Dec. Dig. §§ 106-117.

93. Where it appears that bankrupt has distributable assets under his control or in his possession, court has power to order delivery thereof to trustee. In re Baum [C. C. A.] 169 F 410.

94, 95, 96, 97. In re Ruos, 164 F 749.

98. In re Ruos, 164 F 749. May offer not only evidence already taken, but also such further evidence as may be relevant. Id.

99. In re Ruos, 164 F 749.

1. In re Ruos, 164 F 749. After lapse of seven years from filing of report and findings, it was improper to make order for

ceedings to recover property concealed by the bankrupt are directed to the recovery of specific property [2] and the petition must be definite [3] and should allege that the failure to turn over the property was willful.[4] Irregularities in the petition may be waived.[5] The court in determining whether the bankrupt has concealed property and is withholding it from his trustee may resort to figures showing what property he had on hand prior to the bankruptcy proceedings and those showing what portion of his property has been used or disposed of,[6] and charge him with any discrepancy existing between such figures.[7] The order must be supported by the petition,[8] and evidence showing that the property is in his possession or under his control,[9] and should require the bankrupt to turn the property over to the trustee,[10] or to show cause why he should not be punished for contempt.[11] It must specify the property to be turned over [12] as to amount and character [13] as well as the location thereof.[14] It has been held, however, that a general description of the property is sufficient.[15] The order should not as an alternative require the bankrupt to pay the value of the property,[16] though it may specify the value thereof for the purpose of indicating the extent of the property to be turned over.[17] As already suggested in connection with the terms of the order, failure of the bankrupt to comply with the order may be punished as for contempt of court,[18] or under the provisions of the bankruptcy act.[19] A petition by bankrupt to review the

surrender where it did not appear that bankrupt still had possession and control of property. Id.

2. In re Lesaius, 163 F 614.

3. It is sufficient if the alleged contemnor understands the nature of the charge and is given an opportunity to defend. In re Cole [C. C. A.] 163 F 180.

4. In re Cole [C. C. A.] 163 F 180. Petition held insufficient. Id.

5. By going to trial on the merits without objecting thereto. In re Cole [C. C. A.] 163 F 180.

6. In re Lesaius, 163 F 614. Property of bankrupt estate traced to recent control of bankrupt is presumed to remain there until he satisfactorily accounts to court for its disappearance. In re Lasky, 163 F 99. Statements made to mercantile agencies shortly before bankruptcy may be considered in determining what property the bankrupt had on hand. In re Lesaius, 163 F 614.

7. In re Lesaius, 163 F 614. Court may consider goods bankrupt had on hand shortly before bankruptcy and those subsequently purchased and charge him with those not accounted for. Id. Bankrupts being unable to account for large discrepancy between goods on hand shortly before bankruptcy and the amount shown to have been disposed of in due course of business, and it appearing that bankrupts were seen to have carted considerable stock away, and that they are engaged in business at another point under an assumed name, an order of the referee requiring them to deliver goods unaccounted for to the trustee is affirmed. In re Fidler, 163 F 973. Bankrupt made extraordinarily large purchases shortly before bankruptcy and at time of bankruptcy had but small portion on hand and was unable to account for discrepancy. Held order requiring him to turn over concealed property proper. In re Averick, 170 F 521. Facts considered and held to show that bankrupt was fraudulently withholding property from trustee and to justify an order requiring him to turn over the property to trustee. In re Lesaius, 163 F 614.

8. Petition charging bankrupt with fraudulently retaining cash and order requiring him to turn goods over to trustee. Held that order cannot be supported by a prior petition which has been abandoned. Lesaius v. Goodman [C. C. A.] 165 F 889. Where issue presented question whether bankrupt had fraudulently retained sum of money, an order requiring him to turn over goods of specified value was not supported by pleadings. Id.

9. Evidence held insufficient to warrant order requiring bankrupt to turn over property for which he failed to account. In re Berman, 165 F 383; In re Adler, 170 F 634. Where bankrupt testifies that he has no money or property in his possession, evidence merely tending to contradict him and to throw suspicion on truth of his testimony will not sustain order requiring him to turn over property. In re Adler, 170 F 634.

10. Order requiring delivery into registry of court held erroneous. In re Baum [C. C. A.] 169 F 410.

11. In re Baum [C. C. A.] 169 F 410. Order should not require arrest of bankrupt upon failure to comply therewith, as such an order leaves determination of default and consequent contempt to marshal and would deprive bankrupt of hearing on question of whether or not he is guilty of contempt. Id.

12. In re Lesaius, 163 F 614.

13, 14. In re Rogowski, 166 F 165.

15. Concealed property. Gentlemen's furnishing and clothing held sufficient. In re Lesaius, 163 F 614.

16, 17. In re Lesaius, 163 F 614.

18. In re Lasky, 163 F 99; In re Cole [C. C. A.] 163 F 180.

19. Act July 1, 1898, 30 Stat. 545, 546.

order involves the same question as a citation for contempt.[20] While the bankrupt must be given an opportunity to be heard,[21] the proceedings are not within the sixth amendment of the federal constitution [22] and ex parte affidavits may be used.[23] The court should be satisfied that the refusal to comply with the order was willful,[24] but a mere denial under oath of control of the property will not purge the alleged contemnor.[25] When the trustee is unable to prove in contempt that the failure of the bankrupt to turn over property was willful, he may pursue any civil remedy afforded by the law.[26]

(§ 11) *C. Property in possession of officer appointed by state courts.*[27]—See 11 C. L. 397—The bankruptcy court may enforce the trustee's title and right of possession as against a receiver appointed by a state court.[28]

(§ 11) *D. Summary proceedings against third persons.*[29]—See 11 C. L. 397—The power of courts of bankruptcy summarily to compel the restitution of property in the hands of third persons [30] is limited to property held by such persons under a merely colorable claim of right [31] as distinguished from an adverse claim thereto preferred in good faith,[32] the remedy in the latter case being in a plenary action against the adverse claimant [33] whose right to have the matter so determined is not waived by appearance in the summary proceedings,[34] but the court has jurisdiction in all cases to determine whether or not the claim is real or merely colorable [35] and to decide upon the right to immediate possession as between third persons and the receiver from whom such property was taken,[36] and, where the claim appears to be without merit or legal foundation, the property should be treated as belong-

c. 541, § 2 (U. S. Comp. Stat. 1901, p. 3420). In re Cole [C. C. A.] 163 F 180.

20. In re Adler, 170 F 634.

21. In contempt for failure to obey order to turn property over to the trustee that record should show that an issue was made in some way on the question of contempt and that the alleged contemnor had an opportunity to be heard with reference thereto. In re Cole [C. C. A.] 163 F 180.

22, 23. In re Cole [C. C. A.] 163 F 180.

24. In re Cole [C. C. A.] 163 F 180. Evidence held insufficient to show that bankrupt had control of property and that refusal to turn it over was willful. Id.

25. In re Lasky, 163 F 99.

26. In re Cole [C. C. A.] 163 F 180. Any civil remedy for collection of judgment from debtor who is insolvent or claims to be so. Id.

27. Search Note: See Bankruptcy, Cent. Dig. §§ 225-229, 237; Dec. Dig. § 144.

28. Hecox v. Rollestone [C. C. A.] 164 F 823.

29. Search Note: See note in 5 Ann. Cas. 804; 11 Id. 932.

See, also, Bankruptcy, Cent. Dig. §§ 148-155, 164-184, 624; Dec. Dig. §§ 106-117.

30. Where third party, ruled to show cause why he should not turn certain property belonging to bankrupt over to trustee of bankrupt, answers that he has no such property in his possession, referee has no power summarily to try issues thus joined. In re Gibson [Okl.] 98 P 923.

31. In re Holbrook Shoe & Leather Co., 165 F 973.

32. Where third person prior to bankruptcy obtains property of bankrupt which he claims in good faith as owner, referee has no jurisdiction to determine his right thereto. In re Walsh Bros., 163 F 352. Custodian of securities deposited by bankrupt to secure release of attachment against third party deposited in lieu of bond held an adverse claimant. In re Squier, 165 F 515. Where it appears that claim is in good faith but of doubtful validity, and yet may be real, parties should be left to independent suit to try questions. In re Holbrook Shoe & Leather Co., 165 F 973. Where there is a substantial controversy between receiver and bankrupt's landlord, relative to ownership of fixtures, question whether landlord is guilty of contempt in refusing to permit receiver to comply with order directing him to deliver property to purchaser will not be determined on affidavits in summary proceeding. In re Darlington Co., 163 F 389. Proceeds of sale under execution levied within four months of bankruptcy and paid over to judgment creditor cannot be recovered in summary proceeding before referee. In re Resnek, 167 F 574. Claim of sureties on bail bond, against sum deposited with them to protect them from loss arising from agreement between them and bankrupt that moneys expended by them in defending litigation over deposit, should be a charge thereon held adverse and not merely colorable. In re Horgan [C. C. A.] 164 F 415.

33. In re Resnek, 167 F 574.

34. In re Walsh Bros., 163 F 352.

35. In re Walsh Bros., 163 F 352. Referee has power to hear the testimony and pass upon the question whether the claim is real or merely colorable. In re Holbrook Shoe & Leather Co., 165 F 973.

36. Order of referee merely determines right to immediate possession and not claimant's ultimate right to proceeds. In re Rose Shoe Mfg. Co. [C. C. A.] 168 F 39.

ing to the bankrupt.[37] The court has no jurisdiction over property of a third person mortgaged to secure the bankrupt's debts,[38] except to see that its proceeds are applied on the debt proved,[39] nor can the court require repayment by an attorney for a creditor of money by him collected from the bankrupt and paid over to the creditor.[40] A decree ordering restitution of property is conclusive in a proceeding to punish for failure to comply therewith.[41] The bankruptcy court has jurisdiction to make a call upon stockholders of a bankrupt corporation.[42] One joining in a petition in bankruptcy as a creditor cannot afterwards in contempt proceedings, based on his refusal to turn over property, claim to sustain the relation of bailor with reference to the property upon which his claim as creditor was predicated.[43]

(§ 11) *E. Actions to collect or reduce the property to trustee's possession.*[44] See 11 C. L. 398—Except in cases of fraudulent conveyances,[45] the trustee can recover only such property as the bankrupt could have contracted and collected personally at the time when his rights passed to the trustee.[46] An action to recover a preference is not a proceeding in bankruptcy.[47] Creditors, acting in pursuance of a common plan to obtain property before the appointment of a receiver, are jointly liable for the value of the property so taken,[48] and, where property, preferentially transferred, cannot be restored in kind, the trustee may recover its value.[49] The trustee may, with the approval of the court, compromise any controversy arising in administration of the estate on such terms as he deems best for the interest of the estate.[50] The trustee of a tenant in common is not authorized to sue for par-

37. Surrender to court or trustee should be required. In re Holbrook Shoe & Leather Co., 165 F 973. Where property in possession of receiver is taken by adverse claimant and sold, referee has power to order claimant to turn proceeds of sale to trustee regardless of whether property was taken with or without consent of receiver. In re Rose Shoe Mfg. Co. [C. C. A.] 168 F 39. Where third party holds property at time of bankruptcy merely as agent or bailee of the bankrupt, referee has power summarily to require him to turn it over to trustee. In re Walsh Bros., 163 F 352. Evidence held to justify finding that property held by defendant corporation belonged to bankrupt and that corporation was organized principally to take over assets of bankrupt for purpose of hindering, delaying and defrauding creditors and to justify order of referee requiring defendant to turn over property to trustee. In re Holbrook Shoe & Leather Co., 165 F 973.

38. In re Graves, 163 F 358. Failure of holder of mortgage to submit property to court for valuation does not deprive him of right to prove his claim for deficiency Id. Fact that creditor sets forth in his proof of claim that claim is secured by mortgage on property belonging to third party does not give bankruptcy court jurisdiction over mortgaged property. Id.

39. In re Graves, 163 F 358.

40. Attorney collecting money on claim placed in his hands before he is retained by bankrupt is, in absence of fraud, justified in paying it to his client, though then employed by estate. In re Martin & Co. 167 F 236.

41. In re Strobel, 163 F 380. Contemnor cannot escape by showing that in prior proceeding he, by mistake as to his legal position, defended as a creditor instead of as a bailee. Id.

42. In re Munger Vehicle Tire Co. [C. C. A.] 168 F 910; In re Eureka Furniture Co., 170 F 485. Hearing before referee on question as to whether call should be made on stockholders of bankrupt corporation should be expressly limited to question whether such call should be made and if so to what amount. In re Munger Vehicle Tire Co. [C. C. A.] 168 F 910. See generally Corporations §§ 14C, 16E.

43. In re Strobel, 163 F 380.

44. Search Note: See Bankruptcy, Cent. Dig. §§ 412-465; Dec. Dig. §§ 277-306.

45. See ante, § 10A.

46. Cannot recover on fire policy where bankrupt had, by failure to render required statement of loss, already lost his right to sue when his rights passed over to trustee. Bennett v. Aetna Ins. Co., 201 Mass. 554, 88 NE 335.

47. Within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 23 a, b, 30 Stat. 552 (U. S. Comp. Stat. 1901, p. 3431). In re Walsh Bros., 163 F 352.

48. Where sale of property under process is found to have been made by creditors in pursuance of common plan to obtain property of bankrupt before appointment of receiver in bankruptcy, an order requiring the creditor jointly with others to pay the sum over to the trustee is proper, creditors being joint tort feasors. Ryan v. Hendricks [C. C. A.] 166 F 94.

49. McElvain v. Hardesty [C. C. A.] 169 F 31.

50. Composition agreement approved where bankrupt scheduled no assets and alleged preferential payments were probably valid, such agreement embracing return of portion of alleged preferential pay-

tition,[51] in the absence of a showing that partition is necessary to fully protect the rights of creditors.[52]

*Jurisdiction.*See 11 C. L. 399—The jurisdiction of the bankruptcy court as to rights claimed under the bankruptcy law is exclusive.[53] The district court has jurisdiction of an action by a trustee in bankruptcy of a corporation against several defendants to recover stock subscriptions.[54] Actions for the recovery of preferential payments or transfers are legal in their nature,[55] and can be brought in equity only when embracing some feature peculiarly within the province of courts of equity.[56] They may be brought in either the state courts [57] or the courts of bankruptcy,[58] and when brought in the former are governed by the state laws.[59]

*Limitations and laches.*See 11 C. L. 398—The trustee's laches in suing is not available on appeal where it was not raised below.[60]

*Parties.*See 11 C. L. 399—The trustee has power, to the exclusion of the bankrupt and the creditors,[61] to sue for the recovery of assets belonging to the estate of the bankrupt.[62] Where, in an action to recover property seized by the sheriff after institution of bankruptcy proceedings and sold, the trustee waives the tort and sues the attaching creditor in assumpsit, the sheriff is not a necessary party.[63] The wife and children of the bankrupt are necessary parties to a proceeding by the trustee to reach land devised in trust for the bankrupt and his wife and children.[64] One of three trustees may be sued by the remainder for matter occuring prior to bankruptcy creating liability to creditors of the bankrupt.[65] A trustee in bankruptcy for a partner cannot maintain an action for partnership funds so long as the partnership remains unsettled.[66]

*Pleading.*See 11 C. L. 399—Where property is seized under execution after the filing of the petition and sold, the trustee may waive the tort and sue in assumpsit.[67] A petition by the trustee asserting the bankrupt's right to property by devise must show that the petition in bankruptcy was filed subsequently to the death of the testator.[68] A complaint, containing only general allegations, is sufficient as against a general demurrer,[69] but where the allegations as to proceedings leading to the

ments and the payment into estate for distribution among creditors of $25,000. In re Linderman, 166 F 593.

51. Sale of bankrupt's interest may be had without partition. Hobbs v. Frazier [Fla.] 47 S 929.

52. Hobbs v. Frazier [Fla.] 47 S 929.

53. Admiralty court, having jurisdiction of action in rem before institution of bankruptcy proceedings and having sold vessel, has no jurisdiction to determine the rights of the parties further than admiralty requires and cannot distribute proceeds to creditors of bankrupt. The William B. Kibbee, 164 F 653.

54. Skillin v. Magnus, 162 F 689.

55. Trustee seeking to recover preferential payments has an adequate remedy at law, and cannot sue in equity. Detroit Trust Co. v. Old Nat. Bank [Mich.] 15 Det. Leg. N. 938, 118 NW 729.

56, 57. Detroit Trust Co. v. Old Nat. Bank [Mich.] 15 Det. Leg. N. 938, 118 NW 729.

58. Plenary action by trustee to recover preferential transfer. McElvain v. Hardesty [C. C. A.] 169 F 31.

59. Proceedings to recover preference. Detroit Trust Co. v. Old Nat. Bank [Mich.] 15 Det. Leg. N. 938, 118 NW 729.

60. Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95.

61. Trustee alone has power to sue for recovery of property. Schnurman's Ex'x v. Biddle & Co. [Va.] 64 SE 977.

62. Trustee may recover assets of bankrupt firm used by partner to pay individual debt, payee having notice of the facts. Blake v. Third Nat. Bank [Mo.] 118 SW 641. Trustee may as a person interested in so doing attack a preferential conveyance, under Rev. St. Idaho 1887, § 3396, rendering unrecorded chattel mortgage void as against creditors, and authorizing attack upon same "by any person interested in so doing." In re Hickerson, 162 F 345.

63. Dittemore v. Cable Mill. Co. [Idaho] 101 P 593.

64. Hackett's Ex'rs v. Hackett's Trustee [Ky.] 118 SW 377.

65. In re Syracuse Paper Pulp Co., 164 F 275.

66. Lacey v. Cowan [Ala.] 50 S 281.

67. Dittemore v. Cable Mill. Co. [Idaho] 101 P 593.

68. Where trustee intervened by petition in proceedings to construe will. Hackett's Ex'rs v. Hackett's Trustee [Ky.] 118 SW 377.

69. General allegations of the filing of the petition, the adjudication, and appointment of trustee. Dittemore v. Cable Mill. Co. [Idaho] 101 P 593. Allegation of amount

appointment of the trustee are indefinite as to the time and place of such proceedings they are put in issue by a denial on information and belief directed thereto,[70] and such a denial should not be stricken in such a case.[71] Credit given the bankrupt after receiving preferential payments may be offset against the trustee's cause of action to recover such payments,[72] but only to the extent that such payments are antecedent.[73]

Evidence. See 11 C. L. 400—A creditor receiving payment from the bankrupt prior to the filing of the petition is under the protection of the presumption that the payment was not preferential,[74] and the burden is on the trustee to show all the elements of a voidable preference.[75]

The records of the bankruptcy proceedings are admissible,[76] but the trustee is required to produce only so much thereof as is necessary to prove the adjudication.[77] The adjudication is not conclusive as to the insolvency of the bankrupt at the time of the alleged preferential payment or transfer [78] unless such preferential transfer or payment is expressly made the basis thereof,[79] nor can the insolvency of the bankrupt at the time of the alleged preferential payment be established by the schedule of the bankrupt filed in subsequent bankruptcy proceedings,[80] though the schedules are admissible to show the bankrupt's present insolvent condition.[81] The admissibility of testimony is governed by general rules limiting it to such as is competent,[82] relevant [83] and material,[84] conclusions of the witness being excluded.[85]

received by sheriff and that proceeds thereof were paid to judgment creditor. Id.

70, 71. Dittemore v. Cable Mill. Co. [Idaho] 101 P 593.

72, 73. Price v. Derbyshire Coffee Co., 128 App. Div. 472, 112 NYS 830.

74. Getts v. Janesville Wholesale Grocery Co., 163 F 417. Presumed that creditor did not have reasonable cause to believe that debtor was insolvent. Id.

75. Tumlin v. Bryan [C. C. A.] 165 F 166. Must prove insolvency, transfer within four months, and actual transfer, that preference was obtained thereby and reasonable cause to believe on part of creditor that preference was intended. Id. The burden is on the trustee to show that the alleged preferential transfer was made **within four months** of the filing of the petition. Allen v. Gray, 115 NYS 928; Whitwell v. Wright, 115 NYS 48. **Insolvency** of bankrupt when transfer was made. Whitwell v. Wright, 115 NYS 48; Cree v. Bradley's Bank of Mystic [Iowa] 119 NW 614; Tumlin v. Bryan [C. C. A.] 165 F 166. That particular transaction created a **preference.** In re Sanger, 169 F 722. That transfer enabled defendant as creditor to receive a greater percentage of his claims than other creditors of the same class. Whitwell v. Wright, 115 NYS 48. That transferee had **reasonable cause to believe preference intended.** Whitwell v. Wright, 115 NYS 48; Getts v. Janesville Wholesale Grocery Co., 163 F 417; In re Friedman, 164 F 131; In re Sanger, 169 F 722.

76. Whitwell v. Wright, 115 NYS 48. Admissibility of bankruptcy record held immaterial where evidence outside of such record was sufficient. Matthews v. Joannes Bros. Co., [Mich.] 16 Det. Leg. N. 241, 121 NW 272.

77. Whitwell v. Wright, 115 NYS 48. Creditor may introduce other parts of the records of adjudication to show that petition on which adjudication was based was not the one introduced in evidence. Id.

78. In re Larkin, 168 F 100.

79. Whitwell v. Wright, 115 NYS 48.

80. Tumlin v. Bryan [C. C. A.] 165 F 166.

81. Record of bankruptcy proceedings including schedules are admissible though defendant is not a party. Cree v. Bradley's Bank of Mystic [Iowa] 119 NW 614.

82. Testimony of bankrupt as to his indebtedness to various parties and the sums thereof held admissible, though date thereof not given, it appearing that he was in business but five months and quit a few days after alleged transfer was given and his testimony as to total amount of indebtedness at time of transfer tallying with the aggregate of the various sums stated. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921. Bankrupt may be allowed to testify with reference to schedules, as where creditors listed in second schedule, not produced, were not listed in first schedule, which was in evidence. Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95. Bankrupt allowed to testify that debts listed in second schedule were owing at time of alleged preferential transfer. Evidence of conversation between bankrupt and defendant's salesman who was specially authorized to assist in effecting a settlement with the bankrupt. Id.

83. Testimony of bankrupts that they knew at time of making transfer that they were insolvent held relevant upon question of intent in making transfer as one of elements entering into required proof of reasonable cause for creditor's belief that preference was intended. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921. Testimony of bankrupt that at time of giving alleged preferential mortgage he gave another mortgage to same parties covering same debt is admissible as tending knowledge or belief of mortgagor as to purpose and in-

The weight to be given testimony depends upon the character thereof,[86] and the sufficiency of evidence must be determined with reference to the evidence adduced in the particular case.[87] General testimony as to bankrupt's financial condition at the time of the transfer is insufficient to establish his insolvency.[88] The sufficiency of the testimony to establsh the various elements of a voidable preference is elsewhere treated.[89]

Trial and judgment. See 11 C. L. 400—Instructions to the jury should not be misleading,[90] should be based on the evidence,[91] and should limit testimony to the issues to which it is relevant.[92] The findings should support the judgment,[93] and should not grant recovery of more than the creditor received by way of the preferential payment.[94] Where the findings are inconsistent, a specific finding controls.[95] Where the trustee intervenes in an action by a creditor to recover assets assigned by the bankrupt, he is not bound by a dismissal by the creditor.[96]

tent of mortgage assailed. Id. Evidence of **disposition of property** from which money preferentially paid was raised held admissible on issue of value of such property. Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95. Evidence of **bankrupt's habits** held admissible as tending to show what would have been discovered by inquiry. Id.

84. Testimony of bankrupt that at time of transfer he had not enough money to pay his bills held inadmissible as tending to confuse jury on question of insolvency, its admission rendered particularly erroneous because followed by inquiry whether he knew he was insolvent which was answered in affirmative. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921. Admission of immaterial conversation between bankrupt and his agent held **harmless error.** Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95.

85. Testimony of wife of bankrupt that she had conversations with her husband from which she concluded they had more debts than assets and told him so held inadmissible for purpose of showing insolvency, it being a mere conclusion. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921.

86. The fact that a few days prior to accepting payment creditor accepted the bankrupt as surety for a substantial sum is entitled to much weight in determining whether he had reasonable cause to believe that the bankrupt was insolvent. Getts v. Janesville Wholesale Grocery Co., 163 F 417.

87. Evidence held to show knowledge in payee of fact that funds used were partnership assets. Blake v. Third Nat. Bank [Mo.] 118 SW 641.

88. Tumlin v. Bryan [C. C. A.] 165 F 166.

89. See ante, § 10E.

90. Instruction held misleading as authorizing recovery in action to avoid preference, regardless of solvency or insolvency of debtor at time of transfer. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921. Instruction that circumstances sufficient to put reasonable man on inquiry as to debtor's insolvency would be sufficient to charge transferee with notice held **harmless,** if erroneous, in view of evidence showing reason to believe debtor insolvent. Matthews v. Joannes Bros. Co. [Mich.] 16 Det. Leg. N. 241, 121 NW 272.

91. Instruction as to effect of reasonable grounds for belief that preference was intended held not erroneous as presupposing that evidence established insolvency of bankrupt at time of transfer. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921. Use of words "fraudulent and void" in instructing jury as to effect of conditions indicating preferential character of transfer on transfer made by bankrupt to defendant held not error, though there was no evidence of actual fraud. Id.

92. Where testimony is relevant only as to part of the issues, it should be limited thereto by proper instructions. Blyth & Fargo Co. v. Kastor [Wyo.] 97 P 921.

93. Finding that creditor of bankrupt corporation as secretary thereof made payment to himself at time when bankrupt was obviously insolvent supports judgment for recovery of payment though there is no specific finding that he had reasonable cause to believe bankrupt insolvent. Evans v. Claridge, 137 Wis. 218, 118 NW 803.

94. A. held legal title and equity in one-third of certain property which he conveyed to owner of remainder, subject to mortgage. Property destroyed by fire and transferee collected insurance money and paid incumbrance. Held that, upon setting aside the conveyance in bankruptcy, the transferee could be held to account only for one-third the amount left after discharge of the mortgage. Parker v. Travers [N. J. Err. & App.] 71 A 612. Where at time of receiving preferential transfer creditor paid bankrupt's difference between value of property transferred and his debt, he cannot be held liable for value of entire property transferred. McElvain v. Hardesty [C. C. A.] 169 F 31. Where transfer of business to creditor was held preferential, it was error to allow recovery by trustee of value of good will, the evidence tending to show that, at time of transfer, business had no good will. Id.

95. Specified finding as to date of alleged preferential payment controls conflicting finding merely recapitulating notes of bankrupt with their dates of payment. Evans v. Claridge, 137 Wis. 218, 118 NW 803.

96. After reversal of judgment for creditor. Tharp v. Tharp's Trustee [Ky.] 119 SW 814.

Costs. See 6 C. L. 391—Trustee is entitled to costs upon setting aside a conveyance as fraudulent.[97] A trustee is not liable for the costs of an action by or against the bankrupt when he has not intervened therein or where he had the approval of the federal court to such intervention.[98]

(§ 11) *F. Claims not reduced to possession by the trustee.*[99] See 11 C. L. 400—The fact that the trustee does not reduce property to his possession cannot strengthen claims of third parties thereto [1] or deprive creditors of the right to proceed against it after termination of bankruptcy proceedings.[2]

§ 12. *Protection of trustee's title and possession.*[3] See 11 C. L. 400—A court of bankruptcy may restrain proceedings by a landlord to oust the trustee where such action would result in serious injury to estate,[4] on the other hand, the trustee cannot obtain relief as against a mortgage foreclosure sale resulting in a deficiency judgment against the bankrupt, where he has not acted with due diligence and the granting of relief would result in injury to innocent parties.[5] The state courts have no jurisdiction of an action in replevin against a trustee in bankruptcy.[6]

Rights of trustee in actions pending by and against bankrupt. See 11 C. L. 400—The trustee may be substituted as a party plaintiff to actions brought by the bankrupt and pending at the time of his appointment,[7] but the trustee should not be substituted in a pending suit by or against the bankrupt until he has obtained permission from the federal court.[8] The effect of bankruptcy on pending actions is treated in a previous section.[9]

Suits against trustee. See 11 C. L. 400—The trustee may be sued in state courts for the recovery of money wrongfully paid over to him,[10] without the consent of the bankruptcy court.[11] The district courts as a court of bankruptcy has jurisdiction of an action to create or restore a lien on property, the title to which is in the trustee.[12]

97. Parker v. Travers [N. J. Err. & App.] 71 A 612.

98. Not liable where defendant did not bring case to final trial relying upon the responsibility of trustee for costs. Kessler v. Herklotz, 132 App. Div. 278, 117 NYS 45.

99. Search Note: See Bankruptcy, Cent. Dig. § 350; Dec. Dig. § 250.

1. Fact that bankrupt who gave a deed which was in fact a mortgage failed to schedule equity in property does not vest in mortgage for the title thereto. Horn v. Bates [Ky.] 114 SW 763.

2. Where bankrupt failed to schedule equity in property to which he gave deed which was in fact a mortgage, his creditors after termination of bankruptcy proceeding could enforce their claims against such equity. Horn v. Bates [Ky.] 114 SW 763.

3. Search Note: See Bankruptcy, Cent. Dig. §§ 233, 235, 317-344, 410-468; Dec. Dig. §§ 136, 209-218, 277-306; 5 Cyc. 345, 377, 378.

4. Trustee may be required to give bond to protect landlord from loss. In re Schwartzman, 167 F 399.

5. Motion by trustee for order vacating judgment sale and deficiency judgment on mortgage guaranteed by bankrupt and to permit him to assert invalidity of guaranty denied where such relief would result in injury to innocent parties and trustee is guilty of unexplained laches. Freehold Const. Co. v. Bernstein, 60 Misc. 363, 113 NYS 368.

6. Concord Iron & Metal Co. v. Couch [N. H.] 73 A 301. See, also, ante, § 7.

7. Farrell v. Atlantic C. L. R. Co. [S. C.] 64 SE 226. Refusal of court in reversing judgment and ordering new trial to require substitution of trustee of plaintiff adjudged bankrupt after rendition of judgment held not error where the court held that on new trial trustee could make application to be joined or substituted as party plaintiff and continue action on behalf of creditors. Id.

8. Under Bankruptcy Act 1898 (30 Stat. 549; U. S. Comp. St. 1901, p. 3426). Kessler v. Herklotz, 132 App. Div. 278, 117 NYS 45.

9. See ante, § 5A.

10. So held where money in hands of agent of bankrupt, claimed by plaintiff, was by such agent paid over to trustee. Gardner v. Planters' Nat. Bank [Tex. Civ. App.] 118 SW 1146.

11. Under Act Cong. Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582). Gardner v. Planters' Nat. Bank [Tex. Civ. App.] 118 SW 1146.

12. Cleminshaw v. International Shirt & Collar Co., 165 F 797. Bill in equity in action against trustee in bankruptcy to restore a lien on property of bankrupt, which complainant was fraudulently induced to release, and offering to restore consideration, held to state cause of action, though not alleging whether rights of creditors have intervened. Id.

§ 13. *Management of the property and reduction to money.*[13] See 11 C. L. 401 A solvent member of a firm which has been adjudicated bankrupt may, at his election, administer the estate under the bankruptcy law.[14] The trustee may adopt unexpired leases of the bankrupt or may ignore them entirely.[15] The referee should not, without the express sanction of the court, authorize the continuance of the bankrupt's business where transactions of great magnitude are involved,[16] nor should he, without such sanction, authorize the issuance of trustee's certificates.[17] The trustee is chargeable with all the property passing to him as such,[18] and objections to his accounting and attempts to charge him with property not accounted for may be disposed of by summary proceedings.[19]

Sale of property. See 11 C. L. 401—The court may order a sale of property subject to existing liens thereon [20] or, in a proper case, discharged of such liens,[21] but in the latter event the lien is transferred to the proceeds.[22] Creditors filing claims are chargeable with notice of the sale of the bankrupt's property where the record shows that due notice was mailed to all creditors by the referee.[23] The sale should be held in the manner authorized by the court.[24] The rights of the purchaser are governed by the conditions as they exist at the time of the sale,[25] the trustee being able to pass no better title than he received from the bankrupt [26] of which fact the purchaser is chargeable with notice,[27] and where the purchaser seeks to avail himself of a release of which he has no notice, he must show diligent inquiry.[28] The sale is governed by the rules applicable to judicial sales generally,[29] under which the order of confirmation exhausts the jurisdiction of the court over the property,[30] and the validity of the title passed depends upon the validity of the order of confirmation.[31] Recitals in the trustee's deed do not prove facts set forth therein.[32]

13. Search Note: See Bankruptcy, Cent. Dig. §§ 192, 345-347, 349, 350, 352, 356-380; 410-417, 465, 572, 573; Dec. Dig. §§ 246-276.

14. In re Solomon, 163 F 140.

15. Election must be made within reasonable time after appointment. In re Rubel, 166 F 131. See, ante, § 10A.

16. Bray v. Johnson [C. C. A.] 166 F 57. See, ante, § 10A.

17. Bray v. Johnson [C. C. A.] 166 F 57.

18. Trustee properly charged with property coming into his possession which, without order of court, he turned over to creditor asserting lien thereon. In re Moore [C. C. A.] 166 F 689. Trustee authorized to conduct business of bankrupt held properly charged with sums paid by third parties for work done by employes of the trustee as such. Id.

19. Cannot be construed as plenary suit in equity. In re Moore [C. C. A.] 166 F 689.

20. Ex parte City of Anderson [S. C.] 63 SE 354. Where no mention of liens is made in order of sale, only a sale subject to existing liens is authorized. Id.

21. Where the facts warrant, the referee may order a sale of realty discharged of liens. In re Miners' Brew. Co., 162 F 327.

22. In re Miners' Brew. Co., 162 F 327. Referee hears claims upon the proceeds and determines their validity, extent, and relative priority. Id.

23. Bank proved claim. Mortgagee applied for foreclosure sale, and notice of sale sent to all creditors. Held bank chargeable with notice. West Lumber Co. v. Lyon [Tex. Civ. App.] 116 SW 652.

24. Order requiring receiver to sell at public or private sale, within his discretion, at current rates, without notice, is sufficiently broad to justify sale of perishable property in bulk after receiver had offered it for sale in carload lots. In re Roberts [C. C. A.] 166 F 96.

25. Bankrupt held leasehold on property mortgaged for $10,000. For his protection it was stipulated that rent would be paid and applied on mortgage debt. At the time of sale of leasehold by trustee, $1,342.70 rent was due. Held that tenant had no right to insist that that sum be applied to the payment of the mortgage, he taking the property in the condition it was in at the time of the sale. In re Ketterer Mfg. Co., 162 F 583.

26. Trustee of foreign corporation which had not complied with state laws transferred chose in action to another corporation. Held that failure of bankrupt corporation to comply with state law barred action by second corporation. Buck Stove & Range Co. v. Vickers [Kan.] 101 P 668.

27. Purchasers at bankrupt sale are chargeable with notice that they take nothing further than the interest of the bankrupt. Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 SE 887.

28. Where purchaser had notice of mechanic's lien, and there was unrecorded release of which he had no notice. Kreusler v. Glukoff Co. [Pa.] 72 A 352.

29. West Lumber Co. v. Lyon [Tex. Civ. App.] 116 SW 652. See, also, topic Judicial Sales.

30. Subsequent sale under purported vendor's lien held invalid. West Lumber Co. v. Lyon [Tex. Civ. App.] 116 SW 652.

31. West Lumber Co. v. Lyon [Tex. Civ. App.] 116 SW 652.

§ 14. *Claims against estate and proof and allowance. A. Claims provable.*[33] See 11 C. L. 401—The filing of a petition in bankruptcy vests in a creditor an equitable estate in so much of the property of the bankrupt as the amount of his claim bears to the entire amount of provable claims,[34] the status of his claim, when the petition is filed, fixing his right to share in the distribution of the estate.[35] Claims provable include absolute liabilities,[36] incurred prior to the filing of the petition,[37] and based on contract [38] or judgment,[39] and which are liquidated [40] or capable of liquidation before the time for filing claims expires.[41] Whether a secured debt may be proved as an unsecured claim depends upon whether the security comes within the doctrine of subrogation,[42] but a creditor whose security is held void may prove it as an unsecured debt.[43] A claim for an amount due on the bankrupt's subscription to the stock of an insolvent corporation [44] as well as a claim for

32. Must be supported by enough of record of bankruptcy proceedings to vouch authority for its execution from court having jurisdiction of person and subject-matter. Despard v. Pearcy [W. Va.] 63 SE 871.

33. Search Note: See notes in 3 C. L. 471; 9 Ann. Cas. 448.

See, also, Bankruptcy, Cent. Dig. §§ 469-564; Dec. Dig. §§ 307-328; 5 Cyc. 323-334, 341, 379-389, 414-417.

34. Shawnee County Com'rs v. Hurley [C. C. A.] 169 F 92.

35. Shawnee County Com'rs v. Hurley [C. C. A.] 169 F 92. Obligee of bond or holder of claim upon which several parties are liable may prove his claim against those who become bankrupt and may at same time pursue the others at law, and, notwithstanding partial payments after bankruptcy by other obligors or their estates, he may recover dividends from each estate in bankruptcy upon the full amount of his claim at time petition was filed until from all sources he has received payment in full. Id. County held entitled to prove against surety of insolvent bank full amount of claim against bank at time surety filed petition, notwithstanding subsequent payment of dividends from assets of insolvent bank. Id.

36. Settlement of partnership between father and son provided that son should pay father or his estate a certain sum within 5 years, and in consideration of the prompt payment of interest father was to make no changes in his will detrimental to the son. Held, that such agreement was not provable in bankruptcy as an absolute liability against son. In re Hartman, 166 F 776.

37. Claim of creditor for money advanced to bankrupt after filing petition in bankruptcy, held properly rejected. In re Rome, 162 F 971.

38. Claim for damages for breach of contract is provable. Forest City Steel & Iron Co. v. Detroit, etc., R. Co., 154 Mich. 182, 15 Det. Leg. N. 653, 117 NW 645. Debts founded on open account or on contract are provable in bankruptcy. Standard Sewing Mach. Co. v. Kattell, 117 NYS 32. Action for balance due for goods sold and delivered was provable. Id. Note given by a bankrupt in consideration of money advanced to it for the purpose of making a composition with its creditors is based on a sufficient **consideration** and may be proved as a debt in a subsequent bankruptcy proceeding. In re Bennett Shoe Co., 162 F 691.

39. Where execution is awarded under Cal. Code Civ. Proc., § 685, more than five years after entry of judgment, and levied prior to bankruptcy proceedings against defendant, such execution is provable as claim against estate, though action thereon is barred by another section of statute (§ 336). In re Rebman [C. C. A.] 150 F 759.

40. In Pennsylvania, under lease providing that upon default in payment of rent or appointment of receiver the rent for entire term shall become due, upon such default and appointment of receiver and subsequent bankruptcy, landlord's claim for rent for entire term is a fixed liability absolutely owing and provable in bankruptcy. In re Pittsburg Drug Co., 164 F 482. Taxes and insurance, which lessee covenanted to pay but which at time of bankruptcy are not due and the amounts thereof ascertainable, are not provable debts. Id.

41. A contract liability, contingent when petition is filed, but which is capable of liquidation before the year for filing proofs expires, is a provable claim. In re Dunlap Carpet Co., 162 F 541.

42. Holder of entire stock of two corporations, one of which was adjudged bankrupt, purchased notes of bankrupt corporation which were secured by bonds of other company. Held that he was by virtue of such purchase a secured creditor of bankrupt corporation and could not prove notes as unsecured claim. In re Watertown Paper Co. [C. C. A.] 169 F 252. Creditor holding claim against bankrupt secured by indorsement of third party may prove entire claim as unsecured claim against estate, indorser being entitled to subrogation as to so much of claim as he would be forced to pay if creditor failed to prove claim. In re Otto F. Lange Co., 170 F 114.

43. Claimant sold carriages to bankrupt taking bill of sale therefor, which was in fact a chattel mortgage and which was held invalid for failure to record. Held claimant entitled to prove claim for purchase price of carriages as unsecured claim. In re Burlage Bros., 169 F 1006. Where security held by creditor is determined void, he may surrender it and participate in the proceedings and dividends with the general creditors. In re Quinn [C. C. A.] 165 F 144.

44. Burke v. Maze [Cal. App.] 101 P 438.

damages for breach of contract occasioned by the adjudication [45] is provable, as are, also, claims for money paid for stock subscription in a corporation organized to take over assets of bankrupt corporation to defraud its creditors, where in subsequent bankruptcy proceeding holding corporation is required to turn its property over to the trustee,[46] but a claim for unearned rent is not,[47] nor one based on the obtention of property by false pretenses.[48] A creditor whose claim is based on a judgment for a deficiency, entered in foreclosure proceedings against property of a third party mortgaged to secure the bankrupt's debt, can prove only the excess of the mortgage debt above the market value of the property [49] regardless of the amount for which the property was sold.[50] A contract liability rendered unenforcible by failure to comply with local statutory regulation cannot be made the basis of a claim in bankruptcy,[51] but the fact that a debt represents money loaned to a bankrupt to enable him to make a preferential payment does not render a claim based thereon invalid.[52] Partnership debts are provable against the partnership estate [53] and, where the liability thereon is joint and several, against the estates of the individual partners,[54] but a claim against the estate in favor of a bankrupt partner, while provable,[55] cannot be paid except from the surplus remaining after other creditors are paid in full.[56] Unliquidated claims may be liquidated by means of a hearing before the referee [57] or by plenary suit brought before any court having jurisdiction [58] or by permitting action pending in any court to proceed to judgment.[59] A surety on the note of the bankrupt may prove the note, though he has not yet paid it.[60] The allowance of claims is within the exclusive jurisdiction of the bankruptcy court and cannot be questioned collaterally.[61]

45. Claimant held entitled to damages for breach of contract occasioned by adjudication in bankruptcy. In re National Wire Corp., 166 F 631.

46. Where stockholders of bankrupt corporation participated in organization of corporation to take over property of bankrupt for purpose of defrauding its creditors and purchased and paid for stock of new corporation and in subsequent bankruptcy proceeding corporation was required to turn its property over to the trustee, such stockholder is a creditor to the extent of money paid for the stock. In re Holbrook Shoe & Leather Co., 165 F 973.

47. An unearned instalment of rent cannot be proven in bankruptcy though liquidated. In re Rubel, 166 F 131. Unaccrued rent upon lease for specified term cannot be proven as claim in bankruptcy. Id.

48. Claim for damages for obtention of property by false pretenses or representations are not provable. Maxwell v. Martin, 130 App. Div. 80, 114 NYS 349.

49. Where a creditor whose claim is secured by mortgage on property of a third party obtains title thereto on foreclosure and files his claim for the deficiency, claim should be allowed only at the balance due after deducting from the entire debt the value of the mortgaged property. In re Graves, 163 F 358.

50. Property sold at foreclosure for $15,000. Value of the property proven at $18,000. Held creditor entitled on to prove his debt less the $18,000. In re Graves, 163 F 358.

51. Claims of foreign corporation which are unenforcible because of its noncompliance with state regulations are not provable in bankruptcy. In re Monticello Brick Works, 163 F 621. Transactions held to constitute "doing business" within the regulations of the state of Pennsylvania. Id.

52. A debt, representing money borrowed by the bankrupt for the purpose of making a preferential payment, is not thereby invalidated, the lender having no knowledge of the use to which the money is to be put. Ohio Valley Bank Co. v. Mack [C. C. A.] 163 F 155.

53. Claim based on promissory notes held provable against estate of bankrupt partnership, though signed by individual members thereof and not in firm name. In re Stoddard Bros. Lumber Co., 169 F 190.

54. Bankrupt firm, under contract whereby it received goods to be sold, but held goods and proceeds in trust for vendor, which accepted bills drawn on it for price thereof by vendor, but misappropriated proceeds, held liable as firm on acceptances, and jointly and severally liable for misappropriations, and claim of vendor held provable against partnership and individual estates of partners. In re Coe, 169 F 1002.

55. In re Rice, 164 F 509.

56. Claim of bankrupt partner against estate of bankrupt partnership is provable against the estate by the trustee of bankrupt partner, but can be paid only out of surplus remaining after other partnership creditors are paid in full. In re Rice, 164 F 509.

57, 58, 59. In re Buchan's Soap Corp., 169 F 1017.

60. Surety is creditor of bankrupt principal from date of signing note. Kahn & Bro. v. Bledsoe [Okl.] 98 P 921.

61. By filing of petition, adjudication, and

(§ 14) *B. Proof of claims.*[62]—See 11 C. L. 402—Proofs of claim must be filed within the time required by law,[63] unless the time is extended for good cause shown,[64] but where the filing thereof is delayed by litigation between the trustee and the creditor,[65] and the claim has in such litigation been held an unsecured debt,[66] the creditor may be permitted to participate in the assets of the bankrupt, though no proof of his debt has been filed in the bankruptcy proceedings.[67] The proof of claim must set forth the consideration supporting the debt [68] and state sufficient facts to enable the trustee to investigate the justice and legality thereof.[69] Proof of an unsecured debt may be amended so as to show claimant's right to priority,[70] and a creditor may be permitted to withdraw his claim in order to avail himself of other remedies.[71] Proving a debt against a bankrupt estate operates as an absolute extinguishment of the debt only upon condition that a discharge be granted,[72] and a creditor does not waive rights against parties secondarily liable by proving his claim in the bankruptcy proceedings,[73] nor does the filing of a claim for damages for false pretenses waive the right of action to recover damages therefor [74] or the right, in any case, to proceed in another court,[75] and, when done by inadvertence, the proving of a claim as an unsecured debt does not waive a right of priority inherent therein.[76] The fact that a debt proved by one party is in fact owned by another is immaterial.[77]

presentation of claim, bankruptcy court obtained complete jurisdiction over parties, subject-matter and demand. Carr v. Barnes [Mo. App.] 120 SW 705. Could not be questioned in later proceeding by creditor against bankrupt after discharge had been refused. Id.

62. Search Note: See Bankruptcy, Cent. Dig. §§ 501-507; 517, 519-564; Dec. Dig. §§ 329-364.

63. In re Strobel, 163 F 787. Proofs of claim cannot be received after a final order in composition has been made. In re Cooper Bros., 166 F 932.

64. In re Peck [C. C. A.] 168 F 48. Court cannot extend time for filing claims so as to permit proof by creditor who neglected to file because misled by schedules as to extent of bankrupt's assets. Id.

65. A creditor will not be barred from participation in distribution among creditors by reason of the fact that litigation whereby he endeavored to secure greater rights in the bankrupts properly extended beyond the time for filing proofs of claims. In re Strobel, 163 F 787. Where litigation as to right of a creditor to a lien upon certain property of the bankrupt and ownership of another portion extended beyond the time for filing claims and resulted in a holding that as to his claims he could participate only as a general creditor, he will not be barred from participating in the dividends by reason of his delay in filing his proofs of claim. Id. Creditor who upon suit of trustee is forced to surrender preference may prove claim which was attempted to be liquidated by the preferential payment, though time for filing claims has expired. In re Otto F. Lange Co., 170 F 114.

66. In re Strobel, 163 F 787.

67. Where a creditor as to one part of his claim insisted upon his rights under a chattel mortgage which was held void and as to another part claimed ownership of property in possession of the bankrupt and the ensuing litigation extended beyond the period for filing proofs of claim and resulted in a holding that as to the claims litigated he could participate only as a general creditor, it is held that his claims were sufficiently before the court to render it unnecessary for him to file formal proofs. In re Strobel, 163 F 787.

68. Claim based upon a promissory note. In re Coventry Evans Furniture Co., 166 F 516. "Value received" recited in note which is made a part of the proof held an insufficient statement of consideration. Id.

69. General statement that note is supported by consideration insufficient. In re Coventry Evans Furniture Co., 166 F 516.

70. Claim for priority on claim, which from its nature is entitled thereto under state law, is not such an amendment thereof as is forbidden under § 57n of the Bankruptcy Act. In re Ashland Steel Co. [C. C. A.] 168 F 679.

71. Creditor properly permitted to withdraw proof so as to avail himself of waiver of exemptions in note given him by bankrupt, upon which proof of debt was based. In re Strickland, 167 F 867.

72. Carr v. Barnes [Mo. App.] 120 SW 705.

73. Fact that a conditional sale vendor secures from trustee part of the property covered by contract and proved claim to remainder does not preclude him from proceeding against parties who guaranteed performance of the contract by vendee. Vette v. Merrell Drug Co. [Mo. App.] 117 SW 666.

74. Maxwell v. Martin, 130 App. Div. 80, 114 NYS 349.

75. Filing of proof of claim does not waive right of action on the claim in another court. In re Buchan's Soap Corp., 169 F 1017.

76. Filing of claim as unsecured debt and voting for trustee does not waive right to claim priority inherent therein, when done

(§ 14) *C. Contest of claims.*[78]—See 11 C. L. 403—Where the proof of a claim complies with the requirements of the law, the burden of overthrowing the claim is on the trustee or contesting creditors,[79] but where it is insufficient, the burden is on the claimant to establish it by proof [80] or to correct his proof by amendment.[81] Where the claim is sufficiently established by proof, failure to amend is immaterial.[82] Claims filed by relatives of the bankrupt should be closely scrutinized.[83] In any case only such claims as are based on valid [84] and bona fide debts [85] against the bankrupt estate [86] should be allowed.

(§ 14) *D. Surrender of preferences and effect thereof.*[87]—See 11 C. L. 403—Preferential payments [88] received by a creditor must be surrendered [89] as a condition

by inadvertence or mistake. In re Ashland Steel Co. [C. C. A.] 168 F 679; Ohio Valley Bank Co. v. Mack [C. C. A.] 163 F 155.

77. That a creditor who loaned money to a bankrupt, himself borrowed the money from a bank, giving his note and pledged the mortgage of the bankrupt as collateral, does not affect his right to prove the debt in his own name. Ohio Valley Bank Co. v. Mack [C. C. A.] 163 F 155.

78. Search Note: See Bankruptcy, Cent. Dig. §§ 525-527; Dec. Dig. §§ 338-340.

79. In re Coventry Evans Furniture Co., 166 F 516.

80. In re Coventry Evans Furniture Co., 166 F 516. Written statement containing summary of entries in books of account and unsworn statements of officer of bankrupt corporation, which were not identified and not in evidence, held incompetent. Id.

81. Where the proof does not comply with the law, it should, on motion of trustee, be expunged, unless corrected by amendment or established by proof. In re Coventry Evans Furniture Co., 166 F 516.

82. Where amount of claim is correctly stated and inquiry therein by special master would in no way have been changed by amendment, irregularities in statement of items in proof do not warrant rejection of claim. In re Watertown Paper Co. [C. C. A.] 169 F 252.

83. Honest or dishonest character of the debt cannot, however, be determined by mere question of relationship. Ohio Valley Bank Co. v. Mack [C. C. A.] 163 F 155. Claims of relatives of bankrupt allowed by referee and finding sustained on appeal. Id. Note given by bankrupt to wife held provable, though consideration not satisfactorily shown, it not being shown that bankrupt was indebted at time of execution. In re Kyte, 164 F 302.

84. Claims of creditors held to arise from money loaned bankrupt pursuant to conspiracy to defraud creditors and disallowed. In re Friedman, 164 F 131. Where greater part of creditor's claim is held fraudulent and payments made by bankrupt have not been applied by either debtor or creditor, court will apply payments on part of debt not proved fraudulent. Id. Where greater portion of creditors' claims is shown to arise from money advanced pursuant to a common purpose to defraud creditors, no part thereof should be allowed. Id. Claims of borrowed money creditors arising from advances made to bankrupt pursuant to common arrangement to defraud creditors should be disallowed in their entirety. Id. On issue as to whether claimants participated with bankrupt in pursuance of a common purpose to defraud creditors by obtaining extensive credit, concealing goods so purchased and filing petition in bankruptcy, evidence of claimants' connection in previous similar transactions is admissible on the question of motion. Id.

85. Evidence held sufficient to sustain master's finding establishing a claim for money loaned to the bankrupt. In re Halsey Elec. Generator Co., 163 F 118. Evidence held to support referee's finding notes filed by a creditor of the bankrupt do not represent a valid claim against the bankrupt's estate. Not supported by a consideration and given for the purpose of manufacturing a claim against the bankrupt. In re Rome, 162 F 971. **Evidence insufficient** to sustain claim of president of bankrupt corporation. In re Coventry Evans Furniture Co., 166 F 516. **Claim of officer of corporation** arising from advances made to cover expenses and indebtedness allowed, against contention that advances were voluntary and not recoverable. In re Gouverneur Pub. Co., 168 F 113. **Claim of creditor corporation** held provable against estate of bankrupt corporation in face of contention that both corporations were in fact one. In re Watertown Paper Co. [C. C. A.] 169 F 252.

86. Contract and liability thereunder held that of president of bankrupt corporation and not that of corporation notwithstanding effort of president to transfer rights thereunder to corporation. In re Roanoke Furnace Co., 166 F 944.

87. Search Note: See note in 3 C. L. 476. See, also, Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.

88. Payments made on open account, which are less in amount than the price of the goods sold and delivered during the four-months period previous to adjudication, are not preferences which the creditor is bound to surrender. In this case, account was made up of debits and credits and payments left net amount due from bankrupt estate. Wild & Co. v. Provident Life & Trust Co., 29 S. Ct. 619. Payments made to creditor shortly before bankruptcy held voidable preference and ordered repaid as condition precedent to right of creditor to file proof of claim against estate. In re Rice, 164 F 514.

89. "Surrender" of preference, as used in § 579 of bankruptcy act, includes surrender after judgment in favor of trustee as well

precedent to the right to prove the claim,[90] but after such surrender the creditor is entitled to come in upon equal basis with the other creditors,[91] and, where the suit to avoid the preference is brought in the bankruptcy court, the matter may there finally be adjudged by requiring the creditor to surrender merely the difference between his lawful share of the estate and the amount of the preference with interest.[92] Where a creditor is required to return preferential payments, his proof of claim may be increased to the extent of payments returned though time for filing claims has elapsed.[93]

(§ 14) *E. Secured creditors.*[94]—See 11 C. L. 403—A creditor holding valid security[95] may, where the property is administered by the bankruptcy court and sold, assert his lien in the bankruptcy court[96] against the proceeds of the sale,[97] and, where he does not appear at the hearing of the petition for an order to sell, he cannot complain that the property was sold below its appraised value for a sum less than the amount of his mortgage.[98] Extinguished liens[99] or liens rendered invalid by failure to record evidence thereof[1] cannot be asserted, but the signing of a liquidation agreement as to an unsecured claim does not operate to extinguish the lien of a secured claim held by the same creditor.[2] A surety who by paying

as voluntary surrender. In re Otto F. Lange Co., 170 F 114.

90. In re Friedman, 164 F 131; In re Shiebler, 165 F 363. Surety on note of bankrupt who has paid it and become subrogated to rights of holder, and who has as creditor on open account received preference, cannot prove his claim based on such notes until he surrenders preference. Kahn & Bro. v. Bledsoe [Okl.] 98 P 921.

91, 92. Page v. Rogers, 211 U. S. 575, 53 Law. Ed. —.

93. A proof of claim may be increased after lapse of time for filing where such increase is occasioned by a requirement that the creditor return preferential payments. In re Shiebler, 165 F 363.

94. Search Note: See Bankruptcy, Cent. Dig. §§ 501-507; Dec. Dig. § 310.

95. Mechanic's lien held defective on its face and not to confer priority on claimant. In re Miners' Brew. Co., 162 F 327. Mechanic's lien held invalid, and not to prefer priority upon the claimant. Id. Auctioneer who under contract of employment advanced sum to bankrupt, which was to be deducted from proceeds of sale, held not entitled to lien on property of bankrupt who was adjudicated before auction sale was held. In re Faulhaber Stable Co. [C. C. A.] 170 F 68.

96. Where property subject to chattel mortgages is sold by order of court directing that the liens, if any, be transferred to the proceeds, and the holders of the mortgage make no claim on the property at the time of the sale, and all parties consent to the jurisdiction of the bankruptcy court, all claims with reference to the fund should if possible be determined in the bankruptcy court. Trustee should not be permitted to go into state court unless he shows sufficient reason therefor. In re Vogt, 163 F 551.

97. In re Vogt, 163 F 551. Rights of mortgagee in proceeds of sale of property by trustee determined, the parties being unable to definitely ascertain the proceeds of the mortgaged and unmortgaged property. In re Goldsmith, 168 F 779. Where holders of chattel mortgages consented to a sale free from liens and to have the liens transferred to the proceeds, whether they can be held estopped to make any claim other than that made in previous litigation in the state courts cannot be determined until the trustee or the creditors have determined what course they will pursue and have asked the referee to proceed with the administration. In re Vogt, 163 F 551.

98. In re Baughman, 163 F 669. One holding mortgage on bankrupt's property for less than its appraised value cannot complain of a sale thereof for less than the amount of his mortgage, which did not provide that he might take possession on default, where he did not appear upon notice at the hearing of the petition of the trustee for an order to sell. Petition for disallowance of expenses of sale and trustee's and referee's commissions denied. Id.

99. A pledged instalment accounts as collateral to his notes to B. B authorized A to collect the accounts and apply them on the notes. A collected sufficient to pay the notes, but used a part of the proceeds to run its business. Subsequently A was adjudicated a bankrupt and the trustee collected accounts in excess of the amount on the notes. Held that collections made by A extinguished B's lien pro tanto, whether turned over to B or not, and that B was not entitled to the proceeds of collection made by the trustee to the amount of the balance due on the notes. In re Merrill, 162 F 590.

1. Unrecorded conditional sale contract held not to entitle vendor to participate as secured creditor as against trustee representing creditors whose claims were created after its execution. In re Braselton, 169 F 960. Creditor claiming under unrecorded bill of sale which is in fact a chattel mortgage and invalid as against creditors under Code Iowa, § 2906, held not entitled to priority by virtue thereof, though executed in good faith more than four months prior to bankruptcy. In re Burlage Bros., 169 F 1006.

2. Claimant who advanced money to

the debt of his principal becomes subrogated to creditor's lien may assert it in bankruptcy proceedings.[3] A creditor in the absence of facts raising an estoppel[4] may assert his lien though he has proved his debt as an unsecured claim.[5] The presentation of a claim by a judgment creditor as unsecured does not necessarily waive the rights vested in a receiver appointed in proceedings supplementary to such judgment.[6] Formal amendments to lien claims may be allowed,[7] but amendments materially changing the position of claimant and affecting the status of the remaining creditors are not permissible.[8]

(§ 14) *F. Set-off.*[9]—See 9 C. L. 370—Mutual debts may be set off[10] notwithstanding either is secured,[11] but after the bankrupt has assigned his claim against the creditor, it cannot be offset against the creditor's claim against the bankrupt.[12]

(§ 14) G. *Priorities.*[13]—See 11 C. L. 403—Creditors are classified according to the percentage to which they are entitled.[14] Preference is given to wages,[15] taxes,[16]

bankrupt and took security therefor held not to have relinquished his security by signing liquidation agreement as an unsecured creditor on debt arising out of another transaction. In re Cyclopean Co. [C. C. A.] 167 F 971. Signature held placed on liquidation agreement as unsecured creditor and not to embrace indebtedness for which he held security. Id.

3. Accommodation indorsers of notes of the bankrupt taking mortgage to secure endorsement, who upon maturity paid them, each advancing half the funds necessary for that purpose, may as joint petitioners assert the mortgage lien in subsequent bankruptcy proceedings. In re Farmers' Supply Co., 170 F 502. In Louisiana surety who pays debt after it has been proved in bankruptcy is subrogated to creditor's rights and may in the latter's name assert right to vendor's lien. Sessler v. Paducah Distilleries Co. [C. C. A.] 168 F 44.

4. Filing of claim as unsecured debt and voting for trustee does not, under doctrine of estoppel, bar a claim for priority inherent in such claim, where creditors were not injured thereby and voting thereof did not affect election of trustee. In re Ashland Steel Co. [C. C. A.] 168 F 679. One who is secured by a lien on property to which the bankrupt has no claim is not a secured creditor within the meaning of the bankruptcy act, § 1. County of Coles v. Haynes, 134 Ill. App. 320. Subcontractor secured by lien on building of owner held not to be such secured creditor of bankrupt contractor. Id.

5. Creditor may assert vendor's lien under Art. 3227, Rev. Civ. Code Louisiana, notwithstanding he has proved his debt as one without security. Sessler v. Paducah Distilleries Co. [C. C. A.] 168 F 44.

6. Receiver appointed under Code Civ. Proc. § 2469, takes title to judgment debtor's property. Wrede v. Clark, 117 NYS 5, rvg. Wrede v. Gilley, 61 Misc. 530, 113 NYS 609. Lien was not waived where claim of creditor did not state that he did or did not waive his lien and where receiver had been appointed in proceeding in aid of execution issued on judgment. Wrede v. Clark, 117 NYS 5. Such presentation was considered as notice that judgment had been obtained and a receiver appointed, and not an election of remedy to proceed alone in bankruptcy court. Id.

7. In re Miners' Brew. Co., 162 F 327.

8. After status of various creditors has been fixed in bankruptcy proceedings, a creditor claiming a lien as a subcontractor cannot be permitted to amend his claim so as to claim as a contractor. In re Miners' Brew. Co., 162 F 327.

9. Search Note: See Bankruptcy, Cent. Dig. § 513; Dec. Dig. § 326.

10. Corporation transferring mercantile business to bankrupts to operate for a year contracted that, upon termination of term, property should be restored and that, if stock at that time exceeded inventory at time of surrender by corporation, corporation should pay bankrupts difference. At end of term corporation paid bankrupts difference less sums owing by bankrupts to corporation on account of unpaid insurance, percentages, etc. Held such items were mutual debits and credits which could be set off in bankruptcy. Walther v. Williams Mercantile Co. [C. C. A.] 169 F 270. Bankrupt's **deposits in bank** and note of partnership of which bankrupt was member assumed by bankrupt upon dissolution held mutual debts within § 68 of the bankruptcy act. Hooks v. Gila Valley Bank & Trust Co. [Ariz.] 100 P 806. Money paid on note which had not matured held to be funds illegally held by the bank under an illegal payment, and not a deposit against which note could be set off. Irish v. Citizens' Trust Co., 163 F 880. Bank to whom payments were made by depositor with intent to prefer held, as to notes which were due at time of payment, to have a right of setoff, but, as to notes which were not due, to be liable to the trustee. Id.

11. Right of bank to set off against deposit of bankrupt a note held by it against bankrupt is not affected by fact that note is secured by chattel mortgage. Hooks v. Gila Valley Bank & Trust Co. [Ariz.] 100 P 806.

12. In re Burns [C. C. A.] 165 F 434. Where alleged bankrupt made assignment and petitioning creditor levied writ of attachment which was discharged, creditor's claim was provable against alleged bankrupt, any claim for wr gful attachment being in the assignee. Id.

13. Search Note: See note in 3 Ann. Cas. 238.

See. also. Bankruptcy, Cent. Dig. §§ 531-540, 563, 564; Dec. Dig. §§ 344-351.

14. Test of classification of creditors is the percentage to which they are entitled.

costs of legal proceedings against property of bankrupt prior to bankruptcy, and rendered void thereby,[17] and to certificates representing money borrowed by the receiver under authority of the bankruptcy court,[18] and also to claims for money borrowed by receiver for which certificates were authorized but not issued.[19] A trust creditor is entitled to priority only to the extent that he can show that the trust funds or property into which it was converted passed into the hands of the trustee.[20] Rents [21] and debts due the state [22] are given priority to the extent provided local laws, which also govern questions between the trustee and mortgagee of property belonging to the bankrupt as to the application of rents pending foreclosure.[23] A town supervisor who deposits funds with the bankrupt, without requiring that they be kept separate from other deposits, is not entitled to priority.[24] Claims inherently entitled thereto may be given priority, though it is not claimed until a year after adjudication.[25]

Kahn & Bro. v. Bledsoe [Okl.] 98 P 921. Creditors entitled to the same percentages are in the same class. Id.

15. Commissions earned by a traveling salesman are wages, within § 64b of the bankruptcy act, and are entitled to priority if earned within the three months' period. In re Fink, 163 F 135. Musicians employed at regular wages to play at theatres or other places are "servants" entitled to priority within § 64, cl. 4b of bankruptcy act. In re Caldwell, 164 F 515.

16. In re Industrial Cold Storage & Ice Co., 163 F 390. **Water rent** due a municipality, which is levied and made a lien as a tax, is a tax within the spirit of § 64a of the bankruptcy act. Id.

17. Costs of attachment dissolved by bankruptcy proceedings held, under § 64b of bankruptcy act and Pub. Laws R. I., p. 61, c. 984, § 4, to be entitled to priority. In re Iroquois Mach. Co., 166 F 629. Fees of sheriff for levies of attachments on property of bankrupt within four months of filing petition, which levies were thereby rendered void, should be paid out of bankrupt's estate, where such attachments were issued in proceedings regular under laws of state wherein execution was issued. In re Schmidt & Co. [C. C. A.] 165 F 1006.

18. Parties holding receiver's certificates issued to raise money for purpose of preventing deterioration of property are entitled to priority of payment out of proceeds of sale of such property. In re Alaska Fishing & Development Co., 167 F 875.

19. A receiver was authorized to borrow $10,000 for the purpose of continuing the bankrupt's business and to issue certificates therefor. He issued certificates for $5,000 which were purchased by a surety company, with whose knowledge he contracted indebtedness in excess of the authorized amount for which he issued no certificates. Subsequently he paid $1,000 on the certificate issued to the surety company. Held that the holders of the debts for which no certificates are issued are entitled to participate, to the amount of $6,000 in the bankrupt's assets on the same footing as the remaining $4,000 for which certificates were issued. In re Restein, 162 F 986.

20. In re Brunsing, 169 F 668. Deposit of employe with bankrupt as security held recoverable only upon showing that it or property into which it was converted passed to trustee. Id. Need not identify the specific property. Id. Bankrupt mingled proceeds of sale of property held on consignment under contract requiring him to hold proceeds in trust, with his own funds. Held owner entitled to recover such funds in full to the extent only to which he can show that they or property into which they were converted increased the assets of estate. In re J. M. Acheson Co. [C. C. A.] 170 F 427.

21. Where a lease required the lessee to make all repairs and the landlord was compelled to pay for repairs made by the board of health which constituted a lien, the landlord is entitled to prove the claim against the estate of the lessee only as an unsecured claim, but not as rent entitled to priority. In re Schomacker Piano Forte Mfg. Co., 163 F 413. In Pennsylvania, landlord, under lease providing that, on default of payment of one month's rent, rent for entire term shall become due, is upon such default and subsequent bankruptcy entitled to priority to the extent of rent for one year from proceeds of sale of property subject to distress, although he made no levy thereon. In re Pittsburg Drug Co., 164 F 482.

22. In re Western Implement Co., 166 F 576. States are entitled to priority as to debts due from estate of bankrupt to the extent that their laws provide therefor. Id. Debt due under contract between prison warden and bankrupt held entitled to priority under § 64, subd. b, clause 5, of Bankruptcy Act. Id.

23. A mortgagee being under the Pennsylvania decisions entitled to have the rents and profits of the mortgaged property applied to the payment of the interest on the mortgage debt, where the mortgage is in excess of the value of the property, he is entitled to such application when collected by the trustee pending the foreclosure proceedings. In re Industrial Cold Storage & Ice Co., 163 F 390. Where a mortgagee of property of a bankrupt forecloses and a third party bids it in and takes title in his behalf, the mortgagee will be held the real party in interest in a dispute between him and the trustee relative to the application of rents collected by the trustee, pending the foreclosure proceedings, to the payment of water taxes and interest on the mortgage. Id.

24. In re Nichols, 166 F 603.

25. Claims which are inherently entitled

(§ 14) *H. Expenses of the proceedings.*[26]—See 11 C. L. 404—The costs of bankruptcy proceedings cannot be assessed against the exemptions of the bankrupt[27] nor against a mortgage creditor attempting to enforce his lien against the property of the bankrupt.[28] Attorney's fees should be fixed by the referee[29] in accordance with the extent of the services rendered[30] and the results accomplished,[31] the allowance thereof[32] and also the compensation of the receiver[33] resting largely in the discretion of the court, but no allowance can be made to the attorney for the bankrupt for services in securing the bankrupt his exemptions.[34] Where two petitions are filed, one of which is insufficient, fees should be allowed only to the attorney filing the sufficient petition,[35] and after an attorney is appointed counsel for the receiver, he cannot further represent the petitioning creditors and is entitled to no fee therefor.[36] Proceedings to test the propriety of payments to an attorney for services rendered before payment, as well as those to be rendered in the bankruptcy proceedings should, unless an issue is raised, be in the form of a motion to fix the allowance and for an order directing the return of the balance.[37] The compensation of the referee is limited by law[38] but an improper allowance can be attacked only in direct proceedings.[39] The trustee is not chargeable with occupation of premises leased by the bankrupt by the purchaser of the bankrupt's property located therein,[40] and a claim against him for wrongful detention of such property cannot be allowed until liquidated.[41] The receiver does not take under the lease of the bankrupt,[42] and hence water rents cannot, under a provision therein making them payable by the tenant, be allowed as an expense of the proceeding.[43]

to priority under state law. In re Ashland Steel Co. [C. C. A.] 168 F 679.

26. Search Note: See Bankruptcy, Cent. Dig. § 538; Dec. Dig. § 347.

27. Assessment of cost of bankruptcy proceedings against exemptions of bankrupt held improper. In re Huddleston, 167 F 428. Costs of administration cannot be assessed against bankrupt's homestead exemption. Dunlap Hardware Co. v. Huddleston [C. C. A.] 167 F 433.

28. Mortgage creditor who files his claim for purpose of enforcing lien on proceeds of sale of mortgaged property cannot be compelled to pay a proportionate share of costs of bankruptcy proceedings. Mills v. Virginia-Carolina Lumber Co. [C. C. A.] 164 F 168.

29. In re Stoddard Bros. Lumber Co., 169 F 190.

30. In re Huddleston, 167 F 428, afd. Dunlap Hardware Co. v. Huddleston [C. C. A.] 167 F 433.

31. Three hundred dollars to attorneys for bankrupt held proper where their services added largely to value of estate. In re Huddleston, 167 F 428, afd. Dunlap Hardware Co. v. Huddleston [C. C. A.] 167 F 433. Attorney for mortgagee, who was permitted to sell mortgaged property and hold proceeds subject to order of court, is upon disallowance of security of mortgagee entitled to fee out of proceeds only in so far as his services were directed to conserving them. In re Claussen & Co., 164 F 300.

32, 33. Dunlap Hardware Co. v. Huddleston [C. C. A.] 167 F 433.

34. In re O'Hara, 166 F 384.

35. Where two petitions in bankruptcy are filed but only one of them sufficiently allege an act of bankruptcy, and, in order to prevent loss to creditors owing to appointment of receiver under insufficient petition they are joined, the attorney fee should be allowed to the attorneys who presented the sufficient petition. In re Southern Steel Co., 169 F 702.

36. Where two sets of petitions are filed and attorneys filing one set become attorneys for receivers appointed by the court, their engagement as attorneys for petitioning creditors ceases and they are entitled to no fee therefor. In re Southern Steel Co., 169 F 702.

37. In re Shiebler & Co., 163 F 545.

38. In re Sweeney [C. C. A.] 168 F 612. Cannot be allowed compensation of special master. Id. Referee is entitled to commission only on amount actually disbursed to creditors by trustee, and not to commission on funds handled by trustee in carrying on bankrupt's business. Barry v. Johnson [C. C. A.] 166 F 57.

39. Order fixing referee's compensation based on improper construction of bankruptcy act not appealed from, is, as to sums paid thereunder, conclusive on appeal from allowance made on same basis to referee's successor. Id.

40. In re Rubel, 166 F 131.

41. Claim against trustee and receiver for damages for wrongful detention of property leased to bankrupt is not provable until properly liquidated. In re Rubel, 166 F 131.

42. In re Youdelman-Walsh Foundry Co., 166 F 381.

43. Where lease provides for payment of water rent and taxes by bankrupt but landlord did not take security to protect himself, the taxes and water rent cannot be paid as an expense of receiver's admin-

On re-examination of a claim not pressed in good faith, costs are taxable against the claimant,[44] but he should not be required to pay an attorney's fee to the trustee's counsel.[45]

(§ 14) *I. Expenses of receivers and assignees appointed prior to bankruptcy proceedings.*[46]—See 11 C. L. 405

§ 15. *Distribution of assets; dividends.*[47]—See 11 C. L. 405—Dividends must be paid out of funds in the hands of the trustee,[48] to the party entitled thereto,[49] and those paid on collateral, a note of the bankrupt given to secure his debt should be applied toward the payment of the debt secured thereby.[50] Where a partnership and its members are adjudged, partnership property should first be applied to partnership debts and individual property first to individual debts.[51]

§ 16. *Exceptions.*[52]—See 11 C. L. 405—All questions relating to what is exempt under local laws are excluded from this section, only those relating to the claiming and loss of exemptions under the bankruptcy law being treated here.[53] The rule that the bankrupt is allowed the exemptions prescribed by the state laws in force at the time of the filing of the petition [54] pervades the whole bankruptcy act and must be read into every section,[55] and so, also, with reference to exemptions under the acts of congress.[56] The bankrupt is entitled therefore to his exemptions,[57] unless he waives them,[58] but an allowance cannot be made to his widow out of partnership

istration, as he does not take under lease. In re Youdelman-Walsh Foundry Co., 166 F 381.

44, 45. In re Rome, 162 F 971.

46. Search Note: See Bankruptcy, Cent. Dig. § 538; Dec. Dig. § 347.

47. Search Note: See Bankruptcy, Cent. Dig. §§ 501-507, 541-564; Dec. Dig. §§ 352-364.

48. Trustee offered to creditor bank its share of dividend in form of check drawn on itself by another party having no funds therein, but which its cashier, since removed, promised to honor. Held that trustee must pay dividend from funds in its hands and that bankruptcy court had no jurisdiction to determine controversy between bank and holder of check as to liability of bank thereon. In re Augusta Pottery Co., 163 F 1011. Trustee sold manufacturing plant of bankrupt and reported sale as for cash and it was confirmed. Purchaser, however, was acting for three banks and, instead of paying in cash, each bank gave trustee passbook with their share of purchase price credited therein. One bank was represented by its cashier who was acting without authority and who was afterwards removed, his bank repudiating the transaction. A dividend being ordered, trustee refused to pay bank, it refusing to accept check drawn on itself. Held that trustee, not having in fact made sale for cash, must comply with order requiring him to pay this bank a dividend. Id.

49. Stires v. First Nat. Bank [Neb.] 119 NW 258. Contract between two creditors, whereby one is to purchase claim of third creditor and as owner of such claim is to be preferred by debtor, does not amount to assignment of either creditor's debt nor of dividends declared thereon in subsequent bankruptcy proceedings. Id.

50. Note signed by bankrupt and pledged by third party as security for debt of bankrupt stands in position of surety for payment or principal debt, and dividends paid thereon must be applied on debt secured thereby. Stires v. First Nat. Bank [Neb.] 119 NW 258.

51. Lacey v. Cowan [Ala.] 50 S 281.

52. Search Note: See Bankruptcy, Cent. Dig. §§ 656-678; Dec. Dig. §§ 394-400.

53. See Exemptions.

54. Bankruptcy Act of 1898, § 6. Chandler v. Traub [Ala.] 49 S 240. Exemptions under Code Civ. Proc. Neb § 530. In re Conley, 162 F 806.

55. Insurance policies: Rule as to exemptions qualified § 70 of Bankr. Act 1898 (30 Stat. 365; U. S. Comp. St. 1901, p. 3451), making provision as to insurance policy having cash surrender value. Chandler v. Traub [Ala.] 49 S 240. Policies exempt under state laws are exempt under bankruptcy act. In re Pfaffinger, 164 F 526. Life insurance policy though an asset of bankrupt's estate, held exempt under Pub. St. N. H. 1901, c. 171, §§ 1, 2. In re Whelpley, 169 F 1019. Insurance policy not exempt in bankruptcy unless exempt under state laws. Remley v. Travelers' Ins. Co. [Minn.] 121 NW 230. Fact that, after filing of petition, bankrupt applied to insurance company for surrender value of policy made payable to his wife does not entitle trustee thereto as an asset of estate. In re Pfaffinger, 164 F 526. Under Mass. Rev. Laws, 1902, c. 118, § 73, trustee can recover from wife to whom endowment policy was assigned such premiums as are recoverable as having been paid in fraud of creditors. Bailey v. Wood [Mass.] 89 NE 147. See ante, § 10A.

56. See Rev. St. § 4747 (U. S. Comp. St. 1901, p. 3279). In re Jones, 166 F 337. Pension money actually received and in possession of bankrupt is not exempt. Id.

57. Bankrupt held entitled to his exemptions. In re Berman, 165 F 383.

58. Waiver of exemption will be enforced. Adair v. Decker, 34 Pa. Super. Ct. 153. Where bankrupt in lease has waived his exemptions, landlord has right to funds accruing from sale of exempt property as against bankrupt's claim to exemptions. In

property.[59] While the bankruptcy court has no jurisdiction over exempt property,[60] even though it is subject to specific debts of the bankrupt,[61] it has exclusive power to determine claims to exemptions,[62] and in doing so will follow local laws as construed by the state courts[63] and the procedure prescribed therein.[64] The bankruptcy court is not controlled, however, as to the time or manner in which the claims for exemptions are to be preferred.[65] The bankrupt usually claims his exemptions in his schedules,[66] an extension of time for the filing of which operates to extend the time for claiming exemptions.[67] Schedules may be amended so as to permit the bankrupt to claim his homestead exemption,[68] and the fact that the amendment is not so designated is immaterial.[69] Where the right to exemptions is doubtful, they will not be allowed unless application therefor is seasonably made[70] in compliance with the requirements of the bankruptcy law,[71] but where the bankrupt fails to claim his homestead exemption, his spouse or any member of his family having homestead rights may do so.[72] The right to exemptions must be determined as of the date they are claimed,[73] and, where the property is sold, the bankrupt may assert his claim for exemptions against the proceeds,[74] but if by agreement the exempted property is sold with other property, at less than the value placed thereon in the inventory, the bankrupt is entitled only to his pro rata share of the proceeds.[75] Claims for exemptions in property purchased with partnership

re Highfield, 163 F 924. Waiver of exemptions in accordance with state exemption laws will be recognized. Constitution of Georgia, §§ 5914, 5915, 5916, and Georgia Code, 1895, § 2863, construed. Citizens' Bank v. Hargraves [C. C. A.] 164 F 613. Held that bankrupt, having waived his exemptions in mortgage, was not entitled, as against mortgagee, to exemption of $300 from fund arising from sale of property covered by mortgage and sold by trustee by consent of parties. Id.

59. Probate court of Texas has no power to make allowance to widow of deceased partner out of partnership assets. In re Dobert, 165 F 749. After adjudication and appointment of trustee, surviving partner has no power to consent to an allowance by the probate court from the partnership assets to the widow of a deceased partner. Id.

60. In re Highfield, 163 F 924.

61. That homestead may be subjected to specific debts of bankrupt does not give bankruptcy court jurisdiction to administer it. In re Maxson, 170 F 356. Waiver of homestead exemption as to specified debts does not justify a refusal by the bankruptcy court to allow the homestead exemption. In re Batten, 170 F 688.

62. In re McCrary Bros., 169 F 485. Where property of bankrupt has been sold and he asserts claim of exemptions against proceeds, bankruptcy court has jurisdiction to determine rights thereto and between him and other claimants. In re Highfield, 163 F 924. While the bankruptcy court has no jurisdiction over property claimed as exempt, it may, once the right to exemptions has been established, determine whether or not it can be asserted. Id.

63. In determining bankrupt's claim to exemptions, bankruptcy court will follow state statutes as interpreted by the supreme court of the state. In re McCrary Bros., 169 F 485. Validity of exemptions presents a question of state and not one of federal law. Bailey v. Wood [Mass.] 89 NE 147.

64. In determining claims to exemptions, the bankruptcy court may follow the procedure prescribed by state laws. Blood v. Munn [Cal.] 100 P 694.

65. In re Culwell, 165 F 828.

66. Claim of exemptions held sufficient, when made in bankrupt's schedules. In re O'Hara, 162 F 325. Bankrupt cannot be denied his exemptions because he did not, prior to adjudication, designate the property claimed pursuant to the statute of his state, where he properly complied with the state statute immediately after adjudication and in his schedules claimed the property as exempt. In re Culwell, 165 F 828.

67. In re O'Hara, 162 F 325.

68. Claim for exemptions omitted through oversight. In re Maxson, 170 F 356.

69. Claim for homestead in real property filed after schedules containing no claim for exemptions are filed, held sufficient request to be permitted to amend. In re Maxson, 170 F 356.

70. Denied where exemption was not claimed in schedules and application to amend schedules is made after payment of first dividend. In re Jennings & Co., 166 F 639.

71. In re Jennings & Co., 166 F 639.

72. In re Maxson, 170 F 356.

73. Bankrupt absconding from business in state of Pennsylvania and seeking position in another state at the time of claiming exemptions held not a resident of Pennsylvania so as to be entitled to exemptions allowed under its laws. In re O'Hara, 162 F 325.

74. In re Highfield, 163 F 924. Creditors who fail to object to sale of bankrupt's property with understanding that his homestead exemption will be paid from proceeds cannot afterwards object to cash allowance to the bankrupt in pursuance thereof. Dunlap Hardware Co. v. Huddleston [C. C. A.] 167 F 433.

75. Bankrupt claimed exemption from stock of goods. Goods selected by him were set apart but under agreement sold with bal-

funds are governed by local laws.[76] The trustee acquires no title in the exempt property and no interest in it,[77] or in the money that may be allowed in lieu of such exempt property,[78] nor has he any power to administer exempt property as though it were an asset of the estate,[79] but he may except to the allowance of a statutory exemption [80] on the ground of the bankrupt's fraud.[81] Where the debtor's property is subject to a lien superior to his right of exemption, such lien cannot be affected by selling of a part of the property as exempt,[82] except to such extent as the nonexempt property may be required to be exhausted before subjecting that set apart as exempt.[83]

§ 17. *Death of bankrupt pending proceedings.*[84]—See 9 C. L. 374—The death of the alleged bankrupt intermediate the filing of petition and the adjudication does not abate the proceedings.[85]

§ 18. *Referees, proceedings before them, and review thereof.*[86]—See 11 C. L. 406 The power to appoint or remove referees rests in the district court,[87] and the exercise thereof cannot be controlled by the circuit court of appeals.[88] Such power may be exercised by one judge of the district court, though there is in the same district another judge of such court with equal powers.[89] A referee may also be appointed in chambers [90] at any place where the judge may be and have authority to act.[91] Proceedings may be referred to the referee by general order [92] or upon special issues,[93] his power depending upon the order of reference [94] which is conclu-

ance of assets at less than inventory value. Held bankrupt entitled only to pro rata value of exempt property to proceeds of sale of entire assets. In re Arnold, 169 F 1000.

76. Claim for exemption by partner in property purchased with partnership funds denied where title was taken in names of both partners and property was used partly for partnership purposes and partly as residence by claimant, state law providing that no property purchased with partnership funds for partnership purposes may be subject to exemption. In re McCrary Bros., 169 F 485.

77. His right and duty toward it extends merely to setting it apart. First Nat. Bank v. Bartlett, 35 Pa. Super. Ct. 593.

78. It was held proper to attach such money allowed in lieu of exemptions, while yet in hands of trustee, where bankrupt had waived his exemptions as to attaching creditor. Zumpfe v. Schultz, 35 Pa. Super. Ct. 106. Execution levy sustained on exempt property, where bankrupt had waived exemption rights. First Nat. Bank v. Bartlett, 35 Pa. Super. Ct. 593.

79. In re Culwell, 165 F 828.

80. Provision in general order that "any creditor may take exceptions to the determination of the trustee" does not expressly or by implication exclude the trustee. In re Rice, 164 F 589. Under authority given any creditor to except, the trustee has right to except as representative of whole body of creditors. Id.

81. Trustee's duty to set apart bankrupt's exemption and report items and estimated value thereof to court (§ 47, cl. 11) does deprive him of right or relieve him of duty to decide whether bankrupt is entitled to exemption at all or has forfeited it by improper conduct. Citizens' Bank v. Hargraves [C. C. A.] 164 F 613.

82. Blood v. Munn [Cal.] 100 P 694.

83. Where husband was not party to bankruptcy proceedings against his wife, but was bound by selling off of homestead under state law (Cal. Civ. Code, Civ. Proc. 1248), he had right to insist that nonexempt property should first be applied to prior mortgage given by him and his wife in the whole property, though the nonexempt property had been sold and the mortgagee, for a consideration from the trustee, had released it. Id. Where a husband was not party to wife's bankruptcy proceedings, he was bound by partition of property as exempt, but was not bound by confirmation of sole balance free from liens where he was not notified as required by law, and hence was not estopped to insist that a prior mortgage given by him and his wife on the whole property should first be enforced against the nonexempt property. Id.

84. Search Note: See Bankruptcy, Cent. Dig. §§ 217, 680; Dec. Dig. §§ 401-403.

85. Court may bring in and substitute personal representatives. In re Larkin, 168 F 100.

86. Search Note: See Bankruptcy, Cent. Dig. §§ 381-409, 888-894; Dec. Dig. §§ 220-230.

87. Birch v. Steele [C. C. A.] 165 F 577.

88. The circuit court of appeals cannot control the appointment or removal of a referee by a court of bankruptcy nor, in case of removal, inquire into the grounds thereof. Birch v. Steele [C. C. A.] 165 F 577; Ex parte Steele, 162 F 694.

89. Removal of referee appointed by other judge. Birch v. Steele [C. C. A.] 165 F 577.

90. Chamber business may be done on the streets, in the judge's house, at hotel where he stops, or in transitu on cars. Ex parte Steele, 162 F 694.

91. Judge was appointed to serve in each of two districts of Alabama with privilege to reside in either. Held that while physically in one district he could appoint referee to serve in other district, the order of appointment being forwarded to court of such other district. Ex parte Steele, 162 F 694.

92, 93, 94. In re Sweeney [C. C. A.] 168 F 612.

sive as to the power conferred,[95] but a proceeding cannot be referred to him as special master.[96] An adjudication and order of general reference will supersede the authority of special referee.[97] It is the referee's duty to take all evidence submitted[98] and to report it,[99] except where it is so palpably incompetent, irrelevant and immaterial that compelling its production or permitting its introduction would constitue abuse of process,[1] and where he refuses to do so, the proper remedy is by application successively to the reviewing courts.[2] The weight to be given the findings of the referee depends upon the character thereof;[3] if they represent deductions from established questions of fact, they are not entitled to much weight,[4] but, if on questions of fact[5] and based on conflicting evidence[6] and their correctness depends upon the credibility of the witnesses,[7] they should not be disturbed unless clearly erroneous. Points made, but not pressed at the hearing before the referee, will be deemed waived.[8] The referee has no power to change his own orders.[9] He cannot commit for contempt,[10] but contempt proceedings for refusal to obey his orders must be based on his certificate.[11]

§ 19. *Modification and vacation of orders of bankruptcy court; new trial.*[12] See 11 C. L. 497—A motion to vacate an adjudication[13] may be made by a general creditor[14] or by a receiver appointed at the instance of the creditors[15] for lack of jurisdiction,[16] but the court is not necessarily ousted of jurisdiction by proof on petition to vacate, that the debtor is not subject to adjudication,[17] and should not, upon such proof, be dismissed without determining an issue raised as to the

95. An order of the court requiring referee to hear and determine claims against the proceeds of a sale of realty clear of liens is conclusive as to the power of the referee in that behalf. In re Miners' Brew. Co., 162 F 327.

96. In re Sweeney [C. C. A.] 168 F 612.

97. In re Ruos, 164 F 749.

98. First Nat. Bank v. Abbott [C. C. A.] 165 F 852.

99. First Nat. Bank v. Abbott [C. C. A.] 165 F 852. Court can consider legality of rulings excluding evidence only when the rejected evidence is taken and reported. Id. Masters and referees and the District Court should take and report evidence which they deem incompetent and immaterial as well as that deemed competent and admissible so that the appellate court can determine whether there is sufficient relevant and competent evidence to sustain the decree. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283.

1. Missouri-American Elec. Co. v. Hamilton Brown Shoe Co. [C. C. A.] 165 F 283; First Nat. Bank v. Abbott [C. C. A.] 165 F 852.

2. Appeal does not afford remedy. First Nat. Bank v. Abbott [C. C. A.] 165 F 852.

3. In re McCrary Bros., 169 F 485.

4. In re McCrary Bros., 169 F 485; In re Roanoke Furnace Co., 166 F 944; Ohio Valley Bank v. Mack [C. C. A.] 163 F 155.

5. In re Braselton, 169 F 960.

6. Where based on conflicting evidence and involving the credibility of the witnesses, they should not be disturbed except on most cogent evidence of mistake or miscarriage of justice. Ohio Valley Bank Co. v. Mack [C. C. A.] 163 F 155. Where the findings of a referee are based on conflicting evidence and involve the credibility of the witnesses and have been sustained by the district court, they will not be disturbed on appeal except upon a demonstration of plain mistake. Id.

7. Testimony of bankrupt, uncontradicted, that she resided in district requisite time given to correct previous testimony. In re Wheeler [C. C. A.] 165 F 188.

8. That trustee was guilty of laches in failing to petition for re-examination of claim until eight months after claim was allowed. In re Rome, 162 F 971.

9. Orders of referee cannot be changed except upon review thereof by the district court, and a referee cannot review his own order or change it upon reargument. In re Greek Mfg. Co., 164 F 211.

10. Must certify facts constituting contempt to district court. In re Gitkin, 164 F 71.

11. Proceedings commenced by petition of trustee for order to show cause dismissed. In re Gitkin, 164 F 71.

12. Search Note: See Bankruptcy, Cent. Dig. §§ 574, 867-871; Dec. Dig. §§ 372, 417.

13. See ante, § 5E, as to conclusiveness of adjudication.

14. In re New England Breeders' Club [C. C. A.] 169 F 586. **Denial of status** of some of petitioners does not present sufficient ground for dismissal of petition to vacate. In re Pennsylvania Consol. Coal Co., 163 F 579.

15. Receivers of corporation appointed at instance of creditors may, if not guilty of laches, move to vacate an adjudication entered as a matter of course, no defense being interposed. In re Hudson River Elec. Co., 167 F 986.

16. In re New England Breeders' Club [C. C. A.] 169 F 586. Objection that debtor is not subject to adjudication. In re New England Breeder's Club [C. C. A.] 169 F 586; In re Hudson River Elec. Co., 167 F 986.

17. In re Hudson River Electric Co., 167 F 986; In re New England Breeders' Club [C. C. A.] 169 F 586.

laches of the petitioner asking for such dismissal[18] and without determining the extent to which other creditors will be prejudiced by dismissal.[19] An adjudication will not be vacated on grounds which, if presented prior to adjudication could have been removed by amendment,[20] and, if otherwise sufficiently supported, the adjudication is not affected by statement in the order of incompetent matter considered by the court.[21] Granting of leave to a creditor, after adjudication, to file petition contesting adjudication rests in discretion of court.[22] The petition for vacation must be verified.[23] A trustee duly elected has power to appear and answer a petition for the dismissal of the bankruptcy proceedings for want of jurisdiction.[24]

The granting of new trial after the denial of a petition for adjudication rests in discretion of trial court,[25] and upon granting a new trial the court may allow amendments to the petition showing other and further acts of bankruptcy.[26]

§ 20. *Appeal and review in bankruptcy cases.*[27]—See 11 C. L. 407—The provisions of the bankruptcy act are determinative of the mode of reviewing administrative orders,[28] with reference to whether by appeal,[29] by petition to revise,[30] or by writ

18. In re New England Breeders' Club [C. C. A.] 169 F 586; In re Hudson River Elec. Co., 167 F 986.

19. In re New England Breeders' Club [C. C. A.] 169 F 586.

20. In re Marion Cont. & Const. Co., 166 F 618.

21. Affidavit filed in support of petition tending to establish commission of act of bankruptcy held incompetent and reference thereon in the order of adjudication treated as surplusage. Young & Holland Co. v. Brande Bros. [C. C. A.] 162 F 662.

22. In re Marion Cont. & Const. Co., 166 F 618.

23. In re Pennsylvania Consol. Coal Co., 163 F 579. Where a petition by several creditors for vacation of bankruptcy proceedings is properly verified by one of them, it should not be dismissed for insufficient verification. Id.

24. In re Pennsylvania Consol. Coal Co., 163 F 579. See, also, New England Breeders' Club [C. C. A.] 169 F 586. And see post, § 20. Creditor moving to vacate could not complain where answer of trustee was same as that of general creditors. In re Pennsylvania Consol. Coal Co., 163 F 579.

25, 26. Correro & Co. v. Barton [C. C. A.] 166 F 1019.

27. Search Note: See note in 7 C. L. 425. See, also, Bankruptcy, Cent. Dig. §§ 914-930; Dec. Dig. §§ 439-468.

28. Under Bankruptcy Act July 1, 1898 (30 Stat. 544, c. 541, U. S. Comp. St. 1901, p. 3418) § 25, providing for review to review judgments allowing or rejecting claims of $500 or over, the mode of review depends upon the character of the proceeding. Coder v. Arts, 213 U. S. 223, 53 Law. Ed.—

29. Only independent and plenary proceedings which concern bankrupt's estate arising between trustee and claimant asserting same, or which concern interests adverse to bankrupt or his general creditors as distinguished from administrative orders and decrees in the ordinary course of bankruptcy proceedings, are appealable under § 24a of the bankruptcy act. Brady v. Bernard [C. C. A.] 170 F 576. Decision of the district court **allowing or rejecting claim** can be reviewed only by appeal. Postlethwaite v. Hicks [C. C. A.] 165 F 897. Decision of district court **as to rights of adverse claimant** to property in hands of trustee is reviewable on appeal. Franklin v. Stoughton Wagon Co. [C. C. A.] 168 F 857. Where a creditor answers trustee's petition to sell, claiming **chattel mortgage liens** as the subject-matter of the petition, he may appeal from an order holding the chattel mortgages void. Knapp v. Milwaukee Trust Co. [C. C. A.] 162 F 675. Judgment of bankruptcy court determining validity of chattel mortgage as against trustee is reviewable by appeal. Loeser v. Savings Deposit Bank & Trust Co. [C. C. A.] 163 F 212.

30. The ruling on a petition by a trustee for a **summary order on receiver of state court to deliver property** is reviewable on a petition to revise, in matter of law by the circuit court of appeals, under Bankruptcy Act, 1898 (30 Stat. 553; U. S. Comp. St. 1901, p. 3432). Hecox v. Rollestone [C. C. A.] 164 F 823. **An order denying motion to vacate** judgment of adjudication is not appealable. Review must be had by petition to revise. Brady v. Bernard [C. C. A.] 170 F 576. **Order to third person to turn over property** to trustee cannot be reviewed by appeal, but must be reviewed by petition to revise. In re Rose Shoe Mfg. Co. [C. C. A.] 168 F 39. Trustee may, on original petition, have **dismissal for want of jurisdiction** reviewed by court of appeals. In re New England Breeders' Club [C. C. A.] 169 F 586. Where failure to obey orders of the court is punished under the provisions of the bankruptcy act, the proper method of appeal is by petition for revision. **Order punishing for failure to obey orders** of court is properly reviewable by petition to revise. In re Code [C. C. A.] 163 F 180. **Order sustaining objection to trustee's account** and charging him with property is reviewable only by petition to revise. In re Moore [C. C. A.] 166 F 689. **Order adjudging an individual a member of a partnership** is not appealable. Can be reviewed only on petition. Francis v. McNeal [C. C. A.] 170 F 445. Petition to revise is remedy to review **order allowing claim but denying priority** not appealable. Gaudette v. Graham [C. C. A.] 164 F 311.

of error.[31] It is held that an appeal cannot be treated as a petition to revise,[32] especially where questions of fact are involved,[33] but a contrary practice is indicated by some of the decisions[34] and has been recently indulged, though with an express caution against such indulgence being treated as a precedent.[35] Where an order denying a petition to vacate the adjudication is not properly brought up for review, the appellate court will not remand with order to dismiss the bankruptcy proceedings for lack of jurisdiction unless such lack of jurisdiction affirmatively appears on face of record,[36] but where for want of specification of errors a revisory petition is dismissed, but the evidence casts a doubt upon the decision below, the dismissal will be without further proceedings in the lower court.[37] A petition to revise will not be dismissed for lack of a formal order or decree in the court below.[38] An appeal to the supreme court may in a proper case be allowed from the circuit court of appeals,[39] but the circuit court of appeals will not, in advance of its decree[40] nor of its own motion,[41] determine whether the case is one in which an appeal may be allowed. A federal question sufficient to sustain an appeal to the federal court is involved in a decision of a state court as to the right of a trustee in bankruptcy to sue to avoid a transfer rendered preferential by a state law,[42] and, also, in such court's decision as to the conditions upon which such preference may be avoided at the instance of the trustee.[43] An appeal without supersedeas will not stay proceedings,[44] and hence cannot be made the basis of an answer to a rule to compel bankrupt to file schedules.[45] An appeal from an order adverse to the trustee must be taken by the trustee,[46] but, where he refuses to do so upon request, the court may at the instance of a dissatisfied creditor order

31. Adjudication following trial by jury held reviewable by writ of error and not by appeal. Lennox v. Allen-Lane Co. [C. C. A.] 167 F 114. Order punishing disobedience as for contempt must be reviewed by writ of error. In re Cole [C. C. A.] 163 F 180. A mere interlocutory order of the circuit court of appeals will not prevent the issuance of a **writ of error from supreme court to bankruptcy court.** Affirmance of order overruling motion to dismiss held to be interlocutory order. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 53 Law. Ed. —.

32. Where appeal has been erroneously taken, it cannot be treated as a petition for review as the provisions of §§ 24a and 25b of the bankruptcy act are mutually exclusive. Brady v. Bernard [C. C. A.] 170 F 576.

33. Where consideration of facts is involved, an appeal cannot be treated as petition for revision. Gaudette v. Graham [C. C. A.] 164 F 311.

34. See Gaudette v. Graham [C. C. A.] 164 F 311.

35. Where objection that order was not appealable was not raised and assignments presented questions of law as adequately as petition to revise could have done. In re Rose Shoe Mfg. Co. [C. C. A.] 168 F 139.

36. Brady v. Bernard [C. C. A.] 170 F 576.

37. Ross v. Stroh [C. C. A.] 165 F 628.

38. That no formal order or decree was entered by the district court is not a ground for dismissal of petition to revise. In re Sweetser, 168 F 1018.

39. Knapp v. Milwaukee Trust Co. [C. C. A.] 162 F 675. An appeal lies to the federal supreme court from the judgment of a circuit court of appeals, where the construction of the bankruptcy act is directly involved. Hurley v. Atchison, etc., R. Co., 213 U. S. 126, 53 Law. Ed. —, following Coder v. Arts, 213 U. S. 223, 53 Law. Ed. —. Construction of bankruptcy act was held to be involved in determination of whether advances to enable company to meet pay roll amounted to a pledge enforcible as a preferential claim. Hurley v. Atchison, etc., R. Co., 213 U. S. 126, 53 Law. Ed. —. Appeal by trustee lies where amount of claim exceeds $500, though he does not contest the amount but only the right to priority upon securities asserted. Coder v. Arts, 213 U. S. 223, 53 Law. Ed. —.

40. Intermediate court need not of its own motion determine in advance of its decision whether a question is raised upon which a party is entitled to an appeal to the supreme court. General Bankruptcy Orders, § 36 (89 Fed. xxxvi, 32 C. C. A. xxxvi). Knapp v. Milwaukee Trust Co. [C. C. A.] 162 F 675.

41. Where a right to an appeal to the supreme court of the United States is claimed, it should be called to the attention of the circuit court of appeals with a request for findings in the event of adverse ruling upon the question alleged to be appealable. Knapp v. Milwaukee Trust Co. [C. C. A.] 162 F 675.

42, 43. Miller v. New Orleans Acid & F. Co., 211 U. S. 496, 53 Law. Ed. 300.

44. In re Brady, 169 F 152.

45. Where bankrupt appealed from order of adjudication after lapse of time for appeal without supersedeas, the pendency of the appeal is not a sufficient answer to a rule to compel bankrupt to file schedules. In re Brady, 169 F 152. Bankrupt, however, is respited to allow parties interested to move to dismiss appeal. Id.

him to do so[47] or permit the creditor to appeal in the name of the trustee,[48] the creditor in either case indemnifying the trustee against costs.[49] The proceeding for review must be taken within the time required by law[50] which cannot be extended by any subsequent proceeding in the case,[51] excepting, however, a motion for a rehearing,[52] though in some cases belated review will be allowed,[53] the petitioner not being guilty of laches.[54] An appeal taken for the purpose of delay will be dismissed.[55] Though the procedure in revisory proceedings is not prescribed by the bankruptcy law,[56] it is required that the petitions clearly present the matters of law of which revision is sought.[57] Where review is had by petition to revise, the appellate court may revise any question of law as to which it may justly infer that the district court reached a conclusion, and to this end may search the record and opinion of that court.[58] The scope and necessity of the record,[59] the sufficiency thereof to present questions sought to be reviewed,[60] presumptions in

46, 47, 48, 49. Ohio Valley Bank Co. v. Mack [C. C. A.] 163 F 155.

50. Where time of application for review of referee's order is not fixed by rule, it must be made within a reasonable time. Delay of six months after filing order held to bar review. In re Nichols, 166 F 603. The two years' limitation, fixed by U. S. Rev. St. § 1008, U. S. Comp. St. 1901, p. 715, and act of March 3, 1891 (26 Stat. 826, 827, c. 517, U. S. Comp. St. 1901, p. 547), §§ 4, 5, and not the thirty days' limitation for appeals provided for by rule 36, applies to a writ of error from the federal supreme court to a court of bankruptcy. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445, 53 Law. Ed. —. Appeal from judgment of adjudication must be taken within ten days. In re Goldberg [C. C. A.] 167 F 808; Brady v. Bernard [C. C. A.] 170 F 576. Appeal from order of district court allowing or rejecting claim, must be taken within ten days from rendition of judgment. Postlethwaite v. Hicks [C. C. A.] 165 F 897. Proceedings to review an order refusing to vacate a judgment of adjudication must be taken within six months. Not governed by § 25a limiting time of appeal to ten days. Brady v. Bernard [C. C. A.] 170 F 576.

51. Brady v. Bernard [C. C. A.] 170 F 576. Time within which to appeal from a judgment of adjudication cannot be extended by a motion to vacate the judgment. In re Goldberg [C. C. A.] 167 F 808. Motions or proceedings looking to rehearing cannot extend time for taking appeal from an order of adjudication. In re Brady, 169 F 152.

52. The filing, within ten days allowed for appeal, of a motion for rehearing operates as a stay of the running of **statutory period** allowed within which to appeal, and appeal, prayed and allowed within ten days after motion for rehearing was disposed of, was in time. Mills v. Fisher & Co. [C. C. A.] 159 F 897.

53. Under rule of circuit court for district of Massachusetts which provides for delay in filing notice of petition to revise by leave of court for good cause shown, petition will not be dismissed because notice was by mistake filed in the circuit court instead of the district court. In re Sweetser, 168 F 1018. Motion to dismiss petition for review of order expunging claim, on the ground of laches, denied where it appears that petitioner acted with reasonable diligence and failure to file petition at an earlier date was due to the fact that he was absent from home on business. In re Rome, 162 F 971.

54. In re Rome, 162 F 971. The sound discretion of the court will not be exercised to relieve parties from the results of inexcusable delay in taking an appeal. Nazima Trading Co. v. Martin [C. C. A.] 164 F 838. Appeal was dismissed where no excuse was shown for failure to have citation issued or assignment of errors filed until after intervention of a term of circuit court of appeals and where transcript was not filed until after a second term had passed. Id.

55. An appeal raising the identical questions raised and decided on a former appeal will be dismissed as frivolous and taken for the purposes of delay. In re Kehler [C. C. A.] 162 F 674. Where on the first appeal the cause was remanded for the purpose of ascertaining whether alleged bankrupt was sane when committing acts of bankruptcy and on reference it was found that he was sane, no evidence to establish insanity being offered, an appeal from the second adjudication raising precisely the same questions as were raised and determined on the first appeal will be dismissed. Id.

56, 57. Ross v. Stroh [C. C. A.] 165 F 628.

58. In re Cole [C. C. A.] 163 F 180.

59. The record on appeal to the supreme court consists only of the pleadings, the judgment and decree and the findings of fact and conclusions of law. Knapp v. Milwaukee Trust Co. [C. C. A.] 162 F 675.

60. Questions not presented by specifications of error cannot be considered when there are no findings of fact. Ross v. Stroh [C. C. A.] 165 F 628. Petition, alleging claimant's ownership and possession in another at time receiver took possession of property, specifications of error based on fact that possession was in claimant at time of seizure by receiver, cannot be considered, the record not being accompanied by an opinion or findings of fact. Id. On an appeal from an order reducing the amount claimed by a creditor under a stipulation in a promissory note for the payment of collection fee, a reversal will not be granted where there is no evidence to show what services were rendered in at-

favor of the ruling below,[61] the scope of review generally [62] and the restriction thereof to objections urged and passed on below,[63] are governed by the rules applicable to appeals generally. Facts may be reviewed on appeal [64] but not on revisory petition.[65] Where on a revisory petition it appears that the order is not supported by the petition but the answer of the bankrupt is unsatisfactory, the appellate court will not reverse but will remand for further proceedings.[66] Findings of fact, reasonably supported by any evidence, will not ordinarily be disturbed on review,[67] and so, also, as to questions addressed to the sound judicial discretion of the trial judge.[68] A question of fact, or a mixed question of law and fact,[69] cannot be reviewed by proceedings in mandamus.[70] An appellee who does not take appeal, or a defendant in error who does not sue out a writ of error, cannot assign or argue cross errors.[71] Review of orders appointing referees and of findings by referees are treated in a previous section.[72]

§ 21. *Trustee's bonds; actions thereon.*[73]—See 3 C. L. 467

§ 22. *Discharge of bankrupt; its effect and how availed of. A. Procedure to obtain discharge and vacation thereof.*[74]—See 11 C. L. 408—Application for discharge

tempting to collect the note, the state law allowing only a reasonable fee in such a case. Chestertown Bank v. Walker [C. C. A.] 163 F 510.

61. Where, upon petition to revise an order requiring bankrupt to account for property concealed or stand committed, the record does not contain the evidence, it must be presumed that the evidence was sufficient to sustain the finding upon which the order is based. In re Baum [C. C. A.] 169 F 410.

62. Where an alleged bankrupt fails to appear in response to an order of the district court to show cause why it should not be adjudged a bankrupt for failure to obey orders requiring it to perfect its pleadings, it cannot upon appeal from the order of adjudication try the question of its bankruptcy. Young & Holland Co. v. Brande Bros. [C. C. A.] 162 F 663.

63. The capacity of the trustee as affected by defects in the petition and proof on which the adjudication was made, cannot be attacked for the first time on an appeal from an order of the district court, holding chattel mortgages held by the creditor void. Knapp v. Milwaukee Trust Co. [C. C. A.] 162 F 675. The only question of jurisdiction which could be raised for the first time on an appeal from an order of the district would be the question of the district court's jurisdiction to make the order appealed from. Id. Judgment in favor of trustee avoiding a preference will not be reversed for lack of showing of authority to sue, when such authority was unquestioned below. Miller v. New Orleans Acid & F. Co., 211 U. S. 496, 53 Law. Ed. 300. Failure to object to allowance of preference coupled with delay of eight months from entry of order held to bar review. In re Nichols, 166 F 603.

64. Ross v. Stroh [C. C. A.] 165 F 628. On appeal to the circuit court of appeals or the supreme court, the admissibility of evidence cannot be considered, the review being limited to the question whether there is sufficient, competent and relevant evidence to sustain the decree. First Nat. Bank v. Abbott [C. C. A.] 165 F 852. On appeal to supreme court from circuit court of appeals in matter of allowance of claims and priorities, facts found by circuit court of appeals cannot be reviewed. Coder v. Arts, 213 U. S. 223, 53 Law. Ed. —.

65. Gaudette v. Graham [C. C. A.] 164 F 311; Ross v. Stroh [C. C. A.] 165 F 628; Lesaius v. Goodman [C. C. A.] 165 F 889; Ryan v. Hendricks [C. C. A.] 166 F 94; In re Baum [C. C. A.] 169 F 410.

66. Lesaius v. Goodman [C. C. A.] 165 F 889.

67. Findings by two courts of existence of partnership between two brothers, held to be reasonably supported by evidence that one brother furnished capital, though with original intent to form a corporation, and that other furnished his services, the latter being interested in the profits and not being debtor of former. Manson v. Williams, 213 U. S. 453, 53 Law. Ed. —. Findings of fact made by the referee and confirmed by the judge must be accepted on appeal unless clear error in them is shown. Canner v. Webster Tapper Co. [C. C. A.] 168 F 519; In re Sweeney [C. C. A.] 168 F 612.

68. Reasonableness of testimony of bankrupt in proceedings for discharge, which testimony was not clear or corroborated, was addressed to discretion of court. Seigel v. Cartel [C. C. A.] 164 F 691.

69. Whether business of company was manufacturing and contracting for such manufacturing, held to involve question of fact. In re Riggs, 214 U. S. 9, 53 Law. Ed. —.

70. Construing Bankruptcy Act of July 1, 1898 (30 Stat. 547, c. 541; U. S. Comp. St. 1901, p. 3423), as amended by act of Feb. 5, 1903 (32 Stat. 797, c. 487; U. S. Comp. St. Supp. 1907, p. 1025). In re Riggs, 214 U. S. 9, 53 Law. Ed. —.

71. Can be heard only in support of judgment below. Shawnee County Com'rs v. Hurley [C. C. A.] 169 F 92. See, also, Appeal and Review.

72. See ante, § 18.

73. Search Note: See Bankruptcy, Cent. Dig. § 188; Dec. Dig. §§ 129, 373.

74. Search Note: See Bankruptcy, Cent. Dig. §§ 692-709, 712-728; Dec. Dig. §§ 410-417.

must be made within the time required by law [75] and failure to do so is equivalent to a denial thereof,[76] and, as to debts scheduled, bars a discharge in a subsequent proceeding.[77] Failure to make timely application for discharge cannot be cured by vacating the adjudication and entering a new one,[78] though for good cause shown, the time may be extended for a limited period.[79] After the return day, an appearance by a creditor in the proceedings will be permitted only upon good cause shown.[80]

The specification of objections. See 11 C. L. 408—The specification must allege facts sufficient to come within one of the grounds for the refusal of a discharge,[81] and should specify with particularity the manner in which the bankrupt offended,[82] but may be amended,[83] and, where the record shows that the bankrupt kept no books of account, a general objection on that ground is sufficient.[84] The objections will be held sufficient unless attacked by demurrer on motion [85] and may be based on a nondischargeable debt if it is provable in the proceedings.[86]

Hearing, evidence and burden of proof. See 11 C. L. 408—The objections may be referred to the referee [87] who may consider only competent evidence [88] actually introduced [89] and must pass upon all the grounds of objection advanced.[90] The burden is on the opposing creditors to clearly establish the grounds of objection.[91] The referee cannot pass on the sufficiency of the specification of objections [92] nor can the creditors object to his refusal to do so.[93]

Vacation of discharge. See 11 C. L. 408—A discharge can be vacated only for mat-

75. In re Von Borries, 168 F 718. Petition for discharge must be filed within twelve months from date of adjudication, and an application made a year and six days after adjudication held too late. In re Holmes, 165 F 225. Where last day falls on Sunday, petition for discharge may be filed next day. Id.

76. Failure of bankrupt to apply for discharge within required time constitutes conclusive determination, as between parties then before the court, that he is not entitled thereto. In re Von Borries, 168 F 718.

77. Failure to apply for discharge bars discharge in second proceeding as to debts of bankrupt which could have been discharged under the first petition. In re Von Borries, 168 F 718.

78. Bankrupt's neglect to apply for discharge within required time cannot be cured by opening adjudication entered on default and making new one so as to permit him to make application. In re Morse, 168 F 157.

79. In re Glickman, 164 F 209. Petition for extension of time for filing application for discharge must be supported by proof of facts therein alleged. Id. Petition denied for failure of bankrupts to appear at hearing. Id.

80. After the return day named in the order to show cause, a creditor cannot enter an appearance for the purpose of opposing bankrupt's discharge, except upon good cause shown. In re Young, 162 F 912.

81. An objection to the discharge of a bankrupt on the ground that he has obtained money by false statements of fact is insufficient where it does not allege that the statements were made in writing. In re Lewis, 163 F 137.

82. Objections directed to the failure to keep books of account should specify whether they are directed to a total failure to keep books or whether they were insufficiently kept. In re Lewis, 163 F 137. Objection charging that bankrupt "either destroyed, concealed or failed to keep books of account," held sufficient though failing to specify in which particular bankrupt offended. In re Brod, 166 F 1011.

83. Special master may permit amendment of specifications of objections to discharge so as to cure defect in verification. In re Hanna [C. C. A.] 168 F 238.

84. In re Lewis, 163 F 137.

85. In re Aldridge, 168 F 93.

86. In re Lewis, 163 F 137.

87. In re Murray, 162 F 983.

88. In absence of evidence to the contrary, court will presume that petition in bankruptcy, introduced in evidence, is one on which bankruptcy court acted in making adjudication. Whitwell v. Wright, 115 NYS 48.

89. A referee in acting as special master upon objections to a bankrupt's petition for discharge cannot consider evidence taken before him in the first examination of the bankrupt. In re Murray, 162 F 983.

90. In re Haskell, 164 F 301.

91. In re Brockman, 168 F 1015. Creditors opposing discharge of bankrupt are burdened with the necessity of bringing the exculpatory facts strictly within the grounds for refusal set forth in the bankruptcy act. Hardie v. Swafford Bros. Dry Goods Co. [C. C. A.] 165 F 588.

92. His duty is to ascertain and report facts. In re Brockman, 168 F 1015.

93. Creditors cannot object to referee's refusal to pass on bankrupt's objection to specification of objections to discharge. In re Brockman, 168 F 1015.

ters coming to the knowledge of the creditor after it was granted.[94] The petition for the vacation of a discharge should be specific in its allegation.[95]

(§ 22) *B. Grounds for a refusal.*[96]—See 11 C. L. 409—The discharge may be withheld so as to permit creditors to enforce their claims against assets not recoverable by the trustee,[97] and the discharge may be stayed as to debts scheduled in prior bankruptcy proceedings.[98] The discharge of an honest debtor is favored by the law[99] and is the main object of the bankruptcy act,[1] hence, a bankrupt is ordinarily entitled to his discharge unless some statutory objection thereto is sustained by the evidence,[2] but, where the grounds of objection presented would justify the vacation of a discharge if granted, they will operate to bar the discharge though not specified in the act.[3] Among the grounds for refusal of a discharge are commission of a crime against the provisions of the act,[4] destruction of, or

94. Creditors held guilty of laches, it appearing that they had knowledge of matters urged as ground for vacation, and before discharge commenced suit attacking them, which was abandoned. In re Mauzy, 163 F 900. The burden is on the moving creditor to show that he has not been guilty of laches. Id. Failure of creditors to take steps to have bankrupt examined held important on question whether they were guilty of laches barring relief by way of having the discharge vacated. Id.

95. Allegation that "the bankrupt's discharge was granted before the facts herein set out were known to the creditors or brought to the attention of this court, because they have been recently discovered," held too general. Vary v. Jackson [C. C. A.] 164 F 840. Petition held insufficient which fails to specifically show what property was surrendered by bankrupt, or what representations were made in his schedules as to property surrendered by him, or that any creditor at time of bankruptcy or in the year within which debts could be proven under § 57 of Bankruptcy Act (30 Stat. 560, 561; U. S. Comp. St. 1901, p. 3444) was in any wise deceived by schedules and which further fails to show when alleged fraud was discovered, or that it was discovered within one year prior to filing of petition. Id.

96. Search Note: See note in 5 C. L. 406. See, also, Bankruptcy, Cent. Dig. §§ 729-771; Dec. Dig. §§ 406-409.

97. Claimant holding lien against garnishee held entitled to reasonable stay of bankrupt's discharge so as to render possible enforcement thereof against garnishee and sureties on bond given to dissolve garnishment. In re Maher, 169 F 997. That discharge will deprive creditors having right to proceed against homestead of power to do so does not warrant denial of exemption, creditors having right by timely application to have discharge withheld for reasonable time to permit them to proceed in state court by petition in intervention claiming an interest in the property. In re Maxson, 170 F 356.

98. In re Kuffler [C. C. A.] 168 F 1021. Order staying discharge as to debts scheduled in prior bankruptcy proceeding should be limited to a stay of any application for discharge from debts scheduled in former proceeding. Id.

99, 1. Hardie v. Swafford Bros. Dry Goods Co. [C. C. A.] 165 F 588.

2. In re Brockman, 168 F 1015. Indulgence in improvident transactions and riotous living, more than four months prior to bankruptcy, does not present ground for objection to discharge. In re Boner, 169 F 727.

3. Where, on application for discharge, facts are presented which, if shown after discharge is granted, would authorize a revocation thereof, the court may refuse the discharge though they present no grounds for refusing the discharge under § 14C. In re Luftig, 162 F 322. Payment of creditor in order to prevent his opposing discharge held fraud on other creditors. Id.

4. Giving false testimony: Discharge refused where bankrupt testified falsely in examination in bankruptcy proceedings. In re Luftig, 162 F 322.

Aiding creditor in obtaining property of bankrupt after petition: Aiding and participating in receipt by creditor of a material amount of property from the bankrupt after filing his petition, with intent to defeat the act, presents a ground for the refusal of a discharge. In re Luftig, 162 F 322. That the bankrupt after adjudication procured the buying up of creditors' claims, though done with intent to defraud, does not present a ground for refusing his discharge where it does not appear that the creditor knew that the bankrupt furnished the money. Id. Where a creditor accepts money in settlement of his claim after the filing of the petition, he is not guilty of an offense against the bankruptcy act unless he knew the funds, with which the settlement was made, were supplied by the bankrupt. Id. Creditor not being guilty of an offense, bankrupt could not have participated therein. Id.

Concealment of property from trustee: Failure of bankrupt to schedule property, claimed by another under circumstances lending color to the claim, cannot be made the basis of a refusal to discharge on the ground of a fraudulent concealment of property. In re Alleman, 162 F 693. Whether assisting a creditor in obtaining possession of property under the foreclosure of a chattel mortgage constitutes a fraudulent concealment of property from the trustee depends upon whether or not the foreclosure of the chattel mortgage was valid. In re Olansky, 163 F 428. Concealment of property could be presumed where bankrupt, after demand by referee, failed to account for certain specified

failure to keep, books of account with intent to conceal financial condition,[5] obtention of property or credit by false statements,[6] and transfer or concealment of property with intent to defraud creditors.[7] The burden is on the bankrupt to ac-

goods or for their proceeds, and failed to surrender or schedule such property or its proceeds to the trustee. Seigel v. Cartel [C. C. A.] 164 F 691. Intentional concealment of financial condition is ground for refusal of discharge. Keeping of books and records so as to conceal financial condition was presumed to be intentional. In re Goldich, 164 F 882. Where an application for discharge is resisted on the ground that bankrupts aided and assisted in a transfer of their property to a creditor by means of the foreclosure of a chattel mortgage previously given by them, the question whether such acts are sufficient to bar their discharge depends upon the validity of the foreclosure. In re Olansky, 163 F 428. Where a determination of the question whether the bankrupts fraudulently concealed property from their trustee depends upon whether a foreclosure of a chattel mortgage under which they assisted the mortgagee in obtaining possession of their property is valid, a discharge will not be granted until the validity of the chattel mortgage is determined in an appropriate proceeding. Id. That bankrupt, when he made a general assignment for benefit of his creditor, failed to turn over to assignee rent of farm belonging to bankrupt's father which bankrupt was by his father permitted to receive as a gift, does not present a valid objection to discharge. In re Boner, 169 F 727. Bankrupt denied discharge where he failed to list in schedules his equity in property which he had conveyed to his wife for purpose of defrauding creditors. In re Guilbert, 169 F 149. Concealment of assets by one partner without the knowledge or consent of the other will not deprive other member of right to discharge. In re Schachter, 170 F 683.

5. In re Schachter, 170 F 683.

Failure to keep books: Evidence held insufficient to sustain master's finding of failure to keep books of account. In re Murray, 162 F 983.

Intent to conceal: In order that the destruction of his books by a bankrupt may be a valid ground for a refusal to discharge, they must be destroyed with intent to conceal his financial condition. In re Murray, 162 F 983; In re Brockman, 168 F 1015. Mere negligence in keeping books and failing to make entries therein, in the absence of intent to conceal financial condition does not warrant a refusal to discharge. In re Haskell, 164 F 301. Discharge denied for failure of books to account for shrinkage of $10,000 worth of assets in 13 months, failure being held an intentional omission. In re Brod, 166 F 1011. Payments to bankrupt's relatives, aggregating $5,000 made shortly before bankruptcy and not entered on books of account held in absence of explanation to justify finding of failure to make entries for purpose of concealing financial condition. In re Haskell, 164 F 301. Failure of firm to make entry showing purchase of goods unsuitable to their business held to raise presumption that failure to do so was with intent to conceal financial condition. In re Schachter, 170 F 683. **Failure of partnership to keep books** with intent to conceal the financial condition of the firm operates to prevent the discharge of the partners thereof except as to partners who had no knowledge thereof and did not participate therein (Id.), the latter, however, having the burden of showing their innocence or ignorance of the wrongdoing (Id.). A partner who did not participate in a materially false financial statement made by another member of the firm and had no knowledge thereof is not concluded thereby on his application for discharge. Hardie v. Swafford Bros. Dry Goods Co. [C. C. A.] 165 F 588, rvg. In re Hardie & Co., 143 F 607. Failure to enter borrowed money aggregating $3,000 on books held to be in furtherance of intent to conceal financial condition of partnership, though record thereof was carried by one of the partners in a vest pocketbook, financial statements being made from regular books and not including such borrowed money. In re Pomerantz, 168 F 444.

Fraud upon or detriment to creditors is not essential to this ground of objection. In re Schachter, 170 F 683. Failure to make entries in books of account with a view to concealing his financial condition deprives bankrupt of his right to a discharge, though not made for purpose of defrauding creditors. In re Hanna [C. C. A.] 168 F 238. That large loan was not entered so as to conceal bankrupt's condition from his confidential manager rather than from his creditors, is immaterial. Id.

6. In re Shaffer, 169 F 724. Falsification of inventory, whereby debts to relatives for borrowed money was concealed, willfully false commercial statements, establishment of fictitious credit by discounting bills with money borrowed from relatives, purchases on credit far in excess of present necessity and disappearance of large portion of goods so purchased, held to justify finding that bankrupt fraudulently concealed his true financial condition so as to obtain goods on credit for which he did not intend to pay. In re Friedman, 164 F 131. If goods obtained by means of a materially false statement in writing were obtained on bankrupt's credit, it is immaterial that they were obtained for the use and benefit of third party. In re Aldridge, 168 F 93. That materially false statement of bankrupt's condition was signed by third party is immaterial, if used by bankrupt with knowledge of its falsity and for purpose of obtaining credit on strength thereof. Id. Omission of borrowed money from financial statement held to show **fraudulent intent** in making false statement. In re Brener, 166 F 930. Statement must have been intentionally and knowingly false. Gilpin v. Merchants' Nat. Bank [C. C. A.] 165 F 607. **Contra.** In re Shaffer, 169 F 724.

7. In re Guilbert, 169 F 149. Bankrupt held to have procured conveyance of prop-

count for property not scheduled but shown to have been in his possession shortly before bankruptcy,[8] and the credibility and reasonableness of his explanation is for the court, in its judicial discretion, to determine.[9] A discharge will not ordinarily be refused on account of transactions more than four months prior to the institution of the bankruptcy proceedings.[10]

(§ 22) *C. Liabilities released and use of discharge.*[11] —See 11 C. L. 410— The discharge operates to release the bankrupt from all provable claims[12] as against creditors whose claims were properly scheduled[13] or who had notice or actual knowledge of the bankruptcy proceeding,[14] except, among others, liability for wilful and malicious injury to person or property[15] and claims growing out of the bankrupt's fraud,[16] although the claimant may not have objected or persisted in an objection to the discharge,[17] or may have proved his claim in bankruptcy and received dividends thereon.[18] A debt dischargeable in one bankruptcy proceeding cannot be discharged in a subsequent proceeding,[19] though the bankrupt made no application for discharge in the first proceeding.[20] The burden is on the bank-

erty to his wife for purpose of defrauding his creditors and therefore not entitled to discharge. Id.

8, 9. Seigel v. Cartel [C. C. A.] 164 F 691.

10. Discharge granted notwithstanding alleged fraud and neglect of bankrupt in failing to turn over all his property in insolvency proceedings under state laws more than four months prior to institution of bankruptcy proceedings. In re Boner, 169 F 727.

11. Search Note: See notes in 15 A. S. R. 212; 23 Id. 112; 38 Id. 737; 94 Id. 555; 2 Ann. Cas. 268; 3 Id. 65, 169, 800; 5 Id. 771; 7 Id. 972; 9 Id. 646.

See, also, Bankruptcy, Cent. Dig. §§ 551, 626, 764-914, Princ. & S. § 294; Dec. Dig. §§ 418-438.

12. Baker v. Hooks [Ga. App.] 64 SE 573. Claim for amount due on bankrupt subscription to stock of insolvent corporation is dischargeable. Barker v. Mozer [Cal. App.] 101 P 438. A. sold horse to B., retaining title thereto. B. traded the horse to C. Subsequently B. filed petition in bankruptcy and was discharged. Thereafter A. recovered the horse from C. Held C.'s claim against B. on his warranty of title was not provable at date of adjudication nor release by discharge. Baker v. Hooks [Ga. App.] 64 SE 573.

13. Discharge in bankruptcy operates to discharge only as against such creditors whose claims are properly scheduled. Lutz v. Kalmus, 115 NYS 230.

14. Lutz v. Kalmus, 115 NYS 230.

15. Thompson v. Judy [C. C. A.] 169 F 553. Amendment of bankruptcy act whereby § 17a(2) was amended so as to except liabilities for malicious injury instead of judgments therefor held only to change the act to the extent of excepting claims for malicious injury whether judgment was rendered upon it or not. Id. Did not operate to remove judgments for malicious injury from the exception. Id. In determining **whether a judgment of a state court is for malicious and willful injury** to the person, the bankruptcy court may look into the facts upon which the judgment is based. United States v. Peters, 166 F 613. Claim for damages for **false imprisonment** held not released by discharge in bankruptcy. Johnston v. Bruckheimer, 63 Misc. 248, 116 NYS 688. Liability based on **wrongful sales of pledged property** by which sums in excess of amount secured were realized and appropriated by bankrupt, held liability for willful and malicious injury to property and not dischargeable. Kavanaugh v. McIntyre, 128 App. Div. 722, 112 NYS 987. Discharge in bankruptcy held not to exempt bankrupt from civil arrest in action based on wrongful **conversion** of plaintiff's property under circumstances rendering injury willful and malicious. Id. Judgment for false and malicious **libel** is not discharged. Thompson v. Judy [C. C. A.] 169 F 553. **Injuries inflicted by teacher on resisting pupil** held not malicious and willful, and therefor dischargeable. United States v. Peters, 166 F 613.

What constitutes malice: Injury is malicious if intentional. Johnston v. Bruckheimer, 63 Misc. 248, 116 NYS 688; Kavanaugh v. McIntyre, 128 App. Div. 722, 112 NYS 987. Arrest, though willful, was held not malicious where party honestly believed arrested person had committed a crime and promptly withdrew the charge when he discovered her innocence. Johnston v. Bruckheimer, 118 NYS 189.

16. Standard Sewing Mach. Co. v. Kattell, 117 NYS 32. Discharge in bankruptcy does not affect cause of action arising by reason of fraud of bankrupt in obtaining property. Nelson v. Petterson, 131 Ill. App. 443. Claims for damages for obtaining property by false pretenses or representations are not released. Maxwell v. Martin, 130 App. Div. 80, 114 NYS 349. Claim for damages for conversion of personal property is not released where possession was obtained by false pretenses. Id.

17, 18. This rule is not affected by fact that he filed and withdrew his objection. Standard Sewing Mach. Co. v. Kattell, 117 NYS 32.

19. In re Schnabel, 166 F 383. Judgment entered, intermediate the first and second petition of bankrupt, on debt not discharged in first proceeding does not create new debt so as to render it dischargeable in second proceeding. In re Kuffler, 168 F 1021.

20. In re Schnabel, 166 F 383.

rupt to show that a particular debt was discharged,[21] but the discharge in bankruptcy will release liabilities not shown to be for willful or malicious injury.[22] In a proper case the discharge may be set aside and amended so as to include a claim not capable of being scheduled at the time of the adjudication.[23] Discharge of a tenant does not sever the relation of landlord and tenant or release the tenant from liability for rent to accrue.[24]

The discharge of the bankrupt does not satisfy the debt, but merely releases the debtor of his legal obligation to pay.[25] The defense of discharge is, therefore, personal to the bankrupt and may be waived.[26] A plea of discharge in bankruptcy, sustained by sufficient proof, ordinarily entitles the defendant to a judgment of nil capiat,[27] and only in rare cases will a judgment against the bankrupt with a stay of execution be given instead,[28] but a discharge will ot prevent the entry of a judgment against the bankrupt where necessary to enable the creditor to proceed against parties secondarily liable.[29] In New York the bankrupt may in a proceeding based on his discharge obtain an order canceling all discharged judgments of record.[30] Where the bankrupt is not discharged, the creditor is remitted to his former rights and remedies, subject to the adjudication of the issues over which the bankruptcy court had jurisdiction.[31]

§ 23. *Amendment and reopening; grounds and effect.*[32]—See 11 C. L. 412

§ 24. *Offenses against the bankruptcy law.*[33]—See 11 C. L. 412—The giving of

21. Burden is on defendant who pleads discharge in bankruptcy to show that demand sued on was a dischargeable debt at date of adjudication. Baker v. Hughes, 5 Ga. App. 586, 63 SE 587.

22. Johnston v. Bruckheimer, 118 NYS 189. Where liability was on judgment based on complaint for false imprisonment not showing malice, the injury, in absence of judgment role, will be presumed to have been without malice. Id.

23. Motion by bankrupt to set aside discharge and permit amendment so as to include a claim and counterclaim thereto which had been overlooked, granted, it appearing that at the time of adjudication suit was commenced on the claim and the counterclaim interposed and that the bankrupt scheduled no assets. In re McKee, 165 F 269.

24. Shapiro v. Thompson [Ala.] 49 S 391, dissenting from federal cases to contrary.

25. Carr v. Barnes [Mo. App.] 120 SW 705.

26. Defendant waived such defense by failing to plead same and by filing cognovit. Taber v. Donovan [Mich.] 16 Det. Leg. N. 300, 121 NW 481. Agreement that, in consideration of creditors not opposing bankrupt's discharge, bankruptcy and discharge therein should not be pleaded by bankrupt as a bar to an action by creditor to recover, held valid between the parties. Bacot v. Fessenden, 130 App. Div. 819, 115 NYS 698. Promise by bankrupt to pay pre-existing debt, after adjudication but before discharge, is not impaired by discharge. Dicks v. Andrews [Ga.] 64 SE 788.

27. Such judgment held proper where trial was on appeal, with trial de novo, from justice court. House v. Schnadig, 138 Ill. App. 498. Plaintiff in suit on note, where answer was discharged in bankruptcy, was not permitted to make **reply** inconsistent with his complaint, showing that the note sued on was obtained through fraud and deceit. Strauch v. Flynn [Minn.] 122 NW 320.

28. House v. Schnadig, 138 Ill. App. 498.

29. Discharge of a bankrupt does not prevent the taking of judgment against him with a perpetual stay of execution or a bond given to dissolve an attachment levied four months prior to filing the petition for the purpose of enabling the attaching creditor to proceed against the obligors. Kendrick v. Warren Bros. [Md.] 72 A 461. In action at issue before discharge was granted, bankrupt will not be permitted to amend so as to set up discharge, where the effect thereof would be to deprive creditor of rights against third parties, as in action against bankrupt corporation for purpose of securing judgment as basis for proceedings against stockholders. Firestone Tire & Rubber Co. v. Agnew, 128 App. Div. 518, 112 NYS 907.

30. N. Y. Code Civ. Proc. providing for discharge and cancellation of record of judgments discharged in bankruptcy proceedings is mandatory. Walker v. Muir, 194 N. Y. 420, 87 NE 680. N. Y. Code Civ. Proc. § 433, providing for cancellation on motion of bankrupt of all judgments discharged in the bankruptcy proceedings, applies to judgment on provable debt, which was included in schedules, though the judgment was obtained after discharge of bankrupt. Id. Under Code Civ. Proc. N. Y., § 1268, bankrupt who was adjudicated individually and who was not served in action in which judgment was secured against partnership cannot have such judgment discharged of record. In re Gruber, 129 App. Div. 297, 113 NYS 923.

31. Carr v. Barnes [Mo. App.] 120 SW 705.

32. Search Note: See Bankruptcy, Cent. Dig. §§ 867-871; Dec. Dig. § 417.

33. Search Note: See Bankruptcy, Cent. Dig. §§ 904-913; Dec. Dig. §§ 485-497; 5 Cyc. 247, 250, 417, 418.

false [34] or vague and misleading testimony in bankruptcy proceedings [35] and the fraudulent concealment of property from the trustee [36] on a conspiracy to do so [37] constitute offenses against the bankruptcy act, which cannot be retrieved by afterwards disclosing the property [38] or testifying truthfully [39] nor does a general description of assets in the schedules of the bankrupt constitute a defense to a charge of fraudulently concealing specific property from the trustee.[40] A corporation bankrupt may be guilty of concealing its assets.[41] Third persons aiding the bankrupt to that end are equally amenable to the provisions of the bankruptcy law.[42] A valid adjudication is essential to prosecution of the bankrupt.[43] The indictment must sufficiently allege the offense charged [44] and must be found within the time limited by law,[45] but, where it charges a conspiracy to commit a crime under the bankruptcy act, it is not limited by the provisions of that act.[46] The schedules filed by the bankrupt cannot be introduced by the prosecution [47] but may be admitted at the instance of the bankrupts.[48] The admissibility of testimony generally is governed by rules applicable to criminal prosecutions.[49]

34. Kern v. U. S. [C. C. A.] 169 F 617. Bankrupt willfully testifying falsely throughout examination held guilty of contempt. In re Gitkin, 164 F 71.

35. Bankrupt willfully answering questions so as to give no information and disclaiming knowledge of matters obviously within his knowledge held guilty of contempt. In re Gitkin, 164 F 71.

36. Kern v. U. S. [C. C. A.] 169 F 617. Bankrupt is punishable for concealing his assets from the trustee, under Rev. St. § 5440; U. S. Comp. St. 1901, p. 3433. Johnson v. U. S. [C. C. A.] 158 F 69. There could be no such concealment where it was charged that trustee was a party conspirator to alleged concealment. Id. The failure of a bankrupt to list property in his schedules does not constitute the offense of concealing from the trustee property belonging to the estate. Offense consists of a continuous concealment of property during the whole course of the bankruptcy proceedings. Johnston v. U. S. [C. C. A.] 163 F 30. To prove continuous concealment of property by a bankrupt, it is not necessary to take up each moment of the bankrupt's life while the proceedings lasted. Id.

37. Fact that there was no bankruptcy, when conspiracy to conceal assets of bankrupt from trustee, does not render the offense any the less one under the bankruptcy act, if it embraced an intent to continue concealment after bankruptcy. United States v. Young & Holland Co., 170 F 110.

38. Kern v. U. S. [C. C. A.] 169 F 617.

39. Offense of false swearing and concealment when once committed cannot be retrieved by filing amended schedules disclosing concealed assets. Kern v. U. S. [C. C. A.] 169 F 617. Remark to that effect by court in reply to insistence of counsel that filing of amended schedules rebutted inference of criminal intent held not improper. Id.

40. That, under general description of property in schedules, all bankrupt's property passed to trustee is no defense to prosecution for concealing property, where there is no enumeration in the schedules and the bankrupt was, by active endeavor, keeping valuable assets in hiding. Kern v. U. S. [C. C. A.] 169 F 617.

41, 42. United States v. Young & Holland Co., 170 F 110.

43. For flagrant concealment of property from the trustee. Gilbertson v. U. S. [C. C. A.] 168 F 672.

44. Indictment charging conspiracy to conceal assets of bankrupt corporation from trustee held sufficient, though corporation is not charged as conspirator. United States v. Young & Holland Co., 170 F 110. An indictment for concealing property from the trustee of the bankrupt must allege that the offense was knowingly and fraudulently committed. United States v. Comstock, 162 F 415. Indictment for conspiracy under § 5440, Rev. St. (U. S. Comp. Stat. 1901, p. 3676), to conceal property from the trustee in violation of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544; U. S. Comp. St. 1901, p. 3418). Id.

45. Indictments must be found in one year after the commission of the offense. United States v. Comstock, 162 F 416.

46. United States v. Comstock, 162 F 416.

47. Held to have characteristics of pleadings and inadmissible within Rev. St. § 860 (U. S. Comp. Stat. 1901, p. 661). Johnson v. U. S. [C. C. A.] 163 F 30. Admission of schedules cannot be justified on the theory that they are not in evidence for the purpose of showing statements contained in them, but to show that other statements are not contained in them. Id. General objection to admission of schedules of bankrupt in prosecution for concealing property belonging to the estate, the only possible ground of objection being that they are inadmissible under Rev. St. § 860 (U. S. Comp. Stat. 1901, p. 661). Id. Property, disclosed by the bankrupt in his schedules, may be shown by **secondary evidence** for the purpose of showing that, at the time of their filing, the bankrupt was concealing from the trustee property belonging to the estate. Id.

48. Schedules are admissible, at the instance of the bankrupt, in a prosecution for concealing from the trustee, property belonging to the estate. Johnson v. U. S [C. C. A.] 163 F 30.

49. Evidence of concealment of goods other than those specified in indictment is admissible as showing fraudulent intent. Johnson v. U. S. [C. C. A.] 170 F 581. Trus-

BASTARDS.

The scope of this topic is noted below.[50]

§ 1. Legal Elements and Evidence of Illegitimacy, 494.
§ 2. Rights and Duties of and in Respect to Bastards, 494.
§ 3. Procedure to Ascertain Paternity and Compel Support, 494.
§ 4. Legitimation, Recognition and Adoption, 496.

§ 1. *Legal elements and evidence of illegitimacy.*[51] See 11 C. L. 413—The law presumes legitimacy.[52] Clear evidence is necessary to show illegitimacy of a child born in wedlock.[53]

§ 2. *Rights and duties of and in respect to bastards.*[54] See 11 C. L. 414—In the absence of a statute, the common law governs the relation of bastards to their parents,[55] and does not recognize any right to any interest in the fathers [56] or mother's estate,[57] and he is without heirs save those of his own body.[58] Children of an illegitimate child will not inherit from his mother [59] or from the legitimate brother or sister of their mother,[60] but take through her and not directly.[61] Children of slaves born before their emancipation, being illegitimate, will not inherit from each other,[62] but their estates will descend to their mother and her heirs.[63] Statutes referring to heirs or children are usually construed to mean legitimate ones.[64] The putative father's obligation to illegitimate children is greater than that to collateral kin,[65] and they are not subject to the inheritance tax levied on collateral heirs.[66] The South Carolina act giving the mother the right to recover for death by wrongful act is valid.[67]

§ 3. *Procedure to ascertain paternity and compel support.*[68] See 11 C. L. 414

tee may testify that bankrupt failed to disclose to him places where bankrupt had property and that the trustee found the property in those places. Id.

50. The topic covers the entire subject of illegitimacy, as to birth of illegitimate child as aggravation of seduction. See Seduction,* § 2.

51. Search Note: See notes in 3 C. L. 497; 7 Id. 430; 14 L. R. A. (N. S.) 733; 69 A. S. R. 571; 109 Id. 741.

See, also, Bastards, Cent. Dig. §§ 1-10; Dec. Dig. §§ 1-6; 5 Cyc. 626-630; 3 A. & E. Enc. L. (2ed.) 872, 873.

52. Dunn v. Garnett [Ky.] 112 SW 841. Law encourages decency, morality, and right living. Locust v. Caruthers [Okl.] 100 P 520. After long lapse of time, where proof was given that certain persons are children of certain man and woman and were so recognized and treated by parents and other members of family, although there was no direct evidence of marriage of father and mother. Id.

53. Evidence of legitimacy held sufficient. In re Ledet, 122 La. 200, 47 S 506.

54. Search Note: See 3 C. L. 498; 5 Id. 412; 7 Id. 430; 11 Id. 1024; 23 L. R. A. 753; 2 A. S. R. 185; 12 Id. 101; 73 Id. 415; 88 Id. 874.

See, also, Bastards, Cent. Dig. §§ 19-34, 246-264; Dec. Dig. §§ 15-18, 95-105; 5 Cyc. 637-644; 3 A. & E. Enc. L. (2ed.) 888, 889, 891.

55, 56. Hayworth v. Williams [Tex.] 116 SW 43.

57. Turnmire v. Mayes [Tenn.] 114 SW 478; Truelove v. Truelove [Ind.] 86 NE 1018.

58. Statute had not taken effect at time of illegitimate's death, and common law governed descent of property. Turnmire v. Mayes [Tenn.] 114 SW 478.

59. Owner of realty died leaving children of legitimate brother and children of two illegitimate brothers surviving her. Truelove v. Truelove [Ind.] 86 NE 1018; Id., 88 NE 516.

60. Plaintiff's mother, an illegitimate child, died before Acts 1866-67, p. 57, c. 36, § 10, went into effect, so that common law governed rights of illegitimates to inherit. Turnmire v. Mayes [Tenn.] 114 SW 478.

61. Plaintiff claims as heir of legitimate brother and sister of his illegitimate mother. Turnmire v. Mayes [Tenn.] 114 SW 478.

62. Plaintiff, son of slave who was common father of parties to this suit, but which parties had different mothers, claims share of illegitimate brother's property. Speese's Heirs v. Shores' Estate, 81 Neb. 593, 116 NW 493.

63. Speese's Heirs v. Shores' Estate, 81 Neb. 593, 116 NW 493.

64. Truelove v. Truelove [Ind.] 86 NE 1018. Statute providing for setting off exempt property for unmarried daughter does not mean illegitimate daughter. Hayworth v. Williams [Tex.] 116 SW 43.

65. Decedent left property to his illegitimate children, and collateral kin claim undue influence was exercised over him by children's mother. Best v. House [Ky.] 113 SW 849.

66. Under Act July 10, 1901 (P. L. 639). Commonwealth v. Mackey [Pa.] 72 A 250.

67. Subject expressed in title. Croft v. Southern Cotton Oil Co. [S. C.] 65 SE 216.

68. Search Note: See 3 C. L. 415; 7 Id. 432; 11 Id. 414; 34 L. R. A. 667; 1 L. R. A.

* Always begin with the latest article on the subject. Use the latest topical index.

Statutes making the putative father liable, and enforcing such liability by imprisonment, are a proper exercise of the police power.[69] Proceedings under the bastardy act are generally said to be civil in character,[70] but are anomalous and partake of the nature of both civil and criminal proceedings,[71] and have been held not within a grant of jurisdiction over criminal cases[72] or within a rule that a magistrate loses jurisdiction in criminal cases by an unauthorized continuance even at defendant's request,[73] and, on the other hand, statutes relating to appellate procedure in civil cases have been held inapplicable.[74] Action to compel the support of a bastard cannot be maintained by a married woman.[75] While the proceeding is in part at least for the public benefit,[76] the mother may by a fair settlement preclude herself from further claim.[77] Appearing and going to trial without objection waives formal defects in the warrant[78] or complaint.[79] The child may be exhibited to jury to show resemblance to the putative father,[80] but where such evidence is not admitted, an attorney cannot comment on child's resemblance to father in his argument,[81] and such error cannot be cured by objection to argument.[82] It is proper to show intercourse with other men at or about the time of conception.[83] The period of gestation is a matter to be considered by the jury.[84] Self-serving declarations of the prosecutrix are inadmissible.[85] Evidence of the good character of defendant is admissible.[86] Relatrix is not a party to a prosecution for bastardy, but only a witness,[87] and may not take an appeal[88] and is not required to make an affidavit on appeal,[89] but the state may adopt and ratify such appeal as its own.[90] The proof must be clear and satisfactory,[91] and a conviction, resting substantially upon uncorroborated testimony of the mother, which in

(N. S.) 470; 37 A. S. R. 758; 69 Id. 571; 11 Ann. Cas. 316.

See, also, Bastards, Cent. Dig. §§ 12, 35-245; Dec. Dig. §§ 8, 19-94; 5 Cyc. 644-675; 3 A. & E. Enc. P. & P. 266.

69. Land v. State, 84 Ark. 199, 105 SW 90.

70. Proceedings to recover lying in expenses and certain monthly payments for support of child. Wimberly v. State [Ark.] 119 SW 668. Affiliation proceeding a civil action. Heidemann v. Noxon [Neb.] 119 NW 257.

71. Not classible with either civil or criminal cases in general sense of those terms. It has characteristics of both, and rules of practice therein are applicable as feature happens to be civil or criminal. Goyke v. State, 136 Wis. 557, 117 NW 1027.

72. Exclusive jurisdiction is in municipal court under Laws 1895, c. 24, and transfer to circuit court for prejudice not allowed. Goyke v. State, 136 Wis. 557, 117 NW 1027.

73. Heidemann v. Noxon [Neb.] 119 NW 257.

74. Code Civ. Proc. § 1237, not applicable. People v. Culkin, 60 Misc. 414, 113 NYS 581.

75. Welch v. Cliburne [Miss.] 49 S 184; People v. Griffin, 142 Ill. App. 588.

76. Land v. State, 84 Ark. 199, 105 SW 90.

77. State v. Meier [Iowa] 118 NW 792. Settlement of bastardy proceedings is **sufficient consideration for promissory note.** Griffin v. Chriswisser [Neb.] 120 NW 909. It is no defense to such note that guardian of infant maker made unlawful agreement not to prosecute father for rape, unless infant knowingly participated in such unlawful agreement. Griffin v. Chriswisser [Neb.] 120 NW 909.

78. Warrant was not issued as prescribed, but no question was raised as to its insufficiency before examining magistrate. Heidemann v. Noxon [Neb.] 119 NW 257.

79. Failure to state that child, if born alive, would be a bastard. Collister v. Ritzhaupt [Neb.] 120 NW 489.

80. Land v. State, 84 Ark. 199, 105 SW 90; Smith v. Hawkins [Miss.] 47 S 429.

81. Attorney took child in his arms and commented on resemblance it bore to defendant. State v. Meier [Iowa] 118 NW 792.

82. State v. Meier [Iowa] 118 NW 792.

83. State v. Meier [Iowa] 118 NW 792. There was evidence that relator had had sexual intercourse with three other men. Held error to instruct jury that there was some evidence that relator had had intercourse with other men and tell them purpose of such testimony. Id.

84. Period of gestation of child differed from length of time between birth of child and date of intercourse. Collister v. Ritzhaupt [Neb.] 120 NW 489.

85. People v. Welch, 143 Ill. App. 191.

86. Webb v. Hill, 115 NYS 267.

87. State is the party plaintiff. Walker v. State [Ind. App.] 86 NE 502.

88. Wimberly v. State [Ark.] 119 SW 668.

89. Kirby's Dig. 7778. Wimberly v. State [Ark.] 119 SW 668.

90. Prosecuting witness appealed from trial court's judgment in a bastardy proceedings, finding defendant not guilty. Such appeal not permissible under § 489 Kirby's Dig. Wimberly v. State [Ark.] 119 SW 668.

91. Evidence held sufficient. People v Whittington, 143 Ill. App. 445; Walker v. State [Ind. App.] 86 NE 502.

connection with her contradictory statements makes it very uncertain whether justice has been done, will be reversed.[92]

§ 4. *Legitimation, recognition, and adoption.*[93]—See 11 C. L. 416—An illegitimate child may be legitimated by recognition and adoption,[94] or by the intermarriage of its father and mother,[95] and the father may legitimatize a child without the consent of its mother.[96] When adoption takes place, all the reciprocal responsibilities and duties between a father and a legitimate child obtain between them,[97] and it acquires the legal status of a legitimate child from birth,[98] and thereafter has the settlement of the father.[99] Less exact proof is required of a legitimatizing marriage fifty years back and between slaves,[1] and the declarations of those who knew the parties are admitted.[2] Statutory legitimation affects only those within the terms of the statute.[3]

Beneficial Associations; Beneficiaries; Betterments, see latest topical index.

BETTING AND GAMING.

The scope of this topic is noted below.[4]

§ 1. The Offense and Criminal Prosecutions, 496.
A. The Offense, 496.
B. Indictment or Information and Trial Procedure, 499.
§ 2. Penalties and Seizure of Implements, 500.
§ 3. Recovery Back of Money Lost, 501.

§ 1. *The offense and criminal prosecutions. A. The offense.*[5]—See 11 C. L. 417 The terms "gaming" and "gambling" in the administration and interpretation of criminal laws are usually regarded as synonymous.[6] A banking game of chance is one in which the banker or exhibitor is interested in the result of the play.[7] A "device or apparatus for gambling" is a device or apparatus designed for carrying on the actual gambling, for determining whether the player is to win or lose.[8] The use of an article as a gambling device determines its illegality,[9] but in some

92. Act of intercourse alleged by plaintiff, and place where it was consummated as testified to by plaintiff, did not seem reasonable. Webb v. Hill, 115 NYS 267.

93. Search Note: See note in 1 L. R. A. (N. S.) 773.

See, also, Bastards, Cent. Dig. §§ 13-18; Dec. Dig. §§ 10-14; 5 Cyc. 632-634, 636-639; 3 A. & E. Enc. L. (2ed.) 895.

94. Father publicly acknowledged the child as his own, received it as such, with the consent of his wife, into his family, and otherwise treated it as though it were legitimate. Allison v. Bryan [Okl.] 97 P 282.

95. Parents believed their first marriage was valid, and subsequently learning it was void, as wife had husband living, they had a second marriage. Inhabitants of Wellington v. Corinna [Me.] 71 A 889.

96. Under § 36, art. 2, c. 59 (§ 3795), Wilson's Rev. & Ann. St. 1903. Allison v. Bryan [Okl.] 97 P 282.

97. He is charged with its support and is entitled to its custody, service, and earnings. Under § 36, art. 2, c. 59 (§ 3795), Wilson's Rev. & Ann. St. 1903. Allison v. Bryan [Okl.] 97 P 282.

98. Allison v. Bryan [Okl.] 97 P 282.

99. Inhabitants of Wellington v. Corinna [Me.] 71 A 889.

1, 2. Dunn v. Garnett [Ky.] 112 SW 841.

3. Laws 1879, p. 136, c. 73, making legitimate issue of slaves whose parents were cohabiting at the time of the birth, applies only to issue of exclusive cohabitation and not that of casual intercourse. Spaugh v. Hartman, 150 N. C. 454, 64 SE 198.

4. Matters relating to gambling contracts (see Gambling Contracts*), and lotteries (see Lotteries*), are treated in separate subjects.

5. Search Note: See notes in 3 C. L. 500; 30 L. R. A. 523; 41 Id. 659; 7 L. R. A. (N. S.) 899; 2 Ann. Cas. 71, 618; 4 Id. 575; 6 Id. 693; 7 Id. 240; 11 Id. 66, 280.

See, also, Gaming, Cent. Dig. §§ 119-217; Dec. Dig. §§ 62-81; 20 Cyc. 878-898; 14 A. & E. Enc. L. (2ed.) 664, 692.

6. State v. Shanklin, 51 Wash. 35, 97 P 969.

7. Fact that owner of table or other device merely plays in game with other gamblers does not make him interested in the game as "banker or exhibitor" so as to render him liable under Kirby's Dig. § 1732, making it an offense to exhibit gambling table or device. Tully v. State [Ark.] 114 SW 920.

8. A paper containing information as to horses to be entered in a race, names of jockeys, names of horses which had been withdrawn, length of race and its number, does not constitute a "device and apparatus for gambling" within Pen. Code, § 344. People v. Engeman, 129 App. Div. 462, 114 NYS 174.

9. Gaming devices are not noxious per se.

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states the keeping of certain devices is an offense whether they are kept for gambling purposes or not.[10] To be illegal a game must be within the statute [11] and must be played for a wager [12] which may, however, be made without express agreement.[13] The New York statute as to recording bets applies only to persons engaged therein as a business.[14]

Validity of regulations. See 11 C. L. 418—The extent of the power of municipalities to regulate or prohibit gaming depends on the terms of their charters and the general laws under which they act.[15] An ordinance providing that any one found in a gambling house shall be punished by fine is not a proper exercise of the police power.[16]

Cards and other table games. See 11 C. L. 418—The statutes of different states usually penalize playing cards [17] or dice,[18] for gain, keeping a gaming table and bank,[19] keeping a pool table in connection with a dram shop,[20] or keeping gambling devices.[21] Playing cards is an offense under the Texas statute unless played at a private residence occupied by a family.[22]

Racing and race tracks. See 11 C. L. 419—Promoting and aiding in operating a betting book upon a horse race is generally prohibited.[23] The receiving of a sum

Illegal use must be proven. State v. Derry [Ind.] 85 NE 765.

10. Not error to refuse to charge that evidence must show beyond a reasonable doubt that defendants kept such device "for the purposes alleged in the information." People v. Leach, 143 Ill. App. 442.

11. Betting upon game of golf not a crime. People v. Sheriff of Nassau County, 60 Misc. 326, 112 NYS 154.

12. Under Ballinger's Ann. Codes & St. § 7268 (Pierce's Code, § 1885), to constitute a crime, the game of chance must be played for gain. State v. Burns [Wash.] 102 P 886. Not an offense, under Laws 1903, p. 63, c. 51, when game is played in place which is not a gambling resort. Id.

13. Whether loser in ten pin game paid did not depend upon express agreement. Taylor v. State [Tex. Cr. App.] 115 SW 37.

14. Pen. Code, § 351, does not make bet, upon result of game of golf recorded on card, a crime. People v. Sheriff of Nassau County, 60 Misc. 326, 112 NYS 154.

15. Where statutes did not denounce playing cards as unlawful unless carried on in view of public highway or street, an ordinance penalizing the playing of cards for money in any and all places within the corporate limits of a city, which had no special power to suppress gambling, was not warranted. Town of Marksville v. Worthy [La.] 49 S 11. Fact that city had "power to remove all nuisances" did not give it the power to suppress card playing for money otherwise than provided by statute. Id. Where city in its special charter was given power to restrain or prohibit keeping of billiard and pool tables, etc., within its borders, passed ordinance making it unlawful for any person to engage in operating and running pool room, billiard room, etc., one who had state license to operate such had no right to operate same in such city. City of Corinth v. Crittenden [Miss.] 47 S 525. Where the statute (Sess. Laws 1895, p. 294, c. 155) prohibited pool selling and bookmaking, an ordinance allowing such was ineffective; therefore, one who had paid license to city had no right to recover such license upon city refusing to allow him to conduct such business. Levy v. Kansas [C. C. A.] 168 F 524.

16. People v. Baum, 118 NYS 3.

17. Possession of either cards or money may authorize the inference that defendant who was present at unlawful game of cards was engaged therein, and, upon proof of an unlawful game, he may be convicted of participating therein. Griffin v. State, 5 Ga. App. 43, 62 SE 685.

18. Evidence held not sufficient to support conviction of playing craps at place not a private residence occupied by family. Looper v. State [Tex. Civ. App.] 120 SW 880.

19. Where state's witness testified that accused was dealer in a game of monte at his residence and defense's testimony showed that it was an ordinary game of cards, held that evidence was sufficient to sustain conviction of keeping a gaming table and bank. Murphy v. State [Tex. Cr. App.] 120 SW 998.

20. Evidence held sufficient to warrant conviction for keeping pool table in connection with a dramshop. State v. Rouelle [Mo. App.] 119 SW 55.

21. Evidence held sufficient to sustain conviction for keeping certain gambling devices in specified building. People v. Leach, 143 Ill. App. 442. Taking part as player in game does not render the player guilty of offense of exhibiting a gambling device, as it is necessary that he should be interested as banker or exhibitor. Tully v. State [Ark.] 114 SW 920.

22. One-room house on bachelor's land occupied only by him is not within exception. Patterson v. State [Tex. Cr. App.] 116 SW 1151. Private residence at which two entertainments were given, interval between them being eight months, is not within gaming laws. Pugh v. State [Tex. Cr. App.] 117 SW 817.

23. Intention of Act No. 57 of 1908 (Laws 1908, p. 64) was to put an end to wagering as conducted on race tracks. State v. Scheffield [La.] 48 S 932. There can be no bookmaking without writing or recording, as bookmaking implies the use of books, or sheets of paper, or bulletin board, or some such thing. People v. Langan, 116 NYS 718.

of money in payment of an oral bet, made between two individuals upon a race track upon the result of a race then and there to be run, is not a crime under the New York statute.[24]

Slot machines. See 11 C. L. 419—Slot machines, where the chances are unequal, with chances in favor of the machine, are ejusdem generis with "gambling games" specifically mentioned in the statute of New Mexico.[25]

Dealing in futures[26] on margins where no actual delivery is contemplated, and maintaining or keeping a place where such transactions are carried on, are generally prohibited.[26a] Where either party contemplates actual delivery under the contract, there can be no conviction[27] and where a statute provided punishment for dealing in futures, it must appear that the contract was made and consumated within the state.[28]

Gaming at public places. See 11 C. L. 420—One who plays cards in his own house does not commit the offense of playing cards in a public place unless the playing is or can be seen from a public road.[29]

Keeping a gaming place. See 11 C. L. 420—The keeping of a gaming house or assisting in keeping such is a statutory crime in most states,[30] but one merely found in a gambling house is not guilty of a crime.[31] A single offense is sufficient to sustain a conviction.[32] The keeper of a place where pool selling on horse races is carried on is a keeper of a gambling place.[33] The fact that the place where gambling is conducted is a private residence does not prevent it from being a gambling house.[34]

"Owners," as used in statute of Louisiana, are those who conduct the betting by using "betting books," sheets, tickets and other devices, and statute includes "agents" and "employes" within its prohibitive terms and those who are interested in the bookmaker's book. State v. Scheffield [La.] 48 S 932.

24. Pen. Code, § 351, as amended by Laws 1908, p. 1373, c. 507, relating to pool-selling, bookmaking, bets and wagers, etc., does not make such act a crime. People v. McLaughlin, 128 App. Div. 599, 113 NYS 188, afg. 60 Misc. 306, 113 NYS 306.

25. Slot machines are "banking games" and come within inhibition of Laws 1907, c. 64, p. 25, § 1. Territory v. Jones [N. M.] 99 P 338.

26. See 11 C. L. 419. See, also, Gambling Contracts for validity and civil remedies.

26a. Under Hurd's Rev. St. 1908, c. 38, § 137a, it is unlawful for any person or corporation to keep any bucket shop or other place wherein is permitted pretended buying or selling of any shares of stock of any corporation on margins or otherwise. Held that when it was alleged that person kept place where was permitted pretended buying and selling of shares of stocks and bonds of "certain corporations," and evidence showed but one sale of ten shares of "Philadelphia & Reading," and corporate existence was not proved, conviction could not be sustained as statute did not prohibit pretended sales of stocks issued by persons, partnerships, or associations. People v. Wirsching, 239 Ill. 522, 88 NE 169.

27. The understanding of one of the parties to the contract is not decisive of the question, therefore, it was error for court to so charge the jury. Salmon v. State [Tex. Cr. App.] 120 SW 427.

28. To constitute a violation of Pen. Code 1895, art. 377, such fact must be shown; therefore, it was error for court not to give instructions relative to such fact. Salmon v. State [Tex. Cr. App.] 120 SW 427.

29. Under Code 1896, § 4792 (Code 1907, § 6983), it is necessary not only to see the players but also to see them play. Moseley v. State [Ala.] 49 S 807.

30. Crimes Act June 14, 1898, § 65 (P. L. p. 812), makes it a misdemeanor to aid, abet, or assist in keeping of place to which persons may resort for gambling in any form. State v. Flynn [N. J. Err. & App.] 72 A 296. Furnishing by defendant of a machine that happens afterwards, without his privity, to be used for gambling, does not constitute either an aiding, abetting, or assisting in keeping of a gambling resort. Id. Evidence held sufficient to establish charge of keeping gaming house. People v. Brewer, 142 Ill. App. 610. Evidence held sufficient to sustain conviction for keeping gambling resort. State v. Chase [N. D.] 117 NW 537; Lyman v. State [Ark.] 119 SW 1116.

31. Ordinance cannot make such person criminally liable. People v. Baum, 118 NYS 3.

32. State v. Lane [S. C.] 63 SE 612.

33. Such a person is keeper of resort where gambling is carried on within Ballinger's Ann. Codes & St. § 3006 (Pierce's Code, § 1871). State v. Shanklin, 51 Wash. 35, 97 P 969.

34. Pen. Code 1895, art. 389, makes it an offense for one to permit any prohibited game to be played on his premises, such being a public place. Held that evidence showed that defendant had converted his residence into a gambling house. Simons v. State [Tex. Cr. App.] 120 SW 208.

Statute held not repealed: Acts 30th Leg. 1907, p. 107, c. 49, amending Pen. Code 1895, art. 388, did not repeal art. 389, making it an

(§ 1) *B. Indictment or information and trial procedure.*[35]—See 11 C. L. 420 The information must charge the essential elements of the offense,[36] and must not charge more than one offense against the statute, in the same count.[37] An indictment for running a gambling house is not necessarily open to objections for duplicity merely because some of its allegations relate to the separate offense of exhibiting gaming devises.[38] An indictment in the language of the statute is sufficient when the acts constituting the crime are defined by the statute.[39] While an information for unlawfully keeping a pool table may not be as technically accurate as good pleadings might require, it is sufficient if it charges the offense with sufficient particularity to advise the defendant with what he is charged.[40] An indictment which charges that the defendant "did aid, abet or assist," etc., is defective because the offense is charged in the alternative.[41] The name of the offense is controlled by the acts charged, and the name of the charge is immaterial,[42] but a material variance between the complaint and information is fatal.[43] Under a statute, prohibiting the playing of cards except at a private residence, an indictment is sufficient which alleges that the game was not played at a private residence,[44] but, if allegations are made descriptive of the place, such allegations will

offense for one to permit any prohiblted game to be played on his premises, such being a public place. Simons v. State [Tex. Cr. App.] 120 SW 208.

35. Search Note: See Gaming, Cent. Dig. §§ 218-305; Dec. Dig. §§ 82-106; 20 Cyc. 989-917; 14 A. & E. Enc. L. (2ed.) 689, 724; 6 A. & E. Enc. P. & P. 765; 10 Id. 190.

36. Under Sess. Laws 1905, p. 187, c. 99, providing punishment for procuring, aiding, or abetting any dumb animal to fight for sport or amusement or wager, information which does not allege that act was for sport or amusement or wager charges no offense. Wolf v. People [Colo.] 102 P 20. Information which charges that accused did unlawfully conduct a gambling game at certain place charges no crime under the Washington statute, as it does not state that such game was played for money or any other representative of value. Such information charges no crime under Ballinger's Ann. Codes & St. § 7260 (Pierce's Code, § 1877). State v. Burns [Wash.] 102 P 886. Information which stated that accused did, on a race track, "quote and lay odds" to many persons, etc., but failed to allege the writing or recording of anything, was insufficient. People v. Langan, 116 NYS 718.

37. Rev. St. 1899, § 3018 (Ann. St. 1906, p. 1729), makes it an offense to keep in a dramshop certain gaming devices and also an offense to permit such devices to be used. Held that the charging of these offenses in same count was duplicity but that defendant did not challenge information in time. State v. Sherman [Mo. App.] 119 SW 479. Indictment held to charge offense under Kirby's Dig. § 1735, and not also to charge offense under Kirby's Dig. § 1732. Lyman v. State [Ark.] 119 SW 1116.

38. Indictment charging offense under Kirby's Dig. § 1735 held not to also charge offense under § 1732. De Loney v. State [Ark.] 115 SW 138.

39. Affidavit for visiting gambling house, in violation of Public Offense Statute 1905 (Laws 1905, p. 693, c. 169), § 470, being Burns' Ann. St. 1908, § 2371, is sufficient, charge being in language of statute, and not necessary that gambling house visited be designated. State v. Bridgewater [Ind.] 85 NE 715. Need not allege that defendant went to gambling house for purpose of gambling; but burden is on defendant to show excuse for going there, if any. Id. Need not allege that defendant knowingly went to gambling house; but defendant must prove that he had no knowledge that place was gambling house. Id. Affidavit charging that accused visited gambling house in certain county in violation of statute held sufficient. State v. Derry [Ind.] 86 NE 482. Laws 1907, p. 287, § 1, provides that any person who conducts any game of studhorse poker for money, checks, credits, or any representative of value, is punishable by fine, etc. Held that information following statute was sufficient and need not further describe the offense. State v. Ross, 38 Mont. 319, 99 P 1056. Information charging illegal betting on horse races substantially a reproduction of the words of the statute and therefore sufficient. State v. Scheffield [La.] 48 S 932.

40. Information under Rev. St. 1899, § 3018 (Ann. St. 1906, p. 1729), held sufficient. State v. Rouelle [Mo. App.] 119 SW 55.

41. Held not cured by verdict and judgment. State v. Flynn [N. J. Err. & App.] 72 A 296.

42. Indictment charging accused with "running a gambling house" sufficiently charges an offense under Kirby's Dig. § 1735, making it unlawful for occupant or owner of house to knowingly allow gaming to be carried on in such house. Lyman v. State [Ark.] 119 SW 1116.

43. Where complaint alleged accused had played and bet at a game played with dice, said game not having been played and bet at a private residence occupied by a family, etc., and the information charged that accused had played and bet at a game played with dice, called "craps," such game not having been played at a private residence, etc., held a fatal variance. Johnson v. State [Tex. Cr. App.] 120 SW 893.

44. McAllister v. State [Tex. Cr. App.] 116 SW 582.

be considered descriptive of the offense and must be proved as laid.[45] The averment of the locus in quo is a material averment, proof of which is essential to conviction.[46] In a prosecution for exhibiting a gambling device, the burden is on the state to show that accused was interested as banker or exhibitor,[47] but in a prosecution for receiving pay from the losing man in a game, it is not necessary for the state to prove such was the custom.[48] Where one has been convicted of gaming, he cannot set such conviction up as a bar to a subsequent prosecution for gaming with a minor, based upon the same game.[49] The credibility of a witness for the state may be attacked by showing his interest in a pending civil suit against accused for the recovery of money lost at gaming at the time covered by the information.[50] Under the Texas statute one who testifies against another in a gaming case is not an accomplice.[51] Where the accused is indicted for maintaining a nuisance by keeping a pool room at a certain place, the instructions should limit the conviction for keeping the nuisance at the place mentioned in the indictment.[52] The exclusion of testimony of witnesses that when state's witness entered that they were not engaged in playing any game,[53] or of evidence that prosecuting witness was some distance away when the game in question was being played,[54] is not such error as to authorize a reversal of the case. Where the accusation contains more than one count charging the accused with the offense of gaming, a general verdict will be upheld, it appearing that the accusation charges but the one offense of gaming.[55]

§ 2. *Penalties and seizure of implements.*[56]—See 11 C. L. 421—Gaming devices cannot be destroyed by the state without proof that they were kept or used for unlawful gaming.[57]

Though the keeping of a gambling house is a criminal nuisance, punishable and abatable by indictment and conviction, there is no jurisdiction in equity to abate it, at the instance of either an individual or the state, unless it appears to be

45. Where indictment alleged that game was played in the woods, it was error for court to ignore such fact in its charge to the jury. McAllister v. State [Tex. Cr. App.] 116 SW 582.

46. Where indictment charged the keeping of a room at number 239 E. Twenty-second street, in Chicago, for gambling purposes, proof of the keeping of such a room at corner of Dearborn and Twenty-second streets, in Chicago, is not sufficient. People v. Lewis, 140 Ill. App. 493.

47. Proving merely that accused was a participant is not sufficient. Tully v. State [Ark.] 114 SW 920.

48. Though state contended it was the custom of accused to receive fees from loser, and accused contended the contrary, instruction that jury must believe from the evidence that it was the custom of accused was properly refused. Taylor v. State [Tex. Cr. App.] 115 SW 37.

49. Kirby's Dig. § 2414 held not to bar such prosecution. Sparks v. State [Ark.] 114 SW 1183.

50. People v. Peltz, 143 Ill. App. 181.

51. Therefore not necessary to instruct on law relating to accomplices. Riddel v. State [Tex. Cr. App.] 116 SW 1145.

52. Instruction authorizing jury to convict accused for keeping pool room any where in certain county was erroneous. Ehrlich v. Com. [Ky.] 115 SW 797; Bernero v. Com. [Ky.] 116 SW 312; Ehrlich v. Com. [Ky.] 116 SW 313.

53. Looper v. State [Tex. Cr. App.] 120 SW 880.

54. In prosecution for shooting craps, exclusion of evidence that prosecuting witness was playing in game some distance away held harmless error. Yale v. State [Tex. Cr. App.] 120 SW 419.

55. Accusation which charged accused with the offense of gaming by playing and betting for money at games played with cards and games played with dice charged but one offense, and if evidence supported either count, verdict was valid. Colquitt v. State [Ga. App.] 64 SE 281.

56. **Search Note:** See notes in 7 C. L. 439; 35 L. R. A. 572; 2 Ann. Cas. 936.

See, also, Gaming, Cent. Dig. §§ 108-118; Dec. Dig. §§ 51-61; 20 Cyc. 917-920.

57. Public Offense Laws (Acts 1905, p. 718, c. 169), § 565, making it an offense to keep gambling devices for purpose of betting or gaming, do not prohibit one from possessing, owning and enjoying such things as property within limitations imposed by the statute. State v. Derry [Ind.] 85 NE 765. Such property can only be seized on prima facie proof that same was kept or used for purpose of unlawful gaming. State v. Derry [Ind.] 85 NE 765. Whether property was used for gambling purposes may be determined without waiting for trial of accused for keeping gambling place. Id. Duty to decide if articles in hand of officer were kept or used for gambling purposes; if so, order them destroyed, if not, order their restoration to owner. Id.

injurious to personal or property rights and the injury is not otherwise adequately remediable.[58]

§ 3. *Recovery back of money lost.*[59]—See 11 C. L. 421—The rule is not of universal application that, where parties voluntarily engage in a gambling transaction, the law will hold them to be in pari delicto and that there cannot be a recovery by one of the parties from the other,[60] but usually there is no right to recover money lost, at gaming, unless such right is conferred by statute.[61] A statute which provides for the recovery of money lost in a gambling transaction applies to modes of gambling which were not known at the time such statute was passed.[62] An action to recover money lost at gaming is an action ex contractu.[63] The statute of Ohio providing that a loser may recover money lost at gaming is a statute of limitations;[64] and another statute of the same state providing that one who loses money at gambling may have a lien for the amount of his loss on the premises where the business is carried on[65] does not give the loser in a bucket shop venture a lien before he brings a suit to subject.[66] One who has recovered a judgment in one state for money lost in "futures" may maintain an action on such judgment in another state.[67] Persons engaged in a gambling business to whom money has been lost may be sued jointly or severally by the loser,[68] and in a suit in equity to recover money lost, the defendant may also recover back money lost by him to plaintiff.[69] One who has been invited, persuaded, or induced, by another[70] or his agent,[71] to enter his place and there engage in a gambling game, may recover

58. Preliminary injunction, inhibiting defendants from carrying on a "turf exchange" for purpose of betting on horse races, dissolved, as lower court had no right, under circumstances, to grant such injunction. State v. Ehrlick [W. Va.] 64 SE 935. But where such a fact is shown, equity will restrain the unlawful use of the property. Respass v. Com. [Ky.] 115 SW 1131. While the chancellor may not enjoin persons from operating a poolroom anywhere, yet he may enjoin them from using the property for such purpose. Id.

59. **Search Note:** See note in 8 Ann. Cas. 189.

See, also, Gaming, Cent. Dig. §§ 76-107; Dec. Dig. §§ 39-50; 20 Cyc. 954-966.

60. Held that, though plaintiff sought to perpetrate a fraud, he was entitled to recover money lost upon a fake fight which failed to materialize. Auxer v. Llewellyn, 142 Ill. App. 265.

61. Johnson v. Collier [Ala.] 49 S 761.

62. Under Code 1904, § 2837, which was first introduced into 1 Rev. Code 1819, c. 147, § 3, p. 562, where stock gambling was unknown, recovery may be had for money lost. McIntyre v. Smyth, 108 Va. 738, 62 SE 930.

63. Therefore defendant may set up his claim to exemptions. Johnson v. Collier [Ala.] 49 S 761.

64. Under Rev. St. § 4270, where interval of more than six months occurs between loss of money and bringing of suit for recovery thereof, plaintiff is barred from prosecuting the action, notwithstanding defendant had made assignment for benefit of creditors, and plaintiff had presented claim for money so lost to assignee within six months of loss. Burrows v. Hussong, 12 Ohio C. C. (N. S.) 93.

65. Word "owner" in Rev. St. § 4272, relating to gaming, includes one who is lessee as well as owner of fee. Hence, interest of lessee of premises, who sublets same to one who, with knowledge and permission of such lessee, uses same for gaming purposes, may be subjected to satisfaction of judgment recovered against such sublessee for money lost therein at gaming. Iroquois Co. v. Meyer [Ohio] 89 NE 90.

66. Cannot assert claim against purchaser of premises for value, purchase being made before suit to subject was instituted and without notice of claim. Sanders v. Penney, 79 Ohio St. 221, 86 NE 988.

67. Under the federal constitution and under Code 1906, § 2303, plaintiff had right to bring action on judgment for money lost by her husband in dealing in "future" transactions with defendant. Armstrong v. Minkus [Miss.] 47 S 467.

68. Berns v. Shaw [W. Va.] 64 SE 930. In an action for the recovery of money lost, the law will not apportion the wrong. Cartwright v. McElwain [Ky.] 116 SW 297. Where it is shown that defendant received part of the money lost, he is liable for the whole amount. Id.

69. Berns v. Shaw [W. Va.] 64 SE 930.

70. Held error not to instruct jury that by inviting, persuading, or inducing, is not meant that personal application be made to the person visiting such place, but mere setting up and furnishing place to carry on game of chance is sufficient invitation. Roberts v. Respass [Ky.] 114 SW 341.

71. Instruction not erroneous which charged jury that if money was lost in defendant's building and he received part of the money, or if checks were cashed by his agent, he was liable for the losses. Cartwright v. McElwain [Ky.] 116 SW 297. Where defendant owned a saloon which was conducted in his name and plaintiff lost his money in such saloon building in game with defendant's agents and defendant received part of the money, he will not be permitted to escape liability on ground that he did not knowingly participate in profits of the game. Id.

any money lost[72] in such game, and it is immaterial whether the game was fairly or unfairly conducted.[73] Where a city charter does not confer upon the city exclusive jurisdiction to prevent gambling houses the circuit court has jurisdiction.[74]

BIGAMY.[75]

The scope of this topic is noted below.[76]

*The offense.*See 11 C. L. 422—An actual, previous marriage is an essential element of the offense of bigamy.[77] Whether marriage with a divorcee within the term of statutory prohibition will sustain a charge of bigamy predicated upon a subsequent marriage, depends upon the terms of the statutory prohibition.[78]

*Indictment.*See 11 C. L. 422

*Evidence and instructions.*See 11 C. L. 422—The previous marriage of the defendant must be proved as an actual fact[79] and a paper purporting to be a marriage certificate, signed by one purporting to be duly authorized to solemnize a marriage, though recorded,[80] is not alone sufficient for this purpose,[81] without proof of his signature[82] and of his authority in the premises.[83] It is held that the prior marriage may be proved by the admissions and declarations of the parties, followed by cohabitation,[84] but the contrary is also held.[85]

Bill of Discovery; Bills and Notes; Bills in Equity; Bills of Lading; Bills of Sale; Birth Registers, see latest topical index.

BLACKMAIL.[86]

The scope of this topic is noted below.[87]

A statute defining certain acts as blackmail only when committed with reference to citizens of the state is invalid.[88]

Blasphemy; Blended Properties; Board of Health; Boards; Body Execution; Bona Fides, see latest topical index.

72. Where statute provided for recovery of money "lost" in gambling transactions, instruction which used word "paid" instead of lost was not misleading when taken as a whole. McIntyre v. Smyth, 108 Va. 738, 62 SE 930.

73. Not error to exclude evidence of fact that there were house players engaged in the game, allegations and theory being that plaintiff was induced by defendants to visit their place and there lost his money playing poker. Roberts v. Respass [Ky.] 114 SW 341.

74. State v. Bay [Or.] 99 P 939. B. & C. Comp. § 1944, providing that person who shall carry on certain games shall be guilty of a misdemeanor, was not repealed as to city of North Bend by North Bend City Charter (Laws 1903, p. 103, § 27, subd. 5); therefore, the circuit court had jurisdiction. State v. Short [Or.] 99 P 1043; State v. Bay [Or.] 99 P 939.

75. Search Note: See notes in 11 C. L. 423; 68 L. R. A. 42; 9 L. R. A. (N. S.) 1036; 47 A. S. R. 228; 106 Id. 768; 5 Ann. Cas. 968; 8 Id. 1104; 10 Id. 415.

See, also, Bigamy, Cent. Dig.; Dec. Dig.; 5 Cyc. 687-704; 4 A. & E. Enc. L. (2ed.) 34; 3 A. & E. Enc. P. & P. 322; 16 Id. 655.

76. Treats of the statutory offense of multiple marriage. Excludes matters common to all crimes (see Criminal Law;* Indictment and Prosecution*) and proof of marriage and divorce (see Marriage,* § 2; Divorce,* § 7), except as bearing upon a charge of bigamy. Also excludes matters relating to adultery (see Adultery*) and fornication (see Fornication*).

77. People v. Le Doux [Cal.] 102 P 517.

78. Civ. Code, art. 137, providing that the wife shall not be at liberty to contract another marriage until ten months after dissolution of the previous marriage, when considered in connection with articles 115, 960, does not render a marriage with a divorced woman within such time a nullity. State v. Stevenson, 115 La. 777, 40 S 44.

79. People v. Le Doux [Cal.] 102 P 517.

80. Record of marriage certificate in Arizona held merely to place the foreign record on same footing with domestic records, and, being merely a private writing, it was not thereby rendered admissible without proof of its execution and authenticity. People v. Le Doux [Cal.] 102 P 517.

81, 82, 83. People v. Le Doux [Cal.] 102 P 517.

84. Declarations of parties to alleged previous marriage a few hours after such marriage, followed immediately by continuous cohabitation. Le Grand v. State [Ark.] 113 SW 1028.

85. In California, former marriage cannot be proved by declarations of parties and by common reports, though accompanied by cohabitation. People v. Le Doux [Cal.] 102 P 517.

86. Search Note: See Threats, Cent. Dig.; Dec. Dig.; 4 A. & E. Enc. L. (2ed.) 577; 28 Id. 140; 21 A. & E. Enc. P. & P. 670.

87. Treats of the offense of extortion by

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* Always begin with the latest article on the subject. Use the latest topical index.

BONDS.

The scope of this topic is noted below.[89]

§ 1. The Instrument; Essentials and Validity, 503.
§ 2. Rights of Parties and Transferees, 504.
§ 3. Terms and Conditions in General; Interpretation and Legal Effect, 504.
§ 4. Remedies and Procedure, 505.

§ 1. *The instrument; essentials and validity.*[90] See 11 C. L. 424—The distinction between a common-law bond and a statutory bond is that the latter conforms to a statute while the former does not, although such conformity may have been intended.[91] Hence, an instrument is not valid as a statutory bond where it fails to conform substantially to the statutory requirements,[92] but a departure from the language of the statute in immaterial particulars will not destroy it as a statutory obligation.[93] On the other hand, an instrument void as a statutory bond may nevertheless be valid as a common-law obligation,[94] but it will not be so construed if the liabilities of the sureties be thereby enlarged,[95] or if the liability would be such as was not contemplated by the parties.[96]

Consideration. See 11 C. L. 424

Execution. See 11 C. L. 424—An alteration of a bond by one of the sureties, changing it from a joint to a joint and several bond, before delivery, does not invalidate

threats, as distinguished from extortion by public officers (see Extortion*) and from robbery (see Robbery*). Excludes, also, the offense of making threats without intent to extort (see Threats *), libel and slander (see Libel and Slander*), and matters common to all crimes (see Criminal Law;* Indictment and Prosecution*).

88. Act March 30, 1901, § 3 (Laws 1901, p. 494, c. 93) held invalid under Neb. Const. art. 3, § 15, relative to special legislation and also under U. S. Const., Amend. 14, § 1, guaranteeing equal rights and protection of laws. Greene v. State [Neb.] 119 NW 6.

89. Treats of bonds generally. Excludes bonds in their aspect as negotiable or non-negotiable instruments (see Negotiable Instruments;* Non-negotiable Paper *), and in their peculiar connection with particular relations (see such topics as Agency,* § 4; Apprentices;* Bailment,* §§ 2, 3; Warehousing and Deposits;* Suretyship*). Excludes, also, particular kinds of bonds, such as municipal bonds (see Municipal Bonds*), corporate bonds (see Corporations,* § 16c; Railroads,* § 12), private indemnifying bonds (see Building and Construction Contracts,* § 12; Insurance,* §§ 5-24; Mechanics' Liens,* § 11; Public Works and Improvements,* § 6; Intoxicating Liquors,* § 6), public indemnifying and security bonds (see Surety of the Peace;* Intoxicating Liquors,* § 3; Licenses,* § 3; and, also, such topics as Pawnbrokers and Secondhand Dealers;* etc.), indemnifying bonds given in legal proceedings (see Attachment,* §§ 7, 9; Landlord and Tenant,* § 9; Injunction,* § 4B; Executions,* § 8C; Garnishment,* § 9), supersedeas and stay bonds (see Supersedeas and Stay of Proceedings;* Executions,* § 3), forthcoming bonds and receipts (see Attachment,* § 12; Executions,* § 8C; Detinue;* Replevin,* §§ 5, 14), administration bonds (see Bankruptcy,* § 21; Estates of Decedents,* § 3C; Guardianship,* § 12; Insolvency,* § 4; Receivers,* § 7), appeal and review bonds (see Appeal and Review,* § 6G; Admiralty,* § 4; Eminent Domain,* § 18; Indictment and Prosecution,* § 17E; Justices of the Peace,* §§ 5, 6), bail bonds (see Recognizances*), cost bonds (see Costs,* § 3), officers' bonds (see Officers and Public Employes,* § 12; Clerks of Court,* § 3; Sheriffs and Constables,* §§ 1, 6; Notaries and Commissioners of Deeds*). Excludes also damages (see Damages,* §§ 1, 2, 4), and restoration of lost bonds (see Restoring Lost Instruments*).

90. Search Note: See notes in 45 L. R. A. 321, 333; 12 L. R. A. (N. S.) 1105.

See, also, Bonds, Cent. Dig. §§ 1-46; Dec. Dig. §§ 1-46; 5 Cyc. 729-750; 4 A. & E. Enc. L. (2ed.) 621, 655, 698; 8 Id. 960.

91. City of Mt. Vernon v. Brett, 193 N. Y. 276, 86 NE 6.

92. Where statute required bond in penal sum of $20,000, bond in sum of $25,000 did not comply with requirements. City of Mt. Vernon v. Brett, 193 N. Y. 276, 86 NE 6.

93. Provision in bond that town collector would pay money over pursuant to law "or the order or resolution of the board," and omission of the words "to the party or parties entitled thereto," did not constitute a substantial variance. Town of Cicero v. Hall, 240 Ill. 160, 88 NE 476.

94. Where a guaranty company voluntarily and for valid consideration became surety on public officer's bond, which was not valid as a statutory bond, it was a good common-law bond, and surety was liable according to its undertaking. United States Fidelity & Guar. Co. v. Rainey [Tenn.] 113 SW 397.

95. Kuhl v. Chamberlain [Iowa] 118 NW 776.

96. Where bond was executed by banker as a county depository, but it was never approved, and he never became such, but thereafter county treasurer deposited funds with him, it was held that sureties were not liable on bond, as obligation contemplated his liability in official capacity and not in private capacity. Kuhl v. Chamberlain [Iowa] 118 NW 776.

* Always begin with the latest article on the subject. Use the latest topical index.

it as a joint bond, the change having been made without the knowledge of the obligee.[97] Where the statute requires that the bond shall be entered into by the principal, the requirement is only met when the bond is signed by the principal or by some one authorized by him to sign his name thereto.[98]

Delivery. See 11 C. L. 425—In order that a bond may be effective, there must be an acceptance,[99] but if an absolute obligation, intended to take effect upon delivery, there need be no notice of acceptance.[1]

§ 2. *Right of parties and transferees.*[2]—See 11 C. L. 425

§ 3. *Terms and conditions in general; interpretation and legal effect.*[3]—See 11 C. L. 425—Bonds are to be construed in accordance with the recognized rules for the interpretation of contracts,[4] and like other contracts are to be construed, if possible, so that they may have effect, and to the end that the purposes and the intentions of the parties executing them may be promoted rather than defeated.[5] The interpretation of the language of a bond must be confined to the usual and ordinary meaning of the words used,[6] and the intention must be adjudged to be expressed in the bond itself, which is the contract of the parties and alone binds them.[7] The rule that a strict construction of the bond is to be indulged in favor of the obligors is always inforced for the protection of sureties, and does not apply where the action is prosecuted against the principal alone, it having been dismissed as to sureties.[8] Where the undertaking of the bond is general, and the conditions are preceded by recitals, the operation of the bond will be kept within the recitals.[9] In construing a statutory bond, reference must be had to the statute,[10] and a mistake in naming the obligee may thus be rendered immaterial,[11] but when each of two sections of equal force, in the same statute, provides for a bond and the provisions are at variance, the language of the bond must determine under which section it was given.[12] A bond is not a lien on the property of the promisor in the absence

97. Does not prevent recovery on bond in accordance with its original terms as act of surety was same as alteration by stranger to the contract. Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768, 97 P 919.

98. When statute required that bonds of liquor dealer shall be entered into by the principal, a bond not signed by the principal until after it was approved and filed and acts complained of had been committed was invalid. State v. Teague [Tex. Civ. App.] 111 SW 234.

99. Haupt v. Cravens & Co. [Tex. Civ. App.] 120 SW 541. Acceptance implied from receipt and retention of bond. Id.

1. Sureties not entitled to notice that bond of insurance agent had been accepted. Haupt v. Cravens & Co. [Tex. Civ. App.] 120 SW 541.

2. Search Note: See Cent. Dig. §§ 73-129; Dec. Dig. §§ 74-113.

3. Search Note: See notes in 55 L. R. A. 381; 8 Ann. Cas 1029; 9 Id. 707.

See, also, Bonds, Cent. Dig. §§ 47-72; Dec. Dig. §§ 48-73; 5 Cyc. 750-776; 4 A. & E. Enc. L. (2ed.) 641, 698.

4. Where "principal binds himself" and the "said surety binds itself," the obligation is joint and several. Morrison v. American Surety Co. [Pa.] 73 A 10. As to interpretation of contracts generally, see Contracts, § 4.

5. Ryndak v. Seawell [Okl.] 102 P 125. Construed in light of surrounding circumstances, intent of parties, etc., bond given by defendants, which provided that they were firmly held unto plaintiff as head banker of Modern Woodmen of America and to the said Modern Woodman of America, "jointly and severally" in penal sum to be paid to plaintiff "as head banker of Modern Woodman of America and to the said Modern Woodman of America, or either him or it," was a security for the society and a security for plaintiff personally. Bort v. McCutchen & Co. [C. C. A.] 157 F 182.

6, 7. Schaefer v. American Bonding & Trust Co., 137 Ill. App. 168.

8. Akin v. Rice [Mo. App.] 117 SW 655.

9. New York Life Ins. Co. v. McDearmon, 133 Mo. App. 671, 114 SW 57. Bond given to insurance company conditioned for the faithful performance of the contract which the agent had entered into with them and of all duties pertaining to the agency. Held that advances made for the support of the agent's family were purely personal and not within meaning of terms of bond. Id.

10. Speir v. U. S., 31 App. D. C. 476. Ditch bond, given pursuant to Laws 1901, p. 413, c. 258, § 2. Freeborn County v. Helle, 105 Minn. 92, 117 NW 153.

11. Where the United States should have been expressly named as obligee in a contractor's bond instead of Board of Commissioners of Soldiers' Home in the District of Columbia, the statutory condition must be considered as read into and made part of the bond. Speir v. U. S., 31 App. D. C. 476.

12. Where language shows that bond could have been given under one section which affords no lien, and that it could not have been given under another section which

of a statute or covenant expressly making it such,[13] and where there is such a statute, it must be strictly complied with in order to create the lien.[14]

§ 4. *Remedies and procedure.*[15]—See 11 C. L. 426—An action to enforce a penalty for the violation of the conditions of a statutory bond cannot be sustained unless the bond is in conformity with the provisions of the statute requiring its execution,[16] and in such action neither the principal of estoppel nor the rule of equity, which regards that as done which ought to have been done, has any application.[17] In most states a bond given for a third person's benefit is enforcible by him,[18] but where a contract is made and a bond executed for the benefit of third persons not named, to enable such persons to sue on the bond, it must clearly appear, by the terms of the contract or bond, that they are of the class covered by the conditions of the bond.[19] In the District of Columbia in case of a private bond under seal, a person not a party thereto, though it may have been intended for his benefit, cannot maintain a action at law thereon,[20] but this rule does not preclude an action by the statutory obligee in a statutory bond given in connection with government contracts, though by mistake the bond is not made payable to such obligee.[21]

*Pleading and evidence.*See 11 C. L. 427—Where the facts recited in the declaration show performance on the part of the plaintiff as obligee in a bond of all its terms and conditions, a general allegation of performance is unnecessary.[22] It is not necessary to set out the contract in haec verba,[23] or to set out the bond,[24] or to file a copy thereof,[25] and, where the contract is sufficiently stated in the first count, it need not be repeated in subsequent counts.[26] Where a copy of the instrument is attached to the complaint, it is immaterial by what name the instrument is called.[27] Matters of evidence need not be alleged,[28] and matters of defeasance need not be negatived by the plaintiff in the first instance.[29] The enumeration of the various kinds of damage suffered does not render the pleading duplicitous.[30] Where the plaintiff alleges and proves facts entitling him to recover on a joint bond, he is not precluded because he goes further and alleges and attempts to prove, but fails, that by a charge in the terms of the bond he is entitled to recovery as on a joint and several bond,[31] nor are the defendants precluded from setting up a defense

provided for a lien, "the requirements" of the former measure the obligation of the sureties. City of Mt. Vernon v. Brett, 193 N. Y. 276, 86 NE 6.

13. City of Mt. Vernon v. Brett, 193 N. Y. 276, 86 NE 6.

14. Where statute provided that bond should be given in the penal sum of $20,000, and conferred no power to increase or diminish the amount, bond in sum of $25,000 was not a compliance. City of Mt. Vernon v. Brett, 193 N. Y. 276, 86 NE 6.

15. Search Note: See notes in 3 C. L. 514; 62 L. R. A. 427; 2 Ann. Cas. 891; 3 Id. 456; 6 Id. 467.

See, also, Bonds, Cent. Dig. §§ 130-261; Dec. Dig. §§ 114-148; 5 Cyc. 811-857; 3 A. & E. Enc. P. & P. 635.

16. State v. Teague [Tex. Civ. App.] 111 SW 234.

17. It matters not what may have been the intentions of the makers in delivering it to the obligee. State v. Teague [Tex. Civ. App.] 111 SW 234.

18. Stipulation in contractor's bond held to entitle materialman to recover for material furnished. National Surety Co. v. Foster Lumber Co., 42 Ind. App. 671, 85 NE 489.

19. Contractor's bond. Eau Claire-St. Louis Lumber Co. v. Banks [Mo. App.] 117 SW 611.

20. Speir v. U. S., 31 App. D. C. 476.

21. Bond to protect materialmen and laborers in connection with contract for United States buildings was, by mistake, made payable to Board of Commissioners of Soldiers' Home instead of to United States. Speir v. U. S., 31 App. D. C. 476.

22. Thomason v. Kenney, 4 Ga. App. 721, 62 SE 470.

23, 24, 25. United Surety Co. v. Summers [Md.] 72 A 775.

26. Sufficient to declare upon it as set forth in the first count. United Surety Co. v. Summers [Md.] 72 A 775.

27. Whether called statutory or common-law bond. Dackich v. Barich, 37 Mont. 490, 97 P 931.

28. Number of days of delay in performance of contract for which liquidated damages were claimed under the bond. United Surety Co. v. Summers [Md.] 72 A 775. Date on which contract secured by bond was abandoned. Id.

29, 30. United Surety Co. v. Summers [Md.] 72 A 775.

31. Where bond, which was joint, was altered by one of the sureties and obligee was without fault, recovery could be had

available as against a joint bond merely because plaintiff attempts to recover as on a joint and several bond.[32] A plea of non est factum raises no issue as to the amount of damages,[33] but only puts in issue the execution of the bond declared upon.[34] When such a plea is unverified, the plaintiff is not usually required to prove the execution of the bond.[35] The burden is on plaintiff to prove a breach.[36]

Verdict and judgment. See 11 C. L. 426—A general verdict is an affirmative finding upon an issue as to whether bond sued on is the bond executed by the defendants.[37]

The right of recovery is limited by the condition of the bond,[38] and hence, under a bond conditioned for one's support, only such damages may be recovered, as the proof discloses that such person has suffered by reason of the violation of the conditions mentioned therein.[39] Interest may be allowed on the debt after it is due, although the total sum exceeds the penalty,[40] but the interest which may be recovered is limited to interest from the time of breach.[41] Damages generally are treated in another topic.[42]

"Bottle" and "Can" Laws; Bottomry and Respondentia; Bought and Sold Notes, see latest topical index.

BOUNDARIES.

The scope of this topic is noted below.[43]

§ 1. Rules for Locating and Identifying, 506.
§ 2. Riparian or Littoral Boundaries, 513.
§ 3. Establishment by Agreement of Adjoiners, 515.
§ 4. Establishment by Acquiescence, Estoppel, or Adverse Possession, 516.
§ 5. Establishment by Arbitration, Action or Statutory Mode, 518.

§ 1. *Rules for locating and identifying.*[44] See 11 C. L. 427—Presumptions must be indulged in favor of the accuracy of the work of the surveyor.[45] In case of dispute as to the division line between adjoining tracts, both claimed under original warrants, the first step is to ascertain, if possible, which tract was first located.[46] The lines and corners as actually run and established on the ground are usually controlling,[47] though the doctrine of practical location may be resorted to in proper

as on a joint bond, though he alleged and attempted to recover as on joint and several bond. Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768, 97 P 919.

32. Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 758, 97 P 919.

33, 34. Leman v. U. S. Fidelity & Casualty Co., 137 Ill. App. 258.

35. Lefkow v. Taylor, 140 Ill. App. 570.

36. Where no proof whatever had been offered showing that there had been a breach, a sworn itemized statement of money not accounted for did not entitle the obligee to judgment because defendant did not make affidavit that account was not correct. Adams v. Fidelity Mut. Life Ins. Co. [Miss.] 49 S 119.

37. Dackich v. Barich, 37 Mont. 490, 97 P 931.

38. Schaefer v. American Bonding & Trust Co., 137 Ill. App. 168.

39. Under Code Civ. Proc. § 1915, recovery on bond in a penal sum conditioned to furnish obligee lodging, food, etc., is limited to actual damages. Stuart v. Abbey, 62 Misc. 84, 116 NYS 259.

40. American Surety Co. v. Pacific Surety Co., 81 Conn. 252, 70 A 584. Interest may be included in judgment, although such judgment may then be in excess of penal sum mentioned in the bond. Leman v. U. S. Fidelity & Casualty Co., 137 Ill. App. 258.

41. American Surety Co v. Pacific Surety Co., 81 Conn. 252, 70 A 584. Interest due from date of the decree adjudging liability. United States Fidelity & Guar. Co. v. Rainey [Tenn.] 113 SW 397.

42. See Damages, §§ 1, 2, 4.

43. Treats of boundaries of lots, tracts and parcels of land as such as distinguished from political boundaries (see Counties,* § 1; Municipal Corporations,* § 4; States,* § 1) and boundaries of highways and streets (see Highways and Streets,* § 3). For general construction of conveyances, see Deeds of Conveyance,* § 3.

44. Search Note: See notes in 11 C. L. 428; 22 A. S. R. 34; 30 Id. 453; 94 Id. 678.

See, also, Boundaries, Cent. Dig. §§ 1-94, 123-137; Dec. Dig. §§ 1-11, 19-25; 5 Cyc. 867-889, 891, 905-930; 4 A. & E. Enc. L. (2ed.) 793.

45. Franklin v. Texas Savings & Real Estate Inv. Ass'n [Tex. Civ. App.] 119 SW 1166.

46. Collins v. Clough, 222 Pa. 472, 71 A 1077. Where return of defendant's surveys called for plaintiff's warrant as adjoiner on northeast while return of plaintiff's survey called for vacant land on southwest, priority of location was with plaintiff as matter of law. Id.

47. Line marked as such by surveyor at time of survey establishes itself in suit to

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* Always begin with the latest article on the subject. Use the latest topical index.

cases.[48] Boundary lines are usually determined with reference to some description or plat.[49] In determining the location of a boundary from the description in a deed, the general rules as to the construction of deeds apply,[50] and a particular description will control a general one.[51] Where the parties are mistaken as to the location of lines and corners called for in a deed, the lines must run in accordance with the intention of the parties,[52] and when the evidence conflicts, the jury must determine the location of such lines.[53] In other cases, also, the actual location of a line or corner is often a question of fact[54] dependent on the evidence adduced[55]

determine a lost corner. Ramsey v. Morrow [Ky.] 118 SW 296. Rule that in government surveys first lines are only temporary, and that correction back is made in case metes and bounds do not close, error being divided and lines and corners moved before being made permanent, does not apply in retracing permanent surveys to extent of moving established boundaries so as to include land not within government survey. Seabrook v. Coos Bay Ice & Cold Storage Co. [Or.] 102 P 175. In ejectment, evidence of such rule and map of premises involved, made on such theory, held inadmissible. Id.

48. See post, § 4.

49. Description of land according to terminology employed in system of governmental surveys and plats necessarily refers to plats of those surveys, and conveyance according to official plats of the surveys does not include land not appearing on plat. Little v. Williams [Ark.] 113 SW 340. Where lots can be readily located on the ground according to their own descriptions conforming to a plat, their boundaries will be located in accordance with such plat and cannot be affected by prior transfers by same owner, of other lots in same block under a prior plat. Toudouze v. Keller [Tex. Civ. App.] 118 SW 185. Where tenements were divided by a party wall and owners claimed under deeds calling for a straight line back to an alley, center line of party wall extending back to alley was true dividing line. Hatcher v. Richmond & C. B. R. Co. [Va.] 63 SE 999. Where part of military reservation actually occupied by military authorities was west of true east line to a fence and intermediate land was occupied by squatters, and United States relinquished to city of San Francisco for a street strip between east line and a point 80 feet west of east line "as established by United States authorities," line referred to as established by authorities was line of old fence, no other line answering that description. Rudolph Herman Co. v. San Francisco, 154 Cal. 688, 99 P 169.

50. See Deeds of Conveyance, § 3. Deed to lot "having a frontage of 75 feet on R. street and a length of 271 feet" held to require running of side lines from edge of street and not from center thereof. Bell v. Redd [Ga.] 65 SE 90. Word "about" used to designate beginning point of a description should be construed in accordance with intent of parties to instrument. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617. Word "about" held not equivalent to "at," but to indicate only approximation of distance of beginning point from certain streets. Id.

51. Deed calls for avenue lines as shown on a map held nullified by further description by lot and block number resulting in conveyance of portions of unopened streets. Inter-City Realty Co. v. Newman, 128 App. Div. 195, 112 NYS 481.

52, 53. Sullivan v. Hill, 33 Ky. L. R. 962, 112 SW 564.

54. Reference to commissioner is proper where evidence is conflicting on location of monuments called for in title papers, identity of monuments involving questions of fact. State v. King, 64 W. Va. 546, 63 SE 468.

55. Evidence held to show that line established between two sections by United States survey was straight line. Lillis v. Urrutia, 9 Cal. App. 557, 99 P 992. In suit to establish a lost corner, evidence held to require that an old line marked at time of survey should be given controlling effect. Ramsey v. Morrow [Ky.] 118 SW 296. Evidence sufficient to show land conveyed by certain grant was part of that described in complaint. McNeely v. Laxton, 149 N. C. 327, 63 SE 278. Plaintiff's deed and evidence held sufficient to require submission of location of plaintiff's lot to jury. Hanstein v. Ferrall, 149 N. C. 240, 62 SE 1070. Evidence held to establish boundary line between two surveys as extension of a particular line. Kingsley v. Patterson [Tex. Civ. App.] 115 SW 105. Evidence held to establish plaintiff's claim as to location of boundary. Franklin v. Texas Savings & Real Estate Inv. Ass'n [Tex. Civ. App.] 119 SW 1166. Evidence held to show defendant's deed did not embrace a certain tract so as to place boundary as contended by defendant. Clark v. Boosey [Or.] 97 P 754. Plaintiff held not entitled to recover, it appearing deeds called for lines adverse to him and corresponding with 30 years' occupancy of parties, and that strip sued for was beyond line fixed by conveyance to plaintiff of two feet on which its church encroached. First Baptist Soc. v. Wetherell [R. I.] 72 A 641.

Evidence held to sustain finding as to location of boundary. Arndell v. Malusky [Ky.] 112 SW 640; Preston v. Vanhoose [Ky.] 116 SW 279. That boundary was as claimed by defendant. Holland v. Coleman [Ky.] 114 SW 305. That boundary line of appellee's land extended along a creek and in straight line beyond head of creek to a certain point, according to his contention. Williams v. Murphy, 33 Ky. L. R. 1006, 112 SW 610. That call for old building was more material and certain and entitled to greater weight than calls of other surveys adjoining. Jordan v. James [Tex. Civ. App.] 115 SW 872. That certain line extends in a particular direction. Thurman v. Leach [Ky.] 116 SW 300. That bounda-

under the usual rules governing its admissibility,[56] weight,[57] burden of proof,[58] jury questions,[59] instructions,[60] and findings.[61]

ries of prior survey were certain and covered all land claimed by plaintiff under subsequent patent, leaving nothing for him. Hackbarth v. Gordon [Tex. Civ. App.] 120 SW 591. On issue as to northerly terminus of plaintiff's western boundary line, evidence held to sustain finding that, in measuring off said line of one hundred sixty-eight feet, line was run horizontally through the air, and not after contour of ground, so as to extend line farther north than claimed by defendant and give plaintiff a strip on north side on which defendant built a wall. Lew v. Bray, 81 Conn. 213, 70 A 628.

Evidence insufficient to identify land described in complaint in ejectment. Hayes v. Martin [Ala.] 48 S 681. To support finding that a line was located as claimed by defendant. Meeker v. Simmons [Cal. App.] 101 P 683. To support finding that a certain fence was division line. Gonella v. Simmons [Cal. App.] 101 P 685. To identify alleged strip of land between boundaries of two tracts according to government surveys. Seabrook v. Coos Bay Ice & Cold Storage Co. [Or.] 102 P 175.

56. **Circumstantial evidence** held properly admitted to show that boundary line had been fixed by agreement many years before suit. Roberts v. Blount [Tex. Civ. App.] 120 SW 933.

Materiality: On question of division line between railroad right of way and adjoining lands, evidence as to stone bounds alleged to have been set along center of right of way held immaterial, it not appearing said stone bounds were set along a surveyed line or that any such line was center line of right of way, or that track was so constructed that its center line coincided with center line of right of way. Keefe v. Sullivan County R. Co. [N. H.] 71 A 379.

Adjacent tracts, lines and objects: In trespass to try title to a tract of land, surveys of adjacent tracts are admissible to identify tract in dispute. Sullivan v. Solis [Tex. Civ App.] 114 SW 456. Junior patents calling for line of senior patent and describing it by course held competent to establish true line of senior patent. Thurman v. Leach [Ky.] 116 SW 300. Where deed described land as lying between portion of large tract sold to N. and another portion of such tract sold to P., N.'s and P.'s deeds were admissible to show location. McCollum v. Buckner's Orphans' Home [Tex. Civ. App.] 117 SW 886. Though survey on which no patent ever issued is not admissible to prove identity of location of boundary lines and corners of adjacent survey carried into grant by patent (State v. King, 64 W. Va. 546, 63 SE 468), if both surveys were made by same surveyor, since deceased, and at about same time, first mentioned survey may be given in evidence to prove names of natural objects called for in surveys and situated in vicinity at dates of surveys, and surveyor's knowledge of these facts, where such evidence becomes material (Id.). Evidence of location of other undisputed lines of known distance from one in dispute is admissible. Hobbs v. Hobbs [N. H.] 72 A 290. Testimony that witness set out an elm tree a specified number of feet from fence posts on a line is admissible to show location of old fence. Keefe v. Sullivan County R. Co. [N. H.] 71 A 379.

Reputation and general understanding: Boundary line may be proved by reputation. Thurman v. Leach [Ky.] 116 SW 300. On issue of location of line under old patent, evidence of reputation as to true location and recognition of line by adjoining owners, held admissible. Id. General understanding and reputation among owner's neighbors and others who have been tenants or employes on the respective lands, as to line between them, may be shown. Peters v. Tilghman [Md.] 73 A 726. On issue of location of line running to "Shingle Branch," testimony that witness had heard a certain prong of a creek called by that name held admissible, though credibility of person making statement to witness was not shown. McNeely v. Laxton, 149 N. C. 324, 63 SE 278. On issue of location of line under old patent, survey of junior patents calling for such line in former suit, is evidence by reputation as to location, surveyor being dead. Thurman v. Leach [Ky.] 116 SW 300. Evidence that one of contesting parties had been in possession of disputed tract for many years, and had cultivated it as his own, held not evidence of general reputation. Benton v. Allen [Ga.] 63 SE 626.

Declarations and admissions: In proceedings founded on caveat for determination of location of boundary lines of entries and surveys preparatory to procurement of patents, rules of evidence relating to admissions of parties and locations made by them are more liberal than those applied in proceedings to determine the locations of lines designated in patents. State v. King, 64 W. Va. 546, 63 SE 468. Testimony of third person that he claimed only to a certain line as to his land held hearsay and prejudicial, and not legal evidence that such line was true line. Runkle v. Smith [Tex. Civ. App.] 114 SW 865. Declarations of disinterested deceased person, who had peculiar means of information, made anti litem motam, are admissible to prove private boundaries. Cadwalader v. Price [Md.] 73 A 273. Declaration of former owner after conveyance of part of land. Id. Where a grantor retained a certain landing and thereafter conveyed to another, subsequent declarations as to landing held not inadmissible as impairing rights of first grantee. Id. Admissibility of declarations of deceased owners, tenants and other persons, as to location of corners or lines, considered. State v. King, 64 W. Va. 546, 63 SE 468. See, also, Evidence, § 6B.

Parol evidence: Where it was apparent from the face of a conveyance that mistake existed as to course and distance, held not error to permit oral testimony to correct the calls, though there was no allegation of mistake in answer. Moore v. Loggins [Tex. Civ. App.] 114 SW 183. On question as to location of line under old patent, re-

citals of other patents or deeds calling for that line, recitals of particular grant, testimony of persons who saw line or corners marked, held admissible. Thurman v. Leach [Ky.] 116 SW 300. Held competent for party to testify that line agreed on was run by a surveyor and marked and that thereafter he took and held possession on his side. Hocker v. Keeton [Ky.] 115 SW 784.

Secondary evidence: Where surveyor's map gave distances from streets referred to and streets were not at the time of survey located or used as indicated on map, and evidence of ascertained monuments was lacking, court could receive best evidence obtainable and could ascertain location of such stakes as were commonly recognized and used in lieu of lost or destroyed originals, and such stakes established boundary in absence of more specific evidence. Andrews v. Wheeler [Cal. App.] 103 P 144. In absence of fixed and official establishment of a corner by monuments, testimony of witness as to location of corner based on surrounding facts and circumstances determining his location held admissible. Lecroix v. Malone [Ala.] 47 S 725.

Opinions: Testimony of surveyor that in his opinion line run by him was original line held inadmissible. Goodson v. Fitzgerald [Tex. Civ. App.] 115 SW 50.

Maps, records, and documents: That petition in suit to establish boundary claimed only part of land described by patent and deed held not to render patent and deed inadmissible. Runkle v. Smith [Tex. Civ. App.] 114 SW 865. Where land had been conveyed to plaintiff by an administrator, and was part of a survey described in deed as "Green's Bayou," evidence as to location of survey with reference to Green's Bayou and of probate proceedings was admissible in aid of description. McCullum v. Buckner's Orphans' Home [Tex. Civ. App.] 117 SW 886. Where in plaintiff's declaration he referred to lines established in partition proceedings as boundaries of demanded premises, returns of partition commissioners were admissible against him to show length of lines and consequent dimensions of land divided. Hudson v. Webber [Me.] 72 A 184. In trespass to try title to land claimed under ancient Spanish grant, official map of county, compiled after institution of suit, held properly admitted, against objection map could have no effect in fixing boundaries and that data on which it was made were not before court. Sullivan v. Solis [Tex. Civ. App.] 114 SW 456. Where call in grant did not give length of the line, held proper to instruct that jury could consider plat annexed to grant in determining length of line. McNeely v. Laxton, 149 N. C. 327, 63 SE 278.

Surveys: Government surveyor's field notes, giving trend of lines and distances run, held competent and material on issue of location of disputed quarter-section corner. Kellogg v. Finn [S. D.] 119 NW 545. Field notes do not locate lines on ground, but merely furnish data from which surveyors may locate them. International & G. N. R. Co. v. Morin [Tex. Civ. App.] 116 SW 656. Surveyor could testify to location of street lines though he did not produce city records and was not present when lines were run. Id. Certificate of surveyor to plat that same is correct does not destroy effect of statute (Priv. & Loc. Laws 1870, p. 931, c. 387) that survey is prima facie evidence, where survey is over 30 years old. Dickinson v. Smith, 134 Wis. 6, 114 NW 133.

57. In suit to establish boundary, lines of surveyors in attempting to locate a line are not binding on parties, and such surveys are admitted only to aid jury in finding line originally run. Runkle v. Smith [Tex. Civ. App.] 114 SW 865. Testimony of witness as to surveyor's location of a corner after lapse of 34 years, witness having been present when survey was made, held insufficient. Seabrook v. Coos Bay Ice & Cold Storage Co. [Or.] 102 P 795. On issue as to highway boundary, evidence of supposed monument marking original government corner at or near place where plaintiff claimed it was fixed held not controlling, there being nothing to show it was in fact a government corner or monument. Quinn v. Monona County [Iowa] 117 NW 1100. Where parties claimed land according to plat made from actual survey on ground, survey not made on ground was not entitled to consideration. Andrews v. Wheeler [Cal. App.] 103 P 144. Evidence that defendant's building encroached on plaintiff's ground held mere conclusion of no effect in absence of facts on which it was based. Hamilton v. Monidah Trust [Mont.] 102 P 335. Where parties claimed under common grantor and plaintiff introduced deeds under which defendant claimed to show they did not include the land, it was not necessary for him to introduce deeds showing title in himself. Warden v. Addington [Ky.] 115 SW 241.

58. Burden on defendant who by cross action in trespass to try title affirmatively sought to have boundary established by estoppel. Gaffney v. Clark [Tex. Civ. App.] 118 SW 606.

59. Construction of deeds to determine description of land is for court, but location of boundaries on ground is for jury. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617. Where pleadings and evidence presented issue as to whether land recovered by a third person from a grantee was covered by grantor's deed, court should have submitted the issue. Sullivan v. Hill, 33 Ky. L. R. 962, 112 SW 564. Question as to **location of uncertain call** must be submitted to jury. Sale v. Pulaski Stave Co. [Ky.] 117 SW 404. **Location of lines** is ascertainment of facts and is for jury under proper instructions in actions triable by jury. Thurman v. Leach [Ky.] 116 SW 300. Question for jury, evidence as to true location of boundary lines being conflicting. De Ponta v. Driscoll, 200 Mass. 225, 86 NE 308. **Whether a line was anciently marked by surveyor** held for jury, there being evidence that marks alleged to designate an old line had been made many years after survey by others and for different purposes. Ramsey v. Morrow [Ky.] 118 SW 296. Where question as to how a patent should be located depended on **variation to be given courses** in the patent and the **location of objects and marks,** held proper to submit to jury question whether plaintiff's

Monuments, courses, distances and quantity. See 11 C. L. 430—A monument is of no avail unless identified [62] and if destroyed its position must be accurately located.[63] If not definitely identified or located it must give way to more certain methods of locating lines.[64] Of two artificial monuments, the one most likely to be accurate will be adopted,[65] and where two natural boundaries are named in the same call, one of which cannot be found, the other controls.[66] Straight lines may be run from known corners in order to locate a lost one.[67] A starting point must be rejected if in conflict with all the other calls clearly established.[68] In the absence of conflict, one call is entitled to as much respect as another and uncertainty may often be avoided by reversing the calls.[69] An ambiguity in a call may be explained by

patent included land in controversy. Loughridge v. Ball [Ky.] 118 SW 321.

60. Presentation of issues: Instruction to find for defendant generally if parties had agreed as to one line held error, where two lines were in dispute. Miles v. Eckert [Tex. Civ. App.] 120 SW 1137. Requested instructions held erroneous as ignoring a purchaser's right to recover, regardless of prior boundary agreement if he had no knowledge thereof. Louisiana & T. Lumber Co. v. Dupuy [Tex. Civ. App.] 113 SW 973. Instructions held to correctly present contentions of parties as to true location of land demanded by complaint. McNeely v. Laxton, 149 N. C. 327, 63 SE 278. Where evidence tended to show that one of legs of trestle of defendant's railroad was four inches under walls of plaintiff's building and true line between plaintiff's and defendant's lands was a party wall, jury should have been instructed that plaintiff could recover if defendant's structure encroached on plaintiff's premises. Hatcher v. Richmond & C. B. R. Co. [Va.] 63 SE 999. It was error to charge that defendant could erect its structure anywhere within lines called for by deed. Id. It conclusively appearing that plaintiff's tract had been first located, held error to submit both issue of priority of location and existence of monuments on ground sufficient to locate survey. Collins v. Clough, 222 Pa. 472, 71 A 1077. Instruction held not to mislead jury into belief that they could not find estoppel based on boundary agreement unless defendant purchased without knowledge that agreed line was not original true line. Louisiana & T. Lumber Co. v. Dupuy [Tex. Civ. App.] 113 SW 973.

Conformity to evidence: Instruction that plaintiff could not recover if road shown on plat was road intended by plaintiff's deed held not objectionable as segregating part of evidence and asking verdict on that alone. Peters v. Tilghman [Md.] 73 A 726. Charge that plaintiff's location of a road was not true location if a certain line did not cross a certain lot held erroneous, line having no given distance, and evidence not showing location of lot. Id. Failure to charge on general reputation as evidence held not ground for new trial, there being no evidence of general reputation in the case. Benton v. Allen [Ga.] 63 SE 626.

On weight of evidence: Instruction that jury should locate certain lines if possible by reference to certain fences held objectionable as on weight of evidence. Miles v. Eckert [Tex. Civ. App.] 120 SW 1137. Instruction held not to give undue influence to old fence line claimed by plaintiff as against surveyor's testimony. Brew v. Nugent, 136 Wis. 336, 117 NW 813.

61. Findings of jury fixing boundary lines held sufficiently definite. McCaleb v. Campbell [Tex. Civ. App.] 116 SW 111.

62. Lillis v. Urrutia, 9 Cal. App. 557, 99 P 992. Evidence held to show that northeast corner of a certain lot had not been properly located in a certain survey and could not, therefore, be taken as starting point from which to locate an angle to which such survey was tied. Seabrook v. Coos Bay Ice & Cold Storage Co. [Or.] 102 P 795.

63. Lillis v. Urrutia, 9 Cal. App. 557, 99 P 992. Must be established by the best available **evidence.** Brew v. Nugent, 136 Wis. 336, 117 NW 813. Evidence of construction of fence long ago and at time so near that of original survey as to render it probable original markings were then in place, and evidence of acquiescence in location of fence for 30-40 years, and that a stone existed at end of fence regarded as a landmark, held to warrant conclusion fence formed disputed boundary notwithstanding testimony of surveyor, who measured from monuments located some distance from vicinity of lost corner and supposed by him to be monuments set in original survey, supported contrary contention. Id. Where monument marking boundary line no longer exists, it is permissible to show that measurement was made to certain point when monument was in existence so that location may be ascertained. Williamson v. Gooch, 103 Me. 402, 69 A 691.

64. Under Code Civ. Proc., § 2077, giving effect to definite and ascertained particulars in disregard of indefinite, unknown, or false ones. Lillis v. Urrutia, 9 Cal. App. 557, 99 P 992.

65. Evidence held to show that street corner was properly taken as starting point in measuring width of lot, rather than old stake used in previous survey. Powell v. Allen [Cal.] 99 P 865.

66. Lance v. Rumbough, 150 N. C. 19, 63 SE 357.

67. Rule that lines may be run from established corners until they intersect, in order to determine a lost corner, cannot be applied where lines run from known corners would never intersect. Ramsey v. Morrow [Ky.] 118 SW 296.

68. Hubbard v. Whitehead [Mo.] 121 SW 69.

69. Sullivan v. Hill, 33 Ky. L. R. 962, 112 SW 564. Where, on reversing calls from beginning corner, monuments called for in

the subject-matter and the surrounding facts and circumstances,[70] but where calls are definite and clearly expressed in an instrument, they should not be extended to conform to an intention which might be discovered from other parts of the description or from extrinsic evidence.[71]

The term "true line" used in a surveyor's field notes in reference to a division line means a straight line,[72] and a conveyance by reference to the line of an adjacent tract refers usually to the true line of such tract.[73] A call for a southwest course without more means south forty-five degrees west.[74] A line apparently omitted from a description by mistake and necessary to close a survey may be supplied by the court.[75] Where the same result follows, a survey will be closed by a single straight line rather than by several lines of different courses.[76] A division line of a donation land claim established by special government survey is not necessarily the same as section or quarter section lines.[77]

The actual line of a survey when it can be shown is the highest proof of a boundary line,[78] the next highest being that of monuments and natural or permanent objects definitely located,[79] and a call for courses and distances must yield to these[80] in case of conflict,[81] provided such monuments or objects are sufficiently

deed are found, that much of survey will be located and such location will throw light on location of other lines so as to close survey. Id. Course reversed in locating county school lands. Lewright v. Travis County [Tex. Civ. App.] 118 SW 725. Reversal of calls and disregarding course as to last line held to establish true lines. Hensley v. Burt & Brabb Lumber Co. [Ky.] 116 SW 316. Calls may be reversed to ascertain a grantor's intention where it is apparent on face of deed that there is mistake as to directions in calls for course and distance. Moore v. Loggins [Tex. Civ. App.] 114 SW 183.

70. Where deed described land by line commencing on a street a certain distance from a city tract line and it appeared tract line crossed street obliquely, evidence held to show starting point was intended to be such distance at right angles from tract line and not such distance from point where tract line crossed street line. Raley v. Magendie [Tex. Civ. App.] 116 SW 174.

71. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617. Extrinsic evidence and general expressions in deed and mortgage held ineffective to override specific calls so as to extend boundaries to include all of a dwelling house. Id.

72. Lillis v. Urrutia, 9 Cal. App. 557, 99 P 992.

73. Crook County Com'rs v. Sheridan County Com'rs [Wyo.] 100 P 659. Description bounding county by reference to line of another county held to refer to true line of latter county as defined by law. Id.

74. Holden v. Alexander [S. C.] 62 SE 1108, rehearing denied [S. C.] 64 SE 400.

75. Direction, after giving three lines, to go west and south far enough to include 400 acres, it appearing south line was too short for such purpose. Tompkins v. Thomas [Tex. Civ. App.] 118 SW 581.

76. Where ascertained calls stop short of closing survey. Poitevent v. Scarborough [Tex. Civ. App.] 117 SW 443.

77. Bernheim v. Talbot [Or.] 100 P 1107.

78. Meeker v. Simmons [Cal. App.] 101 P 683. Stakes set by city surveyor are best evidence of location of lines of city lot. Ames v. Thren. 136 Ill. App. 568. Metes and bounds expressed with certainty will include the land within them. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617.

79. Meeker v. Simmons [Cal. App.] 101 P 683; Collins v. Clough, 222 Pa. 472, 71 A 1077; Ames v. Thren, 136 Ill. App. 568.

80. Metcalf v. Buck, 36 Pa. Super. Ct. 58; Page v. Whatley [Ala.] 50 S 116; Meeker v. Simmons [Cal. App.] 101 P 683; Andrews v. Wheeler [Cal. App.] 103 P 144; Barringer v. Davis [Iowa] 120 NW 65; Hensley v. Burt & Brabb Lumber Co. [Ky.] 116 SW 316; Hightower v. Borden [Ky.] 112 SW 675; Sullivan v. Hill, 33 Ky. L. R. 962, 112 SW 564; Finley v. Meadows [Ky.] 119 SW 216; Stewart v. May [Md.] 73 A 460; Green v. Horn, 128 App. Div. 686, 112 NYS 993; McNeely v. Laxton, 149 N. C. 327, 63 SE 278; Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617; Hatcher v. Richmond & C. B. R. Co. [Va.] 63 SE 999; State v. King, 64 W. Va. 546, 63 SE 468; Brew v. Nugent, 136 Wis. 336, 117 NW 813. This is as true of the grant by an individual as of official surveys. Rozelle v. Lewis, 37 Pa. Super. Ct. 563. Monuments in royal grant prevail over courses and distances. Spreckels v. Brown, 212 U. S. 208, 53 Law. Ed. —. A natural boundary governs irrespective of extent of variance from course and distance. Lance v. Rumbough, 150 N. C. 19, 63 SE 357. Survey of independent member of established block of surveys is to be located by work of surveyor on ground if traceable, i. e., by its own marks and monuments, aided, if need be, by legal presumption. Collins v. Clough, 222 Pa. 472, 71 A 1077. An existing **line of adjoining tract** may constitute a monument. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617. Line of adjoining tract is "material boundary," if, at time deed calling for it is made, line is indicated by visible marks or if it can be otherwise located

established.[82] Where the monuments and natural objects cannot be found, resort may be had to courses and distances.[83] Quantity yields to monuments, courses and distances,[84] and distances to courses,[85] but these different rules are not fixed and invariable in such sense as to control a clear intention [86] or a statutory provision.[87] The calls of a senior control those of a junior patent.[88] Field notes prevail over plats made therefrom.[89]

with reasonable certainty. Lance v. Rumbough, 150 N. C. 19, 63 SE 357. When there is a definite call in a deed or grant for an established corner or line of another tract, call will control course and distance unless grant was made with intent to convey according to an actual survey made with a view of making deed. Mitchell v. Welborn, 149 N. C. 347, 63 SE 113. As calls in surveys for trees and other objects indicating corners are conclusive with respect to such corners, so calls for adjoiners as like declarations of surveyor that such adjoining tracts had been previously located are equally conclusive of facts declared. Collins v. Clough, 222 Pa. 472, 71 A 1077. Grant of land by general description, also "**waterpower and dam** on said property," held to pass dam and flowage though part of structure was on adjoining land owned by grantor at the time. Wellman v. Blackman [Mich.] 15 Det. Leg. N. 1126, 119 NW 1102. In case of discrepancy between call of ancient patent and **marked line,** latter controls. Thurman v. Leach [Ky.] 116 SW 300. **Marks on ground** constitute survey and courses and distances are only evidence thereof. Andrews v. Wheeler [Cal. App.] 103 P 144. Where line was described to be along center of a **road** "north 30 degrees 45 minutes west" and it should have been "north 33 degrees 45 minutes west," directions to follow road controlled. Meeker v. Simmons [Cal. App.] 101 P 683. Description held sufficient to convey to a **plank road** notwithstanding mistakes in courses and distances. Green v. Horn, 128 App. Div. 686, 112 NYS 993. Calls for course and distance held inferior to call for **meanders of creek.** Moore v. Loggins [Tex. Civ. App.] 114 SW 183.

81. Presumption is that no conflict exists. Hatcher v. Richmond & C. B. R. Co. [Va.] 63 SE 999.

82. It is only in absence of original marks and monuments and total failure of evidence to supply them that recourse can be had to lines and calls of a block of surveys or the lines and calls of any junior member of the block, or any other. Collins v. Clough, 222 Pa. 472, 71 A 1077. Held competent for defendant to prove that grantor caused oak stakes to be set, indicating the corners and side lines of the lots sold to defendant and adjoining owners and the location thereof. Metcalf v. Buck, 36 Pa. Super. Ct. 58. Parol testimony is admissible to show locations of the marks and monuments on the ground which the grantor and grantee fixed as the true line. Rozelle v. Lewis, 37 Pa. Super. Ct. 563. Mere **conflict in evidence** as to identity of monuments does not preclude application of rule, it being duty of court or jury to determine whether objects in question are monuments called for. State v. King, 64 W. Va. 546, 63 SE 468. **Where only some of original marks and monuments can be found,** it is competent to show that others answering the calls did once exist, and where, and, if testimony fails to supply all, legal presumption will supply those unaccounted for. Id.

83. Andrews v. Wheeler [Cal. App.] 103 P 144; McNeely v. Laxton, 149 N. C. 327, 63 SE 278. When north and west corners of a survey are marked, southeasterly line will be located by official courses and distances in absence of monuments. Enterprise Transit Co. v. Collins, 222 Pa. 372, 71 A 540. Where exact dimensions of a lot were given and exact corners fixed, part of description declaring that west line ran through center of a dwelling house held not to prevail over part declaring that west line was parallel with east line. Lawson v. Murden, 60 Misc. 163, 112 NYS 140. Evidence held not to show monuments precluding resort to course and distance shown on map. Andrews v. Wheeler [Cal. App.] 103 P 144.

84. Quantity to **monuments.** Green v. Horn, 128 App. Div. 686, 112 NYS 993; State v. King, 64 W. Va. 546, 63 SE 468. Quantity entitled to less weight than **course and distance.** Finley v. Meadows [Ky.] 119 SW 216. Where conflict exists between calls for course and distance and call for quantity, lines in adjacent surveys tied to those in controversy can be consulted in determining true boundary. Kingsley v. Patterson [Tex. Civ. App.] 115 SW 105. Under Code Civ. Proc. § 2077, making angles paramount to surfaces, and lines paramount to both, description by mere acreage held inferior to description of adjoining lot by **distances.** Andrews v. Wheeler [Cal. App.] 103 P 144.

85. Ramsey v. Morrow [Ky.] 118 SW 296.

86. Rules provided in Code Civ. Proc. § 2077, are mere aids in determining intention of parties to conveyances and to assist in locating ground as actually surveyed. Lillis v. Urrutia, 9 Cal. App. 557, 99 P 992. All evidence should be considered by the court, object being to ascertain how survey was in fact located. Finley v. Meadows [Ky.] 119 SW 216. Deeds conveying lots divided by party walls held not to leave strip one inch wide unconveyed on theory precise measurements controlled in one deed and party wall in other. Darling v. Alexander, 130 App. Div. 85, 114 NYS 334. Rule that distances yield to courses and both to natural objects or marked monuments does not apply where it is manifest from patent as run out that proximate certainty may be accomplished by changing course instead of distance. Ramsey v. Morrow [Ky.] 118 SW 296.

87. Under Rev. St. 1895, art. 4269, authorizing departure from ordinary rules, in locating county school lands, and giving county benefit of calls most favorable to its interests, held permissible to reverse

A proper apportionment should be made in case of excess of distance or amount,[90] but an owner of a fractional division of land is entitled to any excess in acreage.[91] Where a plat shows the frontage of all the lots in a block except one, the frontage of this one will be what remains after giving to the other lots their designated frontage.[92] Mere deficiency in acreage does not authorize "proportionate measurement" under the federal rules.[93]

Highways, streets or ways as boundaries. See 11 C. L. 433—A holder of land bounded on a highway presumptively owns to the center of the highway subject to the highway easement,[94] but the grantor may restrict the conveyance so as to reserve title to the land in the highway or street,[95] and such is usually the effect of bounding the property conveyed by the exterior lines of the street or way [96] as distinguished from the street or way itself,[97] the question, however, being in its final analysis one of intent.[98] Calls for streets as monuments presumptively refer to streets as actually laid out.[99]

§ 2. *Riparian or littoral boundaries.*[1]—See 11 C. L. 433—The general rule is that

course of lines though an excess of land was given county, and a conflicting call for distance was displaced, effect being given to the only calls clearly established. Lewright v. Travis County [Tex. Civ. App.] 118 SW 725.

88. Where calls of junior warrant are for the lines of the senior warrant, survey and patent, the line of the latter controls. Updegraff v. Snyder, 36 Pa. Super. Ct. 30.

89. Lillis v. Urrutia, 9 Cal. App. 557, 99 P 992.

90. Where measurement over surface of lots showed an excess in distance over that specified on map and called for in deeds conveying according to map, excess should be apportioned between lots in proportion to their respective lengths, there being no marks showing division line between lots. Andrews v. Wheeler [Cal. App.] 103 P 144.

91. Fuelling v. Fuesse [Ind. App.] 87 NE 700.

92. Toudouze v. Keller [Tex. Civ. App.] 118 SW 185.

93. There is no provision in federal statutes relating to rules to be followed by surveyors in relocating corners or in instructions of interior department approved October 16, 1896, relating to lost or obliterated corners, for "proportionate measurement" based on deficiency in acreage of adjoining parcels of land (Somers v. McMordie [Cal.] 99 P 482), and there being no question as to loss of corners, exact boundaries as shown by government plat control regardless of further description by quantity (Id.).

94. Woolf v. Woolf, 116 NYS 104. At common law, grant of land bounded by a public highway or street passes title to center of street if grantor had title. Brown v. Oregon S. L. R. Co. [Utah] 102 P 740. Comp. Laws 1907, § 1120, providing that title passes to center of highway, is but declaratory of common law, and does not apply where recitals in conveyance of a strip of land are such as to create a private as distinguished from a public easement. Id. Where a railroad company had only an easement in land covered by its right of way and in partition land was partly **bounded by railway,** deed passed fee to center of right of way. Foster v. Foster, 81 S. C. 307, 62 SE 320. **Conveyance by state** of platted land owned by it with streets as boundaries. Purchasers acquired title to fee to center of streets same as if platting had been by an individual. Willock v. Beaver Valley R. Co. [Pa.] 72 A 237. Presumption that grantee takes to center of street does not obtain with reference to **conveyance by city** of lots abutting on streets in which it owns the fee (Webber v. Gillies, 112 NYS 397), but it is otherwise as to old city street in which fee was not in city (Id.).

95. Brown v. Oregon S. L. R. Co. [Utah] 102 P 740.

96. Schonleben v. Swain, 130 App. Div. 521, 115 NYS 23. Deed to lot lying east of an alley, describing boundaries as commencing at northwest bounds of lot on such alley and running southwesterly "on the easterly bounds of said alley," held not to convey fee to any part of alley. Rupprecht v. St. Mary's Church Soc., 131 App. Div. 564, 115 NYS 926.

97. Deed describing lines "along" certain streets held to pass fee to center of street. Woolf v. Woolf, 116 NYS 104. Deed conveying lot adjoining an avenue describing it as strip 20 feet wide and 238 feet long "more or less," and deed conveying lot described as running "westerly by said avenue," held both to pass fee to center of avenue. Pinkerton v. Randolph, 200 Mass. 24, 85 NE 892. Where public road ran parallel with **canal,** and party who owned land on both sides sold land next to canal, the call being for canal as boundary, the boundary line was the center of the canal and not the center of the public road. Scholl v. Emerich, 36 Pa. Super. Ct. 404.

98. Ocean City Hotel & Development Co. v. Sooy [N. J. Err. & App.] 73 A 236. If, at time of grant, land covered by the street is in part washed by the ocean, line of grantee's land can extend no further than middle of street as it actually exists at the time upon the ground. Id.

99. Rather that as shown on any map. Winchester v. Payne [Cal. App.] 102 P 531.

1. Search Note: See notes in 3 C. L. 521; 38 L. R. A. 850; 42 Id. 502; 51 Id. 178; 13 L. R. A. (N. S.) 551; 27 A. S. R. 56.

See, also, Boundaries, Cent. Dig. §§ 95-

a holder of lands bordering on navigable waters owns to the low-water mark,[2] and, if the water is not navigable, he has title to the center of the lake or to the thread of the stream.[3] Thus where a stream itself is referred to as the boundary or the line is described as running along the stream, the stream is the monument and its thread the boundary line,[4] but where land is expressly bounded on the bank or shore of the stream or lake, the bank or shore is the monument, and not the stream or lake, and the low-water line will usually be the boundary.[5] At common law a grant of land bordering on a coast where the tide ebbs and flows conveys title only to the line of ordinary high tide in the absence of anything to indicate an intention to extend the grant beyond that line.[6] Meander lines[7] are not usually es-

122; Dec. Dig. §§ 12-18; 5 Cyc. 891-904; 4 A. & E. Enc. L. (2ed.) 818.

2. Hobart-Lee Tie Co. v. Stone, 135 Mo. App. 438, 117 SW 604. Conveyance of upland with right of extension to low-water mark includes land between high and low-water mark. Spreckels v. Brown, 212 U. S. 208, 53 Law. Ed. —.

3. Center of stream. Hartz v. Detroit P. & N. R. Co., 153 Mich. 337, 15 Det. Leg. N. 495, 116 NW 1084. To center of non-navigable lake. Little v. Williams [Ark.] 113 SW 340. State and its grantees held to have taken to center of non-navigable lake by virtue of riparian rights and patent from general government, though federal survey had erroneously included swamp land within meander line of lake as lake bed. Id. Title of owner on non-navigable stream goes to thread of stream or across stream if his estate extends beyond stream. Home for Aged Women v. Com., 202 Mass. 422, 89 NE 124. Common-law rule giving title to middle of non-navigable stream is rule adopted by Civ. Code, § 830. Drake v. Russian River Land Co. [Cal. App.] 103 P 167. Deeds held to give title to middle of stream, and "border" held synonymous with "boundary." Id. Grantee held to take to center of stream notwithstanding survey by prior owner by driving stakes along top of bank of stream. Id.

4. Drake v. Russian River Land Co. [Cal. App.] 103 P 167.

5. Non-navigable stream. Drake v. Russian River Land Co. [Cal. App.] 103 P 167. A grant of land to a point on a lake and thence along its shore line does not carry title to the middle of the lake or stream. City of Geneva v. Henson, 195 N. Y. 447, 88 NE 1104. Grant in connection therewith of docks, buildings and privileges of grantor or appertaining to premises, did not include title to bed of lake. Id. Deed calling for corner in edge of small lake, thence along edge of same, did not include any part of lake. Fuller v. Cole, 33 Pa. Super. Ct. 563.

6. De Meritt v. Robison Land Com'r [Tex.] 116 SW 796. Line to which flow of water reaches at ordinary or neap-tide, unaffected by wind or wave, is boundary line of land bordering on ocean. Eichelberger v. Mills Land & Water Co., 9 Cal. App. 628, 100 P 117.

7. **NOTE. Meander line on boundary:** In Little v. Williams [Ark.] 113 SW 340, where the government surveyor had by mistake meandered a large tract of swamp land lying between defendants' land and the lake, containing 1,000 to 1,200 acres, thinking it to be a part of the lake, and, as a result, the meander line was in some places over a mile from the true bank of the lake, it was held that the bank of the lake, and not the meander line, was the boundary, and consequently riparian owner had title to the intervening swamp land, good as against anyone but the United States.

It appears to be settled in Arkansas that the title of adjoining landowners extends to the center of a non-navigable lake by virtue of their riparian rights. Rhodes v. Cissell, 82 Ark. 367, 101 SW 758. As a general rule, meander lines in government grants are not boundaries, the watercourse itself being the boundary. Railroad v. Schurmeier, 7 Wall. [U. S.] 272, 19 Law. Ed. 74; Hardin v. Jordan, 140 U. S. 371, 35 Law. Ed. 428; Heald v. Yumisko, 7 N. D. 422, 75 NW 806; Chesbrough v. Head, 23 Ohio Cir. Ct. R. 427; Johnson v. Tomlinson, 41 Or. 198, 68 P 406; Hendricks v. Feather River Canal Co., 138 Cal. 423, 71 P 496; Johnson v. Hurst, 10 Idaho, 308, 77 P 784; Schulte v. Warren, 218 Ill. 108, 75 NE 783; Sizor v. Logansport, 151 Ind. 626, 50 NE 377, 44 L. R. A. 814; Berry v. Hoogendoorn, 133 Iowa, 437, 108 NW 923, 8 L. R. A. (N. S.) 1130; Sherwin v. Bitzer, 97 Minn. 252, 106 NW 1046; Provins v. Lovi, 6 Okl. 94, 50 P 81; Johnson v. Brown, 33 Wash. 588, 74 P 677. But an exception to this rule has been recognized where the surveys and grants clearly show that the meander line was intended to be the boundary, or where, by reason of fraud or mistake in making the survey, the meander line does not in fact outline or approach a body of water proper to be meandered. Niles v. Cedar Point Club, 175 U. S. 300, 44 Law. Ed. 171; Tolleston Club of Chicago v. Lindgren, 39 Ind. App. 448, 77 NE 818; Schlosser v. Hemphill, 118 Iowa, 452, 90 NW 842; Security Land & Exploration Co. v. Burns, 87 Minn. 97, 91 NW 304, 63 L. R. A. 157, 94 Am. St. Rep. 684; French Glenn Live Stock v. Springer, 35 Or. 312, 58 P 102; on appeal to the U. S. Supreme Court, 185 U. S. 47, 46 Law. Ed. 800; Whitney v. Detroit Lumber Co., 78 Wis. 240, 47 NW 425; Fuller v. Shedd, 161 Ill. 462, 44 NE 286, 52 Am. St. Rep. 380; Fulton v. Frandolig, 63 Tex. 330; Bissel v. Fletcher, 19 Neb. 725, 28 NW 303; James v. Howell, 41 Ohio St. 696; Shoemaker v. Hatch, 13 Nev. 261; Martin v. Carlin, 19 Wis. 477; Granger v. Swart, 1 Woolw. 88, Fed. Cas. No. 5,685; Barnhart v. Ehrhart, 33 Or. 274, 54 P 195. In many of the more recent cases announcing this exception, the situation was such that the side lines of the frac-

tablished as boundaries by the government,[8] but in the absence of fraud or mistake,[9] when payment for the acreage based on the meander line has been made, the purchaser's title exists to the water's edge though small unmeasured tracts lie outside the meander line.[10] Where land is bounded on or by a nontidal stream, the presumption is that the title extends to the center of the stream,[11] and this presumption obtains even against the state, where a consideration supports the conveyance and no intention to except the bed is shown;[12] but, as a general rule, governmental grants of public lands having meandered shore lines give title only to the line of ordinary high water.[13]

Aside from the question of boundaries, the rights of riparian and littoral owners are treated in another topic.[14]

§ 3. *Establishment by agreement of adjoiners.*[15]—See 11 C. L. 434—Agreements settling boundary disputes are usually binding on the parties[16] agreeing thereto,[17]

tional sections in question would not, if extended beyond the meander line, encounter the banks of the body of water meandered. In others there was no body of water proper to be meandered in the vicinity, so that a water frontage could not be secured. In view of the extent of the tract of land lying between the meander line and the lake, the decision in the principal case represents an extreme application of the general rule, but resulted in giving to the owners of the land bordering on the meander line a frontage upon the lake, in accordance with the survey.—From 7 Mich. Law Rev. 429.

8. Simply as basis from which to measure approximate acreage for which government will demand payment. Barringer v. Davis [Iowa] 120 NW 65.

9. Where no lake or stream calling for expedient of meander line exists, or where such line is placed so far from shore as to leave excess of unsurveyed land so great as clearly to indicate fraud or mistake, meander line will be treated as boundary. Barringer v. Davis [Iowa] 120 NW 65.

10. Barringer v. Davis [Iowa] 120 NW 65. When lots are conveyed with reference to original survey showing north and south lines of section as ending at meander posts on shore of a lake, and showing meander line between them as coinciding with shore marked as being east boundary of lots, shore, and not meander line as actually run on land, is boundary. Barringer v. Davis [Iowa] 120 NW 65.

11, 12. Fulton L., H. & P. Co. v. State, 62 Misc. 189, 116 NYS 1000. Grant by state of land on nontidal stream carries title to center of stream in absence of express or implied reservation. Id. Existence of implied reservation is determinable by language of grant read in light of presumption favoring extension to center of stream. Id. Description in grant by state beginning at sapling on shore of Oswego River, running back to river, then up and along same to place of beginning, held to carry title to center of river. Id.

13. United States v. Ashton, 170 F 509. Executive order of President Pierce in 1857, setting apart lands on Commencement Bay in Oregon Territory as Indian reservation, did not grant any right or title to shore lands, which could be done only by congress for some national purpose. Id. In any event, under treaty of Dec. 26, 1854, 10 Stat. 1132, vesting in president power to relocate reservation, subsequent conveyance of lands therein in severalty in accordance with survey under Act May 29, 1872, c. 233, 17 Stat. 186, in which lands allotted extended only to line of ordinary high water, in effect extinguished any existing rights of Indians, as a community, to tide lands. Id.

14. See Riparian Owners. See, also, Navigable Waters.

15. Search Note: See notes in 11 C. L. 435; 10 L. R. A. (N. S.) 610.

See, also, Boundaries, Cent. Dig. §§ 212-226; 249-251; Dec. Dig. § 46; 5 Cyc. 930-936, 944; 4 A. & E. Enc. L. (2ed.) 859.

16. Where agreement is binding on parties, there is a bona fide dispute as to line, and the parties mark boundary and take possession accordingly. Warden v. Addington [Ky.] 115 SW 241; Foard v. McAnnelly, 215 Mo. 371, 114 SW 990. Where a grant referred to neither natural nor artificial boundaries, it was competent for parties to agree upon monuments as marking dividing line (Seberg v. Iowa Trust & Sav. Bank [Iowa] 119 NW 378), and, where such agreement was followed by vendee taking possession and making improvements, it was conclusive on parties and powers (Id.), especially where vendor pointed out line and change would result in great injury to grantee (Id.).

17. A party interested in a division line cannot settle its location by private survey without the consent of the other party interested. Crook County Com'rs v. Sheridan County Com'rs [Wyo.] 100 P 659. Where owners being ignorant as to true division line had property surveyed, but did not agree that line run by surveyor should control, neither was bound thereby. Foard v. McAnnelly, 215 Mo. 371, 114 SW 990. **Wife not bound by husband's act** in signing of agreement to abide by survey to be made, where wife did not authorize but repudiated such survey. Marshall v. Benetti [Iowa] 118 NW 918.

Evidence held not to show agreement fixing boundary. Bell v. Redd [Ga.] 65 SE 90. Evidence held to show agreement on boundary and recognition thereof for 20 years. Abrams v. Wild [Ky.] 120 SW 357. Evidence held to show such dispute as to render valid parol agreement establishing

and upon persons charged with notice,[18] and in favor of purchasers relying thereon.[19] A settlement prior to conveyance, however, is merged in a deed subsequently executed, and the deed controls in case of a variance.[20] Such agreements, may be verbal,[21] but it is held that in such case they must be acted upon to avoid the statute of frauds.[22]

§ 4. *Establishment by acquiescence, estoppel or adverse possession.*[23]—See 11 C. L. 435—Except as regards the establishment of boundaries adverse possession is treated in another topic.[24]

Acquiescence in a line is evidence that it is the true line,[25] and such acquiescence may result in the establishment of the line [26] as by agreement [27] or by way of estoppel.[28] A boundary may also be settled by estoppel growing out of other acts of the parties,[29] or by practical location,[30] or by adverse possession,[31] but in

boundary. Wells v. Bentley [Ark.] 113 SW 639. Whether plaintiff's deceased husband agreed to and established certain line as a division line of plaintiff's and defendant's property held for jury. Green v. Green, 36 Pa. Super. Ct. 25.

18. Parol agreement when executed either by a marked line or by adverse possession is notice to all the world. Warden v. Addington [Ky.] 115 SW 241. Executed agreement altering boundary line held to bind privy of party yielding up part of land covered by his deed though he had no actual knowledge thereof. Id. **Purchaser** without knowledge of previous boundary agreement held not precluded from claiming to true line. Louisiana & T. Lumber Co. v. Dupuy [Tex. Civ. App.] 113 SW 973. Burden on defendant to show plaintiff had knowledge of agreement when he bought. Id. Boundary line fixed by agreement and undisputed occupancy for longer than period of limitations will be considered true boundary as against purchaser from one of parties to agreement. Cullen v. Ksiaszkiewicz, 154 Mich. 627, 15 Det. Leg. N. 844, 118 NW 496.

19. Agreement estops agreeing parties against purchasers in good faith relying on agreement. Louisiana & T. Lumber Co. v. Dupuy [Tex. Civ. App.] 113 SW 973. If one purchases property on faith of agreement of abutting owners fixing boundary, his knowledge agreed line is not true original line will not prevent his holding to such line. Id.

20. Holden v. Alexander [S. C.] 62 SE 1108, rehearing denied [S. C.] 64 SE 400.

21. Adjoining owners may by parol agree on division line, though such line may differ from that called for by their deeds. Hocker v. Keeton [Ky.] 115 SW 784. Where parties recognize line agreed on for 15 years, each will have title to it and it will be dividing line between their land. Id.

22. Oral agreement must be followed by occupancy and acquiescence. Hooper v. Herald, 154 Mich. 529, 15 Det. Leg. N. 814, 118 NW 3. Must be acted on and followed by improvement, expenditure of money, or circumstances rendering it inequitable for parties to repudiate it, there being no consideration besides such mutual agreement. Fuelling v. Fuesse [Ind. App.] 87 NE 700. Parol agreements, settling boundary, enforcible, where there is bona fide dispute and agreement is executed. Warden v. Addington [Ky.] 115 SW 241.

Evidence sufficient to show agreement as to division line and taking possession accordingly. Hocker v. Keeton [Ky.] 115 SW 784. Evidence insufficient to show improvements. Fuelling v. Fuesse [Ind. App.] 87 NE 700.

Note: As to whether agreements settling boundary disputes are within statute of frauds, see 11 C. L. 434, note 83.

23. Search Note: See notes in 5 C. L. 433; 3 L. R. A. (N. S.) 805; 7 Id. 243; 24 A. S. R. 388; 110 Id. 677.

See, also, Adverse Possession, Cent. Dig. §§ 365-386; Dec. Dig. §§ 65-67; 1 Cyc. 1024-1038; Boundaries, Cent. Dig. §§ 227-248; Dec. Dig. §§ 47-49; 5 Cyc. 936-943; 4 A. & E. Enc. L. (2ed.) 860.

24. See Adverse Possession.

25. Hanstein v. Ferrall, 149 N. C. 240, 62 SE 1070.

26. Defendant's case held strengthened by 30 years' acquiescence in occupation to a certain line. First Baptist Soc. v. Wetherell [R. I.] 72 A 641. Building fence along agreed line and holding possession by parties according thereto for many years held to establish boundary. Nelson v. Alford [Ky.] 117 SW 250. Fence fixed and determined by original owners and recognized and acquiesced in for 30 years held conclusive. Roberts v. Blount [Tex. Civ. App.] 120 SW 933. Government survey made under act of congress for purpose of dividing donation land claim between husband and wife, and acquiesced in for long time, held conclusive as to location of division line and not changed by location of quarter-section line. Bernheim v. Talbot [Or.] 100 P 1107.

27. Acquiescence must be in nature of an agreement, evidenced by acts done on land tending to prove agreement on definite lines and corners. State v. King, 64 W. Va. 546, 63 SE 468. Agreement on boundary inferable from long acquiescence in fence does not arise from duty to fence or otherwise mark division line, though adding strength thereto, but from fact that owners have definitely defined the line by erecting fence or other monument thereon, and both have treated it as boundary for so long that neither should deny what his conduct has declared. Chicago, etc., R. Co. v. Hanken [Iowa] 118 NW 527.

28. Acquiescence for 20 years may estop parties. Curless v. State [Ind.] 87 NE 129.

29. Conduct fixing boundary lines may estop. Curless v. State [Ind.] 87 NE 129. Act of plaintiff's ancestor in **pointing out**

the last case the possessor's claim must be absolute and in disregard of where the

boundary to purchaser of his land in hearing of third person held not to estop him as against such third person who purchased part of tract several years later, representations not having been made to the third person and latter not having relied thereon in purchasing. Gaffney v. Clark [Tex. Civ. App.] 115 SW 330. Plaintiff in action of trespass, quare clausum fregit, held not estopped to show true line by fact that he had pointed out to a surveyor a certain point as being corner of tract involved. Henning v. Keiper, 37 Pa. Super. Ct. 488. **To estop landowner by statements that he** would set back his fence, as against **a** purchaser, it must clearly appear statement was relied on by purchaser. Warden v. Addington [Ky.] 115 SW 241. Evidence insufficient. Id. **Signing agreement to abide by survey** to be made by township trustees held not to operate as estoppel in favor of adjoining owner who had built fence before survey was made. Marshall v. Benetti [Iowa] 118 NW 918. One claiming in disregard of **previous agreement** to be bound by a survey held not estopped as against subsequent grantee who knew of claim and who did not rely on claimant's failure to give notice of repudiation of survey, Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857. Where parties without litigation settle that a wall is a party wall, it is presumed wall is true division line between the lands (Capital City Inv. Co. v. Burnham [Iowa] 121 NW 708), and, when they settle the matter by litigation, the same, if not a conclusive, presumption arises (Id.). Evidence insufficient to overcome presumption a party wall was true line, considering prior litigation and conduct of parties. Id. Grantor's privy held estopped to dispute bay boundary shown on **map with reference to which deed was made.** Inter-City Realty Co. v. Newman, 128 App. Div. 195, 112 NYS 481. **Building of fence** and possession with reference thereto because of mistake as to true line and without agreement fence should constitute boundary held insufficient to constitute estoppel. Foard v. McAnnelly, 215 Mo. 371, 114 SW 990. That county did nothing to cause removal of fence existing before highway was established, and that plaintiff had planted trees along fence, held not acquiescence or estoppel on part of county. Quinn v. Monona County [Iowa] 117 NW 1100. Where owner was not willing that a fence be built on alleged boundary line, fact that it was built did not estop him. Fuelling v. Fuesse [Ind. App.] 87 NE 700. Representations as to locations of boundary lines, consisting of reports of **surveys and maps filed in judicial proceedings,** do not estop subsequent purchasers of the land on theory of acquiescence or otherwise in favor of persons who were not parties to such proceedings, though they may have purchased lands on faith of such representations. State v. Kings, 64 W. Va. 546, 63 SE 468.

30. Lance v. Rumbough, 150 N. C. 19, 63 SE 357. Practical location controls lines and courses stated in deed. Id. Practical location controls regardless of subsequent measurements. Dundas v. Lankershim School Dist. [Cal.] 102 P 925. Rule that, where a line is actually run and marked by a surveyor and a corner made, a person claiming under a patent or deed may hold according to the line and corner, notwithstanding a mistaken description of land in patent or deed, presupposes patent or deed to have been made in pursuance of survey and that line and corner were acted upon in making deed or patent, and is not applicable where it did not appear that patent was made pursuant to what surveyor testified was done by him. Caldwell Land & Lumber Co. v. Erwin, 150 N. C. 41, 63 SE 356.

As against state: Doctrine of practical location may be resorted to where exact location of line bounding state property as shown on map has not been established and other maps are at variance with such line. Fulton L., H. & P. Co. v. State, 62 Misc. 189, 116 NYS 1000.

What constitutes practical location: Mutual act of parties is essential to practical location. Crook County Com'rs v. Sheridan County Com'rs [Wyo.] 100 P 659. Where corners and lines are located by a survey actually made for the purpose of conveying the land and describing its boundaries in the deed therefor, the survey is a practical location. Lance v. Rumbough, 150 N. C. 19, 63 SE 357. Where building intended to mark street line had stood where placed for 30 years and street had been improved with reference thereto, there was practical location of line sufficient to prevail against unreliable survey. Seberg v. Iowa Trust & Sav. Bank [Iowa] 119 NW 378. Points and lines actually located and marked on the ground control regardless of accuracy of locations as they may appear by subsequent measurements. Dundas v. Lankershim School Dist. [Cal.] 102 P 925. Marking of lines and points, defendant's possession with reference thereto, and acquiescence by all parties in interest for much longer than prescriptive period, held to establish defendant's ownership. Id. Where vendee's agent insisted that east end of lot should extend further east than stake set by vendor, and deed subsequently drawn conformed to such contention, description in deed controlled, and not the stake. Bell v. Redd [Ga.] 65 SE 90.

31. Adverse possession by grantee up to line run in partition between him and cograntee held to give his successors complete title to line. Hayward Lumber Co. v. Bonner [Tex. Civ. App.] 120 SW 577. Open adverse possession by parties under claim to line of old survey for more than statutory period for adverse possession held to establish boundary, regardless of actual location of line between lot as platted, and though parties held under deeds conveying lots by number. Weingarten v. Shurtleff, 51 Wash. 602, 99 P 739. Defendant's possession and acquiescence by all parties in interest for longer than statutory period held to give defendant title, lines and points having been actually marked on premises by parties to early conveyance. Dundas v. Lankershim School Dist. [Cal.] 102 P 925. Possession by parties up to old fence for over 20 years held to give title

true line may be.[32] Acts of prior owners are not available to estop a claimant in the absence of privity of estate.[33] The burden of proof is upon the party asserting the establishment of a boundary by acquiescence[34] or adverse possession,[35] the question as to whether such burden has been sustained in a particular case, being referable, of course, to the evidence adduced therein.[36] A commandant of a military reservation may fix the line of his occupancy anywhere within the legal limits of the reservation as against private persons having no rights dependent on the accuracy of the boundary.[37]

§ 5. *Establishment by arbitration, action or statutory mode.*[38] See 11 C. L. 436 Boundaries may be adjudicated in ordinary actions involving land titles[39] or in special statutory proceedings.[40] In the latter case the statute must be looked to for the rights of the parties[41] and the procedure, both original[42] and appellate.[43]

claimed by defendant up to such old fence. Ebel v. Hulce, 154 Mich. 230, 15 Det. Leg. N. 734, 117 NW 625. Subsequent surveys or declarations held not to divest him of such title. Id. Under Civ. Code 1895, § 3248, requiring processioners in proceedings to establish boundaries to respect a party's adverse possession for seven years, held error to charge they could not interfere with line up to which defendant had had adverse possession for seven years, "if that is the true line." Williams v. Giddens [Ga.] 64 SE 64.

32. Possession to fence without intention to claim beyond true boundary, but in belief such fence marked such boundary, held insufficient. Webster v. Shrine Temple Co. [Iowa] 117 NW 665. Possession to a line merely under mistake as to true line and without intention to claim beyond true line when discovered is not adverse. Foard v. McAnnelly, 215 Mo. 371, 114 SW 990. Possession held to be to a particular line and not to true boundary wherever it might be. Wells v. Bentley [Ark.] 113 SW 639.

33. Where after boundary agreement land of one of the parties was forfeited to state, but owner reacquired title from state's grantee, there was no privity of estate between his holdings so as to estop him by the agreement. Runkle v. Smith [Tex. Civ. App.] 114 SW 865.

34. Lizer v. Clubine [Iowa] 118 NW 409.

35. Webster v. Shrine Temple Co. [Iowa] 117 NW 665. Where plaintiffs establish government survey line, burden of proof of showing that line 20 rods east had been acquiesced in so long as to establish adverse possession rests on defendants. Instructions disapproved. Keller v. Harrison, 139 Iowa, 383, 116 NW 327.

36. Evidence insufficient to establish old fence as boundary by acquiescence or adverse possession so that purchase of ten-foot strip by defendant west of his lot line was placed ten feet west of such fence. Lizer v. Clubine [Iowa] 118 NW 409. Evidence held to show a fence was agreed upon as a mere tentative line and that parties had not acquiesced in same as true boundary for ten years. Webster v. Shrine Temple Co. [Iowa] 117 NW 665. Evidence insufficient to show acquiescence by plaintiff in boundary asserted by defendant. Marshall v. Benetti [Iowa] 118 NW 918. When defendant asserted adverse possession, the question of his **good faith** in making survey as county surveyor held properly submitted to jury under evidence. Keller v. Harrison, 139 Iowa, 383, 116 NW 327.

37. Rudolph Herman Co. v. San Francisco, 154 Cal. 688, 99 P 169.

38. Search Note: See notes in 22 A. S. R. 34; 119 Id. 66; 3 Ann. Cas. 1064; 4 Id. 343; 11 Id. 1127.

See, also, Boundaries, Cent. Dig. §§ 138-211, 252-282; Dec. Dig. §§ 26-45, 50-56; 5 Cyc. 944-967, 969-974; 4 A. & E. Enc. L. (2ed.) 838, 842, 847; 3 A. & E. Enc. P. & P. 672.

39. In trespass to try title, defendant, after pleading not guilty, could seek affirmative relief by having boundary established. Gaffney v. Clark [Tex. Civ. App.] 118 SW 606. Where defendant admitted plaintiff owned up to a line but pleaded estoppel and sought to have boundary established, he was bound by his admission where he failed to prove estoppel, though plaintiff failed to prove title and, hence, could not have boundary established in accordance with his contention. Id.

40. Boundary held uncertain within B. & C. Comp. § 4907, providing for establishment of boundaries by county surveyor on notice, it appearing that after survey persons appointed by parties to resurvey could not agree on line. Clark v. Boosey [Or.] 97 P 754. Previous location of a stake by surveyor held not to render line certain, there being dispute whether stake was at corner of defendant's land. Id.

41. Under Civ. Code, § 3248, where actual possession has been held under claim of right for more than seven years, such claim must be respected by the processioners, and the lines so marked as not to interfere with such possession, regardless of whether the line claimed by the adverse party is the true line. Williams v. Giddens [Ga.] 64 SE 64.

42. Where it appeared from an application for processioning that the applicants and other persons, not named in the application, were tenants in common of the land around which it was sought to have lines surveyed and marked anew, it was error to overrule a motion of a protestant to dismiss the application on the ground that the other tenants in common were not **parties** thereto. Carmichael v. Jordan, 131 Ga. 514, 62 SE 810. Where a plat is made under the supervision of processioners in

A statute authorizing the establishing of boundaries by survey on notice does not, however, preclude the establishment of a boundary by other evidence in the absence of such survey.[44] Equity will not determine a boundary dispute if the defendant is in possession and ejectment may be resorted to,[45] but the jurisdiction of equity is not ousted by the mere existence of such a dispute, where there is some independent ground of equity jurisdiction.[46]

BOUNTIES.[47]

Boycott; Brands, see latest topical index.

BREACH OF MARRIAGE PROMISE.[48]

The scope of this topic is noted below.[49]

Right of action. See 11 C. L. 437—A promise contingent on one of the parties securing a divorce is void,[50] but a statute invalidating marriage contracts within a specified time after a divorce applies only to contracts to be performed within such time.[51] Where plaintiff's capacity to marry depends on a divorce, defendant may show want of jurisdiction to grant it.[52] A person is not liable for breach of an agreement to marry one afflicted with syphilis, unless it was made with knowledge of such condition.[53] The right of action does not accrue until the promisor is in default,[54] but where no time is fixed failure to marry within a reasonable time is a default.[55] That the promisor was murdered by plaintiff's father because of the breach of promise is no defense to a suit against his heirs.[56]

running land lines, no protest being filed or trial had thereon, such plat is only prima facie **evidence** of correctness of the lines appearing thereon. McGraw v. Crosby, 129 Ga. 780, 59 SE 898. Where evidence of applicant for establishment of boundary did not require finding that processioners had run a line where no boundary line had been previously located and established, court did not err in overruling motion to dismiss on ground that processioners had run and marked a new line. Id.

43. Under Act Dec. 17, 1901 (Acts 1901, p. 39), amending § 3249, Civ. Code of 1895, any owner of adjoining land dissatisfied with lines as run by processioners and surveyor must file his protest thereto with the "ordinary" within 30 days. Moore v. Hood, 131 Ga. 479, 62 SE 586. Filing with clerk of superior court held insufficient. Id. Immaterial ordinary told protestant to file protest with clerk if ordinary should be busy. Id.

44. Survey by county surveyor, not under c. 25, Gen. St. 1901, held admissible, no other survey having been made. Bain v. Peyton [Kan.] 102 P 251.

45. Cullen v. Ksiaszkiewicz, 154 Mich. 627, 15 Det. Leg. N. 844, 118 NW 496.

46. Vendor of part of lot could sue to restrain purchaser's removal of fence erected on true division line by vendor. Cullen v. Ksiaszkiewicz, 154 Mich. 627, 15 Det. Leg. N. 844, 118 NW 496.

47. No cases have been found for this subject since the last article. See 11 C. L. 437. This topic excludes military bounties (see Military and Naval Law *) and bounty lands (see Public Lands *).

Search Note: See notes in 3 C. L. 525; 42 L. R. A. 63.

See, also, Bounties, Cent. Dig.; Dec. Dig.; 5 Cyc. 976-994; 4 A. & E. Enc. L. (2ed.) 869.

48. Search Note: See notes in 3 C. L. 525, 526; 5 Id. 436; 11 Id. 437, 438; 15 L. R. A. 531; 26 Id. 430; 59 Id. 954; 7 L. R. A. (N. S.) 582; 14 Id. 748; 40 A. S. R. 172; 44 Id. 381; 5 Ann. Cas. 107; 8 Id. 917.

See, also, Breach of Marriage Promise, Cent. Dig.; Dec. Dig.; 5 Cyc. 997-1022; 4 A. & E. Enc. L. (2ed.) 882; 3 A. & E. Enc. P. & P. 683.

49. Seduction under promise of marriage is excluded (see Seduction *).

50. Williams v. Igel, 62 Misc. 354, 116 NYS 778.

51. An agreement to marry, entered into within such six months but to be consummated after the expiration of the six months, is valid. Harpold v. Doyle [Idaho] 102 P 158. Such agreement not invalidated by Rev. Codes, § 2617. Id.

52. Held that plaintiff, who had obtained divorce without personal service and without appearance of plaintiff's husband, was in the eyes of the law and the law of the state of New York still the wife of another and hence marriage promise was void. Williams v. Igel, 62 Misc. 354, 116 NYS 778.

53. Instructions concerning the rights of the parties under such circumstances held proper. Beans v. Denny [Iowa] 117 NW 1091.

54. No formal putting in default is necessary where the obligor denies the existence of the marriage contract and declares his intentions not to perform it. Johnson v. Levy, 122 La. 118, 47 S 422.

55. Pleadings held to present question of the defendant's failure to perform within a reasonable time. Hill v. Houser [Tex. Civ. App.] 115 SW 112.

56. Johnson v. Levy, 122 La. 118, 47 S 422.

* Always begin with the latest article on the subject. Use the latest topical index.

Form of action and pleading.[See 11 C. L. 438]—The action is ex contractu, though it partakes of some of the characteristics of an action ex delicto.[57] The complaint must show the agreement and breach thereof.[58]

Evidence and instructions.[See 11 C. L. 439]—A promise of marriage may be established either by express proof of the agreement[59] or by proof of circumstances from which it may be reasonably inferred.[60] Letters written by plaintiff to defendant are admissible if their contents are relevant.[61] Testimony of plaintiff regarding the forcible violation of her person by defendant is admissible as part of the history of the case,[62] but proof of such is not admissible as corroborative evidence of a promise of marriage,[63] although proof of seduction is admissible as corroborative of the woman's claim that a promise of marriage has been made.[64] Plaintiff's testimony as to seduction need not be corroborated.[65] A contract between the parties, though void because of public policy, is admissible as bearing on the credibility of their testimony,[66] and receipts for money paid to plaintiff by defendant are admissible if tending to show an admission on the defendant's part that he had illicit relations with plaintiff.[67]

The instructions are to be read together[68] and should not be uncertain in meaning,[69] nor should they ignore a defense,[70] nor be reasonably susceptible of a twofold construction.[71] Instruction submitting an issue as to an implied contract of marriage is proper, where the petition does not state that the contract sued on was an express contract.[72]

Damages; aggravation and mitigation.[See 11 C. L. 439]—Seduction[73] and pregnancy may be shown in aggravation of damages,[74] but its weight is for the jury.[75]

57. Sperry v. Cook [Mo. App.] 120 SW 654.

58. Complaint alleging that, "in consideration that plaintiff, who was then sole and unmarried, at request of defendant, would marry him on request, defendant promised the plaintiff to marry plaintiff on request" and plaintiff had repeatedly requested and demanded that defendant marry her, and that defendant had neglected, failed, and refused, and does still neglect, fail and refuse, so to do, sufficiently states mutuality of contract and a breach thereof. Hughes v. Walter, 63 Misc. 199, 116 NYS 1.

59, 60, 61. Hill v. Houser [Tex. Civ. App.] 115 SW 112.

62. Lauer v. Banning [Iowa] 118 NW 446.

63. Court should have distinguished between seduction and rape. Lauer v. Banning [Iowa] 118 NW 446.

64. Lauer v. Banning [Iowa] 118 NW 446; Beans v. Denny [Iowa] 117 NW 1091.

65. Beans v. Denny [Iowa] 117 NW 1091.

66. Where at the time plaintiff, who was defendant's housekeeper, alleged the contract of marriage was entered into, a contract was made between the parties at that time to the effect that in consideration of the employment of plaintiff by defendant and in consideration of wages, etc., plaintiff waived all claim for damages growing out of any tort or legal action whatsoever, such contract was admissible as bearing upon the truthfulness of plaintiff's testimony and upon her character. Lauer v. Banning [Iowa] 118 NW 446.

67. Lauer v. Banning [Iowa] 118 NW 446.

68. Where the court expressly directed the jury not to allow damages because of illicit relations between the parties, an instruction allowing the jury to consider in measuring the damages, the intimacy of the parties and defendant's conduct toward plaintiff, was not erroneous as permitting the consideration of the illicit intercourse. Beans v. Denny [Iowa] 117 NW 1091.

69. Instructions, that "if there be a breach of promise to marry, the woman loses the husband not as he might have been, but as he should be, under the circumstances proved," should not have been given. Lauer v. Banning [Iowa] 118 NW 446.

70. Where there was evidence in support of the defense that plaintiff had a venereal disease, was unchaste, etc., instruction that if there was an agreement to marry and that there had been a breach by defendant and plaintiff had been damaged, the amount should be determined was erroneous as ignoring the defense. Lauer v. Banning [Iowa] 118 NW 446.

71. Where instruction left it open to the jury to find an agreement of marriage from plaintiff's own self-serving declarations, it was erroneous. Lauer v. Banning [Iowa] 118 NW 446.

72. Where petition alleged that plaintiff accepted defendant's proposal of marriage and that they then and there agreed and promised to marry each other, but did not allege that, in express words, they agreed and promised to marry, instructions submitting issue as to implied contract were proper. Hill v. Houser [Tex. Civ. App.] 115 SW 112.

73. Seduction may be shown in aggravation of damages, but where plaintiff has been awarded damages for seduction under a former promise of marriage, such fact is an element to consider in fixing her damages. Harrison v. Carlson [Colo.] 101 P 76.

74. Johnson v. Levy, 122 La. 118, 47 S 422.

The jury in awarding damages may consider the pecuniary advantage to the plaintiff of the marriage, the money value or worldly advantages that the marriage would have given her, the advantage of such a domestic establishment as would be suitable to her as the wife of a person of the defendant's estate and station in life,[76] and may consider the wealth of the defendant.[77] Ill temper and hatred may be shown in mitigation of damages.[78] Compensatory damages may be recovered against the heirs of a decedent for his breach of promise of marriage,[79] but exemplary damages are not allowable in such a case.[80] The damages must be proportionate to the injury sustained.[81]

Breach of the Peace, see latest topical index.

BRIBERY.[82]

The scope of this topic is noted below.[83]

Though it must appear that one indicted for receiving a bribe as officer was such, proof that he performed the duties of the office raises a presumption that he was an officer de jure,[84] and a de facto officer may be guilty of receiving a bribe.[85] While the question whether one is an officer de jure is ordinarily for the court, defendant may elect to have it submitted to the jury.[86] The "lawful duty" with respect to which it is unlawful to bribe federal officers is not confined to duties imposed by statute.[87] The elements of the offense including the official character of the person bribed and the corrupt intent should be specifically alleged.[88]

75. Instruction which practically charged the jury that they must consider the fact of seduction was erroneous. Harrison v. Carlson [Colo.] 101 P 76.

76. McKenzie v. Gray [Iowa] 120 NW 71.

77. McKenzie v. Gray [Iowa] 120 NW 71. Instruction submitting the measure of damages as stated in the text held not open to the objection that it permitted jury to consider the dower interest that the plaintiff might possibly have had as the widow of defendant. Id. Where witness had been acquainted with defendant for 46 years, during all but 4 years of which time he had resided in same county, and defendant was well known in such county, he was competent witness. Beans v. Denny [Iowa] 117 NW 1091. Witness may testify as to reputed wealth of defendant in a place where he has resided temporarily for four years. Id.

78. Where defendant pleaded ill temper and hatred in mitigation of damages, in the absence of a request, it was no error to omit in the instruction a specific reference thereto. Beans v. Denny [Iowa] 117 NW 1091.

79. Where the obligor has been put in default as provided by law. Johnson v. Levy, 122 La. 118, 47 S 422.

80. Johnson v. Levy, 122 La. 118, 47 S 422.

81. Verdict of $20,000, in favor of plaintiff against the heirs of the other party to the marriage agreement, held to be excessive under the facts and circumstances of the case. Ten thousand dollars held sufficient. Johnson v. Levy, 122 La. 118, 47 S 422. Where the evidence showed a continuous engagement extending over a period of 13 years and that defendant's wealth was between $75,000 and $90,000, a verdict for $8,500 was not excessive. McKenzie v. Gray [Iowa] 120 NW 71.

82. **Search Note:** See notes in 14 L. R. A. 62; 15 Id. 501; 25 Id. 341, 434; 15 L. R. A. (N. S.) 1173; 116 A. S. R. 38; 11 Ann. Cas. 566.

See, also, Bribery, Cent. Dig.; Dec. Dig.; 5 Cyc. 1038-1048; 4 A. & E. Enc. L. (2ed.) 907; 3 A. & E. Enc. P. & P. 695.

83. It includes matters peculiar to the crime of bribery. Matters common to all crimes are treated in the topics Criminal Law,* and Indictment and Prosecution.* Corruptly influencing jurors is treated in Embracery * and bribery as contempt of court in Contempt.*

84. Commonwealth v. Wooton, 201 Mass. 81, 87 NE 202.

85. Rev. Laws, c. 210, § 7, as to bribery, applicable to de facto as well as de jure officers. Commonwealth v. Wooton, 201 Mass. 81, 87 NE 202.

86. Commonwealth v. Wooton, 201 Mass. 81, 87 NE 202.

87. Bribing assistant statistician of department of agriculture to disclose information contrary to department rules. United States v. Haas, 163 F 908; Haas v. Henkel, 166 F 621.

88. Indirect averment held sufficient where first attacked by motion in arrest, but with intimation that it would have been ruled otherwise on demurrer. State v. Johnson [N. D.] 118 NW 230.

* Always begin with the latest article on the subject. Use the latest topical index.

BRIDGES.

The scope of this topic is noted below.[89]

§ 1. Regulation and Control, 522.
§ 2. Establishment and Location by Public Agencies, 522.
§ 3. Contracts and Construction, 523.
§ 4. Public Liability for Costs and Maintenance, 523.
§ 5. Establishment, Construction and Maintenance by Private Enterprise, 524.
§ 6. Injuries from Defective Bridges, 525.
§ 7. Injuries to Bridges, 527.

§ 1. *Regulation and control.*[90]—See 11 C. L. 441.—The authorities having control of a bridge may close it while repairs are being made,[91] but such repairs must be made with reasonable diligence, unless legal grounds are shown for delay;[92] and where county commissioners are given control of the public bridges, they are not relieved of liability for the condition of such bridges because the work is required to be done under the supervision of an engineer.[93] A city, in operating a drawbridge forming a part of its streets, acts in its private or corporate, as distinguished from its public or governmental capacity.[94]

§ 2. *Establishment and location by public agencies.*[95]—See 11 C. L. 441.—The power to establish bridges is usually subject to some limitations as to public necessity or convenience.[96] Where the power to determine the advisability of and necessity for a bridge is vested in a board of freeholders, the discretion cannot be disturbed unless it can be shown to have been illegally or fraudulently exercised.[97] In New York a town may construct a bridge across the Erie Canal where there is not a state bridge,[98] but, where it is not known at what particular point the canal will pass, no order for the construction of a bridge will be made.[99] In Kansas a township board has no authority to provide for the construction of a bridge either in whole or in part.[1]

89. This topic is devoted specifically to the establishment, construction, and maintenance, whether by public authorities or by private persons, of public bridges, and purports to cover all questions directly and specifically related thereto, except in questions relative to the obstruction of navigable waters (see Navigable Waters *). As to the general principles bearing upon the subject in hand, but not categorically related thereto, see Building and Construction Contracts;* Canals;* Counties;* Eminent Domain;* Ferries;* Franchises;* Highways and Streets;* Municipal Corporations;* Municipal Bonds;* Negligence;* Public Contracts;* Public Works and Improvements;* Sewers and Drains;* Toll Roads and Bridges;* Towns;* Townships.*

90. Search Note: See Bridges, Cent. Dig. §§ 71-73; Dec. Dig. §§ 29-32, 47; 5 Cyc. 1089-1090; Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20; 29 Cyc. 311-318; 4 A. & E. Enc. L. (2ed.) 922-929.

91. Kline v. State, 61 Misc. 18, 114 NYS 318.

92. Held that state had no right to close bridge forming part of public highway and arbitrarily and negligently omit to make repairs. Kline v. State, 61 Misc. 18, 114 NYS 318.

93. Under Act 1908, p. 359, c. 654, county commissioners are liable for condition of bridges. Anne Arundel County Com'rs v. Carr [Md.] 73 A 668.

94. Lehigh Valley Transp. Co. v. Chicago, 237 Ill. 581, 86 NE 1093, afg. 141 Ill. App. 618.

95. Search Note: See Bridges, Cent. Dig. §§ 2-24, 36, 56, 60; Dec. Dig. §§ 2-12, 18, 19, 22-28; 5 Cyc. 1052, 1053, 1055-1069, 1075-1077, 1084-1087, 1115-1117; 4 A. & E. Enc. L. (2ed.) 931.

96. Under Act of June 13, 1836, P. L. 551, §§ 35 and 37, there is no authority to construct bridge 500 feet from older bridge at point where there is no highway and where it would be necessary to extend street of borough to connect with bridge. Chartiers Creek Bridge, 37 Pa. Super. Ct. 281. County has no authority to erect bridge over a stream which does not cross public road or highway. Commonwealth v. Kessler, 222 Pa. 32, 70 A 941.

97. Resolution of board of freeholders, providing for construction of bridge over Hackensack river between certain streets in Hackensack and Ridgefield Park, held a valid exercise of power conferred by P. L. 1906, c. 16, p. 27, and c. 64, p. 93. State v. Board of Chosen Freeholders [N. J. Law] 73 A 90.

98. Under Canal Law (Laws 1894, pp. 645, 646, c. 338) §§ 115, 117, a bridge may be so constructed with the consent and under the direction of superintendent of public works. In re Mohawk River Bridge, 128 App. Div. 54, 112 NYS 428.

99. Order refused as it could not be ascertained in what manner bridge should cross river when canalized, nor what kind of bridge would be required, nor the cost of same. In re Mohawk River Bridge, 128 App. Div. 54, 112 NYS 428.

1. Held that Gen. St. 1901, § 7826, did

§ 3. *Contracts and construction.*[2] See 11 C. L. 442—The manner of letting contracts for the construction of public bridges is usually regulated by statute,[3] and, where it is provided that the word bridges includes the approaches thereto,[4] a contract for the construction of a bridge without the approaches is invalid if the aggregate cost will exceed the constitutional limitation.[5] A contract for the construction of a bridge, which provides that such bridge shall be constructed in accordance with plans on file and forming part of the contract, refers to plans on file at the time of the execution of the contract.[6] A county which has entered into a contract which it had power to make and has received the benefits thereof is liable though there has been a technical irregularity in the exercise of that power,[7] and, if certain acts have not been performed because the county has failed to do its duty, it will not be permitted to set such up as a defense.[8] An engineer who is merely authorized to supervise the repairing of a public bridge has no power to bind the county by requiring the contractor to perform extra work not called for by the contract.[9]

§ 4. *Public liability for costs and maintenance.*[10] See 11 C. L. 443—When and how county aid may be given for the construction and maintenance of bridges is frequently and more or less specifically regulated by statute.[11] Some statutes provide that the commissioners of highways may, upon the existence of a contingency, make an additional tax levy for the purpose of rebuilding bridges,[12] and,

not authorize township board to subscribe $1,200 toward the construction of a bridge costing $15,000. Rossville Tp. Shawnee County v. Alma Nat. Bank [Kan.] 98 P 234.

2. **Search Note:** See Bridges, Cent. Dig. §§ 37-47; Dec. Dig. § 20; 5 Cyc. 1065-1069; 4 A. & E. Enc. L. (2ed.) 933.

3. Sess. Laws 1897, art. 2, c. 12, p. 116, § 3 (Wilson's Rev. & Ann. St. 1903, § 1405), providing that county commissioners shall give certain notices, etc., held repealed by implication by Sess. Laws 1901, art. 3, c. 27, p. 178. Hine v. Gokey [Okl.] 102 P 77.

4. Rev. Code, § 1416, declares the word "bridges" includes the approaches thereto. Jenkins v. Newman [Mont.] 101 P 625.

5. Under Const. art. 13, § 5, prohibiting a county from incurring any indebtedness for any single purpose to an amount exceeding $10,000, a contract for a bridge without approaches, which with approaches will exceed $10,000, is invalid. Jenkins v. Newman [Mont.] 101 P 625.

6. Held that plans originally adopted may have been different from those existing in the clerk's office when the contract was executed, yet the county was bound by the plans on file at time of execution of contract. Webb County v. Hasie [Tex. Civ. App.] 113 SW 188. Not error to admit tracing of a plan of a bridge which was on file in clerk's office at time contract was executed. Id.

7. Cannot set up fact that highway commissioners had not properly determined that a necessity existed for construction of bridge. Walker v. Vermilion County, 143 Ill. App. 235.

8. Where county had entered into contract, it could not set up as defense that the three supervisors appointed had not filed an itemized statement of costs of bridge and had never certified to county board that said bridge had been accepted, it appearing that said supervisors' term had expired at time bridge was completed and that county failed to appoint others to act in their stead. Walker v. Vermilion County, 143 Ill. App. 235.

9. Under Comp. Laws, § 2111, giving county commissioners power to control and manage public bridges, engineer who was given no authority to order extra work had no power to contract for such. Lund v. Washoe County [Nev.] 101 P 550.

10. **Search Note:** See Bridges, Cent. Dig. §§ 17-24, 48-55; Dec. Dig. §§ 9-12, 21; 5 Cyc. 1058-1062, 1078-1087; 4 A. & E. Enc. L. (2ed.) 933.

11 Under statute allowing county aid for construction or maintenance of bridges when their cost is more than twenty cents on hundred dollars on last assessment roll of town, the estimated cost and not contract price determines right to county aid. Walker v. Vermilion County, 143 Ill. App. 235. Whenever a town has levied forty cents of the sixty cents which § 13 of the Road and Bridge Act authorizes upon the one hundred dollars, it is then in position to demand county aid. Id. Pub. Acts 1907, p. 41, No. 37, § 3, amending Comp. Laws 1897, § 4129, providing that highway commissioner on approval of township board may repair bridges, etc., held repealed by implication by Pub. Acts 1907, p. 125, No. 108, which provides that one of the funds may be used by highway commissioner for repairing bridges unless otherwise directed by township board. Reimink v. Strabbing [Mich.] 16 Det. Leg. N. 406, 122 NW 183.

12. Certificate of highway commissioners which stated that "in view of contingency that it is necessary, on account of their destruction, to rebuild nine bridges," but did not show that bridges were affected by any thing other than natural decay, did not state a contingency within Hurd's Rev. St. 1905, c. 120, § 14. People v. Kankakee & S. W. R. Co., 237 Ill. 362, 86 NE 742.

where two counties are jointly liable for the repair of a bridge, it is sometimes provided that if either of such counties refuse to enter into a contract to have the bridge repaired the other may enter into such contract and recover not exceeding one-half of the full amount expended, by suit from the county in default,[13] but one county cannot, under the guise of making repairs, build a new bridge and hold the other county liable for one-half the cost of building such bridge.[14] In the absense of statute to the contrary, the duty to repair a bridge devolves upon the body upon which is imposed the duty to repair the highway of which the bridge forms a part.[15] A construction, whether of plank, stone, dirt, or other material, necessary to enable persons using the bridge to pass from it to the roadway at either end, may properly be considered an approach, which the county should maintain in a safe condition,[16] but where the approach has been vacated, the county is not obliged to maintain the same.[17]

§ 5. *Establishment, construction and maintenance by private enterprise.*[18]—See 11 C. L. 444—An owner of lots abutting on opposite sides of a street may, under license or permit from the city council revocable at its pleasure, construct an over head bridge for the purpose of transporting freight over the street.[19] Where a county has condemned and taken over a bridge belonging to a bridge company, it is not entitled to unattached lumber owned by the bridge company.[20] Statutes have been enacted in many states requiring railway companies to provide and maintain suitable bridges across any water course which its railway passes over.[21] An

13. Words "recover by suit" as used in the proviso of Cobbey's Ann. St. 1907, § 6147, include a suit instituted by an appeal from disallowance of claim by county board. Cass County v. Sarpy County [Neb.] 119 NW 685. Where proper steps have been taken to render adjoining county liable and where an issue is raised as to necessity of repairs or as to amount paid being more than actual and reasonable cost thereof, then amount defaulting county ought to pay is question for jury, but, if no such issue is tendered, county is liable for one-half cost of repair. Buffalo County v. Kearney County [Neb.] 120 NW 171. Notice served upon county sought to be charged should fairly state intention of the other county and scope of the project contemplated. Held that notice did not include "ice breaks." Colfax County v. Butler County [Neb.] 120 NW 444.

14. Where one county notified the other to join in "repairing" certain bridge which latter county refused to do, and former county then constructed practically a new bridge using only $300 worth of material from old bridge, the latter county was not liable for any part of cost. Colfax County v. Butler County [Neb.] 120 NW 444.

15. Where two townships had divided road and part one had agreed to keep in repair had bridge thereon which said township had repaired for many years, held that though contract was not recorded as required by statute yet township was liable for neglect to repair. Hunter v. Dwight Tp. [Mich.] 16 Det. Leg. N. 508, 122 NW 267.

16. Evidence held sufficient to support finding that filling at end of bridge was part of approach and not portion of highway. Hubbard v. Montgomery County [Iowa] 118 NW 912. Where the county commissioners are given control over county roads, it is their duty to maintain in a safe condition an approach to a bridge as well as other parts of the public road. Code Pub. Gen. Laws 1904, art. 25, §§ 1, 2. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656.

17. Where county, under mistake of facts, erected a bridge across stream where there was no highway but street of city extended to such bridge and was afterward opened on other side of bridge, county was not obliged to maintain bridge after abandonment of street. Commonwealth v. Kessler, 222 Pa. 32, 70 A 941.

18. Search Note: See notes in 46 L. R. A. 199; 85 A. S. R. 708.

See, also, Bridges, Cent. Dig. §§ 25-66; Dec. Dig. §§ 13-28; 5 Cyc. 1064-1087, 1115-1117; 4 A. & E. Enc. L. (2ed.) 921.

19. Where such bridge would tend to relieve street of a serious interference with traffic along street and be constructed so that supports would not be in street and would not interfere with light and air of abutting owners, its construction is permissible. Kellogg v. Cincinnati Trac. Co. [Ohio] 88 NE 882.

20. Lumber owned by company and stored near bridge held not part of bridge. Big Beaver Creek Corp. v. Beaver County, 37 Pa. Super. Ct. 250.

21. Code, §§ 20, 21, requiring railway company to repair all bridges which are used by railway company for passing over water courses, also includes and requires company to repair all culverts placed in embankment to furnish outlet to ditch dug in bed of natural water course. Mason City & Ft. D. R. Co. v. Wright County Sup'rs [Iowa] 121 NW 39. Acts 30th Gen. Assem. 1904, p. 66, c. 68, §§ 18, 19, providing for establishing drainage ditches across right of way of railroad companies, does not re-

indictment in a prosecution of a railroad company for maintaining a public nuisance, committed by failing to keep in repair a public bridge extending over its tracks, must sufficiently allege the duty of the company to maintain or repair such bridge.[22] Companies chartered to build and maintain bridges are not ordinarily regarded as public corporations.[23]

§ 6. *Injuries from defective bridges.*[24]—See 11 C. L. 445—It is the duty of the proper authorities to keep public bridges in a reasonably safe condition for travel,[25] and this duty is not limited to acts of commission and omission within the limits of the bridge,[26] but extends to those outside the bridge that render it unsafe for travelers.[27] Actual notice [28] to a municipality of the dangerous condition of a bridge, and failure to repair it within a reasonable time [29] renders the municipality liable in damages for any injuries that may occur, but there is no liability except for negligence,[30] and a municipality is not liable for injuries caused by the defective condition of a bridge which has not been adopted by it as a part of the public highway,[31] nor is it under obligation to protect a person from dangers not to be anticipated and which could not have resulted from the ordinary use of a bridge,[32] nor is a county liable for the negligent performance of the building of a bridge upon a public highway unless expressly made so by statute.[33] One who has put the

quire county to pay as damages the future cost of maintaining bridges or culverts over such ditch, but railway companies must keep such culverts or bridges in repair after same have been constructed. Id.

22. Indictment held not to allege facts sufficient to show duty to repair or maintain bridge. Louisville & N. R. Co. v. Com. [Ky.] 113 SW 517.

23. Manchester and Richmond Free Bridge Company is neither a municipal corporation nor a public institution. Commonwealth v. Manchester & Richmond Free Bridge Co. [Va.] 63 SE 1083.

24. Search Note: See notes in 10 L. R. A. (N. S.) 710; 11 Ann. Cas. 1198.

See, also, Bridges, Cent. Dig. §§ 80-122; Dec. Dig. §§ 34-46; 5 Cyc. 1090-1115; 4 A. & E. Enc. L. (2ed.) 936; 3 A. & E. Enc. P. & P. 701.

25. Whether taking up worn plank, turning them over and replacing them with thin edges joined together, which afterwards gave way under ordinary and intended use, is a wrongful neglect in making repairs, is a question for the jury. Milliken v. Somerset County Chosen Freeholders [N. J. Law] 71 A 290. Where city did not keep light in order at drawbridge and did not take other measures to guard bridge when open, city was guilty of negligence. City of Chicago v. Thomas, 141 Ill. App. 122. A city is liable for injuries caused by the negligent operation of a drawbridge forming a part of one of its streets. Lehigh Valley Transp. Co. v. Chicago, 237 Ill. 581, 86 NE 1093, **afg.** 141 Ill. App. 618. City held liable for injury to woman who sustained injuries while working under the bridge by reason of the negligent operation of the bridge. Gathman v. Chicago, 236 Ill. 9, 86 NE 152, afg. 139 Ill. App. 253. In action against city for injury to horse caused by defective bridge, held that there was evidence from which jury could conclude it was negligence for municipal authorities not to observe defects and make requisite repairs. Sullivan v. Anderson, 81 S. C. 478, 62 SE 862.

26. City of Winona v. Botzet [C. C. A.] 169 F 321.

27. City held liable for injuries caused by blowing of whistle near bridge. City of Winona v. Botzet [C. C. A.] 169 F 321.

28. Where policeman discovered hole in bridge on day of night plaintiff was injured, and telephoned proper authorities immediately, there was actual notice to city. City of Covington v. Gates [Ky.] 117 SW 342.

29. Whether city had reasonable time to repair bridge after actual notice, held question for the jury. City of Covington v. Gates [Ky.] 117 SW 342.

30. County commissioners are not insurers against accidents occurring on the public bridges, but are only liable where the unsafe condition of the bridge, which caused the injury, is due to their negligence in respect to the duties imposed upon them by law. Anne Arundel County Com'rs v. Carr [Md.] 73 A 668. Instruction erroneous which did not submit question of defendant's negligence. Id.

31. Where private parties had built bridge across river to connect with highway, town not having taken any part in the building of such bridge and not doing any thing to keep it in repair nor treating it as public bridge, town was not liable for injury. Curtiss v. Bovina, 138 Wis. 660, 120 NW 401. To estop town from denying bridge was a public bridge, evidence must show adoption as part of highway. Id.

32. Not liable for injury to child whose head was caught between railing of drawbridge and railing of stationary part of bridge while she was looking at passing vessel. Nicholls v. New York, 128 App. Div. 532, 112 NYS 795.

33. Under provisions of Gen. St. 1901, § 579, bridge is defective only where defects affect its safety or usefulness as a part of public highway. Shawnee County Com'rs v. Jacobs [Kan.] 99 P 817.

approach to a bridge in an unsafe condition is liable for injuries resulting from such condition.[34] A supervisor whose duty is to inspect bridges and prepare plans and specifications for the repair of same is not liable for injuries caused by a defective bridge in his district.[35] A negligent omission to make repairs on a public bridge, which has been closed, renders the authorities in control liable for any special damages occurring to an abutting owner on the highway,[36] but damages cannot be recovered for loss of crops as a result of a bridge being built so low that the water overflows the adjacent land.[37] In order to recover for injuries it must be shown that the bridge is part of the public highway.[38]

Proximate cause. See 9 C. L. 412—The general rule applies that in order to justify a recovery the negligence complained of must have been the proximate cause of the injury.[39]

Contributory negligence. See 11 C. L. 445—Contributory negligence bars recovery.[40] It is the duty of one approaching a drawbridge to stop, look, and listen.[41] The fact that one has often driven over a bridge will not justify inference that he knew it was dangerous or did not use due care in crossing it.[42]

Remedies. See 11 C. L. 445

Pleading, evidence, and instructions. See 11 C. L. 446—The declaration should describe in what respect the bridge was out of repair or unsafe with such a reasonable degree of certainty as will give fair notice to the defendant of the character of the claim.[43] Evidence of precaution taken by city in the day time to prevent

34. Where railroad company raised approach to bridge and thereby made it unsafe and county was compelled to pay damages for death of person, county was entitled to compel indemnity from railroad company. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656. Judgment against county was not conclusive on railroad company where such company was not party to action, but it was admissible as part of the case. Id.

35. Not liable under Code 1906, § 4468, as his duties are not those of an overseer. Lee v. Styles [Miss.] 49 S 259.

36. Where state closed bridge which it had built over canal and which was out of repair, and excluded travel for about two years without making the repairs, held that facts made a prima facie case for special damage to hotel owner who owned hotel adjacent to bridge. Kline v. State, 61 Misc. 18, 114 NYS 318.

37. Where county constructed bridge which was in perfect condition for all purposes of a highway, but by being built too low it caused water to overflow adjacent land during heavy rains, it was held that Gen. St. 1901, § 579, created no liability for injuries, caused by overflow, to crops. Shawnee County Com'rs v. Jacobs [Kan.] 99 P 817.

38. Evidence held sufficient to prove bridge part of highway. Anne Arundel County Com'rs v. Carr [Md.] 73 A 668.

39. Where team of horses broke buggy tongue as the result of fright on part of horses after stumbling into a hole in approach to bridge and plaintiff was thereby injured, the defect of the approach was the proximate cause of the injury, though accident might not have happened if horses had not been bothered by flies or if buggy tongue had not broken. Hubbard v. Montgomery County [Iowa] 118 NW 912. Evidence held to show that injury to small girl was caused by her heedless act in jumping on drawbridge while in motion. Cusimano v. New Orleans [La.] 49 S 195.

40. After drawbridge was put in motion girl ten years of age ran and jumped on the bridge and was injured. Held that she was guilty of contributory negligence. Cusimano v. New Orleans [La.] 49 S 195. Where plank gave way causing horse to fall, driver was not guilty of contributory negligence because he pulled horse to one side to avoid hole in bridge. Sullivan v. Anderson, 81 S. C. 478, 62 SE 862. Evidence held not to show that plaintiff had driven over bridge with excessive speed or that wagon contained a load of more than ordinary weight. Id. Where plaintiff, who was riding over bridge on horseback, was found injured and unconscious and horse's hind feet were in hole caused by broken plank, it was error to submit question of contributory negligence. Clingan v. Dixon County [Neb.] 118 NW 1082.

41. In action against county for death of decedent caused by driving off an open drawbridge alleged to have been negligently guarded, held that evidence showed that deceased was guilty of contributory negligence. Anne Arundel County Com'rs v. State, 107 Md. 210, 68 A 602.

42. Anne Arundel County Com'rs v. Carr [Md.] 73 A 668.

43. Declaration which avers that defendant was negligent in allowing bridge on one of the public roads of county to be out of repair and unsafe for use, and that by reason of such negligence, while passing over same, plaintiff's horse broke through bridge and she was thrown out, etc., is too general and is demurrable. Anne Arundel County Com'rs v. Carr [Md.] 73 A 668. Pe-

any one from entering an open drawbridge is competent to show degree of care which might be expected of such city in the night time.[44] An immaterial variance is not fatal.[45] Whether a bridge was in defective condition is usually a question for the jury.[46] Instructions must submit question of defendant's negligence.[47]

§ 7. *Injuries to bridges.*[48]—See 11 C. L. 446

BROKERS.

The scope of this topic is noted below.[49]

§ 1. Employment and Relation in General, 527. Definition, 527. License, 528. Creation of Relation, 528. Necessity of Contract Being in Writing, 528. Termination of the Relation, 528. Scope of Broker's Authority, 529.
§ 2. Mutual Rights, Duties and Liabilities, 530. Stockbrokers, 532.
§ 3. Rights and Liabilities as to Third Persons, 534.
§ 4. Compensation and Lien, 535. Necessity of Contract, 535. Substantial Performance of his Contract by the Broker, 536. Broker Must be Efficient Producing Cause of Sale, 539. Customer Must be Ready, Willing and Able to Purchase, 541. Broker Must Act in Good Faith Towards Principal, 543. Procuring Loan, 544. Necessity of Broker's Contract Being in Writing, 545. Amount of Commissions and Measure of Recovery for Services, 545. Actions to Recover Commissions, 546.

§ 1. *Employment and relation in general.*[50] *Definition.*See 11 C. L. 446—A broker is one who is engaged for others on a commission[51] in negotiating contracts relative to the sale or exchange of property not in his custody.[52]

tition which alleged that bridge was on public road of county, was constructed since December 29, 1888, detailed injuries sustained, alleged plaintiff was without fault and that his injuries were due to defective construction of bridge, setting forth wherein it was defective, and alleged that such defects were known to county authorities, but were unknown to him until after injuries were sustained, was not subject to general demurrer. Penick v. Morgan County, 131 Ga. 385, 62 SE 300. Declaration alleging that defendant maintained bridge which by reason of settling of its foundations caused loose plank to rattle when horse or buggy went over them and that by reason thereof plaintiff's horse became frightened, etc., and plaintiff was thereby injured, was sufficient. Hunter v. Dwight Tp. [Mich.] 16 Det. Leg. N. 508, 122 NW 267.

44. Evidence that city during day time kept chain across street and had watchman at bridge when such bridge was open was admissible. City of Chicago v. Thomas, 141 Ill. App. 122.

45. Where declaration among other things alleged that plaintiff was injured by reason of horse becoming frightened and springing suddenly forward, fact that proof did not clearly show that the horse first became frightened and sprang forward was not fatal there being evidence that wagon was suddenly checked and that injury was due to negligence alleged. Hunter v. Dwight Tp. [Mich.] 16 Det. Leg. N. 508, 122 NW 267. Where plaintiff's statement alleged that defendant had permitted to remain for several weeks "an unguarded opening or depression between the earthen part of the highway and the bridge planking," fact that opening was surrounded by the stone pavement of the gutter was not a variance. Conroy v. Pittston, 222 Pa 1. 70 A 944.

46. Whether holes on each side of roadway next to bridge were defects rendering approach unsafe, was question for jury. Hubbary v. Montgomery County [Iowa] 118 NW 912. In action against township for injuries resulting from defect in bridge, evidence of notice of bad condition of planking held sufficient to require submission to jury. Hunter v. Dwight Tp. [Mich.] 16 Det. Leg. N. 508, 122 NW 267.

47. An instruction to the effect that that if the bridge was a part of one of the public roads of the county, and was out of repair, the defendant was liable, was erroneous because of its failure to submit to the jury the question of defendant's negligence. Anne Arundel County Com'rs v Carr [Md.] 73 A 668.

48. Search Note: See Bridges, Cent. Dig. §§ 7, 8; Dec. Dig. § 27; 5 Cyc. 1115-1117; 3 A. & E. Enc. P. & P. 707.

49. It **excludes** matters relating to factors (see Factors *), to other special agencies (see Insurance *), matters common to all agencies (see Agency,* Attorneys and Councilors *) matters common to all contracts (see Contracts;* Fraud and Undue Influence;* Frauds, Statute of *), matters relating to the actual sale of land (see Vendors and Purchasers *).

50. Search Note: See notes in 12 L. R. A. (N. S.) 707; 2 Ann. Cas. 886.

See, also, Brokers, Cent. Dig. §§ 1-15; Dec. Dig. §§ 1-18; 19 Cyc. 186-202; 4 A. & E. Enc. L. (2ed.) 51, 962; 23 Id. 896.

51. Salaried agent not acting for fee or rate per cent is not a broker. Rodman v. Manning [Or.] 99 P 657.

52. Being an intermediary or middleman who, in affecting sale or exchange of property, acts in a certain sense as agent of both parties to transaction. Rodman v. Manning [Or.] 99 P 657.

* Always begin with the latest article on the subject. Use the latest topical index.

*License.*See 11 C. L. 447—The failure of a broker to procure a license required by statute will not have the effect of vitiating his employment contracts, unless the statute expressly provides that such contracts shall be void.[53]

*Creation of relation.*See 11 C. L. 447—The relation of principal and broker is created by contract, the sufficiency of which [54] and its construction depend [55] upon the rules applicable to other contracts.[56]

Necessity of contract being in writing See 7 C. L. 467 is treated in another topic.[57]

*Termination of the relation.*See 11 C. L. 447—The employment may be terminated by agreement,[58] in which case the termination is absolute [59] and notice thereof is not required.[60] It may also be terminated by abandonment,[61] by dissolution of a partnership of brokers,[62] or, without notice, by the broker himself.[63] An agency for a fixed period cannot, without cause, be terminated before the expiration thereof.[64] A principal has the right to determine an employment, indefinite in time, at any time before a sale has been consumated [65] or a purchase made,[66] but it is essential that he act in good faith in respect thereto.[67] Such revocation does

53. Held not to make contract void, since otherwise one party to civil action could penalize, for his own benefit, the other party for an act which occasioned him no loss. Manker v. Tough [Kan.] 98 P 792. Whether failure to conform with ordinance requiring broker to procure license will vitiate his contracts of employment, held to depend upon whether such statute contains clause prohibiting brokers from entering into contracts without first procuring license and making such contracts invalid. Stiewel v. Lally [Ark.] 115 SW 1134.

54. May be created by written or spoken words or by conduct of parties. Ankeny v. Young Bros. [Wash.] 100 P 736. Relation created though matters of detail such as character of deed and title to be given were not mentioned. Johnson v. Huber [Kan.] 103 P 99. Proposition from owner to broker to pay him stated commission for affecting sale of property and acceptance thereof by broker held to create relation. Rodman v. Manning [Or.] 99 P 657. Letter of broker disclosing his business, asking if certain property is not for sale and stating commission charged on sales, to which owner replied giving net price, but mentioning that consent of tenant would have to be obtained to sale, held to create relation so as to entitle broker to commission on sale to one willing to buy the place subject to the lease. Johnson v. Huber [Kan.] 103 P 99. Entries on purchasing broker's books constituted contract. Ankeny v. Young Bros. [Wash.] 100 P 736. Authority to buy coffee created by telegram of broker that he could buy certain grade at stated price and answering telegram of customer's agent that customer would accept coffee at such price to be shipped by a certain vessel. Id. **Relation not created** by owner merely answering an inquiry as to price of property as he has right to infer that broker is acting as agent of purchaser. Rodman v. Manning [Or.] 99 P 657. Sufficiency of acts to create is involved in post, § 4, Necessity of Contract.

55. Authority construed according to **custom and usage** of place where broker was authorized to purchase coffee. Ankeny v. Young Bros. [Wash.] 100 P 736. Broker's contract not void for **uncertainty** if it contains data from which land may be identified, and where fact that error is mere clerical one is patent from face of instrument. Powers v. Bohuslav [Neb.] 120 NW 942.

56. See Contracts.

57. See Frauds, Statute of.

58. Held terminated by agreement where defendant wrote that his wife refused to sign deed and that they might as well take land off market, to which plaintiff replied in effect assenting, asking for defendant's lowest price and stating "When we hear from you, we will say what we can do." Lacey v. Thomas, 164 F 623.

59. Termination leaves owner free even to take up and close new negotiations with customer found by broker. Lacey v. Thomas, 164 F 623.

60. Being thereby waived. Bird v. Webber [Okl.] 101 P 1052.

61. Contract to find property for purchaser held abandoned. Martien v. Baltimore, 109 Md. 260, 71 A 966.

62. Larson v. Newman [N. D.] 121 NW 202.

63. Broker may terminate his efforts at will. Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179.

64. Novakovich v. Union Trust Co. [Ark.] 117 SW 246. Where owner makes valid agreement that authority shall continue until prospective purchaser makes binding contract, owner cannot, without broker's consent, revoke authority while negotiations are pending with such purchaser with prospect of sale within reasonable time. Luhn v. Fordtram [Tex. Civ. App.] 115 SW 667.

65. Blumenthal & Co. v. Bridges [Ark.] 120 SW 974; Gardner v. Pierce, 131 App. Div. 605, 116 NYS 155. Before acceptance of proposition by purchaser. Arthur v. Porter [Tex. Civ. App.] 118 SW 611. And may employ another agent. Young v. Hubbard, 154 Mich. 218, 15 Det. Leg. N. 725, 117 NW 632.

66. Where broker is acting for customer, upon broker's informing him that the matter is "practically settled," customer held to have right to withdraw offer. Donnelly v. Chetejian, 115 NYS 125.

67. Must not act merely to avoid payment

not usually become effective until notice is given to the broker.[68] A sale of the property by the owner has the effect of terminating an agency, under which the owner has the right to make the sale,[69] even without notice to the broker,[70] but such sale, where the owner has no right to revoke the agency, has been held not to have such an effect.[71] The principal may terminate a contract where its revocation has been left optional and the condition as to an extension of time has not been met.[72]

Scope of broker's authority. See 11 C. L. 448—The authority usually incident to a broker's employment is simply to find a purchaser, and not to execute a contract of sale,[73] unless authority to so contract be expressly given.[74] The employment contract will be construed according to the usual rules.[75] A broker in negotiating and making a deal has no right to vary from the specified terms,[76] and any contract entered into by him on unauthorized terms is not binding on the principal[77] unless intentionally and clearly ratified.[78] A power of sale conferred on the broker

of commission. See post, § 4, Customer must be ready, etc. Held to have been in good faith where withdrawn for reason that broker misrepresented property to be received in exchange. Arthur v. Porter [Tex. Civ. App.] 118 SW 611.

68. Stiewel v. Lally [Ark.] 115 SW 1134.

69. Blumenthal & Co. v. Bridges [Ark.] 120 SW 974; Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875.

70. Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179.

71. As in case of exclusive agency, contract having a definite time limit. Blumenthal & Co. v. Bridges [Ark.] 120 SW 974. Compare Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875.

72. Agreement to secure loan of $7,000 by mortgage on land held not to have been met by agreement of one to advance $6,500 on land and $500 on another and indefinite arrangement. Jones v. Buck [Iowa] 120 NW 112.

73. Hardinger v. Columbia, 50 Wash. 405, 97 P 445. Broker ordinarily has no right to conclude terms and conditions of sale. Fiegel v. Dowling [Or.] 102 P 178. Broker had no right to make sale where owner merely stated to broker that he would sell property and specified price and terms. Hutchins v. Wertheimer, 51 Wash. 539, 99 P 677. Broker has no implied authority to bind his principal by contract of sale. Id.

74. Manker v. Tough [Kan.] 98 P 792. Bacon v. Davis, 9 Cal. App. 83, 98 P 71. Such being in the power of owner only in absence of due authority in writing as required by Civ. Code, § 1238, subd. 5. Watters v. Dancey [S. D.] 122 NW 430. Under §§ 1721, 1727, Code, defining "sale" an instrument giving broker power "to sell for me in my name and receipt for deposit thereon" and "to sell and convey by a good," etc., gives broker authority to make binding contract of sale. Bacon v. Davis, 9 Cal. App. 83, 98 P 71. Such authority was given where broker was not only authorized to find purchaser at certain price on certain terms but owner agreed to convey property upon such price and terms, there being no reservation or intimation that authority of broker was limited to bringing parties together. Peterson v. O'Connor, 106 Minn. 470, 119 NW 243. The term "negotiate" has been held in certain cases to import authority to enter into and make a binding agreement. Combee v. Adams, 150 N. C. 64, 63 SE 186. Authority to "negotiate for the sale of the Stewart lands at the price of $5 per acre" restricted to a period of thirty days, and binding owners to "execute good conveyances to such purchaser as the parties may produce on the payment of the price," held to authorize broker to make contract which will be binding on owners. Id. Not authorized to execute sale, by letter from owners to broker stating price, terms, and requesting broker to let them hear from him. Lichty v. Daggett [S. D.] 121 NW 862. Broker held to be given no authority to execute contract of sale, by letter stating terms upon which owner is willing to sell. Ross v. Craven [Neb.] 121 NW 451. Power "to sell" as ordinarily used in broker's contract has restrictive meaning and does not give him power to enter into binding contract of sale, but only to find purchaser. Bacon v. Davis, 9 Cal. App. 83, 98 P 71.

75. Ordinary rules of construction of contracts as established by §§ 1638, 1641, 1644, must be invoked. Bacon v. Davis, 9 Cal. App. 83, 98 P 71. Construed according to ordinary acceptance of its terms. Id.

76. No right to accept smaller payment down than authorized. Stoutenburgh v. Evans [Iowa] 120 NW 59. Authority to sell for gross sum is not authority to sell at a price per acre. Schmidt v. Chittenden, 9 Cal. App. 50, 98 P 48. Broker has no right to insert unauthorized forfeiture clause in sale contract. Evants v. Fuqua [Tex.] 118 SW 132.

77. Larson v. Newman [N. D.] 121 NW 202. Since purchaser is bound to inevstigate and ascertain power of broker. McCarthy v. Crawford, 141 Ill. App. 276. Broker's contract giving unauthorized time for making cash payment and taking deposit as forfeit, held not binding. Shirley v. Coffin [Tex. Civ. App.] 121 SW 181. Sale contract containing unauthorized forfeiture clause cannot be specifically enforced, though purchaser is willing to waive forfeiture clause. Hagler v. Ferguson [Tex.] 118 SW 133.

Evidence to show authority of broker and his acts held admissible in action by buyer against seller for breach of written contract of sale signed by alleged broker of seller. Floresville Oil & Mfg. Co. v. Texas Refining Co. [Tex. Civ. App.] 118 SW 194.

78. Authority of brokers to sign contract

includes no other power not necessarily incidental thereto.[79] A broker authorized to deliver the deed to the purchaser has been held to have an implied power to receive payment therefor.[80] An exclusive agency may be given by contract,[81] but will not be implied.[82] The giving of an exclusive agency for a fixed period ordinarily deprives the owner of his right to make the sale during such period,[83] but the giving of such agency, where the period is not fixed, does not have such effect.[84]

The principal is liable for any misrepresentations made by his broker[85] and, in general, for his acts,[86] except when the broker is acting wholly outside his scope of authority.[87] But he is not chargeable with knowledge derived by his broker, in the absence of evidence that the broker had this information in mind while he was doing some act or thing within the scope of his employment.[88] The principal may by his conduct ratify an unauthorized act of his broker.[89]

§ 2. *Mutual rights, duties and liabilities.*[90]—See 11 C. L. 450—Between the broker and his principal exists a fiduciary relation calling for the exercise of the utmost

of sale held ratified by owners' approval in writing. Lawler v. Armstrong [Wash.] 102 P 775. Held not ratified by letter of owner to broker which does not state that he will consummate sale, or that he is satisfied with it, or that broker was authorized to make it, where he did not execute deed sent him but later repudiated contract. Larson v. Newman [N. D.] 121 NW 202. Unauthorized contract not ratified by owner sending abstract as requested but calling attention in letter to fact that contract was not as authorized. Hutchins v. Wertheimer, 61 Wash. 539, 99 P 577. Unauthorized act of broker in executing contract of sale and including therein unauthorized provisions, not ratified by owner's reply "All right, offer accepted," when owner had no knowledge that broker had acted outside his authority. Hardinger v. Columbia, 50 Wash. 405, 97 P 445. Failure of seller to notify buyer that it had refused order taken by broker on terms not authorized should not be construed as ratification of broker's act. Sterling-Hurd Oil Co. v. Big Four Ice, Light & Fuel Storage Co. [Tex. Civ. App.] 116 SW 397.

79. Does not include by implication power to assign rents which may accrue. Gund Brew. Co. v. Tourtelotte [Minn.] 121 NW 417.

80. Not being agent of buyer where he was employed by owner te make sale. Babson v. Cox, 32 App. D. C. 542.

81. Kirshner v. Brown [Kan.] 96 P 848.

82. Under ordinary contract owner has right to employ other brokers to sell same property. Mueller v. Bell [Tex. Civ. App.] 117 SW 993. In absence of special agreement, principal by employing broker to secure customer for him does not deprive himself of right to get customer himself or through another broker. Kimball v. Hayes, 199 Mass. 516, 85 NE 875.

83. Hunter v. Wenatchee Land Co., 50 Wash. 438, 97 P 494.

84. Blumenthal & Co. v. Bridges [Ark.] 120 SW 974; Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875. Owner held not prevented from making sale himself to first party who offers price asked, even though broker has promising negotiations under way and though broker has not been accorded reasonable time in which to find a purchaser. Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179. Contract held to give mere exclusive agency and not to give option on or interest in property itself, since, notwithstanding contract, owner could have sold property at any time and conveyed good title. Metschan v. Swensson [Or.] 99 P 277.

85. Farris v. Gilder [Tex. Civ. App.] 115 SW 645. Acreage misrepresented in making sale. Id. Vendee may recover from vendor the consideration paid, where broker pointed out wrong land, whether such misrepresentation was intentional or otherwise. Stelting v. Bank of Sparta, 136 Wis. 369, 117 NW 798.

86. Principal held directly liable to third party for use of transportation boats in case recovery was not had off of broker. Flannery v. New England Transp. Co., 168 F 397. Principal was bound by authorized contract of sale made by broker, which contract could be enforced by purchaser, under provisions of § 1559, Civ. Code, providing that contract made for benefit of third person may be enforced by him. Bacon v. Davis, 9 Cal. App. 83, 98 P 71.

Evidence: Letters from broker to principal held admissible, when introduced by defendant, the principal, to show broker's agency as affecting cancellation of contract to purchase goods upon which contract it was sought to hold him liable. Webster v. Moore, 108 Md. 572, 71 A 466.

87. Sterling-Hurd Oil Co. v. Big Four Ice, Light & Cold Storage Co. [Tex. Civ. App.] 116 SW 397. Broker only authorized to sell for immediate delivery, cannot bind principal to contract to deliver car of fuel oil every six days. Id. It being duty of one dealing with broker acting under special authority to determine extent thereof. Id. Within scope of broker's authority and duty to show land. Stelting v. Bank of Sparta, 136 Wis. 369, 117 NW 798.

88. Comey v. Harris, 133 App. Div. 686, 118 NYS 244.

89. Purchase of coffee by broker ratified by customer's letters and conduct. Arkeny v. Young Bros. [Wash.] 100 P 736.

90. **Search Note:** See notes in 7 C. L. 470; 53 L. R. A. 241; 8 L. R. A. (N. S.) 474; 74 A. S. 470; 8 Ann. Cas. 851.

See, also, Brokers, Cent. Dig. §§ 16-36;

good faith.[91] Damages may usually be allowed for any failure in respect to this relation,[92] but a broker is not liable for his principal where his fault[93] and resulting damages do not clearly appear.[94] He is not liable to his principal for failure to exercise proper diligence to obtain a purchaser,[95] nor will equity enforce specific performance of his contract to use his best endeavors to make a sale.[96] All profits which result from this relation belong to the principal.[97] The relation forbids the broker, unless the principal have knowledge of all the facts, from purchasing the principal's property for his own benefit,[98] or from selling the principal his own property.[99] As a general rule, a broker cannot act in a dual capacity representing both parties, without their consent,[1] especially where his duties require the exer-

Dec. Dig. §§ 19-38; 19 Cyc. 203-217; 4 A. & E. Enc. L. (2ed.) 962, 968; 23 Id. 896.

91. Humphries v. Smith, 5 Ga. App. 340, 63 SE 248. Governed by same rules as those of trustee. Butler v. Agnew, 9 Cal. App. 327, 99 P 395. Broker owes duty of making full, fair and prompt disclosure of all facts affecting principal's rights and interests as pertaining to sale. Rodman v. Manning [Or.] 99 P 657.

92. Broker may be held liable for failure to exercise diligence to make sale as agreed, and it has been held in this connection that such agreement was independent of owner's covenant to convey part of certain unsold lots as part commission, and that owner could recover either by plea or reconvention or by separate action for damages. Mitchell v. Rushing [Tex. Civ. App.] 118 SW 582. Broker is liable for damages caused by inducing purchaser to permit him to represent him and to delay negotiating direct with owner where such broker in meantime buys the property himself. Bass v. Tolbert [Tex. Civ. App.] 112 SW 1077. In case where broker failed to investigate concerning note and interest as requested by principal, broker held liable for sums principal was legally required to pay thereon, but not for sums paid by principal not under legal requirement. Hinrichs v. Brady [S. D.] 121 NW 777. Broker held liable to principal for difference between interest actually due and amount he represented to be due. Id.

Where principal, having given broker exclusive agency, sells off timber, the most valuable part of property, broker has immediate right of action against him for breach of contract. Hunter v. Wenatchee Land Co., 60 Wash. 438, 97 P 494.

93. Insurance brokers were not liable for securing assignment to mortgagee making insurance void, where they were not informed that the mortgage covered personalty so as to affect validity of mortgage. Fries-Breslin Co. v. Bergen, 168 F 360.

94. No damages shown from broker's failure to send samples where it did not appear that a contract would have been entered into had such samples been sent. Cartan v. Wm. Thackaberry Co., 139 Iowa, 586, 117 NW 953.

95. Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179. And he need not notify principal that he has procured prospective purchaser. Id.

96. Jolliffe v. Steele, 9 Cal. App. 212, 98 P 544.

97. Forrester-Duncan Land Co. v. Evatt [Ark.] 119 SW 282. Though they be indirect. Id. Although principal had no interest or estate in land sold, but only held option which by agreement was relinquished and conveyance made direct from owner to purchaser. Krhut v. Phares [Kan.] 103 P 117. Money received by broker held to belong to principal since mere agent is not permitted to derive profit beyond his lawful compensation. Metschan v. Swensson [Or.] 99 P 277. Broker purchasing property for less than he represented to his principal, the customer, and having same conveyed to confederate and then transferred to principal at advanced price, is liable to principal for all profits arising from such deceit, although he himself did not receive all such profits. Great Western Gold Co. v. Chambers [Cal.] 101 P 6. Broker cannot buy property for principal and then charge him more than amount paid plus commission. De L'Archerie v. Rutherford [Wash.] 102 P 1033. Agent, who has undertaken lawful agency to make sale, has made sale, and has secured to himself the profits, is required to account to principal for such profits. Krhut v. Phares [Kan.] 103 P 117. Broker's fraud in respect thereto held not condoned by implication from purchaser's voluntary payment of agreed purchase price. Great Western Gold Co. v. Chambers [Cal.] 101 P 6. **Evidence** held to show that broker bought property for principal and not on his own account. De L'Archerie v. Rutherford [Wash.] 102 P 1033.

98. Rodman v. Manning [Or.] 99 P 657. Though no actual injury or fraud to principal resulted. Butler v. Agnew, 9 Cal. App. 327, 99 P 395. Such contract set aside. Rodman v. Manning [Or.] 99 P 657. Sale to third party for his benefit may be avoided, being violative of law, contrary to public policy, and unlawful under § 1667, Civ. Code. Butler v. Agnew, 9 Cal. App. 327, 99 P 395. Nor can sub-agent of such broker so purchase, as held in action by such sub-agent for specific performance of contract of sale. Fisk v. Waite [Or.] 99 P 283. In this connection existence of agency **is question for jury.** Forrester-Duncan Land Co. v. Evatt [Ark.] 119 SW 282.

99. Being constructive fraud. De L'Archerie v. Rutherford [Wash.] 102 P 1033.

1. See post, § 4. Contract made by broker representing both without knowledge of both is not enforcible. Harten v. Loffler, 31 App. D. C. 362. But when property which broker was engaged to purchase cannot be obtained, there is no bad faith in broker selling to principal his own

cise of skill, knowledge or influence on behalf of his principal.[2] He may ordinarily act for both, however, with their consent, where his duties are not incompatible.[3]

Stockbrokers. See 11 C. L. 450—Liabilities in stock brokerage contracts based on the illegality of the transaction are elsewhere treated.[4] The broker and his customer each undertake the performance of certain well defined obligations toward the other.[5] It is a part of the broker's duty to make purchases as instructed [6] and at the best price obtainable.[7] Stock purchased by broker for a customer for full cash consideration becomes the immediate property of the customer.[8] The relation of broker and customer in margin transactions,[9] in respect to the stock purchased,

property where principal has full knowledge of all facts. Reilly v. Haseltine, 127 App. Div. 64, 111 NYS 457.

2. Bass v. Tolbert [Tex. Civ. App.] 112 SW 1077. Regardless of whether principal was in fact injured, or agent intended no wrong, or other party acted in good faith. Id. And in no case can broker act as agent and representative of both in same transaction. Harten v. Loffler, 31 App. D. C. 362.

3. By weight of authority, though decisions are conflicting. Bass v. Tolbert [Tex. Civ. App.] 112 SW 1077.

4. See Gambling Contracts.

5. Wahl v. Tracy [Wis.] 121 NW 660; Quinlan & Co. v. Holbrook [C. C. A.] 162 F 272.

Note: "The broker undertakes and agrees, (1) At once to buy for the customer the stocks indicated; (2) To advance all the money required for the purchase beyond the 10 per cent furnished by the customer; (3) To carry or hold such stocks for the benefit of the customer so long as the margin of 10 per cent is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer and not of the broker. (4) At all times to have in his name and under his control ready for delivery the shares purchased, or an equal amount of other shares as the same stock; (5) To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; (6) To sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract the customer undertakes: (1) To pay a margin of 10 per cent on the current market value of the shares; (2) To keep good such margin according to the fluctuations of the market; (3) Te take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker." Markham v. Jandon, 41 N. Y. 235, approved in Richardson v. Stunn, 209 U. S. 365, 52 Law. Ed. 835.—From Quinlan & Co. v. Holbrook [C. C. A.] 162 F 272.

6. Not excused from purchasing particular stock ordered by fact that it would have depreciated to same extent as stock purchased contrary to orders. Wahl v. Tracy [Wis.] 121 NW 660.

7. Liable te customer for any difference between amount placed in his hands and market value of stock purchased therewith where he paid above market price. Wahl v. Tracy [Wis.] 121 NW 660.

8. Free from liability to general creditors of broker and to purchasers of such stock from broker with knowledge of customer's rights therein and broker cannot make sale thereof to innocent purchaser without subjecting himself to penal liability. Wahl v. Tracy [Wis.] 121 NW 660.

9. Existence of provision to contract which custom would not imply must be proven, hence customer must prove stockbroker agreed to carry stock without calling for further margin. Keller v. Halsey, 130 App. Div. 598, 115 NYS 564.

NOTE. The relation of broker and customer in margin transactions: Agitation concerning transactions on margin makes a recent decision of the supreme court especially timely. Securities were bought for a speculator on "margin," under an agreement permitting the broker to pledge the securities carried in his general loans. Within four months of proceedings in bankruptcy against the broker, the securities were redeemed by the broker and delivered to the customer, on receipt of the balance of account. The trustee in bankruptcy sued the customer, alleging a preference. A verdict was directed for the defendant on the ground that, since no relationship of debtor and creditor existed, the transfer was not preferential. Richardson v. Shaw, 209 U. S. 365, 52 Law. Ed. 835. Following a leading New York case (Markham v. Jaudon, 41 N. Y. 235), most jurisdictions regard stocks purchased on "margin" as the customer's property ab initio (Baker v. Drake, 66 N. Y. 518, 23 Am. Rep. 80; Brewster v. Van Llew, 119 Ill. 554, 8 NE 842). The broker, according to their analysis, is the customer's agent in making the purchase; becomes his creditor for the amount advanced; is a pledgee of the stock to secure repayment of advances; is bound to have in his name or under his control, ready for delivery, the identical or similar shares; finally, upon receipt of all advances and commissions accruing, must comply with the customer's demand for delivery or for sale on account. The client must keep good a stipulated "margin," and stand prepared to take over the stock at the purchase price when required.

Upon analysis, the logical and practical difficulties of this position, strongly insisted upon by the Massachusetts courts, infra, and their adherents, 15 Harv. L. R. 78, are not serious. First, omission of delivery and redelivery is immaterial. The law seeks substance, not form. Skiff v. Stoddard, 63 Conn. 198, 26 A 874, 28 A 104.

is that of pledgor and pledgee,[10] the right of possession until the stock is fully paid for being in the broker.[11] In view of this relation, the broker may, upon reasonable and timely notice having first been given to the customer,[12] sell, in the open market,[13] on the account of the customer,[14] stock bought on a margin, for which

21 L. R. A. 102. Moreover, it is well recognized that where a pledgee has the res already in his possession, the contract of pledge per se operates as a delivery. Story, Bailments (9th Ed.) 266. Second, as early as Kent's day (Nourse v. Prime, 4 Johns. Ch. [N. Y.] 490), it was decided in the case of a simple pledge that, provided the broker holds sufficient shares of similar stock, the identical shares of each customer need not be kept separate or even retained. The Massachusetts Supreme Court, on the other hand, speaking through Holmes, C. J., regards the "extreme tenuity of connection with any specific object" as an insurmountable obstacle to the existence of a pledge. Chase v. Boston, 180 Mass. 458, 62 NE 1059. Yet, in the well-known "Grain Elevator" cases, the confusion of the depositor's grain with other grain of like quality is regarded as perfectly compatible with a contract of bailment. Cf. Chase v. Washburn, 1 Ohio St. 244. The case of Levy v. Loeb, 85 N. Y. 365, far from conflicting, harmonizes perfectly, with the New York theory, for the contract specifically provided that the identical original securities be carried. The court expressly recognized that ordinarily a return of similar stock is adequate, provided—and this is fundamental—the broker at all times keeps under his control sufficient to satisfy the claims of his customers; the mere possession of ample funds with which to make good a stock shortage is insufficient. Douglas v. Carpenter, 17 App. Div. 329, 45 NYS 219. Third, the custom of brokers to rehypothecate stock carried is not a real inconsistency. There is ordinarily no implication that a pledgee shall retain the pledge in his exclusive possession. Jones, Pledges (2ed Ed.) 452. Doubtless in exceptional instances, e. g., an artistic masterpiece, such obligation of personal care may arise, but this element is absent in the case of stock certificates. A limitation is that the repledge shall not be for an amount exceeding the indebtedness of the customer to the broker, since such disposition would operate to deprive the customer of immediate possession upon tender of the sum of his indebtedness. Douglas v. Carpenter, supra. Fourth, it is insisted that as stocks are a fluctuating property, the burden should not be upon the broker to call for more "margin," and to give reasonable notice of the time and place of sale. In most jurisdictions, however, and certainly on principle, evidence of a trade custom to sell without notice on exhaustion of "margin" is admissible. 6 Columbia Law Review, 365. Even in New York, where it is inadmissible (Markham v. Jaudon, supra), the broker may protect himself by special agreement with his customer. Dos Passos, Stockbrokers, 114; Baker v. Drake, supra.

In contrast with this theory, the Massachusetts courts regard the broker as the owner of the shares upon a conditional executory contract to deliver them to the customer on demand and proper tender. Wood v. Hayes, 15 Gray (Mass.) 375; Covell v. Loud, 135 Mass. 41, 46 Am. Rep. 446; Weston v. Jordan, 168 Mass. 401, 47 NE 133. A like view of the similar "contango" transaction appears to have been taken in England by a lower court. Bentinck v. London, etc., Bank [1893] 2 Ch. 120, Esp. 140. Apart from the fact that if this construction were adopted it would become very questionable whether all "margin" transactions could not be set aside as mere wagers (Dos Passos, Stockbrokers, 115) it is submitted that only by a perverted construction of the understanding of the parties can the broker be regarded as the owner of the stock. The risk of the venture is the customer's solely. The dividends accruing are his. He pays interest upon the broker's advances. Any enhancement in value belongs to him. The broker is interested only to the extent of his commission. From every logical standpoint, therefore, the rejection of the Massachusetts view by the supreme court appears fortunate.—From 8 Columbia L. R. 488.

10. Mullen v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078.

11. Mullen v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078; Clappe v. Taylor, 125 App. Div. 605, 109 NYS 1072. Broker has right to retain it in his own name, unseparated, and to exact payment of balance before delivery, and his pecuniary interest therein gives him right to sell it or, under customs of New York, to hypothecate it. Wahl v. Tracy [Wis.] 121 NW 660. Customer is not entitled to possession of stock bought on margin until he has paid or tendered balance due. Weir v. Dwyer, 62 Misc. 7, 114 NYS 528. Stock so bought is property of purchaser subject to pledge thereof to broker for balance of purchase price. Schaefer v. Dickinson, 141 Ill. App. 284. It is broker's duty to keep on hand or under his control, either the securities of customer, or like kind and amount of securities, and to have them in such position that customer, by paying amount due, can at any time obtain them. Sprague v. Currie, 133 App. Div. 18, 117 NYS 481.

12. Sale by broker without demand and notice is conversion. Clappe v. Taylor, 125 App. Div. 605, 109 NYS 1072. Sale by broker without notice or consent of customer was conversion. Mullen v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078.

13. Where interested parties may attend and judge if fairly conducted. Weir v. Dwyer, 62 Misc. 7, 114 NYS 528. Where stock is bought on the curb, presumption is that parties intended that it may be sold there, such being sufficient compliance with law requiring pledge to be sold in public place. Id.

14. Stockbroker may be required in equity to render an accounting of securities placed in his hands to protect margins. Holt v. Hopkins, 63 Misc. 537, 117 NYS 177.

stock the customer has failed to pay.[15] A broker is liable in the highest measure for all damages sustained from the wrongful conversion of his customer's stock,[16] from his failure to sell as instructed,[17] or from his failure to invest the customer's funds according to his own subsequent representations.[18] He is not relieved from his liability for a conversion by making an unaccepted tender of after acquired stock.[19] A stop order does not impose an obligation on the broker to hold the stock until it reaches the specified price.[20] Ordinarily he has no implied authority to buy or sell the stock of another in his own name.[21] A stockbroker is liable for the acts of one authorized to act as his agent,[22] but not for an unauthorized act of a mere employee.[23] A customer is liable for his failure on demand, to deliver to a broker stock which he has ordered such broker to sell.[24] His liability in connection with purchase orders extends only in so far as the purchases are made in accordance with his instructions.[25] He may revoke his order at any time before the broker has in good faith acted thereon.[26]

§ 3. *Rights and liabilities as to third persons.*[27]—See 11 C. L. 451—A broker is not liable on a contract if his principal was disclosed, unless he agrees to be so bound.[28] In some cases, the broker may be held liable with the right to recover over against his principal.[29] He is ordinarily under no obligation to protect the interests of a third party as against his principal,[30] nor is he liable to the purchaser

15. Weir v. Dwyer, 62 Misc. 7, 114 NYS 528. Having been made. Keller v. Halsey, 130 App. Div. 598, 115 NYS 564.

16. Liable for market value on date of conversion. Wahl v. Tracy [Wis.] 121 NW 660. Liable for highest market price of stocks and wheat during period of reasonable time from conversion. Mullen v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078. Liable for difference between price realized and highest price reached within reasonable time after plaintiff had learned of conversion, within which he might go into market and repurchase it, fixing such reasonable time as nine days from sale, held proper measure. Keller v. Halsey, 130 App. Div. 598, 115 NYS 564. Measure of damages for unauthorized sale by broker is difference between amount received and amount for which purchaser could have bought stock on the market within reasonable time after notice of sale. Schaefer v. Dickinson, 141 Ill. App. 234. Liable for damages sustained such as loss of profits consequent upon unauthorized sale. Clappe v. Taylor, 125 App. Div. 605, 109 NYS 1072.

17. Customer may recover on basis of market value of stocks when ordered sold, in case of broker's failure to sell, but cannot recover on basis of certain transactions showing profit and rescind as to those showing loss. Quinlan & Co. v. Holbrook [C. C. A.] 162 F 272.

18. In case of broker's failure to invest funds as he reported, customer may at his option sue either for original funds or for the investment and profits as reported. Weiss v. Haight & Freese Co., 156 F 877.

19. Wahl v. Tracy [Wis.] 121 NW 660.

20. Richter v. Poe, 109 Md. 20, 71 A 420. Stop order is direction given by purchaser to broker to effect that if stock touches price named in order, while held, broker shall sell at best available price. Id. **Evidence** held insufficient to show broker agreed to carry stock for principal until it should decline to certain price. Id.

21. Reed v. Light, 170 Ind. 550, 85 NE 9.

22. Held agency question for jury, where so-called "correspondent" maintained office at broker's expense, was guaranteed stated compensation, and transmitted all orders over broker's private wire. Quinlan & Co. v. Holbrook [C. C. A.] 162 F 272.

23. As where such employe assumes to bind the broker to purchase stock, the burden of proof of such authority resting on customer and not being affected by fact that such employe attempted to execute order. Scheftels v. Heine, 139 Ill. App. 632.

24. Bank of Bisbee v. Graf [Ariz.] 100 P 452. Measure of damages in such case being increased price which broker is compelled to pay upon his going into the market and purchasing the stock within reasonable time. Id.

25. Not liable for difference between market price when he directed them to buy and higher price at which they bought. Norden v. Duke, 129 App. Div. 158, 113 NYS 494.

26. Wahl v. Tracy [Wis.] 121 NW 660. Broker having money placed in his hands by customer with instructions to buy stock for cash has not acted thereon in good faith by purchase of stock through another broker on margin. Id.

27. Search Note: See notes in 7 C. L. 471; 16 L. R. A. (N. S.) 431.

See, also, Brokers, Cent. Dig. §§ 134-153; Dec. Dig. §§ 91-106; 19 Cyc. 289-306; 4 A. & E. Enc. L. (2ed.) 751, 986; 23 Id. 896.

28. Blount v. Tomlinson [Fla.] 48 S 751. Broker held liable where he personally agreed that purchaser should receive clear title. Leggett v. Evans [Idaho] 102 P 486.

29. Held liable for pay for boats secured for transportation. Flannery v. New England Trans. Co., 168 F 397.

30. Though he knows third party advanced money for undertaking, he is under no obligation to hold proceeds for such

for misrepresenting the price fixed by the owner.[31] A broker's right to a commission from a third party depends upon contract.[32]

§ 4. *Compensation and lien.*[33] *Necessity of contract.*[See 11 C. L. 451] —A broker's right to compensation is dependent upon the establishment of a valid contract of employment[34] procured without fraud[35] and possessing mutuality.[36] A contract may be implied from an acceptance of the broker's service,[37] from proof that they were authorized[38] or from subsequent ratification.[39] A broker's acceptance of the contract may be implied from his performance of the acts contemplated.[40] Performance by the broker is not a consideration for the execution of an employment contract unless the performance be subsequent to such execution.[41] A third party is liable for a broker's commission only as he may agree thereto.[42]

party's benefit unless such party has retained a lien. Bank of Laddonia v. Bright-Coy Commission Co. [Mo. App.] 120 SW 648.

31. Rule of caveat emptor applying where confidential relations do not exist between the two and where no fraud or artifice is used by broker to prevent investigation. Ripy v. Cronan [Ky.] 115 SW 791.

32. See post, § 4, Necessity of Contract.

33. Search Note: See notes in 43 L. R. A. 593; 44 Id. 321, 593; 45 Id. 33; 64 Id. 554; 3 L. R. A. (N. S.) 576; 8 Id. 153; 9 Id. 933; 11 Id. 575; 15 Id. 187, 272, 1262; 1 A. S. R. 764; 28 Id. 546; 2 Ann. Cas. 184; 5 Id. 897; 9 Id. 433; 11 Id. 736.

See, also, Brokers, Cent. Dig. §§ 37-133; Dec. Dig. §§ 39-90; 19 Cyc. 217-270, 272-288; 4 A. & E. Enc. L. (2ed.) 969; 23 Id. 896.

34. Hovey v. Aaron, 133 Mo. App. 573, 113 SW 718. Mere voluntary service without authority of owner is not sufficient to entitle broker to commission. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. Where there is no contract of employment, broker is not entitled to commission, though he may have procured purchaser. Pecos Valley Immigration Co. v. Cecil [N. M.] 99 P 695; Mueller v. Bell [Tex. Civ. App.] 117 SW 993. Broker's right to commission from another broker for assisting him in making sale depends upon existence of agency contract between them. Macbeth v. Minnesota & Western Land Co. [Minn.] 121 NW 425. Husband of owner may make valid listing contract only when he has authority to act as her agent in such respect. Ebert v. Wilcox [Mich.] 15 Det. Leg. N. 967, 118 NW 735.

Employment not established: Where plaintiff's services were apparently voluntary and there was no agreement as to payment of commission. Booth Cohn Co. v. Lee, 117 NYS 550. Broker not being employed by defendant any more than by other party to exchange. Loeb v. Tepper, 112 NYS 1043. Broker not authorized by real owner to offer property for sale. Edel v. Hillenbrand, 114 NYS 903. Contract of employment held not created by broker's addressing possible purchaser and then writing owner that he had offered property to such proposed purchaser. Morton v. Barney, 140 Ill. App. 333. Not shown by letter introduced where party claimed that he had been employed to sell interest in mining claim for commission. Dreeland v. Pascoe [Mont.] 102 P 331. Where nothing in documents evidencing transaction to show plaintiff was agent to sell property on commission. Pollard v. Sayre [Colo.] 98 P 816. By subsequent mere special promise to pay commission. Walleston v. Fahnestock, 116 NYS 743. Where it did not appear that plaintiff's husband, who told broker that property was for sale, knew that plaintiff intended making any charge for his services, or that he had authority to employ plaintiff, or that defendant had any knowledge of such employment or that she ratified it. Hurd v. Lee, 132 App. Div. 110, 116 NYS 446. Direction to sell and sale of lighters, not being distinct from sale of tugs upon which no commission was collectable, the transaction being treated as a single one throughout. Joyce v. Hawley, 117 NYS 548. Where brokers did not offer to sell but merely covenanted that they had authority to offer to sell, and where defendant later refused to deal further with plaintiff and closed deal directly with a broker having full authority. Mason v. Chicago, B. & Q. R. Co. [C. C. A.] 156 F 959. For general rule as to sufficiency of contract, see ante, § 1, Creation of Relation.

35. Void for fraud of broker. Sand v. Kenney Mfg. Co., 113 NYS 972. But there is no fraud in broker's failure to disclose fact that he already has customer to whom he will probably effect a sale. Larson v. Thoma [Iowa] 121 NW 1059.

36. Lacking in mutuality where not signed by broker and where he does no subsequent acts showing his acceptance. Schoenmann v. Whitt, 136 Wis. 332, 117 NW 851.

37. As where owner knew that broker was conducting negotiations and expected commission if successful. Knight v. Knight, 142 Ill. App. 62.

38. Contract shown from correspondence. Annabil v. Traverse Land Co. [Minn.] 121 NW 233.

39. Contract ratified by owner closing deal with customer procured. Annabil v. Traverse Land Co. [Minn.] 121 NW 233. See, also, this section, post, Substantial Performance of Contract by the Broker. **Not ratified** where final consent of defendant to make exchange, claimed by broker to have been agreed upon, was not shown. Loeb v. Tepper, 112 NYS 1043.

40. Such as doing work and incurring expense. Schoenmann v. Whitt, 136 Wis. 332, 117 NW 851.

41. Contract for payment of commission

Substantial performance of his contract by the broker. See 11 C. L. 453—A broker's right to commission is based upon the successful termination of his employment,[43]

made after services rendered held void as without consideration. Shields v. Sterrat [N. J. Law.] 71 A 1129. Right to compensation was not affected by subsequent agreement made without consideration that broker would not claim commission unless title passed. Rohkohl v. Sussman, 61 Misc. 246, 113 NYS 586.

42. State Bank of Lisbon v. Cullen [N. D.] 121 NW 85; Donnelly v. Chetejian, 115 NYS 125. Purchaser or another broker was not liable, although plaintiff first called purchaser's attention to property and purchaser so arranged purchase that another broker got the commission. Oppenheimer v. Barnett, 131 App. Div. 614, 116 NYS 44. Purchaser assuming responsibility to retain out of purchase price and to pay broker's commission upon approval of title and his acceptance of lands purchased held not authorized to retain and pay same where only part of land was accepted by him. Cole v. Harvey [Iowa] 120 NW 97. Money paid by owner to third party to be paid to broker when title passes is not due to be paid to broker where title does not pass, but must be returned to owner even though broker may be entitled to commission. Bogart v. Reich, 128 App. Div. 854, 113 NYS 141. Purchaser held liable for commission where he requested broker to do nothing further, but to allow him to deal directly with owner and agreed that he would pay the commission if he bought. Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179.

43. Lawler v. Armstrong [Wash.] 102 P 775. Improper to instruct that real estate broker not entitled to commission unless he performed duties not required by terms of contract. E. A. Stront Co. v. Hubbard [Me.] 71 A 1020. In case of severable or apportionable contract such as contract providing that the commission is "to become due on one-quarter payment of the selling price of any piece of land sold," substantial performance of part may entitle broker to his commission for such part, although he abandoned remainder of contract. Tilton v. Gates Land Co. [Wis.] 121 NW 331.

Performance held sufficient: Where employment contract provided broker should be entitled to commission when sale affected, to be paid when delivery made, though enforcible sale which he procured was afterwards rescinded by both seller and buyer. Metz v. Miller, 113 NYS 527. Under contract providing that broker should be paid upon "closing of title" where contract of sale was procured but title was not closed by reason of refusal of owner. Meltzer v. Straus, 61 Misc. 250, 113 NYS 583. Under contract providing no commission unless title passed, and no commission whatever if title could not pass, and where refusal of owner prevented sale, since such provision did not contemplate an arbitrary refusal, but a refusal because of circumstances beyond owner's control. Greenwald v. Rosen, 61 Misc. 260, 113 NYS 764. Broker held entitled to commission from another broker where he induced purchaser to buy by showing him how investment would prove profitable, although direct negotiations were left to defendant, the employment contract being such that it was not necessary that plaintiff should bring parties together or that he should have anything to do with direct negotiations. Casey v. Richards [Cal. App.] 101 P 36. Although owner was forced to bring suit for specific performance which suit he compromised. Lawler v. Armstrong [Wash.] 102 P 775. Where building contract procured was in accordance with agreement between broker and defendant as to its terms, although it was unreasonable and unconscionable. Dutcher v. Empire League, 129 App. Div. 716, 113 NYS 1083. Under provision of contract of employment that he could sell to any one not an Armenian, sale to one not an Armenian held sufficient. Baird v. Loescher, 9 Cal. App. 65, 98 P 49. Where owner left key with woman and told her that "if anybody comes along and talks about the place, and you send them to me and they buy the place, I shall give you a commission," and put up "For Sale" sign, and where purchaser later got key from woman and she talked to him about house. Collins v. De Mars, 107 Minn. 566, 119 NW 1134.

Held insufficient: Where sale made was void for fraud in its procurement. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70. Broker employed to negotiate agreement for lease procured invalid lease and one which could not be carried out. Mann v. Griswold, 59 Misc. 239, 112 NYS 271. Where it appeared that brokers did not make lease of property. Laws v. Schmidt [Ohio] 88 NE 319. Where minds of parties were not brought to agreement, the purchaser offering broker less than half what owner afterwards sold property to him for. Gardner v. Pierce, 131 App. Div. 605, 116 NYS 155. Minds of owner and lessee to be procured did not meet, it being uncertain who such lessee was. Rice v. Neuman, 115 NYS 83. Owner and purchaser canceled conditional contract in a case where terms of sale had not been specified to broker. Johnson v. Sutton [Mass.] 49 S 970. Terms of proposed lease left for future agreement and lease never consummated. Rice v. Neuman, 115 NYS 83. Where, in action by broker for commission for securing employment for actor, it does not appear that contract under which actor is employed is one which broker procured or one coming within the terms of their agreement. Melcer v. Orbes, 117 NYS 929. Broker secured option conditioned on falling down of prior option which prior option was later closed. Frye v. Wakefield, 107 Minn. 291, 120 NW 35. In action by assignee of note given for commission on alleged sale of boat, where it was agreed that purchaser should deposit purchase price before conveyance was deposited, and such purchase price had not been deposited. Dorwin v. Hagerty, 137 Wis. 161, 118 NW 799. Contract stated broker to be paid "when the property is sold" and prospective pur-

which, under the ordinary contract, depends upon his having procured a purchaser or a sale [44] upon the specified terms.[45] A sale subsequent to the termination of the employment will not entitle the broker to a commission,[46] where the contract of employment has been revoked [47] in good faith,[48] or voluntarily surrendered,[49] or all ne-

chaser refused to take property on account of defective title. Pfanz v. Humberg, 11 Ohio C. C. (N. S.) 480.

NOTE. Success essential: "It follows, as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interests of his employer, and yet, if he fails, if, without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success, and in such event it matters not that after his failure and the termination of his agency what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest—but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors. As was said in Wylie v. Marine National Bank, 61 N. Y. 416, in such a case the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not if the sale is to the very party with whom the broker had been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer that he might make further efforts. The failure, therefore, and its consequences, were the risk of the broker only." Sibbald v. Bethlehem Iron Co., 83 N. Y. 378.—From Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179.

44. Mueller v. Bell [Tex. Civ. App.] 117 SW 993. See, also, this section, next two following divisions. Broker employed merely to procure purchaser need not show that sale was actually made. Monson v. Carlstrom [Iowa] 119 NW 606. Must bring minds of purchaser and owner to agreement. Gardner v. Pierce, 131 App. Div. 605, 116 NYS 155. Real estate broker is not entitled to commission on invalid sale, set aside by court. Volker v. Fisk [N. J. Eq.] 72 A 1011.

45. Must bring minds of buyer and seller together for a sale and price and terms thereof. William P. Rae Co. v. Kane, 116 NYS 739; Brown v. Mason [Cal.] 99 P 867. Broker must strictly comply with contract where no sale is actually made, hence must secure purchaser at exact price and terms agreed. Lieuwen v. Kline [Iowa] 120 NW 312. Securing valid and binding agreement to purchase from competent person is not sufficient compliance with contract to sell premises and account to owner for definite sum. Burnett v. Potts, 143 Ill. App. 160. Sale for $1,000 cash, remaining part of one-half purchase price to be paid in five weeks, such being a reasonable and customary provision, is not compliance with authority to make sale for $12,120, half cash, balance on time. Gough v. Coffin [Tex. Civ. App.] 120 SW 210. Where $17,500 was to be paid down, acceptance of $10 and mere promise to pay more later not sufficient. Stoutenburgh v. Evans [Iowa] 120 NW 59. Purchaser for cash held not sufficient compliance with agreement to find purchaser on interest bearing instalments, though actual tender made by purchaser and refused by owner. Jepsen v. Marohn [S. D.] 119 NW 988.

But broker has been held entitled to commission, though he did not close deal upon exact terms first proposed by owner, where sale was made. Annabil v. Traverse Land Co. [Minn.] 121 NW 233.

See, also, this section, post, Customer Must be Ready, etc.

46. There being no implied promise therefor, though sale be made to customer produced by broker. Brown v. Mason [Cal.] 99 P 867.

47. Though sale made to party with whom broker was negotiating. Gardner v. Pierce, 131 App. Div. 605, 116 NYS 155. Where owner told broker or his partner to take land off market and that same was not for sale. Taylor v. Reed [Tex. Civ. App.] 113 SW 191. Where broker fails to keep certain promises in regard to making loan, and principal revokes his authority, to which broker remarks "all right." Hutto v. Strough [Ala.] 47 S 1031. Where plaintiff declares upon only one of two papers constituting contract of employment and defendant does not challenge sufficiency of pleading, but admits execution of contract and alleges that contract was not in force at time of sale, this makes an issue on whether contract was in force, although it was the paper not set out in petition which contained the time limitation. Stiewel v Lally [Ark.] 115 SW 1134.

48. As where cause is bad faith of broker. Arthur v. Porter [Tex. Civ. App.] 118 SW 611. Must not be revoked merely to avoid payment of commission on sale already being negotiated. Montgomery v. Peach River Lumber Co. [Tex. Civ. App.] 117 SW 87. See, also, post, § 4, Customer Must be Ready, etc. Purchaser cannot take property out of broker's hands while negotiations are pending and sell it at reduced price to party with whom broker has begun negotiations, for purpose of availing him-

gotiations abandoned,[50] or the term thereof has expired.[51] Performance indicated by the principal's acceptance of a sale contract is deemed sufficient,[52] although the sale be not completed, whether through the fault of the principal[53] or of the purchaser.[54] A broker's right to a commission does not ordinarily depend upon the payment of the purchase price.[55] The usual duties required of a broker in order to entitle him to a commission may be variously limited and modified by express agreement,[56] the terms of which will be given the usual construction in accordance with the clear intention of the parties.[57] A broker having an exclusive agency

self of broker's labor, services and expense without paying therefor. Lawson v. Black Diamond Coal Min. Co. [Wash.] 102 P 759.

49. Surrender held to become operative and binding upon mailing of letter containing same. Jackson v. Parrish [Ala.] 47 S 1014.

50. As where he severs all relations with purchaser. Wheeler v. Beers [Colo.] 101 P 758. Where broker notified owner that he would not deal further with customer. Heenan v. Harris [Mich.] 16 Det. Leg. N. 344, 121 NW 741. Revoked where broker stated price in excess of lowest price of owner, allowed purchaser to go with understanding that this was lowest price, made no arrangements for further negotiations, and informed owner that he would do nothing further toward trade, although owner in good faith later sold farm to customer. Id.

But right to commission was not lost by abandonment where owner failed to make payment of commission in installments as agreed, although broker's continuance of the contract was not hindered by owner. Tilton v. Gates Land Co. [Wis.] 121 NW 331. Broker's right to commission is not abandoned by his receiving back money paid by customer, where principal represented to broker that he had land to sell when in fact he had none. Peavy v. Greer [Minn.] 121 NW 875.

51. Broker's contract to find purchaser. Kane v. Dawson [Wash.] 100 P 837. Held to have expired. Pecos Valley Immigration Co. v. Cecil [N. M.] 99 P 695. Unless sale delayed by fault of owner. Humphries v. Smith, 5 Ga. App. 340, 63 SE 248. **Held to have not expired,** but to have time extended by request that broker continue his efforts, such request being made by member of committee of two appointed by director of corporation. Lawson v. Black Diamond Coal Min. Co. [Wash.] 102 P 759. Extension being implied from owner's encouraging broker to proceed and making no objection. Stiewel v. Lally [Ark.] 115 SW 1134.

52. Meltzer v. Straus, 61 Misc. 250, 113 NYS 583. In absence of fraud by broker. Moore v. Irvin [Ark.] 116 SW 662. When contract of exchange is executed. Rohkohl v. Sussman, 61 Misc. 246, 113 NYS 586. Binding contract entered into. Fox v. Ryan, 240 Ill. 391, 88 NE 974. Where enforcible contract is entered into, "sold" and "sale" as used in broker's parol authority not necessarily meaning that conveyance must be made or title pass. Sanderson v. Wellsford [Tex. Civ. App.] 116 SW 382. Contract entered into held to be contract of sale not an option. Fox v. Ryan, 240 Ill. 391, 88 NE 974. Where real estate broker procured purchaser to whom principal sold. Eggland v. South [S. D.] 118 NW 719. For effect of forfeiture clause in such contract, see post, this section, Customer Must be Ready, etc.

53. By refusal. Henry & Sons & Co. v. Colorado Farm & Live Stock Co. [C. C. A.] 164 F 986.

54. Broker not being required to enforce sale contract. Moore v. Irvin [Ark.] 116 SW 662.

55. Pinkerton v. Hudson [Ark.] 113 SW 35; Moore v. Irvin [Ark.] 116 SW 662. See post, § 4, Customer Must be Ready, etc. Broker's right to $500 commission under contract providing payment thereof "if you can obtain for me an option to buy the tug boat," held not affected or limited by provision "said $500 to apply on the purchase price of the vessel if I take her." Stetson v. Sun Co., 36 Pa. Super. Ct. 390. Right to commission was not affected, though commission was payable from proceeds, since collection is duty of seller not of broker. Pinkerton v. Hudson [Ark.] 113 SW 35.

56. Fact that commission is not usually due until deal is concluded does not prevent parties from contracting otherwise. Stetson v. Sun Co., 36 Pa. Super. Ct. 390. Contract held not unreasonable which provided broker should receive commission if a sale was made to customer brought by broker to see principal's farm without further effort on broker's part, where principal had other farms listed which he desired to show customer. Lee v. Conrad [Iowa] 117 NW 1096. By contract, broker may be entitled to commission though sale be made to his customer after revocation of his employment. E. A. Strout Co. v. Hubbard [Me.] 71 A 1020.

57. Terms of employment should not be enlarged and made to create liability on owner for less service than was contemplated in contract. Laws v. Schmidt [Ohio] 88 NE 319. Where by contract commission was not due until exchange was consummated, held not due until title was transferred by exchange of deeds. Goodwin v. Siemen, 106 Minn. 368, 118 NW 1008. Broker may be entitled to commission for procuring purchaser though broker's authority for procuring purchaser has terminated, where contract so provides in case sale should be made after such termination on information obtained from broker. Shipman v. Wilkeson, 112 NYS 895. Contract to pay for listing in case of withdrawal is valid in case property is listed in customary manner, but listing would at least mean some mention of property in advertisements, mere taking record of property

may have the right to a commission on a sale effected by a third party,[58] provided he use ordinary diligence to make a sale,[59] but not ordinarily on a sale made by the owner,[60] unless such right be necessarily inferred from the employment contract.[61] An exclusive agency entitles the broker to a commission on a sale made by another, only when the sale has been actually executed.[62]

Broker must be efficient producing cause of sale.[See 11 C. L. 454]—It is essential to a broker's right to compensation, as determined from all the circumstances of the case, that he be the efficient procuring cause of the sale.[63] While it must be through

and making contract not being sufficient. E. A. Strout Co. v. Gay [Me.] 72 A 881. Where payment of commission is by agreement made dependent on fulfillment of sale contract, broker is entitled to commission only when contract was carried out as indicated or when nonperformance was fault of owner. Larson v. Burroughs, 131 App. Div. 877, 116 NYS 358. Owners held liable for commission where they expressly agreed to pay same, although broker was not to become their agent. Lawler v. Armstrong [Wash.] 102 P 775.

58. Bird v. Webber [Okl.] 101 P 1052. But not merely because owner has employed another broker to sell the property and agreed to give him all the proceeds above a certain amount, such employment not constituting a sale, and sales made by such second broker after commencement of action for commission do not affect right to recover. Kirshner v. Brown [Kan.] 96 P 848.

59. Schoenmann v. Whitt, 136 Wis. 332, 117 NW 851.

60. Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875. Under ordinary exclusive agency contract. Id. Agreement in effect that broker is to use best efforts "to get a buyer" and owner was merely "to aid in every possible way," held not to give exclusive agency and not to preclude owner from selling the property himself. Tracy v. Radeke [Iowa] 119 NW 525.

61. Under condition endorsed on back of an otherwise exclusive contract, whereby owner reserved right to sell to any one not becoming interested directly or indirectly through the broker, owner was liable for commission on sale made by owner to one who became interested through information given by broker to third party and by him communicated to purchaser. Shober v. Dean [Mont.] 102 P 323.

62. Humphries v. Smith, 5 Ga. App. 340, 63 SE 248.

63. Cooper v. Upton, 60 W. Va. 648, 64 SE 523. Sale must be made by or through broker before commencement of action. Northwest Land & Trust Co. v. Lowman, 132 Ill. App. 454. Broker is not entitled to commission if he had no connection with sale, where agency is not exclusive. English v. George Realty Co. [Tex. Civ. App.] 117 SW 996.

As between several brokers: Owner is neutral and may pay commission to the one of several brokers, having same property listed, who first procures purchaser. Frink v. Gilbert [Wash.] 101 P 1088. One first making sale is entitled to commission. Mueller v. Bell [Tex. Civ. App.] 117 SW 993. Only the one who was procuring cause is entitled to commission. Russell v. Poor, 133 Mo. App. 723, 119 SW 433. One who is efficient procuring cause is entitled to commission, though efforts of each contributed to result. Frink v. Gilbert [Wash.] 101 P 1088. Where sale is result of efforts of two brokers, that one is entitled to commission who first brought seller and purchaser together. Lewis v. McDonald [Neb.] 120 NW 207. As between two brokers, he is entitled to recover who can show that his efforts resulted in the sale, and not one who put forth no efforts and exerted himself only after purchaser had decided to buy, being prompted by desire to secure as good bargain as possible for purchaser and for himself a commission which he never earned. Id. Broker who procured loan for purchaser, without which he could not have made purchase, held entitled to commission on sale rather than broker who started negotiations but was unable to bring about the deal. Frink v. Gilbert [Wash.] 101 P 1088. Plaintiff not entitled to recover in action for division of commission where he merely informed defendant that owner of property was willing to sell and incorrectly stated the terms. Edel v. Hillenbrand, 114 NYS 903. Broker rather than subagent employed by him held entitled to commission from principal. Mueller v. Bell [Tex. Civ. App.] 117 SW 993. Held that commission should be divided equally between three brokers according to their agreement, and not according to custom. Corbitt v. Hanson [La.] 49 S 995.

Broker held procuring cause: Though negotiations had short break and parties separated but immediately after came together. Annabil v. Traverse Land Co. [Minn.] 121 NW 233. Where sale was made directly by owner before notice was given broker of revocation of his employment. Stiewel v. Lally [Ark.] 115 SW 1134. Though terms of sale were not agreed upon between broker and purchaser, where owner himself made sale to purchaser. Id. Although broker used no persuasion to induce purchaser to buy. Larson v. Thoma [Iowa] 121 NW 1059. Though owner in good faith voluntarily altered terms of sale. Stiewel v. Lally [Ark.] 115 SW 1134. So held under preponderance of evidence given where according to unimpeached testimony of disinterested purchaser, broker first mentioned house to her, showed it, and induced her to buy it. Pollatschek v. Larner, 112 NYS 1024.

Broker held not procuring cause: Where broker referred purchaser to land but did not tell him name of owner and did not tell owner of purchaser, and where purchaser

his efforts that the minds of the parties met and resulted in agreement on the terms of the transaction,[64] he need not necessarily have introduced the parties in the first instance,[65] nor will his employment and act of introducing the parties or starting negotiations be determinative,[66] unless made so by express contract.[67] It is not always necessary that the owner shall have known that the broker was the procuring cause [68] or that the broker shall have been acquainted with the purchaser.[69] The owner is not liable for a commission on a sale made by himself,[70] except under an exclusive agency contract for a definite period or under a special contract other-

abandoned trade but later returned to land and was induced to buy it by tenant to whom owner paid the commission. McLaughlin v. Hardin, 133 Mo. App. 605, 113 SW 681. Terms and whole situation upon which deal was closed were entirely different from proposition presented by broker to same purchaser. Morton v. Barney, 140 Ill. App. 333. Lease finally entered into was not procured through broker's instrumentality. Id. Where it does not affirmatively appear that purchaser was induced to apply to owner through means employed by broker. Kalkstein v. Jackson, 132 App. Div. 1, 116 NYS 302. Broker did not bring purchaser and seller together and did nothing which brought about sale, not even notifying seller of name of proposed purchaser. Hubbell v. Heidrich, 142 Ill. App. 404. Final sale was independent work of another after plaintiff had utterly failed to find purchaser. Junk v. Golden Ranch Sugar & Cattle Co., 122 La. 794, 48 S 267. Sale was made through other brokers for less price, and purchaser learned of property through advertisement by owner, the contract being that broker should receive commission if sale made through information received from him. Shipman v. Wilkeson, 112 NYS 895. No service was rendered owner of which he had knowledge and which he accepted, although broker voluntarily produced a purchaser who made a bid for property which was rejected by owner and thereafter broker had nothing further to do with the transaction, and although such purchaser afterwards obtained the property at original price offered. Albert Booth Cohn Co. v. Lee, 132 App. Div. 697, 117 NYS 550. No effort or influence of broker in procuring contract for plumbing materials was shown. Sand v. Kenney Mfg. Co., 113 NYS 972. Actual purchaser was not procured and was not induced to enter into negotiations and buy through efforts of broker. Monson v. Carlstrom [Iowa] 119 NW 606. It did not appear that means employed by broker resulted in sale. Wheeler v. Beers [Colo.] 101 P 758. Though sale would not have been made but for broker's unsuccessful attempt to sell to partner of purchaser individually, to which attempt broker devoted money, time and efforts. English v. George Realty Co. [Tex. Civ. App.] 117 SW 996. Though final sale was made through one to whom plaintiff had attempted to sell. Junk v. Golden Ranch Sugar & Cattle Co., 122 La. 794, 48 S 267.

64. Sale. Walleston v. Fahnestock, 116 NYS 743. His acts must have drawn purchaser's attention to property and have led to negotiations resulting in purchase. Shipman v. Wilkeson, 112 NYS 895.

But broker is not entitled to compensation, where purchaser unsolicited learned of property through overhearing broker and another talking. Monson v. Carlstrom [Iowa] 119 NW 606.

65. Kalkstein v. Jackson, 132 App. Div. 1, 116 NYS 302; Walleston v. Fahnestock, 116 NYS 743. Where through his efforts and information furnished by him parties were brought together. Wright v. McClintock, 136 Ill. App. 438; Lewis v. McDonald [Neb.] 120 NW 207.

66. Must not have abandoned trade and not sufficient merely that he had first negotiations with purchaser. Young v. Hubbard, 154 Mich. 218, 15 Det. Leg. N. 725, 117 NW 632. Not sufficient that he was employed and introduced purchaser to owner. Russel v. Poor, 133 Mo. App. 723, 119 SW 433. Not sufficient where it does not appear that purchaser was induced to apply to owner through means employed by broker. English v. George Realty Co. [Tex. Civ. App.] 117 SW 996. Insufficient where no negotiations then took place between parties, the owner refusing to set any price or terms because other parties were then negotiating for property. Wheeler v. Beers [Colo.] 101 P 758.

Insufficient where broker failed to get price from owner, which his principal, the defendant, would accept, and then abandoned the deal, and long afterwards under other circumstances defendant renewed negotiations and closed deal himself. Martien v. Baltimore, 109 Md. 260, 71 A 966.

67. Mere introduction held sufficient under contract so providing. Viney v. Bird, 143 Ill. App. 116; Mayer v. McCann, 136 Ill. App. 501.

68. Sechrist v. Atkinson, 31 App. D. C. 1; Stiewel v. Lally [Ark.] 115 SW 1134; Kalkstein v. Jackson, 132 App. Div. 1, 116 NYS 302.

69. Walleston v. Fahnestock, 116 NYS 743.

70. Sechrist v. Atkinson, 31 App. D. C. 1. Owner procured purchaser. Tracy v. Radeke [Iowa] 119 NW 525. When simple form of relation exists, and sale is made by owner and purchaser was uninfluenced by anything done by broker. Humphries v. Smith, 5 Ga. App. 340, 63 SE 248. Where, although sale was made within one week after broker introduced parties, sale made to same party was result of new and independent cause and not result of anything broker had done, his efforts having definitely failed and spent their force. Corse v. Kelly [Kan.] 101 P 1016. Where sale was not result of broker's negotiations, though it was subsequently made to same purchaser upon different terms. Jones v. Buck [Iowa] 120 NW 11..

wise providing,[71] or where the broker is the procuring cause, although he does not himself actually close the sale.[72]

Customer must be ready, willing and able to purchase. See 11 C. L. 456—Under the usual contract of employment,[73] a broker is entitled to a commission when he has procured a purchaser who is, at the time fixed for passing title,[74] ready, willing and able to purchase[75] upon the terms proposed by the owner,[76] but where the

71. If no exclusive agency owner is not liable where sale is made by himself alone. English v. George Realty Co. [Tex. Civ. App.] 117 SW 996; Tracy v. Radeke [Iowa] 119 NW 525. Under exclusive agency, not so providing, owner making sale himself is not liable for commission, unless broker was procuring cause thereof. Jackson v. Stephenson [Tex. Civ. App.] 114 SW 848. Owner held liable for commission regardless of attempted revocation before expiration of fixed period. Novakovich v. Union Trust Co. [Ark.] 117 SW 246.

72. Stiewel v. Lally [Ark.] 115 SW 1134. Held entitled to commission though owner closed sale. Id.; Boqua v. Marshall [Ark.] 114 SW 714; Peach River Lumber Co. v. Montgomery [Tex. Civ. App.] 115 SW 87; Gould v. Ricard Boiler & Engine Co., 136 Ill. App. 322. Entitled to commission although sale was concluded by owner himself at reduced price. Hancock v. Stacy [Tex. Civ. App.] 116 SW 177; Wright v. McClintock, 136 Ill. App. 438. Broker was entitled to commission although not present when deal was closed. Strout v. Lewis [Me.] 71 A 137. See next preceding paragraph. Broker held entitled to commission, where by fair inference from evidence it appears that from broker's running to and fro the parties came to an agreement, although sale was made in broker's absence. Sturenberg v. Spero, 116 NYS 737. Broker was entitled to commission where he brought a contract to his principal, which contract principal declined to accept for reason that there would be no profit on sale after payment of commission, and where, afterward, the principal accepted same contract direct from customer. Haskins v. Lewis, 11 Ohio C. C. (N. S.) 231. Under **special contract** providing that broker be entitled to commission if sale be made to broker's customer even after withdrawal, instruction that "If the listed place was sold, either before or after withdrawal, to a customer to whom the plaintiff or its agents in good faith recommended it, then the defendant is liable for a commission of $200, whether such sale was effected in whole or in part by reason of such recommendation or not," held proper. E. A. Strout Co. v. Hubbard [Me.] 71 A 1020.

73. But parties are not debarred from making different contract. Mayer v. McCann, 136 Ill. App. 501.

74. Not necessarily at time contract was signed. Jaffe v. Nagel, 114 NYS 905.

75. Essential unless binding contract be procured. Watters v. Dancey [S. D.] 122 NW 430. When not shown, mere procuring of a contract held insufficient. Fox v. Ryan, 240 Ill. 391, 88 NE 974. It is essential to recovery that purchaser's ability previous to abandonment of deal by broker be shown. Frink v. Gilbert [Wash.] 101 P 1088. Not shown where customer makes no offer. Wheeler v. Beers [Colo.] 101 P 758. Not shown where purchaser avoided obligating himself. Junk v. Golden Ranch Sugar & Cattle Co., 122 La. 794, 48 S 267. Not shown where broker was unable to obtain money to pay, but, on learning that other broker did not have deed in his possession, he made a tender to him of the money through clerks of bank from whom he had obtained money for such purpose under agreement that he would return to such bank the identical money. Little v. Herzinger, 34 Utah, 337, 97 P 639. Essential, however, where purchaser was alleged to act through an agent, that authority of agent to so act be shown. Abrams v. Turkel, 114 NYS 174. Ability is especially essential in case of exchange of real property; hence must show title of purchaser. Mutchnick v. Davis, 130 App. Div. 417, 114 NYS 997. Held under evidence that alleged purchaser of boat did not exist and was not ready to pay purchase price. Dorwin v. Hagerty, 137 Wis. 161, 118 NW 799. Held entitled to a commission for procuring such a purchaser, though principal was permitted to cancel sale contract upon his promise to pay commission, action for commission being by assignee of broker. Breen v. Roy, 8 Cal. App. 475, 97 P 170. Broker was entitled to commission although purchaser was buying in interest of undisclosed third party. Lawler v. Armstrong [Wash.] 102 P 775.

76. Birch v. McNaught [Okl.] 101 P 1049. Essential. Id.; Hovey v. Aaron, 133 Mo. App. 573, 113 SW 718; Frink v. Gilbert [Wash.] 101 P 1088. Must be on terms agreed upon between broker and principal. Hutto v. Stough [Ala.] 47 S 1031. Where terms are specified. Johnson v. Sutton [Miss.] 49 S 970. Unless principal accept purchaser on modified terms. Hamburger v. Thomas [Tex. Civ. App.] 118 SW 770. Yet, if price specified has been obtained, but there has been some change in mode of payment, the real estate broker may nevertheless be entitled to his commission. Eggland v. South [S. D.] 118 NW 719. But procuring one willing to buy or enter into 99-year lease is not equivalent to procuring one to make 19-year lease. Morton v. Barney, 140 Ill. App. 333. Terms held to include condition imposed as to grading of lots. Hansen v. Williams [Tex. Civ. App.] 113 SW 312. Sale for all cash is not compliance with authority to sell for half cash and half credit, unless term of specified credit be so short as to make it in fact a cash transaction. Taylor v. Read [Tex. Civ. App.] 113 SW 191. Where purchaser procured is not on terms proposed, broker is not entitled to commission, though owner afterwards makes sale to another purchaser on substantially same terms as those rejected. English v. George Realty Co. [Tex. Civ. App.] 117 SW 996. Broker

terms are not specified, his right to a commission depends upon a sale being actually made.[77] By procuring such a purchaser, the broker has performed his contract, although the transaction is not completed because of wrongful conduct of the principal,[78] improper termination of the employment,[79] the principal's refusal to consummate the sale,[80] or of defective title,[81] unless it is otherwise agreed.[82] If

not entitled to commission where sale contract made by him contained an unauthorized clause providing owner should forfeit $50 per day for each day's delay in delivering deed, though such stipulation be waived by purchaser. Evants v. Fuqua [Tex.] 118 SW 132. Purchaser held not ready, willing and able to buy on terms proposed by owner, where broker had undertaken to find purchaser who would pay purchase price and in addition thereto assume such assessments as might be levied against property, and where by agreement with purchaser secured he might assume assessments and, in case he did so, he could deduct them from purchase price. Kane v. Dawson [Wash.] 100 P 837. Change in terms agreed to by husband do not bind wife. Slaughter v. Elliott [Mo. App.] 119 SW 481. As with mineral rights reserved. Weaver v. Richards [Mich.] 16 Det. Leg. N. 117, 120 NW 818. It was essential under contract providing that broker should find purchaser of laundry business to whom principal was "willing to sell." Wenks v. Hazard [Iowa] 121 NW 1058. Essential that purchaser be ready to buy at price satisfactory to owner, under contract thus providing. Cooper v. Upton, 60 W. Va. 648, 64 SE 523. Broker held not entitled to commission where he inserts in sale contract unauthorized provisions changing time and manner of payments, fixing liquidated damages in case of default, requiring seller to furnish abstract of title within reasonable time, and stipulating that such contract and earnest money shall be held in escrow. Settler v. Oliver, 138 Ill. App. 210.

77. Johnson v. Sutton [Miss.] 49 S 970.

78. **Illustrations:** Principal's fault or disinclination. Humphries v. Smith, 5 Ga. App. 340, 63 SE 248. Principal sold the property to another for higher price. Hickman-Coleman Co. v. Leggett [Cal. App.] 100 P 1072. Principal had previously and without cause revoked broker's exclusive agency. Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875. Principal permitted purchaser to rescind enforcible contract. Bankers' Loan & Inv. Co. v. Spindle, 108 Va. 426, 62 SE 266. He raised price to a figure which purchaser would not pay. Sotsky v. Ginsburg, 129 App. Div. 441, 114 NYS 114. He decides not to enforce contract which he accepted. Pinkerton v. Hudson [Ark.] 113 SW 35. He dismissed suit brought to enforce sale contract which he had accepted. Pinkerton v. Hudson [Ark.] 113 SW 35. He entered into written stipulation with purchaser cancelling contract secured by broker. Myers v. Buell, 142 Ill. App. 467. He failed to enforce binding contract secured. Moss v. Wren [Tex. Civ. App.] 118 SW 149. Owner requested delay in negotiations and then continued negotiations himself and concluded sale. Hutto v. Stough [Ala.] 47 S 1031. Broker agreed to procure purchaser and assist in effecting sale, and, after purchaser was procured by broker, owner repudiated agreement and completed sale without broker's assistance. Templeton v. Biegert [Kan.] 100 P 654. Another broker was brought in by owner and permitted to sell at less price to purchaser procured. Lewis v. McDonald [Neb.] 120 NW 207. Owner sells property to another. Frink v. Gilbert [Wash.] 101 P 1088. Principal lowers price and secretly closes deal without broker who has found purchaser. Strout v. Lewis [Me.] 71 A 137. Principal was unable to complete contract. Baldwin v. Smith [Tex. Civ. App.] 119 SW 111. Owner in bad faith withdrew property and made sale himself at reduced price to same purchaser. Hancock v. Stacy [Tex. Civ. App.] 116 SW 177.

But **no wrongful conduct** where owner made less price to prospective purchaser but afterwards withdrew it and returned to price given to broker. Lieuwen v. Kline [Iowa] 120 NW 312.

79. Termination for purpose of defeating broker in collection of commissions already earned. Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179. Termination to defraud brokers of commission. Young v. Hubbard, 154 Mich. 218, 15 Det. Leg. N. 725, 117 NW 632; Templeton v. Biegert [Kan.] 100 P 654; Gardner v. Pierce, 131 App. Div. 605, 116 NYS 155; Peach River Lumber Co. v. Montgomery [Tex. Civ. App.] 115 SW 87.

80. Fox v. Ryan, 240 Ill. 391, 88 NE 974; Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70. Although contract provided, broker should be paid upon "closing of title," such closing of title not being a condition percedent to recovery of commission. Meltzer v. Straus, 61 Misc. 250, 113 NYS 583. Though contract provided "that no commissions are to be paid until title is passed," such provision not contemplating an arbitrary refusal of owner to complete the exchange. Greenwald v. Rosen, 61 Misc. 260, 113 NYS 764. Owner refusing to make sale held liable in damages even where it was agreed that broker should get his commission from purchaser. Henry & Sons & Co. v. Colorado Farm & Live Stock Co. [C. C. A.] 164 F 986. As where owner failed to deliver deed or abstract of title, by reason of which he never came into possession of the part consideration placed in hands of third party. Sanderson v. Wellsford [Tex. Civ. App.] 116 SW 382. Mere arbitrary refusal. Arthur v. Porter [Tex. Civ. App.] 116 SW 127.

Owner is liable in case of his refusal to consummate sale, except in case of **special contract** such as where broker was authorized merely to procure offers for owner, which he could consider and either accept or reject. Kupperstein v. Bayne, 117 NYS 184.

81. Although principal had no title whatever. Peavey v. Greer [Minn.] 121 NW 375. Principal had no title whatever and had no authority to act as agent to sell prop-

the principal accept the offered purchaser, he cannot question his readiness and ability to perform upon the proposed terms.[83] For the procurement of a contract to be determinative of the broker's right to a commission, such contract must be valid and enforcible by the principal[84] or must have been accepted by him.[85] In this connection, the authorities conflict in regard to whether a sale contract containing a forfeiture clause is enforcible.[86]

Broker must act in good faith towards principal.[See 11 C. L. 459]—As a general rule, a broker must not undertake to act in a dual capacity[87] unless it be with the knowledge and consent of the parties interested[88] nor must he become a purchaser

erty. Wilson v. Ewald, 61 Misc. 286, 113 NYS 687. Bringing and compromiee of suit against real owner held no estoppel to suit against principal having no title. Id. Although principal never owned property, right to commission being determined by contract. Sanchez v. Yorba, 8 Cal. App. 490, 97 P 205. Buyer and seller having entered into contract of sale. Little v. Fleishman [Utah] 101 P 984. Broker's right to commission is not defeated by owner's failure to furnish abstract of title as agreed. Hamburger v. Thomas [Tex. Civ. App.] 118 SW 770.

Broker's right to commission is not affected by defective title of purchaser to property exchanged where actual contract of exchange has been executed by buyer and seller. Mutchnick v. Davis, 130 App. Div. 417, 114 NYS 997.

82. Ligon v. Wharton [Tex. Civ. App.] 120 SW 930. Such agreement being made before contract of sale is concluded and being based on valid consideration. Id. As where agreement is to sell such title as owner has. Weaver v. Richards [Mich.] 16 Det. Leg. N. 117, 120 NW 818. Where contract with real estate agent specifically states that he is to be paid for his services "when the property is sold," it is not error in action by agent against owner for recovery of his commission to direct verdict for defendant, where testimony has disclosed that prospective purchaser refused to take property because of defect in title. Pfanz v. Humberg, 11 Ohio C. C. (N. S.) 480. Broker held not entitled to commission where owner made bona fide effort to furnish title within time prescribed in sale contract or where broker himself assumed responsibility of furnishing title. Carter & Co. v. Harrell [Tex. Civ. App.] 118 SW 1139.

83. Fact of his being purchaser is self evident where sale actually takes place. Monson v. Carlstrom [Iowa] 119 NW 606. Where owner accepts and contracts, in absence of fraud on warranty by broker. Moore v. Irvin [Ark.] 116 SW 662; Fox v. Ryan, 240 Ill. 391, 88 NE 974. Though purchaser afterward fails to perform contract. Id. Sale made to designated person on specific terms. Stoutenburgh v. Evans [Iowa] 120 NW 59. Purchaser entered into sale contract. Pinkerton v. Hudson [Ark.] 113 SW 35; Hamburger v. Thomas [Tex. Civ. App.] 118 SW 770. Purchaser conveyed land. Cooper v. Upton, 60 W. Va. 648, 64 SE 523. Broker may be entitled to commission where purchaser is not willing, ready and able to buy on terms proposed, where owner, while negotiations are pending and agency unrevoked, makes sale to purchaser at reduced price. Hovey v. Aaron, 133 Mo. App. 573, 113 SW 718. Broker need not prove purchaser ready, willing and able where owner acting in bad faith withdrew land and made sale himself at reduced price. Hancock v. Stacy [Tex. Civ. App.] 116 SW 177. Held that purchaser was not accepted. Beckley v. Morton, 140 Ill. App. 301.

84. Not made just in name of broker. Watters v. Dancey [S. D.] 122 NW 430.

85. Fox v. Ryan, 240 Ill. 391, 88 NE 974. Held that principal never accepted purchaser where he never saw contract or purchaser and was informed of terms and conditions of contract only in general way. Beckley v. Morton, 140 Ill. App. 301.

86. Contract fixing damages in case of default held enforcible. Moss v. Wren [Tex.] 113 SW 739. Held essential that purchaser be willing to enter into contract to purchase land absolutely, and that contract providing forfeiture as liquidated damages in case of nonperformance was not an absolute sale contract which could be specifically enforced, reversing former opinion (see 113 SW 739, also, 118 SW 149). Moss v. Wren [Tex.] 120 SW 847.

87. See ante, § 2. Duties of obtaining highest possible price for vendor and lowest price for vendee being conflicting and such dual agency contracts being contra bonos mores. Harten v. Loffler, 31 App. D. C. 362. Regardless of whether principal was injured or wrong was intended by broker. Lemon v. Little, 21 S. D. 628, 114 NW 1001. A real estate dealer cannot ordinarily represent both purchaser and owner, since he owes to owner to exercise his best efforts to secure largest price possible and it is to purchaser's interest to buy for lowest possible price. Law v. Ware, 238 Ill. 360, 87 NE 308. It is contrary to public policy for broker, authorized to obtain highest possible price, to accept pay from purchaser. Akin v. Poffenberger [Tex. Civ. App.] 116 SW 615. Broker acting in dual capacity, held not entitled to commission. Hess v. Gallagher, 64 Misc. 95, 117 NYS 960. Broker must not, while pretending to represent owner, in fact represent purchaser and attempt to get land for less than owner was demanding therefor. Lewis v. McDonald [Neb.] 120 NW 207. Fact that he has customer for property before he contracts with owner does not make him agent of such customer. Larson v. Thoma [Iowa] 121 NW 1059.

88. Zimmerman v. Garvey, 81 Conn. 570, 71 A 780. See ante, § 2. Not improper where parties consent. Rohkohl v. Suss-

for his own benefit.[89] It has been held that a broker may act for both parties where he is a mere middleman [90] or has no authority to exercise his discretion on behalf of [91] either party. A broker forfeits his right to a commission by any act adverse to his principal,[92] such as the suppression of material facts,[93] an attempt to secure for himself unauthorized profits,[94] a fraudulent act resulting in injury to his principal,[95] or other acts constituting bad faith.[96]

Procuring loan.[See 11 C. L. 460]—A broker employed to procure a loan is entitled to his commission when he has procured a person [97] ready and able to make the loan [98] upon the terms specified,[99] and has given his employer notice thereof.[1] The general rule that the broker is not entitled to his commission until the loan is made [2]

man, 61 Misc. 246, 113 NYS 586. Parties held to have known and consented, where it was stipulated that each party should pay part of an agreed commission. Zimmerman v. Garvey, 81 Conn. 570, 71 A 780. Not against public policy to represent both with their knowledge. Arthur v. Porter [Tex. Civ. App.] 116 SW 127. Broker may represent both, if with their knowledge and without objection, though he makes no special disclosure of fact to them. Id. Broker may collect commission from purchaser who has agreed to pay it where at such purchaser's request he has ceased his efforts for owner, even though he has not so notified owner. Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179.

89. Not entitled to commission where he does. Hess v. Gallagher, 64 Misc. 95, 117 NYS 960. Not entitled to commission where he enters corporation making purchase and thereby becomes joint purchaser. Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P 10.

90. Where broker merely acts to bring intending purchaser and owner together. Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179.

91. Broker could properly divide his commission with buyer, where seller, a real estate dealer, fixed his own price and did not employ such broker to secure best price possible, but only to secure acceptance of his proposition. Law v. Ware, 238 Ill. 360, 87 NE 308.

92. Skinner Mfg. Co. v. Douville [Fla.] 49 S 125. But acts ordinarily constituting breach of faith are not such, where relation of principal and agent does not exist, as where owner agrees to pay broker commission in case sale is made to his customer without such broker becoming his agent. Lawler v. Armstrong [Wash.] 102 P 775.

93. As where broker procured owner to release his option, and secured to himself the profits. Krhut v. Phares [Kan.] 103 P 117. Broker should disclose anything that would tend to influence owner or affect his interests, such as fact that he would claim commission on sale. Skinner Mfg. Co. v. Douville [Fla.] 49 S 125.

Not bad faith: Failure to give name of purchaser before sale where no harm resulted. Hovey v. Aaron, 133 Mo. App. 573, 113 SW 718. Failure to disclose fact that he already has prospective customer for property. Larson v. Thoma [Iowa] 121 NW 1059. Failure to disclose that purchaser was acting in interest of third party, where purchaser able to carry out contract of purchase. Lawler v. Armstrong [Wash.] 102 P 775.

94. Broker used fraudulent efforts to obtain more than his agreed commission by quoting higher price, contrary to his contract. Heenan v. Harris [Mich.] 16 Det. Leg. N. 344, 121 NW 741. Real estate broker derived profit to himself in violation of contract. Schleifenbaum v. Rundbaken, 81 Conn. 623, 71 A 899.

95. Where sale contract was avoided because of fraud in which broker participated. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70.

96. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70.

Held bad faith: Where agreement between brokers to share commissions without knowledge or consent of principal. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70.

Held not bad faith: Trying to sell property of others to same customer. Lemon v. Macklem [Mich.] 16 Det. Leg. N. 456, 122 NW 77. Broker's agreement to divide his commission with purchaser, seller not being injured thereby. Lawler v. Armstrong [Wash.] 102 P 775. Broker's refusal to pay half of costs of suit to enforce sale contract as he agreed, being merely collateral to the controversy. Pinkerton v. Hudson [Ark.] 113 SW 35. An opinion honestly entertained and expressed, and relied on as such by principal and not as assertion of actual fact. Stetson v. Sun Co., 36 Pa. Super. Ct. 390. Where broker, who was to receive all purchase price above certain amount, offered to sell property so that owner would receive such amount, although broker was to retain improvements for his commission. Luhn v. Fordtran [Tex. Civ. App.] 115 SW 667.

97. Evidence held to show loan secured through instrumentality of plaintiff. Thorne v. Barth, 114 NYS 900.

98. Though transaction failed because of principal's misrepresentation of amount of incumbrance on property. Lechnyr v. Germansky, 113 NYS 969. Regardless of fact that he has agreed to divide his commission with third party. Thorne v. Barth, 114 NYS 900. Right depends upon services undertaken regardless of fact that he was a member of the bar. Kimball v. Hayes, 199 Mass. 516, 85 NE 875.

99. Loan of three years does not meet specifications of loan of five years. Glover v. Duffy, 112 NYS 1099.

1. Morton v. Petit, 117 NYS 364.

2. Steele v. Lippman, 115 NYS 1099; Holliday v. Roxbury Distilling Co., 130 App. Div. 654, 115 NYS 383.

does not apply where the loan is not made by reason of the fault of the principal,[3] or by reason of the principal's refusal to accept the loan, and in such case it is not essential that the broker produce the lender or show such lender's ability to make the loan.[4] It is ordinarily no breach of faith for the principal to secure the loan elsewhere.[5]

Necessity of broker's contract being in writing See 5 C. L. 454 is elsewhere treated.[6]

Amount of commissions and measure of recovery for services. See 11 C. L. 460 Where there is an express contract as to the amount of the broker's commission, he cannot ordinarily recover on a quantum meruit,[7] but the amount which he may recover is dependent upon the terms of his contract[8] as reasonably construed,[9] and is limited thereby.[10] His right to recovery in any amount depends upon his compliance with the terms of such contract.[11] In the absence of an express stipulation, a broker is allowed such commission as is reasonable and customary,[12] based on the actual purchase price,[13] or on the value of the property at the time the services were rendered.[14] Brokers are entitled to a reasonable compensation in certain cases where the employment contract is invalid,[15] where the principal sells at a reduced price to the purchaser procured,[16] or where circumstances have occurred which prevent the agreed commission being proven.[17] The broker may generally recover

3. Steele v. Rumore, 117 NYS 189. Where negotiations fall through on account of defendant's misrepresentations as to security to be given. Holliday v. Roxbury Distilling Co., 130 App. Div. 654, 115 NYS 383.

4. Broker need not even give lender's name. Steele v. Lippman, 115 NYS 1099. Broker held to have been excused from bringing lender into principal's presence, or from disclosing to him lender's name, before bringing suit for commission. Morrison v. Tuska, 113 NYS 611.

5. Especially where it appeared that broker would not succeed. Kimball v. Hayes, 199 Mass. 516, 85 NE 875.

6. See Frauds, Statute of, § 6.

7. Nelson v. Webster [Neb.] 119 NW 256; Goldstein v. D'Arcy, 201 Mass. 312, 87 NE 584.

8. Executor personally agreeing to pay 5 per cent or such amount as court might fix, upon his failure to have court fix the amount, held liable for the 5 per cent commission. Hickman-Coleman Co. v. Leggett [Cal. App.] 100 P 1072. Where commission was to be paid out of proceeds of last three purchase price notes, broker was entitled to interest on such commission only from date of maturity of such notes. Bankers' Loan & Inv. Co. v. Spindle, 108 Va. 426, 62 SE 266. Where contract provided broker should receive "all you get above $2,000 per year" for securing tenant, broker was entitled to excess above $2,000 for each year of lease. Goldstein v. D'Arcy, 201 Mass. 312, 87 NE 584. Contract provided broker entitled to what was sold for above certain amount. Held broker could get no compensation until owners had received such amount, where owners not at fault. Burnett v. Potts, 236 Ill. 499, 86 NE 258. In which case commission may be money, land or other property, to recovery of which usual remedies will apply. Morrison v. Gosnell [Neb.] 121 NW 236.

But contract as to amount of commission to be paid if sale be made to specific purchaser does not necessarily control in fixing amount of commission on sale of same property made to another purchaser. Weil v. Schwartz [Tex. Civ. App.] 120 SW 1039.

9. Construction of contract which would allow commission nearly five times amount involved held preposterous. Junk v. Golden Ranch Sugar & Cattle Co., 122 La. 794, 48 S 267.

10. Regardless of evidence of value of services. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631.

11. Burnett v. Potts, 143 Ill. App. 160. Broker was not entitled to commission where he procured a void sale instead of a valid one. Nelson v. Webster [Neb.] 119 NW 256.

12. Kennedy v. Merickel, 8 Cal. App. 378, 97 P 81. Reasonable commission is determined from market in which contract was made, and to be performed, and which property was sold. Id.

13. Not based on consideration stated in deed of conveyance. Hollinger v. Phillips, 140 Ill. App. 317.

14. Stock transaction. Oliver v. Little [Nev.] 103 P 240.

15. As where contract was invalid for want of power in the principal to execute it. Lyon v. West Side Transfer Co., 117 NYS 648.

16. In such case broker may be entitled, at least, to reasonable compensation for reasonable value of his services. Hancock v. Stacy [Tex. Civ. App.] 116 SW 177. Broker was entitled, at least, to rationable proportion of agreed commission where owner arbitrarily reduces price and concludes sale himself, after negotiations with same purchaser have been begun by broker. Lawson v. Black Diamond Coal Min. Co. [Wash.] 102 P 759.

17. Agreement could not be proven, where it was had in a conversation had by broker with landowner who has since died making such conversation inadmissible. Templeton v. Biegert [Kan.] 100 P 654.

from his principal such damages as may be held reasonable where the principal prevents the consummation of his employment.[18] He is not, however, entitled to damages from the proposed purchaser for breach of his contract to purchase.[19]

Actions to recover commissions. See 11 C. L. 461—The right to bring an action for services in negotiating the sale of property at the request of the owner existed at common law.[20]

Pleading. See 11 C. L. 461—The contract of employment may be sufficiently set forth in the complaint, though it does not affirmatively appear that all statutory requirements have been complied with.[21] If the exigencies of the case demand or permit it, the complaint may state a cause of action on both contract and quantum meruit.[22] The ratification of a broker's unauthorized act may be sufficiently alleged in general terms and without stating how it was ratified.[23] The usual rules apply in respect to the sufficiency of pleading,[24] proof in its relation to the pleading,[25] and variance.[26] By making the plea that he never gave the broker the authority claimed, the defendant does not waive his right to make other defenses.[27] While fraud must be specifically plead,[28] the defendant may ordinarily show any other defense to the contract without specially pleading such other defense.[29] Adverse claimants to a brokerage commission may be required to interplead,[30] but a broker suing only for his share of the commission need not include another broker who assisted in the sale.[31]

Evidence and burden of proof. See 11 C. L. 462—The plaintiff has the burden of

18. Owner was liable for damages even though purchaser had agreed to pay commission, where owner wrongfully prevented sale after terms of exchange had been agreed upon. Bird v. Blackwell, 135 Mo. App. 23, 115 SW 487. In such case, the fact that sale contract was not enforcible was held to be no defense. Id. Broker employed for definite period and discharged without cause was entitled to damages. Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875. In such case, broker may recover anticipated profits, this being proper measure. Blumenthal & Co. v. Bridges [Ark.] 120 SW 974.

19. Broker cannot thus recover his lost commissions. Le Master v. Dalhart Real Estate Agency [Tex. Civ. App.] 121 SW 185.

20. Such right is not created by statute. Adams v. Grady [N. J. Law] 72 A 55.

21. Where statute of frauds requires that contract of listing and for compensation in case of sale shall be in writing, it is not necessary that petition shall state that it is in writing, such statute merely introducing new rule of evidence, and not a rule of pleading. Adams v. Grady [N. J. Law] 72 A 55.

22. Templeton v. Biegert [Kan.] 100 P 654; Lyon v. West Side Transfer Co., 117 NYS 648.

23. Allegation that principal ratified it with full knowledge of facts was sufficient. Mahon v. Rankin [Or.] 102 P 608.

24. Petition setting out written correspondence between parties, which plaintiff claimed constituted contract, and alleged that plaintiff had procured purchaser able and willing to take land on defendant's terms, that defendant was unwilling to convey land to purchaser and refused to pay plaintiff's commission, held sufficient. Johnson v. Huber [Kan.] 103 P 99. Complaint, alleging plaintiff made sale and informed defendant thereof, that the purchaser was ready, willing and able to buy stock, that defendant failed and refused to deliver, held sufficient as against demurrer on ground that it alleged sale by plaintiff in his own name without reporting to defendant terms thereof. Reed v. Light, 170 Ind. 550, 85 NE 9.

25. Proof of principal's signature to contract not required where not raised by answer. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70.

26. It is essential that verbal contract established be the one executed at the time and as alleged in petition. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. Held, that there was no variance between allegation of sale and proof of enforcible contract. Sanderson v. Wellsford [Tex. Civ. App.] 116 SW 382.

27. Mutchnick v. Davis, 130 App. Div. 417, 114 NYS 997. Where defendant denies making contract, he has right to stand, not only upon plaintiff's failure to prove performance of valid contract on their part, but also to show that they did not fully perform by producing person having good title to property proposed to be exchanged. Id.

28. Stetson v. Sun Co., 36 Pa. Super. Ct. 390.

29. Hence, under a general denial, defendant may show that plaintiff contracted to sell such title as defendant had and not to sell the land, as alleged in petition. Weaver v. Richards [Mich.] 16 Det. Leg. N. 117, 120 NW 818. Defendant under general denial may prove sale contract merely an option. Brown v. Wisner, 51 Wash. 509, 99 P 581.

30. Dardonville v. Smith, 117 NYS 216.

31. Kennedy v. Merickel, 8 Cal. App. 878, 97 P 81.

proving his contract of employment,[32] his rendition of the services,[33] the value of his services,[34] and that he was the procuring cause of the transaction.[35] In a suit under the ordinary contract, it is not sufficient merely that he prove his employment and prove that he introduced the customer and the principal.[36] The broker must establish the fact that the party procured was ready, willing and able to conclude the transaction,[37] unless he be relieved from making such proof by the consummation of the transaction,[38] by the principal's repudiation of the employment contract,[39] or by the principal's bad faith.[40] The burden of proving such bad faith rests upon the plaintiff.[41] The burden of proving his defense is upon the employer.[42] The general rules of evidence control the admissibility of testimony as to the employment of the broker,[43] the broker's authority and good faith,[44] his efforts and the services rendered,[45] whether he was the procuring cause,[46] whether

32. Sanchez v. Yorba, 8 Cal. App. 490, 97 P 205. Where he desires to hold known agent of known principal for his commission, he must show that such agent agreed to be personally liable for commission. Blount v. Tomlinson [Fla.] 48 S 751. Burden of proof held not sustained where two defendants were sued jointly and it appeared that the contract with the broker was made by only one of them, and where the lease procured, for the service in procuring which suit was brought, was void by reason of the failure of other defendant to give his consent thereto. Mann v. Griswold, 59 Misc. 239, 112 NYS 271. If such contract be made with agent of principal, he must prove authority of such agent. Ebert v. Wilcox [Mich.] 15 Det. Leg. N. 967, 118 NW 735.

33. Especially where by contract the only service required is diligence in endeavor to make sale. Schoenmann v. Whitt, 136 Wis. 332, 117 NW 851. Broker must show who proposed lessee was. Rice v. Neuman, 115 NYS 83. Broker claiming commission for procuring lease contract must prove by clear and certain evidence the lease contract procured. Id. Broker is not relieved from making such proof by fact that defendant's witnesses are few or none at all. Davis v. Jacobson, 115 NYS 133. Broker must prove strict compliance with contract where no sale results. Lieuwen v. Kline [Iowa] 120 NW 312.

34. Testimony of plaintiff that he had leased and procured commission on only one lease, and that 6 or 7 years before, held to be no proof of value of services in procuring leases. Davis v. Jacobson, 115 NYS 133.

35. Northwest Land & Trust Co. v. Lowman, 132 Ill. App. 454; Kalkstein v. Jackson, 132 App. Div. 1, 116 NYS 302; Russell v. Poor, 133 Mo. App. 723, 119 SW 433. Such proof is especially necessary where sale carried on by owner. Cooper v. Upton, 60 W. Va. 648, 64 SE 523.

36. Russell v. Poor, 133 Mo. App. 723, 115 SW 1; English v. George Realty Co. [Tex. Civ. App.] 117 SW 996.

37. To buy. Fox v. Ryan, 240 Ill. 391, 88 NE 974; Wenks v. Hazard [Iowa] 121 NW 1058. To buy with the specified conditions, as with mineral rights reserved. Weaver v. Richards [Mich.] 16 Det. Leg. N. 117, 120 NW 818. Must show authority of party making offer to act for real purchaser of whom he is alleged to be agent. Abrams v. Turkel, 114 NYS 174.

38. As where a contract is executed by purchaser and seller. Mutchnick v. Davis, 130 App. Div. 417, 114 NYS 997.

39. Where borrower repudiates contract, broker need not prove lender was able to make loan. Steele v. Lippman, 115 NYS 1099.

40. Holliday v. Roxbury Distilling Co., 130 App. Div. 654, 115 NYS 383.

41. Holliday v. Roxbury Distilling Co., 130 App. Div. 654, 115 NYS 383. Broker held to be required to prove that whiskey offered as security for loan was musty and that such was cause of the refusal of lender secured to make loan. Id.

42. Strout v. Lewis [Me.] 71 A 137. Testimony must be clear and convincing where defense is fraud. Id. Where defendant is another agent who is prima facie liable, he must prove facts sufficient to shift liability for commission on his principal. Blount v. Tomlinson [Fla.] 48 S 751. Where waiver of right to commission is alleged as defense, such waiver must be proven, but when this is done defendant need not prove plaintiff understood it as a waiver, that being presumed. Romans v. Thew [Iowa] 120 NW 629.

43. Owner may not corroborate his own testimony as to employment contract by stating what he thought and certain other matters which he knew. Hansen v. Williams [Tex. Civ. App.] 113 SW 312. Letters and telegrams passing between parties some time after parol contract held admissible to show admissions of parties as to substance of such contract, but not as part of it. Mahon v. Rankin [Or.] 103 P 53. Testimony of plaintiff that he expected pay for his services is inadmissible. Latta v. Lackman, 139 Iowa, 626, 117 NW 962.

44. In action by broker against purchaser for commission, where purchaser claims broker acted in bad faith in receiving commission from seller and broker claims such commission was received for purchaser's benefit and by his authority, evidence is admissible to show employment of another broker to assist plaintiff, and to show the extent of his authority, and fact that he communicated to defendant terms of purchase, but not to show compensation he was to receive from defendant. Mahon v. Rankin [Or.] 102 P 608.

45. What purchaser said to broker dur-

the purchaser was willing and able to buy [47] on the terms proposed,[48] and as to the amount of the broker's commission.[49] Evidence is inadmissible which relates to independent, collateral, or unauthorized, negotiations [50] and other matters not in issue.[51] The usual rules apply as to the admissibility of parol evidence to explain or vary written contracts [52] or to show waiver of the time limit [53] or waiver of notice of the termination of a contract of employment.[54]

ing negotiations is admissible to show broker's efforts and likelihood of success. Luhn v. Fordtran [Tex. Civ. App.] 115 SW 667. Conversation between broker and prospective purchaser admissible only for purpose of showing efforts made by broker to make sale. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631.

46. Evidence of course, conduct, and purpose of purchaser is admissible for such purpose. Larson v. Thoma [Iowa] 121 NW 1059. Letters between broker and purchaser were admissible though correspondence not directed to owner. Hurst v. Mechlin [Ky.] 119 SW 807. Purchaser may testify whether he would have purchased if he had not talked with broker, such evidence being admissible to determine whether broker brought about or influenced sale. Larson v. Thoma [Iowa] 121 NW 1059. Testimony of plaintiff and third party held admissible to support complaint and show that sale was result of plaintiff's labors. Casey v. Richards [Cal. App.] 101 P 36. Defendant may show another broker was procuring cause. Russell v. Poor, 133 Mo. App. 723, 119 SW 433.

47. Sale contract was admissible to contradict claim that purchaser was ready, willing, etc. Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875. Intending purchaser may testify that he was ready and willing to purchase the property upon terms stated by owner. Jaffe v. Nagel, 114 NYS 905.

48. As bearing on question of whether customer was willing to accept land subject to reservations, it was competent in cross-examination of customer to show declaration made by him while negotiations were pending as to terms upon which he would be willing to accept conveyance. Weaver v. Richards [Mich.] 16 Det. Leg. N. 117, 120 NW 818.

49. Evidence of usual and customary commission held not improperly admitted where contract commission was less. Knight v. Knight, 142 Ill. App. 62. In action on express contract, evidence of value of services was inadmissible. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. Evidence of usual commission was inadmissible where there was specific contract as to amount. Goldstein v. D'Arcy, 201 Mass. 312, 87 NE 584. Proof of usual commissions was admissible under allegations of contract for services implied from acceptance. Weil v. Schwartz [Tex. Civ. App.] 120 SW 1039. Consideration stated in deed was inadmissible to establish purchase price, being mere hearsay. Holinger v. Phillips, 140 Ill. App. 317. Evidence of reasonable value of services held inadmissible where under other evidence the right to recovery depended upon existence of specific agreement as to amount to be paid. Weldin v. Curfman [Iowa] 118 NW 464. Held harmless error in admitting evidence of agreed sum when it appeared that broker was entitled to same commission as reasonable compensation for his services. Hancock v. Stacy [Tex. Civ. App.] 116 SW 177.

50. Plaintiff's negotiations in regard to other property were inadmissible where claim was for commission on property purchased. Martien v. Baltimore, 109 Md. 260, 71 A 966. Independent negotiations subsequent to sale of stock were not admissible. Reed v. Light, 170 Ind. 550, 85 NE 9. Evidence of offer of lender's attorney to broker to make loan held inadmissible. Steele v. Lippman, 115 NYS 1099.

51. It is not error to exclude evidence of matter not in issue, such as whether purchaser had agreed to pay plaintiff for his services. Latta v. Lockman, 139 Iowa, 626, 117 NW 962. Contract canceled by agreement is inadmissible in suit in assumpsit to recover commission. Breen v. Roy, 8 Cal. App. 475, 97 P 170.

52. Acts of owner subsequent to execution are inadmissible to construe contract since they cannot affect it. Goldstein v. D'Arcy, 201 Mass. 312, 87 NE 584. It is not admissible to add to contract where its terms are not ambiguous or uncertain. Pollard v. Sayre [Colo.] 98 P 816. Evidence of usage is inadmissible to explain, where terms of contract clear and precise. Metz v. Miller, 113 NYS 527. Evidence is not admissible to show tract of land contained more acres than specified in contract, where it does not appear that prior to sale owner claimed or broker knew such fact. Howell v. Denton [Tex. Civ. App.] 113 SW 314. Parol evidence is admissible to fit description to land when this may be done with certainty. Powers v. Bohuslav [Neb.] 120 NW 942. Owner believing she was dealing with purchaser alone may show facts indicating concerted action to which broker was a party to deceive her and facts indicating that she was dealing with assignee of purchaser. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70. Evidence that defendant said "If I had known K. was buying the property or claiming a commission, I never would have sold" held admissible. Id.

53. Evidence held admissible to show time limit where such time limit was contained in power of attorney referred to in contract of employment. Stiewel v. Lally [Ark.] 115 SW 1134. Letters between broker and purchaser and others with whom he was negotiating held admissible to show that they related to negotiations being made for sale of property and to show information to owner that broker was still endeavoring to make the sale. Id.

54. Bird v. Webber [Okl.] 101 P 1052.

The sufficiency of evidence See 11 C. L. 463 is discussed in foregoing sections in connection with the specific matters to which the proof is addressed.

Questions for jury. See 11 C. L. 463—It is within the sole province of the jury to weigh conflicting evidence in determining a broker's right to a commission.[55] It is proper to submit to the jury all controverted questions of fact as to the existence of the employment contract,[56] the nature [57] and terms of such contract,[58] fraud in its procurement,[59] its abandonment,[60] revocation,[61] modification,[62] performance,[63] or probability thereof,[64] the payment of the compensation,[65] the amount of compensation to be recovered,[66] and the good faith of the parties.[67] It is ordinarily improper to submit to the jury the question of what constitutes a reasonable time for making a sale,[68] the construction of a written instrument [69] and whether its terms are reasonable,[70] and whether a given act is within the broker's authority.[71] It has been held improper to submit to the jury the question of whether the owner relied on his own judgment of the purchaser's financial ability.[72]

55. Frazier v. Garrison, 143 Ill. App. 474. Court should not grant non-suit where evidence is conflicting. Marum v. Grantiz, 117 NYS 726; Gooler v. Hidness [N. D.] 121 NW 83.

56. Papajian v. Scott, 37 Pa. Super. Ct. 560; Lee v. Conrad [Iowa] 117 NW 1096; Church v. Van Housen, 15 Idaho, 249, 97 P 36; Macbeth v. Minnesota & Western Land Co. [Minn.] 121 NW 425. Facts upon which disputed authority is based should be submitted to jury. Mahon v. Rankin [Or.] 102 P 608.

57. Whether employment involves discretion or is purely ministerial is jury question. Siegel v. Rosenzweig, 129 App. Div. 547, 114 NYS 179.

58. Heenan v. Harris [Mich.] 16 Det. Leg. N. 344, 121 NW 741. As determined from preponderance of evidence. Mayer v. McCann, 136 Ill. App. 501. Conditions provided as to payment of money and right of owner to withdraw proposition at will. Mitchell v. Edeburn, 37 Pa. Super. Ct. 223. Terms upon which defendant agreed to sell property. Meltzer v. Straus, 61 Misc. 250, 113 NYS 583. Terms of contract determining whether broker was entitled to commission where sales were made by defendant broker to customers introduced by him, regardless of whether he was direct and efficient cause of sale and although defendant had not received his commission. Viney v. Bird, 143 Ill. App. 116. Existence of time limit. Henderson v. Perrott, 9 Cal. App. 452, 99 P 543; Hancock v. Stacy [Tex. Civ. App.] 116 SW 177. Whether defendant promised to pay commission. Markowitz v. Miller, 113 NYS 1037; Breen v. Roy, 8 Cal. App. 475, 97 P 170.

59. Larson v. Thoma [Iowa] 121 NW 1059.

60. Young v. Hubbard, 154 Mich. 218, 15 Det. Leg. N. 725, 117 NW 632.

61. Young v. Hubbard, 154 Mich. 218, 15 Det. Leg. N. 725, 117 NW 632; Hutto v. Stough [Ala.] 47 S 1031.

62. Whether conversation occurred in which agreement was modified is jury question. Romans v. Thew [Iowa] 120 NW 629. Question of abrogation of agreement and substitution of new and distinct contract of sale was jury question. Papajian v. Scott, 37 Pa. Super. Ct. 560.

63. Breen v. Roy, 8 Cal. App. 475, 97 P 170. Whether sale was made to real estate broker's customer as defined by terms of contract. E. A. Strout Co. v. Hubbard [Me.] 71 A 1020. Whether broker was procuring cause. Kalkstein v. Jackson, 132 App. Div. 1, 116 NYS 302; Friedman v. Guth, 113 NYS 11. Which of two brokers was procuring cause. Burns v. Moore, 133 Mo. App. 6, 112 SW 1002. Whether broker procuring sale was direct agent of principal or subagent of another broker. Mueller v. Bell [Tex. Civ. App.] 117 SW 993. Broker's compliance with his contract and whether purchaser procured was ready, willing and able to buy. Lieuwen v. Kline [Iowa] 120 NW 312.

64. Probability that sale would have been consummated within specified time. Hancock v. Stacy [Tex. Civ. App.] 116 SW 177.

65. Whether payment was accepted in full or part settlement. Dickinson v. Hahn [S. D.] 119 NW 1034.

66. Where amount depended on disputed question of number of acres. Jackson v. Stephenson [Tex. Civ. App.] 114 SW 848.

67. Good faith of broker. Heenan v. Harris [Mich.] 16 Det. Leg. N. 344, 121 NW 741. Broker's compliance and misrepresentation by principal. Ranger v. Leo, 117 NYS 927. Whether principal desiring to procure loan misrepresented to agent amount of incumbrance on property. Lechnyr v. Germansky, 113 NYS 969. Bad faith of principal in revoking authority is jury question. Hancock v. Stacy [Tex. Civ. App.] 116 SW 177. Whether owner's refusal to complete sale was capricious. Meltzer v. Straus, 61 Misc. 250, 113 NYS 583.

68. Where no inference from evidence of unreasonable delay, otherwise jury question. Luhn v. Fordtran [Tex. Civ. App.] 115 SW 667. In action over stock transactions held question for court, but court's determinations thereof must be consistent. Keller v. Halsey, 130 App. Div. 598, 115 NYS 564.

69. Whether sale of stock was made by plaintiff in own name by virtue of written memorandum, since not their province to construe document. Reed v. Light, 170 Ind. 550, 85 NE 9.

70. Except as bearing on testimony of witnesses as to what terms of contract were. Lee v. Conrad [Iowa] 117 NW 1096.

71. Mahon v. Rankin [Or.] 102 P 608.

The instructions should apply the law to the issues of fact in the case and be applicable to the evidence.[73]

BUILDING AND CONSTRUCTION CONTRACTS.

The scope of this topic is noted below.[74]

§ 1. The Contract; Sufficiency and Interpretation, 550.
§ 2. Performance of Contract, 551.
§ 3. Modification of Contract, and Changes in Plans and Specifications, 555.
§ 4. Extra Work, 555.
§ 5. Delay in Performance, 556.
§ 6. Termination or Cancellation of Contract, 559.
§ 7. Completion by Owner or Third Person, 559.
§ 8. Architect's and Other Certificates of Performance and Arbitration of Disputes, 560.
§ 9. Acceptance, 563.
§ 10. Payment, 564.
§ 11. Subcontracts, 565.
§ 12. Bonds, 565.
§ 13. Remedies and Procedure, 569.

§ 1. *The contract; sufficiency and interpretation.*[75] See 11 C. L. 484—A bid[76] and acceptance[77] ordinarily comprise the contract and fix its terms.[78] A contract is not invalid because contemplating work which can only be done by permission of the public authorities.[79] Statutes prescribing the mode of execution of construction contracts must of course be complied with.[80] In California failure to record the contract does not invalidate it as between owner and contractor.[81] A contractor's duty is defined by the contract,[82] and statutory requirements, impos-

72. Judgment of purchaser's financial ability. Moore v. Irving [Ark.] 116 SW 662.

73. Instructions held applicable to issues. Latta v. Lockman, 139 Iowa, 626, 117 NW 962. Instructions held correct as to requirement that sale must have been made on terms proposed. Hansen v. Williams [Tex. Civ. App.] 113 SW 312. Where right to compensation depends upon contract, instructions should not base right to recover upon conditions not contained in contract. E. A. Strout Co. v. Hubbard [Me.] 71 A 1020. Instruction misleading as not taking into consideration evidence contradicting plaintiff's assertion that he knew purchaser had sent him to defendant's place. Barendsen v. Wilder [Mich.] 16 Det. Leg. N. 529, 122 NW 355. Instructions as to proof of contract, fraudulent conduct by plaintiff, ratification by defendant and other issues held proper. Akin v. Poffenberger [Tex. Civ. App.] 116 SW 615. Whether defendant accepted earnest money, understanding that he was to deliver property before certain date, held properly in issue. Baldwin v. Smith [Tex. Civ. App.] 119 SW 111.

74. Matters common to all contracts (see Contracts *), those peculiar to public contracts (see Public Contracts *), and the subject of mechanic's liens (see Mechanic's Liens *), are discussed in separate articles. Reference should also be had to the articles on Bonds;* Suretyship;* Damages;* and Independent Contractors,* for matters peculiar to those subjects.

75. **Search Note:** See note in 9 L. R. A. (N. S.) 1007.

See, also, Contracts, Cent. Dig. §§ 1-1116; Dec. Dig. §§ 1-235; 6 Cyc. 7-22; 9 Id. 240-591, 651-684; 30 A. & E. Enc. L. (2ed.) 1195-1208.

76. Bid submitted for construction of house without foundation for certain sum, in response to notice, **held offer** to build for that sum. Lane v. Warren [Tex. Civ. App.] 115 SW 903.

77. Owner, after opening and examining bids, said "Well, Mr. L., it's up to you. Yours is the lowest bid." **Held acceptance** of bid, completing contract. Lane v. Warren [Tex. Civ. App.] 115 SW 903.

78. Acceptance of estimate on work which stated terms fixed the terms. Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715. Where bid for erection of building was accepted, owner could not afterwards insist that contractor buy materials from certain person, this not being in contract. Lane v. Warren [Tex. Civ. App.] 115 SW 903. Where plaintiff's bid had been accepted, before he received bid of defendant for part of work, he could not recover from defendant for refusal to perform on ground that its contract was made on strength of contract with defendant. Grainger & Co v. Louisville Cornice, Roofing & Heating Co. [Ky.] 116 SW 753.

79. **Contract not invalid because involving change of grade of street,** since grade could lawfully be changed with consent of city and property owner, and presumption was that it had been or could be secured. Bigham v. Wabash-Pittsburg Terminal R. Co. [Pa.] 72 A 318.

80. Contract purported to be in three parts. First, building contract, being signed by parties and referring to plans and specifications. General and detailed specifications were attached prepared by the architect and signed by contractor. Held contract sufficiently executed, under Code Civ. Proc. § 1183, relating to building contracts. Hartwell v. Ganahl Lumber Co., 8 Cal. App. 733, 97 P 901.

81. Though Code Civ. Proc. § 1183, provides that unrecorded contracts are void, this provision, in view of the context applies only as to mechanic's lien claimants. Los Angeles Pressed Brick Co. v. Higgins, 8 Cal. App. 514, 97 P 414.

82. Cronin v. Pace [Conn.] 73 A 137.

* Always begin with the latest article on the subject. Use the latest topical index.

ing duties on owners, do not become part of the contract unless expressly made a part thereof.[83] An owner is not bound by a rule of an architect's association of which he has no knowledge.[84] A construction contract requiring skill and experience for its performance cannot be assigned.[85]

Fraud, misrepresentation and mistake are elsewhere treated.[86]

§ 2. *Performance of contract.*[87]—See 11 C. L. 465—Performance by the contractor, according to the terms of the contract,[88] is a condition precedent to his right to recover thereon,[89] unless such performance has been waived[90] or prevented by

83. Pub. Acts 1905, p. 381, § 22, requiring water tight floors and plastered cellar ceilings, not part of contract. Cronin v. Pace [Conn.] 73 A 137.

84. Owner having no knowledge of rule of Institute of Architects that drawings and specifications became architect's property was not bound by it; architect could not recover having refused to deliver plans. Hill v. Sheffield, 117 NYS 99.

85. Johnson v. Vickers, 139 Wis. 145, 120 NW 837.

86. See Fraud and Undue Influence; Mistake and Accident, as to what constitutes; and Contracts; and Cancellation of Instruments, for remedies.

87. Search Note: See notes in 3 C. L. 552; 15 L. R. A. (N. S.) 833; 16 Id. 801; 30 A. S. R. 616; 2 Ann. Cas. 714.

See, also, Contracts, Cent. Dig. §§ 1207-1584; Dec. Dig. §§ 275-323; 6 Cyc. 54-80; 9 Id. 601-650, 666-684; 30 A. & E. Enc. L. (2ed.) 1218; 2 Id. 815.

88. Contracts construed: Contract, construed with ordinances, made part thereof, held not to call for **fireproofing** of hallways. Cronin v. Pace [Conn.] 73 A 137. Contract construed as requiring contractor to build **ceiling of fourth floor of reinforced concrete.** Aetna Indemnity Co. v. Waters [Md. App.] 73 A 712. Evidence held to show that defendant agreed **only to furnish lumber,** not to construct building. Franks v. Harkness [Tex. Civ. App.] 117 SW 913. Contract for repair of building damaged by fire construed and held not to require contract **to remove loose brick** from walls, though he was bound to remove rubbish from roof which he repaired. Hughes v. Harbor & Suburban Bldg. & Sav. Ass'n, 131 App. Div. 185, 115 NYS 320. Where contract required installation of heating plant sufficient to heat residence, it meant that boilers and radiators, when joined would **furnish sufficient heat** not merely that boilers and radiators of certain capacity would be installed. Cooper v. Scott Co. [Iowa] 120 NW 631. Contract construed as one for **removal of ledge of rock** from owner's lands, not simply removal of sufficient rock to supply material for buildings under construction. Gaffey v. United Shoe Mach. Co., 202 Mass. 48, 88 NE 330. That ordinances required **fireproof cellar ceilings** in buildings of certain class did not show that contractor was bound to construct such ceiling under his contract, in absence of finding that building in question was within terms of ordinance. Cronin v. Pace [Conn.] 73 A 137. Contract to construct wall is broken by failure to build it, though **piers are constructed as substitute** and are more suitable and damages may be had for breach consisting of loss caused by breach and cost of wall. Candler Inv. Co. v. Cox, 4 Ga. App. 763, 62 SE 479.

89. Denison Const. Co. v. Manneschmidt, 129 App. Div. 600, 113 NYS 1071; McCormick v. Jordan [W. Va.] 63 SE 778. No recovery when there has not been substantial performance, without waiver or excuse. Fuchs v. Saladino, 118 NYS 172. Contractor who abandons work without cause can recover nothing on contract. D'Ugo v. Cirenza, 131 App. Div. 145, 115 NYS 151. If contractor fails to perform fully, he cannot enforce lien provided for by contract; he can only sue on quantum meruit, if work done was accepted. Murphy v. Williams [Tex. Civ. App.] 116 SW 412. There can be no recovery on a contract to do an entire piece of work for a specified sum unless the work is performed. Meek v. Dangherty [Okl.] 97 P 557. No recovery on contract to build wall when it was never completed. Id. Evidence insufficient to warrant recovery for filling material refused by defendant as not conforming to contract. M. McGirr Sons Co. v. Babbitt, 61 Misc. 291, 113 NYS 753. Evidence and findings warranted recovery for repair of sidewalks. McCormack v. O'Connor, 62 Misc. 297, 114 NYS 1030. Recovery excessive in view of credits for amounts paid and lumber not furnished. Moorer v. Leland Lumber Co. [Miss.] 48 S 621.

90. Strict performance waived: Where owner directed contractor not to do certain work called for by specifications, contractor could recover though specifications not strictly performed. Sundmacher v. Lloyd, 135 Mo. App. 517, 116 SW 12. Contract for digging well at certain price per foot called for tests every 4 to 6 feet. Work proceeded for 40 feet without water being found, and owner directed contractor to proceed without tests. Test clause waived. Foley v. Utica Sanitary Milk Co., 131 App. Div. 456, 115 NYS 418. Contractors having called attention of superintendent to fact that pier was out of plumb, and superintendent decided not to object on this ground and allowed work to proceed, owner could not claim damages on account of appearance of building being marred by pier being out of plumb. Gillett v. Young [Colo.] 101 P 766. Power company, about to build dam, contracted with railway company to build retaining wall to protect railroad right of way and embankment. Later parties agreed that railway company should make fill behind retaining wall according to specifications of original contract, power company to pay for fill, to extent of certain maximum number of yards. Railway company having made and

the owner.[91] But in the case of contracts of this nature, substantial performance is all that is required,[92] and minor defects in matters of detail will not defeat recovery on the contract,[93] the owner having received substantially what he contracted

accepted wall and fill, power company could not defeat liability for cost of fill, under contract on ground that railway company had not complied with specifications. Delaware L. & W. R. Co. v. Monroe County Water, Power & Supply Co., 221 Pa. 387, 70 A 797. Where owner procured and paid for cement for use of subcontractor, without demanding that contractor obtain same, there was no refusal by contractor to furnish it, and owner could not charge it to contractor. McInnis v. Buchanan [Or.] 99 P 929. Contractor not responsible for inferior quality of brick which owner's agent selected. Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715.

91. Contractor who is prevented from fully performing may recover for work done under the contract. Thacke v. Hernsheim, 115 NYS 216. Owner having wrongfully prevented performance was liable to contractor for contract price less payments made. Warren v. Shealy [S. C.] 65 SE 1. Plaintiff could recover for being prevented from performing, where his failure to get permit for alteration of house was due to owner's failure to remove house from jurisdiction of tenement house department, which he was to do. Siniscalchi v. Pennachio, 113 NYS 1003.

92. Walstrom v. Oliver-Watts Const. Co. [Ala.] 50 S 46; Peterson v. Pusey, 141 Ill. App. 578; Carey Mfg. Co. v. Weygandt, 143 Ill. App. 297. Contractor must show substantial performance to establish right to lien. Harris v. Graham [Ark.] 111 SW 984. A contractor seeking to recover on the contract need not show the reasonable value of his incomplete but substantial performance. Mueller v. Burton [Wis.] 121 NW 152. Acceptance of work as substantial performance, notwithstanding known omissions, is a waiver of strict performance; but in such case there can be no recovery under allegation of performance. Allen v. Burns, 201 Mass. 74, 87 NE 194. Where contract is pleaded and relied on, the contract price measures liability for work and materials, though there had been some variations from contract specifications. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 138.

What is substantial performance: Substantial performance by a contractor or architect means an effort in good faith to perform strictly and a completed structure which conforms to the plan and essentially satisfies the purpose of the owner. Foeller v. Heintz, 137 Wis. 169, 118 NW 543. When incompleteness can be remedied without the destruction of any material part of the building erected according to contract, without the expenditure of an unreasonable sum of money, then such incompleteness is not inconsistent with substantial performance. Id. Where there has been no willful departure from terms of contract and no omission in essential points, and it has been faithfully and honestly performed in material and substantial particulars, recovery may be had, though there have been technical or unimportant omissions or defects. Peterson v. Pusey, 237 Ill. 204, 86 NE 692.

Contract held substantially performed: Evidence held to warrant finding of substantial performance in suit by contractor. Christy v. Price [Pa.] 72 A 895. Evidence held to show substantial performance of contract for installation of steam boiler in hotel. Mueller v. Burton [Wis.] 121 NW 152. Contract for building dock, filling in crib, and grading land adjacent, held substantially performed when dock could be used at all times, though some grading remained to be done. Pennsylvania Steel Co. v. Susswein, 117 NYS 436. Where hotel company took possession of remodelled hotel, and only 5 per cent of price represented value of uncompleted work, company could not refuse to pay balance due contractor on ground that contract had not been substantially performed. Jefferson Hotel Co. v. Brumbaugh [C. C. A.] 168 F 867. Amended complaint with itemized statement of work done on railroad sufficient to warrant recovery by contractor. Magoon v. O'Connor, 134 Mo. App. 130, 114 SW 83.

Contract not substantially performed: Omissions, defects, or variations amounting to 15 per cent of value of entire work, are too great; no substantial performance. Fuchs v. Saladino, 118 NYS 172. Where building was to cost $3,945, and contractor abandoned work, leaving it where an expenditure of $2,200 was necessary to complete it, there was no substantial performance. Tice v. Moore [Conn.] 73 A 133. Use of translucent glass not performance of requirement calling for clear glass. Fuchs v. Saladino, 118 NYS 172. Contractor, in charge of work and materials in installing plumbing, was not entitled to certificate of performance until he replaced certain articles stolen after installation, not having shown promise of owner to pay for them. Yule v. Platt, 115 NYS 136.

Question for jury: Whether building had been substantially completed so that contractor could recover, for jury. Loh v. Broadway Realty Co. [N. J. Law] 71 A 112. Whether grading contract substantially performed, for jury. Peet v. East Grand Forks [Minn.] 122 NW 327. Finding that contract to dig first class well of certain capacity was not substantially performed, based on conflicting evidence, not disturbed. Bock v. Sorenson [Wash.] 102 P 428.

93. Substantial performance is consistent with incompleteness in matters of detail, some of which are practicably structurally remediable and others not so, though requiring in the aggregate considerable sums of money. Foeller v. Heintz, 137 Wis. 169, 118 NW 543. Substantial performance in good faith warrants recovery less cost of remedying defects or supplying omissions, such defects or omissions not being such as to defeat object of parties, and easily remedied. Nebraska Plumbing Supply Co. v. Payne [Neb.] 121 NW 243.

for,[94] though the owner may be entitled to a deduction from the contract price, on account of such defects or omissions.[95] The doctrine of substantial performance has no application where the building is destroyed by earthquake before completion or acceptance and use, and where the parties have stipulated as to the division of the loss in case of such destruction.[96]

If the contractor fails to perform in accordance with contract, the owner may refuse to accept, and will not be liable on the contract or on quantum meruit.[97] But if he allows the contractor to proceed without objection and accepts and receives the benefit of the work done, he will be liable for its reasonable value [98] less damages for the contractor's breach, unless such damages have been expressly waived.[99] For partial performance, the contractor may recover the reasonable value of work and materials, not exceeding the contract price, less any damages suffered by owner from nonperformance,[1] unless the owner wrongfully refused to allow the contractor to perform, in which case damages cannot be allowed owner for nonperformance.[2] Where the express contract fails because of a mutual mistake as to price, the contractor may recover the reasonable value of labor and materials furnished,[3] regardless of whether the building has or has not increased the value of the land to an amount equal to such cost.[4] Where a building is destroyed by fire before the completion of work being done by a contractor, he may recover from the owner the value of his labor, and the materials destroyed which had at the time become a part of the realty;[5] the measure of recovery being such part of the contract price as the work and materials done and furnished was of the work and materials he agreed to perform and provide.[6]

94. Substantial performance is not inconsistent with defects in matters of detail which do not defeat the owner's object, though they require the expenditure of considerable money to give him in substance what he contracted for. Foeller v. Heintz, 137 Wis. 169, 118 NW 543.

95. Cost of remedying defects may be deducted. Nebraska Plumbing Supply Co. v. Payne [Neb.] 121 NW 243. Substantial performance in good faith entitled contractor to recover less damages for defects. Peet v. East Grand Forks [Minn.] 122 NW 327; Seebach v. Kuhn, 9 Cal. App. 485, 99 P 723. Owner entitled to deduction from contract price equal to difference between value of work done and that agreed to be done. Walstrom v. Oliver-Watts Const. Co. [Ala.] 50 S 46. Deduction may be made for omissions or defects notwithstanding certificate of substantial performance. Mahoney v. Oxford Realty Co., 118 NYS 216. Owner's damage is cost of supplying or remedying defects so as to complete structure such as contract called for. Nebraska Plumbing Supply Co. v. Payne [Neb.] 121 NW 243. Measure of damages to owner in case of only substantial performance is reasonable cost of remedying defects which can be practicably remedied so as to make the building conform to contract, and difference between value of structure so completed and value of one as agreed upon. Foeller v. Heintz, 137 Wis. 169, 118 NW 543. But it is said that the fact that the structure as completed is of great or even greater value than the one called for is not controlling. Where there has been substantial performance in good faith, owner must pay contract price less cost of remedying defects. Id.

96. Contractor could not recover where earthquake destroyed building, and contract provided for distribution of loss between contractor and owner. Seebach v. Kuhn, 9 Cal. App. 485, 99 P 723.

97. Walstrom v. Oliver-Watts Const. Co. [Ala.] 50 S 46.

98. Contractor may recover, upon quantum meruit, for partial performance, where owner has allowed him to proceed without objection, though not strictly in performance of contract, and has accepted, used, and been benefited by work done. Walstrom v. Oliver-Watts Const. Co. [Ala.] 50 S 46.

99. Right to recover on quantum meruit does not exclude right of owner to recoup for damages for breach. Walstrom v. Oliver-Watts Const. Co. [Ala.] 50 S 46. If owner expressly or impliedly accepts work not done in strict conformity to contract, or not fully completed, he waives the defects and becomes liable upon quantum meruit, but does not waive damages for breach by contractor unless he does so expressly. Id.

1, 2. Moore v. Norman School Board of Regents, 215 Mo. 705, 115 SW 6.

3. Vickery v. Ritchie, 202 Mass. 247, 88 NE 835.

4. That building proved poor investment did not release owner from liability for reasonable value. Vickery v. Ritchie, 202 Mass. 247, 88 NE 835.

5. So held where contractor was putting in heating plant, and it was agreed that material put in was not to be removed. Dame v. Wood [N. H.] 70 A 1081.

6. Measure of recovery properly submitted. Dame v. Wood [N. H.] 70 A 1081.

A provision that the work shall be to the owner's satisfaction requires only that it be such as must satisfy a reasonable man.[7]

The owner is liable to the contractor for damages caused by failure to perform on his part [8] but is not liable for acts or omissions of other contractors, especially where the contract expressly relieves him from such liability.[9] After refusal by the owner to perform, the contractor has no right to complete his contract and recover the full value or the contract price; his sole remedy is an action for damages for the breach.[10]

Architects. See 11 C. L. 467—The relative rights of owner and architect are also controlled by their contract,[11] and performance is essential to recovery.[12] The rule permitting recovery for substantial performance, less damages for defects and incompleteness, applies to a contract for supervision by an architect.[13] Where an architect is employed to prepare plans and specifications for a building the cost of which should not exceed a specified amount, he cannot recover compensation unless the building can be constructed for a sum reasonably near the amount specified,[14] and whether the sum required is reasonably near that specified is a question for the jury.[15] A departure from the plans by the builder through the fault of the supervising architect, resulting in damage to the owner, is chargeable to the architect.[16]

Excuses for nonperformance. See 11 C. L. 467—Nothing short of an act of God, or the law, or the act of the other party, excuses nonperformance of a contract.[17] Thus, a breach of contract by the owner,[18] or prevention by the owner [19] excuses nonperformance, but unforeseen difficulties or expense will not.[20]

7. A provision that a plant should be constructed "to the acceptance" of the owners held to mean that materials and construction should be such that a reasonable man, in view of the specifications, ought to be satisfied with completed work as conforming to contract and specifications. Cashman v. Proctor, 200 Mass. 272, 86 NE 284. Reasonable man could not refuse completed work, if it complied with all terms of contract and specifications, merely because it was insufficient to do work required of it. Id. Provision requiring erection of buildings according to plans and specifications which were satisfactory to owner and approved by bureau of buildings of city did not permit owner to withhold payment because buildings were not satisfactory to it. Hyman v. New York Mortgage & Security Co., 128 App. Div. 254, 112 NYS 669. Where owner furnished plans for gates to be constructed, and contractor agreed that they should be "of first class workmanship and material," and should "operate satisfactorily when erected," this agreement was performed by first class workmanship and material, and such construction that gates worked as well as could reasonably be expected, in view of plan and design. Rosenblum v. New York Butchers' Dressed Meat Co., 61 Misc. 263, 113 NYS 604.

8. Contractor to drive piles could recover damages for failure of other party to furnish piles on ground to be driven, thus preventing performance. Williams v. Yates [Ky.] 113 SW 503.

9. Owner not liable for damages caused by other contractor where contract expressly relieves him from such liability. Bannon v. Jackson [Tenn.] 117 SW 504. Contract provision that owner should not be liable for damage caused by other contractors not waived by payment of part of claim for damage so caused. Id.

10. Richards v. Manitowoc & N. Trac. Co. [Wis.] 121 NW 937.

11. If owner agreed to pay specific price for plans, but claimed that architect agreed to procure loan to enable owner to build, and that he was not to pay for plans unless loan was procured, owner's financial condition was immaterial in action to recover for plans. Hall v. Parry [Tex. Civ. App.] 118 SW 561.

12. No recovery by architect when work was abandoned and architect refused to deliver plans made by him, owner having no knowledge of rule that drawings, etc., remain property of architects. Hill v. Sheffield, 117 NYS 99.

13. Foeller v. Heintz, 137 Wis. 169, 118 NW 543.

14. Instruction which failed to submit question whether work as planned could be done for amount specified, or sum near it, erroneous. Williar v. Nagle, 109 Md. 75, 71 A 427.

15. Error to take question from jury by charge. Williar v. Nagle, 109 Md. 75, 71 A 427.

16. Foeller v. Heintz, 137 Wis. 169, 118 NW 543.

17. McCormick v. Jordan [W. Va.] 63 SE 778.

18. Failure of owner to make payments as agreed warranted abandonment by contractor, and action for breach. Schlesinger v. Ritchie, 115 NYS 116.

19. Where plaintiff contracted to bore well of minimum depth of 300 feet and lost

§ 3. *Modification of contract, and changes in plans and specifications.*[21] See 11 C. L. 468—The contract may be modified by mutual consent,[22] but a contract under seal cannot be modified by an agreement resting in parol.[23] Contract provisions as to the mode of authorizing changes must be observed, when applicable.[24] An engineer has no power to make changes such as practically abrogate the contract.[25]

§ 4. *Extra work.*[26] See 11 C. L. 468—The contractor may recover the reasonable value of work and materials not included in the contract or plans and specifications[27] and furnished at the request of the owner[28] or upon his credit.[29] But compliance with contract provisions requiring written orders or agreements for extra work is a condition precedent to recovery,[30] unless such requirements have been waived by conduct of the owners[31] or their duly authorized agents.[32]

his drill at 286 feet, he could not recover on his contract unless the owner refused to allow him to perform by digging another well. If he was prevented from so doing, he could recover on contract. Mitchell v. Boyce [Tex. Civ. App.] 120 SW 1016.

20. Unforeseen difficulties encountered in boring well no excuse for failure to perform contract. McCormick v. Jordan [W. Va.] 63 SE 778. Contractor liable on contract to repair engine, though, on account of latent defects, it was found that it could not be repaired for sum agreed upon; reasons for not making repairs, and fact that defects were not readily discoverable, immaterial. Marx v. Kilby Locomotive & Mach. Works [Ala.] 50 S 136.

21. Search Note: See Contracts, Cent. Dig. §§ 1117-1140; Dec. Dig. §§ 236-248; 6 Cyc. 23, 24; 9 Id. 593-600, 633-635; 30 A. & E. Enc. L. (2ed.) 1209.

22. Evidence sufficient to support finding that original contract to dig well for $250 was modified when rock was struck and that owner agreed to pay reasonable value of labor and materials. Prye v. Kalbaugh, 34 Utah, 306, 97 P 331. In case of disagreement as to a particular item, a new agreement in respect thereto takes such item out of the original contract. Contractor allowed to recover for item agreed upon by parties. Cronin v. Pace [Conn.] 73 A 137.

23. Where contract for building work is under seal, subsequent parol agreement, varying mode and time of payments, is void so far as unexecuted, and may be repudiated. Interrante v. Levinson, 129 App. Div. 495, 113 NYS 1082.

24. Labor and materials used in putting in new sewage system in remodeled building held not "alterations" within clause requiring written orders of architects for alterations. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766.

25. Where contract was for removal of rock ledge on owner's land, grade to be designated by engineer, engineer could not change grade so as to abrogate contract for removal of ledge. Gaffey v. United Shoe Mach. Co., 202 Mass. 48, 88 NE 330.

26. Search Note: See note in 7 Ann. Cas. 213.

See, also, Contracts, Cent. Dig. §§ 1071-1097; Dec. Dig. § 232; 30 A. & E. Enc. L. (2ed.) 1279.

27. Contract for sewer construction provided different compensation for different classes of work and different kinds of excavation, rock and earth, and estimated amount of excavation but provided expressly that amounts were not guaranteed, but right was reserved to increase or diminish "the quantitles" 25 per cent. Held, proviso related to quantity of each kind of work; **contractor could recover** on quantum meruit for excess, above 25 per cent, of rock excavation, though total excavation did not exceed estimate by 25 per cent. Gammino v. Dedham [C. C. A.] 164 F 593. Contract for clearing and grubbing provided that removing weeds, grass, etc., should not be considered clearing, but must be done free. Held, there could be **no recovery** for such work, without proof of modification of contract. Brown & Co. v. McKnight [Ark.] 118 SW 409. Contract for erection of bridge construed, and held that contractor was not entitled to extra compensation for building temporary liftspan, after accident had carried away part of work, contract contemplating early completion to allow navigation, and this being means thereto. Phoenix Bridge Co. v. U. S., 211 U. S. 188, 53 Law. Ed. 141. **A declaration** for extra work must show that it was done pursuant to contract and that it was in fact extra. Rosenblum v. Stolzenberg, 36 Pa. Super. Ct. 644.

28. Where contract contemplated remodeling of drainage system of building, and contractor refused to instal entirely new system, under contract, and was told to proceed and that he would be paid, he could recover therefor as for extra work. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766.

29. Decision of trial court that extra work was done on defendant's credit not disturbed, evidence being conflicting. Shapiro v. Leahy Bldg. Co., 112 NYS 1090.

30. Provision that work shall not be considered extra unless written order for it be given by architect enforced, there being no waiver. No recovery for alleged extra work. Bannon v. Jackson [Tenn.] 117 SW 504. Where contract provides that extras must be separately contracted for in writing signed by owners or their attorney, acting under authority under seal, contractor cannot recover for extra work not so contracted for. Walsh v. Howard, 61 Misc. 328, 113 NYS 499. Where contract requires written orders for changes and extras, and provides that no recovery can be had for extras, unless there was such written order, this provision is binding, and no recovery can be had for extras

§ 5. *Delay in performance.*[33]—See 11 C. L. 469—Time is of the essence of the contract when it expressly so provides,[34] or when the circumstances indicate that such was the intention;[35] and failure of the contractor to complete within the time fixed subjects him to liability for damages, in the absence of some valid excuse or waive, but will not wholly prevent a recovery,[36] unless the owner exercises his right to rescind.[37] Acceptance after the time fixed may make him liable for reasonable value of work and materials.[38] When no time is fixed for completion,[39] or when the time limit has been removed or waived,[40] the law implies an agree-

without production of order in writing. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729.

31. Clause that no claim for extra work should be allowed, unless done on written order of engineer, but that nothing should be considered extra work which could be measured and estimated under terms of contract, may be waived, and waiver may be found in conduct of parties. Charlotte Harbor & N. R. Co. v. Burwell [Fla.] 48 S 213. Contract by husband and wife for erection of house on their property contained clause requiring written order from them, and written agreement as to cost, before alterations or extra work could be charged to them. Evidence held to warrant finding that husband had waived this clause by requesting extra work, but no waiver by wife. Guenther v. Moffett [N. J. Law] 71 A 153. Where contractor, with knowledge and consent of owner, and under direction of architect, but without written order, performs extra work, he may recover the reasonable value thereof notwithstanding a clause requiring written order of architect for alterations. Johst v. Hayden Bros. [Neb.] 121 NW 957.

32. Where extras were ordered orally by owner's **superintendent,** whose authority owner could not deny, provision for written orders for extras was waived. Jefferson Hotel Co. v. Brumbaugh [C. C. A.] 168 F 867. Provision for written orders from architects to cover extra work waived where **general manager of corporation** ordered work done orally. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766. **Architect cannot by oral order for work waive provision** of contract that work shall not be considered extra unless ordered in writing. Bannon v. Jackson [Tenn.] 117 SW 504. Where contract required written order of architect for alterations, and provided that extras would not be paid for unless ordered in writing and the agreed price stated therein, and the order countersigned by owner, held, architect could not waive latter provision by an oral order for extra work. Carter v. Root [Neb.] 121 NW 952.

No waiver: Waiver of provision that alterations or extras must be authorized by written contract signed by owner or agent authorized by sealed power of attorney in certain instances does not operate as waiver in subsequent independent transaction. Walsh v. Howard, 61 Misc. 328, 113 NYS 499. Proof that previous extras had been paid for on written proposals approved by agent, without proof that such agent did not have sealed authority, is not waiver of provision that extra work must be authorized by contract signed by owner or attorney acting under sealed authority. Id.

33. Search Note: See notes in 1 C. L. 379; 3 Id. 554.

See, also, Contracts, Cent. Dig. §§ 1372-1400; Dec. Dig. §§ 299-301; 6 Cyc. 79; 30 A. & E. Enc. L. (2ed.) 1253.

34. Written provision that "time is of the essence" held to prevail over printed clause that contractor would not be responsible for delays; contractor liable in damages for delay in completing contract. Pike's Peak Hydro Elec. Co. v. Power & Min. Mach. Co. [C. C. A.] 165 F 184.

35. Time was essence of contract to complete building by certain date, when delay meant loss of rents. Mikolajewski v. Pugell, 62 Misc. 449, 114 NYS 1084.

36. Where contract provided for recovery of liquidated damages for delay in completion, time was not of the essence in the sense that failure to complete by date fixed would forfeit right to recovery by contractor. Hunn v. Pennsylvania Inst. for Instruction of the Blind, 221 Pa. 403, 70 A 812.

37. Where the contract provides for work to be performed by a day fixed, and payment of a gross sum, and the contractor fails to complete the work in time, the owner may rescind. Deeves v. Manhattan Life Ins. Co., 195 N. Y. 324, 88 NE 395. But if the owner voluntarily permits the contractor to proceed and complete the work, and accepts the same, he cannot set up the delay as a defense to an action for the agreed price. Id. Contract construed as one agreement, covering payment of cost of work and materials and lump sum of $20,000, not two separate agreements, one of which was guarantee of completion by certain day for separate consideration of $10,000. Id.

38. Where work is not finished within stipulated time, but is accepted, suit may be brought in assumpsit and acceptance and receipt of benefits shown. Kendrick v. Warren Bros. Co. [Md.] 72 A 461. By permitting contractor to continue, knowing work was not completed in time, owner waives right to object on that ground, and the law implies promise to pay what work is reasonably worth. Id.

39. When no time for completion is specified, law implies reasonable time. Missouri Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 114 SW 1119. Where contract does not designate time for completion, contractor undertakes to complete work within reasonable time. American Bridge Co. v. American Dist. Steam Co., 107 Minn. 140, 119 NW 783.

40. Where time limit has been removed or waived by act of the owner, there is im-

ment to complete within a reasonable time, what is a reasonable time being a question of fact.[41] The right to completion within the time stated, and to recover liquidated damages for delay is waived where the delay is caused, wholly or in part,[42] by act or default of the owner [43] or his agent.[44] Merely allowing work to proceed after expiration of the time fixed for completion [45] or occupying the building,[46] or making payments,[47] will not operate as a waiver of the claim for damages for delay.

Liquidated damages for delay cannot be recovered where the owner terminates the contract and takes charge of the work before the time fixed for completion.[48]

plied an agreement to complete within reasonable time, unless there is an express agreement as to time. Ward v. Haren [Mo. App.] 119 SW 446. Where the parties make a substantial change in the contract, which in effect abrogates the time limit clause, the contractor is allowed a reasonable time to perform. Not proper to hold contractor to time limit, and add allowance for change. Missouri Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 114 SW 1119. Question becomes one of completion within a reasonable time, and only actual damages can be recovered, where time clause is waived by default of owner. Holland Torpedo Boat Co. v. Nixon, 61 Misc. 469, 115 NYS 573.

41. Whether work completed within reasonable time for jury under all circumstances. American Bridge Co. v. American Dist. Steam Co., 107 Minn. 140, 119 NW 783. In determining what is reasonable time for completing work, change in plans, and default of owner, if any, in furnishing materials should be considered. Missouri Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 114 SW 1119.

42. No damages allowed for delay, **where both parties were at fault** and there was no means of apportioning delays or damages. Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715. Where delays are caused by mutual defaults, contract penalties for delay are considered waived and courts will not attempt to apportion delays for which each is responsible and charge contractor with penalties for time chargeable to him. Vilter Mfg. Co. v. Tygart's Valley Brew. Co., 168 F 1002. Where delay is caused partly by the owner or his employes or independent contractors, the contractor will be excused, as courts will not attempt to apportion the delay. Jefferson Hotel Co. v. Brumbaugh [C. C. A.] 168 F 867. Where the owner is himself responsible in whole or in part for delay, and has by his acts waived completion within the time stated, the provision for liquidated damages is waived, since there can be no apportionment of same. Holland Torpedo Boat Co. v. Nixon, 61 Misc. 469, 115 NYS 573.

43. Owner cannot demand strict performance by contractor unless he himself performs preliminary work of preparation and furnishing material. Pittsburg Bridge Co. v. St. Louis Transit Co., 135 Mo. App. 579, 116 SW 467. The act of the owner in demanding extra work or changes requiring additional time operates as waiver of time limit. Ward v. Haren [Mo. App.] 119 SW 446. Act of owner which delays or impedes performance releases contractor from obligation to perform within stated time. Id. Where owner failed to have foundation ready for superstructure as agreed, his failure was waiver of time limit clause. Pittsburg Bridge Co. v. St. Louis Transit Co., 135 Mo. App. 579, 116 SW 467. Where contract provided for extension of time in case owner did not have foundation ready at time agreed, and agreed to give 10 days' notice in case of default, failure to complete in time or to give notice to contractor of completion relieved latter of duty to proceed. Id. Where contractor was to give all notices, procure permits, etc., required by authorities, and owner had only to execute bond, which he did as soon as contractor presented it, **owner was not chargeable with causing delay.** Mikolajewski v. Pugell, 62 Misc. 449, 114 NYS 1084.

44. Whether delay in completing work was caused by fraud of architect, or whether he acted in good faith, for jury. Boston Store v. Schleuter [Ark.] 114 SW 242. Where contract made architect's decisions conclusive, delays caused by work required by him in good faith would not entitle contractor to extension, though such work was in fact unnecessary. Id.

45. Owner may allow contractor to go on with work and complete building without waiving claim of damages for delay. Mikolajewski v. Pugell, 62 Misc. 449, 114 NYS 1084. The owner may recover damages for the delay in an independent action or by counterclaim in an action for the price, though he has allowed work to proceed. Deeves & Son v. Manhattan Life Ins. Co., 195 N. Y. 324, 88 NE 395. Owner may protest against delay and still claim damages for breach thereby. Traub-Dittmar Const. Co. v. Hartman, 61 Misc. 173, 112 NYS 919.

46. Delay not waived by taking possession of building before its completion, work being continued. Mikolajewski v. Pugell, 62 Misc. 449, 114 NYS 1084.

47. Mere acceptance and payment is not waiver of damages for delay. Missouri Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 114 SW 1119. Payment in full on demand with threat to file lien was not waiver of delay, owner not having compromised or relinquished claim for damages. Mikolajewski v. Pugell, 62 Misc. 449, 114 NYS 1084.

48. Moore v. Board of Regents, 215 Mo. 705, 115 SW 6. Where owners elected to complete building, under contract clause permitting them to do so, and charged expense to contractor, they could not also charge him with liquidated damages for delay, especially where delay was due to their own negligence. Gillett v. Young [Colo.] 101 P 766.

The contractor is not entitled to an extension of time for causes which might have been foreseen and provided for,[49] unless the contract provides therefor,[50] but a delay caused by a mistake in an estimate has been held excusable.[51] A strike clause does not protect a contractor against the consequences of a voluntary lockout by him.[52] A provision requiring a written demand for additional time to complete work is valid and enforcible [53] as to all causes for additional time stated in the contract,[54] but may be waived by the owner entering into supplemental contracts for extra work requiring additional time for the completion of the whole.[55] The right to additional time for causes not mentioned in the contract depends upon the same rules as though no provision for a written demand for time had been made.[56] Where the contract requires completion by a stated time, a naked promise to waive the clause, without consideration, is invalid, and the owner is not thereby estopped to claim damages for delay, the contractor not having acted on such promise to his prejudice.[57] But such promise of the owner will estop him from insisting upon a stipulation that no allowance of additional time shall be made unless a claim therefor is presented in writing to the architect.[58]

The contractor may recover damages from the owner for delays and consequent expenses caused by the owner or his agents,[59] but not for delays caused by work contemplated by the contract itself.[60] Where the contract provides for an extension of time for certain causes, delays so caused entitle the contractor to additional time but not to damages.[61] Extra compensation for completion by a fixed

49. Unless otherwise provided in contract, builder is not entitled to extra time on account of ordinary rains, such as might have been foreseen, nor for other delays or accidents against which he could have provided in his contract. Carter v. Root [Neb.] 121 NW 952.

50. Where contract allowed extensions of time for causes or casualties beyond the control of the contractor, he was not entitled to extension on account of rainy days, holidays, or delays caused by his own subcontractors. Cook & Laurie Cont. Co. v. Denis [La.] 49 S 1014. Delay caused by owner and by injunction issued at instance of municipal authorities entitled him to extensions. Id. Contractor agreed with adjoining owners to build structure with common wall and one entrance, building to cover both lots. Cottages on two lots were to be moved, and contractor's time extended by delay in their removal. Held, one owner could not recover damages from contractor for delay caused by other owner's failure to move cottage. Salisbury v. King [Ky.] 119 SW 160.

51. Contractor not liable to forfeiture of $10 per day for delay caused by mistake in estimate whereby he was compelled to do more rock excavation than contemplated. Gammino v. Dedham [C. C. A.] 164 F 593.

52. In action by contractor for damages, he sought to excuse his delay by proving strike; proper to show that employers' association to which he belonged had limited number of men to be employed by order. Mahoney v. Smith, 116 NYS 1091.

53. Carter v. Root [Neb.] 121 NW 952. Pleading attempting to set up excuses for delay, insufficient, when it did not appear that there had been written demand or consent for extension or that contract requirement as to written extension had been waived. Fohlinger v. Boos, 118 NYS 167.

54. Carter v. Root [Neb.] 121 NW 952. Where contract provided for liquidated damages, but provided for an extension of time for certain causes, including acts of owner, if written demand therefor was made within 48 hours, such written demand was condition precedent to right to extension on account of change demanded by owner. Ward v. Haren [Mo. App.] 119 SW 446.

55, 56. Carter v. Root [Neb.] 121 NW 952.

57, 58. Jobst v. Hayden Bros. [Neb.] 121 NW 957.

59. Where railroad construction contract required work to be done by stated time, company owed contractor duty to have ground and materials ready so as not to delay contractor unreasonably, and company would be liable in damages for extra work and expense caused by its fault in delaying work. Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215. Contract under which owner was to do excavating required contractor to have men on ground within two weeks after notice, and to complete work within stated time. Held owner impliedly agreed to be ready for men; contractor entitled to damages for delay caused by owner not being ready. Hinds v. Hinchman-Renton Fireproofing Co. [C. C. A.] 165 F 339.

60. Where contract provided that no claim for damages or delay could be made on account of encountering other pipes, etc., in constructing sewer, contractor could not recover damages for delay or expense caused by encountering water and gas pipes in center of street where sewer trench was made, though such location of such pipes was unusual. Gammino v. Dedham [C. C. A.] 164 F 593.

61. Where contract provided that contractor should be entitled to an extension of time in case delay was caused by an-

date cannot be recovered where failure to complete work in time stated is due to the negligence of the contractor.[62]

§ 6. *Termination or cancellation of contract.*[63]—See 11 C. L. 469—Right of action for breach by the contractor accrues to the owner when the contractor refuses to perform,[64] and is not waived by a subsequent ineffectual demand for performance.[65] A contractor who quits work and consents to the appointment of a receiver of his property, making performance by him impossible, in law abandons the work.[66] A refusal to do certain work, on the ground that the contract does not require it, is not an abandonment when the contractor still has time to complete all the work.[67] Where the contract has been wrongfully [68] terminated by the owner or his agents,[69] the contractor may sue for damages for breach [70] and recover the difference between the contract price and the cost of performance,[71] and a clause relieving the owner from liability for damages for delay is no defense to such action,[72] or he may recover the reasonable value of work and materials furnished [73] together with lost profits.[74]

§ 7. *Completion by owner or third person.*[75]—See 11 C. L. 470—Building contracts usually provide that the surety or owner may complete performance upon default or abandonment by the contractor.[76] The surety has a reasonable time to elect to complete the work, after notice of abandonment by the contractor.[77] The

other contractor, this was extent of his rights. He could not recover damages from owner on account of another contractor's delay. Goss v. Northern Pac. Hospital Ass'n, 50 Wash. 236, 96 P 1078. Contractor for superstructure made no objection to delay of contractor for foundation but commenced work when notified. Held only effect of delay was to extend time of performance. Mahoney v. Oxford Realty Co., 133 App. Div. 656, 118 NYS 216. An owner is not responsible to a contractor for delays caused by another independent contractor, where contract provides only for extension of time in case of delay so caused. Seebach v. Kuhn, 9 Cal. App. 485, 99 P 723. Where contract between principal and subcontractor provided that architects were agents of owner for purposes of the contract, the contractor was not liable to the subcontractor for delay of architects in delivering plans; only remedy, under contract, was extension of time for completion. Norcross v. Wills, 130 App. Div. 470, 114 NYS 969.

62. Construction contract construed as allowing to architect and supervisor 7 per cent on certain sum if work completed by certain date, and 6 per cent, if completed after that date, and delay held to have been due to his own negligence in not discovering nature of ground. Irwin v. Gould Elevator Co., 107 Minn. 233, 119 NW 1065.

63. Search Note: See Contracts, Cent. Dig. §§ 1141-1206; Dec. Dig. §§ 249-274; 6 Cyc. 24-28; 9 Cyc. 433, 434, 464, 595-599; 30 A. & E. Enc. L. (2ed.) 1211.

64, 65. Bologh v. Roof Maintenance Co., 112 NYS 1104.

66. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

67. Where part of contract was grading of certain land and contractor claimed that grading agreement covered less ground, refusal to grade all land included in contract not abandonment where he had year in which to complete. Pennsylvania Steel Co. v. Susswein, 117 NYS 436.

68. Contractor, suing for breach of contract by owner, who had taken over work, can recover only on showing wrongful termination by owner. Mahoney v. Oxford Realty Co., 133 App. Div. 656, 118 NYS 216.

69. Order by owner's son, apparently in charge of work, to quit work, could be shown to prove that defendant prevented performance. Siniscalchi v. Pennachio, 113 NYS 1003.

70. Where a contractor has been evicted without cause, he may maintain an action for damages. Farnum v. Kennebec Water Dist. [C. C. A.] 170 F 173.

71. See, also, Damages, § 4A. For breach of contract by owner, contractor may recover difference between contract price and cost of performance. Gaffey v. United Shoe Mach. Co., 202 Mass. 48, 88 NE 330.

72. Farnum v. Kennebec Water Dist. [C. C. A.] 170 F 173.

73. Where full performance is prevented by insolvency of owner or failure or refusal to make payments, contractor may recover for work done. Lunsford v. Wren, 64 W. Va. 458, 63 SE 308.

74. Where owner breaks contract without cause, contractor may recover reasonable value of work and materials furnished and such reasonable profit as he might have earned had he been allowed to complete. Carlin v. New York, 116 NYS 346.

75. Search Note: See notes in 3 C. L. 556; 56 A. S. R. 312.

See, also, Contracts, Cent. Dig. §§ 1528-1533; Dec. Dig. § 306; 6 Cyc. 74; 30 A. & E. Enc. L. (2ed.) 1264.

76. Contractor delayed completion of building by failing to employ sufficient number of men, and refused to complete after written notice. Owner could complete work and recover damages from contractor. Shank v. Trustees of McCordsville Lodge No. 338, I. O. O. F. [Ind. App.] 88 NE 85.

77. Surety has reasonable time, after notice of abandonment by principal in which

owner seeking to recover for loss sustained by him in completing a building has the burden of showing neglect or breach by the contractor, and the resulting loss.[78] Certification of damage by the architect is sometimes required.[79] The amount recoverable by the owner, in case of completion by him, is the cost of his work[80] over and above the contract price.[81] The amount recoverable by the contractor depends largely upon the terms of the contract[82]

§ 8. *Architect's and other certificates of performance and arbitration of disputes.*[83] See 11 C. L. 470—The production of a certificate, in proper form,[84] made by the architect or engineer named in the contract or agreed upon by both parties,[85] is a condition precedent to the right to recover upon the contract, when made so by the contract,[86] unless it is shown that such certificate is wrongfully withheld,[87]

to elect to complete work, unless bond specifies time. Where surety did not act for two weeks after notice, contractor, to whom bond was given, was justified in completing work himself. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

78. Action to recover from contractor excess of cost over contract price. Kann v. Bennett [Pa.] 72 A 342.

79. Contract provision that owner may complete upon certificate of architect to refusal or neglect of contractor, and that architect's certificate of expense incurred by owner in completing contract shall be conclusive between parties, is valid. Certification of damage is condition precedent to recovery of damages for delay by owner. Belmont Iron Works v. Hotel Corporation [Va.] 63 SE 1068.

80. Requirements of building inspector having been made part of contract, and owner having been required to do extra work to meet such requirements, owner could recover cost thereof from surety. United Surety Co. v. Summers [Md.] 72 A 775.

81. Contractor suing on bond of subcontractor, who has abandoned contract, is entitled to recover reasonable cost of completing work less balance of contract price remaining in his hands. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

82. Where contract provided that, upon the happening of certain delays, etc., owners could take possession and complete contract, and provided mode of settlement in such case, proof of completion of the work by owners would support action for recovery of balance due contractors under terms of contract. Hunn v. Pennsylvania Inst. for Instruction of the Blind, 221 Pa. 403, 70 A 812. Where a contractor is evicted for delay, after partial performance, previous estimates having been paid in part, according to contract prices, he is not entitled to have the entire account restated and recover upon quantum meruit, but is bound by contract prices so far as work has been done. Farnum v. Kennebec Water Dist. [C. C. A.] 170 F 173. Where contract provided that in case of delay, or failure to prosecute work properly, owner could supply men or materials and deduct therefor, or could on three days' notice, upon certificate of architect showing cause, terminate contract and complete it himself, and deduct expense from contract price remaining unpaid, this did not give contractor right to recover excess of contract price over expense to owner of completing work, where contractor had broken contract by abandoning work without cause. Denison Const. Co. v. Manneschmidt, 129 App. Div. 600, 113 NYS 1071.

83. See 11 C. L. 471, and note on "What Constitutes Fraud in Certificate of Architect or Engineer."

Search Note: See notes in 11 C. L. 471; 1 L. R. A. (N. S.) 1050; 6 Id. 774; 56 A. S. R. 312; 10 Ann. Cas. 575.

See, also, Contracts, Cent. Dig. §§ 1290-1351; Dec. Dig. §§ 283-292; 6 Cyc. 34-45, 51; 30 A. & E. Enc. L. (2ed.) 1237.

84. Unless otherwise provided by the contract, the architect's final certificate need not be in any particular form. Albany Phosphate Co. v. Hugger Bros., 4 Ga. App. 771, 62 SE 533. Letters from architect to contractor held not to amount to final certificate of completion leaving some questions unsettled. Strauss v. Hanover Realty & Const. Co., 118 NYS 193. Certificate of architect as to expense incurred by contractor in completing work abandoned by subcontractor must be based on an actual inspection of work, one showing on its face that it was based only on inspection of checks and vouchers not compliance with contract requiring audit and certificate by architect. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

85. Where contract required certificate and final estimate of engineer in charge of work as condition precedent to right to payment, contractor had no right, without consent of other party, to employ engineers who were strangers to contract to make estimate and certificate, especially in absence of fraud or delay without cause. Johnston & Grommett Bros. v. Bunn, 108 Va. 490, 62 SE 341. Certificate of inspector of buildings bureau that building conformed to requirements of bureau was not evidence of performance of contract with owner as to materials and work. Strauss v. Hanover Realty & Const. Co., 118 NYS 193. That person named as one who should certify work afterwards acquired an interest in the property as owner did not dispense with necessity of certificate as condition precedent to recovery. Bell v. Fox, 129 App. Div. 405, 113 NYS 231.

86. Where the parties to the contract have made the procuring of a certificate of the architect or engineer a condition precedent to the assertion of a right thereunder, such provision is valid. Korbly v. Loomis [Ind.] 88 NE 698. Complaint bad which did

or that its production has been waived,[88] or that its nonproduction is due to some cause beyond the control of the contractor.[89] Such certificates are ordinarily binding and conclusive on both parties,[90] as to matters properly covered by them,[91] in the absence of proof of fraud, arbitrary action, or such gross mistake as to imply fraud.[92] They constitute prima facie evidence where the contract does not make them conclusive.[93]

not show that engineer's certificate of completion had been made. Id. Where contract provided for presentation of certificate by person named as to performance, production of such certificate or proof that it is wrongfully withheld is a condition precedent to recovery of contract price. Bell v. Fox, 129 App. Div. 405, 113 NYS 231. Contract for interlocking signal device called for approval by engineer of state railroad commission. No recovery when he had disapproved system, though railroad company had failed to obey another order of the commission, this not affecting approval of the system. Pneumatic Signal Co. v. Texas & P. R. Co., 118 NYS 66.

87. Certificate properly withheld where 15 per cent of work was unfinished or did not comply with contract. Fuchs v. Saladino, 118 NYS 172. Where architect refused to give certificate of expense incurred by contractor in completing work abandoned by subcontractor, contractor could, in suit on bond, prove his expense and damage by other evidence. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

88. A provision requiring a certificate of completion of work before final payment is for benefit of owner and may be waived by him. Hunn v. Pennsylvania Inst. for Instruction of Blind, 221 Pa. 403, 70 A 812. Requirement that vouchers for work done, etc., must be approved by architect, waived where many payments were made without requiring such approval. Lunsford v. Wren, 64 W. Va. 458, 63 SE 308. Production of architect's certificate waived where owner raised other objections for refusal to pay, and parties stipulated that only matter in issue was right to recover balance withheld, after part of amount certified had been paid. McInnis v. Buchanan [Or.] 99 P 929. Provision that payments should be made only on architect's certificates waived where owner made payments and gave notes on instalments without requiring certificates. Fuchs v. Saladino, 118 NYS 172. Where the owner completes, accepts and occupies a building, after a default by the contractor, whether certificate of completion is waived is for court or jury, according to proof. Hunn v. Pennsylvania Inst. for Instruction of Blind, 221 Pa. 403, 70 A 812. Contract provided work should be done under direction of and to satisfaction of architect, final payment to be made on his certificate. Owner went into possession, and promised repeatedly to pay, and made no objection to work. Jury warranted in finding waiver of conditions of contract as to certificate by architect. Steelman v. Ludy [N. J. Law] 72 A 423.

89. Certificate of architect that work has been done and payment is due is condition precedent to right to recover unless it is wrongfully withheld or waived, or cannot be obtained because of something beyond the control of the contractor. Bannon v. Jackson [Tenn.] 117 SW 504.

90. Owner is bound by decisions of architect employed by him, though contract provides expressly only that his certificates shall be conclusive and binding on contractor. Boston Store v. Schleuter [Ark.] 114 SW 242. Subcontractor agreed to do work on railroad for certain compensation for solid rock, and for hard pan, according to engineer's certificate as to character of material moved. Held, he could recover from contractor in accordance with certificate, though same material certified as rock was hard pan, there being no evidence of fraud or mistake. Pinickneff v. Johnson [Wash.] 102 P 1047. Contract provision that work should be under supervision and to satisfaction of engineer, and that his decision as to construction of specifications, and his estimates, should be final, was valid and binding on city. City Street Imp. Co. v. Marysville [Cal.] 101 P 308. Where engineer issued certificates and estimates and city paid some, city was estopped to set up nonperformance in action for balance, in absence of showing of fraud by contractor, though it appeared that joints in sewer were defective owing to water in trenches when sewer was laid. Id.

91. Architect's certificate as to amount due contractor not binding when contract did not give him power to certify to this matter, his powers being confined to supervision, etc., though contract made certificate conclusive "on all matters." Boston Store v. Schleuter [Ark.] 114 SW 242.

92. Fraud of the engineer, or failure to exercise honest judgment, in making an estimate of work done will not prevent recovery by the contractor on the theory of substantial performance, he not being a party to the fraud. Peet v. East Grand Forks [Minn.] 122 NW 327. Contractor not precluded from bringing action for actual work done though he had accepted, under protest, previous estimates, by engineer, where difference between estimate and actual work done was so great as to imply fraud. Cornell & Co. v. Steele [Va.] 64 SE 1038. If architect fails to exercise honest judgment, or makes such gross mistakes as necessarily imply bad faith or fraud, his decisions are not binding, though contract makes them conclusive. Boston Store v. Schleuter [Ark.] 114 SW 242. Provision that engineer's estimate and classification of material removed should be conclusive not binding if he made mistake so gross as to amount to fraud on contractor though engineer acted in good faith. Cornell & Co. v. Steele [Va.] 64 SE 1038. Arbitrary misclassification of 9,000 cubic yards of material would amount to fraud. Id.

93. Where owner's architects were supervising agents, but were not expressly authorized to make conclusive, final certificate,

Contract provisions under which certain questions of fact are to be finally determined by an architect or engineer are valid and binding,[94] and do not constitute a mere naked agreement to arbitrate,[95] nor are such provisions for arbitration merely collateral to and independent of other provisions of the contract,[96] but they are of the very essence of the contract, and the agreement to arbitrate is not subject to revocation.[97] Actual or tendered compliance with such provisions is a necessary condition precedent to recovery on the contract [98] and a decision or award, made in accordance with the contract,[99] relating to matters actually in dispute and open to arbitration,[1] and within the power of the architect or engineer to determine,[2] is conclusive upon the parties [3] in the absence of fraud or mistake or unreasonable or arbitrary action.[4] Such arbitration clauses refer only to matters arising between the owner and contractor, and specified in the contract,[5] and not to matters concerning the performance of duties by the architects themselves.[6] But the fact that the engineer or architect named as arbitrator is in the employ of the owner does not affect his qualification to act as such.[7] Where the arbitrator by mistake makes a partial award, his authority is not terminated but he may complete the award.[8] Such contract provisions do not preclude resort to a court to have a con-

such certificate was only prima facie evidence of completion of work. Burden was on owner to impeach such certificate for error, omission, or concealment. Jefferson Hotel Co. v. Brumbaugh [C. C. A.] 168 F 867.

94. Hunn v. Pennsylvania Inst. for Instruction of Blind, 221 Pa. 403, 70 A 812.

95. Provisions in building and construction contracts whereby architects or engineers are given power to determine finally all disputed matters, and settlement had and payment made on their certificates, do not create a mere naked agreement to submit disputes to arbitration. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398.

96. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398.

97. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398. Can only be terminated by mutual consent. Frederick v. Margwarth, 221 Pa. 418, 70 A 797.

98. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398. Such matters must be determined by architects. Hunn v. Pennsylvania Inst. for Instruction of Blind, 221 Pa. 403, 70 A 812.

99. Where contract authorized substitution for arbitrator named, an award by a substituted arbitrator was under original contract. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398.

1. Evidence held to show that parties had already adjusted dispute as to express charges to certain date; improper for award of arbitrator to include such item. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398.

2. Authority, given to an architect to construe plans and settle disputes in regard thereto, does not give authority to materially change plans. Foeller v. Heintz, 137 Wis. 169, 118 NW 543.

3. No right to have such questions referred to jury. Hunn v. Pennsylvania Inst. for Instruction of Blind, 221 Pa. 403, 70 A 812. Where parties to a contract have agreed upon an arbiter to determine the quality of work done or materials furnished and have stipulated that his determination shall be conclusive, they are bound by his decision in the absence of fraud or mistake. Town of Sterling v. Hurd, 44 Colo. 436, 98 P 174. Measurements, estimates, and classifications of material by an engineer, to whose judgment these matters are left by the contract, are prima facie correct, in the absence of fraud or mistake, and the burden is on party assailing them to prove them incorrect. Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215.

4. Evidence held not to show fraud or bad faith in award by architect. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398. Contract provided that it might be terminated and work completed by owner on certificate by architect of unreasonable delay by contractor. Held, architect's certificate conclusive on question in absence of fraud, bad faith, or unreasonable or arbitrary action by architect. Mahoney v. Oxford Realty Co., 118 NYS 216

5. Hunn v. Pennsylvania Inst. for Instruction of Blind, 221 Pa. 403, 70 A 812.

6. Whether architects had caused delay by changes, and by failure to perform their duties properly, were questions for jury, not for arbitration by architects themselves. Hunn v. Pennsylvania Inst. for Instruction of Blind, 221 Pa. 403, 70 A 812.

7. It is common practice. Memphis Trust Co. v. Brown-Ketchum Iron Works [C. C. A.] 166 F 398. Arbitrator held not disqualified to act because he was member of firm of architects for owner whom one party charged with responsibility for delay where it did not appear that architects had incurred any liability to owner, even though at fault as between them and contractor, especially where contractor knew of relation between architect and owner. Id.

8. Frederick v. Margworth, 221 Pa. 418, 70 A 797.

tract interpreted,[9] since nothing short of an express waiver of the right to resort to a court to determine rights under a contract will deprive one of that right.[10]

§ 9. *Acceptance.*[11]—See 11 C. L. 472—Absolute and unconditional acceptance of work is a waiver of such defects as are known [12] but acceptance is not a waiver of unknown and latent defects,[13] and the owner may recover damages for breach of contractor after discovery of defects, within a reasonable time.[14] Mere occupancy, or use, or partial payment, does not necessarily show an acceptance of work,[15] though such facts may be considered on the question of acceptance.[16] An unauthorized acceptance by an architect or engineer is not binding on the owner [17] especially where the contractor has notice of the agent's want of power to accept.[18] Acceptance as a condition precedent to recover may be waived,[19] whether work has been fully and unconditionally accepted,[20] and whether one accepting work for the owner had authority to do so [21] are frequently questions of fact for the jury. A refusal to ac-

9. Provision that the architect's decision as to the construction and meaning of drawings and specifications shall be final does not take from the court power to construe the contract. Aetna Indemnity Co. v. Waters [Md.] 73 A 712. Provision that engineer was to classify materials excavated and that his conclusion was to be final did not prevent resort to court for construction of contract, it being claimed that he had misinterpreted it. Indianapolis Northern Trac. Co. v. Brennan [Ind.] 87 NE 215. Provision in sewer contract that disputes should be referred to engineer, and that his interpretation of specifications and contract should be final, held not to preclude right of parties to judicial interpretation of contract to determine amount of compensation. Gammino v. Dedham [C. C. A.] 164 F 593.

10. Aetna Indemnity Co. v. Waters [Md.] 73 A 712.

11. Search Note: See note in 16 L. R. A. (N. S.) 439.

See, also, Contracts, Cent. Dig. §§ 1457-1479; Dec. Dig. §§ 304, 305; 6 Cyc. 67; 30 A. & E. Enc. L. (2ed.) 1227.

12. Acceptance and taking possession of a building with knowledge that it is defective and incomplete is a waiver of such defects, entitling the contractor to recover. Steltz v. Armory Co., 15 Idaho, 551, 99 P 98. Owner may be estopped to deny liability for plans because of excessive cost to erect building by accepting plans with knowledge of increased cost of building. Hall v. Parry [Tex. Civ. App.] 118 SW 561. Where contract required 3-inch casing for well, but owner, knowing that first 800 feet had not been so cased, agreed to continuance of work, with 2-inch casing, he waived requirement as to 3-inch casing, and treated first 800 feet as performed. Hall v. Cook [Tex. Civ. App.] 117 SW 449.

13. Steltz v. Armory Co., 15 Idaho, 551, 99 P 98. Giving order for balance after claimed defects had been repaired did not estop owner to claim damages if he did not know that repairs had not been properly made. Central Mantel Co. v. Thaler, 133 Mo. App. 86, 113 SW 220.

14. Steltz v. Armory Co., 15 Idaho, 551, 99 P 98.

15. Taking possession is not acceptance. Fuchs v. Saladino, 118 NYS 172. Mere occupancy and part payment does not show acceptance. Walstrom v. Oliver-Watts Const. Co. [Ala.] 50 S 46. Merely entering into possession of a building is not a waiver of defects, though known, in the absence of an express waiver of damages or circumstances amounting to such waiver. Steltz v. Armory Co., 15 Idaho, 551, 99 P 98. Use of signal device for three years, while parties were testing it and awaiting approval by railroad commission, did not amount to acceptance, approval by commission being essential before device could be used permanently. Pneumatic Signal Co. v. Texas & P. R. Co., 118 NYS 66.

16. Acceptance may be implied from conduct of owner, but mere occupancy or payment in part does not warrant an inference of acceptance when objections are made to work, but these facts may be considered with others. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 138.

17. Unauthorized or improper acceptance by architect or superintendent is not waiver of owner's claim of damages for breach. Walstrom v. Oliver-Watts Const. Co. [Ala.] 50 S 46. Where the contract specifies the quality of work and materials, and provides that the engineer shall have power to reject materials not conforming to specifications, and provides for acceptance only when specifications have been followed, an acceptance of work by the engineer is not binding on the owner, being unauthorized. Contract held not to confer power to accept on engineer for town. Town of Sterling v. Hurd, 44 Colo. 436, 98 P 174.

18. Town of Sterling v. Hurd, 44 Colo. 436, 98 P 174.

19. Acceptance by superintendent waived where parties submitted disputes to arbitration, expressly waiving provisions of contract as to certificates. Beck Coal & Lumber Co. v. Peterson Mfg. Co., 237 Ill. 250, 86 NE 715.

20. Whether owners accepted well and released contractors, or abandoned it, for jury. Redd v. Carnahan [W. Va.] 64 SE 138. Contractor entitled to recover if work had been accepted, and this was for jury. Loh v. Broadway Realty Co. [N. J. Law] 71 A 112. Whether owner and architect had accepted building as complete, by failing to make objections, or by accepting changes, held for jury. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 138.

21. Whether agent of owner had author-

cept a building authorizes the contractor to enter upon the premises to protect the work from damage.[22]

§ 10. *Payment.*[23]—See 11 C. L. 473—The time when payments are due [24] and the amount thereof,[25] the amount which may be withheld,[26] what are conditions precedent to the right to receive payment,[27] and whether payment has been made,[28] are questions depending upon the terms of the contract and the facts of the particular case. When no time for payment has been agreed upon, it is not due until the work has been completed.[29] The contractor is not entitled to interest on sums not due before actual payment [30] nor on sums withheld to satisfy valid claims of subcontractors.[31] Failure to make a payment when due justifies abandonment by the contractor.[32]

ity to and did accept and approve of items of work, including extras, held for jury. Loh v. Broadway Realty Co. [N. J. Law] 71 A 112.

22. Where owner refused to accept building, it was contractor's right, if not his duty, to enter it, after commencement of action for price, to protect plumbing from severity of weather, and his doing so did not affect right to recover. Loh v. Broadway Realty Co. [N. J. Law] 71 A 112.

23. Search Note: See note in 5 Ann. Cas. 721.

See, also, Contracts, Cent. Dig. §§ 1463, 1464; Dec. Dig. § 308; 6 Cyc. 75-80; 30 A. & E. Enc. L. (2ed.) 1265.

24. Contract provided for third payment "when house is enclosed, except window and door openings and porch floor," and for fourth "when wall board and plaster is on." Held, fourth payment due when work specified was done, though work excepted in third payment clause had not been done. Jones v. Whittier [N. J. Err. & App.] 73 A 497. Contract for well construed as calling for payment in full when capacity of 1,500,000 gallons was reached and shown by test, such capacity to be maintained for 14 months. Contractor was not, however, obliged to wait 14 months for payment. Green v. Ballard, 51 Wash. 149, 98 P 95. Contract for construction of dock, filling in crib, and grading land adjacent, provided for payment on completion of dock. Held owner liable for price when dock was accepted, though grading was not finished. Pennsylvania Steel Co. v. Susswein, 132 App. Div. 659, 117 NYS 436.

25. Contract for excavation and dredging providing for measurement of earth in place, etc., held to exclude payment for removal of earth which slid into channel during excavation. Bowers Hydraulic Dredging Co. v. U. S., 211 U. S. 176, 53 Law. Ed. 136.

26. Contract held to require contractor to make to subcontractor payments in instalments, as work progressed, up to 5 per cent of total amount due. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Under clause in contract with state authorizing withholding of sums for which owner is liable or for which liens might attach, state could not withhold amounts claimed by subcontractors or materialmen unless it had expressly or impliedly promised to pay them, since no lien can attach on state property. Rathbun v. State, 15 Idaho, 273, 97 P 335.

27. Contractor not entitled to payment so long as liens existed which he had promised to pay. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 138. Contract provided that, when payments were made, contractor should furnish certificate of custodian of records showing there were no liens, if required. Provision was made for final payment after 40 days from date of completion. Held provision as to certificate concerning liens applied only to monthly payments, not to final payment. Morrison Co. v. Williams, 200 Mass. 406, 86 NE 888. Where contract provided that contractor should, "if required," present certificate showing absence of liens before receiving payment, failure to present certificate would not bar recovery or enforcement of lien, when no certificate was required. Id.

28. Evidence held to show conclusively that payments by owners were made to contractor as such, and not as agent for company supplying materials, so as to show payment in defense of suit to enforce lien. Kaighn v. Friday [N. J. Err. & App.] 73 A 540.

29. Litchgi v. Gottlieb, 134 Mo. App. 237, 113 SW 1134.

30. Contract provided for payment in full upon final certificate, no payments during work being contemplated, but city, for benefit of contractor, paid amounts on progress certificates. Held contractor not entitled to interest on amounts withheld, as nothing was due until completion in full. O'Rourke v. New York, 130 App. Div. 673, 115 NYS 398.

31. Owner holding funds to which subcontractors and others were entitled could not safely pay it over before judgment determining their rights, and, hence, could not be charged with interest on the sums withheld. Hurley v. Tucker, 128 App. Div. 580, 112 NYS 980.

32. Failure to pay an estimate when due justifies contractor in abandoning work. Peet v. East Grand Forks [Minn.] 122 NW 327. Recovery for contractor sustained where owner refused to make fourth payment when due according to terms of contract, and contractor abandoned work and brought suit for amount due. Jones v. Whittier [N. J. Err. & App.] 73 A 497.

§ 11. *Subcontractors.*[33] See 11 C. L. 473—A subcontractor who submits a bid for part of the work upon a building, with knowledge of the specifications and requirements of the original contract will be held to have undertaken to do this portion of the work in accordance therewith.[34]

In Florida the right of the subcontractor to a lien depends upon whether anything was due the contractor at the time of the service of the cautionary notice under the statute.[35]

Under the New York lien law, the subcontractor's claim against the contractor rests upon their contract,[36] and his rights against the owner rest upon the right to garnish or attach the amount due the contractor from the owner and to foreclose.[37] The lien of the subcontractor attaches perforce of the owner's indebtedness to the contractor.[38] Payment to the contractor in full in good faith will defeat the right of the subcontractor to a lien.[39] The subcontractor may waive his right to a lien by his contract.[40] Where the owner has permitted the subcontractor to proceed with the work, such permission is not a consent, under the lien law, which will enable the subcontractor to file a mechanic's lien.[41] The owner of premises and principal contractor are not joint contractors as to a subcontractor nor are they united in interest within the meaning of the lien law,[42] and service of summons on the contractor is not the commencement of an action against the owner.[43]

§ 12. *Bonds.*[44] See 11 C. L. 474—A bond is usually required of the contractor. Where the contractor requires the giving of bond, failure to do so is a breach of the contract,[45] but if the contractor had been allowed to proceed, the owner cannot rescind for failure to give bond without allowing a reasonable time to procure a bond [46] and to obviate objections made to a bond tendered.[47] The making of certain objections to a bond tendered is a waiver of other objections.[48]

33. See Mechanics' Liens, for discussion of this subject.

Search Note: See Contracts, Cent. Dig.; Dec. Dig.; 9 Cyc. 213-786.

34. Oliver v. Noel Const. Co., 109 Md. 465, 71 A 959.

35. Right of subcontractor to recover from owner, and enforce lien, depends upon amount due contractor from owner at time of service of cautionary notice, under Gen. St. 1906, § 2211. Right cannot be defeated by showing payment to contractor in full after such notice. Stringfellow v. Coons [Fla.] 49 S 1019. Subcontractor is entitled to lien if anything was due from owner after service of notice and abandonment by contractor and completion by surety does not cut off subcontractor's right to lien. Id.

36, 37. Martens v. O'Neill, 131 App. Div. 123, 115 NYS 260.

38. Martens v. O'Neill, 131 App. Div. 123, 115 NYS 260. Where contractor failed to substantially perform, leaving nothing due him from owner, subcontractor could not recover from owner. Schumer v. Kohn, 117 NYS 771. Owner not liable to subcontractor, when contractor abandoned work, leaving work unfinished requiring an expenditure of more than balance due contractor. Schumer v. Kohn, 117 NYS 770.

Contra: A subcontractor's lien is not dependent upon whether anything is due the principal contractor, or whether he has been given an architect's certificate of satisfactory performance. Rieser v. Commeau, 129 App. Div. 490, 114 NYS 154.

39. Martens v. O'Neill, 131 App. Div. 123, 115 NYS 260. An owner who in good faith and without collusion has paid the contractor the full contract price is not liable to a subcontractor for the amount due from the principal contractor. Rosenbaum v. Paletz, 114 NYS 802. Owner paid contractor in full, and contractor abandoned work, which owner was not authorized by contract to complete. After abandonment, third persons filed liens for sums due from contractor, and owner paid them. Held he could not recover such amounts from contractor, since third persons had no valid liens. Stevens v. Smith, 112 NYS 361.

40. Hedden Const. Co. v. Proctor & Gamble Co., 62 Misc. 129, 114 NYS 1103.

41. Rosenbaum v. Paletz, 114 NYS 802.

42, 43. Martens v. O'Neill, 131 App. Div. 123, 115 NYS 260.

44. See, also Bonds; Suretyship.

Search Note: See note in 14 L. R. A. (N. S.) 457.

See, also, Principal and Surety, Cent. Dig.; Dec. Dig.; 30 A. & E. Enc. L. (2ed.) 1288.

45. Contract was complete and operative when sealed and delivered though bond required by provision of it had not been given. Failure to give bond would be breach of contract. Shallenberger v. Standard Sanitary Mfg. Co. [Pa.] 72 A 500.

46. Having allowed contractor to proceed with work, though he had not filed bond, right to rescind for failure to tender bond could be exercised only in view of circumstances existing at time; thus reasonable time must be allowed to procure bond and

Bonds to secure performance of building and construction contracts are, in some jurisdictions, given the same construction as insurance contracts.[49] The surety's liability is measured by the terms and conditions of the bond,[50] but these should receive a rational construction.[51] The contract for the work is a part of the bond[52] and the surety has the right to insist on strict performance of its conditions,[53] and he is discharged from liability by any substantial departure from or change in the contract or plans[54] made without his consent,[55] unless the right to make such change or alteration is expressly given in the bond or in the contract which it secures,[56] and, in the absence of conduct, amounting to an estoppel to

meet objections to bond tendered. Shallenberger v. Standard Sanitary Mfg. Co. [Pa.] 72 A 500. Whether, in view of conduct of parties, three days' notice to give bond as required by contract, or abandon work, was reasonable time, was for jury. Id.

47. Owner having previously waived other objections to bond, except that it was not tendered in time, contractor would be entitled to reasonable time to procure another on objection that bond tendered was executed by foreign company. Shallenberger v. Standard Sanitary Mfg. Co. [Pa.] 72 A 500.

48. Refusal to accept bond was on sole ground that it had not been tendered within time allowed by notice given. Held, in action by contractor for damages for breach by owner who did work, proof of contractor's financial condition and fact that bond was of foreign corporation was immaterial. Shallenberger v. Standard Sanitary Mfg. Co. [Pa.] 72 A 500.

49. Surety contracts of this kind are to be construed according to the rule applicable to insurance contracts. Lakeside Land Co. v. Empire State Surety Co., 105 Minn. 213, 117 NW 431. A contractor's bond is to be treated as a contract of insurance by the surety, and construed strictly against the surety in case of doubt. Lesher v. U. S. Fidelity & Guar. Co., 239 Ill. 502, 88 NE 208.

50. Knight & Jillison Co. v. Castle [Ind.] 87 NE 976.

51. Though a surety is not liable beyond the strict terms of its contract, yet the contract must receive a rational construction. Aetna Indemnity Co. v. Waters [Md.] 73 A 712. Where a surety, seeking to avoid liability on a bond, sets up failure to obtain its consent to an alteration, it cannot object to a strict adherence by the court to a provision of the contract as to the manner in which such alteration could be legally made. Id.

52. Litchgi v. Gottlieb, 134 Mo. App. 237, 113 SW 1134. Where parties adopted drawings and specifications and acted upon them and signed contract, signing of drawings and specifications was waived, and omission of signatures did not release surety. Aetna Indemnity Co. v. Waters [Md.] 73 A 712.

53. Litchgi v. Gottlieb, 134 Mo. App. 237, 113 SW 1134.

54. Litchgi v. Gottlieb, 134 Mo. App. 237, 113 SW 1134; Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Any material alteration in original contract, without consent of surety and increasing risk, releases surety. Haigler v. Adams, 5 Ga. App. 637, 63 SE 715.

Surety released by material change in contract, increasing risk, without surety's consent. Woodruff v. Schultz [Mich.] 15 Det. Leg. N. 899, 118 NW 579. Substantial changes in plans for schoolhouse, without surety's consent, released surety. Barfield School Dist. v. Green, 134 Mo. App. 421, 114 SW 578. Changes in plans and addition of story to building, without consent of surety, would discharge him. Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 P 856. Substitution of new contract, under which house was built without consent of surety, operated to release it. Haigler v. Adams, 5 Ga. App. 637, 63 SE 715. That new contract had been substituted for one sued on and that house had been built under substituted contract was good defense to action on bond given in connection with original contract. Id.

Surety not released: Evidence held not to show alteration in plans, without notice to surety, so as to release surety. United Surety Co. v. Summers [Md.] 72 A 775. Failure to give notice of or obtain written consent to slight delays or deviations from plans will not release the surety, since this would be in nature of forfeiture, and this is not favored. Aetna Indemnity Co. v. Waters [Md.] 73 A 712. Alteration involving $30 on $13,000 building will not release surety because made within its consent. Id. Omission of stairway in building did not involve loss to surety; hence, failure to notify surety thereof, under provision of contract, did not release surety. United Surety Co. v. Summers [Md.] 72 A 775. Contract called for two-story frame dwelling, but specifications showed it to be brick veneer. Bond and indemnifying bond given surety described building as "two-story frame residence." Held indemnitors of surety not released on ground that building erected was not the one contracted for. Title Guaranty & Trust Co. v. Murphy [Wash.] 100 P 315.

55. Burden on owner to show consent of surety to change in plans; mere knowledge not consent. Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 P 856.

56. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Where the contract provides that one party may make certain specified changes during the progress of the work, the sureties are deemed to have consented thereto in advance (McMullen v. U. S. [C. C. A.] 167 F 460), and if such changes are made, even though they alter the contract materially, the sureties are not released (Id.).

deny liability on this ground.[57] Where the surety thus consents in advance to alterations, as he may legally do,[58] changes within the contemplation of the bond and contract, and made and evidenced as there required,[59] do not release him. A contract provision that additional time may be allowed does not permit an extension without the consent of the surety.[60] To the extent that a bond enlarges the right of the parties to make alterations, over that given by the contract, its terms control as to the liability of the surety.[61] Where the surety has consented to changes, the owner or principal contractor may waive a requirement that changes can be made only upon written order, such requirement being for his benefit, and such waiver will not release the surety,[62] especially where the changes are not such as to increase the cost or entitle the contractor to additional compensation.[63]

Failure to make payments as agreed will not release the surety,[64] when the default of the contractor was not caused thereby,[65] nor will an unenforcible secret agreement as to the extension of credit to the owner release the surety.[66] The payment of a substantial amount to the contractor before it is due under the terms of the contract releases the surety,[67] unless the payment was made at the surety's request.[68] Where the contractor does not provide when payment shall be made, payments prior to completion of work do not release the surety.[69] Bonds usually in-

57. Owner gave three days' notice to contractor, after his default, and owner and surety made new agreements for completion of building according to original contract, rights upon bond being saved. Held surety's indemnitors not released because another was placed in charge of work. Title Guaranty & Trust Co. v. Murphy [Wash.] 100 P 315. Sureties not estopped to deny liability on bond where, after contractor abandoned work, they took all material on ground and received property of contractor's wife, to be applied in completing building, and requested owners not to sue on bond for present. Barfield School Dist. v. Green, 134 Mo. App. 421, 114 SW 578.

58. A provision that changes may be made, and that if made and agreed upon they should in no manner relieve or release the sureties in the bond, is valid. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729.

59. Where contract required changes to be agreed upon, and amount of difference indorsed on contract, an indorsement of changes and amounts was compliance. Failure of parties to sign indorsements did not relieve surety. Illinois Surety Co. v. Garrard Hotel Co. [Ky.] 118 SW 967. Where contract provided that owner might make changes, the price to be agreed upon in writing, and that such changes should not affect the validity of the bond or release the surety, and the bond provided for changes by owner and contractor without notice to surety and without affecting bond, a change agreed upon by owner and contractor did not release surety though price was not agreed on in writing. Hax-Smith Furniture Co. v. Joll, 133 Mo. App. 404, 113 SW 650.

60. Contract provided that additional time might be allowed, upon certain contingencies. Held, extension without consent of surety released it. McMullen v. U. S. [C. C. A.] 167 F 460.

61. Hax-Smith Furniture Co. v. Joll, 133 Mo. App. 404, 113 SW 650.

62. Surety not released by changes orally agreed to, provided for in contract by clause allowing changes without releasing surety. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729.

63. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729.

64. Failure of contractor to make payments to subcontractor as agreed does not defeat recovery on subcontractor's bond for abandonment by him. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

65. Failure to make payment to contractor did not release surety where certificate had not been presented and failure to pay was not cause of contractor's default in payment of claims against him, which were made liens on property and foreclosed. Martin v. Empire State Surety Co. [Wash.] 101 P 876.

66. Secret agreement between owner and contractor, whereby latter agreed to take second mortgage on property for balance due, did not release surety, not being enforcible, especially since contractor did not finish work in time, and payment was made in cash. Martin v. Empire State Surety Co. [Wash.] 101 P 876.

67. Overpayment amounting to $2,000 released surety, amount retained by owner being less than amount of liens which he had to pay. Kunz v. Boll [Wis.] 121 NW 601. Bond provided that last payment should not be made until work had been completed and until after notice to surety. Held, payment in full before commencement of work released surety. Leiendecker v. Aetna Indemnity Co. [Wash.] 101 P 219. Evidence held to show that owner retained 25 per cent of amounts due, so that surety was not released by overpayment; amount due included amounts for extras included in architect's certificate. Illinois Surety Co. v. Garrard Hotel Co. [Ky.] 118 SW 967.

68. The surety is estopped to assert that overpayments to the contractor made at the request and for the benefit of the surety are a violation of contract releasing it. Hellman v. Farrelly, 132 App. Div. 151, 116 NYS 809.

69. No contract provision being violated. Litchgi v. Gottlieb, 134 Mo. App. 237, 113 SW 1134.

demnify the obligee against mechanics' liens,[70] and the owner may pay claims which are lienable, and recover the amount from the surety.[71] Failure to retain from payments an amount sufficient to pay such claims, as permitted by contract, releases the surety.[72] When the obligee in a bond retains an amount equal to claims against the contractor, and is under no legal obligation to pay it, he cannot recover such sum from the surety.[73]

Conditions precedent must be complied with, to enforce the surety's obligation.[74] Notice of the contractor's default must be given, as required by the bond.[75] A reasonable time should be given a surety to exercise an option, given by the bond, to complete the work upon abandonment by the contractor or its lawful termination by the owner,[76] though it has been held that failure to give the surety such opportunity is not a condition precedent but is matter of defense.[77] A provision in a bond that the surety shall not be subject to any suit action or proceeding instituted after a certain date is plain and not open to construction.[78] Such provision is reasonable and valid though the contract is not completed prior to the date named,[79] since an action could be maintained prior to the date named for damages accrued, without prejudice to a second action for subsequent damages.[80] Where the action is to recover for liens which the owner has been compelled to pay, the limitation does not begin to run until the rendition of judgment.[81]

Rights of third parties.[See 11 C. L. 475]—In determining the liability of the surety and the rights of other parties, the contract and bond should be construed together.[82] Persons for whose benefit a bond is executed, in another's name as obligee, may sue thereon.[83] Where the contract contains an express promise to pay

70. A bond indemnifying obligee from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the contract, makes the surety liable for mechanics' liens. Stoddard v. Hibbler [Mich.] 16 Det. Leg. N. 114, 120 NW 787.

71. Illinois Surety Co. v. Garrard Hotel Co. [Ky.] 118 SW 967.

72. Contractor, under contract with subcontractor, had right to retain from instalments sufficient to pay claims against subcontractor, and to require receipts before paying. Held, payment to subcontractor without requiring receipts or withholding amount of claims against subcontractor released surety. Pauly Jail Bldg. & Mfg. Co. v. Collins, 138 Wis. 494, 120 NW 225.

73. Woodruff v. Schultz [Mich.] 15 Det. Leg. N. 899, 118 NW 579.

74. Compliance must be alleged and proved. Knight & Jillson Co. v. Castle [Ind.] 87 NE 976.

75. Compliance with provision requiring written notice and verified statement within ten days after default necessary. Knight & Jillson Co. v. Castle [Ind.] 87 NE 976. Where work was delayed 17 days by strike, and contract allowed extension for that cause, notice of default given surety at expiration of 17 days after date fixed in contract was sufficient, bond requiring notice of default within 24 hours. Illinois Surety Co. v. Garrard Hotel Co. [Ky.] 118 SW 967. Notice of contractor's default in paying claims need not be given, as soon as default occurs; sufficient if given at time when claims are sought to be made a lien, as, in this case, by giving notice before liens were filed. Martin v. Empire State Surety Co. [Wash.] 101 P 876. Where a bond contains only a general provision requiring notice of default, failure to give notice of delay in completion of building, for which no claim of damages is made, does not release surety from liability for labor and material liens paid by owner. Lakeside Land Co. v. Empire State Surety Co., 105 Minn. 213, 117 NW 431. Failure to give notice to surety of cessation of work on certain date did not release surety, where parties were disputing certain items, and contractor was given opportunity to correct certain work, and owner did not know cessation was final. Aetna Indemnity Co. v. Waters [Md.] 73 A 712. A requirement in a contractor's bond that the obligee shall give **immediate notice** to the surety of any default by the contractor is equivalent to a requirement of **reasonable notice.** Thomason v. Kenney, 4 Ga. App. 721, 62 SE 470. What is reasonable notice to surety of default by contractor is for jury on all the facts. Id.

76. What is reasonable time is for jury under all facts. Thomason v. Kenney, 4 Ga. App. 721, 62 SE 470.

77. Contractor could sue on bond at once on abandonment by subcontractor. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

78, 79, 80. Lesher v. United States Fidelity & Guar. Co., 239 Ill. 502, 88 NE 208.

81. Action begun on bond within six months after judgment in action to foreclose liens begun in time. Owner may wait until amount which he must pay is determined; need not sue within six months after notice of default by contractor. Martin v. Empire State Surety Co. [Wash.] 101 P 876.

82. Knight & Jillson Co. v. Castle [Ind.] 87 NE 976.

83. Where grading contract was made in behalf of several property owners in name of one, and bond ran to one in whose name contract was made for benefit of all, persons interested, for whom contract was made, could sue on bond. Michaud v. Erickson [Minn.]

for all labor and materials when due, and the conditions of the bond are that the contractors will faithfully perform the contract according to its terms, such contract and bond inure to the benefit of laborers and materialmen, and they may maintain an action thereon.[84] Where the contract and bond contain on such express promise, but only a general agreement to perform, third persons cannot sue for breach.[85] Bond to secure an agreement to deliver work free of liens gives no rights to laborers or materialmen.[86] Laborers may sue on bonds given to secure government contracts, by virtue of the act of congress.[87] Third persons seeking to enforce the liability of the surety must show compliance with conditions of the bond.[88]

Other security.—The owner may secure advances by a lien on the contractor's equipment and materials.[89] An agreement in an assignment of a contract for railroad construction, that the assignee was to be paid money due the assignor, does not make assignee trustee of such sums for laborers and materialmen unpaid by the assignor.[90]

§ 13. *Remedies and procedure*[91]—See 11 C. L. 475 differ in no way from those allowed on other contracts, and are elsewhere treated.[92]

BUILDING AND LOAN ASSOCIATIONS.

The scope of this topic is noted below.[93]

§ 1. Definition and Statutory Regulation, 569.
§ 2. Membership and Stock, 570.
§ 3. Loans and Mortgages, 570.
A. In General, 570.
B. Applicability of, and Exemption from, Usury Laws, 571.
C. Accounting with Borrower While Solvent, 573.
D. Accounting After Insolvency, 578.
§ 4. Termination and Insolvency, 574.
§ 5. Rights of Withdrawing Shareholders, 574.

§ 1. *Definition and statutory regulation.*[94]—See 11 C. L. 475—The powers of incorporated associations are dependent on their charters and the statutes under which

122 NW 324. Where bond was for use and benefit of all who "may become entitled to liens," one who furnished materials used in building, and became entitled to lien, could sue on bond, though he had not perfected lien. Gwinn v. Wright, 42 Ind. App. 597, 86 NE 453.

84. May sue for breach of agreement to pay them. Knight & Jillson Co. v. Castle [Ind.] 87 NE 976.

85. Knight & Jillson Co. v. Castle [Ind.] 87 NE 976.

86. Fleming v. Greener [Ind.] 87 NE 719.

87. Action on bond by laborer, under Act Congress, Aug. 13, 1894, c. 280, 28 Stat. 278. Plaintiff held not estopped to claim wages at $25 per week, though he had, under arrangement with subcontractor, turned in time at 40 cents an hour. United States v. Jobst, 81 Neb. 11, 115 NW 553.

88. Unpaid materialmen could not recover on bond without proving notice of default duly given surety. Knight & Jillson Co. v. Castle [Ind.] 87 NE 976.

89. Contract between contractor for construction of tunnel for railroad company provided that latter should advance part of cost of contractor's plant, and that portions of the plant and materials placed on the railroad company's ground should become its property, to be returned to contractor after completion of work, on certificate by engineer. Final payment not to be made so long as there was an outside lien on property. Held, contractor had attachable interest in plant on ground, but creditor could not remove it until completion of work, and that materials could be used and made part of work on tunnel and lien of attachment thereon thus be released. Knickerbocker Trust Co. v. O'Rourke Engineering Const. Co., 74 N. J. Law, 53, 70 A 735.

90. Fleming v. Greener [Ind.] 87 NE 719.

91. **Search Note:** See note in 13 L. R. A. (N. S.) 448.

See, also, Contracts, Cent. Dig. §§ 1549-1844; Dec. Dig. §§ 324-356; 6 Cyc. 84-115; 9 Id. 685-786.

92. See Contracts, § 9. Also, generally, such topics as Damages, § 4A; Pleading, Evidence, etc.

93. Treats of all matters peculiarly relating to building and loan associations, except taxation (see Taxes*). Excludes matters pertaining generally to corporations (see Corporations*), mortgages (see Mortgages;* Foreclosure of Mortgages on Land*), interest (see Interest*), and usury (see Usury*), such matters being retained, however, in all aspects that they may have with peculiar reference to building and loan associations.

94. **Search Note:** See notes in 43 L. R. A. 419; 4 L. R. A. (N. S.) 1047; 9 Id. 461.

See, also, Building and Loan Associations, Cent. Dig. §§ 1-46, 6, 69, 82; Dec. Dig. §§ 1-

thy exist,[95] subject to the doctrine of ratification.[96] A foreign association must conform to the laws of the state regulating similar domestic corporations,[97] and the laws pertaining to the right of foreign corporations to do business in the state,[98] and its contracts, though in terms solvable at its domicile in a foreign state, must be such as are authorized by domestic corporations.[99]

§ 2. *Membership and stock.*[1]—See 11 C. L. 476—Where an association is a stock corporation its stockholders are liable accordingly.[2]

*Charters and by-laws.*See 9 C. L. 437

*Kinds of stock.*See 11 C. L. 476

*Payment of dues.*See 11 C. L. 476—On failure of members to make payments required by their contracts, fines are usually imposed,[3] or the stock is forfeited.[4]

*Maturity of stock and rights of holders of matured stock.*See 11 C. L. 476—Where an association continues as a going concern for a considerable period after executing notes in settlement with a member as a maturing policy-holder, it cannot plead or prove insolvency prior to that time in an action on the notes.[5]

§ 3. *Loans and mortgages. A. In general.*[6]—See 11 C. L. 476—The obligations assumed by the parties will, of course, depend on the terms of the particular con-

4, 46; 6 Cyc. 120-123; 4 A. & E. Enc. L. (2ed.) 1001, 1008.

95. Association created for purpose of "building and improving homesteads and lending money to members only" held without power to become shareholder in similar association, and latter held without power to lend it money as shareholder. Standard Savings & Loan Ass'n v. Aldrich [C. C. A.] 163 F 216. Statute held not to give to association express or implied power to borrow money for purpose of paying off withdrawing shareholders. Id. Money not recoverable on contract or in equity, lender knowing purpose of loan and association being insolvent when money was borrowed, it not appearing association received any benefits. Id. Association organized under Laws 1851, p. 234, c. 122, to accumulate fund to buy realty, erect buildings, etc., has authority to purchase realty for members and pledge its credit for price under scheme to apportion same among members at appraised values. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918.

96. Association's purchase of land for division among members and pledging its credit for price held ratified by members actively promoting scheme precluding plea of ultra vires against creditors seeking to apply sums due from members for lots. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918.

97. Irving v. Iron Belt Building & Loan Ass'n, 63 W. Va. 348, 61 SE 325.

98. See Foreign Corporatians, § 1. Where foreign association had issued stock entitling holders to loans thereon, prior to taking effect of statute regulating foreign corporations, it could make and enforce loan accordingly after statute took effect though it did not comply therewith but ceased to do other business. Steinman v. Midland Savings & Loan Co. [Kan.] 96 P 860.

99. Irving v. Iron Belt Building & Loan Ass'n, 63 W. Va. 348, 61 SE 325.

1. Search Note: See notes in 3 C. L. 563; 29 L. R. A. 120; 35 Id. 215, 244; 15 L. R. A. (N. S.) 503; 1 Ann. Cas. 796; 3 Id. 731.

See, also, Building and Loan Associations, Cent. Dig. §§ 5-35; Dec. Dig. §§ 5-24, 340; 6 Cyc. 122-141; 4 A. & E. Enc. L. (2ed.) 1026, 1030.

2. Building association formed under Laws 1851, p. 234, c. 122, and having capital stock divided into shares, is a stock corporation within Stock Corporation Law, Laws 1890, p. 1066, c. 564, defining liability of stockholders of stock corporations. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918. Stockholders not liable for price of land purchased by association where same was not to be paid until after expiration of ten years, statute limiting liability to debts payable within two years from date of their creation. Id.

3. Where statute provided fines should only be due and payable from profits belonging to delinquent, fines were not authorized where no profits were earned during the alleged delinquency. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694. Where, on increase of a loan, member made a new note and mortgage covering indebtedness as increased limitation in § 68, c. 48, Rev. St., against charging offenses after "six months from first lapse," runs from first lapse under new note and mortgage. Tibbetts v. Deering Loan & Bldg. Ass'n [Me.] 72 A 162.

4. Where an account is stated under Rev. St. § 69, c. 48, on forfeiture of stock for failure to pay dues, interest, premiums and fines, balance against member constitutes a new principal bearing interest until payment. Gibbetts v. Deering Loan & Bldg. Ass'n [Me.] 72 A 162.

5. Evidence of insolvency before execution of notes held not availing, it having been held on former appeal that association could not plead such insolvency, it having continued as a going concern for one year after notes were given. Bohn v. Boone Building & Loan Ass'n [Iowa] 118 NW 383.

6. Search Note: See notes in 29 L. R. A. 120; 4 L. R. A. (N. S.) 439.

See, also, Building and Loan Associations, Cent. Dig. §§ 32-47, 63, 73-80; Dec. Dig. §§ 24-31, 38, 39; 6 Cyc. 140-155; 4 A. & E. Enc. L. (2ed.) 1017, 1054.

tract.[7] A borrowing member is presumed to know the provisions of notes given, certificates of stock pledged, and of the articles of the association,[8] and these written instruments cannot be varied by parol evidence of oral agreements as to the terms of the loan.[9] In the absence of fraud, a member is estopped to deny the verity of the recitals in a loan application[10] and cannot escape liability arising therefrom by a plea of failure to read the document or to ascertain its contents.[11] One to whom a loan is allowed cannot assert that he was not a stockholder at the time where he subscribes to stock in perfecting the loan and then assigns it to the company as security,[12] and, where one becomes a member of a reorganized company when he applies for a loan, he cannot thereafter deny the validity of the law providing for such reorganization.[13] When a borrower increases the amount of his loan, a second note and mortgage may be given to cover the whole indebtedness as increased.[14] Assignment of the contract is sometimes provided for,[15] and it is often stipulated that the association may declare the whole loan due in case of default.[16] Unconscionable contracts will not be enforced as written.[17] A withdrawal of an application for a loan must be addressed to officers having authority to consider it.[18] The allowance of a loan at an open meeting of the directors at which the preference was offered to the highest bidder, constitutes a compliance with a requirement of competitive bidding.[19]

(§ 3) *B. Applicability of, and exemption from, usury laws.*[20] See 11 C. L. 477 Loans are not usurious if made in conformity with the law,[21] but, to exempt the

7. Contract providing for advancing of $1,000 by association and its repayment in instalments held not fully discharged on company's part by advancement of the $1,000, there being an insurance feature by which, in case of borrower's death before repayment of full amount, advanced balance was not to be repaid. Butler v. Home Co-operative Co. [Colo.] 99 P 54.

8. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694. Allegations that association had falsely construed contract and that under contract as so construed loan had been fully paid held not to entitle mortgagor to cancellation of mortgage. Wiley v. Com. Loan & Sav. Ass'n [Ind. App.] 86 NE 1032.

9. Could not be shown that agent and borrower agreed orally that stock should mature by 84 payments, 90 being required by certificate of stock and articles. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694. Association not estopped to insist on terms of written contract. Id. Where bond and mortgage made no reference to by-laws or rules, statements by plaintiff's agent during negotiations that certain payments would satisfy loan held admissible under defense of fraud in action to foreclose mortgage. American Building & Loan Ass'n v. Fowler [Ind. App.] 88 NE 118.

10. Wright v. Curtin, 137 Ill. App. 267. That he was allowed a preference for a loan at regular meeting of stockholders. Id.

11, 12. Wright v. Curtin, 137 Ill. App. 267.

13. Holmes v. Royal Loan Ass'n, 128 Mo. App. 329, 107 SW 1005.

14. Held intention of parties that new note and mortgage should be continuing security for original contract. Tibbetts v. Deering Loan & Bldg. Ass'n [Me.] 72 A 162.

15. Where contract required notice of assignment thereof to company for its approval, company held to have approved assignment where it accepted payments from assignee and wrote him that it was satisfied with him as a responsible person and requested refund of loan. Butler v. Home Co-operative Co. [Colo.] 99 P 54. Contract held not entirely executed so as not to be assignable, an insurance obligation remaining on company. Id.

16. Contract, by-laws and statute held to authorize association to declare whole loan due after default in payment of premiums, interest, etc., for more than six months without notifying plaintiff of exact amount due. Long v. Newman [Cal. App.] 102 P 534. Plaintiff's willingness to pay amount due held not to prevent exercise of company's option to sell property on default in absence of fraud, mistake or offer to pay full amount due, specifying it. Id. Temporary injunction restraining foreclosure held properly dissolved. Id.

17. Loan of $1,000 under which, after payment of $700, borrower still owed $900 and interest to a bank, and $46 to association, held unconscionable and not enforcible according to its terms. Ensign v. Colorado Inv. Loan Co. [Utah] 99 P 1076.

18. Letter to local secretary withdrawing application for loan held ineffective, secretary having no authority to accept such notice and it not having been communicated to principal. Arkansas Building & Loan Ass'n v. Pottenger Drug Co. [Okl.] 99 P 635. Applicant not entitled to return of money advanced. Id.

19. Though only one bid is made. Wright v. Curtin, 137 Ill. App. 267.

20. Search Note: See notes in 1 C. L. 394; 5 Id. 481; 18 L. R. A. 129; 62 Id. 64; 2 Ann. Cas. 996.

See, also, Building and Loan Associations, Cent. Dig. §§ 48-59; 67; Dec. Dig. §§ 32, 33; 6 Cyc. 150-152; 4 A. & E. Enc. L. (2ed.) 1071.

21. Edwards v. Oil City Bldg. & Sav. Ass'n, 137 Ill. App. 522.

contract from the operation of the ordinary usury laws, statutory provisions must be complied with in making the loan.[22] Otherwise the loan will be held usurious if the charges thereon amount to more than the legal rate of interest,[23] but usury cannot usually be predicated upon the deduction of attorney's fees for the examination of the abstract of title to the property mortgaged as security,[24] or upon the deduction of the interest in advance.[25] The burden is on party asserting usury to prove it [26] with reasonable clearness,[27] and such proof must be confined to the loan in controversy.[28] A plea of usury does not put in issue the status of plaintiff as a building and loan association.[29]

As a general rule the contract is to be construed with reference to the laws of the association's domicile,[30] and a contract not usurious under laws expressly made controlling will be sustained though the interest rate is higher than that allowed by the laws of the forum, provided there is no attempt to evade the usury laws.[31] The place where the security is situated may be made the place of performance, and thus render the laws of such place applicable,[32] as where the loan is made and handled through the medium of a resident board,[33] but the parties will not be allowed arbitrarily to contract against to exclude the operation of the laws of the association's domicile,[34] and no presumptions will be indulged in favor of an association attempting thus to avoid the laws of its domicile.[35]

22. Contract usurious if premium is fixed by other methods than prescribed by statute and is greater than legal rate of interest. Irving v. Iron Belt Building & Loan Ass'n, 63 W. Va. 348, 61 SE 325. Loan usurious where there was no **bidding** in open meeting and association had not dispensed with such bidding by by-law as authorized by statute. Cobe v. Guyer, 237 Ill. 568, 86 NE 1088. Exemption of building and loan associations from operation of interest law applies to only intsrest fines and premiums accruing under act providing for their organization, and, where money is not offered for loan at open meeting to highest bidder but at arbitrary premium fixed by directors, loan is not exempt from usury laws. Garlick v. Mutual Loan & Bldg. Ass'n, 236 Ill. 232, 86 NE 236; Cobe v. Guyer, 237 Ill. 568, 86 NE 1088, rvg. 139 Ill. App. 580. Premium or profit for use of advance or loan must be fixed by competitive bidding or, in default of bidding, at or above minimum premium fixed in by-laws. Irving v. Iron Belt Building & Loan Ass'n, 63 W. Va. 348, 61 SE 325.

23. Contract requiring payment of fixed monthly premium indefinitely is usurious. Irving v. Iron Belt Building & Loan Ass'n, 63 W. Va. 348, 61 SE 325. Contract for advance of $1,500 on 15 shares of regular stock, and 15 shares of special stock in lieu of fixed premium, borrower being required to pay monthly $9 dues on regular stock, $7.50 on special stock and $7.50 interest, until such time as stock should mature, held usurious. Id. Agreement by borrowing stockholder to pay $8.50 monthly on five shares of stock, $3 as dues, $3 as premium and $2.50 as interest, until dues paid, together with earnings on each share of stock, should amount to $100, held not usurious. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694.

Borrowers not estopped to assert usury, it not appearing that they had knowledge of by-laws or that they were stockholders before completion of loan to them. Garlick v. Mutual Loan & Building Ass'n, 236 Ill. 232, 86 NE 236. Immaterial borrowers were credited with earnings in arriving at amount due from them at time of giving new notes and mortgages. Id.

24, 25. Cobe v. Guyer, 237 Ill. 516, 86 NE 1071, afg. 139 Ill. App. 592.

26. Cobe v. Guyer, 237 Ill. 516, 86 NE 1071, afg. 139 Ill. App. 580; Garlick v. Mutual Loan & Building Ass'n, 236 Ill. 232, 86 NE 236; Wright v. Curtin, 137 Ill. App. 267.

27. Cobe v. Guyer, 237 Ill. 516, 86 NE 1071, afg. 139 Ill. App. 580. Evidence insufficient to show usury as to a certain loan. Garlick v. Mutual Loan & Building Ass'n, 236 Ill. 232, 86 NE 236.

28. Wright v. Curtin, 137 Ill. App. 267.

29. Code, § 3628, providing that, if incorporation is controverted, facts relied on shall be specifically stated. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694.

30. Washington Nat. Building & Loan Ass'n v. Piper, 31 App. D. C. 434; Washington Nat. Building & Loan Ass'n v. Conley, 31 App. D. C. 439. Domicile held to be in District of Columbia, notwithstanding that the association was incorporated in Virginia. Id.

31. Steinman v. Midland Savings & Loan Co. [Kan.] 96 P 860.

32. Washington Nat. Building & Loan Ass'n v. Piper, 31 App. D. C. 434; Washington Nat. Building & Loan Ass'n v. Conley, 31 App. D. C. 439.

33. Irving v. Iron Belt Building & Loan Ass'n, 63 W. Va. 348, 61 SE 325.

34. Washington Nat. Building & Loan Ass'n v. Piper, 31 App. D. C. 434; Washington Nat. Building & Loan Ass'n v. Conley, 31 App. D. C. 439. Where loan was made by association domiciled in District of Columbia on land located in West Virginia, a stipulation that contract was to be controlled by laws of Virginia was unavailing, though association was incorporated in Virginia. Id.

35. Washington Nat. Building & Loan Ass'n v. Piper, 31 App. D. C. 434; Washington Nat.

(§ 3) *C. Accounting with borrower while solvent.*[36]—See 11 C. L. 477—A borrowing member usually assumes more obligations than those of a mere borrower to a lender of money,[37] and adjustments must be made accordingly.[38] The fact that he does not receive the full sum at one time does not obviate the payment of interest and premiums on the whole loan according to the contract,[39] nor is such payment obviated by the fact that the association did not set aside as a special fund the amount of the loan.[40] Voluntary liquidation contemplating the maturing of outstanding stock, as intended when it was issued is not a breach of contract on the part of the association so as to allow borrowers to have their loans adjusted as ordinary loans.[41] Upon voluntary liquidation under the New Jersey statute, borrowing members, whether in default or not, are charged with the amount actually borrowed, with lawful interest, and credited with all interest and premiums paid and also with interest on premiums paid from the date of each payment,[42] and all payments made as dues are applied to the shares.[43] In a suit by a third person, pending liquidation of the association, to enforce subrogation against the mortgaged property by reason of his having made payments for a borrower, the directors and stockholders of the association are not necessary parties.[44] Premiums and interest cannot be credited on the stock in acceleration of its maturity for the purpose of stopping payments on the loan where by the terms of the contract the stock is to mature by payment of stock dues and the crediting of dividends.[45] Where the borrower has assigned his interest in the property covered by the mortgage, with a guarantee against the association's claim against such property, his remedy at law against a suit to foreclose is inadequate, and he may resort to equity to have the mortgage released on the ground of payment.[46]

(§ 3) *D. Accounting after insolvency.*[47]—See 11 C. L. 478—Insolvency matures the debt regardless of contract provisions,[48] and the association may resort to either the mortgage or the pledged stock, or both, for the collection of its claims.[49] There is a conflict as to whether payments on pledged stock ipso facto constitute payments on the loan.[50] It is declared, however, that the authorities preponderate to the effect that the parties must be held to the terms of their contracts where there

Building & Loan Ass'n v. Conley, 31 App. D. C. 439.

36. Search Note: See Building and Loan Associations, Cent. Dig. §§ 61-81; Dec. Dig. §§ 34-39; 6 Cyc. 135, 144-147, 152-155; 4 A. & E. Enc. L. (2ed.) 1074.

37. Must pay such dues, interest, and fines as are imposed by statutes, by-laws, and contracts made pursuant thereto. Tibbetts v. Deering Loan & Bldg Ass'n [Me.] 72 A 162.

38. Where member contracts for specific loan, giving note and mortgage requiring payment, according to statutes and by-laws, of specific sums as interest premiums, and fines, such payments must be made, and borrower's obligations are not performed by mere payment of interest and premiums on the different instalments advanced him on loan from time he received them. Tibbetts v. Deering Loan & Building Ass'n [Me.] 72 A 162.

39. Words "loan" and "lent" in §§ 64, 65, c. 48, Rev. St., held not to mean merely sum or sums actually drawn out, but whole sum contracted for. Tibbetts v. Deering Loan & Building Ass'n [Me.] 72 A 162.

40. Tibbetts v. Deering Loan & Bldg. Ass'n [Me.] 72 A 162.

41. Could not be allowed to pay in book value of stock at date association ceased new business, with interest. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694.

42, 43. In re State Mutual Building & Loan Ass'n [N. J. Eq.] 68 A 108.

44. Where association in corporate capacity, trustees appointed by stockholders, and trustees in deeds of trust, were made parties. Mather v. Mather, 64 W. Va. 646, 63 SE 332.

45. Where stockholder had bound himself to make payments on a loan during its continuance which was to be until maturity of stock securing it, and stock was to mature when amount of stock payments plus dividends equalled par value, premium and interest could not be credited on the stock. Wiley v. Com. Loan & Sav. Ass'n [Ind. App.] 86 NE 1032.

46. Washington Nat. Building & Loan Ass'n v. Conley, 31 App. D. C. 439.

47. Search Note: See notes in 3 C. L. 569; 5 Id. 484, 485.

See, also, Building and Loan Associations, Cent. Dig. §§ 63, 66, 86-88; Dec. Dig. § 42; 6 Cyc. 164, 165; 4 A. & E. Enc. L. (2ed.) 1079.

48, 49. New Jersey Bldg., Loan & Inv. Co. v. McNulty [N. J. Eq.] 71 A 493.

appears no explicit intention to merge the indebtedness on the stock in the loan,[51] and under this doctrine the question of such merger is necessarily a question of construction.[52] Where there is no such merger, the borrower must repay his loan without credit for premiums paid on stock[53] and then look to the association for his share of the assets as a stockholder.[54] On the other hand, borrowers as such cannot be charged as stockholders.[55] Borrowers, though not parties to the proceedings, are bound by a decree declaring the company insolvent and ordering the collection of all loans.[56] A federal court which has taken jurisdiction of dissolution proceedings has ancillary jurisdiction of suits by the receiver to enforce loans, regardless of their amount.[57] It it sufficient to sustain such a bill that an indebtedness to the company appears, regardless of whether it is upon the loan or the borrower's stock subscription,[58] and as the true gist of the bill is the insolvency and dissolution of the corporation and an accounting of the mutual rights and liabilities of the association and the member,[59] failure to allege a demand upon the member is not ground for general demurrer.[60]

§ 4. *Termination and insolvency.*[61]—See 11 C. L. 478—Receivers may be appointed[62] and the assets of the association applied in satisfaction of its debts.[63] Under some of the statutes the receiver may sue without special order of court.[64]

§ 5. *Rights of withdrawing shareholders.*[65]—See 11 C. L. 478—Provisions for withdrawal of the amount paid in instalments on stock, with interest, assumes the continued solvency of the association,[66] and are abrogated with other contract terms in case of insolvency.[67] Where legal remedies are adequate, a suit for an ac-

50, 51. See Cooper v. Newton, 160 F 190.

52. Liability on stock subscription held not merged in loan. Cooper v. Newton, 160 F 190.

53. Cooper v. Newton, 160 F 190; Wright v. Curtin, 137 Ill. App. 267; New Jersey Bldg., Loan & Inv. Co. v. McNulty [N. J. Eq.] 71 A 493. See, also, In re State Mutual Building & Loan Ass'n [N. J. Eq.] 68 A 108.

54. Cooper v. Newton, 160 F 190; Wright v. Curtin, 137 Ill. App. 267. Member held not entitled to credit value of stock on amount of loan, value not being ascertainable until final winding up. New Jersey Bldg., Loan & Inv. Co. v. McNulty [N. J. Eq.] 71 A 493. Could not be credited with dues paid on stock and dividends allowed thereon before insolvency of association. Id.

55. Member as mortgagor held not chargeable with any part of running expenses of association limited by by-laws to stock, nor chargeable with any sum as reduction charge in book value of stock assigned as collateral. New Jersey Bldg., Loan & Inv. Co. v. McNulty [N. J. Eq.] 71 A 493. Member as mortgagor should be debited with only amount of loan and interest and credited with only interest and premiums paid, and interest on premiums cost under rule of average payments. Id.

56. Whether loans are matured or not. Wright v. Curtin, 137 Ill. App. 267.

57, 58, 59, 60. Cooper v. Newton, 160 F 190.

61. Search Note: See notes in 3 C. L. 571; 61 A. S. R. 24; 72 Id. 47; 4 Ann. Cas. 1080; 7 Id. 318; 10 Id. 391.

See, also, Building and Loan Associations, Cent. Dig. §§ 63, 66, 86-91; Dec. Dig. §§ 42-45; 6 Cyc. 160-165; 4 A. & E. Enc. L. (2ed.) 1079.

62. Where assets of association were already in hands of court of equity, court could remove receiver and appoint another in its place either on its own motion or on intervening petition. Wehrs v. Sullivan, 217 Mo. 167, 116 SW 1104. Section 25 of the Illinois Homestead and Loan Association Act, providing for the appointment of a receiver under certain circumstances, is a general grant of jurisdiction to the circuit court, limiting the venue to the county of the location of the association involved. Cobe v. Guyer, 237 Ill. 516, 86 NE 1071, afg. 139 Ill. App. 592. Held not necessary for **supervisor of building and loan associations** to file suit to be appointed receiver where property of association was already being administered under supervision of court. Wehrs v. Sullivan, 217 Mo. 167, 116 SW 1104. Administration of assets held required to be **under supervision of court,** where supervisor of building and loan associations intervened and was made receiver, though he should proceed to administer assets under statute authorizing his appointment as receiver. Id.

63. Sums due from members to association for lots held asset of association reachable by its creditors. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918.

64. Under Rev. St. c. 32, § 127, a receiver of a homestead loan association may sue without special authorization of the courts. McKeag v. Pirie, 134 Ill. App. 652.

65. Search Note: See notes in 5 C. L. 487; 35 L. R. A. 289; 8 Ann. Cas. 835.

See, also, Building and Loan Associations, Cent. Dig. §§ 16-19; Dec. Dig. § 14; 6 Cyc. 129-132; 44 A. & E. Enc. L. (2ed.) 1046.

66. New Jersey Bldg., Loan & Inv. Co. v. McNulty [N. J. Eq.] 71 A 493.

67. Loan fund into which instalments are paid as well as other estates of corporation must be held pending ascertainment of losses and cost of liquidation. New Jersey Bldg., Loan & Inv. Co. v. McNulty [N. J. Eq.] 71 A 493. Insolvency suspends power of associa-

counting will not lie.[68] A withdrawing member who fails to show that he has made payments to the association is not entitled to an accounting.[69]

BUILDINGS AND BUILDING RESTRICTIONS.

The scope of this topic is noted below.[70]

§ 1. Public Regulation, 575.
§ 2. Private Regulation, Restrictive Covenants, 578.
§ 3. Liability for Unsafe Condition of Premises, 582.
§ 4. Liability for Negligent Operation of Elevators, 584.

§ 1. *Public regulation.*[71]—See 11 C. L. 479—In the exercise of the police power, it is generally provided by statute [72] or ordinance [73] that certain regulations be complied with in the construction of buildings, with a view to protection against fire,[74]

tion to pay off withdrawing members. Standard Savings & Loan Ass'n v. Aldrich [C. C. A.] 163 F 216.

68. Withdrawing member not entitled to accounting because he was unable to state how much association had deducted from withdrawal fund. Kenefick v. Co-operative Bldg. Bank, 62 Misc. 519, 115 NYS 966.

69. Neither on theory of partnership nor of fiduciary relation. Kenefick v. Co-Operative Bldg. Bank, 62 Misc. 519, 115 NYS 966.

70. Treats generally of the subject-matter indicated by the title and analysis of the topic, without reference to peculiar relations (see Adjoining Owners;* Bailment,* § 2; Carriers,* §§ 9, 16, 26, 34; Landlord and Tenant,* § 5; Inns, Restaurants and Lodging Houses;* Master and Servant,* §§ 3, 4; Tenants in Common and Joint Tenants,* §§ 2, 3; Vendors and Purchasers,* §§ 1C, 2, 6, 9, 11, 12; Warehousing and Deposits *), or to particular kinds of buildings (see Bridges;* Counties,* § 1; Exhibitions and Shows;* Municipal Corporations,* § 11; Parks and Public Grounds;* Prisons, Jails and Reformatories;* Public Works and Improvements;* Railroads,* §§ 8, 11; Religious Societies,* §§ 5, 7; States,* §§ 2, 7; Toll Roads and Bridges;* Wharves *), or to particular uses of buildings (see Disorderly Houses;* Betting and Gaming,* §§ 1, 2; Exhibitions and Shows;* Nuisances *). It excludes, also, building and construction contracts (see Building and Construction Contracts *), liens for labor or material (see Mechanics' Liens *), encroachment on streets or highways (see Highways and Streets,* §§ 11, 16), easements (see Easements *), licenses to enter buildings (see Licenses to Enter Land *), and public service to buildings (see Electricity;* Gas;* Water and Water Supply,* § 16). As to negligence generally, see Negligence;* and as to negligence with reference to particular substances and instrumentalities commonly used in buildings, see Electricity,* § 3; Steam;* Explosives and Inflammables.*

71. Search Note: See notes in 3 C. L. 572, 573; 7 Id. 507; 16 L. R. A. 400; 20 Id. 725; 38 Id. 161; 39 Id. 662; 41 Id. 328; 42 Id. 814; 1 L. R. A. (N. S.) 458; 2 Id. 398, 483; 9 Id. 376; 13 Id. 737; 93 A. S. R. 405; 5 Ann. Cas. 48; 9 Id. 1166; 11 Id. 173.

See, also, Health, Cent. Dig. § 32; Dec. Dig. § 32; Municipal Corporations, Cent. Dig. §§ 1333, 1334; Dec. Dig. §§ 601-603; 28 Cyc. 736-737, 741-743; 13 A. & E. Enc. L. (2ed.) 82, 396.

72. Pub. Laws 1878, p. 116, c. 688, § 7, providing that alterations in buildings in city of Providence shall be subject to regulations of such act, is not impliedly repealed by § 34, c. 688, as amended by Pub. Laws 1894, p. 29, c. 1339, § 6. Lederer Realty Corp. v. Hopkins [R. I.] 71 A 456. Under St. 1907, p. 531, c. 550, regulating the construction, alteration and maintenance of buildings in Boston, a **covered passageway** projecting over street is a violation of such statute, where it appears that building is provided with two means of egress from every story as required. Jordan v. Swasey [Mass.] 89 NE 108.

73. Section 40 of building regulations of District of Columbia, providing that no building shall be erected on resident street exceeding 90 feet in height, with certain exception in favor of corner lots. Berry v. District of Columbia, 32 App. D. C. 96. In exercise of police power city may, without a resort to judicial proceedings, prevent erection of building within **prohibited area** or take down a building which has been erected in violation of an ordinance forbidding its erection. Davison v. Walla Walla [Wash.] 100 P 981.

74. Ordinance, prohibiting erection of any building within fire limits except buildings constructed of "brick" or "stone," is not more restrictive than statute (Rev. St. 1895, art. 523) authorizing cities to establish fire limits and prohibit construction therein of any building except such as are of **fireproof** material. Ex parte Morris [Tex. Cr. App.] 120 SW 1007. Ordinance requiring buildings to be of **brick or stone** held not to inhibit building of concrete building, as concrete is a species of brick or else is an artificial stone. Id. Provision of Act April 28, 1908, which authorizes closing of **school houses** and other public buildings pending installation of such appliances for protection against fire as the chief inspector of work shops may have ordered, is not in excess of the police powers of the state. Akron Board of Education v. Sawyer, 7 Ohio N. P. (N. S.) 401. State may prevent building of **theaters** which are not in accordance with plans which are reasonable. McGee v. Kennedy [Ky.] 114 SW 298. Ordinance requiring theaters to be erected to have five exits of certain width, main exit

and the conservation of the general welfare and safety of the public.[75] As a general rule before a building may be erected a permit in the nature of a license is required,[76] and, while the issuance of such a permit is usually a matter of more or less discretion,[77] such a permit can be refused only upon reasonable grounds.[78] If, however, a permit is issued contrary to law, it is a nullity.[79] Such regulations as the foregoing, if not unreasonable,[80] are upheld,[81] but one may not be deprived of

to be fireproof, etc., held not unreasonable. Id. Laws 1897, p. 481, c. 415, § 82, requiring that such fire escapes as may be deemed necessary by factory inspector shall be provided on the outside of **factories** in state consisting of three or more stories, is mandatory, and requires factory owner to seek from factory inspector such additional directions as are necessary. Arnold v. National Starch Co., 194 N. Y. 42, 86 NE 815. Laws 1907, p. 481, c. 415, § 82, is mandatory and applies to New York City as well as the rest of the state, and factory owner who failed to provide fire escape held liable for injuries to employe who was compelled to jump from factory. Maiorca v. Myers, 131 App. Div. 210, 115 NYS 923. Cities have inherent power to establish fire limits and to prohibit the **repair of buildings** within such limits which are damaged beyond a certain per cent of their value. Ex parte Cain [Tex. Cr. App.] 120 SW 999. But if statute provides what the per cent of damage shall be, city cannot establish a different basis. Rev. St. 1895, art. 523, provides that building damaged over 50 per cent cannot be repaired. Held that part of ordinance which made basis 25 per cent would not be upheld. Id. Ordinance providing that any wooden building within certain limits, 30 per cent of which is destroyed by fire, shall be removed, is valid exercise of police power. Concrete foundation cannot be taken into consideration in estimating value of building and relative proportion destroyed by fire. Davison v. Walla Walla [Wash.] 100 P 981.

75. Building Code of New York, § 144, in so far as it arbitrarily and absolutely forbids erection of any **"sky sign"** over nine feet in height above front wall or cornice, is invalid exercise of police power. People v. Murphy, 129 App. Div. 260, 113 NYS 855, rvg. 60 Misc. 336, 113 NYS 854.

76. McGee v. Kennedy [Ky.] 114 SW 298. Sky sign is structure which cannot lawfully be erected in City of New York without permit. Permit to erect sign 9 feet high furnishes no authority to erect one 25 feet in height. City of New York v. Wineburgh Advertising Co., 124 App. Div. 641, 109 NYS 335.

77. Quaere as to extent of building commissioner's discretion in matter of issuing or refusing permits to repair. State v. Koch, 138 Wis. 27, 119 NW 839.

78. Where one had bought a city building and in contemplation of moving same applied for permit to superintendent of buildings to make alterations, superintendent had no right to refuse to pass upon petitioner's application because he had not yet received permission of president of borough to move same. Hurwitz v. Moore, 132 App. Div. 29, 116 NYS 248. Where city council, acting under authority of city charter (Acts 1901, p. 420, c. 151, § 28), and general law (Code 1906, § 1868), which empowered it "to provide for regular building of houses or other structures and to provide for kind of material to be used in construction thereof" and "to make regulations guarding against danger or damage by fire," passed ordinance requiring permission to be obtained from city council before property owner could "alter, change, or repair" a building erected, and under such ordinance refuse permission to owner of house to make minor alterations, changes and repairs, such refusal was unwarranted and officials might be enjoined from preventing such alterations. Harvey v. Elkins [W. Va.] 64 SE 247.

Mandamus to compel building commissioner to issue permit to repair will not be granted where petition for writ does not show any ordinance requiring him to issue such permits. State v. Koch, 138 Wis. 27, 119 NW 839. Allegation, that it was respondent's duty under law and ordinances and that application for permit under law and ordinances was made, held insufficient. Id.

79. Ordinance of city of Louisville provided that theater building should conform to certain requirements. Kentucky St. 1903, § 2861, authorized creation of board of public safety, such board to have control of matters relating to the building department. Building inspector having rejected plans for proposed theater building, board of public safety granted permit. Held that permit was in violation of ordinance, the requirements of which, as to exits, etc., were mandatory. McGee v. Kennedy [Ky.] 114 SW 298. Laws 1904, p. 1008, c. 481, amending Brooklyn city charter and providing that building commissioner should have certain discretionary powers, did not confer power to sanction building of bay window over street more than one foot from wall. Heyman v. Steich, 114 NYS 603.

80. Ordinance applicable to entire borough which undertook to specify uniform standard of construction for every building, to which it applied, thereafter to be erected, whether building was large or small, or cheap or costly, was invalid. Commonwealth v. Corson, 36 Pa. Super. Ct. 7. Where it was impossible to determine whether buildings not over one story high were intended to be embraced within ordinance or excluded from its operations and where ordinance was otherwise ambiguous it was invalid. Id. Gen. Laws 1896, c. 40, § 21, authorizing towns to pass ordinances for the managing and directing of the prudential affairs and police of their respective towns, not repugnant to constitution and laws of state or of United States, does not authorize ordinance providing that every person constructing or reconstructing any building shall first have a permit. State v. Crepeau [R. I.] 71 A 449.

81. Mass. Pub. Acts 1904, c. 333, and Acts 1905, c. 383, dividing the city of Boston

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BUILDINGS AND BUILDING RESTRICTIONS—Cont'd.

an existing right to construct a building unless the authority appears.[82] Tenement houses are often specially subjected to regulation both as to construction,[83] and as to conduct and maintenance,[84] but it is held that a violation of regulations of the latter character is not ground for revocation of an approval of alteration plans,[85] the remedy in such case being the prosecution of the offender.[86] Such provisions, however, being penal, are strictly construed.[87] The authorities are sometimes given power under certain conditions to make an unsafe building safe at the owner's expense,[88] but no lien attaches unless the expense incurred is within the provision[89] or unless the proceedings have been according to the requirements of the law.[90] The duty of determining what appliances and alterations are necessary for protection and safety of persons against dangers from fire in public buildings may properly be delegated to inspectors;[91] and the fact that details as to such inspec-

into two districts, and **limiting height of buildings** in commercial district to 125 feet and in residential district to from 80 to 100 feet, is valid exercise of legislative power. Welch v. Swasey, 214 U. S. 86, 112, 53 Law. Ed. —, afg. 193 Mass. 364, 79 NE 745.

82. Where board of trustees of village has not exercised authority given in Laws 1897, p. 391, c. 414, § 88, subd. 7, to establish fire limits, they cannot enjoin erection of wooden building any where within village. Village of Skaneateles v. Hennessey, 62 Misc. 347, 116 NYS 788.

83. Hall in tenement house, which is 3 feet 5 inches in width except that chimney breast about 4 feet wide extends into it from side wall about 1 foot, complies with Tenement House Act (Laws 1901, p. 895, c. 334) § 20, which requires every entrance hall in a tenement house to be at least 3 feet 6 inches wide in clear. Umberg v. Neinken, 128 App. Div. 165, 112 NYS 618.

84. Having on premises moving picture films which are properly protected from fire is not violation of Tenement House Act (Laws 1901, p. 900, c. 334) § 40, prohibiting storage of combustible material. Fox v. Butler, 60 Misc. 484, 113 NYS 846. Where one is committed for violation of Tenement House Act (Laws 1901, p. 920, c. 334) § 141, he is deemed a vagrant and the commissioner of correction is required by Greater New York city charter, § 710, to prepare and transmit a written order to the superintendent, warden or sheriff having charge of the institution to which such person is committed, which shall disclose whether such person is committed for the first or second offense, and upon such order the person so committed is entitled to a hearing before the magistrate, and, if the **commitment** is for first time within two years, the commissioner's order shall require the person committed to be discharged at expiration of twenty days. People v. Coggey, 115 NYS 195. Where such commissioner fails to make any order or certificate at all, he may be compelled by mandamus to make one. Id.

85. Violation of Tenement House Act (Laws 1901, p. 900, c. 334) § 40, prohibiting storage of combustible material on such premises, is not cause for revocation of an approval of plans which refer to alteration of building. Fox v. Butler, 60 Misc. 484, 113 NYS 846.

86. One guilty of storing combustible material in tenement house may be prosecuted under § 126 of Tenement House Act. Fox v. Butler, 60 Misc. 484, 113 NYS 846.

87. Accused, a tailor, had in his possession in tenement house about quart of naphtha which he used for cleaning garments. Held that his act while within strict letter of Tenement House Act (Laws 1901, p. 900, c. 334) § 40, as amended by Laws 1903, p. 406, c. 179, § 25, was not within its spirit and intent, and giving statute strict construction required by law, the act of accused was not an offense. People v. Friedman, 132 App. Div. 61, 116 NYS 538.

88. City of New York v. Unsafe Bldg., Nos. 216-220 Broome St., 130 App. Div. 396, 114 NYS 1018.

89. City, under New York City Building Code (Code of Ordinances, c. 15) §§ 153-158, has no lien on property for expenses incurred in removing debris of a collapsed building for the purpose of removing dead bodies. In re Jenkins, 130 App. Div. 702, 115 NYS 385. Under New York City Building Code (Code of Ordinances, c. 15) §§ 153-158, providing such method, owner is not liable for expense incurred prior to the proceedings required by such ordinance. City of New York v. Unsafe Bldg., Nos. 216-220 Broome St., 130 App. Div. 396, 114 NYS 1018.

90. Under Building Code, § 115, the city has no lien for costs and expenses of preliminary search and survey of building supposed to be unsafe, where complaint has been withdrawn, as there can only be recovery if final judgment is rendered declaring building unsafe and directing precept to issue for removal, and such precept has been returned with indorsement of action thereunder. Alpern v. Farrell, 133 App. Div. 278, 117 NYS 706.

91. Akron Board of Education v. Sawyer, 7 Ohio N. P. (N. S.) 401. Act of April 28, 1908 (99 O. L. 232), enlarging duties of chief inspector of work shops and factories by requiring inspection of school houses and other places of public assemblage, and authorizing him where means for safe and speedy egress are insufficient to specify such appliances, additions or alterations as are necessary to insure proper protection and require that they be installed, is not a provision for the taking of property without due process of law, but is a mere requirement that such property be used in a

tion are not fixed, but are left to be worked out by the administrative officers, does not invalidate the statute.[92] Where commissioners are empowered to promulgate general building regulations, they are not authorized to make special orders exempting any particular persons or property from their operation.[93] The violation of a building regulation may give rise to a cause of action in favor of persons injured thereby,[94] but the erection of a building, which can be used for lawful purposes and which would not effect adjacent owners' rights, ought not to be enjoined because of the possibility that after completion it may be used so as to constitute a nuisance.[95] As a prerequisite to the exercise of jurisdiction in summary proceedings for a violation of a building regulation, every requirement of the statute must be strictly observed.[96] The duty of complying with building restrictions is upon the person upon whom it is imposed by statute,[97] and hence persons who are not amenable to a building regulation cannot be punished because of the dereliction of those who are responsible.[98] In a prosecution for allowing a building to project into the street, it is not error to exclude evidence as to the similar position of other structures, offered for the purpose of showing the true boundary line, when there is better evidence from which the line can be determined.[99]

§ 2. *Private regulation, restrictive covenants.*[1]—See 11 C. L. 481—Restrictive covenants upon the use of lands or buildings are not inherently invalid,[2] the legality of a particular covenant of this character being dependent upon its particular purpose or effect,[3] and aside from questions of legality, its validity depends upon whether the ordinary elements of a contract exist.[4] Such covenants are strictly

lawful way, and is a constitutional and valid enactment. Id.

92. Akron Board of Education v. Sawyer, 7 Ohio N. P. (N. S.) 401.

93. When such regulations are promulgated they have force of law and are binding on commissioners until they are amended or repealed. Berry v. District of Columbia, 32 App. D. C. 96. Where, at request of plaintiff, a property owner, the commissioners, before application was made for permit, informed plaintiff that he might erect building on his lot of certain height which was higher than that allowed by regulations, and plaintiff went to considerable expense but when application was made permit to erect one of that height was refused, it was held that act of commissioners before application was without authority and that city was not liable in damages. Id.

94. Under Building Code of New York City, § 22, making it duty of person excavating more than 10 feet below curb to preserve adjoining wall or using party wall to preserve adjoining building, one who has excavated more than 10 feet and used party wall cannot avoid statutory liability by showing due care. Post v. Kerwin, 133 App. Div. 404, 117 NYS 761.

95. Where there were no building restrictions on lot which was in locality which was not strictly a residence section, owner could erect any kind of structure thereon as long as he did not interfere with rights of adjacent owners, and that it might after erection be used as to be a nuisance was not ground for issuing injunction restraining its erection. Siegel v. Donovan [Mich.] 15 Det. Leg. N. 1035, 119 NW 645.

96. Labor Law (Laws 1906, p. 303, c. 178) § 94, as amended by Laws 1908, p. 1217, c. 426, provides that landlord may dispossess his lessee or tenant of any part of tenant factory where tenant refuses to allow landlord to enter premises for purpose of complying with law. Held that petition was defective which was absolutely silent as to character of building or the use to which it was put. Minsky v. Weller, 63 Misc. 244, 116 NYS 628.

97. Pub. Acts 1905, p. 381, c. 178, § 22, requiring lower floor and ceiling of every tenement house to be built in certain manner, imposes a duty on the owner and not on contractor. Cronin v. Pace [Conn.] 73 A 137.

98. Where workmen on building were not responsible for plans or specifications, or for failure of owner to file them with building inspector and obtain his permit, summary conviction for violating ordinance cannot be sustained against them. Commonwealth v. Corson, 36 Pa. Super. Ct. 7.

99. Not error where there are monuments in existence, probably erected in accordance with original survey and plan. Philbrick v. Ohio, 8 Ohio N. P. (N. S.) 374.

1. Search Note: See notes in 3 C. L. 574; 2 L. R. A. (N. S.) 1002; 3 Id. 741; 4 Id. 589; 9 Id. 1039; 21 A. S. R. 484; 95 Id. 219; 1 Ann. Cas. 603.

See, also, Covenants, Cent. Dig. §§ 19, 50, 67-69, 169; Dec. Dig. §§ 20, 51, 69, 103; 11 Cyc. 1051, 1091, 1130; Deeds, Cent. Dig. §§ 535-548; Dec. Dig. §§ 170-176; 13 Cyc. 713-720; 5 A. & E. Enc. L. (2ed.) 2.

2. Guyer v. Auers, 132 Ill. App. 520.

3. Reservation restraining sale of intoxicating liquor on premises, neither against public policy nor contrary to law, nor an illegal restraint upon trade. Guyer v. Auers, 132 Ill. App. 520.

4. A release of claims under restrictions rendered of doubtful applicability by new

construed,[5] but will, nevertheless, be given effect according to their plain and positive provisions,[6] the test to be applied being the intentions of the parties,[7] and where the terms are plain [8] and the violation thereof intentional,[9] they will be strictly enforced.[10] Equity will enforce such covenants at the instance of any party designed to be benefited thereby,[11] but ordinarily a covenant will not be construed to extend

conditions is a sufficient **consideration** for a covenant imposing new restrictions. Codman v. Bradley, 201 Mass. 361, 87 NE 591.

5. Scharer v. Pantler, 127 Mo. App. 433, 105 SW 668.

6. Where restrictive covenant applied **building line restriction** to what it called the "main avenues" and map made before restrictive resolutions indicated two classes of highways, one as streets and other as avenues, avenues being wider than streets, it was held that word "main" was surplusage and that covenant was not vague or uncertain. Newbery v. Barkalow [N. J. Eq.] 71 A 752. Where covenant running with the land provided that no building should be erected within 10 feet of street line, plaintiff, who obtained title from defendant's grantor who was common grantor of all property in block, could maintain action to enjoin defendant from maintaining building within 10 feet of street lines. Francis v. Ziering, 128 App. Div. 253, 112 NYS 647. Where it is provided in restriction in deeds that no building shall be erected within 20 feet of the front property line of any street or avenue, such restriction applies to both front and street side of corner lots as corner lot fronts on both streets which form the angle. Waters v. Collins [N. J. Eq.] 70 A 984. Where restriction in deed forbids erection of building over nine feet high "on rear end of lot," the owner will be enjoined from erecting factory five stories high occupying entire lot. Wesley v. Sulzer [Pa.] 73 A 338. Words "rear end of lot" are not indefinite when it is taken into consideration that owner of lot intends to build on whole lot. Id. Where a restriction as to the **kind and character of buildings** provided that the only building on lot shall be a residence of certain price, two buildings of that price could not be erected on such lot. Brown v. Huber [Ohio] 88 NE 322. Restricting use of land to residence purposes is violated by maintaining wagon and feed yard. Lowrance v. Woods [Tex. Civ. App.] 118 SW 551. Where restrictive covenants, made pursuant to general building scheme in residential district, provided that no factories should be built in such district, no distinction can be drawn between manufacturing businesses then in existence and those coming into existence later. Scrymser v. Seabright Elec. Light Co., [N. J. Eq.] 70 A 977. Electric light station, with necessary incidents attending its operation, is a manufactory within meaning of restrictive building covenant. Id. Where covenant running with land stipulated that there "shall not be erected, made, or carried on upon any part of such premises, any bakery," it prohibited maintenance of bakery oven in basement of tenement house subsequently erected. Simons v. Mutual Const. Co., 132 App. Div. 719, 117 NYS 567. Where covenant in deed by corporation provided **that grantee would not violate provisions contained of act of incorporation,** by-laws, rules, or regulations made by association "at any time," the phrase "at any time" refers to date of violation, and not date of adoption of by-laws, rules, or regulations. Newbery v. Barkalow [N. J. Eq.] 71 A 752.

7. Where the neighborhood is a residential section and it appears that original owners never contemplated erection of business buildings on street, a clause in deed restricting location of dwellings applies also to business building. Hyman v. Tash [N. J. Eq.] 71 A 742.

8. Plaintiff sold defendant a lot, the deed for which contained covenant to the effect that defendant would not erect any building within seven feet of the south line of such premises, said south line being north line of plaintiff's property. Held that meaning of covenant was plain. Taylor v. McAdam, 112 NYS 50. Where the language of a restriction in a deed is unambiguous, acts cannot vary the force of the restriction. Waters v. Collins [N. J. Eq.] 70 A 984.

9. Where defendant had covenanted not to erect building within seven feet of south line of premises, and while plaintiff was away violated such covenant, his act was held intentional. Taylor v. McAdam, 112 NYS 50. Mandatory injunction against defendant who with knowledge of restrictive covenants was proceeding to violate them. Codman v. Bradley, 201 Mass. 361, 87 NE 591.

10. Where defendant erected building within seven feet of south line of his premises, he having covenanted not to do so, the plaintiff was held entitled to judgment enjoining defendant from continuing the encroachment. Taylor v. McAdam, 112 NYS 50. Where complainants acted promptly and defendant progressed with his building in the face of warning, complainants were entitled to mandatory injunction. Hyman v. Tash [N. J. Eq.] 71 A 742. Restriction for benefit of adjacent land is in nature of easement and may be enforced by suit for **specific performance.** Codman v. Bradley, 201 Mass. 361, 87 NE 591.

11. Scharer v. Pantler, 127 Mo. App. 433, 105 SW 668. Grantee having covenanted not to erect building within seven feet of line of grantor's lot, he having done so, **grantor** was entitled to judgment enjoining him from continuing the encroachment. Taylor v. McAdam, 112 NYS 50. **Subsequent grantees** may enforce such restrictions if made for their benefit. McNichol v. Townsend [N. J. Eq.] 70 A 965. Where grantor conveyed nine-foot strip to adjacent owner who covenanted that he, his heirs, and assigns would not obstruct windows or lights of grantor by building or placing any structure on nine-foot strip, it was held that as long as building and windows remained the same and building was occupied

beyond the original parties unless it constitutes a part of a general plan or scheme of restriction.[12] The vital question in this connection, however, is not whether there is a covenant running with the land, but whether the restriction asserted and relied on was imposed upon the servient estate for the benefit of the land in behalf of which it is sought to be enforced,[13] the rule being the same whether the restriction imposed is charged upon the land retained by the grantor,[14] and where the restriction is still of substantial value to the dominant property, the court will enforce it,[15] but the right to insist upon restrictive covenants and to invoke the injunctive powers of the court to enforce them[16] must be clear and satisfactory, and if it appears that its enforcement will not benefit the party suing, or that its violation will not injure him, it will not be enforced.[17] In a proceeding by one grantee to compel the grantor to enforce a building restriction against another grantee, the latter must be made a party.[18] Where a restriction is implied,[19] as from a dedi-

as residence, such covenant could be enforced, and that the covenant followed land through various transmissions of title. O'Connor v. Bauer, 127 App. Div. 854, 111 NYS 869. **Trustees** in deed of trust on land protected by restrictions held not entitled to enforce same where they were not so authorized by the trust deed. Codman v. Bradley, 201 Mass. 361, 87 NE 591. A trustee's right to enforce a restriction is not affected by the fact that the cestuis que trustent own different interests in the property. Id. Four trustees holding single lot for single owner held to have covenanted as single owner with owners of other lots, notwithstanding words used to indicate that each owner covenanted severally, and not jointly. Id. **Devisee** may enforce building line restrictions. Id.

12. Where a number of lots had been conveyed without any restrictions as to distance buildings were to be built from street, in the absence of sufficient evidence, a restrictive covenant contained in later conveyance would not be construed as inuring to a subsequent purchaser. McNichol v. Townsend [N. J. Eq.] 70 A 965. Original grantor conveyed entire plot with covenant restricting the use of property to first class residences, nothing indicating that the land was to be divided, and first grantee conveyed undivided one-third to A., and later first grantee and A. conveyed entire plot to B., subject to the covenant. B. divided plot into lots and mortgaged and sold same without mentioning or exacting any covenant. The mortgages were foreclosed and plaintiff and defendant derived title by mesne conveyances which did not refer to restrictive covenant. Held that neither plaintiff nor defendant had any different title than that which they derived through the unrestricted deeds from their common grantor B. Korn v. Campbell, 192 N. Y. 490, 85 NE 687, afg. 119 App. Div. 401, 104 NYS 462.

13. Brown v. Huber [Ohio] 88 NE 322.

14. Brown v. Huber [Ohio] 88 NE 322. Covenant in deed of conveyance, whereby grantor, in part consideration for said conveyance, stipulated concerning an adjacent lot, which he then owned, "that the only building put upon said lot shall be a residence and the necessary attachments, and that it shall be used for no other purpose than that of a family residence, and shall cost not less than $5,000, for residence alone," is a covenant binding on grantor and all persons claiming under him with notice of the same. Id. Covenant in deed restricting depth of building on adjoining land of grantor "when sold or built upon by him" was expressly intended as beneficial one to grantee's land and as running with land and passing to subsequent grantees as incident of fee. Davis v. McCarthy, 131 App. Div. 755, 116 NYS 149.

15. This is so notwithstanding the change of use of the land and buildings in the neighborhood. Brown v. Huber [Ohio] 88 NE 322. Right to enforce building line restriction held not affected by **change in use of building** subject to such restriction. Codman v. Bradley, 201 Mass. 361, 87 NE 591.

16. Newbery v. Barkalow [N. J. Eq.] 71 A 752.

17. Mere naked covenant in deed that property should not be used for other than church purposes, supported by no valuable consideration and appurtenant to no dominant tenement, is not enforcible. St. Stephen's Protestant Episcopal Church v. Church of the Transfiguration, 130 App. Div. 166, 114 NYS 623, rvg. 59 Misc. 560, 112 NYS 405.

18. In proceedings against board of harbor and land commissioners, under Rev. Laws 1902, c. 96, § 7, providing that if commonwealth has right under stipulations in deed given in its name to enter on premises, and at expense of party at fault to remove or alter a building, any of its grantees under similar deeds may institute proceedings in equity to compel board to enforce such stipulations, the owner of building must be made a party. Lawrence v. Smith, 201 Mass. 214, 87 NE 623.

19. May be implied from a general building plan. Stott v. Avery [Mich.] 16 Det. Leg. N. 295, 121 NW 825. In suit to enjoin lot owner from maintaining wagon and feed yard on lot, deeds containing restrictions against such use of property in neighboring blocks were admissible to show dedication of lots, in block in which plaintiff's and defendant's lots were, for residence purposes exclusively. Lowrance v. Woods [Tex. Civ. App.] 118 SW 551.

cation of land as a part of a general building scheme,[20] such restriction is equivalent to a covenant with each purchaser,[21] and is binding upon all purchasers who had knowledge thereof at time of purchase,[22] and is enforcible by one grantee against any other,[23] but equity recognizes implied restrictions merely for the purpose of requiring specific observance of the general plan for the benefit of those who have purchased the right to such observance,[24] as distinguished from the allowance of damages or the ascertainment of the proportion of injury inflicted by the violation thereof.[25] On the other hand, the violation of an express restriction may be actionable though the restriction be not specifically enforcible.[26]

The right to maintain an action to enforce a restriction may be barred by estoppel,[27] but the mere fact of delay [28] or acquiescence in a trivial breach,[29] or an immaterial violation by a party himself,[30] will not preclude relief in case of a substantial violation. A general abandonment of a building restriction will not be inferred from slight and immaterial violations,[31] nor will one having a right under a building restriction be denied relief because other adjacent owners have agreed to abolish such restrictions,[32] and the contractual rights which grantees have by reason of such restrictions in their deeds cannot be effected by different restrictions

20, 21. Lowrance v. Woods [Tex. Civ. App.] 118 SW 551.

22. Where as part of general scheme town-site company set apart certain block in which property of plaintiff and defendant is situated as residence property exclusively and plaintiff and defendant each purchased with knowledge of that fact, defendant was precluded from maintaining wagon and feed yard on his lot. Lowrance v. Woods [Tex. Civ. App.] 118 SW 551. Where deeds from corporation specifically referred to a general building plan and contained covenant by grantees which provided that grantees would not violate any provisions contained in act of incorporation, by-laws, rules, or regulations made by association at any time, it was held that lands of grantees were bound by building restriction although it only appeared in its complete form in minute book of corporation. Newbery v. Barkalow [N. J. Eq.] 71 A 752. Where receipt of payment on lot was not sufficient to support action for specific performance, the date defendant received deed should be considered date of his purchase as affecting notice to him of dedication of land exclusively for residence purposes. Lowrance v. Woods [Tex. Civ. App.] 118 SW 551.

23. Where owner of plot filed map reserving strip of five feet to be always kept open next to street, and subsequently he and adjacent owners agreed that all their land should be subject to such restriction, and thereafter he sold lots abutting on such street, all grantees acquired easement which was appurtenant to lot of each and enforcible against any grantee. Batchelor v. Hinkle, 132 App. Div. 620, 117 NYS 542.

24, 25. Stott v. Avery [Mich.] 16 Det. Leg. N. 295, 121 NW 825.

26. Where because of changed conditions equity will not enforce restrictive covenants, yet action for damages for breach thereof exists. Doyle v. Olson Realty Co., 132 App. Div. 200, 116 NYS 834.

27. Where purchaser of a lot in tract subject to building restrictions knew that lots in same tract were to be sold under different restrictions, and also was present and did not notify those who were about to purchase but purchased a lot himself, he was estopped from enforcing restrictions. Stott v. Avery [Mich.] 16 Det. Leg. N. 295, 121 NW 825. Where person has not built in conformity with restrictions in deed, he will not be permitted to complain because neighbors have conducted operations of same character. Hyman v. Tash [N. J. Eq.] 71 A 742.

28. Plaintiff held not bound by laches from enforcing building line restriction where he sued as soon as defendant removed fence concealing the breach of the covenant. Codman v. Bradley, 201 Mass. 361, 87 NE 591. Failure to prosecute held not a waiver. Id.

29. Newbery v. Barkalow [N. J. Eq.] 71 A 752.

30. One who had built open piazza over building restriction line was not estopped from restraining another from building within restricted area. Newbery v. Barkalow [N. J. Eq.] 71 A 752. Does not give right to substantially violate restriction. Hyman v. Tash [N. J. Eq.] 71 A 742.

31. Fact that some of the owners built a few inches over the building line or that a few subjected themselves to the liability of a lawsuit by violating the covenant cannot be held general abandonment of such covenant. Newbery v. Barkalow [N. J. Eq.] 71 A 752. Where a great number of grantees had conformed to restriction, the fact that a few had violated the restriction would not be considered a general abandonment of the scheme. Waters v. Collins [N. J. Eq.] 70 A 984.

32. Where building restriction line was established by owner of lots through whom both plaintiff and defendant claimed title, defendant could not avoid restriction on ground that owner verbally assented to abolition of building line or on ground that son of owner signed agreement to that effect, it appearing that owner did not know of son's act until after plaintiff had purchased. Fogel v. Swart, 37 Pa. Super. Ct. 217.

put in deeds to lots subsequently sold,[33] but violations may be such as to constitute an abandonment.[34] In determining whether there has been an abandonment of building lien restrictions applicable to several streets, the streets will be considered separately,[35] though such restrictions constitute a part of a general plan applicable to all the streets.[36]

§ 3. *Liability for unsafe condition of premises.*[37] See 11 C. L. 484. The owner or person in possession of premises,[38] or charged with the repair thereof,[39] or undertaking to repair the same,[40] owes, to all persons who are thereon either by express or implied invitation,[41] or rightly passing so near thereto as to be in reach of danger from negligence in regard thereto,[42] the duty to use ordinary care[43] to have the premises safe[44] as well as to warn them of any hidden or lurking danger;[45] but

33. Resolution of company, subsequent to the sale of lots to complainant and defendant, that buildings might be built near front line of property, did not effect rights of the parties. Waters v. Collins [N. J. Eq.] 70 A 984.

34. Where owner of plot divided it into lots and sold such lots with restriction to the effect that no building should be erected nearer than 25 feet to front line of such lots, and owner and grantees erected all buildings within 15 feet of line, there was an abandonment, and one of the grantees could not be prevented from erecting addition to his building to within 5 feet of line. Scharer v. Pantler, 127 Mo. App. 433, 105 SW 668.

35. Newbery v. Barkalow [N. J. Eq.] 71 A 752.

36. Rule applies although corporation formulated plans for building line restrictions which should cover all its property. Newbery v. Barkalow [N. J. Eq.] 71 A 752.

37. Search Note: See notes in 3 C. L. 576; 9 Id. 446; 9 L. R. A. (N. S.) 379; 10 Id. 177.

See, also, Counties, Cent. Dig. § 210; Dec. Dig. § 143; 11 Cyc. 497; Landlord and Tenant, Cent. Dig. §§ 629-690; Dec. Dig. §§ 162-170; 24 Cyc. 1114-1129; Master and Servant, Cent. Dig. §§ 205-208; Dec. Dig. §§ 115-117; 26 Cyc. 1113, 1114, 1115, 1116; Municipal Corporations, Cent. Dig. §§ 1547-1550, 1803-1812; Dec. Dig. §§ 733, 734, 847-857; 28 Cyc. 1285, 1299, 1302, 1732-1748; Negligence, Cent. Dig. §§ 41-68; Dec. Dig. §§ 28-55; 29 Cyc. 442-487.

38. Liability in such case depends upon who was in possession and control of the building at time of accident; and where there is no testimony that defendants owned the building, or were in possession or control, and therefore no evidence that they were bound for repairs, it is not error to direct a verdict in their favor at the conclusion of the testimony for the plaintiff. Smith v. Miller, 11 Ohio C. C. (N. S.) 577.

39. A landlord is liable for injuries caused by the falling of iron shutter which was in defective condition when last lease was made. Foley v. Everett, 142 Ill. App. 250. Leases prior to last lease cannot be offered in evidence to show that other tenants had contracted to keep premises in good repair. Id.

40. Person undertaking to underpin building for owner owes to tenants the duty of exercising due care in performance of work. Kennedy v. Hawkins [Or.] 102 P 733. See Independent Contractors.

41. Customer, entering public store to trade and injured by falling down unguarded cellarway was on premises by invitation, and not mere licensee. Montague v. Hanson, 38 Mont. 376, 99 P 1063. Persons on premises on business or by invitation. Blakeley v. White Star Line, 154 Mich. 635, 15 Det. Leg. N. 835, 118 NW 482. Where proprietor of store invited plaintiff to his store to consult him on business matters and when plaintiff came into office proprietor asked him to wait while he finished looking at his mail and plaintiff asked permission to use toilet and in going to same fell into unguarded excavation in basement, it was held that plaintiff was an invitee to whom the proprietor owed duty to take ordinary care to prevent injury to him. Glaser v. Rothschild [Mo.] 120 SW 1. Petition, in action for injuries caused by falling in unguarded excavation in basement, which alleged there was no light of any kind in basement, is supported by evidence that the degree of light was so small that by reasonable use of his eyesight plaintiff was unable to see pit into which he fell. Id.

42. Owner of building and contractor both held liable for injuries caused by falling brick where they did not take precaution to protect passersby while roof was being put on building which had been damaged by fire. Hughes v. Harbor & Suburban Bldg. & Sav. Ass'n, 131 App. Div. 185, 115 NYS 320. Contractor undertaking to set roof beams into and construct a roof against unsafe wall 100 feet above sidewalk is guilty of negligence in not taking some precaution to protect pedestrian from falling brick. Id. Where defendant was engaged in putting up fire escape and there was no evidence that there was other work being done on building except by defendant and his servants, fact that ironworker's hammer fell on plaintiff and that there were other tools on fire escape established prima facie case against defendant. Zettel v. Taylor, 128 App. Div. 251, 112 NYS 639.

43. Whether, in action for injuries caused by glass falling from defendant's building, defendant had used reasonable care was question that should have been submitted to jury. Sinkovitz v. Peters Land Co. [Ga. App.] 64 SE 93.

44. Where plaintiff was legally in basement of store, proprietor owed him the duty to keep sufficient light therein to enable plaintiff, while in exercise of ordinary care, to avoid falling into excavation. Glaser v. Rothschild [Mo.] 120 SW 1. Owner

he is not an insurer [46] of their safe condition, and has a right to proceed in their construction on the theory that the public is acquainted with prevailing conditions,[47] and may also assume that persons frequenting the premises will exercise ordinary circumspection.[48] Where such persons are mere licensees, the only duty owed to them is to refrain from doing them willful or wanton injury.[49] Whether there has been negligence in a particular case is generally a question of fact [50] to be determined from the evidence adduced therein,[51] but in certain cases an inference of negligence arises as a matter of law from the very nature of the accident.[52] Whether the person injured was guilty of contributory negligence is likewise a matter of inference from the evidence or facts proved,[53] such inference being usu-

of land who has erected stone foundation thereon and thereafter employs contractor to build brick wall on such foundation, is liable for injuries to contractor caused by falling of brick wall because of defective condition of stone wall. Declaration held to state cause of action. Hagen v. Schleuter, 236 Ill. 467, 86 NE 112, rvg. 140 Ill. App. 84.

45. Whether defendant guilty of negligence in failing to warn plaintiff who was injured by falling down unguarded cellarway in defendant's store or whether in fact he did warn him, held for the jury. Montague v. Hanson, 38 Mont. 376, 99 P 1063.

46. Sinkovitz v. Peters Land Co. [Ga. App.] 64 SE 93. Storekeeper not liable for injuries caused by plaintiff slipping on banana peel in the store, there being no evidence that defendant had notice of fact that same was upon floor, or that it had been there long enough for such notice to be implied. De Velin v. Swanson [R. I.] 72 A 388.

47. Where owner of store building was compelled because of local conditions to construct approaches to such building at different levels, he was not liable for injuries to customer by stumbling over riser between the two levels. Hoyt v. Woodbury, 200 Mass. 343, 86 NE 772.

48. Hoyt v. Woodbury, 200 Mass. 343, 86 NE 772.

49. Montague v. Hanson, 38 Mont. 376, 99 P 1063. A person lawfully upon premises by permission of the law, but not by invitation of the owner, is a mere naked licensee, to whom the owner owes no duty except to refrain from willful or affimative acts injurious to him. Eckels v. Maher, 137 Ill. App. 45. Where water-closet was maintained and not ventilated as required by ordinance, and deceased who was lawfully on premises but not by invitation entered closet to find out if there was gas in closet and was killed by explosion, owner was not liable. Id. A bare licensee, barring wantonness or some form of intentional wrong or active negligence by owner or occupier, takes the premises as he finds them. Glaser v. Rothschild [Mo.] 120 SW 1.

50. It is not negligence per se for storekeeper to maintain cellarway for use in conducting his business, even though, when open and unguarded, it might be considered a trap. Montague v. Hanson, 38 Mont. 376, 99 P 1063.

51. Evidence held sufficient to sustain verdict for plaintiff for injuries alleged to have been received by falling over outside cellar door. Johns v. Ash, 50 Wash. 559, 97 P 748. Evidence as to whether storekeeper was negligent in the keeping of a temporary entrance to his store while contractor was repairing building held question for jury. Frost v. McCarthy, 200 Mass. 445, 86 NE 918.

52. Plaintiff made prima facie case by showing that she was injured by glass falling from defendant's building, and her case was not altered by the fact that fracture of glass might have been caused by excessive draft from interior of building. Sinkovitz v. Peters Land Co. [Ga. App.] 64 SE 93. The fact that a sign fell to the sidewalk, injuring a pedestrian who was passing thereunder, affords some evidence, as a matter of law, that someone was negligent in not maintaining it in a safe condition. Smith v. Miller, 11 Ohio C. C. (N S.) 577. Injury to pedestrian by falling of a brick calls for an explanation from owner in possession and control. Hughes v. Harbor & Suburban Bldg. & Sav. Ass'n, 131 App. Div. 185, 115 NYS 320. Owner who employed contractor to put roof on building damaged by fire, without making any provision to repair or insure safety of the wall or to protect pedestrians on street was not relieved of responsibility because contractor who was putting on roof may have dislodged some of the loose brick. Id. Where fence 14 feet high, erected along inner line of sidewalk, fell on plaintiff passing on sidewalk, in absence of evidence, presumption was that owner was doing the work on his property and erected the fence, which, if so unsafely fastened as likely to fall into street, rendered him liable. Masal v. Tarrnowski, 128 App. Div. 159, 112 NYS 556.

53. Where workman who had been working on unfinished building left building by route which he had not used before and had no invitation to use, he was required to look out for himself and took risk incident to unfinished condition of building. Burke v. Cowen & Co., 130 App. Div. 207, 114 NYS 505. Persons, visiting tenant on fourth floor of flat building, had previously used water-closet on floor below, borrowed key of tenant and supposing there was closet on fourth floor in relative position as on third floor, went along dark hallway to a door, found it was unlocked, opened it, stepped in dark opening and fell to basement. Held that he was guilty of contributory negligence. Steger v. Immen [Mich.] 16 Det. Leg. N. 419, 122 NW 104.

ally left to the jury as the arbiters of questions of fact.[54] One entering a building may ordinarily assume that the party responsible for its condition has performed his duty in regard thereto.[55]

Where the declaration charges negligence as to the character of the material used in building a wall, evidence of negligence in the manner of construction is not admissible.[56]

§ 4. *Liability for negligent operation of elevators.*[57]—See 11 C. L. 485—The owners[58] and operators of passenger elevators owe to passengers[59] the same degree of care in the operation thereof required of passenger carriers generally.[60] They must, therefore, by reason of the peculiar nature of the relation,[61] exercise a comparatively high degree of care,[62] but, aside from any comparison with the care required under ordinary conditions and relations, the care required is merely ordinary care,[63] measured by the circumstances of the particular case,[64] and the same degree of care

54. Question of plaintiff's due care in entering and leaving defendant's store held for the jury. Frost v. McCarthy, 200 Mass. 445, 86 NE 918. Whether plaintiff, injured by falling down unguarded cellarway in defendant's store, was guilty of contributory negligence held for the jury. Montague v. Hanson, 38 Mont. 376, 99 P 1063. Forgetting that there was a hole in walk which one had promised to repair is not contributory negligence as matter of law, nor negligence per se to walk fast on such walk without looking at same. Udwin v. Spirkel, 136 Ill. App. 155. Mere fact that one who had gone into basement of store on way to toilet fell into pit is not evidence that he failed to exercise ordinary care. Glaser v. Rothschild [Mo.] 120 SW 1. Observation of loose pieces of mortar and powdered plaster does not, as a matter of law, render a walk so obviously dangerous as to stamp the act of attempting to pass over it as one that no reasonable person would undertake. Frost v. McCarthy, 200 Mass. 445, 86 NE 918.

55. Person entering public store not under obligation to keep constant watch to avoid danger as he had right to assume that storekeeper had premises in reasonably safe condition. Montague v. Hanson, 38 Mont. 376, 99 P 1063.

56. Hagen v. Schleuter, 236 Ill. 467, 86 NE 112, rvg. 140 Ill. App. 84.

57. **Search Note:** See notes in 11 C. L. 486, 500; 23 L. R. A. 155; 2 L. R. A. (N. S.) 744; 14 Id. 350; 15 Id. 402; 56 A. S. R. 806; 8 Ann. Cas. 976.

See, also, Carriers, Cent. Dig. §§ 1188, 1194; Dec. Dig. §§ 293, 295; 6 Cyc. 622; Counties, Dec. Dig. § 143; 11 Cyc. 497; Landlord and Tenant, Dec. Dig. § 1165; 24 Cyc. 1119; Master and Servant, Cent. Dig. § 208; Dec. Dig. § 117; 26 Cyc. 1116. Negligence, Cent. Dig. § 60; Dec. Dig. § 45; 29 Cyc. 470, 471; 10 A. & E. Enc. L. (2ed.) 944.

58. Elevator in building many stories in height installed for purpose of enabling tenants of upper stories to reach same is part of building and if it be improperly constructed or negligently operated, the proprietor is liable, and he cannot escape liability by attempting to delegate that duty to some one else. Sciolaro v. Asch, 129 App. Div. 86, 113 NYS 446.

59. Relation of passenger and carrier existed between person who took elevator for purpose of seeing superintendent of building, relative to securing employment, and proprietor of such building. Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 NE 117, afg. 142 Ill. App. 154. Where judgment of appellate court was reversed on issue of contributory negligence, a finding of jury that plaintiff was a passenger not being questioned in the supreme court, such finding was the **law of the case** on a second appeal to appellate court. Cullen v. Higgins, 138 Ill. App. 168.

60. Ferguson v. Truax, 136 Wis. 637, 118 NW 251. Proprietor of store who operates passenger elevator is a carrier of persons. Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 NE 117, afg. 142 Ill. App. 154.

See note in 11 C. L. 500.

61. See Carriers, § 25.

62. Ferguson v. Truax, 136 Wis. 637, 118 NW 251.

63. Ferguson v. Truax, 136 Wis. 637, 118 NW 251. Proprietor of passenger elevator must use highest degree of care that men of reasonable vigilance and foresight ordinarily exercise in practical conduct of such business under same or similar circumstances. Id. Charge that proprietor was bound to use such as a very prudent and skillful man would ordinarily use to keep elevator in ordinarily safe condition for passengers was erroneous. Id. Where plaintiff was at work in elevator shaft under contract made between hotel keeper, the defendant and plaintiff's employers, the defendant was bound to exercise reasonable care to prevent injury to plaintiff. Schwartz v. Onward Const. Co., 130 App. Div. 588, 115 NYS 380.

64. Act of elevator boy in sending elevator up while doors leading to elevator shaft were open and shaft unguarded was act of negligence. Smith v. Pawlak, 136 Ill. App. 276. Where hydraulic elevator was leaky and elevator boy left lever forward of center to counteract leak and leaving elevator left door open knowing that plaintiff might return to take elevator down, the jury were warranted in finding defendant was negligent. Toohy v. McLean, 199 Mass. 466, 85 NE 578. **Declaration** that alleged that plaintiff "was injured by reason of negligence of defendant and her servants in managing, operating and controlling said passenger elevator," includes negligence in elevator boy being absent from elevator when his presence in it was required for its proper management. Id. Evi-

is required in the matter of guarding the elevator shaft.[65] The distinction between passenger and freight elevators is material only with reference to the difference in the circumstances by which the care required is measured, the absolute standard being the same in both cases.[66] Whether proper care has been exercised in a particular case is usually a question of fact for the jury,[67] subject, however, to the doctrine of res ipsa loquitur.[68] In this connection it should be noted that the mere happening of the accident does not necessarily give rise to a presumption of negligence.[69] Whether a person was a passenger at the time of his injury is, likewise, usually a question for the jury.[70] The proprietor of an elevator is not responsible for the acts of persons not under his control,[71] and in any case where the defendant has not been personally negligent he must, in order to be held liable, have held towards the person, whose act caused the accident, some relation recognized by law as fixing upon him the responsibility therefor.[72] In all cases the act complained

dence held to warrant finding that injury to workman in elevator shaft was caused by lack of care of defendant's employe in charge of elevator. Schwartz v. Onward Const. Co., 130 App. Div. 588, 115 NYS 380.

65. Where, in an action for injuries caused by falling down elevator shaft, court submitted question whether entrance to elevator shaft was reasonably guarded and charged jury that it was incumbent on plaintiff to show that defendant did not reasonably guard elevator entrance, requirements of St. 1898, § 1636j, providing that all elevators shall be securely guarded and fenced, was substantially covered. Anderson v. Horlick's Malted Milk Co., 137 Wis. 569, 119 NW 342.

66. Where plaintiff was injured by falling down shaft of elevator which was used both for passengers and freight, instruction offered by defendant, making distinction between degree of care required in case of freight elevator and passenger elevator, was properly refused where court instructed jury that it was defendant's duty "to exercise the highest degree of care and skill" usually exercised by prudent persons in the same business in the management and operation of elevators of the kind and character as shown by the proof. Eilerman v. Farmer [Ky.] 118 SW 289.

67. Whether proprietor used proper care to keep passenger elevator in ordinarily safe condition. Ferguson v. Truax, 136 Wis. 637, 118 NW 251. Whether plaintiff, injured while standing in freight elevator shaft, was entitled to recover. Fisher v. Chambers [Neb.] 120 NW 931. Question of negligence with reference to starting elevator just as plaintiff was about to get on. Cullen v. Higgins, 138 Ill. App. 168.

68. Where passenger elevator failed to stop but continued to top of shaft and thereby cable was broken, causing elevator to fall, injuring plaintiff, a presumption of negligence arose, making out a case for the plaintiff. Keller v. Wove Realty Co., 128 App. Div. 154, 112 NYS 538. Fact that passenger elevator used in store building fell when persons were being carried thereon is evidence that elevator was mismanaged, or was out of repair or of faulty construction. Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 NE 117, afg. 142 Ill. App. 154. Where evidence did not show that accident was caused through negligence of operator, it was error to charge that if jury found that the elevator was negligently operated plaintiff could recover. Keller v. Wove Realty Co., 128 App. Div. 154, 112 NYS 538.

69. Where plaintiff was injured by plaster falling on her while in elevator, an instruction that jury might find from such happening that defendant was negligent was stating the case too broadly as instruction should have been given that in absence of evidence that established that defendant knew, or in the exercise of reasonable care should have known, that mortar on elevator shaft was in such condition that a reasonably prudent person would believe that it might fall, the verdict should be for defendant. Frahm v. Siegel-Cooper Co., 131 App. Div. 747, 116 NYS 90.

70. Whether plaintiff, injured while passenger on elevator, was at the time of accident on his way to visit doctor in the building or whether he had prior thereto been forbidden by defendant's agents to ride in the elevator, held question for jury. Ferguson v. Truax, 136 Wis. 637, 118 NW 251.

71. Where operator of defendant's passenger elevator, on being told by plaintiff that she was in hurry to catch train, attempted to move elevator quickly and in doing so closed door on plaintiff's hand, she having put her hand where door would close against it because of being pushed by other passengers, it was held that defendant was not liable for injuries. Cashman v. New York, etc., R. Co., 201 Mass. 355, 87 NE 570. Where defendant's hall boy had no authority to employ any one to operate elevators and it being no part of his duty to operate same, the defendant was not liable for injuries to plaintiff caused by negligent operation of elevator by boy whom the hall boy requested to operate elevator. Board of Trade Bldg. Corp. v. Cralle [Va.] 63 SE 995. Plaintiff, who was an employe of defendant and had charge of freight elevator, was injured while loading freight in elevator by reason of elevator moving downward three or four feet. Held that in order to recover it was essential to prove that elevator was moved by some one for whose conduct defendant was responsible. Cupples Woodenware Co. v. Walins, 140 Ill. App. 624.

72. Agent, having charge of building, held not liable for injuries caused by negligence of operator of a passenger elevator, such

of must have been the proximate cause of the injury,[73] and the person seeking to recover must have been free from contributory negligence.[74]

Bulk Sales; Burden of Proof, see latest topical index.

BURGLARY.

The scope of this topic is noted below.[75]

§ 1. What Constitutes, 586. Breaking and Entry, 587. Nature and Situation of Building, 587. To Constitute the Offense of Having Burglar's Tools in Possession, 587. Accomplices, 587.
§ 2. Indictment, 587.
§ 3. Evidence, 588.
§ 4. Instructions and Verdict, 590.

§ 1. *What constitutes.*[76]—See 11 C. L. 487—Breaking and entering a dwelling[77] at night, with intent[78] to commit a felony,[79] was the gist of the common-law crime, but generally by statute the offense has been extended to include the breaking and entering at any time of any building[80] with intent to commit a felony or misdemeanor.[81] Such statutory extensions must be strictly construed.[82]

agent not being agent of undisclosed principal and not being personally negligent. Smith v. Pawlak, 136 Ill. App. 276. Person who rented hod elevator to contractor with services of engineer, such elevator having been installed in unfinished building by the contractor, was not liable for injuries to workman by elevator descending upon him, such person not being a contractor or owner within Laws 1899, p. 351, c. 192, § 20. Anderson v. Pelham Hod Elevating Co., 129 App. Div. 639, 113 NYS 989. Hotel waitress held not **fellow-servant** of elevator boy. Cullen v. Higgins, 138 Ill. App. 168. Where jury found that plaintiff was not a fellow-servant of elevator operator, and such finding was not argued, discussed or passed upon on defendant's appeal from appellate court to supreme court from former court's affirmance of the trial court's judgment, but the judgment was reversed on issue of contributory negligence, the jury's finding on the question of fellow-servants was the **law of the case** on a second appeal to appellate court. Id.

73. The door of defendant's passenger elevator was left open by boy in charge while temporarily absent, and in the meantime one, who had no authority to operate elevator, took plaintiff up in elevator but by sudden lowering of same plaintiff was injured. Held that the leaving of elevator door open was not proximate cause of plaintiff's injuries. Board of Trade Bldg. Corp. v. Cralle [Va.] 63 SE 995. Failure to comply with the requirements of an ordinance providing for the protection of elevators gives ground for recovery for injuries which would not have been prevented even if such ordinance had been complied with. Cupples Woodenware Co. v. Walins, 140 Ill. App. 624.

74. Kaplan v. Lyons Building & Operating Co., 61 Misc. 315, 113 NYS 516.

Held contributory negligence: Mere fact that elevator door was open when no one was in charge was not an invitation to plaintiff to enter elevator and having done so he was guilty of contributory negligence. Kaplan v. Lyons Building & Operating Co., 61 Misc. 315, 113 NYS 516.

Held for jury: Whether plaintiff, who was injured while riding on passenger elevator, was guilty of contributory negligence. Ferguson v. Truax, 136 Wis. 637, 118 NW 251. Whether plaintiff who was injured while working in elevator shaft was guilty of contributory negligence. Schwartz v. Onward Const. Co., 130 App. Div. 588, 115 NYS 380. Whether plaintiff who was working in elevator shaft and was injured by elevator descending upon him, assumed the risk of the accident. Id. Question of contributory negligence in getting on elevator when it was starting or about to start. Cullen v. Higgins, 138 Ill. App. 168. Plaintiff, a boy, who had taken defendant's passenger elevator and on returning to same found door open and elevator boy absent was entitled to think that elevator boy intended that he should enter and could be found not guilty of contributory negligence. Toohy v. McLean, 199 Mass. 466, 85 NE 578.

75. Includes the common law crime and statutory extensions thereof. **Excludes** offense committed after burglarious entrance (see Homicide* and like topics). Matters common to all crimes are treated elsewhere (see Criminal Law;* Indictment and Prosecution *).

76. Search Note: See notes in 3 C. L. 578; 4 L. R. A. (N. S.) 727; 2 A. S. R. 383, 388.

See, also, Burglary, Cent. Dig. §§ 1-27; Dec. Dig. §§ 1-16; 6 Cyc. 172-198; 5 A. & E. Enc. L. (2ed.) 45, 69.

77. At common law was offense against habitation, and not property. Howard v. State [Wis.] 121 NW 133.

78. Abandonment of intent after breaking and entry no defense. Schwartz v. State [Tex. Cr. App.] 114 SW 809. Where, after breaking and entering, accused abandons felonious intent and his accomplices later re-enter and steal, he is not principal in the second burglary. Id.

79. Indictment held to sufficiently charge intent to commit grand larceny, a felony. McCarthy v. State [Ark.] 119 SW 647.

80. See post, this section, Nature and Situation of Building.

81. State v. Beeman, 51 Wash. 557, 99 P 756. Value of goods stolen is immaterial. State v. Nicholas [Mo.] 121 SW 12.

82. Howard v. State [Wis.] 121 NW 133.

* Always begin with the latest article on the subject. Use the latest topical index.

Breaking and entry.[See 11 C. L. 487]—Both breaking [83] and entry [84] are essential at common law and under statutes, declaratory thereof,[85] but otherwise under statutes denouncing breaking or entry.[86] The removal of any obstacle will constitute a breaking,[87] and any entry, however slight, is sufficient.[88] The crime is complete upon breaking and entry and abandonment of criminal intent thereafter is no defense.[89] The statutory crime of entering is not necessarily a degree of burglary.[90]

Nature and situation of building.[See 11 C. L. 488]—Statutes very generally extend the crime to include breaking and entering a store or warehouse [91] or a railway car,[92] or provide a more severe punishment for burglary from an occupied dwelling.[93] A large showcase is not, however, a house within the statutory definition,[94] and burglary of a post-office as defined by federal statute can only be committed in that portion of a building used for post-office purposes.[95] The statutory crime of breaking and entering a public building is not necessarily burglary.[96]

To constitute the offense of having burglar's tools in possession.[See 11 C. L. 488]

Accomplices.[See 11 C. L. 488]—An accomplice may be convicted as such although indicted jointly as principal,[97] and it is not necessary to the offense that the accomplice shall have himself assisted in the breaking or have personally entered.[98] One having broken and entered is not a principal in a second entry and asportation by his accomplices without his knowledge.[99] The testimony of an accomplice must, of course, be corroborated.[1]

§ 2. *Indictment.*[2]—[See 11 C. L. 488]—The offense must be clearly charged [3] in all its essentials,[4] and the indictment or information must be laid under the appropriate statute where the common-law offense has been extended.[5] Larceny is not

83. Instruction that entry is sufficient held erroneous. Newman v. State [Tex. Cr. App.] 116 SW 577.

84. Instruction that breaking is sufficient held erroneous. Newman v. State [Tex. Cr. App.] 116 SW 577. Breaking car seal and opening door insufficient. Price v. Com. [Ky.] 112 SW 855.

85. Entry essential under statute denouncing breaking and entering. Ky. St. 1903, § 1163. Price v. Com. [Ky.] 112 SW 855.

86. Entering alone sufficient under Rev. Pen. Code, § 566, subd. 2. State v. Vierck [S. D.] 120 NW 1098.

87. Slightest force sufficient. Montgomery v. State [Tex. Cr. App.] 116 SW 1160. Opening or unlatching a door. State v. Vierck [S. D.] 120 NW 1098. Opening closed door though there was no latch. Brown v. State [Tex. Cr. App.] 119 SW 312.

88. Price v. Com. [Ky.] 112 SW 855.

89. Schwartz v. State [Tex. Cr. App.] 114 SW 809.

90. Not under Rev. Pen. Code, § 571. State v. Vierck [S. D.] 120 NW 1098.

91. Code 1906, § 1073. Place where goods are kept for sale. State v. Smith [Miss.] 47 S 478.

92. Ky. St. 1903, § 1163. Price v. Com. [Ky.] 112 SW 855.

93. Laws 1899, p. 318, c. 178; Pen. Code 1895, art. 839a, 845a, 845b. Lewis v. State, 54 Tex. Cr. R. 636, 114 SW 818.

94. Show case, sufficient to contain six men standing, situated within building but not attached thereto, not a "house" within meaning of Pen. Code 1895, art. 843, defining burglary. Clark v. State [Tex. Cr. App.] 120 SW 892.

95. Larceny from safe in same room, though containing post-office funds, offense under Rev. St. 5478 not when there was no entry inside post-office inclosure. Sorenson v. U. S. [C. C. A.] 168 F 785.

96. Under statute forbidding breaking and entering any office, shop, warehouse, or any other building, the rule ejusden generis excludes public buildings particularly in view of a statute specifically forbidding breaking and entering such buildings. Howard v. State [Wis.] 121 NW 133. Breaking and entering a public building denounced by St. 1898, § 4412, is not burglary defined by §§ 4407-11. Id. Schoolhouse is public building. Id.

97. Vance v. Com. [Ky.] 115 SW 774.

98. Assisting in asportation of goods sufficient. Vance v. Com. [Ky.] 115 SW 774.

99. Schwartz v. State [Tex. Cr. App.] 114 SW 809.

1. See post, § 3.

2. Search Note: See notes in 2 A. S. R. 392; 5 Ann. Cas. 1011.

See, also, Burglary, Cent. Dig. §§ 28-78; Dec. Dig. §§ 17-28; 6 Cyc. 199-231; 3 A. & E. Enc. P. & P. 736.

3. Held sufficient under § 1073, Code 1906, denouncing burglary from a store. State v. Smith [Miss.] 47 S 478.

4. Entering. Price v. Com. [Ky.] 112 SW 855. Felonious intent. McCarthy v. State [Ark.] 119 SW 647. Sufficient to state every material fact without alleging manner of breaking, since not essential under Rev. St. 1899, § 1886. State v. Moss, 216 Mo. 436, 115 SW 1007.

5. Howard v. State [Wis.] 121 NW 133.

a material allegation [6] but may be joined in the same court,[7] and if so charged must be proved as laid.[8] It is not necessary to designate the particular felony intended.[9] A general allegation is sufficient to charge burglary in either day or nighttime.[10] Principal and accessory may be jointly indicted as principals.[11] Under the Texas statute denouncing burglary from an occupied dwelling as a separate offense, the indictment must clearly charge occupancy by a designated family.[12]

§ 3. *Evidence.*[13]—See 11 C. L. 489—The state must prove the crime [14] and the defendant's connection therewith [15] beyond a reasonable doubt.[16] Circumstantial evidence may support a verdict of guilty,[17] but strict proof is required.[18] Unexplained possession of the fruits of recent burglary, while not prima facie evidence of guilt, is a circumstance to be considered by the jury [19] as raising a strong inference thereof,[20] and may be sufficient to support conviction.[21] The explanation necessary to overthrow the inference of guilt in such cases must be such as will raise a reasonable doubt,[22] whereupon the burden is on the state to prove its falsity.[23] Where possession is relied upon to convict, the property must be clearly identified.[24] The locus of the burglarized premises establishes venue,[25] hence the evidentiary effect of possession of stolen goods is not weakened where such possession is shown

6. Walker v. State, 5 Ga. App. 430, 63 SE 534.

7. State v. Carpenter, 216 Mo. 442, 115 SW 1008.

8. Walker v. State, 5 Ga. App. 430, 63 SE 534.

9. Under 99 Ohio Laws, p. 98, § 6855. State v. Groves [Ohio] 88 NE 1096.

10. Walker v. State [Tex. Cr. App.] 117 SW 797; Montgomery v. State [Tex. Cr. App.] 116 SW 1160; Newman v. State [Tex. Cr. App.] 116 SW 577.

11. Vance v. Com. [Ky.] 115 SW 774.

12. **Held not good:** Burglary from house occupied and actually used by a family as a private residence then and there occupied and controlled by A. Lewis v. State, 54 Tex. Cr. R. 636, 114 SW 818.

Held good: A certain house then and there actually used, occupied, and controlled by B. as the private residence for his family. Jones v. State [Tex. Cr. App.] 117 SW 127. Then and there occupied and controlled by C., which said house was then and there actually used and occupied by the family of C. as a private residence. Knuckles v. State [Tex. Cr. App.] 114 SW 825. In the last case the occupation by C. is an immaterial allegation since occupancy by family is sufficient. Id.

13. **Search Note:** See notes in 68 L. R. A. 41; 12 L. R. A. (N. S.) 199.

See, also, Burglary, Cent. Dig. §§ 79-109; Dec. Dig. §§ 29-43; 6 Cyc. 231-239, 240-250; 5 A. & E. Enc. L. (2ed.) 61.

14. Breaking and entering a post-office not shown. Sorenson v. U. S. [C. C. A.] 168 F 785.

15. Connection of defendant not shown. State v. Hedgpath [Iowa] 120 NW 468. Alibi sufficient to raise reasonable doubt is complete defense. State v. Tapack [N. J. Law] 72 A 962.

16. Commonwealth v. McCloskey, 37 Pa. Super. Ct. 621. Jury cannot guess though guess is correct. Id.

Held sufficient to go to jury. Vance v. Com. [Ky.] 115 SW 774. To sustain conviction of burglary. People v. Higgins, 9 Cal. App. 267, 98 P 683; Peterson v. State [Ga. App.] 65 SE 311; State v. Wilkes [S. C.] 63 SE 688; Walker v. State, 5 Ga. App. 430, 63 SE 534; People v. Wieland [Cal. App.] 102 P 828; Brown v. State [Tex. Cr. App.] 119 SW 312; Skaggs v. State [Tex. Cr. App.] 119 SW 106; Conley v. State [Tex. Cr. App.] 116 SW 806. To show burglary from railroad car. Crowson v. State [Tex. Cr. App.] 118 SW 1036. To show burglary with intent to rape. Ballentine v. State [Tex. Cr. App.] 117 SW 972. To certain conviction notwithstanding attempted alibi. People v. Stanley, 130 App. Div. 64, 114 NYS 395. To sustain conviction notwithstanding defense of insanity. Smith v. State [Tex. Cr. App.] 117 SW 966.

Held insufficient. Commonwealth v. McCloskey, 37 Pa. Super. Ct. 621; Rayfield v. State, 5 Ga. App. 816, 63 SE 920.

17. State v. Vierck [S. D.] 120 NW 1098. Held sufficient. Id.

18. Sorenson v. U. S. [C. C. A.] 168 F 785.

19. Quong Yu v. Ter. [Ariz.] 100 P 462; State v. Beeman, 51 Wash. 557, 88 P 756. Admissible. People v. Wieland [Cal. App.] 102 P 828. Circumstance for jury under proper instructions. State v. Vierck [S. D.] 120 NW 1098.

20. Guilt does not follow as presumption of law, but the presumption is of fact of which jury are sole judges. Collier v. State, 55 Fla. 7, 45 S 752. Though larceny is not alleged. Walker v. State, 5 Ga. App. 430, 63 SE 534.

21. Collier v. State, 55 Fla. 7, 45 S 752. Irrespective of the value of the property. Id.

22. Collier v. State, 55 Fla. 7, 45 S 752. Where possession was month after burglary and defendant claimed to have purchased but could not say just where, explanation was sufficient to go to jury. Merriwether v. State [Tex. Cr. App.] 115 SW 44.

23. Collier v. State, 55 Fla. 7, 45 S 752.

24. Beyond reasonable doubt. Rayfield v. State, 5 Ga. App. 816, 63 SE 920. And connected with accused. Sorenson v. U. S. [C. C. A.] 168 F 785.

25, 26. Peterson v. State [Ga. App.] 65 SE 311.

to have been outside the jurisdiction.[26] Possession of stolen goods other than those charged may be shown for the purpose of identifying the accused,[27] but only where clearly connected with the crime charged.[28] The testimony of an accomplice must be corroborated,[29] but when so corroborated may be sufficient to convict.[30] An allegation of ownership may be established by proof of unquestioned possession,[31] and nonconsent of one of several parties authorized to permit an entry will support a prima facie case.[32] Variance may be harmless if not material to the merits.[33] Confessions properly obtained are admissible,[34] as are matters going to the res gestae,[35] and memoranda made immediately after the crime may be used to refresh the memory of the witness.[36] Immaterial testimony is properly excluded,[37] and the offer of an improper witness, although not permitted to testify, may be reversible error if tending to prejudice the jury.[38] Instructions must accurately define the offense [39] and correctly [40] set forth the law applicable to the case,[41] but it is unnecessary to charge on matters rendered immaterial in view of the evidence.[42]

27. From same house. Walker v. State, 5 Ga. App. 430, 63 SE 534. From another house. People v. Wieland [Cal. App.] 102 P 828.

28. Hawkins v. State [Ga. App.] 64 SE 289.

29. Quong Yu v. Ter. [Ariz.] 100 P 462. One accomplice cannot corroborate another. Schwartz v. State [Tex. Cr. App.] 114 SW 809.

30. Weight of corroboration for jury. Quong Yu v. Ter. [Ariz.] 100 P 462.

Held sufficient. People v. Higgins, 9 Cal. App. 267, 98 P 683. Finding of stolen goods on defendant's premises. Quong Yu v. Ter. [Ariz.] 100 P 462.

Held insufficient. Newman v. State [Tex. Cr. App.] 116 SW 577. That accomplice testimony tended to show defendant's guilt and other evidence tended to corroborate accomplice is insufficient. Id.

31. Peterson v. State [Ga. App.] 65 SE 311.

32. Consent of others is matter of defense. Skaggs v. State [Tex. Cr. App.] 119 SW 106.

33. Rev. St. § 7216. State v. Turnbaugh, 79 Ohio St. 63, 85 NE 1060. Allegation of breaking and entering a storehouse and proof of breaking and entering a storeroom attached to a dwelling held immaterial variance. Id.

34. Not induced by fear of punishment. Hawkins v. State [Ga. App.] 64 SE 289. Testimony of officer that accused was arrested for burglary and made written confession after due warning, and that the paper offered in evidence was such confession, is sufficient evidence to warrant its admission. Knuckles v. State [Tex. Cr. App.] 114 SW 825.

35. Appearance of accused and explanations given by him to account for his presence in the vicinity. People v. Wieland [Cal. App.] 102 P 828. Conversation with third party corroborating explanation of accused that he was at certain place to meet third party rather than by appointment with alleged accomplice admissible as res gestea of his act in going there. State v. Kane [N. J. Law] 72 A 39.

36. Memorandum of the stolen goods made the day after burglary. State v. Carpenter, 216 Mo. 442, 115 SW 1008.

37. State v. Moss, 216 Mo. 436, 115 SW 1007.

38. Testimony of conversation with accused showing ill will of wife and later her offer as witness fatal error. Finklea v. State [Miss.] 48 S 1. Accused's wife incompetent to testify against him. Her proffer as a witness fatal error. Finklea v. State [Miss.] 48 S 1.

39. Error to charge certain acts to be a breaking and sufficient to warrant conviction, same with regard to entry. Newman v. State [Tex. Cr. App.] 116 SW 577. But a similar charge may be correct where clearly confined to definition and the essentials elsewhere enumerated. Montgomery v. State [Tex. Cr. App.] 116 SW 1160.

40. Instruction in the "nighttime, between sunset and sunrise," correctly defines **nighttime** under Pen. Code, § 463. People v. Higgins, 9 Cal. App. 267, 98 P 683. Law of **alibi** incorrectly stated. State v. Tapack [N. J. Law] 72 A 962. Incorrect to charge that a mere tendency to **corroborate accomplice** is sufficient. Newman v. State [Tex. Cr. App.] 116 SW 577. Charge upon sufficiency of **impeaching testimony** held erroneous. Schwartz v. State [Tex. Cr. App.] 114 SW 809.

41. Evidence warranted charge on **explanation** of possession. Skaggs v. State [Tex. Cr. App.] 119 SW 106. Error not to charge law of **possession** of fruits of burglary where possession was a month after burglary and defendant claimed to have purchased goods but could not say just where. Merriwether v. State [Tex. Cr. App.] 115 SW 44. Explanation of possession of stolen goods. Id.

42. Need not define "force" and "entry" where case is clearly made. Dupree v. State [Tex. Cr. App.] 119 SW 685. Breaking nor entering where evidence clearly showed larceny from closed dwelling. Brown v. State [Tex. Cr. App.] 119 SW 312. **Circumstantial evidence** need not be charged where confession is corroborated. Knuckles v. State [Tex. Cr. App.] 114 SW 825. Where accused was caught in the act. Montgomery v. State [Tex. Cr. App.] 116 SW 1160. **Explanation of possession** need not be charged where no explanation was made and case was supported by other evidence. Young v. State, 54 Tex. Cr. R. 560, 113 SW 764. **Included offense** need not be charged where major offense is clearly shown. State v. Moss, 216 Mo. 436, 115 SW

Under a general indictment for burglary, the court may properly instruct on burglary in the nighttime.[43] The verdict need not necessarily name the offense.[44] Under a charge of burglary and larceny, a verdict may be returned for either.[45]

§ 4. *Instructions and verdict.*[46] See 11 C. L. 490

Sentence See 11 C. L. 491 may depend upon the age of the convict.[47] A sentence for burglary and larceny is usually regarded as cumulative.[48] Failure to conform to statutory requirements may be fatal.[49]

Burnt Records; By-Laws; Calendars, see latest topical index.

CANALS.[50]

The scope of this topic is noted below.[51]

It is the duty of the Secretary of War to prescribe such rules and regulations for the use, administration, and navigation of any canal, operated or maintained by the United States, as in his judgment the public necessity may require.[52] The right to improve a navigable stream for the purpose of using it as a canal is a right which cannot be acquired without delegated authority from the state.[53] A special grant of a franchise for such purpose,[54] to a corporation already in existence, is not the creation of a corporation,[55] and the transfer of such a franchise to another corporation carries with it the burdens incident thereto in the hands of the first

1007; Ballentine v. State [Tex. Cr. App.] 117 SW 972.

43. Walker v. State [Tex. Cr. App.] 117 SW 797.

44. Under Code Cr. Proc. 1895, art. 743, "Guilty as charged" sufficient. Jones v. State [Tex. Cr. App.] 117 SW 127.

45. State v. Carpenter, 216 Mo. 442, 115 SW 1008.

46. Search Note: See notes in 61 L. R. A. 197, 207.

See, also, Burglary, Cent. Dig. §§ 111-121; Dec. Dig. §§ 46, 47; 6 Cyc. 251-254, 256; 3 A. & E. Enc. P. & P. 797.

47. Conley v. State [Tex. Cr. App.] 116 SW 806.

48. May be punished for both. State v. Nicholas [Mo.] 121 SW 12. Proper if within the statutory maximum for both. People v. Frost, 129 App. Div. 498, 114 NYS 209.

49. Sentence for breaking and entering post-office, under Rev. St. § 5478, fatally defective unless it imposes imprisonment at hard labor. Sorenson v. U. S. [C. C. A.] 168 F 785.

50. Search Note: See notes in 7 C. L. 516; 61 L. R. A. 833, 834, 853; 4 L. R. A. (N. S.) 717.

See, also, Canals, Cent. Dig.; Dec. Dig.; 6 Cyc. 267-281; 5 A. & E. Enc. L. (2ed.) 111

51. Treats of the nature, construction and maintenance of navigable canals as such, as distinguished from navigable waters generally (see Navigable Waters *), sewage and drainage canals (see Sewers and Drains *), irrigation canals (see Waters and Water Supply,* § 13), mill dams and canals (see Waters and Water Supply,* § 12), canals in their aspect as public works or improvements (see Public Works and Improvements *), and canals as boundaries (see Boundaries,* §§ 1, 2). Excludes also the law of waters generally (see Waters and Water Supply,* §§ 1-11, 17-19), water supply and service (see Waters and Water Supply,* §§ 15, 16), bridges (see Bridges *), water traffic (see Shipping and Water Traffic *), canal companies as carriers (see Carriers *), or as corporations generally (see Corporations *), and the general law of eminent domain (see Eminent Domain *), franchises (see Franchises *), negligence (see Negligence *) and riparian ownership (see Riparian Owners *).

52. Act Aug. 18, 1894, c. 299, § 4, 28 Stat 362 (U. S. Comp. St. 1901, p. 3525) makes a willful violation of such rules a criminal offense. Held that the delegation of the power to make such rules was not unconstitutional as delegating legislative power to an executive officer. United States v. Moody, 164 F 269. Rule 8 of the regulations promulgated by secretary of war for the use, administration, and navigation of St. Mary's Falls Canal, is within the power conferred on him by statute. Id.

53. Even though such purpose is specified in articles of incorporation, it is not sufficient, but must be authorized by general statutes under which corporation is organized. State v. Portland General Elec. Co. [Or.] 98 P 160.

54. Laws 1870, p. 14, appropriated funds to a corporation for improvement of the Willamette river and provided that it should be the duty of the corporation to construct a canal and locks and after completion to pass all steamboats, etc. Held that term "duty to construct" was more comprehensive than grant of authority, and the term "shall not charge a greater rate of toll than 50 cents per ton" is equivalent to saying that it may charge that much. State v. Portland General Elec. Co. [Or.] 98 P 160.

55. Laws 1870, p. 14, granting such right to corporation is not in violation of Const. art. 11, § 2, prohibiting creation of corporation by special law. State v. Portland General Elec. Co. [Or.] 98 P 160.

corporation.[56] Damages[57] may be recovered for injuries caused by the construction,[58] or the improvement,[59] or the negligent management[60] of a canal, but a contractor, constructing a canal for a state is not liable for damages caused by the obstruction of a stream which was involved in the state plan,[61] and, on the other hand, a state is not responsible to a third person for the negligence of an independent contractor in the construction of a state canal.[62] Under the New York statute providing compensation for lands appropriated for canal purposes, there can be no recovery for remote or consequential damages,[63] nor does the statute of such state, providing that the state shall, in the construction of a canal, assume the same measure of liability incurred by individuals and corporations engaged in similar enterprises, make the state liable for injury to property occasioned by the changing of the grade to a highway to meet the grade of a bridge over a canal.[64] Where the state owns the bed of a river and its water, it can abstract the water for canal purposes,[65] but the state cannot by reason of riparian ownership abstract water to the injury of other riparian owners,[66] nor is such right comprehended within the reserve power of the state to improve the navigation of the river.[67] Permission to lay a sewer across the right of way of a canal company is not a lease of a portion of such canal.[68]

Where a canal company has a right of way only upon the abandonment of the land for use as a canal, the use and occupation of the land reverts to the owner of the fee.[69]

CANCELLATION OF INSTRUMENTS.

The scope of this topic is noted below.[70]

§ 1. Nature of Remedy, 592. Adequacy of Remedy at Law, 592. Relief Obtainable and Conditions Precedent Thereto, 592. Laches and Limitations, 594.

§ 2. Cause of Action and Grounds for Relief, 595.

§ 3. Procedure, 596.

56. Validity of Laws 1870, p. 14, granting franchise to corporation to construct canal and locks in the Willamette river, does not depend upon legislative authority to appropriate to the school fund the 10 per cent of the net profits, but such profits can be exacted as a burden upon the franchise. State v. Portland General Elec. Co. [Or.] 98 P 160.

57. Measure of damages for destruction of bridges passed upon. Town of Lenox v. State, 61 Misc. 28, 114 NYS 744. See Bridges, § 7. Under Canal Law (Laws 1894, p. 629, c. 338) § 37, one may prosecute his claim for damages without any other legislative authority. Id.

58. Canal company held liable for injury caused by overflow of mud, sand, and water. Spence v. Lake Drummond Canal Co., 150 N. C. 160, 63 SE 729.

59. Town may recover damages for destruction of bridges caused by widening and deepening ditch used to convey surplus water of canal. Town of Lenox v. State, 61 Misc. 28, 114 NYS 744.

60. Where lands were overflowed by negligent turning of water from state's canal into creek, there being no proof that any damage would have resulted irrespective of negligence of state, state was liable for full amount of damage, though creek was swollen by heavy rains. Carhart v. State, 61 Misc. 13, 114 NYS 544. In action for damages alleged to have been caused by water escaping from canal feeder, evidence with reference to prevalence of heavy rainstorms at some distance from claimant's farm was not incompetent or inadmissible. Ostrander v. State, 192 N. Y. 415, 85 NE 668.

61. Where obstruction of stream was involved in state plan, state was liable and not contractor. Meneely v. Kinser Const. Co., 128 App. Div. 799, 113 NYS 183. Where obstruction is made on land appropriated by state according to state plan, contractor is not liable. Meneely v. Kinser Const. Co., 130 App. Div. 525, 114 NYS 1136.

62. Where contractor was not shown to be incompetent and work was not inherently dangerous, state was not liable to one who fell from insufficiently guarded road into excavation made by contractor. Coolidge v. State, 61 Misc. 38, 114 NYS 553.

63. Owner of land on street intersected by state canal has no right to damages under Laws 1903, p. 332, c. 147, where no part of land is taken and such land does not abut on canal. Vogel v. State, 61 Misc. 35, 114 NYS 548.

64. Such damages are damnum absque injuria. Warner v. State, 132 App. Div. 611, 117 NYS 108.

65, 66, 67. Fulton L., H. & P. Co. v. State, 62 Misc. 189, 116 NYS 1000.

68. Permission from commissioners of the Illinois and Michigan canals to lay sewer across right of way is not lease within section of constitution of Illinois which provides that such canals shall never be sold or leased except by vote of the people. City of Chicago v. Green, 238 Ill. 258, 87 NE 417.

§ 1. *Nature of remedy.*[71] See 11 C. L. 493—Equity has exclusive jurisdiction,[72] independent of statute,[73] to cancel a contract.

Adequacy of remedy at law. See 11 C. L. 493—Equity will not ordinarily exercise jurisdiction where there exists an adequate remedy at law,[74] except where some independent ground of equity jurisdiction exists.[75] For the remedy at law to be adequate, it must be equivalent to a complete establishment of the status quo.[76] Where there is a subject-matter of equitable cognizance, the existence of an adequate legal remedy does not go to the jurisdiction and must be availed of by timely objection.[77] A party may, by bringing an action for damages, waive his right to sue for cancellation.[78]

Relief obtainable and conditions precedent thereto. See 11 C. L. 493—As a general rule, it is a condition precedent to the right to relief that the party seeking the cancellation of an instrument restore or offer to restore everything of value received thereunder.[79] Thus, equity will not usually avoid contracts made in good faith for

69. Grantees of canal company had no estate in land upon abandonment of land for use as canal. Scholl v. Emerich, 36 Pa. Super. Ct. 404.

70. It treats of the equitable remedy between the parties for the cancellation of contracts and conveyances. It excludes definition and proof of fraud (see Fraud and Undue Influence *), mistake (see Mistake and Accident *), lack of capacity to contract (see Incompetency *), rescission of contracts other than by bill in equity (see Contracts,* § 8; Sales,* §§ 10A, 11A), relief against instruments constituting cloud on title (see Quieting Title *) and conveyances in fraud of creditors (see Fraudulent Conveyances *). Sufficiency of proof of forgery of signature is treated in Names, Signatures and Seals,* § 2.

71. **Search Note:** See notes in 14 L. R. A. (N. S.) 204; 9 A. S. R. 859.

See, also, Cancellation of Instruments, Cent. Dig. §§ 1-48; Dec. Dig. §§ 1-31; 6 Cyc. 285-319.

72. Mahn v. Chicago & M. Elec. R. Co. [Wis.] 121 NW 645. Court of law has no jurisdiction to rescind sale contract. Riverside Residence Co. v. Husted [Va.] 64 SE 958. Justice court has no jurisdiction. Snyder v. Crutcher [Mo. App.] 118 SW 489.

73. Cawood v. Howard [Ky.] 113 SW 109.

74. Lawlor v. Merritt, 81 Conn. 715, 72 A 143. Such jurisdiction is not exercised unless plaintiff allege and show that he will suffer some irreparable injury if equitable relief be denied him. Id. Relief denied where action at law afforded remedy for mere breach of contract complained of. Haydon v. St. Louis & S. F. R. Co. [Mo.] 121 SW 15. Denied where court of law has already obtained jurisdiction of controversy involving alleged fraud. Biermann v. Guaranty Mut. Life Ins. Co. [Iowa] 120 NW 963. Denied where defendant has brought action at law on non-negotiable contract, in which action its genuineness may be fully determined. Sunset Tel. & T. Co. v. Williams [C. C. A.] 162 F 301. Denied after death of assured, to cancel policy for fraud, since company may interpose defense in action at law on policy. Griesa v. Mutual Life Ins. Co. [C. C. A.] 169 F 509. Equitable relief was denied defendant in suit on insurance policies, the fraud, alleged by answer, in their procurement being a complete defense to the action at law. Biermann v. Guaranty Mut. Life Ins. Co. [Iowa] 120 NW 963. Fact that beneficiary cannot maintain bill in equity to enforce delivery of bonds in payment of insurance policy, but must resort to suit for damages, gives insurance company no ground to maintain suit in equity to cancel policy. Griesa v. Mutual Life Ins. Co. [C. C. A.] 169 F 509.

75. In absence of fraud, mistake, trust, cloud on title, multiplicity of suits, necessity for cancellation or some other independent ground of equitable jurisdiction, equity will not interfere to rescind contract on sole ground that defendant has failed to perform his part or has broken its warranties of conditions. Forster v. Flack [Wis.] 121 NW 890. Right to maintain action to set aside conveyance where grantee has failed to furnish support and maintainance as agreed, does not depend upon inadequacy of legal remedy. Spangler v. Yarborough [Okl.] 101 P 1107.

76. Recovery of damages and possession without cancellation of deed held insufficient. Mahn v. Chicago & M. Elec. R. Co. [Wis.] 121 NW 645.

77. Unless defendant objects that there is adequate remedy at law, court may exercise jurisdiction to cancel will and deeds procured by fraud, although court of law has power to determine their validity. Knikel v. Spitz [N. J. Eq.] 70 A 992.

78. Waived where suit for damages was brought by plaintiff with knowledge of the fraudulent transaction. Smith v. Gray [Wash.] 100 P 339.

79. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616. Offer in complaint and tender at trial is sufficient. Cox v. Stillman, 132 App. Div. 433, 116 NYS 931. Restoration or offer held essential in action to rescind sale by executors. In re Richards' Estate, 154 Cal. 478, 98 P 528. Money obtained by infant, by misrepresenting his age, for making a void conveyance must first be returned. International Land Co. v. Marshall [Okl.] 98 P 951. Quitclaim deed and mortgages will not be canceled, except on pay-

the benefit of an incompetent, unless the parties can be restored to their original positions.[80] Such offer or restoration has been held not necessary, however, in certain cases, such as where the defendant by his own act has made restoration impossible,[81] where the things received [82] has no particular value or was not received under the instrument sought to be set aside,[83] where it appears that the grantee was guilty of fraud and had knowledge of the incompetency of the grantor,[84] where the accounts balance or are in favor of the opposite party and may be equitably adjusted without restoration,[85] and where restoration would serve no useful purpose.[86] The doctrine of restoration of consideration has peculiar application in respect to rescission of releases, and this aspect is elsewhere treated.[87] Rescission of the contract by the complaining party is prerequisite to cancellation in equity, and to such rescission notice to the opposite party is ordinarily essential.[88] The court may, in canceling an instrument, order each party to make a complete restoration to the other,[89] and may take an account of and adjust all differences between the parties in so far as is necessary in order to place them in a position of status quo,[90] and may grant

ment of amount equitably due. Garlick v. Mutual Loan & Bldg. Ass'n, 236 Ill. 232, 86 NE 236. Valid tender of amount due holder of tax deed must be made prior to filing of bill. Buettner v. Glos, 240 Ill. 9, 88 NE 280. Bill to cancel deeds to real estate sold to pay debts of complainant which were an admitted charge upon lands conveyed held to be without equity in that complainant did not offer to restore money paid out for its benefit in satisfaction of such legal charges. Chicago-Texas Land & Lumber Co. v. Robertson [C. C. A.] 169 F 287.

80. Dodd v. Anderson, 131 App. Div. 224, 115 NYS 688.

81. Plaintiff without unnecessary delay having offered restoration in so far as possible. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616. Defendant, in pursuance of his fraudulent schemes, had spent money advanced him on contract. Id.

82. Plaintiff had received office of treasurer which he held on to, but which required no attention or duties and carried no compensation. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616.

83. Money loaned by donee to heir of donor seeking to set aside deed of gift need not be returned as a condition precedent to equitable relief. Post v. Hagen [N. J. Eq.] 72 A 384.

84. Schindler v. Parzoo [Or.] 97 P 755.

85. Cox v. Stillman, 132 App. Div. 433, 116 NYS 931. Defendant wrongfully secured and retained more than would be due to be restored by plaintiff. Id. Amount of rentals and personal property received by defendant equalled amount disbursed by defendant for plaintiff. Hensan v. Cooksey, 237 Ill. 620, 86 NE 1107. Income of property was alleged to be more than sufficient to reimburse. In re Richards' Estate, 154 Cal. 478, 98 P 528.

86. Tender back of stock received held not condition precedent to maintainance of suit to cancel stock subscription, since equity has power by its decree to put dedendant in status quo without offer or assent by plaintiff. Cawthra v. Stewart, 59 Misc. 38, 109 NYS 770.

87. See Releases, § 4.

88. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616. Plain manifestation of election to rescind held sufficient notice. Id. See, also, Contracts, § 8; Sales, §§ 10A, 11A.

89. Reconveyance was ordered of lands exchanged. Cordes v. Cushman [Kan.] 101 P 460. Repayment with interest was directed. Prindle v. Dewitt Union Free School Board of Education, 61 Misc. 533, 115 NYS 888. Held that contract of sale should be rescinded, bond and mortgage given therefor canceled, and money paid refunded. Tryon v. Lyon, 133 App. Div. 798, 118 NYS 5. In case of cancellation of stock subscriptions, subscriber may recover amound paid for stock. Cawthra v. Stewart, 59 Misc. 38, 109 NYS 770.

90. Defendant was allowed for moneys necessarily expended in execution of contract less moneys received under it. Callanan v. Keeseville, etc., R. Co., 131 App. Div. 306, 115 NYS 779. Purchase price was ordered returned and an accounting ordered. In re Richards' Estate, 154 Cal. 478, 98 P 528. In suit to declare deed a mortgage and cancel same, grantee was credited with sums expended in payment of grantor's debts and in improving property. Veeder v. Veeder [Iowa] 120 NW 61. Amount owed by plaintiff was properly charged against interest due from defendant. Witham v. Walsh [Mich.] 16 Det. Leg. N. 190, 121 NW 309. Grantor was held to pay for improvements which he consented that grantee should make. Cordes v. Cushman [Kan.] 101 P 460. Defendant was charged with amount received from sale of part of property conveyed and with interest, and credited with taxes and special assessments paid. Gillen v. Gillen, 238 Ill. 218, 87 NE 388. In suit to avoid sale to one of three heirs of deceased, sale was set aside and defendant was charged with total amount of rents and profits less his proper expenditures for taxes, repairs, and insurance upon two-thirds of the estate, and plaintiffs were charged with two-thirds of the improvements made, but it was held within their option whether they would pay same and take their share of property. Sunter v. Sunter, 198 Mass. 137, 84 NE 334. Upon setting aside **deed of gift** for improvident conduct of donor, restoration of property

such further relief [91] and administer relief in such way as justice may require.[92] A money judgment may sometimes be awarded in lieu of a return of the property,[93] and in some cases a lien may be given to secure repayment.[94] When a deed of gift is canceled for improvident conduct of the donor without fault of the donee, the donee is liable only for that which was actually received.[95] If cancellation be decreed, equity draws to itself the determination of the entire controversy.[96] As a general rule, cancellation will not be granted to the injury of an innocent third party.[97]

Laches and limitations. See 11 C. L. 495—It is essential that an action for the cancellation of an instrument be brought within a reasonable time after the discovery of the ground relied on for relief.[98] The statute of limitations does not usually operate to bar an action for the cancellation of a deed, unless there shall have been adverse possession by the grantee.[99] By his misconduct, the defendant may be estopped to plead laches.[1]

and rents collected was ordered. Post v. Hagen [N. J. Eq.] 72 A 384. It was held equitable for decree setting aside deed of gift to impose on plaintiff duty of returning to donee everything he had received from her in pursuance of donor's scheme which he elects to set aside. Id. Donee held not entitled to recover back premiums paid out on insurance policies on property taken out in her own name, or charges for collecting rent. Id.

91. Powell v. Powell, 217 Mo. 571, 117 SW 1113. Quit claim deed was set aside and plaintiff was given benefit of judgments previously obtained by defendant against licensees. Id.

92. In action brought to set aside conveyance made by insane person, court may set it aside altogether or only sub modo. Beeson v. Smith, 149 N. C. 142, 62 SE 888. The court properly canceled stock certificate without determining rights of existing creditors of limited copartnership. Nichols v. Buell [Mich.] 16 Det. Leg. N. 463, 122 NW 217.

93. Awarded where property secured through fraud had been conveyed to innocent purchaser. Johnson v. Carter [Iowa] 120 NW 320. Damages may be awarded to injured party where other party has made relief sought impossible. Johnson v. Carter [Iowa] 120 NW 320.

94. Lien was allowed on property in which money secured under instrument has been invested. Witham v. Walsh [Mich.] 16 Det. Leg. N. 190, 121 NW 309. Defendant was given lien on premises contracted to be conveyed. Prindle v. Dewitt Union Free School Board of Education, 61 Misc. 533, 115 NYS 888.

95. Not liable for rent of property not used. Post v. Hagen [N. J. Eq.] 72 A 384.

96. Kamman v. D'Heur & Swain Lumber Co. [Ind. App.] 88 NE 348. But unless conveyance of property be set aside, a claim for waste on such property cannot prevail. Id.

97. Not cancel negotiable instruments, given in payment of worthless machine and in hands of innocent holder. Pennebaker Bros. v. Bell City Mfg. Co. [Ky.] 113 SW 829. Not set aside conveyance as against subsequent purchaser unless it appear that he had knowledge of the fraud alleged or participated therein. Denike v. Santa Clara Valley Agricultural Soc., 9 Cal. App. 228, 98 P 687.

98. Smith v. Gray [Wash.] 100 P 339. Question of **reasonable time** is determined from circumstances of particular case. Id. Whether defrauded party acted promptly (Civ. Code, § 1691) is question for trial court upon facts of particular case. Davis v. Butler, 154 Cal. 623, 98 P 1047.

As to the general doctrine of laches, see Equity, § 3.

Held bar to relief: Where other people's rights had become involved and plaintiff had taken time to speculate on success or failure of enterprise before determining whether to set aside sale of land made for stock in part payment. Romaine v. Excelsior Carbide & Gas Mach. Co. [Wash.] 103 P 32. Delay for one and one-fourth years after facts had become public. Id. Grantor had permitted deed to stand without objection for 24 years and action was brought by his heirs 37 years after execution of deed. Lancaster v. Springer, 239 Ill. 472, 88 NE 272. Delay, by decedent's heirs, of 7, 9, and 14 years in bringing suit to set aside contract and deed obtained by fraud, where it does not appear that they acted promptly on discovery or that failure to make discovery sooner was not their fault. Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049. Laches of principal and his devisees, in action to avoid deed to agent. Lancaster v. Springer, 239 Ill. 472, 88 NE 272.

Held not bar to relief: Fifteen years after execution of deed, but there was no adverse holding by grantee. Shute v. Shute [S. C.] 64 SE 145. Delay of 7 years after majority attained to bring suit to cancel deed. Lake v. Perry [Miss.] 49 S 569. Delay of a few days more than two months after discovery of fraud. Davis v. Butler, 154 Cal. 623, 98 P 1047. Where parties were brothers dealing together in other matters and amount due from grantor to grantee was not paid. Veeder v. Veeder [Iowa] 120 NW 61. Grantor remained in possession, paid taxes and managed property, and no one was mislead to his injury by the delay. Ackman v. Potter, 239 Ill. 578, 88 NE 231.

99. Action begun fifteen years after execution of deed and based on want of delivery held not barred. Shute v. Shute [S. C.]

§ 2. *Cause of action and grounds for relief.*[2] See 11 C. L. 496—An instrument will be canceled for fraud,[3] mistake [4] whether mutual [5] or unilateral,[6] undue influence,[7] incompetency,[8] duress,[9] want or failure of consideration [10] in some material respect,[11] such as failure to furnish support and maintenance as agreed,[12] repudiation,[13] or abandonment.[14] Where fraud in the execution of contract is alleged as the ground for its cancellation, it is not essential that such fraud be the sole inducing cause.[15] It is important, however, that the fraud shall have existed at the time of the execution of the contract.[16] A contract will not be canceled for misrepresentations which were not relied upon [17] or which were the mere expression

64 SE 145. As to the application of statutes of limitation to equitable proceedings, see Equity, § 3.

1. Defendant held to be estopped, where, in violation of a trust and through fraud and deceit, he obtained conveyance sought to be set aside. Ten Mile Coal & Coke Co. v. Burt, 170 F 332.

2. **Search Note:** See notes in 3 C. L. 585, 587; 92 A. S. R. 272.

See, also, Cancellation of Instruments, Cent. Dig. §§ 1-6; Dec. Dig. §§ 3-8; 6 Cyc. 286-288; Deeds, Cent. Dig. §§ 210, 211; Release, Cent. Dig. § 42; 24 A. & E. Enc. L. (2ed.) 604.

3. Under Civ. Code § 1689 so providing. Shopbell v. Boyd, 9 Cal. App. 136, 98 P 69. What constitutes fraud warranting cancellation is treated under topic Fraud and Undue Influence.

4. For what constitutes mistake, see Mistake and Accident.

5. Allen v. Luckett [Miss.] 48 S 186. Such as misrepresentation, without fraud, and through error of one or both parties as to identity, situation, boundaries, title, amount, value and the like of land conveyed. Id. Defendant need not know that representations to secure lease were false. Kelty v. McPeake [Iowa] 121 NW 529. Right to rescind therefor is not waived by failure to make investigation proposed by vendor's agent. Stevenson v. Cauble [Tex. Civ. App.] 118 SW 811. Canceled for misrepresentations without fraudulent intent as to location of land conveyed. Id. Canceled for unintentional misstatement of real estimate of expert as to amount of mineral (Johnson v. Withers, 9 Cal. App. 52, 98 P 42), for unintentional misstatement as to amount of land (Tryon v. Lyon, 133 App. Div. 798, 118 NYS 5), for unintentional misstatement of expert's opinion (Johnson v. Withers, 9 Cal. App. 52, 98 P 42). In case of cancellation for mutual mistake, **proof** of amount of damage caused thereby held unnecessary. Tryon v. Lyon, 133 App. Div. 798, 118 NYS 5.

6. Prindie v. Dewitt Union Free School Board of Education, 61 Misc. 533, 115 NYS 888. Reformation of instrument had been denied. Id. Mistake on one side and knowledge thereof on the other. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826.

7. See Fraud and Undue Influence, as to what constitute.

8. Beeson v. Smith, 149 N. C. 142, 62 SE 888. Contracts by insane persons are voidable but not necessarily void. Id.; Dodd v. Anderson, 131 App. Div. 224, 115 NYS 688. But infancy cannot be pleaded to avoid liability for frauds, trespasses, or torts of the infant. Authorities cited and discussed. International Land Co. v. Marshall [Okl.] 98 P 951. Intoxication of the grantor induced by the grantee. Dalhmann v. Gaugente, 238 Ill. 224, 87 NE 287. Intoxication must be such as to drown memory, reason and judgment. Id. See Incompetency as to what constitutes.

9. Lappin v. Crawford [Mo.] 120 SW 605. For what constitutes duress sufficient to warrant cancellation, see Duress.

10. Lappin v. Crawford [Mo.] 120 SW 605; Haydon v. St. Louis & S. F. R. Co. [Mo.] 121 SW 15; Bonney v. Bonney, 141 Ill. App. 476. Release from liability for wrongful conversion of bonds was canceled as being without consideration. Id. Release canceled between the parties for failure of consideration. Bonney v. Bonney, 237 Ill. 452, 86 NE 1048. Cancellation was denied where **lesion beyond moiety,** or damage from more than half the value of estate sold, was not shown. Hickman v. Washington, 122 La. 945, 48 S 333. **Evidence** of necessities of party executing contract, condition of health, etc., admissible in connection with determining inadequacy of consideration. Bonney v. Bonney, 141 Ill. App. 476. As to **what constitutes** failure of consideration, see Contracts, § 2.

11. Material failure was not shown. Eichelberger v. Mills Land & Water Co., 9 Cal. App. 628, 100 P 117.

12. Gillen v. Gillen, 238 Ill. 218, 87 NE 388; Spangler v. Yarborough [Okl.] 101 P 1107. Fraud in inception is presumed in such case. Spangler v. Yarborough [Okl.] 101 P 1107. Where grantees violated agreement to permit grantors to occupy property during their lives. Gustin v. Crockett, 51 Wash. 67, 97 P 1091. Grantee violated agreement to pay grantor during her life one-half the proceeds of farm conveyed. Cumby v. Cumby, 240 Ill. 235, 88 NE 549.

13. Refusal of one party to perform requirement. Callanan v. Keeseville, etc., R. Co., 131 App. Div. 306, 115 NYS 779.

14. By radical nonperformance. Haydon v. St. Louis & S. F. R. Co. [Mo.] 121 SW 15. By failure to perform substantial requirement, although contract be indefinite or damages for its breach cannot be measured. Callanan v. Keeseville, etc., R. Co., 131 App. Div. 306, 115 NYS 779.

15. People v. New York Railroad Com'rs, 128 App. Div. 814, 114 NYS 122; Kelty v. McPeake [Iowa] 121 NW 529.

16. Marriage may be set aside for fraud existing at time of marriage. Berry v. Berry, 130 App. Div. 53, 114 NYS 497.

17. French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150. Not

of an opinion,[18] or which were made by a third party and were unauthorized.[19] It will not be canceled for a mistake curable by reformation [20] for mere breach of contract [21] or of warranty,[22] or for the reason that mere tricks of trade were resorted to where the parties dealt at arm's length.[23] Nor does the right to secure cancellation exist where the parties are equally culpable,[24] where it is essential that the plaintiff plead his own wrong doing as a ground for relief,[25] where no appreciable damage is shown,[26] where to grant relief is as liable to be wrong as right,[27] or where no proper grounds exist and the object sought is the enforcement of a parol trust in land.[28] A deed of gift may be canceled for fraud of the donee, and in some cases for mere improvident conduct of the donor, under the rule of independent advise.[29] It has been frequently held, however, that improvident conduct alone is insufficient ground for the cancellation of an instrument.[30]

§ 3. *Procedure.*[31]—See 11 C. L. 497

*Parties.*See 11 C. L. 497—A bill to cancel a deed may be maintained by one not in possession of the property.[32] The grantor is usually a necessary party to an action to cancel a deed.[33] In an action to set aside a deed or will, all tenants in common should be joined as parties plaintiff or defendant.[34] Parties having no interest in the litigation need not be joined.[35]

*Pleading.*See 11 C. L. 498—The complaint should clearly set forth facts sufficient

where parties relied upon their own judgment and were not unduly imposed upon. Crooker v. White [Ala.] 50 S 227.

18. Lee v. Hail [Tex. Civ. App.] 114 SW 403.

19. Travis v. Taylor [Ky.] 118 SW 988.

20. Omission of agreed clause from indemnity bond signed in blank was curable by reformation. Bindsell v. Federal Union Surety Co., 130 App. Div. 775, 115 NYS 447.

21. As where railroad company in consideration of conveyance sought to be set aside agreed to maintain switch and to keep it free from cars, but broke its agreement in the latter particular. Haydon v. St. Louis & S. F. R. Co. [Mo.] 121 SW 15.

22. Stock received as consideration failed to pay dividends as represented by defendant. Forster v. Flack [Wis.] 121 NW 890.

23. Storthz v. Crusoe [Ark.] 113 SW 1015.

24. Bonus contract. Farrington v. Stucky [C. C. A.] 165 F 325.

25. Farrington v. Stucky [C. C. A.] 165 F 325. Though, were it an action to enforce bonus contract, the plaintiff herein, who would then be defendant, might prevail in his defense that such contract was invalid as containing clause that railroad company should not maintain station between two given points. Id.

26. Eichelberger v. Mills Land & Water Co., 9 Cal. App. 628, 100 P 117.

27. Proof was insufficient to show fraud which was alleged to have been used in procurement of lease. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

28. O'Briant v. O'Briant [Ala.] 49 S 317.

29. Post v. Hagen [N. J. Eq.] 72 A 384. Deed was set aside for improvident conduct of donor, where donee took no part in procurement of deed. Id. Held to be improvident conduct, where it appeared that fiduciary relation existed between donee and donor, that conveyance was of substantially all of donor's property so as to leave donor unprovided for in respect to the future, that conveyance was made without any reservation of any power of revocation, and that in making it donor did not have benefit of proper independent advice. Id.

30. Simpson v. League [Md.] 72 A 1109. Where there is absence of fraud or imposition, there is no such thing as equitable incapacity, and a gift voluntarily made will not be set aside because donor subsequently changes his mind or because court regards his act as absurd or improvident. Id. Not sufficient ground where evidence does not show that conveyance was obtained by fraud, undue influence, or coercion, there being no great disparity in ages and no trust relation existing. Smith v. Lamb [Ark.] 112 SW 884. Held insufficient ground in suit to cancel trade transaction. Storthz v. Crusoe [Ark.] 113 SW 1015.

31. Search Note: See note in 1 C. L. 417. See, also, Cancellation of Instruments, Cent. Dig. §§ 49-213; Dec. Dig. §§ 32-63; 6 Cyc. 319-345.

32. Tucker v. Witherbee [Ky.] 113 SW 123. Deed by grantee to third party. Id.

33. Relief will not be granted to cancel deed in action wherein neither grantor nor grantee are parties. Kehr v. Floyd & Co. [Ga.] 64 SE 673. City of Savannah held necessary party to cancellation of deed given to portion of its streets in exchange for other land to be used as street. Kehoe v. Rourke, 131 Ga. 269, 62 SE 185.

34. Knikel v. Spitz [N. J. Eq.] 70 A 992.

35. Lienees against whom assignees of lien have already obtained judgment are not necessary parties in action by assignor to set aside assignment and obtain benefit of such judgment. Powell v. Powell, 217 Mo. 571, 117 SW 1113. One who merely aids in fraudulent procurement of deed to third party is not proper party. Wright v. Day, 59 Misc. 76, 111 NYS 1105. Mortgagee who had assigned away all interest was not proper party. Id.

to warrant the equitable relief sought,[36] and should show plaintiff's performance of all conditions precedent.[37] Unilateral mistake[38] and fraud may be sufficiently alleged in general terms[39] in the absence of a motion to make more specific.[40] Money damages may be awarded without any specific prayer therefor.[41] A plea of ratification may be set up in answer to a petition alleging imposition and fraud, although it also allege insanity.[42] In some cases the defendant may, by a sufficient cross bill,[43] ask for the enforcement of an instrument in a suit for its cancellation.[44] After cancellation has been decreed and an accounting ordered, the defendant will not usually be permitted to set up claims not pleaded prior thereto.[45]

Evidence and proof. See 11 C. L. 498—The party seeking cancelation has the burden of proving the fraud or mistake,[46] or other grounds relied on,[47] together with his excuse for any delay in bringing the action,[48] the manner and sufficiency of

36. Must allege no consideration if such cause relied on. Schindler v. Parzoo [Or.] 97 P 755. Must allege of what consideration consisted where fraud in procurement of contract is relied on. Id. Facts pleaded must show case of fraud and mistake, or fraud or mistake, in order to entitle complainant to relief on either ground. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826. Where mental incapacity or insanity of the grantor is relied upon, it is not necessary to allege fraud and undue influence (Towner v. Towner [W. Va.] 64 SE 732), or to state the consideration of the contract sought to be canceled (Schindler v. Parzoo [Or.] 97 P 755).

Complaint held sufficient: In action to set aside assignment of claim for fraud. Cox v. Stillman, 132 App. Div. 433, 116 NYS 931. Bill was sufficient to secure cancellation of deeds, which alleged that deed and will were procured by fraud, requested their cancellation and that title be vested in heirs of grantor and testator. Knikel v. Spitz [N. J. Eq.] 70 A 992. Fraud and undue influence were sufficiently alleged in bill to set aside deed, by the allegation of sufficient matters to constitute. Reck v. Reck [Md.] 73 A 144. Bill alleging that defendant did not, and did not intend to, fulfill promises for which conveyance sought to be set aside was given. Ten Mile Coal & Coke Co. v. Burt, 170 F 332. Allegation of time of execution of deed, committal of grantor to asylum, and not admitting his release therefrom, or lucid intervals, held sufficient to charge incompetency. Towner v. Towner [W. Va.] 64 SE 732. Petition to rescind contract of sale of electric piano held sufficient as against general demurrer. French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150. It not being necessary to allege insolvency in action to set aside conveyance for fraud (Civ. Code, § 1689). Shopbell v. Boyd, 9 Cal. App. 136, 98 P 69.

Complaint held insufficient: Allegation that mortgage by corporation was illegally executed by directors because, as election of such directors, certain stock was voted by a third party claiming to have authority from the owner and where it is not alleged that such third party did not actually have such authority. Florida Clay Co. v. Vause [Fla.] 49 S 35. Defendant's knowledge of alleged fraud not being set out. Denike v. Santa Clara Valley Agricultural Soc., 9 Cal. App. 228, 98 P 687. Bill to set aside stock pooling receipt which did not state time, place, and circumstances of its delivery parties thereto, or its acceptance without consideration. Ryan v. Martin, 165 F 765. Facts being insufficient. O'Briant v. O'Briant [Ala.] 49 S 317.

37. Allegation of offer to transfer shares of stock held to be allegation of offer to do everything, including delivery of indorsed certificate, necessary to accomplish such transfer. Davis v. Butler, 154 Cal. 623, 98 P 1047. Should allege offer to return consideration, where such offer essential. Schindler v. Parzoo [Or.] 97 P 755.

38. Allegation of fraudulent representations and undue influence is sufficient to sustain proof of mistake on one side and knowledge thereof on the other. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826.

39. Fraudulent representations were sufficiently alleged by setting out matters which showed constructive fraud. French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150.

40. Johnson v. Carter [Iowa] 120 NW 320.

41. Johnson v. Carter [Iowa] 120 NW 320. So held in action to set aside conveyance procured through fraud. Id.

42. Allegation of fraud being construed as made on theory of sanity. Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149.

43. In action by insurer asking cancellation of policy, cross bill of insured asking enforcement of policy held sufficient though not distinct from answer. Phoenix Ins. Co. v. Smith [Miss.] 48 S 1020.

44. Under § 587, Code 1906. Phoenix Ins. Co. v. Smith [Miss.] 48 S 1020.

45. Donee in deed of gift was not then permitted to set off advances made to heir for his support when he had not previously made claim for such advances. Post v. Hagen [N. J. Eq.] 72 A 384.

46. See Fraud and Undue Influence, § 3; Mistake and Accident, § 3.

47. In action to cancel injunction bond given by plaintiff, plaintiff must prove no damages sustained for which such bond is liable. Lawlor v. Merritt, 81 Conn. 715, 72 A 143.

48. Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049.

such proof varying in no way from the rules applicable in other caess where fraud or mistake is urged.[49]

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Part I. General Principles.

§ 1. *Definitions and distinctions.*[51]—See 11 C. L. 499—Any one holding himself out to the public as ready to undertake for hire the transportation of persons or goods and inviting patronage is a common carrier,[52] but one operating facilities for

49. See Fraud and Undue Influence, § 3; Mistake and Accident, § 3.

50. This topic treats only of the laws relating to common carriers of persons or property. Those relating to corporations engaged in such carriage (see Railroads;* Street Railways;* Shipping and Water Traffic*) are pertinent to specific topics, and likewise the relationship of carrier and employe is treated in Master and Servant.* Rules peculiar to water traffic are treated in Shipping and Water Traffic.*

51. Search Note: See notes in 11 C. L. 500; 68 L. R. A. 153; 2 L. R. A. (N. S.) 745; 5 Id. 458; 61 A. S. R. 360.
See, also, Carriers, Cent. Dig. §§ 17, 462-478, 966, 967; Dec. Dig. §§ 4, 235; 6 Cyc. 265-271, 533, 534; 6 A. & E. Enc. L. (2ed.) 236; 12 Id. 542.

52. Lloyd v. Haugh Storage & Transfer Co. [Pa.] 72 A 516. **Warehouse company** engaged in moving household goods and so advertising as to solicit custom from general public is a common carrier, notwithstanding in practice it selects whom it will serve. Lloyd v. Haugh Storage & Transfer Co. [Pa.] 72 A 516. **Stockyards company** maintaining extensive system of tracks in and about its yards and making connections with transfer tracks of various roads, where it received stock cars and transferred same to yards with its own equip-

such transportation merely as incidental to another business, with the exception of passenger elevators,[53] is not usually regarded as such.[54] It is not necessary that he own the means of transportation,[55] and he may limit his business to a particular class of commodities.[56] Public draymen,[57] truckmen,[58] and parcel delivery companies,[59] are usually held to be common carriers, but mere "forwarders" are not.[60]

§ 2. *Public duty, control and regulation. A. In general.*[61] See 11 C. L. 500 Common carriers are engaged in a semi-public service and hence cannot so contract with private persons as to incapacitate themselves in the discharge of the duties owed to the public.[62] In the discharge of such duties they are subject to public control [63] and a valid regulation may be enforced by reasonable penalties.[64] Such public control, however, must be exercised within constitutional limitations.[65] The

ment, held a common carrier. Union Stockyards Co. of Omaha v. U. S. [C. C. A.] 169 F 404. **Company doing switching** for fixed charges, paid sometimes by shipper and sometimes by other roads, held common carrier. Kansas City So. R. Co. v. Rosebrook-Josey Grain Co. [Tex. Civ. App.] 114 SW 436.

53. Stelskal v. Marshall Field & Co., 142 Ill. App. 154.

54. Amusement company maintaining extensive grounds and a ferry thereto merely as a part of its general scheme held not a common carrier. Meisner v. Detroit, etc., Ferry Co., 154 Mich. 545, 15 Det. Leg. N. 826, 118 NW 14. **Lumber company** operating engine and cars in connection with its business for transportation of lumber and employes held not a common carrier (Self v. Adel Lumber Co. [Ga. App.] 64 SE 112), especially where it does not own rolling stock (Taenzer & Co. v. Chicago, etc., R. Co. [C. C. A.] 170 F 240), and a contract between it and the railroad company relative to the same is not a contract between connecting carriers (Id.). Evidence held to make question for jury whether defendant was an ordinary commercial carrier or a logging road. Campbell v. Duluth & N. E. R. Co., 107 Minn. 358, 120 NW 375.

55. Stockyard company maintaining short lines connecting with other roads and engines to haul such cars as may be tendered held a common carrier though owning no cars. United States v. Sioux City Stock Yards Co., 162 F 556.

56. Common carrier by water, not a public institution, can limit its carriage to such commodities as it wishes. Ocean Steamship Co. v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 63 SE 577.

57. Benson v. Oregon Short Line R. Co. [Utah] 99 P 1072.

58. Heyman v. Stryker, 116 NYS 638.

59. Johnson Exp. Co. v. Chicago, 136 Ill. App. 368.

60. Where for 22 years defendant had acted as a forwarder and not as a carrier for plaintiff, mere fact that the special contract was not delivered in particular instance held not to change character of relation. Barasch v. Richards, 113 NYS 1005. Company's designation of its business as a "forwarder and distributor" held to estop it from asserting that it was a forwarder only. Lee v. Fidelity Storage & Transfer Co., 51 Wash. 208, 98 P 658.

61. Search Note: See notes in 33 L. R. A. 179, 209; 42 Id. 110; 67 Id. 637; 5 L. R. A. (N. S.) 1069; 14 Id. 292; 16 Id. 914.

See, also, Carriers, Cent. Dig. §§ 2-6, 29-97; Dec. Dig. §§ 1-11, 14-38; 6 Cyc. 265-271, 364-371, 374, 533, 534.

62. See Railroads, § 9.

63. The discretion of the carrier in discharge of public duties must be exercised within the limitations of the law. State v. Florida East Coast R. Co. [Fla.] 49 S 43.

64. They must not be so excessive as to prevent resort to courts to determine validity. Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578. Revisal 1905, § 2631, imposing penalty of $50 for each day's refusal to receive freight, held not so enormous as to prevent resort to courts to test validity. Id.

65. A lawful governmental regulation though a burden is not a violation of constitutional rights to acquire property, to due process of law, or to the equal protection of the laws, since carrier devotes property to use of public subject to right of regulation. State v. Florida East Coast R. Co. [Fla.] 49 S 43. Even if particular regulation causes a pecuniary loss, if not arbitrary and reasonable with reference to just demands of the public, it does not constitute taking of property in violation of constitution. Id. Police power of a state may be properly exercised to insure a faithful and prompt performance of duty within the state by carriers of interstate commerce, especially with reference to safety of persons and property. Pittsburgh, etc., R. Co. v. State [Ind.] 87 NE 1034. Rev. St. 1899, § 1085 (Ann. St. 1906, p. 933), in so far as it requires railroads to furnish free return transportation to shippers of stock in car load lots, held unconstitutional as taking property without due process of law and as denying equal protection of law. George v. Chicago, etc., R. Co., 214 Mo. 551, 113 SW 1099. Laws 1907, p. 263, c. 185, requiring all persons engaged in the selling of steamship or railroad tickets for transportation to foreign countries who also transport money to give bond, etc., held constitutional (Buffanti v. National Surety Co., 118 NYS 207) as valid police regulation (Musco v. United Surety Co., 132 App. Div. 300, 117 NYS 21), and not unconstitutional as denying equal protection because it exempts steamship companies and their agents and banks from its operation (Id.).

Contra: Held unconstitutional as denying equal protection of law, in that trans-

particular body seeking to exercise control must act within its constitutional powers,[66] and, generally speaking, the federal government can only act through its power to regulate interstate commerce.[67]

(§ 2) *B. Duty to undertake and provide carriage.*[68]—See 11 C. L. 500—The general common-law duty to accept and carry all goods tendered, unless of a prohibited character,[69] has been supplemented in many states by statutory enactments[70] and by rules and regulations of commissioners.[71] Under the North Carolina statute, a carrier refusing to accept[72] without a legal excuse[73] a shipment tendered[74] at a regular depot during business hours[75] is liable to a per diem penalty for each day

atlantic companies are exempt therefrom. Patti v. United Surety Co., 61 Misc. 445, 115 NYS 844; Benvega v. U. S. Surety Co., 115 NYS 199. Constitution should be so construed as to preserve and make effective sovereign power of state. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969.

66. Const. art. 16, § 30, declaring that the legislature is invested with full power to pass laws for the correction of abuses and to prevent discrimination, etc., held not a grant or limitation of power but an express recognition of power. State v. Florida East Coast R. Co. [Fla.] 49 S 43. Under Const. art. 9, § 18 (Bunn's Ed.), corporation commission has power to require establishment and maintenance of flag station. Atchison, etc., R. Co. v. State [Okl.] 101 P 262. Section 18, art. 9, of Constitution (Bunn's Ed. § 222), giving commission power to require "such public service facilities and conveniences as may be reasonable and just," means everything incident to the general, prompt, safe, and impartial performance of the duties of common carrier (Chicago, etc., R. Co. v. State [Okl.] 99 P 901), but does not require such facilities as will overcome natural disadvantages of location, etc. Id.

67. "Commodities clause" of interstate commerce act, making it unlawful for railroads to transport certain commodities if owned by them, held not a regulation of interstate commerce and unconstitutional as to companies that had acquired and developed coal mines at great expense prior to its enactment. United States v. Delaware & H. R. R. Co., 164 F 215.

68. Search Note: See notes in 3 C. L. 592; 18 L. R. A. 105, 393; 5 L. R. A. (N. S.) 783; 6 Id. 834; 7 Id. 1086; 11 Id. 973; 12 Id. 506; 15 Id. 108; 16 Id. 651.

See, also, 5 A. & E. Enc. L. (2ed.) 158.

69. In receiving prohibited goods, servants of carrier must exercise same kind of judgment as if doing business for themselves, and where they would so acquire knowledge carrier is charged therewith. Adams Exp. Co. v. Com., 33 Ky. L. R. 967, 112 SW 577.

70. Revisal 1905, § 2631, providing a penalty for refusal to accept freight for transportation, is not unconstitutional as applied to interstate shipments as an interference therewith. Reid v. Southern R. Co., 149 N. C. 423, 63 SE 112; Id. [N. C.] 64 SE 874; Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578. What will constitute "reasonable provision" within Code 1906, § 2364, for transportation of coal, held to depend upon facts and circumstances of the case (State v. White Oak R. Co., 65 W. Va. 15, 64 SE 630), and where it requires a side track and switch upon its right of way, installation thereof may be compelled by mandamus (Id.), which is not a taking of private property for private use without due process of law (Id.). Where carrier and shipper have agreed upon what is "reasonable provision," court will adopt same until a different showing is made. Id.

71. Where neither the declaration in suit to recover penalty for violation of rule 3 of commissioners in refusing to accept freight nor the order of commissioners attached thereto gives destination or states that it was within the state, it is demurrable. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 387.

72. Where shipper was permitted to load lumber on to car but carrier refused to accept car or to issue a bill of lading therefor, held a "refusal to receive" within Revisal 1905, § 2631. Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578.

73. Sufficient excuse: Where it is impossible because of conditions for which it is not responsible to carry tendered shipment. Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578. Motive power tied up by strike. Murphy Hardware Co. v. Southern R. Co., 150 N. C. 703, 64 SE 873.

Held insufficient: That consignee failed to unload cars consigned to him, such act created a congestion of traffic. Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578. Where there was a side track at destination, that it was not a regular station. Reid v. Southern R. Co., 149 N. C. 423, 63 SE 112. Fact that connecting line has placed embargo on shipments consigned to particular person does not justify carrier in refusing to accept for shipment goods consigned to such person (Wampum Cotton Mills v. Carolina & N. W. R. Co., 150 N. C. 608, 64 SE 588), even though a through bill of lading is demanded (Id.). That tendered goods were marked for "Scottsville," when real name of town on defendant's line was "Scottville," held not to excuse refusal to receive (Reid v. Southern R. Co., 150 N. C. 753, 64 SE 874), especially where defendant's new agent promptly ascertained destination and forwarded same (Id.).

74. While no particular language need be used, it must amount in common understanding to a tender and refusal. Wampum Cotton Mills v. Carolina & N. W. R. Co., 150 N. C. 608, 64 SE 586. Evidence held to show that, on being informed that it was too late for morning train, plaintiff took goods back with him without making general tender. Cox v. Atlantic Coast Line R. Co., 148 N. C. 459, 62 SE 556.

75. Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578.

it so refuses to accept[76] to the party aggrieved,[77] provided the tender is kept good.[78] Since, however, the carrier is entitled to two days at initial point within which to make the shipment, it may refuse a tender for immediate shipment.[79] It is no defense to a suit for the penalty that the shipper suffered no pecuniary loss.[80] A carrier merely having trackage rights over the road of another need not act as a carrier over such line.[81] Carriers may be compelled to furnish reasonable connecting service[82] and adequate train facilities,[83] and especially are they bound to discharge the duties imposed by their enabling act.[84]

*Duty to furnish cars.*See 11 C. L. 501—Carriers rest under a general common-law duty to furnish cars upon proper demand,[85] but many states have re-enforced the obligation by special statutes[86] enforcible in prescribed manner.[87] These statutes frequently prescribe the kind of cars to be furnished and the equipment thereof.[88]

76. Where shipper was permitted to load lumber on car and demanded a bill of lading therefor which was refused, but car was finally transported after repeated requests, held that there was a refusal to ship on each day from time of loading until final shipment. Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578.

77. "Party aggrieved" held not to include attorney who had attached goods in action against real owner (McRackan v. Atlantic Coast Line R. Co., 150 N. C. 331, 63 SE 1042), nor can such attorney maintain action for benefit of attaching creditor, since action must, under the statute, be prosecuted in the name of the real party in interest (Id.). Owner of freight is proper party to sue and not intended consignee. Reid v. Southern R. Co., 149 N. C. 423, 63 SE 112.

78. Wampum Cotton Mills v. Carolina & N. W. R. Co., 150 N. C. 608, 64 SE 586. Where goods which have been tendered and refused are left on platform, a mere inquiry as to when they would be shipped held to make question of tender for jury. Id.

79. On train being loaded at time of tender. Cox v. Atlantic Coast Line R. Co., 148 N. C. 459, 62 SE 556.

80. Reid v. Southern R. Co., 150 N. C. 753, 64 SE 874.

81. Where carrier who contracted for trackage over another road agreed not to do business at intermediate points, the railroad commissioners had no authority under Rev. St. 1895, art. 4580, subd. 2, as amended by Acts 1903, p. 183, c. 117, to compel said road to stop at intermediate points, especially where service appeared ample. State v. Trinity & B. V. R. Co. [Tex Civ. App.] 120 SW 1123.

82. Provision of interstate commerce act that requirement that all railroads shall provide reasonable facilities for interchange of traffic shall not require one carrier to give use of its track or terminal facilities to another is not a substantive enactment but a rule of interpretation. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328. Interstate commerce act requiring carriers in certain cases to construct connections with branch lines on application of shipper, and providing that if carrier fails to install such connections "on application therefor in writing by any shipper" complaint may be made to commission, etc., does not authorize complaint on refusal of application of branch line. Delaware, L. & W. R. Co. v. Interstate Commerce Commission, 166 F 498. Constitution of Kentucky, § 213, requiring a railway company to deliver its own cars to any point where there is a physical connection between its tracks and those of another company, is a taking of property without due process of law, as such law does not provide adequate regulations for the company's protection from loss or undue detention of cars or for securing due compensation for their use. Louisville & N. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 53 Law. Ed. —, rvg. 30 Ky. L. R. 18, 97 SW 778. Property of carrier is taken without due process of law by Const. of Ky. under which a carrier is compelled, upon payment simply for the service of carriage, to accept cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using the terminal station of the former. Id.

83. Where passenger service between Guthrie and Purcell was sufficient, but between Purcell and Marietta inadequate, order of commission requiring extra train between Guthrie and Marietta held unreasonable. Gulf, etc., R. Co. v. State [Okl.] 101 P 258. In action to compel carrier to furnish adequate train service, evidence that the relator or others feared if a mine was opened it would not have sufficient railroad service was not proper. People v. Illinois Cent. R. Co., 143 Ill. App. 337.

84. Act Cong. July 2nd, 1864, c. 217, 13 Stat. 365, authorizing Northern Pacific Railroad Company to construct and maintain a "continuous railroad," etc., between point on Lake Superior and some point on Pacific Sound, held complied with where there was one through daily train each way from terminus to terminus, which was sufficient to accommodate the public, although other trains did not run through. State v. Northern Pac. R. Co. [Wash.] 102 P 24.

85. See post, § 6. Where, by virtue of traffic arrangements with connecting lines, carrier holds itself out as a through carrier to points beyond its terminus, it owes duty of furnishing cars for such places. Pittsburgh, etc., R. Co. v. Wood [Ind. App.] 88 NE 709.

86. Act Ark. 1907, p. 453, imposing absolute duty to furnish cars, subject to no exception, is unconstitutional. St. Louis, etc., R. Co. v. Hampton, 162 F 693.

(§ 2) *C. Charges.*[89]—See 11 C. L. 501—Subject to constitutional restrictions,[90] such as the inhibition against taking property without due process of law,[91] denying equal protection of the laws,[92] etc., the states may establish reasonable rates[93] and prescribe penalties for any deviation therefrom.[94] Where the statute, under which a corporation carrier organizes, prescribes rates, it is bound thereby without regard to their reasonableness.[95] The reasonableness of a rate is ultimately a judicial question,[96] and, where a statute attempts to make the rate conclusive,[97] imposes

87. Laws 1907, p. 311, c. 90, will not in every instance afford adequate remedy to a shipper unlawfully refused sufficient cars by an appeal to the commission (State v. Chicago & N. W. R. Co. [Neb.] 120 NW 163), and district court has jurisdiction to compel carrier to furnish same by mandamus (Id.).

88. Gen. St. 1906, § 2864, relative to duty to equip flat cars with standards, etc., when furnished for shipment of lumber, applies only to cars belonging to carrier and not to cars of another carrier furnished by it. Florida R. Co. v. Adams [Fla.] 47 S 921.

89. **Search Note:** See notes in 15 L. R. A. (N. S.) 116; 11 A. S. R. 647; 2 Ann. Cas. 420; 3 Id. 1095; 7 Id. 961; 9 Id. 1082, 1130; 11 Id. 849.

See, also, Carriers, Cent. Dig. §§ 7-24, 67-85; Dec. Dig. §§ 12, 13, 26-32; 6 Cyc. 373, 492, 498, 500.

90. Courts are not concerned with wisdom of prescribing particular rate, and can interfere only when violative of some constitutional provision. Southern Ind. R. Co. v. Railroad Commission [Ind.] 87 NE 966.

91. Where notice of petition to commission was served on railroads and they appeared and opposed modification, and after order was made had opportunity to contest same in a court of law, held that order did not violate constitutional provision as to due process of law. Southern Ind. R. Co. v. Railroad Commission [Ind.] 87 NE 966. Order prescribing a rate which inflicts loss upon carrier or which exacts a higher charge of shipper than is reasonable under the circumstances is a taking of property without due process of law (Id.), and without just compensation (Id.).

92. Order prescribing rate between two points to be charged by designated carriers held not to deny equal protection of the law because not made applicable to all carriers. Southern Ind. R. Co. v. Railroad Commission [Ind.] 87 NE 966.

93. Southern Ind. R. Co. v. Railroad Commission [Ind.] 87 NE 966. Rate which barely returns actual cost of service is unjust and unreasonable. Texas & N. O. R. Co. v. Sabine Tram Co. [Tex. Civ. App.] 121 SW 256. Held that passage of the railroad commission act of 1907 (Sess. Laws 1907, p. 536, c. 226), empowering commission to fix rates, repealed maximum rate acts of 1893 and 1897, or at least made the repeal effective on the establishment of rates by the commission. State v. Railroad Commission [Wash.] 100 P 184. Under Kirby's Dig. § 6611, authorizing railroad companies to charge fixed amount "per mile," company may charge such fare for fraction of mile. Jonesboro, etc., R. Co. v. Brookfield [Ark.] 112 SW 977.

Held valid: Any irregularity in Pub. Acts 1877, p. 186, No. 177, amending Sess. Laws 1873, p. 504, No. 198, § 9, relating to maximum freight rates for carload lots, held cured by subsequent amendments. Robinson v. Harmon [Mich.] 15 Det. Leg. N. 711, 117 NW 661. Laws 1907, p. 73, c. 51, amending and re-enacting Rev. Codes 1905, § 4395, prescribing maximum rates, held valid. State v. Northern Pac. R. Co. [N. D.] 120 NW 869. Under Acts 1907, p. 458, joint rate for connecting carriers is not void for failure of commission to divide same between them. Southern Ind. R. Co. v. Railroad Commission [Ind.] 87 NE 966. Order of commission, reducing rate charged for picking up empties from other connecting carriers, and hauling them to a gravel quarry, held constitutional. Chicago, I. & L. R. Co. v. Railroad Commission [Ind.] 87 NE 1030. Official classification, rule 501, note, providing that carload rates shall apply to cars loaded with different packages only when consignor or consignee is the actual owner thereof, and rule 15e, declaring that shipping of packages by forwarding agents claiming to act as consignors will only be accepted when names of individual consignors and consignees, as well as the character and contents of package, are disclosed to forwarding railroad agent, etc., held reasonable and valid, and not violative of interstate commerce act, prohibiting discriminations, etc. Delaware, L. & W. R. Co. v. Interstate Commerce Commission, 166 F 499. Comp. Laws, § 6234, subd. 7, providing that in transportation of freight by car, loaded by shipper and unloaded by consignee, charge for transporting each car shall be so much, etc., held not invalid for uncertainty in that charge was for car and not the freight, or on ground that cars vary in capacity. Robinson v. Harmon [Mich.] 16 Det. Leg. N. 711, 117 NW 661.

Unreasonable: Where rate on lumber, one of the principal articles of transportation, is insufficient to pay cost of transportation thereof, such rate is unreasonable. Gulf, etc., R. Co. v. Railroad Commission [Tex.] 116 SW 795. Act Mo. Feb. 27, 1907 (Laws 1907, p. 170), establishing two-cent passenger rate, and Act March 19, 1907 (Laws 1907, p. 171), establishing maximum freight rates, held confiscatory on showing that roads could not earn exceeding 3 per cent net income on state business. St. Louis & S. F. R. Co. v. Hadley, 168 F 317.

94. Comp. Laws, § 6234, fixing maximum rates and making the corporation or its agents, which failed to comply therewith, liable to a penalty, held not to render a receiver of a road liable. Robinson v. Harmon [Mich.] 16 Det. Leg. N. 414, 122 NW 106.

95. Robinson v. Harmon [Mich.] 15 Det. Leg. N. 711, 117 NW 661.

96. All rates established are subject to judicial inquiry as to justness and reason-

onerous conditions upon an appeal to the courts,[98] or prescribes penalties so excessive as to prevent redress therein,[99] it is invalid. A carrier is entitled to a reasonable return upon its investment,[1] unless it is unreasonable in its expenditures.[2] In determining what are reasonable rates, all facts and circumstances having a legitimate bearing upon the matter may be considered.[3] Among the facts thus proper to be considered are the existence of a large surplus under existing rates,[4] the effect of the change upon the revenues of the company,[5] differences in the nature of commodities,[6] evidence of unlawful combinations,[7] the fact that the rates are the out-

ableness. Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645.

97. Law, making decision of legislature or commission conclusive as to sufficiency of rates, unconstitutional. Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714.

98. Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714.

99. Penalty provisions of Missouri two-cent passenger fare statute (Laws 1907, p. 170), imposing fine of not less than $100 nor more than $500 for each violation, and of freight rate statute (Laws 1907, p. 171), imposing fine of not more than $5,000 for its violation, held so excessive as to be unconstitutional as tending to prevent testing of legality of rates in court. St. Louis & S. F. R. Co. v. Hadley, 168 F 317. Pub. Acts 1907, p. 428, No. 312, § 16, prescribing penalty of a fine of not less than $50 or more than $500 for each violation, or imprisonment for not exceeding three months or both, held not unconstitutional as denying redress to courts. Michigan Cent. R. Co. v. Murphy [Mich.] 16 Det. Leg. N. 168, 120 NW 1073.

1. State v. Central Vermont R. Co., 81 Vt. 463, 71 A 194. Neither congress nor any inferior legislative or administrative board can establish such rates as will prevent earning a just and reasonable compensation. Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645. Railroad property, properly built and managed, is entitled to annual income of 6 per cent on its fair valuation. St. Louis & S. F. R. Co. v. Hadley, 168 F 317.

2. While regard must be had to cost of service to carrier, and value of property employed therein, reasonable regard must be had for value of service to public, and, where cost to carrier is not kept within reasonable limits, loss must fall upon carrier. Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645.

3. In determining validity of maximum rates established by legislature, consideration given to matter by legislature before passage of the act is immaterial. St. Louis & S. F. R. Co. v. Hadley, 168 F 317. No ground for holding maximum rate fixed by state statute invalid that it caused discharge of large number of employes. Id. Commission is justified in reducing rate only when, upon consideration of all facts and circumstances, it is of opinion that rate is unreasonable, unduly discriminatory, or otherwise in violation of act to regulate commerce. Paola Refining Co. v. Missouri, K. & T. R. Co., 15 I. C. C. 29. In determining what are reasonable rates between two points neither that railroad which can afford to handle traffic at the lowest rate nor that whose necessities might justify highest rate should be exclusively considered. Rates must be established with reference to whole situation. City of Spokane v. Northern Pac. R. Co., 15 I. C. C. 376. In general adjustment of rates individual instances of seeming discrepancy are noticed which are inexplainable from cursory examination, but often when such instances are made subject of specific complaint, circumstances and conditions before unknown are brought out tending to justify apparently unreasonable relation. Commission consequently moves with great caution in condemning rate or practice and does so only when facts before it amply warrant such action. City of Spokane v. Northern Pac. R. Co., 15 I. C. C. 376. General foundation upon which rests whole structure of eastbound and westbound rates in "percentage-basis" territory described and discussed. Saginaw Board of Trade v. Grand Trunk R. Co., 17 I. C. C. 128.

4. In determining what will be reasonable rates for future, commission may properly consider that under rates in effect large surplus has been accumulated in past, but it should not make rates for purpose of distributing that surplus to public. City of Spokane v. Northern Pac. R. Co., 15 I. C. C. 376. Upon examination of history of these properties, cost of reproducing them at present time, original cost of construction, present capitalization, and manner in which that capitalization has been made. Held that earnings of both Great Northern and Northern Pacific in recent years have been excessive. Id.

5. Only duty of commission is to establish reasonable rates from eastern points of origin to Spokane, and in so doing it can only act upon those rates specifically called to its attention, although it must have in mind effect upon revenues of these companies of resulting reductions upon other commodities and at other points than Spokane. City of Spokane v. Northern Pac. R. Co., 15 I. C. C. 376.

6. Differences in value of two commodities, in volume of the traffic, in conditions under which they move, and in risk and cost of handling them ordinarily result in substantial difference in rates under which they are carried; and therefore comparison of rates on cement with rates on potatoes is of little value in support of allegation that there is discrimination in rates in favor of cement as against potatoes, two commodities being wholly noncompetitive. Anthony v. Philadelphia & R. R. Co., 14 I. C. C. 581. Potatoes, being in fifth class, take 17-cent rate from one Pennsylvania rate group and 14-cent rate from adjoining

growth of actual conditions and gradual development,[8] the fact that the rate was the result of conference and understanding among carriers,[9] agreements between shipper and carrier,[10] and the amount shipped;[11] but other facts, such as the division of rates accepted by the carrier,[12] the value of the commodity,[13] comparative earnings per ton per mile,[14] increases in cost of labor, materials, and decrease in net earnings,[15] the existence of a lower rate on another line,[16] or the voluntary re-

New Jersey group, to certain New England points. Cement moves to same points under blanket commodity rate from all mills within radius of two groups. Held that complainant's contention that potatoes ought, for that reason, to enjoy one rate, viz., 14-cent rate, from all points within same radius is without merit, and complaint is therefore dismissed. Id.

7. While evidence of unlawful combinations is always admissible as part of history of rate of which complaint is made, and may often throw light upon question of its reasonableness, unlawful combination, standing by itself, without proof also of unreasonableness of rate, is not sufficient ground for order reducing rate. Mayor & Aldermen of Bristol v. Virginia & S. W. R. Co., 15 I. C. C. 453.

8. The complainant alleges exaction by defendants of unreasonable class rates from Indianapolis to Ohio River points and to Chicago, respectively, as compared with rates between Chicago and Ohio River. Mere fact that there is greater percentage disparity between rates on two classes from Indianapolis than on two other classes, or that disparity greater in one case than in another exists between corresponding classes from Indianapolis and Chicago, does not afford just or proper basis or reason for rearrangement of rates and disturbance of conditions, commercial and otherwise, throughout large territory when it is manifest that established system is outgrowth of actual conditions and result of gradual development. No showing has been made that present rates are unreasonable or unjust in and of themselves, or that they yield to carriers exorbitant earnings for transportation service. This prayer of petition is denied. Indianapolis Freight Bureau v. Cleveland, etc., R. Co., 15 I. C. C. 504.

9. Fact that advance was result of conference and understanding between carriers is entitled to be duly considered in connection with other circumstances and conditions bearing upon reasonableness of the rates under consideration, but this fact of itself does not of necessity establish unreasonableness of such rates. Chicago Lumber & Coal Co. v. Tioga S. W. R. Co., 16 I. C. C. 323.

10. Because delivering carrier sees fit to state that it will protect rate made by its competitor, but fails to do so, commission cannot hold that such lower rate is necessarily reasonable. It will take some other evidence in order to justify commission in holding existing rate unreasonable than mere statement two years ago of one of connecting carriers that it will protect rate made by one of its competitors. De Camp Bros. v. Southern R. Co., 16 I. C. C. 144. Agreement between carrier and shipper for issuance of a tariff may be regarded and used as evidence of admission as between parties executing it, of strong evidentiary value, that rate agreed upon is reasonable. Hood v. Delaware & Hudson Co., 17 I. C. C. 15.

11. While amount shipped by concern has little or no bearing on question of reasonableness of rates, it is of some significance where shipments reach substantial proportions. Acme Cement Plaster Co. v. Lake Shore & M. S. R. Co., 17 I. C. C. 30.

12. It is well settled that divisions accepted by carrier can not be taken as measure of reasonableness of its separately established rates. Acme Cement Plaster Co. v. Lake Shore & M. S. R. Co., 17 I. C. C. 30. While division of through rate long accepted by carrier may often be pertinent evidence, it is not sound final test of reasonableness of through rate itself. Bulte Milling Co. v. Chicago & A. R. Co., 15 I. C. C. 351.

13. Commission declines at present time to establish rating upon basis of value, but commends idea to consideration of carriers. Union Pac. Tea Co. v. Pennsylvania R. Co., 14 I. C. C. 545.

14. Rate per ton per mile is not generally accepted basis in this country for making up interstate rates. Bulte Milling Co. v. Chicago & A. R. Co., 15 I. C. C. 351. Chief reliance for relief in these cases is based upon comparisons per-ton-per-mile revenue derived by carriers from transportation of coal from Walsenburg district to various markets of consumption with revenue per ton per mile from other coal-producing fields; but rate-per-ton-per-mile rule excludes consideration of other circumstances and conditions which enter into making of rates, and cannot be accepted as controlling in determining reasonableness of rates. Cedar Hill Coal & Coke Co. v. Colorado & So. R. Co., 16 I. C. C. 387. Commission is not convinced that present proportional rates published from Indianapolis to Ohio River crossings for application on through traffic to southeastern territory are unreasonable. It is evident that proportional rates from more distant points must be less per mile to permit such points to compete in common market, and commission does not feel warranted in condemning system of rate making whereby wholesome competition between producing centers is preserved when no showing is made that rates complained of are unreasonable or do in fact result in unjust discrimination, or that more advantageous geographical location of one point has been disregarded and vitiated by abnormal adjustment. Indianapolis Freight Bureau v. Cleveland, etc., R. Co., 15 I. C. C. 504.

15. Increase in cost of labor, and in price of railway materials and supplies, does not necessarily imply decrease in net earnings of carrier or preclude possibility even of

duction of a rate,[17] and methods of issuing stocks and certificates in past or whether for value, are not entitled to consideration or weight and are not conclusive of the unreasonableness of a rate.[18] Besides these general matters of fact which may be considered, there are, however, certain general rules which may often be alone determinative of the question. Thus through rates will seldom[19] be permitted to exceed the sum of the locals,[20] and, where a rate has been long established and capital

increase in its net earnings, due to increase in volume of its traffic or to decrease in ratio of its operating expenses to its operating revenues; nor is increase in cost of labor and materials, accompanied by decrease in net revenues of carrier, necessarily inconsistent with possibility that its net earnings may still suffice to afford it fair return on investment without increase in its rate schedules. Shippers' & Receivers' Bureau v. New York, O. & W. R. Co., 15 I. C. C. 264.

16. Commission cannot lend sanction to idea that lower rate in effect via one line than via another line is conclusive evidence of unreasonableness of higher rate. Menefee Lumber Co. v. Texas & R. R. Co., 15 I. C. C. 49. Charge of 14 cents per 100 pounds for carload of corn from Celina, Ohio, to Johnstown, Pa., held not unreasonable merely because lower rate is in effect between same points via other routes. Palmer v. Lake Erie & W. R. Co., 15 I. C. C. 107.

Rate of 32.5 cents per 100 pounds for yellow pine from Lake Charles, La., to El Paso, Tex., distance of 1,067 miles over two lines, cannot be found unreasonable because single line has published rate on such commodity between same points of 25 cents per 100 pounds, carrying it distance of 972 miles, even though defendants subsequently for competitive reasons reduced their rate to 25 cents per 100 pounds. Reparation denied and complaint dismissed. Menefee Lumber Co. v. Texas & P. R. Co., 15 I. C. C. 49. Carrier with long route is not obliged as matter of law to meet rate of short-line competitor, neither is carrier via long route obliged as matter of law to reduce its rate because its short-line competitor reduces rate which has been same via both routes. Commercial Coal Co. v. Baltimore & O. R. Co., 15 I. C. C. 11.

17. Voluntary reduction of rate does not carry with it conclusive presumption that prior rate was unreasonable. Commercial Coal Co. v. Baltimore & O. R. Co., 15 I. C. C. 11.

18. Certificates issued against ore lands formerly owned by Great Northern Railway Company can not be properly considered in determining what are reasonable earnings for that company at present day. City of Spokane v. Northern Pacific R. Co., 15 I. C. C. 376. Great Northern Railway Company has in past distributed its stock issues among its stockholders at par from time to time, although market value of stock was often much above par. Without expressing any opinion upon legality or propriety of this practice, it is held that this fact, at this time, can have no bearing upon earnings to which that company is entitled. Id. Neither can capital stock of Great Northern Railway Company be reduced for purpose of determining what its fair earnings should be by amount of that stock which was originally issued without money consideration. Id.

19. Unreasonableness of through rate upon interstate shipment via given route cannot be determined, in absence of other evidence, by mere comparison therewith of lower aggregate of rates consisting of local intrastate rate plus independent interstate rate based upon junction through which carriers have no joint route and no basis of division. Marble Falls Insulator Pin Co. v. Houston & T. Cent. R. Co., 15 I. C. C. 167. Through rate of 32 cents per 100 pounds upon lumber, in carloads, from Warsaw, N. C., to Chappaqua, N. Y., held not unreasonable, because it exceeded combination of local charges to and from New York, where it appeared that for reasons stated complainant could not have taken advantage of combination of local charges, except at expense as great or greater than through rate. Harlow Lumber Co. v. Atlantic Coast Line R. Co., 15 I. C. C. 501.

20. It is almost invariable rule of this commission that through charge must not exceed combination of locals. Kurtz v. Pennsylvania Co., 16 I. C. C. 410. Commission again insists on principle that in absence of justifying explanation through rate in excess of sum of locals is unreasonable rate. Lindsay Bros. v. Baltimore, etc., R. Co., 15 I. C. C. 6; Michigan Buggy Co. v. Grand Rapids & I. R. Co., 15 I. C. C. 297; United States v. Adams Exp. Co., 16 I. C. C. 394.

Through rate held unreasonable: Rate of 33½ cents per 100 pounds upon oil meal in carloads from Minneapolis, Minn., to Milo, Mo., while combination of local rates based upon Kansas City amounted to only 18 cents. Stock Yards Cotton & Linseed Meal Co. v. Chicago, etc., R. Co., 16 I. C. C. 366. Rate applicable to grape baskets from Traverse City, Mich., to Montrose, Iowa, to extent that it exceeds combination of locals. Wells-Higman Co. v. Grand Rapids & I. R. Co., 16 I. C. C. 339. Rates for manure spreaders in carloads from De Kalb, Ill., to Olivia and Hutchinson, Minn. Smith Mfg. Co. v. Chicago, M. & G. R. Co., 16 I. C. C. 447. Shipment of machinery from Allegheny, Pa., to Victoria Mines, Ontario, Canada. Carlin's Sons Co. v. Baltimore & O. R. Co., 16 I. C. C. 477. Rate for gasoline in carloads from Reno, Pa., to Milton Junction, Wis. Empire Oil Works v. Chicago, etc., R. Co., 16 I. C. C. 401. Shipment of building paper from St. Joseph, Mich., to Wausau, Wis., because sixth class rate, higher than combination of local rates, was charged after such class rate had been canceled. Barrett Mfg. Co. v. Graham & Morton Transp. Co., 16 I. C. C. 399. Rate on buckwheat from Cattaraugus, N. Y., to Janesville, Wis. Blodgett Milling Co. v.

has been invested and industries established in reliance thereon, the rate will not be discontinued without taking into account the effect upon commercial and industrial conditions,[21] though this does not require the indefinite continuance of the rate unless it is just and reasonable under all the circumstances.[22] It is not necessary, however, that the rate on each particular commodity should allow a profit from

Chicago, etc., R. Co., 16 I. C. C. 384. Rate of 74 cents per 100 pounds on shipment of oilwell supplies and pipe from Fishers, Ind., to Bartlesville, Okl., should not have exceeded 58½ cents per 100 pounds. Gilchrist v. Lake Erie & W. R. Co., 16 I. C. C. 318. Express rates from New York City to Boise and other points in southern Idaho held in almost every instance to violate general principle that through rate shall not exceed lowest combination of locals between same points. Boise Commercial Club v. Adams Exp. Co., 17 I. C. C. 115. Rate on bran from Salina, Kan., to Hugo, Okl. Lee-Warren Milling Co. v. Chicago, etc., R. Co., 16 I. C. C. 422. Rate of 23½ cents for carloads of stack chimney brick from Brazil, Ind., to Minnesota Transfer, Minn. Alphons Custodis Chimney Const. Co. v. Vandalia R. Co., 16 I. C. C. 600. Rates for transportation of boilers (under 10 feet in length) and parts from Kalamazoo, Mich., to Blue Mounds and Mount Horeb, Wis. Lindsay Bros. v. Grand Rapids & I. R. Co., 16 I. C. C. 441. With respect to shipment of machinery from Hopkins, Minn., to Abbyville, Kan. Minneapolis Threshing Mach. Co. v. Chicago, etc., R. Co., 14 I. C. C. 536. Shipment of grain products from Kansas City, Mo., to Howard, Wis. Wilson v. Chicago, etc., R. Co., 14 I. C. C. 549. Oranges from different Florida points to Pottsville, Pa., where rates applicable to this traffic exceeded combination of locals upon Reading, Pa., by 5 cents per box. Since shipments in question defendants have increased rate from points of origin to Reading by 8.8 cents per box, thus making combination of locals 3.2 cents greater than through rate. Held that through joint rates at time of shipments were unjust and unreasonable to extent that they exceeded combination of locals upon Reading, Pa. Sylvester v. Pennsylvania R. Co., 14 I. C. C. 573. Carloads of hay shipped by complainant from Portland, Or., to Auburn, Wash., over defendant's line at rate of 14 cents per 100 pounds in accordance with its duly published tariffs while combination of locals upon Tacoma or Seattle is 13 cents per 100 pounds. Hardenberg v. Northern Pac. R. Co., 14 I. C. C. 579. Carload of corrugated iron from Newport, Ky., to Globe, Ariz., where rate applicable exceeded combination of locals by 40 cents per 100 pounds. Momsen & Co. v. Gila Valley, G. & N. R. Co., 14 I. C. C. 614. Rate charged by defendants on complainant's shipment of emigrant outfit from Fletcher, Okl., to Bovina, Tex., of 68 cents per 100 pounds to extent that it exceeds 41 cents per 100 pounds. Porter v. St. Louis & S. F. R. Co., 15 I. C. C. 1. L. C. L. shipments of boilers from Kalamazoo, Mich., to New Glarus, South Wayne, Monticello, and Monroe, Wis., over defendants' lines. Lindsay v. Michigan Cent. R. Co., 15 I. C. C. 40. Separate L. C. L. shipments of engines and boilers from Kalamazoo, Mich., over defendants' lines, via Chicago, one going to Woodford and the other to Argyle, Wis. Lindsay v. Grand Rapids & I. R. Co., 15 I. C. C. 182. Rates of $1.49 per 100 pounds, applied by defendants on shipments of steel tanks, L. C. L., from Goshen, Ind., to Sullivan and Sheboygan, Wis. Lindsay v. Lake Shore & M. So. R. Co., 15 I. C. C. 284. As defendant carriers have right to increase their separate local rates, order that joint through rate may not, for stated period, exceed sum of local rates could, by such increase in local rates, be made ineffective. Specific rate prescribed. Michigan Buggy Co. v. Grand Rapids & I. R. Co., 15 I. C. C. 297. Rates from north to Monroe cannot reasonably exceed in any instance combination on Vicksburg or New Orleans, whichever may make lower. Monroe Progressive League v. St. Louis, etc., R. Co., 15 I. C. C. 534. Rate of 29 cents per 100 pounds on shipment of vehicles from Lawrenceburg, Ind., to Milwaukee, Wis., should not have exceeded 25½ cents per 100 pounds. Lindsay v. Baltimore, etc., R. Co., 15 I. C. C. 6.

21. Green Bay Business Men's Ass'n v. Baltimore & O. R. Co., 15 I. C. C. 59.

22. Green Bay Business Men's Ass'n v. Baltimore & O. R. Co., 15 I. C. C. 59. There is no such thing as contract between railway and shipper that certain rate shall be charged, for railway rate is matter of public concern, which cannot ordinarily be made subject of private contract, but in determining what is just and reasonable thing to be done this commission must consider effect upon all parties. Blue Valley Creamery Co. v. Michigan Cent. R. Co., 15 I. C. C. 109. When it is remembered that value of ice when taken up for transportation is almost nothing, and that cars readily load to their physical capacity, on average more than 27 tons, it will be seen that to few if any kinds of business should lower rates be applied by defendants; and this is especially true in view of fact that business of complainants has been built up under much lower rates, voluntarily established and long maintained by defendants, and that investment so induced must be largely destroyed if present rates are maintained. All that, however, would be no reason for requiring defendants to perform this service for sum which would not fairly compensate them. Cost of service, rate per ton per mile, and other factors in making present rates, considered and discussed, but when taken into account they still leave present rates excessive. Mountain Ice Co. & Trout Lake Ice Co. v. Erie R. Co., 15 I. C. C. 305; Mountain Ice Co. v. Delaware, L. & W. R. Co., 15 I. C. C. 305.

23. In determining whether rates are reasonable, the test is not whether returns from particular commodity is sufficient to allow a reasonable profit, but whether total returns from entire intrastate commerce after deducting reasonable costs for trans-

its handling, although separate and distinct charges must be separately considered,[24] as must interstate and intrastate business as respecting the rates on either.[25] Where expensive branches are built primarily as feeders for interstate business, the carrier is not entitled to such rate on intrastate business as will allow full return for such investment.[26] The fact that a rate is unreasonable and confiscatory as to one carrier does not invalidate it as to others.[27] The power to establish rates is usually lodged in the legislature,[28] although it may be invested in appropriate, inferior bodies,[29] especially nonlegislative powers.[30] In many states, the commissioners, etc., are only empowered to prescribe or alter rates upon proper complaint.[31] In all cases, however, a duly established and published rate is the legal rate,[32] is presumed to be reasonable,[33] and must be conformed to; but such publication cannot render a rate immune from attack as unreasonable and excessive.[34]

porting same, yields a fair profit upon investment. State v. Northern Pac. R. Co. [N. D.] 120 NW 869. In attacking single rate, carrier need not show that carrier cannot under the schedule prescribed earn a fair return on its investment. Gulf, etc., R. Co. v. Railroad Commission [Tex.] 113 SW 741.

24. Where separate terminal charge of $2 for transportation to stockyards is reasonable in itself, commission cannot reduce it on ground that it renders rate from point of shipment to stockyards excessive. Stickney v. Interstate Commerce Com., 164 F 638.

25. St. Louis & S. F. R. Co. v. Hadley, 168 F 317. In determining reasonableness of intrastate rates, as applied to railroads doing intrastate and interstate business, difference in cost in handling each kind of business as related to earnings from each should be taken into account. In re Arkansas R. Rates, 163 F 141; St. Louis & S. F. R. Co. v. Hadley, 168 F 317.

26. In re Arkansas R. Rates, 168 F 720.

27. St. Louis & S. F. R. Co. v. Hadley, 168 F 317.

28. Under Const. § 142, legislature held to have power to prescribe a reasonable maximum rate. State v. Northern Pac. R. Co. [N. D.] 120 NW 869.

29. See topic Commerce. Const. art. 12, § 18, providing that legislature shall pass laws fixing reasonable maximum rates, is merely declaratory of the common-law power to fix rates, and does not prevent a delegation of the power to a commission. State v. Railroad Com. [Wash.] 100 P 184.

30. Power conferred on public service commission to prescribe rates is not legislative rather than judicial merely because it prescribes rule for future conduct. People v. Willcox, 194 N. Y. 383, 87 NE 517.

31. Railroad commission held without power to change rates on commodities where no complaint has been made in respect thereto, and no hearing has been had thereon. State v. Railroad Com. [Wash.] 100 P 987. Kentucky railroad commission is not given, by Act of March 10, 1900, power to make a general schedule of maximum rates for transportation of all commodities, upon all railroads, to and from all points within state, upon a general complaint that all rates are too high, or upon like information of the commission itself, as the power of such commission is limited to some specific complaint or information in regard to each rate to be investigated. Siler v. Louisville & N. R. Co., 213 U. S. 175, 53 Law. Ed. ——. Held also that it had no authority after a general complaint was filed to investigate and issue a specific order reducing the rate on a specific commodity as such order was, under the proceedings, a general order made by the commission in the exercise of an assumed power. Siler v. Louisville & N. R. Co., 213 U. S. 195, 53 Law. Ed. ——.

32. Arkansas Fuel Co. v. Chicago, etc., R. Co., 16 I. C. C. 95.

33. Rates established by state authority are presumed to be reasonable, but the same presumption also attaches to rates voluntarily established by carriers, and in proceedings before this commission no greater sanctity can be presumed in respect of rates established by a state railroad commission than of those voluntarily established by carriers. Paola Refining Co. v. Missouri, K. & T. R. Co., 15 I. C. C. 29. Attacking party has burden of showing contrary (State v. Northern Pac. R. Co. [N. D.] 120 NW 869; Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714), by clear and convincing evidence (Railroad Com. v. Galveston Chamber of Commerce [Tex. Civ. App.] 115 SW 94). In action to contest reasonableness of rates, under Rev. St. 1895, arts. 4565, 4566, one attacking rates must show their unreasonableness by clear and conclusive proof (Gulf, etc., R. Co. v. Railroad Com. [Tex.] 116 SW 795), and, on demurrer to petition, court must assume that allegations thereof are established by such proof (Id.).

34. Arkansas Fuel Co. v. Chicago, etc., R. Co., 16 I. C. C. 95. In dealing with shippers carrier is required to conform freight charges actually collected to amount fixed in its published tariffs, and in that sense published rate in effect at time of movement is legal rate; but law declares that every charge for services rendered by carrier in transportation of passengers or property shall be reasonable and just, and if carrier promulgates rate in violation of this injunction it is not lawful rate when its reasonableness is subsequently questioned upon complaint filed. While published rate is legal rate, mere publication cannot make rate lawful that is unreasonable and excessive. No rate can be lawful, in sense of being immune from attack, either with respect to past or future ship-

The Interstate Commerce Commission. See 11 C. L. 504—Under the act to regulate commerce as amended, the Interstate Commerce Commission is given very complete and comprehensive powers to fix, determine the reasonableness, and order reparation for unreasonable rates,[35] allowances,[36] storage,[37] track,[38] demurrage,[39]

ments, if it be excessive and unreasonable in amount. Id.

35. It is duty of commission to establish just and reasonable rates available for all shippers alike without discrimination in favor of any shipper by reason of agreement with carrier. Hood v. Delaware & Hudson Co., 17 I. C. C. 15. Reparation will be awarded in accordance with findings upon proper proof of shipments. Id. Commission, in passing upon reasonableness or unreasonableness of rate, acts as administrative body having quasi judicial functions; when it determines what rate should have been and shall be in future, it exercises certain legislative functions; when it computes damages or reparation due shipper by reason of enforcement and collection of rate unreasonable to extent that it exceeds rate which is declared to be reasonable, there is mere mathematical determination of damages shipper should receive. Reparation or damages, therefore, in all matters which concern rates, are reduced, after commission has determined what reasonable rate should have been, to simplicity of mathematical calculation; elements of conjecture, speculation, and inference are entirely eliminated. In matters of discrimination, however, of undue preference, prejudice, or disadvantage, different field is entered, where services of jury may be necessary, not only by reason of seventh amendment to constitution, but by very nature of subject-matter itself. It may be proper, and commission has so considered in many instances to award money damages in cases of kind just described, and such awards have been complied with by carriers, but proofs to support such awards should be very clear and exact; they should be free from surmise and conjecture. Washer Grain Co. v. Missouri Pac. R. Co., 15 I. C. C. 147. Defendants issue certificates for actual weight of grain shipments going into their elevators at Baltimore, and on that weight assess their transportation and elevator charges; but each certificate shows on its face "scaleage deduction" that will be made, on basis of published tariff estimates, when grain is delivered out of elevator to certificate holder. Upon complaint that these deductions are arbitrary and constitute illegal appropriation of property and moneys of complainant's members and others who ship grain to Baltimore, held that defendants by this practice are not exacting from grain shippers either rate in form of grain or addition to rate, and therefore question presented is not one of rates. Baltimore Chamber of Commerce v. Pennsylvania R. Co., 15 I. C. C. 341. Neither is practice one affecting rates, as tariff rules are simply notice that while shipment weighed so much when taken into elevator, grain will weigh so much less when it goes out, because of weight of dirt, dust, chaff, and moisture, which, in process of elevation, will disappear and cannot therefore be delivered to holder of elevator certificate when grain is ordered out. So long as deductions are based on reasonable estimates of weight of foreign matter that is unavoidably eliminated and lost in process of elevation, practice is not one that affects rates or has any real relation to rates. Id.

Rate held reasonable: Local rates between Louisville, Ky., and New Albany, Ind., here complained of. Railroad Commission of Indiana v. Kentucky & Indiana Bridge & R. Co., 14 I. C. C. 563. Rates from eastern territory to Green Bay, Wis., may properly be higher than Chicago scale. Basis now in effect, which is about 107 per cent of Chicago, not found unlawful. Green Bay Business Men's Ass'n v. Baltimore & O. R. Co., 15 I. C. C. 59. Direct route from wheat fields on line of Frisco in Oklahoma to points on Cotton Belt in Texas is through their junction at Sherman. Complainant's flour mill at Celina is 28 miles south of Sherman; haul of its wheat to Celina and of its flour back to Sherman therefore involves extra service of 56 miles in order to get benefit of through milling-in-transit rate applicable via Sherman. Held that defendants cannot be required to perform this back haul free of charge and that its present tariff rates for **back hauls and out-of-line service** are not unreasonable. Celina Mill & Elevator Co. v. St. Louis S. W. R. Co., 15 I. C. C. 138. **Class and commodity rates to Santa Rosa, N. M.,** over defendant railways, from Chicago, Kansas City, St. Louis, and Memphis, in and of themselves and when compared with through rates from same points of origin to El Paso, Tex. Moise Bros. Co. v. Chicago, etc., R. Co., 16 I. C. C. 550. Complaint alleges that **class proportional rates to Ohio River crossings,** generally applicable on traffic destined to southeastern territory on specific articles mentioned, are eliminated by publication of higher commodity proportional rates, and asks that these latter be canceled in order that lower class proportionals may apply. Held that under circumstances of this case order prayed for is not warranted. Indianapolis Freight Bureau v. Cleveland, etc., R. Co., 15 I. C. C. 367. Percentage of Chicago rates, adopted by defendants as basis for fixing **rates from Atlantic coast territory to Saginaw, Flint, and other points** in Saginaw Valley, is not found, under circumstances of case, to be too high, when compared with percentages that fix rates enjoyed by other groups in adjacent territory. Saginaw Board of Trade v. Grand Trunk R. Co., 17 I. C. C. 128. In case of commodities except 5, present rate from Chicago to Seattle is established as reasonable **local rate from St. Paul to Spokane.** Upon 5 articles somewhat higher rates are fixed. Rates on all these commodities from Chicago to Spokane are made 16 2-3 per cent above those from St. Paul. Neither class nor commodity rates are named from points east of Chicago. City of Spokane v. Northern Pac. R. Co., 15 I. C. C. 376. Rates on

oranges from Florida base points to territory north of Ohio River ought not to be higher on average than from California; but establishment of **blanket rate** applicable to that territory is not justified. Florida Fruit & Vegetable Shippers' Protective Ass'n v. Atlantic C. L. R. Co., 14 I. C. C. 476. **Express charges on small packages** shipped from St. Paul, Minn., to Courtenay, N. D., held governed by Kindel v. Adams Exp. Co., 13 I. C. C. 475, in which it was held that rates on small packages were made in competition with United States mail rates. City of Spokane v. Northern Pac. R. Co., 15 I. C. C. 376. Rates on small packages shipped from New York, N. Y., to Courtenay, N. D. Sanford v. Western Exp. Co., 16 I. C. C. 32. Rate of 37½ cents per 100 pounds for **agricultural implements** in carloads, from Minneapolis, Minn., to New York, N. Y., when for export. Minneapolis Threshing Mach. Co. v. Chicago, etc., R. Co., 16 I. C. C. 193. Rate of 92 cents per 100 pounds for **uncrated automobile** from Beatrice, Neb., to Kenosha, Wis. Whitcomb v. Chicago & N. W. R. Co., 15 I. C. C. 27. Rates for transportation of **burlap bags** from New York to Chicago and other points in Central Freight Association territory. Neither can commission, under peculiar circumstances of case, take action condemning relation between rates upon such burlap bags and upon burlaps. Percy Kent Co. v. New York Cent. & H. R. R. Co., 15 I. C. C. 439.

Coal rates from Pittsburg, Kan., and certain Colorado points, to various points in Oklahoma. State of Oklahoma v. Atchison, etc., R. Co., 14 I. C. C. 516. Rate of $1.90 per net ton for bituminous coal from Grafton, W. Va., via Willow Creek, Ind., to Kalamazoo, Mich., 640 miles, though defendants subsequently for competitive reasons reduced rate to $1.85 per ton, as carriers may voluntarily make rates lower than they may lawfully be required to make. Commercial Coal Co. v. Baltimore & O. R. Co., 15 I. C. C. 11. Compared to soft coal mined in west, **smithing coal** is different commodity with different characteristics and of different value. Whether it may move under special smithing coal rate is not here determined, but there are no grounds shown for disturbing rates on smithing coal from Chicago, Ill., to Portales, N. M Sligo Iron Stove Co. v. Atchison, etc., R. Co., 17 I. C. C. 139. Rate of 39 cents per 100 pounds on **sea-island cotton** from Alachua to Savannah when shipped over the Searboard Air Line. Burr v. Seaboard A. L. R. Co., 16 I. C. C. 1.

Fruit: All-rail rates on oranges and pineapples from shipping points in Florida to Florida base points. Florida Fruit & Vegetable Shippers' Protective Ass'n v. Atlantic Coast Line R. Co., 14 I. C. C. 476. Rail and water rates on these commodities between such points not found unreasonable, and commission declines to establish carload rates by rail and water. Id. Rate of 82 cents per 100 pounds for transportation of bananas in carloads from New Orleans, La., to El Paso, Tex. Crombie & Co. v. Texas & Pac. R. Co., 15 I. C. C. 185. Rates on bananas in carloads from New Orleans and Mobile to Burlington, Cedar Rapids, Davenport, Ottumwa, Des Moines, Fort Dodge, and Waterloo, Iowa. Lagomarcino-Grupe Co. v. Illinois Cent. R. Co., 16 I. C. C. 151. Rates for apples via defendants' lines from Ozark fruit region in Arkansas and Missouri to St. Louis and Kansas City, Mo., and to points in Tennessee, South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana. Ozark Fruit Growers Ass'n v. St. Louis & S. F. R. Co., 16 I. C. C. 134. Defendants' rates for transportation of strawberries and peaches from points in Ozark fruit region to points to east, north, and west. Ozark Fruit Growers Ass'n v. St. Louis & S. F. R. Co., 16 I. C. C. 106. Rates on **grain and grain products** from points in Kansas to various points in Oklahoma. Southern Kansas Millers Commercial Club v. Atchison, etc., R. Co., 15 I. C. C. 607. Rates on grain and grain products from points in Kansas to Memphis, Tenn., and Little Rock, Ark. Southern Kansas Millers Commercial Club v. Chicago, etc., R. Co., 15 I. C. C. 605. Rates on wheat from points in Oklahoma to Kansas City, Mo. Southern Kansas Millers Commercial Club v. Atchison, etc., R. Co., 15 I. C. C. 604. Charge of one and one-half times first class rates for rapid roller **letter copiers** in Western Classification territory. Yawman & Erbe Mfg. Co. v. Atchison, etc., R. Co., 15 I. C. C. 260. Complainants manufacture yellow-pine **lumber** in Arkansas and northern Louisiana and ship it over defendants' lines to markets in Central Freight Association territory. By simultaneous action defendants established rates of 16 cents per 100 pounds to Cairo from entire producing territory, resulting in advance of 2 cents per 100 pounds on lumber originating in complainants' territory, but in other portions of producing territory rates remained stationary and there were material reductions in some quarters. Complainants attacked advance as unreasonable and discriminatory. Held that rates were not unreasonable per se and, under all circumstances appearing, there is no reason for interfering with present adjustment. Chicago Lumber & Coal Co. v. Tioga S. E. R. Co., 16 I. C. C. 323. Carload rates on **manufactured products of gypsum rock** from Grand Rapids, Mich., to all points in Official and Southern Classification territory, state of Wisconsin, and that part of Illinois which is in Western Classification territory. Acme Cement Plaster Co. v. Lake Shore & M. S. R. Co., 17 I. C. C. 30. Defendants' rate on **paper stock** from Chicago, Ill., to South Bend, Ind., as compared with their rate on manufactured paper between same points. La Salle Paper Co. v. Michigan Cent. R. Co., 16 I. C. C. 149. Rate for **pig iron** in carloads from Sheffield, Ala., to Hutchinson, Kan., effective August 2, 1906. De Camp Bros. v. Southern R. Co., 16 I. C. C. 144.

Vegetables: Rate of 50 cents per 100 pounds for express shipments of celery from Hartville to Pittsburg. Hartville Celery Growers' Ass'n v. Pacific Exp. Co., 14 I. C. C. 590. Present any quantity all-rail rates upon vegetables except to Boston Vegetable rates from Florida to points north of the Ohio River. Florida Fruit & Vegetable Shippers' Protective Ass'n v Atlantic Coast Line R. Co., 14 I. C. C. 476. Defendants' present rate of 48 cents on lettuce in half barrel packages from St.

Andrews, S. C., to New York, N. Y. Voorhees v. Atlantic Coast Line R. Co., 16 I. C. C. 45. Rates on **walnut veneer** from Kansas City to Chicago and Chicago points at time of filing complaint were 65 cents in any quantity, but shortly before hearing they were reduced to 27 cents, C. L., and 45 cents, L. C. L. Upon complaint that present rates are still excessive, held that, considering value of article and manner in which it is manufactured, present rates ought not to be pronounced excessive. Reparation will be awarded upon basis of rates here established in further proceedings, if necessary. Penrod Walnut & Veneer Co. v. Chicago, B. & Q. R. Co., 15 I. C. C. 326.

Rate held unreasonable, rate established, and reparation ordered. Nollenberger v. Missouri Pac. R. Co., 15 I. C. C. 595; Interstate Iron & Steel Co. v. Chicago, etc., R. Co., 15 I. C. C. 277. Class rate. Reasonable commodity rate voluntarily established by carriers. Monarch Milling Co. v. Chicago, etc., R. Co., 17 I. C. C. 1. Reparation awarded in case No. 1,628 for $2,509.74 and interest. Nye-Schneider-Fowler Grain Co. v. Union Pac. R. Co., 15 I. C. C. 90. Reparation awarded in case No. 1,775 for $1,560.79 and interest. Id. Reparation awarded in case No. 1,642 for $698.29 and interest. Id. Reparation awarded in case No. 1,655 for $6,742.10 and interest. Id. Reparation awarded in case No. 1,644 for $1,013.71 and interest. Id. Commission declines to put in **carload rates on boots and shoes** between Boston and Des Moines, because those articles generally move in less than carload quantities and there is no evidence in record warranting introduction of new unit of transportation as to those commodities. Bentley & Olmsted Co. v. Lake Shore & M. S. R. Co., 17 I. C. C. 56. **Base rates applying between Phoenix, Mesa, and Tempe, Ariz.,** and specified points in California, Arizona, New Mexico, Colorado, and Kansas. Maricopa County Commercial Club v. Wells Fargo & Co., 16 I. C. C. 182. **Proportional rates on through traffic to Des Moines, Iowa,** ordered reduced. Greater Des Moines Committee v. Chicago, etc., R. Co., 17 I. C. C. 54. **Class rates** from Chicago and from St. Louis to Denver. Kindel v. New York, etc., R. Co., 15 I. C. C. 555. Class rates from Missouri River to Denver and from Denver to Utah common points. Id. First class rate from Chicago to Des Moines. Greater Des Moines Committee v. Chicago, etc., R. Co., 17 I. C. C. 57. Class rates from St. Paul and Chicago to Spokane and commodity rates upon 34 enumerated articles. Class rates are established from St. Paul to Spokane which are 16 2-3 per cent less than those now in effect, and class rates from Chicago to Spokane are made higher than those from St. Paul by certain named arbitraries. City of Spokane v. Northern Pac. R. Co., 15 I. C. C. 376. **Local class rates from St. Paul, Minn., to Missouri River,** plus its local class rates from Missouri River to Lemmon, S. D., and Hettinger, N. D., on through shipments from St. Paul to Lemmon and Hettinger, should not have exceeded through rates subsequently established. Allen & Co. v. Chicago, etc., R. Co., 16 I. C. C. 293. Rate of 19.3 cents per 100 pounds for **beer in carloads** from La Crosse, Wis., to Glencoe, Minn., to extent that it exceeded defendant's rate of 15 cents per 100 pounds, applied under substantially similar circumstances and conditions, on movements of same commodity from La Crosse to Granite Falls, Minn., point beyond. Heileman Brew. Co. v. Chicago, etc., R. Co., 16 I. C. C. 396. Pressed **brick** in carloads from Collinsville, Ill., to Galveston, Tex. Hydraulic Press Brick Co. v. Vandalia R. Co., 15 I. C. C. 175. Reparation awarded on certain shipments of stack chimney brick from North Birmingham, Ala., to Washington, D. C. Alphons Custodis Chimney Const. Co. v. Southern R. Co., 16 I. C. C. 584. Rate of 5 cents per 100 pounds for fire brick from Joliet, Ill., to Milwaukee, Wis., was excessive and ought not to exceed present rate of 4 cents. American Refractories Co. v. Elgin, J. & E. R. Co., 15 I. C. C. 480. Class rate of 11 cents per 100 pounds applied to complainant's shipments of clay conduit from Brazil, Ind., to Racine, Wis., and rate ought not to have exceeded rate then in effect to Milwaukee. Milwaukee Elec. R. & L. Co. v. Chicago, etc., R. Co., 15 I. C. C. 468. Class B rate of 20 cents per 100 pounds on carload shipment of **clam shells** from Mendota, Minn., to La Crosse, Wis., and rate of 8 cents per 100 pounds for such transportation would have been reasonable and lawful rate. Wisconsin Pearl Button Co. v. Chicago, etc., R. Co., 16 I. C. C. 80. Present rate of 40 cents per ton from mines of complainants to Trinidad, when **coal** is for points upon Santa Fe, should not for future exceed 25 cents. Santa Fe should, by proper tariff provision, apply to this coal when received from Colorado & Southern at Trinidad rate of 10 cents per ton less than local Trinidad rate. Cedar Hill Coal & Coke Co. v. Atchison, etc., R. Co., 15 I. C. C. 73. Rates for bituminous and anthracite coal in carloads from Duluth, Minn., and Superior, Wis., to St. Paul and Minneapolis, Minn. Manahan v. Northern Pac. R. Co., 17 I. C. C. 95. Rates assessed on shipments of soft coal from Wellston, Ohio, to Manitowoc, Wis., for points beyond. Sunderland Bros. Co. v. Pere Marquette R. Co., 16 I. C. C. 450. Rate of $5.20 per ton on soft coal from Sterling, Ill., to Wausa, Neb. Rate of $2.70 per ton prescribed. Sunderland Bros. Co. v. Chicago & N. W. R. Co., 16 I. C. C. 212. Rate charged from Pocahontas (Va.) district to Winston-Salem on soft coal in carloads is unreasonable to extent that it exceeds $2.10 per ton, and that charge to Durham is unreasonable to extent that it exceeds $2.20 per ton. Winston-Salem and Winston City Board of Trade v. Norfolk & W. R. Co., 16 I. C. C. 12. Flat rate of 85 cents per ton for steam and domestic coal from Appalachia coal field in Virginia to Bristol, Tenn. 75 cents per ton will yield fair and reasonable compensation. City of Bristol v. Virginia & S. W. R. Co., 15 I. C. C. 453.

Cotton, etc.: 20 cents per 100 pounds on uncompressed cotton from Vincent, Ark., to Memphis, Tenn., 15 miles, and ought not to exceed 15 cents per 100 pounds. On that basis reparation is awarded on all shipments made by complainant since September 1, 1907, at which time defendant canceled rate of 12 cents per 100 pounds that had been in effect for some years. Barton, Reisinger,

Davis Co. v. St. Louis, etc., R. Co., 15 I. C. C. 222. Class rate of $1.37 per 100 pounds on cotton from Marshall, Tex., to East St. Louis, Ill., as part of through rate to Biddeford, Me., to extent that it exceeded 60 cents per 100 pounds. Pepperell Mfg. Co. v. Texas So. R. Co., 16 I. C. C. 353. Reasonable rate for cotton-seed cake from Shreveport, La., to Leon, Kan., routed via Sherman, Tex., prescribed and reparation awarded. Stock Yards Cotton & Linseed Meal Co. v. St. Louis S. W. R. Co., 14 I. C. C. 530. Reparation for unreasonable charges on carloads of cotton seed shipped from Kilbourne, La., to Pine Bluff, Ark., on basis of subsequent lower rate voluntarily established. Bluff City Oil Co. v. St. Louis, etc., R. Co., 16 I. C. C. 296.

Dairy products: Present rates for transportation of cheese from various stations in state of Wisconsin, named in report herein, to Chicago, Ill. Railroad Commission of Wisconsin v. Chicago & N. W. R. Co., 16 I. C. C. 85. Rates for transportation of **cream** to Chicago between Detroit and Port Huron upon east and Colorado common points upon west. Defendants ordered to establish scale of rates prescribed as maximum. Blue Valley Creamery Co. v. Michigan Cent. R. Co., 15 I. C. C. 109. Complainant shipped carload of **eggs** from Leslie, Ark., to Chicago, Ill. Defendants' rate, as applied to this traffic, was (third class) $1.10 per 100 pounds. Subsequent to shipment in question, defendants established special commodity rate of 77½ cents per 100 pounds on butter, eggs, dressed poultry, from Leslie to Chicago. Held that rate applied was unjust and unreasonable. Smith & Co. v. Missouri & N. A. R. Co., 15 I. C. C. 443. Reparation awarded to complainants for excessive amount collected on their shipment of **emigrant outfit,** plus whatever amount was collected by sale for demurrage or warehousing. Porter v. St. Louis & S. F. R. Co., 15 I. C. C. 1. The Pecos & Northern Texas Railway Company required to keep in force for at least two years local rate which now results in combination rate of 41 cents per 100 pounds on emigrant outfits from Fletcher to Bovina. Id. Rates on **fertilizer** from Shreveport, La., to certain Arkansas destinations, and reasonable maximum rates prescribed. Virginia-Carolina Chemical Co. v. St. Louis S. W. R. Co., 16 I. C. C. 49. Fertilizer is low-grade traffic, subject to no great risk in transit, and requiring no special service for its transportation in sense that "special service" is generally understood. Its free movement and use is auxiliary tending to produce and furnish larger volume of traffic, and thus promote prosperity of carriers and their patrons, so that, considering both commercial and transportation conditions, it is entitled to comparatively low rates. Id. Reparation awarded shipped from Chicago, Ill., to Toledo, Ohio. Crane Bros. v. Cincinnati, H. & D. R. Co., 16 I. C. C. 571.

Fruit: Carload rates on oranges and pineapples from base points in Florida to northeastern cities and maxima therefor established. Florida Fruit & Vegetable Shippers' Protective Ass'n v. Atlantic Coast Line R. Co., 14 I. C. C. 476. Class rates of 75 cents and 82 cents per 100 pounds, applied on shipments of canned peaches from Atlanta, Tex., to Kansas City and Chicago, respectively, ought not to have exceeded present commodity rates of 51 cents per 100 pounds to Kansas City and 58 cents to Chicago. Godfrey v. Texas, A. & L. R. Co., 15 I. C. C. 65. First shipments of canned peaches from new point of production moved under class-rates. Carrier thereafter established commodity rates from that point, which were adjusted with relation to other producing points similarly situated, and which were resigned to provide for further movements. Reparation awarded upon basis of the commodity rates thus established. Hutcheson & Co. v. Central of Georgia R. Co., 16 I. C. C. 523. Reparation allowed with respect to shipment of peaches from Horatio, Ark., to Memphis, Tenn. Memphis Freight Bureau v. Kansas City So. R. Co., 17 I. C. C. 90. Defendants' rates for dried fruit in boxes from Fresno, Cal., to Bozeman and Billings, Mont., of $1.32 and $1.37½ per 100 pounds, respectively, and $1.10 per 100 pounds prescribed. Stone-Ordean-Wells Co. v. Northern Pac. R. Co., 16 I. C. C. 313. Rates for **apples** via defendants' lines from Ozark fruit region to points in Oklahoma and Texas. Ozark Fruit Growers' Ass'n v. St. Louis & S. F. R. Co., 16 I. C. C. 134.

Furniture: Rate of 17½ cents per 100 pounds for transportation of chairs, in carloads, from Grafton, Wis., to Chicago, Ill., to extent that it exceeds 15 cents per 100 pounds, rate in force prior to January 3, 1908, and subsequent to September 1, 1908. Milwaukee Falls Chair Co. v. Chicago, etc., R. Co., 16 I. C. C. 217.

Grain and flour: Rate for corn in carloads of 19 cents per 100 pounds from Humboldt, Neb., to St. Francis, Kan., and of 18 cents per 100 pounds from Pawnee, Neb., to St. Francis and Atwood, Kan., and maximum of 13.6 cents per 100 pounds prescribed. Cooper v. Chicago, B. & Q. R. Co., 15 I. C. C. 324. In view of former practice through rate on wheat from Idaho Falls, Idaho, to McKinney, Tex., held applicable, under Special Circular No. 6 of commission's tariff department, to carload shipment to McKinney which moved on July 17, 1907, from Wooley's Spur, intermediate point from which no specific through rate had been published. Reparation is awarded on that basis. Williamson v. Oregon Short Line R. Co., 15 I. C. C. 228. Rate of 26½ cents on carloads of flax seed from Britton, S. D., to Red Wing, Minn., to extent that it exceeded subsequently established rate of 15.5 cents. Red Wing Linseed Co. v. Chicago, etc., R. Co., 15 I. C. C. 47. Reparation awarded for collection of unreasonable charges on shipments of flour from Windsor, Colo., to Eunice and Opelousas, La. Windsor Milling & Elevator Co. v. Colorado & So. R. Co., 16 I. C. C. 349. In Howard Mills Co. v. Missouri Pac. R. Co., 12 I. C. C. 258, difference between rates on wheat and on flour from Kansas points to Pacific Coast terminals was prescribed. That decision included adjustment from Kansas points to Phoenix, Ariz., that question having been raised in complaint and nothing in line of testimony or information having been brought to attention of commission indicating that any interests other than those of parties to that proceeding were involved. It now appears that milling in-

terests at Phoenix were unfavorably affected by that decision, and in this proceeding relationship of rates on wheat and flour from Belpre, Pawnee Rock, and Hutchinson, Kan., to Phoenix, Ariz., is brought in issue. Held that rate on wheat from said Kansas points to Phoenix, Ariz., should not exceed $1 per 100 pounds, and that rate on flour from same points to same destination should not exceed rate on wheat by more than 12 per cent. Order in Howard Mills case modified accordingly. Valley Flour Mills v. Atchison, etc., R. Co., 16 I. C. C. 73. Defendants voluntarily reduced their rate on snapped corn from Okemah, Okl., to Terrell, Tex. Within period of statute of limitations, but fifteen months after rate was reduced, complaint was filed asking reparation on shipment moving under higher rate. Defendants were never asked to make informal adjustment, and when formal complaint was filed, were willing to satisfy same without formal hearing. Held that complainant is entitled to reparation for difference between reduced rate and rate charged as applied to weight of shipment, but under peculiar facts, reduced rate should be maintained for period of not less than two years from date it became effective. Tully Grain Co. v. Fort Smith & W. R. Co., 16 I. C. C. 28. Rate of $1.40 per 100 pounds of rice in carloads from New Orleans, La., to Billings, Mont., to extent that it exceeded $1.07 per 100 pounds. Stone-Ordean-Wells Co. v. Chicago, B. & Q. R. Co., 16 I. C. C. 30. Rate of 13¾ cents per 100 pounds formerly applied on carload shipments of malt from Chilton, Wis., to Kansas City, Mo., and present rate of 10 cents per 100 pounds held reasonable. Chilton Malting Co. v. Chicago, etc., R. Co., 15 I. C. C. 10. Class rates charged for **hay** from Kansas City, Mo., to Mississippi River points and points east. These rates ought not to have exceeded proportional commodity rates. North Bros. v. Chicago, etc., R. Co., 15 I. C. C. 70. Class rate charged by principal defendant for carload of baled hay originating at Batesville, Kan., from Kansas City, Mo., to Clinton, Ohio. Tyler Commission Co. v. Chicago, etc., R. Co., 16 I. C. C. 490. On June 30, 1907, class C rates became effective on hay from Kansas City to Mississippi River, Peoria, St. Paul, Chicago, and common points, because of cancellation on that date of proportional commodity rates that had been in force between those points on hay coming from points beyond Kansas City. Shortly thereafter latter rates were restored. During interval complainant made shipments to points in Illinois, Iowa, and Minnesota. Held that rates charged were excessive, and that complainant is entitled to reparation on basis of proportional rates. Kansas City Hay Co. v. Chicago, etc., R. Co., 16 I. C. C. 100. Complainant shipped from Kansas City, Mo., to Seymour, Iowa, via defendant's railway, carload of hay upon which it was compelled to pay class rate of 13½ cents per 100 pounds. This was 1 cent higher than proportional commodity rate which had been in effect between points in question until short time prior to date of shipment and was restored within about sixty days thereafter by amendment to defendant's tariffs. Held that, under admission of defendant, and upon commission's knowledge of hay rates in same territory, class rate was excessive and unreasonable, and should not have exceeded commodity rate. Arkansas Fuel Co. v. Chicago, etc., R. Co., 16 I. C. C. 95. Rates on **natural ice** from points of harvest in New Jersey and Pennsylvania to various consuming interstate destinations and maximum rates prescribed when the ice is carried in ordinary box cars. Mountain Ice Co. & Trout Lake Ice Co. v. Erie R. Co., 15 I. C. C. 305. Service rendered by defendants in movement of traffic may properly be styled "special" service; but it is not in any proper sense "expedited" service, nor is it expensive service. Id.

Iron and products: Complainant shipped two carloads of bar iron from Fort Wayne, Ind., to Joliet, Ill., for transportation of which defendants charged higher rate than was in effect from Fort Wayne to Chicago. Complaint alleged, and answers admitted, that Joliet ought properly to be Chicago rate point with respect to that commodity. Subsequently, Chicago rates on bar iron from Fort Wayne were made applicable to Joliet. Held on record, that Joliet must be maintained by defendants as Chicago rate point with respect to bar iron for period of two years from date of their tariff to that effect, and that complainant is entitled to recover from defendants sum of $11.15 as reparation on their shipments. The Fort Wayne Rolling Mill Co. v. New York, etc., R. Co., 14 I. C. C. 514. Complainant awarded reparation on its shipments of ground iron ore from Iron Ridge, Wis., to Michigan City, Ind., and Louisville, Ky., based upon lower rates now in effect. Winters Metallic Paint Co. v. Chicago, etc., R. Co., 16 I. C. C. 562. Reparation in sum of $38.59, with interest, awarded for unreasonable charges exacted for one carload of steel from Buffalo, N. Y., to Watertown, Wis. Scully Steel & Iron Co. v. Lake Shore & M. S. R. Co., 16 I. C. C. 358. Rates of $3.23 and $3.02 per gross ton on imported iron pyrites in carloads from points in New York Harbor to Linndale and Cleveland, Ohio, respectively, and should not have exceeded $2.56 per gross ton. American Agricultural Chemical Co. v. Erie R. Co., 16 I. C. C. 320. Rate of 63 cents per 100 pounds on carload shipments of scrap iron from Douglas, Ariz., to El Paso, Tex., via El Paso & Southwestern Railroad Company, and rate of $3.50 per net ton prescribed as maximum. Darbyshire-Harvie Iron & Mach. Co. v. El Paso & S. W. R. Co., 15 I. C. C. 451. Complainant shipped from Stoughton, Wis., to Passaic, N. J., over defendants' lines, one carload of **leaf tobacco,** for which it was charged rate of 52½ cents per 100 pounds, of which initial carrier received 17½ cents and delivering carrier 35 cents per 100 pounds. At time of shipment 17½-cent rate was legally published rate over initial line for interstate commerce, whereas at same time it had rate of 15 cents per 100 pounds for local shipments. Subsequently, interstate rate was reduced to local rate; 17½-cent rate found unreasonable, and reparation awarded. American Cigar Co. v. Chicago, etc., R. Co., 15 I. C. C. 618.

Live stock: Stock-cattle rate from South St. Paul to points upon Pierre, Rapid City

& Northwestern Railway, should not exceed 75 per cent of beef-cattle rate. Slimmer v. Chicago, etc., R. Co., 14 I. C. C. 525. Defendants' tariff, applicable to transportation of cattle from Anaconda, Mont., to Tacoma, Wash., names rate of $110 per 36½-foot car. Complainant ordered 36½-foot equipment, but two of cars furnished were only 34 feet in length. Since shipment defendants' tariff has been amended so as to provide that when cars less than 36 feet in length are furnished for carriers' convenience, reduction of 3½ per cent per foot will be made from rates applicable to cars not exceeding 36½ feet in length. Held that tariff prior to amendment as indicated was unreasonable. Carstens Packing Co. v. Northern Pac. R. Co., 14 I. C. C. 577. Through charges exacted on complainant's shipments of range cattle from Midland, Tex., to Kennebec, S. D., under conditions obtaining at time, to extent of 9½ cents per 100 pounds, and as excess was collected by principal defendant for its portion of transportation, reparation is awarded against that carrier. Philip v. Chicago, etc., R. Co., 16 I. C. C. 418. Reparation awarded complainant against initial carrier for excessive charges on shipments of cattle from Ontario, Or., and Nampa, Idaho, to Tacoma, Wash., on account of unnecessary diversion in transit effected without knowledge or consent of shippers. Carstens Packing Co. v. Oregon R. & Nav. Co., 15 I. C. C. 482. Defendants' tariff, applicable to transportation of cattle from Anaconda, Mont., to Tacoma, Wash., names rate of $110 per 36½-foot car. Complainant shipped 2 carloads of cattle between these points, but the cars furnished were only 34 feet in length, which resulted in an excess charge. Since filing complaint defendants' tariff has been amended so as to provide that when cars less than 36 feet in length are furnished for carriers' convenience reduction of 3½ per cent per foot will be made from rates applicable to cars 36½ feet in length. Held that, following the ruling laid down in former case of same title, 14 I. C. C. 577, tariff of defendants prior to amendment as indicated was unreasonable. Carstens Packing Co. v. Northern Pac. R. Co., 15 I. C. C. 431. Exaction of double merchandise rates for transportation of **small live animals** in secure containers, and when such animals do not require feeding or watering en route. Merchandise rates should apply. Davis v. West Jersey Exp. Co., 16 I. C. C. 214.

Lumber, etc.: Class B rate of 60 cents per 100 pounds to rough-sawed tent pins from Gleason, Ark., to Dallas, Tex., and rate ought not to be more than 1 cent per 100 pounds in excess of general lumber rate between those points, which is 20 cents per 100 pounds. Beekman Lumber Co. v. St. Louis, etc., R. Co., 15 I. C. C. 274. Rate of 19 cents per 100 pounds on doors, in carloads, from Dubuque, Iowa, to Sioux Falls, S. D. Farley & Loetscher Mfg. Co. v. Chicago, etc., R. Co., 15 I. C. C. 602. On motion of various complainants in 113 supplemental complaints of like character involving claims for reparation for unreasonable rates on lumber on basis of decisions of commission in original proceedings (698 and 707), written agreement or stipulation providing for compromise settlement of these claims, it appearing that same contains no provisions inconsistent with law, is approved as basis for final settlement and satisfaction thereof, in so far as it relates to matters within commission's jurisdiction. Joice & Co. v. Illinois Cent. R. Co., 15 I. C. C. 239. Reparation awarded for unreasonable rate for shipments of cottonwood box shooks from Greenville, Miss., to Cedar Rapids, Iowa. Holley Matthews Mfg. Co. v. Yazoo & M. V. R. Co., 15 I. C. C. 436. Reparation allowed with respect to shipment of lumber from Jackson, Miss., to Chicago, Ill., since rate charged had been found by commission to be unreasonable. Hayden & Westcott Lumber Co. v. Gulf & S. I. R. Co., 14 I. C. C. 537. Reparation allowed on shipment of lumber from Jackson, Miss., to Chicago, Ill. Hayden & Westcott Lumber Co. v. Gulf & S. I. R. Co., 14 I. C. C. 539; Hayden & Westcott Lumber Co. v. Gulf & S. I. R. Co., 14 I. C. C. 540. Lumber on basis of decisions of commission in original proceedings (Nos. 698 and 707). Jenks Lumber Co. v. Southern R. Co., 17 I. C. C. 58. Rates on ties that exceed rates on lumber of same character as ties. Beekman Lumber Co. v. Chicago, etc., R. Co., 16 I. C. C. 528. Reparation awarded for unreasonable charges collected on shipments of cedar posts and lumber from points in Idaho to points in Wyoming. Humbird Lumber Co. v. Northern Pac. R. Co., 16 I. C. C. 441. Reparation awarded for excessive charges collected on shipment of coiled elm hoops from Cardington, Ohio, to Green Bay, Wis. Noble v. Chicago, etc., R. Co., 16 I. C. C. 420. Requirement which resulted in exaction by defendant of combinations of local rates upon shipments of lumber, shingles, posts, and poles concentrated by complainant at Menominee, Mich., and Marinette, Wis. Roper Lumber-Cedar Co. v. Chicago & N. W. R. Co., 16 I. C. C. 382. Rate on fence posts from Amarillo, Tex., to St. Vrain, N. M., of 34 cents per 100 pounds, and subsequently established rate of 16 cents per 100 pounds prescribed. Snook v. Atchison, etc., R. Co., 16 I. C. C. 356. Through confusion in defendant's tariffs, there were three conflicting rates on lumber and logs purporting to be in effect at same time from Dyersburg and other stations in Tennessee, to Louisville, Ky. Held that first established rate of 12 cents was legal rate, but it was unreasonable and ought not to have exceeded 8½-cent schedule that was subsequently issued. Reparation awarded to complainant in the difference between the 10-cent rate applied on certain shipments and the 8½-cent rate. New Albany Box & Basket Co. v. Illinois Cent. R. Co., 16 I. C. C. 315. Rate of 16 cents per 100 pounds on sawdust from Duluth, Minn., to Andover, S. D., to extent that it exceeded 12½ cents. Diehl v. Chicago, etc., R. Co., 16 I. C. C. 190. Northern Pacific Railway and Chicago, Burlington & Quincy Railroad companies ordered to establish and maintain rates on lumber and other forest products from certain points on Northern Pacific Railway to specified points named in report which are certain differentials under lumber rates from Spokane group. Big Blackfoot Milling Co. v. Northern Pac. R. Co., 16 I. C. C. 173. Great Northern Railway and

Minneapolis, St. Paul & Sault Ste. Marie Railway companies ordered to establish and maintain through routes and joint rates on lumber and other forest products between certain points in Idaho and Montana and certain points in North Dakota. Kalispell Lumber Co. v. Great Northern R. Co., 16 I. C. C. 164. Great Northern Railway Company ordered to establish and maintain rates on lumber and other forest products from certain points on its line in Idaho and Montana to certain points on its line located on Pembina-Port Arthur line, which are certain differentials under lumber rates from Spokane group. Id. Rates on building and roofing paper from Erie, Pa., to points in Central Freight Association territory. H. F. Watson Co. v. Lake Shore & M. S. R. Co., 16 I. C. C. 124. Rate on cedar poles from Chicago, Ill. to Brady, Tex., assessed on complainant's shipment, should not have exceeded their rate on lumber. MacGillis & Gibbs Co. v. Chicago & E. I. R. Co., 16 I. C. C. 40. Rate of 17½ cents per 100 pounds for **walnut logs** in carloads from Newport, Ark., to East St. Louis, Ill., and 11½ cents prescribed as maximum rate. East St. Louis Walnut Co. v. Missouri Pac. R. Co., 14 I. C. C. 553. Rates of 16 and 17½ cents per 100 pounds for walnut logs in carloads from Jacksonport, Ark., to St. Louis, Mo., and East St. Louis, Ill., respectively, and 13 and 14½ cents prescribed as maximum rates. East St. Louis Walnut Co. v. Chicago, etc., R. Co., 14 I. C. C. 575.

Machinery: Rate assessed on tanning outfit from Milwaukee, Wis., to Tacoma, Wash. Carstens Packing Co. v. Chicago, etc., R. Co., 16 I. C. C. 469. Export commodity rate and minimum weight on clover hullers from Newark, Ohio, to Baltimore, Md., when applied to consignments on which charges would be less if assessed at higher domestic rate and lower minimum weight. Newark Mach. Co. v. Pittsburg, etc., R. Co., 16 I. C. C. 291. Rate of 59 cents per 100 pounds on agricultural machinery, in carloads, from Bancroft, Tex., to Crowley, La. Advance Thresher Co. v. Orange & N. W. R. Co., 15 I. C. C. 599. Defendants' combination rates for the transportation of fresh **ment and packinghouse products** from Fort Worth, Tex., to Rocky Mount, N. C. Swift & Co. v. Texas & Pac. R. Co., 16 I. C. C. 442. Complainant shipped 16 carloads of **mill cinders** from Chicago to Omaha, charges being assessed at rate of $2 per net ton. Tariff was subsequently amended so as to provide for assessment of charges per gross ton. American Trust & Sav. Bank v. Chicago, etc., R. Co., 17 I. C. C. 11. Defendant ordered to maintain rate of 17 cents per 100 pounds for **mole traps,** L. C. L., in crates, from Niles, Mich., to Chicago, Ill. Reddick v. Michigan Cent. R. Co., 16 I. C. C. 492. Rate of 36.32 cents per 100 pounds for **paper-mill machinery** in carloads from Pittsfield, Mass., to Millinocket, Me., to extent that it exceeds 23 cents per 100 pounds. Jones & Sons Co. v. Boston & A. R. Co., 15 I. C. C. 226. Rates for **petroleum and its products** in carloads from refining points in Kansas and Missouri to specified points in Oklahoma, and lower maximum rates prescribed. State of Oklahoma v. Chicago, etc., R. Co., 15 I. C. C. 42. Rate of 8 cents per 100 pounds for crude petroleum from Paola, Kan., to Kansas City, Kan., and that reasonable rate should not exceed 7 cents per 100 pounds. Hafey v. St. Louis & S. F. R. Co., 15 I. C. C. 245. Through class rate of 33⅓ cents per 100 pounds formerly applied on carload shipments of nonedible grease from Austin, Minn., to Dayton, Ohio. Dayton Chamber of Commerce v. Chicago, etc., R. Co., 16 I. C. C. 82.

Powder, etc.: Rate of 69 cents per 100 pounds on safety fuse in carloads from Avon, Conn., to Pleasant Prairie, Wis., to extent that it exceeded 44 cents per 100 pounds. Du Pont De Nemours Powder Co. v. New York, etc., R. Co., 16 I. C. C. 351. Rates of 57 cents and $1.30 per 100 pounds for transportation of ball cartridges and saluting powder, respectively, from Norfolk, Va., to Annapolis, Md., to extent that they exceed 36 cents per 100 pounds on ball cartridges and 74 cents per 100 pounds on saluting powder. United States v. New York, P. & N. R. Co., 15 I. C. C. 233. Chicago-New York base rate on **products of gypsum rock** was raised June 1, 1907, from 22½ cents to 25 cents per 100 pounds, and on April 20, 1908, was reduced to 22½ cents. This reduction took place after complaint was filed. It appears that 22½-cent rate had been maintained for long time prior to advance and has been continuously maintained since reduction. Defendants have made no attempt to explain or justify this advance, and only fact appearing in relation thereto is that it was made and enforced for about eleven months. Held that under these circumstances 25-cent base rate was unreasonable as applied to these commodities, and that on shipments made while it was in effect complainant is entitled to reparation. On this record, however, no order for reparation can be made, but case will be held open to give complainant opportunity to make necessary proof. Acme Cement Plaster Co. v. Lake Shore & M. S. R. Co., 17 I. C. C. 30. In November and December, 1907, complainant shipped 2 carloads of **plaster** from Grand Rapids, Mich., to Milwaukee, Wis., via defendant railway and its car ferry. Charges were collected at the rate of 9 cents per 100 pounds in accordance with defendant's regularly published tariff. Prior to October 5, 1907, rate applicable to this transportation was 7½ cents per 100 pounds, and defendant has re-established 7½-cent rate since shipments in question. Held that rate assessed by defendant was unjust and unreasonable to extent that it exceeded 7½ cents per 100 pounds. Reparation awarded. Grand Rapids Plaster Co. v. Pere Marquette R. Co., 14 I. C. C. 571. Complainant shipped 2 carloads of plaster from Grand Rapids, Mich., via Milwaukee, Wis., to Houghton, Mich., for which it was charged 20 cents per 100 pounds. When shipments were made initial carrier had published rate on plaster between said points of 16½ cents per 100 pounds, but at date of shipments delivering carrier had not concurred in 16½-cent rate. Subsequently, 16½-cent rate was made legal rate over route taken. Held that 20-cent rate was unjust and unreasonable, and that 16½-cent rate would be just and reasonable rate. Grand Rapids Plaster Co. v. Pere Marquette R. Co., 15 I. C. C. 68. Rate of $1.60 per net ton for **stone** in car-

loads from East Branch, N. Y., to Weehawken, N. J., 150 miles, and $1.40 per net ton prescribed as maximum for future. Shippers' & Receivers' Bureau v. New York, O. & W. R. Co., 15 I. C. C. 264. Rates on furnace limestone from Bunker Hill, W. Va., to various points in Ohio and Pennsylvania west of Pittsburg, to extent that they exceed increase of 5 cents per ton over and above rate from Martinsburg, W. Va. Reduction ordered. Baker v. Cumberland Valley R. Co., 14 I. C. C. 568. Defendants' rates on phosphate rock shipped from Mount Pleasant and Centerville districts in Tennessee to fertilize manufactories at cities located in Illinois, Indiana, Ohio, Michigan, New York, and Pennsylvania, via Ohio River crossings, and reductions in such rates ordered. Darling & Co. v. Baltimore & O. R. Co., 15 I. C. C. 79. Rate applied to carloads of marble from Long Island City, N. Y., to Shipman, Va., of 54 cents per 100 pounds, and rate of 22 cents per 100 pounds found reasonable. Cohen & Co. v. Southern R. Co., 16 I. C. C. 177. Through fifth class rate of 33 cents per 100 pounds formerly applied by defendants on carload shipments of **stoves** from Minneapolis, Minn., via Chicago, to Fremont, Ohio, reparation awarded on basis of present through commodity rate of 29½ cents per 100 pounds. Hartman Furniture & Carpet Co. v. Wisconsin Cent. R. Co., 15 I. C. C. 530. Through class rate of 74½ cents per 100 pounds for **sugar** from Eaton, Colo., to Decatur, Ill., to extent that it exceeded subsequently established joint through rate of 32½ cents per 100 pounds. Havemeyer v. Union Pac. R. Co., 17 I. C. C. 13. Charges exacted on carload of beet sugar shipped in May, 1908, from Las Animas, Colo., to Romero, Tex. American Beet Sugar Co. v. Chicago, etc., R. Co., 16 I. C. C. 288. Defendants' class rate for carloads of **sulphuric acid** from Howe, Ill., to Aetna, Ind. Mineral Point Zinc Co. v. Wabash R. Co., 16 I. C. C. 440. Reparation awarded for unreasonable charges collected on a shipment of **tan bark** from Trenary, Mich., to Milwaukee, Wis. Albert Trostel v. Minneapolis, etc., R. Co., 16 I. C. C. 348.

Vehicles: Class rate of 73 cents per 100 pounds on mixed carload of buggies and wagons from East St. Louis, Ill., to Beebe, Ark., ought not to have exceeded commodity rate of 39 cents per 100 pounds presently to be established by defendant. Parlin & Orendorff Co. v. St. Louis, etc., R. Co., 15 I. C. C. 145.

Vegetables: Present rail and water rates on vegetables from Florida base points to northeastern cities. Whether lower carload rates should be established upon vegetables to eastern markets, query. Florida Fruit & Vegetable Shippers' Protective Ass'n v. Atlantic Coast Line R. Co., 14 I. C. C. 476. Combination through rate of 31½ cents per 100 pounds formerly applied on carload shipments of vegetables from Green Bay, Wis., to Pattonsburg, Mo., and reparation awarded on basis of 22 cents per 100 pounds. Thomas v. Chicago, etc., R. Co., 15 I. C. C. 584. Reparation awarded complainant on shipment of one carload of pickles from Ottumwa, Iowa, to Kansas City, Mo. Ottumwa Pickle Co. v. Chicago, etc., R. Co., 16 I. C. C. 368. Rate of 21 cents per 100 pounds for transportation of potatoes, in carloads, from Pound, Wausaukee, and Beaver, Wis., to Painesdale, Mich., to extent that it exceeded 15 cents per 100 pounds. Thomas v. Chicago, etc., R. Co., 16 I. C. C. 364. Rate of 48 cents now in effect should be applied on baskets of lettuce shipped by complainant from St. Andrews, S. C., to New York, N. Y., and which were charged at rate of 63 cents per half-barrel crate. Voorhees v. Atlantic Coast Line R. Co., 16 I. C. C. 45.

36. Defendant had tariff in effect which made no allowance for weight of stakes used to secure lumber on car. Within reasonable time after shipments moved defendant amended its tariff to make such allowance. Upon the facts stipulated, reparation awarded. Kaye & Carter Lumber Co. v. Chicago, etc., R. Co., 14 I. C. C. 604; Duluth Log Co. v. Minnesota & I. R. Co., 15 I. C. C. 627.

37. Charges for storage of brewers' rice at New Orleans, La., are not unreasonable or unjust. Gough & Co. v. Illinois Cent. R. Co., 15 I. C. C. 280.

38. Track-storage charges of defendant applied to complainant's shipments of oats, and free time allowance governing same, not found unreasonable. F. M. Turnbull Co. v. Erie R. Co., 17 I. C. C. 123.

39. Defendant's track-storage tariff, applying to carload shipments of fruit and produce received at Pennsylvania Lines Produce Yards at Pittsburg, Pa., provides that after expiration of 48 hours' free time, track-storage charges will be assessed as follows: For first two days, $1 per car per day or fraction thereof; for next succeeding two days, $3 per car per day or fraction thereof, and for each succeeding day, $4 per car per day or fraction thereof. Wilson Produce Co. v. Pennsylvania R. Co., 16 I. C. C. 116.

Demurrage charge held reasonable: Exaction of demurrage charges upon certain shipments of complainant's coal detained at St. George, Staten Island, N. Y., during February, 1908. Hutchinson-McCandlish Coal Co. v. Baltimore & O. R. Co., 16 I. C. C. 360. Complainant, desiring to ship creosoted lumber from near New Orleans, La., to points in Texas, Arizona, and Mexico, requested 200 empty flat cars to be delivered at rate of 4 a day. These cars were not delivered as requested, but on many days no cars were furnished and on some days more than 4 cars were furnished. Numbers of these cars were not loaded within free time prescribed in Car Service Association's rules, and demurrage accrued on them. Complainant contested these demurrage charges on ground that defendants failed to deliver cars at rate of 4 cars per day, as requested. Held that, upon whole record, commission is unable to find these demurrage charges were in this case unreasonable or unjust. Complaint dismissed. American Creosoting Works v. Illinois Cent. R. Co., 15 I. C. C. 160. If complainant had no voice in directing setting in of more than 4 cars per day, or if it were shown that complainant protested against setting in of so many at one time, and its voice and protest had been ignored, there might be room to find that demurrage charges resulting were unjust and unrea-

refrigeration,[40] switching,[41] reconsignment,[42] change of destination,[43] and other charges.[44] The Interstate Commerce Commission may also determine the rate schedule or tariff applicable,[45] and the reasonableness [46] and applicability of classifications.[47] In connection with these powers, the commission has power to order

sonable; but there is, however, no such showing in record in this case. Id.

40. Charges held reasonable: Refrigeration charges on fruits and vegetables from Florida to northern markets. Traffic Bureau, Merchants' Exch. v. Chicago, B. & Q. R. Co., 14 I. C. C. 510. Rates for refrigeration of strawberries and peaches shipped from points in Ozark fruit region to points in west, north, and east. Ozark Fruit Growers Ass'n v. St. Louis & S. F. R. Co., 16 I. C. C. 153.

41. Charge held reasonable: Charge of $6.50 for switching in Chicago car of scrap iron consigned to Wheatland, Pa., from Freeport, Ill. Bregman & Co. v. Pennsylvania Co., 15 I. C. C. 478.

Charge held unreasonable: Switching charge of $5 per car and charge of $3 per car prescribed. West Texas Fuel Co. v. Texas & P. R. Co., 15 I. C. C. 443.

42. Tariff under which shipment moved provided for charge of $5 per car for reconsignment. This charge is excessive where only name of consignee is changed. One dollar per car is reasonable charge for service in this case. Beekman Lumber Co. v. Kansas City So. R. Co., 17 I. C. C. 86. Missouri Commission Company received 82,000 pounds of hay shipped over defendant's line from station in Kansas to St. Louis, Mo.; paid 19 cents per 100 pounds, and sold hay to its customer. Bartlett Commission Company received 82,000 pounds of hay shipped from points in Illinois, Iowa, and Missouri over lines other than defendant's at St. Louis, Mo., and reconsigned same to points east of Mississippi River and south of Ohio River. Complainant obtained expense bills of Missouri Commission Company and duplicate bills of lading of Bartlett Company, presented them to defendant and demanded refund to amount of 13½-cent rate by reason of defendant's tariff, which "applies on hay, C. L., from stations in Missouri, Kansas, and Indian Territory on M., K. & T. Ry. to St. Louis for reconsignment to points south of Ohio River and east of Mississippi River at proportional rates shown on page 2 of schedule." Held that complainant was not entitled to any refund or reparation in such case, and that such substitution of tonnage could not be sanctioned. Rodehaver v. Missouri, K. & T. R. Co., 16 I. C. C. 146.

43. Charge of $5 per car for privilege of changing destination of shipment, when change was made before or immediately after arrival of car at first destination, and when no back haul or out-of-line haul was required, was unreasonable to extent that it exceeded $2 per car. Cedar Hill Coal & Coke Co. v. Colorado & So. R. Co., 15 I. C. C. 546.

44. Where service has been rendered for which no tariff authority whatever exists and shipper has paid sum claimed for that service, commission has jurisdiction to inquire what was reasonable charge for service and to order repayment of whatever carrier has collected over and above such reasonable charge. Memphis Freight Bureau v. Kansas City So. R. Co., 17 I. C. C. 90.

45. Traffic originating at points south of Louisville destined to New Albany, or originating at points north of New Albany and destined to Louisville, is through traffic; and, in absence of through joint rate, rates applicable on such business when it reaches either Louisville or New Albany are rates set forth in Bridge Tariff No. 18. Railroad Commission of Indiana v. Kentucky & Indiana Bridge & R. Co., 14 I. C. C. 563. Under circumstances complainant was properly assessed joint through rate on its shipments of butter from Wellington, Ohio, to Evansville, Wis., rather than sum of locals based on Chicago. Wood Butter Co. v. Cleveland, etc., R. Co., 16 I. C. C. 374.

46. Change in classification ordered: Earthenware or crockery is classified under rule 26, in Official Classification, 20 per cent less than third class, L. C. L., whatever form of package. Chinaware in same classification is first class in boxes and second class in casks. Held that rate on chinaware in boxes should be reduced to second class. Union Pac. Tea Co. v. Pennsylvania R. Co., 14 I. C. C. 545. Complainant challenges reasonableness of Official Classification rule providing for application of fourth class ratings on castings, japanned, in carloads, and third class on less than carloads. Formerly carload shipments of such articles were charged fifth class rates and less than carload shipments, fourth class. Application of higher ratings is condemned and carriers ordered to apply fifth class ratings on carload and fourth class on less than carload shipments. These ratings were applied during long period of time and advance results solely from conformance with rule which follows arbitrary line of demarcation for convenience of carriers in applying general classification basis. This does not constitute sound transportation reason for such marked differences in rates, and no other conditions appear as warrant therefor. Indianapolis Freight Bureau v. Cleveland, etc., R. Co., 15 I. C. C. 504. Defendants ordered to cease and desist from charging for transportation of complainant's Pin Yon soap, in less than carload quantities, in boxes or in barrels, rates in excess of fourth class in Western Classification territory. Iowa Soap Co. v. Chicago, B. & Q. R. Co., 16 I. C. C. 444.

Change in classification denied: Garments manufactured by members of complainant association, such as overalls, jackets, shirts, of low grades, and play suits for children, made of coarse heavy cotton cloth, are classified in Official, Western, and Southern Classifications as first class, and purpose of this proceeding is to obtain reduction in that rating; but upon facts disclosed by record, contention is not sustained and complaint is dismissed. Union Made Garment Manufacturers Ass'n v. Chicago & N. W. R. Co., 16 I. C. C. 405.

47. Commission is disposed to encourage making of class rates wherever practicable,

reparation in cases of overcharge erroneously or illegally collected,[48] in case of in-

because of their tendency to uniformity and stability. It is only in cases where it clearly appears that inclusion of given article in class results in unreasonable charges, and lower classification will not meet demands of justice, commodity rates are required to be established. Acme Cement Plaster Co. v. Lake Shore & M. R. Co., 17 I. C. C. 30.

Particular classification held applicable: Complaint that rate which, by terms of tariff, is applicable to "paper photographic cards and cardboard (cut in shape)," should be applied to shipments of illustrated post cards in preference to rate which, by same tariff, is made applicable to "holiday cards (including Christmas and Easter cards) and other cards of similar character." H. S. Crocker Co. v. Atchison, etc., R. Co., 14 I. C. C. 558. Fuel wood may lawfully be included in carload of emigrant movables under tariff which permits including limited quantities of lumber and fence posts, and also "property included in outfit of intending settlers." Place v. Toledo, P. & W. R. Co., 15 I. C. C. 543. Complainant shipped 11 rolls of old worn-out canvas, bought as junk, from Worcester, Mass., to Chicago, Ill., upon which first class rate of 75 cents per 100 pounds was assessed, instead of junk rate of 35 cents per 100 pounds. Reparation awarded on 35-cent basis, and defendants required to apply to this commodity for next two years, rate not exceeding that imposed for transportation of junk. H. Channon Co. v. Lake Shore & M. S. R. Co., 15 I. C. C. 551. Under circumstances of this case application of machinery rate to complainant's shipments of parts of dredging machine was authorized by tariffs of defendants. Complaint dismissed. Link-Belt Co. v. Chicago & N. W. R. Co., 16 I. C. C. 566. Round iron ore should be accorded rates from Iron Ridge, Wis., to points in Central Freight Association and Trunk Line territories which shall not exceed regular sixth class ratings applying under Official Classification between same points; also that this commodity is entitled to Class D ratings under Western Classification from Iron Ridge to points in Western Trunk Line Association territory. Winters Metallic Paint Co. v. Chicago, etc., R. Co., 16 I. C. C. 587. Elevator controllers involved in these cases were parts of hoisting machines with which they were shipped and under classification could have been shipped in mixed carloads at rate applicable to hoisting machines. Otis Elevator Co. v. New York, etc., R. Co., 17 I. C. C. 3. Third class rates on less than carload movements of illuminating oils and gasoline from Minneapolis and St. Paul to points in South Dakota and defendants required to apply fourth class rates. Bartles Oil Co. v. Chicago, etc., R. Co., 17 I. C. C. 146. Defendants ordered to establish and maintain for transportation of coal-tar paving cement from Ensley, Ala., to Lagrange, Ga., same classification and commodity rates that are in force at same time on coal-tar pitch. Barrett Mfg. Co. v. Louisville & N. R. Co., 15 I. C. C. 196. Defendants' rate on pyrites cinder should not exceed their rate on iron ore from Buffalo, N. Y., to points in Pennsylvania and New Jersey. Naylor & Co. v. Lehigh Valley R. Co., 15 I. C. C. 9. Classification of new and old automobiles in same class not found, under circumstances, unjust, as no definite line can be drawn between old and new machines of different value. Whitcomb v. Chicago & N. W. R. Co., 15 I. C. C. 27. Manufactured product commonly takes higher rate than raw material from which it is made. But maintenance of parity of rates on wheat and flour between Missouri River and Atlantic seaboard tends to equalize conditions at all points at which flour-milling enterprises exist, and seems on many grounds to be sound rate policy in that territory. Bulte Milling Co. v. Chicago & A. R. Co., 15 I. C. C. 351. Complainant's suggestion that flour-milling industry of this country can be fostered by order requiring carriers to Atlantic seaboard to maintain lower rate on flour than on wheat involves matter of national policy beyond authority of commission to adopt until congress, by adequate legislation, has made that rule of transportation. Id.

Particular classification held inapplicable: Reparation allowed on account of certain shipments of stock cattle which had moved at beef-cattle rate. Slimmer v. Chicago, etc., R. Co., 14 I. C. C. 525. Under Western Classification tallow in barrels, or other packages with cloth covers, takes third class rates; whereas, same article in barrels or casks with wooden tops is rated at fourth class. Method of closure being within choice of shipper, complaint in this case should be dismissed. Green Bay Soap Co. v. Chicago, etc., R. Co., 14 I. C. C. 609.

48. Reparation awarded: On account of rate overcharge and to cover transfer and demurrage charges accruing because of refusal of delivering line to receive car from its connection. German Co. v. New Orleans & N. E. R. Co., 17 I. C. C. 22. Complainant shipped 6 carloads of cabbages from St. Andrews, S. C., to New York, N. Y., for transportation of which defendants charged their less than carload rate, because initial carrier performed loading service. Held that these shipments, having been offered in carload quantities, were entitled to published carload rate, and in absence of specific tariff provision no additional charge could be lawfully collected from complainant to cover loading service performed by railroad company. Voorhees v. Atlantic Coast Line R. Co., 16 I. C. C. 42. Sum in excess of tariff collected by mistake. Hydraulic Press Brick Co. v. Vandalia R. Co., 15 I. C. C. 175; Carstens Packing Co. v. Butte, A. & Pac. R. Co., 15 I. C. C. 432; Isbell-Brown Co. v. Michigan Cent. R. Co., 15 I. C. C. 616; Laning-Harris Coal & Grain Co. v. St. Louis & S. F. R. Co., 15 I. C. C. 37. Defendant's tariff provides that under certain circumstances two or more packages forwarded by one company, from same point, on same day, to one consignee, whether from one or more shippers, must be aggregated as to weights if lower charge is thereby made. Upon complaint that this rule was not applied to certain shipments to which it should have been applied. California Commercial Ass'n v. Wells Fargo &

creased charges due to carrier's inability to furnish a car of the size ordered by the shipper,[49] in case of misclassification resulting in increased charge,[50] in case of misrouting resulting in increased charges,[51] where carrier and not shipper is at fault,[52]

Co., 16 I. C. C. 458. For unreasonable rates charged on less than carload shipments of metallic cartridges and loaded paper shells from Kings Mills, Ohio, to Muncie, Ind., because of typographical error in tariff sheet which has subsequently been corrected. Joseph A. Goddard Co. v. Cleveland, etc., R. Co., 16 I. C. C. 298. For overcharges exacted on shipments of elevator guides from Chicago, Ill., to Portland, Or. Otis Elevator Co. v. Chicago G. W. R. Co., 16 I. C. C. 502. For excessive charge erroneously collected by defendant on 1 carload of shingles shipped from Lake City, Ark., to Springfield, Mo. Keich Mfg. Co. v. St. Louis & S. F. R. Co., 15 I. C. C. 230. On account of exaction of freight charges for excess weight on shipment of coal from Williams, Okl., to Kansas City, Mo. Katzmaier v. Atchison, etc., R. Co., 14 I. C. C. 528. Defendants collected from complainant 18½ cents per 100 pounds on 60,000 pounds of wheat shipped in car of 55,000 pounds' maximum capacity from Kansas City, Kan., to Galveston, Tex., for export, and thus collected on 5,000 pounds more than maximum loading capacity of car. Held that this was unreasonable charge. Rosenbaum Grain Co. v. Missouri, K. & T. R. Co., 15 I. C. C. 499.

49. Carload rate and minimum weight for car of definite dimensions when lawfully published in tariffs of carrier constitute open offer to shipping public to move their merchandise on those terms, and it would be wholly unsound in principle to permit carrier to impose additional transportation charges on shipper who ordered car of a capacity, length, or dimension specified in its tariffs, simply because it is not provided with cars of dimensions ordered. Kaye & Carter Lumber Co. v. Minnesota & I. R. Co., 16 I. C. C. 285.

Reparation denied: On shipments of sheep from points in California to Tacoma, Wash., because single-deck cars were furnished instead of double-deck cars ordered. Carstens Packing Co. v. Southern Pac. Co., 17 I. C. C. 6.

Reparation awarded: Because of excess weight charged on shipment of wagons, where 2 cars of smaller size but of larger aggregate minimum weight were furnished instead of one car of smaller minimum weight ordered, which would have held wagons. Racine-Sattley Co. v. Chicago, etc., R. Co., 16 I. C. C. 488. Obligation to carry merchandise of shippers on basis of published rates and minimum weights, and to use whatever cars are available for that purpose, ought to have been covered in published tariffs of defendants by proper rule to that effect, and their tariffs were unreasonable and unlawful in not containing such provision at time these shipments were made. Kaye & Carter Lumber Co. v. Minnesota & I. R. Co., 16 I. C. C. 285. On account of imposition of unreasonable freight charges on 5 carloads of coal shipped from Superior, Wis., to destinations in North and South Dakota. Hanna Coal Co. v. Northern Pac. R. Co., 16 I. C. C. 289. On account of imposition of unreasonable freight charge on shipment of corn from Bates, Ill., to Detroit, Mich. Beggs v. Wabash R. Co., 16 I. C. C. 208. On account of imposition of unreasonable freight charge on a shipment of lumber from Paper Mills, Or., to Queen Junction, Pa. American Lumber & Mfg. Co. v. Southern Pac. Co., 14 I. C. C. 561.

50. Rate for transportation of cotton linters from Meridian, Miss., to New Orleans for export, value limited to 2 cents per pound, is 30 cents per 100 pounds; when not so limited rate is 46 cents per 100 pounds, this being rate applicable to transportation of cotton between same points. Complainant tendered 150 bales of cotton linters to defendant's agent at Meridian for transportation to New Orleans for export and requested lowest rate on cotton linters. Defendant assessed 46-cent rate. Upon complaint questioning application of 46-cent rate and asking for reparation, held that it was duty of carrier's agent to apply to shipment lower of two rates, and that reparation should be awarded to complainant on that basis. Salomon Bros. & Co. v. New Orleans & N. E. R. Co., 15 I. C. C. 332.

51. Commission declines to modify its administrative rulings numbered 60, 70, and 83, in regard to misrouting and liability therefor, under pleadings in this case; but if there is any modification of these rulings which may properly be made, commission will entertain any suggestion that carriers may make without formality of complaint. Woodward v. Louisville & N. R. Co., 15 I. C. C. 170.

Reparation awarded. Hill v. Missouri, K. & T. R. Co., 16 I. C. C. 569. Misrouting carload of cullet (broken glass) from New York, N. Y., to Kane, Pa. Thatcher Mfg. Co. v. New York, etc., R. Co., 16 I. C. C. 126. It appearing that principal defendant herein, by disregarding its duty to forward shipment in question by cheapest reasonable available route, caused complainant to pay higher rate. Hendrickson Lumber Co. v. Kansas City So. R. Co., 16 I. C. C. 129. With respect to shipment of lump coal from Rugby, Colo., to Carmen, Okl. Cedar Hill Coal & Coke Co. v. Colorado & So. R. Co., 14 I. C. C. 606. Complainant shipped 2 carloads of crude phosphate rock from St. Blaise, Tenn., to Riddlesburg, Pa., but instead of shipments going over route directed at published rate of $3.45 per gross ton, they were diverted at Cincinnati by initial carrier to another route over which $3.45 joint rate did not apply. Upon complaint asking damages for excess charged caused by such misrouting, held that this commission has jurisdiction to award damages for diversion of shipments under such circumstances, and that complainant should be awarded damages. Woodward v. Louisville & N. R. Co., 15 I. C. C. 170. For misrouting of certain shipments of wheat from points upon St. Joseph & Grand Island Railway to Chicago. Shipments might have moved either through St. Joseph at rate of 35¼ cents, or through Omaha at rate of

but reparation will not be ordered in certain cases where the carrier has voluntarily reduced a rate not per se unreasonable before complaint,[53] or the commission has reduced the rate before claim for reparation has been made,[54] or where the shipper has been negligently deprived of an unlawful privilege or rate,[55] or the subject-

33¼ cents, and were sent by more expensive route. McCaull-Dinsmore Co. v. Chicago G. W. R. Co., 14 I. C. C. 527. On facts shown of record, held that defendant alone was responsible for misrouting of shipment in question through junction carrying higher rate than was available through another junction, and must therefore bear entire burden of mistake, and that connecting carriers participating in movement, being without fault in premises, cannot be required to join in payment of damages to which complainant is entitled. Washington Broom & Woodenware Co. v. Chicago, etc., R. Co., 15 I. C. C. 219. Where record discloses that while defendants transported shipment over lines named by complainant, they did not route or carry it via cheapest reasonable route available over lines of carriers specified in shipping bill. If shipment had moved over Frisco Line from Kansas City to Poplar Bluff through Springfield, Mo., rather than through St. Louis, lower rate than one collected would have been available. Duluth Log Co. v. Minnesota & I. R. Co., 15 I. C. C. 627.

52. Shipper held at fault. Preston v. Chesapeake & O. R. Co., 16 I. C. C. 565. Complainant alleges that its shipment of poles over lines of defendants from La Porte, Minn., to Poplar Bluff, Mo., should have moved to St. Louis without passing through Kansas City, but it appeared that representative of complainant directed that routing. Held that it was duty of the initial carrier to obey specific routing instructions furnished by complainant. When shipper names carriers that are to transport his shipment, it must be assumed that he is relying upon his own investigations, and that for some reason he considers it expedient that shipment move over route indicated by him. Duluth Log Co. v. Minnesota & I. R. Co., 15 I. C. C. 627. Complainant specifically directed that shipment of live stock be forwarded via certain route in order that he might have advantage of trying market so reached. Shipment moved in accordance with his directions. He now claims reparation on ground that lower rate applied via another and more direct route than one which he selected, but via which he could not have reached market which he desired to try. Complaint dismissed. Counsil v. St. Louis & S. F. R. Co., 16 I. C. C. 188.

53. Often wide divergence of opinion exists as to reasonableness of specific rate between certain points, and any policy pursued by this commission tending to make it burdensome to carriers to reduce rates would ultimately work hardship to shipping public. For these reasons it would appear unwise for this commission to adopt policy by which, upon voluntary reduction of rate, shipper who had previously paid higher rate should recover as damages whatever difference there might be between rate which he was compelled to pay and rate newly established by railroad, where application had not been made, either to railroad or to this commission, for reduction of rate prior to time at which railroad itself made such reduction, and where it does not clearly appear that rate was at time unreasonable. Foster Lumber Co. v. Atchison, etc., R. Co., 15 I. C. C. 56. Under law carriers must initiate rates, and so long as they do not abuse right conferred upon them by statute, commission is not justified in penalizing them. Foster Lumber Co. v. Atchison, etc., R. Co., 15 I. C. C. 56. When carriers have of their own volition made reduction in rates, it is not practice of commission to award reparation as matter of course on all shipments made previous to reduction. Such policy would operate as strongest possible deterrent to voluntary decrease of rates. Pilant v. Atchison, etc., R. Co., 15 I. C. C. 178. Complainant shipped carload of lumber from Fostoria, Tex., to Melrose, N. M., on which it was charged 41 cents per 100 pounds. Subsequently, defendants established joint through rate of 33 cents per 100 pounds on lumber between said points. Upon complaint seeking reparation based on difference between these rates, held, on record, that the 41-cent rate was not so unreasonable as to warrant order that all moneys collected thereunder should be refunded. Reparation disallowed and complaint dismissed. Foster Lumber Co. v. Atchison, etc., R. Co., 15 I. C. C. 56.

54. Complainant, in petition which did not claim reparation, had heretofore alleged that certain rates were unjust, unreasonable, and discriminatory, and commission, after full hearing, condemned said rates as unjust, unreasonable, and discriminatory, and prescribed maximum rates to apply thereafter in lieu of rates so condemned. Carrier complied with order of commission. Thereafter complainant filed present petition, based upon shipments and facts set forth in its former complaint, and asked for reparation in amount equal to difference between aggregate sum actually collected by carrier under old rates and sum it should have collected if rate which commission had declared reasonable had been in effect. Held that petition should state whole case, including any reparation claimed, and that it does not necessarily follow that reparation will be awarded in all cases upon basis of rate prescribed to be observed thereafter. Upon facts in this case reparation is denied. Morse Produce Co. v. Chicago, etc., R. Co., 15 I. C. C. 334.

55. Shipper cannot be deprived through carrier's negligence of any lawful privilege offered by another carrier, but such privilege must itself be not only one which carrier may lawfully allow, but it must also be duly established and filed with commission. Kile & Morgan Co. v. Deepwater R. Co., 15 I. C. C. 235.

Reparation denied. Folmer & Co. v. Great Northern R. Co., 15 I. C. C. 33. On claim for reparation for expense of local haul from New Haven to Nashau, N. H., point to which shipment would have been

matter of the contract has been destroyed in transit without the carrier's fault and the shipper thus deprived of the right to claim a privilege subsequently accruing,[56] nor will reparation be awarded against a shipper in favor of a carrier in case of undercharge.[57]

Enforcement of established rates and actions in respect thereto. See 11 C. L. 506. Since the Interstate Commerce Commission has been given jurisdiction in the first instance to determine the reasonableness of an interstate rate, it has been held that the courts have no power to enjoin the enforcement of rates until it has acted thereon,[58] especially the state courts,[59] although a distinction has been made between enjoining the enforcement of an established rate and the restraining of the establishment of a rate by the railroads.[60] But in any case an injunction should issue only in the absence of other adequate remedy [61] and upon a clear showing of the unreasonableness of the rates,[62] and where no inequity will result.[63] Where established rates have proven confiscatory,[64] a temporary injunction may issue

reconsigned had misrouting not occurred, since provision therefor was not filed with commission. Kile & Morgan Co. v. Deepwater R. Co., 15 I. C. C. 235. Because carrier has ceased to grant unpublished privilege, which amounted to nothing less than departure from legal tariff, and that transit privileges cannot be given retroactive effect. National Lumber Co. v. San Pedro, etc., R. Co., 15 I. C. C. 434. Complainant claims reparation in these two cases for higher charge collected on shipments of poles from Washburn, Wis., to Winside, Neb., and from Northome, Minn., to James, Iowa, because actual weight at destination was greater than that named in bill of lading. Record shows that weight upon which rates were finally assessed was correct weight, and complaints as to this matter should be dismissed, but order issued for admitted overcharge on Northome shipment. Duluth Log Co. v. Chicago, etc., R. Co., 16 I. C. C. 38.

56. Complainant shipped 125 bales of cotton from Lawton, Okl., to Chickasha, Okl., for concentration and subsequent reshipment. Defendants' tariffs provided that on reshipment from the concentration point the through rate from point of origin to final destination would be protected. Consignment was destroyed by fire while standing upon the platform of the compress at Chickasha. Complaint seeking refund of the local charges collected for the movement from Lawton to Chickasha dismissed. Anderson, Clayton & Co. v. St. Louis & S. F. R. Co., 17 I. C. C. 12.

57. Commission is without authority to order shipper to make good undercharge, but shippers must understand their liability under law for failure or refusal to pay published rates. Falk & Co. v. Chicago, etc., R. Co., 15 I. C. C. 269.

58. Atlantic Coast Line R. Co. v. Macon Grocery Co. [C. C. A.] 166 F 206, rvg. Id. 163 F 738.

59. State court is without jurisdiction to temporarily enjoin putting into effect of increase in freight rates on interstate traffic, pending a determination by Interstate Commerce Commission of the question of reasonableness of the proposed rate. Ohio Dairy Co. v. Lake Shore & M. S. R. Co., 7 Ohio N. P. (N. S.) 451.

60. Under Interstate Commerce Act expressly reserving all legal remedies, circuit court of United States has jurisdiction to enjoin railroad companies from filing and enforcing schedules alleged to be unjust and unreasonable, pending investigation by commission, a proper showing being made. Northern Pac. R. Co. v. Pacific Coast Lumber Mfrs. [C. C. A.] 165 F 1. After a new interstate rate has been duly established and put into effect, court has no power to enjoin the enforcement of same until commission has investigated its reasonableness. Great Northern R. Co. v. Kalispell Lumber Co. [C. C. A.] 165 F 25.

61. Remedy provided by Pub. Act 1907, p. 428, No. 312, § 26, authorizing commencement of immediate suit in circuit court to test validity of order of commissioners and giving such suit preference over all civil suits, held prompt and complainants are not entitled as matter of law to injunction pending such suit to restrain enforcement of order changing excess baggage rate. Michigan Cent. R. Co. v. Murphy [Mich.] 16 Det. Leg. N. 168, 120 NW 1073. In Virginia a right of appeal is given from Virginia State Corporation Commission, and hence federal court will not enjoin enforcement of orders. Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210, 53 Law. Ed. 150.

62. No injunction should be granted unless the case is reasonably free from doubt. Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714. Where railroads were given full hearing before the commissioners but offered no evidence as basis for fixing rates and admitted in suit in circuit court that rates fixed were not confiscatory, held that injunction was properly denied. Michigan Cent. R. Co. v. Murphy [Mich.] 16 Det. Leg. N. 168, 120 NW 1073.

63. Fact that court may require railroads to give bonds to secure passengers and shippers against loss, should rates sought to be enjoined ultimately be held valid, is not sufficient ground for issuing injunction, where it would be inadequate to protect where amounts are small. Railroad Commission of Alabama v. Central of Georgia R. Co. [C. C. A.] 170 F 225.

64. Showing of confiscatory character of rates upon actual trial thereof held to au-

although its office is usually to preserve a status quo.[65] Upon granting an injunction to a carrier, the court may restrict the rates to be charged as a condition thereof,[66] or it may leave the carrier untrammeled.[67] An injunction should not issue where it is probable that a practical test will be necessary to determine the reasonableness of the rates.[68] Where a federal court having jurisdiction of the subject and of the parties [69] has found a state statute establishing rates void and still retains jurisdiction, it may restrain state officials from attempting to enforce the same.[70] In the absence of statute a court has only power to determine whether a particular rate is reasonable or confiscatory and cannot prescribe another rate,[71] and it is doubtful if such power can be conferred.[72] A statutory method for the review of the orders of commissioners is usually prescribed [73] and must be followed.[74] In the absence thereof, the usual and appropriate procedure is to enjoin the members of the commission from enforcing a confiscatory order.[75] The federal courts may set aside an order of the Interstate Commerce Commission resulting from a misapplication or misconception of law.[76]

thorize temporary injunction. In re Arkansas R. Rates, 163 F 141.

65. In re Arkansas R. Rates, 163 F 141.

66. Where upon enjoining prescribed rates pendente lite as confiscatory, railroad immediately returned to three-cent passenger rate and raised freight rate from 50 to 200 per cent, held that freight advancement was extortionate, and court could limit advancement as condition to retaining injunction. In re Arkansas R. Rates, 168 F 720.

67. Issuing of preliminary injunction restraining the enforcement of freight rates prescribed by Arkansas Railroad Commission and two-cent passenger rate imposed by Act Ark. Feb. 9th, 1907, (Acts 1907, p. 10), held to leave no limitation as to freight rates and to allow return to three-cent rate. In re Arkansas R. Rates, 168 F 720.

68. Railroad Com. of Alabama v. Central of Georgia R. Co. [C. C. A.] 170 F 225.

69. Federal court of district of which complainants are inhabitants has jurisdiction of suit to enjoin several railroads, members of association, from putting into effect alleged illegal rates on food commodities shipped in interstate commerce within the territory of district, although roads are citizens of another state. Macon Grocery Co. v. Atlantic Coast Line R. Co., 163 F 736.

70. May on supplemental bill enjoin circuit attorney of state from prosecuting suit in state court to restrain railroads from charging more than statutory rates. Missouri Pac. R. Co. v. Jones, 170 F 124.

71. Gulf, etc., R. Co. v. Railroad Com. [Tex.] 116 SW 795.

72. Pub. Acts 1907, p. 433, § 26, No. 433, empowering courts to determine whether rates fixed are unreasonable or confiscatory, but no authority to ascertain what rate would be reasonable, held not unconstitutional as conferring jurisdiction to fix rates (Michigan Cent. R. Co. v. Murphy [Mich.] 16 Det. Leg. N. 168, 120 NW 1073), and even if such provision is unconstitutional, the other provisions of the act are not thereby rendered invalid (Id.).

73. Under Acts 1907, p. 469, c. 241, § 6, order of commission may be reviewed by action commenced in superior court within 30 days from making thereof. Chicago, I. & L. R. Co. v. Railroad Com. [Ind.] 87 NE 1030. Under Rev. St. 1895, art. 4565, authorizing railroad dissatisfied with rates prescribed by commission to file a petition setting forth objection, company may attack single rate. Gulf, etc., R. Co. v. Railroad Com. [Tex.] 113 SW 741. Petition filed under Rev. St. 1895, art. 4565, objecting to reasonableness of rate, must set forth facts, which, if true, would render such rate unreasonable as a matter of law. Id. Petition alleging that hauling of lumber over the portion of road designated would not yield sufficient returns, which did not state earnings in hauling lumber over remainder of road, nor amount of traffic over portion from beyond, held insufficient. Id. Rev. St. §§ 244-16, par. "d," prescribing mode of procedure necessary to review judgment rendered in action prosecuted to reverse order of railroad commission, held applicable only to judgment in court of common pleas (Railroad Com. v. Hocking Val. R. Co., 79 Ohio St. 419, 87 NE 548), and either party may take case upon error, as in other civil actions (Id.). Motion for a new trial and case made is not necessary to review order of corporation commission under Const. Okl. art. 9, § 22. Atchison, etc., R. Co. v. Love [Okl.] 99 P 1081.

74. Where order of commission fixing rates is not reviewed as provided by Acts 1907, p. 469, § 6, it becomes conclusive except for causes rendering it absolutley void. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966.

75. Such bill is not bad as an attempt to enjoin legislation or as a suit against a state. Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210, 53 Law. Ed. 150. Though the Virginia State Corporation Commission has for some purposes the function of a court, yet the establishing of rates by such commission is a legislative act, and if such rates are confiscatory the federal court may grant injunctive relief. Id.

76. Stickney v. Interstate Commerce Com., 164 F 638.

(§ 2) *D. Discriminations and preferences.*[77]—See 11 C. L. 509—At common law,[78] under the Elkins act and its amendments[79] and under the constitution and statutes of many states,[80] a carrier must not unjustly[81] discriminate between commodities,[82] persons,[83] or localities,[84] but must serve all alike who apply under substantially similar conditions.[85] The prohibition applies not only to rates,[86] but to facilities,[87] and thus in case of a car shortage such cars as are available must be

77. Search Note: See notes in 5 C. L. 512; 11 A. S. R. 647; 1 Ann. Cas. 55.

See, also, Carriers, Cent. Dig. §§ 901-905; Dec. Dig. §§ 198-202; 5 A. & E. Enc. L. (2ed.) 177.

78. Missouri, K. & T. R. Co. v. New Era Milling Co. [Kan.] 100 P 273.

79. The provisions of the Elkins Act making a common carrier criminally liable for the violation of the prohibitions of that act against giving rebates, by its officers acting within the scope of their employment is not unconstitutional as denying due process of law. New York, etc., R. Co. v. U. S., 212 U. S. 481, 500, 53 Law. Ed. —, afg. 146 F 298. Under the Elkins Act of February 19, 1903 (32 Stat. at L. 847, c. 708, U. S. Comp. St. Supp. 1907, p. 880), as amended by the Hepburn Act of June 29, 1906 (34 Stat. at L. 584, 587, c. 3591, U. S. Comp. St. Supp. 1907, pp. 892, 898), express companies are prohibited from giving free transportation of personal packages to their officers and employes and members of their families, and to officers of other transportation companies and members of their families, in exchange for passes issued by the latter to the officers of the express company. American Exp. Co. v. U. S., 212 U. S. 522, 53 Law. Ed. —, afg. 161 F 606. Hepburn Act of June 29, 1906, § 1, does not give express companies the right to give free transportation of personal packages to their officers, etc. Id.

80. Legislature by passage of Acts 1905, p. 83, c. 53, prohibiting unjust discrimination in rates, held not to have intended to stifle all competition for passenger traffic by rates between steam railroad and interurban road between same places. Etter v. Cleveland, etc., R. Co. [Ind.] 86 NE 1020. Ticket good for two trips either way for one person, or for carriage of two persons one way, held a "commutation ticket," within Acts 1905, p. 83, c. 53, prohibiting unjust discrimination in rates, but expressly excepting commutation ticket. Id. "Discrimination," as used in Rev. St. 1895, art. 4574, means "delay." Missouri, K. & T. R. Co. of Texas v. Thompson [Tex. Civ. App.] 118 SW 618. Inducing or forcing a connecting carrier to carry freight over a different route and deliver to a different connection from that demanded by the owner is not "unjust discrimination" under Rev. St. 1895, art. 4574. Id.

81. At common law, carrier is not obliged to carry for all on same terms, but discrimination must not be unreasonable. State v. Central Vermont R. Co., 81 Vt. 463, 71 A 194.

82. Evidence held to show discrimination in furnishing cars for hay shipment in favor of other freight, especially at noncompetitive points. State v. Chicago & N. W. R. Co. [Neb.] 120 NW 165. Carrier cannot discriminate in receiving freight in favor of that tendered by connecting carriers and in favor of that intended for foreign shipment. Ocean S. S. Co. v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 63 SE 577. Carrier cannot reject goods tendered of a kind which it carries and thereafter accept goods of another kind (Id.), but must receive goods in order of tender (Id.).

83. Word "terms," as used in Acts 1882, p. 47, No. 36 (V. S. 3902-3904), requiring railroads to give all persons reasonable and equal terms, held to refer to rates. State v. Central Vermont R. Co., 81 Vt. 463, 71 A 194. Shipper has a right to demand that the rate shall not only be reasonable as to amount but also as compared with the rates charged others for similar service. Missouri, K. & T. R. Co. v. New Era Milling Co. [Kan.] 100 P 273. Where railroad company fixes charges for shipments originating on own line or on certain connecting lines, it must give same rates to shipments originating on other connecting lines. Id. Rule 36 of railroad commission, requiring the furnishing of equal facilities to all, held violated where carrier refused to switch cars onto plaintiff's sidetrack, while it did so for others receiving like shipments. Augusta Brokerage Co. v. Central of Georgia R. Co., 5 Ga. App. 187, 62 SE 996.

84. Under Rev. St. 1895, art. 4574, subd. 1, making it unlawful to give undue preference, unreasonable preference cannot be given to one locality over another although latter has natural facilities and advantage which off-set discrimination. Railroad Com. v. Galveston Chamber of Commerce [Tex. Civ. App.] 115 SW 94. Where carrier makes through traffic arrangements, it must furnish same facilities to all shippers along line. Pittsburg, etc., R. Co. v. Wood [Ind. App.] 88 NE 709. Evidence held to show through traffic discrimination in favor of shipper at competitive points. Id.

85. Under Sayles' Ann. Civ. St. 1897, art. 4574, there is no "unjust discrimination" against shippers unless a discrimination is made between shippers similarly situated. Held that a contract with carrier to deliver cars at a certain time which shipper had secured from another carrier, was not invalid as unjustly discriminating between shippers, where evidence did not show that any other shipper of live stock furnishing his own cars had priority. Texas & P. R. Co. v. Shawnee Cotton Oil Co. [Tex. Civ. App.] 118 SW 776.

86. Any discrimination in charges for which no valid reason exists is unjust. Missouri, K. & T. R. Co. v. New Era Milling Co. [Kan.] 100 P 273.

87. Must furnish cars without unreasonable discrimination. Pittsburg, etc., R. Co. v. Wood [Ind. App.] 88 NE 709. Interstate Commerce Act, as amended, requires railroads to furnish equal facilities for trans-

equitably pro rated [88] without unjust discrimination.[89] What constitutes an unjust and unreasonable discrimination is a question of fact,[90] into which, however, the existence of substantially dissimilar, natural,[91] and competitive conditions neces-

portation and it is no defense that it does not own portion of cars operated over its line. United States v. Baltimore & O. R. Co. [C. C. A.] 165 F 113. Rule 36 of Railroad Commission, relating to equal facilities, held not violated by refusal to issue through bills of lading or to furnish its cars to connecting carriers. Augusta Brokerage Co. v. Central of Georgia R. Co., 5 Ga. App. 187, 62 SE 996. Word "transportation" as used in Act June 29th, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), amending Interstate Commerce Act, includes all kinds of instrumentalities of shipment. United States v. Baltimore & O. R. Co. [C. C. A.] 165 F 113.

88. Shipper is only entitled to his proportion of cars apportioned to his station. State v. Chicago & N. W. R. Co. [Neb.] 120 NW 165. While mine owner is entitled to its individual private cars, such cars, in case of shortage, must be charged against its pro rata share. United States v. Baltimore & O. R. Co. [C. C. A.] 165 F 113. In pro rating insufficient cars, company's private fuel cars, fuel cars of other roads sent upon its line, private or individual cars of mines, should be placed on same basis as forming available supply, fuel cars specially consigned and private cars being charged against particular mine's quota. Id. In determining a mine's rating during car shortage, its physical capacity to furnish coal should be taken as sole basis, and rule by which such capacity is taken as one, and shipments during last two years as two, is unfair and inequitable to new mines. Id. Interstate carrier making a shortage distribution of cars among coal mining companies has no right under the Interstate Commerce Act to leave out private and foreign cars used in intrastate business. Majestic Coal & Coke Co. v. Illinois Cent. R. Co., 162 F 810.

89. United States v. Baltimore & O. R. Co. [C. C. A.] 165 F 113. Shippers on main and collateral lines are entitled to same treatment under Interstate Commerce Act, as amended. Id. Rule allowing any mine operator using sea coast terminal tracks and unloading its cars thereat within five days on average, a 50 per cent allotment during succeeding month, held a violation of Interstate Commerce Act. Id.

90. State v. Central Vermont R. Co., 81 Vt. 463, 71 A 194. Lease by carrier of space between its tracks and river, held and treated as a part of its right of way or depot grounds, to logging company to enable it to more advantageously load its logs, held a discrimination against other similar shippers, in violation of Rev. St. 1899, § 1127 (Ann. St. 1900, p. 972). Hobart-Lee Tie Co. v. Stone, 135 Mo. App. 438, 117 SW 604. Where carrier engaged in transferring cars from track of another carrier to a certain town delivered to all parties except the plaintiff, a milling company, it was an unlawful preference. Missouri Pac. R. Co. v. Larabee Fleur Mills Co., 211 U. S. 612, 53 Law. Ed. —, afg. 74 Kan. 808, 88 P 72. Fact that company permitted private elevator to be constructed on its right of way does not render its refusal to construct at its own expense a sidetrack to elevator off its right of way an unlawful discrimination within Const. art. 9, § 18 (Bunn's Ed. § 222). Chicago, etc., R. Co. v. State [Okl.] 99 P 901. Where carrier charges same rate for compressed and uncompressed cotton, but compresses the latter at a particular place for its own convenience and at its own expense, its refusal to pay cost of compressing at another place is no discrimination though price is the same. Railroad Commission of Alabama v. Central of Georgia R. Co. [Ala.] 49 S 237.

91. It is matter of common knowledge that freight rates are controlled by various and varying conditions, and therefore rates established in one section furnish no reliable standard by which to measure reasonableness of rates in another section where dissimilar conditions prevail. Acme Cement Plaster Co. v. Lake Shore & M. S. R. Co., 17 I. C. C. 30.

Conditions held dissimilar: Proximity of Detroit and Toledo to great channels of through transportation and their location on direct through routes where density of traffic is very great and general operating and traffic conditions are favorable, are elements that cannot be ignored by rate maker and must necessarily tend to lower rates than can be accorded to communities that are removed from these great streams of traffic. Saginaw Board of Trade v. Grand Trunk R. Co., 17 I. C. C. 128. Complainant offered testimony tending to show that Santa Rosa rates should not exceed defendants' division of through rates to El Paso, and that they ought not to exceed Santa Fe rates from same points of origin to Roswell, N. M., but circumstances and conditions prevailing at El Paso and Roswell afford no basis for measuring rates to Santa Rosa. Moise Bros. Co. v. Chicago, etc., R. Co., 16 I. C. C. 550. Substantial dissimilarity in transportation conditions found to exist in producing territories east and west of Mississippi River. Chicago Lumber & Coal Co. v. Tioga S. W. R. Co., 16 I. C. C. 323. That conditions are not same on both sides of Ohio river, and that no showing is made which would warrant compulsory change in grouping as prayed for, and which would in all probability involve all rate adjustments from bituminous coal fields of states of Ohio, Pennsylvania, and West Virginia. Hitchman Coal & Coke Co. v. Baltimore & O. R. Co., 16 I. C. C. 512. Complainant shipped carload of cross ties from Sault Ste. Marie, Mich., to Thiensville, Wis., for which it was charged combination of locals of 20 cents per 100 pounds, whereas at same time there was in effect joint through rate of 13 cents over defendants' lines from Sault Ste. Marie to Milwaukee, Wis., Thiensville being intermediate to Milwaukee. Held that, because of dissimilarity of circumstances at Milwaukee, fourth section of the act is not violated. MacGillis & Gibbs Co. v. Chicago,

sarily enter to a considerable extent.[92] A mere unequal charge or furnishing of

etc., R. Co., 15 I. C. C. 329. Blanket rates for coal from Walsenburg fields, in southern Colorado, to points in Kansas, Nebraska, Oklahoma, Texas, and New Mexico, compared with rates on coal from points in Kansas, Iowa, Missouri, Wyoming, Illinois, Oklahoma, and Arkansas, to consuming markets, held justified by dissimilar conditions. Cedar Hill Coal & Coke Co. v. Colorado & So. R. Co., 16 I. C. C. 387. Rate as compared with rates of one of defendants from Middlesboro to Knoxville is not sustained, as circumstances surrounding shipments from Middlesboro are dissimilar. City of Bristol v. Virginia & S. W. R. Co., 15 I. C. C. 453. Rate of $1.20 per ton for bituminous coal from Middlesboro, Ky., to Bristol, Tenn., when compared with 80-cent rate for haul of same distance to Chattanooga, Tenn., is not sustained, there being a dissimilarity in circumstances and conditions surrounding traffic to Chattanooga. City of Bristol v. Southern R. Co., 15 I. C C. 887. Held that circumstances and conditions obtaining at Eufaula are materially different from those surrounding Bainbridge, and that therefore complaint should be dismissed. Bainbridge Board of Trade v. Louisville, etc., R. Co., 15 I. C. C. 586. Imposition of higher **track-storage charges** at Pennsylvania Lines Produce Yards in Pittsburg than at other points does not constitute undue discrimination in view of substantial dissimilarity of conditions. Wilson Produce Co. v. Pennsylvania R. Co., 16 I. C. C. 116. Held that, in view of practical difficulties attending **"C. O. D." carriage of intoxicating liquors,** discrimination against that traffic resulting from refusal to perform service in question is not undue, and therefore not in violation of statute. Royal Brew. Co. v. Adams Exp. Co., 15 I. C. C. 225. Right of express company to maintain **free package pick-up and delivery** service at one point, while not maintaining such service at another point, must necessarily be controlled by conditions existing at each place. Because such service is maintained at Fall River, where volume of traffic is large, and wagon service can be conducted economically, it by no means follows that like service must be maintained at Bristol Ferry, where traffic is small and cost of keeping up wagon service might more than absorb all revenue. Phillips v. New York & Boston Despatch Exp. Co., 15 I. C. C. 631.

92. Where competitive conditions among shippers are leading considerations that induce complaint, commission in determining reasonableness of rates must have due regard to transportaton conditions and rights of carriers as well as interests of shippers. Chicago Lumber & Coal Co. v. Tioga S. W. R. Co., 16 I. C. C. 323.

Lower rate held warranted by competition: Commission cannot order reduction on paper stock in order to meet market competition, as railroads are authorized to meet or not to meet competition, as to them seems to their interest. La Salle Paper Co. v. Michigan Cent. R. Co., 16 I. C. C. 149. Shipment of carload of tanks and substructures weighing 52,400 pounds, from Kendallville, Ind., to Gallatin, Tenn., to which movement rate of 46 cents per 100 pounds was applied, made by combination of local joint rate of 16 cents via Grand Rapids & Indiana Railway and Pittsburg, Cincinnati, Chicago & St. Louis Railway from Kendallville to Louisville, distance 246 miles, and local rate of 30 cents via Louisville & Nashville Railway from Louisville to Gallatin, distance 159 miles. Rate from Louisville to Nashville, distance 187 miles, is 15 cents, making through rate from Kendallville to Nashville of 31 cents. Movement to Nashville is through Gallatin. Flint & Walling Mfg. Co. v. Grand Rapids & I. R. Co., 14 I. C. C. 520. Lower rate to more distant points. Chicago Sash & Door Ass'n v. Norfolk & W. R. Co., 14 I. C. C. 594. Held that rate adjustment, in view of substantial dissimilarity in circumstances and conditions surrounding traffic from Kansas City and Paola, does not violate prohibition against unjust discrimination nor long-and-short-haul provision of statute. Paola Refining Co. v. Missouri, K. & T. R. Co., 15 I. C. C. 29. Defendants having shown that competitive conditions at El Paso compelled lower rates thereto than to Santa Rosa, burden of proof does not rest upon them to justify their Santa Rosa rates. Moise Bros. Co. v. Chicago, etc., R. Co., 16 I. C. C. 550. Competition of carriers at New York, which does not exist in Philadelphia, justifies longer free time at former city. Brey v. Pennsylvania R. Co., 16 I. C. C. 497. Dissimilarity in conditions affecting express traffic to Fall River and Bristol Ferry explains and justifies relation of defendant's rates to two points. Phillips v. New York & Boston Despatch Exp. Co., 15 I. C. C. 631. It is manifest that rail carriers from Grand Rapids ought not to be required to make rates to meet **water competition** or to equalize for complainant advantages of business rival which moves its product to Chicago by its own water line. Acme Cement Plaster Co. v. Lake Shore & M. S. R. Co., 17 I. C. C. 30. Water competition may justify difference in carload minimums and in right of combining different commodities at carload rate as well as in rate itself, but carriers should be prepared to justify such preference. City of Spokane v. Northern Pac. R. Co., 15 I. C. C. 376. System of transcontinental rates now in force applies lower transportation charges from points of origin upon Missouri River and east to Pacific coast cities than are applied to intermediate interior points. Held that this scheme of rate making has been forced by water competition between Atlantic and Pacific coasts, and that maintenance of lower rate to more distant coast point is not of necessity violation of third or fourth sections, since water competition creates dissimilarity of circumstance and condition between interior and coast. Id. Circumstances and conditions surrounding transportation of flour through Chicago from Minneapolis to seaboard for export or domestic consumption are substantially dissimilar to circumstances and conditions surrounding traffic through Chicago from Missouri River points, in that lower proportional rates from Minneapolis to Chicago are direct result of competition of lake and rail routes. Bulte Milling Co. v. Chicago &

facilities is not conclusive.[93] Penal statutes, however, relating thereto are strictly construed.[94] The prohibition against undue preference applies equally to a commission fixing the rates.[95]

To more effectually prevent unjust discrimination, the interstate commerce act requires interstate rates to be filed,[96] and the amendment of June 29th, 1906, makes the transportation of property moving in interstate commerce[97] by a carrier who has failed to file rates for such service a misdemeanor.[98] Where a rate has been duly established, it is an offense under the Elkins Act to deviate therefrom,[99] and

A. R. Co., 15 I. C. C. 351. Where well sustained water competition exists that takes substantial portion of tonnage and could readily prepare to take it all, if left in undisturbed control of traffic, rail line, without necessarily subjecting itself to charges of discriminating against other localities, may adjust its rates so as to fight for whole tonnage the moment it really feels effect and influence of its competitor's rates; it need not wait, as complainants contend, until water line is prepared to take half tonnage. Id. Rates from St. Louis and points basing thereon to New Orleans, Natchez, Vicksburg, and other Mississippi River points are controlled by water competition, and, therefore, fact that such rates are lower than rates from same points of origin to Monroe does not unjustly discriminate against Monroe. Monroe Progressive League v. St. Louis, etc., R. Co., 15 I. C. C. 534. That departure from former relationship of rates on sugar from New Orleans to Indianapolis and to St. Louis and the Ohio River crossings is not unjustly discriminatory against Indianapolis, because rates on sugar from New Orleans to St. Louis and to Ohio River crossings are controlled by potential water competition, but that it is unjustly discriminatory against Indianapolis to depart from former relationship of rates on coffee as between Indianapolis and St. Louis and Ohio River crossings, because such rates on coffee are not controlled by the water competition. Indianapoliis Freight Bureau v. Illinois Cent. R. Co., 15 I. C. C. 567. That rates on sugar from Atlantic seaboard points to St. Louis and the Ohio River crossings are controlled by water-controlled rates from New Orleans and that therefore it is not unjustly discriminatory against Indianapolis to depart from former relationship of rates on sugar from Atlantic seaboard points to Indianapolis and to St. Louis and Ohio River crossings, but that it is unjustly discriminatory against Indianapolis to depart from former relationship of rates on coffee as between Indianapolis and St. Louis and Ohio River crossings, which are not so controlled by water competition. Id. Indianapolis Freight Bureau v. Pennsylvania R. Co., 15 I. C. C. 567; Indianapolis Freight Bureau v. Illinois Cent. R. Co., 15 I. C. C. 567. While water competition may be availed of by carrier as its justification and excuse for rates that are lower than would otherwise be lawful, existence of such competition is not in itself ground upon which shipper may demand lower rate. It is privilege of carrier, in its own interest, to meet such competition, but it is not privilege of shipper to demand less than normal rates because of existence of competition which carrier in its own behalf does not choose to meet. Lindsay Bros. v. Baltimore, etc., R. Co., 15 I. C. C. 6. Held that order as prayed for in relation to class rates from Indianapolis to St. Paul and Winona is not warranted in view of peculiar conditions under which traffic is handled and rates constructed from Indianapolis and competing cities of St. Louis and Chicago to St. Paul and Winona territory. Chicago not only has advantage of more intense railroad competition, but is much shorter distance and enjoys natural advantages of location over Indianapolis in reaching St. Paul and Winona. Likewise St. Louis, while but little nearer than Indianapolis by short line, reaches St. Paul and Winona by direct routes, which must compete not only with each other but also with boat lines plying on the Mississippi River. Indianapolis Freight Bureau v. Cleveland, etc., R. Co., 16 I. C. C. 276.

93. Mere charging of 50 cents per ton less for transportation of coal does not of itself show unreasonable discrimination. State v. Central Vermont R. Co., 81 Vt. 463, 71 A 194.

94. Rev. St. 1895, art. 4574, providing that a shipper unjustly discriminated against may recover penalties, is a penal statute and strictly construed and will not be extended so as to embrace acts not covered by its language. Missouri, K. & T. R. Co. v. Thompson [Tex. Civ. App.] 118 SW 618.

95. Rates established by Interstate Commerce Commission. Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645., Railroad commission cannot disregard Rev. St. 1895, art. 4574, subd. 1, prohibiting undue preference. Railroad Commission v. Galveston Chamber of Commerce [Tex. Civ. App.] 115 SW 94.

96. It is not essential to constitute "rates in force," within interstate commerce act requiring the same to be filed, that transportation should have taken place thereunder. New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 166 F 267.

97. Where railroad hauls interstate commerce, it is subject to interstate commerce act and amendments in respect thereto, although its line lies wholly within one state. United States v. Illinois Terminal R. Co., 168 F 546.

98. Amendment of June 29th, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892). United States v. Illinois Terminal R. Co., 168 F 546.

99. Agreement to furnish publisher transportation in exchange for advertisement which has no fixed commercial value held violation of interstate commerce act, as amended, prohibiting acceptance of "greater

it is no defense that the concession was granted by way of a compromise of claims.[1] It is equally an offense to receive a concession, but in either case the granting[2] or receiving[3] thereof must be willful. The act applies to a carrier transporting an interstate shipment under a "common arrangement."[4] Likewise, it is an offense under the Elkins Act[5] to charge the lawful rate[6] and to thereafter knowingly[7] and willfully[8] give a rebate therefrom,[9] and it is no defense that competition required the giving thereof[10] or that the officers acted in good faith, believing that they could lawfully do as they did.[11] Where a carrier is a party to a joint rate, it may be prosecuted for granting a rebate therefrom, though it did not file and publish the same.[12] The payment of the rebate is the gist of the offense,[13] and a single payment constitutes but one offense though it covers several shipments.[14] Conspiracy to induce the giving or receiving of a rebate in violation of the Elkins Act is not limited to the giver or receiver alone.[15]

Remedies, criminal liability, prosecution, and punishment. See 11 C. L. 512—Mandamus[16] and injunction[17] will ordinarily lie at the instance of the party affected[18]

or less or different" compensation than that named in schedules. United States v. Chicago, I. & L. R. Co., 163 F 114.

1. United States v. Atchison, etc., R. Co., 163 F 111.

2. Atchison, etc., R. Co. v. U. S. [C. C. A.] 170 F 250. Evidence that reduction was made as freight charges on lime lost from car held admissible on intent to give a concession. Id.

3. Shipper is not guilty of accepting a concession within Elkins Act unless he in fact has knowledge of the concession. Standard Oil Co. v. U. S. [C. C. A.] 164 F 376.

4. Carrier by water only agreed to "protect" a rate of 45 cents per hundred on shipment of iron pipe from Philadelphia to Winnipeg, and routed shipment over railroad from Philadelphia to point on Lake Erie, hence over its line to West Superior, Wis., and thence over two railroads to Winnipeg. Shipment was made under through bills of lading issued by initial carrier at rate of 49½ cents, sum of such road's rate to West Superior and rate of terminal roads. Water carrier refunded difference. Held that shipment was not under a "common arrangement." Camden Iron Works v. U. S. [C. C. A.] 158 F 561.

5. Payment of rebates after passage of Elkins Act on shipments made before passage is a violation of the provisions of that act against giving rebates. New York Cent. & H. R. R. Co. v. U. S., 212 U. S. 481, 500, 53 Law. Ed. —, afg. 146 F 298. Held that instructions submitted to jury as a basis of conviction only acts which occurred after passage of Elkins Act against rebates. Id.

6. Failure of carrier to post its schedules and tariff of rates in depot, as required by interstate commerce law, does not invalidate rate. Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 SW 1052.

7. Receipted freight bills and vouchers given to consignee and presented by consignor as basis for refunding of elevator charges held to show that defendant knew that consignee paid as agent for consignor. Wisconsin Cent. R. Co. v. U. S. [C. C. A.] 169 F 76.

8. Although giving of rebate must be "willful," it need not be given with evil intent, but it is sufficient if the act was done knowingly and purposely. Chicago, etc., R. Co. v. U. S. [C. C. A.] 162 F 835.

9. Refund of elevator charges where schedule filed did not show absorption of such charge held a rebate. Wisconsin Cent. R. Co. v. U. S. [C. C. A.] 169 F 76.

10. As other roads were giving same. Chicago, etc., R. Co. v. U. S. [C. C. A.] 162 F 835.

11. Chicago, etc., R. Co. v. U. S. [C. C. A.] 162 F 835.

12. United States v. New York, etc., R. Co., 212 U. S. 509, 53 Law. Ed. —. Under Elkins Act, § 1, all the carriers who have participated in any rate filed or published are brought within the terms of the act, as much so as if the tariff had been published and filed by each of them. Id.

13. Offense is complete when carrier, to whom legal rate has been paid, pays to shipper stipulated rebate upon a claim being presented by him. New York, etc., R. Co. v. U. S., 212 U. S. 481, 500, 53 Law. Ed. —, afg. 146 F 298. To warrant conviction for receiving rebates, actual payment must be shown. United States v. Bunch, 165 F 736.

14. United States v. Bunch, 165 F 736. Where allegations and conceded facts show that there were 20 shipments upon which rebates were received in 6 settlements, held that there were 6 offenses. United States v. Stearns Salt & Lumber Co., 165 F 735.

15. Thomas v. U. S. [C. C. A.] 156 F 897.

16. Where carrier transferred cars to all parties but plaintiff, a milling company, mandamus would lie, and no legislative enactment, no special mandate from any commission or other administrative board was necessary. Missouri Pac. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 53 Law. Ed. —, afg. 74 Kan. 808, 88 P 72.

17. Since remedy at law is usually inadequate. Merchants' & Miners' Transp. Co. v. Granger [Ga.] 63 SE 700.

18. Since discrimination between cities affects all shippers along road, shipper at point along road is proper plaintiff to enjoin enforcement of discriminatory rate.

to remedy and prevent unlawful discrimination. The plaintiff in a suit for unlawful discrimination by granting rebates to his competitor cannot recover if he has also received rebate though less in amount.[19] Where the interstate commerce commission finds a rate, regulation, or practice, unlawfully discriminatory, it may make such order as is necessary to eliminate the same,[20] and, where all the parties appear and are fully heard, it may grant such relief as the facts warrant though technically without the pleadings.[21] While it is the duty of the commission to fix the duration of an order, failure to do so does not invalidate the same.[22]

Under the Elkins Act, prosecutions for the violation of the Interstate Commerce Act and its amendments must be in the district where the offense occurs,[23] and, where the offense is a continuing one,[24] it may be prosecuted in any district through which the transportation may have extended. An indictment for granting a concession or a rebate must allege all the essential elements of the offense,[25] and the evidence must establish the offense charged.[26] The carrier and its agents may be jointly indicted for giving a rebate.[27] The integer for imposing penalty for the granting of a concession is the transaction,[28] but the amount thereof rests largely within the discretion of the court.[29]

Interstate Commerce Commission.—The Interstate Commerce Commission has broad powers with regard to discrimination,[30] and, in the exercise of that power,

Railroad Com. v. Galveston Chamber of Commerce [Tex. Civ. App.] 115 SW 94.

19. International Coal Min. Co. v. Pennsylvania R. Co., 162 F 996.

20. Is not limited to fixing maximum rates. New York, etc., R. Co. v. Interstate Commerce Com., 168 F 131. Order correcting a discrimination is not invalid because it does not correct others. Id. Interstate Commerce Act, § 15, as amended by Hepburn Act, providing that where commission finds a rate or any regulations or practices unjustly discriminative it shall "determine and prescribe what will be the just and reasonable rate or rates * * * and what regulations or practices will be just," etc., does not require that on finding particular rate discriminatory it shall prescribe regulations in detail not necessary to remove discriminations. Id. Order, requiring carriers to cease from according to flour milled in transit at interior points, a lower rate for export than that for grain brought to New York from such interior points and there milled for export, held within powers of commission. Id. Carrier cannot complain of provision in order for its benefit, though outside of commission's power. Id. No objection to modification of rate order of commission that modified rate was discriminatory, for it is duty of commission to adjust same. Railroad Com. v. Galveston Chamber of Commerce [Tex. Civ. App.] 115 SW 94.

21. New York, etc., R. Co. v. Interstate Commerce Com., 168 F 131.

22. Will be deemed effective for maximum limit of two years. New York, etc., R. Co. v. Interstate Commerce Com., 168 F 131.

23. Offense of failure to file schedule is committed in District of Columbia where filing is required. New York, etc., R. Co. v. U. S. [C. C. A.] 166 F 267.

24. Provision in Elkins Act, that, where violation of Interstate Commerce Act and its amendments commences in one federal district and is completed in another, either has jurisdiction, relates to a continuing offense and is inapplicable to offense of failing to file rate (New York, etc., R. Co. v. U. S. [C. C. A.] 166 F 267), since the transportation is no element thereof (Id.).

25. Indictment for granting rebate in violation of Elkins Act, alleging kind of property shipped, time and place of shipment, consignee, existing legal rate, payment thereof and subsequent rebate, held sufficient without alleging devise whereby rebate was accomplished. Chicago, etc., R. Co. v. U. S. [C. C. A.] 162 F 835. Indictment, alleging that established rate was $70 per car of 40,000 pounds of lime and that defendant charged and received $64.75 and no more, sufficiently charges granting of concession from established rate. Atchison, etc., R. Co. v. U. S. [C. C. A.] 170 F 250.

26. Tariff sheet, showing established and published rate on bulk lime between two points of $3.50 per ton in carload lots of not less than 40,000, did not sustain an indictment against carrier for granting concession alleging that established was $70 a car of 40,000 pounds minimum. Atchison, etc., R. Co. v. U. S. [C. C. A.] 170 F 250.

27. New York, etc., R. Co. v. U. S., 212 U. S. 481, 500, 53 Law. Ed. —, afg. 146 F 298.

28. Not necessarily number of carloads. Standard Oil Co. of Indiana v. U. S. [C. C. A.] 164 F 376.

29. Imposition of maximum fine of $29,000,000, upon corporation having only $1,000,000 capital stock and not shown to have assets in excess thereof, held abuse of discretion. Standard Oil Co. of Indiana v. U. S. [C. C. A.] 164 F 376.

30. Indianapolis Freight Bureau v. Cleveland, etc., R. Co., 16 I. C. C. 56. It is duty of common carrier to receive and carry,

may determine the existence, order the cessation and afford reparation for undue discrimination [31] between commodities,[32] industries,[33] persons,[34] places and localities,[35] privileges,[36] or rates.[37]

upon reasonable terms, all goods tendered in suitable condition, and it cannot lawfully discriminate in favor of any person, product, or locality. Standard Lime & Stone Co. v. Cumberland Val. R. Co., 15 I. C. C. 620. There can, however, be no question as to right and power of commission to order removal of unjust discrimination and to prescribe such reasonable rates and regulations as will effect such removal. Douglas & Co. v. Chicago, etc., R. Co., 15 I. C. C. 232. While Abilene Case, 204 U. S. 426, settles primary jurisdiction of commission to determine reasonableness or unreasonableness of established rate and to award reparation predicated upon unreasonableness of established rate, commission's jurisdiction is primary also in matters of unjust discrimination, undue or unreasonable preference or advantage, undue or unreasonable prejudice or disadvantage, and, generally, whenever commission may order carrier to cease and desist from violations of act. Washer Grain Co. v. Missouri Pac. R. Co., 15 I. C. C. 147.

31. Act does not forbid all discrimination, but only that which is undue. Discrimination involved in carrying of personal baggage of passenger without extra charge is not undue as against passenger without baggage. Herbeck-Demer Co. v. Baltimore & O. R. Co., 17 I. C. C. 88.

32. Held not discriminative: Movement of traffic is encouraged and increased when carriers adjust their charges to meet mercantile interests, but they are not obliged in adjusting their charges to equalize value of commodities in their final distribution. Chicago Lumber & Coal Co. v. Tioga S. W. R. Co., 16 I. C. C. 323. Carrier is not guilty of discrimination because it does not afford as favorable rates as others serving different territory, though products carried by each are brought to same market. Id. Law does not deal with carriers collectively as single unit or system, but its commands are directed to each with respect to service which it is required to perform. Id. Decision of commission must be based upon broad principles of justice, keeping in view welfare of public as well as interests of carriers and shippers in entire territory involved, and under facts and circumstances of this case it should not be limited to those interests located in restricted part of producing territory. Id. Blanket or group rates in many cases, especially with reference to particular commodities, are of great advantage to public without serious injustice to any interest, though there is of necessity more or less disregard of distance and varying degrees of inequality. Id.

33. Several intervening associations, and representatives from department of agriculture, claimed that local creamery method of manufacturing butter should, in interest of public, be fostered and centralizer method be discouraged; but such is not impression left by record. Centralizer is engaged in perfectly legitimate business enterprise and affords to hundreds of thousands of farmers only satisfactory means of disposing of their milk. It seems plain that duty of this commission is to establish just and fair transportation charges in so far as that can be done and allow these rival methods to operate under those charges. Blue Valley Creamery Co. v. Michigan Cent. R. Co., 15 I. C. C. 109.

Held discriminative: Common carrier, in order to build up and foster industries on its own lines, cannot lawfully refuse to carry products of like industries located on connecting lines. Standard Lime & Stone Co. v. Cumberland Val. R. Co., 15 I. C. C. 620. There is of course limit to products which can reasonably be included in list of those which will be transported at raw material rate either with or without transit privilege. It might be reasonable to withhold transit privilege from product that is essentially different from raw material and from other products of same raw material which are accorded transit rates, as, for example, liquid product of grain; but it is clearly discriminatory to single out one or more of several milled products of grain and withhold from it or them transit privilege which is accorded at that or some other competitive point to other milled products of grain of substantially similar character, value, and packing, and which are transported under substantially same conditions, attended by substantially equal risks, where there is competition between millers of grain either in marketing their product or in securing their material for milling. Douglas & Co. v. Chicago, etc., R. Co., 15 I. C. C. 232.

34. Held unlawful discrimination: Lease at nominal rental, of elevator erected by defendants on their right of way at Argenta, Ark., as against dealers and shippers of grain at Little Rock. Brook-Rauch Mill & Elevator Co. v. Missouri Pac. R. Co., 17 I. C. C. 158. Custom has been somewhat general in years gone by for carriers to accord to each other preferential rates lower than were charged for same service to the shipping public. There is, however, no warrant in common law for the theory that carrier as shipper over lines of another carrier may enjoy or be given preferred status. There is no intimation in act to regulate commerce that carrier as shipper has or may be given status that is different from or more advantageous than that given to all other shippers. Practice cannot be upheld without removing very corner stone of act, which seeks to abolish and prevent unjust and undue discrimination and preference. Commission adheres to view that it is law that carrier as shipper over lines of another carrier may not lawfully be given any preference in application of tariff rates on interstate shipments. In other words, that one carrier shipping its fuel, material, or other supplies over lines of another carrier must pay legal tariff rates applicable to same commodities shipped between same points by individual. If carriers insist upon making or maintaining such preferential rates, they may confidently expect that such voluntary action

on their part will be accepted and taken as evidence of unreasonableness of higher rates which they may undertake to enforce against other shippers. Hitchman Coal & Coke Co. v. Baltimore & O. R. Co., 16 I. C. C. 512. Difference in rates based on time of payment of charges cannot be made. Boise Commercial Club v. Adams Exp. Co., 17 I. C. C. 115. Railway company may not lawfully transport men and supplies of express company when employed or used in business of that company at points not on line of railway, and express company may not lawfully transport for railway packages between points on its route but not on that particular line of railway. In re Contracts of Exp. Companies for Free Transp. of Their Men and Material Over Railroads, 16 I. C. C. 246. Where carriers have in effect uniform rate per 100 pounds for any quantity, which rate applies uniformly to all shippers, different rate applied to carloads from that applied to less than carloads will not be ordered, especially when such differential will have tendency to increase rate on less than carloads, and further, to cut off consumers and small dealers from purchasing at distant markets in less-than-carload lots. Duncan & Co. v. Nashville, etc., R. Co., 16 I. C. C. 590.

Held not discriminative: Railway company may lawfully transport men and supplies of express company without reference to any tariff provision when employed or used in the business of express company upon line of railway itself, and in same manner express company may lawfully transport packages of railway company between points upon that line of railway without reference to its tariff rates. In re Contracts of Exp. Companies for Free Transp. of Their Men and Material Over Railroads, 16 I. C. C. 246.

35. Held not to discriminate: Defendants' rate on beer from Milwaukee, Wis., to Roswell, N. M., was at time complainant's shipments moved 78 cents per 100 pounds, while rate to El Paso, Tex., was 60 cents, subsequently Roswell rate was reduced to 72 cents. Held, that rate on beer from Milwaukee to Roswell, under circumstances disclosed by record, is not violative of fourth section of act, does not unduly prejudice Roswell, and should not be further reduced. Pilant v. Atchison, etc., R. Co., 15 I. C. C. 178. Local rates for transportation of freight between Chicago and Des Moines and to give undue advantage to Minneapolis and St. Paul as against Des Moines. Greater Des Moines Committee v. Chicago, etc., R. Co., 17 I. C. C. 57. Complaint alleges that rate adjustment established by defendants, under and in accord with commission's decision in Farmers' Merchants' & Shippers' Club of Kansas v. Atchison, etc., R. Co., 12 I. C. C. 351, is unjust and unduly discriminates against Kansas City market. Principles of that decision are reaffirmed. Complaint dismissed. Kansas City Transp. Bureau of the Commercial Club v. Atchison, etc., R. Co., 15 I. C. C. 491. Defendants find no difficulty in defending grouping of Vicksburg, Natchez, New Orleans, Gulfport, and Mobile, on ground that conditions at those places are similar and are dissimilar to those at other neighboring and intermediate points. Just to west of Vicksburg are Shreveport, Alexandria, and Monroe in well-established group, which this commission has recently declined to order dissolution of. Just east in Alabama are other groups, established, maintained, and defended upon same ground. And Jackson and Meridian are grouped, and that grouping is maintained and defended upon same reasons and arguments. Of course, carriers may voluntarily do many things which they may not lawfully be compelled to do. Some of these defendants could, if they chose, add Hattiesburg to the Jackson-Meridian group, and others could meet competition thus created at Hattiesburg, and all of them could no doubt defend that action as strongly and logically as they now defend Jackson-Meridian group. Commission cannot, however, find that, as matter of law, Hattiesburg must be grouped with Jackson and Meridian. Commercial Club of Hattiesburg v. Alabama, G. S. R. Co., 16 I. C. C. 534. However strongly commission might feel inclined to relieve conditions complained of, its actions must be within provisions of law and with due and proper regard for rights of every affected interest. Id. George's Creek basin for ten years or more has been grouped for rate-making purposes with Meyersdale, Austen-Newburg, and Upper Potomac coal-producing districts, and Philadelphia, Baltimore, Wilmington, and other points of consumption for like period of time have also taken a group rate from all these mines. Held that no showing is here made justifying order disturbing this grouping of coal-producing districts and coal-consuming destinations. American Coal Co. v. Baltimore & O. R. Co., 17 I. C. C. 149. Rates for coal and coke and of various other commodities named from Chicago, Ill., and other points, to Fort Dodge, Iowa, as compared with rates from same points of origin to Des Moines, Iowa, and Albert Lea, Minn., neither is Fort Dodge unjustly discriminated against by reason of rate adjustment in question. Fort Dodge Commercial Club v. Illinois Cent. R. Co., 16 I. C. C. 572. Rate adjustment which groups Monroe, Alexandria, and Shreveport under common rates against Monroe. Monroe Progressive League v. St. Louis, etc., R. Co., 15 I. C. C. 534. Rate adjustment from Mississippi River crossings to Texas common points, and from Vicksburg, Miss., to certain points in northeast Texas. P. P. Williams Co. v. Vicksburg, S. & P. R., 16 I. C. C. 482. Adoption of distance alone as measure of rates from points of origin to primary market would necessarily result in clear division of territory between markets and would be destructive of competition in most of that territory. It would destroy long-established adjustment which places Missouri River crossings on parity in both inbound and outbound rates on traffic generally. Giving to Kansas City all advantage that could come to it from mileage adjustment would give it monopoly of territory in which Omaha now freely competes with Kansas City, and application of same rule to Omaha would give it exclusive purchasing power in territory in which Kansas City now competes with Omaha on equal terms. Kansas City Transp. Bureau v. Atchison, etc., R. Co., 16 I. C. C. 195. Held that under facts and circumstances shown lower rates on agricultural implements

granted Canton, Galva, and Springfield do not unduly prejudice Peoria, and are therefore not unlawful. Avery Mfg. Co. v. Atchison, etc., R. Co., 16 I. C. C. 20.

Held to discriminate: Complainant made shipment of apples from Nooksack, Wash., to Minneapolis, Minn., paying $1 per 100 pounds. Complaint alleged that rate from Nooksack should not have exceeded 80 cents, since that rate was applicable from certain other points. After shipment rate of 80 cents was extended to Nooksack, but before hearing rate from all points had been advanced to $1. Held that to maintain higher rate from Nooksack than from other point was discrimination against Nooksack and unlawful, that rate at time shipment moved should have been 80 cents, and that complainant was therefore entitled to reparation upon that basis. Gamble-Robinson Com. Co. v. Northern Pac. R. Co., 14 I. C. C. 523. If milling-in-transit rates over through route from Oklahoma wheat fields to points where flour is consumed are made available to one milling point not on such through route, by giving it back haul or out-of-line service at reasonable rates, no reason is perceived why same opportunity should not be accorded to another milling point, even though more distant from such through route, at rates that are relatively reasonable. Celina Mill & Elevator Co. v. St. Louis S. W. R. Co., 15 I. C. C. 138. Where, however, same carrier serves two districts which, by their location, character of their output, and distance from markets where their product must be disposed of are in substantially similar circumstances and conditions, serving carrier cannot lawfully prefer one to other in any manner whatsoever. Black Mountain Coal Land Co. v. Southern R. Co., 15 I. C. C. 286. Carrier cannot lawfully so group its mines with respect of rates as to unduly discriminate against any locality. Duty imposed by law is to give equal treatment to all shippers who are in position to demand it, and this includes right to reach competitive markets on relatively equal terms. Id. Rates from Apalachia coal district in Virginia, including Black Mountain coal district, which exceed by 25 cents rate from Coal Creek to all points on defendants' lines east and south of Morristown, Tenn., as far south as Charleston, S. C., and Augusta, Ga., unduly discriminate against Black Mountain and Apalachia operators and unduly prefer Coal Creek operators. Id. In claiming that as Chicago affords as good market for grain as does Milwaukee principal defendant may therefore lawfully so adjust its rate schedules as to force grain to Chicago, defendant overlooks right of shipper to choose his own market and to do business where he prefers or finds it more advantageous to carry it on. It also overlooks chief function of common carrier, which is to carry at reasonable rates traffic that is tendered to it. Milwaukee Chamber of Commerce v. Chicago, etc., R. Co., 15 I. C. C. 460. Carrier has no right to insist that shipment shall go to end of its rails if shipper desires it to be diverted at intermediate point to another market off its rails. Nor may carrier accomplish these results indirectly by any unreasonable adjustment of its rate schedules with that end in view. It cannot lawfully compel shipping public to contribute to its revenues on any such grounds. Id. Complainant had shipped to it 1 carload of rosin from Louin, Miss., to Peoria, Ill., for transportation of which defendants exacted combination rate of 61 cents per 100 pounds, whereas Laurel, Miss., only 3 miles from Louin, had through rate of 27 cents per 100 pounds. Defendants, admitting facts, have since given Louin the Laurel rate on rosin between points and are willing to make reparation. Central Commercial Co. v. Mobile, etc., R. Co., 15 I. C. C. 25. Increase in rates on salt from Washburn, Wis., to points westward on defendants' lines via Minnesota Transfer. Delray Salt Co. v. Chicago, etc., R. Co., 16 I. C. C. 507. Higher classification of and minimum charges upon empty oil barrels from points in New Mexico to El Paso, Tex., than from same points to Albuquerque. Great Western Oil Co. v. Atchison, etc., R. Co., 16 I. C. C. 505. Defendant ordered to establish no higher rates for corn and wheat in carloads from Talmage and Brock, Neb., to St. Louis, Mo., than are contemporaneously maintained to same point from Paul and Julian, Neb. Bartling Grain Co. v. Missouri Pac. R. Co., 16 I. C. C. 494. Defendants ordered to cease and desist from according to coal originating upon Colorado & Southeastern Railway and transported to points upon Santa Fe, lower rate than is given to coal of complainants from their mines at Ludlow, Colo. Cedar Hill Coal & Coke Co. v. Atchison, etc., R. Co., 16 I. C. C. 402. While recognizing differences in competitive conditions as between Indianapolis and Chicago, commission is convinced that disparities between existing rates from these respective points of origin are too great on some commodities, and prescribes proper relative adjustment on iron and steel articles, castings, burlap and gunny bags, furniture and chairs, iron beds, and wooden ladders. Indianapolis Freight Bureau v. Cleveland, etc., R. Co., 15 I. C. C. 504. Commission is of opinion that application of so-called two-for-one rule from Chicago and its nonapplication from Indianapolis result in such great disparities between freight charges from these respective points as to work unjust discrimination against place last mentioned, but rule in form in which it is applied at Chicago will not be extended. Id. However, rule similar in substance, but so restricted and modified as to prevent its improper manipulation, should be extended to Indianapolis or else unlawful discrimination should be removed by readjustment of minimum weights on various articles referred to in complaint so that they will conform approximately to actual loading capacity of cars. Id. Defendant has classified various lumber-producing points on its lines in northern and northeastern Wisconsin in groups, same carload rates on lumber applying from all points in particular group to points on defendant's lines in Illinois and Iowa. Wabeno has been placed in Rhinelander group, from which group rates to points in Illinois and Iowa are from one-half cent to 1 cent higher than rates from Wausau group, which adjoins Rhinelander group on southwest. Held that Wabeno, by reason of its geographical location and its distance by rail from Chicago and other points in Illinois and Iowa, is entitled to

same rates as points in Wausau group. Jones Lumber Co. v. Chicago & N. W. R. Co., 15 I. C. C. 427. Rate of 22½ cents per 100 pounds on laths, in carloads, from Beecher Lake, Wis., to Chicago, Ill., to extent that it exceeded 10 cents per 100 pounds, rate applicable from Pembine, Wis., farther-distant point, to Chicago, Ill. Neufeld v. Chicago, etc., R. Co., 16 I. C. C. 26. Held that defendants' rates on big-vein coal, from George's Creek basin in Allegany County, Md., to tide-water, when going over piers to destinations outside Delaware and Chesapeake capes are unreasonable and unduly discriminatory and ought not to exceed rates contemporaneously in effect on small-vein coal from same district and on coals from Meyersdale, Austen-Newburg, and Upper Potomac districts in Pennsylvania and West Virginia when water borne to same destinations, and that defendants' rates on coals mined in George's Creek basin when destined to points in New York, Pennsylvania, New Jersey, and New England are unreasonable and discriminatory and ought not to exceed rates to same destinations from Meyersdale, Austen-Newburg, and Upper Potomac regions. American Coal Co. v. Baltimore & O. R. Co., 17 I. C. C. 149. Defendants' tariff in force when complaint was filed permitted dealers to ship lumber into Memphis from southern and western territory, there unload, assort, grade, and dry it, and within ninety days from date of arrival, upon presentation of paid expense bills covering movement into Memphis, to ship out same lumber, or equal tonnage of same kind of lumber, to certain northern and eastern territory upon rates which, combined with rates into Memphis, were less than combination of rates upon Memphis, but not less than through rate from original shipping points to final destinations. Maximum "shrinkage" of rates so permitted was 4 cents per 100 pounds. No such privilege was permitted at Cairo, and rates exacted upon lumber handled through that point were full locals in and out. Since complaint was filed tariff in question has been superseded by tariff which is admitted by complainant to have removed alleged discrimination in rates. E. Sondheimer Co. v. Illinois Cent. R. Co., 17 I. C. C. 60. Held that owing to dissimilarity in circumstances and conditions surrounding movement of lumber through Memphis and Cairo, yarding and reshipping privilege at Memphis, if proper rates are applied thereunder, is not undue discrimination against Cairo, but that rates in force through Memphis when complaint was filed, from competitive producing points in Mississippi to competitive consuming points in territory involved, were unduly discriminatory against Cairo. Id. Adjustment of rates from Memphis and from Natchez which are complained of. Monroe Progressive League v. St. Louis, etc., R. Co., 15 I. C. C. 534. Present adjustment of rates from Missouri River and east thereof to Denver, and from Denver to Utah common points against Denver, in favor of Kansas City and other Missouri River crossings. Kindel v. New York, etc., R. Co., 15 I. C. C. 555. Rates on sea-island cotton from Alachua, Gainesville, and Hawthorne, Fla., to Savannah, Ga., respective rates being 39, 40, and 45 cents per 100 pounds via each of defendant lines held undue preference to Alachua. Burr v. Seaboard A. L. R. Co., 16 I. C. C. 1. Forty-cent rate from Gainesville to Savannah and 45-cent rate from Hawthorne to Savannah. Id. Present class rates on through traffic from Indianapolis to Missouri River points give to Chicago undue preference. Indianapolis Freight Bureau v. Cleveland, etc., R. Co., 16 I. C. C. 56. Rates on compressed cotton from Hermanville and Port Gibson, Miss., to New Orleans, La., against former point. Planters Gin & Compress Co. v. Yazoo & M. V. R. Co., 16 I. C. C. 131. Held that different rates, rules, and regulations made to apply to Chicago territory and to Cincinnati territory beginning in May, 1907, created discriminations, preferences, prejudices, and disadvantages as between Chicago territory and Cincinnati territory, and particularly between plants located at Joliet, De Kalb, Lockport, Waukegan, Janesville, and Milwaukee, in Chicago territory, and plants located at Muncie and Kokomo, in Cincinnati territory, which said discriminations, preferences, prejudices, and disadvantages are found to be undue and unjust, and are hereby condemned. Indiana Steel & Wire Co. v. Chicago, etc., R. Co., 16 I. C. C. 155. Charge of 10 cents more per ton upon shipments of coal in carloads from Black Mountain coal district, in Virginia, than from Apalachia district, in same state, to Morristown, Tenn., and all points east and south thereof on defendants' lines. Black Mountain Coal Land Co. v. Southern R. Co., 15 I. C. C. 286. Higher rate on elm hoops to East St. Louis, Ill., from Prairie Grove, Ark., than from Fayetteville, Ark. Noble v. St. Louis & S. F. R. Co., 16 I. C. C. 186. Shipments of grain, grain products, and hay are carried from Ohio and Mississippi River crossings and points north and west thereof to Nashville at local rates, and quantities of these articles are afterwards reshipped and rebilled from Nashville to points in southeast at local rate, but difference between sum of locals thus collected and through rate from crossing point to ultimate destination is refunded to shipper through claims department of railroad company. There is no agreement for through carriage between shipper and carrier at original point of shipment, no other destination than Nashville is named, and upon delivery of grain to that point it loses its identity and is in every respect local shipment. Held that circumstances and conditions prevailing at Nashville are not so dissimilar from those prevailing at other points in southeast as to warrant continuance of this privilege at Nashville without undue discrimination, to prejudice and disadvantage of points in that territory not having similar privilege. Held further that this privilege operates as device by which traffic may move at less than lawful tariff rate. Duncan & Co. v. Nashville, etc., R. Co., 16 I. C. C. 590. Rates on cypress lumber from Baden and Kirkpatrick, Miss., to Davenport, Iowa, that were higher than from Tutwiler and Drew, Miss., respectively, to Davenport. Davenport Commercial Club v. Yazoo & M. V. R. Co., 16 I. C. C. 209. Against Indianapolis in favor of Cincinnati, Louisville, New Albany, Evansville, and Chicago in the application of charges for transportation of furniture, chairs, ladders, and vehicles to destinations

in Texas, Arkansas, Oklahoma, and Louisiana under so-called "two-for-one rule," permitting application of carload rates on part car lots in excess of full carloads from Cincinnati, Louisville, New Albany, Evansville, and Chicago, whereas less than carload rates are charged on any excess from Indianapolis. Indianapolis Freight Bureau v. Cleveland, etc., R. Co., 16 I. C. C. 254. Rates on furniture (new, n. o. s.) kitchen safes, iron and steel articles, stoves, roasted coffee, and machinery for coal mines, carloads, from Indianapoliis to Muskogee, should not exceed those contemporaneously in effect from Cincinnati. Id. Against Indianapolis in favor of Chicago, Cincinnati, Louisville, New Albany, and Evansville in transportation of vehicles, chairs, furniture, and woodenware to Arkansas common points in that local class rates to East St. Louis are applied on such shipments from Indianapolis to common points in Arkansas; whereas on similar shipments from Chicago and other points of origin mentioned, arbitrary differential bases via East St. Louis are applied, which added to rate beyond, result in lower through rates. Id. Against Indianapolis in application of class rates to points in Louisiana as compared with rates contemporaneously applied from Cincinnati and Louisville to same destinations. Id. Class rates from Indianapolis to St. Paul approximately 30 per cent in excess of those from St. Louis, on many commodities disparities between rates from these respective points of origin are much greater. These greater disparities as between commodity rates from these two points of origin are not warranted. Indianapolis Freight Bureau v. Cleveland, etc., R. Co., 16 I. C. C. 276.

36. The commission finds with respect to all shipments involved in these cases that provision in tariffs requiring return to defendant of car within forty-eight hours as condition precedent to payment of allowance is unjust, unreasonable, unduly discriminatory, and unlawful and that complainants are entitled to damages by reason of maintenance of such unlawful provision which equal amount which would have accrued to them by way of this elevation allowance, provided tariff had contained no such provision. Defendant has paid to competitors of complainants this elevation allowance; it has at same time declined to pay it to complainants. Commission finds that defendant's reason for so declining is not valid one, and that it has been guilty of undue discrimination against complainants, for which they are entitled to recover as damages difference between what has been paid to their competitors and to them. Nye-Schneider-Fowler Grain Co. v. Union Pac. R. Co., 15 I. C. C. 90.

Free delivery: Held that if defendants voluntarily extend time of free delivery at Philadelphia they must treat alike all points similarly situated, and there might arise duty to extend benefit to every other noncompetitive point. Brey v. Pennsylvania R. Co., 16 I. C. C. 497.

Elevator charges: Payment of so-called elevation allowance to dealers in hay, grain, and grain products in Nashville, Tenn. Duncan & Co. v. Nashville, etc., R. Co., 16 I. C. C. 690. Reparation, based upon amount of grain actually elevated, allowed in this case because it is found that free commercial elevation afforded shippers elsewhere discriminated against Atchison and affected rates paid by complainant to exact extent of ¾ of cent per 100 pounds. Washer Grain Co. v. Missouri Pac. R. Co., 15 I. C. C. 147. Reparation awarded because of undue discrimination in favor of complainant's competitore in elevator allowances made by defendant at Omaha and Council Bluffs. Merriam v. Union Pac. R. Co., 16 I. C. C. 337. Various complainants herein seek reparation caused by alleged undue discrimination against them in favor of competitors in elevator allowances made by defendant at Omaha and Council Bluffs. Defendant declined to pay these allowances, alleging that they were unlawful and that terms of tariffs were not complied with. Held that this commission cannot, without stultifying itself, make any ruling which will condemn as unlawful payment of these allowances during time they have been expressly sanctioned by its decisions. Nye-Schneider-Fowler Grain Co. v. Union Pac. R. Co., 15 I. C. C. 90.

Allowance for transfer charges: It is not part of carrier's duty to bear expense of transfer of goods from shipper to carrier. For carriers to undertake to compensate shippers for performing services which shippers are legally bound to do for themselves is for carriers to violate act. In re Allowances for Transfer of Sugar, 14 I. C. C. 619.

37. It appears that purchaser of coal from Victor Fuel Company at its mines upon Colorado & Southeastern Railway for points of consumption upon Santa Fe has benefit of Trinidad rate, while coal from mines of complainants near Ludlow, in same district, for same destinations, must pay 40 cents above Trinidad rate; it also appears that Colorado Fuel & Iron Company ships coal from its mines on Colorado & Wyoming Railway to points on Santa Fe at Trinidad rate; and that Victor Fuel Company owns Colorado & Southeastern Railway, and Colorado Fuel & Iron Company owns Colorado & Wyoming Railway. Complainants, who are engaged in mining coal in Trinidad district, in Colorado, near Ludlow, on Colorado & Southern Railway, claim that defendants unduly discriminate against them in favor of other coal companies mentioned. Held that arrangements entered into between these railroads work an undue prejudice against the mines of complainants and give unlawful preference to their said competitors. Cedar Hill Coal & Coke Co. v. Atchison, etc., R. Co., 15 I. C. C. 73. Railroads should not be allowed to so divide and diversify themselves by contract and traffic agreements as to work practical discrimination. So long as there is identity of ownership in agency of transportation and thing transported it is extremely difficult, if not impossible, to prevent discrimination between shippers. Id. Practice of one defendant herein of supplying at its New York elevators enough grain to make up weight of dirt, chaff, and moisture lost in process of elevation is practice affecting rates, in that it is advantage or benefit that shipper gets under published rate. Baltimore Chamber of Commerce v. Pennsylvania R. Co., 15 I. C. C. 341.

§ 3. *Connecting carriers, draymen, and transfermen.*[38] See 11 C. L. 612—Ordinarily a carrier is liable only for its own negligence,[39] and its responsibility ends upon a delivery to a connecting carrier.[40] It may, however, by a special course of dealing or by contract [41] undertake to carry to destination, in which case it is liable wherever the loss may occur,[42] the connecting carriers being its agents,[43] and the

38. Search Note: See notes in 5 C. L. 513; 7 Id. 530, 532; 22 A. S. R. 699; 89 Id. 527; 101 Id. 392; 106 Id. 604; 1 Ann. Cas. 707; 2 Id. 517; 3 Id. 5, 584; 5 Id. 576; 7 Id. 471; 9 Id. 812.

See, also, Carriers, Cent. Dig. §§ 25-32, 86-90, 734-852; Dec. Dig. §§ 14-17, 33, 169-187; 6 Cyc. 374, 478-490; 6 A. & E. Enc. L. (2ed.) 603; 13 Id. 1165.

39. In absence of special contract, partnership or agency between carriers. Southern Exp. Co. v. Saks [Ala.] 49 S 392. Connecting carrier is not liable for default of prior carrier though damages develop on its line. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767. Connecting carrier is not liable for negligence of initial carrier in selling a ticket to wrong station where there was no proof of partnership or that selling agent represented both carriers and instruction that if selling agent was negligent in selling the ticket both carriers were liable for injuries proximately resulting was erroneous. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118. Instruction as to liability of carrier held erroneous. Texas Cent. R. Co. v. Watson [Tex. Civ. App.] 118 SW 175. Initial carrier is liable for loss by acts of connecting carriers. Windmiller v. Northern Pac. R. Co. [Wash.] 101 P 225.

40. Kirk v. Lehigh Val. Transp. Co., 135 Mo. App. 99, 115 SW 515. In absence of contract or course of business to the contrary. Blackburn v. Chicago, etc., R. Co. [Tex. Civ. App.] 115 SW 874. Plea that defendant's liability according to contract was to cease upon delivery to connecting line and that shipment was safely delivered held not demurrable for failure to allege discharge of duty by connecting carrier. McNeill v. Atlantic Coast Line R. Co. [Ala.] 49 S 797. Railroad company merely shifting and placing car on house track of a consignee is not a connecting carrier, but acts as agent of the carrier. St. Louis S. W. R. Co. v. Jackson & Co. [Tex. Civ. App.] 118 SW 853.

41. Express or implied. Lake Erie & W. R. Co. v. Seeley [Ind. App.] 86 NE 1002. Where steamboat company sold single ticket to destination which was reached by boat and trolley line, presumption arises that passenger was to be under care of steamboat company to the end, and burden rests on it to show that trolley line was under separate management. Clemmens v. Washington Park Steamboat Co., 162 F 815. Where on trial some evidence was introduced to show that trolley line used was under separate management, fact held for jury. Id. Goods carried to destination by connecting carrier were refused by consignee. Consignor entered into contract with initial carrier appointing it as his agent to stop delivery and return goods, agreeing to indemnify and hold harmless against suit, loss charges, etc. Held that contract did not imply contract by carrier to return over all connecting lines so as to render it liable for a loss thereon. Erie R. Co. v. Cappel [Ohio] 88 NE 144. Where contract for shipment from New York to Los Angeles, Cal., named Colon as terminus of initial carrier, fact that answer admitted its liability as far as Panama because of its management of railroad across isthmus does not necessitate the disregarding of terminus named in construing contract. Schwartz v. Panama R. Co. [Cal.] 103 P 196. Answer alleging that at time defendant "received shipment" it entered into contract, etc., is not an admission that it received shipment for transportation to destination beyond line. Brooke v. Nashville, etc., R. Co., 5 Ga. App. 253, 62 SE 1002. Requested instruction held erroneous in ignoring the liability of the initial carrier, if the regular rate was charged, for breakage occurring from any cause en route, except from the act of God or the public enemy. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 13. Requested instruction exonerating the initial carrier from liability for injury to goods if goods were damaged by connecting carrier held erroneous because evidence tended to prove that latter carrier was agent of initial carrier. Id.

42. Schwartz v. Panama R. Co. [Cal.] 103 P 196. Unless it expressly limits liability. Southern R. Co. v. Frank & Co., 5 Ga. App. 574, 63 SE 656. Delay. Aultman Engine Thresher Co. v. Chicago, etc., R. Co. [Iowa] 121 NW 22. Where an initial carrier contracts for through carriage of freight without limiting its common-law liability, it is liable for the loss of the property anywhere on the route, unless it was due to the act of God or the public enemy. Simmons Hardware Co. v. St. Louis, etc., R. Co. [Mo. App.] 120 SW 663. Where there is no proof of law of state where shipment originated as to liability of initial carrier, it will be presumed to be the same as that of the state where suit is brought. Schwartz v. Panama R. Co. [Cal.] 103 P 196. Where initial carrier agreed to deliver at switch on plaintiff's docks and received entire charge, carrier making final switch cannot be regarded as plaintiff's agent or as independent carrier. Atlanta, B. & A. R. Co. v. Emanuel & Co. [Ga. App.] 64 SE 1098. Where stockyard company was part of defendant's connecting line to deliver at yards, defendant is liable for its negligent delay. Vencill v. Quincy, etc., R. Co., 132 Mo. App. 722, 112 SW 1030. Initial carrier issuing bill of lading to point beyond its line, which contains no provision limiting liability, it is liable for negligence of connecting carrier, especially under Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), providing that when railroad issues bill of lading it shall be liable for negligence of any carrier over whose lines it passes.

acceptance of goods consigned beyond its line makes a prima facie case of through shipment [44] in the absence of a limiting contract.[45] A local freight agent has no implied authority to contract for carriage beyond termini,[46] and hence actual authority must be shown [47] or such a course of dealing as will imply the same.[48] Likewise, where a partnership,[49] joint undertaking,[50] or agency [51] exists between connecting carriers, they are jointly liable for loss or damage without regard to place. A carrier is liable for the damages proximately resulting from its negligence, though the injury results beyond its line,[52] and where the negligence of connecting carriers concur in causing the injury, they are jointly liable.[53] A carrier receiving

Holland v. Atchison, etc., R. Co., 133 Mo. App. 694, 114 SW 61. Under Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), a carrier issuing a through bill of lading is liable for the negligence of a connecting carrier, and if a full rate is charged it is an insurer over the whole route. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1. Bill of lading construed and held to be for a through shipment. Id. Where the contract of the initial carrier is through one, it is liable for breakage occurring anywhere on the route, whether from negligence or not, unless there is a consideration for the restriction of its common-law liability. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 13. Where injury to plaintiff's horses occurred in a continuous shipment over two railroads within state of Texas, the court could have found a joint judgment against both roads. Missouri, K. & T. R. v. Lawson [Tex. Civ. App.] 119 SW 921. Receipt and bill of lading construed and held not to constitute a contract for through carriage. Simmons Hardware Co. v. St. Louis, etc., R. Co. [Mo. App.] 120 SW 663.

43. St. Louis S. W. R. Co. v. Wallace [Ark.] 118 SW 412.

44. Chicago, etc., R. Co. v. Cotton [Ark.] 112 SW 742; Coats v. Chicago, etc., R. Co., 239 Ill. 154, 87 NE 929.

45. By express contract, carrier may limit liability to own line of goods marked for destination beyond line. Coats v. Chicago, etc., R. Co., 239 Ill. 154, 87 NE 929. See post, § 11.

46. Blackburn v. Chicago, etc., R. Co. [Tex. Civ. App.] 115 SW 874.

47. Lake Erie & W. R. Co. v. Seeley [Ind. App.] 86 NE 1002.

48. Two oral contracts for carriage beyond line held insufficient to show custom within knowledge of carrier, where shipper in each case signed usual pass contract which limited liability to own line. Blackburn v. Chicago, etc., R. Co. [Tex. Civ. App.] 115 SW 874.

49. Mere division of charges according to mileage does not create a partnership. Southern Exp. Co. v. Saks [Ala.] 49 S 392.

50. In view of provisions limiting liability of each carrier to its own line and that contract was signed for the different carriers severally, and not jointly, contract construed merely as undertaking to carry to terminus. Schwartz v. Panama R. Co. [Cal.] 103 P 196. Where consignee pays carrier full amount of freight charges on shipment which had passed over number of roads and been received in bad condition, and by agreement files with company a claim for damages, the company will be held to have recognized that there was but one contract for transportation, and in absence of knowledge as to where or how damages occurred company delivering is liable. Cincinnati, etc., R. Co. v. Barron, Boyle & Co., 11 Ohio C. C. (N. S.) 602. Testimony held not to show distinct contracts of shipment with two carriers but to show joint contract with both of them to carry to destination. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 13. The delivery of a shipment by certain carriers to another carrier for through shipment held under the facts in proof not to make them joint promisors to shipper for the carriage over the entire route. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1.

51. Competition between connecting carrier to secure routing most advantageous to each held to negative any agency. Southern Exp. Co. v. Saks [Ala.] 49 S 392.

52. Whitnack v. Chicago, B. & Q. R. Co. [Neb.] 118 NW 67. Where decay in shipment of cabbage is due to negligence of initial carrier, immaterial where actual damage occurred. International & G. N. R. Co. v. Welbourne [Tex. Civ. App.] 113 SW 780. Where initial carrier furnishes defective car and shipper is injured thereby, initial carrier is liable, though connecting carrier is charged with duty of inspecting car. Blatcher v. Philadelphia, B. & W. R. Co., 31 App. D. C. 385. Where carrier transporting two carloads of potatoes in charge of caretaker negligently separates same so that caretaker can only accompany one, it is liable although they did not freeze until after delivery to connecting carrier. Whitnack v. Chicago, B. & Q. R. Co. [Neb.] 118 NW 67. Where initial carrier's failure to feed as required by statute contributed to so weaken stock as to render them subject to injury, fact that they were further weakened by failure of connecting carrier to feed does not relieve initial carrier. Baltimore, etc., R. Co. v. Wood & Co. [Ky.] 114 SW 734. An initial carrier of stock is liable in the event delay was caused or contributed to by it, even though the injury to the animals may not have developed until the animals passed into the possession of the connecting carrier or until after they arrived at destination. Wisecarver v. Chicago, etc., R. Co. [Iowa] 119 NW 532.

53. An initial carrier is liable for the results of any negligence to which it contributes, although its conduct might not have been the sole cause of the injury.

goods to be forwarded over another line becomes the agent of the shipper for that purpose,[54] and, where it routes at variance with instructions, it becomes liable for any loss or damage that may result.[55] The liability of connecting carriers has been the subject of the state[56] and federal[57] legislation, and under the Hepburn Act the initial carrier in an interstate shipment is liable wherever the loss or injury may occur,[58] provided the connecting carrier causing the same would be liable therefor.[59] The loss or damage, however, must be connected with the transportation of the goods,[60] and the liability is enforcible in the state courts,[61] especially if adopted into the general law of the state.[62] It may also be enforced in the federal courts if the proper jurisdictional grounds exist.[63] The act is inapplicable to a drayman or truckman merely transporting goods to the depot or wharf.[64]

The Georgia statute prescribing a penalty for refusing to sell tickets to points on connecting lines is for the purpose of protecting connecting lines from discrimination,[65] and hence no recovery can be had unless the connecting line has furnished tickets or requested the sale thereof.[66]

Wisecarver v. Chicago, etc., R. Co. [Iowa] 119 NW 532. Evidence of delay and condition of animals held to show that they were injured on lines of both connecting carriers. Holland v. Atchison, etc., R. Co., 133 Mo. App. 694, 114 SW 61.

54. Weaver v. Southern R. Co., 135 Mo. App. 210, 115 SW 500.

55. Atlantic Coast Line R. Co. v. Richardson [Tenn.] 117 SW 496. Where goods are routed over a particular road and initial carrier through mistake sends them over another road where they are delayed, it is jointly liable with such carrier (Illinois Cent. R. Co. v. Hopkinsville Canning Co. [Ky.] 116 SW 758), initial carrier being alone liable, however, for extra expense to consignee in removing goods caused by misrouting (Id.).

56. Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), making initial carrier liable for damages occurring anywhere on route, does not apply to shipment wholly outside of state. Connelly v. Illinois Cent. R. Co., 133 Mo. App. 310, 113 SW 233. Rev. St. 1895, arts. 331a, 331b, as amended, regulates the liability of connecting carriers with reference to freight, and not as to the carriage of passengers. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118.

57. Hepburn Act authorizing an action by holder of interstate bill of lading for loss of goods on any part of transit against initial carrier held valid. Riverside Mills v. Atlantic Coast Line R. Co., 168 F 987; Id., 168 F 990. Not unconstitutional as depriving carrier of property or of liberty without due process of law. Galveston, etc., R. Co. v. F. A. Piper Co. [Tex. Civ. App.] 115 SW 107.

58. St. Louis, etc., R. Co. v. Furlow [Ark.] 117 SW 517; Missouri, K. & T. R. Co. v. Carpenter [Tex. Civ. App.] 114 SW 900. Deviation from routing by connecting carrier. International & G. N. R. Co. v. Wilbourne [Tex. Civ. App.] 115 SW 111. The Interstate Commerce Act, as amended by Hepburn Act, makes a carrier receiving property for transportation from point in one state to point in another liable for loss without regard to whether it occurred on its own line or on connecting line, therefore, instruction that carrier who had contracted with shipper, limiting its liability to damages occurring on its own lines, was not liable, was erroneous. St. Louis S. W. R. Co. v. Grayson [Ark.] 115 SW 933.

59. Any defense available to carrier where loss occurred is open to initial carrier. Riverside Mills v. Atlantic Coast Line R. Co., 168 F 987.

60. Carmack amendment to interstate commerce act making initial carrier of interstate shipment liable for loss, etc., by act or omission of any carrier, does not apply where goods are sold by terminal carrier for charges after its liability as carrier had ceased. Norfolk & W. R. Co. v. Stuart's Draft Milling Co. [Va.] 63 SE 415.

61. Action against initial carrier to enforce liability under Act June 29, 1906, c. 3591, § 7, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 909), making initial carrier of interstate shipment liable for loss caused by any connecting carrier, may be prosecuted in state court. Galveston, etc., R. Co. v. F. A. Piper Co. [Tex. Civ. App.] 115 SW 107; Southern Pac. Co. v. Crenshaw, 5 Ga. App. 675, 63 SE 865. Is not derogatory of common law. Southern Pac. Co. v. Crenshaw, 5 Ga. App. 675, 63 SE 865; Louisville & N. R. Co. v. Warfield [Ga. App.] 65 SE 308.

62. Held a part of general law of Georgia under its constitution. Southern Pac. Co. v. Crenshaw, 5 Ga. App. 675, 63 SE 865.

63. Where in action for violation of § 20, Interstate Commerce Act, as amended by Hepburn Act, which requires initial carrier on receiving interstate shipment to give through bill of lading therefor, and gives a right of action against it for loss or damage to property, etc., more than $2,000 is involved, federal court has jurisdiction. Smeltzer v. St. Louis & S. F. R. Co., 168 F 420.

64. Hirsch v. New England Nav. Co., 129 App. Div. 178, 113 NYS 395.

65. Civ. Code 1895, §§ 2299-2301. Wimberly v. Georgia So. & F. R. Co., 5 Ga. App. 263, 63 SE 29.

66. Jones v. Louisville & N. R. Co. [Ga.] 63 SE 627; Wimberly v. Georgia So. & F. R. Co., 5 Ga. App. 263, 63 SE 29. There can be

As between the carriers, the one causing the loss or damage is usually liable and a recovery over should be allowed.[67]

A carrier cannot grant such exclusive privileges to a transfer company as to create a monopoly.[68] A contract whereby a hotel company agrees to lease the exclusive "taximeter cab" service includes motor cab service.[69] A railroad company may designate the places at its platform where competing hackmen shall stand their vehicles.[70]

Part II. Carriage of Goods.

§ 4. *Delivery to carrier and inception of liability.*[71]—See 11 C. L. 515—The liability of a carrier attaches when the goods have been delivered to [72] and accepted by [73] the carrier for immediate shipment, and not when the bill of lading issues.[74] What constitutes a delivery depends largely upon the circumstances of each particular case,[75] and the general custom of doing business.[76] Where the shipper is required to load, the carrier may refuse a tender thereof when loaded in a car which would render transportation unsafe.[77] One shippping explosives without disclosing the nature thereof,[78] is liable for resulting damage,[79] the burden resting, however, upon the carrier to show that a disclosure was not made.[80] Where an article presented

no discrimination unless such road wishes its tickets sold. Wimberly v. Georgia So. & F. R. Co., 5 Ga. App. 263, 63 SE 29.

67. Where there is no evidence of negligence on part of road sued as a copartner, judgment over held proper. Texas Cent. R. Co. v. Pool [Tex. Civ. App.] 114 SW 685. Where damages sought is loss of market, and not deterioration of goods because of delay, instruction apportioning damages according to degree of negligence held improper. Missouri, K. & T. R. Co. v. Carpenter [Tex. Civ. App.] 114 SW 900.

68. Contract whereby one transfer company was given exclusive privilege of occupying space of ground adjoining improved sidewalk so that passengers had to walk for 150 feet past its vehicles before reaching vehicles of other companies held to create a monopoly and hence void as against public policy. Palmer Transfer Co. v. Anderson [Ky.] 115 SW 182.

69. Lynch v. Murphy Hotel Co., 112 NYS 915.

70. City of Hot Springs v. Demby [Ark.] 119 SW 1126.

71. Search Note: See Carriers, Cent. Dig. §§ 98-128; Dec. Dig. §§ 39-45; 6 Cyc. 412-415; 5 A. & E. Enc. L. (2ed.) 167.

72. Evidence held insufficient to show delivery, where only witness testifying thereto was not able to identify package. James Autler Co. v. Rankin, 112 NYS 1085. Evidence that call was left with express company and that wagon bearing its name, etc., called for package held sufficient to show that package was delivered to defendant's agent. Rosenblum v. Weir, 113 NYS 520. Identification of party to whom package was delivered as one to whom former packages for defendant express company were delivered, together with evidence that he wore defendant's uniform and drove wagon bearing defendant's name, held to show delivery to defendant. Silverman v. Weir, 114 NYS 6.

73. Evidence, that large shipment of cotton was delivered onto platform as fast as it could be loaded therefrom so as to make room for more, that the cotton burned had been delivered thereon but that agent had not had time to check same and hence had not signed the bill of lading, held to show acceptance for immediate shipment. St. Louis, etc., R. Co. v. Burrow & Co. [Ark.] 116 SW 198.

74. St. Louis, etc., R. Co. v. Burrow & Co. [Ark.] 116 SW 198.

75. Held sufficient delivery to common carrier engaged in switching cars over its switch tracks to and from other roads where shipper loaded and sealed car and notified carrier to move same which it agreed to do. Kansas City S. R. Co. v. Rosebrook-Josey Grain Co. [Tex. Civ. App.] 114 SW 436.

76. Evidence that lumber was placed on wharf where it was customarily received by boat and that president of defendant company was notified thereof held to authorize finding of delivery and acceptance. Oostanaula & C. R. Steamboat Co. v. Hampton [Ga. App.] 65 SE 303.

77. Barrel staves loaded under rule of commission. Central of Georgia R. Co. v. Cook, 4 Ga. App. 698, 62 SE 464.

78. International Mercantile Marine Co. v. Fels [C. C. A.] 170 F 275. Evidence held to show that shipper of soap containing naphtha sufficiently disclosed explosive character. Id. Letters and conversations and markings "Fels Naphtha" soap held to advise carrier of explosive character from vapor. International Mercantile Marine Co. v. Fels, 164 F 337.

79. Surrounding facts held to sustain finding that explosion was caused by vapors from naphtha soap. International Mercantile Marine Co. v. Fels, 164 F 337.

80. International Mercantile Marine Co. v. Fels [C. C. A.] 170 F 275.

for shipment possesses unusual value which is not indicated by its markings, it is the affirmative is on shipper or his delivering agent[81] to disclose the fact, and the failure to do so constitutes a fraud without regard to the actual intent of the shipper,[82] unless the carrier otherwise has knowledge thereof,[83] and defeats recovery for any loss or injury thereto.[84] Although not possessing exceptional value, if actual fraud is practiced,[85] recovery will be limited or denied, and especially under the statutes of some states.[86]

§ 5. *Bills of lading and other contracts of carriage.*[87] See 11 C. L. 516—A contract of carriage is governed by the laws of the state where made,[88] especially if it is to be partially or wholly performed therein.[89] It is not necessary that the contract of carriage should be in writing,[90] but an oral contract is usually merged in a sub-

81. Local express company delivering goods to carrier held shipper's agent for purpose of disclosing contents. Harrington v. Wabash R. Co. [Minn.] 122 NW 14.

82. Southern Exp. Co. v. Pope, 5 Ga. App. 689, 63 SE 809. Fact that shipper of household furniture concealed some wearing apparel in dresser held not such fraud as would preclude recovery for loss of furniture although no recovery could be had for such apparel. Way v. Southern R. Co. [Ga.] 64 SE 1066.

83. Where carrier, knowing exact nature of goods, classified them, it cannot assert wrongful classification to defeat liability. St. Louis & S. F. R. Co. v. Cash Grain Co. [Ala.] 50 S 81. Answer alleging that shipper represented the horse to be worth $75, that defendant did not know its actual value, but not alleging that defendant did not know that it was worth more than $75, held defective. Southern Exp. Co. v. Fox [Ky.] 115 SW 184.

84. Plaintiff cannot recover value at which it was accepted. Southern Exp. Co. v. Pope, 5 Ga. App. 689, 63 SE 809. Where shipper has practiced fraud on carrier as to true value, he cannot recover full value in case of loss. Southern Exp. Co. v. Fox [Ky.] 115 SW 184.

85. Whether shipper refused to declare value of package, when asked, or disguised shipment so as to defraud express company. Caldwell v. U. S. Exp. Co., 36 Pa. Super. Ct. 465. Where box of household goods is mistakenly marked books by shipper's agent and shipped as such, fraud is perpetrated on carrier although shipper did not intend to impose, since carrier had right to rely on markings. Harrington v. Wabash R. Co. [Minn.] 122 NW 14. Shipper can only recover for books in case of loss. Id. Agent of express company called for trunk and removed same to lower floor, nothing having been said as to value. Thereafter, owner sent same to company's office. The taker truthfully stated that he did not know its value, and accepted receipt at a low value. Held that no fraud was practiced on carrier. Southern Exp. Co. v. Keeler [Va.] 64 SE 38. That two bundles in shipment of household goods are described as "two bundles of carpet" does not prevent recovery for other household articles wrapped therein, where they were subject to same rates and especially where bundles indicated that they might contain some articles. Benson v. Oregon Short Line R. Co. [Utah] 99 P 1072. One falsely giving value of goods can only recover for value given, and hence one accepting bill of lading in silence, knowing that it is based upon an insufficient valuation, can only recover such value. Atkinson v. New York Transfer Co., 76 N. J. Law, 608, 71 A 278.

86. Virginia Code 1904, § 1294c, cl. 10, practically identical with Interstate Commerce Act, making it an offense to procure shipment at lesser rate by falsely representing character of goods, etc., except that punishment prescribed is less, held not unconstitutional as in conflict therewith. Adams Exp. Co. v. Charlottesville Woolen Mills [Va.] 63 SE 8.

87. Search Note: See notes in 7 C. L. 534; 49 L. R. A. 679; 1 L. R. A. (N. S.) 242; 6 Id. 302; 12 Id. 609; 13 A. S. R. 782; 23 Id. 595; 30 Id. 634; 46 Id. 777; 91 Id. 212; 105 Id. 332; 7 Ann. Cas. 731.

See, also, Carriers, Cent. Dig. §§ 128-239; Dec. Dig. §§ 46-49; 6 Cyc. 416-433; 4 A. & E. Enc. L. (2ed.) 507.

88. Townsend & Wyatt Dry Goods Co. v. U. S. Exp. Co., 133 Mo. App. 683, 113 SW 1161. Unless it is to be wholly performed in another state. Missouri, K. & T. R. Co. v. Sealy [Kan.] 99 P 230. Where contract for shipment of intrastate shipment is made within state decisions and opinions of Interstate Commerce Commission and acts of congress, upon which they are based, are not binding upon state courts in determining effect of state statutes. Alabama G. S. R. Co. v. McCleskey [Ala.] 49 S 433.

89. Where contract for transportation of flour from Pond Creek, Okl., to New York, made in Oklahoma, is subject to the Oklahoma law unless invading exclusive rights of United States to regulate interstate commerce. Erie R. Co. v. Pond Creek Mill & Elevator Co. [C. C. A.] 162 F 878. Where contract was made in Iowa and was to be partly performed therein, its validity and interpretation is governed by laws of Iowa, though shipment passed through Illinois. Coats v. Chicago, etc., R. Co., 239 Ill. 154, 87 NE 929.

90. McNeill v. Atlantic Coast Line R. Co. [Ala.] 49 S 797.

91. An anterior, verbal agreement between a shipper and carrier is merged in the contractual terms of the bill of lading. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 13. Bill of lading, signed and accepted by shipper, held contract of shipment, and not the prior oral

sequent written one [91] in the absence of fraud or imposition,[92] unless rights have accrued thereunder,[93] and especially where the parties contemplated a formal written contract.[94] It need not be imbodied in a single instrument or paper,[95] but, if in writing, it cannot be varied or altered by parol.[96] The general rules governing the making,[97] effect,[98] and construction [99] of contracts, control. A contract may be ratified and made binding by subsequent acts thereunder.[1] The mere fact that the contract contains provisions inapplicable to the shipment does not render it invalid.[2] Such contracts are subject to reasonable public control,[3] and stipulations therein for the sole benefit of the carrier are strictly construed.[4] A contract with the final carrier is terminated by the shipper ordering return of the goods before it receives the same.[5]

A bill of lading [6] is usually an instrument of a dual character, being a receipt for the goods and a contract for the carriage thereof.[7] As a receipt, it is usually only prima facie evidence of the receipt of the goods,[8] and, if nonnegotiable, the carrier may show that it did not in fact receive the goods as against a purchaser thereof.[9] In some states, it is conclusive in the hands of a bona fide holder,[10] and

negotiations. Whitnack v. Chicago, B. & Q. R. Co. [Neb.] 118 NW 67.

92. Written contract signed, supposing it to correspond to oral contract and without an opportunity to read same, held not to supersede oral one. Gulf, etc., R. Co. v. Looney [Tex. Civ. App.] 115 SW 268.

93. Lake Erie & W. R. Co. v. Seeley [Ind. App.] 86 NE 1002; Luckey v. St. Louis & S. F. R. Co., 133 Mo. App. 589, 113 SW 703.

94. Assuming that where carrier has once accepted goods under common-law liability, it can not thereafter limit its liability by agreement assented to by shipper, such rule has no application where parties contemplated entering into a formal contract. Union Pac. R. Co. v. Beardwell [Kan.] 99 P 214.

95. Where letters contemplated issuing of usual bill of lading, such bill forms a part of contract of carriage. Merchants' & Miners' Transp. Co. v. Eichberg, 109 Md. 211, 71 A 993.

96. Hachadoorian v. Louisville & N. R. Co., 128 App. Div. 171, 112 NYS 660. Where bill of lading has blank for rate unfilled, said rate, however, being recited as less than regular rate for carriage at carrier's risk, it is not varied by parol evidence of rate. St. Louis, etc., R. Co. v. Furlow [Ark.] 117 SW 517.

97. Where shipper accepted bill of lading after routing designated by him had been erased and permitted carrier to take cars for shipment, he was bound by contract as changed. Missouri, K. & T. R. Co. v. Thompson [Tex. Civ. App.] 118 SW 618. Where shipper prepares and sends to railroad company with his goods a shipping ticket containing directions that goods be shipped to certain point "as per condition of company's bill of lading," and company signs receipt for goods under those terms, and there is a standard form of bill, express contract of shipment is created, and conditions of bill of lading become a part of it. Southern R. Co. v. Frank & Co., 5 Ga. App. 514, 63 SE 656.

98. Whatever contract of shipment provides, whether verbal or written, under which freight is carried, determines route and connections to be observed. Missouri, K. & T. R. Co. v. Thompson [Tex. Civ. App.] 118 SW 618.

99. Where bill of lading provides that, if word "order" is written therein before name of person to whose order property is consigned, etc., bill of lading shall be demanded before delivery of goods, held to contemplate that consignor might be consignee. Pisapia v. Hartford & N. Y. Transp. Co., 62 Misc. 607, 116 NYS 26.

1. Where initial carrier without authority makes a contract for benefit of connecting carriers, the latter ratify same by accepting and transporting goods thereunder. Hachadoorian v. Louisville & N. R. Co., 128 App. Div. 171, 112 NYS 660. Shipper ratifies contract made by initial carrier for through shipment by bringing suit thereon. Id. Where petition alleged that contract of agent was ratified by superior officer, it is proper to show what contract was, and then that it was ratified. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767.

2. Potatoes shipped under contract intended for live stock. Whitnack v. Chicago, B. & Q. R. Co. [Neb.] 118 NW 67.

3. Valid regulation cannot be defeated by any printed form of contract. Yazoo & M. V. R. Co. v. Bent & Co. [Miss.] 47 S 805.

4. Yazoo & M. V. R. Co. v. Bent & Co. [Miss.] 47 S 805.

5. Kirk v. Lehigh Val. Transp. Co., 135 Mo. App. 99, 115 SW 515.

6. Receipt containing specification "as per conditions company's bill of lading" held properly admitted as bill of lading. McMeekin v. Southern R. Co., 82 S. C. 468, 64 SE 413.

7. Whitnack v. Chicago, B. & Q. R. Co. [Neb.] 118 NW 67.

8. Franklin Trust Co. v. Philadelphia, B. & W. R. Co., 222 Pa. 96, 70 A 949; Central of Georgia R. Co. v. Cook, 4 Ga. App. 698, 62 SE 464. Bill of lading is ordinarily prima facie proof of receipt of goods. Peele v. Atlantic Coast Line R. Co., 149 N. C. 390, 63 SE 66.

9. Franklin Trust Co. v. Philadelphia, B. & W. R. Co., 222 Pa. 96, 70 A 949.

10. Recital in bill of lading as to goods received, where some goods are received,

in others it is expressly governed by statute.[11] Where the goods are loaded by the shipper and the bill is issued without verification,[12] it is not prima facie proof.[13]

Indorsement and transfer. See 11 C. L. 516—At common law bills of lading are symbolical of the property represented thereby,[14] and the indorsement thereof passes the title,[15] although a mere transfer thereof is usually held sufficient.[16] In some states, however, statutes expressly require indorsement.[17] Although bills of lading may be negotiable or nonnegotiable,[18] they do not ordinarily possess all the attributes of negotiable paper in the absence of statute,[19] and the transferee acquires only such interest as the transferor may have.[20] An assignee of a bill of lading holds superior to an assignee of the invoice bill of which he had no notice.[21] Rights under the transfer are not lost by allowing delivery of the goods to the consignee,[22] and, where the consignee fraudulently induces a delivery without a surrender of the bill contrary to its terms, it is no defense that the transferee fails to present

held conclusive on carrier as against consignee or transferee who has sustained loss in reliance thereon. Thomas v. Atlantic Coast Line R. Co. [S. C.] 64 SE 220. As against one advancing money in reliance upon bills of lading issued without receiving the goods, held that carrier was estopped to assert nonreceipt. Missouri, K. & T. R. Co. v. Sealy [Kan.] 99 P 230.

11. Code 1906, § 4851, making bill of lading acknowledging receipt of goods conclusive on carrier in hands of bona fide holder, is not invalid as depriving carrier of property without due process of law nor as a regulation of interstate commerce (Yazoo & M. V. R. Co. v. Bent & Co. [Miss.] 47 S 805), and a recital of weight is conclusive though over column for insertion of weights are the words "Weights subject to correction" (Id.). Answer to action to recover for money advanced in reliance upon bills of lading issued without actual receipt of goods, alleging that under statute of Missouri where same was issued it was unlawful to issue without receipt of goods, and the highest courts thereof had held bills so issued void, held to state good defense. Missouri, K. & T. R. Co. v. Sealy [Kan.] 99 P 230.

12. Shipper may compel carrier to verify count. Peele v. Atlantic Coast Line R. Co., 149 N. C. 390, 63 SE 66.

13. Peele v. Atlantic Coast Line R. Co., 149 N. C. 390, 63 SE 66. Burden rests upon shipper to show delivery. Id.

14. Bill of lading represents the goods shipped thereunder, title to which may be transferred thereby. Yegen v. Northern Pac. R. Co. [N. D.] 121 NW 205; Bonds-Foster Lumber Co. v. Northern Pac. R. Co. [Wash.] 101 P 877. Where plaintiff turned over to another bills of lading for shipment to defendant, which goods defendant had purchased of such third person, held that defendant was justified to pay such third person in absence of knowledge of the terms under which bills were turned over to him. Greenville Lumber Co. v. National Pressed Brick Co., 133 Mo. App. 217, 113 SW 236.

15. Where bill of lading provides for carriage and delivery to order of consignor, indorsement by him of such bill with draft attached transfers title to property to indorsee, and consignor cannot thereafter control shipment. Paxson Bros. v. Warfield [Ga. App.] 65 SE 34. Holder of draft, who takes bill of lading attached thereto by assignment as security for amount advanced, becomes the owner of the goods, as against acceptor, to extent necessary to protect his advancement. Mason v. Nelson Cotton Co., 148 N. C. 492, 62 SE 625. Transfer by indorsement of a bill of lading to shipper's order vests title in transferee as purchaser or pledgee as the case may be. Scheuermann v. Monarch Fruit Co., 123 La. 55, 48 S 647.

16. McMeekin v. Southern R. Co., 82 S. C. 468, 64 SE 413. Mere possession of bill of lading is evidence of title, general or special, to the goods embraced therein, and that bill was not made nor indorsed to such holder is not material. In re Fils & Co., 165 F 245. Transfer to one making advancements in reliance on the assignment thereof is effectual to give an interest in the goods though not indorsed. Manufacturers' Commercial Co. v. Rochester R. Co., 117 NYS 989. Where carrier recognizes transfer of bill without indorsement by delivering part of goods thereunder and giving voucher for goods lost, it waives indorsement, if necessary. McMeekin v. Southern R. Co., 82 S. C. 468, 64 SE 413.

17. Ballinger's Ann. Codes & St. §§ 3590, 3598-3601 (Pierce's Code §§ 6780, 8920, 6781, 6782), relating to bills of lading and assignment thereof, construed and held that where bill was marked non-negotiable and nonassignable delivery thereof by consignor unindorsed with invoice duly assigned passed no title. Bonds-Foster Lumber Co. v. Northern Pac. R. Co. [Wash.] 101 P 877.

18. Where by its terms a bill of lading is negotiable, stamping of word "nonnegotiable" across face held not to change character. Pisapia v. Hartford & N. Y. Transp. Co., 62 Misc. 607, 116 NYS 26.

19. Under Act No. 150, p. 193, of 1868, bill of lading is a "negotiable instrument." Scheuermann v. Monarch Fruit Co., 123 La. 55, 48 S 647.

20. First Nat. Bank of Birmingham v. Wilkesbarre Lace Mfg. Co. [Ala.] 50 S 152. Delivery of bill of lading by consignor transfers property only when consignor has reserved an interest therein. Bonds-Foster Lumber Co. v. Northern Pac. R. Co. [Wash.] 101 P 877.

21, 22. Manufacturers' Commercial Co. v. Rochester R. Co., 117 NYS 989.

claim therefor until after the consignee becomes insolvent.[23] Where a seller ships to his own order and assigns the bills of lading with a draft for the price attached, such assignee does not ordinarily become liable on the contract of sale,[24] and especially where he has no notice of the breach.[25]

§ 6. *The duty to furnish cars.*[26]—See 11 C. L. 517—Under the common law a carrier must furnish suitable and proper cars [27] sufficient to meet normal conditions of traffic [28] within a reasonable time after demand.[29] A carrier is, however, under no common-law duty to furnish cars for a shipment beyond its own line,[30] nor can a carrier be compelled to allow its cars to go beyond its own line without compensation.[31] Where a carrier enters into a contract to furnish cars at a specified time,[32] it must do so,[33] and excuses which would relieve it from common-law liability are usually unavailable.[34] The agent making such a contract must have authority to do so,[35] although an unauthorized contract may be ratified.[36] Where the contract

23. Sheldon v. New York Cent. & H. R. R. Co., 61 Misc. 274, 113 NYS 676.

24. Buyer of draft for price with bill of lading attached may hold goods until draft is paid, and fact that consignee is obliged to pay draft before he can examine goods does not render holder liable for breach of warrant in contract of sale. Mason v. Nelson Cotton Co., 148 N. C. 492, 62 SE 625. Seller of cotton, pursuant to instructions from buyer, shipped under bill of lading naming purchaser as shipper and a bank as consignee. Seller drew draft on purchaser payable to bank and attached bill of lading, which was deposited with bank. Held that on paying same purchaser could not recover of bank for shortage. First Nat. Bank of Birmingham v. Wilkesbarre Lace Mfg. Co. [Ala.] 50 S 153.

25. Mason v. Nelson Cotton Co., 148 N. C. 492, 62 SE 625.

26. **Search Note:** See notes in 43 L. R. A. 225; 7 L. R. A. (N. S.) 108; 13 Id. 164; 15 Id. 733; 9 Ann. Cas. 990.

See, also, Carriers, Cent. Dig. §§ 120-122; Dec. Dig. § 40; 6 Cyc. 372, 373; 5 A. & E. Enc. L. (2ed.) 167.

27. Gulf, etc., R. Co. v. State [Tex. Civ. App.] 120 SW 1028. Car stall for shipment of horses is "reasonably safe" when it is such as an ordinarily prudent person would provide. Southern Exp. Co. v. Fox [Ky.] 117 SW 270. Carrier may show by one qualified to know that stall in car was put up in the customary manner for shipment of horses. Id. Not relieved from liability by fact that shipper examined car and did not object (Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767), and acceptance of unsuitable car by shipper does not relieve carrier from liability in absence of contributory negligence (Allen v. Chicago, B. & Q. R. Co. [Neb.] 118 NW 655). Where cars because of congested traffic are wholly beyond the control of a carrier, their places should be supplied with others, except when the conditions are only temporary and a return to normal conditions may soon reasonably be expected. Midland Val. R. Co. v. Hoffman Coal Co. [Ark.] 120 SW 380.

28. Midland Val. R. Co. v. Hoffman Coal Co. [Ark.] 120 SW 380.

29. Darlington Lumber Co. v. Missouri Pac. R. Co., 216 Mo. 658, 116 SW 530.

30. Gulf, etc., R. Co. v. State [Tex. Civ. App.] 120 SW 1028.

31. Rev. St. 1895, art. 4574, and order of railroad commission construed and held not to require carrier to allow its cars to go beyond its own line, and, if so, they were unconstitutional in that carrier would be deprived of its property without due compensation. Gulf, etc., R. Co. v. State [Tex. Civ. App.] 120 SW 1028.

32. Evidence held to support finding that defendant's agent agreed to furnish refrigerator car at specified time. Luckey v. St. Louis & S. F. R. Co., 133 Mo. App. 589, 113 SW 703. Statement that cattle would be ready for shipment on a specified day, coupled with request for cars on that day and answer "All right," held to constitute contract to furnish cars on that date. San Antonio & A. P. R. Co. v. Timon [Tex.] 114 SW 792. Petition alleging that general manager of defendant orally told plaintiff that defendant could handle his fruit and would have cars at designated station within 24 hours after same were ordered, that plaintiff ordered cars, which were received but not until after expiration of the 24 hours, held to show contract to furnish cars within 24 hours. Chattanooga So. R. Co. v. Thompson [Ga.] 65 SE 285.

33. Carrier cannot relieve itself on ground that it exercised due diligence. Grimes v. Lake Erie & W. R. Co., 142 Ill. App. 532.

34. Chattanooga So. R. Co. v. Thompson [Ga.] 65 SE 285. Where defendant did not have cars but shipper secured same from another carrier and defendant agreed to deliver them to shipper at certain time, failure to do so gave right of action against defendant though there was a scarcity of cars. Texas & P. R. Co. v. Shawnee Cotton Oil Co. [Tex. Civ. App.] 118 SW 776.

35. Station agent has apparent authority. Grimes v. Lake Erie & W. R. Co., 142 Ill. App. 532. Agent authorized to receive and ship freight has implied authority. St. Louis, etc., R. Co. v. Taylor [Ark.] 112 SW 745. Evidence that prior agreements of traveling freight agent to furnish cars had been carried out held to authorize submission of question of authority to make contract to jury. St. Louis, etc., R. Co. v. Boshear [Tex.] 113 SW 6.

36. Evidence that carrier not legally

stipulates for cars upon shipper's order, a proper requisition must be made therefor.[37] A carrier, leading the people of a particular region to believe that, if they put in a paticular crop, suitable cars will be furnished for the handling thereof, is liable for a failure to furnish the same.[38]

In some states, a carrier failing to furnish cars within a speciefid time after a proper demand [39] is subject to a penalty,[40] unless legally excused.[41] Although the Arkansas statute on its face imposes an absolute duty to furnish cars, legal excuses are available to defeat liability.[42]

Unless the carrier has refused to furnish the cars,[43] a tender of the goods for shipment is usually necessary to fix liability,[44] and, to entitle a shipper to a penalty under the Texas statute, he must at the time of demand for cars have goods on

bound to furnish cars off its own line did so in accordance with contract of traveling freight agent held to justify finding that they were furnished in pursuance of such agreement (St. Louis, etc., R. Co. v. Boshear [Tex.] 113 SW 6), and to authorize submission of issue of ratification of such agreement if agent had no authority to make same (Id.).

37. No recovery can be had for failure to furnish cars for ungathered peaches for which no requisition had been made. Chattanooga So. R. Co. v. Thompson [Ga.] 65 SE 285.

38. Carrier led truck growers to believe that, if they raised vegetables, refrigerator cars necessary for their transportation would be furnished. Atlantic Coast Line R. Co. v. Geraty [C. C. A.] 166 F 10.

39. Under the Texas statutes authorizing the recovery of a penalty for failure to furnish cars, the application must sufficiently comply with the requirements of the statute. Application construed and held sufficient to authorize recovery of penalty. Texas & P. R. Co. v. Andrews, Reynolds & Co. [Tex. Civ. App.] 118 SW 1101. Acts 20th Leg. 1887, pp. 133, 134, c. 139 (Rev. St. 1895, arts. 4497-4502) arts. 4497 and 4500 being §§ 1, 4, of Act of 1887, as amended by Acts 26th Leg. 1899, pp. 166, 167, c. 95, providing that when proper application is made in writing for 10 cars or less, carrier shall furnish same at place stated within three days from time of demand and shall be liable for penalty for failure, held that requisition calling for cars on date of application is insufficient. Griffith v. Texas & N. O. R. Co. [Tex. Civ. App.] 116 SW 648. Rev. St. 1905, art. 4497, does not impose upon a railway company the duty of supplying a particular kind of cars, and the shipper who imposes upon the company that duty does not bring himself within the letter of the statute giving the penalty, and therefore he has no cause of action for penalty. Chicago, etc., R. Co. v. Risley Bros. & Co. [Tex. Civ. App.] 119 SW 897.

40. Since a shipment is either interstate or intrastate, held that there would be no confusion to enforcing Laws 1907, Act No. 193, p. 453, § 1, requiring cars to be furnished within six days, as to intrastate shipments if it is unconstitutional as to interstate shipments. Oliver v. Chicago, etc., R. Co. [Ark.] 117 SW 238. Rev. St. arts. 4497-4502, authorizing recovery of penalties against carriers for failure to furnish cars are not contrary to fourteenth amendment of the federal constitution because they make no provision for exempting carriers from damage for failure under circumstances beyond its control. Texas & P. R. Co. v. Taylor [Tex. Civ. App.] 118 SW 1097; Texas & P. R. Co. v. Andrews, Reynolds & Co. [Tex. Civ. App.] 118 SW 1101. Rev. St. 1895, arts. 4497-4502, not in violation of constitution as imposing excessive fines and punishment. Texas & P. R. Co. v. Andrews, Reynolds & Co. [Tex. Civ. App.] 118 SW 1101. Rev. St. 1895, art. 4497, requiring a railroad company to furnish cars within certain time applies to interstate shipments. Texas & P. R. Co. v. Smith [Tex. Civ. App.] 118 SW 1118. Under Rev. St. 1895, art. 4499, a penalty of $25 per day may be recovered for each car and be continued for whole time of carrier's delinquency. Texas & P. R. Co. v. Taylor [Tex. Civ. App.] 118 SW 1097.

41. Evidence held to sustain finding that carrier's failure to furnish cars within time demanded was without sufficient legal excuse. Texas & P. R. Co. v. Taylor [Tex. Civ. App.] 118 SW 1097. Finding aided by judgment held to require conclusion that carrier was without excuse for its delay at any time after certain date. Texas & P. R. Co. v. Andrews, Reynolds & Co. [Tex. Civ. App.] 118 SW 1101.

42. Laws 1907, Act No. 193, pp. 454, 463, §§ 1, 17, requiring carriers to furnish cars within six days of application. Oliver v. Chicago, etc., R. Co. [Ark.] 117 SW 238. Only unusual and extraordinary emergencies which cannot be reasonably foreseen will excuse failure to furnish cars. Id.

43. Atlantic Coast Line R. Co. v. Geraty [C. C. A.] 166 F 10.

44. Mere fact that shipment is not on platform does not excuse failure to furnish cars, where it is under control of shipper and ready for shipment. St. Louis S. W. R. Co. v. Leder Bros. [Ark.] 112 SW 744.

45. Rev. St. 1905, art. 4497, giving a penalty, provides that the owner or shipper of any freight of any kind shall make application in writing, etc., and art. 4502 requires that a party bringing suit under the provisions of this law shall show by evidence that he "had on hand," at the time any demand for cars was made, the freight necessary to load the cars so ordered. Held that the evidence in the case showed that at the time plaintiffs gave their orders for the cars to be loaded with crushed stone, they were not the owners of and did not have on hand any crushed stone,

hand for shipment.[45] Where a carrier has incurred liability for failing to furnish cars as required, it is not relieved therefrom by the fact that the shipment is subsequently made.[46]

§ 7. *Forwarding and transporting goods.*[47] See 11 C. L. 519—Custom cannot control an express contract as to forwarding obligations,[48] and, when a carrier accepts perishable goods, it impliedly undertakes to exercise such care as the nature thereof may require.[49] The duty to furnish suitable cars extends to proper refrigeration according to established custom.[50] A carrier must render such special services as it expressly contracts to furnish,[51] but it cannot charge for special services unnecessarily rendered.[52] Where a carrier deviates from the designated route,[53] it is liable for any resulting injury,[54] and the burden rests upon it to show that the deviation was not a contributing cause.[55] A carrier issuing a through bill cannot forward

therefore they were not entitled to penalty for defendant's failure to furnish cars. Chicago, etc., R. Co. v. Risley Bros. & Co. [Tex. Civ. App.] 119 SW 897. Rev. St. 1895, art. 4509, requiring a shipper, before recovery of penalty may be had for failure to furnish cars, to show by evidence that he "had on hand at the time any demand for cars was made" the necessary freight with which to load them, is not void for uncertainty. Meaning of "on hand" construed. Texas & P. R. Co. v. Taylor [Tex. Civ. App.] 118 SW 1097. Petition held to sufficiently allege that carrier had cattle intended to be shipped "on hand" as required by Rev. St. 1895, art. 4502, providing that shipper claiming penalty must show that he had property "on hand." Texas & P. R. Co. v. Smith [Tex. Civ. App.] 118 SW 1118.

46. St. Louis, etc., R. Co. v. Taylor [Ark.] 112 SW 745.

47. Search Note: See notes in 3 C. L. 596; 1 A. S. R. 312; 19 Id. 87; 11 Ann. Cas. 274. See, also, Carriers, Cent. Dig. §§ 240-461, 734-852; Dec. Dig. §§ 70-106, 169-187; 6 Cyc. 433-436, 463-490.

48. Where express company undertook by contract to transport money, it cannot show custom merely to pay on order without actual transmission. Downs v. Pacific Exp. Co., 135 Mo. App. 330, 116 SW 9.

49. Carrier undertaking to carry perishable property in cars specially adapted to preserve it is responsible for any defect in cars resulting in injury to property. Missouri, K. & T. R. Co. v. McLean [Tex. Civ. App.] 118 SW 161. Where connecting carrier accepts car of peaches it is charged with notice of perishable nature of shipment, and by such acceptance undertakes to exercise reasonable care to protect same and to deliver with reasonable dispatch. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193. Failed to ventilate car of apples which should have been delivered to cold storage. Michigan Cent. R. Co. v. Harville, 136 Ill. App. 243. Where carrier undertakes to transport fruit in cars provided with ventilating apparatus, it impliedly contracts to so handle as to make appliance available. Western R. Co. v. Hart [Ala.] 49 S 371. Although carrier does not expressly contract to furnish refrigerator car, if it accepts perishable property in such car, it impliedly agrees to exercise such diligence as class of goods requires. International & T. N. R. Co. v. Welbourne [Tex. Civ. App.] 113 SW 780.

50. Evidence that shipper's cabbages had just been cut from stalks, were sound, firm and hard when shipped, and decayed in transit, and badly damaged when they reached their destination, are circumstances sufficient to warrant a finding that cars were either not properly constructed or refrigerated. Missouri, K. & T. R. Co. v. McLean [Tex. Civ. App.] 118 SW 161. Although a shipper may discover before loading or departure of the car that it is not suitable to carry perishable goods, he will not on that account be deemed guilty of contributory negligence, or to have assumed the risk where he has no means or opportunity of relieving himself of the situation. Id.

51. Pennsylvania R. Co. v. Orem Fruit & Produce Co. [Md.] 73 A 571. Where carrier contracts to re-ice car containing perishable goods, it is bound so to do, and evidence as to why it did not re-ice held inadmissible. Id.

52. Held for jury whether carrier unnecessarily rendered special service in shipment of monument for which plaintiff was obliged to pay by way of reduction of selling price. Harrison Granite Co. v. Pennsylvania R. Co., 154 Mich. 48, 15 Det. Leg. N. 68, 117 NW 549.

53. Where contract required that grain should be carried to "the usual place of delivery at said destination," delivery at yard which had been customarily used for seven years to plaintiff's knowledge is not a diversion. Smith v. Baltimore & O. R. Co. [Pa.] 72 A 264. Where written contract is silent as to route, evidence of parol agreement in respect thereto is admissible. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856. The act of changing the route of a shipment from that stated in the contract is not negligence per se. Parsons Applegate Co. v. Louisville & N. R. Co., 136 Mo. App. 494, 118 SW 101.

54. Becomes an insurer. Weaver v. Southern R. Co., 135 Mo. App. 210, 115 SW 500. Destination of car of apples changed from "Drucker's Cold Storage, Canal and Lake," to "Drucker's Cold Co.," which was responsible for the refusal of connecting carrier to accept car. Michigan Cent. R. Co. v. Harville, 136 Ill. App. 243.

55. Weaver v. Southern R. Co., 135 Mo. App. 210, 115 SW 500. Carrier is liable for loss of goods where but for changing of

by another carrier to a point to which its line extends.[56] A carrier accepting a shipment for a point on its own line is not bound to obey a reconsigning order taking its cars onto another road.[57]

Delay in transportation. See 11 C. L. 519—A carrier is not an insurer against delay,[58] but must exercise reasonable care[59] to transport within a reasonable time,[60] and is liable for all injuries proximately[61] resulting from its negligence.[62] What

directions of shipper they would have reached destination notwithstanding negligent directing of shipper. Id.

56. St. Louis, etc., R. Co. v. Caldwell [Ark.] 116 SW 210.

57. Where there was no special contract to that effect and no universal custom, and if so notice had been given by carrier that its cars would not be reconsigned to points on foreign roads. Martin-Howe Coal Co. v. Illinois Cent. R. Co., 142 Ill. App. 80.

58. Tiller v. Chicago, B. & Q. R. Co. [Iowa] 120 NW 672. Carrier may ordinarily make such reasonable train schedules as may be proper to the ordinary and economical conduct of its business, due regard being had to nature of shipment. Id. Evidence held insufficient to support judgment by reason of the fact that there was no proof of special contract with reference to time of transportation and no proof of injury because of delay. Missouri, K. & T. R. Co. v. Rogers [Tex. Civ. App.] 118 SW 738.

59. St. Louis & S. F. R. Co. v. Vaughan [Ark.] 113 SW 1035. Liable for negligent delays on its own line. Shockley v. Pennsylvania R. Co., 109 Md. 123, 71 A 437. Although notice of special damages that will result from delay requires exercise of care commensurate with the case, carrier is only required to exercise reasonable care to transport promptly. Chicago, etc., R. Co. v. Planters' Gin & Oil Co. [Ark.] 113 SW 352.

60. Libby v. St. Louis, etc., R. Co. [Mo. App.] 117 SW 659; Groot v. Oregon Short Line R. Co., 34 Utah, 152, 96 P 1019; Tiller v. Chicago, B. & Q. R. Co. [Iowa] 120 NW 672. Where there is evidence that shipment was materially delayed and was received by consignee in damaged condition, held not error to submit question of unreasonable delay to jury. Allen v. Chicago, B. & Q. R. Co. [Neb.] 118 NW 655. Evidence held not to support verdict that carrier had unreasonably delayed transportation of stock. Tate v. Missouri Pac. R. Co., 143 Ill. App. 289. Where goods consigned at point in Washington to a point in Minnesota arrived at destination 10 days after initial delivery, mere proof that schedule time between points was 7 days, without proof that goods went by first train after delivery or were to so go, or that schedule time was ever made, held not to show that delivery was not made within reasonable time. Gamble-Robinson Com. Co. v. Northern Pac. R. Co., 107 Minn. 187, 119 NW 1068. Where carrier's agent informed plaintiff that it would take about 24 hours to deliver shipment to connecting carrier, and shipment, loaded on June 16, was not delivered to connecting carrier until June 18, at 7 p. m., and was at transfer point 19 hours before delivery. Whether this delay was unreasonable was for jury. St. Louis, etc., R. Co. v. Hutson [Tex. Civ. App.] 120 SW 213.

61. Where stock could not have reached destination sooner than day before actual arrival, evidence of decline in market since first of week held improper. St. Louis & S. F. R. Co. v. May [Tex. Civ. App.] 115 SW 900. In absence of actual damages, nominal damages may be recovered for unreasonable delay. Aultman Engine Thresher Co. v. Chicago, etc., R. Co. [Iowa] 121 NW 22.

62. Shipper of live stock, suffering loss by reason of decline in market and shrinkage of cattle occasioned by negligent delay, is entitled to recover. Libby v. St. Louis, etc., R. Co. [Mo. App.] 117 SW 659.

Negligence for jury: In clearing wreck so as to transport corpse on time. Alabama City, G. & A. R. Co. v. Brady [Ala.] 49 S 351.

Excusable causes for delay: Snowstorm. Vencill v. Quincy, etc., R. Co., 132 Mo. App. 722, 112 SW 1030. Evidence held not to show any actionable delay in shipping cattle from Watson, Mo., to Chicago, Ill., delays being for feed and water, and for trains belated by derailments. Tiller v. Chicago, B. & Q. R. Co. [Iowa] 120 NW 672. Where shipper's agent gave directions that if cattle could not be gotten on during evening for which cars were ordered not to ship until the next evening, carrier complying therewith is not liable for the delay after it could have moved shipment. Chicago, etc., R. Co. v. Kapp [Tex. Civ. App.] 117 SW 904.

Inexcusable: Absence of cars on other lines. St. Louis S. W. R. Co. v. Phoenix Cotton Oil Co. [Ark.] 115 SW 393. Refusal of engineer to proceed because of lack of rest, though carrier exercised ordinary care to secure another. Missouri, K. & T. R. Co. v. Woods [Tex. Civ. App.] 117 SW 196. Breaking down of engine where due to negligent coupling or defect in end sill, and there is no proof of due inspection. Vencill v. Quincy, etc., R. Co., 132 Mo. App. 722, 112 SW 1030. Delay, due to defective roadbed or tracks or equipment, is not ordinarily excusable. Thompson v. Quincy, etc., R. Co., 136 Mo. App. 404, 117 SW 1193. Although permit issued by steamship company designated March 4th as the date on which certain goods were to be delivered on wharf for shipment, railroad company had no right to disobey express directions of shipper to deliver same during forenoon, and is liable where it failed to deliver until afternoon, when it was too late. White v. North German Lloyd S. S. Co., 61 Misc. 268, 113 NYS 805. Evidence held to show that carrier was negligent in not sooner moving and refrigerating shipment of cabbage. McLean v. Gulf & I. R. Co. [Tex. Civ. App.] 118 SW 578

is a reasonable time is a question of fact,[63] to be determined from all the surrounding circumstances.[64] While mere delay is not proof of negligence,[65] it may be so great as to make a prima facie case.[66] A carrier may, however, expressly obligate itself to transport within a specified time [67] or in time for a particular market.[68] The carrier must not mislead shipper as to the time of starting the shipment,[69] and where there is unreasonable delay therein, it must notify him so that he may act accordingly.[70] Likewise, it must not mislead him as to arrival of goods at destination.[71] It is liable for delay caused by route deviation.[72]

In the exercise of its control over carriers, a state may prescribe a penalty [73] for unreasonable [74] delay [75] or may authorize the recovery of liquidated damages.[76]

63. Tiller v. Chicago, B. & Q. R. Co. [Iowa] 120 NW 672.

64. Length of journey, mode of conveyance, state of roads, season of year, nature of shipment, and all other surrounding facts. Tiller v. Chicago, B. & Q. R. Co. [Iowa] 120 NW 672. In determining unreasonable delay, carrier is entitled to deduction of such time as is reasonably necessary for loading and unloading, in addition to the five hours which federal law requires for feeding and watering. St. Louis & S. F. R. Co. v. May [Tex. Civ. App.] 115 SW 900. It cannot be assumed that from April 28th to May 21st is more than a reasonable time for transportation of goods from Tucumcari, N. M., to Emory, Tex., in absence of other evidence. Missouri, K. & T. R. Co. v. Dement [Tex. Civ. App.] 115 SW 635.

65. But it has probative force with other evidence. Holland v. Atchison, etc., R. Co., 133 Mo. App. 694, 114 SW 61. Only slight evidence is required where there has been an unusual delay. Gilbert v. Chicago, etc., R. Co., 132 Mo. App. 697, 112 SW 1002.

66. Where it took 31 hours to transport stock over route which usually took but 8 or 10 hours, a prima facie case of negligence is made out. Libby v. St. Louis, etc., R. Co. [Mo. App.] 117 SW 659. Where evidence showed that shipment of cattle did not arrive at certain station until four or five hours after they were loaded, and time required for the run was 2 hours and 20 minutes, whether there was negligent delay was question for jury. Texas & P. R. Co. v. Moore [Tex. Civ. App.] 119 SW 697.

67. Mere statement by agent that shipment would arrive at a certain time held not to constitute a special contract to carry by that time. Sauter v. Atchison, etc., R. Co. [Kan.] 97 P 434. Where carrier had expressly contracted to transport wheat, without stipulating for exemptions for delay caused by extraordinary rush of business, it cannot defend on that ground. Missouri, K. & T. R. Co. of Texas v. Stark Grain Co. [Tex. Civ. App.] 120 SW 1146.

68. Station agent may make contract for delivery in time for a particular market. Gulf, etc., R. Co. v. Looney [Tex. Civ. App.] 115 SW 268. Evidence held sufficient to take issue of contract for delivery in time of specified market to jury. Id.

69. Although carrier was not liable for failure to forward stock received at 7 o'clock until 9:30 next morning, held liable where it led shipper to believe that it would be sent out at once, there being no regular train until 9:30 and it requiring eight or nine hours to get special. St. Louis & S. F. R. Co. v. Vaughan [Ark.] 113 SW 1035. Where shipper would have cared for cattle at junction at yards or elsewhere had it not been for representation that cars would be forwarded at once, it cannot be contended that assurances were not proximate cause of injury because yards of connecting carrier were too small to accommodate all. Id.

70. St. Louis & S. F. R. Co. v. Vaughan [Ark.] 113 SW 1035.

71. Where, after arrival of horses, agent, without exercising due care to ascertain that fact, informed plaintiff that they had not arrived, knowing that he was very anxious to give them care, held negligent. Gilbert v. Chicago, etc., R. Co., 132 Mo. App. 697, 112 SW 1002.

72. Where it appeared that the unusual delay was result of diversion of shipment and was proximate cause of injury to property, demurrer to the evidence was properly overruled. Parsons-Applegate Co. v. Louisville & N. R. Co., 136 Mo. App. 494, 118 SW 101.

73. Statutory penalty for delay, under Act Mar. 26, 1904 (24 Stat. p. 671), may be recovered without proof of injury. Mills v. Southern R. Co., 82 S. C. 242, 64 SE 238. Under Acts 1904, p. 671, § 1, providing that carrier shall transport certain distance within specified time, when prompt shipment is requested, and § 2 providing penalty which may be recovered by any consignee "who may be injured * * * by such delay or by the owner or holder of the bill of lading," owner or holder of bill may recover though not injured by delay. Muckenfuss Mfg. Co. v. Charleston & W. C. R. Co., 82 S. C. 177, 63 SE 747.

74. Evidence held not to support findings that shipments were unreasonably delayed 10 and 12 days. International & G. N. R. Co. v. Beasley [Tex. Civ. App.] 120 SW 1199. Carrier not liable for demurrage charges when delay is excusable. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. Not liable under Cobbey's Ann. St. 1907, § 10,606, for delay at feeding point, where to continue would require carriage and delivery on Sunday. Cram v. Chicago, B. & Q. R. Co. [Neb.] 122 NW 31.

75. Cobbey's Ann. St. 1907, §§ 10,606, 10,607, being c. 107, p. 506, Laws Neb. 1905, requiring carriers of live stock to maintain specified average speed, held not violative of Const. Neb. art. 3, §§ 11, 15, nor of 14th amendment to U. S. Const. Cram v. Chi-

Such penal statutes must be strictly construed,[77] and the action must be prosecuted by the proper party.[78] These statutes frequently prescribe the speed which must be maintained.[79] Under the South Carolina statute due and timely [80] notice must be given to the shipping agent that prompt shipment is desired,[81] by the consignor or his agent.[82] The petition must allege all facts necessary to bring the case within the statute.[83]

§ 8. *Loss or injury to goods.*[84]—See 11 C. L. 521—In the absence of special contract [85] or statute,[86] a common carrier is an insurer [87] against loss or injury to goods being carried in such capacity,[88] unless due to an act of God,[89] judicial intervention,[90] the inherent nature of the goods,[91] or the negligence of the shipper,[92] and,

cago, B. & Q. R. Co. [Neb.] 122 NW 31; Kyle v. Chicago, B. & Q. R. Co. [Neb.] 122 NW 37. Rule of railroad commissioners making carrier liable to shipper for certain delays by way of demurrage penalty held reasonable, and not discriminatory. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. Complaint alleging delay of three weeks in violation of 24 Stat. 671, and demanding judgment against defendant for the sum of $90 penalty as provided by statute, held to sufficiently show that action was for per diem penalty for delay as provided in 24 Stat. 671. Farrell v. Atlantic Coast Line R. Co., 82 S. C. 410, 64 SE 226. Mere refusal to pay demurrage charge as prescribed by rule of commissioners does not subject carrier to penalty. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969.

76. Cram v. Chicago, B. & Q. R. Co. [Neb.] 122 NW 31.

77. Act Mar. 26, 1904 (24 Stat. 671), prescribing penalty for delay, being penal must be strictly construed. Mills v. Southern R. Co., 82 S. C. 242, 64 SE 238.

78. Penalty prescribed by Rule 10 of demurrage and delay rules of railroad commissioners may be recovered by consignee. Keystone Lumber Yard v. Yazoo & M. V. R. Co. [Miss.] 47 S 803. Rule of railroad commissioners, making carrier liable for demurrage for delay of car and prescribing a penalty, is enforcible by shipper and not by commissioners. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969.

79. Speed prescribed by Cobbey's Ann. St. 1907, § 10,606, need only be maintained from initial point "of receiving said stock to the point of feeding or destination," and, hence, when maintained until arrival at feeding point, statute is complied with. Cram v. Chicago, B. & Q. R. Co. [Neb.] 122 NW 31.

80. Notice must be given within such reasonable time before shipment that agent, notwithstanding his other duties, by reasonable diligence, may keep same in mind. Mills v. Southern R. Co., 82 S. C. 242, 64 SE 238.

81. Act Mar. 26, 1904 (24 Stat. 671). Mills v. Southern R. Co., 82 S. C. 242, 64 SE 238.

82. Notice may be given through agent. Mills v. Southern R. Co., 82 S. C. 242, 64 SE 238.

83. Declaration predicated on Rule 10 of Demurrage and Delay Rules of Railroad Commission, prescribing penalty for delaying shipments by sidetracking, which fails to allege that delay was caused by sidetracking, is deficient. Keystone Lumber Yard v. Yazoo & M. V. R. Co. [Miss.] 47 S 803.

84. Search Note: See notes in 5 L. R. A. (N. S.) 459; 10 Id. 317; 15 Id. 801; 11 A. S. R. 360; 90 Id. 300; 97 Id. 526; 4 Ann. Cas. 769; 5 Id. 821; 10 Id. 171.

See, also, Carriers, Cent. Dig. §§ 462-607, 775-803; Dec. Dig. §§ 107-137½, 177; 6 Cyc. 488; 5 A. & E. Enc. L. (2ed.) 233.

85. See post, § 11.

86. Where legislature increases common-law liability, it will not be declared unconstitutional under Const. art. 11, § 4, providing that carrier's liability shall not be limited, because under a hypothetical situation it may work to prejudice of shipper. Cram v. Chicago, B. & Q. R. Co. [Neb.] 122 NW 31.

87. Law presumes negligence from loss of goods. Kansas City So. R. Co. v. Rosebrook-Josey Grain Co. [Tex. Civ. App.] 114 SW 436. Under Hepburn amendment to twentieth section of Interstate Commerce Act as amended, making initial carrier liable for "any loss, damage, or injury caused by it" or connecting carrier, the liability is that of insurer as to common law. Louisville & N. R. Co. v. Warfield [Ga. App.] 65 SE 308. Nonsuit held properly denied where evidence shows that goods were received by transfer company and delivered to defendant. Hill v. Adams Exp. Co. [N. J. Law] 71 A 683. That connecting carrier did not receive way-bill or other information as to whom to deliver to does not excuse from duty to carry safely, where owner did not prevent it from getting same. Western R. Co. of Alabama v. Hart [Ala.] 49 S 371.

88. Where initial carrier receives freight under contract between shipper and terminal carrier and after delivery to connecting carrier agrees with shipper to receive and return without charges, it is only a bailee. Kirk v. Lehigh Val. Transp. Co., 135 Mo. App. 99, 115 SW 515.

89. Special contract to deliver within a specified time does not render carrier liable for loss occasioned by act of God. Sauter v. Atchison, etc., R. Co. [Kan.] 97 P 434. Whether delay alleged to be due to snow storm was caused by act of God held for jury. Owens Bros. v. Chicago, etc., R. Co., 139 Iowa, 538, 117 NW 762.

90. Where intoxicating liquors were seized while in possession of express company and consignor was notified in time to carry on litigation and gave assurance that he would do so the express company was not liable. American Exp. Co. v. Mullins, 212 U. S. 311, 53 Law. Ed. —.

91. While carrier is not liable for deterioration due to inherent perishable nature of goods, it must exercise reasonable care

hence, is liable for the tortious acts of third persons [93] and of its servants.[94] It is always liable for injuries proximately [95] resulting from its negligence,[96] and the negligence of the shipper,[97] inherent deterioration,[98] or an act of God,[99] is no defense if its negligence proximately contributed therewith.[1] Where a carrier expressly accepts [2] a shipment defectively addressed, it must deliver it safely,[3] and where shipping directions are not clear, it is the duty of the carrier to hold the shipment and demand further instructions.[4] A special contract must be performed according to its terms.[5] The liability has been expressly defined in some states by

to protect same and to deliver same with dispatch. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193. Evidence held to show that apples when shipped were in good condition and were properly packed, and that the only reason the apples did not reach destination in sound condition was the failure of carrier to keep car ventilated and properly iced. St. Louis S. W. R. Co. of Texas v. Jackson & Co. [Tex. Civ. App.] 118 SW 853.

92. Rev. Codes 1905, § 5690, making carrier an insurer with certain specified exception of which negligence of shipper is not one, held not to entirely abrogate common-law rule relieving carrier for negligence of shipper. Duncan v. Great Northern R. Co. [N. D.] 118 NW 826. Where many articles of shipment of household goods were not packed or crated but merely tied together, question of proper packing and loading held for jury. Connelly v. Illinois Cent. R. Co., 133 Mo. App. 310, 113 SW 233. Where goods left at dock were mistakenly taken on board of steamer and hence miscarried, custom that goods on dock with other goods are taken on board without regard to markings offered in defense must be established by clear evidence. Spiero v. New York, etc., R. Co., 64 Misc. 53, 117 NYS 1039.

93. Stockton Lumber Co. v. California Nav. & Imp. Co. [Cal. App.] 101 P 541.

94. Liable for goods stolen by employe without regard to negligence. Heyman v. Stryker, 116 NYS 638; Fein v. Weir, 129 App. Div. 299, 114 NYS 426; Rosenblum v. Weir, 113 NYS 520. Evidence that goods were delivered to defendant's servant, that he signed a false name to the receipt and that they were never delivered to defendant, held to authorize inference that he stole same. Fein v. Weir, 129 App. Div. 299, 114 NYS 426.

95. Held for jury whether negligence in failing to properly feed and water horse was proximate cause of its sickening and dying. Pierson v. Northern Pac. R. Co. [Wash.] 100 P 999. Where negligence in failing to feed and water horses so weakened them that they contracted disease from which some died, held that negligence was proximate cause of death. Id. Evidence held to warrant finding that horse which died and one that became sick contracted disease because of weakened condition produced by delay and failure to feed and water. Gilbert v. Chicago, etc., R. Co., 132 Mo. App. 697, 112 SW 1002.

96. It is right of shipper to demand that goods which have failed to reach consignee be traced, and where carrier upon receiving demand apparently acquiesces therein, but as a matter of fact takes no action for a long period during which goods might have been traced, and they are finally destroyed in a burning warehouse, carrier is liable as a matter of law for the loss thus sustained. Freiberg v. Cleveland, etc., R. Co., 11 Ohio C. C. (N. S.) 241. Where car in which apples were shipped from New York to Dallas, Texas, was not iced by shipper, the temperature being 10 degrees above zero at New York, nor were any instructions given to carrier to ice or ventilate car, held it was duty of carrier to use ordinary care to protect shipment from injury by keeping car ventilated and properly iced. St. Louis S. W. R. Co. of Texas v. Jackson & Co. [Tex. Civ. App.] 118 SW 853. Evidence held sufficient to sustain finding that derailment of freight train, delay, and injury caused thereby, was occasioned by negligence of carrier. Arkansas Cent. R. Co. v. Janson [Ark.] 119 SW 648.

97. Negligence of shipper in giving shipping directions, where its negligence intervenes. Weaver v. Southern R. Co., 135 Mo. App. 210, 115 SW 500. Where outside door of grain car was closed and sealed by defendant's agent who had full opportunity to observe whether inner door was closed, shipper's negligence in respect thereto does not relieve carrier. Duncan v. Great Northern R. Co. [N. D.] 118 NW 826.

98. Liable for deterioration of peaches due to failure to properly re-ice car. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193.

99. Negligence for jury in relying upon reports of weather bureau as to height water was likely to rise, in face of fact that it had frequently risen higher during past few years and was rapidly rising at time of reports. Smith v. Baltimore & O. R. Co. [Pa.] 72 A 264.

1. Negligent and unjustifiable failure to deliver at time when a loss by flood could not be reasonably anticipated held not proximate cause of loss due to unprecedented flood. Atchison, etc., R. Co. v. Henry [Kan.] 97 P 465.

2. Express company is bound by statement of driver of wagon that address is sufficient and his refusal to allow shipper to re-mark. Magnus v. Platt, 62 Misc. 499, 115 NYS 824.

3. Magnus v. Platt, 62 Misc. 499, 115 NYS 824.

4. Weaver v. Southern R. Co., 135 Mo App. 210, 115 SW 500.

5. Under contract by a company engaged in assembling carload lots of goods for shipment, it is immaterial in action for damages to the goods and for cartage and storage paid whether it was a mere forwarder or a forwarder and distributor, since it was obliged in either case to carry

special statutes.[6] Nonpayment of freight in advance does not lessen responsibility if transportation is undertaken.[7]

§ 9. *Delivery by carrier and storage at destination.*[8] See 11 C. L. 523—Delivery to the proper person[9] or his agent,[10] or a tender of such delivery,[11] terminates the relationship,[12] and the carrier may thereafter assume a different one.[13] A constructive delivery, however, can be effected only by agreement.[14] In the absence of special contract,[15] a carrier's liability as such ceases in some states upon the arrival of the goods and a reasonable opportunity for removal,[16] but in others it continues

out contract. Garberson v. Trans-Continental Freight Co., 51 Wash. 213, 98 P 612.

6. Absolutely liable unless loss was due to act of shipper or by one of the causes specified in Civ. Code, § 2194. Stockton Lumber Co. v. California Nav. & Imp. Co. [Cal. App.] 101 P 541. Under Civ. Code, § 2194, destruction by the elements is no defense unless caused by some irresistible superhuman cause. Id. First sentence of Va. Code 1904, § 1294c(24), rendering initial carrier liable as insurer for damage caused by its negligence or the negligence of a connecting carrier, does not apply to shipment wholly on one road. Chesapeake & O. R. Co. v. Pew [Va.] 64 SE 35.

7. Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555.

8. Search Note: See notes in 3 C. L. 600; 17 L. R. A. 691; 33 Id. 66; 37 Id. 177; 38 Id. 358; 4 L. R. A. (N. S.) 1056; 7 Id. 926; 8 Id. 235, 240; 9 Id. 577; 14 Id. 393; 15 Id. 756; 9 A. S. R. 511; 34 Id. 731, 735; 97 Id. 84; 5 Ann. Cas. 100; 9 Id. 794; 10 Id. 442.

See, also, Carriers, Cent. Dig. §§ 272-395, 608-636, 764, 765; Dec. Dig. §§ 77-94, 138-146, 175; 6 Cyc. 436, 453-477; 5 A. & E. Enc. L. (2ed.) 244; 26 Id. 1077.

9. At common law, unless bill of lading otherwise stipulated or carrier has notice to contrary, delivery to consignee exonerates carrier from liability. Bonds-Foster Lumber Co. v. Northern Pac. R. Co. [Wash.] 101 P 877. Where bill of lading provides for notice to particular person, he becomes agent of consignor for purpose of receiving notice. Hardin Grain Co. v. Chicago & A. R. Co., 134 Mo. App. 681, 114 SW 1117. Addressing of package to consignee in care of a third person, in absence of known limitations of authority, confers upon such third person implied authority to receive the goods. Commonwealth v. People's Exp. Co., 201 Mass. 564, 88 NE 420. Provision in bill of lading to notify certain person does not make him consignee. Pisapia v. Hartford & N. Y. Transp. Co., 62 Misc. 607, 116 NYS 26. The duty of a carrier to deliver goods to the proper party is absolute. Chicago, etc., R. Co. v. Pfeifer [Ark.] 119 SW 642.

10. Evidence held not to show that compress company, to which carrier delivered shipment of cotton, was agent of consignee. Arkansas Midland R. Co. v. Moody [Ark.] 117 SW 757.

11. Where offer of express company to deliver money package at destination was declined and afterwards place where package was kept was burglarized and package taken, in action against express company, evidence was held to sustain verdict for defendant. Bank of Vanduser v. Wells-Fargo Co. [Mo. App.] 120 SW 678.

12. Where shipment carried to wrong destination is there accepted by consignee, no recovery can be had for cost of returning same to right destination. Flakne v. Great Northern R. Co., 106 Minn. 64, 118 NW 58. Where carrier contracts to deliver trunk at station, and not to owner at station, and he does so, he is not liable for loss of trunk after such delivery. Newby v. Ford, 36 Pa. Super. Ct. 634. Duty of carrier to deliver in such condition that consignment may be identified, and consignee cannot arbitrarily apply unidentified goods in its warehouse subject to carrier's order to the consignor's account. Galveston, etc., R. Co. v. Crow [Tex. Civ. App.] 117 SW 170.

13. Where, after delivery of cars, carrier agreed to take them to higher ground to protect from flood, consignee to pay only actual cost, it took same as bailee and not as carrier. Kingman St. Louis Implement Co. v. Southern R. Co., 133 Mo. App. 317, 112 SW 721. Evidence held to show delivery of cars in good condition before flood by placing same on side track. Id. Under special contract to hold in storage, the liability of a common carrier is terminated and that of warehouseman established. Yazoo & M. V. R. Co. v. Hughes [Miss.] 47 S 662. Where carrier delivers refrigerator car to consignee for storage of fruit and latter has exclusive possession thereof, the consignee owes no duty to repair car (Missouri, K. & T. R. Co. v. Tripis [Tex. Civ. App.] 117 SW 199), nor does carrier in absence of notice or knowledge of the need thereof (Id.), although it must exercise ordinary care (Id.). Negligence in failing to repair leaky pipes held for jury. Id. Where carrier furnishes defective refrigerator car for storage purposes, and evidence shows that if fruit had been removed therefrom it would have spoiled immediately as owner had no cold storage facilities, there is no issue of contributory negligence in leaving fruit therein. Missouri, K. & T. R. Co. v. Tripis [Tex. Civ. App.] 117 SW 199.

14. State v. Intoxicating Liquors, 104 Me. 463, 72 A 331.

15. Where bill of lading provided that if goods were not accepted and removed within 24 hours they might be stored at owner's expense and risk, liability as carrier ceased where not so accepted. Norfolk & W. R. Co. v. Stuart's Draft Milling Co. [Va.] 63 SE 415.

16. Deschamps v. Atlantic Coast Line R. Co., 82 S. C. 236, 64 SE 144; Seaboard Air Line R. Co. v. Shackelford, 5 Ga. App. 395, 63 SE 252. After a shipment of stock has arrived at its destination and the consignee has been notified and he fails to receive and care for the same after a reasonable time, the liability of the carrier then becomes that of a warehouseman. Louisville & N.

wherever the goods may be kept [17] for a reasonable time after due notice to the consignee of the arrival.[18] While it continues thereafter to hold the goods as a carrier,[19] its liability becomes that of a warehouseman [20] wherever the goods may be kept,[21] unless it has wrongfully prevented removal.[22] What constitutes a reasonable time within which to remove goods depends upon the circumstances of the particular case,[23] unless controlled by statute.[24] Notice of arrival of goods may be required by special contract [25] or local custom.[26] While a notice through the mails is usually sufficient,[27] it must be directed to the consignee's known place of business.[28] The place where property is to be delivered by the carrier is at the usual place for making such delivery at the point of destination, unless the specific place is named in the contract of shipment.[29] A delivery of a shipment which is indivisible is not complete until the delivery of the entire shipment, provided the same is removed within a reasonable time.[30] While it is ordinarily the duty of a carrier to unload goods from the car,[31] if the consignee is to unload the same, the car must be placed in a convenient position for that purpose [32] and the placing thereof is usually held a delivery.[33] Under the common law, express companies may establish reasonable delivery limits.[34] It is the duty of the consignee to remove the goods within a rea-

R. Co. v. Stiles [Ky.] 119 SW 786. A day and a half not unreasonable time, shipper being compelled to take stock one and a half miles from place of unloading. Missouri & N. A. R. Co. v. Pullen [Ark.] 118 SW 702.

17. Where carrier placed mules in care of stable keeper, they were still in its possession. Jones-Lane Co. v. Atlantic Coast Line R. Co., 148 N. C. 580, 62 SE 701.

18. Poythress v. Durham & S. R. Co., 148 N. C. 391, 62 SE 515.

19. Placed in storage. State v. Intoxicating Liquors, 104 Me. 463, 72 A 331. Unclaimed cases of intoxicating liquors placed in storage held not constructively delivered so as to cease to be interstate commerce in transitu. Id.

20. Norfolk & W. R. Co. v. Stuart's Draft Milling Co. [Va.] 63 SE 415. When a carrier has completed transportation of freight and notifies consignee of its arrival, and a reasonable time to accept delivery elapses, the relationship of carrier changes to that of warehouseman. Seaboard Air Line R. Co. v. Shackelford, 5 Ga. App. 395, 63 SE 252.

21. Carrier's relationship was that of warehouseman though goods were kept on platform instead of being placed inside depot. Seaboard Air Line R. Co. v. Shackelford, 5 Ga. App. 395, 63 SE 252.

22. If carrier wrongfully refuses to allow consignee to take away goods while its liability is yet that of common carrier, it continues to remain such. Catlett v. Charleston & W. C. R. Co., 81 S. C. 327, 62 SE 315.

23. Poythress v. Durham & S. R. Co., 148 N. C. 391, 62 SE 515. Where goods were held for 3½ months, held that liability of carrier as such had ceased. Norfolk & W. R. Co. v. Stuart's Draft Milling Co. [Va.] 63 SE 415.

24. Regulations of state railway commission fixing amount of time to be allowed for consigning of goods to take delivery of them, and the rate of storage to be paid after its expiration, are binding on the carrier and shipper alike. Ga. Civ. Code 1895, §§ 2287, 2928. Seaboard Air Line R. Co. v. Shackelford, 5 Ga. App. 395, 63 SE 252.

25. National Bank of Commerce v. Southern R. Co., 135 Mo. App. 74, 115 SW 517.

26. Where carrier customarily gives notice of arrival of goods, it is liable for failure to do so. Illinois Cent. R. Co. v. Hopkinsville Canning Co. [Ky.] 116 SW 758.

27. Under Rule 1 of Corporation Commission, written notice deposited in post office and properly addressed to consignee is sufficient. Poythress v. Durham & S. R. Co., 148 N. C. 391, 62 SE 515.

28. Insufficient to direct same to place of delivery. National Bank of Commerce v. Southern R. Co., 135 Mo. App. 74, 115 SW 517.

29. Missouri & N. A. R. Co. v. Pullen [Ark.] 118 SW 702.

30. Shipment of household goods and live stock. Missouri & N. A. R. Co. v. Pullen [Ark.] 118 SW 702.

31. Where horse was injured while being unloaded from car, fact that plaintiff's servant was aiding in the unloading did not shift the duty to safely unload from carrier to plaintiff. Creel v. Missouri Pac. R. Co. [Mo. App.] 119 SW 30. Where car load of freight which had arrived at destination was not set on team track until after it had been in yards over two days, the carrier's liability was not that of warehouseman, but carrier. Yount v. Wabash R. C., 136 Mo. App. 697, 119 SW 1.

32. Damages recovered for failure to set car on team track, car having been in freight yards two days. Yount v. Wabash R. Co., 136 Mo. App. 697, 119 SW 1.

33. Even though consignee had right of inspection of cars placed on switch before accepting, delivery on switch subject to right of inspection terminates relation of carrier unless consignee rejects. Kingman St. Louis Implement Co. v. Southern R. Co., 133 Mo. App. 317, 112 SW 721.

34. State v. Adams Exp. Co. [Ind.] 85 NE 966. Acts 1901, p. 97, c. 62 (Burns' Ann. St. 1901, § 3312a), imposing penalty upon express companies refusing to deliver express-

sonable time after notice of arrival,[35] and the carrier is not liable for any damages resulting from his negligent failure to do so.[36] Injury to the shipment does not authorize him to reject the shipment and sue for the full value unless it is valueless.[37] Upon failing to make delivery, it is the duty of a carrier to notify the consignor or other person known to be interested.[38] While the carrier upon making delivery is usually entitled to demand a receipt,[39] the consignee need not receipt for all the goods when in fact not delivered.[40] Where the carrier wrongfully makes delivery without the production of the bill of lading,[41] it is liable for resulting damages.[42] A delivery need not be made in opposition to local police authorities.[43]

Liability for conversion. See 11 C. L. 525—Acceptance from and carriage of goods for one in the apparent rightful possession thereof is not a conversion in the absence of notice of nonownership.[44] A material deviation from the terms of the contract of carriage,[45] a wrongful refusal to continue the shipment[46] or to deliver to the proper party,[47] or a misdelivery,[48] constitute a conversion. Where goods have

age at residence of consignee in towns and cities of 2,500, held not merely declaratory of common law (State v. Adams Exp. Co. [Ind.] 83 NE 966), and as applied to interstate shipments is in violation of congress' power to regulate interstate commerce (Id.).

35. Where carrier wrongfully refused inspection by consigned until it was too late to receive same on Saturday, consignee was not bound to unload on Sunday to lessen damages. Missouri, K. & T. R. Co. v. Hopkins [Tex. Civ. App.] 113 SW 306.

36. Carrier is not liable for damages due to fermentation of oats after due notice of arrival to consignee and reasonable time to remove. Hardin Grain Co. v. Chicago & A. R. Co., 134 Mo. App. 681, 114 SW 1117. Although negligent delay of carrier caused damage, it is not liable for further damages caused by delay of consignee in removing (Gulf, etc., R. Co. v. Chinski [Tex. Civ. App.] 114 SW 851), and carrier is entitled to special instruction distinguishing the damages (Id.).

37. Evidence held sufficient to sustain finding that injured pipe iron was of no value, although plaintiff testified that "it might have been worth something to somebody." Berley v. Columbia, N. & L. R. Co., 82 S. C. 232, 64 SE 397.

38. Refusal of consignee to accept, or nondelivery through other obstacles. Michigan Cent. R. Co. v. Harville, 136 Ill. App. 243.

39. Receipt signed by agent of consignee with his mark is binding on consignee and admissible though not attested and acknowledged. Louisville & N. R. Co. v. Price [Ala.] 48 S 814.

40. Express receipt. Brink's Chicago City Exp. Co. v. Brophy, 136 Ill. App. 145.

41. Where bill of lading provided that unless word "order" was written immediately before or after name of consignee delivery could be made without requiring production of bill, delivery may be made without surrender of bill where word was not so written in. St. Louis & S. F. R. Co. v. Mayer Bros. Co. [Kan.] 100 P 623.

42. Though delivered to consignee. Pisapia v. Hartford & N. Y. Transp. Co., 62 Misc. 607, 116 NYS 26. Where there is total failure to show damages for failing to demand surrender of bill of lading, recovery must be reversed. Id.

43. Nondelivery held excused where railroad was notified by chief of police not to deliver shipment and police force acting under executive department of city was prepared to resist delivery, though shipment in fact was not within quarantine ordinance. Alabama & V. R. Co. v. Tirelli Bros. [Miss.] 48 S 962.

44. Shellnut v. Central of Georgia R. Co., 131 Ga. 404, 62 SE 294.

45. Where contract required notice to consignee and carrier reshipped an order of third person who had purchased shipment, without notice, held a conversion. National Bank of Commerce v. Southern R. Co., 135 Mo. App. 74, 115 SW 517. Mere consent to a diversion of the shipment from original destination to another did not authorize carrier to wrongfully deliver hay to person not holding the bills of lading. Farris v. Baltimore, etc., R. Co., 143 Ill. App. 208. Fact that new destination is within same switching limits does not make it less a change of destination, where it is separate and distinct from original destination. National Bank of Commerce v. Southern R. Co., 135 Mo. App. 74, 115 SW 517.

46. Where agent at intermediate point wrongfully refuses to convey to destination until charges are paid, demand is not necessary to render defendant liable in conversion. Lee v. Fidelity Storage & Transfer Co., 51 Wash. 208, 98 P 658.

47. Refusal to deliver unless illegal charges are paid, constitutes conversion. Paxson Bros. v. Warfield [Ga. App.] 65 SE 34. Evidence held to not show a demand and refusal necessary to maintain action for conversion of goods refused by consignee. Baruch v Platt, 114 NYS 26.

48. Where goods are shipped to seller's order and bill of lading is attached to a draft on buyer, delivery to buyer without production of the bill and payment of draft is a conversion. Midland Val. R. Co. v. Fay & Egan Co. [Ark.] 116 SW 1171. Carrier is not liable in conversion to assignee of bills of lading for failure to take up bills when delivering goods, where same were made negotiable by forgery, since forgery and not failure to take up the bills was proximate cause of loss. Mairs v. Baltimore & O. R.

been wrongfully converted by misdelivery, the shipper need not seek to recover the goods,[49] and if he thereafter accepts them back, the liability is not affected.[50] A negligent delay [51] or injury [52] does not authorize the consignee to reject the goods and claim conversion, but, if on the consignee's refusal to accept delayed goods the carrier disposes of them, it is a conversion.[53]

§ 10. *Liability of carrier or connecting carrier.*[54]

§ 11. *Limitation of liability.*[55]—See 11 C. L. 526.—Where the relation of common carrier is not involved [56] or where special services are being rendered,[57] a carrier may limit its liability. In the discharge of its common-law duties, it is usually permitted, in the absence of constitutional [58] or statutory [59] prohibitions, to reasonably restrict its general liabilities by special contract.[60] Such limitation being con-

Co., 132 App. Div. 652, 117 NYS 370. Evidence held to show that delivery was not made in reliance upon custom but upon guaranty of third person to hold carrier harmless. Texas & G. R. Co. v. First Nat. Bank [Tex. Civ. App.] 112 SW 589.

49. Midland Val. R. Co. v. Fay & Egan Co. [Ark.] 116 SW 1171.

50. Such fact goes in mitigation of damage. Midland Val. R. Co. v. Fay & Egan Co. [Ark.] 116 SW 1171.

51. Although shipment is delayed for four months, consignee must accept the same, notwithstanding Act Feb. 23, 1903, prescribing penalty for failure to adjust claim within such time. Bullock v. Charleston & W. C. R. Co., 82 S. C. 375, 64 SE 234. Owner cannot justify refusal on ground that because of delay they have bought other goods. Chicago, etc., R. Co. v. Pfeifer [Ark.] 119 SW 642.

52. Although shipment has been so injured by carrier that purchaser refuses to accept, seller must exercise reasonable care to dispose of same. Texarkana & Ft. S. R. Co. v. Shivel [Tex. Civ. App.] 114 SW 196.

53. Chicago, etc., R. Co. v. Pfeifer [Ark.] 119 SW 642.

54. See ante, § 3.

55. **Search Note:** See notes in 3 C. L. 602; 14 L. R. A. 433; 18 Id. 527; 63 Id. 513; 1 L. R. A. (N. S.) 985; 2 Id. 773; 5 A. S. R. 719; 88 Id. 74; 1 Ann. Cas. 676; 5 Id. 120; 9 Id. 17.

See. also, Carriers, Cent. Dig. §§ 637-733, 815-828; Dec. Dig. §§ 147-168, 180; 6 Cyc. 385-410, 488; 5 A. & E. Enc. L. (2ed.) 288.

56. As against loss by fire of goods stored on right of way. Southern R. Co. v. Blunt, 165 F 258.

57. Under no common-law duty to furnish motive power for moving of circus trains at reduced rates. Sager v. Northern Pac. R. Co., 166 F 526. Contract for transportation of circus train at special rate and releasing carrier from all liability for negligence held valid as between carrier and circus company (Id.), and not against public policy (Id.), nor invalidated by Rev. Codes N. D. 1905, §§ 4333, 4334, prohibiting undue preference to persons, or localities with respect to any particular traffic (Id.).

58. Under Const. § 196, carrier cannot limit its common-law liability by contract. Southern Exp. Co. v. Fox [Ky.] 115 SW 184.

59. Laws 1907, p. 911, c. 429, § 38, making carriers liable absolutely for loss of goods in transit, has no application by its express terms to interstate shipments. Shapiro v. Weir, 128 App. Div. 245, 112 NYS 705. Act Ill. 1874 (Rev. St. 1874, c. 27) § 1, prohibiting limitation of liability by terms contained in a receipt, does not apply to a contract of limitation Ingram v Weir, 166 F 328. Under Va. Code 1904, § 1294c (24), carrier cannot limit liability (Chesapeake & O. R. Co. v. Pew [Va.] 64 SE 35), in case of loss, to less than actual value (Id.), and stipulation in express receipt that company would be liable only to extent of $50, if no value is given, is invalid (Southern Exp. Co. v. Keeler [Va.] 64 SE 38). Express company, being by Va. Code 1904, § 1294a(2) declared a transportation company, is within § 1294c(24), prohibiting common carrier from limiting liability. Id. Under Missouri statute, a carrier undertaking to carry to destination cannot limit its liability to losses occurring on own line, but is responsible for the negligence of connecting lines. Missouri Pac. R. Co. v. Baden [Kan.] 102 P 502. Under Interstate Commerce Act, as amended by Act June 29, 1906, c. 3591, providing that no carrier shall exempt itself from liability for loss or injury to goods, provision that express company will not be liable in excess of $50 unless true value of goods is stated, held invalid where lost or injured through negligence. Vigouroux v. Platt, 62 Misc. 364, 115 NYS 880. Limitation of liability to specified amount in interstate shipment, held invalid under Interstate Commerce Act. Silverman v. Weir, 114 NYS 6. Interstate Commerce Act as amended by Act June 29, 1906, c. 3591, § 7, held not to prevent agreements as to value. Greenwald v. Weir, 130 App. Div. 696, 115 NYS 311. Provision in express receipt that the carrier should not be liable beyond $50, at which sum the property was valued, unless a different value was therein stated, held a limitation of the "common-law liability," within Hurd's Rev. St. 1905, c. 27. Cutter v. Wells, Fargo & Co., 237 Ill. 247, 86 NE 695.

60. Benson v. Oregon Short Line R. Co. [Utah] 99 P 1072; Summerlin v. Seaboard Air Line R. Co. [Fla.] 47 S 557. Shipper may assume risk from overheating of live stock. St. Louis & S. F. R. Co. v. Copeland [Okl.] 102 P 104. Stipulation that shipper shall assume the risk and expense of feeding, watering, etc., held void where shipper does not accompany stock. Wisecarver v. Chicago, etc., R. Co. [Iowa] 119 NW 532. Whether special limited contract was made held for jury. Lake Erie & W. R. Co. v. Seeley [Ind. App.] 86 NE 1002. Where shipper himself filled out receipt which limited liability to $50 unless a greater value was de-

tractual in character, the shipper or his duly authorized agent[61] must assent thereto,[62] although such assent is usually presumed from the signing[63] or acceptance[64] before shipment[65] of the contract of carriage containing the same, and especially if the shipper knows thereof[66] or by the exercise of due care would know.[67] Assent must be voluntarily given and, if obtained by duress, the limitation is void[68] unless subsequently ratified.[69] In some states knowledge of the limitation must be actually brought home to the shipper,[70] and his assent thereto manifested in a particular way.[71] It is the duty of a common carrier to carry without any contract

cared, oral conversation with driver as to value held inadmissible to vary written receipt. Jonasson v. Weir, 130 App. Div. 528, 115 NYS 6.

61. Transfer company receiving goods at consignor's residence and delivering to express company has no implied authority to contract for limited liability. Hill v. Adams Exp. Co. [N. J. Law] 71 A 683. Drayman employed to take goods to depot and have same shipped held not to have authority to limit liability. Benson v. Oregon Short Line R. Co. [Utah] 99 P 1072. Authority to deliver to carrier implies authority to stipulate as to terms of carriage unless carrier has knowledge of express limitation. Wright v. Fargo, 59 Misc. 416, 112 NYS 358. Where agent has no authority to make a contract of shipment and carrier knows that he is merely an agent, shipper may disregard the writing contract entered into by him and sue upon implied contract arising from tender and acceptance of shipment. Wellborn v. Southern R. Co. [Ga. App.] 64 SE 491.

62. To render a contract of shipment limiting liability of carrier, binding upon shipper, the carrier must establish by the greater weight of evidence that shipper assented to terms and conditions of contract. Cleveland, etc., R. Co. v. McNutt, 138 Ill. App. 66. Where carrier receiving horses for shipment without inquiry or representations as to value seeks to impose conditions contained in regulations of railroad commission, providing for classification with maximum value of live stock at specified rate, it must show assent thereto of shipper. Faulk v. Columbia, N. & L. R. Co., 82 S. C. 369, 64 SE 383. Under Hurd's Rev. St. 1908, c. 114, § 96, limitation of liability contained in receipt is not binding unless shipper assented thereto, and burden rests on carrier to show such fact. Coats v. Chicago, etc., R. Co., 239 Ill. 154, 87 NE 929. Mere fact that receipt limiting liability was left with plaintiff's agent without proof that such agent was given opportunity to examine same does not establish contract where plaintiff does not rely on receipts as basis of action. Wright v. Fargo, 59 Misc. 416, 112 NYS 358. Whether shipper assented to contract, that notice should be given within five days, held question for jury. Cleveland, etc., R. Co. v. McNutt, 138 Ill. App. 66. Held that evidence did show that shipper assented to limitation contained in receipt. Wells, Fargo & Co. v. Cutter, 140 Ill. App. 324.

63. In absence of fraud or imposition. Baker v. Atlantic Coast Line R. Co., 82 S. C. 146, 63 SE 611.

64. Coats v. Chicago, etc., R. Co., 239 Ill. 154, 87 NE 929; Ingram v. Weir, 166 F 328. Shipper accepting express receipts held to assent to provision therein that agreed value and company's liability was $50 unless a greater value was given. Jonasson v. Weir, 130 App. Div. 528, 115 NYS 6.

65. Evidence held insufficient to show that bill of lading limiting liability to own line was not delivered to shipper until after shipment. Coats v. Chicago, etc., R. Co., 239 Ill. 154, 87 NE 929.

66. Shipper knowingly accepted in silence a bill of lading fixing value upon goods at less than actual value. Atkinson v. New York Transfer Co., 76 N. J. Law, 608, 71 A 278.

67. Acceptance of "claim check" from one undertaking to deliver baggage to station upon which was printed a limitation of liability on the back held not to bind plaintiff where he did not know of limitation and a reasonably prudent person would not have examined check to see what was on back. Smith v. Hughes, 63 Misc. 326, 117 NYS 162.

68. Agreement by shipper to load cattle at station at which there was no agent and to sign contract at designated station enroute, coupled with an admission that he intended to sign usual stock contract, held not to show agreement to sign special contract not shown to be the usual stock contract (St. Louis & S. F. R. Co. v. Gorman [Kan.] 100 P 647), and where carrier refused to continue transportation unless he signed same, such refusal constitutes duress (Id.). Where shipper demanded unrestricted contract but, after shipment was started, was compelled to accept a restricted one, the latter is not binding. Chicago, etc., R. Co. v. Cotton [Ark.] 112 SW 742.

69. Where contract exacted by duress required shipper to accompany stock, surrender of contract at end of route and acceptance of return ticket held not a ratification. St. Louis & S. F. R. Co. v. Gorman [Kan.] 100 P 647.

70. Under Civ. Code, § 1709, liability cannot be limited by public notice (Faulk v. Columbia, N. & L. R. Co., 82 S. C. 369, 64 SE 383), and ordinarily, carrier must make known the restrictions of liability, and procure shipper's assent thereto (Id.). Shipper is not bound by "special notice to agents" on back of contract, in absence of evidence of express assent. St. Louis & S. F. R. Co. v. Copeland [Okl.] 102 P 104.

71. Wilson's Rev. & Ann. St. Okl. 1903, § 707, declaring that consignor accepting a bill of lading or written contract of carriage, with knowledge of its terms, assents to rate, time, place and manner of delivery, but his assent to any other modification of carrier's liability contained therein can only be manifest by his signature, held more than mere rule of evidence and to affect contract itself. Erie R. Co. v. Pond Creek Mill & Elevator Co. [C. C. A.] 162 F 878.

limiting its liability, and it may be compelled to do so when compensation for the service is tendered.[72] Where the shipper makes the receipt or contract containing the limitation the basis of a suit, he is bound by the restriction.[73] Likewise, the contract of limitation must usually be supported by an independent consideration,[74] a reduction in rate being sufficient.[75] The carrier, however, must actually have a higher rate for carriage under full common-law liability,[76] and must offer the shipper a choice between rates.[77] Limitation of liability to carrier's own line does not need a special consideration,[78] and it has been held that the general consideration for carriage is sufficient to support a stipulation therein for notice of injury.[79] A recital in a contract of affreightment to the effect that a reduced freight rate was granted to the shipper, in consideration of a stipulation limiting the carrier's common-law liability, is prima facie evidence of that fact,[80] but such a recital may be contradicted by parol.[81] On grounds of public policy, carriers are not usually permitted to contract against negligence,[82] although until recently they could relieve

72. Burgher v. Wabash R. Co. [Mo. App.] 120 SW 673.

73. Jonasson v. Weir, 130 App. Div. 528, 115 NYS 6.

74. Limitation is void unless it appears by recital or otherwise that it is supported by a consideration. Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 SW 1052; Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1; Simmons Hardware Co. v. St. Louis, etc., R. Co. [Mo. App.] 120 SW 663. In absence of fraud or imposition, shipper is prima facie at least bound by recital of consideration. Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 SW 1052. Parol evidence is admissible on consideration. Id. Where no reduction in rates is given, provision in through bill of lading limiting liability to own line is without consideration. St. Louis, etc., R. Co. v. Caldwell [Ark.] 116 SW 210. Contract, reciting that charge for transportation was "at the rate of ——— tariff ——— per cent," was for full tariff rate, though it also recited that it was less than rate charged for shipments at carrier's risk. George v. Chicago, etc., R. Co., 214 Mo. 551, 113 SW 1099. Contract for notice. George v. Chicago, etc., R. Co., 214 Mo. 551, 113 SW 1099; Libby v. St. Louis, etc., R. Co. [Mo. App.] 117 SW 659. Stipulation fixing value at less than real value. Wilcox v. Chicago, G. W. R. Co., 135 Mo. App. 193, 115 SW 1061. A stipulation requiring a shipper of stock to notify the carrier of any injury within 10 days after unloading the same held invalid, no consideration being shown. Burgher v. Wabash R. Co. [Mo. App.] 120 SW 673. Evidence held to show that no reduced freight rate was granted as a consideration for a stipulation requiring claim and notice of any injury to stock within 10 days after removal from car. Id. Where a shipper by shipping cars of stock in the names of other persons thereby secured free transportation for more persons than he was entitled to, it was not a consideration for a stipulation in a shipping contract, requiring shipper to give notice of his loss 10 days after it accrued. Id.

75. Burgher v. Wabash R. Co. [Mo. App.] 120 SW 673; St. Louis, etc., R. Co. v. Furlow [Ark.] 117 SW 517; Simms v. New Orleans & N. E. R. Co., 122 La. 268, 47 S 602; Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 SW 1052. Where shipment of animals was not by weight but by the head, while contract provided that rate was 7 cents per hundred weight, based on certain valuation and was to be increased according to valuation, held contract did not limit liability where blank for shipper's valuation was filed in with dollar sign and letters "Trf." Wilcox v. Chicago, G. W. R. Co., 135 Mo. App. 193, 115 SW 1061.

76. Under Rev. St. 1899, § 1136 (Ann. St. 1906, p. 975), prohibiting carrier from charging more than tariff rate, such rate is for performance of all common-law liabilities. George v. Chicago, etc., R. Co., 214 Mo. 551, 113 SW 1099. Where contract recited that rate charged for shipment of horse was less than rate charged for shipments at carrier's risk, such contract was inoperative to limit carrier's common-law liability, where it appeared that only one rate was provided for horses, the declared value of which did not exceed $100 per head, the value of horse shipped, and fact that higher rate was charged for horses of a higher declared value than $100 did not alter case. Creel v. Missouri Pac. R. Co. [Mo. App.] 119 SW 30.

77. St. Louis S. W. R. Co. v. Phoenix Cotton Oil Co. [Ark.] 115 SW 393. Where carrier has established rate in compliance with interstate commerce act, shippers are charged with knowledge thereof. Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 SW 1052. While it is not necessary to actually offer shipper an unrestricted contract (Cleveland,etc., R. Co. v. Hollowell [Ind.] 88 NE 680), where agent had no authority to make any contract except one of restricted liability, shipper accepting same is not bound thereby, though he did not demand unrestricted contract (Id.). Where contract recites that in consideration of reduced rate carrier's liability is limited, shipper cannot, in absence of fraud or imposition show that he did not know of higher rate. Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 SW 1052.

78. McNeill v. Atlantic Coast Line R. Co. [Ala.] 49 S 797.

79. Aull v. Missouri Pac. R. Co., 136 Mo. App. 291, 116 SW 1122.

80, 81. Burgher v. Wabash R. Co. [Mo. App.] 120 SW 673.

82. Atlantic Coast Line R. Co. v. Dothan

themselves in North Dakota except as against gross negligence.[83] They may usually fix the value of the shipment even against loss by negligence,[84] and especially if such valuation is for rating purposes.[85] Among the more common limitations held valid are those fixing the amount of recovery,[86] especially if for rating purposes [87] or the time and place of ascertaining the same,[88] and limiting recovery to a particular sum unless the true value is given.[89] An arbitrary valuation, however, is not

Mule Co. [Ala.] 49 S 882; Summerlin v. Seahoard Air Line R. Co. [Fla.] 47 S 557; Libby v. St. Louis, etc., R. Co. [Mo. App.] 117 SW 659; Atkinson v. New York Transfer Co., 76 N. J. Law, 608, 71 A 278; Jolliffe v. Northern Pac. R. Co. [Wash.] 100 P 977. Though not inhibited from making such exemption by statute. St. Louis S. W. R. Co. v. Wallace [Ark.] 118 SW 412. Assumption of risk of overheating by shipper does not relieve carrier where it is due to carrier's gross negligence. St. Louis & S. F. R. Co. v. Copeland [Okl.] 102 P 104. Provisions in contract between carrier and shipper of live stock, that the carrier should not be liable for injury to shipper or stock and that shipper should inspect car containing shipment, are void. Blatcher v. Philadelphia B. & W. R. Co., 31 App. D. C. 385. Provision that shipper of live stock should examine cars and pens, and that occupancy of same should constitute an acknowledgment that they were sufficient, to be valid held to require only reasonable diligence, and not to relieve carrier for failure to provide sufficient latch to gate, where shipper took stock to yards at night and found only one unoccupied pen and examined the fence thereof. Buck v. Oregon R. & Nav. Co. [Wash.] 101 P 491. A contract between shipper and carrier releasing carrier from "any and all liability for delay in shipping said stock after delivery thereof to its agent" is inoperative to release the carrier from liability for damage resulting to shipper from its negligence in delaying the shipment. Texas & P. R. Co. v. Moore [Tex. Civ. App.] 119 SW 697.

Negligence for jnry: Whether stock escaped because of defective latch on gate. Buck v. Oregon R. & Nav. Co. [Wash.] 101 P 491. In action for injury to hogs, whether defendant or connecting carriers were negligent. Lake Erie & W. R. Co. v. Seeley [Ind. App.] 86 NE 1002.

Held negligent: Where carrier permitted flour to remain in warehouse for 49 days before forwarding same, because of shortage of cars, without notifying shipper so that he could protect himself by insurance. Erie R. Co. v. Star & Crescent Milling Co. [C. C. A.] 162 F 879. Where car containing hogs arrived at destination dry and dusty, held to authorize finding that defendant or connecting carriers negligently failed to properly flush car. Lake Erie & W. R. Co. v. Seeley [Ind. App.] 86 NE 1002.

Held not negligent: Where carrier had no train which received freight in less than carload lots, failure to ship out freights received between 11 and 12 o'clock before 9:35 o'clock. Fails Lubricating Co. v. Erie R. Co., 112 NYS 432.

83. Prior to enactment of Laws 1907, p. 83, c. 57. Hanson v. Great Northern R. Co. [N. D.] 121 NW 78.

84. Atkinson v. New York Transfer Co., 76 N. J. Law, 608, 71 A 278. Limitation of liability to $50 unless a greater value is declared held valid whether carrier was negligent or not. Magnus v. Platt, 62 Misc. 499, 115 NYS 824. Under the common law a contract limiting the carriers liability to a less sum than the damages actually caused by it is void. Atchison, etc., R. Co. v. Smythe [Tex. Civ. App.] 119 SW 892. Limiting liability to $5 per 100 pounds. Id.

85. Townsend & Wyatt Dry Goods Co. v. U. S. Exp. Co., 133 Mo. App. 683, 113 SW 1161.

86. Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 SW 1052. Limitation on value of goods fairly and openly made is binding. Windmiller v. Northern Pac. R. Co. [Wash.] 101 P 225. Shipper under valuing to obtain low rate is bound thereby in case of loss. Townsend & Wyatt Dry Goods Co. v. U. S. Exp. Co., 133 Mo. App. 683, 113 SW 1161. Contract for reasonable reduced value in consideration of reduced rates held valid. Jones-Lane Co. v. Atlantic Coast Line R. Co., 148 N. C. 580, 62 SE 701 Where entered into in good faith and not for purpose of evading liability for negligence, carrier and shipper may fix value. Id. Contract expressly limiting liability to $50 in case of loss held valid. Shapiro v. Weir, 128 App. Div. 245, 112 NYS 705. Plaintiff expressed furs worth $2,000, but marked no value on package and gave none to company. Box, however, had been previously used and was marked as of value of $150 and such value was written in receipt which plaintiff accepted without demur. Held that she could only recover $150. Taylor v. Weir, 162 F 585. Commodity Act (Gen. Acts 1907, p. 209) and Gen. Acts Sp. Sess. 1907, p. 125, fixing rates, etc., held not to validate limitations in bills of lading as to amount of recovery. Alabama Great So. R. Co. v. McCleskey [Ala.] 49 S 433. In action for injury to various articles, transported by full car load under bill of lading for "H. H. Goods, 12,000 (lbs.)," "value restricted to $5 per 100 lbs," plaintiff's recovery is not limited to $5 per 100 lbs. for each article damaged, but her whole recovery is limited to $600. Carleton v. New York Cent. & H. R. R. Co., 64 Misc. 51, 117 NYS 1021.

87. Greenwald v. Weir, 130 App. Div. 696, 115 NYS 311. Estoppel from asserting a higher value in case of loss. Faulk v. Columbia, N. & L. R. Co., 82 S. C. 369, 64 SE 383; Greenwald v. Weir, 130 App. Div. 696, 115 NYS 311.

88. May contract for admeasurement of damages at time and place of shipment. Merchants' & Miners' Transp. Co. v. Eichberg, 109 Md. 211, 71 A 993. Parties may waive provision. Id.

89. Where contract stipulates that shipper agrees that value does not exceed $50 unless a higher value is disclosed, which is not done, shipper is estopped from claiming a higher value. Greenwald v. Weir, 130 App. Div. 696, 115 NYS 311. Judgment of court

usually upheld.[90] Except as controlled by statute,[91] a carrier may usually limit its liability to its own line;[92] unless it has agreed to carry through,[93] it may limit its common-law liability for a consideration.[94] The validity of a contract of limitation is usually tested by the laws of the state where made,[95] but it will not be enforced in another state if against the public policy thereof.[96] Where the carrier unnecessarily deviates from the agreed route without the shipper's assent, it becomes subject to full common-law benefit.[97] The loss or damage occurring must come clearly within the limitation,[98] the restriction being construed against the carrier.[99]

limiting recovery to $50 where a receipt prepared by shipper limited recovery to that amount unless a higher value was stated, and shipper did not fill in blank or inform carrier of higher value, proper. J. M. High Co. v. Adams Exp. Co. [Ga. App.] 63 SE 1125. Where Persian shawls and rugs and a diamond ring are shipped under a contract describing shipment as a secondhand desk and stipulating that carrier will not be liable for any article of extraordinary value not specifically rated, unless a special agreement to do so and a stipulation of value is indorsed hereon, no recovery can be had for loss thereof. Hachadoorian v. Louisville & N. R. Co., 128 App. Div. 171, 112 NYS 660.

90. Hanson v. Great Northern R. Co. [N. D.] 121 NW 78. Invalid under general law and under twentieth section of Interstate Commerce Act. Louisville & N. R. Co. v. Warfield [Ga. App.] 65 SE 308. Arbitrary fixing of value of household goods at $5 per hundred weight by persons who did not know the value thereof held against public policy. Hanson v. Great Northern R. Co. [N. D.] 121 NW 78. Where some bills of lading expressed value of stone at 20 cents per cubic foot, some at 40 cents per cubic foot, and some fixed no value at all, held that court did not err in not limiting recovery. Louisville & N. R. Co. v. Venable [Ga.] 64 SE 466.

91. Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1907, p. 909), providing that carrier receiving property in one state to be carried into another cannot limit liability to own line, held constitutional (Galveston, etc., R. Co. v. Crow [Tex. Civ. App.] 117 SW 170), as taking property without due process of law (Galveston, etc., R. Co. v. Wallace [Tex. Civ. App.] 117 SW 169), as denying equal protection of the laws (Id.), nor as infringing state sovereignty (Id.).

92. Chicago, etc., R. Co. v. Cotton [Ark.] 112 SW 742. Interstate shipment. International & G. N. R. Co. v. Welbourne [Tex. Civ. App.] 113 SW 780. Where contract expressly limited liability to own line and delay which caused injury occurred on connecting line, initial carrier is not liable (Coats v. Chicago, etc., R. Co., 239 Ill. 154, 87 NE 929), and where there was no evidence of injury on connecting carrier's line, court properly directed verdict in its favor (Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767). Where partnership exists between roads undertaking shipment, liability of each cannot be limited to damages occurring on respective lines. Texas Cent. R. Co. v. Pool [Tex. Civ. App.] 114 SW 685. Where evidence showed that by contract each connecting carrier handling certain automobile limited its liability to damage done on its own line, an instruction ignoring such limitation was erroneous. St. Louis S. W. R. Co. v. Patton [Tex. Civ. App.] 118 SW 798. Under Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), providing that a common carrier issuing a bill of lading shall be liable for any loss or injury to the shipment caused by its negligence or the negligence of any other common carrier to which such property may be delivered, the initial carrier may limit its liability to carriage over its own road provided its contract of shipment is only to carry to the end of its line, but, if the contract is to carry to destination, the initial carrier can neither limit its liability to losses happening on its own line nor exempt itself from liability for the negligence of connecting carriers. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1.

93. Stating rules developed by decisions on Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), making initial carrier responsible for the negligence of connecting carriers. Simmons Hardware Co. v. St. Louis, etc., R. Co. [Mo. App.] 120 SW 663.

94. Simmons Hardware Co. v. St. Louis, etc., R. Co. [Mo. App.] 120 SW 663.

95. Hanson v. Great Northern R. Co. [N. D.] 121 NW 78. Where goods at time of negotiation were in Illinois where parties resided and where contract was executed, held that validity of limitation of liability is controlled by laws of Illinois, although loss occurred in New York. Valk v. Erie R. Co., 130 App. Div. 446, 114 NYS 964.

96. Hanson v. Great Northern R. Co. [N. D.] 121 NW 78.

97. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856. Loses benefit of limitation of liability to own line. Southern R. Co. v. Frank & Co., 5 Ga. App. 574, 63 SE 656. Provision limiting liability to own line has no application where it wrongfully forwards by another carrier to point to which it could carry shipment. St. Louis, etc., R. Co. v. Caldwell [Ark.] 116 SW 210.

98. Provision relieving carrier from liability for delay does not relieve it from liability for failure to properly re-ice car during such delay. Geraty v. Atlantic Coast Line R. Co., 81 S. C. 367, 62 SE 444. Duty of carrier to bed car to render it reasonably safe is not relieved by contract requiring shipper to load and unload and to care for the stock. Allen v. Chicago, B. & Q. R. Co., 82 Neb. 726, 118 NW 655. **Release** of damages for delay has no application to action for injuries because stock was kept in cars for 12 hours because of negligent assurances that they would be immediately forwarded. St. Louis & S. F. R. Co. v. Vaughan [Ark.] 113 SW 1035.

99. Provision that shipper shall load and unload stock at own risk does not relieve carrier from duty of providing suitable

Provisions for notice of injuries.[See 11 C. L. 529]—In the absence of statute,[1] a carrier may on proper consideration[2] contract[3] for notice of injury or claim for damages within a reasonable time[4] after the accrual of the claim[5] or delivery of the goods,[6] or due time therefor,[7] and an inexcusable failure[8] to give the same to the proper party[9] in the manner provided[10] defeats recovery,[11] unless waived[12] or the

shutes, platforms, etc., and especially where it waives provision by unloading itself. Atlantic Coast Line R. Co. v. Dothan Mule Co. [Ala.] 49 S 882.

1. Stipulation for notice of claim for damages within specified time as condition precedent is not a limitation of liability within Hepburn act (Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]), prohibiting initial carrier in interstate shipment from limiting liability by contract. St. Louis, etc., R. Co. v. Furlow [Ark.] 117 SW 517; St. Louis & S. F. R. Co. v. Keller [Ark.] 119 SW 254.

2. Stipulation providing for notice of injury must be supported by a consideration. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1.

3. For necessity of assent, consideration, etc., see ante, this section.

4 **Held reasonable:** Provision for written notice of loss or injury within 30 days after delivery or the time when goods should have arrived at destination. Atlantic Coast Line R. Co. v. Bryan [Va.] 65 SE 30. Company may stipulate for notice within 60 days. Vigouraux v. Platt, 62 Misc. 364, 115 NYS 880. Stipulation for presentment within 30 days after arrival of property. Nashville, etc., R. Co. v. Long [Ala.] 50 S 130. Stipulation for written notice before removal of property from place of destination. Jones-Lane Co. v. Atlantic Coast Line R. Co., 148 N. C. 580, 62 SE 701. Stipulation that shipper of car load of peaches should notify carrier of any loss or damage within 30 hours after delivery. St. Louis & S. F. R. Co. v. Keller [Ark.] 119 SW 254. Reasonableness of stipulation for notice within day after arrival, where stock arrived at 2 p. m. and nearest agent was 35 miles away, **held for jury.** St. Louis, etc., R. Co. v. Furlow [Ark.] 117 SW 517.

5. Where notice is to be given within specified time from accrual of claim, a claim for damages accrues at time of delivery in a damaged condition. St. Louis S. W. R. Co. v. Phoenix Cotton Oil Co. [Ark.] 115 SW 393.

6. Nashville, etc., R. Co. v Long [Ala.] 50 S 130. Provision for notice if based upon consideration is valid. George v. Chicago, etc., R. Co., 214 Mo. 551, 113 SW 1099. Failure to comply with contract calling for notice of injury may be asserted in tort action if properly pleaded. Libby v. St. Louis, etc., R. Co. [Mo. App.] 117 SW 659. Where there was no evidence as to usual place of delivery and place of unloading stock at destination and no place was named in contract limiting carrier's liability, the plaintiff had a right in the course of unloading his stock to take the same to some place for care and protection, and fact that he removed them one and a half miles from car was not such removal as constitute breach of contract requiring shipper to give notice of injury before removing shipment from point of destination. Missouri & N. A. R. Co. v. Pullen [Ark.] 118 SW 702.

7. Where claim was to be filed within 30 days after due time for delivery, court cannot say as matter of law that from February 27th to May 16th a due time for delivery had elapsed (Louisville & N. R. Co. v. Price [Ala.] 48 S 814), nor that because part of shipment is delivered due time for delivery of remainder has elapsed (Id.).

8. Mailing of notice in time to reach designated agent in due course of the mails within time prescribed held a reasonable compliance, though in fact it did not reach him until after expiration thereof. Vencill v. Quncy, etc., R. Co., 132 Mo. App. 722, 112 SW 1030. Held insufficient unless it arrives in time. St. Louis, etc., R. Co. v. Furlow [Ark.] 117 SW 517.

9. Where partnership exists between roads transporting shipment, notice to one sufficient. Texas Cent. R. Co. v. Pools [Tex. Civ. App.] 114 SW 685

10. Mere inquiry for shipment with request that same be traced is not a compliance with provision requiring written notice of claim for loss. Atlantic Coast Line R. Co. v. Bryan [Va.] 65 SE 30.

11. Where contract stipulates for notice of claim for injury on day of arrival and no notice is given for two or three weeks no recovery can be had in absence of proof of waiver or legal excuse. Schonhoff v. St. Louis & S. F. R. Co., 135 Mo. App. 705, 117 SW 113.

12. Where carrier had waived omission to give notice, the shipper's action could not be defeated by the ommission. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1. Evidence held insufficient to show that claim was one of the two as to which notice was waived in conversation negotiating for settlement of another. Shumaker v. Northern Pac. R. Co. [Minn.] 121 NW 122.

Held a waiver: Acceptance of notice after time limited without objection. Merchants' & Miners' Transp. Co. v. Eichberg, 109 Md. 211, 71 A 993. Where agent knowing that owner claimed stock was injured inspected same and took memorandum of his claim and authorized him to remove same from pens, there was a waiver. Missouri, K. & T. R. Co. v. Hood [Tex. Civ. App.] 120 SW 236. Where shipper gave verbal notice to claim agent on day of arrival, who refused to investigate and instructed him to sell stock and present claim for damages. Clubb v. St. Louis & S. F. R. Co., 136 Mo. App. 1, 117 SW 110. Where shipper was not notified for nearly five months of nondelivery, and in correspondence carrier did not assert failure to present claim within 60 days of shipment as provided in contract. Magnus v. Platt, 62 Misc. 499, 115 NYS 824. Waiver inferred from carrier referring the claim to its claim department and negotiating for an adjustment of the claim. St. Louis S. W. R. Co. v.

shipper has been misled by the carrier.[13] Where the stipulation fixes an unreasonable time, it is wholly void and no notice need be given.[14] A waiver must be within the time for giving such notice and is a question of intention.[15] The loss or claim must come clearly within the terms of the contract to prevent recovery.[16]

§ 12. *Public records of traffic.*[17]—See 3 C. L. 603

§ 13. *Remedies and procedure.*[18] *Timely notice and bringing of suit.* See 11 C. L. 530—The action must be timely instituted[19] in a court having jurisdiction,[20] and all conditions precedent must have been complied with.[21] Suit upon a bond given under the New York statute, requiring all persons selling tickets to foreign countries and undertaking to transport money to give a bond, may be maintained by one for the benefit of all similarly situated.[22]

Grayson [Ark.] 115 SW 933. Where if a verbal notice to carrier's agent of claim for damages had been accepted as to a uniform course of business the carrier was bound thereby. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1. Where unverified claim is filed and carrier makes no objection but refuses to pay until freight charges are paid, held a waiver of verified claim. Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555.

No waiver: Where carrier, upon receiving claim after its exemption has attached, asks for certain information, stating that upon receipt thereof the matter will receive attention. Atlantic Coast Line R. Co. v. Bryan [Va.] 65 SE 30. Sending out of tracer after exemption from liability has attached for failure to give required notice. Id. Evidence that, where consignee refused to accept stock at night on ground that he could not ascertain condition, carrier's agent told him to take same to stable and they would examine them in the morning, held to **authorize submission of waiver** of notice of waiver before removal. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856.

13. Where carrier leads shipper to believe that strict compliance with stipulation will be waived, it cannot escape liability for his failure to strictly comply. Clubb v. St. Louis & S. F. R. Co., 136 Mo. App. 1, 117 SW 110.

14. Immaterial whether notice actually given was within reasonable time. St. Louis, etc., R. Co. v. Furlow [Ark.] 117 SW 517.

15. Vencill v. Quincy, etc., R. Co., 132 Mo. App. 722, 112 SW 1030. Letter acknowledging receipt of notice without stating that it was late in arriving, asking for information and stating that endeavor would be made to get an equitable settlement, held to indicate intention to waive before expiration of time. Id.

16. Provision for notice of loss or injury to live stock before removal and intermingling held inapplicable where carrier took possession of and removed dead bodies. Southern R. Co. v. Forrest [Ga.] 65 SE 93; Louisville & N. R. Co. v. Warfield [Ga. App.] 65 SE 308; Jones-Lane Co. v. Atlantic Coast Line R. Co., 148 N. C. 580, 62 SE 701. Provision requiring notice of claim for loss or damage at delivery point within 30 days after delivery held inapplicable to claim for nondelivery due to misdelivery. Sheldon v. New York Cent. & H. R. R. Co., 61 Misc. 274, 113 NYS 676. Provision for notice within a specified time is inapplicable where injury is of a character which could not be ascertained within that time. St. Louis & S. F. R. Co. v. Copeland [Okl.] 102 P 104. Provision for notice of claim for damages does not cover damages for failure to furnish cars as provided by a prior agreement. St. Louis, etc., R. Co. v. Taylor [Ark.] 112 SW 745. Stipulation for notice of loss or injury to the stock does not require notice of loss due to decline of market price of cattle caused by negligent delay. Libby v. St. Louis, etc., R. Co. [Mo. App.] 117 SW 659. Stipulation for notice of loss or damage to the hogs is inapplicable to damages for extra feed and loss of market due to delay. Aull v. Missouri Pac. R. Co., 136 Mo. App. 291, 116 SW 1122. Where contract attempted to limit liability to own line, stipulation for notice held not to cover injuries caused by connecting carrier's negligence. Holland v. Atchison, etc., R. Co., 133 Mo. App. 694, 114 SW 61.

17. Search Note: See Carriers, Cent. Dig. §§ 81, 82; Dec. Dig. §§ 30, 31.

18. Search Note: See notes in 11 C. L. 530; 5 Ann. Cas. 827.

See, also, Carriers, Cent. Dig. §§ 123-128, 217-219, 222, 230, 232-239, 256-271, 367-395, 434-461, 557-607, 631-636, 649, 672, 720-733, 790, 829-852, 879-890, 906-915; Dec. Dig. §§ 45, 69, 94, 102-106, 127-137½, 146, 162-168, 181-187, 196, 196½, 202; 6 Cyc. 448-452, 462, 490, 491, 500, 508, 510, 511, 513-515, 517-533; 3 A. & E. Enc. P. & P. 812.

19. Provision in contract that suit must be brought within one year is reasonable. Ingram v. Weir, 166 F 328.

20. Federal courts have exclusive jurisdiction of all suits arising under Interstate Commerce Act (Northern Pac. R. Co. v. Pacific Coast Lumber Manufacturers [C. C. A.] 165 F 1), but, where liability is based upon violation of common-law duty, state courts have jurisdiction though shipment is interstate (Chicago, etc., R. Co. v. Clements [Tex. Civ. App.] 115 SW 664). Under Civ. Code Prac. § 73, actions for breach of contract to deliver goods safely may be brought in county where goods were to be delivered. Wilson v. Louisville & N. R. Co., 33 Ky. L. R. 985, 112 SW 585.

21. Shipper is not obliged, as a condition precedent to a right to recover, to volunteer information as to contents or value of a package, if no inquiry is made. Caldwell v. U. S. Exp. Co., 36 Pa. Super. Ct. 465.

22. Suit on bond given under Laws 1907, p. 263, c. 185. Buffanti v. National Surety Co., 118 NYS 207.

Persons who may sue and be sued.[See 11 C. L. 530]—The action must ordinarily be prosecuted by the party in interest,[23] and hence the right of a vendor consignor to maintain the same depends upon whether title has passed to the consignee.[24] It is immaterial whether the goods were held under a carrier's or warehouseman's liability at the time of injury.[25] While a consignee may usually sue,[26] the action must be based upon the contract of the consignor,[27] unless he had previously made a special contract with the carrier which the consignor had no authority to alter.[28] Where goods of husband and wife are received indiscriminately in a shipment of household goods, the carrier cannot escape liability for loss of wife's goods upon the ground that the contract was made with the husband alone.[29] An action upon the contract may be brought by the contractor though not the owner of the goods.[30] Actions for penalties must be brought by the party designated by statute,[31] but it it is not necessary under Texas statute that the plaintiff be the sole owner of the goods.[32]

Particular remedies available.[See 11 C. L. 531]—Generally damages for loss or injury to goods may be recovered in an action ex contractu [33] or ex delicto,[34] at the

23. One having beneficial ownership in goods may sue. Lloyd v. Hough & Keenan Storage & Transfer Co. [Pa.] 72 A 516. One to whom goods were shipped for sale on commission who sold the goods and consigned them to the buyer has such interest as will enable him to sue in tort for goods taken from car before sale. Edgerton v. Chicago, etc., R. Co., 240 Ill. 311, 88 NE 808. Where manufacturing company in filling order makes contract for benefit of buyer, consignee as real party in interest may recover. Illinois Cent. R. Co. v. Hopkinsville Canning Co. [Ky.] 116 SW 758. Where buyer refuses to accept goods and returns same, he can not recover for loss thereof on return shipment. Nathan v. Missouri Pac. R. Co., 135 Mo. App. 46, 115 SW 496. Owner of live stock shipped under bill of lading issued to his agent and in latter's name may sue in his own name for injuries to stock en route. Clubb v. St. Louis & S. F. R. Co., 136 Mo. App. 1, 117 SW 110. One having no property or interest in the goods cannot sue in tort a carrier for its breach of duty. Edgerton v. Chicago, etc., R. Co., 240 Ill. 311, 88 NE 808. Under Revisal 1905, § 2632, one who has shipped goods to be sold for his benefit may sue for nondelivery. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 SE 413.

24. Fein v. Weir, 129 App. Div. 299, 114 NYS 426. Presumption is that title to goods passes to consignee upon delivery to carrier and hence consignor must overcome same to recover for nondelivery. Wertheimer v. Wells, Fargo & Co., 112 NYS 1062. Where consignee was not to pay for coal until delivery, consignor may sue for coal converted by railroad to its own use. St. Louis & S. F. R. Co. v. Stone [Kan.] 97 P 471. Consignor held entitled to sue where sale was void as within statute of frauds and where purchaser had right of inspection before accepting. Fein v. Weir, 129 App. Div. 299, 114 NYS 426. Where consignor agreed to deliver goods to consignee, he may recover. Acme Paper Box Factory v. Atlantic Coast Line R. Co., 148 N. C. 421, 62 SE 557. Where complaint alleged contract with consignee for sale of potatoes at 70 cents per bushel, f. o. b. at point of shipment, but also alleged that bill of lading expressly provided for inspection by consignee before acceptance, held it did not show lack of title in plaintiff so as to be demurrable. Missouri, K. & T. R. Co. v. Hopkins [Tex. Civ. App.] 113 SW 306. Under shipment of iron consigned to seller, "notify" the purchaser, purchaser must look to seller for damages due to delay and cannot hold carrier. Asheboro Wheelbarrow & Mfg. Co. v. Southern R. Co., 149 N. C. 261, 62 SE 1091.

25. Edgerton v. Chicago, etc., R. Co., 240 Ill. 311, 88 NE 808.

26. Although contract was made by the consignor, consignee may sue upon implied agreement to deliver. Henry J. Perkins Co. v. American Exp. Co., 199 Mass. 561, 85 NE 895.

27. Bound by the limitations therein. Henry J. Perkins Co. v. American Exp. Co., 199 Mass. 561, 85 NE 895.

28. Henry J. Perkins Co. v. American Exp. Co., 199 Mass. 561, 85 NE 895. Held for jury under the evidence whether shipment was made under contract with consignee or whether alleged agreement was a mere negotiation, the actual contract of shipment being made with consignor. Id.

29. Lloyd v. Hough & Keenan Storage & Transfer Co. [Pa.] 72 A 516.

30. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 118 SW 759.

31. Action for penalty under Revisal 1905, § 2632, for unreasonable delay in delivery must be in name of party aggrieved and not in name of state. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 SE 413. Under Act March 25, 1904 (24 Stat., pp. 671, 672), imposing penalty for delay in carriage of freight, to be recovered "by any consignee who may be injured * * * or by the owner or holder of the bill of lading," consignee not shown to be the owner or holder of bill of lading, cannot recover without a showing of injury. Fullerton v. Atlantic Coast Line R. Co., 82 S. C. 333, 64 SE 142.

32. A plaintiff does not have to be sole owner of goods in order to bring action, it being sufficient if he is part owner, having control of property. Texas & P. R. Co. v. Taylor [Tex. Civ. App.] 118 SW 1097.

33. Held ex contractu: Action for death of stock shipped. Southern R. Co. v. Forrest

shipper's option,[35] and, in case of doubt as to the nature of an action, it will be construed in tort rather than upon contract.[36] An action for loss due to issuing of bill of lading without receipt of goods will be construed ex contractu rather than ex delicto.[37] A penal claim for delay under the North Carolina statute may be joined with an action on contract for nondelivery.[38]

Pleading, proof, and evidence. See 11 C. L. 531—The complaint must be definite and certain[39] and must allege all of the essential elements of the particular cause of action sought to be maintained,[40] including defendant's negligence[41] and the particular damages sought to be recovered.[42] Plaintiff, however, need not anticipate the defense of limited liability.[43] The federal statute, relating to connecting carriers' liability, need not be pleaded in Kentucky.[44] Causes of action in tort and on

[Ga.] 65 SE 93. Count alleging that carrier undertook as a warehouseman, for a reward, etc. Western R. Co. v. Hart [Ala.] 49 S 371. Action following statutory form for recovery of damages for failure to deliver, and for failure to deliver within a reasonable time. McNeill v. Atlantic Coast Line R. Co. [Ala.] 49 S 797. Action for damages for failure to use ventilating apparatus of refrigerator car, resulting in injury to fruit, construed to be ex contractu, allegations of negligence being merely descriptive of breach. Western R. Co. v. Hart [Ala.] 49 S 371. Where words "promised," "undertook," "agreed," etc., in complaint, are coupled with a statement that the same were based upon a consideration, action will be construed as ex contractu. Id.

34. May waive contract remedy and sue in tort. Owens Bros v. Chicago, etc., R. Co., 139 Iowa, 538, 117 NW 762. Complaint alleging that shipment of hogs were carelessly detained for 10 hours at a way station, causing them to be late in reaching destination, whereby they lost in weight and condition, etc., held to charge violation of common-law duty to carry promptly and not a breach of contract. Brown v. St. Louis & S. F. R. Co., 135 Mo. App. 624, 117 SW 112.

35. Shipper whose goods are damaged while being transported by a common carrier has the choice of declaring either in assumpsit on the contract of affreightment, or in tort for breach of the duty imposed on the carrier by law to carry safely. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1.

36. Owens Bros. v. Chicago, etc., R. Co., 139 Iowa, 538, 117 NW 762. Especially if interest of plaintiff will be best served thereby. Southern Exp. Co. v. Pope, 5 Ga. App. 689, 63 SE 809. Pleading of contract is not conclusive that action is in tort, since contract is basis of relation upon which common-law liability depends. Owens Bros. v. Chicago, etc., R. Co., 139 Iowa, 538, 117 NW 762.

37. Missouri, K. & T. R. Co. v. Sealy [Kan.] 99 P 230. Construed ex contractu. Id.

38. Claim under Revisal 1905, § 2632. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 SE 413.

39. Complaint alleging failure to deliver orange boxes within reasonable time, and "that by reason of the premises the plaintiff incurred loss in being unable to pick and ship his oranges for Christmas market" held indefinite and uncertain. Williams v. Atlantic Coast Line R. Co. [Fla.] 48 S 209. Where complaint alleges a shipment in general terms and does not suggest a special contract, held not error to overrule motion to make more specific by alleging whether shipment was under oral or written contract. Union Pac. R. Co. v. Beardwell [Kan.] 99 P 214. Petition against initial and connecting carrier, alleging that contract bound carriers to transport with reasonable care, within reasonable time, etc., held not insufficient as against objection of connecting carrier that it did not show which carrier furnished cars and on which line injuries occurred. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767.

40. Petition setting out special contract held to sufficiently allege negligence in failing to provide safe facilities for unloading. Brannon v. Atlantic & W. P. R. Co., 4 Ga. App. 749, 62 SE 468. In action instituted by state to recover of railroad a penalty imposed by railroad commissioners for violation of one of its rules, failure of commissioners' finding or judgment attached to declaration as required by statute to designate destination of freight shipment which constituted violation is cured by proper allegations in declaration (State v. Seaboard Air Line R. Co. [Fla.] 47 S 986), and such finding or judgment may be construed and aided by entire record in case (Id.). In an action for loss of goods, allegations that lost box contained enlarged pictures of plaintiff's deceased wife and of the father, mother and sister of plaintiff's wife, which could not be reproduced, and family Bible containing family records, held proper as descriptive of property. Missouri, K. & T. R. Co. v. Dement [Tex. Civ. App.] 115 SW 635.

41. Petition in action against initial and connecting carrier, alleging that feed and watering pens of connecting carrier were without troughs and water, and were muddy, and that as a result horses suffered injury, held to show that injury was caused by negligence of connecting carrier. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767.

42. Complaint that sheep because of carrier's negligence shrunk in flesh and weight held sufficient to authorize evidence of effect of excessive shrinkage on mutton for food and on market value. Groot v. Oregon Short Line R. Co., 34 Utah, 152, 96 P 1019.

43. Silverman v. Weir, 114 NYS 6.

44. "Carmack amendment to the Interstate Commerce Act." Louisville & N. R. Co. v. Scott [Ky.] 118 SW 990.

contract must not be joined.[45] Pleas must be consistent with one another,[46] must be responsive to the cause of action alleged in the complaint,[47] and must allege all the elements of the defense.[48] Limitation of liability must be pleaded,[49] and it must appear that the carrier's negligence did not concur with the exempted cause in producing the injury.[50] In pleading contributory negligence, facts imposing the duty claimed to have been violated must be alleged.[51] An allegation of partnership between defendant roads must be specifically denied.[52] A new cause of action cannot be asserted by way of reply.[53] The general rules governing amendments apply.[54]

While plaintiff has the burden of proving all the essential elements of his complaint,[55] unless judicially noticed,[56] including his right to sue,[57] defendant's negli-

45. Pleading held bad in that causes of action ex contractu and ex delicto were joined in one petition and one count. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1.

46. In action for failure to furnish cars, a general denial and a plea admitting that plaintiff's demand was refused, whereby plaintiff was compelled to ship to another place and suffered loss, but alleging that his contract required written notice of claim which was not given, held not inconsistent. Aull v. Missouri Pac. R. Co., 136 Mo. App. 291, 116 SW 1122.

47. Plea not shown to have related to same shipment held bad. St. Louis & S. F. R. Co. v. Cash Grain Co. [Ala.] 50 S 81. In action for conversion of lumber by wrongful delivery, plea of estoppel based on custom as to delivery, known to plaintiff, which fails to identify lumber delivered thereunder, as that sued for, is defective. Mobile, etc., R. Co. v. Bay Shore Lumber Co. [Ala.] 48 S 377. In action for failure to furnish cars whereby plaintiff was compelled to ship to another market at a loss, answer alleging that shipment to latter place was under contract, which required notice of claim for damages which was not given, held not responsive to action pleaded. Aull v. Missouri Pac. R. Co., 136 Mo. App. 291, 116 SW 1122.

48. Plea in action for conversion of lumber by wrongful delivery, that lumber was shipped for sale on market, that shipper delivered to person who received lumber and invoice, and that delivery was made upon invoice as was custom, that custom was known to shipper, held to state defense of estoppel. Mobile, etc., R. Co. v. Bay Shore Lumber Co. [Ala.] 48 S 377. Plea setting up defense that by contract defendant's liability ceased upon delivery of shipment to connecting carrier held not defective for failure to attach an exhibit or to set out specific contract, as it was not necessary for contract to have been in writing and it may not have been. McNeill v. Atlantic Coast Line R. Co. [Ala.] 49 S 797. Where consignee made tender of demurrage and brings replevin, answer should show that amount tendered was insufficient in that it was not a reasonable amount as fixed by federal regulation, if such fact is relied upon. Darlington Lumber Co. v. Missouri Pac. R. Co., 216 Mo. 658, 116 SW 530.

49. Missouri & N. A. R. Co. v. Pullen [Ark.] 118 SW 702. Under Code, § 3629, carrier cannot avail itself of contract exempting it from liability for negligence of connecting carrier unless it pleads same. Aultman Engine Thresher Co. v. Chicago, etc., R. Co. [Iowa] 121 NW 22. Under Rev. St. 1899, § 604 (Ann. St. 1906, p. 631), requiring statement of any new matter constituting a defense, carrier must affirmatively plead that contract requires notice of injury. Libby v. St. Louis, etc., R. Co. [Mo. App.] 117 SW 659. Stipulation provided for notice of claim within 30 days after delivery or after due time for delivery. In action for loss of one case of larger shipment, plea that remainder was delivered February 27th and claim was not made until May 16th, is defective for failure to allege that it was not filed within 30 days after "due time for delivery." Louisville & N. R. Co. v. Price [Ala.] 48 S 814.

50. Where contract for shipment of fruit limited carrier's liability for loss or decay caused by weather, and arising during ordinary time and method of transportation, plea alleging limitation and that damage was caused by decay and weather, held bad for failure to negative carrier's negligence as proximate cause of decay. Western R. Co. v. Hart [Ala.] 49 S 371.

51. Plea, setting up negligence of consignee in calling for goods, failing to allege a duty to call, or that notice of arrival was given or facts excusing giving of same, is defective (Western R. Co. v. Hart [Ala.] 49 S 371), especially where contract called for notice (Id.).

52. Texas Cent. R. Co. v. Pool [Tex. Civ. App.] 114 SW 685.

53. Where plea that defendant's liability was to cease upon delivery to connecting carrier and that shipment was so delivered is filed to complaint in action ex contractu for failure to deliver, a reply, setting up misrepresentations of defendant's agents as to connecting carrier to which delivery had been made, held erroneous as setting up new cause of action ex delicto. McNeill v. Atlantic Coast Line R. Co. [Ala.] 49 S 497.

54. Where goods are described as "two bundles of carpet and one box of household goods," held not error to allow amendment so as to specify articles, where list was furnished to opposite party before trial. Benson v. Oregon Short Line R. Co. [Utah] 99 P 1072. Held not an abuse of discretion to allow amendment of petition to allege consideration for contract after request for peremptory charge, where bill of lading attached to answer as exhibit tended to show consideration. Baltimore, etc., R. Co. v. Wood & Co. [Ky.] 114 SW 734.

55. Charges that defendant failed to ice

gence,[58] and ownership of line,[59] proof of delivery of shipment to the carrier in good condition,[60] and nondelivery [61] or re-delivery in a damaged state,[62] and that same

said cars properly and failed to carry same in proper manner, whereby they were lost to plaintiff, held not to present issue as to delay or improper handling of car. International & G. N. R. Co. v. Welbourne [Tex. Civ. App.] 113 SW 780. Where initial carrier only undertook to deliver to connecting carrier, plaintiff suing for nondelivery must show that goods were not so delivered. Glazer v. Old Dominion S. S. Co., 113 NYS 979. In action against initial carrier for nondelivery of goods, plaintiff is under no obligation to show regular freight rate and nonpayment. Galveston, etc., R. Co. v. F. A. Piper Co. [Tex. Civ. App.] 115 SW 107. Evidence held sufficient to sustain finding that shipper ordered refrigerator cars to be iced before loading. Missouri, K. & T. R. Co. v. McLean [Tex. Civ. App.] 118 SW 161. Cause of injury to live stock may be established by collateral facts affording a reasonable inference. Libby v. St. Louis, etc., R. Co. [Mo. App.] 117 SW 659.

56. Court may take judicial notice of location of Baltimore, Md., and Washington, D. C., distance between same, and approximate time required for transportation of freight between same. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193.

57. Copies of account sales of commission firm held insufficient to show plaintiff's ownership, especially where admitted by stipulation to show "number, weight, sale and market value" of cattle. St. Louis, etc., R. Co. v. Alverson [Tex. Civ. App.] 114 SW 673.

58. Proof of injury to stock in carrier's possession raises presumption of negligence. Jones v. Atlantic Coast Line R. Co., 148 N. C. 449, 62 SE 521; Jones-Lane Co. v. Atlantic Coast Line R. Co., 148 N. C. 580, 62 SE 701. May draw inference of fact that injury sustained was caused by negligence of carrier, though there was a special contract exempting carrier from liability except for negligence. Gross v. Adams Exp. Co., 35 Pa. Super. Ct. 467. Evidence held legally sufficient to warrant an inference by jury that negligence of carrier caused injury to glass which was found broken on arrival. Id. Evidence held sufficient to support verdict of not guilty of negligence in transporting cattle. Trogdon v. Vandalia R. Co., 143 Ill. App. 230. Evidence held prima facie sufficient to authorize finding against the delivering carrier for all the damages to shipment of horses. St. Louis, etc., R. Co. v. Fenley [Tex. Civ. App.] 118 SW 845. Where evidence does not show when intermediate carrier received shipment or when it delivered it to succeeding carrier, held insufficient to show delay on its line. Shockley v. Pennsylvania R. Co., 109 Md. 123, 71 A 437. Where the question of negligence in issue was that of causing "native" cattle, not subject to quarantine, to be wrongfully placed in "quarantine pens," instruction to the effect that if jury found that the initial carrier delivered the "native" cattle to the connecting carrier in the customary manner then the burden of proof was on the latter to show by a preponderance of evidence that it in turn delivered to next connecting carrier in usual and customary manner was erroneous as facts stated by plaintiff would only be prima facie evidence, and not a presumption of law that said connecting carrier caused the particular injury complained of. Texas & P. R. Co. v. Rankin [Tex. Civ. App.] 118 SW 823.

59. In action for failure to furnish 30 cars, plaintiff has burden of showing that defendant owns or operates the road running through station where cars were desired. Brandom v. Atchison, etc., R. Co., 134 Mo. App. 89, 114 SW 540. Where ownership is not materially disputed, very little evidence will take issue to jury, but, where it is disputed in both the pleadings and evidence, plaintiff must furnish competent evidence of sufficient evidentiary strength to make a debatable issue. Id. In action against Santa Fe Railroad Company, folders of Santa Fe System showing that point at which cars were desired was on the Santa Fe system but on the line of the Southern Kansas Railway Company, a distinct corporation, held to show that defendant's line did not run through same. Id. Where defendant contends that its line runs only to Texas line, proof that conductor on system issued a receipt of defendant for cash fare paid in Texas is insufficient to take issue of ownership to jury, there being no showing of authority to issue such receipt or of any custom. Id.

60. Evidence held sufficient to show that peaches were delivered to initial carrier in good condition. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193. Evidence of plaintiff's purchasing agent held to show that cotton delivered to carrier in good condition. St. Louis S. W. R. Co. v. Phoenix Cotton Oil Co. [Ark.] 115 SW 393. Evidence held to show that horse was in good condition when shipped. Foust v. Lee [Mo. App.] 119 SW 505.

61. Positive evidence of plaintiff that cotton was not received as against inference of delivery from fact that it was placed in certain car, which was subsequently reloaded by plaintiff, held to warrant finding of nondelivery. Central of Georgia R. Co. v. Manchester Mfg. Co. [Ga. App.] 64 SE 1128. Evidence of consignee's receiving clerk that he receives all consignments to employer and did not receive one in question, held to show nondelivery. Galveston, etc., R. Co. v. Crow [Tex. Civ. App.] 117 SW 170. Evidence held to sustain finding that entire shipment of 93 bales of cotton was wrongfully delivered to third person. Texas & G. R. Co. v. First Nat. Bank [Tex. Civ. App.] 112 SW 589. In action to recover for loss of traveling bag from carrier to whom it was intrusted to be delivered at a designated depot, in time for a particular train, a prima facie case is made out by testimony of plaintiff that he inquired at baggage room at proper time and was unable to find baggage. Ziegler v. Freeman, 12 Ohio C. C. (N. S.) 122. Record of state weighing department showing that car contained a less weight of flax at destination than at point of shipment held insufficient to show loss where same report and other evidence showed car to be in good condition and there was no proof that scales upon which car was originally weighed was correct. Miller v. Northern Pac. R. Co. [N. D.] 118 NW 344.

62. Fact that oats were found in fermented

was not due to inherent nature or vices of the shipment,[63] ordinarily raises a presumption of negligence.[64] Where the liability sought to be enforced is that at common law, a prima facie case of negligence in the transportation of animals arises from showing injury by external violence during transit.[65] Where the shipper loaded the goods, he must also show that they were properly loaded.[66] Such presumption makes a prima facie case,[67] casting the burden on the carrier to overcome the same, or to relieve itself by showing that the loss or injury was due to a cause for which it was not responsible,[68] or by establishing a special exempting contract,[69] bringing the case within it,[70] and showing that its negligence did not contribute.[71] Unless controlled by statute,[72] plaintiff has the burden of showing that the loss or injury occurred in defendant's possession,[73] but, where goods are shipped over several connecting lines and are shown to have been injured,[74] a presumption[75] arises that it occurred on the terminal line,[76] unless plaintiff's evidence shows the

condition two weeks after arrival, is no proof that they were in that condition when they arrived. Hardin Grain Co. v. Chicago & A. R. Co., 134 Mo. App. 681, 114 SW 1117.

63. While shipper has burden of showing that injury of animal was not due to natural vice, very slight evidence of negligence is sufficient. Libby v. St. Louis, etc., R. Co. [Mo. App.] 117 SW 659. Where a shipper sues for an injury to an animal, the burden is on him to show prima facie that the injuries were received through some cause other than the vicious propensities of the animal or animals shipped. Slight proof of carrier's negligence is sufficient. Foust v. Lee [Mo. App.] 119 SW 505.

64. Magnus v. Platt, 62 Misc. 499, 115 NYS 824; Duncan v. Great Northern R. Co. [N. D.] 118 NW 826. By special agreement burden of proving actual negligence on part of carrier may be placed on plaintiff. Merchants' & Miners' Transp. Co. v. Eichberg, 109 Md. 211, 71 A 993. In action for penalty under Revisal 1905, § 2632, for unreasonable delay in delivery, proof of nondelivery raises a presumption of negligence and casts burden on carrier to excuse itself by showing that goods were burned, destroyed or stolen without its fault. Robertson v. Atlantic Coast Line R. Co., 148 N. C. 323, 62 SE 413.

65. Foust v. Lee [Mo. App.] 119 SW 505.

66. E. C. Fuller Co. v. Pennsylvania R. Co., 61 Misc. 599, 113 NYS 1001.

67. Proof that injury to stock was an ordinary incident of handling stock rebuts presumption of negligence arising from mere fact of injury. Jones v. Atlantic Coast Line R. Co., 148 N. C. 449, 62 SE 521. Where, from evidence, it was equally plausible that door through which flax escaped came open from some other cause as from shipper's failure to properly fasten same, carrier has not relieved itself from liability. Duncan v. Great Northern R. Co. [N. D.] 118 NW 826.

68. Burden rests on carrier to show loss came within common-law exception from liability. Lloyd v. Hough & Keenan Storage & Transfer Co. [Pa.] 72 A. 516. Evidence held insufficient to show that fire resulted from spontaneous combustion. Id.

69. Owens Bros. v. Chicago, etc., R. Co., 139 Iowa, 538, 117 NW 762. Limiting liability in event of unusual delay to cost of food for stock. Hennigh v. Cleveland, etc., R. Co., 143 Ill. App. 283; Cleveland, etc., R. Co. v. McNutt, 138 Ill. App. 66.

70. Duncan v. Great Northern R. Co. [N. D.] 118 NW 826; Owens Bros. v. Chicago, etc., R. Co., 139 Iowa, 538, 117 NW 762; Southern R. Co. v. Frank & Co., 5 Ga. App. 574, 63 SE 656. Burden rests on carrier to show noncompliance with stipulation for notice of claim, especially where action is in tort. Brown v. St. Louis & S. F. R. Co., 135 Mo. App. 624, 117 SW 112. Where horses were shipped under contract whereby shipper assumed all risk of damage from delay, burden rests upon carrier to show that its negligence did not cause delay. Jolliffe v. Northern Pac. R. Co. [Wash.] 100 P 977. Where contract relieves carrier from all liability except for negligence, proof that carrier was not negligent in handling car held sufficient to relieve from liability in absence of showing as to cause of injury. Simms v. New Orleans & N. E. R. Co., 122 La. 268, 47 S 602.

71. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856.

72. Under Code 1904, §§ 1294-1, burden rests on defendant to show that injury did not occur on its line. Southern Exp. Co. v. Jacobs [Va.] 63 SE 17.

73. Where plaintiff as provided by Rev. St. 1899, § 5222, as amended by Laws 1905, p. 54 (Ann. St. 1906, p. 2718), joined in his action for damages the initial carrier and all connecting carriers, the burden was on him to prove which carrier was liable. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1; Id. [Mo. App.] 119 SW 13.

74. Where there is no proof that goods delivered in damaged condition was received by initial carrier in a different condition, there is no presumption of injury on line of last carrier. Gude v. Pennsylvania R. Co. [N. J. Law] 71 A 1128.

75. Liability of terminal carrier is based upon a presumption that goods continued in same condition as when delivered to initial carrier, indulged in to preserve the rights of the shipper since he does not accompany the shipment. Sheble v. Oregon R. & Nav. Co., 51 Wash. 359, 98 P 745.

76. Laverne Citrus Ass'n v. Chicago G. W. R. Co., 107 Minn. 94, 119 NW 795; Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193; Connelly v. Illinois Cent. R. Co., 133 Mo. App. 310, 113 SW 233; International & G. N. R. Co. v. Welbourne [Tex. Civ. App.] 113 SW 780; St. Louis S. W. R. Co. v. Jackson & Co. [Tex. Civ. App.] 118 SW 853; Texas Cent. R. Co. v. Watson [Tex. Civ. App.] 118 SW

contrary,[77] and, hence, in a suit against the initial [78] or an intermediate [79] carrier, plaintiff must make affirmative proof.[80] Such presumption is not indulged, however, where the shipments over the various lines are independent or where there is a total loss.[81] The fact that a connecting carrier receives a shipment without objections is not a presumption as against the shipper that the goods were in good order at the time.[82] Where the carrier is only liable for negligent delay, plaintiff must prove the same,[83] although proof of a wreck makes a prima facie case.[84] The burden of proving a breach of contract rests on the plaintiff.[85] A carrier asserting a custom as a defense has the burden of establishing the same.[86] Where the carrier separates cars in charge of a caretaker, it must show a justifying reason.[87] As in actions generally, there must be no material variance between the allegations and proof.[88]

In the admission of evidence, the ordinary rules respecting conformity to the

175. Presumption of injury while in possession of terminal carrier held fully and explicitly given. Central of Georgia R. Co. v. Dothan Mule Co. [Ala.] 49 S 243. Where goods are received in good condition by the initial carrier, and delivered by the terminal carrier in a damaged condition, a prima facie case of negligence is made against the delivering carrier. Atchison, etc., R. Co. v. Smythe [Tex. Civ. App.] 119 SW 892.

77. Bill of lading showed that it was damaged when received. Georgia, F. & A. R. Co. v. Stanton & Co., 5 Ga. App. 500, 63 SE 655. Where goods came into possession of terminal carrier only a few days before damaged condition was discovered, and damage is shown to have been in progress for several months, presumption of injury while in hands of terminal carrier does not prevail. Southern R. Co. v. Frank & Co., 5 Ga. App. 574, 63 SE 656.

78. Connelly v. Illinois Cent. R. Co., 133 Mo. App. 310, 113 SW 233.

79. Shockley v. Pennsylvania R. Co., 109 Md. 123, 71 A 437.

80. Sheble v. Oregon R. & Nav. Co., 51 Wash. 359, 98 P 745.

81. Plaintiff has burden of proving that fact. Southern Exp. Co. v. Saks [Ala.] 49 S 392. Applies where part of single entire shipment, though made up of individual articles, is lost. Way v. Southern R. Co. [Ga.] 64 SE 1066.

82. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 13.

83. Special contract exempted carrier from liability for delay. Gilbert v. Chicago, etc., R. Co., 132 Mo. App. 697, 112 SW 1002. While proof alone of unreasonable delay in a shipment will not support an inference of negligence, yet such proof, when buttressed by evidence of circumstances which even slightly tend to show a negligent origin of the delay, will warrant such inference. Parsons Applegate Co. v. Louisville & N. R. Co., 136 Mo. App. 494, 118 SW 101.

84. Thompson v. Quincy, etc., R. Co., 136 Mo. App. 404, 117 SW 1193; St. Louis S. W. R. Co. v. Wallace [Ark.] 118 SW 412. Carrier has burden of proving that it was unavoidable. Thompson v. Quincy, etc., R. Co., 136 Mo. App. 404, 117 SW 1193. Where carrier offered evidence that track and equipment was in good condition and wreck was unexplainable, held for jury whether it had overcome presumption of negligence. Id.

85. Instruction that the burden of proof was upon the delivering carrier to show by a preponderance of testimony that it delivered the cattle in question in the suit to the consignee at their destination was erroneous as burden of proving breach was on shipper. Texas & P. R. Co. v. Rankin [Tex. Civ. App.] 118 SW 823.

86. Where carrier relied on custom authorizing delivery of cotton to compress company as agent of consignee, burden rested on it to prove such custom. Arkansas Midland R. Co. v. Moody [Ark.] 117 SW 757.

87. Whitnack v. Chicago, B. & Q. R. Co., 82 Neb. 464, 118 NW 67.

88. Error to admit evidence to show damage caused by delay at junction point, such issue not being raised by pleadings, cause of action being founded solely upon negligent handling of train by which it was alleged horses were thrown down and injured. Barr v. Quincy, etc., R. Co. [Mo. App.] 120 SW 111. Where petition by carrier to recover freight charges advanced to initial carrier, connecting carrier, and its own charges, alleged contract by defendant to pay plaintiff said charges, but not as to amount to be paid, evidence was admissible to prove that charges paid to the other carriers and its own were reasonable. Chicago, etc., R. Co. v. Bay Shore Lumber Co. [Mo. App.] 119 SW 973. Where basis of recovery as alleged was negligent delay, no recovery can be had on theory that defendant's agent authorized shipper to sell goods and promised to pay loss. Missouri, K. & T. R. Co. v. Carpenter [Tex. Civ. App.] 114 SW 900. In action in tort for loss of goods, variance between allegations and proof of the destination of goods and consideration held not material. Kansas City So. R. Co. v. Rosebrook-Josey Grain Co. [Tex. Civ. App.] 114 SW 436. Under Civ. Code Prac. § 129, providing that a variance shall not be material unless it misled adverse party, alleging of oral contract and proof of written is not material where written one was pleaded by defendant since it could not have been misled thereby. Baltimore, etc., R. Co. v. Wood & Co. [Ky.] 114 SW 734. Variance between complaint that alleged that damage to goods was caused from delay in transportation, and proof that damage arose from carrier's failure to keep the car properly refrigerated. Missouri, K. & T. R. Co. v. McLean [Tex. Civ. App.] 118 SW 161.

the pleadings [89] and the case made,[90] admissibility of records,[91] admissions,[92] directions,[93] and statements [94] of agents and employes, relevancy,[95] materiality,[96] com-

89. In action for goods alleged to have been consigned to "A. G. B.," bill of lading consigning to "W. R. B." held properly received where plaintiff testified that the goods had been ordered and paid for by "A. G. B." but that seller had always addressed him as "W. G. B." Bullock v. Charleston & W. C. R. Co., 82 S. C. 375, 64 SE 234. Where petition alleged that cattle in controversy were negligently delayed and in consequence lost in weight and suffered in appearance, evidence that some of the cattle got down while cars were standing held admissible. St. Louis, etc., R. Co. v. Alverson [Tex. Civ. App.] 114 SW 673. In action for damage to fruit by leaky pipes in refrigerator car used for storage after relation of carrier and warehouseman had ceased, allegation of negligence in failing to repair pipes held sufficient to admit evidence of any facts going to show negligence, including promise to repair, the duty arising not from the promise but from notice or knowledge of the defect. Missouri, K. & T. R. Co. v. Tripis [Tex. Civ. App.] 117 SW 199. In action for breach of contract to furnish cars, testimony of witness who made contract for himself and plaintiff held relevant under general denial. St. Louis, etc., R. Co. v. Taylor [Ark.] 112 SW 745. Where, in an action against carriers for delay in shipment of wheat, bills of lading were admitted as evidence without objection or request that it be limited to one of the defendants, it was not error to refuse instruction that another defendant was not bound by such evidence as to amount of wheat shipped. Missouri, K. & T. R. Co. v. Stark Grain Co. [Tex. Civ. App.] 120 SW 1146.

90. Where there was no evidence of any delay in transportation, evidence as to value of use of goods during delayed transportation held inadmissible. Missouri, K. & T. R. Co. v. Dement [Tex. Civ. App.] 115 SW 665.

91. Where loading clerk identified loading sheet and his personal check marks thereon and testified that they were put on after he had examined and found goods loaded as stated therein, held same was admissible. Glazer v. Old Dominion S. S. Co., 113 NYS 979. In action to recover overcharges, books of plaintiff's weighmaster are inadmissible to prove weight without evidence of correctness. Illinois Cent. R. Co. v. Butterfield Lumber Co. [Miss.] 49 S 179. Records of conductor who handles shipment, showing that there was no exception to the condition of the stock, held properly excluded where conductor was not called, so as to render it admissible in corroboration. Jones v. Atlantic Coast Line R. Co., 148 N. C. 449, 62 SE 521.

92. Admission of claim agent while attempting to adjust claim held within scope of his authority. Rutland v. Southern R. Co., 81 S. C. 448, 62 SE 865. In action for coal converted by railroad to own use, certain admissions of facts by fuel agent of defendant held admissible though made during negotiations for settlement. St. Louis & S. F. R. Co. v. Stone [Kan.] 97 P 471.

93. In suit against several connecting carriers, direction of one as to disposition of goods to be made by shipper held inadmissible against others. Missouri, K. & T. R. Co. v. Carpenter [Tex. Civ. App.] 114 SW 900.

94. **Admissible:** Interviews with defendant's agent in an attempt to locate the goods. Fein v. Weir, 129 App. Div. 299, 114 NYS 426. In an action for breach of contract to furnish cars, letters of the officials of the carrier were competent in so far as they tended to show that the officers of the carrier knew that the carrier did not have sufficient cars to meet the ordinary demands of the shippers. Midland Val. R. Co. v. Hoffman Coal Co. [Ark.] 120 SW 380. Relevant statements of claim agent during negotiations. Hill v. Adams Exp. Co. [N. J. Law] 71 A 683. Claim agent who has authority to pass on a claim, order it paid, and to communicate with claimant in respect thereto, held to have authority to bind company by admission of liability. Tenhet v. Atlantic Coast Line R. Co., 82 S. C. 465, 64 SE 232. Where shipper was referred to third person by station agents, statements by him while actively engaged in discharge of carrier's duties, as to time when train would leave and cause of delay. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. Evidence that plaintiff asked to be directed to superintendent's office and was directed to certain office, that person to whom plaintiff was directed was working there and seemed to have general charge, held sufficient showing of such person's connection with defendant to render conversation admissible. Gulf, etc., R. Co. v. Looney [Tex. Civ. App.] 115 SW 268. Statement by claim agent that claim had been ordered paid and for plaintiff to go home and get his money held an admission of liability, and was not objectionable as a compromise statement. Tenhet v. Atlantic Coast Line R. Co., 82 S. C. 465, 64 SE 232. Testimony as to what carrier's agent said about unloading a car of plaintiff's cattle at certain station in the quarantine pens, **held improperly admitted** because such declaration was made long after the unloading. St. Louis, etc., R. Co. v. Adams [Tex. Civ. App.] 118 SW 1155.

95. On issue whether contract included delivery also, evidence of railroad rates for carriage held too remote. Garberson v. Trans-Continental Freight Co., 51 Wash. 213, 98 P 612. In action for failure to re-ice car as per contract witness may testify as to condition of other similar shipments where car was properly iced. Pennsylvania R. Co. v. Orem Fruit & Produce Co. [Md.] 73 A 571. Evidence that cars are customarily bedded for transportation of cattle is admissible in action for failure to bed for shipment of horses and mules, since same necessity therefor exists in each case. Chicago, etc., R. Co. v. Clements [Tex. Civ. App.] 115 SW 664. Custom as to deliveries for immediate shipment held admissible as bearing on acceptance of particular shipment. St. Louis, etc., R. Co. v. Burrow & Co. [Ark.] 116 SW 198. In action for loss of goods claimed to have been accepted for immediate shipment, postal card from defendant's agent to shipper after loss that carrier would not assume further

petency,[97] res gestæ,[98] hearsay evidence,[99] conclusions of witnesses,[1] expert testimony,[2] apply.

Trial and instructions.[See 11 C. L. 536]—Instructions should fairly submit the case,[3] conform to the pleadings,[4] and be supported by the evidence,[5] should not

liability respecting the freight held admissible as showing knowledge that it had been delivered for shipment. Id. In action for death of hog alleged to be due to removal from car into which it had been wrongfully loaded through misdirection of carrier, evidence that, when hogs were being driven to station, witness heard hog squeal, to support claim that hog was hot and would have died anyway without identification of hog that squealed as one which died. Weisinger v. Southern R. Co., 33 Ky. L. R. 1038, 112 SW 660.

96. Testimony of witness that he had never seen cattle shipped that were bruised up and butchered any more than shipment in question, without statement of condition of other shipments, held immaterial on issue of damages. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 114 SW 413. In action for failure to deliver part of shipment, evidence of freight charges paid thereon by plaintiff is admissible on damages if nothing else. Louisville & N. R. Co. v. Price [Ala.] 48 S 814. In action for negligent delays and rough handling of shipment, admission of testimony of plaintiff that he had ordered cars a week before cattle were shipped held not error where it was mere inducement. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894.

97. Testimony that carrier had only quoted plaintiff one price, as bearing upon consideration for restricted liability, held properly received where written contract was not in evidence, subject to be stricken if in conflict therewith. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856.

98. Declarations of duly authorized agent of defendant made while interviewed relative to lost goods held admissible. Fein v. Weir, 129 App. Div. 299, 114 NYS 426.

99. Hearsay: Statement of one examining injured animals at request of shipper and carrier as to cause of injury. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856. Folders and maps not published by defendant are inadmissible to show that particular station is on defendant's line. Brandom v. Atchison, etc., R. Co., 134 Mo. App. 89, 114 SW 540. Held error to admit account of sales of cattle where plaintiff was not present when some of them were sold and other evidence did not show correctness of items. Gulf, etc., R. Co. v. Lampkin [Tex. Civ. App.] 116 SW 128.

1. Inadmissible: Opinion of witness as to what is reasonable time within which to transport. Hennigh v. Cleveland, etc., R. Co., 143 Ill. App. 283; Cleveland, etc., R. Co. v. McNutt, 138 Ill. App. 66; St. Louis & S. F. R. Co. v. May [Tex. Civ. App.] 115 SW 900; Texas & P. R. Co. v. Goldsmith [Tex. Civ. App.] 118 SW 1146.

Admissible: Witness may give opinion as to what was cause of condition. Gulf, etc., R. Co. v. Rogers [Tex. Civ. App.] 113 SW 583. Where experienced stockmen testified that they had seen the shipment and described the injuries, statements that some of the animals were damaged more than the others, that three were badly damaged and that entire shipment had the appearance of being damaged to some extent, held not objectionable as conclusions. St. Louis S. W. R. Co. v. Allen [Tex. Civ. App.] 117 SW 923.

2. One who has had 42 years' experience in machinery business and 10 or 15 years in loading machinery into cars for shipment held qualified as an expert to testify whether bookbinding machinery was properly loaded, though he was familiar with the loading of that kind of machinery only in a general way. E. C. Fuller Co. v. Pennsylvania R. Co., 61 Misc. 599, 113 NYS 1001. One who has had large experience with horses, who knows their habits and temperments and the stalls in which they were shipped, may testify what effect long shipment in such stalls would have. Southern Exp. Co. v. Jacobs [Va.] 63 SE 17. One who had shipped cattle to designated point for 15 years is competent to testify to average rate of speed of trains carrying cattle to that point. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. Witness of 18 years' experience in shipment of cattle is competent to testify as to effect of jerks of train detailed by him had on cattle. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894.

3. Where in one portion of the charge the court instructed jury as to what negligence was, and in another instructed that, if horses were negligently kept on cars longer than they should have been and injury thereby resulted, verdict should be for plaintiff, instruction was not erroneous as not furnishing guide for jury in determining how long horses should have been kept on cars. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 118 SW 759.

4. Instruction on inherent defects held properly refused where pleading did not raise issue. International & G. N. R. Co. v. Welbourne [Tex. Civ. App.] 113 SW 780. In action for loss of stock en route, instructions based on theory that contract required shipper to select cars and see that they were properly closed and fastened held properly refused where not pleaded by carrier, since it was defensive matter. Missouri, K. & T. R. Co. v. Woods [Tex. Civ. App.] 117 SW 196. Instruction authorizing jury to return verdict for plaintiff if they should find that some of the horses of plaintiff were bruised, injured, or damaged by being knocked down, thrown or falling down, upon the floor of the car, etc., held erroneous as permitting recovery on different theory from that alleged in petition. Barr v. Quincy, etc., R. Co. [Mo. App.] 120 SW 111.

5. Where there is no evidence that cattle suffered damage on terminal line, instruction to deduct damage suffered on terminal line from total damage and render verdict for difference held properly refused. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. Where there was no

ignore [6] or withdraw issues,[7] assume facts in dispute [8] or invade the province of the jury,[9] single out evidence [10] or be upon the weight thereof,[11] and must not be misleading.[12] Requested instructions covered by those given may be refused [13] or inconsistent.[14]

evidence of delay in transportation of household goods, charge on damages held improper in so far as it related thereto. Missouri, K. & T. R. Co. v. Dement [Tex. Civ. App.] 115 SW 635. Expert evidence of depreciation in market value due to delay held sufficient to authorize submission of issue "in the price per hundredweight." St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 115 SW 882. Charge submitting issue as to whether mules were denied water while in transit held supported by the evidence. Missouri, K. & T. R. Co. v. Hood [Tex. Civ. App.] 120 SW 236.

6. Instruction which in substance directed a verdict without calling attention to alleged contract limiting carrier's liability was erroneous. Hennigh v. Cleveland, etc., R. Co., 143 Ill. App. 283. In action for delay and for damages caused by unloading and holding in muddy pen, instruction to find for defendant if it could not have carried to destination within 28 hours held properly refused as ignoring issue of negligence in unloading in muddy pens. Missouri, K. & T. R. Co. v. House [Tex. Civ. App.] 113 SW 154. Instruction that it was the duty of carrier to transport the cattle within a reasonable time and with reasonable care and to deliver them in good condition held erroneous as ignoring element of negligence. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 114 SW 413. Instruction, in an action for death of a jack, held not to preclude jury from considering whether carrier's want of care was the proximate cause of loss. Kelly v. Adams Exp. Co. [Ky.] 119 SW 747.

7. Instructions considered and held to withdraw question of diversion from jury. Smith v. Baltimore & O. R. Co. [Pa.] 72 A 264. Where plaintiff contracted with defendant to furnish cars to be sent beyond its line and pursuant to such agreement had been shipping their coal, an instruction "that the fact that connecting lines have failed and refused to return promptly the cars of the defendant is no valid legal excuse or defense in this case absolving the defendant from its obligation to furnish with reasonable promptness and diligence sufficient cars for the transportation of plaintiff's coal," was erroneous as withdrawing from the consideration of the jury the fact that cars were off the line, and that return thereof could not be secured in determining whether or not the defendant was excusable for its failure to furnish cars. Midland Val. R. Co. v. Hoffman Coal Co. [Ark.] 120 SW 38.

8. Instruction that agent's statement that he would try to furnish cars was not an agreement so to do held erroneous as assuming that he made the statement, the evidence being conflicting. St. Louis, etc., R. Co. v. Boshear [Tex.] 113 SW 6. Where undisputed evidence showed that some of alleged injured animals sold for prices in excess of what plaintiff testified they would have been worth if uninjured, instruction that, if animals were injured through carrier's negligence, plaintiff could recover, held erroneous as assuming that injuries caused depreciation in market values. Missouri, K. & T. R. Co. v. Light [Tex. Civ. App.] 117 SW 1058. Instruction which assumed as a fact proven beyond controversy that automobile had been totally destroyed while in transit over roads of certain carriers was erroneous, there being evidence to the contrary. St. Louis S. W. R. Co. v. Patton [Tex. Civ. App.] 118 SW 798. Instruction held not to assume that shipment of mules was in bad condition at time they reached destination nor that plaintiffs suffered injury by reason of a change in the market value at destination. Missouri, K. & T. R. Co. v. Hood [Tex. Civ. App.] 120 SW 236. Where the evidence was contradictory as to whether a reduced rate of shipment had been given, an instruction exonerating defendants from liability, if the quantity of breakage was only such as was usually incident to such shipment, was erroneous. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1.

9. Instruction that fact that animals did not show injury at time of delivery by initial carrier to connecting carrier did not prove that they were in good condition. Central of Georgia R. Co. v. Dothan Mule Co. [Ala.] 49 S 243. Instruction assuming that carrier did not exercise reasonable care in transportation of stock and that the shipper who had agreed to care for stock would not have to under the circumstances. Tate v. Missouri Pac. R. Co., 143 Ill. App. 289.

10. Instruction that fact that certain witness testified that animals did not show injury at time of delivery by initial carrier to connecting carrier does not show that they were in good condition. Central of Georgia R. Co. v. Dothan Mule Co. [Ala.] 49 S 243.

11. Instruction that fact that witness testified that animals did not show injury at time of delivery by initial carrier to connecting carrier does not prove that they were in good condition. Central of Georgia R. Co. v. Dothan Mule Co. [Ala.] 49 S 243.

12. Instruction that, in case of loss, the presumption is against carrier and it must show that it was occasioned by an act of God, etc., held not misleading in that it tended to relieve plaintiff from burden of showing nondelivery. Central of Georgia R. Co. v. Manchester Mfg. Co. [Ga. App.] 64 SE 1128. In action for delay and for damages caused by unloading and holding in muddy pen, instruction to find for defendant if it could not have run train to destination within 28 hours held properly refused where its line did not run to destination. Missouri, K. & T. R. Co. v. House [Tex. Civ. App.] 113 SW 154. Where there is evidence tending to show that injury occurred on initial line sufficient to take issue to jury, instruction as to presumption of injury on terminal line in absence of

Damages and penalties. See 11 C. L. 537—By statute [15] in some states, a carrier is liable for a penalty for failure to adjust and pay [16] duly filed [17] claims for loss or injury [18] to goods within a specified time,[19] provided the claimant ultimately recovers the full amount demanded.[20] A voluntary payment of the claim after the prescribed period does not affect the right to recover the penalty.[21]

Although a carrier has rendered itself liable by a wrongful diversion of the shipment, the shipper must exercise reasonable care to minimize the damages.[22]

§ 14. *Freight and other charges.*[23]—See 11 C. L. 538—Public regulation of rates and the determination of the reasonableness thereof are treated in another section.[24] Subject to public control and the general limitation that the charge must be fair and reasonable,[25] rates are a matter of agreement.[26] A rate duly established under

evidence is erroneous as leading jury to believe that there was no evidence as to place of delivery. Connelly v. Illinois Cent. R. Co., 133 Mo. App. 310, 113 SW 233. Instructions as to liability and care required of express company after its offer to deliver package was refused held not misleading. Bank of Vanduser v. Wells-Fargo Co. [Mo. App.] 120 SW 678.

13. **Covered:** Instruction on liability and proximate cause. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767. Instruction that plaintiff could not recover unless delays were unreasonable and negligent. Id. Instruction on duty to furnish suitable car. Id.

14. Instruction as to general duty to furnish cars and subsequent instruction enumerating excuses held not in conflict. St. Louis S. W. R. Co. v. Leder Bros. [Ark.] 112 SW 744.

15. Acts of 1905, p. 104, c. 5424, providing "that any person, firm, or corporation operating any railroad in this state" failing to pay claim within 90 days after filing same, shall be liable in sum of 25 per cent per annum on principal, held sufficient as to title (Seaboard Air Line R. Co. v. Simon [Fla.] 47 S 1001), and not such an arbitrary classification in excluding other common carriers as to deny due process of law and equal protection of the laws (Id.).

16. Unless place of payment is fixed, carrier must seek out claimant if within state in order to avoid penalty for nonpayment of claim under St. 1903 (24 Stat. 81). Berley v. Columbia, N. & L. R. Co., 82 S. C. 232, 64 SE 397.

17. Plaintiff could testify to fact of filing claim without producing notice, since it was collateral. Rabon v. Atlantic Coast Line R. Co., 149 N. C. 59, 62 SE 743. Burden rests on defendant to prove that claim was not filed or was excessive. Id.

18. Penalty under Act of 1903 (24 Stat. 81) can only be recovered where claim is for loss of or injury to goods as distinct from injury to consignee for delay. Cousar Mercantile Co. v. Southern R. Co., 82 S. C. 307, 64 SE 391. Consignee cannot refuse tender of uninjured goods and recover penalty for failure to adjust as for a loss. Id. Under Act of 1903 (24 Stat. 81), although claim filed is for loss of goods, recovery may be had for injury to the same or vice versa, but penalty for failure to adjust cannot be recovered. Id.

19. Where claim was not settled within the time prescribed by Act Feb. 23, 1903, 24 Stat. 81, and there is sufficient evidence to take question of liability to jury, question of penalty should also be submitted. Tenhet v. Atlantic Coast Line R. Co., 82 S. C. 465, 64 SE 232.

20. Claimant held entitled to penalty where claim established plus interest thereon exceeded claim filed. White Laundry Co. v. Charleston & W. C. R. Co. [S. C.] 65 SE 239. Where claim established is only one-half cent less than claim filed, claimant is entitled to penalty under maxim "De minimis non curat lex." Id. No recovery can be had under Act Feb. 23, 1903 (24 Stat. 81) for failure to adjust where consignee rejected shipment delayed and sought to recover full value thereof, since he could recover only loss due to delay. Bullock v. Charleston & W. C. R. Co., 82 S. C. 375, 64 SE 234.

21. Albritton & Co. v. Atlantic Coast Line R. Co., 148 N. C. 485, 62 SE 597. After judgment and pending appeal. Rabon v. Atlantic Coast Line R. Co., 149 N. C. 59, 62 SE 743. By accepting a voluntary settlement after period prescribed therefor, claimant does not waive right to penalty under Revisal 1905, § 2634, since independent action may be maintained therefor. Albritton & Co. v. Atlantic Coast Line R. Co., 148 N. C. 485, 62 SE 597.

22. Where goods are carried to wrong destination, shipper is not required to reship to initial point, thereby causing delay of three or four weeks, where he was under obligation to make prompt shipment and another route offered quicker service. Spiero v. New York Cent. & H. R. R. Co., 64 Misc. 53, 117 NYS 1039.

23. **Search Note:** See notes in 22 L. R. A. 530; 3 L. R. A. (N. S.) 327; 30 A. S. R. 636; 44 Id. 921; 4 Ann. Cas. 15.

See, also, Carriers, Cent. Dig. §§ 853-916; Dec. Dig. 188-202; 6 Cyc. 491-504; 5 A. & E. Enc. L. (2ed.) 399; 9 Id. 220.

24. See ante, § 2C.

25. Sherman anti-trust law does not give any right of action for damages sustained by payment of excessive unjust rates. Meeker v. Lehigh Val. R. Co., 162 F 354.

26. Where plaintiff contracted, for use of whole vessel for transportation of coal, to pay for same at rate of $1.30 per ton, carrier cannot charge for full capacity at such rate where it prevented plaintiff from using same. Clancy v. Dutton, 129 App. Div. 23, 113 NYS 124. Failure to establish a rate as required by law cannot be set up by the carrier to defeat a contract in

the Interstate Commerce Act is conclusively reasonable until declared otherwise by the commission,[27] and, likewise, the rate established by state commission is made conclusive until attacked by direct action.[28] An agreed rate not in conformity with the lawful rate[29] is void,[30] though made in good faith,[31] and the party entitled thereto may recover the difference.[32] The burden, however, rests upon him to show the invalidity of the agreed rate.[33] All rates[34] and privileges offered by an interstate carrier must be published in order to be legal,[35] and when so published are binding upon the parties and must be adhered to[36] as they stand at the date of ship-

respect thereto. Kansas City So. R. Co. v. Albers Com. Co. [Kan.] 99 P 819. In absence of rates established under Interstate Commerce Act, contract with shipper for an agreed joint rate is valid. Id. Where no through rate between stations in different states and on different roads has been established in accordance with Interstate Commerce Act and initial carrier agrees to specified through rate, the second company accepting and completing shipment, held that rate is not invalid as not being the sum of the two local rates, and contract is binding in absence of showing that rate is unreasonable or that other shippers were charged a different one. Missouri Pac. R. Co. v. Relf [Kan.] 97 P 477.

27. Shipper seeking relief from unreasonable rates must apply to Interstate Commerce Commission. Baltimore & O. R. Co. v. La Due, 128 App. Div. 594, 112 NYS 964; Missouri, K. & T. R. Co. v. New Era Milling Co. [Kan.] 101 P 1011. Shipper cannot maintain an action to recover for alleged excessiveness of interstate rate conforming to established rate, until Interstate Commerce Commission has first declared such established rate excessive. Robinson v. Baltimore & O. R. Co., 64 W. Va. 406, 63 SE 323. Nothing but evidence that established rate has been declared excessive by Interstate Commerce Commission will justify judgment for plaintiff. Id. Action for excessive charge held properly dismissed where there was no evidence that carrier of interstate shipment charged more than established rate. A. P. Brantley Co. v. Ocean S. S. Co. [Ga. App.] 63 SE 1129.

28. Rev. St. 1895, art. 4564, providing that the rates prescribed by the railroad commission shall be held conclusive until finally found otherwise in a direct action, brought for that purpose under arts. 4565, 4566, is not unconstitutional as denying equal protection of the laws. Texas & N. O. R. Co. v. Sabine Tram Co. [Tex. Civ. App.] 121 SW 266.

29. Rule that two connecting lines cannot contract for a joint rate for less than sum of two local rates has no application where no local rates have been established. Kansas City So. R. Co. v. Albers Com. Co. [Kan.] 99 P 819. Where connecting roads enter into contract for joint rates, one cannot increase the amount to which it is entitled by making joint rates with other connecting carriers by which it receives more. Id.

30. Baltimore & O. R. Co. v. La Due, 128 App. Div. 594, 112 NYS 964.

31. Where, through mistake, agent misquoted rate and plaintiff shipped in reliance thereon, carrier can recover rate established in conformity to act of congress. Georgia R. Co. v. Creety, 5 Ga. App. 424, 63 SE 528.

32. New York Cent. & H. R. R. Co. v. Smith, 62 Misc. 526, 115 NYS 838.

33. Kansas City So. R. Co. v. Albers Com. Co. [Kan.] 99 P 819. Counterclaim by shipper in suit for freight charges merely alleging that on prior shipments carrier exacted more than agreed rate without allegation or proof that it exacted more than established rate is insufficient, burden being on defendant to prove that more was exacted than was legal. Baltimore & O. R. Co. v. La Due, 128 App. Div. 594, 112 NYS 964.

34. Publication of gross-and-net rates would needlessly add to complexity of tariffs. Wherever it is possible for carriers to file net rate as such, it is their duty so to do. In re Allowances for Transfer of Sugar, 14 I. C. C. 619.

35. Reconsignment rules required to be signed by shipper and subject to cancellation at option of carrier are inconsistent with law governing establishment and modification of tariff schedules. Kile & Morgan Co. v. Deepwater R. Co., 15 I. C. C. 235. During September and October, 1907, when shipments in question moved, regulations of commission did not require, as do present regulations in Rule 10 of Tariff Circular 15-A, that tariff naming local rates into reconsigning point must either specifically show reconsigning privilege and charge therefor or specifically refer to separate tariff in which privilege and charge are published. Therefore, held that complainant's demand for refund of reconsignment charge of $2 per car on shipments named in complaint, on ground that defendant's tariff naming local rates was defective in that respect, is without merits and must be dismissed. Kansas City Hay Co. v. St. Louis & S. F. R. Co., 14 I. C. C. 631. Holding, storing, unloading and reloading of Pacific coast shipments of shingles at Menasha subject to rebilling and reconsignment under proportional rate from Minnesota Transfer to Chicago was privilege and service that required publication in tariff in order to be lawful. Folmer & Co. v. Great Northern R. Co., 15 I. C. C. 33.

36. On complaint alleging improper assessment of charges on shipments of show cases from Quincy, Ill., to San Francisco, Cal., held that show cases are entitled to commodity rate on furniture under transcontinental tariff in effect at time of shipment. Frankel Display Fixture Co. v. Chicago, B. & Q. R. Co., 16 I. C. C. 341. Through rate regularly published between two points and available under tariff over several different routes is not nullified as to one such route by failure of participating carriers to agree upon divisions over that route. Germain Co. v. New Orleans & N. E. R. Co., 17 I. C. C. 22. Whatever may have

ment.[37] A rate once lawfully published continues to be the lawful rate until it has been practice in past of "meeting the rate," act, and decisions of commission interpreting its provisions, unmistakably lay down doctrine that tariffs must now be adhered to. Menefee Lumber Co. v. Texas & P. R. Co., 15 I. C. C. 49. Tariff fixing rate on ex-lake grain for export from Ogdensburg, N. Y., to Boston, Mass., having been legally established, it was duty of defendants to apply rate so published and in effect upon shipment made by complainant between those points, and if, as claimed by complainant, contract was made with defendants for lower charge upon that shipment, such contract was not binding, and its violation furnishes no ground for redress under act to regulate commerce. Ames Brooks Co. v. Rutland R. Co., 16 I. C. C. 479. Carrier's own published tariffs are measure of its obligations to shippers; it cannot be controlled by terms of separate tariffs of its connections. Under local any-quantity rate shipper has no right to demand car of given size; carrier may use any available equipment, notwithstanding fact that separate tariffs of connecting line provide minimum weight under carload rate, and initial carrier, in absence of definite agreement with shipper as to size of car to be used is not liable to shipper for increased rate charges imposed upon him by reason of fact that it delivers to connecting line in two cars shipment, moving under two local rates, weight of which comes within carload minimum weight provided in tariffs of connecting line. Falls & Co. v. Chicago, etc., R. Co., 15 I. C. C. 269. Complainants ordered cars of certain dimensions for shipments of cattle from South St. Paul, Minn., to Hammond, Ind. Initial carriers supplied cars of larger dimensions, but protected minimum weights of sizes ordered. At Hammond cattle were rebilled to Philadelphia, Pa., on separately established tariff, and payment of freight charges to Hammond was made to western lines. Lines east of Hammond declined to protect minimum weights, as provisions of their tariffs had not been complied with. Upon complaint asking for reparation, held that under circumstances complaint should be dismissed. Slimmer v. Pennsylvania Co., 16 I. C. C. 531. Privileges embodied in separate storage and reconsignment tariff issued by one carrier cannot be availed of, or applied to movements, under joint tariff to which that carrier and two others are named as parties, unless latter tariff by express reference to former so provides. Washington Broom & Woodenware Co. v. Chicago, etc., R. Co., 15 I. C. C. 219. Rates charged and collected must be in accordance with tariff legally effective whether same was issued in compliance with any private agreement with shipper or not. Hood v. Delaware & Hudson Co., 17 I. C. C. 15. Switching charges on two small cars, furnished by defendant for its convenience in lieu of one large car ordered by complainant, held not in accordance with defendant's tariff provision and reparation ordered. Milwaukee Falls Chair Co. v. Chicago, etc., R. Co., 16 I. C. C. 217. In pursuance of suggestion of commission in original proceeding herein, carriers arranged to incorporate certain provisions in their tariffs in regard to marine insurance on lakes. Complainants filed supplemental petition setting forth that under this arrangement they did not receive protection which had formerly been secured by their policies of insurance and asking that matter be further considered. For reasons stated in decision order will be made requiring carriers to cease and desist from tendering to shippers contract of shipment containing conditions opposed to their tariffs, and carriers will be required to tender bill of lading which is consonant with their tariffs in this respect. Carriers allowed until April 20, 1909, in which to modify their tariffs in accordance with the views expressed. Wyman, Partridge & Co. v. Boston & M. R., 15 I. C. C. 577. Reconsigning charge of $5 per car as applied on 4 carloads of lumber from Thornton, Ark., originally consigned to East St. Louis, and diverted to Granite City, Ill., also lawfulness of car service charge of $2 on carload of lumber from Atlanta, La., originally billed to East St. Louis and reconsigned to Granite City. Held that the reconsigning charge assessed on shipments from Thornton, Ark., was made in accordance with published tariffs, and no evidence having been offered or adduced to show that such charge is of itself unreasonable, complainant's claim for reparation is denied. Held further that exaction of the car service charge of $2 on the shipment from Atlanta, La., was unlawful and refund thereof ordered. Beekman Lumber Co. v. St. Louis S. W. R. Co., 14 I. C. C. 532. Complainant alleges that rate of 34½ cents per 100 pounds charged him by Chicago, Milwaukee & St. Paul Railway Company for the shipment of a mixed carload of cabbages, potatoes, and onions from Green Bay, Wis., to Poplar Bluff, Mo., is unreasonable and unjust to the extent that it exceeds 27 cents per 100 pounds. Only reason given for filing complaint and only evidence offered to sustain it was that complainant had previously been charged 27-cent rate for similar shipments by Chicago & North Western Railway Company. Inasmuch as published tariffs of carriers appear to show that at time shipment in question moved rate applicable was 35½ cents per 100 pounds and that no tariff by any route shows 27-cent rate on such commodities between points named, complaint is dismissed. Platten Produce Co. v. Chicago, etc., R. Co., 14 I. C. C. 512.

37. Date of original shipment determines rights, privileges, and obligations attaching to that shipment throughout its transportation. Interstate Remedy Co. v. American Exp. Co., 16 I. C. C. 436. Commission adheres to its former ruling in proceeding entitled In the Matter of Through Routes and Through Rates, 12 I. C. C. 163, that whenever by any transit arrangement through rates are applied, such through rates must be as of date of first movement of shipment from point of origin under such through rates. In re Milling-in-Transit Rates, 17 I. C. C. 113. Prior to May 20, 1908, defendant's tariffs provided certain charges for return shipment of C. O. D. packages of medicine; effective May 20, 1908, these tariff

been lawfuly canceled.[38] Tariffs are to be construed according to their language, and the intention of the framers and the practice of the carriers do not control,[39] but tariffs will not be construed so as to enable a shipper to ship his goods at a weight less than their actual weight,[40] and when the language of a tariff is ambiguous an agreement between the carrier and shipper may be looked to to explain the language, and remove the ambiguity.[41] A carrier is entitled to some compensation in addition to the actual cost involved in a reconsignment.[42] At common law a connecting carrier is not bound by the contract of carriage made by the initial carrier[43] and may charge its regular rate,[44] but under the statute of South Carolina it is otherwise.[45] In some states, a carrier demanding excessive rates is liable to a penalty.[46] A carrier may ordinarily demand its freight charges in advance,[47] but, where it undertakes the carriage without so doing, it must carry to destination.[48] At common law, a carrier could demand prepayment of one and extend credit to another.[49] Unreasonably discriminatory charges[50] are prohibited by

provisions were canceled and provision made for assessment of regular merchandise rates on such traffic. Held that as to shipments moving prior to May 20, 1908, and returning subsequent thereto, tariff provisions in effect prior to that date govern assessment of charges. Interstate Remedy Co. v. American Exp. Co., 16 I. C. C. 436.

38. Subsequent tariff naming other rates without canceling previous rates cannot carry new rates into lawful effect; and silence of subsequent tariff cannot be accepted as lawful cancellation of rates previously established. New Albany Box & Basket Co. v. Illinois Cent. R. Co., 16 I. C. C. 315.

39. Newton Gum Co. v. Chicago, B. & Q. R. Co., 16 I. C. C. 341. Commodity rates of Trans-Continental Freight Bureau tariffs are not to be construed as governed by western classification in absence of tariff provisions to that effect. Frankel Display Fixture Co. v. Chicago, B. & Q. R. Co., 16 I. C. C. 341.

40. Tariff provided estimated weights for cabbages when shipped in so-called standard crates theretofore in use in cabbage traffic, but it appears that during spring of 1908 shipments from Louisiana and Mississippi points to Chicago were made in crates of other dimensions. Held, upon special facts shown of record, that complainant is liable for, and defendant may lawfully collect, freight charges at published rate per 100 pounds on actual weight of such shipments as were received by complainant during period in question, estimated, as was done, by weighing number of crates in each shipment and thus ascertaining average weight per crate. Defendant criticised for not having revised its tariffs to conform to the changed conditions. Davies v. Illinois Cent. R. Co., 16 I. C. C. 376.

41. Hood v. Delaware & Hudson Co., 17 I. C. C. 15.

42. Where carrier delivered cars in transit to shipper's warehouse for unloading, inspection, and reloading for market, carrier was entitled to a reasonable profit besides the actual cost. Southern R. Co. v. St. Louis Hay & Grain Co., 29 S. Ct. 678, rvg. [C. C. A.] 153 F 728 and 149 F 609.

43. In absence of agency. Reynolds v. Seaboard Air Line R. Co., 81 S. C. 383, 62 SE 445.

44. If higher than contract rate, shipper's remedy is against initial carrier. Reynolds v. Seaboard Air Line R. Co., 81 S. C. 383, 62 SE 445.

45. Under 24 Stat., p. 1, making each carrier acting under a through contract of shipment agent of the others, such contract is binding. Reynolds v. Seaboard Air Line R. Co., 81 S. C. 383, 62 SE 445.

46. Under Rev. St. 1895, art. 4575, a shipper may sue a carrier for excessive freight charges and penalties, and is not, under Rev. St. 1895, art. 4568, obliged to first make complaint to railroad commission. Texas & N. O. R. Co. v. Sabine Tram Co. [Tex. Civ. App.] 121 SW 256. Under Rev. St. 1895, art. 4591, a shipper who has been compelled to pay excessive freight charges may recover penalty for each separate act of extortion as defined by art. 4573. Id. Such construction of Rev. St. 1895, art. 4591, does not render it violative of Const. art. § 13, nor violative of the fourteenth amendment to the federal constitution. Id. Under Rev. St. 1895, arts. 4573, 4575, where carrier has exacted excessive freight charges on 24 shipments on as many several days, each shipment constitutes a separate offense and shipper may recover penalty for each violation thereof. Id. A mistake of law is no defense in an action under Rev. St. 1895, art. 4575, imposing a penalty on railroads guilty of extortion. Id.

47. Plaintiff's subcontractors, engaged in grading defendant's road, shipped a carload of mules over defenant's road without payment of freight. Held that the fact that plaintiffs paid no freight to defendant was no defense to their claim for damages to their mules from negligent transportation. Gulf, etc., R. Co. v. Gillespie [Tex. Civ. App.] 118 SW 628.

48. Forwarder. Lee v. Fidelity Storage & Transfer Co., 51 Wash. 208, 98 P 658. Evidence held to make a question for the jury whether defendant so undertook. Id.

49. Gamble-Robinson Com. Co. v. Chicago & N. W. R. Co. [C. C. A.] 168 F 161. It is not an undue or unreasonable prejudice or disadvantage to require one shipper to pay freight charges in advance, though credit is given to another. Id. And motive is immaterial. Id.

50. Gamble-Robinson Com. Co. v. Chicago & N. W. R. Co. [C. C. A.] 168 F 161.

the Interstate Commerce Act and the statutes of most states.[51] It is not an unjust or illegal discrimination for a terminal carrier to maliciously refuse to advance charges of other carriers for particular consignee.[52] Where the carrier charges more than the established rate [53] or the same has been declared unreasonable by the commission,[54] an action to recover the excessive charge may be brought in the state court.[55] One, voluntarily [56] paying an excessive rate, has no remedy. In an action to recover excessive charges, plaintiff must aver facts showing same,[57] and, if the rate charged is one established under the Interstate Commerce Act, he must allege [58] and prove [59] that the commission has declared the same void. In Vermont, the "aggrieved party" [60] is expressly authorized to recover overcharges.

Demurrage charge is authorized by statute [61] in many states, but, independent thereof and of special contract, a reasonable [62] charge may be made for an unreasonable detention of cars [63] not due to the carrier's fault,[64] especially where the

51. Under Const. § 214, prohibiting preferential contracts for transportation of goods, and Ky. St. § 817 (Russell's St. § 5354), making it an offense to render services to one at a lesser rate than it charges another for the same service, a contract to carry for less than the regular rate is void as against public policy, though shipper did not know that he was getting a lesser rate. Chesapeake & O. R. Co. v. Maysville Brick Co. [Ky.] 116 SW 1183. Where express company delivered expressage to another carrier, which charged a delivery fee, held that company was not liable under railroad commission act, § 14 (Acts 1905, pp. 83, 96, c. 53), prohibiting discriminating charges, although it usually delivered direct and free of charge, since it did not charge such amount. State v. Adams Exp. Co. [Ind.] 87 NE 712.

52. Gamble-Robinson Com. Co. v. Chicago & N. W. R. Co. [C. C. A.] 168 F 161.

53. Carrier coerced shipper into paying a higher rate. Pine Tree Lumber Co. v. Chicago, etc., R. Co., 123 La. 583, 49 S 202.

54. Robinson v. Baltimore & O. R. Co., 64 W. Va. 406, 63 SE 323.

55. Where right to recover alleged excessive freight charges is based upon common-law principles and not upon Interstate Commerce Act, state courts have jurisdiction although shipment was interstate. Missouri, K. & T. R. Co. v. New Era Milling Co. [Kan.] 100 P 273.

56. Where shipper's agent at distant point paid charges as shown by bills without knowledge that they did not correspond to contract rate, such payment was not a "voluntary payment" so as to prevent recovery. Kansas City So. R. Co. v. Albers Com. Co. [Kan.] 99 P 819.

57. Allegation that plaintiffs were obliged to pay excessive and unlawful rates without allegation of facts. Meeker v. Lehigh Val. R. Co., 162 F 354. Where by contract carrier was to do certain switching to plaintiff's compress "charging therefor for switching service the same per car as obtains at Cordele, Americus and Albany, Ga.," mere allegation that the compresses at named points paid nothing for switching does not show that charges to plaintiff were excessive. Hawkinsville & F. S. R. Co. v. Livingston [Ga.] 63 SE 832.

58. Meeker v. Lehigh Val. R. Co., 162 F 354. Allegation that rates were "unlawful rates" is insufficient allegation that they have been so found by commission. Id.

59. Court cannot take judicial notice that Interstate Commerce Commission has adjudged particular rate unreasonable. Robinson v. Baltimore & O. R. Co., 64 W. Va. 406, 63 SE 323.

60. V. S. 3901, authorizing the "party aggrieved" to recover an overcharge, does not permit buyer to recover for overcharge paid by seller, though freight charge was included in selling price. State v. Central Vermont R. Co., 81 Vt. 459, 71 A 193. One suffering loss of 50 cents per ton by reason of the fact that he was charged 50 cents per ton more for transportation of coal than others is the "party aggrieved" within V. S. 3904, making carrier liable to party aggrieved for overcharges. State v. Central Vermont R. Co., 81 Vt. 463, 71 A 194.

61. Word "capacity," as used in Demurrage Act April 12, 1905 (Laws 1905, p. 110, § 5), giving shippers 48 hours for loading or unloading cars of less than 60,000 pounds capacity and 72 hours for cars of 60,000 or greater capacity, construed with maximum rate statute, and held to refer to load and not to estimated capacity of car (Darlington Lumber Co. v. Missouri Pac. R. Co., 216 Mo. 658, 116 SW 530), and especially since it would be unconstitutional as depriving carriers of use of cars if otherwise construed (Id.). Where consignee tenders amount of demurrage as required by state law and brings replevin, and answer alleges that such law interferes with interstate commerce but does not allege that amount tendered was not a reasonable amount, constitutionality of law need not be decided. Id.

62. General custom, expressed in rules which are or ought to be known to customers, is admissible on issue of reasonableness of charges for demurrage. Erie R. Co. v. Waite, 62 Misc. 372, 114 NYS 1115.

63. Erie R. Co. v. Waite, 62 Misc. 372, 114 NYS 1115. Where a connecting carrier claimed demurrage charges on automobile, it was entitled to have such claim submitted to the jury. St. Louis S. W. R. Co. v. Patton [Tex. Civ. App.] 118 SW 798. After allowing reasonable time for unloading cars, carrier may impose such charges for further detention as will lead to speedy release of its equipment. Wilson Produce Co. v. Pennsylvania R. Co., 16 I. C. C. 116.

carrier is liable to a per diem charge to the owners thereof.[65] Rules and regulations of the carrier in respect thereto are construed in favor of the shipper.[66] Likewise, in some states, a carrier is liable to a demurrage charge.[67] Where goods are not removed within a reasonable time, the carrier may charge storage although not placed within a building,[68] unless the failure to remove is due to the carrier's wrongful act.[69]

A carrier has a lien for freight and for storage charges where goods are not removed within a reasonable length of time,[70] but such lien is inferior to the rights of a conditional sale vendor who did not consent to the shipment.[71]

Part III. Carriage of Live Stock.

§ 15. *Duty to carry and contract of carriage generally.*[72]—See 11 C. L. 539— Under an act of congress the secretary of agriculture is authorized to make quarantine rules, and, when duly promulgated, carriers must comply therewith.[73]

§ 16. *Care required of carriers.*[74]—See 11 C. L. 539—Except as to injuries due to the inherent nature and propensities of the animals,[75] the carrier assumes the same liability as in the carriage of other goods,[76] which is ordinarily that of an insurer.[77]

64. Where carrier provides in its tariff for reconsignment without any requirement for repayment of freight or guaranty of same, it may not lawfully charge demurrage for time during which it holds shipment while parleying with its connections as to advancement of its freight charges. Beekman Lumber Co. v. St. Louis S. W. R. Co., 14 I. C. C. 532.

65. Erie R. Co. v. Waite, 62 Misc. 372, 114 NYS 1115.

66. Staten Island Rapid Transit R. Co. v. Marshall, 117 NYS 1034. Rule of carrier that demurrage would be charged at designated coal piers for detention of coal cars held not to authorize demurrage for detention at freight yard 12 miles distant. Id. Rule requiring payment of demurrage on cars where more than stated number of days elapse between the "date of arrival" of such car and "date of release" must be construed to mean date on which car actually arrived at destination, and not date on which consignee received notice thereof and day when car again becomes available for use by company. Central R. Co. v. Hite, 166 F 976. United States circuit court has jurisdiction to construe demurrage charge rule in first instance, although its reasonableness is for Interstate Commerce Commission. Id.

67. Authority given by Gen. St. 1906, § 2910, as amended by Acts 1907, p. 108, c. 5624, to railroad commissioners to sue to compel restitution and to enforce a penalty incurred for a wrong or injury inflicted on any person by carrier in disregard of any rule, rate, or regulation, is to enforce duties and obligations of a public nature (Railroad Com'rs v. Atlantic Coast Line R. Co. [Fla.] 47 S 870), and commissioners cannot maintain action to recover penalty incurred for violation of demurrage and delay rule, which is a mere money obligation (Id.).

68. Left on platform. Seaboard Air Line R. Co. v. Shackelford, 5 Ga. App. 395, 63 SE 252.

69. Where carrier wrongfully refuses to deliver goods, cannot charge for warehousing the same. Hockfield v. Southern R. Co., 150 N. C. 419, 64 SE 181.

70. Kawcabany v. Boston & M. R. Co., 199 Mass. 586, 85 NE 846; Seaboard Air Line R. Co. v. Shackelford, 5 Ga. App. 395, 63 SE 252. Consignee of goods cannot recover them in an action of bail trover, unless he has first tendered the freight or storage charges. Seaboard Air Line R. Co. v. Shackelford, 5 Ga. App. 395, 63 SE 252.

71. Corinth Engine & Boiler Works v. Mississippi Cent. R. Co. [Miss.] 49 S 261.

72. **Search Note:** See Carriers, Cent. Dig. §§ 129-239, 916-922, 927; Dec. Dig. §§ 203-213; 6 Cyc. 381, 387, 437-441; 5 A. & E. Enc. L. (2ed.) 430.

73. Indictment for violating rule of secretary of agriculture under Act Cong. Mar. 3, 1905, c. 1496, 33 Stat. 1264 (U. S. Comp. St. Supp. 1907, p. 925), respecting quarantine, must allege facts showing promulgation of rule as required by act, and allegation that rule was "duly and legally made and promulgated" is insufficient. United States v. Louisville & N. R. Co., 165 F 936.

74. **Search Note:** See notes in 14 L. R. A. 550; 44 Id. 289, 449; 10 L. R. A. (N. S.) 571, 576; 16 Id. 883; 63 A. S. R. 548.

See, also, Carriers, Cent. Dig. §§ 92, 929-931; Dec. Dig. §§ 214-217; 6 Cyc. 381; 5 A. & E. Enc. L. (2ed.) 436, 463.

75. Foust v. Lee [Mo. App.] 119 SW 505; Summerlin v. Seaboard Air Line R. Co. [Fla.] 47 S 557. Evidence held to show that injuries were due to natural propensities of horses in becoming frightened. Quinby v. Union Pac. R. Co., 83 Neb. 777, 120 NW 453.

76. Southern Exp. Co. v. Fox [Ky.] 115 SW 184. In absence of special contract, carrier accepting stock for shipment assumes common-law liability. Summerlin v. Seaboard Air Line R. Co. [Fla.] 47 S 557. See Part II, ante, for cases depending on general rules.

77. Louisville & N. R. Co. v. Pedigo [Ky.] 113 SW 116. Not liable for death of animal after delivery where death is not con-

Natural vices and propensities, however, do not relieve the carrier unless they are the sole proximate cause of the injury.[78] Carrier is liable for negligence[79] and, in some states, only for negligence,[80] and is not liable for the negligence of the shipper,[81] but mere knowledge by the owner of the carrier's neglect does not relieve the latter.[82] The carrier must furnish a reasonably safe car for the carriage of stock,[83] and upon request must designate the same,[84] and where it designates the wrong car and compels removal,[85] it is liable for such damages as naturally follow.[86] Likewise, it must furnish reasonably safe pens for the reception of stock.[87] If the shipper loads without inquiring, he assumes the risk.[88] By special contract, a carrier may reasonably limit its liability,[89] but where a shipper who has contracted to care for the stock becomes separated therefrom, the carrier must take charge thereof.[90] Where live stock is delivered to a carrier for transportation, its liability commences when the stock is delivered to it at its pens or warehouse for shipment.[91] The carrier must furnish a shipper who accompanies and agrees to care for stock reasonable opportunities and facilities for taking care of the same.[92]

nected with any disease or injury contracted or received in transit. McDowell v. Louisville & N. R. Co. [Ky.] 113 SW 519.

78. Must affirmatively appear that it was sole proximate cause. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 117 SW 459.

79. Evidence that in switching car was "kicked" so hard as to knock it several feet and to throw man from box held to sustain finding that horses were injured by negligent switching. Louisville & N. R. Co. v. Pedigo [Ky.] 113 SW 116. Where jack in crate became frightened and threw himself, it was carrier's duty to use ordinary care to protect the animal from further injury. Kelly v. Adams Exp. Co. [Ky.] 119 SW 747.

80. St. Louis S. W. R. Co. v. Lewellen Bros. [Tex. Civ. App.] 116 SW 116. Carrier is not absolutely required to deliver in good condition, but its duty is to use ordinary care and diligence. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 114 SW 413. Where owner accompanies live stock, carrier is not liable for loss due to excessive heat in absence of negligence. Cleve v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 959.

81. Where care taker left horses loaded but waiting on sidetrack, without notice to carrier, latter is not liable for injuries which might have been prevented by his presence. Quinby v. Union Pac. R. Co., 83 Neb. 777, 120 NW 453.

82. Where a carrier by its contract undertakes to use ordinary care in transporting an animal, the fact that the owner is present and knows of the carrier's failure to comply with its contract does not distract from the carrier's liability, so long as the owner's conduct does not amount to an estoppel. Kelly v. Adams Exp. Co. [Ky.] 119 SW 747.

83. Duty to furnish cars suitable to transport stock imposes duty on carrier to bed the car where necessary to render it reasonably safe. Allen v. Chicago, B. & Q. R. Co., 82 Neb. 726, 118 NW 655. Where car stall was reasonably safe for transportation of horses, carrier is not liable for injuries caused by horse kicking same loose during its fright. Southern Exp. Co. v. Fox [Ky.] 115 SW 184.

84. Exercise of reasonable care is not sufficient. Weisinger v. Southern R. Co., 33 Ky. L. R. 1038, 112 SW 660.

85. In action for death of hog alleged to have died as result of removal from car into which it was loaded through misdirection of carrier, court should have instructed that carrier was not liable if hog would have died anyway, or if carrier offered to permit it to remain until it could be safely removed, or if death resulted from carelessness in removing. Weisinger v. Southern R. Co., 33 Ky. L. R. 1038, 112 SW 660.

86. Weisinger v. Southern R. Co., 33 Ky. L. R. 1038, 112 SW 660.

87. Shipper has right to rely on pen being sufficient. Fact that shipper who was unloading stock was intoxicated and did not notice the open gates is no defense. El Paso & N. E. R. Co. v. Lumbley [Tex. Civ. App.] 120 SW 1050. Evidence held sufficient to show that cattle were infected with disease while in the pens of the carrier. International & G. N. R. Co. v. McCullough [Tex. Civ. App.] 118 SW 558.

88. Weisinger v. Southern R. Co., 33 Ky. L. R. 1038, 112 SW 660.

89. See ante, § 11.

90. Where shipper became separated from car at divisional point, and upon arrival of car at destination five mules were found dead, the question of carrier's negligence and shipper's contributory negligence were for the jury. Stewart v. Baltimore & O. R. Co., 37 Pa. Super. Ct. 273.

91. Louisville & N. R. Co. v. Stiles [Ky.] 119 SW 786. Where carrier failed to have cars at station at time cattle reached same, and without fault of shipper they were detained in pens without food or water, the liability of carrier being contractual, the fact that it was not negligent would not relieve it of liability for injuries to stock. Texas & P. R. Co. v. Moore [Tex. Civ. App.] 119 SW 697.

92. Where a shipper accompanied shipment of stock and agreed to water and feed same, the carrier was not absolved from responsibility, it not having furnished the shipper ways and means to water and feed stock. Missouri & N. A. R. Co. v. Pullen [Ark.] 118 SW 702.

Under the federal statute a carrier,[93] knowingly and willfully[94] confining stock without unloading for rest, feeding, and watering, unless prevented by storms, accident, or other unavoidable cause,[95] for more than twenty-eight hours, is liable to a penalty.[96] The period may be extended with the consent of the shipper,[97] and sheep need not be unloaded in the nighttime, provided the period is not thereby extended beyond thirty-six hours.[98] In the absence of custom it is the duty of the carrier last receiving shipment during the period to comply with the statute,[99] but where the period has already expired, a connecting carrier is not liable unless it confines for another period.[1] In the absence of statute, the carrier must not negligently confine stock,[2] and must provide adequate facilities for feeding and watering,[3] even though the shipper has undertaken to feed and water.[4] Where the shipper fails to provide food as agreed [5] or where the carrier subsequently undertakes

93. Stockyard company, authorized to construct and operate a railroad, which has constructed seven miles of line connecting with railroads and upon which it operated engines to haul cars received from other roads, held a railroad. United States v. Sioux City Stock Yards Co., 162 F 556.

94. St. Louis & S. F. R. Co. v. U. S. [C. C. A.] 169 F 69. Word "willfully" does not imply a vicious or evil intent (United States v. Atchison, etc., R. Co., 166 F 160; United States v. Union Pac. R. Co. [C. C. A.] 169 F 65), but means purposely or obstinately, where there is a freedom of choice (St. Louis & S. F. R. Co. v. U. S. [C. C. A.] 169 F 69). Words "knowingly and willfully" do not require an evil intent, but only that defendant should have failed to obey purposely and with knowledge of facts. New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 165 F 833; United States v. Sioux City Stock Yards Co., 162 F 556. Where carrier unloads at very first opportunity, there is not "willful" confinement of stock within statute. Id. Word "knowingly" means with a knowledge of the facts which taken together constitute a failure to comply. St. Louis & S. F. R. Co. v. U. S. [C. C. A.] 169 F 69. No defense that such confinement was due to "oversight, forgetfulness, and unintentional neglect" of train dispatcher contrary to rules and orders. Montana Cent. R. Co. v. U. S. [C. C. A.] 164 F 400.

95. Failure to provide unloading station, congestion of traffic to be reasonably expected and breakdowns due to negligence are not accidental and avoidable cause. United States v. Atchison, etc., R. Co., 166 F 160. Great and unusual press of business does not, unexplained and of itself, excuse confinement beyond period. United States v. Union Pac. R. Co. [C. C. A.] 169 F 65.

96. Instruction for defendant held properly refused where, notwithstanding jury found in defendant's favor upon all the recitals and conditions therein, they might still find that defendant "willfully and knowingly" failed to comply with food and rest law. Houston & T. C. R. Co. v. U. S. [C. C. A.] 168 F 895.

97. Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918) providing that shipper may extend time of confinement of animals in transit from 28 to 36 hours is not unconstitutional as a delegation of legislative power to shipper. United States v. Oregon R. & Nav. Co., 163 F 640.

98. Provision "that it shall not be required to unload sheep in nighttime, but, where time expires in nighttime, in case of sheep, same may be continued in transit to a suitable place for unloading, subject to aforesaid limitation of 36 hours," does not excuse unloading within 28 hours unless it expires in nighttime and, in any event, beyond 36 hours. United States v. Atchison, etc., R. Co., 166 F 160.

99. Wisecarver v. Chicago, etc., R. Co. [Iowa] 119 NW 532. But if, by custom, that duty is undertaken by the initial carrier before delivery to the next succeeding carrier, and it fails to perform that duty, it is liable for any resulting loss. Id.

1. United States v. Sioux City Stock Yards Co., 162 F 556.

2. Confinement of horses for 45 hours without food or water held negligence without regard to statute. Pierson v. Northern Pac. R. Co. [Wash.] 100 P 999.

3. Must stop at point where there are reasonable facilities for obtaining food and water (Groot v. Oregon Short Line R. Co., 34 Utah, 152, 96 P 1019), notwithstanding shipper has agreed to pay therefor (Id.). Where shipment is unavoidably delayed, it is duty of carrier to exercise reasonable efforts to carry to some point where there are reasonable facilities for obtaining food and water. Id. At common law, it was the duty of carriers of stock for long distances to feed, water, and rest them as reasonable necessity required. Louisville & N. R. Co. v. Stiles [Ky.] 119 SW 786. Evidence held not to show that finding of jury that plaintiff was not guilty of negligence, in failing to feed and water stock while they were detained in pens waiting for cars, was without evidence to support it. Texas & P. R. Co. v. Moore [Tex. Civ. App.] 119 SW 697.

4. Shipper's undertaking to feed and water is reasonable only so long as carrier furnishes adequate facilities, and, when it fails to furnish same, it must feed and water. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767. Where carrier fails to furnish adequate facilities for feeding and watering stock, shipper, who has agreed to feed and water, need not procure same elsewhere. Id.

5. Groot v. Oregon Short Line R. Co., 34 Utah, 152, 96 P 1019.

to do so,[6] it must provide the same. Where the carrier has agreed to unload upon request, the request must be made as stipulated, unless waived.[7] Failure to comply with the statute or a negligent failure to unload for rest, feeding, and watering, renders carrier liable for resulting injuries.[8] The liability of the carrier for negligence extends to a time when the cattle are in pens for feeding pursuant to the statute.[9]

The action for recovery of penalty must be brought in the proper court.[10] As relates to procedure, the action is civil, and not criminal,[11] and, hence, the general rules applicable to civil pleading apply.[12] Exceptions excusing compliance with the statute are defensive matter.[13] The shipment, and not the car or train load, is the integer for imposition of penalty.[14]

§ 17. *Delivery.*[15]

§ 18. *Liability of carrier or connecting carrier.*[16]

§ 19. *Limitation of liability.*[17]

§ 20. *Procedure in action relating to carriage of stock.*[18]—See 11 C. L. 541—All matters not peculiar to the character of the shipment are elsewhere treated.[16] The proceeding under the Act of Congress June 29th, 1906, regulating transportation of live stock is a civil action,[20] and it is the duty of the court thereunder to fix the penalty between the statutory limits.[21]

§ 21. *Damages.*[22]

Part IV. Carriage of Passengers.

§ 22. *Who are passengers.*[23]—See 11 C. L. 541—The relation of carrier and passenger is contractual,[24] and hence there must be both [25] an offer [26] and an accept-

6. Where agent at intermediate stop agreed to water and feed horses and accepted compensation therefor, carrier is liable for failure to do so, notwithstanding original contract required shipper to feed and water. Gilbert v. Chicago, etc., R. Co., 132 Mo. App. 697, 112 SW 1002.

7. Where carrier refused to unload upon oral request of shipper on the ground that freight was not paid, it waived the objection that the contract required request to be in writing. St. Louis & S. F. R. Co. v. Copeland [Okl.] 102 P 104.

8. Evidence held sufficient to show that injury was caused or contributed to by failure of carrier to feed as required by federal statute. Baltimore, etc., R. Co. v. Wood & Co. [Ky.] 114 SW 734.

9. Where pursuant to federal statute, carrier unloaded stock for purpose of feeding, watering, and resting them, and yards were burned through no negligence of carrier, the carrier was not thereby relieved of its common-law liability, but was liable for loss. Louisville & N. R. Co. v. Stiles [Ky.] 119 SW 786.

10. Neither § 2, art. 3, U. S. Const. nor 6th amendment thereto requires action to recover penalty for violation of the act occurring out of the limits of the state, to be brought in district wherein violation occurred, but it may be brought in the district wherein defendant resides or carries on business, as provided in § 4 of the act. St. Louis & S. F. R. Co. v. U. S. [C. C. A.] 169 F 69.

11. Montana Cent. R. Co. v. U. S. [C. C. A.] 164 F 400. As relates to pleading and proof. New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 165 F 833. Reviewable by a writ of error. United States v. New York, etc., R. Co. [C. C. A.] 168 F 699.

12. Declaration for violation of 28-hour law, which describes defendant as lessee of road and otherwise follows statute, is sufficient after verdict, although it does not specifically allege that defendant was operating same. New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 165 F 833.

13. Negative need not be pleaded and proven by plaintiff. New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 165 F 833.

14. United States v. Oregon R. & Nav. Co., 163 F 642; United States v. New York, etc., R. Co. [C. C. A.] 168 F 699; New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 165 F 833; United States v. Atchison, etc., R. Co., 166 F 160.

15. See ante, § 9.

16. See ante, §§ 3, 8.

17. See ante, § 11.

18. **Search Note:** See Carriers, Cent. Dig. §§ 932, 952-962; Dec. Dig. §§ 221-228, 230, 231; 6 Cyc. 508, 524.

19. See ante, § 13.

20. Proceeding under Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), regulating transportation of live stock and imposing a penalty to be recovered in "civil actions" in name of the United States, is a civil action and case need be established only by a preponderance of evidence. United States v. Southern Pac. R. Co., 162 F 412.

21. United States v. Southern Pac. R. Co., 162 F 412.

22. See ante, § 13. Also topic Damages, § 4F.

23. **Search Note:** See notes in 3 C. L. 617; 5 Id. 529; 15 L. R. A. 399; 19 Id. 339; 24 Id.

ance [27] as a passenger.[28] While a contract will be implied from the receiving of one for carriage,[29] one boarding without invitation,[30] or after he has been ejected,[31] does not ordinarily become a passenger, and one who enters a passenger elevator after he has been forbidden by the owner,[32] or without legitimate business in the building,[33] is not a passenger. An invitation must come from one having authority to issue the same.[34] While payment of fare is not essential,[35] the party must intend to pay [36] upon demand and have ability to do so.[37] Railroad postal clerks while

521; 31 Id. 321; 46 Id. 56; 2 L. R. A. (N. S.) 873; 3 Id. 588; 5 Id. 1025; 6 Id. 1146; 15 Id. 960; 61 A. S. R. 75; 1 Ann. Cas. 451, 605; 4 Id. 1131; 5 Id. 72; 6 Id. 669, 799, 863; 7 Id. 528, 587; 8 Id. 89; 9 Id. 488, 540, 963, 1104; 10 Id. 161, 870.

See, also, Carriers, Cent. Dig. §§ 973-993, 1076, 1109, 1115, 1116, 1284; Dec. Dig. §§ 238-247; 6 Cyc. 536, 537, 540-543; 5 A. & E. Enc. L. (2ed.) 486.

24. Canaday v. United R. Co., 134 Mo. App. 282, 114 SW 88.

25. Where plaintiff desiring to become a passenger signaled street car and motorman inclined his head in response, and on car stopping plaintiff boarded same, held that he was a passenger. Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 NE 934. Stopping of electric car at place where passengers are customarily received and opening of gates is an invitation for persons desiring to travel by such car to board, and one so doing in good faith becomes a passenger. Petersen v. Elgin, A. & S. Trac. Co., 238 Ill. 403, 87 NE 345.

26. Where car is stopped so as to indicate that it is ready to receive passengers, an invitation is issued. Robinson v. Helena L. & R. Co., 38 Mont. 222, 99 P 837. Evidence held to authorize submission of question whether car stopped to receive passengers. Blue Ridge L. & P. Co. v. Price, 108 Va. 652, 62 SE 938.

27. Where conductor on street car saw plaintiff approach and board car and made no objection, verbally or by gesture, held to show acceptance. Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 NE 934. One attempting to board car at point where passengers are not received, without knowledge of parties in charge thereof, is not a passenger. Robinson v. Helena L. & R. Co., 38 Mont. 222, 99 P 837. Instructions held to fully and explicitly submit question of acceptance of plaintiff as a passenger. Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 NE 934.

28. One who boards the car of one carrier thinking that he is boarding the car of another carrier is not received by the former carrier as a passenger and is not under its control and entitled to its care as a passenger. Metropolitan West Side El. R. Co. v. Sutherland, 139 Ill. App. 85. Whether plaintiff was lawfully on passenger elevator and had become a passenger at time of injury held question for jury. Stelskal v. Marshall Field & Co., 142 Ill. App. 154.

29. Petersen v. Elgin, A. & S. Trac. Co., 142 Ill. App. 34.

30. Where car was forced to stop at unusual place because of exigencies of city traffic, and plaintiff attempted to board without knowledge on part of defendant or servants, he was not a passenger and defendant was not liable for his injuries Blair v. Philadelphia Rapid Transit Co., 36 Pa. Super. Ct. 319.

31. Instruction that such person as matter of law is a trespasser if he was guilty of improper conduct, approved. Colbeck v. Sampsell, 140 Ill. App. 566.

32. Whether plaintiff had been previously forbidden to ride on elevator. Ferguson v. Truax, 136 Wis. 637, 118 NW 251.

33. Whether plaintiff who was injured on passenger elevator was on his way to visit a doctor. Ferguson v. Truax, 136 Wis. 637, 118 NW 251.

34. Invitation of employe not connected with running of train does not create relation of passenger. Thompson v. Nashville, etc., R. Co. [Ala.] 49 S 340. Where one who desired to take passage on freight train delayed boarding until train was about to start, when, fearing that he would not have time to reach caboose, accepted invitation of engineer to board engine, held not a passenger. Fischer v. Columbia & P. S. R. Co. [Wash.] 100 P 1005. Whether agent of another road who sold ticket as initial carrier, which was to some extent recognized by defendant, had authority to sell for defendant, held for jury. Alabama City G. & A. R. Co. v. Brady [Ala.] 49 S 351.

35. One ready and willing to pay his fare upon request is a passenger. Petersen v. Elgin, A. & S. Trac. Co., 142 Ill. App. 34. Such contract may be implied from circumstances. Barnes v. Danville St. R. & L. Co., 143 Ill. App. 259.

36. One who boards car with no intention of paying fare and who refuses to do so on demand is not a passenger. Garrett v. St. Louis Transit Co., 219 Mo. 65, 118 SW 68. Evidence held to support finding that he boarded car in good faith to become a passenger and intended to pay fare, but that there was no opportunity to do so in absence of conductor. Indiana Union Trac. Co. v. Smalley [Ind. App.] 88 NE 867. Instruction on character as passenger that if plaintiff entered car with intention of becoming a passenger, and was willing and able to pay usual fare, he was entitled to rights of a passenger, etc., held not to ignore factor of good faith. Id. Evidence held to show that one on train who was killed before paying fare intended to become passenger. St. Louis, etc., R. Co v Pate [Ark.] 118 SW 260.

37. Where passenger continues on train beyond destination for which he paid fare whether he continues a passenger or becomes a trespasser depends upon his ability and intention as to paying additional fare. Southern R. Co. v. Skinner [Ga.] 65 SE 134. Where passenger refuses to pay fare except an invalid transfer, no contract of carriage exists, and no recovery

being carried under arrangement with the government for transportation are usually regarded as passengers,[38] provided they are riding in the line of their duties.[39] While there seems to be a conflict of authority as to whether an employe riding to and from his work with the consent of his employer and without the payment of fare is a passenger,[40] he is usually so regarded where the transportation is given as a part of his compensation.[41] One employed by express company to assist in loading and unloading expressage from the cars is not a passenger while walking in the yards.[42]

*Trains other than passenger trains.*See 11 C. L. 542—Carriers may exclude passengers from freight trains,[43] and a brakeman has no authority to bind the carrier in violation of established and enforced rules to the contrary.[44] Where one is conditionally accepted, he must comply therewith,[45] and must ride in the proper place.[46] Permission to ride on freight trains given without consideration may be revoked at any time that the holder is not an actual passenger thereunder.[47]

*The relation begins.*See 11 C. L. 543—Since the relation is established by contract, it begins upon the acceptance of the offer,[48] and, ordinarily, one who goes to the station a reasonable time before the departure of the train on which he intends to take passage, and makes his intention known, is a passenger.[49] Certainly one who,

can be had for ejection. Berkelhamer v. Joline, 113 NYS 921.

38. Hoskins v. Northern Pac. R. Co. [Mont.] 102 P 988.

39. Where he is off duty, he must show that carrier owed contractual or statutory duty to carry him at such time, or that carrier recognized the request for transportation embodied in a photograph commission, relating to transportation while off duty. Hoskens v. Northern Pac. R. Co. [Mont.] 102 P 988.

40. One riding with H on pass issued to H and reciting "Pass H and five men, bonders," held a passenger without regard to H's authority to hire him at so much per day and transportation. Harris v. Puget Sound Elec. R. Co. [Wash.] 100 P 841. Where railroad company verbally consents for quarry company to operate cars on its tracks, and later transports employes to and from work, employe being so transported and not connected with operation of train is a passenger of railroad company. Gregory v. Georgia Granite R. Co. [Ga.] 64 SE 686. Where brakeman on construction train working some distance from home is given a free pass to go home Saturday night and back to work Sunday, it will be presumed that he uses same as employe. Vroom v. New York Cent. & H. R. R. Co., 129 App. Div. 858, 115 NYS 1063. Plaintiff was employed by residents of a borough as a special police officer, and also helped to preserve order on street cars when requested, for which he received small pay and free transportation. He was asked to board car on outward trip, and on return trip was injured. Held for jury whether he was riding as a passenger or as employe. Goehring v. Beaver Val. Trac. Co. [Pa.] 72 A 259.

41. Harris v. Puget Sound Elec. R. Co., [Wash.] 100 P 838. Pass to foreman of bonder crew reciting, "Pass H and five men, bonders," held sufficient to take case to jury on question of foreman's authority to agree with plaintiff to pass him as a part of his wages as a bonder. Harris v. Puget Sound Elec. R. Co. [Wash.] 100 P 841. Evidence held to warrant finding that pass was given employe as part of his compensation. Harris v. Puget Sound Elec. R. Co. [Wash.] 100 P 838.

42. Piper v. Boston & M. R. Co. [N. H.] 72 A 1024.

43. Unscheduled extra freight. Reed v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 442.

44. Goodney v. International & G. N. R. Co. [Tex. Civ. App.] 113 SW 171.

45. Where one was permitted to ride in stock car with stock on his promise to procure ticket at next division point and he failed to do so, he is not entitled to continue, though he owns some of the stock. Texas & P. R. Co. v. Diefenbach [C. C. A.] 167 F 39.

46. Where after accident conductor permitted plaintiff to ride in car with shipment, together with evidence that brakeman knew he was therein when car was switched into train, held to make question for jury as to plaintiff's right to ride therein in absence of proof of actual contract. Leasum v. Green Bay & W. R. Co., 138 Wis. 593, 120 NW 510.

47. Reed v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 442.

48. Rules applicable to acceptance of passengers at railroad stations are inapplicable to street railways having no regular stopping places. Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 NE 934. Where car stops or almost stops at place where passengers are usually received, and one attempts to board, held for jury whether he became passenger. Marshall v. Boston El. R. Co. [Mass.] 88 NE 1094. Where one stands at usual place for receiving passengers and signals car to stop and it was practically stopped in obedience thereto, relation is established. Nilson v. Oakland Trac. Co. [Cal. App.] 101 P 413.

49. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 121 NW 676. One in waiting room waiting for his train held a passenger. Philadelphia, B. & W. R. Co. v. Green, 110 Md. 32, 71 A 986. One who has purchased

contemplating taking passage, boards a car which has stopped for the purpose of taking on passengers, is a passenger.[50] One allowed through courtesy to remain in a Pullman car until hers is attached is not yet a passenger thereof.[51]

Cessation or interruption of relation. See 11 C. L. 543—A passenger leaving the premises of the carrier usually ceases to be a passenger;[52] but one leaving the train or car with permission of the carrier,[53] or for a proper purpose,[54] is still a passenger. A through passenger remains such while awaiting connections at junctions.[55] The relation continues in the case of a steam railway until the passenger has left the premises,[56] or has a reasonable time to do so. When the relation ceases in alighting from a street car depends upon circumstances.[57]

§ 23. *Duty to receive and carry passengers.*[58] See 11 C. L. 544—Generally it is the duty of a carrier to receive and carry to destination[59] all who desire transportation, but it may reject one afflicted with a serious contagious disease.[60] Misconduct of passenger on a prior trip is not ordinarily a sufficient ground for refusing to accept.[61]

Through trains. See 11 C. L. 544—Where a carrier furnishes ample local service,[62] it may operate through trains, and it is the duty of a passenger boarding a train to

a ticket. Keifner v. Pittsburg, etc., R. Co. [Pa.] 72 A 253.

50. Scott v. Metropolitan St. R. Co. [Mo. App.] 120 SW 131.

51. Cincinnati, etc., R. Co. v. Raine [Ky.] 113 SW 495.

52. Du Bose v. Atlantic Coast Line R. Co., 81 S. C. 271, 62 SE 255. Evidence that plaintiff after becoming a passenger left depot to secure bundle off premises and was injured while attempting to board train from side opposite depot held to authorize instruction on losing right as passenger by leaving premises. Id.

53. Within scope of conductor to grant permission to passenger to temporarily leave car at place where passengers are not customarily discharged and received. Birmingham R., L. & P. Co. v. Jung [Ala.] 49 S 434.

54. Person momentarily stepping off street car to permit some passengers to alight does not cease to be a passenger. Tompkins v. Boston El. R. Co., 201 Mass. 114, 87 NE 488. Passenger who alights at intermediate station to exercise, intending to continue his journey, continues to be a passenger. Gannon v. Chicago, etc., R. Co. [Iowa] 117 NW 966. He may at regular stopping places leave the train for refreshments, exercise, etc., and when a station is announced in such a way that would amount to an invitation to other passengers bound for that station to alight, he too may accept the invitation and rely upon implied assurance of safety. St. Louis, etc., R. Co. v. Glossup [Ark.] 114 SW 247.

55. St. Louis S. W. R. Co. v. Foster [Tex. Civ. App.] 112 SW 797. Passenger alighting to transfer to another car of defendant who was injured while passing around rear of car from which he alighted held a passenger at time of injury. Whilt v. Public Service Corp., 76 N. J. Law, 729, 72 A 420.

56. Hall v. Bessemer & Lake Erie R. Co., 36 Pa. Super. Ct. 556.

57. Duty to street car passenger does not cease the moment she reaches the street but continues until she has had a reasonable opportunity to receive infant child from fellow passenger who is handing same to her. Catterson v. Brooklyn Heights R. Co., 132 App. Div. 399, 116 NYS 760. Evidence sufficient to show that plaintiff had not safely alighted from car before she was injured. Farrington v. Boston El. R. Co., 202 Mass. 315, 88 NE 578.

58. Search Note: See notes in 3 C. L. 620, 622, 623; 5 Id. 531; 7 Id. 561; 4 L. R. A. 103; 107 A. S. R. 298; 3 Ann. Cas. 1080; 5 Id. 43; 6 Id. 23, 1033; 7 Id. 720; 8 Id. 221; 11 Id. 973.

See, also, Carriers, Cent. Dig. §§ 968-972, 994-996, 1035-1084, 1409-1501; Dec. Dig. §§ 236, 248, 262-279, 350-386; 6 Cyc. 535, 536, 545, 546, 549-569; 581-590; 5 A. & E. Enc. L. (2ed.) 536.

59. Evidence that plaintiff's wife was required to leave Pullman sleeper before reaching destination held to authorize verdict for plaintiff. Pullman Co. v. Cox [Tex. Civ. App.] 120 SW 1058.

60. Where plaintiff was ejected as affected with a **contagious disease,** defendant could not rely on its steamship doctor, if he was in fact mistaken. Mountford v. Cunard S. S. Co., 202 Mass. 345, 88 NE 782. Where plaintiff's ejectment was justified on the ground that she was afflicted with trachoma, evidence of husband and other witnesses that their intimate relations with her were not followed by any trouble with the eyes held admissible on issue whether she was so afflicted (Id.), but evidence that she was examined by defendant's doctors when she went to Liverpool early in 1904 and that she sailed from Liverpool in August of that year on vessel of another line held immaterial (Id.).

61. Meisner v. Detroit, etc., Ferry Co., 154 Mich. 545, 15 Det. Leg. N. 826, 118 NW 14.

62. As against limited contract, carrier cannot refuse to stop all of its trains at station to which it sold transportation. Dillman v. Chicago, I. & L. R. Co. [Ind. App.] 88 NE 873.

ascertain whether it stops at his destination.[63] Where the carrier has specially contracted,[64] it must stop,[65] and failure to do so is negligence.[66]

*Ejection of passenger.*See 11 C. L. 544—A carrier may lawfully eject one not entitled to ride,[67] and, hence, no liability is incurred in ejecting one who refuses to pay fare [68] or fails to produce proper evidence of having paid it,[69] although a carrier must give a passenger reasonable opportunity to produce.[70] The ticket is not conclusive in Arkansas as between the conductor and passenger,[71] although it is in some states.[72] A through passenger while waiting at junction has a right to use the waiting room,[73] and, if he is compelled to leave the same,[74] his ejection is as wrongful

63. Black v. Atlantic Coast Line R. Co., 82 S. C. 478, 64 SE 418; Dillman v. Chicago, I. & L. R. Co. [Ind. App.] 88 NE 873.

64. Where carrier sells commutation ticket which states that it is not good on specifically enumerated trains, including all but one, it constitutes special contract to carry on such train. Dillman v. Chicago, I. & L. R. Co. [Ind. App.] 88 NE 873.

65. Dillman v. Chicago, I. & L. R. Co. [Ind. App.] 88 NE 873.

66. Failure to stop at flag station for which passenger has ticket is evidence of negligence. Davis v. Atlanta & C. Air Line R. Co. [S. C.] 64 SE 1015.

67. Where one entitled to ride on stock car was finally permitted to take two assistants onto car without transportation contracts or his promise to procure tickets for them at the next station, such assistants were not entitled to continue after passing such station, though they were all asleep when they passed the station. Texas & P. R. Co. v. Diefenbach [C. C. A.] 167 F 39. Where one entitled to ride in stock car permitted others not so entitled to get in and thereafter closed door and knowingly refused to unfasten same on request of conductor so that he could examine ticket and see who were in car, he forfeited his right of transportation, and instruction requiring a conspiracy between all is too restrictive. Id. Conductor kept out of money tender on train the regular rate for cash fares, which was higher than ticket fare, and passenger objected saying that unless excess was returned he would ride to point beyond destination, to which conductor did not reply. Held that silence was not an agreement to so carry. Allison v. Georgia Railroad & Banking Co. [Ga.] 65 SE 85.

68. Braly v. Fresno City R. Co., 9 Cal. App. 417, 99 P 400; Allison v. Georgia Railroad & Banking Co. [Ga.] 65 SE 85; Bolles v. Kansas City So. R. Co., 134 Mo. App. 696, 115 SW 459; Texas & P. R. Co. v. Diefenbach [C. C. A.] 167 F 39. Baggage check is insufficient evidence of right to transportation, though baggage is only checked upon presentation of ticket. Bolles v. Kansas City So. R. Co., 134 Mo. App. 696, 115 SW 459. Street car passengers must procure transfers as evidence of payment of fares, and conductor need not accept statement that fare was paid on another car. People v. Detroit United R. Co., 154 Mich. 514, 15 Det. Leg. N. 820, 118 NW 9. Evidence held to show that plaintiff's refusal to give ticket or pay fare and his abusive language justified ejection. Watson v. Southern R. Co. [Ga.] 64 SE 549. Where plaintiff was being carried out of car by carrier's servants and there was evidence that while having money in his hand he said "Here, I will pay you," and reached out the money, there was no error in submitting question whether plaintiff made tender of fare. Louisville & N. R. Co. v. Cottongim [Ky.] 119 SW 751. Where passenger who had mislaid ticket handed conductor $10 with directions not to take fare out of it, it was not payment of fare but was a fact to be properly considered by the jury in determining whether request for time to find ticket was reasonable and made in good faith. Anderson v. Louisville & N. R. Co. [Ky.] 120 SW 298.

69. Rule requiring passenger to produce ticket or pay fare is reasonable. Bolles v. Kansas City So. R. Co., 134 Mo. App. 696, 115 SW 459. It is the duty of a passenger when approached by a conductor to either deliver his ticket or pay his fare. Anderson v. Louisville & N. R. Co. [Ky.] 120 SW 298. If a passenger refuses to deliver his ticket or pay his fare, the conductor is justified in putting him off the train, without insulting him or using more force than is necessary. Id.

70. To find ticket. Bolles v. Kansas City So. R. Co., 134 Mo. App. 696, 115 SW 459; Anderson v. Louisville & N. R. Co. [Ky.] 120 SW 298.

71. St. Louis, etc., R. Co. v. Baty [Ark.] 114 SW 218. Evidence held to warrant finding that agent negligently punched ticket as for female passenger. St. Louis, etc., R. Co. v. Batty [Ark.] 114 SW 218.

72. Where it was claimed that passenger's ticket was for the wrong station because of agent's negligence, it was not the duty of the conductor to correct the error, if any, nor to assist passenger to get ticket to right station. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118.

73. St. Louis S. W. R. Co. v. Foster [Tex. Civ. App.] 112 SW 797. Right is not affected by proximity of places where he could secure accommodations. Id.

74. Where passenger is commanded to leave waiting room, that he is given alternative of being locked in does not make his going pursuant to the demand any less an ejection. St. Louis S. W. R. Co. v. Foster [Tex. Civ. App.] 112 SW 797. Where there was evidence that depot agent ordered plaintiff and his wife out of depot in rough, loud, and harsh manner and directed marshal to take charge of them, instruction not to find for plaintiff, unless agent wantonly and maliciously threatened to eject plaintiff and his wife, held favorable to defendant. Texas Midland R. Co. v. Geraldon [Tex. Civ. App.] 117 SW 1004.

as if ejected from a train.[75] Although an ejection is lawful, the carrier must not use excessive force [76] and must put the passenger off at a proper place.[77] Where reasonably necessary, the carrier may invoke police aid in effecting an ejection,[78] but such officers are usually held to be acting for the carrier.[79] While the carrier's responsibility usually terminates as soon as the party is safely ejected, in the case of a helpless person it must thereafter exercise due care.[80] A carrier is liable for all injuries proximately [81] resulting from a wrongful ejection. Punitive damages are not recoverable unless the carrier directs, participates, or approves the malicious acts of its servants.[82]

Delay and misrouting. See 11 C. L. 545—It is the duty of a carrier to run its trains on schedule time, and it is liable for negligenctly failing to do so.[83] It is also liable for negligent failure to send ticket from another station as agreed, thereby causing delay.[84] It must exercise reasonable care to prevent misrouting [85] and to advise passengers of transfer points.[86]

§ 24. *Rates and fares, tickets and special contracts.*[87]—See 11 C. L. 546—Al-

75. St. Louis S. W. R. Co. v. Foster [Tex. Civ. App.] 112 SW 797.

76. Leyser v. Chicago, B. & Q. R. Co. [Mo App.] 119 SW 1068; Braly v. Fresno City R. Co., 9 Cal. App. 417, 99 P 400. Where passenger was drunk and in ejecting him conductor hit him over the head with a billy and passenger died, whether conductor exceeded his lawful authority was question for jury. Verdict for plaintiff held authorized. Devine v. Chicago City R. Co., 141 Ill. App. 583. Instruction that if plaintiff voluntarily left train, believing that he had not gotten ticket from the agent, he could not recover, held erroneous as ignoring hypothesis that conductor assaulted and abused him as he was leaving. Bolies v. Kansas City So. R. Co., 134 Mo. App. 696, 115 SW 459.

77. Carrier ejecting passenger for nonpayment of fare at place other than passenger station, in violation of Pub. St. 1901, c. 160, § 6, is liable only for injuries proximately resulting therefrom. Caher v. Grand Trunk R. Co. [N. H.] 71 A 225.

78. Where persons in stock car, some of whom had transportation contract and some did not, refused at one station to open car for inspection of train officials, and same resistance was reasonably to be anticipated at next station, held that police officers were rightfully summoned. Texas & P. R. Co. v. Diefenbach [C. C. A.] 167 F 39.

79. Officer called merely to make an ejectment acts for company, and not as an official. Texas Midland R. Co. v. Geraldon [Tex. Civ. App.] 117 SW 1004. Carrier is liable for excessive force used. Texas & P. R. Co. v. Diefenbach [C. C. A.] 167 F 39. Where company issued passes to town marshal and his deputy to encourage them in the discharge of their official duty, they were not thereby made servants of company so as to render latter liable for their tortious act in ejecting passenger. St. Louis, etc., R. Co. v. Morrow [Ark.] 115 SW 173.

80. Where unattended passenger becomes insane on train and disturbs other passengers, carrier may eject her but must exercise such special care as reasonable prudence and foresight demands for her safety. St. Louis, etc., R. Co. v. Woodruff [Ark.] 115 SW 953.

81. Not liable for injuries received while walking home where ejected passenger would have walked home had it been a regular station. Caher v. Grand Trunk R. Co. [N. H.] 71 A 225.

82. Held error to authorize exemplary damages if ejectment was willful and malicious without regard as to whether defendant was guilty by directing, participating in, or approving acts of servants. Wells v. Boston & M. R. Co. [Vt.] 71 A 1103.

83. Taber v. Seaboard Air Line R. Co., 81 S. C. 317, 62 SE 311. In not making schedules and connections, and in failing to apprise plaintiff of an early connecting train, negligence held for jury. Id. Whether or not the delay due to wreck or some other cause that could not have been avoided by use of ordinary care was held for jury. Southern R. Co. v. Miller [Ky.] 120 SW 278.

84. Where agent selling transportation from another station to his station agreed to notify agent at such other station to deliver ticket and failed to do so for several days, held to authorize finding of negligence. Reeves v. Seaboard Air Line R. Co., 149 N. C. 244, 62 SE 1078.

85. Where porter directed plaintiff into car which was cut out before reaching destination, negligence held for jury. Southern R. Co. v. Wooley [Ala.] 48 S 369. Where Pullman conductor, in presence of regular conductor, undertook to see that passenger was transferred to her sleeper which was attached at junction point, he was acting as agent of railroad company and it is liable for his failure to properly transfer her. Cincinnati, etc., R. Co. v. Raine [Ky.] 113 SW 495.

86. Central of Georgia R. Co. v. Ashley [Ala.] 48 S 981.

87. **Search Note:** See notes in 3 C. L. 630; 11 Id. 547; 16 L. R. A. 53, 55, 471; 18 Id. 55; 20 Id. 483; 22 Id. 794; 23 Id. 746; 24 Id. 152; 28 Id. 773; 38 Id. 140; 43 Id. 706; 2 L. R. A. (N. S.) 695; 3 Id. 558; 4 Id. 480; 5 Id. 779; 7 Id. 97; 9 Id. 851; 8 Id. 287; 13 Id. 445, 624; 14 Id. 464; 23 A. S. R. 593; 84 Id. 397; 96 Id. 828; 1 Ann. Cas. 392; 2 Id. 420; 3 Id. 887; 4

though payment of fare is not essential to the relation of carrier and passenger,[88] and especially to the transporting carrier,[89] free transportation is prohibited in some states,[90] and, likewise, discriminatory charges.[91] Trainmen ordinarily have no authority to carry one free.[92] In Arkansas special charges may be collected of those boarding at a flag station.[93] In the absence of constitutional or statutory restrictions,[94] a carrier may issue annual passes. While a passenger on a street car may tender more than the fare and demand reasonable change,[95] the carrier may reasonably limit the amount of change it will give.[96] A carrier cannot resort to force to collect a fare,[97] and the passenger may defend himself from the assault.[98] Although a contract entered into through a duly authorized agent[98] must be performed according to its terms,[1] where a carrier abandons a trip in violation thereof, the pas-

Id. 557; 5 Id. 487, 768; 6 Id. 119, 873, 943, 946; 8 Id. 649; 9 Id. 889, 972, 1130; 10 Id. 277, 642, 923, 941; 11 Id. 557.

See, also, Carriers, Cent. Dig. §§ 997-1084; Dec. Dig. §§ 248½-279; 6 Cyc. 547-549, 570-580; 28 A. & E. Enc. L. (2ed.) 150.

88. See ante, § 22.

89. Where carrier transports passengers of another road in consideration of use of its tracks, it is not relieved of responsibility to such passenger because fare is paid to the other road. Louisville, etc., R. Co. v. Linton [Ind. App.] 88 NE 532.

90. Anti Pass Law, Laws 1907, p. 342, c. 93, prohibiting issuance and use of free pass, held a valid police regulation and of power to prevent unjust discriminations and not unconstitutional as impairing obligations of contract. State v. Martyn, 82 Neb. 225, 117 NW 719. Contract with physician whereby he was to give free professional services to railroad employes, for which company gave him $25 per month and an annual pass, held a free pass within Cobbey's St. 1907, §§ 10664, 10665. State v. Martyn, 82 Neb. 225, 117 NW 719. Act Mar. 26, 1907 (Acts 1907, p. 95, c. 42) prohibiting railroad companies from carrying persons free of charge, does not provide that a person who boards a railway train with intentions of accepting, or does accept transportation at hands of conductor without paying the fare prescribed by law, shall be guilty of a felony. Carpenter v. Trinity & B. V. R. Co. [Tex. Civ. App.] 119 SW 335.

91. Where contract provided that plaintiff should publish such time cards, etc., as defendant should furnish "to be charged at regular rates to the amount of $400," and that "in full consideration of the above advertising" company was to issue $400 worth of transportation, construed, in view of Laws 1905, p. 564, c. 362, making it a penal offense to charge one more than another for transportation, to render carrier liable for advertising in excess of $400 at regular rates. Hicks Print. Co. v. Wisconsin Cent. R. Co., 138 Wis. 584, 120 NW 512. Section 2 of the act precludes the allowance of commutation rates to school children unless the same rates are open to all children within the age limit. Former administrative ruling upon this question affirmed. In re Regulations Governing Sale of Commutation Tickets to School Children, 17 I. C. C. 144.

92. Neither master mechanic, conductor, nor engineer has any implied authority. Clark v. Colorado & N. W. R. Co. [C. C. A.] 165 F 408.

93. Whether particular station is a "regular" or "flag" station, within Kirby's Dig. § 6612, authorizing special charges to passengers boarding at flag stations, is a question of fact. Clark v. Jonesboro, etc., R. Co. [Ark.] 112 SW 961. Held a "flag" station, where company had no depot and did not use depot of another road at crossing point, though passengers and freight were received thereat on signal, no tickets or bills of lading being issued. Id.

94. Act Cong. June 29, 1906, c. 3591, §§ 1 and 2, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), prohibiting carriers from giving interstate free transportation to passengers or from charging different fares than specified in the tariff filed, is not applicable to a contract or annual passes issued pursuant thereto, said contract having been entered into prior to its passage and in consideration of a claim for damages for personal injuries. Louisville & N. R. Co. v. Mottley [Ky.] 118 SW 982.

95. Wynn v. Georgia R. & Elec. Co. [Ga. App.] 64 SE 278.

96. Where street car company, whose fare was five cents, had a rule requiring conductors to make change not exceeding $2, tender of $5 with demand for change held unreasonable. Wynn v. Georgia R. & Elec. Co. [Ga. App.] 64 SE 278.

97, 98. Braly v. Fresno City R. Co., 9 Cal. App. 417, 99 P 400.

99. Where transportation was purchased at one station, ticket to be furnished at another, testimony of agent at latter place that he had no authority to deliver ticket until he received order from agent selling ticket held sufficient to take question of selling agent's authority to jury. Reeves v. Seaboard Air Line R. Co., 149 N. C. 244, 62 SE 1078. Evidence held to show that contract providing for sleeping car accommodations was made by agent having authority to bind defendant. Smith v. Pullman Co. [Mo. App.] 119 SW 1072.

1. Where plaintiff had been carried as far as he had paid fare and had not indicated his intention of going on, no duty rested upon carrier for further transportation. Sullivan v. Old Colony St. R. Co., 200 Mass. 303, 86 NE 511. Complaint alleging that plaintiff's agent purchased transportation at Sanford from Kittrell to Sanford, agent at Sanford agreeing to notify agent at Kittrell to deliver ticket to plaintiff, and

senger is not entitled to remain on the car on the return trip without payment of fare.[2]

*Conditions and limitations.*See 11 C. L. 548—In the absence of statute,[3] a carrier may make reasonable limitation upon its liability by special contract,[4] except as against negligence,[5] but such restriction must ordinarily be assented to by the one affected thereby.[6] Where a passenger purchases a ticket and pays full fare therefor, the ticket is ordinarily not regarded as the contract between him and the carrier but as a mere token of the contract,[7] and the passenger is entitled to show what the contract was.[8] But where the ticket purports on its face to express the contract between the parties, its conditions and restrictions if supported by a consideration will be enforced if reasonable and lawful.[9] A provision in a commutation ticket that it will be forfeited and taken up if presented by other than the one to whom issued applies only when offered with his consent and connivance,[10] but when it has been so offered it may be taken up any time thereafter.[11] Reasonable time limits are valid, and if a ticket has expired the conductor may refuse to accept it, and if fare is refused he may eject the passenger from the train.[12] Condition, "Void if detached," in a coupon ticket, must be reasonably construed.[13]

*Transfers.*See 11 C. L. 546—The duty to issue transfers is prescribed and regulated by statute in many states,[14] and the public service commission of New York

that he negligently failed to do so, held to state a cause of action. Reeves v. Seaboard Air Line R. Co., 149 N. C. 244, 62 SE 1078. Where carrier has contracted to carry passenger on a particular train, it is liable in tort and on contract if it causes train to leave without coming to usual place for receiving passengers and without giving him an opportunity to board. Payton v. Gulf Line R. Co., 4 Ga. App. 762, 62 SE 469.

2. Rightfully ejected for refusal to pay. Wright v. Orange & P. V. R. Co. [N. J. Err. & App.] 73 A 517.

3. Rev. Codes N. D. 1905, § 4400, making railroad liable for injury to employe, held a fellow-servant statute, and not applicable to an injury to servant of circus company, being carried under special contract. Sager v. Northern Pac. R. Co., 166 F 526.

4. Provision in commutation ticket that it was nontransferable, and that, if offered by any other than person to whom issued, it will be forfeited and taken up, is valid. Harris v. Delaware, L. & W. R. Co. [N. J. Law] 72 A 50.

5. Contract attempting to exempt from liability for injury to shipper who was passenger for hire is void. Blatcher v. Philadelphia, B. & W. R. Co., 31 App. D. C. 385. In view of Gen. St. 1901, §§ 5857, 5858, making railroad liable for damage done to persons or property or employes, held that contract between railroad company and express company whereby latter agreed to hold former harmless for injury to its employes, and contract between express company and employe whereby latter relieved both express company and railroad from liability for injury, held not to relieve railroad from injury due to negligence. Sewell v. Atchison, etc., R. Co. [Kan.] 96 P 1007.

6. Exemption in contract between carrier and circus company relieving former from liability for negligent injury to employes of latter held invalid as to employe not knowing thereof and, hence, not assenting thereto. Sager v. Northern Pac. R. Co., 166 F 526. Not error to refuse to admit contract in evidence for the purpose of showing use, control, and management of cars on defendant's line, said contract being with another carrier and unknown to plaintiff. Pell v. Joliet, P. & A. R. Co., 142 Ill. App. 362.

7. Ticket construed and held to entitle purchaser to stop-over on return trip, and not to require him to complete journey in three days as provided in certain clause of ticket. Leyser v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 1068.

8. Where clause in passenger's ticket referred to stop-over privileges adopted by certain carrier and by implication wrote them into the contract, it was proper to allow purchaser to prove what these regulations were by statements made by the selling agent as well as by printed circular. Leyser v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 1068.

9. Leyser v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 1068.

10. Harris v. Delaware, L. & W. R. Co. [N. J. Law] 72 A 50. Evidence of misuse of other tickets is admissible to show permission or connivance. Id.

11. Does not require that it be taken up when so offered, but it may be subsequently taken up when offered by holder. Harris v. Delaware, L. & W. R. Co. [N. J. Law] 72 A 50.

12. Leyser v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 1068.

13. Where it has been detached inadvertently, if both book and coupon are presented and it can be seen by inspection that they correspond, coupon is good. Fairfield v. Louisville & N. R. Co. [Miss.] 48 S 513.

14. Railroad Law (Laws 1890, p. 1113, c. 565) § 101, providing that no surface railroad shall charge more than five cents for

is authorized to establish through routes.[15] An action to recover a penalty for refusing to issue transfer must be timely brought.[16] In procuring the consent of abutters to an extension, a carrier may bind itself to issue transfers.[17] A carrier may adopt reasonable rules regulating the issuance of transfers.[18] Receivers, being trustees for the owners and the creditors, should curtail transfer privileges where it will increase earnings and there is no law requiring a continuance.[19]

Regulation of sale of tickets; brokerage.[See 11 C. L. 550]—The interstate commerce commission has jurisdiction to establish and regulate through rates by interstate carriers.[20]

§ 25. *General rules of liability for personal injuries.*[21] *A. Nature and extent of liability.*[See 11 C. L. 550]—While not an insurer[22] of the safety of its passengers,[23]

one continuous ride from any point on its road, or on any line or branch operated by it, to any other point thereof, held inapplicable where plaintiff changed from one line to another at point of intersection. King v. Nassau Elec. R. Co., 128 App. Div. 130, 112 NYS 589. Where carrier issued a transfer where it was not legally obliged to do so, a refusal thereafter to recognize same does not render it liable to penalty under Railroad Law (Laws 1890, p. 1113, c. 565), for charging more than lawful rate. Id.

15. Action by public service commission, establishing a through route for transporting of passengers over two independent street railway lines and apportioning joint fare, as authorized by Laws 1907, p. 917, c. 429, § 49, is judicial or quasi-judicial, making certiorari proper remedy for reviewing same. People v. Willcox, 129 App. Div. 267, 113 NYS 861.

16. Action for penalty imposed by § 104, railroad law (Laws 1890, p. 1114, c. 565), as amended by Laws 1892, p. 1406, c. 676, requiring carrier to issue transfers, is not barred in one year, under § 39, limiting time in which to commence actions against carriers asking or receiving more than lawful rate, but is barred in three years, under Code Civ. Proc. § 383, relating to penalties. Munro v. Brooklyn Heights R. Co., 195 N. Y. 254, 88 NE 567.

17. Consent of abutting owners to extension does not bind the company to continue a transfer arrangement with another line, where no such condition is expressed therein. Central Trust Co. v. Third Ave. R. Co., 165 F 494.

18. Rule requiring passengers to ask for transfers at time of paying fare held reasonable, and not in violation of contract to give a continuous trip between two points. Crandall v. International R. Co., 117 NYS 1055.

19. In re Receiverships of Street R. Co., 161 F 879. Receivers will not be required to continue an unprofitable system of transfers not required by law or contract, nor will it be continued because franchise of outside company may be forfeited, where no one interested in such transfer objects to discontinuance. Central Trust Co. v. Third Ave. R. Co., 165 F 494. Receivers of federal court operating street railroad lines will not be directed to obey order of state public service commission to establish a joint rate and exchange transfers with independent company, where it can be done only at a serious loss and the power of commission is doubtful, until such power is settled by court. Pennsylvania Steel Co. v. New York City R. Co., 165 F 470. Receivers of two lines authorized to discontinue transfers upon 10 days' notice to public by posting on lines affected. In re Dry Dock R. Co., 165 F 487.

20. The Northern Pacific Railway Company, the Union Pacific Lines, and the Chicago & Northwestern Railway Company ordered to join in the sale of through passenger tickets between Seattle and other points in the northwest and eastern destinations, via Portland, Or., and to accord through facilities, like the checking of baggage, over this route. In re Through Passenger Routes Via Portland, Oregon, 16 I. C. C. 300. Complainant, desiring to travel from New Castle, Pa., to New York City via the Pennsylvania Company to Pittsburg and the Pennsylvania Railroad from Pittsburg, presented a local ticket from New Castle to Pittsburg and a mileage book from Pittsburg to New York for the purpose of securing his berth in a Pullman car, but the agent refused to grant him the Pullman accommodations upon the ground that his regulation prohibited him from selling such accommodations except upon a through ticket which in this case was greater than the combination of locals. Held that, under its tariff, the Pullman Company should have declined, as it did, to sell the through berth to the complainant. Kurtz v. Pennsylvania Co., 16 I. C. C. 410. Defenants had in force from Pittsburg, Pa., to Newport, R. I., through fare of $12.50, while at same time combination of locals over same line made through charge of $11. Held that under circumstances higher through fare was unreasonable to extent that it exceeded sum of locals. Reparation awarded. United States v. Baltimore & O. R. Co., 15 I. C. C. 470.

21. Search Note: See notes in 5 C. L. 534; 21 L. R. A. 289; 4 L. R. A. (N. S.) 947, 1081; 11 Id. 432, 926; 12 Id. 840; 13 Id. 481; 14 Id. 526; 15 Id. 523, 740; 16 Id. 197; 2 Ann. Cas. 344.

See, also, Carriers, Cent. Dig. §§ 1085-1141, 1245-1269; Dec. Dig. §§ 280-285, 305-308; 6 Cyc. 578-580, 590-604, 610; 5 A. & E. Enc. L. (2ed.) 558.

22. Arkansas Cent. R. Co. v. Janson [Ark.] 119 SW 648; Canaday v. United R. Co., 134 Mo. App. 282, 114 SW 88; Norfolk W. R. Co. v. Rhodes [Va.] 63 SE 445; Irwin v. Louisville & N. R. Co. [Ala.] 50 S 62; Tompkins

a carrier owes the highest degree of care [24] consistent with a practical operation of its business,[25] and is liable for all injuries proximately [26] resulting from its negli-

v. Boston El. R. Co., 201 Mass. 114, 87 NE 488. Liable only for negligence. Feil v. West Jersey & S. R. Co. [N. J. Err. & App.] 72 A 362. Not liable for injury caused by closing of door in absence of negligence. Christensen v. Oregon Short Line R. Co. [Utah] 99 P 676. Instructions construed and held not to make carrier an insurer. Indiana Union Trac. Co. v. Thomas [Ind. App.] 88 NE 356. Instruction that if passenger is injured on train, and carrier does not exercise highest degree of care, it is liable, held not to make carrier an insurer. Sutton v. Southern R. Co., 82 S. C. 345, 64 SE 401.

23. Passenger stands in special relation to carrier and its duty to him cannot be made the basis of liability for injury to trespasser. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689.

24. Martin v. Missouri Pac. R. Co. [Mo. App.] 119 SW 444; Wills v. Atchison, etc., R. Co., 133 Mo. App. 625, 113 SW 713; Sutton v. Southern R. Co., 82 S. C. 345, 64 SE 401; Fischer v. Columbia & P. S. R. Co., 52 Wash. 462, 100 P 1005; Nilson v. Oakland Trac. Co. [Cal. App.] 101 P 413; Brackney v. Public Service Corp. [N. J. Law] 71 A 149. Must exercise utmost care to protect passengers. Christensen v. Oregon Short Line R. Co. [Utah] 99 P 676; Murphy v. Southern Pac. R. Co. [Nev.] 101 P 322. Instruction that a carrier owes to a passenger "the utmost care" for his safety and protection held not objectionable. Houston & T. C. R. Co. v. Keeling [Tex.] 120 SW 847. Instruction exacting "utmost care" held erroneous. Houston & T. C. R. Co. v. Keeling [Tex. Civ. App.] 112 SW 808. Held that the word "highest" rather than "utmost" should be used in describing degree of care owed. Quinn v. Metropolitan St. R. Co., 218 Mo. 546, 118 SW 46. Owes the care that a very careful, prudent and careful man would exercise under the same or similar circumstances. Northern Texas Trac. Co. v. Danforth [Tex. Civ. App.] 116 SW 147. Instruction that "The slightest neglect * * * by reason of which the injury 'may' have been occasioned" renders carrier liable held not erroneous in using word "may" instead of "must." Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385. Expression "a high degree of care" held indefinite, and should be defined as that care "which a very cautious, prudent and competent man would exercise under same circumstances." Houston & T. C. R. Co. v. Keeling [Tex. Civ. App.] 112 SW 808. Street car company must exercise the highest degree of skill and care which may be reasonably expected of intelligent and prudent persons engaged in that business, in view of instrumentalities used and attendant dangers. Oliver v. Ft. Smith L. & Trac. Co. [Ark.] 116 SW 204. Instruction that it was the duty of the carrier to use the highest practical degree of care of very prudent, skillful and experienced men engaged in that kind of business, was not erroneous because of the use of the words "and experienced." Loftus v. Metropolitan St. R. Co., 220 Mo. 470, 119 SW 942. Held that where charges attempt to define the carrier's duty only by the use of adjectives, the standard by which the conduct of the carrier under investigation is to be judged should be given in connection with them, which standard is the conduct of skillful and prudent carrier in like situation. Houston & T. C. R. Co. v. Keeling [Tex.] 120 SW 847.

25. Campbell v. Duluth & N. E. R. Co., 107 Minn. 358, 120 NW 375; Chicago City R. Co. v. Crauf, 136 Ill. App. 66; Huff v. Cleveland, etc., R. Co., 138 Ill. App. 89; Asher v. East St. Louis & S. R. Co., 140 Ill. App. 220. Interurban electric road. Peil v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 642. Only bound to exercise highest care consistent with mode of carriage and practical operation of the business. Barnes v. Danville St. R. & L. Co., 235 Ill. 666, 85 NE 921. Instruction omitting qualification that the care should be consistent with a practical operation of the business, etc., held to exact too high a degree of care. Colorado & S. R. Co. v. McGeorge [Colo.] 102 P 747. Instruction construed and held to mean highest care consistent with practical operation of road. St. Louis, etc., R. Co. v. Richardson [Ark.] 113 SW 794; Indiana Union Trac. Co. v. Smalley [Ind. App.] 88 NE 867. Instruction that if the jury find that the accident would not have resulted had greater care been taken, etc., held to place too high a degree of care on carrier. Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793. Instruction that defendant as operator of a passenger elevator was bound to use such care as a "very prudent and careful" man would use, etc., held to exact too high a degree of care. Ferguson v. Truax, 136 Wis. 637, 118 NW 261.

26. Charge that plaintiff could recover if car was negligently started while she was alighting held erroneous as omitting hypothesis of proximate cause. Birmingham R., L. & P. Co. v. Moore [Ala.] 50 S 115. Instruction to the effect that plaintiff could not recover on account of tuberculosis of the lungs or throat, "since that disease, as has been testified to by physicians, does not necessarily, reasonably, and naturally follow from exposure to cold," was properly refused. Washington, A. & Mt. V. R. Co. v. Lukens, 32 App. D. C. 442. Where a carrier's negligence in having its depot platform and passageway leading to its train in the condition it was, and the concurrent negligence of another, resulted in injury to plaintiff, the carrier was liable nevertheless. Missouri, K. & T. R. Co. v. Harrison [Tex. Civ. App.] 120 SW 254.

Held proximate cause: Where car is negligently driven so close to wagon as to cause latter to strike passenger, such negligence is proximate cause of plaintiff's injury caused by being knocked from car by wagon actually struck. Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 NE 934. Where plaintiff was injured while attempting to board street car at a point where street cars in passing sometimes touched, the condition of the track was the proximate cause of his injury. Scott v. Metropolitan St. R. Co. [Mo. App.] 120 SW 131. Evidence held

gence.[27] A passenger assumes all risks incident to operation with due care.[28]

to show that sickness after injury was caused thereby. Missouri, K. & T. R. Co. v. Craig [Tex. Civ. App.] 114 SW 850. Evidence held to sustain conclusion of fact that placing in plaintiff's hat a wrong and misleading conductor's check and telling him that he had reached destination when he had not, and negligently permitting piece of iron on which plaintiff stumbled to remain near track, was the proximate cause of plaintiff's injury. Missouri, K. & T. R. Co. v. Redus [Tex. Civ. App.] 118 SW 208. Evidence held sufficient to warrant finding that injury to back was proximate cause of death from cerebral apoplexy. McCormick v. Rochester R. Co., 117 NYS 1110.

Held not proximate cause: Speed of car not proximate cause of injury to passenger who was standing on running board of street car when horse balked and backed wagon into the car. Wood v. Chester Trac. Co., 36 Pa. Super. Ct. 483. Leaving baggage truck at very end of platform and failing to light platform at that place is not proximate cause of injury to plaintiff, a child, who was landed safely, but the mother being on train which had started, a person, taking plaintiff, ran along side of train 75 or 100 feet, endeavoring to restore him to his mother, and in such attempt fell over truck and injury to child resulted. Atchison, etc., R. Co. v. Calhoun, 213 U. S. 1, 53 Law Ed. —, rvg. Atchison, etc., R. Co. v. Calhoun, 18 Okl. 75, 89 P 207. Absence of guard chains on rear platform not shown to be proximate cause of injury caused by plaintiff's foot slipping in between cars. Coady v. Brooklyn Heights R. Co., 128 App. Div. 856, 113 NYS 100. Evidence held insufficient to show that peritonitis of which deceased died was caused by injuries received. Mageau v. Great Northern R. Co., 106 Minn. 375, 119 NW 200. Leaving of elevator door open of injury caused by sudden lowering of elevator as plaintiff was about to step therefrom after being taken up by one not in defendant's employment. Board of Trade Bldg. Corp. v. Cralle [Va.] 63 SE 995.

For jury: Whether being thrown against stove by derailment was proximate cause of death. MacDonald v. Metropolitan St. R. Co., 219 Mo. 468, 118 SW 78. Whether accident to car was proximate cause of plaintiff's illness. Washington, etc., R. Co. v. Lukens, 32 App. D. C. 442.

27. Slight negligence is such a breach of duty as will render it liable. Chicago Union Trac. Co. v. Mee, 136 Ill. App. 98. Negligence of flagman in failing to notify a train, as ordered, that another was approaching, held negligence of carrier as to injured passenger. Harris v. Puget Sound Elec. R. Co., 52 Wash. 289, 100 P 838. Not liable for injury caused by door closing on plaintiff's hand, in absence of evidence that operatives were negligent or that door was closed by excessive speed in rounding curve. Hunt v. Boston El. R. Co., 201 Mass. 182, 87 NE 489. In action for injury caused by glass in door breaking as plaintiff pushed against same, the door being locked, recovery for plaintiff held improper where there was no evidence of improper construction of door and there were other doors unlocked. McCormack v. Interborough Rapid Transit Co., 132 App. Div. 703, 117 NYS 532. Where there is evidence that if car had been equipped with electric brake, as required by Loc. Acts 1901, p. 485, No. 439, it could have been stopped in time to have avoided injury, instruction that fact that car did not have electric brakes is immaterial unless accident was caused or contributed to by lack of braking power held sufficiently favorable to defendant. Fortin v. Bay City Trac. & Elec. Co., 154 Mich. 316, 15 Det. Leg. N. 741, 117 NW 741. Failure to carry safely is a breach of the obligation imposed by contract creating relation. Canaday v. United R. Co., 134 Mo. App. 282, 114 SW 88.

Held negligent: Fact that immediate cause of collision was breaking of brake rod of automobile from a latent defect does not relieve driver from liability where accident would not have happened had he had the car under control. Johnson v. Coey, 237 Ill. 88, 86 NE 678.

Held not negligent: Not liable for injury to passenger caused by engine running into train, where engine was left on side track in safe condition but was started by boy whose duty was to put oil in cans. Chicago Terminal Transfer R. Co. v. Berkowitz, 137 Ill. App. 95. Where conductor merely asked boy to show him his father, who, the boy alleged, had paid his fare, company is not liable for injuries caused by boy slipping from running board, there being no cause to anticipate that boy would leave his seat to point out his father. Goodfellow v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1139, 119 NW 900. Where to set emergency brake would endanger the passengers, and it was not necessary to rescue trespasser clinging to outside of vestibule, it is not negligence not to set same. Graham v. Chicago & N. W. R. Co. [Iowa] 119 NW 708. Ferryman held not negligent in calling "Come on, drivers," before guard chain was removed from gangway, as to foot passenger who knew that invitation did not include him and that such way was not intended for foot passengers. Grabler v. New York & E. R. Ferry Co., 64 Misc. 58, 117 NYS 1018. Findings that controller was defective at time of accident, that defect was known or should have been known to defendant, without finding that it had existed for sufficient length of time to have enabled carrier to repair same, do not show negligence. Gay v. Milwaukee Elec. R. & L. Co., 138 Wis. 348, 120 NW 283. Evidence held insufficient to show negligence of porter in closing dressing room door on plaintiff's fingers, he having no reason to know that they were in jamb. Wilkins v. Pullman Co., 166 F 1004.

Negligence for jury: Negligence of motorman in failing to completely shut off power of car, which became stalled on railroad track, as he jumped off in haste to push car from track. Barnes v. Danville St. R. & L. Co., 235 Ill. 566, 85 NE 921. Whether interurban cars which come in close proximity to cars on parallel track should have guards to prevent passengers from projecting arms from window is for jury and not

While a carrier owes the same high degree of care to a passenger riding on a freight [29] or mixed [30] train, the latter assumes all risks incident to the mode of travel.[31] A common carrier by automobile owes reasonable care,[32] but there seems to be a conflict of authority as to whether the operator of a passenger elevator owes highest [33] or only ordinary care.[34] The violation of a public regulation for the general safety of the public is prima facie negligence.[35] If a passenger is in need of special care [36] and the carrier knows thereof,[37] it must render the same in the discharge of the high care owed to a passenger.[38] Likewise, it must render commensurate care where it knows of special danger.[39] Where the carrier violates its contract, it is liable for results naturally flowing therefrom.[40] Willful and wanton

question of engineering science. Peil v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 542. Instruction in effect making defendant liable if it failed to maintain sufficient lights about platform to avoid injury, "as testified to by plaintiff," held erroneous as making plaintiff's testimony rather than rule of law the test of liability. Dinkelspiel v. Interborough Rapid Transit Co., 113 NYS 187.

28. Lurching of cars in rounding curves. Norfolk & W. R. Co. v. Rhodes [Va.] 63 SE 445.

29. St. Louis & S. F. R. Co. v. Gosnell [Okl.] 101 P 1126; St. Louis S. W. R. Co. v. Cobb [Ark.] 115 SW 939. Although due consideration must be given to character of train (Suttle v. Southern R. Co., 150 N. C. 668, 64 SE 778), yet it is bound to provide a safe conveyance for them as far as human care and foresight will go, no matter upon what kind of train it undertakes to carry them (Arkansas Cent. R. Co. v. Janson [Ark.] 119 SW 648). Where freight train was derailed and passengers were detained upon the route on a cold and stormy night through negligence of carrier, the carrier was liable. Id.

30. Must exercise highest degree of care consistent with that mode of transportation. Campbell v. Duluth & N. E. R. Co., 107 Minn. 358, 120 NW 375. Instruction that if plaintiff boarded mixed train before switching was completed and before being invited she could not recover for injuries held properly refused. Leach v. St. Louis & S. F. R. Co. [Mo. App.] 118 SW 510.

31. Campbell v. Duluth & N. E. R. Co., 107 Minn. 358, 120 NW 375; Arkansas Cent. R. Co. v. Janson [Ark.] 119 SW 648. Subject to ordinary inconvenience and risks incidental to travel on freight train. Arkansas Cent. R. Co. v. Janson [Ark.] 119 SW 648.

32. Is bound to use at least reasonable care, and must anticipate while driving in city streets that he will meet persons and vehicles and must have his machine under reasonable control. Johnson v. Coey, 237 Ill. 88, 86 NE 678.

33. Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 NE 117.

34. Frahm v. Siegel-Cooper Co., 131 App. Div. 747, 116 NYS 90.

35. Failed to equip with electric brakes as required by Loc. Acts 1901, p. 485, No. 439. Fortin v. Bay City Trac. & Elec. Co., 154 Mich. 316, 15 Det. Leg. N. 741, 117 NW 741.

36. Care owed to intoxicated passenger depends upon degree of intoxication and knowledge thereof on part of carrier. Paris & G. N. R. Co. v. Robinson [Tex. Civ. App.] 114 SW 658. Although passenger is drunk, if he is not incapable of caring for himself, carrier need not render special care. Id. Where intoxicated person had sufficient mental capacity to go to depot, purchase ticket through companion, giving him correct change, and to board train and find seat, and physical capacity to do those things without assistance, held that carrier owed no special care. Id. Passenger taken insane on train and ejected and placed in charge of station agent is not an "insane person at large" within Kirby's Dig. § 4049, authorizing sheriff to arrest her, so as to relieve carrier of its duty after sheriff takes charge (St. Louis, etc., R. Co. v. Woodruff [Ark.] 115 SW 953), especially where he only took charge as an individual (Id.). Whether decedent's intoxicated condition was such as to require special care of carrier held for jury. Benson v. Tacoma R. & P. Co., 51 Wash. 216, 98 P 605.

37. Where intoxication is not discernible, carrier is not negligent in failing to render special care. Paris & G. N. R. Co. v. Robinson [Tex. Civ. App.] 114 SW 658. Whether decedent's intoxicated condition was known to conductor held for jury. Benson v. Tacoma R. & P. Co., 51 Wash. 216, 98 P 605.

38. Paris & G. N. R. Co. v. Robinson [Tex. Civ. App.] 114 SW 658. Fact that carrier could have refused to receive intoxicated passenger because of his noisy and boisterous manner should not be considered in determining its liability for his death in falling or being thrown from train. Id.

39. In action for injuries to plaintiff's thumb by being wrenched when conductor attempted to pull her onto step, where there was evidence that she attempted to board moving car and conductor attempted to prevent her from falling as car rounded curve, instruction that if conductor had reasonable grounds for believing that she was liable to fall off he was bound to take such steps as circumstances required, and if in jerking her he used no more force than appeared to be reasonably necessary, company was not liable. South Covington & C. R. Co. v. Raymer [Ky.] 116 SW 281.

40. Complaint charging negligent placing of blind passenger who had first class ticket in second class car where he was made sick by smoke, etc., held that it was not necessary to allege knowledge on part of servant that smoke would make him sick or that he be placed in such car over protest. Louisville & N. R. Co. v. Weathers [Ala.] 50 S 268.

misconduct [41] renders the carrier liable to punitive damages.[42] Liability ordinarily depends upon possession and control, and not ownership.[43] A carrier is not relieved from liability by the concurrent negligence of a third person,[44] but they are severally liable.[45] Negligence of a joint agent generally renders the carriers jointly liable.[46] Where a carrier leases the use of its road to another, it is liable to its own passengers for negligence of the lessee.[47]

(§ 25) *B. Contributory negligence.*[48]—See 11 C. L. 553—Passengers must exercise ordinary care for their own safety,[49] and a failure to do so precludes recovery [50]

41. Wanton negligence for jury where motorman saw plaintiff in act of alighting and started car with a jerk. Birmingham R., L. & P. Co. v. Moore [Ala.] 50 S 115. Wantonness held for jury in directing passenger into car which was cut out of train before reaching her destination. Southern R. Co. v. Wooley [Ala.] 48 S 369. Evidence that plaintiff was several times required to change seat as it became necessary to make up berths and that porter directed her to get off at place where she was to change and put her baggage off, although she was allowed to get on again to try to make connections at another place, held not to show willful misconduct. Taber v. Seaboard Air Line R. Co., 81 S. C. 317, 62 SE 311.

42. Where facts were such as would support an inference of wantonness, court properly refused to instruct that punitive damages could not be recovered. Southern R. Co. v. Wooley [Ala.] 48 S 369.

43. That defendant company was operating cars of another company no defense. South Chicago City R. Co. v. Atton, 137 Ill. App. 364. Road permitting another road to use its tracks is not liable for injury to passengers of latter except for defects in track. Louisville, etc., R. Co. v. Linton [Ind. App.] 88 NE 532.

44. Failure of railroad to exercise due care resulting in collision does not relieve street car company from its duty owed to a passenger (Wills v. Atchison, etc., R. Co., 133 Mo. App. 625, 113 SW 713), and from liability unless sole cause of injury (Id.). In action against street car company for injuries caused by collision between locomotive and street car, it was held error not to give instruction, "The fact that the railroad company was negligent will not excuse the traction company if it also was negligent; but if you find that the railroad company was negligent and that the traction company was not negligent, your verdict will be for the defendant." Cincinnati, D. & T. Trac. Co. v. Holbrock, 12 Ohio C. C. (N. S.) 234.

45. Companies are severally, and not jointly, liable for injury caused by negligence of independent companies at intersection, resulting in a collision. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. Where several roads jointly employ towerman at intersection, each is liable for his negligence. Gorman v. New York, etc., R. Co., 194 N. Y. 488, 87 NE 682.

46. Where gateman at union depot is alleged to have been agent of defendant in action for misdirection, the question of liability for his acts if a joint agent of all roads is not involved. Louisville & N. R. Co. v. Cannon [Ala.] 48 S 64.

47. Big Sandy & C. R. Co. v. Blankenship [Ky.] 118 SW 315; Id. [Ky.] 118 SW 316.

48. **Search Note:** See notes in 5 C. L. 540; 12 L. R. A. 359, 831; 16 Id. 91, 631; 19 Id. 310; 21 Id. 354; 34 Id. 720; 38 Id. 786; 2 L. R. A. (N. S.) 1191; 5 Id. 274; 10 Id. 352; 17 A. S. R. 422; 116 Id. 721; 1 Ann. Cas. 315, 710, 778, 781; 2 Id. 939; 3 Id. 1020; 4 Id. 666, 750; 6 Id. 705, 725; 8 Id. 1041; 9 Id. 1025; 10 Id. 816.

See, also, Carriers, Cent. Dig. §§ 1346-1408; Dec. Dig. §§ 323-349; 6 Cyc. 635-656; 5 A. & E. Enc. L. (2ed.) 645.

49. A passenger is only required to exercise ordinary care for his safety. Martin v. Missouri Pac. R. Co. [Mo. App.] 119 SW 444. Plaintiff's failure to leave car stalled on railroad track as directed by conductor held material on his negligence in remaining on the car, although he was under no obligation to assist in pushing car as requested. Barnes v. Danville St. R. & L. Co., 235 Ill. 566, 85 NE 921. Where car is negligently started while a passenger is alighting, fact that passenger was intoxicated does not bar recovery. Rangenier v. Seattle Elec. Co., 52 Wash. 401, 100 P 842.

Gross negligence to hold to grip of moving train after alighting therefrom. Hoylman v. Kanawha & M. R. Co., 65 W. Va. 264, 64 SE 536.

Held not negligent: Where car escaped control and ran wild down dangerous grade, in jumping therefrom. Lehner v. Pittsburg R. Co. [Pa.] 72 A 525. Evidence that door of elevator was left open and surrounding facts held to warrant finding that plaintiff was not negligent in entering into same. Toohy v. McLean, 199 Mass. 466, 85 NE 578. Mere fact that plaintiff did not exercise the best judgment in resisting unlawful assault of conductor is not proof of negligence. Braly v. Fresno City R. Co., 9 Cal. App. 417, 99 P 400. Fact that passenger could not describe her manner in leaving car during excitement following explosion in controller does not show negligence. Beattie v. Boston El. R. Co., 201 Mass. 3, 86 NE 920. That passenger was asleep in her seat at 11 or 12 o'clock at night when she was thrown therefrom by jerk in coupling does not raise issue of contributory negligence. Texas & P. R. Co. v. Boleman [Tex. Civ. App.] 112 SW 805. Failure of one just boarding car to consider whether, under usual conditions of travel, car will be so operated as to come into contact with wagon which has just passed, is not conclusive of negligence though a matter to be considered. Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 NE 934. Held not per se negligence for one at station gate to put hand against collapsible gate as it was about to be opened to keep from being pushed by

for injuries proximately [51] resulting therefrom, unless the carrier is guilty of wanton [52] or gross [53] negligence, or discovers the passenger's perilous position in time to avoid injury by the exercise of ordinary care.[54] A passenger is not guilty of contributory negligence unless his acts which contribute to his injury are negligent acts.[55] A passenger may assume that the carrier will fully discharge its duty until it has notice to the contrary.[56]

Acts done at direction of employes [57]—See 11 C. L. 554 are not negligent if one of ordinary prudence would rely thereon under the circumstances.[58]

Acts due to impulse of sudden danger, See 11 C. L. 555 unless devoid of common prudence,[59] are not such negligence as will defeat recovery.[60]

crowd against same. Pacetti v. Central of Georgia R. Co. [Ga. App.] 64 SE 302.

Negligence for jury: Where evidence was conflicting whether plaintiff in attempting to alight from moving car fell therefrom during struggle over fare. Braly v. Fresno City R. Co., 9 Cal. App. 417, 99 P 400. In attempting to use seat with defective bottom. St. Louis, etc., R. Co. v. Grimsley [Ark.] 117 SW 1064. In not immediately leaving street car stalled on railroad track. Barnes v. Danville St. R. & L. Co., 235 Ill. 566, 85 NE 921. In stumbling in nighttime over stone in path provided by carrier in passing around obstruction to take car on other side. Powers v. Old Colony St. R. Co., 201 Mass. 66, 87 NE 192. Of one ejected at flag station in seeking to reach regular station by use of track, the wagon road being shorter and there being a nearby club house at which he might have stopped. Tilburg v. Northern Cent. R. Co., 221 Pa. 245, 70 A 723. Where plaintiff and his wife were carried 3½ miles past destination to point where they were strangers and it was necessary for plaintiff to reach home that night, contributory negligence of wife, who was in poor health, in walking back with him held for jury. St. Louis S. W. R. Co. v. Franks [Tex. Civ. App.] 114 SW 874.

50. Oliver v. Ft. Smith L. & Trac. Co. [Ark.] 116 SW 204. Instruction that if plaintiff attempted to board car when it was dangerous to do so because of rapid speed, and because of this plaintiff fell and was injured, then, if injury was caused by defendant's negligence, recovery should be had, held erroneous, as plaintiff's negligence would be cause of injury. Alabama City, G. & A. R. Co. v. Bullard [Ala.] 47 S 578.

51. Only necessary that passenger's negligence contributed to the injury, and it is not required that it shall have contributed to the derailment to defeat recovery. Winters v. Baltimore & O. R. Co., 163 F 106. Instructions as whole held to sufficiently require negligence to be proximate cause. Rangenier v. Seattle Elec. Co., 52 Wash. 401, 100 P 842. Where others not riding in cupola were hurt equally as badly as plaintiff who was so riding, instruction that, if plaintiff's riding in cupola contributed "in any way whatsoever" to injury, he could not recover, held erroneous. Reid v. Yazoo & M. V. R. Co. [Miss.] 47 S 670. Instruction that, though defendant was guilty of gross negligence, yet, if plaintiff was guilty of any want of ordinary care contributing to injury, he could not recover, held erroneous as not requiring it to be proximate cause. Id.

52. Actual knowledge of passenger's peril so as to render carrier guilty of wanton and willful negligence need not be shown by direct evidence, but may be proved by circumstances. Birmingham R., L. & P. Co. v. Jung [Ala.] 49 S 434.

53. Reid v. Yazoo & M. V. R. Co. [Miss.] 47 S 670.

54. Evidence authorizing finding that motorman saw plaintiff from time he signalled car until he was thrown by sudden starting as he was attempting to board held to authorize instruction on last clear chance doctrine. Nilson v. Oakland Trac. Co. [Cal. App.] 101 P 413.

55. Instruction that plaintiff could not "recover if he by his own act or conduct in any degree directly contributed to his own injury" held erroneous in not limiting the act or conduct of plaintiff contributing to his injury to a negligent act. Dowd v. Metropolitan St. R. Co. [Mo.] 120 SW 772.

56. Passenger having no notice of crowded condition of train and the impossibility or uncertainty of obtaining a seat may assume that carrier will discharge its duty in that respect. St. Louis S. W. R. Co. v. Tittle [Tex. Civ. App.] 115 SW 640.

57. Opening of door, announcing of station, and wave of hand by porter in response to question as to which side to get off held insufficient to go to jury whether defendant directed plaintiff to get off from moving train. Powers v. Chicago, etc., R. Co. [Minn.] 121 NW 897. Evidence held to show that person urging passengers to hurry was employe of defendant. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83.

58. Crossing track ahead of train. Dieckman v. Chicago & N. W. R. Co. [Iowa] 121 NW 676.

59. Not negligent to leave seat to avoid apparent danger. Louisville & S. I. Trac. Co. v. Worrell [Ind.] 86 NE 78. Where there was evidence that passenger moved by impulse of fear caused by explosion of controllers, carefully stepped off car and was thrown to ground and injured, held that jury properly found that she was not negligent. Id. When collision was imminent, it was not material whether plaintiff was thrown by the collision from car or jumped from car to avoid injury and was thereby injured. South Chicago City R. Co. v. Atton, 137 Ill. App. 364. In action for injury to passenger who jumped from street car during panic caused by explosion of

Going about stations, platforms, tracks, or standing cars.[See 11 C. L. 555]—A passenger, approaching the station [61] and upon the platform [62] or tracks,[63] must exercise reasonable care for his own safety. While a passenger crossing intervening tracks to take passage may assume that the carrier will exercise due care,[64] he is not relieved from the duty of using reasonable diligence for his own safety,[65] the assumption being merely a factor in determining whether he was negligent.[66] A stockman may properly alight at intermediate station and go about the cars to look after the stock,[67] but he must exercise care commensurate with the situation.[68]

Boarding the car or vehicle of transit.[See 11 C. L. 555]—Passengers must exercise ordinary care in boarding the vehicle of transit to avoid injury,[69] although he may

controllers, instructions that existence of fire in vestibule did not authorize plaintiff, assured that there was no danger, to heedlessly jump from car while same was in motion, that sometimes an injury to a passenger might as well happen through his own negligence as through negligence of carrier, held favorable to defendant. Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78.

60. Where a passenger in shock and excitement of a collision jumped off moving train and was injured, fact that she did jump from train and that she might not have been injured if she had remained on train was no bar to recovery. Big Sandy & C. R. Co. v. Blankenship [Ky.] 118 SW 315. Evidence that plaintiff on wild car was seen pushing her way towards platform from which passengers were jumping and was found a few minutes later lying beside track held to authorize finding that she fell while trying to alight. Lehner v. Pittsburg R. Co. [Pa.] 72 A 525.

61. Negligence for jury in stumbling over semaphore wires stretched across areaway between roadways leading to depot, plaintiff knowing thereof but momentarily forgetting same. Chase v. Atchison, etc., R. Co., 134 Mo. App. 655, 114 SW 1141.

62. Not necessarily negligent in stepping back to allow lady to pass, without first looking for obstructions. Vance v. Great Northern R. Co., 106 Minn. 172, 118 NW 674. Where passenger awaiting train stands so close to edge as to be struck by passing engine bumper, fact that his back was turned toward train does not make him negligent as a matter of law. Campbell v. Yazoo & M. V. R. Co. [Miss.] 48 S 618.

63. One flagging a train at flag station and running along track until hit by train is guilty of contributory negligence. Pillow v. Texarkana & Ft. S. R. Co. [Tex. Civ. App.] 119 SW 128.

64. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 121 NW 676. May assume that no train will be run in on such tracks. Keifner v. Pittsburg, etc., R. Co. [Pa.] 72 A 253.

65. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 121 NW 676. **Negligence for jury:** In not observing train approaching on intervening track while on way to train. Keifner v. Pittsburg, etc., R. Co. [Pa.] 72 A 253. In crossing ahead of approaching train to take passage thereon, he having been requested by the agent to do so, it being difficult to judge distance of the train from the headlight. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 121 NW 676. Passenger crossing track to take train is not required, as matter of law, to stop, look, and listen, but must exercise reasonable care. Chicago, etc., R. Co. v. Stepp [C. C. A.] 164 F 785. Evidence held to show that plaintiff did not look for approaching car, it being in plain view. Yevsack v. Lackawanna & W. V. R. Co., 221 Pa. 493, 70 A 837.

66. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 121 NW 676.

67. Christiansen v. Illinois Cent. R. Co. [Iowa] 118 NW 387.

68. Where stockman looking after stock at intermediate station saw engine standing on passing track, he was not negligent as a matter of law in going two car lengths before again looking (Christiansen v. Illinois Cent. R. Co. [Iowa] 118 NW 387), nor in standing back on passing track so as to better see numbers on cars, though he would have been in safe position had he stood nearer the cars (Id.).

69. Testimony of plaintiff that after she got onto car she paused a "couple of minutes" before taking her seat held not to necessarily mean 120 seconds, but merely a short time. McGlynn v. Nassau Elec. R. Co., 128 App. Div. 866, 113 NYS 119.

Held negligent: In attempting to enter at door at which passengers usually leave car and without paying any attention to automatic door, which closed on plaintiff. Bentson v. Boston El. R. Co., 202 Mass. 377, 88 NE 437. To enter elevator when no one was in charge, though door was open. Kaplan v. Lyons Building & Operating Co., 61 Misc. 315, 113 NYS 516. Where plaintiff stepped into space between platform and car, the place being well lighted and there being no crowd or occasion to hurry. Smith v. Brooklyn Heights R. Co., 129 App. Div. 635, 114 NYS 62.

Negligence held for jury: Whether plaintiff, who was injured while attempting to board street car by being caught between said car and car passing from the opposite direction, was guilty of negligence, held question for jury. Scott v. Metropolitan St. R. Co. [Mo. App.] 120 SW 131. In action for injury received in being caught between car and viaduct railing, case held for jury, where evidence was conflicting, whether car prematurely started or whether plaintiff attempted to board moving car. Joyce v. Metropolitan St. R. Co., 219 Mo. 344, 118 SW 21.

Held not negligent: Evidence insufficient to show that plaintiff who slipped and fell on muddy step while alighting with 17 months' old child was negligent. Northern Texas Trac. Co. v. Danforth [Tex. Civ. App.] 116 SW 147.

assume that it will not be prematurely started.[70] Upon invitation,[71] a passenger may board a train as it is being made up, but he must exercise ordinary care.[72]

Boarding at wrong place. See 7 C. L. 572.

Boarding moving train or car[73]—See 11 C. L. 556 is not per se negligence,[74] unless there are special circumstances,[75] but is a question of fact.[76] In some states it is an offense to board a moving train or car,[77] but, if done with the consent and assistance of an employe,[78] it is not conclusively negligent under the Iowa statute.[79]

Riding or being in dangerous position or place. See 11 C. L. 556—A passenger must ride in the proper place,[80] and one voluntarily riding in a dangerous place assumes the risks ordinarily incident thereto,[81] but not those arising from negligence of the carrier.[82] Negligence in being in a dangerous position is a question of fact,[83] unless the danger is so obvious as to render the act devoid of common prudence.[84]

70. That car will not be started until danger of striking wagon which has just passed is removed. Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 NE 934.

71. Evidence of custom held to show implied invitation to passengers to board train before it was made up. Wise v. Wabash R. Co., 135 Mo. App. 230, 115 SW 452.

72. Wise v. Wabash R. Co., 135 Mo. App. 230, 115 SW 452. Passenger stepped onto car when it is apparent that coach is about to be backed into to it is negligent. Id.

73. Evidence held to show that plaintiff was injured while attempting to board moving car, and not by sudden starting of car as he was boarding same. Quagliana v. Jersey City, etc., R. Co. [N. J. Law] 71 A 43; Schuman v. Brooklyn Helghts R. Co., 117 NYS 145.

74. To attempt to board slowly moving street car which had slackened speed in response to signal. Nilson v. Oakland Trac. Co. [Cal. App.] 101 P 413.

75. Such as infirmity, etc. Birmingham R., L. & P. Co. v. Jung [Ala.] 49 S 434.

76. Where train started without warning, passenger who had temporarily alighted held not negligent as matter of law in attempting to board moving train with assistance of Pullman porter and not relinquishing hand hold after slipping. Gannon v. Chicago, etc., R. Co. [Iowa] 117 NW 966.

Held negligence to board car moving faster than one could walk. Quinn v. Philadelphia Rapid Transit Co. [Pa.] 73 A 319.

77. Pen. Code, § 426, subd. 2, making it a misdemeanor for a person to get on any car or train while in motion, to obtain transportation as a passenger, held not to apply to one who boards with intent to become a passenger in good faith. East v. Brooklyn Heights R. Co., 195 N. Y. 409, 88 NE 751.

78. Pullman car porter held employe of railroad company. Gannon v. Chicago, etc., R. Co. [Iowa] 117 NW 966.

79. Gannon v. Chicago, etc., R. Co. [Iowa] 117 NW 966.

80. Although contract for transportation of caretaker requires him to look after and feed horses and does not specify where he is to ride, the car is not the place for his transportation, although he may enter same at reasonable times. Bruce v. Chicago, B. & Q. R. Co., 136 Mo. App. 204, 116 SW 447.

81. Doctrine of assumed risks as applied to relation of passenger and carrier involves doctrine of contributory negligence. United R. & Elec. Co. v. Riley, 109 Md. 327, 71 A 970. Where passenger, knowing of rule that all passengers riding on platform assume all risks, takes position on platform, he assumes risk of injury in boarding car again after having stepped off to allow passengers to alight. Tompkins v. Boston El. R. Co., 201 Mass. 114, 87 NE 488.

82. Lobner v. Metropolitan St. R. Co. [Kan.] 107 P 463. Passenger riding on footboard does not assume dangers arising from negligent operation of car (Oliver v. Ft. Smith L. & Trac. Co. [Ark.] 116 SW 204), or from collision (Brackney v. Public Service Corp. [N. J. Law] 71 A 149) with runaway car (United R. & Elec. Co. v. Riley, 109 Md. 327, 71 A 970).

83. Negligence for jury: To place hand on door jamb. Christensen v. Oregon Short Line R. Co. [Utah] 99 P 676. In remaining in car after power had been cut off and motorman had left car for purpose of pushing it off railroad track. Barnes v. Danville St. R. & L. Co., 143 Ill. App. 259. To stand up in freight caboose. St. Louis, etc., R. Co. v. Gilbreath [Ark.] 113 SW 200. Held not negligence as matter of law for one riding in coach attached to freight train to leave seat to get drink while coach was standing and switching was being done. Suttle v. Southern R. Co., 150 N. C. 668, 64 SE 778.

Held negligent: Traveling salesman, familiar with danger in standing in car in mixed train while switching was being done. Gabriel v. St. Louis, etc. R. Co., 135 Mo. App. 222, 115 SW 3.

Held not negligent: Passenger in coach attached to freight train held not negligent in leaving seat to get drink while car was standing still and switching was being done. Suttle v. Southern R. Co., 150 N. C. 668, 64 SE 778.

84. Negligent as matter of law: Standing on lower steps of car, grasping handholds and leaning out while approaching station. Thielker v. East St. Louis & Suburban R. Co., 140 Ill. App. 138. In being on top of car without occasion. Winters v. Baltimore & O. R. Co., 163 F 106. As matter of law position on outer edge of an open car running 12 miles per hour is perilous, where car is brought to a sudden stop. Richmond St. & I. R. Co. v. Beverly [Ind. App.] 85 NE 721. Where dangerousness of position is obvious, it does not relieve the passenger of contributory negligence that employes did not request that he leave the same. Winters v. Baltimore & O. R. Co., 163 F 106.

Riding on the running board or platform of a street car.[See 11 C. L. 557]—Generally, it is not negligence as a matter of law to ride on the running board, step,[85] or platform [86] of a street car, but is a question of fact,[87] especially if the passenger has been invited so to do [88] by one having authority.[89] He assumes the risks, however, incident to the place,[90] and especially if the rule of the carrier so provides.[91]

Riding on platform of railroad train.[See 11 C. L. 557]—While it is not generally per se negligence to ride on the platform, especially if vestibuled,[92] unless made so by statute,[93] it may be so in fact.[94]

Going about on cars or from car to car.[See 11 C. L. 557].

Allowing body to project.[See 11 C. L. 557]—Negligence in allowing body to project is usually a question of fact [95] and not of law.[96]

85. Not per se negligence to ride on step of platform with knowledge and consent of conductor, there being no room inside or on platform. Hoppock v. Easton Transit Co. [N. J. Law] 72 A 453.

86. Not negligence as a matter of law to ride on front platform. Brackney v. Public Service Corp. [N. J. Law] 71 A 149; Lobner v. Metropolitan St. R. Co. [Kan.] 101 P 463. At direction of conductor. Mittleman v. Philadelphia Rapid Transit Co., 221 Pa. 485, 70 A 828. A passenger does not owe the duty to the carrier to push and crowd his way in order to get an advantage over other passengers in securing a place within the cars, and it does not follow as a matter of law that he will be guilty of negligence in not so doing. Petersen v. Elgin, A. & S. Trac. Co., 142 Ill. App. 34 Where carrier customarily allowed passengers to ride on platform which was enclosed by apparently secure gates, a passenger thrown off car by giving way of gates is not chargeable with negligence in that he did not use handhold. Cincinnati Trac. Co. v. Leach [C. C. A.] 169 F 549. Where plaintiff knew that defendant's street cars in passing over certain crossing passed within six inches of each other, but also knew it was the practice of the defendant to avoid having its cars pass at such crossing, and plaintiff also being on platform of car where he had right to be, he had right to assume that defendant's cars would not pass each other at that point. Scott v. Metropolitan St. R. Co. Mo. App.] 120 SW 131. Where plaintiff who was on step of street car on side next to approaching car signaled motorman of approaching car to stop instead of jumping from car and seeking place of safety, he was not negligent per se in doing so, if his actions at the time were consistant with that which a person in the exercise of reasonable care might have adopted. Id.

87. Negligence for jury: Riding on steps of car. Petersen v. Elgin, A. & S. Trac. Co., 238 Ill. 403, 87 NE 345; Id., 142 Ill. App. 34. Riding on running board. Betz v. Rhode Island Co. [R. I.] 70 A 1058. In boarding crowded street car and riding on platform from which he was pushed. Lobner v. Metropolitan St. R. Co. [Kan.] 101 P 463. Special police officer to preserve order on cars in riding on front platfom at direction of conductor. Goehring v. Beaver Val. Trac. Co. [Pa.] 72 A 259. In riding upon rear platform of traction car while car went around curve at 18 or 20 miles per hour. Metropolitan West Side E. R. Co. v. Kowolski, 139 Ill. App. 89.

Held negligent: When there is room within body of summer car, passenger who chooses to ride on running board is guilty of contributory negligence, and there can be no recovery for his death caused by falling while car was passing around curve. Ramsay v. Pottstown & R. St. R. Co., 35 Pa. Super. Ct. 598. Evidence held to show that plaintiff fell from car because he voluntarily let loose of guard rail. Quinn v. Metropolitan St. R. Co., 218 Mo. 545, 118 SW 46.

88. Direction, "go to the front," to one laden with bundles objectionable to passengers, held a direction to go onto front platform. Mittleman v. Philadelphia Rapid Transit Co., 221 Pa. 485, 70 A 828.

89. Conductor has implied authority to direct passenger to ride on platform. Mittleman v. Philadelphia Rapid Transit Co., 221 Pa. 485, 70 A 828.

90. Passenger who rides on running board of street car assumes the risk from collision with passing vehicles and with obstructions of whatever nature which unexpectedly appear. Wood v. Chester Trac. Co., 36 Pa. Super. Ct. 483.

91. Rule that persons riding on platform do so at own risk is reasonable. Tompkins v. Boston El. R. Co., 201 Mass. 114, 87 NE 488.

92. Johnson v. Yazoo & M. V. R. Co. [Miss.] 47 S 785.

93. Civ. Code Cal. § 483, requires carriers to provide room for all passengers inside of car, and § 484 declares that every railroad corporation shall print and post rules and regulations regarding conduct of passengers, and that if passenger is injured on platform in violation of such rules, carrier shall not be liable unless it has failed to comply with § 483. Held that under such sections, as construed by supreme court of California, a passenger who goes on platform in violation of rules is not, as a matter of law, negligent. Thomas v. San Pedro, etc., R. Co. [C. C. A.] 170 F 129.

94. Adult going onto open platform several blocks before train reached station and while train was going ten miles per hour held negligent. Chicago Great Western R. Co. v. Mohaupt [C. C. A.] 162 F 665. Where passenger, unaware that porter had opened trap door of vestibule train and placed stool near same, walked out onto platform in night time and stumbled over stool and out door, negligence held for jury. Johnson v. Yazoo & M. V. R. Co. [Miss.] 47 S 785.

95. Whether person riding in a street car who places his arm upon window sill, even if it extends slightly outside, does so in a

Acts attendant on alighting and departing.[See 11 C. L. 557]—A passenger must exercise ordinary care in preparing to alight,[97] in alighting,[98] and in departing.[99] A passenger may ordinarily assume that the car has stopped at a safe place to alight,[1] that the platform of car is safe,[2] and, if it is the usual place, that he will not be negligently injured.[3] Reasonable rules of the carrier must be observed [4] if known or properly published.[5]

Leaving moving train or car.[See 11 C. L. 558]—It is not ordinarily negligence per se to alight from a moving train or car [6] unless moving at such rate as to make it ob-

manner hazardous under the circumstances, or whether he exercises reasonable care, is for jury. Pell v. Joliet, P. & A. R. Co., 142 Ill. App. 362.

96. Passenger sitting sideways on seat running lengthwise of interurban car and allowing arm to slightly project from window is not negligent as matter of law, although if he had been sitting as was designed accident would not have happened. Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 542.

97. **Negligence for jury:** Whether passenger about to alight was guilty of contributory negligence held for jury. Houston & T. C. R. Co. v. Harris [Tex. Civ. App.] 120 SW 500. In going onto platform after announcement of his station and before train stopped. Thomas v. San Pedro, etc., R. Co. [C. C. A.] 170 F 129; Houston & T. C. R. Co. v. Harris [Tex. Civ. App.] 120 SW 500; Southworth v. Pecos & N. T. R. Co. [Tex. Civ. App.] 118 SW 861; Davis v. Atlanta & C. Air Line R. Co. [S. C.] 64 SE 1015; Myrick v. Macon R. & L. Co. [Ga. App.] 64 SE 296. Encumbered with bundles. Myrick v. Macon R. & L. Co. [Ga. App.] 64 SE 296. Going out onto front platform to alight as car was ascending incline with power shut off, knowing that power would be turned on and car started with a jerk. Cutts v. Boston El. R. Co., 202 Mass. 450, 89 NE 21. Whether passenger, injured by being thrown from platform while there intending to alight, but train failing to stop. Davis v. Atlanta & C. Air Line R. Co. [S. C.] 64 SE 1015.

98. Instruction that "ordinary care means that degree of care which a person of ordinary prudence would usually exercise under the same circumstances, and the failure to use such care is negligence," is not incorrect because of the use of the word "usually." International & G. N. R. Co. v. Ford [Tex. Civ. App.] 118 SW 1137.

Held negligent: Where passenger attempted to leave ferry by way of vehicle gangway and fell over chain at time when passenger gangplank was not crowded, knowing that it was not for foot passengers. Grabler v. New York & E. R. Ferry Co., 64 Misc. 58, 117 NYS 1018. Evidence held sufficient to sustain finding that plaintiff who was injured by catching her heel in platform while alighting was guilty of contributory negligence. Hertzberg v. San Antonio Trac. Co. [Tex. Civ. App.] 120 SW 572.

Negligence for jury: Stepping off at night into open manhole. Murray v. Seattle Elec. Co., 50 Wash. 444, 97 P 458. Stepping from body of car onto running board and thrown by sudden jerk. McCullom v. Atlantic City & S. R. Co. [N. J. Err. & App.] 72 A 87. Mere fact that passenger knew of street improvements held not to make her negligent as a matter of law in stepping off in night time into hole. Murray v. Seattle Elec. Co., 50 Wash. 444, 97 P 458. In alighting in darkness from front platform of coach and stepping into hole, there being no assistant thereat. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961.

99. Fact that company has provided a paseway across tracks does not relieve passenger, going around rear of one car onto adjoining track, of duty to look for cars. Yevsack v. Lackawanna & W. U. R. Co., 221 Pa. 493, 70 A. 837.

Held negligent: In attempting to cross track immediately after alighting in front of rapidly moving car, which plaintiff saw but miscalculated distance. Cohen v. Boston El. R. Co., 202 Mass. 66, 88 NE 453. Alighting from car and passing behind it onto adjoining track without looking for cars thereon. Yevsack v. Lackawanna & W. V. R. Co., 221 Pa. 493, 70 A 837.

Held not negligent: In going around car from which he had just alighted onto adjoining parallel street car track without looking for car, where ordinance required such car to stop. Jones v. New Orleans R. & L. Co., 123 La. 1060, 49 S 706. In using five-foot wide gangplank to alight from ferry, such plank being provided by defendant for that purpose. Peters v. Philadelphia & C. Ferry Co. [N. J. Err. & App.] 72 A 106.

1. Where carrier has stopped at usual place to discharge passengers, passenger may assume that it is safe to alight from front platform, that being a usual exit, where it is dark and no warning is given. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961.

2. Hertzberg v. San Antonio Trac. Co. [Tex. Civ. App.] 120 SW 572.

3. Passenger exercising due care may assume that carrier will also use due care. Indiana Union Trac. Co. v. Thomas [Ind. App.] 88 NE 356. Where car stops to change motive power, passenger has the right to get off, though operators have no knowledge of his intention to do so. Eckels v. Bryant, 137 Ill. App. 234.

4. Mere warning against leaving car by way of front platform is not equivalent to notice that passengers so doing assume risk. Cutts v. Boston El. R. Co., 202 Mass. 450, 89 NE 21.

5. Rule that passengers leaving car by way of front platform assumed risk painted on outside of car under window opening onto platform, and consisting of two lower lines of five lines of printed matter, held not properly posted. Cutts v. Boston El. R. Co., 202 Mass. 450, 89 NE 21.

6. St. Louis, etc., R. Co. v. Pate [Ark.] 118 SW 260. Slowly moving train. Sevier v. Southern R. Co., 82 S. C. 311, 64 SE 390. Negligence per se to alight from moving train.

viously dangerous,[7] but a question of fact for the jury [8] under all the circumstances.[9]

Alighting at wrong station or unusual place. See 11 C. L. 559—A passenger must exercise due care to alight at the proper place,[10] and, where he knows that the car has not reached the usual stopping place, he cannot assume that it is slackening speed to allow him to alight.[11]

§ 26. *Care and condition of premises.*[12] See 11 C. L. 559—A carrier must exercise reasonable care [13] to construct and maintain its station,[14] the approaches thereto,[15] and its platforms,[16] in a safe condition,[17] free from obstructions,[18] water [19] and

Hoylman v. Kanawha & M. R. Co., 65 W. Va. App. 264, 64 SE 536. To sustain verdict for plaintiff, where it appeared that plaintiff was not injured by car starting at crossing, but that plaintiff left car while in motion after passing crossing. Springfield Consol. R. Co. v. Milan, 137 Ill. App. 435. Held contributory negligence for female passenger to attempt to alight from rapidly moving car. Scroggins v. Metropolitan St. R. Co. [Mo. App.] 120 SW 731. Where passenger on street car alighted while car was in motion and immediately passed around its rear end, practically upon adjoining track, upon which he knew cars passed at frequent intervals from opposite direction, and neither stopped, looked, nor listened, he was guilty of contributory negligence. Austin Elec. R. Co. v. Lane [Tex. Civ. App.] 120 SW 1011.

7. Negligence to step from moving car when circumstances are such that the danger is obvious. Norton v. Columbia Elec. St. R., L. & P. Co. [S. C.] 64 SE 962.

Negligent as matter of law: Adult alighting from moving car without any necessity or invitation. Armstrong v. Portland R. Co. [Or.] 97 P 715.

8. Negligence for jury: In alighting from slowly moving train. St. Louis, etc., R. Co. v. Fambro [Ark.] 114 SW 230. Boy 12 years old attempting to alight from slowly moving train onto platform, near edge of same. Moeller v. United R. Co., 133 Mo. App. 68, 112 SW 714. In alighting from train which was just started and was not moving over 2 miles per hour. Sevier v. Southern R. Co., 82 S. C. 311, 64 SE 390. Stepping off train under belief that it had stopped, the front end of car being unlighted and the station in darkness. Bartle v. New York Cent. & H. R. R. Co., 193 N. Y. 362, 85 NE 1091. In jumping from slowly moving train, under command and pressure of crowd on platform. Yazoo & M. V. R. Co. v. Beattie [Miss.] 49 S 609. Evidence held to show that injury was caused by passenger's attempt to alight before train stopped. Wade v. Illinois Cent. R. Co. [Ky.] 112 SW 1103; Scroggins v. Metropolitan St. R. Co. [Mo. App.] 120 SW 731.

9. Haralson v. San Antonio Trac. Co. [Tex. Civ. App.] 115 SW 876. In action for injury while alighting from moving train which passenger had wrongfully boarded, instruction that if plaintiff was informed that train made connection with one which went to her destination she was justified in leaving it while in motion held erroneous, where there was evidence that she was informed by brakeman that it did not go to destination. St. Louis, etc., R. Co. v. Frambro [Ark.] 114 SW 230.

10. Negligence for jury in alighting at stop for railroad crossing, night being dark and conductor having called plaintiff's transfer point. Smith v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1055, 119 NW 640. Unless electric carrier has waived its established rule that passengers shall alight only at designated stopping places, slowing up of car before crossing another track is not an invitation to alight, and fact that people sometimes take advantage of such slowing to alight does not show a waiver. Stevens v. Boston El. R. Co., 199 Mass. 471, 85 NE 571.

11. Dwyer v. Auburn & S. Elec. R. Co., 131 App. Div. 477, 115 NYS 364.

12. Search Note: See notes in 16 L. R. A. 449-593; 20 Id. 520, 527; 29 A. S. R. 55; 6 Ann. Cas. 571; 7 Id. 969.

See, also, Carriers, Cent. Dig. §§ 1142-1152; Dec. Dig. § 286; 6 Cyc. 597, 605-610; 5 A. & E. Enc. L. (2ed.) 572.

13. Instruction that company must keep waiting room in a reasonably safe condition held inaccurate. St. Louis, etc., R. v. Grimsley [Ark.] 117 SW 1064. Instruction in effect making carrier liable if it did not provide sufficient light in and about station platform "to avoid injury" held to exact too high a degree of care. Dinkelspiel v. Interborough Rapid Transit Co., 113 NYS 187. Must use the care of ordinarily prudent persons under like circumstances to adopt safest construction consistent with exigencies of the situation in erection of platform. Feil v. West Jersey & S. R. Co. [N. J. Err. & App.] 72 A 362. That construction was one in general use does not conclusively show due care, though it is a fact to be considered. Vance v. Great Northern R. Co., 106 Minn. 172, 118 NW 674. It is a carrier's duty to exercise the highest degree of care that a very cautious, competent, and prudent person would exercise, under similar circumstances, to provide for its passengers a safe approach to its passenger coach, and a failure to exercise such care is negligence. Missouri, K. & T. R. Co. v. Harrison [Tex. Civ. App.] 120 SW 254.

14. Held for jury whether carrier so constructing turnstile that there was space of eight inches between floor and lower arm should have foreseen that passenger would catch foot therein and be injured. Gascoigne v. Metropolitan West Side El. R. Co., 239 Ill. 18, 87 NE 883.

15. Must exercise reasonable care to keep approaches in a reasonably safe condition. Chase v. Atchison, etc., R. Co., 134 Mo. App. 655, 114 SW 1141. As to approaches, owes same duty as owner of any property owes who impliedly invites people thereon. Chase v. Atchison, etc., R. Co., 134 Mo. App. 655, 114 SW 1141. Owes ordinary care in construction and maintenance of viaduct, including railing running parallel to track and in close

snow,[20] and properly lighted [21] and heated,[22] as to those rightfully using the same.[23] It is the duty of a carrier to use ordinary care to protect persons lawfully upon its platform against injuries by mail sacks thrown from its trains.[24] Where it has pro-

proximity thereto. Joyce v. Metropolitan St. R. Co., 219 Mo. 344, 118 SW 21. Negligence for jury in maintaining semaphore wire across smooth graveled area between two driveway approaches. Chase v. Atchison, etc., R. Co., 134 Mo. App. 655, 114 SW 1141. Carrier must keep road leading from depot to its ferry landing in reasonably safe condition. Whether reasonably safe held question for jury. Chesapeake & O. R. Co. v. Meyer [Ky.] 119 SW 183.

16. Adoption of platform construction in general use by well regulated railroads and approved by experience is sufficient. Feil v. West Jersey & S. R. Co. [N. J. Err. & App.] 72 A 362.

Negligence held for jury: In not having guardrail at end of high platform onto which passengers are discharged. Moeller v. United R. Co., 133 Mo. App. 68, 112 SW 714. Evidence of proximity of steps on which plaintiff was waiting for the car to the tracks and the insufficiency of the lights. Harkins v. Seattle Elec. Co. [Wash.] 101 P 836. Where platform was so constructed that passing cars projected over two or three inches. Campbell v. Yazoo & M. V. R. Co. [Miss.] 48 S 618. Fact that one portion of platform is constructed one step lower than balance does not show negligence. Feil v. West Jersey & S. R. Co. [N. J. Err. & App.] 72 A 362.

17. Evidence that deceased was seen to leave waiting room for apparent purpose of taking train and was found a few minutes later dead at foot of cellar stairway opening onto platform held to authorize inference that he fell into same while on way to train. Vosler v. Delaware, L. & W. R. Co. [N. J. Err. & App.] 73 A 483.

Held for jury: Whether carrier should have anticipated injury from nineteen-inch change of level in station platform, connected by two steps. Fisher v. Boston & M. R. Co. [N. H.] 72 A 212. Whether defendant ought to have foreseen that such an accident might happen as did happen if a certain turnstile was set up and maintained was question for jury. Gascoigne v. Metropolitan, etc., R. Co., 143 Ill. App. 547.

18. Negligence to allow truck to stand so near track as to strike one on first step of coach. Bell v. Southern R. Co. [Miss.] 49 S 120.

Negligence for jury: In attaching ladder to semaphore located in platform so that base was 2½ feet from base of semaphore and connected therewith by brace. Vance v. Great Northern R. Co., 106 Minn. 172, 118 NW 674. In leaving truck on platform in pathway of passengers where train arrived at 4 o'clock a. m. and platform was not lighted. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83.

19. Where carrier was negligent in permitting a sheet of water to be on its platform and a passenger in going around same was hit by locomotive and thrown against plaintiff, causing him to fall against truck handles, the negligence of the carrier was the proximate cause of plaintiff's injury. Missouri, K. & T. R. Co. v. Harrison [Tex. Civ. App.] 120 SW 254.

20. Evidence that during snow storm defendant kept two men shoveling snow from platform held to show due care in keeping same free from snow. Strong v. Long Island R. Co., 129 App. Div. 361, 113 NYS 828.

21. Carrier must provide adequate lights at station. St. Louis, etc., R. Co. v. Briggs [Ark.] 113 SW 644. Instruction that if the station and platform and premises were dark, or not sufficiently lighted, and failure to light was negligence, etc., defendant could recover, held not to impose absolute duty to light. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83. Under Rev. St. 1895, art. 4494, requiring company to maintain reasonable accommodations, etc., carrier must have station and platform sufficiently lighted to enable passengers to board and alight with reasonable safety. Id.

Held for jury: Whether lights from waiting room through windows was sufficient light to guard against unguarded cellarway in platform near waiting room door. Vosler v. Delaware, L. & W. R. Co. [N. J. Err. & App.] 73 A 483. Whether platform upon which plaintiff alighted from train was reasonably lighted, only light being one in operator's room. Hall v. Bessemer & L. E. R. Co., 36 Pa. Super. Ct. 556. Where only light was that which came through windows, negligence for jury. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83. Evidence as to lights held to show that subway station was sufficiently lighted, notwithstanding plaintiff's testimony that it was dimly lighted. Becker v. Interborough Rapid Transit Co., 128 App. Div. 455, 112 NYS 816.

22. It is duty of carriers to keep their passenger stations heated during time passengers are authorized to use same, and this common-law duty is not changed by Sayles' Ann. Civ. St. 1897, art. 4521 (International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118), and where passenger, because of receiving wrong ticket, was compelled to wait in station which was not properly heated and thereby contracted illness, held there were sufficient facts justifying submission of carrier's negligence (Id.). Under Sayles' Ann. Civ. St. 1897, art. 4521, a railroad is required to keep its depot heated one hour before and after departure of its trains. Held that said requirements apply to flag station where company sold tickets and maintained depot for passengers. St. Louis S. W. R. Co. v. Rumfield [Tex. Civ. App.] 118 SW 810. Held that instruction predicated on such statute was erroneous in that it failed to limit duty of defendants as required therein. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118.

23. Where railroad is using tracks jointly with another railroad, it owes same duty to passengers of latter in and about station as to its own. Chicago, etc., R. Co. v. Stepp [C. C. A.] 164 F 785. Duty owed to keep platform safe as a means of discharging passengers from train is distinct from duty respecting maintenance of platforms as to persons who have not become passengers or who have ceased to be such. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961.

24. Held that carrier could have done so by

vided a safe approach, it is not liable to one deviating therefrom,[25] unless it has invited such deviation.[26] Where the carrier provides a way around an obstructed part of its line and invites its passengers to use the same,[27] it must exercise reasonable care to keep the same safe, though it is over private property which the carrier has no right to use,[28] and it is immaterial whether it sustains the technical relation of carrier and passenger while they are so using it.[29] While a carrier is not liable for the placing of obstructions by third persons,[30] it must exercise due care to discover and remove the same.[31] It is not negligence to pile trunks on the platform if a sufficient and safe passageway is left.[32] Ordinarily, a carrier must exercise the highest degree of care in the construction and maintenance of its tracks [33] and bridges.[34] Perilous conditions may require carrier to warn passengers thereof.[35]

§ 27. *Means and facilities of transportation.*[36]—See 11 C. L. 560—A carrier must exercise the highest care to provide and furnish safe cars [37] and track,[38] and is liable for a latent defect in construction or material which could have been discovered

requiring sacks to be thrown at certain place and by notices, or by other means. Huddleston v. St. Louis, etc., R. Co. [Ark.] 119 SW 280. Instruction, in action for injuries to passenger caused by mail sack being thrown from moving train, held erroneous as ignoring duty of carrier to persons lawfully on its depot platform. Id.

25. Chase v. Atchison, etc., R. Co., 134 Mo. App. 655, 114 SW 1141.

26. Where carrier maintained a smooth graveled area between two roadways leading to depot, held for jury whether it impliedly invited public to use same. Chase v. Atchison, etc., R. Co., 134 Mo. App. 655, 114 SW 1141.

27. Evidence held to show that carrier voluntarily provided way to pass around obstructed part of its line and invited patrons to use same. Powers v. Old Colony St. R. Co., 201 Mass. 66, 87 NE 192.

28. Condition of path and lighting of same held to make negligence for jury. Powers v. Old Colony St. R. Co., 201 Mass. 66, 87 NE 192.

29. Powers v. Old Colony St. R. Co., 201 Mass. 66, 87 NE 192.

30. Where section foreman gave some discarded ties to one, carrier is not liable for initial leaving of such ties on station platform by such person, in absence of any showing that he was acting as agent of company. Moriarty v. Boston & M. R. Co., 202 Mass. 166, 88 NE 585.

31. Negligence of defendant's section foreman and of station agent in not discovering and removing ties left on platform by one to whom they had been given. Moriarty v. Boston & M. R. Co., 202 Mass. 166, 88 NE 585.

32. Strain v. Vicksburg, S. & P. R. Co., 123 La. 407, 49 S 2. Where platform was only three feet from ground, passageway of two feet outside of trunks held sufficient. Strain v. Vicksburg, S. & P. R. Co., 123 La. 407, 49 S 2.

33. Instructions as to degree of care required in keeping track in safe condition held erroneous as not imposing as high degree of care as is required. Huff v. Cleveland, etc., R. Co., 138 Ill. App. 89. Evidence held to warrant finding that carrier was negligent in permitting low places in track. St. Louis, etc., R. Co. v. Richardson [Ark.] 113 SW 794.

Negligence held for jury: Where evidence is conflicting as to sufficiency of roadbed. Pate v. Columbia & P. S. R. Co., 52 Wash. 166, 100 P 324. Evidence that ties were so rotten at place of derailment as not to hold spikes. Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777.

34. Where collapse of bridge was due to latent defect in supporting cord which could not be discovered by any degree of care and diligence, carrier is not liable. Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385.

35. Carrier held not required to give warning of step in platform required by exigencies of business. Feil v. West Jersey & S. R. Co. [N. J. Err. & App.] 72 A 362.

36. **Search Note:** See notes in 11 C. L. 560; 22 L. R. A. 259; 24 Id. 710; 31 Id. 313; 15 L. R. A. (N. S.) 790; 65 A. S. R. 738; 7 Ann. Cas. 274; 9 Id. 557.

See, also, Carriers, Cent. Dig. §§ 1168-1178; Dec. Dig. §§ 289-293; 6 Cyc. 619-621; 5 A. & E. Enc. L. (2ed.) 520.

37. Where there was no evidence that window catch was defective or that window was opened by employe, nonsuit for injury caused by falling thereof is proper. Rosengarten v. Delaware, L. & W. R. Co. [N. J. Law] 71 A 35.

Negligence for jury: Negligence resulting in controller blowing out, notwithstanding testimony of defendant's employes tending to show due examination of controller and careful operation. Endres v. International R. Co., 129 App. Div. 785, 114 NYS 631. Evidence, together with inference of negligence arising from explosion of drum, held sufficient to take issue of negligence in inspecting and testing heating apparatus to jury. Houston, etc., R. Co. v. Roach [Tex. Civ. App.] 114 SW 418. Where the most reasonable solution of plaintiff's injury is that he allowed arm to project out of car window above screen and was struck thereon by passing car, verdict for defendant affirmed. Levy v. New Orleans R. & L. Co., 123 La. 198, 48 S 887. Where passenger was thrown from moving street car by defective board in car platform, the company was liable. Blackwell v. Metropolitan St. R. Co. [Mo. App.] 119 SW 456.

38. Arkansas Cent. R. Co. v. Janson [Ark.] 119 SW 648. Evidence of experts and of condition of bridge after the collapse held to show collapse was caused by breaking of supporting cord. Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385.

by it or the builders in the exercise of the highest degree of care.[39] It must properly equip its cars,[40] and especially with the equipment provided by statute.[41] The highest degree of diligence must be asserted in keeping the facilities in proper repair,[42] and the steps of cars free from ice and snow.[43] A carrier must have due regard to the convenience of its passengers,[44] and the same high degree of care is owed to provide sufficient seats for passengers[45] and to see that some passengers do not unnecessarily occupy the same to the exclusion of others,[46] although a passenger may waive his right to a seat.[47] In some states a lesser degree of care seems to be exacted of an operator of a passenger elevator.[48]

Separate accommodations for white and colored persons. See 11 C. L. 562—Common carriers may not, in accommodations which they furnish to each, unjustly discriminate between white and colored passengers paying the same fare.[49] A lessee and operator of an interurban road[50] must provide separate accommodations for white and colored passengers as required by the Kentucky statute,[51] and the lessor is not criminally liable unless it leased with knowledge that such accommodations were not to be furnished.[52]

§ 28. *Operation and management of trains and other vehicles.*[53] See 11 C. L. 562 A carrier is usually required to exercise the highest degree of care[54] in respect to all operations of the train,[55] such as making up the same,[56] in starting and stop-

39. Chesapeake & O. R. Co. v. Morgan [Ky.] 112 SW 859.

40. Must equip and keep vehicle in reasonably safe condition. Irwin v. Louisville & N. R. Co. [Ala.] 50 S 62. A carrier must furnish and maintain reasonably safe equipments so far as can be provided by the utmost human skill and foresight. Arkansas Cent. R. Co. v. Janson [Ark.] 119 SW 648.

41. Loc. Acts 1901, p. 485, No. 439, requiring electric cars to be equipped with electric brakes, held sufficient as to title. Fortin v. Bay City Trac. & Elec. Co., 154 Mich. 316, 15 Det. Leg. N. 741, 117 NW 741.

42. Instruction making defendant's liability depend upon the existence of such a condition of the floor as of itself to "necessarily" apprise defendant of its dangerous condition held erroneous as too favorable to carrier. Plefka v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 911, 118 NW 731.

43. Instruction exacting only reasonable care to keep steps free from snow and ice held erroneous. Johnston v. Cedar Rapids & M. C. R. Co. [Iowa] 119 NW 286.

44. Where at junction point receiving connecting carrier forwarded train in two sections, it was not liable to passenger already on one section for inconvenience in attaching her sleeper to other section, it having no knowledge of her presence or right to sleeper. Cincinnati, etc., R. Co. v. Raine [Ky.] 113 SW 495.

45. St. Louis S. W. R. Co. v. Tittle [Tex. Civ. App.] 115 SW 640.

46. Where it is not made certain that some passengers did not occupy more seats than was necessary, or that employes could not have found plaintiff's wife a seat when she asked for one, instruction that defendant was not liable if it provided sufficient seats to meet needs to be reasonably expected held erroneous. St. Louis S. W. R. Co. v. Tittle [Tex. Civ. App.] 115 SW 640.

47. Where plaintiff accepted transportation on car so crowded that she could not find a seat and surrendered her ticket, she waived her contract right to a seat. Weeks v. Auburn & S. Elec. R. Co., 60 Misc. 400, 113 NYS 636.

48. Held for jury under the evidence whether operator of a passenger elevator used due care to keep same in a reasonably safe condition. Ferguson v. Truax, 136 Wis. 637, 118 NW 251.

49. Cozart v. Southsrn R. Co., 15 I. C. C. 226. Certain bishops of the African Methodist Episcopal Church alleged that the day coaches furnished for colored passengers in the southeastern states are not equal to those provided for white people; that negroes are denied sleeping car accommodations, and are refused food in the dining cars solely on account of their race and color. The complaint with respect to the day coaches was abandoned in view of the great weight of the evidence to the contrary, and with respect to eating accommodations was materially modified by concession; most of the complainants and their witnesses testified that they do ride upon the sleeping cars. Held that undue discrimination or prejudice has not been shown and that the complaint should be dismissed. Gaines v. Seaboard Air Line R. Co., 16 I. C. C. 471.

50. Where it operates road in fact, it cannot set up lack of corporate authority to lease same. Louisville R. Co. v. Com. [Ky.] 114 SW 343.

51, 52. Louisville R. Co. v. Com. [Ky.] 114 SW 343.

53. **Search Note:** See notes in 3 C. L. 635; 15 L. R. A. 347; 32 Id. 543; 42 Id. 110; 2 L. R. A. (N. S.) 505, 645, 1108; 4 Id. 399; 5 Id. 1012; 11 Id. 268; 13 Id. 620; 2 Ann. Cas. 676.

See, also, Carriers, Cent. Dig. §§ 1191-1220; Dec. Dig. §§ 295-301; 6 Cyc. 622-625; 5 A. & E. Enc. L. (2ed.) 566, 586.

54. Highest degree of care not exacted in manner of operation. Endres v. International R. Co., 129 App. Div. 785, 114 NYS 631.

55. Fact that conductor announced in ex-

ping,[57] in operating without unnecessarily violent jerks,[58] in running at a safe speed,[59] in protecting cars from fire,[60] in approaching station where passengers must

cited tone that train was on fire held not negligence rendering carrier liable to passenger who rushed to platform and was thrown therefrom by sudden lurch as he was looking forward along train. Chicago, etc., R. Co. v. James [Kan.] 100 P 641. Carrier held liable for carelessness of stewardess on vessel in allowing spout of teapot to strike plaintiff's eye. Korzib v. Netherlands-American Steam Nav. Co., 169 F 917. Swinging of trolley rope by conductor around rear of car in front of steps, intending to catch it with other hand, which rope struck passenger in eye, held negligence. Coolidge v. La Crosse City R. Co., 136 Wis. 356, 117 NW 818.

56. After caboose has been drawn up to station for receiving passengers, trainmen must thereafter anticipate their presence in same. St. Louis, etc., R. Co. v. Gilbreath [Ark.] 113 SW 200. Where there was a conflict of evidence as to whether trainmen knew of caretaker's presence in car with horses, held error to refuse instruction that if they did not know, and engineer, in backing into car, exercised such care as an ordinarily prudent engineer would have exercised under similar circumstances, defendant is not liable. Bruce v. Chicago, B. & Q. R. Co., 136 Mo. App. 204, 116 SW 447.

Held negligent: Where passenger was requested to change coaches and before she was seated a train or engine was propelled against car with such force as to throw her against back of seat. Missouri, K. & T. R. Co. v. Allen [Tex. Civ. App.] 115 SW 1179. Where, in switching, car was violently bumped into passenger coach attached to freight train. Suttle v. Southern R. Co., 150 N. C. 668, 64 SE 778. Evidence of violent shoving of freight car against passenger car in mixed train during switching. Evidence held to authorize finding that coupling was negligently made, the jerk having thrown plaintiff from her seat. Texas & P. R. Co. v. Boleman [Tex. Civ. App.] 112 SW 805. Evidence that freight car was shoved violently against car in which plaintiff was standing held to make prima facie case of negligence. Gabriel v. St. Louis, etc., R. Co., 135 Mo App. 222, 115 SW 3.

57. Not per se negligence to suddenly start street car, but the negligence of the act depends upon the circumstances. Oliver v. Ft. Smith L. & Trac. Co. [Ark.] 116 SW 204. Where increase of speed after slowing down caused passenger to fall from footboard, negligence is for jury. Id. Held not negligence to stop train, discovered on fire, with emergency brake, although stop could have been nearly as quickly made by service stop. Chicago, etc., R. Co. v. James [Kan.] 100 P 641.

58. Mere jerk of electric car is insufficient to show negligence. McGann v. Boston El. R. Co., 199 Mass. 446, 85 NE 570. Fact that freight train moving about three miles per hour stopped with a jerk sufficient to injure one leaning against door casing held not of itself to show negligence. St. Louis & S. F. R. Co. v. Gasnell [Okl.] 101 P 1126. Evidence held insufficient to show that jerk of cable car throwing man's arm through glass next to which he was carelessly standing was due to negligence. De Yoe v. Seattle Elec. Co. [Wash.] 102 P 446. Negligence for jury in turning on of full power suddenly as passenger was standing on front platform preparatory to alighting. Cutts v. Boston El. R. Co., 202 Mass. 450, 89 NE 21. Instruction, in action for personal injury caused by being thrown by jerk in making coupling, to find for plaintiff if jerk was with great and "unusual" violence, held not prejudicial to defendant in use of word "unusual." Texas & P. R. Co. v. Boleman [Tex. Civ. App.] 112 SW 805. Where child which had been placed on platform of car by its mother was thrown from car by jerk of train and killed, whether the jerking of the train under the circumstances was negligence held question for jury. Miles v. St. Louis, etc., R. Co. [Ark.] 119 SW 837. Testimony of plaintiff that he was standing on the rear platform of first car, and that when cable of bumper car let go the front platform thereof overrode platform on which he was standing and injured him, held not so physically impossible as to take case from jury. Johnson v. Brooklyn Heights R. Co., 117 NYS 360. Evidence that, in rounding curve, car lurched so as to throw standing passengers, held insufficient to show negligence, though witness testified that it was unusual. Norfolk & W. R. Co. v. Rhodes [Va.] 63 SE 445. To justify inference that the injury to plaintiff by being thrown from car while going around curve was the result of carrier's negligence. Chicago Union Trac. Co. v. Duckstein, 136 Ill. App. 389. Evidence held sufficient to show that sudden stop of trains was due to negligence of carrier. Chicago Union Trac. Co. v. Berkes, 136 Ill. App. 105.

59. High speed may be negligence per se as to a passenger. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. Within station yards a high rate of speed may be negligent as a matter of law. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 121 NW 676. Speed of 45 miles per hour is not per se negligence, though schedule is only 24 miles. Haskins v. Northern Pac. R. Co. [Mont.] 102 P 988. Fact that defendant's witnesses disagree as to speed does not render their testimony unworthy of credit as establishing fact that car was moving. Levy v. New York City R. Co., 116 NYS 655.

Negligence for jury: Operation of train at 18 to 20 miles per hour over ties so rotten as not to hold spikes. Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777. In running traction car around curve at 18 or 20 miles per hour, knowing that plaintiff was standing on rear platform. Metropolitan West Side El. R. Co. v. Kowalski, 139 Ill. App. 89. Where evidence is conflicting as to speed. Pate v. Columbia & P. S. R. Co., 52 Wash. 166, 100 P 324.

Held not negligent: Motorman of an electric car may increase speed though within 250 or 300 feet of stopping place for which signal has been given. McGann v. Boston El. R. Co., 199 Mass. 446, 85 NE 570. Evidence that car increased speed and threw plaintiff who was attempting to alight at unusual place. Stevens v. Boston El. R. Co., 199 Mass. 471, 85 NE 571.

Held negligent: Where electric railway

cross tracks to take passage,[61] in crossing the tracks of other carriers,[62] in passing cars from which passengers are alighting,[63] in avoiding collisions,[64] in discovering obstructions on the track,[65] in preventing derailment,[66] in remaining stationary while passengers are boarding or alighting,[67] in opening and closing car doors,[68]

company operates its roads on public highway and runs cars in night time upon a straight level track, although in open country, at such rate of speed that a cow cannot be discovered standing upon track by light of headlight in time to stop the car. Cleveland, P. & E. R. Co. v. Sites, 12 Ohio C. C. (N. S.) 73.

60. Evidence of flying sparks and of condition of car, etc., held to warrant finding that fire which destroyed car started from without. McGuire v. Great Northern R. Co., 106 Minn. 192, 118 NW 556.

61. Trainmen approaching on a straight track are bound to know that it is difficult to judge distance of train from headlight. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 121 NW 676. Carrier owes positive duty not to let trains run in on such tracks while passengers are using same. Keifner v. Pittsburg, etc., R. Co. [Pa.] 72 A 253.

62. Held not negligence for employes in charge of street car to respond to invitation of watchman of steam railway to cross tracks, although engine down the track showed indication of starting, the collision being caused by car becoming stranded on track. Gaines v. Chester Trac. Co. [Pa.] 73 A 7. Evidence insufficient to show that trolley jumped wire and left car on track of railroad through any negligence of defendant. Id.

63. Held liable where, in violation of ordinance requiring car to stop as it approached car on parrallel track discharging passengers, it attempted to pass and struck passenger who was attempting to cross tracks. Jones v. New Orleans R. & L. Co., 123 La. 1060, 49 S 706.

64. It is duty of conductor as well as motorman to prevent collisions, and instruction making carrier liable if either was negligent held proper. Williamson v. St. Louis & M. R. Co., 133 Mo. App. 375, 113 SW 239. In action for injury to passenger from collision with wagon, doctrine of paramount rights is not of much importance, since duty to passenger requires it to surrender the right. Tucker v. Brooklyn Heights R. Co., 131 App. Div. 97, 115 NYS 224. Where evidence showed that plaintiff was in open car with boards running along sides thereof and that the conductor in attempting to swing around a passenger on running board struck some portion of wagon, causing it to swerve in such a way as to throw pole of same into the car against plaintiff, held negligence for jury. Monday v. St. Joseph R. Co., 136 Mo. App. 692, 119 SW 24.

Negligence for jury: Whether collision was result of defendant's negligence. Chicago Union Trac. Co. v. Mee, 136 Ill. App. 98. That negligence of street car company caused collision between car and locomotive. Asher v. East St. Louis & S. R. Co., 140 Ill. App. 220. That collision between street car and wagon was caused by carriers's negligence. Chicago Union Trac. Co. v. Mee, 136 Ill. App. 98. In running into wagon which attempted to leave track but skidded. Brackney v. Public Service Corp. [N. J. Law] 71 A 149.

Held not negligent: Motorman held not negligent in colliding with driverless horse where it suddenly became frightened and turned into car. Trenchard v. New Orleans R. & L. Co., 123 La. 36, 48 S 575. Where engine was left by engineer in safe condition but was started by boy who was filling oil cans. Chicago Terminal Transfer R. Co. v. Berkowitz, 137 Ill. App. 95.

Held negligent: Where car had stopped in order to allow wagon to get out of way but when started ran into wagon. Eckels v. Boylan, 136 Ill. App. 258. Evidence that gong on fire hose wagon with which collision occurred could be heard two or three blocks, and that man tried to stop car while it was 125 or 150 feet distant by waving of hands. Williamson v. St. Louis & M. R. Co., 133 Mo. App. 375, 113 SW 239. Collision caused by disobedience of orders by motorman. St. Louis & N. E. R. Co. v. Sommerland, 140 Ill. App. 184. Collision between street car and locomotive held to be result of street car company's negligence. Chicago City R. Co. v. Casey, 139 Ill. App. 655.

65. Instruction requiring motorman to attempt to stop only after discovering driver about to go onto track held liberal in favor of carrier. Newman v. New York & Q. C. R. Co., 127 App. Div. 12, 111 NYS 289. Negligence for the jury in failing to observe truckman driving in close proximity to track and avoid collision. Tucker v. Brooklyn Heights R. Co., 131 App. Div. 97, 115 NYS 224.

66. Where car left track while rounding curve, evidence held to require verdict for plaintiff. McGrew v. Chicago & M. Elec. R. Co., 142 Ill. App. 210.

67. See post, § 30.

68. Where carrier provides vestibules, it must maintain them in a safe condition. Chicago, etc., R. Co. v. Simpson [Ark.] 112 SW 875. Held not negligent in not having door of vestibule of rear car closed where carrier had not led passenger to believe that such platform was to be used for observation. Id. Failure to close vestibule doors on side nearest the tracks on which cars were run in opposite directions, and to see that no passengers were riding upon step of car, and if so to either provide a place inside or warn them off, is negligence. Petersen v. Elgin, A. & S. Trac. Co., 142 Ill. App. 34. Mere proof that door closed on plaintiff's hand held insufficient to show negligence. Gillmore v. Interborough Rapid Transit Co., 116 NYS 674. To render company liable for injury to plaintiff's hand by closing of door thereon, it is not necessary that servant closing same should have actual knowledge of position of hand (Bennett v. Central of Georgia R. Co. [Ga. App.] 64 SE 700), and an allegation that in the exercise of due care he should have known held sufficient (Id.). Evidence insufficient to show negligence in carrier's servant closing door on passenger's finger. Martin v. Missouri Pac. R. Co. [Mo. App.] 119 SW 444.

in giving due warning of known dangers,[69] etc. A carrier must not permit its cars to become dangerously overcrowded,[70] and, if it does, it must exercise commensurate care.[71] While public regulations must be duly observed,[72] a carrier is not ordinarily required to maintain flagmen in the absence of statute,[73] although their absence may be considered in determining negligence in operating train.[74] Where employes attempt to transfer a passenger in the wrong car, they must exercise due care.[75] Railroad company is not liable for default of a sleeping car company in the discharge of its special contract.[76]

An operator of a passenger elevator must exercise reasonable care in the operation of the same.[77]

§ 29. *The duty to protect passengers*[78]—See 11 C. L. 564 generally renders the carrier liable absolutely for assaults[79] and insults by employes[80] unless the passenger provokes the same,[81] and mere insulting words do not justify an assault.[82]

69. Owes highest degree of care to warn passenger on running board of obstruction which might strike him. Hinckley v. Danbury, 81 Conn. 241, 70 A 590.

70. Carrier is liable where it negligently allows car to become so crowded as to force passenger, standing on running board, out so as to strike car on adjoining track. Kalis v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1107, 119 NW 906. Negligence for jury in allowing car to become so crowded that passenger is pushed therefrom. Lobner v. Metropolitan St. R. Co. [Kan.] 101 P 463.

71. Where street car approaches car on parallel track, so crowded that passengers are standing on inner running board, it may be negligence not to ring the bell, and instruction thereon held proper. Kalis v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1107, 119 NW 906.

72. Ordinance requiring railroads to keep watchmen at crossings to perform such duties as might be prescribed by ordinance held inadmissible without evidence of ordinance prescribing duties. Wills v. Atchison, etc., R. Co., 133 Mo. App. 625, 113 SW 713.

73, 74. McCherry v. Snare & Triest Co., 130 App. Div. 241, 114 NYS 674.

75. Though servants may ordinarily give proper directions to passenger in wrong car and leave him to follow same. Cincinnati, etc., R. Co. v. Raine [Ky.] 113 SW 495.

76. Acts of Pullman porter in refusing to make up berth. Taber v. Seaboard Air Line R. Co., 71 S. C. 317, 62 SE 311.

77. Where, because of leak, it was necessary to leave lever of hydraulic elevator unlatched and partly over center line to hold elevator still, held negligence for boy to leave same with door open, knowing that tailor boy was likely to return and might throw lever while entering by clothes catching thereon. Toohy v. McLean, 199 Mass. 466, 85 NE 578. Where elevator operator at railroad station, upon request of plaintiff, hastened to close door so that she could catch her train, and caught plaintiff's hand which she placed on jamb just as it closed, held that operator was not negligent. Cashman v. New York, etc., R. Co., 201 Mass. 355, 87 NE 570.

78. Search Note: See notes in 14 L. R. A. 737, 791; 16 Id. 627; 31 Id. 261; 2 L. R. A. (N. S.) 105; 3 Id. 605; 6 Id. 1009; 8 Id. 298; 11 Id. 1142; 13 Id. 159, 589; 15 Id. 425; 6 A. S. R. 734; 7 Id. 830; 32 Id. 90; 3 Ann. Cas. 254, 1084; 8 Id. 225, 590; 11 Id. 856.

See, also, Carriers, Cent. Dig. §§ 1093-1141, 1152, 1242; Dec. Dig. §§ 281-285, 304; 6 Cyc. 597-604, 610, 615; 5 A. & E. Enc. L. (2ed.) 541; 25 Id. 1109.

79. McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223. Liable absolutely. Norfolk & W. R. Co. v. Brame [Va.] 63 SE 1018. Assault by servants entitle passenger to nominal damages at least. Fielder v. St. Louis, B. & M. R. Co. [Tex. Civ. App.] 112 SW 699. Injury to plaintiff resulting from scuffle between conductor and plaintiff's husband. McMahon v. Chicago City R. Co., 143 Ill. App. 608. Where plaintiff, a passenger, was assaulted and knocked from street car by conductor, and the assault continued, and conductor immediately ordered officer to arrest plaintiff, the company was liable both for the assault and arrest, if unlawful, and it was not error to omit from instructions the question whether or not conductor was acting within scope of employment. Louisville R. Co. v. Kupper [Ky.] 118 SW 266. Two thousand dollars held not excessive for criminal assault by driver of hack upon female passenger. Beardmore v. Barton [Minn.] 121 NW 228. Plaintiff's evidence and testimony of negro held to warrant finding that conductor insulted and assaulted plaintiff before he had decided to get off car. Yazoo & M. V. R. Co. v. Shelby [Miss.] 48 S 403. Evidence held sufficient to support finding that plaintiff was injured by conductor while he and plaintiff's husband were engaged in a scuffle. McMahon v. Chicago City R. Co., 143 Ill. App. 608.

80. Remark of conductor to passenger that "If I was in your place, and conductors would smuggle my children over the road and not have to pay for them, I would not give them away," held not to charge her with undue intimacy with other conductors. Carpenter v. Trinity & B. V. R. Co. [Tex. Civ. App.] 119 SW 335. Whether statement by conductor to plaintiff, "You are a woman. You can take advantage of me. I will just pay your fare in the presence of these gentlemen," was insulting, held for jury. Georgia Southern & F. R. Co. v. Ransom, 5 Ga. App. 740, 63 SE 525.

81. Rohrback v. Pullman's Palace Car Co., 166 F 797. Parlor car company held not liable for assault of porter provoked by wholly unjustified insulting language of passenger. Id. Where one on train brings on assault by conductor or voluntarily en-

Servants, however, may protect themselves from attack,[83] and the carrier is not liable for assaults committed by them in self-defense,[84] provided no unnecessary force is used.[85] An assault upon a trespasser is not a breach of any contract.[86] Where the carrier wrongfully procures an officer to arrest[87] or search[88] a passenger, it is liable, but it is not liable for the acts of a public officer[89] in the discharge of his public duties.[90] While not an insurer,[91] the carrier owes the highest degree of care to protect passengers from insults[92] and assaults[93] by fellow passengers and third persons, and is liable for negligence, and, where its negligence concurs with the acts of a third person,[94] it is liable.[95] Under its general duty to protect, a carrier is liable if it leads a passenger into danger[96] or negligently fails to give due warning

gages in the fight, carrier is not liable, especially where it is doubtful whether he is a passenger. Garrett v. St. Louis Transit Co., 219 Mo. 65, 118 SW 68.

82. But may be shown in mitigation of damages. Norfolk & W. R. Co. v. Brame [Va.] 63 SE 1018.

83. Norfolk & W. R. Co. v. Brame [Va.] 63 SE 1018.

84. International & G. N. R. Co. v. Washington [Tex. Civ. App.] 117 SW 992. Movement by disorderly person of hand toward hip pocket as if to draw weapon, but accompanied by statement, "I'll see you later," held not to afford reasonable grounds for fear of immediate attack, so as to justify assault. Norfolk & W. R. Co. v. Brame [Va.] 63 SE 1018.

85. Instruction so drawn as to authorize jury to believe that conductor could use any amount of force even to the point of taking life if he had reasonable grounds to believe there was danger of his receiving bodily injury, however slight, held properly refused. Devine v. Chicago City R. Co., 237 Ill. 278, 86 NE 689.

86. Rothstein v. Brooklyn Heights R. Co., 129 App. Div. 527, 114 NYS 344.

87. In action against sleeping-car company for wrongful arrest, evidence held for jury whether arrest was at instance of defendant's conductor. Pullman Co. v. Hunt [C. C. A.] 166 F 833.

88. Where agent wrongfully causes officer to search passenger for weapons, carrier is not relieved from liability that agent believed or had been informed that passenger had a pistol. Texas Midland R. Co. v. Geraldon [Tex. Civ. App.] 117 SW 1004. Evidence that, after conversation between officer and depot agent, the latter pointed out plaintiff to the former as man having a concealed weapon, held to authorize submission to jury question whether agent caused officer to make search. Id.

89. Special officer, appointed and commissioned by governor at instance of railroad company, under Code 1899, c. 145, § 31, and paid by company, held prima facie a public officer for whose acts company is not liable. McKain v. Baltimore & O. R. Co., 65 W. Va. 233, 64 SE 18. Where employe thought that he had been duly commissioned as a peace officer, testimony that he was a public officer is admissible to show in what capacity he made assault and arrest, though appointment was in fact void. Philadelphia, B. & W. R. Co. v. Green, 110 Md. 32, 71 A 986.

90. If engaged in special service of the company, such as protecting property, etc., it becomes liable (McKain v. Baltimore & O. R. Co., 65 W. Va. 233, 64 SE 18), but where arrest was made by such officer because of an insult offered to his wife, and which was in no way directed or instigated by the company, held that company was not liable (Id.).

91. Not liable for injuries inflicted by third persons which could not have been reasonably anticipated. Irwin v. Louisville & N. R. Co. [Ala.] 50 S 62. Complaint alleging that while plaintiff was a passenger on defendant's platform, defendant, knowing, or with reasonable cause to know, that another company was using platform or about to use same, by moving freight trucks, negligently permitted it so to do, held to state cause of action. Miller v. West Jersey & S. R. Co. [N. J. Law] 71 A 1113. Negligence of brakeman in not then and there removing white man from negro coach, who was insulting plaintiff and wife, by use of force instead of going after conductor, held for jury. Walker v. International & G. N. R. Co. [Tex. Civ. App.] 117 SW 1020.

92. Must protect female passenger against immodest conduct and wanton approach (Birmingham R., L. & P. Co. v. Parker [Ala.] 50 S 55), and duty should not be frittered away by nice questions as to whether conductor was acting within scope of authority (Id.). Owes same high degree of care to protect negro passengers from insult as is owed to other passengers. Walker v. International & G. N. R. Co. [Tex. Civ. App.] 117 SW 1020.

93. Held that conductor was not negligent in preventing another passenger from pushing plaintiff against gate. Widener v. Philadelphia Rapid Transit Co. [Pa.] 73 A 209.

94. Ordinarily carrier is not obliged to keep blinds on windows closed to prevent missiles from being thrown through window by third persons, there being no reason to anticipate such act. Irwin v. Louisville & N. R. Co. [Ala.] 50 S 62.

95. Irwin v. Louisville & N. R. Co. [Ala.] 50 S 62.

96. Negligence of agent in announcing train and starting across track ahead of approaching train, it being necessary for passengers to cross, held for jury. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 121 NW 676. Complaint alleging that from call of conductor plaintiff believed that car had stopped, and that, because of crowd on platform, he did not discover contrary until he stepped onto steps and he was then unable, because of crowd, to grasp anything to keep from falling, held to state

of danger.[97] Where a passenger needs special attention and the carrier knows thereof,[98] it must render the same.[99]

§ 30. *Taking up and setting down passengers.*[1] *Generally.*[See 11 C. L. 566]—The high degree of care owed to passengers generally must be exercised in receiving and discharging them,[2] provided they are boarding or alighting upon invitation,[3] and the carrier is liable for injuries proximately[4] resulting from its negligence. The carrier is liable for putting a passenger off at the wrong place,[5] or in failing to afford an opportunity to alight at destination, where it has notice or should have notice thereof.[6]

Particular duties.[See 11 C. L. 566]—A carrier must give passengers a reasonable opportunity to board[7] cars in service,[8] and should see that no one is boarding be-

cause of action. Worthington v. Georgia R. & Elec. Co., 131 Ga. 450, 62 SE 525.

97. Negligence for jury in failing to warn passenger with arm projecting from car window of close proximity of cars on adjoining track. Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 542.

98. Need must be actually known to carrier. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109.

99. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109. While a carrier need not receive one so helpless as to be unable to care for himself unless accompanied with an attendant, if it accepts him it must render such special care as his condition requires. Benson v. Tacoma R. & P. Co., 51 Wash. 216, 98 P 605. Carrier not guilty of negligence in carrying intoxicated passenger by destination and putting him off at flag station, said passenger being afterwards run over by another train. Dabney v. Baltimore, etc., R. Co., 140 Ill. App. 269.

1. **Search Note:** See notes in 3 C. L. 639; 19 L. R. A. 327; 26 Id. 129; 42 Id. 293; 2 L. R. A. (N. S.) 115; 3 Id. 94; 4 Id. 558, 1440; 7 Id. 603, 729; 9 Id. 1113; 11 Id. 140; 13 Id. 364, 476; 14 Id. 907; 16 Id. 467, 1132; 1 Ann. Cas. 916; 7 Id. 760; 9 Id. 854, 965; 10 Id. 367.

See, also, Carriers, Cent. Dig. §§ 1154-1166, 1216-1218, 1224-1243; Dec. Dig. §§ 287, 393; 6 Cyc. 607, 611-615; 5 A. & E. Enc. L. (2ed.) 572.

2. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961; Weatherford, etc., R. Co. v. White [Tex. Civ. App.] 118 SW 799; Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 118 SW 116. Charge that it was duty to provide safest means practicable, safest means known and used by railroad companies, to assist passengers to alight and if not to safely assist plaintiff to the ground, held erroneous and not cured by subsequent instruction. Texas & P. R. Co. v. Beezley [Tex. Civ. App.] 120 SW 1136.

3. Carrier owes no duty to one attempting to board moving car between blocks unbeknown to employes. Quinn v. Philadelphia Rapid Transit Co. [Pa.] 73 A 319. Where one alights at place where it is not customary to receive passengers and attempts to re-enter, there is no liability for starting car while he is in perilous position unless servants know thereof. Birmingham R., L. & P. Co. v. Jung [Ala.] 49 S 434. Where stop is a precautionary measure before crossing tracks of steam railroad and passengers are not in the habit of alighting thereat, carrier is not liable for starting car without seeing that plaintiff was off, and this though the last street was her destination and she had been carried by. Central Kentucky Trac. Co. v. Chapman [Ky.] 113 SW 438. Instruction, in action for injuries received while attempting to alight at stop at which passengers were not discharged, that, if those in charge could with ordinary care have known of plaintiff's purpose to alight, they were bound to look out for her safety as well as if they knew of her purpose, held erroneous as placing same duty upon carrier as at regular stop. Id.

4. Evidence held sufficient to sustain findings that negligence alleged on part of defendant was proximate cause of plaintiff's injuries. International & G. N. R. Co. v. Ford [Tex. Civ. App.] 118 SW 1137.

5. Where conductor who was not familiar with new route put passenger off at wrong station, gross negligence held for jury. Davis v. Yazoo & M. V. R. Co. [Miss.] 49 S 179. Where carrier induces passenger to alight at night some three miles from destination and he is compelled to walk to destination, passenger is entitled to substantial damages. St. Louis S. W. R. Co. v. Pearson [Ark.] 114 SW 211.

6. Duty to stop at regular station and failure to do so is gross negligence. Yazoo & M. V. R. Co. v. Beattie [Miss.] 49 S 609. Duty of conductor to take up tickets within reasonable time after leaving station, and taking of ticket to flag station is notice of passenger's intention to alight thereat. Louisville & N. R. Co. v. Seale [Ala.] 49 S 323. Where conductor started to take tickets at front end of train and was delayed by drunken passengers, failure to take up plaintiff's ticket before reaching flag station, three miles from station where she boarded, held to make question for jury whether it was taken up within reasonable time. Id.

7. Where bondsman for one who failed to appear to answer a charge had him under arrest and was obliged to leave train to prevent him from escaping, carrier must give him a reasonable opportunity to reboard, and is liable if it goes away without doing so, but is not liable if his failure to reboard is due to acts of prisoner. Chesapeake & O. R. Co. v. Vaughn [Ky.] 115 SW 217. In action based upon alleged premature starting of car where there was evidence that car stopped a reasonable length of time and that plaintiff was waiting when

fore starting,[9] and must then avoid unnecessary jerks and violence.[10] While the carrier should not start until the passenger has reached a place of safety,[11] it need not ordinarily wait until a street car passenger has reached a seat.[12] The giving of the starting signal revokes the invitation to board as to one who has not commenced to do so.[13] A carrier admitting passengers to cars while others are being coupled thereto is negligent.[14] Where a passenger has alighted at an intermediate point with the carriers consent, he must be given a reasonable opportunity to reboard.[15] Unless the conductor has expressly undertaken to let him off at a particular place,[16] it is the duty of a street car passenger to give a proper stop signal,[17]

it stopped, held proper to charge that, if the car stopped a reasonable length of time to enable plaintiff to board same in safety by exercise of ordinary care, he cannot recover. Quinn v. Metropolitan St. R. Co., 218 Mo. 545, 118 SW 46. Instruction on duty of carriers towards alighting passenger held not erroneous as not limiting time which car must be stopped to such time as would allow passenger with reasonable promptness to alight therefrom, nor as setting up facts which would constitute negligence, nor as charging company whether starting was due to negligence or not. Indianapolis Trac. & T. Co. v. Miller [Ind. App.] 88 NE 526. Where only negligence claimed was sudden jerking of car while plaintiff was alighting, instruction that defendant was bound to furnish ample means for plaintiff to alight held not erroneous as using word "means" instead of "opportunity." Indiana Union Trac. Co. v. Smalley [Ind. App.] 88 NE 867. A carrier is not liable for injuries to intoxicated passenger caused by attempting to alight from stationary car at crossing. Allen v. Springfield Consol. R. Co., 142 Ill. App. 510.

8. Evidence held to warrant finding that there was nothing in appearance of car which was taking a disabled car to barns or in conduct of conductor to apprise an ordinary person that it was not in service. Mosbach v. Union R. Co., 129 App. Div. 543, 114 NYS 282.

9. Where car has stopped, or has practically done so, to receive passenger, it is duty of conductor to ascertain whether he is safely on before starting car. Nilson v. Oakland Trac. Co. [Cal. App.] 101 P 413. Where, failing to exercise the highest practical care, carrier starts car while passenger is boarding in the exercise of due care, it is liable. Wellman v. Metropolitan St. R. Co., 219 Mo. 126, 118 SW 31. Where plaintiff's evidence tended to show that car started as she was boarding and defendant's that she was safely on car and attempted to get off after the same started, instruction that, if car started while she was boarding same and threw her off, verdict should be for plaintiff, held erroneous as withdrawing questions of defendant's negligence and plaintiff's contributory negligence, though as abstract instruction was given thereon. Woods v. New York & Q. C. R. Co., 128 App. Div. 235, 112 NYS 680.

10. Starting of car with jerk while strong, healthy man was boarding held not "gross" negligence. Marshall v. Boston El. R. Co. [Mass.] 88 NE 1094. Mere proof that street car started with a jerk and plaintiff fell is insufficient to show negligence in absence of evidence that jerk was unusual. Boston El. R. Co. v. Smith [C. C. A.] 168 F 628. **Negligence for jury** in starting car with jerk as plaintiff was boarding. Lacour v. Springfield St. R. Co., 200 Mass. 34, 85 NE 868. Evidence held to authorize submission of question whether car started suddenly without warning while plaintiff was boarding. Blue Ridge L. & P. Co. v. Price, 108 Va. 652, 62 SE 938.

Held negligent: Sudden increase of speed as plaintiff was boarding. Mosbach v. Union R. Co., 129 App. Div. 543, 114 NYS 282. Fact that train started in such manner that plaintiff was obliged to grasp door jamb to maintain upright position and that door closed upon her fingers sufficient to show negligence in manner of starting. Gould v. New York, etc., R. Co., 59 Misc. 36, 111 NYS 1106. Evidence held sufficient negligence in suddenly starting car while passenger was boarding. Wellman v. Metropolitan St. R. Co., 219 Mo. 126, 118 SW 31; Malinowski v. Detroit United R. Co., 154 Mich. 104, 15 Det. Leg. N. 693, 117 NW 565.

11. Where conductor or motorman saw close proximity of wagon ahead to track and started car before plaintiff who had just boarded could reach a place of safety, the wagon brushing him off, held to warrant finding of negligence. Lockwood v. Boston El. R. Co., 200 Mass. 537, 86 NE 934.

12. Complaint not alleging special facts or circumstance held not to state cause of action. Lexington R. Co. v. Britton [Ky.] 114 SW 295. Negligence for jury in starting car before **female** passenger was seated. McGlynn v. Nassau Elec. R. Co., 128 App. Div. 866, 113 NYS 119; Goodhart v. Columbia & M. Elec. R. Co., 36 Pa. Super. Ct. 441.

13. Especially if he heard same. Quinn v. Metropolitan St. R. Co., 218 Mo. 545, 118 SW 46.

14. Wise v. Wabash R. Co., 135 Mo. App. 230, 115 SW 452.

15. Gannon v. Chicago, etc., R. Co. [Iowa] 117 NW 966. Duty of servants to exercise due care to know that he is not re-entering before starting. Birmingham R., L. & P. Co. v. Jung [Ala.] 49 S 434.

16. Passenger may rely on promise of conductor to let him off at certain point. Moeller v. United R. Co., 133 Mo. App. 68, 112 SW 714. Where conductor accepted notice of passenger to let him off at designated place, he must notify motorman to stop. Id.

17. Not where conductor is outside the car changing its motive power. Eckels v. Bryant, 137 Ill. App. 234. Whether plaintiff notified conductor of his desire to alight **at particular point held for jury** although

and a signal given mid block is reasonably interpreted as a signal to stop at the next crossing.[18] It is ordinarily the duty of a steam railway carrier to announce stations,[19] and in so doing it must exercise reasonable care not to lead passengers to prematurely alight.[20] After a passenger has made known his desire to alight, the carrier must anticipate preparations to do so and must operate the train or car with respect thereto.[21] Unless controlled by ordinance, a street car company in the exercise of the care owed to passengers may select its own places for stopping,[22] but, where passengers customarily alight at a stop for other purposes, the same care must be exercised thereat as at regular stops.[23] A carrier is not required to provide a safe means of exit,[24] but must use the highest practical degree of care to do so.[25] Carriers by steam must stop trains at their station platforms.[26] While a

other witness directly contradicted plaintiff. Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038.

18. Instructions held erroneous as not submitting such theory. Cohen v. Sioux City Trac. Co. [Iowa] 119 NW 964. If intended as a signal to stop midblock and is so understood and assented to, same opportunity to alight must be given as at regular stop. Id.

19. Must give reasonable notice of arrival at destination. Gulf, etc., R. Co. v. Bagby [Tex. Civ. App.] 115 SW 858. Sleeping car company owes duty of seeing that passenger is discharged at right place. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315.

20. Held negligent: Evidence held sufficient to justify a finding of negligence on part of carrier's servants in calling station prematurely, thus inducing plaintiff to attempt to alight, the train at the time having stopped on a bridge. St. Louis, etc., R. Co. v. Glossup [Ark.] 114 SW 247. Where defendant's servant announced that next stop would be plaintiff's destination and when train stopped at siding again announced station, held negligence not to warn passenger that stop was not at station. Dye v. Chicago & A. R. Co., 135 Mo. App. 254, 115 SW 497.

Held not negligence: To stop on dark, stormy night to ascertain whereabouts of train, although next station had been announced. Union Pac. R. Co. v. Luck [Kan.] 100 P 278. To announce that the "next stop is Carnuro" when the train in fact first stopped about a mile out, for it must be understood as meaning a stop to discharge passengers. Id.

For jury: Where defendant called out transfer point just before stop for railroad crossing, on a dark night, and started car as plaintiff was alighting in mistaken belief that she had reached place to transfer Smith v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1055, 119 NW 640. Whether defendant negligently caused plaintiff to alight at wrong place by premature announcement held for jury. Dye v. Chicago & A. R. Co., 135 Mo. App. 254, 115 SW 497. Evidence held to show that railroad company and sleeping car company were negligent in discharging plaintiff before station was reached. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315.

21. Evidence held insufficient to show that car was negligently stopped with a jerk. Snyder v. Michigan Trac. Co., 154 Mich. 418, 15 Det. Leg. N. 781, 117 NW 889. Testimony that car which had slackened speed but which had not reached usual stopping place "went ahead with a jerk," or started violently with a "lurch or jerk," held insufficient to show negligence, expressions being too indefinite. Dwyer v. Auburn & S. Elec. R. Co., 131 App. Div. 477, 115 NYS 364.

Negligence for jury: In increasing speed after car had been signaled to stop and while plaintiff was preparing to alight in midblock. Cohen v. Sioux City Trac. Co. [Iowa] 119 NW 964. Whether defendant's servants moved train with sudden jerk or lurch while plaintiff was standing on platform waiting to alight, and was thereby guilty of negligence, held question for jury. Houston & T. C. R. Co. v. Harris [Tex. Civ. App.] 120 SW 500.

22. Robinson v. Helena L. & R. Co., 38 Mont. 222, 99 P 837. Where street car system extends into country, it is governed by same rules as a steam road as to receiving passengers. Id.

23. Admission of evidence of custom among passengers of alighting at a certain point is not error where issue is defendant's negligence in failing to anticipate that plaintiff might alight there and in failing to take proper measures to prevent injury to her. Eckels v. Bryant, 137 Ill. App. 234.

24. St. Louis S. W. R. Co. v. Tittle [Tex. Civ. App.] 115 SW 640. Instruction "It is the duty of the railroad company to provide means for its passengers to alight from its trains with reasonable safety," etc., held to exact too high a degree of care. Id. Error to instruct that it was duty of carrier to furnish safe place for passenger to alight and such place as it was able to furnish. Southern R. Co. v. Skinner [Ga.] 65 SE 134.

25. St. Louis S. W. R. Co. v. Tittle [Tex. Civ. App.] 115 SW 640. Must afford a reasonably safe place to alight. Speck v. International R. Co., 133 App. Div. 802, 118 NYS 71; Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961. In providing means of egress and ingress, carrier must anticipate that feeble as well as strong and robust will seek passage. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961. Duty to keep free from snow and ice is a relative one, taking into consideration the weather on one hand and the safety of passengers on the other. Speck v. International R. Co., 133 App. Div. 802, 118 NYS 71. Instructions on care owed to alighting

street car company is not liable for the condition of the street,[27] it rests under the duty of a carrier to select a safe place for discharging its passengers,[28] and, where it knows of the dangerous condition of the street, must give adequate warning thereof.[29] A carrier need not so stop that all of its exits are a safe means of egress [30] unless it expressly or impliedly invites the passengers to use them;[31] but, where it is dangerous to alight from a particular exit, it is the duty of a servant thereat to give warning,[32] and, if passengers customarily use the same, the carrier must have a servant there.[33] A passenger [34] must be given a reasonable time to alight in the exercise of due care,[35] and the carrier must ascertain if any one is alighting,[36] or

passenger and duty of providing safe means, etc., held to properly submit issue where plaintiff slipped because of alleged defective and slippery step. Northern Texas Trac. Co. v. Danforth [Tex. Civ. App.] 116 SW 147.

Negligence for jury: In so stopping at night that alighting passenger stepped into open hole, motorman relying on position of red light which had been moved, but there being evidence that hole could be seen. Murray v. Seattle Elec. Co., 50 Wash. 444, 97 P 458. In allowing slanting drift of snow and ice to remain near track. Speck v. International R. Co., 133 App. Div. 802, 118 NYS 71. In leaving front end of train and station in darkness causing passenger to prematurely alight. Bartle v. New York Cent. & H. R. R. Co., 193 N. Y. 362, 85 NE 1091.

Not negligent: In stopping at point where passenger had to step onto curb. Farrington v. Boston El. R. Co., 202 Mass. 315, 88 NE 678. Curbstones constructed by city, inclosing a reserved space used for street railroad purposes and for ornamentation, did not amount to a defect, rendering carrier liable for injury caused by passenger slipping thereon. Id.

26. St. Louis, etc., R. Co. v. Briggs [Ark.] 113 SW 644. Instruction that it was duty of defendant to stop train so that plaintiff could alight upon platform held not susceptible of construction that it required defendant to stop until plaintiff had alighted. Id.

27. Sligo v. Philadelphia Rapid Transit Co. [Pa.] 73 A 211.

28. Although city is responsible for snow and ice on street, street car company will be liable where its negligence in operating car caused passenger to slip thereon. Ward v. Chicago City R. Co., 237 Ill. 633, 86 NE 1111. Duty of street car company is met where it stops so that passenger may alight onto street properly worked for public travel. Farrington v. Boston El. R. Co., 202 Mass. 315, 88 NE 578.

29. Street is torn up for repairs. Catterson v. Brooklyn Heights R. Co., 132 App. Div. 399, 116 NYS 760.

30. Where summer car which had running board on each side stopped so that on one side the road was level, held not liable for injury to one stepping off on gutter side. Sligo v. Philadelphia Rapid Transit Co. [Pa.] 73 A 211.

31. Instruction on duty to provide equal facilities on each side of train for boarding held properly modified so as to depend upon whether carrier expressly or impliedly invited passengers to use both sides. Du Bose v. Atlantic Coast Line R. Co., 81 S. C. 271, 62 SE 255.

32. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961.

33. Where it is customary to alight from front platform of coach and peculiar conditions of particular stop render it dangerous to do so, it is duty of company to have some one thereat to give warning. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961.

34. Not liable where carrier had no notice of plaintiff's presence on train and he did not procure ticket or offer to pay fare, or give notice of his intention to alight at street crossing at which train did not stop. Fretwell v. Seaboard Air Line R. Co., 5 Ga. App. 532, 63 SE 637.

35. Allen v. Springfield Consol. R. Co., 142 Ill. App. 510; Choctaw, O. & G. R. Co. v. Burgess [Okl.] 97 P 271; Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038; Birmingham R., L. & P. Co. v. McGinty [Ala.] 48 S 491; Westervelt v. St. Louis Transit Co. [Mo.] 121 SW 114. To jerk or back a car while a passenger is alighting without waiting a reasonable time is actionable negligence if an injury results. Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 118 SW 116. Where a carrier has, by reason of its failure to stop a reasonable time, carried a passenger beyond his station, and where, upon request, it negligently fails to return him to the station, it cannot be allowed to defend against an action brought for injuries thereby occasioned, though the passenger on account of its negligence may have voluntarily left the train with a view of returning to the station. Freeman v. Puckett [Tex. Civ. App.] 120 SW 514.

Evidence sufficient to show that car had come to a stop before plaintiff attempted to alight and started as she was alighting. Indianapolis Trac. & T. Co. v. Rowe [Ind. App.] 87 NE 653; Hannestad v. Chicago, etc., R. Co. [Iowa] 118 NW 38; Rafferty v. Public Service R. Co. [N. J. Law] 73 A 41; Miller v. St. Louis Transit Co., 215 Mo. 607, 114 SW 945; Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038; Cutts v. Boston El. R. Co., 202 Mass. 450, 89 NE 21; Scroggins v. Metropolitan St. R. Co. [Mo. App.] 120 SW 731; Brown v. Brooklyn Heights R. Co., 117 NYS 610; Armstrong v. Portland R. Co. [Or.] 97 P 715.

For jury: Whether plaintiff was injured by starting of car with a jerk while she was alighting or whether she attempted to alight before car stopped. Barnett v. Metropolitan St. R. Co. [Mo. App.] 120 SW 730. Whether carrier was liable for injuries to plaintiff inflicted while alighting from

at least exercise the high duty owed to passengers to do so,[37] before starting, especially where it stops for express purpose of allowing passengers to alight,[38] and if a carrier knows [39] or should know, that a passenger is alighting, it is negligence to start the car or train.[40] A carrier must warn against known dangers.[41] Where a passenger is carried by his destination through his own fault, the carrier owes no duty to back up the train.[42]

Where the carrier knows [43] of the need of special assistance, it must render the same,[44] but it is under no duty to discover such need.[45]

§ 31. *Duties to persons other than passengers.*[46]—See 11 C. L. 568—These generally are employes,[47] trespassers,[48] or licensees.[49] Where one boards train but in-

street car. Vaughn v. Springfield Trac. Co. [Mo. App.] 120 SW 683. Whether plaintiff was thrown from car by sudden starting thereof as she was alighting, or whether she attempted to alight from moving car before it stopped. Thompson v. Norfolk & P. Trac. Co. [Va.] 64 SE 953; Oakerson v. Atlantic Coast Elec. R. Co. [N. J. Err. & App.] 73 A 496.

36. Alten v. Metropolitan St. R. Co., 133 Mo. App. 425, 113 SW 691; Peterson v. Baker [Kan.] 97 P 373; Chicago City R. Co. v. Crauf, 136 Ill. App. 66; Jones v. Springfield Trac. Co. [Mo. App.] 118 SW 675. Conductor of street car before giving signal to start must look into car to see if passengers intending to alight have done so. Bommarius v. New Orleans R. & L. Co., 123 La. 615, 49 S 213. Whether conductor saw plaintiff alighting held for jury, evidence showing that he was standing nearby. Birmingham R., L. & P. Co. v. McGinty [Ala.] 48 S 491.

37. Instruction that it was conductor's duty to see and know whether any one was alighting held to impose too great a burden. Bryant v. Northern Texas Trac. Co. [Tex. Civ. App.] 115 SW 880.

38. Instructions held not erroneous in assuming as a matter of law that the conductor "had reason to suspect" that plaintiff was in the act of alighting. Westervelt v. St. Louis Transit Co. [Mo.] 121 SW 114.

39. Where conductor starts car knowing that passenger is alighting, he is negligent as a matter of law. Jirachek v. Milwaukee Elec. R. & L. Co. [Wis.] 121 NW 326. Where undisputed evidence showed that conductor was on rear platform and saw plaintiff in act of alighting when he gave signal to start, special verdict held not insufficient because failing to specifically find that defendant was negligent. Id. Instruction authorizing recovery if car started while plaintiff was stepping off, it having stopped to allow her to alight, held not erroneous as omitting word "negligently" before word "started." Olson v. Brooklyn Heights R. Co., 133 App. Div. 445, 117 NYS 611.

40. Where there was evidence that train started before plaintiff had time to alight, instruction that it is duty of carrier to give passengers notice of all movements, where they have not had time to alight, held applicable. St. Louis, etc., R. Co. v. Briggs [Ark.] 113 SW 644. **Negligence** to start car suddenly while passenger is in act of alighting. Indianapolis Trac. & T. Co. v. Miller [Ind. App.] 88 NE 526; Eckels v. Bryant, 137 Ill. App. 234. Where woman while attempting to get off car took hold of hand rail and in some manner not clear her ring caught on something, thereby injuring her, held that under evidence the defendant's negligence was for jury. Whitehouse v. Pittsburg R. Co., 36 Pa. Super. Ct. 581. Evidence that car started as plaintiff was stepping from step onto platform held to make question of negligence in starting car too soon for jury. Lacour v. Springfield St. R. Co., 200 Mass. 34, 85 NE 868.

41. Not negligence: Failing to warn and prevent passenger from alighting at stop before reaching station when it had no notice of his intention to do so. Union Pac. R. Co. v. Luck [Kan.] 100 P 278. Failure to warn passenger that car had not stopped where conductor had no reason to anticipate that she was going to alight therefrom. Armstrong v. Portland R. Co. [Or.] 97 P 715.

42. Where evidence made a controverted issue as to whether passenger was carried by destination by negligence of carrier, instruction authorizing recovery, if carrier negligently failed to back train to station, held erroneous. Gulf, etc., R. Co. v. Bagby [Tex. Civ. App.] 115 SW 858.

43. Where plaintiff, a robust woman weighing nearly 200 pounds, entered car at regular stopping place, carrying an umbrella and small hand bag, held that there was nothing in her appearance calling for special care. Boston El. R. Co. v. Smith [C. C. A.] 168 F 628.

44. Gulf, etc., R. Co. v. Garner [Tex. Civ. App.] 115 SW 273. Whether personal physical assistance to passenger is required depends upon circumstances of case. Southern R. Co. v. Wright [Ga. App.] 64 SE 703. Instruction charging duty owed and ending "Did the railroad company exercise this degree of care and diligence in seeing that this passenger was properly and safely deposited upon the ground?" held not erroneous as requiring actual physical assistance. Id.

45. Gulf, etc., R. Co. v. Garner [Tex. Civ. App.] 115 SW 273.

46. Search Note: See notes in 15 L. R. A. 434; 3 L. R. A. (N. S.) 432; 8 Id. 1240; 29 A. S. R. 54; 9 Ann. Cas. 1123.

See, also, Carriers, Cent. Dig. §§ 1104, 1107, 1108, 1110-1116, 1124, 1152, 1242; Dec. Dig. §§ 282, 304; 6 Cyc. 610, 615; 5 A. & E. Enc. L. (2ed.) 518.

47. See Master and Servant.

48. See Railroads, § 11E. Since conductor has implied authority to decide who shall ride on trains, one riding with his consent is entitled to ordinary care, though

nocently leaves his ticket behind, he is not in a strict sense a trespasser.[50] Persons seeking to obtain transportation are usually deemed passengers,[51] and care must be used for their safety.[52] There is an implied invitation to the public to resort to the depot to greet or bid passengers goodbye [53] especially relatives and members of the family,[54] and even to go upon the train where not ready to start,[55] especially rendering assistance,[56] and the carrier must exercise reasonable care for their safety,[57] but persons going to meet trains out of mere curiosity are bare licensees.[58] Where one boards the train, however, the carrier is not negligent in failing to afford him an opportunity to alight, unless the carrier has notice that he is not a passenger.[59] Such persons, however, must exercise reasonable care for their own safety.[60] As to trespassers, the carrier is liable for unnecessary assaults of its servants in the discharge of its business.[61]

riding gratuitously, unless in collusion. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678. Permit issued by carrier will be construed most strongly against it. Id.

49. See Railroads, § 11E. The duty owed one boarding through mistake is that of a mere licensee. Metropolitan West Side El. R. Co. v. Sutherland, 139 Ill. App. 85.

50. Where women having forgotten their tickets which they had bought boarded train, the conductor had no right to put them off at place where they were compelled to expose their persons. International & G. N. R. Co. v. Hood [Tex. Civ. App.] 118 SW 1119.

51. See ante, § 22.

52. Where person seeking transportation at flag station flagged train and started along track toward platform, trainmen had right to assume that he would get into a place of safety. Pillow v. Texarkana & Ft. S. R. Co. [Tex. Civ. App.] 119 SW 128.

53. Fortune v. Southern R. Co., 150 N. C. 695, 64 SE 759. Those who go upon cars at a railway station for the purpose of meeting and assisting the incoming or outgoing passengers in such friendly offices as may be reasonably necessary for their convenience, comfort and safety, are upon the premises of the railway company by its implied invitation, and are therefore not trespassers. Arkansas & L. R. Co. v. Sain [Ark.] 119 SW 659.

54. No implied invitation to a mere friend or acquaintance to come to depot to bid goodbye. Galveston, etc., R. Co. v. Matzdorf [Tex.] 112 SW 1036. Where a carrier maintains a road from depot to its ferry landing for the use of passengers and persons having business with company, it is liable for injuries to persons using such road for the purpose of meeting his family, if such injury was result of unsafe condition of road. Chesapeake & O. R. Co. v. Meyer [Ky.] 119 SW 183.

55. Where it was customary for carrier to open car standing on side track and which was picked up by train and allow passengers to enter several minutes before arrival of train, held not negligence for wife to go upon same shortly before train time to bid husband goodbye. Fortune v. Southern R. Co., 150 N. C. 695, 64 SE 759.

56. Person has a legal right to go to the entrance of a passenger car when it arrives at a station to assist his family to alight therefrom, and a peace officer using force to prevent is guilty of assault and battery. Deregon v. Sero, 137 Wis. 276, 118 NW 839. Where it was established custom to assist passengers to board, one assisting his infirm sister to a seat was not a trespasser but had an implied invitation to be there. Huchingson v. Texas Cent. R. Co. [Tex. Civ. App.] 118 SW 1123.

57. To keep premises in safe condition. Atchison, etc., R. Co. v. Cogswell [Okl.] 99 P 923. To keep waiting room in safe condition. St. Louis, etc., R. Co. v. Grimsley [Ark.] 117 SW 1064. Company held liable for negligence as to one going to station to meet incoming passenger to continue business negotiations. Atchison, etc., R. Co. v. Cogswell [Okl.] 99 P 923. Carrier owes to one, boarding its train to assist a passenger, duty of exercising ordinary care to protect him from injury. Huchingson v. Texas Cent. R. Co. [Tex. Civ. App.] 118 SW 1123. Evidence that plaintiff boarded train to assist his sister to a seat and that he was injured while alighting from moving train held to make question for jury whether carrier was negligent. Id.

58. One who goes upon the premises of a railway company, or upon its cars, out of mere curiosity, or for the pleasure of merely greeting friends or relatives, or of seeing strangers, but with no idea or purpose of rendering any assistance, is not there upon any invitation of the company. Arkansas & L. R. Co. v. Sain [Ark.] 119 SW 659. Where boy 11 years of age went to station to meet delegates to a school exhibition, but had not been sent for any purpose, and he testified that he went "to see whoever came," he was a mere licensee. Id.

59. Must have actual or constructive notice of his relation. Cole's Adm'r v. Chesapeake & O. R. Co. [Ky.] 113 SW 822. Mere fact that young lady had several bundles and needed assistance held insufficient to constructively charge servants that gentleman boarding with her did not intend to become passenger, they not knowing of relationship between them. Id.

60. Whether plaintiff who was injured while attempting to alight from moving train, after having assisted a passenger on board, was guilty of contributory negligence, held question for jury. Huchingson v. Texas Cent. R. Co. [Tex. Civ. App.] 118 SW 1123.

61. Conductor in charge of a train, which has been made up to go to the relief of a

§ 32. *Remedies and procedure.*[62]—See 11 C. L. 570—The proper venue must be laid.[63] Where a passenger is injured through the concurrent negligence of the carrier and another,[64] he may sue them jointly.[65] An action ex contractu or ex delicto will usually lie for a negligent injury [66] or a wrongful ejection.[67]

*Pleadings.*See 11 C. L. 570—The plaintiff must allege all the essential elements of his cause of action,[68] including the relationship,[69] and a violated duty resting upon the carrier [70] resulting in damages.[71] It must be definite and certain,[72] and

wrecked train, who insults and assaults one seeking permission to ride thereon, is engaged in the business of the railroad. Yazoo & M. V. R. Co. v. Shelby [Miss.] 48 S 403. Compelled boy to get off moving train. Chicago, etc., R. Co. v. Anderson [C. C. A.] 168 F 901.

62. Search Note: See notes in 2 L. R. A. (N. S.) 725; 7 Id. 231, 1076; 12 Id. 760; 13 Id. 601; 16 Id. 739, 799; 4 Ann. Cas. 10; 10 Id. 462.

See, also, Carriers, Cent. Dig. §§ 1075-1084, 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1247, 1248, 1270-1345, 1398-1408, 1463-1501; Dec. Dig. §§ 274-279, 310-322, 343-349, 379-386; 6 Cyc. 555-558, 565, 566-569, 588-590, 626-628, 632-635, 656; 5 A. & E. Enc. L. (2ed.) 632; 15 A. & E. Enc. P. & P. 1120.

63. Under Civ. Code Prac. § 73, action for personal injuries cannot be brought in county where injury did not occur, and in which neither plaintiff nor defendant resides. Wilson v. Louisville & N. R. Co., 33 Ky. L. R. 985, 112 SW 585. Under Laws 1899, p. 214, c. 125, as amended by Laws 1905, p. 129, c. 25, passenger who has purchased ticket over two roads may bring action against them for injuries in the county in which initial carrier operates its road, had an office, and had an agent who entered into the contract which was ratified by connecting road. Blanks v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 116 SW 377. See Venue and Place of Trial.

64. Railroad agent, under no duty to notify a train that another train is preceding it, is not liable for injuries received from collision of such trains. Sutton v. Southern R. Co., 82 S. C. 345, 64 SE 401. Good defense that defendant did not own track or have control of car causing injury. Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 542.

65. Complaint against railroad company and sleeping car company, alleging that their employes negligently caused plaintiff to alight before her destination was reached, held to charge negligence on part of both. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. In the absence of allegations and proof of joint liability of carriers to keep passenger station properly heated, a verdict against both defendants jointly is contrary to law. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118.

66. As general rule, action for personal injury is in tort (Canaday v. United R. Co., 134 Mo. App. 282, 114 SW 88), and allegation of contract is usually regarded as inducement only (Id.). Complaint alleging contract of carriage and injury by negligence of defendant's servants held in tort. Id. Where contract is merely set out to show the relation of carrier and passenger, action held ex delicto. Taber v. Seaboard Air Line R. Co., 81 S. C. 317, 62 SE 311.

67. Complaint alleging that plaintiff possessed a mileage ticket and a freight train permit, and that defendant, disregarding its duties as a common carrier of passengers, wrongfully ejected him, etc., held to state action ex delicto and not ex contractu. Reed v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 442.

68. Declaration which sets out the relation of carrier and passenger, the duty of the defendant arising out of that relation, the negligent performance of that duty, and alleges that the exposure of the plaintiff, the cold, and the contraction of disease, were the consequence of the defendant's negligence, states a good cause of action. Washington, etc., R. Co. v. Lukens, 32 App. D. C. 442.

69. It is necessary to allege that plaintiff was a passenger. Scott v. Metropolitan St. R. Co. [Mo. App.] 120 SW 131. Mere allegation that plaintiff was on car at the request or invitation of the defendant, its agents or employes, without allegation that giving of invitation was within scope of agent's authority, is insufficient. Thompson v. Nashville, etc., R. Co. [Ala.] 49 S 340. In action for damages sustained by passenger in being set down at wrong station, allegations of purchasing ticket and boarding of train held to sufficiently show relation of carrier and passenger. Southern R. Co. v. Melton [Ala.] 47 S 1008. Complaint held to sufficiently allege that motorman saw plaintiff's signal and slackened speed in response thereto. Nilson v. Oakland Trac. Co. [Cal. App.] 101 P 413.

70. Complaint alleging that pushing crowd compelled plaintiff to put hand against collapsing gate, etc., held to show duty resting on gatekeeper to ascertain whether her hand was against same before opening gate. Pacetti v. Central of Georgia R. Co. [Ga. App.] 64 SE 302.

71. Pleading alleging that motorman refused to stop on plaintiff's signaling, carried him to end of line, that on return he was made to believe that car was going into barn and alighted, when car ran on past his destination, held to state but single cause of action, with matters in aggravation of damages, namely, failure to deliver at destination. North Alabama Trac. Co. v. Daniel [Ala.] 48 S 50. Petition held to allege nature and extent of injuries sufficiently specific to enable defendant to prepare its defense. Missouri, K. & T. R. Co. v. Dalton [Tex. Civ. App.] 120 SW 240.

72. Complaint alleging that plaintiff was injured while attempting to alight at his destination by sudden starting of car, etc., held not demurrable as being vague or uncertain. Birmingham R., L. & P. Co. v. McGinty [Ala.] 48 S 491. Held no error in overruling defendant's exceptions to allegations of petition relating to nature of plaintiff's

must show the giving of notice precedent where necessary.[73] Negligence may be alleged generally,[74] but a general allegation is usually limited by subsequent averments of specific negligent acts.[75] Several distinct negligent acts may be pleaded,[76] provided they are consistent.[77] In some states it is only necessary to allege the relationship and injury from a cause that will raise a presumption of negligence.[78] Where the negligence of a servant is pleaded, the complaint must show that he was acting within the scope of his authority.[79] Wanton and willful negligence must be

injuries, as the same were sufficiently full and specific to appraise defendant of what it would be called upon to defend against. Missouri, K. & T. R. Co. v. Farris [Tex. Civ. App.] 120 SW 535.

73. Petition for death by wrongful act under New Mexico statute, which fails to allege giving of notice, as required by Laws N. M. 1903, p. 51, c. 33, held insufficient. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75.

74. **Held sufficient:** Petition alleging in general terms that defendant's servants negligently operated the street car so that as a result of such negligence it ran into a wagon and hurt plaintiff, who was a passenger, sufficiently alleged negligence in general terms. Monday v. St. Joseph R. Co., 136 Mo. App. 692, 119 SW 24. Declaration charges negligence generally which avers that the "defendant then and there, by its servants, agents, and employes, so carelessly, recklessly, willfully, negligently," drove and managed its car, that "by and through the negligence * * * of the defendant, through its said servants," plaintiff was injured. West Chicago St. R. Co. v. Mileham, 138 Ill. App. 569. Complaint held to sufficiently allege negligence in allowing iron bar to lie on platform. Mettler v. Delaware, L. & W. R. Co. [N. J. Law] 71 A 111. Amended complaint held to sufficiently allege negligence in starting car before plaintiff could reboard after alighting with carrier's permission. Birmingham R., L. & P. Co. v. Jung [Ala.] 49 S 434. Complaint alleging that plaintiff notified conductor of his desire to alight at certain place, slowing of car thereat, inducing him to believe that car was about to stop, and sudden acceleration of speed, held to sufficiently allege negligence in stopping and starting of car. Moeller v. United R. Co., 133 Mo. App. 68, 112 SW 714. As against general demurrer, complaint alleging sudden and violent jerking of train as plaintiff was on platform preparatory to alighting held good, but subject to special demurrer for failure to allege where he purchased ticket and became passenger and how far train was from station. Charleston & W. C. R. Co. v. Boyd, 5 Ga. App. 137, 62 SE 714. Petition in an action for injuries sustained while alighting from defendant's car held sufficient after verdict, though it failed to allege that the car did not stop a reasonable time to allow plaintiff to alight, or that the servants of the defendant knew, or should have known, that she was in the act of alighting. Jones v. Springfield Trac. Co. [Mo. App.] 118 SW 675

Insufficient: General allegation that plaintiff was thrown from train through defendant's negligence. Charleston & W. C. R. Co. v. Boyd, 5 Ga. App. 137, 62 SE 714.

75. Count averring surroundings and conditions, and that motorman negligently started car, but not ascribing negligence to preceding surroundings or conditions, is not insufficient because such conditions do not constitute negligence. Selma St. & S. R. Co. v. Campbell [Ala.] 48 S 378. Where general allegation of negligence in operating train is not modified by amended petition setting forth allegations of specific acts of negligence, plaintiff is not precluded from relying on negligence in operating train with defective axle because of such specific allegations. Chesapeake & O. R. Co. v. Morgan [Ky.] 112 SW 859.

76. Complaint may charge that sudden starting of car was due to negligence of motorman or to a negligent defect in the car. Paducah Trac. Co. v. Baker [Ky.] 113 SW 449. Under Code Civ. Proc. 1902, § 186a, allowing all acts of negligence or other wrongs contributing to injury to be set up in the complaint, without any right in the defendant to require an election, it is immaterial that some of the acts occurred without the state. Taber v. Seaboard Air Line R. Co., 81 S. C. 317, 62 SE 311.

77. Allegations that fall was caused by sudden starting of car and by sudden stopping of same after it started held consistent. Alten v. Metropolitan St. R. Co., 133 Mo. App. 425, 113 SW 691.

78. Only necessary to allege relation and that plaintiff was injured in the operation of the instrumentality, negligence being presumed. Nilson v. Oakland Trac. Co. [Cal. App.] 101 P 413. Where derailment is alleged, particular cause thereof need not be. Haskins v. Northern Pac. R. Co. [Mont.] 102 P 988.

79. Declaration that plaintiff was assaulted and arrested "by an officer or agent of said defendant in its employ" held insufficient allegation that he was acting within scope of his employment. Philadelphia, B. & W. R. Co. v. Green, 110 Md. 32, 71 A 986. Declaration held to sufficiently show that assault was committed by employe while acting within scope of his employment as watchman in waiting room. Philadelphia, B. & W. R. Co. v. Green, 110 Md. 32, 71 A 986. Where complaint alleges "that * * * defendant's servant or agent on said car, acting within the line and scope of his authority, threw or caused" plaintiff's son to fall from car, and, after setting out the injuries, continued, "defendant's servant or agent, to-wit, the conductor thereof, wantonly or intentionally caused plaintiff's son to fall," etc., held to sufficiently allege that servant was acting within scope of authority. Birmingham R., L. & P. Co. v. Chastain [Ala.] 48 S 85.

specifically pleaded.[80] The complaint must show that the negligence alleged was the proximate cause of the injuries complained of.[81]

A plea of the general issue does not put in issue the ownership of the track or control of the cars.[82] Contributory negligence must be pleaded,[83] and specific averments limit a general averment.[84]

Issues, proof and variance. See 11 C. L. 572—Except as to matters of which the court can take judicial notice,[85] plaintiff must prove all the material [86] allegations of his complaint,[87] unless admitted by the pleadings.[88] As in actions generally, there must be no material variance between the pleadings and proof.[89] While

80. Held insufficient: Complaint for injuries due to a collision, alleging that train despatcher willfully ordered two passenger trains to pass over track in opposite directions at same time, and that defendant's station agent, knowing the facts willfully withheld information, etc., but which failed to charge that defendant willfully and purposely intended to inflict injury complained of. Southern R. Co. v. McNeeley [Ind. App.] 88 NE 710; Southern R. Co. v. McNeeley [Ind. App.] 88 NE 714. Complaint in action for injuries caused by derailment, alleging defective condition of ties, knowledge of condition on part of carrier, and that, notwithstanding, cars were propelled along track at great rate of speed, recklessly, wantonly, and intentionally. St. Louis & S. F. R. Co. v. Pearce [Ala.] 49 S 247. Complaint charging wanton and willful negligence in starting car while plaintiff was alighting, which alleged that servants knew that it was necessary for plaintiff to get off at corner of B and S streets, but not alleging that they knew he was to alight at particular point or that it was place for alighting, held not to show wanton or willful negligence. Selma St. & S. R. Co. v. Campbell [Ala.] 48 S 378. Allegation that plaintiff, who possessed first class ticket, was placed in second class or smoker car by servants over his protest, and after he informed them that smoke would make him sick, **held to sufficiently** charge wanton negligence. Louisville & N. R. Co. v. Weathers [Ala.] 50 S 268. Allegation that conductor wantonly assaulted plaintiff by grasping her by the arm is equivalent to allegation that he wantonly grasped her by the arm. Birmingham R., L. & P. Co. v. Parker [Ala.] 50 S 55. Allegation that conductor wantonly assaulted plaintiff by grasping her by the arm and shoulder, by winking and smiling at her, held not to mean that he grasped her by winking and smiling. Id.

81. Petition alleging that plaintiff was negligently caused to alight before her station was reached, and was compelled to walk thereto, that her child in arms and baggage were too heavy for her, resulting in her reaching station in an exhausted, nervous condition, and sustaining special injuries, held to sufficiently show that negligence was proximate cause of injury. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315.

82. Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 542; Barnes v. Danville St. R. & L. Co., 143 Ill. App. 259; Eckels v. Bryant, 137 Ill. App. 234.

83. St. Louis, etc., R. Co. v. Grimsley [Ark.] 117 SW 1064.

84. Where action was for injuries to passenger alighting from street car, a plea that plaintiff was negligent in the manner in which she alighted from the car was a specific allegation of negligence distinct from other specifications of negligence, and in the absence of a special exception was sufficient to admit evidence as to her manner of alighting. Dallas Consol. Elec. St. R. Co. v. Barnes [Tex. Civ. App.] 119 SW 122.

85. **Courts will take judicial notice** that the conductor has general control and management of train. Chicago, etc., R. Co. v. Anderson [C. C. A.] 168 F 901. Of fact that Pullman car porters usually assist passengers on and off Pullman cars in same manner as brakemen usually do from ordinary coaches. Gannon v. Chicago, etc., R. Co. [Iowa] 117 NW 966.

86. In action for damages for failure to notify plaintiff to change cars, whereby she was deflected from her route, allegation that motive power was steam is immaterial and need not be proven. Central of Georgia R. Co. v. Ashley [Ala.] 48 S 981. Although plaintiff alleged and testified that accident did not happen later than 1:30 o'clock, while evidence was offered that car did not pass until 1:41 o'clock, and issue was as to whether accident occurred at all, held that allegation had not become so material that jury could not allow recovery upon finding that accident occurred shortly after 1:30. Hawley v. Minneapolis St. R. Co. [Minn.] 121 NW 627.

87. Allegation that plaintiff purchased ticket of defendant for passage over another road is not supported by testimony of ticket agent, called by defendant, that he sold tickets over all roads, no reference being had to particular ticket. Louisville & N. R. Co. v. Cannon [Ala.] 48 S 64. Evidence tending to show that defendants operated elevator, that they were common carriers of passengers, that plaintiff was a passenger thereon when it fell, and facts and circumstances attending fall, held to make prima facie case. Orcutt v. Century Bldg. Co., 214 Mo. 35, 112 SW 532.

88. Admission of ownership and operation by general denial, see ante, subsection Pleadings.

89. Where cause of action pleaded was breach by defendant of contractual obligation to provide plaintiff and her family with sleeping car accommodations from certain point to her destination, she could not recover by proving that her reservation was from an intermediate point to destination. Smith v. Pullman Co. [Mo. App.] 119 SW 1072.

No variance: Between allegation that "said car was suddenly started, jerked, and violently and without warning propelled," and proof that, as plaintiff stepped from plat-

plaintiff must recover upon the negligence alleged,[89] and must prove the facts substantially as pleaded,[91] he need only prove one of several distinct acts of negligence charged.[92] Negligence must be shown by direct evidence or by proof of facts from which it can be reasonably inferred.[93] Where plaintiff bases his action upon the relation of carrier and passenger, he must prove the same,[94] and cannot recover upon a showing of the relation of master and servant.[95]

form onto running board before car stopped, it gave a sudden jerk. McCullom v. Atlantic City & S. R. Co. [N. J. Err. & App.] 72 A 87. Between allegation that plaintiff was injured while alighting "at" C, which was only shed station, and proof that he was injured two car lengths therefrom. Birmingham R., L. & P. Co. v. McGinty [Ala.] 48 S 491. Between allegation that ticket was purchased from defendant, its agent or servant, and proof that ticket was purchased from another company as initial carrier and was recognized by defendant. Alabama City, G. & A. R. Co. v. Brady [Ala.] 49 S 351. Between allegation that turnstile was improperly constructed, and evidence that lower arm was at such distance from floor that plaintiff's foot caught thereunder. Gascoigne v. Metropolitan West Side El. R. Co., 239 Ill. 18, 87 NE 883. Between allegation that car had nearly come to a standstill, and evidence that, if it had not stopped, it had practically done so. Nilson v. Oakland Trac. Co. [Cal. App.] 101 P 413. Under Rev. Codes, § 6585, providing that no variance shall be deemed material unless it actually misleads, there is no fatal variance between complaint alleging that plaintiff was injured by forward movement of car, after passengers had been discharged and car had started on return trip, and evidence that he was injured by backward movement to reach platform to discharge passengers, no one having been misled. Robinson v. Helena L. & R. Co., 38 Mont. 222, 99 P 837. In action for damages in being set down at wrong station, allegation that plaintiff was "put off" held to mean merely that she was caused to alight, and no variance with proof that she was informed by conductor that she had reached destination and invited to alight. Southern R. Co. v. Melton [Ala.] 47 S 1008.

90. General instruction that in order to recover plaintiff must show defendant to have been guilty of negligence held not erroneous as failing to limit the jury to the negligence pleaded where court subsequently specifically enumerated omissions which would authorize recovery. Johnson v. Cedar Rapids & M. C. R. Co. [Iowa] 119 NW 286. Where complaint alleged that car was standing when plaintiff attempted to board same and started suddenly while he was boarding, instruction that if car was moving when plaintiff attempted to board there can be no recovery should be given. Alabama City G. & A. R. Co. v. Bullard [Ala.] 47 S 578. Allegation that plaintiff was injured "by reason of the negligence of defendant and her servants in managing, operating, and controlling said elevator," held to include negligence of elevator boy in being absent from elevator when his presence was required thereat. Toohy v. McLean, 199 Mass. 466, 85 NE 578. Where negligence alleged was starting of car while plaintiff was alighting, no recovery can be had on evidence that car had not yet stopped when plaintiff attempted to alight. Walsh v. Nassau Elec. R. Co., 133 App. Div. 144, 117 NYS 358. Where only negligence alleged was allowing ditch to exist near step leading from platform, held error to charge on duty to keep platform lighted. St. Louis & S. F. R. Co. v. Elrod [Kan.] 98 P 215. Evidence of negligent failure to light depot platform held inadmissible where negligence alleged was sudden starting of train. Louisville & N. R. Co. v. Payne [Ky.] 118 SW 352. Petition construed and held that gist of action was failure to stop for a reasonable time and not negligent starting and stopping after it had stopped to allow passenger to alight. Millar v. St. Louis Transit Co., 215 Mo. 607, 114 SW 945.

91. Haralson v. San Antonio Trac. Co. [Tex. Civ. App.] 115 SW 876. One alleging injury caused by sudden starting of car cannot recover for injury received while stepping from moving car. Id. Where plaintiff alleged that he stepped with one foot on metallic covering of sand box and with other on metallic part of door sill and received electric shock, instruction authorizing recovery if he stepped on either and received shock held erroneous. Black v. Metropolitan St. R. Co., 217 Mo. 672, 117 SW 1142. Where, in action for misdirection of defendant's gateman as to trains, plaintiff alleged that she had purchased ticket from defendant for another road as showing right to pass gate, it was material to show that she did purchase same from defendant though it would have been sufficient if she had merely alleged that she possessed ticket. Louisville & N. R. Co. v. Cannon [Ala.] 48 S 64.

92. Harris v. Puget Sound Elec. R. Co., 52 Wash. 289, 100 P 838. Where presumption of negligence arising from fact of collision makes prima facie case, recovery is not defeated merely because plaintiff does not sustain allegations of other negligence. Sutton v. Southern R. Co., 82 S. C. 345, 64 SE 401. Where grounds of negligence alleged were, in substance, that defendant had stopped its train at an unsafe place for plaintiff to alight, that it failed to have the place properly lighted, and failed to assist plaintiff in alighting, an instruction as to defendant's negligence in either of these respects in the conjunctive was not erroneous. International & G. N. R. Co. v. Ford [Tex. Civ. App.] 118 SW 1137.

93. Norfolk & W. R. Co. v. Rhodes [Va.] 63 SE 445.

94. Garrett v. St. Louis Transit Co., 219 Mo. 65, 118 SW 68. Under Rev. St. § 4000 (U. S. Comp. St. 1901, p. 2719), postal clerk injured while on duty need not prove that he was a passenger. Hoskins v. Northern Pac. R. Co. [Mont.] 102 P 988. Proof that conductor accepted transfer is sufficient proof of acceptance of plaintiff as a passenger without proof that transfer was valid. Kohn v. Nassau Elec. R. Co., 117 NYS 231.

95. Allegation of relation of carrier and passenger is material, and where evidence

Burden of proof and presumpions.[See 11 C. L. 574]—The burden rests upon the plaintiff to prove all the essential elements of his cause of action,[96] including defendant's negligence,[97] and that such negligence was the proximate cause of the injuries complained.[98] Plaintiff must show that he was where he had a right to be or that his position elsewhere did not contribute to his injury,[99] and a trespasser has the burden of bringing himself within the doctrine of discovered peril.[1] While no presumption of negligence ordinarily arises from the mere fact of injury,[2] in some states it arises from injury to a passenger,[3] especially where the instrument causing the same was under the control and management of the defendant,[4] and, under the doctrine of res ipsa loquitur, the happening of an accident which does not occur in the ordinary course of affairs without negligence [5] gives rise to a pre-

does not tend to show such relation, but rather master and servant, affirmative charge for defendant is proper. Birmingham R., L. & P. Co. v. Stanfield [Ala.] 50 S 51.

96. Defendant is not called upon to offer evidence until prima facie case is made, and no inference of negligence can be drawn from its failure to do so. Paris & G. N. R. Co. v. Robinson [Tex. Civ. App.] 114 SW 658. Prima facie case is made out by proof of accident, injury, and reasonable care of plaintiff, and the circumstances embraced by rule stated in opinion. Asher v. East St. Louis & S. R. Co., 140 Ill. App. 220. Count alleging that plaintiff was negligently carried by his station and thereafter insulted and abused by defendant's servants held not to state two separate causes of action, but the allegations of abuse, etc., being grounds for special damages. Central of Georgia R. Co. v. Morgan [Ala.] 49 S 865.

97. Paris & G. N. R. Co. v. Robinson [Tex. Civ. App.] 114 SW 658; Hart v. St. Louis & S. F. R. Co. [Kan.] 102 P 1101.

98. Evidence that plaintiff was thrown from seat onto floor by derailment authorizes finding that carrier's negligence was proximate cause of injuries. Freeman v. Davis [Tex. Civ. App.] 117 SW 186.

99. Winters v. Baltimore & O. R. Co., 163 F 106.

1. Arkansas & L. R. Co. v. Sain [Ark.] 119 SW 659.

2. Brown v. Atlantic Coast Line R. Co. [S. C.] 64 SE 1012.

3. Davis v. Atlantic & C. Air Line R. Co. [S. C.] 64 SE 1015. Passenger killed by a train. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 121 NW 676. Burden shifts to carrier to show that it was not negligent. Cincinnati Trac. Co. v. Leach [C. C. A.] 169 F 549. Under Kirby's Dig. § 6607, injury to passenger while alighting from moving train raises presumption of negligence. St. Louis, etc., R. Co. v. Fambro [Ark.] 114 SW 230. Presumption of negligence does not arise under Civ. Code 1895, § 2321, unless injury is occasioned by the operation of "locomotive or other machinery" or by act or misfeasance of someone in employ of carrier. Smith v. Atlantic Coast Line R. Co., 5 Ga. App. 219, 62 SE 1020. Starting of train while passenger is alighting makes prima facie case of negligence, under Kirby's Dig. § 6773. St. Louis, etc., R. Co. v. Briggs [Ark.] 113 SW 644. Prima facie case of negligence made out where there was evidence tending to indicate that from some cause the grip iron of traction car became wedged in slot of conduit in which cable runs. Chicago City R. Co. v. Wyckoff, 136 Ill. App. 342. Where passenger is caused to fall by moving of train as he was entering, presumption of negligence arises. St. Louis, etc., R. Co. v. Stell [Ark.] 112 SW 876. Proof that plaintiff was injured by car she was riding in running against car of another company at street intersections held to make prima facie case. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. Evidence that passenger was last seen alive standing on platform preparatory to alighting at station, and that as train pulled out of station he was found dead by track, held to make question for jury whether he was killed by running of cars. Troutman v. Louisville & N. R. Co. [Miss.] 48 S 515. In an action for injuries in a collision where the passenger is without fault, a presumption that the carrier was negligent arises and the burden is upon it to rebut the presumption and show that it was not guilty. Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 SW 932. A showing by plaintiff that his intestate was injured by the operation of defendant's train while she was attempting to board as a passenger established a prima facie case of negligence against the defendant. Miller v. St. Louis, etc., R. Co. [Ark.] 119 SW 837. Where passenger on platform of station was injured by being struck by mail sack thrown from passing train, negligence of carrier is presumed. Huddleston v. St. Louis, etc., R. Co. [Ark.] 119 SW 280.

4. Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78. Where the case shows an unusual occurrence in the operation of machinery entirely under the control of defendant, an injury without fault of plaintiff, and an undisputed relation of carrier and passenger, a presumption of negligence arises and the doctrine of res ipsa loquitur applies. Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 SW 932.

5. Doctrine of res ipsa loquitur is not applicable to all accidents to passengers (Christensen v. Oregon Short Line R. Co. [Utah] 99 P 676; Barnes v. Danville St. R. & L. Co., 235 Ill. 566, 85 NE 921), but only where it is apparent that accident would not have happened but for negligence (De Yoe v. Seattle Elec. Co. [Wash.] 102 P 446; Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385). Instruction that jury could find negligence from mere unexplained fact that plaster fell from elevator shaft and struck plaintiff held too broad where defendant undertook to

sumption.[6] The presumption of negligence arising under this doctrine, being general, however, will only support an allegation of general negligence,[7] and a plaintiff averring specific acts of negligence cannot ordinarily rely thereon,[8] unless the only

show that it exercised reasonable care, etc. Frahm v. Siegel-Cooper Co., 131 App. Div. 747, 116 NYS 90.

6. Doctrine applicable.

Derailment. Freeman v. Davis [Tex. Civ. App.] 117 SW 186; Arkansas Cent. R. Co. v. Janson [Ark.] 119 SW 648; Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777; James v. Boston El. R. Co., 201 Mass. 263, 87 NE 474; Winters v. Baltimore & O. R. Co., 163 F 106; Sloan v. Little Rock R. & Elec. Co. [Ark.] 117 SW 551; Arkansas Midland R. Co. v. Rambo [Ark.] 117 SW 784. Car leaving track while going around curve. St. Louis & S. R. Co. v. Homer, 137 Ill. App. 548; McGrew v. Chicago & M. Elec. R. Co., 142 Ill. App. 210. Breaking of axel under tender, derailing car. Pate v. Columbia & P. S. R. Co., 52 Wash. 166, 100 P 324. Wreck. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113.

Collision. Sutton v. Southern R. Co., 82 S. C. 345, 64 SE 401; Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 SW 932; Murphy v. Southern Pac. Co. [Nev.] 101 P 322; Parrent v. Rhode Island Co. [R. I.] 72 A 865; Harris v. Puget Sound Elec. R. Co., 52 Wash. 289, 100 P 838; Chicago City R. Co. v. Greinke, 136 Ill. App. 77. Collision with fire hose wagon. Williamson v. St. Louis & M. R. Co., 133 Mo. App. 375, 113 SW 239. Collision between street car and truck wagon loaded with flour. West Chicago St. R. Co. v. Mileham, 138 Ill. App. 569.

Closing of door. Christensen v. Oregon Short Line R. Co. [Utah] 99 P 676.

Explosion in controller. Beattie v. Boston El. R. Co., 201 Mass. 3, 86 NE 920; Gay v. Milwaukee Elec. R. & L. Co., 138 Wis. 348, 120 NW 283. Explosion of drum to heating apparatus. Houston, etc., R. Co. v. Roach [Tex. Civ. App.] 114 SW 418.

Fall of store elevator. Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 NE 117. Failure of elevator to stop when brake was applied, it going to top and then falling. Keller v. Wove Realty Co., 128 App. Div. 154, 112 NYS 538. Motorman leaving car without having fully shut off controller. Barnes v. Danville St. R. & L. Co., 143 Ill. App. 259.

Burning of freight car in which passenger was riding in care of stock by fire which started from without. McGuire v. Great Northern R. Co., 106 Minn. 192, 118 NW 556.

Sudden starting of car after it had slowed to allow plaintiff to alight, throwing her off. Paducah Trac. Co. v. Baker [Ky.] 113 SW 449.

Violent stopping of train telescoping two cars. Chicago Union Trac. Co. v. Berkes, 136 Ill. App. 105. Where evidence showed that cable car made an unusual and violent stop throwing plaintiff against the stove, a case of presumptive negligence was made out. Briscoe v. Metropolitan St. R. Co. [Mo.] 120 SW 1162. Evidence that car did not check speed until it collided with truck held to cast burden on defendant to explain. Vogel v. Bahr, 130 App. Div. 732, 115 NYS 284. Where jerking of trains is so unusual and extraordinary as to break hold of passenger, and of such nature as could not have happened without negligence, presumption of negligence arises. Norfolk & W. R. Co. v. Rhodes [Va.] 63 SE 445. Where the proof was that the car jerked or lurched, and thereby plaintiff was thrown down and injured, it was not error to refuse to charge that the law presumed the defendant guilty of negligence. Beatty v. Metropolitan, etc., R. Co., 141 Ill. App. 92. Where plaintiff was injured by glass in swing door breaking when he pushed against it to open same as he passed down corridor to take train, which door was locked, held that burden was on defendant to explain why it was locked, plaintiff having used no more force than is usually used to open door. McCormack v. Interborough Rapid Transit Co., 61 Misc. 601, 113 NYS 1006. Instruction on necessity of plaintiff proving negligence held properly modified so as to give plaintiff the advantage of presumption arising from **collapse of bridge.** Roanoke R. & Elec. Co. v. Sterrett, 108 Va. 533, 62 SE 385.

Not applicable: Where plaintiff was injured by breaking of glass in door as he attempted to push it open, the door being locked. McCormack v. Interborough Rapid Transit Co., 132 App. Div. 703, 117 NYS 532. No presumption of negligence arises from fact that rear fender was drawn contrary to general prior custom. Whilt v. Public Service Corp., 76 N. J. Law, 729, 72 A 420. Where passenger is killed by unexplained fall from moving train. Paris & G. N. R. Co. v. Robinson [Tex. Civ. App.] 114 SW 658. Where jerk causing accident was one of frequent occurrence when cable car is operated with due care. De Yoe v. Seattle Elec. Co. [Wash.] 102 P 446. Mere fact of injury while alighting. Armstrong v. Portland R. Co. [Or.] 97 P 715. Car became stalled on railroad track because of failure of power, and motorman failed to entirely shut off power as he hastily jumped from car to push it from track. After car was pushed from track, it suddenly started forward onto track when current came back, and collision occurred. Barnes v. Danville St. R. & L. Co., 235 Ill. 566, 85 NE 921. Negligence not shown where deceased was found lifeless along track, and there being no proof how he fell from train, or who opened vestibule door, if he fell through same. Hart v. St. Louis & S. F. R. Co. [Kan.] 102 P 1101.

7. Allegations that death was caused by derailment because of negligent condition of the appliances or the negligent management of car held to charge negligence generally. MacDonald v. Metropolitan St. R. Co., 219 Mo. 468, 118 SW 78. Petition in action for injuries to plaintiff, caused by collision between street cars, construed and held to charge general negligence and thereby make the doctrine res ipsa loquitur applicable. Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 SW 932.

8. Where there are different kinds of negligence which might have caused accident, mere happening of accident does not sustain count based upon particular negligence. James v. Boston El. R. Co., 201 Mass. 263, 87 NE 474. Allegation of specific negligence may be regarded as surplusage, and reliance

legal inference from the facts supports the same;[9] but proof of specific negligence has been held not to preclude plaintiff from relying on the presumption.[10] These presumptions, however, do not change the burden of proof,[11] but merely requires the defendant to take the affirmative in the adduction of evidence and to meet the prima facie case made,[12] and, if he does not do so, the presumption becomes conclusive.[13] Failure to make schedule time is prima facie negligence,[14] as is the violation of a speed regulation.[15]

The burden of proving contributory negligence lies upon the defendant,[16] but he may utilize plaintiff's evidence;[17] and, where it makes a prima facie case of negligence,[18] plaintiff must relieve himself therefrom.[19] The burden of justifying an ejectment rests upon the carrier.[20]

had on doctrine of res ipsa loquitur. Hoskins v. Northern Pac. R. Co. [Mont.] 102 P 988. Where cause of sudden starting of car is not within knowledge of plaintiff, she may under doctrine of res ipsa loquitur go to jury upon negligence of motorman in handling car and upon negligent defect in car. Paducah Trac. Co. v. Baker [Ky.] 113 SW 449.

9. Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78. Although plaintiff alleged that negligent condition of controller was cause of explosion therein, she may rely on doctrine of res ipsa loquitur, where expert evidence showed that condition of controller was all that could cause explosion. Beattie v. Boston El. R Co., 201 Mass. 3, 86 NE 920. Where complaint charges negligence in care and operation of the controllers, whereby fire was produced, alarming plaintiff and causing her to jump from moving car, acts alleged held such as legal inference tended to establish. Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78.

10. Because plaintiff, in an action for injuries in collision between street cars, on her case in chief put in proof of some specific acts of negligence, she was not thereby precluded from presumption of negligence to which she was entitled under her petition charging negligence in general terms and not specifically. Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 SW 932.

11. Griswold v. Macon R. & L. Co. [Ga. App.] 63 SE 1132; Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793.

12. Presumption overcome: Any inference that latch was defective from mere closing of door by positive testimony of conductor that it was in perfect order. Christensen v. Oregon Short Line R. Co. [Utah] 99 P 676. Evidence of carpenter that he examined car before it left shop and found latch alright and that it was not defective shortly after accident held to overcome presumption that it was defective, arising from fact that window fell. Segelman v. Interborough Rapid Transit R. Co., 112 NYS 1068. Where defendant has shown by undisputed evidence that window which fell on plaintiff's hand was not defective and plaintiff relies on presumption of negligence, verdict for defendant should be directed. Seaboard Air Line R. Co. v. Thompson [Fla.] 48 S 750. Proof that controller of street car sometimes explodes without negligence overcomes presumption of negligence arising from explosion. Gay v. Milwaukee Elec. R. & L. Co., 138 Wis. 348, 120 NW 283. Presumption of negligence arising from derailment is **not overcome** by proof that it occurred in some unaccountable manner. Sloan v. Little Rock R. & Elec. Co. [Ark.] 117 SW 551.

13. Where company does not show that derailment was not due to negligence or to an independent cause, negligence will be conclusively presumed. MacDonald v. Metropolitan St. R. Co., 219 Mo. 468, 118 SW 78.

14. Taber v. Seaboard Air Line R. Co., 81 S. C. 317, 62 SE 311. Presumption not conclusively overcome by testimony that delay was due to being 28 minutes late from C, to loss of 20 minutes on account of burning trestle, to delay of 9 minutes in loading baggage, and to 20 minutes lost because of bad coal. Id.

15. Signals of approach will not exonerate carrier from running in violation of speed limit, since such violation raises presumption that it was cause of accident. Collison v. Illinois Cent. R. Co., 239 Ill. 532, 88 NE 251.

16. Miles v. St. Louis, etc., R. Co. [Ark.] 119 SW 837; Indianapolis Trac. & T. Co. v. Miller [Ind. App.] 88 NE 526; Braly v. Fresno City R. Co., 9 Cal. App. 417, 99 P 400; St. Louis, etc., R. Co. v. Gilbreath [Ark.] 113 SW 200. In jumping from car during panic caused by explosion of controller. Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78. In action for injuries alleged to have been caused by jerk of train while plaintiff was on platform waiting to alight, held that under the pleadings and evidence, the burden was on carrier to establish plea of contributory negligence. Houston & T. C. R. Co. v. Harris [Tex. Civ. App.] 120 SW 500.

17. Where plaintiff's evidence was such as to authorize finding of contributory negligence, instruction authorizing recovery unless "defendant showed" contributory negligence held erroneous United R. & Elec. Co. v. Riley, 109 Md. 327, 71 A 970.

18. Mere admission by plaintiff that he was standing in freight caboose when injury occurred from sudden jerk does not make him prima facie negligent so as to cast burden on him to relieve himself. St. Louis, etc., R. Co. v. Gilbreath [Ark.] 113 SW 200. Since it is prima facie negligence to alight from moving train, one so doing must show facts or circumstances justifying. Haylman v. Kanawha & M. R. Co., 65 W. Va. 264, 64 SE 536.

19. Where after charging that burden rested upon defendant to prove contributory negligence by a fair preponderance of the evidence, instruction continued "but if the whole evidence in the case shows contributory negligence," plaintiff cannot recover, held not to require that all the evidence in

Admissibility of evidence See 11 C. L. 576 is governed by the general rules applicable thereto.[21]

the case prove such negligence but only that the evidence as a whole must show it. Indianapolis Trac. & T. Co. v. Miller [Ind. App.] 88 NE 526.

20. In action for assault and wrongful ejectment, defendant put in a general denial and a special plea that plaintiff was affected with a dangerous contagious disease. Held that, where court's attention was not called to the difference between the two counts, court was not in error in charging that the burden of proving justification was on defendant. Mountford v. Cunard S. S. Co., 202 Mass. 345, 88 NE 782.

21. Customs and orders.

Admissible: General custom to furnish passes to like employes and that such passes were stated by manager to be a part of wages, to show that they were not gratuitous. Harris v. Puget Sound Elec. R. Co., 52 Wash. 289, 100 P 838. Where other evidence make issue as to plaintiff's intoxicated condition at time of accident, evidence that he has been intoxicated many times previous to injury. Lewis v. Houston Elec. Co. [Tex. Civ. App.] 112 SW 593.

Inadmissible: Where issue is whether purser invited plaintiff to alight as boat lay along wharf but unattached, evidence of defendant's custom in making landings and discharging passengers. McKay v. Anderson Steamboat Co., 51 Wash. 679, 99 P 1030. Posted bulletin regulating rights at intersectings, in absence of evidence that it was still in force. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. Evidence that witness bad traveled on train once a month for a year and had heard a certain call given held insufficient to show custom in respect thereto. Southern R. Co. v. Wooley [Ala.] 48 S 369.

Res gestae.

Admissible: In action for injury received by plaintiff during scuffle between her husband and conductor growing out of dispute over transfers, conversation between three parties. McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223, afg. Id., 143 Ill. App. 608. Where passenger claims that he was ejected without being given reasonable opportunity to find his ticket, evidence that he produced his baggage check, as bearing on hastiness of conductor. Bolles v. Kansas City S. R. Co., 134 Mo. App. 696, 115 SW 459. Where plaintiff was injured by car starting as she was alighting, evidence of call "hold on" to plaintiff made as car started. Smith v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1055, 119 NW 640. Where, in action for injury received by starting of car while plaintiff was alighting at wrong place, she had testified that others were leaving car, actions of others passengers. Smith v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1055, 119 NW 640. What conductor did at time of accident with section of floor upon which plaintiff fell. Plefka v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 911, 118 NW 731.

Not admissible: Statement of conductor to witness after car resumed journey. Alten v. Metropolitan St. R. Co., 133 Mo. App. 425, 113 SW 691. Statement made by motorman after passenger thrown from car had gotten back onto same. Blue Ridge L. & P. Co. v. Price, 108 Va. 652, 62 SE 938. Statement of conductor on following day as to how accident happened held only admissible to contradict him. Wade v. Illinois Cent. R. Co. [Ky.] 112 SW 1103. Statement of passenger several hours after accident as to how it happened. Id. Statement of plaintiff that conductor "said that he caught my foot with his handle raising the lever and pulled me off; that is just what he said," is not part of res gestae, though made about a minute after the accident occurred. Lecklieder v. Chicago City R. Co., 142 Ill. App. 139. In action for ejectment for nonpayment of fare, statement of another passenger to conductor that he saw prior conductor take up plaintiff's ticket. Wells v. Boston & M. R. Co. [Vt.] 71 A 1103.

Opinions and conclusions.

Admissible: Question did you step from car, or were you thrown off, held not to call for conclusion. Selma St. & S. R. Co. v. Campbell [Ala.] 48 S 378.

Inadmissible: Where plaintiff was injured while attempting to alight at stop before crossing tracks, question "what do you say as to where you expected the car would stop." Stevens v. Boston El. R. Co., 199 Mass. 471, 85 NE 571. Question to engineer whether train could have been stopped at particular crossing, in rebuttal of dangerous speed, held properly excluded, since conclusion called for was not a permissible shorthand rendering of pertinent collective facts. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. In action for death of intoxicated passenger allowed to alight at dangerous place, declarations of another passenger that it was murder to allow him to alight at such place inadmissible. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109.

Primary and secondary evidence: Section foreman may testify as to speed limits of trains although information is obtained from a letter from his superior, it being collateral matter. Johnson v. Union Pac. R. Co. [Utah] 100 P 390.

Expert testimony: Nonexpert may testify as to speed. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. In action for injuries caused by fall of elevator, evidence of expert mechanics who testified as elevator experts held admissible. Shaughnessy v. Holt, 236 Ill. 485, 86 NE 256. Witness held properly qualified to testify as to the effect of the application of brakes to cars, of the reversal of power, and proper manner of operating car approaching a curve. McGrew v. Chicago & M. Elec. R. Co., 142 Ill. App. 210.

Acts and declarations of employes: Where witness testifies without objection that one was claim agent, held that such fact was sufficiently established to render admissions competent. St. Louis & S. F. R. Co. v. Lienrance [Kan.] 102 P 842. Declarations of agents of general authority made within reasonable discharge of duties are admissible as admissions of carrier. Pennsylvania R. Co. v. Orem Fruit & Produce Co. [Md.] 73 A 571. Statement made by motorman that he had no right to stop on railroad track held without his authority and not binding on

company. Blue Ridge L. & P. Co. v. Price, 108 Va. 652, 62 SE 938.

Prior and subsequent acts and conditions: In action for injuries caused by fall of elevator, evidence tending to show condition of elevator two years prior to accident and down to time of the same held admissible. Orcutt v. Century Bldg. Co., 214 Mo. 35, 112 SW 532. Witness coming to a town in spring is incompetent to testify as to manner in which depot platform of defendant was lighted previous summer. Louisville & N. R. Co. v. Payne [Ky.] 118 SW 352. In an action for ejectment of passenger, evidence as to what was the conductor's general habit toward the treatment of passengers held inadmissible. Anderson v. Louisville & N. R. Co. [Ky.] 120 SW 298.

Inspections and measurements: Where it is admitted that only change made after wreck and before taking of photographs was removal of a few broken ties, and there was no dispute as to them, photograph held admissible. Johnson v. Union Pac. R. Co. [Utah] 100 P 390.

Evidence admissible on particular issues: Evidence of care customary among well constructed and operated roads of same class is admissible to show diligence. Campbell v. Duluth & N. E. R. Co., 107 Minn. 358, 120 NW 375. In an action for injuries in collision, evidence that upon a similar incline controlled by defendant, and over which defendant operated its street cars, rail brakes were in use, and that they were very effective in stopping cars on an incline, held admissible as tending to show failure to exercise that degree of care required by law in the instant case. Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 SW 932. Where defendant specifically pleaded contributory negligence in boarding train hastily, evidence of announcement for passengers to hasten is admissible irrespective of who made it. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83. Where, to meet plaintiff's evidence that derailment was caused by rotten ties, company offered evidence that all ties between designated stations were creosoted when road was constructed and ties were not rotten, evidence of witness that she had walked along track north of bridge, 100 yards distance, and observed rotten ties, held admissible. Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777. Evidence that train was behind time as tending to show unusual speed. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. Evidence of swaying of car while ascending curve due to play between body and trucks to negative law of physics that sudden accceleration of speed on a curve tends to throw body inward. Cutts v. Boston El. R. Co., 202 Mass. 450, 89 NE 21. General character and reputation of conductor for polite and courteous treatment of passengers on issue whether his conduct and language to plaintiff was insulting. Georgia Southern & F. R. Co. v. Ransom, 5 Ga. App. 740, 63 SE 525. In absence of a showing of changes, schedule of prior year held admissible. Geraty v Atlantic Coast Line R. Co., 81 S. C. 367, 62 SE 444. In action for injury resulting from head-on collision, evidence of grade and curves for purpose of showing situation and not independent negligence. Harris v. Puget Sound Elec. R. Co., 52 Wash. 289, 100 P 835. Testimony of section foreman that for several days prior to accident he had been engaged in repairing track and that trains were limited to speed of 15 miles per hour, to show notice to company of unsafe condition of bed. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. That decedent was bloody and muddy when he boarded car, as showing his intoxicated condition and to attract attention of trainmen thereto. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109. Evidence of prior attempts of deceased to alight and of prevention by servants to show his drunken condition and knowledge thereof on part of defendant's servants. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109. Rule governing right of way of cars at point of intersection, in action for injury resulting from collision. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. Bulletins of defendant showing time of arrival of stock for which deceased was waiting, were admissible to show that same carried passengers having mileage tickets, in connection with proof that deceased had such a ticket. Collision v. Illinois Cent. R. Co., 239 Ill. 532, 88 NE 251. Where conductor testified that he saw car which ran into his car just as it struck and it was going 10 miles an hour, objection that he saw car just as it struck and could not tell speed goes to weight of his testimony and not its admissibility. Fuhry v. Chicago City R. Co., 239 Ill. 548, 88 NE 221. Evidence that street car company furnished electricity to light path used to pass around obstructed portion of its track to car beyond and that conductor on last trip turned same off, to show an invitation to patrons to use same. Powers v. Old Colony St. R. Co., 201 Mass. 66, 87 NE 192. Evidence that motorman knew that electric power had been intermittent all day, as bearing on negligence in failing to completely shut off power of car left stalled on railroad track before jumping off to push car from track. Barnes v. Danville St. R. & L. Co., 235 Ill. 566, 85 NE 921. Where plaintiff claimed that car stopped on near side of street and suddenly started while she was alighting therefrom, while defendant contended that she attempted to alight as it was slowing down to stop on far side, evidence of ordiannce and rule requiring car to stop on far side held admissible. Grady v. St. Louis Transit Co. [C. C. A.] 169 F 400. In action for damages in being carried by station, question as to what became of plaintiff immediately after coming to witness' house, as bearing upon her condition. Louisville & N. R. Co. v. Seale [Ala.] 49 S 323. Where, in action for injury, while riding in cupola of freight caboose, carrier relied on rule prohibiting passengers from so riding to show negligence, evidence that rule was not generally known to public and was not enforced is admissible. Reid v. Yazoo & M. V. R. Co. [Miss.] 47 S 670. Held not error in action for death of passenger killed at station to permit answer that deceased wife and children were at home on evening of accident, such being the inference from all the facts. Collision v. Illinois Cent. R. Co., 239 Ill. 532, 88 NE 251. In action for being carried by flag station, rules of company as to where passengers board, as bearing on question whether employes knew plaintiff was on

The sufficiency of evidence to establish negligence [21a] and contributory negligence [22] is treated in connection with the substantive rulings relating to the particular negligence involved.

Questions for the jury. See 11 C. L. 580—All issues of fact based upon conflicting evidence are for the jury.[23]

Instructions. See 11 C. L. 580—While instructions should submit only issues raised by the pleadings [24] and supported by the evidence,[25] they must not ignore [26]

train. Louisville & N. R. Co. v. Seale [Ala.] 49 S 323. In action for injury caused by fall resulting from change of level in platform of station, not reversible error to admit evidence that within 18 months about a dozen others had slipped, as had plaintiff, without injury. Fisher v. Boston & M. R. Co. [N. H.] 72 A 212. Evidence as to conditions surrounding the place where plaintiff's wife, who had been carried by station, was required to alight held admissible. Freeman v. Puckett [Tex. Civ. App.] 120 SW 514.

Inadmissible on particular issue: In action for being carried by station, testimony of witness that it was first time he had known any one to have been carried by flag station. Louisville & N. R. Co. v. Seale [Ala.] 49 S 323. Evidence of interlocking and denailing systems in use at grade crossings held immaterial where collision was due to confusion of signals by towerman, in which case devise would not have been so set as to be effective. Gorman v. New York, etc., R. Co., 194 N. Y. 488, 87 NE 682. Where only issue was premature starting of train, question as to height of plaintiff's heel. St Louis, etc., R. Co. v. Briggs [Ark.] 113 SW 644. Evidence of how viaducts in other cities are constructed as bearing upon negligence in construction of particular viaduct in placing railing too close to track. Joyce v. Metropolitan St. R. Co., 219 Mo. 344, 118 SW 21.

Evidence admissible under particular pleadings: Where plaintiff was injured while alighting from train on side toward freight depot, evidence of the extent of the carrier's freight business conducted at its freight depot on that side of the track was inadmissible, it appearing that plaintiff had no business to transact at freight depot. Louisville & N. R. Co. v. Payne [Ky.] 118 SW 352. Evidence of negligent failure to properly light depot platform held inadmissible where the negligence alleged was sudden starting of train. Id. Evidence of assault and abusive conduct under allegation of breach of contract to carry safely. Telzer v. Brooklyn Union El. R. Co., 61 Misc. 59, 113 NYS 18. Under allegation of assault and wrongful ejection, plaintiff may show that he purchased a three coupon ticket, one of which entitled him to return trip, and that prior conductor had taken up the same. Wells v. Boston & M. R. Co. [Vt.] 71 A 1103. In action for carrying plaintiff's wife past her destination, testimony of wife that the platforms of several coaches from which she attempted to alight were closed and dark held admissible under the petition. Freeman v. Puckett [Tex. Civ. App.] 120 SW 514.

21a. See ante, §§ 25-31.

22. See ante, § 25B.

23. Contributory negligence. Eckels v. Bryant, 137 Ill. App. 234. Whether servants negligently started car while plaintiff was alighting. Birmingham R., L. & P. Co. v. Pritchett [Ala.] 49 S 782.

24. Held improper: Where no issue was made as to whether carrier gave plaintiff sufficient opportunity to alight, charge submitting same held properly refused. Bryant v. Northern Texas Trac. Co. [Tex. Civ. App.] 115 SW 880. Where petition alleges actual knowledge of plaintiff's condition but did not allege that by exercise of ordinary care they could have known thereof, held error to give instruction authorizing recovery if they could, in exercise of ordinary care, have discovered his condition. Gulf, etc., R. Co. v. Garner [Tex. Civ. App.] 115 SW 273. Instruction directing jury not to consider question whether or not conductor notified plaintiff not to attempt to alight until car stopped was proper, where such fact was not alleged as a ground of negligence. Drewery v. El Paso Elec. R. Co. [Tex. Civ. App.] 120 SW 1061. Where there was no charge of negligence in failing to prevent passenger from alighting from moving train, instruction that carrier was not required to keep guard, etc., to prevent passengers from alighting from moving train held properly refused. St. Louis, etc., R. Co. v. Fainbro [Ark.] 114 SW 230. Where plaintiff alleges sudden starting of car from standing position while boarding same, instruction on contributory negligence in boarding moving car. Alabama City G. & A. R. Co. v. Bullard [Ala.] 47 S 578. Where, by pleadings, defendant justified refusal to accept plaintiff on ground that cars were full, held error to instruct that plaintiff could not recover unless she presented book with coupons attached. Fairfield v. Louisville & N. R. Co. [Miss.] 48 S 513. Where contributory negligence charged was the standing on running board, held error to give instruction submitting negligence in trying to alight from moving car. Boesen v. Omaha St. R. Co., 83 Neb. 378, 119 NW 771. Where there was no claim of negligence in permitting platform to be crowded, instruction "it is not negligence to permit crowding but I say it is obliged, in view thereof, to take such reasonable precautions as will reasonably protect its passengers from injury," held erroneous. Becker v. Interborough Rapid Transit Co., 128 App. Div. 455, 112 NYS 816. Where petition alleged that car had come to full stop and plaintiff was thrown by a sudden start thereof while she was alighting and there was no evidence of a sudden increase of speed, instruction, authorizing recovery if after slacking speed it suddenly increased same, held not within issue. Grady v. St. Louis Transit Co. [C. C. A.] 169 F 400. Where petition alleged that while plaintiff was on steps of car and in act of

alighting from train car was negligently jerked and backed, thereby causing plaintiff to "fall to and against the said depot platform," etc., instruction that did not require jury to find that plaintiff did in fact fall against depot platform was not erroneous. Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 118 SW 116. Where child 3½ years old was placed on platform of train by its mother preparatory to boarding and by jerk of train was thrown from car and killed, in an action by the father, as administrator, for its death, it was error to charge on contributory negligence. Miles v. St. Louis, etc., R. Co. [Ark.] 119 SW 837. In action by father, as administrator, for death of child caused by being thrown from car by jerk of train, it was error to charge that if its mother, before any instruction to get aboard, set the child on platform of car, and in doing so failed to use ordinary care and caution, the verdict must be for the defendant. Id. Instruction, in action for injuries by being struck while standing on platform by mail sack, thrown from moving train, held erroneous as not being based on the evidence. Huddleston v. St. Louis, etc., R. Co. [Ark.] 119 SW 280.

25. Held supported: Charge on negligent starting of car while plaintiff was alighting. Westervelt v. St. Louis Transit Co. [Mo.] 121 SW 114. Where evidence showed injury from sudden jerk of car, instruction on duty to maintain safe track held applicable. St. Louis, etc., R. Co. v. Richardson [Ark.] 113 SW 794. Evidence that conductor had announced station, that when train stopped passengers started out, and that while plaintiff's wife was going down aisle train moved suddenly forward and backward, held to authorize submission of issue whether train had stopped at time of injury. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403. Where there was evidence that plaintiff was standing some distance away when car started and thereafter attempted to board moving car, instruction that if plaintiff attempted to board moving car he assumed the risk of danger and that if his injuries resulted from his own negligence he could not recover, held improperly refused under the evidence. Joyce v. Metropolitan St. R. Co., 219 Mo. 344, 118 SW 21. Where plaintiff's evidence showed that he had gotten safely onto car and thereafter loosened his hold on guard rail, thinking that a woman was about to jump off, and was thrown by ordinary jerk, held to authorize instruction that, if plaintiff got safely on and rode some distance and thereafter released his handhold and fell, he could not recover. Quinn v. Metropolitan St. R. Co., 218 Mo. 545, 118 SW 46.

Held unsupported: That carrier was not liable if switch was left open not through carelessness of carrier's employes, but by some one other than an employe. Pecos & N. T. R. Co. v. Coffman [Tex. Civ. App.] 121 SW 218. Where there was no evidence to show that any employe of carrier knew that plaintiff, who had assisted passenger on board, was on platform and about to alight from moving train, instruction that if carrier by its negligence placed plaintiff in a position of peril and thereby caused him to believe himself in danger of falling from train, and that he jumped from the train in order to save himself from danger, he could not then be charged with contributory negligence, held properly refused. Shaddix v. St. Louis S. W. R. Co. [Tex. Civ. App.] 120 SW 517. Where injury was caused by derailment, court properly refused instruction as to ordinary jars and jolts of a mixed train. Arkansas Midland R. Co. v. Rambo [Ark.] 117 SW 784. Instruction authorizing recovery for expenses for nursing. Heidbrink v. United R. Co., 133 Mo. App. 40, 113 SW 223. Where evidence showed that plaintiff was seated in passenger coach as he should have been when he was injured by sudden stopping of train due to derailment, instruction on contributory negligence held properly refused. Atlantic Coast Line R. Co. v. Odum, 5 Ga. App. 780, 63 SE 1126. Where plaintiff's evidence showed that car door became defective during transit, instruction authorizing recovery for furnishing defective car held erroneous. Jones v. St. Louis, etc., R. Co., 135 Mo. App. 468, 116 SW 4. Instruction based upon conductor's knowledge that plaintiff had been discharged before reaching her destination held properly refused where the evidence shows that plaintiff was mistaken in her testimony as to his knowledge. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. Where there is no evidence that passenger knew of dangerous condition of ground, instruction, submitting issue, held erroneous. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961. Where negligence charged and tended to be established was sudden starting, instruction as to "increasing of speed" held properly refused. Birmingham R., L. & P. Co. v. Moore [Ala.] 50 S 115. Where there was no evidence of negligence in condition of car, count based thereon should be withdrawn on request. James v. Boston El. R. Co., 201 Mass. 263, 87 NE 474. Instruction on want of care in removing snow from car steps. Baker v. North Jersey St. R. Co. [N. J. Law] 72 A 434. Where there was no evidence under which owner of road bed could be held, it was not error to give instructions in respect to its liability, as against plaintiff. Marcus v. Omaha & C. B. Railway & Bridge Co. [Iowa] 120 NW 469. Where, in action for injuries received from derailment, the undisputed evidence shows that car was in good order and track in safe condition, court properly eliminated issue of negligence on those points. Sloan v. Little Rock R. & Elec. Co. [Ark.] 117 SW 551. Where one accompanying carload of melons was injured while walking about yards at intermediate station and not while a passenger, instruction that carrier was bound to exercise same degree of care as to shipper as to passenger held erroneous. Jones v. St. Louis, etc., R. Co., 135 Mo. App. 468, 116 SW 4.

26. Instruction, authorizing recovery if jury found certain facts, held erroneous as ignoring defense of release. Smith v. Central R. Co., 142 Ill. App. 311. Where there was evidence tending to show that plaintiff, who was injured while alighting from street car, alighted from car while in motion with her back the way car was going, it was error not to submit requested charge on contributory negligence. Dallas Consol. Elec. St. R. Co. v. Barnes [Tex. Civ. App.] 119 SW 122.

or withdraw [27] any issues properly raised without unduly emphasizing particular evidence.[28] Generally speaking, they must fairly submit [29] the issues made by the evidence adduced,[30] and should not assume facts in dispute [31] or invade the province

Instruction regarding improper remarks of conductor held to ignore issue. Carpenter v. Trinity & B. U. R. Co. [Tex. Civ. App.] 119 SW 335. Instruction held to sufficiently charge on issue whether plaintiff had been given a reasonable opportunity to alight. Westervelt v. St. Louis Transit Co. [Mo.] 121 SW 114. Where gist of action was sudden starting of car while plaintiff was alighting at usual stopping place, instruction held not erroneous as ignoring questions whether car was stopped a reasonable time or whether defendant's servants knew plaintiff was alighting. Jones v. Springfield Trac. Co. [Mo. App.] 118 SW 675.

27. Instruction in action for injuries, alleged to have been sustained because depot was not properly heated, held erroneous as not submitting issue whether such acts complained of constituted negligence. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118. In action for injury resulting from fatigue in being compelled to stand because of crowded condition of car, charged that defendant was not negligent in not using more power and cars and other equipment, held to withdraw only ground of recovery. Weeks v. Auburn & S. Elec. R. Co., 60 Misc. 400, 113 NYS 636. Although plaintiff's testimony of broken floor was much shaken on cross-examination and five or six passengers testified that they did not see same, held error to instruct that it was not claimed by plaintiff that floor was broken Plefka v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 911, 118 NW 731. Instruction on right to recover for injury received while boarding train, being made up, held not to withdraw issue of contributory negligence, except as to premature boarding which was proper, evidence showing that defendant had invited passengers to board at that time. Wise v. Wabash R. Co., 135 Mo. App. 230, 115 SW 452. Instruction held erroneous in view of Pen. Code, § 419, and Railroad Laws (Laws 1890, p. 1126, c. 565), §§ 138, 139, governing starting of trains, etc., as withdrawing liability, if conductor pushed plaintiff from the train. Wehn v. Interborough Rapid Transit Co., 132 App. Div. 841, 117 NYS 731.

28. Instruction that, if defendant was engaged in running street cars, it owed highest degree of care, etc., held not erroneous as calling attention to part of evidence. Blue Ridge L. & P. Co. v. Price, 108 Va. 652, 62 SE 938.

29. Held proper: Instruction, in action for damages in being induced to alight at improper place, that if jury believed that defendant's acts under the facts proved were negligent, to find for plaintiff, held proper. Dye v. Chicago & A. R. Co., 135 Mo. App. 254, 115 SW 497. Where petition alleged that car stopped and suddenly started as plaintiff was alighting, held that defendant was entitled to an instruction distinctly submitting the issue whether car stopped and then started, where there was only a general instruction to find for plaintiff if car was negligently moved forward. Dallas Consol. Elec. St. R. Co. v. McGrew [Tex. Civ. App.] 115 SW 344. Where caretaker entered car with horses, knowing that switching was to be done, and evidence was conflicting as to whether he informed servants of his entrance, defendant was entitled to instruction that if plaintiff entered car knowing that switching was to be done and did not notify trainmen, and if his so doing was negligence contributing to the injury, he could not recover. Bruce v. Chicago, B. & Q. R. Co., 136 Mo. App. 204, 116 SW 447. In action for an injury resulting from a collision between street car and car of another company, held that instruction defining proximate cause should have been given. Shane v. Butte Elec. R. Co., 37 Mont. 599, 97 P 958. The negative of plaintiff's case should have been submitted, that is, if the jury failed to find that plaintiff was injured in the manner alleged, or if she received her injuries through no fault of defendant, they should return verdict for defendant. Texas & P. R. Co. v. Beezley [Tex. Civ. App.] 120 SW 1136.

Improper: Where petition alleged knowledge on part of trainmen of plaintiff's need for special assistance, instruction limiting right to recover to knowledge on part of conductor held erroneous. Gulf, etc., R. Co. v. Garner [Tex. Civ. App.] 115 SW 273.

30. Held inapplicable: Where undisputed evidence shows that conductor knew that plaintiff was alighting when he gave signal to start, instruction on liability for starting car without knowledge that passenger was alighting after car had stopped a reasonable time. Jirachek v. Milwaukee Elec. R. & L. Co. [Wis.] 121 NW 326. Instruction that plaintiff should have made inquiries of conductor before alighting held inapplicable where evidence showed that conductor was not on the car at time. Smith v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1055, 119 NW 640. Evidence of contradictory statements of plaintiff as to how injury occurred held not affirmative proof thereof so as to require an instruction that if injury occurred in different manner from that testified to by plaintiff, no recovery could be had. Atlantic Coast Line R. Co. v. Odum, 5 Ga. App. 780, 63 SE 1126. Instruction on right to eject for nonpayment of fare and obligation of passenger to present valid transfer held properly refused where conductor was trying to restrain plaintiff from leaving instead of ejecting him. Braly v. Fresno City R. Co., 9 Cal. App. 417, 99 P 400. Instruction which in effect was to submit to jury whether plaintiff showed a want of ordinary care "in failing to avail herself of such means of shelter and protection as were then and there at hand, or which were nearby," provided there were such means at hand or "nearby." Striking out the words "which were nearby," and "nearby," not error. Washington, etc., R. Co. v. Lukens, 32 App. D. C. 442.

31. Held erroneous: Instruction that if

of the jury,[32] be upon the weight of the evidence,[33] nor should they be misleading.[34]

injury was due partly to plaintiff's riding in cupola, and partly to defendant's gross negligence, plaintiff could not recover, held erroneous as assuming that it was dangerous to ride in cupola and that it contributed proximately to injury. Reid v. Yazoo & M. V. R. Co. [Miss.] 47 S 670.

Held correct: Instruction assuming that decedent was a passenger is not erroneous where uncontroverted evidence establishes such fact. Petersen v. Elgin, A. & S. Trac. Co., 238 Ill. 403, 87 NE 345. Instruction that if a carrier "permits" one to board its car without payment of fare in advance, obligation to pay is equivalent to actual payment as far as giving effect to the contract is concerned, held not erroneous as assuming that carrier permitted decedent to board car, whereas evidence did not show that employes knew thereof. Id. Instruction held not to assume that plaintiff notified conductor of desire to alight at particular point. Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038. Instruction that if jury believes that plaintiff was a passenger, and that car started after it had stopped to allow him to alight, etc., held not to assume facts. Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038. Where evidence was that car had stopped or had practically done so, instruction based upon assumption that it had stopped held not erroneous. Nilson v. Oakland Trac. Co. [Cal. App.] 101 P 413. Instruction that defendant owes its passengers the highest degree of care, being merely for purpose of defining duty to a passenger, held not to assume that plaintiff was a passenger. Blue Ridge L. & P. Co. v. Price, 108 Va. 652, 62 SE 938. Where ticket is identified by defendant and admitted without objection, held not error to assume that it was one upon which plaintiff rode. Black v. Atlantic Coast Line R. Co., 82 S. C. 478, 64 SE 418. Where defendant's evidence clearly showed that conductor knew that plaintiff was alighting, instruction as to duty owed to alighting passenger held not erroneous for failing to submit whether servants knew that they were alighting. Alten v. Metropolitan St. R. Co., 133 Mo. App. 425, 113 SW 691. Instructions assuming that defendants operated elevator held not erroneous where all the evidence showed that fact. Orcutt v. Century Bldg. Co., 214 Mo. 35, 112 SW 532. Instructions: "But on the other hand if you believe from the evidence that the said employes of defendant did not cause the car to move suddenly forward, but that the fall and the injury, if any, that plaintiff received, was caused by her own contributory negligence * * * then your verdict should be for the defendant," did not assume by use of words "if any" that plaintiff was guilty of contributory negligence. Drewery v. El Paso Elec. R. Co. [Tex. Civ. App.] 120 SW 1061. Court is authorized to assume that plaintiff's act contributed to injury only where it is so directly and intimately related to result as necessarily to have contributed to it; and where plaintiff, who was injured while alighting from street car by catching her heel in hole in platform of car, testified that she made misstep, instruction that if jury believed from evidence that plaintiff's wife was guilty of negligence in manner in which she alighted from car at time and under circumstances she did, then jury should find for defendant, was not erroneous. Hertzberg v. San Antonio Trac. Co. [Tex. Civ. App.] 120 SW 572.

32. Erroneous: Instruction assuming that defendant's servants were negligent in starting car as they did. Smith v. Central R. Co., 142 Ill. App. 311. Instruction as to what duty owed by carrier to intoxicated passenger required carrier to do. Benson v. Tacoma R. & P. Co., 51 Wash. 216, 98 P 605. Instruction that expert testimony had been introduced to show effect of certain causes, "but the court warns the jury that such testimony does not establish the fact that the wires and fuse were defective as alleged in complaint." Louisville & S. I. Trac. Co. v. Worrell [Ind. App.] 86 NE 78. Instruction in effect telling jury that indications were given that car was being slowed to permit passengers to alight, when it was for jury if any were given and character of same. Selma St. & L. R. Co. v. Campbell [Ala.] 48 S 378.

33. Instruction tending to cause jury to believe that agent was negligent in selling ticket and that such negligence resulted in injury to plaintiffs was on weight of the evidence. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118.

34. Misleading: Instruction on duty to keep depot warm held erroneous. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118. In action for injuries received by plaintiff during scuffle between her husband and conductor, instruction that if plaintiff could have avoided injury by exercise of reasonable care she cannot recover, where contention is that she should have kept her seat during same. McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223, afg. Id., 143 Ill. App. 143. Instruction that plaintiff could not recover if she voluntarily left train after being carried beyond destination, in that jury might infer that actual force was necessary to render alighting involuntary. Gulf, etc., R. Co. v. Bagby [Tex. Civ. App.] 115 SW 858. Instruction in action for death of child caused by jerk of car held misleading as to burden of proof. Miles v. St. Louis, etc., R. Co. [Ark.] 119 SW 837. Where defendant was charged with negligence in management and operation of its street car, instruction that if collision between car and locomotive "was caused by reason of the trolley wire or trolley pole being out of repair, or for any other reason outside the negligence charged in plaintiff's declaration," jury should find for the defendant, was erroneous. Asher v. East St. Louis & S. R. Co., 140 Ill. App. 220.

Not misleading: Charge defining degree of care required of carrier as to passenger alighting held not misleading. Southworth v. Pecos & N. T. R. Co. [Tex. Civ. App.] 118 SW 861. Where evidence shows that plaintiff asked if car was "Blackstone avenue car," and that such car ran along S street, instruction in language "if plaintiff asked servants if the car would take him along S street," etc. Braly v. Fresno

They are to be considered as a whole,[35,36] and requested instuctions substantially covered by those given may be denied.[37]

Trial. See 11 C. L. 584—The general rules governing fair dealing,[38] and arguments[39] of counsel, opening and closing of case,[40] summarizing[41] and submission of issues,[42] apply.

City R. Co., 9 Cal. App. 417, 99 P 400. Instruction on duty of motorman to watch for signals, considered with a view to the other instructions and to the facts of the case, held not misleading as exacting the duty at other than stopping places. Harkins v. Seattle Elec. Co. [Wash.] 101 P 836. Where court distinctly charged that burden was on plaintiff to prove defendant's negligence, instruction that the jury were the best 12 men to determine "this accident, because of this negligence, as the case may be," of any 12 men because they had heard and knew about it, as misleading jury to believe that negligence had been established. Malinowski v. Detroit United R. Co., 154 Mich. 104, 15 Det. Leg. N. 693, 117 NW 565. Although portion of charge on duty owed to one injured while boarding car, by being caught between starting car and rail of viaduct, held such as might cause jury to infer that company owed same high degree of care in construction of viaduct as in receiving passenger, as a whole held not misleading. Joyce v. Metropolitan St. R. Co., 219 Mo. 344, 118 SW 21. Instruction on general duty owed by carrier and by conductor to alighting passenger held not misleading as requiring conductor to use care in aiding plaintiff to alight. Northern Texas Trac. Co. v. Danforth [Tex. Civ. App.] 116 SW 147. Where train was new one and there was nothing showing that deceased knew that it habitually violated speed ordinance, instruction that deceased had a right to presume that train would not exceed speed limit held not misleading. Collison v. Illinois Cent. R. Co., 239 Ill. 532, 88 NE 251. Instruction in action for injuries alleged to have been caused by sudden jerk of train while plaintiff was on platform waiting to alight held not erroneous because of the use of the word "step." Houston & T. C. R. Co. v. Harris [Tex. Civ. App.] 120 SW 500. Instruction in action for injuries while alighting from car held not misleading as presenting issue of negligence as to projection on platform as distinguished from step. Dallas Consol. Elec. St. R. Co. v. Chase [Tex. Civ. App.] 118 SW 783. Instruction as to duty of railroad company in maintaining road between depot and its ferry landing held not misleading. Chesapeake & O. R. Co. v. Meyer [Ky.] 119 SW 183. Instruction, in action for injuries in collision between street cars, stating doctrine of res ipsa loquitur, held not misleading. Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 SW 932.

35, 36. Instruction on general care owed to passenger held not objectionable as a generality in view of other instructions. Dye v. Chicago & A. R. Co., 135 Mo. App. 254, 115 SW 497. Instruction as to right of motorman to strike person who had been ejected from car but was attempting to board again held not erroneous. Colbeck v. Sampsell, 140 Ill. App. 566. Instructions held not to ignore question as to whether the relation of passenger and carrier existed. Petersen v. Elgin, A. & S. Trac. Co., 142 Ill. App. 34. Instruction defining degree of care owed by street railway companies to passengers sufficiently stated the negligence of the employes to be the negligence of the company. Drewery v. El Paso Elec. R. Co. [Tex. Civ. App.] 120 SW 1061. Instructions in action for injuries by derailment of train held not confusing as to carrier's negligence. Galvesten, etc., R. Co. v. Norton [Tex. Civ. App.] 119 SW 702.

37. Held covered: Instruction on assumption of risk from injury from icy condition of street. Ward v. Chicago City R. Co., 237 Ill. 633, 86 NE 1111. Instruction on negligence in not seeing plaintiff alighting and in starting car before she was off. Petersen v. Baker [Kan.] 97 P 373. Requested instruction on assumption of risk and contributory negligence in alighting from moving car. Rangenier v. Seattle Elec. Co., 52 Wash. 401, 100 P 842. Instruction on contributory negligence in using defective seat. St. Louis, etc., R. Co. v. Grimsley [Ark.] 117 SW 1064. Instruction relieving carrier from liability for accidental injury. St. Louis, etc., R. Co. v. Richardson [Ark.] 113 SW 794. Instruction on contributory negligence. St. Louis, etc., R. Co. v. Fambro [Ark.] 114 SW 230; Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961. Instruction as to diligence and care required of conducter in stopping train and allowing passenger, who had forgotten ticket, to alight. International & G. N. R. Co. v. Hood [Tex. Civ. App.] 118 SW 1119.

Not covered: Requested instruction on right of self-defense, characterizing passenger's attack, held to present the law more specifically and affirmatively than one given. International & G. N. R. Co. v. Washington [Tex. Civ. App.] 117 SW 992.

38. In action for an assault on car No. 3717, proof that plaintiff's attorney had stated over telephone that number of car was 3771, he being under no obligation to give the information at all, held not to show such bad faith as to authorize judgment for defendant. Cohen v. Brooklyn, etc., R. Co., 115 NYS 1101.

39. Where issue was decedent's condition at time of accident, argument of counsel on his general character for sobriety is improper. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109.

40. Plaintiff alleged that, while a passenger, he was willfully and maliciously assaulted and thrown from car. Answer justified removal on ground of boisterous conduct, alleging that no unnecessary force was used. Held that answer was only affirmative denial, and plaintiff had closing argument. Stringfield v. Louisville R. Co. [Ky.] 113 SW 513.

41. Although plaintiff has abandoned one

Part V. Carriers of Baggage and Passenger's Effects.

§ 33. *What constitutes baggage and effects; duty to accept and carry.*[43]—See 11 C. L. 584—Baggage is ordinarily whatever article or effect a passenger takes with him for his personal use, enjoyment or pleasure in traveling, according to the wants and habits of the particular class to which he belongs.[44] Whether particular articles are to be deemed baggage is ordinarily a question of fact.[45]

§ 34. *Care of baggage and effects.*[46]—See 11 C. L. 584—The duty to carry is incidental to the contract for the transportation of the passenger, and hence a through ticket entitles the passenger to have his baggage checked to destination.[47] Likewise, its liability may be reduced by a special contract for storage,[48] and its liability becomes that of a warehouseman,[49] where the contract of carriage is completed and the passenger has failed to remove his baggage within a reasonable time.[50] While a carrier is an insurer against loss, it is not liable for punitive damages for delay caused by miscarriage where it made earnest effort to trace and deliver same.[51]

§ 35. *Limitation of liability.*[52]—See 11 C. L. 585—The right to limit liability is controlled by statute in some states,[53] but in the absence thereof, it may ordinarily be limited by special contract, assented to by the passenger[54] and supported by a

ground of alleged negligence, held not error in summarizing complaint to refer thereto. Southern R. Co. v. Wright [Ga. App.] 64 SE 703.

42. Where before arguments court stated that the only negligence that it would submit would be as to crowded condition of car, held error to thereafter submit negligence in failing to ring bell before passing car. Kalis v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1107, 119 NW 906.

43. Search Note: See notes in 7 C. L. 601; 34 L. R. A. 137; 36 Id. 781; I L. R. A. (N. S.) 353; 4 Id. 1035; 10 Id. 119; 15 Id. 558; 99 A. S. R. 343; 6 Ann. Cas. 828; 9 Id. 201.

See, also, Carriers, Cent. Dig. §§ 1502-1518, 1539-1543, 1550-1556; Dec. Dig. §§ 387-396, 404, 407, 496; 6 Cyc. 661, 662, 670-673, 675; 3 A. & E. Enc. L. (2ed.) 529, 543.

44. Kansas City So. R. Co. v. Skinner [Ark.] 113 SW 1019; Chicago, etc., R. Co. v. Whitten [Ark.] 119 SW 835. Suitcase and dress pattern purchased en route, the former for personal use of passenger and latter for use of family, and placed in trunk, held baggage. Kansas City So. R. Co. v. Skinner [Ark.] 113 SW 1019. Damages recovered for injury to clothing, quilts, seine, some cooking utensils and groceries carried by person going on pleasure trip. Chicago, etc., R. Co. v. Whitten [Ark.] 119 SW 835.

45. Chicago, etc., R. Co. v. Whitten [Ark.] 119 SW 835.

46. Search Note: See notes in 3 C. L. 662; 11 Id. 585; 14 L. R. A. 515, 859; 10 Ann. Cas. 895.

See, also, Carriers, Cent. Dig. §§ 1505-1543; Dec. Dig. §§ 395-404; 6 Cyc. 462, 561, 661, 662, 671, 672, 675; 3 A. & E. Enc. L. (2ed.) 546-560.

47. Gomm v. Oregon R. & Nav. Co., 52 Wash. 685, 101 P 361.

48. Yazoo & M. V. R. Co. v. Hughes [Miss.] 47 S 662.

49. Church v. New York Cent. & H. R. R. Co., 116 NYS 560. Where it appears that baggage was stolen without negligence on part of carrier, plaintiff must show that he used reasonable diligence in calling for same. Id.

50. What constitutes a reasonable time depends upon facts and circumstances of particular cases. Tallman v. Chicago, etc., R. Co., 136 Wis. 648, 118 NW 205. Where plaintiff arrived at 6:30 p. m. and baggage room was open until 10:30 p. m., but plaintiff was unable to get an expressman and did not call for same until next morning, reasonableness of call held for jury. Church v. New York Cent. & H. R. R. Co., 116 NYS 560. Where plaintiff and baggage arrived at 5 p. m. Sunday and there were no conveyances at the depot to receive his baggage which was too heavy to carry, held that leaving it until 8:30 or 9:00 the next morning was not unreasonable. Tallman v. Chicago, etc., R. Co., 136 Wis. 648, 118 NW 205.

51. Black v. Atlantic Coast Line R. Co., 82 S. C. 478, 64 SE 418.

52. Search Note: See notes in 3 L. R. A. (N. S.) 183; 5 Id. 650; 8 Id. 199; 9 Ann. Cas. 913.

See, also, Carriers, Cent. Dig. §§ 1544-1549; Dec. Dig. § 405; 6 Cyc. 663; 3 A. & E. Enc. L. (2ed.) 554.

53. Under Pub. Service Commissions Law (Laws 1907, p. 911, c. 429) § 38, providing that carriers shall be liable for full value of baggage, except that if value be in excess of $150 such fact must be stated to carrier and extra charge paid therefor, one failing to disclose extra value cannot recover for loss thereof. Richardson v. Woolverton, 117 NYS 908.

54. Limitations of amount of liability contained in baggage receipt given in exchange for baggage check held not binding where passenger's attention was not called to same and she did not read receipt. Scofield v. May, 62 Misc. 243, 114 NYS 787. Plaintiff held bound by limitation of damages for loss of baggage contained in ticket for ocean voyage, though same was not specifically brought to his knowledge, it constituting a contract. Darnana v. La Compagnie Generale Transatlantique, 114 NYS 118.

consideration.[55] Such contracts must be construed in the light of public policy,[56] but an agreed valuation in case of loss is usually held valid.[57]

§ 36. *Damages.*[58]—See 9 C. L. 538.

§ 37. *Remedies and procedure.*[59]—See 11 C. L. 585.—Plaintiff must allege and prove the contract of carriage and a breach thereof,[60] but proof of delivery to the carrier and a failure to redeliver,[61] or delivery to the carrier in good condition,[62] and receipt thereof in a damaged state, makes a prima facie case.

Capacity (defined), see 12 C. L. 995, n. 76.
Carrying Weapons; Car Trusts, see latest topical index.

CASE, ACTION ON.[1]

The scope of this topic is noted below.[2]

Case will lie concurrently with assumpsit for a breach of duty arising out of an express or implied contract,[3] or for a violation of the duty which the contractual relations of the parties involve.[4] A count in trespass on the case should aver in what particular defendant failed to perform his duty.[5]

Case Agreed; Case Certified; Case Settled; Cash; Catching Bargain, see latest topical index.

CAUSES OF ACTION AND DEFENSES.[6]

The scope of this topic is noted below.[7]

Causes of Action, 721. | **Defenses,** 723.

Causes of action.—See 11 C. L. 587.—The term "cause of action" is variously defined by various writers and treatises.[8] A right of action arises from the existence of a

55. Passenger receiving no consideration for limitation and not assenting thereto is not bound by limitation. Black v. Allantic Coast Line R. Co., 82 S. C. 478, 64 SE 418.

56. Gomm v. Oregon R. & Nav. Co., 52 Wash. 685, 101 P 361. Contract as to passenger's baggage is not determined alone by the conditions in the ticket, but also by the circumstances of each case. Id. Where carrier sold through ticket over various roads and return, checking her baggage through, held that it was liable for loss due to failure of connecting line on return trip to check through, though it limited liability to its own line. Id.

57. Black v. Atlantic Coast Line R. Co., 82 S. C. 478, 64 SE 418. Limitation of liability to $100 in consideration of reduced rate held valid. Gomm v. Oregon R. & Nav. Co., 52 Wash. 685, 101 P 361. See Damages.

58. **Search Note:** See notes in 3 L. R. A. (N. S.) 225; 7 Id. 188; 9 Id. 1218; 11 Ann. Cas. 837.

See, also, Carriers, Cent. Dig. §§ 1568, 1569; Dec. Dig. § 408; 6 Cyc. 675-678; 3 A. & E. Enc. L. (2ed.) 584.

59. **Search Note:** See note in 11 C. L. 586.

See, also, Carriers, Cent. Dig. §§ 1557-1571; Dec. Dig. § 408; 6 Cyc. 675-678; 3 A. & E. Enc. L. (2ed.) 582.

60. Allegation that plaintiff gave her suitcase to an employe of defendant carrier as cashier of its freight house and baggage depot under agreement that he should care for same, etc., held to sufficiently allege contract with defendant. Larson v. Great Northern R. Co. [Minn.] 121 NW 121.

61. Croll v. Pullman Co., 61 Misc. 265, 113 NYS 542. Where upon leaving sleeping car for the night plaintiff was informed by the conductor that it would be all right to leave hand baggage in car which he did and never thereafter received same, though demanded, held to make prima facie case. Id.

62. Where carrier accepted and receipted for baggage which had been delivered to one who issued railroad check therefor, it ratified his act and made him its agent, so that proof of delivery to him in good condition is sufficient proof of delivery to carrier in that condition. Younger v. Central R. Co., 62 Misc. 1, 114 NYS 449.

1. See 11 C. L. 586.

Search Note: See notes in 21 L. R. A. 233; 62 Id. 678; 16 L. R. A. (N. S.) 746.

See, also, Action on the Case, Cent. Dig.; Dec. Dig.; 6 Cyc. 681-699.

2. It treats generally of the common-law action of trespass on the case. Topics dealing with causes of action enforcible on such action should be consulted. See Torts,* § 5; Deceit,* § 2; Conversion as Tort,* § 5; Trespass,* § 2A.

3. Inhabitants of Milford v. Bangor R. & Elec. Co. [Me.] 71 A 759.

4. Defendants in constructing certain hydrants, which they had contracted to, were negligent, and as result plaintiffs suffered loss by fire which occurred. Inhabitants of Milford v. Bangor R. & Elec. Co. [Me.] 71 A 759.

5. Count that charges generally that defendant negligently ran its car into plaintiff's wagon while he was attempting to cross tracks not sufficient. Newport News & Old Point R. & Elec. Co. v. Nicolopoolos [Va.] 63 SE 443.

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* Always begin with the latest article on the subject. Use the latest topical index.

primary right in the plaintiff and an invasion of such right by some delict on the part of the defendant,[9] and the facts which establish the existence of such right and such delict constitute the cause of action,[10, 11] but does not include the conditions rendering an act wrongful and as such a delict, such conditions being merely evidentiary and are no part of the cause of action.[12] Otherwise defined, a cause of action is the wrongful invasion of a private right for which law or equity affords the injured person redress against the wrongdoer.[13] In a broad sense it includes every fact necessary to be proved in order to authorize a recovery,[14] and in such sense is held equivalent of the right of action,[15] which implies a right to sue on the one hand and a liability to suit on the other,[16] and thus statutory conditions precedent to the right to sue constitute a part of the cause of action,[17] and a party will not be allowed to evade the necessity of performing such conditions by suing in another jurisdiction,[18] nor can such conditions be waived.[19] A cause of action is to be distinguished from the remedy [20] and from the relief sought.[21] The cause of action must be determined upon the facts existing at the time the action is commenced,[22] and must be predicated upon existing rights and their present or imminently impending violation as distinguished from future contingencies,[23] just as an

6. See 11 C. L. 587.

7. Treats of causes of action and defenses generally, without reference to particular causes of action (see the topics specifically devoted to particular causes of action and the relations out of which or in connection with which they arise), and without reference to the specific aspects of causes of action and defenses as bearing upon joinder of causes (see Pleading,* § 2), or defenses (see Pleading,* § 3), splitting causes of action (see Pleading,* § 3; Assignments,* § 2; Former Adjudication,* § 2; Jurisdiction,* § 6; Justices of the Peace,* § 3), amendment (see Pleading,* § 7), limitation of actions (see Limitation of Actions,* § 3, as to accrual of cause of action, § 5B, as to whether amendments state new causes of action, § 7, as to operation of bar upon cause of action), former adjudication (see Former Adjudication,* § 2), survival of causes of action (see Abatement and Revival,* § 3), venue (see Venue and Place of Trial,* § 1) and conflict of laws (see Conflict of Laws*). Causes of action as herein treated are distinguished from actions (see Actions*) and forms of action (see Forms of Action*).

8. **Note:** "Bliss in his work on Code Pleading (2d. Ed.) § 113, says: 'We have defined an action to be a judicial proceeding for the prevention or redress of a wrong. The cause of action, then is the wrong.' In the same section in speaking of what may be considered a wrong, he states that 'the wrong may be done by the refusal to reapond to an obligation.' Among the definitions of a cause of action in 6 Cyc. 705, are the following: 'Matter for which an action may be brought;' 'the ground on which an action may be sustained;' 'the fact or combination of facts which give rise to a right of action.' Bliss, in § 118, says: 'It is a rule that the cause of action—as one springing from a single contract—cannot be so split as to authorize more than one action.' Further Bliss cites the words of Judge Cowen, in the case of Bendernagie v. Cocks, 19 Wend. (N. Y.) 207, wherein he says: 'All damages arising from a single wrong, though at different times, make but one cause of action; and all debts and demands already due by the same contract make one entire cause of action.' Bliss also refers to the test stated by Judge Strong of the New York Court of Appeals, in the case of Secor v. Sturgis, 16 N. Y. 548: 'The case of a contract containing several stipulations, to be performed at different times, is no exception.' "—From Jerome v. Rust [S. D.] 122 NW 344.

9. Pavelka v. St. Albert Soc. [Conn.] 72 A 725.

10, 11. Pavelka v. St. Albert Soc. [Conn.] 72 A 725. Fact that plaintiff was member of fraternal order established his primary right, and fact of wrongful expulsion constituted defendant's delict. Id.

12. Reasons why expulsion of member of fraternal order was wrongful. Pavelka v. St. Albert Soc. [Conn.] 72 A 725.

13. Sperry v. Cook [Mo. App.] 120 SW 664.

14, 15, 16. Walters v. Ottawa, 240 Ill. 259, 88 NE 651.

17. Under St. 1898, § 672, apportionment, by county board, of credits is condition precedent of right of town, to which portion of another town is attached, to sue such other town for its share of credits. Town of Emery v. Worcester, 137 Wis. 281, 118 NW 807. Where statute requires notice as a condition to the right to sue, the giving of the notice is essential to the cause of action. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75; Walters v. Ottawa, 240 Ill. 259, 88 NE 651.

18. Necessity of giving notice of injury. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75.

19. Statutory notice of injury cannot be waived. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75.

20. The remedy being merely the means by which the cause of action is made effectual. Lemon v. Hubbard [Cal. App.] 102 P 554.

21. Lemon v. Hubbard [Cal. App.] 102 P 554.

22. Kirchner v. Wapsinonoc Directors of School Tp. [Iowa] 118 NW 51.

23. Illinois Cent. R. Co. v. St. Louis & S. F. R. Co. [La.] 49 S 976.

action must be predicated upon an existing controversy.[24] A cause of action cannot be predicated upon the doing of a lawful thing in a lawful manner,[25] and, with the exception of those causes of action founded upon malice,[26] one's motive in doing a thing otherwise lawful is immaterial.[27] One's own misconduct cannot give rise to a cause of action in his favor[28] and where the fault is mutual the law will leave the case where it finds it.[29] The facts constituting the delict may be referable to different dates, and yet there may be only a single cause of action,[30] nor is the singleness or entirety of a cause of action necessarily destroyed because the rights of more than one person are violated by the delict.[31]

A cause of action cannot accrue until a wrong has been committed.[32] In actions on contract, the wrong usually consists of the breach of the contractual obligation,[33] while in actions ex delicto the delict consists of some tort, such as trespass or negligence,[34] but these rules are not always determinative of the date of accrual of a cause of action of a dual nature, in which case the date of accrual may relate back to the inception of the relation giving rise to the right subsequently violated.[35]

Statutory conditions precedent to the right to sue are generally upheld,[36] and, in conferring a right of action where none existed at common law, congress may couple the grant with any conditions it may deem reasonable,[37] without affixing the same condition to all similar grants.[38]

Defenses. See 11 C. L. 588—Where not authorized by statute, equitable defenses cannot be set up against legal rights.[39] Where the plaintiff is asserting a legal or equitable right in a lawful manner, his motives are immaterial.[40]

CEMETERIES.[41]

The scope of this topic is noted below.[42]

A cemetery corporation being ordinarily a membership corporation not for pecuniary profit [43] it may restrict the transfer of its shares,[44] and is not liable to purchasers in good faith of stock illegally issued or transferred.[45] A trust under a statute which authorizes town councils to take and hold money or property in trust given to it to keep up burial ground is not void for perpetuity,[46] but court cannot

24. Illinois Cent. R. Co. v. St. Louis & S. F. R. Co. [La.] 49 S 976; Andrews & Co. v. Norton [Va.] 65 SE 466. See Actions.

25. White v. Kincaid, 149 N. C. 415, 63 SE 109.

Damnum absque injuria. See Torts, §§ 1, 2.

26. See Malicious Prosecution and Abuse of Process.

27. White v. Kincaid, 149 N. C. 415, 63 SE 109. See Torts, § 1.

28, 29. Avery v. Central Bank [Mo.] 119 SW 1106.

30, 31. Jerome v. Rust [S. D.] 122 NW 344.

32. Sperry v. Cook [Mo. App.] 120 SW 654.

33. Sperry v. Cook [Mo. App.] 120 SW 654. See Contracts, § 9.

34. Sperry v. Cook [Mo. App.] 120 SW 654. See Torts, §§ 1, 2.

35. Breach of marriage promise. Sperry v. Cook [Mo. App.] 120 SW 654. See Breach of Promise of Marriage.

36. Requirement of notice of injury. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75.

37, 38. Hyde v. Southern R. Co., 31 App. D. C. 466.

39. Laches. Waits v. Moore [Ark.] 115 SW 931.

40. Eggers v. Newark [N. J. Law] 71 A 665; Roberts v. Tompkins [N. J. Err. & App.] 73 A 505.

41. See 11 C. L. 588.

Search Note: See notes in 5 C. L. 557; 11 Id. 590; 7 L. R. A. 155; 23 Id. 301; 35 Id. 36; 41 Id. 323; 53 Id. 895; 67 Id. 118; 33 A. S. R. 409; 75 Id. 427; 87 Id. 678.

See, also, Cemeteries, Cent. Dig.; Dec. Dig.; 6 Cyc. 707-723; 5 A. & E. Enc. L. (2ed.) 781; 3 A. & E. Enc. P. & P. 910.

42. It includes rights in cemetery property and organization and powers of associations controlling such property. It excludes right of sepulture (see Corpses and Burial*), monuments and funeral expenses as a claim against the decedent's estate (see Estates of Decedents,* § 6A), taxation of cemetery property (see Taxes,* § 2A), exemption from execution (see Executions,* § 8A), subjection to power of eminent domain (see Eminent Domain,* § 3).

43. American Exch. Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 NE 107.

44. Requirement of transfer on books of association held to render stock nonnegotiable. American Exch. Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 NE 107.

45. American Exch. Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 NE 107.

46. In the absence of statute, such trust would be void. Rhode Island Hospital Trust Co. v. Warwick Town Council [R. I.] 71 A 644.

compel council to accept such gifts.[47] A statute authorizing the sale of public lands for cemetery purposes is not a grant of special privileges.[48] A New York statute requires the consent of the board of supervisors to the establishment of a cemetery in Queens county, and the statute applies to counties subsequently carved out of Queens county.[49] The jurisdiction of the board is not limited to granting or denying the application as made, but it may give assent to a cemetery of smaller area than is applied for.[50] A cemetery wherein interments were made upon payment of a fee without the granting of any title to the ground, and in which no interments have been made for forty years, may be appropriated by a village for use for parks and public buildings.[51]

CENSUS AND STATISTICS.[52]

The scope of this topic is noted below.[53]

Statutes in some states provide for the enumerating of the population both generally and for special purposes,[54] and municipalities are often authorized to take a census of their population.[55] A municipal census must conform in scope to the enabling statute.[56] The question of which census is meant by a statutory reference is a matter of interpretation.[57] Where no formal approval of a census is required, approval may be presumed.[58] A citizen has sufficient interest to test the validity of a census,[59] but can do so only in a direct proceeding and not collaterally.[60]

Certificate of Doubt; Certificates of Deposit, see latest topical index.

CERTIORARI.

The scope of this topic is noted below.[61]

§ 1. **Nature, Occasion and Propriety of Remedy, 724.** Ancillary Certiorari, 728. Prerogative Writ, 728.
§ 2. **Right to Certiorari; Parties, 728.**
§ 3. **Procedure for Writ; Writ, Service and Return, 730.** The Statutory Bond, 730. The Writ, 731. Notice and Service of Writ, 731. The Return, 731. Objections and Amendments, 732. Quashal or Dismissal, 732.
§ 4. **Hearing and Questions Which May Be Raised and Settled, 732.**
§ 5. **Judgment, 735.**
§ 6. **Costs, 735.**
§ 7. **Review of Certiorari, 735.**

§ 1. *Nature, occasion and propriety of remedy.*[62]—See 11 C. L. 591—The writ of certiorari was a common-law writ,[63] but it is now quite generally provided for by

47. Certain money was left by plaintiff's testator for ornamenting and keeping in repair burial lot. On council's refusal to accept gift, plaintiff brings this action to compel acceptance. Rhode Island Hospital Trust Co. v. Warwick Town Council [R. I.] 71 A 644.

48. Laws 1901, p. 312, c. 150, does not infringe Const. art. 1, § 3. Day v. Richardson [Wash.] 103 P 8.

49. Laws 1895, c. 559, § 42, applies to Nassau County. Baylis v. Rosemount Cemetery Ass'n, 118 NYS 947.

50. Greater New York charter, § 1539a. Rottkamp v. Springfield L. I. Cemetery Soc., 118 NYS 911.

51. Pansing v. Miamisburg, 11 Ohio C. C. (N. S.) 511.

52. See 11 C. L. 590.

Search Note: See note in 9 L. R. A. 718. See, also, Census, Cent. Dig.; Dec. Dig.

53. This topic includes all matters respecting the public taking and compilation of statistics, by way of census or otherwise. It excludes the admissibility in evidence of public documents showing statistics previously compiled. See Evidence,* § 7C.

54. The act of 1905 interpolating § 5895a into article 5 of chapter 91, Rev. St. 1899, was intended to apply to the taking of a census solely to determine the tax levy rate, while § 6300 is general in its object, being taken to ascertain population for any other purpose. State v. Rinke [Mo. App.] 121 SW 159.

55. Rev. St. 1899, § 3029 (Ann. St. 1906, p. 1736) may be judicially noticed. State v. Mitchell [Mo. App.] 115 SW 1098.

56. Census ordinance held to order census of "inhabitants" as authorized, despite some provisions for inclusion of all persons within limits. State v. Cass County [Mo. App.] 119 SW 1010.

57. Statute providing that only one liquor license could be issued in any town for every five hundred inhabitants according to last census taken means last by either state or United States. Greenough v. Narragansett Town Council [R. I.] 71 A 594.

58. Census board transmitted census to general assembly which published and circulated it. Held that approval by both bodies was presumed. Greenough v. Narragansett Town Council [R. I.] 71 A 594.

59. Census to determine applicability of liquor law. State v. Cass County [Mo. App.] 119 SW 1010.

60. Cannot be raised as defense to law put into effect as result of census. State v. Cass County [Mo. App.] 119 SW 1010.

61. This topic treats of the right to the writ of certiorari and procedure thereon

* Always begin with the latest article on the subject. Use the latest topical index.

statute, and in several states is called a writ of review.[64] Where the constitution provides for certiorari, but no procedure or grounds therefor are prescribed, the writ is authorized as it existed at common law.[65]

The writ of certiorari lies from a superior court [66] to review the proceedings of inferior courts,[67] boards [68] and public officers,[69] exercising judicial or quasi judicial functions.[70] The common-law writ does not lie to review official acts that are purely executive, legislative, administrative or ministerial.[71] The writ may issue upon the grounds that the proceedings to be reviewed were without jurisdiction,[72] were in excess of jurisdiction [73] or were illegal and irregular.[74] Certiorari

except the matter of costs which is treated in Costs,* § 7D. The right to the remedy in particular cases is more fully treated in other topics. For example, see Indictment and Prosecution,* § 17, for certiorari to review summary criminal convictions; Municipal Corporations,* § 8H, for review of ordinances; Habeas Corpus,* § 6, for ancillary certiorari; Appeal and Review,* § 10D, for certiorari to bring up to the appellate courts amendments made below to the record. Choice between certiorari and other remedies for review is treated in Appeal and Review,* § 2.

62. Search Note: See notes in 3 C. L. 668, 669, 670; 45 L. R. A. 158; 51 Id. 33; 22 A. S. R. 421.

See, also, Certiorari, Cent. Dig. §§ 1-50, 88-90; Dec. Dig. §§ 1-35; 6 Cyc. 737-774; 4 A. & E. Enc. P. & P. 1.

63. At common law, it was an original writ issued out of a court of chancery, or the King's Bench, directed in the king's name, and directing officers of inferior courts to return the records of causes pending before them to end that party might have more sure and speedy justice. Cushman v. Blount County Com'rs Ct. [Ala.] 49 S 311.

64. The statutory writ of review (B. & C. Comp. § 597) in Oregon is substantially the common-law remedy by certiorari. Gue v. Eugene [Or.] 100 P 254; Curran v. State [Or.] 99 P 420.

65. Baker v. Newton [Okl.] 98 P 931. Certiorari is provided for by constitution (Bunn's Ed. § 170), but there is no legislative provision. Id.

66. At common law. Cushman v. Blount County Com'rs Ct. [Ala.] 49 S 311; Winkler Brokerage Co. v. Courson [Ala.] 49 S 341.

67. Schmuck v. Hartman, 222 Pa. 190, 70 A 1091. May review and correct proceedings of all inferior courts, except as expressly forbidden by statute or constitution. Id. Writ lies from district court to review proceedings of justice court (see Comp. Laws 1907, § 3630). Griffiths v. Justice's Ct. of Logan City [Utah] 100 P 1064.

68. Commissioners of highways. People v. Johnson Com'rs of Highways, 240 Ill. 399, 88 NE 977. Common council of City of New Rochelle. People v. Raymond, 129 App. Div. 477, 114 NYS 365. County commissioners. State v. Posz, 106 Minn. 197, 118 NW 1014. Railroad commissioners. People v. Public Service Commission, 195 N. Y. 157, 88 NE 261. School board. Southworth v. Ogle County Board of Education, 238 Ill. 190, 87 NE 403.

69. City treasurer and members of board of canvassers were required to produce records in order that certificates wrongfully issued to certain parties as taxpayers might be quashed. Lennon v. White [R. I.] 72 A 998.

70. People v. Willcox, 129 App. Div. 267, 113 NYS 861; People v. Harvey, 127 App. Div. 211, 111 NYS 167; State v. Posz, 106 Minn. 197, 118 NW 1014. See Gen. St. 1885, § 3458. State v. White Pine County [Nev.] 101 P 104. Action by public service commission, establishing route and apportioning fare over two street railway lines, as provided by Laws 1907, p. 917, c. 429, § 49, held to be judicial. People v. Willcox, 129 App. Div. 267, 113 NYS 861. Removal of city officers held judicial. People v. Raymond, 129 App. Div. 477, 114 NYS 365. Action of commissioners in vacating public highway is judicial. People v. Johnson Commissioners of Highways, 240 Ill. 399, 88 NE 977. Act of school board in passing motion for appointment of committee to make effective result of election and in providing for condemnation proceedings to acquire property held not purely ministerial. Southworth v. Ogle County Board of Education, 238 Ill. 190, 87 NE 403. Issuance, by board of railroad commissioners, of certificate of convenience and necessity, provided for by § 59 of the railroad law, is a judicial determination. People v. Public Service Commission, 195 N. Y. 157, 88 NE 261.

71. People v. Willcox, 129 App. Div. 267, 113 NYS 861. Acts of inspectors of local option election in rejecting ballots and canvass was merely ministerial and not reviewable. State v. Emerson, 137 Wis. 292, 118 NW 836. Act of board of county commissioners in contracting for indexing of records of county recorder was not exercise of judicial function. State v. White Pine County [Nev.] 101 P 104.

72. Commonwealth v. Brownell, 35 Pa. Super. Ct. 249. Originally this was sole ground. Ex parte Dickens [Ala.] 50 S 218. Will issue to review an assessment made without jurisdiction, although not to review mere overvaluation. People v. Keno, 61 Misc. 345, 114 NYS 1094. Circuit court held to have had no jurisdiction of appeal from justice court, where proceedings in justice court had not been certified in manner provided by law, nor shown in any manner. McPhail v. Blann [Miss.] 47 S 666.

73. State v. Selby, 133 Mo. App. 552, 113 SW 682; In re Goldsmith [Ark.] 113 SW 799; In re Slippery Rock Tp. School Dist., 222 Pa. 538, 71 A 1085; Mitchell v. Portland [Or.] 99 P 881, rvd. on other grounds [Or.] 101 P 388. At common law certiorari is never a proper remedy unless proceedings to be reviewed are absolutely void for want

will not lie where there is an adequate remedy by appeal[75] or otherwise,[76] and per contra the want of any other remedy[77] or the loss of other remedy without fault[78]

of jurisdiction. Cushman v. Blount County Com'rs Ct. [Ala.] 49 S 311. Common-law certiorari would not lie to review commissioner's proceedings which complied with statute. Id. By statute (Comp. Laws, 1907, § 3630), district court may determine whether justice kept within his jurisdiction. Griffiths v. Justice's Ct. of Logan City [Utah] 100 P 1064. Held, that lower court acted beyond its jurisdiction in disturbing action of mayor and board of aldermen whereby they fixed bond of marshal at $3,000 and reduced his salary to $1.00 per month, such action being within their discretion under authority given them by statute (Laws 1898, Act 136, p. 228, § 15). State v. Dodson [La.] 49 S 635. School board exceeded its jurisdiction in locating school house without being authorized by voters. Southworth v. Ogle County Board of Education, 238 Ill. 190, 87 NE 403. It was not an act in excess of jurisdiction for trial court to grant order superseding its judgment. Palmer v. Harris [Okl.] 101 P 852. Justice of the peace acted beyond his jurisdiction in vacating his judgment. White v. Brown [Or.] 101 P 900. County court exceeded its jurisdiction in removing road surveyor whose term of office was fixed by law. Helmick v. Tucker County Ct. [W. Va.] 64 SE 17.

74. Commonwealth v. Brownell, 35 Pa. Super Ct. 249. That is, when lower tribunal or court has exercised its jurisdiction erroneously and contrary to course of procedure applicable to matter before it. Mitchell v. Portland [Or.] 99 P 881, rvd. on other grounds [Or.] 101 P 388. At common law, the ground for certiorari was lower court's proceeding erroneously and without authority. Winkler Brokerage Co. v. Courson [Ala.] 49 S 341. Act of justice of the peace in proceeding to trial without first fixing day of trial and notifying parties held sufficient ground for certiorari proceedings in district court. Griffiths v. Justice's Ct. of Logan City [Utah] 100 P 1064. District court could determine whether justice court "had regularly pursued its authority as prescribed by law" (see Comp. Laws 1907, § 3630). Id. There was no illegality, reviewable by certiorari, in appraisement commissioners' reporting damages in lump sum instead of making separate awards, the matter of distribution being properly left to other tribunals. Zimmerman v. Hudson & M. R. Co. [N. J. Law] 71 A 127.

75. Ex parte Dickens [Ala.] 50 S 218. Does not lie where remedy by appeal exists. Detroit Lumber Co. v. The Petrel [Mich.] 15 Det. Leg. N. 1034, 119 NW 1072; Fitchett v. Henley [Nev.] 102 P 865; State v. Posz, 106 Minn. 197, 118 NW 1014. Writ was denied where right to appeal had not expired. O'Connor v. Smithers [Colo.] 99 P 46. Certiorari would not lie to review appealable error in granting new trial. First Nat. Bank v. Richardson [La.] 49 S 485. Certiorari will not lie in supreme court to review appealable action of circuit court in denying writ of certiorari. In re Goldsmith [Ark.] 113 SW 799. Writ was refused, since appeal would lie from void judgment. Baker v. Newton [Okl.] 98 P 931. Writ was denied where matter was reviewable on writ of error. People v. James [Mich.] 15 Det. Leg. N. 1103, 119 NW 1073. Denied where appeal was provided for by statute. In re Phillips, 154 Mich. 139, 15 Det. Leg. N. 683, 117 NW 630. Denied where other remedy lay by application to district court and by appeal therefrom. Schouweiler v. Allen [N. D.] 117 NW 866. Remedy was refused in divorce case, another remedy by appeal and writ of error being provided by statute (3 Mills' Ann. St. Rev. Supp. § 1567b). Carlton v. Carlton, 44 Colo. 27, 96 P 995. Certiorari would not lie to review judgment of state board of medical examiners where statute (Rev. Codes, §§ 7098, 7099) gave remedy by appeal. State v. Silver Bow County Dist. Ct. [Mont.] 101 P 961. Writ was denied where garnishee had other remedy by appeal. St. Louis, etc., R. Co. v. McDermitt [Ark.] 120 SW 831.

76. Where other remedy exists, a writ of certiorari will not issue unless cogent reasons exist therefor. In re Newark School Board [N. J. Law] 70 A 881. Held not to lie to abate nuisance arising from illegal sale of liquor, the statutory remedy (Rev. Laws 1902, c. 101, § 8) being adequate. Cheney v. Coughlin, 201 Mass. 204, 87 NE 744. Would not lie where mandamus or quo warranto was available. Overman v. Manly Drive Co. [N. J. Law] 71 A 1125. Writ was denied school board seeking to review election proceedings where their real interest was not as taxpayers, but as members of school board desirous of retaining their offices, since they had their remedy by quo warranto. In re Newark School Board [N. J. Law] 70 A 881. Would not lie to vacate order which might be corrected by amendment. Gratiot County Sup'rs v. Munson [Mich.] 16 Det. Leg. N. 435, 122 NW 117. The statute (Comp. Laws, § 3531) provides another adequate remedy by objection which would delay action of county commissioners in contracting, hence certiorari would not lie. State v. White Pine County [Nev.] 101 P 104. Held not to lie where remedy in equity existed against action of city council. Mitchell v. Portland [Or.] 99 P 881, rvd. [Or.] 101 P 388. Writ was not allowed under statute (Code Civ. Proc. § 1068), to review appealable order. Magee v. Solano County Superior Ct. [Cal. App.] 101 P 532.

77. The common-law writ of certiorari will lie from supreme court to justice courts, in extreme cases in absence of other remedy, to prevent failure of justice. People v. Turja [Mich.] 16 Det. Leg. N. 428, 122 NW 177. Lies to review acts of public service commission, there being no other remedy provided. People v. Willcox, 129 App. Div. 267, 113 NYS 861. Order committing party for contempt was reviewable on certiorari, not being appealable. Ex parte Dickens [Ala.] 50 S 218. Certiorari lies in absence of statutory provision for review, where substantial rights of applicant have been so far invaded as to prejudicially affect him if the proceeding or judgment remain unreversed. State v. Posz, 106 Minn. 197, 118 NW 1014. Writ was allowed, no remedy being provided by law by appeal

is of itself ground for certiorari, provided that a right to review exists.[79] Certiorari will not usually lie to review determinations which are purely discretionary, unless there shall have been a flagrant abuse of discretion,[80] nor to review the acts of a private corporation which are not judicial in character,[81] nor to review interlocutory orders,[82] or judgments which are not final.[83] The writ is generally denied when it is sought to review proceedings which it is beyond the power of the reviewing court to correct,[84] where the amount involved is small and substantial justice has been done,[85] or where the errors complained of as a ground for review are not jurisdictional.[86] A familiar office of certiorari is to require the record to be sent up or completed in an appeal case,[87] but not to supply matters which do not exist in the record in the lower court.[88] In certain cases, in some states, certiorari

or review. Southworth v. Ogle County Board of Education, 238 Ill. 190, 87 NE 403. Order of county commissioners laying out public ditch as provided by statute (Laws 1905, c. 230, p. 303) held reviewable, no appeal therefrom being provided. State v. Posz, 106 Minn. 197, 118 NW 1014. In Michigan, certiorari lies to review mandamus proceedings, no other remedy being provided. Chicago, etc., R. Co. v. St. Clair Circuit Judge [Mich.] 16 Det. Leg. N. 211, 121 NW 297.

78. Certiorari lies where right to appeal has been unavoidably lost. In re Goldsmith [Ark.] 113 SW 799. Mere mailing of necessary affidavit and bond failed to disprove his fault in permitting time for appeal to lapse. St. Louis, etc., R. Co. v. McDermitt [Ark.] 120 SW 831. Writ was denied where party had allowed time for appeal to lapse. State v. Silver Bow County Dist. Ct. [Mont.] 101 P 961.

79. The state is not entitled to a review of criminal proceedings wherein an acquittal has been had. City of Muskegon v. Brennan [Mich.] 16 Det. Leg. N. 10, 120 NW 14.

80. In re Slippery Rock Tp. School Dist., 222 Pa. 538, 71 A 1085. Myers v. Tucker County Circuit Ct., 64 W. Va. 444, 63 SE 201. Circuit court has no jurisdiction to review the discretionary action of county court in granting liquor license. Id. Order of court in refusing to strike off satisfaction of judgment was purely discretionary. Campbell v. Erb, 35 Pa. Super. Ct. 436. Final and conclusive action of city council in revoking liquor license was a discretionary act. State v. Pierce County Super. Ct., 60 Wash. 650, 97 P 778.

81. Proceedings of private corporation in removing or not removing officers were not judicial. Overman v. Manly Drive Co. [N. J. Law] 71 A 1125.

82. Held not to lie to review order denying temporary injunction where statute (Ballinger's Ann. Codes & St. § 6500, subd. 3) especially provided that such order should not be reviewed by appeal. State v. King County Super. Ct. [Wash.] 103 P 17.

83. Admonition in impeachment proceedings held not to be a reviewable final judgment. State v. Selby, 133 Mo. App. 552, 113 SW 632. Sustaining of general demurrer to entire action is a final judgment. Barnes v. Fleetwood, 5 Ga. App. 296, 63 SE 60.

84. State v. Mead [Wash.] 100 P 1033 Writ was denied when it was sought to review the action of a court martial which had since dissolved. Id.

85. Meeks v. Carter, 5 Ga. App. 421, 63 SE 517.

86. Utah Ass'n of Credit Men v. Budge [Idaho] 102 P 390; State v. Broaddus, 216 Mo. 336, 115 SW 1018; Dahlgren v. Santa Cruz Super. Ct., 8 Cal. App. 622, 97 P 681; Griffiths v. Justice's Ct. of Logan City [Utah] 100 P 1064; Baker v. Newton [Okl.] 98 P 931; Kapp v. District Ct. [Nev.] 103 P 235. Where lower court had jurisdiction of divorce action and discretion to allow temporary alimony, errors in connection therewith were not reviewable. Kapp v. District Ct. [Nev.] 103 P 235. Writ of certiorari cannot be used as substitute for appeal or writ of error for correction of errors or irregularities. Douglas v. Hamilton [Ark.] 120 SW 387; United States v. Dickinson, 213 U. S. 92, 53 Law. Ed. —. Certiorari will not lie to review order granting new trial, where court had jurisdiction to hear motion. State v. Silver Bow County Dist. Ct., 38 Mont. 119, 99 P 139. Writ was denied for review of error in method of selecting jury, which error was within jurisdiction. State v. Silver Bow County Dist. Ct. [Mont.] 101 P 961. Error of assessors in counting number of resident owners, where no claim is made that they acted fraudulently or in bad faith, was not reviewable. People v. Buffalo Board of Assessors, 193 N. Y. 248, 86 NE 466. Jurisdiction was not exceeded so as to give ground for certiorari by appointment of stranger as special administrator, on his own petition, notwithstanding petition of heir (construing Code Civ. Proc. §§ 1365, 1368, 1369, 1411-1413, 1427). Dahlgren v. Santa Cruz Super. Ct., 8 Cal. App. 622, 97 P 681. Review was denied of court's action, within his jurisdiction, in making order appointing receiver. Utah Ass'n of Credit Men v. Budge [Idaho] 102 P 390, sustained on rehearing [Idaho] 102 P 691.

87. Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 123. In such cases, it will only require the officer or party to whom it is directed to perform such duty as law imposes upon him. Id. Writ issued at common law to bring up record for inspection. Winkler Brokerage Co. v. Courson [Ala.] 49 S 341. Writ will issue to direct completion of record on appeal. Jones v. State [Miss.] 47 S 479. Writ was issued from supreme court to circuit court where judgment which was rendered in justice court and appealed from to circuit court did not appear in record on appeal in supreme court. Id.

88. Writ was denied where it was sought

is little more than a mere appeal by indirection and is regulated by special statutes.[89] Under some statutes, the title of the action remains the same in certiorari as in the proceedings below.[90]

In New York, certiorari will in some cases, issue to inquire into the restraint of one deprived of his liberty,[91] but it will not issue in a case where he is detained by virtue of a final judgment of a competent tribunal,[92] or where it is sought to review the sufficiency of a commitment for criminal contempt.[93]

The federal supreme court has no power to review by certiorari a judgment of the circuit court of appeals, reversing a conviction below.[94]

Ancillary certiorari. See 9 C. L. 546

Prerogative writ. See 11 C. L. 595

§ 2. *Right to certiorari; parties.*[95] See 11 C. L. 595—A writ of certiorari is not a writ of right, but its issuance is discretionary.[96] It will generally be refused where the petitioner has previously resorted to another available remedy.[97] The petitioner

to bring up transcript of report of evidence and incorporate it in record and where it did not appear that such report was used in evidence on hearing of exceptions to verdict and presented by bill of exceptions. Columbia Heights Realty Co. v. MacFarland, 31 App. D. C. 112. Writ will not lie where record on appeal is incomplete in that it does not contain testimony which it is admitted was not reduced to writing or preserved. Fletcher v. Ozone Lumber Co. [La.] 49 S 158.

89. In certiorari to review proceedings before justice of the peace in **Alabama,** trial is had de novo. Winkler Brokerage Co. v. Courson [Ala.] 49 S 341. In **Colorado** by statute (Mills Ann. St. § 2694), the writ may be granted to review proceedings had before a justice of the peace in order to afford unsuccessful party trial de novo, when he is unable to appeal within time prescribed by statute. Axelson v. People [Colo.] 101 P 54. The statute does not provide for notice to nonappealing party, and unless parties voluntarily appear, or have been served with notice, the court cannot proceed with trial de novo. Id. In **Iowa,** the revision provided for in contempt proceedings (Code, § 4468) is by certiorari, and such proceeding being quasi criminal, conviction should not be sustained unless proof of guilt is clear. Russell v. Anderson [Iowa] 120 NW 89. Forcible entry and detainer proceedings are reviewable on certiorari in **New Jersey.** See Haurand v. Schorb [N J. Law] 72 A 107. In **New York,** the statute provides (Tax Law art. 11, § 250) that certiorari will only lie to review assessment made "at a higher proportionate valuation than the assessment of other property on the same roll by the same officers." People v. Woodbury, 63 Misc. 1, 116 NYS 209. Certiorari will not lie to equalize assessment of franchises by state board of tax commissioners with assessments of local assessors on ordinary real property. Id. In **Michigan,** certiorari lies when demurrer has been overruled in action at law in circuit court, under Pub. Acts 1905, p. 484, No. 310. Boughner v Bay City [Mich.] 16 Det. Leg. N. 79, 120 NW 597. In **Rhode Island,** an action in forcible entry and detainer may be removed by certiorari into the supreme court and there quashed for irregularity, under Pub. Laws 1908, § 9, c. 1533, p. 39. Hart v. Superior Ct. [R. I.] 71 A 513.

90. Title of cause remains same in district court as in justice court, under Mills Ann. St. § 2694. Axelson v. People [Colo.] 101 P 54. Omission of words "transferee" (of party named) after plaintiff's name is no change of title, such words being regarded as mere description. Briggs Hardware Co. v. Safkee Naval Stores Co., 5 Ga. App. 285, 63 SE 60.

91. Writ was issued before trial of party detained, although restraint was slight, the party being committed to care of his attorney. People v. Potter, 112 NYS 298.

92. Writ of certiorari to review criminal case, save criminal contempt of court, being abolished and remedy being by appeal (Code Civ. Proc. §§ 515, 2148). People v. Frost, 129 App. Div. 498, 114 NYS 209.

93. People v. Platzek, 133 App. Div. 25, 117 NYS 852. In such case remedy is by habeas corpus. Id.

94. Federal statutes (26 Stat. 828, c. 517, U. S. Comp. St. 1901, p. 549; and 34 Stat. 1246, c. 2564, U. S. Comp. St. Supp. 1907, p. 209) construed not to give authority for such review. United States v. Dickinson, 213 U. S. 92, 53 Law. Ed. —.

95. Search Note: See notes in 50 L. R. A. 787; 103 A. S. R. 110; 10 Ann. Cas. 861.

See, also, Certiorari, Cent. Dig. §§ 15, 16, 43-45, 53-63, 88-90; Dec. Dig. §§ 9, 31-34, 37-41; 6 Cyc. 748-750, 766-769, 774-780; 4 A. & E. Enc. P. & P. 162.

96. McDonald v. McDonald, 141 Ill. App. 259; State v. Posz, 106 Minn. 197, 118 NW 1014; People v. James [Mich.] 15 Det. Leg. N. 1103, 119 NW 1073. Writ was refused where to grant it would result in great public inconvenience, as where building of public road was involved. Johnson v. West [Ark.] 117 SW 770.

97. But not denied in such case, where court resorted to has no power to grant the relief sought by certiorari. Southworth v. Ogle County Board of Education, 238 Ill. 190, 87 NE 403. Refused where petitioner has resorted to appeal of case in which justice of the peace had refused trial by jury. New Jersey Soc. for Prevention of Cruelty to Animals v. Atkinson [N. J. Law] 69 A 976.

may be barred from his right to the writ where he has been guilty of laches,[98] especially where to grant the right would be detrimental to intervening interests.[99] Mere lapse of time, however, is no absolute bar,[1] except as controlled by statute.[2] By entering his appearance and taking part in the action in the lower court, a party is not usually estopped to question the jurisdiction of such court by certiorari,[3] even though he made no objection to the proceedings.[4] The right to the writ of certiorari is not lost by a futile attempt to obtain one.[5]

As a general rule, the petitioner for a writ of certiorari must have been a party to the proceedings sought to be reviewed.[6] In some cases, however, the writ may be issued on an application of one who was not a party to such proceedings, but whose interest therein is direct and immediate,[7] providing it be made to appear that such interest exists[8] and did exist at the time of the proceedings complained of,[9] that the petitioner is a party aggrieved,[10] and that he may gain some

98. Writ refused where petitioner failed to show that he proceeded with expediency after discovery of necessity therefor. Johnson v. West [Ark.] 117 SW 770. Held barred by lapse of time, notwithstanding allegation of ignorance of his rights, the limitation of one year applicable to petition for new trial applying. Cotter v. Cumberland Town Council [R. I.] 72 A 645. Generally refused where application for writ is not made within time allowed within which to prosecute writ of error. McDonald v. McDonald, 141 Ill. App. 259. Refused where application was not made until nearly two months after review by appeal was denied and 8 days after judgment was signed. In re Lindner, 122 La. 683, 48 S 150. Gross laches held to exist where suit to set aside ordinance was not brought for 11 years. Livelli v. Hoboken [N. J. Law] 73 A 77.

99. Application having effect to challenge validity of election law made too late when after election has been held, at which time it would be detrimental to public interest. In re Newark School Board [N. J. Law] 70 A 881.

1. Certiorari was allowed from supreme court in criminal case where right to certiorari from circuit court had been lost by lapse of time. People v. Turja [Mich.] 16 Det. Leg. N. 428, 122 NW 177.

2. Under statute (Code Civ. Proc. § 2125) providing that writ must be served within four months after determination becomes final and binding, determination of board of railroad commissioners held not to become final and binding until certificate of convenience and necessity was granted and filed. People v. Public Service Commission, 195 N. Y. 157, 88 NE 261. Act of 1882 providing that no certiorari shall be allowed after lapse of 30 days from confirmation of assessment was repealed by P. L. 1907, p. 109, which fixes limitation at 60 days. Essen v. Cape May Common Council [N. J. Law] 72 A 49. The New Jersey statute (P. L. p. 109), providing that no review shall be had of assessment proceedings unless application shall be made therefor within 60 days, does not control so as to protect an assessment which the legislature could not constitutionally authorize. Walsh v. Newark [N. J. Law] 73 A 523.

3. Hettel v. Nevada First Judicial Dist. Ct., 30 Nev. 382, 96 P 1062.

4. It is not essential that objection to jurisdiction shall have been made below. Rynearson v. Union County [Or.] 102 P 785.

5. Wilbur v. Lane [Tex. Civ. App.] 115 SW 298. The statute (Rev. St. 1895, art. 354) providing that no amendment to bond or affidavit shall be made nor any new bond or affidavit filed has no application. Id.

6. State v. Spokane County Superior Ct. [Wash.] 100 P 978. Must usually be one who in form or in substance was such party that he would be concluded by determination thereof. Ex parte Boles [Ark.] 114 SW 918. County attorney had no right to have a review of instructions to grand jury as to what he should do and should not do in his official capacity before such jury, since it is not a matter in which he can be said to be a party. State v. Spokane County Super. Ct. [Wash.] 100 P 978.

7. Ex parte Boles [Ark.] 114 SW 918. One who has immediate interest in matter, though not a party to proceedings below, may be made party under the statute (Kirby's Dig. §§ 6005, 6006). Id. One who was not a party below is not entitled to writ, under statute (Kirby's Dig. §§ 6005, 6006), whatever his interest, unless he lost opportunity to become a party through no fault of his own. Id.

8. Garrison v. Richardson [Or.] 101 P 900. Interest of appellant was not shown where it did not appear from either the petition or writ that he appeared in county court to oppose order sought to be reviewed in circuit court. Id. Held that contestant for an office had no interest in habeas corpus proceedings of party committed for contempt in refusing to deliver over ballot boxes, such as would entitle him to a writ of certiorari to review such proceedings. Ex parte Boles [Ark.] 114 SW 918. Interest of party not shown. Raper v. Dunn [Or.] 99 P 889.

9. Ownership of land acquired after laying and vacation of road will not authorize issuance of writ. Bennett v. Millard, 142 Ill. App. 282.

10. People v. Raymond, 131 App. Div. 160, 115 NYS 275. Under Code Civ. Proc. § 2127. Id. Writ denied where petitioner was not injured by proceedings. Wilbur v. Lane [Tex. Civ. App.] 115 SW 298. Newspaper failed to show itself to be party aggrieved by action of city council in designating an-

advantage from the review sought.[11] The interests of the public may, in rare cases, demand that a writ issue to set aside a judgment from which the plaintiff suffers no wrong which it is necessary to redress.[12] It is sometimes essential that a suit brought by a resident taxpayer as such shall be brought in the name of the people.[13]

§ 3. *Procedure for writ; writ, service, and return.*[14] *Application or petition.* See 11 C. L. 597—The petition for certiorari or writ of review must contain such a statement of facts, that, when taken as true, it will disclose sufficient grounds to warrant the issuance of the writ.[15] It is sufficient if it make out a prima facie case,[16] and give notice of the precise inquiry intended to be raised.[17] The allegations of a verified petition are taken as true until the coming in of the answer.[18] Failure to verify the petition may be cured by an answer which verifies the recitals of the petition.[19] No affirmative allegation of good faith is required.[20] The petition should not be multifarious.[21]

The statutory bond. See 11 C. L. 597—A bond must be given, filed and approved at or within the time required by statute.[22]

In Georgia, unless a pauper's affidavit be filed, the filing, with the court whose

other paper as one of two official newspapers representing two leading political parties, as required, where it did not show that there was no other newspaper in city of the same political faith as its own. People v. Raymond, 131 App. Div. 160, 115 NYS 275. One landowner cannot object to an irregularity which only concerns land of another landowner. Bennett v. Millard, 142 Ill. App. 282. Right to writ of certiorari cannot be based upon allegation that party who is not complaining has not had his day in court. Utah Ass'n of Credit Men v. Budge [Idaho] 102 P 691, sustaining former decision [Idaho] 102 P 390.

11. Newspaper sought to review proceedings of city council in designating another paper as official paper held that no useful purpose advantageous to petitioner could be served by such review after term of office of such paper, so appointed, had expired. People v. Raymond, 131 App. Div. 160, 115 NYS 275.

12. Judgment clearly wrong and subversive of spirit and intent of the law relating to nominations by individuals was set aside to prevent confusion and controversy in the future. O'Connor v. Smithers [Colo.] 99 P 46.

13. People v. Johnson Com'rs of Public Highways, 240 Ill. 399, 88 NE 977.

14. **Search Note:** See note in 3 C. L. 673. See, also, Certiorari, Cent. Dig. §§ 51, 52, 64-167; 214-216; Dec. Dig. §§ 36, 42-60, 72; 6 Cyc. 781-788, 790-792, 795, 796-818, 822-832; 4 A. & E. Enc. P. & P. 143, 184.

15. Griffiths v. Logan City Justice's Ct. [Utah] 100 P 1064. Must describe with certainty the judicial functions claimed to have been exercised to substantial injury of plaintiff's right, and must set forth errors alleged to have been committed. Curran v. State [Or.] 99 P 420. Must state facts relating to alleged error so that court can say upon inspection thereof, assuming it to be true, that there was error. Michell v. Portland [Or.] 99 P 881, rvd. on other grounds [Or.] 101 P 388. Petition must show prima facie that inferior court or tribunal acted without jurisdiction or exercised its functions erroneously and must set out specific errors in relation thereto. Raper v. Dunn [Or.] 99 P 889. Petition must show sufficient grounds. See B. & C. Comp. §§ 596, 597. Rynearson v. Union County [Or.] 102 P 785; White v. Brown [Or.] 101 P 900. As to what constitutes sufficient grounds for certiorari, see ante, § 1.

16. In re Rosenthal, 118 NYS 241. Allegation of party that he was removed from office on an insufficient charge, or upon a proper charge without evidence to sustain it, held sufficient. Id. Not necessary for plaintiff to set out evidence in full or to excuse his failure to do so. Id. General statement that applicant did not owe plaintiff below anything and that she was prevented from making appearance and defense by severe sickness was sufficient to entitle her to review of proceedings wherein default judgment was taken against her. Wilbur v. Lane [Tex. Civ. App.] 115 SW 298.

17. Petition to review act of justice of the peace in setting aside his own judgment held sufficient. White v. Brown [Or.] 101 P 900.

18. Bush v. Roberts, 4 Ga. App. 531, 62 SE 92.

19. Bass v. Masters, 5 Ga. App. 288, 63 SE 24.

20. Being presumed. State v. Posz, 106 Minn. 197, 118 NW 1014.

21. Was not multifarious where in reality only one of two proceedings was involved. State v. Posz, 106 Minn. 197, 118 NW 1014. Held not multifarious where object of each of three proceedings sought to be reviewed was to locate same site for same school house. Southworth v. Ogle County Board of Education, 238 Ill. 190, 87 NE 403.

22. Mills Ann. St. § 2694 requires that it be given before issuance of writ, where review of proceedings of justice of the peace is sought. Axelson v. People [Colo.] 101 P 54. Statute requires filing, but not approval, within 90 days after rendition of judgment. Wilbur v. Lane [Tex. Civ. App.] 115 SW 298.

proceedings are to be reviewed,[23] of a bond, executed in due form [24] by the petitioner or some one authorized in the premises [25] and duly approved,[26] is a condition precedent to the issuance of a writ of certiorari.[27] There is no necessity for this bond, however, until the petition for certiorari has been sanctioned.[28]

*The writ.*See 11 C. L. 598—A writ against a tribunal should be directed to it and not to the individual members thereof.[29] Separate writs should be issued to several officers or bodies having no joint or common duties.[30] The writ is sufficient in substance if it advise the court of the precise issues presented.[31]

*Notice and service of writ.*See 11 C. L. 598—Service of the writ [32] and notice of the hearing are ordinarily required,[33] but the requirements may be waived.[34]

*The return.*See 11 C. L. 598—The return is a duly authenticated copy of the record of the proceedings to be reviewed.[35] It should be made by the proper official,[36] should reasonably conform to the statutory requirements,[37] should be responsive to the writ, should fully answer the allegations of the petition, and should be full and complete with reference to all the essentials of jurisdiction.[38] When the writ is issued the lower court has no alternative but to send up its return.[39] The return is usually conclusive,[40] but where it is insufficient, a further return may be required.[41]

23. Condon v. Jesup, 5 Ga. App. 100, 62 SE 677.

24. Bond wherein petitioner bound herself to appear and abide final judgment of recorder's court or the superior court, "in the event said certiorari should be refused," held insufficient, as it placed on such bond an unauthorized limitation. Thomas v. Atlanta [Ga. App.] 65 SE 32.

25. Bond may be executed by agent, unless it affirmatively appear that agency was created by undisclosed power of attorney. Bass v. Masters, 5 Ga. App. 288, 63 SE 24.

26. Must be approved by clerk of court, if there be one, otherwise it may be approved by the judge whose decision is to be reviewed. Condon v. Jesup, 5 Ga. App. 100, 62 SE 677.

27. See Civ. Code 1895, § 4639 and Acts 1902, p. 105. Condon v. Jesup, 5 Ga. App. 100, 62 SE 677. Held to apply to review of judgment of municipal court. Id.

28. Bush v. Roberts, 4 Ga. App. 531, 62 SE 92.

29. Writ should have been directed to village council instead of to certain individuals by name, described as president and recorder of village. State v. Blackduck Village Council, 107 Minn. 441, 120 NW 894.

30. Improper to issue single writ against county clerk, who has custody of assessment proceedings, and against city clerk who has record of ordinances. Manufacturers' Land & Improvement Co. v. Camden [N. J. Law] 73 A 77.

31. Need not contain all allegations of petition. State v. Posz, 106 Minn. 197, 118 NW 1014.

32. Service upon municipal corporation by service upon its head officer, as permitted at common law, is sufficient compliance with statute (Civ. Code 1895, § 4644). Martin v. Tifton [Ga. App.] 63 SE 1132. Rule just stated in previous note is not affected by fact mayor served as officer whose judgment it is sought to review. Id.

33. Under certiorari act, § 5 (P. L. p. 344), 5 days' notice, given within 15 days after reasons are filed, is sufficient. Fishblatt v. Atlantic City [N. J. Law] 73 A 125.

34. Notice required by Civ. Code 1895, § 4644, was waived before sanction of petition for certiorari. King Bros. & Co. v. Turner [Ga. App.] 65 SE 321.

35. Curran v. State [Or.] 99 P 420.

36. Where writ is issued to review action of circuit court, return should be made by the judge, since it is for him, and not for the clerk, to determine what was submitted to him. Stevens v. Kirby, 154 Mich. 509, 15 Det. Leg. N. 825, 118 NW 17.

37. People v. State Board of Tax Com'rs, 132 App. Div. 604, 117 NYS 81. Return under statute (Tax Law, § 252), which in addition to specifying records, papers and evidence taken in open session, upon which determination was made, shall state the separate valuations and special right and material facts which entered into their determination, held to be full compliance with statute, without stating other specific information or opinions acquired by board apart from open session or through their agents and experts. Id. Statute requires certified transcript to be transmitted to clerk within 15 days. Hill v. Adams Exp. Co. [N. J. Law] 71 A 683.

38. Griffiths v. Logan City Justice's Ct. [Utah] 100 P 1064. Answer of magistrate, that "After reading over the evidence and rulings as set forth in the within petition for certiorari, answer that to the best of my recollection that the evidence and rulings of the court as set forth in said petition are correct," is substantial verification of allegations of petition. Peeples v. Tygart [Ga. App.] 65 SE 167.

39. Garrison v. Richardson [Or.] 101 P 900.

40. See post, § 4.

41. Where the magistrate fails to certify and send up all proceedings, it is duty of plaintiff to make application for an order on such magistrate to supply the deficiency. Peeples v. Tygart [Ga. App.] 65 SE 167. Return held sufficient and further return

Objections and amendments.[See 11 C. L. 598]—The petition for a writ of certiorari may usually be amended,[42] regardless of the sufficiency of the questions sought to be raised.[43] Such amendment may be allowed, even after the time to institute another proceeding has elapsed.[44] Timely objection must be made to an erroneous bond,[45] or return,[46] or the right to make such objections will be waived.[47]

Quashal or dismissal.[See 11 C. L. 599]—A motion to quash or supersede the writ is addressed to the discretion of the court.[48] Where sufficient grounds for certiorari exists, the certiorari will not be dismissed unless it can be said in the particular case that the same results would have been reached, regardless of the alleged errors.[49] The motion to quash presents the question of whether the allegations of the petition are sufficient in law to authorize the issuance of the writ.[50] Improvident issuance is ground for quashal.[51] Failure of the lower court to include in his answer proceedings which are not necessary to a determination will not, however, be ground for dismissing the certiorari.[52] A demurrer or motion to quash the petition need not be made until after a return is made.[53] The justice who allows the writ of certiorari may before the return of the writ, for proper cause, after hearing and upon due notice, vacate the allocatur.[54] The granting of an amendment may make inadvisable the granting of a pending motion to quash the writ.[55]

In New York a motion to vacate a writ of certiorari issued out of the supreme court is properly made in the first instance in the appellate division.[56]

§ 4. *Hearing and questions which may be raised and settled.*[57]—[See 11 C. L. 600] As a general rule, only questions raised by the petition for certiorari or writ of review[58] and presented by the record,[59] as returned,[60] and certified to,[61] in response to

unnecessary. Michell v. Portland [Or.] 101 P 388, rvg. [Or.] 99 P 881. Evidence held to not show return to be false or insufficient, and no further return was required. People v. Bingham, 117 NYS 363.

42. Authorized by Code Civ. Proc. §§ 1997, 2133. People v. Buffalo, 62 Misc. 313, 114 NYS 1077. In action to review paving assessment where petitioners sought to amend their petition by alleging that board of assessors made false report and that city council in letting pavement contract violated charter requirement held an abuse of discretion to refuse to permit such amendment. People v. Raymond, 129 App. Div. 477, 114 NYS 365.

43. Such matters being left for later determination. People v. Buffalo, 62 Misc. 313, 114 NYS 1077.

44. People v. Buffalo, 62 Misc. 313, 114 NYS 1077.

45. Bush v. Roberts, 4 Ga. App. 531, 62 SE 92.

46. Hill v. Adams Exp. Co. [N. J. Law] 71 A 683.

47. Under Rule 32, return shall be deemed complete, if not objected to within 5 days after service. Hill v. Adams Exp. Co. [N. J. Law] 71 A 683. Technical defects in the return were waived. District of Columbia v. Brooke, 29 S. Ct. 560. Objections to bond were waived. Bush v. Roberts, 4 Ga. App. 531, 62 SE 92.

48. McDonald v. McDonald, 141 Ill. App. 259.

49. King Bros. & Co. v. Turner [Ga. App.] 65 SE 321.

50. People v. Buffalo Board of Assessors, 193 N. Y. 248, 86 NE 466. A writ should not be quashed when it presents sufficient facts to call for a determination of the merits of the controversy. State v. Posz, 106 Minn. 197, 118 NW 1014. For sufficiency of writ see ante this section, "The writ." Id.

51. McDonald v. McDonald, 141 Ill. App. 259. For laches as constituting improvidence, see § 1. Improvident issuance without sufficient grounds, as to what constitutes grounds, see § 1.

52. Peeples v. Tygart [Ga. App.] 65 SE 167.

53. Garrison v. Richardson [Or.] 101 P 900.

54. Winegrath v. Fairview [N. J. Law] 72 A 91.

55. People v. Buffalo, 62 Misc. 313, 114 NYS 1077.

56. Under Civ. Code Proc. § 1348, and notwithstanding § 2138. People v. Willcox, 129 App. Div. 267, 113 NYS 861.

57. Search Note: See notes in 3 C. L. 674; 40 A. S. R. 29.

See, also, Certiorari, Cent. Dig. §§ 168-184; Dec. Dig. §§ 61-68; 6 Cyc. 818-833; 4 A. & E. Enc. P. & P. 252.

58. Green County v. Thomas, 211 U. S. 598, 53 Law. Ed. —; Michell v. Portland [Or.] 99 P 881, rvd. on other grounds [Or.] 101 P 388. Under Const. art. 101, inquiry is confined to matters of petition. Fletcher v. Ozone Lumber Co. [La.] 49 S 158. Inquiry does not extend to matters presented in brief of counsel and not raised in petition. Id.

59. Bennett v. Millard, 142 Ill. App. 282; State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291; Gue v. Eugene [Or.] 100 P 254; Ex parte Dickens [Ala.] 50 S 218; Michell v. Portland [Or.] 99 P 881, rvd. on other grounds [Or.] 101 P 388. Evidence outside record was not admissible to show

the writ,[62] will be considered. However, questions upon which the jurisdiction of the lower court depends and based upon matters which are not required to be made of record, may, in some cases, be reviewed from the return, although not contained in the record.[63] In such case the return is conclusive only when made by the same person before whom the proceedings were had.[64] The inquiry is usually confined to questions of law,[65] and concerned only with whether the proceedings reviewed indicate that jurisdiction was exceeded or that judicial functions were exercised erroneously.[66] As a general rule, the court will not review findings upon questions

that plaintiff was interested party. Raper v. Dunn [Or.] 99 P 889. Record was conclusive whether it spoke the truth or not. State v. Buchanan County Ct., 135 Mo. App. 143, 116 SW 14. Even if record be false, it cannot be contradicted by reviewing court. Curran v. State [Or.] 99 P 420. Inquiry is confined to face of record by common law and statute, and judgment, though void on facts alleged outside the record, was not reviewed. Winkler Brokerage Co. v. Courson [Ala.] 49 S 341. Evidence outside the return will not be considered. Gay v. Eugene [Or.] 100 P 306; State v. Emerson, 137 Wis. 392, 118 NW 836. Record is only evidence necessary in proceedings under writ of review in Oregon. Curran v. State [Or.] 99 P 420. In review of order granting liquor license, the question of whether local option law had been adopted in same vicinity, which question was not presented by the record, was not considered. State v. Mitchell [Mo. App.] 119 SW 498. Matters not of record, there being no transcript of evidence or affimative finding of fact, would not be considered in reviewing discharge of accused in contempt proceeding. Lewis v. Brennan [Iowa] 120 NW 332. Matters required to be recorded which are dehors the record will not be considered. Griffiths v. Logan City Justice's Ct. [Utah] 100 P 1064. Refusal of continuance would not be reviewed where record failed to disclose that any motion for continuance had been filed. Atlantic C. L. R. Co. v. Cohn & Co., 4 Ga. App. 854, 62 SE 572. Questions presented in petition **held not part of record.** Raper v. Dunn [Or.] 99 P 889. State of the case, signed by judge, unless diminution has been alleged, held not properly part of record. New Jersey Board of Health v. Vandruens [N. J. Law] 72 A 125. Petition for review is not part of record. Michell v. Portland [Or.] 99 P 881. Recital of facts in opinion filed by court of quarter sessions in desertion proceeding does not bring them upon record for purposes of review. Commonwealth v. Brownell, 35 Pa. Super. Ct. 249.

60. Michell v. Portland [Or.] 101 P 388, rvg. [Or.] 99 P 881; Griffiths v. Logan City Justice's Ct. [Utah] 100 P 1064. Real merits are determined from the answer returned. Bush v. Roberts, 4 Ga. App. 531, 62 SE 92. Mere fugitive paper contradictory of official return was disregarded. Bernstein v. Thayer [Mich.] 16 Det. Leg. N. 535, 122 NW 365. Proceedings of highway commissioner were reviewed as disclosed in his return, which was taken as true. Gorham v. Johnson [Mich.] 16 Det. Leg. N. 387, 122 NW 181. Return supersedes the petition, in determining what questions shall be considered. Curran v. State [Or.] 99 P 420.

61. Matters not certified to by court below were not to be considered. Haurand v. Schorb [N. J. Law] 72 A 107.

62. People v. State Board of Tax Com'rs, 132 App. Div. 604, 117 NYS 81. Under ordinary code (Code Civ. Proc. § 2138) the determination must be upon return and writ and papers upon which writ was granted. Id.

63. Griffiths v. Logan City Justice's Ct. [Utah] 100 P 1064. Such matters with regard to justice's court may be thus reviewed. Id.

64. Evidence may be heard aliunde the return, to ascertain what transpired before the inferior tribunal and what proceedings were there had, when return is made by another, such as by a successor in office. Griffiths v. Logan City Justice's Ct. [Utah] 100 P 1064.

65. State v. Patterson, 138 Wis. 475, 120 NW 227; Bennett v. Millard, 142 Ill. App. 282. Certiorari may now be used to examine law questions involved in case which may affect its merits. Ex parte Dickens [Ala.] 50 S 218. Writ of review presents questions of law alone. Curran v. State [Or.] 99 P 420. Question which was largely one of fact in reference to whether or not inventions had been exhibited in an expired foreign patent was not considered by federal supreme court. Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U. S. 301, 325, 53 Law. Ed. —. Whether reasons assigned for removal of assistant matron from office were sufficient held to be question of law. People v. Harvey, 127 App. Div. 211, 111 NYS 167.

66. Gue v. Eugene [Or.] 100 P 254; Raper v. Dunn [Or.] 99 P 889. Such questions considered must be based upon grounds requisite to proper issuance of writ. Griffiths v. Logan City Justice's Ct. [Utah] 100 P 1064; Commonwealth v. Brownell, 35 Pa. Super. Ct. 249; Ex parte Dickens [Ala.] 50 S 218. As to what constitutes grounds for certiorari, see ante, § 1. Only questions considered were whether court below exceeded its jurisdiction or its proper legal discretion. In re Slippery Rock Tp. School Dist., 222 Pa. 538, 71 A 1085. Error in order made within limits of jurisdiction was not considered (Florence-Goldfield Min. Co. v. Nevada Dist. Ct., 30 Nev. 391, 97 P 49), sustained on rehearing (Florence-Goldfield Min. Co. v. Nevada Dist. Ct., 30 Nev. 391, 97 P 389). Could consider right of city council to act in any particular proceeding, either as to subject-matter or as to person, such question being jurisdictional. Michell v. Portland [Or.] 99 P 881, rvd. on

of fact, which are supported by any evidence,[67] nor will it consider moot questions,[68] collateral issues,[69] matters not essential to the return,[70] or matters which relate to the exercise of rightful jurisdiction.[71] A material unsupported finding of fact is reviewable, where the finding is such as to be a controlling error of law.[72] A finding on a question of fact will not be reviewed, however, unless the court have before it the entire testimony.[73] The court is not called upon in certiorari to pass upon the admissibility of evidence.[74] The record cannot be impeached by the filing of a stipulation agreed to by the parties.[75] A statement contained in the return does not necessarily preclude the court from looking into the evidence thereon, which is contained in the record returned.[76] The opinion of the court below will be examined in so far as it may be necessary to determine the basis of its action.[77] Material questions will ordinarily be determined only upon formal hearing and full argument and not at the hearing on a prelimiary application.[78] The regularity of the proceedings of a lower court, necessary to give it jurisdiction, will be presumed until the contrary is shown.[79] Several proceedings which had but a single object may be reviewed under the same writ.[80]

other grounds [Or.] 101 P 388. Whether city council acted in manner provided by charter and ordinances in disposition of matter before it was jurisdictional question. Id.

67. State v. Patterson, 138 Wis. 475, 120 NW 227; In re Phillips, 154 Mich. 139, 15 Det. Leg. N. 683, 117 NW 630; Bowler v. Osborne, 75 N. J. Law, 903, 70 A 149; Michell v. Portland [Or.] 99 P 881, rvd. on other grounds [Or.] 101 P 388. Not disturbed unless clearly against the proof. People v. Helns, 112 NYS 139. Court will not consider preponderance of evidence where substantial conflict exists. State v. Buckham [Minn.] 121 NW 217. Whether grounds existed for removal of assistant police matron was question of fact. People v. Harvey, 127 App. Div. 211, 111 NYS 167. Finding by board of trustees in granting policemen's pension that pneumonia from which he died was contracted while on duty was question of fact. State v. Board of Trustees of Policemen's Pension Fund, 138 Wis. 133, 119 NW 806. Conclusions of fact were not reviewed as trial could not be had de novo on certiorari. Ex parte Dickens [Ala.] 50 S 218. Findings of commissioner of City of New York on dismissing policeman, based on conflicting evidence, were not reviewed. People v. Bingham, 130 App. Div. 710, 115 NYS 639. Disputed questions of fact will not be reviewed by supreme court in the absence of statute. Ex parte Dickens [Ala.] 50 S 218.

68. Florence-Goldfield Min. Co. v. Nevada Dist. Ct., 30 Nev. 391, 97 P 49. Not review contempt order from which plaintiff has been relieved. Dugane v. Smith [Iowa] 119 NW 73. Court will not review a sentence of reprimand rendered by court martial when such sentence has been fully executed and the party restored to his former position and rank. State v. Mead [Wash.] 100 P 1033. Certiorari denied where it was sought to review order of trial court in matter which has been determined on appeal. Hanna v. Bailie [Iowa] 118 NW 900.

69. Defense of anticipation and want of infringement will not usually be considered by the federal supreme court in reviewing order granting preliminary injunction in patent suit. Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U. S. 301, 325, 53 Law. Ed. —.

70. Assertions, or denials of, or conclusions reached by circuit judge based upon the evidence at hearing wherein mandamus was denied, held not proper part of return. Stevens v. Kirby, 154 Mich. 509, 15 Det. Leg. N. 825, 118 NW 17.

71. Determination of whether any benefits resulted to property of plaintiff in consequence of street improvement and whether apportionment of expense thereof against property of plaintiffs is made in proportion to such benefits held not matters reviewable by certiorari. Michell v. Portland [Or.] 99 P 881, rvd. on other grounds [Or.] 101 P 388.

72. Held reviewable. State v. Buckham [Minn.] 121 NW 217. Finding of recorder without evidence to sustain it held not to be controlling error of law. Cook v. Atlanta [Ga. App.] 64 SE 1107.

73. In re Phillips, 154 Mich. 139, 15 Det. Leg. N. 683, 117 NW 630.

74. In review of contempt matter. Russell v. Anderson [Iowa] 120 NW 89.

75. Gay v. Eugene [Or.] 100 P 306.

76. Where return includes all proceedings and testimony taken before railroad commission. People v. Public Service Commission, 195 N. Y. 157, 88 NE 261.

77. The appellate court in such case occupying a middle ground between common-law actions and equity suits and not stopping with mere inspection of formal proceedings. In re Krickbaum's Contested Election, 221 Pa. 521, 70 A 852.

78. Questions, such as right of appeal from award of appraisement commissioners, whether mandamus will lie, and whether under facts writ of certiorari should be allowed. Zimmerman v. Hudson & M. R. Co. [N. J. Law] 71 A 127.

79. State v. Broaddus, 216 Mo. 336, 115 SW 1018. Presumption was that default was founded on lawful return of lawful writ, until disproved by record. Id. Presumption prevails even where record is silent on jurisdictional facts. Id.

In New York, in certiorari under the tax law, the court has the power to take further evidence, or to direct that further evidence be taken before the referee.[81]

On rehearing, the cause must be submitted on the record as it was at the former submission.[82]

§ 5. *Judgment.*[83] See 11 C. L. 800—The only judgment at common law, and under the rule yet prevailing in some states, is either to quash the proceedings or to sustain the same.[84] Under the procedure in other states, error of the court below, as disclosed by the record, may be corrected,[85] or the lower court may be directed to so modify its judgment as to make it legal,[86] or the case may be remanded for further trial where it is not absolutely controlled by some question of law.[87] A judgment may be valid and the reason stated therefor be erroneous.[88]

§ 6. *Costs.* See 9 C. L. 552—This subject is treated elsewhere.[89]

§ 7. *Review of certiorari.*[90] See 11 C. L. 800—Only matters properly included in the records of the lower court,[91] and to which exceptions have been saved, will be considered on a review of certiorari.[92] The discretion of the next lower court in ordering a new trial on certiorari will not usually be disturbed.[93] A judgment of a lower court quashing a writ of certiorari is generally reviewable, when it is rendered on the merits of the case.[94]

Challenges; Chambers and Vacation, see latest topical index.

80. Common object was location of same school house on same site. Southworth v. Ogle County Board of Education, 238 Ill. 190, 87 NE 403.

81. People v. State Board of Tax Com'rs, 132 App. Div. 604, 117 NYS 81.

82. Affidavits, filed after granting of rehearing, stricken. Booker v. Grand Rapids Medical College [Mich.] 16 Det. Leg. N. 56, 120 NW 589.

83. Search Note: See Certiorari, Cent. Dig. §§ 185-194; Dec. Dig. § 69; 6 Cyc. 833-837; 4 A. & E. Enc. P. & P. 301.

84. Winkler Brokerage Co. v. Courson [Ala.] 49 S 341. In Wisconsin, the judgment upon writ of certiorari can only affirm or reverse the judgment of determination reviewed. State v. Emerson, 137 Wis. 292, 118 NW 836.

85. Error in denying petitioner's legal right under admitted facts could be corrected. Town of Union v. Hudson County Board of Taxation [N. J. Law] 71 A 46. So held in case where appeal was treated as certiorari. Id.

86. Judgment of lower court against partnership and individual members, where evidence of existence of partnership was not clear, was ordered modified so as to be effective only against the individuals. Briggs Hardware Co. v. Sofkee Naval Stores Co., 5 Ga. App. 285, 63 SE 60.

87. Logan v. Atlanta, 5 Ga. App. 493, 63 SE 569. **In Georgia,** the superior court should render final judgment in sustaining a certiorari only when case is absolutely controlled by some question of law otherwise, the procedure being to remand. Id. Superior court properly remanded case for trial in police court. Smith v. Atlanta, 5 Ga. App. 492, 63 SE 569. Superior court can remand case for further trial where there is no proof of venue. Cook v. Atlanta [Ga. App.] 64 SE 1107. Although finding of city recorder may be without evidence to support it, such finding was not error of law which was absolutely controlling. Id.

88. Lewis v. Brennan [Iowa] 120 NW 332. Judgment denying motion to modify decree held valid. Id.

89. See Costs, § 7D.

90. Search Note: See Certiorari, Cent. Dig. §§ 195-208; Dec. Dig. § 70; 6 Cyc. 839-842; 4 A. & E. Enc. P. & P. 328.

91. Petition for writ of certiorari does not become part of record until granted and review cannot be had of refusal to sanction application for certiorari, unless petition is incorporated in bill of exceptions or otherwise verified as part thereof. Gassett v. Atlanta, 5 Ga. App. 357, 63 SE 143. An unsanctioned petition cannot be specified as part of the record. Rollins v. Speer [Ga. App.] 64 SE 280. Petition is not part of record unless included in bill of exceptions or otherwise verified as part thereof by trial judge. Id. Findings of fact by judge of circuit court are not proper part of record and will be disregarded on review by supreme court. Gorham v. Johnson [Mich.] 16 Det. Leg. N. 387, 122 NW 181.

92. Exception as follows: "After hearing the certiorari, the court overruled the same, and refused to grant a new trial, to which ruling plaintiff in certiorari excepts, and assigns the same as error," is sufficient to present questions of law for review. Meeks v. Carter, 5 Ga. App. 421, 63 SE 517. In order to secure a review based upon insufficiency of the magistrate's answer, the plaintiff should file exceptions thereto as provided by Civ. Code 1895, § 4647. Peeples v. Tygart [Ga. App.] 65 SE 167.

93. Appellate court refused to disturb such action of the superior court. King Bros. & Co. v. Turner [Ga. App.] 65 SE 321.

94. Judgment quashing writ and affirming order of supervisors was reviewed, where it was not rendered merely on motion to quash. State v. Miller, 136 Wis. 344, 117 NW 809.

CHAMPERTY AND MAINTENANCE.[95]

The scope of this topic is noted below.[96]

In General, 736.
Grants of Land Held Adversely, 736.
Agreements as to Contingent Fees and Payment of Expenses at Trial, 737.
Assignment to or Purchase by Attorney of Chose in Action, 738.
Champerty as a Defense, 738.
Maintenance, 738.

In general.[See 11 C. L. 601]—Maintenance is an officious intermeddling in a suit by assisting either party with money or otherwise to prosecute or defend it; and champerty is a species of maintenance whereby a stranger to the suit agrees to carry it on at his own expense, in considration of an agreement that he shall receive a share of its proceeds.[97] The usual laws with regard to champerty and maintenance do not apply in New Jersey.[98]

Grants of land held adversely.[See 11 C. L. 601]—Grants of land by persons out of

95. See 11 C. L. 601.

Search Note: See notes in 3 C. L. 677, 678; 5 Id. 566; 7 Id. 621, 622; 14 L. R. A. 745, 785; 2 L. R. A. (N. S.) 261; 83 A. S. R. 167; 9 Ann. Cas. 863; 11 Id. 69.

See, also, Champerty and Maintenance, Cent. Dig.; Dec. Dig.; 5 A. & E. Enc. L. (2ed.) 815-824, 830, 834; 3 A. & E. Enc. P. & P. 264; 4 Id. 368, 371.

96. This topic includes all matters relating to contracts invalid because of tendency to promote litigation, including contracts of maintenance, contingent fee contracts, and sales of land adversely held. As to agreements by attorneys for compensation generally, see Attorneys and Counselors,* § 7.

97. Smith v. Hartsell, 150 N. C. 71, 63 SE 172. Maintenance and champerty discussed and distinguished. Breeden v. Frankfort Marine Accident & Plate Glass Ins. Co. [Mo.] 119 SW 576.

NOTE. General definition and application of doctrine of champerty and maintenance: "Champerty is a species of maintenance which at common law was an indictable offense. Maintenance was an officious intermeddling in a law suit by a mere stranger without profit. Champerty involved an element of compensation for such unlawful interference by bargain for part of the matter in suit, or some profit growing out of it." Sommerville, Judge, in Gilman v. Jones, 87 Ala. 691, 5 S 785, 7 S 48, 4 L. R. A. 113. And see Torrence v. Shedd, 112 Ill. 466. The harsher application of the doctrine contained in these definitions as it formerly obtained has been very much relaxed and modified under the more recent decisions, many exceptions have been recognized and established, and it has come to be very generally accepted that a contract or agreement will not be held within the condemnation of the principle indicated, unless the interference is clearly officious and for the purpose of stirring up "strife and continuing litigation." Lawson on Rights and Remedies, Vol. 5, § 2400; Gilman v. Jones, 87 Ala. 691, 5 S 785, 7 S 48, 4 L. R. A. 113; Thallhimer v. Brinkerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308. And there is well-considered authority to the effect that assistance of this kind will not be considered officious when one has an interest or acts in the bona fide belief that he has. McCall v. Capehart, 20 Ala. 526; Lewis v. Broun, 36 W. Va. 1, 14 SE 444.

Relationship by blood and marriage will often justify parties in giving each other assistance in law suits; and the relation of attorney and client; or the extension of charitable aid to the poor and oppressed litigant; and especially is an interference in a lawsuit excusable when it is by one who has, or honestly believes he has, a valuable interest in its prosecution. * * * And in Thallhimer's Case, supra, Sanford, Chancellor, said: "Where the person promoting the suit of another has any interest whatever in the thing demanded, distinct from that which he may acquire by an agreement with the suitor, he is in effect also a suitor, according to the nature and extent of his interest. To deny to such a person the benefit which he might receive from a suit conducted mainly or partly for the benefit of another would be to close the temple of justice against all persons not parties to the suit, and yet having interest in the subject of litigation, which may be affected by the determination of the cause. It is accordingly a principle that any interest whatever in the subject of the suit is sufficient to exempt him who gives aid to the suitor from the charge of illegal maintenance. Whether this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to him who has such an interest to participate in the suit of another who has or claims some right to the same subject. Bac. Abr., tit. 'Maintenance,' B, and the several authorities there cited. Where there is consanguinity or affinity between the suitor and him who gives aid to the suit, the voice of nature and the language of the law equally declare that such assistance is not unlawful maintenance. The relation of landlord and tenant, that of master and servant, acts of charity to the poor, and the exercise of the legal profession, are all cases in which it is not unlawful to give aid in the conduct of suits before the courts of justice. Upon all such cases these laws were never intended to operate. They were intended to prevent the interference of strangers having no pretense of right to the subject of the suit, and standing in no relation of duty to the suitor. They were intended to prevent traffic in doubtful claims, and to operate upon buyers of pretended rights, who had no relation to the suitor or the subject, otherwise than as purchasers of the profits

possession [99] are at common law and, in some states by special statutory provision,[1] voidable as to the persons in adverse possession and those claiming in privity with them,[2] but are good as to the grantor, his heirs,[3] and assigns,[4] unless abandoned or rescinded.[5] While it has been said that ouster which will avoid a deed is the same as that which would make a perfect title by adverse user in the occupant,[6] the possession must be actual [7] and exclusive [8] under claim of title,[9] and constructive possession may be sufficient under the statute of limitations which is not sufficient under the champerty statute,[10] and a mere boundary dispute is not sufficient to avoid a conveyance.[11] Possession by the state will not affect the validity of a conveyance of land not owned by it.[12] The champerty statutes do not usually apply to judicial sales,[13] or to resales by the purchaser thereat.[14]

Agreements as to contingent fees and payment of expenses at trial. See 11 C. L. 608—Where the common-law doctrine of champerty, as applied to agreements between attorney and client, does not prevail,[15] an agreement that an attorney shall receive a percent of the amount recovered as his fee, is not improper [16] in the absence of

of litigation."—From Smith v. Hartsell, 150 N. C. 71, 63 SE 172.

98. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. English laws in respect thereto have not been adopted. Id. There is no law or rule of public policy to prevent stockholders of corporation from agreeing among themselves to aid corporation in proper ways in its litigation against third parties, and to use their influence as stockholders to see that out of proceeds of litigation, if successful, the reasonable disbursements made by stockholders in company's behalf shall be refunded, and a special dividend be made, if lawful, out of net proceeds. Id.

99. Paton v. Robinson, 81 Conn. 547, 71 A 730. English statute (St. 32 Hen. VIII, c. 9) is not part of **common law of Arkansas, having been abrogated** by statute. Moore v. Sharpe [Ark.] 121 SW 341. Common law as to champerty not adopted in New Jersey. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

1. Gen. St. 1902, § 4042. Paton v. Robinson, 81 Conn. 547, 71 A 730. Real Property Law, § 225. McAuliff v. Hughes, 128 App. Dig. 355, 112 NYS 486; Green v. Horn, 128 App. Div. 686, 112 NYS 993. Code 1896, § 1530 (amended by Code 1907, § 3839, but not so as to affect any existing right, remedy, or defense). Carr v. Miller [Ala.] 49 S 802. Voidable though made in good faith and for valuable consideration. Meade v. Ratliff [Ky.] 118 SW 271.

2. Paton v. Robinson, 81 Conn. 547, 71 A 730; Green v. Horn, 128 App. Div. 686, 112 NYS 993; Meade v. Ratliff [Ky.] 118 SW 271. Held void as to party in adverse possession under statute as it existed at time of transfer. Carr v. Miller [Ala.] 49 S 802.

3. Carr v. Miller [Ala.] 49 S 802. Grantor and his heirs are estopped and grantee may sue for and recover possession in name of grantor and then protect himself in his title under such deed. Paton v. Robinson, 81 Conn. 547, 71 A 730.

4. Good as to subsequent purchaser of grantor. Meade v. Ratliff [Ky.] 118 SW 271.

5. Parties may place themselves in statu quo by rescission (Russell's St. § 1783 does not apply). Meade v. Ratliff [Ky.] 118 SW 271.

6. Paton v. Robinson, 81 Conn. 547, 71 A 730. Held that complainant's actions before execution and delivery of deed were a plain admission and acknowledgment of grantor's title, and his possession did not constitute ouster, but showed submission to that title. Id.

7. Actual adverse possession at time of purchase is essential to invalidate deed. Brown v. Wallace [Ky.] 116 SW 763. Deed held void as to actual close of plaintiff but good as to remainder. Jones v. Gatliff [Ky.] 113 SW 436.

8. One in possession under terms of will which also gave trustee power has not such adverse possession as will prevent trustee from making sale, but will be considered as a tenant. Nunn v. Peak [Ky.] 113 SW 493.

9. Claim of purchaser at partition sale held adverse to the world. McAuliff v. Hughes, 128 App. Div. 355, 112 NYS 486.

10. Possession may be sufficient under statute of limitations which is not sufficient under champerty law. Sullivan v. Hill, 33 Ky. L. R. 962, 112 SW 564.

11. Webber v. Gillies, 112 NYS 397.

12. State not being a person within meaning of statute defining "person" (Laws 1892, p. 1487, c. 677) unless property owned by it is concerned. Saranac Land & Timber Co. v. Roberts, 197 N. Y. 303, 88 NE 753. Possession by forest commission is same as possession by state. Id.

13. Title of purchaser at attachment sale was not affected by fact that claimant was living on land. Martin v. Turner [Ky.] 115 SW 833. Conveyance made by trustee in pursuance to judgment of court was not champertous as to party in possession. Bryant v. Prewitt [Ky.] 117 SW 343.

14. Sale by execution purchaser while judgment debtor yet remains in possession of land is not champertous. Bartley v. Redmon's Adm'x [Ky.] 115 SW 831.

15. Doctrine does not prevail in Michigan. Foley v. Grand Rapids & I. R. Co. [Mich.] 16 Det. Leg. N. 246, 121 NW 257.

16. Baltimore, etc., R. Co. v. Trennepohl [Ind. App.] 87 NE 1059; Foley v. Grand Rapids & I. R. Co. [Mich.] 16 Det. Leg. N. 246, 121 NW 257.

any agreement that such attorney shall pay any part of the costs.[17] Nor are other contracts for a contingent fee invalid,[18] though they contain certain divisible invalid stipulations.[19]

Assignment to or purchase by attorney of chose in action. See 9 C. L. 554—The acquirement by an attorney from his client of an interest in the subject-matter of a pending action is presumptively fraudulent.[20] The assignment to assignor's attorney of an unliquidated claim for personal injuries, prior to judgment, is contrary to public policy.[21] On the other hand, a person, even though he be an attorney, is not usually precluded from purchasing a debatable title to land.[22] In Louisiana,[23] however, the transfer to an attorney or other court officer of a litigious right[24] is voidable at the instance of the party to the suit against whom the right is to be exercised.[25]

Champerty as a defense. See 11 C. L. 603—A champertous agreement does not necessarily defeat a just cause of action.[26]

Maintenance. See 11 C. L. 604—In the absence of any bargain to share in the recovery, it is not violative of law or public policy to give financial and other aid to the suit of a minor[27] or of a poor suitor who is prosecuting a meritorious cause of action.[28] Nor is it improper for one to promote the suit of another when he has any interest whatever in the thing demanded, apart from that which he may acquire by an agreement with the suitor.[29] A contract whereby a city in consideration of the payment of the expenses of an action undertakes to give control of the prosecution of such action to an individual is void and against public policy.[30]

Change of Venue; Character Evidence; Charitable and Correctional Institutions, see latest topical index.

CHARITABLE GIFTS.

The scope of this topic is noted below.[31]

§ 1. Nature and Essentials; Validity, 738.
§ 2. Capacity of Donee or Trustee, 742.
§ 3. Interpretation and Construction, 742.
§ 4. Administration and Enforcement, 743.

§ 1. *Nature and essentials; validity.* See 11 C. L. 604—A charitable gift is a voluntary donation of money or other property usually for the relief of sufferers from poverty or illness or for the advancement of education or morals.[33]

17. Sparling v. U. S. Sugar Co., 136 Wis. 509, 117 NW 1055.

18. Contingent fee is expressly authorized by Ann. St. 1906, § 4937-2. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042.

19. Stipulation that client should not compromise without consent of attorney was divisible. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042. Stipulation that client should not accept compromise without consent of attorney was not invalid where such compromise could result to detriment of attorney's lien (see Ann. St. 1906, § 4937-2). Id.

20. Burden is on attorney to prove fairness of contract, adequacy of its consideration, that it was equitable, and that no undue advantage was taken. Boyles v. Read, 138 Ill. App. 153. This presumption may be overcome by sufficient proof. Id.

21. Tyler v. Superior Ct. [R. I.] 73 A 467.

22. Cordiner v. Finch Inv. Co. [Wash.] 103 P 829.

23. For statute, see Civ. Code, art. 2447. Saint v. Martel, 122 La. 93, 47 S 413.

24. Right is litigious only when there exists a suit and contestation on same (see Civ. Code, art. 2653). Saint v. Martel, 122 La. 93, 47 S 413. Title ceases to be litigious when final judgment is rendered and its litigious character is not revived by subsequent litigation between successful claimant and other parties asserting title from same author. Id.

25. Vendor of litigious right has no standing to complain of transfer. Saint v. Martel, 122 La. 93, 47 S 413.

26. Champertous contract does not affect the obligation. Baltimore, etc., R. Co. v. Trennepohl [Ind. App.] 87 NE 1059. Especially not where made after judgment. Id.

27. Not improper for party having no interest in result to advise minor to rescind invalid contract and bring suit, and to pay costs and expenses. Champagne Lumber Co. v. Jahn [C. C. A.] 168 F 510. Where party did not furnish aid maliciously and for his own profit, there was no iniquitous intention of promoting and stirring up strife. Id.

28. Jahn v. Champagne Lumber Co., 157 F 407.

29. Not improper for one having claim against decedent's estate to assist rightful owners to recover under promise that they

Reasonable certainty is required in the designation of persons and purposes [34] in the absence of statute dispensing with this rule,[35] but it is generally sufficient if the class to be benefited is specified, the selection of the immediate beneficiaries being left to the trustees.[36]

will pay his claim. Smith v. Hartsell, 150 N. C. 71, 63 SE 172. Insurer of employer against damages for injuries to employes has sufficient interest. Breeden v. Frankfort Marine Accident & Plate Glass Ins. Co. [Mo.] 119 SW 576. Not improper for one having such interest to agree to testify, and to do all things proper and legitimate to aid their recovery. Id. See ante, note under subdiv., In General.

30. City of Carbondale v. Brush, 133 Ill. App. 236.

31. Matters applicable to trusts in general (see Trusts *) and to religious societies (see Religious Societies *), hospitals (see Asylums and Hospitals *), schools (see Schools and Education *), and the care of paupers (see Paupers *) in particular, and to the taxation of the property of charitable institutions (see Taxes *) and their liability for the torts of their agents and servants (see topics dealing with the particular institution involved, such as Asylums and Hospitals,* and the like), are treated in separate articles. Reference should also be had to the topics dealing with the interpretation and validity of deeds (see Deeds of Conveyance *) and wills (see Wills *), and with the law of real (see Real Property *) and personal (see Property *) property, and the rule against perpetuities (see Perpetuities and Accumulations *).

32. Search Note: See notes in 3 C. L. 679; 7 Id. 626, 627; 14 L. R. A. 410; 20 Id. 465; 32 Id. 625; 5 L. R. A. (N. S.) 687; 6 Id. 320; 7 Id. 471, 1119; 27 A. S. R. 512; 49 Id. 127; 63 Id. 248, 257; 64 Id. 756; 65 Id. 118; 4 Ann. Cas. 1139; 9 Id. 1202; 10 Id. 1030.

See, also, Charities, Cent. Dig. §§ 1-17, 34-61; Dec. Dig. §§ 1-19, 21-30; 6 Cyc. 897-930, 935, 936, 939-946, 948-977; 5 A. & E. Enc. L. (2ed.) 912, 915, 925.

33. Trust for art gallery is a charitable trust. Mason v. Bloomington Library Ass'n, 237 Ill. 442, 86 NE 1044. Bequest to "the poor of Voorst, Gelderland, Netherlands" held for a "charitable purpose." Klumpert v. Vrieland [Iowa] 121 NW 34. Bequest to a city, subject to certain contingencies, to found and maintain a hospital, creates a charitable trust on gift taking effect. Ware v. Fitchburg, 200 Mass. 61, 85 NE 951. Gift causa mortis to priest for masses for donor's soul held valid as a charitable gift. Gilmore v. Lee, 237 Ill. 402, 86 NE 568. Bequest of money to be loaned for interest to deserving Armenians by society to be incorporated without stock held to call for creation of a corporation not creatable under laws of state, and held not sustainable as a charitable gift. Tavshanjian v. Abbott, 59 Misc. 642, 112 NYS 583. **Perpetual trust to take care of private burial lot** cannot be upheld as a public charitable gift. Cannot be created unless authorized by statute. Mason v. Bloomington Library Ass'n, 237 Ill. 442, 86 NE 1044. Hurd's Rev. St. 1905. c. 21, §§ 22-28, authorizing creation of trusts to take care of private burial lots in hands of a board of directors, held not to authorize perpetual trusts in hands of private trustees. Id. Trust created under a statute authorizing perpetual trust for purpose of caring for cemetery, burial lot, or monument, is a "statutory trust," and not a charitable trust. Id. Bequest in trust to use interest for care of family burial lot held void. Id.

34. Gift of property to trustees to pay over to trutsees of a certain society in India or wherever society might be located, or acting under a deed of trust referred to, held void for uncertainty in designation of trustees. Korstrom v. Barnes, 167 F 216. Gift to be used "in obtaining translations into English of ancient Hieratic Scriptures believed to exist in India and elsewhere, for use of the Theosophical Society and its branches all over the world," held void for uncertainty in designation of purpose. Id. Evidence held to show attempt to create gift "for charity" without naming the charitable purposes. McPherson v. Byrne [Mich.] 15 Det. Leg. N. 1025, 118 NW 985. Where estate intended for a church and masonic hall was not bequeathed to any one and beneficiaries of appropriation for hall were not named, nor any description or directions for its building given, devise for hall was void for indefiniteness. Ingraham v. Sutherland [Ark.] 117 SW 748. Testamentary trust for establishment and maintenance of orphan's asylum for poor orphan children under 17 years of age of members of a secret society held sufficiently definite. Green's Adm'rs v. Fidelity Trust Co. [Ky.] 120 SW 283. Beneficiaries named with sufficient certainty. Id.

35. Laws 1893, p. 1748, c. 701, § 1, and Laws 1901, p. 751, c. 291, preventing failure of gifts for charitable, etc., uses by reason of indefiniteness of beneficiaries, applies to public, not private, charitable gifts (In re Shattuck's Will, 193 N. Y. 441, 86 NE 455), and refers to indefiniteness of beneficiaries and not of purposes (Id.), and gift to pay rents and profits annually to "religious, educational, or eleemosynary institutions" is invalid, "educational" and "institutions" being so broad as to include both private and public organizations and invalidity in this respect necessarily rendering entire gift invalid (Id.). Bequest of money to be loaned for interest to deserving Armenians held not a charity sustainable under Laws 1893, p. 1748, c. 701, saving charitable gifts otherwise void for indefiniteness. Tavshanjian v. Abbott, 59 Misc. 642, 112 NYS 583.

36. If class of beneficiaries be named in general language or outline leaving to trustee discretion to select immediate objects of class named as actual beneficiaries, trust is sufficiently certain. Kasey v. Fidelity Trust Co. [Ky.] 115 SW 739.

Held sufficiently definite: Charitable trust providing for payment of income to bible society for distribution of bibles to destitute of the earth. Kasey v. Fidelity Trust Co. [Ky.] 115 SW 739. Gift to incorporated charitable home capable of taking charitable gifts, for "maintaining aged and infirm

The law of decedent's domicile and situs of the property determines the validity of a charitable trust to be elsewhere administered.[37] In some states the amount of a testamentary gift to charity is limited where decedent leaves relatives or heirs,[38] or the gift is made illegal where made within a specified time before testator's death.[39] The rule against perpetuities is generally held inapplicable to charitable gifts,[40] but the contrary is also held,[41] and charitable institutions are such as have for their objects the administration of charities rather than pecuniary gain.[42] A

persons in said home, or in maintaining free beds in their infirmary in the discretion of the legatee." Baltzell v. Church Home & Infirmary [Md.] 73 A 151. Bequests to "women's work in foreign fields" and to "women's work in home lands" held not too indefinite as to beneficiaries in view of circumstances and conditions surrounding testatrix at her death. Gilchrist v. Corliss [Mich.] 15 Det. Leg. N. 971, 118 NW 938. Money to First Presbyterian Church of T. of which testatrix was member, and by succeeding clause a sum to be divided between home and foreign missions, held to boards of home and foreign missions of Presbyterian church, and not void for uncertainty. In re Johnson's Estate [Iowa] 119 NW 275. To "the poor of Voorst, Gelderland, Netherlands," held sufficiently certain, Voorst being a municipal corporation having certain institutions supporting the poor. Klumpert v. Vrieland [Iowa] 121 NW 34.

37. Charitable trust governed by laws of testator's domicile and situs of property. Green's Adm'rs v. Fidelity Trust Co. [Ky.] 120 SW 283. Validity of bequest of property to the poor of a designated place will depend on law of decedent's domicile and location of the property rather than place of distribution. Klumpert v. Vrieland [Iowa] 121 NW 34.

38. One attacking a will on ground it gives more than half of estate to an educational institution in violation of Laws 1860, p. 607, c. 360, has burden of showing invalidity thereof. In re Durand, 194 N. Y. 477, 87 NE 677. In determining whether testator, leaving wife and child to whom he gave life estate, remainder to education, gave educational institution more than half of estate in violation of Laws 1860, c. 360, court must consider value of estate at testator's death and reckon the then present value of life estates under mortality tables rather than lives as they were actually extended. Id.

39. Bequest in trust for benefit of a hospital held not void because will was executed within two months before testatrix' death. Laws 1848, c. 319, § 6, and Laws 1903, c. 623, § 1, relating exclusively to direct bequests. In re Beaver's Estate, 62 Misc. 155, 116 NYS 424.

40. See, also, Perpetuities and Accumulations. Trust held invalid as contravening rule against perpetuities where question whether fund should be devoted to charity was left in discretion of trustees. In re Peabody's Estate, 154 Cal. 173, 97 P 184. Word eleemosynary in Const. art. 20, § 9, forbidding perpetuities except for eleemosynary purposes, is synonymous with charitable. Id. Fund provided to care for burial lot. Mason v. Bloomington Library Ass'n, 143 Ill. App. 39.

41. Though object of a trust is charitable, trust itself may still be objected to as transgressing rule against perpetuities or accumulations. Russell v. Girard Trust Co., 171 F 161. In absence of statute, testamentary trust to apply income to care of testator's burial lot is void. Driscoll v. Hewlett, 132 App. Div. 125, 116 NYS 466. Gift to apply income for care of testator's burial lot held not to charitable use within statute regulating gifts to such uses. Id. Held authorized by Laws 1895, p. 481, c. 723, § 7. Id. Legacy to town council for keeping in repair testator's burying ground held a private as distinguished from a charitable trust. Rhode Island Hospital Trust Co. v. Warwick Town Council [R. I.] 71 A 644.

42. Held charitable: Members and officers of Grand Lodge of Masons held a charitable institution having been incorporated for administration of charity funds. Masonic Education & Charity Trust v. Boston, 201 Mass. 320, 87 NE 602. Corporation organized under statute relating to charitable associations, for purpose of providing homes for working girls at moderate cost, held a "public charity." Thornton v. Franklin Square House, 200 Mass. 465, 86 NE 909 That payments from inmates in a year were sufficient to pay for fuel, light, food, etc., expenses forming only part of necessary disbursements, held not to change its character. Id. Association organized under statute governing charitable organizations, and treating patients gratuitously, held charitable and entitled to fund under will bequeathing money for maintenance of a free hospital. Webber Hospital Ass'n v. McKenzie [Me.] 71 A 1032. Word "free" held to mean open and accessible to all for public use, and not to prohibit compensation to be paid by patients able to pay. Id. Stockless corporation not run for profit held a charitable institution not liable for death of a boy, though to some extent receiving compensation from inmates and though receiving small sum for care of boy. Cunningham v. Sheltering Arms, 61 Misc. 501, 115 NYS 576.

Held not charitable: Private enterprise organized with capital stock under Rev. St. c. 47, governing business corporations, held neither public nor charitable institution entitled to charitable bequest for care of unfortunates. Webber Hospital Ass'n v. McKenzie [Me.] 71 A 1032. Agricultural society organized to make money held not a charitable institution. Logan v. Agricultural Soc. [Mich.] 16 Det. Leg. N. 192, 121 NW 485. Fire insurance patrol of New Orleans held not a public charity though saving life and not charging for service, and held liable for injury due to negligence of servants. Coleman v. Fire Ins. Patrol, 122 La. 626, 48 S 130. Zoological

public charity is one the benefits of which extend generally to all the members of the community of the class contemplated.[43] The validity of charitable trusts depends largely on the statutes of the various states,[44] but it is the policy of the law to uphold such trusts wherever possible,[45] and, where a charity cannot be enforced precisely as prescribed by the donor, a method as near his intention as conditions prmit will be adopted.[46] The doctrine of cy pres cannot, however, be applied where

society held not exempt from liability for negligence of employes resulting in personal injury on theory it was a charitable corporation and mere trustee for a public purpose. Gartland v. New York Zoological Soc., 61 Misc. 648, 113 NYS 1087.

Incorporation of a charitable corporation held not invalid by failure of certificate to state incorporators were "free, white persons, citizens of the United States, and a majority of them citizens of this state," as required by Acts 1852, c. 231. Baltzell v. Church Home & Infirmary [Md.] 73 A 151.

43. Bequest to "life saving station to be built and established" held equivalent to gift to proprietors of station for benefit of the station, and held a public charity, its benefits extending generally to all members of class or classes for whose benefit life saving station was to be established. Richardson v. Mullery, 200 Mass. 247, 86 NE 319. Charitable trusts are those created for the benefit of an unascertained, uncertain, and sometimes fluctuating body of individuals in which the cestuis qui trustent may be a portion or class of a public community. Webber Hospital Ass'n v. McKenzie [Me.] 71 A 1032. Provision for application of income for maintenance of free hospital, where the unfortunate might receive good care and skillful treatment, held a public charity. Id. Gift to town toward erection of building for sick and poor, those without homes, held a public charity. Bowden v. Brown, 200 Mass. 269, 86 NE 351. Bequest to master, wardens, and members of Grand Lodge of Masons, for home for indigent and needy masons in Boston and vicinity, held to public charity, though class was limited. Masonic Education & Charity Trust v. Boston, 201 Mass. 320, 87 NE 602. Fact that a gift is made to a particular religious denomination does not deprive it of its character as a public charity or eliminate it from rule applicable to gifts for pious uses. First German Reformed Church v. Weikel, 7 Ohio N. P. (N. S.) 377. Testamentary trust to establish and maintain an orphan's asylum for maintenance and education of orphan children under 17 years of age of members of a secret society is a "public charity" and valid, within Ky. St. § 317 (Russell's St. § 2306) concerning charitable gifts. Green's Adm'rs v. Fidelity Trust Co. [Ky.] 120 SW 283.

44. See Trusts. Devise to executors to "transfer" to certain trustees for a "House of Rest" held not invalid as an attempted trust to convey realty, word "transferred" having reference only to administration of testatrix's estate. In re Peabody's Estate, 154 Cal. 173, 97 P 184. Civ. Code, §§ 847, 857, limiting purposes for which express trusts may be created, apply only to private trusts and not to trusts for charitable uses, and at common law trusts to convey to charitable uses are valid, and common-law rule applies to them under Pol. Code, § 4468, in absence of contrary statute or constitutional provisions. In re Sutro's Estate [Cal.] 102 P 920.

45. City of Keene v. Eastman [N. H.] 72 A 213. Charitable trusts favorites of equity. Green's Adm'rs v. Fidelity Trust Co. [Ky.] 120 SW 283. Charitable gifts highly favored and sustained, if possible, consistently with rules of law. In re Johnston's Estate [Iowa] 119 NW 275. While courts look with favor on charitable bequests, it cannot ignore established principles of law to sustain them. Klumpert v. Vrieland [Iowa] 121 NW 34. Where bequest is charitable it is immaterial how uncertain persons or objects may be or whether persons to take are in esse or whether legatee is a corporation capable of taking, or whether bequest can be exactly carried out, for court will sustain legacy and give it effect according to its own principles. Mason v. Bloomington Library Ass'n, 237 Ill. 442, 86 NE 1044.

46. City of Keene v. Eastman [N. H.] 72 A 213. Provision for art gallery and studio. Mason v. Bloomington Library Ass'n, 143 Ill. App. 39. Absence of forfeiture provisions is evidence that donor did not intend a reversion so long as it is practicable to carry out his general purpose. City of Keene v. Eastman [N. H.] 72 A 213.

Doctrine of cy pres, that fund for charity impossible of application according to intention of donor shall be applied as nearly as may be according to such intention, obtains in New Jersey. Larkin v. Wikoff [N. J. Eq.] 72 A 98. Bequest to life saving station held impossible of execution exactly as contemplated by donor, United States being owner of station and refusing to accept. Richardson v. Mullery, 200 Mass. 247, 86 NE 319. Where intent of testatrix in addition to maintenance of station itself was to help persons exposed to perils of sea by any reasonable method, charity could be administered cy pres, some other scheme being devised by or under direction of probate court. Id. Action of voters of a town in declining to accept legacy for erection of building for sick and poor held equivalent to refusal to erect building resulting in failure of gift unless it could be administered cy pres. Bowden v. Brown, 200 Mass. 269, 86 NE 351. Held proper to administer charity for kindergarten home for deaf children through a home 14 or 15 miles distant, property proving inadequate for purpose of founding a home on testatrix' old estate as contemplated by her. Ely v. Attorney General, 202 Mass. 545, 89 NE 166. Where library association, which testatrix intended should have charge of an art gallery for which she gave property, ceased to exist after selling out to another association, court could substitute latter

the donor has himself directed what shall be done in case of failure of the charitable use contemplated,[47] nor where a specific charity fails and no general charitable purpose is disclosed,[48] and where a bequest is burdened with a condition but for which it would not have been made, and the condition is illegal or impossible of fulfillment, the gift must fail.[49] The statute of charitable uses is recognized in at least some of our states so far as consistent with our institution,[50] but the disposal of property by the sign manual of the crown under that statute did not become a part of the common law of this country.[51]

§ 2. *Capacity of donee or trustee.*[52]—See 11 C. L. 608—Trustees or beneficiaries must have the requisite capacity.[53] Corporate trustees or donees must have power to accept and administer the property in accordance with the terms of the gift,[54] and hence an institution cannot accept a gift which is inconsistent with its previously settled obligations or purposes.[55] The amount of property which may be accepted by a corporation is sometimes limited by statute.[56]

§ 3. *Interpretation and construction.*[57]—See 11 C. L. 609—Whether a gift is abso-

association to administer trust. Mason v. Bloomington Library Ass'n, 237 Ill. 442, 86 NE 1044. That bequest was reduced by two-thirds by statute limiting amount of charitable gifts held not to invalidate it, court being authorized to use it for testatrix' general charitable purpose under doctrine of cy pres. In re Peabody's Estate, 154 Cal. 173, 97 P 184. That before testatrix' death a city to whose insane asylum a sum of money was bequeathed had ceased to permanently care for insane at the hospital and merely cared for them temporarily elsewhere held not to lapse legacy. Succession of Staub [La.] 48 S 766.

47. Larkin v. Wikoff [N. J. Eq.] 72 A 98.

48. Where testatrix contemplated erection of a building by a town with aid of funds by her bequeathed and such funds alone were insufficient for the building and provided the building should be for the homeless, sick and poor, legacy was for a specific charity, and disclosed no general charitable purpose, so that the town having refused to erect building doctrine of cy pres could not apply. Bowden v. Brown, 200 Mass. 269, 86 NE 351. When residue should amount to $75,000, income therefrom to be used for maintenance of "free hospital" in Biddleford, Maine, "where the unfortunate may receive good care and skillful treatment," held to provide for a general public charity capable of being carried out. Webber Hospital Ass'n v. McKenzie [Me.] 71 A 1032.

49. Where because of condition to support testator's daughters, should they ever be homeless, asylum donee could not receive the legacy. Succession of Thompson [La.] 49 S 651. Expression "$25,000 of principal may be used for building a hospital provided a sufficient sum is guaranteed for its maintenance" held not to attach any condition, trustee having discretion as to whether hospital should be built or fund merely expended in care of unfortunates. Webber Hospital Ass'n v. McKenzie [Me.] 71 A 1032.

50, 51. Klumpert v. Vrieland [Iowa] 121 NW 34.

52. See, also, Trusts, § 7.

Search Note: See notes in 3 C. L. 680; 14 L. R. A. 69.

See, also, Charities, Cent. Dig. §§ 18-33; Dec. Dig. § 20; 6 Cyc. 932-936; 5 A. & E. Enc. L. (2ed.) 916, 920.

53. Bequest to treasurer of a hospital to be used as she might deem best for interest of hospital held valid under Laws 1893, p. 1748, c. 701, as amended by Laws 1901, p. 751, c. 291, enabling all corporate as well as voluntary bodies there described to become beneficiaries of trusts. In re Beaver's Estate, 62 Misc. 155, 116 NYS 424.

54. Under Gen. St. 1902, §§ 3939, 4456, 4459, providing for incorporation of ecclesiastical societies with power to hold trust donations, among other things for care and improvement of their cemeteries, such society may accept a bequest to hold and manage same and apply part of income to keeping in order a lot in cemetery where testator's relatives are buried, and for walks, drives and fences, and remainder to repair and maintenance of edifice of society. Hewitt v. Wheeler School & Library [Conn.] 72 A 935. Capacity of a school corporation to take under a will is not affected by previous faults in administration of corporate powers in absence of any proceedings by state founded on usurpation of franchises. Id.

55. Asylum holding used funds, previously bequeathed by another, for erection of asylum for "protestant widows and orphans" only, could not accept bequest burdened with condition that testator's daughters, not widows or orphans, should be supported therein. Succession of Thompson [La.] 49 S 651. That a city had previously accepted money and land for a library building held not to incapacitate it from accepting from others another lot and building for library. City of Keene v. Eastman [N. H.] 72 A 213.

56. School and library corporation, organized with power to acquire by will property not exceeding $150,000 in value, held authorized to accept property worth $173,000, $150,000 limitation having been removed before testator's death. Hewitt v. Wheeler School and Library [Conn.] 72 A 935.

57. **Search Note:** See notes in 11 C. L. 609; 1 Ann. Cas. 541.

See, also, Charities, Cent. Dig. §§ 63-77;

lute or in trust to charity,[58] and who were intended as the beneficiaries,[59] are largely questions of intention. A provision for a "free" hospital does not necessarily prohibit the receipt of compensation from patients able to pay.[60]

§ 4. *Administration and enforcement.*[61]—See 11 C. L. 610—The donor may name the trustees and determine the manner of appointing successors,[62] failing in which the court may appoint trustees,[63] for a charitable trust will not be suffered to fail for want of trustee.[64] The terms of the particular gift and the circumstances of each case must be looked to in determining the manner in which the trust should be administered,[65] the propriety of holding funds for further accumulation,[66] and the right of claimants to compel direct distribution.[67] The principal or corpus of a trust may be held in one state and the income thereof expended in another.[68] A statute may be passed in aid of the administration of a bequest to a city for charitable uses.[69] The courts will not take jurisdiction of matters concerning the inter-

Dec. Dig. §§ 31-38; 6 Cyc. 949, 951-956, 961-965; 5 A. & E. Enc. L. (2ed.) 912, 915.

58. Request that residue be used in part for charity held to rest only on conscience of legatees. In re O'Regan's Will, 62 Misc. 592, 117 NYS 96.

59. Evidence held to show beneficiaries to be boards of home and foreign missions of Presbyterian church of which testatrix was member. In re Johnston's Estate [Iowa] 119 NW 275. Where testatrix made bequests to "women's work in foreign fields," and to "women's work in home lands," and to Protestant missionary work among colored people of South, evidence held to show beneficiaries to be "Women's Board of Missions of Interior," "Women's Home Missionary Union of Congregational Churches of Michigan," and "American Missionary Association," respectively. Gilchrist v. Corliss [Mich.] 15 Det. Leg. N. 971, 118 NW 938. Bequest to Art Museum of San Francisco held to "San Francisco Art Association" with which testator was familiar, there being no association with first mentioned name, and a certain "Park Museum," another claimant, not being extant when testator left city. Walter v. Walter, 60 Misc. 383, 113 NYS 465; Walter v. Frank, 118 NYS 268.

60. Free held to mean thrown open or made accessible to all for public use. Webber Hospital Ass'n v. McKenzie [Me.] 71 A 1032.

61. **Search Note:** See notes in 7 C. L. 631; 3 L. R. A. (N. S.) 227; 14 Id. 49; 4 Ann. Cas. 104; 8 Id. 1111; 11 Id. 160.

See, also, Charities, Cent. Dig. §§ 78-106; Dec. Dig. §§ 39-50; 6 Cyc. 957-970, 974-977; 5 A. & E. Enc. L. (2ed.) 897, 936.

62. Mason v. Bloomington Library Ass'n, 237 Ill. 442, 86 NE 1044.

63. Where testator named trustees but did not designate how successors should be appointed, equity court should, in case of trustees' failure to qualify, their resignation, death, or other disqualification, appoint successors (Mason v. Bloomington Library Ass'n, 237 Ill. 442, 86 NE 1044), but should exercise such power only on proof of vacancy and on notice to all parties interested (Id.).

64. Klumpert v. Vrieland [Iowa] 121 NW 34; Green's Adm'rs v. Fidelity Trust Co [Ky.] 120 SW 283. Executor may be held to act as trustee or court may appoint one. Webber Hospital Ass'n v. McKenzie [Me.] 71 A 1032.

65. Trustee held authorized and directed when trust estate should amount to $75,000 to pay over semi-annually to treasurer of a certain association for its use income from such fund and, if at that time association had not already built a hospital, $25,000 could be applied for that purpose if sufficient funds should be guaranteed by others to assure maintenance of hospital. Webber Hospital Ass'n v. McKenzie [Me.] 71 A 1032.

66. Where fund proved insufficient and it was problematical where necessary amount could be accumulated, trustees would not be instructed to hold fund for accumulation. Ely v. Attorney General, 202 Mass. 545, 89 NE 166.

67. Where funds were contributed and placed in hands of a committee to be used for relief of sufferers from a steamboat disaster but evidence did not disclose terms on which contributions were made, sufferers could not compel direct distribution of fund to themselves (Boenhardt v. Loch, 129 App. Div. 355, 113 NYS 747), especially where part of fund specifically designated for use of sufferers had been paid out (Id.).

68. Objection that domestic courts would not administer charity out of state held not applicable since domestic trustee could be required to pay income to trustee appointed by court of other state. Green's Adm'rs v. Fidelity Trust Co. [Ky.] 120 SW 283.

69. Purpose of St. 1890, p. 385, c. 422, reciting bequest to a city for a hospital, and creating a corporation to administer the trust, was to remove any doubt as to power of city to accept gift and execute trust and to provide means whereby city could administer same. Ware v. Fitchburg, 200 Mass. 61, 85 NE 951. Statute held not to take from city property which had vested under will (Id.), and even if such was its effect city could not complain, it having accepted its provisions (Id.). Not void as legislative exercise of judicial power. Id. Corporation created held agent of city in administration of trust and statute held valid as being within power of legislature to control cities in their public affairs. Id. Trustees authorized to pay money over to corporation. Id.

nal management of charitable associations unless it appears that financial or property rights are involved.[70]

Charter Party, see latest topical index.

CHATTEL MORTGAGES.

The scope of this topic is noted below.[71]

§ 1. What Constitutes a Chattel Mortgage, 744.
§ 2. Subject-Matter, 745. Title and Interest of Mortgagor, 745. Description of Property, 746.
§ 3. Consideration, 747.
§ 4. Fraudulent Conveyances, 747.
§ 5. The Instrument, Form, Execution and Delivery, 747. Alteration, Reformation and Construction, 747. Renewal Affidavits, 748.
§ 6. Filing or Recording and Notice of Title or Rights, 748.
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§ 8. Disposal and Use of the Property by the Mortgagor, 748.
§ 9. Liens and Priorities; Waiver, 749. Duration of Mortgage Lien, 749. Conflicting Liens, 749. Waiver, 750.
§ 10. Assignment of the Mortgage, 751.
§ 11. Payment and Discharge, 751.
§ 12. Enforcement, Foreclosure, Sale, 752.
§ 13. Redemption, 754.
§ 14. Other Remedies as Between the Parties, 754.
§ 15. Remedies as Against Third Persons, 754.

§ 1. *What constitutes a chattel mortgage.*[72]—See 11 C. L. 612—A chattel mortgage is commonly understood to be a written conveyance, given by way of security, containing a defeasance clause,[73] and operating to create a lien and not to convey title.[74] No particular form of words is necessary, the intention of the parties being controlling.[75] Hence, apparently absolute[76] or conditional[77] sales, evidenced by a bill of sale[78] or contract to sell,[79] and conditional assignments,[80] may be shown to be a chattel mortgage, and for this purpose parol evidence is usually admissible.[81] A

70. Houston v. Howze [Ala.] 50 S 266.

71. This topic deals with chattel mortgages only. Excludes mortgages on realty (see Mortgages:* Foreclosure of Mortgages on Land *). conditional sales (see Sales,* § 14), general trust deeds upon the property of corporations (see Corporations,* §§ 7c, 16c), such as railroads (see Railroads,* § 10), street railway (see Street Railways,* §§ 1, 4), and water (see Waters and Water Supply,* § 15) companies. The effect of a chattel mortgage as a preference or a fraudulent transfer (see Fraudulent Conveyances;* Bankruptcy,* §§ 3C, 10E; Assignments for Benefit of Creditors,* § 6), the law pertaining to the filing or the recording of the instrument and notice of prior rights and liens (see Notice and Record of Title *), and questions relating to interest (see Interest;* Usury *), limitations on the right to enforce the mortgage (see Limitation of Actions *), are treated fully in separate articles. As to mortgages on community property, see Husband and Wife,* § 4C; on homesteads, see Homesteads,* §§ 5, 6.

72. Search Note: See Chattel Mortgages, Cent. Dig. §§ 1-46, 67-77; Dec. Dig. §§ 1-9, 20-40; 6 Cyc. 986-998, 1014-1022, 1038, 1039, 1060; 5 A. & E. Enc. L. (2ed.) 950.

73. State v. Hurlburt [Conn.] 72 A 1079. Such is its meaning under the statute (Gen. St. 1902, § 1), unless the context of the mortgage indicates otherwise. Id.

Defeasance clause is provision that it shall be void if obligation secured be duly performed. State v. Hurlburt [Conn.] 72 A 1079. Defeasance is agreement to resell same property, for same price, made at same time, and between same parties, as mortgage. Dickinson v. Oliver, 195 N. Y. 238, 88 NE 44. Right to redeem is essential characteristic of mortgage. Id.

74. Ayer v. Hixson [Or.] 98 P 515.

75. Emerson v. Knapp, 129 App. Div. 827, 114 NYS 794. Clause in note reading, "One black horse named Bill is holding until this note is paid," held to be in effect a chattel mortgage as between the parties. Id.

76. Jones' Adm'r v. Jones' Adm'x, 33 Ky. L. R. 1036, 112 SW 650. Sale absolute on its face held to be mortgage where transfer was made as security for debt. Clarke v. McDowell's Adm'r, 33 Ky. L. R. 177, 109 SW 887.

77. Gigray v. Mumper [Iowa] 118 NW 393. Conditional sale taken with contract secured was properly treated as chattel mortgage. Walker v. Cooper, 150 N. C. 128, 63 SE 681. Court of equity may treat conditional sale contract as chattel mortgage, in order to protect purchaser from unconscionable forfeiture. Gigray v. Mumper [Iowa] 118 NW 393.

78. Cabrera v. American Colonial Bank, 29 S. Ct. 623. Bill of sale, providing that lumber conveyed was conveyed as security, held to be in effect a mortgage. First Nat. Bank v. Manser [Me.] 71 A 134. Bill of sale of chattels, with separate defeasance, is as clearly a mortgage as if defeasance formed part of bill of sale. Dickinson v. Oliver, 195 N. Y. 238, 88 NE 44.

79. Contract for sale of stock of goods was construed as absolute sale with mortgage back, where the debt was to be paid in monthly instalments, the seller having the right to resume possession on default and to treat payments as rent and to retain possession until purchase price was fully paid. Jones' Adm'r v. Jones' Adm'x, 33 Ky. L. R. 1036, 112 SW 650.

80. Dyer v. Schneider, 106 Minn. 271, 118 NW 1011.

81. Porto Rico Law of Evidence, § 101, making written instrument conclusive pre-

chattel mortgage is distinct, however, from an absolute sale,[82] a conditional sale,[83] an assignment,[84] a pledge,[85] or a mere provision, in another instrument, for security,[86] or for reservation of title.[87] A chattel deed of trust may be made to answer the purpose of a chattel mortgage.[88]

§ 2. *Subject-matter.*[89] *What may be mortgaged.* See 11 C. L. 612—As a general rule, any assignable personal property may be mortgaged.[90] This ordinarily includes such things as growing crops,[91] future acquired property,[92] and wages to be earned in the future under an existing definite contract of employment.[93] At common law, nothing can be mortgaged which is not in existence, but equity may now apply a different rule,[94] unless the thing mortgaged be a mere expectancy dependent on contingencies.[95] A mortgage on property not yet in existence is a mere executory contract, however, and is binding only as between the parties and when the property shall have come into existence.[96]

Title and interest of mortgagor. See 11 C. L. 614—It is essential that the mortgagor be the owner of the property[97] or of a mortgageable interest therein,[98] or that he have special authority from the owner to execute the mortgage,[99] and a

sumption of facts recited, held not to apply. Cabrera v. American Colonial Bank, 29 S. Ct. 623.

82. Instrument, stating that owner turned over chattels to cover checks drawn by owner, held to be sale and not chattel mortgage. Leak v. Bank of Wadesboro, 149 N. C. 17, 62 SE 733.

83. Sale of household furniture, title to remain in seller until payment, with right in seller to retake on default, held to be conditional sale and not chattel mortgage. Higdon v. Garrett [Ala.] 50 S 323.

84. Written invalid assignment of future wages by way of security held not to be chattel mortgage. State v. Hurlburt [Conn.] 72 A 1079.

85. Transaction is pledge and not mortgage, whereby neither absolute nor defeasible title to personalty is transferred by owner, but only possession with power to sell if default be made in payment of note secured. Grand Ave. Bank v. St. Louis Union Trust Co., 135 Mo. App. 366, 115 SW 1071.

86. Provision in lease that improvements should be considered as personalty and be security for payment of rent held not to be chattel mortgage. Niagara Falls Hydraulic Power & Mfg. Co. v. Schermerhorn, 132 App. Div. 442, 117 NYS 10.

87. Stipulation in farm contract reserving title to crop in landlord held not to be chattel mortgage. McFadden v. Thorpe Elevator Co. [N. D.] 118 NW 242.

88. Scott v. Vogel-Boul Soda Water Co., 134 Mo. App. 302, 114 SW 44; Turberville v. Simpson [Miss.] 47 S 784.

89. **Search Note:** See notes in 3 C. L. 684; 7 Id. 636; 11 Id. 613; 14 L. R. A. 126; 15 Id. 65; 18 Id. 298; 23 Id. 449; 1 L. R. A. (N. S.) 451; 14 Id. 431; 9 Ann. Cas. 1151.

See, also, Chattel Mortgages, Cent. Dig. §§ 9, 47-74, 82-109, 141, 184-218; Dec. Dig. §§ 11-26, 41-56, 100-137; 6 Cyc. 1014-1052, 1060-1062, 987-999; 7 Id. 55; 5 A. & E. Enc. L. (2ed.) 974.

90. Dyer v. Schneider, 106 Minn. 271, 118 NW 1011.

91. Souza v. Lucas [Cal. App.] 100 P 115.

92. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 63 SE 1045; American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176; Macdonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801; Adams v. Young, 200 Mass. 588, 86 NE 942. At common law nothing can be mortgaged which does not belong to mortgagor at time of execution of mortgage, but equity will give effect to mortgage on future acquired property. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 63 SE 1045. Under Rev. Civ. Code, § 2024, mortgage on crop to be grown on land which the mortgagor afterwards leased held valid. Iverson v. Soo Elevator Co. [S. D.] 119 NW 1006.

93. Dyer v. Schneider, 106 Minn. 271, 118 NW 1011. But such wages cannot be mortgaged where there is no limit as to amount or time. Id. Such wages cannot be mortgaged where there is no existing contract of employment, nor persons designated in mortgage from whom future earnings were to accrue. Id.

Assignment of wages: See Master and Servant, § 2.

94. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 63 SE 1045.

95. Mere possibility of subsequent acquisition of property was held not proper to be mortgaged. Dyer v. Schneider, 106 Minn. 271, 118 NW 1011.

96. Macdonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801.

97. Mortgage not being given by owner of property, mortgagee acquired no rights against owner. Porter v. Stuart [Mass.] 89 NE 118.

98. Cropping contract whereby party furnishes labor only and is to receive half of crop as compensation held not to give him a mortgageable interest in any part of crop before it is gathered. Vandegrift v. Hawkins [Ala.] 49 S 754. Evidence held to show that mortgagor had such interest in property as gave him right to mortgage same. Bernick v. McClure, 107 Minn. 9, 119 NW 247.

99. Mortgage given by associates of complainant and authorized by him, held valid, although it did not have his signature attached. The Seattle [C. C. A.] 170 F 284. **Burden of proof** is on mortgagee to show

mortgage given by one shown to be without right or title is a nullity,[1] but authority to mortgage may be implied [2] from the facts as where the mortgagor has been intrusted with the possession, title and indicia of ownership of the property,[3] and the mortgagor's ownership of the property will be presumed until the contrary is shown.[4] An agent, as such, has no right to mortgage the property of his principal.[5]

Description of property. See 11 C. L. 614—The property must be actually identified by the parties at the time of the execution of the mortgage.[6] As between the parties, it is sufficient to so identify the chattels that the mortgagee can say with reasonable certainty what property is subject to his lien.[7] As against third persons, the mortgage must point out the property so that it may be identified by them with the aid of inquiries suggested by the mortgage itself.[8] Any insufficiency of description is cured by actual knowledge of the identity of the mortgaged property on the part of the parties affected.[9] Questions as to what is covered by the description,[10] and as to whether after acquired property,[11] or increase of the prop-

authority of agent to mortgage his principal's property. Roberts v. Little [N. D.] 120 NW 563.

1. Blair v. Williams [Ala.] 49 S 71.

2. Held that mortgagor in possession had right to mortgage one-half interest in lumber subject to existing liens. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176.

3. First Nat. Bank v. Kissare [Okl.] 98 P 433. Owner of cattle, by intrusting them to another and by placing the other's brand on them, gave him right to mortgage them. Id.

4. Dierling v. Pettit [Mo. App.] 119 SW 524.

5. Roberts v. Little [N D.] 120 NW 563.

6. Ayre v. Hixson [Or.] 98 P 515.

7. John Breuner Co. v. King, 9 Cal. App. 271, 98 P 1077. Description which showed where property was located, that it was all of a certain kind and not an indefinite part of it, held sufficient. Id. "One black mare mule, six years old, with muley nose; one bay mare mule, six years old," held sufficient. Dierling v. Pettit [Mo. App.] 119 SW 524.

8. Mills Guy Co. v. Dickerson [Miss.] 48 S 404; First Nat. Bank v. Rogers [Okl.] 103 P 582; Reeves & Co. v. Brown [Kan.] 102 P 840; Dierling v. Pettit [Mo. App.] 119 SW 524. Description complying with above requirement is prima facie sufficient as matter of law. Dierling v. Pettit [Mo. App.] 119 SW 524. It is not necessary that property should be so described as to be capable of being identified by written recital or name used to designate it in mortgage. Id.

Description held sufficient: "One black horse mule about five years old and about 15 hands high, and one brown horse mule about 8 years old and about 16½ hands high." Powell v. Tinsley [Mo. App.] 119 SW 47. "The product and proceeds of my 1907 crop and all my future crops, until the above note is paid," held sufficient although it did not describe location of crops. First Nat. Bank v. Rogers [Okl.] 103 P 582. Where property which might have rendered description indefinite had been removed from premises before controversy arose. State Bank of West Union v. Keeney, 134 Mo. App. 74, 114 SW 553. Mortgage held not necessarily invalid although it appeared that acreage of crop mortgaged was not stated with exact correctness. Reeves & Co. v. Brown [Kan.] 102 P 840.

Description held insufficient: Description that was so vague and uncertain as to afford no notice to third parties. Dyer v. Schneider, 106 Minn. 271, 118 NW 1011. Description read "One black mare mule, six years old, with muley nose; one bay mare mule six years old" and contained no word as to where mules were at time or where they were to be located, or in whose possession they were to remain, nor did it appear whether mortgagor owned these mules only or owned or had in his possession other mules. Dierling v. Pettit [Mo. App.] 119 SW 524. Description of 54 cows, when it was shown that there were at least 64 cows of same description from which they were not distinguished or excluded. Sigel-Campion Live Stock Co. v. Holly, 44 Colo. 580, 101 P 68.

9. Fenby v. Hunt [Wash.] 101 P 492.

10. The term **"choses in action"** held not to include by intention mortgagee's right of action against mortgagor for his own act of conversion. Macdonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801. Mortgage covering choses in action coming into existence after default held not intended to include choses in action coming into existence before default. Id. Term **sawmill** held not to include other property specifically mentioned in mortgage, although without such mention it would have included them. McGregor v. Port Huron Engine & Thresher Co. [Tex. Civ. App.] 120 SW 1128. Attempted mortgage on material **property of corporation** by stockholder held to have been intended to cover mortgagor's interest. Thompson v. Grace [Ark.] 120 SW 397.

11. First Nat. Bank v. Manser [Me.] 72 A 134; Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 63 SE 1045. Intention to include after-acquired property was manifest by mortgage of "all the property—wherever the same is situated, now owned by" the mortgagor, "or shall be owned during the continuance of the liability hereinafter mentioned." Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 63 SE 1045. Mortgage covering goods thereafter to be

erty described,[12] is included, rest largely in the intention of the parties. A mortgage will not be construed to include property not in some manner mentioned therein.[13] Parol evidence is admissible to show that a particular article is included within the general words of description, but not to supply an essential word which has been omitted.[14] The burden of proving the identity of the property mortgaged is upon the mortgagee.[15] The sufficiency of the description[16] and the identity of the property mortgaged[17] are jury questions.

§ 3. *Consideration.*[18]—See 11 C. L. 615—The consideration determines the measure of the mortgagee's interest in the mortgaged property.[19] Among the things which will constitute sufficient consideration are pre-existing debts,[20] future, contingent liabilities,[21] future advances limited in amount,[22] though optional,[23] and the payment of debts owed by the mortgagor to a third party.[24] The question of whether the debt secured is based on honest consideration is for the jury.[25]

§ 4. *Fraudulent conveyances.*See 7 C. L. 638—This subject is fully treated in other articles.[26]

§ 5. *The instrument, form, execution and delivery.*[27]—See 11 C. L. 616—Delivery and acceptance of a chattel mortgage are essential to give it validity.[28]

*Alteration, reformation and construction.*See 11 C. L. 617—The law in force when a mortgage is made is a part of the contract.[29] A mortgage will be construed so as to do equity between the parties.[30] Due regard will be given, for the manifest intention of the parties, in the determination of disputes with reference to particular matters,[31] such as the debt secured[32] or of the property covered.[33] The inter-

purchased covered after-acquired merchandise. Adams v. Young, 200 Mass. 588, 86 NE 942.

12. Mortgage does not cover increase unless specified. Ayre v. Hixson [Or.] 98 P 515.

13. Mills Guy Co. v. Dickerson [Miss.] 48 S 404. Mortgage referring only to property as that of wife held not to necessarily include husband's property, although husband also signed mortgage. Id.

14. Dierling v. Pettit [Mo. App.] 119 SW 524.

15. In re Goldsmith, 168 F 779. Mortgagee was required to prove what cattle were included. Kime v. Bank of Edgemont [S. D.] 119 NW 1003.

16. Sigel-Campion Live Stock Co. v. Holly, 44 Colo. 580, 101 P 68; Reeves & Co. v. Brown [Kan.] 102 P 840.

17. Mills Guy Co. v. Dickerson [Miss.] 48 S 404; Weber Implement Co. v. Dunard [Mo. App.] 120 SW 608. So held where there was variance between description contained in note and in mortgage. Weber Implement Co. v. Dunard [Mo. App.] 120 SW 608.

18. **Search Note:** See note in 19 L. R. A. 590.

See, also, Chattel Mortgages, Cent. Dig. §§ 78-82; Dec. Dig. § 32; 6 Cyc. 1010-1022; 5 A. & E. Enc. L. (2ed.) 964.

19. Dewey v. Bobbitt [Kan.] 100 P 77.

20. Kelly v. Ryan [Iowa] 118 NW 901. In this case agreement was made at time debt was contracted, that mortgage should be thereafter given, and such debt was not otherwise secured. Id. Validity of mortgage taken for pre-existing debt was not affected by fact that mortgagee knew mortgagor was indebted to third party. Id. "Mortgagee in good faith" as used in statute (P. L. 1902, p. 487) includes mortgagee whose mortgage has been executed to secure pre-existing indebtedness. Vanaman v. Fliehr [N. J. Eq.] 71 A 692.

21. Damages for breach of contract entered into between mortgagor and mortgagee. Walker v. Cooper, 150 N. C. 128, 63 SE 681.

22. Such advances were to be money and merchandise. Souza v. Lucas [Cal. App.] 100 P 115.

23. The Seattle [C. C. A.] 170 F 284.

24. Payment of existing mortgage on mortgaged property. Walker v. Cooper, 150 N. C. 128, 63 SE 681.

25. So held, as relating to rights of subsequent mortgagee. Weber Implement Co. v. Dunard [Mo. App.] 120 SW 608.

26. See Fraudulent Conveyances; Bankruptcy, §§ 3B, 3C, 10E; Assignments for Benefit of Creditors, § 6.

27. **Search Note:** See notes in 7 L. R. A. (N. S.) 418; 14 A. S. R. 239.

See, also, Chattel Mortgages, Cent. Dig. §§ 83-149, 175-218; Dec. Dig. §§ 41-80, 95-132; 6 Cyc. 987-1010, 1014-1037, 1060-1062, 1092-1121; 5 A. & E. Enc. L. (2ed.) 953.

28. Feuby v. Hunt [Wash.] 101 P 492.

29. Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 P 1082.

30. Attempted mortgage on material property of corporation by stockholder was construed as an equitable mortgage on mortgagor's stock. Thompson v. Grace [Ark.] 120 SW 397.

31. Intent of parties is determined from the writing in light of surrounding circumstances under which it was executed, it being permissible to show purpose by **parol evidence.** Stalker v. Hayes, 81 Conn. 711, 71 A 1099. In this connection, the general rules with reference to construction of written instruments apply. First Nat. Bank

pretation of a renewal mortgage may be aided by a consideration of the original mortgage.[34] Stipulations for the payment of attorney's fees must be strictly construed in favor of the mortgagor.[35]

The validity of a chattel mortgage will not be affected by an immaterial alteration, either in the mortgage itself,[36] or in the note secured by it.[37] A substitution of other property for the property mortgaged may be effected by a delivery of such other property to the mortgagee.[38]

Renewal affidavits. See 11 C. L. 617

§ 6. *Filing or recording and notice of title or rights.* See 7 C. L. 640—Matters relating to the filing and recording of chattel mortgages, and the doctrine of bona fide purchasers, are treated in a separate article.[39]

§ 7. *Title and possession before default.*[40]—See 11 C. L. 617—The validity of a provision in a mortgage stipulating that the mortgagee may take possession of the property before default is generally recognized.[41]

§ 8. *Disposal and use of the property by the mortgagor.*[42]—See 11 C. L. 616—At common law a real or fictitious delivery of the chattels to the mortgagee is necessary,[43] which requirement, in a more or less limited form, still obtains in some states,[44] but the primary purpose thereof being to protect third parties, as between the parties the validity of the mortgage is not affected by failure to comply with statutory substitutes for such delivery,[45] and the effect of a stipulation for the retention of the property by the mortgagor is nullified by actual delivery to the

v. Manser [Me.] 71 A 134. For rules in reference to construction of written instruments generally, see Contracts, § 4.

32. Debt will not include after incurred liability unless such intention be clearly manifest from terms of mortgage. First Nat. Bank v. Manser [Me.] 71 A 134.

33. See ante, § 2, Description of Property.

34. Held not error to admit in evidence original mortgage of which mortgage claimed under is renewal. Maddox v. Dunklin [Ala.] 60 S 277.

35. Turberville v. Simpson [Miss.] 47 S 784. Attorney's fee was allowed on sums collected through efforts of attorney, but disallowed on sums not so collected. Id.

36. Alteration having effect merely to make plainer the intended description was not material. Benton v. Clemmons [Ala.] 47 S 582. Alteration having effect to make available additional testimony was not material, on objection of mortgagor or his privies, in contest on identity of mortgaged property. Id.

37. Addition of signature of wife to note was immaterial. Souza v. Lucas [Cal. App.] 100 P 115.

38. Constructive, if not an actual, delivery of lumber was affected by mortgagor pointing out lumber and telling mortgagee to take charge of it and sell it. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176.

39. See Notice and Record of Title.

40. **Search Note:** See Chattel Mortgages, Cent. Dig. §§ 198-218; Dec. Dig. §§ 116-132; 5 A. & E. Enc. L. (2ed.) 986.

41. Such agreement held not bad as to other creditors. Martin v. Holloway [Idaho] 102 P 3.

42. **Search Note:** See notes in 15 A. S. R. 912; 96 Id. 682.

See, also, Chattel Mortgages, Cent. Dig. §§ 294-305, 465-495; Dec. Dig. §§ 164-170; 216-234; 7 Cyc. 14-35, 47-51, 61-65, 90, 91; 5 A. & E. Enc. L. (2ed.) 995.

43. Donoven v. Travers, 122 La. 468, 47 S 769.

44. Under P. L. 1902, p. 487, § 4, an affidavit stating the consideration is required to be annexed to a chattel mortgage, where such mortgage is not accompanied by an immediate delivery of the property, followed by an actual and continued change of possession. Vaneman v. Flichr [N. J. Eq.] 71 A 692. In the absence of fraud, an affidavit substantially complying with this statutory requirement is sufficient. Breit v. Solferino [N. J. Law] 72 A 79. Mortgage and affidavit should be read together to determine whether there has been compliance with statute. Simpson v. Anderson [N. J. Err. & App.] 73 A 493. In case of bona fide chattel mortgage, a statutory affidavit (P. L. 1902, p. 487) which states the consideration with substantial truth is sufficient, it being immaterial that it is artificially drawn and not technically precise. Howell v. Stone [N. J. Err. & App.] 71 A 914. Where the consideration was an amount paid out to relieve mortgagor from certain mortgage liability, it was sufficient to designate such amount and not necessary to state the consideration of the mortgage from which mortgagor was released. Simpson v. Anderson [N. J. Err. & App.] 73 A 493. Held that affidavit was not insufficient because of use of word "whereas" where the word "whereas" and all that followed it was preceded by direct and positive statement "that the consideration is" as disclosed by recital following. Id.

45. As between the parties the mortgage may be valid although the statutory **affidavit of consideration** is false. Tingley v. International Dynelectron Co. [N. J. Eq.] 70 A 919. As to effect of failure to comply with requirements as to **filing and re-**

mortgagee.[46] The sufficiency of delivery in a particular case must, of course, be determined from the acts of the parties in such connection.[47] A mortgage permitting the mortgagor to sell the mortgaged property to his own use is fraudulent per se,[48] but a sale of the mortgaged property by the mortgagor without the knowledge or consent of the mortgagee does not invalidate the mortgage as to other creditors.[49] An agreement, valid between the parties, may be made to the effect that the mortgagor shall remain in possession and dispose of the mortgaged property and apply all or part of the proceeds to the payment of the mortgage debt.[50]

§ 9. *Liens and priorities; waiver.*[51]—See 11 C. L. 619

Duration of mortgage lien. See 11 C. L. 619

Conflicting liens. See 11 C. L. 619—The effect upon priority, of notice and record, and of securing possession of the mortgaged property, is treated elsewhere.[52] The rights of an innocent purchaser,[53] mortgagee, or other lien holder, take precedence over a prior, invalid mortgage,[54] or one for which another mortgage has been substituted after the adverse rights have accrued.[55] A chattel mortgage is ordinarily inferior to a prior vendor's lien created by a bona fide sale,[56] especially when the mortgagee had knowledge of the existence of such lien.[57] A purchase price mortgage may take precedence over a landlord's lien subsequently accruing against the same property.[58] Usually a landlord's lien for rents[59] and advances[60] is superior to a subsequent mortgage. In Louisiana a lien is given on crops for plantation supplies that is superior to any mortgage lien not given for such purpose.[61]

cording, see Notice and Record of Title, § 2C.

46. Possession by mortgagee cured effect of stipulation that mortgagor might retain possession of and sell mortgaged property. **Martin v. Holloway** [Idaho] 102 P 3. Such mortgage held good as against subsequently attaching creditor. Id.

47. Delivery held sufficient where mortgagee received key to storehouse and inspected mortgaged property, although mortgagor without knowledge of mortgagee retained another key, it not appearing that mortgagor subsequently visited storeroom or exercised control over goods. In re Cole, 171 F 297.

48. Gilbert v. Peppers [W. Va.] 64 SE 361. Express or implied agreement that mortgagor shall remain in possession of and dispose of mortgaged stock of goods will render mortgage void as to other creditors. Gillespie v. McCleskey [Ala.] 49 S 362.

49. Glover v. Ehrlich, 62 Misc. 245, 114 NYS 992.

50. Martin v. Holloway [Idaho] 102 P 3. Rev. Codes § 3409, recognizes right of parties to agree that mortgagor shall remain in possession. Id.

Complaint, charging that defendant sold or otherwise disposed of mortgaged property, without charging even in general terms that such selling was fraudulent or unlawful, held insufficient. Alexander v. West [Ga. App.] 64 SE 288.

51. Search Note: See notes in 7 C. L. 645; 50 L. R. A. 714; 6 L. R. A. (N. S.) 940; 11 Id. 869; 12 Id. 310; 18 A. S. R. 770; 30 Id. 324; 4 Ann. Cas. 487; 11 Id. 1043.

See, also, Chattel Mortgages, Cent. Dig. §§ 219-271; Dec. Dig. §§ 133-157; 6 Cyc. 1020, 1070-1079; 7 Id. 37-50; 4 A. & E. Enc. P. & P. 528.

52. See Notice and Record of Title, § 2.

53. Subsequent mortgagee held to be innocent where he had no knowledge of existence of prior mortgage. Tingley v. International Dynelectron Co. [N. J. Eq.] 70 A 919. Purchaser was innocent when prior mortgage was destroyed without his inducement or knowledge and with consent of mortgagee. Id.

54. Prior mortgage held invalid by reason of affidavit attached thereto being false. Tingley v. International Dynelectron Co. [N. J. Eq.] 70 A 919. Lien of landlord for rent took precedence over prior invalid mortgage. Id.

55. Mortgage substituted for another mortgage released of record, and of which it purports to be a renewal, held inferior. South Omaha Nat. Bank v. McGillin [Neb.] 119 NW 665. Held not to have been mere correction, but substitution of new mortgage, where only part of first mortgage was used and balance rewritten, and mortgage executed as new paper. Tingley v. International Dynelectron Co. [N. J. Eq.] 70 A 919.

56. Parker v. Payne [Miss.] 48 S 835. It is not inferior, however, unless seller was in fact the owner, and unless he shall have made bona fide sale to bona fide purchaser by which sale actual possession of the property was changed. Id. Right of mortgagee cannot be defeated by mere constructive sale and resale. Id.

57. Zacharia v. M. C. Cohen Co. [Iowa] 119 NW 136.

58. Anundson v. Standard Printing & Mfg. Co. [Iowa] 118 NW 789.

59. Lien given for rent is superior to lien of subsequent mortgage on property having protection of leased premises. Gillespie v. McCleskey [Ala.] 49 S 362.

60. Ferniman v. Nowlin [Ark.] 120 SW 378. Landlord's lien for supplies advanced to tenant to make crop held superior. Id.

61. Under Civ. Code La. art. 3217. **Lowenberg v. Lewis-Herman Co.** [Miss.] 48 S 517.

The lien given by a mortgage for future advances will be prior to the lien given by a second mortgage, when such advances are made without actual notice of the existence of such second mortgage.[62] A chattel mortgage takes priority over a subsequent attachment [63] and the costs of a sale under an execution inferior in right.[64] In Colorado a chattel mortgage given between the time that an execution is issued and the levy made is inferior to such execution.[65] Where successive chattel mortgages are given on less than the whole of an undivided number of things, rights of selection are given which take priority in the same order as the mortgages.[66] Priorities are usually fixed by the law existing when the mortgage was executed.[67]

As a general rule, the rights of a mortgagee will not be affected by any proceedings, to which he is not made a party, instituted by the holder of an inferior lien,[68] or by his failure to take immediate possession upon the levy of an execution upon the mortgaged property,[69] or by any act of the mortgagor [70] or of a third party,[71] subsequent to the execution of the mortgage. The rights of the mortgagees as affected by the subsequent bankruptcy of the mortgagor are treated elsewhere.[72]

Waiver. See 11 C. L. 620—A mortgagor may waive his lien or priority rights by oral agreement,[73] by conduct inconsistent with an intention to enforce it,[74] by delay in objecting to sale of the mortgaged property by the mortgagor,[75] or by a statement, to the injury of a third party, that his debt had been paid.[76] But a party does not waive his mortgage lien by resorting to methods other than foreclosure to collect the note secured.[77] Before an agreement to waive will be implied, an intention to waive must be clearly apparent.[76, 79]

62. In such case, recording of second mortgage does not import knowledge to first mortgagee. The Seattle [C. C. A.] 170 F 284.

63. State Bank of West Union v. Keeney, 134 Mo. App. 74, 114 SW 553.

64. Mortgagee is entitled to full amount for which property sold without any deductions whatever, for costs or otherwise, when such amount is insufficient to pay his claim. McKenna Bros. v. Brown [R. I.] 71 A 450.

65. Under statute (2 Mills Ann. St. § 2669), although mortgagee took possession of property before levy was made. Lewis v. Smith [Colo.] 101 P 762.

66. This rule is not affected by assignment of mortgages. South Omaha Nat. Bank v. McGillin [Neb.] 119 NW 665.

67. Law determining priorities passed subsequent to execution of mortgage held not to apply. Corbitt v. Nebern [Ga.] 64 SE 479.

68. Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 P 1082.

69. Lange v. Cole, 239 Ill. 88, 87 NE 880.

70. Assignment by mortgagor, with consent of mortgagee, of recorded lease, held not to affect mortgagee's rights under mortgage clause contained in such lease. Stees v. Lind, 106 Minn. 485, 119 NW 67.

71. Mortgagee's rights were not affected by attempted invalid levy of attachment. Souza v. Lucas [Cal. App.] 100 P 115. Tortious removal of mortgaged crops did not impair mortgagee's rights. Id.

72. See Bankruptcy, §§ 10C, 10D.

73. Catlett v. Stokes [S. D.] 121 NW 103. See post, § 11.

74. Act of mortgagee in petitioning in receivership proceedings for allowance of his claim was inconsistent with such intention. Dilley v. Jasper Lumber Co. [Tex. Civ. App.] 114 SW 878. Participation by mortgagee in sale under prior mortgage was conduct such as waived his mortgage. Weber Implement Co. v. Dunard [Mo. App.] 120 SW 608. Mortgagee waived lien as to third parties by taking possession of property for breach and then subsequently redelivering property to mortgagor. Lange v. Cole, 140 Ill. App. 545. Lien for payment of instalments not yet due was **not waived** by taking possession of property and afterwards releasing it to mortgagee upon his payment of amount due. Lange v. Cole, 239 Ill. 88, 87 NE 880. Held that mortgage was not waived by mortgagee's permitting sale of property after default without foreclosing, and by endeavoring to collect debt from transferee and subsequently selling property. Niccloy v. Treasure, 115 NYS 1030.

75. Where mortgagee had notice of sale within 5 or 6 days, at which time purchaser could have protected himself by retaining part of purchase price yet unpaid, and delayed some three months to object, he was held to have waived his lien. Fillon v. Stewart [Wash.] 101 P 370.

76. Third party, relying on such statement, accepted subsequent mortgage to his injury. Powell v. Tinsley [Mo. App.] 119 SW 47.

77. Lien not waived by resort to attachment or other process. Kansas City Live Stock Commission Co. v. Bank of Hamlin [Kan.] 101 P 617.

78, 79. Mortgagee, with knowledge of fact that mortgaged property had been sold to

§ 10. *Assignment of the mortgage.*[80]—See 11 C. L. 020—An assignee for value [81] takes such interest, as the mortgagee had,[82] subject to the rules applicable to the assignment of negotiable and non-negotiable instruments.[83] An agreement to divide the proceeds of a foreclosure sale is not an assignment of the mortgage.[84, 85]

§ 11. *Payment and discharge.*[86]—See 11 C. L. 820—Payment of the indebtedness [87, 88] releases the mortgage lien. The debt itself may be canceled by an unauthorized sale by the mortgagee,[89] or a disposition of the property by the mortgagee otherwise than as provided by statute.[90] As a general rule, however, an appropriation of the mortgaged property by the mortgagee to his own use will discharge the debt only up to the value of such property.[91] The debt is not necessarily, fully discharged by the receipt of the mortgaged property by the mortgagee,[92] nor, in the absence of statute to such effect, is it discharged by a change in the locality or possession of the mortgaged property.[93] The rule that the foreclosure of a chattel mortgage will discharge the debt to the extent of the proceeds of the mortgage sale has been held not to apply where such proceeds were paid over to the mortgagor's trustee in bankruptcy.[94] The taking of a second chattel mortgage to secure the same debt, secured by the first mortgage upon the same property, does not necessarily operate as a satisfaction and release of the first mortgage,[95] unless such first mortgage be voluntarily destroyed and the second mortgage be accepted as a substitute.[96] The validity of a release for value will not be affected by a conversion of the property before the execution of such release.[97] A release of the mortgage is prima facie evidence of payment, but is open to impeachment.[98] The question of payment is for the jury.[99]

assignee, would not waive his lien on the property by consenting that lease, which mortgage was given to secure, should be assigned. Stees v. Lind, 106 Minn. 485, 119 NW 67.

80. **Search Note:** See Chattel Mortgages, Cent. Dig. §§ 459-465; Dec. Dig. §§ 203-215; 7 Cyc. 55-61; 5 A. & E. Enc. L. (2ed.) 1018.

81. Agreement to hold mortgagee harmless on appeal bond held sufficient consideration for assignment. Powell v. Tinsley [Mo. App.] 119 SW 47.

82. Assignee may assert estoppel against prior mortgagee. Powell v. Tinsley [Mo. App.] 119 SW 47. Assignee of mortgage, by taking possession of **after-acquired goods** covered by mortgage, held to have acquired a good title to them. Adams v. Young, 200 Mass. 588, 86 NE 942.

83. Dewey v. Bobbitt [Kan.] 100 P 77.

84, 85. Tabor Mfg. Co. v. Lovell, 37 Pa. Super. Ct. 592.

86. **Search Note:** See Chattel Mortgages, Cent. Dig. §§ 496-514; Dec. Dig. §§ 235-248; 7 Cyc. 66-76; 5 A. & E. Enc. L. (2ed.) 1019.

87, 88. Jackson v. Erkins, 131 App. Div. 301, 116 NYS 385. Mortgage was discharged by payment of indebtedness covered, irrespective of other existing debts. First Nat. Bank v. Manser [Me.] 71 A 134.

89. Under St. 1898, § 2316a, debt is canceled by private sale by mortgagee. Minneapolis Threshing Mach. Co. v. Haug, 136 Wis. 350, 117 NW 811.

90. The statute (St. 1898, § 2316a) prohibits mortgagee from selling property or removing it from county within five days from time when it is actually taken. Minneapolis Threshing Mach. Co. v. Haug, 136 Wis. 350, 117 NW 811. "Actually taken" as used in this statute means corporal taking out of control and possession of mortgagor. Id.

91. This is preferable to rule prevailing in some states, that entire debt will be discharged. Priddy v. Miners' & Merchants' Bank, 132 Mo. App. 279, 111 SW 865.

92. Stalker v. Hayes, 81 Conn. 711, 71 A 1099. Effect of such act to constitute payment depends upon the intent of the parties. Priest v. Hodges [Ark.] 118 SW 253.

93. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596.

94. Priddy v. Miners' & Merchants' Bank, 132 Mo. App. 279, 111 SW 865.

95. Adams-Burks-Simmons Co. v. Johnson [Tex. Civ. App.] 113 SW 176.

96. Mortgage was discharged by its voluntary destruction and the substitution of a new mortgage. Tingley v. International Dynelectron Co. [N. J. Eq.] 70 A 919.

97. Catlett v. Stokes [S. D.] 121 NW 103. Not affected where there was executed consideration for release, such as substitution of other property for that released. Id.

98. Brown v. Koffler, 133 Mo. App. 494, 113 SW 711. Same rule applies as to receipt. Id. Such impeachment may be had in **proceedings** at law in Missouri to foreclose, and direct proceedings are unnecessary. Id. Plaintiff may impeach such release under a reply which is a general denial. Id. Release may be impeached by **parol evidence** showing no payment was made. Id. Cancellation of mortgage held not conclusive evidence of **consideration for cancellation.** Sims v. Scheussler [Ga. App.] 64 SE 99.

99. Weber Implement Co. v. Dunard [Mo. App.] 120 SW 608.

Questions of payment and tender generally are treated elsewhere.[1]

§ 12. *Enforcement, foreclosure, sale.*[2]—See 11 C. L. 622—The mortgagee has his option either to collect his debt by an action at law or by a proceeding to foreclose the mortgage.[3] By default or a breach of conditions,[4] the mortgagor forfeits his conditional title and right of possession,[5] and such title [6] and right [7] then vest unconditionally in the mortgagee. A junior mortgagee, after the conditions of his mortgage have been broken,[8] is entitled to possession against all except the senior mortgagee.[9] If a mortgagee cannot secure such possession without a breach of peace, however, he must resort to legal proceedings,[10] but where the mortgage is in the form of a trust deed the proper party plaintiff is the trustee.[11]

If the foreclosure sale is at public auction, a fair opportunity for competitive bids must be afforded.[12] The mortgagee may usually dispose of the goods at private sale without incurring a liability for conversion,[13] but a wrongful disposition of the property by the mortgagee may render him liable for actual and penal damages.[14] Possession of the property by the mortgagee is not always essential to the validity of the sale.[15] The rights of a purchaser at such sale are dependent upon the validity of the mortgage.[16] Equity may, upon the usual grounds enjoin [17] or set aside [18] an improper sale. Where a sale has been enjoined, it is proper for the property to be placed in the hands of a receiver pending trial.[19] Under the usual

1. See Payment and Tender.

2. **Search Note:** See notes in 5 C. L. 585; 15 L. R. A. 1164.
See, also, Chattel Mortgages, Cent. Dig. §§ 515-580; Dec. Dig. §§ 249-292; 7 Cyc. 92-121.

3. Stalker v. Hayes, 81 Conn. 711, 71 A 1099.

4. Surrender, by mortgagor, of mortgaged property to another was a breach of conditions of mortgage, such as entitled mortgagee to possession. Swartz v. Gottlieb-Bauern-Schmidt-Straus Brew. Co., 109 Md. 393, 71 A 854.

5. Niccloy v. Treasure, 115 NYS 1030.

6. Scott v. Vogel-Boul Soda Water Co., 134 Mo. App. 302, 114 SW 44; Willis v. Whittle [S. C.] 64 SE 410; James Music Co. v. Hankwitz, 137 Wis. 302, 118 NW 806.

7. Scott v. Vogel-Boul Soda Water Co., 134 Mo. App. 302, 114 SW 44; Willis v. Whittle [S. C.] 64 SE 410; James Music Co. v. Hankwitz, 137 Wis. 302, 118 NW 806. Especially where mortgage provides that he shall be entitled to possession whenever he feels himself insecure. Swartz v. Gottlieb-Bauern-Schmidt-Straus Brew. Co., 109 Md. 393, 71 A 854. Right of mortgagee to possession is not conditioned by his payment of difference between value of property and amount of mortgage debt. Wagoner Nat. Bank v. Welch [C. C. A.] 164 F 813. Mortgagee rightfully in possession after default has right to retain possession until debt is paid by sale or otherwise. Id.

8. Levy of attachment on property by creditor was held to be breach of condition that mortgagor would not sell or attempt to sell mortgaged property. State Bank of West Union v. Keeney, 134 Mo. App. 74, 114 SW 553.

9. State Bank of West Union v. Keeney, 134 Mo. App. 74, 114 SW 553.

10. Must bring replevin. Willis v. Whittle [S. C.] 64 SE 410.

11. In replevin. Scott v. Vogel-Boul Soda Water Co., 134 Mo. App. 302, 114 SW 44. Trustee held to be only necessary party. Id. Such action could not be maintained where creditor and not trustee was real plaintiff. Id.

12. Henderson-Snyder Co. v. Polk, 149 N. C. 104, 62 SE 904. Sale of mortgaged property at auction is sale to highest bidder, its object a fair price, and its means competition. Id. Agreement to stifle competition is fraud upon principles on which sale is founded. Id.

13. There was no conversion where it did not appear that value of goods exceeded amount of debt or that fraud was practiced on other creditors. W. A. Jordan Co. v. Sperry Bros. [Iowa] 119 NW 692.

14. St. 1898, § 2316a, provides that in addition to actual damages, such mortgagee shall be liable for $25.00 liquidated damages. Minneapolis Threshing Mach. Co. v. Haug, 136 Wis. 350, 117 NW 811. Statute providing penal damages for wrongful disposition of property by mortgagee will be strictly construed. Id.

15. Foreclosure sale by trustee under trust deed, where property was in hands of sheriff, did not prevent title passing, subject to sheriff's right of possession. Brant v. Lane [Tex. Civ. App.] 118 SW 229.

16. Blair v. Williams [Ala.] 49 S 71.

17. Williams v. Harrison, 135 Mo. App. 152, 115 SW 1056. Injunction permissible where, through insolvency of debtor, no other adequate remedy existed. Id. Injunction was granted on complaint of senior mortgagee whose lien would be affected by sale under junior mortgage. Citizens' State Bank v. First Nat. Bank [Tex. Civ. App.] 120 SW 1141.

18. Sale is improper if it perverts its legitimate purpose, or is prematurely made or if its object is to oppress the debtor or to enable the creditor to acquire the property himself. Henderson-Law Co. v. Wilson [Ala.] 49 S 845.

19. McGregor v. Port Huron Engine & Thresher Co. [Tex. Civ. App.] 120 SW 1128.

terms of a mortgage, sale before default is permissible only in case of disposal or attempted disposal of the property by the mortgagor.[20] The proceeds of a foreclosure sale should not be applied to the payment of the debt during the pendency of a replevin action to determine the right of the mortgagee to the possession of the property.[21]

A mortgage may be foreclosed indirectly by a simple suit and execution.[22] While the ordinary court foreclosure proceeding is maintainable only in equity,[23] in Missouri, it may be done by an action at law.[24] Jurisdiction of foreclosure proceedings does not necessarily depend upon the location of the property.[25] The complaint should show jurisdiction and venue,[26] and should set forth the mortgage, and show the compliance of the mortgagee and the default of the mortgagor.[27] It is proper to join as a party defendant one asserting a claim against he property,[28] but parties whose rights are not affected need not be joined.[29] In a suit in equity to enforce the lien given by a chattel deed of trust, the beneficiary may bring the action in his own name, but should join with him the trustee.[30] The legal effect of an affidavit of illegality in a foreclosure proceeding in Georgia is practically the same as that of a counter-affidavit.[31] The bond required to be filed with such affidavit is amendable.[32] The mortgagor is estopped to deny his ownership of the mortgaged property,[33] or to claim it as exempt.[34] A certified copy of a chattel mortgage is ordinarily admissible in evidence without proof of the execution of the original, where such execution is not denied as provided by statute,[35] or of its loss,[36] and the mortgage itself, when duly acknowledged is usually admissible by a

20. Mortgage so construed. Henderson-Law Co. v. Wilson [Ala.] 49 S 845.

21. Since such property, for which bond has been given, is in custodia legis. Farmers' State Bank v. Stephenson [Okl.] 102 P 992.

22. Emerson v. Knapp, 129 App. Div. 827, 114 NYS 794.

23. Jones' Adm'r v. Jones' Adm'x, 33 Ky. L. R. 1036, 112 SW 650.

24. Brown v. Koffler, 133 Mo. App. 494, 113 SW 711.

25. Depends upon the existence of the lien, the value of the property, and the amount of the original debt, as alleged, and not upon the present locality of the property. See Rev. St. 1895, art. 1340. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596. Allegation that property was secreted or removed from county would not warrant court in assuming that it had been entirely destroyed, so as to deprive court of jurisdiction. Id.

26. Petition, stating that plaintiff and defendant resided in county where suit was brought and stating value of property at amount within the jurisdiction of the court, held sufficient. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596.

27. Complaint held sufficient on demurrer. Hopkins v. Crane, 50 Wash. 636, 97 P 772.

28. Hopkins v. Crane, 50 Wash. 636, 97 P 772.

29. In action to foreclose equitable mortgage on stockholder's stock, it was not necessary to join corporation or other stockholders. Thompson v. Grace [Ark.] 120 SW 397.

30. Peeples v. Hayley, Beine & Co. [Ark.] 116 SW 197. Failure to join trustee is, however, an error which is waived if not objected to. Id.

31. Waters v. Hughes, 131 Ga. 725, 63 SE 214. It is mere pleading. Id. It converts mortgage execution into mere process. Id. Payment to levying officer of amount admitted to be due is not condition precedent to return into court of affidavit and to trial upon issues raised by it. Id. Rule 30 of superior court as embraced in Civ. Code 1895, § 5661, providing that defendant upon making affidavit of illegality on account of partial payment on execution, must pay amount he admits to be due, or sheriff shall proceed to raise that amount and accept affidavit for balance, held not applicable to case of mortgage foreclosure on personalty. Id.

32. Gelders v. Mathews [Ga. App.] 64 SE 576. Common-law bond could be amended to conform with statute, even without consent of surety. Id. Construing Civ. Code, 1895, § 5123. Id.

33. First Nat. Bank v. Fowler [Wash.] 102 P 1038.

34. Since the mortgage is in effect a waiver of all statutory claims or privileges arising out of its character or use. First Nat. Bank v. Fowler [Wash.] 102 P 1038. Held estopped where mortgage was foreclosed indirectly by simple suit and execution. Emerson v. Knapp, 129 App. Div. 827, 114 NYS 794.

35. Morris v. Moon [Tex. Civ. App.] 120 SW 1063. Held admissible, under Sayles' Ann. Civ. St. 1897, art. 3330, if filed with papers in case at any time before announcement of ready for trial. Id. Held admissible without proof of execution, although plea denying existence of partnership appearing as mortgagor had been filed, such plea not being equivalent to plea of non est factum. Id.

36. Where it appears that original is on file. Morris v. Moon [Tex. Civ. App.] 120 SW 1063.

certificate of record without further proof of execution,[37] but the certificate of record is not a part of the mortgage within this rule.[38] The court is usually given power, in a foreclosure proceeding, to determine all equities between the parties, not affecting the rights of others not parties to the suit,[39] including a determination of the amount of the indebtedness,[40] the rendition of a deficiency judgment under statutory authority,[41] and the allowance of a set-off.[42] It may decree a personal judgment against the mortgagor without foreclosure, when the mortgaged property cannot be reached.[43] When the mortgaged property has been confused with other property, through the fault of the mortgagor, the decree may be for a sufficient amount of the commingled property to satisfy the debt.[44] No personal judgment can be rendered against a third party defendant by reason of his asserting a claim against the property.[45] A general creditor cannot object to the enforcement of the chattel mortgage, unless he has laid hold upon the mortgaged property by process [46] in compliance with the law.[47] Matters peculiar to foreclosure against purchasers are treated in another section.[48]

§ 13. *Redemption.*[49]—See 11 C. L. 625—After default the mortgagor has only an equity of redemption,[50] which can be enlarged into title or right of possession only by payment of the debt,[51] and cannot therefore be enlarged by transfer or assignment of the property.[52]

§ 14. *Other remedies as between the parties.*[53]—See 11 C. L. 625—A mortgagee who interferes with the mortgagor's possession of the morgtaged property, before default, may be held liable for conversion [54] in the amount of the damage caused.[55]

§ 15. *Remedies as against third persons.*[56]—See 11 C. L. 625—A purchaser from the mortgagor with notice of the mortgage has no greater rights than had the mort-

37. Under B. & C. Comp. §§ 5355, 5357, 5634. Ayre v. Hixson [Or.] 98 P 515.

38. Such certificate must be identified and offered in evidence in order to be evidence of time and place of record. Ayre v. Hixson [Or.] 98 P 515.

39. Under Kirby's Dig. § 6011. Thompson v. Grace [Ark.] 120 SW 397.

40. Hopkins v. Crane, 50 Wash. 636, 97 P 772. Damages for breach of contract which mortgage was given to secure could be determined. Id.

41. Court of equity has no power to enter deficiency judgment in action to foreclose mortgage unless authorized to do so by statute or rule of court. Bradley Engineering & Mach. Co. v. Muzzy [Wash.] 103 P 37. Ballinger's Ann. Codes & St. § 5880, authorizing such deficiency judgment, has not been repealed by Laws 1899, p. 85, c. 53, § 2. Id.

42. Defendant was allowed his rent and expenses incident to gathering and marketing cotton. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596.

43. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596.

44. Amount taken is limited by amount of debt. Ayre v. Hixson [Or.] 98 P 515. Sheep were mingled so that those mortgaged could not be identified. Id.

45. Hopkins v. Crane, 50 Wash. 636, 97 P 772.

46. Neustadter Bros. v. Doust, 13 Idaho, 617, 92 P 978.

47. One who has attempted to acquire lien by levy of attachment, invalid for noncompliance with statute (Civ. Code § 2969) providing that amount of mortgage debt must be first paid or tendered, cannot object to proceedings. Souza v. Lucas [Cal. App.] 100 P 115.

48. See post, § 15.

49. Search Note: See notes in 2 Ann. Cas. 712; 3 Id. 109.

See, also, Chattel Mortgages, Cent. Dig. §§ 581-590; Dec. Dig. §§ 293-300; 7 Cyc. 83-91; 4 A. & E. Enc. P. & P. 520.

50. Niccloy v. Treasure, 115 NYS 1030.

51. Wagoner Nat. Bank v. Welch [C. C. A.] 164 F 813; Niccloy v. Treasure, 115 NYS 1030.

52. Where purchaser gave mortgage to secure purchase money and after default sold property to third party, taking back a mortgage expressly subject to original purchase-money mortgage, the assignee of the second mortgage acquired at most only the right to pay off the first mortgage as against purchaser from first mortgagee Niccloy v. Treasure, 115 NYS 1030.

53. Search Note: See Chattel Mortgages, Cent. Dig. §§ 306-315, 330-339, 530; Dec. Dig. §§ 172, 175, 176, 292; 7 Cyc. 14-35; 4 A. & E. Enc. P. & P. 509.

54. Aylesbury Mercantile Co. v. Fitch [Okl.] 99 P 1089. Mortgagee held liable for interference after he had agreed that mortgagor might take mortgaged cattle out of county. Ramsey v. Maberry, 135 Mo. App. 569, 116 SW 1066.

55. Extent of such liability was market value of goods converted and interest. Crouch Hardware Co. v. Walker [Tex. Civ. App.] 113 SW 163.

56. Search Note: See notes in 59 L. R. A. 737; 16 A. S. R. 499.

See, also, Chattel Mortgages, Cent. Dig.

gagor.[57] The mortgagee, if entitled to possession, is entitled to recover the mortgaged property or its value from such purchaser,[58] provided the mortgagor was not authorized by the mortgagee to make the sale.[59] Such purchaser will not, however, be made to suffer as a consequence of any negligence of the mortgagee,[60] but the purchaser has the burden of proving such negligence.[61] In such proceedings the defendant must show that he was an innocent purchaser [62] by his pleadings [63] and by the proof introduced.[64] Whether he was an innocent and bona fide purchaser is a question for the jury.[65] The indebtedness may be proven by parol.[66] A third party who wrongfully converts the mortgaged property is liable to the mortgagee,[67] provided the latter has not abandoned his claim [68] in the amount of the mortgage indebtedness,[69] not exceeding, however, the value of the property at the time of the conversion, where the defendant acted in good faith.[70] On the other hand the mortgagee may be held personally liable to third parties for expenses in connection with his possession of the mortgaged property.[71] Where the mortgagee elects to follow the specific property upon which the lien exists, his security attaches to such property in its entirety.[72] In such an action, the mortgagee need not prove

§§ 307, 309, 316-329, 336, 340-359, 477; Dec. Dig. §§ 173, 174, 177, 178, 292; 7 Cyc. 14-35, 43-46.

57. Ayre v. Hixson [Or.] 98 P 515.

58. Van Eps v. Newald, 139 Wis. 129, 120 NW 853.

59. Whether mortgagee gave mortgagor unconditional authority to sell mortgaged property held to be **question for jury.** Stevenson v. Whatley [Ala.] 50 S 41. **Evidence** as to what mortgagor did with proceeds and of fact that mortgagee had knowledge thereof and did not repudiate the act held admissible on question of authority. Stevenson v. Whatley [Ala.] 50 S 41.

60. As where mortgage by reason of which mortgagee seeks to recover was signed by mortgagor in assumed name and so accepted. Bradford v. Lembke [Tex. Civ. App.] 118 SW 159.

61. Purchaser required to prove name signed by mortgagor was assumed. Bradford v. Lembke [Tex. Civ. App.] 118 SW 159.

62. One is not innocent purchaser in good faith who has actual knowledge of an improperly recorded mortgage. Ayre v. Hixson [Or.] 98 P 515. As to what constitutes notice sufficient to rebut claim of party to be innocent purchaser see Notice and Record of Title, §§ 2A, 2B.

63. He must plead that he had not actual or constructive notice and that he was innocent purchaser for value. Ayre v. Hixson [Or.] 98 P 515. Administratrix of mortgagor did not show by her plea that she was an innocent purchaser. Jones' Adm'r v. Jones' Adm'x, 33 Ky. L. R. 1036, 112 SW 650.

64. Burden was sustained where evidence that defendant was innocent purchaser was uncontradicted, and plaintiff's mortgage had not been recorded. Fischbach v. Garrison Milling & Elevator Co. [Colo.] 102 P 895. Defendant must sustain the burden of proving that he was an innocent purchaser. Ayre v. Hixson [Or.] 98 P 515. Must prove he had not actual or constructive notice. Id. Evidence held to show that purchaser had sufficient notice to put him on inquiry. Id.

65. Hickey v. McDonald Bros. [Ala.] 48 S 1031.

66. Van Eps v. Newald, 139 Wis. 129, 120 NW 853.

67. Swartz v. Gottlieb-Bauern-Schmidt-Straus Brew. Co., 109 Md. 393, 71 A 854. Where the mortgagee had no opportunity to apply for jury and to try right of property, as contemplated by statute (P. L. 1898, p. 624), he may, where his claim has been ignored, rely upon his common-law remedy and recover from an **officer** who has sold the property. Breit v. Solferino [N. J. Law] 72 A 79. Officer who sold mortgaged property under execution without complying with statute which requires that it be sold subject to mortgage and that purchaser give bond to secure payment of incumbrance (Ky. St. 1903, § 1709) was liable to mortgagee for damages sustained. Davis v. Gott [Ky.] 113 SW 826. Officer levying attachment on mortgaged property was held liable. Martin v. Holloway [Idaho] 102 P 3. **Junior mortgagee** held liable to senior mortgagee for conversion by his transferee under a simulated transfer. Henderson Law Co. v. Hinson [Ala.] 47 S 717.

68. Held that mortgagee did not abandon his claim where he was given no opportunity to enforce it. Breit v. Solferino [N. J. Law] 72 A 79. Claim held not abandoned as against levying officer. Martin v. Holloway [Idaho] 102 P 3.

69. Where judgment is for damages, the amount should be for amount of mortgage indebtedness, and not for value of property, when debt is less than such value. Maddox v. Dunklin [Ala.] 50 S 277; Watkins v. Citizens' Nat. Bank [Tex. Civ. App.] 115 SW 304.

70. In suit for conversion and not for possession, where wrongdoer was not naked trespasser and acted in good faith, measure of damages is value of property at time of conversion rather than its value as increased by defendant at time of suit. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176.

71. Held liable to lessor for rent. Talley v. Everard's Breweries, 116 NYS 657.

72. He is not compelled to release any

the exact amount due upon the mortgage,[73] and, as between a first and a second mortgage, the consideration of the latter is immaterial.[74] A mortgagee may recover from a mere trespasser regardless of failure to file the mortgage as required by law.[75] In Ohio the mortgagee cannot be maintained against an administrator of the mortgagor.[76] In a suit to foreclose a second mortgage, against a purchaser from the first mortgagee, the court will not consider whether the second mortgage covers property not covered by the first mortgage, where the first mortgage is attacked as a whole and the defendant asserts no title to property not covered thereby,[77] nor will the court, in such a case, determine whether the first mortgage was extinguished by the mortgagor's sale thereunder.[78]

Chattels; Cheats; Checks; Children; Chinese; Cigarettes; Citations, see latest topical index.

CITIZENS.[79]

The scope of this topic is noted below.[80]

Cession of territory works a transfer of the allegiance of residents thereof unless treaty provisions to prevent such result are availed of.[81] There are, under our form of government, two classes of citizenship, one of the United States and one of the state,[82] and, while they usually coexist,[83] one class may exist in a person without the other.[84] A man is a citizen of the country to which his father owes allegiance.[85] An Indian who has received an allotment and patent for land thereby becomes a citizen of the United States and of the state wherein he resides.[86] A federal corporation is not considered as a citizen of any state.[87] Citizenship may be proven by evidence of the exercise of the rights and duties of citizenship and by evidence of a judgment of naturalization.[88]

CIVIL ARREST.

The scope of this topic is noted below.[89]

§ 1. Validity of Provision for Arrest and Privilege Therefrom, 756.
§ 2. Arrest on Mesne Process, 757.
§ 3. Execution Against the Body, 758.
§ 4. Supersedeas Bail or Discharge from Arrest, 759.
§ 5. Liability for Wrongful Arrest or False Imprisonment, 759.
§ 6. Liability on Bonds or Undertakings Given to Secure Arrest, 759.

§ 1. *Validity of provision for arrest and privilege therefrom.*[90]—Imprisonment for debt is prohibited by the constitutions of many states.[91] Debt, in this

portion because another has knowingly changed its form or added to its value. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176.

73. In absence of evidence to contrary, it will be presumed that the whole debt which mortgage was given to secure is due. Houston v. Davis [Ala.] 49 S 869. It is sufficient if anything appear to be due. Id.

74. Weber Implement Co. v. Dunard [Mo. App.] 120 SW 608.

75. James Music Co. v. Hankwitz, 137 Wis. 302, 118 NW 806.

76. Mortgagee is confined to his remedy against fund arising from sale of mortgaged property by administrator. Lingler v. Wesco, 79 Ohio St. 225, 86 NE 1004.

77. Niccloy v. Treasure, 115 NYS 1030.

78. Since, if it was not extinguished, the party claiming under the second mortgage would still hold subject to the first mortgage. Niccloy v. Treasure, 115 NYS 1030.

79. See 11 C. L. 627.

Search Note: See note in 5 C. L. 587.

See, also, Citizens, Cent. Dig.; Dec. Dig.; 7 Cyc. 132-148; 6 A. & E. Enc. L. (2ed.) 14.

80. **It excludes** alienage and naturalization (see Aliens*), domicile (see Domicile*), and the right to vote (see Elections,* § 2).

81. Absence of a Spanish subject from the Philippines during the year allowed by treaty of Dec. 10, 1898, prevents loss of Spanish citizenship by failure to make declaration of intent to retain it. Bosque v. U. S., 209 U. S. 91, 52 Law Ed. 698.

82, 83. Gardina v. Jefferson County Registrars [Ala.] 48 S 788.

84. As in the case of resident of District of Columbia. Gardina v. Jefferson County Registrars [Ala.] 48 S 788.

85. One who came to America at age of five and has not been naturalized could not be prevented from voting in absence of showing that his father had not become a citizen during son's minority. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

86. Under Act of Congress, Feb. 8, 1887, § 6. State v. Morrin, 136 Wis. 552, 117 NW 1006.

87. Choctaw, O. & G. R. Co. v. Hendricks [Okl.] 95 P 970.

88. People v. Quijada, 154 Cal. 243, 97 P 689.

89. **It excludes** an admission to bail (see

* Always begin with the latest article on the subject. Use the latest topical index.

connection, includes an order for the payment of alimony,[92] but does not include torts.[93] Nor do such prohibitions forbid the punishment of a debtor for his fraud.[94]

§ 2. *Arrest on mesne process.*[95] *When allowable.*[See 11 C. L. 627]—A distress warrant,[96] provided for by federal statute,[97] may issue[98] and may be levied upon the person of a delinquent officer,[99] at any time before his liability for the delinquency has been discharged.[1] In some jurisdictions a plaintiff is entitled to arrest a defendant in a civil action, when the judgment which could be rendered would be ineffectual if the defendant left the state.[2]

Procedure to obtain arrest.[See 11 C. L. 627]—An affidavit to secure arrest is insufficient which is based solely on hearsay,[3] and is not supplemented by the affidavit of the party having the requisite knowledge,[4] or which is not legally verified.[5] Its sufficiency may depend upon the statutory nature of the suit,[6] and upon its con-

Bail, Civil *), arrest in bastardy proceedings (see Bastards,* § 3), or for nonpayment of fines in criminal actions (see Fines*), and commitment for contempt for failing to obey decree (see Contempt,* § 7).

90. Search Note: See notes in 3 C. L. 700; 37 A. S. R. 758; 8 Ann. Cas. 56.

See, also, Arrest, Cent. Dig. §§ 20-32; Dec. Dig. § 9; 3 Cyc. 917-924; 9 Id. 985; 16 A. & E. Enc. L. (2ed.) 38.

91. See Const. art. 1, § 17. Ex parte Milecke [Wash.] 100 P 743. Imprisonment for debt is abhorrent to spirit of free government and is not to be tolerated under form of penal statutes. Id. Prohibited in North Carolina, except for fraud. Edwards v. Sorrell, 150 N. C. 712, 64 SE 898; Ex parte Hollman, 79 S. C. 9, 60 SE 19. See Mo. Const. art. 2, § 16. Ex parte Kinsolving, 135 Mo. App. 631, 116 SW 1068. But this inhibition was directed against imprisonment for debt in civil actions, at instance of creditor, with view to coercing payment, and had no reference to such actions as might be brought by the state through its officers in interest of good morals and honest dealing. Clark v. State [Ind.] 84 NE 984.

92. Ex parte Kinsolving, 135 Mo. App. 631, 116 SW 1068.

93. Is confined to obligations arising on express or implied contracts. Ex parte Milecke [Wash.] 100 P 743.

94. Do not make unconstitutional the statute (Sess. Laws 1903, p. 244, c. 131), making it an offense for one to secure hotel accommodations without paying therefor and with intent to defraud. Ex parte Milecke [Wash.] 100 P 743; Edwards v. Sorrell, 150 N. C. 712, 64 SE 898.

95. Search Note: See notes in 3 C. L. 700; 59 L. R. A. 954; 4 L. R. A. (N. S.) 130.

See, also, Arrest, Cent. Dig. §§ 1-19, 33-94, 127-141; Dec. Dig. §§ 1-8, 10-40, 54-57; 3 Cyc. 898-963, 974-980; 16 A. & E. Enc. L. (2ed.) 20; 8 A. & E. Enc. P. & P. 584.

96. United States v. Dillin [C. C. A.] 168 F 813.

97. Rev. St. § 3625 et seq.; U. S. Comp. St. 1901, pp. 2418, 2419. United States v. Dillin [C. C. A.] 168 F 813.

98. Issues whenever any officer, who has received public money before it is paid into treasury, fails to render his account or pay over same as required by law. United States v. Dillin [C. C. A.] 168 F 813.

99. Such levy is not unconstitutional as depriving him of his liberty without due process of law. United States v. Dillin [C. C. A.] 168 F 813. Rev. St. § 990, U. S. Comp. St. 1901, p. 709, providing wherein no person shall be imprisoned for debt, has no application to imprisonment under such distress warrant. Id.

1. United States v. Dillin [C. C. A.] 168 F 813. May be levied even after his term of office has expired. Id. Such levy is not prevented by fact that officer is out under bail on charge of embezzlement. Id.

2. Under Code Civ. Proc. § 550. General Explosive Co. v. Hough, 63 Misc. 377, 116 NYS 1114. Held that judgment which could be rendered in suit to enjoin defendant from breach of contract and to recover damages was such as might thus become ineffectual. Id.

3. Penn Oil & Supply Co. v. Cohn, 116 NYS 124. Affidavit on information and belief is insufficient even though it make positive statement. Id. Affidavit held insufficient to justify arrest, where it stated that party was not owner of land in fee simple, without stating that affiant had examined the record or that party had admitted that he had not title. Gardiner v. Donovan [Mich.] 15 Det. Leg. N. 1033, 119 NW 432.

4. It is incumbent on affiant not having personal knowledge to show source of his information and to attach affidavit of person having requisite knowledge. Gardiner v. Donovan [Mich.] 15 Det. Leg. N. 1033, 119 NW 432.

5. Verification held insufficient when there was no certificate accompanying a purported affidavit taken outside the state as to official character of notary and genuineness of his signature as required by Code Civ. Proc. § 844. Marks v. Goetchius, 60 Misc. 143, 112 NYS 1009. Affidavit is insufficient which shows on its face that it was taken in county where notary taking same had no authority to act (as to authority of notary see Laws 1892, p. 1704, c. 683, § 85, as amended by Laws 1894, p. 186, c. 68, and also Executive Law, § 82). Robinson v. Cooper, 62 Misc. 517, 115 NYS 599. Affidavit must show on its face that it was taken within jurisdiction of officer who certifies it. Id.

6. In suit commenced under provisions of Comp. Laws, §§ 9998, 9999, requiring affidavit to be attached to writ and to show nature of plaintiff's claim, it need not contain statement of belief that plaintiff is entitled to

* Always begin with the latest article on the subject. Use the latest topical index.

formity to statutory requirements.[7] It must be considered by a judicial officer.[8] A court having jurisdiction of the subject-matter is authorized to decide upon its sufficiency.[9] Under some statutes an order of arrest may issue upon the allegations of the complaint.[10] A party who wishes to proceed by arrest must allege a case, which from its substance,[11] is sufficient to entitle him to arrest.[12]

Writ and proceedings thereon. See 11 C. L. 628—A writ is not necessarily invalid because it is dated before it can become effective,[13] or issued without the affidavit having been filed with the clerk.[14] It is not effective as an order of arrest until the statutory endorsements have been made [15] and it has been delivered to an officer with a bona fide intention of having it served.[16] It should ordinarily show that the required undertaking has been given.[17] Mere clerical errors therein will be disregarded.[18] An order of arrest cannot be executed in any other jurisdiction than that in which it is lawfully issued.[19] It stands until revoked.[20]

§ 3. *Execution against the body.*[21] *Occasion and propriety.* See 11 C. L. 628 The right to enforce an execution against the person of the judgment debtor depends upon local statutes,[22] which, in some cases, specially favor women.[23] The plaintiff's right to a body execution is to be determined by the allegations of his complaint.[24] If a sufficient affidavit shall have been filed,[25] no allegation for arrest and bail need be contained in the complaint to warrant the issuance of a body

recover certain sum exceeding $100, as required when suit is begun under provisions of § 9996. Benie v. Mandell, 154 Mich. 591, 15 Det. Leg. N. 833, 118 NW 369.

7. Affidavit that defendant secured property by false representations was sufficient under Code Civ. Proc. § 549. Mussiller v. Rice, 116 NYS 1028.

8. Consideration by clerk is insufficient. People v. Gebhardt, 154 Mich. 504, 15 Det. Leg. N. 818, 118 NW 16.

9. Justice of the peace held to have jurisdiction. Feld v. Loftis, 240 Ill. 105, 88 NE 281.

10. Issuance on complaint is authorized by Code Civ. Proc. § 484, subd. 9. Taylor v. Klein, 130 App. Div. 615, 115 NYS 445.

11. Test must be nature of action as determined from substance. Caldbeck v. Simanton [Vt.] 71 A 881. Right to arrest is not given by mere form or classification. Id.

12. Caldbeck v. Simanton [Vt.] 71 A 881. Allegation that defendant falsely and fraudulently deceived plaintiff without allegation that defendant knew that such representations were false is insufficient. Id. But where affidavits and complaint are replete with facts showing that property has been parted with through fraudulent representations of defendant, no amended complaint is necessary. Mussiller v. Rice, 116 NYS 1028.

13. People v. Gebhardt, 154 Mich. 504, 15 Det. Leg. N. 818, 118 NW 16.

14. Statute does not require affidavit to be filed with clerk. People v. Gebhardt, 154 Mich. 504, 15 Det. Leg. N. 818, 118 NW 16.

15. Writ is absolutely noneffective as authority to make arrest until, upon affidavit of plaintiff or some person in his behalf, showing nature of plaintiff's claim (Comp. Laws, § 9999), the order directing amount in which bail is to be taken is endorsed upon the writ (Comp. Laws, § 9998). People v. Gebhardt, 154 Mich. 504, 15 Det. Leg. N. 818, 118 NW 16.

16. People v. Gebhardt, 154 Mich. 504, 15 Det. Leg. N. 818, 118 NW 16.

17. This was sufficiently shown where undertaking proper in form was attached to order and same was approved as to form and sufficiency by justice who signed and allowed order. Mussiller v. Rice, 116 NYS 1028.

18. Allegation that plaintiff, instead of plaintiff's assignor, was deceived, held to be mere clerical error. Mussiller v. Rice, 116 NYS 1028.

19. Rev. St. 1899, § 3964, providing that order shall not be issued before judgment in any other county than that in which action is brought, makes unlawful its execution in any other county. Ahlrep v. Hughes [Wyo.] 102 P 659.

20. Lyon v. Bertolero [S. D.] 120 NW 766.

21. **Search Note:** See Execution, Cent. Dig. §§ 1207-1381; Dec. Dig. §§ 421-453; 17 Cyc. 1590-1569; 16 A. & E. Enc. L. (2ed.) 48; 8 A. & E. Enc. P. & P. 584.

22. In New York the right of defendant to arrest plaintiff upon body execution depends solely upon right of plaintiff to have defendant arrested had judgment been against him, under Civ. Code Proc. § 1487. Allen v. Fromme, 195 N. Y. 404, 88 NE 645. Right exists in two classes of cases: (1) Where plaintiff's right to arrest defendant depends upon nature of action; and (2) in any other case where order of arrest has been granted and executed in action, and if executed against judgment debtor, where it has not been vacated (Code Civ. Proc. § 1487). Id.

23. Allen v. Fromme, 195 N. Y. 404, 88 NE 645. A woman cannot be arrested except in case where order can be granted only by court, or where it appears that action is to recover damages for willful injury to person, character, or property (Code Civ. Proc. § 553). Id. Action of woman in holding property under claim of inferior warehouseman lien was not willful injury to property within meaning of preceding note. Id.

24. Under Code Civ. Proc. § 549. Fenton v. Duckworth, 131 App. Div. 291, 115 NYS 686

25. Affidavit was sufficient which contained

execution.[26] Such execution may, however, be issued upon a complaint which contains the necessary allegations, although there has been no order of arrest.[27] An execution against the person cannot usually be issued in a suit wherein one of the causes of action upon which it is based [28] is purely equitable.[29] And, in some jurisdictions, such execution cannot be issued until due notice has been given to the defendant [30] and an execution against his property has been returned unsatisfied.[31] Under the New Jersey statute,[32] the judge, and not the jury, determines the question of fraud warranting the issuance of such execution, and the debtor has the burden of proving the absence of fraud.[33]

The order and writ. See 11 C. L. 628

§ 4. *Supersedeas bail or discharge from arrest.*[34] See 11 C. L. 628—A defendant by giving bail does not waive his right to move to vacate the order of arrest.[35] Nor can he be required to agree not to bring suit for false imprisonment as a condition precedent to a vacation of such order.[36] In some states a debtor is entitled to discharge upon taking the poor debtor's oath [37] after due and sufficient notice thereof has been given,[38] or upon his substantial compliance with a statute for the relief of insolvent debtors.[39] When the creditor has failed to plead within the statutory time after the debtor has filed his statutory declaration, the debtor is entitled to his discharge as a matter of course.[40] A discharge in bankruptcy will not authorize the discharge from civil arrest of a party who has been guilty of wilful and malicious conversion amounting to larceny.[41] On an application for a discharge from arrest, the court may examine the entire record to determine the character of the wrongful acts.[42]

§ 5. *Liability for wrongful arrest or false imprisonment* See 11 C. L. 629 is elsewhere treated.[43, 44]

§ 6. *Liability on bonds or undertakings given to secure arrest.*[45] See 11 C. L. 629

Civil Damage Acts; Civil Death, see latest topical index.

an essential allegation which was struck out of complaint. Lyon v. Bertolero [S. D.] 120 NW 766.

26. Under Code Civ. Proc. § 333. Lyon v. Bertolero [S. D.] 120 NW 766. In this respect these proceedings are very analogous to attachment proceedings. Id.

27. Under Code Civ. Proc. § 333. Lyon v. Bertolero [S. D.] 120 NW 766.

28. Not issue where one of several causes is purely equitable. Fenton v. Duckworth, 131 App. Div. 291, 115 NYS 686.

29. Not issued in equity except where common-law action is brought on equity side for special reasons giving equity jurisdiction. Fenton v. Duckworth, 131 App. Div. 291, 115 NYS 686. Suit for accounting held to be in equity and such execution not issuable. Id.

30. Notice was sufficient when complaint contained one or more of causes relied on for arrest, when defendant had notice of trial and relief asked for, and opportunity at trial to rebut allegations of fraud and embezzlement. Martin v. Hutto [S. C.] 64 SE 421.

31. Under Code Civ. Proc. 1902, § 307. Martin v. Hutto [S. C.] 64 SE 421.

32. Pen. Laws, p. 581. Austrian v. Laubheim [N. J. Law] 73 A 226.

33. Austrian v. Laubheim [N. J. Law] 73 A 226.

34. Search Note: See note in 19 L. R. A. 560.

See, also, Arrest, Cent. Dig. §§ 95-126; Dec. Dig. §§ 41-53; Execution, Cent. Dig. §§ 1255-1361; Dec. Dig. §§ 443-453; 3 Cyc. 958, 959, 965-974, 978-980; 17 Id. 1516-1569.

35. Marks v. Goetchius, 60 Misc. 143, 112 NYS 1009. Right to make motion is given by Code Civ. Proc. § 567. Id.

36. Marks v. Goetchius, 60 Misc. 143, 112 NYS 1009.

37. Young v. Jewell, 201 Mass. 385, 87 NE 604. Oath that he does not intend to leave state. Id.

38. Notice giving debtor's name as Clarke Jewell instead of William Clarke Jewell, held sufficient where debtor was known by both names and the master had entered record of recognizance given in name of debtor as it appeared in notice. Young v. Jewell, 201 Mass. 385, 87 NE 604. Due notice is provided for by Rev. Laws, c. 168, §§ 30, 33. Id.

39. For statute, see Revisal 1905, § 1920 et seq. Edwards v. Sorrell, 150 N. C. 712, 64 SE 898. Substantial compliance with such statute in so far as it may be in his power is sufficient. Id.

40. Statute limiting time to plead to 20 days after debtor's declaration has been filed is mandatory and time cannot be extended. Compton v. Calvert [N. J. Law.] 72 A 29.

41, 42. Kavanaugh v. McIntyre, 128 App. Div. 722, 112 NYS 987.

43, 44. See False Imprisonment; Malicious Prosecution; and Abuse of Process.

45. Search Note: See Arrest, Cent. Dig. §§ 131-140; Dec. Dig. § 56

CIVIL RIGHTS.[46]

The scope of this topic is noted below.[47]

One who, under color of a law regulation or usage of any state or territory, violates the civil rights secured to a citizen of the United States is liable under federal law, to the party injured,[48] regardless of the nonexistence of malice.[49] The fourteenth and fifteenth amendments to the federal constitution are limitations on the states and do not confer primary rights,[50] or give one race any greater rights than another.[51] Nor does the fourteenth amendment guarantee to a person a jury composed in part of his own race.[52] An infringement of the federal penal statute designed for the protection of civil rights[53] does not authorize a civil action for damages.[54] In some states, one is liable in damages to the party aggrieved for any denial of the equal enjoyment of a place of public accomodations or amusement.[55]

Civil Service; Clearing Houses, see latest topical index.

CLERKS OF COURT.

The scope of this topic is noted below.[56]

§ 1. The Office; Appointment; General Powers and Duties, 760.
§ 2. Fees and Compensation, 761.
§ 3. Liabilities, 761.

§ 1. *The office; appointment; general powers and duties.*[57]—See 11 C. L. 629 One appointed to fill a vacancy is for some purposes regarded as beginning a new term.[58] The office is usually regarded as purely ministerial[59] though certain judicial powers are sometimes conferred.[60] Justices of the peace are usually re-

46. See 11 C. L. 629.

Search Note: See notes in 14 L. R. A. 579; 18 Id. 639; 28 Id. 204; 9 L. R. A. (N. S.) 601; 6 A. S. R. 379; 89 Id. 844; 9 Ann. Cas. 69.

See, also, Civil Rights, Cent. Dig.; Dec. Dig.; 7 Cyc. 158-173; 6 A. & E. Enc. L. (2ed.) 68; 4 A. & E. Enc. P. & P. 552.

47. Separation of the races in the schools (see Schools and Education,* § 2), and in the conveyances of common carriers (see Carriers,* § 27), are treated elsewhere. As to race discrimination in the drawing of juries, see Jury,* § 5.

48. Under Rev. St. U. S. § 1979; U. S. Comp. St. 1901, p. 1262, wrongful rejection of vote for member of congress, held actionable. Brickhouse v. Brooks, 165 F 534. Statute has reference to rights guaranteed by federal constitution and does not include right to life, liberty and property, which are primary rights within protection of state. Brawner v. Irvin, 169 F 964.

49. Need not be alleged. Brickhouse v. Brooks, 165 F 534.

50. Brawner v. Irvin, 169 F 964. Do not give negro right to resort to federal court to secure protection of life, liberty or property. Id.

51. Brawner v. Irvin, 169 F 964; Crosby v. Mayfield [Ky.] 117 SW 316.

52. Thomas v. Texas, 212 U. S. 278, 53 Law. Ed. —. See, also, Jury, § 5.

53. Rev. St. § 5510; U. S. Comp. St. 1901, p. 3713. Brawner v. Irvin, 169 F 964.

54. Brawner v. Irvin, 169 F 964.

55. Liable under St. 1898, § 4338c. Jones v. Broadway Roller Rink Co., 136 Wis. 595, 118 NW 170. Roller skating rink is place of public amusement. Id.

56. It includes the election or appointment, tenure of office, compensation, powers and liabilities of clerks of court. It excludes matters common to all officers (see Officers and Public Employes*) records of court, their keeping and authenticity (see Records and Files*) and the powers and duties of clerks as to particular matters of practice. See, for example, Appeal and Review,* § 10, as to authentication and transmission of the record on appeal; Process,* § 1, as to issuance and form of process.

57. Search Note: See note in 95 A. S. R. 89.

See, also, Clerks of Courts, Cent. Dig. §§ 1-32, 89-126; Dec. Dig. §§ 1-9, 64-72; 7 Cyc. 196-206, 219-234, 247-251; 6 A. & E. Enc. L. (2ed.) 132.

58. New term within salary act taking effect on expiration of existing terms. Atlantic County Freeholders v. Lee [N. J. Law.] 70 A 925.

59. Clerk of municipal court is merely ministerial officer. People v. Devlin, 118 NYS 478. The fact that the clerk of a municipal court wrote "do not file" upon a satisfaction of judgment presented for filing, attempting to assume judicial functions and disclose instrument irregular, does not affect validity of filing. Id.

60. Under statute requiring that question of law and fact raised before clerk of court be docketed for trial before judge, fact that clerk finds he has committed error, and corrects mistake to comply with statute, in term, before case is brought before judge, is within his power. Little v. Duncan, 149 N. C. 84, 62 SE 770.

quired to act as clerks of their own courts [61] and ordinarily have the same rights and duties of clerks of court generally.[62] Many of the duties imposed on clerks for the benefit of litigants do not arise until a proper request formally presenting the matter.[63] Duties of clerks of court, the performance of which are ministerial and not discretionary in exercise,[64] may be compelled by mandamus. A deputy clerk has the power to perform any official ministerial act of the clerk as his principal,[65] in the absence of a statutory provision to the contrary,[66] but cannot perform judicial acts without statutory power.[67]

§ 2. *Fees and compensation.*[68]—See 11 C. L. 631—Though it has been said that no fee is provided by statute he can recover none,[69] it is generally held that where the compensation of a clerk of court is not fixed by law [70] he may require a reasonable fee [71] in advance [72] and may retain papers and documents upon and about which service have been performed until compensation is paid.[73] In some states a clerk of court has no right to collect his fees before the termination of the case in which the services were rendered.[74] A salary act taking effect on the expiration of existing terms applies to one appointed to fill a vacancy.[75] The compensation of a clerk, whether fees or salary, is usually fixed by statute.[76] The compensation of clerks and assistants cannot be extended to expenses not included within the statute fixing the same.[77] In the absence of a statute providing otherwise, the clerk of the supreme court is not required to furnish copies of opinions to the agencies of the state without the statutory fee.[78]

§ 3. *Liabilities.*[79]—See 11 C. L. 631—Penal statutes [80] making clerks of court liable for failure to perform certain duties [81] are in force in some states. An action cannot be maintained against the clerk in his official capacity for money received in such capacity.[82] Costs illegally taxed and collected by the clerk should be re-

61, 62. State v. Cooper [Tenn.] 113 SW 1048.

63. An appeal bond not considered as approved by clerk by merely filing same. Koller v. People [Colo] 99 P 316.

64. Statutory duty to keep subpoena docket. Jackson v. Mobbey [Ala.] 47 S 590. Duty to satisfy judgment. People v. Devlin, 118 NYS 478.

65. Reed v. Ter. [Okl. Cr. App.] 98 P 583. Under § 1; Act of Congress, Feb. 9, 1906, 34 Stat. 11, c. 155, ministerial acts performed by deputy clerk in drawing grand jury, regular and binding. Id. No merit in objection to order of reference, on filing of voluntary bankruptcy petition, that it was signed by deputy. Gilbertson v. U. S. [C. C. A.] 168 F 672. A deputy clerk of court may, at common law, make a certificate of acknowledgment in the name of his principal. Halbouer v. Cuenin [Colo.] 101 P 763. Rev. St. Colo., 1908, § 684 enlarges rather than restricts powers of deputy clerks. Id.

66, 67. Reed v. Ter. [Okl. Cr. App.] 98 P 583.

68. Search Note: See Clerks of Courts, Cent. Dig. §§ 33-88; Dec. Dig. §§ 10-63; 7 Cyc. 167, 168, 172-178, 193-251.

69. Fee legally chargeable for an attorney's license. In re Reardon [Ill.] 89 NE 169.

70. Existing statute relating to fees of clerk of supreme court and payment thereof declared void. Bohart v. Anderson [Okl.] 103 P 742.

71, 72, 73. Bohart v. Anderson [Okl.] 103 P 742.

74. State v. Cooper [Tenn.] 113 SW 1048.

75. Atlantic County Freeholders v. Lee [N. J. Law.] 70 A 925.

76. Statute fixing fee of clerk at 10 per cent of all fines and forfeitures recovered gives him no interest in damages awarded in affirmance of judgment for commonwealth. Commonwealth v. Funck [Ky.] 114 SW 255. Statute as construed not to entitle clerk of court to fees earned in taking oaths and depositions authorized by federal statute. Keeling v. Searcy County [Ark.] 114 SW 925. Clerk entitled to fees under statute for copying original papers in case on change of venue. Escavaille v. Stephens [Tex.] 119 SW 842. Under construction of federal statute, clerk entitled to per diem compensation for days on which certain services were performed though in absence of direct authority. United States v. Marvin, 212 U. S. 275, 53 Law. Ed. —.

77. Clerk not entitled to traveling expenses to and from office. Statute does not refer to assistants whose salaries are not fixed therein. Cook v. Norfolk County, 201 Mass. 257, 87 NE 599.

78. Ex parte Fitzpatrick [Ind.] 86 NE 964.

79. Search Note: See note in 91 A. S. R. 562.

See, also, Clerks of Courts, Cent. Dig. §§ 127-142; Dec. Dig. §§ 74, 75; 6 A. & E. Enc. L. (2ed.) 141.

80. Code 1906, § 4333. McClendon v. Whitten [Miss.] 48 S 964. Code 1907, § 2850. Id.

81. Neglect of clerk to notify defaulting taxpayer before maturity or tax title. McClendon v. Whitten [Miss.] 48 S 964. Defective transcript or negligence or delay of clerk in delivering same. Holmes v. Lamberth [Ala.] 50 S 140.

82. Recovery could be had where clerk ap

covered by petition in the court having jurisdiction of the original action, and a bill in equity will not lie.[83]

Cloud on Title (defined, see 12 C. L. 1531, n. 14); **Clubs; Codicils, Cognovit,** see latest topical index.

COLLEGES AND ACADEMIES.[84]

This scope of this topic is noted below.[85]

Nature, Establishment and Public Regulation, 762.
Bequests and Private Aid, 762.
Public Aid and Funds, 762.
Consolidation, 762.
Actions and Rights, 763.
Officers and Instructors, 763.
Insolvency and Dissolution, 763.

Nature, establishment and public regulation.[See 11 C. L. 632]—The university of Alabama is a part of the state as a public municipal corporation; it was founded by the state and is under state control.[86] The state college of Washington is a state institution.[87] A university cannot give corporate powers to a board which it has created for the control of a department.[88] Private institutions, though incorporated, may select those whom they will receive as students.[89]

Bequests and private aid.[See 7 C. L. 658]—A change in the location of an educational institution will not necessarily render invalid a note given as a bequest.[90]

Public aid and funds.[See 9 C. L. 575]—The legislature has power to compel or authorize a municipal corporation to aid in establishing and maintaining a state university located within the municipal limits.[91] The state becomes the trustee[92] of funds created through a grant by congress for the use of state educational institutions,[93] and it has no power to divert such funds from the use for which they were granted.[94] It is its duty to create a board to disburse the same and to provide the manner and method of disbursement.[95] The legislature of Kentucky may make appropriations for the use of the State University and State Normal Schools without submitting the question to the voters.[96] The statute in Washington requiring moneys belonging to a state institution to be transmitted to the state treasurer[97] does not apply to the state college of Washington.[98]

Consolidation.[See 7 C. L. 660]—The removal and consolidation of state schools is a legitimate exercise of power.[99]

propriated money to his own use, his term of office having expired before commencement of action. Hills v. Valentine [C. C. A.] 164 F 328.

83. State v. Richards [Tenn.] 113 SW 370.

84. See 11 C. L. 632.

Search Note: See note in 14 L. R. A. (N. S.) 714, 719, 725.

See, also, 29 A. & E. Enc. L. (2ed.) 320.

85. Schools of grade inferior to colleges are treated elsewhere (see Schools and Education *).

86. Cox v. Alabama University Trustees [Ala.] 49 S 814.

87. State v. Clausen, 51 Wash. 548, 99 P 743.

88. Cannot make such board a separate corporation. State v. St. Louis, 216 Mo. 47, 115 SW 534. Athletic association held part of university. George v. University of Minnesota Athletic Ass'n, 107 Minn. 424, 120 NW 750.

89. Not illegal to discriminate by race, sex, age, or proficiency in learning. Booker v. Grand Rapids Medical College [Mich.] 16 Det. Leg. N. 56, 120 NW 589.

90. Note was not made invalid though gymnasium for benefit of which it was given was, by such removal, rendered useless, there being no argeement that school should not be moved. Miller v. Central University [Ky.] 112 SW 669.

91. State v. Lawrence [Kan.] 100 P 485.

92. State v. Brian [Neb.] 120 NW 916; Cox v. Alabama University Trustees [Ala.] 49 S 814.

93. Public lands were granted to state for support of University and Agricultural College by terms of Act of Congress, 12 Stat. 503. State v. Brian [Neb.] 120 NW 916. Under Act. Cong. 23 Stat. 12, land was granted to state for benefit of state university. Cox v. Alabama University Trustees [Ala.] 49 S 814.

94. State v. Brian [Neb.] 120 NW 916. Has no power to turn fund over to general funds of state. Id.

95. Held that such duty had been complied with by Comp. St. 1905, c. 87, § 19. State v. Brian [Neb.] 120 NW 916.

96. Under Const. § 184. James v. State University [Ky.] 114 SW 767.

97. Sess. Laws, 1907, p. 179, c. 96, § 1. State v. Clausen, 51 Wash. 548, 99 P 743.

98. State v. Clausen, 51 Wash. 548, 99 P 743.

99. Such power was vested in constituted

Actions and rights. See 11 C. L. 632—Mandamus will not lie to compel a private college, though it be incorporated, to admit students whose right to admission depends upon an implied contract.[1] Free tuition is a bar to the requirement of a registration or matriculation fee, but not to the requirement of a laboratory fee.[2] A college which accepts and receives valuable rights and property cannot avoid being liable for their purchase price by denying the authority of the officer making the purchase.[3] A board of control for a department of a university does not ordinarily have capacity to sue.[4] An athletic association which is a mere branch of the college is not subject to suit.[5]

Officers and instructors. See 11 C. L. 632—The board of trustees in Alabama is a mere agent of the state.[6]

Insolvency and dissolution. See 11 C. L. 633—The franchise of a college will not usually be forfeited by nonuser alone.[7]

Collision; Color of Title, see latest topical index.

COMBINATIONS AND MONOPOLIES.

The scope of this topic is noted below.[8]

§ 1. **Combinations Violative of the Federal Anti-Trust Act, 763.**
§ 2. **Combinations Violative of State Anti-Trust Acts and of the Common Law, 765.**
§ 3. **Grants of Privileges by Statute, Ordinance, and Contracts with Municipalities Tending to Create Monopolies, 770.**
§ 4. **Remedies and Procedure Under State and Federal Laws, 770.**

§ 1. *Combinations violative of the federal anti-trust act.*[9] See 11 C. L. 633—The power of congress to legislate on contracts and combinations in restraint of trade is derived from its constitutional power to regulate interstate and foreign commerce,[10] and hence the Sherman anti-trust act applies only to contracts or combinations directly and necessarily affecting commerce between the states or with foreign nations.[11] If a contract affects only products within the limits of a state, it does not come within the act, though it incidentally affects interstate commerce.[12] Nor can a violation of the act be predicated upon acts committed in a foreign jurisdiction,[13] especially when such acts are co-operated in by the officials of the foreign state and also sanctioned by such state itself.[14] To violate the provision against

authorities of university. Miller v. Central University [Ky.] 112 SW 669.

1. Booker v. Grand Rapids Medical College [Mich.] 16 Det. Leg. N. 56, 120 NW 589.

2. City of New Orleans v. Tulane Educational Fund Administrators [La.] 49 S 171.

3. Authority of president of board of trustees and business manager to purchase will be presumed from retention of benefits. Doolittle v. Keuka College, 129 App. Div. 829, 114 NYS 662.

4. Board of control of art museum, not being legal entity or corporate body, had no capacity to sue. State v. St. Louis, 216 Mo. 47, 115 SW 534.

5. University of Minnesota Athletic Association is branch of University of Minnesota, and not party defendant in action of tort by plaintiff injured by collapse of platform at football game. George v. University of Minnesota Athletic Ass'n, 107 Minn. 424, 120 NW 750. Defendant neither partnership, corporation, nor voluntary association of individuals. Id.

6. Cox v. Alabama University Trustees [Ala.] 49 S 814.

7. It must be judicially forfeited to render invalid a sale made by such college. Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905.

8. It excludes the rule of public policy invalidating as between the parties contracts in restraint of trade (see Contracts,* § 3K), and against public policy (see Contracts,* § 3D), and the forfeiture of corporate charters or privileges as a penalty for violation of anti-monopoly laws (see Corporations,* § 12; Foreign Corporations,* § 1). Excludes, also, conspiracy generally (see Conspiracy*), and trade unions (see Trade Unions,* §§ 1, 2).

9. Search Note: See notes in 3 C. L. 707, 708; 11 Id. 634; 7 L. R. A. (N. S.) 984; 10 Id. 268; 12 Id. 150, 600; 2 Ann. Cas. 956; 7 Id. 55; 9 Id. 299, 677.

See, also, Monopolies, Cent. Dig. §§ 7-18; Dec. Dig. §§ 8-28; 27 Cyc. 898, 901-908, 910; 20 A. & E. Enc. L. (2ed.) 844; 23 Id. 664.

10, 11. Bigelow v. Calumet & Hecla Min. Co. [C. C. A.] 167 F 721, afg. 167 F 704.

12. Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. [C. C. A.] 166 F 254. Otherwise if it attempt to control disposition of manufactured product across state lines. Id. Held illegal where intended to stop plaintiff's business which consisted of buying and selling sugar in different states. Id.

13, 14. American Banana Co. v. United Fruit Co., 213 U. S. 347, 53 Law. Ed. —.

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monopolies, the combination must directly, necessarily, and substantially tend toward monopoly.[15] A combination does not violate the act merely because it incidentally or remotely restrains trade or tends towards monopoly.[16]

Any contract or combination directly or necessarily operating in restraint of interstate or international commerce is violative of the Sherman act.[17] The restraint need not be so complete as to entirely destroy competition,[18] and whether reasonable or unreasonable is immaterial.[19] The intention of the parties is material or not accordingly as the necessary effect of the agreement or acts to be done is or is not to directly restrain the trade or create a monopoly.[20] A mere combination to manufacture an article is not within the act,[21] nor does the act necessarily prohibit one corporation from securing control of another corporation by purchase

15. Bigelow v. Calumet & Hecla Min. Co., 167 F 704; Wheeler-Stenzel Co. v. American Window Glass Co., 202 Mass. 471, 89 NE 28.

16. Chief purpose being to promote business of the parties. Bigelow v. Calumet & Hecla Min. Co., 167 F 704.

17. United States v. American Tobacco Co., 164 F 700. Two things are made illegal. By § 1, combinations in restraint of trade, and by § 2, combinations or conspiracies to monopolize or attempt to monopolize trade or commerce. Monarch Tobacco Works v. American Tobacco Co., 165 F 774. Act prohibits any combination whatever to secure action which ostensibly obstructs the free flow of commerce between the states or obstructs in that regard the liberty of a trader to engage in business. Id.

Act held violated: By consolidation of tobacco corporations giving consolidated company control of 75 per cent of tobacco business. United States v. American Tobacco Co., 164 F 700. By agreement between manufacturers of licorice paste that there should be no competition in price between them, providing for arbitrary noncompetitive prices, and apportioning and limiting amount of business to be done by competing companies. United States Tobacco Co. v. American Tobacco Co., 163 F 701. By system of contracts for sale of proprietory medicine made by secret formula whether regarded as contracts of sale or agency. Dr. Miles Medical Co. v. Park & Sons Co. [C. C. A.] 164 F 803. By combination of shipowners to prevent rates by establishing uniform competition in South African trade. Thomsen v. Union Castle Mail S. S. Co. [C. C. A.] 166 F 251. By conspiracy to prevent plaintiff from engaging in the sugar business in competition with defendant, by securing voting power of plaintiff's majority stockholder through pledge of his stock for a loan and voting to exclude plaintiff from business. Pennsylvania Sugar R. Co. v. American Sugar R. Co. [C. C. A.] 166 F 254. Petition in action for treble damages held to state cause of action by showing violation of both sections, one and two of Sherman act, by conspiracy to injure plaintiff's domestic and foreign tobacco trade through combination and monopoly. People's Tobacco Co. v. American Tobacco Co. [C. C. A.] 170 F 396.

Act held not violated: By operating 400 retail cigar stores out of 600,000 places where tobacco is sold. United States v. American Tobacco Co., 164 F 700. That majority of stock of corporation selling tobacco was owned by another corporation, which was an unlawful combination in restraint of trade and which sold first named corporation most goods, held not to render it unlawful where it conducted its business independently in a lawful manner, and also sold goods of other manufacturers. Id. No issue is presented under Sherman Act by complaint in respect to trading which bases right of recovery solely upon defendant's inducing another dealer not to sell to plaintiff, evidence showing merely agreement to notify each other of customers who did not pay their bills, leaving each free to sell such customer goods or not. Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co. [C. C. A.] 159 F 824. Association of window glass jobbers for purpose of appointing common agent to purchase glass for them and distribute under contracts severally entered into by them with agent held not illegal though one object was to avoid competition of members with each other. Wheeler-Stenzel Co. v. American Window Glass Co., 202 Mass. 471, 89 NE 28. Action of two competing railroad companies in furnishing funds and taking stock in new company for purpose of building new road to open new territory, held not violative of Sherman Act. State v. Skamania County Superior Ct., 51 Wash. 346, 98 P 739. Contract for sale of goods by member of a trust, requiring buyer before being entitled to certain premiums to buy only from seller for one year, but containing no forfeiture clause, held not violative of federal act. Moroney Hardware Co. v. Goodwin Pottery Co. [Tex. Civ. App.] 120 SW 1088. Two parallel and competing railroads may promote and finance a third corporation incorporated to build new line opening up and serving new territory. State v. Skamania County Superior Ct., 51 Wash. 346, 98 P 739.

18. Monarch Tobacco Works v. American Tobacco Co., 165 F 774.

19. Thomsen v. Union Castle Mail S. S. Co. [C. C. A.] 166 F 251.

20. If such is not the necessary effect, intention is important. Bigelow v. Calumet & Hecla Min. Co., 167 F 704.

21. Monarch Tobacco Works v. American Tobacco Co., 165 F 774. Contract combination or conspiracy must be in itself in restraint of trade or commerce among the several states or with foreign nations (United States Tobacco Co. v. American Tobacco Co., 163 F 701), or, if a monopoly or attempted monopoly or combination or conspiracy to monopolize, it must be of some part of trade or commerce among the states or with foreign nations (Id.).

of the latter's stocks and properties.[22] A series of separate acts in fact stifling competition is unlawful though each act considered by itself is innocent.[23] That a combination is formed in a foreign country does not exempt it from the statute where it is put in operation in the United States and affects her commerce.[24]

Patented articles. See 11 C. L. 635—Patented articles unless and until released by the owner of the patent from the dominion of his monopoly are not articles of trade or interstate commerce within the meaning of the Sherman Act;[25] hence a patentee may require licensees to join other licensees in a combination or pool to control the output or prices of an innocuous article.[26]

§ 2. *Combinations violative of state anti-trust acts and of the common law.*[27] See 11 C. L. 635—The essence of a monopoly is the concentration of business in the hands of a few.[28] In order that a monopoly may exist at common law, there must be property affected with a public interest,[29] and hence in the absence of statute an occupation cannot be the subject of monopoly,[30] and a statute prohibiting trusts will not be held to apply to combinations to fix wages for laborers unless it appears clearly that such was the legislative intent.[31]

22. Securing control of competing mining corporation held not necessarily illegal though intention was to place both corporations under general control. Bigelow v. Calumet & Hecla Min. Co. [C. C. A.] 167 F 721, afg. 167 F 704. Transaction not illegal where primary purpose was to secure more economical operation of mines especially where controlled corporation was one of a group previously under common management. Id.

23. Monarch Tobacco Works v. American Tobacco Co., 165 F 774.

24. Suit for treble damages. Thomsen v. Union Castle Mail S. S. Co. [C. C. A.] 166 F 251.

25. See Patents, § 8.

Proprietary medicines made by secret formula but unpatented held not within exception in favor of patented or copyrighted articles. Dr. Miles Medical Co. v. Park & Sons Co. [C. C. A.] 164 F 803.

26. See Patents, § 8.

27. Search Note: See notes in 3 C. L. 709; 5 Id. 595, 597; 7 Id. 663; 11 Id. 636, 637, 649; 64 L. R. A. 689; 7 L. R. A. (N. S.) 976; 11 Id. 368, 968; 15 Id. 846; 16 Id. 223; 74 A. S. R. 235, 236; 1 Ann. Cas. 847; 6 Id. 846; 8 Id. 155. 721.

See, also, Monopolies, Cent. Dig. §§ 7-18; Dec. Dig. §§ 8-28; 27 Cyc. 898, 901-908, 910; 20 A. & E. Enc. L. (2ed.) 844; 23 Id. 664.

28 National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259. Trade and commerce is monopolized when as a result of efforts to that end previously competing businesses are so concentrated that one or a few persons or corporations have power to practically control the prices of a commodity and to thus practically suppress competition. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395. Within anti-trust law, Rev. St. 1899, c. 143. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Test is not that prices are raised, but whether combination has power to raise prices and destroy competition at pleasure. Id. Word "monopoly" as used in Stock Corp. Law, N. Y. (Laws 1890, c. 564), § 7, as amended by Laws of 1892, held not to mean control of all present and future means of carrying on a business, but any exclusive privilege to carry on a traffic or possession or assumption of anything to exclusion of other possessors, embracing any combination or contract tendency of which is to prevent competition in its broad and general sense. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945. Railroad merger held within statute though consolidation was still subject to control of Public Service Commission. Id. Rules of Duluth board of trade held not to create or tend to create a monopoly. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395. Combination purpose of which was to **control** price of milk generally within a city as distinguished from fixing price charged by members held an unlawful monopoly. State v. Erickson [Wash.] 103 P 796. To constitute **a trust** within Rev. St. 1899, c. 143, there must be a combination of capital, skill, or acts by two or more, "combination" meaning "union" or "association." State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Under **old English law** a technical "monopoly" was a special privilege granted by the sovereign to an individual for sole trading in, or making or using anything, whereby people in general were excluded from previously enjoyed liberty of manufacturing or trading. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395. It differed from "engrossing" in that a patent was had from king, while engrossing was between individuals. Id.

29. Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 SW 997. "Best Lake" Superior copper held not so distinct from western copper as to render combination between two or more companies producing same a monopoly or an attempted monopoly. Bigelow v. Calumet & Hecla Min. Co. [C. C. A.] 167 F 721, afg. 167 F 704.

30. Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 SW 997.

31. Rohlf v. Kasemeier [Iowa] 118 NW 276. Code, § 5060, prohibiting combinations to regulate price of any "article of merchandise or commodity" or to fix amount or quality of any "article, commodity or merchandise to be manufactured, mined, produced, or sold," held not to cover combinations to fix price of skilled or unskilled labor. Id. Held not to prevent physicians from combining to fix charges for services. Id. Agreement or combination to fix wages or other charges for personal services held not within state anti-

Combinations, monopolies, and conspiracies in restraint of trade and restrictive of legitimate competition, are illegal at common law.[32] Furthermore, the state, in the exercise of its police power,[33] has undoubted power to regulate or prohibit monopolies and combinations in restraint of trade,[34] and to provide its own means for carrying such regulations or prohibitions into effect,[35] including the fixing of

trust statute. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395. Agreement between mason builders' association and bricklayers' unions of city of New York prohibiting subletting of interior brick work, fire proofing, etc., and giving preference to certain men, held not a monopoly within New York statute declaring void contracts and combinations monopolizing production or sale of articles or commodities of common use. National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259.

32. Combinations in restraint of competition or trade are invalid as contrary to public policy at common law. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Combination which in apparent purpose or natural consequence restricts competition or tends to monopoly is illegal. Id. Though contract otherwise legal will not be held invalid because it incidentally limits trade or fixes prices (State v. Standard Oil Co., 218 Mo. 1, 116 SW 902), if primary purpose is to restrain trade, it is void at common law and not protected by constitution guaranteeing freedom of contract (Id.). Public policy favors competition in trade and opposes monopolies and restraints. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. Inhabitants of a village are entitled to protection from restraint of trade or monopoly in useful commodities without reference to opportunities for obtaining the commodities elsewhere. Id.

Held illegal: Control of commodities which are necessaries of life, or of material necessary to building or sanitation or of subjects of legitimate trade affecting public interest, or interests of producers, dealers or consumers, so as to prevent or tend to prevent or restrain competition, is illegal. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Plumber's supplies are "necessities" of life and staple commodities within rule. Id. Agreement between fire insurance companies to fix prices and regulate channels of **insurance** business within a certain area, to injury of public, held contrary to public policy and ultra vires such corporations, and restrainable in equity at suit of attorney general. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80. Lumber, coal and grain monopoly, held a public nuisance. Territory v. Long Bell Lumber Co. [Okl.] 99 P 911. Purchase of majority of stock of telephone company by competing company, for purpose of stifling competition and monopolizing **telephone business**, held contrary to public policy and void. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521. Contract giving a transfer company exclusive right to occupy most desirable part of station ground of a railroad to exclusion of other cabs held to give practical monopoly in **transfer service** and hence void. Palmer Transfer Co. v. Anderson [Ky.] 115 SW 182. **Control and management of coal mining company by railway company** upon whose road coal company is shipper, through stock ownership, tends to monopoly and restriction of trade and competition, and is therefore unwarranted and illegal. State v. Hocking Valley R. Co., 12 Ohio C. C. (N. S.) 49. Guaranty of bonds of coal company by railway company cannot be construed as a tonnage contract, but is in nature of monopoly and leads to discrimination where under permissive clause a competing railway company is brought in to share guaranty on condition of equal division of traffic arising from the mines of company issuing the bonds, and where such guaranty exists, it is unlawful exercise of power. State v. Hocking Valley R. Co., 12 Ohio C. C. (N. S.) 145.

Held not illegal: Association of window glass jobbers for purpose of appointing a common agent to buy glass and distribute among members under separate contracts held not violative of common law. Wheeler-Stenzel Co. v. American Window Glass Co., 202 Mass 471, 89 NE 28. Inasmuch as combinations of telephone exchanges and telephone lines are necessary to afford proper facilities for the public, and legislature has recognized this necessity by provision for mergers and combinations of such companies, contract between two telephone companies which provides for an exclusive interchange of business must be distinguished from contracts effecting mergers of gas or street railway companies and is not void because of tendency to create monopoly or subversive of public interest and benefit, and, where system of lines has been built upon faith of such interchange of business, claim on the part of defendant company that contract is in restraint of trade and should be abrogated is not well founded. United States Telephone Co. v. Middlepoint Home Tel. Co., 7 Ohio N. P (N. S.) 425.

33. Enactment of ante-trust laws is within police or analogous power of state. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. State in exercise of police power may prohibit manufacturing or trading companies from forming trusts or combinations and making agreements in restraint of trade detrimental to interests of general public. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

34. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Legislative power to regulate trusts, etc., inimical to public welfare, held not dependent solely on Const. 1890, § 198, authorizing laws to prevent trusts, etc., legislature having general power to declare what combinations are inimical. State v. Jackson Cotton Oil Co. [Miss.] 48 S 300. Neither state nor federal constitution prevents enactment of statutes prohibiting contracts in restraint of trade whether reasonable or unreasonable. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Legislature **may prohibit rebates,** object of which is to restrain trade for purpose of fixing and maintaining prices. Id.

35, 36. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —.

the punishment for the violation of its laws in such regard,[36] subject only to constitutional limitations.[37] This has been done usually by the enactment of so-called anti-trust laws, intended to restrict or extend the common-law principles.[38] Whether or not an agreement or combination is unlawful will accordingly depend largely on the terms of the state statute,[39] when construed according to the usual

37. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Laws 1900, p. 125, c. 88, held constitutional. State v. Jackson Cotton Oil Co. [Miss.] 48 S 300. Held severable allowing elimination of invalid parts. Id. Oklahoma anti-trust act of Dec. 25, 1890, held not repugnant to constitution of United States or with Sherman Act, but valid. Territory v. Long Bell Lumber Co. [Okl.] 99 P 911. That violation thereof would also be punishable under federal act, held not to affect its validity. Id. Acts 1906, p. 429, c. 117, legalizing pooling of farm products in order that higher prices may be obtained is in conflict with Const. § 198, if construed to enable farmers to obtain more than real value for their products (Commonwealth v. International Harvester Co. [Ky.] 115 SW 703), but is valid so far as permitting farmers to obtain better prices not above real values (Id.). Act held not invalid under Const. § 198, providing for laws against combinations to enhance cost of any article above its real value or to depreciate any article below its real value. Id. Rev. St. 1899, §§ 8965, 66, 71, 78 (Ann. St. 1906, pp. 4150, 4152, 4153, 4157) against pools, etc., held not unconstitutional as **unjustly discriminating against property,** by reason of excluding labor. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Not violative of federal constitutional provision conferring on congress **exclusive jurisdiction to regulate interstate commerce.** Id. Rev. St. 1899, §§ 8965, 66, 71, 78 (Ann. St. 1906, pp. 4150, 4152, 4153, 4157), does not impair **obligation of contract.** Id. Since Const. Ark. reserves right to repeal, alter or amend corporate charters, Ark. anti-trust act Jan. 23, 1905, § 1, penalizing the doing of business by members of illegal combinations, is not invalid as impairing contractual rights. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —. A provision that the character of an alleged trust or combination may be established by its general reputation is invalid as constituting a denial of **due process of law.** Provision of Rev. St. § 4427-6, to such effect held invalid under U. S. Const. amend. 14, § 1. Hammond v. State, 78 Ohio St. 15, 84 NE 416. Acts 1899, p. 257, c. 148, held not denial of due process. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Ark. Act Jan. 23, 1905, § 1, prohibiting members of illegal combinations from doing business in state held not invalid as denying **equal protection** of laws to corporations. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —. Such act includes domestic as well as foreign corporations. Id. Acts 1899, p. 257, c. 148, held not denial of equal protection. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Acts 1899, p. 257, c. 148, held not invalid as **granting special privileges.** Id. Acts 1899, p. 257, c. 148, held not invalid as imposing **punishments** so severe as to deter resort to courts. Id. Fines, imposed for violation of Texas anti-trust laws of 1899 and 1903, held not so excessive as to warrant interference therewith as being unconstitutional. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. A statute is not given a **retroactive effect** by applying it to the continuation of an agreement made prior to the enactment of the statute and lawful at such time. Id. Acts 1899, p. 257, c. 148, prohibiting combinations to prevent dealers and manufacturers from selling supplies to any dealer, manufacturer or artisan, held not unconstitutional as to **title.** Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Defendant in action under anti-trust act (Acts 1899, p. 257, c. 148) could not complain that act was not as broad as title where act defined conditions which described combinations having per se only the effect of preventing or tending to prevent competition. Id.

38. Statutes of the state indicate a policy to extend and confirm, not to restrict, common-law principles relating to restraint of trade and monopolies. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. Act May 20, 1890 (Ky. St. 1903, § 3915), and Acts 1906, p. 429, c. 117, prohibiting trusts, etc., but legalizing pooling of farm products extend common-law principles against absorption by fraud or coercion necessities of life to all articles of commerce (Commonwealth v. International Harvester Co. [Ky.] 115 SW 703), and leave out ingredients of fraud or coercion (Id.). While at common law result must have produced common misery, it is sufficient under statutes if it unsettles usual balance of markets (Id.), and the test under statutes is whether prices are brought above or below real values (Id.). Act May 20, 1890, held not repealed by Const. § 198. Id. Anti-trust act (Acts 1899, p. 257, c. 148), prohibiting combinations preventing free competition, etc., is declaratory of common law except as to punishments. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Act May 20, 1890 (Ky. St. 1903, § 3915) and Acts 1906, p. 429, c. 117, held not invalid for uncertainty. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703. Where an act prohibiting combinations is simply declaratory of common law except as to punishment, it is not insufficient for not specifically making intent to restrain competition an element when combinations prohibited in fact restrain competition. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Not necessary that body of act shall declare that combination must be formed with specific intent when situation is disclosed on which law engrafts an intent, and which can have no other purpose than to restrain free competition. Id.

39. Combination, understanding or contract, the direct or necessary effect of which is to stifle or restrict competition in trade or business, violates Anti-trust

rules of statutory construction,[40] such as those relative to construing together statutes that are in pari materia,[41] and those determinative as to when a statute will

Statute, c. 359, Gen. Laws 1899, Rev. Laws 1905, § 5168, whatever may have been intention of parties. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395. **Kind of goods affected** whether luxuries or necessities held immaterial. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

Statutes held violated: Under Code 1906, c. 145, § 6002, declaring that a **combination intended to hinder competition in sale or purchase** of a commodity shall be a criminal conspiracy, held immaterial whether means adopted be peaceable and otherwise lawful if intent be to accomplish the unlawful object. Retail Lumber Dealers' Ass'n v. State [Miss.] 48 S 1021. Statute violated by combination of retail lumber dealers under agreement not to purchase from wholesalers competing with retailers. Id. Not necessary to show that means adopted would be effective. Id. Words "inimical to public welfare" held not an element of each offense stated in separate sections of statute, but offense held complete when shown to be within terms of any section. Id. Argument that very existence of retailers depended on such combinations, held unavailing. Id. In prosecution of **harvester trust,** evidence held sufficient to justify inference of guilt. State v. International Harvester Co. [Kan.] 99 P 603. Evidence held to sustain finding of unlawful **combination to fix price of petroleum** and its products in violation of Rev. St. 1899, c. 143, arts. 1, 2, prohibiting trusts, pools, etc. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Giving **rebates** to customers, by combine, under agreement in restraint of trade to fix and maintain prices, violates statute. Id. **Consolidation of competing street railway companies** held violative of New York Stock Corporation Law prohibiting combinations to create a "monopoly" or restraint of trade to prevent competition. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945. **Contract between local and long distance telephone companies,** providing for connection of lines and binding local company for 99 years not to permit connection with any other long distance company, held monopolistic and discrimatory under public policy of Ohio as shown by its statutes and decisions. United States Tel. Co. v. Central Union Tel. Co., 171 F 130.

Statutes held not violated: Reciprocal **agreements by insurance agents** selling their agencies to corporation formed by them, not to solicit same kind of insurance business except in behalf of corporation, held not violative of anti-trust law, Laws 1905, p. 1, insurance premiums not being affected. Bloom v. Home Ins. Agency [Ark.] 121 SW 293. Act May 20, 1890 (Ky. St. 1903, § 3915) prohibiting trusts, pools, etc., to regulate prices or limit amount of articles, and Acts 1906, p. 429, c. 117, legalizing **pooling of farm products,** when construed with Const. § 198 and U. S. Const. 14th amendment, held to permit the pooling of property or combining of capital generally, provided no article is thereby depreciated below its real value or its cost enhanced above real value. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703. Act of 1906 modified Act of 1890 to extent of permitting pools, combines, etc., provided prices are not enhanced or lowered above or below real values of the articles affected. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703; Commonwealth v. International Harvester Co. [Ky.] 115 SW 755; American Tobacco Co. v. Com. [Ky.] 115 SW 754; Id. [Ky.] 116 SW 1176. **Purchase by mining corporation of controlling stock in another** held, under evidence, not violative of Pub. Acts March, 1899, p. 409, No. 255, prohibiting combinations to prevent competition in "manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity" (Bigelow v. Calumet & Hecla Min. Co. [C. C. A.] 167 F 721, afg. 167 F 704), or of Pub. Acts March 1905, p. 507, No. 329, declaring illegal all combinations entered into "for the purpose and with the intent of establishing or maintaining or of attempting to establish and maintain, a monopoly" (Id.). Purchaser of corporate stock is a transferee of a business within Pub. Acts 1905, p. 507, No. 329, §§ 1, 6, prohibiting all **agreements not to engage in any business,** except those in favor of a transferee of a business. Buckhout v. Witwer [Mich.] 16 Det. Leg. N. 417, 122 NW 184. Evidence of existence of **association of undertakers** for social purposes and for purpose of discussing best methods of carrying on business held insufficient to show trust or combination in violation of statute against pools, trusts, etc., it not being shown prices had been fixed or any regulations adopted tending to stifle competition. Wagoner Undertaking Co. v. Jones, 134 Mo. App. 101, 114 SW 1049. **Resolution of stock exchange,** prohibiting members from doing business with members of a rival exchange, held not an "illegal combination in restraint of trade" violative of Laws 1899, c. 690. Helm v. New York Stock Exchange, 133 App. Div. 529, 118 NYS 591. Act 1903, p. 119, c. 94, defining a trust as a combination to create restrictions in trade or restriction in the free pursuit of any business "permitted by the laws of the state," held not to prohibit owner of a plantation from giving another **exclusive privilege of selling merchandise** thereon. Redland Fruit Co. v. Sargent [Tex. Civ. App.] 113 SW 330

40. See Statutes, § 5.

41. Rev. St. 1899, § 8978, prohibiting all combinations to fix, regulate or control prices, should be construed together with §§ 8965, 8966, relating to same subject. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

42. Rev. St. 1899, §§ 8965, 8966, 8971, 8978 (Ann. St. 1906, pp. 4150, 4152, 4153, 4157), prohibiting trusts, etc., and providing for forfeiture of corporate franchises for violations are in aid of and supplementary to common law, and remedial, and hence should not be strictly construed. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Rev. Laws 1902, c. 56, § 1, prohibiting vendors from imposing condition against purchaser dealing in goods of others being penal must be strictly

be liberally and when strictly construed.[42] A restraint or monopoly need not be complete, or amount to a crime,[43] or even result in an actual monopoly.[44] It is generally held, however, both in the federal[45] and state jurisdictions that the anti-trust law is not violated unless the agreement or combination necessarily and directly affects trade,[46] and that agreements primarily calculated to foster, promote or facilitate business, are valid though incidentally restraining trade or restricting competition.[47] So, also, a monopoly resulting from ordinary, lawful competition is not unlawful,[48] and an anti-trust act should not be so construed as to cripple or destroy a previously legitimate and legally authorized business, unless such clearly appears to have been the legislative intent.[49] State anti-trust laws are generally held inapplicable to interstate commerce,[50] and it has recently been held in New York that an agreement to maintain fixed retail prices for copyrighted books and prohibiting the handling thereof by retailers, cutting prices is not subject to the state statute.[51] Whether a transaction is an unlawful sale or a mere delivery to an agent depends on the intent of the parties and not necessarily on the form of the contract.[52] Two parallel and competing railroad companies may promote the incorporation of, and finance a third company to build a new line opening up and serving new territory.[53]

construed, and so construed, does not prohibit such condition where sale is at reduced price. Butterick Pub. Co. v. Fisher [Mass.] 89 NE 189.

43. Test is injury to public. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19.

44. Texas Anti-trust Laws, May 25, 1899, and March 31, 1903, held not invalid on account of uncertainty because the acts penalized are such as are "reasonably calculated" or "tend" to produce the prohibited result. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —.

45. See ante, § 1.

46. Rule 26 of Duluth Board of Trade held not necessarily or directly to prevent competition in, or to monopolize, grain trade. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395.

47. Agreements tending to facilitate and promote trade are regarded with favor. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. Rev. St. 1899, §§ 8965-67, 71, 72, 78, prohibiting pools, etc., and contracts in restraint of trade reasonable or unreasonable, held not to invalidate a contract having for its object a legitimate purpose, and only incidentally restraining trade. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Combination, main purpose and effect of which is to foster the trade and increase the business of members and which only indirectly and remotely restricts competition, is not "a combination or conspiracy in restraint of trade" within statute. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395. Combination of dealers in articles of similar nature in a particular locality for purpose of fairly regulating methods of conducting business and providing rules for fair dealing among members but which exercises no improper control over nonmembers and does not control prices or production is not within state statute. Id. Rule 26 of Duluth Board of Trade, requiring all members to charge a uniform and determined rate for selling grain on commission and providing penalties, does not violate Minnesota anti-trust statute. Id. Duluth Board of Trade as constituted under its charter and rules is not a conspiracy or combination in restraint of trade or which restrains, limits, or interferes with free competition in the production or purchase or sale of grain. Id.

48. Common law "law of competition" held not restricted by Alabama constitution, giving legislature power to regulate trusts, monopolies, etc., so as to prevent them from stifling reasonable competition, etc. Citizens' L., H. & P. Co. v. Montgomery Light & Water Power Co., 171 F 553. Control of a pursuit or trade not forbidden, though lodged in a single hand, if the result of competition waged by lawful means. Id. One man may take over all of another man's customers and thus control business, if doing so by competition within legal means. Id.

49. Held not intended to cripple or destroy boards of trade conducting business in a manner not contrary to public policy of state. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395.

50. See Commerce, § 2. Moroney Hardware Co. v. Goodwin Pottery Co. [Tex. Civ. App.] 120 SW 1088. Agreement of a company to furnish albums and not to sell to others in defendant's city within a year held to relate to interstate commerce, and held not subject to statute prohibiting conspiracies in restraint of trade. Albertype Co. v. Gust Feist Co. [Tex.] 114 SW 791. Transaction in which defendant in Texas gave plaintiff's agent an order for goods which was accepted by plaintiffs in Ohio, goods being shipped from there to defendant in Texas, held interstate commerce not covered by state anti-trust act. Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co. [Tex. Civ. App.] 120 SW 532.

51. Straus v. American Publishers' Ass'n, 193 N. Y. 496, 86 NE 525. See Copyrights.

52. Sale in violation of Kansas anti-trust act. State v. International Harvester Co. [Kan.] 99 P 603.

53. Great Northern and Northern Pacific

All persons actively participating in the violation of the statute are subject to its penalties,[54] and, if business is transacted within the state pursuant to a combination or agreement unlawful therein, exemption cannot be had because the combination was formed without the state.[55] Where on the face of an agreement its direct effect and tendency is to stifle competition and restrain trade, the law infers unlawful intent.[56]

§ 3. *Grants of privileges by statute, ordinance, and contracts with municipalities tending to create monopolies.*[57]—See 11 C. L. 639.—Exclusive privileges may be granted in proper cases by municipalities by virtue of the police power possessed by them to legislate for the safety, health, and welfare of their inhabitants.[58]

§ 4. *Remedies and procedure under state and federal laws.*[59]—See 11 C. L. 639.—Forfeiture of corporate franchises as a remedy for violating anti-monopoly laws is elsewhere treated.[60] Agreements in unreasonable restraint of trade, though they be unenforcible as being against public policy,[61] are not illegal in such sense as to give third persons a right of acton for injury sustained[62] or to afford ground for injunctive relief against threatened injury,[63] in the absence of a conspiracy[64] or some controlling statute,[65] or except where the state seeks to restrain public injury by acts ultra vires acts of a corporation.[66] Combinations violative of the Sherman act may be enjoined,[67] but the injunctive remedy is available to the government only,[68] individuals being limited to actions for damages.[69] Treble damages are recoverable under the act by any person injured in his business or property.[70] In

could subscribe for stock and contribute necessary funds without violating constitutional inhibition against railroad consolidation. State v. Skamania Superior Ct., 51 Wash. 346, 98 P 739.

54. One who was president of an unlawful exchange and chairman of board of directors and also president of another organization which was member of exchange held to all intents and purposes a member of the exchange. Howell v. State [Neb.] 120 NW 139.

55. All persons or corporations conducting business in state pursuant to contracts in restraint of trade to fix prices are amenable to Rev. St. 1899, c. 143, arts. 1, 2, prohibiting pools, trusts, etc., though contract or combination is made without the state. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

56. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823.

57. **Search Note:** See notes in 27 L. R. A. 540; 53 Id. 763; 22 A. S. R. 797; 97 Id. 688; 1 Ann. Cas. 847; 6 Id. 157.

See, also, Monopolies, Cent. Dig. §§ 1-6; Dec. Dig. §§ 1-7; 27 Cyc. 892-896.

58. City could grant exclusive right to remove deposits from unsewered privies at rates fixed by city and paid by owners of premises. Dreyfus v. Boone [Ark.] 114 SW 718. Ordinance cannot be passed under guise of police regulation, in order to raise revenue. Id. Ordinance requiring licensee to pay city part of profits held invalid. Id. Contract between city and water company precluding city from granting to others right to furnish water for fire hydrants held invalid under Const. art. 1, § 3, prohibiting exclusive public privileges, except in consideration of public services. Hartford Fire Ins. Co. v. Houston [Tex.] 116 SW 36. That ordinance for public sale of a telephone franchise to owner of an existing franchise eliminated owner of another franchise as bidder held not violative of Const. § 164, prohibiting monopolies, purpose of ordinance being to preserve effective competition. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855.

59. **Search Note:** See notes in 2 Ann. Cas. 339, 951; 7 Id. 55; 8 Id. 892; 9 Id. 677, 906, 1189.

See, also, Monopolies, Cent. Dig. §§ 16-20; Dec. Dig.; 14 A. & E. Enc. P. & P. 55.

60. See Corporations, § 12; Foreign Corporations, § 1.

61. See Contracts, §§ 3D, 3K.

62, 63. National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259.

64. See Conspiracy, § 1. See, also, Trade Unions, § 2.

65. Combination, trust or pool whereby monopoly was created in lumber, coal, and grain trade, and exhorbitant prices exacted, held a "public nuisance" enjoinable at suit of county attorney under Wilson's Rev. & Ann. St. 1903, § 4440. Territory v. Long Bell Lumber Co. [Okl.] 99 P 911.

66. If a corporation engaged in a business affected with a public interest contracts to enter upon a line of conduct with respect to such business that tends to affect such public interest injuriously and is contrary to public policy, the contract is ultra vires, and corporation may be restrained in equity at suit of attorney general though no actual injury has resulted to the public. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80.

67. Monarch Tobacco Works v. American Tobacco Co., 165 F 774.

68. National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259.

69. Limited to action for treble damages. National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259.

70. Under § 7 of Sherman Act declaring

a suit for such damages, the fact that the combination was entered into before the plaintiff commenced business will not preclude recover where it was continuing and the plaintiff in fact sustained damage,[71] but the defendant's acts prior to the commencement of the defendant's business may be immaterial as res inter alios acta.[72] Several defendants charged with having acted in pursuance of a common design may be jointly sued.[73] The appointment of a receiver for a constituent of an illegal combination in other proceedings prior to the commencement of a suit to have the consolidation declared illegal does not remove it from the illegal combination so as to preclude the suit.[74] By a congressional act of 1903, it is provided that in an equity suit in the federal circuit court to protect commerce against unlawful restraints and monopolies the attorney general may file a certificate of importance giving the case precedence and requiring that it be heard before not less than three judges.[75]

The sufficiency of an indictment or information under the anti-monopoly statutes is tested by the usual rules,[76] and so also pleadings in civil actions.[77] In

that any person injured in his business or property by any person or corporation by violation of the act may sue for treble damages, it is sufficient if complainant's business or property has been in some way injured by reason of the illegal scheme. Monarch Tobacco Works v. American Tobacco Co., 165 F 774. Being compelled to pay higher price for articles affected held **injury** giving right to treble damages. Id. In suit for treble damages from African trade combination, **complaint** held to sufficiently allege that plaintiff had suffered damages by violation of the act. Thomsen v. Union Castle Mail S. S. Co. [C. C. A.] 166 F 251. Complaint by a stockholder held to show injury to plaintiff's corporation by defendant's control of interstate telephone commerce, and not to its stockholders precluding plaintiff from recovering treble damages under Sherman Act. Ames v. American Tel. & T. Co., 166 F 820. Not necessary to allege injury to an existing business, it being as unlawful to prevent business as to drive one therefrom. American Banana Co. v. United Fruit Co. [C. C. A.] 166 F 261. Necessary to allege facts showing intention and preparedness to engage in business. Id. Allegation that plaintiff was prevented from buying and shipping bananas to United States as it would otherwise have done held merely incidental to demand for damages for injury to a plantation, and not sufficient as independent allegation of intention and preparedness to engage in business. Id. Complaint not demurrable as showing no business to be injured, it alleging that plaintiff by defendant's conspiracy was prevented from resuming business suspended during Spanish war. Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. [C. C. A.] 166 F 254. General damages sufficiently charged. Monarch Tobacco Works v. American Tobacco Co., 165 F 744.

Act held inapplicable: Provision for treble damages held not applicable where the acts complained of were committed outside the jurisdiction of United States and within jurisdiction of a foreign state, especially where they were done with the co-operation of officials of such state and with its sanction. American Banana Co. v. United Fruit Co., 213 U. S. 347, 53 Law. Ed. —.

71. Equally unlawful to prevent one from engaging in business as to drive him out of business. Thomsen v. Union Castle Mail S. S. Co. [C. C. A.] 166 F 251.

72. In suit for damages under Sherman Act defendant's conduct prior to plaintiff's organization held immaterial as res inter alios acta. Monarch Tobacco Works v. American Tobacco Co., 165 F 774.

73. Plaintiff not required to elect because some defendants were charged with doing one act and some with doing others. Monarch Tobacco Works v. American Tobacco Co., 165 F 774.

74. Receiver appointed in prior actions because of financial embarrassment and to foreclose a mortgage. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

75. Act Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Sup. 1907, p. 951) held constitutional though discriminatory. United States v. New York, etc., R. Co., 165 F 742.

76. **Indictment** charging violation of act May 20, 1890 (Ky. St. 1903, § 3915) must allege that purpose or effect of alleged combination was to enhance the articles involved above their real value or to depreciate them below such value. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703. Petition in penal action alleging that defendant became party to trust to fix and regulate price of tobacco and that defendant attempted to fix and regulate price of tobacco in a designated county held insufficient under anti-trust law of May 20, 1890, and Act Mar. 21, 1906, gravamen of offense being raising or lowering of prices above or below real values. American Tobacco Co. v. Com. [Ky.] 115 SW 754. Indictment held insufficient in view of modification of Act May 20, 1890 by Act Mar. 21, 1906, so as to permit combinations, etc., provided the price of any article is not raised or lowered above or below its real value. Commonwealth v. International Harvester Co. [Ky.] 115 SW 755; American Tobacco Co. v. Com. [Ky.] 115 SW 755; Id. [Ky.] 115 SW 756. Indictment charging violation of "Junkin Act" must allege that

an action for treble damages under the Sherman act, it is sufficient if the facts constituting the cause of action are stated with the particularity required by the local statutes.[78] On an information the prosecutor need not prove everything alleged in the information where not necessary to establish an offense.[79] The usual rules govern evidence [80] and instructions.[81] All the facts and circumstances should be considered in arriving at a decision,[82] and the particular statutes involved and the circumstances of each case will determine the penalty to be imposed or the re-

acts complained of were in restraint of trade within the state. Howell v. State [Neb.] 120 NW 139. Information held to charge conspiracy to control price of milk generally in a city as distinguished from undertaking of each participant to control price of his own milk. State v. Erickson [Wash.] 103 P 796. **Information** in nature of quo warranto held not fatally defective for failure to charge combination to "maintain" prices where it charged combination to fix, regulate, and control prices, since Rev. St. 1899, § 8978, should be considered in connection with §§ 8965, 8966. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Information in nature of quo warranto even if required to conform to rules governing indictments held not defective for failure to charge the means by which acts complained of were accomplished, such acts being unlawful per se. Id. Information held not too uncertain as to offense charged, it appearing that though several combinations, etc., prohibited by statute were mentioned generally in introductory statement, the several counts charged different sales made unlawful by the anti-trust act. State v. International Harvester Co. [Kan.] 99 P 603. Refusal to charge that several counts charging unlawful sales charged but one offense held not error in view of the general ground of previous motion to quash, and the state of the evidence. Id. Information in nature of quo warranto alleging agreement by one cotton oil company not to buy cotton seed near plant of another and that agreement was an unlawful combination to restrain trade for purpose of limiting price of a commodity, though containing unnecessary averments, held to allege single cause of action, and held sufficient under Laws 1900, p. 125, c. 88, defining "combine" and making it illegal. State v. Jackson Cotton Oil Co. [Miss.] 48 S 300.

77. Complaint charging combination to prevent competition in plumbing business held to state cause of action under anti-trust act (Acts 1899, p. 257, c. 148) and not at common law. Knight & Jillison v. Miller [Ind.] 87 NE 823. Answer in civil action under act May 20, 1890, as amended by act Mar. 21, 1906, held insufficient. Stahr v. Hickman Grain Co. [Ky.] 116 SW 784.

78. Particularity of indictments not necessary, statute of Kentucky where federal court was sitting merely requiring statement of facts as concisely as possible consistent with clearness. Monarch Tobacco Works v. American Tobacco Co., 165 F 774.

79. Certain instructions held properly refused as making guilt dependent on combination with a certain company, defendant being guilty if it made illegal sales under combination with any other person or corporations. State v. International Harvester Co. [Kan.] 99 P 603.

80. Evidence of **rebate system** held admissible to show unlawful combination. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. That another corporation owned majority of stock of respondent companies, though not conclusive, held admissible as fact or circumstance showing existence **of combination between corporations.** Id. On issue **of validity of contract between telephone companies,** evidence of condition of telephone business within field in which companies were operating is admissible for purpose of showing tendency and effect of agreement made. United States Tel. Co. v. Middlepoint Home Tel. Co., 7 Ohio N. P. (N. S.) 425. In prosecution **of harvester trust,** previous application of constituent company to do business in state showing resources, etc., and that its business had been sold out, and evidence that after 1904 its machinery had been sold through defendant, held not hearsay. Id.; State v. International Harvester Co. [Kan.] 99 P 603. Testimony of a witness for state in prosecution of harvester trust that defendant handled certain machines mentioned by him held not objectionable on ground that witness assumed to know that the various corporations alleged to have combined with defendant manufactured the machines which they handled, the material question being whether defendant joined with them in attempting to monopolize the trade. Id. Evidence of corporate and business character of certain corporations based only on general reputation held not prejudicial, it not being necessary to show that the various companies were corporations or that they were engaged in manufacture of harvester machinery. Id. **Declarations** of president of defendant corporation in an address to local machine dealers tending to show monopoly held admissible in prosecution under anti-trust act. Id.

Degree of proof: Bill to set aside sale of majority of stock of a corporation to competing corporation on ground it stifled competition and was therefore contrary to public policy held not to charge criminal violation of anti-trust act so as to raise degree of proof required to justify relief sought. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521.

81. In prosecution of harvester trust certain instructions held properly refused as misleading. State v. International Harvester Co. [Kan.] 99 P 603. Instruction that a certain article in constitution of defendant's association was "in itself" a violation of laws of state held erroneous as precluding further inquiry as to defendant's guilt. Howell v. State [Neb.] 120 NW 139.

82. In determining existence of unlawful

lief to be granted.[83] Special provision is sometimes made for the fees of the prosecuting attorneys.[84] The state may appeal in a proceeding under the Minnesota statute.[85]

Compulsory testimony and immunity of witnesses. See 9 C. L. 588—Corporate officers and agents may be required by statute to testify and produce books and papers,[86] and where immunity from prosecution is granted they cannot invoke the constitutional guaranty against self-incrimination.[87] A corporation has no constitutional right to refuse to produce books and papers in a proceeding by the state against it for violation of the anti-trust laws [88] nor can its officer in charge plead the criminality of the corporation in justification of refusal to produce the books.[89] The state legislature may penalize the failure to comply with orders for the production of evidence in such manner as it deems proper, subject only to constitutional limitations,[90] but an honest effort to comply with an order for the production of evidence exempts the defendant from the penalty imposed for noncompliance.[91]

COMMERCE.

The scope of this topic is noted below.[92]

§ 1. Nature of Commerce; Domestic, Interstate, or Foreign, 774.

§ 2. Regulation of Commerce, 775.

A. The "Commerce Clause" and Its Application to Particular Regulatory Measures, 775. Regulation of Foreign Corporations, 776. Regulation of Traffic in Intoxicating Liquors, 778. Inspection Laws; Quarantine, Public Health and Safety, and Fertilizer Laws, 779. Regulation of Railroads and Other Carriers, 780. Tax Laws, 783. The Safety Appliance Act, 783.

B. Regulation of Trade and Commerce Within a State, 784.

§ 3. The Interstate Commerce Commission; Its Functions and Proceedings Before It, 784.

§ 4. The Department of Commerce and Labor; Its Functions, 786.

§ 5. State Railroad and Corporation Commissions, 786.

combination, court may consider all facts and circumstances together and need not separate each factor and determine its legality by itself. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

83. Two hundred dollars without forfeiture of charter held proper for violation of anti-trust act while Laws 1900, p. 125, c. 88, was in force. State v. Jackson Cotton Oil Co. [Miss.] 48 S 300. Restraining defendants from carrying on interstate or foreign commerce until conditions existing prior to illegal combination should be restored held sufficient, it not being practicable or necessary to appoint receivers. United States v. American Tobacco Co., 164 F 700.

84. Anti-trust Law of 1903 repealed that part of Act of 1899 (Laws 26th Leg. p. 246, c. 146) approved May 25, 1899, giving prosecuting attorney one-fourth of penalties as compensation, proviso saving only rights mentioned (State v. Brady [Tex.] 118 SW 128, rvg. [Tex. Civ. App.] 114 SW 895), but provision of law of 1903 that fees of prosecuting attorney shall be over and above fees allowed by general fee bill applies to collection of penalties for violation of law of 1899 by suits brought after its repeal (Id.).

85. State may apppeal from judgment in favor of defendants charged with violating state anti-trust statute. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395.

86. Rev. St. 1899, § 8983 (Ann. St. 1906, p. 4159), compelling officers and agents of corporate defendants to appear and testify and produce books and papers by order and authorizing striking of answer on refusal to do so, held not unconstitutional as depriving of property without due process. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Order issued under Ark. anti-trust act, Jan. 23, 1905, § 8, for production of certain officers, etc., as witnesses, and of certain books, etc., as evidence, held not an unreasonable search or seizure. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —. Such remedy held not denial of due process of law in that it requires production of evidence relative to defendant's defense. Id. Such remedy held not a denial of equal protection of laws in that it applies only to books and papers outside the state or because it does not extend to individuals as distinguished from corporations and joint stock companies. Id.

87. Witness produced by order of court in proceedings against corporations for violation of anti-trust acts cannot avail themselves of constitutional privileges of refusing to incriminate themselves either as to oral or documentary evidence, Rev. St. 1899, § 8989, granting immunity from prosecution, which immunity applies to both kinds of evidence. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

88, 89. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

90. Ark. Anti-trust Act, Jan. 23, 1905, § 9, providing for striking out of defendant's answer where defendant fails to comply with order for production of evidence, held not denial of due process. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —.

91. Will prevent striking out of defend-

§ 1. *Nature of commerce; domestic, interstate or foreign.*[93] See 11 C. L. 643 Commerce in its simplest sense meant an exchange of goods, but it now includes all the various operations by which such exchange is effected.[94] Interstate commerce consists of intercourse between citizens of different states and includes the transportation of persons and property [95] as well as the purchase, sale and exchange of commodities,[96] but not contracts of employment incident to the carrying on of interstate transportation.[97] It includes all interstate shipments,[98] even during the time that they are being shipped over or handled by a line which may lie wholly within one state.[99] The intrastate characer of a shipment is determined from the relation of the carrier to the shipment and not from any intention of the consignee as to the future disposition of the property shipped.[1] To constitute domestic commerce within the control of the state, it is essential that the subject transported be

ant's answer as provided by Arkansas Anti-trust Act, Jan. 23, 1905, § 8. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —.

92. This topic deals with the respective province of the federal and state governments in the regulation of commerce and with the powers and proceedings of special agencies created to administer such regulations. It excludes the general constitutional limitations on the power to regulate (see Constitutional Law *), and the operation and effect of regulations (see topics relating to the subject matter regulated as Intoxicating Liquors,* § 1). It also excludes regulations designed to prevent monopoly (see Combinations and Monopolies *), questions relating to the reasonableness of rates or discrimination therein (see Carriers,* § 2), and questions relating to foreign corporations except so far as interstate commerce is concerned (see Foreign Corporations *). Review by appeal or certiorari, and relief by injunction, as related to orders of various commissions having supervision of commerce are included, but other court proceedings relating to commerce are excluded (see Carriers,* § 2D; Jurisdiction,* § 11C).

93. Search Note: See notes in 17 L. R. A. 643; 24 Id. 161; 5 Id. 630; 14 Id. 108; 15 Id. 169.

See, also, Commerce, Cent. Dig. §§ 10-35; Dec. Dig. §§ 15-47; 7 Cyc. 413-418, 428-485; 17 A. & E. Enc. L. (2ed.) 61.

94. It includes subject, vehicle, agent, etc. Riverside Mills v. Atlantic Coast Line R. Co., 168 F 987.

95. Hickory Marble & Granite Co. v. Southern R. Co., 147 N. C. 53, 60 SE 719. Transportation is one branch of commerce. Wabash R. Co. v. U. S., 168 F 1. Transportation as an independent business for others is commerce, irrespective of the purpose of it. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. As to what constitutes interstate commerce within meaning of Safety Appliance Act, see post, § 2A. As to what constitutes interstate commerce in relation to delivery of shipment, see § 2A, Regulation of Traffic in Intoxicating Liquors.

96. Hickory Marble & Granite Co. v. Southern R. Co., 147 N. C. 53, 60 SE 719. Those who are engaged in carrying on any business among the states are engaged in interstate commerce. United States v. American Tobacco Co., 164 F 700. Manufacturing corporation which purchases its raw materials in different states and foreign countries and sells and ships into different states held to be engaged in interstate commerce, regardless of fact that title to goods technically passes upon delivery to shipping carrier. Id. Contract for sale of goods to resident corporation by foreign corporation affects interstate commerce. Moroney Hardware Co. v. Goodwin Pottery Co. [Tex. Civ. App.] 120 SW 1088. As to what business of foreign corporations constitutes interstate commerce, see post, § 2A, Regulation of Foreign Corporations.

97. Contract between employe and employer engaged in interstate transportation, to effect that employer shall be exempt from liability for injuries to employe, held not a matter relating to interstate commerce. Rountree v. Adams Exp. Co. [C. C. A.] 165 F 152.

98. Freight received to be transported through different states over initial and a connecting line by continuous shipment is interstate commerce. Missouri, K. & T. R. Co. v. New Era Milling Co. [Kan.] 101 P 1011.

99. United States v. Standard Oil Co., 155 F 305; United States v. Illinois Terminal R. Co., 168 F 546. Shipment stored in cars, actually engaged in interstate transportation, are part of interstate commerce. Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co. [Tex. Civ. App.] 120 SW 532. Final link in interstate shipment may be carrier wholly within terminal state, or may be horse and wagon. Commonwealth v. People's Exp. Co., 201 Mass. 564, 88 NE 420.

1. Augusta Brokerage Co. v. Central of Georgia R. Co., 5 Ga. App. 187, 62 SE 996. Fact that owner of merchandise offered to carrier for transportation from one point to another in same state intends to have it transported by another carrier into another state does not make such first transportation interstate commerce even though first carrier may be informed of ultimate destination of merchandise. Id. Not affected by fact that carrier delivered lumber to buyer at port for exporting. Texas & N. O. R. Co. v. Sabine Tram Co. [Tex. Civ. App.] 121 SW 256. Not affected by fact that shipper intended to deliver shipment to connecting carrier for further transportation in Mexico. Texas & P. R. Co. v. Taylor [Tex. Civ. App.] 118 SW 1097.

during the entire transportation under the exclusive jurisdiction of the state.[2] The right to engage in interstate commerce is a privilege inherent in American citizenship.[3]

Original packages. See 9 C. L. 584

§ 2. *Regulation of commerce. A. The commerce clause and its application to particular regulatory measures.*[4] See 11 C. L. 644 This section treats only of the validity of regulations. For their operation and effect see topics dealing with the subjects to which they relate.[5] Whether regulations infringe constitutional provisions other than the "commerce clause" is also excluded.[6] The term "regulate" as used in the commerce clause means to control.[7] The power to regulate commerce involves the right to prescribe the rules by which it shall be governed.[8] The plenary power conferred by the commerce clause of the constitution to regulate interstate and foreign commerce[9] is limited by specific provisions contained elsewhere in the constitution,[10] or which must be inferred by virtue of the necessary implication from the dual system of government created by that instrument.[11] The federal power, under the authority of the "commerce clause," embraces the regulation of interstate commerce[12] including commerce in the territories,[13] and of all its instrumentalities.[14] It includes an authority to prescribe a new rule of right as to transactions occurring in connection with such commerce.[15] The federal power is exclusive in matters primarily and directly affecting interstate commerce,[16] or upon which congress has passed valid laws.[17] But congress has no power to regulate all the business concerns of one simply because he may be engaged in interstate commerce,[18] nor can it unreasonably exclude an article from interstate

2. Hickory Marble & Granite Co. v. Southern R. Co., 147 N. C. 53, 60 SE 719.

3. It is not created by the federal constitution but is impliedly guaranteed by Const. art. 4, § 2. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754.

4. **Search Note:** See notes in 3 C. L. 711; 5 Id. 601; 11 Id. 652; 20 L. R. A. 641; 24 Id. 161; 27 Id. 414; 64 Id. 689; 1 L. R. A. (N. S.) 124, 629; 4 Id. 528; 7 Id. 388; 14 Id. 292; 23 A. S. R. 837; 27 Id. 547, 560; 47 Id. 538; 78 Id. 251; 85 Id. 400; 93 Id. 77; 97 Id. 242; 98 Id. 607; 2 Ann. Cas. 701; 5 Id. 880, 1019; 7 Id. 5, 591; 10 Id. 1022.

See, also, Commerce, Cent. Dig. §§ 1-9, 48-136; Dec. Dig. §§ 1-14, 48-82; 7 Cyc. 419-423, 429, 432-485; 17 A. & E. Enc. L. (2ed.) 41, 74; 11 A. & E. Enc. P. & P. 482.

5. See Carriers, § 2; Intoxicating Liquors, § 1; Railroads, § 7, and like topics.

6. See Constitutional Law.

7. Titsworth v. State [Okl. Cr. App.] 101 P 288.

8. That is, to prescribe the conditions upon which it shall be conducted. Hickory Marble & Granite Co. v. Southern R. Co., 147 N. C. 53, 60 SE 719.

9. Const. art. 1, § 8. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754. Power discussed. Wabash R. Co. v. U. S., 168 F 1.

10. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754. Limited by fifth amendment. United States v. Delaware & H. R. Co., 164 F 215. Limited by fifth amendment providing that no person shall be deprived of life, liberty or property without due process of law. United States v. Delaware & H. R. Co., 164 F 215; Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645.

11. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754.

12. Albertype Co. v. Gust Feist Co. [Tex.] 114 SW 791. Contract, in respect to selling and refraining therefrom, between parties located in New York and Texas, was matter of interstate commerce. Id. As to federal power over commerce as exercised toward specific matters or instrumentalities, see post, subdivisions of this section.

13. Employer's Liability Act (34 Stat. 232; U. S. Comp. St. Supp. 1907, p. 891) held valid in its application to the territories. Gutierrez v. El Paso & N. E. R. Co. [Tex.] 117 SW 426.

14. State v. Northern Pac. R. Co. [Wash.] 102 P 876.

15. Congress may prescribe new rule of right as to transactions occurring in course of commerce between states, to be recognized and to control disposition of causes in all courts, state and federal, since such would not be change in substantive law so as to alter so far forth the law of the land. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754.

16. McCord v. State [Okl. Cr. App.] 101 P 280. Congress has exclusive power to fix time when interstate shipment shall lose its interstate character and become subject to state control. Id.

17. That is, when a state statute and a federal statute operate upon same subject-matter, and prescribe different rules concerning it, and federal statute is one within competency of congress to enact, the state statute must give way. Pennsylvania R. Co. v. Coggins, 38 Pa. Super. Ct. 129.

18. United States v. Erie R. Co., 166 F 352.

commerce,[19] or infringe upon the reserved police powers of the state.[20] The states may exercise control when congress has removed the federal barriers to the exercise of the powers conferred upon the state by its own people.[21]

In aid of its validity, a state statute will, if possible, be so construed as not to apply to interstate commerce.[22]

Regulation of foreign corporations.[See 11 C. L. 646]—A state has a power which is commonly exercised by statute[23] to prescribe the terms and conditions[24] upon which foreign corporations may do business within the state,[25] and may require a compliance therewith preliminary to their invoking the jurisdiction of its courts.[26] Such laws are usually made to apply regardless of whether or not the foreign corporation has any capital invested in the state.[27] Their reasonableness and validity as affecting interstate matters cannot be questioned by a foreign corporation.[28] They will not operate, however, so as to burden or restrict interstate commerce,[29]

19. Exclusion of useful and legitimate subject of commerce, not inimical to public safety, health, or morals, except when and because it is property of certain class of owners, is unreasonable. United States v. Delaware & H. R. Co., 164 F 215.

20. United States v. Delaware & H. R. Co., 164 F 215.

21. State v. Intoxicating Liquors [Me.] 71 A 758.

22. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328; Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co. [Tex. Civ. App.] 120 SW 532; Black-Clawson Co. v. Carlyle Paper Co., 133 Ill. App. 61. Law was held not to apply to interstate carriers where state courts had not given it such application. St. Louis & S. F. R. Co. v. Hadley, 168 F 317. "Full Crew Act" (Acts 1907, p. 18, c. 11) held to apply to operation of trains only within state. Pittsburgh, etc., R. Co. v. State [Ind.] 87 NE 1034. Laws 1907, p. 500, c. 22, providing conditions precedent to foreign corporations doing business in state will be construed to apply only to intrastate business. Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194. Revisal 1905, § 2632, construed to apply only to intrastate shipments. Hickory Marble & Granite Co. v. Southern R. Co., 147 N. C. 53, 60 SE 719.

Held not possible to construe statute specifying number of hours of continuous employment for telegraph operators (Laws 1907, p. 1188, c. 575), so that it will be valid and applicable only to state commerce. State v. Chicago, etc., R. Co., 136 Wis. 407, 117 NW 686.

23. May prohibit foreign corporation from acquiring domicile in the state and from engaging in manufacturing therein. Flint & Walling Mfg. Co. v. McDonald, 21 S. D. 526, 114 NW 684. Such power may even be exercised so as to exclude foreign corporation. Southern R. Co. v. Greene [Ala.] 49 S 404. Gen. St. 1901, § 1283, providing terms prerequisite to a foreign corporation's doing business in state or maintaining an action therein, held within powers of state and not violative of state or federal constitution. Wilson-Moline Buggy Co. v. Hawkins [Kan.] 101 P 1009. For certain specific state statutes, see those cited in notes of this section.

24. Payment of tax is prescribed by Sanborn's St. Supp. Wis. § 1770b. Atlas Engine Works v. Parkinson, 161 F 223.

25. Single or occasional acts of a corporation in another state such as sale or taking security, where transactions are not continuous or of permanent character, do not constitute **"doing business"** in such state. Atlas Engine Works v. Parkinson, 161 F 223. Sale through local commission agent and transfer of interstate shipment while stored within state, held not "doing business within this state" within meaning of statute. Sucker State Drill Co. v. Wirtz Bros. [N. D.] 115 NW 844; State v. Robb-Lawrence Co. [N. D.] 115 NW 846. Execution of single contract is "doing business." Southwestern Slate Co. v. Stephens [Wis.] 120 NW 408. Offer of corporation to sell some of its stock, followed by completed contract of sale, subject to repudiation if manager stipulated for was not employed, were such acts as constituted "doing business in the state." Id. Missouri corporation whose salesmen solicited and received orders to be filled and goods shipped f. o. b. at St. Louis to purchasers was engaged in doing business in Kansas. State v. Lemp Brew. Co. [Kan.] 102 P 504. Sale and delivery in state of machinery and furnishing man to assist in erection thereof is not transacting business in state. Black-Clawson Co. v. Carlyle Paper Co., 133 Ill. App. 61. Contracts inhibited by Laws 1905, p. 936, c. 506, § 1, subd. 10, are not limited to corporations doing business within meaning of § 2. Southwestern Slate Co. v. Stephens [Wis.] 120 NW 408.

26. St. 1898, § 1770h, as amended by Laws 1898, p. 653, c. 351, § 27, Laws 1901, p. 571, c. 399, § 1, and c. 434, p. 620, and Laws 1905, p. 932, c. 506, § 1, prevent foreign corporation not having complied therewith from enforcing collection of note taken by its resident commission agent. Duluth Music Co. v. Clancy, 139 Wis. 189, 120 NW 854.

27. St. 1898, § 1770b, as amended by Laws 1905, p. 936, c. 506, § 1, subd. 10, so construed. Southwestern Slate Co. v. Stephens [Wis.] 120 NW 408.

28. Cannot complain though fee exacted is based on entire capital of corporation, the most of which is outside the state. Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194.

29. Flint & Walling Mfg. Co. v. McDonald, 21 S. D. 526, 114 NW 684; Herman Bros. Co. v. Nasiacos [Colo.] 103 P 301; Black-Clawson Co. v. Carlyle Paper Co., 133 Ill. App. 61; State v. Standard Oil Co., 218 Mo. 1,

nor will they apply to the maintenance of suits in the state by a foreign corporation, when such suits are based on other causes than the unlawful transaction of business in the state.[30] A state may change its existing laws affecting foreign corporations,

116 SW 902. Foreign corporation engaged in transaction of interstate business need not comply with conditions precedent to foreign corporation doing business in state. Rex Buggy Co. v. Dinneen [S. D.] 122 NW 433. Order for books directed to seller in another state and contemplating delivery of such books held **interstate commerce** and not covered by state law (Pub. Acts 1901, p. 316, No. 206, § 1), making it unlawful for foreign corporation to carry on business or maintain action in state without first complying with provisions of such statute. Fifth Avenue Library Soc. v. Hastie [Mich.] 15 Det. Leg. N. 939, 118 NW 727. Foreign corporation having no local agent or place of business but engaged in selling goods in state through traveling salesmen was engaged solely in interstate commerce. Herman Bros. Co. v. Nasiacos [Colo.] 103 P 301. Receipt of goods from foreign corporation by one who purchased them for resale was interstate commerce business. Sanitas Co. v. Niezorawski [Wis.] 120 NW 292. Sale of stock of corporation, being sale of fractional part of corporation, **held not interstate commerce.** Southwestern Slate Co. v. Stephens [Wis.] 120 NW 408. Sale and delivery of goods by agent within state to whom they have been sent by foreign corporation is not transaction in interstate commerce, where goods were originally sent to such agent to sell on commission, not in response to order from a purchaser, but to be held and thereafter sold, and although purchase price note is made payable to such foreign corporation. Duluth Music Co. v. Clancy, 139 Wis. 189, 120 NW 854.

Held not restriction on interstate commerce: Forfeiture of charter of foreign corporation. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Code 1907, § 2391, requiring foreign corporation to pay annual franchise tax. Southern R. Co. v. Greene [Ala.] 49 S 404. Rev. Codes 1905, §§ 4695-4699, prescribing terms under which foreign corporations may do business in state. Sucker State Drill Co. v. Wirtz Bros. [N. D.] 115 NW 844. Regulation affecting produce which has not started on its ultimate transportation to another state. State v. Missouri Pac. R. Co., 81 Neb. 15, 115 NW 614.

Held restriction on interstate commerce: Prohibiting foreign corporation from selling in state articles manufactured elsewhere. Flint & Walling Mfg. Co. v. McDonald, 21 S. D. 526, 114 NW 684. Rev. St. 1899, § 1025, Ann. St. 1906, p. 888, providing fine for foreign corporation doing business in state without filing charter. State v. S. P. Pond Co., 135 Mo. App. 81, 115 SW 505.

NOTE. State cannot burden interstate commerce: "To carry on interstate commerce is not a franchise or a privilege granted by the state. It is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless congress should see fit to interpose some contrary regulation on the subject. * * * The prerogative, the responsibility, and duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the governments of the several states; and confidence in that regard may be reposed in the national legislature without any anxiety or apprehension arising from the fact that the subject-matter is not within the province or jurisdiction of the state legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two." Western U. Tel. Co. v. Texas, 105 U. S. 460, 26 Law. Ed. 1067; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 Law. Ed. 158; Philadelphia & So. S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 Law. Ed. 1200; McCall v. California, 136 U. S. 104, 34 Law. Ed. 392; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 Law. Ed. 394. As was said by Mr. Justice Lamar in the case last cited: "It is well settled by numerous decisions of this court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits." * * * A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it." Pickard v. Pullman So. Car Co., 117 U. S. 34, 29 Law. Ed. 785; Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 30 Law. Ed. 694; Leloup v. Port of Mobile, 127 U. S. 640, 32 Law. Ed. 311; Asher v. Texas, 128 U. S. 129, 32 Law. Ed. 368; Stoutenburgh v. Hennick, 129 U. S. 141, 32 Law. Ed. 637; McCall v. California, 136 U. S. 104, 34 Law. Ed. 392; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 Law. Ed. 394.—From Flint & Walling Mfg. Co. v. McDonald, 21 S. D. 526, 114 NW 684.

30. St. 1898, § 1770b, does not prevent foreign corporation not having complied therewith, from maintaining suit within state for default of person as agent. Sanitas Co. v. Niezorawski [Wis.] 120 NW 292. By failure to comply with Rev. Civ. Code, §§ 883, 885, foreign corporation was not precluded from bringing suit in replevin to recover buggies disposed of in state by one not having authority to do so. Rex Buggy Co. v. Dinneen [S. D.] 122 NW 433.

31. Kirby's Dig. Ark., § 7947, providing that "all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages" was held valid

provided it place upon them no greater burdens than upon like corporations created under state laws.[31]

Regulation of traffic in intoxicating liquors.[See 11 C. L. 848]—While the states have general power to regulate within their borders matters connected with the business of dealing in intoxicating liquors,[32] such laws are inapplicable to liquor in the course of transportation in interstate commerce, and do not attach until there has been a completed delivery, within the state, of such interstate shipment.[33] Although the Wilson Act has to a great extent withdrawn the protection of the commerce clause from intoxicating liquors,[34] it gives the state no power to seize intoxicating liquors

under above rule. Ivy v. Western Union Tel. Co., 165 F 371. This rule is not affected by fact that foreign corporation has accepted Act Congress, July 24, 1866, c. 230, 14 Stat. 221, Rev. St. § 5263, et seq.; U. S. Comp. St. 1901, p. 3579. Id.

32. Crigler v. Shepler [Kan.] 101 P 619. Gen. St. 1901, § 2479, prohibiting nonresident owner of intoxicating liquors from soliciting orders within state, is not attempt to regulate interstate commerce repugnant to federal constitution. Id. Kansas statute relative to taking orders for intoxicating liquors is not repugnant to commerce clause of federal constitution. State v. Lemp Brew. Co. [Kan.] 102 P 504.

Note: In Vance v. W. A. Vandercook Co., 170 U. S. 439, 42 Law. Ed. 1101, Mr. Justice White, in delivering the opinion of the court, in part says:

"(a) Beyond dispute, the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the law-making power of the states; provided always they do not transcend the limits of state authority in invading rights which are secured by the constitution of the United States, and provided, further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other states of the union. (b) Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the constitution of the United States to congress, and hence that a state law which denies such a right, or substantially interferes or hampers the same, is in conflict with the constitution of the United States."—From High v. State [Okl. Cr. App.] 101 P 115.

33. Under commerce clause of U. S. Const. State v. Whisenant, 149 N. C. 515, 63 SE 91. Clause in Oklahoma Const. (Bunn's Ed. § 499), prohibiting conveyance of intoxicating liquors, has no application to interstate shipments until there has been delivery thereof. High v. State [Okl. Cr. App.] 101 P 115. Liquor imported into state for personal use is protected by interstate commerce clause of U. S. Const. from seizure until it reaches home of consignee by continuous conveyance. Hudson v. State [Okl. Cr. App.] 101 P 275; Schwedes v. State [Okl.] 99 P 804. Interstate shipments are protected from seizure by state officers until delivery to the consignee. McCord v. State [Okl. Cr. App.] 101 P 280. Jurisdiction of state does not attach to interstate shipments until destination is reached. Id. Clause in Sess. Laws 1908, c. 69, art. 3, § 1, p. 603, which reads "or to have the possession of any such liquors with the intention of violating any of the provisions of this act" has no application to interstate shipments until delivery at destination. Id. Prohibition law of Oklahoma, known as "Billups' Bill" (Sess. Laws, 1908, c. 69, p. 594), does not by express language or by implication relate to interstate commerce. Id. Prohibition law of Oklahoma does not by express language or by implication abrogate or abridge right to order and receive interstate shipments of intoxicating liquors. Moreland v. State [Okl. Cr. App.] 101 P 138. Ky. St. 1903, § 1307, as applied to liquor by express company from one state to another is unconstitutional regulation of interstate commerce. Adams Exp. Co. v. Com. of Kentucky, 29 S. Ct. 633.

Delivery held incomplete: Liquor ordered and received by resident through interstate commerce is, while being conveyed in original package from depot to his home, to be regarded as yet being transported in interstate commerce, within meaning of U. S. Const. art. 1, § 8, subd. 3. High v. State [Okl. Cr. App.] 101 P 115; Moreland v. State [Okl. Cr. App.] 101 P 138; Hudson v. State [Okl. Cr. App.] 101 P 275.

Delivery held complete: Liquor ceased to be interstate commerce and became subject to state laws upon being removed from box in which it was shipped. Vernon v. State [Ala.] 50 S 57.

34. In view of such withdrawal, the state may prohibit advertisement within the state of intoxicating liquors kept for sale or sold without the state. State v. Bass Pub. Co. [Me.] 71 A 894.

NOTE. Extension of state power by Act of Congress: In Vance v. W. A. Vandercook Co., 170 U. S. 439, 42 Law. Ed. 1101, Mr. Justice White, in delivering the opinion of the court, in part says: "It is also certain that the settled doctrine is that the power to ship merchandise from one state into another carries with it, as an incident, the right in the receiver of the goods to sell them, in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the constitution, until by a sale in the original package they have been commingled with the general mass of property in the state.

"This proposition, however, whilst generally true, is no longer applicable to in-

in transit as interstate commerce in the hands of the carrier.[35] In this connection, a shipment is deemed to be in transit until its destination is reached.[36]

Misbranded or adulterated intoxicating liquors become subject to the state law immediately upon their introduction into the state.[37]

Inspection laws; quarantine, public health and safety, and fertilizer laws. See 11 C. L. 649—The usual state inspection laws are a legitimate exercise of police power,[38] and it is not improper that they require the result of the inspection to be made public.[39] By congressional enactment,[40] authority is given for the seizure and forfeiture of adulterated or misbranded articles, shipped in interstate commerce,[41] while remaining in unbroken original packages.[42] State laws may apply after the packages have been broken,[43] and, in the case of misbranded or adulterated intoxicating liquors, may apply upon their entrance into the state.[44] The statutes of some states[45] penalize the sale of fertilizer, when the sacks have not been properly branded to indicate the ingredients with approximate exactness,[46] by the allowance of a discount on the purchase price and damages proximately resulting from the sale.[47] A for-

toxicating liquors, since congress, in the exercise of its lawful authority, has recognized the power of the several states to control the incidental right of sale in the original packages of intoxicating liquors shipped into one state from another, so as to enable the states to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in the original packages except in conformity to lawful state regulations. In other words, by virtue of the act of congress the receiver of intoxicating liquors in one state, sent from another, can no longer assert a right to sell in defiance of the state law in the original packages, because congress has recognized to the contrary. The act of congress referred to was approved Aug. 8, 1890, c. 728, 26 Stat. 313 (U. S. Comp. St. 1901, p. 3177), and is entitled 'An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases.'" The scope and effect of this act of congress have been settled. In re Rahrer, 140 U. S. 545, 35 Law. Ed. 572; Rhodes v. Iowa, 170 U. S. 412, 42 Law. Ed. 1088; Scott v. Donald, supra.—From High v. State [Okl. Cr. App.] 101 P 115.

35. State v. Intoxicating Liquors [Me.] 72 A 331.

36. It is in transit while being conveyed in original package by purchaser from depot to his home. High v. State [Okl. Cr. App.] 101 P 115 (see like cases in previous note, this paragraph). Expression "'upon arrival' in such state" as used in Wilson Act means neither on entrance into borders nor on delivery to consignee, but means on reaching its destination. Hudson v. State [Okl. Cr. App.] 101 P 275. In transit, where there was no actual or constructive delivery. State v. Intoxicating Liquors [Me.] 72 A 331. In transit, where liquors consigned to fictitious persons were stored in custody of carrier. Id.

37. Under "Pure Food Law" (34 Stat. 7681, c. 3915; U. S. Comp. St. Supp. 1907, p. 928) forbidding the transportation of misbranded and adulterated intoxicating liquors into any state from another state or foreign country, and removing such liquors from protection of "commerce clause." State v. Intoxicating Liquors [Me.] 71 A 758.

38. State may pass laws to prevent introduction and spread of contagious diseases of animals in state. Kansas City So. R. Co. v. State [Ark.] 119 SW 288. Laws 1907, p. 1043, held proper exercise of state police power and not improper interference with interstate commerce. Id. Laws 1907, p. 167, held constitutional and not substantial interference with interstate commerce. State v. Minneapolis & No. El. Co. [N. D.] 114 NW 482. Rev. St. 1899, § 2090, as amended and re-enacted by Sess. Laws, 1905, p. 150, c. 98, § 4, making it unlawful to bring infected sheep into state, held valid. Patrick v. State [Wyo.] 98 P 588.

Laws 1907, c. 250, p. 400, entitled "An act to protect mines, miners, and mine laborers, and defining the manner of sale and delivery of black powder for use in coal mines in the State of Kansas" held proper exercise of state's police power and not improper attempt to regulate interstate commerce. Ex parte Williams [Kan.] 98 P 777.

39. State v. Minneapolis & No. El. Co. [N. D.] 114 NW 482.

40. Food and Drug Act, 34 St. 771; U. S. Comp. St. Supp. 1907, p. 934. United States v. Sixty-five Casks Liquid Extracts, 170 F 449.

41. United States v. Sixty-five Casks Liquid Extracts, 170 F 449. Shipment of drugs from manufacturing agent to owner held not to be shipment in interstate commerce. Id.

42. Where liquid, in carload lots, is shipped in casks, the cask and not car is "original package." United States v. Sixty-five Casks Liquid Extracts, 170 F 449.

43. Packages broken and sold in different packages subject to state laws. City of St. Louis v. Wortman, 213 Mo. 131, 112 SW 520.

44. See ante, this section, subd. Regulation of Traffic in Intoxicating Liquors.

45. There is no common-law duty to brand sacks of fertilizer. Cooper v. National Fertilizer Co. [Ga.] 64 SE 650.

46. Acts 1901, p. 65, requires ingredients to be within 3 per cent of that guaranteed and branded. Cooper v. National Fertilizer Co. [Ga.] 64 SE 650.

47. Note given therefor is under statute (Acts 1901, p. 65) collectible only for

eign corporation doing business within a state without compliance with the state inspection laws may be denied the protection of the federal court.[48]

Regulation of railroads and other carriers.[See 11 C. L. 650]—Congress has exclusive power over the interstate business of common carriers.[49] Where the matter affected, as well as the carrier, is identified with interstate commerce, it may, in the exercise of its power, regulate the relation of master and servant by specifying liabilities,[50] and by limiting the number of hours of continuous employment of employes.[51] It may prohibit a carrier from being interested in the production or ownership of the article carried,[52] and make the initial carrier liable for loss occurring to an interstate shipment on any part of the transit, regardless of any contract to the contrary,[53] and include in such liability reasonable attorney fees.[54] It may, also, regulate the transmission of telegraph messages from one state to another.[55]

But the federal power extends only to the regulation of the interstate business of carriers [56] and does not extend to matters wholly intrastate or not concerned with interstate commerce.[57]

A state may regulate the business of common carriers and acts done by them

amount of actual total commercial value as ascertained by official analysis. Cooper v. National Fertilizer Co. [Ga.] 64 SE 650. Damages resulting to business of purchaser who resells fertilizer with knowledge of fact that it was short weight and defectively sacked was not proximate result of first sale but was result of voluntary resale by first purchaser. Id.

48. Foreign corporation which sold fertilizer in Tennessee without complying with state law (Laws Tenn. 1897, p. 297, c. 123) requiring submission for analysis and certificate of approval, was denied relief, in federal court, on sale contract. Coweta Fertilizer Co. v. Brown [C. C. A.] 163 F 162.

49. United States v. Southern R. Co., 164 F 347. Power has no limitation except those prescribed by U. S. constitution. Id.

50. Employers' liability act (35 Stat. 65) so providing, and limited to employes identified with interstate commerce, held constitutional. Watson v. St. Louis, etc., R. Co., 169 F 942.

51. State v. Northern Pac. R. Co. [Wash.] 102 P 876; State v. Chicago, etc., R. Co., 136 Wis. 407, 117 NW 686. Act Congress, 1907 (34 Stat. 1415, U. S. Comp. St. Supp. 1907, p. 913) is constitutional, being applicable to hours of labor of only those employes engaged in or identified with interstate commerce. Id.

52. Hepburn Act (34 Stat. 584, c. 3591; U. S. Comp. St. Supp. 1907, p. 892) having such purpose is constitutional. United States v. Delaware & H. Co., 213 U. S. 366, 53 Law. Ed. —.

53. 34 Stat. 593; U. S. Comp. St. Supp. 1907, p. 906, so providing, held constitutional. Riverside Mills v. Atlantic Coast Line R. Co., 168 F 987; Galveston, etc., R. Co. v. Wallace [Tex. Civ. App.] 117 SW 169. Carmack amendment (34 Stat. 595; U. S. Comp. St. Supp. 1907, p. 909, so providing, held constitutional. Louisville & N. R. Co. v. Scott [Ky.] 118 SW 990. Act exercising such power (34 Stat. 584; U. S. Comp. St. Supp. 1907, p. 909) is not unconstitutional as depriving carrier of carrier of property without due process of law. Galveston, etc., R. Co. v. F. A. Piper Co. [Tex. Civ. App.] 115 SW 107.

54. Hepburn Act of 1887 (24 Stat. 384; U. S. Comp. St. 1901, p. 3159), providing for such fees to be taxed as costs, held valid. Riverside Mills v. Atlantic Coast Line R. Co., 168 F 987.

55. Acts 1908, p. 72, c. 280, held valid. Postal Telegraph-Cable Co. v. State [Md.] 73 A 679.

56. "Commodities clause" of interstate commerce act (24 Stat. 379; U. S. Comp. St. 1901, p. 3154) as amended (34 Stat. 584; U. S. Comp. St. Supp. 1907, p. 894) making it unlawful for any railroad company to transport in interstate or foreign commerce any commodity "other than timber and the manufactured products thereof, manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have an interest, direct or indirect, except such articles as may be necessary and intended for its use in the conduct of its business as a common carrier" held not a regulation of interstate commerce, but an unconstitutional interference in intrastate matters. United States v. Delaware & H. R. Co., 164 F 215.

57. Interstate commerce act does not include carriage or handling of property when such acts are performed wholly within a state, unless such property is directly shipped to or from foreign country, from or to such state. Chicago, I. & L. R. Co. v. Railroad Commission [Ind.] 87 NE 1030. Congress cannot invade settled limits of sovereignty of states as to their own internal police. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754. Act of Congress (35 Stat. 65) held invalid except so far as it is a regulation of interstate commerce. Id. Congress has no power over cars not used in interstate commerce, though used on interstate railroads. United States v. Erie R. Co., 166 F 352. But train composed of cars some of which are and some of which are not engaged in interstate traffic, is subject to regulations of congress, for every such car is in fact used in moving interstate commerce. Id.

58. St. Louis & S. F. R. Co. v. State [Ark.] 113 SW 203. Regulation of intrastate transportation is inherent and reserved power of

wholly within the boundaries of the state,[58] and, in the absence of federal inhibition, may establish beneficial local laws and regulations, though such action may incidentally affect interstate commerce.[59] Nor will the enforcement of an otherwise valid state law be stayed because it may incidentally affect interstate commerce.[60] In conformity with its above mentioned law-making power, a state may exercise a reasonable control over railroad rates,[61] provide the minimum number of a train crew,[62] make reasonable demurrage regulations[63] and equitable classifications for railroads,[64] regulate the amount of recovery to be had for damages resulting from any negligence of the carrier irrespective of contract,[65] provide damages for failure to transport stock,[66] penalize a refusal to accept freight for shipment,[67] make regu-

state. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. Decisions or opinions of Interstate Commerce Commission or of acts of congress have no binding force upon contract of shipment where shipment was wholly within state. Alabama Great So. R. Co. v. McCleskey [Ala.] 49 S 433.

Held intrastate matter: Refusal to accept freight for shipment. Reid v. Southern R. Co., 149 N. C. 423, 63 SE 112; Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578. Transportation by latter carrier, where goods from point outside state were missent and rebilled from point within state to point of destination within state. Hockfield v. Southern R. Co., 150 N. C. 419, 64 SE 181. Transportation between two points within the state. Farrell v. Atlantic Coast Line R. Co. [S. C.] 64 SE 226.

Held not intrastate: Transportation of goods through another state in their carriage between two points within the state. Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 SW 1052. When, by reason of condition of bridge, goods billed between two points within the state are carried for some distance over line outside state, such transportation is interstate commerce free from interference by state. St. Louis & S. F. R. Co. v. State [Ark.] 113 SW 203. Rainy Lake River was held, under terms of Webster-Ashburton treaty, not to be within the boundaries of Minnesota, but to be international highway, free and open to use of citizens of Canada and United States and not under control of any state. Rainy Lake River Boom Corp. v. Rainy River Lumber Co. [C. C. A.] 162 F 287.

59. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754; State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969; Pittsburgh, etc., R. Co. v. State [Ind.] 87 NE 1034; Postal Telegraph-Cable Co. v. State [Md.] 73 A 679; Atchison, etc., R. Co. v. Smythe [Tex. Civ. App.] 119 SW 892; State v. Chicago, etc., R. Co., 136 Wis. 407, 117 NW 686. Rule applied to telegraph messages. Ivy v. Western Union Tel. Co., 165 F 371. Burn's Ann. St. 1908, § 5551, affecting interstate commerce only secondarily and in a remote degree, held valid. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328.

60. De Rochemont v. New York Cent. & H. R. R. Co. [N. H.] 71 A 868. Held that state attachment law was valid and that seizure of car when not in use did not directly affect either intrastate or interstate commerce. Id. Sequestration of fund, paid as shipping charges to one railroad and due from it to another road jointly interested with it in interstate shipment on which charges accrued, held not unlawful interference with interstate commerce where carriage has been completed. Cavanaugh Bros. v. Chicago, etc., R. Co. [N. H.] 72 A 694. At present, in absence of act of congress or of Interstate Commerce Commission, state courts have power by mandamus to prevent carrier from showing partiality to shipper. Missouri Pac. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 53 Law. Ed. —. Property of railroad, when not in actual use, is not exempted from attachment under state laws, by federal statute granting all railroads privilege of engaging in interstate business in all parts of United States (Rev. St. § 5258; U. S. Comp. St. 1901, p. 3564), or by statute forbidding preferences and intended to prevent delay to commerce (24 Stat. 379, c. 104; U. S. Comp. St. 1901, p. 3154). De Rochemont v. New York Cent. & H. R. R. Co. [N. H.] 71 A 868.

61. Southern Indiana R. Co. v. Railroad Commission [Ind.] 87 NE 966. May prescribe maximum transportation rates within state within limits of state and federal constitution. State v. Northern Pac. R. Co. [N. D.] 120 NW 869. Laws 1907, c. 51, p. 73, amending and re-enacting Rev. Codes, 1905, § 4395, prescribing maximum rates for coal in carload lots within state, is not violative of commerce clause of federal constitution, nor does it deprive any person of life, liberty, or property without due process of law. Id. As to what constitutes reasonable rate, see Carriers, § 2C.

62. Laws 1907, p. 295, providing for crew equipment of trains of certain length and operating certain distances, held valid. Chicago, etc., R. Co. v. State [Ark.] 111 SW 456. "Full Crew Act" (Acts 1907, p. 18, c. 11) requiring certain number of operatives on trains is proper exercise of police power. Pittsburgh, etc., R. Co. v. State [Ind.] 87 NE 1034.

63, 64. Darlington Lumber Co. v. Missouri Pac. R. Co., 216 Mo. 658, 116 SW 530.

65. Rev. St. 1895, to such effect held valid. Atchison, etc., R. Co. v. Smythe [Tex. Civ. App.] 119 SW 892.

66. The statute (Cobbey's Ann. St. 1907, §§ 10606, 10607), providing for damages for failure to transport stock committed to carrier for transportation between stations in state, is not attempt to regulate interstate commerce. Cram v. Chicago, B. & Q. R. Co. [Neb.] 122 NW 31.

67. Revisal 1905, § 2631, providing penalty for refusal to accept freight for shipment, held valid. Reid v. Southern R. Co., 149 N. C.

lations concerning intrastate railroad connections,[68] penalize a carrier for failure to pay damages [69] for failure to refund overcharges within a prescribed time,[70] or for failure to notify consignee of freight charges and to deliver freight upon tender or payment of such charges,[71] regulate the transmission of telegraph messages wholly intrastate,[72] and legitimately exercise all the proper police powers of the state.[73] But a state cannot require one carrier to permit another carrier to have the use of its property without due compensation.[74] Nor can it make laws or exercise jurisdiction concerning matters over which congress has the exclusive power under the constitution to legislate,[75] or concerning which congress has legislated,[76] or over which it has given the Interstate Commerce Commission control.[77]

423, 63 SE 112; Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578; Reid v. Southern R. Co., 150 N. C. 753, 64 SE 874.

68. Burn's Ann. St. 1908, § 6551, authorizing state commission to order intrastate railroad connections, held valid, the subject being one upon which congress had not acted. United States v. Southern R. Co., 164 F 347.

69. Revisal 1905, § 2634, subjecting carrier to penalty for failure to pay damages to property within prescribed time is not unlawful burden, not being in violation of the commerce clause or of the fourteenth amendment to the U. S. Const. Raleigh Iron Works v. Southern R. Co., 148 N. C. 469, 62 SE 595.

70. Revisal 1905, § 2644, subjecting carrier to penalty for failure to refund overcharge within prescribed time, is not unlawful burden, not being in violation of the commerce clause of the U. S. Const. Raleigh Iron Works v. Southern R. Co., 148 N. C. 469, 62 SE 595.

71. Failure to deliver freight is intrastate matter and not interstate commerce (construing Revisal 1905, § 2633). Hockfield v. Southern R. Co., 150 N. C. 419, 64 SE 181.

72. Acts 1908, p. 72, c. 280, requiring time filed and received to be noted on message, held to have intrastate application only. Postal Telegraph-Cable Co. v. State [Md.] 73 A 679.

73. Act to better protect lives of railroad employes and traveling public is proper exercise of police power. Pittsburgh, etc., R. Co. v. State [Ind.] 87 NE 1034. Statute providing that suit may be brought in relation to freight carried by connecting carriers within the state, in any county where either does business or has an agent (Laws 1905, p. 29, c. 25), is proper exercise of state police power. Texarkana & Ft. S. R. Co. v. Shivel [Tex. Civ. App.] 114 SW 196. Statutory provision (Code 1906, § 4851), providing that bill of lading should be conclusive evidence in hands of bona fide holder of receipt of property by carrier, is proper police regulation. Yazoo & M. V. R. Co. v. Bent & Co. [Miss.] 47 S 805.

74. Requirement (Ky. Const. § 213) for interchange of railway cars is invalid and a taking of property without due process of law. Louisville & N. R. Co. v. Central Stock Yards, 212 U. S. 132, 53 Law. Ed. —.

75. Pittsburgh, etc., R. Co. v. State [Ind.] 87 NE 1034. State act would be invalid which regulates freight or passenger rates for interstate carriage or which imposes direct prohibition or charge upon importation of property from one state into another. State v. Chicago, etc., R. Co., 136 Wis. 407, 117 NW 686. State must not directly interfere with interstate commerce. State v. Missouri Pac. R. Co., 81 Neb. 15, 115 NW 614. State act (Laws 1907, p. 1188, c. 575), restricting hours of labor of telegraph operators engaged in moving interstate trains or traffic is field of legislation forbidden to states by federal constitution. State v. Chicago, etc., R. Co., 136 Wis. 407, 117 NW 686.

76. State has no right to enact legislation with regard to railroad engaged in interstate commerce, where act of congress is controlling upon the subject. United States v. Southern R. Co., 164 F 347. Provision for storage charges (P. L. 229) as applied to interstate shipment is covered by act of congress (24 Stat. 379; and 34 Stat. 584). Pennsylvania R. Co. v. M. O. Coggins Co., 38 Pa. Super. Ct. 129. Revisal 1905, § 2631, providing penalty for refusal to receive freight for shipment, as applying to points within state, is infringement on field covered by U. S. Const. or acts of congress. Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578; Reid v. Southern R. Co., 150 N. C. 753, 64 SE 874. The Employer's Liability Act (35 Stat. 65) is exclusive and covers and supersedes all state legislation regulating the relations of employers and employes engaged in interstate commerce; hence it supersedes Arkansas statute providing for survival of action for injury to deceased. Fulgham v. Midland Valley R. Co., 167 F 660. Laws 1907, p. 1188, c. 575, limiting number of hours which telegraph operators shall be on duty, infringes on field covered by act of Congress (34 Stat. 1415; U. S. Comp. St. Supp. 1907, p. 913). State v. Chicago, etc., R. Co., 136 Wis. 407, 117 NW 686. Before congressional enactment upon the subject (34 Stat. 1415; U. S. Comp. St. Supp. 1907, p. 913) went into effect on Mar. 4, 1908, a state could limit the number of hours of continuous employment for railroad employes engaged within the state though employed by a common carrier engaged in interstate commerce, and, until such date, Laws 1907, p. 25, c. 20, relating to such subject were effective. State v. Northern Pac. R. Co. [Wash.] 102 P 876.

No congressional act to promote safety in commerce covers same ground as statute to fix minimum number of train crew. Chicago, etc., R. Co. v. State [Ark.] 111 SW 456. Interstate commerce act has no application to transportation between points in same state. Chesapeake & O. R. Co. v. Maysville Brick Co. [Ky.] 116 SW 1183. Carmack amendment to interstate commerce act (34 Stat. 595; U. S. Comp. St. Supp. 1907, p. 909) does not deprive state court of jurisdiction over action

Tax laws.[See 11 C. L. 558]—A state or city has no power to tax interstate commerce,[78] but it may tax intrastate business done within its limits.[79] While a state or city is prohibited from laying a duty on tonnage without the consent of congress,[80] such prohibition does not affect a charge for wharfage.[81]

The Safety Appliance Act.[See 11 C. L. 655]—The Safety Appliance Act[82] and amendments thereto[83] have been held to be constitutional[84] and exclusive in their operation in so far as they apply.[85] These acts apply to all railroads engaged in interstate commerce,[86] although operating entirely within a state, independently of all other carriers, if any interstate freight is carrier on any car of the train.[87] Their requirements relate to any car used in moving interstate traffic.[88]

for damages to interstate shipment of livestock. Louisville & N. R. Co. v. Scott [Ky.] 118 SW 990. Virginia Code, 1904, § 1294c, cl. 10, prescribing penalty for false representation of character of shipment to secure less rate, is not in conflict with Interstate Commerce Act 1887 (25 Stat. 857; U. S. Comp. St. 1901, p. 3160). Adams Exp. Co. v. Charlottesville Woolen Mills [Va.] 63 SE 8. None of acts of congress show intention to regulate number of employes to be used upon trains operating within a state, the subject-matter of the "Full Crew Act" (Acts 1907, p. 18, c. 11). Pittsburgh, etc., R. Co. v. State [Ind.] 87 NE 1034.

77. State v. Adams Exp. Co. [Ind.] 85 NE 966. State law (Burns' Ann. St. 1901, § 3312a), imposing local burden of transportation which forced interstate carrier to adjust interstate rate with reference thereto, infringes on power given commission. Id.

78. Cannot tax warehouse receipts where goods represented are protected from taxation by federal constitution. Selliger v. Com., 213 U. S. 200, 53 Law. Ed. —. Has no power to tax federal franchise by itself. Western Union Tel. Co. v. Lakin [Wash.] 101 P 1094. As to placing burden on foreign corporations, see ante, this section, subd. Regulation of Foregin Corporations.

79. Occupation tax ordinance expressly providing that it shall apply only to intrastate business is valid. City of Leavenworth v. Ewing [Kan.] 101 P 664. May tax intrastate business of express company where intrastate business of such company can be separated and distinguished from its interstate business. Id. May tax business of express company, although in carrying express from one point to another, both within the state, express is carried for short distance outside state. Id. Express company doing intrastate business is not relieved from paying license tax thereon by fact that it may wish to engage in interstate business. Hardee v. Brown [Fla.] 47 S 834. City may tax business of telegraph company done exclusively within city and not including business done for the United States, its officers, or its agents. Atlantic Postal Telegraph-Cable Co. v. Savannah [Ga.] 65 SE 184. State has right to place franchise tax on capital used by foreign corporation in its business within state. Southern R. Co. v. Greene [Ala.] 49 S 404.

80. Under U. S. Const. art. 1, § 10, cl. 3. City of St. Louis v. Eagle Packet Co., 214 Mo. 668, 114 SW 21.

81. Estimation of wharfage on tonnage of boat does not make it a duty on tonnage. City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21.

82. 27 Stat. 531; U. S. Comp. St. 1901, p. 3174. United States v. Southern R. Co., 164 F 347.

83. 29 Stat. 85; and 32 Stat. 943; U. S. Comp. St. Supp. 1907, p. 885. United States v. Southern R. Co., 164 F 347.

84. United States v. Southern R. Co., 164 F 347. They do not violate U. S. Const. art. 1, § 8, subd. 3. Id. Commerce clause and tenth amendment not violated. Wabash R. Co. v. U. S. [C. C. A.] 168 F 1.

85. United States v. Southern R. Co., 164 F 347.

86. Apply alone to use of interstate railroad highway as instrument of interstate commerce, as distinguished from employers' liability acts which apply to individuals or corporations engaged in interstate commerce. United States v. Southern R. Co., 164 F 347. Those who do the business of carrying passengers and freight across state lines are engaged in interstate commerce. Wabash R. Co. v. U. S., 168 F 1. Stockyards engaged in handling and switching cars containing interstate shipments held to be engaged in interstate commerce. Union Stockyards Co. v. U. S., 169 F 404.

87. Watson v. St. Louis, etc., R. Co., 169 F 942. Held that railroad operating wholly within a city, county, or state, is, while handling car containing interstate shipment, engaged in interstate commerce within meaning of act. Belt R. Co. v. U. S. [C. C. A.] 168 F 542.

88. "Any car used in moving interstate traffic," as the expression is used in § 2 of Act of 1893, held to forbid interstate carrier from hauling or using on its line any car that is customarily or generally employed in moving interstate traffic and that is not equipped with automatic couplers, even though at particular time car be empty or be moving intrastate traffic. Wabash R. Co. v. U. S. [C. C. A.] 168 F 1. Acts may apply to cars used by railroads engaged in interstate commerce, although the particular cars may be used only in intrastate traffic. United States v. Southern R. Co., 164 F 347. Act applies to car which is regularly used in movement of interstate traffic but at time when defect is known to exist is itself not being used for carrying interstate commerce, but is being hauled in train containing car loaded with interstate commerce. United States v. Wheeling & L. E. R. Co., 167 F 198. Acts apply to car not loaded with interstate traffic but which is coupled in a train which is loaded with interstate traffic. United States v. Baltimore & O. R. Co., 170 F 456.

(§ 2) *B. Regulation of trade and commerce within a state.*[89] See 11 C. L. 656 The domestic commerce of the state and the facilities with which it is conducted are within the control of the state,[90] but such control must not be exercised so as to cause a direct and substantial interference with interstate commerce.[91]

§ 3. *The Interstate Commerce Commission; its functions and proceedings before it.*[92] See 11 C. L. 657 The Interstate Commerce Commission has exclusive jurisdiction[93] in the first instance to determine the reasonableness of interstate rates,[94] but not to determine the construction of rules adopted and filed by a railroad company.[95] It acts as a legislative or administrative board, and not judicially,[96] and its power is at most merely regulatory of existing vested rights.[97] It is authorized

Railway company cannot escape liability by mixing in same train cars engaged in interstate traffic, but all such cars must be provided with automatic couplers and grabirons as required by the safety appliance act. United States v. Erie R. Co., 166 F 352.

Act is not intended to regulate equipments on cars not used or intended for use in interstate commerce, merely because they may be used on railroad engaged in interstate commerce. United States v. Erie R. Co., 166 F 352. Comma should be inserted in first section of Act of 1903 (32 Stat. 943; U. S. Comp. St. Supp. 1907, p. 885) after word "railroad" so as to make meaning clear and language consistent with other parts of section, thus making word "engaged" not relate to its immediate substantive "railroad" but to preceding substantives, "trains, locomotives, tenders, cars, and similar vehicles." Id.

89. Search Note: See notes in 11 C. L. 657; 14 L. R. A. (N. S.) 1128; 96 A. S. R. 844; 3 Ann. Cas. 309.

See, also, Commerce, Cent. Dig. §§ 48-136; Dec. Dig. 48-82; 7 Cyc. 419-423, 429, 432; 4 A. & E. Enc. L. (2ed.) 874.

90. State v. Missouri Pac. R. Co., 81 Neb. 15, 115 NW 614. As to power of states to fix rates, see Carriers, § 2C. For powers of state as related to interstate commerce, see previous subdivisions of this section, div. A. For validity of state inspection and fertilizer laws, see this section, subd. A, Inspection Laws. State may enact laws to prevent commercial discrimination when such discrimination is for purpose of stifling competition. State v. Drayton [Neb.] 117 NW 768. Sess. Laws, 1907, p. 490, c. 157, are constitutional and within proper police power of state. Id. A city may enforce ordinances, properly within its police power, against a foreign corporation doing business therein. International Text Book Co. v. Auburn, 163 F 543. Ordinance providing that "no person shall distribute on the public streets, or from any building, handbills, cards, circulars, or papers of any description except newspapers," held to be within police powers of city. Id. Laws 1905, p. 143, c. 82, § 1, prohibiting disposition of cigarettes or cigarette papers, is properly within police powers of state. State v. Sbragia, 138 Wis. 579, 119 NW 290.

91. State v. Minneapolis & Northern Elevator Co. [N. D.] 114 NW 482. City ordinance is invalid which attempts to regulate interstate commerce. State v. Glasby, 50 Wash. 598, 97 P 734. Ordinance having effect to prohibit nonresident from taking orders by sample, goods to be shipped to buyers in unbroken packages, and to be delivered by persons other than solicitors, held to be attempt to regulate interstate commerce. Id. Fact that goods are sent to selling agent for delivery does not prevent transaction from being interstate commerce. City of Kinsley v. Dyerly [Kan.] 98 P 228. Ordinance cannot prevent merchant of another state from selling and delivering his goods through any agency he may choose, provided that before delivery he does not so mingle his goods as to deprive transaction of its interstate features. Id.

92. Search Note: See Commerce, Cent. Dig. §§ 137-148; Dec. Dig. §§ 83-98; 17 A. & E. Enc. L. (2ed.) 124.

93. State courts have no jurisdiction to determine reasonableness of interstate rates. Missouri, K. & T. R. Co. v. New Era Milling Co. [Kan.] 101 P 1011.

94. Under Interstate Commerce Act (24 Stat. 379; U. S. Comp. St. 1901, p. 3154) as amended (34 Stat. 584; U. S. Comp. St. Supp. 1907, p. 892). Atlantic Coast Line R. Co. v. Macon Grocery Co. [C. C. A.] 166 F 206; Great Northern R. Co. v. Kalispell Lumber Co. [C. C. A.] 165 F 25; Hite v. Central R. of New Jersey [C. C. A.] 171 F 370; Columbus Iron & Steel Co. v. Kanawha & M. R. Co., 171 F 713; Houston Coal & Coke Co. v. Norfolk & W. R. Co., 171 F 723; Baltimore & O. R. Co. v. La Due, 128 App. Div. 594, 112 NYS 964. Has jurisdiction to hear complaints in regard to rates and rebates. Louisville & N. R. Co. v. Scott [Ky.] 118 SW 990. Suit in equity is not maintainable to affect schedule of rates pending determination of their reasonableness by commission. Atlantic Coast Line R. Co. v. Macon Grocery Co. [C. C. A.] 166 F 206. There can be no doubt as to the jurisdiction of the commission of any question of discrimination connected with the service of the express companies as carriers. American Bankers' Ass'n v. American Exp. Co., 15 I. C. C. 15.

95. Where construction only, and not reasonableness of rules, is the issue, circuit court has jurisdiction in first instance to determine question of indebtedness of shipper to railroad company for demurrage. Central R. Co. of New Jersey v. Hite, 166 F 976; Hite v. Central R. of New Jersey [C. C. A.] 171 F 370.

96. Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645. Cannot try actions for damages to interstate shipments. Louisville & N. R. Co. v. Scott [Ky.] 118 SW 990.

97. Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645.

to prescribe regulations and practices in respect to transportation.[98] The evidence which the commission may require is limited to those investigations which concern a specific breach of the law.[99] The commission has no power to make an order affecting rates without first finding that existing rates are unreasonable or in violation of the interstate commerce act, nor can it establish rates for the sole purpose of creating zones of trade.[1] The rates prescribed by it must not be unjust or unreasonable, within the meaning of the constitutional guarantee,[2] or unjustly discriminating or unduly preferential.[3] It should determine the legality of a terminal charge and a through rate charge, each independent of the other.[4] The commission has jurisdiction to make an order in any inquiry on its own motion in the same manner and to the same effect as though complaint has been made.[5] Its orders are not necessarily invalid for failure to specify the time during which they shall remain in force [6] for failure to prescribe other than relative rates,[7] for failure to prescribe all the regulations and practices which might become necessary in order to make them effective,[8] for failure to comprehend all that they might have comprehended,[9] for failure to strictly conform with the decision which forms its basis,[10] or for failure to conform to the issues raised by the pleadings.[11]

Equity has jurisdiction to enjoin, set aside, amend, or suspend an order of the Interstate Commerce Commission based on a misconception or misapplication of the law to a conceded or established state of facts,[12] and to determine whether the rates prescribed are reasonable,[13] and for such purpose may consider evidence which was not before the commission.[14] At such hearing, an order of the commission will

98. New York Cent. & H. R. R. Co. v. Interstate Commence Commission, 168 F 131. The term "transportation" as defined in interstate commerce act (§ 1) includes "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported." Id.

99. Commission can require witnesses to testify only upon matters which are or which might properly be subject of complaint. Harriman v. Interstate Commerce Commission, 211 U. S. 407, 53 Law. Ed. 253.

1. Cannot establish rates to counteract effect of geographical position or otherwise. Chicago, etc., R. Co. v. Interstate Commerce Commission, 171 F 680.

2. To be just and reasonable, rates must be prescribed with reasonable regard for cost of carriage and value of property employed, taken in connection with regard for value of services rendered, and, in case the latter consideration does not warrant rates warranted by the former ones considered alone, the misfortune must fall upon the carrier. Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645.

3. Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645.

4. Applying section six of the interstate commerce act (24 Stat. 380; U. S. Comp. St. 1901, p. 3156) as amended (34 Stat. 586; U. S. Comp. St. Supp. 1907, p. 895). Stickney v. Interstate Commerce Commission, 164 F 638.

5. In re allowances for transfer of sugar, 14 I. C. C. 619.

6. New York Cent. & H. R. R. Co. v. Interstate Commerce Commission, 168 F 131. While the commission in order to technically comply with the law should specify the time, the statute, in the absence of such specification, fixes the limitation at two years. Id.

7. Order which attempts to remove discrimination need not prescribe the just and reasonable rate to be observed as a maximum, and the just, fair, and reasonable regulation to be followed in respect to transportation involved. New York Cent. & H. R. R. Co. v. Interstate Commerce Commission, 168 F 131.

8. Order held not ineffective by reason of fact that carriers were left right to initiate practices to be followed to relieve them from possible mistakes or impositions in operation of order. New York Cent. & H. R. R. Co. v. Interstate Commerce Commission, 168 F 131.

9. Order removing one discrimination held not inoperative because it failed to remove others. New York Cent. & H. R. R. Co. v. Interstate Commerce Commission, 168 F 131.

10. Order held sufficient which substantially conformed thereto. New York Cent. & H. R. R. Co. v. Interstate Commerce Commission, 168 F 131.

11. Strict rules of pleading are not applicable to proceedings before the commission. New York Cent. & H. R. R. Co. v. Interstate Commerce Commission, 168 F 131.

12. Stickney v. Interstate Commerce Commission, 164 F 638. Under authority of 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), as amended by 34 Stat. 589 (U. S. Comp. St. Supp. 1907, p. 900), and, also, 32 Stat. 823 (U. S. Comp. St. Supp. 1907, p. 951). Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645. Orders beyond power conferred on commission were enjoined. Chicago, etc., R. Co. v. Interstate Commerce Commission, 171 F 680; Southern Pac. Terminal Co. v. Interstate Commerce Commission, 166 F 134.

13. Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645.

14. Hearing may be had de novo. Mis-

be presumed to be valid until the contrary is shown.[15] Third parties are not allowed to intervene in such action as a matter of right.[16] The "Expedition Act"[17] and amendments thereto,[18] requiring that a suit in equity to review an action of the Interstate Commerce Commission shall be certified to the supreme court when the three judges sitting shall be divided in opinion, appplies only where by reason of such division of opinion a final decree cannot be entered.[19] The commission has jurisdiction, without regard to the amount in controversy, to award damages whenever they arise under the act, excepting in those cases where the act itself names another forum.[20] While the action of the commission in one case touching the reasonableness of a rule or regulation affecting rates ought ordinarily to afford a guide for its action in another case involving the same rule or regulation, even though between other litigants, nevertheless the question of reasonableness is always one of fact, and each case must stand upon its own record.[21] Under ordinary circumstances oral argument will be permitted in proceedings before the commission, but requests for such argument should be made not later than at the close of the taking of the testimony.[22] If briefs are not filed within the time fixed by the commission, it will proceed to determine the case without them.[23, 24]

§ 4. *The department of commerce and labor; its functions.* See 7 C. L. 673

§ 5. *State railroad and corporation commissions.*[25]—See 11 C. L. 659—A state legislature has a right to enact a law intrusting to a board of commissioners such supervision of railroads as is reasonable and expedient for the public welfare,[26] and to prescribe duties upon which the law may operate in imposing a penalty and in effectuating the purpose designed in its enactment.[27] The law prescribing such penalties will be strictly construed.[28] Constitutional requirements upon which the

souri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645.

15. Burden of proving invalidity rests on party assailing order. Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 F 645.

16. But may be allowed to intervene on request of commission on condition that hearing be not delayed thereby. Delaware, L. & W. R. Co. v. Interstate Commerce Commission, 169 F 894.

17. 32 Stat. 823; U. S. Comp. St. Supp. 1907, p. 951. Southern Pac. Terminal Co. v. Interstate Commerce Commission, 166 F 134.

18. Interstate Commerce Act (24 Stat. 384; U. S. Comp. St. 1901, p. 3165) as amended (34 Stat. 590; U. S. Comp. St. Supp. 1907, p. 902). Southern Pac. Terminal Co. v. Interstate Commerce Commission, 166 F 134.

19. Southern Pac. Terminal Co. v. Interstate Commerce Commission, 166 F 134. Not necessary that case be certified up where two judges concur in opinion that temporary injunction should be denied. Id. Certifying up is unnecessary where appeal lies. Id.

20. Washer Grain Co. v. Missouri Pac. R. Co., 15 I. C. C. 147.

21. Kansas City Hay Dealers' Ass'n v. Missouri Pac. R. Co., 14 I. C. C. 597; Chicago Lumber & Coal Co. v. Tioga S. W. R. Co., 16 I. C. C. 323.

22, 23, 24. Ullman v. Adams Exp. Co., 14 I. C. C. 585.

25. Search Note: See Carriers, Cent. Dig. §§ 14-20; Dec. Dig. § 10; Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9; 23 A. & E. Enc. L. (2ed.) 950.

26. Caughman v. Columbia, N. & L. R. Co. [S. C.] 64 SE 240; State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. Legislature may delegate its power to regulate railroads to commission. Southern Indiana R. Co v. Railroad Commission [Ind.] 87 NE 966. State legislature has power to confer upon commission the right to fix and regulate intrastate rates, subject to limitations of state and federal constitutions. Railroad Commission v. Central of Georgia R. Co. [C. C. A.] 170 F 225. Railroad commission law (Laws 1905, p. 145, c. 81, as amended by Sess. Laws 1907, p. 536, c. 226) held to be just, fair, and reasonable, and to fully protect all of constitutional rights of railroads. State v. Railroad Commission [Wash.] 100 P 179. Delegation of power to specify nature and route of construction of subway to be constructed by Boston Transit Commission on request of Boston Elevated Railway Company (St. 1906, p. 754, c. 520, § 23) held valid. Codman v. Crocker [Mass.] 89 NE 177. Laws 1907, p. 439, c. 454, delegating to commission power to fix proportion of expense for constructing and operating crossings is valid. State v. Railroad Commission [Wis.] 121 NW 919. Provision of Laws 1905, p. 145, c. 81, as amended by Sess. Laws 1907, p. 536, c. 226, empowering commissioners to limit number of witnesses is not unreasonable. State v. Railroad Commisson [Wash.] 100 P 179. Ohio railroad commission act is saved from invalidity by provision that its jurisdiction shall not be exclusive, but a matter first presented to commission may be subsequently heard and determined de novo in courts. Black Diamond Coal & Coke Co. v. Railroad Commission, 8 Ohio N. P. (N. S.) 585.

27. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969.

28. State v. Gulf, etc., R. Co. [Tex. Civ. App.] 118 SW 736. Commission was required

legislative act is silent may be read into such act to make it valid.[29] It is sometimes provided by statute[30] that no person shall be eligible to the office of railroad commissioner who is interested in any railroad corporation.[31] The scope of the regulations of state commissions is confined to intrastate shipments.[32] They can exercise only such powers as are expressly conferred or as may be fairly implied from the statute.[33] The power to do whatever is reasonably necessary to execute their orders will be implied,[34] but any reasonable doubt will be construed against the exercise of power.[35] A railroad commission is ordinarily given power to make reasonable regulations[36] in regard to schedules,[37] rates and charges,[38] and to pro rate charges between connecting lines within the state, in case the railroads fail to agree thereon.[39] Failure to fix the pro rata does not, however, make void the joint rate fixed.[40] It may require a public service corporation to furnish the public such facilities as are reasonable,[41] provided they be connected with the duties of such cor-

to furnish blanks as specified by statute before railroad was liable for penalty for failure to report. Id.

29. Caughman v. Columbia, N. & L. R. Co. [S. C.] 64 SE 240. Constitutional requirements as to notice and hearing should be read into Civ. Code 1902, § 2069. Id.

30. Provided by Pub. St. 1901, c. 155, § 1. In re Opinion of the Justices [N. H.] 72 A 754.

31. One is not interested unless his interest prevents him from being indifferent. In re Opinion of the Justices [N. H.] 72 A 754. Whether one is interested is a question of fact. Id.

32. Their rules cannot be so applied as to burden interstate commerce. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. Powers of state railroad commission are limited to matters not within jurisdiction of Interstate Commerce Commission. Chicago, I. & L. R. Co. v. Railroad Commission [Ind.] 87 NE 1030. Order held valid concerning services confined to handling cars between two points in same state. Id. Regulations adopted by Ohio Railroad Commission with reference to car service are invalid as to interstate shipments over interstate commerce railways, but as to intrastate commerce they are valid and enforcible. Ann Arbor R. Co. v. Railroad Commission, 8 Ohio N. P. (N. S.) 233.

33. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. All its powers are derived from statute which creates it. Gulf, etc., R. Co. v. State [Tex. Civ. App.] 120 SW 1028. An unusual power, especially, must be conferred by language free from doubt and which admits of no other reasonable construction, as it will not be taken from implication. Siler v. Louisville & N. R. Co., 213 U. S. 175, 53 Law. Ed. —. Statute giving railroad commissioners jurisdiction in all matters respecting construction and maintenance of cattle guards and farm crossings does not authorize them to readjust system of farm crossings on existing roads. Libby v. Canadian Pac. R. Co. [Vt.] 73 A 593; State v. Louisville & N. R. Co. [Fla.] 49 S 39. There is no authority of law for Florida Railroad Commission to require report of wrecks to it by telegram. State v. Louisville & N. R. Co. [Fla.] 49 S 39.

34. Griffin v. Southern R. Co., 150 N. C. 312, 64 SE 16. Held to have power to adopt rule making carriers liable to shipper for $1.00 per day charge for detaining cars properly loaded. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. Statute (P. L. p. 448), giving railroad commission control over railroads generally, gives it jurisdiction in first instance over any question as to right to prevent discontinuance of railroad station. Fritts v. Delaware, L. & W. R. Co. [N. J. Eq.] 73 A 92.

35. State v. Louisville & N. R. Co. [Fla.] 49 S 39.

36. Rate which barely returns actual cost of service is unreasonable. Texas & N. O. R. Co. v. Sabine Tram. Co. [Tex. Civ. App.] 121 SW 256. Rate is unreasonable where revenue derived is insufficient to pay cost of transportation of important article, but not when article selected for attack is unimportant. Gulf, etc., R. Co. v. Railroad Commission [Tex.] 116 SW 795.

37. Regulation is not unreasonable, though it causes pecuniary loss to carrier if it is reasonable with reference to just demands of public, and does not arbitrarily impose unreasonable burden on carrier. State v. Florida East Coast R. Co. [Fla.] 49 S 43.

38. Order fixing charges for picking up and hauling empties held constitutional. Chicago, I. & L. R. Co. v. Railroad Commission [Ind.] 87 NE 1030. Commission may establish reasonable maximum rates for the transportation of passengers and freight, under Sess. Laws 1907, p. 536, c. 226. State v. Railroad Commission [Wash.] 100 P 184.

39. Such power is given under Acts 1907, p. 458. Southern Indiana R. Co. v. Railroad Commission [Ind.] 87 NE 966.

40. Southern Indiana R. Co. v. Railroad Commission [Ind.] 87 NE 966.

41. Order requiring extra train to be run from Guthrie to Marietta was unreasonable when based on finding that service from Guthrie to Purcell, about half the distance, was adequate and that services from Purcell to Marietta was inadequate. Gulf, etc., R. Co. v. State [Okl.] 101 P 258. Order requiring carrier to establish and maintain flag station was reasonable. Atchison, etc., R. Co. v. State [Okl.] 101 P 262. Commission has power to determine place and manner of crossing of railroad tracks, under Laws 1907, pp. 439-447, c. 464, by which §§ 1797—39 to 1797—60 were added to St. 1898. State v. Railroad Commission [Wis.] 121 NW 919.

It is not reasonable, just, or equitable to include railroad fuel cars with the regular

poration,[42] and there is generally some valid provision whereby it may prescribe penalties [43] and enforce its orders.[44] In New York, it is the duty of the public service commission to issue a certificate of convenience and necessity upon its having found that the proposed railroad is both necessary and convenient to public service,[45] regardless of conditions not provided for by statute.[46] The power of a state railroad commission is not ordinarily judicial, but it is administrative or legislative.[47] A state commission should not without due process of law [48] change rates [49] or make any regulation which is in effect a deprivation of property.[50] Rates can ordinarily be changed only upon special complaint and by a hearing had thereon.[51] All parties interested in the controversy should be permitted to participate in the hearing,[52] and all carriers should be allowed the equal protection of the law.[53] It is proper for receivers appointed by the federal court to attend hearings before state commissions which may affect property over which they have charge.[54] An action by a quorum of the commission is ordinarily binding.[55]

equipment of a company in the distribution of cars to coal mines along its lines. Black Diamond Coal & Coke Co. v. Railroad Commission, 8 Ohio N. P. (N. S.) 585. It is not within the province or power of the commission to promulgate an arbitrary rule as to the distribution of cars in the future, and thereby determine a future judicial question as to discrimination in distribution of such cars without regard to circumstances and conditions as they may then exist; but the most that commission can do is to observe provision of § 244-20 (§ 10), that when a railroad has insufficient number of cars to meet all requirements, "such cars as are available shall be distributed among the several applicants therefor in proportion to their respective immediate requirements without discrimination between shippers or competitive or noncompetitive places." Id.

42. Maintenance of a telegraph station to transmit messages for commercial purposes is not necessary part of business and duty of common carrier. Atchison, etc., R. Co. v. State [Okl.] 100 P 16; Chicago, etc., R. Co. v. State [Okl.] 103 P 617. Railroad need not maintain telegraph station unless it be shown to be necessary and convenient in connection with the train service. Chicago, etc., R. Co. v. State [Okl.] 103 P 617.

43. Provision held valid. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969.

44. Sess. Laws 1907, c. 226, p. 536, gives commission power to compel making of physical track connections. State v. Railroad Commission [Wash.] 100 P 179.

45. People v. Willcox, 133 App. Div. 556, 118 NYS 248; In re Buffalo Frontier Terminal R. Co., 131 App. Dig. 503, 115 NYS 483.

46. Where local authorities have granted consent and commission has found street railway necessary and convenient, it is duty of commission to issue certificate although it does not approve terms imposed by local authorities. People v. Willcox, 133 App. Div. 556, 118 NYS 248.

47. In Indiana it has power to hear complaints, strike down existing rates, and create new ones. Southern Indiana R. Co. v. Railroad Commission [Ind.] 87 NE 966. In Massachusetts, the board of railway commissioners is administrative and not judicial body. Codman v. Crocker [Mass.] 89 NE 177. Establishment of rates by state corporation commission is legislative function. Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210, 53 Law. Ed. 150. Functions are administrative or ministerial and not legislative or judicial. Gulf, etc., R. Co. v. State [Tex. Civ. App.] 120 SW 1028.

Courts differ as to whether powers conferred upon state railroad commission are administrative, legislative, or judicial. Chicago, I. & L. R. Co. v. Railroad Commission [Ind.] 87 NE 1030. Fact that powers conferred upon state railroad commission enable it to enforce rule of future conduct does not necessarily render its powers legislative rather than judicial, since judicial decisions often determine in advance what future action will be a discharge of existing liabilities or obligations. People v. Willcox, 194 N. Y. 383, 87 NE 517.

48. An arbitrary and unreasonable regulation is deprivation of property without due process of law, although apparently authorized. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969.

49. Notice as provided by statute (Acts 1907, p. 468), followed by appearance of companies affected and proper hearing, held sufficient. Southern Indiana R. Co. v. Railroad Commission [Ind.] 87 NE 966. Order fixing unreasonable and confiscatory rate held to be a taking of property without due process. Id.

50. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969.

51. Order made without complaint or hearing was void. State v. Railroad Commission [Wash.] 100 P 987. Commission held to not have power in Kentucky to establish all rates at one time, and in regard to all commodities, and on all railroads in state, on general and comprehensive complaint to commission that all rates are too high, or upon like information of commission itself. Siler v. Louisville & N. R. Co., 213 U. S. 175, 53 Law. Ed. ——.

52. Central Vermont R. Co. v. State [Vt.] 72 A 324.

53. Southern Indiana R. Co. v. Railroad Commission [Ind.] 87 NE 966. But order requiring certain carriers to conform to a certain rate without so requiring all is not a violation of this rule, since commission can only make orders concerning those shown to be at fault. Id.

54. Proper to attend hearing of Public

In some states, the decisions of a railroad commission may be judicially determined by a court before their enforcement,[56] but if such determination is not sought, the decisions of the commission, unless they be void, become conclusive.[57] The final orders of a state railroad commission may generally be reviewed by the courts,[58] upon the record of the proceedings before the commission,[59] and, in the absence of a statutory requirement, without a motion for a new trial having been filed before the commission.[60] The reviewing court determines the reasonableness, justness and validity of a final order of a corporation commission [61] supported by that prima facie presumption which exists in favor of the same.[62] It will, if possible, so construe the rules of the commission as to render them valid.[63] The findings of a commission will not, ordinarily, be disturbed unless unlawful, unreasonable,[64]

Service Commission. In re Metropolitan St. R. Co., 166 F 1006.

55. Codman v. Crocker [Mass.] 89 NE 177.

56. Under Acts 1907, p. 469, § 6. Southern Indiana R. Co. v. Railroad Commission [Ind.] 87 NE 966.

57. Southern Indiana R. Co. v. Railroad Commission [Ind.] 87 NE 966. When void or unconstitutional, they may be set up as a defense under general denial in suit to enforce order of commission. Id.

58. Order was final after issuance, when only jurisdiction retained by commission related to execution of order. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328. Reviewable under Acts 1907, p. 469, c. 241, § 6. Chicago, I. & L. R. Co. v. Railroad Commission [Ind.] 87 NE 1030. In New York a determination of the board of railroad commissioners was reviewable by supreme court. In re Buffalo Frontier Terminal R. Co., 131 App. Div. 503, 115 NYS 483.

59. Review is had from entire record in case, not merely from order of commission. State v. Seaboard Air Line R. Co. [Fla.] 47 S 986.

Sufficiency of record: Required record consists of proceedings certified to under seal of commission by its chairman, on application of any party entitled to appeal, and sets out all facts upon which action appealed from was based and which may be essential for proper decision of appeal, together with such of the evidence as may be specified by such party or any other party in interest, and such other evidence as commission may deem proper to certify, and also statement of reasons upon which action appealed from was based. Atchison, etc., R. Co. v. Love [Okl.] 99 P 1081; Missouri, K. & T. R. Co. v. State [Okl.] 103 P 613; Kansas City So. R. Co. v. Love [Okl.] 100 P 22. Requirement that record contain "all facts upon which action appealed from was based, and which may be essential for proper decision of appeal" (Const. Okl. art. 9, § 22; Snyder's Ed. p. 259; Bunn's Ed. § 234) means facts found by commission, and does not include evidence introduced at hearing. Chicago, etc., R. Co. v. State [Okl.] 103 P 617. Reference in certificate to record to evidence taken in another case, which evidence it had been stipulated should be the evidence in case, held not objectionable. State v. Railroad Commission [Wash.] 100 P 179.

60. Atchison, etc., R. Co. v. Love [Okl.] 99 P 1081. Construing Const. Okl. § 22, art. 9 (Bunn's Ed. § 234; Snyder's Ed. p. 259; Gen. St. Okl. 1908, p. 114) and § 20, art. 9 (Bunn's Ed. § 231; Snyder's Ed. p. 258; Gen. St. Okl. Ann. 1908, p. 113). Kansas City So. R. Co. v. Love [Okl.] 100 P 22.

61. Atchison, etc., R. Co. v. State [Okl.] 101 P 262. In making such determination, the court is not restricted to rule as to taking of property without due process of law. Id. See Rev. St. 1895, §§ 4565, 4566. People v. Hesterberg, 29 S. Ct. 10.

62. Atchison, etc., R. Co. v. State [Okl.] 101 P 262. Findings are presumed to be correct under Okl. Const. art. 9, § 22. Chicago, etc., R. Co. v. State [Okl.] 103 P 617. Finding by the corporation commission, in Oklahoma, will be presumed to be correct. Atchison, etc., R. Co. v. State [Okl.] 100 P 11. Orders presumed to be correct on review by the courts, under Rev. St. 1895, art. 4565, 4566. Gulf, etc., R. Co. v. Railroad Commission [Tex.] 116 SW 795. He who attacks order has burden of proving it unreasonable, unjust, or incorrect. Missouri, K. & T. R. Co. v. State [Okl.] 103 P 613. Validity of order, within jurisdiction given by Burns' Ann. St. 1908, § 5553, specifying place for connection at junction point, will be presumed, unless mistake or abuse of commissioners' power clearly appear. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328. Rates were presumed to be reasonable and not confiscatory where the contrary was not shown. Michigan Cent. R. Co. v. Murphy [Mich.] 16 Det. Leg. N. 168, 120 NW 1073. It will be presumed that order was designed in consonance with state laws and not intended to infringe on interstate commerce law. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328. Held that order requiring construction of connection to other road would be presumed not to give the one road the right to use other's terminal facilities, contrary to provisions of interstate commerce act. Id. Order requiring installation and maintenance of telephone in railway station, as matter of public convenience and necessity, was presumed to be just and reasonable, where presumption was not overcome by proof. Atchison, etc., R. Co. v. State [Okl.] 100 P 11.

63. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. By statute, they are declared to be prima facie reasonable and just. State v. Florida East Coast R. Co. [Fla.] 49 S 43.

64. State v. Railroad Commission [Wis.] 121 NW 919.

or incomplete in some essential particular.[65] In New York the public service commission, recently created by a general statute,[66] must have acted upon the issuance of a certificate of convenience and necessity [67] before the courts will pass upon the propriety of the issuance of such certificate.[68] In the absence of statute, the courts have no power to revise the rates made by a railroad commission.[69] A railroad paralleling the proposed road has the right to appeal from the issuance of a certificate to the proposed road.[70] A judicial or quasi judicial action by a public service commission is in some cases reviewable by certiorari.[71] Equity will not ordinarily enjoin a future act of a state railroad commission [72] or the enforcement of its orders when the statute offers another speedy and adequate remedy.[73] Unreasonable and confiscatory rates may be enjoined by the state courts,[74] and also in the federal courts [75] when all the remedies afforded by the state statute have been exhausted.[76]

Commercial Paper; Commitments; Common and Public Schools, see latest topical index.

COMMON LAW.[77]

The scope of this topic is noted below.[78]

Common law is based on the law of nature and the public good.[79] It is to be found in judicial decisions [80] and treatises.[81] Though the ecclesiastical law is no part of the common law of England, yet, when any part of the jurisdiction exercised by these courts is given to state courts, the settled principles and practice of the ecclesiastical courts become a precedent and a guide for the state courts.[82] Sub-

65. Set aside where no finding on necessary point. Chicago, etc., R. Co. v. State [Okl.] 103 P 617.

66. By Laws 1907, c. 429, p. 889, this commission was substituted in place of board of railroad commissioners which was abolished. In re Buffalo Frontier Terminal Co., 131 App. Div. 503, 115 NYS 483.

67. That is, it must have found whether such railroad is necessary and convenient for public service. In re Buffalo Frontier Terminal R. Co., 131 App. Div. 503, 115 NYS 483. This statute is not local or a private act. Gubner v. McClellan, 130 App. Div. 716, 115 NYS 755.

68. In re Buffalo Frontier Terminal Co., 131 App. Div. 503, 115 NYS 483.

69. Gulf, etc., R. Co. v. Railroad Commission [Tex.] 116 SW 795.

70. People v. Public Service Commission, 195 N. Y. 157, 88 NE 261.

71. People v. Willcox, 129 App. Div. 267, 113 NYS 861. Action establishing through route and apportioning joint fare over two independent street railways was quasi judicial. Id. Action of board of railroad commissioners in issuing certificate of convenience and necessity as required in New York (Laws 1890, p. 1082, c. 565, § 59, added by Laws 1892, p. 1395, c. 676, and amended by Laws 1895, p. 317, c. 545) was judicial determination that railroad has become de jure company. People v. Public Service Commission, 195 N. Y. 157, 88 NE 261.

72. State Railroad Commission v. People, 44 Colo. 345, 98 P 7.

73. Pub. Acts 1907, p. 428, No. 312, § 26, affords prompt remedy in chancery court if complaint be made within 60 days. Michigan Cent R. Co. v. Murphy [Mich.] 16 Det. Leg. N. 168, 120 NW 1073.

74. Gulf, etc., R. Co. v. Railroad Commission [Tex.] 116 SW 795.

75. U. S. Rev. St. § 720, U. S. Comp. St. 1901, p. 581, forbidding federal courts to enjoin proceedings in state courts in such case, the action enjoined being legislative. Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210, 53 Law. Ed. 150. Such action is not bad as an attempt to enjoin legislation or as a suit against the state. Id.

76. Such injunctive relief will not be granted in advance of taking of appeal as provided for highest state court. Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210, 53 Law. Ed. 150.

77. See 11 C. L. 661.

Search Note: See notes in 3 C. L. 718; 11 Id. 1354; 22 L. R. A. 501; 6 L. R. A. (N. S.) 212.

See, also, Common Law, Cent. Dig.; Dec. Dig.; 8 Cyc. 366-387; 6 A. & E. Enc. L. (2ed.) 268.

78. It includes the nature and sources of the common law and its existence generally as part of the jurisprudence of the federal states. It excludes the common-law rules applicable to particular subject-matters (see such topics as Criminal Law,* § 1), the distinction between common law and other remedies (see Forms of Action;* Equity,* § 1), and the presumptions and proof in one state as to the common law of another (see Conflict of Laws,* § 8).

79. Henry v. Cherry [R. I.] 73 A 97.

80. Dimpfel v. Wilson, 107 Md. 329, 68 A 561.

81. State v. Nethercutt, 48 Wash. 105, 92 P 938.

82. Hawkins v. Hawkins, 193 N. Y. 409, 86 NE 468.

* Always begin with the latest article on the subject. Use the latest topical index.

ject to statutory modification, many states have adopted the common law, including Arizona,[83] California,[84] Colorado,[85] Florida,[86] Illinois,[87] Iowa,[88] Missouri,[89] New Hampshire,[90] Utah,[91] Washington,[92] Kentucky and Tennessee.[93]

In adopting the common law, any principles which are essentially inconsonant with our circumstances or repugnant to the spirit of our institutions are not included.[94]

The United States Court for China has power to enforce the common law in civil controversies between its citizens residing in China, and in respect to all crimes committed by its citizens residing there.[95] A statute supersedes the common-law rule and should be considered in accordance with its intention and the purpose which it was designed to accomplish;[96] it is not to be interpreted according to the common law, as it previously existed.[97]

Common law may be repealed by express words in a statute, by repugnance in the two laws, or by a revision of the whole subject-matter of the former laws, which shows an intention to substitute the statute.[98] Repeals by implication are not favored in the law.[99]

Community Property; Comparative Negligence; Complaint for Arrest; Complaints In Pleading, see latest topical index.

COMPOSITION WITH CREDITORS.[1]

The scope of this topic is noted below.[2]

A creditor who enters into a composition agreement after accepting and negotiating a note for the debt is bound to protect the debtor against such note.[3] A note

83. Howell Code of 1864, c. 61, § 7. Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 Law. Ed. —.

84. Pol. Code, § 4468. Peters v. Peters [Cal.] 103 P 219.

85. As it existed March 24, 1907 (Mills' Ann. St. § 4184). Marmaduke v. People [Colo.] 101 P 337.

86. Restraint of trade and monopolies. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19.

87. Doctrine of revocation of wills by implication, not abrogated by statute. Phillippe v. Clevenger, 239 Ill. 117, 87 NE 858.

88. Statute of charitable uses. Klumpert v. Vrieland [Iowa] 121 NW 34.

89. Common law and statutes of England prior to the fourth year of the reign of James I, adopted (Section 4151, Rev. St. 1899 [Section 4151, p. 2250, Ann. St. Mo. 1906]). Common-law offenses may continue to exist, when not excluded by provisions of criminal code. State v. Dalton, 134 Mo. App. 517, 114 SW 1132.

90. Following principle refusing to recognize contracts between husband and wife. Kimball v. Kimball [N. H.] 73 A 408.

91. Easements. Rio Grande Western R. Co. v. Salt Lake Inv. Co. [Utah] 101 P 586.

92. Superior court given jurisdiction to try all common-law offenses not defined by statute. Ballinger's Ann. Codes and St. § 6774. State v. Nethercutt, 48 Wash. 105, 92 P 938.

93. Servant's assumption of risk. Louisville & N. R. Co. v. McMillen [Ky.] 119 SW 221.

94. Scheuermann v. Scharfenberg [Ala.] 50 S 335. Doctrine of littoral and riparian rights not adaptable in every particular. Barnes v. Midland R. Terminal Co., 193 N. Y. 378, 85 NE 1093; Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 Law. Ed. —.

95. Act of Congress June 30, 1906, c. 3934, 34 Stat. pt. 1, p. 814 (U. S. Comp. St. Supp. 1907, p. 797). Biddle v. U. S. [C. C. A.] 156 F 759.

96. Dimpfel v. Wilson, 107 Md. 329, 68 A 561; Rio Grande Western R. Co. v. Salt Lake Inv. Co. [Utah] 101 P 586.

97. Its object may be to change common-law rule. Dimpfel v. Wilson, 107 Md. 329, 68 A 561.

98. Where not only the subject-matter is included but the common-law offense is defined and enacted by a subsequent affirmative statute prescribing penalty therefor, this doctrine obtains with special force. State v. Dalton, 134 Mo. App. 517, 114 SW 1132.

99. Repeal must be inevitable, or legislative intent must be obvious. State v. Dalton, 134 Mo. App. 517, 114 SW 1132.

1. See 11 C. L. 662.

Search Note: See note in 3 C. L. 715.

See, also, Compositions with Creditors, Cent. Dig.; Dec. Dig.; 8 Cyc. 409-489; 6 A. & E. Enc. L. (2ed.) 376.

2. It includes only general compositions, independent of bankruptcy or general assignment (see Assignment for Benefit of Creditors;* Bankruptcy,* § 9) composition of a single claim being elsewhere treated (see Accord and Satisfaction *).

3. Where debtor was compelled to pay note which was given creditor prior to

given secretly to a creditor in excess of the amount which was to be accepted by creditors in a composition, in consideration that such creditor would join in the composition and not oppose it or its confirmation is illegal and void,[4] and is not rendered valid by being dated in advance and left with another person to be delivered after the composition was complete, and so delivered.[5]

COMPOUNDING OFFENSES.[6]

The scope of this topic is noted below.[7]

The offense consists generally in the agreement to suppress a prosecution for crime,[8] and is to be distinguished from misprision of felony which at common law consisted in failure to prevent when possible the commission of a felony.[9]

Compromise and Settlement; Concealed Weapons, see latest topical index.

CONCEALING BIRTH OR DEATH.[10]

Condemnation Proceedings; Conditional Sales; Confession and Avoidance, see latest topical index.

CONFESSION OF JUDGMENT.[11]

The scope of this topic is noted below.[12]

Definition and Nature, 792.
Offer to Allow Judgment, 792.
The Warrant and Authority Conferred, 793.
The Judgment, 793.

*Definition and nature.*See 11 C. L. 663

Offer to allow judgment.—The acceptance of an offer under statute to allow judgment must be within the time required by statute or the offer is deemed withdrawn,[13] and, before judgment may, under the New York statute, be entered on a written offer, the offer must be filed.[14] Likewise where it is provided that an offer

composition agreement, the creditor was liable for amount of note. Warshawsky v. Bonewur, 130 App. Div. 250, 114 NYS 665.

4, 5. Dicks v. Andrews [Ga.] 64 SE 788.

6. See 9 C. L. 594.

Search Note: See notes in 30 L. R. A. 240; 48 Id. 848; 7 L. R. A. (N. S.) 709; 16 Id. 971; 9 Ann. Cas. 565.

See, also, Compounding Felony, Cent. Dig.; Dec. Dig.; 6 A. & E. Enc. L. (2ed.) 399; 7 A. & E. Enc. P. & P. 245.

7. It includes the criminal offense of agreeing to abstain from, delay or discontinue a criminal prosecution. It excludes validity of agreements contemplating suppression of prosecutions (see Contracts,* § 31), threat to prosecute as duress (see Duress*) and matters common to all crimes (see Criminal Law; Indictment and Prosecution*).

8. Attorney employed to sue for criminal assault held guilty of compounding offense by agreeing in consideration of settlement to prevent prosecution. In re Hart, 131 App. Div. 661, 116 NYS 193.

9. Suell v. Derricott [Ala.] 49 S 895.

10. No cases have been found for this subject since the last article. See 5 C. L. 608.

Search Note: See notes in 15 L. R. A. 438; 23 Id. 578; 2 L. R. A. (N. S.) 945, 952; 6 Id. 567; 9 Id. 111, 568; 10 Id. 611; 11 Id. 148, 789, 1018.

See, also, Bastards, Cent. Dig. §§ 28-34; Dec. Dig. § 18; 6 A. & E. Enc. L. (2ed.) 424; 4 A. & E. Enc. P. & P. 624.

11. See 11 C. L. 663.

Search Note: See notes in 5 C. L. 609; 13 L. R. A. 796; 30 Id. 240; 4 L. R. A. (N. S.) 528.

See, also, Judgment, Cent. Dig. 42-129; Dec. Dig. §§ 29-70; 17 A. & E. Enc. L. (2ed.) 752; 4 A. & E. Enc. P. & P. 560.

12. It excludes judgments by default (see Defaults*), or on the pleadings (see Pleading,* § 14), bills in equity taken as confessed (see Equity,* § 7), the appealability of judgments on confession (see Appeal and Review,* § 4B), their effect as estoppel (see Former Adjudication,* § 1), and the application of the law merchant to judgment notes (see Negotiable Instruments*). The authority of an attorney to confess judgment for his client is also excluded (see Attorneys and Counsellors,* § 8).

13. Where plaintiff did nothing toward accepting the offer until after the case had come from court of appeals, the acceptance was not given as required. Hagerman v Mutual Life Ins. Co. [Colo.] 103 P 276.

14. People v. Wells, 61 Misc. 356, 113 NYS 880.

of judgment made by an attorney must have annexed thereto an affidavit by the attorney, such requirement must be complied with.[15]

*The warrant and authority conferred.*See 11 C. L. 663—The warrant of attorney while originally used only as a matter of practice is now, in many cases, given as security for debt.[16] A warrant of attorney based on the common law, authorizing confession of judgment without service of process, is invalid in Missouri as against public policy,[17] and is now abrogated by statute, both in that state [18] and in Alabama.[19] Where warrants are allowed, they are to be strictly construed [20] and the proceedings thereunder must be within the strict letter of the warrant; [21] but a stipulation, conferring power to confess judgment without preliminary process, is not limited or impaired by a stipulation which refers to the venue of the judgment,[22] and a stipulation by which the debtor agrees to pay attorney's fees, in case judgment should be confessed, is lawful and may be included in the judgment.[23] Entry of judgment is a complete execution of the power conferred by the warrant of attorney,[24] and, if a second judgment is entered, it, as well as the first, may be stricken off.[25] A warrant of attorney following a joint and several obligation to pay money, and authorizing the confession of judgment against "us, or any or either of us," is the equivalent of as many separate warrants as there are signers.[26]

*The judgment.*See 11 C. L. 663—A judgment rendered by virtue of a power of attorney is as valid and binding as if rendered on service of process,[27] and is within the full faith and credit clause of the constitution.[28] The intendments in its favor include a presumption of the authority of the attorney by whom the judgment was confessed.[29] Where a judgment is prematurely entered under a warrant of attorney, it is voidable,[30] and a judgment, which upon its face is a judgment upon and after a trial in which evidence was heard, is unauthorized by a warrant of attorney to confess judgment.[31] A confession of judgment waives any prior irregularities and is a release of errors.[32] When a judgment has been rendered by confession without authority, the remedy is either by direct application to the court which rendered the judgment [33] or by bill in equity,[34] and, if the nullity of the judgment appears on the face of the record, the trial court may, on motion at a subsequent term, set it aside.[35]

15. Code of Civil Procedure requiring such affidavit applies to municipal courts. Miller v. Allen, 131 App. Div. 172, 115 NYS 253.

16. Origin and history discussed. First Nat. Bank v. White [Mo.] 120 SW 36.

17. First Nat. Bank v. White [Mo.] 120 SW 36.

18. Rev. St. 1899, §§ 789-792 (Ann. St. 1906, pp. 755-757). First Nat. Bank v. White [Mo.] 120 SW 36.

19. Code 1907, § 4296, provides that judgment may not be without preliminary process. Jemison v. Freed [Ala.] 50 S 52.

20, 21. First Nat. Bank v. White [Mo.] 120 SW 36.

22. Jemison v. Freed [Ala.] 50 S 52.

23. Four hundred dollars attorney's fees allowed. Keenan v. Blue, 240 Ill. 177, 58 NE 553.

24. Power is exhausted by such entry. Osterhout v. Briggs, 37 Pa. Super. Ct. 169.

25. This is allowed where defendant takes proper action and does not estop himself by acquiescence. Osterhout v. Briggs, 37 Pa. Super. Ct. 169.

26. Separate judgments may be entered against the different signers. George D. Harter Bank v. Straus, 170 F 489.

27. Jemison v. Freed [Ala.] 50 S 52. Rule that judgment is conclusive as to every matter that might have been pleaded or given in evidence obtains as to a judgment by confession. Farmers' State Bank v. Stephenson [Okl.] 102 P 992. A judgment on the merits, rendered by consent, is as conclusive as one rendered in the ordinary course. In re Harris' Estate [Vt.] 72 A 912.

28. In re Harris' Estate [Vt.] 72 A 912. Judgment rendered upon an instrument containing a warrant of attorney to confess judgment is held valid under the full faith and credit clause of the federal constitution. First Nat. Bank v. White [Mo.] 120 SW 36.

29. Lowellville Coal Min. Co. v. Zappio [Ohio] 89 NE 97.

30. Judgment note. Osterhout v. Briggs. 37 Pa. Super. Ct. 169.

31. First Nat. Bank v. White [Mo.] 120 SW 36.

32. Gunter v. Hinson [Ala.] 50 S 86.

33. Statutory certiorari or appeal will not lie. Winkler Brokerage Co. v. Courson [Ala.] 49 S 341.

34, 35. Winkler Brokerage Co. v. Courson [Ala.] 49 S 341.

On a motion to vacate a judgment confessed by authority, the question is not whether the judgment should be set aside because of error of law,[36] but whether there exists any equitable reason for opening the judgment to let in a defense.[37] Like other judgments, a confessed judgment will not be opened for technical irregularity[38] or at the instance of one who has been guilty of laches.[39]

Confessions; Confiscation, see latest topical index.

CONFLICT OF LAWS.

The scope of this topic is noted below.[40]

§ 1. **Extraterritorial Effect of Laws in General, 794.**
§ 2. **Contracts in General, 796.**
§ 3. **Effect of Status or Domicile, 799.**
§ 4. **Matters Relating to Personal Property, 799.**
§ 5. **Effect of Public Policy, 799.**
§ 6. **Protection of Citizens in State of Forum, 800.**
§ 7. **Contracts Respecting Realty, 800.**
§ 8. **Application of Remedies, 801.** Presumptions and Judicial Notice and Pleading of Foreign Laws, 802.
§ 9. **Torts, 804.**

§ 1. *Extraterritorial effect of laws in general.*[41]—See 11 C. L. 665—Statutes do not extend exproprio vigore beyond the boundaries of the state by which they are enacted,[42] but rights arising under such statutes will ordinarily be enforced in an-

36. Moyses v. Schendorf, 238 Ill. 232, 87 NE 401, afg. 142 Ill. App. 293; Nees v. Dumbauld, 142 Ill. App. 487.

37. Affidavit of defendant, based on hearsay, unsupported by direct proof, is insufficient to justify opening of judgment on ground of fraud. Moyses v. Schendorf, 238 Ill. 232, 87 NE 401, afg. 142 Ill. App. 293. Defendant's oath uncorroborated against oath of plaintiff and judgment note under seal is not sufficient. Huppert v. Huppert [Pa.] 73 A 333. Where judgment note was given to bank by bondsman of defaulting cashier, evidence held not to show that note was merely given to enable bank to continue business and was not to be enforced. People's Bank of California v. Stroud [Pa.] 72 A 341. Where defendant was liable on a note and while intoxicated was induced to sign a renewal note containing a warrant of attorney, it was not sufficient to induce court to interfere. Kissinger v. Zieger, 138 Wis. 368, 120 NW 249. Affidavits charging fraud and affidavits of others, corroborating the same, held sufficient to justify opening judgment. Nees v. Dumbauld 142 Ill. App. 487.

38. Kissinger v. Zieger, 138 Wis. 368, 120 NW 249.

39. Defendant because of delay was not allowed to interpose defense of bankruptcy. Taber v. Donovan [Mich.] 16 Det. Leg. N. 300, 121 NW 481.

40. Treats of conflict of laws generally. Excludes the operation of the federal conformity act (see Courts,* § 4), the doctrine of stare decisis (see Stare Decisis,* § 4), the respective legislative and executive functions of the federal and state governments (see Constitutional Law,* § 5; Aliens;* Commerce,* § 2; Bankruptcy,* § 2; Extradition,* § 2; Patents;* Treaties;* Customs Laws,* § 3). Also excludes, except in so far as retained for illustrative and incidental purposes, the conflict of particular laws and the application of the general doctrine herein treated to particular subjects and relations (see the topics devoted to the particular law, subject or relation, such as Frauds, Statute of;* Limitation of Actions;* Descent and Distribution;* Estates of Decedents;* Wills;* Husband and Wife;* Bankruptcy;* Carriers;* Corporations;* Foreign Corporations;* Foreign Judgments;* Liens;* Exemptions;* Homesteads;* Trusts *).

41. Search Note: See notes in 23 L. R. A. 52; 46 Id. 264; 67 Id. 33; 2 L. R. A. (N. S.) 408; 6 Id. 212.

See, also, Adoption, Cent. Dig. §§ 6, 37; Dec. Dig. § 25; Aliens, Cent. Dig. § 28; Dec. Dig. § 9; 2 Cyc. 211; Bastards, Cent. Dig. § 247; Dec. Dig. § 96; 5 Cyc. 642; Charities, Cent. Dig. § 2; Dec. Dig. § 2; Conversion, Dec. Dig. § 2; Corporations, Cent. Dig. §§ 829-834, 2553, 2579; Dec. Dig. §§ 216, 656, 657; 10 Cyc. 670-676; 19 Cyc. 1240-1249, 1276-1279, 1289, 1311; Criminal Law, Cent. Dig. § 7; Dec. Dig. § 18; Deeds, Cent. Dig. § 80; Descent and Distribution, Cent. Dig. §§ 440-442; Dec. Dig. § 121; 14 Cyc. 189, 190; Dower, Cent. Dig. §§ 4, 5; Dec. Dig. § 2; 14 Cyc. 887, 888; Executors and Administrators, Cent. Dig. §§ 2, 2297-2354; Dec. Dig. §§ 2, 517-526; 18 Cyc. 74, 1220-1248; Garnishment. Dec. Dig. § 2; Guardian and Ward, Cent. Dig. § 3; Dec. Dig. § 3; Homestead, Cent. Dig. §§ 2, 3; Dec. Dig. § 2; 21 Cyc. 463; Husband and Wife, Cent. Dig. §§ 3, 4, 178, 219, 273, 400, 561, 712, 878; Dec. Dig. §§ 2, 31, 36½, 56, 110½, 146½, 180, 203½, 246; 21 Cyc. 1145-1147, 1258-1265, 1311, 1499, 1634-1638; Infants, Cent. Dig. § 2; Dec. Dig. § 2; Marriage, Cent. Dig. §§ 3, 23; Dec. Dig. § 3; 26 Cyc. 829-832; Payment, Cent. Dig. § 2; Dec. Dig. § 2; Perpetuities, Cent. Dig. § 2; Seamen, Dec. Dig. § 3; Trusts, Cent. Dig. § 89; Dec. Dig. § 62½; Wills, Cent. Dig. §§ 2, 50, 163, 183, 947-950; Dec. Dig. §§ 2, 22, 57, 70, 436, 828; 13 A. & E. Enc. L. (2ed.) 1050.

42. Walsh v. Boston & M. R. Co., 201 Mass. 527, 88 NE 12; Pietraroia v. New Jersey & H. R. Co. & Ferry Co., 131 App. Div. 829, 116 NYS 249; Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164

other state as a matter of comity,[43] unless the laws thus invoked are penal,[44] or merely establish a rule of practice,[45] or furnish only a local remedy for the invasion

F 869. **Statute conferring right of inheritance** upon adopted children. Brown v. Finley [Ala.] 47 S 577. **Laws relative to administration of estate** of decedent. Wilson v. Hartford Fire Ins. Co. [C. C. A.] 164 F 817. Monopoly of a **patent** does not extend beyond the jurisdiction of the government granting it. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 F 869. The use of articles covered by a United States patent within the United States can no more be controlled by foreign law than the sale can, therefore a purchaser of such an article made in a foreign country has no right because sale was valid in foreign country to bring such article to the United States and use it contrary to patent laws. Daimler Mfg. Co. v. Conklin [C. C. A.] 170 F 70. Oklahoma **registration law** providing that a contract of conditional sale "shall be deposited in the office of the register of deeds in and for the county wherein the property shall be kept" have no extra territorial effect, and therefore did not apply to goods thus sold in Oklahoma, but to be delivered and kept in Indian Territory. In re Gray, 170 F 638. The statute of New Mexico, relative to courts in which certain suits may be brought, requiring suits for personal injuries to be brought only in the district court of the territory, has no extraterritorial effect. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —, afg. [Tex. Civ. App.] 17 Tex. Ct. Rep. 613, 99 SW 190. Law of Alabama, providing that where decree of **divorce** does not expressly authorize a subsequent marriage it is construed as prohibiting a second marriage, will not be given extraterritorial effect where party at time of second marriage was no longer citizen of that state. Wingo v. Rudder [Tex. Civ. App.] 120 SW 1073. Statute of Kansas making it a **misdemeanor** to deduct any amount from actual weight of certain articles, has no application to a settlement between purchaser and seller made in a foreign state. In re Martin [Kan.] 101 P 1006. A **corporate name** has no extraterritorial worth except under the doctrine of comity. State v. Nichols, 51 Wash. 619, 99 P 876.

43. The enforcement of the law of one state in another being a privilege granted by comity, if there is no case under the lex loci, then there is no case under the lex fori, and the substantive law of the sister state will be administered as it is in that state. Newlin v. St. Louis & S. F. R. Co. [Mo.] 121 SW 125. Courts of Georgia will not exclude Alabama suitors, so long as the courts of that state do not exclude Georgia suitors. Only in this sense is the expression **"reciprocity is comity"** applicable to causes of actions springing from wrongful deaths occurring in Alabama. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678. Causes of action arising under the statute of one state may be enforced in another, **where the laws of both states are substantially the same.** St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403.

Applications of rule of comity: Adoption under Wisconsin statute given effect in Connecticut. Appeal of Woodward, 81 Conn. 152, 70 A 453. Relation of adopted child and foster parent, and the former's **right to inherit** under laws of Iowa, recognized in Ohio. Simpson v. Simpson, 9 Ohio C. C. (N. S.) 137. Where wages of nonresident defendant in garnishment suit were earned and made payable in Indiana, he is entitled in Illinois to the benefit of the **exemption laws** of Indiana. Jackson & Co. v. Republic Iron & Steel Co., 141 Ill. App. 453. Action arising under the laws of Tennessee entitling a husband and children to recover **damages for injuries resulting in death of wife and mother** is enforcible in Texas. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403. Laws of Kansas allowing **damages for wrongful death** held enforcible in Missouri. Newlin v. St. Louis & S. F. R. Co. [Mo.] 121 SW 125.

44. Walsh v. Boston & M. R. Co., 201 Mass. 527, 88 NE 12.

Question whether statute is penal is one of general jurisprudence which must be determined independently of local decisions. Leyner Engineering Works v. Kempner, 163 F 605. Whether statute of one state, which in some respects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish for an offense against the public justice of the state, or, on the other hand, to afford a private remedy to a person injured by the wrongful act. Id. Mills' Ann. St. Col. § 501, providing that officers, etc., of a foreign corporation doing business in Colorado without having complied with the requirements of the statute shall be jointly and severally liable on all contracts made by the company, is **not penal.** Id. Alabama statute authorizing civil action for unlawful homicide as construed and applied by court of that state is not penal in the international sense. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678. Statute of Colorado mining corporations are required to file certain report within a certain time and failing to file report the officers and directors become individually liable for all debts contracted by corporation. Held that statute was **penal** and not enforcible in Missouri. Carey v. Schmeltz [Mo.] 119 SW 946. Where supreme court of another state holds that liability of directors of corporation in that state is penal, it will not be enforced in Pennsylvania. Commercial Nat. Bank v. Kirk, 222 Pa. 567, 71 A 1085.

45. Where certain creditors of insolvent corporation in Colorado were appointed by court of that state to collect amount of corporate indebtedness which corporation was unable to pay, action cannot be maintained against Massachusetts stockholder to enforce his statutory liability, as Colorado statute merely establishes a rule of practice. Miller v. Aldrich, 202 Mass. 109, 88 NE 441.

of a recognized right which is protected elsewhere in other ways,[46] or unless their enforcement would contravene the settled policy or positive law of the state of the forum.[47] Under the peculiar relation existing between the state and federal government, many of the ordinary rules of private international law are not applicable in determining when and how far the courts of the state will enforce the statutes of the United States and vice versa.[48] The federal courts will enforce the public policy of the respective states in local matters,[49] whether such policy has been established by local statutes or by local decisions.[50]

§ 2. *Contracts in general.*[51]—See 11 C. L. 666—It is well settled that the lex loci contractus, as distinguished from the lex fori, controls in determining the validity, force and effect of contracts generally,[52] and there is no difficulty in applying this rule where the place of celebration of a contract is the same as the place of its performance, the two considerations bearing upon the determination of the place of the contract being united in such case, thus calling for a simple application of the doctrine that the lex loci contractus controls;[53] but, where these two elements are

46. Code Civ. Proc. N. Y. §§ 1902-1904, giving right of action for wrongful death, is a recognition and creation of a substantive right, and not merely a provision of local procedure, and therefore enforcible in Massachusetts. Walsh v. Boston & M. R. Co., 201 Mass. 527, 88 NE 12.

47. See post, § 5, Effect of Public Policy.

48. Hepburn amendment to interstate commerce law. Southern Pac. R. Co. v. Crenshaw, 5 Ga. App. 675, 63 SE 865.

49. McCue v. Northwestern Mut. Life Ins. Co. [C. C. A.] 167 F 435.

50. McCue v. Northwestern Mut. Life Ins. Co. [C. C. A.] 167 F 435. As to following local decisions, see Stare Decisis, § 4B.

51. Search Note: See notes in 3 C. L. 720, 722; 5 Id. 611, 612; 17 L. R. A. 127, 435; 24 Id. 831; 25 Id. 178; 34 Id. 737; 55 Id. 933; 57 Id. 155, 513; 61 Id. 193; 62 Id. 33; 63 Id. 513; 2 L. R. A. (N. S.) 299; 4 Id. 1191; 5 Id. 751; 7 Id. 191; 11 Id. 1082; 55 A. S. R. 774; 104 Id. 483; 1 Ann. Cas. 88, 241; 2 Id. 706; 4 Id. 1106; 9 Id. 44; 11 Id. 498.

See, also, Acknowledgment, Cent. Dig. §§ 6, 264; Dec. Dig. §§ 2, 57; 1 Cyc. 549, 551, 559, 565; Apprentices, Cent. Dig. §§ 7, 14; Assignments, Cent. Dig. § 4; Dec. Dig. § 2; 4 Cyc. 63; Assignments for Benefit of Creditors, Cent. Dig. §§ 75-88; Dec. Dig. §§ 19-21; 4 Cyc. 193-195; Bills and Notes, Cent. Dig. §§ 30, 106, 213, 248-254, 362, 429, 526, 647-649, 744, 788, 1051-1054; Dec. Dig. §§ 2, 29, 67, 99, 117, 145, 180, 204, 224, 263, 311, 328, 386; 7 Cyc. 634-642, 679, 782, 837, 959, 1089; Bonds, Cent. Dig. §§ 2, 48, 74; Dec. Dig. §§ 2, 49, 75; 5 Cyc. 730, 752, 777; Brokers, Dec. Dig. § 20; Building and Loan Associations, Dec. Dig. § 27; Carriers, Cent. Dig. §§ 220, 496, 650, 686, 965, 1263, 1538; Dec. Dig. §§ 46, 109, 148, 203, 234; 6 Cyc. 410; Champerty and Maintenance, Cent. Dig. §§ 2, 22, 52; Dec. Dig. § 2; 6 Cyc. 883; Chattel Mortgages, Cent. Dig. §§ 2, 151, 185, 186; Dec. Dig. §§ 2, 82, 101; 6 Cyc. 1060; Contracts, Cent. Dig. §§ 2, 41, 145, 455-461, 724-727, 1216; Dec. Dig. §§ 2, 101, 144, 276; 6 Cyc. 18; 9 Id. 664-684; Corporations, Cent. Dig. §§ 466, 2553, 2579; Dec. Dig. §§ 114, 656, 657; 10 Cyc. 593-597; 19 Id. 1240-1249, 1276-1279, 1289-1311; Frauds, Statute of, Cent. Dig. § 268; Dec. Dig. § 120; 20 Cyc. 279, 280; Gaming, Cent. Dig. § 2; Dec. Dig. § 2; 20 Cyc. 923; Gifts, Cent. Dig. § 1; Guaranty, Cent. Dig. § 29; Dec. Dig. §§ 1, 28; 20 Cyc. 1397-1425, 1442, 1479; Husband and Wife, Cent. Dig. §§ 178, 219; Dec. Dig. §§ 31, 36½; 21 Cyc. 1258-1265; Insurance, Cent. Dig. §§ 173-175, 293, 469, 894, 1934; Dec. Dig. §§ 125, 147, 200, 251, 351, 712; 19 Cyc. 661; 25 Id. 747-749; 26 Id. 583; 29 Id. 86; Interest, Cent. Dig. §§ 2, 55-59; Dec. Dig. §§ 2, 28; 22 Cyc. 1476-1480, 1482-1494, 1496, 1498, 1503-1521; Intoxicating Liquors, Cent. Dig. § 469; Dec. Dig. § 326; Judgment, Dec. Dig. § 46; 23 Cyc. 705; Landlord and Tenant, Dec. Dig. § 2; 24 Cyc. 915; Partnership, Cent. Dig. § 29½; Dec. Dig. § 2; Principal and Agent, Cent. Dig. § 2; Dec. Dig. § 2; Patents, Dec. Dig. § 158; Principal and Surety, Cent. Dig. §§ 2, 104, 132; Dec. Dig. § 2, 60; Sales, Cent. Dig. §§ 2, 153, 858, 1328; Dec. Dig. §§ 2, 55, 302, 451; Shipping, Cent. Dig. §§ 120, 400, 523, 600; Dec. Dig. §§ 34, 102, 157, 187; Telegraphs and Telephones, Dec. Dig. § 27; Usury, Cent. Dig. §§ 2-15, 418; Dec. Dig. §§ 2, 135; Wills, Cent. Dig. § 168; Dec. Dig. § 57; 22 A. & E. Enc. L. (2ed) 1322.

52. Mandru v. Ashby, 108 Md. 693, 71 A 312. Where a state statute constitutes a part of a contract, the courts of another state, in enforcing such contract, will follow the construction thereof by the courts of the former state. Hayward v. Sencenbaugh, 141 Ill. App. 395. Lex loci contractus is part of **contract for loan of money** and the pledge of an insurance policy as security therefor. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. The lex loci contractu controls the **liability incident to a signature.** Hackley Nat. Bank v. Barry, 139 Wis. 96, 120 NW 275. Where there was evidence that contract was made in another state, an **instruction** as to effect of statutes of state of former should be qualified by proviso that they apply only in case contract was made in such state. Johnson County Sav. Bank v. Walker, 80 Conn. 509, 69 A 15.

53. Contract made and by its terms to be performed in same state is controlled by laws of such state. Arnett v. Pinson, 33 Ky. L. R. 36, 108 SW 852. Contract made

severed, the court must first determine the place of the contract before it can apply the law of such place, and thus more or less seeming conflict has arisen, a controlling effect having been given in some cases to the place of celebration,[54] in others to the place of performance,[55] and in still others to the place of celebration and partial performance,[56] or to the place of performance and partial celebration.[57] The true

and to be performed in state of New York governed by common law of that state. Sugar Beets Product Co. v. Lyons Beet Sugar Refining Co., 161 F 215. Contract made in Louisiana for purchase of timber rights on land in such state held a Louisiana contract. Sanders v. Schilling [La.] 49 S 689. Contract made and to be executed in Mississippi, one of the parties being a married woman domiciled in that state, held governed by law of such state. First Nat. Bank v. Hinton [La.] 49 S 692. Validity of **future contracts** is determined by law where made and consummated. Salmon v. State [Tex. Cr. App.] 120 SW 427. Where contract for **life insurance** was made in Pennsylvania and provided that place of contract should be the state of Pennsylvania, it would be construed according to the laws of that state. Russell v. Grigsby [C. C. A.] 168 F 577. Insurance business transacted in Nebraska by New York insurance companies, without any provisions that the New York laws shall govern, is not subject to provision of New York statute requiring a notice to be mailed to the policy holder in that state as a condition of forfeiture for nonpayment of premiums. McElroy v. Metropolitan Life Ins. Co. [Neb.] 122 NW 27. Where insured was a member of mutual life insurance company, a Wisconsin corporation, and the policy on its face showed it was executed in Wisconsin, and by its express terms was made payable there, it was a Wisconsin contract and governed by laws of such state. McCue v. Northwestern Mut. Life Ins. Co. [C. C. A.] 167 F 435. Where a beneficiary association and the insured were both residents of the state of Illinois at the time the application for insurance was made and the certificate issued and delivered, the contract was an Illinois contract. Roberts v. Modern Woodmen of America, 133 Mo. App. 207, 113 SW 726. Rights of parties to **conditional sale** and of creditors of purchaser must be determined under the laws of the state where the sale is made and in which property is delivered and used. In re Burke, 168 F 994; In re Hager, 166 F 972.

54. Indorser is bound by law of place of **indorsement.** Greives v. Tait [Okl.] 99 P 810. **Acceptances** are construed by the law of the state where they are made. Johnson County Sav. Bank v. Kramer, 42 Ind. App. 548, 86 NE 84. Acceptance of a foreign draft in Indiana is governed by the laws of that state. Id. The general rule that the law of the state in which an **assignment** is made controls as to its validity only applies were the assignor is a party. Arnett v. Pinson, 33 Ky. L. R. 36, 108 SW 852. The validity of contract of assignment of life insurance policy is to be determined by the law of the place of execution of the assignment. Russell v. Grigsby [C. C. A.] 168 F 577. Transfer of Ohio notes to a Kentucky bank to secure an Ohio debt, the transaction taking place in Ohio, must be governed by laws of Ohio, and Kentucky statutes providing that every assignment in contemplation of insolvency with a design to prefer one creditor to another shall operate as assignment for the benefit of creditors has no effect on such Ohio transaction. Fawcett's Assignee v. Mitchell, Finch & Co. [Ky.] 117 SW 956. A **seaman's contract** and remedies, in so far as they relate to contract rights, must be governed by the law where the contract is made. The Ucayali, 164 F 897.

55. Contract with quasi municipal corporation created by laws of Maine for laying in that state a water pipe line, held made with reference to laws of that state, nothing appearing to contrary. Farnum v. Kennebec Water Dist. [C. C. A.] 170 F 173. Where **drafts** were made payable at Paris, the law of France determined what constituted payment. Kessler v. Armstrong Cork Co. [C. C. A.] 158 F 744. **Agreement for acceptance** of foreign bill of exchange is governed by place of performance of agreement. Bank of Laddonia v. Bright-Coy Commission Co. [Mo. App.] 120 SW 648. Where **notes** were executed in Kentucky and made payable in Iowa, in action by assignee in Kentucky, the Iowa negotiable instrument act was held to apply. Price v. Gatliff's Ex'rs, 33 Ky. L. R. 324, 110 SW 332. Negotiability of note made in Kansas and payable in Missouri is determined by laws of Missouri, in absence of stipulations evincing a contrary intent. Sykes v. Citizens' Nat. Bank [Kan.] 98 P 206. Note executed in one state and secured by reservation of title to property situate therein, but which is negotiable and payable in another state, held controlled by the laws of the latter state. Lienkauf Banking Co. v. Haney [Miss.] 46 S 626. Where a **conditional sale** is made in one state, which contemplates or expressly provides that the property is to be delivered or used in another state, the law of latter governs. In re Gray, 170 F 638. Where **telegram** was sent from Georgia to Alabama and the breach occurred in the latter state, recovery could be had for mental anguish under the law of such state, although no recovery could be had in the former state. Western Union Tel. Co. v. Hill [Ala.] 50 S 248. Where a contract containing a **stipulation limiting carrier's liability** for negligence is made in one state, but, with a view to its performance, by transportation through or into one or more other states, it will be construed in accordance with the law of the state where its negligent breach causing the injury occurs. Stewart v. Baltimore & O. R. Co., 37 Pa. Super. Ct. 273.

56. Locus of **contract for carriage of goods** is place where contract is made and goods are delivered to carrier for transmission. Hanson v. Great Northern R. Co. [N. D.] 121 NW 78. Whether provision in

doctrine, however, which underlies all the decisions on this point, and under which most if not all of them may be reconciled, is that the locus of the contract, as that term is used in the phrase lex loci contractus, is the place the laws of which the parties may fairly be presumed to have had in mind when they made their contract,[58] and the intention of the parties in this regard must be determined from all the circumstances of the case and not from any one or more isolated acts.[59] The place where the last act is done which is necessary to give validity to a contract is the place where the contract is made.[60]

Subject to qualification based on public policy, a contract valid at its locus is valid everywhere,[61] and vice versa,[62] nor is a contract which is valid under a territorial government affected by the subsequent admission of the territory as a state.[63]

bill of lading releasing carrier from liability for loss of goods by fire not caused by their negligence was a part of the contract of shipment, must be governed by law of Illinois where contract was made and where shipper lived and carrier was by law entitled to do business. Valk v. Erie R. Co., 130 App. Div. 446, 114 NYS 964. Laws of New York govern a contract made in that state by an express company to carry goods to point in Missouri. Townsend & Wyatt Dry Goods Co. v. U. S. Exp. Co., 133 Mo. App. 683, 113 SW 1161. Validity of **bill of lading** issued without receipt of goods is determined by law of place where bill was issued and where goods purported to have been received. Missouri, K. & T. R. Co. v. Sealy [Kan.] 99 P 230. Telegraph company's **contract to transmit telegram** is made where company receives message for transmission, and laws of such place will govern if not against public policy of the forum. Fox v. Postal Telegraph-Cable Co., 138 Wis. 648, 120 NW 399.

57. Where a collateral note containing a contract of pledge was signed in Missouri but was dated, accepted, and made payable in Ohio, it was an Ohio contract and governed by law of Ohio. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. Where maker who lived in Michigan sent note to person in Wisconsin who signed same and by direction of maker sent paper to payee in Michigan, it was a Michigan contract. Hackley Nat. Bank v. Barry, 139 Wis. 96, 120 NW 275.

58. Validity of a contractual obligation is ordinarily governed by the law of the state or country with reference to which it was assumed. In re Fisk, 81 Conn. 433, 71 A 559. Proper law of every contract so far as contractual obligations of parties to each other are concerned is that by which they may justly be presumed to have meant to bind themselves. New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788. Though effect of instrument purporting to pass title to real estate must be determined by the law of the state where the real estate is situated, yet what the parties to the instrument at the time of its execution understood to be its effect is to be determined by the law which they had in mind as governing its construction and operation. Id. Notes made in Louisiana which showed on their face that they were given for coal to be used on a Louisiana plantation on which such coal was actually used held to evidence a Louisiana contract within Rev. Civ. Code La., art. 3217, giving furnisher of supplies for any plantation a lien on the crop, though the original contract for sale of the coal bore many earmarks of a Pennsylvania contract. Iberville Planting & Mfg. Co. v. Monongahela Coal Co. [C. C. A.] 168 F 12. Where deceased took a **life policy** in an Iowa insurance company, which thereafter transferred all its business to a Minnesota company, which latter company undertook to reinsure, assume and guarantee all insurance contracts of first named company, it was held that, as between the wife of deceased who was the original beneficiary and the defendant who claimed that he was substituted as beneficiary in her stead, the construction which deceased put upon contract and the acquiescence in such construction by the wife and defendant would be adopted by the court. Crowell v. Northwestern Nat. Life Ins. Co. [Iowa] 118 NW 412. Where **deed of settlement** made in New York was a settlement of funds owned by a Connecticut woman and deed referred to provisions in the laws of Connecticut, the deed was construed according to laws of Connecticut. White v. Holly, 80 Conn. 438, 68 A 997.

59. Hooley v. Talcott, 129 App. Div. 233, 113 NYS 820. Contract for loan upon security of warehouse goods, as distinguished from contract evidenced by note executed by borrower, held a New York contract where it was entered into and in New York, goods were stored there and interest paid there, though note was signed and made payable, for borrower's convenience, in Pennsylvania. Id.

60. Lawson v. Tripp, 34 Utah, 28, 95 P 520. Where notes, which fixed no place of payment, were prepared and sent to Tennessee, where they were signed without change and then sent to another state, they were Tennessee contracts and were governed as to rate of interest by law of that state. Troendle v. Highleyman [Ky.] 113 SW 812. Where the parties to an insurance contract are in different jurisdictions, the place where the last act is done which is necessary to the validity of the contract is the place where the contract is entered into. McElroy v. Metropolitan Life Ins. Co. [Neb.] 122 NW 27. An acceptance of an order for goods in another state and the delivery of the goods to the railroad company in that state billed to consignee in Illinois was a sale made in the former state. Tokheim Mfg. Co. v. Stoyles, 142 Ill. App. 198.

61. Price v. Walker [Ind. App.] 88 NE 78. Persons, citizens, and domiciled in New

§ 3. *Effect of status or domicile.*[64]—See 11 C. L. 666—The status or condition of a person, the relations in which he stands to another person, and by which he is qualified and made capable to take certain rights in that other's property, is fixed by the law of the domicile,[65] and this status and capacity are to be recognized in every other state,[66] unless inconsistent with the laws and policy of such other state.[67]

§ 4. *Matters relating to personal property.*[68]—See 11 C. L. 669—Some courts hold that funds obtained as damages for wrongful death are distributable according to the laws of the state in which the wrongful death occurred.[69]

§ 5. *Effect of public policy.*[70]—See 11 C. L. 676—The law of comity is not a law by absolute obligation and its principles can never be invoked in aid of the enforcement of foreign laws, if such enforcement would contravene the settled policy or positive law of the state of the forum.[71] Furthermore, the lex loci contractus as

York and under age of consent, contracted marriage out of such state which was valid where contracted. Held that marriage being lawful where contracted it was valid in New York. Donohue v. Donohue, 63 Misc. 111, 116 NYS 241.

62. Common-law marriages not being recognized in New York, living together as man and wife in that state will not be considered a marriage in Missouri, although latter state recognizes common-law marriages. Jordan v. Missouri & Kansas Tel. Co. [Mo. App.] 116 SW 432.

63. A contract made in the Indian Territory prior to the admission of Oklahoma as a state, valid at the time and place where made, will not be affected by the change in the form of government incident to Oklahoma becoming a state. Turner v. Trial [Okl.] 103 P 575.

64. Search Note: See note in 65 L. R. A. 177.

See, also, Descent and Distribution, Cent. Dig. §§ 16-27; Dec. Dig. §§ 3-5; 14 Cyc. 20, 21; Husband and Wife, Cent. Dig. §§ 3, 4, 273, 400, 561, 712; Dec. Dig. §§ 2, 56, 110½, 146½, 180; 21 Cyc. 1145-1147, 1311, 1499, Marriage, Cent. Dig. §§ 3, 23; Dec. Dig. § 3, 26 Cyc. 829-832; Wills, Cent. Dig. §§ 184-186, 947-950; Dec. Dig. §§ 71, 436.

65. Inheritable capacity of adopted child. Simpson v. Simpson, 9 Ohio C. C. (N. S.) 137. Whether one dies testate or intestate is to be determined by the law of his domicile, in respect to his personal property. Murdoch v. Murdoch, 81 Conn. 681, 72 A 290. Whether a divorce or annulment shall be had is determined by the marriage domicile of the parties, regardless of where the marriage occurred, and hence where persons, citizens, and domiciled in New York and under the age of consent, go out of such state and contract marriage, valid where contracted, and then return to New York, the New York courts may annul such marriage. Mitchell v. Mitchell, 63 Misc. 580, 117 NYS 671. Deed of separation between husband and wife must be construed and its legal effect ascertained by the law of their domicile. Coe v. Hill, 201 Mass. 15, 86 NE 949. Liability of a stockholder in a foreign corporation is governed by the law of the domicile of such corporation or society. Leyner Engineering Works v. Kempner, 163 F 605; Hayward v. Sencenbaugh, 141 Ill. App. 395. A member of a foreign fraternal benefit is bound by the laws of the state where the society is domiciled, and hence a certificate issued at its domicile but delivered in another state is construed in accordance with the laws of the domicile of the society. Supreme Lodge, New England Order of Protection v. Hine [Conn.] 73 A 791.

66. Simpson v. Simpson, 9 Ohio C. C. (N. S.) 137.

67. See post, § 5.

68. Search Note: See notes in 3 C. L. 722; 57 L. R. A. 353; 65 Id. 353; 7 L. R. A. (N. S.) 386; 11 Id. 1007.

See, also, Chattel Mortgages, Cent. Dig. §§ 2, 185, 186; Dec. Dig. §§ 2, 101; 6 Cyc. 1060; Descent and Distribution, Cent. Dig. § 1922; Dec. Dig. § 5; 14 Cyc. 21; 22 A. & E. Enc. L. (2ed.) 1338.

69. Funds paid to administrator in Maryland in settlement of claim for wrongful death of person in District of Columbia, who was at time of his death a resident of Maryland, must be disposed of under statute of distribution of District of Columbia. Dronenburg v. Harris, 108 Md. 597, 71 A 81.

70. Search Note: See Assignments for Benefit of Creditors, Cent. Dig. §§ 75-88, 642-657; Dec. Dig. §§ 19-21, 199; 4 Cyc. 193, 194, 195, 225; Contracts, Cent. Dig. §§ 455-461; Dec. Dig. § 101; 9 Cyc. 575, 576; Courts, Cent. Dig. §§ 18, 19, 1431-1443; Dec. Dig. §§ 8, 9, 510-517; 11 Cyc. 663, 664, 1017-1019; 22 A. & E. Enc. L. (2ed.) 1329.

71. Provisions in a contract made in another state, obnoxious to the laws of Alabama, will not be enforced in that state. Western Union Tel. Co. v. Hill [Ala.] 50 S 248.

Full faith and credit clause of the federal constitution and the acts of congress pursuant thereto do not compel a state to enforce a foreign statute which is contrary to public policy or penal in its nature. Statute making officers and directors liable for corporate debt. Carey v. Schmeltz [Mo.] 119 SW 946.

Held against public policy: District of Columbia **law relative to recovery for wrongful death,** which allows recovery without showing that the equitable plaintiff had any claim upon deceased for support, is not enforcible in Maryland. Dronenburg v. Harris, 108 Md. 597, 71 A 81. An **oral contract** for the payment of a commission for procuring a purchaser for real estate, though valid in the state where made, is not enforcible in Indiana as Burns'

regards matters of public policy, being a part of the contract, will follow the contract wherever it is sought to be enforced.[72]

§ 6. *Protection of citizens in state of forum.*[73]—See 11 C. L. 670—Comity will not be indulged to the extent of enforcing the laws of a foreign state when to do so would be prejudicial to the interests of citizens of the state of the forum.[74]

§ 7. *Contracts respecting realty.*[75]—See 11 C. L. 670—The law of the situs governs in regard to all rights, interest, and titles in and to immovable property.[76]

Ann. St. 1908, § 7463, renders such contract void. Price v. Walker [Ind. App.] 88 NE 78. Stipulation in contract with telegraph company, providing for **limitation of liability for negligence,** will not be given force and effect in Wisconsin. Fox v. Postal Telegraph-Cable Co., 138 Wis. 648, 120 NW 399. Stipulation in contract with carrier made in another state by which the carrier's liability was limited to $5 per hundred weight on household goods held against public policy of North Dakota. Hanson v. Great Northern R. Co. [N. D.] 121 NW 78.

Held not against public policy: Code Civ. Proc. N. Y. §§ 1902-1904, giving right of **action for wrongful death,** held not against public policy of Massachusetts. Walsh v. Boston & M. R. Co., 201 Mass. 527, 88 NE 12. Statute of Alabama authorizing a civil action for negligent homicide is not violative of the public policy of Georgia because the measure of damages is dissimilar to the measures prescribed in like cases by statutes of the latter state. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678. **Contract of married woman,** entered into in Mississippi, where she was domiciled and to be executed in such state, will be enforced in Louisiana though if such contract had been made in the latter state, it would have been invalid. First Nat. Bank v. Hinton [La.] 49 S 692. Ky. St. 1903, § 4223, making certain **notes** void unless the words "peddler's note" are written across their face, has no extraterritorial effect so as to preclude enforcement, in Kentucky, of a West Virginia contract not conforming to requirement of Ky. statute. Arnett v. Pinson, 33 Ky. L. R. 36, 108 SW 852.

72. Whether fact that insured was legally executed for crime would defeat recovery on life policy, is determined by rule of public policy as established by statutes and decisions of state constituting the locus of the contract. McCue v. Northwestern Mut. Life Ins. Co. [C. C. A.] 167 F 435. Rev. St. Mo., 1899, § 7896 (Ann. St. 1906, p. 3750), relative to suicide as defense to action on life policy, is part of a Missouri contract of insurance. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754.

73. Search Note: See note in 3 C. L. 723.

See, also, Assignments for Benefit of Creditors, Cent. Dig. §§ 82-86, 642-657; Dec. Dig. §§ 21-199; 4 Cyc. 194, 195, 225.

74. Where statute provided that no corporation shall take the name of an existing corporation, although such statute only applied to domestic corporations, nevertheless, a foreign corporation having the same name as a domestic corporation will not be entitled to certificate to do business in Washington. State v. Nichols, 51 Wash. 619, 99 P 876. Where, as provided by statute of Minnesota, receiver brought action against stockholder in Wisconsin to collect an assessment, it was held that Wisconsin courts were not as a matter of comity required to entertain action. Converse v. Hamilton, 136 Wis. 589, 118 NW 190.

75. Search Note: See notes in 48 L. R. A. 635; 2 Ann. Cas. 591; 3 Id. 863.

See, also, Covenants, Cent. Dig. § 21; Dec. Dig. § 22; 11 Cyc. 1052; Deeds, Cent. Dig. § 1; Dec. Dig. § 1; 13 Cyc. 526; Frauds, Statute of, Cent. Dig. § 268; Dec. Dig. § 120; 20 Cyc. 279, 280; Husband and Wife, Cent. Dig. § 712; Dec. Dig. § 180; 21 Cyc. 1499; Landlord and Tenant, Dec. Dig. § 32; 24 Cyc. 915; Mortgages, Cent. Dig. §§ 2, 209; Dec. Dig. §§ 2, 98; 27 Cyc. 975, 1133; Trusts, Cent. Dig. §§ 2, 89, 163; Dec. Dig. §§ 2, 62½, 113; Vendor and Purchaser, Cent. Dig. §§ 2, 79; Dec. Dig. §§ 2, 47; 22 A. & E. Enc. L. (2ed.) 1337.

76. Title to real property is controlled by law of situs. Ball v. Phelan [Miss.] 49 S 956. Effect of instrument purporting to pass title to real estate in Connecticut but made in New York must be determined by the law of the former state. New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788. Whether leases of school land in Mississippi for 99 years create a leasehold estate, or a determinable fee, or some estate greater than a leasehold estate, must be governed by laws of Mississippi. Simpson County v. Wisner-Cox Lumber & Mfg. Co. [C. C. A.] 170 F 52. Deed of **assignment for benefit of creditors,** executed within state of Wisconsin in accordance with the provisions of St. Wis. 1898, c. 80, and amendatory and supplemental acts in force at date of execution, 1893, held to have no extraterritorial effect on real estate and not to convey title to real estate in North Dakota. Adams v. Hartzell [N. D.] 119 NW 635. Where deed of assignment for benefit of creditors was made in Wisconsin and assignee was given power of attorney to execute deeds in the name of the principal, the assignee had no authority to convey land situated in North Dakota, such land not having been conveyed by the deed of assignment. Id. **Whether one dies testate or intestate** in respect to his real property is to be determined by the law of the state within which such real estate is situated. Murdoch v. Murdoch, 81 Conn. 671, 72 A 290. Laws of Texas govern **descent of title** to land certificates issued under the laws of Texas. Waterman v. Charlton [Tex.] 120 SW 171. **Infant's right to disaffirm deed** after attaining majority is governed by the lex rei sitae, as is also the right to disaffirm the covenants of such deed. Beauchamp v. Bertig [Ark.] 119 SW 75. **Covenants that run with land** are subject to the lex rei sitae. Id.

§ 8. *Application of remedies.*[77]—See 11 C. L. 671—The lex fori governs as to all matters of procedure and practice,[78] parties,[79] evidence, presumptions, and burden of proof,[80] and exemptions.[81] The lex fori usually governs as to limitation of actions,[82] unless the limitation operates by way of a condition upon the right to sue,[83] or the effect of the statute is to extinguish the cause of action instead of merely denying a remedy.[84] Proceedings antecedent to and creative of a cause of action,[85]

77. **Search Note:** See notes in 3 C. L. 724; 11 Id. 1349, 1354; 19 L. R. A. 577, 792; 23 Id. 33; 34 Id. 737; 48 Id. 625, 637; 56 Id. 301; 64 Id. 119; 65 Id. 353; 1 L. R. A. (N. S.) 195; 3 Id. 608; 4 Id. 986, 1029; 6 Id. 658; 7 Id. 114; 12 Id. 873; 14 Id. 776; 113 A. S. R. 868; 4 Ann. Cas. 88; 6 Id. 584; 8 Id. 1123.

See, also, Abatement and Revival, Cent. Dig. §§ 246, 247; Dec. Dig. § 49; 1 Cyc. 48; Action, Cent. Dig. § 94; Dec. Dig. § 17; 1 Cyc. 706; Adverse Possession, Cent. Dig. § 6; Bastards, Dec. Dig. §§ 12, 13; 5 Cyc. 633, 634; Bills and Notes, Cent. Dig. §§ 1310, 1340, 1341; Dec. Dig. § 449; Collision, Dec. Dig. § 126½; Common Law, Cent. Dig. §§ 13-17; Dec. Dig. §§ 15-17; 8 Cyc. 386, 387; Contracts, Cent. Dig. §§ 1558-1562; Dec. Dig. § 325; 9 Cyc. 684, 690-693; Corporations, Cent. Dig. §§ 829-834, 1085; Dec. Dig. § 216; 10 Cyc. 670-676; Courts, Cent. Dig. §§ 18, 19, 900-984, 1431-1443; Dec. Dig. §§ 4, 8, 9, 331-376, 510-517; 11 Cyc. 662-664, 884-890, 895-912, 1017-1019; Covenants, Cent. Dig. § 171; Dec. Dig. § 105; 11 Cyc. 1132; Damages, Cent. Dig. § 2; Dec. Dig. § 2; Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. § 8; 13 Cyc. 313-316; Depositions, Dec. Dig. § 56; 13 Cyc. 899-913; Divorce, Cent. Dig. §§ 3, 827-844; Dec. Dig. §§ 3, 326-332; 14 Cyc. 578, 579, 814, 816-821; Evidence, Cent. Dig. §§ 124, 2327, 2354; Dec. Dig. §§ 101, 517, 541; 17 Cyc. 67; Exemptions, Cent. Dig. § 2; Dec. Dig. § 2; 18 Cyc. 1376-1378; Garnishment, Dec. Dig. § 2; Husband and Wife, Dec. Dig. § 203½; Judgment, Cent. Dig. § 2, 1755, 1764-1768; Dec. Dig. §§ 2, 46, 928, 934; 23 Cyc. 674, 705, 1563-1665; Limitation of Actions, Cent. Dig. §§ 4-8; Dec. Dig. § 2; 25 Cyc. 988, 1018-1023; Mechanics' Liens, Cent. Dig. §§ 2, 49, 89; Dec. Dig. § 2; 27 Cyc. 19; Set-off and Counterclaim, Cent. Dig. § 2; Dec. Dig. § 2; Statutes, Cent. Dig. §§ 389-391; Dec. Dig. §§ 289, 290; Witnesses, Cent. Dig. § 733; Dec. Dig. § 184; 13 A. & E. Enc. L. (2ed.) 1050; 22 Id. 1383; 6 A. & E. Enc. P. & P. 542.

78. Hooley v. Talcott, 129 App. Div. 233, 113 NYS 820; Southern R. Co. v. McNeeley [Ind. App.] 88 NE 710. Where **complaint** for willful injury did not contain averment to the effect that defendant "intended willfully and purposely to inflict the injury complained of," fact that courts of Illinois, where injury occurred, would consider averment to be unnecessary would not govern. Southern R. Co. v. McNeeley [Ind. App.] 88 NE 714. **Motion for judgment of nonsuit** is a part of procedure, and lex fori governs. Dryden v. Pelton-Armstrong Co. [Or.] 101 P 190. There is no rule of comity that will affect the **jurisdiction** of justice's court, where such jurisdiction of the cause of action is localized by statute. Beth v. St. Louis & S. F. R. Co. [Mo. App.] 116 SW 1111. Statute of New Mexico, requiring suits for personal injury to be brought only in the district court of the territory will not be recognized in Texas. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —, afg. [Tex. Civ. App.] 17 Tex. Ct. Rep. 613, 99 SW 190.

79. Right of assignee to sue in own name. Dixon Crucible Co. v. Paul [C. C. A.] 167 F 784.

80. Southern R. Co. v. McNeeley [Ind. App.] 88 NE 710. Question of effect, as to creditors, of continued possession of personalty by seller, is determined by the law of the state where property is situated and so held by the seller, though the contract of sale was made elsewhere. Burke v. Sharp [Ark.] 115 SW 145.

81. Right of exemption is not a part of a contract, but effects only the remedy, and is governed by the law of the forum. Missouri, K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275.

82 Gregory v. Southern Pac. R. Co., 157 F 113; Dowse v. Gaynor [Mich.] 15 Det. Leg. N. 897, 118 NW 615. This is so whether the period within which the action must be brought is longer or shorter than that of the foreign state. McCoy v. Chicago, B. & Q. R. Co., 134 Mo. App. 622, 114 SW 1124. As to **actions on stock subscriptions** not presently payable in full. Brown v. Allebach, 166 F 488. **Sealed note** made in Ohio, though not a specialty in that state, held in an action in Maryland to be subject to limitation laws of latter state as to a specialty. Mandru v. Ashby, 108 Md. 693, 71 A 312. Probate of **will** cannot be had in Kentucky if probate proceedings are not commenced within 10 years of testator's death, and fact that will was in state of testator's domicile does not alter the matter. Foster v. Jordan [Ky.] 113 SW 490. Limitations of a **common-law action for injuries** is governed by the law of the forum. Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 116 SW 852. Statute of limitation of Texas applies to **action for wrongful death** which arose in Tennessee. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403. Where resident of Idaho goes into Washington and makes a **partial payment** upon a Washington contract after maturity and before contract is barred by statute of limitations of that state, upon his return to Idaho the contract follows him as made and statute of limitations begins to run upon his re-entry into Idaho. Sterrett v. Sweeney, 15 Idaho, 416, 98 P 418.

83. Gregory v. Southern Pac. R. Co., 157 F 113.

84. Right of actions arising in Iowa for personal injuries, statute of such state prescribing that such actions "are limited to be commenced within two years" and "not afterwards," is barred in Missouri after Iowa limitation has run. McCoy v. Chicago, B. & Q. R. Co., 134 Mo. App. 622, 114 SW 1124. Law of the place where action arose governs as to limitations when the statute prescribes that right of action is killed if

and defenses, both in tort and contract,[86] are governed by the lex loci. The administration of estates is usually governed by the situs of the property,[87] but charitable trusts are administered according to the law of the donor's domicile.[88]

Presumptions and judicial notice and pleading of foreign laws. See 11 C.L. 671 Whenever the laws of a foreign state are relied on to sustain an action or defense, they must be pleaded and proved [89] as facts,[90] such laws not being judicially noticed [91] except as provided by statute.[92] Where the law of a foreign country is found

not brought within certain time. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403. Law of Pennsylvania where debt was payable, providing that no judgment should remain a lien longer than five years without a revival by scire facias, held to apply to judgment in that state and not enforcible unless revived within that time. Davis v. Davis, 164 F 281. Law of Kentucky limiting the time within which an action may be brought for wrongful death. De Valle Da Costa v. Southern Pac. R. Co., 167 F 654. Rev. St. Mo. 1899, §§ 2864, 2868, giving right of action for wrongful death and requiring action to be brought within one year. Earnest v. St. Louis, etc., R. Co. [Ark.] 112 SW 141. Law of Quebec limiting right of recovery for wrongful death. Johnson v. Phoenix Bridge Co., 133 App. Div. 807, 118 NYS 88.

85. Whether a lien was obtained upon personal property in the hands of a bankrupt upon delivery of executions to sheriff, and, if so, whether such lien is applicable to property held by him under a contract of conditional sale, is governed by the lex loci. Reardon v. Rock Island Plow Co. [C. C. A.] 168 F 654.

86. Contract between husband and wife. Kimball v. Kimball [N. H.] 73 A 408.

87. Decedent's estate. Wilson v. Hartford Fire Ins. Co. [C. C. A.] 164 F 817. Fact that administration proceedings were pending in another state was not bar to administration in Washington. State v. Thurston County Superior Ct. [Wash.] 100 P 198.

88. Green's Adm'rs v. Fidelity Trust Co. [Ky.] 120 SW 283.

89. Peck v. Woll, 154 Cal. 351, 97 P 865; Kessler v. Armstrong Cork Co. [C. C. A.] 158 F 744; Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153; Electro-Tint Engraving Co. v. American Handkerchief Co., 130 App. Div. 561, 115 NYS 34. Mere reading of law in argument is not sufficient. Mandru v. Ashby, 108 Md. 693, 71 A 312; Varner v. Interstate Exch., 138 Iowa, 201, 115 NW 1111. Reference to particular decision of supreme court of another state citing volume and page of reports where decision may be found is not sufficient. Missouri, K. & T. R. Co. v. Sealy [Kan.] 99 P 230. Whether property brought into state of Oregon was community property, under the law of the state where brought from, cannot be determined in a divorce action in Oregon, the foreign statute not being pleaded. Young v. Young [Or.] 100 P 656. Verbal acceptance of bill of exchange held governed by common law where law of state where made was not proved. Bank of Laddonia v. Bright-Coy Commission Co. [Mo. App.] 120 SW 648. **Finding as to foreign law** in one case is not binding on parties to any other action involving the same question. Kessler v. Armstrong Cork Co. [C. C. A.] 158 F 744. **Objections** as to necessity for complying with requirement that foreign laws must be pleaded as facts is not raised by a general demurrer. Charleston & W. C. R. Co. v. Lyons, 5 Ga. App. 668, 63 SE 862.

Sufficiency of pleadings: Though petition contained only portion of statute, where answer pleaded entire act and reply admitted the truthfulness of such plea, the entire act was held to be properly before the court. Mathieson v. St. Louis & S. F. R. Co. [Mo.] 118 SW 9. Complaint in an action in New York by an administrator to recover for wrongful death occurring in New Jersey held not to sufficiently allege provisions of statute. Howlan v. New York & N. J. Tel. Co., 131 App. Div. 443, 115 NYS 316. Mere fact that it appeared in complaint that insurance company was incorporated under laws of foreign state is not sufficient pleading and proving of laws of such state relative to such company as to allow reviewing court to consider such laws. Ancient Order of the Pyramids v. Dixon [Colo.] 100 P 427. In reviewing overruling demurrer to declaration, court cannot go beyond declaration to ascertain either the common or the statutory law of a sister state. Miller v. Aldrich, 202 Mass. 109, 88 NE 441. If one wishes to have a foreign law considered **on appeal,** he must have them incorporated in record. Union Cent. Life Ins. Co. v. Dukes [Ky.] 113 SW 454.

90. Mandru v. Ashby, 108 Md. 693, 71 A 312; Coe v. Hill, 201 Mass. 15, 86 NE 949; Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947. Law of another state as regards right of a husband and wife to contract between themselves must be proved as any other fact. Kimball v. Kimball [N. H.] 73 A 408.

91. Mandru v. Ashby, 108 Md. 693, 71 A 312; Mathieson v. St. Louis & S. F. R. Co. [Mo.] 118 SW 9. Courts of Virginia will not take judicial cognizance of laws of sister state relative to stockholder's liability which are at variance with the common law. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751. **Cuba** during the period of its military government by the United States was no part of the United States, but a foreign country, of whose laws a federal court will not take cognizance without plea and proof. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 F 869. Laws of the **Indian Territory** must be pleaded and proved in **Oklahoma** the same as any foreign law. Schlotterbeck v. Schwinn [Okl.] 103 P 854.

NOTE. Judicial notice of foreign law: In a suit arising from a dispute as to the ownership of church property, and the

in a single statute or decision, the language of which is not in dispute, the interpretation thereof presents a question of law for the court,[93] but, where the law is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the subject only collaterally or by way of analogy, and where inferences may be drawn from them, the question is one of fact for the jury.[94] Proof may ordinarily be made by the introduction in evidence of statutes and judicial decisions,[95] or by parol evidence,[96] as by testimony of experts learned in the law;[97] but the presumption based upon the policy of consistency, which authorizes the inference that when the judiciary of a country has once adopted a rule of construction it will be adhered to and considered as prevailing until the contrary is shown, does not apply with equal force when there has been an entire change of the judicial system.[98]

As a general rule the presumption is that the law of a sister state is like that of the forum, not only as to judicially declared law but also as to statutory enactments,[99] and generally it will also be presumed that the common law of other states

status of the Roman Catholic Church in Porto Rico, held, that the federal supreme court will take judicial notice of the law of Spain so far as it affected the insular possessions of the United States. Ponce v. Roman Catholic Apostolic Church in Porto Rico, 210 U. S. 296, 52 Law. Ed. 1068.

The general rule is well established that a court will not take judicial notice of foreign law. Wigmore, Evidence, § 2573; Dainese v. Hale, 91 U. S. 13, 23 Law. Ed. 190; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 32 Law. Ed. 788. Previous cases, however, have announced the exception which the present case follows. In United States v. Philadelphia, 52 U. S. (11 How.) 609, 13 Law. Ed. 834; United States v. Turner, 52 U. S. (11 How.) 663; Malpica v. McKown, 1 La. 248; Doe ex. dem. Farmer's Heirs v. Eslava, 11 Ala. 1028, and Ott v. Soulard, 9 Mo. 573, cases involving the validity of Spanish land grants [in Louisiana, Alabama and Missouri, it was held proper for the courts to take judicial notice of the Spanish law prevailing in those localities before their acquisition by the United States. Similar decisions were made in Fremont v. U. S., 58 U. S. (17 How.) 542, 15 Law. Ed. 241; United States v. Chaves, 159 U. S. 452, 40 Law. Ed. 215, and Wells v. Stout, 9 Cal. 480, cases involving the validity of land grants] made under the Mexican law. The preceding cases were decided upon the theory that the laws of which judicial notice were taken were not foreign, but those of an antecedent government. Louisiana in two early cases, Arayo v. Currell, 1 La. 528, and Berluchaux v. Berluchaux et al., 7 La. 539, carried this doctrine still further, holding it to be proper, in deciding cases involving the law of Mexico and Cuba respectively, to take judicial notice of the laws of those countries, in that the law of Spanish America had formerly been the law of Louisiana, the court presuming that no change had been made since that time. The doctrine of these early Louisiana cases, however, has apparently never been adopted in any other state.—From 7 Mich. L. R. 75.

92. Gen. St. 1902, § 697, provides that all courts are to take judicial notice of the public statutes of the several states of the United States, as printed by authority. Appeal of Woodward, 81 Conn. 152, 70 A 453. Where finding of lower court, as to what Wisconsin law was at certain time, was not in accord with the facts, supreme court would, as provided by statute, take judicial notice of the statutes of such state and consider them as they really were. Id.

93. Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947.

94. Directed verdict not proper as question should have been submitted to jury. Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947.

95. Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947. May be shown by the books of reports of adjudged cases accredited in the foreign state. Varner v. Interstate Exch., 138 Iowa, 201, 115 NW 1111; Robinson v. Yetter, 143 Ill. App. 172; Hayward v. Sencenbaugh, 141 Ill. App. 395.

96. Code, § 4652. Varner v. Interstate Exch., 138 Iowa, 201, 115 NW 1111.

97. Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947. Common law of sister state may be shown by testimony of witnesses learned in the law, or by books of reports of adjudged cases accredited in that state. Robinson v. Yetter, 143 Ill. App. 172.

98. Court will not presume that a rule of construction adopted in the territory of Oklahoma by its territorial supreme court extended over and is made applicable to a portion of the country never a part of the territory. Western Union Tel. Co. v. Parsley [Tex. Civ. App.] 121 SW 226.

99. Elmergreen v. Welmer, 138 Wis. 112, 119 NW 836. Law of Oklahoma at time of certain trial presumed same as that of the forum. Western Union Tel. Co. v. Parsley [Tex. Civ. App.] 121 SW 226. **Personal injury** suit. Atchison, etc., R. Co. v. Pickens [Tex. Civ. App.] 118 SW 1133. Personal injury suit governed by common law of forum in absence of proof of law of Cuba where injury occurred. Cuba R. Co. v. Crosby [C. C. A.] 170 F 369. Presumed that law of Kentucky was same as statutory law of Texas which denounced as void a stipulation in contract for transmission of telegram requiring **notice as condition to right to sue.** Western Union Tel. Co. v. Lannon

is the same as that of the forum.[1] The latter rule ordinarily applies only to those states which derived the body of their law from England,[2] or are carved out of English territory,[3] but in some states the presumption is that the common law obtains in a foreign state.[4] In determining the common law of another state, the decisions of the courts of final resort of that state will be followed, regardless of precedents to the contrary in the state where the trial is held.[5]

§ 9. *Torts.*[6]—See 11 C. L. 673—Transitory actions for tort may be maintained wherever a court can be found that has jurisdiction of the parties and the subject-matter,[7] when not inconsistent with any local policy of the state wherein the suit

[Tex. Civ. App.] 119 SW 910. Laws of New York at time certain **conveyance from husband to wife** presumed to have been the same as the laws of Texas. Kin Kaid v. Lee [Tex. Civ. App.] 119 SW 342. Law of Georgia regarding **marriages after divorce.** Wingo v. Rudder [Tex. Civ. App.] 120 SW 1073. Statutory **liability of initial carrier** for loss of goods presumed same as that of California. Schwartz v. Panama R. Co. [Cal.] 103 P 196. **Liability of stockholders** of a foreign corporation. Daggett v. Southwest Packing Co. [Cal.] 103 P 204. Stockholder's liability. Peck v. Noee, 154 Cal. 351, 97 P 865. Law of Alaska relative to **seduction** presumed same as that of Washington. Murrilla v. Guis, 51 Wash. 93, 98 P 100. Where law of forum provides that **corporation** for specified purposes shall continue to be bodies corporate for three years after being dissolved, it will, in the absence of proof, be presumed that a foreign law respecting corporations is the same. Elmergreen v. Weimer, 138 Wis. 112, 119 NW 836. Presumed that same statutes exist in New York as in Wisconsin, providing for **continuance** of action after death of a party to the action. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826. Rule applies in an action to recover price of **intoxicating liquors** sold and delivered in Missouri. Beshears v. Nelson Distilling Co. [Kan.] 101 P 1011. **Interest** laws that were in force in Indian Territory presumed the same as those of Oklahoma. Schlotterbeck v. Schwinn [Okl.] 103 P 854. Where decree for costs rendered by the United States circuit court for the northern district of California was sued for in Illinois, in absence of proof of what the law of that district was as to the decree drawing interest, interest was allowed as provided by the law of Illinois. Santa Clara Valley Mill & Lumber Co. v. Prescott, 238 Ill. 625, 87 NE 851. Tennessee **county court** presumed similar to county court of Texas. Green v. Hewett [Tex. Civ. App.] 118 SW 170.

Contra: Rule not followed in New Hampshire. Kimball v. Kimball [N. H.] 73 A 408. Not presumed that the statute of Missouri making railroad companies liable for injuries to employes from negligence of fellow-servant is in force in another state. Ham v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 108. Where it does not appear where **note** was executed or where the **indorsement** was made or where residence of indorser is, and the parties having treated indorsement as contract of place of suit, the law of the forum will govern. Grimes v. Tait [Okl.] 99 P 810.

1. Miller v. Aldrich, 202 Mass. 109, 88 NE 441. Kansas presumes common law of Missouri same as her own. Sykes v. Citizens' Nat. Bank [Kan.] 98 P 206. Contract between **husband and wife.** Kimball v. Kimball [N. H.] 73 A 408. **Stockholder's liability** presumed the same. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751. Common law relative to sale of **pledges** presumed to obtain in Ohio. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. **Liability for injury** occurring in another state. Cobe v. Malloy [Ind. App.] 88 NE 620. **Injury to servant.** Ham v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 108. Massachusetts law regarding liability of master for injuries caused by negligence of fellow-servant, in absence of proof, is presumed to be same as common law of Connecticut. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754.

2. Kimball v. Kimball [N. H.] 73 A 408; Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. Where statute of a state, which was not a common-law state, adopts the common law, it must nevertheless be pleaded. Mathieson v. St. Louis & S. F. R. Co. [Mo.] 118 SW 9.

3. Does not apply to Kansas. Mathieson v. St. Louis & S. F. R. Co. [Mo.] 118 SW 9.

4. Negligence of carrier in carriage of goods. Hanson v. Great Northern R. Co. [N. D.] 121 NW 78. Testimony of lawyers practicing in state of Missouri which is in part uncertain is not sufficient to overcome presumption. Robinson v. Yetter, 143 Ill. App. 172.

5. Sykes v. Citizens' Nat. Bank [Kan.] 98 P 206.

6. Search Note: See notes in 56 L. R. A. 193, 312; 61 Id. 418; 5 L. R. A. (N. S.) 756; 9 Id. 1078; 4 Ann. Cas. 524; 7 Id. 257, 1053; 8 Id. 140.

See, also, Collision, Cent. Dig. § 2; Dec. Dig. § 2; 7 Cyc. 319-321; Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. § 8; 13 Cyc. 313-316; Master and Servant, Cent. Dig. §§ 137, 326, 669; Dec. Dig. §§ 86, 160, 227; 26 Cyc. 1079, 1226; Shipping, Dec. Dig. § 73; Telegraphs and Telephones, Dec. Dig. § 27; Torts, Cent. Dig. § 2; Dec. Dig. § 2; 22 A. & E. Enc. L. (2ed.) 1378.

7. Action for injuries to servant caused by negligence of carrier. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —, afg. [Tex. Civ. App.] 17 Tex. Ct. Rep. 613, 99 SW 190. Code Civ. Proc. N. Y. §§ 1902-1904 giving right of **action for wrongful death** is a recognition and creation of a substantive right and not merely a provision of local procedure and hence enforcible in Massachusetts. Walsh v. Boston & M. R. Co., 201 Mass. 527, 88 NE

is brought,[8] even though the statutes where the tort was committed requires all actions under it to be brought in its own courts alone,[9] but under certain circumstances a foreign court may refuse to take jurisdiction.[10] The law in force at the situs of a tort usually determines the civil results of its commission,[11] and the right of action,[12] the plaintiff's legal capacity to sue,[13] and the time within which the action may be brought if such is an integral part of the cause of action,[14] depend solely on the law of the state where the wrongful act is committed. An action for injuries to a seaman on the high seas is governed by the law of the domicile or flag of the vessel.[15] The right to sue for mental suffering caused by failure to deliver a telegram is governed by the law of the state where the message was to be delivered.[16]

Conformity Act; Confusion of Goods; Connecting Carriers; Consideration; Consolidation, see latest topical index.

CONSPIRACY.

The scope of this topic is noted below.[17]

§ 1. Civil Liability, 806.
§ 2. Criminal Liability, 807. Venue, 809. Indictment, 809. Variance, 810. Evidence, 810. Instructions, 811. Verdict and Punishment, 811.

12. An action in South Carolina may be brought for death caused in another state by engineer running down person on railroad track. Free v. Southern R. Co. [S. C.] 65 SE 212. Action arising under laws of Tennessee entitling a husband and children to recover wrongful death of wife and mother is similar to laws of Texas and enforcible in that state. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403. Right of action for wrongful death conferred by statutes of province of Quebec, being similar to law of New York, is maintainable in the latter. Johnson v. Phoenix Bridge Co., 133 App. Div. 807, 118 NYS 88. Statute of the state of Alabama authorizing a civil action for unlawful homicides, as construed and applied by the supreme court of that state, is not penal in the international sense. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678. Action is not penal because it awards only punitive damages, measuring the amount by the culpability of the wrongdoer. Id.

8. See ante, § 5, Effect of Public Policy. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —, afg. [Tex. Civ. App.] 17 Tex. Ct. Rep. 613, 99 SW 190.

9. Full faith and credit demanded by U. S. Rev. St. § 906, U. S. Comp. St. 1901, p. 678, is given, although Texas courts refused to recognize the part of the New Mexico statute requiring suit for injuries caused in such territory to be brought in its own courts. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —, afg. [Tex. Civ. App.] 17 Tex. Ct. Rep. 613, 99 SW 190. Statute of Alabama authorizes a civil action for unlawful homicide and a labor statute provides that all actions shall be brought in that state. Held that Georgia courts would disregard the latter statute and would take jurisdiction of the case. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678.

10. Where all parties were nonresidents and accident occurred in another state, and court had jurisdiction only because decedent left small amount of property in state, the court refused to take jurisdiction of action for wrongful death. Pietraroia v. New Jersey & H. R. Co. & Ferry Co., 131 App. Div. 829, 116 NYS 249.

11. Civil action for unlawful homicide. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678. Where common law is in force in both the lex loci and lex fori, its principals will govern in an action for injuries to a servant. Louisville & N. R. Co. v. McMillen [Ky.] 119 SW 221. An action brought in Missouri for injuries to servant is governed by law of state where injury occurred. Ham v. St. Louis & S. F. R. Co. [Mo. App.] 117 SW 108. Laws of place where tort occurred applies, as **master's liability for injuries** caused by fellow-servant; as to contributory negligence or assumption of risk; and, as to the relation of master and servant. Louisville & N. R. Co. v. Keiffer [Ky.] 113 SW 433. Liability of master for injuries to his servant. Dryden v. Pelton-Armstrong Co. [Or.] 101 P 190. Action for **wrongful death.** Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754.

12. In a transitory common-law action, the interpretation of the common law obtaining in the state where the action occurred will govern, and, if a litigant had no case in the courts of the state where injured, he has none anywhere. Contributory negligence. Gabriel v. St. Louis, etc., R. Co., 135 Mo. App. 222, 115 SW 3. Action brought by a citizen of Kentucky against a corporation of that state for injuries occurring in another state is governed by the law of the latter state. Louisville & N. R. Co. v. Keiffer [Ky.] 113 SW 433.

13. Where, in an action for wrongful death, widow sued as administratrix instead of in her own right as required by law of Quebec, complaint could not be amended after statute of limitations had become a bar. Johnson v. Phoenix Bridge Co., 133 App. Div. 807, 118 NYS 88.

14. See ante, § 8, Application of Remedies.

15. Injury to seaman on German vessel on the high seas, carrying the German flag, governed by law of Germany. Boyer v. Hamburg-American S. S. Co., 171 F 582.

16. Recovery allowed in Arkansas where message was sent from Tennessee to a point in Kentucky. Western Union Tel. Co. v. Hanley, 85 Ark. 263, 107 SW 1168. Failure to deliver a telegram promptly after it has been received is a tort committed at place where telegram was sent to, and right of action is governed by the laws of such place. Fox v. Postal Telegraph-Cable Co., 138 Wis. 648, 120 NW 399. In an action

§ 1. *Civil liability.*[18]—See 11 C. L. 675—A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.[19] Concert among a number of persons to effect an unlawful purpose will frequently authorize a court of equity to intervene, when it could not grant such relief against like acts of a single individual.[20] What one may lawfully do singly, two or more may lawfully agree to do jointly,[21] but acts in themselves lawful may become unlawful as part of a conspiracy.[22] When the chief object of a combination is to injure or oppress third persons, it is an unlawful conspiracy,[23] but when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not.[24] Thus it is an unlawful conspiracy to combine to injure or destroy the trade, business, or occupation of another by threatening or producing injury to the trade, business, or occupation of those who have business relations with him,[25] and at common law it was an indictable offense.[26] A conspiracy cannot be formed by one person.[27] Therefore, at common law, a husband and wife could not be jointly convicted of conspiracy,[28] and a corporation cannot conspire that its own directors shall be unfaith-

of tort place of delivery governs. Western Union Tel. Co. v. Hill [Ala.] 50 S 248.

17. It includes civil and criminal liability for conspiracy. It excludes joint, civil (see Contracts,* § 1; Torts,* § 4; Parties,* § 3), and criminal (see Criminal Law,* § 4), liability apart from conspiracy, measure of damages (see Damages,* § 5), relief by injunction (see Injunction,* § 21) and punishment for violation of injunctions (see Contempt,* § 1C), and also prosecutions for crimes committed in pursuance of conspiracy (see Homicide;* Larceny;* and like topics). The legality of acts of labor organizations is more fully treated in another topic (see Trade Unions,* § 2).

18. Search Note: See notes in 1 C. L. 567; 7 Id. 682, 683; 63 L. R. A. 289; 2 L. R. A. (N. S.) 824; 3 Id. 470; 4 Id. 302, 1119, 1198; 9 Id. 904; 12 Id. 1153; 3 A. S. R. 474; 103 Id. 488; 1 Ann. Cas. 177; 5 Id. 373; 8 Id. 803; 9 Id. 1222.

See, also, Conspiracy, Cent. Dig. §§ 1-29; Dec. Dig. §§ 1-22½; 8 Cyc. 620-622, 645-660, 673-687, 691-693; 6 A. & E. Enc. L. (2ed.) 872; 4 A. & E. Enc. P. & P. 736; 20 Id. 981.

19. Where labor unions formulated agreement for mutual benefit, and agreement operated to complainant's prejudice, held, combination not intended to injure complainant; lawful agreement. National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259. Combination of labor unions to effect own welfare held not conspiracy. J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council, 154 Cal. 581, 98 P 1027. Strike and boycott held lawful. Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 SW 997. Assault and duress in progress of strike held unlawful means of accomplishing lawful end. Iron Molders' Union v. Allis-Chalmers Co. [C. C. A.] 166 F 45. Strike and conspiracy to prevent operation of mine by unlawful interference. Carter v. Fortney, 170 F 463. If an unlawful combination exists, it is none the less unlawful because existing under a self-imposed constitution and governed by by-laws, and because it conducts its operations in a public or semi-public way, asserting the right, in pursuit of its purposes, to interfere with individual liberty and with the public interests. Labor union. Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 SW 997.

20. Conspiracy to destroy complainant's business by lawful competition held not such conspiracy as court would enjoin. Citizens' L., H. & P. Co. v. Montgomery L. & W. P. Co., 171 F 553.

21. Governor of soldiers' home prohibited inmates from visiting plaintiff's place of business; others enforced order. Held order was lawful, as it was not issued with malicious purpose. Rowan v. Butler [Ind.] 85 NE 714.

22. Stockholder asked inveetigation of company's books in order to divulge information to rival concern. Held part of conspiracy. Funck v. Farmers' Elevator Co. [Iowa] 121 NW 53. Though separate acts may not be illegal, if these acts when taken together constitute a conspiracy, the perpetrator is not immune. Monarch Tobacco Works v. American Tobacco Co., 165 F 774.

23. National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259. Although no acts have been done in pursuance of conspiracy. National Life Ins. Co. v. Myers, 140 Ill. App. 392.

24. National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259; J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council, 154 Cal. 581, 98 P 1027. Theatre forced out of business because competing house got control of attractions by means of better inducements. Roseneau v. Empire Circuit Co., 131 App. Div. 429, 115 NYS 511. A boycott not necessarily a conspiracy; depends on means employed to carry it out. Pierce v. Stablemen's Union [Cal.] 103 P 324; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 SW 997.

25. Strike and boycott. Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 SW 997.

26. Funck v. Farmers' Elevator Co. [Iowa] 121 NW 53.

27. Where several defendants were sued jointly and jury acquitted all but one of conspiracy charge, held remaining defendant necessarily acquitted. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144.

28. But that principle does not exempt wife from consequences of criminal acts in execution of conspiracy jointly with hus-

ful to it.[29] A mere tacit understanding between conspirators to work to a common purpose is all that is essential to constitute a guilty actionable combination.[30] Each conspirator is responsible for the acts of every other conspirator, done in furtherance of the unlawful scheme.[31] The gravamen of the offense is the combination.[32] To sustain an action, damage must have resulted from the combination; to warrant an injunction, damage must be threatened.[33] There is therefore in strictness no such thing as a civil action for conspiracy.[34] Facts constituting the conspiracy need not be set up in a pleading;[35] but a concrete cause of action must be stated.[36] After the fact of conspiracy has been proved,[37] acts and declarations of one conspirator, made while the conspiracy is pending and during the progress of the plan adopted for its accomplishment, are admissible against both,[38] but declarations made after the conspiracy has been dissolved are not evidence[39] except against the person making them.[40]

§ 2. *Criminal liability.*[41]—See 11 C. L. 679—A conspiracy at common law is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose or to accomplish a lawful purpose by criminal or unlawful means,[42] and statutes substantially declaratory of the common law have been passed in many states.[43] A design, followed by an overt act in pursuance of that design, completes the conspiracy.[44] If the conspiracy ceases without some overt act, it does not constitute a crime, although when it is consummated it is the conspiracy rather than the overt act which is the crime.[45] The overt act must at least have a tendency to carry out the object of the conspiracy, or in some way tend to

band, which are of themselves subjects of criminal prosecution, the conspiracy not being the gist of offense. Jones v. Monson, 137 Wis. 478, 119 NW 179.

29. Action which directors take in name of corporation, detrimental to its interests and in bad faith, is, with respect to them, act of corporation in name only. Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. [C. C. A.] 166 F 254.

30. Where bankrupt falsely concealed insolvency in order to obtain goods on credit, and was assisted by creditors. In re Friedman, 164 F 131.

31. Wrongful use of trade name and injury to business. Solar Baking Powder Co. v. Royal Baking Powder Co., 128 App. Div. 850, 112 NYS 1013.

32. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. It is unnecessary to prove overt acts done in pursuance of a conspiracy. Id.

33. National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259. The combination may be of no consequence except as bearing upon rules of evidence. Jones v. Monson, 137 Wis. 478, 119 NW 179.

34. Jones v. Monson, 137 Wis. 478, 119 NW 179; Remmers v. Remmers, 217 Mo. 541, 117 SW 1117.

35. Conspiracy may exist without overt act to carry it into execution. National Life Ins. Co. v. Myers, 140 Ill. App. 392.

36. Allegations of bad faith by defendant to plaintiff for purpose of defrauding him of property held not to state cause of action for conspiracy. Remmers v. Remmers, 217 Mo. 541, 117 SW 1117.

37. Evidence failed to show concerted action to injure plaintiff by means of anonymous letter containing charges of dishonesty and embezzlement. Green v. Kiefer, 36 Pa. Super. Ct. 587.

38. Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049; Henderson-Snyder Co. v. Polk, 149 N. C. 104, 62 SE 904. Where claimants assist bankrupt to conceal insolvency, they are bound by his fraudulent practices. In re Friedman, 164 F 131.

39. Green v. Kiefer, 36 Pa. Super. Ct. 587.

40. Where conspirators secured the execution of a deed conveying an interest in land, they had accomplished their object, and a declaration of a conspirator made afterwards was inadmissible against a co-conspirator, though the conspirators remained tenants in common of the land acquired. Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049.

41. **Search Note:** See notes in 1 C. L. 567, 568; 3 Id. 727, 728; 68 L. R. A. 193; 6 L. R. A. (N. S.) 1067; 12 Id. 642; 1 Ann. Cas. 508; 8 Id. 803.

See, also, Conspiracy, Cent. Dig. §§ 30-114; Dec. Dig. §§ 23-51; 8 Cyc. 620-645, 659-673, 676-691; 6 A. & E. Enc. L. (2ed.) 831; 4 A. & E. Enc. P. & P. 706.

42. Not essential that intended act be indictable. Lanasa v. State, 109 Md. 602, 71 A 1058; Gambrell v. Com. [Ky.] 113 SW 476. Extortion of money in order to withdraw influence in procuring employes to leave. State v. Dalton, 134 Mo. App. 517, 114 SW 1132.

43. Rev. St. 1899, §§ 2152 and 2153, Ann. St. Mo. 1906, §§ 2152 and 2153, pp. 1384, 1385, held not to repeal common law. State v. Dalton, 134 Mo. App. 517, 114 SW 1132.

44. Even though purpose fail. State v. Nugent [N. J. Law] 71 A 485.

45. United States v. McLaughlin, 169 F 302.

make it effectual.[46] The gist of the offense of conspiracy is the unlawful combination;[47] the act done is a mere concrete illustration of what lies behind the conspiracy.[48] Conspiracy implies a united design for an unlawful object,[49] so co-operation must be contemplated.[50] There is no such thing as an inadvertent and negligent conspiracy, because there must be unity of purpose.[51] Where an act would amount to a criminal offense, if done by an individual, a confederation to do such act is a complete offense,[52] and though separate acts are legal, these acts, when taken together, may constitute a conspiracy.[53] Where an additional power or enhanced ability to accomplish an injurious purpose arises by virtue of the confederation and concert of action, an element of criminal conspiracy is thereby introduced which will render sufficiently criminal either the means or the purpose, otherwise merely unlawful, to sustain a conviction, although the means or the end were not such as are indictable if performed by an individual.[54] Federal statutes make it a crime to conspire to monopolize interstate commerce,[55] to defraud the United States,[56] or to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States.[57] If two or more agree to commit an offense against the United States and one of them does any act to effect the object of the conspiracy, all of them are guilty.[58] It is a completed criminal conspiracy to cheat [59] or to combine and agree to willfully and maliciously injure and destroy the property of a third person.[60] Where several form a conspiracy to murder, the plea of self-defense will not avail, unless it appear from the evidence that the accused did not begin the assault, and the killing was essential to protect their own lives.[61] All who take part in a conspiracy after it is formed and while it is in execution, and all who, with knowledge of the facts, concur in the plans originally formed and aid in executing them, are fellow-conspirators.[62] Knowledge by one that others are proposing

46. Where defendants, by means of letters, requested catalogues from mail-order houses, and it was alleged they did not intend to buy goods, held none of letters contained matter which might be construed into representation that defendants intended to purchase, therefore, they are not overt acts to show fraud. United States v. McLaughlin, 169 F 302.

47. Perrin v. U. S. [C. C. A.] 169 F 17. Plan to smuggle Chinese into United States (Daly v. U. S. [C. C. A.] 170 F 321; State v. Nugent [N. J. Law] 71 A 485), though nothing be done in furtherance of it (Lanasa v. State, 109 Md. 602, 71 A 1053). Money demanded in order to withdraw influence to have employes leave. State v. Dalton, 134 Mo. App. 517, 114 SW 1132.

48. Daly v. U. S. [C. C. A.] 170 F 321.

49. Commonwealth v. Tilly, 33 Pa. Super. Ct. 35.

50. Indictment alleged that one person was to commit adultery. Ford v. U. S. [Ariz.] 94 P 1102.

51. Certain members of school board were convicted of conspiracy in defrauding school district. Held other members cannot be convicted of same offense, merely because they were members of board. Commonwealth v. Tilly, 33 Pa. Super. Ct. 35.

52. State v. Dalton, 134 Mo. App. 517, 114 SW 1132.

53. Gambrell v. Com. [Ky.] 113 SW 476.

54. State v. Dalton, 134 Mo. App. 517, 114 SW 1132.

55. Act Cong. July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3200). Monarch Tobacco Works v. American Tobacco Co., 165 F 774; People's Tobacco Co. v. American Tobacco Co. [C. C. A.] 170 F 396; Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. [C. C. A.] 166 F 254.

56. U. S. Rev. St. § 5440, U. S. Comp. St. 1901, p. 3676. Fraud in entry of coal lands. United States v. Keitel, 211 U. S. 370, 53 Law. Ed. 230.

Evidence held sufficient to sustain conviction: Conspiracy to suborn persons to commit perjury in entry of timber lands. Nickell v. U. S. [C. C. A.] 167 F 741.

57. Rev. St. U. S., § 5508. Rakes v. U. S., 212 U. S. 55, 53 Law. Ed. —.

58. An indictment charging defendants with aiding bankrupt to conceal property before adjudication held insufficient, because not alleged that an overt act was done after adjudication. United States v. Grodson, 164 F 157. Combination to stifle competition held fact that contracts were let at reasonable figure is not mitigating circumstance. People v. Strauch, 240 Ill. 60, 88 NE 155. Using mails to defraud. Marrin v. U. S. [C. C. A.] 167 F 951.

59. People v. Smith, 239 Ill. 91, 87 NE 885.

60. Although conspirators do not determine in advance on particular property. Lanasa v. State, 109 Md. 602, 71 A 1053.

61. Instructions held prejudicial to defendant. Gambrell v. Com. [Ky.] 113 SW 476. Murder is very essence of malice. Id.

62. People v. Strauch, 240 Ill. 60, 88 NE 155. They commit the offense when they

to commit a crime does not make him guilty of conspiracy to commit that crime, although he assents to their purpose.[63] It requires some active participation to make one a conspirator.[64] If one concur in a conspiracy, no proof of agreement to concur is necessary.[65] It is not necessary to prove an express confederation;[66] the existence of preconcert may be inferred from the subsequent conduct of the parties.[67] That one may be guilty of a conspiracy to commit a crime, the circumstances must be such that, if the crime should be consummated, the conspirators would be accessories to the consummated crime.[68] Each conspirator is responsible for what the others do in the prosecution of the design for which they combined,[69] even though individual conspirators may do acts in furtherance of the common unlawful design apart from and unknown to the others.[70] A corporation may be guilty of conspiracy,[71] and even if doubt existed as to whether or not the corporation could be charged as a conspirator the individual officers jointly indicted could be held.[72]

*Venue.*See 11 C. L. 682—The place where the conspiracy was entered into determines the jurisdiction.[73] An order granting a petition for service of a summons upon nonresident coconspirators before service of process upon resident conspirator and without notice is neither irregular nor premature.[74]

*Indictment.*See 11 C. L. 683—An indictment for conspiracy must contain specific facts so as to inform defendants of the exact nature of the charge,[75] but the indictment is sufficient if the facts stated fairly and reasonably inform the accused of the offense charged.[76] Where the act is not unlawful per se, but is a statutory crime, the indictment should charge with certainty and precision all matters in which the illegality consists,[77] and in such instances, the words of a statute are sufficient.[78] It is necessary to set out the means to be used for the accomplishment of a conspiracy, when it is one in which a lawful act is to be done by unlawful means,[79] but this is unnecessary where the object of the conspiracy is unlawful.[80] Overt acts need not be set forth,[81] and, if set forth, they cannot be resorted to in aid of the averments of the charging portion of the pleading, nor can they on demurrer be con-

become partners to the transaction or further the original plan. Id.

Evidence held insufficient to sustain conviction: Defendant and others were charged with stealing hogs. Only evidence against him was that he went to town with others to sell hogs. Held improper to admit evidence showing conduct of parties after they separated without disposing of hogs. O'Quinn v. State, 55 Tex. Cr. R. 18, 115 SW 39.

63. Ford v. U. S. [Ariz.] 94 P 1102. Mere suspicion that he was a party to conspiracy not enough. Marrash v. U. S. [C. C. A.] 168 F 225.

64. Failure to repudiate suits brought in one's name on contracts illegally obtained, not conclusive of conspiracy. Buifer v. People, 141 Ill. App. 70. Witness for prosecution held not to be accomplice. People v. Yannicola, 117 NYS 381.

65. People v. Strauch, 240 Ill. 60, 88 NE 155.

66. Commonwealth v. Tilly, 33 Pa. Super. Ct. 35.

67. Doyle v. U. S. [C. C. A.] 169 F 625.

68. Ford v. U. S. [Ariz.] 94 P 1102.

69. People v. Strauch, 240 Ill. 60, 88 NE 155; Gambrell v. Com. [Ky.] 113 SW 476; Commonwealth v. Ellis [Ky.] 118 SW 973; Gardner v. State [Tenn.] 120 SW 816.

70. Marrash v. U. S. [C. C. A.] 168 F 225.

71. Fraudulent concealment of assets of bankrupt corporation. United States v. Young & Holland Co., 170 F 110.

72. United States v. Young & Holland Co., 170 F 110.

73. State v. Nugent [N. J. Law] 71 A 485.

74. Act July 2, 1890, c. 647, § 5, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3201), against monopolies. United States v. Standard Oil Co., 152 F 290.

75. State v. Nugent [N. J. Law] 71 A 485; Bulfer v. People, 141 Ill. App. 70.

76. Lanasa v. State, 109 Md. 602, 71 A 1058.

77. Fraudulently procuring votes at an election. State v. Nugent [N. J. Law] 71 A 481.

78. Smuggling goods into United States. United States v. White, 171 F 775.

79. Where indictment charged a conspiracy to obtain money or other property by false pretenses, held sufficient facts to give jury clear idea of charge. People v. Smith, 239 Ill. 91, 87 NE 885.

80. To obtain money or property by false pretenses by issuing false statements concerning the financial condition of a bank. People v. Smith, 239 Ill. 91, 87 NE 885.

81. United States v. Haas, 163 F 908; Perrin v. U. S. [C. C. A.] 169 F 17.

sidered, because they are not strictly part of the indictment.[82] The particularity with which the overt act is set forth cannot vitiate the indictment, if the conspiracy of itself be sufficient.[83] Acts in execution of a conspiracy are alleged in the indictment and received in evidence as tending to elucidate the intention of the parties or in aggravation of the unlawful combination only.[84] Where the nature of the conspiracy implies fraud, it is not necessary to allege in an indictment the object of the agreement.[85] Where it is not necessary to prove that the conspiracy was formed to defraud or cheat a particular person, it is not necessary to aver in the indictment that the conspiracy was formed against any particular person.[86] Where the conspiracy results in mischief to the public, the indictment will be sustained where neither the object nor the means are criminal.[87] Where several conspirators are named in an indictment, it is not necessary to secure the conviction of all,[88] and if two or more conspirators are named in an indictment, it is no defense to prove that some one not named in the indictment was a party to the crime.[89] An indictment is not multifarious because it charges a design having a multitude of objects to be accomplished.[90]

Variance. See 11 C. L. 985—Where several persons are designated in an indictment as having been defrauded in the same manner, and each transaction is stated in a separate count, a charge of variance will not be sustained because the proof falls short of any one of them.[91] The fact that a conspirator is designated in the indictment as unknown, when he is known, to the grand jury, is not fatal to a conviction.[92]

Evidence. See 11 C. L. 666—The evidence must be limited to establishing the charge made in the indictment.[93] It is not necessary to prove by direct evidence an agreement to act together;[94] in most cases the corrupt agreement is proved by circumstantial evidence,[95] and such evidence, showing an unlawful combination, must logically lead to such a conclusion.[96] Where a defendant is charged with being a conspirator, evidence must be first shown to prove he was a member of the band.[97] Hearsay declarations of the conspirators themselves are not competent to connect a person with the band.[98] The jury must be satisfied that the concert existed before they can consider what one of the parties did or said in carrying out the joint purpose.[99] Declarations made while the conspiracy was being carried on are admissible in evidence.[1] Admissions of one of two or more coconspirators, after the fact,

82. United States v. Haas, 163 F 908.

83. United States v. Stamatopoulos, 164 F 524.

84. State v. Dalton, 134 Mo. App. 517, 114 SW 1132.

85. Where a public official is to have secret interest in contract, the fulfilling of which by the contractor such officer is to be judge, its almost necessary result would be to defraud public. Crawford v. U. S., 212 U. S. 183, 53 Law. Ed. —.

86. Sufficient to show an unlawful combination to obtain money or property of any person belonging to class known as the "public." People v. Smith, 239 Ill. 91, 87 NE 885.

87. Tampering with ballots cast at party primary. State v. Bienstock [N. J. Law] 73 A 530.

88, 89. People v. Smith, 239 Ill. 91, 87 NE 885.

90. State v. Nugent [N. J. Law] 71 A 485.

91. Marrin v. U. S. [C. C. A.] 167 F 951.

92. People v. Smith, 239 Ill. 91, 87 NE 885.

93. Testimony of acts done and declarations made subsequent to outrage charged in indictment properly excluded. Commonwealth v. Ellis [Ky.] 118 SW 973.

94. Proper to resort to inferences. Alkon v. U. S. [C. C. A.] 163 F 810. Isolated facts and circumstances may be put together. Commonwealth v. Ellis [Ky.] 118 SW 973; Barco v. Taylor, 5 Ga. App. 372, 63 SE 224. Enough that they have common purpose to defraud and act together for that purpose. Marrash v. U. S. [C. C. A.] 168 F 225.

95. Marrash v. U. S. [C. C. A.] 168 F 225. Where indictment charges assault with particular weapon, proper to prove assault made by others with different weapons in order to show intent to accomplish purpose of conspiracy. People v. Carson [Cal.] 99 P 970.

96. Commonwealth v. Tilly, 33 Pa. Super. Ct. 35.

97, 98. Commonwealth v. Ellis [Ky.] 118 SW 973.

99. Rule is not inflexible and order of production of evidence is largely in court's discretion. Doyle v. U. S. [C. C. A.] 169 F 625; People v. Carson [Cal.] 99 P 970

1. Letters admitted which were written

is not evidence against his associate.[2] Where only one of two coconspirators is on trial, facts regarding the absent one may be shown which bear on the criminality of the one apprehended.[3] Books of account, taken possession of by a receiver appointed by a bankruptcy court, are admissible as evidence in a trial of a bankrupt charged with conspiracy or conceal property from his trustee.[4] Overt acts committed before the formation of the conspiracy are not admissible.[5]

Instructions. See 11 C. L. 688—A court may instruct a jury on the subject of conspiracy, although the defendants are not charged with the same, provided they are jointly charged with another crime.[6] Where two are jointly charged with conspiracy, if one is not guilty neither is the other.[7]

Verdict and punishment. See 11 C. L. 888—Whether a conspiracy exists as charged in the indictment,[8] and whether an act was done by one or more of the defendants to effect the object of the conspiracy,[9] are questions for the jury. The jury must be satisfied beyond a reasonable doubt.[10] It is proper to separate the conspiracy from the act itself and affix a distinct penalty for each.[11] Where defendants are charged jointly with a criminal conspiracy and a murder committed in execution of such conspiracy, and they are acquitted of the murder charge, it is to be taken that no such crime of murder as charged in the indictment was committed.[12]

Constables, see latest topical index.

CONSTITUTIONAL LAW.

The scope of this topic is noted below.[13]

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by coconspirator during defendant's absence. State v. Erickson [Wash.] 103 P 796. Even such declarations will not be admitted unless evidence is produced sufficient, in judgment of court, to warrant jury in finding existence of conspiracy beyond reasonable doubt. Miller v. State, 139 Wis. 57, 119 NW 850.

2. In prosecution for murder, declarations were admitted which were made concerning defendant, while latter was absent. Held error. Miller v. State, 139 Wis. 57, 119 NW 850.

3. Felonious assault with intent to kill. Weisenbach v. State, 138 Wis. 152, 119 NW 843.

4. Kerrch v. U. S. [C. C. A.] 171 F 366.

5. United States v. Grodson, 164 F 157.

6. Murder. Van Wyk v. People [Colo.] 99 P 1009.

7. Jurors were incorrectly instructed that if evidence left reasonable doubt in their minds as to guilt of either of defendants, they should find such defendant not guilty. Flynn v. People, 139 Ill. App. 112.

8, 9. Marrash v. U. S. [C. C. A.] 168 F 225.

10. The evidence must be such as to exclude every reasonable hypothesis of innocence. Marrash v. U. S. [C. C. A.] 168 F 225; Gambrell v. Com. [Ky.] 113 SW 476.

11. Agent of a railroad company indicted for violating Hepburn Act, June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892). United States v. Clark, 164 F 75; Scott v. U. S. [C. C. A.] 165 F 172.

12. An acquittal of murder after regular trial in state court is bar to so much of indictment for conspiring criminally in violation of Rev. St. §§ 5508, 5509, U. S. Comp. St. 1901, p. 3712, as seeks, by charging defendants with commission of such murder, to enforce provisions of § 5509, that if, in carrying out such conspiracy an offense against state has been committed, punishment provided by state law shall be imposed. United States v. Mason, 213 U. S. 115, 53 Law. Ed. ——.

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§ 1. *Adoption and amendment of constitutions.*[14] —See 11 C. L. 686— Laws in force when a constitution is adopted remain operative with their settled construction,[15] if they are consistent with the constitution, but all laws in conflict therewith become inoperative.[16] Whether a constitution shall be amended is a political question.[17] Amendments relating to distinct subjects must be separately submitted to the electors,[18] and the manner and form in which they are to be submitted must be determined by the general assembly which approves the amendments,[19] after they have been regularly proposed.[20] A majority of the electors is necessary to adopt an amendment,[21] and such amendment goes into effect on its adoption and ratifica-

13. This topic treats of the organic law of the nation and the states, and the distribution of power between them. Constitutional provisions germane to specific subjects are treated in appropriate topics. See Commerce,* § 2; Criminal Law,* §§ 1, 5; Elections;* Eminent Domain;* Health,* § 1; Intoxicating Liquors,* § 1; Jury,* § 1A; Licenses,* § 2; Statutes,* §§ 2, 3; Taxes,* § 1.

14. Search Note: See notes in 15 L. R. A. 524; 10 L. R. A. (N. S.) 149; 1 A. S. R. 21; 3 Ann. Cas. 756; 4 Ann. Cas. 703.

See, also, Constitutional Law, Cent. Dig. §§ 1-8; Dec. Dig. §§ 1-10; 8 Cyc. 714-724; 6 A. & E. Enc. L. (2ed.) 893.

15. When constitutional provision has received a settled construction and is afterwards incorporated into a new or revised constitution, it must be presumed to have been retained with a knowledge of that construction, and courts will adhere to such construction. Western Union Tel. Co. v. Julian, 169 F 166. Construction of Ala. Const. § 240, in light of Const. of 1875. Id. Construction given by supreme court to constitution of 1865 is presumed to have been known to constitutional convention of 1875. State v. St. Louis, 216 Mo. 47, 115 SW 534.

16. Applies to city charter providing for appeal only in cases tried under city ordinances when tried before police magistrate without jury, since under statute appeal may be taken from police magistrate in ordinary criminal cases, and no exception can be made as to city on question. Mannie v. Hatfield [S. D.] 118 NW 817.

17. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408. Whether the people of Virginia have duly adopted the constitution of 1902 is a political question, and, where it has been recognized as valid by the executive and legislative departments and accepted by the people, legality of its adoption cannot be brought in question by a federal court. Brickhouse v. Brooks, 165 F 534.

18. Proposition to amend prohibition article of constitution and proposition for approval or rejection of Enforcing Act, art. 1 (Laws 1907-8, p. 594, c. 69), could not be limited. Lozier v. Alexander Drug Co. [Okl.] 99 P 808; Armstrong v. Berkey [Okl.] 99 P 921. Provision of Const., art. 20, § 2, providing that constitutional amendments shall be so submitted that electors may vote upon them separately, is mandatory. McBee v. Brady, 15 Idaho, 761, 100 P 97. Const. art. 20, § 2, providing for separate submissions of constitutional amendments means that all changes which relate to one subject and accomplish a single purpose shall be submitted as a single amendment. Id.

19. General assembly which approves amendments and not the one proposing them has sole right to determine, under Const. art. 13, whether such amendments shall be submitted to electors singly or together. In re Opinion of Supreme Ct. [R. I.] 71 A 798. May provide that an approved proposition of preceding general assembly may be submitted to electors as separate proposed amendments to constitution where such proposition contains proposed amendments relating to distinct subjects. Id. Although proposed in single resolution, general assembly, in submitting separate amendments to electors, must state them separately in same form in act of approval as they were in resolution proposing them. Id. Concluding section intended to indicate effect of proposed amendments, but not clearly doing so, did not prevent approval and submission separately of the several amendments since such section was not a necessary part to either section. Id.

20. Legislature has no power to incorporate in joint resolution proposing amendments to constitution any matter except amendment proposed, and question and manner of submitting same. McBee v. Brady, 15 Idaho, 761, 100 P 97. Resolution proposing amendment should indicate particular matter to be inserted or omitted, and particular place in which to be inserted in section to be amended. Id. Amendments to constitution may be proposed in either branch of legislature by joint resolution, and Const. art. 3, § 18, governing amendments to statutes, does not apply. Id. Canvass of vote of people on adoption of proposed amendments was required by Sess. Laws 1877, p. 114, and Const. art. 5, § 4. State v. Dean [Neb.] 121 NW 719.

21. Mere majority of those voting is not

tion.[22] If two different amendments to constitution are adopted and they are in conflict, both must fail,[23] but, if one is not regularly passed, the other will stand.[24]

§ 2. *Operative force and effect.*[25] See 11 C. L. 689—Being organic in character, constitutional provisions stand on a higher plane than statutes, and, as a rule, are mandatory, prescribing exact or exclusive methods of doing acts permitted or required.[26] The fifth amendment does not apply to state governments, but only to federal action.[27]

Self-executing provisions. See 11 C. L. 690—A constitutional provision is self-executing if it supplies a sufficient rule by means of which a right given may be enjoyed or a duty enforced.[28]

sufficient under Const. art. 20, § 1. State v. Brooks, 17 Wyo. 344, 99 P 874.

22. Amendment adopted in 1908, to Const. 1879, art. 5, § 19, giving certain state officers compensation which shall not be diminished or increased during term of office, taking effect from date of ratification and state officer elected in 1906 was entitled to salary fixed by amendments after its ratification. Kingsbury v. Nye, 9 Cal. App. 574, 99 P 985. In collateral proceeding, certificate of secretary of state that majority vote was cast in favor of proposed constitutional amendment is conclusive on question of ratification of amendment. Id.

23. Utter v. Moseley [Idaho] 100 P 1058. Amendment repealing Const. art. 5, §§ 11, 21, and amending Const. art. 5, §§ 2, 17, 20, 24, and art. 18, § 6, is void as being conflicting. McBee v. Brady, 15 Idaho, 761, 100 P 97.

24. Utter v. Moseley [Idaho] 100 P 1058.

25. Search Note: See notes in 16 L. R. A. 281; 30 A. S. R. 709; 7 Ann. Cas. 627.

See, also, Constitutional Law, Cent. Dig. §§ 18-38; Dec. Dig. §§ 22-40; 8 Cyc. 743-763, 765-779; 6 A. & E. Enc. L. (2ed.) 912.

26. Const. art. 7, § 14, requiring governor to file bill with his objections in office of secretary of state, within 5 days after adjournment of legislature, in order to effect veto thereof, is mandatory. Capito v. Topping, 65 W. Va. 587, 64 SE 845. Constitution prevails where there is a difference in its language (§ 157) and that of Ky. St. § 3490, subs. 2, as to what shall constitute a majority vote on question of issuing school bonds. Frost v. Central City [Ky.] 120 SW 367.

27. State v. Armeno [R. I.] 72 A 216.

28. Ex parte McNaught, 1 Okl. Cr. R. 260, 100 P 27. When a constitutional provision or a statute is declarative of the common law, it is self-active. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823.

Held self-executing: Const. 1901, §§ 178, 194, requiring voter to have paid poll tax in order to vote, and for levy of such tax. Finklea v. Farish [Ala.] 49 S 366. New York City Charter, § 716, added to Laws 1901, p. 32, c. 466, by Laws 1903, p. 1175, c. 511, § 1, providing that prison matrons and assistants might be graded according to term of service and providing that members of each grade shall receive not less than a certain compensation. People v. Coggey, 132 App. Div. 268, 117 NYS 65. Const. art. 17, § 6, providing for holding of elections for relocation or removal of county seats, is self-executing, although specific duty of making manual delivery of returns and ballots was placed upon no particular person. City of Pond Creek v. Haskell, 21 Okl. 711, 97 P 338. Const. 1901, § 91, exempting from taxation lots in incorporated cities and towns when used exclusively for religious worship, for schools, and for purely charitable purposes. Anniston City Land Co. v. State [Ala.] 48 S 659. Const. art. 18, § 3 (Bunn's Ed. §§ 413, 414), relating to framing and proposing city charters, is self-executing, although neither qualifications of electors, nor means by which proposed charter shall be submitted to electors, are specified. State v. Scales, 21 Okl. 683, 97 P 584. Const. art. 2, § 6 (Bunn's Ed. § 15; Snyder's Ed. p. 21), providing for **administration of justice** without prejudice. State v. Brown [Okl.] 103 P 762. Const. art. 7, §§ 14, 18, relating to appeals from justice of the peace courts to county courts. St. Louis & S. F. R. Co. v. Bray [Okl.] 103 P 573. Const. art. 5, § 11, providing that when judge of district court is disqualified, parties may agree upon proper person to try case. Oates v. State [Tex. Cr. App.] 121 SW 370. Bill of Rights, § 17, providing for prosecution of felonies by information after accused has had preliminary examination. In re McNaught, 1 Okl. Cr. R. 528, 99 P 241. Const. art. 2, § 17, providing that no person shall be prosecuted criminally in courts of record otherwise than by presentment, indictment or information, no person shall be prosecuted for felony by information without preliminary examination. Ex parte McNaught, 1 Okl. Cr. R. 260, 100 P 27. Const. art. 2, § 17, being self-executing to extent that prosecution for felonies shall be by means of indictment or information, Wilson's Rev. & Ann. St. 1903, providing that no person shall be prosecuted for felony except by indictment, did not remain in force after admission of state into union. Id.

Held not self-executing: Const. art. 12, § 2, providing that dues from corporations shall be secured by double individual liability of stockholders. Rowland v. Forest Park Creamery Co. [Kan.] 99 P 212. Provision declaring that every man is entitled to an adequate legal remedy for every injury done to him. Henry v. Cherry [R. I.] 73 A 97. Const. art. 6, § 12, providing that circuit court shall have such appellate jurisdiction as is or may be provided by law. Drainage Com'rs of Niles v. Harms, 238 Ill. 414, 87 NE 277. Const. art. 1, § 9, providing that pool-selling, book-making or any other kind of gambling shall not be authorized or allowed within state. People v. McLaughlin, 128 App. Div. 599, 113 NYS 188.

§ 3. *Interpretation and exposition. A. When called for.*[29] See 11 C. L. 690 Courts will not pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that point becomes necessary to a determination of the cause,[30] and unless the question is properly [31] and clearly raised,[32] showing the particular constitutional provision violated,[33] and the question must be raised at the

Const. amendment of art. 11, § 2, June 4, 1906, giving municipalities power to amend charter. Hall v. Dunn [Or.] 97 P 811. Const. art. 4, § 1A, reserving to people power of initiative and referendum. Long v. Portland [Or.] 98 P 149.

29. Search Note: See, also, Constitutional Law, Cent. Dig. §§ 39-47; Dec. Dig. §§ 41-49; 8 Cyc. 787-805; 6 A. & E. Enc. L. (2ed.) 920.

30. Ross v. Lipscomb [S. C.] 65 SE 451; State v. Boston & M. R. Co. [Vt.] 71 A 1044; State v. Parker [Fla.] 49 S 124; Karns v. State Bank & Trust Co. [Nev.] 101 P 564; Sanden v. Northern Pac. R. Co. [Mont.] 102 P 145; State v. Clausen, 51 Wash. 689, 101 P 835. Where decision can properly be made to rest upon other grounds, court will not pass upon constitutionality of statute. Cleveland, etc., R. Co. v. Hollowell [Ind.] 88 NE 680; McGill v. Osborne, 131 Ga. 541, 62 SE 811. Where Registration Act, § 18, as amended (Hurd's Rev. St. 1908, c. 30, § 61), provides that in proceeding to register title examiner may receive in evidence any abstract of title as prima facie evidence only, which provision was not in act when evidence was taken in suit to register title, there being evidence outside abstracts sufficient to show title in applicant, defendants could not raise constitutional question as to legal adoption of section on appeal. McMahon v. Rowley, 238 Ill. 31, 87 NE 66. Constitutionality of act under which indictment is drawn will not be passed upon, where indictment would have been insufficient if act valid. Hewitt v. State [Ind.] 86 NE 63. Court will not determine constitutionality of Act of Legislature 1905, p. 159, c. 77, providing for vote upon relocation of county seat in mandamus proceeding by private party against county officer to change location of officer, action not being maintained in name of state. Dean v. Dimmick [N. D.] 122 NW 245. Constitutionality of that portion of Hepburn Act of June 29, 1906, imposing penalties for violation of provisions forbidding railways from transporting commodities in which they have an interest, will not be considered in action to enforce such provisions by injunction in which no recovery of penalties is sought. United States v. Delaware & H. Co., 213 U. S. 366, 53 Law. Ed. —. Courts will not pass upon proposed amendment of city charter giving city power to use space for power generating plant. Cataract Power & Conduit Co. v. Buffalo, 131 App. Div. 485, 115 NYS 1045. Validity of drainage statute seeking to make judgment or order conclusive upon one of parties litigant and not upon other will not be considered until it appears that legislature has attempted to pass such statute. In re Remington Drainage Dist., 138 Wis. 621, 120 NW 523. As to whether primary election law respecting election of United States senators is valid. State v. Frear 138 Wis. 173, 119 NW 894. Supreme court had no jurisdiction to pass upon constitutionality of case sent to supreme court for determination of constitutional question, in advance of determination of demurrer, since constitutional question would be immaterial if demurrer sustained. State v. Kelley, 17 Wyo. 335, 98 P 886.

31. Where plaintiffs in error had made no effort to register title in court below, and where question as to validity of Registration Act (Hurd's Rev. St. 1903, c. 30, § 61) was not raised, it cannot be raised on appeal. McMahon v. Rowley, 238 Ill. 31, 87 NE 66. Properly raised by a bill in which plaintiff seeks to have defendant enjoined from taking action under it which will affect his rights of property. Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 NE 870. May be raised by demurrer to complaint or by general denial. Benvega v. U. S. Surety Co., 115 NYS 199. Need not be pleaded with any greater definiteness or certainty than other issues, general statements, and even conclusions which by fair intendment are directed to point, being sufficient if not attacked by motion. Union Pac. R. Co. v. Abilene [Kan.] 98 P 224. Unconstitutionality of order of railroad commission reducing rates may be presented under general denial in action to enforce such order. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966. Elector whose ballot has been rejected by moderator of voting district cannot test constitutionality of statute in tort action against moderator. Blake v. Mason [Conn.] 73 A 782.

32. Contention that Acts 1907, pp. 29-33, c. 16, §§ 2-14 (Burns' Ann. St. 1908, § 8333, et seq.), relating to destruction of intoxicating liquors, is unconstitutional as applied to intoxicating liquors because it authorizes taking of one's property without due process of law, held too indefinite to present any question. Rose v. State [Ind.] 87 NE 103. Question as to whether demurrage act (Laws 1905, p. 110; Ann. St. 1906, § 1082-5) is in violation of commerce clause of federal constitution will not be considered unless raised in a concrete case. Darlington Lumber Co. v. Missouri Pac. R. Co., 216 Mo. 658, 116 SW 530.

33. One who challenges an act of legislature as being invalid must show that such act is without the province of legislation, or that particular subject-matter within purview of constitution is withdrawn by people from consideration by legislature. People v. Nye, 9 Cal. App. 148, 98 P 241. Where particular section of state constitution which is asserted to have been violated is specified, and where by descriptive words it has been indicated that rights guaranteed under first section of fourteenth amendment of federal constitution have been disregarded, question is raised with sufficient particularity. Wabash R. Co. v. Flannigan, 218 Mo. 566, 117 SW 722. Prohibition article, having been de-

earliest possible moment.[34] Except in certain cases[35] constitutional questions will not be considered at the instance of one who is not affected thereby,[36] or who has waived his rights.[37] The constitutionality of an act, when first raised, is an open

clared adopted and accepted by federal and state governments will not be declared invalid as not having been properly submitted to vote of people, or adopted, where party assailing same fails to point out in what particular it was not properly submitted. Arle v. State, 1 Okl. Cr. R. 250, 100 P 23. Whether motion to assess damages on injunction bond in suit merely incident to main subject of litigation, party enjoined is entitled to recover attorney's fees, does not raise question. Wabash R. Co. v. Flannigan, 218 Mo. 566, 117 SW 722.

34. Should be lodged in case at earliest possible moment that good pleading and orderly procedure will admit under the circumstances. Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 SW 1108. Constitutional point, arising on motion in case after final judgment, and which could not have been presented until developed by evidence at trial, is timely presented in motions for new trial and in arrest. Wabash R. Co. v. Flannigan, 218 Mo. 566, 117 SW 722. May be preserved in rare cases by clause in motion for new trial, where not appearing elsewhere in record as when judge permitted nine jurors to render verdict. Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 SW 1108.

35. Where unconstitutionality consists in unwarranted discrimination between individuals against whom aggressions thereby forbidden is committed, rule that court will not consider objections to constitutionality by party whose rights it does not affect does not apply. Greene v. State, 83 Neb. 84, 119 NW 6. Any person may raise question of validity of Acts 1901, p. 494, § 3, making certain acts blackmail when committed against citizens of state. Id.

36. Home Sav. Bank v. Morris [Iowa] 120 NW 100. Objections to constitutionality of a statute founded on interests of party who has not appeared cannot be raised by others. Malone v. Provident Inst. for Sav. [Mass.] 86 NE 912. Validity of Laws 1887, p. 237, § 1, making city or county liable for damages to property by mobs as against objection that location of property destroyed rather than place where riot occurred is made criterion of liability, will not be considered where mob and property damaged were in same municipal division. Sturges v. Chicago, 237 Ill. 46, 86 NE 683.

Those who are not within class affected by anti-trust act March 3, 1899 (Acts 1899, p. 257; Burn's Ann. St. 1908, § 3884) cannot complain that it is unconstitutional as being limited to dealers, mechanics and artisans, and in denial of equal protection to consumers. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Where if city charter requirement that defendant in prosecution for keeping saloon open after hours give recognizance to pay fine and costs as condition of appeal, were declared unconstitutional, district court would still be without jurisdiction, defendant cannot raise question of constitutionality. State v. Brandt, 83 Neb. 656, 120 NW 196. Surety sued on bond provided for by Laws 1907, p. 263, c. 185, requiring that ticket agents to give bond for faithful transmission of money to foreign countries, not being a person discriminated against or affected by statute, cannot raise question of unconstitutionality. Patti v. United Surety Co., 61 Misc. 445, 115 NYS 844. Constitutionality of St. 1897, p. 190, c. 129, applying only to cities of certain classss organized under general scheme of municipal corporation act, will not be considered on application of city not affected by act. City of San Buenaventura v. McGuire, 8 Cal. App. 497, 97 P 526. Since Act No. 49, p. 108, of 1904, relating to hawkers and peddlers, does not apply to one selling by sample for foreign concern, he has no interest to attack its constitutionality. Saal v. Fortner [La.] 49 S 997. Constitutionality of provision of Act May 19, 1896 (29 Stat. 125, c. 206), creating drainage system in District of Columbia, affecting only owners of unimproved property, cannot be challenged by owner of improved property. District of Columbia v. Brooke, 29 S. Ct. 560. Claim that Rev. Codes § 3823, requiring domestic corporations to file articles of incorporation in any county where they hold property, is invalid, can only be raised by a domestic corporation which has failed to comply with such requirement. Ulhlein v. Caplice Commercial Co. [Mont.] 102 P 564. Nonregistered pharmacist prosecuted under Code Va. 1904, c. 78, §§ 1754-1766, for retailing carbolic acid, cannot complain of provision giving pharmacy board sole right to institute proceedings, since his rights are not affected. Bertram v. Com., 108 Va. 902, 62 SE 969. One who has no hotel cannot raise question of discrimination made by city ordinance providing for issuance of licenses to sell intoxicating liquors only to bona fide existing hotels. Ritz v. Lightston [Cal. App.] 103 P 363. Private citizens who are members of an organization which has as its object the enforcement of the Rose county local option law are not, by reason of that fact, rendered proper defendants to an action to test the constitutionality of that law. Gassman v. Kerns, 7 Ohio N. P. (N. S.) 626. Violator of Stock Law (Revisal 1905, § 1684), cannot attack its constitutionality on ground that adjoining county has not adopted it and that his property is subject to incursions from animals straying from such other county. State v. Mathis, 149 N. C. 546, 63 SE 99.

37. Where petitioner, from whom water commissioners of a village took certain water rights under Acts 1886, p. 228, No. 238, had commissioners appointed by county court to assess damages and later on appeal to supreme court accepted damages awarded by that court, but raised no question as to constitutionality of act in question for seventeen years, he was held to have waived the constitutional question by failing to raise it. Harwood v. West Randolph [Vt.] 72 A 1076. Where county treasurer brings suit against county under proviso attempted to be added to Comp. St. 1899, c. 10, § 19, by Laws 1901, p. 63, c. 11, for premiums paid on his official bond, county is not estopped to set up invalidity of statute, there being no gain to which county was not entitled, nor

question, notwithstanding an adjudication between the same parties in another though like case in which the constitutional question was not raised.[38] In order that the appellate court may pass upon a constitutional question, it must have been properly raised below,[39] decided adversely to appellant, and fully argued on appeal.[40]

(§ 3) *B. General rules of interpretation.*[41]—See 11 C. L. 691—A constitutional provision must be interpreted in the sense most obvious to the common understanding,[42] and so that it may accomplish the objects for which it was inteuded.[43] Where there is doubt the court must have recourse to the entire constitution to ascertain the true meaning and intent of the particular provision,[44] and effect should be given to all its provisions.[45] Where there is a conflict between a general and special provision in a constitution, the special provision must prevail in respect to its subject-matter.[46] The intent of the framers of the constitution,[47] established usages,[48]

any burden to plaintiff that would not have been his without the proviso. Prowett v. Nance County, 82 Neb. 400, 117 NW 996. **Long acquiescence** by county in paying taxes for many years under act of legislature imposing taxes for maintenance of bridge cannot estop county commissioners from raising question of constitutionality of act. Somerset County Com'rs v. Pocomoke Bridge Co., 109 Md. 1, 71 A 462. **By invoking its benefits,** a party is precluded from questioning constitutionality of act. Ross v. Lipscomb [S. C.] 65 SE 451. Landowner through whose land drain was laid, who waived claims for damages, accepted its benefits and elected to treat statute under which it was laid as constitutional, cannot have constitutional question raised as to him. Smittle v. Haag [Iowa] 118 NW 869. Taxpayer who claimed under Code § 1417, providing for refund of moneys illegally or erroneously exacted from taxpayer cannot question its constitutionality since he was precluded by making claim. Home Sav. Bank v. Morris [Iowa] 120 NW 100. Surety company sued on bond provided for by Laws 1907, p. 263, c. 185, requiring ticket agents to give bond for faithful transmission of money to foreign countries, having voluntarily given bond and accepted benefits of statute, has waived right to question its constitutionality. Patti v. United Surety Co., 61 Misc. 445, 115 NYS 844.

38. Harwood v. West Randolph [Vt.] 72 A 1076.

39. Where question was not raised below either in answer or in instructions, it is waived. Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 SW 1108. Where order of county court expressly recited that statute under which prayer of nonresident for appointment of administrator, was constitutional, it must be concluded that question of constitutionality was raised in lower court. In re McWhirter's Estate, 235 Ill. 607, 85 NE 918. A district court can, under Rev. St. 1899, c. 4276, as amended by Sess. Laws 1903, p. 78, c. 72, reserve pending constitutional questions only to supreme court. State v. Keefe, 17 Wyo. 227, 98 P 122.

40. See Appeal and Review, § 11F.

41. Search Note: See notes in 3 C. L. 735; 39 L. R. A. 449; 1 L. R. A. (N. S.) 489; 5 Id. 340, 36 A. S. R. 682; 10 Am. Cas. 1146.

See, also, Constitutional Law, Cent. Dig. §§ 9-17; Dec. Dig. §§ 11-21; 8 Cyc. 724-743; 6 A. & E. Enc. L. (2ed.) 920.

42. Const. art. 7, § 15, providing that if governor disapproves bill it may be repassed, contemplates that governor must exercise disapproval before adjournment of legislature. May v. Topping, 65 W. Va. 656, 64 SE 848. Should not be given a narrow or technical construction. Hagan v. Limestone County Com'rs Ct. [Ala.] 49 S 417. Constitutional provisions designed to protect liberty and security should be liberally construed. Salter v. State [Okl. Cr. R.] 102 P 719. Remedial statutes will be liberally construed. Nether Providence School Dist. v. Montgomery, 38 Pa. Super. Ct. 483. Act. April 11, 1899 (P. L. 38), giving school directors power to act as boards of health. Id.

43. Purchase of land certificate from guardian by judge who ordered, approved and confirmed sale is void and not remedied by approval of guardian's final account by another judge. Nona Mills Co. v. Wingate [Tex. Civ. App.] 113 SW 182.

44. Blackrock Copper Mining & Milling Co. v. Tingey, 34 Utah, 369, 98 P 180. Rev. St. 1879, § 706, giving corporations power to mortgage its property including franchises must be considered with reference to Const. 1875, art. 12, § 20 (Ann. St. 1906, p. 309), which makes assent of city requisite to mortgaging of franchises by street railway company. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552. Mo. Const. Art. 12, § 8 (Ann. St. 1906, p. 304), prohibiting corporations from issuing stock except for money, labor or property actually received was intended to restrict corporations from issuing preferred stock by making assent of stockholders necessary, but not to limit increase of stock. Pollitz v. Wabash R. Co., 167 F 145.

45. All provisions relating directly or indirectly to same subject must be read together, and any amendment in conflict with prior provisions must control. People v. Metz, 193 N. Y. 148, 85 NE 1070. No proviso may be arbitrarily rejected, but whole instrument must be regarded. People v. Nye, 9 Cal. App. 148, 98 P 241. Const. art. 7, § 3, authorizing legislature to provide for formation of school districts "within all or any of the counties" of the state construed to mean that district must conform to county lines, as such words would have been useless if purpose had been to give unlimited power to create districts without regard to divisions of state and counties. Parks v. West [Tex.] 113 SW 529.

46. People v. Nye, 9 Cal. App. 148, 98 P 241. Portland city charter, § 49, providing that

legislative construction,[49] unquestioned validity,[50] and what may be done under the act,[51] may be considered. Courts will not consider whether an act is well adapted to attain the object for which it was passed,[52] nor whether it is harsh or unjust.[53]

Statutes violative of the constitution See 11 C. L. 692 are unenforcible,[54] but the repugnancy between the statute and the constitution must be plain [55] in which case the court must declare the statute unconstitutional.[56]

Every presumption favors the validity of a statute. See 11 C. L. 693—Courts will uphold the constitutionality of an act if possible,[57] giving it the benefit of every

an ordinance shall take effect immediately upon approval by mayor, is not amended by Act Legislative Assembly, Feb. 25, 1907, providing that no ordinance shall take effect until 30 days after its passage, within meaning of Const. art. 11, § 2, prohibiting legislature from amending any charter. Long v. Portland [Or.] 98 P 149.

47. Intention of framers of constitution, and of people who adopted it, should be considered in construing constitutional provision. State v. Hooker [Okl.] 98 P 964. Where an ambiguity exists because of an apparent conflict between the statute and the constitution, courts are permitted to look beyond words of statute to the legislative purpose. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703. Proceedings of constitutional convention may be considered in determining meaning of terms used. "Property held thereunder" as used in Const. art. 12, § 7. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Legislative motives will not be considered except as disclosed on face of enactments, or are inferable from operation and effect. De Merritt v. Weldon, 154 Cal. 545, 98 P 537.

48. Established laws, usages and customs at time of adoption must be regarded. In re Hammond, 83 Neb. 636, 120 NW 203. Circumstance that for nearly 30 years certain executive officers have been installed in office on first Monday after first day of January, while not controlling, is entitled to great weight in effort to ascertain meaning of Const. art. 5, §§ 2, 17, providing that certain officers shall hold office for four years from first Monday in January after their election. People v. Nye, 9 Cal. App. 148, 98 P 241.

49. Legislative construction, when followed by years of harmonious subsequent legislation, is entitled to great weight in determining construction of constitutional provisions. State v. Blaisdell [N. D.] 119 NW 360. Practical construction by legislative and executive departments continued for many years has great weight in construction of constitution. City of New York v. New York City R. Co., 193 N. Y. 543, 86 NE 565.

50. Laws 1909, relating to selection of high school committee, will not be declared unconstitutional where previous laws, practically identical, have never been questioned, and schools erected on assumption of validity and bonds issued under such law. Kyle v. Abernethy [Colo.] 102 P 746.

51. Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 NE 824.

52. Graham v. Roberts, 200 Mass. 152, 85 NE 1009; Heflin v. Allen [Ala.] 48 S 695. Court will not decide upon wisdom of legislature in enacting Pub. Acts 1899, p. 414, No. 257, relative to proceedings against garnishees. Dunkley v. McCarthy [Mich.] 16 Det. Leg. N. 403, 122 NW 126.

53. Layzell v. Somers Coal Co. [Mich.] 16 Det. Leg. N. 147, 120 NW 996; Likin's Petition, No. 1, 37 Pa. Super. Ct. 625. Argument that Pub. Acts 1905, p. 143, No. 100, providing that only competent engineers shall be permitted to operate hoists in coal mines, shall not be given an unreasonable interpretation tending to hardship, is a dangerous one and should not be heeded, where hardship would be occasional and exceptional. Layzell v. Somers Coal Co. [Mich.] 16 Det. Leg. N. 147, 120 NW 996.

54. Any construction of a state statute, which brings it into conflict with constitutional provision as to equal protection of laws, will nullify it as effectually as if it had in first instance been enacted in conflict with that instrument. Gilkeson v. Missouri Pac. R. Co. [Mo.] 121 SW 138. Office of dairy and food commissioner is a valid constitutional office under Const. art. 3, § 27, providing that no state office shall be created for inspection or measuring of any merchandise, manufacture or commodity. Commonwealth v. Hanley, 38 Pa. Super. Ct. 430. Act April 25, 1898 (93 Ohio Laws, p. 277), as amended, being Rev. St. §§ 2966-54, to 2966-67, inclusive, providing for use of voting machines, is unconstitutional as contravening Const. art. 5, providing that all elections shall be by ballot. State v. Sup'rs of Elections Deputy State [Ohio] 89 NE 33. Sess. Laws Okl. p. 256, c. 32, art. 8, § 2 (Gen. St. Ann. Okl. 1908, § 2958) providing that court fund shall be used only for certain purposes is repugnant to Const. Okl. art. 10, § 26, as far as it relates to construction of court houses and jails. Campbell v. State [Okl.] 99 P 778. St. 1907, p. 344, c. 274, amending Civ. Code, § 401, providing for extension of corporate charters is in conflict with Const. art. 12, § 7, forbidding legislature from extending charter or franchise of any corporation. Boca Mill Co. v. Curry, 154 Cal. 326, 97 P 1117. Laws 1897, p. 160, c. 15, relating to fees of clerk of supreme court, is void being contrary to constitution. Bohart v. Anderson [Okl.] 103 P 742.

55. Willis v. Kalmbach [Va.] 64 SE 342.

56. Where conflict is irreconcilable by reasonable interpretation, court must declare act void. State v. Butler [Me.] 73 A 560.

57. Straw v. Harris [Or.] 103 P 777; People v. Stickle [Mich.] 16 Det. Leg. N. 204, 121 NW 497; Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 NE 504; Nether Providence School Dist. v. Montgomery, 38 Pa. Super. Ct. 483; In re Likens [Pa.] 72 A 858; Bush v. New York Life Ins. Co., 63 Misc. 89, 116 NYS 1056. Although question is judicial, not legislative. Sullivan's Island Tp. Com'rs v.

doubt, so as to carry its plain purpose into effect.[58] To justify court in declaring statute unconstitutional, it must clearly appear to be so.[59] Where a statute is susceptible of two interpretations, one of which will uphold its constitutionality, that interpretation will be adopted,[60] but such rule does not justify court in striking out provisions nor in inserting others.[61] Courts cannot refuse to give statutes effect on mere principles of comity.[62] After a legislative act has once been declared unconstitutional, there no longer remains any presumption in favor of its validity.[63]

Buckley, 82 S. C. 352, 64 SE 163. Presumption is that act of legislature is within its power. People v. Nye, 9 Cal. App. 148, 98 P 241. Presumptions in favor of validity of municipal ordinance. Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 NE 824. Legislature in exercise of police power will be presumed to have found substantial reasons for its conclusions and its enactments will not be overthrown unless unreasonable. State v. Barrett [Ind.] 87 NE 7. Question will be left to appellate courts and not determined at special term unless clearly void. Hathorn v. Natural Carbonic Gas Co., 60 Misc. 341, 113 NYS 458. Courts will not hold regulations provided by legislature invalid, although in court's opinion they might have been made simpler and more reasonable. State v. Anderson [N. D.] 118 NW 22. If a statute may or may not, according to circumstances, be within limits of legislative authority, **existence of circumstances necessary** to support it **must be presumed.** Bush v. New York Life Ins. Co., 63 Misc. 89, 116 NYS 1056. Wilson's Rev. & Ann. St. § 5306, providing that in misdemeanor cases a warrant may issue upon information which has been verified only upon information and belief. Salter v. State [Okl. Cr. R.] 102 P 719.

58. St. 1906, p. 22, c. 19, and St. 1907, p. 745, c. 403, relieving corporations from penalties, does not show such a continuous course of legislative construction of Const. art. 12, § 7, as is entitled to weight in construing such statute. Boca Mill Co. v. Curry, 154 Cal. 326, 97 P 1117.

59. McCord v. State [Okl. Cr. R.] 101 P 280; In re Likins [Pa.] 72 A 858; State v. Cunningham [Mont.] 103 P 497. Unless beyond reasonable doubt. City of Pond Creek v. Haskell, 21 Okl. 711, 97 P 338; State v. Webber, 214 Mo. 272, 113 SW 1054. Statutes must be enforced unless they violate some positive principle of government laid down by fundamental law. State v. Northern Pac. R. Co. [Wash.] 102 P 876. Laws 1907, p. 126, c. 107 (Comp. Laws 1907, §§ 456x6 to 456x10), requiring all corporations to pay annual state license, held constitutional. Blackrock Copper Mining & Milling Co. v. Tingey, 34 Utah, 369, 98 P 180. Courts will be very cautious in striking down acts of legislature, but will protect public from being imposed upon by violation of constitutional provisions intended to furnish them protection, as by requiring subject-matter to be expressed in title. Somerset County Com'rs v. Pocomoke Bridge Co., 109 Md. 1, 71 A 462. Fact that, in accordance with statute, practice of deducting debits from credits in listing personal property for taxation has continued for 70 years calls upon court to move with utmost caution in asserting invalidity of such statute. Stumpf v. Storz [Mich.] 16 Det. Leg. N. 87, 120 NW 618. Act Extra Sess. 1907, No. 4, p. 3a, § 41, providing for recount of votes cast in certain election precincts at primary election, not ambiguous or in conflict with general purpose of legislation of act. Bradley v. State Canvassers, 154 Mich. 274, 15 Det. Leg. N. 728, 117 NW 649. **Burden of proof** is upon party asserting unconstitutionality to show it beyond all reasonable doubt. Commonwealth v. McDermott, 37 Pa. Super. Ct. 1.

60. State v. Pitts [Ala.] 49 S 441; State v. Barrett [Ind.] 87 NE 7; Dixon v. Russell [N. J. Law] 73 A 51; Rakowski v. Wagoner [Okl.] 103 P 632. It is duty of courts to adopt such interpretation as will sustain constitutionality of an act of the legislature if it can be done without doing violence to its language. McKenzie v. Elliott [N. J. Law] 72 A 47. Construction in accord with constitution will be adopted. Gulf, etc., R. Co. v. State [Tex. Civ. App.] 120 SW 1028. Although its adoption is less natural. State v. Pitts [Ala.] 49 S 441. Construction by which grave and doubtful constitutional questions can be avoided will be adopted. United States v. Delaware & H. Co., 213 U. S. 366, 53 Law. Ed. —. Since St. 1906, p. 437, c. 421, providing that no person or corporation except railway corporations shall transport liquors for hire into or in a city in which licenses of first five classes are not granted, would be unconstitutional if made to include interstate shipments, intention of legislature was only to apply to intrastate shipments. Commonwealth v. People's Exp. Co., 201 Mass. 564, 88 NE 420. Act May 16, 1907 (Laws 1907, p. 500, c. 22), requiring foreign corporations to obtain permit to do business in state and to pay certain fees, though broad enough to embrace interstate business, construed to apply only to domestic business so as not to violate commerce clause of federal constitution. Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194. Demurrage Law Ann. St. 1906, §§ 1082-5, upheld. Darlington Lumber Co. v. Missouri Pac. R. Co., 216 Mo. 658, 116 SW 530. St. 1907, p. 354, c. 282, increasing salaries of county and township officers, was intended by legislature to apply only to officers elected for ensuing term, since such construction would harmonize it with constitutional prohibition (Const. art. 11, § 9) against raising compensation of officers during term of office. Smith v. Mathews [Cal.] 103 P 199; Hawkins v. Ware [Cal. App.] 103 P 204. Act Aug. 7, 1906 (Acts 1906, p. 121) providing for change of county lines within limits of incorporated towns by holding election to determine in which county corporate limits should be entirely included will not be construed to apply to county sites where such construction would render act invalid. De Kalb County v. Atlanta [Ga.] 65 SE 72.

61. Dupree v. State [Tex.] 119 SW 301.

62. State v. Northern Pac. R. Co. [Wash.] 102 P 876.

63. State v. Loer, 82 Neb. 602, 118 NW 129.

A statute containing invalid provisions yields only to the extent of its repugnancy to the constitution See 11 C. L. 693 and a part may be unconstitutional without rendering the whole statute bad, but, if the invalid part is independent of the remainder, it may be eliminated without rendering the whole ineffective, unless the invalid portion was manifestly an inducement for the passage of the remainder.[64]

Scope of federal and state power. See 9 C. L. 615—The federal constitution is the paramount law of the land and a statute of a state in conflict with it is void.[65] The legislature has full legislative power wherever it is not restricted by constitution, whereas congress has power only when it is granted by constitution.[66, 67]

§ 4. *Executive, legislative and judicial functions.* See 11 C. L. 694—Special jurisdiction of legislative, executive, and judicial departments is to be applied in a limited sense and need not be kept entirely distinct without any connection between them.[68]

(§ 4) *A. Executive functions.*[69]—See 11 C. L. 694—Powers conferred on the executive cannot be exercised by other departments of the government[70] nor can powers belonging to other departments be exercised by the executive.[71]

64. See Statutes, § 5H. Code Va. 1904, c. 78, §§ 1754-1766, designating State Board of Pharmacy as informer for violation of pharmacy laws, is valid as separate from remainder of chapter. Bertram v. Com., 108 Va. 902, 62 SE 969. Laws 1907, p. 454, authorizing construction of interchange tracks, being capable of being limited in particular cases to constitutional bounds, will to that extent be upheld. Pittsburgh, etc., R. Co. v. Hunt [Ind.] 86 NE 328.

65. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703.

66, 67. State v. Taylor, 220 Mo. 618, 119 SW 373.

68. State v. Railroad Com., 52 Wash. 17, 100 P 179. Burns' Ann. St. 1908, § 8716, providing for appointment by court of appraisers to make reassessment for public improvements is not invalid as violative of Const. art. 3, forbidding an officer of one department from exercising functions in another. City of Indianapolis v. State [Ind.] 88 NE 687.

69. Search Note: See note in 31 A. S. R. 294.

See, also, Constitutional Law, Cent. Dig. §§ 139-147; Dec. Dig. §§ 76-80; 8 Cyc. 857-862; 6 A. & E. Enc. L. (2ed.) 1009.

70. As a rule, courts will not interfere with exercise of discretion vested by statute in administrative officials in absence of proof of improper conduct or transgression of power. Holly v. New York, 128 App. Div. 499, 112 NYS 797. Authority to make rules and regulations to carry out expressed legislative purpose is administrative in nature and is not an exclusive legislative power. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. Exercise of some authority, discretion, or judgment, may be incident or necessary to performance of administrative duties, but is subject to judicial review and is not among powers separated by constitution into departments. Id. Where, by Rev. Laws Hawaii, c. 66, § 843, power to regulate time of running of cars of street railway companies is vested in governor and superintendent of public works, court had no judicial power to fix schedules on ground that public convenience demanded it. Honolulu Rapid Transit & L. Co. v. Hawaii, 211 U. S. 282, 53 Law. Ed. 186. Pub. Acts 1907, p. 182, No. 144, making abandonment of wife or children a felony and authorizing suspension of sentence or giving of bond, does not invade governor's pardoning power. People v. Stickle [Mich.] 16 Det. Leg. N. 204, 121 NW 497. Legislature, by Laws 1901, p. 636, c. 466, § 1543, intending to give borough presidents same power as they had under Laws 1897, p. 1, c. 378, to organize bureaus for proper discharge of departmental functions, and such power being administrative and not legislative, it had power to confer it upon borough presidents. People v. Ahearn, 193 N. Y. 441, 86 NE 474. Village Law, § 170 added by Laws 1907, p. 126, c. 93, § 1, providing that where property has been platted and streets or roads laid out, but in such manner that village cannot accept same by dedication, board of trustees may light and care for same, is not in violation of Const. art. 3, § 18, providing that legislature shall not pass a private or local bill for laying out, opening, altering, working or discontinuing roads, highways or alleys, power thus conferred upon trustees being power properly vested in them. Smith v. Smythe, 132 App. Div. 71, 116 NYS 1071. Validity of title of United States to land purchased and occupied by it as a military fort, and identification and definite boundaries of the land, are matters within scope of powers and duties of executive department of government to ascertain and settle, and not subject to judicial scrutiny on trial of a criminal case. United States v. Holt, 168 F. 141.

71. St. 1970, p. 517, c. 535, providing that computing scales for indicating value as well as weight of a commodity sold shall be tested by sealer of weights and measures as to correctness, being only intended to apply to arithmetical and not commercial correctness, is not unconstitutional as being exercise of judicial function by executive officer. Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 NE 870. New York City Charter, § 717, providing that all persons in employ of department of correction known as matrons or assistant matrons, and all those who had performed duties of matrons

(§ 4) *B. Legislative functions.*[72]—See 11 C. L. 694—Except as limited by the state or federal constitutions, the authority of the legislature is supreme,[73] and, as to matters within its scope,[74] its actions cannot be reviewed by the courts.[75] Among

as set forth in § 715 of charter for preceding 3 years, were appointed matrons and continued in office under that title, is not unconstitutional as an appointment by legislature to a municipal position. People v. Coggey, 132 App. Div. 268, 117 NYS 65.

72. Search Note: See notes in 17 L. R. A. 838; 19 Id. 247; 23 Id. 340; 1 L. R. A. (N. S.) 312, 382; 2 Id. 531; 6 Id. 143; 10 Id. 251, 289; 12 Id. 707; 13 Id. 716; 15 Id. 575, 942; 2 Ann. Cas. 427; 7 Id. 743.

See, also, Constitutional Law, Cent. Dig. §§ 48-122; Dec. Dig. §§ 50-66; 8 Cyc. 800-843; 10 Id. 191; 6 A. & E. Enc. L. (2ed.) 1020.

73. Finklea v. Farish [Ala.] 49 S 366; State v. Bley [Ala.] 50 S 263; State v. Goldthait [Ind.] 87 NE 133; Straw v. Harris [Or.] 103 P 777; City of Norfolk v. Board of Trade & Business Men's Ass'n [Va.] 63 SE 987. Words "legislative power" as used in Const. § 29, providing that legislative power shall be vested in General Assembly, means all powers that appertain to or are usually exercised by a legislative body, including power to impose taxes. Booth's Ex'r v. Com. [Ky.] 113 SW 61. Const. art. 4, § 1, providing that legislative power shall be vested in senate and assembly, contemplates that legislature shall exercise all the soverign authority of the state in matters which are properly the subject of legislation (People v. Nye, 9 Cal. App. 148, 98 P 241), and may adopt its own rules and methods of enacting such legislation (Conek v. Skeen [Va.] 63 SE 11). Only limitation imposed upon legislature in legislation in aid of constitutional provision, that is self-executing, is that rights guaranteed shall not be curtailed. State v. Hooker [Okl.] 98 P 964. Const. art. 3, § 1, vesting legislative power of state in general assembly, covers whole field of legitimate legislation except so far as limitations are found in state of federal constitutions. Appeal of Allyn, 81 Conn. 534, 71 A 794. Except where there are constitutional limitations upon the legislature, it is practically absolute and may delegate to a municipality the power to build wharves for public use and condemn land therefor. City of Burlington v. Central Vermont R. Co. [Vt.] 71 A 826.

74. When a state has the right of regulation, its exercise is an exclusive legislative function. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966. Where constitutionality depends upon question of fact, determination thereof is for legislature. State v. Northern Pac. R. Co. [N. D.] 120 NW 869. Questions as to wisdom or expediency of acts are for legislature alone. Snyder v. Thieme & Wagner Brew. Co. [Ind. App.] 87 NE 155. Whether a statute is good or bad as offering opportunities for fraud is for consideration of legislature. Bailey v. Wood, 202 Mass. 549, 89 NE 147. Question of whether a general law can be made applicable or whether a special one shall be passed is one for legislature. Block v. Chicago, 239 Ill. 251, 87 NE 1011. Where determination of questions of fact as to character of land included in drainage district has been referred to consideration of board of supervisors, and no appeal is provided, its determination is final. Campbell v. Youngson, 82 Neb. 743, 118 NW 1053, afg. 80 Neb. 323, 114 NW 415. Legislature may commit to commissioners or assessors power to determine that public improvement shall be made, amount to be raised, territory to be benefited and classes to be assessed. New York Cent. & H. R. R. Co. v. Rochester, 129 App. Div. 805, 114 NYS 779. While legislature may commit to judicial tribunals, investigation of facts, and granting of decrees of divorce, it may exercise such power itself. Mitchell v. Mitchell, 63 Misc. 580, 117 NYS 671. Judicial construction cannot avoid tort consequences of a statute, since sole power to change is in legislature. Burdick v. Kimball [Wash.] 101 P 845. Under Ballinger's Ann. Codes & St. § 1077 (Pierce's Code, § 3644), giving municipal authorities right to sell municipal bonds, court cannot enforce execution of contract for sale of such bonds to particular parties, since such action would constitute usurpation of legislative function. Hansard v. Green [Wash.] 103 P 40. Public policy of New Jersey is creature not of courts but of legislature. Courts have nothing to do with forming it, and can only recognize it like any other matter of public law. Where questions of New Jersey law are involved in actions pending in other states, it is proper for litigant to set them up and prove them in state where action is pending. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

75. State v. Hageman, 123 La. 802, 49 S 530. What can be accomplished by general or special legislation is for the legislature, and its action is not reviewable. State v. Brown [Okl.] 103 P 762. Arguments as to expediency and reasons why provisions made by legislature may not be the most expedient are properly addressed to legislature and will not justify supreme court in holding provisions invalid. State v. Anderson [N. D.] 118 NW 22. When meaning of statute is clear, its consequences of evil can only be avoided by a change in law itself, to be effected by legislature, and not by judicial construction. Florida R. Co. v. Adams [Fla.] 47 S 921. Courts cannot review question whether discretion conferred on board of public officers was properly exercised, in absence of fraud or bad faith. De Merritt v. Weldon, 154 Cal. 545, 98 P 537. Action of legislature in determining classes of property to be assessed for public improvements and amount to be assessed to each class, and in determining what property is benefited by improvement and to what extent, is not reviewable by courts. New York Cent. & H. R. R. Co. v. Rochester, 129 App. Div. 805, 114 NYS 779. Where legislature has authorized passage by municipality of an ordinance of a particular kind, requiring or prohibiting doing of a specific thing, judicial department cannot declare it unreasonable and on that ground set it aside, since such action would be a substitution of judicial judgment as to reasonableness for legislative judgment on same subject. Landberg v. Chicago, 237 Ill. 112, 86 NE

the strictly legislative functions are the power to establish political divisions of the state,[78] to determine what are necessary public structures,[77] to determine the terms,[78] the compensation of public officers,[79] and the mode of the administration of their offices,[80] to prescribe rates of public service corporations,[81] to organize the judicial system [82] and establish rules of evidence [83] and procedure,[84] to establish police regu-

638. Courts cannot interfere with exercise of legislative power to prescribe rule by which compensation of county officers shall be determined. Brookings County v. Murphy [S. D.] 121 NW 793.

76. Legislature has full power to subdivide cities of second class into wards and to provide any method it chooses to attain such result. Pittsburg's Redistricting, 37 Pa. Super. Ct. 525. Acts 1907, p. 340, providing for creation of road improvement districts, making no provision as to how assessment shall be made upon which tax can be levied is inoperative, courts having no power to amend, such power belonging to legislative department exclusively. Road Imp. Dist. No. 1 v. Glover [Ark.] 117 SW 544. In order to exercise power of eminent domain, a municipal corporation must have express authorization of legislature. Gasaway v. Seattle, 52 Wash. 444, 100 P 991.

77. Power to determine kind of public buildings necessary or their reasonable cost is for legislature and municipal authorities and not for courts, although latter have power to determine what are necessary public buildings. Hightower v. Raleigh [N. C.] 65 SE 279. Legislature had power to authorize city of fourth class to erect and maintain a public wharf. Nichols v. Charlevoix Circuit Judge [Mich.] 15 Det. Leg. N. 1047, 120 NW 343.

78. May shorten term of public office, or abolish office during term of incumbent. Graham v. Roberts, 200 Mass. 152, 85 NE 1009. St. Nev. 1907, p. 73, c. 44, providing that governor, lieutenant governor and attorney general shall constitute a board to appoint railroad commission, is a valid exercise of legislative power and is not the exercise of executive functions. Southern Pac. Co. v. Bartine, 170 F 725. Legislative or county board to whom it has delegated power may take away whatever interest candidates, for nomination of district county supervisors at primary election, have in office or in place on ballot. Lahart v. Thompson [Iowa] 118 NW 398. Supplement to Militia Act approved March 2, 1909 (P. L. p. 13), fixing age at which commissioned officers shall retire, is strictly within legislative province and is not in conflict with Const. art. 7, § 1, par. 6, providing that commissioned officers shall be removed from office only by sentence of court-martial. Campbell v. Gilkyson [N. J. Law] 72 A 944.

79. Act 1907, No. 136, amending Kirby's Dig. § 4402, Acts 1907, p. 328, allowing sheriff 75 cents per day for keeping and feeding prisoners, is not void as exceeding power of legislature. Cain v. Woodruff County [Ark.] 117 SW 768. Acts 1907, No. 136, amending Kirby's Dig. § 4402, Acts 1907, p. 328, allowing sheriff 75 cents per day for keeping and feeding prisoners, does not conflict with Const. art 7, § 28, giving county court exclusive original jurisdiction in all matters relating to disbursement of moneys and matters of local concern of the county. Cain v. Woodruff County [Ark.] 117 SW 768.

80. Legislature has power to relieve county treasurer from liability on his bond, on theory that he was acting as an officer. McSurely v. McGrew [Iowa] 118 NW 415. Act May 2, 1905 (P. L. 351), providing that attorney general may appoint a special district attorney in certain cases, is not unconstitutional as depriving elected district attorney of his power, he being a constitutional officer, but his duties not being prescribed by constitution. Commonwealth v. Havrilla, 38 Pa. Super. Ct. 292.

81. Function of rate making is purely legislative, whether exercised by legislature itself or by some subordinate or administrative body to whom power has been delegated. Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 Law. Ed. —. Prescribing of rates for public service corporation or one affected with a public interest is a legislative and not a judicial function. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477. St. Nev. 1907, p. 73, c. 44, authorizing fixing of rates by railroad commission, is not an attempt to exercise judicial functions. Southern Pac. Co. v. Bartine, 170 F 725. Provision of state constitution that legislature is invested with full power to pass laws for correction of abuses and to prevent unjust discrimination and excessive charges by persons or corporations engaged as common carriers in transporting persons and property or performing other service of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures, applies to waterworks companies furnishing water to a city. State v. Tampa Waterworks Co. [Fla.] 48 S 639.

82. Laws 1861, p. 50, c. 31, creating office of police justice for town of Saugerties in so far as it has concurrent jurisdiction with justices of the peace in criminal matters only, is valid. People v. Boice, 118 NYS 500. Laws 1861, p. 50, c. 31, creating office of police justice for town of Saugerties, in so far as it vests in police justice exclusive jurisdiction to hear and determine all criminal cases, is unconstitutional (as depriving justices of jurisdiction). Id. Appointment of prosecuting attorney to assist regular prosecuting attorney as authorized by 2 Rev. St. 1852, p. 386, § 5 (Burns' Ann. St. 1908, § 9407) being exercise of power of court implied from statutory authority to fill temporary vacancies, is properly within regulation of legislature. Clay County Com'rs v. McGregor [Ind.] 87 NE 1.

83. Part of Code 1896, § 4730, as amended by Gen. Acts 1903, p. 345, and Gen. Acts 1907, p. 636, making act of employe in refusing to refund to employer or perform services contracted for, prima facie evidence of intent to defraud, does not invade province of judiciary. Bailey v. State [Ala.] 48 S 498. Statute conferring power to take depositions and commit for refusal to testify is a valid

lation[85] to define and declare offenses,[86] to confirm previous legislation,[87] to amend [88] or suspend the laws,[89] to prescribe rules as to the investment of trust funds,[90] and to exercise the taxing power.[91] The legislature cannot use lands donated by congress to the state for the use of schools for any other purpose.[92]

Legislative powers cannot be delegated.[93] The legislature may delegate regu-

exercise of legislative power. In re Hammond, 83 Neb. 636, 120 NW 203. Congress may empower secretary of commerce and labor to enforce penalty imposed by act March 3, 1903, § 9, for importing aliens afflicted with disease, when official medical examination at port of arrival shows that alien was suffering from disease upon embarkation, existence of which might have been detected at that time. Oceanic Steam Nav. Co. v. Stranahan, 29 S. Ct. 671.

84. N. Dak. Const. § 111, defining jurisdiction of county courts, confers authority upon such courts in probate, testamentary and guardianship matters merely and cannot be made to apply to an attempt to inventory and distribute funds which are no part of decedent's estate. Finn v. Walsh [N. D.] 121 NW 766. Laws 1902, p. 1348, c. 564, being a local act providing for selecting petit jurors is not unconstitutional in so far as it provides for appointment of commissioner of jurors in Kings County, as offending against Const. art. 3, § 18, providing that legislature shall not pass a private or local bill for selecting, drawing, summoning or impaneling grand or petit jurors. Coler v. Brooklyn Daily Eagle, 117 NYS 273. Act 1902, p. 93, No. 66, imposing fine and imprisonment in discretion of court for selling intoxicating liquors without license, is not unconstitutional as not fixing maximum and minimum terms of imprisonment under Const. art. 155, such constitutional provision not precluding legislature from leaving discretion to trial court to fix punishment. State v. Hageman, 123 La. 802, 49 S 530. Method and procedure in taking appeals is a matter of determination for legislature and it may provide for taking appeal without notice. In re McPhee's Estate, 154 Cal. 385, 97 P 878. Under Const. art. 5, § 13, legislature may provide a proper system of appeals and may specify such orders and decisions as shall be directly appealable to supreme court. Utah Ass'n of Credit Men v. Budge [Idaho] 102 P 390.

85. Exercise of police power in determining what regulations of property shall be ordained is a legislative function wholly. McGee v. Kennedy [Ky.] 114 SW 298. Legislature may establish reasonable rules for protection of public health and safety and may empower local or state boards to carry out such rule. State Board of Health v. St. Johnsbury [Vt.] 73 A 581. Legislature may, under police power, clothe county commissioners or any other administrative board with authority to establish drainage district. Gen. Laws 1907, p. 474, c. 153 (Cobbey's Ann. St. 1907, § 5598, et seq). State v. Fuller, 83 Neb. 784, 120 NW 495. Nothing in constitution of Iowa to prevent legislature from passing mulct law (Code, §§ 2447, 2448) regulating and permitting sale of intoxicating liquors under certain restrictions. Campbell v. Jackman Bros. [Iowa] 118 NW 755.

86. Laws 1903, p. 308, c. 132, prohibiting unauthorized use of name or picture of any person for purposes of trade and providing a punishment therefor, is not unconstitutional because it imposes a liability unknown to common law nor because it converts a theretofore innocent act into a criminal offense, power of legislature to define and declare public offenses being unlimited except as restrained by constitutional provisions. Rhodes v. Sperry & Hutchinson Co., 193 N. Y. 223, 85 NE 1097. Pen. Code 1895, arts. 641, 643, 644, relating to abortion, are not unconstitutional and void in not sufficiently describing or defining offense. Jackson v. State, 55 Tex. Cr. R. 79, 115 SW 262.

87. What is within power of legislature to do in the first instance may be subsequently confirmed by it. City of Barre v. Perry [Vt.] 73 A 574.

88. Courts cannot amend Local Option Law (Rev. St. 1899, c. 22, art. 3; Ann. St. 1906, pp. 1733-1740) by correcting oversight of legislature in believing that act providing for election contests for county offices could be made to apply to contests under act, since amendment of statutes is a function of legislature. Kehr v. Columbia, 136 Mo. App. 322, 116 SW 428.

89. Acts 30th Leg. 1907, p. 138, c. 62, punishing abandonment of wife and children, invalid in that it authorizes county judge to suspend punishment, Const. art. 1, § 28, providing that no power of suspending laws shall be exercised except by legislature. Ex parte Smythe [Tex. Cr. R.] 120 SW 200; Burch v. State [Tex. Cr. R.] 120 SW 206; Waller v. State [Tex. Cr. R.] 120 SW 207; Phillips v. State [Tex. Cr. R.] 120 SW 207; Schneider v. State [Tex. Cr. R.] 120 SW 207; Adams v. State [Tex. Cr. R.] 120 SW 208.

90. Adoption of special rules determining the classes of securities proper for the investment of trust funds is within province of legislature, and not of courts. Scoville v. Brock, 81 Vt. 405, 70 A 1014.

91. Laws 1906, p. 265, No. 256, providing that when city council decides that paving improvements when made were for public good and convenience and necessity of individuals, it may order an assessment upon abutting property, where no property is taken or assessment made, is not open to objection that it leaves jurisdictional facts to final determination of city council. Lazelle v. Barre, 81 Vt. 545, 71 A 824.

92. State v. Brian [Neb.] 120 NW 916. Where state has accepted from congress trust as to disposition of funds from public lands granted by Act Cong. July 2, 1862, c. 130, 12 Stat. 503, for support of university and agricultural college, and it has become a trustee of such funds, for sole purpose of applying them to such purposes, it cannot divert them to other purposes. Id.

93. Brookings County v. Murphy [S. D.] 121 NW 793. In order to justify courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that duty or authority so con-

latory power over particular subject-matters to municipal corporations,[94] boards or commissions,[95] to officers,[96] courts,[97] or to the electors,[98] and it may delegate power

ferred is a power that appertains exclusively to legislative department and conferring of it is not warranted by provisions of constitution. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969.

Held void for delegation: Legislature cannot properly delegate authority to a railroad commission to determine what powers a corporation shall possess, but it may clothe such commission with authority to determine whether facts exist rendering corporation competent to exercise its corporate powers in a given case. State v. Railroad Com., 137 Wis. 80, 117 NW 846. Legislature cannot delegate authority to impose a license tax for purpose of raising revenue only upon cities. Johnson v. Great Falls, 38 Mont. 369, 99 P 1059. Village ordinance requiring all saloons to be closed at 11 o'clock and remain closed until 5 o'clock the following morning, unless by special permission of the president, is void as being a delegation of legislative power to regulate saloons. Village of Little Chute v. Van Camp, 136 Wis. 526, 117 NW 1012. Laws 1903, p. 257, c. 132, providing for sprinkling of streets in cities of first and second class and authorizing such cities to levy a tax therefor, is void as being a delegation of proceedings to certain property owners and excluding a hearing to others. Union Pac. R. Co. v. Abilene [Kan.] 98 P 224. Legislature could not, by P. L. 1905, p. 95, c. 92, § 8, authorize governor to appoint special prosecuting attorney to enforce liquor laws. State v. Butler [Me.] 73 A 560. Act May 29, 1908, § 1 (Sess. Laws, 1907-8, p. 453, c. 46), providing that upon recommendation to supreme court governor shall appoint additional judge for time recommended, delegating legislative power to court to fix term of office of such judge, is invalid. In re County Com'rs [Okl.] 98 P 557. Provision of Sunday Civil Appropriation Act of June 4, 1897, c. 2, § 1, 30 Stat. 35, (U. S. Comp. St. 1901, p. 1540), making it a criminal offense to violate rules and regulations made by secretary of interior for protection of forest reserves, is unconstitutional as an attempted delegation of legislative power, since it leaves secretary discretion to prescribe what acts shall constitute crimes. United States v. Grimaud, 170 F 205.

Held not void for delegation: Pub. Laws 1903, c. 1100, § 16, providing that regulations relating to occupation of barbers in cities may be made to extend to towns when adopted by the town council, is not unconstitutional as a delegation of legislative power. State v. Armeno [R. I.] 72 A 216. That owner of stock shipped has option of saying whether it shall be confined for period of 36 hours does not render Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), prohibiting carriers from confining stock in transit for more than 28 consecutive hours without unloading for rest and food, except that period may be extended to 36 hours with owner's consent, unconstitutional as a delegation of power to owner. United States v. Oregon R. & Nav. Co., 163 F 640. Primary Election Law, Laws 1907, p. 151, c. 109, permitting electors to designate choice of candidate for office of United States senator, is not invalid as being an unlawful delegation of power granted to legislature by federal constitution, since legislature still elects senator and act merely gives electors opportunity to express choice of candidates. State v. Blaisdell [N. D.] 118 NW 141. City ordinance forbidding keeping livery stable in block in which two-thirds of buildings are residences, within two hundred feet of any residence without consent of majority of lot owners, is not void as being a delegation of legislative power to property owners of city, which power is exclusively vested in mayor and city council. City of Spokane v. Camp, 50 Wash. 554, 97 P 770. Ky. St. 1909, § 4080, as amended, providing that assessing board shall fix capital stock of foreign corporation in state by capitalizing net income derived in state or capitalize net earnings less value of tangible property, not being intended to provide board with alternative means of arriving at value of franchise, but to require board to consider the two items of gross earnings and net income, is not unconstitutional as being a delegation of taxing power. James v. U. S. Fidelity & Guar. Co. [Ky.] 117 SW 406. Code 1906, §§ 4695-4716, conferring on several counties, through supervisors, jurisdiction of sixteen section lands, is valid. Jefferson Davis County v. James-Sumrall Lumber Co. [Miss.] 49 S 611. Conferring of power on boards of health to take summary action is not a delegation of state legislative power, but merely provision of an agency for carrying out legislative enactment. Kirk v. Wyman [S. C.] 65 SE 387. Act Aug. 6, 1907 (Loc. Laws 1907, p. 758), authorizing commissioner's court of T. county to regulate toll charges, does not delegate legislative power to court. Tallassee Falls Mfg. Co. v. Tallapoosa County Com'rs Ct. [Ala.] 48 S 354.

94. State may not delegate power to municipality to extent that it must be deemed to have perpetually lost control. Straw v. Harris [Or.] 103 P 777; State v. Andrae, 216 Mo. 617, 116 SW 561. Sacramento City Charter, St. 1893, p. 552, c. 7, § 25, subd. 8, delegating to city authority to determine what are nuisances, is within legislative power. Ex parte Junqua [Cal. App.] 103 P 159. Legislature may delegate to counties and townships power to declare operation of stock law. State v. Mathis, 149 N. C. 546, 63 SE 99. Mayor and city council of Macon had authority under delegated power to prohibit keeping of **intoxicating liquors** at clubs, under police power. Wright v. Macon [Ga. App.] 64 SE 807. Sp. Laws 1905, p. 435, c. 49, § 104, conferring authority upon city council to prescribe saloon limits is not void as a delegation of power to council to suspend general license law (Laws 1907, p. 260, c. 138, § 10). Andreas v. Beaumont [Tex. Civ. App.] 113 SW 614.

95. Legislature has authority to delegate power to release county treasurer from liability on his bond for loss of funds, to board of county supervisors, and such delegation is not objectionable as conferring legislative powers upon some other body than lawmaking department of government. McSurely v. McGrew [Iowa] 118 NW 415. Rev. St. § 9742, providing for determination of

appeals as to change in boundaries of school districts by school commissioner and board of arbitrators is not unconstitutional as giving determination of judicial matters to body other than a court. State v. Andrae, 216 Mo. 617, 116 SW 561. Board of supervisors being given power to determine whether drainage district shall be established or not, being one of purely statutory functions, may be given legislative or administrative, as well as judicial, functions. Denny v. Des Moines County [Iowa] 121 NW 1066. Power given to commission under St. 1906, p. 754, c. 520, authorizing railway company to construct tunnel on such one of two routes as commission may direct, is a proper delegation of power. Codman v. Crocker [Mass.] 89 NE 177. Proviso of Laws 1903, p. 272, c. 207, that in certain counties board of county commissioners may in their discretion allow a certain salary to county auditor, must be construed as a limitation upon provision requiring salaries to be computed on basis of taxable valuation, and is not invalid as a delegation of legislative power. Brookings County v. Murphy [S. D.] 121 NW 793. Laws 1907, p. 439, c. 454, providing that railroad commission shall fix proportion of expenses of grade crossings, is not void as a delegation of legislative power. State v. Railroad Com., 140 Wis. 145, 121 NW 919. Delegation by congress to American railway association to fix the standard height of drawbars and to the interstate commerce commission to declare such height not unconstitutional delegation of legislative authority. Under Safety Appliance Act Mar. 2, 1893, § 5. St. Louis, etc., R. Co. v. Taylor, 210 U. S. 281, 52 Law. Ed. 1061. Laws 1907, p. 72, c. 55, providing that Civ. Code 1901, pars. 3993-4009, relating to toll roads, should be construed to include trials, and giving boards of supervisors power to extend franchises, was not invalid as delegation of power to board, since board's act would only make franchise already granted available to holder. Duffield v. Ashurst [Ariz.] 100 P 820. Board of **medical examiners** provided for by Code, c. 17, acts in a ministerial capacity when revoking a license to practice medicine, and may in such capacity determine character of notice and procedure, and such action is not in violation of principle that legislative authority shall not be delegated. Smith v. State Medical Examiners [Iowa] 117 NW 1116. Rev. Laws 1905, § 2316, as amended by Laws 1907, p. 128, c. 117, § 3, relating to registration of licensed dentists, is not unconstitutional as being a delegation of legislative or judicial power to board of **dental examiners.** State v. Crombie, 107 Minn. 166, 119 NW 658. Police Commission Bill, Laws 1907, p. 344, c. 136, providing for **police examining and trial board,** is not void as delegation of power to supervise municipal functions. State v. Edwards, 38 Mont. 250, 99 P 940. St. 1905, p. 289, c. 366, § 1, as amended by St. 1906, p. 425, c. 412, § 9, and St. 1907, p. 153, c. 203, authorizing boards of aldermen in cities and boards of selectmen in towns to **prescribe speed and use of automobiles** upon particular roads, is a proper delegation of police power. Commonwealth v. Kingsbury, 199 Mass. 542, 85 NE 848. Legislature could properly, by Rev. St. 1895, art. 4562, vest board of railroad commissioners with authority to make rules and **regulations for government of railroads,** legislature really enacting law but leaving its execution to commission. Gulf, etc., R. Co. v. State [Tex. Civ. App.] 120 SW 1028. Legislature may not delegate power to make a law prescribing a penalty, but it is competent for legislature to authorize railroad commission to prescribe duties upon which law may operate in imposing a penalty and in effectuating purpose designed in enacting the law. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. Legislature may delegate its power of regulation of railroads to railroad commission. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966. State railroad commission (Sess. Laws 1907, pp. 531-545, c. 208), holding properly delegated power of legislature to **fix rates,** judiciary will not interfere with or control its actions in advance by assuming jurisdiction of quo warranto proceedings to oust members of commission. State Railroad Com. v. People, 44 Colo. 345, 98 P 7. That Const. art. 12, § 18, providing that legislature shall establish reasonable maximum passenger and freight rates, and for organization of railroad commission, does not deprive legislature of right to delegate its power to fix rates. State v. Railroad Com., 52 Wash. 33, 100 P 184. Alabama railroad rate statute (Gen. Acts 1907, p. 711), giving state railroad commission power to change rates fixed by statute, is not a delegation of legislative power, legislature having power to regulate rates under Const. 1901. Railroad Com. v. Central of Georgia R. Co. [C. C. A.] 170 F 225.

96. Act April 24, 1905, P. L. 307, relating to redistricting of cities of second class, is not unconstitutional as violating Const. art. 3, § 7, forbidding local or special legislation regulating practice or jurisdiction of courts, power conferred upon judge to appoint commission to divide city into wards being proper exercise of legislative function. Pittsburg's Redistricting, 37 Pa. Super. Ct. 525. Legislature of Hawaii had power to delegate fixing of schedules and time of running street cars in governor and superintendent of public works, under Rev. Laws Haw. c. 66, § 843. Honolulu Rapid Transit & L. Co. v. Hawaii, 211 U. S 282, 53 Law. Ed. 186. Legislature may, in city charter, delegate to chief of police power to determine whether operator of moving picture show is to be given permit to exhibit and to require him to exhibit films in order to determine whether they are immoral or obscene. Block v. Chicago, 239 Ill. 251, 87 NE 1011. Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1907, p. 511), providing for irrigation by United States of arid public land, is not unconstitutional as delegating legislative authority to secretary of interior in authorizing him to determine what and where irrigation systems shall be maintained and what shall be expended since secretary only executes will of congress. United States v. Hanson [C. C. A.] 167 F 881. Oleomargarine Act May 9, 1902, c. 784, § 4, 32 Stat. 194 (U. S. Comp. St. Supp. 1907, p. 637), imposing internal revenue tax on adulterated butter and authorizing commissioner of internal revenue to make regulations as to what amount of water content will constitute adulterated butter is not a delegation of power. Coopersville Co-operative Creamery Co. v. Lemon [C. C. A.] 163 F 145. Congress may lawfully delegate to commissioner of agriculture authority to make rules and

to determine questions of fact in which the operations of its own acts are made to depend.[99]

(§ 4) *C. Judicial functions.*[1]—See 11 C. L. 696—The powers of the judiciary cannot be invaded by executive or legislative action,[2] hence, judicial functions cannot be conferred upon nonjudicial officers [3] nor can nonjudicial duties be imposed

regulations to suppress and prevent spread of contagious diseases among live stock. Kansas City So. R. Co. v. State [Ark.] 119 SW 288.

97. Legislature had power under Const. art. 11, § 2, as amended, to delegate to county court power to declare incorporation of a port. Straw v. Harris [Or.] 103 P 777. Hurd's Rev. St. 1905, c. 37, § 300, giving judge of municipal court discretion to deliver charge orally or in writing, is not invalid as a delegation of legislative power to determine method of instruction in particular cases. Morton v. Pusey, 237 Ill. 26, 86 NE 601.

98. That part of Texarkana City Charter (Sp. Laws 1907, p. 823, c. 104), limiting number of saloons to be conducted in any one-half block, is not unconstitutional as being in conflict with Const. art. 16, § 20, in that it prohibits sale of intoxicating liquor without first submitting question to vote of people. Ex parte Abrams [Tex. Cr. R.] 120 SW 883. Provision in St. 1908, p. 542, c. 574, amending a certain city charter to take effect when adopted by electors, is valid, such authority being capable of delegation. Graham v. Roberts, 200 Mass. 152, 85 NE 1009. Laws 1907, p. 131, c. 114, providing for commission plan of government to be operative only in cities wherein it is adopted by popular vote, is not void as a delegation of legislative power to electors. Cole v. Dorr [Kan.] 101 P 1016. Fort Worth City Charter (Sp. Laws 1907, p. 81, c. 7), not void as a delegation of power to people, although it provides that, if majority of votes cast at election provided for by act shall be against new charter, act shall be of no effect, true construction being that act should operate immediately, but in event of unfavorable vote act to be of no further effect. Orrick v. Fort Worth [Tex. Civ. App.] 114 SW 677. Laws 1907, p. 566, c. 280, prohibiting live stock running at large to be put in effect by county commissioners upon petition of ten freeholders, is not void as a delegation of legislative power upon freeholders. State v. Storey, 51 Wash. 630, 99 P 878.

99. Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. Supp. 1907, p. 918), not unconstitutional as a delegation of legislative power to shipper in giving him option of allowing stock to be confined for 36 hours without feed or rest. Southern Pac. R. Co. v. U. S. [C. C. A.] 171 F 360.

1. **Search Note:** See notes in 3 C. L. 745; 8 L. R. A. (N. S.) 529; 11 Id. 940; 12 Id. 166.

See, also, Constitutional Law, Cent. Dig. §§ 123-138; Dec. Dig. §§ 67-75; 8 Cyc. 843-857; 6 A. & E. Enc. L. (2ed.) 1053.

2. Legislature cannot deprive courts of their inherent common-law power to punish for contempt. Chicago, B. & Q. R. Co. v. Gildersleeve, 219 Mo. 170, 118 SW 86. Rev. St. 1899, § 1617 (Ann. St. 1906, p. 1199), prohibiting courts from imposing fine in any case exceeding $50 and in limiting imprisonment for contempt to 10 days, is void as placing limitation upon inherent power of courts. Id. Wilson's Rev. & Ann. St. 1903, § 439 (Okl. St. 1893, § 626), providing for removal of city marshals and police officers, is repugnant to Organic Act, § 9, as an encroachment of judicial power. State v. Chaney [Okl.] 102 P 133. Laws 1907, p. 540, c. 373, § 3, making posting of notice of forfeiture of school lands, in office of county clerk, conclusive evidence of proper service of notice, is void as an exercise of judicial functions. Petersilie v. McLachlin [Kan.] 101 P 1014. Pub. Acts 1907, p. 182, No. 144, authorizing suspension of sentence for abandonment of wife or children on giving bond, and that court may pass sentence on failure to comply with bond or further suspend sentence, does not interfere with power of court to impose sentence. People v. Slickle [Mich.] 16 Det. Leg. N. 204, 121 NW 497. Acts 32d Gen. Assem. (Laws 1907, p. 257, c. 255), §§ 1, 2, legalizing acts of supervisors of a county releasing treasurer from liability for loss of funds deposited in failing bank, and providing, after action on bond was brought, that such action was void, and court without jurisdiction, is void as being an assumption of a judicial function by the legislature. McSurely v. McGrew [Iowa] 118 NW 415. Legislature cannot give executive department power to appoint employes of supreme court. State v. Cunningham [Mont.] 101 P 962. St. 1890, p. 385, c. 422, creating a corporation to administer a charitable trust created by a testator who bequeathed his property to a city to found a hospital, and placed no restrictions upon it as to management, was not invalid as an exercise by legislature of judicial power of removal of trustees. Ware v. Fitchburg, 200 Mass. 61, 85 NE 951. Writ of habeas corpus being beyond legislative control or impairment at common law and every court having power to exercise all powers exercised at common law by English court of King's Bench and New York supreme court, judge of appellate division of supreme court may issue writ returnable before court of which he is a member, though district where prisoner is detained is not in district where court is held. People v. Frost, 117 NYS 524. Alabama Declaration of Rights, § 21, declaring that no power of suspending laws shall be exercised except by legislature, has no reference to admitted power and duty of courts to annul and refuse operation to unconstitutional statutes. Western R. Co. v. Railroad Com., 171 F 694.

3. Laws 1907, p. 156, c. 77, authorizing issuance of warrants to search places where intoxicating liquors are kept for sale in violation of law and for their seizure and confiscation, and providing that obligors on replevin bond responsible for value placed upon goods by sheriff is unconstitutional as conferring judicial power on sheriff, in fixing valuation. Dupree v. State [Tex.] 119 SW 301. Laws 1909, p. 300, providing for contest of water permit issued and vesting power in state engineer to cancel permit, does not

on the judiciary.[4] A question respecting boundaries of nations is more a political

vest judicial power in engineer. Speer v. Stephenson [Idaho] 102 P 365. St. 1905, p. 443, c. 368, creating drainage district and providing that board of commissioners equalize assessments for benefits, which determination is final, is not in violation of Const. art. 6, §§ 1, 5, as conferring judicial power on executive officers. People v. Sacramento Drainage Dist. [Cal.] 103 P 207. Laws 1907, p. 566, c. 230, prohibiting live stock running at large to be put in effect by county commissioners upon petition of ten freeholders, is not void as conferring judicial power upon county board, their duties being ministerial rather than judicial. State v. Storey, 51 Wash. 630, 99 P 878. Laws 1907, p. 496, c. 254, subd. 5, providing that question of negligence in actions against railway companies for personal injuries to their employes shall be for jury, does not confer judicial power on jury in violation of Constitution, art. 7, § 2. Kiley v. Chicago, etc., R. Co., 138 Wis. 215, 119 NW 309. Act Mar. 26, 1907 (St. 1907, p. 232, c. 119), § 10, empowering bank commissioners to order bank examiner to take possession of bank, if they shall determine that it is unsafe, does not confer judicial power on an executive board. State v. State Bank & Trust Co. [Nev.] 103 P 407. Act approved Mar. 20, 1905 (St. 1905, p. 493, c. 386), as amended June 13, 1906 (St. 1906, p. 22, c. 19), and Mar. 20, 1907 (St. 1907, p. 745, c. 403), imposing license tax on domestic corporations with certain exceptions, forfeiting charter on failure to pay, and empowering secretary of state to determine whether any delinquent corporation is within exception, such determination being ministerial, is not unconstitutional as conferring judicial power on executive officer. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341.

4. Cobbey's St. 1907, § 8978, in effect providing that one owning and occupying land within and contiguous to a city may petition district court to disconnect unplatted real estate from city limits, is not unconstitutional as vesting court with legislative and administrative power. Bisenius v. Randolph, 82 Neb. 520, 118 NW 127. Sp. Laws 1897, p. 150, c. 110, creating road system as amended by Sp. Laws 1905, p. 262, c. 30, is not invalid as contravening Const. art. 1, § 28, for reason that power of suspending law is vested in commissioner's court, since law gives no such power. Bluitt v. State [Tex. Cr. R.] 121 SW 168. Cobbey's Ann. St. 1907, § 5514, authorizing appeal from decision of county board upon **question of utility of construction of drain,** is void as conferring power to exercise control over administrative bodies upon courts. Johannes v. Thayer County, 83 Neb. 689, 120 NW 176. Act 29th Leg. approved April 13, 1905, p. 116, c. 83, providing that **special terms** may be held **in discretion of** district **judge,** is not unconstitutional in clothing judge with legislative functions. McIntosh v. State [Tex. Cr. R.] [illegible] SW 455. Pub. Acts 1907, p. 433, No. 312, is not void as conferring **power to fix rates** upon courts, if rates fixed by railroad commission are unreasonable. Michigan Cent. R. Co. v. Murphy [Mich.] 16 Det. Leg. N. 168. 120 NW 1073. Charter of cities of metropolitan class (Comp. St. 1907, c. 12a, § 55), providing for **appointment of park commissioners** by judges of district court, is unconstitutional as being imposition upon judiciary of appointing power properly belonging to mayor and council. State v. Nehle, 82 Neb. 267, 117 NW 723.

Functions held judicial: Acts 30th Gen. Assem. p. 61, c. 68, as amended by Acts 32nd Gen. Assem. p. 98, c. 94 (Code Supp. 1907, § 1989a1 et seq.), providing for establishment of drainage districts and giving board of supervisors power to determine whether district will be conducive to public benefit and providing for appeal to district court, giving board legislative powers, does not allow of appeal to district court, that only having judicial functions. Denny v. Des Moines County [Iowa] 121 NW 1066. Courts had jurisdiction to determine whether "good roads amendment" submitted to electors Nov. 6, 1906, was adopted or not. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408. Courts may control head of executive department of state by mandamus or injunction as to duties purely ministerial, or where he assumes to act in violation of constitution. Cooke v. Iverson [Minn.] 122 NW 251. When rights under primary election law are violated, courts may be resorted to for their redress, and mandamus may be used to compel performance of duties which are imposed by statute upon members of congressional or standing committee of a congressional district, if those duties are ministerial and not judicial. D'Alemberte v. State [Fla.] 47 S 489. In exercising jurisdiction to review regulations and actions of boards of public health by injunction or other proceedings, courts cannot invade province of legislative branch but courts must determine whether there is any real relation between preservation of public health and legislative enactment or regulations of board. Kirk v. Wyman [S. C.] 65 SE 387. **Power of construing constitution** devolves upon judiciary. In re Likins [Pa.] 72 A 858. Question as to whether constitution has been complied with in proposing, submitting, and adopting constitutional amendment is a judicial question. McBee v. Brady, 15 Idaho, 761, 100 P 97. A decision that a statute is unconstitutional or that its operation upon a particular person is forbidden by constitution, and a subsequent decree that it shall not be executed as to such person, is the exercise of a judicial function. Western R. Co. v. Railroad Com., 171 F 694. Meaning of phrase "otherwise interested" in a railroad corporation within meaning of Pub. St. 1901, c. 155, § 1, disqualifying certain persons from eligibility to hold office of railroad commissioner. In re Opinion of the Justices [N. H.] 72 A 754. **Determination** by county court **of amount of inheritance tax** imposed by Laws 1903, p. 65, c. 44, as amended by p. 403, c. 249, and its assessment against estate, is a judicial function. Beals v. State, 139 Wis. 544, 121 NW 347. **Correctness of commercial values** as shown by automatic computing scales, of articles when sold by fraction of a cent, is a judicial question. Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 NE 870. Power of **determining** and prescribing **what are just and reasonable rates** in interstate commerce is in a limited way conferred upon Interstate Commerce Commission, but, as

than a legal question and in its discussion courts must respect pronounced will of legislature.[5]

§ 5. *Relative powers of federal and state or other subordinate governments.*[6]—See 11 C. L. 696—Within its granted powers, the federal government is supreme, and, in such matters, state legislation must give way to federal legislation. This rule as applied to federal bankruptcy acts,[7] patents,[8] regulation of interstate commerce,[9] recognition of foreign judgments,[10] extradition,[11] treaties,[12] import duties,[13] and other matters of federal administration and regulation, which are discussed in appropriate topics elsewhere.

§ 6. *Police power in general.*[14]—See 11 C. L. 696—The police power is the power of the state [15] to pass all laws which in the contemplation of the constitution promote the public welfare.[16] Whether such legislation is within police power must be determined by each particular case.[17] In the exercise of its police power, the state

commission acts only as a legislative or administrative board, its determination does not preclude judicial inquiry into justness and reasonableness of rates within meaning of constitutional guaranty, for that is a judicial question. Missouri, K. & T. R. Co. v. Interstate Commerce Com., 164 F 645. Power conferred upon public service commission to prescribe transportation rates is of a judicial nature, and is not necessarily nonjudicial because it is a rule of conduct for the future. People v. Willcox, 194 N. Y. 383, 87 NE 517. Court, for purpose of requiring complainant, who has obtained preliminary injunction against alleged confiscatory rates to do equity, may fix maximum rates beyond which it shall not go during pendency of litigation, and may make compliance with such maximum a condition on which temporary injunction will be continued. In re Arkansas Railroad Rates, 168 F 720.

Nonjudicial: Power of appointment of city park commissioners is not exercise of judicial function. State v. Neble, 82 Neb. 267, 117 NW 723. Constitutionality of Primary Election Law, Laws 1907, p. 151, c. 109, permitting electors to designate choice of candidate for United States senator, being a federal question, is not a judicial question for state courts. State v. Blaisdell [N. D.] 118 NW 141. Const. art. 4, § 9, having made state senate sole judge of qualifications, elections, and returns of its members, supreme court can neither determine a basis for its decision nor review it when made. Attorney General v. Seventh Senatorial Dist. Board of Canvassers [Mich.] 15 Det. Leg. N. 923, 118 NW 584. Courts have nothing to do with policy of law. Coler v. Brooklyn Daily Eagle, 117 NYS 273. Police judge of city of second class, while exercising judicial functions, is not a repository of judicial power within meaning of Const. art. 3, § 1, providing in whom judicial power shall be vested. State v. Keener [Kan.] 97 P 860. Giving decision by appellate court of District of Columbia upon acquittal in criminal case is concerned only with most questions, has no effect on verdict, and is not a judicial function. United States v. Evans, 213 U. S. 297, 53 Law. Ed. —. P. S. 5496, giving state board of health power to prohibit any village from using water from any source whenever in board's opinion water is so contaminated as to endanger public health, is constitutional. State Board of Health v. St. Johnsbury [Vt.] 73 A 581. Police court organized for purposes of local municipal judicature is not a repository of judicial power. State v. Keener [Kan.] 97 P 860.

5. Location of gambling house in Red River between Arkansas and Texas. De Loney v. State [Ark.] 115 SW 138. Since question as to boundaries between general government and one of the states, or between two states, is a judicial one, where state of Arkansas asserted authority over "Choctaw strip" and accepted it from federal government by Acts 1905, p. 124, its courts will treat such territory as part of their jurisdiction. State v. Bowman [Ark.] 116 SW 896.

6. **Search Note:** See note in 3 C. L. 746.

See, also, Constitutional Law, Cent. Dig. §§ 31, 49; Dec. Dig. §§ 27, 82; 8 Cyc. 770-774, 877.

7. See Bankruptcy, § 1.

8. See Patents.

9. See Commerce.

10. See Foreign Judgments.

11. See Extradition.

12. See Treaties.

13. See Customs Laws.

14. **Search Note:** See notes in 3 C. L. 748, 749; 5 Id. 629; 16 L. R. A. 400; 32 Id. 853; 1 L. R. A. (N. S.) 184, 918, 926, 928, 932; 2 Id. 859; 7 Id. 321; 15 Id. 915; 25 A. S. R. 882, 888; 78 Id. 236; 1 Ann. Cas. 747; 3 Id. 495; 4 Id. 270; 7 Id. 551; 8 Id. 437; 10 Id. 528; 11 Id. 728.

See, also, Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81; 8 Cyc. 863-874; 22 A. & E. Enc. L. (2ed.) 914.

15. Police power being reserved to states, congress had no power to pass Act February 20, 1907 (34 Stat. 898, c. 1134), § 3, for criminal punishment of mere harboring alien woman for purpose of prostitution within three years of entry into United States. Keller v. U. S., 213 U. S. 138, 53 Law. Ed. —.

16. State v. Railroad Com., 140 Wis. 145, 121 NW 919; Mutual Loan Co. v. Martell, 200 Mass. 482, 86 NE 916. State may require individual to use his property so that public health and safety shall be conserved. State v. Whitlock, 149 N. C. 542, 63 SE 123. Regulation of billboards. Id.

17. Ex parte Thomas [Cal. App.] 102 P 19.

may make such regulations as are conducive of the health,[18] morals,[19] safety,[20] con-

18. Act May 29, 1901 (P. L. 327), prohibiting manufacture and **sale of oleomargarine,** butterine, and similar products when colored in imitation of yellow butter is constitutional. Commonwealth v. McDermott [Pa.] 73 A 427. Act April 11, 1899, P. L. 38, giving school directors powers to act as boards of health and to use school funds to prevent **spread of contagious diseases,** is based upon a lawful expenditure of money for support of public schools, and is a valid exercise of police power. Nether Providence School Dist. v. Montgomery, 38 Pa. Super. Ct. 483. Act May 28 (Laws 1907, p. 1043) for **prevention of contagious diseases among live stock** is a valid exercise of police power. Kansas City So. R. Co. v. State [Ark.] 119 SW 288. A city has power to provide, by proper ordinance, regulations requiring removal at suitable intervals of deposits from **unscwered privies** and may grant exclusive right to do work at compensation to be fixed by city and paid for by occupant of premises. Dreyfus v. Boone [Ark.] 114 SW 718. Laws 1893, p. 671, c. 338, § 70E, as amended, Laws 1902, p. 39, c. 30; Laws 1905, p. 364, c. 171, prohibiting **sale of carcasses of calves** less than 4 weeks old, is a valid exercise of police power. People v. Dennis, 114 NYS 7. Removal of stagnant water through agency of **drainage** and levee district is within police power. Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 36, 86 NE 163. Rev. Codes, § 1566, authorizing state board of health to prohibit discharge of sewage into a stream, if detrimental to public health, is within police power. Miles City v. Board of Health [Mont.] 102 P 696. Wilson's Rev. & Ann. St. 1903, § 624, prohibiting maintenance of **slaughter houses** within certain distance of city limits of first-class city, is within police power. Kuchler v. Weaver [Okl.] 100 P 915.

19. Ordinance prohibiting **pool and billiard halls** is within police power. City of Corinth v. Crittenden [Miss.] 47 S 525. City ordinance providing for **inspection** of films **of moving picture shows** being for purpose of securing decency and morality in moving picture business is within police power. Block v. Chicago, 239 Ill. 251, 87 NE 1011. Legislature cannot under police power prohibit possession or **use of intoxicating liquor** by one for his own necessity or comfort. Commonwealth v. Campbell [Ky.] 117 SW 383. Warrant under city ordinance, charging accused with bringing into city intoxicating liquor exceeding one quart in quantity, but not negativing idea that accused had it for his own use, quashed. Id. Pen. Code 1895, § 428, which prohibits soliciting or taking of orders for sale of intoxicating liquors in counties where such sales are prohibited is a valid police regulation. Rose v. State, 4 Ga. App. 583, 62 SE 117. Acts 1904, p. 214, c. 116, allowing chartered social club to sell liquor to member is within police power, though abridging police power of cities to impose license tax. City of Norfolk v. Board of Trade & Business Men's Ass'n [Va.] 63 SE 987. Since passage of Wilson Act (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p 3177]). removing in large measure intoxicating liquors from protection of federal commerce clause, police power of state extends to prohibition of advertising, within state, of intoxicating liquors kept for sale in another state under Rev. St. 1903, c. 29, § 45. State v. Bass Pub. Co., 104 Me. 288, 71 A 894. May license sale of intoxicating liquors. Appeal of Allyn, 81 Conn. 534, 71 A 794. Liquor Tax Law (Laws 1896, p. 66, c. 112), providing that traffic in liquor shall not be permitted in any building on same street within two hundred feet of a building occupied exclusively as a church, constitutes a valid exercise of police power of state to regulate or prohibit liquor traffic. In re Hering, 117 NYS 747. Laws 1907, p. 326, making it unlawful to solicit orders for intoxicating liquors in prohibition territory through agents or advertisements, is a valid exercise of the police power. Zinn v. State [Ark.] 114 SW 227. Rev. St. 1899, § 3011 (Ann. St. 1906, p. 1726), prohibiting sale of intoxicating liquor on **Sunday,** is a reasonable regulation of liquor traffic. State v. Grossman, 214 Mo. 233, 113 SW 1074. State may under constitution regulate sale of liquor or any other use in itself inimical to public health, morals or safety. Commonwealth v. Campbell [Ky.] 117 SW 383. Municipal ordinance, imposing license tax upon persons selling beer by barrel, half barrel or quarter barrel, is a valid exercise of state police power under Wilson Act, Aug. 8, 1890 (26 Stat. 313, c. 728, U. S. Comp. St. 1901, p. 3177) regardless of fact that city derived revenue therefrom. Phillips v. Mobile, 208 U. S. 472, 52 Law. Ed. 578. Act May 13, 1887, P. L. 108, authorizing granting of license for sale of spirituous, brewed and malt liquors at retail, is constitutional as exercise of police power. Gregg's License, 36 Pa. Super. Ct. 633. That part of Texarkana City Charter (Sp. Laws 1907, p. 823, c. 104), **limiting number of saloons** in any one-half block, constitutes a valid exercise of police power in regulating liquor traffic. Ex parte Abrams [Tex. Civ. R.] 130 SW 883. Rev. St. 1903, c. 29, § 45, forbidding **publication of advertisements** in papers, published within state, of intoxicating liquors kept for sale in another state, is a valid exercise of police power applying to publication of newspapers. State v. Bass Pub. Co., 104 Me. 288, 71 A 894. Laws regulating sale of intoxicating liquors and **requiring bond** from seller to keep orderly house is within police power, and applies to sales of liquors by social clubs. City of Spokane v. Baughman [Wash.] 103 P 14. Ordinance regulating sale of **"near beer,"** as to closing hours, screens and loitering, is within police power. Campbell v. Thomasville [Ga. App.] 64 SE 815. Act Aug. 13, 1907 (Gen. Acts 1907, p. 696), prohibiting sale of beverages produced from maltose or glucose is within police power. Elder v. State [Ala.] 50 S 370. City ordinance relating to **"locker clubs"** is a reasonable exercise of police power. Wright v. Macon [Ga. App.] 64 SE 807.

20. Act July 1, 1907 (Laws 1907, p. 510), regulating operation of **motor vehicle** is a valid exercise of police power. Ayres v. Chicago, 239 Ill. 237, 87 NE 1073. St. 1906, p. 289, c. 366, § 1, as amended by St. 1906.

venience and general welfare and prosperity [21] of the people,[22] though they may incidentally interfere with liberty or affect property rights,[23] but such interference

p. 425, c. 412, § 9, and St. 1907, p. 153, c. 203, authorizing boards of aldermen in cities and boards of selectmen in towns to make special regulations as to speed of automobiles and as to their use upon particular roads, including their complete expulsion therefrom is a valid exercise of police power. Commonwealth v. Kingsbury, 199 Mass. 542, 85 NE 848. Legislature may pass laws regulating speed of automobiles upon highways. Id. It is within police power to regulate **height of buildings** in cities and **mode of construction** if such regulations are reasonable. Welch v. Swasey, 214 U. S. 91, 53 Law. Ed. —. Police power extends to enactment of ordinances relating to erection of buildings in prohibited area and to destruction of buildings erected contrary to ordinance. Davison v. Walla Walla, 52 Wash. 453, 100 P 981. Regulations as to construction of buildings, where a great number of people gather, to provide for their safety, are within police power. McGee v. Kennedy [Ky.] 114 SW 298. **Fire Marshal Law,** Acts 1907, p. 1538, c. 460, providing for investigation of fires and for expense of such investigation to be borne by fire insurance companies doing business in state, is a police measure within power of general assembly. Rhinehart v. State [Tenn.] 117 SW 508. Police power extends to establishment of fire limits and regulating construction of buildings thereon. Davison v. Walla Walla, 52 Wash. 453, 100 P 981. Acts 1907, p. 336, making railroad companies responsible for damage caused by fire, is constitutional under police power. St. Louis & S. F. R. Co. v. Shore [Ark.] 117 SW 515. Okl. Sess. Laws 1899, p. 186, excluding from territory **illuminating fluids** having specific gravity of more than 46 Baume, is a valid exercise of police power, although thereby some oils would be excluded which would be safe although having a specific gravity of more than 46 Baume. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. —. Laws 1907, p. 400, c. 250, regulating sale of **black powder** for use **in coal mines,** and prescribing size of cans and manner of sealing, is a valid exercise of police power. Ex parte Williams [Kan.] 98 P 777. Act May 2, 1907, P. L. 157, requiring newspapers to print in a conspicuous place **name** of proprietors, **publishers** and managing editors, is a valid exercise of police power for prevention of breaches of peace and riots through publication of libelous and improper articles. Commonwealth v. Short, 38 Pa. Super. Ct. 562. Rev. St. 1874, c. 114, § 46, relating to fencing and operation of railroads and requiring railroads to construct and maintain highways and **street crossings** and its approaches, is a valid exercise of police power and applies to railroads built before as well as after its passage. People v. Illinois Cent. R. Co., 235 Ill. 374, 85 NE 606. Laws 1887, p. 237, § 1, making city or county liable for damages done by **mobs,** is a valid exercise of police power. Sturges v. Chicago, 237 Ill. 46, 86 NE 683.

21. Acts 30th Gen. Assem. 1904, p. 66, c. 68, providing for establishment of drainage district, is within police power. Mason City & Ft. D. R. Co. v. Wright County Sup'rs [Iowa] 121 NW 39. Ordinance prohibiting hack solicitors from soliciting business from passengers in railway stations at certain times, adopted under Pierce's Code, § 3732, subds. 34, 36 (Ballinger's Ann. Codes & St. § 3732), is a valid exercise of police power. City of Seattle v. Hurst, 50 Wash. 424, 97 P 454. Village Law, § 170 (added by Laws 1907, p. 126, c. 93, § 1), providing that, where property has been platted and streets or roads have been laid out in such manner that village cannot accept same by dedication, board of trustees may light and care for same, is not in violation of Const. art. 8, § 10, providing that no village shall incur indebtedness except for village purposes, such act being within police power of village. Smith v. Smythe, 132 App. Div. 71, 116 NYS 1071. Legislature may include contiguous tracts, even in different counties, in one drainage district for more convenient exercise of police power. State v. Fuller, 83 Neb. 784, 120 NW 495. That part of Laws 1908, p. 1221, c. 429, forbidding accelerating or increasing flow of percolating waters or natural carbonic acid gas from wells bored into rock by pumping or any artificial contrivance, when object of so doing is to extract or collect carbonic acid gas for purpose of marketing same, is a valid exercise of state police power. Hathorn v. Natural Carbonic Gas Co., 194 NY 326, 87 NE 504. Conn. Gen. Laws, §§ 4868, 4869, providing that retail dealers shall not as against creditors sell stock in trade at single transaction without recording notice thereof seven days previous to sale, is a valid exercise of police power. Lemieux v. Young, 211 U. S. 489, 53 Law. Ed. 295. Police power extends to ordinance making it unlawful to hold public assemblages or to make public speeches in public parks. Ex parte Thomas [Cal. App.] 102 P 19. Pen. Code, § 267, prohibiting sale of property on Sunday is a valid exercise of police power. Silverberg Bros. v. Douglass, 62 Misc. 340, 114 NYS 824. Legislature may in exercise of police power prohibit sale of goods unless in original package under manufacturer's label. People v. Luhrs, 127 App. Div. 634, 111 NYS 749. Abatement of nuisances is an exercise of police power. Louisa County v. Yancey's Trustee [Va.] 63 SE 452. Laws N. M. 1903, p. 51, c. 33, requiring actions for personal injuries to be brought in territory of New Mexico and 90 days' notice of injury served upon defendant as condition precedent to recovery, is constitutional as a valid exercise of police power. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75.

22. Rights of individuals, both in their persons and in use of their property, are subject to exercise of police power. Home for Aged Women v. Com., 202 Mass. 422, 89 NE 124. Anti-trust Act March 3, 1899 (Acts 1899, p. 257; Burns' Ann. St. 1908, § 3884), is a reasonable exercise of police power although restraining general right of contract. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823.

23. Restrictions upon use of property and even its destruction without compensation

cannot be extended so as to affect constitutional rights.[24] Laws for the prevention of fraud,[25] the protection of labor,[26] preservation of game,[27] the regulation of public service corporations,[28] weights and measures,[29] prohibiting trusts and monopo-

is allowable in exercise of police power if dangerous to public. Crocker v. Champlin, 202 Mass. 437, 89 NE 129. State may under police power in Acts 32nd Gen. Assem. Iowa, 1907, p. 100, c. 95, require railway company, crossing drainage district, to erect bridges without allowing damages. Chicago, B. & Q. R. Co. v. Appanoose County Sup'rs, 170 F 665. While no one may be deprived of anything recognized by law as being property without notice and opportunity to defend it, articles which from their very nature are only adapted to illegal uses may be destroyed by court under police power. State v. Derry [Ind.] 85 NE 765.

24. Legislature in exercise of police power may enact valid laws requiring each citizen to use his property so as not to injure others, regardless of U. S. Const. Amend. 14, prohibiting infringement of right of contract and provisions depriving him of property without due process of law. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Full Crew Statute (Acts 1907, p. 18, c. 11) held not to affect interstate commerce to extent of making it invalid. Pittsburgh, etc., R. Co. v. State [Ind.] 87 NE 1034. Fixing amount of fines for violation of state legislation is within police power. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Laws 1907, p. 263, c. 185, providing that all persons engaged in selling steamship or railroad tickets for transportation to or from foreign countries, who in conjunction shall carry on business of transmitting money, shall, before entering into such business, give bond, conditioned for faithful holding and transmission of such money, is not unconstitutional as an unjustifiable interference with rights of citizens, it being a reasonable regulation for purpose of preventing imposition and fraud. Musco v. United Surety Co., 132 App. Div. 300, 117 NYS 21. Property cannot be confiscated under guise of exercise of police power. Durgin v. Minot [Mass.] 89 NE 144. Police power of state cannot justify reduction by law of compensation which insurance company agreed to pay its general agent, and Laws 1906, p. 794, c. 326, § 33, will not be construed to have such effect. Boswell v. Security Mut. Life Ins. Co., 193 N. Y. 465, 86 NE 532.

25. Pen. Code § 364, prohibiting sale of goods represented to be the manufacture of any other than seller unless in original package, is valid. People v. Luhrs, 195 N. Y. 377, 89 NE 171.

26. Ark. Acts 1905, c. 219, § 1, providing that miners employed at quantity rates shall be paid according to weight of coal before it is screened, is a valid exercise of police power. McLean v. Arkansas, 211 U. S. 539, 53 Law. Ed. —. Sayles' Ann. Civ. St. 1897, arts. 4560g, 4560h, providing that all railroad employes entrusted with authority of superintendence shall be vice principals and prescribing who are fellow-servants, is a legitimate exercise of police power. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Police power extends to regulation of children employed in factories. Inland Steel Co. v. Yedinak [Ind.] 87 NE 229. Fact that by Laws 1907, p. 1076, c. 506, amending Penal Code, § 384h, by adding criminal penalty for violation of Laws 1906, p. 1395, c. 506, § 3, **limiting a day's work** for municipal corporations to eight hours, does not affect validity of said act. People v. Metz, 194 N. Y. 145, 86 NE 986. That provision of the Act of Feb. 28, 1908 (99 O. L. 30) which makes it an offense to permit girls under eighteen years of age to work more than eight hours in one day in factories, etc., is constitutional. Bolton v. Ohio, 11 Ohio C. C. (N. S.) 472. Laws 1906, p. 1395, c. 506, providing that no workman upon public work shall be allowed or required to work more than eight hours in any one calendar day, is constitutional as being within power of legislature to fix and regulate hours of labor in public works, expressly given by constitutional amendment to permit such legislation. People v. Metz, 193 N. Y. 148, 85 NE 1070. St. 1908, p. 714, c. 605, § 7, providing that no **assignment of wages** to be earned in future to secure a loan of less than $200 shall be valid unless accepted by employer and recorded, is a valid exercise of police power. Mutual Loan Co. v. Martell, 200 Mass. 482, 86 NE 916. St. 1908, p. 714, c. 605, § 8, providing that no assignment of wages to be earned in future shall be valid when made by a married man unless with written consent of wife, is a valid exercise of police power. Id. Burns' Ann. St. 1908, § 7987, prohibiting assignment of future wages and imposing a penalty for its violation, is constitutional. Chicago & E. R. Co. v. Ebersole [Ind.] 87 NE 1090.

27. N. Y. Laws 1900, c. 20, forbidding possession of game out of season being for protection of game in state in interest of food supply. People v. Hesterberg, 29 S. Ct. 10. Gen. Laws 1907, pp. 278, 279, c. 144, §§ 1, 5, forbidding sale of wild game. Ex parte Blardone, 55 Tex. Cr. R. 189, 115 SW 838. Laws 1907, p. 912, prohibiting fishing with nets, is valid, state having power to regulate catching of fish. Fritz v. State [Ark.] 115 SW 385.

28. Acts 1908, p. 72, c. 280, requiring telegraph companies to show time of transmission and receipt of telegrams, being applicable only to intrastate messages, is a proper exercise of police power. Postal Telegraph-Cable Co. v. State, 110 Md. 608, 73 A 679. State in exercise of police power for protection of public safety and convenience may prescribe reasonable regulations for conduct of business of telegraph companies within its jurisdiction. State v. Western Union Tel. Co. [Ind.] 87 NE 641. As to delivery limits. Id. The federal law, providing for automatic couplers on cars moving interstate traffic, and the state law, providing for automatic couplers on cars moving state traffic, are not contradictory or in conflict, and the constitutionality of the state statute (98 O. L. 75) cannot be successfully attacked on that ground. State v. Detroit, T. & I. Co., 7 Ohio N. P. (N. S.)

lies,[30] the conduct of insolvent banks,[31] providing for the licensing of peddling,[32] and occupations requiring knowledge or skill,[33] are within the police power. To constitute a valid police regulation, a law must be reasonable [34] and bear a substan-

541. The Ohio Automatic Coupler Act (98 O. L. 75) is not in conflict with the federal act relating to the same subject, and is not unconstitutional because relating to the same subject-matter. State v. Lake Shore & M. S. R. Co., 7 Ohio N. P. (N. S.) 571. Regulation of intrastate commerce by common carriers is the exercise of inherent and reserved power of state. While constitution expressly authorizes regulation of common carriers, it also expressly provides for protection of property rights against unlawful invasion. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969.

29. It is within police power of state to forbid sale of incorrect automatic computing scales. Moneyweight Scale Co. v. McBride, 199 Mass. 503, 85 NE 870.

30. Act March 21, 1906, p. 429, c. 117, known as the "Pooling Act," and "Anti-Trust and Pooling Statute" of 1906, are both limited, by Const. § 198, to extent that no person or corporation engaged in a pool-trust or combine is allowed to agree to, or to raise or depreciate price of any article above or below its real value. Commonwealth v. International Harvester Co. [Ky.] 115 SW 755. Rev. St. 1899, §§ 8965, 8966, 8971, 8978 (Ann. St. 1906, pp. 4150, 4152, 4153, 4157), prohibiting trusts and monopolies and providing for forfeiture of licenses issued to foreign corporations for violation thereof, are an exercise of police power and could be enacted after issuance of such licenses. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Anti-competition law (Sess. Laws 1907, p. 490, c. 157), prohibiting unfair commercial discrimination between different sections, communities, or localities, or unfair competition, is a valid exercise of police power. State v. Drayton, 82 Neb. 254, 117 NW 768. Combinations in restraint of competition are an acknowledged subject of police regulation. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Laws 1900, p. 125, c. 88, prohibiting trusts and combinations in restraint of trade, is not unconstitutional. State v. Jackson Cotton Oil Co. [Miss.] 48 S 300. Wilson's Rev. & Ann. St. Okl. 1903, c. 83, prohibiting combinations in restraint of trade, is not in conflict with federal anti-trust law and is valid legislative power extending to all rightful subjects of legislation not inconsistent with U. S. Constitution. Territory v. Long Bell Lumber Co. [Okl.] 99 P 911.

31. Legislature within lawful exercise of police power can impose penalty for conduct of insolvent bank, when bank or banker is in fact insolvent. Ex parte Pittman [Nev.] 99 P 700.

32. Laws Wash. 1909, p. 767, requiring license from peddlers, is within police power. Ex parte Crowder, 171 F 250. Rev. St. 1899, §§ 8861, 8862 8868 (Ann. St. 1906, pp. 4118-4120), prohibiting peddling without license, constitute a valid exercise of police power. State v. Webber, 214 Mo. 272, 113 SW 1054. Laws 1905, p. 222, as amended by Laws 1907, p. 281, licensing itinerant venders of drugs and prescribing penalty for sale without license, was a proper exercise of police power. State v. Miller [Or.] 103 P 519.

33. Acts 1904, p. 100, c. 34, requiring applicants for certificates to practice medicine to pass examination before state board of health, is a valid exercise of police power. Webster v. State Board of Health [Ky.] 113 SW 415. Rev. Laws 1905, § 2315, as amended by Laws 1907, p. 128, c. 117, § 2, relating to requirement that dentists be licensed, is an appropriate exercise of police power. State v. Crombie, 107 Minn. 171, 119 NW 660. Pub. Laws 1903, c. 1100, p. 26, § 4, authorizing members of board of examiners to enter and inspect barber shops, is a valid exercise of police power. State v. Armeno [R. I.] 72 A 216. Licensing of dentists under Laws 1897, p. 203, is within police power of municipalities. Johnson v. Great Falls, 38 Mont. 369, 99 P 1059. Police ordinance requiring junk dealers to keep book showing purchases and description of seller being reasonable was a valid exercise of police power. Grossman v. Indianapolis [Ind.] 88 NE 945. Code Va. 1904, c. 78, §§ 1754-1766, regulating practice of pharmacy, is invalid police regulation. Bertram v. Com., 108 Va. 902, 62 SE 969.

34. Ex parte Junqua [Cal. App.] 103 P 159. City ordinance under Sacramento City Charter, St. 1893, p. 552, c. 7, § 25, subd. 8, making escape of soot from smokestacks a nuisance, is reasonable exercise of police power. Id. St. 1894, p. 92, c. 119, authorizing board of health to require pavement of private passageways, is invalid as unreasonably invading rights of citizen in ownership and use of property. Durgin v. Minot [Mass.] 89 NE 144. Nothing in Gen. St. 1902, § 2039, as amended, relating to obstruction of street by railway trains and fixing an arbitrary sum as measure of recovery, held constitutional. Tracy v. New York, etc., R. Co. [Conn.] 72 A 156. Municipal ordinance of City of Chicago, providing for letting contract, for removal of manure, to highest bidder, passed in pursuance to general authority given by act of legislature, held void as being unreasonable. Landberg v. Chicago, 237 Ill. 112, 86 NE 638. Rev. St. § 2833, requiring levy of per capita tax on dogs upon real estate where dogs kept, and collection thereof, notwithstanding owner of real estate had no knowledge that dogs were kept thereon and was not consenting thereto, is an arbitrary and unreasonable exercise of police power and void. Mirick v. Gims, 79 Ohio St. 174, 86 NE 880. Anti-Pass Law, Laws 1907, p. 342, c. 93, prohibiting issuance, acceptance and use of free transportation, is a proper and reasonable exercise of police power. State v. Martyn, 82 Neb. 225, 117 NW 719. Building Code City of New York, § 144, absolutely prohibiting erection of any sky sign exceeding nine feet in height above cornice or front wall, is not a valid exercise of police power. People v. Murphy, 129 App. Div. 260, 113 NYS 855. City ordinance, requiring theatre to have exits from main

tial relation to the public welfare,[35] and cannot be passed for the mere purpose of raising revenue.[36] The police power cannot be abdicated [37] but may be delegated to municipal corporations.[38]

§ 7. *Liberty of contract and right of property* [39] See 11 C. L. 699 cannot be invaded except when the public welfare requires it.[40] The free right of contract does

auditorium floor, one in front at least 12 feet in clear, two in sides at least 5 feet, front corridor to be fireproof as wide as exit and not over 30 feet long, held reasonable. McGee v. Kennedy [Ky.] 114 SW 298. Prohibition of billboards upon lot line, if safe, is unreasonable. State v. Whitlock, 149 N. C. 542, 63 SE 123. Section 33 of "an act to provide for the registration, identification and regulation of motor vehicles" (99 O. L. p. 538) which provides that "all actions for injury to the person or property caused by negligence of the owner of any automobile, included within the provisions of this act, may be brought by the party injured against the owner of such automobile in the county wherein such injured party resides" is an arbitrary, unjust and unreasonable classification, creates a burden and subjects a class of citizens only to certain liabilities and requirements to respond to a suit in any county in the state, which is required of no other class, and is a denial to them of the equal protection of the law, and such provisions in said act are, therefore, unconstitutional and void. Hobilt v. Gorman, 8 Ohio N. P. (N. S.) 270.

35. Legislation may, under police power, enact laws which have a tendency to promote public welfare, comfort, health, safety or morals. Massie v. Cessna, 239 Ill. 352, 88 NE 152. State may, under police power, determine what is dangerous to public health, morals and safety. McCord v. State [Okl. Cr. R.] 101 P 280. Rules of board of registration in embalming passed pursuant to St. 1905, p. 483, c. 473, and requiring burial of human dead body to be made by licensed embalmer, is not a valid exercise of police power, since there is no such connection between requiring all undertakers to be licensed embalmers and promotion of public health as to bring such requirement within police power of state. Wyeth v. Cambridge City Board of Health, 200 Mass. 474, 86 NE 925. Laws 1908, p. 1041, c. 359, adding § 31c to liquor tax law, providing for seizure and destruction of liquor unlawfully kept for sale, together with vessels in which liquor is contained, is not a valid exercise of police power since where vessels are owned by another than owner of liquor then destruction is not reasonably connected with main purpose of law. Clement v. Liquors Seized at 188-190 Second Ave., 62 Misc. 27, 115 NYS 162. Rev. St. 1899. § 5969, and ordinance passed thereunder, providing for tax of $2.50 on $100 valuation for public sewer system, cannot be upheld as an exercise of police power, tax applying to both real and personal property and not being an assessment against lands for benefits accruing thereto. Union Trust Co. v. Pagenstecher [Mo.] 119 SW 1103.

36. Police regulations must be directed solely to legitimate regulation of subject-matter undertaken; they cannot be passed in order to raise revenue. Dreyfus v. Boone [Ark.] 114 SW 718. Ordinance for cleaning unsewered privies providing that contract be let to highest bidder held a scheme for raising revenue passed under guise of police regulation. Id.

37. State cannot by express grant divest itself of its police power. Chicago, etc., R. Co. v. Douglas County, 134 Wis. 197, 114 NW 511. State cannot divest itself of its police power, and prescription does not run against such right. Miles City v. Board of Health [Mont.] 102 P 696.

38. Police power may be exercised by state and municipality concurrently. Johnson v. Great Falls, 38 Mont. 369, 99 P 1059. State may delegate police power to subordinate boards and commissions, and reasonable and just exercise by them of delegated power will be upheld. Downs v. Swann [Md.] 73 A 653. Creation by legislative authority of boards of health, with discretion lodged in them of summary inquiry and action, is a reasonable exercise of police power. Kirk v. Wyman [S. C.] 65 SE 387. The delegation of power to the board of any agricultural society, to determine who shall carry on business within one-fourth of a mile of a fair ground during course of fair, is an unlawful restriction upon a lawful business, giving the board the power to destroy competition and create a monopoly and to deprive a citizen of the right guaranteed to him by Bill of Rights, art. 1, § 1, of enjoying and possessing his property. Markley v. Ohio, 12 Ohio C. C. (N. S.) 81.

39. Search Note: See notes in 3 C. L. 751; 14 L. R. A. 325; 17 Id. 853; 21 Id. 789; 65 Id. 33; 7 L. R. A. (N. S.) 282, 1079; 8 Id. 131; 12 Id. 1130; 15 Id. 350.

See, also, Constitutional Law, Cent. Dig. §§ 156-171; Dec. Dig. §§ 87-89; 8 Cyc. 886-892.

"Life, liberty and property" embrace every right which the law protects. They include not only the right to own and hold, but also the right to use and enjoy property. Spring Val. Water Co. v. San Francisco, 165 F 667.

40. City may pass an ordinance under police power for purpose of regulating cleaning of unsewered privies and let contract to certain persons exclusively without creating a monopoly in a private business. Dreyfus v. Boone [Ark.] 114 SW 718. Statutes and ordinances requiring removal or destruction of property or isolation of infected persons, when necessary for protection of public health, do not violate constitutional guaranty of right of enjoyment of liberty and property, such right not extending to use injuring others. Kirk v. Wyman [S. C.] 65 SE 887. Parties are free to contract and it is well settled law that courts will enforce their contracts as made, unless it would be unconscionable to do so. Bond v. Sandford, 134 Mo. App. 477, 114 SW 570.

Held valid: The Rose local option law is not unconstitutional as a denial of constitutional liberty in making it possible to

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not protect an individual contracting with the intention of perpetrating fraud.[41] There is no constitutional provision which secures to one the right to dispose of his property after his death nor the right of any one to take it by inheritance,[42] but it has been held by some courts that such right is an inherent one.[43] The right to pursue a lawful occupation is a property right.[44]

§ 8. *Freedom of speech and of the press* [45]—See 11 C. L. 700 cannot be abridged,[46]

prohibit the liquor traffic within certain territory, or because the act violates the principle of the inviolability of private property, or because it is a general law without uniform operation, or in contravention of the principle that no act shall "take effect" upon the approval of any other authority than the general assembly. Gassman v. Kerns, 7 Ohio N. P. (N. S.) 626. Laws 1907, p. 495, c. 254, declaring that no contract or rule shall exempt railway company from liability imposed by act, does not invade right to contract, since it is but a regulation to secure right created by act. Kiley v. Chicago, etc., R. Co., 138 Wis. 215, 119 NW 209. Laws 1907-8, p. 145, c. 6, art. 2, as amended by Laws 1907-8, p. 153, c. 6, art. 3, establishing depositor's guaranty fund to insure against loss upon bank's insolvency, does not violate Const. art. 2, § 2, providing that all persons have inherent right to life, liberty, pursuit of happiness and enjoyment of gains of their own industry. Noble State Bank v. Haskell [Okl.] 97 P 590. Laws 1907-8, p. 145, c. 6, art. 2, as amended by Laws 1907-8, p. 153, c. 6, art. 3, establishing depositor's guaranty fund, does not violate Const. art. 2, § 23, forbidding taking of private property for private use. Id. Ark. Acts 1905, c. 219, § 1, providing that miners employed at quantity rates shall be paid according to weight of coal as originally produced before it is screened, being a valid exercise of police power, does not violate liberty of contract secured by 14th Amend. U. S. Constitution. McLean v. Arkansas, 211 U. S. 539, 53 Law. Ed. —. Gen. Laws 1907, pp. 278, 279, c. 144, §§ 1, 5, making sale of wild game, not in closed season, unlawful, is not unconstitutional as abridging right to alienate property. Ex parte Blardone, 55 Tex. Cr. R. 189, 115 SW 838. United Brotherhood of Carpenters and Joiners and allied associations held not unlawful combinations made in restraint of trade. Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 SW 997. Louisville city ordinance, regulating construction of theater buildings and prescribing number and width of exits, is not objectionable as oppressively interfering with owner's use of his private property. McGee v. Kennedy [Ky.] 114 SW 298.

Held invalid: Contract of which primary purpose is to limit and restrain trade is void at common law and is not protected by provision of federal constitution guaranteeing freedom of contract. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. A city ordinance requiring payment of a license tax by persons engaged in business of lending money on assignment of salaries is unconstitutional as applying to persons engaged in buying just claims against city as investments. City of Louisville v. Simons & Co. [Ky.] 119 SW 185. Acts 29th Leg. p. 217, c. 111, imposing annual occupation tax upon persons engaged in business of taking assignments of unearned wages, is in violation of fourteenth amendment of constitution of United States in that it is in restraint of freedom of trade. Owens v. State, 53 Tex. Cr. R. 105, 112 SW 1075. A Massachusetts insurance company has a constitutional right to enter into a contract in Massachusetts with citizens of New York for purpose of insuring property in New York and in so far as Insurance Law (Laws 1892, pp. 1934, 1941, c. 690), §§ 9, 25, interferes with this right it is void. Hammond v. International R. Co., 63 Misc. 437, 116 NYS 854. St. 1903, p. 289, c. 235, forbidding restraint of combinations to procure any act to be done in furtherance of trade disputes between employers and employes, is void if construed to prevent court from restraining labor union for illegal interference with business of former employer. Pierce v. Stablemen's Union, Local No. 8760 [Cal.] 103 P 324.

41. Bailey v. State [Ala.] 48 S 498.

42. Booth's Ex'r v. Com. [Ky.] 113 SW 61.

43. Beals v. State, 139 Wis. 544, 121 NW 347.

44. Right to pursue occupation of pawnbroker. People v. Rosenberg, 59 Misc. 342, 112 NYS 316. Occupation of making and selling intoxicating liquor when recognized by state is but a mere license which may be revoked by legislature at will, after which there is no property right to such business which is protected by constitution. Cook Brew. Co. v. Garber, 168 F 942. A citizen has a right to pursue any lawful avocation which he may choose, subject only to such restrictions as are necessary for protection of public health, morals, safety and welfare. Landberg v. Chicago, 237 Ill. 112, 86 NE 638.

45. **Search Note:** See Constitutional Law, Cent. Dig. § 72; Dec. Dig. § 90; 8 Cyc. 892, 893; 6 A. & E. Enc. L. (2ed.) 1002.

46. Gen. St. 1901, §§ 2421-2424, requiring employer of labor to furnish employe true reason of discharge in writing, is invalid as an invasion of freedom of speech. Atchison, etc., R. Co. v. Brown [Kan.] 102 P 459. Sess. Laws 1909, c. 53, §§ 1, 10, providing that candidates for judicial or educational offices shall not be criticised or referred to in any manner by any political party or at any primary election, violates right of free speech guaranteed by Bill of Rights, § 5, and of right of public assembly and petition. State v. Junkin [Neb.] 122 NW 473. Const. art. 1, § 11, does not protect an attorney in publishing libelous matter regarding a judge, although right to criticise in respectful manner belongs to him. In re Thatcher, 80 Ohio St. 492, 89 NE 39. In view of constitutional guaranty of liberty of speech (Const. art. 1, § 8), an injunction

nor can it be abused without liability.[47] Constitutional provision respecting libel suits does not divest judge of his duty to determine matters of law arising in case.[48]

§ 9. *Personal and religious liberty.*[49]—See 11 C. L. 700—Personal[50] and religious liberty,[51] including the right to choose employment,[52] cannot be infringed. Involuntary servitude, except for crime and imprisonment for debt,[53] except for fraud or other wrong,[54] is prohibited.

will not issue to restrain publication of a libel. Mitchell v. Grand Lodge F. & A. M. [Tex. Civ. App.] 121 SW 178.

47. Freedom of press consists in right, in conductor of newspaper, to print what he chooses without previous license, but subject to be held responsible therefor as any one else for a similar publication. Levert v. Daily States Pub. Co., 123 La. 594, 49 S 206. Constitutional guaranties of religious freedom and freedom of press cannot shield violation of R. S. U. S. § 3893 (U. S. Comp. St. 1901, p. 2658), prohibiting use of mails for circulation of obscene writings. Knowles v. U. S. [C. C. A.] 170 F 409. Under Bill of Rights, § 5, truth alone is not a complete defense in a civil action for libel, but, if defendant justifies, he must also show that he published defamatory matter with good motives and for justifiable ends. Wertz v. Sprecher, 82 Neb. 834, 118 NW 1071.

48. Branch v. Knapp & Co. [Mo.] 121 SW 93.

49. Search Note: See notes in 3 C. L. 754; 14 L. R. A. 611; 22 Id. 721; 3 L. R. A. (N. S.) 168.

See, also, Constitutional Law, Cent. Dig. §§ 150-154, 165; Dec. Dig. §§ 83, 84, 88; 8 Cyc. 878-885, 889; 6 A. & E. Enc. L. (2ed.) 1002.

50. "Personal liberty" includes not only right to go where one pleases, but to do all lawful things. Henry v. Cherry [R. I.] 73 A 97. Constitutional right of privacy has reference only to exemption from bodily injury, it does not include a right to be free from public comment. Id. There is no common-law right of privacy by which one may recover for mental suffering caused by publication of his picture as part of a mercantile advertisement, though it exposes him to ridicule. Id. Personal liberty secured by constitution is subject to reasonable conditions necessary to health, peace, and morals of community. State Board of Health v. St. Johnsbury [Vt.] 73 A 581. Photographing and measuring, by Bertillon system, one accused of crime but not convicted, is a reasonable exercise of police power, and does not constitute a violation of his personal liberty, it not being shown that it is purpose of police to place picture in rogue's gallery or distribute copies of it unless accused becomes fugitive from justice. Downs v. Swann [Md.] 73 A 653. Gen. St. 1901, §§ 2421-2424, requiring employer of labor to furnish on employe's request true reason for his discharge, in writing, is an interference with personal liberty. Atchison, etc., R. Co. v. Brown [Kan.] 102 P 459. Right to use liquor for one's own comfort, if use is without direct injury to public, is one of natural and inalienable rights of citizen. Commonwealth v. Campbell [Ky.] 117 SW 383.

51. Pen. Code, § 267, prohibiting public sale of any property on Sunday, is not unconstitutional as being a discrimination as to free exercise of religious profession as against persons of Jewish faith who observe Saturday. Silverberg Bros. v. Douglass, 62 Misc. 340, 114 NYS 824.

52. Rules adopted by board of registration in embalming organized by St. 1905, p. 483, c. 473, assuring to regulate undertaking business and prohibiting burial of dead body except by licensed embalmer, is an interference with private right not allowable under state or federal constitution. Wyeth v. Cambridge City Board of Health, 200 Mass. 474, 86 NE 925. Rule passed by board of registration in embalming organized under St. 1905, p. 483, c. 473, prohibiting one not a licensed embalmer from engaging in undertaking business, is an interference with a private right contrary to provision of state and federal constitutions. Id.

53. Code 1896, § 4730, as amended by Gen. Acts 1903, p. 345, and Gen. Acts 1907, p. 636, providing that an employe who with intent to defraud contracts in writing to perform services and fails to perform same without refunding shall be punished as for larceny, is not unconstitutional as providing for imprisonment for debt. Bailey v. State [Ala.] 48 S 498. Revisal 1905, § 3366, providing for imprisonment of cropper who abandons crop without repaying advances, is unconstitutional as imprisonment for debt. State v. Williams, 150 N. C. 802, 62 SE 949. Judgment for alimony is a debt within Const. art. 2, § 16, forbidding imprisonment for debt. Ex parte Kinsolving, 135 Mo. App. 631, 116 SW 1068. Order committing party for contempt until amount of certain coupons was paid violates constitutional prohibition against imprisonment for debt. Ex parte Dickens [Ala.] 50 S 218. Gen. Acts 1907, p. 636, prescribing rule that refusal or failure of person who enters into contract with employer to perform services or to pay for property obtained under contract shall be taken as prima facie evidence of intent to defraud employer, is not unconstitutional on ground that it amounts to "peonage." Bailey v. State [Ala.] 49 S 886. Where defendant was convicted under Laws 1903, p. 248, §§ 14a, 14b, for selling cocaine contrary to law, and imprisoned for failure to pay fine, such imprisonment did not infringe constitutional rights. People v. Zito, 237 Ill. 434, 86 NE 1041. Sess. Laws 1903, p. 244, c. 131, relating to obtaining hotel accommodations with intent to defraud, is not unconstitutional as providing for imprisonment for debt. Ex parte Milecke, 52 Wash. 312, 100 P 743. Act March 2, 1905 (Laws 1905, p. 78, c. 49), § 1, making it a felony to utter check where there are no funds to meet it, does not authorize imprisonment for debt. State v. Pilling [Wash.] 102 P 230.

54. Gen. Acts 1907, p. 636, prescribing rule

§ 10. *Equal protection of the law* [55]—See 11 C. L. 700 requires that the law shall operate equally on all persons [56] belonging to the same class,[57] and such classifica-

of evidence that refusal or failure of person who enters into contract with employer to perform services or to pay for property obtained under contract shall be taken as prima facie evidence of intent to defraud employer, is not violative of constitutional provision against imprisonment for debt. Bailey v. State [Ala.] 49 S 886.

55. **Search Note:** See notes in 3 C. L. 755; 14 L. R. A. 579; 25 Id. 161; 25 A. S. R. 873. See, also, Constitutional Law, Cent. Dig. §§ 678-725; Dec. Dig. §§ 209-250; 8 Cyc. 1058-1079; 6 A. & E. Enc. L. (2ed.) 967.

56. Corporations are "persons" within constitutional guaranty of equal protection of laws. Kiley v. Chicago, etc., R. Co., 130 Wis. 215, 119 NW 309. Word "people," as used in Const. art. 1, § 2, means aggregate or mass of the individuals who constitute state. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349. As to whether race discrimination has been practiced by jury commissioners in selection of grand and petit jurors is a question of fact to be decided by trial court, and unless its decision constitutes such abuse as amounts to infraction of federal constitution, it will be upheld. Thomas v. Texas, 212 U. S. 278, 53 Law. Ed. —. No discrimination between races contrary to constitution shown in selection of grand pury consisting of 11 white men and 1 negro, jury commissioners testifying that they made no discrimination but selected jury men from both races. McIntosh v. State [Tex. Cr. R.] 120 SW 455. Sp. Laws 1897, p. 150, c. 110, providing for creation of road system, as amended by Sp. Laws 1905, p. 262, c. 30, is not unconstitutional so far as affected by Sayles' Ann. Civ. St. 1897, art. 5048, as being contrary to Const. art. 8, § 1, in that burden of working on road is to be construed and tested as if it were taxation levied and prescribed in such article, and not equal and uniform since it discriminates against persons between 21 and 60 years of age. Bluitt v. State [Tex. Cr. R.] 121 SW 168.

57. Rule of equal protection of law requires only that persons similarly situated shall be treated alike, or that law shall be applicable alike to all who are in same class. State v. Barrett [Ind.] 87 NE 7. Laws 1907, pp. 79, 89, 114, cc. 45, 46, 62, creating boards of fire and police commissioners, boards of finance and boards of public works in cities of not less than 100,000 nor more than 200,000 inhabitants, are not unconstitutional as special legislation. McCarter v. McKelvey [N. J. Law] 73 A 884. Mass. Pub. Acts 1904, c. 333, and Acts 1905, c. 383, limiting height of buildings in residence section of Boston to from 80 to 100 feet, and in business sections to 125 feet, do not deny to owner of property in residence section equal protection of law. Welch v. Swasey, 214 U. S. 91, 53 Law. Ed. —. Gen. Laws 1907, pp. 278, 279, c. 144, §§ 1, 5, forbidding sale of wild game, is not unconstitutional as being class legislation. Ex parte Blardone, 55 Tex. Cr. R. 189, 115 SW 838. Ordinance of city of Milwaukee, prohibiting removal of sand, stone, or earth from beach within certain distance of high-water mark within city limits, is not unconstitutional as class legislation. C. Beck Co. v. Milwaukee, 139 Wis. 340, 120 NW 293. Statute which denies to nonresidents of state a right to come into our courts for enforcement of their contracts, made in state, would be a denial of equal protection of law. Drew v. Cass, 129 App. Div. 453, 113 NYS 1042. Legislature, while having right to regulate appeals and writs of error, cannot discriminate between parties and allow one party to appeal from an adverse decision and not allow it upon equal terms to the other. People v. Sholem, 238 Ill. 203, 87 NE 390. Laws 1903, p. 524, c. 338, providing for abatement of nuisance maintained in violation of liquor law, authorizing allowance of attorney's fees, is not a denial of equal protection of law. State v. Fritz [Kan.] 101 P 1013. St. 1906, p. 176, c. 210, relating to control and management of police departments, is not unconstitutional as creating a special class from those governed by civil service rules, since such statute must be limited to offices in police departments. Logan v. Lawrence, 201 Mass. 506, 88 NE 9. Laws 1907, p. 72, c. 55, providing that Civ. Code 1901, pars. 3998-4009, relating to toll roads should be construed to have included tracts from time of its enactment and conferring attempted transfers of such franchises, not being limited to those whose franchises had already expired but applying also to those whose franchises would expire in future, was not violative of Act Cong. July 30, 1886, c. 818, 24 Stat. 170, prohibiting territorial legislatures from passing special laws granting special franchises, being based upon reasonable classification in giving preference to those who had incurred labor of constructing such roads. Duffield v. Ashurst [Ariz.] 100 P 820. Act April 11, 1899, P. L. 38, giving school directors power to exercise powers of boards of health, applying to all townships of the state, is not objectionable as being special legislation applying only to school districts. Nether Providence School District v. Montgomery, 38 Pa. Super. Ct. 483. Act April 17, 1905, P. L. 183, providing for determination by court of common pleas of proper county of all disputes as to reasonableness of amount of license fees between municipal corporations and telegraph and telephone, or light and power companies, applying to all such companies, is a general act, and not special legislation, regardless of fact that street railway companies are not included. West Chester Borough v. Postal Telegraph-Cable Co., 38 Pa. Super. Ct. 603. Election law Laws 1896, p. 893, c. 909, as amended by Laws 1908, p. 1903, c. 521), providing for free exercise of elective franchise, is not a local or private law although applying only to cities of a million or more inhabitants. Ahern v. Elder, 195 N. Y. 493, 88 NE 1059. Practice Act (Laws 1907, p. 468, § 120), providing that, if any final determination of any cause except in chancery shall be made by the appellate court as result of finding of facts different from that of trial court, judgment of appellate court shall be final,

tion must be reasonable.[58] Statutes imposing licenses,[59] regulating taxation and

is unconstitutional because discriminative between parties, allowing review of facts to appellee but denying it to appellant if finding is same as that of trial court. Reinhardt v. Chicago Junction R. Co., 235 Ill. 576, 85 NE 605. Chicago City Charter, art. 5, cl. 45, empowering city to prohibit exhibition of immoral or obscene pictures, is not within inhibition of Const. art. 4, § 22, prohibiting special laws as applied to city charters. Block v. Chicago, 239 Ill. 251, 87 NE 1011. St. 1905, p. 443, c. 368, creating drainage district throughout certain counties, is not in violation of constitutional provisions forbidding special laws where general laws will apply. People v. Sacramento Drainage Dist. [Cal.] 103 P 207.

58. It is sufficient if classification is practical, it does not have to be based on scientific or marked differences. Smith v. Wolf [Ala.] 49 S 395. Classifications adopted for legislative regulation should have some just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to subject regulated, and should not be merely arbitrary, and all similarly situated or having similar legal duties and obligations in regard to subject regulated should be included in one class. Seaboard Air Line R. Co. v. Simon [Fla.] 47 S 1001. Discrimination to be constitutional must be based upon some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. State v. Leavitt [Me.] 72 A 875. Legal duties of persons, firms, or corporations operating railroads may be of a peculiar nature and essentially different from duties of other common carriers, and as to such matters they may be separately classified for purposes of legislative regulation. Seaboard Air Line R. Co. v. Simon [Fla.] 47 S 1001. A basis for classification is sufficient even if it seems unreasonable to the courts, provided there is reason enough for it to support an argument so that it could have seemed reasonable to the legislature. People v. Metz, 193 N. Y. 148, 85 NE 1070. Acts 30th Gen. Assem. p. 61, c. 68, § 12, relating to construction of drains and to assessment of benefits conferred thereby, and providing for assessment of railroad land in a manner different from agricultural lands, is based upon a proper classification, railroad lands being used in a different manner from other lands and benefits derived by such property being of different character from those conferred upon agricultural lands. In re Johnson Drainage Dist. No. 9 [Iowa] 118 NW 380. Priv. and Sp. Laws 1903, p. 489, c. 317, prohibiting digging of clams within town of S. at certain times, excepting by residents and hotel keepers for own use or for use of their hotels, held not unreasonable or arbitrary discrimination within meaning of fourteenth amend. U. S. Const. State v. Leavitt [Me.] 72 A 875. Laws 1907, p. 304, § 19, providing that county court shall have final jurisdiction to hear and determine contest of local option election, although not providing for appeal, is not unconstitutional, it being within power of state to make classification giving only single hearing to one class and two to others. Saylor v. Duel, 236 Ill. 429, 86 NE 119. Act Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1907, p. 951), providing for hearing of cases of public importance before three circuit judges, is not unconstitutional for reason that it is discriminatory. United States v. New York, etc., R. Co., 165 F 742. Laws 1908, c. 185, § 2 (P. L. 1908, p. 375), making it a misdemeanor for owners of amusement place to permit attendance, unless accompanied by adults, of children under 16, at certain classes of amusements, excepting such as are held upon piers devoted to public entertainment, unconstitutional under fourteenth amendment of federal constitution, there being no basis for discrimination. In re Van Horne [N. J. Eq.] 70 A 986.

59. Chicago Wheel Tax Ordinance requiring owners of automobiles or motor vehicles, seating two or more persons, to obtain license to use vehicles in city is not invalid as discriminating between persons coming within same class in that it does not levy tax upon automobile seating only one person. Ayres v. Chicago, 239 Ill. 237, 87 NE 1073. Legislature may select **peddlers** as a class which shall be required to obtain a license as a prerequisite to following that occupation. State v. Webber, 214 Mo. 272, 113 SW 1054. Laws 1905, p. 339, c. 206, requiring license to peddle stoves, ranges and wagons, is void as class legislation, since it does not require license from peddlers of other articles. State v. Wright [Or.] 100 P 296. Laws Wash. 1909, p. 767, regulating peddlers and requiring license, but exempting from its operation peddlers of agricultural products, books and newspapers, and peddlers within cities or towns where peddling is regulated by ordinance bearing evenly upon all, is not objectionable as a deprivation of equal protection of law. Ex parte Crowder, 171 F 250. Rev. St. 1899, §§ 8869, 8862, 8868 (Ann. St. 1906, pp. 4118-4120), prohibiting peddling without a license and exempting from its provisions those who deal in certain articles, is not unconstitutional as class legislation since all members of each class are treated alike. State v. Webber, 214 Mo. 272, 113 SW 1054. City ordinance, declaring that in certain part of city **licenses to conduct bar** shall only be issued to bona fide existing hotels, is based upon a proper classification. Ritz v. Lightston [Cal. App.] 103 P 363. Gen. Laws 1907, p. 14, c. 15, providing for validation of payments made to seller of intoxicating liquor whose license has been revoked by public officers is not invalid as being special legislation. Calderwood v. Schlitz Brew. Co., 107 Minn. 465, 121 NW 221. Rev. Codes, § 2776, requiring others than **steam laundries** to pay license fee and providing that such act shall not apply to women engaged in business where more than two women are not employed, is a reasonable classification. Quong Wing v. Kirkendall [Mont.] 101 P 250. Pub. Laws 1903, c. 1100, p. 26, prohibiting **barbers** from practicing without registration, not open to objection of unconstitutionality as special legislation from fact that it extends only to barbers in cities. State v. Armeno [R. I.] 72 A 216. Acts 30th Leg. 1907, p. 275, c. 141, imposing license tax on barbers, is

local improvements,[60] or corporations,[61] the operation of public carriers,[62] business,

unconstitutional as exempting, from tax, students of state university and other state schools who are making their way through school by serving as barbers, those serving as barbers in any eleemosynary institution, and barbers in towns of less than 1,000 inhabitants. Jackson v. State, 55 Tex. Cr. R. 557. 117 SW 818. Const. art. 8, § 1, providing that legislature may not compel persons engaged in mechanical pursuits to pay an occupation tax, applies to barbers. Id. Laws 1905, p. 463, c. 97, providing for examination and licensing of persons engaged in **practice of veterinary medicine,** and forbidding persons not so licensed from assuming title of veterinary surgeon or of representing themselves as being holder of degree of veterinary college, is not unconstitutional as infringing right to life, liberty and property. In re Barnes, 83 Neb. 443, 119 NW 662.

60. Act 1870, p. 54, c. 21, authorizing city of Lawrence to issue bonds in aid of state university, is not repugnant to Const. art. 12, §§ 1, 12, forbidding special acts conferring corporate powers. State v. Lawrence [Kan.] 100 P 485. Ordinance passed by city council of Chicago Feb. 5, 1908, prohibiting permits for use of space under roadway of any street or public ground, operating alike upon all persons similarly situated, is not void for nonuniformity. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93. General Municipal Incorporation Act (Gen. Laws 1906, p. 898, § 862), empowering cities of sixth class to maintain waterworks and lighting plants, is not unconstitutional as special legislation, since it applies to all cities of such class. Cary v. Blodgett [Cal. App.] 102 P 668. Act April 26, 1894 (P. L. p. 146), authorizing any city located on or near ocean and embracing within its limits or jurisdiction any beach or ocean front to open and lay out on and along such beach public parks and to acquire lands for such purposes by purchase and condemnation, does not deprive land owners of equal protection of laws. Fishblatt v. Atlantic City [N. J. Law] 73 A 125. Distinction between resident and nonresident owners of abutting property in act of May 19, 1896, creating drainage system for District of Columbia, in that coercion of law as to making connections with a sewer is by criminal punishment in case of residents, whereas, against nonresident owners, district does the work in case of their neglect, and assesses cost against property as a tax, does not invalidate statute for discrimination, even assuming that congress is forbidden to enact discriminating legislation. District of Columbia v. Brooke, 29 S. Ct. 560. U. S. Const. Amend. 14 is not violated by taxing mortgaged land at its full value without deducting mortgage debt from owner's estate. Paddell v. New York, 211 U. S. 446, 53 Law. Ed. 275. Laws 1905, p. 561, c. 11, § 170, prohibiting any person to knowingly loan money to another to be used for paying poll tax in order to qualify as elector, is not unconstitutional as working a denial of equal protection of laws. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349. Assessment of property in Dallas county and assessment of intangible assets of railway company, where not made according to same standard of value, constitutes a violation of U. S. Const. Amend. 14, guaranteeing equal protection of laws. Lively v. Missouri, K. & T. R. Co. [Tex.] 120 SW 852. Ky. St. § 637 (Russell's St. § 4284), providing that foreign insurance companies doing business in the state shall be subject to same taxes and burdens that are imposed upon domestic companies doing business in domicile of such foreign companies, is invalid since amount of such taxation is made to depend upon laws of foreign state, and thus taking effect upon approval of authority other than that of general assembly, and because taxation would be unequal. Western & So. Life Ins. Co.. v. Com. [Ky.] 117 SW 376. Since funds raised by taxation for school purposes are divided equally among all children of state regardless of race or color, additional maintenance of white school by taxation of property owned by white persons and of colored schools by **taxation of property owned by colored persons** does not constitute a discrimination between races in violation of U. S. Const. Amend. 14. Crosby v. Mayfield [Ky.] 117 SW 316. Laws 1908, p. 1112, raising **revenue for development of state penitentiary** and to buy farm lands therefor by licensing sale of intoxicating liquors, is not void as denying equal protection of law as applying only to liquor dealers. Carroll v. Wright, 131 Ga. 728, 63 SE 260. Act Aug. 17, 1903 (Acts 1903, p. 18), allowing amount of **occupation tax** imposed by a municipality paid by a corporation liable for franchise tax under Acts 1902, p. 37, to go in reduction of amount due municipality on its franchise tax is not violative of Const. art. 7, § 2, par. 1, requiring that all taxes shall be uniform. State v. Southern Exp. Co. [Ga.] 65 SE 282. Act Aug. 17, 1903 (Acts 1903, p. 18), allowing amount of occupation tax imposed by a municipality paid by a corporation liable for franchise tax under Acts 1902, p. 37, to go in reduction of amount due municipality on franchise tax, does not offend guaranty in Bill of Rights (art. 1, § 1, par. 22 [Civ. Code 1895, § 5699]), that protection to person and property shall be impartial and complete. Id. Act March 7, 1907, p. 418, § 1 (Code 1907, § 2391), imposing annual **franchise tax** on foreign corporations alone, is not a denial of equal protection of laws. Southern R. Co. v. Greene [Ala.] 49 S 404. Authority given city of Miami in its charter act (Acts 1907, p. 536, c. 5823) does not offend organic law, and ordinance of city imposing $100 license tax upon express companies is not unconstitutional nor discriminatory or unreasonable. Hardee v. Brown [Fla.] 47 S 834. **Transfer tax law** imposed upon stocks and bonds is not invalid on ground that it singles out transfers where life estate is reserved to grantor for taxation, leaving other transfer exempt, discrimination being reasonable. In re Keeney's Estate, 194 N. Y. 281, 87 NE 428. Transfer tax law imposed upon stocks and bonds in trust with reservation of life estate and remainder to children is not invalid on ground that rate varies according to relation grantee bears to grantor. Id.

Inheritance Tax Law, § 11 (Hurd's Rev. St. 1908, p. 1822), providing that any person or persons dissatisfied with appraisement or assessment may appeal to county court, construed to allow appeal by state, and consequently is not unconstitutional as being an act in denial of equal protection of law. People v. Sholen, 238 Ill. 203, 87 NE 390. Inheritance Tax Law, N. Y. Laws 1887, c. 713, amending Laws 1885, does not deny equal protection of law within 14th amendment by reason of fact that tax was imposed upon bequests of nonresident decedent, owning both real and personal property, tax not being applicable if only property be personalty. Lord v. Glynn, 211 U. S. 477, 53 Law. Ed. 290. Revenue Act 1906 (Acts 1906, p. 240, c. 22), art. 19, imposing tax upon inheritances, is not unconstitutional as resulting in inequality contrary to fourteenth amendment to federal constitution. Booth's Ex'r v. Com. [Ky.] 113 SW 61. Inheritance Tax Law (Laws 1903, p. 65, c. 44, as amended by Laws 1903, p. 403, c. 249) is not void as a deprivation of equal protection of laws. State v. Pabst, 139 Wis. 561, 121 NW 351.

61. Gen. St. 1901, § 1283, requiring foreign corporations to file certain statements with secretary of state as condition to maintaining action, does not deny equal protection of law. Wilson-Moline Buggy Co. v. Hawkins [Kan.] 101 P 1009. Insurance Law (Laws 1892, p. 1930, c. 690), § 96, added by Laws 1906, p. 794, c. 326, § 32, providing limitations as to amount of business which a domestic life insurance company may do, but excepting from operation of act a corporation more than one-half of outstanding insurance of which on Dec. 31, 1905, consisted of industrial insurance, is not in violation of equal protection of law guaranteed by Const. U. S. Amend. 14, there being substantial difference between corporations issuing ordinary life insurance policies and corporations engaged in industrial insurance business. Bush v. New York Life Ins. Co., 63 Misc. 89, 116 NYS 1056. Act approved March 20, 1905 (St. 1905, p. 493, c. 386) as amended June 13, 1906 (St. 1906, p. 22, c. 19), and March 20, 1907 (St. 1907, p. 745, c. 403), imposing license tax on domestic corporations with certain exceptions and on all foreign corporations doing business in state, and forfeiting charter for failure to pay, does not discriminate in favor of foreign corporations in violation of Const. art. 12, § 15. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Act approved March 20, 1905 (St. 1905, p. 493, c. 386), as amended, forfeiting charters of domestic corporations for failure to pay license tax, does not operate as denial of equal protection of law under rule that, where validity depends upon existence of facts which can only be determined by complicated, technical investigation, and penalty is so severe that persons affected are intimidated from applying to courts to test validity, equal protection is denied. Id. Act March 26, 1907 (St. 1907, p. 232, c. 119), empowering bank commissioners to order bank examiner to take charge of unsafe bank, is not special legislation because providing for receivers for insolvent banks only. State v. State Bank & Trust Co. [Nev.] 103 P 407. That **rates of telephone company** as fixed by municipal ordinances are on lower scale for one company than for another which is its competitor is not in violation of provision giving equal protection of laws, since competition by increased service may render service more valuable. Home Tel. & T. Co. v. Los Angeles, 211 U. S. 265, 53 Law. Ed. 176.

62. Laws 1907, p. 263, c. 185, providing for giving of bond by ticket agents for faithful transmission of money deposited to foreign countries, is unconstitutional in discriminating in favor of steamship companies and their authorized agents in violating guaranty of equal protection of law. Patti v. United Surety Co., 61 Misc. 445, 115 NYS 844. Laws 1907, p. 263, c. 185, providing that all corporations, firms and persons engaged in selling steamship or railroad tickets for transportation to or from foreign countries, who in connection therewith receive deposits of money for transmission to foreign countries shall execute bond, is unconstitutional as violating equal protection of laws, in arbitrarily excluding steamship companies or their authorized agents from operation thereof. Benvega v. U. S. Surety Co., 115 NYS 199. Equality clause of federal constitution is not violated by 24 Stat. p. 671, providing for collection of penalties from carriers for delay in transportation of goods. Farrell v. Atlantic Coast Line R. Co., 82 S. C. 410, 64 SE 226. Laws 1907, p. 263, c. 185, providing that all persons engaged in selling steamship or railroad tickets for transportation to or from foreign countries, who, in conjunction with such business, shall carry on business of receiving deposits of money for transmission to foreign countries, shall, before entering into such business, give bond, conditioned for faithful transmission of such money, is not unconstitutional as class legislation, although it exempts steamship companies or their agents, such classification being reasonable and affecting entire class alike. Musco v. United Surety Co., 132 App. Div. 300, 117 NYS 21. Act Cong. June 29, 1906, c. 3591 (34 Stat. 593; U. S. Comp. St. Supp. 1907, p. 909), providing that no common carrier receiving property from a point in one state to a point in another state can limit its liability to its own line, is not invalid as depriving carrier of equal protection of law. Galveston, etc., R. Co. v. Wallace [Tex. Civ. App.] 117 SW 169. Legislature may authorize county commissioners to compel street railway company to move its tracks upon proper indemnity and such act is not open to objection that it is special legislation, Act 1908, c. 654. Anne Arundel County Com'rs v. United R. & Elec. Co., 109 Md. 377, 72 A 542. Laws 1907, p. 506, c. 107 (Cobbey's Ann. St. 1907, §§ 10606, 10607), requiring **stock trains to be run at a speed of 18 miles an hour,** being based upon a reasonable classification and operating equally upon all carriers, is not void as a deprivation of equal protection of laws. Cram v. Chicago, B. & Q. R. Co. [Neb.] 122 NW 31. Where subject of regulation as in Acts 1905, p. 104, c. 5424, is payment for **goods lost in transit** by a common carrier, a subject as to which legal duties of all common carriers are similar, and there appears to be no reasonable basis for imposing burden of regulation upon railroads alone, a statute making such regulation applicable to railways only provides

trades and professions,[63] and criminal law and procedure,[64] and civil remedies and proceedings,[65] have been held valid or invalid in accordance with this rule.

for an unreasonable classification, that in effect denies to those operating railroads due process of law and equal protection of law. Seaboard Air Line R. Co. v. Simon [Fla.] 47 S 1001. **Employer's Liability Act** (Burns' Ann. St. 1901, § 7083; Burns' Ann. St. 1908, § 8017), making railroad corporations liable for personal injuries to employes, being founded upon proper classification relating to peculiar hazards inherent in operation of railroads, referring to character of employment and not to employer, is not unconstitutional as denying equal protection of law. Indianapolis Trac. & T. Co. v. Kinney [Ind.] 85 NE 954. Const. 1890, § 193, providing that every employe of railway company shall have same rights to recover for personal injuries as others where it results from negligence of superior or from fellow-servant in another department, is constitutional since based upon reasonable classification due to inherent danger of operating commercial railways. Givens v. Southern R. Co. [Miss.] 49 S 180. Handcars do not come within rule. Id. Laws 1907, p. 495, c. 254, making railway companies liable for injuries to employes caused by negligence of co-employes, is not invalid as a denial of equal protection of laws, dangers peculiar to railways furnishing reasonable basis for classification. Kiley v. Chicago, etc., R. Co., 138 Wis. 215, 119 NW 309. Under Const. S. C. art. 9, § 15, providing that every railroad employe shall have same rights and remedies for injuries from acts or omissions of corporation or its employes as are allowed to persons not employes, where injury results from negligence of superior agents or officers, a railway corporation cannot by promulgation of rules avoid its liability under such provision. Snipes v. Southern R. Co. [C. C. A.] 166 F 1. Employer's Liability Act, Apr. 22, 1908, c. 149, 35 Stat. 65, abolishing fellow-servant rule and limiting its application to railroads is not a denial of equal protection of law, since it is neither an unreasonable nor an arbitrary classification. Watson v. St. Louis, etc., R. Co., 169 F 942. Sayles' Ann. Civ. St. 1897, arts. 4560g, 4560h, providing that all railroad employes entrusted with authority of superintendence shall be vice-principals and prescribing who are fellow-servants, are not in violation of U. S. Const. Amend. 14, prohibiting any state from denying any person within its jurisdiction equal protection of laws. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Revisal 1905, § 2636, penalizing carrier for **failure to pay claims** within prescribed time, is not a denial of equal protection of law. Raleigh Iron Works v. Southern R. Co., 148 N. C. 469, 62 SE 595. Revisal 1905, § 2644, penalizing carriers for failure to refund overcharges within prescribed time, does not deny equal protection of law. Id. Provision in **Hepburn Act,** June 29, 1906, excepting timber and manufactured products thereof from operation of act forbidding carriers from transporting in interstate commerce commodities in which they are interested, does not render statute invalid for discrimination. United States v. Delaware & H. Co., 213 U. S. 366, 53 Law. Ed. —. Code 1906, § 4854, providing for **maintenance of depots** in every incorporated village through which railroad passes, is not unconstitutional as depriving company of equal protection of laws, although applied to branch line operated at a loss. Southern R. Co. v. State [Miss.] 48 S 236. Order of railroad commission reducing freight **rates** as to two railroad companies not a denial of equal protection of laws even though other carriers were not included in such order. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966. St. Nev. 1907, p. 73, c. 44, authorizing railroad commission to fix rate after investigation, does not deny railway companies equal protection of laws although rates are not the same for all companies. Southern Pac. R. Co. v. Bartine, 170 F 725. Act Nev. March 5, 1907 (St. Nev. 1907, p. 73, c. 44), providing that maximum rates shall not apply until railroad has been in operation two years, provides for a reasonable classification. Id.

63. Hawkers and peddlers may be divided into classes if classification is reasonable. State v. Miller [Or.] 103 P 519. St. 1903, p. 289, c. 235, relating to combinations to procure any act to be done in furtherance of trade disputes between employer and employe, is void as special legislation if construed to prevent court from restraining a labor union from illegal interference with business of former employer since it legalizes combination in restraint of trade entered into by trade union which would be illegal if entered into by others. Pierce v. Stablemen's Union, Local No. 8760 [Cal.] 103 P 324. Conn. Gen. Laws, §§ 4686, 4869, providing that retail dealers shall not, as against creditors, sell stock in trade at single transaction without seven days previously recording notice of such sale, being based upon reasonable classification, does not deny equal protection of laws. Lemieux v. Young, 211 U. S. 489, 53 Law. Ed. 295. Cobbey's St. 1907, §§ 9800, et seq., regulating practice of medicine, are not in violation of U. S. Const. Amend. 14. Mathews v. Hedlund, 82 Neb. 825, 119 NW 17. Pub. Acts 1907, p. 838, c. 238, providing that no person, other than national bank or trust company or pawnbroker, shall loan money at greater rate than 15 per cent, held constitutional. State v. Hurlburt [Conn.] 72 A 1079. Rev. St. 1899, § 3011 (Ann. St. 1906, p. 1726), prohibiting sale of intoxicating liquors on Sunday, is not unconstitutional as violating Const. art. 4, § 53, prohibiting class legislation. State v. Grossman, 214 Mo. 233, 113 SW 1074. Act May 29, 1901, P. L. 327, regulating sale of **oleomargarine or butterine** and prohibiting its sale when colored in imitation of butter, is constitutional. Commonwealth v. McDermott, 37 Pa. Super. Ct. 1. County ordinances, forbidding herders from driving sheep along highways and from **herding in certain places,** is discriminatory as it does not apply to sheep driven to market. Ex parte McCoy [Cal. App.] 101 P 419. Code 1896, § 2917, requiring mine operators to furnish

stretchers and bandages, is not invalid as class legislation, being based on reasonable grounds. Smith v. Wolf [Ala.] 49 S 395. Act Ark. March 7, 1903 (Acts 1903, p. 123, No. 68), Kirby's Dig. Ark. § 7947, providing that all **telegraph companies** doing business in the state shall be **liable** in damages **for mental anguish** or suffering even in absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages, is not unconstitutional as applying only to telegraph companies, there being a reasonable ground for classification. Ive v. Western Union Tel. Co., 165 F 371. Acts 1885, p. 36, c. 21 (Burns' Ann. St. 1901, §§ 7056, 7057; Burns' Ann. St. 1908, §§ 7981, 7982), requiring corporations **to pay wages once in every** calendar **month** and prescribing a penalty for failure to do so, is unconstitutional as class legislation. Smith v. Ohio Oil Co. [Ind. App.] 86 NE 1027. Laws 1908, p. 517, c. 53, art. 4, putting into effect Const. art. 23, § 1, providing what shall constitute **a day's labor** on public contracts, is not unconstitutional as being in deprivation of equal protection of laws. Byars v. State [Okl.] 102 P 804. The law requiring equality only among those similarly situated, Laws 1906, p. 1395, c. 506, providing that no workman upon public work shall be permitted or required to work more than eight hours a day, is not unconstitutional because engineers, electricians and elevator men and others, are exempt from operation of statute. People v. Metz, 193 N. Y. 148, 85 NE 1070. Burns' Ann. St. 1908, § 8021, prohibiting **employment of persons under 16 years of age** in factories for more than 60 hours a week or for more than 10 hours a day, and § 8022, forbidding employment of persons under 14 years of age, are not invalid as class legislation. Inland Steel Co. v. Yedinak [Ind.] 87 NE 229. St. 1908, p. 714, c. 605, §§ 7, 8, providing that **assignments of future wages** must be accepted by employer, recorded and consented to by wife, in writing, if assignor is married, is not unconstitutional because of provisions of act that it shall be inapplicable to certain banks, banking institutions and loan companies, such discrimination being reasonable. Mutual Loan Co. v. Martell, 200 Mass. 482, 86 NE 916. Act May 13, 1905 (Laws 1905, p. 80), § 3, avoiding assignment of wages as security for loan tainted with usury, is special legislation and void, since other instruments securing usurious debts are not provided for. Massie v. Cessna, 239 Ill. 352, 88 NE 152. St. 1908, p. 714, c. 605, § 7, providing that no assignment of wages to be earned in future to secure a loan of less than $200 shall be valid unless accepted by employer and recorded, is not unconstitutional because it deals only with security for loans and does not include security for other debts. Mutual Loan Co. v. Martell, 200 Mass. 482, 86 NE 916. Acts 29th Leg. p. 217, c. 111, imposing annual occupation tax upon persons engaged in business of taking assignments of unearned wages, is unconstitutional as being class legislation in exempting from its provisions all dealers in necessaries of life, seller of a homestead or dealers in necessaries for use of assignor in his employment, all persons making repairs on homesteads and all life and accident insurance companies. Owens v. State, 53 Tex. Cr. R. 105, 112 SW 1075. **Prohibition of pools, trusts and conspiracies** and agreements to regulate prices and limit trade in Rev. St. 1899, §§ 8965, 8966, 8971, 8978 (Ann. St. 1906, pp. 4150, 4152, 4153, 4157) does not discriminate against property by embracing commodities and excluding labor. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Anti-competition Law (Sess. Laws 1907, p. 490, c. 157), prohibiting unfair competition or unfair commercial discrimination between different sections, communities or localities, is not unconstitutional as being class legislation. State v. Drayton, 82 Neb. 254, 117 NW 768. Anti-trust Act March 3, 1899 (Acts 1899, p. 257; Burns' Ann. St. 1908, § 3884) is not invalid as being in denial of equal protection of law, it not being a denial of equal protection of law where it is a prohibition of that which is unlawful in itself at common law. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Anti-trust Act March 3, 1899 (Acts 1899, p. 257; Burns' Ann. St. 1908, § 3884) is not unconstitutional as being in denial of equal protection of law, in applying only to dealers, mechanics and artisans and not to consumers, such classification being proper. Id. Act May 20, 1890 (Ky. St. 1903, § 3915), forbidding trusts to regulate price of any article, and Acts 1906, p. 429, c. 117, legalizing pooling of farm products, apply equally to all classes and are not in conflict with U. S. Const. Amend. 14. Commonwealth v. International Harvester Co. [Ky.] 115 SW 703. Acts 1907, p. 334, c. 197, regulating **width of entries in bituminous mines** and exempting block coal mines from its provisions, is not unconstitutional as being based upon an arbitrary classification. State v. Barrett [Ind.] 87 NE 7. Laws 1907, p. 400, c. 250, regulating sale and delivery of **black powder for use in coal mines,** is not unconstitutional as based upon unreasonable classification, or because it applies to black powder alone. Ex parte Williams [Kan.] 98 P 777. Ark. Acts 1905, c. 219, § 1, providing that **miners employed at quantity rates** shall be paid according to weight of coal before it is screened, does not deny equal protection of laws under U. S. Const. Amend. 14, because it applies only to mines employing ten or more men, such classification being based on question of whether mine is in formative stage or not and consequently being reasonable. McLean v. Arkansas, 211 U. S. 539, 53 Law. Ed. —. That part of Laws 1908, p. 1221, c. 429, forbidding **accelerating or increasing flow of percolating** waters or **natural** carbonic acid **gas** from wells bored into the rock by pumping or any artificial contrivance, is unconstitutional as creating unlawful distinctions. Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 NE 504. Laws 1908, p. 1221, c. 429, providing that wells bored into rock which produce natural gas in class by themselves and subjecting them to certain regulations not applying to wells not bored into rock, does not deny equal protection of law. Hathorn v. Natural Carbonic Gas Co., 128 App. Div. 33, 112 NYS 374. Laws 1908, p. 1221, c. 429, does not deny equal protection of laws because prohibiting pumping from wells bored into rock, but not from wells bored into earth. Hathorn v. Natural Carbonic Gas Co., 60 Misc. 341, 113 NYS 458. That part of Laws

§ 11. *Privileges and immunities of citizens.*[66]—See 11 C. L. 763—The federal constitution prohibits states from passing laws abridging the privileges or immunities [67] of citizens [68] or from granting privileges to citizens of the states not accorded to citizens of other states.[69]

1908, p. 1221, c. 429, forbidding accelerating or increasing flow of percolating waters or natural carbonic acid gas from wells bored into rock, by pumping or any artificial contrivance, when object of so doing is to extract or collect carbonic acid gas for purpose of marketing same, is not in violation of federal constitution prohibiting any state from denying to any person equal protection of the laws, since classification based upon wells bored into rock is a proper one. Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 NE 504.

64. Rev. Codes, § 6452, fixing punishment of person escaping from state prison at term equal to that which he is serving, is a denial of equal protection of the laws to persons under circumstances in exempting federal prisoners confined for temporary purposes. Ex parte Mallon [Idaho] 102 P 374. Act March 29, 1907 (St. 1907, p. 414, c. 189), making it a crime to **receive deposits with knowledge of bank's insolvency,** is not void as a special law, nor as class legislation, classification being reasonable. Ex parte Pittman [Nev.] 99 P 700. Criminal Code, § 241 (Cobbey's St. 1907, § 2338), **prohibing common labor on Sunday,** is not in violation of U. S. Const. Amend. 14, it being based upon reasonable discrimination between common labor and labor of other kinds. In re Caldwell, 82 Neb. 544, 118 NW 133. Applies to operation of barber shop as common labor. Id. **Classification of offenses** according to their nature must rest on a reasonable difference. Birmingham Waterworks Co. v. State [Ala.] 48 S 658. Code 1896, § 4561, giving $50 **solicitor's fee on conviction of corporation** for violation of law, and for solicitor's fee of $7.50 for conviction of misdemeanor not otherwise provided for, constitutes an unjust discrimination against corporations, except as to offenses peculiar to them. Id. Acts 1901, p. 494, § 3, providing that **certain acts shall be considered blackmail** when committed against citizens of state, is in contravention of U. S. Const. Amend. 14, § 1, which forbids a state to deny to any person within its jurisdiction the equal protection of law. Greene v. State, 83 Neb. 84, 119 NW 6. Acts 1901, p. 494, § 3, providing that certain acts shall be considered blackmail when committed against citizens of state, is in contravention of Const. art. 3, § 15, forbidding special legislation. Id. Equality clause of federal constitution is not violated by Rev. Laws 1899, §§ 8965, 8966, 8971, 8978 (Ann. St. 1906, pp. 4150, 4152, 4153, 4157), providing for forfeiture of corporate franchises on conviction of violating of provisions of act forbidding pools and conspiracies to limit trade, because **providing different punishmeuts for corporations and individuals.** State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

65. Gen. Acts 1907, p. 636, prescribing rule of evidence that refusal or failure of person who enters into contract with employer to perform services or to pay for property obtained under contract shall be taken as **prima facie evidence of intent to defraud employer,** is not obnoxious as class legislation since it operates upon all persons similarly situated. Bailey v. State [Ala.] 49 S 886. Rev. St. 1895, art. 4564, making **rates prescribed by railroad commission conclusive** in suits against railroad companies, is not invalid as denying equal protection of laws in violation of fourteenth amendment of federal constitution, since arts. 4565, 4566 provide an appropriate proceeding in courts to determine whether rates are just. Texas & N. O. R. Co. v. Sabine Tram Co. [Tex. Civ. App.] 121 SW 256. Code Ala. 1907, §§ 3642-3658, providing that any foreign corporation shall forfeit its license on **removal of suit** from a state to a federal court, violates constitutional guaranty of equal protection of law. Western Union Tel. Co. v. Julian, 169 F 166. Act Feb. 28, 1907, and Act Aug. 8, 1907, providing for holding **terms of circuit court** at G. in C. county, are not in violation of Const. 1901, § 105, prohibiting enactment of special, private or local laws, in any case provided for by general law, there being no general law applicable. Ex parte Kelly, 153 Ala. 668, 45 S 290.

66. **Search Note:** See notes in 3 C. L. 760; 5 Id. 635; 1 Id. 704; 14 L. R. A. 579; 49 Id. 111; 60 Id. 321; 7 L. R. A. (N. S.) 812; 15 Id. 931; 16 Id. 1033; 1 Ann. Cas. 832.

See, also, Constitutional Law, Cent. Dig. §§ 691, 625-649; Dec. Dig. §§ 204, 206, 208; 8 Cyc. 1036, 1037, 1042-1056; 6 A. & E. Enc. L. (2ed.) 958.

67. Fourteenth and fifteenth amendments of the federal constitution are limitations on the states and cannot be invoked in support of a proceeding by negro for deprivation of right secured by constitution in first instance. Brawner v. Irvin, 169 F 964. Under constitutional amendment of 1904, being art. 4, § 34, of the Constitution, providing that in event of creation of municipal courts in city of Chicago jurisdiction and practice of such courts shall be such as general assembly shall prescribe, rights given to litigants by constitution as it stood before amendment cannot be taken away in reference to any matter other than practice in that court. Morton v. Pusey, 237 Ill. 26, 86 NE 601. Hurd's Rev. St. 1905, c. 3, § 18, providing that only such persons as are entitled to administer an estate under act shall have right to nominate administrator, is not unconstitutional because it deprives nonresident widow and children of deceased of right of nominating administrator, such right not being a privilege or immunity, denial of which is prohibited by federal constitution. In re McWhirter's Estate, 235 Ill. 607, 85 NE 918. Cobbey's St. 1907, §§ 9800, et seq., regulating **practice of medicine** in state are not in violation of Const. Neb. art. 3, § 15, as depriving a practicing physician of any privilege or immunity because it requires him to conform to its requirements. Mathews v. Hedlund,

§ 12. *Grants of special privileges and immunities.*[70]—See 11 C. L. 705—Constitutions of many states prohibit discriminations between persons of the same class [71]

82 Neb. 825, 119 NW 17. Refusal by medical college, incorporated under Comp. Laws, c. 218, to admit negro students, is not a deprivation of privileges or immunities guaranteed under state or federal constitution, since college has right to select its students. Booker v. Grand Rapids Medical College [Mich.] 6 Det. Leg. N. 56, 120 NW 589. Gen. Laws 1903, p. 375, c. 253, approved at general election 1904, as provided by Const. art. 4, § 32a, **increasing rate of gross earnings tax of railroad companies** doing business in state to 4 per cent, is not invalid as interfering with rights, privileges, and immunities of citizens, since contract between state and company's predecessor for lower rate does not pass as an appurtenance to railroad property. State v. Great Northern R. Co., 106 Minn. 303, 119 NW 202. **Exemption from compulsory self-incrimination** is not a privilege or immunity of national citizenship guaranteed by federal Const. amend. 14. Twining v. New Jersey, 211 U. S. 78, 53 Law. Ed. 97. **Right to engage in interstate commerce** is one impliedly guaranteed by U. S. Const. art. 4, § 2, as a privilege inherent in American citizenship. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754. **Detention in jail,** by local officers of state, **for failure to perform work on roads** outside military post and reservation is a violation of constitutional rights of teamster permanently employed in quartermaster's department of United States army. Pundt v. Pendleton, 167 F 997. Acts 1903, p. 68, c. 56, **forbidding attorneys to personally solicit business** is valid, practice of law being a privilege and not a right guaranteed by constitution. State v. Rossman [Wash.] 101 P 357.

68. Corporation is not citizen of United States within meaning of term as used in Fourteenth Amend. U. S. Const. relating to abridgement of privileges and immunities of citizens, such amendment being only made for protection of natural persons. Validity of Burns' Ann. St. 1908, §§ 8021, 8022, relating to employment of persons under certain ages in factories, in view of Fourteenth Amend. U. S. Const., will not be considered on application of a corporation. Inland Steel Co. v. Yedinak [Ind.] 87 NE 229. Anti-trust Act Mar. 3, 1899 (Acts 1899, p. 257; Burns' Ann. St. 1908, § 3884), is not unconstitutional as a denial of privileges and immunities to one citizen or class of citizens which upon same terms shall not belong equally to all, since Const. § 23, applies only to lawful contracts and since it applies only to persons who come within its classification. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Insurance companies and persons owning insured property are entitled to equal rights, and not to special privileges. Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922.

69. Laws 1907, p. 304, § 19, providing that county court shall have final jurisdiction to hear and determine contest of a local option election, is not unconstitutional as being an abridgment of privileges and immunities of citizens of the United States. Saylor v. Duel, 236 Ill. 429, 86 NE 119. Comp. St. 1903, c. 23, § 20, providing that dower right of nonresident widow shall be limited to lands of which her husband died seised, and extending dower right of resident widow to other lands, is not unconstitutional as being in violation of Const. art. 1, § 25, providing that no distinction shall be made between resident aliens and citizens in possession, enjoyment, or descent of property. Miner v. Morgan, 83 Neb. 400, 119 NW 781. To close courts to parties who may not be residents of state for enforcement of their contracts within state would be to violate constitutional provisions as to privileges and immunities of citizens. Drew v. Cass, 129 App. Div. 453, 113 NYS 1042. That foreign corporation has for a long time transacted business in state without permission does not render enforcement of statute, exacting conditions as prerequisite to continuing to do business, an abridgment of privileges and immunities of citizens of another state. Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194. Privileges and immunities of citizens of United States not abridged by Rev. St. 1899, §§ 8965, 8966, 8971, 8978 (Ann. St. 1906, pp. 4150, 4152, 4153, 4157), providing for forfeiture of corporate franchises on conviction of violating sections forbidding pools and trusts, because imposing greater or different punishment on corporations than on individuals. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Gen. St. 1901, § 1283, requiring foreign corporations to file certain statements with secretary of state as condition to maintaining suits, does not abridge privileges and immunities of citizens of United States. Wilson-Moline Buggy Co. v. Hawkins [Kan.] 101 P 1009. Pen. Code, § 27, applying penal laws of state to person who commits a crime therein, does not violate provision of federal constitution that citizens of each state shall be entitled to all privileges and immunities of citizens of several states. People v. Botkin, 9 Cal. App. 244, 98 P 861.

70. Search Note: See notes in 53 L. R. A. 763; 2 L. R. A. (N. S.) 813; 6 Id. 722; 8 Id. 362; 11 Id. 635; 13 Id. 901.

See, also, Constitutional Law, Cent. Dig. §§ 591-624, 649-677; Dec. Dig. §§ 205, 208; 8 Cyc. 1038-1041, 1051-1056; 6 A. & E. Enc. L. (2ed.) 966.

71. Grant of special privilege: Acts 1907, p. 1371, c. 403, amending Code 1858, § 3305, giving life tenants right to sell land of remaindermen without latter's assent and permitting judgment for such sale on showing that it is for life tenant's interest, is void as violating Const. art. 11, § 8, forbidding granting of special privileges. McConnell v. Bell [Tenn.] 114 SW 203. St. 1903, p. 289, c. 235, relating to restraint of combinations in furtherance of trade disputes if construed to prevent court from restraining labor union from illegally interferring with business of former employer, is a grant of special privileges contrary to constitution. Pierce v. Stablemen's Union, Local No. 8,760 [Cal.] 103 P 324. Since Const. 1870, art. 4, § 22, prohibits grants of special privileges, **contracts made to prevent competition** in business impressed with public character are void. Dunbar v. American Tel. & T. Co., 238

by grants of special privileges or immunities. As such grants necessarily result in a denial of equal protection of the law, resort should be had to the section dealing with that provision.[72] Such provisions are to be distinguished from those against special legislation which are treated elsewhere.[73]

§ 13. *Laws impairing the obligation of contracts*[74]—See 11 C. L. 706 are void.[75]

Ill. 456, 87 NE 521. Acts 30th Leg. 1907, p. 275, c. 141, imposing **license tax on barbers** and exempting students working their way as barbers, barbers in eleemosynary institutions, and barbers in towns of less than 1000 inhabitants, is void as granting special privileges to certain individuals. Jackson v. State, 55 Tex. Cr. R. 557, 117 SW 818. Acts 30th Leg. 1907, p. 133, c. 62, punishing abandonment of wife and children, is invalid in that it provides for **payment of fine into court** for benefit of wife or child, since it amounts to an appropriation of public funds for individual purposes in violation of Const. art. 16, § 6. Ex parte Smythe [Tex. Cr. R.] 120 SW 200; Waller v. State [Tex. Cr. R.] 120 SW 207; Phillips v. State [Tex. Cr. R.] 120 SW 207; Schneider v. State [Tex. Cr. R.] 120 SW 207; Adams v. State [Tex. Cr. R.] 120 SW 208.

Not grant of special privilege: Act Mar. 7, 1907, p. 418, § 1 (Code 1907, § 2391), requiring foreign corporation to pay franchise tax based on amount of capital employed in state, does not violate U. S. Const. art. 1, § 10, as to a foreign corporation that has complied with all legal requirements as a grant of a special privilege. Southern R. Co. v. Greene [Ala.] 49 S 404. Sess. Laws 1903, p. 244, c. 131, relating to defrauding hotel keepers, is not in violation of Const. art. 1, § 12, as being a grant of special privileges. Ex parte Milecke, 52 Wash. 312, 100 P 743. Laws 1901, p. 312, c. 150, authorizing board of appraisers and commissioner of public lands to sell certain lands for cemetery purposes at not less than a certain price per acre, is not void as a grant of special privileges. Day v. Richardson [Wash.] 103 P 8. Acts 32d Gen. Assem. (Laws 1907, p. 257, c. 255), legalizing acts of county supervisors in releasing treasurer from liability for loss of funds deposited in failing bank, is not invalid as conferring a special benefit or immunity upon a particular individual. McSurely v. McGrew [Iowa] 118 NW 415. Privilege of **selling intoxicants to whites** at bar but which does not give privilege to sell to colored persons at a separate bar in same building, granted by police regulation, is not violative of constitution. State v. Falkenheiner, 123 La. 617, 49 S 214. Acts 1904, p. 214, c. 116, allowing chartered social club to sell liquor to members, is not a grant of special privileges. City of Norfolk v. Board of Trade & Business Men's Ass'n [Va.] 63 SE 987. Sp. Laws 1905, p. 996, c. 4, authorizing city of Medford to license saloons, is not unconstitutional as granting privileges not equally belonging to all citizens. Hall v. Dunn [Or.] 97 P 811. Laws 1905, p. 222, as amended by Laws 1907, p. 281, **licensing** itinerant **peddlers** of drugs, does not violate Const. art. 1, § 20, forbidding class legislation, it applying equally to all itinerant venders of drugs. State v. Miller [Or.] 103 P 519. Rev. St. 1899, §§ 8861, 8862, 8868 (Ann. St. 1906, pp. 4118-4120), prohibiting peddling without a license and excepting pianos, etc., are not unconstitutional as violating Const. art. 4, § 53, forbidding laws granting special privileges. State v. Webber, 214 Mo. 272, 113 SW 1054.

72. See § 10, supra.

73. See Statutes, § 2.

74. Search Note: See notes in 3 C. L. 765, 767; 1 L. R. A. 356; 16 Id. 646; 17 Id. 611; 31 Id. 721; 50 Id. 142; 60 Id. 33; 1 L. R. A. (N. S.) 1171; 5 Id. 860; 14 Id. 1074; 15 Id. 929; 3 Ann. Cas. 88, 986, 1148; 4 Id. 93, 259, 794; 6 Id. 601; 8 Id. 622; 9 Id. 1121.

See, also, Constitutional Law, Cent. Dig. §§ 271-525; Dec. Dig. §§ 113-185; 8 Cyc. 929-1017; 15 A. & E. Enc. L. (2ed.) 103.

75. There is no constitutional inhibition upon congress passing laws to impair obligation of contracts as there is against states. Louisville & N. R. Co. v. Mottley [Ky.] 113 SW 982. Subsequent constitutional authorizing recovery not only for property taken by railroad company for public use but for property damaged thereby does not impair railroad's contract rights, since charter taken subject to subsequent legislation. Alabama & V. R. Co. v. King [Miss.] 47 S 857. Laws 1903, p. 308, c. 132, prohibiting unauthorized use of name or picture of any person for trade or advertising purposes, not applying to pictures acquired before passage of act, is not unconstitutional on ground that it impairs obligation of contracts. Rhodes v. Sperry & Hutchinson Co., 193 N. Y. 223, 85 NE 1097. Insurance Law, § 97 (Laws 1906, p. 794, c. 326, § 33), limiting amount life insurers may pay to procure new business, is not to be construed as being retroactive, and hence does not apply to 20-year contract made before its passage between life insurance company and general agent, whereby latter was to be paid in commissions at different rate than that prescribed by act. Boswell v. Security Mut. Life Ins. Co., 193 N. Y. 465, 86 NE 532. St. 1908, p. 606, c. 590, §§ 56, 57, authorizing probate court on application of attorney general to direct payment of savings bank deposits to state treasurer if unclaimed for more than 30 years, is not unconstitutional as impairing obligation of contracts. Malone v. Provident Inst. for Sav. [Mass.] 86 NE 912. Burns' Ann. St. 1908, §§ 8021, 8022, regulating employment of persons under certain ages in manufacturing establishment, are not unconstitutional as impairing obligation of contracts, such statutes being in force before contracts in litigation were executed. Inland Steel Co. v. Yedinak [Ind.] 87 NE 229. Acts 28th Gen. Assem. p. 51, c. 69, regulating building and loan associations and fixing rate of interest to be paid, is not unconstitutional as impairing obligation of contracts of an existing association, since legislature had absolute authority under reserved power to terminate its right to do business and since act gave it an option to comply with law or go out of business. St. John v. Iowa Business Men's

Building & Loan Ass'n, 136 Iowa, 448, 113 NW 863. Banking Law (1 Birdseye Rev. St. [3d ed.] p. 275), §§ 227-238 (Laws 1899, p. 923, c. 451, as amended by Laws 1901, pp. 375, 1243, cc. 171, 503), authorizing person claiming to be owner of lost or destroyed certificate of deposit to maintain proceeding to enforce its payment and that after payment on order of court no claim shall be available against bank by one having certificate in his possession, is unconstitutional as impairing obligation of contracts of bona fide holders. In re Ellard, 62 Misc. 374, 114 NYS 827. Trinity church, chartered by British crown in 1697, not subject to religious corporations law (Laws 1895, p. 477, c. 723), so far as it is inconsistent with or in derogation of rights or privileges of the corporation under charter. Burke v. Trinity Church, 63 Misc. 43, 117 NYS 255. Since a renewal note extinguishes the old debt, a construction of Negotiable Instruments Act (Acts 1905, p. 251, § 63), applying it to renewal note executed after passage of act, does not render it unconstitutional as being an impairment of contract. Walker v. Dunham, 135 Mo. App. 396, 115 SW 1086. Acts 1907, p. 485, creating depository for county funds, does not impair obligation of contracts in violation of U. S. Const. art. 1, § 10, and of Ark. Const. art. 2, § 17, in changing penalties on county treasurer's bond, treasurer not holding office by contract or grant. Hunter State Bank v. Mills [Ark.] 117 SW 760. Code of 1904, § 1906c, validating voidable parol sale of standing timber, was not in violation of Const. 1902, art. 4, § 58 (Code 1904, p. ccxxii), as impairing obligation of contracts. Hurley v. Hurley [Va.] 65 SE 472. License issued under general statute to liquor dealer is not such a contract as comes within constitutional provision degarding impairment. Arie v. State, 1 Okl. Cr. R. 250, 100 P 23. St. 1905, p. 443, c. 368, creating drainage district, is not invalid as impairing obligation of contracts, since state has right to vary its plans for reclamation of lands and to that end may create new or different agencies. People v. Sacramento Drainage Dist. [Cal.] 103 P 207. Laws 1907-8, p. 145, c. 6, art. 2, as amended by Laws 1907-8, p. 153, c. 6, art. 3, establishing depositor's guaranty fund to insure against loss upon bank's insolvency, does not impair obligation of contracts. Noble State Bank v. Haskell [Okl.] 97 P 590. Mere assertion of right to a patent by filing application does not constitute such a contract as comes within rule as to impairment of contracts under federal constitution. De Ferranti v. Lyndmark, 30 App. D. C. 417. Act 1904, p. 281, No. 120, recognizing validity of corporations previously formed and of their acts, does not impair obligation of contracts. Provident Bank & Trust Co. v. Saxon, 123 La. 243, 48 S 922. Compulsory annexation of territory to municipalities relative to taxation involves no contract between state and citizens of annexed territory. Lutterloh v. Fayetteville, 149 N. C. 65, 62 SE 758. Acts 1905, p. 406, c. 42, relating to sale of forfeited lands, is not an impairment of contract or vested rights. Act Aug. 30, 1856 (4 Laws, p. 499; Pascal's Dig. art. 4210, violates constitutional provision relating to impairment of contracts since it declares **surveys on conditional certificates** void unless unconditional certificates have been returned to land office. State v. King, 64 W. Va. 546, 63 SE 468; Keith v. Guedry [Tex. Civ. App.] 114 SW 392. Act Nov 29, 1871 (Laws 1870-71, p. 45, c. 57; Pascal's Dig. art. 7079), violates constitutional provision against impairing obligation of contracts in declaring location and surveys on certificates not returned to land office within a fixed time void. Keith v. Guedry [Tex. Civ. App.] 114 SW 392. Laws 1906, p. 265, No. 256, providing for special **assessments** upon abutting property for paving already done, does not impair obligation of contracts, it involving merely principles of taxation, no property being taken or assessment made. Durkee v. Barre, 81 Vt. 530, 71 A 819. Where a town makes a contract for furnishing light and water under statute giving it power to tax at a certain rate, subsequent statutes lowering rates are void. Welch W., L. & P. Co. v. Welch, 64 W. Va. 373, 62 SE 497. Anti-Pass Law, Laws 1907, p. 342, c. 93, prohibiting issuance, acceptance, and use of **free transportation,** is not unconstitutional as impairing obligation of contracts between carrier and passenger. State v. Martyn, 82 Neb. 225, 117 NW 719. Rev. St. 1887, § 2653, as amended by Laws 1903, p. 49, **imposing additional requirements on foreign corporations** doing business in state, does not violate contractual rights since same requirements are imposed on domestic corporations. Tarr v. Western Loan & Sav. Co., 15 Idaho, 741, 99 P 1049. Gen. St. 1901, § 1283, requiring foreign corporations **to file statements** with secretary of state as condition to maintaining actions, is not void as an impairment of obligation of contract. Wilson-Moline Buggy Co. v. Hawkins [Kan.] 101 P 1009. Const. art. 9, §§ 43, 44, requiring filing of list of foreign corporation stockholders and officers as condition precedent to doing business in state, does not affect contractual rights accrued prior to enactments of such sections. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785. Act Okl. May 26, 1908 (Laws 1908, p. 214, c. 16), providing that, on filing by any foreign corporation in any court of record claim of domicile in another state, license to transact business in state shall be revoked, is unconstitutional as impairing contract rights. St. Louis & S. F. R. Co. v. Cross, 171 F 480. Acts 29 Leg. 1905, pp. 21, 100, cc. 19, 72, imposing a **franchise tax** upon corporations, is not unconstitutional as to a corporation that has been granted a permit under Laws of 1901 for a period of 10 years and paid tax therefor, the state not being thereby precluded from passing a further franchise tax. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361. Gen. Laws 1903, p. 375, c. 253, approved at general election 1904, as provided by Const. art. 4, § 32a, increasing rate of gross earnings tax of railroad companies doing business in state to 4 per cent, is not invalid as impairing obligation of contract between state and predecessor of company taxed. State v. Great Northern R. Co., 106 Minn. 303, 119 NW 202; State v. Chicago G. W. R. Co., 106 Minn. 290, 119 NW 211. Since constitutional provision does not apply to license of foreign corporation, Rev. St. 1899, §§ 8965-8967, 8971, 8972, 8978 (Ann. St. 1906, pp. 4150, 4152-4154, 4157), providing for **forfeiture of license of** foreign corporation for violation of anti-trust clause of act, such statute does not impair obligation of contract. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Act Ark. Mar. 7, 1903 (Acts 1903, p. 123, No. 68), Kirby's Dig. Ark. § 7947,

Regulations of remedies[76]—See 11 C. L. 707 or laws passed under the police power[77] are valid. Contracts made in accordance with a construction given to

providing that all telegraph companies doing business in state shall be liable in **damages for mental anguish** or suffering, even in absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting, or delivering messages, is not unconstitutional as impairing obligation of contracts as to foreign companies that had entered state prior to its passage, since such companies entered state subject to any change in laws affecting business of domestic and foreign corporations alike. Ivy v. Western Union Tel. Co., 165 F 371. Provision in ordinance granting street railway franchise requiring establishment and maintenance of **additional routes** made up of original routes, thereby depriving company of right to collect second fare, is void as impairing obligation of contract. People v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 223, 121 NW 321. Judgment in mandamus to compel a water company holding city franchise to construct connections with consumers at its own cost held not an impairment of contract with city. International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816. Laws 1874 (Hurd's Rev. St. 1908, c. 114, §§ 62-102), requiring **railway companies to fence** tracks, does not apply to company's exemption from liability under contract previously made, since to hold otherwise would impair obligation of contract. Lynch v. Baltimore, etc., R. Co., 240 Ill. 567, 88 NE 1034.

76. Impairment of obligation of contract by a state includes not only cases where statute destroys remedy for enforcement of contract, but also where substitution of a different remedy is of one in substance more difficult or uncertain than the one repealed. City of Cleveland v. U. S. [C. C. A.] 166 F 677. Acts Tenn. 1895, p. 203, c. 120, whereby power of assessing property for taxation was taken from municipal authorities and vested in county assessor, held void as impairing obligation of contract by depriving relator of a remedy against city recorder to compel an assessment at true value. Id. Gen. Laws 1905, p. 407, c. 271, providing that no notice of expiration of time of redemption of tax certificate shall be issued after six years, is not unconstitutional as impairing obligation of contracts. State v. Krahmer, 105 Minn. 422, 117 NW 780. Pub. Acts 1903, p. 386, No. 236, amending Comp. Laws, §§ 3959, 3960, relative to giving notice of tax sale and giving of tax deed, and of its redemption within six months, so as to require notice to owner, which notice is to provide that payment may be made either to purchaser or to register in chancery, does not impair obligation of contracts, since it merely relates to the remedy. Weller v. Wheelock [Mich.] 15 Det. Leg. N. 856, 118 NW 609. Code Civ. Proc. § 2728, requiring that a surety must be made party to proceedings for voluntary accounting of administrator before he will become bound by decree, affecting only procedure, is not an impairment of contract of suretyship executed before passage of such amending section. Bookman v. Stoddard, 132 App. Div. 485, 116 NYS 901. Code 1880, § 589, providing that contracts made in violation of Acts 1875, p. 10, c. 1, § 5, relating to privilege license taxes, should be void so far only as claims should be based on them, relating only to remedy. Hence Code 1906, § 3894, providing fine and imprisonment only for violation of act, was valid. Sullivan v. Ommons [Miss.] 48 S 244. Code Civ. Proc. § 1391 (Laws 1908, p. 433, c. 148), providing that where a judgment has been recovered an execution may issue against wages of judgment debtor to become due and owing, impairs no contract right of judgment debtor as to judgment recovered prior to passage of statute, so as to render statute unconstitutional, it being retroactive and merely furnishes judgment creditor additional remedy for previously existing right. Bayliss v. Ryan, 64 Misc. 146, 117 NYS 1022. A statute **may change mere rules of evidence,** and although it applies to cases in which cause of action accrued and rights became vested prior to its passage, it is constitutional, though a statute affecting rules of evidence, and in fact divesting vested rights, would be unconstitutional. Laws 1907, p. 845, c. 197, as to testimony of corporate officers as to transactions which happened prior to enactment, is constitutional. In re McNaughton's Will, 138 Wis. 179, 118 NW 997. One cannot acquire a vested right in a judicial remedy unless it is of the contract so that an invasion of the remedy necessarily impairs the property right. Such exception does not apply where other rules ample to establish remedial right by competent witnesses is left in force. Id. Acts 1908, p. 260, c. 125, providing for administration of estates of persons presumed to be dead from absence of over seven years, does not impair contractual obligations between absentee and others because of fact that seven-year period may have commenced prior to passage of act. Savings Bank v. Weeks, 110 Md. 78, 72 A 475.

77. Laws 1907, p. 315, limiting compensation and salaries of officers of life insurance companies, being for protection of citizens of state, and licenses to corporations to do business in state, are not contracts between corporations and state, but are police regulations which may be amended or repealed at pleasure of legislature. State v. Vandiver [Mo.] 121 SW 45. Sayles' Ann. Civ. St. 1897, arts. 4560g, 4560h, making all railroad employes entrusted with authority to superintend vice-principals, and prescribing who shall be fellow-servants, does not impair obligation of contracts, being an exercise of police power. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Ordinance prohibiting hack solicitors from soliciting business from passengers in railway stations at certain times, adopted under Pierce's Code, § 3732, subds. 34, 36 (Ballinger's Ann. Codes & St. § 3732), does not operate to impair existing contract between transfer company and railway company, since such contract is subject to police power of city. City of Seattle v. Hurst, 50 Wash. 424, 97 P 454. An ordinance passed by city council, requiring a railway company to maintain approaches to subway under its tracks, held invalid as imposing an additional burden upon company, being a mere police regulation and not authorized by

statutes or constitutional provisions by courts of last resort, and rights so acquired, may not be invalidated by subsequent change of construction.[78]

§ 14. *Retroactive legislation; vested rights.*[79]—See 11 C. L. 707—Retroactive laws,[80] except as expressly forbidden by the constitution,[81] are valid,[82] unless they infringe on other constitutional limitations.[83]

Vested rights See 11 C. L. 707 cannot be impaired.[84]

charter or statute since it afforded no protection to public from passing trains. People v. Illinois Cent. R. Co., 235 Ill. 374, 85 NE 606.

78. Mason v. Nelson Cotton Co., 148 N. C. 492, 62 SE 625.

79. Search Note: See notes in 19 L. R. A. 256; 22 Id. 379; 45 Id. 609; 52 Id. 934; 1 L. R. A. (N. S.) 431, 528; 5 Id. 327; 6 Id. 198, 257; 8 Id. 1180, 1272; 15 Id. 929; 37 A. S. R. 582, 587; 84 Id. 437; 111 Id. 455.

See, also, Constitutional Law, Cent. Dig. §§ 174-270, 526-590; Dec. Dig. §§ 92-112, 186-203; 8 Cyc. 894-929, 1017-1036; 6 A. & E. Enc. L. (2ed.) 937.

80. Constitutional provisions are intended to operate prospectively and all doubts must be resolved in favor of such construction. Bohart v. Anderson [Okl.] 103 P 742. In order to become retrospective, law must take away a vested right, or it must create a new obligation, impose a new duty, or attach a new disability in respect to past transactions. Clark v. Kansas City, etc., R. Co., 219 Mo. 524, 118 SW 40. Amendment adopted at general election of 1906 to Const. Kan. art. 2, § 17, is not retroactive. Stephens v. Labette County Com'rs [Kan.] 98 P 790. Const. art. 2, § 17, as amended in 1906, providing that courts shall determine whether a law is repugnant to section as being special, is not retroactive and does not apply to Laws 1903, p. 349, c. 199. State v. Cox [Kan.] 99 P 1128. Okl. Const. art. 9, § 31, providing that in order to entitle foreign railway companies to benefit of eminent domain they must be incorporated in state, does not affect right of way previously acquired, and hence is not retroactive. St. Louis & S. F. R. Co. v. Cross, 171 F 480. Change in constitution and laws of benefit associations, whereby beneficiary was required to submit claim under certificate to tribunal within association, did not deprive him of vested rights where certificate was subject to conditions of constitution, although when beneficiary became member constitution was silent as to enforcement of claims. Monger v. New Era Ass'n [Mich.] 16 Det. Leg. N. 261, 121 NW 823.

81. Act Nov. 29, 1871 (Laws 1870-71, p. 45, c. 57; Pascal's Dig. art. 7079), is, in violation of constitutional provision against passage of retroactive legislature in declaring location and surveys on certificates not returned to General Land office within a certain time, void. Keith v. Guedry [Tex. Civ. App.] 114 SW 392. Act Aug. 30, 1856 (4 Laws, p. 499; Pascal's Dig. art. 4210) is, in violation of constitutional provision forbidding passage of retroactive legislation, since it declares locations and surveys on conditional certificates for which unconditional certificates have not been returned, void. Id. The constitutional inhibition against retroactive laws is designed and intended to prevent retrospective legislation injuriously affecting individuals and thus protect their rights from invasion. Cullman County v. Blount County [Ala.] 49 S 315.

82. Where statute plainly shows that it was intended to have a retrospective effect, court will so construe it as to give it operation intended. Anderson v. Ritterbusch [Okl.] 98 P 1002. Act Feb. 27, 1907 (Loc. Acts 1907, p. 290), apportioning indebtedness where new county created, though passed subsequently to act creating county, is not within constitutional inhibition. Cullman County v. Blount County [Ala.] 49 S 315. Inhibition does not apply to legislation recognizing and affirming obligation of subordinate branch of state with respect to past transactions. Id. Laws 1907, p. 72, c. 55, providing that Civ. Code 1901, pars. 3998-4009, making franchises for toll roads cover construction of trails, should be construed to have included trails from time of enactment and that such franchise had always been transferrable, and confirming attempted transfers, was a proper exercise of legislative power to pass retrospective remedial acts. Duffield v. Ashurst [Ariz.] 100 P 820. Inasmuch as judicial construction with respect to a statute is given the same effect in its operation on contracts and existing contract rights that would be given by legislative amendment, subsequent adjudications would seem to render Rev. St. § 2502, authorizing certain cities to grant originally, or to extend grants, to street railway franchises for fifty years, unconstitutional, will not be construed as having a retroactive effect upon a franchise founded on a good consideration and granted at a time when this statute would have stood the constitutional test, and particularly will such retroactive effect be denied in view of the curative provisions of § 31 of the municipal code. State v. Oakwood St. R. Co., 11 Ohio C. C. (N. S.) 263.

83. Code 1907, § 3011, giving attorney's lien, is not retroactive, and does not apply to suit in progress when enacted. Leahart v. Deedmeyer [Ala.] 48 S 371. Deed insufficiently acknowledged, under Laws 1907, p. 308, c. 165, of Texas, is admissible, since remedial acts do not come within inhibition of Texas constitution. Donns v. Blount [C. C. A.] 170 F 15.

84. Vested right is some right or interest in property that has become fixed and established, but does not include claims contrary to justice nor property bought pending litigation concerning title. Downs v. Blount [C. C. A.] 170 F 15. Unadjusted costs made in effort to carry out drainage scheme do not, as between parties to pending proceedings to establish a public drain, constitute a liability within Burns' Ann. St. 1908, § 248, and, as between them, repeal of statute and dismissal of proceedings did not affect any vested or contractual right. Kunkalman v. Gibson [Ind.] 86 NE 850. A judgment lien

Taxes, licenses and public rights.[See 11 C. L. 708]—The legislature may validate the payment of public funds paid to one whose license has been revoked [85] and may provide new remedies for the collection of taxes due.[86]

is general and is a mere remedy given by statute to judgment creditor and may be withheld or divested by legislature at any time before rights have become thereby vested. Snyder v. Thieme & Wagner Brew. Co. [Ind.] 87 NE 155. Sayles' Ann. Civ. St. 1897, arts. 4560g, 4560h, making all railroad employes entrusted with authority of superintendence vice-principals, and prescribing who shall be fellow-servants, is not unconstitutional as interfering with vested rights. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Loc. Acts 1907, p. 362, No. 461, requiring county supervisors to designate county depository, wherein county officers are required to deposit county funds, does not impair vested right of county treasurer where act was in force before he took office. Gratiot County Sup'rs v. Munson [Mich.] 16 Det. Leg. N. 435, 122 NW 117. Acts 32d Gen. Assem. (Laws 1907, p. 257, c. 255), legalizing acts of supervisors of county in releasing county treasurer from liability for loss of funds deposited in failing bank, is not unconstitutional as being retroactive legislation operating upon past transactions, there being no contract rights involved save as statute created such rights. McSurely v. McGrew [Iowa] 118 NW 415. Fact that New Mex. Act Mar. 11, 1903, (Acts 35th Leg. c. 23), prescribing causes of action enforcible only in territory of New Mexico, has been annulled under power of congress, does not render law void from beginning so as to strike down vested rights, such laws remaining in force until congress asserts its authority. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —. Forest, Fish and Game Law, Laws 1900, p. 60, c. 20, §§ 208, 209, ordering **fishways** through certain dams to be erected on order of Forest, Fish and Game Commissioner, does not deprive owner of dam of vested right since no vested right to maintain dam without efficient fishways exists. In re Delaware River at Stilesville, 121 App. Div. 403, 115 NYS 745. There is no constitutional or inherent **right to hold office.** State v. Goldthait [Ind.] 87 NE 133. Incumbents of municipal officers have no standing to complain of change of abolition of such officers. Robbins v. Wilkes-Barre, 37 Pa. Super. Ct. 382. Laws 1885, p. 1162, c. 299, authorizing city to change two-thirds of cost of street paving against abutting property on original paving and providing that it should not apply to repaving where abutting property had borne expense of original paving, gives no vested rights to exemption from further **special assessments for repaving,** such statute being subject to amendment. Carstens v. Fond du Lac, 137 Wis. 465, 119 NW 117. Laws 1906, p. 265, No. 256, providing that city council may direct street commissioners to assess not to exceed half of costs on abutting property for paving already done, does not impair vested rights, no property being taken or assessment made. Durkee v. Barre, 81 Vt. 530, 71 A. 819. Acts 1904, p. 504, c. 281, § 2, **validating void tax deed,** not invalid as impairing owner's vested rights, his rights having been divested by the tax sale to the city. McMahon v. Crean [Md.] 71 A. 995. A statute enacted after acquisition, by a private party, of a tax sale certificate, requiring a particular and additional notice to be given to the owner of the land before a deed issues on the certificate, when the right to a deed had not become absolute and giving of notice imposes no burden upon holder of certificate, may not impair any substantial right of holder of certificate, and consequently may not be an impairment of vested property rights or a deprivation of property without due process of law. Starks v. Sawyer [Fla.] 47 S 513. **Special franchise** is the right granted by the public to use public property for a public use but with private profit, and when such a franchise is acted upon it becomes property and cannot be repealed by the legislature, unless power to do so is reserved in grant, although it may be condemned upon making compensation. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Where Gen. St. 1901, §§ 1302, 1315, imposing **double liability upon** corporation **stockholders,** has been repealed, a creditor whose claim against corporation originated after such repeal has no vested rights under law repealed, and could not be injured thereby. Rowland & Mayer v. Forest Park Creamery Co. [Kan.] 99 P 212. Acts 1907 changing amount of fees to be paid for **increase of capital stock** is not unconstitutional as neither domestic nor foreign **corporations** have any vested rights to obtain privilege of increasing stock at amount of fees fixed by prior law. Cudahy Packing Co. v. Denton [Kan.] 97 P 439. That part of Laws 1906, p. 763, c. 326, providing for mutualization of stock life insurance companies, which confers on policy holders the right to vote for majority of directors, and limiting stockholders to right to vote for minority only, is invalid, since stockholders have the **right to vote for all directors** and such right is a vested one. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Gen. Laws 1903, p. 375, c. 253, approved at general election 1904 as provided by Const. art. 4, § 32a, **increasing rate of gross earnings tax** of railroad companies doing business in state to 4 per cent, is not invalid as taking from company taxed any vested property right to any contract entered into by its predecessor relating to lower rate. State v. Great Northern R. Co., 106 Minn. 303, 119 NW 202.

85. Gen. Laws 1907, p. 14, c. 15, validating payments of public moneys to seller of intoxicating liquors whose license has been revoked, not being an interference with a vested right, is valid. Calderwood v. Schlitz Brew. Co., 107 Minn. 465, 121 NW 221.

86. Senate Bill No. 245 (Sess. Laws 1907-8, p. 729, c. 81, art 9), providing method by which taxes due on omitted property may be assessed and collected, merely giving new remedy to state for collection of taxes, invades no vested right of taxpayer. Anderson v. Ritterbusch [Okl.] 98 P 1002. Laws 1908, p. 1112, licensing sale of intoxicating liquors for support of state penitentiary, is not retroactive. Carroll v. Wright, 131 Ga. 728, 63 SE 260.

Regulations of procedure.[See 9 C. L. 631]—Since no vested rights in rules of procedure exists, there is no inhibition against changing rules of procedure.[87] There are no vested rights in rules of evidence.[88]

Statutes of limitations.[See 11 C. L. 708]—There being no vested right to a statute of limitations,[89] such statutes may be made to apply to existing causes of action.[90]

Ex post facto laws.[See 11 C. L. 708]—The prohibition against the passage of ex post facto laws applies to penal and criminal laws only.[91]

87. Const. Amendment June, 1908, providing that no person shall be charged with commission of any crime or misdemeanor except upon indictment of grand jury, does not apply to disposition of criminal case appealed prior to its passage. State v. Ju Nun [Or.] 98 P 513. Code Civ. Proc. § 1391 (Laws 1908, p. 433, c. 148), providing that where a judgment has been recovered, an execution may issue against wages of judgment debtor to become due and owing, is retroactive in effect and applies to judgments recovered prior to passage of act. Bayliss v. Ryan, 64 Misc. 146, 117 NYS 1022. Mortgage Tax Law (Laws 1905, p. 2064, c. 729), § 296, as amended by Laws 1907, p. 624, c. 340, § 3, so far as it authorizes proceedings to enforce payment, may be retroactive and valid as to matters of practice, but as creating a liability against mortgagor in respect to a prior transaction is invalid. People v. Union Bag & Paper Co., 63 Misc. 132, 118 NYS 456. If statute giving special remedy is repealed without saving clause in favor of pending suits, holding that such suits are defeated is not in violation of constitutional inhibition against retroactive legislation affecting vested rights. Stewart v. Lattner [Tex. Civ. App.] 116 SW 860. That part of Laws 1897, p. 285, c. 98, § 1, providing for notice to creditors by executor of estate without intervention of probate court, and barring claims not presented within year, relating merely to procedure, is not invalid as interfering with vested rights. Strand v. Stewart, 51 Wash. 685, 99 P 1027. Laws 1907, p. 277, c. 43, amending Rev. St. 1895, art. 3106, so as to decrease amount of recovery of usurious interest, operates only upon payments made after taking effect of act. Stewart v. Lattner [Tex. Civ. App.] 116 SW 860. There is no vested right in an adjudication of supreme court construing a limitation in a suit to which he is not a party. Gulledge v. Seaboard Air Line R. Co., 148 N. C. 567, 62 SE 732.

88. State v. King, 64 W. Va. 546, 63 SE 468. No vested rights apply to rules of evidence, but legislation by changing rules cannot deprive a party of a vested property right. Downs v. Blount [C. C. A.] 170 F 15. Legislature can make a deed prima facie evidence of facts therein stated. State v. King, 64 W. Va. 546, 63 SE 468. Acts 1884, p. 670, c. 502 (Code Pub. Gen. Laws 1904, art. 53, § 26), providing that failure for 20 years to make demand for ground rent shall conclusively be presumed to extinguish rent and which extinguishes the reversionary interest, is constitutional since legislature may fix rules of evidence by which tenant could show adverse possession as against landlord, if rent not demanded, within time fixed. Safe Deposit & Trust Co. v. Marburg, 110 Md. 410, 72 A 839. Laws 1907, p. 538, c. 373, providing that if sheriff's return in proceedings to forfeit school lands shows that notice was posted in county clerk's office it shall be prima facie evidence of service, is not objectionable as interfering with vested rights. Jones v. Hickey [Kan.] 102 P 247; Reitler v. Harris [Kan.] 102 P 249. St. 1907, p. 122, c. 100, amending Code Civ. Proc. § 1339, by permitting **will destroyed by public calamity** to be proved as a destroyed will, is within power of legislature to alter rules of evidence and burden of proof as to pending case. In re Patterson's Estate [Cal.] 102 P 941. Rev. St. 1895, art. 2312, as amended by Gen. Laws 1907, p. 398, c. 165, providing that an **instrument recorded for ten years** may be admitted in evidence without proof of execution, is not void as taking away a vested right, it merely depriving parties of an objection that would have been available under former law. Haney v. Gartin [Tex. Civ. App.] 113 SW 166. Rev. St. 1895, art. 2312, as amended by Acts 1907, p. 308, c. 165, allowing instruments recorded within a certain time to be admitted as evidence without proof of execution whether proved or executed in required manner or not, is not unconstitutional since it affects procedure only. Ariola v. Newman [Tex. Civ. App.] 113 SW 157. Acts 1907, p. 308, c. 165, amending Rev. St. 1895, art. 2312, providing that certified copy of an instrument that has been recorded for 10 years shall be admissible in evidence, relates to rule of evidence only and does not affect vested rights. Sims v. Sealy [Tex. Civ. App.] 116 SW 630.

89. There being no vested right in a statute of limitations, it was within power of legislature to pass statute (Kirby's Dig. § 5593), providing that statute of limitations cannot be pleaded against city of second class proceeding to remove obstruction on public streets, although statute has begun to run before passage of act. City of Paragould v. Lawson [Ark.] 115 SW 379.

90. Rev. St. 1899, § 2868 (Ann. St. 1906, p. 1652), limiting time in which action for damages for torts may be commenced to one year, is not in violation of Const. art. 2, § 15, prohibiting passage of laws retrospective in their operation, since it applies only to procedure. Clark v. Kansas City, etc., R. Co., 219 Mo. 524, 118 SW 40. Civ. Code 1901, par. 2938, barring actions for recovery of lands in peaceable and adverse possession of another after 10 years, operates upon causes of action accruing between its passage and time it became effective, such time being reasonable. Cummings v. Rosenberg [Ariz.] 100 P 810.

91. Punishment for crime cannot be increased by an amendatory or repealing act, which would bring it into conflict with constitutional prohibition against ex post facto laws. People v. Zito, 237 Ill. 434, 86 NE 1041. Acts 32d Gen. Assem. p. 10, c. 12 (Code Supp.

§ 15. *Deprivation without due process of law, or contrary to law of the land.*[92] See 11 C. L. 708—The fifth amendment to the federal constitution declaring that no person shall be deprived of liberty or property without due process of law operates exclusively in restriction of federal power and has no application to the several states.[93]

*Due process of law.*See 11 C. L. 708—Corporations are persons within constitutional guaranty of due process of law.[94] Due process of law merely means process due, according to the laws of the land,[95] and is secured by laws operating upon all alike.[96] It is satisfied by notice [97] and an opportunity to be heard.[98] It does not

1907, §§ 337a-337d), providing for drawing of jurors whenever a lawfully constituted grand jury cannot be obtained from list returned by judge of election, being merely a matter of procedure, is not objectionable as an ex post facto law. State v. Pell [Iowa] 119 NW 154. Commutation of death sentence for murder in first degree to imprisonment for life is not void as being ex post facto. People v. Frost, 117 NYS 524. Construing Texas anti-trust laws of May 25, 1899, and March 31, 1903, to authorize conviction of foreign corporation for carrying out agreement to suppress competition entered into at time when such agreement was not illegal, does not make act retroactive. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Laws 1903, p. 125, c. 86, providing increased punishment for habitiual eriminals, is not ex post facto. State v. Le Pitre [Wash.] 103 P 27. Part of Senate Bill No. 245 (Sess. Laws 1907-8, p. 729, c. 81, art. 9, providing that all taxes levied under act shall bear penalties and interest at same rate as existing laws, in so far as it attempts to operate retrospectively, is an ex post facto law and void. Anderson v. Ritterbusch [Okl.] 98 P 1002. Act June 29, 1906, c. 3592, § 15, 34 Stat. 601, U. S. Comp. St. Supp. 1907, p. 427, authorizing certain courts to set aside certificates of citizenship on ground of fraud, is constitutional. United States v. Mansour, 170 F 671; United States v. Simon, 170 F 680.

92. Search Note: See notes in 3 C. L. 772; 5 Id. 644; 16 L. R. A. 380; 21 Id. 789; 23 Id. 737; 25 Id. 759; 33 Id. 177; 39 Id. 116; 50 Id. 577; 61 Id. 489; 2 L. R. A. (N. S.) 1007; 4 Id. 169, 944; 8 Id. 978, 1225; 12 Id. 394; 13 Id. 894; 20 A. S. R. 554; 98 Id. 774; 2 Ann. Cas. 317.

See, also, Constitutional Law, Cent. Dig. §§ 726-949; Dec. Dig. 251-320; 8 Cyc. 1080-1136; 10 A & E. Enc. L. (2ed.) 287.

93. Burns' Ann. St. 1908, §§ 8021, 8022, regulating employment of persons under certain ages in factories, not unconstitutional as against Fifth Amend. U. S. Const. Inland Steel Co. v. Yedinak [Ind.] 87 NE 229. U. S. Const. Fifth Amend., providing that no person shall be deprived of life, liberty or property without due process of law, refers to United States only. People v. Botkin, 9 Cal. App. 244, 98 P 861. Prohibition of U. S. Const. Amend. 14, that no state shall deprive any person of life, liberty or property without due process of law, nor deny equal protection of law, is directed against state and not individuals, nevertheless applies to state officers, their act being that of state. Risley v. Utica, 168 F 737.

94. Kiley v. Chicago, etc., R. Co., 138 Wis. 215, 119 NW 309. Provisions of state constitution that no person shall be deprived of property without due process of law, and provisions of Fourteenth Amendment of U. S. Const., as to property rights, extend to property held and used by corporations, since beneficial ownership is in natural persons, and law forbids doing by indirection that which is forbidden to be directly done. Seaboard Air Line R. Co. v. Simon [Fla.] 47 S 1001. "Person" as used in U. S. Const. 14th Amend. includes natural persons composing a corporation and who are owners of property, title to which is in corporation. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969.

95. Expressions "due process of law" and the law of the land" go strictly hand in hand. United States v. New York, etc., R. Co., 165 F 742. "Law of land" includes law of state, state constitution and federal constitution. Titsworth v. State [Okl. Cr. R.] 101 P 288. Due process does not require any particular form of proceedings, as long as they are regular and provide notice of claim asserted and opportunity afforded to defend. Smith v. State Board of Medical Ex'rs [Iowa] 117 NW 1116. Rev. St. 1895, arts. 4497-4502, authorizing recovery of penalties against railroad companies for failure to furnish cars, although making no provision for exempting carrier from damages for failure under circumstances beyond its control, is not in violation of fourteenth amendment of federal constitution forbidding taking of property without due process of law. Texas & P. R. Co. v. Taylor [Tex. Civ. App.] 118 SW 1097; Texas & P. R. Co. v. Andrews, Reynolds & Co. [Tex. Civ. App.] 118 SW 1101. Exemption from compulsory self-incrimination does not come within protection Amend. 14, U. S. Const. as to deprivation of property without due process of law, as far as action by states is concerned. Twining v. New Jersey, 211 U. S. 78, 53 Law. Ed. 97. Elkin's Act Feb. 19, 1903 (32 Stat. 847, c. 708, U. S. Comp. St. Supp. 1907, p. 880), imputing criminal violations of act as to giving rebates by officers acting within scope of employment to corporation, does not constitute denial of due process. New York Central & H. R. R. Co. v. U. S., 212 U. S. 481, 500, 53 Law. Ed. — Action for determination of whether water rates fixed by board of supervisors to be charged by water company are just and reasonable is not one to review the action of the board, and evidence upon which it acted is immaterial on question of preliminary injunction, only question being whether such rates are confiscatory. Spring Val. Water Co. v. San Francisco, 165 F 667.

96. Ky. Acts 1904, c. 85, p. 181, prohlbiting teaching white and negro children in same institution, is not in violation of due process of law clause of federal constitution as applied to corporation within control of state. Berea College v. Kentucky, 211 U. S. 45, 53

Law. Ed. **81.** Legality of classifications adopted for legislative regulation may be determined with reference to due process of law provision of state constitution. Seaboard Air Line R. Co. v. Simon [Fla.] 47 S 1001. When a person accused of crime within a state is subjected, like all other persons, to the law in its regular course of administration in courts, proceedings against him constitute due process of law within federal constitution and Maryland declaration of rights. Lanasa v. State, 109 Md. 602, 71 A 1058. Acts 30th Gen. Assem. p. 61, c. 68, § 12, relating to construction of drains and to assessment of benefits conferred thereby, providing that railway lands shall be differently assessed than agricultural lands, and that proceedings in relation to railroads shall be the same as provided for individual landowners within district, including notice and appeal, is not invalid as a deprivation of property without due process. In re Johnson Drainage Dist. No. 9 [Iowa] 118 NW 380.

97. Due process of law requires that no man may be depriyed of his property without his day in court proceeding upon notice which gives court jurisdiction. Ohlmann v. Clarkson Sawmill Co. [Mo.] 120 SW 1155. Notice of hearing before commissioners appointed to assess damages for establishment of building line, served upon agent of estate, held to give sufficient opportunity to be heard. Northrop v. Waterbury, 81 Conn. 305, 70 A 1024. St. 1908, p. 606, c. 590, §§ 56, 57, authorizing probate court on application of attorney general to direct payment of savings bank deposits to state treasurer, if unclaimed for more than 30 years, is not unconstitutional as depriving owner of property without due process of law, personal notice being necessary as to bank. Malone v. Provident Inst. for Sav. [Mass.] 86 NE 912. Insanity Law, § 62 (Laws 1896, p. 492, c. 545) providing that notice to insane person may be dispensed with, is not invalid as depriving insane person of constitutional rights. Brayman v. Grant, 130 App. Div. 272, 114 NYS 336. Ten days' statutory notice for settlement of executor's final account and for distribution is due process of law as to nonresident claimant. Goodrich v. Ferris, 214 U. S. 71, 53 Law. Ed. —. Acts 1904, p. 129, No. 115, providing for seizure and condemnation of intoxicating liquors kept for sale contrary to law, are not unconstitutional as failing to provide for notice if owner of liquor is unknown to officer, since in such case owner or occupant of premises is to be apprehended if known to officer. State v. Intoxicating Liquor [Vt.] 73 A 586. Notice of contents of water permit sent by registered mail to last known address of persons to whom permit was issued constitutes due process. Speer v. Stephenson [Idaho] 102 P 365. Recordation of water permit in state engineer's office and requiring notice to be given to all persons shown to have an interest in such permit as shown by records provides for due process of law. Id. Rev. Laws 1905, § 4068, providing for service of summons on one or more of associates carrying on business under common name, is constitutional. Venner v. Great Northern R. Co. [Minn.] 121 NW 212.

98. Due process of law requires that a person shall have reasonable notice and opportunity to be heard before an impartial tribunal before any binding decree or order can be made affecting his rights to liberty or property. Commission of Fisheries v. Hampton Roads Oyster Packers' & Planters' Ass'n [Va.] 64 SE 1041. Due process of law implies right of person affected to be present before tribunal which pronounces judgment, to be heard by testimony or otherwise and to have right of controverting by proof of material facts. Wilber v. Reed [Neb.] 122 NW 53. Where parties have been fully heard in regular course of judicial proceedings, an erroneous decision of a state court does not deprive unsuccessful party of his property without due process of law within U. S. Const. 14th Amend. Bonner v. Gorman, 213 U. S. 86, 53 Law. Ed. —. Use of depositions taken by commissioner of patents without notice to attorney in disbarment proceedings before department of interior did not constitute denial of due process of law when copies of such depositions were delivered to relator and not objected to by him. Garfield v. U. S., 32 App. D. C. 143. Where defendant nonresident of state is fairly notified of an action involving his rights to property situated in state, so as to have ample opportunity to appear and be heard, rights of all parties interested in the res are determined by due process of law. Amparo Min. Co. v. Fidelity Trust Co. [N. J. Eq.] 71 A 605. Enforcing Act (Laws 1907-8, p. 594, c. 69), prohibiting sale of intoxicating liquors, is not invalid as failing to provide for notice of proceeding and hearing to determine whether property taken under search warrant shall be forfeited. State v. Hooke [Okl.] 98 P 964. The Elkin's Act Feb. 19, 1903, c. 708 (32 Stat. 847, U. S. Comp. St. Supp. 1907, p. 880), is not unconstitutional as in violation of the fifth amendment in that it subjects a shipper to criminal prosecution for accepting a concession from a rate published and filed without permitting him as a defense to show that the established rate was extortionate and unreasonable and the rate paid was reasonable. United States v. Vacuum Oil Co., 158 F 536. Condemnation on charge of **constructive contempt** without giving party opportunity to be heard is a condemnation without due process of law. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717. Where secretary of interior based **order disbarring attorney** from practice before his department, upon other charges than those which they are cited to answer, had upon depositions taken without notice to them, due process of law is denied, such process requiring a specific charge, due notice of same, opportunity to answer, opportunity to introduce evidence and cross-examine witnesses and to make agreement. Garfield v. U. S., 32 App. D. C. 153. Attorney disbarred from practice before department of interior by secretary was not denied due process of law by reason of fact that secretary made ex parte investigation of facts as to custome regarding purchases of land warrants, where secretary held as matter of law that facts even if true constituted no justification of practices for which disbarment was made. Garfield v. U. S., 32 App. D. C. 109. Due process of law was not denied to attorney disbarred by secretary of interior from practice before his department where order of disbarment was not based upon depositions taken ex parte, but upon admissions of at-

necessarily include a trial by jury,[99] or the right to appeal.[1] Interference with property and liberty under the police power does not constitute a deprivation without due process.[2]

Regulations must be reasonable.[3]—See 9 C. L. 634

torney. Id. In **cases affecting public health,** due process of law does not always require notice and hearing. Valentine v. Englewood, 76 N. J. Law, 509, 71 A 344. Code §§ 2576, 2578, requiring state board of health to hold certain regular and special meetings with due notice, and that in all examinations any member may administer oaths and take testimony, and authorizing board to revoke certificates for incompetency, imply that hearing shall be had, and are not unconstitutional as being a deprivation of property without due process of law. Smith v. State Board of Medical Ex'rs [Iowa] 117 NW 1116.

99. Seizure and destruction of intoxicating liquors kept for sale in violation of law, under Acts 1907, p. 29, c. 16, not void as not affording jury trial. Campbell v. State [Ind.] 87 NE 212.

1. Due process of law does not require state to provide a mode of obtaining a new trial or review of proceedings in favor of one convicted of criminal charge by a proper judicial tribunal. Ward v. State [Ind.] 86 NE 994. Laws 1907, p. 304, § 19, providing that county court shall have final jurisdiction to hear and determine a contest of a local option election, is not unconstitutional as being a deprivation of life, liberty and property without due process of law because it allows no appeal. Saylor v. Duel, 236 Ill. 429, 86 NE 119. A statute authorizing a dissatisfied landowner, in proceedings to lay out public highways, to apply by petition to county court and have rehearing on all questions, is a sufficient provision by way of appeal to meet objection of unconstitutionality of statute in failing to provide for appeal to disinterested tribunal. Barber v. Vinton [Vt.] 73 A 881.

2. Notification by city physician and investigation by board of health and its physicians, where plaintiff's house was quarantined for scarlet fever, constituted due process. Valentine v. Englewood, 76 N. J. Law, 509, 71 A 344. Where board of health is required to act upon an emergency, due process requires only that they should be liable to an action in case they act wrongfully, but action to which they are liable is only such an action as law gives. Id. No action under common law of matter upon which board decided was colorably within its jurisdiction. Id. Rev. Laws 1905, § 2315, as amended by Laws 1907, p. 128, c. 117, § 2, providing that all persons who use any title or letters in connection with name which represents them as engaged in practice of dentistry shall be said to be practicing dentistry within meaning of statute prohibiting practice of dentistry without license, is not in violation of constitutional provision that no person shall be deprived of life, liberty or property without due process of law. State v. Crombie, 107 Minn. 171, 119 NW 660. Pen. Code, § 27, applying penal laws of state to person who commits a crime therein, is not in violation of provision of federal constitution as to due process of law. People v. Botkin, 9 Cal. App. 244, 98 P 861. Boards of health may not deprive any person of property or liberty, unless such deprivation is made to appear by due inquiry to be reasonably necessary to public health, and such inquiry must include notice to person whose property or liberty is involved, and opportunity given to be heard unless emergency so great that notice and hearing would imperil public safety. Kirk v. Wyman [S. C.] 65 SE 387. P. S. 5496, giving state board of health power to prohibit any village from using water when in board's opinion it is contaminated and providing that court of chancery may enforce such order, does not require hearing before board in order to give due process of law, board's order not being conclusive. State Board of Health v. St. Johnsbury [Vt.] 73 A 581.

3. Regulations and interference with personal liberty of boards of public health must be reasonably necessary to public safety. Kirk v. Wyman [S. C.] 65 SE 387. Act of May 29, 1901 (P. L. 327), regulating sale of oleomargarine or butterine and prohibiting its sale when colored to resemble yellow butter, is not unconstitutional as being a deprivation of property without due process of law. Commonwealth v. McDermott, 37 Pa. Super. Ct. 1. Facts held not to show that municipal ordinance fixing maximum water rates would necessarily be so confiscatory as to company as to violate U. S. constitution. Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 Law. Ed. —. Laws 1905, c. 736, limiting price of gas to city of New York and requiring a certain illuminating power and pressure, and providing penalties, and Laws 1906, c. 125, prescribing similar regulations as to gas sold outside city of New York, are not invalid as far as rates are concerned, since it does not appear that rate is confiscatory. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —. Penalties at rate of $1500 and $50 per day for numerous violations of Texas Anti-Trust Laws of May 25, 1899, and March 31, 1903, are not excessive where value of property amounts to $40,000,000 and dividends have been as high as 700 per cent. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Mass. Pub. Acts 1904, c. 333, and Acts 1905, c. 383, limiting height of buildings in commercial section of Boston to 125 feet and in residence sections to from 80 to 100 feet, held not so unreasonable as to deprive owner of property in residence section without due process of law, even though such regulations were passed in order to beautify residence district. Welch v. Swasey, 214 U. S. 91, 53 Law. Ed. —. An arbitrary and unreasonable regulation is not within authority of railroad commission. If action of state through commission is not a legally authorized regulation of a public service, or if authorized regulation is arbitrary and unreasonable, and in effect deprives beneficial owners of property used in rendering public service of property rights in manner or to an extent contemplated by law as a limitation upon rights of those devoting their property to a public use, such action, though

*Liberty.*See 11 C. L. 709—Restraint on ground of insanity [4] or to prevent the spread of disease,[5] detention of aliens on the border pending investigation,[6] prohibition of unauthorized use of names or pictures,[7] imprisonment in good faith to suppress insurrections,[8] does not constitute a deprivation of liberty without due process of law. A citizen of full age may agree to pay his debt by labor for another than his creditor.[9]

*Property.*See 11 C. L. 709—To render an act invalid as a deprivation of property [10]

under form of regulation, is in law a deprivation of property without due process of law. State v. Atlantic Coast Line R. Co. [Fla.] 47 S 969. Code 1906, § 4854, providing for maintenance of depots by railroads in every incorporated village through which road passes, does not deprive railroad company of due process of law although applied to branch line operated at a loss. Southern R. Co. v. State [Miss.] 48 S 236. Laws 1908, p. 1221, c. 429, forbidding acceleration of flow of mineral water from wells bored into rock or production of unnatural flow of natural gas, merely prohibiting owner from obtaining unnatural flow from well, is not invalid as an unreasonable invasion of property rights. Hathorn v. Natural Carbonic Gas Co., 128 App. Div. 33, 112 NYS 374. Laws 1907, p. 495, c. 254, making railway companies liable for injuries to employes caused by negligence of co-employes, does not deny to railway companies due process of law. Kiley v. Chicago, etc., R. Co., 138 Wis. 215, 119 NW 309. Acts 1905, p. 265, requiring maintenance of depot where there is no public necessity for it, is invalid. Louisiana & A. R. Co. v. State [Ark.] 121 SW 284. Comp. Laws 1897, § 2419, providing that in disputes as to partition fences, either of parties may apply to fence viewers, who after due notice to each party may assign shares and direct time of repairs or erection of fence, which assignment shall be recorded in township clerk's office, is constitutional. Vincent v. Ackerman [Mich.] 15 Det. Leg. N. 1128, 119 NW 1085.

4. Code Cr. Proc. § 454, providing for commitment to insane asylum of one acquitted of crime on ground of insanity, giving accused right to forthwith institute proceedings to establish sanity, is not unconstitutional as a deprivation of liberty without due process of law, although no appeal is given for final order of commitment. People v. Chanler, 117 NYS 322.

5. Destruction of business by posting by board of health upon office door that there was scarlet fever in house not a deprivation of liberty. Valentine v. Englewood, 76 N. J. Law, 509, 71 A 344.

6. An applicant for admission to the United States detained upon border by officials of department of commerce and labor is not deprived of his liberty without due process of law, although he is not given a judicial trial if such officer give him hearing in good faith and take testimony of witnesses suggested by applicant pertinent to issues, and although applicant is not entitled as of right to be present in person or by counsel and is not entitled to be informed of nature of testimony while it is being taken. In re Can Pon [C. C. A.] 168 F 479.

7. Laws 1903, p. 308, c. 132, prohibiting unauthorized use of name or picture of any person for trade or advertising purposes, is not unconstitutional as being an interference with personal liberty without due process of law. Rhodes v. Sperry & Hutchinson Co., 193 N. Y. 223, 85 NE 1097.

8. Imprisonment by order of governor in good faith although with insufficient reason under power to suppress insurrection is not a deprivation of liberty without due process. Moyer v. Peabody, 212 U. S. 78, 53 Law. Ed. ——.

9. Potts v. Riddle, 5 Ga. App. 378, 63 SE 253.

10. Acts 30th Gen. Assem. 1904, p. 66, c. 68, providing for establishment of drainage district, being within police power, injury to railway embankment by excavation of drainage ditch was not a taking of property within constitutional prohibition. Mason City & Ft. D. R. Co. v. Wright County Sup'rs [Iowa] 121 NW 39. Act May 13, 1905 (Laws 1905, p. 79), § 1, providing that assignments of wages must be in writing, acknowledged and served upon employer and that they be executed by assignor's wife, if assignor is married, is unconstitutional. Massie v. Cessna, 239 Ill. 352, 88 NE 152. N. Y. Laws 1900, c. 20, forbidding possession of game out of season, does not deny due process of law, in violation of 14th Amend. federal constitution in spite of fact that such game may have been taken in a foreign county. People v. Hesterberg, 29 S. Ct. 10. Laws 1905, p. 561, c. 11, § 170, prohibiting any person to knowingly loan money to another to be used for paying poll tax in order to comply with qualifications to vote, is not unconstitutional as a deprivation of rights without due process of law, right of suffrage not being a right of person or property. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349. Comp. St. 1903, c. 23, § 20, providing that dower right of nonresident widow shall be limited to lands of which her husband died seised, and extending dower right of resident widow to other lands, is not unconstitutional as being a deprivation of property without due process of law. Miner v. Morgan, 83 Neb. 400, 119 NW 781. Right to practice medicine is a valuable right which cannot be taken away without due process of law. Smith v. State Board of Medical Ex'rs [Iowa] 117 NW 1116. Laws 1903, p. 308, c. 132, prohibiting unauthorized use of name or picture of any person for trade or advertising purposes, applying only to use of pictures after passage of act, is not unconstitutional on ground that it applies to pictures acquired by others before passage of act. Rhodes v. Sperry & Hutchinson Co., 193 N. Y. 223, 85 NE 1097. The temporary, casual and incidental use of an unused armory rented to various organizations for their private gain, in the interest of public economy to avoid loss of revenue and to lighten burden of taxpayers, is not a deprivation of property of other

without due process of law, it must interfere with vested rights [11] or be a taking of property without compensation.[12]

property holders without due process. Gottlieb-Knabe & Co. v. Macklin, 109 Md. 429, 71 A 949. Employer's Liability Act, April 22, 1908, c. 149, 35 Stat. 65, although indirectly working harm and loss to individuals, is not a taking of property without due process of law within meaning of 5th Amend. of federal constitution. Watson v. St. Louis, etc., R. Co., 169 F 942. Refusal, under city ordinance, of permit to exhibit immoral or obscene pictures is not a deprivation of property or use of property which operator of moving picture show has any right to use. Block v. Chicago, 239 Ill. 251, 87 NE 1011. Where **articles are capable of two uses,** one lawful and the other unlawful, such as gaming tables, neither ministerial officers nor courts can, upon mere view, deprive them of their characteristics as property and put them under legal condemnation. State v. Derry [Ind.] 85 NE 765.

11. Resolution passed by city council ordering street railway company to remove tracks from streets and directing city solicitor to take such action as he shall deem advisable to enforce resolution, not being a law and contemplating only proceedings in court for removal of tracks instead of removal by force, does not operate as a denial of due process of law. City of Des Moines v. Des Moines City R. Co., 29 S. Ct. 553. Admission in evidence in action for infringement of copyright of replevin proceedings under which infringing copies were seized was not in violation of constitutional rights of corporate defendant under 4th and 5th Amend. to federal constitution. American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 Law. Ed. 208. Burns' Ann. St. 1908, § 8021, prohibiting employment of persons under 16 years of age in factories for more than 60 hours a week, or for more than 10 hours a day, and § 8022, forbidding employment of persons under 14 years of age, are not unconstitutional as deprivation of property without due process of law in violation of 14th Amend. U. S. Const. Inland Steel Co. v. Yedinak [Ind.] 87 NE 229. Pen. Code, § 364, making it a misdemeanor to knowingly sell goods represented to be manufacture or product of any other than seller, unless such goods are contained in original package under manufacture's label, is not unconstitutional as being a deprivation of property without due process of law, such prohibition being proper exercise of police power. People v. Luhrs, 127 App. Div. 634, 111 NYS 749. Laws 1906, p. 1442, c. 527, § 9, providing that all railroad bridges rebuilt over proposed improved channel of Buffalo river shall be such bridges as may be determined by common council and that such bridges shall be built at railroad's expense, is not unconstitutional as being a taking of property without due process of law, regulation as to kind of bridge to be built being a reasonable one. City of Buffalo v. Delaware, L. & W. R. Co., 60 Misc. 584, 112 NYS 690. Acts 1906, p. 614, c. 337, providing proceeding through courts of chancery for redemption of ground rents, when their title is vested in trustees, or life tenants, or holdere of a defeasible estate who have no powers of sale, is not unconstitutional as a deprivation of property of those beneficially interested, although it does not require that they be made parties or served with notice, since they are parties by representation as those in whom title is vested. Kingan Packing Ass'n v. Lloyd, 110 Md. 619, 73 A 887. Laws 1907-8, p. 145, c. 6, art. 2, as amended by Laws 1907-8, p. 153, c. 6, art. 3, establishing depositor's guaranty fund to insure against loss on bank's insolvency, is not void as a deprivation of property without due process of law. Noble State Bank v. Haskell [Okl.] 97 P 590. Acts 1905, p. 406, c. 42 (Code 1906, §§ 3513-3535), relating to sales of forfeited lands, does not deprive owners of forfeited lands of property without due process. State v. King, 64 W. Va. 546, 63 SE 468. Acts 1907, p. 1371, c. 403, amending Code 1858, § 3305, purporting to give life tenant right to sell land of remaindermen or reversioners without assent of latter and without giving them opportunity to make defense, is unconstitutional as being a deprivation of property without due process of law. McConnell v. Bell [Tenn.] 114 SW 203. Act 30th Leg. May 14, 1907 (Acts 1907, p. 447, c. 8), regulating contests of local option elections and providing for conclusiveness thereof in court trials, is not unconstitutional as being a deprivation of due process of law, contest of an election being an action in rem. Evans v. State, 55 Tex. Cr. R. 450, 117 SW 167. Acts 1897, p. 82, validating issuance of certain bonds, is not unconstitutional as depriving citizens of property without due process of law, by excluding future investigation in reference to validity of such bonds. Lipitt v. Albany, 131 Ga. 629, 63 SE 33. Anti-Pass Law, Laws 1907, p. 342, c. 93, prohibiting issuance, acceptance and use of **free transportation,** is not unconstitutional as depriving holder of pass of property without due process of law. State v. Martyn, 82 Neb. 225, 117 NW 719. Rev. St. 1899, § 1085 (Ann. St. 1906, p. 933), imposing on railroad company obligation to furnish shipper of stock free transportation to point of destination of shipment and return, is to extent of free return transportation in violation of 14th Amend. of federal constitution. George v. Chicago, etc., R. Co., 214 Mo. 551, 113 SW 1099. Neither congress nor any legislative or administrative board acting by its authorization can competently establish **rates** for transportation of property in interstate commerce that will not admit of carrier earning reasonable and just compensation, since that would be to deprive carrier of property without due process of law. Missouri, K. & T. R. Co. v. Interstate Commerce Com., 164 F 645. Rev. St. 1895, art. 4581, when construed as authorizing recovery of a penalty for each act of extortion based on charging excessive freight rates, is not violative of constitutional provision as to deprivation of property without due process of law or as a denial of equal protection of law. Texas & N. O. R. Co. v. Sabine Tram. Co. [Tex. Civ. App.] 121 SW 256. Laws 1907, p. 73, c. 51, amending and re-enacting Rev. Codes 1905, § 4395, prescribing maximum coal rates, is

Regulations of business and occupations, See 11 C. L. 710 when reasonable,[13] are valid.

not unconstitutional as violating 14th Amend. of federal constitution nor of Const. N. Dak. § 13, providing that no person shall be deprived of life, liberty, or property without due process of law. State v. Northern Pac. R. Co. [N. D.] 120 NW 869. Laws 1908, p. 1112, licensing **sale of intoxicating liquors** for maintenance of state penitentiary, does not deny due process. Carroll v. Wright, 131 Ga. 728, 63 SE 260. Laws 1908, p. 1041, c. 350, adding § 31c to liquor tax law, providing for seizure and destruction of liquor unlawfully kept for sale, together with vessels in which it is contained, is unconstitutional as a taking of property without due process of law, in so far as it provides for destruction of vessels containing liquor when possessor of liquor does not own vessels in which it is contained. Clement v. Liquors Seized at 188-190 Second Av., 62 Misc. 27, 115 NYS 162.

12. Ejectment may be maintained against warden of state penitentiary to recover possession of property held by him as warden and consisting of prison buildings erected in plaintiff's land, since under Declaration of Rights, art. 19, giving remedy for injuries, art. 23, providing that no man ought to be deprived of his property but by judgment of his peers, or by law of land, Const. art. 3, § 40, prohibiting taking of property without compensation or without due process of law, and U. S. Const. Amend. 14, § 1, providing for due process of law. Weyler v. Gibson, 110 Md. 636, 73 A 261.

13. Fact that owner of moving picture show would be required to pay rent on films during time necessary for inspection by chief of police does not constitute a taking of property without due process of law. Block v. Chicago, 239 Ill. 251, 87 NE 1011. Code 1887, § 2153 (Code 1904, p. 1090), as amended by Act Feb. 25, 1892 (Acts 1891-92, p. 599, c. 363), providing that no person shall stake or use for oyster planting any natural oyster bed nor continue to occupy same, and conferring power on oyster inspector to remove all stakes if, after notice, occupants refuse to remove same, and providing not only for reasonable notice but an opportunity to be heard before board of fisheries, and making its decision conclusive of all controversies, provides due process of law. Commission of Fisheries v. Hampton Roads Oyster Packers' & Planters' Ass'n [Va.] 64 SE 1041. Laws 1908, p. 517, c. 53, art 4, putting into effect Const. art. 23, § 1, providing what shall constitute a day's work on public contracts, is not unconstitutional as a deprivation of property without due process of law. Byars v. State [Okl.] 102 P 804. Acts 1908, p. 236, No. 176, providing for sale of intoxicants to whites and colored persons in separate buildings, is not in violation of due process clause of constitution. State v. Falkenheiner, 123 La. 617, 49 S 214. Pen. Code, § 364, prohibiting sale of goods represented to have been manufactured by another than seller, unless in original package, is not unconstitutional as a deprivation of property without due process of law. People v. Luhrs, 195 N. Y. 377, 89 NE 171. Rev. St. § 7006, prohibiting carrying on of business within quarter of a mile of a fair ground during the course of the fair without permission from the board, violates § 1, art. XIV, of the federal constitution, because it abridges the privileges and immunities of citizens, deprives them of their property without due process of law, and denies to each the equal protection of the law. Markley v. State, 12 Ohio C. C. (N. S.) 81. Judgment in mandamus to compel water company holding city franchise to construct connections with consumers at its own cost does not involve taking of property without due process of law. International Water Co. v. El Paso [Tex. Civ. App.] 112 SW 816. Wash. Dental Law, requiring applicant for **license** to have diploma from dental college in good standing, does not infringe U. S. Const. 14th Amend. State v. Littooy, 52 Wash. 87, 100 P 170. Laws Wash. 1909, p. 767, requiring peddlers to pay license fee of from $100 to $250 per year and to make deposit of $500, is not so excessive as to amount to a deprivation of property without due process of law. Ex parte Crowder, 171 F 250. Rev. Mun. Code of Chicago, § 1161, providing for summary **seizure and destruction of food in cold storage** when unfit for food, although not providing for notice and hearing, is not in violation of due process clause of 14th Amend. of U. S. constitution, since it is within discretion of legislature to provide in what emergency hearing may be dispensed with. North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 Law. Ed. 195. Conn. Gen. Laws, §§ 4868, 4869, providing that retail dealers shall not as against creditors make **sale of stock in trade at single transaction** unless notice thereof has been recorded seven days before sale, does not deny due process of law, such regulation being within police power. Lemieux v. Young, 211 U. S. 489, 53 Law. Ed. 295. Act approved Mar. 20, 1905 (St. 1905, p. 493, c. 386), as amended June 13, 1906 (St. 1906, p. 22, c. 19), and Mar. 20, 1907 (St. 1907, p. 745, c. 403), imposing license tax on domestic corporations and on all foreign corporations doing business in state and forfeiting charter on failure to pay, is not a taking of property without due process, because failure to pay ipso facto forfeited charter. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Where a particular regulation of railroad commission causes pecuniary loss to common carrier, if regulation is reasonable with reference to just demands of public to be affected by it and does not arbitrarily impose unreasonable burden on carrier, regulation will not be a taking of property in violation of constitution. State v. Florida East Coast R. Co. [Fla.] 49 S 43. Ky. Const. § 213, under which railway company may be compelled to accept cars offered at arbitrary connection point by competing road. Louisville & N. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 53 Law. Ed. —. Laws 1907, p. 506, c. 107 (Cobbey's Ann. St. 1907, §§ 10606, 10607), requiring **stock trains to be run at a speed of 18 miles an hour,** is not unconstitutional as a deprivation of railway's property without due process of law. Cram v. Chicago, B. & Q. R. Co. [Neb.] 122 NW 31. Code 1906, § 485, making **bill of lad-**

Eminent domain proceedings[14]—See 11 C. L. 710 after notice and hearing,[15] which properly conserve the owners the right to compensation,[16] are valid.

ing of property received by railway company for transportation **conclusive evidence of receipt** in hands of bona fide holder as against carrier, creates a substantive rule of law and is not invalid as depriving carrier of property without due process of law. Yazoo & M. V. R. Co. v. Bent & Co. [Miss.] 47 S 805. Code 1906, § 2364, requiring railroad company to make reasonable provision for **transportation of all coal** offered it for shipment, does not amount to a command to enter into a contract therefor with shipper or to build and maintain permanent structure on right of way, to be continued indefinitely, nor to the taking of the private property of such railroad company for private use without due process of law inhibited by U. S. Const. 14th Amend. State v. White Oak R. Co., 65 W. Va. 15, 64 SE 630. Revisal 1905, § 2631, **imposing penalty** upon railway companies of $50 for each day's **refusal to receive freight** for shipment does not provide such heavy penalties as to be a taking of railway's property without due process of law. Garrison v. Southern R. Co., 150 N. C. 575, 64 SE 578. Rev. St. 1895, arts. 4574, 4575, providing that railroad companies shall **deliver cars to connecting carriers without delay** or discrimination and order of railway commission based thereon would be unconstitutional as a denial of due process of law if construed to compel carrier to deliver its own cars beyond its own line where it had only sufficient number of cars for traffic on its own line, to make such statute and order constitutional they must be construed to shipper's cars and not to company's cars. Gulf, etc., R. Co. v. State [Tex. Civ. App.] 120 SW 1028. Act Cong. Apr. 22, 1908, c. 149, § 5, 35 Stat. 66, providing that **contracts** between interstate railroad and employe **exempting railroad from liability** created by act shall be void, is in violation of U. S. Const. 5th Amend. as a deprivation of liberty and property without due process of law. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754. Federal statute of June 29, 1906, c. 3591, § 7, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 909), providing that a common carrier receiving property for transportation from a point in one state to a point in another state shall be liable for loss or damage caused by it or by a connecting carrier and no contract shall exempt such carrier from such liability, is not unconstitutional as a deprivation of property without due process of law, carrier still having its day in court. Galveston, etc., R. Co. v. F. A. Piper Co. [Tex. Civ. App.] 115 SW 107. Civ. Code 1902, § 2069, requiring railway companies to carry out **improvements suggested by railroad commission** within 60 days, is valid. Caughman v. Columbia, N. & L. R. Co., 82 S. C. 418, 64 SE 240. Municipal ordinances fixing **telephone rates** are valid where ordinances require companies to furnish city council monthly statements of receipts and expenditures and property employed. Home Tel. & T. Co. v. Los Angeles, 211 U. S. 265, 53 Law. Ed. 176. Where a corporation in proceedings for violation of **anti-trust act** have been duly served and are in court resisting order authorized by Rev. St. 1899, § 8983 (Ann. St. 1906, p. 4159), and § 8984 (p. 4160) for production of books and papers, hearing constitutes due process of law, hence both sections are constitutional. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Anti-trust Act Mar. 3, 1899 (Acts 1899, p. 257; Burns' Ann. St. 1908, § 3884), being the exercise of a power under general welfare clause of constitution, is not unconstitutional as being a denial of due process of law. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Permitting conviction of acts which tend to bring about results prohibited by Texas anti-trust laws of May 25, 1899, and March 31, 1903, does not constitute a denial of due process. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Act Okl. May 26, 1908 (Laws 1908, p. 214, c. 16), providing that on **filing** by any foreign corporation in any court of record, **claim of domicile in another state,** license to transact business in state shall be revoked, is unconstitutional as depriving corporation of property without due process of law. St. Louis & S. F. R. Co. v. Cross, 171 F 480. Act Ark. Jan. 23, 1905, § 1, imposing penalty upon foreign corporation **doing business within state while member of trust,** is not invalid. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —.

14. Erection of trestle for street railway in front of private residence, such as would have been a private nuisance is not authorized by legislature, is a taking under right of eminent domain. Lentell v. Boston & W. St. R. Co., 202 Mass. 115, 88 NE 765.

15. Acts 1906, p. 356, No. 262, authorizing a city to condemn lands for wharfage purposes, and giving city council power to determine question of public necessity and to award damages and allowing an appeal to county court on every question involved, provides for due process of law. City of Burlington v. Central Vermont R. Co. [Vt.] 71 A 826. Provision of Cobbey's Ann. St. 1907, c. 37, § 8605, authorizing city council of cities of first-class to appoint assessors to appraise damages to owners of property condemned for park purposes, is void at taking property without due process of law. Wilber v. Reed [Neb.] 122 NW 53. Laws 1895, p. 2067, c. 1018, authorizing commissioners to acquire part of lake shore for city of Rochester to obtain water supply and to close highway for that purpose and open a new one, is not unconstitutional as a deprivation of property without due process of law, legislature having supreme control over highways. City of Rochester v. Gray, 117 NYS 1091.

16. Act Apr. 26, 1894 (P. L. p. 146), authorizing any city located on or near ocean, and embracing within its limits or jurisdiction any beach or ocean front, may open and lay out on and along such beach a public park and may acquire lands for such purpose by purchase and condemnation, does not deprive landowners of property without due process of law. Fishblatt v. Atlantic City [N. J. Law] 73 A 125. Act Cong. Feb. 10, 1899 (30 Stat. 834, c. 150), extending city street providing that half amount awarded for land condemned shall be assessed against lands to be benefited, lying within designated district, is constitutional. Briscoe v. MacFarland, 32 App. D. C. 167.

Drainage acts,[See 11 C. L. 710] when providing for hearing after reasonable notice,[17] will be upheld.

Local assessments for improvements [See 11 C. L. 710] require notice [18] and opportunity to be heard.[19]

Taxation.[See 11 C. L. 711]—Taxes properly assessed [20] under authority of law [21]

17. Farm Drainage Act (Hurd's Rev. St. 1908, c. 42) is not in violation of constitution in depriving landowner of property without due process of law for reason that it makes assessment of damages by justice of the peace final. Drainage Com'rs of Niles v. Harms, 238 Ill. 414, 87 NE 277. Act Mar. 6, 1899, § 11, as amended by Laws 1901, p. 194, relating to formation of irrigation districts, is not unconstitutional by fact that it fails to provide for notice to landowner that on a particular day board of directors will assess benefits, where it does provide for notice of proceedings to organize district and for notice of hearing for confirmation of proceedings. Oregon Short Line R. Co. v. Pioneer Irr. Dist. [Idaho] 102 P 904. St. 1905, p. 443, c. 368, creating drainage district, satisfies requirement as to due process of law by providing for hearing before board of commissioners on reasonable notice to property owner. People v. Sacramento Drainage Dist. [Cal.] 103 P 207. Iowa Statute (Acts 30th Gen. Assem. 1904, p. 61, c. 68), creating drainage districts, as amended by Acts 3220, Gen. Assem. 1907, p. 100, c. 95, providing that railway company shall not be allowed damages for bridging drains in such district, is not unconstitutional as a taking of property without due process of law. Chicago, B. & Q. R. Co. v. Appanoose County Sup'rs, 170 F 665.

18. Rev. St. 1899, c. 122, art. 5 (Ann. St. 1906, pp. 3935-3947), relating to establishment of drainage districts, provides for due notice and hearing. State v. Wilson, 216 Mo. 215, 115 SW 549. An owner of abutting property against which an assessment for original street improvements is made by city order is not deprived of his property without due process of law where he had notice by publication of ordinance required by statute. Guilfoyle's Ex'r v. Maysville [Ky.] 112 SW 666. Laws 1903, p. 257, c. 132, § 1, making of duty of mayor and council of city of first or second class upon petition of majority of resident owners of real estate, to provide for sprinkling streets by letting contract to lowest bidder, is invalid as not providing for notice and hearing. Union Pac. R. Co. v. Abilene [Kan.] 98 P 224.

19. Owner of improved property is not denied due process of law by reason of Act May 19, 1896, creating drainage system in District of Columbia under which she is assessed for sewer connections, act giving controlling effect to fact that property is improved so far as necessity for sewer connections is concerned. District of Columbia v. Brooke, 29 S. Ct. 560. Fact that Laws 1906, p. 265, No. 256, providing that, where a street has been paved and city council shall decide that such improvement, when made, was for public good and convenience and necessity of individuals, council may order an assessment on notice, empowers council to decide said questions, without opportunity for such persons to be heard does not deprive persons liable for assessment of property without due process of law. Durkee v. Barre, 81 Vt. 530, 71 A 819. Local Improvement Act (Hurd's Rev. St. 1905, c. 24, § 547), § 41, providing that unsubdivided tracts of land may for purpose of water assessments be divided into strips of 25 feet each, and ordinance based thereon subdividing tract, is unconstitutional as depriving owner of control and dominion over land without due process, since subdivision would be made against owner's consent. City of Chicago v. Wells, 236 Ill. 129, 86 NE 197. Act April 2, 1903, § 2 (P. L. 126), amending Act May 16, 1891, § 6 (P. L. 77), making report of viewers when confirmed conclusive as to any assessment made to pay costs of sewer, street, or other improvement, and giving right of appeal, is constitutional. Murdoch v. Pittsburg [Pa.] 72 A 701.

20. Laws 1907, p. 123, c. 73, relating to assessment of state lands benefited by local improvements as if same were private property, and providing for sale of leasehold interest, is void as a deprivation of property without due process of law, since leasehold cannot be sold to satisfy assessment against fee. Coast Land Co. v. Seattle, 52 Wash. 380, 100 P 856. Where owner had notice that property was listed and assessed under certain description not designated on tract but which would have been so designated if tract had been platted, he was not deprived of property without due process. Ontario Land Co. v. Yordy, 212 U. S. 152, 53 Law. Ed. —. When legislation makes provision that certain officers or boards shall fix assessment of property, it does not violate right of due process of law. Clay County v. Brown Lumber Co. [Ark.] 119 SW 251. Description on assessment roll which only identifies property assessed as one of 15 lots fronting on a certain street is not sufficient to comply with constitutional requirement that due process of law demands that assessment roll identifies land intended to be assessed. Noxon v. Rochelle, 63 Misc. 232, 116 NYS 822. Irregularity in process of taxation consisting merely in that notice of meeting of board of equalization was not published strictly as required by statute is not a denial of due process of law, proceeding not being arbitrary, oppressive or unjust. State v. Several Parcels of Land, 83 Neb. 13, 119 NW 21. Const. art. 13, § 6, forfeiting lands for nonentry on tax book, is not void as against due process of law. State v. King, 64 W. Va. 546, 63 SE 468.

21. Due process of law does not necessarily include trial by jury or judicial hearings in taxation matters. Anderson v. Ritterbusch [Okl.] 98 P 1002. When tax sale purchaser has a mere right of action, legislature may prescribe a reasonable time in which he may proceed, but if he has both title and possession legislature exceeds its power if it attempts to convert his estate in possession into a mere right of action and then limits time in which such action may be brought. Martin v. White [Or.] 100

after notice [22] and opportunity to be heard [23] do not constitute a taking of property without due process of law.

Civil remedies and proceedings.[24]—See 11 C. L. 711—Acts imposing conditions

P 290. B. & C. Comp. § 3127 is void as a deprivation of property without due process of law, since legislature cannot make tax deed conclusive evidence of regularity of proceedings. Bradford v. Durham [Or.] 101 P 897. There is no express limitation upon power of legislature to provide for levying a tax on licenses; but such power should not be so exercised as to deprive any person of property without due process of law, as a denial of equal protection of law. Hardee v. Brown [Fla.] 47 S 834. Acts 1907, p. 536, c. 5823, and ordinances taxing express companies thereunder, is constitutional. Id. Tax under Civ. Code 1902, §§ 302, 808, 1809, on gross income in state of foreign insurance companies for preceding year, is unconstitutional. New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433. State having vested taxing power for municipal purposes of city of Utica in its city council, city ordinance imposing water tax on property owner within such city, without any corresponding benefit, or any opportunity to be heard in resistance to tax, constitutes violation by state of the 14th Amend. Risley v. Utica, 168 F 737. Public Acts 1897, No. 229, requiring grantee in tax deed, before instituting proceedings to obtain possession, to serve notice upon original holder giving him six months to redeem, does not deny grantee due process of law where redemption was exercised according to law as laid down to highest state court. Rusch v. Duncan Land & Min. Co., 211 U. S. 526, 53 Law Ed. —. Act April 22, 1858, P. L. 472, annexing a certain school subdistrict to a neighboring borough for school purposes, held not unconstitutional as taxing electors in territory annexed without representation, since qualified electors of territory annexed were in same footing as the others. Claysville Borough School Dist. v. Worrell, 37 Pa. Super. Ct. 10. Police regulation, supervision and control of the operation of motor vehicles within the limits of municipalities, and the additional expenses involved in the construction and maintenance of streets, justify the imposition of special licenses for the purpose of reimbursing the municipality, notwithstanding state licenses are also imposed. Frisbie v. Columbus, 12 Ohio C. C. (N. S.) 23. Act Feb. 19, 1903 (32 Stat. 847, c. 708, U. S. Comp. St. Supp. 1907, p. 880), not unconstitutional as violating U. S. Const. art. 1, § 9, par. 5, because incidentally affecting exports from inland port to foreign port. Armour Packing Co. v. U. S., 209 U. S. 56, 52 Law. Ed. 681.

22. Statute enacted after acquisition, by a private party, of a tax sale certificate, requiring a particular and additional notice to be given to owner of land before issuance of deed, when right to deed had not become absolute, and giving of notice impose no burden upon holder of certificate, may not impair any substantial right of holder and consequently may not be a deprivation of property without due process of law. Starks v. Sawyer [Fla.] 47 S 513. If owner of land is not made a party to a suit to avoid sale for taxes as required by Rev. St. 1899, § 9303 (Ann. St. 1906, p. 4274), or has no actual notice, recovery by tax sale purchaser would be a deprivation of owner's property without due process of law. Zweigart v. Reed [Mo.] 119 SW 960. Laws 1905, p. 1722, c. 676, determining classes of propesty to be assessed for public improvement and amount to be assessed to each class, is not unconstitutional as being a deprivation of property without due process of law, although no notice to property holders. New York Cent. & H. R. R. Co. v. Rochester, 129 App. Div. 805, 114 NYS 779. To constitute due process of law, it is not necessary that notice be given of each step in process of taxation; it is sufficient if tax payer has an opportunity to appear at some time before a tribunal having jurisdiction and there procure an adjustment of his liabilities. State v. Several Parcels of Land, 83 Neb. 13, 119 NW 21. St. 1898, § 1152, providing for assessment by assessor and treasurer of adjoining town in certain contingencies, is not unconstitutional as depriving property owners of property without due process of law, records and published notices of sale of land for taxes and record of tax sale being of such public nature as to amount to ample notice. Strange v. Oconto Land Co., 136 Wis. 516, 117 NW 1023. Notice which will enable owner of assessed property to appear before some authorized tribunal and contest special assessment is sufficient. City of Kinston v. Loftin, 149 N. C. 255, 62 SE 1069.

23. Sess. Laws 1907-8, p. 729, c. 81, art. 9, authorizing assessment and collection of taxes on omitted property, affording owner opportunity to question its validity either before amount is determined or in proceedings for its collection, provides for due process of law. Anderson v. Ritterbusch [Okl.] 98 P 1002. Act Sept. 30, 1903 (Gen. Acts 1903, p. 295), § 1, authorizing tax commissioner to appear from order dismissing assessment, affords taxpayer equal opportunity to appeal. State v. Bley [Ala.] 50 S 263. Review of assessment in taxation proceedings by courts not necessary to constitute due process of law, it being sufficient if owner has opportunity to be heard before tribunal or board in resistance to tax. Id. Laws Fla. 1907, pp. 13, 14, c. 5596, §§ 22, 23, providing for assessment of property for not more than three previous years where it has escaped taxation and that assessors shall meet with board of county commissioners for purpose of hearing complaints and receiving testimony with power of review, of which meeting due notice shall be given by publication, gives property owners due opportunity to be heard and sale for nonpayment of taxes on such assessment is with due process. Jackson Lumber Co. v. McCrimmon, 164 F 759. Where property owner assessed under Priv. Laws 1905, c. 338, providing that he may deny amount and plead irregularity of assessment, is given opportunity to establish every available defense, he is afforded due process. City of Kinston v. Loftin, 149 N. C. 255, 62 SE 1069; City of Kinston v. Wooten, 150 N. C. 295, 63 SE 1061.

24. Due process of law as applied to judicial proceedings means the right of every

precedent to maintaining actions,[25] changing bar of statute of limitations,[26] providing for the service of process,[27] rules of evidence,[28] the payment of costs,[29] the taking of appeals,[30] the administration of estates,[31] and for seizure and destruction of intoxicating liquor,[32] are sustained unless violative of property rights.

Criminal offenses and procedure. See 11 C. L. 712—Statutes defining fixing the punishment for crimes.[33] and regulating criminal procedure [33a] are sustained unless violative of fundamental rights.

litigant to have his cause tried and determined under rules of procedure the same as are applied to other similar cases. In re McPhee's Estate, 154 Cal. 385, 97 P 878. Due process of law, as used in Const. Idaho, art. 1, § 13, and in federal constitution as applied to judicial proceedings, means that every litigant shall have the right to have his cause tried under rules of procedure, as applied to similar cases. Eagleson v. Rubin [Idaho] 100 P 765.

25. Gen. St. 1901, § 1283, requiring foreign corporations to file certain statements with secretary of state as condition to maintaining actions, is not a deprivation of property without due process of law. Wilson-Moline Buggy Co. v. Hawkins [Kan.] 101 P 1009.

26. Application of three-year prescription established by Const. art. 233, against actions to annul tax titles to action brought by minor, does not deprive him of his property without due process of law although he may not have had notice of intention to sell property for taxes. Doyle v. Negrotto [La.] 49 S 992.

27. Every case where question of sufficiency of substituted process arises necessarily embraces proposition as to whether or not there has been due process of law. Roberts v. Jacob, 154 Cal. 307, 97 P 671. Affidavit of publication of summons held sufficient as due process of law. Id. Ky. St. § 2294, providing for constructive notice in forcible detainer action by posting copy of warrant and notice upon premises and by leaving copy with person over 16 years of age in possession, does not violate 14th amendment of federal constitution providing for due process of law although defendants are nonresidents of state. Weber v. Grand Lodge of Kentucky, F. & A. M. [C. C. A.] 169 F 522. Act 1900, p. 29, No. 23, purporting to authorize service of process beyond limits of territorial jurisdiction of courts, is void as being in contravention of U. S. Const. 14th Amend. Aikmann v. Sandersin, 122 La. 265, 47 S 600. Acts 1907, p. 158 (Rev. Codes, § 4310a, et seq.), requiring garnishee to be served with notice and giving him an opportunity, provides for due process of law. Eagleson v. Rubin [Idaho] 100 P 765. A judgment at a term subsequent to term in which defendants had been dismissed, entered without notice to them, is void as contrary to due process of law. Liddell v. Landau, 87 Ark. 438, 112 SW 1085.

28. That official medical examination of aliens at port of arrival is made conclusive for purpose of imposing penalty under Act March 3, 1903, § 9, for importing aliens afflicted with disease which disease might have been detected at time of embarkation, does not violate U. S. Const. 5th Amend. as being a taking of property without due process of law. Oceanic Steam Nav. Co. v. Stranahan, 29 S. Ct. 671. Striking answer from files and rendering judgment by default against foreign corporation in conformity with Arkansas Anti-trust Act of Jan. 23, 1905, where defendant disobeys order to secure attendance of witnesses, does not constitute denial of due process of law. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —. Gen. Acts 1907, p. 636, prescribing rule of evidence that refusal or failure if a person who enters into a contract with employer to perform services or to pay for property obtained under contract shall be taken as prima facie evidence of intent to defraud employer, does not violate due process clause of federal constitution. Bailey v. State [Ala.] 49 S 886. Laws 1907, p. 540, c. 373, § 3, making posting of notice of forfeiture of school lands, in office of a county clerk, conclusive evidence of proper service is void as depriving holder of certificate of property without due process of law. Petersilie v. McLachlin [Kan.] 101 P 1014.

29. Ky. St. 1903, § 900, providing that in actions for alimony and divorce husband shall pay cost of each party unless it is made to appear that wife is at fault and has ample estate to pay same, is not unconstitutional as depriving husband of his property without due process of law, he entering into marriage state voluntarily with full notice of liability imposed by statute. Gorbrandt v. Gorbrandt [Ky.] 115 SW 210.

30. St. 1907, p. 753, c. 410, providing for taking of appeals, is not in violation of Const. art. 1, § 13, relating to due process of law, although it does not provide for notice of appeal. In re McPhee's Estate, 154 Cal. 385, 97 P 878.

31. Acts 1908, p. 260, c. 125, providing for administration of estates of persons unheard of for more than seven years, is consistent with due process clause of federal constitution. Savings Bank of Baltimore v. Weeks, 110 Md. 78, 72 A 475.

32. Acts 1907, p. 29, c. 16, § 2, providing for seizure and destruction of intoxicating liquor kept for sale in violation of law, is not unconstitutional as a deprivation of property without due process of law, such proceeding being one in rem in nature of libel, and due process being satisfied by notice as provided by act. Campbell v. State [Ind.] 87 NE 212. Laws 1899, p. 11, making it the duty of certain officers to issue warrant for seizure and destruction of intoxicating liquors when, after notice to and hearing of claimants, it should be established that liquors seized were illegally kept for sale, is constitutional. Lindley v. State [Ark.] 120 SW 987.

33. Rev. Codes, § 6452, fixing punishment of person who escapes from state prison at term equal to that which he is serving, is not a denial of due process of law. Ex parte Mallon [Idaho] 102 P 374.

33a. Due process of law does not necessarily require an indictment by grand jury in pros-

§ 16. *Compensation for taking property.*[34]—See 11 C. L. 712—The taking of private property for public use without compensation [35] or for an inadequate compensation [36] is prohibited. Taking of property which is harmless and properly used, although for an object within police power to accomplish, calls for compensation.[37]

ecution for murder. In re McNaught, 1 Okl. Cr. R. 528, 99 P 241. Conviction upon information for manslaughter not illegal as deprivation of liberty without due process of law under procedure of Wilson's Rev. & Ann. St. 1903, §§ 5216-5303. Ex parte McNaught, 1 Okl. Cr. R. 260, 100 P 27. One indicted for murder and convicted of manslaughter may on his own motion be again tried for murder without violating U. S. Const. 14th Amend. Brantley v. State [Ga.] 64 SE 676. Where by amendment in circuit court, prosecution was changed from one for violation of town ordinance to one in name of state for violation of state statute for sale of liquor without license, such change operated to trial of accused for criminal offense in circuit court without first being indicted and without an appeal having been taken by him to such court, such procedure was in violation of Const. 1901, § 6, providing for due process of law. Lewis v. State [Ala.] 49 S 753. Trial and conviction of accused for murder by special judge, appointed by governor, in violation of Act June 19, 1897 (Acts 25th Leg. Sp. Sess. p. 39, c. 12, amending Rev. St. 1895, art. 1069), constituted a deprivation of life without due process of law. Oates v. State [Tex. Cr. R.] 121 SW 370. Act June 19, 1897 (Acts 25th Leg. Sp. Sess. p. 39, c. 12, amending Rev. St. 1895, art. 1069), depriving governor of power of appointing member of bar to try case where resident judge is disqualified, is not unconstitutional as a deprivation of life or liberty without due process of law. Id. Laws 1905, p. 1846, c. 689, authorizing state superintendent of elections to subpoena and examine persons regarding illegal registration, does not come within constitutional provision that no person shall be compelled in any criminal case to be a witness against himself, such proceeding not being a "case" within purview of provision. People v. Cahill, 193 N. Y. 232, 86 NE 39. Rev. St. U. S. § 3625, et seq., as amended by Act Feb. 27, 1877, c. 69, 19 Stat. 249, and Act July 31, 1894, c. 174, § 4, 28 Stat. 206 (U. S. Comp. St. 1901, pp. 2418, 2419), authorizing treasury distress warrant for defaulting public officers, is not unconstitutional as a deprivation of liberty without due process of law. United States v. Dillin [C. C. A.] 168 F 813.

34. Search Note: See note in 3 L. R. A. (N. S.) 404.

See, also, Eminent Domain, Cent. Dig.; Dec. Dig.; 15 Cyc. 543-1029; 10 A. & E. Enc. L. (2ed.) 1132.

35. Drainage district cannot take land without compensation, and if it does so an action on case against it will lie. Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 36, 86 NE 163. Since an attorney may accept or decline a proffered appointment to assist prosecuting attorney in a criminal cause, and since he is bound to know limitations on power of court to make such appointment and to allow compensation therefor, his services have not been required without compensation in violation of constitutional provision. Clay County Com'rs v. McGregor [Ind.] 87 NE 1. Rapid Transit Act 1894 (Laws 1894, p. 1886, c. 752), § 39, as amended by Laws 1901, p. 1423, c. 587, § 1, authorizing New York city to condemn real estate in construction of underground railroads, provides for compensation for taking property and is therefore not unconstitutional. In re Low, 128 App. Div. 103, 112 NYS 619. Building Code of City of New York, § 144, absolutely prohibiting erection of any sky sign exceeding nine feet in height above cornice or front wall, in effect deprives owner of real estate of enjoyment of his property without compensation. People v. Murphy, 129 App. Div. 260, 113 NYS 855. Act Cong. June 29, 1906, c. 3591 (34 Stat. 593; U. S. Comp. St. Supp. 1907, p. 909), providing that no common carrier receiving property from a point in one state to a point in another state can limit its liability to its own line, is not unconstitutional as taking carrier's property without compensation. Galveston, etc., R. Co. v. Wallace [Tex. Civ. App.] 117 SW 169. Levy of assessment by drainage district against land of one who has purchased water rights from canal company upon fixed rental per acre, for purpose of purchasing water system and canals, without first purchasing rights of such owner, is taking of property without compensation. Knowles v. New Sweden Irr. Dist. [Idaho] 101 P 81. Laws 1907-8, p. 145, c. 6, art. 2, as amended by Laws 1907-8, p. 153, c. 6, art. 3, establishing depositor's guaranty fund, is invalid as a taking of private property for public use without compensation. Noble State Bank v. Haskell [Okl.] 97 P 590.

For a full treatment, see the topic **Eminent Domain.**

36. Neither congress nor any board acting under its authorization can establish traffic rates in interstate commerce that will not admit of carrier earning reasonable and just compensation, since such action would be taking property without just compensation. Missouri, K. & T. R. Co. v. Interstate Commerce Com., 164 F 645. Where a water company has devoted certain property to a public use, rates must be just and reasonable both to the company and to the consumer. Spring Valley Water Co. v. San Francisco, 165 F 667. Water company whose rates are fixed by a municipal body is entitled to a fair return upon fair present value of that which is used for the public benefit, having due regard to reasonable value of service rendered. Id. Each case must depend upon its special facts, and every element and every circumstance which increases or depreciates the value of the property or the service rendered should be considered. Id.

37. Maintenance of dam by order of river commission to increase depth of river.

§ 17. *Right to justice and guaranty of remedies.*[38]—See 11 C. L. 713—A certain remedy for every wrong is guaranteed.[39]

§ 18. *Jury trials preserved.*[40]—See 11 C. L. 718—The right to trial by jury as it existed at common law has been almost universally preserved.

§ 19. *Regulation of criminal procedure; rights secured to persons accused of crime.*[41]—See 11 C. L. 713—Persons accused of crime are entitled to a speedy[42] and public trial,[43] to be informed of the nature of the accusation against them,[44] to be confronted with the witnesses,[45] and to be heard,[46] and are protected from giving

Crocker v. Champlin, 202 Mass. 437, 89 NE 129.

38. Search Note: See Constitutional Law, Cent. Dig. §§ 950-963; Dec. Dig. §§ 321-329; 8 Cyc. 1137-1140; 6 A. & E. Enc. L. (2ed.) 972.

39. Oregon City charter, which exempts city from liability for injuries on account of condition of streets, but does not exonerate city officer if injury caused by his negligence, is in violation of Const. art. 1, § 10, giving all persons remedies for injuries to person or property. Batdorff v. Oregon City [Or.] 100 P 937.

40. See Jury, § 1A.

41. Search Note: See notes in 3 C. L. 780; 14 L. R. A. 809; 2 L. R. A. (N. S.) 509; 9 Id. 277; 37 A. S. R. 582.

See, also, Constitutional Law, Cent. Dig. §§ 526-590, 711-713, 746-761; Dec. Dig. §§ 186-203, 250, 257-272; 8 Cyc. 1017-1036, 1075, 1076, 1087, 1089-1092; Criminal Law, Cent. Dig. §§ 219, 236, 290-409, 411-413, 460, 871-874, 1292, 1293, 1307, 1452, 3271-3277, 3279, 3280, 3304-3309; Dec. Dig. §§ 107, 116, 161-204, 206, 393, 573, 574, 636, 1206, 1213, 1214; 12 Cyc. 229, 259-291, 400, 401, 498, 520, 954-957, 963-966; 28 Cyc. 50; Indictment and Information, Cent. Dig. §§ 4-8, 90, 145, 175, 176, 576, 627; Dec. Dig. §§ 2, 18, 36, 56, 186, 194; 22 Cyc. 171-173, 285-288, 467, 491; Witnesses, Cent. Dig. §§ 1042-1046; Dec. Dig. 300, 301; 6 A. & E. Enc. L. (2ed.) 992.

42. Requirement that justice be administered without delay means without unreasonable or unnecessary delay. Three continuances on hearing for writ of habeas corpus held not unreasonable delay nor to show denial of justice. Ex parte Ryan [La.] 50 S 385. To reopen case and remand it to court below after it has been in courts a decade and after death of witnesses would constitute denial of speedy trial guaranteed by Const. Or. art. 1, § 10. Hough v. Porter, 51 Or. 318, 102 P 728. Constitutional guaranty of speedy trial applies, although accused is imprisoned for another offense. State v. Keefe, 17 Wyo. 227, 98 P 122. Speedy trial as guaranteed by constitution means generally a trial as soon after indictment as prosecution can with reasonable diligence prepare for it, regard being had to terms of court. Rev. St. 1899, §§ 5382, 5383, requiring accused persons to be tried at specified terms of court, constitutes a reasonable legislative declaration of what is a reasonable delay. Id. Where there were pending in district court of county at beginning of term 419 criminal cases and 409 civil cases, and where it was a physical impossibility to dispose of all of them within terms fixed, accused was not deprived of his right to speedy trial as provided for by Mansfield's Dig. Laws Ark. §§ 2192, 2193, although more than 3 terms of court had passed. State v. Caruthers 1 Okl. Cr. R. 428, 98 P 474.

43. Exclusion of public from court room on trial for rape is a denial of public trial. State v. Osborne [Or.] 103 P 62. Accused is not deprived of constitutional right to public trial by fact that court on refusing to clear court room warned audience that there would be no testimony that any right minded person would desire to hear, whereupon entire audience left room. People v. Gregory, 8 Cal. App. 738, 97 P 912.

44. U. S. Const. 5th Amend., providing that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment, refers to United States only. People v. Botkin, 9 Cal. 244, 98 P 861. Act 1907, § 3, providing for trial and punishment of offenders against game laws before justice of the peace, is not violative of Bill of Rights, § 14, declaring that no person shall be put to answer any criminal charge but by presentment, indictment, or impeachment. State v. Sexton [Tenn.] 114 SW 494.

45. Persons accused are entitled to be confronted with witnesses against them in presence of court. Rev. Code Civ. Proc. § 7, subsec. 3, held proper rule of procedure adopted by legislature. State v. Heffernan [S. D.] 118 NW 1027. Admission of testimony of nonresident taken at examining trial in criminal case is not in contravention of Bill of Rights, § 10, guaranteeing that every person shall be confronted with witnesses against him. Somers v. State, 54 Tex. Cr. R. 475, 113 SW 533. Constitutional provision that accused be confronted with witnesses against him was not violated by permitting court stenographer to read notes of testimony taken at a former criminal trial, witness being dead, though such testimony was never read to witness nor signed by her. Arnwine v. State, 54 Tex. Cr. R. 213, 114 SW 796.

46. Exclusion of attorney for defense in criminal trial on ground that he is a witness, although accused has other counsel, violates provision of Bill of Rights guaranteeing that when accused is placed on trial he shall have the right to be heard by his counsel and himself, either or both. Jackson v. State, 55 Tex. Cr. R. 79, 115 SW 262. Code Cr. Proc. § 454, requiring jury acquitting accused on ground of insanity to state that fact with verdict, and authorizing commitment in discretion of court, is not invalid, as not providing for notice and hearing, since act contemplates that investigation satisfy court that accused is insane to degree menacing public safety. People v. Chanler, 117 NYS 322. Fine against New Jersey corporation for crime com-

evidence against themselves,[47] and from being twice put in jeopardy for the same offense,[48] and from cruel and unusual punishment.[49] The legislature may prescribe rules of procedure [50] and provide for the order of proof.[51, 52]

§ 20. *Searches and seizures.*[53]—See 11 C. L. 714—Unreasonable searches and seizures are prohibited.

§ 21. *Suffrage and elections.*See 11 C. L. 714—This subject is governed by constitutional provisions peculiar to the several states and is treated in an appropriate topic.[54]

§ 22. *Frame and organization of government, courts and officers.*[55]—See 11 C. L. 714—The supreme court has inherent power to appoint its own assistants.[56] Jurisdiction and remedies conferred by constitution and statutes of the United States on national courts are uniform throughout states of union and cannot be impaired by state legislation.[57] The right to local self-government is guaranteed in terms in many constitutions.[58] Provisions for initiative and referendum in regard to the adoption of ordinances is constitutional.[59]

mitted by Indiana corporation, former not even indicted. Standard Oil Co. v. U. S. [C. C. A.] 164 F 376.

47. While one accused of crime cannot, under guise of cross-examination, be compelled in violation of Const. art. 1, § 11, to give evidence against himself, if he becomes a witness in his own behalf he waives the constitutional guaranty as to all matters connected with his examination in chief. State v. Deal [Or.] 98 P 165. U. S. Const. 5th Amend., providing that no person shall be compelled to be a witness against himself in a criminal case, applies to United States only. People v. Batkin, 9 Cal. App. 244, 98 P 861. Inquisition before grand jury is a criminal case within meaning of constitutional provisions that no person can be compelled in any criminal case to give evidence against himself. People v. Argo, 237 Ill. 173, 86 NE 679.

48. To subject a person indicted for murder and convicted of manslaughter to new trial on his own motion is not in violation of Const. art. 1, § 1, par. 8, providing that no person shall be put in jeopardy of life or liberty more than once for same offense save on his own motion. Brantley v. State [Ga.] 64 SE 676. Laws 1903, p. 125, c. 86, providing increased punishment for habitual criminals, is not invalid as putting accused twice in jeopardy. State v. Le Pitre [Wash.] 103 P 27. Rev. Codes, § 6452, fixing punishment of person who escapes from state prison at term equal to that which he is serving, is not void as providing for placing twice in jeopardy. Ex parte Mallon [Idaho] 102 P 374. U. S. Const. 5th Amend., providing that no person shall be put twice in jeopardy for same offense, refers to United States only. People v. Batkin, 9 Cal. App. 244, 98 P 861.

49. Ten-year jail sentence to member of Black Hand for conspiracy to destroy property by dynamite not cruel or unusual. Lanasa v. State, 109 Md. 602, 71 A 1058. Imposition of fine of twenty-nine million dollars held abuse of discretion. Standard Oil Co. v. U. S. [C. C. A.] 164 F 376. Oregon Const. art. 1, § 15, declaring that laws for punishment of crime shall be founded on principles of reformation, does not impliedly prohibit infliction of death penalty. State v. Finch [Or.] 103 P 505.

See, also, Criminal Law, § 6.

50. Code Cr. Prac. § 11, providing that a public offense of which the only punishment is a fine may be prosecuted by a penal action, applies to a corporation, although offense is punishable both by fine and imprisonment, apparent discrimination growing out of fact that corporation cannot be imprisoned. Small & Co. v. Com. [Ky.] 120 SW 361.

51, 52. Sess. Laws 1903, p. 244, c. 131, providing that showing that a party has refused or neglected to pay for hotel accommodations, or has surreptitiously removed his baggage, shall be prima facie evidence of guilt, is constitutional, since legislature may provide for order of proof. In re Milecke, 52 Wash. 312, 100 P 743. Act March 15, 1906 (Laws 1906, p. 411, c. 236), making possession of United States internal revenue tax receipt for sale of liquors prima facie evidence of sale, does not deny accused right to confront witnesses. Clopton v. Com. [Va.] 63 SE 1022.

See, also, Criminal Law, § 5.

53. See Search and Seizure.

54. See Elections.

55. Search Note: See 6 A. & E. Enc. L. (2ed.) 1004.

56. Under Const. art. 4, § 1. State v. Cunningham [Mont.] 101 P 962.

57. Rev. St. Ohio, §§ 3170-1 to 3170-7, providing for filing of certificates of names of partners, and forbidding partners to maintain action if they have failed to comply with statute, does not impair jurisdiction of federal courts. In re Farmers' Supply Co., 170 F 502.

58. See Municipal Corporations, 12 C. L. 905.

59. St. 1908, p. 542, c. 574. Graham v. Roberts, 200 Mass. 152, 85 NE 1009. Const. art. 4, § 1, as amended in 1902, creating and defining initiative and referendum, contemplates that legislature shall no longer have power to enact or amend municipal charters, but that such power is to be exercised only by the people. Farrell v. Port of Portland [Or.] 98 P 145.

§ 23. *Taxation and fiscal affairs.*[See 11 C. L. 714]—Validity of tax laws under general constitutional provisions is treated in preceding sections of this topic, while constitutional limitations expressly imposed on the power to tax and the manner of its exercise are treated in an appropriate topic.[60, 61]

§ 24. *Schools and education; school funds.*[62]—[See 7 C. L. 743]

§ 25. *The enactment of statutes* [See 11 C. L. 714] is hedged about with various inhibitions such as those against local or special laws, laws addressed to a plurality of subjects and not reciting their subjects in their titles, and amendatory acts as setting out that amended.[63]

§ 26. *Miscellaneous provisions other than the foregoing.*[See 11 C. L. 714]—Chiefly, matters more properly belonging within the domain of legislation are to be found in the more recent constitutions. Among them are claims against the state,[64, 65] public lands,[66] homesteads,[67] and other exemptions,[68] regulations of carriers,[69] corporations,[70] and liquor traffic.[71] The full faith and credit clause of the constitution is most frequently invoked to protect foreign judgments.[72]

Consuls, see latest topical index.

CONTEMPT.

The scope of this topic is noted below.[73]

§ 1. Nature of Contempt and What Constitutes, 862.
- A. Elements of Contempt and Nature of Proceedings; Civil or Criminal, 862.
- B. Disrespect to the Court in General, 863.
- C. Acts in Disobedience of Court, 863.
- D. Official Misconduct and Obstruction or Perversion of Justice, 864.

§ 2. Defense, Excuse or Purgation, 865.
§ 3. Power to Punish or Redress; Contempt or Other Remedy, 866.
§ 4. Pleadings and Other Proceedings Before Hearing, 867.
§ 5. Hearing; Evidence; Trial, 868.
§ 6. Findings and Judgment, 869.
§ 7. Punishment; Fine and Commitment; Further Proceedings, 869.
§ 8. Discharge or Pardon, 870.
§ 9. Review of Proceedings, 870.

§ 1. *Nature of contempt and what constitutes.*[74] *A. Elements of contempt and nature of proceedings; civil or criminal.*[See 11 C. L. 715]—It is contempt to openly insult or resist the powers of the court or the persons of the judges, or to do acts which may lead to a general disregard of their authority.[75] Contempts are of two classes, criminal and civil.[76] Proceedings to punish criminal contempts are conducted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders;[77] civil contempt proceedings are instituted to pro-

60, 61. See Taxes, § 1, and see such topics as Municipal Corporations, § 13, as to constitutional provisions relating to fiscal management.

62. For full treatment, see Schools and Education.

63. See Statutes, §§ 2, 3.

64, 65. See States, § 6.

66. See Public Lands.

67. See Homesteads.

68. See Exemptions.

69. See Carriers, § 2.

70. See Corporations, § 11.

71. See Intoxicating Liquors, § 1.

72. See Foreign Judgments, § 1.

73. It includes all matters relating to contempt of court. It excludes criminal prosecutions for acts obstructing justice (see Obstructing Justice *), stay of proceedings until compliance with previous orders (see Stay of Proceedings *), the striking of disrespectful pleadings (see Pleading,* §§ 9, 10), and briefs (see Appeal and Review,* § 11F), and the suspension or disbarment of attorneys for contempt (see Attorneys and Counselors,* § 3).

74. Search Note: See Contempt, Cent. Dig. §§ 1-5, 117-121; Dec. Dig. §§ 1-5, 38; 9 Cyc. 5-7, 15; 7 A. & E. Enc. L. (2ed.) 27.

75. McCarthy v. Hugo [Conn.] 73 A 778; Ex parte Creely, 8 Cal. App. 713, 97 P 766.

76. Gorham v. New Haven [Conn.] 72 A 1012.

77. Gorham v. New Haven [Conn.] 72 A 1012; Ex parte Gudenoge [Okl. Cr. R.] 109 P 39. Fact that fine imposed is for benefit of person pecuniarily aggrieved by offender's conduct does not preclude punishment from being one to vindicate dignity of court. In re Koronsky [C. C. A.] 170 F 719. Fraudulent substitution of material instrument of evidence in order to defeat prose-

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* Always begin with the latest article on the subject. Use the latest topical index.

tect and enforce the rights of private parties.[78] The nature of the contempt does not partake of the nature of the original action or proceeding out of which it arises.[79] Criminal contempts are frequently regulated by statute.[80] Contempts are also divided into direct and indirect, or constructive contempts.[81] Direct contempts are those committed during the session of the court and in its immediate view and presence, while a constructive contempt is one committed without the presence of the court.[82]

(§ 1) *B. Disrespect to the court in general.*[83]—See 11 C. L. 718—A criticism in good faith of the rulings of a court, after the litigation is concluded, is not contemptuous,[84] nor is criticism of a judge, where it is not directed to him in his judicial capacity.[85]

(§ 1) *C. Acts in disobedience of court.*[86]—See 11 C. L. 718—Failure to comply with an order of the court [87] constitutes contempt, unless the order is void,[88] or is held

cution of criminal case. McCarthy v. Hugo [Conn.] 73 A 778.

78. Gorham v. New Haven [Conn.] 72 A 1012; Ex parte Dickens [Ala.] 50 S 218. Order in such case is not in nature of punishment, but is coercive to compel him to act in accordance with order of court. Ex parte Gudenoge [Okl. Cr. R.] 100 P 39.

79. Where original action was application for injunction, held violation of such injunction not civil contempt. Hammond Lumber Co. v. Sailors' Union, 167 F 809.

80. People v. Platzer, 133 App. Div. 25, 117 NYS 852; Barber v. Brennan [Iowa] 119 NW 142. Subpoena duces tecum not a mandate so as to make willful disobedience to it criminal contempt under subd. 3 and 4, § 8, Code of Civ Proc. People v. Andrews, 134 App. Div. 32, 118 NYS 37.

81. Ex parte Gudenoge [Okl. Cr. R.] 100 P 39.

82. In re McCarthy, 154 Cal. 534, 98 P 540.

83. Search Note: See notes in 68 L. R. A. 251; 2 L. R. A. (N. S.) 603; 5 Id. 916; 15 Id. 389; 15 Id. 621; 50 A. S. R. 572.

See, also, Contempt, Cent. Dig. §§ 6-18; Dec. Dig. §§ 6-9; 9 Cyc. 19, 20, 22; 7 A. & E. Enc. L. (2ed.) 52, 59.

84. "Great weight of authority upholds doctrine that every citizen has unrestricted right to comment upon and criticise rulings of court after litigation is concluded, subject only to liability therefor in criminal or civil action triable by jury. Rex v. Charlier Rap. Jud. Quebec, 12 B. R. 385; State v. Sweetland, 3 S. D. 503, 54 NW 415; State v. Anderson, 40 Iowa, 207; Field v. Thornell, 106 Iowa, 15, 75 NW 685, 68 Am. St. Rep. 281; Cheadle v. State, 110 Ind. 301, 11 NE 426, 59 Am. Rep. 199; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; Storey v. People, 79 Ill. 45, 22 Am. Rep. 158; Post v. State, 14 Ohio C. C. 111; Percival v. State, 45 Neb. 741, 64 NW 221, 50 Am. St. Rep. 568; Rosewater v. State, 47 Neb. 630, 66 NW 640; In re Dalton, 46 Kan. 253, 26 P 673; In re Robinson, 117 N. C. 533, 23 SE 453, 53 Ann. St. Rep. 596; In re Cooke, 116 La. 723, 41 S 49; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637; Sturoc's Case, 48 N. H. 428, 432, 97 Am. Dec. 626."—State Board of Ex'rs v. Hart, 104 Minn. 88, 116 NW 212.

85. Writer of newspaper article which attacked judge for remarks he made outside of record of case held not in contempt. State v. District Ct., 37 Mont. 590, 97 P 1032.

86. Search Note: See notes in 24 L. R. A. 433; 48 Id. 708; 3 Ann. Cas. 28.

See, also Contempt, Cent. Dig. §§ 58-80; Dec. Dig. §§ 20-26; 9 Cyc. 8, 10-14; 7 A. & E. Enc. L. (2ed.) 54.

87. Held contempt: Disobeying **subpoena.** Leber v. U. S. [C. C. A.] 170 F 881. **Refusing to produce** ballots in election contest. Ex parte Boles [Ark.] 114 SW 918. **Failure to file accounts** as surviving partner and administrator within reasonable time. Ex parte Dickens [Ala.] 50 S 218. **Failure to pay money** out of trust estate, as ordered by decree. Jastram v. McAustan [R. I.] 71 A 454. Failure of receiver to pay over money as decreed. Davis Colliery Co. v. Charlevoix Sugar Co. [Mich.] 16 Det. Leg. N. 235, 121 NW 292; People v. Zimmer, 238 Ill. 607, 87 NE 845. **Refusal to testify or produce documents:** Violation of order of referee to produce books. In re Sorkin, 166 F 831. Failure to appear as witness before notary, although advised by counsel to stay away. Leber v. U. S. [C. C. A.] 170 F 881. Witness' refusal to answer questions. Ex parte Gudenoge [Okl. Cr. R.] 100 P 39. Refusal to be sworn as witness. In re Hammond, 83 Neb. 636, 120 NW 203. **In bankruptcy proceedings:** Failure of bankrupt to file schedules within 10 days of date of order adjudicating him involuntary bankrupt as provided in order. In re Schulman, 164 F 440. Creditor of bankrupt violated order of referee restraining him from prosecuting suit on debt. In re Mustin, 165 F 506. **Failure to pay alimony:** Where demurrer to complaint is sustained, with leave to file amended complaint, and time for amendment has not expired, action is still pending, and disobeying order made therein held contempt. Ex parte Joutsen, 154 Cal. 540, 98 P 391. Neglect to pay wife temporary allowances. MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848, afg. 141 Ill. App. 126. **Violation of an injunction:** Where one is enjoined from infringing on patent and thereafter makes slight change in device and sells same, held change immaterial as principle of operation remained as before. Queen & Co. v. Green, 170 F 611. Order enjoining sale of intoxicating liquor. Barber v. Brennan [Iowa] 119 NW 142; Schlosser v. Mould [Iowa] 121 NW 520. Violation of injunction restraining keeping or sale of liquor on specified premises held general allegation of sale in violation of law suffi-

in abeyance by virtue of another order,[89] but it is no excuse for the violation of an injunction that it was improperly or improvidently granted.[90] One cannot be held guilty of contempt in violating an order which is not directed to him;[91] but where one, with knowledge of an injunction against another, assists the latter to violate the order, he is guilty of contempt.[92] A corporation may be guilty of contempt,[93] and an officer may be guilty though his company is discharged.[94]

(§ 1) *D. Official misconduct and obstruction or perversion of justice.*[95]—See 11 C. L. 718—An attorney who attempts to influence a judge's action in a pending case,[96] or who advises a client to disobey an order of a court,[97] is guilty of contempt, although he has a right to advise as to the validity of the order. Other acts constituting contempt are practicing law after disbarment,[98] attempts to influence jurors,[99] even before they are accepted,[1] discrimination in summoning talesmen to complete a jury,[2] destruction of evidence,[3] perjury,[4] unless it is not prejudicial,[5] murdering

cient to require defendant to show cause why he should not be punished for contempt. Pumphrey v. Anderson [Iowa] 119 NW 528. Prohibiting cutting of wood. Davis v. Champion Fiber Co., 150 N. C. 84, 63 SE 178. Injunction against infringement of patent. Rushmore v. Motor Car Equipment Co., 170 F 189.

Held not contempt: Failure to obey subpoena when no witness fees are tendered. People v. Healey, 139 Ill. App. 363. Violation of restraining order held in abeyance by subsequent order. King County Drainage Dist. v. Costello [Wash.] 101 P 497. Where one advises a witness to disobey a subpoena to produce books and appear before grand jury, held not contempt where witness obeys subpoena. People v. Andrews, 134 App. Div. 32, 118 NYS 37. Where a chamberlain of the city of New York had been ordered to pay to state treasurer all money which remained unclaimed in his hands for 20 years, held not contempt to ask for appointment of referee to ascertain what sums are unclaimed, before paying same over. People v. Keenan, 132 App. Div. 331, 117 NYS 42. Refusal to attend as witness where order to appear is void. Vogel v. Ninmark, 62 Misc. 591, 116 NYS 825. Failure to execute bond ordered given to insure payment of alimony not punishable as contempt. People v. Walsh, 132 App. Div. 462, 116 NYS 839.

88. Where court has jurisdiction of parties and subject-matter, and it not appearing that judgment was not within issuee presented by pleadings, judgment cannot be held void. Smith v. Schlink, 44 Colo. 200, 99 P 566. In absence of jurisdiction, judgment is nullity. Ex parte Gudenoge [Okl. Cr. R.] 100 P 39. Referees appointed for special purpose made order after accomplishing object of appointment. Cline v. Langan [Nev.] 101 P 553. Where statute required bond be given before injunction shall issue, held issuance of restraining order of no effect without bond. Castleman v. State [Miss.] 47 S 647. Decree ordering commitment until payment of debt held void under constitution, being imprisonment for debt. Ex parte Dickens [Ala.] 50 S 218.

89. Restraining order prohibiting work on ditch held in abeyance by subsequent order decreeing all previous orders in cause suspended, pending outcome of trial on merits. King County Drainage Dist. v. Costello [Wash.] 101 P 497. Injunction held not suspended by appeal. Ft. Worth Driving Club v. Ft. Worth Fair Ass'n [Tex. Civ. App.] 121 SW 213.

90. Ft. Worth Driving Club v. Ft. Worth Fair Ass'n [Tex. Civ. App.] 121 SW 213.

91. Writ acts in personam and not in rem. Ex parte State [Ala.] 50 S 143.

92. Ex parte Testard [Tex.] 115 SW 1155. Officer of company found guilty of contempt, though company was discharged. Fiedler v. Bambrick, 135 Mo. App. 301, 115 SW 1033.

93. Failure to produce an agent who is not an officer of corporation, when he has not been served with order to appear as witness, held not contempt. Wilkens v. American Bank of Torreon, 133 App. Div. 646, 118 NYS 210.

94. Fiedler v. Bambrick, 135 Mo. App. 301, 115 SW 1033.

95. Search Note: See notes in 3 C. L. 797; 3 Ann. Cas. 763.

See, also, contempt, Cent. Dig. §§ 19-57; Dec. Dig. 10-18; 9 Cyc. 7, 8, 14-16, 20, 22, 24; 7 A. & E. Enc. L. (2ed.) 44, 46.

96. Attorney went to private chambers of judge and after saying he wanted to address him "as private citizen" made threatening remarks concerning pending cause. Leber v. U. S. [C. C. A.] 170 F 881.

97. Disobeyed subpoena to appear before notary. Held court was in session and regular procedure to determine validity was motion to quash. Leber v. U. S. [C. C. A.] 170 F 881.

98. Disbarred attorney accepted retainer to procure release of client's husband from custody. In re Duncan [S. C.] 65 SE 210.

99. Person called out to jury "Don't convict my friend R.," while latter were considering verdict held within Code Civ. Proc. § 1209, declaring any unlawful interference with proceedings of court, to be contempt. Ex parte Creely, 8 Cal. App. 713, 97 P 766.

1. Endeavoring to procure friends of accused to act as jurors. Coleman v. State [Tenn.] 113 SW 1045.

2. In criminal prosecution deputy marshal refused to summon persons as talesmen who were acquainted with defendant's attorney. Harjo v. U. S., 1 Okl. Cr. R. 590, 98 P 1021.

3. Substitution of ginger ale for whisky in prosecution for violating liquor law. McCarthy v. Hugo [Conn.] 73 A 778.

a prisoner sentenced to death, after stay of execution had been granted,[6] obtaining a stay of proceedings by practicing deceit on the court [7] or refusal of a prosecuting officer to deliver a transcript of the evidence of a witness before a grand jury, to counsel for defense,[8] refusal of a witness to be sworn or to answer proper interrogatories.[9] But a refusal to be sworn in a void proceeding does not constitute contempt,[10] nor does a refusal to answer such questions as would constitute an abuse of process.[11] Neither will a witness be punished for contempt in failing to obey a subpoena requiring his attendance upon court, unless his witness fee have been paid or tendered to him, unless he has waived the same.[12]

§ 2. *Defense, excuse or purgation.*[13]—See 11 C. L. 719—Inability to comply with the order of a court is a defense to contempt proceedings in some cases; [14] but where the inability is the result of a wrongful act, it is not a defense.[15] One cannot be

4. In re Koronsky [C. C. A.] 170 F 719. Testimony at examination tended to show deliberate effort by bankrupt to suppress material facts relating to his business. In re Schulman, 167 F 237.

5. Where bankrupt testified he had no money on his person but subsequently surrendered some to referee, held estate not prejudiced. In re Gordon, 167 F 239. Bankrupts who give false testimony should not be punished for contempt if they afterwards divulge truth, because this would discourage such admission. Id. Perjury by judgment debtor, in testifying concerning his property, in supplementary proceedings, held not prejudicial. Saggese v. Virgilio, 106 NYS 1100.

6. Sheriff who failed to protect prisoner and members of mob who lynched him held guilty of contempt. United States v. Shipp, 29 S. Ct. 637.

7. Dollard v. Koronsky, 61 Misc. 392, 113 NYS 793. Four elements are necessary in order to hold one guilty of contempt of court in obtaining stay of proceedings by practicing deceit on court: Must be shown that there was deceit on court; that plaintiff's remedies and rights were impaired, impeded or prejudiced; that actual loss or damage was caused plaintiff; and that he has no other remedy prescribed by law for recoupment of such damages. Id. Where defendant stayed default judgment on false affidavits that he had not been served with process, and obtained an order of reference to take testimony, held defendant practiced deceit and was subject to punishment for contempt under Code Proc. § 14. Id.

8. It is now an established canon of ethics of bar of this country and state that "primary duty of lawyer engaged in public prosecution is not to convict, but to see justice is done. The suppression * * * of facts capable of establishing innocence of accused is highly reprehensible." Semble, suppression of material fact reflecting upon credibility of witness touching vital point at issue in case is likewise misconduct. If court, upon making examination of official transcript of evidence of witness given before grand jury, which prosecutor has used in conducting cross-examination of such witness on trial, finds items of testimony which would tend to refute charge of inconsistency made by prosecutor, and which should go to jury, it may properly direct him to deliver such transcript to counsel for defense to enable them to place it before jury as reflecting upon attempted impeachment of witness. Refusal to so deliver transcript is not only contempt of court, but is violation of ethical obligation of prosecuting attorney. State of Ohio v. R. Stanley Rhoads, 7 Ohio L. R. 305.

9. Where witness acted on advice of counsel, held contempt to refuse to be sworn; need not answer improper questions. In re Hammond, 83 Neb. 636, 120 NW 203.

10. Chairmen of political parties called before court in proceeding to enable court to make up its mind whether or not to call grand jury to investigate election expenses held no authority to subpoena witnesses for such purpose. Williams v. People [Colo.] 103 P 298. Commitment of witness for properly protecting himself from illegal inquisition will not be upheld. In re Hammond, 83 Neb. 636, 120 NW 203.

11. Witness is entitled to privileges and immunities as well when deposition is taken as when examined in open court. In re Hammond, 83 Neb. 636, 120 NW 203.

12. People v. Healey, 139 Ill. App. 363. Conversation over telephone after alleged contempt with attorney issuing subpoena in which failure to tender witness fees was not assigned as reason for failure to obey, held no waiver. Id.

13. **Search Note:** See notes in 6 L. R. A. 572; 9 L. R. A. (N. S.) 304, 1119; 16 Id. 1063; 10 Ann. Cas. 692.

See, also, Contempt, Cent. Dig. §§ 81-85, 271; Dec. Dig. § 28; 9 Cyc. 25; 7 A. & E. Enc. L. (2ed.) 71.

14. Where defendant was ordered to pay plaintiff monthly sum, affidavit showing income had decreased so as to make payment impossible held sufficient excuse. Hershenstein v. Hahn [N. J. Law] 71 A 105. Where temporary administrator was directed to pay money when there were no funds in estate, held sufficient excuse. In re Grant, 130 App. Div. 706, 115 NYS 283. Where one paid out money in good faith and court made order subsequently directing this money to be returned to court, held inability to comply sufficient excuse, although relatrix disabled herself to comply with order. State v. Silver Bow County District Ct., 37 Mont. 485, 97 P 841. Contemnor hopelessly insolvent. Holcomb v. Holcomb [Wash.] 102 P 653.

15. Receiver converted funds instead of paying same as ordered by court. Held,

punished for contempt where he has not been legally served with notice of the proceeding,[16] or where he was induced by fraud, artifice or trickery, to submit himself to a court's jurisdiction.[17] If a court has power to issue an order, the fact that the power was not properly exercised is no defense for violating the order.[18] The ability of a wife to support herself is no defense for failure to pay alimony.[19] An oral agreement between the judge and counsel that a degree was to be inoperative until it could be complied with does not excuse a violation of the decree,[20] nor is the mere fact that one acts by advice of counsel a sufficient defense.[21] A slight variance in an original subpoena read to a witness, and the copy delivered to him, does not excuse him from appearing.[22]

§ 3. *Power to punish or redress; contempt or other remedy.*[23] See 11 C. L. 719 The power to punish for contempt is inherent in the very nature and purpose of courts of justice,[24] and that power cannot be taken away by legislative enactment.[25] Federal statutes specify the cases where district and circuit courts are authorized to punish for contempt,[26] and define the acts for which a person can be punished for contempt before referees.[27] Not only must the court have jurisdiction over the person and subject-matter, but authority to render the particular judgment.[28] Or-

could be imprisoned for contempt. People v. Zimmer, 238 Ill. 607, 87 NE 845. Assertion by receiver that he paid out large sums on verbal order of circuit judge, so that he has no funds to make payment under decree, no defense for contempt. Davis Colliery Co. v. Charlevoix Sugar Co. [Mich.] 16 Det. Leg. N. 235, 121 NW 292. Trustee cannot justify failure to pay dividends in accordance with decree by showing no part of trust estate is available for such payment, because they have diverted same to other purposes. Jastram v. McAustan [R. I.] 71 A 454. In such cases they must reimburse fund from individual estates. Id.

16. Stidger v. People [Colo.] 102 P 745. Where receiver in supplementary proceedings called on defendant and showed him copy of order and "satisfied" defendant he was receiver, held not legal service. Dowling v. Twombly, 113 NYS 970. An order of one justice requiring defendant to appear in supplementary proceedings was altered by another justice who did not sign his name. Held order was nullity and service void. Vogel v. Ninmark, 62 Misc. 591, 116 NYS 825. Where purchaser at foreclosure sale failed to complete purchase and was ordered to pay to referee resulting damages, from which he appealed, but failed to give security to stay proceedings, an order to show cause why he should not be punished for contempt in failing to comply with order was properly served at office of attorneys who represented him on prior order. State Bank v. Wilchinsky, 64 Misc. 476, 118 NYS 578.

17. Contemnor, a nonresident, alleged wife's counsel induced him to come into state to settle litigation resulting from failure to pay temporary allowances, and then had him arrested for contempt in failing to pay such allowances. MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848.

18. Order restraining grading of sidewalk. City of Marshall v. Allen [Tex. Civ. App.] 115 SW 849.

19. Nipper v. Nipper [Ga.] 65 SE 405.

20. Where decree forbade operation of saloon, held oral agreement that it remain inoperative until premises could be fixed to conform to law, no defense. Buck v. Powers [Iowa] 121 NW 1042.

21. Violation of preliminary injunction restraining infringement of patent. Queen & Co. v. Green, 170 F 611.

22. Difference of an hour between original and copy held contempt, as witness did not appear at either time. Leber v. U. S. [C. C. A.] 170 F 881.

23. **Search Note:** See notes in 3 C. L. 798; 36 L. R. A. 254, 822; 1 L. R. A. (N. S.) 1135; 11 Id. 619; 14 Id. 1150; 117 A. S. R. 950; 7 Ann. Cas. 877; 9 Id. 316; 11 Id. 1037.

See, also, Contempt, Cent. Dig. §§ 91-124; Dec. Dig. §§ 30-40; 9 Cyc. 26-34; 7 A. & E. Enc. L. (2ed.) 30.

24. Hammond Lumber Co. v. Sailors' Union, 167 F 809; Ex parte Gudenoge [Okl. Cr. R.] 100 P 39; Ex parte Dickens [Ala.] 50 S 218.

25. **Note:** "Legislature prohibited courts from imposing fine exceeding $50 and limited imprisonment for contempt to 10 days. Rapalje on Contempts, § 11; 7 A. & E. Enc. L. (2ed.) p. 33; Arnold v. Com., 80 Ky. 300, 44 Am. Rep. 480; Middlebrook v. State, 43 Conn. 257, 21 Am. Rep. 650; State v. Morrill, 16 Ark. 384; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; Ex parte Robinson, 19 Wall. 505, 22 Law. Ed. 205; Worland v. State, 82 Ind. 49; Cheadle v. State, 110 Ind. 301, 11 NE 426, 59 Am. Rep. 199; Holman v. State, 105 Ind. 513, 5 NE 556; In re Shortridge, 99 Cal. 526, 34 P 227, 37 Am. St. Rep. 78, 21 L. R. A. 755; People v. Stapleton, 18 Colo. 568, 33 P 167, 23 L. R. A. 787; In re Chadwick, 109 Mich. 588, 67 NW 1071; Hawes v. State, 46 Neb. 149, 64 NW 699; Hale v. State, 55 Ohio St. 210, 45 NE 199, 36 L. R. A. 254, 60 Am. St. Rep. 691."—Chicago, B. & Q. R. Co. v. Gildersleeve, 219 Mo. 170, 118 SW 86.

26. Rev. St. § 725 (U. S. Comp. St. 1901, p. 583). In re Gitkin, 164 F 71.

27. Bankruptcy Act July 1, 1898, c. 541, § 41a (4), 30 Stat. 556 (U. S. Comp. St. 1901, p. 3437). Where bankrupt committed perjury in his examination, held amenable to law. In re Gitkin, 164 F 71.

28. Ex parte Gudenoge [Okl. Cr. R.] 100

derly practice requires that in proceedings for contempt arising from the violation of an order, recourse should be had to the justices of the court whose orders are alleged to have been violated;[29] but a receiver cannot suspend an order of a court by appeal and then defy the order of the appellate court on the ground that only the court which appointed him can enforce the order.[30] Some probate courts are given the same power as district courts to deal with witnesses for contempt,[31] but it has been held that they have no power to enforce payment of costs by contempt proceedings.[32] A decree for the payment of money may be enforced in chancery proceedings for contempt;[33] but such proceedings are not proper when the remedy by execution is open.[34] Under New York statutes, where a debtor fails to appear in supplementary proceedings, the creditor is either entitled to an attachment or an order to show cause why he should not be punished for contempt.[35] A contract cannot be enforced by contempt proceedings.[36]

§ 4. *Pleadings and other proceedings before hearing.*[37]—See 11 C. L. 720—Contempt proceedings are not proper where there is a statute prescribing a remedy by action.[38] Some courts have established a form for instituting and conducting such proceedings.[39] The proper course in cases of indirect criminal contempts is for some informing officer to bring it to the attention of the court[40] by the affidavits of persons who witnessed it, or who have knowledge of it.[41] The petition or affidavit must state facts showing contempt[42] by means of direct charges, either positively or on

P 39. Proceedings for civil contempt cannot be maintained for violation of injunction until complainant's rights have been determined on the merits. New Jersey Patent Co. v. Martin, 166 F 1010.

29. Judge of city court of New York, before whom proceedings supplementary to execution are pending, can entertain application to punish judgment debtor for contempt in disobeying order made in such proceedings, so that recourse should be had to him for such purpose rather than to supreme court. Buchsbaum v. Laue, 63 Misc. 374, 118 NYS 419. Code Civ. Proc. § 2457. Motion to punish for contempt made to city court of New York. Held judgment on which proceeding was based was obtained in municipal court and became judgment of supreme court out of which execution was issued, so motion must be to supreme court. In re Landis Mach. Co., 63 Misc. 24, 117 NYS 305. Where two courts have jurisdiction to entertain motion to punish for contempt, recourse should be had to court whose order is alleged to have been violated. Buchsbaum v. Laue, 63 Misc. 374, 118 NYS 419.

30. Appellate court has jurisdiction to adjudge receiver in contempt and punish him. Eichert v. Eichert, 11 Ohio C. C. (N. S.) 525.

31. Idaho Sess Laws 1893, p. 134. In re Niday, 15 Idaho, 559, 98 P 845.

32. In re Grant, 130 App. Div. 706, 115 NYS 283.

33. Such enforcement is not imprisonment for debt. In re Grant, 130 App. Div. 706, 115 NYS 283. And this may be done although execution might also have issued. Jastram v. McAuslan [R. I.] 71 A 454.

34. Decree directed certain trust funds to be paid to register of court in 10 days. Funds were not paid. Held remedy by execution open. Mast v. Washtenaw Circuit Judge, 154 Mich. 485, 15 Det. Leg. N. 808, 117 NW 1052.

35. By Code Civ. Proc. § 2269, court can afford debtor opportunity to purge himself of contempt, and is not compelled to issue commitment. Sonn v. Kenny, 63 Misc. 251, 116 NYS 613.

36. After divorce and decree allowing wife monthly alimony, she entered into agreement with former husband whereby terms of payment were changed. Held agreement was contract and breach could not be punished as contempt. Clark v. Clark, 130 App. Div. 610, 115 NYS 500.

37. **Search Note:** See note in 3 C. L. 799. See, also, Contempt, Cent. Dig. §§ 125-175; Dec. Dig. §§ 41-58; 9 Cyc. 32, 35-44; 4 A. & E. Enc. P. & P. 766.

38. Plaintiff sought to punish officers of corporation for contempt for failure to pay over 10 per cent of judgment debtor's salary, under Code Civ. Proc. § 1391. Held remedy under code. Kahn v. Coles, 115 NYS 885.

39. In Connecticut it is by petition and motion for attachment, for contempt, an order of notice to defendant to appear and show cause, notice to party to appear and show cause, a hearing, the order that an attachment be issued for contempt, and attachment for contempt. Gorham v. New Haven [Conn.] 72 A 1012.

40. Gorham v. New Haven [Conn.] 72 A 1012.

41. In order to invest the court with jurisdiction. In re McCarty, 154 Cal. 534, 98 P 540. No affidavit or its equivalent filed. Held error. Ex parte York [Ark.] 115 SW 948. Where affidavit by juror that accused said "Don't convict my friend R.," while jury were deliberating on verdict, held to sufficiently charge contempt of court, without stating language was used to influence jury. Ex parte Creely, 8 Cal. App. 713, 97 P 766.

42. Cline v. Langan [Nev.] 101 P 553. Where it is sought to have judge cited for contempt in failing to obey mandate of ap-

information and belief.[43] It is proper to proceed by information and warrant, though the contempt was committed in the presence of the court.[44] A motion for an attachment for contempt is but an incident to the original action and should not be commenced as a separate action.[45] It is not necessary that a copy of the judgment violated should be attached to the accusation; the court may take judicial notice of it.[46] In the absence of any statutory regulation, the common-law practice in the entitling of contempt proceedings is followed.[47] The statement of the venue at the top of the verification should be read as a part of the official certificate.[48] If a statute does not require a verification to be made by a party to the proceeding in which the alleged contempt is committed, or by an attorney, it is sufficient if verified by a stranger.[49] Failure to make objection to proceedings, and the giving of a recognizance for one's appearance, waives all irregularities up to that time,[50] and an answer to the merits waives all technical defects in the accusation.[51]

§ 5. *Hearing; evidence; trial.*[52]—See 11 C. L. 722—It is not due process of law to condemn a party without a hearing on a charge of indirect contempt,[53] but in direct contempt there is no need of evidence to prove what is already manifest.[54] Criminal contempt proceedings are governed by the strict rules of construction applied in criminal cases.[55] Thus a conviction should not be sustained unless the proof is clear and satisfactory,[56] and unless guilt is shown beyond a reasonable doubt,[57] while the admissibility of evidence against one's self is controlled by rules

pellate court, petition must show particulars in which he failed to obey order. State v. Ross [Ind. App.] 88 NE 734.

43. Personal attack on judge through newspaper, in criticizing him for remarks made outside of record of case, held not contempt. State v. District Ct., 37 Mont. 590, 97 P 1032.

44. Act done in court room during recess held committed in presence of court. McCarthy v. Hugo [Conn.] 73 A 778.

45. Injunction granted to prohibit pollution of stream. Same was violated and plaintiff asks decree to enforce injunction. Held action not adapted to such purpose. Gorham v. New Haven [Conn.] 72 A 1012.

46. State v. Walker [Kan.] 97 P 862.

47. Where contempts are strictly criminal and where they are by third parties in the cause of civil litigation, proceedings should be entitled in name of people; where contempts arise from violation of mandates of court in civil cause, proceeding may be entitled in name of people or in cause in which order violated was made. Typothetae of New York v. Typographical Union No. 6, 117 NYS 144.

48. Where this shows justice acted in his county, not necessary that certificate show he acted in his township. State v. Walker [Kan.] 97 P 862.

49. State v. Kindseder [Kan.] 97 P 1025.

50, 51. State v. Walker [Kan.] 97 P 862.

52. **Search Note:** See notes in 10 L. R. A. (N. S.) 1098; 4 Ann. Cas. 183; 8 Id. 267; 11 Id. 532.

See, also, Contempt, Cent. Dig. §§ 176-196; Dec. Dig. §§ 59-62; 9 Cyc. 43-47; 4 A. & E. Enc. P. & P. 779.

53. Court refused to permit person cited to make answer to charge of contempt, which consisted in refusing to return child given into another's custody by order of court. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717, afg. 141 Ill. App. 201.

54. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717, afg. 141 Ill. App. 201. Where an order required a bankrupt to pay over certain money within specified time and gave marshal orders to arrest him in case of default, held bankrupt entitled to hearing after default on order to show cause why he could not be punished for contempt. In re Baum [C. C. A.] 169 F 410.

55. A rule granted on petition of trustee in bankruptcy, citing bankrupt for contempt in committing perjury during examination, held of no effect, because Bankruptcy Act July 1, 1898, c. 541, § 41b, 30 Stat. 556 (U. S. Comp. St. 1901, p. 3437), requires such proceedings shall be based on certificate of referee. In re Gitkin, 164 F 71.

56. In prosecution for contempt in violating decree restraining defendant from selling intoxicating liquors, evidence tending to show such violation was properly admitted and sufficient to secure conviction. Russell v. Anderson [Iowa] 120 NW 89. Not necessary for wife on hearing of contempt proceeding for nonpayment of alimony to prove anything more than making of order and disobedience of it by husband, where court found he had ability to pay when order was made. In re McCarty, 154 Cal. 534, 98 P 540.

57. In re Cashman, 168 F 1008. Court exercises but limited jurisdiction in such proceedings and record of court upon which party is adjudged guilty should show upon its face facts upon which judicial action is based and upon which its jurisdiction depended. In re McCarty, 154 Cal. 534, 98 P 540. By code in Montana, contempt proceedings are sui generis and have most characteristics of criminal case and few of civil action. Dunlavey v. Doggett, 38 Mont. 204, 99 P 436. Party proceeded against is entitled to benefit of any doubt which may exist by reason of form of statute under which punishment is invoked, or in form of

of criminal procedure.[58] Whether the contempt be regarded as civil or criminal, ex parte affidavits should not be used to convict, where the punishment would subject one to imprisonment.[59] A slight deviation in a purported copy, from the original copy of a judgment violated, in the matter of orthography, does not warrant the sustaining of an objection to the introduction of evidence,[60] and evidence is not prejudicial when the court would have taken notice of it without proof.[61] When it is sought to escape the consequences of contempt by a plea in confession and avoidance, the burden of proof is on the defendant.[62] The common law principle, that the filing of an affidavit denying the contempt charged purged the accused so as to preclude the introduction of evidence to prove the charge, is not generally followed.[63]

§ 6. *Findings and judgment.*[64]—See 11 C. L. 723—An order in a contempt proceeding, directing a party to be imprisoned until he has complied with the order requiring the payment of money, is unlawful unless the party is able to make such payment.[65] Where a judgment does not embrace the alternative of imprisonment in case the fine imposed by the court is not paid, such alternative may be embodied in a second judgment, without modifying the first.[66] Damages may be awarded to a private person though a court has issued an order purging a respondent in contempt proceedings from fine and imprisonment.[67]

§ 7. *Punishment; fine and commitment; further proceedings.*[68]—See 11 C. L. 723—Contempts may be punished by fine or by imprisonment,[69] but imprisonment will not lie to enforce a debt.[70] Courts have discretionary power to inflict punishment in view of all the surrounding circumstances of the case.[71] Statutes fre-

order which it is claimed he disobeyed, so far as doubt is cast upon fact of prohibition of act alleged to have been committed (In re McCormick, 117 NYS 70), but as to degree of proof, civil character of proceeding controls, and while fact to be proved may involve finding of commission of crime, that fact is to be determined upon preponderance of evidence, giving proper regard to existence of presumption of innocence (Id.).

58. A deposition taken before a notary tending to show defendant was implicated in a strike held inadmissible to show defendant was responsible for violation of injunction issued pursuant to such strike, because within § 860, Rev. St. (U. S. Comp. St. 1901, p. 661). Hammond Lumber Co. v. Sailors' Union, 167 F 809.

59. Affidavits were submitted to show intentional violation of temporary injunction. Held testimony should be taken before special examiner, upon due notice to defendant. New Jersey Patent Co. v. Martin, 166 F 1010.

60. State v. Walker [Kan.] 97 P 862.

61. State v. Kindseder [Kan.] 97 P 1025.

62. Allegation of insanity. In re Cashman, 168 F 1008.

63. Coleman v. State [Tenn.] 113 SW 1045.

64. **Search Note:** See Contempt, Cent. Dig. §§ 195-201; Dec. Dig. §§ 61, 63; 9 Cyc. 46-49; 4 A. & E. Enc. P. & P. 788, 797.

65. Where court found as fact that contemnor was able to pay alimony. Ex parte Joutsen, 154 Cal. 540, 98 P 391.

66. Curtis v. Wilfley [C. C. A.] 165 F 893.

67. One party, pending review, violated judgment and damaged adverse party. Held, under Ballingers' Ann. Codes & St. § 5807 (Pierce's Code, § 1476), court may award judgment for damages for injury caused by contempt, though party prosecuted cause in federal courts in good faith, and executed supersedeas bond. State v. North Shore Boom & Driving Co. [Wash.] 103 P 426.

68. **Search Note:** See notes in 4 L. R. A. (N. S.) 1001, 1185; 37 A. S. R. 763; 2 Ann. Cas. 463; 6 Id. 535; 8 Id. 56, 841.

See, also, Contempt, Cent. Dig. §§ 202-209, 246-274; Dec. Dig. §§ 64, 70-81; 9 Cyc. 50-61; 4 A. & E. Enc. P. & P. 800.

69. In case of conviction of a receiver in a proceeding for contempt, for failure to pay over receivership funds, he should be committed until he pays over the funds or is otherwise discharged by law. Held commitment for 20 days unless funds are paid over sooner, erroneous. People v. Zimmer, 238 Ill. 607, 87 NE 845.

70. Alimony a debt. Ex parte Kinsolving, 135 Mo. App. 631, 116 SW 1068. Writs of attachment secured by wife against husband's creditors to satisfy award of alimony pendente lite held equivalent to imprisonment for debt. Carper v. Carper [Miss.] 48 S 186.

71. Admission of offense and promise to desist from future acts of disobedience. Victor Talking Mach. Co. v. Berwald, 170 F 128. Where disbarred attorney was fined for contempt in practicing, held that disclaimer of intention to practice was extenuating circumstance. In re Duncan [S. C.] 65 SE 210. While fact that person acted on advice of counsel in commission of contempt is not sufficient to excuse act, it will be considered in determining punishment. Queen & Co. v. Green, 170 F 611.

quently limit the penalty for contempts.[72] Penalties imposed in criminal proceedings are for the benefit of the United States.[73] Expenses of prosecuting contempt proceedings, instituted to vindicate the dignity of the court, cannot be recovered in a civil suit for damages.[74] A judge is not liable for damages for fining or committing one for contempt, where he acts judicially and has jurisdiction.[75]

§ 8. *Discharge or pardon.*[76]—See 11 C. L. 724—A person who is imprisoned for contempt in disobeying a court's order is entitled to a discharge when such order is complied with.[77] Where an order of conviction for contempt is reversed, the petitioner is entitled to be discharged.[78] Fines imposed in contempt proceedings are not dischargeable in bankruptcy.[79] Contemnors, who stand committed for inability to pay a fine will not be discharged until they prove such inability.[80] A statute authorizing a governor to remit fines and forfeitures does not empower him to relieve the payment of damages in a judgment for contempt.[81]

§ 9. *Review of proceedings.*[82]—See 11 C. L. 724—On appeal slight technical errors in the order of commitment, or in the proceedings had below, will not suffice to secure a reversal or rehearing.[83] There must be a final judgment imposing punishment, before an appeal is proper.[84] The right to appeal,[85] and the mode of re-

Where one is cited for contempt because he refused to obey a subpoena, a court has discretionary power to punish for such offense or for a refusal to answer questions. In re Hammond, 83 Neb. 636, 120 NW 203.

72. Gen. St. Conn. 1902, § 506. McCarthy v. Hugo [Conn.] 73 A 778. Wilson's Rev. & Ann. St. 1903, § 2126. Ex parte Gudenoge [Okl. Cr. R.] 100 P 39. Under Code Civ. Proc. § 111, one may not be imprisoned longer than three months where amount of alimony due is less than $500. People v. Walsh, 132 App. Div. 462, 116 NYS 839.

73. New Jersey Patent Co. v. Martin, 166 F 1010.

74. Plaintiff had defendant prosecuted for contempt in violating order relating to water rights, and for damages for such violation included expenses of contempt litigation. Held not recoverable. Dunlavey v. Doggett, 38 Mont. 204, 99 P 436.

75. Action against justice of peace. Held justice had power so was not civilly liable, no matter how erroneous decision. Early v. Fitzpatrick [Ala.] 49 S 686.

76. **Search Note:** See Contempt, Cent. Dig. §§ 275-284; Dec. Dig. § 82; 9 Cyc. 59-61; 4 A. & E. Enc. P. & P. 807.

77. Surviving partner refused to deliver partnership property to administratrix but did so after incarceration. Harrington v. Jones [Or.] 99 P 935.

78. Ex parte McCarty, 154 Cal. xvi, 98 P 543.

79. Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418). In re Koronsky [C. C. A.] 170 F 719. Proceedings for enforcement of fine imposed on bankrupt by state court for criminal contempt will not be stayed by court of bankruptcy, if contempt occurred prior to filing of petition against him. In re Hall, 170 F 721.

80. Mere statement by petitioner that he has no property and no means of earning money except by personal services held not sufficient proof of inability to pay. In re Geyer, 62 Misc. 443, 116 NYS 800.

81. Commonwealth v. French [Ky.] 114 SW 255.

82. **Search Note:** See notes in 22 A. S. R. 417; 87 Id. 179; 3 Ann. Cas. 759, 1050.

See, also, Contempt, Cent. Dig. §§ 213-237; Dec. Dig. §§ 66, 67; 9 Cyc. 61-68; Habeas Corpus, Dec. Dig. §§ 4, 10, 22(21), 25(1), 28-30(1), 85(3), 92(3), 95, 96, 106; 21 Cyc. 285, 289, 294-296, 298, 301-307, 322, 327; 4 A. & E. Enc. P. & P. 807.

83. Order of commitment failed to provide fine might be paid to sheriff or jailer in order to procure release from custody. Held, could easily place money in proper hands. MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848. Where record failed to show convening order for term at which decree for temporary allowances had been entered, and contemnor was proceeded against for failure to pay such allowances, held error in record immaterial. Id. Although an order may in form be court order instead of judge's order, it is not void and cannot be reviewed upon appeal from order in contempt proceedings. Goldreyer v. Shatz, 114 NYS 339. If there is clear and satisfactory evidence, action of trial court should not be set aside merely because some evidence has been erroneously received. Russell v. Anderson [Iowa] 120 NW 89. Where, in contempt proceedings for violating decree restraining defendant from selling intoxicating liquors, no evidence of direct sales was offered, but circumstances tending to show violation were admitted, held evidence sufficient to warrant conviction. Id.

84. Decree declared appellant in contempt but reserved punishment. Held not final. Nutt v. State [Miss.] 49 S 145. Judgment having for its object protection of rights of litigating party is not regarded as final, and, therefore, not reviewable on writ of error. Id. Since judgment is not reviewable, neither is order on which it is based. International Paper Co. v. Chaloux [C. C. A.] 165 F 436.

85. An appeal will lie from order in proceedings for contempt. Jastram v. McAuslan [R. I.] 71 A 454. Ballinger's Ann. Codes & St. § 5811. King County Drainage Dist. v. Vostello [Wash.] 101 P 497.

view,[86] are largely governed by statutes. Appellate courts have discretionary power to reopen contempt proceedings.[87] A judgment on conviction for contempt, or a refusal to punish, will not be disturbed on appeal, when there is evidence to warrant such judgment,[88] but facts charging contempt may be reviewed, although the trial court has considered them insufficient to prove guilt.[89] Presumptions and intendments will not be indulged in, in order to sustain a conviction for contempt.[90] A proceeding for contempt is a collateral one and does not come up for consideration on an appeal in the main case,[91] so an order cannot be collaterally attacked by habeas corpus to obtain release from custody for contempt in disobeying order, though the court erred in making such order.[92] Moot questions will not be considered on appeal,[93] and an order suspending an attorney from practicing will not be reviewed, where the time covered by the suspension expired before the matter was appealed.[94] An appellate court may correct judgments so as to sufficiently set out the facts on which a conviction was based.[95]

Evidence held sufficient to warrant conviction for contempt.[96]

Evidence held insufficient to sustain conviction.[97]

CONTINUANCE AND POSTPONEMENT.

The scope of this topic is noted below.[98]

§ 1. Power and Duty of Court, 872.
§ 2. Occasion for or Propriety of Continuance or Postponement, 873.
A. In General, 873.
B. Absence or Disability of Party or Counsel, 873.
C. Absence of Witness or Inability to Procure Evidence, 874.
D. Surprise, 876.
§ 3. Proceedings to Procure Continuance or Postponement, 876.
§ 4. Appellate Procedure, 877.

86. Certiorari is proper remedy for review of order adjudging one in contempt. People v. Andrews, 134 App. Div. 32, 118 NYS 37; Ex parte Dickens [Ala.] 50 S 218. Where proceeding and order adjudging one guilty of criminal contempt are regular, and sustained by evidence, and are valid, validity of commitment can only be tested by writ of habeas corpus. People v. Platzek, 133 App. Div. 25, 117 NYS 852. In Iowa no appeal from order of court is allowed in contempt proceedings, but revision provided for is by certiorari. Code, § 4468. Russell v. Anderson [Iowa] 120 NW 89. Where the punishment imposed is to vindicate dignity and power of court, it is a judgment in criminal case and reviewable only as such; but, where punishment is to benefit private party, it will be reviewed in mode appropriate to review of judgments in civil cases. Hammond Lumber Co. v. Sailors' Union, 167 F 809.

87. Court refused to vacate order, fining defendant for contempt, entered three years previously. Frank v. Bernard, 171 F 117.

88. Mormand v. Carlisle, 131 Ga. 493, 62 SE 705. Prosecution for contempt in violating injunction prohibiting sale of liquor. Barber v. Brennan [Iowa] 119 NW 142.

89. Barber v. Brennan [Iowa] 119 NW 142.

90. Commitment failed to state grounds of contempt, as provided by Rev. St. 1899 (Ann. St. 1906, pp. 1199, 2023), §§ 1619, 3576. Held fatally defective. Ex parte Shull [Mo.] 121 SW 10.

91. Ex parte Dickens [Ala.] 50 S 218.

92. Where court granted order for alimony pendente lite, held proper remedy is appeal from order. Ex parte Joutsen, 154 Cal. 540, 98 P 391.

93. Where defendant was ordered to surrender usurious instrument to plaintiff and dismiss suit to collect same, and was deemed in contempt until order was complied with, held that certiorari to review power of court to make such order should not be considered, as order was executed. Dugane v. Smith [Iowa] 119 NW 73.

94. Court's sentence expired Feb. 1, 1908; transcript of record filed June 9, 1908. Leber v. U. S. [C. C. A.] 170 F 881.

95. Coleman v. State [Tenn.] 113 SW 1045.

96. Code, § 2448 (Mulct Law), providing sales of liquor shall be made only in single room having but one entrance or exit, and that on public street, held violated by sale and delivery of liquor in shed or room back of saloon with connection between two rooms which could be used as entrance or exit. Schlosser v. Mould [Iowa] 121 NW 520. Where officers of trade union did not use reasonable efforts to cause members to obey injunction issued in strike. In re McCormick, 117 NYS 70. Violation of injunction restraining operation of stone quarry so as to make it detrimental to lives and property of persons in immediate vicinity. Fiedler v. Bambrick, 135 Mo. App. 301, 115 SW 1033.

97. Where a person caused inaccurate accounts of divorce trial to be published, held not criminal contempt, though evidence would warrant conviction for civil contempt. People v. Platzek, 133 App. Div. 25, 117 NYS 852. Where one is stranger to writ, he cannot be held guilty of contempt for violating order, since it acts in personem and not in rem. Ex parte State [Ala.] 50 S 143. Attorney ate luncheon with three jurors, played pool with them and treated them to cigars, and engaged in conversation with them in courthouse. Held impropriety but not contempt under circumstances of case. State v. Clark, 134 Mo. App. 55, 114 SW 536.

98. Excludes postponements in criminal

§ 1. *Power and duty of court.*[99]—See 11 C. L. 725—The grant[1] or refusal[2] of a continuance[3] rests largely in the discretion of the court under all the circumstances;[4] but such discretion must be exercised in such manner as not to deny substantial justice to any litigant,[5] or to deprive him of a strict legal right.[6]

cases (see Indictment and Prosecution,* § 7), and of hearings in appellate courts (see Appeal and Review,* § 11D), and adjournment of term of court (see Courts,* § 3), the necessity of objection and exceptions to save questions for review (see Saving Questions for Review*), and the general rules relative to appeal and review, such as right of appeal, sufficiency of record to present question, and review of discretionary matter (see Appeal and Review,* §§ 4, 9, 13F1). See, also, Dockets, Calendars and Trial Lists;* Harmless and Prejudicial Error.*

99. Search Note: See notes in 16 L. R. A. 239; 78 A. S. R. 781.

See, also, Continuance, Cent. Dig. §§ 1-18; Dec. Dig. §§ 1-7; 9 Cyc. 79-83, 146; Trial, Cent. Dig. § 42; Dec. Dig. § 26; 4 A. & E. Enc. P. & P. 825.

1. Delaying trial until deposition could be taken was a matter in discretion of trial court. Pine Bluff & W. R. Co. v. McCaskill [Ark.] 114 SW 208.

2. Sole ground, that applicant's counsel is ill, where no affidavit of merits is filed showing that the applicant has a meritorious defense, and that other counsel cannot be procured who are able to try case. Rankin v. Caldwell, 15 Idaho, 625, 99 P 108. Second continuance where it appeared that absent witness was a fugitive from justice in another state. Levy v. Larson [C. C. A.] 167 F 110. Where grounds were not such as to absolutely require that the motion should be granted. Burnstine v. Reddy, 107 NYS 626. Where case was on calendar many times before inquest and on several occasions was answered "Ready." Morgan v. Whalen, 113 NYS 609. Motion for continuance on ground of illness of the mother of the leading counsel for defendant. Southern R. Co. v. Brock [Ga.] 64 SE 1083. Second motion for a continuance made after the allowance of amendment to petition. Id. Refusal to allow continuance after amendment of ad damnum clause of complaint. Ross v. Carr [N. M.] 103 P 307. Where bill of particulars was not called for at term pleadings were made up but at time of trial, the element of damages claimed in the bill of particulars did not afford such surprise as that it could be claimed that the court erred, especially where defendant had a number of other witnesses who testified as to the disorder complained of. Norfolk & W. R. Co. v. Spears [Va.] 65 SE 482. Motion by caveator, made on day of trial of issues to test validity of will, on ground that he had not received proper notice, properly overruled where it appeared that at time issues were framed and trial fixed he appeared in person and by attorney. Storey v. Storey, 30 App. D. C. 41. Whether continuance should be granted because witness was in attendance upon the court as a juryman in same panel from which the jury trying the case was selected. Kalin v. Wehrle, 36 Pa. Super. Ct. 305. Where defendant's attorney refused to act and defendant, having notice of such fact, appeared next day without any other attorney and gave no reason why he was not prepared. Johnston v. Dakan, 9 Cal. App. 522, 99 P 729. Where it is provided by statute that if one or not more than three jurors shall be disabled from sitting the remainder may render a verdict, one of the jurors being drunk, the court did not abuse discretion by refusing continuance. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156.

3. "Continue," as used in Code Civ. Proc. § 26, that a special proceeding pending may be continued from time to time before one or more other judges of the same court, means kept up, maintained, protracted, extended in duration, carried onward, extended or prolonged from time to time. Bridges v. Koppelman, 63 Misc. 27, 117 NYS 306.

4. In re Rubenstein, 129 App. Div. 326, 113 NYS 554; Continental Casualty Co. v. Semple [Ky.] 112 SW 1122; Rexford v. Bleckley, 131 Ga. 678, 63 SE 337; Leathers v. McGuire [Ga.] 63 SE 626; Cicerello v. Chesapeake & O. R. Co., 65 W. Va. 439, 64 SE 621; Leverett v. Tift [Ga. App.] 64 SE 317. Continuances and postponements of cases are addressed to the sound legal discretion of the court, and unless the facts show that this discretion, exercised in a particular case, was manifestly and legally unsound, it will not be disturbed. Civ. Code 1895, § 5138. Frost v. Pennington [Ga. App.] 65 SE 41.

5. Where there had been no disposition on the part of the defendant to delay the action, the court erred in not granting continuance in order that defendant might receive depositions which were expected to arrive within an hour. Sun Ins. Office v. Stegar [Ky.] 112 SW 922. Setting case down for trial "peremptorily" cannot deprive party from having postponement thereof, if he has a legal excuse, though it may require stronger proof under such circumstances. Harde v. Purdy, 115 NYS 92, rvg. 62 Misc. 232, 114 NYS 814. Where complainant had notified defendant that he would take certain depositions and had twice postponed the taking of same for the convenience of defendant, and complainant, being informed on December 9th that case would be called on December 11th, wired for depositions which did not arrive in time, held abuse of discretion not to grant continuance of a few days. Morrow v. Sneed [Tenn.] 114 SW 201.

6. Where affidavit showed that on day of inquest defendants' attorney was obliged to argue a case in court of appeals, continuance should have been granted under trial term rules of first district, rule 7. Bock v. Bock, 116 NYS 1090. Where a jury trial has not been waived and no jury can

* Always begin with the latest article on the subject. Use the latest topical index.

§ 2. *Occasion for or propriety of continuance, or postponement. A. In general.*[7]—See 11 C. L. 726—Lack of preparation,[8] or inability to obtain a jury on day set for trial,[9] may constitute ground for a continuance; and where it is provided by statute that the deposition of a party to a suit may be taken as any other witness, the fact that the party has refused to give such deposition is good ground for a continuance.[10] In Maine it is provided that where a question of law is raised for the determination of the law court, the case shall be marked "law," and the statute being mandatory, it operates as a continuance without special order of court.[11] The admission of incompetent evidence and the subsequent withdrawal of it before argument is not of itself gound for continuance,[12] nor is an amendment of the addamnum clause of a complaint,[13] nor is the filing of a supplemental complaint necessarily so;[14] and where a plea is insufficient, there is not error in refusing a continuance made with a view to secure testimony to support the plea.[15]

(§ 2) *B. Absence or disability of party or counsel.*[16]—See 11 C. L. 726—A party may be entitled to a continuance on a showing of inability to attend court because of sickness,[17] but the fact that a party is sick,[18] or the absence of a codefendant,[19]

be had on day set for trial, it is the duty of the court on motion to have the cause continued until there should be a jury in attendance. Smith v. Redmond [Iowa] 119 NW 271.

7. Search Note: See note in 56 L. R. A. 531.

See, also, Continuance, Cent. Dig. §§ 19-40; Dec. Dig. §§ 10-18; 9 Cyc. 83-93, 104, 122-130; Trial, Cent. Dig. § 42; Dec. Dig. § 26; 4 A. & E. Enc. P. & P. 831.

8. When an amendment to a pleading makes a material change, a reasonable time should be allowed, upon a proper showing and request, within which to prepare to meet the case as made by the amendment. Harrison v. Carlson [Colo.] 101 P 76. Where cause had been pending for five years and had been tried several times in the common pleas and had been three times in supreme court and case was placed on the list April 18th, it was not improper to refuse motion to strike the cause from the June trial list and postpone it to the next term. Burns v. Pennsylvania R. Co., 222 Pa. 406, 71 A 1054. Where notice in condemnation proceedings was served on defendant's counsel that plaintiff would apply on Feb. 10th to have case set for trial on that day, and defendant not objecting it was brought to trial on Feb. 26th, at which time defendant moved for continuance because of lack of preparation as ground was covered with snow and witnesses could not see same, it was held there was no abuse of discretion in refusing continuance as it did not appear that conditions were any different on 10th of February. Fruitland Irr. Co. v. Smith [Wash.] 102 P 1031.

9. Jury trial not having been waived, court should have continued cause. Smith v. Redmond [Iowa] 119 NW 217.

10. Under Civ. Code Prac. § 537, such right is given, therefore it was error to refuse continuance. Western Union Tel. Co. v. Williams, 33 Ky. L. R. 1062, 112 SW 651.

11. Under Rev. St. 1903, c. 79, § 46, actions marked "law" are continued until determined by the law court and are certified as provided by such statute. Applies to actions commenced by trustee process. Rockland Sav. Bank v. Alden, 104 Me. 416, 72 A 159.

12. Mitchell v. Edeburn, 37 Pa. Super. Ct. 223.

13. Ross v. Carr [N. M.] 103 P 307.

14. Where no facts were presented to trial court or to appellate court to show that defendants were prejudiced, it could not be said that court abused its discretion in its refusal. Copper Belle Min. Co. v. Costello [Ariz.] 100 P 807.

15. Callen v. Evans [Tex. Civ. App.] 120 SW 543.

16. Search Note: See Continuance, Cent. Dig. §§ 40-57; Dec. Dig. §§ 12, 19, 20; 9 Cyc. 104; Trial, Cent. Dig. § 42; Dec. Dig. § 26; 4 A. & E. Enc. P. & P. 839, 842.

17. Not error to postpone case on account of sickness of one of the parties, especially where such party is a material witness, even though the motion is not verified by affidavit. American Standard Jewelry Co. v. Hill [Ark.] 117 SW 781.

18. Properly denied where case had been once continued by request of defendant, who agreed that the trial should then proceed whether defendant was present or not, and if he could not be present his deposition should be taken, and on cause being again called defendant asked for continuance without giving excuse for failure to keep agreement. Allen v. Chase, 81 Conn. 474, 71 A 367. Under the circumstances court did not abuse discretion in refusing continuance because of alleged illness of one of the parties to the action. Leathers v. Leathers [Ga.] 63 SE 1118.

19. In an action to enforce mechanic's lien, continuance properly refused where plaintiff conceded wife's testimony and husband was present. Meyer v. Schmidt, 130 Mo. App. 333, 109 SW 832. Properly denied where one of the defendants who was absent was suffering from senile dementia and physician testified that he could give no assurance that she would be better, and where the motion for continuance was not filed until eve of trial. McBride v. McBride [Iowa] 120 NW 709.

does not necessarily require a continuance. Absence of counsel is usually ground for a continuance where it is occasioned by his sickness,[20] or his actual engagement in other causes,[21] but not where the party is sufficiently represented by other counsel,[22] who, in the exercise of diligence, could have been ready for trial.[23]

(§ 2) *C. Absence of witness or inability to procure evidence.*[24] —See 11 C. L. 727— Absence of material witnesses or evidence is generally good ground for a continuance,[25] but a refusal of a continuance in such case is not necessarily error,[26] especially where it is not shown that due diligence has been used to obtain the same,[27]

20. Not abuse of discretion to deny continuance where no affidavit of merits is filed showing that applicant has a meritorious defense, and that other counsel cannot be procured who are able to try case. Rankin v. Caldwell, 15 Idaho, 625, 99 P 108.

21. Though case had been twice continued and at last continuance the case was set for trial "at all events," it appearing that engagement on the other case would only take the day set for trial. Harde v. Purdy, 115 NYS 92, rvg. 62 Misc. 232, 114 NYS 814. Where affidavit was filed showing that defendant's attorney was obliged to argue case in court of appeals on day inquest was to be taken, the taking of the inquest was in violation of rule 7 of the trial term rules of first district. Bock v. Bock, 116 NYS 1090. If the court believes the absence of counsel unavoidable, upon application for continuance, it may grant the application penalizing the applicant to the amount of the other parties' costs incurred and for the delay occasioned. Luke v. Coffee [Nev.] 101 P 555.

22. Where defendant at all times during the pendency of the action and when it was called for trial was represented by two competent attorneys, the absence of another attorney who had no connection with case until a corporation purchased business of defendant is not ground for continuance. Troendle Coal Co. v. Morgan Coal, Coke & Min. Co. [Ky.] 114 SW 312. Absence of leading counsel engaged in another case not a good reason where other competent counsel of record are present. Cicerello v. Chesapeake & O. R. Co., 65 W. Va. 439, 64 SE 621.

23. Where regular attorney was in attendance upon another court but motion did not show effort to get witnesses, there being time before trial. El Dorado & B. R. Co. v. Knox [Ark.] 117 SW 779.

24. Search Note: See Continuance, Cent. Dig. §§ 58-94, 113-115; Dec. Dig. §§ 22-27, 33-35; 9 Cyc. 104, 106-121, 133, 153-155; Trial, Cent. Dig. § 42; Dec. Dig. § 26; 4 A. & E. Enc. P. & P. 845, 865.

25. Where plaintiff's attorney informed defendant over telephone that assault was committed on car No. 3,771, and upon trial stated the number to be 3,717, it was ground for continuance to procure witness. Cohen v. Brooklyn, etc., R. Co., 115 NYS 1101. Order denying an application for an adjournment to procure a necessary witness affects a substantial right and is appealable (Code Civ. Proc. § 3189, and § 1347, subd. 4). Damsky v. Dochterman, 61 Misc. 597, 114 NYS 170. Delaying trial until deposition of plaintiff could be taken was within discretion of the court. Pine Bluff & W. R. Co. v. McCaskill [Ark.] 114 SW 208. Error to refuse continuance where depositions were expected on next train. Sun Ins. Office v. Stegar [Ky.] 112 SW 922. Where material witness had been subpoenaed and affidavit of doctor was presented showing he was too ill to attend, although affidavit did not show effort to take deposition or that fact he would not be able to attend was known in time to take his deposition, yet it was error to refuse continuance. Troendle Coal Co. v. Morgan Coal, Coke & Min. Co. [Ky.] 114 SW 312. No error can be predicated upon a granting of a postponement because of the absence of a material witness, even without a strict showing in accordance with the statute regulating continuances on account of the absence of witnesses. American Standard Jewelry Co. v. Hill [Ark.] 117 SW 781.

26. Especially where the absent witness had substantially testified in the case by deposition to the identical fact that it was desired to prove by him. Aetna Ins. Co. v. Brannon [Tex. Civ. App.] 116 SW 116. Where plaintiff's witness testified to certain facts which he did not testify to on the previous trial, and defendant's absent witness had substantially testified to the facts which it was desired to prove in contradiction by him. Id. Where absent witness was a refugee from justice and it was not shown what the material evidence was to which he would testify. City of Covington v. O'Meara [Ky.] 119 SW 187. Within discretion of court to deny continuance to permit defendant to obtain evidence to rebut evidence of plaintiff as to the value of his time. St. Louis, etc., R. Co. v. Grimsley [Ark.] 117 SW 1064. Where it did not appear that the witness had been subpoenaed, and there was no offer made to show what he would testify to, and his testimony would have been simply cumulative. Gillman v. Media, etc., R. Co. [Pa.] 73 A 342. No abuse to refuse continuance in order that plaintiff might procure witnesses to sustain her reputation for truthfulness, etc., it appearing that a number of persons were in attendance from where plaintiff lived. McCann v. McCann [Okl.] 103 P 694. Where motion was made on ground that one of the defendants was in jail and could not attend and that he was a material witness, said motion being made just as trial was called and defendants had been notified of assignment of trial 15 days before that day, there was no abuse of discretion, it appearing also that continuance would have been granted on condition that plaintiff recover costs. Warehime v. Schweitzer, 51 Wash. 299, 98 P 747.

27. City of Chicago v. Wilshire, 238 Ill. 317, 87 NE 383; Elkins' Adm'r v. New Livingston Coal Co. [Ky.] 115 SW 203; City of Covington v. O'Meara [Ky.] 119 SW 187. Where in-

or that the expected testimony of the witness is material [28] or admissibility,[29] or that it would tend to establish a defense,[30] or change the result of the trial,[31] or that his attendance may be procured.[32] Where a continuance is granted and a reasonable time given in which to take the testimony of an absent witness, a refusal of a second continuance is not error.[33]

Admission of testimony to avoid continuance.[See 11 C. L. 728]—In some jurisdictions a continuance is properly denied where the opposite party admits that the absent witness would testify as claimed, and this admission is allowed to be considered as evidence,[34] especially where the affidavit for continuance which is permitted to be read discloses with minuteness all the facts proposed to be proven by such witness,[35] and other witnesses have testified to the same point.[36] There are also circumstances where an admission of the expected testimony of one or more defendants is sufficient to prevent a continuance.[37] Where the law authorizes the reading of the affidavit as the deposition of the absent witness, it is not infringed

terrogatories to witness had not been filed with clerk, nor had notice, time, and commission been waived, nor the same crossed, until the day after parties announced ready for trial. Hamilton v. Dismukes [Tex. Civ. App.] 115 SW 1181. Where the case had been pending some time before interrogatories were propounded for the depositions of absent witnesses, which was only two weeks before trial, and there was no statement in application that the facts expected to be proven were not known and that the affiants were not aware of the fact that the witnesses would testify thereto, there was lack of diligence. Missouri, K. & T. R. Co. v. Lawson [Tex. Civ. App.] 119 SW 921. Where witness who was really the defendant in the action should in the exercise of due diligence have been present. Troendle Coal Co. v. Morgan Coal, Coke & Min. Co. [Ky.] 114 SW 312. Where no effort had been made to take deposition of absent witness and case had been pending six months. Deschamps v. Atlantic Coast Line R. Co., 82 S. C. 236, 64 SE 144. Where witness' attorney in fact knew several months before trial what evidence he wished to dispute by witness' testimony. In re McNamara's Estate, 154 Mich. 671, 15 Det. Leg. N. 924, 118 NW 598. Absence of material witness, not shown to have been served with process, and proper diligence not having been shown, is not good cause. Cicerello v. Chesapeake & O. R. Co., 65 W. Va. 439, 64 SE 621. Where only showing of diligence is that witness agreed to be present. Rankin v. Caldwell, 15 Idaho, 625, 99 P 108. Where it appeared that witness was a resident of the county and was not served with the subpoena duces tecum 10 days prior to the trial of the case. Civ. Code 1895, § 5255. Frost v. Pennington [Ga. App.] 65 SE 41. Where it did not appear that defendant took any steps, by issual of subpoenas or otherwise. Louisville & N. R. Co. v. Pedigo [Ky.] 113 SW 116. Where defendant had not used any diligence whatever to obtain testimony of absent witness, the fact that counsel with the court's consent agreed that trial should go on and that if witness had not arrived when testimony was all in the trial might then be postponed did not prevent court from refusing continuance. Western Union Tel. Co. v. Blair [Tex. Civ. App.] 113 SW 164.

28. Hyman v. Grant [Tex.] 112 SW 1042, afd. [Tex. Civ. App.] 114 SW 853. Must show that testimony is material. Hamilton v. Dismukes [Tex. Civ. App.] 115 SW 1181; Missouri, K. & T. R. Co. v. Lawson [Tex. Civ. App.] 119 SW 921.

29. Where in trespass to try title lease was not in evidence, testimony of absent witness to explain same would not be admissible. Hyman v. Grant [Tex.] 112 SW 1042, afd. [Tex. Civ. App.] 114 SW 853.

30. Where in trespass to try title neither evidence offered nor that of the absent witness tended to prove that repudiation of landlord and tenant had ever been brought to knowledge of lessor, it would be insufficient. Hyman v. Grant [Tex.] 112 SW 1042, afd. [Tex. Civ. App.] 114 SW 853.

31. In re McNamara's Estate, 154 Mich. 671, 15 Det. Leg. N. 924, 118 NW 598.

32. Where the cause had been continued from one term to another and it appeared that witness was a fugutive from justice in another state, it was not error. Levy v. Larson [C. C. A.] 167 F 110.

33. Seventeen days under the circumstances was reasonable time in which to obtain return of the commission. Fell v. McIlhenny, 123 La. 364, 48 S 991.

34. City of Covington v. O'Meara [Ky.] 119 SW 187; Louisville & N. R. Co. v. Pedigo [Ky.] 113 SW 116. Defendant's application for continuance properly denied where plaintiff consented that affidavit for continuance might be read as deposition of absent witness. Continental Casualty Co. v. Semple [Ky.] 112 SW 1122.

35. Continental Casualty Co. v. Semple [Ky.] 112 SW 1122.

36. Eight physicians were present at autopsy, one of whom was absent witness, the other seven testified. Continental Casualty Co. v. Semple [Ky.] 112 SW 1122.

37. Application for continuance properly overruled where absent defendant was suffering from senile dementia and physician testified that she was not in mental condition to give testimony and could give no assurance of future improvement. McBride v. McBride [Iowa] 120 NW 709. Where, in an action to enforce mechanic's lien, husband was present and plaintiff conceded wife's testimony, there was no abuse in refusing continuance. Meyer v. Schmidt, 130 Mo. App. 333, 109 SW 832.

by allowing the adverse party to cross-examine the witness if his presence is obtained during the trial,[38] but party should not be allowed to read as a deposition the affidavit of what an absent witness will state, unless it appears that due diligence has been exercised to obtain the testimony of the witness in the regular way.[39]

(§ 2) *D. Surprise*[40]—See 11 C. L. 728 due to a material amendment of a pleading,[41] or the introduction of evidence which could not have been reasonably anticipated,[42] may entitle the adverse party to a continuance, but the grant or refusal of a continuance on this, as on other, grounds, is largely within the court's discretion.[43] A formal ground of surprise,[44] or an amendment, where no reason is given why the trial should not proceed,[45] is not cause for continuance, and where a pleading has been amended, the party amending is not entitled to a continuance because of the introduction of defensive matter which was proper to urge to refuse the allegations brought in by the amendment,[46] especially where the party amending is responsible for not pleading the issue before.[47]

§ 3. *Proceedings to procure continuance or postponement.*[48]—See 11 C. L. 728—In order to be entitled to a continuance, a proper application[49] must be timely made,[50] showing positively[51] the necessity therefor.[52] Facts, not mere conclusions,

38. Elkins' Adm'r v. New Livingston Coal Co. [Ky.] 115 SW 203.

39. Troendle Coal Co. v. Morgan Coal, Coke & Min. Co. [Ky.] 114 SW 312.

40. Search Note: See Continuance, Cent. Dig. §§ 95-112; Dec. Dig. §§ 29-31; 9 Cyc. 129, 131, 132; 4 A. & E. Enc. P. & P. 863.

41. Where plaintiff's position is shifted thereby substituting entirely new issues, continuance should have been granted. Despatch Laundry Co. v. Employer's Liability Assur. Corp., 105 Minn. 384, 118 NW 152. No surprise shown where amendment omitted name of use plaintiff, and case stood in the name of legal plaintiff alone, as cause of action was in legal plaintiffs. Bracken v. Pennsylvania R. Co., 222 Pa. 410, 71 A 926.

42. Where in an action for personal injury the complaint did not allege excessive menstruation as an element of damages but evidence upon that point was permitted to go to the jury, continuance should have been granted. Horton v. Seattle [Wash.] 101 P 1091. Where in an action to recover damages alleged to have been caused by fire occurring on defendant's right of way, the defendant had made motion that plaintiff specify date of fires but motion was denied because of plea of ignorance, yet at trial plaintiff testified that fires occurred on certain dates. Held that defendant should have been granted a continuance. Louisville & N. R. Co. v. Bell [Ky.] 119 SW 782.

43. Lowenstein v. Missouri Pac. R. Co., 134 Mo. App. 24, 119 SW 430; American Ins. Co. v. Bailey [Ga. App.] 65 SE 160. Refusal was not error where party did not ask for continuance as prescribed by Civ. Code Prac. § 136. Troendle Coal Co. v. Morgan Coal, Coke & Min. Co. [Ky.] 114 SW 312. Where defendant offered deed in evidence and no statutory affidavit of forgery was filed but plaintiff's counsel stated he believed the deed to be a forgery, but judge after comparing signature with signature on another deed refused continuance, there was no abuse of discretion. Leverett v. Tift [Ga. App.] 64 SE 317. No abuse of discretion to refuse continuance, where plaintiff did not mislead defendants as to what he would testify to and one of the defendants was present who knew the facts, but was not sworn. Hodgkins v. Dunham [Cal. App.] 103 P 351.

44. Not abuse of discretion to refuse continuance where prayer in mechanic's lien case was amended so as to ask for personal judgment. Zide v. Scheinberg, 114 NYS 41

45. In order to entitle a party to a continuance, he must show, if not by affidavit, at least by a statement to the court based on the pleadings, apparently supporting such statement, that he is unprepared to meet and cannot, with the evidence available, meet the issues raised by the amendment. Rahles v. Thompson & Sons Mfg. Co., 137 Wis. 506, 118 NW 350.

46. Amendment to answer alleged contributory negligence; reply that act of decedent was necessary because of negligence of defendant. Houston & T. C. R. Co. v. Lemair [Tex. Civ. App.] 119 SW 1162.

47. Houston & T. C. R. Co. v. Lemair [Tex. Civ. App.] 119 SW 1162.

48. Search Note: See note in 48 L. R. A. 432.

See, also, Continuance, Cent. Dig. §§ 12, 16, 116-152; Dec. Dig. §§ 8, 9, 36-54; 9 Cyc. 81, 133-152, 157-161; Trial, Cent. Dig. § 42; Dec. Dig. § 26; 4 A. & E. Enc. P. & P. 870, 873, 890.

49. Merely stating that "we are not prepared to meet these issues" without application for a continuance is not sufficient. Harrison v. Carlson [Colo.] 101 P 76.

50. Where defendants learned that certain witness would not testify as they had been informed he would, and knowing this allowed trial to proceed until noon before moving for continuance, the motion was properly overruled. Texas & P. R. Co. v. Crump [Tex.] 115 SW 26.

51. Stating on information and belief facts on which a motion for a continuance is predicated is not sufficient. International & G. N. R. Co. v. Biles [Tex. Civ. App.] 120 SW 952.

52. Where defendant's attorney refused to proceed with motion for charge of venue but left the courtroom, and defendant was

must be set out.[53] Where the absence of a witness is relied upon, his residence should be given,[54] facts should be alleged showing diligence in attempting to procure his attendance or deposition,[55] that his testimony is material,[56] and that the application is not made for delay.[57] A showing of prejudice must be made in order to be entitled to a continuance on account of the filing of a supplemental complaint,[58] and when an amended pleading is filed out of the regular order of procedure, the adverse party, if he desires a continuance, should inform the court by affidavit or otherwise why the amended pleading is of such a nature that he cannot be ready for trial in consequence thereof;[59] and, if the continuance is sought on the ground of illness of counsel, the affidavit must show diligence on the part of the applicant in supplying his place or show some reason why it is not done.[60] The party making the motion to postpone cannot require it to be heard and decided on any particular day,[61] but, the motion, having been denied, he has a right to have a formal order entered from which he may appeal.[62] If a motion to postpone be made before the cause is in a position to be moved for trial, the court may hold the motion and reserve the decision until the cause is reached for trial, unless the rules of the court provide otherwise.[63] If the hearing of a matter is in fact continued and so stated of record, it cannot be contradicted by expressions in the order indicating that a hearing was had.[64] A stipulation for continuance, signed only by attorneys of one of the parties, is wholly void.[65]

§ 4. *Appellate procedure* [66]—See 11 C. L. 729 is elsewhere treated.[67]

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brought into court and notified to appear next day with an attorney, and next day asked for continuance without stating that he had made an attempt to find any other attorney, there was no abuse of discretion in refusing continuance. Johnston v. Dakan, 9 Cal. App. 522, 99 P 729.

53. Affidavit which states that witness is ill and unable to attend trial is not sufficient, as it should further show that the party making such statement is qualified to make the same by reason of his knowledge of the witness' condition. Rankin v. Caldwell, 15 Idaho, 625, 99 P 108. Affidavit for postponement on ground of engagement of counsel in another cause, stating that it "will be reached immediately on the opening of court" on the next day, without giving facts that it would be reached on that day is insufficient. Mahe v. Bauer, 133 App. Div. 373, 117 NYS 335. Must disclose facts expected to be proved. Adams v. Mineral Development Co. [Ky.] 116 SW 246. Affidavit that absent witness who was a refugee from justice knew facts material to the defense but did not state such facts was not sufficient. City of Covington v. O'Meara [Ky.] 119 SW 187.

54. Ft. Worth & R. G. R. Co. v. Eddleman [Tex. Civ. App.] 114 SW 425.

55. Missouri, K. & T. R. Co. v. Lawson [Tex. Civ. App.] 119 SW 921; Ft. Worth & R. G. R. Co. v. Eddleman [Tex. Civ. App.] 114 SW 425; Louisville & N. R. Co. v. Pedigo [Ky.] 113 SW 116; International & G. N. R. Co. v. Biles [Tex. Civ. App.] 120 SW 952; Adams v. Mineral Development Co. [Ky.] 116 SW 246. Where affidavit was indefinite in important particulars and opposing affidavit showed lack of diligence, trial court did not abuse discretion in refusing continuance. Wehring v. Modern Woodmen of America. 107 Minn. 25, 119 NW 245. Where motion for continuance stated that counsel defendant now has does not know who the witness for the defendant are and does not know how to reach them, but motion did not state that any effort was made to get witnesses, due diligence was not shown. El Dorado & B. R. Co. v. Knox [Ark.] 117 SW 779.

56. Ft. Worth & R. G. R. Co. v. Eddleman [Tex. Civ. App.] 114 SW 425. Continuance properly denied where there was no statement as to what evidence would be or that it would be favorable to applicant. Missouri, K. & T. R. Co. v. Lawson [Tex. Civ. App.] 119 SW 921. Under Sayles' Ann. Civ. St. 1897, art. 1278, a motion which does not affirmatively allege that testimony is material is defective. Hamilton v. Dismukes [Tex. Civ. App.] 115 SW 1181.

57. Ft. Worth & R. G. R. Co. v. Eddleman [Tex. Civ. App.] 114 SW 425.

58. Copper Belle Min. Co. v. Costello [Ariz.] 100 P 807.

59. Civ. Code Prac. § 136. Troendle Coal Co. v. Morgan Coal, Coke & Min. Co. [Ky.] 114 SW 312.

60. Rankin v. Caldwell, 15 Idaho, 625, 99 P 108.

61, 62, 63. In re Rubenstein, 129 App. Div. 326, 113 NYS 554.

64. State v. Ramey, 134 Mo. App. 722, 115 SW 458.

65. Meadows v. Osterkamp [S. D.] 122 NW 419.

66. Search Note: See Appeal and Error, Cent. Dig. §§ 375, 472, 491, 633, 729, 834, 961, 1155, 1382, 1429, 1496, 1715, 1716, 2362, 2968, 3408, 3540, 3715, 3809, 4121; Dec. Dig. §§ 70(6), 106, 189(5), 257, 286, 500(1), 520(4), 684(2), 899, 920(2), 966(1, 2), 1024(3), 1043(7); 2 Cyc. 591-594, 718, 1045, 1061, 1062; 3 Cyc. 159-161, 265, 295, 334, 336; 29 Cyc. 751, 752; 4 A. & E. Enc. P. & P. 899.

67. See Appeal and Review, § 4B, as to appealability of orders, §§ 9B, 9D, as to showing

CONTRACTS.

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§ 1. *Nature and formal requisites. A. Definition and kinds of contracts.*[69]—See 11 C. L. 729—An agreement between two competent parties, upon a sufficient consideration, to do or not to do a particular thing, constitutes a contract.[70] An express contract is one whose terms are uttered or stated in words or writing,[71] while

in record; § 13F1, as to extent of review of discretion of trial court.

68. Treats of contracts express or implied in fact as distinguished from contracts implied in law (see Implied Contracts*), of private contracts as distinguished from public contracts and franchises (see Public Contracts;* Franchises;* Corporations,* §§ 3, 11), of contracts as such as distinguished from gifts (see Gifts;* Charitable Gifts;* Wills*), and of contracts in general as distinguished from particular kinds of contracts and contracts relating to particular matters (see the topics dealing with such particular contracts, such as Accord and Satisfaction;* Agency;* Animals,* § 5, as to contracts of agistment; Assignments;* Bailment;* Bonds;* Negotiable Instruments;* Mortgages;* Master and Servant,* etc). Excludes also, aside from questions of public policy, the validity of contracts as affected by the subject-matter (see Champerty and Maintenance;* Commerce,* § 2; Gambling Contracts;* Lotteries;* Slaves;* Usury*), or by the character, capacity or authority to contract (see Parent and Child,* § 4; Foreign Corporations,* § 1; Corporations,* §§ 7, 8, 15; Guardianship,* §§ 3, 4, 5; Aliens,* § 2; Husband and Wife;* Infants,* § 5; Partnership,* § 4; Insane Persons,* § 6; Estates of Decedents,* § 4B), or the reality of consent (see Duress;* Fraud and Undue Influence;* Mistake and Accident*), or by the mode or time of execution with reference to statutory regulation (see Frauds, Statute of;* Sunday,* §§ 1, 2). Excludes also constitutional limitations with respect to contracts (see Constitutional Law,* §§ 7, 13, 14), assignment of contracts (see Assignments,* § 1), conflict of laws (see Conflict of Laws,* §§ 2-7), customs and usages (see Customs and Usages,* § 2), measure of damages (see Damages,* § 4), limitation of actions (see Limitation of Actions*), specific remedies (see Cancellation of Instruments;* Reformation of Instruments;* Specific Performance;* Injunction,* § 2H; Restoring Instruments and Records*), and criminal offense (see Compounding Offenses;* Combinations and Monopolies;* Lotteries;* Betting and Gaming;* Conspiracy*).

69. **Search Note:** See notes in 14 L. R. A. 230, 952; 15 Id. 850; 17 Id. 207; 24 Id. 737; 54 Id. 440; 68 Id. 925; 2 L. R. A. (N. S.) 666; 3 Id. 174; 18 A. S. R. 380; 35 Id. 331; 39 Id. 531; 71 Id. 176, 178.

See, also, Contracts, Cent. Dig. §§ 1-41, 144-219, 790-810; Dec. Dig. §§ 1-10, 30-46, 186-188; 6 Cyc. 7-11; 9 Id. 240-308; 672-676, 1038; 7 A. & E. Enc. L. (2ed.) 90, 91, 98; 11 Id. 583.

70. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461.

71. Indianapolis Coal Trac. Co. v. Dalton

a contract implied in fact arises where the intention to contract is inferred from the acts or conduct of the parties,[72] and the same elements are necessary to constitute a contract of either kind,[73] but a contract implied in law is distinguished from both.[74] Proof of an express contract necessarily excludes a contemporaneous implied one in relation to the same matter.[75] A special contract is one containing peculiar provisions or terms not ordinarily found in contracts relating to the same subject-matter, and which, if omitted, the law will not supply.[76] An express contract may or may not be special, but a special contract is always express.[77] An executed contract is one all the obligations of which have been performed; an executory contract is one which has not been fully performed.[78]

*Parties.*See 11 C. L. 731—The obligations of a contract are ordinarily limited to the parties by whom they are made, and those who stand in privity with them, either in estate or contract.[79] One cannot contract with himself.[80] Whether certain persons are bound by, or entitled to enforce, a contract, as parties, is a matter of intention, to be inferred from the contract itself,[81] and from extrinsic evidence,[82] which

[Ind. App.] 87 NE 552. Evidence held to show express contract of employment. Brougham v. Paul, 138 Ill. App. 455.

72. Indianapolis Coal Trac. Co. v. Dalton [Ind. App.] 87 NE 552. In such case the promise to pay is not implied by law, but the law implies that reasonable compensation will be made as a result of the contract. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461. Where services are performed by one person for another with the latter's assent, a contract to pay will be implied. Niederer v. Gridley, 143 Ill. App. 88.

73. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631; Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461.

74. See Implied Contracts.

Distinction: The terms "express contracts" and "contracts implied in fact" do not indicate a distinction in the principles of contract, but a difference in the mode of proof. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. Contracts implied in law are sometimes called "quasi" or "constructive" contracts. Leonard v. State [Tex. Cr. R.] 120 SW 183. There is no actual meeting of minds in contracts implied in law, the intention of the parties being wholly immaterial, and a promise is implied by law, in proper case, notwithstanding contrary intent. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461. Term "implied contracts" is applied to obligations created by law without regard to assent of party bound, based on ground of justice and reason, the remedy allowed by law being same as on contracts generally. Leonard v. State [Tex. Cr. R.] 120 SW 183. A contract, implied in law, contrary to intention of parties, arises where the circumstances create a duty to pay. Wagner v. Edison Elec. Illuminating Co. [Mo. App.] 121 SW 329. Presumption of law applies only as between strangers; where the relation creates the duty to render services gratuitously, the presumption is against a contract to pay. Id.

75. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461. See, also, post, § 9F, subd. Variance.

76, 77. Indianapolis Coal Trac. Co. v. Dalton [Ind. App.] 87 NE 552.

78. See 9 C. L. 655, n. 21.

79. Evansville & S. I. Trac. Co. v. Evansville Belt R. Co. [Ind. App.] 87 NE 21. Judgment cannot stand against one of two defendants when evidence shows contract was solely with other. Selnick v. Epstein, 113 NYS 827. Contract being signed by one as president of corporation only, not binding on him personally, notwithstanding fact that he practically owned corporation, other party knowing all facts at time of signing. Lynch v. McDonald [Cal.] 102 P 918. Plaintiff city had no legal interest in and could not sue upon this contract: "We * * * agree to pay the amounts set opposite our names for the purpose of erecting a courthouse and jail at Lyons, Georgia, should the county of Toombs be formed, and Lyons chosen as its county seat." City of Lyons v. Kelley [Ga. App.] 65 SE 44.

80. Trust agreement held not to require one of the parties to perform impossible feat of contracting with himself. Baker v. Baker, 139 Ill. App. 217.

81. Signature as "committee" for syndicate. Benedict v. Wilson [Cal. App.] 103 P 350. Contract signed in corporate name by one as treasurer. Taylor v. Danielsonville Cotton Co. [Conn.] 72 A 1080. One who acknowledged herself as "party of the first part," and acknowledged, as one of such parties, the receipt of money, became jointly liable with other party to one who paid money, consideration having failed. Sherwin v. Sternberg [N. J. Law] 71 A 117.

Effect of particular signatures: Is treated fully elsewhere. See Names, Signatures and Seals, §§ 1, 2; Agency, § 3; Corporations, § 15P.

82. Evidence held not to show that one who signed as president and as stockholder of **corporation** was personally bound. Lynch v. McDonald [Cal.] 102 P 918. Evidence held to show that laundry company was party to contract whereby purchaser of stock agreed to pay indebtedness due laundry as part consideration for stock; suit to enjoin transfer of stock, and fix lien for debt. Wolfort v. Hochbaum [Ark.] 117 SW 525. Contract by woman to pay certain sums to relatives of husband, after his death, recited consideration paid by husband. Held, this and situation of parties showed that **husband and wife** were contracting parties, contract being for benefit of his relatives. Fearnley v.

is competent, at least in the case of simple contracts,[83] to show who are the real parties in interest, and the real relation of parties who execute it.[84]

At common law a stranger to a contract could neither claim any benefits nor sustain any liability under it,[85] but now in most jurisdictions one may enforce a contract, made for his benefit, though he is not a party thereto,[86] and though no consideration flowed from him to the promisor.[87]

Fearnley, 44 Colo. 417, 98 P 819. Promise to pay for services enforcible against two persons if both promised, but if one was employed by other, and there was no partnership, **promise of employe** in behalf of other would not make him liable. Ageloff v. Lakin, 115 NYS 1082. Whether plaintiff was real **party in interest** held for jury. Mitchell v. Boyce [Tex. Civ. App.] 120 SW 1016.

83. See, also, Evidence, 11 C. L. 1374, n. 50, 51.

84. Signature "as stockholder." Lynch v. McDonald [Cal.] 102 P 918. Parol proof is competent to show that party named in contract was acting for another. Eddy v. American Amusement Co., 9 Cal. App. 624, 99 P 1115. Where evidence that plaintiff dealt with G. Realty Company, it was error to exclude, in action against G personally, certificate of incorporation, and to direct verdict against G personally. Brooks v. Gleason, 113 NYS 122.

85. Evans v. U. S., 42 Ct. of Cl. 287.

86. Evans v. U. S., 42 Ct. of Cl. 287; Bacon v. Davis, 9 Cal. App. 83, 98 P 71; Bank of Laddonia v. Bright-Coy Com. Co. [Mo. App.] 120 SW 648; Ancrum v. Camden Water, Light & Ice Co., 82 S. C. 284, 64 SE 151; Eau Claire-St. Louis Lumber Co. v. Banks, 136 Mo. App. 44, 117 SW 611.

Third person held entitled to sue: Where vendee of land promised to pay brother and sister of vendor the sum of $1,000 each, the brother or sister could maintain action against vendee's administrator. Hoffa v. Hoffa, 38 Pa. Super. Ct. 356. Where A, who was indebted to X, promised the receiver of X that he would pay a debt due from X to B, such promise gave B the right to enforce it as being the party for whose benefit it was made. Buffalo Forge Co. v. Columbus & Hocking Clay Const. Co., 112 NYS 460. Evidence held to show that contract was taken by another as plaintiff's agent, and to warrant recovery by plaintiffs. Wilson v. Yegen Bros., 38 Mont. 504, 100 P 613. Where contract between two persons contains an agreement to pay money to a third, the latter may enforce such agreement. Beauchamp v. Bertig [Ark.] 119 SW 75. If promisee owes to third person some obligation or duty, legal or equitable, which would give him a just claim, a contract may be enforced by the third person. Duty of contractor to laborers and materialmen example; they may usually enforce bonds. Eau Claire-St. Louis Lumber Co. v. Banks, 136 Mo. App. 44, 117 SW 611. Insurer of vessels which were beached contracted with another to release them, with owner's consent, and time limit for performance was inserted for owner's benefit, as contractor knew. Held owner had right to damages for delay. Klauck v. Federal Ins. Co., 131 App. Div. 519, 115 NYS 1049. Where **corporation** buys assets of another and assumes liability for debts, creditors of the seller may sue buyer as on contract made for their benefit. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. Plaintiff's husband agreed not to change life insurance policy, payable to defendant, his mother, so that one-half would be paid to wife upon her promise to pay half of proceeds to plaintiff, his wife. Held plaintiff had right, after husband's death, to sue upon such promise of defendant. Waterhouse v. Waterhouse [R. I.] 72 A. 642. Where contract and bond were in name of one of several property owners for whose benefit they were executed, two of such owners, injured by breach of contract, could sue on bond. Michaud v. Erickson [Minn.] 122 NW 324. Where seller of coal received notes, as he supposed, of firm, but in fact of corporation, which took over firm's assets and liabilities, seller could in equity enforce promise of corporation to firm to pay for coal, not having received notes as payment. Roberts v. Rowe [N. H.] 70 A 1074. Contract to build and maintain crossing on farm and pay for all stock killed ran to owner and heirs and assigns. Held son and heir of owner could sue on it. Livingston v. Chicago & N. W. R. Co. [Iowa] 120 NW 1040. Where sale of insurance business, and of good will, was for benefit of corporation to be formed, and corporation adopted and acted upon it, it was party in interest competent to sue thereon. Bloom v. Home Ins. Agency [Ark.] 121 SW 293. Bond for use and benefit of all persons who "may become entitled to liens." Held, one who furnished materials could sue on bond, being entitled to lien though he had not perfected lien. Gwinn v. Wright, 42 Ind. App. 597, 86 NE 453. Though one not a party to a contract given to another for his benefit cannot ordinarily sue thereon, this rule does not apply to actions to enforce the liability of sureties in bonds given to protect those having claims for labor and materials. Materialman could sue surety on bond. George H. Sampson Co. v. Com., 202 Mass. 326, 88 NE 911. **Undisclosed principal** may sue on contract made by agent, and prove by parol that he was real party in interest. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785; Block v. Meridian [C. C. A.] 169 F 516. Where a contract not under seal is made by an agent in his own name, either the agent or principal may sue on it. Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp. [Va.] 64 SE 56.

Third person held not entitled to sue: Where contractor's bond contained no stipulation which expressly or impliedly gave laborers or materialmen any rights thereunder, they could not sue thereon. Eau Claire-St. Louis Lumber Co. v. Banks, 136 Mo. App. 44, 117 SW 611.

87. Where promise is for benefit of several, it is enforcible though consideration therefor was not paid by all. Elmer v. Campbell, 136 Mo. App. 100, 117 SW 622.

Execution.[See 11 C. L. 732]—Except as to contracts within the statute of frauds,[88] a contract may be oral,[89] and if in writing no particular form of writing is necessary,[90] and it is not necessary for the parties to sign the same instrument.[91] Where a written contract shows on its face that it was intended to be signed by both parties, it is not ordinarily effective until so signed.[92] Usually, however, execution by one, and acceptance or adoption by the other, is sufficient,[93] unless execution by all the parties is made a condition precedent.[94] The date appearing on the face of a contract is only prima facie evidence of the time of its execution.[95]

Delivery.[See 11 C. L. 733]—As a general rule delivery is essential,[96] unless the circumstances give rise to an estoppel to complain of nondelivery.[97] Whether particular acts constitute delivery is a matter of intent,[98] but such intent may be inferred from the acts and conduct of the parties.[99] If delivery is conditional, the contract does not become effective unless and until the condition has been performed.[1]

(§ 1) *B. Offer and acceptance.*[2]—[See 11 C. L. 733]—There can be no contract without the mutual assent of the parties, and their minds must meet as to all its essential terms.[3] In other words there must be an offer and an acceptance thereof,[4]

88. See Frauds, Statute of.

89. Contract may be oral unless writing is required by statute of frauds. John King Co. v. Louisville & N. R. Co. [Ky.] 114 SW 308. Though policy requires company's assent to additional insurance to be in writing, it may legally be given by parol. Northwestern Nat. Ins. Co. v. Avant [Ky.] 116 SW 274.

90. Contract of employment proved by **letters** exchanged between parties. Helwig v. Aulabaugh, 83 Neb. 542, 120 NW 162. Contract may be made by **letters,** or by **receipt showing acceptance** of terms of contract. Fruit Dispatch Co. v. Gilinsky [Neb.] 122 NW 45. **Correspondence and memorandum** held to contain terms of contract for storage of grain, and enforcible, parties having commenced performance, though no formal contract was made and no day fixed when it should go into effect. South Chicago Elevator Co. v. United Grain Co. [C. C. A.] 165 F 132.

91. See Rev. Civ. Code, § 1804. Union Sawmill Co. v. Mitchell, 122 La. 900, 48 S 317.

92. Clarke Bros. v. McNatt [Ga.] 64 SE 795. Where lease was signed by life tenant and some of remaindermen, but lessee and other remaindermen did not sign it, it was not fully executed. Green Ridge Fuel Co. v. Littlejohn [Iowa] 119 NW 698.

93. McCauley v. Schatzley [Ind. App.] 88 NE 972; Parker v. Carter [Ark.] 120 SW 836. Though written contract be not signed by one or both parties, acceptance by one of performance by other gives validity to instrument and imposes its obligations on acceptor. Sunbury v. Aaron, 136 Mo. App. 222, 116 SW 431. Both parties **need not sign same instrument.** Union Sawmill Co. v. Mitchell, 122 La. 900, 48 S 317; Owens v. National Hatchet Co. [Iowa] 121 NW 1076. Conditional **bill of sale** valid, though signed only by vendees. Clarke Bros. v. McNatt [Ga.] 64 SE 795. Adjoining landowner's **contract to fence railroad** right of way, made upon valuable consideration paid by company, pursuant to statute, is binding on him though not executed by company. Lynch v. Baltimore, etc., R. Co., 240 Ill. 567, 88 NE 1034.

94. Competent to show agreement that lease should not be binding until signed by all remaindermen, and copy signed by lessee was returned, since it is not operative until these things were done. Green Ridge Fuel Co. v. Littlejohn [Iowa] 119 NW 698.

95. Harden v. Card, 17 Wyo. 210, 97 P 1075; Warner v. Warner, 235 Ill. 448, 85 NE 630.

96. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819. Signing contract not alone sufficient; it must be delivered. Ligon v. Wharton [Tex. Civ. App.] 120 SW 930.

97. Party who has accepted full consideration for contract is bound thereby, though it was not formally delivered to other party. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819.

98. Whether certain acts, words, or circumstances constitute delivery is question of intent. Sarasohn v. Kamaiky, 193 N. Y. 203, 86 NE 20.

99. Delivery will be presumed, in the absence of direct evidence to the contrary, where the parties, by concurrent acts, recognize the obligation thereof. Sarasohn v. Kamaiky, 193 N. Y. 203, 86 NE 20. Delivery of copy certified by scrivener and signed by other party held presumptive evidence of delivery of agreement. Id. Where mutual promises are made in writing and instrument is left with scrivener, this fact is to be considered with acts of parties on question of intended delivery, especially where instrument recited acceptance by both parties. Id.

1. Perry v. Security Life & Annuity Co., 150 N. C. 143, 63 SE 679; Appell v. Appell, 235 Ill. 27, 85 NE 205. Note for stock was given upon oral agreement to give two extensions, and that buyer could then surrender stock, at his election, in satisfaction of note. Held note never became binding obligation; such parol agreement competent. Paulson v. Boyd, 137 Wis. 241, 118 NW 841.

2. **Search Note:** See notes in 21 L. R. A. 127; 29 Id. 431; 4 L. R. A. (N. S.) 177; 6 Id. 1016; 10 Id. 1138; 11 Id. 254; 12 Id. 439; 110 A. S. R. 742.

See, also, Contracts, Cent. Dig. §§ 48-142; Dec. Dig. §§ 14-29; 9 Cyc. 245-280, 283-287, 290-296; 7 A. & E. Enc. L. (2ed.) 125.

3. German Savings & Loan Soc. v. McClellan, 154 Cal. 710, 99 P 194; Barrie v. United R. Co. [Mo. App.] 119 SW 1020. Minds must

meet on all essential details. Rice v. Neuman, 115 NYS 83. Minds of parties must meet to same thing in same sense. Luckey v. St. Louis & S. F. R. Co., 133 Mo. App. 589, 113 SW 703. Where parties negotiating for sale of land submitted propositions and counter propositions, without these being an assent to the same thing in the same sense, there was no contract. Burchard-Hulburt Inv. Co. v. Hanson, 143 Ill. App. 97.

Evidence held to show contract.

Contract whereby landowner agreed to pay one-half of excess of $25 per acre for selling land. Larson v. Hortman [Minn.] 121 NW 900. Account closed, and promise of defendant to pay amount due, and application of proceeds of crop on debt, as was done. Putnam v. Live Oak Mercantile Co., 122 La. 507, 47 S 846. Express promise to turn over proceeds of sale of wheat to pay debt for seed. Hyde v. Thompson [N. D.] 120 NW 1095. Contract whereby decedent agreed **to account for proceeds of notes** delivered to him. Welsinger v. Harding's Adm'r [Ky.] 115 SW 800. **Contract of employment** between father and son. Hialey v. Hialey's Estate [Mich.] 16 Det. Leg. N. 244, 121 NW 465. Agreement that services were rendered under agreement for payment out of estate. Walker v. Ganote [Ky.] 116 SW 689. **Agreement to work** for reasonable value of services not for fixed wages. Allen v. Urdangen [Iowa] 119 NW 724. **Agreement to pay attorney** reasonable value of services. In re Nethaway [Minn.] 121 NW 418. **Agreement by mortgagor to deed premises** and that one of them should receive amount in excess of mortgagee's claim. Felgner's Adm'rs v. Slingluff, 109 Md. 474, 71 A 978. **Contract of sale** of interest in estate and promise to pay certain amount. Bosel v. Barge [Minn.] 121 NW 1133. **Loan** by claimant to decedent. McGregor v. McGregor's Estate [Mich.] 16 Det. Leg. N. 179, 120 NW 1071. Agreement, collateral to notes given for patent rights, **that notes would not be sold** until maker's sons had been given certain instruction, and until maker signed paper showing satisfaction. Hughes v. Crocker, 148 N. C. 318, 62 SE 429. Agreement whereby bank was **to furnish funds** to cattle buyer, and that commission company would pay bank by honoring drafts, and remitting proceeds. Bank of Laddonia v. Bright-Coy Com. Co. [Mo. App.] 120 SW 648. **Contract to devise** property in consideration of care and support. McAllister's Adm'r v. Bronaugh [Ky.] 113 SW 821. **Promise of decedent to pay for services** rendered by plaintiff. Fenton v. Mansfield [Conn.] 73 A 770. Contract by decedent to pay son for services. Cowles v. Cowles' Estate, 81 Vt. 498, 71 A 191.

Evidence held insufficient to show contract.

Evidence held insufficient to show **assumption of liability** of purchaser of brick making outfit to seller by one to whom such outfit or the right to use same was sold by purchaser. Averett v. Walker, 131 Va. 611, 62 SE 1046. To show completed **contract to convey,** specific enforcement denied. Stanton v. Driffkorn, 83 Neb. 36, 118 NW 1092. To show promise to convey land in consideration of promise to pay taxes and insurance. Satterly v. Dewick, 129 App. Div. 701, 114 NYS 354. To show oral contract to convey land in consideration of plaintiff's going to live with decedent. Boeck v. Milke [Iowa] 118 NW 874. To show contract of defendant **to pay debt of another.** Coates v. Posner, 117 NYS 807. **Agreement of surety to look to insurers** alone and not owners, made on stipulation for release of vessel libeled. The White Seal, 166 F 640. To show, as part of **house moving contract,** agreement by defendant to assume liability for injuries to workmen caused by plaintiff's negligence. Theobald v. Shepard Bros. [N. H.] 71 A 26. To show **agreement by decedent** to pay physician for time lost from office as well as for services. Burke v. Mulgrew, 127 App. Div. 733, 111 NYS 899. To show promise of decedent to pay for services. Dueser v. Meyer, 129 App. Div. 598, 114 NYS 64. To show **contract to make will** in plaintiff's favor, and not to revoke it. Messier v. Rainville [R. I.] 73 A 378. Where claimant lived in father's family after coming of age, and enjoyed part of profits of farm, loose statements of father that she would be paid were insufficient to show contract to pay her, stronger proof being required in such cases. Foley v. Dillon, 32 Ky. L. R. 222, 105 SW 461. Evidence, consisting mostly of declarations of decedent, insufficient to prove contract whereby he agreed to pay for services of niece as clerk and bookkeeper. In re Miller's Estate, 222 Pa. 334, 71 A 185. To show **loan of money to decedent,** represented by check. Russell v. Amiot, 132 App. Div. 584, 116 NYS 1080. Evidence, in suit to foreclose trust deed, insufficient to show **agreement to surrender mortgage notes** upon reconveyance, specific performance of which was asked. Elwell v. Hicks, 238 Ill. 170, 87 NE 316. Express **contract by corporation to pay president** for services. Dial v. Inland Logging Co., 52 Wash. 81, 100 P 157. To show **agreement by freight agent** that refrigerator car would arrive with particular train. Luckey v. St. Louis & S. F. R. Co., 133 Mo. App. 589, 113 SW 703.

4. Barrie v. United R. Co. [Mo. App.] 119 SW 1020; Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631.

Offer held not accepted: Proposition to guarantee payment of notes, not accepted, never became contract. Brown v. Spiegel [Mich.] 16 Det. Leg. N. 43, 120 NW 579. No contract for sale of land where minds of parties did not meet as to spring on land, which was to be reserved. German Sav. & Loan Soc. v. McClellan, 154 Cal. 710, 99 P 194. Where letter containing proposal to renew policy of insurance on certain stated terms was not answered or accepted, insured simply retaining policy, there was no contract of insurance. Harper & Co. v. Grinners' Mut. Ins. Co. [Ga. App.] 64 SE 567. Order for goods taken by agent subject to seller's acceptance, but not accepted by seller, did not become contract. Bronson v. Weber Implement Co., 135 Mo. App. 483, 116 SW 20. Where vendee never signed contract, and neither he nor his transferrees ever assumed or discharged the obligations intended to have been imposed, there was no acceptance and no contract. Union Sawmill Co. v. Arkansas S. E. R. Co., 123 La. 555, 49 S 173. Inchoate contract, never made binding on or accepted by one, is not binding on other party. Id.

Offer and acceptance not shown: Correspondence held not to show completed **sale** of fruit. Scudders-Gale Grocery Co. v. Gregory Fruit Co., 9 Cal. App. 553, 99 P 978. Cor-

and the acceptance, moreover, must be unconditional,[5] must conform to the offer as made,[6] must be within the time specified in the offer [7] or within a reasonable time, if no time is specified,[8] and before the offer has been withdrawn by act of the offerer,[9]

respondence construed and held not to show completed contract for sale of goods. Hunkins-Willis Lime & Cement Co. v. Los Angeles Warehouse Co. [Cal.] 99 P 369. Correspondence and negotiations held not to show completed contract for sale of land. Schaeffer v. Mutual Benefit Life Ins. Co., 38 Mont. 459, 100 P 225. Evidence held not to show meeting of minds so as to make contract for **joint acquisition of realty.** Kelly v. Wheeler [S. D.] 119 NW 994. Defendant made **subscription for publication** at $20 a year, and publisher sent it two years, and then increased price to $40. Defendant did not subscribe at that price, and told agent to take book away, but it was left. Held no contract. Realty Records Co. v. Pierson, 116 NYS 547.

Offer and acceptance shown: Finding of jury that minds of parties met on specific lots to be sold conclusive, based on conflicting evidence. Alexander v. Brillhart [Tex. Civ. App.] 113 SW 184. Where promise to pay for services was made, it was immaterial that parties lived in family relation. Flowers v. Poorman [Ind. App.] 87 NE 1107. Contract resulted when **bid or proposal** by one party was accepted by other. Grainger & Co. v. Louisville Cornice, Roofing & Heating Co. [Ky.] 116 SW 753. Bid for construction of building, in response to notice was offer, and statement of owner, on opening bids, "Well, Mr. L., it's up to you. Yours is the lowest bid," was acceptance; contract being complete owner could not add term later. Lane v. Warren [Tex. Civ. App.] 115 SW 903. Negotiations, and offer to furnish cut stone for "courthouse and jail," and acceptance of "bid for cut stone for courthouse and jail," made contract. Bollenbacher v. Reid [Mich.] 15 Det. Leg. N. 961, 118 NW 933. Street **railway charter,** when accepted and acted upon, became contract. City of New York v. New York City R. Co., 193 N. Y. 543, 86 NE 565. Written **offer to corporation,** and acceptance by vote of directors, communicated to offerer, made contract. Beach & Clarridge Co. v. American Steam Gauge & Valve Mfg. Co., 202 Mass. 177, 88 NE 924. Where **contract by promoters** was made for benefit of corporation to be formed, and corporation after its formation adopted contract, and all parties recognized it, it became mutually binding. Bloom v. Home Ins. Agency [Ark.] 121 SW 293. Where **lease** was sent to be signed, and was signed and returned, there was contract. Cohn v. Jeffries [Ark.] 115 SW 926. Letters between landlord and tenant held to constitute contract of lease for another year, under clause allowing renewal. Goodfield Realty Co. v. Boden, 116 NYS 703. Written instrument certifying that parties of first part employ party of second part may be regarded as **promise to employ,** which, when accepted by employe's going to work, became contract. Spatz v. Singer, 116 NYS 576. Letter from broker to owner of land asking if he will sell land described, and asking terms, and stating commission expected, and answer from owner, stating price, held **contract to pay broker's commission** for finding purchaser. Johnson v. Huber [Kan.] 103 P 99. Correspondence held to show that owner of timber and broker had agreed on terms of sale, and that owner accepted buyer, so that broker was entitled to commission. Watson v. Paschall [S. C.] 65 SE 337.

5. Cheboygan Paper Co. v. Swigart Paper Co., 140 Ill. App. 314; Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Defendant's letter **held unconditional** acceptance of plaintiff's offer to furnish certain amount of coal daily. Great Western Coal & Coke Co. v. St. Louis & Big Muddy Coal Co., 140 Ill. App. 368. Mere request that payment be made at certain place, not made condition of acceptance, does not invalidate acceptance. Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Acceptance of offer to sell land, but fixing place other than residence of vendor or place named in offer for payment of consideration and delivery of deed, is **not unconditional** acceptance and does not bind vendor. Lopeman v. Colburn, 82 Neb. 641, 118 NW 116. If vendee, in letter replying to offer to sell, attach any condition to acceptance not contained in offer, even stipulation as to place of payment, this is not acceptance but counter proposition. Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853.

6. Lopeman v. Colburn, 82 Neb. 641, 118 NW 116; Breen v. Mayne [Iowa] 118 NW 441; Ross v. Craven [Neb.] 121 NW 451. Where negotiations for sale of timber and land were on theory of plaintiff's ownership in fee, and offer assumed such ownership, an acceptance as to plaintiff's interest, which was mere license, did not result in contract. Hood & Co. v. Girard Lumber Co., 137 Wis. 152, 118 NW 552. **Counter proposition** does not complete contract, must be accepted. Greenwich Bank v. Oppenheim, 118 NYS 297. Written proposal to furnish coal was accepted orally, parties agreeing that formal written contract should be drawn up by buyer. This contract, as tendered seller, differed materially from first proposal, and seller refused to accept, and withdrew his offer. Held, buyer having elected to consider negotiations open, by submitting different offer, could not afterwards contend that seller was bound by verbal acceptance. No contract. Hite v. Savannah Elec. Co. [C. C. A.] 164 F 944. Broker sent owner proposed contract of employment, and owner, instead of signing it, wrote letter to broker authorizing sale to anyone except an Armenian. Held this counter offer was sufficiently accepted by broker's procuring purchaser, not an Armenian, ready, willing and able to buy on any terms demanded. Baird v. Loescher, 9 Cal. App. 65, 98 P 49.

7. Stubblefield v. Stubblefield, 32 App. D. C. 535.

8. Thompson v. Burns, 15 Idaho, 572, 99 P 111. Where **offer of timber** fixed no time for acceptance, only such time as was required for submission of contract and acceptance was allowable; assent after one year, in one case, and three months, in others, too late.

and such withdrawal has been communicated to the person receiving the offer,[10] or before the offer has been terminated by operation of law, as in case of death.[11] The acceptance, furthermore, must be communicated to the party making the offer,[12] or to his authorized agent,[13] unless notice of acceptance is waived.[14] A contract is completed, however, by properly placing a notice of acceptance in course of transmission to the offerer by the same agency through which the offer was communicated,[15] provided notice of revocation has not been received prior thereto.[16] But this doctrine is not to be extended so as to make communication to the offeree's agent a sufficient acceptance, even though accompanied by direction to give notice.[17] Where there is a written as well as an oral acceptance, each may be relied on.[18]

The acts and conduct of the parties may give rise to an implication of their

Union Sawmill Co. v. Mitchell, 122 La. 900, 48 S 317. Where agreement purports to sell timber in presenti, but contains stipulations to be performed by vendee in future, and vendee does not sign it, there is no contract but only an offer to be accepted by performance or assent within such time as is reasonably necessary. Where assent is given after several years, vendor may withdraw offer, and there is no contract. Riley v. Union Sawmill Co., 122 La. 863, 48 S 304. An offer by telegraph impliedly requires a quick reply by telegraph. Thompson v. Burns, 15 Idaho, 572, 99 P 111. Offer by telegraph Nov. 4, requesting quick answer; acceptance Nov. 11, too late. Id.

9. Offer to furnish castings at certain price withdrawn by letter stating that after certain date price would be greater. Hopkins v. Racine Malleable & Wrought Iron Co., 137 Wis. 583, 119 NW 301. Order for machine, subject to acceptance or not by vendor, may be withdrawn by vendee before acceptance, no time being fixed. Northwest Thresher Co. v. Kubicek, 82 Neb. 485, 118 NW 94. Letter, in reply to request for terms for which stock would be sold, that owner would not take less than certain price, was not continuing offer. Being refused, no contract could be made by subsequent attempted acceptance. Sprague v. Hosie [Mich.] 15 Det. Leg. N. 847, 118 NW 497. Where proposal by letter did not bind party to send any quantity of goods in any amount, but stated that orders would be filled as received, acceptance did not make complete contract, when proposal was withdrawn. Stein-Gray Drug Co. v. Mickelson Co., 116 NYS 789. Where offer to sell stock was withdrawn before acceptance, offerer having learned that other party was not acting in good faith, there was no enforcible contract. Blanks v. Sutcliffe, 122 La. 448, 47 S 765.

10. Revocation of offer is effective only if received before acceptance is mailed. Stein-Gray Drug Co. v. Mickelsen Co., 116 NYS 789.

11. If offerer, or offeree, dies before acceptance, representatives of neither are bound, nor can they bind the survivor. Rev. Civ. Code, § 1810. Union Sawmill Co. v. Mitchell, 122 La. 900, 48 S 317. Complaint alleging that work done after death of person was requested by him in his lifetime states no contract, since request was mere offer, revoked by death before acceptance. Herrlich v. Hyman, 61 Misc. 606, 113 NYS 471.

12. New v. Germania Fire Ins. Co. [Ind.] 85 NE 703. If the notice of acceptance actually reaches the offerer, the agency through which it is communicated is immaterial, but, prior to his receiving actual or constructive notice, there is no contract. Id. Mere undetermination to accept, or even acts done insufficient. Northwest Thresher Co. v. Kubicek, 82 Neb. 485, 118 NW 94. Merely mental determination to accept, or even acts done in pursuance thereof, is not enough to bind the party making the offer. New v. Germania Fire Ins. Co. [Ind.] 85 NE 703. Instruction that mental assent might be inferred from defendant's silence held erroneous. Metzler v. Kaufman Co., 32 App. D. C. 434.

13. Where plaintiff's assent to defendant's offer was communicated to defendant's bookkeeper, so as to reach defendant in usual course, acceptance was sufficient. Morrison v. Tuska, 113 NYS 611.

14. Where an offer contains a request to do something, it is sometimes held that notice of acceptance is waived, and that the doing of the thing requested is impliedly made a sufficient acceptance. New v. Germania Fire Ins. Co. [Ind.] 85 NE 703. Writing, signed by both parties, agreeing to sell timber, based on consideration of $1, gave vendee right to accept by paying $100 within 60 days. Held, payment of such sum within the time resulted in enforcible valid contract. Kent v. Davis Bros. Lumber Co., 122 La. 1046, 48 S 451.

15. Where the offer is made by mail, it is implied, in the absence of notice of revocation reaching the offeree before acceptance, that the offerer continues willing to contract down to the time that the other party may, with due diligence, accept, using the same medium to give notice of acceptance. New v. Germania Fire Ins. Co. [Ind.] 85 NE 703. Where one party proposes contract by letter, and other accepts by letter, contract is complete when acceptance is deposited in mails, properly addressed and stamped. Stein-Gray Drug Co. v. Mickelsen Co., 116 NYS 789.

16. Merely writing letter or telegram of acceptance is not enough. It must be placed in course of transmission beyond control of party sending before it is complete acceptance, and this before withdrawal of offer. Northwest Thresher Co. v. Kubicek, 82 Neb. 485, 118 NW 94.

17. New v. Germania Fire Ins. Co. [Ind.] 85 NE 703.

18. Beach & Clarridge Co. v. American Steam Gauge & Valve Mfg. Co., 202 Mass. 177, 88 NE 924.

mutual assent,[19] which, of course, includes the acceptance of an offer made.[20] Thus, a promise to pay for work or services may be implied from the acceptance of the benefit thereof,[21] unless the relation of the parties gives rise to a contrary presumption,[22] but the mere fact that the benefit of services is received is not alone sufficient to show the acceptance contemplated by law,[23] and no such presumption of a promise to pay arises unless there is an intention or expectation on the one side to exact payment, and on the other to make compensation,[24] or unless the circumstances are

19. An action of assumpsit lies where one pays out money at another's request, since the law implies a promise to repay. Teter v. Teter, 65 W. Va. 167, 63 SE 967.

Evidence held not to warrant finding of implied assent: Binding agreement to make a certain will is not to be inferred from the making of the will. Miller v. Hill, 64 Misc. 199, 118 NYS 63. Evidence held to show that plaintiff promised to and did furnish money to defendant bank for purpose of locating and bringing back fugutive from justice; money having been used for that purpose, he could not recover it, there being no promise to repay. Carroll v. Chauncey, 132 App. Div. 13, 116 NYS 366. Proof that plaintiff gave her husband $500 and that two months later she saw him give defendant $500 did not entitle her to recover from defendant as for money had and received. Levine v. Klein, 113 NYS 95. Assent to terms published in newspaper will not be implied from mere fact of publication, where party sought to be charged never saw the publication. Gschwendtner v. Gebhardt, 142 Ill. App. 260.

20. Porter v. Everts' Estate, 81 Vt. 517, 71 A 722. Action, without words, is presumptive evidence of acceptance of a proposition when taken under circumstances naturally implying such acceptance. Shreveport Trac. Co. v. Mulhaupt, 122 La. 667, 48 S 144.

Acceptance implied: A timely suit brought on the contract alleged to have resulted from a proposition and its acceptance may in itself be an acceptance. Shreveport Trac. Co. v. Mulhaupt, 122 La. 667, 48 S 144. Number of persons proposed to railway company that if it would build road along certain route, on certain grade, at its own expense, they would pay certain sums to company when rails were laid or within 30 days after road was in operation, and company built and commenced to operate road as agreed, and commenced suit on agreement, it could recover. Id. If contract for sale of land signed only by vendor is unilateral, it becomes mutual when vendee begins suit for specific enforcement. Krah v. Wassmer [N. J. Eq.] 71 A 404. Written instrument provided that certain payments should be made to plaintiff from the signer's estate if plaintiff would do certain things and refrain from doing certain others. Held written acceptance or promise by plaintiff was unnecessary, and contract was binding if she indicated by conduct her intention to accept and other party knew of it. Porter v. Everts' Estate, 81 Vt. 517, 71 A 722.

Acceptance not implied: Order for doors at about one-half net price of cheapest kind must have been expressly accepted; no implied acceptance of such an unusual order. Harris v. Santee River Cypress Lumber Co. [R. I.] 72 A 392. Order for goods received in South Carolina July 29 was incomplete, list referred to not being enclosed. Refusal to accept, mailed August 17, was timely, in view of distance between points at which parties were, Rhode Island, and South Carolina, and held no acceptance by acquiescence. Id. Acceptance is not necessarily implied from mere act of physical acceptance of and attempt to enforce contract unilateral in form and not signed by the party so accepting. Levin v. Dietz, 194 N. Y. 376, 87 NE 454.

21. Jackson v. Buice [Ga.] 63 SE 823.

22. Generally where one receives services or property from another the law implies a promise to pay, but this does not hold as between near relatives. Jackson v. Buice [Ga.] 63 SE 823. Mere rendition of services by president to bank, though outside his usual duties, did not raise implied promise to pay for them. Notley v. First State Bank, 164 Mich. 676, 15 Det. Leg. N. 838, 118 NW 486. Where mother-in-law lived in family for 20 years, performing services as member of family would, there was no implied contract to pay for her board, but after she became old and helpless, and had to be cared for as invalid, there was an implied contract to pay for services rendered her. Henderson v. McLain, 146 N. C. 329, 59 SE 873.

23. Notley v. First State Bank, 154 Mich. 676, 15 Det. Leg. N. 838, 118 NW 486.

24. Reasonable compensation may be recovered for services rendered on expectation of both parties that they were to be paid for. Walker v. Ganate [Ky.] 116 SW 689. Where minor was taken into family of defendants to live, his right to compensation for services depended upon whether there was an expectation by defendants to pay anything, except maintenance, and an expectation by minor's parent that minor should be paid. Winebremer v. Eberhardt [Mo. App.] 119 SW 530. Instructions disapproved. Id. Whether son entitled to recover for board and services from mother's estate, for jury, there being some evidence that no pay was expected. Bettinghouse v. Bettinghouse's Estate [Mich.] 16 Det. Leg. N. 37, 120 NW 617.

Evidence held to show implied promise: Evidence held to sustain claim for services to decedent, showing distinct understanding to pay, and that they were necessary and worth sum claimed. Johnson v. Taylor [R. I.] 73 A 307. Evidence sufficient to show understanding that son's services in caring for father were to be paid for. Stone v. Troll, 134 Mo. App. 308, 114 SW 82. Where plaintiffs rendered services to defendants in land transaction, at defendants' request or with their knowledge and acquiescence, there was an implied promise to pay and plaintiffs could recover on quantum meruit. Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831. Where defendant requested plaintiff, physician, to render services to injured employe, defendant intending to pay, and plaintiff intending to charge, there was contract, inferred from facts, to

such that a reasonable person would know that compensation was expected.[25] Under this latter rule, therefore, a voluntary courtesy, moved by a previous request, is not sufficient in the absence of benefits conferred, to raise an implied promise.[26] A written contract may be renewed by conduct of the parties after its expiration,[27] but a renewal will not be presumed from failure to act where conditions have materially changed.[28]

A contract to take effect upon condition does not become binding until the condition has happened or has been performed,[29] but where all the terms of the contract are agreed upon, it becomes binding, though the parties intend that it shall be reduced to writing,[30] but an intention to have a formal written contract is evidence that the oral agreement was not intended or understood to be binding.[31]

*Options.*See 11 C. L. 738—An option is a mere right to accept a contractual offer

pay. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461.

Evidence held not to show implied promise: No recovery for services of no benefit to defendant, where neither party contemplated payment therefor. Li Greci v. Hanover Realty & Const. Co., 115 NYS 1086. Son cannot recover compensation for services to father unless latter expected to pay and former intended to charge. Evidence insufficient. Lowe v. Lowe [Md.] 73 A 878. Evidence held not to show that corporation expected to pay president for services, though he may have expected to be paid. Dial v. Inland Logging Co., 52 Wash. 81, 100 P 157.

25. To establish contract to pay for services by inference, plaintiff must show rendition of services, intention to charge and expectation of other party to pay, or that services were such reasonable person ought to know that payment was expected. Wagner v. Edison Elec. Illuminating Co. [Mo. App.] 121 SW 329. Trustee or officer of corporation cannot recover for services as an implied contract without proving that services were outside his usual duties, and that it was understood, or that circumstances warranted expectation, that they were to be paid for. Dial v. Inland Logging Co., 52 Wash. 81, 100 P 157. Claim against estate not shown where it did not appear that decedent had expected to pay for services, and circumstances were not such as to warrant claimant in expecting pay, parties having lived in family relation many years. Thomas v. Hobb's Ex'r, 33 Ky. L. R. 995, 112 SW 574. Corporation will not be held to implied promise to pay for services rendered by directors or officers, unless there was expectation on one side to pay and on other to receive payment, or unless circumstances were such that reasonable man would know that pay was expected. Notley v. First State Bank, 154 Mich. 676, 15 Det. Leg. N. 838, 118 NW 486.

26. Clark v. National Steel & Wire Co. [Conn.] 72 A 930.

27. Kennesaw Guano Co. v. Miles & Co. [Ga.] 64 SE 1087. Allowing service to continue, and giving new bond for performance, held to show renewal of contract after expiration of term. Long v. Charles Kaufman Co., 122 La. 281, 47 S 606.

28. The presumption upon which tacit reconduction rests is not one of law, but such reconduction rests upon the presumed consent of the parties, and such consent will not be presumed where conditions existing at the commencement of the contract have materially changed to the prejudice of one of the parties. City of New Orleans v. Louisiana Nat. Bank Liquidators, 123 La. 654, 49 S 274.

29. Deposit on lease recoverable where it was subject to withdrawal if lessor refused consent to lease, and he did so refuse. Smith v. Geoghegan, 114 NYS 29. Whether contract to convey land to partner was not to be binding until accepted and approved by him held for jury. Slayden & Co. v. Palmo [Tex. Civ. App.] 117 SW 1054. Evidence held not to show that lease was to be guaranteed by third person before acceptance, printed guaranty having been stricken. Refusal to deliver premises after lease was signed was breach. Cohn v. Jeffries [Ark.] 115 SW 926. An agreement executed by certain parties with the intention and understanding that it shall be executed by, and binding upon, others, is unenforcible unless executed by such others. Appell v. Appell, 235 Ill. 27, 85 NE 205. Trust agreement among tenants in common. Id.

30. Sherry v. Proal, 131 App. Div. 774, 116 NYS 234; Campbell & Co. v. Mion Bros. [Ga. App.] 64 SE 571; Hallerbach & May Contract Co. v. Wilkins [Ky.] 112 SW 1126; Bollenbacher v. Reid [Mich.] 15 Det. Leg. N. 961, 118 NW 933; Gooding v. Moore, 150 N. C. 195, 63 SE 895. Though it was agreed that contract for sale of timber should be reduced to writing, failure to do so did not affect its validity, but only the mode of proving it. Teal v. Templeton, 149 N. C. 32, 62 SE 737. Offer and acceptance construed as final contract and not mere steps in negotiations, regardless of whether parties contemplated reduction of agreement to more formal writing. Beach & Clarridge Co. v. American Steam Gauge & Valve Mfg. Co., 202 Mass. 177, 88 NE 924.

31. Sherry v. Proal, 131 App. Div. 774, 116 NYS 234. Writing was signed but parties agreed that it should be rewritten and other provisions inserted. Held that proof of this agreement was competent, contract not being binding until mutually adopted. Wiltse v. Fifield [Iowa] 121 NW 1086.

Instruction held properly to submit issue whether contract to take steel was made or whether it was understood that contract was to be reduced to writing and bond given before it should become effective. Lynch v. Snead Architectural Iron Works [Ky.] 116 SW 693.

within the time limited, or within a reasonable time.[32] It is necessarily unilateral,[33] while a contract proper imposes mutual obligations.[34] Unless founded on a sufficient consideration, an option may be revoked at any time before acceptance,[35] but if based upon a consideration, it cannot be revoked prior to the time when it expires by its own terms.[36] It may be accepted by notice to the party giving it at any time efore it expires,[37] and must be so accepted in order to convert it into the contract contemplated thereby.[38] Where no time is fixed, an option does not expire until after the lapse of a reasonable time,[39] and an acceptance within such time is necessary to ripen it into a contract.[40] When accepted,[41] and when conditions of acceptance have been performed [42] or waived,[43] it becomes a binding contract.[44]

(§ 1) *C. Reality of consent.*[45]—See 11 C. L. 738—Since the mutual assent of the parties is necessary,[46] there is no valid contract where either party is induced to enter

32. Right to purchase. Brickell v. Atlas Assur. Co. [Cal. App.] 101 P 16. Option to purchase is not a sale or agreement to sell. Hamburger v. Thomas [Tex. Civ. App.] 118 SW 770. Agreement to sell planks of certain dimensions, when sawed, to other party, at market price, gave option to such person to buy. New England Box Co. v. Prentiss [N. H.] 72 A 826.

33. Option to purchase, contained in lease, binds only lessors until accepted. Pearson v. Millard, 150 N. C. 303, 63 SE 1053. Lack of mutuality no objection to its validity. Stay v. Tennille [Ala.] 49 S 238.

34. Contract by one to sell and other to buy, terms of payment being specified, and right reserved to vendor to forfeit payments or enforce on default of vendee, was contract of sale, not option. Brickell v. Atlas Assur. Co. [Cal. App.] 101 P 16. Contract construed as one of sale, not mere option, fixing liquidated damages for breach. Hamburger v. Thomas [Tex. Civ. App.] 118 SW 770.

35. Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874. Promise to convey, without consideration not binding when withdrawn before acceptance. Id. An option is not enforcible unless it is under seal or supported by a valuable consideration. Johnson v. Virginia-Carolina Lumber Co. [C. C. A.] 163 F 249. Proposal to furnish contractor all timber he may order is mere option, enforcible only so far as orders were made and accepted. Campfield v. Sauer [C. C. A.] 164 F 833. Writing signed by owner of land only agreeing to convey coal vein at certain price per acre, to be paid by certain time, otherwise agreement to be considered rescinded without consideration, was mere option, revocable at any time before acceptance. Wheeling Creek Gas Coal & Coke Co. v. Elder, 170 F 215.

36. New England Box Co. v. Prentiss [N. H.] 72 A 826.

Sufficiency of consideration: Lease is sufficient consideration for option to purchase given thereby to lessees; it cannot be withdrawn before expiration by its terms. Pearson v. Millard, 150 N. C. 303, 63 SE 1053. Promise of agent that he will try to sell real estate is not sufficient consideration for option to him on terms specified; option revocable any time before acceptance or sale. Jolliffe v. Steele, 9 Cal. App. 212, 98 P 544. Owner gave option on fixtures, agreed to leave them as they were, and deposited $100 as forfeit should he refuse to sell. Held sufficient consideration for agreement of vendee that $100 deposited by him should be paid owner if he failed to buy. Nagel v. Cohen, 112 NYS 1066. Offer to convey, by its terms to continue 15 days, held without consideration, though promisee spent $25 in getting information concerning land in question. Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874.

37. New England Box Co. v. Prentiss [N. H.] 72 A 826.

38. Hardy v. Ward, 150 N. C. 385, 64 SE 171.

39, 40. New England Box Co. v. Prentiss [N. H.] 72 A 826.

41. Option must be accepted unequivocally and acceptance communicated to other party. Breen v. Mayne [Iowa] 118 NW 441. Option to purchase, contained in lease, held to have been accepted according to its terms. Pearson v. Millard, 150 N. C. 303, 63 SE 1053. Acceptance of option to purchase, given in lease, by one of two lessees, sufficient, in absence of objection that both should accept. Id.

42. Option held to require vendor to tender deed before vendee was required to tender money and notes. Hardy v. Ward, 150 N. C. 385, 64 SE 171. If the option is only to convey upon the happening of some condition or performance of some act, there is no binding contract until acceptance and performance. Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874.

43. Where option required vendor to tender deed on notice of acceptance of option by vendee, but the parties modified this by subsequent correspondence, in which it was agreed that vendee's attorney was to prepare deed, and deed was not prepared when option expired though vendor furnished all information asked for, vendee was in default and not entitled to specific performance. Hardy v. Ward, 150 N. C. 385, 64 SE 171.

44. Option may be withdrawn any time before acceptance, but after acceptance becomes binding contract. Jones v. Lewis [Ark.] 117 SW 561. An optional contract to convey land, founded on a proper and valuable consideration, may be specifically enforced upon an acceptance of the terms and tender of the price within the time limited. Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874.

45. Search Note: See note in 70 L. R. A. 107.

See, also, Contracts, Cent. Dig. §§ 411-454; Dec. Dig. §§ 92-100; 9 Cyc. 388-464.

46. See ante, § 1B.

into it through duress,[47] mistake,[48] misrepresentations, fraud or undue influence,[49] or where either party is mentally incapacitated,[50] but one who enters into a contract in writing, without any fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect.[51]

§ 2. *Consideration.*[52]—See 11 C. L. 738—A legal consideration is essential to the validity of every contract,[53] though a fully executed contract will not, ordinarily, be disturbed for want of consideration.[54] A seal imparts a consideration, both at common law [55] and by statute in some jurisdictions,[56] but the presumption is not conclusive,[57] and courts of equity will look to the actual consideration, notwithstanding the presence of a seal.[58] The statute of some of the states extend this presumption to written instruments generally,[59] and it is extended to certain kinds of written instruments though not specifically as provided by statute.[60]

The competency of parol evidence to show want of consideration, or the true consideration, for a written contract, is elsewhere discussed.[61]

*What constitutes in general.*See 11 C. L. 739—A valuable consideration may consist in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other.[62]

47. See Duress.

48. See Mistake and Accident.

49. See Fraud and Undue Influence.

50. See Incompetency; Insane Persons, § 6.

51. Release held valid and binding. Zdancewicz v. Burlington County Trac. Co. [N. J. Law] 71 A 123. One who signs a contract without reading it, having opportunity to do so, will not afterwards, in absence of fraud, be permitted to say he did not understand it. Chicago Bldg. & Mfg. Co. v. Peterson [Ky.] 118 SW 384.

52. Search Note: See notes in 34 L. R. A. 33; 5 L. R. A. (N. S.) 725; 11 Id. 789; 36 A. S. R. 145; 39 Id. 735; 60 Id. 432; 117 Id. 493; 2 Ann. Cas. 493; 3 Id. 395; 11 Id. 482.

See, also, Contracts, Cent. Dig. §§ 220-410; Dec. Dig. §§ 47-91; 6 Cyc. 11; 9 Id. 308-371; 6 A. & E. Enc. L. (2ed.) 667.

53. Hopkins v. Racine Malleable & Wrought Iron Co., 137 Wis. 583, 119 NW 301; Clark v. Robertson Bros. & Co., 135 Mo. App. 90, 115 SW 514; Mueller v. Bell [Tex. Civ. App.] 117 SW 993; Holman v. Thomas, 171 F 219. Non-negotiable notes, absolutely without consideration, are void. Bradshaw v. Farnsworth, 65 W. Va. 28, 63 SE 755. Agreement by sellers of business to obtain renewal of lease for three years is unenforcible without new consideration. Norton v. Abbott, 113 NYS 669. In suit to compel conveyance, there could be no recovery on counterclaim setting up promise of vendors to assume debt, when no consideration was shown. Thompson v. McKee [Ky.] 119 SW 229. Landowner's agreement, in conveyance of land to railroad for right of way, to release company from duty of maintaining drainage ditches, as required by statute, was void if not based on consideration. Missouri, K. & T. R. Co. v. Riverhead Farm [Tex. Civ. App.] 117 SW 1049.

54. Lamb's Estate v. Morrow [Iowa] 117 NW 1118. Bondsmen, who gave judgment note to bank to make good loss caused by defalcations of cashier, were estopped to set up want of consideration, or that bank had agreed not to reduce it to judgment. People's Bank v. Stroud [Pa.] 72 A 341.

55. Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874.

56. Under statute changing effect of seal, seal is only prima facie evidence of consideration. Olston v. Oregon Water Power & R. Co. [Or.] 97 P 538.

57. Sims v. Scheussler [Ga. App.] 64 SE 99; Lacey v. Hutchinson [Ga. App.] 64 SE 105.

58. A court of equity will not grant its remedy of specific performance unless an agreement is based upon an actual consideration, even though it is under seal. Corbett v. Cronkhite, 239 Ill. 9, 87 NE 874.

59. Written contract presumed to be based on sufficient consideration, but this presumption is disputable. Code Civ. Proc. § 3266, subd. 39. Dackich v. Barich, 37 Mont. 490, 97 P 931.

60. Written promissory note imports consideration. Zimbleman v. Finnegan [Iowa] 118 NW 312. Note reciting that it is given for value received is presumptively based on consideration. Mussey v. Dempsey, 60 Misc. 317, 113 NYS 271. Commercial paper is presumptively based on sufficient consideration especially when "value received" is recited. Bing v. Bank of Kingston, 5 Ga. App. 578, 63 SE 652.

61. See Evidence, § 5.

62. Waterhouse v. Waterhouse [R. I.] 72 A 642. Consideration valid if benefit accrues to him who makes promise or any injury to him who receives it. Golding v. McCall, 5 Ga. App. 545, 63 SE 706. Damage or inconvenience suffered by promisee is sufficient consideration. Underwood Typewriter Co. v. Century Realty Co., 220 Mo. 522, 119 SW 400. It is a sufficient consideration for an undertaking if, by acting on the faith of it, there be any damage or detriment to the party to whom it is given, though no actual benefit accrues to the party giving the undertaking. Druckamiller v. Coy, 42 Ind. App. 500, 85 NE 1028. A valuable consideration is some legal right acquired by the promisor in consideration of his promise or forborne by the promisee in consideration of such promise. Darcey v. Darcey [R. I.] 71 A 595. Waiver of right under lease to plant any

crops desired, and agreement to plant only corn, was valuable consideration for agreement by lessor to waive lease and rentals thereunder in case of crop failure. Jones v. Longerbeam [S. D.] 119 NW 1000.

Contracts held supported by sufficient consideration: Widow, given power coupled with interest in will, executed deed of property, with all others interested, to C. Will gave widow right to establish charitable institutions, and provided for descent of property to such institutions should she elect to establish them. She agreed with C that if she should so elect, she would so establish them as not to interfere with C's interest. Held, agreement was based on sufficient consideration, the protection of purchase price and notes given by C. Columbia Trust Co. v. Christopher [Ky.] 117 SW 943. Broker's **agreement not to charge commission** in case sale was not consummated because of defect in title, made before sale contract was entered into, was based on sufficient consideration, as owner entered into contract on faith of it, and broker made contract he would not otherwise have made. Ligon v. Wharton [Tex. Civ. App.] 120 SW 930. Expense and labor assumed by mortgagor of cattle in removing them to another county is sufficient consideration for **agreement by mortgagee to allow removal** of cattle for better pasturage or for sale. Ramsey v. Maberry, 135 Mo. App. 569, 116 SW 1066. **Note, given for interest in patent right,** held enforcible though expected profits by resale were not made. Mann v. Urquhart [Ark.] 116 SW 219. Delivery of patent to land sufficient consideration for **extension of time on note** given for land patent. Drake v. Pueblo Nat. Bank, 44 Colo. 49, 96 P 999. **Notes for corporate stock** were given under this agreement: After six months, maker could demand stock of payee and pay notes; at maturity, if unpaid, payee had option to keep stock and cancel notes, or assign stock and demand payment. Held, agreement was based on sufficient consideration. Dickson v. Eames, 134 Mo. App. 373, 114 SW 574. Where promissory **note delivered to attorney for his client** is payable to attorney or bearer, and turned over to client, question of consideration as between maker and attorney does not arise; note is valid if consideration passed from maker to client. Dicks v. Andrews [Ga.] 64 SE 788. **Obligation to sell** culls was part of contract leasing premises to buyers, who were not obligated to buy culls, but could do so if they wished. Held, obligation to pay rent was consideration for promise to supply culls, as well as for lease. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. **Contract to sell personal property to corporation** was valid though legal title to property was already in corporation, seller being owner of all its stock, which he was also selling, and the corporation being indebted to him for the property, which he had paid for personally. Taylor v. Danielsonville Cotton Co. [Conn.] 72 A 1080. **Consideration of one dollar for railroad right of way** sufficient to support specific performance of contract, in absence of fraud. Alabama Cent. R. Co. v. Long [Ala.] 48 S 363. Services performed in assisting in sale of department of business, not within contract for services, and agreement to waive commissions on sales in that department, held sufficient consideration for **agreement to pay part of bonus received by seller.** Muir v. Kalamazoo Corset Co. [Mich.] 15 Det. Leg. N. 1143, 119 NW 1079. Vendor agreed to return price of land if he failed to dig oil well on adjoining land, and he failed to dig the well. Deed to him from vendees was sufficient consideration for **promise to return price of land.** Mayes v. Miller [Tex. Civ. App.] 118 SW 725. Enhancement of values in vicinity sufficient consideration for execution of **deed** to right of way to railroad. United Inv. Co. v. Los Angeles Interurban R. Co. [Cal. App.] 101 P 543. Where contract provided for mining of ore by defendants on plaintiff's land, and suit threatened plaintiff's title, the latter's **agreement to pay for surveys** of land as part of defense of suit was upon sufficient consideration. Codman v. Adamson, 130 App. Div. 317, 114 NYS 408. Subcontractor quit work because contractor refused to pay him, and owner gave his **promise to pay subcontractor** if he would complete work. Held, owner's promise was original, and based on sufficient consideration. Howell v. Harvey, 65 W. Va. 310, 64 SE 249. Where railroad company promised to accept assignee of contracts with railroad, and assignment was then made, this was sufficient consideration for **promise of railroad to accept new contractors** and consent to assignment. Galbreath v. Wallrich [Colo.] 102 P 1085. **Contract not to publish** "any false or defamatory written statements or reports about the good name, business, property or stability of" certain insurance company, in consideration of delivery by said company of certain papers in its possession, etc., held supported by sufficient consideration. National Life Ins. Co. v. Myers, 140 Ill. App. 392. **Oil and gas lease** for five years, or so long as oil and gas shall be found, given for bonus of $55, lessee agreeing to complete well within three months, or pay $15 for each three months thereafter, held not void for want of consideration. Pyle v. Henderson, 65 W. Va. 39, 63 SE 762. Owner of oil rights on tract of land drilled, cased and equipped well which proved to be gas well. Owner of gas rights on same tract agreed to pay cost of drilling, casing and equipping well. Held that **agreement to pay cost of casing, etc., of gas well** was supported by sufficient consideration. Pittsburg Vitrified Paving & Bldg. Brick Co. v. Cerebus Oil Co. [Kan.] 100 P 631. Plaintiff's husband forbore to change life policy payable to defendant so as to make one-half of proceeds payable to plaintiff, upon **beneficiaries' agreement to pay one-half proceeds of policy to plaintiff.** Held, contract was based on sufficient consideration, enforcible by plaintiff. Waterhouse v. Waterhouse [R. I.] 72 A 642. Where lease prohibited assignment without lessor's written consent, and lessor promised to give such consent if lessee would find suitable tenant, and lessee spent time and labor in securing tenant, this was sufficient consideration for **lessor's promise to consent to assignment.** Underwood Typewriter Co. v. Century Realty Co., 220 Mo. 522, 119 SW 400. Lessees, after land had been flooded, offered to surrender lease, but were told they would be allowed to occupy land for two years, rent free, if they would clear part of land. Held, **agreement releasing rent** was supported by sufficient consideration. Clark v. Robertson Bros. & Co., 135 Mo. App.

The satisfaction of indebtedness to a payee, or a release of an obligation of one person, is a sufficient consideration to support a new note or promise by a third person.[63] The consideration must have been mutually assented to.[64]

90, 115 SW 514. **Bond to pay rent** and lease, executed on same day, but lease was first construed together, and bond held based on sufficient consideration. Dodd v. Vucovich, 38 Mont. 188, 99 P 296. Conveyance of real estate by father to son held a sufficient consideration for **promise by son to father to pay rent,** though land had already been conveyed without any reservation in deed. Henton v. Henton, 143 Ill. App. 53. **Contract to form present partnership,** to become corporation in which parties were to hold stock, one to furnish capital and devote part of his time, and the other to give business all his time and receive a salary, was based on valid consideration. Doan v. Rogan, 79 Ohio St. 372, 87 NE 263. **Conveyance by husband to wife** in order to make provision for her support in case of his death is supported by meritorious consideration, such that equity will reform it. Partridge v. Partridge, 220 Mo. 321, 119 SW 415. Continuation of marital relation on part of wife who had good cause to leave husband held sufficient consideration for **note given to wife by husband.** Christie's Estate, 36 Pa. Super. Ct. 506. **Contract by wife to pay sums to husband's relatives** held based on sufficient consideration, to wit, conveyance to wife of all husband's property. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819. **Note given by widow to creditor of husband's estate,** in which she promised to pay debt if estate did not, consideration being withdrawal by creditor of objections to allowance of year's support out of estate, held valid. Golding v. McCall, 5 Ga. App. 545, 63 SE 706. **Agreement to pay for care and support** of promisor's sister held supported by promisee's agreement to care for such sister. Buell v. Adams [Mich.] 16 Det. Leg. N. 309, 121 NW 752. Agreement of son to care for mother during life sufficient consideration for conveyance of land to him. Ames v. Moore [Or.] 101 P 769. Deed in consideration of grantor being supported during her life rests upon sufficient consideration. Strothers v. Woodcox [Iowa] 121 NW 51. **Payment of debt after discharge in bankruptcy** is sufficient consideration to support transfer of stock. Hill v. Kerstetter [Ind. App.] 86 NE 858.

Contracts held without consideration: Lease of part of premises recited that lessor had $500 interest in firm from which he was withdrawing, and that lessee was to have use of said $500 for one year and then repay it to lessor. Held, lessor having no interest in firm, promise to pay was without consideration. Schroeter v. Bowdon [Tex. Civ. App.] 115 SW 331. Evidence held to show that note was without consideration. Mussey v. Dempsey, 60 Misc. 317, 113 NYS 271. **Note by parent for claim against minor son** to whom payee had previously sold a milk route. Gilbert v. Wilbur [Me.] 72 A 868. **Note for work on house** without consideration where payee abandoned work without substantial performance; neither payee nor transferee with notice could enforce it. Tice v. Moore [Conn.] 73 A 133. Where lessee gave **note for rents to accrue** as well as for other indebtedness, notes were without consideration as to rents, there being no obligation to pay them except to owner. Roberts v. Feringer [Tex. Civ. App.] 113 SW 149. **Broker's promise to pay half cost of collecting purchase price** was voluntary and without consideration, where he had already found a purchaser. Pinkerton v. Hudson, 87 Ark. 506, 113 SW 35. Assertion of tax title under void assessment no consideration for **mortgage by owner to holder of tax title.** State Land Co. v. Mitchell [Ala.] 50 S 117. Writing held mere **license to cut trees** without definite term or consideration; void and not enforcible. Blackshear v. Hood, 120 La. 966, 45 S 957. Where trust deed was given to secure purchase price of land, and trustee and owner's husband made a **promise to apply payments on prior trust deed,** there could be no recovery of amount paid (after default and sale under trust deed) from trustee and owner's husband, their promise being without consideration. Savage v. Cauthorn [Va.] 64 SE 1052. After execution of contract by one party, his **promise to release** the other from liability thereunder, without any new consideration, and without change of position by other to his prejudice, is not enforcible. George v. Lane [Kan.] 102 P 55. Where insurance company paid only amount due for claims at time, **release of future claims** as well as past was without consideration. Moore v. Maryland Casualty Co., 150 N. C. 153, 63 SE 675. Where vendor tendered good title but vendee requested more time for examination of it, **agreement by vendor to return deposit** and pay cost of examination was without consideration, vendor not being released from its obligation to convey. Green-Shrier Co. v. State Realty & Mortg. Co., 129 App. Div. 581, 114 NYS 49. Where salesman contracted to sell goods for certain commission, subsequent oral **promise to pay commission** on reorders was without consideration. Altmayer v. Lahm, 113 NYS 964. After broker had arranged exchange of property, and contract had been executed, his commission was earned; hence **agreement not to claim commission** unless deeds were made and exchanged was without consideration. Rohkohl v. Sussman, 61 Misc. 246, 113 NYS 586. **Deputy sheriff's acceptance of less than amount allowed him by law** did not release sheriff's liability for full amount, being without consideration. Badenhafer v. Hogan [Iowa] 120 NW 659.

63. Obligee in party wall contract released obligor from his duty to contribute on using the wall. This was sufficient consideration for agreement of third person to pay when he or his successors took possession of or used the wall. Hurford v. Smith [Okl.] 103 P 851. One who makes and delivers his note to another, to be used to pay the debts of the latter, and they are so used, cannot be heard to defend on the ground that he received no consideration for the notes. Central Typesetting Co. v. Ober, 36 Pa. Super. Ct. 291. Acceptance of a note in payment of a debt due by third persons is a sufficient consideration for the note. Broom & Co. v. Harrah, 143 Ill.

Mutual promises.[See 11 C. L. 742]—Mutual promises, of a substantial character, not illegal, and involving benefit to respective promisors, are usually sufficient.[65] If each of the parties to a contract agrees to release the other from further obligation thereunder, the release of each furnishes a consideration for the release of the other.[66]

Forbearance to enforce legal rights.[See 11 C. L. 742]—Forbearance to sue,[67] discontinuance of a suit,[68] abandonment of an appeal,[69] and the extension of time in which to pay a debt,[70] have been held sufficient consideration, and the agreement of the debtor to keep the money and pay interest has been held a valid consideration for the extension,[71] and so also the payment of interest in advance.[72] An extension of time to the debtor is sufficient consideration for the promise of a third person to pay the debt.[73]

App. 476. Consideration may not flow from promisee but may consist in promise or undertaking of one or more of third persons. Bing v. Bank of Kingston, 5 Ga. App. 578, 63 SE 652. Cancellation of notes of company with which defendant had intimate business relations, to insure continuance of these relations undisturbed, was sufficient consideration for notes by defendant. Bacon v. Montauk Brew. Co., 130 App. Div. 737, 115 NYS 617. **Agreement to assume payment** of mortgage sufficient consideration for extension of time. Huene v. Cribb, 9 Cal. App. 141, 98 P 78. C's assumption of debt due by B to A in order to enable C to make trade with B held supported by A's release of B. Daniel Sons & Palmer Co. v. Dickey [Ga. App.] 65 SE 301. Assumption of liabilities sufficient consideration for transfer of property when bearing fair relation to value. Barrie v. United R. Co. [Mo. App.] 119 SW 1020. Conveyance by deed for nominal consideration, and possession given, by mortgagor to grantee, sufficient consideration for grantee's promise to pay mortgage. Kenney v. Streeter [Ark.] 114 SW 923. Evidence held sufficient to go to jury on question whether consideration to assume note was transfer of property from original to new debtor. Naylor v. Davis, 130 App. Div. 311, 114 NYS 248.

64. Consideration implies mutuality; that minds of parties have met and assented on that which passes between them as reason for contract. Burgher v. Wabash R. Co. [Mo. App.] 120 SW 673.

65. Doan v. Rogan, 79 Ohio St. 372, 87 NE 263. Under ordinary circumstances, mutual promises are a sufficient consideration one for the other. Weed v. Spears, 193 N. Y. 289, 86 NE 10. Consideration for contract may consist in promise that an agreed beneficial thing shall afterwards be done for the maker. Bing v. Bank of Kingston, 5 Ga. App. 578, 63 SE 652. A promise to do, forbear, or suffer, given in return for like promise, is consideration for executory contract, provided that promise is not illegal or against public policy. Beauchamp v. Couch [Tex. Civ. App.] 117 SW 924. Evidence held to show lease and instrument whereby lessor promised to pay bonus or commission of $300 were practically contemporaneous and that mutual promises of parties then made were sufficient consideration. Silberman v. Horowitz, 114 NYS 1. Mortgage and note, given with understanding that they were to take effect at once, based on sufficient consideration, agreement being to advance money to mortgagor from time to time. Immaterial that no money was actually advanced. Marling v. Fitzgerald, 138 Wis. 93, 120 NW 388.

66. Chandler v. Griffin [Ga.] 65 SE 128.

67. Waiver of legal right or forbearance to sue is legal consideration. Golding v. McCall, 5 Ga. App. 545, 63 SE 706. Promise of bank to forbear suing indorser on note in consideration of new demand note given by indorser and wife as security was binding, since indorser did something he was not previously bound to do. Lowell v. Bickford, 201 Mass. 543, 88 NE 1. Agreement not to contest will held sufficient consideration to support promise to leave property by will. Halcombe v. Griggs [N. J. Law] 73 A 37.

68. Agreement to discontinue suit for divorce and condone offenses valuable consideration for husband's promise to convey land in case he resumed improper relations with another woman. Darcey v. Darcey [R. I.] 71 A 595.

69. Abandonment by debtor, at request of creditor, of appellate proceedings to review judgment on which money was due, was sufficient additional consideration to support promise to accept as satisfaction a less sum than that due on the judgment. Roberts v. Banse [N. J. Law] 72 A 452.

70. Extension of time is sufficient consideration for note. Zimbleman v. Finnegan [Iowa] 118 NW 312. Where bank held two notes, and debtor claimed one was forgery, his renewal note for both was based on sufficient consideration; surrendering two notes, and extending time of payment on both. First State Bank of Corwith v. Williams [Iowa] 121 NW 702. An oral agreement for forbearance, and giving time for payment of money then due, is sufficient consideration for agreement of debtor to pay interest thereon. Sanford v. Lundquist, 80 Neb. 408, 118 NW 129.

71. Definite agreement for extension of time on note for fixed period is based on sufficient consideration though maker parts with nothing and agrees only to keep money for definite time and pay same rate of interest. Conkling v. Young [Iowa] 120 NW 353.

72. Lancaster v. Prussing, 139 Ill. App. 33. But, in the absence of any evidence to support the agreement, it is not either prima facie proof or presumptive evidence of such an agreement. Id.

73. An agreement to forbear pressing a debt for a definite time, or for a reasonable

The compromise of a doubtful right See 11 C. L. 742 asserted in good faith [74] is a sufficient consideration for a contract,[75] though it afterwards appears that the claim was in fact unfounded,[76] but the release of the entire debt for a sum certain upon payment of a part of the amount due is without consideration and void.[77] A release of an entire debt in consideration of the payment of articles different from the thing due according to the terms of the contract, though those articles are of much less value than the thing due, is valid,[78] under the doctrine of accord and satsifaction.[79]

Love and affection. See 9 C. L. 666—Blood relationship and natural affection is a good consideration, as distinguished from a valuable one,[80] but cannot be made the predicate of legal liability.[81]

Marriage See 11 C. L. 743 will support an antenuptial contract.[82] An agreement

time, or to grant a renewal or extension, is a detriment to the creditor and is a good consideration for a contract by a stranger to pay the debt. Jones v. Britt [C. C. A.] 168 F 852. A debt due from a third person is a good consideration for a note if there was an express or implied agreement for an extension of time to the principal debtor. Zimbleman v. Finnegan [Iowa] 118 NW 312. An agreement will be implied if the debt is then due and the note is made payable at a future day. Id.

74. Good faith of claimant is usually test of whether compromise of claim is good consideration. Osborne v. Fridrich, 134 Mo. App. 449, 114 SW 1045. Reasonable minds might differ on question of validity of policy where insured had stated falsely that he had never before applied for insurance and been rejected, hence compromise of claim in such case was supported by consideration. Western & So. Life Ins. Co. v. Quinn [Ky.] 113 SW 456.

75. Reinecke v. Bailey, 33 Ky. L. R. 977, 112 SW 569; Osborne v. Fridrich, 134 Mo. App. 449, 114 SW 1045. Courts will not inquire into adequacy of consideration of compromise fairly and deliberately made. Worcester Loom Co. v. Heald [N. J. Law] 72 A 421.

Contracts sustained: Agreement to satisfy mortgage is valuable consideration for another agreement whether it represented valid indebtedness or was disputed claim constituting cloud on title. Sarasohn v. Kamaiky, 193 N. Y. 203, 86 NE 20. Compromise of claim for personal injuries is good consideration for **promise to give employment** to person injured. Kelly v. Peter & Burghard Stone Co. [Ky.] 113 SW 486. **Compromise of bona fide dispute as to ownership of property** is sufficient consideration for waiver rights, but such contract is not binding if other party waives nothing and there is no other consideration. Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 SE 1056. Widow's claim to personal property under will being doubtful, **family settlement** would not be disturbed on ground of inadequacy of consideration as to one party. Bell v. White [N. J. Eq.] 73 A 861. **Note given to contestant of will** in consideration of her withdrawing from contest valid, contest being in good faith. Wright v. Bayless [Ky.] 118 SW 918. Where the construction of restrictions in a deed was doubtful, as applied to conditions which had arisen, a release of rights thereunder was a valuable consideration for other **restrictive covenants.** Codman v. Bradley, 201 Mass. 361, 87 NE 591. Bona fide difference of opinion between city and street railway company as to latter's liability for paving was sufficient consideration for agreement to arbitrate. McKennie v. Charlottesville & A. R. Co. [Va.] 65 SE 503. The adjustment of a bona fide dispute as to the existence of conditions upon which it was agreed that a sum should or should not become due and payable is a good consideration, as where there was dispute as to cause of death, whether suicide or not, **compromise of claim for insurance** was valid. Sovereign Camp, W. of W. v. Bridges [C. C. A.] 165 F 342.

76. Worcester Loom Co. v. Heald [N. J. Law] 72 A 421. Deed to land, given to settle claim to larger tract, based on good consideration, though the claim proves not to be as sound as was thought. Jones v. Gatliff [Ky.] 113 SW 436.

77. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283. Where there is liquidated sum due, payment of less in satisfaction not binding without some other consideration. Sovereign Camp, W. of W. v. Bridges [C. C. A.] 165 F 342; Scott v. Rawls [Ala.] 48 S 710. See, also, Accord and Satisfaction, § 1B.

Part payment: See Payment and Tender, § 1.

Formal releases: See Releases.

78. The presumption being that the articles received in payment are of special value to the recipient. Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co. [C. C. A.] 165 F 283.

79. See Accord and Satisfaction.

80. Gift for such consideration should prevail unless in fraud of creditors or purchasers. Candee v. Connecticut Sav. Bank, 81 Conn. 372, 71 A 551. Love and affection sufficient consideration for conveyance **as between husband and wife.** Robertson v. Hefley [Tex. Civ. App.] 118 SW 1159. Love and affection sufficient to sustain **deed from father to daughter.** Burrow v. Hicks [Iowa] 120 NW 727. Immaterial that deed from father to daughter recited money consideration which did not pass, deed being based on love and affection. Burrow v. Hicks [Iowa] 120 NW 727.

81. Promise founded upon consideration of affection or gratitude, such as a promise to contribute to support of parent, cannot be foundation for legal action. Schwerdt v. Schwerdt, 141 Ill. App. 386.

82. Intended marriage is sufficient consideration to support antenuptial contract whereby each waives claims to share in es-

to marry, entered into at the request of a third person, accompanied by a promise to consummate the marriage upon execution of a certain contract by such third person, is a sufficient consideration for the obligation of the third person.[83]

Legal duty.[See 11 C. L. 743]—A promise to do what one is already obligated to do, by law or by contract, is not a sufficient consideration,[84] but a promise to assist another in the discharge of a legal duty owed by both is enforcible,[85] and so also a promise to do what another is legally bound to do.[86]

Moral obligation.[See 11 C. L. 744]

A past consideration [See 11 C. L. 744] will not ordinarily support a promise,[87] but it is held that security for an antecedent debt is enforcible.[88]

Adequacy.[See 11 C. L. 744]—Courts of law will not ordinarily inquire into the adequacy or inadequacy of considerations,[89] though inadequacy may bar equitable relief.[90] In any case a very slight consideration, provided it be valuable and free from fraud, will support a contract.[91]

Failure of consideration.[See 11 C. L. 744]—A failure of consideration,[92] in whole

tate of other. Settles v. Settles [Ky.] 114 SW 303. See Husband and Wife, § 2B.

83. Agreement by son to marry certain woman is sufficient consideration for father's contract to maintain son in part, and to will property to him. Sarasohn v. Kamaiky, 193 N. Y. 203, 86 NE 20.

84. Jones v. Longerbeam [S. D.] 119 NW 1000; Weed v. Spears, 193 N. Y. 289, 86 NE 10. Where lessee promised to remain, and purchaser of premises and assignee of lease promised lessee three months' rent free if he would make repairs, promise was without consideration, since lessee promised nothing that he was not already bound to do by lease. Kaye v. Hoage, 63 Misc. 332, 117 NYS 122. Agreement of landlord to repair demised premises after making of lease and the delivery of possession thereunder held nudum pactum. Strong v. Soodvoisky, 141 Ill. App. 183. **A new promise to do less** than party has already agreed to do is not a good consideration for the promise of the other party to do more than he is obligated to do. Weed v. Spears, 193 N. Y. 289, 86 NE 10.

85. Children being under legal duty of supporting poor parents (Code Cr. Proc. § 914), and plaintiff having to support his father on a farm leased by plaintiff, defendant's promise to pay part of plaintiff's rent, in aid of such support of their father, was based on sufficient consideration. Canfield v. Canfield, 118 NYS 530.

86. Where property was bought with funds stolen from buyer's employers, and title placed in his wife, his duty to return what he stole was sufficient consideration to support transfer by wife. Bishop v. Howe, 117 NYS 896.

87. Guaranty to secure **pre-existing debt** void. Polk Print. Co. v. Smedley [Mich.] 15 Det. Leg. N. 1001, 118 NW 984. Mortgage by wife to secure pre-existing debt of husband not based on any new consideration is void. Bell v. Bell, 133 Mo. App. 570, 113 SW 667. Where mortgagee advanced other sums, not included in mortgage, to mortgagor, and some days later they agreed that mortgage should secure such advances, such subsequent oral agreement was not based on any new or sufficient consideration and was unenforcible. Hayhurst v. Morin, 104 Me. 169, 71 A 707. **Services already rendered do not** furnish sufficient consideration for subsequent promise. Conant v. Evans, 202 Mass. 34, 88 NE 438. Written promise to pay broker's commission, after broker had performed services, was unenforcible. Shields v. Sterrat [N. J. Law] 71 A 1129. Where a contract whereby part of debt was satisfied and portion of **trust deed** released had been fully executed, there was no consideration for subsequent written agreement allowing interest to one party for the release. Catulla v. Barlow [Tex. Civ. App.] 115 SW 294. **Where materials had been sold and delivered to buyer,** subsequent agreement by third person guaranteeing payment was without consideration. Delinsky v. Brodow, 113 NYS 7.

Consideration not past: Immaterial that conveyance of property to wife was consummated before her agreement to give certain sums to his relatives had been reduced to writing, oral agreement being in existence prior to conveyance. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819.

88. Chattel mortgage given pursuant to previous agreement to secure debt thereby is valid; would be valid even if given for pre-existing unsecured debt. Kelly v. Ryan [Iowa] 118 NW 901.

89. See 9 C. L. 669; 11 C. L. 744. Courts will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made. Worcester Loom Co. v. Heald [N. J. Law] 72 A 421.

90. Civ. Code, § 3391, barred specific performance when consideration for land was inadequate. Valentine v. Streeton, 9 Cal. App. 640, 99 P 1107.

91. Weiss v. Swift & Co., 36 Pa. Super. Ct. 376.

92. **Held a failure:** Where mortgage and bond were based wholly on promises, none of which were kept. Newman v. Overbaugh, 116 NYS 369. Where stock food sold was represented as suitable for certain purpose and proved to be valueless. Swift & Co. v. Redhead [Iowa] 122 NW 140. Where railroad company failed to convey perfect title to land exchanged for right of way. Mahn v. Chicago & M. Elec. R. Co., 140 Wis. 8, 121 NW 645. Notes given for secret process of china manufacture without consideration,

or in part, precludes a recovery on the contract pro tanto,[93] and may be ground for rescission of the contract,[94] and the recovery of money or property parted with pursuant thereto.[95] Either want or failure of consideration may now generally be pleaded as a defense to a contract under seal,[96] especially where the contract is one not required to be under seal.[97]

§ 3. *Validity of contract. A. General principles.*[98]—See 11 C. L. 745—Generally speaking, parties are free to make such contracts as they please, so long as they do not violate good morals, public policy or the law,[99] and, in the absence of fraud, mistake, or other vitiating circumstances, they will, if legal, be enforced as made.[1] Presumptively a contract is legal,[2] and the intention of the parties lawful,[3] and the burden is upon one asserting its invalidity to prove it.[4]

Whether a particular contract is prohibited by statute depends upon the intention of the legislature.[5] Contracts are not necessarily void by reason of the fact that a party thereto has failed to comply with conditions prescribed by statute for the conduct of a business, trade, or profession,[6] unless such conditions are for the

where seller had sold previously to third person the same process, except one ingredient which had no substantial effect and was no secret. Sweeting v. Iroquois China Co., 129 App. Div. 777, 113 NYS 945.

Held not a failure: Where there was failure to do act, the promise to do which was the real consideration. Newton v. Clarke, 138 Ill. App. 196. Defense of failure of consideration held not shown where there was no evidence as to value of property for which note was given. Pierce v. Coryn, 139 Ill. App. 445. No failure of consideration of note to pay university certain sum for gymnasium, to be erected on grounds, in consideration of scholarship and benefits to maker's granddaughter, though school was consolidated with another and seat of institution moved, and it was limited to men only, beneficiary having had 6 years' schooling, and scholarship being offered her. Miller v. Central University [Ky.] 112 SW 669. Where lease covered many rooms, including barroom, and gave privilege of subletting, passage of act prohibiting sale of liquor did not entitle lessee to abatement of part of rent for bar room. Lawrence v. White, 131 Ga. 840, 63 SE 631. One who buys notes payable in labor cannot avoid his contract to pay for notes because of death of person who agreed to perform labor; he takes his chances on such contingency unless he protects himself against it by his contract. Potts v. Riddle, 5 Ga. App. 378, 63 SE 253.

93. See 11 C. L. 744, n. 24.

94. See post, § 8B.

95. Plaintiff paid money upon agreement that corporation was to be formed and stock issued to him. Upon failure to form corporation, he was entitled to recover money paid in assumpsit. Sherwin v. Sternberg [N. J. Law] 71 A 117.

96. Sims v. Scheussler [Ga. App.] 64 SE 99; Lacey v. Hutchinson [Ga. App.] 64 SE 105.

97. Cancellation of mortgage need not be under seal; want of consideration is defense. Sims v. Scheussler [Ga. App.] 64 SE 99.

98. **Search Note:** See notes in 16 L. R. A. 423; 24 Id. 315; 14 L. R. A. (N. S.) 274; 120 A. S. R. 468; 11 Ann. Cas. 124.

See, also, Contracts, Cent. Dig. §§ 9-40, 344-353, 455-722, 1760, 1761, 1785, 1826; Dec. Dig. §§ 7-10, 56-59, 101-142; 6 Cyc. 9, 10, 12-18; 9 Cyc. 244, 245, 323, 327-335, 465-576; Assignments, Cent. Dig. § 13; Dec. Dig. § 8.

99. See 9 C. L. 670; 11 C. L. 745. See, also, this section, subsections D-K. Parties cannot by agreement change the law, and, hence, an agreement that a contract which the law requires to be in writing shall be valid though in parol or that a contract shall not be valid unless in writing, though law allowe it to be oral, is not enforcible. Northwestern Nat. Ins. Co. v. Avant [Ky.] 116 SW 274.

1. See, also, post, § 4A. Unless opposed to good morals or public policy, the contract of parties is the measure of their rights. Pittsburg Bridge Co. v. St. Louis Transit Co., 135 Mo. App. 579, 116 SW 467.

2. Potts v. Riddle, 5 Ga. App. 378, 63 SE 253.

3. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19.

4. Bartelдes Seed Co. v. Border Queen Mill & Elevator Co. [Okl.] 101 P 1130.

5. Sunflower Lumber Co. v. Turner Supply Co. [Ala.] 48 S 510.

6. Sunflower Lumber Co. v. Turner Supply Co. [Ala.] 48 S 510. If the conditions are simply for administrative purposes, such as collection of revenue, and are imposed upon a business generally, specific transactions not being declared void, noncompliance with the conditions does not render the contract void. Id. Statutes imposing privilege or license taxes do not invalidate contracts of a corporation which has not paid the tax. Corporation could enforce note to it though tax not paid, under Code 1907, § 2361, subd. 26. Id. Failure of foreign corporation to comply with statutes to enable it to do business in the state does not make note to it void. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785. P. L. 1906, p. 513, making it misdemeanor to carry on business under fictitious name without filing with county clerk certificate giving true name and address, does not make contracts by such person void. He may recover on executed sale though no certificate filed. Rutkowsky v. Bozza [N. J. Err. & App.] 73 A 502. Where the ordinance or statute merely requires and fixes the amount of the license fee and contains no penalty or prohibition, a contract by an unlicensed person is not void. Applied to contract by

benefit of the public or the protection of those who deal with the persons subject to such conditions.[7] But where a statute prohibits engaging in a business or calling without having procured a license required by the statute, or where it expressly vitiates all contracts made by unlicensed persons engaged in such business or calling, a contract made by one not having a license generally held void.[8]

One who claims rights by virtue of a contract cannot at the same time claim that the contract is void.[9]

(§ 3) *B. Subject-matter or consideration.*[10]—See 11 C. L. 745—Contracts prohibited by statute,[11] or which involve the doing of a thing which is contrary to law,[12] good morals,[13] or public policy,[14] or the purpose of which is to aid in such violation of law, good morals, or public policy,[15] or which are founded upon a consideration which for any reason is illegal,[16] are void. But since the presumption favors le-

unlicensed broker. Recovery of commission allowed. Stiewel v. Lally [Ark.] 115 SW 1134.

7. Sunflower Lumber Co. v. Turner Supply Co. [Ala.] 48 S 510.

8. Stiewel v. Lally [Ark.] 115 SW 1134; Duluth Music Co. v. Clancy, 139 Wis. 189, 120 NW 854; Southwestern Slate Co. v. Stephens, 139 Wis. 616, 120 NW 408. See Licenses, § 6; Foreign Corporation, § 1.

9. Baker v. Baker, 139 Ill. App. 217.

10. **Search Note:** See notes in 53 L. R. A. 233; 1 L. R. A. (N. S.) 445; 6 Id. 469.
See, also, Contracts, Cent. Dig. §§ 9-40, 455-487, 509; Dec. Dig. §§ 7-10, 101-107; 6 Cyc. 9, 10, 12-18; 9 Id. 9, 244, 245, 466, 475-480, 569, 570, 575, 576; Assignments, Cent. Dig. § 13; Dec. Dig. § 8; 4 Cyc. 15; 7 A. & E. Enc. L. (2ed.) 114.

11. Where a statute prohibiting a contract declares it to be void, no enforcible promise or obligation can grow out of it. Security Life & Annuity Co. v. Castner, 149 N. C. 293, 63 SE 304. Bill of sale held by brewing company as security for liquor sold on premises void, under Code, c. 6, § 2423, which nullifies all securities, etc., made on account of liquor sold in violation of the chapter. Orke v. McManus [Iowa] 121 NW 177.

12. Heart v. East Tennessee Brew. Co. [Tenn.] 113 SW 364. Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is void, and hence note for price of mule was void when mule had glanders and sale was unlawful. Compagionette v. McArmick [Ark.] 120 SW 400. Agreement to allow subscriber for stock in corporation time in which to pay for stock, to apply his salary on it, etc., held void as in violation of Const. art. 12, § 6, requiring cash payment for stock. San Antonio Irr. Co. v. Deutschmann [Tex.] 114 SW 1174. Nor could subscriber recover value of franchise transferred to corporation, since this would in effect be enforcing illegal contract. Id. Plaintiff could not recover for supplies furnished defendant where he had paid defendant's chauffeur a discount on goods furnished, in violation of Pen. Code, § 384r. General Tire Repair Co. v. Price, 115 NYS 171.

Distinction between contracts malum in se and malum prohibitum is not recognized in North Carolina. Security Life & Annuity Co. v. Costner, 149 N. C. 293, 63 SE 304.

13. Heart v. East Tennessee Brew. Co. [Tenn.] 113 SW 364. See, also, post, § 3S.

14. See post, this section, subsections D-K.

15. Consent of property owner to maintenance of saloon on adjoining property is illegal consideration for note and invalidates note as whole and also lease given as part of same transaction. O'Connor v. Kleiman [Iowa] 121 NW 1088. Transaction whereby plaintiff bank's cashier deposited his personal note with defendant bank, and defendant then credited plaintiff with amount, to make plaintiff appear solvent in report to state auditor, was illegal. Kentucky & Indiana Bank v. Globe Bank & Trust Co. [Ky.] 116 SW 792. Lease of premises for use as cigar stand and saloon only invalid, where, under statutes and ordinances, no license could be granted for saloon on premises, owing to proximity to church. Dunn v. Stegemann [Cal. App.] 101 P 25.

16. **Held based on illegal consideration: Note secretly given to one creditor of bankrupt,** for amount of indebtedness over that creditor would receive from composition, to induce him to enter into composition, is void for illegality of consideration. Dicks v. Andrews [Ga.] 64 SE 788. **Note given for right of possession of Indian lands** held founded on illegal consideration when plaintiff's possession was unlawful, in that he was attempting to hold more than law allowed him. Combs v. Miller [Okl.] 103 P 590.

Held not based on illegal consideration: Where contract to marry was not based on promise of present or future sexual intercourse, though such intercourse subsequently took place, a release of the promise to marry, given upon consideration to support the woman, was valid, and the **contract to support** enforcible. Henderson v. Spratten, 44 Colo. 278, 98 P 14.

New promise founded upon illegal contract is tainted with illegality. Coffey v. Burke, 132 App. Div. 128, 116 NYS 514. Note and mortgage given in settlement of partnership formed for illegal purpose of carrying on gambling house are unenforcible, being based on illegal consideration. Mackin v. Shannon, 165 F 98. Rule that new contract founded on one the consideration for which was illegal is void does not apply where original consideration was legal, though the original contract was void for other reasons of public policy. Curry v. Lafon, 133 Mo. App. 163, 113 SW 246. **Novation** is treated in another topic. See Novation.

gality and lawful intent, contracts will be upheld if reasonably capable of a construction which will make them valid.[17]

Definiteness or certainty of terms. See 11 C. L. 747—In order to be enforcible, a contract must be reasonably definite and certain in its terms[18] or capable of being made so.[19] An agreement to make a contract in the future is not binding unless

17. Barteldes Seed Co. v. Border Queen Mill & Elevator Co. [Okl.] 101 P 1130. Where party gave **notes for liquors** and bar fixtures, when sale of liquors was prohibited by law, but they could be kept and used for same purposes, it would be presumed that purpose of parties was legal, and not illegal, and that notes were valid. Davis v. Kuehn [Tex. Civ. App.] 119 SW 118. If druggist kept stock of beers and whiskies for purpose of illegal sale, **insurance on stock of liquors** was void, as aiding violation of law, but if druggist's purpose was legal, to use liquors for legal purpose only, insurance was valid, and mere fact of having liquors in store was not conclusive. Kellogg v. German American Ins. Co., 133 Mo. App. 391, 113 SW 663. **Contract involving change of grade** of street held not necessarily invalid, since consent of city and adjoining owner only was required, and presumption was that it had been or would be secured. Bigham v. Wabash-Pittsburg Terminal R. Co. [Pa.] 72 A 318. Evidence insufficient to show that purpose of **contract to furnish market reports** was to enable plaintiff to deal in margins in violation of law. Western Union Tel. Co. v. Bradford [Tex. Civ. App.] 114 SW 686. **Sale of grain** contemplating actual future delivery is valid, though delivery is in fact made. Id. **Contract for forming corporation, selling stock, etc.,** not invalid under Rev. Laws 1902, c. 74, § 7, which is aimed at stock gambling. Wood v. Farmer, 200 Mass. 209, 86 NE 297. **Attorney's contract to pay creditor's claim** if creditor would sign petition to have debtor declared bankrupt, so that attorney could earn fees, was not illegal as to creditor, and he could enforce it against attorney. Bernard v. Fromme, 116 NYS 807. Parties were not in pari delicto. Attorney could not set up own wrongful act in defense. Id.

18. **Held sufficiently definite: Contract to leave property by will** in consideration of promise not to contest will of ancestor of parties. Holcombe v. Griggs [N. J. Law] 73 A 37. **Agreement to waive lease** and rentals thereunder if lessee would plant land wholly to corn, and in case of crop failure. Jones v. Longerbeam [S. D.] 119 NW 1000. **Contract to assign** half interest in invention held to sufficiently describe invention so as to warrant specific performance. McRae v. Smart [Tenn.] 114 SW 729. **Contract to support** woman, upon release of promise to marry, not void for uncertainty because amount to be paid was not fixed. Henderson v. Spratten, 44 Colo. 278, 98 P 14. **Contract to supply material** for use in certain business for certain time held sufficiently definite as to quantity. Marx v. American Malting Co. [C. C. A.] 169 F 582.

Contracts held not sufficiently definite: Contract providing that one should not run corn sheller "in the territory contiguous" to certain town held void for uncertainty. Hoff v. Leneerman, 143 Ill. App. 170. **Contract for plaintiff and tending corn void for uncertainty** where amount to be paid for such work cannot be ascertained from contract. Stoneking v. Long, 142 Ill. App. 203. **Contract of sale** of goods held to have been an agreement to purchase during a certain period a certain amount in moneys' worth of certain kinds of goods, the exact goods to be agreed upon within the period specified, and, until an agreement was reached as to the exact goods to be purchased, there was no contract in which the legal relations between the parties was determined. National Bed Co. v. Bates, 12 Ohio C. C. (N. S.) 154. A contract for the purchase of lumber, which is so indefinite that the amount to be furnished under the contract cannot be ascertained with any degree of certainty, either from the contract itself or from extrinsic evidence, is not enforcible. Phillips v. Farrin Lumber Co., 8 Ohio N. P. (N. S.) 274. Evidence held not to show certain and definite contract to sell land. Thompson v. Burns, 15 Idaho, 572, 99 P 111. Writing relating to sale of bark or timber too uncertain, vague, and indefinite, to be enforced, when it did not specify parties to be bound nor time of beginning or end of agreement nor timber or land on which it was located. James v. Penn Tanning Co., 221 Pa. 634, 70 A 885. **Contract to convey,** providing: "We, the undersigned citizens of * * * voluntarily agree to deed and redeed to the old lines as they stand as present." Armstrong v. Henderson [Idaho] 102 P 361. **Contract to secure loan** from company if defendant would take two policies of life insurance held void as uncertain and indefinite, no time for repayment nor conditions of security being fixed. Smith v. Dotterweich, 132 App. Div. 489, 116 NYS 396. **Contract between promoters and third person,** whereby latter agreed to take stock and was given option to take part in management of corporation on same terms as promoters, too indefinite to be enforced, no particular office, no term, and no salary being specified. Hampton v. Buchanan, 51 Wash. 155, 98 P 374. **Agreement not to press subscriber for payment for stock,** to allow time, to apply salary, etc., held not enforcible because too vague and indefinite as to time for payment. San Antonio Irr. Co. v. Deutschmann [Tex.] 114 SW 1174.

19. That time of **extension of note** was not specified did not make extension void for uncertainty as between parties thereto. Drake v. Pueblo Nat. Bank, 44 Colo. 49, 96 P 999. Correspondence held to make valid **contract to furnish cut stone** for buildings, though time of delivery and payment not specified, these being supplied by law; delivery, within reasonable time; payment, on delivery. Bollenbacher v. Reid [Mich.] 15 Det. Leg. N. 961, 118 NW 933. **Agreement to sell timber** on described land, accepted according to its terms, was not indefinite because payment was to be at 50 cents per 1,000 feet as and when timber was cut, since this was capable of being made definite. Kent v.

all the terms and conditions are agreed upon and nothing is left to future negotiations.[20]

(§ 3) *C. Mutuality.*[21]—See 11 C. L. 747—Mutuality is essential to the validity of a contract; that is, it must be binding upon both parties,[22] but this rule does not

Davis Bros. Lumber Co., 122 La. 1046, 48 S 451. **Contract to transfer shares of stock** to plaintiffs in consideration of their using their best energies to sell the stock of a corporation and assisting in advancing its interests held not too indefinite after they had performed by selling all shares held for sale. Turley v. Thomas [Nev.] 101 P 568.

20. St. Louis & S. F. R. Co. v. Gorman [Kan.] 100 P 647.

21. Search Note: See notes in 15 L. R. A. 218; 8 L. R. A. (N. S.) 433; 11 Id. 713; 13 Id. 164.

See, also, Contracts, Cent. Dig. §§ 21-40, 344-353; Dec. Dig. §§ 10, 56-59; 6 Cyc. 10; 9 Id. 244, 245, 323, 327-335; 15 A. & E. Enc. L. (2ed.) 933.

22. Contract unilateral in form, executed by one party only, does not become mutual until acceptance by the other party. Levin v. Dietz, 194 N. Y. 376, 87 NE 454. As to what constitutes acceptance, see ante, § 1B. Wholly executory contract for mutual acts does not bind one party unless and until it becomes binding on the other; mutuality is essential. Hopkins v. Racine Malleable & Wrought Iron Co., 137 Wis. 583, 119 NW 301.

Held mutual: Excavating contract between plaintiff and third person, executed after defendant had agreed to furnish cars and haul away the material excavated. St. Louis, etc., R. Co. v. Clark [Ark.] 119 SW 825. **Contract of employment** of acrobat held mutual as to winter season, though providing for performances at times and places which employer might designate, since employe could recover if employer refused to designate any time or place. Keith v. Kellermann, 169 F 196. Contract employing physician, for expenses and salary, and agreeing to introduce and recommend him, latter agreeing to give best services, and not to engage in practice for five years, in same town, after termination of contract, not lacking in mutuality. Freundenthal v. Espey [Colo.] 102 P 280. That employer had right to terminate contract on 30 days' notice did not affect mutuality of employment contract. McCall Co. v. Wright, 133 App. Div. 62, 117 NYS 775. Though contract did not in terms bind plaintiff to engage defendant to work, though defendant was obligated to serve, it did not lack mutuality, the obligation to employ being implied. Id. **Contract to form present partnership,** to be later made corporation, in which parties would hold stock, fixing parties' duties and obligations, not lacking in mutuality because corporation was not bound, not being party, there being two parties between whom agreement was binding. Doan v. Rogan, 79 Ohio St. 372, 87 NE 263. **Contract for exclusive right to sell goods** in certain territory, the goods to be billed at discount from list prices, and such party agreeing not to sell other goods in competition and to push sale of goods under contract, is mutual. Peck-Williamson Heating & Ventilating Co. v. Miller [Ky.] 118 SW 376. **Garbage picking contract** between city and defendant, whereby city gave defendant the privilege of sorting and picking out and appropriating garbage at certain dumps for certain weekly payments to the city, which reserved right to change location and increase number of dumps, held to bind city to furnish garbage, and hence to be mutual. City of New York v. Paoli, 63 Misc. 411, 116 NYS 544. **Stock notes** were given under agreement that in six months stock, which payee owned, could be demanded and notes should then be paid, or at maturity of notes payee could surrender stock and demand payment of notes, or destroy notes and keep stock. Held, contract mutual. Dickson v. Eames, 134 Mo. App. 373, 114 SW 574. **Contract of sale** of ice business bound vendor to buy ice of vendee at $2.00 per ton for certain time. Held vendee was bound to furnish ice at $2.00 for term specified. Secor v. Ardsley Ice Co., 133 App. Div. 136, 117 NYS 414. Proposal to contractor having contract for school building to furnish all timber, needed for the building, of dimensions required by specifications, accepted by contractor, was mutual contract to sell and other to buy. Campfield v. Sauer [C. C. A.] 164 F 833. Contract, signed by both parties, reciting that one agrees to sell property to other at named price and on terms stated and that part of price is paid, and that mutual obligations are settled thereby, is not unilateral Henderson v. Phillips [Ga. App.] 65 SE 40. Offer to sell standing timber, if accepted, held not lacking in mutuality, where other party was bound to pay taxes on timber, remove it within certain time, pay certain prices, and contract was to be void if railroad was not built within certain time. Riley v. Union Sawmill Co., 122 La. 863, 48 S 304. **Agreement to assign** half interest in invention when completed, for which other party was to supply tools and materials necessary to make model, and money to secure patent, was mutual. McRae v. Smart [Tenn.] 114 SW 729. **Trust agreement** held not lacking in mutuality. Baker v. Baker, 139 Ill. App. 217.

Held not mutual: Where contract for **sale** of lumber is so indefinite as to amount to be furnished thereunder that such amount cannot be ascertained with any degree of certainty, either from contract itself or from extrinsic evidence, it is void for lack of mutuality. Phillips v. Farrin Lumber Co., 8 Ohio N. P. (N. S.) 274. Writings construed as unilateral agreement to sell, without obligation to buy. Levin v. Dietz, 194 N. Y. 376, 87 NE 454. Offer by defendant to furnish iron castings for specified time at certain price not binding on defendant as to orders given thereunder, plaintiff not being bound to buy. Hopkins v. Racine Malleable & Wrought Iron Co., 137 Wis. 583, 119 NW 301. Mere promise to sell and deliver cotton at certain place and at fixed price not enforcible, where there was no promise by vendee to buy or pay. Mallett v. Watkins

apply where the contract has been executed in whole or in part,[23] nor does it apply to so-called "unilateral" contracts. As to the latter, the only question is whether the promise is supported by a consideration.[24]

(§ 3) *D. Public policy in general.*[25]—See 11 C. L. 748—Contracts which are contrary to public policy, that is, injurious to the state or the public,[26] are void,[27] and the state is not bound by the fact that the contracting parties to an illegal agreement are satisfied therewith, but may inquire whether others and especially the public at large are prejudiced thereby.[28] A contract will be held contrary to public policy only when the question is free from doubt [29] and when this result cannot be avoided by any other reasonable construction,[30] and the burden of establishing invalidity on this ground is on the party asserting it.[31] In determining questions of public policy, courts may look to the entire body of law, statutory, common, and judicial decisions,[32] and the rights of the parties as well as of the general public are to be considered.[33]

[Ga.] 64 SE 999. Purported contract whereby plaintiff agreed to sell and deliver and defendant to receive and pay for all ties that plaintiff could produce and ship up to certain date, at fixed price, void for want of mutuality, plaintiff not being bound to produce and ship any ties. Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co., 166 F 191. Where **contract for conveyance** of 960 acres of land referred to 320 acres which vendor could not convey, on account of wife's interest, there was no mutuality of remedy, since vendee could not be compelled to accept less than 960 acres; hence no specific enforcement as to 640 acres, with abatement of part of price. Knudtson v. Robinson [N. D.] 118 NW 1051. **Contract of employment** of actor, whereby he was forbidden to enter employment of any other, but was not entitled to pay except when actually engaged, and which did not bind employer to keep him so engaged in professional work, lacked mutuality. Shubert Theatrical Co. v. Coyne, 115 NYS 968; Keith v. Kellermann, 169 F 196. **Contract for support,** whereby party agreed to pay certain sum weekly for support of parent, held lacking in mutuality. Schwerdt v. Schwerdt, 141 Ill. App. 386. **Contract for personal services** not being enforcible against promisor will not be enforced against other party. Jolliffe v. Steele, 9 Cal. App. 212, 98 P 544.

23. A contract not enforcible while executory for want of mutuality becomes valid when executed. Oconto Brew. Co. v. Cayouette, 138 Wis. 664, 120 NW 497. Contract for sale of land, signed only by vendor, is not unilateral where vendee has paid cash required to be paid and entered into possession. Krah v. Wassmer [N. J. Eq.] 71 A 404. Contract whereby defendant agreed to handle plaintiff's beer at certain place, and plaintiff agreed to build beer depot, and that until this was done defendant need not pay for beer furnished, was enforcible by defendant, he having performed on his part. Oconto Brew. Co. v. Cayouette, 138 Wis. 664, 120 NW 497.

24. See ante, § 1B, "Options." Promise to give written consent to assignment of lease enforcible when lessee has gone to trouble of finding suitable tenant as agreed. Underwood Typewriter Co. v. Century Realty Co., 220 Mo. 522, 119 SW 400.

25. Search Note: See notes in 14 L. R. A. 860; 15 Id. 834; 19 Id. 371; 27 Id. 56; 30 Id. 737; 70 Id. 485; 1 L. R. A. (N. S.) 1159; 2 Id. 292, 1094; 5 Id. 680; 7 Id. 175, 1048, 1053; 8 Id. 909; 9 Id. 568, 953; 12 Id. 575; 13 Id. 484; 16 Id. 236; 40 A. S. R. 767; 81 Id. 663; 1 Ann. Cas. 333, 573; 6 Id. 218; 7 Id. 874; 8 Id. 484; 10 Id. 1024; 11 Id. 664.

See, also, Contracts, Cent. Dig. §§ 498-722, 1760, 1761, 1785, 1826; Dec. Dig. §§ 108-142; 6 Cyc. 864-867; 9 Id. 456, 468-470, 481-483, 485, 486, 490-495, 498-500, 505-514, 516, 518-543, 546-575.

26. Lawson v. Cobban, 38 Mont. 138, 99 P 128. A contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society. Hall v. O'Neil Turpentine Co. [Fla.] 47 S 609. Acts or contracts are contrary to public policy which tend clearly to injure the public health, the public morals, confidence in the purity of the administration of law, or to undermine the sense of security of individual rights of person or property. Holland v. Sheehan [Minn.] 122 NW 1. Agreement whereby plaintiff was to have the right and privilege to erect and maintain a lunch stand on the three feet of the outer edge of the sidewalk adjoining defendant's building held void as against public policy, and both parties being equally guilty of the same violation of the law, they would be left without remedy against each other. Ryan v. Allen, 138 Ill. App. 52.

27. Heart v. East Tennessee Brew. Co. [Tenn.] 113 SW 364.

28. State v. Hocking Val. R. Co., 12 Ohio C. C. (N. S.) 145.

29. Livingston v. Chicago & N. W. R. Co. [Iowa] 120 NW 1040; Superior Coal Co. v. Darlington Lumber Co., 236 Ill. 83, 86 NE 180. Contract will not be declared void as against public policy unless question is free from doubt, and the benefit to the public from so doing is substantial and not merely theoretical. Cox v. Hughes [Cal. App.] 102 P 956.

30. Lawson v. Cobban, 38 Mont. 138, 99 P 128.

31. Horn v. Gibson [Okl.] 103 P 563.

32. Holland v. Sheehan [Minn.] 122 NW 1. Courts are not at liberty to hold that contracts which have long been recognized as valid by legislatures are contrary to pub-

Among contracts which have been held void as against public policy are the following: Contracts involving a breach of fiduciary relations;[34] contracts looking to or involving violation of legal duties;[35] contracts tending to interfere with the exercise of the functions of the courts as agencies for the adjustment of rights and administration of remedies,[36] or with the proper and complete presentation of the evidence upon which litigation must be determined,[37] or with the punishment of criminals.[38]

Among contracts which have been held not to violate public policy are the following: Contract to leave property by will;[39] assignment of future earnings in present and future employments;[40] purchase of notes payable in labor with consent of maker;[41] that insurance policy shall not become binding until first premium has been paid;[42] lease of premises owned, by corporations, for dramshop purposes, though corporation cannot procure liquor license;[43] contract subhiring convicts;[44]

lic policy, such as agreements to pay bonus to railroad company on construction of road. Farrington v. Stucky [C. C. A.] 165 F 325.

33. Central New York Tel. & T. Co. v. Averill, 129 App. Div. 752, 114 NYS 99.

34. Contract between **agent** for sale of property and purchaser, whereby agent was to acquire half interest in property and divide his commission, received from seller, with purchaser, invalid and not enforcible. Butler v. Agnew, 9 Cal. App. 327, 99 P 395. Where brokers buy property, representing themselves as purchasers, they cannot recover commissions from seller, though they act for undisclosed buyer, since they cannot act for both parties. Hess v. Gallagher, 64 Misc. 95, 117 NYS 960. Contract whereby **officers of corporation** sold claims against it to plaintiff, and intended thereby, and agreed to give plaintiff control of corporation, and to resign, and assist in removal of place of business of corporation, held void, because inconsistent with duty owed corporation by officers. Sauerhering v. Rueping, 137 Wis. 407, 119 NW 184. Contract to pay director of corporation to procure contract from corporation void as against public policy. Landes v. Hart, 131 App. Div. 6, 115 NYS 337. **Agreements by corporations** having special rights and privileges and owing duties to the public, which disregard duties owed the public, are contrary to public policy. Livingston v. Chicago & N. W. R. Co. [Iowa] 120 NW 1040. Contract whereby one of two **joint adventurers** takes title to land and makes secret profit by connivance with vendor is void as against public policy (Curry v. Lafon, 133 Mo. App. 163, 113 SW 246), but a contract to pay a bonus to a **construction company** to deflect the route from the line surveyed is void (Cobb v. Wm. Kenefick Co. [Okl.] 100 P 545), unless, in contracting for the bonus, the construction company was acting as agent for the railroad company, and the latter knew of and acquiesced therein (Id.).

35. Contract to allow wife $500 a year for wardrobe, etc., void, since legal duty was to support her according to her station. Warner v. Warner, 235 Ill. 448, 85 NE 630.

36. Warrant of attorney, authorizing confession of judgment, and waiving all errors of procedure and right of appeal, infringes judicial power, and is not consonant with Missouri statutes concerning confession of judgment. First Nat. Bank v. White, 220 Mo. 717, 120 SW 36. Contract to pay money to secure appointment as receivers in pending suit. McGraw v. Traders' Nat. Bank, 64 W. Va. 509, 63 SE 398.

37. Contract by physician requiring extra compensation in case he was called to testify in action by patient and her husband for her injuries. Burnett v. Freeman, 134 Mo. App. 709, 115 SW 488. Contract whereby one agreed to "remain noncommittal" in will contest, and to aid proponent, though aware of facts which would aid contestants, void, and promise to convey land in consideration of such agreement could not be enforced. Lazenby v. Lazenby [Ga.] 65 SE 120. Where money is placed in the hands of one person to be paid to another in case the latter does not appear as witness in a case, courts will not compel delivery of the money by the holder to the person for whom it was deposited, as transaction was to hinder justice. Feltner v. Feltner [Ky.] 116 SW 1196.

38. There is no implied obligation on the part of a principal in a bail bond in a criminal case to indemnify his surety, and an express contract to indemnify would be invalid, because against pubic policy, as it would give public security of only one person instead of two. United States v. Greene, 163 F 442. Bond of indemnity given by person under charge of felony to indemnify his bail in a recognizance for his appearance to answer to the charge, and is not void as against public policy. (Conflict in authorities recognized.) Carr v. Davis, 64 W. Va. 522, 63 SE 326.

39. Contract to devise property in consideration of care and support is valid and enforcible after death of promisor. McAllister's Adm'r v. Bronaugh [Ky.] 113 SW 821. Agreement to leave property by will is valid and enforcible by action for damages for its breach. Holcombe v. Griggs [N. J. Law] 73 A 37.

40. Cox v. Hughes [Cal. App.] 102 P 956.

41. Potts v. Riddle, 5 Ga. App. 378, 63 SE 253.

42. Perry v. Security Life & Annuity Co., 150 N. C. 143, 63 SE 679.

43. Conservative Realty Co. v. St. Louis Brew. Ass'n, 133 Mo. App. 261, 113 SW 229.

44. Contract subhiring convicts, which have been hired to contractor by county

agreement to sell stock by persons having option;[49] agreement by purchaser of school lands to execute bond for title to another, and complete period of occupancy, so as to perfect title;[46] contract by administrator to convey land belonging to estate;[47] contract turning over stock of goods and business for certain period;[48] agreement by a claimant to aid heirs in recovering an estate.[49] Some courts hold that any agreement which separates the beneficial ownership of corporate stock from the legal title is contrary to public policy and void.[50] Thus, an agreement transferring the right to vote from stockholders to voting trustees is held void,[51] rights of minority stockholders being violated.[52] Elsewhere, a contract turning over stock and the control of a corporation, in consideration of payments to the owners of the stock, was held valid.[53] A contract whereby property pledged becomes forfeited to the pledgee for nonpayment of the debt at maturity is void.[54] But it is competent for the parties to stipulate that the pledgee may buy the pledged securities at private sale at the market price in case of default, or that he may sell at public or private sale with or without notice, and that he may become the purchaser.[55] A provision whereby one party agrees not to enter into contracts with others is not invalid,[56] though it results in the breach of contracts already made with a third party,[57] and though the motive is malicious, the means being legal.[58]

A contract to pay a bonus to a railroad company for constructing its road to a certain place or over a certain route is valid,[59] as is also an agreement to procure

commissioners, is not contrary to public policy, when subcontractor assumes all obligations of contractor and proper treatment of convicts is provided for. Hall v. O'Neil Turpentine Co. [Fla.] 47 S 609.

45. Contract whereby plaintiff and defendant agreed to sell stock on which they had an option to a corporation, at a profit, held not contrary to public policy as declared by Rev. Civ. Code, §§ 1271, 1272. Chambers v. Mittnacht [S. D.] 122 NW 434.

46. Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875.

47. Presumption is that land will be sold under order of court. Lawson v. Cobban, 38 Mont. 138, 99 P 128.

48. Contract whereby stock of goods was turned over to one for one year, such party to keep stock replenished, and at end of year to turn back unsold goods and stock equal in value to that received, and give owner 10 per cent of invoice price, is not contrary to public policy. Holder v. Shelby [Tex. Civ. App.] 118 SW 590.

49. Agreement by one having claim against estate, in consideration of heirs paying the claim to do everything proper to aid them in recovering the estate, and to give all and true evidence in any suit necessary to recover it, was not void on account of provision as to testifying. Smith v. Hartsell, 150 N. C. 71, 63 SE 172.

50. Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 SE 894. Contract between corporation promoters and another which would deprive stockholders of right to elect trustees is illegal. Hampton v. Buchanan, 51 Wash. 155, 98 P 374.

51. Agreement void which pooled stock and gave power to vote it to trustees for three years, their decisions being final and conclusive, object not being to protect bondholders but to control corporation. Not valid as proxy under Rev. 1905, § 1184. Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 SE 894.

52. Contract by which owner of 60 per cent of stock of corporation agreed to sell all the property and rights of the corporation to another, agreeing to have passed the proper resolution directing the transfer when accepted by other party, void as against public policy, and violation of rights of minority stockholders. Bias v. Atkinson, 64 W. Va. 486, 63 SE 395. Pooling agreement between majority of stockholders, to last ten years, dividing directorships among members of pool, was void as against public policy. Bridgers v. Staton, 150 N. C. 216, 63 SE 892.

53. Contract whereby holders of majority of the stock of corporation turn it over to certain persons with power to vote it and control corporation, holders to receive dividends, and to pay all debts and assessments during the life of contract, for which stock would be liable, and to pay certain sum monthly to owners, is not against public policy, and is enforcible as between the parties thereto, in the absence of a statutory prohibition. White v. Snell [Utah] 100 P 927. Enforcement of such contract will not be refused merely because it proves unprofitable to the owners of the stock. They could not recover from holders amount of debts incurred by corporation and unpaid. Id.

54, 55. Sherman v. Mutual Life Ins. Co. [Wash.] 102 P 419.

56. Booking corporation booked burlesque companies on condition that they would not play in competing houses. Roseneau v. Empire Circuit Co., 131 App. Div. 429, 115 NYS 511.

57. Burlesque companies cancelled contracts in order to show in theaters controlled by defendant. Roseneau v. Empire Circuit Co., 131 App. Div. 429, 115 NYS 511.

58. Roseneau v. Empire Circuit Co., 131 App. Div. 429, 115 NYS 511.

59. Cobb v. Wm. Kenefick Co. [Okl.] 100 P 545. Note given railroad in aid of con-

switch tracks to be built to a building;[60] but an agreement by a railroad company not to place a station or depot between two points on its road is contrary to public policy, and a contract to pay a bonus, based on this consideration, is also void.[61]

(§ 3) *E. Limitations of liability.*[62]—See 11 C. L. 751—Contractual limitation of liability imposed by law as incident to certain acts or omissions is not ordinarily allowed,[63] though it is usually permissible to place a time limitation upon the enforcement of contractual rights.[64] A limitation of liability, even if lawful, must be based upon a sufficient consideration.[65]

(§ 3) *F. Contracts relating to marriage or divorce.*[66]—See 11 C. L. 751—Contracts looking or tending to the alteration or dissolution of the marriage relation are generally void.[67]

(§ 3) *G. Contracts tending to promote immorality* [68]—See 11 C. L. 751 are void.[69] A contract for the sale of books will not be held illegal on account of the character of the books, unless their sale or publication would violate a statute aimed to suppress immoral or obscene literature.[70]

(§ 3) *H. Litigious agreements.*[71]—See 11 C. L. 751—A contract between a layman and a lawyer whereby the former agrees to hunt up and bring to the latter

struction of road not void as against public policy. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785. A promissory note or obligation payable to a railroad company in aid of the construction of its line between two points and through a certain point is not void as against public policy. Southard v. Arkansas Val. & W. R. Co. [Okl.] 103 P 750. Contract to pay bonus to railroad company to deflect line of its road is not contrary to public policy though resulting route is not most natural nor cheapest. Farrington v. Stucky [C. C. A.] 165 F 325.

60. The rule that contracts between railway companies and private individuals to control location of railway stations are void is inapplicable to an agreement to procure side tracks to be built to leased building. Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 NW 746. Contract by railroad section foreman, in consideration of conveyance of land to him, to procure construction of switch track at certain place, is not void, location of track being beneficial to company and to public. Wright v. Riley [Tex. Civ. App.] 118 SW 1134.

61. Farrington v. Stucky [C. C. A.] 165 F 325.

62. See Carriers, §§ 11, 19, 25A, 35; Master and Servant, § 3.

Search Note: See notes in 7 L. R. A. (N. S.) 537, 1041; 11 Id. 432, 560; 13 Id. 753.

See, also, Contracts, Cent. Dig. § 475; Dec. Dig. § 114; 9 Cyc. 543.

63. Parents' waiver in employment contract of claim for death of minor does not exempt wrongdoer from liability for negligence. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841.

64. Provision in trust agreement that certain action shall be commenced within one year or thereafter be barred held valid. Baker v. Baker, 139 Ill. App. 217.

65. Limitation of common-law liability of carrier is not valid unless based on some consideration other than carriage, such as reduced rate. Burgher v. Wabash R. Co. [Mo. App.] 120 SW 673. Limitation of liability of carrier by stipulating value less than actual value must be based on some consideration. Wilcox v. Chicago G. W. R. Co., 135 Mo. App. 193, 115 SW 1061. Stipulations limiting liability of carrier without consideration where no choice of rates or contracts was given shipper. St. Louis S. W. R. Co. v. Phoenix Cotton Oil Co. [Ark.] 115 SW 393. See Carriers, §§ 11, 19, 25, 35.

66. Search Note: See notes in 12 L. R. A. (N. S.) 848; 84 A. S. R. 147; 104 Id. 919; 4 Ann. Cas. 732; 10 Id. 572; 11 Id. 377.

See, also, Contracts, Cent. Dig. §§ 515-520; Dec. Dig. § 111; 9 Cyc. 518-522; 15 A. & E. Enc. L. (2ed.) 954.

67. See Husband and Wife, § 2B.

Held void: Contract to live apart. Boyd v. Boyd, 130 App. Div. 161, 114 NYS 361. Contract purporting to satisfy a judgment for alimony, not in existence at the time, made pending suit for divorce, for the evident purpose of facilitating the procuring of the divorce. Wilson v. Fahnestock [Ind. App.] 86 NE 1037. After suit for divorce had been dismissed, parties entered into contract, whereby wife waived existing cause for divorce and agreed that if cause should subsequently arise, and she should establish it, she would accept $10,000 as full compensation, in lieu of alimony, etc., though husband was worth $77,000. Held contract void, as facilitating divorce by husband. Pereira v. Pereira [Cal.] 103 P 488.

68. Search Note: See note in 60 L. R. A. 406.

See, also, Contracts, Cent. Dig. §§ 512-514; Dec. Dig. § 112; 15 A. & E. Enc. L. (2ed.) 959.

69. Contract containing stipulation to do an immoral act. Nicholson v. Ellis [Md.] 73 A 17. Contract contrary to good morals will not be enforced. Coffey v. Burke, 132 App. Div. 128, 116 NYS 514.

70. Contract of sale of works of Voltaire cannot be held illegal. St. Hubert Guild v. Quinn, 64 Misc. 336, 118 NYS 582.

71. Search Note: See note in 97 A. S. R. 145.

personal injury cases, for a division of the fees, is void.[72] Champertous contracts come within the rule of public policy against contracts tending to cause litigation, but are treated elsewhere.[73]

(§ 3) *I. Compounding offenses.*[74]—See 11 C. L. 751—Contracts having for their object the stifling of criminal prosecutions are void,[75] but in the absence of any agreement not to prosecute or to prevent prosecution, a settlement is not invalidated by the fact that the acts creating the liability constitute a crime.[76]

(§ 3) *J. Interfering with public service.*[77]—See 11 C. L. 751—An agreement or contract to corrupt or improperly influence the conduct of a public official is void,[78] but public policy does not forbid an undertaking to procure certain legislative action by fair and proper means.[79] Contracts to procure the appointment of a person to public office,[80] to secure the location of a post office in a particular place,[81] to pay a public official extra compensation for services required of him by law,[82] the con-

See, also, Champerty and Maintenance, Cent. Dig.; Dec. Dig.; 6 Cyc. 847-890; 15 A. & E. Enc. L. (2ed.) 981.

72. Both parties in pari delicto; neither can enforce it. Holland v. Sheehan [Minn.] 122 NW 1.

73. See Champerty and Maintenance.

74. **Search Note:** See notes in 16 L. R. A. (N. S.) 971; 3 Id. 849; 4 Id. 213; 4 Id. 589; 6 Id. 524; 9 Id. 529, 1014; 15 Id. 594; 7 Ann. Cas. 1010; 11 Id. 612.

See, also, Contracts, Cent. Dig. §§ 633-653; Dec. Dig. § 128; 15 A. & E. Enc. L. (2ed.) 979.

75. Note void when consideration was in part, discontinuance of criminal prosecution against makers. Stanard v. Sampson [Okl.] 99 P 796. Notes given by employe for money embezzled by him, and endorsed by another upon understanding that employe will not be prosecuted, held void, as to endorser, being based on illegal consideration. Agreement was compounding felony under N. Y. Code, § 125. In re Lawrence [C. C. A.] 166 F 239.

76. Agreement to transfer property to make good defalcation was not contrary to public policy when there was no promise not to prosecute, though expectation and intention was not to prosecute. Bishop v. Howe, 117 NYS 996. Settlement of bastardy proceedings is valid consideration for promissory note by defendant for benefit of infant, who was with child, legality not affected by agreement of mother and guardian not to prosecute for rape, not participated in by infant. Griffin v. Chriswisser [Neb.] 120 NW 909. Though note and mortgage were given with expectation that grand jury would not return indictment on charge of selling mortgaged property, debt being satisfied by note and mortgage given, and no indictment was returned, yet if there was no agreement to use influence in having charge dismissed and no indictment returned, note and mortgage would not be invalid. Horn v. Gibson [Okl.] 103 P 563.

77. **Search Note:** See, also, Contracts, Cent. Dig. §§ 570-680; Dec. Dig. §§ 123-133; 6 Cyc. 864-867; 9 Cyc. 485, 486, 490-495, 499, 500, 505-514, 516; 15 A. & E. Enc. L. (2ed.) 963.

78. Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 NW 746. Contract to pay an attorney for using his influence to secure a contract from the county for a bridge is void. Flynn v. Bank of Mineral Wells [Tex. Civ. App.] 118 SW 848. Contract to secure reduction of taxes of corporation void if it contemplated improper influence to be brought to bear on tax officers; compensation for such service not recoverable. McCallum v. Corn Products Co., 131 App. Div. 617, 116 NYS 118.

Note: For special article on contracts interfering with public services, see 3 C. L. 861.

79. Agreement to procure railroad trackage at building leased not void, since necessary action by city could be procured by proper means. Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 NW 746. Contract to press claim against government for property during Civil War was not illegal as lobbying contract, though attorney was obliged to show committees of senate and house that claimant had been loyal citizen in order to get favorable action on claim. Pennebaker v. Williams [Ky.] 120 SW 321. Where builder was hired to do work and to procure necessary permits and licenses, and it became necessary to obtain resolution of board of aldermen to allow certain construction, and builder employed lawyer to draw resolution and procure its adoption, which he did, using no improper means, owner was liable for fee paid lawyer. Eisenstein v. Maiden Lane Safe Deposit Co., 113 NYS 967.

80. An agreement to resign as postmaster and endeavor to secure the position for another, for a consideration, is void. McCall v. Whaley [Tex. Civ. App.] 115 SW 658. Agreement, for money consideration, to secure resignation of sheriff, to secure plaintiff's appointment to vacancy, and that defendant would then be appointed deputy, held void. Eversole v. Holliday [Ky.] 114 SW 1195.

81. Contract providing for payment for services and expenses incurred in procuring the establishment of a postoffice in a city in and upon a certain block therein, payments to continue as long as office is maintained there, not to exceed ten years, is contrary to public policy and void. Hare v. Phaup [Okl.] 101 P 1050.

82. Contract between county clerk and county board, whereby clerk was to be paid certain compensation for indexing records, held void because this work was within his official duties, and agreement for extra pay

tract of a public officer to perform services required of him for less than the compensation provided by law,[83] or to perform services inconsistent with his duties to the public, as an official,[84] and a contract aiming at the elimination of competition in bids for public contracts,[85] have been held void. Where a grant of power under a statute is for the accomplishment of the policy of the state, the due performance of the function by the grantee is the consideration for the grant,[86] and any contract by the grantee which tends to disable it from performing its entire function by undertaking to transfer to others the discharge thereof, with an effect different from the grant, violates the contract with the state and is contrary to public policy.[87]

(§ 3) *K. Restraint of trade.*[88]—See 11 C. L. 752—Both at common law and under many statutory provisions,[89] contracts in general restraint of trade are void,[90] but contracts in partial restraint of trade, if reasonable as to time, place and terms, are not in violation of public policy,[91] and hence contracts whereby parties for a valuable consideration [92] agree not to engage in a particular business, trade or profession, for a limited time and in a limited territory, are generally held valid, if reasonable,[93] the test of reasonableness being whether the restraint imposed is such as to afford only a fair protection to the interests of the promisee,[94] without being

was contrary to statute. Wadsworth v. Livingston County Sup'rs, 115 NYS 8.

83. Bodenhofer v. Hogan [Iowa] 120 NW 659.

84. City employe agreed to furnish information, gained while an employe of another city before consolidation with present employer, to aid a suit against the city, information being in public records but understood only by him. Contract immoral; he could not recover compensation. Coffey v. Burke, 132 App. Div. 128, 116 NYS 514.

85. Secret agreement between bidders for public contract whereby they agree to bid for different portion, and one agrees, if he gets a contract, to share it with the other as partner, is void as against public policy. Citizens' Nat. Bank v. Mitchell [Okl.] 103 P 720.

86. McKinney v. Big Horn Basin Development Co. [C. C. A.] 167 F 770.

87. Irrigation company, granted right to construct irrigation works to reclaim public lands and sell same to settlers, under acts of congress and acceptance by state, could not lawfully give another exclusive right to sell water rights and lands at any price between $19 and $30 per acre, retaining as compensation all amounts above $19 per acre, since statute contemplated fixed price, and sale by company. McKinney v. Big Horn Basin Development Co. [C. C. A.] 167 F 770.

88. Search Note: See notes in 1 C. L. 648; 22 L. R. A. 673; 6 L. R. A. (N. S.) 847, 892; 9 Id. 446, 501; 14 Id. 1052; 74 A. S. R. 235.

See, also, Contracts, Cent. Dig. §§ 542-569; Dec. Dig. §§ 116-118; 9 Cyc. 523, 525; 24 A. & E. Enc. L. (2ed.) 841.

89. Statutes of Florida extend rather than restrict common-law doctrine which condemns contracts in restraint of trade. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19.

90. Flowers v. Smith Lumber Co. [Ala.] 47 S 1022.

91. Hoff v. Leneerman, 143 Ill. App. 170; Bloom v. Home Ins. Agency [Ark.] 121 SW 293.

Held not in restraint of trade: Contract whereby it was agreed that if certain company would buy out certain coal dealer, and buy all coal from such coal dealer at wholesale which it would sell at certain place, the coal dealer would not sell at wholesale to any other dealer in coal at that place, is not in restraint of trade, it appearing that output of any other wholesale dealer of coal was in no way involved. Superior Coal Co. v. Darlington Lumber Co., 143 Ill. App. 199.

92. Such a covenant must be based upon a sufficient legal consideration, though courts will not inquire as to the adequacy of the consideration, but whether consideration equal in value to restraint agreed upon is immaterial. Freudenthal v. Espey [Colo.] 102 P 280. Contract employing physician, agreeing to introduce him to patients and recommend him, pay expenses and salary, employe agreeing not to engage in practice in same town for five years after termination of contract, based on legal consideration. Id.

93. Louisville Board of Fire Underwriters v. Johnson [Ky.] 119 SW 153. Contract only partially limiting a person's business, and not injurious to public, is valid. Bloom v. Home Ins. Agency [Ark.] 121 SW 293. Contracts in restraint of trade are void (Code, § 1277), but an exception is made in cases of sales of good will (§ 1278), where restraint is limited as provided in statute. Griffing v. Dunn [S. D.] 120 NW 890. Pub. Acts 1905, pp. 507, 508, make all contracts in restraint of trade illegal, but except sales of good will, where only object is to protect vendee. Held, sale of stock of corporation, with good will of business, was within exception. Agreement of stockholder not to engage in business enforcible. Buckhout v. Witwer [Mich.] 16 Det. Leg. N. 417, 122 NW 184.

94. Agreement not contrary to public policy unless it goes farther than is reasonably required for the protection and enjoyment of the business sold. Fleckenstein Bros. Co. v. Fleckenstein, 76 N. J. Law, 613, 71 A 265.

so great as to interfere with the interests of the public.[95] Contracts having a tendency to stifle fair and free competition in trade[96] or tending to create or promote

95. Fleckenstein Bros. Co. v. Fleckenstein, 76 N. J. Law, 613, 71 A 265.

Rules as to reasonableness: To be reasonable, such covenants must be of benefit to the covenantee, not prejudicial to public interests, and not oppressive. Freudenthal v. Espey [Colo.] 102 P 280. The validity of such contracts often depends upon the nature and character of the business and whether the restraints afford the grantee reasonable protection or impose restrictions either as to time or place which are unreasonable. Southworth v. Davison, 106 Minn. 119, 118 NW 363. The rule seems to be that no contract is void as in restraint of trade where it operates simply to prevent a party from engaging or competing in the same business. Id. It is now generally held that limitation as to both time and place is unnecessary if the agreement be reasonable and not contrary to public policy in other respects, and though there are authorities to the contrary, the great weight of authority is that, in the case of ordinary occupations or business establishments, failure to impose a limitation as to time does not invalidate the contract where there is a proper limitation as to place. Id. Agreement not to engage in laundry business within five miles of N, valid. Id. The trend of present day opinion is that such a contract is not injurious to public interests so long as the area within which the business is restrained is no greater than that covered by the business whose good will has been sold. Fleckenstein Bros. Co. v. Fleckenstein, 76 N. J. Law, 613, 71 A 265. The courts are not agreed on the question of the validity of a contract which imposes restraint over a greater area than that covered by the business at the time of sale. Id. Majority seem to hold such contracts unreasonable. Id. Contracts not transferring any business, trade or occupation, or lawfully exclusive right, but containing agreements giving up the right to engage in business or occupation, or some right common to all to engage in business, are invalid. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. Contract transferring business, trade, or occupation, and binding vendor to refrain from engaging therein within reasonable territory and for reasonable time, and not unreasonably affecting public, may be enforced. Id.

Presumptions: Mere fact that contract for sale of flour fixed prices according to "Millers' Association prices" did not show that it was invalid as in restraint of trade, presumption being that prices were lawfully made and promulgated. Barteldes Seed Co. v. Border Queen Mill & Elevator Co. [Okl.] 101 P 1130.

Contracts held valid: Agreement not to engage in same business for five years, in same city, valid at common law. Buckhout v. Witwer [Mich.] 16 Det. Leg. N. 417, 122 NW 184. Contract whereby seller of business agreed not to engage in same business within 500 miles of Jersey City for period of 20 years, valid. Fleckenstein Bros. Co. v. Fleckenstein, 76 N. J. Law, 613, 71 A 265. **Agreement not to practice medicine** in certain town, or within radius of ten miles, for two years, based on valuable consideration, is valid. Threlkeld v. Steward [Okl.] 103 P 630. Agreement of physician employed by another not to engage in practice in same town within 5 years after termination of employment, reasonable. Freudenthal v. Espey [Colo.] 102 P 280. **Agreement by soliciting salesman,** etc., not to interfere with good will or trade of employer, after termination of employment, and not to furnish others with information as to lists of customers, etc., and not to call on his customers, held not in restraint of trade. Witkop & Holmes Co. v. Boyce, 61 Misc. 126, 112 NYS 874. **Agreement by retiring partner,** from firm conducting pawnbroking and secondhand business, not to engage in said business in the same city for two years, as part consideration for cash paid, was valid and enforcible. Siegel v. Marcus [N. D.] 119 NW 358. Covenant by partner on sale of interest in business of manufacture and sale of article throughout the United States, though not in every state, not to engage in same business, construed, as limited to United States, and held valid, though no time limit stated, no monopoly being created, and public not injured, there being active competition in business. Prame v. Ferrell [C. C. A.] 166 F 702. Where **insurance** agencies sold their businesses and "expirations" to corporation to be formed, and made **agreement not to engage independently in fire insurance business** in county for five years, such agreement was valid. Bloom v. Home Ins. Agency [Ark.] 121 SW 293.

Contracts held invalid: An agreement, without limitation as to space or territory, not to carry on a particular trade or business, such business being lawful in itself, is contrary to public policy. Manufacturing; time limitation, two years; invalid. Seay v. Spratling [Ga.] 65 SE 137.

96. Contract to obtain control of a pursuit or trade in a locality, or keep up prices is not enforcible. Citizens' L., H. & P. Co. v. Montgomery L. & W. P. Co., 171 F 553. Contract between two lumber companies dividing two counties between them for trade purposes, each agreeing not to compete with other in territory reserved to it, is void, though conveyances of land have been made pursuant to it. Flowers v. Smith Lumber Co. [Ala.] 47 S 1022. Contract placing it within power of parties to partially control supply of commodities, useful if not necessary to considerable part of local community, or to unreasonably limit the places where they may be obtained and to increase prices and restrain trade, are illegal. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. Contract, giving telephone company **exclusive right to establish phones, etc., in hotel,** held void. Central New York Tel. & T. Co. v. Averill, 55 Misc. 346, 105 NYS 378, 58 Misc. 59, 110 NYS 273. Single employer may lawfully agree with **labor union** to employ only its members, but such an agreement when participated in generally by employers throughout a community is contrary to public pol-

monopolies[97] are void as contrary to public policy,[98] both at common law[99] and under statutes of many states,[1] if in any degree injurious to the public,[2] regardless of the intent of the parties.[3] If not so injurious, such contracts may be enforced if otherwise legal and binding.[4] Contracts between public service corporations are

icy because it practically prevents nonunion men in that trade from making a living. McCord v. Thompson-Starrett Co., 129 App. Div. 130, 113 NYS 385. It is not unlawful for any number of persons, not having an unlawful object, to associate themselves and agree that they will not work for or with certain classes of men, or under a certain price, or under certain conditions. Rohlf v. Kasemeier [Iowa] 118 NW 276.

97. Flowers v. Smith Lumber Co. [Ala.] 47 S 1022. At common law, any contract or agreement that in its operation has or may have tendency to restrain trade, stifle competition, create or maintain a monopoly, or unnaturally control supply of, or increase price of, or lessen opportunity to secure useful commodities, to the injury of the public or any considerable portion of the population of a locality, is void. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. Contract, whereby lumber company, employing many men, leased storehouse to partnership for general store, agreed to give up its own commissary store and make merchandise checks to employes redeemable only by partnership lumber company to receive 5 per cent of gross sales, and to redeem checks for cash, held contrary to public policy. Id. That a contract tending to restrain trade, create monopoly and increase prices, affecting large part of local community, was ancillary to lease of storehouse, did not save it from invalidity. Id. Contract whereby railroad company granted transfer company exclusive right to occupy with its cabs, etc., part of station grounds traversed by passengers, so that they would have to go 150 feet past this company's cabs to reach others, gave practical monopoly, and was void. Palmer Transfer Co. v. Anderson [Ky.] 115 SW 182. Contract between fire insurance companies, the necessary effect and actual result of which is to control such business within certain area and to fix and regulate rates therein and to limit or eliminate competition, is contrary to public policy because in restraint of trade and injurious to the public. Enjoined in equity. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80. **Contracts restraining rights of parties owning patents** to sell the article, with intention and result of restraining competition, maintaining prices and pooling profits, was in restraint of trade and contrary to anti-trust act. Blount Mfg. Co. v. Yale & Towne Mfg. Co., 166 F 555. **Contracts between manufacturer of proprietary medicine and jobbers and dealers,** prohibiting sales except to licensed dealers and buyers, and at any price except that fixed by the manufacturer, object being to maintain price and prevent competition, is illegal both at common law, and, as to interstate trade, under anti-trust act. Dr. Miles Medical Co. v. John D. Park & Sons Co. [C. C. A.] 164 F 803.

98. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823.

99. Contracts tending to create monopolies and prevent proper competition are illegal and void at common law. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521.

1. Const. 1870, art. 4, § 22, prohibiting granting of special privileges, immunities or franchises, declares public policy which is contravened by such contracts. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521.

2. At common law, the test is whether the agreement is injurious to the public interests. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. The validity or invalidity of an agreement, that in operation tends to restrain trade or to monopolize, is in general determined by the element of whether it is or is not injurious to the public. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. If injurious in any perceptible degree to any considerable portion of the public, the agreement is contrary to public policy and will not be enforced. Id. Where an agreement in operation has a necessary tendency to restrain trade or to create a monopoly to the appreciable injury of the public, limitations as to time, place or subjects contained in the agreement are immaterial. Id.

3. If injurious to the public in any degree, contract will not be enforced, though parties express a lawful intent, and though agreement does not amount to a criminal offense. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19.

4. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. By-law of voluntary association of insurance agents that no agent who is member shall take agency for company already represented by an agent in the city, valid, not being prejudicial to public. Louisville Board of Fire Underwriters v. Johnson [Ky.] 119 SW 153. Contract whereby plaintiff agreed not to sell coal to any other dealer in a town, if defendant would buy its coal and sell at retail, was not contrary to public policy. Superior Coal Co. v. Darlington Lumber Co., 236 Ill. 83, 86 NE 180. Contracts in restraint of trade, or granting exclusive privileges, are not necessarily contrary to public policy. They may be valid if reasonable and not injurious to the public interests. Central New York Tel. & T. Co. v. Averill, 129 App. Div. 752, 114 NYS 99. Contract for telephone service, giving company exclusive right to furnish service to hotel, held not contrary to public policy where rates were reasonable, service satisfactory, and object of hotel company in ending contract was only to give similar exclusive contract to another company. Id. **A contract between owner of copyrights and publisher of books on one hand and dealers on other** that books shall retail at fixed price, and that no dealer cutting price shall be allowed to handle books, is not invalid as in restraint of trade. Straus v. American Publishers' Ass'n, 193 N. Y. 496, 86 NE 525. Modifica-

not invalid where provisions in partial restraint of trade or competition are merely incidental to the principal object of the contract, which is valid,[5] but if the object is to create a monopoly, such a contract is void.[6] Contracts granting special rights, privileges and immunities,[7] and tending to create monopolies, are expressly prohibited in some states.[8] Violation of the Sherman Act by the formation of a trust or combination does not preclude the offender from recovering on collateral contracts.[9] A contract invalid as in violation of the anti-trust act cannot be validated by mere renewal.[10]

(§ 3) *L. Effect of invalidity.*[11]—See 11 C. L. 758—Neither a court of law nor a court of equity will lend its aid to the enforcement of contracts which are illegal, immoral, or contrary to public policy.[12] A court of equity will not lend its aid in the enforcement of claims or rights which arise out of contracts that are contrary to the public policy of the state, as where contract violates anti-trust act.[13]

tion of licenses between owner of patent and licensees **regulating and controlling manufacture and sale of patented article** held not illegal as in restraint of trade, since public secured from licenses only right to purchase article after its manufacture and after it was offered for sale. Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co. [C. C. A.] 166 F 431.

5. Wayne-Monroe Tel. Co. v. Ontario Tel. Co., 60 Misc. 435, 112 NYS 424. Two telephone companies, operating in different counties, contracted to unite systems and give each other service to certain points, and each agreed not to compete for business in each other's territory or make contracts with other parties, so as to violate contract. Held not void as in restraint of trade or tending to create monopoly. Id. An agreement between individuals operating separate telephone systems providing for physical connection of the systems is not contrary to public policy because the connection can be discontinued on notice; patrons bound by knowledge of condition. State v. Cadwallader [Ind.] 87 NE 644. In as much as combinations of telephone exchanges and telephone lines are necessary to afford proper facilities for the public, and the legislature has recognized this necessity by provision for mergers and combinations of such companies, a contract between two telephone companies which provides for an exclusive interchange of business must be distinguished from contracts effecting mergers of gas or street railway companies, and is not void because of a tendency to create a monopoly or subversive of the public interest and benefit, and, where a system of lines has been built upon the faith of such an interchange of business, the claim on the part of the defendant company that the contract is in restraint of trade and should be abrogated is not well founded. United States Tel. Co. v. Middlepoint Home Tel. Co., 7 Ohio N. P. (N. S.) 425. In an action to determine the validity of a contract between two telephone companies, evidence of the condition of the telephone business within the field in which the companies were operating is admissible for the purpose of showing the tendency and effect of the agreement which was made. Id.

6. Contract by which local telephone company binds itself not to connect its system with any other long distance system than that of other contracting party is contrary to public policy of Ohio, as tending to create monopoly. United States Tel. Co. v. Central Union Tel. Co., 171 F 130.

7. Contract by city giving water company exclusive right to furnish water for fire hydrants was void under Const. art. 1, § 3, prohibiting monopolies. Hartford Fire Ins. Co. v. Houston [Tex.] 116 SW 36. Contract to carry freight between two points at less than regular rate is void and contrary to Const. § 214, and Ky. St. § 817, prohibiting preferences, even though shipper does not know that he is receiving preference. Chesapeake & O. R. Co. v. Maysville Brick Co. [Ky.] 116 SW 1183.

8. See Combinations and Monopolies, § 2.

9. Contracts for purchase of goods sold. Moroney Hardware Co. v. Goodwin Pottery Co. [Tex. Civ. App.] 120 SW 1088. See, also, post, § 2. That a coal company was identified with illegal coal trust and sold all its coal through another member of such trust held not to preclude it from suing common carrier for breach of contractual and common-law duty to furnish cars for shipment of coal despite state and federal anti-trust acts. Midland Val. R. Co. v. Hoffman Coal Co. [Ark.] 120 SW 380.

10. Bonds issued in consideration of illegal contract in violation of anti-trust act are not relieved of taint of illegality by renewal after cancellation of such contracts. Perry v. U. S. School Furniture Co., 232 Ill. 101, 83 NE 444.

11. **Search Note:** See notes in 17 L. R. A. 113; 18 Id. 142; 33 Id. 628; 43 Id. 842; 1 L. R. A. (N. S.) 1032; 5 Id. 906; 6 Id. 547; 7 Id. 467; 13 Id. 267; 15 Id. 567; 113 A. S. R. 724; 4 Ann. Cas. 714.

See, also, Contracts, Cent. Dig. §§ 681-721; Dec. Dig. §§ 136-140; 9 Cyc. 546, 550-575; 17 A. & E. Enc. L. (2ed.) 986-1013.

12. Butler v. Agnew, 9 Cal. App. 327, 99 P 395; National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259.

Held unenforcible: Executory contract to carry on business which is unlawful at time cannot be enforced by either. O'Byrne v. Henley [Ala.] 50 S 83. Contract to pay for services in selling liquor in violation of law cannot be enforced. Crigler v. Shepler [Kan.] 101 P 619.

13. Perry v. U. S. School Furniture Co.,

In regard to such contracts the court simply leaves the parties where it finds them,[14] except where public policy requires it to afford relief,[15] or where the parties are not really in pari delicto;[16] but this rule is not based upon any consideration for the parties,[17] and may be applied even as against an innocent party,[18] and in a proper case for its application it should be applied by the court of its own motion.[19] So long, however, as an illegal contract remains unexecuted, money paid thereon may be recovered,[20] and a merely voidable contract will be given effect until disaffirmed.[21] The rule that neither party to a transaction will be permitted to take advantage of its invalidity without returning the benefits applies only to voidable contracts, not to those which are void.[22] Thus, one who has derived benefit from

232 Ill. 101, 83 NE 444. Bonds issued in consideration for illegal contract in violation of anti-trust act are not relieved of taint of illegality by fact that they were renewed after cancellation of contracts in consideration of which they were issued. Id. Price of machine and chemical for preserving fruit could not be recovered if statute prohibited use of chemical. Smith v. Alphin, 150 N. C. 425, 64 SE 210. Where cashier of one bank deposited personal check with another bank and first bank was then credited with it to make it appear solvent, neither party could enforce it in courts, transaction being illegal. Kentucky & Indiana Bank v. Globe Bank & Trust Co. [Ky.] 116 SW 792. Vendor cannot recover price nor rescind and recover goods not paid for. Town of Cottonwood v. Austin & Co. [Ala.] 48 S 345. Where liquor was delivered under agreement that goods not sold by dispensary could be returned, statute requiring sales to be for cash only was violated and vendor could not recover unsold goods. Id. Where agreement to transfer shares of stock to promoter, to be sold by him and paid for out of proceeds, was invalid and contrary to public policy, agreement of defendants to finance corporation by paying $100,000 in instalments could not be enforced. Holman v. Thomas, 171 F 219. No recovery can be had on an account for goods sold and delivered by corporation organized for purpose illegally combining wall paper manufacturers to restrain and monopolize the trade in violation of anti-trust act, both parties knowing that account was made up and goods sold in execution of and in accordance with such illegal agreement. Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 53 Law. Ed. ——.

Implied contracts: There can be no recovery upon a quantum meruit for services rendered or other consideration furnished under a contract void for illegality or reasons of public policy. Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 NW 746. Acceptance by sheriff of cash bail, instead of bond, being violation of Code 1906, § 1464, and person paying cash being in pari delicto, cannot recover sum paid. Cooper v. Rivers [Miss.] 48 S 1024.

14. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. Law does not prohibit making of contracts in restraint of trade; it simply refuses to recognize their validity or enforce them. Heim v. New York Stock Exch., 64 Misc. 529, 118 NYS 591. Where both parties to contract which is against public policy are aware of facts rendering it void, courts will not aid either, regardless of partial performance by one. Sauerhering v. Rueping, 137 Wis. 407, 119 NW 184. Court will not open default on petition of defendant that contract sued on was illegal, when it appears that he was particeps criminis. Tedford v. Lichtenstein, 131 App. Div. 805, 116 NYS 361. Purchaser of prohibited preserving preparation, having paid the price, cannot recover it unless the article sold is useless. Smith v. Alphin, 150 N. C. 425, 64 SE 210.

15. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. Although plaintiff joined with others to have a fake fight, he was entitled, in the interest of public policy, to recover money lost. Auxer v. Llewellyn, 142 Ill. App. 265.

16. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19.

17. The courts refuse aid to either party, not out of regard for his adversary, but because of public policy. Dunn v. Stegemann [Cal. App.] 101 P 25. In applying the rule, courts are concerned only with maintaining the purity of the law and its administration, and do not consider whether the party against whom enforcement is sought will benefit by the court's refusal to act. Butler v. Agnew, 9 Cal. App. 327, 99 P 395.

18. No right of action can be predicated on contract which is contrary to public policy, even by one who is innocent. Chesapeake & O. R. Co. v. Maysville Brick Co. [Ky.] 116 SW 1183. Courts will not aid in the enforcement of an immoral contract though the fruits of such contract are in the hands of a third person. Coffey v. Burke, 132 App. Div. 128, 116 NYS 514.

19. No recovery can be had by either party to a contract having for its object the violation of law. Courts should deny relief of their own motion. Dunn v. Stegemann [Cal. App.] 101 P 25.

20. This is disaffirmance, not enforcement. McCall v. Whaley [Tex. Civ. App.] 115 SW 658. Where contract contemplated transfer of property and also contained illegal stipulation concerning official position, and nothing was done except payment of part of consideration, parties failing to agree on written contract, it was not executed and money paid was recoverable. Id.

21. Hyde v. Equitable Life Assur. Soc., 61 Misc. 518, 116 NYS 219; Jordan v. Missouri & Kansas Tel. Co., 136 Mo. App. 192, 116 SW 432.

22. Independent School Dist. No. 5 v. Collins, 15 Idaho, 535, 98 P 857.

a contract void as against public policy is not estopped to deny its validity,[23] and, where a contract is illegal because involving commission of a crime, it cannot be ratified.[24] Contracts void as against public policy are not illegal in the sense that third persons have a right of action thereon for injuries sustained thereby.[25]

If the contract is entire, the illegality of a part renders the whole void,[26] but if the contract is severable the illegal portion may be rejected and the legal portion retained and enforced.[27] A contract containing a stipulation to do an immoral act is wholly void.[28] A contract is also void in toto if the entire consideration is illegal, though not immoral,[29] or if the illegal portion of the consideration is so blended with the residue of the contract as not to be severable.[30] If the residue of the consideration is distinct and severable, the contract will be enforced as to it.[31] A new promise cannot be enforced if connected in any way with an original illegal transaction,[32] but the illegality of one contract does not extend to another unless the two are united either in consideration or promise.[33] Relief not dependent upon or

23. Wilson v. Fahnestock [Ind. App.] 86 NE 1037.

24. As where based on discontinuance of criminal prosecution as consideration. Stanard v. Sampson [Okl.] 99 P 796.

25. National Fireproofing Co. v. Mason Builders' Ass'n [C. C. A.] 169 F 259.

26. If plaintiff cannot enforce his demand without the aid of the illegal agreement, the court will not aid him, and the contract is entire. Butler v. Agnew, 9 Cal. App. 327, 99 P 395.

Contract held inseparable: Part of consideration for note and mortgage being discontinuance of criminal prosecution against makers, note and mortgage were wholly void. Stanard v. Sampson [Okl.] 99 P 796. Where partnership agreement was part of an illegal contract, to do away with competition in bidding for public contract, court would not lend its aid in an accounting between the parties, since illegal contract would have to be proved. Citizens' Nat. Bank v. Mitchell [Okl.] 103 P 720. Deed of wife, conveying her property to pay husband's debt, is void, being declared so by Civ. Code, § 2488, and it cannot be held valid in part, if given partly to pay liens on property, since legal and illegal parts cannot be separated. Bond v. Sullivan [Ga.] 65 SE 376. An agreement to pay stated sum for use of building with railway trackage is entire, if agreement to secure trackage is illegal, so is entire contract. Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 NW 746.

27. Livingston v. Chicago & N. W. R. Co. [Iowa] 120 NW 1040; Fryer v. Harker [Iowa] 121 NW 526. When a contract embraces several agreements, some valid and others illegal, it is the duty of the court to separate the good from the bad when that is possible. Kansas City Hydraulic Press Brick Co. v. National Surety Co. [C. C. A.] 167 F 496.

Held severable: Contract whereby corporation received formula in consideration of issue of stock and $10,000, latter to be in lieu of salary of person transferring formula, as chemist, held severable so that invalidity of stock issue for failure to comply with statutory requirement of action by stockholders did not make contract for services unenforcible. Miller v. Cosmic Cement, Tile & Stone Co., 109 Md. 11, 71 A 91. Where contract for exchange of service between two companies provided for certain compensation to one for messages delivered by other, contract was severable. There could be recovery on that part which covered messages over wires legally maintained, though not for messages over wires maintained on public street without franchise. Bland v. Cumberland Tel. & T. Co., 33 Ky. L. R. 399, 109 SW 1180. Where contract with policy holder provided for reduction of premiums by allowance of renewal commissions on policies obtained by him, this provision, if void as giving special benefit contrary to Rev. 1905, § 4775, did not invalidate entire contract so as to release him on premium note when he kept the policy. Security Life & Annuity Co. v. Costner, 149 N. C. 293, 63 SE 304. Where, to prevent a monopoly in rendering telephone services, a company which had purchased stock of another company was enjoined from voting such stock, the assignor of such stock had no right to vote same until there had been a rescission, as the sale had sufficient validity to require a rescission. Dunbar v. American Tel. & T. Co., 142 Ill. App. 6.

28, 29. Nicholson v. Ellis, 110 Md. 322, 73 A 17.

30. Nicholson v. Ellis, 110 Md. 322, 73 A 17. If any part of consideration of entire contract is contrary to public policy, no part of contract will be enforced. Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 NW 746.

31. Contract of sale of business and good will of chemical business, and certain formulas, recited consideration of $600. Separate paragraph contained covenant not to engage in same or like business in United States. Latter clause did not invalidate entire contract. Nicholson v. Ellis, 110 Md. 322, 73 A 17.

32. Contract of separation of husband and wife being illegal, subsequent security was also void. Boyd v. Boyd, 130 App. Div. 161, 114 NYS 361.

33. Illegality of public contract, improperly let, did not invalidate bond to state to secure laborers and materialmen. Kansas City Hydraulic Press Brick Co. v. National Surety Co. [C. C. A.] 167 F 496.

requiring the enforcement of an illegal contact between the parties will be granted, notwithstanding the existence of the agreement,[34] especially where interests of the public intervene.[35]

A contract of a corporation engaged in a business that is affected with a public interest[36] which tends to affect such public interest injuriously,[37] and is contrary to public policy,[38] is ultra vires and may be restrained in equity at suit of attorney general whether or not actual injury has resulted to the public.[39] The rule in equity that contracts in restraint of trade are merely unenforcible does not render the parties thereto immune from the ordinary equitable remedies, when their violation of public policy is intended to and does work a public injury.[40]

§ 4. *Interpretation. A. General rules.*[41]—See 11 C. L. 755—Where a contract is certain and unambiguous in its terms, its construction is for the court,[42] and it is only in the case of the necessity of the introduction of parol evidence that the jury can have any function in this regard.[43]

A contract will be construed according to the intent of the parties,[44] as ex-

34. Illegal contract by deputy sheriff to perform services for less than amount fixed by law held not to bar action to recover legal compensation, where he did not seek to enforce contract rights. Bodenhofer v. Hogan [Iowa] 120 NW 659. Bank could recover money advanced to partnership to carry on public contract, though partnership agreement was contrary to public policy as restricting competition in bidding on contract. Citizens' Nat. Bank v. Mitchell [Okl.] 103 P 720. Agent to purchase property received commission for vendor, pursuant to secret agreement with vendor. After the purchase, but before payment of commission, purchaser decided to use property in lottery. Held unlawful purpose of vendee did not affect agent's liability to him for the commission, even if parties all knew of it. Commercial Club v. Davis, 136 Mo. App. 583, 118 SW 668. Where water company failed to supply sufficient water for fire protection and city sued for loss, and in settlement of suit water company sold water system to city and city agreed to reimburse insurance companies to extent of $100,000, companies could sue city for said sum paid for their benefit regardless of illegality of city's original contract with water company. Hartford Fire Ins. Co. v. Houston [Tex.] 116 SW 36.

35. That sheriff and his deputy were in office as result of illegal agreement between them to oust their predecessors and divide the office is no defense to an action by the sheriff against the deputy for an accounting in their official capacity. Eversole v. Holliday [Ky.] 114 SW 1195.

36. Such as fire insurance. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80.

37. Combination of fire insurance companies to increase rate of insurance. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80.

38. Combination of insurance companies and contract to control rates and business is in restraint of trade and contrary to public policy. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80.

39. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80.

40. May be restrained in such case. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80.

41. Search Note: See notes in 29 L. R. A. 512; 35 Id. 512; 7 L. R. A. (N. S.) 362; 8 Id. 1140; 12 Id. 661; 60 A. S. R. 93; 6 Ann. Cas. 55.

See, also, Contracts, Cent. Dig. §§ 723-770, 811-928, 1011-1041, 1097; Dec. Dig. §§ 143-176, 189-206, 218-227; 6 Cyc. 18-22, 52, 53; 9 Id. 577-591, 659-684; 17 A. & E. Enc. L. (2ed.) 1.

42. See post, § 9G.

43. See post, § 9F, subd. Questions of Law and Fact. As to the admissibility of parol evidence, see Evidence, § 5.

44. Baker v. Baker, 139 Ill. App. 217; Salisbury v. King [Ky.] 119 SW 160; Bright v. Bacon [Ky.] 116 SW 268; Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 117. Aside from technical rules of construction, there is no binding rule of determining intent, which may be indicated by a word, tone, look or gesture, or, in a writing, by a word, clause or sentence. Lynch v. Huston [Mo. App.] 119 SW 994.

Construction of particular contracts. Miscellaneous contracts: Contract to furnish coal daily construed. Great Western Coal & Coke Co. v. St. Louis & Big Muddy Coal Co., 140 Ill. App. 368. Contract between company formed to supply information concerning construction work, and manufacturer and seller of slate used in construction, held to require that such information should be promptly forwarded when gained. F. W. Dodge Co. v. H. A. Hughes Co., 110 Md. 374, 72 A 1036. Contract for transformation and installation of engine construed as one contract, and guaranty of satisfactory work, etc., applied to whole. Kumberger v. Hartford, 114 NYS 808. Contract construed as giving party exclusive right to operate motor cabs at certain hotel. Lynch v. Murphy Hotel Co., 112 NYS 915. Contract for transcript of testimony in grain investigation construed as relating only to testimony taken, not to that to be taken thereafter. Law Reporting Co. v. H. Poehler Co., 106 Minn. 213, 118 NW 664. Contract for legal editorial work construed as giving publishers ownership of article written and copyright, writer re-

pressed [45] in the entire instrument,[46] and with the view of giving effect to the con-

serving right to use material in any manner not infringing copyright. Publication of portions written by such editor, with other parts written by others, held not trespass on his rights. American Law Book Co. v. Chamberlayne [C. C. A.] 165 F 313. Contract to share cost and expense of any and all suits against one of parties includes costs taxed against one as expenses of suit. But object being to protect mutual interests in patented article, costs in suit against one for infringement, in which other was not interested, was not within contract. Provident Chemical Works v. Hygienic Chemical Co., 170 F 523. Agreement whereby hotel company leases carriage privilege of hotel for certain sum monthly was not lease but license or privilege. Lynch v. Murphy Hotel Co., 130 App. Div. 691, 115 NYS 465. Defendant made gift of land to plaintiff and her children, and thereafter she agreed to a sale provided he would reinvest the sum received. He failed to make the reinvestment. Held, plaintiff and her children were entitled to proceeds of land. Combest v. Wall [Tex. Civ. App.] 115 SW 354. Contract by advertising company to furnish one cut each week for advertising purposes, for exclusive use of defendant, did not give defendant exclusive right to all the company's service, but only to cuts furnished under agreement. Buster Brown Co. v. Valley Dry Goods Co. [Miss.] 47 S 549. Contract providing for collection of money and application to debts held to allow application only to debts existing when contract was made, and not to debts subsequently incurred. Bader v. Chicago Mill & Lumber Co., 134 Mo. App. 135, 113 SW 1154. Agreement to retain $1,200 out of purchase price of certain lands, in case of purchase, and pay same to plaintiffs, pursuant to buyers' agreement with selling broker, never became operative when they took title to only a part of the land. Cole v. Harvey [Iowa] 120 NW 97. **Broker's contract** to "list" property held to require more than merely taking description and making contract for compensation for listing. E. A. Strout Co. v. Gay [Me.] 72 A 881. Defendant agreed to procure conveyance of 15 acres to plaintiff from third party, tract to be selected by plaintiff. Held, selection of tract by plaintiff was condition precedent to putting defendant in default. Jacocks v. Morrison, 129 App. Div. 284, 113 NYS 322. **Contract of employment** construed as establishing relation of owner and contractor, not master and servant. Kendall v. Johnson, 51 Wash. 477, 99 P 310. Contract to saw timber on coal company's lands at $7 per thousand held to refer only to coal company's timber; for their own timber furnished to coal company, plaintiffs could recover, outside contract. Carr v. Middle States Coal Co., 64 W. Va. 448, 63 SE 334. Contract required contractor to have men and materials on ground ready for work within two weeks after receipt of notice that ground was ready. Held, owner impliedly agreed to have ground ready for workmen when they came, two weeks after notice, and contractor could recover damages for delay caused by owner. Hinds v. Hinchman-Renton Fireproofing Co. [C. C. A.] 165 F 339. Contract construed and held to be contract of employment and not one of sale of merchandise. Barr v. American Copying Co., 142 Ill. App. 92. Agreement construed as one whereby plaintiff made **loan** of money to her father in return for home and board for herself and children, money to be returned with interest, less amounts paid by maintenance, in case she demanded it. Cook v. Gore's Estate [Vt.] 72 A 322. Contract between bankrupt and claimants construed as mere loan to bankrupt to enable him to buy materials, taken in claimants' name. Property became that of bankrupt. In re Sassman, 167 F 419. Transaction treated by parties as loan, and evidenced by note, held loan, not a trust. Martin v. New York & St. Louis Min. & Mfg. Co. [C. C. A.] 165 F 398. Contract to advance money to defendant to enable him to construct automobile according to patents obtained by him construed as giving plaintiffs present interest in automobile and patents; plaintiffs had lien on same and on stock in company received by defendant from sale of same. Caulkins v. Lavigne [Mich.] 16 Det. Leg. N. 34, 120 NW 607. Contract and notes construed as allowing payment of note of coal company to lumber company by delivery of coal to latter. Note to president of lumber company payable in coal, at rate of 1,000 tons per month, after payment of company's note, and up to maturity of president's note; thereafter only in cash. McFarlane v. York [Ark.] 117 SW 773. Contract whereby debtor made **pledge** of shares of stock to holder of note upon agreement that creditor should satisfy note out of proceeds on liquidation of corporation and debtor was to receive balance, if any, held not to entitle debtor to entire balance, but only to his share, other stockholders, including holder of note, who held other shares in addition to those pledged, also sharing in proceeds on liquidation. Fuller v. Perkins [R. I.] 73 A 372. Contract of **sale** construed as one wherein seller guaranteed that buyer would retail at certain prices provided he displayed goods and kept them for sale as agreed. Held, where buyer refused to receive goods, seller need not show that goods would retail at prices fixed in order to recover price. Rice v. Malone [Mich.] 16 Det. Leg. N. 25, 120 NW 605. Where defendant agreed to pay plaintiff certain proportion of net price received for mine, plaintiff was entitled to that proportion of stock of company received for it. Kinard v. Jordan [Cal. App.] 101 P 696. Written contract of sale, fixing time of delivery, was not modified by printed clause on letter heads that "all agreements are subject to strikes, accidente and other delays beyond our control." Augusta Factory v. Mente & Co. [Ga.] 64 SE 553. Where owner declares in written contract that he sells and delivers for price paid in cash all merchantable pine timber on certain described tract of land, contract is one of sale. Smith v. Hule-Hodge Lumber Co., 123 La. 959, 49 S 655.

45. Intention is to be gained solely from language employed where that is clear. Shuler v. Allam [Colo.] 101 P 350; Baker v.

tract[47] in its entirety,[48] without regard to clerical errors[49] or technical rules,[50] and when the form and substance of the instrument conflict, the latter controls.[51] Words, therefore, will be given their ordinary and usual meaning.[52] The intent of the parties as to the meaning will, nevertheless, be followed whenever it is clearly apparent,[53] regardless of the aptness of the expressions used,[54] and, furthermore,

Baker, 139 Ill. App. 217; Sinnickson v. Richter, 140 Ill. App. 212; Eagle Fire Ins. Co. v. Spry Lumber Co., 138 Ill. App. 609; Anderson v. New York & H. R. R. Co., 132 App. Div. 183, 116 NYS 954. Courts do not make contracts for parties; only construe and enforce them as made. McFarlane v. York [Ark.] 117 SW 773; Garnes v. Frazier [Ky.] 118 SW 998.

Wisdom or fairness of contract: Court cannot consider wisdom of unambiguous contract. Carroll v. Title Guarantee & Trust Co., 131 App. Div. 221, 115 NYS 660. Construction of unambiguous contract is not affected by opinion of party as to its fairness. Lee v. Cochran [Ala.] 47 S 581. Plain intent of parties will be effectuated though agreement is harsh or unusual. Conservative Realty Co. v. St. Louis Brew. Ass'n, 129 Mo. App. 261, 113 SW 229.

Addition or omission of words or terms: Words cannot be omitted. Norfolk Lumber Co. v. Smith, 150 N. C. 253, 63 SE 954. Court is not justified in reading into a contract a provision which the parties to it have failed to insert, simply because from one point of view it would have been reasonable or desirable. Burt v. Garden City Sand Co., 141 Ill. App. 603. Words will not be added to contract when much more natural meaning can be gathered from contract as it stands. Klauder v. C. V. G. Import Co., 61 Misc. 255, 113 NYS 716. Guaranty to be construed according to what may be fairly presumed to have been intent of parties, and language used will not be extended by any strained construction to enlarge liability. Finnucan v. Feigenspan, 81 Conn. 378, 71 A 497.

46. Franklin v. Stoughton Wagon Co. [C. C. A.] 168 F 857; Town of Sterling v. Hurd, 44 Colo. 436, 98 P 174; Ashby v. Catheart [Ala.] 49 S 75; Spengler v. Stiles-Tull Lumber Co. [Miss.] 48 S 966. Contract to be taken as a whole, in light of subject-matter and circumstances. Donovan v. Boeck, 217 Mo. 70, 116 SW 543. All provisions of contract should be considered with reference to controlling principles and provisions of law. Stewart v. Stearns & Culver Lumber Co. [Fla.] 48 S 19. Relation of parties to contract must be determined from contract as whole. Walsh v. Colvin [Wash.] 101 P 1085. A written agreement and a note executed in pursuance thereof are to be construed as one agreement. Toledo Computing Scale Co. v. Tyden, 141 Ill. App. 21.

47. Contract will be construed with view of sustaining it. Baker v. Baker, 139 Ill. App. 217. As between two possible constructions, the one will be adopted which will sustain the contract. Yost v. Anchor Fire Ins. Co., 38 Pa. Super. Ct. 594; Baker v. Baker, 139 Ill. App. 217. When the true meaning of a contract is in dispute, the harsh or unreasonable results flowing from one construction should cause the court to search the contract diligently to see if it is capable of some more reasonable construction which the parties really intended. Losee v. Brunson, 141 Ill. App. 326.

48. Contract to be taken as whole. Lachmund v. Lope Sing [Or.] 102 P 598; Candler Inv. Co. v. Cox, 4 Ga. App. 763, 62 SE 479; Meinecke v. Smith, 135 Wis. 220, 115 NW 816; Warrum v. White [Ind.] 86 NE 959; Spring Garden Ins. Co. v. Imperial Tobacco Co. [Ky.] 116 SW 234; Yost v. Anchor Fire Ins. Co., 38 Pa. Super. Ct. 594. Whether ambiguity in a clause is patent or latent, court will endeavor to ascertain and effectuate intent as shown by entire instrument. Conservative Realty Co. v. St. Louis Brew. Ass'n, 133 Mo. App. 261, 113 SW 229.

49. Written contracts are to be construed according to the obvious intention of the parties, regardless of clerical errors or omissions which may be corrected by reading the entire instrument. Schroeder v. Griggs [Kan.] 102 P 469.

50. Statutory provision that contract is to be construed against a party thereto in the sense in which he understood the other to have intended it not applicable where terms are plain and unambiguous. Cole v. Harvey [Iowa] 120 NW 97.

51. Intent, not words, is essence of agreement, if it can be ascertained. Lachmund v. Lope Sing [Or.] 102 P 598. Courts look to purpose of contract, rather than name given it by parties, to determine its real character. Steele v. State [Ala.] 48 S 673.

52. Eagle Fire Ins. Co. v. Spry Lumber Co., 138 Ill. App. 609; Spring Garden Ins. Co. v. Imperial Tobacco Co. [Ky.] 116 SW 234; Daly v. Old [Utah] 99 P 460; E. A. Strout Co. v. Gay [Me.] 72 A 881. Unambiguous words to be given natural meaning. Webb v. Missouri State Life Ins. Co., 134 Mo. App. 576, 115 SW 481; Thompson v. Trenton Water Power Co. [N. J. Err. & App.] 73 A 410. Rule applies to negotiable instruments. Berenson v. London & Lancashire Fire Ins. Co., 201 Mass. 172, 87 NE 687. Where three persons bought patent right, and one agreed to **"carry"** another's interest in the patent, this meant that he would advance money to pay his interest. Mann v. Urquhart [Ark.] 116 SW 219. Word **"occupation"** construed. Yost v. Anchor Fire Ins. Co., 38 Pa. Super. Ct. 594.

53. E. A. Strout Co. v. Gay [Me.] 72 A 881; Spring Garden Ins. Co. v. Imperial Tobacco Co. [Ky.] 116 SW 234. If parties manifest in contract an intent not to use words in ordinary sense, they will not be so construed. Warrum v. White [Ind.] 86 NE 959. Word **"may"** in contract for purchase of shares of stock held not to turn contract into a conditional one dependent on the organization of the company. Watson v. Donald, 142 Ill. App. 110.

54. "Give" construed as "pay." Fearnley v. Fearnley, 44 Colo. 417, 98 P 819. So-called "lease" construed as contract of sale. Prather v. Brandon [Ind. App.] 88 NE 700.

that construction will be adopted which is consistent with the entire instrument,[55] does not lead to an absurdity,[56] and which will give effect to the contract.[57] If technical words are used, they will be construed in a technical sense, unless a contrary intention clearly appears in either case from the context.[58]

A contract will be construed most strongly against the party who prepares it,[59] and a party will be bound by the meaning which he has reason to believe the other party understood the words to bear.[60]

Repugnant clauses are to be reconciled if possible,[61] and effect given to every part of the instrument.[62] To this end, particular words or clauses may be enlarged or restricted in order to effectuate the intention of the parties,[63] and paragraphs relating to the same subject-matter should be construed together.[64] Where clauses are irreconcilable, the earlier prevails,[65] but matter written into a contract after

55. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819; Hunter v. Wenatchee Land Co., 50 Wash. 438, 97 P 494; Thompson v. Trenton Water Power Co. [N. J. Err. & App.] 73 A 410.

56. Thompson v. Trenton Water Power Co. [N. J. Err. & App.] 73 A 410. Grammatical and ordinary sense may be modified so as to avoid absurdity and inconsistency, but no further. Id. An apparently unambiguous contract may be rendered ambiguous and open to construction if its words taken literally lead to absurdity or illegality when applied to the facts. Clappenback v. New York Life Ins. Co., 136 Wis. 626, 118 NW 245.

57. When words admit of two senses, that which effect to the design of the parties is preferred to that which destroys it. Yost v. Anchor Fire Ins. Co., 38 Pa. Super. Ct. 594.

58. Yost v. Anchor Fire Ins. Co., 38 Pa. Super. Ct. 594; Daly v. Old [Utah] 99 P 460.

59. Payne v. Neuval [Cal.] 99 P 476; Pike's Peak Hydro-Elec. Co. v. Power & Min. Mach. Co. [C. C. A.] 165 F 184; McFarlane v. New York [Ark.] 117 SW 773. Doubtful or conflicting claims should be construed against the party responsible for the ambiguity. Dollar v. International Banking Corp. [Cal. App.] 101 P 34. Construction against him who gives, undertakes, or enters into agreement. Ashby v. Cathcart [Ala.] 49 S 75. Where vendor prepares contract for his own protection, it will be construed most strongly against him. Advance Thresher Co. v. Vinckel [Neb.] 121 NW 431. One writing and delivering contract is bound by legal meaning used, though he wrote it hastily, there being no fraud. Goldstein v. D'Arcy, 201 Mass. 312, 87 NE 584. Contractor who entered into contract with full knowledge of meaning attached to certain words by government cannot thereafter claim different meaning for such terms. Bowers Hydraulic Dredging Co. v. U. S., 211 U. S. 176, 53 Law. Ed. 136. Language of option most strongly construed against plaintiff, who drew it. Hardy v. Ward, 150 N. C. 385, 64 SE 171.

60. In case of doubt contract should be construed in sense in which promisor, who wrote it, had reason to believe promisee understood it. Stanton v. Erie R. Co., 131 App. Div. 879, 116 NYS 375. Contracting party held to meaning which he knew other party supposed words to have. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819.

61. McMillin v. Titus, 222 Pa. 500, 72 A 240; Green v. Ballard, 51 Wash. 149, 98 P 95. A clause is to be rejected as irreconcilable with a previous provision only when the contract as a whole cannot otherwise be given effect according to the intent of the parties. Davis v. Frazier, 150 N. C. 447, 64 SE 200. Clause whereby one promised to "give" certain sum, construed in connection with rest of contract, as promise to "pay," being based on same consideration as other promises to "pay" other persons. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819.

62. Ashby v. Cathcart [Ala.] 49 S 75; Norfolk Lumber Co. v. Smith, 150 N. C. 253, 63 SE 954; Codman v. Adamson, 130 App. Div. 317, 114 NYS 408; Witt Shoe Co. v. Peacock, 150 N. C. 545, 64 SE 437; Webb v. Missouri State Life Ins. Co., 134 Mo. App. 576, 115 SW 481. All parts of contract are to be construed as consistent with each other if possible. Buxton v. Kroeger, 219 Mo. 224, 117 SW 1147; Davis v. Frazier, 150 N. C. 447, 64 SE 200. Effect must be given to each clause that will promote general purpose. Conservative Realty Co. v. St. Louis Brew. Ass'n, 133 Mo. App. 261, 113 SW 229. Contract to be construed as whole and given effect as entirety, if possible, no part being disregarded. McMillin v. Titus, 222 Pa. 500, 72 A 240.

63. Given clause may be enlarged or limited by construction in connection with other provisions of contract., Dollar v. International Banking Corp. [Cal. App.] 101 P 34. Where a stipulation that the contract shall be void under certain circumstances is for the sole benefit of one of the parties, the word void is to be construed as voidable. Pacific Northwest Inv. Soc. v. Cunningham [Wash.] 103 P 9. Note was given for installment on investment bond which was delivered to maker of note, and note provided that bond should be void if note was not paid at maturity. Held investment company could elect to treat bond as valid and enforce note after maturity. Id. **General terms** should be restricted to subject-matter so as not to extend obligation beyond intention of parties. Daly v. Old [Utah] 99 P 460. **Particular words** or clauses may be restricted or enlarged, if literal construction would defeat intention. Id.

64. Paragraphs in contract relating to same matter should be construed together. Shubert v. Woodward [C. C. A.] 167 F 47.

65. Lachmund v. Lope Sing [Or.] 102 P 598.

the rest has been prepared controls inconsistent matter previously written.[66] Written words prevail over printed,[67] words prevail over figures.[68] Punctuation is only an aid to construction.[69]

If possible the contract should be given a reasonable construction,[70] and one upholding it should be preferred to one rendering it inoperative.[71] Provisions for forfeitures will be strictly construed and never aided by implication,[72] and so also as to provisions in restraint of trade.[73]

Provisions necessary to effectuate the manifest intention of the parties will be supplied by implication,[74] but no agreements will be implied which it could not be supposed the parties would have made.[75]

If the contract is ambiguous,[76] the court should place itself as nearly as possible in the position of the parties when it was made,[77] and to that end may take

66. Shubert v. Woodward [C. C. A.] 167 F 47.

67. Davis v. Lee, 52 Wash. 330, 100 P 752.

68. United Surety Co. v. Summers, 110 Md. 95, 72 A 775.

69. May be resorted to or disregarded. Commonwealth v. Grant, 201 Mass. 458, 87 NE 895.

70. Condon v. New Rochelle Water Co., 116 NYS 142. Construction consistent with fairness and common sense should be given in preference to one that is unreasonable to the point of dishonesty. Keith v. Kellermann, 169 F 196. Courts will construe an agreement to do an act as an agreement that failure to do it shall divest an existing title, when the contract would otherwise be unreasonable or absurd. Western Lime & Cement Co. v. Copper River Land Co., 138 Wis. 404, 120 NW 277.

71. Contract imports validity and good consideration, nothing to contrary appearing on its face. Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 SW 1052. Construction should be adopted which will make contract effective and reasonable. Coleman v. Wax, 120 La. 877, 45 S 926. Presumption favors good faith of parties and validity of contracts, and they will be construed as valid if susceptible of such construction. Cole v. Brown-Hurley Hardware Co., 139 Iowa, 487, 117 NW 746. Words "in occupation" construed as "in possession" in **guaranty of payment of rent.** Woods v. Broder, 129 App. Div. 122, 113 NYS 335. **Contract for railroad advertising** construed as one requiring payment at regular advertising rates, though in transportation, contract being otherwise invalid, as discrimination in rates contrary to statute. Hicks Print. Co. v. Wisconsin Cent. R. Co., 138 Wis. 584, 120 NW 512. Under rule that contract must be so construed as to make it operative if possible, **contract by executor to pay broker's commission** for finding purchaser for property of estate was held his personal contract. Hickman-Coleman Co. v. Leggett [Cal. App.] 100 P 1072.

72. Conditions providing for forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced, and they are enforced only when there is the clearest evidence that that was what was meant by the stipulation of the parties. There must be no trickery to entrap the party into a forfeiture. Yost v. Anchor Fire Ins. Co., 38 Pa. Super. Ct. 594. Clause providing for forfeiture will not be aided or given effect by construction where plain meaning of language does not require it. Haas v. Mutual Life Ins. Co. [Neb.] 121 NW 996. Where a contract is susceptible of two constructions one of which will work a forfeiture and the other of which will not, the one which will avoid the forfeiture will be adopted. Hamann v. Nebraska Underwriters' Ins. Co., 82 Neb. 429, 118 NW 65. Meaning of words will not be extended by construction so as to work forfeiture. Albers v. Merchants' Exch. [Mo. App.] 120 SW 139. Provision involving total forfeiture should yield to one involving only partial forfeiture. Dollar v. International Banking Corp. [Cal. App.] 101 P 34. Where one construction involves absolute destruction of property right of alienation and another suspends such right and protects parties from loss or injury, the latter construction, avoiding forfeiture, should be adopted. Id.

73. Contracts restricting the rights of others to engage in certain businesses or occupations are to be strictly construed. Plaintiff not entitled to injunction to prevent breach of agreement not to engage in business of extracting teeth by use of nitrous oxide gas when method used was not invented nor used exclusively by plaintiff, as contract provided. Thomas v. Borden, 222 Pa. 184, 70 A 1051.

74. Implied promise exists where equity and justice require the party to do or refrain from doing a thing, where the covenant on one side involves a corresponding obligation on the other, where duty arises from relation of parties and subject-matter, which, though not expressed, it may be assumed would have been expressed had attention of parties been called to it. Marvin v. Rogers [Tex. Civ. App.] 115 SW 863.

75. The law implies agreements necessarily a part of the express agreements, but will not make a contract for the parties or imply agreements which it could not be supposed the parties would have made. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291.

76. Proof of circumstances inadmissible to aid construction where contract was unambiguous. Manhattan Rolling Mill v. Dellon, 113 NYS 571. If contract is clear and unambiguous, proof of circumstances attending execution is inadmissible. Grosse v. Barman, 9 Cal. App. 650, 100 P 348.

Parol evidence: See Evidence, § 5.

77. Courts entitled to place themselves in

into consideration the subject-matter, the purpose, situation and conduct of the parties, and all the surrounding circumstances.[78] And so, also, where the contract is ambiguous,[79] the practical construction adopted by the parties themselves, while engaged in its execution, and before any controversy has arisen, may be considered,[80] and is usually entitled to great weight.[81]

situation occupied by parties when executing contract, and construe language used in light of circumstances. F. W. Dodge Co. v. H. A. Hughes Co., 110 Md. 374, 72 A 1036. Evidence may be received concerning situation of parties and subject-matter so that court, in construing contract, may view it as parties did. Wood v. Kelsey [Ark.] 119 SW 258.

78. United States v. Hoyt, 158 F 162; In re Hartman, 166 F 776; Green County v. Quinlan, 211 U. S. 582, 53 Law. Ed. —; Stalker v. Hayes, 81 Conn. 711, 71 A 1099; Finnucan v. Feigenspan, 81 Conn. 378, 71 A 497; Aetna Indemnity Co. v. Waters [Md.] 73 A 712; McMillin v. Titus, 222 Pa. 500, 72 A 240; Hardy v. Ward, 150 N. C. 385, 64 SE 171; Irwin v. Gould Elevator Co., 107 Minn. 233, 119 NW 1065; Warrum v. White [Ind.] 86 NE 959; Gwinn v. Wright, 42 Ind. App. 597, 86 NE 453; Ramage v. Wilson [Ind. App.] 88 NE 862; Fearnley v. Fearnley, 44 Colo. 417, 98 P 819; Kalinowski v. Jacobowski, 52 Wash. 359, 100 P 852; Daly v. Old [Utah] 99 P 460; Hunter v. Wenatchee Land Co., 50 Wash. 428, 97 P 494. Situation of parties, subject-matter, circumstances, and all language used in contract, should be considered, but one party should not be allowed to trap the other by form of words which he did not understand. E. A. Strout Co. v. Gay [Me.] 72 A 881.

Particular circumstances: Circumstances and subject-matter to be considered in determining whether instrument was lease or grant of mineral rights. Payne v. Neuval [Cal.] 99 P 476. Probable **motive** or object of parties, and their condition, to be considered, if language used is ambiguous. **Frisble v. Bigham Masonic Lodge, No. 256** [Ky.] 118 SW 359. Intent of agent in leaving contract with other party not alone conclusive on question of making of contract; other circumstances and acts were to be considered on question whether contract resulted. Tutwiler v. Burns [Ala.] 49 S 455. **Facts of public notoriety** relating to the subject of the contract will be presumed to have been known to the parties and their language will be construed in the light of such facts. McMillin v. Titus, 222 Pa. 500, 72 A 240. Situation of parties, and facts concerning subject-matter, known to them at time, to be considered. Kellerman Cont. Co. v. Chicago House Wrecking Co. [Mo. App.] 118 SW 99. Facts of public notoriety presumed to have been known to parties, and construction should be in light of such facts. Anse La Butte Oil & Mineral Co. v. Babb, 122 La. 415, 47 S 754. **General custom** need not be pleaded to admit proof of it in order to explain an obscure contract. Ryder-Gougar Co. v. Garretson [Wash.] 101 P 498.

79. Construction by parties important only where contract is ambiguous or uncertain. Davis v. Randall, 44 Colo. 488, 99 P 322; Bader v. Chicago Mill & Lumber Co., 134 Mo. App. 135, 113 SW 1154.

80. Kerz v. Galena Water Co., 139 Ill. App. 598; Cantrall Co-Op. Coal Co. v. Level 139 Ill. App. 104; Kroger Co. v. Butchers' Hide Ass'n, 8 Ohio N. P. (N. S.) 222; United States v. Hoyt, 158 F 162; Chamberlain v. Brown [Iowa] 120 NW 334; Ramage v. Wilson [Ind. App.] 88 NE 862; Bader v. Chicago Mill & Lumber Co., 134 Mo. App. 135, 113 SW 1154. Acts of parties under contract afford reliable test of construction of doubtful contract. Dollar v. International Banking Corp. [Cal. App.] 101 P 34. Where parties have acted upon and construed a contract, in the absence of any mistake or misunderstanding, the court will enforce the contract as interpreted by them. Jobst v. Hayden Bros. [Neb.] 121 NW 957. Where parties to contract have given it a practical meaning by long continued and consistent course of conduct, courts will so construe it, even though they might originally have construed it differently. City of New York v. New York City R. Co., 193 N. Y. 543, 86 NE 565. Conversations with defendant's superintendent, and with latter's subordinates, tending to show that they understood contract to be as plaintiff contended, held competent. St. Louis, etc., R. Co. v. Clark [Ark.] 119 SW 825. Interpretation of contract by attorney for one party, not brought to knowledge of other party, would not affect its meaning or binding force. Stokes v. Stokes, 240 Ill. 330, 88 NE 829.

81. Henry v. Mason City & Ft. D. R. Co. [Iowa] 118 NW 310; Boyer v. Metropolitan Sewing Mach. Co., 128 App. Div. 458, 112 NYS 817; Spengler v. Stiles-Tull Lumber Co. [Miss.] 48 S 966. **Third parties cannot complain** of such construction. Allison v. Taylor, 133 Ill. App. 70.

Practical construction followed: Where parties have adopted and acted upon fair and reasonable construction of contract for number of years. Ord Hardware Co. v. Case Threshing Mach. Co., 83 Neb. 353, 119 NW 682. Where parties interested have placed construction on instrument, acted on it, and parted with property on faith of it. Coulter v. Crawfordsville Trust Co. [Ind. App.] 88 NE 865. Contract being ambiguous, court will usually follow construction of parties themselves. Gorder v. Pankonin, 83 Neb. 204, 119 NW 449. In case of doubt, construction which parties themselves have placed on contract will prevail. McMillin v. Titus, 222 Pa. 500, 72 A 240. Where construction is doubtful, that placed on contract by parties themselves is entitled to great weight and will control, unless at variance with correct legal interpretation. Scott v. Lafayette Gas Co., 42 Ind. App. 614, 86 NE 495. Contract provision for measuring excavation material being ambiguous, practical construction placed on contract by parties was entitled to great weight. Virginia & K. R. Co. v. Heninger [Va.] 65 SE 495. Practical construction of contract by parties followed. Bardes v. Herman, 62 Misc. 428, 114 NYS 1098.

The recital of the consideration is not usually contractual,[82] but where, in addition to a recital of the consideration, terms are inserted which show a purpose to dispose, in the instrument, of the question of the amount and nature of the consideration, the statement of the consideration is contractual.[83]

The foregoing rules apply equally to the construction of oral contracts, but in such case the question is usually what the terms of the contract were, rather than the meaning of the language used, and this is a question of fact.[84]

(§ 4) *B. What is part of contract.*[85]—See 11 C. L. 784.—A single contract may consist of several agreements separate in form,[86] which several agreements may be evidenced by separate writings, even though there is no reference between them,[87] as where several writings are executed contemporaneously by the same parties and relate to the same transaction or subject-matter,[88] or when a subsequent instrument is executed in order to carry out the plan or provisions of a former instrument;[89] or a contract may be partly oral and partly written,[90] though where the parties have reduced their agreement to writing, the writing is presumed to contain the entire contract,[91] and one seeking to establish a collateral oral agreement must prove it

82. The words, "the receipt whereof is hereby acknowledged," appearing in an assignment, though under seal and acknowledged, if treated as a receipt, have no greater effect than a receipt not under seal. Gardner v. Ben Steele Weigher Mfg. Co., 142 Ill. App. 348.

83. Agreement of party injured in railroad wreck to accept specified sum held contractual and not mere recital of fact. Tate v. Wabash R. Co., 131 Mo. App. 107, 110 SW 622.

84. See ante, § 1B, also, post, § 9F.

85. Search Note: See Contracts, Cent. Dig. §§ 746-752; Dec. Dig. §§ 164-169; 6 Cyc. 18, 19; 9 Id. 580, 582, 587.

86. Though assumption of mortgage debt by subsequent purchaser is absolute in deed to him, it will be controlled by collateral contract between him and his grantor, not embodied in deed, and mortgagee cannot enforce contract of assumption appearing in deed unless grantor could. Klemmer v. Kerns, 71 N. J. Eq. 297, 71 A 332.

87. Oliver Typewriter Co. v. Huffman, 65 W. Va. 51, 63 SE 1086.

88. Oliver Typewriter Co. v. Huffman, 65 W. Va. 51, 63 SE 1086; McCauley v. Schatzley [Ind. App.] 88 NE 972; Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp. [Va.] 64 SE 56; Reber v. Pearson [Mich.] 15 Det. Leg. N. 1111, 119 NW 897. Contemporaneous writings between same parties relating to same subject-matter are received, not to change contract, but to be read together with it as parts of one contract. Oliver Typewriter Co. v. Huffman, 65 W. Va. 51, 63 SE 1086. See Mortgages, §§ 3, 6.

Held single contract: Agreement of parties to buy patent right, transfer of title to one, retransfer of an interest to another, and his note therefor, all being dated to date of purchase, should be construed together. Mann v. Urquhart [Ark.] 116 SW 219. Mining lease with option to purchase was executed, and at same time deed placed in escrow with instructions to deliver when conditions of lease were complied with, option and instructions to be construed together as parts of one transaction. Pollard v. Sayre [Colo.] 98 P 816. Where entire contract between parties was contained in written order and acceptance, and latter contained guaranty, no other guaranty could be relied on as defense than that so expressed. Warren-Ehret Co. v. Byrd, 220 Pa. 246, 69 A 751. Accepted proposal for work, and letter sent with it, construed together as calling only for work on interior of building. New York Metal Ceiling Co. v. New York, 133 App. Div. 110, 117 NYS 632. Where there was building contract containing general description, and enumeration of few items, and also more specific plans and specifications, both were to be construed together, in light of purpose of parties. Aetna Indemnity Co. v. Waters [Md.] 73 A 712.

89. Cole v. Harney [Iowa] 120 NW 97.

90. Indelli v. Lesster, 130 App. Div. 548, 115 NYS 46.

Written and oral agreements held part of single contract: Note held only part of contract, other part being oral. Kessler & Co. v. Parelius, 107 Minn. 224, 119 NW 1069. Written lease held only part of contract, it being provided by oral agreement that lease was not to take effect until premises were fully equipped for certain purpose. Manvell v. Weaver [Wash.] 102 P 36. Where writing refers to conversation for nature of services to be rendered, oral terms are part of contract. Sieberts v. Spangler [Iowa] 118 NW 292. Where blank space for rate was not filled in in shipping contract, which, however, recited that it was less than rate where carriage was at carrier's risk, parol proof of rate did not vary contract. St. Louis, etc., R. Co. v. Furlow [Ark.] 117 SW 517. Where contract to make garments contemplated that price should be fixed by parties subsequently, oral evidence was competent to show what parties did, and what price was fixed, in action for breach. Becher v. National Cloak & Suit Co., 128 App. Div. 423, 112 NYS 839. Contract of employment being oral, parol evidence explaining or modifying letters introduced in evidence was competent. Wintermute v. Standard Furniture Co. [Wash.] 102 P 443.

91. Chaplin v. Gerald, 104 Me. 187, 71 A 712. Release of liability for injury, complete and unambiguous, could not be added to by proof

by evidence which is clear, strong and convincing,[92] especially where the alleged oral agreement is improbable and unreasonable.[93] Questions of evidence arising out of attempts to prove oral agreements as parts of contracts evidenced in part by writings are considered elsewhere.[94] Laws and statutes applicable to a contract are considered as much a part thereof as they would be if expressly incorporated therein.[95]

(§ 4) *C. Character; joint or several, entire or divisible, etc.*[96] See 11 C. L. 765 Where two or more persons enter into a contract or obligation without using language indicating a contrary intention, the presumption is that the obligation is joint and not several,[97] but this presumption may be rebutted by the use of language showing an intention to make a joint and several obligation,[98] the question being one of intention,[99] and a contract may contain joint and also several obligations.[1] In some jurisdictions the matter is controlled by statute.[2]

of oral agreement to employ injured man. Id. Where words are omitted from a contract, or contradict each other, the resulting ambiguity is patent, and the contract cannot be aided by parol. If meaningless, it is not enforcible. Singer Sewing Mach. Co. v. Omaha Umbrella Mfg. Co., 83 Neb. 619, 119 NW 958.

92. Chaplin v. Gerald, 104 Me. 187, 71 A 712.

93. Oral agreement to employ motorman at $65 per month as long as he could work, in addition to written release of liability for loss of foot, given for cash consideration of $1,000, not proved by plaintiff's testimony as to conversations four years previous. Chaplin v. Gerald, 104 Me. 187, 71 A 712.

94. See Evidence, § 5.

95. Lynch v. Baltimore, etc., R. Co., 240 Ill. 567, 88 NE 1034. Where a contract is entered into with reference to an existing statute, the statute becomes part of the contract. Watkins & Co. v. Kobela [Neb.] 121 NW 448. Statutes and **laws governing citizens** are presumed to be incorporated into contracts made by them, since they are presumed to know the law. Leiendecker v. Aetna Indemnity Co., 52 Wash. 609, 101 P 219. All contracts are to be construed with reference to the rules and principles of law applicable to the subject-matter, and such law controls. **Law as to good will as property,** part of contract for sale of good will. Haugen v. Sundseth, 106 Minn. 129, 118 NW 666. Contract for sale and purchase of restaurant required seller to obtain lease from third person. Held, parties presumed to have had in mind **statute requiring proper ventilation and sanitary conditions in restaurant** kitchens. Manvell v. Weaver [Wash.] 102 P 36.

96. Search Note: See notes in 22 L. R. A. 80; 5 L. R. A. (N. S.) 475; 59 A. S. R. 277.

See, also, Contracts, Cent. Dig. §§ 771-810; Dec. Dig. §§ 177-188; 9 Cyc. 651-664.

97. Morrison v. American Surety Co. [Pa.] 73 A 10; Turley v. Thomas [Nev.] 101 P 568.

98. Where subscribers agreed, in consideration of benefits to be derived from location of federal building on land, to pay the amount "set after our names," to acquire the land, each subscriber was severally bound to pay amount subscribed by him. Los Angeles Nat. Bank v. Vance, 9 Cal. App. 57, 98 P 58. Bond executed by principal and surety, and reciting that "principal binds himself, his heirs, executors," etc., and "said surety binds itself and its successors," held several as well as joint obligation. Morrison v. American Surety Co. [Pa.] 73 A 10. "We or either of us hereby guarantee" held joint and several. Savannah Bank & Trust Co. v. Purvis [Ga. App.] 65 SE 35.

NOTE. Language held to create several as well as joint contract: Use of singular number in contract clause, and signatures of several persons, "we bind ourselves and each of heirs;" "ourselves, our heirs;" "and every of them;" "respectively;" "to be levied of our several goods."—From Morrison v. American Surety Co. [Pa.] 73 A 10.

99. Contract whereby guarantors "jointly guaranty payment of said $25,000 or any part thereof, pro rata, and also" performance of contract, **held joint** and not several, words "pro rata" not referring to proportionate payments by each, but to part of entire sum guaranteed. Wood v. Farmer, 200 Mass. 209, 86 NE 297. Notes secured by mortgage held joint, and not joint and several. Boltz v. Muehlhof, 37 Pa. Super. Ct. 375. Bond construed as joint obligation of principal and surety. International Hotel Co. v. Flynn, 238 Ill. 636, 87 NE 855. Subscription for stock of corporation **held joint and several** so as to make all delinquent subscribers jointly and severally liable for amount due, though, as stockholders, each would be liable only for the amount of stock subscribed. Chicago Bldg. & Mfg. Co. v. Peterson [Ky.] 118 SW 384. Covenants in bonds to pay the obligees certain damages that might be awarded to the obligees or "to any one or more of them jointly or severally" **held several** as to each obligee. International Hotel Co. v. Flynn, 141 Ill. App. 532. A contract may be construed as joint or several **according to interests of parties,** if the language used is consistent with such construction; several, if interests are several; joint, if interests are joint. International Hotel Co. v. Flynn, 238 Ill. 636, 87 NE 855.

1. Krbel v. Krbel [Neb.] 120 NW 935.

2. Release by partnership is release by each partner, since Rev. St. 1899, § 889, makes joint undertakings joint and several. Equitable Fire & Marine Ins. Co. v. St. Louis & S. F. R. Co., 134 Mo. App. 48, 114 SW 546. Under statutes, obligation of joint note is presumptively joint and several, and unless this presumption is overcome, judgment against one or more does not bar action against other makers. McMaster v. City Nat. Bank [Okl.] 101 P 1103. Words obligating

Whether a contract is entire or severable,[3] and whether its conditions are concurrent and dependent, or independent,[4] and whether words used are words of

parties jointly make them jointly and severally liable, under Code, § 3465. Cole v. Harvey [Iowa] 120 NW 97.

3. Whether contract entire or severable is matter of intention. Quarton v. American Law Book Co. [Iowa] 121 NW 1009; Barlow Mfg. Co. v. Stone, 200 Mass. 158, 86 NE 306; Cole v. Harvey [Iowa] 120 NW 97; Equitable Trading Co. v. Stoneman, 131 App. Div. 376, 115 NYS 285.

Contract provisions held severable: Stipulation in **contract for contingent fee** for attorney that client shall not compromise without attorney's approval is separable. Beagles v. Robertson, 135 Mo. App. 306, 115 SW 1042. **Contract employing broker** to show land, which provided for payment of 5 per cent commission or 10 per cent in case brokers sold alone, and which was for one year, but provided for payments of commissions when 25 per cent of price was paid on land sold, held divisible. Tilton v. Gates Land Co., 140 Wis. 197, 121 NW 331. **Contract with railway company to maintain crossing** on farm and to pay for all stock killed valid, though agreement to maintain open crossing might be held void as endangering safety of public. Livingston v. Chicago & N. W. R. Co. [Iowa] 120 NW 1040. **Contract to sow and harvest grain** held severable. Stoneking v. Long, 142 Ill. App. 203. **Sale** of articles, each at fixed price, severable contract. Barlow Mfg. Co. v. Stone, 200 Mass. 158, 86 NE 306. Contract for sale of goods at different prices severable; plaintiffs could recover for amount shipped. Equitable Trading Co. v. Stoneman, 131 App. Div. 376, 115 NYS 285. Agreement to order $12,850 worth of goods and to pay one-half within 10 days after delivery of each installment, and balance in 60 days after delivery, was severable; suit could be maintained for price of installment when due. Ikonograph Co. v. John Newton Porter Co., 113 NYS 537. Contract for specially made goods in carload lots to be delivered at different times as ordered is severable. Jennings v. Shertz [Ind. App.] 88 NE 729. Contract for eleven carloads of lumber, each car to be separately billed and paid for, severable. Harris Lumber Co. v. Wheeler Lumber Co. [Ark.] 115 SW 168. Where price to be paid is clearly and distinctly **apportioned** to different parts of what is to be performed, although the whole is in its nature single and entire, contract is severable. **Covenant not to engage in same or similar business** in United States, contained in contract of sale of stock, business, and good will, held severable from residue, being contained in separate paragraph, and no consideration being recited. Nicholson v. Ellis, 110 Md. 322, 73 A 17. Agreement whereby seller of business agreed not to engage in business for 20 years "within 500 miles from city of Jersey City" construed as agreement not to engage in such business "either in city of Jersey City or within 500 miles from that city," and held divisible. Portion relating to Jersey City was reasonable and valid and enforcible. Fleckenstein Bros. Co. v. Fleckenstein, 76 N. J. Law, 613, 71 A 265.

Contract held entire: Contract to thresh entire crop would be entire though price per bushel was fixed. Johnson v. Fehsfeldt, 106 Minn. 202, 118 NW 797. Where one party agreed to procure for another the timber of a third person, consisting of several tracts, for a fixed entire sum, and was paid $1,000, to be repaid if he failed to procure the timber, the contract was entire, and was not performed by procuring a portion of the timber, in the absence of a waiver or modification of the contract. Fletcher v. McMillan [Ga.] 64 SE 268. Contract to rent sawmill (with option to purchase), and sell and cut timber, held entire, for one consideration; lease of mill could not be surrendered and right to cut timber retained. Wood v. Kelsey [Ark.] 119 SW 258. Mere fact that duty to be performed is severable, or that price is per pound, or yard, or measure, does not make contract severable. Johnson v. Fehsefeldt, 106 Minn. 202, 118 NW 797.

4. Where it is manifest that what is called a condition is really but a covenant or agreement, to be independently performed, courts will enforce it as such, though the technical meaning of the word "condition" is disregarded as a result of such construction. Green County v. Quinlan, 211 U. S. 582, 53 Law. Ed. —. Where contract provides for performance of certain labor or delivery of certain articles on one hand, and payment of price on other, these acts cannot be concurrently performed and the question which is to be performed first must be determined from nature of contract and subject-matter. Gagnon v. Molden, 15 Idaho, 727, 99 P 965. Contract for water held to require delivery of water on land prior to date of maturity of first instalment of price. Id. Covenant in license given by patentee to protect patent against infringement held concurrent condition under Civ. Code Cal. §§ 1437, 1439; performance or readiness and ability to perform essential to recovery of royalties under license. Wilfley v. New Standard Concentrator Co. [C. C. A.] 164 F 421. Contract for writing law books construed, and held that stipulation that writer was to abstain totally from use of intoxicants was not of consideration, but was mere condition precedent, upon breach of which, unless waived, portion of compensation was to be forfeited. Clark v. West, 193 N. Y. 349, 86 NE 1. Lease of homestead and other premises provided for sale of personalty on premises. Lease of homestead was void. Held parties released on entire contract, parties regarding provisions as dependent. Mailhot v. Turner [Mich.] 16 Det. Leg. N. 326, 121 NW 804. Terms providing for suspension of contract in case of controversies held independent of other provisions dependent upon which of parties was in the right in regard to controversy. Kohler v. Northern Electrical Mfg. Co. [C. C. A.] 162 F 876.

Where mutual covenants go to the whole of the consideration on both sides, they are dependent and one is a condition precedent to the other. Cluley-Miller Coal Co. v. Freund Packing & Mfg. Co. [Mo. App.] 120 SW 658. In the absence of clear language to the

description or condition,[5] are questions of intention. Conditions subsequent, when relied on to work a forfeiture, must be created by express terms or clear implication.[6] Where performance is to be at the time of the happening of some future event, there is an implied promise not to hinder or prevent the happening of such event,[7] and if the obligor prevents the happening of the event, the contract becomes at once absolute.[8]

(§ 4) *D. Custom and usage.*[9]—See 11 C. L. 766—This subject is treated fully in another topic.[10]

(§ 4) *E. As to place, time and compensation.*[11] *Place.*See 11 C. L. 766 *Time.*See 11 C. L. 766—Where no time for performance is specified, the law implies that a reasonable time is to be allowed.[12] Whether time is of the essence of the contract is a question of intent,[13] to be ascertained by a consideration of the terms of the contract,[14] the conduct of the parties,[15] and the nature of the subject-matter.[16]

contrary, promises which form the consideration, if doubtful, will be held to be concurrent or dependent. World's Fair Min. Co. v. Powers [Ariz.] 100 P 957.

Where a covenant goes only to a part of the consideration, and is only incidental to the main purpose of the contract, it is independent, and a breach of it is not a breach of the entire contract so as to excuse the other from performing, since he has a remedy by way of damages for breach. Cluley-Miller Coal Co. v. Freund Packing & Mfg. Co. [Mo. App.] 120 SW 658.

5. Words construed as words of description and not of condition (that defendant should furnish such sums as might be required, etc.). Joline v. Metropolitan Securities Co., 164 F 144.

6. Davidson v. Ellis, 9 Cal. App. 145, 98 P 254.

7. Marvin v. Rogers [Tex. Civ. App.] 115 SW 863.

8. Money was to be paid when drug company secured new lease, or extension of lease, of certain store. Obligor sold store. Held, liable for money. Marvin v. Rogers [Tex. Civ. App.] 115 SW 863.

9. **Search Note:** See Customs and Usages, Cent. Dig.; Dec. Dig.; 12 Cyc. 1028-1102.

10. See Customs and Usages.

11. **Search Note:** See notes in 15 L. R. A. 737; 49 Id. 205; 1 L. R. A. (N. S.) 364; 6 Ann. Cas. 378.

See, also, Contracts, Cent. Dig. §§ 929-1010, 1042-1116; Dec. Dig. §§ 207-217, 228-235; 6 Cyc. 75-80; 9 Id. 608.

12. Turley v. Thomas [Nev.] 101 P 568; South Texas Tel. Co. v. Huntington [Tex. Civ. App.] 121 SW 242; Western Lime & Cement Co. v. Copper River Land Co., 138 Wis. 404, 120 NW 277; McArthur v. Cheboygan [Mich] 16 Det. Leg. N. 45, 120 NW 575; American Bridge Co. v. American Dist. Steam Co., 107 Minn. 140, 119 NW 783. When no time is specified, or when time clause is in effect abrogated by change mutually agreed upon, law implies reasonable time for performance. Missouri Bridge & Iron Co. v. Steward, 134 Mo. App. 618, 114 SW 1119. No time being fixed in which surety might elect to complete work, abandoned by contractor, law implied reasonable time, and failure to elect for more than two weeks after notice was election not to complete. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Insurance agency contract held to provide that company would be liable to agent for renewal cash premiums only during the time he was their agent. Dodson v. New York Life Ins. Co., 36 Pa. Super. Ct. 551. Agreement by vendor of bonds with vendee that "We will carry the above bonds for you charging interest at the rate of six per cent" held not to constitute an agreement to carry the bonds so long as vendee paid the six per cent. Harrison v. Atlee, 38 Pa. Super. Ct. 241.

13. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785. Time will not ordinarily be regarded as of the essence when the parties do not expressly make it so. Chapman & Dewey Land Co. v. Wilson [Ark.] 120 SW 391. While time is not generally of the essence of the contract, it may be made so by express stipulation or reasonable construction. Civ. Code § 3675 (8). Augusta Factory v. Mente & Co. [Ga.] 64 SE 553. Competent to make time the essence and forfeit vendee's rights and money paid on default. Spedden v. Sykes, 51 Wash. 267, 98 P 752. Parties may make time the essence of contract for sale of land, and make default work a forfeiture. Friar v. Baldridge [Ark.] 120 SW 989. Where contract of sale does not make time of the essence, though time of delivery is specified generally, the vendee may call for performance by a stated time, and, if this time is reasonable, it becomes essential, and delivery thereafter may be treated as breach. Augusta Factory v. Mente & Co. [Ga.] 64 SE 553.

14. Written provision that "time is of essence" held to prevail over printed clause that contractor should not be liable in damages for delay. Pike's Peak Hydro-Elect. Co. v. Power & Min. Mach. Co. [C. C. A.] 165 F 184. Stipulation in real estate sale contract that balance of price was to be paid by certain day, in default of which vendee should forfeit interest in land, showed intent to make time the essence. Cadwell v. Smith, 83 Neb. 567, 120 NW 130. Contract to employ counsel and pay expenses of litigation concerning land, upon agreement to convey part of land if suit was successful. Held, time was of essence; failure to pay expenses barred recovery, notwithstanding offer to reimburse after litigation was ended.

Compensation.[See 11 C. L. 768]—Where compensation is not specified, the law implies a promise to pay the reasonable value.[17] Provisions as to compensation are to be construed with reference to the rules already discussed.[18]

(§ 4) *F. What law governs.*[19]—[See 11 C. L. 768]—This subject is treated elsewhere.[20]

§ 5. *Modification and merger.*[21]—[See 11 C. L. 768]—The parties to an executory contract may, at pleasure and by mutual consent,[22] change or modify it,[23] and substitute for it a new contract,[24] which then becomes the measure of their rights and

Abernathy v. Florence [Tex. Civ. App.] 113 SW 161. Where note given to aid railroad construction provided that it should become due and payable when the line was in operation to certain point and contract, part of note, fixed time of completion, time was of essence, and completion of road by time stated condition precedent to recovery on note. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785.

15. Time not of essence of sale where there was partial delivery and parties treated contract as existing after defaults. Pitch Pine Lumber Co. v. Wood Lumber Co. [Fla.] 48 S 993. **Party may waive default** which under terms of contract gave him right to declare forfeiture. Friar v. Baldridge [Ark.] 120 SW 989. Where contract provided for forfeiture on failure to make stipulated payments, but also provided for deed on giving notes and mortgage for balance due, and notes and mortgage were accepted, forfeiture clause was waived. Spedden v. Sykes, 51 Wash. 267, 98 P 752.

16. Time was essence of contract to complete building by certain date when delay meant loss of rents. Mikolajewski v. Pugell, 62 Misc. 449, 114 NYS 1084. In actions at law, the stipulated time for performance of contracts for sale of realty is of the essence. Groden v. Jacobson, 129 App. Div. 508, 114 NYS 183. Time is not necessarily the essence in equity, unless value of subject-matter is fluctuating, and delay might cause loss or detriment to other party. Garrett v. Cohen, 63 Misc. 450, 117 NYS 129. In determining whether time is of essence in equitable proceeding, regard must be had to character of subject-matter. Thus, time held to be essence where option was given on timber, which was increasing in value rapidly, and for which there was great demand. Hardy v. Ward, 150 N. C. 385, 64 SE 171.

17. Myers v. Holton, 9 Cal. App. 114, 98 P 197. See Implied Contracts, §§ 2, 4.

18. See ante, § 4A.

Construction of particular contracts: Contract for tuition held not to require payment for time when pupil did not attend. Hartridge School v. Riordan, 112 NYS 1089. Actor's contract construed, according to meaning parties placed on it, as one entitling him to compensation for entire period, though he did not act for two weeks, being under orders at all times. Day v. Klaw, 112 NYS 1072. Contract construed as not limiting salary of Indian commissioners to days when they were actually and actively engaged. United States v. Hoyt, 158 F 162. Contractor, to whom advances had been made, agreed to repay them in case he realized profits out of contract with the United States. Held, he realized a profit, within meaning of contract, by subletting at a profit, though there was an actual loss by parties who did work. Sand Filtration Corp. v. Cowardin, 213 U. S. 360, 53 Law. Ed. —. Special insurance agent's contract construed as not entitling him to commissions on renewals after contract of principal agent terminated. Nelles v. MacFarland, 9 Cal. App. 534, 99 P 980.

19. Search Note: See Contracts, Cent. Dig. §§ 2, 41, 145, 445-461, 724-727, 1216, 1558-1562; Dec. Dig. §§ 2, 101, 144, 276, 325; 6 Cyc. 18; 9 Id. 575, 576, 664-684, 690-693.

20. See Conflict of Laws. See, also, topics dealing with particular contracts, and, also, Limitation of Actions, § 1.

21. Search Note: See note in 4 L. R. A. (N. S.) 980.

See, also, Contracts, Cent. Dig. §§ 1117-1140; Dec. Dig. §§ 236-248; 6 Cyc. 23, 24; 9 Id. 593-600, 633-635.

22. That one party understood it was changed, not enough. United States Coal Co. v. Pinkerton [C. C. A.] 169 F 536. One relying on substituted oral agreement for written contract must show not merely his own understanding that new agreement resulted, but that other party also understood it. Merely accepting extra pay, as bonus, was not accepting new contract. Molostowsky v. Grauer, 113 NYS 679. Letter or other writing cannot be treated as contract of parties, superseding previous oral agreement, until it has been mutually adopted by parties as such. Simpson Plumbing & Heating Co. v. Geschke [N. J. Eq.] 72 A 90. Evidence insufficient to show meeting of minds of parties on modification of contract. Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co., 105 Minn. 483, 117 NW 825. Agreement between employe of defendant and its president, whereby employe was to have bond and stocks of company if he remained, not being ratified by company, was not binding; old contract remained in force; no recovery on new contract, or on quantum meruit. Minshull v. New Jersey Terminal R. Co., 76 N. J. Law, 684, 71 A 663.

23. Evidence held to show that parties to an assignment of a contract for sale of realty, as security, was mutually changed by parties, making assignment absolute. Barker v. More [N. D.] 118 NW 823. Where client conveyed property to attorney for his compensation, reserving right to collect rents and pay taxes and otherwise manage same, and subsequently orally agreed to surrender right to reconveyance, after which property was managed entirely by attorney, latter agreement, under evidence, was held complete surrender. Porter v. Howes, 202 Mass. 54, 88 NE 445.

24. Contract changed by subsequent agreement is new contract. Malken v. Hem-

obligations.[25] There is no special formula or set of words which must be used in modifying or abrogating a contract,[26] and whether there has been such modification or abrogation is a question of intent,[27] which may be manifested by the conduct of the parties.[28]

Written contracts, not under seal, and not required by law to be in writing, may be modified by subsequent parol agreement,[29] but proof of such modification must be clear and satisfactory.[30] A consideration for the new contract is necessary,[31] but it is usually held that no new consideration is necessary,[32] or rather that the mutual releases of the respective obligation under the old contract, and the mutual promises or engagements under the new, constitute a sufficient consideration,[33]

ming Bros. [Conn.] 73 A 752. Evidence insufficient to show new contract for automobile after first contract has been mutually rescinded. Pierce v. Cleveland Motor Car Co., 112 NYS 1096.

25. Fritz v. Fritz [Iowa] 118 NW 769. Action to cancel contract and recover consideration could not be maintained where new contract had been made in settlement of old one. French v. Provident Drug Co. [Tex. Civ. App.] 113 SW 765. Where parties have substituted a new oral agreement for a written contract, strangers or third persons cannot hold them to the terms of the original contract, though it provided that it could not be changed by parol. Long v. Shepherd [Ala.] 48 S 675. Where insurance company consents to additional insurance, provision against it is waived. Northwestern Nat. Ins. Co. v. Avant [Ky.] 116 SW 274. Where parties who acquired franchise, being unable to raise money and commence work, transferred it to corporation to be formed, stock of which was to be subscribed and paid for by parties, they waived claim of compensation for franchise. San Antonio Irr. Co. v. Deutschmann [Tex.] 114 SW 1174. Contract whereby plaintiff paid $15,000 to defendant upon agreement to organize company to make machine provided for return of money if machine should not be commercial success. Subsequent modification was to effect that $15,000 should be returned less one-fourth expenditure on machine. Plaintiff could not recover on both; must prove rescission of latter to recover on former. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616. Contract for sewer was abandoned by city under statute authorizing such action, and new contract with another made, which referred to old contract merely to describe and measure work. Held, new contract not connected with old, so as not to come within statute passed after first was made. People v. Metz, 193 N. Y. 148, 85 NE 1070. Motion for reargument denied. People v. Metz, 194 N. Y. 145, 86 NE 986.

26. Question for jury or trial court, on evidence. Tong v. Orr [Ind. App.] 88 NE 308.

27. Agreement for additional work, not provided for in contract, operated to extend time for performance. Virginia & K. R. Co. v. Heninger [Va.] 65 SE 495. Ambiguous transactions, not inconsistent with continuance of original contract, insufficient to show modification. Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co., 105 Minn. 483, 117 NW 825. Release of trust deed held not to change or modify contract under which it was given. Cotulla v. Barlow [Tex. Civ. App.] 115 SW 294. If damages have accrued under a verbal contract and there is no waiver of disclaimer of such breach in the subsequent writing, an action may be maintained on the oral contract, notwithstanding the writing. Luckey v. St. Louis & S. F. R. Co., 133 Mo. App. 589, 113 SW 703. Where contract for sale of realty made time the essence, and fixed time and place of payment, acceptance of partial payment at place other than that stated, and extension of time on partial payment, did not amount to modification of contract as to subsequent payments. Prairie Development Co. v. Leiberg, 15 Idaho, 379, 98 P 616.

28. By statute in Georgia, where parties, in course of execution of a contract, depart from its terms, and pay and receive money under the departure, before either can recover for failure to observe the letter of the contract, reasonable notice must be given the other of intention to insist thereon. Until such notice, the departure is a quasi new agreement. Civ. Code 1895, § 3642, applied to facts of case. Kennesaw Guano Co. v. Miles & Co. [Ga.] 64 SE 1087.

29. Long v. Shepherd [Ala.] 48 S 675; Schoblasky v. Rayworth, 139 Wis. 115, 120 NW 822; Weed v. Spears, 193 N. Y. 289, 86 NE 10. Contract may be modified by parol, unless within statute of frauds. John King Co. v. Louisville & N. R. Co. [Ky.] 114 SW 308. Subsequent contract extending time of payment may be proved by parol. Freeman v. Bell, 150 N. C. 146, 63 SE 682. Waiver of stipulated damages for forfeiture may be shown by parol. Rock Island Plow Co. v. Rankin Bros. & Winn [Ark.] 115 SW 943.

30. Prairie Development Co. v. Leiberg, 15 Idaho, 379, 98 P 616. Abrogation of written contract by parol agreement must be established by evidence which is clear and satisfactory, but it may be sufficient though there is some conflict. Guldman v. Wilder [Colo.] 101 P 759. Burden is on party asserting subsequent modification of written contract to prove it. Brown & Co. v. McKnight [Ark.] 118 SW 409.

31. American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 NYS 236; Pyre v. Kalbaugh, 34 Utah, 306, 97 P 331; Weed v. Spears, 193 N. Y. 289, 86 NE 10. Parol evidence rule does not prevent parties from modifying or changing contracts if modifications are based on consideration or are executed. Lamb's Estate v. Morrow [Iowa] 117 NW 1113.

32. Prye v. Kalbaugh, 34 Utah, 306, 97 P 331; Schoblasky v. Rayworth, 139 Wis. 115, 120 NW 822.

33. Waiver or release of liability under

though it is held that the performance of or the promise to perform that which a party is, under the old contract, already bound to perform, is not a sufficient consideration for such party's release from liabilities which have become fixed under such contract.[34] A contract under seal can be altered only by one of equal dignity,[35] unless the new contract is executed,[36] and a contract within the statute of frauds can be modified only by a writing which satisfies the statute.[37] Statutes regulate modification in some states.[38]

Merger See 11 C. L. 769 is generally a question of intention.[39] All prior and contemporaneous oral negotiations and agreements are presumed to have been merged in the final written contract,[40] and, hence, the latter cannot be varied by proof of the former,[41] but this rule applies only when the oral agreement is executory on both sides.[42]

the original contract, which remains executory, is a sufficient consideration for the new contract. Prye v. Kalbaugh, 34 Utah, 306, 97 P 331. Cancellation or modification of the terms and obligations of a written contract is sufficient consideration for subsequent oral one. Lamb's Estate v. Morrow [Iowa] 117 NW 1118. Promise of lessor not to enforce rent payments, and promise of lessee not to enforce payment of sum due from lessor, sufficient. American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 NYS 236. Where parties to excavation contract were in error as to character of material to be removed, and contractor threatened to abondon the contract, there was sufficient consideration for a new contract, increasing the compensation. John King Co. v. Louisville & N. R. Co. [Ky.] 114 SW 308. Where lease allowed lessee to plant any crops he should choose, an agreement to plant all land to corn, made at lessor's request, and that in case of crop failure no rent was to be paid, was upon sufficient consideration. Jones v. Longerbeam [S. D.] 119 NW 1000.

34. Weed v. Spears, 193 N. Y. 289, 86 NE 10.

35. Subsequent parol modification of contract under seal ineffective; party could repudiate it and stand on original contract. Interrante v. Levinson, 129 App. Div. 495, 113 NYS 1082.

36. Oral agreement to accept lower rental than that stipulated in written lease void so far as unexecuted but valid and binding so far as executed by making and receiving payments under it. Zindler v. Levitt, 132 App. Div. 397, 116 NYS 726.

37. Modification of contract for sale of real estate can be modified only by written contract or memorandum signed by parties. Malken v. Hemming Bros. [Conn.] 73 A 752. Subsequent agreement cannot change or abrogate written contract unless it possesses elements and formalities essential to creation of valid contract as to particular subject-matter. When relating to land, must comply with statute of frauds. Reams v. Thompson, 5 Ga. App. 226, 62 SE 1014.

38. Written contract may be changed by executed oral agreement, under statute. Jones v. Longerbeam [S. D.] 119 NW 1000.

39. Option to sell merged in subsequent deed and trust deed given as security for price. Savage v. Cauthorn [Va.] 64 SE 1052. Previous correspondence merged in subsequent written contract. Creamery Package Mfg. Co. v. Duncan, 136 Mo. App. 659, 119 SW 33. Evidence insufficient to show that settlement for injuries to horse was not final merger of prior negotiations. Woodward v. Neal, 113 NYS 751. Written contract deemed final consummation of negotiations, and embraced entire agreement. Letter previously written not considered part of contract. Pammel v. Pacific Mut. Life Ins. Co. [Mich.] 16 Det. Leg. N. 322, 121 NW 760.

40. Southard v. Arkansas Valley & W. R. Co. [Okla.] 103 P 750; Western Lime & Cement Co. v. Copper River Land Co., 138 Wis. 404, 120 NW 277; Krbel v. Krbel [Neb.] 120 NW 935; Commonwealth Trust Co. v. Coveney, 200 Mass. 379, 86 NE 895; Kellerman Cont. Co. v. Chicago House Wrecking Co. [Mo. App.] 118 SW 99; St. Louis & S. F. R. Co. v. Gorman [Kan.] 100 P 647. Parol agreement merged in written contract which expressly provided that it superseded all former agreements. Drake v. White Sewing Mach. Co., 133 App. Div. 446, 118 NYS 178. Prior representations and negotiations merged in contract, which provided expressly that it contained all agreements and conditions binding on parties. Bruner v. Kansas Moline Plow Co. [C. C. A.] 168 F 218. Previous **conversations merged** in written contract. Central Life Assur. Soc. v. Mulford [Colo.] 100 P 423. Previous **negotiations merged** in written contract. Schoblasky v. Rayworth, 139 Wis. 115, 120 NW 822. Contemporaneous agreements **merged in contract of sale.** Robinson v. Yetter, 238 Ill. 320, 87 NE 363. Oral agreement as to time when contract of sale was to be closed by conveyance merged in written contract stipulating time. Garrett v. Cohen, 63 Misc. 450, 117 NYS 129. Prior oral agreement **merged in note and trust deed.** Cotulla v. Barlow [Tex. Civ. App.] 115 SW 294. Parol agreement merged in note. Ferdinand Munch Brewery v. De Matteis, 128 App. Div. 830, 112 NYS 1042. Contemporaneous agreement as to enforcement held merged in trust deed. Bradshaw v. Farnsworth, 65 W. Va. 28, 63 SE 755.

Consideration: Whether contemporaneous, prior agreement is based on consideration or not, is immaterial. Reams v. Thompson, 5 Ga. App. 226, 62 SE 1014.

41. See Evidence, § 5.

42. Cotulla v. Barlow [Tex. Civ. App.] 115 SW 294.

§ 6. *Discharge by performance, or breach. A. General rules.*[43] See 11 C. L. 770 A breach arises on the unexcused [44] failure or refusal of one party to carry out his part of an entire contract,[45] or where he voluntarily puts it out of his power to perform,[46] or prevents performance by the other party.[47] The general rule requiring

43. Search Note: See notes in 23 L. R. A. 707; 24 Id. 231.

See, also, Contracts, Cent. Dig. §§ 1207-1448; Dec. Dig. §§ 275-323; 6 Cyc. 54-80; 9 Id. 601-650, 666-684; 7 A. & E. Enc. L. (2ed.) 149; 16 A. & E. Enc. P. & P. 312.

44. As to excuses for failure to perform, see post, § 6C.

45. See ante, § 4C, for distinction between entire and severable contract.

Held breach: By son, **of agreement to care of parent** and provide comfortable home for her as consideration for conveyance of land. Hensan v. Cooksey, 237 Ill. 620, 86 NE 1107. Evidence held to warrant finding that plaintiff failed to perform its **contract to furnish coal.** Hibernian Bank Ass'n v. Eckhart & Swan Mill Co., 140 Ill. App. 479. Where **lease** of mine provided that lease should be null and void as far as the same affected certain part of land leased, if certain switch was not put in within a year, the provision was self-executing, and failure to put in switch made lease null and void. Cox v. Eckstrom, 142 Ill. App. 426. Failure of contractor to furnish bond as agreed would be breach **of construction contract.** Shallenberger v. Standard Sanitary Mfg. Co. [Pa.] 72 A 500. Failure to order goods held with other conduct of buyer, breach **of sale contract.** Jung Brew. Co. v. Konrad, 137 Wis. 107, 118 NW 548. Seller of grain elevator agreed not to go into competing business or become interested in it for certain period within certain limits. Held he breached the agreement by advancing money and extending credit to son and another, in such business, and aiding and working for them. C. H. Barrett Co. v. Ainsworth [Mich.] 16 Det. Leg. N. 152, 120 NW 797. Where manufacturer gives exclusive selling right by valid contract, he is liable in damages if he gives agency to another. Peck-Williamson Heating & Ventilating Co. v. Miller [Ky.] 118 SW 376. Where retiring partner agreed not to go into same business in same city for two years, "or with any partner, partners, firm, company or corporation," for said term, his employment as clerk and manager for another, whom he induced to start competitive business, was violation of his agreement. Siegel v. Marcus [N. D.] 119 NW 358. Steel company, by refusal to accept and pay for steel ingots furnished by foundry company under contract, put an end to contract. Pittsburg Steel Foundry v. Pittsburg Steel Co. [Pa.] 72 A 813. Where contract provided for termination by either, and that if parties could not agree on terms the matter was to be submitted to arbitration, it contemplated that termination would result in damages, and that amount thereof should be arbitrated and **refusal to arbitrate** was breach, warranting recovery of damages. Harlow v. Oregonian Pub. Co. [Or.] 100 P 7.

Held not breach: Contract to credit plaintiff, in railroad's printed matter, with invention of automatic train stop, not breached by failure to mention his invention, when speaking of automatic train-stopping system, in its literature. Kinsman Block System Co. v. Union Switch & Signal Co., 169 F 670. Evidence held insufficient to warrant finding that dismissal of plaintiff's son from military academy was breach of contract between plaintiff and defendant. Manson v. Culver Military Academy, 141 Ill. App. 250. Agreement not to sell other makes of "furnaces, furnace fittings and laundry dryers," by one given exclusive selling rights in such goods, is not breached by selling air tight stoves. Peck-Williamson Heating & Ventilating Co. v. Miller [Ky.] 118 SW 376. Contract not to "engage directly or indirectly in business of buying cotton waste from any cotton mills in the United States or Canada" does not prohibit buying from other sources or dealing in cotton waste in other ways than buying from prohibited sources. Bauer v. International Waste Co., 201 Mass. 197, 87 NE 637.

Executory contracts: There may be breach of executory contract by deliberate refusal to perform. Jung Brew. Co. v. Konrad, 137 Wis. 107, 118 NW 548. Refusal of one party to perform unless other consents to modification of contract is breach. Richards v. Manitowoc & N. Trac. Co., 140 Wis. 85, 121 NW 937.

46. Where, as part of contract of sale of teaming outfit, sellers agreed to give buyer all hauling for their stores for a year, their sale of stores in three months was breach of contract, though they gave buyer thereafter such hauling as they had. Smith v. Carter & Co., 136 Mo. App. 529, 118 SW 527. Subcontractor abandoned work, in law, when he suspended and consented to appointment of receiver to take charge of his property, thus putting it out of his power to perform. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

47. Where no time for completion of well was specified, and plaintiff offered to dig another without extra charge, after breaking drill in first before completing it, defendant's refusal of that offer was breach authorizing recovery of damages. Mitchell v. Boyce [Tex. Civ. App.] 120 SW 1016. There is in every contract an implied obligation on each party to do all that he reasonably can to enable the other to perform his contract, and for a failure so to do, directly or through his agents or servants, he can be made to respond in damages to the other. Norcross v. Wills, 130 App. Div. 470, 114 NYS 969. Plaintiff could recover for being prevented from performing contract for alteration of building where his failure to procure a permit was due to owner's prior failure to remove house from jurisdiction of tenement house bureau as he had agreed. Siniscalchi v. Pennachio, 113 NYS 1003. Where contractor was prevented from doing work by failure of other party to furnish materials as agreed, he could recover damages. Williams v. Yates

absolute performance, however, is applicable only where the contract is positive and absolute, and is not subject to any condition either express or implied.[48] A contract to perform personal services is discharged by the death or disability of the person promising to perform.[49] Where time of payment is not of the essence of the contract, a mere omission to pay is not a breach.[50]

Discharge by release and by accord and satisfaction and by payment are elsewhere discussed.[51]

(§ 6) *B. Acceptance and waiver.*[52]—See 11 C. L. 772—Performance of a contract according to its terms may be waived either expressly [53] or by acts or conduct showing an intention not to require strict performance,[54] such as acceptance of work

[Ky.] 113 SW 503. One who prevents performance or disables himself from performing becomes liable on the contract. City of Atchison v. Friend [Kan.] 96 P 348. Where contract for construction of a machine provided that machine was to be made to the approval and according to the ideas of certain person, the failure to furnish such person's ideas in some understandable form constituted a breach. Hydraulic Engineering Works v. Wittenberg Matzoh Co., 141 Ill. App. 130.

48. Destruction of building held to render substantial performance of contract to furnish space in department store impossible and to excuse further performance. Emerich Outfitting Co. v. Siegel, Cooper & Co., 141 Ill. App. 147.

49. Mendenhall v. Davis, 52 Wash. 169, 100 P 336.

50. Where plaintiff contracted to furnish defendant certain amount of coal, an omission to pay was not a default on the part of defendant. Hibernian Bank Ass'n v. Eckhart & Swan Milling Co., 140 Ill. App. 479.

51. See Releases; Accord and Satisfaction; Payment and Tender.

52. **Search Note:** See Contracts, Cent. Dig. §§ 1382-1387, 1395, 1398, 1399, 1467-1492; Dec. Dig. §§ 304, 305, 316; 6 Cyc. 67.

53. A party may waive a provision which is for his own benefit. Ellsworth v. Knowles, 8 Cal. App. 630, 97 P 690. Where contract bound writer of law books to abstain from use of intoxicants and provided for additional compensation in case of its performance, complaint alleging that defendant, with full knowledge of violation of said stipulation, repeatedly represented that plaintiff was entitled to and would receive full compensation and that plaintiff relied on such representations and that it was mutually understood and agreed that, notwithstanding plaintiff's use of intoxicants, he was to receive full compensation as agreed in contract, alleged waiver of such condition precedent to full recovery. Clark v. West, 193 N. Y. 349, 86 NE 1.

54. **Strict performance waived:** Owner having received benefit of brokers services, and paid part of consideration, could not withhold balance unless contract gave him that right. Mitchell v. Rushing [Tex. Civ. App.] 118 SW 582. Where contractor was allowed to proceed with work though **bond** had not been given, requirement that bond should be furnished in specified time was waived, and contractor was entitled to reasonable time to get bond. Shallenberger v. Standard Sanitary Mfg. Co. [Pa.] 72 A 500. Permitting contractor to complete after **time** for completion has expired is waiver of objection and raises implied promise to pay reasonable value. Kendrick v. Warren Bros. Co., 110 Md. 47, 72 A 461. The receipt in whole or part of payments at a time subsequent to that agreed upon is a waiver of time of payment and of the breach of the contract by reason thereof. Kinney v. Pocock, 8 Ohio N. P. (N. S.) 121. Where both parties fail to perform mutual covenants on the day named, they will be held to have waived its strict performance as to time, but the contract will remain unimpaired as to its effect. Cadwell v. Smith, 83 Neb. 567, 120 NW 130. Where seller shipped lumber after buyer was in default in payments, defaults of buyer were waived. Harris Lumber Co. v. Wheeler Lumber Co. [Ark.] 115 SW 168. Where contract contains limitation on time of performance, party who urges performance after expiration of time will not be permitted to withhold fruits of contract because of delay. Stiewel v. Lally [Ark.] 115 SW 1134.

Strict performance not waived: Where promise to pay for installation of engine was based on promise to make it work satisfactorily and latter promise was not kept, there was no effective waiver of failure to perform. Kumberger v. Hartford, 114 NYS 808. Letter from foundry company stating that steel company did not need amount of steel ingots ordered, but that foundry company was ready to fill all orders and would expect full performance by steel company, was not waiver of terms, but showed intention to insist upon compliance. Pittsburg Steel Foundry v. Pittsburg Steel Co. [Pa.] 72 A 813. Mere payment of sum which defendant was bound to pay in any event was not waiver of stipulation on performance of which other party was to be entitled to additional compensation. Clark v. West, 193 N. Y. 1, 86 NE 1. Letter waiving previous defaults of buyer of goods in failing to order as agreed, but expressly insisting on performance of terms of contract thereafter, held not waiver of future defaults. Jung Brew. Co. v. Konrad, 137 Wis. 107, 118 NW 548. Waiver of prior defaults by buyer in payments, by shipping lumber, ceased to operate when seller notified buyer that it would make no more shipments unless payments were made as agreed. Harris Lumber Co. v. Wheeler Lumber Co. [Ark.] 115 SW 168. Retaining engineering company's report on railroad

or labor with knowledge of defects or of breach of some conditions,[55] and a refusal to accept upon certain grounds is a waiver of objections not raised.[56] Such a waiver prevents a forfeiture for nonperformance,[57] but does not preclude recovery of damages for the breach.[58]

(§ 6) *C. Excuses for failure to perform.*[59]—See 11 C. L. 773—Where the contract is entire, a repudiation[60] or unexcused breach[61] by one excuses performance by the other.[62] Performance is also excused when prevented by the other party[63] or when performance by the other becomes impossible.[64] In such cases, recovery may be had on the contract, though it has not been fully performed.[65] On the other hand, a

property held not to waive breach. Land-Wharton Co. v. Hughes, 37 Pa. Super. Ct. 602.

55. Where work has been accepted after time fixed for performance, the delay does not preclude recovery of the contract price. Reading Hardware Co. v. New York, 129 App. Div. 292, 113 NYS 331. After accepting work, acceptor cannot claim damages for failure to comply with contract. Virginia & K. R. Co. v. Heninger [Va.] 65 SE 495. One cannot receive and enjoy the benefit of labor and materials furnished under contract and then refuse to pay because performance was not completed within the time specified. Deeves v. Manhattan Life Ins. Co., 195 N. Y. 324, 88 NE 395.

56. Refusal to accept bond for certain reason is waiver of other objections. Contractor entitled to reasonable time to furnish unobjectionable bond. Shallenberger v. Standard Sanitary Mfg. Co. [Pa.] 72 A 500.

57. Where stipulation is not part of consideration but is mere condition precedent, it may be waived, and waiver prevents forfeiture for nonperformance. Clark v. West, 193 N. Y. 349, 86 NE 1. Party who, by his acts, waives or acquiesces in a breach of contract cannot thereafter take advantage of it and declare a forfeiture. Vendor held to have waived default of vendor of land. Friar v. Baldridge [Ark.] 120 SW 989.

58. One who has waived breach of stipulation in contract may yet sue for damages for its breach. Clark v. West, 193 N. Y. 349, 86 NE 1. Mere acceptance and payment not waiver of damages for delay in performance. Missouri Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 114 SW 1119; Reading Hardware Co. v. New York, 129 App. Div. 292, 113 NYS 331.

59. Search Note: See notes in 14 L. R. A. 215; 9 L. R. A. (N. S.) 1187; 1 Ann. Cas. 466. See, also, Contracts, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303; 6 Cyc. 70, 71, 80; 1 A. & E. Enc. L. (2ed.) 584; 7 Id. 146.

60. Formal refusal to perform by one releases other party. Beach & Clarridge Co. v. American Steam Guage & Valve Mfg. Co., 212 Mass. 177, 88 NE 924. Repudiation of an agreement by one party in advance of the time for performance dispenses with the further performance of conditions precedent by the other party. Holt v. United Security Life Ins. & Trust Co., 76 N. J. Law, 585, 72 A 301. Refusal of property owner to make payments as agreed is breach. Contractor may quit and sue for damages. Schlesinger v. Ritchie, 115 NYS 116.

61. Wrongful refusal to perform excuses performance by the other party. Central Oil Co. v. Southern Refining Co., 154 Cal. 165, 97 P 177. Refusal or inability of one party to perform excuses performance by the other. McCormick v. Tappendorf, 51 Wash. 312, 99 P 2.

62. One in default cannot insist on performance by other. Montgomery v. Wise [Mo. App.] 120 SW 100.

63. Blair v. Wilkeson Coal & Coke Co. [Wash.] 103 P 18. One cannot demand strict performance unless he himself has performed work preliminary to that to be done by the other party. Pittsburg Bridge Co. v. St. Louis Transit Co., 135 Mo. App. 579, 116 SW 467.

Matters held excused: Contract to cut and haul logs and load them on skidways, contemplated that other party was to provide skidways. He failed to do so, and logs were piled on ground, contract contemplating continuous hauling. Held no liability for expense of piling logs on skidways, party bound to furnish them being in default. Ayer & Lord Tie Co. v. Martin [Ark.] 117 SW 1081. Where testator gave notes which plaintiff could surrender and keep certain stock or assign stock and demand payment of notes, failure to assign stock was excusable where executrix had possession of certificates and refused to produce them for assignment. Dickson v. Eames, 134 Mo. App. 373, 114 SW 574. **Delay in** moving furniture, caused by dispute as to who should pay elevator men for overtime, not chargeable to contractor when contract contemplated use of elevators by contractor. Mehrle v. American Bridge Co., 115 NYS 724. Where contractor was wrongfully evicted from work, provision against damages for delay was no defense to action for damages for breach. Farnum v. Kennebec Water Dist. [C. C. A.] 170 F 173. **Failure to furnish bond** held no defense when other party had refused to allow performance before time when bond should be furnished. Hailerbach & May Contract Co. v. Wilkins [Ky.] 112 SW 1126.

Acts of agent: An act of a person placed in charge of work, under owner's control, could be shown to prove that contractor was prevented from performing. Siniscalchi v. Pennachio, 113 NYS 1003.

64. One party need not perform a condition precedent if it appears that the other will not or cannot perform. McCormick v. Tappendorf, 51 Wash. 312, 99 P 2. Involuntary adjudication of bankruptcy against employer terminates contract of employment by operation of law. No claim of damages for breach provable against estate. In re Inman & Co., 171 F 185.

65. One who is wrongfully prevented from performing may recover for work done. Kelley v. Torrington, 81 Conn. 615,

breach by one party of an independent covenant does not excuse performance by the other,[66] the remedy of the latter being by action or claim for damages,[67] and, ordinarily, when one unqualifiedly undertakes to do a particular thing, nothing short of performance [68] by him will discharge him, so far as his liability for the breach is concerned.[69] In such case he will not be excused because performance subsequently becomes impossible,[70] unless performance is rendered impossible by an act of God,[71] or by the law,[72] or by the other party.[73] Unforeseen difficulties, however great, do not constitute an excuse,[74] since they might have been provided for by the contract.[75] But in some cases, where the parties appear to have contemplated that a contingency might arise and make performance impossible, the law will imply a condition excusing nonperformance when such contingency [76] arises. Thus, where the continued existence of a particular person or thing is necessary to the per-

71 A 939. Where owner wrongfully refused to allow contractor to complete building, latter was entitled to recover contract price less payments made. Warren v. Shealy [S. C.] 65 SE 1. One who is prevented from performing by other party may recover for work done under contract. Thacke v. Hernsheim, 115 NYS 216. If completion of work under contract is prevented by insolvency of owner, or failure of refusal to make payments when due, contractor is entitled to compensation for work done, though contract not fully performed. Lunsford v. Wren, 64 W. Va. 458, 63 SE 308. Recovery may be had where the happening of a contingency upon which liability was to attach is wrongfully prevented by the other party. Money was to be paid wife, in lieu of dower, in case she survived husband. Husband killed her, and then himself. Recovery could be had. Logan v. Whitley, 129 App. Div. 665, 114 NYS 255.

66. Shipping coal over other than agreed route did not warrant refusal to accept coal. Cluley-Miller Coal Co. v. Freund Packing & Mfg. Co. [Mo. App.] 120 SW 658.

67. Cluley-Miller Coal Co. v. Freund Packing & Mfg. Co. [Mo. App.] 120 SW 658.

68. See post, § 6D.

69. Contract to pay expenses of one who returned fugitive from justice not released by such person also getting payment of expenses from authorities. Bynum v. Dalton [Miss.] 48 S 1019. Defendant promised to support plaintiff in consideration of a release of his promise to marry her. She married another, but was divorced. Held defendant was not relieved from liability under contract to support. Henderson v. Spratlen, 44 Colo. 278, 98 P 14. Plaintiffs bought two houses from defendants who agreed to keep both rented for certain period. Held sale of one house by plaintiff during period did not release defendants from duty to keep other rented. Williams v. Arnold, 139 Wis. 177, 120 NW 824.

70. Where performance becomes impossible subsequent to the making of the contract, the promisor is not discharged. Burgett v. Loeb [Ind. App.] 88 NE 346. One is bound to perform contracts made by him if they do not require violation of law; he is bound by his agreement, however inconvenient, unprofitable, or even impossible performance may be for him. Marx v. Kilby Locomotive & Mach. Works [Ala.] 50 S 136.

71. Ward v. Haren [Mo. App.] 119 SW 446; McCormick v. Jordan, 65 W. Va. 86, 63 SE 778.

72. Ward v. Haren [Mo. App.] 119 SW 446; McCormick v. Jordan, 65 W. Va. 86, 63 SE 778.

73. Ward v. Haren [Mo. App.] 119 SW 446; McCormick v. Jordan, 65 W. Va. 86, 63 SE 778. See, also, ante, this subsection.

74. Ward v. Haren [Mo. App.] 119 SW 446; McCormick v. Jordan, 65 W. Va. 86, 63 SE 778. Inability to ship coal over agreed route did not excuse breach by shipping over other route. Cluley-Miller Coal Co. v. Freund Packing & Mfg. Co. [Mo. App.] 120 SW 658. Contract to furnish cans to plaintiffs during cannery season, not to exceed certain number per day, provided that nonperformance caused "by damage by elements" or "unavoidable casualty." Defendants relied on receipt of cargo of tin then en route from Liverpool to San Francisco. Held failure of ship to arrive on time, due to storms, did not excuse nonperformance by defendants, contract not contemplating that matter. Pacific Sheet Metal Works v. Californian Canneries Co. [C. C. A.] 164 F 980. That locomotive could not profitably be repaired for agreed price did not relieve contractor. Marx v. Kilby Locomotive & Mach. Works [Ala.] 50 S 136. Where defendant gave contract for cutting timber on land he did not own, his good faith would not relieve him from consequences of breach of contract, real owner having prevented cutting of timber. Mott v. Penoyar, 153 Mich. 273, 15 Det. Leg. N. 440, 116 NW 1110.

75. Ordinarily, mere inability to perform, caused by unforeseen accident or misfortune, will not excuse nonperformance, when the party has failed to protect himself against the contingency by contract. Whipple v. Lyons Beet Sugar Refining Co., 64 Misc. 363, 118 NYS 338.

76. Contract bound plaintiff to grow and deliver to defendant eight acres of beets, contract containing minute instructions as to manner of planting and growing crop. Part of crop was failure, owing solely to drought, plaintiff having followed defendant's instructions. Held nonperformance was excused; provision for liquidated damages applied only to instructions. Whipple v. Lyons Beet Sugar Refining Co., 64 Misc. 363, 118 NYS 338.

formance of a contract, a condition is always implied that the death or destruction of the person or thing shall excuse performance.[77] A change in the law making performance impossible is an excuse.[78] But subsequent application of a law, existing when a contract was made, is no excuse.[79]

(§ 6) *D. Sufficiency of performance.*[80]—See 11 C. L. 775—Ordinarily, a contract must be performed according to its terms,[81] in the absence of a waiver [82] or excuse.[83] But in some cases, such as under building and construction contracts,[84] substantial performance [85] warrants a recovery on the contract [86] or equitable relief against a forfeiture,[87] and in no case is a party required to go beyond his contract.[88]

77. Martin Emerich Outfitting Co. v. Siegel, Cooper & Co., 237 Ill. 610, 86 NE 1104. Contract provided that plaintiff should have third floor of building occupied by defendant in which to conduct millinery establishment upon specified terms. Held, where building was destroyed, plaintiff was not entitled to space in another building secured as location by defendant. Id.

78. Burgett v. Loeb [Ind. App.] 88 NE 346. Where lease of premises was for sale of intoxicating liquors therein, and law was passed prohibiting sale of liquor, further performance by lessee was excused. Heart v. East Tennessee Brew. Co. [Tenn.] 113 SW 364.

79. Lessee of premises for saloon purposes not relieved because authorities denied him a license. Burgett v. Loeb [Ind. App.] 88 NE 346.

80. Search Note: See notes in 16 L. R. A. 655; 54 A. S. R 711.

See, also, Contracts, Cent. Dig. §§ 1207-1215, 1249-1408; Dec. Dig. §§ 278, 280-302; 6 Cyc. 34-45, 51, 54, 57, 62-67, 79; 9 Id. 601-603, 615-625.

81. Where organ contracted for by defendant did not work properly, and parties agreed upon certain changes, and plaintiff claimed and insisted upon narrow construction of second agreement, defendant was entitled to strict performance of original agreement. Howard v. Albright, 129 App. Div. 763, 114 NYS 194. Contract to build plant "to the acceptance" of owners means to build of such materials and make such construction as ought to satisfy reasonable man in view of contract and specifications. Capacity of plant immaterial, not being provided for in contract. Cashman v. Proctor, 200 Mass. 272, 86 NE 284. If plant as constructed complied fully with contract and specifications, it could not be rejected because it did not do work required of it, contract containing no provision as to capacity. Cashman v. Proctor, 200 Mass. 272, 86 NE 284.

Evidence held to show performance: Evidence held to show performance by son of **contract to support** and care for mother as agreed upon in consideration of deed to him. Baker v. Baker [Mich.] 16 Det. Leg. N. 272, 121 NW 287. Recovery for **repair of sidewalks** warranted. McCormack v. O'Connor, 62 Misc. 297, 114 NYS 1030. **Contract to furnish entertainment** relieved plaintiff of claims for damage on account of inability of artists to appear, and allowed substitution of other artists who were booked at same price. Held such substitution, where one singer was ill, did not prevent recovery on contract. Columbian Lyceum Bureau v. Sherman [N. D.] 121 NW 765.

Evidence held not to show performance: Evidence insufficient to warrant recovery for value of filling material refused by defendant as not meeting contract requirements. M. McGirr Sons Co. v. Babbitt, 61 Misc. 291, 113 NYS 753. Forwarding information "regularly" would not be performance of contract which required that it should be "promptly" furnished. F. W. Dodge Co. v. H. A. Hughes Co., 110 Md. 374, 72 A 1036. **Contractor for plumbing** had not fully performed when he refused to replace certain stolen articles, he being in charge of them. Yule v. Platt, 115 NYS 136. **Lease** required lessee to grade certain land. Held he could not abandon contract for work without surrendering possession. Pennsylvania Steel Co. v. Susswein, 132 App. Div. 659, 117 NYS 436. **Contract to furnish correct market reports** is breached by failure to do so, regardless of degree of care exercised by company. Western Union Tel. Co. v. Bradford [Tex. Civ. App.] 114 SW 686. **Contract for electric sign** called for certain number of lights in border; no recovery where sign made contained fewer lights in border than required, even though more lights than required were placed in body. Doctrine of substantial performance inapplicable. Ellison Furniture & Carpet Co. v. Langever [Tex. Civ. App.] 113 SW 178. **Contract to secure reduction of taxes** of corporation not performed by securing reduction by means of fraud, since it must be assumed that intention was to secure reduction by legal and proper means, such as by showing erroneous assessment. McCallum v. Corn Products Co., 131 App. Div. 617, 116 NYS 118.

82. See ante, § 6B.

83. See ante, § 6C.

84. See, also, Building and Construction Contracts, §§ 2, 5, 7, 8, 9.

85. Whether construction contract substantially performed held for jury. Kinney v. Philadelphia Watch Case Co., 76 N. J. Law, 735, 71 A 269. Architect employed to make plans for building cannot recover unless building can be constructed for sum reasonably near sum stated; whether cost is reasonably near stipulated cost is for jury, unless question can be determined from contract. Williar v. Nagle, 109 Md. 75, 71 A 427. No substantial performance where contractor abandoned work on house to cost $3,945, and it would require expenditure of $2,200 to complete it. Tice v. Moore [Conn.] 73 A 133. Portions or units of heating plant became part of realty as soon as installed. Where fire destroyed

(§ 6) *E. Demand or tender necessary to fix performance or breach.*[89]—See 11 C. L. 777—Where a contract requires contemporaneous performance, neither can sue without putting the other in default[90] by performance or a tender thereof.[91] An offer to perform made in the pleadings or at the trial is not enough.[92] No demand or tender of performance is necessary where the other party has denied the contract[93] or refused to be bound by it,[94] or where the other party is unable to perform.[95]

building before completion, contractor could recover such part of the contract price as labor and materials furnished formed of the entire work and materials agreed to be done and furnished. Value to owner not the measure of recovery. Dame v. Wood [N. H.] 70 A 1081.

86. Substantial performance by one, and acceptance by other, warrants recovery on contract. Columbian Lyceum Bureau v. Sherman [N. D.] 121 NW 765. Substantial performance of building contract warrants recovery notwithstanding technical and unimportant omissions or defects. Peterson v. Pusey, 237 Ill. 204, 86 NE 692. If contract was substantially performed, recovery could be had under it, according to contract price, with deductions for expense caused by variations or uncompleted work. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 NE 138.

87. Where before the time for performance has expired there has been such a substantial performance by a party that to deny him relief would be gross injustice, equity will grant relief as from a forfeiture. Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 SE 836.

88. Where obligation to repair automobile had expired, defendant was not liable for repairs thereafter made. Barry v. American Locomotive Automobile Co., 113 NYS 826. Provision that buildings were to be in accordance with plans and specifications which were satisfactory to owner did not permit him to withhold payment on ground that buildings were not satisfactory to him. Hyman v. New York Mortgage & Security Co., 128 App. Div. 254, 112 NYS 669.

89. Search Note: See note in 14 L. R. A. (N. S.) 547.

See, also, Contracts, Cent. Dig. §§ 1217-1248; Dec. Dig. §§ 277, 279; 9 Cyc. 616, 625.

90. Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 NE 53. Vendee of logs, in default in payments, could not sue for damages for failure of vendor to deliver, not having put vendor in default. Sitman v. Lindsey, 123 La. 53, 48 S 646. Where contract bound defendant to inspect electric installation to determine correctness of charges for current, to audit all bills for one year, and to obtain rebates on all overcharged bills for two years past, there was not breach of last agreement, when no bills were presented for audit. Ernst v. Electrical Audit & Rebate Co., 115 NYS 731. Where contract bound builder to keep chimney in repair for 5 years, and he offered to make repairs needed, owner had no right to tear it down without allowing builder reasonable opportunity to make repairs and put it in good condition. Kinney v. Philadelphia Watch Case Co., 76 N. J. Law, 735, 71 A 269. Owner may protest against delay by construction contractor and still claim damages for breach by delay. Traub-Ditmar Const. Co. v. Hartman, 61 Misc. 173, 112 NYS 919.

91. Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 NE 53. Where contract is to buy certain property, implied promise by other party is to convey or assign, and the promises are mutual and dependent and to be performed contemporaneously. Seller cannot sue as for debt without tender of performance. Id. A party who is in default cannot, without any offer to repair such default, insist on performance by the other as a condition precedent to his performance. Harris Lumber Co. v. Wheeler Lumber Co. [Ark.] 115 SW 168. Buyer of lumber, who failed to make agreed payments, had no right to withhold payments and demand full performance by seller. Id. Vendee could not be put in default without tendering deed. Hooe v. O'Callaghan [Cal. App.] 103 P 175.

92. Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 NE 53.

93. Tender not necessary when other party denies there is any binding contract. Ronaldson & Puckett Co. v. Bynum, 122 La. 687, 48 S 152; Johnson v. Levy, 122 La. 118, 47 S 422; Hollerbach & May Contract Co. v. Wilkins [Ky.] 112 SW 1126. As where vendee refuses to accept title. Reinach v. Jung, 122 La. 610, 48 S 124. Demand for part of amount due under contract and absolute refusal to pay made further demand unnecessary. Joline v. Metropolitan Securities Co., 164 F 144.

94. Tender excused where amount was offered and refused, and vendor said there was no use counting money. Ronaldson & Puckett Co. v. Bynum, 122 La. 687, 48 S 152. Tender of further services, or demand to be allowed to perform, unnecessary when defendants ordered plaintiffs to cease and would not allow them to proceed. Blair v. Wilkeson Coal & Coke Co. [Wash.] 103 P 18.

95. Offer to perform or tender unnecessary where other party has placed himself in position where he cannot perform. Montgomery v. Wise [Mo. App.] 120 SW 100. Tender of performance unnecessary when other party has incapacitated himself to perform. Palmer v. Clark, 52 Wash. 345, 100 P 749. Vendee need not tender payment when records have been destroyed, since it has thus become impossible for vendor to convey perfect title as agreed. Hooe v. O'Callaghan [Cal. App.] 103 P 175. Tender of performance by vendee unnecessary where full performance by vendor had become impossible, and full performance had been refused. Cabrera v. Payne [Cal. App.] 103 P 176. Strict legal tender by vendee is not necessary where vendor is wholly unable to give title to large part of land contracted for. Thomas v. Walden [Fla.] 48 S 746. Where a vendor, after date of contract, puts it out of his power to convey title, the

(§ 6) *F. Rights after default.*[96]—See 11 C. L. 777—One who is in default cannot enforce the contract[97] in the absence of a waiver by the other party.[98]

§ 7. *Damages for breach*[99] are elsewhere treated.

§ 8. *Rescission and abandonment. A. By agreement or under special provisions of the contract.*[1]—See 11 C. L. 778—A contract may be abandoned or rescinded by mutual consent,[2] which may be shown or inferred from the conduct and declarations of the parties.[3] A contract may, by its own terms, fix the grounds and mode of its termination by the parties.[4] Where a contract provides that a violation of its terms by either party shall work a forfeiture and that the contract shall be void and of no effect, a breach terminates the rights of the party at fault, but not the right of the innocent party to enforce the contract.[5]

(§ 8) *B. Occasion or right to rescind or abandon without consent.*[6]—See 11 C. L. 778—Before a breach, a contract can be rescinded only by mutual consent,[7] but

vendee may rescind and need not offer to perform. Cash v. Meisenheimer [Wash.] 102 P 429.

96. See post, §§ 8B, 9A, 9B.

Search Note: See notes in 16 L. R. A. 858; 5 Ann. Cas. 613.

See, also, Contracts, Cent. Dig. §§ 1483-1527; Dec. Dig. §§ 319-321.

97. Vendor, having broken conditions of contract, could not enforce it against vendee, who had not waived vendor's default. Carrabine & Co. v. Cox [Mo. App.] 117 SW 616. Vendor and builder of electric sign having broken promise not to make another sign of the same kind in the city could not recover price. Ellison Furniture & Carpet Co. v. Langever [Tex. Civ. App.] 113 SW 178. Performance is a condition precedent to recovery on the contract; breach leaves contractor without remedy unless other party agrees to complete for his account. Denison Const. Co. v. Manneschmidt, 129 App. Div. 600, 113 NYS 1071. One who fails to fully perform cannot recover on contract, but must sue on quantum meruit, based on acceptance of work. Murphy v. Williams [Tex. Civ. App.] 116 SW 412.

98. See ante, § 6B.

99. See Damages.

1. Search Note: See note in 94 A. S. R. 119.

See, also, Contracts, Cent. Dig. §§ 1141-1150; Dec. Dig. §§ 249-255; 7 A. & E. Enc. L. (2ed.) 145.

2. Contract may be terminated by mutual consent. Ashby v. Cathcart [Ala.] 49 S 75.

3. Contract abandoned: Where vendor of lumber wrote to vendee, after arrival of lumber, and ordered vendee to keep it subject to vendor's order, and vendee refused to accept lumber except upon certain conditions, jury could find that contract was mutually abandoned. Continental Lumber Co. v. Munshaw & Co., 82 Neb. 783, 118 NW 1057. Where negotiations for assignment of lease were broken off, because lessor refused to consent, and check was given for amount deposited to apply on assignment, and accepted, the parties accepting it could not thereafter enforce the contract for assignment. Sully v. Bushell, 52 Wash. 586, 100 P 995. Purchaser of books failed to pay for volumes received, and paid no attention to notices sent, nor to final notice that contract was canceled. Held, both parties considered contract abandoned, and buyer could not enforce it. Quarton v. American Law Book Co. [Iowa] 121 NW 1009.

Contract not abandoned: Promoters' agreement to form corporation to acquire property not abandoned by placing title in one as trustee, merely as step in proceedings. Turner v. Markham [Cal.] 102 P 272. Note was given to secure performance of agreement to purchase stock in restaurant business. On failure to pay for stock, plaintiff's attorney demanded of defendant that he pay or surrender position as manager of restaurant. Defendant quit and surrendered keys. Held not to show mutual rescission of contract; defendant liable on note. Moyses v. Schendorf, 238 Ill. 232, 87 NE 401.

4. Contract to furnish logs construed as giving vendor power to terminate it before entire tract was cleared. Ashby v. Cathcart [Ala.] 49 S 75. Where either party had right to terminate contract, breach by one and election by other to cancel, with notice of cancellation, terminated contract. Schalkenbach v. National Ventilating Co., 129 App. Div. 389, 113 NYS 352. Provision in lease of mine held to give lessor right to terminate lease upon failure of lessee to keep proper books. Cox v. Eckstrom, 142 Ill. App. 426. Where contract provided that in case controversies should arise it might be suspended by either party, and within 30 days thereafter either party might finally terminate the contract, the basing of an action on the suspension was a recognition by plaintiffs that the contract was terminated. Kohler v. Northern Elec. Mfg. Co. [C. C. A.] 162 F 876. Where contract of employment provided for its termination upon 30 days' **notice,** and for repurchase by defendant of stock bought by plaintiff, employe, notice of termination only 7 days before contract terminated by its own terms was not sufficient to require repurchase of stock. Meurer v. American Moving Picture Mach. Co., 61 Misc. 281, 113 NYS 719. Letter by principal to agent that termination of agency was necessary, "notice of which is hereby given," held sufficient notice of exercise by principal of right to terminate. Nelles v. MacFarland, 9 Cal. App. 534, 99 P 980.

5. Central Oil Co. v. Southern Refining Co., 154 Cal. 165, 97 P 177.

6. Search Note: See notes in 17 L. R. A. 779; 30 Id. 33; 5 L. R. A. (N. S.) 799; 10 Id. 552; 11 Ann. Cas. 633.

See, also, Contracts, Cent. Dig. §§ 1151-1183; Dec. Dig. §§ 256-262; 6 Cyc. 24, 28; 9 Id. 433, 434.

7. Written contract cannot be abrogated

one party may, without the consent of the other, rescind a contract for fraud in its inception,[8] or for abandonment,[9] repudiation,[10] or for the other party's failure,[11] refusal,[12] or unability to perform,[13] breach of a dependent covenant of an entire contract,[14] or of a material condition of the contract,[15] or any conduct on the part of such party showing an intention no longer to be bound by the contract.[16] A total or substantial failure of consideration justifies rescission,[17] but mere inadequacy

by one party without consent of other. Starling v. State, 5 Ga. App. 171, 62 SE 993.

8. Fraud, which induces the contract, is ground for rescission. Central Life Assur. Soc. v. Mulford [Colo.] 100 P 423; Chase v. Wolgamot, 137 Iowa, 128, 114 NW 614; New York Brokerage Co. v. Wharton [Iowa] 119 NW 969. Facts warranting rescission for fraud must have existed when contract was made. Badger State Lumber Co. v. Jones Lumber Co., 140 Wis. 73, 121 NW 933. The right to rescind for fraud depends upon the existence of fraud and not upon the accuracy or conclusiveness of the party's knowledge of it. Cunningham v. Pettigrew [C. C. A.] 169 F 335. Fraudulent misrepresentation that property was free from incumbrance ground for rescission, though liens only amounted to $100, contract of exchange being induced by the fraud. Shopbell v. Boyd, 9 Cal. App. 136, 98 P 69. **Solvency of other party** is immaterial as regards right to rescind, and one induced to enter into contract by fraud may rescind, even though other party is solvent. Code, § 1689. Id.

As to what constitutes fraud, see Fraud and Undue Influence, §§ 1, 2.

9. Abandonment by one party is ground for rescission by other. Schneider v. Miller, 129 App. Div. 197, 113 NYS 399.

10. Evidence held not to show repudiation by vendee so as to forfeit deposit, prior to time when performance by vendor became impossible. Cabrera v. Payne [Cal. App.] 103 P 176. If there is a provision in a contract of sale that the measurements shall be made at the place of shipment, it amounts to a condition precedent, and a refusal by the buyer to be bound by this provision justified the seller in repudiating the whole contract. Weller Co. v. Columbia Conserve Co., 12 Ohio C. C. (N. S.) 173. Preventing other party from completing contract to sow and harvest grain. Stoneking v. Long, 142 Ill. App. 203.

11. Failure to deliver good and sufficient deed as per contract of exchange held to authorize retaking of merchandise which was to have been given in exchange for land. Robinson v. Yetter, 143 Ill. App. 172. Evidence held not to show that delivery service was unsatisfactory, warranting termination of contract. Long v. Charles Kaufman Co., 122 La. 281, 47 S 606. Failure to use ordinary care in management of business, making one liable in damages, is not ground for rescission of underwriting contract. Runkle v. Burrage, 202 Mass. 89, 88 NE 573.

12. Refusal of one party to perform is ground for rescission by other. Callanan v. Keeseville, etc., R. Co., 131 App. Div. 306, 115 NYS 779.

13. Where vendor could not show perfect record title, owing to destruction of records, vendee had right to rescind and recover deposit. Crim v. Umbsen [Cal.] 103 P 178; Cabrera v. Payne [Cal. App.] 103 P 176; Hooe v. O'Callaghan [Cal. App.] 103 P 175. Where records were destroyed by fire and it became impossible to restore them or tender good record title within 90 days as agreed, and vendor tendered deed, based on mere certificate of title recognizing impossibility of performance, right of action to recover deposit accrued. Cabrera v. Payne [Cal. App.] 103 P 176. If vendor agrees to convey title at specified time, and has no title when time for performance arrives, there is a breach for which vendee may rescind at once. Walsh v. Colvin [Wash.] 101 P 1085.

14. Where an agreement is by its terms mutual and dependent and one party fails to perform, the other may treat it as rescinded. South Texas Tel. Co. v. Huntington [Tex. Civ. App.] 121 SW 242.

15. Nonpayment of an instalment due under a contract is a breach of a material condition of the contract, authorizing a rescission. Burt v. Garden City Sand Co., 141 Ill. App. 603. Breach of a **condition subsequent** warrants rescission. Schneider v. Miller, 129 App. Div. 197, 113 NYS 399.

Partial breach may amount to abandonment if other acts and conduct show intent not to be bound. South Texas Tel. Co. v. Huntington [Tex. Civ. App.] 121 SW 242. A breach of contract which will warrant the party not in default to treat it as rescinded need not amount to prevention of performance; any breach or action showing an intention not to be bound by the contract and treating it as abandoned is sufficient. Gauger & Co. v. Sawyer & Austin Lumber Co. [Ark.] 115 SW 157.

Waiver of breach: Where no waiver is pleaded as to the most important of the breaches of a contract, it is error to charge the jury that the defendant had no right to rescind the contract if he had waived all the breaches of its material provisions. Weller Co. v. Columbia Conserve Co., 12 Ohio C. C. (N. S.) 173.

16. In absence of fraud, nothing short of conduct amounting to an abrogation of the contract, or that goes to its essence, or removes its foundation, is ground for rescission. Runkle v. Burrage, 202 Mass. 89, 88 NE 573. Plaintiff, who had contract to haul wood, was entitled to consider letter from defendant stating that he had let work to another, a breach of contract; not obliged to consider suggestion to haul part, or assist other person. Gibson v. Wheldon [Vt.] 72 A 909.

17. See ante, § 2, subd. Failure of Consideration. Kessler & Co. v. Parelius, 107 Minn. 224, 119 NW 1069. Evidence sufficient to show that daughter failed to comply with agreement to care for and maintain father as agreed; father entitled to reconveyance of land. Ebert v. Gildemeister, 106 Minn. 83, 118 NW 155.

of consideration is not ground for rescission in a court of equity [18] unless the inadequacy is so great as to raise the presumption of fraud.[19] Where before the time for performance, it appears that one party will not be able to perform his agreement upon the precise date stipulated, the other other may not repudiate his agreement in advance, unless time is of the essence.[20] One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions unless he is in a position to perform on his part.[21] After an ordinary contract for the benefit of a third person has been accepted, it cannot be rescinded by the original parties.[22]

(§ 8) *C. Time and mode of rescission and abandonment.*[23]—See 11 C. L. 779—A contract may be rescinded, where the right to rescind exists, by asserting the right, and giving notice to the other party,[24] accompanied or followed by a return of the consideration received [25] so as to restore the status quo,[26] or by an offer to restore

18. Tausick v. Tausick, 52 Wash. 301, 100 P 757.

19. Tausick v. Tausick, 52 Wash. 301, 100 P 757. Evidence insufficient to show inadequacy of consideration such as to warrant rescission of sale. Hickman v. Washington, 122 La. 945, 48 S 333.

20. Holt v. United Security Life Ins. & Trust Co., 76 N. J. Law, 585, 72 A 301.

21. Cadwell v. Smith, 83 Neb. 567, 120 NW 130.

22. American Central Life Ins. Co. v. Rosenstein [Ind. App.] 88 NE 97.

23. See Cancellation of Instruments, as to procedure in sults for rescission.

Search Note: See note in 1 L. R. A. (N. S.) 379.

See, also, Contracts, Cent. Dig. §§ 1184-1194, 1200; Dec. Dig. §§ 270-273; 6 Cyc. 28; 9 Cyc. 595-599.

24. Cunningham v. Pettigrew [C. C. A.] 169 F 335. Assent of other party to the rescission is not necessary. New York Brokerage Co. v. Wharton [Iowa] 119 NW 969. Letter by owner of land obtained from him by fraud held **sufficient notice** of election to rescind. Mabry v. Randolph, 7 Cal. App. 421, 94 P 403. Jury warranted in finding that defendant was notified of plaintiff's election to rescind. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616.

25. Dunbar v. American Tel. & T. Co., 142 Ill. App. 6; O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616. Where, by statute, a contract is made void as to one party but enforcible by the other, the one who has violated the law cannot assert the invalidity of the contract and recover property with which he parted without returning the consideration received, and hence unlicensed corporation could not recover piano sold conditionally without returning what it had received. Duluth Music Co. v. Clancy, 139 Wis. 189, 120 NW 854.

26. Central Life Assur. Soc. v. Mulford [Colo.] 100 P 423. The situation must be such that both parties can be restored to their former position. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616. One seeking to rescind for fraud may recover property by placing other in statu quo. Duy v. Higdon [Ala.] 50 S 378.

NOTE. Restoration of status quo: Upon the rescission in equity of a performed or partly performed contract, the plaintiff must, first, show fraud or mistake (Nance v. Boyer, 30 Pa. 99); second, be guilty of no laches (Whitcomb v. Hardy, 73 Minn. 285, 76 NW 29); third, have made no election to affirm (Betts v. Gunn, 31 Ala. 219; Masson v. Bovet, 1 Den. [N. Y.] 69, 43 Am. Dec. 651); and fourth, must stand ready to "do equity." It is upon this last consideration that the status quo rule rests. Carlton v. Hulett, 49 Minn. 308, 51 NW 1053. In cases of mistake or failure of consideration, if without fault of either party it is no longer possible to do equity to an innocent defendant by restoring him to his original position, the court may well refuse relief. Okill v. Whittaker, 2 Phillips, 338; Anderson v. McDaniel [Ky.] 22 SW 647. But when actual fraud is proved, the defendant cannot well urge such impossibility to bar a rescission (Hammond v. Pennock, 61 N. Y. 145), whether it be due to his own acts (Mayer v. Fishburn, 65 Neb. 626, 91 NW 534) or to the plaintiff's (Shafer v. Sleade, 7 Blackf. [Ind.] 178), or to causes beyond their control (Hale v. Kobbert, 109 Iowa, 128, 80 NW 308). It is enough if the plaintiff rescinds promptly upon the discovery of the fraud (Baker v. Lever, 67 N. Y. 304, 23 Am. Rep. 117), restores all that he has received (Neblett v. Macfarland, 92 U. S. 101, 23 Law. Ed. 471), and accounts for that which cannot be restored in specie (Bryant's Ex'r v. Boothe, 30 Ala. 311, 315, 68 Am. Dec. 117). Mere change of circumstances, preventing a complete restoration of the status quo, does not avail as a defense. Paquin v. Milliken, 163 Mo. 79, 63 SW 417, 1092. Some courts have even decreed partial rescission (Hopkins v. Snedaker, 71 Ill. 449), or have otherwise shaped the relief to meet the circumstances (Thackrah v. Haas, 119 U. S. 499, 30 Law. Ed. 486. A restoration to status quo is often defined as a return of all benefits received. This is inaccurate for all that need be restored is what was received as a performance of the contract and the subsequent losses and profits and consequent value of the contract resulting therefrom are immaterial. The courts seek to undo the whole transaction, 2 Pom. Eq. Jur. 910, by canceling promises and returning the property which was transferred, regardless of its present value (Gatling v. Newell, 9 Ind. 572); e. g., stocks which had depreciated (Blake v. Mowatt, 21 Beav. 603, 613), or a note whereof the maker had meanwhile become insolvent (Whitcomb v. Denio, 52 Vt. 382). The defendant's protection lies in the doctrines of laches and election (both presupposing knowledge by the plaintiff of the fraud), which prevent the plaintiff from taking the advantages of the contract and

such status,[27] provided anything of value has been received,[28] but, where rescission is sought on the ground of fraud, the party guilty thereof need not be restored to his former position as to expenditures made by him in pursuance of his scheme to defraud.[29] One seeking to rescind on the ground of fraud must act promptly [30] or within a reasonable time,[31] as delay, with knowledge of the facts and one's rights,[32] will bar rescission.[33]

then asking for a rescission when it becomes disadvantageous. Grymes v. Sanders, 93 U. S. 55, 23 Law. Ed. 798. But if the plaintiff's suit is not open to either of these objections, there is nothing to prevent him from rescinding for the fraud and incidentally getting out of a bad bargain (Maturin v. Tredinnick, 12 Wkly. Rep. 740; Dawson v. Sparks, 1 Tex. Unrep. Cas. 735); and the defendant cannot then complain of a change in the value of the property which makes him a loser through the contract not being performed (Goodrich v. Lathrop, 94 Cal. 56, 29 P 329, 28 Am. St. Rep. 91). It is obvious that in every case, upon discovery of the fraud, the defrauded party will promptly elect to rescind if the transaction has proved to be a losing one; if by reason of collateral facts it has turned out favorably in spite of the fraud, he will affirm it and sue for the fraud at common law, or avoid litigation entirely. The defendant cannot complain if the plaintiff makes that election which is most profitable to himself. In almost all of the cases where it is said that a return of all benefits received, so as to put the defendant in status quo, is a condition of rescission, some other consideration really controlled the decision; e. g., the plaintiff failed to prove fraud (McNett v. Cooper, 13 F 586), or was guilty of laches (Robinson v. Siple, 129 Mo. 208, 31 SW 788), or sought to avoid returning what he held (Lee v. Vacuum Oil Co., 126 N. Y. 579, 27 NE 1018), or manifested an election to affirm Cobb v. Hatfield, 46 N. Y. 533, or had an adequate remedy at law (Naugle v. Yerkes, 89 Ill. App. 310; Id., 187 Ill. 358, 58 NE 310). Thus it would seem that in equity the status quo rule is rather an incident to, than a condition of, the relief (Brown v. Norman, 65 Miss. 369, 377, 4 S 293, 52 Am. Rep. 190), is flexible to meet the equities of each case and concerns itself only with things actually received under the contract.

In a recent New York case, a divided court allowed a rescission of an insurance contract for fraud by the insurer in its inception, by a cancellation of the policy, and a return of all the premiums or assessments paid with interest, without any deduction for the risk carried. Moore v. Mutual, etc., Ass'n, 106 NYS 255. The contract was performed on the part of the insurer, being on its part a promise to pay upon death. Reed v. Provident Sav. Life Assur. Soc., 190 N. Y. 111, 82 NE 734. Before any loss has occurred the value of a policy consists in the prospect of the company performing its promise, and the insured simply enjoys an ability to enforce performance if there should be a loss. But the previous discussion shows that such value and corresponding benefit to the insured is not within the status quo rule, which is satisfied by a return of the policy. Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25; Merino v. Ins. Co., 21 Times L. R. 167. Contra, under the civil law (Angers v. Mutual Reserve Ass'n, 35 Can. Sup. Ct. 330, 337), opinion of Taschereau, C. J. Cases like the principal case must not be confused with recovery of premiums where the policy is absolutely void ab initio (Fisher v. Metropolitan Life Ins. Co., 160 Mass. 386, 35 NE 849, 39 Am. St. Rep. 495; Id., 162 Mass. 236, 38 NE 603), nor with so-called "rescission" for an anticipatory breach where some courts allow such a recovery as a measure of damages (Mutual Reserve Ass'n v. Ferrenbach, 144 F 342, 7 L. R. A. (N. S.) 1163; American Life Ins. Co. v. McAden, 109 Pa. 399, 1 A 256; Toplitz v. Bauer, 161 N. Y. 325, 335, 55 NE 1059).—From 8 Columbia L. R. 123.

27. Central Life Assur. Soc. v. Mulford [Colo.] 100 P 423. In case of fraudulent representations as to consideration for note, maker must rescind and offer to return consideration, if it has any value, in order to escape liability. Rev. Civ. Code, § 1285. Iowa Nat. Bank v. Sherman [S. D.] 119 NW 1010. Offer upon trial to return all rent received while property stood in his name **held sufficient.** Chase v. Wolgamot, 137 Iowa, 128, 114 NW 614. Bill tendering performance of all conditions and covenants and averring willingness in good faith to go on and perform all covenants held to show sufficient tender in equity. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219.

28. If consideration is wholly worthless, there need be no rescission or offer to return consideration in order to defend against note. Iowa Nat. Bank v. Sherman [S. D.] 119 NW 1010. Failure to offer to return worthless insurance policy held not to defeat right to rescind contract to exchange property. Chase v. Wolgamot, 137 Iowa, 128, 114 NW 614. Where office of treasurer of company paid no salary, and was of no benefit to either party, failure to give it up was not bar to rescission of contract whereby plaintiff was to pay $15,000 for stock in company to make machine, the money to be returned in case machine did not prove commercial success. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616.

29. Principal applied where rescission of contract to form corporation was sought. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616.

30. Duy v. Higdon [Ala.] 50 S 378; Finch v. Garrett [Va.] 63 SE 417.

31. One must elect to rescind for fraud within reasonable time. Central Life Assur. Soc. v. Mulford [Colo.] 100 P 423.

32. Confirmation of a contract, induced by fraud, must be shown by the clearest evidence. Fitzgerald v. Frankel [Va.] 64 SE 941. It must clearly appear that waiver of right to rescind for fraud was with full knowledge of rights and with intention to waive them. Id.

33. One who treats contract as existing after discovery of fraud waives right to re-

(§ 8) *D. Remedies.*[34]—See 11 C. L. 781—A rescission of an express contract renders it of no force or validity so far as its enforcement or damages for its breach is concerned,[35] but the implied obligation of the parties to restore everything of value received under the contract remains and may be enforced.[36] Rescission is not the exclusive remedy where one has been induced to part with property by means of fraud.[37] A court of equity may direct a reconveyance, upon proper terms, though there has been no previous rescission.[38]

§ 9. *Remedies for breach. A. The right and its accrual.*[39]—See 11 C. L. 782—In the case of mutually executory contracts,[40] where one party makes performance by himself impossible,[41] or abandons or repudiates the contract,[42] or refuses to perform,[43] or to allow the other to perform,[44] the contract is then breached and a right of action at once accrues, though the time for full performance has not arrived;[45]

pudiate. Finch v. Garrett [Va.] 63 SE 417. Lessee not entitled to rescission of lease on ground of fraud, after enjoying use of premises many years with knowledge of fraud. Id. Where vendor, after discovery of fraud, treated property received by him as his own, and treated contract as existing, he could not, three months later, rescind and sue for damages. Winter v. Hawkins [Tex. Civ. App.] 117 SW 172.

34. Search Note: See Cancellation of Instruments, Cent. Dig.; Dec. Dig.; 6 Cyc. 282-345; Contracts, Cent. Dig. §§ 1195-1206; Dec. Dig. § 274; 18 A. & E. Enc. P. & P. 744.

35. Chesley v. Soo Lignite Coal Co. [N. D.] 121 NW 73. Renunciation by one party, treated by other as a breach, cannot be withdrawn so as to compel performance thereafter. Quarton v. American Law Book Co. [Iowa] 121 NW 1009.

36. Chesley v. Soo Lignite Coal Co. [N. D.] 121 NW 73. After rescission, money paid under contract may be recovered. Drake v. White Sewing Mach. Co., 133 App. Div. 446, 118 NYS 178.

37. Mabry v. Randolph, 7 Cal. App. 421, 94 P 403. One who has been induced to enter into a contract by fraud may rescind the contract and recover back the consideration, or affirm the contract and recover the difference in value between the property received and what he would have received but for the fraud. Siltz v. Springer, 236 Ill. 276, 85 NE 748.

38. Mabry v. Randolph, 7 Cal. App. 421, 94 P 403.

39. Search Note: See notes in 3 L. R. A. (N. S.) 1042; 59 A. S. R. 283.

See, also, Contracts, Cent. Dig. §§ 1563-1570; Dec. Dig. §§ 326, 327; 6 Cyc. 86-90; 9 Id. 699-701; 4 A. & E. Enc. P. & P. 626, 915.

40. The rule that where one party to a contract disables himself from its performance, or gives notice that he will not fulfill it, the other may maintain an action for damages for the anticipatory breach before the time of performance arrives, applies to mutually executory contracts. See illustrations in Moore v. Security Trust & Life Ins. Co. [C. C. A.] 168 F 496.

41. Where owner sold timber, thereby preventing sale by agents to whom exclusive authority to sell had been given, agents could sue at once for breach of contract. Hunter v. Wenatchee Land Co., 50 Wash. 438, 97 P 494.

42. Where one party falls or refuses to perform, or by his acts or conduct clearly evinces a purpose not to be bound by the contract, or has placed himself in position where he cannot perform, this amounts to a repudiation or abandonment, and other may sue for damages for breach. South Texas Tel. Co. v. Huntington [Tex. Civ. App.] 121 SW 242. Right of action on bond of subcontractor accrued as soon as he abandoned work; that surety was not given opportunity to complete work was matter of defense, or mitigation of damages. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Final renunciation by one party of a contract providing for future performance gives to the other an immediate right of election, either to continue to assert his strict contract rights or accept the renunciation, and sue upon it as distinct cause of action. Canada-Atlantic & Plant S. S. Co. v. Flanders [C. C. A.] 165 F 321.

43. Where party to contract of sale of personalty refuses to perform before time for performance has arrived, other party may treat renunciation as breach and sue at once for damages. Caley v. Mills [Kan.] 100 P 69. Refusal to deliver bonds agreed to be sold gave rise to right of action for breach at once, bonds having been issued. Zimmermann v. Timmermann, 193 N. Y. 486, 86 NE 540. Where executor repudiated his testator's contract, before time for performance, right of action for breach at once accrued. Portland Co. v. Searle, 169 F 968. Where contractor refused to perform, right of action for breach at once accrued to other party, and breach not waived by subsequent ineffectual demand for performance. Bologh v. Roof Maintenance Co., 112 NYS 1104.

44. Where city had made contract for street and city lighting for 5 years, resolution that negotiations (referring to contract) were canceled and annulled was renunciation of contract, and other party could sue at once for breach. Block v. Meridian [C. C. A.] 169 F 516.

45. Right of action accrues at once upon breach, though only nominal or general damages are then recoverable. Houser v. Farmers' Supply Co. [Ga. App.] 64 SE 293. Cause of action arises at once upon breach of contract. Sloan v. Hart, 150 N. C. 269, 63 SE 1037. Contract to pay $70 per month for care and nursing as long as she lived, and to leave $20,000 when she died, broken by decedent when she left the house of the person to whom she made the promise, and refused

but this rule does not apply to actions on bonds, notes, or contracts for the payment of money at times specified, which have been executed by one of the parties.[46] In the latter case there is no right of action until performance is due.[47] As a general rule, one cannot recover upon or enforce a contract unless he himself has performed,[48] or unless he is able to perform,[49] and has tendered a performance,[50] or unless performance by him has been waived,[51] or excused.[52]

The cause of action for breach of contract is the breach of the contractual right, as distinguished from the contractual acts, ordinarily called the contract, by which such right is created,[53] and even in the broadest sense which can possibly be attributed to it, such cause of action cannot be deemed to include more than the contractual right, the breach thereof and the remedy therefor.[54] There can be but one recovery for a breach where the contract is entire.[55] Where the contract is not in its nature indivisible,[56] the injured party may sue for and recover damages for breaches up to the time of trial without thereby electing to accept the other's renunciation, and a judgment in such action is not a bar to a second action for damages subsequently accruing, and for prospective damages for anticipated future breaches;[57]

to return or perform the contract. Ga Nun v. Palmer, 63 Misc. 77, 116 NYS 23. In the federal courts upon refusal of one party to perform, the other may sue at once for damages without waiting for time of performance to pass, and may recover such damage as he can show has resulted at time of suit, and such further damage as he can show by competent evidence will likely result. H. T. Smith Co. v. Minetto-Meriden Co., 168 F 777.

46. Rule inapplicable to insurance agency contract executed by company. Moore v. Security Trust & Life Ins. Co. [C. C. A.] 168 F 496.

47. Where services are rendered under agreement for compensation by will or out of estate, cause of action does not accrue until death of person making promise. Walker v. Ganate [Ky.] 116 SW 689. Where employer renounced contract to devise property at death in consideration of services, employe was not bound to acquiesce in renunciation, but could wait until his death, treating contract as existing, and then sue upon it. Heery v. Reed [Kan.] 102 P 846.

48. One who is in default cannot enforce alleged contract. Blackshear v. Hood, 120 La. 966, 45 S 957. One who relies upon an executed contract can recover only by showing a full performance of the contract on his part. Sattler v. Oliver, 138 Ill. App. 210.

49. Where stallion sold plaintiff died, so that plaintiff could not return him, he could not enforce stipulation of contract that horse could be exchanged for another if he proved not to be 60 per cent foal getter. Nutting v. Watson, Woods Bros. & Kelly Co. [Neb.] 121 NW 582. Half interest in business was sold for $2,000, half cash, balance in one year if buyer desired to remain, or first payment to be returned if he desired to withdraw. Seller became voluntarily bankrupt before year expired. Held he could not recover second $1,000, since he could not perform consideration for which it was promised. Hardy v. Weyer, 42 Ind. App. 343, 85 NE 731.

50. See ante, § 6E.

51. See ante, § 6B.

52. See ante, § 6C.

53. **Note:** The concrete holding in this case was that where the original petition against a carrier for negligence in handling goods alleged a specific or express contract to carry, an amended petition alleging, as the base of petitioner's right, the mere delivery to and acceptance of the goods by the carrier and its consequent duty to exercise due care, etc., did not set up a new cause of action. The court in reaching this conclusion declared that while a contract may be the basis of a cause of action, it is not the cause of action itself, and that the cause of action consists in the breach of the contract. This latter declaration is in seeming conflict with the general rule that a cause of action includes both the right and its breach (see Causes of Action and Defenses), but the decision on the whole is not necessarily in conflict with such general rule, since, when properly analyzed, it is merely that the gist of the action was the violation of plaintiff's contractual right to have his goods handled with due care, regardless of whether such right was based upon an express or specific contract or upon a contract implied in law. In other words, the case holds merely that the manner in which the contractual right arose, as distinguished from the contractual right itself, was not a part of the cause of action. [Ed.]

54. Barnett v. Colonial Hotel Bldg. Co. [Mo. App.] 119 SW 471.

Note: It is well to note here that the court does not declare that the cause of action does include the remedy, but that it certainly does not include more than the right, the breach and the remedy. [Ed.]

55. Where there are two separate contracts relating to same subject-matter, suit for breach of one does not bar suit for breach of other; but where there is but one contract, only one action for damages can be brought. Judgment held bar. Peacock v. Coltrane [Tex. Civ. App.] 116 SW 389.

56. As contract for services for term of years, with salary payable in monthly instalments. Canada-Atlantic & Plant S. S. Co. v. Flanders [C. C. A.] 165 F 321.

57. Judgment for amounts due under contract of employment to date of trial and verdict not bar to subsequent action for

and when payments of money are to be made periodically under a contract, separate actions may be maintained in succession for instalments as they mature,[58] but all sums due when an action is begun must be included in it or they cannot afterwards be recovered.[59] Where money is payable in instalments, failure to pay an instalment when due is not a repudiation or abandonment of the contract so as to warrant an action for unpaid instalments and also future instalments, as damages for breach,[60] and the total damages cannot in such case be recovered because to allow recovery would be an enlargement of the rights of the parties shown by their agreement.[61]

(§ 9) *B. Particular remedies and election between them.*[62]—See 11 C. L. 783— Where the contract is broken or repudiated by one party, the other may treat it as at an end[63] and recover on a quantum meruit so far as he has performed,[64] or treat the contract as at an end for all purposes of performance and sue for damages for breach,[65] or treat it as still in force for the benefit of both parties until the expiration of the time for performance, and then sue on the contract.[66] He may also, in a proper case, sue in equity for specific performance,[67] or set up the breach as a defense to an action on the contract.[68] He may not, however, after repudiation by the other, complete performance and recover the contract price.[69]

damages thereafter accruing and to accrue up to end of term of contract. Canada-Atlantic & Plant S. S. Co. v. Flanders [C. C. A.] 165 F 321.

58. Puckett v. National Annuity Ass'n, 134 Mo. App. 501, 114 SW 1039.

59. Puckett v. National Annuity Ass'n, 134 Mo. App. 501, 114 SW 1039.

Note: As to judgment as bar to subsequent cause of action or defense, see judgments, § 2, subd. Scope of Adjudication.

60. Only amount due can be recovered. Puckett v. National Annuity Ass'n, 134 Mo. App. 501, 114 SW 1039. Where defendant refused to pay annuities because of erroneous report by physician as to extent of disability, but on learning true facts agreed to pay according to terms of policy, refusal to pay instalments was not abandonment of contract. Id.

61. Where intention is to pay in instalments, party cannot be compelled to pay all in lump sum. Puckett v. National Annuity Ass'n, 134 Mo. App. 501, 114 SW 1039. Annuity company had refused to pay instalments because of mistake of physician. On learning facts it offered to perform. Held, having offered to pay all sums due with interest, and consented to decree for execution on unpaid future instalments when ten days past due, such decree should be entered. Id.

62. **Search Note:** See notes in 5 C. L. 732; 12 L. R. A. (N. S.) 924; 1 Ann. Cas. 427; 3 Id. 1032.

See, also, Contracts, Cent. Dig. §§ 1549-1562; Dec. Dig. §§ 324, 325; 9 Cyc. 684-693; Election of Remedies, Cent. Dig.; Dec. Dig.; 15 Cyc. 251-267; Injunction, Cent. Dig. §§ 111-130; Dec. Dig. §§ 57-63; 22 Cyc. 844-870.

63. See ante, § 8B.

64. Stoneking v. Long, 142 Ill. App. 203. Where plaintiffs and defendants agreed to work jointly in sale of lands of others and divide profits, and plaintiffs placed land of another with defendants to sell, and defendants themselves bought it and realized profit on resale, plaintiffs could recover on quantum meruit though they had tried to prevent defendants procuring the land. Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831.

65. Where one party repudiates in toto, in advance of the time for performance, the injured party need not rescind, but may hold wrongdoer liable for damages for breach. Holt v. United Security Life Ins. & Trust Co., 76 N. J. Law, 585, 72 A 301. May treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. Stoneking v. Long, 142 Ill. App. 203. Where agents delivered machine before payment, which contract provided would constitute "conversion" and make agents personally liable, an action to recover value of machine so delivered was for breach of contract, not an action for conversion. Case Threshing Mach. Co. v. Folger, 136 Wis. 468, 117 NW 944. If one party to a contract containing mutual obligations repudiates it before the time fixed for performance, the other may treat such repudiation as a breach and sue at once for damages. Ford & Co. v. Lawson [Ga.] 65 SE 444.

66. Stoneking v. Long, 142 Ill. App. 203. After repudiation by one, other may wait until time for performance and then demand performance, and his right of action for breach will depend upon whether his demand is complied with or not. Ford & Co. v. Lawson [Ga.] 65 SE 444.

67. See Specific Performance.

68. See post, § 9C.

69. Upon breach of an executory contract, the injured party cannot complete performance and recover on the contract, his only remedy being an action for damages for the breach. Beckes v. Schlick, 82 Neb. 289, 117 NW 707; Frederick v. Willoughby, 136 Mo. App. 244, 116 SW 1109; Badger State Lumber Co. v. Jones Lumber Co., 140 Wis. 73, 121 NW 933; Richards v. Manitowoc & N. Trac. Co., 140 Wis. 85, 121 NW 937.

Since an express contract excludes an implied one on the same subject,[70] one cannot ordinarily recover the reasonable value of work or materials furnished under an express contract [71] unless the contract has been fully executed so that nothing remains to be done except to make payment.[72] One who fails to perform fully an entire contract cannot ordinarily recover on a quantum meruit,[73] but recovery is sometimes permitted in this form of action, notwithstanding a breach, where the other has accepted the work done [74] and has received the benefit thereof.[75] Recovery upon quantum meruit may also be had where the express contract fails because of mutual mistake,[76] or because of failure to comply with statutory requirements.[77]

One having several inconsistent remedies must elect between them.[78] The form of action has, however, been held immaterial, where the measure of recovery was the same.[79]

A cause of action for cancellation of a contract on the ground of fraud, or mistake, cannot be joined with one for damages for breach of the contract.[80] If, however, a plaintiff fail in a suit for cancellation, he may maintain a subsequent action for breach of the contract.[81] An action for rescission on the ground of the failure

70. See ante, § 1A.

71. Evidence of reasonable value of services immaterial when they were rendered under contract fixing compensation. Prouty v. Perry [Iowa] 120 NW 722. Assumpsit, under common counts, cannot be maintained on sealed contract. Smith v. Sharp [Ala.] 50 S 381.

72. Assumpsit cannot be maintained on a contract unless it has been fully performed, except payment. Smith v. Sharp [Ala.] 50 S 381. Where a contract has been performed, except as to payment for work and materials, recovery may be had under the common counts. Peterson v. Pusey, 237 Ill. 204, 86 NE 692; Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843; Lord v. Henderson, 65 W. Va. 321, 64 SE 134. Where oral contract had been performed, recovery for work and materials could be had under common counts, even though there were slight deviations from original contract. Peterson v. Pusey, 237 Ill. 204, 86 NE 692.

73. Agreement or option gave person right to sell property at certain price net to owner, for limited time, compensation to be amount of price over that named, no sale having been made at that figure, and, owner having sold for less price, there could be no recovery on quantum meruit for services performed. Johnson v. Virginia-Carolina Lumber Co. [C. C. A.] 163 F 249. Where the contract is entire and one party is willing to perform, the other cannot, after abandoning the contract, recover upon quantum meruit for work done. Johnson v. Fehsefeldt, 106 Minn. 202, 118 NW 797.

74. Where work was not finished within stipulated time, proper to show acceptance of benefit of it, and its value, in assumpsit. Kendrick v. Warren Bros. Co., 110 Md. 47, 72 A 461. Where work contracted for is not completed within specified time but is accepted, suit is properly brought in assumpsit. Id.

75. If contract for work is made and repudiated, but work is done with knowledge of other party, who received benefit, he would be liable for its reasonable value. Suderman-Dolson Co. v. Hope [Tex. Civ. App.] 118 SW 216. Owner of furniture could not rescind contract for moving on account of alleged delay and thereafter allow part of it to be moved, and then defeat recovery under quantum meruit. Mehrle v. American Bridge Co., 115 NYS 724.

76. Where the contract fails because of mutual mistake as to the price, the contractor may recover the reasonable value of labor and materials furnished. Price named when one signed was fraudulently changed by architect before other party signed. Vickery v. Ritchie, 202 Mass. 247, 88 NE 835.

77. Where contract under which chemist was employed was unenforcible in part because of failure to comply with statutory requirement, he could, for services performed, recover upon quantum meruit, contract price being measure of recovery. Miller v. Cosmic Cement, Tile & Stone Co., 109 Md. 11, 71 A 91. Where note by bank was void, because made by cashier without written authority from directors as required by statute, payee who had loaned money to the bank, which had been used by it, could recover as for money lent. Union Nat. Bank v. Lyons, 220 Mo. 538, 119 SW 540.

78. Where one party rescinds or refuses to perform, other may rescind or enforce contract, he cannot do both. Olsen v. Sortedahl [Iowa] 121 NW 559. If plaintiffs were entitled to recover on quantum meruit, they were not entitled to recover half profits of transaction under express contract. Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831. If after repudiation by one the other waits until time for performance has come, and an offer to perform is then made, he cannot rely upon the former repudiation to establish a right to damages. Ford & Co. v. Lawson [Ga.] 65 SE 444.

79. Damages for breach of contract for exclusive selling agency being lost profits, it is immaterial whether agent, on breach by other party, sues for an accounting or for damages for breach. Peck-Williamson Heating & Ventilating Co. v. Miller [Ky.] 118 SW 376.

80. Two are inconsistent. Ross v. Sheldon [Ky.] 119 SW 225.

81, 82, 83. Ross v. Sheldon [Ky.] 119 SW 225.

of the other party to perform may be united with one for damages for breach.[82] Where plaintiff seeks rescission on the ground that no contract was made, and also on the ground that the other party failed to perform, he may be made to elect.[83]

Where parties stipulate what shall be the consequences of a breach of the contract, such stipulation, if reasonable, is controlling, and excludes other consequences,[84] though some courts hold that a remedy provided by the contract, in case of breach, will not be held exclusive unless this clearly appears to have been the intention of the parties.[85] That a contract is broken by means of injunctive processes issued at the instance of a party does not relegate the other solely to an action on the injunction bond.[86]

Breach of a contract will not be enjoined when the party injured has an adequate remedy at law.[87] A suit to enjoin violation of a contract is governed by the same rules as a suit for specific performance.[88] This subject is fully discussed elsewhere.[89] Mandamus does not lie to compel private corporations to perform contract obligations to individuals.[90]

Tort liability growing out of contractual relations is treated elsewhere,[91] as is, also, the liability for interference with contractual relations.[92]

(§ 9) *C. Defenses and counter rights.*[93]—See 11 C. L. 784—A defense may be available though unknown at the time of the breach complained of.[94] A breach of the contract by plaintiff is a good defense to an action on the contract,[95] but breach of an independent covenant is not a defense,[96] though it is available as the basis of

84. Ancrum v. Camden Water, Light & Ice Co., 82 S. C. 284, 64 SE 151; Foxley v. Rich [Utah] 99 P 666. Sale contract provided that if stallion sold was not 60 per cent foal getter, he could be returned and another horse substituted. Held, parties having provided remedy, law would not imply any other. Nutting v. Watson, Woods Bros. & Kelly Co. [Neb.] 121 NW 582. Where contract remedy against purchaser of land in case he should fail or refuse to perform was forfeiture of $1,000, contract could not be specifically enforced against him. Moss v. Wren [Tex.] 120 SW 847. Contract of sale of vessel provided that, in case of default in payments by vendee, vendor should retain payments already made as for rent, etc., and that vendee should owe nothing more. Held vendor could not recover for use of vessel by vendee having retained payments made, even though parties agreed to waive default. Ollinger & Bruce Dry Dock Co. v. Tunstall [Ala.] 48 S 482. Where a contract is entered into by divorced parties after the rendition of a decree, the contract reciting that it may be enforced by any appropriate remedy and that plaintiff should not thereby be precluded from collecting alimony by any legal method, a breach of the contract did not render husband liable to contempt. Clark v. Clark, 130 App. Div. 610, 115 NYS 500.

85. White Furnace Co. v. Miller Transfer Co., 115 NYS 625. Provision for stipulated damages in contract between partners to form corporation was not exclusive remedy of corporation seeking to quiet title to land conveyed by one partner to third person. Thompson-Spencer Co. v. Thompson, 49 Wash. 170, 94 P 935.

86. Tutwiler v. Burns [Ala.] 49 S 455.

87. Continuance of newspaper prize contest beyond date set not enjoined at instance of contestant who had adequate legal remedy. McDaniel v. Orner [Ark.] 120 SW 829.

Injunction held proper remedy to prevent defendant, its officers and employes, from inducing customers of plaintiff, a competitor, to break their contracts with plaintiff by promising to indemnify them against loss by the breach, plaintiff having no adequate legal remedy. Citizens L., H. & P. Co. v. Montgomery L. & Water Power Co., 171 F 556. Breach of contract not to engage in practice of medicine within reasonable area may be enjoined. Threekeld v. Steward [Okl.] 103 P 630.

88. Ulrey v. Keith, 237 Ill. 284, 86 NE 606.

89. See, also, Injunctions, § 2H. See, also, generally, Specific Performance.

90. Courts will not thus compel medical college to receive student. Booker v. Grand Rapids Medical College [Mich.] 16 Det. Leg. N. 56, 120 NW 589. See Mandamus, § 2.

91. See Negligence; Torts. See, also, topics dealing with particular relations.

92. See Master and Servant, § 5.

93. Search Note: See Contracts, Cent. Dig. §§ 1571-1584; Dec. Dig. § 328; 6 Cyc. 91; 9 Id. 693-697; 14 Id. 1103-1106.

94. Wineburgh Advertising Co. v. Faust Co., 113 NYS 709.

95. If builders, as part of contract, agreed to get possession of premises, which were held adversely by third person, their failure to do so would be good defense to action on contract by them. Indelli v. Lesster, 130 App. Div. 548, 115 NYS 46. Failure to protect exclusive patent against infringement, as agreed, held good defense to action on license to recover royalties. Wilfley v. New Standard Concentrator Co. [C. C. A.] 164 F 421. Action for price of transforming and installing engine. Evidence held to sustain defense of breach of guaranty that engine

a counterclaim.[97] Fraud is a defense to an action on a simple contract,[98] but fraud touching the consideration is not available as a defense to a contract under seal,[99] except where the statute has reduced sealed instruments to the footing of simple contracts.[1] Want or failure of consideration may now usually be pleaded even to contracts under seal.[2] Payment to the agent of an undisclosed principal is a good defense.[3] Mere notice by a party that he intends to violate a contract is no defense to an action for damages for the breach.[4] It is no defense for a breach of contract that to perform it would be unprofitable.[5] The mere fact that performance by one party is interfered with by the other does not necessarily constitute a defense, where no contractual rights are violated.[6]

(§ 9) *D. Limitations.*[7]—See 11 C. L. 785—The action must, of course, be brought within the time fixed by statute [8] or by the contract itself.[9] Contractual limitation, however, is sometimes prohibited by statute.[10] A contractual limitation upon the right to sue relates wholly to the remedy and may be controlled or limited by other provisions of the contract.[11]

would work satisfactorily. Kumberger v. Hartford, 114 NYS 808.

96. Where agreement to convey interest in lots, after certain amount of land was sold, was simply part of consideration for broker's services, breach of independent covenant of broker to use diligence in pushing sales was no bar to recovery of such interest. Mitchell v. Rushing [Tex. Civ. App.] 118 SW 582.

97. Breach of independent covenant by broker would give cause of action for damages, but would be no defense to action for broker's compensation, services having been accepted and benefits received. Mitchell v. Rushing [Tex. Civ. App.] 118 SW 582.

98. Robinson v. Yetter, 238 Ill. 320, 87 NE 363. That contract was induced by fraud is defense. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785. Where a simple contract is induced by fraud, the party defrauded may rescind without the aid of equity and may plead the fraud in defense of an action on the contract or for its breach. Olston v. Oregon Water Power & R. Co. [Or.] 97 P 538.

99. Remedy in such case is to have it set aside in equity. Robinson v. Yetter, 238 Ill. 320, 87 NE 363.

1. In those states, fraud is defense to action on sealed contract. Olston v. Oregon Water Power & R. Co. [Or.] 97 P 538.

2. Defense allowed to sealed cancellation of mortgage. Sims v. Scheussler [Ga. App.] 64 SE 99. Defense allowed to promissory note under seal, as between maker and payee. Yancey v. Hutchinson [Ga. App.] 64 SE 105. Plea of failure of consideration not sustained, where suit was for price of passenger elevator, and alleged defect was failure of elevator to attain required speed, lack of speed being due to vendee's failure to supply water pressure. Yancey v. Warner Elevator Mfg. Co. [Ga. App.] 64 SE 663.

3. Payment to member of firm with whom defendant supposed he was dealing good defense to action on contract. Brodzak v. Robinson, 114 NYS 113.

4. Chesapeake & O. R. Co. v. Maysville Brick Co. [Ky.] 116 SW 1183.

5. Hartje v. Keller, 133 Ill. App. 461.

6. The parties entered into a contract by which the defendants agreed, in consideration of $20,000 bonus, to build a glass factory in Wooster, Ohio, and keep it running ten months a year for ten years, employing not less than 200 operatives, and, in case of default, to return the bonus. Plaintiffs knew defendants intended to employ boys because of the cheapness of such labor, and that they were induced to enter into a contract on that account. Defendants defaulted on the contract and alleged in defense of suit for a return of the bonus that plaintiffs joined with others in a crusade against boys working in such a business because of its alliance with the liquor traffic, and thereby prevented them from hiring boys to work in the business and made it impossible to carry on the business with profit, and thereby caused the default for which and by reason of which they sued for the return of the money so advanced. Held that the answer alleging such conduct set forth no defense. Kinney v. Pocock, 8 Ohio N. P. (N. S.) 121.

7. **Search Note:** See Contracts, Cent. Dig. §§ 1585-1588; Dec. Dig. § 329; 9 Cyc. 697, 698; Limitation of Actions, Cent. Dig.; Dec. Dig.; 25 Cyc. 963-1440.

8. See Limitation of Actions.

9. Where trust agreement provided that it is a condition precedent to the maintenance of certain action or suit, that the same shall be commenced within one year or thereafter be barred, the commencement and dismissal of a suit within the year was not a compliance with the limitation. Baker v. Baker, 139 Ill. App. 217.

10. Rev. St. 1899, § 899, makes void all parts of a contract or agreement limiting the time in which an action may be brought thereon. Roberts v. Modern Woodmen of America, 133 Mo. App. 207, 113 SW 726. Though provision in insurance policy barring action unless brought within one year after death of insured would be void in Missouri (Rev. St. 1899, § 899), plaintiff had right to show that it was valid in Illinois, contract being Illinois contract. Id.

11. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Thus, where the contract provides that no remedial or other provision shall be construed for the benefit of the surety in the bond given to secure performance, or of any person not a party to the contract, the surety cannot set up a failure

(§ 9) *E. Procedure before trial.*[12]—See 7 C. L. 829 matters relating to process[13] and venue,[14] are treated elsewhere.

(§ 9) *F. Parties, pleading, evidence, etc.*[15] *Parties.*See 11 C. L. 785—The subject of parties in general is elsewhere fully discussed.[16] At common law no one not a party to a contract can sue thereon, but there are well settled exceptions to the rule.[17] Thus, where one receives property or money on a promise to pay an indebtedness to a third person, the third person may sue on the promise.[18] And under modern statutes, one for whose benefit a contract was made may sue thereon, though not a party to it,[19] unless the contract is under seal.[20] In such case the beneficiary may either sue in his own name or bring an action in the name of the nominal party for his use.[21] Where the legal plaintiff has a right of action on a contract, it is immaterial to the defendant whether the beneficiary plaintiff has any interest in it,[22] but one who is not the beneficiary, and not in privity with the parties to a contract, cannot sue thereon.[23] Where an obligation is made to two more persons jointly, but in the defeasance provides for its discharge upon the payment of a sum of money to one of them, the legal interest in the oblgaton s joint, and the obligees must, if living, join in the action.[24] An action will lie against any or all of joint and several obligors.[25] The representative of a deceased joint contractor may be sued separately during the lifetime of the other joint contractors.[26] Where the action is against one only, an allegation that the contract was made by the defendant is sustained by proof that it was made by defendant and others, in the absence of objection.[27]

Pleading.—See 11 C. L. 785—The general rules of pleading apply.[28] The nature of the action is to be determined from the allegations of the complaint,[29] without

to sue the principal within the time limited as a defense to an action on the bond. Id.

12. Search Note: See Process, Cent. Dig.; Dec. Dig.; Venue, Cent. Dig.; Dec. Dig.

13. See Process.

14. See Venue and Place of Trial.

15. Search Note: See notes in 8 A. S. R. 921; 7 Ann. Cas. 611; 11 Id. 253.

See, also, Contracts, Cent. Dig. §§ 1589-1823; Dec. Dig. §§ 330-350; 6 Cyc. 92-104, 108-110; 9 Id. 702-775; 11 A. & E. Enc. L. (2ed.) 583; 4 A. & E. Enc. P. & P. 916; 16 Id. 312.

16. See Parties.

17. Howes v. Scott [Pa.] 73 A 186.

18. Howes v. Scott [Pa.] 73 A 186. Interest in realty was transferred to defendant who, as part of consideration, promised to pay $2,000 which had been borrowed from plaintiff and paid for the property, defendant knowing soon after that money was to be paid plaintiff. Plaintiff could sue therefor. Id. Where property is placed in the hands of a person, who agrees to deliver the proceeds thereof to a third person, the latter has a cause of action against the person with whom the property was left. Bank of Laddonia v. Bright-Coy Com. Co. [Mo. App.] 120 SW 648.

19. See ante, § 1A, subd. Parties.

20. Where agent contracts by deed, under seal, in his own name, he alone can sue on it. Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp. [Va.] 64 SE 56.

21. Holt v. United Security Life Ins. & Trust Co., 76 N. J. Law, 585, 72 A 301.

22. This is matter solely between legal and use plaintiffs. Howes v. Scott [Pa.] 73 A 186.

23. Plaintiff cannot recover rentals from defendant when latter is in possession under a different lease from that on which plaintiff sues, there being no privity of contract between plaintiff and defendant. Titley v. Craig, 222 Pa. 618, 72 A 233. Lease of cotton compress and warehouse fixed schedule of maximum charges. Held, one engaged in buying, selling and shipping cotton had no such interest in lease as to entitle him to enforce provision as to charges. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477.

24. International Hotel Co. v. Flynn, 238 Ill. 636, 87 NE 855.

25. Morrison v. American Surety Co. [Pa.] 73 A 10. The obligee of a contract to which there are several obligors may have different judgments against them for breach but can have only one satisfaction. Vette v. Merrell Drug Co. [Mo. App.] 117 SW 666. Where promise to pay note, and liability for attorney's fees thereon, was joint and several, liability of two for attorney's fees could be enforced though third could not be held because notice required by statute had not been given him in time. Savannah Bank & Trust Co. v. Purvis [Ga. App.] 65 SE 35.

26. Gen. St. p. 2336. Fleming v. Reed [N. J. Err. & App.] 72 A 299.

27. If plaintiff declare against one of several joint contractors, and defendant does not plead it in abatement and give notice of nonjoinder, an allegation that contract was made by defenant may be supported by proof that it was made jointly by defendant and others. Fleming v. Reed [N. J. Err. & App.] 72 A 299.

28. See Pleading.

29. Complaint held to state cause of action

regard, however, to surplusage.[30] In an action for services, an allegation both of value and agreed price does not necessarily state two causes of action,[31] nor is the plaintiff put to an election where there are two counts for the same services, one on special contract and one on quantum meruit.[32] Where a contract has been performed by the plaintiff, a recovery may be had under the common counts.[33]

Plaintiff must allege facts showing the existence of the contract sued on;[34] that it is based on a valuable or sufficient consideration,[35] unless the action is based on a contract which imports a consideration;[36] performance on his part, of the contract,[37] and of all conditions precedent,[38] or a valid excuse for nonperformance,[39] such as a repudiation of the contract by defendant,[40] or a waiver;[41] and a breach by

for services on quantum meruit, where value of services were alleged, and contract to convey land in payment, and breach. Flowers v. Poorman [Ind. App.] 87 NE 1107. Complaint held to state cause of action for money lent, not action on note. Union Nat. Bank v. Lyons, 220 Mo. 538, 119 SW 540.

30. Where the complaint is manifestly upon a specially agreed price, the allegation of value will be treated as surplusage. Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843. Where complaint alleges special contract for services, subsqeuent allegation of value of services deos not make action one of quantum meruit. O'Neill v. Guyther, 123 La. 100, 48 S 759.

31. Value may be agreed price. Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843.

32. Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843.

33. Peterson v. Pusey, 141 Ill. App. 578.

34. A general allegation of contract, with good consideration, performance and indebtedness, is sufficient; plaintiff need not allege whether contract was written or oral. Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843.

35. In the absence of statutory enactments to the contrary, it is necessary in actions on contracts to allege a consideration. Schwerdt v. Schwerdt, 141 Ill. App. 386. Where contract of assumption alleged does not impart a consideration, consideration must be shown by direct allegation or necessary inference. Evansville & S. I. Tract Co. v. Evansville Belt R. Co. [Ind. App.] 87 NE 21. Where the action is founded on an oral contract, or on a written contract which does not impart a consideration, the consideration must be alleged with such particularity as will enable the court to pass upon its legal sufficiency. Allegation that purchasers assumed mortgage insufficient. Southern Indiana Loan & Sav. Inst. v. Roberts, 42 Ind. App. 653, 86 NE 490. A failure to state a consideration or a statement of an insufficient consideration may be taken advantage of by **demurrer.** Schwerdt v. Schwerdt, 141 Ill. App. 386. Count demurrable, not alleging consideration. Poland v. Hollander, 62 Misc. 523, 115 NYS 1042. Count alleging an agreement, for a consideration, to look for liquidation of an existing debt out of profits of another contract, and a breach by suit on the debt, states cause of action, as againt demurrer. Commonwealth Trust Co. v. Coveney, 200 Mass. 379. 86 NE 895.

36. Such as contract under seal, or bill of exchange, or promissory note. Poland v. Hollander, 62 Misc. 523, 115 NYS 1042; Schwerdt v. Schwerdt, 141 Ill. App. 386.

37. Where covenants are mutually dependent, one party cannot recover without alleging and proving performance of all conditions by him to be performed, or an excuse for nonperformance. World's Fair Min. Co. v. Powers [Ariz.] 100 P 957. Performance or excuse by plaintiff, of acts to be done before defendant can be placed in default, must be alleged. Jacocks v. Morrison, 129 App. Div. 284, 113 NYS 322. Under Civ. Code Cal. § 1439, complaint must allege performance, or ability and readiness, or an offer to perform, conditions concurrent, before there can be recovery. Allegation of performance of covenant to protect patent against infringement necessary in action to recover royalties under license. Wilfley v. New Standard Concentrator Co. [C. C. A.] 164 F 421.

38. Korbly v. Loomis [Ind.] 88 NE 698. Complaint must allege performance by plaintiff of conditions precedent to right, denial of which is complained of as breach. Herrington v. Jones [Ga.] 63 SE 832. Where contract bound defendant to pay $3,500 in case he failed to procure conveyance of 15 acres of land owned by certain party, said tract to be selected by purchaser, complaint to recover $3,500 was fatally defective in not alleging selection of tract, this being necessary before defendant could be put in default. Jacocks v. Morrison, 129 App. Div. 284, 113 NYS 322; Jacocks v. Dessar, 129 App. Div. 286, 113 NYS 324.

39. A pleading based on a contract as the cause of action or defense must allege performance of conditions or stipulations to be performed by the party relying on the contract or a sufficient excuse for nonperformance. Parker Land & Imp. Co. v. Ayers [Ind. App.] 87 NE 1062. In action for compensation under contract, completion of work must be alleged, or an excuse averred, and facts and circumstances constituting excuse for nonperformance must be set out. McCormick v. Jordon, 65 W. Va. 86, 63 SE 778. A complaint which alleges an abandonment by a contractor and a notice by the surety not to make further payments sufficiently shows an excuse for nonperformance by plaintiff in an action on the bond. Parker Land & Imp. Co. v. Ayers [Ind. App.] 87 NE 1062.

40. An allegation that defendants abandoned the contract is equivalent to an allegation of repudiation. Parker Land & Imp. Co. v. Ayers [Ind. App.] 87 NE 1062. In an action for breach of contract it is unnecessary to allege performance by plaintiff where it is shown that defendant has repudiated the contract and refused to perform. Shank v. Trustees of McCordsville Lodge. No. 338. I. O. O. F. [Ind. App.] 88 NE 85. When the

defendant,[42] and resulting damages.[43] General allegations of performance are permitted in some states,[44] particularly performance of conditions precedent.[45] If such conditions precedent are not set out in the manner allowed by statute, in a general allegation,[46] the facts must be alleged with the particularity required by the common law.[47] Allegations generally should be definite, certain, and specific,[48] and facts, not conclusions, should be pleaded.[49] Where the contract is in writing and appears to be the contract of the agent it must be declared on as made by the principal through the agent.[50] Matters irrelevant to the cause of action should not be pleaded.[51] Matters of defense need not be negatived in the complaint.[52] A de-

complaint shows refusal by other party to perform, and repudiation, it need not allege performance or readiness to perform by plaintiff. Jennings v. Shertz [Ind. App.] 88 NE 729. Where a complaint in an action for breach of contract alleges a refusal by defendant to allow plaintiff to perform, it need not set out parts of the contract relating to the time and manner of performance. Gibson v. Wheldon [Vt.] 72 A 909.

41. When a plaintiff relies on a waiver of conditions of his contract, such **waiver must be pleaded and proved.** Poheim v. Meyers, 9 Cal. App. 31, 98 P 65. Waiver of condition of contract must be specially pleaded. American Jobbing Ass'n v. James [Okl.] 103 P 670. Error to receive proof of and charge on waiver when not alleged. List & Son Co. v. Chase, 80 Ohio St. 42, 88 NE 120.

42. Zeller v. Wunder, 36 Pa. Super. Ct. 1. Count in declaration on written instrument for payment of money bad because not alleging breach; nonpayment. Junkins v. Sullivan, 110 Md. 539, 73 A 264. Breach of contract may be alleged in the negative of words of contract unless such negative fails to plainly show breach. Sherlag v. Kelley,, 200 Mass. 232, 86 NE 293. Averment that defendant breached contract in that he forbade construction of the building by plaintiff and refused to allow him to proceed is sufficient allegation of breach of contract. Tutwiler v. Burns [Ala.] 49 S 455. In an action for breach of contract to pay upon demand, demand and nonpayment must be alleged. Smith v. State Bank, 61 Misc. 647. 114 NYS 56. Action for breach of agreement to repurchase stock or find purchaser "as soon as possible" after notice of termination of contract. Complaint insufficient because not alleging that defendant could have found purchaser with reasonable effort. Meurer v. American Moving Picture Mach. Co. 61 Misc. 281, 113 NYS 719. Complaint sufficient to sustain action for breach of contract, mutual agreements, consideration moving to each party, and default of defendant being sufficiently alleged. Wessel v. Wessel Mfg. Co., 106 Minn. 66, 118 NW 157.

43. Complaint not subject to general demurrer where it alleged contract, breach and damages. Southern Granite Co. v. Venable Bros., 131 Ga. 599, 62 SE 1038. In an action on a contract to pay a stipulated sum of money, it is proper to allege that plaintiff has been damaged in the sum of the amounts due. Compressed Air Mach. Co. v. West San Pablo Land & W. Co., 9 Cal. App. 361, 99 P 531. Allegation of performance by plaintiff, and breach by defendant in that he failed to pay consideration of $1,000, sufficiently alleges sum due and unpaid. Poull & Co. v. Foy-Hays Const. Co. [Ala.] 48 S 785.

44. Performance being generally alleged, as allowed by Code Civ. Proc. § 457, not necessary to allege specially that certificates of engineer had been obtained, in action by contractor against city. City Street Imp. Co. v. Marysville [Cal.] 101 P 308.

45. General allegation of performance of conditions precedent is sufficient under Code Civ. Proc. N. Y. § 533. Clement v. Dowling, 171 F 607; Hudson Cos. v. Briemer, 113 NYS 997. Allegation that contractor had obtained certificate of architect, and that contractor had performed each and everything required of him, was sufficient under B. & C. Comp. § 88, providing for pleading of conditions precedent in this general way. McInnis v. Buchanan [Or.] 99 P 929.

46. Burns, Ann. St. 1901, § 376. Korbly v. Loomis [Ind.] 88 NE 698.

47. Korbly v. Loomis [Ind.] 88 NE 698.

48. Though complaint alleged both express and implied contract, it was sufficiently definite when facts alleged show that implied contract was relied on. Broussard v. South Texas Rice Co. [Tex. Civ. App.] 120 SW 587. Amended complaint containing itemized statement of work done sufficient in action by contractor to recover for railroad work. Magoon v. O'Connor, 134 Mo. App. 130, 114 SW 33.

49. Where the contract sued on is set out, it speaks for itself and will be construed by the court, on demurrer, independently of the pleader's conclusions therefrom. Lawson v. Sprague, 51 Wash. 286, 98 P 737. Where bond and contract were set out, allegations that the bond was for benefit of parties furnishing materials and labor were mere conclusions, not admitted by demurrer. Eau Claire-St. Louis Lumber Co. v. Banks, 136 Mo. App. 44, 117 SW 611.

50. Lawson v. Sprague, 51 Wash. 286, 98 P 737.

51. Action for breach of agreement to build drain. Allegations in complaint that ditch built under previous agreement had been destroyed by defendant held irrelevant, no connection between two contracts being alleged, and second contract not being set up as settlement of first. Robinson v. Luther [Iowa] 119 NW 146.

52. Not necessary to allege in complaint in action on note reciting that it was "subject to terms of contract between maker and payee" that such coontract had been performed; breach of it would be matter of defense. Manufacturers' Commercial Co. v. Klots Throwing Co. [C. C. A.] 170 F 311. When a right of action has become vested, matters of omission tending to defeat it, whether called a proviso or condition precedent, are matters of defense, and need not be alleged in the declaration as having been

murrer to a complaint on the ground that the contract disclosed is contrary to public policy cannot be sustained unless the allegations of the complaint disclose such illegality.[53] Where the declaration alleges performance of all conditions precedent, and a plea denies performance of a particular condition, plaintiff cannot in reply set up a waiver of such condition.[54]

Sufficient facts should be alleged to make a complete defense,[55] and defenses must be consistent.[56] Special defenses,[57] such as want[58] or failure of consideration,[59] must be specially pleaded. Under a general denial the defendant may show that the contract actually made was other than as pleaded by the plaintiff,[60] and if plaintiff's evidence shows that the contract is void as against public policy, defendant is entitled to the benefit of the defense under a general denial.[61] A plea of total failure of consideration includes partial failure.[62] Defendant should specify the conditions precedent, performance of which he intends to contest,[63] and where certain breaches of contract by plaintiff are specified, others are waived.[64] Where plaintiff alleges performance generally, a general denial puts him to proof.[65] Pleas of not guilty and never indebted are bad where the action is on an express contract,[66] and where the instrument declared on is under seal, pleas of never indebted as alleged and never promised as alleged are bad[67] and do not deny the execution of the instrument.[68] Execution is taken as admitted when not denied.[69] A counterclaim for damages must, of course, state facts sufficient to show a cause of action.[70]

performed. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Plaintiff entitled to recover contract price for instruction to be given defendant on showing breach by defendant and refusal to perform. Any mitigation of damages by reason of not giving instruction to defendant must be pleaded and proved in defense. International Text-Book Co. v. Martin, 82 Neb. 403, 117 NW 994.

53. Court cannot receive evidence on such issue. Coons v. Green [Tex. Civ. App.] 120 SW 1108. Where the complaint is good, and the defense of illegality is raised by answer, the court should try the issue on the merits. Proper judgment may then be rendered if contract is found to be illegal. Id.

54. Stratton v. Essex County Park Com., 164 F 901.

55. A plea of failure of consideration must set out the facts constituting the failure; otherwise bad on demurrer. Light v. Henderson [Ala] 48 S 588. Plea to complaint on note given corporation, alleging noncompliance by corporation with statute requiring payment of privilege tax, bad because not showing that statute made contracts of corporation void in case of noncompliance. Sunflower Lumber Co., v. Turner Supply Co. [Ala.] 48 S 510. **Plea held sufficient** to raise issue of failure of consideration of note. Baldwin v. Self [Tex. Civ. App.] 114 SW 427.

56. In suit on oral contract for work at agreed price, defendant may deny contract, or show different agreement, and that work was not properly done. Benedict v. McMurty, 115 NYS 87.

57. Carrier, in action for damages for delay in shipment, cannot rely on contract exempting it from liability for damage caused by connecting lines, unless it pleads such contract under Code, § 3629, reuiring pleading of such defenses. Aultman Engine Thresher Co. v. Chicago, etc., R. Co. [Iowa] 121 NW 22. Action on claim against estate. Held, defense that claimant intended that services should be gratuitous not available, not being pleaded. Saddler v. Pickard [Iowa] 121 NW 374.

58. Want of consideration for bond could not be raised, because not specially pleaded. Swinn v. Wright, 42 Ind. App. 597, 86 NE 453.

59. Failure of consideration of note must be specially pleaded. Baldwin v. Self [Tex. Civ. App.] 114 SW 427; Scott v. Rawls [Ala.] 48 S 710.

60. Brown v. Wisner, 51 Wash. 509, 99 P 581.

61. Laudes v. Hart, 131 App. Div. 6, 115 NYS 337.

62. Yancey v. Warner Elevator Mfg. Co. [Ga. App.] 64 SE 663; Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex.] 112 SW 1047.

63. Thomas v. Walden [Fla] 48 S 746.

64. Gauger & Co. v. Sawyer & Austin Lumber Co. [Ark.] 115 SW 157.

65. Hudson Cos. v. Briemer, 113 NYS 997. Where plaintiff alleges that one year was reasonable time for performance, general denial puts him to proof. South Texas Tel. Co. v. Huntington [Tex. Civ. App.] 121 SW 242.

66. Thomas v. Walden [Fla.] 48 S 746.

67, 68. Junkins v. Sullivan, 110 Md. 539, 73 A 264.

69. Pub. Gen. Laws 1904, art. 75, § 24, subsec. 108. Junkins v. Sullivan, 110 Md. 539, 73 A 264.

70. In suit by subcontractor against contractor, counterclaim merely alleging that plaintiff did not do work according to contract, and that defendant was thereby damaged in certain sum, without alleging how, did not state cause of action for damages. Connor v. National Roofing & Supply Co. [Ky.] 113 SW 122.

Variance.[See 11 C. L. 789]—Recovery must be had, if at all, on the cause of action and contract alleged,[71] though an immaterial variance may be disregarded.[72] Plaintiff may allege a promise and recover on proof of an implied promise,[73] but he cannot allege a special contract and recover on proof of an implied contract,[74] and in this connection the distinction between an "express" and a "special" contract should be noted.[75] When the action is for money had and received, a recovery cannot be had upon an express promise to pay,[76] but an express contract may be proved in an action upon a quantum meruit.[77]

Evidence. Presumptions and burden of proof.[See 11 C. L. 789]—The burden is upon plaintiff to prove every essential element of his cause of action[78] by a pre-

71. Plaintiff cannot declare upon one contract, and, without amendment, recover on another. Sumrell v. International Salt Co., 148 N. C. 552, 62 SE 619. Under an allegation of performance of a contract, plaintiff cannot recover on proof of a waiver of strict performance by acceptance of work as substantial performance. Allen v. Burns, 201 Mass. 74, 87 NE 194. One **excuse for nonperformance** being alleged, another, not pleaded, cannot be relied on. McCormick v. Jordon, 65 W. Va. 86, 63 SE 778.

Held a variance: Allegation of verbal contract, or one not under seal, not sustained by proof of contract under seal. Smith v. Sharp [Ala.] 50 S 381. Variance fatal where contract alleged was with plaintiff, and proof showed contract with plaintiff and his brother as partners. Atlas Coal Co. v. O'Rear [Ala.] 50 S 63. Declaration alleging contract growing out of commercial paper, entered into by defendant alone, not supported by proof of contract by defendant and others; nor can such variance in proof be cured by amendment. Jordan v. Reed [N. J. Err. & App.] 71 A 280.

72. Recovery for work done on building held warranted by theory of complaint, and by evidence. Miller v. State, 42 Ind. App. 630, 86 NE 493. Complaint alleged performance of services at defendant's "instance and request;" proof showed rendition with defendant's "knowledge and consent." Variance not material. Butterworth v. Teale [Wash.] 102 P 768.

73. Jackson v. Bnice [Ga.] 63 SE 823. In quantum meruit, for value of services, an allegation that services were rendered on the faith of promises to pay therefor may be sustained by proof of an implied promise. Id. In an action for services performed and materials furnished, where an express contract is pleaded, a recovery may be had upon a quantum meruit, if the proof fails to establish a special contract, but does show rendition of services. Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843.

74. Jackson v. Bnice [Ga.] 63 SE 823; Canaday v. United R. Co., 134 Mo. App. 282, 114 SW 88; McMillion v. Cook [Tex. Civ. App.] 118 SW 775; Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831; Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. Where evidence showed express contract to pay for services of minor, partly executed, and a settlement in full, there could be no recovery on quantum meruit. Robinson v. Van Vleet [Ark.] 121 SW 288.

75. A complaint may declare on an express contract and a recovery had on an implied promise, but it cannot declare on a special contract and recovery had on an implied contract. Indianapolis Coal Trac. Co. v. Dalton [Ind.] 87 NE 552.

76. McCormick-Ormond Co. v. Nofziger Bros. Lumber Co. [Cal. App.] 101 P 688.

77. The specified price then becomes the value. Rubin v. Cohen, 129 App. Div. 395, 113 NYS 843.

78. The plaintiff has the burden of proving the **existence of contract.** Sterling-Hurd Oil Co. v. Big Four Ice, Light & Cold Storage Co. [Tex. Civ. App.] 116 SW 397. Where plaintiff sets out contract and alleges performance by himself, and defendant denies complaint and sets out different contract, burden remains with plaintiff. Error to charge that defendant must establish by preponderance contract alleged by him. List & Son Co. v. Chase, 80 Ohio St. 42, 88 NE 120. In suit upon oral contract for work at agreed price, plaintiff must prove **contract, agreed price, and proper performance.** Benedict v. McMurtry, 115 NYS 87. In action for agreed **price and value** of work. Petzoldt Co. v. Cohn, 114 NYS 165. In action on contract for exchange of work plaintiff could recover only on showing that his work for defendant was of greater **value** than defendant's work for him. Adams v. Fisher, 83 Neb. 686, 120 NW 194. A contractor seeking to recover on the contract need not show the reasonable value of his incomplete but substantial performance. Mueller v. Burton, 139 Wis. 384, 121 NW 152. Plaintiff has burden of proving **breach by defendant.** Gauger & Co. v. Sawyer & Austin Lumber Co. [Ark.] 115 SW 157. One suing for damages for breach of contract has burden of proving **performance of conditions,** breach of which is alleged by defendant. Id. Where publisher agreed to receive pay for advertisement out of orders received therefrom, he could not recover price without showing receipt of orders. Keystone Pub. Co. v. Roman, 116 NYS 654. In action for breach of contract to pay on demand, burden is on plaintiff to prove **nonpayment.** Smith v. State Bank, 61 Misc. 647, 114 NYS 56. Complaint alleged money loaned to be repaid on demand. Defendant denied loan and alleged payment for different purpose. Burden was on plaintiff to prove that sum was to be repaid on demand, and not on defendant to prove contrary. Stamaty v. Pappadamitriu, 51 Wash. 221, 98 P 613. Vendee, in action for breach, not showing an offer to perform on his part, had burden

ponderance of the evidence,[79] and the burden is upon defendant to prove any special defense [80] or affirmative claim against the plaintiff.[81] The relevancy of evidence depends of course upon the nature of the action [82] and the issues raised.[83] The parol evidence rule is fully treated in another article.[84]

A party who introduces a contract in evidence, relying on it as part of his case, cannot seek to benefit by it, and at the same time repudiate it in part.[85] Decisions dealing with the sufficiency of evidence to show the existence of a contract, express or implied, usually blend questions of evidence with questions as to the elements necessary to constitute a contract; such decisions are therefore treated, in this article, in the section dealing with the substantive law,[86] and so, also, as to questions relative to the validity of contracts.[87] A few decisions, however, dealing in a general way with the sufficiency of the evidence to warrant a recovery are here collected in the note.[88]

of showing **excuse for failure to offer performance,** as that vendor had put it out of his power to perform. Cash v. Meisenheimer [Wash.] 102 P 429.

79. Instruction, requiring proof on the part of the plaintiff to remove all doubt from minds of jury, held erroneous. Reynolds v. Wray, 135 Ill. App. 527.

80. Maker of note having admitted its execution, had burden of showing that debt of plaintiffs was lien on stock which was consideration for note, and that plaintiffs had agreed to pay debt. Wolfort v. Hochbaum [Ark.] 117 SW 525. Defendant has burden to prove **failure of consideration.** Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex.] 112 SW 1047. Defendant, alleging **fraud** in inception of contract, and, in effect, seeking reformation, has burden of proving fraud, by clear and convincing evidence. Strout **v. Lewis,** 104 Me. 65, 71 A 137.

81. Defendant has burden to prove set-off. Poull & Co. v. Foy-Haye Const. Co. [Ala.] 48 S 785.

82. In **action on express contract** fixing compensation, proof of value of services is inadmissible. Fordtran v. Stowers [Tex. Civ. App.] 113 SW 631. Where both parties rely on express contract, evidence of value of services contracted for, and of what another offered to perform them for, was properly excluded. **Kelly v. Malone,** 3 Ga. App. 618, 63 SE 639. **In action to recover proceeds** of property sold by defendant for plaintiff, defendant was entitled to show value of personal property owned by him and included in sale, in order to show what part of proceeds he was entitled to. Howe v. Howard [Vt.] 71 A 835. Complaint alleged cause of action for balance due on written contract, and second cause of action **in assumpsit** for services and materials; under second, evidence that engineer ordered stone prepared for certain work, after contract was signed, was admissible. Harvey v. Denver & R. G. R. Co., 44 Colo. 258, 99 P 31. In action for property furnished for defendant and damaged and for services alleged to have been furnished at defendant's request, proof of the value of the services and property was competent. Engler v. Richardson, 133 App. Div. 419, 117 NYS 653.

83. On issue whether tiles had been properly repaired, proof that contractor had paid mantel company to fix them was inadmissible, not being binding on owner. Central Mantel Co. v. Thaler, 133 Mo. App. 86, 113 SW 220. Evidence held admissible to explain **technical terms** of contract. Dornfeld-Kunert Co. v. Volkmann, 138 Ill. App. 421. Testimony of experts held admissible to prove that **amount** sought to be recovered by plaintiff on building contract was twice the amount which the defendant alleged was the contract price, said testimony being for the purpose of corroborating defendant's testimony as to price agreed upon. Winters v. Schmitz, 36 Pa. Super. Ct. 498. Amount received by defendant, claimed by plaintiff, being disputed in pleadings, defendant should be allowed to prove amount he received. Kvamme v. Barthell [Iowa] 118 NW 766. Where there was dispute as to **what was called for by construction contract,** evidence was admissible to furnish light as to what was the real intention of the parties. Dornfeld-Kunert Co. v. Volkmann, 138 Ill. App. 421. Expressions of intention to pay for services rendered held competent as tending to prove **legal liability to pay.** Bradenkamp v. Rouge, 143 Ill. App. 492. Evidence of statements by decedent acknowledging his promise to do something for his housekeeper claimant, admissible though not in exact terms of claim as alleged. Forsythe v. Thompson's Estate [Mich.] 16 Det. Leg. N. 490, 122 NW 219. Where plaintiff testified that he dealt with another as defendant's **agent,** cross-examination to show that he dealt with him as principal, or as another's agent, was proper. Barrish v. Orben [N. J. Law] 73 A 529.

Admissibility of contract: Contract sued on admissible, execution being proved, though denied by sworn plea. Harris v. Basden [Ala.] 50 S 321. Contract admissible though word "and" was used for "of" in pleading, variance being immaterial. Id.

84. See Evidence, § 5.

85. Contract of shipment; could not repudiate clause limiting amount of liability. Jonasson v. Weir, 130 App. Div. 528, 115 NYS 6.

86. See ante, §§ 1, 2.

87. See ante, § 3.

88. Evidence held insufficient: To show claim against decedent for part of family expenses. Weisinger v. Harding's Adm'r [Ky.] 115 SW 800. To warrant allowance

(§ 9) *G. Procedure at trial; verdict and judgment.*[89]—See 11 C. L. 792—The construction of a written contract is usually for the court,[90] but where extrinsic evidence is received in aid of an ambiguity or uncertainty, the question becomes one of law and fact for the jury,[91] and so, also, it is for the jury to determine the existence of a disputed contract,[92] and the amount to be recovered, upon a quantum meruit.[93] It is within the province of the court, however, to determine what constitutes a contract [94] or a breach thereof.[95] The propriety and accuracy of particu-

in sum awarded for services to decedent. Bartholomew v. Adams [Iowa] 121 NW 1026. Evidence to sustain claim for services rendered person since deceased must be reasonably satisfactory. Id. **To support recovery on notes** given in settlement. Quayle v. Ream, 15 Idaho, 666, 99 P 707. **To warrant recovery of amount awarded on quantum meruit,** action being on contract. Leslie v. Ginsberg, 114 NYS 800. **To justify recovery of money retained** as payment of note pursuant to agreement. Remillard v. Robinson [Minn.] 121 NW 217. Evidence held not **to show breach by defendant** of contract for quarrying granite, either by improper work, or by refusal to form corporation as agreed. Rudiger v. Coleman, 129 App. Div. 916, 114 NYS 689.

Evidence held sufficient to show contract for services either on theory of authority of one who hired plaintiff to represent defendant, or on theory of assumed authority and ratification. Larson v. Foss, 137 Wis. 304, 118 NW 804. Under Civ. Code, art. 2277, requiring proof of contract for more than $500 by at least one credible witness and other corroborating evidence, testimony of one credible witness, and proof of circumstances showing employment, performance of services, and promises to pay, sufficient to show contract for services. O'Niell v. Guyther, 123 La. 100, 48 S 759. **To warrant recovery on horse-shoeing contract,** defendants' claim of defective work not being proved. De Lawrence v. Bacigalupo, 113 NYS 1130. Evidence held to sustain finding for plaintiff **in action to recover moneys loaned.** Pullis v. Somerville, 218 Mo. 624, 117 SW 736. Evidence held to warrant finding for claimant in less **amount** than he claimed for services to decedent. Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328.

89. Search Note: See Contracts, Cent. Dig. §§ 1824-1844; Dec. Dig. §§ 351-355; 6 Cyc. 104-108, 110; 9 Id. 775-786.

90. Aetna Indemnity Co. v. Waters, 110 Md. 673, 73 A 712; Robinson v. Yetter, 238 Ill. 320, 87 NE 363. Facts being undisputed. Smith v. Dotterweich, 132 App. Div. 489, 116 NYS 896; Wood v. Kelsey [Ark.] 119 SW 258; C. B. Coles & Sons Co. v. Standard Lumber Co., 150 N. C. 183, 63 SE 736; Pearson v. M. M. Potter Co. [Cal. App.] 101 P 681; Goldstein v. D'Arcy, 201 Mass. 312, 87 NE 584; Kohler v. Northern Electrical Mfg. Co. [C. C. A.] 162 F 876. Duty of court to declare legal effect of contract, question being one of construction only. Carter v. Chicago, B. & Q. R. Co., 136 Mo. App. 719, 119 SW 35.

Held for court: Construction of unambiguous **written contract.** Gay v. Roanoke R. & Lumber Co., 148 N. C. 336, 62 SE 436; Maryland & P. R. Co. v. Silver, 110 Md. 510, 73 A 297. Construction of unambiguous contract **as to whether contract cancelled previous one.** Creamery Package Mfg. Co. v. Duncan, 136 Mo. App. 659, 119 SW 33. Construction of inaccurate but unambiguous **contract, set out in pleading,** is for court, on demurrer. Donovan v. Boeck, 217 Mo. 70, 116 SW 543. Construction of **contract made by written correspondence.** Cincinnati Punch & Shear Co. v. Thompson [Kan.] 102 P 848; Capital City Brick Co. v. Atlanta Ice & Coal Co., 5 Ga. App. 436, 63 SE 562. Contract of employment being shown entirely by written correspondence, interpretation was for court. Bauer v. Goldman [Colo.] 100 P 435. Construction of **contract made by letters and telegrams,** no extrinsic evidence being necessary, is solely for court. American Jobbing Ass'n v. James [Okl.] 103 P 670. Construction of sale contract for court, when evidence by letters and telegrams. Mann v. Urquhart [Ark.] 116 SW 219. Construction of unambiguous **written guaranty.** Manhattan Rolling Mill v. Dellon, 113 NYS 571.

91. Where written instrument does not clearly express intention, question should be left to jury. Jones v. Lewis [Ark.] 117 SW 561. If terms are technical, ambiguous or obscure, parol explanatory evidence is competent, and interpretation is for jury on all the evidence. Aetna Indemnity Co. v. Waters, 110 Md. 673, 73 A 712. Parol evidence being necessary to show whether shipments under sale contract were to be made regularly or as ordered, construction of contract was for jury. Jung Brew. Co. v. Konrad, 137 Wis. 107, 118 NW 548. Where contract was ambiguous, proper to allow jury to construe it, under evidence as to circumstances of execution, and acts of parties under it. Yost v. Silver [Mo. App.] 119 SW 971.

92. Whether conversations were mere negotiations looking to written contract, which was never approved, or whether there was valid oral contract for work, for jury. Instruction submitting issue should have been given. Tucker v. Deering S. W. R. Co., 133 Mo. App. 122, 113 SW 242. Not error, where there was evidence tending to show that married woman made contract for exchange of household effects, not to grant motion to direct verdict for defendant in action to recover balance on exchange. Dobbins v. Thomas, 30 App. D. C. 511. Question whether vendee agreed to pay brother and sister of vendor certain sums in addition to the consideration expressed in the deed held for the jury. Hoffa v. Hoffa, 38 Pa. Super. Ct. 356.

93. Amount to be recovered for jury, in quantum meruit for services in real estate transaction, nature of services and results, being shown. Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831.

lar instructions are determined by the general rules,[96] such as those with reference to conformity to the pleadings, issues and proof,[97] and invasion of the province of the jury,[98] and, in determining the correctness of an instruction, the whole instruction must, as in other cases, be considered in the light of the evidence adduced.[99]

Generally, when the action is on a joint contract, judgment must be rendered against all the defendants or none,[1] unless a defense is interposed by one or more of the defendants personally, of such character as infancy, bankruptcy, or the like,[2] or unless otherwise provided by statute. A general treatment of this subject will be found in another topic.[3]

Contracts of Affreightment; Contracts of Hire, see latest topical index.

CONTRIBUTION.

The scope of this article is noted below.[4]

§ 1. General Principles, 945.
§ 2. The Right and Defenses as Between Joint Tort Feasors and Persons in Particular Relations, 946.
§ 3. Proceedings to Enforce, 947.

§ 1. *General principles.*[5]—See 11 C. L. 793—The doctrine of contribution is founded upon principles of equity, and not upon contract.[6] The doctrine is worked out in its application, however, upon the theory of an implied promise by one person to reimburse another,[7] where one joint obligee has discharged that part of the joint obligation which, as between themselves, the other joint obligee ought to have discharged.[8]

94. Instruction as to necessity of signature or acceptance sustained. Averett v. Walker, 131 Ga. 611, 62 SE 1046.

95. It is the duty of the court to declare, as a matter of law, the effect of the violation of provisions of a contract. Rock Island Plow Co. v. Rankin Bros. & Winn [Ark.] 115 SW 943.

96. See Instructions.

97. Instructions on theory that suit was on contract erroneous when action was in assumpsit. Kendrick v. Warren Bros. Co., 110 Md. 47, 72 A 461. Instruction on rights under contract erroneous because failing to present issue whether contract was consummated. Lynch v. Snead Architectural Iron Works [Ky.] 116 SW 693. Instruction, ignoring issue raised by pleadings as to breach of contract by plaintiff, reversible error. Long v. Consumers' Light & Heating Co. [Tex. Civ. App.] 121 SW 172. Instructions erroneous which assumed existence of stipulations not contained in contract. Basenberg v. Lawrence [Ala] 49 S 771. Instructions, allowing recovery of money advanced, less interest, proper. Stevenson v. Moore [Ky.] 118 SW 951. Where action was for breach of contract, and plaintiff alleged contract to drill well 300 feet deep, that at depth of 286 feet drill was broken, and that he offered to drill another well near for same price, but defendant refused, and asked contract price, or, in alternative, reasonable value of work done, it was error to authorize recovery on basis of value of well dug to defendant. Mitchell v. Boyce [Tex. Civ. App.] 120 SW 1016.

98. Instruction which merely identified contract in evidence as that sued on held not erroneous as on weight of evidence. Yost v. Silvers [Mo. App.] 119 SW 971.

99. Instruction that defendant was not bound by terms of an assignment of plaintiff's interest in certain property to defendant unless defendant signed it, even though it was delivered to him, held not misleading when taken together with whole instruction and in light of evidence. Averett v. Walker 131 Ga. 611, 62 SE 1046.

1, 2. Merrifield v. Western Cottage Piano & Organ Co., 238 Ill. 526, 87 NE 379.

3. See Judgments, § 2A.

4. Includes only the equitable doctrine of contribution and exoneration. Excludes contract and common-law obligation to contribute to a common object (see Corporations,* § 5, as to promotion of corporations, § 14, as to stock subscriptions, § 16, subsecs. E, F, as to liability of stockholders; Partnership,* § 7F; Suretyship,* § 5; Subscriptions* and like topics, rights growing out of joint tenancy (see Tenants in Common and Joint Tenants,* § 2), the right of subrogation (see Subrogation*) and rights under indemnity contracts (see Indemnity*).

5. Search Note: See Contribution, Cent. Dig. §§ 1-15; Dec. Dig. §§ 1-8; 6 Cyc. 957; 9 Cyc. 793-800, 802, 805-808; 7 A. & E. Enc. L. (2ed.) 326.

6. Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116. Where several persons contracted to secure a right of way and terminal property for a railroad, it was immaterial, in an action by a part of the obligors to compel contribution, whether the railroad had fulfilled its contract in building or not. Boyce v. Stringfellow [Tex. Civ. App.] 114 SW 652.

7. Jarvis v. Matson [Tex. Civ. App.] 113 SW 326.

8. Johnson v. Tennessee Oil, Gas & Mineral Development Co. [N. J. Eq.] 73 A 60;

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* Always begin with the latest article on the subject. Use the latest topical index.

Recovery over against person primarily liable.[See 11 C. L. 794]—Where one is required to respond in damages to a third person as a legal but not an actual wrongdoer, he can compel the actual wrongdoer to indemnify him.[9]

§ 2. *The right and defenses as between joint tort feasors and persons in particular relations.*[10]—[See 11 C. L. 794]—Equity does not recognize any right of contribution between joint tort feasors,[11] and one joint tort feasor who has been compelled to respond in damages ordinarily has no remedy over against the other,[12] but, where the act of the party seeking contribution is merely malum prohibitum and involves no moral turpitude, the court will inquire into the relative delinquencies of the parties with the view of fixing, as between such parties, the primary liability,[13]

Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116; Mountain Lake Land Co. v. Blair [Va.] 63 SE 751. Payment of full amount of subscription by part of subscribers gives them no right of contribution against the others where the liabilities of the several subscribers is several. Los Angeles Nat. Bank v. Vance, 9 Cal. App. 57, 98 P 58. Voluntary payment by part of joint subscribers of sufficient sum to cover whole amount subscribed did not deprive such subscribers of right to contribution from co-subscriber, where it did not appear that the amount so voluntarily paid was intended to be applied to the deficiency caused by such co-subscriber's default. Boyce v. Stringfellow [Tex. Civ. App.] 114 SW 652. Parties must be bound to perform the same duty or obligation. Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116.

9. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841; Fulton County Gas & Elec. Co. v. Hudson River Tel. Co., 130 App. Div. 343, 114 NYS 642.

10. Search Note: See notes in 1 L. R. A. (N. S.) 461; 10 A S. R. 639; 16 Id. 254; 35 Id. 416; 60 Id. 201; 70 Id. 444; 2 Ann. Cas. 528; 4 Id. 734.

See, also, Contribution, Cent. Dig. §§ 1-15; Dec. Dig. 1-8; 6 Cyc. 957; 9 Id. 793-800, 802, 805-808; 7 A. & E. Enc. L. (2ed.) 331.

11. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153; Bradley v. Rosenthal, 154 Cal. 420, 97 P 875; Walton v. Miller's Adm'x [Va.] 63 SE 458; Avery v. Central Bank [Mo.] 119 SW 1106. The rule is founded upon the maxim that no one can make his own misconduct the ground for an action in his own favor. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841. It is against public policy to adjust equities between wrongdoers. Avery v. Central Bank [Mo.] 119 SW 1106.

12. Walton v. Miller's Adm'x [Va.] 63 SE 458. The rule applies between members of a corporation who have conspired to defraud it. Avery v. Central Bank [Mo.] 119 SW 1106. No contribution between joint trustees who have been intentionally guilty of breach of their trust. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. Contribution between promoters denied. Id.

13. Baltimore & O. R. Co. v. Howard County Com'rs. [Md.] 73 A 656. In such case the parties are not in pari delicto as to each other, though either is liable to third persons. Fulton County Gas & Elec. Co. v. Hudson River Tel. Co., 130 App. Div. 343, 114 NYS 642.

Note: The general rule that there can be no contribution or indemnity as between wrongdoers is founded on the maxim that no one can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrongdoing, the law will not relieve him, for it cannot recognize a right as springing from a wrong in favor of one concerned in its commmission. Galveston, etc., R. Co. v. Nass. 94 Tex. 255, 59 SW 870; Gulf, C. & S. F. R. Co. v. Galveston, H. & S. A. R. Co., 83 Tex. 509; 18 SW 956; Northern Texas Trac. Co. v. Caldwell, 44 Tex. Civ. App. 374, 18 Tex. Ct. Rep. 88, 99 SW 869; Fort Worth & D. C. R. Co. v. Chicago, etc., R. Co., 47 Tex. Civ. App. 304, 105 SW 829; St. Louis S. W. R. Co. v. Black [Tex. Civ. App.] 109 SW 410; Johnson v. Torpy, 35 Neb. 604, 53 NW 575, 37 Am. St. Rep. 477; Boyer v. Bolender, 129 Pa. 324, 18 A 127, 15 Am. St. Rep. 723; Oakdale v. Gamble, 201 Pa. 289, 50 A. 971. But there is an exception to this rule, under which, although the law holds all the parties liable as wrongdoers to the injured party, if, as between themselves, one of them is blameless, equity requires the one guilty of the wrong to indemnify the one who is guiltless for all damages that may be recovered against him by reason of his (wrongdoer's) wrongful acts. This exception is as well established as the rule itself, Gulf, C. & S. F. R. Co. v. Galveston, H. & S. A. R. Co. supra; City of Antonio v. Smith, 94 Tex. 266, 59 SW 1109; City of San Antonio v. Talerico, 98 Tex. 151, 81 SW 518; Pullman Co. v. Norton [Tex. Civ. App.] 14 Tex. Ct. Rep. 869, 91 SW 841; Southwestern Tel. & Tel. Co. v. Krause [Tex. Civ. App.] 92 SW 431; City of San Antonio v. Pizzini, 95 Tex. 1, 61 SW 1102; Kampmann v. Rothwell [Tex.] 109 SW 1089; Eaton & Prince Co. v. Mississippi Val. Trust Co., 123 Mo. App. 117, 100 SW 551. Upon this subject it is said in Sherman & Redf. on Negligence (5th Ed.), § 24a: "It is not necessary that the plaintiff's damage should have resulted immediately from the defendant's negligence. It is enough if the plaintiff, being legally liable, though not personally at fault, for a third person's injuries, due to the defendant's negligence, has been compelled to answer therefor to the person injured. In such a case, the principal delinquent is bound to indemnify his co-delinquent, their fault being unequal; this whether any contractual relation exists between them or not." See, also, Webb's Pollock on Torts (Enlarged Am. Ed.) 231 and note; Cooley on Torts (3d Ed.) 254, et seq.; Alexander v. Nanticoke Light Co., 209 Pa. 571, 58 A 1068, 67 L. R. A. 475; Gray v. Light Co.,

and will compel the principal delinquent to respond to the other to such extent as the latter has been compelled to respond to the person injured.[14]

The right of contribution exists between joint makers of a note,[15] less any set-off,[16] and also between sureties,[17] and stockholders.[18] Infant children in order to enjoy the benefit of the redemption by their mother, under her dower right, of property sold under a mortgage, must contribute their pro rata amount paid by her to redeem.[19]

§ 3. *Proceedings to enforce.*[20]—See 11 C. L. 795—The right of action for contribution accrues at the time of the payment upon which right is predicated,[21] unless there is an agreement fixing the date of repayment at a future date.[22] Objection to failure to instruct upon the promise of the plaintiff to save the defendant harmless is waived by failure to request an instruction to such effect.[23] An allegation of joint liability is sustained where the evidence shows a joint liability in effect, though not strictly so in form.[24]

Contributory Negligence, see latest topical index.

CONVERSION AS TORT.

The scope of this topic is noted below.[25]

§ 1. What Constitutes, 948.
§ 2. Property Subject to Conversion, 949.
§ 3. Elements Necessary to Maintain the Action, 949.
§ 4. Defenses, 950.
§ 5. Practice and Procedure, 951.

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114 Mass. 149, 19 Am. Rep. 324.—From Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841.

14. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656. Persons who undertook to repair sidewalk for property owner without any supervision by latter held liable to latter for any amount, which latter might be compelled to pay as damages for injuries caused by obstruction placed on sidewalk by former in course of their work, regardless of whether they were servants or independent contractors. Kampmann v. Rothwell [Tex.] 109 SW 1089. County could recover of a railroad company where it had been compelled to pay damages for the death of a person killed on a dangerous approach to a bridge, because of a change in the approach made by the company in constructing its tracks. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656. Where a municipal corporation is held liable in damages to one injured by dangerous sidewalk, it may recover over against the person who rendered the sidewalk unsafe. City of Bowling Green v. Bowling Green Gaslight Co. [Ky.] 112 SW 917.

15. Dyer v. Adams [Tex. Civ. App.] 120 SW 946; Los Angeles Nat. Bank v. Vance, 9 Cal. App. 57, 98 P 58. Evidence that a note made by intestate jointly with another, and found in his private papers after his death, held to prima facie show payment by deceased entitling the **administrator** to contribution. Brady v. Brady, 110 Md. 656, 73 A 567.

16. In an action by a joint maker of a note to recover of the executor of his comaker the full amount, on the ground that he signed as surety only, the executor was permitted to plead as set-off, that the decedent had paid another note of equal amount executed jointly by him and plaintiff. Mundorf v. Wier, 38 Pa. Super. Ct. 348. Contribution between sureties is not dependent upon privity of contract, or knowledge, nor need they be signers upon the same instruments, but it is essential that they be bound to the same principal, and for the performance of the same duty. Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116.

17. See Suretyship, § 5.

18. See Corporations, § 16, subsecs. E, F.

19. Hiller v. Nelson [Ky.] 118 SW 292.

20. Search Note: See notes in 5 C. L. 752; 98 A. S. R. 31.

See, also, Contribution, Cent. Dig. §§ 14, 16-22; Dec. Dig. § 9; 9 Cyc. 801-804, 807, 808.

21. Limitation of actions. Mentzer v. Burlingame [Kan.] 97 P 371; Jarvis v. Matson [Tex. Civ. App.] 113 SW 326; Brady v. Brady, 110 Md. 656, 73 A 567.

22. In an action for contribution for money advanced by one party to a bond against the others, it being understood that the money would not be repaid until a future date, held that the statute of limitations did not begin to run until such time. Jarvis v. Matson [Tex. Civ. App.] 113 SW 326.

23. Such a promise being matter of defense. Dyer v. Adams [Tex. Civ. App] 120 SW 946.

24. When complaint alleged that plaintiff and defendant were joint makers, and evidence showed that plaintiff was the maker and the defendant a surety, but the note was joint and several on its face and was given to settle partnership debts evidenced by previous notes. Dyer v. Adams [Tex. Civ. App.] 120 SW 946.

25. It treats generally of tortious conversion and of the remedy therefor by action of trover or statutory substitutes for such action. Many applications of the rules as to what constitutes conversion are, however, inseparable from the rights and liabilities of persons in particular relations, and topics

§ 1. *What constitutes.*[26]—See 11 C. L. 795—Conversion [27] is the unauthorized and wrongful [28] exercise of dominion, ownership or control of personal property,[29] to the exclusion of the rightful owner.[30] There must be an actual misappropriation of the property by defendant, and mere negligent dealing therewith whereby it is subsequently lost is not sufficient,[31] nor is loss by a bailee through negligence,[32] and a mere breach of contract in dealing with property is not a conversion.[33] The conversion dates from the time when the rights of the owner are denied.[34] Wrongfulness being essential, there can be no conversion for doing what one is authorized to do by contract [35] or otherwise.[36] The conversion may be effected either by an actual unlawful taking [37] or by a wrongful refusal to surrender on demand,[38] or by wrong-

dealing therewith should be consulted. See, for example, Agency,* § 4, as to conversion by agent; Carriers,* §§ 7, 8, as to conversion by carrier; Pledges,* § 5, as to conversion by pledgee. The action of bail trover in Georgia looks to the regaining of the specific property and is treated in Replevin.*

26. Search Note: See notes in 3 C. L. 868; 26 L. R. A. 366; 3 L. R. A. (N. S.) 1135; 6 Id. 1048, 1058; 24 A. S. R. 795.

See, also, Trover and Conversion, Cent. Dig. §§ 1-2, 21-102; Dec. Dig. §§ 1, 3-12; 28 A. & E. Enc. L. (2ed.) 656, 679.

27. Defined: The unlawful turning or applying personal goods of another to use of taker or of some other person, or unlawful destroying or altering their nature. National Bank of Commerce v. Southern R. Co., 135 Mo. App. 74, 115 SW 517.

28. Where the United States has lawfully taken possession of property of a contractor in default and turned it over to another to complete the work, the latter is not chargeable for conversion. Tinker v. U. S. Fidelity & Guar. Co., 169 F 211.

29. Where a person receiving stock certificates for purpose of having them transferred on the company's books delivers them to a broker as his own, there is a conversion. Kilmer v. Hutton, 131 App. Div. 625, 116 NYS 127.

30. Exercise of dominion or control not inconsistent with owner's rights or title is not conversion. Sigel-Campion Live Stock Co. v. Holly, 44 Colo. 580, 101 P 68. Refusal of an auctioneer to allow delivery of property to buyer, after latter had complied with all necessary conditions, is conversion. Smith v. Hurley [R. I.] 72 A 705. Must be an intent to deprive the owner of his property. Bowe v. Palmer [Utah] 102 P 1007.

31. That an employer broke open an employe's tool chest to get some of his own tools, left the chest open, and refused to carry it to a place designated by the employe, in consequence of which the latter's tools were lost, not a conversion of such tools. Berman v. Kling, 81 Conn. 403, 71 A 507. A livery stable keeper with whom a truck belonging to a public truckman is kept, and who negligently delivered such truck to one not the owner, at a time when it contained property of plaintiff, is not liable for conversion of such property. Cohen v. Koster, 133 App. Div. 570, 118 NYS 142. Loss of horse through neglect of bailee to put it in barn at night as agreed is not conversion. Rosenberg v. Diele, 61 Misc. 610, 114 NYS 24.

32. Wickstrom v. Swanson, 107 Minn. 482, 120 NW 1090.

33. Provision in agency contract that a delivery by agent in violation of its terms should be deemed a "conversion" merely means that it shall be deemed a default, and action against him for value of property so delivered is not for conversion. Case Threshing Mach. Co. v. Folger, 136 Wis. 468, 117 NW 944. Where a mortgagee and mortgagor of a stock of goods agreed to sell them jointly, the exclusion of the latter from the building except during business hours, and sales by the former at less than value, is not conversion but breach of contract. Aylesbury Mercantile Co. v. Fitch [Okl.] 99 P 1089.

34. Where corporate property is unlawfully pledged by an officer to secure his personal debt, a conversion by the pledgee does not occur until it ignored the company's rights by transferring the property to another creditor of the officer. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801. One holding a lot under a void tax sale does not convert a building thereon until he moves it from the land, hence is liable for rent for time he occupied it prior to removing it. Cavins v. Trice [Tex. Civ. App.] 119 SW 896.

35. Sale by mortgagee with consent of mortgagor is not a conversion as to the latter's creditors. Where mortgagor turned over the property to mortgagee that he might make the amount of the debt, which equaled value of property. W. A. Jordan Co. v. Sperry Bros. [Iowa] 119 NW 692. Failure by a bailee to return a hired horse is not conversion where he had assumed obligations in addition to that for the return. Tichenor-Grand Co. v. Weingarten, 116 NYS 634.

36. Purchase from a bailee having a license to sell (Prouty v. Nichols [Vt.] 72 A 988), or from an undisclosed agent having authority to deal in his own name (Guggenheime & Co. v. Youell [Wash.] 101 P 711).

37. Seizure of mortgaged property by the mortgagee without the mortgagor's consent. Crouch Hardware Co. v. Walker [Tex. Civ. App.] 113 SW 163; Aylesbury Mercantile Co. v. Fitch [Okl.] 99 P 1089. Retaking of purchase money by a buyer without cancellation of the contract. Hellerman v. Schantz, 112 NYS 1083. **Removal of a building** by a purchaser of land and a subsequent repudiation of the contract is a conversion, although vendor consented to removal on account of cloud on title, afterwards cleared. Twitchell v. Benjamin, 51 Wash. 143, 98 P 109.

Breach of trust: Delivery of check drawn on funds of an estate in payment of indi-

* Always begin with the latest article on the subject. Use the latest topical index.

ful surrender to a third person,[39] unless the owner's rights are protected therein.[40] To make a bailee liable in conversion, he must have been obligated to return in specie.[41] Wrongful intent is not necessary to constitute conversion,[42] and malice is not the gist of the action,[43] hence, a taking under invalid process is conversion.[44]

§ 2. *Property subject to conversion.*[45]—See 11 C. L. 797—Any property which is personal,[46] including that which has become so by severance,[47] is subject of conversion, but not property which has become attached to realty as a fixture.[48]

§ 3. *Elements necessary to maintain the action.*[49] *Ownership and possession.* See 11 C. L. 798—Plaintiff must have title or right of possession at the time of the conversion,[50] and at the time suit is instituted.[51] The plaintiff's right must be unconditional as to defendant,[52] but a special property will suffice against a bare tort feasor.[53]

vidual debt of the executor. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435. A delivery of money by a proposed mortgagee to the mortgagor to deliver to a prior mortgagee in discharge of the latter's mortgage, and a taking of a note for the amount as receipt, is not a loan, and failure of mortgagor to either deliver or return the money is a conversion. Dunham v. Cox, 81 Conn. 268, 70 A 1033.

38. Refusal of a factor to return unsold goods may be treated as a conversion. Passow v. Kirkwood Distillery Co. [Wash.] 103 P 34. Refusal of seller to deliver after recovery of judgment for the price, and a satisfaction of the same, is a conversion. Pacific Coast Borax Co. v. Waring, 128 App. Div. 66, 112 NYS 458. Refusal by a tenant, after abandonment by his subtenant, to deliver the keys to a mortgagee of the latter until after the mortgaged property had been distrained for rent due from the tenant, is a conversion. Swartz v. Gottlieb-Bauern-Schmidt-Straus Brew. Co., 109 Md. 393, 71 A 854. Denial by a tenant in common of his cotenant's title, and refusal to surrender the latter's share, is a conversion. Weeks v. Hackett, 104 Me. 264, 71 A 858.

39. Surrender to officer making a levy under a void process (MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801), or failure to reclaim attached property after the attachment suit is discontinued (Id.), or failure of a pledgee to notify the pledgor when the property is taken under a legal process (Id.).

40. Jones v. Seaman, 133 App. Div. 127, 117 NYS 288.

41. The cashing by a pledgee of checks deposited as collateral does not make him liable for conversion unless he was obligated to return the specific money received. Janson v. Potruch, 62 Misc. 459, 115 NYS 111. Where the agent might have a right to a set-off for commissions, an action of trover to recover the premiums collected would work an injustice. Hazelton v. Locke, 104 Me. 164, 71 A 661.

42. That plaintiff introduced evidence as to representations made by defendant to others from whom he also obtained similar property, to controvert another issue, does not entitle defendant to prove his good faith. Douglas v. Scott, 130 App. Div. 322, 114 NYS 470.

43. Hence defendant is entitled to a discharge from ca. sa. under the insolvent debtor's act. Ettinger v. Norton, 131 Ill. App. 521.

44. Moving a house from a lot under a void writ of sequestration, although sheriff disclaims intention to take possession of house. Crawford v. Thomason [Tex. Civ. App.] 117 SW 181. It is conversion for a sheriff to take property from the owner under a charge that it has been stolen and deliver it to another in recognition of the latter's claim to the property. Bell v. Carter [C. C. A.] 164 F 417.

45. Search Note: See note in 3 C. L. 868, 870.

See, also, Trover and Conversion, Cent. Dig. §§ 3-20; Dec. Dig. § 2; 28 A. & E. Enc. L. (2ed.) 647.

46. Legal currency. Hazelton v. Locke, 104 Me. 164, 71 A 661.

47. Standing trees, cut and carried away. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270.

48. Timber cut from plaintiff's land and used in constructing fences and buildings on defendant's land without the latter's knowledge or consent. Bynum v. Gay [Ala.] 49 S 757.

49. Search Note: See note in 7 C. L. 850.

See, also, Trover and Conversion, Cent. Dig. §§ 103-150, 171-180; Dec. Dig. §§ 13-20, 24, 25; 28 A. & E. Enc. L. (2ed.) 679.

50. Belfer v. Diedrick, 133 App. Div. 112, 117 NYS 206; Dixon Crucible Co. v. Paul [C. C. A.] 167 F 784. Mortgagee, who by terms of mortgage cannot take possession until a date later than conversion, cannot maintain action. Tallassee Falls Mfg. Co. v. First Nat. Bank [Ala.] 49 S 246. A seller, after assignment of the purchase-money note which provided that title should not pass until the note was paid, has no title sufficient to maintain the action. Union Iron Works Co. v. Union Naval Stores Co. [Ala.] 47 S 652. Evidence held insufficient to prove plaintiff's ownership or right to possession. Erlanger v. Sprung, 113 NYS 16.

51. One who had traded the horse in controversy, and who is resisting a rescission of the trade, cannot sue one who has levied on the property in the hands of the person to whom it was traded. Prater v. Painter [Ga. App.] 64 SE 1003.

52. Right conditional on settlement of plaintiff's debts, such settlement not being effected as to defendant. Liebowitz v. Brinn, 113 NYS 685.

53. Purchaser in possession under condi-

*Demand and refusal.*See 11 C. L. 798—Demand and refusal are necessary [54] where the bailee is lawfully in possession.[55] The refusal must amount to a denial of the owner's right to possession.[56] But demand is not necessary where possession was unlawfully acquired,[57] or where the defendant had parted with the custody,[58] or has made an adverse claim of title,[59] or has imposed an unlawful condition precedent to delivery.[60] Demand of the key to the premises where the goods are stored is a sufficient demand for the goods,[61] and it is immaterial whether plaintiff was in a position to receive the property, if his demand was complied with.[62]

Tender of a return of the consideration received is not necessary.[63]

*Who may maintain and persons liable.*See 11 C. L. 799—Where title has not passed by delivery to a carrier, the consignor may sue the carrier for conversion.[64] An executor [65] or administrator with will annexed,[66] or one having a special property in money collected by another, may maintain the action.[67] On refusal of a corporation to register a transfer of its stock, only the buyer may maintain an action for conversion.[68] One assisting another to deprive an owner of property,[69] or one to whom the person converting the property conveys it, may be held liable.[70] A tenant in common of divisible property may maintain trover against his cotenant.[71]

§ 4. *Defenses.*[72]—See 11 C. L. 799—Malice being no part of the cause of action,[73] ignorance or good faith of defendant is no defense.[74] If the owner, authorized the

tional sale may maintain action. Painter v. McGaha [Ga. App.] 64 SE 129. A purchaser of standing timber, to be cut by a certain time, has a title sufficient to maintain trover against one who cuts and converts the trees. Camp v. Horton, 131 Ga. 793, 63 SE 351. Purchaser of a portion of grain in bulk may maintain action for its conversion, although there has been no separation of his portion. Farmers' Nat. Bank v. Coyner [Ind. App.] 88 NE 856. Finder of lost goods, unless owner is found, may maintain trover. Weeks v. Hackett, 104 Me. 264, 71 A 858.

54. Baruch v. Platt, 114 NYS 26.

55. Stevens v. Stevens, 132 Mo. App. 624, 112 SW 35.

56. A mere refusal of a hirer to bring the property back is not a conversion. Cumberland Tel. & T. Co. v. Taylor [Ind. App.] 88 NE 631.

57. Camp v. Horton, 131 Ga. 793, 63 SE 351; Dixie v. Harrison [Ala.] 50 S 284. Receiving negotiable instrument under forged indorsement. Warren v. Smith [Utah] 100 P 1069.

58. Mullen v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078. After unlawful disposal of property by lawful custodian. Kavanaugh v. McIntyre, 128 App. Div. 722, 112 NYS 987. Where a sheriff who has confiscated property of one under arrest has delivered it to another in recognition of the latter's claim to it. Bell v. Carter [C. C. A.] 164 F 417. Where one to whom corporate property is pledged to secure individual debts of its officer treated it as the property of such officer and disposed of it as such, no demand by the corporation is necessary. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801.

59. Piazzek v. Harman [Kan.] 98 P 771.

60. Lee v. Fidelity Storage & Transfer Co., 51 Wash. 208, 98 P 658.

61. Swartz v. Gottlieb-Bauern-Schmidt-Straus Brew. Co., 109 Md. 393, 71 A 854.

62. Where defendant showed no disposition to accede to plaintiff's demand. McFadden v. Thorpe Elevator Co. [N. D.] 118 NW 242.

63. Where a pawnbroker refuses to return pledged property on ground that it is claimed to belong to others than pledgee, a tender of the amount of the loan is not necessary. Buchanan v. Provident Loan Soc., 63 Misc. 269, 116 NYS 653. Return of consideration received for property fraudulently taken is not necessary. Douglass v. Scott, 130 App. Div. 322, 114 NYS 470.

64. Where the carrier refused to deliver a bill of lading for coal loaded on its cars for transportation, but confiscated it to its own use, no title had passed to consignee. St. Louis & S. F. R. Co. v. Stone [Kan.] 97 P 471.

65. Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328.

66. Devlin v. Houghton, 202 Mass. 75, 88 NE 580.

67. A general insurance agent has a special property in premiums collected by a special agent employed by him, under a contract requiring the employe to turn over to the employer all moneys collected. Hazelton v. Locke, 104 Me. 164, 71 A 661.

68. The seller cannot maintain the action. Lewis v. Bidwell Elec. Co., 141 Ill. App. 33.

69. The question whether he is guilty of conversion is one of fact for the jury. Bowe v. Palmer [Utah] 102 P 1007.

70. Kilmer v. Hutton, 131 App. Div. 625, 116 NYS 127; Crossland v. Graham [S. C.] 65 SE 233. One receiving a check signed by the executor as such is charged with notice that it is drawn against funds of the estate. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435.

71. Money. Weeks v. Hackett, 104 Me. 264, 71 A 858.

72. Search Note: See Trover and Conversion, Cent. Dig. §§ 152-169; Dec. Dig. §§ 22, 23.

73. See ante, § 1.

74. One cutting and converting trees from land of another is liable although he did not know that such trees were unlawfully

conversion [75] or is estopped to complain thereof,[76] he cannot maintain the action. The owner is not deprived of his right of action by presenting a claim in insolvency [77] or by demand for payment,[78] or on account of failure to resist the taking.[79] Defendant cannot defeat a right of action by offering to return the property.[80] Judgment against codefendant is not a defense unless it has been paid.[81]

§ 5. *Practice and procedure.*[82]—See 11 C. L. 800—In Georgia the owner may at his election recover the specific property or damages for its conversion,[83] but cannot waive the tort and sue in assumpsit.[84] The rule, however, being otherwise in most jurisdictions,[85] and where he alleges a waiver of the tort, his action cannot be treated as one ex delicto,[88] but causes of action for conversion and for breach of contract, growing out of the same transaction, may be joined.[87] A complaint for standing trees cut and carried away, praying judgment for the value thereof, is in trover and not trespass.[88]

*Parties.*See 11 C. L. 801—Where an indemnified sheriff is sued, the attachment plaintiff may defend without intervening.[89]

*The complaint.*See 11 C. L. 801 must set out a cause of action,[90] and must contain all material allegations necessary in the action of trover at common law,[91] and must allege plaintiff's ownership [92] and time of conversion,[93] and contain a description of specific property,[94] a general description being sufficient,[95] and plaintiff claiming by virtue of a lien must allege the facts entitling him thereto [96] but need not allege

cut from plaintiff's land. Crossland v. Graham [S. C.] 65 SE 233.

75. Consent by a mortgagee to a sale of the property is a complete defense to the purchaser. Stevenson v. Whatley [Ala] 50 S 41.

See, also, Ante, § 1.

76. Knowledge by mortagee of sale before payment, reliance on mortgagor for payment out of proceeds, and failure to notify buyer of his claim until three months after sale and after payment had been made, held to constitute acquiescence. Sigel-Campion Live Stock Co. v. Holly, 44 Colo. 580, 101 P 68.

77. Filing claim in insolvency against debtor is not deprival of right to sue a third person for conversion of the debtor's property (Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 118 NW 282), but the amount of the dividend in insolvency should be deducted from amount claimed in suit for conversion (Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 120 NW 625).

78, 79. Dixie v. Harrison [Ala.] 50 S 284.

80. Crawford v. Thomason [Tex. Civ. App.] 117 SW 181. A return may, however, be considered in mitigation of damages. Aylesbury Mercantile Co. v. Fitch [Okl.] 99 P 1089.

81. The burden is on defendant to establish such payment. Squire v. Ordemann, 194 N. Y. 394, 87 NE 455.

82. Search Note: See notes in 8 L. R. A. (N. S.) 291; 1 Ann. Cas. 763; 6 Id. 841.

See, also, Trover and Conversion, Cent. Dig. §§ 103-319; Dec. Dig. §§ 13-72; 28 A. & E. Enc. L. (2ed.) 716; 21 A. & E. Enc. P. & P. 1009.

83. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270.

84. Allegation that defendants "carried said personal property away, thereby converting same to their own use," since it does not show that defendant had disposed of it, will not sustain action in assumpsit. Woodruff v. Zaban [Ga.] 65 SE 123.

85. Tort may be waived and suit maintained on implied contract. Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328.

See Election and Waiver, § 2A.

86. Woodruff v. Zaban [Ga] 65 SE 123.

87. Aylesbury Mercantile Co. v. Fitch [Okl.] 99 P 1089.

88. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270.

89. He, being the real person interested, may file an affidavit of prejudice against the presiding judge. Gehlert v. Quinn, 38 Mont. 1, 98 P 369.

90. Allegation that plaintiff was the owner of a note of a certain value, and that it was wrongfully converted by defendant, states a cause of action. Capps v. Vasey Bros. [Okl.] 101 P 1043. Allegation of a delivery by plaintiff to defendant under a memorandum of purchase, a refusal, after demand, to return them, and that defendant did then and there "convert" the goods "and dispose of the same to his own use," states a course of action for conversion. Ettinger v. Norton, 131 Ill. App. 521. Complaint against pawnbroker for refusal to redeliver pledged articles held sufficient. Buchanan v. Provident Loan Soc., 63 Misc. 269, 116 NYS 653.

91. Although code abolishes distinction between forms of actions. Sigel-Campion Live Stock Co. v. Holly, 44 Colo. 580, 101 P 68.

92. Thayer v. Kitchen, 200 Mass. 382, 86 NE 952; Jones v. Winsor [S. D.] 118 NW 716.

93. Tallassee Falls Mfg. Co. v. First Nat. Bank [Ala.] 49 S 246.

94. A general reference to certain classes of property is insufficient. Thayer v. Kitchen, 200 Mass. 382, 86 NE 952.

95. Allegation of conversion of "$1,850 in cash" sufficient. Dunham v. Cox, 81 Conn. 268, 70 A 1033. Allegation of conversion of $51.13 "in lawful current money of the United States" is sufficient. Hazelton v. Locke, 104 Me. 164, 71 A 661.

96. Mere allegation that he has a lien is

that the conversion was willful.[97] It cannot be framed so as to present the double aspect of actions for conversion and for money had and received.[98]

Answer or plea.[See 11 C. L. 802]—A plea that the proceeds was applied on a lien prior to that of plaintiff must allege the ownership of such lien.[99] Amendment to allege acquiescence in the sale to defendant should be allowed.[1]

Evidence, issues, proof, variance.[See 11 C. L. 802]—Material allegations must be proved.[2] Title can be tried in action for conversion [3] and, under an allegation that defendant maliciously took plaintiff's property and deprived plaintiff of it and refused to return it on demand, exemplary damages for retention of the property after demand may be recovered,[4] and evidence that the proceeds was used in discharging liens on the property is admissible under the general issue.[5] The burden is on plaintiff to prove a conversion or a refusal to deliver,[6] and whether such burden is sustained is usually a question for the jury.[7] Most of the questions as to admissibility of evidence are determinable by application of general rules of evidence.[8]

Instructions must be confined to the issues [9] but must not ignore defenses.[10]

a conclusion, and an allegation that he has "performed labor" for another is insufficient to sustain a claim based on a lien for wages. Lindale Brick Co. v. Smith [Tex. Civ. App.] 118 SW 568.

97. Under complaint alleging willfulness, recovery may be had although proof shows it to have been innocent. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270.

98. Allegations charging conversion cannot be treated as surplusage. Jones v. Winsor [S. D.] 118 NW 716.

99. Tallassee Falls Mfg. Co. v. First Nat. Bank [Ala.] 49 S 246.

1. Abuse of discretion to deny such amendment when accompanied by affidavit that such fact was not discovered until time of trial. Sigel-Campion Live Stock Co. v. Holly, 44 Colo. 580, 101 P 68.

2. Allegation of joint conversion must be proved. Proof that one of the joint defendants had nothing to do with conversion will prevent recovery. Stevenson v. Whatley [Ala.] 50 S 41. The date of the conversion must be proved as alleged. Mobile, etc., R. Co. v. Bay Shore Lumber Co. [Ala.] 48 S 377. Evidence must show value of the property at the time of conversion, or a reasonable time thereafter. Swartz v. Rosseau, 112 NYS 1065. Where there was no proof as to how many of the cattle in controversy were steers and how many were cows, the evidence showing that steers were worth $30 and cows $20, the proof is not sufficient. Sigel-Campion Live Stock Co. v. Holly, 44 Colo. 580, 101 P 68.

3. Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328.

4. Shandy v. McDonald, 38 Mont. 393, 100 P 203.

5. Gandy v. Cowart [Ala.] 50 S 355.

6. Berman v. Kling, 81 Conn. 403, 71 A 507.

7. Evidence held sufficient to prove alleged theft of goods by defendant from plaintiff's house. Galler v. McMahon, 51 Wash. 473, 99 P 309. To show a conversion of property of testatrix by persuading her to sell her real estate and obtaining possession of the proceeds. Devlin v. Houghton, 202 Mass. 75, 88 NE 580. Conversion of wheat from elevator. Evidence held sufficient to require submission of question to jury. Woodworth Elevator Co. v. Theis [Minn.] 122 NW 310. **Evidence held insufficient** as to value. Fertitta v. Schnurmacher, 117 NYS 161. Permission by a mortgagor to a mortgagee to "do what he pleased" with the property cannot be held, as a matter of law, to be permission to do anything more than exercise his legal rights. Crouch Hardware Co. v. Walker [Tex. Civ. App.] 113 SW 163.

8. Admissible: Evidence of a claim by plaintiff, made in a prior suit, that he was still the owner of the property, is admissible. Hill v. Wiley, 202 Mass. 243, 88 NE 838; Swartz v. Gottlieb-Bauern-Schmidt-Straus Brew. Co., 109 Md. 393, 71 A 854. The amount the goods brought at auction sale in distress proceedings brought against defendant is evidence of **value.** Testimony that "the price I paid for it was what it was worth" is not in violation of rule that testimony must be as to cash market **value.** Crouch Hardware Co. v. Walker [Tex. Civ. App.] 113 SW 163. Knowledge of mortgagee that mortgaged goods were sold and proceeds applied to use of mortgagor, and acquiescence therein, admissible to show **consent.** Stevenson v. Whatley [Ala.] 50 S 41. In action by mortgagee, original mortgage, in renewal of which the one under which plaintiff claimed was given, is admissible. Maddox v. Dunklin [Ala.] 50 S 277. Where a seller retook property because of buyer's refusal to execute mortgage for purchase price, latter may show that former was indebted to him as reason for not doing so. Boardman v. Woodward [Tex. Civ. App.] 118 SW 550. **Res gestae:** Evidence of difficulty occurring at time of taking is admissible as part of res gestae, where exemplary damages are claimed. Boardman v. Woodward [Tex. Civ. App.] 118 SW 550. **Inadmissible:** Where conversion consisted in moving building, situated on lot 5, but projecting on lot 6, back on to lot 5 under void writ of sequestration, evidence that plaintiff had no title to lot 5, and that other houses had been moved back without any damage, held inadmissible. Crawford v. Thomason [Tex. Civ. App.] 117 SW 181.

9. Instruction authorizing recovery for negligence in leaving unlocked the box containing the property is erroneous. Berman v. Kling, 81 Conn. 403, 71 A 507. Instructions permitting recovery on a state of facts

*Judgment.*See 11 C. L. 804—Where verdict is for plaintiff, judgment for defendant, notwithstanding verdict, should not be entered, but a new trial granted.[11]

CONVERSION IN EQUITY.

The scope of this topic is noted below.[12]

§ 1. Definition and Nature of Doctrine, 953.
§ 2. How Effected, 953.
§ 3. Reconversion, 955.
§ 4. Effect of Conversion, 955.

§ 1. *Definition and nature of doctrine.*[13]—See 11 C. L. 804—Equitable conversion is a constructive alteration in the nature of property by which in equity real estate is regarded as personalty or personal estate as realty.[14] It grows out of the old equitable maxim that "equity regards that as done which ought to be done," [15] and was primarily adopted for the purpose of carrying into effect the intention of a testator,[16] and for executing trusts, it being essential to the application of the doctrine that the property should be subject to a trust or imperative direction for conversion.[17] The conversion takes effect only to the extent of the purpose for which conversion was required,[18] and, if the enforcement of the doctrine aids or accomplishes an act against the law, it will not be enforced.[19]

§ 2. *How effected.*[20]—See 11 C. L. 805—The presumption is against conversion,[21] and it is only to be resorted to when actually necessary to carry out the testamentary purpose.[22] In order to constitute a conversion of the testator's realty, it must be the

not in issue are properly refused. Banner Lumber Co. v. McDermott, 128 Mo. App. 89, 106 SW 583.

10. An instruction that if plaintiff loaned property to defendant, and defendant converted it, held erroneous as ignoring defendant's claim that he held as pledgee. Warrington v. Kallaner, 135 Mo. App. 5, 115 SW 492. Ignoring defendant's claim of ownership is erroneous. Posey v. Gamble [Ala.] 47 S 569.

11. In order that deficiencies in plaintiff's evidence may be supplied. Frederickson v. Iron Range Brew. Ass'n [Minn.] 121 NW 632.

12. Includes the general rules of equitable conversion and reconversion. Excludes the specific application of such rules in the interpretation of wills (see Wills,* § 5), administration of decedent's estates (see Estates of Decedents,* § 5), and the settlement of partnership affairs (see Partnership,* §§ 3, 7E).

13. Search Note: See note in 8 L. R. A. (N. S.) 72.

See, also, Conversion, Cent. Dig. §§ 1, 3-55; Dec. Dig. §§ 3, 20; 9 Cyc. 826, 829, 830, 840, 841, 848, 849; 7 A. & E. Enc. L. (2ed.) 464.

14, 15. Beaver v. Ross [Iowa] 118 NW 287.

16. Where it was possible to carry out intention of testatrix without any sale, and intention of testatrix was that such a conversion should not take place, it was deemed not to have taken place. Renwick v. Renwick, 63 Misc. 596, 117 NYS 217.

17. Beaver v. Ross [Iowa] 118 NW 287.

18. Surplus on foreclosure sale of decedent's land descends as realty. Kitchens v. Jones, 87 Ark. 502, 113 SW 29.

19. Statute of West Virginia prohibits any church organization from taking or holding land, except a certain amount. Held that where devise was to trustee with direction to sell and proceeds to be paid to church, that trustee was mere representative of the church and that equity would not enforce doctrine of equitable conversion. Miller v. Ahrens, 163 F 870.

20. Search Note: See notes in 3 C. L. 877; 7 Id. 855; 16 L. R. A. (N. S.) 859; 5 A. S. R. 141.

See, also, Conversion, Cent. Dig. §§ 2-55; Dec. Dig. §§ 4-19; 9 Cyc. 826-843, 844-849; 7 A. & E. Enc. L. (2ed.) 465.

21. Scott's Estate, 37 Pa. Super. Ct. 198.

22. Scott's Estate, 37 Pa. Super. Ct. 198. Where executor was authorized and directed to convert into cash all property, real and personal, and to sell the same at public or private sale and distribute the proceeds as directed by the will, it amounted to a devise of the real estate to him. Fenton v. Hall, 235 Ill. 552, 85 NE 936. Where will by express provisions directed executors to convert "the entire estate into cash as soon after" the death of testator as his executors or the survivor of them "deemed best in such manner and upon such terms, as my executors think proper," and after setting apart certain fund directed to divide balance into two equal parts to be distributed as directed, there was a conversion, and sale by executor was valid. Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261.

No conversion: Where testatrix reserved the right to sell in her discretion the real property which she was contracting to will to her stepsons, and further provided that proceeds of such sale should be held and substituted in place and stead of such realty, it evidenced an intention that there should be no conversion. Renwick v. Renwick, 63 Misc. 596, 117 NYS 217. Where testatrix devised her real estate to her executor in trust to hold one of the parts, after equal division and collect the rents, issues, and profits of same for the use of stepson, the use of word "rents" indicated that testatrix did not intend that there should be a conversion. Id.

* Always begin with the latest article on the subject. Use the latest topical index.

duty of, or obligatory on, the executor to sell in any event,[23] and this may be manifest by a positive direction to the executor to sell,[24] or by the necessity of a sale in order to carry out the general scheme of the will,[25] or when the purpose of the testator would fail without such conversion.[26] If the sale be contingent on the election or consent of the legatee or devisee or other person than the executor, the power of sale does not work a conversion,[27] even where the will provides for a payment of legacies and distribution of the remainder of the fund.[28] Although the fact that no power of sale is given does not, in itself, prevent conversion,[29] still it is a circumstance to be taken into consideration in determining the intention of the testator.[30] The fact that the sale is postponed to a time subsequent to the death of the testator is not controlling in determining the time of conversion;[31] the general rule being that the conversion takes place at the instant of testator's death,[32] unless it appears to have been the intention of the testator that the conversion should take place upon the happening of a designated event or at some future time.[33]

*By contract.*See 11 C. L. 806—The general rule in this country, as to how far real estate held by partners is to be deemed personal property, is that the conversion is limited to the purposes of the partnership.[34] A vendor's interest in real estate is converted by a contract of sale from realty to personalty,[35] and an optional con-

23. Testator gave to his wife and daughter the use and control of his property, real and personal, so long as they or either of them should live and the right to use any or all for their support, with power to sell or mortgage any real estate, and then directed how remainder, if any, at death of wife and daughter, should be disposed of. All the property was sold. Held that there was no conversion and that money remaining was real estate. Harris v. Achilles, 129 App. Div. 847, 114 NYS 855. Instrument resorted to must decisively fix on land the quality of money. Scott's Estate, 37 Pa. Super. Ct. 198.

24. Harris v. Achilles, 129 App. Div. 847, 114 NYS 855. Direction to sell must be imperative and explicit. Scott's Estate, 37 Pa. Super. Ct. 198. Where testator gave to his wife furniture, and house and lot in which they resided, to enjoy as long as she desired, after which they should be disposed of by executors and become part of estate, and also directed that legal share of his real estate and personal property be paid to his said wife as her share out of his estate, and further directed that the executors dispose of all the balance of the estate within three years after testator's death, held that the direction to sell converted all real estate into personalty of which widow took one-half. In re Dull's Estate, 222 Pa. 208, 71 A 9.

25, 26. Harris v. Achilles, 129 App. Div. 847, 114 NYS 855.

27. Testator directed that at any time after the decease of his wife his executors may be required by a majority of those having an interest therein to sell his real estate and that the proceeds should be divided as directed. Held that there was no conversion until majority directed sale and that their interest was subject to judgment. Scott's Estate, 37 Pa. Super. Ct. 198.

28. Scott's Estate, 37 Pa. Super. Ct. 198.

29, 30. Renwick v. Renwick, 63 Misc. 596, 117 NYS 217.

31. Beaver v. Ross [Iowa] 118 NW 287.

32. Beaver v. Ross [Iowa] 118 NW 287; Haywood v. Wachovia L. & T. Co., 149 N. C. 208, 62 SE 915. While the time, manner, and terms of sale were left to the discretion of trustees, the fact that sale by trustees was contemplated at all events worked a conversion of the realty at time of death of testator. Lambert v. Morgan, 110 Md. 1, 72 A 407. Where testator bequeathed all his real property to his wife to have the use and control of same until all testator's children should become 21 years of age, property then to be sold and wife to have one-third interest, the wife's interest was treated as personal property. Ross v. Ware's Adm'r [Ky.] 116 SW 241. Where testator directed executor to sell his real estate ten years after testator's death, and directed proceeds to be paid to devisees, there was a conversion at time of testator's death. Kroh v. Rothrock [Iowa] 119 NW 131, following Beaver v. Ross [Iowa] 118 NW 287.

33. Testator only authorized his executors to sell his real estate at their discretion, two important parcels could not be sold without consent of widow. On the death of widow final distribution was to be made. Held that it was not his intent that the real property should be converted at his death but should be postponed until death of the widow. Liveright v. Sternberger, 131 App. Div. 13, 115 NYS 349.

34. Mann v. Paddock, 108 Va. 827, 62 SE 951.

35. The contract must be enforcible on death of either party thereto; but enforcibility at time of death of one of the parties refers to validity of the contract, and not to events in the nature of conditions which may not have been preformed because such performance was not due at time of the death of testator, it being sufficient if the conditions can be performed by his representatives. Flomerfelt v. Siglin, 155 Ala. 633, 47 S 106. Where parties owning certain land conveyed to each other an undivided one-half interest in all of said land and an accounting was had and it was as-

tract to purchase land works a conversion, though not exercised until after the death of the vendor.[36]

§ 3. *Reconversion.*[37]—See 11 C. L. 806—Where the beneficiaries, being sui juris, all concur, they may elect to take the property in its actual condition;[38] but a remainder man cannot elect so as to effect prior estates.[39]

§ 4. *Effect of conversion.*[40]—See 11 C. L. 807—When an equitable conversion of realty has taken place it becomes personalty in the hands of the executor or trustee,[41] and the interest of the beneficiaries is merely a chose in action,[42] which is not subject to lien of judgment,[43] or mortgage,[44] or to an execution for the sale of real estate.[45] However, there may be an equitable assignment by the devisee of his interest as by mortgage or otherwise.[46] A conversion of realty does not exclude the heir, unless the testator manifests a clear intention to that effect.[47] A remainderman takes no title or interest in the land, but only in the proceeds.[48] The doctrine of equitable conversion has no application in ascertaining dower.[49]

CONVICTS.[50]

The scope of this topic is noted below.[51]

A convict is not exempt from trial and sentence for another crime committed before or during imprisonment.[52] His presence in court may be obtained by habeas

certained and agreed that one of the parties was entitled to be paid the sum of $20,000 out of the proceeds of the sale of said lands, the contract was enforcible, though contract provided that neither party should authorize or consent to a sale at a price less than $45,000 without the written consent of the other. Id.

36. Exercise of the option by tender of purchase price to administrator fulfills the obligation of the vendee. Rockland-Rockport Lime Co. v. Leary, 133 App. Div. 379, 117 NYS 405.

37. Search Note: See Conversion, Cent. Dig. §§ 66-72; Dec. Dig. § 22; 9 Cyc. 853-857; 7 A. & E. Enc. L. (2ed.) 480.

38. One who is the owner of both the legal and equitable title to funds that would arise from sale of real estate, as provided by will, may elect to take land before sale. Givens v. Ott [Mo.] 121 SW 23.

39. Remainderman who comes into possession of estate cannot elect to rescind prior conveyance but may demand an accounting. Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261.

40. Search Note: See Conversion, Cent. Dig. §§ 56-65; Dec. Dig. § 21; 9 Cyc. 850-853; 7 A. & E. Enc. L. (2ed.) 475.

41. Lambert v. Morgan, 110 Md. 1, 72 A 407.

42. Not a right in the real estate. Lambert v. Morgan, 110 Md. 1, 72 A 407.

43. Where executor was directed in will to sell real property 10 years after testator's death and pay proceeds to devisee, the devisee had no such interest in land as was subject to lien of judgment rendered before sale. Krob v. Rothrock [Iowa] 119 NW 131, following Beaver v. Ross [Iowa] 118 NW 287.

44. Mortgage creates no lien. Lambert v. Morgan, 110 Md. 1, 72 A 407.

45. Testator devised realty to his wife for life, providing that, on her death, the property should be sold, a certain part of proceeds to be set aside for support of one child and remainder to be divided among other children. Held that interest of one of the children was not subject to execution for the sale of the realty. Beaver v. Ross [Iowa] 118 NW 287.

46. Assignment from husband to wife held valid. Beaver v. Ross [Iowa] 118 NW 287.

47. Where testatrix gave to nephews all residue and remainder of her personal estate and devised all real estate to executor with power to sell same in trust for her estate, it was held that the proceeds passed to testatrix children and not to the nephews. In re Alabone's Estate [N. J. Eq.] 72 A 427.

48. Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261.

49. Testator devised to his widow such portion of his estate as she would be entitled to by law and subject to that provision for her he directed his executor to convert all his property into money and to divide same equally between his five children. Widow did not elect to take under the will but after being allowed share out of real property claimed right to share in remainder as personalty. Held that she had no right to such interest. Geiger v. Bitzer, 80 Ohio St. 65, 88 NE 134.

50. Search Note: See notes in 1 C. L. 708; 5 Id. 761; 16 L. R. A. 82; 36 Id. 293; 39 Id. 680; 12 L. R. A. (N. S.) 317; 6 A. S. R. 380.

See, also, Convicts, Cent. Dig.; Dec. Dig.; 9 Cyc. 869-888; 6 A. & E. Enc. L. (2ed.) 64; 7 Id. 496; 22 Id. 1099; 5 A. & E. Enc. P. & P. 15.

51. This topic includes the status, rights and liabilities of convicts, and contracts for convict labor. It excludes procedure for conviction, sentence and commitment (see Indictment and Prosecution*), nature and extent of punishment for crime (see Criminal Law,* § 6), pardon and parol (see Pardons and Paroles *), management and discipline of penal institutions (see Prisons, Jails and Reformatories,* § 2), and peonage laws (see Slaves*).

* Always begin with the latest article on the subject. Use the latest topical index.

corpus or some similar legal proceeding.[53] The constitutional guaranty of a speedy trial applies to convicts.[54] A convict serving an unexpired sentence in the state prison of Massachusetts imposed for violation of its laws cannot be extradited, unless he is first pardoned.[55]

Convict labor contracts. See 11 C. L. 807—The contract must be sufficiently definite as to place and kind of labor.[56] A contract of subhiring of convicts is not void in Florida as against public policy.[57] In Georgia the physical custody of the convicts is not delivered into the hands of the lessees,[58] therefore, the lessees are not, by virtue of their mere relation as such, liable to a convict for injuries inflicted upon him by the wrongful act of another.[59] Prior to the passing of a recent statute, the county authorities of the respective counties of the above mentioned state had the legal right to employ the misdemeanor chain gangs in private works,[60] and the ordinary, having charge of county matters, was authorized to employ guards and other officers to manage such chain gang.[61] Where a county has made no order providing for the working of county convicts in any of the modes provided by law, a convict is not entitled to his liberty because no such order has been made.[62] Provision is generally made for the enforcement of convict labor contracts.[63]

COPYRIGHTS.[64]

The scope of this topic is noted below.[65]

The common-law right of literary property See 11 C. L. 808 may exist as to productions not subject of copyright.[66] It is absolute until publication,[67] but is lost by publication [68] or by taking out of statutory copyright.[69]

Matter subject of copyright is that authorized by the statute in the exercise of the constitutional power to protect "writings." [70] It is generally confined to produc-

52, 53, 54. State v. Keefe, 17 Wyo. 227, 98 P 122.

55. Governor has no power under federal constitution, or otherwise, to grant extradition. In re Opinion of the Justices, 201 Mass. 609, 89 NE 174.

56. Contract providing that convicts are to work and labor in mining in and around the mines of a certain company in specified counties in the state is sufficiently definite. Askew v. State [Ala.] 48 S 107.

57. Where contract and subcontract omit nothing essential to human treatment of convicts, and where hirer by subletting does not undertake to exempt himself, and where subhirer binds himself to observe in all respects the terms of the original contract. Hall v. O'Neil Turpentine Co. [Fla.] 47 S 609.

58. Convict leases made by prison commission under act of December 21, 1897 (Acts 1897, p. 76), and amendment thereto approved August 17, 1903 (Acts 1903, p. 66), did not deliver physical custody. Mason v. Hamby [Ga. App.] 64 SE 569.

59. Not liable for injuries by wrongful act of a guard or "boss," or by negligence of sublessee or one of his employes. Mason v. Hamby [Ga. App.] 64 SE 569.

60. Words "other works," as used in Pen. Code 1895, § 1039, authorizes the employment of chain gang in private works, provided actual control of prisoners was wholly in county authorities. McDonald v. State [Ga. App.] 64 SE 1108.

61. Duly appointed whipping boss of chain gang so organized and employed could justify whipping of one of the convicts if it appeared that latter had been guilty of insubordination or an attempt to assault a guard, provided the whipping was not brutal. McDonald v. State [Ga. App.] 64 SE 1108.

62. Ex parte Parker [Miss.] 48 S 297.

63. Act No. 204, p. 304, of 1908, provides a remedy where the lessee of parish convicts has violated the provisions of the statute and the obligations imposed upon him by the terms of his lease. State v. Patterson, 122 La. 215, 47 S 511.

64. Search Note: See notes in 5 C. L. 762; 51 L. R. A. 353; 55 Id. 631; 57 Id. 57; 58 Id. 564; 66 Id. 444; 2 L. R. A. (N. S.) 913; 5 Id. 1187; 9 Id. 174; 15 Id. 766; 3 Ann. Cas. 1116; 5 Id. 279.

See, also, Copyrights, Cent. Dig.; Dec. Dig.; 9 Cyc. 889-976; 7 A. & E. Enc. L. (2ed.) 503; 5 A. & E. Enc. P. & P. 16.

65. It includes all matters as to rights acquired under the federal copyright law.

66. Foreign dramatic production not printed in book. Frohman v. Ferris, 238 Ill. 430, 87 NE 327.

67. Frohman v. Ferris, 238 Ill. 430, 87 NE 327.

68. Public representation of play held not publication thereof. Frohman v. Ferris, 238 Ill. 430, 87 NE 327.

69. West Pub. Co. v. Edward Thompson Co., 169 F 833.

70. Term "writings" which congress is authorized to protect by copyright includes moving pictures representing a dramatic production. Harper v. Kalem Co. [C. C. A.] 169 F 61.

tions of a literary nature.[71] The requirement of printing from type set or plates made in the United States does not apply to dramatic compositions though printed in book form.[72] Judicial opinions are not capable of being copyrighted by the official reporter.[73]

Acquisition, transfer, and loss. See 11 C. L. 808—One who is himself entitled to take out copyright on a painting[74] may assign the right to take out copyright thereon;[75] and an author may sell a production giving to the publisher the right to copyright while retaining the right of dramatization.[76] If the article sought to be copyrighted is a picture, a copy should be filed,[77] or if a book or article, the title page.[78] Republication of copyrighted matter without notice of the first copyright frees such matter, whether done by the owner[79] or by a licensee.[80]

Rights acquired. See 11 C. L. 808—Copyright protects only those matters which are the original literary work of the author.[81] There may be several copyrightable dramatizations of the same story.[82] Right to license subsequent dramatizations remains in the owner of the copyright,[83] and the owner of the story having assigned the right of performing one dramatization may assign the right to perform another.[84] Since the copyright law contemplates a monopoly, an agreement between publisher and retailers as to maintaining prices on a copyrighted book is not within statutes against monopolies.[85]

Infringement. See 11 C. L. 800—Where a story is alleged to be infringed by a dramatization, the question is whether the substance of the composition has been taken.[86] Pictures representing a story are not an infringement,[87] but when presented by a moving picture machine at a public performance they are.[88] Infringement of a literary work may consist not only in copying and paraphrasing but in any appropriation of the literary labor or ideas of another, including arrangement and selection as well as mere language.[89] The very purpose, however, for which

71. Monogram campaign design not subject of copyright and not protected by copyright of book describing and illustrating it. Royal Sales Co. v. Gaynor, 164 F 207.

72. Rev. St. § 4956, construed. Hervieu v. Ogilvie Pub. Co., 169 F 978.

73. Only protects original work of reporter. Banks Law Pub. Co. v. Lawyers' Co-Op. Pub. Co., 169 F 386; West Pub. Co. v. Edward Thompson Co., 169 F 833.

74. The author of a painting cannot give to another the right to take out copyright thereon, if he is not himself a citizen of country having copyrighted relation with United States. Bong v. Campbell Art. Co., 29 S. Ct. 628. Whether the nation of which an author is a citizen has reciprocal copyright relations with the United States is not a question of fact, but depends wholly on the determination of the president to be evidenced by proclamation. Bong v. Campbell Art Co., 29 S. Ct. 628.

75. Assignee held to take no right because author had none. Bong v. Campbell Art Co., 29 S. Ct. 628.

76. Dam v. Kirke La Shelle Co., 166 F 589.

77. Series of moving pictures representing a play is a single picture for purpose of copyright. Harper v. Kalem Co. [C. C. A.] 169 F 61.

78. Filing of the title page of magazine is sufficient without filing of titles of various articles therein. Dam v. Kirke La Shelle Co., 166 F 589.

79. Where book has been issued in advance parts each separately copyrighted, the copyright of the completed book under a date later than that at which the different parts were copyrighted works a forfeiture of such former copyright. West Pub. Co. v. Edward Thompson Co., 169 F 833.

80. Publication of parts of copyrighted book pursuant to license, in a book copyrighted as of a date later than the original copyright of the parts so appropriated, works a loss of the copyright thereon. West Pub. Co. v. Edward Thompson Co., 169 F 833.

81. **A law reporter's copyright on judicial reports** covers only the syllabus and statement. West Pub. Co. v. Edward Thompson Co., 169 F 833. Does not cover sequence in which cases are arranged, distribution of cases between volumes or paging of volumes. Banks Law Pub. Co. v. Lawyers' Co-Op. Pub. Co. [C. C. A.] 169 F 386.

82. Harper v. Kalem Co. [C. C. A.] 169 F 61.

83, 84. Licensee of particular dramatization cannot make another. Harper v. Kalem Co. [C. C. A.] 169 F 61.

85. Straus v. American Publishers' Ass'n, 193 N. Y. 496, 86 NE 525.

86. Dam v. Kirke La Shelle Co., 166 F 589. Dramatization held to infringe story from which theme, dialogue and incidents were taken. Id.

87, 88. Harper v. Kalem Co. [C. C. A.] 169 F 61.

89, 90, 91, 92, 93, 94. West Pub. Co. v. Edward Thompson Co., 169 F 833.

legal publications are prepared contemplates to a certain extent the improvement in the literature of the science which is open to the subsequent writer as much as to a lawyer or to a judge.[90] Thus, the writers of a legal encyclopedia have the right to consult a digest or to obtain therefrom clues to the various cases, and may, subject to verification, collect the cases cited by the digest and classify them under the same heading.[91] The use of index or digest paragraphs from a compilation in another similar work after having verified them by comparison with the original sources is, however, such a saving of labor and expensive copying as to amount to an unfair use,[92] which will be ground for recovery of damages, though not for injunction.[93]

It is no defense to a suit in infringement that defendant carefully and in good faith instructed his employes not to use copyrighted material, if in spite of such instructions there was in fact an infringement.[94]

*Remedies and procedure.*See 11 C. L. 809—A mere grant of stage rights in a play does not give the grantee the right to sue for penalties for infringement.[95] The statutory remedies by way of seizure and penalty in case of infringing maps, etc., is exclusive.[96] In an action for penalty plaintiff has the burden of showing strict compliance with all the requirements to secure his copyright.[97] Certificate of librarian as to deposit of copies is competent.[98] Though the writ of seizure is "in the nature of replevin," it is not a writ of replevin and is not invalidated by failure to observe technical requirements of a state statute relating to the latter remedy.[99] The writ may issue before the commencement of an action for penalties and forfeiture.[1]

Complainant's right and infringement must be clear to authorize preliminary injunction.[2] Exhibits consisting of detailed comparison of the publications in question, when made by competent persons, are admissible in evidence, an opportunity being afforded to the adverse party to test their correctness.[3] Where an infringing dramatization has been staged at great expense, it will not be enjoined if it can be revamped to eliminate the infringing matter.[4] While mere delay does not bar a suit for injunction, long delay may be taken into consideration as a ground for denying an injunction where only a part of defendant's publication constitutes an infringement.[5]

The remedy to recover royalties under an assignment of copyright is at law.[6]

Coram Nobis and Coram Vobis, see latest topical index.

CORONERS.[7]

The scope of this topic is noted below.[8]

Under certain circumstances the duties of the sheriff are cast upon the coroner.[9] The duty of investigating the cause of death where any person dies in a suspicious

95. Lederer v. Saake, 166 F 810.
96. Ohman v. New York, 168 F 953.
97. Lederer v. Saake, 166 F 810.
98. Lederer v. Saake, 166 F 810. Evidence to show copyright **sufficient.** Suderman v. Saake, 166 F 815.
99. Richardson v. Bosselman & Co., 164 F 781.
1. Stern v. Remick & Co., 164 F 781.
2. Denied in case of alleged infringment of previous dramatization of a novel which was out of copyright. Nixon v. Doran, 163 F 575. Denied on conflicting affidavits as to unfair use of market bulletin. Benton v. Van Dyke, 170 F 203. Similarity in plays held so clear evidence of infringement as to warrant injunction. Eisfeldt v. Campbell, 171 F 594.
3. West Pub. Co. v. Edward Thompson Co., 169 F 833.
4. Dam v. Kirke La Shelle Co., 166 F 589.
5. West Pub. Co. v. Edward Thompson Co., 169 F 833.
6. Karst v. Prang Educational Co., 132 App. Div. 197, 116 NYS 1049.
7. See 11 C. L. 809.
Search Note: See notes in 5 C. L. 763; 21 L. R. A. 394; 31 Id. 540; 68 Id. 285; 95 A. S. R. 763; 3 Ann. Cas. 517; 4 Id. 1020, 1096, 1162; 11 Id. 1023.
See, also, Coroners, Cent. Dig.; Dec. Dig.; 9 Cyc. 980-997; 7 A. & E. Enc. L. (2ed.) 598;

or unusual manner is reposed in the coroner,[10] and in such case it is under the New York statute, his duty to require a coroner's physician to view the body of the deceased or perform an autopsy thereon as may be required.[11] The power of a coroner in Indiana to hold an autopsy is ministerial,[12] and arises only on a reasonable supposition that the death has resulted from violence or casualty.[13] The power itself is limited [14] to the specific conditions [15] which invoke it, and the fact that coroners are by statute given the power to direct autopsies does not prevent the court from reviewing the conditions,[16] nor estop the county from contesting a physician's claim for an autopsy.[17] Under the Arkansas statute, a coroner does not exceed his authority in employing more than one physician to make an autopsy,[18] and the fact that the coroner's jury was not sworn in the immediate presence of the dead body,[19] and did not together view the dead body before the inquest,[20] does not effect the physicians' claim for making the autopsy.[21] A deputy coroner, appointed under the provisions of the Ohio statute, is not an officer, and quo warranto will not lie to determine his right to hold the position.[22]

CORPORATIONS.

The scope of this topic is noted below.[1]

§ 1. Definition and Nature of Corporations, 961.
§ 2. Classification of Corporations, 962.
§ 3. Creation, Name and Existence of Corporations, and the Amendment, Extension and Revival of Charters, 962. Corporate Name, 964. Purposes, 965. Fees, 966. Pleading and Proof of Incorporation, 966. Amendment, Extension and Revival of Charters, 967.
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§ 5. Promotion of Corporations; Acts Prior to Incorporation, 971. Incorporation of Partnerships or other Associations, 972. Fraud of Promoters, 972.
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§ 7. Powers of Corporations, 974.
A. In General, 974.
B. Power to Take and Hold Property, 976.
C. Power to Transfer or Incumber Property and Franchises, 977.
D. Power to Contract and Incur Debts, 980.
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§ 8. Effect of Ultra Vires and Illegal Transactions, 984. Estoppel to Assert Ultra Vires or Illegality, 986.
§ 9. Torts, Penalties and Crimes, 987.
§ 10. Actions by and Against Corporations, 990.

16 Id. 556; 5 A. & E. Enc. P. & P. 38.

8. This topic includes the powers, duties, liabilities, and compensation of coroners and the holding of inquests by them. It excludes admissibility on criminal trial of evidence given at inquest (see Indictment and Prosecution,* § 9), and verdict or finding at inquest as evidence in civil cases (see Evidence,* § 7C; Death by Wrongful Act,* § 5; Insurance,* § 24C), and criminal cases (see Homicide,* § 7B).

9. Where the sheriff is disqualified from summoning jurors, the court should then make an order directing coroner, unless also disqualified, to summon the jury. People v. Vasquez, 9 Cal. App. 545, 99 P 982.

10. Darcy v. Presbyterian Hospital, 130 App. Div. 496, 114 NYS 1052.

11. Section 1773 of the Consolidation Act (Laws 1882, p. 430, c. 410). Darcy v. Presbyterian Hospital, 130 App. Div. 496, 114 NYS 1052.

12. Sandy v. Morgan County Com'rs [Ind.] 87 NE 131.

13. Sandy v. Morgan County Com'rs [Ind.] 87 NE 131.

14. One holding an autopsy under direction of coroner is charged with notice of his statutory limitations. Sandy v. Morgan County Com'rs [Ind.] 87 NE 131. The fact that the law provides that no undertaker shall bury a human body without certificate of physician as to the cause of death, and that physician refused to give certificate because he did not know cause, did not authorize coroner to hold autopsy. Id.

15. Autopsy held not authorized where circumstances indicated that the death of child was from natural cause and there was not the slightest suspicion of death from casualty or violence. Sandy v. Morgan County Com'rs [Ind.] 87 NE 131.

16. Sandy v. Morgan County Com'rs [Ind.] 87 NE 131.

17. Being directed by coroner does not prevent contesting of claim. Sandy v. Morgan County Com'rs [Ind.] 87 NE 131.

18. Clay County v. Thornton [Ark.] 119 SW 246.

19. As contemplated by Kirby's Dig. § 796. Clay County v. Thornton [Ark.] 119 SW 246.

20. As provided by Kirby's Dig. § 797. Clay County v. Thornton [Ark.] 119 SW 246.

21. Did not render act done by physicians in good faith under directions of acting coroner unlawful. Clay County v. Thornton [Ark.] 119 SW 246.

22. Section 1209a. State of Ohio v. Houck, 11 Ohio C. C. (N. S.) 414.

§ 11. **Legislative Control Over Corporations, 992.**

§ 12. **How Corporations May be Dissolved; Forfeiture of Charter; Effect of Dissolution; Winding Up Under Statutory Provisions, 994.** Modes of Dissolution Generally, 994. Dissolution by Forfeiture of Charter, 994. Dissolution by Consent of Stockholders or Directors, 996. Procedure, 997. Effect of Dissolution or Forfeiture, 998. Winding Up and Receivers, 999.

§ 13. **Succession of Corporations; Reorganization; Consolidation, 1002.**

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1. Treats of domestic, private corporations generally. **Excludes** matters relating to foreign corporations (see Foreign Corporations*), taxation of corporations (see Taxes,* § 2C), service of process on them (see Process,* § 4A), and the venue of actions by and against corporations (see Venue,* § 1D). As to unincorporated associations see Associations and Societies;* Joint Stock Companies.* As to franchises generally, as distinguished from corporate franchises as such, see Franchises.* As to the power of a corporation to receive charitable gifts, see Charitable Gifts,* § 2; and as to the power of religious corporations to take property, see Religious Societies,* § 5. The citizenship of a corporation as involving jurisdiction of the federal courts is treated in the topic Removal of Causes.* As to particular crimes by corporations, see Conspiracy* and like topics. As to consolidation of corporations to stifle competition, see Combinations and Monopolies,* § 2. As to regulation of corporations engaging in commerce, see Commerce,* § 2A. As to the remedies to compel the performance of duties by corporations, see Injunction,* § 2G; Mandamus,* § 2C. As to the procedure for the forfeiture of corporate charters, see Quo Warranto.* As to creditor's suits against corporations, see Creditors' Suits.* As to admissions of insolvency by corporate officers see Bankruptcy,* § 3F. As to endeavors of counsel to prejudice a jury against corporations, see Argument and Conduct of Counsel,* § 3. As to the disqualification of stockholders as jurors because of their interest, see Jury,* § 3. As to stockholders as witnesses, see Witnesses,* § 2. As to stockbrokers, see Brokers,* § 2, and as to the accrual of causes of action between stockholder, corporation and creditor, resort may be had to Limitation of Actions,* § 3. As to corporations created for particular purposes including quasi public corporations, see Banking and Finance;* Building and Loan Associations;* Electricity;* Exchanges and Boards of Trade;* Gas;* Insurance;* Mines and Minerals;* Railroads;* Street Railways;* Telegraphs and Telephones;* Warehousing and Deposits.* As to quasi public corporations operating drains, see Sewers and Drains,* § 3, or engaging in supplying water, see Waters and Water Supply,* § 15, as to water companies and § 14 as to irrigation and power companies.

§ 1. *Definition and nature of corporations.*[2]—See 11 C. L. 810—A corporation is an artificial being,[3] distinct from its stockholders,[4] owing its existence entirely to the action of the state[5] and acting only through duly authorized agents.[6] Corporations are usually held to be persons[7] within constitutional or statutory provisions using that word but not referring expressly to corporations.[8] In some cases equity will look beyond form to the substance and observe that a corporation is merely an instrument by means of which individuals upon an agreed capital do an agreed business with limited personal liability,[9] as where fraud may thus be circumvented.[10]

2. Search Note: See notes in 19 L. R. A. 222; 29 Id. 378.

See, also, Corporations, Cent. Dig. §§ 1-6; Dec. Dig. §§ 7, 2; 10 Cyc. 143-148; 7 A. & E. Enc. L. (2ed.) 632.

3. Cunningham v. Klamath Lake R. Co. [Or.] 101 P 1099. An artificial person a distinct legal entity. Ex parte Rickey [Nev.] 100 P 134; In re Roanoke Furnace Co., 166 F 944. A legal entity. Young v. Rohrbough [Neb.] 121 NW 585; State v. Mudie [S. D.] 115 NW 107; Babcock & Wilcox Co. v. Toledo Boiler Works Co. [C. C. A.] 170 F 81. An artificial entity. New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433. An artificial creation with powers conferred by charter. Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731. Artificial creature of state's creation. De La Croix v. Eid Concrete Steel Co., 8 Ohio N. P. (N. S.) 489; Black v. Ellis, 129 App. Div. 140, 113 NYS 558. A fictitious being. Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 NW 926. Corporation is legal fiction, a creature of law. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. **Political parties** organized under general laws of state are legal entities. Independence League v. Taylor, 154 Cal. 179, 97 P 303.

Definition: A private corporation is association of persons to whom sovereign has offered franchise to become an artificial, juridical person, with name of its own, under which they can act and contract, and sue and be sued, and who have either accepted offer and effected an organization in conformity with its terms (in which case a corporation de jure has been constituted) or have done acts indicating a purpose to accept such offer and effected an organization designed to be, but in fact not, in substantial conformity with its terms (in which case a corporation de facto has been constituted). MacKay v. New York, etc., R. Co. [Conn.] 72 A 583.

4. J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council, 154 Cal. 581, 98 P 1027; Judy v. Beckwith, 137 Iowa, 24, 114 NW 565; State v. Mudie [S. D.] 115 NW 107; Thomas v. Matthiessen, 170 F 362; In re Roanoke Furnace Co., 166 F 944. Corporation is entity separate and distinct from stockholders and from other corporations with which it may be connected. In re Watertown Paper Co. [C. C. A.] 169 F 252. Mere fact that corporation is under control of members of particular church does not make it religious corporation. Baltzell v. Church Home & Infirmary, 110 Md. 244, 73 A 151. Ownership of majority of capital stock of another corporation by one corporation, fact that some persons are members of boards of directors of both corporations, fact that latter corporation advertises that its certain department is operated by and that it will continue to manufacture product of former corporation, together with an averment that it does not in anywise control former company, are insufficient to show infringement of patent of a third corporation by latter corporation. Westinghouse Elec. & Mfg. Co. v. Allis-Chalmers Co., 168 F 91. Where corporation, stockholder of another corporation, is made codefendant with latter in infringement suit, decree for injunction and accounting will not issue against former where latter corporation is solvent and former corporation has not violated and is not threatening to violate patent. Id. Corporation is **entity distinct from its board of directors,** whose personnel may change without affecting identity or life of corporation. Mueces Val. Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

5. New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433. See post, § 3.

6. Corporation is principal and its officers are its agents. Ex parte Rickey [Nev.] 100 P 134. Corporation is nonpersonal in its formal legal entity, but represents natural persons and must necessarily act through natural persons or agents. Hypes v. Southern R. Co., 82 S. C. 315, 64 SE 395. Corporation can receive money only by officer or agent. Heckard v. Dougherty, 133 Ill. App. 420.

7. Corporation, though an intangible thing in eyes of law, is a person. Thomas v. Matthiessen, 170 F 362. Corporation composed of colored persons held **not colored person** within covenant against vesting title to land in "colored persons." People's Pleasure Park Co. v. Rohleder [Va.] 63 SE 981, denying rehearing [Va.] 61 SE 794.

8. Cannot be denied **equal protection of laws.** Birmingham Waterworks Co. v. State [Ala.] 48 S 658; Kiley v. Chicago, etc., R. Co., 138 Wis. 215, 119 NW 309. Due process of law. Kiley v. Chicago, etc., R. Co., 138 Wis. 215, 119 NW 309.

9. Champagne Lumber Co. v. Jahn [C. C. A.] 168 F 510. Where corporation is dissolved by mutual consent, stockholders with corporate assets were in no better position than corporation itself to challenge plaintiff's prima facie right to bill in aid of execution. Id.

10. In re Watertown Paper Co. [C. C. A.] 169 F 252. Legal fiction of distinct corporate existence will be disregarded where corporation is so organized and controlled and its affairs are so conducted that it is merely an instrumentality or adjunct of another corporation. Id. Exception not applicable

§ 2. *Classification of corporations.*[11]—See 11 C. L. 811—Corporations are variously classified for the purposes of taxation [12] with relation to the right to do business in the state [13] and with relation to liability for negligence.[14] A general and fundamental division of all corporations is into public [15] and private,[16] corporations, and all belong to one or the other of these two classes.[17] A class of private corporations having to do with what are called public utilities partake somewhat of the nature of public corporations and are known as quasi public corporations.[18]

§ 3. *Creation, name and existence of corporations, and the amendment, extension and revival of charters.*[19]—See 11 C. L. 811—The right to be and exist as a corporation is often termed a corporate "franchise" or charter,[20] and such right is derived solely from the legislature [21] which represents the sovereign power of the state, and may, subject to constitutional restrictions, create and destroy corporations at will.[22] Probably the most common constitutional restriction of the legis-

where separate organizations apparently kept up, separate creditors, assets, books of account, stockholders, etc., though affairs mingled and lax business methods. Id.

11. Search Note: See note in 1 Ann. Cas. 371.

See, also, Corporations, Cent. Dig. §§ 7-10, 136; Dec. Dig. § 3; 10 Cyc. 145-148; 7 A. & E. Enc. L. (2ed.) 635.

12. See Taxes, § 2C.

13. See Foreign Corporations, § 1.

14. See post, § 9, Torts, Penalties and Crimes.

15. Public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with public good, in administration of civil government, an instrument of government subject to control of legislature and its members. Phillips v. Baltimore, 110 Md. 431, 72 A 902. Public corporations are synonymous with municipal or political corporations. Id.

16. Corporation may be private and yet act or charter of incorporation contain provisions of purely public character, introduced solely for public good and as general police regulation of state. Phillips v. Baltimore, 110 Md. 431, 72 A 902.

17. Phillips v. Baltimore, 110 Md. 431, 72 A 902.

18. Private in ownership and distribution of profits, but engaged in business directly affecting public, such as transportation, and partake of nature of both private and public corporations. Economic Power & Const. Co. v. Buffalo, 195 N. Y. 286, 88 NE 389; McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80. That a corporation is obligated to perform public duties, and is endowed with certain rights which depend upon public use, does not make such corporation a public corporation. Economic Power & Const. Co. v. Buffalo, 195 N. Y. 286, 88 NE 389.

19. Search Note: See notes in 22 L. R. A. (N. S.) 176; 1 L. R. A. (N. S.) 176; 50 A. S. R. 150; 11 Ann. Cas. 807.

See, also, Corporations, Cent. Dig. §§ 11-69, 79, 80, 101-138, 2052-2081, 2086, 2087; Dec. Dig. §§ 4-24, 31-50, 514, 518; 10 Cyc. 160-205, 219-235; 7 A. & E. Enc. L. (2ed.) 639, 684.

20. Right to exist as corporation is "corporate franchise." Blackrock Copper Mining & Mill Co. v. Tingey, 34 Utah, 369, 98 P 180; Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. General franchise is corporation's right to live and do business by exercise of corporate powers granted by state. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Charter of corporation is law which gives it existence as such, that is, its "general franchise." Id. Spirit of corporation's existence is its charter. Nueces Val. Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633. It is quite generally recognized by courts that true franchise as applied to corporations has various significations both in legal and popular sense and has especially two well defined meanings, one pertaining to what is sometimes called "primary franchise," the right to exist as corporation, and the other to different rights, powers and privileges which are obtained and exercised by the corporation and which are not prerequisite to its existence, such as, among others, right or privilege to occupy and use streets and public places. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Strictly speaking, franchise of corporation consists of rights, powers, and privileges given by act of legislature incorporating it, or certificate of incorporation creating its existence pursuant to statutory authority. People v. Consolidated Gas Co., 130 App. Div. 626, 115 NYS 393. Municipal grants and consents are not franchises strictly speaking but in nature of consent of property owners and those having management and control of property, and are somewhat similar to consent of private property owner for use of his property by corporation in fulfillment of its functions. Id.

21. Legislative department alone may form corporations or authorize their formation or prescribe their term of existence. Boca Mill Co. v. Curry, 154 Cal. 326, 97 P 1117. Right to exist derived solely from state. City of New York v. Bryan, 130 App. Div. 658, 115 NYS 551. Corporation is created by statute. Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 NE 670. Purely creature of statute and can exist only by permission of state. Boca Mill Co. v. Curry, 154 Cal. 326, 97 P 1117. Creatures of legislative department and exist only by virtue of act of incorporation. Knapp v. Supreme Commandery U. O. of G. C. [Tenn.] 118 SW 390.

22. New York Life Ins Co. v. Bradley [S. C.] 65 SE 433. State may wind up any corporation it has created. State v. Syndicate Land Co. [Iowa] 120 NW 327. Power to create implies power to destroy. City of New York v. Bryan, 130 App. Div. 658, 115 NYS 551.

lative power is that forbidding the creation of corporations by special act.[23] Another restriction frequently applied to incorporating statutes is that private bills shall embrace only one subject, which shall be expressed in its title.[24] It is apparent that a corporation cannot be actually or virtually created by estoppel.[25] A state may grant a franchise of incorporation to a corporation of another state,[26] and a corporation created under the laws of a territory becomes a corporation of the state when the territory is admitted as a state.[27] Ministerial acts necessary to effect the existence of a corporation may be delegated.[28] Since the granting of the privilege to be a corporation rests entirely in the discretion of state, it may be conditional [29] and may limit the duration of corporations,[30] provide conditions precedent or subsequent to their existence,[31] or withhold powers which may be exercised by

23. Statement that corporations shall not be created by special laws implies that no limitation is intended to be placed upon power of legislative departments of state, whether asserted by people through initiative or by them through representatives to permit formation of corporations by general laws upon subject. Straw v. Harris [Or.] 103 P 777. Incorporation of Economic Power & Const. Co. under special act not rendered necessary because objects of corporation could not be attained under general laws (Const. art 8, § 1). Economic Power & Const. Co. v. Buffalo, 195 N. Y. 286, 88 NE 389. Laws 1870, p. 14, authorizing construction of locks in river and collection of tolls, is special grant of franchise which could not be acquired by specification in articles and is not creation of corporation by special law, contrary to constitution. State v. Portland General Elec. Co. [Or.] 98 P 160. Under Const. art. 11, § 2, as amended June 4, 1906, reading, "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws" when viewed in the light of other section, **word "corporations"** is employed in its broadest sense including public, municipal, and private corporations. Straw v. Harris [Or.] 103 P 777. Statute authorizing incorporation of **fraternal society** composed of grand and subordinate lodges is not unconstitutional as special legislation prohibited by Const. art. 15, § 1. People v. Wilson [Mich.] 16 Det. Leg. N. 506, 122 NW 297. Act Feb. 12, 1909 (Laws 1909, p. 78), as to **incorporation of ports** in counties bordering on bays or rivers navigable from the sea, is a general law. Straw v. Harris [Or.] 103 P 777.

24. Const. art. 3, § 16. Economic Power & Const. Co. v. Buffalo, 195 N. Y. 286, 88 NE 389. Every act incorporating company for private gain and generally all acts relating to single corporation are private acts, while an act relating to all corporations would be a public act. Id. Laws 1893, p. 949, c. 459, to incorporate Economic Power and Construction Company, is private bill. Id. Mere fact that corporation is obligated to perform public duties and is endowed with certain rights which depend upon public use does not make act under which it is incorporated public act. Id. Name of corporation may materially affect question as to whether private franchise given by act can be sustained. Id. Title of Laws 1893, p. 949, c. 459, "to incorporate the Economic Power & Construction Co.," held insufficient to embrace granting of privilege to dig trenches in streets of municipality for steam pipes and electric power conduits, and, hence, that portion of act was violative of Const. art. 3, § 16, as to title. Id. Words "construction" and "power" held insufficient to indicate necessity of special franchise. Id.

25. Act would be in manifest opposition to statutes and clearly against its policy. National Shutter Bar Co. v. Zimmerman & Co., 110 Md. 313, 73 A 19. In action for libel where defense was successfully invoked that complainant's corporation by failing to comply with Pub. Gen. Laws, art. 81, § 98, as to payment of bonus tax, had no corporate existence, estoppel could not be relied upon as valid replication, since such plea would operate to create corporation in disregard of statutes prescribing conditions precedent. Id.

26. MacKay v. New York, etc., R. Co [Conn.] 72 A 583.

27. Consolidation and formation of domestic corporation under territory of Oklahoma not effected. St. Louis & S. F. R. Co. v. Cross, 171 F 480.

28. Straw v. Harris [Or.] 103 P 777. Act Feb. 12, 1909 (Laws 1907, p. 78), providing for incorporation of sea ports, is valid in that it provides for determination of incorporation of port by county court. Id.

29. Berea College v. Kentucky, 211 U. S. 45, 53 Law. Ed. 81; People v. Glynn, 194 N. Y. 387, 87 NE 434. State has sole power to determine upon what conditions corporations may be created and exist within its borders. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Legislative authority to confer powers upon corporations created by it necessarily involves authority to regulate and restrict exercise of such powers. Robinson v. Harmon [Mich.] 15 Det. Leg. N. 711, 117 NW 661. Individuals have no right to demand creation and state may create one corporation and refuse to create another of same kind. New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433. No statute or inference authorizes one corporation to organize another. Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 NE 670.

30. City of New York v. Bryan, 130 App. Div. 658, 115 NYS 551.

31. City of New York v. Bryan, 130 App. Div. 658, 115 NYS 551. Under Civ. Code 1902, §§ 1918-1921, Const. art. 9, § 8, and 23 Stat. 1053, owners or projectors of railroad already chartered in another state desiring to extend third railroad into this state must : condition of incorporation open subscription books in state to amount of $500 per mile, elect officers and take steps set out as con-

and cannot be denied to an individual [32] or which have been granted other corporations.[33] General laws usually provide for the incorporation of certain businesses,[34] and such statutes contain provisions requiring the application for incorporation to state the amount of capital to be employed by the proposed corporation,[35] provisions as to filing of the articles of incorporation [36] and by laws,[37] and as to publication of notice of incorporation.[38] Where a statement in an application would not be available to prevent a forfeiture of the corporate charter, the charter will not be invalidated by the omission of such statement.[39]

Corporate name. See 11 C. L. 812—A corporate name is essential to the existence of a corporation,[40] and cannot be changed, either directly or by user, except in the manner authorized by law.[41] The matter of changing the name of a corporation, however, is usually a matter of business management only,[42] and the mere change

ditions to issuance of charter by secretary of state. Lyles v. McCown, 82 S. C. 127, 63 SE 355. Under Code Pub. Gen. Laws, art. 81, § 98, **payment of bonus tax** is prescribed as condition precedent to possession or exercise by any corporation, other than excepted classes, of any corporate powers. National Shutter Bar Co. v. Zimmerman & Co., 110 Md. 313, 73 A 19.

Legislative control: See post, § 11.

32. Berea College v. Kentucky, 211 U. S. 45, 53 Law. Ed. 81. Statute forbidding corporation to teach white or colored children together may be valid as to such corporation, though violating federal constitution as denying rights of individuals. Id. While corporations are entitled to protection of constitutions of state and United States, they are in class by themselves, and may be dealt with differently from natural persons. State v. Jackson Cotton Oil Co. [Miss.] 48 S 300.

33. State may grant or withhold privilege as to each corporation on conditions it sees fit. People v. Glynn, 194 N. Y. 387, 87 NE 434.

34. Act Mar. 5, 1887 (Comp. St. 1887, div. 5, c. 27), purports to be a complete statute as to incorporation, management, and control of state banks and banking corporations. State v. Yoder [Mont.] 103 P 499. If incorporation laws found in Comp. St. 1887, div. 5, c. 25, ever applied to state banks, they were superseded by statute found in c. 27. Id.

35. Not necessary to pay in capital or any part of it, until charter has been obtained and corporation is about to commence business, and, hence, it is unnecessary to recite in application that capital has been paid in. Civ. Code 1895, § 2350(1), construed in connection with paragraph three of same section. Bing v. Bank of Kingston, 5 Ga. App. 578, 63 SE 652.

36. Corporations formed for the purpose of engaging in business of manufacturing are governed by Comp. St. 1905, c. 16, § 37, and the articles of incorporation need not be filed with the county clerk in the county where its headquarters are located. Meyer-Cord Co. v. Hill [Neb.] 120 NW 951. Rev. Codes, § 3823, as to filing of copy of articles in office of secretary of state and preventing holding of any property or actions in relation thereto until such filing, applies only to domestic corporations. Uihlein v. Caplice Commercial Co. [Mont.] 102 P 564.

37. Wilson's Rev. & Ann. St. 1903, § 962, requiring every corporation formed thereunder to adopt code of by-laws within one month after filing articles of incorporation, does not apply to banking corporation. Smock v. Farmers' Union State Bank [Okl.] 98 P 945.

38. Under Code, §§ 1613, 1616, with reference to publishing notice of incorporation, etc., statement in notice that property of incorporators was exempt from corporate "suits" instead of "debts" held not fatal mistake and that it was equivalent to saying that incorporators were exempt from corporate debts. Commercial Nat. Bank v. Gilinsky [Iowa] 120 NW 476. Code, §§ 1613, 1666, providing for filing of affidavit of publication of notice of incorporation with secretary of state, is directory and not mandatory, requirement not being essence of thing done, but proof of it, and as no time is fixed within which affidavit must be filed and no prejudice could result from delay. Id.

39. Baltzell v. Church Home & Infirmary, 110 Md. 244, 73 A 151. Under Acts 1852, c. 231, incorporation of charitable institution was not rendered invalid because certificate of incorporation failed to state that incorporators were "free white persons, citizens of the United States and a majority of them citizens of the state." Id.

40. Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731. Under Business Corporation Law (Laws 1890, p. 1168, c. 567), § 2, subd. 1, first requisite in certificate of incorporation is "name of proposed corporation." Id.

41. Public cannot give corporation name other than that of its creation, by which it can be recognized in judicial proceedings. Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731. In its business dealings and contracts, corporation must use name given to it by law of its existence. Id. Hyphenating a name and amputating one-half of it is not using the corporate name. Id. The **unification of two corporations** into one corporate existence does not warrant the use of the name of either as a substitute for the name of the new corporation. Id. Contract signed "The Colonial Press" by a corporation bearing the name "Scarsdale Publishing Company—The Colonial Press" held not binding. Id.

42. Change is not material, and, whether name be valuable or merely designative and ornamental, change thereof under and pursuant to law does not require unanimous consent of stockholders, and in absence of fraud is matter of business management. Thomas & Barton Co. v. Thomas, 165 F 29.

of name, even when authorized, has no effect upon the identity of the corporation.[43] A corporation usually has a proprietary right in its name,[44] and equity has jurisdiction to prevent unfair use of corporate names and to assess damages for such use,[45] but a corporate name has no extraterritorial worth except under the doctrine of comity.[46] The assumption of a corporate name for the purpose of soliciting business is sometimes denounced by statute.[47]

Purposes.[See 11 C. L. 813]—The statutes designated with more or less particularity the purposes for which corporations may be formed.[48] The purposes for which a company is organized is primarily to be sought in its charter or certificate of incorporation,[49] and, as between the corporators, the corporate objects so expressed cannot be changed without unanimous consent,[50] unless authorized by statute.[51]

43. Peever Mercantile Co. v. State Mut. Fire Ass'n [S. D.] 119 NW 1008; North Birmingham Lumber Co. v. Sims [Ala.] 48 S 84. Where corporation changed its corporate name under authority of amendment to its articles of incorporation, fact that officers and stockholders changed would not change corporate character or existence. Carlon v. City Sav. Bank, 82 Neb. 582, 118 NW 334. **Evidence** held to show that defendant City Savings Bank was old Omaha Loan & Trust Co. Savings Bank, acting under different name authorized by amendment to articles of incorporation. Id.

44. Under Const. art. 12, § 7, and Laws 1903, p. 124, c. 84, § 1, foreign and domestic corporations are put on terms of equality and prevented from appropriating existing corporate names. State v. Nichols, 51 Wash. 619, 99 P 876.

45. L. Martin Co. v. L. Martin & Wilckes Co. [N. J. Eq.] 71 A 409. A person has no right to use his name as part of name of corporation in which he is interested without regard to effect of such use in way of accomplishing deception and fraud. Id. Apart from any equitable principles which will limit a person in use of his name as part of corporation which he creates for carrying on his business, statute recognizes right in every corporation under general act to be protected against uncertainties and confusion which arise from adoption of similar name by subsequently created corporation. Laws Apr. 21, 1896, c. 185, § 8 (P. L. 280). Id. Corporation may adopt corporate name if not in conflict with corporation act, but such adoption gives it no greater right to use it to injury of another than if an individual should so act. Bear Lithia Springs Co. v. Great Bear Spring Co., 71 N. J. Eq. 595, 71 A 383. Corporation cannot appropriate name and trademarks of another and thus obtain its business by any simulation or deceit. Id. Held that if plaintiff had come into court with **clean hands,** its adoption and use of corporate name including word "bear" by advertising its goods as "Bear Lithia Water" would be protected against unfair competition shown to exist on account of the public's confusion of names or from defendant's use of "Great Bear Spring Water," though latter did not simulate former's labels and packages further than to use large white polar bear while plaintiff used black bear with "Bear Lithia Water" printed across its body. Id. "The American Salvation Army" **held not similar** to "The Salvation Army in the United States," and whatever resemblance between names there is held not to mislead or deceive persons of common intelligence and observation. Salvation Army v. American Salvation Army, 62 Misc. 360, 114 NYS 1039. **Injunction held** proper to prohibit corporation which had assumed name of another corporation from doing any kind of business done by such other corporation during time name thus assumed was unchanged. L. Martin Co. v. L. Martin & Wilckes Co. [N. J. Eq.] 71 A 409. Evidence held to show that company doing business under name of Weglin & Wilckes, which hired one L. Martin as manager for five years at salary of $1,800 and agreed to transfer 60 shares of stock to him at end of five years under certain conditions, and thereupon changed its name to L. Martin & Wilckes, did so with intent to work fraud and secure advantage of prestige belonging to rival concern of L. Martin & Co., particularly where L. Martin had formerly been connected with L. Martin & Co. and his name as he was accustomed to then use it was changed to that shown herein. Id. Benevolent and Protective Order of Elks, composed only of white persons, having for its object charity, entertainment of members, etc., whose name had become very valuable in financial and social way, held entitled to injunction restraining Improved Benevolent Protective Order of Elks composed solely of negroes from using name. Benevolent and Protective Order of Elks v. Improved B. P. O. E. [Tenn.] 118 SW 389.

46. State v. Nichols, 51 Wash. 619, 99 P 876.

47. Civ. Code, § 220, does not denounce assumption of corporate name if not done for purpose of soliciting business. First Nat. Bank v. Cox, 140 Ill. App. 98. Promissory note taken in corporate name held not rendered invalid even if name in question was intended to represent corporate name. Id.

48. Under Laws 1900, p. 699, c. 327, §§ 45, 46, 55; Laws 1896, p. 1052, c. 803, § 1; Building Code New York, par. 25, subd. 2, 3, authorized by charter of 1897; Laws 1897, p. 1, c. 378, confirmed and amended by charter of 1901 (Laws 1901, p. 1, c. 466), and Laws 1904, pp. 1433, 1490, cc. 602, 628, amending charter § 407, corporations may receive certificates of competency to plumb and engage in such business in New York City. William Messer Co. v. Rothstein, 129 App. Div. 215, 113 NYS 772.

49. Corporation Acts (1875 and 1896) require that certificate state objects for which company is formed. Colgate v. U. S. Leather Co. [N. J. Err. & App.] 72 A 126.

50. Colgate v. U. S. Leather Co. [N. J. Err. & App.] 72 A 126.

51. Rule may be changed by legislative act

Fees.[See 11 C. L. 813]—Fees for incorporation may be fixed by the legislature by referring to the provisions of a repealed act.[52] The imposition of annual license fees as a condition to the right to do business is treated in a subsequent section.[53]

Pleading and proof of incorporation.[54]—[See 11 C. L. 813]—In litigation, corporations should be designated by their corporate name,[54a] though a slight departure is immaterial.[55] The name may, of itself, import a corporation and obviate the necessity of allegations of incorporation,[56] and in some cases incorporation will be judicially noticed.[57] Where the allegation of incorporation is sufficient,[58] it will be taken as true unless specifically denied.[59] A defendant association is not prevented from denying corporate existence by the fact that its name imports a corporation,

read into contract. Colgate v. U. S. Leather Co. [N. J. Err. & App.] 72 A 126. General corporation act authorizes change in nature of business of company by vote of two-thirds in interest of stockholders. Id. Action on part of corporation to change nature of its business must be exercised by direct proceedings pursuant to statute authorizing such change. Id. Acts authorizing consolidation (Acts Mar. 8, 1893, P. L. p. 121, and Acts Apr. 21, 1896, P. L. p. 309, § 104) neither permit nor contemplate that change of objects of incorporation is to be accomplished by means of a consolidation agreement. Id.

52. Secretary of state held entitled to fees provided by Act Feb. 28, 1899 (23 Stat. p. 64), as required by Act Feb. 25, 1902 (23 Stat. p 1053), § 4, passed after adoption of Civ. Code 1902, § 1888, incorporating Act Feb. 20, 1901 (23 Stat. p. 710), and consequently repealing latter provisions providing for higher fees. Lyles v. McCown, 82 S. C. 127, 63 SE 355.

53. See post, § 11, Legislative Control Over Corporations.

54. See, also, **Helliwell Supp. to Clark & Marshall, vol. 4, p. 3104.**

54a. Mobile L. & R. Co. v. Mackay [Ala.] 48 S 509.

55. Provided that name would be readily recognized. Mobile L. & R. Co. v. Mackay [Ala.] 48 S 509. In absence of proof that there was another corporation of similar name, proof that M. L. & Railroad Company operated certain car will be held equivalent to proof that M. L. & Railway Company operated same as alleged, words railway and railroad having substantially same meaning, and understood in common parlance to be same. Id. Existence of another corporation of similar name will not be judicially noticed. Id. Although corporation must sue and be sued by its corporate name, yet if some words are added, omitted or changed in spelling, this is not fatal **variance** if there be enough to distinguish it from other corporations, or to show that the corporation sued or being sued is one intended. Varney v. Hutchinson Lumber & Mfg. Co., 64 W. Va. 417, 63 SE 203. Where correct name of corporation was Hutchinson Lumber & Manufacturing Company but writ summoned Hutchinson Lumber & Manufacturing Corporation, there was no fatal variance. Id.

56. Corporate name connotes corporate entity. Minchew v. Nahunta Lumber Co., 5 Ga. App. 154, 62 SE 716. Rule applicable to civil and criminal cases. Id. When name imports incorporation, an amendment of petition setting out real character of plaintiff is unnecessary unless it is denied that plaintiff is corporation and denial is shown by proof. Charles v. Valdosta Foundry & Mach. Co., 4 Ga. App. 733, 62 SE 493. Words "Valdosta Foundry & Machine Co." import corporation and are sufficient as against special demurrer on ground that there is no party plaintiff. Id. In indictment for obtaining money by false pretenses, terms "Southern Express Company" and "Western Express Company" import incorporation and obviate necessity of alleging them to be such. Gray v. State [Ga. App.] 65 SE 191.

57. Though not pleaded. Incorporation by act of congress. Matter of Dunn, 212 U. S. 374, 53 Law. Ed. —.

58. Complaint alleging that defendant is "duly organized and existing, and engaged in operating street railroads," means legally organized, for "duly" in legal parlance means according to law. Hollis v. Brooklyn Heights R. Co., 128 App. Div. 821, 113 NYS 4. Allegation admitting that defendant "knowingly and wrongfully jeopardized lives," etc., of citizens, cannot be construed to controvert allegation of lawfulness. Id. Allegation "solely by reason of wrongful acts of defendant," etc., cannot be construed to controvert. Id.

59. Hollis v. Brooklyn Heights R. Co., 128 App. Div. 821, 113 NYS 4; Steely v. Texas Imp. Co. [Tex. Civ. App.] 119 SW 319.

Sufficiency of denial: Mere recital in answer of defendant to bill filed by corporation, although answer is sworn to, referring to plaintiff as "pretended corporation," is not such denial of existence of corporation under Code W. Va. 1899, c. 125, § 41 (Code 1906, § 3861), as puts matter in issue. Iguano Land & Min. Co. v. Jones, 65 W. Va. 59, 64 SE 640. Allegation of usury alone held not to put in issue corporate capacity of building and loan association in absence of assertion of facts relied upon to show otherwise as required by Code, § 3628. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694. In action against foreign corporation, motion to strike plea that plaintiff was not corporation was correctly overruled. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Under Code Civ. Proc. § 1776, issue cannot be raised on allegation in complaint that plaintiff is corporation by denial at all, but only by affirmative allegation in verified answer that plaintiff is not corporation. Stroock Plush Co. v. Talcott, 129 App. Div. 14, 113 NYS 214. Incorporation not denied as required by Rev. St. 1895, art. 1265, subd. 7. Steely v. Texas Imp. Co. [Tex. Civ. App.] 119 SW 319.

and that it appears and answers in such name.[60] A plea that there is no such corporation as the defendant named is in abatement and cannot be tried at the same time with a plea in bar,[61] but a plea denying that the plaintiff is a corporation is a plea in bar.[62]

Incorporation may be shown by evidence that the proceedings were in substantial compliance with the statute authorizing incorporation,[63] and a de facto corporation is shown by introduction of the charter, proof of user and that the party denying the legality of the corporation dealt with it as a corporation.[64] When no special charter is shown, a corporation may be presumed to have been organized under the general incorporation statute.[65] An affidavit, upon which a charter of a corporation was obtained, is prima facie presumed to be true as to its recital of facts,[66] and a party attacking the same has the burden of establishing the truth of his allegations.[67] Secondary evidence of incorporation is admissible under the conditions usually applicable to such evidence.[68]

Amendment, extension and revival of charters. See 11 C. L. 814—A corporate charter is a contract between the state and the corporation, the obligations of which the state cannot impair,[69] but, in granting a charter, the state may reserve the power to alter, amend or repeal the same,[70] and such reservations in the constitution or statutes of a state[71] become a part of every charter granted by such state,[72] but the reserved power to alter or amend charters is not without limitations,[73] and must be exercised in a reasonable manner[74] and so as not to violate constitutional restric-

60. Where complaint shows defendant to be an association. Farmers' Mutual v. Reser [Ind. App.] 88 NE 349.

61, 62. Gelmer Creamery Ass'n v. Quentin, 142 Ill. App. 448.

63. Evidence held to show that certain company was corporation and not partnership, its proceedings for incorporation having been in close conformity with Code 1896, art. 11, c. 28 (§§ 1251-1260). First Nat. Bank v. Henry [Ala.] 49 S 97.

64. Introduction of charter, proof of user, and that party dealt with it as corporation. Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167.

65. Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 NW 857.

66. Cherry v. First Texas Chemical Mfg. Co. [Tex. Civ. App.] 115 SW 81.

67. Cherry v. First Texas Chemical Mfg. Co. [Tex. Civ. App.] 115 SW 81. Evidence held insufficient to raise question of truth or falsity of affidavit. Id.

68. Admissible after notice to defendant to produce charter, though defendant be a foreign corporation. Ackerman v. Atlantic Coast Line R. Co. [S. C.] 65 SE 265.

69. In re Western Bank & Trust Co., 163 F 713; Boswell v. Security Mut. Life Ins. Co., 193 N. Y. 465, 86 NE 532. In absence of reserved power, legislature cannot revoke valuable rights and privileges of corporation amounting to franchise. St. Louis & S. F. R. Co. v. Cross, 171 F 480.

70. Power to alter or amend charter reserved power in interest of state to modify or repeal its own contracts with corporations. State v. Railroad Com. [Wis.] 121 NW 919. Charters are held at will of legislature subject to amendment and repeal. State v. Jackson Cotton Oil Co. [Miss.] 48 S 300.

71. Const. art. 15, § 1. Bigelow v. Calumet & Hecla Min. Co., 167 F 704, afd. [C. C. A.] 167 F 721. Const. art. 8, § 1, provides that all general and special acts creating corporations may be altered or repealed. Yadkin River Power Co. v. Whitney Co., 150 N. C. 31, 63 SE 188. Power reserved by constitution and statutes. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Corporate charters issued under Laws 1853, p 887, c. 463, as amended, providing for organization of life insurance companies, are subject to power of amendment under 1 Rev. St. (1st ed.) pt. 1, c. 18, tit. 3, § 8. Id. Under reserved power of Const. 1879, art. 12, § 1, legislature may change conditions upon which privilege of being and acting as corporation shall continue to exist, and every corporation accepts its charter subject to such power. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341.

72. People v. Raymond, 194 N. Y. 189, 87 NE 90. Corporation takes charter subject to reserved power (Const. art. 8, § 1) to amend or repeal. Yadkin River Power Co. v. Whitney Co., 150 N. C. 31, 63 SE 188. Legislature has reserved power to so amend law under which charter has been taken out as to carry with it a corresponding amendment of the charter itself, either directly, or by authorizing corporation to make change. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443.

73. Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 SW 796; Berea College v. Kentucky, 211 U. S. 45, 53 Law. Ed. 81.

74. Reserved power to amend charter, in absence of express limitation, must be exercised upon terms that are just and reasonable. Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 SW 796. Under Const. art. 12, § 6, power to revoke or annul charters is subject to limitation that no injustice shall be done incorporators. Id. **Fellow-servant act**

tions.[75] Whether a legislative enactment shall operate as a repeal or alteration of a charter is a question of legislative intent.[76] Repeals by implication, however, are not favored,[77] but the amendment or repeal of general laws forming part of a corporate charter operates as an amendment or repeal of such charter,[78] unless a contrary intent is indicated.[79]

The authority to allow amendments at the instance of the corporation rests in the legislature the same as the power to incorporate in the first instance.[80] A corporation may, therefore, have its charter amended when [81] and in the manner [82] authorized by statute.

(Acts 1907, p. 162) held a reasonable and constitutional amendment to charters of corporations. Id.

75. Power of repeal reserved in acts of incorporation must be exerised in subjection to acts of federal constitution. City of New York v. Bryan, 130 App. Div. 658, 115 NYS 551. Legislature cannot defeat or substantially impair object of grant or rights vested under it. Berea College v. Kentucky, 211 U. S. 45, 53 Law. Ed. 81. The Manchester & Richmond Free Bridge Co. is neither municipal corporation nor public institution owned and controlled by state in contemplation of Const. art. 12 (Code 1904, p. ccxlix) and hence general assembly had no power to pass Act of March 5, 1908 (Laws 1908, p 184, c. 144), amending act of incorporation and granting certain powers. Commonwealth v. Manchester & Richmond Free Bridge Co. [Va.] 63 SE 1083. Power limited by provision of federal constitution against **impairment of contracts.** New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433. Reserved power of state to regulate corporations must be exercised subject to the constitutional provisions against impairing obligation of contracts. Boswell v. Security Mut. Life Ins. Co., 193 N. Y. 465, 86 NE 532. Legislative regulation of commissions payable to agents held not retroactive so as to annul contract for twenty years made before passage of statute. Id. Power of state to alter or repeal existing corporate charters is one of regulation and control, and does not authorize **interference with vested property rights.** State v. Railroad Com. [Wis.] 121 NW 919. Right to amend charter does not include right to take away money invested in reliance thereon or property acquired thereunder, such rights being protected by federal constitution. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Cannot deprive corporation of property without compensation. Id. No reservation could authorize law giving, to policyholders of insurance company, capital stock of stockholders or any right so connected with their property as to be essential to its preservation and existence. Id. Charter of insurance company held to have limited dividends to 7 per cent annually, to have required all excess to be accumulated, to have provided that business be transacted on mutual plan, meaning that policyholders were to share in surplus upon some equitable basis consistent with safety, and that mutualization might be provided by act of directors in certain manner, hence held that stockholders took stock subject to these provisions and are bound thereby, and hence held that Laws 1892, p. 1955, c. 690, § 52; Laws 1901, p. 1779, c. 772, § 1; Laws 1906, p. 771, c. 326, § 13, permitting mutualization as under original charter with exception of differences of detail, which are held reserved to legislature under its general power to amend, etc., corporate charters, was within power of legislature under charter, and stockholders are deprived of no rights thereunder by such act which enables policyholders to elect majority of board of directors. Id.

76, 77. Smock v. Farmers' Union State Bank [Okl.] 98 P 945.

78. Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 SW 796. Electric company deprived of right of eminent domain by re-enactment of statutes operating to repeal charter rights. Yadkin River Power Co. v. Whitney Co., 150 N. C. 31, 63 SE 188. Ky. Acts 1904, c. 85, p. 181, § 1, is not in terms an amendment of corporate charter but has such effect and provides that authority previously given state corporations to teach white and colored children together is forbidden. Berea College v. Kentucky, 211 U. S. 45, 53 Law. Ed. 81.

79. Repeal of general incorporation act and re-enactment of new act does not affect existing corporations formed under former act, unless expressly so provided. Smock v. Farmers' Union State Bank [Okl.] 98 P 945. Cannot be so construed where the manifest purpose of new act is to revise and substitute more perfect statute. Id. Act of legislature (Sess. Laws 1907-1908, p. 125, c. 6, art. 1) is revising act intended as substitute for all former acts relating to banks and banking, and repeals Wilson's Rev. & Ann. St. 1903, §§ 242-300, and Sess. Laws 1903, p. 83, c. 41; Sess. Laws 1905, p. 84, c. 7; Sess. Laws 1907-08, p. 145, c. 6, art. 2, and Sess. Laws 1907-8, p. 152, c. 6, art. 3. Id.

80. When legislature authorizes course of procedure whereby charter may be acquired or amended, action in conformity thereto does not create charter or make amendment, but both come into existence through operation of statute. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Amendment is act of legislature same as charter itself, and neither has existence except as conferred by statute. Id. Fact that legislature authorized directors to amend corporate charter did not change fact that legislature amended same. Id.

81. Under Ky. St. 1909, §§ 570, 574 (Russell's St. §§ 2156, 2145), as to filing of acceptance of provisions of constitution with secretary of state, and authorizing amendment of articles as if corporation organized under act and § 559 (§ 2144) as to amendment of articles by consent of two-thirds of owners

Except as limited by constitutional provisions,[83] the power of the legislature to extend the term of existence of a corporation is absolute,[84] and in some states corporations may, by proper proceedings, continue their existence [85] indefinitely.[86]

§ 4. *Effect of irregularities in organization and of failure to incorporate.*[87] See 11 C. L. 815—Remedial or curative statutes providing that incorporations shall not be declared void for formal defects [88] are constitutional if vested rights are not impaired thereby.[89]

Stockholder or member as partner or agent. See 11 C. L. 815—The general rule is that parties who associate themselves together and actively engage in business for profit under any name are liable as partners for the debts incurred,[90] but a well recognized exception to this rule arises where associates escape individual liability by the formation of a de jure corporation,[91] or by a real attempt to form such a corporation, which, however, is defective and results in a de facto corporation.[92] Since, therefore, escape from individual liability is an exception to the rule, the parties seeking to avail themselves of this exemption have the burden of proving incorporation.[93] Individual liability may also arise where parties engage in busi-

of stock, a corporation could amend its articles of incorporation during its corporate life. Home Bldg. Ass'n v. Bruner [Ky.] 120 SW 306.

82. Law of Georgia permits amendments to charters of corporations by proper proceedings before superior court. Civ. Code Ga. 1895, § 2350, Acts 1897, p. 28. Thomas & Barton Co. v. Thomas [C. C. A.] 165 F 29. Where governing statute requires charter to be registered in public office, **registration of amendment** is also required. State v. Railroad Com., 137 Wis. 80, 117 NW 846. Where no express provision in statutes for amendments of corporate charter to be publicly recorded (St. 1898, § 1820), requiring fee for **filing of amendments,** recognizes that filing is essential. Id.

83. Const. art. 12, § 7, prohibiting legislature from directly extending franchises or charter, forbids any legislation effecting or authorizing extension of corporate life. Boca Mill Co. v. Curry, 154 Cal. 326, 97 P 1117. Under Const. art. 12, § 7, when considered with other portions of such constitution, legislature is prohibited from granting extensions or remitting forfeiture of any franchise or charter of any corporation by any kind of legislation, general or special. Id. Const. art. 12, § 1, prohibiting creation of corporations by special act and declaring that "corporations may be formed under general laws, does not recognize legislative power to extend or authorize extension of corporate charters. Id. Fact that legislative power as to period for which corporation was organized was unlimited would not authorize legislature to extend charters. Id. St. 1907, p. 344, c. 274, held invalid. Id.

84. Boca Mill Co. v. Curry, 154 Cal. 326, 97 P 1117.

85. Statutes construed and Rev. Codes, § 3907, held applicable to extension of corporate existence of state banks. State v. Yoder [Mont.] 103 P 499. Failure to give six weeks' notice of stockholders' meeting, required by Rev. Codes, §§ 3826-3828, inapplicable and action under § 3907 effectual. Id.

86. Under Laws 1896, p. 277, c. 185. M. Redgrave Co. v. Redgrave [N. J. Eq.] 71 A 147.

87. Search Note: See notes in 9 C. L. 739; 11 Id. 1200; 24 L. R. A. 289; 2 L. R. A. (N. S.) 144; 15 Id. 409; 29 A. S. R. 600; 33 Id. 176; 94 Id. 593; 118 Id. 253.

See, also, Corporations, Cent. Dig. §§ 26, 70, 96, 2504; Dec. Dig. §§ 25-29, 4; 10 Cyc. 241, 244-261, 1065, 1086-1088, 1345, 1346; Partnership, Cent. Dig. §§ 56-60; Dec. Dig. §§ 41-43; 8 A. & E. Enc. L. (2ed.) 747.

88. Acts 1908, p. 27, c. 240, § 6, is manifestly for purpose of saving incorporation of persons who have in good faith made an effort to comply with requirements of corporation laws, but whose compliance was in some respects irregular or informal. National Shutter Bar Co. v. Zimmerman & Co., 110 Md. 313, 73 A 19. Act not applicable in case of indifference or neglect. Id. Statute not intended as an enabling or curative act to counteract effect of decisions of court under Code Pub. Gen. Laws 1904, art. 81, § 98, declaring payment of **bonus tax** a condition precedent to existence of a corporation. Id.

89. Act 1904, p. 281, No. 120, recognizing validity of corporations theretofore attempted to be formed under laws of state, and providing that validity of their acts and contracts shall be same as if said corporations had been always valid, is not unconstitutional as impairing obligation of contracts. Provident Bank & Trust Co. v. Saxon, 123 La. 243, 48 S 922.

90, 91. Harrill v. Davis [C. C. A.] 168 F 187.

92. Harrill v. Davis [C. C. A.] 168 F 187. Generally, in absence of statute, stockholders of supposed corporation doing business as de facto corporation cannot be held liable as partners, though organization is defective. Wasson v. Boland, 136 Mo. App. 622, 118 SW 663. Demand based on certificate of deposit denied, since by law of Iowa stockholders were not liable as partners. Id.

93. Harrill v. Davis [C. C. A.] 168 F 187. Burden upon corporators to organize so as to be exempt from individual liability and liability is imposed upon failure, even in absence of fraud, upon principle that where one of two parties must suffer, he must bear loss whose breach of duty caused it. Id. Associates held individually liable where failure to prove de facto corporation. Id.

ness as a pretended corporation,[94] where a corporation is fraudulently organized,[95] or where stockholders of a de facto corporation consider and conduct themselves as partners.[96] Statutes sometimes render incorporators liable as partners when the corporation is formed in a foreign jurisdiction to avoid state laws.[97]

De facto corporation.[See 11 C. L. 816]—Essential to the existence of a de facto corporation is a valid law under which a corporation with the powers assumed might be incorporated,[98] a bona fide attempt to organize under such law,[99] and actual user of the supposed corporate franchise.[1] Where these three elements coexist, there is a de facto corporation,[2] but not otherwise.[3]

Collateral attack.[See 11 C. L. 816]—The general rule is that the existence of a de facto [4] or de jure [5] corporation cannot be questioned collaterally.

Estoppel to deny incorporation.[See 11 C. L. 817]—One who contracts or deals with a corporation as such admits its existence and is usually estopped to deny the incorporation.[6] This rule, however, presupposes the existence of at least a de facto corporation.[7]

94. Parties acting under name and pretense of corporation which they know neither exists nor has any color of existence are agents of principal known not to exist, and under familiar rule are liable because no responsible principal. Harrill v. Davis [C. C. A.] 168 F 187.

95. Corporation fraudulently organized has no legal existence. Journal Co. v. Nelson, 133 Mo. App. 482, 113 SW 690. Members are liable as partners. Id.

96. Evidence insufficient to show deceased knowingly party to change in mode of operating bank, whereby he considered himself partner, but that bank was to him de facto corporation. Wasson v. Boland, 136 Mo. App. 622, 118 SW 663.

97. Rev. St. 1899, § 1025, as amended by Laws 1903, pp. 122-123 (Ann. St. 1906, p. 889), is inapplicable where corporation is organized in foreign state to do business in another foreign state. Journal Co. v. Nelson, 133 Mo. App. 482, 113 SW 690.

98. Farmers' Mutual v. Reser [Ind. App.] 88 NE 349; Harrill v. Davis [C. C. A.] 168 F 187; Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 89 NE 167.

99. Farmers' Mutual v. Reser [Ind. App.] 88 NE 349; Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167; Harrill v. Davis [C. C. A.] 168 F 187. Agreements to form, statements, signed articles to form, or acts as corporation, created no corporation where filing was essential. Harrill v. Davis [C. C. A.] 168 F 187. Association could not be held corporation where there was no attempt to incorporate. Farmers' Mutual v. Reser [Ind. App.] 88 NE 349.

1. Farmers' Mutual v. Reser [Ind. App.] 88 NE 349; Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167; Harrill v. Davis [C. C. A.] 168 F 187.

2. Where corporation attempted to amend charter pursuant to statutes and changed name and domicile. In re Western Bank & Trust Co., 163 F 713. Where defect of incorporation of railroad could have been remedied under statute, and certificate was received by secretary of state, signers assuming to act as corporation. In re New York, W. & B. R. Co., 193 N. Y. 72, 85 NE 1014. Defect in acknowledgment of articles of incorporation and failure to give statutory notice do not deprive corporation of its de facto standing. Troutman v. Council Bluffs Street Fair & Carnival Co. [Iowa] 120 NW 730. Defect in organization did not prevent corporation from being such de facto. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563. Did not disqualify it from acquiring, holding, and conveying real estate. Id. Charter faultily drawn but which has all essentials is nevertheless charter. Stephens v. Louisiana Long Leaf Lumber Co., 122 La. 547, 47 S 887.

3. Absence of any of above requirements defeats claim. Farmers' Mutual v. Reser [Ind. App.] 88 NE 349. User is ineffectual where other elements lacking. Harrill v. Davis [C. C. A.] 168 F 187.

4. Legality of corporation de facto cannot be questioned collaterally by one who deals with it as corporation. Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167. If religious corporation incorporated under wrong act and might be held improperly organized in quo warranto proceedings, its corporate existence could not be attacked in an action for specific performance. St. John The Baptist Greek Catholic Church v. Baron [N. J. Eq.] 78 A 422.

5. Validity of charter cannot be attacked collaterally. Harrison v. Philadelphia Contributionship for Ins., 171 F 178. Invalidity of religious society cannot be drawn into question by private suitor in collateral proceeding. Klix v. Polish Roman Catholic St. Stanislaus Parish [Mo. App.] 118 SW 1171. Where there were irregularities in manner of retirement of old and issue of new stock, state alone had right to complain. In re Western Bank & Trust Co., 163 F 713. Existence as corporation de jure is subject to question in direct proceedings only. Troutman v. Council Bluffs Street Fair & Carnival Co. [Iowa] 120 NW 730. Objection that through defects in acknowledgment of articles of incorporation and failure to give statutory notice pretended corporation is in fact only partnership is of no avail to one not creditor, but stockholder equally at fault with other stockholders for defect. Id.

6. Patterson v. Northern Trust Co., 132 Ill. App. 208; Orr v. McLeay [Ga. App.] 65 SE

§ 5. *Promotion of corporations; acts prior to incorporation.*[8] See 11 C. L. 817 A promoter of a corporation is one who brings about its incorporation and organization.[9] Though he purports to act for the projected corporation, a promoter is not strictly an agent,[10] and contracts seeking to bind the future corporation are generally unenforcible as to the corporation,[11] unless expressly or impliedly ratified after incorporation.[12] The rights and liabilities of promoters among themselves often involve a construction of the contracts entered into,[13] and, under the particular contract involved, promoters are sometimes held to be quasi partners.[14] In the

164. Where all **parties interested** treated and dealt with company as corporation and so held it out to world, they were estopped from denying its corporate existence. Eggert v. Cleveland, 138 Ill. App. 434. Could not escape debts contracted on faith of verities of appearance. Id. Parties contracting with each other as corporations estopped to deny corporate existence in respect to such contracts. First Nat. Bank v. Henry [Ala.] 49 S 97. Where corporation acquired all franchises and rights of another corporation by consolidation, becoming obligated to pay its debts and liabilities, it cannot evade such liability by asserting invalidity of its own incorporation. City of Niles v. Benton Harbor-St. Joe R. & L. Co., 154 Mich. 378, 15 Det. Leg. N. 757, 117 NW 937. **Third party** dealing with purported corporation as a corporation held estopped. Toledo Computing Scale Co. v. Young [Idaho] 101 P 257. Person receiving property by agreement cannot deny corporate existence in suit to enforce consideration for use. Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448. Evidence held sufficient to show parties dealt with company as corporation. First Nat. Bank v. Henry [Ala.] 49 S 97. Person dealing with de facto corporation estopped from questioning authority, in action for specific performance. St. John The Baptist Greek Catholic Church v. Baron [N. J. Eq.] 73 A 422. Where banking business was conducted as if corporation legally organized, stock issued and purchased in good faith, etc., persons dealing with such corporation were estopped to deny its existence and to charge stockholders with liability as partners. In re Western Bank & Trust Co., 163 F 713.

Rule inapplicable where association never assumed to be a corporation, or was never so considered by plaintiff. Farmers' Mutual v. Reser [Ind. App.] 88 NE 349.

7. Harrill v. Davis [C. C. A.] 168 F 187. Law will not recognize nor lend its aid to organization of de facto corporation, where law does not authorize or where it forbids such corporation. Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167. One who deals with a pretended corporation which has no colorable legal existence is not estopped from denying incorporation. Harrill v. Davis [C. C. A.] 168 F 187. Parties held not estopped in such case because they stated under oath in their claim for lien that milling company was corporation. Id. Evidence held not to sufficiently show that one denying legal existence of corporation was estopped from so doing because he was one of its promoters. Id.

8. **Search Note:** See notes in 25 L. R. A. 90; 16 L. R. A. (N. S.) 348; 13 A. S. R. 28; 17 Id. 161; 59 Id. 547; 85 Id. 385; 4 Ann. Cas. 660; 8 Id. 262.

See, also, Corporations, Cent. Dig. §§ 97-100, 1789-1792; Dec. Dig. §§ 30, 448; 10 Cyc. 262-280, 1072, 1201; 23 A. & E. Enc. L. (2ed.) 232.

9. Promoter is one who seeks opportunities for making advantageous purchases and profitable investments in industrial or other enterprises, who interests men of means in such projects when found, organizes them into corporation for purpose of taking over project, and attends upon newly formed company until it is fully launched in business. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. Promoter may be stockholder, director, officer, or none of these. Id.

10. Jordan v. Annex Corp. [Va.] 64 SE 1050; Gough Mill & Gin Co. v. Loomey [Tex. Civ. App.] 112 SW 782. Nominal principal is not then in existence. Gough Mill & Gin Co. v. Loomey [Tex. Civ. App.] 112 SW 782.

11. Promoters individually liable. Gough Mill & Gin Co. v. Loomey [Tex. Civ. App.] 112 SW 782.

12. Where corporation after its organization makes original agreement its own contract by adopting and acting on it, such original contract becomes binding on it. Bloom v. Home Ins. Agency [Ark.] 121 SW 293. Where all parties after organization recognize and act on original contract, all parties are bound by it. Id. Contract mutual and binding. Id. As to ratification of promoter's agreement in connection with stock subscriptions, see post, § 14C.

13. Where persons had subscribed for mining stock in proposed company and it was discovered that promoter's option on claims was unenforcible and deal was made with owners of another option, whereby promoter was to be given bonus stock in company to be organized, in settlement of his claim and for services rendered in obtaining subscriptions, subscribers being given an option to ratify act by taking stock in proposed company or receiving their money, when such ratification took place promoter's right to stock was complete. Cranney v. McAllister [Utah] 101 P 985. Evidence held to support finding that bonus stock was given by promoters partly in consideration of forbearance in pressing claim. Id. Promoters had right to give stock in corporation in settlement of claims against mining property sought to be developed and as bonus for services in raising funds. Id.

14. Where complainants were underwriters for the flotation of mining property, which defendant was about to place on the market primarily for his own benefit, such defendant was not in a fiduciary relation but all

latter case each is bound to exercise good faith towards the others,[15] and equity will protect their respective rights;[16] but the mere negligence of one promoter, as distinguished from fraud or breach of contract will not constitute ground for the cancellation of his associates' subscriptions.[17] The abandonment of an agreement for the promotion of a corporation is governed by the intent of the parties.[18] Stock agreements before incorporation are treated in connection with subscriptions after incorporation.[19]

Incorporation of partnerships or other associations.[See 11 C. L. 818]—A partnership may be terminated and merged in a corporation when the partnership property is acquired and stock and bonds are issued in consideration thereof, pursuant to agreement.[20] Since a corporation is a distinct entity,[21] it is not liable for the debts of a firm to whose business and property it succeeds,[22] unless such debts are assumed[23] by special agreement,[24] or it appears that the transfer is a fraud,[25] or a mere continuation of the old firm.[26] The delivery of stated accounts in the name of a partnership to which a corporation succeeds with nothing to notify the corporation that a claim is asserted against it will not create liability.[27]

Fraud of promoters.[See 11 C. L. 818]—Promoters are held accountable to a corporation and its stockholders by the general application to the special circumstances of the principles of equity bearing upon relations of trust and confidence.[28] Thus,

were quasi-partners. Runkle v. Burrage, 202 Mass. 89, 88 NE 573.

15. Runkle v. Burrage, 202 Mass. 89, 88 NE 573. That certain mine was not included, not evidence of lack of good faith or breach of contract. Id. Where determination of properties to be bought was left with defendant and he invested large sums, such investment was strong evidence of good faith. Id.

16. Complaint held sufficient in suit against corporation to protect interest of joint adventurer in stock about to be issued to his associate in disregard of former's rights. Chambers v. Mittnacht [S. D.] 122 NW 434.

17. Runkle v. Burrage, 202 Mass. 89, 88 NE 573. Failure to exercise reasonable care in ascertaining character of properties purchased did not entitle underwriters to rescind and reclaim money subscribed. Id.

18. Turner v. Markham [Cal.] 102 P 272. In parol agreement by promoters of corporation to subscribe for all stock, and to pay for it by securing and conveying property, etc., fact that one of such promoters took such property in his own name as trustee for the corporation was not evidence of abandonment but was a taking in furtherance of agreement, so that there could be no question of disposition in event of death. Id. Evidence insufficient to show abandonment. Id.

19. See post, § 14C.

20. Watkins v. Delahunty, 133 App. Div. 422, 117 NYS 885. Agreement held to contemplate continuance of partnership. Id. Where partnership contemplated purchase of railroad and formation of corporation to reestablish road, in an action for an accounting, defendant had **burden of proof** that partnership had been merged in corporation. Id.

21. See § 1, Definition and Nature of Corporations.

22. Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co. [S. D.] 121 NW 620.

23. In absence of evidence that corporation has assumed debt, it cannot be held liable for debt incurred prior to its incorporation. Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. [Tex. Civ. App.] 116 SW 153. Corporation formed by members of partnership, assets of partnership being assigned to it for continuance of business, will be **presumed** to have assumed partnership debts and it will be held prima facie liable therefor. Id.

24. Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co. [S. D.] 121 NW 620.

25. Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co. [S. D.] 121 NW 620. Complaint insufficient to show incorporation of defendant with intent to hinder and delay creditors of old copartnership. Id. Allegation that insolvent partners with their assets of money joined with third person who also contributed and organized corporation, each receiving one-third of stock, does not carry an implication of fraudulent intent to hinder and delay creditors of partnership. Id. Allegations of what was done with corporate stock, by stockholders, subsequent to incorporation, immaterial if complaint be based upon theory original organization was fraudulent. Id. Such allegations are immaterial if complaint is based upon theory that corporation was liable for debts of partnership which it acquired on its incorporation regardless of question of fraud. Id. Where members of an insolvent partnership take its assets and with third person, who contributes, form corporation, and such corporation issues its stock in ratio of money paid in, stock is good consideration for money paid into corporation. Id.

26. Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co. [S. D.] 121 NW 620. Complaint held insufficient to show organization of corporation which became successor of copartnership. Id.

27. Stimson Mill Co. v. Hughes Mfg. Co., 8 Cal. App. 559, 97 P 322.

28. Bigelow v. Old Dominion Copper Min-

it is said that promoters occupy a fiduciary relation to the corporation,[29] requiring the utmost good faith and fullest disclosure of every matter concerning the financial interests of such corporations [30] and precluding them from taking a secret advantage of other stockholders.[31] This rule should not be applied, however, to deprive promoters of their rights as creditors for money actually advanced.[32] From the fiduciary relation existing, promoters have the burden of sustaining bargains made with the corporation.[33] Knowledge of promoters in a transaction when acting in their own interest and antagonistically to the corporation cannot be attributed to such corporation,[34] and the mere silence by promoters is such fraudulent concealment as will be deemed continuing to avoid the statute of limitations.[35] Promoters acquiring secret profits are jointly and severally liable for the same,[36] and, where the secret profit is taken in the form of shares of stock in excess of the value of services rendered, the promoters may be required to refund the shares or proceeds,[37] and such promoters are also liable as for unpaid subscriptions.[38] The corporation's right of action to recover moneys claimed to be due for promoter's breach of trust is assignable.[39] Contracts for the promotion of a corporation entered into for the express purpose of effectuating an unlawful scheme to dispose of the stock of such corporations are unenforcible.[40] The fraud of promoters is largely involved in connection with stock subscriptions.[41]

§ 6. *Citizenship and residence or domicile of corporation.*[42]—See 11 C. L. 820—A domestic corporation is both a citizen and an inhabitant of that state in which it is

ing & Smelting Co. [N. J. Eq.] 71 A 153. Principles of law of principal and agent and of trustee and beneficiary have been extended to promoters of corporations and promoter is accountable to corporation as if relation of principal and agent or trustee and cestui que trust actually had existed. Jordan v. Annex Corp. [Va.] 64 SE 1050.

29. Chaffee v. Berkley [Iowa] 118 NW 267.

30. Chaffee v. Berkley [Iowa] 118 NW 267. Promoter's acts carefully scrutinized. Jordan v. Annex Corp. [Va.] 64 SE 1050. Promoters, being agents and trustees of corporation, could not purchase land on their own account and sell to corporation at enlarged price unless corporation had fullest and most complete knowledge of transaction and consented thereto. Chaffee v. Berkley [Iowa] 118 NW 267.

31. Jordan v. Annex Corp. [Va.] 64 SE 1050. Stockholder or corporation may recover secret profit of promoter in form of rent from property leased to corporation. Id. **Sale by promoters to themselves,** as corporation, of entire capital stock and large portion of bonds of corporation, held not legally objectionable under existing statutes. Schlesinger v. Fisk, 60 Misc. 442, 113 NYS 578. Sale of entire property of one corporation to another in process of which transactors of deal received large personal profits held not fraud upon purchasing corporation though such transactors dominated both corporations. Id.

32. Sharing in assets. Jordan v. Annex Corp. [Va.] 64 SE 1050.

33. Fraud or misrepresentation need not be shown to disentitle promoters from secret profits. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. Bargain cannot exist unless independent board of direotors is shown to have existed or that bargain was made after full disclosure to shareholders. Id. Evidence held to show that secret profit of promoters was unknown to stockholders. Chaffee v. Berkley [Iowa] 118 NW 267.

34. Chaffee v. Berkley [Iowa] 118 NW 267. Recording of deeds not constructive notice to corporation of price paid for land by promoters where secret profit made. Id.

35. Chaffee v. Berkley [Iowa] 118 NW 267. Action to recover secret profit from promoters because of the fiduciary relation of the parties is solely cognizable in equity, and therefore within one of exceptions to operation of statute of limitations. Code, § 3448. Id.

36. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. Entire secret profit recoverable from one promoter where others beyond state court's jurisdiction. Id.

37. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. As to consideration for shares, see post, § 14C, Subscriptions to Capital Stock, etc.

38. Double liability not to be imposed. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. Liability of stockholders on account of unpaid subscriptions, see post, § 16E.

39. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

40. Against public policy, as giving assistance to promote an unlawful end. Holman v. Thomas, 171 F 219.

41. See post, § 14C, Subscriptions to Capital Stock and Other Agreements to Take Stock.

42. **Search Note:** See Citizens, Cent. Dig. § 16; Dec. Dig. § 2; 7 Cyc. 133-136; Constitutional Law, Cent. Dig. § 627; Dec. Dig. §§ 206(7), 207(7); 8 Cyc. 1042-1051; Corporations, Cent. Dig. §§ 140-150; Dec. Dig. § 52; 7 A. & E. Enc. L. (2ed.) 694.

incorporated.[43] A corporation limited in its operations to certain territory belonging to a foreign nation does not continue as a citizen of such foreign nation when the territory in question is ceded to another nation,[44] but such territory may be rendered a body politic by the nation acquiring it so that the corporation in question may become a citizen of such territory.[45] A domestic corporation doing business in a foreign country is deemed an enemy when a state of war exists.[46]

§ 7. *Powers of corporations.*[47] *A. In general.*[See 11C. L. 820]—Corporations possess only those powers which are conferred either expressly or by necessary implication.[48] Authority for all corporate acts must be found in the corporate charter,[49] consisting of the general laws under which a corporation is formed,[50]

43. Mahopoulus v. Chicago, etc., R. Co., 167 F 165. Corporation is deemed to be resident of state by laws of which it was created. Cunningham v. Klamath Lake R. Co. [Or.] 101 P 1099. Powers of corporation are governed by law of state creating it. Vandagrift v. Rich Hill Bank [C. C. A.] 163 F 823.

44. Corporation organized by Spanish Crown in 1863 for charitable purposes only, its activities being solely in Porto Rico, did not remain citizen of Spain, within Act Mar. 2, 1901 (31 Stat. 953, c. 812, § 3), giving district court of United States for Porto Rico jurisdiction of controversies concerning citizens or subjects of foreign state. Martinez v. La Asociacion De Senoras Damas Del Santo Asilo De Ponce, 213 U. S. 20, 53 Law. Ed. —.

45. Effect of organic act of Porto Rico (31 Stat. 77, c. 191) is to intrust legislative function so far as relates to charitable corporation to government of Porto Rico, and, hence, charitable corporation created by Spanish Crown in 1863, activities of which were limited to Porto Rico, is citizen of Porto Rico if citizen of any country and not within 31 Stat. 953, c. 82, § 3, extending jurisdiction of district court of Porto Rico to controversies where parties or either of them are citizens of United States. Martinez v. La Asociacion De Senoras Damas Del Santo Asilo De Ponce, 213 U. S. 20, 53 Law. Ed. —.

46. An American corporation doing business in Cuba was, during war with Spain, to be deemed an enemy to United States with respect to its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by United States in progress of war then being prosecuted, indeed subject to be destroyed whenever, in conduct of military operations, its destruction was necessary for safety of our troops or to weaken power of enemy. Juragua Iron Co. v. U. S., 212 U. S. 297, 53 Law. Ed. —. The United States is not liable to an American corporation doing business in Cuba during war with Spain for destruction of property to protect health and lives of soldiers, during war, under an implied contract. Id.

47. Search Note: See note in 14 L. R. A. (N. S.) 111.

See, also, Corporations, Cent. Dig. §§ 1511-1584; Dec. Dig. §§ 370-396; 10 Cyc. 148, 282, 796, 1003, 1065-1100, 1140-1167, 1265, 1346; 7 A. & E. Enc. L. (2ed.) 695.

48. McCarter v. Vineland L. & P. Co. [N. J. Err. & App.] 70 A 177; State v. Atlantic City & S. R. Co. [N. J. Err. & App.] 72 A 111; Robert Gair Co. v. Columbia Rice & Packing Co. [La.] 50 S 8; Knapp v. Supreme Commandery, N. O. G. C. [Tenn.] 118 SW 390; Ozan Lumber Co. v. Biddie [Ark.] 113 SW 796; Derr v. Fisher [Okl.] 98 P 978; Warner v. Berks County Poor Directors, 38 Pa. Super. Ct. 437; De Lacroix v. Eid Concrete Steel Co., 8 Ohio N. P. (N. S.) 489. Rule applies to private and public corporations. De Lacroix v. Eid Concrete Steel Co., 8 Ohio N. P. (N. S.) 489. Corporation has **no natural or inherent powers** except as conferred by charter. Scarsdale Pub. Co. — The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731. Corporations are created by statute and have no powers except those conferred by statute, directly or indirectly. Laws 1892, p. 1824, c. 687; Laws 1895, p. 449, c. 672, § 10. Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 NE 670. Corporate powers, obligations, duties and limitations, are only those granted, permitted, allowed, and prescribed by law. Black v. Ellis, 129 App. Div. 140, 113 NYS 558. General Corporation Law (Laws 1892, p. 1802, c. 687) denies to all corporations all powers not expressly conferred, and such implied or incidental powers as are not necessary to powers expressly conferred. Hyde v. Equitable Life Assur. Soc., 61 Misc. 518, 116 NYS 219.

Implied powers: Such powers presumptively exist only to extent of enabling corporation to carry out express powers granted and to accomplish purpose of creation. Robert Gair Co. v. Columbia Rice & Packing Co. [La.] 50 S 8; Deer v. Fisher [Okl.] 98 P 978. In exercising powers conferred by its charter, corporation may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to transaction of separate unauthorized business. Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 NE 107. May be **defined** to be one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it. Robert Gair Co. v. Columbia Rice & Packing Co. [La.] 50 S 8.

49. Knapp v. Supreme Commandery, N. O. G. C. [Tenn.] 118 SW 390. Charter limits powers. Earle v. American Sugar Refining Co. [N. J. Eq.] 71 A 391. Corporate acts not authorized remain prohibited by common law. Leighton v. Knapp, 115 NYS 1040.

50. General laws under which corporation is formed constitute its charter (Const. art. 12, §§ 2, 6). Ozan Lumber Co. v. Biddie [Ark.] 113 SW 796.

51. Derr v. Fisher [Okl.] 98 P 978. Authority for corporation's acts must be found in corporate charter, or general laws of state

considered in connection with the articles of incorporation, in which the purposes and objects of corporate life are set forth.[51] It follows that corporate powers are subject to alteration.[52] An asserted grant of power must clearly appear,[53] and such grants must be construed in favor of the state from which the power emanated.[54]

or creation. Knapp v. Supreme Commandery, N. O. G. C. [Tenn.] 118 SW 390.

Intra vires: Corporation is capable of suing and being sued, holding property, and of making contracts, through its agents, which it can enforce, and by which it can be bound. Young v. Rohrbough [Neb.] 121 NW 585. Contract obligating street railway to extend its line held not ultra vires under charter. City of Niles v. Benton Harbor-St. Joe R. & L. Co., 154 Mich. 378, 15 Det. Leg. N. 757, 117 NW 937. Lease of "ticker" business by telegraph company not of such different nature as to render such lease ultra vires. Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 NE 107.

Ultra vires: Corporation organized as assessment life insurance company cannot issue policies and contracts on another plan. Smoot v. Bankers' Life Ass'n [Mo. App.] 120 SW 719. Corporations whose charters express no other objects than social and religious purposes are not allowed to make contracts of life insurance either technically or substantially on the assessment plan or otherwise, unless incorporated in the manner prescribed by act of June 23, 1883. Recovery on policy of corporation not purporting to be so organized denied on grounds the policy was ultra vires. Society of St. Stephen v. Sikorski, 141 Ill. App. 1. Construction and operation of cotton gin beyond powers of a corporation "buying, selling, leasing and dealing in lands, securities, notes, bonds, stocks and other negotiable paper, and also buying and selling general merchandise." Harrill v. Davis [C. C. A.] 168 F 187. Corporation organized to buy grain and live stock, etc., with capital stock of $10,000, and limitation of indebtedness to $2,000, has no power to engage in speculative transactions in grain upon board of trade amounting to over $40,000 in a day, and such transactions are ultra vires and void. Farmers' Co-operative Shipping Ass'n v. Adams Grain Co. [Neb.] 122 NW 55. Legislation relating to the incorporation of title insurance companies, on which has been ingrafted the modern trust companies, reviewed, showing conclusively that such corporations were never intended to possess banking and discounting privileges. De Haven v. Pratt [Pa.] 72 A 1068. Trust companies organized under the general incorporation act of April 20, 1874 (P. L. 73), and acts supplementary thereto, are not banks or banking institutions. Since Const. art. 16, § 11, provides that no corporate body be created or organized to possess banking and discounting privileges without 3 months' public notice of the intention to apply therefor, and that no charter be granted for longer period than 20 years. Id.

52. See ante, § 3. Under general railroad act (P. L. 1903, p. 647, § 3), railroad company may exercise general powers conferred by corporation act of 1896 only so far as same are appropriate to and not inconsistent with railroad act or with provisions of act under which such company may have been created or organized. Under this section a railroad company may not claim any general power not appropriate to and consistent with construction, maintenance, and operation of its railroad. State v. Atlantic City & S. R. Co. [N. J. Err. & App.] 72 A 111.

53. Will not be inferred or presumed. Knapp v. Supreme Commandery, N. O. G. C. [Tenn.] 118 SW 390. Where charter or law is silent as to power sought to be exercised, it does not exist. Id. Ambiguities operate against grantees. Tallassee Falls Mfg. Co. v. Tallapoosa County Ct. Com'rs [Ala.] 48 S 354.

54. Knapp v. Supreme Commandery, N. O. G. C. [Tenn.] 118 SW 390; State v. Hocking Val. R. Co., 12 Ohio C. C. (N. S.) 145; Tallassee Falls Mfg. Co. v. Tallapoosa County Ct. Com'rs [Ala.] 48 S 354. Act Aug. 6, 1907, authorized county commissioners' court to fix tolls of bridge authorized to be built by corporation by act Feb. 11, 1893 (Loc. Laws 1892-93, p. 491), which also permitted corporation to take reasonable tolls. Does not deprive corporation of right to receive reasonable tolls as permitted by act 1893, but is to be construed as if limitations prescribing reasonable tolls were written into it. Id. Such act is not unconstitutional as delegating legislative power to court of county commissioners. Id. Failure of Act Feb. 11, 1893 (Loc. Laws 1892-93, p. 491), providing for construction of bridge to prescribe tolls, or to designate by whom tolls were to be fixed, implies no grant of power to corporation to fix same, either by § 1, permitting taking of reasonable tolls, or by § 2, empowering establishment of all regulations expedient for management of traffic over bridge, nor is it thereby deprived of right to receive reasonable tolls given to it by act, since statutes then in force afforded means whereby tolls might be fixed by application to court of county commissioners (Code 1896, § 2501; Code, 1886, § 1445). Id. Held that act authorizing construction of bridge by corporation must be taken as extension of chartered powers and rights of corporation, and in effect to that end an amendment of its charter and is to be construed against the corporation as is its charter. Id. Statutes granting power of assessment for improvement of lands are to be strictly construed, and, where there are two constructions available, one consistent with, and other repugnant to, Bill of Rights, former should be adopted. Louderback v. Warner, 37 Pa. Super. Ct. 136. Penn's Manor Meadow Company, corporation chartered under special act of March 4, 1815, 6 Am. L. 257, rechartered by special act of Apr. 30, 1855, P. L. (1857) 738, and reincorporated under act of April 29, 1874, for purpose of reclaiming overflowed lands, has no power to levy an assessment upon person who is not member of corporation, and whose land, though part of area originally surveyed for protection by company's works, is not touched by work for which assessment was levied. Id. Construing act which rechar-

A corporation consolidated from corporations created in different states is limited in its powers by the laws of each state with reference to transactions therein.[55] Courts of equity have jurisdiction to define and determine the extent and limitation of the powers of corporations.[56]

(§ 7) *B. Power to take and hold property.*[57]—See 11 C. L. 821—A corporation may acquire such property as it is expressly authorized to acquire,[58] or such as is reasonably necessary or incidental to the business and purposes authorized by its charter,[59] and the acquisition of more real estate than this, no matter for what purpose a corporation is organized, is often prohibited by statute.[60] The power to take property will authorize the acquisition of options in a foreign country,[61] and the taking of a fee simple estate as well as a lesser title.[62] The extinction of the cor-

tered company as whole, there seems to be necessary implication that prerequisite of power to assess member is his ownership, or at least his holding, of land within district. Id.

55. MacKay v. New York, etc., R. Co. [Conn.] 72 A 583. Corporation acting within power possessed in one state, and incurring liability there, cannot escape enforcement of such liability by pleading that act is prohibited in another state where it is also domiciled. Id.

56. Knapp v. Supreme Commandery, N. O. G. C. [Tenn.] 118 SW 390.

57. **Search Note:** See notes in 32 L. R. A. 293; 7 L. R. A. (N. S.) 816; 9 Id. 689; 14 Id. 140; 4 Ann. Cas. 1061.

See, also, Corporations, Cent. Dig. §§ 1763-1771; Dec. Dig. §§ 434, 435; 10 Cyc. 1122-1125, 1130-1136, 1139; 7 A. & E. Enc. L. (2ed.) 714.

58. Under Laws 1851, c. 122, p. 234, § 1, building and loan association has express power to purchase land and pledge its credit for purchase price. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918.

59. Or incidental to the business and purposes authorized by the charter. Ronaldson & Puckett Co. v. Bynum, 122 La. 687, 48 S 152; Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167. Charter held to authorize acquiring and disposing of land for necessary purposes of corporation and not to violate Const. art. 265. Ronaldson & Puckett Co. v. Bynum, 122 La. 687, 48 S 152. Corporation may purchase land on foreclosure to secure claims due. Id. Under Gen. St. 1875, p. 317, tit. 17, c. 2, pt. 9, § 6, and Pub. Acts 1883, p. 232, c. 2, railroad company could acquire land "convenient for accomplishing objects of its organization." New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563. Mining corporation held to own only such real estate as was necessary (Pub. Acts Mich. 1907, No. 162, p. 214). Bigelow v. Calumet & Hecla Min. Co., 167 F 704, afd. [C. C. A.] 167 F 721. In determining whether corporation holds more than statutory amount of real estate permitted, land ownings of other corporation in which corporation in question is interested are not to be considered. Id.

60. Hurd's Rev. St. 1905, c. 32. Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167. Corporation cannot be organized for purpose of acquiring and holding real estate. Id. Lease for 99 years is acquiring real estate within meaning of statute. Id. Under Hurd's Rev. St. 1905, c. 32, a corporation having for its purpose the erection of building for accommodation of tenants, making leases, collections of rents, and to do all things necessary for management, etc., and for that purpose to lease land, is illegal, since acquisition of real estate is not incidental but prerequisite to right to engage in business outlined. Id. Under Const. § 192, and Ky. St. § 567 (Russell's St. § 2153), providing for escheat of real estate held by corporation over five years when not necessary to its legitimate business, where railroad supplied money and caused title to be held by dummy corporation to evade constitution, land would be subject to escheat, whether stockholders of railroad and dummy company were the same or not. Commonwealth v. Louisville Property Co. [Ky.] 121 SW 399. Powers of **dummy corporation** as expressed in charter held immaterial as bearing upon escheat, under St. 1909, § 567 (Russell's St. § 2153), of property held by the real corporation in excess of that necessary for accomplishment of its legitimate purposes. Id. Corporation authorized to deal in real estate could not "hold" real estate indefinitely in violation of Const. § 192, and Ky. St. 1909, § 567 (Russell's St. § 153), but could hold only for reasonable time until sale. Id. Expression in corporation charter must be construed in harmony with constitution. Id. Const. § 192, as to escheat, deals with situation five years next preceding time invoked and has no reference to future. Id. Petition as to escheat of unnecessary land held fatally defective in not alleging that railroad or its agent had held title to land for five years when unnecessary for carrying on of legitimate business. Id.

61. Under Pub. Acts Mich. 1905, pp. 153, 154, No. 153, and of Comp. Laws Mich. § 7012, mining corporation may take option on lands in Canada, and such option is not ultra vires. Bigelow v. Calumet & Hecla Min. Co., 167 F 704, afd. [C. C. A.] 167 F 721.

62. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563. That warranty deed to railroad corporation, expressed in apt terms for conveying fee, described premises as within location of company's railroad, held to have no effect except to make it clear that acquisition was necessary. Id. Words in deed, expressed in words apt for conveying fee simple, stating that company was to trestle pond, had no effect except to throw upon company either contractual duty or to impose condition subsequent upon grant, and cannot be availed of by grantees of

porate purpose for which land is acquired will not extinguish the general right of property where a fee simple title is taken,[63] and in such case the title of the corporation may be determined in an action to settle title.[64] A devise to a religious corporation in Maryland must, under the bill of rights, have special legislative sanction to be valid.[65]

A defense of disability to hold property must be pleaded and proved,[66] regardless of any presumption from the corporate name.[67]

(§ 7) *C. Power to transfer or encumber property and franchises.*[68]—See 11 C. L. 822—Corporations are sometimes expressly authorized to alienate property.[69] Express power, however, is not usually necessary, the power to alienate usually being incidental to the ownership of property;[70] and as a general rule a corporation, having no public duties to perform has, ordinarily, the same power to sell, with the consent of its stockholders, all its property, including its privileges and franchises, except its franchise to be a corporation, that an individual has,[71] but it may not, any more than an individual, dispose of its property to the prejudice of creditors.[72] A quasi public corporation may not usually alienate property essential to the performance of duties owing to the public,[73] and while such authority is sometimes expressly conferred,[74] constitutional provisions may even render the express authoriza-

original grantor who did not limit use to which land so granted might be used, nor ever claim forfeiture for breach of condition. Id.

63. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563.

64. Action to settle title proper where railroad acquired fee simple title to land, and time for completion of road expired. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563. Institution of such suit is within power of single director given plenary powers to dispose of property of such corporation immediately prior to lapse of such period. Id.

65. Declaration of Rights, § 38. Baltzell v. Church Home & Infirmary, 110 Md. 244, 73 A 151. Charitable corporation organized under Acts 1852, c. 231, held not religious corporation within Declaration of Rights. Id. Portions of charter referred to and insufficient to render corporation a religious corporation. Id.

66. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552.

67. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552. In absence of other evidence, ferry company would not be presumed incapable of holding beneficial interest in street railway. Id.

68. **Search Note:** See notes in 11 C. L. 1045; 8 L. R. A. (N. S.) 966.

See, also, Corporations, Cent. Dig. §§ 1525-1529, 1772-1785; Dec. Dig. §§ 375, 437-446; 10 Cyc. 282, 1008-1016, 1090-1095, 1136-1139, 1182-1197, 1265-1269; 7 A. & E. Enc. L. (2ed.) 734.

69. Corporation organized to erect buildings and loan funds to purchase real property had authority to "sell, mortgage or otherwise convey such real estate as the purposes of the corporation required" by the express provisions of Sayles' Ann. Civ. St. 1897, art. 651, subd. 4. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232. Grant of right of way authorized. Id.

70. Right of corporation to dispose of real estate it is authorized to purchase is a necessary incident of its ownership. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232.

71. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Unless right is given corporation by power creating it, corporation may not sell primary franchise, but in absence of constitutional or legislative restrictions it may sell what has been denominated "secondary franchises." Id. General creditor has no lien upon funds of a solvent corporation, and right of such corporation to deal with its property is absolute, so long as it does not violate its charter or laws applicable to such corporation. Id. An assigned franchise will survive legal death of corporation to which it was originally granted. Consolidated Gas Co. v. New York, 157 F 849. Secondary franchise is assignable. Id.

72. See post, § 16B, Rights and Remedies of Creditors. See, also, post § 13, Succession of Corporations.

73. Without statutory authority corporation cannot alienate its franchises to construct, operate, and maintain street railroad. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552. Public service company, such as railway company, cannot, without express legislative consent, lease property which is necessary to exercise of its public functions, and thereby escape responsibility for their proper performance. Kelley v. Forney [Kan.] 101 P 1020.

74. Express authorization of mortgage of street railroad, including franchise, granted. (Rev. St. 1879, § 706.) Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552. Civ. Code, §§ 494, 510, 511, authorizes transfer of street railway franchise without formal or express consent of state. O'Sullivan v. Griffith, 153 Cal. 502, 95 P 873. Code 1907, § 3495 (Code 1896, § 1169), authorizing sale of railroad's franchise, roadbed, etc., to another railroad, when purchasing company owns all capital stock of selling company, is merely consent of state, essential to sale of franchise, etc., of public service corporation, when authority to make such sale was not given by charter. South & N. A. R. Co. v. Gray [Ala.]

tion invalid.[75] Constitutional provisions may also prohibit alienation which will relieve the franchise or property of corporations of liabilities incurred,[76] but, while in a general sense, a mortgage upon a corporation's property is an alienation, since such instrument may culminate in the absolute alienation of the property,[77] it is held that such a provision will not affect the right of a corporation to mortgage its property.[78] Neither does such a provision prevent an insolvent corporation from selling its property in good faith to pay its debts.[79] A sale of the entire stock and assets of a corporation by an individual who owns such stock is not a sale of the corporation by the corporation itself.[80]

A corporation with the power of alienation may lose its property through the doctrine of ratification [81] or estoppel,[82] and be relegated to an action for damages.[83]

Mode of transfer.[See 11 C. L. 822]—Where the common seal of a corporation is affixed to a conveyance, it is prima facie presumed to have been affixed by proper authority.[84] A conveyance properly executed is not impaired by the failure of the

49 S 347. While railroad incorporated prior to constitution of 1875 could not sell franchise without consent of state and all stockholders, it being public service corporation, such corporation might by its acts and conduct bring itself within such constitution and be rendered amenable to statute with reference to corporations of its character. South & N. A. R. Co. v. Gray [Ala.] 49 S 347.

Consent of city presumed to have been obtained where street railway mortgaged its franchise. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552. Where plaintiff pleaded ordinance granting franchise to street railroad and mortgage of same, and defendant city only pleaded abandonment, issue of invalidity of mortgage for want of city's consent to same did not arise. Id.

75. Rev. St. 1879, § 706, expressly authorizing a street railroad to mortgage its property, including its franchise, when construed in connection with Const. 1875, art. 12, § 20 (Ann. St. 1906, p. 309), prohibiting legislative grants to operate street railways without the consent of the city, and providing that franchises so granted shall not be transferred without similar consent, a mortgage of a street railroad's franchise without the city's assent is prohibited. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552.

76. Const. § 203, prohibits alienation of franchise so as to relieve franchise or property from liabilities incurred. Russell's Adm'r v. Frankfort & S. R. Co. [Ky.] 116 SW 289. Under Const. art. 12, § 7, corporation exercising right to occupy and use streets and public places for operating an electric light and power plant and street railway, under franchise granted by city, cannot convey such franchise so as to relieve corporate property of liability for judgment obtained by an employe for personal injuries. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Under Const. art. 12, § 7, providing that "no corporation shall lease or alienate any franchise, so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee contracted or incurred in operation, use or enjoyment of such franchise or any of its privileges," the word "any" means any one of a number, and the words "any franchise" include all franchises, primary or secondary, and as distinguished from the corporeal property of the corporation. Id. Words "property held thereunder" mean such property as is necessarily held and used in operation, use or enjoyment of privileges and rights conferred by the franchise, and without possession of which property, rights and privileges conferred or granted by the franchise could not successfully be exercised, operated or enjoyed. Id.

77. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552.

78. Russell's Adm'r v. Frankfort & S. R. Co. [Ky.] 116 SW 289. Const. § 203, providing that no corporation shall lease or alienate any franchise so as to release any franchise or property held thereunder from liabilities of lessor or grantor, lessee or grantee, contracted or incurred in operation, etc., does not affect right of corporation to mortgage its property, nor does it destroy security of mortgage when property is sold for its full value to pay mortgage debt, since it cannot be said under such circumstances that property was allenated to relieve it from liabilities, hence, held that holders of judgment against property of corporation already mortgaged beyond its full value have no rights against purchasers of such property bona fide in payment of part of mortgage debt. Id.

79. Russell's Adm'r v. Frankfort & S. R. Co. [Ky.] 116 SW 289.

80. Eppley v. Kennedy, 131 App. Div. 1, 115 NYS 360.

81. Appropriation without consent is subject to ratification. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232. Evidence held to support finding of consent. Id.

82. Corporation permitting traction company to shift right of way to its land could not oust traction company from possession. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232. Corporate owner estopped from ousting traction company, though right of way was constructed in violation of city ordinances, the city having exclusive right to complain of such violation. Id.

83. When corporation allowed right of way of traction company to be shifted to its land, its only remedy was action for damages. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232.

84. And that mortgage was executed by proper authority. Edwards v. Snow Hill

register to record the corporate seal.[85] A mortgage is not invalidated where the name of the corporation is treated as a collective noun,[86] or because the certificate of authority for signing is not recorded in the minute book of the corporation,[87] or because there is no seal,[88] and a corporate lease may be effective though not signed with the corporation's name.[89] Various statutes require corporate mortgages and deeds to be acknowledged by the proper officers of the corporation,[90] and provide for the written consent of stockholders.[91] The fact that there is no resolution of the corporate action attached to a mortgage may prevent its enforcement.[92] In the absence of statute, such instruments may be executed in the same manner as by individuals.[93] Even a prescribed statutory method of conveyance is usually not exclusive,[94] and immaterial departures from a statutory form do not affect a cor-

Supply Co., 150 N. C. 173, 63 SE 740. Execution of deed in manner prescribed by statute (Rev. 1905, § 1130) where corporate seal is affixed is presumed to be authorized. Edwards v. Snow Hill Supply Co., 150 N. C. 171, 63 SE 742.

85. Mortgage. Edwards v. Snow Hill Supply Co., 150 N. C. 173, 63 SE 740. Correction after action begun. Id. Deed. Powers v. Spiedel [Neb.] 121 NW 968.

86. Mere fact that corporate mortgage properly drawn in every respect except that it twice recited "the said S. Co. of that first part, their heirs and assigns," does not invalidate mortgage. Edwards v. Snow Hill Supply Co., 150 N. C. 173, 63 SE 740.

87. Certificate of authority for signing of mortgage by officers of corporation will not be held insufficient because certificate does not appear to have been recorded in minutes of company, where there is evidence that certificate was authorized by board of directors and both parties to mortgage relied on its correctness. Fritsch Mfg. Co. v. Elmont Bldg. & Sav. Co., 11 Ohio C. C. (N. S.) 356.

88. Where there is no statutory or charter provision as to mode of procedure, a mortgage executed in same manner as individual cannot be defeated for want of seal. In re Farmers' Supply Co., 170 F 502.

89. Lease by corporate landlord held properly admitted in evidence in suit by corporation for rent where signed by two out of three directors, where they signed for purpose of binding corporation though corporate name was not signed to lease. Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448.

90. Rev. St. 1899, § 904 (Ann. St. 1906, p. 836). Barrie v. United R. Co. [Mo. App.] 119 SW 1020. Unlike conveyances between individuals. Id. Rev. St. Tex. 1895, art. 676, provides that corporate deed be signed by president or presiding member or trustee, and that when acknowledged by such officers such deed may be recorded. Chambliss v. Simmons [C. C. A.] 165 F 419. In action of trespass to try title, where 5-year limitation statute was pleaded as defense, deed by foreign corporation doing business in state executed over its corporate seal, signed and acknowledged by two directors under authority of board of directors, is "a deed duly registered" within such statute. Id. Under Real Property Law (Laws 1896, p. 612, c. 547), §§ 255, 258, prescribing form of corporate acknowledgment, acknowledgment of signature of lease by president of corporation which fails to substantially comply with statute renders lease inadmissible against corporation. Smith v. Guarantee Dental Co., 114 NYS 867. Evidence that check signed by certain party, "president of Dental Guarantee Company," had been sent plaintiff in payment of rent due from defendant corporation, is insufficient to bind such corporation where there is no evidence to show check to have been in fact signed by such party, that he was president of company, or that check was ever paid. Id. Where certificate of proof fails to show who signer was, where he resided, what his connection with corporation was, if any, or that he signed instrument by order of its board of directors, and where also there is no evidence in record that signer was president of corporation when lease was made, so that had signature been sufficiently proved and had president had power to bind it by lease, an essential element of corporate liability was still lacking. Id.

91. Under Stock Corporation Law, Laws 1892, p. 1824, c. 688, § 2, as amended by Laws 1905, p. 2113, c. 745, and Laws 1901, p. 961, c. 354, providing for written notice filed in county clerk's office and consent of two-thirds of all stockholders to execution of mortgage by corporation, written notice held intended to be mere evidence of stockholders' consent. Black v. Ellis, 129 App. Div. 140, 113 NYS 558. Consent valid though writing not filed and one stockholder had no notice of mortgage. Id. Statute is for benefit of stockholders. Glover v. Ehrlich, 62 Misc. 245, 114 NYS 992.

92. Where act of mortgage recites that corporation appears in its corporate name through its president, and notary declares in the deed that president appeared before him and acted by virtue of resolution passed by board of directors authorizing and empowering him to execute mortgage in question, and that copy of resolution is attached and made part of mortgage, such mortgage cannot be enforced by seizure and sale where such resolution was in fact not so attached. Bank of Leesville v. Wingate, 123 La. 386, 48 S 1005.

93. See post, next section, as to execution of contracts. Mortgage executed in same manner as that of an individual would not be defeated for want of corporate seal. In re Farmers' Supply Co., 170 F 502.

94. Cobbey's St. 1907, § 4129, as to conveyance of land by corporations, does not prescribe an absolute and exclusive method by which lands may be transferred. Lincoln Upholstering Co. v. Baker, 82 Neb. 592, 118

porate mortgage.[95] The transfer of ownership of a corporation may be accomplished by the transfer of stock and a deed by the proper officers of all the property.[96]

(§ 7) *D. Power to contract and incur debts.*[97]—See 11 C. L. 823—A corporation's power to incur indebtedness is limited by its act of incorporation,[98] and is sometimes limited by its by-laws as to amount of indebtedness to be incurred,[99] but a corporation may, for the purposes of advancing the objects and purposes of its creation, do many acts which, except for their bearing upon the express powers of such corporation, would be ultra vires,[1] and within the scope of the purposes of their creation, corporations have the same power to make and take contracts as natural persons.[2] Where, therefore, the matter bears a proper relation to the legitimate

NW 321. Conveyance by general officer of bank, and especially by an executive officer with whom secretary joins, is valid and sufficient. Id.

95. Form susceptible of reformation. Spedden v. Sykes, 51 Wash. 267, 98 P 752. Courts are not overtechnical in construing acts of original parties to contract. Id. Mortgage by corporation which fails to literally comply with form provided by Ballinger's Ann. Codes & St. § 4522; Pierce's Code, § 4454, and whose acknowledgment is informal, is nevertheless binding where there was no fraud, parties bona fide proceeded to carry out contract, and no rights of third parties have intervened. Id.

96. Where capital stock of water company was owned by city, and council adopted ordinance directing transfer by custodians of stock to city, that property might be subject to board of waterworks, which was accomplished, and president and secretary of corporation, by resolution of directors, executed deed to city, transfer of property was valid. Ryan v. Louisville [Ky.] 118 SW 992.

97. Search Note: See notes in 49 L. R. A. 471; 9 L. R. A. (N. S.) 193; 11 Id. 598; 12 Id. 825; 111 A. S. R. 309; 2 Ann. Cas. 520; 11 Id. 891.

See, also, Corporations, Cent. Dig. §§ 1786-1898; Dec. Dig. §§ 447-487; 10 Cyc. 568, 918, 1000-1053, 1072, 1100, 1122, 1167-1203; 7 A. & E. Enc. L. (2ed.) 754.

98. Power not authorized by legislature is prohibited. Leighton v. Knapp, 115 NYS 1040. Corporation incorporated under Laws 1851, c. 122, p. 234, has no authority to incur indebtedness except that which was conferred by act. Id. Where no express power to incur indebtedness for erection of buildings, purchase of real estate, etc., none could be implied. Id. Fund for purchase of real estate must be accumulated in manner prescribed by statute. Id. Purchase-money mortgage held enforcible upon general principals of equity and upon ground that property purchased was applied to proper use of company. Id. Authority to do acts which might increase corporate liabilities can alone be conferred by legislature of state, and exercise of an unauthorized power on part of their officers honestly or fraudulently would be illegal and void. American Exch. & Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 NE 107. Cemetery association under Laws 1847, c. 133, p. 125, and amendments, cannot obligate themselves absolutely with respect to proceeds of sales, or otherwise than by certificates of indebtedness. Id. Certificates of shares issued by cemetery association under Laws 1847, c. 133, p. 125, and amendments, held certificates of indebtedness entitled to application at periodical intervals of one-half of proceeds of future sales of lots. Id. Building association organized under Comp. Laws Mich. 1897, §§ 7554, 7581, held to have no express or implied power to borrow money to meet claims of withdrawing shareholders. Standard Savings & Loan Ass'n v. Aldrich [C. C. A.] 163 F 216.

99. By-law that "no indebtedness over $1,000 shall be incurred" is not violated by resolution providing for compensation of company's secretary at $50 per month. Haynes v. Griffith [Idaho] 101 P 728. Not violated by allowance of claim for salary of an officer at rate of $50 per month which in aggregate exceeds $1,000. Id.

1. Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 NE 107. See ante, § 7A, Corporate Powers in General.

2. Bloom v. Home Ins. Agency [Ark.] 121 SW 293. Power to make all such contracts as are necessary and usual in course of business or are reasonably incident to objects for which private corporation is created is always implied, where there is no positive restriction in charter. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266. Contract by corporation germane to purposes for which it was formed, not in violation of its charter, public policy of state, or any statutory prohibition, may be enforced. Derr v. Fisher [Okl.] 98 P 978. Contract by light and power corporation, furnishing power to street railway, to pave along line of street. Id. Agreement by corporation entering employer's association, whereby latter had authority to bind it by regulations to prevent labor disputes, was not beyond corporate power. McCord v. Thompson-Starrett Co., 112 NYS 902. Where corporation had power to dispose of its property (an insurance agency), contract to refrain from entering into business of local insurance was but incident to the sale of property. Bloom v. Home Ins. Agency [Ark.] 121 SW 293. Contract for medical services by manufacturing corporation at request of superintendent is valid only if facts leading up to it were so unusual and extreme as to impose upon employer duty analogous to that imposed upon railroad companies. Severity of injury would not change rule. Sourwine v. McRoy Clay Works, 42 Ind. App. 358, 85 NE 782. Corporation may be bound by **implied contract** in same manner as an individual. Notley v.

business or purposes of the corporation, a corporation may lend [3] or borrow [4] money, issue and sell bonds,[5] and pledge its own bonds for the payment of its debt,[6] and issue negotiable paper.[7] It is generally stated that a corporation cannot become an accommodation indorser,[8] but this rule is not applicable to a case where a corporation assumes an obligation of another for the purpose of protecting its own interests where its property rights or interests might be affected.[9] Likewise, a corporation generally, has no power to act as a guarantor or surety,[10] at least such contracts are so foreign to the objects for which a corporation is created as to be subjected to close scrutiny,[11] and yet a contract of guaranty is not ultra vires when

First State Bank, 154 Mich. 676, 15 Det. Leg. N. 838, 118 NW 486; Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766; Hyde v. Equitable Life Assur. Soc., 61 Misc. 518, 116 NYS 219. Advances by officer held to be under an implied agreement by corporation to repay. In re Gouverneur Pub. Co., 168 F 113. Payments by officer of corporation for latter's benefit held not voluntary but binding upon corporation where officer, who was secretary and treasurer and active de facto manager, authorized to collect all moneys and pay all debts, purchase property and pay therefor, ran company into debt, paid debts with money of company and his own, reimbursing himself from company's funds when he could, all of which was acquiesced in and expected of him, company having actual knowledge that such officer was advancing his own money and, as to some of these advances, were recognized by resolution of company. Id.

3. Earle v. American Sugar Refining Co. [N. J. Eq.] 71 A 39. Corporation organized for purchase, manufacture, refining and sale of sugar, etc., could not loan money. Id. Loan of money by corporation in direct violation of P. L. p. 278 (Act Apr. 21, 1896), prohibiting power of carrying on business of discounting bills, notes, etc. Id.

4. Hyde v. Equitable Life Assur. Soc., 61 Misc. 518, 116 NYS 219. Life insurance corporation has no express power to borrow money by Laws 1853, p. 887, c. 463, p. 1029, c. 551, neither is it prohibited. Id. Stock Corporation Law of 1892, § 2 (Laws 1892, p. 1824, c. 688), giving power to corporations in general, does not apply to moneyed corporations. Id. Moneyed corporations are defined as those formed or subject to banking or insurance law (Gen. Corp. Law 1892 [Laws 1892, p. 1802, c. 687] § 3). Id. Contract of **indemnity** by insurance company to indemnify guarantors of indebtedness incurred by another in its behalf within incidental powers of such insurance company. Id. Necessary to preserve assets and protect them from loss or depreciation. Id. Contract voidable, at most, by corporation as distinguished from its managers, and being affirmed by corporation and within society's incidental powers, it is intra vires and operative. Id. Evidence held to warrant inference that contract was approved by stockholders. Id.

5. Issue of bonds by consolidated corporation held not ultra vires or void. Pollitz v. Wabash R. Co., 167 F 145. As to issue of bonds and limitations thereto, see post, § 16C, Rights of Corporate Mortgagees and Bondholders.

6. Gilchrist Transp. Co. v. Phenix Ins. Co. [C. C. A.] 170 F 279. A corporation may lawfully issue to a creditor its bonds secured by mortgage in pledge for the payment of another of its obligations. Id.

7. Corporation organized for purpose of carrying on manufacturing business has implied power to make negotiable paper for use within scope of its business. Owen & Co. v. Storms & Co. [N. J. Law] 72 A 441. Execution of corporation note is unauthorized unless it is in furtherance, either directly or indirectly, of purpose for which company was chartered. Security Mut. Life Ins. Co. v. Schott & Sons Co., 11 Ohio C. C. (N. S.) 401.

8. Corporation can neither make nor indorse commercial paper for accommodation, though it be paid therefor. Bacon v. Montauk Brew. Co., 130 App. Div. 737, 115 NYS 617. Corporation with implied power to make negotiable paper has no power to become party to bills and notes for accommodation of others. Owen & Co. v. Storms & Co. [N. J. Law] 72 A 441. Corporation not bound by notes signed by its officer as treasurer in corporate name for accommodation for another company in which such treasurer was interested, where business of former corporation was entirely different and unconnected with business of latter corporation. Id.

9. Bacon v. Montauk Brew. Co., 130 App. Div. 737, 115 NYS 617.

10. Spencer v. Alki Point Transp. Co. [Wash.] 101 P 509. Generally, corporation has no power to guarantee payment of debts of its stockholders or directors. Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 NE 107. Railway company's indorsement and guarantee of bonds of coal mining company is ultra vires. State v. Hocking Val. R. Co., 12 Ohio C. C. (N. S.) 49. Contract of mill company guaranteeing contracts of rice packing company held ultra vires. Robert Gair Co. v. Columbia Rice & Packing Co. [La.] 50 S 8. Corporate authority to buy and sell goods which was ancillary to lumbering and milling business does not authorize purchase of goods for another or guarantee for another's purchase. Gulf Yellow Pine Lumber Co. v. Chapman & Co. [Ala.] 48 S 662. Promise of corporate manager to pay for goods sold and delivered to manager of boarding house in which corporation had no interest is ultra vires. Id.

11. While industrial and mercantile corporations are not wholly prohibited from making contracts of guaranty and suretyship, such contracts are closely scrutinized and are not valid unless it appears that they were in direct furtherance of authorized corporate purposes. Houser v. Farmers'

redounding to the financial benefit of the guarantor.[12] The power to form a partnership is so wholly inconsistent with the scope and tenor of the powers and duties of corporations as to require express authority.[13] Corporations are presumed to contract within their powers.[14] Corporate contracts must, of course, be based on sufficient consideration,[15] and must not be contrary to public policy or positive law.[16] Separable portions of a contract, partially void as conflicting with statutory provisions, are binding upon a corporation.[17]

*Mode of execution of contracts.*See 11 C. L. 824—A corporation having the power to contract may adopt the same modes to accomplish the purpose which an individual can adopt,[18] provided, of course, that there is no charter or statutory restriction as to the manner of contracting,[19] and it is now quite generally held that the corporate seal is not necessary.[20] Thus, the mere acceptance by the vote of a board of directors of a written offer constitutes a binding contract,[21] and the form of a corporate indorsement is immaterial when it is apparent that the company intended to be bound.[22] The fact that an agreement speaks of the treasurer in the first per-

Supply Co. [Ga. App.] 64 SE 293. Contract held to have been ultra vires. Id.

12. Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 NE 107. Guaranty of rent. Id.

13. Emmett & Co. v. Dekle [Ga.] 64 SE 682. Partnership contract void in absence of permission in charter. Id. Corporation cannot as surviving partner claim legal right to administer estate of partnership, since it is only through interposition of equitable principles that either its rights or obligations as a partner can be enforced. Id.

Note: A corporation may not become a partner (Geurinck v. Alcott, 66 Ohio St. 94, 63 NE 714; Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F 462; White Star Line v. Star Line of Steamers, 141 Mich. 604, 12 Det. Leg. N. 586, 105 NW 135, 113 Am. St. Rep. 551; Franz v. Barr Dry Goods Co., 132 Mo. App. 8, 111 SW 636; Miller DuBrul & Peters Mfg. Co. v. Laidlaw-Dunn-Gordon Co., 4 Ohio N. P. [N. S.] 554; Doubleday, Page & Co. v. Shumaker, 60 Misc. 227, 113 NYS 83), though it may contract to share the profits of contracts (Mestier & Co. v. Chevalier Pavement Co., 108 La. 562, 32 S 520; Markowitz v. Greenwall Theatrical Circuit Co. [Tex. Civ. App.] 75 SW 74).—Ed.

14. Bloom v. Home Ins. Agency [Ark.] 121 SW 293. Will not be assumed that one corporation acquired stock in another ultra vires and unlawfully. Hyde v. Equitable Life Assur. Soc., 61 Misc. 518, 116 NYS 219.

15. Company with legal title to personal property could make valid promise to pay market value to person entitled to same, and to whom company was justly indebted. Taylor v. Danielsonville Cotton Co. [Conn.] 72 A 1080.

16. Contract of corporation must not violate public policy of state or any statutory prohibition. Derr v. Fisher [Okl.] 98 P 978. Corporation may lawfully receive license to vend, at wholesale, **intoxicating liquors,** but no such authority exists for licensing corporation to engage in retail traffic in such liquors (Roher v. Hastings Brew. Co., 83 Neb. 111, 119 NW 27), and a corporation cannot enter into a contract which is invalid on the grounds of public policy as being in **restraint of trade** (Bloom v. Home Ins. Agency [Ark.] 121 SW 293). Where no evidence of combination, agreement whereby several insurance agents sold their business to corporation formed by them, agreeing not to engage in local business, was not invalidated by "Anti-Trust Law," Acts 1905, p. 1. Id. Agreement between railroad companies operating parallel and naturally competing railroads to indorse and guarantee bonds of coal mining company, in consideration of an equal division between railroad companies of all freight to and from mines of coal company, is ultra vires. State v. Hocking Val. R. Co., 12 Ohio C. C. (N. S.) 49.

17. Contract by corporation for formula and services of inventor as chemist, though void in so far as agreeing to payments of stock for formula (violating Code, art. 23, § 69 [Pub. Gen. Laws 1904]), was valid as to employment, especially since same was accepted. Miller v. Cosmic Cement, Tile & Stone Co., 109 Md. 11, 71 A 91. If contract be considered indivisible, party could recover for services rendered on quantum meruit. Id.

18. Stands as to contract on same footing as natural person. In re Farmers' Supply Co., 170 F 502.

19. In re Farmers' Supply Co., 170 F 502.

20. Seal is not necessary to constitute note obligation of corporation. Second Nat. Bank v. Snoqualmie Trust Co., 83 Neb. 645, 120 NW 182. Transferee of negotiable notes transferred by corporation may sue thereon, though indorsement did not bear assignor's seal. Hall v. First Nat. Bank [Tex. Civ. App.] 115 SW 293. Indorsement of negotiable instrument by corporate payee held sufficient proof of transfer though not accompanied by corporate seal. Cedar Rapids Nat. Bank v. Beckham [Ga. App.] 65 SE 359. Sufficient proof of transfer, unless indorsement be denied by sworn plea of non est factum. Civ. Code 1895, § 3705. Id.

21. Acceptance communicated on same day to corporation making offer. Beach & Clarridge Co. v. American Steam Guage & Valve Mfg. Co., 202 Mass. 177, 88 NE 924.

22. Van Norden Trust Co. v. Rosenberg, 62 Misc. 285, 114 NYS 1025. Where promissory notes payable to treasurer of corporation as individual are indorsed over to corporation

son will not prevent the contract from being that of the corporation, the intent being clear,[23] and the same rule is applicable where a corporation's bid for a public contract is clearly intended to bind the corporation, though such bid is signed by the vice-president.[24] The intent must clearly appear from the face of the instrument to render a written obligation of a corporation a specialty.[25]

(§ 7) *E. Power to take and hold stock.*[26]—See 11 C. L. 824—A corporation has no power to become a stockholder in another corporation unless such power is expressly given [27] or necessarily implied,[28] and this rule is especially applicable when the object is to control another corporation.[29] Even an express power in this regard may be subject to limitations.[30]

by him with guaranty of payment of principal and interest and are retained by such treasurer, his possession is possession of corporation. Catholic University v. Waggaman, 32 App. D. C. 307. **Variance as to corporate name** is immaterial where corporation intended to be bound, as where corporation indorser appeared as "Louis" instead of "L." and "Inc." instead of "Incorporated." Van Norden Trust Co. v. Rosenberg, 62 Misc. 285, 114 NYS 1025. Indorsement of promissory note by writing name of corporation and below it name of treasurer without anything to indicate that name below that of corporation was that of its treasurer, nevertheless binds corporation where it is made to appear that such person was treasurer, signed same as treasurer, and was authorized to do so. Id. Evidence held to show that indorsement of note by corporation by its treasurer was for its benefit. Id.

23. Agreement for the purchase of certain goods held to be contract of corporation when signed by treasurer found to be director and admitted by answer to be general manager. Taylor v. Danielsonville Cotton Co. [Conn.] 72 A 1080.

24. Bid of corporation for public contract signed by vice-president was as binding as if corporate name had been formally prefixed to signature. Daly v. O'Brien, 60 Misc. 423, 112 NYS 304.

25. Smith v. Woman's Medical College, 110 Md. 441, 72 A 1107. Written promise of corporation with no reference in body of instrument to corporate seal impressed thereon, and nothing to indicate that it was intended to be issued as specialty, must be considered simple contract obligation. Id.

26. Search Note: See notes in 18 L. R. A. 252; 61 Id. 621; 2 L. R. A. (N. S.) 130; 33 A. S. R. 339; 36 Id. 134; 8 Ann. Cas. 64.

See, also, Corporations, Cent. Dig. §§ 1530-1534; Dec. Dig. §§ 376, 377; 10 Cyc. 376-380, 768, 796, 1107-1109, 1145, 1265; 7 A. & E. Enc. L. (2ed.) 810, 818.

27. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521; State v. Atlantic City & S. R. Co. [N. J. Err. & App.] 72 A 111. Power to purchase stock conferred by amendment of 1905 to Mining Act (Pub. Acts Mich. 1905, p. 153, No. 105). Bigelow v. Calumet & Hecla Min. Co., 167 F 704, afd. [C. C. A.] 167 F 721. Amendment of 1905 to Mining Act (Pub. Act Mich. 1905, p. 153, No. 105) does not limit purchases of stock in one mining corporation by another to investment only but has for its object to further active and profitable prosecution of business of purchasing corporations by way of holding interests in other corporations carrying on same or allied business, and, hence, includes right to vote stock so purchased as incident to ownership. Id. May be exercised by mining company though its articles of incorporation do not include such power where by-law conferring such power was adopted after due notice, corporation acted under such by-law and stockholders ratified action subsequently after due notice. Id.

28. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521; State v. Atlantic City & S. R. Co. [N. J. Err. & App.] 72 A 111. General incorporation law does not authorize one corporation to purchase and hold shares of stock in other corporations except where it is necessary to carry into effect objects for which such corporation was formed. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521. Building association organized under Comp. Laws Mich. 1897, §§ 7554, 7581, "for purpose of building and improving homesteads and lending money to members only," had no express or implied power to become shareholder of similar association. Standard Savings & Loan Ass'n v. Aldrich [C. C. A.] 163 F 216. Could not legally lend money to association which was not and could not become member. Id. Corporation may take stock in another corporation **in payment of a debt.** Hyde v. Equitable Life Assur. Soc., 61 Misc. 518, 116 NYS 219. Contract of corporation acquiring stock of another corporation by subscription or purchase **as investment,** and not in payment of antecedent debt when such acquisition is foreign to objects of corporation and unauthorized, is ultra vires. Vandagrift v. Rich Hill Bank [C. C. A.] 163 F 823.

29. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521. Ownership of stock of railway by competing road is illegal. State v. Hocking Val. R. Co., 12 Ohio C. C. (N. S.) 49. Railway company has no authority to acquire and hold shares of capital stock of company incorporated to mine and deal in coal, especially when shares so held constitute controlling interest in such coal mining company. Id. Incidental purpose in charter of coal mining company to construct railway from its mines to railway or other outlet does not constitute such coal mining company, railway, or kindred company, so as to make applicable Rev. St. § 3300, or § 3256, authorizing a railway company to subscribe for and hold stock in another railway or kindred company. Id. Control of parallel lines through combination may be shown by circumstance and unity of stockholding interests together with unity of

In the absence of prohibition by statute, a corporation may usually purchase its own stock, hold it unextinguished, and reissue the same,[31] though in some states an express grant of authority is necessary,[32] while in others the use of corporate funds for the purchase of a corporation's stock is prohibited,[33] and generally a corporation's purchase of its own stock cannot be upheld if existing creditors are injured thereby.[34]

§ 8. *Effect of ultra vires and illegal transactions.*[35]—See 11 C. L. 825—A contract that a corporaton has neither the express nor the implied power to make is one that is beyond its power, i. e., ultra vires.[36] Ultra vires contracts in the proper sense are wholly void,[37] and incapable of being validated or enforced by being acted upon.[38]

management pursuant to an established plan to that effect. Id.

30. Power to purchase, hold, etc., stock and bonds of other corporations, conferred by § 51, General Corporation Act (P. L. 1896, p. 294), is to be exercised subject to limitations imposed by § 2, that is, power exists as primary power only when power to exercise it as such is expressed in certificate of incorporation, and otherwise it exists as incidental power only so far as necessary or convenient to attainment of objects set forth in charter or certificate of incorporation. State v. Atlantic City & S. R. Co. [N. J. Err. & App.] 72 A 111. Railroad company organized under P. L. 1903, p. 645, for purpose of constructing, maintaining, and operating line of railway, with definite termini, is without power to hold stock and bonds in street railway company operating beyond those termini, and thereby to control operations of street railway. Id. Railroad company organized under P. L. 1903, p. 645, having by usurpation of franchises acquired ownership of all bonds and substantially all of the stock of street railroad company organized under P. L. 1886, p. 185 (Gen. St. 1895, p. 3216), and having thus practically absorbed street railway company, the exercise by railway company of control resulting from such ownership, including operation of its cars over street railway lines and making of agreement ostensibly between the two companies for continuance of such operation, likewise constitutes usurpation of franchises by railroad company. Id.

31. Moses v. Soule, 118 NYS 410. Sale of stock to corporation not against public policy. Id. By Stock Corporation Law, § 23 (Laws 1890, p. 1066, c. 564, as am'd by Laws 1901, p. 965, c. 354, § 1), it is expressly provided that corporation may accept and receive its own stock in payment of debts deemed bad by its directors. Such stock is subject to sale, and implication is that corporation may purchase its own stock. Id. Statutory enactments examined and there being no express abrogation of rule, purchase of stock by corporation was legitimate. Id. Evidence held to show sale of stock to corporation, and finding that stock was sold to stockholders as individuals not sustained. Id.

32. In absence of statutory authority, corporations organized under laws of Ohio have no power or right to traffic in or purchase their own shares except for the purpose of saving themselves from loss. General rule. Louis De Lacroix v. Eid Concrete Steel Co., 8 Ohio N. P. (N. S.) 489.

33. 1 Mills Ann. St. § 485, prohibiting use of corporate funds for purchase of its own stock except such as is forfeited for nonpayment of assessments, does not apply to sale of its own stock subject to purchaser's right to rescind and recover purchase price. Mulford v. Torrey Exploration Co. [Colo.] 100 P 596. Such contract is indivisible and cannot be held binding as to sale and void as to condition requiring repurchase after rescission. Id.

34. Copper Belle Min. Co. v. Costello [Ariz.] 100 P 807. Evidence held not to show that creditors were injured. Id. No creditor affected, and transaction concurred in by all directors and stockholders. Moses v. Soule, 118 NYS 410.

35. Search Note: See notes in 1 C. L. 728; 20 L. R. A. 765; 41 Id. 650; 12 L. R. A. (N. S.) 757; 70 A. S. R. 156, 158; 6 Ann. Cas. 126.

See, also, Corporations, Cent. Dig. §§ 1545-1567, 1785, 1893-1898, 2082-2084; Dec. Dig. §§ 385-388, 446, 487, 515; 10 Cyc. 821-823, 1065-1085, 1114, 1116, 1122, 1146-1167, 1174, 1197, 1346; 29 A. & E. Enc. L. (2ed.) 40.

See, also, Helliwell's Supp. to Clark & Marshall, vol. 4, p. 3235.

36. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80.

37. Contracts beyond corporation's express or implied powers are void. Robert Gair Co. v. Columbia Rice & Packing Co. [La.] 50 S 8. Ultra vires acts and contracts wholly beyond and outside general scope of corporate powers and entirely foreign to objects and purposes of its creation are void as against public policy. Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167.

38. Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167. Contract beyond scope of power of corporation cannot be enforced by appeal to rules of estoppel. Standard Savings & Loan Ass'n v. Aldrich [C. C. A.] 163 F 216. Where manager contracted ultra vires loan, purpose of which was known to lender, and assigned securities to secure same, lender was constructively charged with knowledge of their want of power. Id. Where officer of cemetery association with whom certificates of shares were left to be issued in furtherance of lawful business of association issued them fraudulently to secure his private debt, they being non-negotiable, his assignee was chargeable with notice of statutory restriction on powers of association and of its incapacity to issue anything under its contract except certificates of indebtedness, association was not estopped to deny their validity and assignee has no cause of action

This rule will not, however, be enforced to the extent of permitting inequity or injustice,[39] and it is accordingly often held that ultra vires transactions are merely voidable,[40] that is, such transactions are held valid until assailed in direct proceedings instituted for that purpose,[41] and that a stranger to an ultra vires transaction cannot question the corporation's want of authority.[42] It may be noted also that if a corporation's indorsement of negotiable paper is ultra vires, and it incurs no liability thereby, its effect nevertheless is to pass the property therein.[43] The defense of ultra vires to a claim of a corporation only applies to an executory, and not to an executed, contract.[44] A corporation seeking to avail itself of the plea of ultra vires has the burden of showing the same,[45] and the defense, to be available, must be specifically pleaded.[46] Quasi public corporations seeking to enter upon an ultra vires line of conduct in respect to their business are subject to restraint by a court of equity.[47]

against the corporation. American Exch. Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 NE 107.

39. See post, this subsection, subdivision Estoppel to Assert Ultra Vires.

40. Conveyance to corporation incompetent to take title to real estate is voidable only. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232; Puget Sound Nat. Bank v. Fisher, 52 Wash. 246, 100 P 724.

41. By the sovereign. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232; Puget Sound Nat. Bank v. Fisher, 52 Wash. 246, 100 P 724. Ordinarily question of whether corporation has exceeded its powers in entering into a contract can only be raised by state or by stockholder. Kelley v. Forney [Kan.] 101 P 1020. Cannot be attacked collaterally. Harrison v. Philadelphia Contributionship for Ins., 171 F 178. Where a fire insurance society amended its deed of settlement and charter and provided for the cancellation of policies and return of deposits after due notice, such provisions being repeated in a policy subsequently issued, holder could not enjoin cancellation on the ground that amendment providing for cancellation was ultra vires. Id. Whether an investment by an insurance company in stock of another company is authorized or not affects state only. Hyde v. Equitable Life Assur. Soc., 61 Misc. 518, 116 NYS 219. Purchase by insurance company of controlling interest in bank. Id.

42. Kelley v. Forney [Kan.] 101 P 1020. In an action of forcible entry and detainer brought by lessee of corporation to recover possession of leased property, defendant whose right of occupancy has expired cannot question power of corporation to execute lease. Id. Fact that he is a stockholder gives him no right to raise the question of ultra vires in a proceeding of that character. Id.

NOTE. Competition resulting from ultra vires act as ground for action by competitor of corporation: In Burns v. St. Paul City R. Co., 101 Minn. 363, 112 NW 412, the publisher of a weekly newspaper sought to enjoin the defendant company from displaying advertising matter in its cars on the ground that the act was ultra vires and that the revenue derived therefrom might otherwise be enjoyed by plaintiff's newspaper. The court held that the facts were insufficient to entitle the plaintiff to litigate the question of ultra vires. In New Orleans, M. & T. R. Co. v. Ellerman, 105 U. S. 166, 26 Law. Ed. 1015, it is held that the legal interest which qualifies an individual to raise the question of ultra vires against a corporation is a pecuniary interest in preventing an act in itself wrongful, and accordingly a wharfinger cannot enjoin, on the ground of ultra vires, competition by a railway company which would give no cause of action as against a natural person. On like grounds in Camblos v. Philadelphia & R. R. Co., 4 Brewst. (Pa.) 563, Fed. Cas. No. 2,331, injunction to prevent a railway company from ultra vires competition with an express company was refused, and in New England R. Co. v. Central R. & Elec. Co., 69 Conn. 47, 36 A 1061, injurious competition was held insufficient to give a railway company the right to raise the question of ultra vires as against a street car company's unauthorized extension of its lines.—Adapted from 12 L. R. A. (N. S.) 757.

43. Winer v. Bank of Blytheville [Ark.] 117 SW 232.

44. Doubleday, Page & Co. v. Shumaker, 60 Misc. 227, 113 NYS 83.

45. The burden of proof is on a surety company to show that its undertaking is ultra vires. Baglin v. Title Guaranty & Surety Co., 166 F 356.

46. Winer v. Bank of Blytheville [Ark.] 117 SW 232; Bacon v. Montauk Brew. Co., 130 App. Div. 737, 115 NYS 617. Where question of ultra vires is not raised by pleadings, it is not available. Stanton v. Erie R. Co., 131 App. Div. 879, 116 NYS 375. Corporation could not claim that note was ultra vires where there was no **denial under oath** of execution of same as required by Cir. Ct. Rule 8. Citizens' Sav. Bank v. Globe Brass Works [Mich.] 15 Det. Leg. N. 849, 118 NW 507. Ultra vires as defense not available when no **notice** of same given under court rule 7. City of Niles v. Benton Harbor-St. Joe R. & L. Co., 154 Mich. 378, 15 Det. Leg. N. 757, 117 NW 937.

47. If corporation, engaged in business that is affected with public interest, contracts to enter upon line of conduct in respect to such business that tends to affect such public interest injuriously and is contrary to public policy, such contract is ultra vires such corporation and may be restrained in equity at suit of attorney general without regard to whether or not ac-

A corporation engaging in illegal business, contrary to statute, cannot enforce its obligations resulting therefrom.[48]

Estoppel to assert ultra vires or illegality. See 11 C. L. 825—It has been noted that corporate powers cannot be extended by an appeal to the doctrines of estoppel,[49] but it should also be observed that the doctrine of ultra vires is not allowed to prevail when invoked for or against a corporation where it would defeat the ends of justice or work a great wrong.[50] Thus, a corporation cannot by a plea of ultra vires defeat a consummated transaction not in itself unlawful and of which it has accepted and retained the benefits.[51] Neither will a corporation be permitted to

tual injury has resulted to public. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80. Business of fire insurance as carried on by corporations created, licensed, and regulated by state, is business affected with public interest within rule that ultra vires contracts of such quasi-public corporations may be restrained. Id. Contract in restraint of trade entered into by fire insurance companies, necessary effect and actual result of which is to control such business within certain area, and within such area to fix and regulate prices, and to limit or eliminate competition to injury of public, is contrary to public policy, and ultra vires such corporations and may be restrained. Id. Rule in equity that contracts in restraint of trade are merely unenforcible does not require that parties so contracting be deemed to be immune from ordinary equitable remedies, when their violation of public policy is directed at and actually works a public injury. Id.

48. Where board of trades occupied premises under agreement to pay rent, liability so created, if any, cannot be enforced in suit by corporation owning premises, where such corporation was engaged in illegal business and was itself illegal in that it was organized to acquire land contrary to Hurd's Rev. St. 1905, c. 32. Imperial Bldg. Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 NE 167.

49. Ante, this section.

50. Earle v. American Sugar Refining Co. [N. J. Eq.] 71 A 391. Plea of ultra vires is not admitted except where it is practicable to restore status quo ante. Id. Except in cases where rights of public are involved, plea of ultra vires, whether interposed for or against corporation, will not be allowed to prevail, when it will not advance justice but will accomplish a legal wrong. Wayte v. Red Cross Protective Soc., 166 F 372. Where necessities of corporation required retention of real estate which had been acquired under an ultra vires contract and compromise of pending suits, court will not, in absence of fraud or bad faith, order that agreements be rescinded and reconveyance made. Baldwin v. Egan, 11 Ohio C. C. (N. S.) 584.

51. Mulford v. Torrey Exploration Co. [Colo.] 100 P 596; Bloom v. Home Ins. Agency [Ark.] 121 SW 293; Spencer v. Alki Point Transp. Co. [Wash.] 101 P 509; Wayte v. Red Cross Protective Soc., 166 F 372. Contract executed by president of light and power company who owned majority of stock in both corporations and afterwards ratified by board of directors of light and power company, and acted on to its detriment by other contracting party, becomes binding obligation of company. Derr v. Fisher [Okl.] 98 P 978. Where plaintiff was employed not to make any illegal contract, but to secure a charter to enable defendants to do in New York same kind of business done in home state, and he did so, expending large sums of money and services to attain his end, all of which defendants knew and with the results which they were satisfied, they were estopped to claim illegality in defense to plaintiff's **claims for services.** Wayte v. Red Cross Protective Soc., 166 F 372. Where bank has received full benefit of an **attorney's services,** it cannot plead invalidity of contract to defeat recovery of compensation. Rebadow v. Buffalo Sav. Bank, 63 Misc. 407, 117 NYS 282. Where corporation succeeded to business of individual and acquired his assets subject to lien, giving of note to secure release of lien could not be repudiated as ultra vires, as executed in **payment of debt of third person.** Citizens' Sav. Bank v. Globe Brass Works [Mich.] 15 Det. Leg. N. 849, 118 NW 507. Corporation making **sale of stock** subject to purchaser's right to rescind cannot claim such contract is ultra vires and cannot be rescinded where it has received benefits. Mulford v. Torrey Exploration Co. [Colo.] 100 P 596. Corporation with power to issue **negotiable paper** for value is estopped from denying liability on accommodation paper issued without authority. Scherer & Co. v. Everest [C. C. A.] 168 F 822. Where corporation has power under any circumstances to issue negotiable securities, bona fide holder has right to presume that they were issued under circumstances which give requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper. Id. Fact that corporation authorized to issue commercial paper within limit prescribed by statute, which does not declare indebtedness in excess of that limit void, created an indebtedness in excess of the limit, to knowledge of purchasers of such commercial paper for value, did not relieve it from liability thereon. Id. Form of **indorsement** immaterial where defendant corporation received benefit of transaction with full knowledge. Van Norden Trust Co. v. Rosenberg, 62 Misc. 285, 114 NYS 1025.

Rule unavailing where evidence of benefit is too vague and uncertain to become foundation of any right. Spencer v. Alki Point Transp. Co. [Wash.] 101 P 509. In action against corporation on contract held to be ultra vires, evidence was insufficient to show retention of fruits of transaction by defendant and judgment non obstante

retain the benefits resulting from that part of its contract which it affirms as legal and escape the burden imposed by that part of the same contract which it asserts is ultra vires.[52] On the other hand, one dealing with a corporation is himself usually estopped to assert the corporation's lack of power in the premises.[53] A stockholder may not interpose the doctrine of ultra vires to unjustly disavow a transaction which he has affirmed.[54]

§ 9. *Torts, penalties and crimes.*[55]—See 11 C. L. 826—Since a corporation of necessity acts only through natural persons or agents,[56] a correlative responsibility for the acts of its agents within the scope of their employment is created.[57] It follows, therefore, that corporations are liable for the willful torts of agents committed within the general scope of their employment,[58] or ratified by it.[59] This doctrine is

veredicto was proper. Dickinson v. Matheson Motor Car Co. [C. C. A.] 171 F 646. Proof held insufficient to show anything in relation of parties estopping corporation to set up defense of ultra vires. Society of St. Stephen v. Sikarski, 141 Ill. App. 1. Corporation held not estopped to set up defense of ultra vires where there is no evidence that any stockholder or director except one committing act knew thereof. Owen & Co. v. Storms & Co. [N. J. Law] 72 A 441. Corporation not estopped from denying power to guarantee price of goods purchased by boarding house because employe was afforded place to board, benefit being insufficient. Gulf Yellow Pine Lumber Co. v. Chapman & Co. [Ala.] 48 S 662.

52. Mulford v. Torrey Exploration Co. [Colo.] 100 P 596.

53. Where a loan is clearly an act ultra vires, estoppel will prevent the borrower from defending a suit for its recovery upon the ground that a loan by a corporation not made for its own benefit is ultra vires. Earle v. American Sugar Refining Co. [N. J. Eq.] 71 A 391. Where two corporations or a corporation and a natural person have assumed to enter into a partnership not in violation of the anti-trust statute, and have done business jointly, they may recover upon obligations made to them in their partnership name, irrespective of their rights and duties as between themselves or of the power of the corporation to enter into the partnership. Fact of such partnership held no defense to suit by partnership. Stahr v. Hickman Grain Co. [Ky.] 116 SW 784.

54. Where whole scheme for building and loan association to purchase land and divide it up into lots and apportion them among its members at appraised value was actively promoted by defendants with knowledge of terms of indebtedness incurred by association to its grantor, defendants will be held to have ratified act of pledging credit of association for purchase price, and, there being no public right involved, they will not be heard to raise ultra vires. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918.

55. **Search Note:** See notes in 4 L. R. A. (N. S.) 1001, 1091; 115 A. S. R. 721; 5 Ann. Cas. 413.

See, also, Corporations, Cent. Dig. §§ 1579-1584, 1899-1909, 2138-2149; Dec. Dig. §§ 396, 488-498, 526-536; 10 Cyc. 951, 952, 1203-1235; 7 A. & E. Enc. L. (2ed.) 824.

56. See ante, § 1.

57. Hypes v. Southern R. Co., 82 S. C. 315, 64 SE 395. Corporation is, generally speaking, liable for conduct of agents through whom it conducts business. People v. Rochester R. & L. Co., 195 N. Y. 102, 88 NE 22. Corporations are liable for acts of agents in their employment in same manner and to same extent that individuals are liable under like circumstances. First Nat. Bank v. Henry [Ala.] 49 S 97.

58. Payton v. People's Credit Clothing Co., 136 Mo. App. 577, 118 SW 531. Liable without previous express authority or subsequent ratification. Hypes v. Southern R. Co., 82 S. C. 315, 64 SE 395. Old doctrine that corporation having no mind could not be liable for acts of agents involving **malice** is completely repudiated by modern jurisprudence. Id. In absence of allegation and proof that agents of corporation acted in **scope of authority** in arresting or detaining wife while attempting to collect debt of husband or that corporation ratified act, the corporation is not liable for agents' tort. Powell v. Champion Fiber Co., 150 N. C. 12, 63 SE 159. Where no express authority is shown as to whether authority to commit wrong should be implied, question of fact for jury is presented as to whether facts and circumstances in proof would induce reasonable person to infer that act was in general powers conferred on agent. Payton v. People's Credit Clothing Co., 136 Mo. App. 577, 118 SW 531. Jury held warranted in finding that general manager of foreign corporation in state whose duty embraced widest scope was acting in line of authority in making slander and was not merely result of his own malice. Id. When one corporation makes use of another as its instrument through which to perform its business, the principal corporation is really represented by the **agents** of the **subcorporation,** and its liability is just the same as if the principal corporation had done business in its own name. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403. Where domestic company was practically controlled and operated by foreign company, conductor on latter's train operated by same crew outside of state was conductor upon whom process could be served under Laws 1905, p. 30, c. 25, § 2, though corporation had agreed that crews should be employes of domestic corporation while running over its road. Id.

59. Kane v. Boston Mut. Life Ins. Co., 200 Mass. 265, 86 NE 302. **Evidence held insufficient** to show superintendent's authority to ratify agent's acts constituting libel. Id. Mere inaction of corporation and refusal of

exemplified in liability for slander,[60] malicious prosecution,[61] trespass,[62] and where relief is granted for fraud [63] or unfair competition.[64] Liability for the wrong cannot be evaded by recourse to the doctrine of ultra vires,[65] and while legislative authority may exempt a corporation from liability for certain torts, such as public nuisance, it will nevertheless be liable to individuals injured by a private nuisance.[66] To hold two corporations in solido for the same tort, both must be bound alike and must have participated in the wrongful act.[67] Vindictive damages may be imposed in a proper case.[68] Statutes often provide for the prosecution of an action for tort after the dissolution of the corporation.[69]

superintendent to do anything for plaintiff libeled by an agent cannot indicate ratification of libel. Id. Letters held not to show ratification of libel by agent but rather to express disapproval of agent's act. Id. Where corporation did not knowingly receive benefit of its agent's misconduct, it cannot be held thereby to have ratified such misconduct. Id. No proof that libel was uttered in course of agent's employment, or while acting in apparent scope thereof. Id.

60. Corporation may be held responsible for slander uttered by an officer or agent within scope of his employment. Payton v. People's Credit Clothing Co., 136 Mo. App. 577, 118 SW 531. Corporation held liable for slander in reference to a matter growing out of its contract relations with slandered person, such matter being within duty of agent uttering same to adjust. Hypes v. Southern R. Co., 82 S. C. 315, 64 SE 395. Where agent declared "I am going to stop you fellows stealing from company." Id. Complaint held sufficient as against demurrer where it showed facts from which it might be inferred slander was uttered in course and scope of agent's employment and under implied authority of master. Id. Corporation may be held liable for **slander of title.** Continental Realty Co. v. Little [Ky.] 117 SW 310.

61. Corporation not relieved from liability for instituting criminal prosecution against an agent, where corporation's representative failed to disclose to an attorney all facts within his knowledge. White v. International Textbook Co. [Iowa] 121 NW 1104. Corporation is presumed to have known what agent ascertained in connection therewith. Id. Instruction in action for malicious prosecution held misleading, in that authority was essential to render defendant liable for agent's acts. Emerson v. Lowe Mfg. Co. [Ala.] 49 S 69.

62. In action for direct corporate trespass, president or board of directors must be shown to have participated in damnifying act, but the rule is otherwise if the action is on the case. Chamberlain v. Southern R. Co. [Ala.] 48 S 703.

63. Contract for purchase of real estate held to be induced by fraudulent representations that lots were improved. Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731. If doubt as to preponderance of evidence, same was removed by plaintiff which combined business of selling books with real estate, having dual existence, and possessing pictures and other literature tending to give false impression of lots sold. Id. Where two individuals fraudulently induced execution of deed and caused corporation to be incorporated to purchase lands in question, they being stockholders and officers, effect of act and conduct of individuals would **estop** corporation from claiming any benefit from deed in question. Lyndon Lumber Co. v. Sawyer, 135 Wis. 525, 116 NW 255. In action by corporation upon written agreement to recover sum due on real estate transaction, affidavit of defense, alleging certain representations and unperformed promises by unnamed agents of plaintiff corporation, and failing to set forth the authority of such agents, is insufficient. Folsom Real Estate Co. v. Esmark, 38 Pa. Super. Ct. 580.

64. In equitable suit for injunction for unfair competition where corporation was shown to have succeeded to business of copartnership, partners becoming charter members of corporation, acts charged, as far as material to remedy of injunction, were merely evidentiary, tending to show course of conduct and intention, and, not being causes of action, were not within statute of limitations. Racine Paper Goods Co. v. Dittgen [C. C. A.] 171 F 631.

65. Corporations are liable for every wrong of which they are guilty and in such cases doctrine of ultra vires has no application. First Nat. Bank v. Henry [Ala.] 49 S 97. Bank held liable for violating terms of special deposit. Id.

66. Alabama & V. R. Co. v. King [Miss.] 47 S 857. Recovery of damages because of private nuisance not violative of constitution as taking of property without due process of law. Id. Where charter of railroad and amendatory acts authorized construction of railroad and exercise of power of eminent domain prior to constitution of 1890, which required compensation for property taken "or damaged," the quoted words being omitted in the previous constitution. Id. Such recovery not impairment of contract rights. Id.

67. Lumber corporation is not liable for injury to employe of railroad caused by wreck since railroad owed certain duties to employe not owed by lumber company, and lumber company had nothing to do with operation of road which operation caused injury. Stephens v. Louisiana Long Leaf Lumber Co., 122 La. 547, 47 S 887. Fact that members of railroad corporation went beyond terms of charter does not render it possible to hold another separate corporation for its illegal acts. Id. Corporations kept separate books, and declared separate dividends. One, being railroad, issued other, lumbering corporation, bills of lading and certain freight rate was paid one to other. Officers were different and though one superintendent was in charge for both he received separate directions from each. Held to be separate corporations. Id.

68. Vindictive damages proper element for

From a corporation's liability for tort, it is but a step further to hold that it may, in many instances, be charged criminally with the unlawful motives of its agents in its behalf,[70] and the fact that the servant may be punished does not relieve the corporation,[71] but indictment is available only when specifically authorized.[72] It should also be noted, however, that every grant of corporate power is upon the implied condition that the created corporation will not violate the criminal laws,[73] and that forfeiture of the corporate charter may be demanded if a corporation enters upon a career of lawlessness.[74] A corporation may be guilty of concealment of assets while a bankrupt,[75] or of breach of the Sunday Laws,[76] but, under a statute defining homicide, the words "human being" have been construed not to refer to a corporation.[77] Statutes may permit penal actions against corporations for public offenses,[78] but constitutional restrictions must be observed in this regard.[79] A cor-

wrongful act of agent perpetrated while ostensibly discharging duties within scope of corporate purposes. Aygarn v. Rogers' Grain Co., 141 Ill. App. 402. Corporation held liable to vindictive damages occasioned by its agent willfully and wantonly taking and loading car set out for a competitor. Id. Punitive damages proper element in action for gross negligence against corporations when such acts are committed by their agents. Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264. In action for slander of title where corporation did not participate in acts complained of and had no knowledge of them, it is not liable in punitive damages but only for actual loss caused by presence of its fraudulent title on record. Lacroix v. Villio, 123 La. 459, 49 S 20.

69. See post, § 12, subd. Effect of Dissolution.

70. People v. Rochester R. & L. Co., 195 N. Y. 102, 88 NE 22. May be indicted for nonfeasance or misfeasance. Id. Corporation may be indicted and punished for any violation of law by its servants and agents in conduct of its business, which it commands or ratifies. Rose v. State, 4 Ga. App. 588, 62 SE 117. Act of agent, while exercising authority delegated to him to make rates for transportation, may be controlled, in interest of **public policy**, by imputing his act to his employer and imposing penalties upon corporation for which he is acting in premises. New York Cent. & H. R. R. Co. v. U. S., 212 U. S. 481, 53 Law. Ed. —. While there are some crimes which cannot be committed by corporation, there is large class of offenses, of which **rebating** under federal statutes is one, wherein crime consists in purposely doing things prohibited by statute, in which case corporation may be held responsible for and charged with knowledge and purposes of their agents acting within authority conferred upon them. Id. Provisions of Elkin's Act (32 Stat. 847, c. 708, U. S. Comp. St. 1907, p. 880), imputing violation of act prohibiting rebating to corporation, is not unconstitutional as denying due process of law. Id. Act held valid as to corporate carriers whether valid as to individuals or not. Id.

71. Roso v. State, 4 Ga. App. 588, 62 SE 117. Elkin's Rebate Act (32 Stat. 847, c. 708, U. S. Comp. St. 1907, p. 880) held to permit both agent and corporation to be **joined** in one indictment for commission of prohibited offense. New York Cent. & H. R. R. Co. v. U. S., 212 U. S. 481, 53 Law. Ed. —.

72. Corporations are only indictable where legislature has specifically provided that they may be proceeded against. State v. French Lick Springs Hotel Co., 42 Ind. App. 282, 85 NE 724.

73. State v. French Lick Springs Hotel Co., 42 Ind. App. 282, 85 NE 724.

74. See post, § 12.

75. In violation of Bankr. Act, July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433). United States v. Young & Holland Co., 170 F 110. Even if a corporation could not be charged as conspirator, this would not affect an indictment, since individual defendants could be guilty of conspiracy including fraudulent concealment by bankrupt corporation. Id. Indictment under § 5440 for conspiracy in violation of Bankr. Act (July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]), § 29b, c. 4. Id.

76. Amusement company which operated patent coaster known as "Figure 8," sold refreshments, etc., did so in violation of Sunday laws of state. Pen. Code, §§ 259, 263, 265. Roth v. Robertson, 133 App. Div. 343, 118 NYS 351.

77. Penal Code, § 179, defining homicide as killing of one human being by another, does not include killing by corporation, word "another" referring not to "person" but to "human being," and hence corporation is not liable under statute for such crime. People v. Rochester R. & L. Co., 195 N. Y. 102, 88 NE 22. It is stated that statute might be so worded as to render corporation punishable for crime of homicide. Id. People v. Rochester R. & L. Co., 129 App. Div. 843, 114 NYS 755; People v. Rochester R. & L. Co., 59 Misc. 347, 112 NYS 362.

78. Under Cr. Code Prac. § 11, authorizing penal action for public offense of which only punishment is fine, penal action lies against corporation under Ky. St. 1909, § 1905a (Russell's St. §§ 3615a[1]-3615a[4], 3615a[8] 3615b[3], 3615b[4]), prohibiting misbranding or adulteration of food. Small & Co. v. Com. [Ky.] 120 SW 361. If only punishment that can be imposed upon corporation is fine, offense may be prosecuted as penal action, although statute prescribes both fine and imprisonment as punishment. Id.

79. Cr. Code Prac. § 11, authorizing penal action for public offense for which only punishment is fine, if construed to authorize penal action against corporation for violating statute imposing both fine and imprisonment, is nevertheless valid, though an individual may be both fined and imprisoned.

poration indicted for an offense punishable by statute will not, if guilty, be permitted to escape punishment by showing that the act constituting the offense was ultra vires.[80] A corporation may be cited to appear for contempt of court.[81]

An indictment against a corporation's president cannot be sustained when it appears that the wrongful act was committed by another agent.[82]

A corporation's right to relief against torts against it is well settled.[83]

§ 10. *Actions by and against corporations.*[84]—See 11 C. L. 827—Corporations are judicial persons, and the rules of procedure apply to them as to natural persons,[85] and may avail themselves of any legal or equitable remedy available to individuals under the same circumstances,[86] though in the nature of things a corporation cannot bring an action ex delicto for a purely personal tort, nor be awarded purely personal damages.[87] Inability to maintain actions is sometimes prescribed as a means of enforcing statutory requirements,[88] such as the payment of licenses or

The discrimination cannot be avoided and corporation cannot complain that it is favored. Small & Co. v. Com. [Ky.] 120 SW 361. Corporation must not be denied equal protection of laws. Birmingham Waterworks Co. v. State [Ala.] 48 S 658. Code 1896, § 4561, imposing solicitor's fee of $50 for securing conviction of any corporation for violating state law, is unconstitutional except as to offenses peculiar only to corporations. Id.

80. Doctrine of estoppel applies with full force, hence street railway leasing interurban road cannot fall back on want of authority to do so where it operates same and fails to provide separate cars for races. Louisville R. Co. v. Com. [Ky.] 114 SW 343. Lessor corporation held not liable for failure of lessee corporation to obey law where it had no knowledge when it made lease that lessee would violate law and where it did not participate therein. Id.

81. Where corporation not party of record, but assignor of plaintiff and claimed to be real party in interest, is required by an ex parte order to appear for examination by defendant, and complies with such order, plaintiff cannot complain. Wilkens v. American Bank of Torreon, 133 App. Div. 646, 118 NYS 210. Corporation is not guilty of contempt for the failure to produce a traveling agent where the original order provided for service upon him, which had not been had. Id.

82. Both president and receiving teller of incorporated bank are agents of same principal and not of each other, and president is not chargeable with latter's act of receiving deposits after insolvency of bank, though he knew of insolvency and teller did not, but his acts within scope of his authority are merely those of corporation. Ex parte Rickey [Nev.] 100 P 134.

83. NOTE. Right of corporation to sue for libel or slander: There is no question as to the right of a corporation at common law to sue for libel or slander of its business. Gross Coal Co. v. Rose, 126 Wis. 24, 105 NW 225, 2 L. R. A. 741, 110 Am. St. Rep. 894; Ohio & M. R. Co. v. Press Pub. Co., 48 F 206; American Book Co. v. Gates, 85 F 729; Hahnemannian L. Ins. Co. v. Beebee, 48 Ill. 87, 95 Am. Dec. 519; St. James Military Academy v. Gaiser, 125 Mo. 517, 28 SW 851, 46 Am. St. Rep. 502, 28 L. R. A. 667; Morrison-Jewell Filtration Co. v. Lingane, 19 R. I. 316, 33 A 452; Dr. Shoop Family Medicine Co. v. Wernich, 95 Wis. 164, 70 NW 160. See, also, cases collated in note under Brayton v. Cleveland Special Police Co., 52 L. R. A. 525.

The question of the right of a corporation to maintain action when the words complained of are spoken or published with regard to its officers, employes or stockholders, is more difficult. In the Brayton case and in Midland Pub. Co. v. Implement Trade Journal Co., 108 Mo. App. 223, 83 SW 298, failure to show that such alleged libel or slander was in direct relation to the trade or business of the corporation was held fatal to recovery.—Adapted from 2 L. R. A. (N. S.) 152.

84. Search Note: See notes in 2 L. R. A. (N. S.) 741; 35 A. S. R. 289; 96 Id. 972; 5 Ann. Cas. 550.

See, also, Corporations, Cent. Dig. §§ 1916-2149; Dec. Dig. §§ 499-525; 10 Cyc. 736, 1331-1363; 7 A. & E. Enc. L. (2ed.) 848; 5 A. & E. Enc. P. & P. 54.

85. Gonner v. Missouri Val. Bridge & Iron Co., 123 La. 964, 49 S 657.

86. It is intention of law to secure to corporations all rights and remedies of natural persons as far as their purely artificial nature will permit. Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 NW 926. No limitation on corporation's right to sue in any court of law or equity. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. **Political party** organized as corporation is entitled to sue. Independence League v. Taylor, 154 Cal. 179, 97 P 303. **Corporation transacting business under an assumed or trade name** can maintain or defend suit in such name, and if objection on this account is not properly raised it is waived. Charles v. Valdosta Foundry & Mach. Co., 4 Ga. App. 733, 62 SE 493.

87. Hansen Mercantile Co. v. Wyman, Partridge & Co., 105 Minn. 491, 117 NW 926.

88. Corporation's failure to register as "person" engaged in plumbing business (Laws 1896, p. 1052, c. 803) is good defense to action for services rendered. Schnaier & Co. v. Grigsby, 61 Misc. 325, 113 NYS 548. Rev. Codes, § 3823, requiring filing of copy of articles in office of secretary of state, prevents holding of any property or actions in relation thereto by domestic corporation until such filing. Uihlein v. Caplice Commercial Co. [Mont.] 102 P 564.

taxes.[89] A corporation cannot change its status for jurisdictional purposes by the creation of a new corporation in another state when such new corporation is in fact controlled by the old corporation.[90] A corporation and its successor may properly join in the prosecution of a suit for a wrong,[91] and an individual owning practically all of a corporation's stock and directing its acts may be joined with the corporation as defendant in a suit.[92]

The pleading and proof of incorporation have already been considered,[93] and the verification of pleadings by corporations is treated elsewhere.[94] That a corporation has officers and stockholders must be presumed.[95] A misjoinder of counts setting forth independent causes of action against a corporation and its officers is subject to demurrer.[96] To render one corporation liable for the torts or contracts of another corporation, it must appear that such liability attaches by operation of law or by contract,[97] and in an action against a consolidated corporation, a general averment of consolidation of corporations is sufficient.[98] An amendment of a plain-

89. Nonpayment of a **bonus tax** is condition precedent to existence of corporation. Nonpayment of bonus tax required by Code Pub. Gen. Laws, art. 81, § 98, is good defense to an action for libel. National Shutter Bar Co. v. Zimmerman & Co., 110 Md. 313, 73 A 19. Nonpayment of bonus tax as defense to action for libel is properly pleaded by way of traverse and not in abatement, since plea does not interpose an objection to further progress of suit but denies existence of cause of action itself. Id. Theory of plea is that corporation is not created at time of wrong and could not be injured. Id. Under statute providing that until annual state **license tax** is paid defaulting company may neither maintain nor defend a suit, defense that company has not paid such tax is not available where same was paid prior to hearing and properly authenticated by certificate. Rollins v. Fearnley [Colo.] 101 P 345. Sess. Laws 1902, p. 73, c. 3, §§ 64, 66, permitting pleading of failure to pay license tax provided thereby in bar of action, are inapplicable to cause arising prior to its enactment but are applicable to writ of error sued out in such action after enactment of statute, since writ is equivalent to new action. Ohio-Colorado Mining & Milling Co v. Elder [Colo.] 99 P 42. Sess. Laws 1907, p. 548, c. 211, repealing and re-enacting Laws 1902, p. 73, c. 3, §§ 64-66, providing for payment of certain license tax by corporations, foreign corporations to pay twice as much as domestic, held by § 11 of repealing act to negative idea that legislature would not have passed act had it known that act was void as against foreign corporations, since by that section (§ 11) of re-enacting act, placing foreign and domestic corporations on same footing, it was provided that new act should not affect penalties already incurred under old act. Id. Writ of error sued out in 1905 will be dismissed under Sess. Laws 1902, pp. 73, 74, c. 3, §§ 64-66, and repealed and re-enacted by Sess. Laws 1907, p. 548, c. 211, regarding payment of annual license tax by corporations where corporation suing out writ has failed to pay tax. Id.

90. Under Act of March 3, 1875 (18 Stat. at L. 470, 472, c. 137, U. S. Comp. St. 1901, pp. 508, 511), § 5, California corporation will not be permitted to remove suit by it against another California corporation to federal court by incorporating Nevada corporation to assume to be owner, etc., of its property only that it would have standing in federal court as plaintiff, where old corporation can control suit and require new one to transfer benefit of decree to itself without any new or valuable consideration. Miller v. East Side Canal & Irr. Co., 211 U. S. 293, 53 Law. Ed. 189.

91. A bill in equity is not demurrable for misjoinder of parties where two corporations are injured by defendant's acts, one directly and other indirectly, in that it might be liable to its vendee (other corporation) upon its guaranty. Sipe & Co. v. Columbia Refining Co., 171 F 295. Where defendant used secret formula in manufacture. Id.

92. Suit for infringement of patents. Chicago R. Equipment Co. v. Perry Side Bearing Co., 170 F 968.

93. See ante, § 3.

94. See Verification.

95. Presumptions of fact never arise against well known, usual occurrences or condition of things. Richards v. Northwestern Coal & Min. Co. [Mo.] 119 SW 953.

96. Marter v. Henry Sanchez Co. [N. J. Law] 71 A 41. Plaintiff cannot in one action assert an independent liability of corporation in one count, an independent liability of individual directors of corporation in another count, and liability of both corporation and individual directors in third count. Id.

97. White v. Atlanta, B. & A. R. Co., 5 Ga. App. 308, 63 SE 234. Petition in which it is sought to charge one railroad company with liability for tort of another which fails to set forth in what manner or for what reason such liability attaches may properly be dismissed on demurrer. Id. Allegations of petition held not to show merger of A. & B. Ry. Co. with defendant, or negative inference that depot and property of that company had not become property of defendant by virtue of proper judicial sale. Id. As to liability of **consolidated corporations,** etc., see post, § 13, Succession of Corporation, Reorganization, Consolidation.

98. Facts showing organization of corporation in detail need not be averred. Jackson Consol. Trac. Co. v. Jackson Circuit Judge [Mich.] 15 Det. Leg. N. 1081, 119 NW 915. Court takes same judicial notice of legal consequences of consolidation of cor-

tiff's statement describing the defendant as a corporation of a foreign state, such corporation being in court, is proper.[99] Statutes sometimes provide for the rendition of default judgments upon corporate notes or other evidences of debt, unless defendant serves an order directing the issues to be tried, with his answer or demurrer.[1] Actions by corporations like those of individuals are subject to defenses of estoppel,[2] or laches,[3] in appropriate cases.

§ 11. *Legislative control over corporations.*[4]—See 11 C. L. 829—The extent of legislative control in the creation of corporations,[5] and the amendment, alteration, or repeal of their charters,[6] have been treated in a prior section. Legislative enactments providing for the control and management of corporations for the protection and well being of a state's citizens, and licenses issued in pursuance thereof, are in no sense contracts,[7] but are police regulations subject to amendment or repeal at pleasure.[8] Legislative control is often exercised by the imposition of license [9] fees,

porations occurring in foreign jurisdiction that it does in case of a domestic corporation. Id.

99. Meitzner v. Baltimore & O. R. Co. [Pa.] 73 A 434. No new party on record. Id.

1. Code Civ. Proc. § 1778, is applicable to municipal courts by Municipal Court Act (Laws 1902, p. 1496, c. 580), § 20. Blenderman v. J. R. Beliis Co., 64 Misc. 65, 117 NYS 897. Plaintiff in an action in such court was not entitled to judgment unless he gave notice of intention to rely on omission. Id. Under Code Civ. Proc. § 1778, it was manifest purpose that when an answer was interposed to note made by corporation in which note itself was involved and defended, the judge should look into issue tendered to see if they had sufficient merit to be tried. Pennypacker v. Levis & Co., 63 Misc. 384, 116 NYS 771. Where no issue was made by an answer, but counterclaim was set up, necessitating a reply, an order directing trial of issues was unnecessary, and judgment entered "as in case default" should be set aside. Id.

2. A corporation may be estopped only by some corporate act or relation of privity of estate or interest under or with one who is estopped. Babcock & Wilcox Co. v. Toledo Boiler Works Co. [C. C. A.] 170 F 81. An infringing corporation is not estopped from denying validity of patent sued upon merely because assignor patentee is subordinate in its employment. Id. Complainant corporation and innocent stockholders held not barred from relief for infringement of patent on ground of equitable estoppel, where there was no actual notice to all of stockholders, and therefore notice would not be imputed to corporation. Seeger Refrigerator Co. v. American Car & Foundry Co., 171 F 416.

Estoppel to disaffirm acts of agents: See post, § 15K.

3. In action for infringement of patent where laches pleaded as defense, evidence did not show that infringement was brought home to corporation complainant and its predecessor in title, wherefore defense not maintainable. Seeger Refrigerator Co. v. American Car & Foundry Co., 171 F 416.

4. Search Note: See notes in 11 L. R. A. (N. S.) 973; 11 Ann. Cas. 823.

See, also, Corporations, Cent. Dig. §§ 1573, 1578; Dec. Dig. § 391; 10 Cyc. 157; 7 A. & E. Enc. L. (2ed.) 855.

5. See ante, § 3.

6. See ante, § 3, subd. Amendment, Extension and Revival of Charter.

7, 8. State v. Vandiver [Mo.] 121 SW 45.

9. Act approved March 20, 1905 (St. 1905, p. 493, c. 386), as amended June 13, 1906 (St. 1906, p. 22, c. 19), March 19, 1907 (St. 1907, p. 664, c. 347), and March 20, 1907 (St. 1907, p. 745, c. 403), must be construed as imposing the duty upon all domestic corporations (except educational, charitable, etc., institutions) to pay a **license tax** to state, regardless of whether they transact or attempt to transact business in the state. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Intention is obvious that tax should be paid by every corporation, a certified copy of whose articles of incorporation was on file in office of secretary of state. Id. There is no difference in principle between fee required as condition of being corporation, and an annual charge for right to continue corporate existence. Id. License tax imposed is charge for privilege of being and continuing to exist as corporation in case of domestic corporation, and charge for privilege of doing business in state in case of foreign corporations. Id. The license tax imposed by state on corporations (St. 1906, p. 22, c. 19) is imposed not alone for doing business, but as condition for corporate privilege and authority to do business. Lewis v. Curry [Cal.] 103 P 493. Though foreign corporation was formed to acquire property of domestic corporation and assume charge of its affairs, payment of license tax by such foreign corporation was not discharge of license tax due from domestic corporation. Id. **License or privilege of existence** (Laws 1907, p. 126, c. 107; Comp. Laws 1907, §§ 456x6 to 456x10). Blackrock Copper Mining & Milling Co. v. Tingey, 34 Utah, 369, 98 P 180. Corporation held doing business and employing capital in state, where its own statement showed that it began business on certain date, that office of its comptroller was in state, and it appeared that it was organized to buy certain property, had done so and used rentals to pay dividends, and consequently was liable for **franchise tax** imposed by Laws 1901, p. 1365, c. 558, § 182, amended by Laws 1906, p. 1196, c. 474, § 2. People v. Glynn, 194 N. Y. 387, 87 NE 434. Under Act April 14, 1905 (P. L. 161), corporation organized to carry on general business of real estate agent

by the exaction of reports,[10] and other conditions,[11] and the compensation of corporate officers is also sometimes controlled by statute.[12] Such legislative requirements are enforced by various methods.[13] Public service corporations[14] are especially

must pay **license fee on "merchandise brokers and real estate brokers,** whether persons, firms or corporations," by such act. Commonwealth v. Samuel W. Black Co. [Pa.] 72 A 261. Under St. 1906, p. 22, c. 19, § 7, providing for **exemption** of certain corporations from tax required by state, such as those not organized for pecuniary profit, where corporation was organized on death of member of partnership possessing large business and property interests, to dispose of same without loss, issuing shares to distributees of deceased's interests and carrying on business giving various distributees their share of profits as stockholders, such corporation was organized for pecuniary profit and therefore was not exempt from tax. Lewis v. Curry [Cal.] 103 P 493.

Constitutional limitations: Where license tax valid, corporation cannot complain because **penalty** imposed is not more drastic. Blackrock Copper Mining & Milling Co. v. Tingey, 34 Utah, 369, 98 P 180. License tax not void for **uncertainty.** Id. Corporation license statute (St. 1905, p. 493, c. 386, and amendatory acts) is not void for failure of the **title** to sufficiently express its subject. Const. art. 4, § 24. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Act April 14, 1905, P. L. 161, held not unconstitutional on account of defective title as violating Const. 1874, art. 3, § 3. Commonwealth v. Samuel W. Black Co. [Pa.] 72 A 261. Not unconstitutional as violating art. 3, § 6, relating to **amendments,** being an original act. Id. Corporation license statute (St. 1905, p. 493, c. 386, and amendatory acts) is not violative of Const. art. 3, § 1, providing that no person charged with exercise of powers belonging to **the legislative, the executive, and the judicial functions,** shall exercise functions appertaining to either of the others. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Corporation license imposed by St. 1905, p. 493, c. 386, and amendatory acts, and forfeiture provisions of same act, are of class which require no investigation and of which the legislature has complete jurisdiction. Id. Determination of secretary of state as to corporations within corporation license statute (St. 1905, p. 493, c. 386, and amendatory acts) is mere incident to exercise of purely ministerial function and is not determination binding on corporation. Id. License fee charged for privilege of existence and doing business by corporations (St. 1903, p. 493, c. 386, and amendatory acts) is **not a tax upon property,** and Const. art. 13, § 1, is inapplicable. Id. License tax not void as offending against **uniformity** clause of constitution, classification being for legislature. Blackrock Copper Mining & Milling Co. v. Tingey, 34 Utah, 369, 98 P 180. Corporation license statute (St. 1905, p. 493, c. 386, and amendatory acts) is not in conflict with Const. art. 1, § 11, as not operating uniformly upon domestic and foreign corporations. Domestic corporation forfeits charter and foreign corporation forfeits right to do business. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Tax imposed by Laws 1901, p. 1365, c. 558, § 182, as amended by Laws 1906, p. 1196, c. 474, § 2, held not invalid for inequality and lack of uniformity because of fact that franchise of one corporation is taxed while that of another is not. People v. Glynn, 194 N. Y. 387, 87 NE 434. Rules relating to taxation are inapplicable. Id. Corporation license statute (St. 1905, p. 493, c. 386, and amendatory acts) is not in conflict with Const. art. 15, § 15, providing that no corporation be allowed to transact business on more favorable conditions than are prescribed to domestic corporations, since both domestic and foreign corporations pay same fee. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Legislature may change amount of fees required from domestic or foreign corporations, at any time, without destroying any **vested rights.** Cudahy Packing Co. v. Denton [Kan.] 97 P 439. Provisions of Const. art. 13, § 1, authorizing assessment of corporate franchise as a thing of value, cannot be held to preclude state on theory of **double taxation** from imposing charge for privilege obtained from it of being and acting as a corporation. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341.

10. Montana statute making it duty of mining corporation to make certain annual report showing amount of capital stock authorized, proportion of capitalization paid in, and existing indebtedness, and imposing on directors statutory liability to jointly and severally pay indebtedness of corporation then existing, or thereafter contracted, until such report is filed, is penal. Commercial Nat. Bank v. Kirk, 222 Pa. 567, 71 A 1085.

11. Corporation engaged in plumbing business held "person" under Laws 1896, p. 1052, c. 803, requiring registration of "persons" engaged in plumbing business. Schnaier & Co. v. Grigsby, 61 Misc. 325, 113 NYS 548.

12. Laws 1907, p. 315, limiting compensation of officers of life insurance companies, does not revoke license of company disregarding its provisions, but prohibits granting of new license to disobedient corporation. State v. Vandiver [Mo.] 121 SW 45. Act of 1907 (Laws 1907, p. 315), limiting the salaries and compensation of officers of life insurance companies, is not violative of Const. art. 4, § 28, as to title of the act. Id.

13. Under Ky. St. 1903, § 4028, and Cr. Code Pr. § 11, offense prescribed by Ky. St. 1903, § 4087, as to reports required from corporations, is to be prosecuted by **penal action.** Commonwealth v. Morrell Refrigerator Car Co. [Ky.] 112 SW 860. Corporations refusing to make reports are guilty of misdemeanor. Id. Code 1907, § 2361, subd. 26, pp. 712, 2401, requiring domestic corporations to be licensed and penalizing failure to procure license, held to be part of general revenue law and intended solely for purposes of raising revenue, and hence, not being intended as regulation or protection for benefit of public, and in absence of statute invalidating contracts made by unlicensed corporations, such contracts should be enforced. Sunflower Lumber Co. v. Turner Supply Co. [Ala.] 48 S 510. License tax held not invalid because made **lien** on corporate

subject to state control,[15] and such control is often exercised by a state commission.[16]

§ 12. *How corporations may be dissolved; forfeiture of charter; effect of dissolution; winding up under statutory provisions.*[17] *Modes of dissolution generally.* See 11 C. L. 830—A corporation may be dissolved by operation of law,[18] by the repeal,[19] or expiration of its charter,[20] by the happening of a contingency prescribed by the charter,[21] or by the loss or forfeiture of the corporate franchise in some of the methods provided by law,[22] but usually the acts, omissions and conditions constituting grounds for dissolution do not ipso facto have that effect.[23] The death of a majority of trustees of a corporation does not necessarily operate to dissolve the corporate existence.[24]

Dissolution by forfeiture of charter. See 11 C. L. 831—Since a corporate franchise is in the nature of a special privilege from the state,[25] it follows that the user of such franchise may be inquired into by the state,[26] and a forfeiture declared for misuser,[27] nonuser,[28] or abuse thereof,[29] or of the corporate powers.[30] Thus, a for-

property. Blackrock Copper Mining & Milling Co. v. Tingey, 34 Utah, 369, 98 P 180. Lien mere matter of detail as to enforcement of license tax. Id. See, also, ante, § 10, on **right to maintain actions**; post, § 12, as to **forfeiture of charters**; § 15P, on **liability of officers** for failure to make reports; and § 16G, on liability of officers to creditors for failure to make reports.

14. See, also, such topics as Carriers, §§ 2, 6, 7; Railroads, § 2; Street Railways, §§ 1, 3; Telegraphs and Telephones, §§ 1, 6.

15. Const. art. 16, § 30, giving legislature power to prevent discrimination or excessive charges by persons or corporations performing services of public nature, applies to waterworks companies. State v. Tampa Waterworks Co. [Fla.] 48 S 639. Acts 1901, c. 5070, p. 240, Gen. St. 1906, § 1099, gives cities power to regulate water rates. Id. The terms of an ordinance, contract under which franchise for rendering service of public nature is sought to be exercised, are subject to right of governmental authority under existing laws to regulate rendering of service and charges made therefor as provided in constitution. Id.

16. Statutory enactments may provide for commissions regulating railroad corporations. State v. Railroad Com. [Wis.] 121 NW 919. Railroad commission. Id. Legislative grant of authority to commission to determine whether corporation may do particular thing implies authority to determine corporate competency in that regard tested by charter. State v. Railroad Com., 137 Wis. 80, 117 NW 846. Increase of capital stock. Id.

17. Search Note: See notes in 15 L. R. A. 627; 24 Id. 462; 33 Id. 576; 63 Id. 761; 69 Id. 124; 2 L. R. A. (N. S.) 493; 14 Id. 336; 8 A. S. R. 179; 8 Ann. Cas. 1076.

See, also, Corporations, Cent. Dig. §§ 2373-2486; Dec. Dig. §§ 592-630; 10 Cyc. 988, 1087, 1088, 1265-1331; 9 A. & E. Enc. L. (2ed.) 544; 30 Id. 819; 22 A. & E. Enc. P. & P. 1222.

18. Consolidation and merger. See post, § 13. Succession of Corporations; Reorganization; Consolidation.

19. See ante, § 3, as to power to repeal, and, also, subd. Amendment, Extension and Revival of Charters. Repeal of general railroad law of 1905 (Pub. Acts 1905, p. 335, c. 126) did not affect continued existence of any companies already incorporated under its provisions. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563. Such liquidation of a corporate business would naturally require sale and appointment of receiver. Id.

20. Existence continues until charter expires. Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905.

21. Failure of railroad to build in prescribed time (Gen. St. 1888, § 3440). New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563.

22. Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905.

23. Failure to build railroad in prescribed time does not ipso facto destroy corporate existence. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563. Nonuser of franchise. Reed v. Sampson [Tex. Civ. App.] 118 SW 749; Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905. There can be no dissolution of body corporate till it loses its life, which is its charter. Nueces Val. Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

24. Where number of trustees in corporation is reduced to less than quorum by death, and other trustees may be appointed to carry on the corporate functions, corporate action is only held in suspension till that act is done. Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905.

25. See ante, § 3, and subd. as to repeal of charters.

26. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. That charter is subject to forfeiture is condition annexed to contract creating corporation. Id. Domestic corporation is bound to know law that if it violated state statutes to such an extent as to merit corporate death legislature has full power and authority to inflict that penalty upon it. Boswell v. Security Mut. Life Ins. Co., 193 N. Y. 465, 86 NE 532. If corporation violates its charter or laws of state, it is liable to proceeding to forfeit its charter. Earle v. American Sugar Refining Co. [N. J. Eq.] 71 A 391.

27. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

28. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902; Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905. Corporation organized for particular purpose which had adjourned sine die is presumed not to exist. City of Cleve-

feiture may be demanded for the violation of criminal laws,[31] such a forfeiture sometimes being specifically provided for, as where corporations violate laws against combinations.[32] The violation of regulatory statutes may also result in forfeiture.[33] The general rule that an ipso facto forfeiture will not usually result from an act or omission,[34] such as nonuser,[35] but that a forfeiture must be obtained directly by the state [36] is apparent where statutory provisions as to the forfeiture of charters for nonuser have been held not self-executory.[37] The presumption of dissolution said to arise from nonuser [38] is rebutted by evidence of a statute recogniz-

land v. Cleveland, etc., R. Co., 8 Ohio N. P. (N. S.) 457. Under Code, § 1628, corporation will cease to exist by nonuser of its franchise for two years at any one time. Commercial Nat. Bank v. Gilinsky [Iowa] 120 NW 476.

29. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Noncompliance with Acts 30th Gen. Assem. 1904, p. 49, c. 66, providing for forfeiture of corporate privileges where intentional fraud and deceit in incorporation, held to warrant dissolution. State v. Syndicate Land Co. [Iowa] 120 NW 327. Where evidence tends to prove allegation that defendant was pretended corporation doing business by virtue of charter issued by state, that it was issued ostensibly to conduct burial insurance business, that it issued certificates and made assessments but failed to comply with provisions thereof, failed to deposit any part of assessments with state treasurer under Gen. St. 1901, c. 50, art. 3, has no capital stock, stockholders or directors, and has failed to pay state annual school fund tax of $50, held to warrant judgment of ouster. State v. National Co-Operative Burial Ass'n [Kan.] 98 P 1134.

30. Relief for abuse of corporate powers is ouster. State v. Hocking Val. R. Co., 12 Ohio C. C. (N. S.) 49. Where a corporation issues commercial paper in excess of the limit prescribed by statute, remedy is by ouster and dissolution of corporation at suit of state. Scherer & Co. v. Everest [C. C. A.] 168 F 822.

31. State v. French Lick Springs Hotel Co., 42 Ind. App. 282, 85 NE 724. Charter and franchise may be forfeited where corporation has, by misuser, nonuser, or usurpation of power, so conducted itself as to violate criminal laws of state. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Forfeiture of charter for violation of criminal laws as upon theory that corporation violates its implied agreement of performance of duties and discharge of obligations to public. Id. State v. French Lick Springs Hotel Co., 42 Ind. App. 282, 85 NE 724.

32. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Under Ann. St. 1906, §§ 8965, 8966, 8978, where construed together, inhibition against combination to fix and control prices is sufficiently within purview of statute so as to justify forfeiture. Id.

Constitutional limitations: Anti-Trust Act (Rev. St. 1899, §§ 8965, 8966, 8971, 8978), providing for forfeiture of corporate charters, is not in violation of constitution as imposing greater and different punishment than that inflicted upon individuals. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Not violative of constitution as denying equal protection of laws. Id. Not violative of constitution as discriminating against corporations engaged in sale of commodities. Id.

33. License fees. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Failure to make annual reports. Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448.

34. Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905. Cannot be determined in proceeding to enforce rent. Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448. Right to exercise corporate franchise can ordinarily be questioned only by state directly. Dunmore v. Scranton R. Co., 34 Pa. Super. Ct. 294. Existence as corporation de jure is subject to question in direct proceedings only. Troutman v. Council Bluffs Street Fair & Carnival Co. [Iowa] 120 NW 730.

35. Nonuser for a long period of time may be ground for a forfeiture of private corporation but does not of itself put an end to franchise. Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905.

36. Forfeiture of charter is an authority that lies with the officers of state. Stephens v. Louisiana Long Leaf Lumber Co., 122 La. 547, 47 S 887. Whether franchise is to be forfeited depends upon will of body that created it. Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905.

37. Under Rev. St. 1895, tit. 21, art. 681, which provides that corporations failing to commence active operations within three years from filing of charter shall be dissolved and charter be void, such article is not self-executing, and failure of corporation to commence active operation within three years did not ipso facto dissolve it. Reed v. Sampson [Tex. Civ. App.] 118 SW 749. Judicial determination of failure must be had. Id. Act April 23, 1907, p. 311, c. 164, § 4, subd. 5, providing for forfeiture of charter of corporation created under tit. 21 of General Law, which fails to commence active operations within three years from filing charter, reaches future omissions only and cannot be relied upon as basis for forfeiture for past omissions of a corporation. Id. Under Code, § 1628, providing for forfeiture of charter for nonuser, etc., such forfeiture does not of itself create partnership of stockholders nor create liability against stockholders not participating in transaction of business in corporate name thereafter, and, hence, mere purchaser of fruit and produce for corporation without any further participation in transactions and with no knowledge of facts cannot be held liable. Commercial Nat. Bank v. Gilinsky [Iowa] 120 NW 476.

38. Where corporation was in nature of public institution to provide system of education and establish college, its "franchise" being intended for public benefit, same presumption of forfeiture or corporate dissolution which is usually indulged in, in cases of long nonuser by private corporations, should not be indulged in. Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905.

ing corporate existence.[39] It is sometimes provided that forfeiture results ipso facto from the disregard of a statute,[40] or after certain statutory formalities are complied with,[41] but such a penalty is not favored,[42] and usually the cancellation authorized by statute is merely prima facie evidence which can be used to effect a forfeiture.[43] The forfeiture of a corporate franchise may be waived by the state.[44]

Dissolution by consent of stockholders or directors. See 9 C. L. 751—The liquidation[45] of a corporation by its shareholders may be authorized by the corporate charter[46] or by statute,[47] and such right cannot be surrendered by the corporate officers.[48] Where shareholders hold their stock subject to the power of voluntary dissolution,[49] courts will interfere with such dissolution only in rare instances,[50] as when superinduced by fraud.[51]

39. Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905. College held not dissolved by nonuser, there being no judgment of dissolution, no conditions or limitations in act creating it, and it having been recognized by statute. Id.

40. Corporation license statute (Act March 20, 1905 [Acts 1905, p. 493, c. 386] and amendatory acts) provides for the forfeiture of charter of corporation, ipso facto, on failure to comply with statute by paying imposed charge at specified time. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Forfeiture of corporate charter prescribed for failure to pay license only occurs upon the breach of condition prescribed by act. Id. There can be no forfeiture as to any corporation exempted from the provisions of the act. Id. Statute in so far as it ipso facto works forfeiture of corporate charters where act is disregarded, without hearing, is not void as conflicting with **due process of law** provisions of state and federal constitutions. Id. Grant of privilege to be corporation upon condition subsequent that such privilege cease if corporate license tax be not paid at specified time is not taking of property without due process of law. Id. Legislature has not power to enact law depriving corporation summarily of all its property as penalty for nonpayment of an amount due state without notice and opportunity to be heard. Id. Property rights of a corporation are as sacred as those of an individual. Id.

41. Under St. 1906, p. 22, c. 19, imposing license tax on corporations and providing for forfeiture of charter of corporations delinquent in paying same, governor's proclamation that forfeiture will follow, issued pursuant to statute, is sufficient though not specifying which corporations are foreign and which domestic. Lewis v. Curry [Cal.] 103 P 493. Under St. 1906, p. 22, c. 19, as to forfeiture of charter of corporations failing to pay state license tax, and requiring issuance of proclamation by governor "forthwith" after receiving report from secretary of state, and also requiring filing of proclamation "immediately" in secretary's office, who shall publish same, etc., delay of two days until issuance of proclamation and delay of three days until publication showed reasonable despatch. Id. There is no precise definition as to words "forthwith" and "immediately." In every case the meaning depends upon the circumstances of the case and the act to be performed. Id.

42. License statute should be construed against an ipso facto forfeiture of corporate charters for failure to comply with act, if fairly susceptible of such interpretation. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341.

43. Cancellation which statute authorizes secretary of state to enter upon his records in case corporation fails to make its annual report is not an absolute forfeiture of charter but is merely prima facie evidence of nonuser of which public can avail in a direct proceeding to oust corporation of its franchise. Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448.

44. Where state does not institute proceedings to oust corporation from its franchises, it remains corporation de jure. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A. 563.

45. In its general sense liquidation means the act or operation of winding up affairs of firm or company by getting in assets, settling with debtors and creditors and apportioning amount of profit or loss. Fuller v. Perkins [R. I.] 73 A 372.

46. Dreifus v. Colonial Bank & Trust Co. [La.] 48 S 649. Solvent corporation. Id.

47. Summary proceeding provided by corporation act, § 65 (Laws 1896, p. 298, c. 185), for winding up insolvent corporation, can be instituted only by stockholders or creditors of company. O'Grady v. U. S. Independent Tel. Co. [N. J. Err. & App.] 71 A 1040. Beneficial owner of "voting trust stock" held "stockholder" within Corporation Act, § 65. Id.

48. Where charter of bank gives right to shareholders to control liquidation of bank, officers of bank, including board of directors, are without authority to surrender such right and request by shareholders, made to court to confirm their action in appointing liquidators, is not renunciation of their right to select liquidators but is an affirmance of it. Dreifus v. Colonial Bank & Trust Co. [La.] 48 S 649.

49. Every stockholder holds stock in corporation subject to power of voluntary dissolution by resolution of directors, concurred in by two-thirds in interest of stockholders (Rev. 1905, § 1195). White v. Kincaid, 149 N. C. 415, 63 SE 109. Corporation guaranteeing to pay fixed dividend on another corporation's stock held not to have contracted to not exercise its statutory right as stockholder to vote for dissolution of such cor-

Procedure.[See 11 C. L. 832]—The usual method of enforcing a forfeiture of a corporate charter is by a proceeding in the nature of quo warranto.[52] Such procedure, though directed against a corporation for the violation of criminal laws, is not a criminal prosecution.[53] Statutes providing for forfeitures of charters and revocation of licenses are generally intended to be in aid and supplementary to other remedies.[54]

Generally, in the absence of statute, a court of equity has no jurisdiction to dissolve a corporation,[55] but such jurisdiction is often conferred.[56] A federal court cannot have concurrent jurisdiction of a proceeding instituted by the state to wind up a corporation under a state statute,[57] but this principle would not prevent the federal court from having jurisdiction of the ordinary litigation of such corporation.[58]

Proceedings for the voluntary dissolution of a corporation are purely statutory,[59] and a violation of the express requirements of the statute in connection with the institution and maintenance of such proceedings is jurisdictional in character.[60] Thus, requisites as to process[61] and parties[62] must be observed. Liquidation may

poration. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934.

50. Only in rare and exceptional instances will courts interfere with voluntary dissolution of corporations as provided by Rev. 1905, § 1195. Damnum absque injuria. White v. Kincaid, 149 N. C. 415, 63 SE 109.

51. Where dissolution of corporation is superinduced by fraud or undue influence, for unjustly oppressing minority stockholders, etc., action will be subject of judicial scrutiny. White v. Kincaid, 149 N. C. 415, 63 SE 109. Evidence insufficient to show fraud. Id.; Dreifus v. Colonial Bank & Trust Co. [La.] 48 S 649.

52. Attorney general may institute civil proceedings in nature of quo warranto to forfeit corporate charter. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Under Code Civ. Proc. § 1948, authorizing attorney general to proceed against a person who usurps, intrudes into, or unlawfully holds or exercises franchise within state, attorney general cannot proceed against gas company on grounds that municipal grants or consents to use streets had expired since such grants or consents are not franchises within statute and were matters of local concern as to which municipality could protect itself. People v. Consolidated Gas Co., 130 App. Div. 626, 115 NYS 393.

53. Information in nature of quo warranto to forfeit corporate charter for violation of criminal laws is not criminal prosecution. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Legislature has unquestionable power in addition to declaring acts which will work forfeiture of charter, to punish corporate agents and servants under criminal laws. Id. Procedure provided by Rev. St. 1899, § 8971, for violation of anti-trust laws, is not exclusive. Id. In civil proceedings to enforce forfeiture of corporate franchise for violation of Anti-Trust Act (Rev. St. 1899, c. 143; Ann. St. 1906, §§ 8965-8992), it was no defense that such acts constituted violation of criminal laws. Id.

54. Not in derogation of common law. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Are highly remedial and salutary. Id. That heavy losses may be sustained in consequence of adjudication of ouster should not influence or deter court from declaring intention of legislature as contained in statutes. Id. Remedial and salutary statutes should be enforced and construed according to plain intent of legislature though heavy damages are prescribed and penalties imposed for their violation. Id.

55. Lyon v. McKeefrey [C. C. A.] 171 F 384; Cobe v. Guyer, 237 Ill. 516, 86 NE 1071; De Lacroix v. Eid Concrete Steel Co., 8 Ohio N. P. (N. S.) 489; Pearce v. Sutherland [C. C. A.] 164 F 609.

56. Cobe v. Guyer, 237 Ill. 516, 86 NE 1071. Power of superior court to exercise jurisdiction in suit for dissolution of corporation is derived from Homestead and Loan Ass'n Act, § 25, but such power is not in derogation of the common law and is not summary, but is exercised in usual form of chancery proceedings. Id.

57. Where state by Act Pa. Feb. 11, 1895 (P. L. 4) subjected banking corporations to supervision and administrative control and ordained proceedings, partly administrative and partly judicial, to determine the life of such corporations and wind up its affairs, which proceedings were instituted by the attorney general on behalf of the commonwealth and in the interest of the public, a federal court could not have concurrent jurisdiction of such proceedings. Lyon v. McKeefrey [C. C. A.] 171 F 384.

58. Lyon v. McKeefrey [C. C. A.] 171 F 384. Suit to liquidate assets and pay debts. Id.

59. Knickerbocker Trust Co. v. Tarrytown, etc., R. Co., 117 NYS 871. Proceeding for voluntary dissolution of corporation under Code Civ. Proc. c. 17, tit. 11, is special proceeding (Code Civ. Proc. §§ 3333, 3334). In re Tarrytown, etc., R. Co., 117 NYS 695.

60. Knickerbocker Trust Co. v. Tarrytown, etc., R. Co., 117 NYS 871.

61. In proceedings under St. 1903, p. 155, c. 88, § 94, providing for dissolution of corporations by stockholders, a summons returnable forthwith cannot be regarded as due notice. Golden v. Averill [Nev.] 101 P 1021. Notice of proceeding commanding an appearance of corporation forthwith to show cause why receiver should not be appointed is insufficient,

be effected after the required vote by stockholders is taken,[63] and a petition may be sufficient though signed only by de facto directors.[64]

The court may on motion of a stockholder, in a proper case and on proper conditions, vacate a final order dissolving a corporation.[65]

Effect of dissolution or forfeiture. See 11 C. L. 332—The dissolution of a corporation denotes its complete destruction and connotes liquidation and the distribution of assets.[66] The dissolution terminates a shareholder's personal rights as a member,[67] but not his property right in the assets.[68] Corporate franchises, rights and privilges in general, cease or determine upon dissolution, but are assets for distribution.[69] The common-law doctrine of reverter of the real property of a corporation upon its dissolution or civil death is not favored[70] though properly applicable as to the public lands of an incorporated college, public in nature, which becomes defunct by nonuser.[71]

A dissolved corporation cannot sue[72] unless authorized by statute.[73]

and all orders in such proceeding are void. Id. Notice requiring corporation to appear forthwith carries with it temporary restraining order and, under Comp. Laws, § 3212, such order shall not be granted without due notice of application therefor. Id. Where, in proceedings for dissolution of corporation, Laws 1883, p. 559, c. 378, § 8, requiring an order to show cause to be served on the attorney general, was disregarded, which order is in nature of process, court was not in a position to decree dissolution. Knickerbocker Trust Co. v. Tarrytown, etc., R. Co., 117 NYS 871. Under Laws 1883, p. 559, c. 378, § 8, as to dissolution of corporations, requiring copies of motion papers or other applications, etc., to be served on attorney general, such officer has no authority to validate an order by appearing after it had been made. In re E. R. Strong Co., 128 App. Div. 208, 112 NYS 557. Court without jurisdiction and order void. Id. Under Laws 1883, p. 559, c. 378, § 8, providing that copy of motion and motion papers, etc., be served on attorney general in dissolution proceedings, that officer may confer jurisdiction by waiving service of the papers before motion is brought on for hearing. Id.

62. In dissolution proceedings by stockholders under St. 1903, p. 150, c. 88, § 94, directors of corporation are necessary parties. Golden v. Averill [Nev.] 101 P 1021. Where court in dissolution proceedings has no jurisdiction to appoint receiver of corporation, because necessary parties not served, prohibition will lie to restrain court and receivers and all subsequent action. Id. Upon petition for dissolution of corporation, temporary receiver should not be appointed except upon hearing of all parties. In re Manoca Temple Ass'n, 128 App. Div. 796, 113 NYS 172. Where respondents represent larger interests of both stockholders and directors. Id.

63. Under Rev. St. § 687, providing for dissolution upon vote of three-fourths stock represented at meeting, election of liquidators by all of stockholders present at stockholders' meeting is not invalid because not supported by three-fourths of entire stock. Dreifus v. Colonial Bank & Trust Co. [La.] 48 S 649.

64. Petition under Code Civ. Proc. § 2419. In re Manoca Temple Ass'n, 128 App. Div. 796, 113 NYS 172.

65. In re Automatic Chain Co., 118 NYS 542. Where corporation for manufacture of patented article was dissolved, owner of majority of stock, who did not appear in dissolution proceedings, was entitled to have final order set aside, it appearing that he had paid $29,500 for his stock and that debts of corporation did not exceed $500. Id. Satisfactory bond to pay debts required. Id.

66. Farish v. Cieneguita Copper Co. [Ariz.] 100 P 781.

67. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934. Dissolution of corporation held to terminate stockholders' rights to dividends under guaranty agreement, term "outstanding" meaning "lawfully outstanding." Id.

68. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934. Upon dissolution, shareholder is entitled to his proportion of corporate property remaining after payment of corporate debts. Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 NE 205; Judy v. Beckwith, 137 Iowa, 24, 114 NW 565. Every shareholder is entitled to participate in proportion to number of shares held by him in the winding up of corporation. Avery v. Central Bank [Mo.] 119 SW 1106. The **preferred stockholders** have lien upon property of a corporation unlawfully removed from one state to another after dissolution. Kent v. Hansinger, 167 F 619. Where books, papers, etc., and surplus funds were improperly removed. Id.

69. City of New York v. Bryan, 130 App. Div. 658, 115 NYS 551.

70. Richards v. Northwestern Coal & Min. Co. [Mo.] 119 SW 953. Common-law rule of reverter is not in force in Missouri even if Rev. St. 1899, § 976 (Ann. St. 1906, p. 867), providing that officers be trustees of corporation on dissolution, be held inapplicable. Id.

71. Where public lands appropriated to incorporated college, public in nature, and dissolution takes place by nonuser, corporate entity becoming defunct, lands acquired by virtue of location and survey would logically revert to the state. Murphy v. Luttrell [Tex. Civ. App.] 120 SW 905.

72. Corporation which had been dissolved and was nonexistent for several years before trial could not maintain action, and where there was no successor, the action was properly abated. Buck Stove & Range Co. v. Vickers [Kan.] 101 P 668.

The forfeiture of a corporate franchise does not of itself create a partnership of the stockholders,[74] nor does the transaction of business thereafter in the name of the corporation create a liability against stockholders other than those who participate therein.[75]

Winding up and receivers. See 11 C. L. 832—The continuation of the existence of a corporation for the purpose of winding up its affairs is often provided for by statute,[76] but such continuance is for such purpose only.[77] In some states it is provided that the directors become trustees for the corporation upon dissolution,[78] or upon the forfeiture of charter,[79] with the duty of settling its affairs and distributing the assets.[80] They are authorized to sue for the recovery of debts and

73. See post, this section, subd. Winding Up and Receivers.

74, 75. Commercial Nat. Bank v. Gilinsky [Iowa] 120 NW 476.

76. Code, § 1629. Commercial Nat. Bank v. Gilinsky [Iowa] 120 NW 476. Act Pa. May 21, 1881 (P. L. 30) provides for winding up of trading corporations whose charters have expired. American Ice Co. v. Pocono Spring Water Ice Co., 165 F 714. Under St. 1898, § 1764, legal existence of dissolved corporation continues for three years for purpose of suit and being sued in actions enabling them to settle and close up their business, etc. Elmergreen v. Weimer, 138 Wis. 112, 119 NW 336. Under Rev. St. c. 32, §§ 10, 12, corporations are limited to two years after their legal dissolution to institute suits upon claims in their favor. Central Stock & Grain Co. v. Pine Tree Lumber Co., 140 Ill. App. 471. Under Cobbey's St. 1907, § 4112, a dissolved corporation may be sued in corporate name, and service made upon trustee or person in charge of assets. Heenan v. Parmele, 80 Neb. 509, 118 NW 324. Code 1906, § 2287, provides that corporate property be subject to payment of liabilities and expenses of winding up under receiver, etc., that suits may be brought in so far as necessary to wind up and collect assets for final distribution. Mather v. Mather, 64 W. Va. 646, 63 SE 332. For purpose of ascertaining amount due from stockholder and selling property for amount so ascertained, building and loan association in process of dissolution in its corporate capacity, trustee appointed to wind same up, debtor and trustees in deeds of trust given association by debtor, are all parties necessary to bring in, and stockholders are not **necessary parties,** being represented by corporation, defendant and trustees. Id. Under Stock Corporation Law, § 57 (Laws 1896, p. 1007, c. 932 amended by Laws 1900, p. 1621, c. 760), an action of **tort** committed by a corporation during its lifetime should be prosecuted against the corporation after dissolution. Cunningham v. Glauber, 133 App. Div. 10, 117 NYS 866. Special provisions of Stock Corporation Law (Laws 1896, p. 994, c. 932), § 57, providing for enforcement of demands against stock corporation after voluntary dissolution, must necessarily control over provisions of General Corporation Law (Laws 1892, p. 1811, c. 687), § 30, and hence complaint stating cause of action against directors of corporation after voluntary dissolution to recover damages for negligent injuries for which corporation was liable states cause which continues against corporation and not against directors as trustees for purposes of suit. Cunningham v. Glauber, 61 Misc. 443, 115 NYS 259.

77. Under Ky. St. 1909, § 561 (Russell's St. § 2147), when corporation expires by the terms of its articles of incorporation, it may be continued only for purpose of closing up its business and for no other purpose. Home Bldg. Ass'n v. Bruner [Ky.] 120 SW 306. Where, under Ky. St. 1909, § 561 (Russell's St. § 2147), corporation could only exist after its corporation for purpose of closing its business, an amendment to its articles of incorporation after the expiration of a corporation's existence was ineffective. Id. Such amendment an effort to create a new corporation. Id. Where corporation forfeited its charter by failure to pay license tax required by state, and directors took charge of corporate affairs pursuant to Civ. Code, § 400, as trustees, corporation having ceased to exist, neither corporation itself nor its directors can be compelled to continue doing business by reissuing stock transferred from one of its stockholders to another person. Lewis v. Miller [Cal.] 103 P 496. Holders of stock by assignment have right to participate in division of corporate assets. Id.

78. Voluntary dissolution. J. F. Tapley Co. v. Keller, 133 App. Div. 54, 117 NYS 817. Directors become trustees for benefit of persons entitled to share in assets. Cunningham v. Glauber, 133 App. Div. 10, 117 NYS 866. Franchises, rights and privileges granted to corporation by a municipality, pass to directors as trustees of creditors and stockholders under General Corporation Law, § 30. City of New York v. Bryan, 130 App. Div. 658, 115 NYS 551. **President** is rendered trustee. Sullivan Timber Co. v. Black [Ala.] 48 S 870. Evidence considered and held to warrant finding that certain individual was last acting **manager** of dissolved corporation, and was therefore sole trustee and competent to sell and convey real estate of corporation. Heenan v. Parmele, 80 Neb. 509, 118 NW 324.

79. Upon forfeiture of charter for failure to pay license tax, directors take charge of corporate affairs as trustees (Civ. Code, § 400). Lewis v. Miller [Cal.] 103 P 496. That corporation is adjudged on quo warranto to have no legal existence does not destroy its property rights, but property passes to corporate directors as trustees for distribution. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563.

80. Cunningham v. Glauber, 133 App. Div. 10, 117 NYS 866. Directors became trus

property,[81] and dispose of the same,[82] and are liable for losses resulting to creditors in such distribution.[83] Certain actions against a corporation thus being dissolved may be enjoined.[84] In such a case the appointment of a receiver is of course unnecessary,[85] but statutes often provide for the winding up of a corporation by a receiver [86] when grounds of forfeiture exist.[87] Receivers may also be appointed at the instance of stockholders [88] or creditors.[89] The extent and nature of a receiver's power of representation involves the nature of the suit.[90] By the appointing of a receiver, a court holds and administers the corporate property for the benefit of

tees with duty of settling its affairs, collecting assets, paying debts, and distributing property remaining. J. F. Tapley Co. v. Keller, 133 App. Div. 54, 117 NYS 817.

81. J. F. Tapley Co. v. Keller, 133 App. Div. 54, 117 NYS 817.

82. Dissolution of corporation would not remove director's power to dispose of corporate property, though under statute disposal must be as trustees rather than directors. Sullivan Timber Co. v. Black [Ala.] 48 S 870. A claim for breach of contract is a charge upon assets on dissolution. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934.

83. Trustees are accountable for what they receive. Cunningham v. Glauber, 133 App. Div. 10, 117 NYS 866. On voluntary dissolution, directors, who became trustees, became jointly and severally liable to extent of property which came into their hands. Laws 1909, c. 28, § 35. J. F. Tapley Co. v. Keller, 133 App. Div. 54, 117 NYS 817. Where corporate assets were distributed without providing for corporation's contingent liability as indorser of note, such distribution was illegal and directors were jointly and severally liable for damages sustained (Laws 1909, c. 61, § 28). Id. Where note was delivered to corporation, indorsed by it and distributed with its assets, on voluntary dissolutions, at time of filing certificate of dissolution, corporation was only contingently liable, but such liability became absolute when note was unpaid and protested, and judgment recovered subsequently conclusively established plaintiff's right to recover against corporation. Id. Under Pa. Act May 21, 1881 (P. L. 30), providing that corporations whose charters have expired may bring suits or continue suits already brought for protection and possession of their property, collection of debts, etc., dispose of property, and that officers last elected shall represent them, provided that act shall be construed only so as to enable corporation to realize and divide assets, the officers cannot prefer creditors to others but must divide the assets pro rata among creditors of the same class. American Ice Co. v. Pocono Spring Water Ice Co., 165 F 714. Equity has undoubted jurisdiction of distribution by trustees of funds of corporation in process of dissolution, and it will not permit an unequal distribution among creditors of same class, and, since trustees may apply to the court for instructions, an unequal distribution by them is at their own risk and liable to an action in accounting by creditors injured. Id. Under this statute (Pa. Act May 21, 1881, P. L. 30) the objection that claim for unliquidated damages against trustees could not be made in bill against trustees for an accounting until there had been liquidation by proceedings at law is unsustainable since no suit against corporation for such purposes is sustainable at law, hence court of equity has jurisdiction under familiar principles and necessity of case. Id.

84. Injunctive power of court before final order in dissolution proceedings is limited to restraining actions for recovery if sum of money only, and court has no power to restrain foreclosure of mortgage. See Code Civ. Proc. § 2423. In re Tarrytown, etc., R. Co., 117 NYS 695.

85. Where directors of corporation became trustees of creditors on voluntary dissolution of such corporation, and were jointly and severally liable to creditors for property received, with their property subject to execution, appointment of receiver was unnecessary. J. F. Tapley Co. v. Keller, 133 App. Div. 54, 117 NYS 817.

86. Appointment of receiver for corporation which has ceased to do business and whose affairs were ready to be closed held proper. Zeckendorf v. Steinfeld [Ariz.] 100 P 784.

87. Record held to show violation of Code, §§ 1620, 1621, relating to fraud in failure to comply substantially with articles of incorporation, etc., and diversion of corporate funds for illegal purposes. State v. Syndicate Land Co. [Iowa] 120 NW 327. Evidence in suit brought by state to wind up real estate corporation that it had intentionally misrepresented its business and status. Id. Held to be intention of legislature to wind up corporations engaged in issuing investment securities on instalment plan, provided it did not comply with Acts 30th Gen. Assem. c. 66, providing among other things for deposit of securities with state auditor. Id. Held proper to wind up corporation in such case where not shown that creditors and stockholders would not go unprotected thereby. Id. Evidence held sufficient to warrant order dissolving corporation and appointment of receiver for such purpose. Id. Evidence of doing of other business by corporation sufficient to result in great loss by dissolution of corporation held insufficient. Id.

88. See post, § 14D, subd. Receivers and Injunctions.

89. See post, § 16B, Rights and Remedies of Creditors.

90. Extent of receiver's power of representation depends upon nature and purpose of suit in which he is appointed and scope of his authority as defined in appointment, or in absence of particular or precise definition as implied from fact of appointment considered in connection with object sought to be obtained in suit. H. K. Porter Co. v. Boyd [C. C. A.] 171 F 305.

those who shall ultimately become entitled to it.[91] Receivers appointed on dissolution may be given full power to dispose of the corporate property.[92] Generally a receiver can neither sue or be sued without leave of the court making the appointment,[93] but the rule is changed by statute in some states.[94] A receiver can be held liable for injuries occasioned by his management of the corporate property.[95] The rule that a court having jurisdiction in personam of a receiver may restrain actions in another state is especially applicable where a receiver is appointed for the dissolution of a corporation.[96]

A sale of the receiver's interest in the property does not affect prior liens,[97] and a sale of the corporate property by the trustees of the dissolved corporation does not bind such trustees personally, in the absence of express contract.[98] Neither does such a sale bind the dissolved corporation.[99] In winding up a corporation and

91. Where receivers are appointed for an insolvent corporation, the court holds and administers the estate, through the receivers as its officers, for the benefit of those whom it shall ultimately adjudge to be entitled to it. Hamilton v. David C. Beggs Co., 171 F 157. Action of court in appointing receivers does not take corporations so placed in hands of receivers out of an illegal combination or monopoly if one existed, but same contracts and agreements and stock issues and ownerships exist as theretofore, and court in administering affairs of companies and in running and operating roads must recognize and treat such contracts as valid and subsisting. Continental Securities Co. v. Interbough Rapid Transit Co., 165 F 945. Where receiver of corporation borrowed money from third person and executed note therefor, pursuant to the direction of the chancellor and it appeared that receiver had sufficient money to pay same, payment should be decreed and balance distributed to stockholders. Fagan v. Stuttgart Normal Institute [Ark.] 120 SW 404.

92. Under statutes of Florida, receivers appointed on dissolution of corporation have full power to sell or lease property of corporation, real or personal. Sullivan Timber Co. v. Black [Ala.] 48 S 870. Under Fla. Statutes governing dissolution of corporation and particularly Rev. St. Fla. 1892, § 2155, providing that dissolved corporation shall be continued as body corporate for three years after dissolution to enable it to dispose of and convey its property, trustees of corporation dissolved in Florida may sell or lease property in Alabama unless some law of Alabama provides to contrary. Id.

93. Harmon v. Perkins [Ind. App.] 88 NE 961.

94. Under Act. Mar. 3, 1887, c. 373, §§ 2, 3; 24 Stat. 554 (U. S. Comp. St. 1901, p. 582), receiver under appointment of federal court in charge of corporate property may be sued in state courts where property is situated without leave of court making appointment. Peterson v. Baker [Kan.] 97 P 373; Harmon v. Perkins [Ind. App.] 88 NE 961. Section limited to suits arising out of transactions of receiver after appointment and assumption of control of property. Harmon v. Perkin [Ind. App.] 88 NE 961.

Process may be served on federal receiver as provided by state laws for service on corporations. Peterson v. Baker [Kan.] 97 P 373. Where federal receiver properly sued in state court, is subsequently discharged and property returned to company under order that such corporation indemnify receiver from judgment which might be rendered, such discharge is not ground for dismissal of action in state court. Id.

95. Receiver of corporation alone is liable for all injuries occasioned by his management, as for personal injuries occasioned during management of street railway by receiver. Eckels v. Henning, 139 Ill. App. 660. The receiver of a railroad is not the agent of the company nor its representative nor in any sense under its control, He is person who comes into possession of equipment and business of road in invitum, placed there by court which sequestrates property for time being. Id. Receiver of a railroad is only answerable for the acts of negligence of his own servant and employes operating franchise of corporation. Harmon v. Perkins [Ind. App.] 88 NE 961. Receivers of lesser corporation cannot be held liable for the torts and negligences of receivers of lessee corporation where each set of receivers was appointed in hostile proceeding to one of corporations. Eckels v. Henning, 139 Ill. App. 660. When it is sought to hold either receiver or corporation being administered by receiver for negligent act, it must appear by appropriate averments that act complained of was committed by party against whom liability is sought to be enforced. Harmon v. Perkins [Ind. App.] 88 NE 961. No liability against receiver of railroad shown where no act charged against such receiver in complaint. Id.

96. Guaranty Trust Co. v. Edison United Phonograph Co., 112 NYS 929. Where question of ownership and right of disposition of stock can be determined as expeditiously and more conclusively than in foreign state, receiver may be restrained from prosecuting action in foreign state. Id.

97. See, also, § 16B, subd. Winding Up Proceedings, etc., as to receiver's certificate displacing prior liens. Where a receiver acting under order of court, on the dissolution of a corporation, sells all his right, title, and interest in the real estate, the sale does not affect prior valid liens. Court can only order sale of receiver's interest. Mayer v. Burr, 118 NYS 203.

98. Shannon v. Martin, 135 Mo. App. 50, 114 SW 1127. Caveat emptor applies. Id.

99. Shannon v. Martin, 135 Mo. App. 50, 114 SW 1127. A dissolved corporation which is being administered in court may be lik-

making distribution among shareholders, the court should try controversies involving private disputes between the stockholders.[1] Stockholders who consent to the voluntary dissolution of a corporation cannot thereafter object to the validity of a sale of the corporate property.[2] The question of the right of the preferred and common stockholders in the distribution of the surplus remaining after paying debts is one of contract inter sese and is to be determined by the provisions of the statute and of the certificate of incorporation.[3] The rights of a pledgor to share in the excess of dividends, on the liquidation of a corporation may also require a construction of contract.[4]

Preferred stockholders are entitled to equitable relief where funds are misappropriated on the dissolution of a corporation, in defiance of their rights.[5]

§ 13. *Succession of corporations; reorganization; consolidation.*[6] See 11 C. L. 833.—The power of corporations to consolidate and merge is not to be implied and exists only by virtue of plain legislative enactment.[7] Such power must of necessity require the unanimous consent of stockholders, unless the power has been conferred by legislation so that it may be read into the contract of incorporation.[8] Usually, the power to merge is conferred only where two corporations are organized for the

ened to a deceased individual whose estate is being so administered and purchaser of its assets is understood to buy only what corporation has to sell. Id. Corporation held not liable for sale or assignment of lease without warranty by its trustees appointed by court to dissolve it covenanting that they had right and authority to assign. Id.

1. Especially where issues are framed and submitted without objection. Avery v. Central Bank [Mo.] 119 SW 1106.

2. Where stockholders of failing corporation sought to wind up same under Ky. St. § 561 (Russell's St. § 2147), and signed agreement consenting to closing of business, sale of property, etc., pursuant to which sale was made, and consideration used to pay debts, plaintiffs could not thereafter object to the validity of sale as unauthorized by directors. Ebelhar v. Nave [Ky.] 119 SW 1176.

3. P. L. 1896, p. 277, §§ 8, 18, 86, held material to decision. Lloyd v. Pennsylvania Elec. Vehicle Co. [N. J. Err. App.] 72 A 16. Under general corporation act of April 12, 1896 (P. L. p. 277), authorizing creation of two or more kinds of stock of such classes, with such designations, preferences and voting powers, or restriction or qualification thereof, as shall be stated or expressed in certificate of incorporation, where corporation organized under act provided in its certificate for creation of preferred stock, holder thereof to receive, and company to pay fixed yearly dividend of six per cent before common stock should receive dividend, held that upon winding up of corporation preferred stockholders were entitled only to preference set forth in certificate of incorporation and not to be paid on account of par value of their shares in preference to the common stockholders. Id.

4. Where owner of 250 shares in corporation pledged 185 as collateral security for note and it was decided to liquidate corporation, and estate of pledgee, fearing their security to be inadequate, induced pledgor to turn over remaining 65 shares on condition "that, if in liquidation the property should pay more than the note and accrued interest," the estate would turn over the balance, such agreement only meant that the pledgor should be entitled to share in the excess of dividends after payment of the note. Fuller v. Perkins [R. I.] 73 A 373. Agreement did not entitle pledgor to all of assets of corporation, after payment of note. Id.

5. Where entire property of corporation was removed from state wrongfully and unlawfully to another state, and proceedings resulting in dissolution were prosecuted in state from whence such property was wrongfully removed, resulting in appointment and qualification of receiver to take possession of property, original proceeding in foreign state where jurisdiction over officers and property of corporation can be obtained seeking to have property taken and transmitted to proper state court to be dealt with according to law, may be maintained by preferred stockholder where officers ignore decree of state court and refuse to transfer property. Kent v. Honsinger, 167 F 619.

6. **Search Note:** See notes in 15 L. R. A. 82; 23 Id. 231; 52 Id. 369; 59 A. S. R. 550; 89 Id. 604, 607; 3 Ann. Cas. 499; 4 Id. 260.

See, also, Corporations, Cent. Dig. §§ 2290-2372; Dec. Dig. §§ 570-591; 5 Cyc. 573; 10 Id. 281-318, 1265, 1267, 1268; 6 A. & E. Enc. L. (2ed.) 800; 7 Id. 684.

7. Colgate v. U. S. Leather Co. [N. J. Err. App.] 72 A 126. Express authority must be found in charters or statutes of state of creation. Knapp v. Supreme Commandery, N. O. G. C. [Tenn.] 118 SW 390. Neither charter of Order of Golden Cross nor statutes of state, including Laws 1887, c. 198, p. 329, authorized its union with another similar order. Id. Acts 1887, c. 198, p. 329, authorizing lease and disposition of corporate property subject to approval of vote of certain proportion of stock in stockholder's meeting, etc., held to embrace only quasi-public corporation. Id. Statute held to contemplate corporations having capital stock and stockholders and not to include fraternal order. Id.

8. Colgate v. U. S. Leather Co. [N. J. Err. & App.] 72 A 126.

same or similar business.[9] Consolidation statutes do not usually contemplate the union of domestic with foreign corporations,[10] but corporations of different states may be permitted to consolidate by mutually concerted legislation.[11] Such a consolidation is in effect an incorporation of the individuals constituting the membership of the original corporations,[12] and the consolidated corporation is, as to the acts done or to be done in each state, a corporation of that state.[13] The consent of a state to the consolidation of corporations existing in different states will not authorize the disregard of the laws of such state,[14] but an act of the consolidated corporation may, nevertheless, be lawful in one state though unlawful in the other.[15] Statutory provisions designed to prevent combinations and monopolies[16] limit, to a greater or less extent, the power of corporations to combine or consolidate,[17] and a consolidation effected in disregard of such provisions is generally subject to dissolution,[18] but questions affecting illegal combinations can only be raised by the state in direct proceedings.[19] Consolidation is effected by the transfer of

9. Under Act Mar. 8, 1893 (P. L. p. 121), and Act Apr. 21, 1896 (P. L. 309), § 104, power to merge two corporations is conferred only where they are organized for purpose of carrying on business of same or similar nature. Colgate v. U. S. Leather Co. [N. J. Err. & App.] 72 A 126. Respective certificates of incorporation of United States Leather Company and Central Leather Company held to show that they were not organized for purpose of carrying on business of same or similar nature within meaning of Act Mar. 8, 1833 (P. L. 121), and that proposed consolidation of two companies is unauthorized by law and violative of rights of nonassenting shareholder. Id.

10. Acts 1887, p. 329, c. 198, held not to authorize union of domestic with foreign corporation. Knapp Supreme Commander, N. O. G. C. [Tenn.] 118 SW 390.

11. Legislation by two states permitting consolidation does not, in absence of legislation by congress to contrary, come within prohibition of agreements or compacts between states contained in constitution of the United States. Const. art. 1, § 10. McKay v. New York, etc., R. Co. [Conn.] 72 A 583. Such a consolidation, voluntarily made by constituent corporations with assent by shareholders, comes into effect when last step is completed, as result of simultaneous action, and it is immaterial in which state or at what date any of these corporations was first incorporated. Id.

12. MacKay v. New York, etc., R. Co. [Conn.] 72 A 583. After consolidation, numbers of original corporations are beneficial owners of all rights, franchises and property so constituted. Id.

13. MacKay v. New York, etc., R. Co. [Conn.] 72 A 583. Neither of states in question could confer upon it the franchise of maintaining a corporate existence in any other state nor add to nor diminish the powers that it can exercise in any other. Id. Held that no shareholder in N. Y., N. H. & H. R. Co., who consented to its becoming by consolidations and mergers a corporation composed of several corporations of different states, can complain that each state regulates its conduct so far as concerns franchises which it has granted, and as no shareholder can complain of this, all cannot nor can the corporation whether regarded as the same legal entity in each state or as a different legal entity. Id.

14. While contract of state to consolidation necessarily implies consent to doing of such acts as are essential to life, existence, and carrying on of business by consolidated company, it may not disregard the laws of any one of states except so far as an assent is necessarily implied. Cannot act in violation of constitution of state. (Railroad). Pollitz v. Wabash R. Co., 167 F 145.

15. MacKay v. New York, etc., R. Co. [Conn.] 72 A 583. Duty of one state to recognize sovereignty of other held not to invalidate judgment in former state requiring corporation to do an act unlawful in latter state. Id. Fact that merger was effected between purely Connecticut corporation and corporation also incorporated in Massachusetts and Rhode Island without authority from the latter state does not detract from power of Connecticut courts to regulate latter corporation by compelling it to fulfill its obligations here assumed to do acts here to be performed. To suit against it as Connecticut corporation, it must respond as Connecticut corporation. Id.

16. See Combinations and Monopolies.

17. N. Y. Stock Corp. Law, § 40 (Laws 1890, p. 1073, c. 564), permitting certain corporations to purchase, etc., stocks, etc., of other corporations engaged in similar business, if authorized so to do by their certificate of incorporation, etc., is limited by § 7 thereof which prohibits such consolidation as creates a monopoly, unlawful restraint of trade, or prevents competition in any necessary of life. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

18. Where all corporations and individuals who took part in alleged illegal consolidation, or who would be affected by decree, are before court, receivers of certain of corporations, not owning property or any part of it, are not indispensible or necessary parties to an action by corporations in behalf of all similarly situated who desire to come in, for dissolution of consolidation as in restraint of trade. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

19. Any question of illegal combination or arrangement affecting the franchise of a cor-

corporate franchises and property to another corporation under an agreement whereby stockholders of the former company secure in exchange, stock of the consolidated company.[20] A consolidation agreement may provide that stockholders, who decline to exchange their stock, shall continue to share proportionately in the earnings and assets of the consolidated corporation,[21] and such a provision will entitle such stockholders to have the books of the new company kept so as to show the earnings of the consolidated property at all times.[22] Acquisition of one corporation by another is not to be presumed unlawful from the mere failure to present evidence of compliance with the statute.[23]

Generally, a separate and distinct corporation which succeeds by valid purchase to the property and franchises of another corporation is not liable, merely by reason of the succession for the general debts and contracts of the other corporation.[24] To render a purchasing corporation liable for the debts of the corporation to which it has succeeded, there must be an agreement to assume such debts,[25] or the circumstances surrounding the transaction must warrant a finding of consolidation of the two companies,[26] or a finding that the transaction is fraudulent as to creditors,[27] or that the purchasing corporation is a mere continuation of the selling corporation.[28] Usually the statutes expressly require the consolidated body to assume and become liable for all the obligations of each of the constitutive corporations,[29] and a corporation, availing itself of the privileges of a statute as to the

poration can be raised only by the state in a proceeding instituted for that purpose. People v. Illinois Cent. R. Co., 143 Ill. App. 337.

20. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Fact that stockholders of two separately chartered corporations are identical, that one owns shares in another, and that they have mutual dealings, will not, as general rule, merge them into one corporation. In re Watertown Paper Co. [C. C. A.] 169 F 282.

21. Miller v. Chicago & A. R. Co., 171 F 253.

22. Miller v. Chicago & A. R. Co., 171 F 253. Where money paid out of surplus earnings to benefit other property, stockholder could have same returned and his share distributed. Id.

23. Where street railway could only become owner of another company by purchase under St. 1887, p. 1072, c. 413 (Pub. St. 1882, c. 113, § 18), acquisition of such company is not to be presumed unlawful from mere failure to present evidence of compliance with statute in acquisition, especially where act acquiesced in 20 years and approved by board of railroad commissioners. Whiting v. Malden & M. R. Co., 202 Mass. 298, 88 NE 907.

24. Cooper v. Utah L. & R. Co. [Utah] 102 P 202; Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co. [S. D.] 121 NW 620. In absence of statute, acquisition of all-stock property and assets of corporation does not make new holder liable for debts. Whiting v. Malden & M. R. Co., 202 Mass. 298, 88 NE 907. Fact that street railway corporation took possession of assets of another company would not render it liable to judgment creditor of latter. Id.

25. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456; Cooper v. Utah L. & R. Co. [Utah] 102 P 202; Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co. [S. D.] 121 NW 620. Neither lessee nor purchaser becomes liable for prior debts or obligations of lessor or vendor in absence of express contract or statutory provision therefor. Taenzer & Co. v. Chicago, etc., R. Co. [C. C. A.] 170 F 240. Railroad company which succeeded to property of another and continued to carry out contract between predecessor and lumber company as to shipments by latter and connection and operation of branch road owned by it, receiving benefits thereby, adopted contract as its own and was liable for any breach of such contract. Id. In lease of railroad, lessee's agreement to save lessor harmless from suits of "any and all kinds whatsoever arising out of, or in any manner appertaining to or connected with the maintenance, operation or management of said demised railways," etc., was apt for expressing obligation to preserve property from lienable charges but did not express an assumption of existing indebtedness. Boyd v. Northern Pac. R. Co., 170 F 779.

26. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. Transaction held not consolidation. Barrie v. United R. Co. [Mo. App.] 119 SW 1020.

27. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456; Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co. [S. D.] 121 NW 620. Property not liable in absence of valid lien unless transfer is in fraud of creditors. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. See, also, post § 16B, subd. Assets for Creditors.

28. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456; Cooper v. Utah L. & R. Co. [Utah] 102 P 202; Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co. [S. D.] 121 NW 620.

29. Rev. St. 1899, § 1059 (Ann. St. 1906, p. 913). Barrie v. United R. Co. [Mo. App.] 119 SW 1020.

acquisition of another corporation, cannot complain because it is held to the accompanying liabilities.[30] The absence of legislative provisions as to the manner of enforcing existing liabilities or obligations will not authorize an agreement to evade such liabilities,[31] since such agreement would be contrary to public policy,[32] and where a consolidation takes place pursuant to written agreement, and no provision is made for the payment of the liabilities of the company which ceases to exist, those liabilities become binding upon the new or surviving company.[33]

The reorganization[34] of a corporation does not involve the question of corporate power,[35] and may lawfully be accomplished by the consent of all the stockholders.[36] A stockholder objecting to a reorganization usually has appropriate remedies,[37] but he must be free from laches,[38] and, in the absence of fraud or deception practiced upon him, one present and voting in favor of the reorganization of a corporation cannot thereafter object to such reorganization.[39] Upon the refusal of a reorganized corporation to exchange stock, the remedy of the stockholder is for specific performance of the conditions.[40] A corporate charter is not affected by the fact that there were no stockholders for a short period on the reorganization

30. Whiting v. Malden & M. R. Co., 202 Mass. 298, 88 NE 907. Noncompliance with statutory provisions, made for the benefit of a corporation, cannot be set up against third persons, when those for whose protection they were intended have acquired advantages through action in disregard of them. Id. Where statute says that corporation acquiring property and franchises of another corporation shall be subject to its liability, strong proof of negative is necessary to justify conclusion that statute as to consolidation was disregarded. Id. Corporation acquiring such other corporation cannot object to drawing of inferences in favor of legality of consolidation. Id. Admission of plaintiff that statute had not been complied with held merely an admission that that portion had been disregarded, and not that consolidation was not affected. Id. Finding of master that corporation acquired took no corporate action except for choice of officers held not to indicate that directors did not agree to purchase by other corporation. Id. If finding meant that acquired company did not agree to purchase, statute imposing liabilities of such company on corporation acquiring same was for protection of stockholders. Id.

31. White v. Atlanta, B. & A. R. Co., 5 Ga. App. 308, 63 SE 234. Phrase that consolidation may be affected "upon such terms as may be agreed upon" would not authorize consolidation and transfer of property free from liabilities. Id.

32. White v. Atlanta, B. & A. R. Co., 5 Ga. App. 308, 63 SE 234.

33. White v. Atlanta, B. & A. R. Co., 5 Ga. App. 308, 63 SE 234. At least to extent of assets of absorbed company or of its liability to perform contracts out of which liabilities arose. Id.

34. Distinct from dissolution. Farish v. Cieneguita Copper Co. [Ariz.] 100 P 781. Reorganization not contemplating termination of corporate business, nor liquidation and distribution, but which was attempt to continue corporate business under new corporate entity in foreign jurisdiction, held not a dissolution. Id.

35. Farish v. Cieneguita Copper Co. [Ariz.] 100 P 781. Reorganization is not vulnerable upon ground of ultra vires. Id. By loose usage term ultra vires has been applied to an attempted reorganization without unanimous consent because it is beyond the lawful power of the majority thus to break corporate compact. Id.

36. Farish v. Cieneguita Copper Co. [Ariz.] 100 P 781. In absence of statute, reorganization of solvent corporation cannot be accomplished without unanimous consent of stockholders, since it ruptures corporate contract. Id. Laws 1903, No. 82, held not to authorize majority stockholders to place upon nonassenting stockholders the necessity of being parties to a continuance of the corporate business under a new corporate franchise, neither does it authorize transfer of entire corporate assets to another corporation without any consideration except transfer of corporate stock. Id.

37. Where directors of one corporation have transferred its entire assets to a corporation organized in a foreign state under vote to reorganize, court may, on petition of stockholders entitled to such relief, annul apparent authority of directors to make such transfer, and thus pave way for action of restitution in foreign court against foreign corporation which cannot be made party in present action. Farish v. Cieneguita Copper Co. [Ariz.] 100 P 781.

38. Stockholders giving proxies without intimation that proposition to reorganize corporation would come up at meeting and who were without knowledge of such reorganization until another stockholder brought suit on behalf of himself and others similarly situated are not guilty of laches because several months elapsed between institution of suit and their appearance in case. Farish v. Cieneguita Copper Co. [Ariz.] 100 P 781.

39. Farish v. Cieneguita Copper Co. [Ariz.] 100 P 781.

40. Stockholder having acquiesced and voted for reorganization should not attack same. Farish v. Cieneguita Copper Co. [Ariz.] 100 P 781.

of the corporation.[41] If it appear upon the reorganization of a company that its property has greatly increased in value, such increase may be treated as profits and divided among the stockholders.[42] An agreement for the reorganization of a corporation may impose a mandatory duty upon directors as to the issuance of bonds.[43] On transition of a territorial bank into a national bank, the latter acquires the assets of the former by operation of law and not as a purchaser.[44]

§ 14. *Stock and membership. A. Membership in corporations in general.*[45]—See 11 C. L. 834—The relation of stockholder to a corporation is one of contract, express or implied,[46] and the corporation may be estopped to deny the status of a member as such.[47] Since the corporation is a distinct entity,[48] a stockholder, regardless of the proportion of stock owned, cannot be said in legal contemplation to be the employer of the servants of the corporation,[49] and shareholders have no proprietary ownership in the property of the corporation.[50] A shareholder has, however, a beneficial interest in the corporate property,[51] and owns what may be said to represent an integral, proportionate part of the corporation as a property right,[52] and it is his privilege to protect that right, or to deal with it according to his best judgment.[53] The rights of a stockholder as evidenced by his certificate are all compressed in two classes viz., the personal rights inherent in a stockholder as member

41. When corporate name was changed, old stock retired and new issued. In re Western Bank & Trust Co., 163 F 713.

42. Where it is agreed among parties that property of corporation was worth $10,000 more than original capital stock, such amount may be treated as profits and divided upon organization of new corporation among old stockholders in proportion to their holdings. McGinnis v. O'Connor [Md.] 72 A 614. Division made by lower court approved. Id. Evidence held to sustain finding that stockholder had received stock for all cash shown to have been put into corporation by him. Id.

43. Where judgment creditor with lien on corporate property agreed with trustees of corporation that corporate bonds be accepted in payment of judgment, such agreement was held to vest no discretion with directors as to amount of issue agreed upon ($150,000) so that directors could only issue bonds to pay creditor's judgment ($35,000). South Texas Tel. Co. v. Huntington [Tex. Civ. App.] 121 SW 242.

44. People's Nat. Bank v. Kingfisher County Com'rs [Okl.] 103 P 682.

45. Search Note: See notes in 24 L. R. A. 252; 46 Id. 618.

See, also, Corporations, Cent. Dig. §§ 624-731; Dec. Dig. §§ 170-190; 10 Cyc. 373-376, 806, 936, 954-1000; 26 A. & E. Enc. L. (2ed.) 808.

46. Shattuck & Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 99 P 348; Business Men's Ass'n v. Williams [Mo. App.] 119 SW 439.

47. Where one has been elected director and has otherwise been recognized as a member, his status as such cannot be attacked on ground of nonpayment of subscription. Snyder v. Charleston & Southside Bridge Co., 65 W. Va. 1, 63 SE 616. Where at stockholders' meeting held for purpose of organizing in pursuance of certificate of incorporation, at which meeting all of stock was properly represented, one of persons appearing from certificate of incorporation to be stockholder is elected director, corporation is thereby estopped from denying that such member so elected is legally constituted and bona fide stockholder. Id.

48. See ante, § 1.

49. J. F. Parkinson Co. v. Santa Clara County Bldg. Trades Council, 154 Cal. 581, 98 P 1027. Tinner owning stock in corporation held not "employer" within rules of labor union requiring master tinner to be employer of labor. Id.

50. Ownership of stock is not to be confused with ownership of property. In re Roanoke Furnace Co., 166 F 944. Neither legal or equitable title to corporate assets is in stockholders. People's Nat Bank v. Kingfisher County Com'rs [Okl.] 103 P 682. Corporation is sole owner of property. Judy v. Beckwith, 137 Iowa, 24, 114 NW 665. Shareholders' rights and interests with relation to property and business of corporation is distinct and severable. Id. Shareholders are not tenants in common or coowners of property of corporation in any sense, but title is vested in corporation. State v. Mudie [S. D.] 115 NW 107. Rule applicable to members of corporation having no capital stock. Id.

Change of stockholders does not affect change of ownership of assets. People's Nat. Bank v. Kingfisher County Com'rs [Okl.] 103 P 682. Stockholder whose property has been mingled with assets of corporation held not estopped to assert ownership thereof, because of acts in connection with change of ownership of stock. Id.

51. Stockholder held from facts to have such beneficial interest in corporate mining property that work performed by him on claims was representative work inuring to benefit of corporation and preventing forfeiture of claims. Wailes v. Davis [C. C. A.] 164 F 397.

52, 53. Stephany v. Marsden [N. J. Eq.] 71 A 593.

of a corporation,[54] and his property rights,[55] and the rights conferred by law are to protect such personal and property rights.[56]

(§ 14) *B. Capital stock and shares of stock.*[57]—See 11 C. L. 835—The capital stock of a corporation is the money or property contributed by the corporators to the capital,[58] as distinguished from a share of stock, which is one of the whole number of equal parts into which the capital stock of a trading company or corporation is or may be divided,[59] and the capital stock and shares of capital stock represent different property rights, one belonging to the corporation and the other to the shareholders.[60] A certificate of stock in a corporation is generally recognized merely as the representative of property, and not the property itself,[61] being the evidence of the stockholders rights.[62] The shares of stock of a corporation constitute a liability against the corporation,[63] but when transferred they become assets in the hands of the owner,[64] and are usually considered personal propery,[65] but a

54. Being right to attend meetings, vote, etc., and including all personal rights. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934.

55. Being right to share in dividends of corporation and distribution of assets. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934.

56. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934.

57. **Search Note:** See notes in 1 C. L. 745; 19 L. R. A. 331, 684; 27 Id. 136, 305; 38 Id. 490, 616; 16 L. R. A. (N. S.) 520; 57 A. S. R. 393; 73 Id. 227; 76 Id. 126; 5 Ann. Cas. 251, 743.

See, also, Corporations, Cent. Dig. §§ 162-183, 449; Dec. Dig. §§ 60-68; 10 Cyc. 364-373, 538-545; 26 A. & E. Enc. L. (2ed.) 808.

58. Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 NE 205. Capital stock is aggregate of money invested in corporation enterprise by subscribers thereto, and may consist of cash thus contributed or be represented by property, real or personal, in which such cash has been invested. Judy v. Beckwith, 137 Iowa, 24, 114 NW 565. In Comp. Laws 1907, § 4411, making it misdemeanor for manager to divide or pay any part of "capital stock" to stockholders except as provided by law, "capital stock" means the capital of the corporation on which it transacts business, whether such capital consist of money, property, or other valuable commodities. Cooper v. Utah L. & P. Co. [Utah] 102 P 202. **"Authorized capital stock"** is to be distinguished from corporations' actual capital stock. Stemple v. Bruin [Fla.] 49 S 151. "Authorized capital" may never become "actual capital" in consequence of never receiving any contributors. Id. Corporation's **actual capital stock** is amount of its authorized capital that has been bona fide subscribed for and paid in. Id.

59. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945. **Shareholder** is one who holds or owns a share or shares in joint stock or incorporated company in common fund or in some property. Id. Allegation that one is "bona fide owner of stock of record" in a corporation is allegation that one is shareholder. Id.

60. Judy v. Beckwith, 137 Iowa, 24, 114 NW 565. In finance stock is share of capital of corporation or commercial company; fund employed in carrying on of some business or enterprise divided into shares of equal amount and owned by individuals who jointly form corporation. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945. Purchaser of stock in corporation does not purchase any portion of assets of corporation. People's Nat. Bank v. Kingfisher County Com'rs [Okl.] 103 P 682.

61. Commonwealth v. Peebles [Ky.] 119 SW 774. Certificate occupies very much same status as promissory notes, bonds, or other choses in action. Id. Certificate is not itself property, in so far as relating to stockholder's rights. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934. Shares have no value independently of interest they represent in franchise and property of corporation. Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 NE 205.

62. Business Men's Ass'n v. Williams [Mo. App.] 119 SW 439. Evidence of membership and right to share in property and assets. Judy v. Beckwith, 137 Iowa, 24, 114 NW 565; Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934; People's Nat. Bank v. Kingfisher County Com'rs [Okl.] 103 P 682. Share of stock represent and evidence right of holder to vote at corporate meetings and to receive his portion of dividends and of residue of property of corporation upon its dissolution. Judy v. Beckwith, 137 Iowa, 24, 114 NW 565. Shareholder's rights in corporation are not necessarily dependent on issue or holding of certificate but are rights of which certificate is muniment of title. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934.

63. Barrie v. United R. Co. [Mo. App.] 119 SW 1020. As between a corporation and its stockholders, the former must always stand charged with its own stock at par. Id. No matter what market value of stock of corporation is, that stock in hands of the corporation itself stands and must stand at par, and any statement of corporation which carried its own stock at less than par would be an erroneous statement. Id.

64. Barrie v. United R. Co. [Mo. App.] 119 SW 1020.

65. For purpose of taxation. Judy v. Beckwith, 137 Iowa, 24, 114 NW 565. Subject to levy under writ of attachment and may be sold under judgment recovered. Pease v. Chicago Crayon Co., 235 Ill. 391, 85 NE 619.

corporation cannot be summoned as garnishee to answer for shares of its stock when the certificate has been issued and delivered.[66]

The shares of stock may be divided into "common" and "preferred," with certain disabilities and preferences,[67] the extent of the preference being determined by the terms of the subscription contract.[68] It is necessary that the required amount of capital of a corporation be subscribed by persons apparently able to pay the assessments which may be made upon their shares,[69] and the issuance of shares of stock by a corporation is usually subject to the restriction that the consideration therefor be valuable.[70]

The capital stock of a corporation may be increased or reduced as authorized by statute,[71] and a corporation cannot evade the provisions of statute as to the increase of capital stock by the organization of another corporation.[72] In the absence of express statutory provision to the contrary, the rights of individual stockholders must be preserved,[73] and so, also, in connection with changes in the proportion of common and preferred shares of stock[74] and as to the issue of new shares of stock.[75] An unauthorized increase in the stock issue[76] is subject to ratifica-

66. Corporation cannot be said to be indebted to its stockholder or to have possession of latter's property. Pease v. Chicago Crayon Co., 235 Ill. 391, 85 NE 619, afg. 138 Ill. App. 513.

67. Stockholders may arrange that preferred holders be deprived of right to vote, in consideration of other benefits. People v. Keonig, 118 NYS 136. Mo. Const. art. 12, §§ 8, 10 (Ann. St. 1906, pp. 304, 305), and Mo. Rev. St. 1889, §§ 962, 1050 (Ann. St. 1906, pp. 860, 908), governing **issuance of preferred stock** by corporations, were intended only to restrict original issuance of such stock and not to restrict increase in such stock when policy of issuing same was established. Pollitz v. Wabash R. Co., 167 F 145.

68. Lloyd v. Pennsylvania Elec. Vehicle Co. [N. J. Err. & App.] 72 A 16. Calling stock preferred does not of itself determine rights of holders. Id.

69. A **subscription in good faith** is one made by party apparently able to pay assessments which might reasonably be expected to be made upon stock, although subscriber proves to be insolvent, and subscription is not made in good faith if made by person whose apparent ability is not such as a person of ordinary prudence would deem reasonably sufficient to meet such assessments. Stone v. Monticello Const. Co. [Ky.] 117 SW 369. Instruction as to what constitutes subscription in good faith held erroneous. Id. Subscriptions made by corporations and paid are not invalid because not warranted by their articles and are not subscriptions in bad faith. Id. See, also, post, this subsection, subd. Assessments and Calls.

70. See post this section, subd. C. Subscriptions to Capital Stock, and Other Agreements to Take Stock.

71. Page v. American & British Mfg. Co., 129 App. Div. 346, 113 NYS 734. Increase of capital stock by state bank in 1891 when only statutes relating to subject were Comp. St. 1887, div. 5, c. 25, as to all corporations, and c. 27, as to banks, and act was performed pursuant to c. 27, § 526, was valid. St. 1887, div. 5, c. 25, §§ 468, 469, as to six weeks' notice, inapplicable to bank. State v. Yoder [Mont.] 103 P 499. An increase of capital stock is a change of a fundamental character, and **requires amendment.** State v. Railroad Com., 137 Wis. 80, 117 NW 846.

Notice: West Virginia statute requiring published notice of proposed stock increase by corporation at least two weeks before action taken held satisfied by public notice once each week for two successive weeks, first publication being more than two weeks before proposed action. Sherwood v. Wallin, 154 Cal. 735, 99 P 191. Statutory certificate of West Virginia secretary of state reciting resolution of stockholders increasing capital stock of corporation and declaring action to be authorized by law, which certificate is to be received as evidence of such facts, held prima facie **evidence** of fact notice required by statute was given stockholders of proposed increase. Id.

72. Schwab v. E. G. Potter Co., 129 App. Div. 36, 113 NYS 439, afd. 194 N. Y. 409, 87 NE 670. Creation of new corporation at expense of old one, by delivery of portion of assets which were capitalized at fixed valuation, all stock being received back. Id.

73. Page v. American & British Mfg. Co., 129 App. Div. 346, 113 NYS 734.

74. Right of a stockholder to voice in management of corporation in which he has invested money is a property right and vested interest entitled to protection under statute, and common stock cannot be so cut down in amount that preferred stockholders' voting power shall be increased. Page v. American & British Mfg. Co., 129 App. Div. 346, 113 NYS 734. Under stock corporation law (Laws 1890, p. 1074, c. 564), § 44, providing for increase and reduction of capital stock only in general terms, capital stock of corporation cannot be so changed that whereas there had been one million preferred and nine millions common stock there should be one million of each, thus giving preferred shareholders equal voice with common though latter advanced for greater share of capital, but if stock is to be reduced it must be done so that all shareholders retain same proportionate power to control corporation as before. Id.

75. A stockholder has right to reasonable opportunity to subscribe for new stock about to be issued by corporation in proportion to his present holdings, and he may enjoin di-

tion,[77] or objection thereto may be waived,[78] and a stockholder who has objected to the issuance of stock on certain grounds cannot after the stock has been issued, sold, and he has commenced action to litigate its issuance in such grounds, object to its issuance on other grounds.[79]

(§ 14) *C. Subscriptions to capital stock, and other agreements to take stock.*[80] See 11 C. L. 837—An organized corporation has a right to offer and sell its unsubscribed stock[81] and by offering to sell a portion of its stock, a company represents that it exists as a corporation by authority of law.[82] A contract to subscribe for stock in a corporation is governed by the same principles that apply to other contracts,[83] including the requisites of certainty and completeness[84] and the necessity of a consideration[85] and the sufficiency thereof.[86] A common restriction upon the issuance of corporate stock is that such issuance shall only be in exchange for money, property, or services.[87] Agreements designed to evade such restriction are invalid.[88]

rectors from issuing any stock without giving him such right and also enjoin voting of any stock previously issued without giving him such opportunity. Snelling v. Richard, 166 F 635. Where directors endeavored to wrest control from majority stockholders by issuing stock without giving latter opportunity to subscribe for same in order that they might retain their control of the corporation. Id.

Right of action for the sale of corporate stock by a corporation without allowing shareholders an opportunity to purchase lies only in shareholders, and not in corporation. Waters v. Waters & Co., 130 App. Div. 678, 115 NYS 432.

76. Issuance of stock in corporation properly authorized to be issued is not ultra vires though issued without giving shareholders opportunity to purchase same. Waters v. Waters & Co., 130 App. Div. 678, 115 NYS 432.

77. Where corporation issuing stock without affording shareholders an opportunity to subscribe therefor ratified act by resolution and every stockholder except plaintiff acquiesced therein, corporation, and hence plaintiff suing for corporation in representative capacity, has no cause of action arising out of such issuance. Waters v. Waters & Co., 130 App. Div. 678, 115 NYS 432.

78. Where full opportunity was given stockholders to take their pro rata share of a new issue of stock and they failed to do so, they will be deemed to have waived their right thereto, and purchasers from them four years later of their stock of original issue acquire no rights thereby in the new issue, but such new stock remaining untaken becomes treasury stock, which may be legally sold by the board of directors. Hall v. Hall, 11 Ohio C. C. (N. S.) 335.

79. Where company proceeded on basis of position originally taken and many persons have changed their position. Pollitz v. Wabash R. Co., 167 F 145.

80. Search Note: See notes in 11 C. L. 838; 33 L. R. A. 593, 721; 14 L. R. A. (N. S.) 1176; 76 A. S. R. 126; 3 Ann. Cas. 188; 7 Id. 287.

See, also, Corporations, Cent. Dig. §§ 184-434, 447, 455; Dec. Dig. §§ 69-93; 10 Cyc. 380-538; 26 A. & E. Enc. L. (2ed.) 902.

See, also, Helliwell Supp. to Clark & Marshall, vol. 4, p. 3490.

81. Southwestern Slate Co. v. Stephens, 139 Wis. 616, 120 NW 408. Evidence held sufficient to show offer made by corporation to sell its stock in the state, which when accepted and its conditions complied with constituted a complete contract made in the state. Id. Where corporation has offered to sell stock at stipulated figure subject to repudiation by the purchaser for breach of conditions subsequent, an acceptance of such offer will make a binding contract, and an acceptance of acceptance is unnecessary. Id. Evidence held sufficient to show acceptance of acceptance. Id.

82. That it is not as creature of fraud practiced upon state. Cherry v. First Texas Chemical Mfg. Co. [Tex. Civ. App.] 115 SW 81.

83. Owensboro Seating & Cabinet Co. v. Miller [Ky.] 113 SW 423.

84. Must be certain and complete. Steely v. Texas Imp. Co. [Tex. Civ. App.] 119 SW 319. Subscription agreement held not so incomplete nor uncertain as to be void ab initio. Id. Subscription agreement, on strength of which incorporation is effected, will not be held void as uncertain in that no payee was named or no corporation referred to. Rutenbeck v. Hohn [Iowa] 121 NW 698.

85. Agreement not void for lack of consideration. Steely v. Texas Imp. Co. [Tex. Civ. App.] 119 SW 319.

86. Mutual promises of number of subscribers constitute sufficient consideration for the agreement entered into. Shelby County R. Co. v. Crow [Mo. App.] 119 SW 435. Mutual promises constitute sufficient consideration at common law. Business Men's Ass'n v. Williams [Mo. App.] 119 SW 439; Shelby County R. Co. v. Crow [Mo. App.] 119 SW 435. **Where corporation has no assets,** its stockholders may lawfully agree to issue its stock for anything of value. Turner v. Markham [Cal.] 102 P 272.

87. Stock Corporation Law, § 42 (Laws 1892, p. 1835, c. 688). Ersfeld v. Exner, 128 App. Div. 135, 112 NYS 561. Act Apr. 29, 1874 (P. L. 81). Gearhart v. Standard Steel Car Co. [Pa.] 72 A 669. Const. art. 12, § 6. San Antonio Irr. Co. v. Deutschmann [Tex.] 114 SW 1174. Constitution declares fictitious increase of stock void, but does not declare stock issued without payment invalid. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149. Qualified property right of discoverer of unpatented recipe or formula does not constitute "property" within Const. art. 12, § 6, requiring stock to be issued only for money, labor, or property

Properly speaking, however, such agreements are usually merely voidable as distinguished from void,[89] and are subject to validation on the payment of the full consideration,[90] unless it is otherwise provided by statute.[91] The right to receive property in exchange for stock [92] is sometimes restricted by specific limitations.[93] A

actually received. O'Bear-Nester Glass Co. v. Antiexplo Co. [Tex.] 108 SW 967. Payment of stock for formula void (violating Code Pub. Gen. Laws 1904, art. 23, § 69). Miller v. Cosmic Cement, Tile & Stone Co., 109 Md. 11, 71 A 91. In action against participant in intentional inflation of capital, where there was no independent board of trustees and no bona fide appraisement of property, fact that promoter's certificates were issued stamped "issued for property purchased" is not controlling. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. Const. art. 17, § 8, providing that corporations shall issue stock or bonds only for money, etc., or property actually received, and Rev. Civ. Code, §§ 1271, 1272, prohibiting contracts against policy of law or good morals, etc., were not intended to prohibit contract whereby owner of option on mining property was to sell same to corporation at profit and receive money and stock in payment. Chambers v. Mittnacht [S. D.] 122 NW 434. Where promoter's profit is taken in form of shares that represent no investment in money or property and exceed reasonable value of **services** and expenses of promoter, shares are not deemed fully paid within statutes requiring money or money's worth equivalent to par value of shares to be contributed by subscribers. Bigelow v Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

88. Under Const. art. 12, § 6, providing that no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, contract by which one was not to pay for stock any money at time of its issue but might pay for it in such time as he found necessary is void so far as it provides that plaintiff might have all time he might find necessary in which to pay for stock. San Antonio Irr. Co. v. Deutschmann [Tex.] 114 SW 1174. Alleged agreement that plaintiff might pay for stock at such time as he could arrange, that he was to get salary which was to go on stock, that he was not to be harassed or forced, held too indefinite to be enforced. Id. Where sewage franchise was acquired by plaintiff and two associates, who upon failure of plans for financing project agreed to transfer it to corporation whose stock was to be issued, subscribed for by each of promoters and paid for in full, plaintiff admitting that he was to receive no pay for his share in franchise and that he was to pay for his stock but was to have all time he needed to do so, held to have abandoned right to compensation for transfer of his interest in franchise to corporation. Id. Where under such circumstances plaintiff refused to accept his share of stock because immediate payment was demanded, he cannot recover value of his share of stock, since under Const. art. 12, § 6, contract was void as not requiring money paid, etc., in consideration of stock issued. Id. Under Gen. St. Minn. 1894, § 3415, providing that corporations shall not issue shares for a less amount than par value of shares first issued, a scheme for the promotion of a corporation whereby each purchaser should receive as a bonus stock equal to that subscribed for was invalid as fraudulent. Holman v. Thomas, 171 F 219. In scheme for promotion of co-operative sugar refining corporation whereby nine million dollars were to be obtained for about one-fourth of stock, a share paid to persons who financed scheme, and over half of stock was to be retained by promoter who gave corporation no property therefor and had no good will to transfer, such retention of stock was invalid for want of sufficient consideration. Id. **Evidence** held to sustain finding that issue of 28,000 shares of stock was fraudulent and void. Shaw v. Staight, 107 Minn. 152, 119 NW 951. Evidence held to show that holder of stock void on account of its issuance fraudulently and without consideration took with knowledge of facts. Id. **Complaint** alleging that stock was unlawfully and fraudulently issued and that no consideration was paid therefor held to allege not merely that stock was issued without consideration but to allege absence of consideration as incident of fraud, and, hence, fact slight consideration was shown does not destroy propriety of court's finding for cancellation of such stock nor render improper admission of evidence of fraud. Id.

Question of law or fact: Where property is transferred or assigned to a corporation for paid up stock, the asserted fraudulent character of transaction is ordinarily one of fact, but, where overvaluation is great, possibility of honest mistake is excluded. Holman v. Thomas, 171 F 219.

89. Shares of stock in corporation, issued and sold as full paid stock but for sum less than its par value, are not void, but agreement between holder and corporation that it shall be considered and treated as paid in full is voidable as to creditors of corporation. Shaw v. Staight, 107 Minn. 152, 119 NW 951. Under Stock Corporation Law, § 42 (Laws 1892, p. 1835, c. 688), an issue of stock in violation of act is not void. Ersfeld v. Exner, 128 App. Div. 135, 112 NYS 561.

90. Under St. 1898, § 1753, overissue of stock by corporation is void, but, under §§ 1751, 1754, 1756, such stock may be validated by paying full consideration therefor. Haynes v. Kenosha St. R. Co. [Wis.] 119 NW 568.

91. Under Act Apr. 29, 1874 (P. L. 81), all fictitious increases of stock or indebtedness in any form are void. Gearhart v. Standard Steel Car Co. [Pa.] 72 A 699. Agreement that certain stock should be set aside by corporation to be issued to certain party when paid for out of earnings of company held provision for mere gratuity and void. Id.

92. Under the Illinois statute, it is entirely competent for directors of corporation to accept merchandise in lieu of cash for payment of capital stock. In re Beachy & Co., 170 F 825.

93. Under Code (Pub. Gen. Laws 1904), art. 23, § 69, an agreement by directors to re-

charter limitation requiring subscriptions to be paid "in cash" [94] means no more than that the payment must be made in money.[95] In the absence of statutory liability on the part of directors who issue stock in violation of restrictions as to the consideration, or on the part of the person to whom such stock is issued,[96] the only remedy of a subsequent purchaser is a common-law action against the seller for fraud and deceit,[97] but a corporation issuing stock in consideration of a forged certificate may, on discovering the fraud, treat the purchaser as a subscriber and recover the consideration [98] or have the certificate canceled,[99] unless the rights of third parties intervene.[1] The strict definition of the word "subscribe" involves the idea of a written subscription,[2] but there is no principle, aside from statutory requirements, that invalidates an oral agreement to take stock.[3] The statutes often provide, however, that subscription contracts shall be unenforcible, unless the articles of association are also signed,[4] or require a payment of a portion of the amount subscribed.[5] Even though the original subscription is irregular and unenforcible in the first instance, the relation of corporation and stockholder may arise from

ceive formula in exchange for stock held void as not authorized by stockholders in general meeting. Miller v. Cosmic Cement, Tile & Stone Co., 109 Md. 11, 71 A 91.

94. Under provisions of Gen. St. 1906, § 2653, where charter of incorporated company provides that its capital stock shall be paid in cash, except that one-half of capital stock or less may be paid in labor or services, subscribers to such stock are bound to pay one-half of amount of each of their subscriptions thereto in cash. Stemple v. Bruin [Fla.] 49 S 151.

95. Payments by instalments held valid. Keystone Life Ins. Co. v. Von Schlemmer, 122 La. 280, 47 S 606.

96. Laws 1892, p. 1835, c. 688, § 42, creates no such liability in favor of a subsequent purchaser of such stock. Ersfeld v. Exner, 128 App. Div. 135, 112 NYS 561.

97. Ersfeld v. Exner, 128 App. Div. 135, 112 NYS 561.

98. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149. Where officer of corporation procured issuance of stock by giving as consideration forged certificates issued to fictitious person, he was clearly a subscriber, and indebted for value of such stock. Id. Where officer of corporation procured issuance of stock, and same passed to his widow as community survivor, evidence failed to present any estoppel which would prevent corporation from securing good consideration when fraud was discovered. Id. Corporation not estopped by fact that its agents acted as agents of widow in sale of stock to third party. Id. No estoppel because officers might have discovered fraud. Id. Pleading held to seek recovery on theory of stock subscription, and theory not changed by amendment of wrongful acts. Id. Pleading amply sufficient to sustain recovery of damages measured by value of forged bonds. Id.

99. Where corporation issued stock in consideration of forged certificates issued to fictitious persons, it could have certificate canceled on discovering fraud. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

1. Where stock was by fraud issued to officer but subsequently passed to purchaser in good faith without notice, only recourse of corporation was against officer or his estate. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149. Where corporation issued paid up stock which passed to purchaser's widow and was sold to third parties for valuable consideration, and subsequently corporation discovered its consideration to be forged, and that first issuance was fraudulent, the third parties were purchasers without notice, and stock could not be treated as void. Id.

2. Rutenbeck v. Hohn [Iowa] 121 NW 698.

3. Oral agreement is valid. Rutenbeck v. Hohn [Iowa] 121 NW 698. Word subscription by common usage is often employed to include an agreement written or oral, to give or pay some amount to designated purpose, more usually, perhaps, to some purpose for the promotion of which numerous persons are uniting their means and their efforts. Id.

4. Under Rev. St. 1899, § 1034 (Ann. St. 1906, p. 897), unless subscriber to preliminary subscription paper for railroad company also subscribes to articles of association of the company pursuant to statute, there is no enforcible contract of subscription. Shelby County R. Co. v. Crow [Mo. App.] 119 SW 435.

5. Effect of insurance laws (Laws 1892, p. 1974, c. 690), § 110, providing for subscription to stock of newly organized stock corporation only after certain preliminary steps have been taken, held to be that incorporators become corporation before stock subscriptions are invited and such subscriptions fall within Stock Corporation Laws (Laws 1892, p. 1835, c. 688), § 41, and are void unless ten per cent is paid in cash as required by such law. Van Schaick v. Mackin, 129 App. Div. 335, 113 NYS 408. Subscription to stock of corporation organized under insurance laws (Laws 1892, p. 1974, c. 690), § 110, without paying ten per cent in cash as required by Stock Corporation Laws (Laws 1892, p. 1835, c. 688), § 41, held, at most, a mere agreement to subscribe and not a valid subscription enforcible as such by receiver under Code Civ. Proc. § 2429, appointed on voluntary dissolution. Id.

acts and conduct evincing that end,[6] as where such acts and conduct amount to a ratification of the prior, insufficient contract [7] or give rise to an estoppel.[8] Though there is a line of decisons to the effect that a subscription is revocable until accepted by the corporation [9] ordinarily a subscriber for stock in a corporation cannot obtain a cancellation of his subscription except by the unanimous consent of other subscribers,[10] in the absence of fraud [11] or other good cause, such as a substantial

6. Business Men's Ass'n v. Williams [Mo. App.] 119 SW 439.

7. Business Men's Ass'n v. Williams [Mo. App.] 119 SW 439. Contract unenforcible because of noncompliance with statutory or other conditions may be ratified by payment after corporation comes into being. **Id.**

8. Acceptance of payment by corporation, though subscription is unenforcible, binds it to respond to subscriber in capacity of stockholder, and he is estopped to deny obligation, provided payment is not induced by fraud or misrepresentation. Business Men's Ass'n v. Williams [Mo. App.] 119 SW 439. Where subscription agreement stipulated for capitalization of proposed corporation at $25,000, or such less amount as might be decided upon, capitalization at $2,500 did not invalidate subscription, subscriber having paid a portion of his share. Id. Criterion of liability of subscriber to stock in corporation is whether any act has been done by which corporation has been forced to receive subscriber. Id. Principle extends to one who has subscribed to an irregular preliminary paper and therein appointed another to participate for him in organization of proposed company. Id. Subscriber estopped to deny regularity of preliminary subscription where board of directors appointed to, and actually did, represent him in formation of corporation. Id. Stockholder, subscribing upon condition that certain amount of stock be bona fide subscribed, held estopped to deny fulfillment of such condition where he acquiesces in organization of company, accepts office as director, etc. McConnaghy v. Monticello Const. Co. [Ky.] 117 SW 372. Person subscribing to capital stock after he had acted as director, merely to qualify for position, is estopped from contesting his subscription on ground that terms of payment were violative of corporate charter. Keystone Life Ins. Co. v. Von Schlemmer, 122 La. 280, 47 S. 606.

9. See Steely v. Texas Imp. Co. [Tex. Civ. App.] 119 SW 319. Defendant's liability for stock subscription held established, whether rule of law that such subscription cannot be withdrawn without consent of other subscribers or the rule that such subscription can be revoked if not accepted by the corporation be applied. Id.

10. Shelby County R. Co. v. Crow [Mo. App.] 119 SW 435; Chicago Bldg. & Mfg. Co. v. Peterson [Ky.] 118 SW 384. See, also, Steely v. Texas Imp. Co. [Tex. Civ. App.] 119 SW 319. Even consent of majority cannot authorize such withdrawal. Shelby County R. Co. v. Crow [Mo. App.] 119 SW 435. Holder of corporate stock cannot at pleasure withdraw his contribution. Hammond v. Vetsburg Co. [Fla.] 48 S. 419. **Officers have no power to release subscriber** without payment of valuable and sufficient consideration. In re Eureka Furniture Co., 170 F. 485.

11. Chicago Bldg. & Mfg. Co. v. Peterson [Ky.] 118 SW 384. Representation that stock would only cost 10 per cent of its value and was given to subscriber for his influence and patronage could not be relied upon, and must be regarded as mere **opinion.** Gough Milling & Gin Co. v. Loomey [Tex. Civ. App.] 112 SW 782. If agent of syndicate is guilty of fraud in purchasing certain stock for syndicate at 70 instead of par as he might have done under the syndicate agreement, the **right to rescind** contract where syndicate has been succeeded by corporation rests in corporation and not in subscriber to syndicate since the contract of purchase of stock and not the agreement to subscribe to syndicate was rendered voidable by such act. Heckscher v. Edenborn, 131 App. Div. 253, 115 NYS 673. Purchase of corporate stock on basis of fraudulent representations may, after stock has been rendered worthless by manipulation of officer, either resort to **rescission or suit for damages.** Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257. Where defendant, as stockholder and officer in charge and management of corporate affairs, secured benefit through corporation which had obtained money for stock sold to plaintiff, and by ultimately gaining possession of property, thus through fraudulent manipulation obtaining title to the company's property and retaining it against right of plaintiff, defendant and corporation are subject to **joint liability.** Id. Subscribers entitled to cancellation of subscriptions procured by false representations, and complainants suffered **injury** by such representations, though stock given to agent was nearly all turned back, except small amount used for private purposes. Hamilton v. American Hulled Bean Co. [Mich.] 16 Det. Leg. N. 273, 121 NW 731. The **defense of fraud** is available to subscriber to corporate stock of solvent corporation if he has been diligent in pursuing his right to rescission on this ground, but least neglect on part of subscriber will prevent successful defense for fraud after interests of creditors has intervened. Brown v. Allebach, 166 F. 488. Stockholders who permitted names to continue on register as stockholders for year after discovery of fraud and until corporation became insolvent and rights of creditors attached cannot avail themselves of defense of fraud. Id. Where **allegations** that defendants made fraudulent representations by which plaintiff was induced to purchase stock and part with his money reasonably permit inference that officers and agents acted authoritatively in matter complained of, such allegations, if proved, subject corporation to liability. Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257. **Evidence** held to show that defendant did not give note for stock in suit relying upon fraudulent representations by officers of corporation as to its condition. Cherry v. First Texas Chemical Mfg. Co. [Tex. Civ. App.] 115 SW 81. Evidence held to sustain

change in the contract without his consent;[12] but any condition which may be legally performed by the corporation may be a condition of a stock subscription,[13] especially in the case of treasury stock,[14] and the corporation will not be heard to repudiate conditions which it has affirmed or ratified.[15] Where the subscription contract is silent as to the same, the conditions may be proved by parol evidence.[16] Promoters who guarantee the performance of an agreement by the corporation are personally liable for a breach thereof.[17]

allegations of false representations as to corporations' ownership of patent rights, and amount of stock in treasury, entitling subscribers to cancellation of subscription. Hamilton v. American Hulled Bean Co. [Mich.] 16 Det. Leg. N. 273, 121 NW 731.

Fraud of promoters: In case of syndicate, or carrying out of promotion agreement to form syndicate, rescission cannot be relied upon, restitution offered, and original payment demanded back, on an action at law against the individual who acted as promoter or agent. Sim v. Edenborn, 163 F 655. Subscription of corporate stock cannot be rescinded for fraud of promoter in secretly taking profit to himself in form of rent from property leased to corporation, since parties cannot be placed in statu quo, but stockholder or corporation may recover such profit. Jordan v. Annex Corp. [Va.] 64 SE 1050. A subscriber seeking to be released from his subscription because of a secret agreement with the agent who procured the same, which is not expressed in the written contract, would thereby perpetrate a fraud upon the other subscribers, and is estopped to claim such a release, but this rule inapplicable where subscriber is not bound by his subscription and co-subscribers are not injured. Real Estate Trust Co. v. Riter-Conley Mfg. Co. [Pa.] 72 A 695.

12. Where foreign corporation was dissolved, subscriber to stock in such corporation could not be compelled to purchase stock in new domestic corporation organized in its place, and which acquired its assets. Owensboro Seating & Cabinet Co. v. Miller [Ky.] 113 SW 423. A material alteration or change in the contract without the consent of the subscriber will release him from his obligations thereunder. Id. No evidence of **estoppel** to complain of change. Id.

13. Bobzin v. Gould Balance Valve Co. [Iowa] 118 NW 40. See, also, Real Estate Trust Co. v. Riter-Conley Mfg. Co. [Pa.] 72 A 695. Contract by citizens of town with railroad company to pay certain amount for extending railroad was not contract for the sale of land and within **statute of frauds.** Texas & G. R. Co. v. Whiteside [Tex. Civ. App.] 119 SW 126.

Conditions subsequent do not affect subscriber's liability to take and pay for stock, but give him right of action against corporation for its failure to perform condition. Bobzin v. Gould Balance Valve Co. [Iowa] 118 NW 40. Subscription contract whereby corporation agreed to maintain plant at certain place for five years was valid and irrevocable. Id. **Injunction** warranted where corporation sought to remove its place of business in violation of stock subscription agreement. Id. Condition subsequent as to maintenance of place of business **held not waived.** Id.

14. Rule that stock subscribers must be on same basis does not apply to conditional purchaser of treasury stock held by corporation for purposes of sale, such person not being a subscribed but a conditional purchaser of property of corporation which it had power to dispose of upon such terms as it saw fit. Mulford v. Tarrey Exploration Co. [Colo.] 100 P 596. Contracts to purchase stock subject to purchaser's right to rescind are not fraudulent as tending to mislead other stockholders with respect to corporate assets since, if officers of corporation cause records to show facts, no one can be misled. Id.

15. Corporation electing to affirm part of contract cannot repudiate conditions of sale on grounds that agent had no authority to enter into contracts. Mulford v. Tarrey Exploration Co. [Colo.] 100 P 596. By-law held to give agent authority to enter into contracts and president held to have been fully advised as to contracts in question. Id. Where corporation selling stock subject to right of purchaser to rescind and return before certain time disposed of note and other consideration received by it prior to such time, a purchaser electing to rescind may sue prior to expiration of such time. Id. Where president of railroad contracted with citizens of town for extension of line in consideration of their subscriptions and company appropriated and used the right of way under such contract, it thereby adopted such contract. Texas & G. R. Co. v. Whiteside [Tex. Civ. App.] 119 SW 126. In contract by citizens of town with railroad company, subscribing money for an extension, providing that railroad should repay subscriptions if it failed to extend its line as agreed, the **contract to repay** was expressly provided for, and an assignment of error that there could be no recovery since there was no contract to refund was without merit. Id. **Promoter's agreement** requiring maintenance of corporation's plant at specified location was ratified where corporation accepted and retained money paid on stock subscriptions induced in reliance thereon. Bobzin v. Gould Balance Valve Co. [Iowa] 118 NW 48.

16. Not variance of terms. Bobzin v. Gould Balance Valve Co. [Iowa] 118 NW 40.

17. Where promoters agreed to refund subscription if mill company to be organized did not, within one year, establish tiling plant. Broadus v. Russell [Ala.] 49 S 327. Subscription money was recoverable from promoters, regardless of subscriber's refusal to pay instalments stipulated, and regardless of time when company determined to abandon erection of tiling plat. Id.

Res adjudicata: Where promoters guaranteed that proposed mill company would establish tiling plant within a year, in a suit against such promoters, a judgment for subscribers, in action by company for balance

An agreement to take stock inures to the benefit of the corporation subsequently formed as contemplated by the parties,[18] and thus the doctrine obtains generally that a subscription to the stock of a corporation is a trilateral contract, that is, it is an undertaking between the corporation, the individual, and all other subscribers to the stock as well.[19] Subscriptions may lawfully be evidenced by promissory notes payable to some person in the nature of a trustee.[20] A subscription paper is to be construed by the application of the principles applicable to the construction of contracts generally.[21]

The corporation is entitled to insist upon the terms of a contract as reduced to writing.[22] In an action for a balance due on corporate stock, evidence of the corporate assets, including book accounts, is proper for certain purposes.[23] A defendant seeking to establish a special defense has the burden of proving same,[24] and it is no defense to an action on a subscription that the corporation has not delivered or tendered to the defendant the certificate of stock to which he was entitled.[25] A corporation's claim for nonpaid subscriptions is ordinarily assignable.[26]

of their subscription, was not binding as to promoters, there being no such privity between promoters and company as would bind them. Broadus v. Russell [Ala.] 49 S 327.

18. Agreement is enforcible by corporation formed pursuant to recitals in subscription, at common law. Shelby County R. Co. v. Crow [Mo. App.] 119 SW 435. Agreement to subscribe for stock in corporation to be organized upon compliance with certain conditions may be enforced in name of corporation. Stone v. Monticello Const. Co. [Ky.] 117 SW 369.

19. Shelby County R. Co. v. Crow [Mo. App.] 119 SW 435; Altoona Sanitary Milk Co. v. Armstrong, 38 Pa. Super. Ct. 350. Contracts are trilateral and, even **if fraudulent as between two of parties,** they are to be enforced for benefit of third. Altoona Sanitary Milk Co. v. Armstrong, 38 Pa. Super. Ct. 350.

20. Bing v. Bank of Kingston, 5 Ga. App. 578, 63 SE 652. Trustee holds them for purposes of proposed corporation and payee may upon charter being obtained sue upon notes for use of corporation. Id. Such notes are supported by consideration though charter is not yet obtained, since a promise of future consideration is sufficient. Id.

21. In construing subscription proper **all provisions must be considered** in determining its true meaning and ascertaining its effect and rights and duties to which it gave rise. Altoona Sanitary Milk Co. v. Armstrong, 38 Pa. Super. Ct. 350. Stock subscription contract reviewed and **practical construction** of parties throughout held to be that defendants had not obligated themselves to take an entire issue of preferred stock, wherefore verdict against weight of evidence. Bankers' Money Order Ass'n v. Nachod, 128 App. Div. 281, 112 NYS 721.

22. Since one receiving certificate of stock of building and loan association becomes member of association, mutual in character, it is to be inferred that member was aware of provisions of certificate and of articles of incorporation, and hence corporation is not estopped to insist upon terms of contract as reduced to writing. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694. Action on note. Id.

23. Tending to show probability of the price paid by defendant therefor. McIntosh v. McNair [Or.] 99 P 74. In such action, however, evidence not going to book accounts of corporation but to such accounts generally is improper. Id.

24. Incumbent on defendant to show that the corporation was not organized when he withdrew his subscription. Steely v. Texas Imp. Co. [Tex. Civ. App.] 119 SW 319. In action on stock subscription, defendant had burden of showing notice of revocation of his subscription prior to date when corporation was organized. Id.

25. Doctrine proceeds on theory that it is contract and acts of ratification and estoppel on an irregular contract which bring forth relation of stockholder and corporation, and certificate itself amounts to no more than evidence of right of stockholder to participate therein. Business Men's Ass'n v. Williams [Mo. App.] 119 SW 439. Where contract of subscription is made in state, subscribers become members of corporation which is bound to deliver muniments of title, showing interest they had acquired in corporation, and in event of its failure to do so delivery might be compelled by appropriate proceedings in courts, and by virtue of such contract of purchase subscribers became entitled to enforce ordinary rights of stockholders against corporation. Southwestern Slate Co. v. Stephens, 139 Wis. 616, 120 NW 408.

26. Under D. C. Code, § 433 (31 Stat. 1256, c. 854), providing that non-negotiable written instruments for payment of money, etc., may be assigned in writing so as to vest in assignee right to sue for same in his own name, a written subscription to capital stock of corporation is assignable by corporation, so that assignee may sue subscriber in his own name. Crook v. International Trust Co., 32 App. D. C. 490. If facts pleaded showed valid subscription, **receiver** would be authorized, under 2 Rev. St. (1st Ed.) tit. 4, c. 8, pt. 3, § 69, which is made applicable to proceedings for voluntary dissolution of corporation under Code Civ. Proc. § 2429, by Laws 1880, p. 368, c. 245, to counterclaim unpaid amounts on stock subscriptions against one suing for value of legal services rendered, since such receiver is authorized to collect such unpaid subscriptions unless subscriber is insolvent. Van Schaick v. Mackin, 129 App. Div. 335, 113 NYS 408.

Calls and assessments. See 11 C. L. 841—The words "calls" and "assessments" are often used interchangeably,[27] but strictly speaking the word "call" ordinarily means the action of the board of directors of a corporation in demanding the payment of all or a portion of unpaid subscriptions,[28] while "assessment" means a demand upon stockholders for payments above the par value of their stock.[29] The general rule is well established that corporations have no implied power to levy assessments on full paid stock,[30] but authority to make such assessments is frequently conferred by statute[31] or charter.[32] When statutes authorize such assessments, the mode provided for the exercise of the power must be strictly pursued,[33] and such authority is also subject to such limitations as may be imposed by the corporation's by-laws.[34] In the absence of statute to the contrary, a corporation may contract with its stockholders that stock shall be nonassessable,[35] and it is held that a pledgee of corporate stock may maintain an action to have certain assessments on stock declared invalid, as being in violation of the contract with the corporation.[36] Under statutory authority the levy of an assessment may be enforced by a sale of the stock,[37] or the assessment may be collected by personal action.[38] Requirements as to notice

27, 28. Wall v. Basin Min. Co. [Idaho] 101 P 733.

29. To meet money demands of creditors. Wall v. Basin Min. Co. [Idaho] 101 P 733. Word "assessments" as used in Rev. Codes, § 2769, is distinguished from "calls" or "instalments" and means assessments upon full paid stock, as distinguished from calls or instalments for portions of unpaid subscriptions. Id.

30. Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 P 994.

31. Assessment may be made upon full paid stock. Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 P 994. Where statute authorizes assessment on full paid stock, it becomes part of stockholder's contract with corporation. Id. Rev. Codes, § 2750, empowers the directors of a corporation to levy and collect assessments upon subscribed capital stock thereof for purpose of paying obligations, conducting business or paying debts after one-fourth of the same has been subscribed. Wall v. Basin Min. Co. [Idaho] 101 P 733. Const. art. 11, § 17, providing that dues be secured but that in no case shall stockholder be individually liable in any amount over or above amount of stock owned by him, and relates to and limits personal liability of stockholders, and such provision in no way limits power of corporation to make assessments upon stock fully paid and to subject such stock to sale in default of payment of assessment. Id. By statute (Comp. Laws 1907, § 355), it is expressly provided that no assessments may be levied against full paid stock unless right to do so is expressly provided for in articles of incorporation. White v. Snell [Utah] 100 P 927.

32. To assess full paid stock. Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 P 994.

33. Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 P 994.

34. Under by-law authorizing assessment only where there are not sufficient funds in treasurer's hands to pay indebtedness of corporation and then authorizes assessment only for sufficient amount to cancel indebtedness, assessment to pay estimates of expense for conducting company during current year, it not appearing that amount was needed to pay indebtedness, is void. Delaware Val. Tel. Co. v. Tiffany, 131 App. Div. 343, 115 NYS 867.

35. Stockholder may enforce such contract against corporation's right to assess stock. Wall v. Basin Min. Co. [Idaho] 101 P 733. Where a corporation issues certificates of stock and prints thereon as a part thereof the word "nonassessable," such word becomes a matter of agreement and part of the contract between corporation and stockholder and may be enforced by stockholder against corporation's right to assess such stock. Id. Equity will prevent the exercise of a **conditional right to assess** under a contract until the conditions are performed. Farmers' Pawnee Canal Co. v. Henderson [Colo.] 102 P 1063.

36. Farmers' Pawnee Canal Co. v. Henderson [Colo.] 102 P 1063. In written contract by ostensible owner of all capital stock of company and a new corporation providing that such owner should cause company to convey its property on condition that new corporation should convey certain water rights to be free from assessments until used by such owner or his assigns, or sold by him, parol evidence was competent to show that word "assigns" was intended to be restricted to certain investment company, real owner of stock, and that contract was for benefit of such company, the real party in interest. Id. Pledgee held not a purchaser within meaning of such agreement. Id. Where equity had jurisdiction of action to declare assessment on stock held by pledgee void, it would also grant **incidental relief** of ordering transfer on corporate books, so as to effectuate decree declaring assessment void. Id.

37. Levy of assessments under statute against paid-up stock is proceeding in rem by which stock may be sold. Wall v. Basin Min. Co. [Idaho] 101 P 733. No personal liability attaches to stockholder for any deficiency arising from sale. Id.

38. In case of an assessment in the nature of call for unpaid portion of stock subscribed, corporation may proceed to recover

must be observed,[39] and a call is usually a necessary condition to an action by a corporation for the unpaid portion of subscribed stock,[40] though this rule does not apply to creditors seeking to enforce their rights.[41] The question whether a call has been made may be one of fact,[42] and the denial of a call may be precluded under the doctrine of estoppel.[43] Where the capital stock and the number of shares are fixed by the act or certificate of incorporation, no calls or assessments, can lawfully be made upon the share of any subscriber until the whole number of shares has been taken,[44] but this also is subject to waiver or estoppel.[45] Actions to re-

amount assessed from the stockholder. Wall v. Basin Min. Co. [Idaho] 101 P 733. May elect to waive sale of stock. Id. Assessment may be collected by personal action under Civil Code, § 331, authorizing assessments for certain purposes, §§ 332, 333, placing limitations on power, and §§ 331-349, providing procedure, there being nothing in §§ 586-590, taking mining corporations out of general rule. Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 P 994. To sustain personal action for amount of stock assessment under Civ. Code, § 349, providing for waiver of right to sell stock and election to proceed by action, waiver must be made at time when right to sell stock for nonpayment of assessment yet existed. Id.

39. Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 P 994. Allegation that notice of assessment was mailed forthwith held to refer to time of passing resolution of assessment. Id. Where statute requiring notice of assessment provides no particular time prior to either date of delinquency or date of sale when notice of assessment must be published, allegation that it was published at places and for duration of time required by statute is sufficient. Id. Where copies of decree of assessment made Aug. 31 together with notice of call were sent stockholders by receiver Sept. 19, and payment requested within 15 days, but upon objection being raised that 30 days' notice had not been given, another notice was given on certain day that 30 days from latter date would be allowed in which to pay, stockholders held to have had sufficient notice. Brown v. Allebach, 166 F 488.

40. Daggett v. Southwest Packing Co. [Cal.] 103 P 204; Burke v. Maze [Cal. App.] 101 P 38. Under subscription contract making of call is first essential step to render subscriber liable. Crook v. International Trust Co., 32 App. D. C. 490. Where solvent corporation finds it necessary in course of its business to call in an additional amount of its subscribed capital stock and subscription agreements do not state when, in what amounts, and upon what conditions it is to be paid, the statute, being measure of corporate rights in that regard, must be followed, and a call is necessary condition to the existence of a cause of action by the corporation to recover upon such subscriptions. Daggett v. Southwest Packing Co. [Cal.] 103 P 204.

41. See post, § 16F.

42. Crook v. International Trust Co., 32 App. D. C. 490.

43. Stockholder who is present in person or by proxy at a meeting when call is made cannot require additional notice. Crook v. International Trust Co., 32 App. D. C. 490. Where trust company agreed to make loan to corporation agreeing to take assignment of 90 per cent of subscriptions, and only paid over money on representation that call had been made and collected for the remaining 10 per cent, and the subscription contract provided for loans by corporation thereupon, a subscriber was estopped to deny call. Id. By becoming a member of corporation, a stockholder subjects himself to liability for all corporate actions taken in regular course without his presence. Id.

44. Morgan v. Landstreet, 109 Md. 558, 72 A 399. For this purpose only unconditional subscriptions payable in cash can be counted. Id.

Note: It is well settled that where the capital stock and number of shares are fixed by the act or certificate of incorporation, no assessment can lawfully be made on the share of any subscriber until the whole number of shares has been taken. Two of the earliest American cases to this effect are Salem Mildam v. Ropes, 23 Mass. (6 Pick.) 23, and Stoneham v. Gould, 68 Mass. (2 Gray) 277. In the latter case Judge Shaw says: "This is no arbitrary rule. It is founded on the plain dictate of justice and the strict principles regulating the obligation of contract." The reason of this rule, as announced by Judge Shaw, is that otherwise a subscriber would be liable not only to contribute his contractual portion to the corporate enterprise but would be compelled to assume the risk of the failure thereof by reason of the failure to dispose of the balance of the shares, by which the amount paid by the subscriber might be entirely lost. This rule, with its reasons, was adopted in Maryland in the case of Hughes v. Antietam, 34 Md. 331, and has been followed consistently in subsequent cases. See Hayes v. Cleveland, 36 Md. 476; Garlug v. Baechtel, 41 Md. 305; Stillman v. Dougherty, 44 Md. 380; Morrison v. Dorsey, 48 Md. 472; Musgrove v. Morrison, 54 Md. 164; Gettysburg Nat. Bank v. Brown, 95 Md. 367, 52 A 975, 93 Am. St. Rep. 339. There are substantial differences, it is true, in this regard between "original or formative" stock and "increased" stock, but the general rule prevails not only in Maryland, but also in New York, Missouri, Connecticut, New Hampshire, Wisconsin, Iowa, Georgia, California, Illinois, Maine, Tennessee, Ohio, and generally throughout the United States. It is generally spoken of as an implied rule, but it may, of course, be expressed. For the purpose of ascertaining whether the whole stock has been subscribed, only unconditional subscriptions can be counted. Troy R. Co. v. Newton, 8 Gray [Mass.] 596; Oskaloosa Agricultural Works v. Parkhurst, 54 Iowa, 357, 6 NW 547; Brand

cover assessments may be barred by limitations,[46] the statute beginning to run when a call is made.[47] A charter provision may relieve an original subscriber of liability for future assessments where he has paid the first instalment and transferred his stock to the real owner on the corporation's books.[48]

(§ 14) *D. Miscellaneous rights of stockholders.*[49] *The right to dividends.* See 11 C. L. 843—A dividend is a corporate profit set aside, declared, and ordered by the directors to be paid to the stockholders upon demand or at a fixed time,[50] and the net income of corporation for dividend purposes can only be determined after the deduction of taxes, depreciation, maintenance and up-keep expenditures.[51] A cash dividend by a corporation can be declared out of the surplus assets only.[52] Whether a distribution of stock pro rata among the stockholders of a corporation is a dividend representing profits, or an adjustment of capital account depends upon the circumstances of each case.[53] The function of fixing the amount to be reserved as working capital may, by statute, be primarily the duty of the stockholders,[54] but such function may be conferred ou the directors,[55] and usually dividends are payable from the surplus profits regardless of when acquired.[56] A re-

v. Lawrenceville Branch R. Co., 77 Ga. 506, 1 SE 255; California So. Hotel Co. v. Russell, 88 Cal. 277, 26 P 105.—Adapted from Morgan v. Landstreet, 109 Md. 558, 72 A 399.

45. Morgan v. Landstreet, 109 Md. 558, 72 A 399. Where defendant subscribed for stock upon representation that all stock was either actually subscribed or promised to be taken immediately on his subscription, was elected director but never qualified, attended meeting or participated in company's business, he is entitled to benefit of rule when sent by receivers for subscription. Id.

46. Action to recover assessment upon stock held barred by statute of limitations and not maintainable against administrator or heirs of deceased stockholders. Rev. Laws, c. 141, §§ 9, 27. Converse v. Nichols, 202 Mass. 270, 89 NE 135. In action by receiver of corporation to recover claim from heirs of stockholders under Rev. Laws, c. 141, §§ 26, 28, where § 13 of such statute provided for presentation of claims which "might justly become due from the estate" in the probate court, the action was held not maintainable, since proceeding for the enforcement of the stockholder's liability had been determined in another state, and since assessments could have been made in the lifetime of such stockholder, the claim was one which might "become due" under § 13. Id. In action by receiver of corporation to recover a claim from the heirs of a stockholder, which action was barred by Rev. Laws, c. 141, § 13, because not presented in probate court, it sufficiently appeared that receiver was authorized to prosecute claim when due, and hence he was proper person to present claim in probate court. Id. Where receiver was prosecuting claims for assessments upon stock, and it appeared that, by laws of another state where he was appointed, making of second assessment rested upon an order of court appointing such receiver, but application therefor was promptly made, action to enforce such assessment was **not barred** by limitations. Converse v. Elward [Kan.] 103 P 140.

47. Where by terms of charter and subscription contract subscribers after payment of certain sum on stock were not liable for any balance until assessment or call was made upon them, it is not until the date of the call that statute of limitations begins to run. Brown v. Allebach, 166 F 488

48. Brown v. Artman, 166 F 485. Where actual owner kept stock in name of another, neither were relieved. Id.

49. **Search Note:** See notes in 1 C. L. 758; 9 Id. 764; 16 L. R. A. 461; 45 Id. 392, 446; 3 L. R. A. (N. S.) 1034; 8 Id. 788; 9 Id. 606; 10 Id. 725; 12 Id. 810, 969; 16 Id. 892; 71 A. S. R. 40; 91 Id. 33; 97 Id. 29; 107 Id. 674; 118 Id. 162; 1 Ann. Cas. 130; 2 Id. 216; 4 Id. 437; 7 Id. 617; 9 Id. 745; 10 Id. 990.

See, also, Corporations, Cent. Dig. §§ 448, 547-603, 653-731, 777-825, 1426-1439, 2176, 2177; Dec. Dig. §§ 150-160, 177-190, 202-214, 320, 546; 10 Cyc. 374, 375, 543-577, 770, 806, 936, 954-1000; 19 Id. 1345, 1346; 9 A. & E. Enc. L. (2ed.) 679; 26 Id. 949, 959.

50. People v. Glynn, 130 App. Div. 332, 114 NYS 460.

51. Since otherwise dividend would be depreciation of capital. People v. State Board of Tax Com'rs, 128 App. Div. 13, 112 NYS 392.

52. Will not be permitted to reach capital. Bishop v. Bishop, 81 Conn. 509, 71 A 583. Dividend in form of bonds chargeable against all assets of company is not cash dividend. Id.

53. People v. Glynn, 130 App. Div. 332, 114 NYS 460. If such distribution represents surplus earnings, it may fairly be treated as dividend and as income from original stock. Id. Issue of stock held dividend. Id.

54. Under Corporation Act 1896 (P. L. p. 293), § 47, as amended in 1901 (P. L. p. 246, § 2). Bassett v. U. S. Cast Iron Pipe & Foundry Co. [N. J. Eq.] 70 A 929.

55. May be conferred on directors. Bassett v. U. S. Cast Iron Pipe & Foundry Co. [N. J. Eq.] 70 A 929.

56. Charter held to permit payment of dividends from corporation's surplus profits, regardless of when same was acquired. Bassett v. U. S. Cast Iron Pipe & Foundry Co. [N. J. Eq.] 70 A 929. Where power to fix amount of working capital was conferred on directors, fund was held to be surplus net profits, and not actual working capital so that such fund was under full control of

serve fund accumulated in whole or in part by cutting down dividends otherwise payable to preferred stockholders is available for the subsequent payment of dividends on such stock.[57]

Every shareholder is entitled to participate in the distribution of a corporation's profits, in proportion to the number of shares held by him.[58] This right is incidental to membership,[59] like the right to participate in the assets of a corporation upon dissolution.[60] A dividend may be declared subject to the rights of creditors,[61] and the question as to whether a dividend has been declared may be a question of fact.[62] Generally, persons having a right to the income of trust funds invested in stocks are only entitled to the enjoyment of those dividends declared which partake of the character of cash dividends,[63] not including dividends declared in the process of liquidation or reduction of capital.[64] Stock dividends declared out of a surplus produced by the accumulation of earnings are usually the property of the life tenant,[65] and the remainderman has the burden of proving that an issue of dividend obligations decreased the value of the stock.[66] A pledgee of corporate stock may usually collect the dividends thereon.[67]

A declared, money dividend constitutes a debt of the corporation,[68] and, while

directors and might be used for payment of dividends on preferred stock. Id. Charter provided for payment of dividends from surplus net profits. Id. If fund be considered working capital, and authority to fix amount of same had been conferred on directors by charter and by-law, statute (P. L. 1901, p. 246, § 2, amended act of 1896, § 47) permitted reduction of same without consent of common stockholders. Id.

57. Bassett v. U. S. Cast Iron Pipe & Foundry Co. [N. J. Err. & App.] 73 A 514. Corporation has no right to accumulate reserve fund from earnings which would otherwise be paid out as dividends to holders of common stock, and afterwards use it to pay dividends to preferred stockholders, when net profits of year, for which dividend is declared, are not sufficient for that purpose. Id.

58. Avery v. Central Bank [Mo.] 119 SW 1106. Shareholder is entitled to participate in net profits. Consolidated Coal Co. v. Miller, 236 Ill. 149, 86 NE 205; Judy v. Beckwith, 137 Iowa, 24, 114 NW 565.

59. See ante, § 14A, Membership in Corporations in General.

60. See ante, § 12, subd. Effect of Dissolution.

61. Where corporation with capital stock of $10,000 declared a dividend of 120 per cent, upon receiving the report of accountants, showing over $13,000 in assets, but provided that creditors entitled to $9,000 should first be paid, a stockholder could not maintain action for his dividend until the indebtedness was paid. Tepfer v. Rival Gas & Elec. Fixture Supply Co., 117 NYS 959.

62. In insolvency proceedings against corporation, evidence reviewed and preponderance held to show that no dividend was declared. Allen-West Com. Co. v. Gwaltney [Ark.] 119 SW 292.

63. Bishop v. Bishop, 81 Conn. 509, 71 A 583. Term cash dividend, as applied to persons entitled to income of trust funds, includes all distributions of surplus assets of corporation, whether same be in form of cash or property, which are made to shareholders pro rata through medium of dividend declarations in such manner that assets so distributed are separated from body of assets of corporation to become property of shareholders and thus to pass out of dominion and control of corporation into that of the shareowners. Id.

64. Bishop v. Bishop, 81 Conn. 509, 71 A 583.

65. As between life tenant who is entitled to income from certain stock, and remainderman, who will receive corpus of estate after death of life tenant, stock dividends declared out of surplus produced by accumulation of earnings after death of testator belong to life tenant as part of earnings of original stock. Goodwin v. McGaughy [Minn.] 122 NW 6. Where trust in corporate stock is created, as between life tenant and remainderman, latter is entitled to just what stock is actually worth at time of creation of trust, no less and no more. Appeal of Boyer [Pa.] 73 A 320. Where trust is created in corporate stock, with "dividends, income and profits" for life tenant, "dividend obligations" and "certificate of indebtedness" issued by corporations in lieu of dividends, money for which was expended for permanent improvements, should be paid to life tenant, when not shown to decrease value of stock at creation of trust. Id. Apportionment of dividend obligations and certificates of indebtedness between life tenant and remainderman on theory that same represented distribution of profits earned by corporations prior to creation of trust erroneous, there being no attempt to ascertain real value of stocks when trust created, or that after such issue value of the stock was less than when created. Id.

66. Appeal of Boyer [Pa.] 73 A 320. Presumptively every dividend goes to the beneficial holder of shares at time it is declared, and therefore dividends presumptively go to life tenant instead of remainderman. Id.

67. Union Trust Co. v. Hasseltine, 200 Mass. 414, 86 NE 777. As increment of thing pledged, to be accounted for later. Booth v. Consolidated Fruit Jar Co., 62 Misc. 252, 114 NYS 1000.

68. Bishop v. Bishop, 81 Conn. 509, 71 A 583. Although demand by stockholder for his pro rata share of stock dividend is

the courts will not ordinarily interfere to require dividends to be declared out of net profits,[69] when the distribution of profits is wrongfully refused, equity will compel a corporation to declare a dividend.[70] Generally such suits must be in the name of the corporation,[71] but this rule does not apply where a corporation is defendant and the majority of directors are parties charged with fraud.[72] The decree may provide that the matter remain under the scrutiny of the court.[73] A corporation's contract to guarantee dividends[74] will be terminated by the dissolution of the company whose stock was guaranteed.[75]

Right to inspect books and papers of the corporation. See 11 C. L. 844.—Stockholders have a common-law right to inspect corporate records and documents in a proper case and for proper purposes,[76] even though the only object of such inspection is to ascertain if their affairs have been properly conducted.[77] Corporate by-laws, authorizing the directors to deny the right, are unlawful,[78] but, since the directors are bound to manage the corporation for the good of all, they are entitled to an assurance that inspection is for a proper purpose.[79] The right to inspect is often expressly given by statute,[80] the refusal being penalized in many cases.[81]

necessary before beginning of an action by him for recovery of such dividend, failure to make such demand does not suspend operation of statute of limitations. Stearns v. Hibben, 11 Ohio C. C. (N. S.) 553.

69. Miller v. Chicago & A. R. Co., 171 F 253. Discretion vested in board of directors to declare dividends will not be interfered with or controlled by courts in absence of showing of bad faith or an arbitrary and unjustifiable withholding of profits. De Lacroix v. Eid Concrete Steel Co., 8 Ohio N. P. (N. S.) 489. A court of equity has no power to direct or compel directors of an Ohio corporation to declare dividend out of any other fund than surplus profits as defined by statutes of Ohio. Id.

70. Ritchie v. People's Tel. Co. [S. D.] 119 NW 990. Suit for accounting of dividends properly cognizable in equity. Snyder v. Charleston & Southside Bridge Co., 65 W. Va. 1, 63 SE 616. Minority stockholder purchasing stock on representation that expenses would not exceed certain amount held entitled to have excess of expenses allowed over such amount returned to corporation and divided as dividends. Ritchie v. People's Tel. Co. [S. D.] 119 NW 990. Where minority stockholder was induced to take stock by representation of president and principal stockholder that expenses would not exceed certain amount, and where business was managed entirely by president, no accounts kept, or separate deposit of moneys received, and president through passage of void resolutions increased expenses above stipulated amount, minority stockholder may compel return to corporation of all moneys paid for expenses in excess of stipulated amount. Id.

71. Lawton v. Bedell [N. J. Eq.] 71 A 490.

72. Lawton v. Bedell [N. J. Eq.] 71 A 490. Where it appears that no misrepresentation was made by board of directors upon which stockholder relied to his prejudice, nor any concealment by them of facts not recorded in minutes, an action by stockholder for recovery on ground of fraud and concealment will not lie. Stearns v. Hibben, 11 Ohio C. C. (N. S.) 553.

73. With leave to apply to court for relief if it be necessary. Lawton v. Bedell [N. J. Eq.] 71 A 490. Since it is duty of board of directors, under decree of plaintiff's rights to dividend, to come together and declare dividend of all net earnings not needed for legitimate business of corporation, decree may direct defendants to account and declare reasonable dividends from time to time as financial status of business may warrant. Id.

74. Contract of guaranty is really independent, being for substantial consideration and not subject to qualification by proof of prior negotiations. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934. Where preferred stockholders agreed to reduction of their dividends as fixed by charter, in consideration of guaranty. Id. Where corporation agreed to guarantee dividends of another corporation on readjustment, it must be presumed, in absence of proof, that trust company received old certificates and delivered new certificates with guaranty as adopted as required by agreement. Id. Certificates presumed accepted by stockholders. Id.

75. See ante, § 13, subd. Effect of Dissolution.

76. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893; Hodder v. George Hogg Co. [Pa.] 72 A 553.

77. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893. Even though only object of such inspection is to procure information for purpose of enjoining corporate officers for mismanagement. Hodder v. George Hogg Co. [Pa.] 72 A 553. Fact that stockholder is interested in competing company is insufficient ground for denying permission. Id.

78. By-law vesting in directors discretion of denying right to examine books, and making their decision final, is unreasonable and unlawful. State v. Jessup & Moore Paper Co. [Del.] 72 A 1057.

79. State v. Jessup & Moore Paper Co. [Del.] 72 A 1057. Directors are clearly entitled to assurance that information sought is not for purpose of injuring corporation, building up competitive concern or other

The right of inspection is properly enforcible by mandamus,[82] upon a sufficient petition therefor.[83] It should appear that relator made his demand for inspection at a proper time and place,[84] and that the purpose of such demand was and is legitimate and proper.[85] The grant or refusal of the writ is often discretionery with the court,[86] but refusal cannot be justified upon the ground that inconvenience would result [87] or that the books are in another state.[88] The common-law right of inspection is distinct from the right to invoke a court rule relative to the production of documents impending litigation,[89] and the fact that a suit in a state court in connection with which the inspection is sought is dismissed and then recommended in a federal court will not affect the plaintiff's right to a writ of mandamus where the reasons for the inspection remain the same.[90] Corporate officers under certain circumstances may be estopped to deny that the relator is a stockholder, and as such entitled to the writ.[91]

improper motive. Id. It is the duty of directors of corporation to afford stockholders every reasonable opportunity to obtain accurate information as to conduct and management of business as to which they merely act as trustees, but it is also their duty to protect interests of stockholders. Id.

80. Rev. St. § 3254, requiring that books and records of corporations shall be open to the inspection of stockholders at all reasonable times, has no reference to corporations not for profit. Ohio Humane Soc. v. Biles, 11 Ohio C. C. (N. S.) 384. Stock Corporation Law (Laws 1892, p. 1840, c. 688, as amended by Laws 1897, p. 314, c. 384, § 3), § 53, relative to foreign corporations, does not specifically give stockholders **right to make extracts** from stock book. People v. Giroux Consol. Mines Co., 122 App. Div. 617, 107 NYS 188; Henry v. Babcock & Wilcox Co., 125 App. Div. 538, 109 NYS 853. Under Gen. Corp. Law (Laws 1890, c. 563, p. 1064, as amended by Laws 1892, p. 1800, c. 687, and Laws 1901, p. 975, c. 355), § 20, requiring pledgee of corporate stock to give pledgor voting proxy, and Laws 1890, p. 1077, c. 564, § 54, as amended by Laws 1892, p. 1824, c. 688, and Laws 1901, p. 961, c. 354, providing that pledgee shall not be personally liable as stockholder, **pledgor** is entitled to claim statutory right to inspect books of company. Booth v. Consolidated Fruit Jar Co., 62 Misc. 252, 114 NYS 1000.

81. See post, § 15H, subd. Penalties for Refusal.

82. State court has **jurisdiction** to compel inspection of books of national bank. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893.

83. Petition for mandamus to compel corporation to permit stockholder to inspect books, alleging that during stockholder's service as officer irregularities came to his attention, that he frequently requested statements of condition of corporation, that they were for time refused and when granted were misleading, etc., that, while large profits were made, statements failed to show same, that salaries were irregularly and improperly increased, that he desired to inspect books, in order to determine truth as to management and as basis for bill to restrain mismanagement if such be found, and that officers had refused to permit him to see books, held sufficient. Hodder v. George Hogg Co. [Pa.] 72 A 553. On petition for mandamus to produce books for inspection of stockholders, **averments** of petition and return both open to objection as evasive and argumentative. State v. Jessup & Moore Paper Co. [Del.] 72 A 1057.

84. Demand held proper. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893.

85. Purpose held proper. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893. **Refusal to disclose motive** raises inference that same is improper. Henry v. Babcock & Wilcox Co., 125 App. Div. 538, 109 NYS 853.

86. Granting of writ is discretionary and court will protect rights of all concerned. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893. No express statute authorizes mandamus to enforce Stock Corporation Law (Laws 1892, p. 1840, c. 688, as amended by Laws 1897, p. 314, c. 384, § 3), § 53, as to inspection of stock book, and issuance of writ is discretionary. People v. Giroux Consol. Mines Co., 122 App. Div. 617, 107 NYS 188. Where application to inspect books is for some ulterior or improper purpose, writ should be **refused.** Id. Denied where stockholder was broker and sought to further his own personal interests. Id.; Henry v. Babcock & Wilcox Co., 125 App. Div. 538, 109 NYS 853. Mandamus **granted** where wife's executor owned half of capital stock of corporation and as sole legatee was interested in corporate affairs, no improper purpose having been shown. In re Hastings, 128 App. Div. 516, 112 NYS 800. Order for inspection of books granted, subject to modification. Charles v. Manhattan Tel. Co., 128 App. Div. 919, 112 NYS 1124.

87. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893.

88. State v. Jessup & Moore Paper Co. [Del.] 72 A 1057.

89. Right of discovery under court rules 50, 57, (87 NW vi) against opposite party in pending litigation, which is limited to cases where a subpoena duces tecum would not be available, does not affect common-law right of inspection in other cases. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893.

90. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893.

91. Where directors of bank made relator a stockholder, director, and president of

Remedies for injuries to stockholders or to the corporation. See 11 C. L. 845—In the absence of any other adequate remedy, mandamus will lie to enforce the plain rights of stockholders or members of corporations.[92] It is the policy of the law, however, not to interfere with the internal management of corporations,[93] provided the acts complained of are intra vires,[94] and provided there is no fraud or bad faith.[95] Relief for an injury to a stockholder may require an action for an accounting.[96] The rights of a dissenting stockholder may be lost by laches[97] or acquiescence.[98]

corporation, which was a mere instrumentality of the bank, they could not deny his rights as stockholder, relator having same interest as directors, none of them having paid value for stock. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 773, 117 NW 893.

92. Miller v. Imperial Water Co. [Cal.] 103 P 227. Mandamus will lie to restore member of corporation who has been improperly discharged or removed from his connection with corporation, though right is based on contract of membership. Id. Where stockholder's right to have water furnished on his land is not based on any special contract entered into by him with an irrigation corporation, but is an inseparable adjunct of his membership, and it is plain duty of corporation to furnish him with such water, duty may be compelled by mandamus. Id. Legal right of a stockholder or member of corporation to have an election of directors or other officers, or meetings of stockholders or members for other purposes, as required by charter or by-laws, or to have new election in case of illegality, may be enforced by mandamus to compel existing officers or other proper officers to call and hold meeting for such purposes. O'Hara v. Williamstown Cemetery Co. [Ky.] 119 SW 234. Stockholders may sue corporation and trustees to compel accounting and election of trustees as required by charter. Id. If, on trial, trustees are merely de facto trustees, court may at least require accounting and that they be removed, that offices be declared vacant and in addition that legal election be held. Id. **Petition** by stockholders against corporation and its trustees is not defective because individual trustees are not styled trustees in caption of petition, when so named and declared in body of petition. Id.

93. Van Horn v. New Western Shingle Co [Wash.] 103 P 42; Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 NE 670, afg. 129 App. Div. 36, 113 NYS 439.

94. Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 NE 670, afg. 129 App. Div. 36, 113 NYS 439; White v. Snell [Utah] 100 P 927.

95. Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 NE 670, afg. 129 App. Div. 36, 113 NYS 439; De Lacroix v. Eid Concrete Steel Co., 5 Ohio N. P. (N. S.) 489; White v. Snell [Utah] 100 P 927. Minority stockholders will not be permitted to displace corporate authority, except in plain cases of fraud or maladministration as works oppression or wrong to them. Van Horn v. New Western Shingle Co. [Wash.] 103 P 42. See, also, post, § 15A, Power of Majority.

96. Stockholders are entitled to accounting where merger is set aside. Knapp v. Supreme Commandery, N. O. G. C. [Tenn.] 118 SW 390. One, who under contract of loan to corporation puts those who will do his bidding upon board of directors of corporation, and controlled company as against interests of its minority stockholder, is bound to account for profits made in transaction. Earle v. American Sugar Refining Co. [N. J. Eq.] 71 A 391. Where borrowing corporation was not going concern when its stock was hypothecated, its business had never been established, and it could not be postulated that its business if established would have been profitable, but on contrary it was entirely problematical whether its business would not have been unsuccessful considering the fierce competition it would necessarily have encountered, receiver of borrowing corporation cannot compel lending corporation to account for profits made as result of loan conditioned on borrower not engaging in business. Id. In an equitable action by stockholders for an accounting and praying that a trust be declared in certain property, **complaint** held to state cause of action. Grant v. Cobre Grande Copper Co., 193 N. Y. 306, 86 NE 34, rvg. 126 App. Div. 750, 111 NYS 386. Complaint held sufficient in action by stockholders of a corporation against another corporation for an accounting as to property and assets of their corporation transferred to defendant corporation by one who had ousted officers of former and assumed management of same. Grant v. Cobre Grande Copper Co., 193 N. Y. 306, 86 NE 34. In order to sustain bill by stockholders against corporation and its corporate lessee to obtain an accounting for unpaid rentals where majority of directors of former corporation interested in demanding payment were officers, directors, and employes of latter company, interested in refusing payment, and latter company and its officers controlled working majority of stock of other corporation, effort to secure action by corporation and its officers need not be set forth with particularity required by equity rule 94. Delaware & Hudson Co. v. Albany & S. R. Co., 213 U. S. 435, 53 Law. Ed. —.

97. Wright v. Tacoma Gas & Elec. Light Co. [Wash.] 101 P 865. Right of stockholder to sue and set aside sale of corporation's property, franchises and assets, is lost by laches, when suit is not brought until six months after ratification of the sale and in meantime large sums are expended and large number of bonds sold. Id. Evidence that delay was caused by attempt of stockholder to sell bonds which he held, and that failure to do so was cause of suit. Id. Bill in equity by stockholder attacking agreement entered into by street railway

Stockholders suing for corporation. See 11 C. L. 847—Primarily the corporation itself is the proper party to redress its own wrongs,[99] though in certain cases the privilege is given stockholders to sue in its behalf.[1] The exhaustion of remedies within the corporation itself is usually a condition precedent to such actions by stockholders,[2] and it must appear that a demand has been made for action by the proper authorities[3] or that an application for redress through corporate action

and city held barred by laches. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266. **Doctrine inapplicable** to action on contract for collection of debt when commenced at time prior to bar of statute of limitations. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381.

98. Acquiescence of stockholders in acts of corporation, bringing it within statutes permitting alienation of franchise, held to estop such stockholders from setting up that statutes did not apply. South & N. A. R. Co. v. Gray [Ala.] 49 S 347. Stockholders who accept dissolution and take proceedings to carry same into effect and procure distribution of assets are estopped to allege that such dissolution was fraudulent. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934.

99. Hagood v. Smith [Ala.] 50 S 374. Actions for wrongs committed against corporation, or for money due by officers or other persons, must ordinarily be brought in name of corporation. Id. Though wrong complained of is wrong to stockholders, primary right to sue rests with corporation. Elmergreen v. Weimer, 138 Wis. 112, 119 NW 836. **Action to recover corporate property** must be brought in name of corporation. Reinecke v. Bailey, 33 Ky. L. R. 977, 112 SW 569. Action seeking **cancellation of corporate stock** should ordinarily be brought by corporation itself. Stephany v. Marsden [N. J. Eq.] 71 A 598. An **injury to stock and capital** by negligence or misfeasance is not an injury to stockholder's separate interest as distinct from general interest of corporation but is an injury to whole body of stockholders in common, and is redressable only by corporation. Ames v. American Tel. & T. Co., 166 F 820. When directors or officers of corporation are charged with **mismanagement,** action to redress wrong should be instituted by corporation. Sigwald v. City Bank, 82 S. C. 382, 64 SE 398. An individual shareholder has no right inconsistent with the corporation's right to dispose of its assets by proper corporate action, and shareholder cannot sue to recover damages for **violation of Sherman Anti-trust Act** where sole injury suffered is to corporation. Ames v. American Tel. & T. Co., 166 F 820. Where corporation has right of action for damages resulting from violation of Sherman Anti-trust Act, to permit shareholder to recover also would permit sextuple instead of triple damages. Id. General averment that plaintiff has been greatly injured in his business and property cannot support allegation of injury to shareholder as distinct from that to corporation. Id. Where corporation is in hands of receivers, shareholder will not be allowed to recover damages for violation of Sherman Anti-trust Act which would diminish recovery by receiver and consequently result in depriving creditors of assets properly belonging to them and taking precedence over shareholder's interest. Id. No indication in Sherman Act of intention of congress to subject defendant to independent suits by multitude of stockholders for act for which statute affords redress to corporation itself. Id. Stockholder in corporation has no power to make settlement of **embezzlement** of corporate funds or to institute suit for such embezzlement, though owner of principal interest of corporation. Reinecke v. Bailey, 33 Ky. L. R. 977, 112 SW 569.

1. Stockholder's privilege to sue is for prevention of failure of justice. Turner v. Markham [Cal.] 102 P 272. Where management of corporation is in hands of adverse parties. Stephany v. Marsden [N. J. Eq.] 71 A 598. Corporate interests may be protected by stockholders where **corporate officers refuse to act.** Duquesne Gold Mln. Co. v. Glaser [Colo.] 103 P 299. Stockholder may require corporation to cancel **conveyance to directors,** made by the governing body, or upon failure of company to sue bring action himself. Nueces Val. Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

2. Before stockholder can sue for redress of a wrong to corporation, he must show that he has done all in his power to obtain relief within corporation itself. Hagood v. Smith [Ala.] 50 S 374. A bill by one or more stockholders in behalf of general body cannot be maintained unless it shows that plaintiffs have exhausted every means of putting corporation in motion. Elliott v. Puget Sound Wood Products Co., 52 Wash. 637, 101 P 228. Demurrer properly sustained where there is no allegation of any application having been made to directors or shareholders of a corporation. Id.

3. Must appear that stockholder has made honest effort to get governing body of corporation to remedy wrong. Hagood v. Smith [Ala.] 50 S 374; Seattle & N. R. Co. v. Bowman [Wash.] 102 P 27. Stockholders suing to protect corporation's interest must show their interest and demand upon corporation to protect such interest. Wright v. Floyd [Ind. App.] 86 NE 971. Stockholder **must show demand.** Elmergreen v. Weimer, 138 Wis. 112, 119 NW 836. Shareholder must show that directors are at fault or wrongfully refuse to sue. Ward v. Hotel Randolph Co., 65 W. Va. 721, 63 SE 613. Pleading defective where no **allegation** of exhaustion of remedies within corporation itself, or available by application to officers or trustees. Seattle & N. R. Co. v. Bowman [Wash.] 102 P 27. No averment that corporation declined to act. Reinecke v. Bailey, 33 Ky. L. R. 977, 112 SW 569. Bill held not to show suit brought by interested members or that plaintiffs had any personal interest. Wright v. Floyd [Ind. App.] 86 NE 971. Bill averring no rule requiring members of board of trustees to be member of corporation, but merely averring that complainant was trus-

would be useless.[4] The exhaustion of remedies within the corporation also contemplates an appeal to the stockholders to take action.[5] A stockholder may sue in the name of the corporation to protect his right as a stockholder,[6] without having made any demand for action by the stockholders as a body.[7] Permission to sue in

tee, does not show sufficient interest to support bill for benefit of corporation to protect interest of corporation and stockholder. Id. **Equity rule 94,** requiring plaintiff to set forth particularly failure to secure corporate action, is intended to have practical operation and to fit cases involved. Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 53 Law. Ed. —. Rule is intended to secure federal courts from imposition upon their jurisdiction and recognizes right of corporate directory to corporate control, in other words, to make the corporation paramount, even when its rights are to be protected or sought through litigation. Id.

Doctrine applied: To action to recover funds illegally expended. Roth v. Robertson, 64 Misc. 343, 118 NYS 351. To action to recover corporate property. Reinecke v. Bailey, 33 Ky. L. R. 977, 112 SW 569.

4. Sigwald v. City Bank, 82 S. C. 382, 64 SE 398; Wright v. Floyd [Ind. App.] 86 NE 971; Duquesne Gold Min. Co. v. Glaser [Colo.] 103 P 299. Stockholder suing for wrong primarily to corporation must show some justifiable reason for failure to make demand. Elmergreen v. Weimer, 138 Wis. 112, 119 NW 836.

Doctrine applied: Where corporation is exclusively under control of officers whose acts are questioned, and demand to bring action to recover illegal funds would be fruitless, stockholder may sue. Roth v. Roberteon, 64 Misc. 343, 118 NYS 351. Evidence sufficient to disclose stockholder's right to maintain action. Id. Suit by stockholders held proper **where corporation is in hands of receiver,** and consequently no application for redress could be successfully made at meeting of stockholders or before board of directors charged with mismanagement, and receiver is one of parties charged with wrongdoing. Sigwald v. City Bank, 82 S. C. 382, 64 SE 398. **Where corporation is practically dissolved,** it has ceased to do business, it was organized for special purpose and that purpose has been accomplished, its officers have violated laws of state creating corporation and in other respects absolutely disregard and ignore rights of preferred stockholders, such stockholder may sue without demand on officers to bring suit. Kent v. Honsinger, 167 F 619. **Fact** corporation was dissolved is insufficient reason for failure to make such demand, since under St. 1898, § 1764, it had three years in which to sue and be sued, etc. Elmergreen v. Weimer, 138 Wis. 112, 119 NW 836. Mere fact that defendant, charged with acts harmful to corporation, controlled corporation, officers, and directors, until corporation was dissolved, is insufficient to show that defendant interfered with winding up of corporate affairs after dissolution so as to excuse plaintiff from making demand that corporation redress alleged wrong by its own suit. Id.

Equity rule 94 does not apply where it would be useless to apply to the board of directors to proceed against certain officers and former officers of corporation because such directors are mere tools of the offending persons. Field v. Western Life Indemnity Co., 166 F 607. Failure of complainants to demand relief from board of directors or stockholders held under facts not to prevent maintenance of bill. Delaware & H. Co. v. Albany & S. R. Co., 213 U. S. 435, 53 Law. Ed. —.

5. Ward v. Hotel Randolph Co., 65 W. Va. 721, 63 SE 613; Hagood v. Smith [Ala.] 50 S 374. Where stockholder sued corporation and officer for moneys misappropriated, evidence that officer's wife and plaintiff's wife, who were sisters, and certain nephews and nieces, were owners of the stock of the corporation, was insufficient as an excuse for failing to apply to stockholders for relief. Hagood v. Smith [Ala] 50 S 374. Alleged mismanagement or misappropriation of funds of corporation by managing officers or directors are matters to be redressed by corporation, by proper proceedings in its name, or, on default of proper action by directors, by action of stockholders in general meeting. Ward v. Hotel Randolph Co., 65 W. Va. 721, 63 SE 613.

6. The refusal of corporation officers to bring **suit to cancel stock** issued fraudulently and without consideration is not final and binding on stockholder, as officers have no discretion in premises so far as exercise thereof would bar stockholder's right to sue. Shaw v. Staight, 107 Minn. 152, 119 NW 951. Complaint alleging that corporation had issued stock to certain persons in consideration of transfer of certain rights, that transaction was fraudulent and that no rights ever passed, that corporation on demand failed to sue to cancel such stock which had passed into hands of one who took with full knowledge of facts, held to state cause of action by stockholders. Id. Wrong occasioned by fraudulent issuance of stock by corporation without consideration held to accrue to stockholders and not to corporation as such. Id. Fact he has paid less than par does not put him in position of coming into equity with unclean hands in suit to compel cancellation of stock issued fraudulently and without consideration. Id. Where, under an **agreement for sale of entire corporate property,** a shareholder agreed to buy such property of corporation and to pay all corporate debts and par value of stock to each stockholder, he became liable to each individual stockholder for par value of stock although deed from corporation recited total amount of debt and stock as consideration, since purchaser might show manner in which he agreed to pay consideration. Fleming v. Reed [N. J. Err. & App.] 72 A 299. Under such agreement, purchaser, when deed was accepted, became liable under P. L. 1903. p. 541, § 28, to pay each stockholder par value of his stock as on contract made for benefit of each stockholder. Id.

7. Shaw v. Staight, 107 Minn. 152, 119 NW 951. Request of managing officers of a corporation to institute an action to set aside

behalf of the corporation does not in any manner enlarge the rights and remedies of the parties,[8] and the action must still be founded upon some wrong which the corporation as such has suffered.[9] A stockholder's action is usually maintainable though he was not owner of stock at the time the cause of action accrued,[10] except in cases where it is shown that the purchase of stock was for the purpose of bringing suit [11] or that the vendor was for some reason estopped from maintaining action and the purchaser had notice of such bar.[12] The rule of the federal courts preventing an action to redress corporate wrongs incurred before the plaintiff became a stockholder [13] is a rule of practice rather than a principle of law.[14] In the federal courts a stockholder's suit also requires a verified allegation that the suit is not brought collusively for the purpose of securing federal jurisdiction.[15] A corporation failing

and cancel a fraudulent issue of corporate stock, and their refusal, is all that is necessary to enable an individual stockholder to maintain a suit. Id.

8. Turner v. Markham [Cal.] 102 P 272.

9. For which corporation if it were plaintiff could secure legal redress. Turner v. Markham [Cal.] 102 P 272. In a stockholder's action **for misconduct of officer** if the evidence establish that corporation has suffered no wrong, legal or equitable, it will not matter how grievous may be the complaint of the individual stockholder nor how complete the proof of his personal loss, damage or injury. Id. No recovery for **personal injury to stockholder.** Id. **False representation of officers** that stock sold was treasury stock does not wrong corporation so that stockholder can sue on behalf of corporation to redress wrong. Injury is to individuals purchasing. Id. False statements of corporate officers in selling stock that there was about $11,000 in the company's treasury was not an injury to the corporation, entitling the stockholder to sue on behalf of it. Id. A **misstatement of fact in articles of incorporation** that mining properties were "now owned" by subscribers was not circumstance of fraud where subscribers had an equitable interest by reason of contract of one of them to hold as trustee. Id. Corporation not injured so long as particular property was conveyed to it. Id. Where pursuant to oral agreement property intended to be acquired was conveyed to corporation, though not formally accepted by the board of directors, agreement was performed and omission must have been mere inadvertence. Id. Corporation not injured by false statements as to property to be acquired, where the property actually contemplated was acquired and conveyed to the corporation. Id. **Indefiniteness in article of incorporation** as to mining property to be acquired of no importance and only property acquired or expected to be acquired was definitely known by subscribers Id. Evidence held insufficient to show **fraudulent issue of stock** in that shares of stock were issued by corporation without affording shareholders opportunity to subscribe, so as to authorize shareholder to sue in representative capacity for corporation. Waters v. Waters & Co., 130 App. Div. 678, 115 NYS 432. Possibility that stockholder might be deprived of some right through failure or refusal of corporation to take proper steps to enforce its rights is not sufficient reason to permit him to sue to recover **damages for injury** suffered solely by corporation. Ames v. American Tel. & T. Co., 166 F 820. If action of directors in appropriating funds of corporation to purchase of building stock of benevolent order was an **unlawful diversion of funds,** then it was for the corporation to complain, and, while stockholders may act for the corporation if on demand the officers and board of directors refuse to take proper action in the premises, the suit thus brought by stockholders must be for the benefit of the corporation, and not in their individual right. Troutman v. Council Bluffs Street Fair & Carnival Co. [Iowa] 120 NW 730. Action not even ostensibly in name or interest of corporation dismissed. Id.

10. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381. Where corporation was not dissolved until six months after action was brought, allegation that plaintiff was stockholder at time of dissolution is **insufficient allegation** that he was such at time action was brought. Elmergreen v. Weimer, 138 Wis. 112, 119 NW 836.

11, 12. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381.

13. Ninety-fourth equity rule requires an allegation, verified by plaintiff, that he was shareholder at time of transaction complained of. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945. In an action by stockholder, under equity rule 94, an allegation that he is bona fide and lawful owner "of record" of shares of stock mentioned is not open to criticism as being evasive or intended to be so, nor is it to be implied that some one else is real owner, legal or equitable in fact. Id. It is not necessary for pleader to use words of rule. Id.

14. Adopted for prevention of transfers of stock to nonresidents to enable bringing of suit in federal court. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381.

15. Bill verified by president of corporation holding stock and plaintiff in action, president giving source of his information and belief, alleging ownership of stock in defendant, "that suit was not collusive one to confer on a court of United States jurisdiction of cause of which it would not otherwise have cognizance," that efforts to secure relief now sought were made, and detailing reasons for their failure, held sufficient under equity rule 94. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

to sue to redress its wrong is a necessary party defendant in an action by a stockholder.[18]

Since stockholders may in a proper case save the corporate property by suit, it follows that they may also, in a proper case, protect the corporation's rights, and incidentally their own, when a suit is not involved.[17] Thus, a stockholder may redeem corporate property sold under judgment, and the law will imply a promise on the part of the corporation to repay the advances made.[18]

Stockholders may agree among themselves to aid their corporation in proper ways in its litigation against third parties.[19]

*Costs and allowances.*See 11 C. L. 848—In an action by a shareholder against a corporation, costs as an element of damages are not recoverable, being a damage sustained by the corporation.[20]

*Receivers and injunctions.*See 11 C. L. 848—Injunction is the usual remedy of minority stockholders when ultra vires or fraudulent intra vires acts are undertaken.[21] The remedy of injunction may be available regardless of actual injury,[22] and may be invoked against de facto as well as de jure officers.[23]

Statutes authorizing the appointment of receivers for corporations at the instance of stockholders are merely an extension of the general power of equity to correct the fraud and mismanagement of corporate officers and agents,[24] but as a general rule courts are reluctant to take away the management of a corporation and appoint a receiver,[25] and thus, the rule is generally recognized that a receiver will be appointed upon allegations of misconduct by the corporate officers only when necessary to preserve the rights of stockholders[26] or creditors.[27] A receiver may be ob-

Stockholder's bill to prevent corporate officers from complying with rate regulation alleging demand that corporate officers refuse to comply with statute, that such officers refused stockholders' demand because of severe penalties of statute, wherefore corporation and officers were parties defendant, held to sufficiently set forth reason for suit (Eq. rule 94). Ex parte Young, 209 U. S. 123, 52 Law. Ed. 714.

16. Unlawful sale of corporate treasury stock, conversion of proceeds to seller's use, and transfer of property, held in trust for corporation. Elmergreen v. Weimer, 138 Wis. 112, 119 NW 836.

17. When conduct of officers is so negligent or fraudulent as to render demand for action useless. Duquesne Gold Min. Co. v. Glaser [Colo.] 103 P 299.

18. Duquesne Gold Min. Co. v. Glaser [Colo.] 103 P 299. Stockholder not mere volunteer. Id.

19. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. Stockholders may agree to use their influence as stockholders to see that out of proceeds of litigation, if successful, reasonable disbursements made in corporation's behalf shall be refunded, and special dividend made of net proceeds when that can lawfully be done. Id.

20. Singers-Bigger v. Young [C. C. A.] 166 F 82.

21. See ante, this section, Remedies for Injuries to Stockholders or to Corporation. See, also, post, § 15A, Power of Majority.

22. Any stockholder who opposes an illegal scheme sought to be undertaken by the corporation is entitled to an injunction, even without alleging actual injury, or the certainty thereof in the future, for he is entitled to stand on his legal rights and may refuse to accept "something better" in exchange. Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 NE 670.

23. Court of equity will enjoin de facto as well as de jure officers of corporation from perpetrating, facilitating or permitting violations of law to detriment of innocent stockholders who have no adequate remedy at law, and are unable to induce corporation to adopt effective measures for their protection. Morrell v. Geo. Brooks & Son Co., 164 F 501.

24. Courts of equity have always had jurisdiction to prevent and correct fraud and mismanagement of trustees and the agents of corporations in control of their affairs, and effect of Homestead and Loan Act, § 25, is merely to extend this jurisdiction to meet new necessities and furnish new remedy in cases where remedy already existing was inadequate. Cobe v. Guyer, 237 Ill. 516, 86 NE 1071.

25. Van Horn v. New Western Shingle Co. [Wash.] 103 P 42. Power of appointing receiver is discretionary, to be exercised with great circumspection. Id.; Secord v. Wheeler Gold Min. Co. [Wash.] 102 P 654. Relief largely discretionary. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —. Court will consider advantages and disadvantages in appointing receiver to wind up insurance company, at instance of policy holder, because of wrongdoing of former officers. Id.

26. Secord v. Wheeler Gold Min. Co. [Wash.] 102 P 654; Fenn v. Ostrander, 132 App. Div. 311, 116 NYS 1083. Where unfaithful trustees have abandoned their trust, court may take charge of property through

tained, however, in cases of gross mismanagement by the corporate officers,[28] but such facts must be satisfactorily shown,[29] and mere misconduct, or the fact that the business is managed unwisely is insufficient,[30] especially where the mismanage-

receiver, if necessary for preservation. California Fruit Grower's Ass'n v. Superior Ct., 8 Cal. App. 711, 97 P 769.

27. See post, § 16B, Rights and Remedies of Creditors.

28. A court of equity at suit of stockholder may appoint receiver of corporate property to hold and manage it until new election of directors, where it satisfactorily appears that directors are acting fraudulently or in bad faith and in their own interests and contrary to interests of corporation and that such relief is necessary to protection of rights of stockholder in interim. Welcke v. Tragerer, 131 App. Div. 731, 116 NYS 166. Courts of chancery have long exercised power of appointing receivers where officers of corporation have shown incapacity or are guilty of gross fraud or wrong, or abuse of office, as trustees or directors, by misappropriation of funds until such funds have been returned to the company. Ritchie v. People's Tel. Co. [S. D.] 119 NW 990. Rev. Code Civ. Proc. § 227, providing for appointment of receiver in cases where receivers have hitherto been appointed in equity, held to warrant receiver for corporation at instance of minority stockholder who purchased on representation that corporate expenses would not exceed certain sum, where such expenses were by void acts of directors for director's benefit made to exceed such sum. Id. Receiver may be appointed where party having sole charge and management used same for his own private benefit. Id.

Complaint held sufficient in proceedings by stockholder for appointment of receiver where it disclosed that corporation was on brink of insolvency, that salaries were illegally voted, etc. Van Horn v. New Western Shingle Co. [Wash.] 103 P 42. Allegations of complaint comprehending removal of directors, cancellation of stock if fraudulently issued, and for appointment of receiver pendente lite to preserve corporate property, held to authorize appointment. California Fruit Grower's Ass'n v. Superior Ct., 8 Cal. App. 711, 97 P 769. Complaint held to show impracticability of effecting removal of trustees under Civ. Code, § 310, since until determination of validity of stock issue, it would be impossible for stockholders to remove directors and correct evils by election as therein provided. Id.

Complaint held insufficient: Receiver will not be appointed upon loose and general allegations of fraud and maladministration, made on information and belief, and unsupported by anything that can reasonably be called legal **proof,** especially when answering affidavits deny allegations in moving papers. Fenn v. Ostrander, 132 App. Div. 311, 116 NYS 1083. Where stockholders brought action against corporation and officers under Code Civ. Proc. § 1781, to compel officers to account and restore property, the fact that such officers held property in trust for corporation to convey to whomsoever it might designate would not justify a conclusion of fraud and appointment of a receiver. Id.

29. Welcke v. Trageser, 131 App Div. 731, 116 NYS 166. Where allegations of neglect, mismanagement, misuse of corporate funds, etc., contained in petition, are entirely unsupported by proof and in fact disproved, plaintiff as a stockholder presents no case for appointment of receiver. Felix v. Kenner Canning & Packing Co., 123 La. 188, 48 S 884. Stockholder under facts of case held to have no standing in court on grounds that majority were violating charter rights of minority and putting their interests in imminent danger. Hero v. Consumers' Lumber Manufacturing & Export Co., 123 La. 359, 48 S 989. Evidence held insufficient to show mismanagement or misuser of funds or other corporate property. Id. Allegations of fraud unsupported by proof. Fenn v. Ostrander, 132 App. Div. 311, 116 NYS 1083.

30. Benson v. Columbia Life Ins. Co., 7 Ohio N. P. (N. S.) 113; Pearce v. Sutherland [C. C. A.] 164 F 609. Mistakes, inadvertence or bad policy, if honestly pursued, will not warrant appointment of receiver, as courts will not interfere except in cases of fraud or infringement of legal acts which cannot be otherwise redressed. Secord v. Wheeler Gold Min. Co. [Wash.] 102 P 654. Misconduct is not alone sufficient, as court of equity may forbid misconduct or remove officer. Id. Mere misconduct will not justify appointment of receiver unless necessary to preserve property or rights of creditors or stockholders. Fenn v. Ostrander, 132 App. Div. 311, 116 NYS 1083. Removal of corporation's books to another state for convenience of business, fact that bona fide debt to wife of president was not shown in semi-annual statement and was unknown to stockholders, and fact that stockholder did not obtain information or by-laws requested, held insufficient to justify appointment of receiver under ground of mismanagement. Secord v. Wheeler Gold Min. Co. [Wash.] 102 P 654. Contention that corporation has failed to carry out purposes for which it was organized cannot be complained of by one participating in and approving of every action alleged to constitute breach of duty, who is not suing as beneficiary for whom corporation holds funds in trust, and who is not by articles of incorporation entitled to share in distribution of those funds, purposes for which funds should be distributed being by articles left entirely to discretion of board. Troutman v. Council Bluffs Street Fair & Carnival Co. [Iowa] 120 NW 730. In such case court of equity cannot appoint receiver to exercise such discretion, there being nothing in record to show assets were not of substantial pecuniary value, worth price paid therefor, and subject to distribution as provided by articles. Id. Held no grounds stated for appointment of receiver where there was no allegation in either original or amended bill that corporation was insolvent, trustees incompetent, or fraud attempted, but only that parties were about to make sale or lease of property which was not best which could be made. Sullivan Timber Co. v. Black [Ala.] 48 S 870.

ment complained of is entirely in the past [31] and has resulted in no injury either to the complaining stockholder or to the corporation,[32] or where the corporation is acting within the scope of its authority [33] and is solvent,[34] or where the application is by a resident stockholder to wind up a foreign corporation.[35] The insolvency of a corporation is usually of itself insufficient ground for appointing a receiver,[36] though such a condition may warrant dissolution by statutory proceedings.[37] The right of the court to appoint a receiver necessarily involves the right to enjoin interference with the corporate property by officers or directors,[38] and an order thus operating to restrain corporate officers is not necessarily violative of the federal statutes as preventing bankruptcy.[39] The appointment of a receiver displaces the corporate management and may operate as a practical dissolution of the corporation,[40] but a receiver appointed upon a stockholder's bill for the preservation of assets is not superseded by a receiver appointed under a bill to dissolve the corporation.[41] While an original appointment may merely contemplate the preservation of the corporate property, circumstances may arise which involve the necessity of a sale.[42]

The jurisdiction of the court first acquiring jurisdiction of receivership proceedings is exclusive [43] unless the suit is voluntarily dismissed,[44] but subsequent

31. Benson v. Columbia Life Ins. Co., 7 Ohio N. P. (N. S.) 113.

32. Where three directors are stated in charter as authorized number, erroneous election of fourth and further election of such fourth director to office of vice-president, where such director held office only two or three days, resigning upon learning that he held office illegally, rights of company and complaining stockholder held not prejudiced. Hero v. Consumers' Lumber Manufacturing & Export Co., 123 La. 359, 48 S 989.

33. Troutman v. Council Bluffs Street Fair & Carnival Co. [Iowa] 120 NW 730.

34. Troutman v. Council Bluffs Street Fair & Carnival Co. [Iowa] 120 NW 730. In proceeding for appointment of receiver, facts held to show corporation solvent. Secord v. Wheeler Gold Mill. Co. [Wash.] 102 P 654.

35. Notwithstanding it is doing business within jurisdiction of court. Pearce v. Sutherland [C. C. A.] 164 F 609.

36. Fuller v. McCormick [Mich.] 16 Det. Leg. N. 195, 121 NW 280; Hero v. Consumers' Lumber Manufacturing & Export Co., 123 La. 359, 48 S 989. Right of minority stockholder, alleging mismanagement, insolvency, etc., is under Act 1898, p. 128, No. 102, and that statute does not permit receivership in case of insolvency at instance of stockholders. Hero v. Consumers' Lumber Mfg. & Export Co., 123 La. 359, 48 S 989. Bill by stockholder, charging that defendants induced plaintiff to embark in corporate undertaking, and to employ his property and money in reliance upon promises to pay for stock, that corporation is insolvent and praying a receivership, held not maintainable. Fuller v. McCormick [Mich.] 16 Det. Leg. N. 195, 121 NW 280. Comp. Laws, §§ 8545, 9757, 9759, do not confer jurisdiction where there is no averment of mismanagement of corporate funds or wasting assets. Id. Power of court of equity under Ohio statutes to appoint receiver in case of insolvency doubted. De Lacroix v. Eid Concrete Steel Co., 8 Ohio N. P. (N. S.) 489. Practice of appointing receivers of insolvent corporations in absence of foreclosure proceedings or judgment levies on its property, but solely for purpose of warding off its creditors and preventing or delaying creditors and others in assertion of their legal demands, is reprehensible and unauthorized. Id.

37. See ante, § 12, Dissolution by Stockholders.

38. Goss v. Warp Twisting Mach. Co., 133 App. Div. 122, 117 NYS 228. Under Code Civ. Proc. § 1781, subds. 1, 2, 5, 6 and § 1810, as to appointment of receivers, there is no limitation that injunction is to be confined to actions brought by the attorney general. Id. In action under Code Civ. Proc. §§ 1781, 1782, an order to show cause constituted sufficient **notice of application for injunction** restraining officers from interfering with corporate affairs. Id.

39. In action under Code Civ. Proc. §§ 1781, 1782, order appointing receiver and restraining officers of corporation from duties was not violative of federal statutes as presenting proceedings on bankruptcy, since order of court might be modified if necessary. Goss v. Warp Twisting Mach. Co., 133 App. Div. 122, 117 NYS 228.

40. Though bill did not pray in terms for dissolution of corporation, such was incidental effect of placing corporation in hands of receiver. Pearce v. Sutherland [C. C. A.] 164 F 609.

41. Is not superseded by receiver appointed at instance of attorney general by another court, under Act Feb. 11, 1895, creating banking department of commonwealth. Jones v. Lincoln Savings & Trust Co., 222 Pa. 325, 71 A 209.

42. California Fruit Growers' Ass'n v. Superior Ct., 8 Cal. App. 711, 97 P 769. Such an order of sale so far independent of suit as to be final for purposes of **appeal.** Id.

43. Bill in federal court by stockholder against corporation, alleging conspiracy to unlawfully transfer property of corporation praying for receiver, etc., confers exclusive jurisdiction on such court to determine all controversies relative thereto. Harding v. Corn Products Refining Co. [C. C. A.] 168 F 658.

44. Where stockholder's suit was removed to federal court and defendants answered

proceedings in state courts will not unnecessarily be injoined by a federal court.[45] Petitions for receivership will be liberally construed,[46] but must not be multifarious.[47] Express denials are usually necessary to put in issue allegations of ownership of stock.[48] Stockholders seeking the appointment of a receiver as incident to dissolution, must comply with statutory requisites,[49] and it may be necessary to show good cause before the bill will be entertained.[50] An ex parte appointment of a receiver is sometimes authorized.[51] An appointment when made is presumptively correct.[52]

Contribution between stockholders.[See 11 C. L. 849]—If a stockholder is required to pay more than his proportionate part of a debt asserted against a corporation, he may enforce contribution against the remaining stockholders,[53] subject, however, to the rule that there can be no contribution against joint wrongdoers.[54]

(14) *E. Transfer of shares.*[55]—[See 11 C. L. 850]—A corporation issuing a stock certificate to a person impliedly represents that such person is the owner thereof,

denying right to maintain suit, and one defendant filed cross bill for cancellation of complainant's stock, and another stockholder brought suit in state court, and defendant sought to enjoin such second suit, complainant was entitled to secure dismissal of removed suit without prejudice, though such act was for purpose of securing litigation of issues in state court. Denial of dismissal and granting of injunction error. Harding v. Corn Products Refining Co. [C. C. A.] 168 F 658.

45. In stockholders' suit against corporation where diversity of citizenship was alleged, granting of injunctive relief on cross bill restraining further proceedings in state court must be postponed until determination of jurisdictional issue raised, where facts in issue are speedily ascertainable and record raises issue of jurisdiction. National Hollow Brake Beam Co. v. Chicago R. Equipment Co. [C. C. A.] 168 F 666.

46. In action by stockholder for appointment of receiver of corporation, a complaint must be liberally construed, especially where objection to sufficiency thereof is not raised until objection to introduction of evidence at trial. Van Horn v. New Western Shingle Co. [Wash.] 103 P 42.

47. Stockholder's suit to settle affairs of certain corporations and praying for receiver as ancillary relief cannot be properly joined with suit to set aside transfers of stock as against one of defendants individually. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170. A bill to restrain the amendment of the charter of a corporation, providing for an increase of capital and also to obtain an adjudication of insolvency for the appointment of a receiver, for an injunction against the exercise of its franchise and the continuance of its business, contains two distinct causes of action and is demurrable for multifariousness. Rodman v. Manganese Steel Safe Co. [N. J. Err. & App.] 72 A 963.

48. Plaintiffs' allegation of ownership of stock was not put in issue by answer which contained no express denial of such allegation. Van Horn v. New Western Shingle Co. [Wash.] 103 P 42.

49. Resolution asking for appointment of receiver is not defective and illegal because it asked that officer be appointed as receiver to take charge of and administer corporate affairs and did not ask for such appointment to "preserve" property, since to administer is held to imply preservation in such cases. Nelson & Co. v. Rocquet & Co., 123 La. 91, 48 S 756.

50. Ward v. Hotel Randolph Co., 65 W. Va. 721, 63 SE 613. Before bill by stockholder under Code 1899, c. 53, § 57 (Code 1904, §§ 2285, 2286), or by director or stockholder under § 58, will be entertained by a court of equity, to appoint receiver and wind up affairs of corporation, good cause must be shown therefor, and, without allegation and proof thereof, bill for that purpose will be dismissed. Id. Exhaustion of remedies within corporation must be shown. Id.

51. Code Civ. Proc. § 565. California Fruit Growers' Ass'n v. Superior Ct., 8 Cal. App. 711, 97 P 769.

52. Appointment of receiver by trial court though disregarding designation of stockholders is presumptively correct and will not be interfered with on appeal unless prejudice is shown. Garig v. Truth Print. & Pub. Co., 123 La. 895, 49 S 632.

53. One stockholder sued cannot complain that others are not joined. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751.

54. Where members of a corporation conspire to defraud it. Avery v. Central Bank [Mo.] 119 SW 1106. Where a corporation recovered a judgment against a joint tortfeasor (a shareholder), proceeds of judgment went into corporate treasury, and necessarily inured to benefit of all shareholders, and wrongdoer, because he happens to be a shareholder, has no cause for complaint if reparation exacted for his wrong inures to benefit of shares owned by his joint wrongdoers. Id. Judgment in action at law by corporation against stockholder for misconduct which fixes liability and is subsequently paid is res judicata and in winding up corporation court cannot order repayment of part of judgment on ground that another stockholder was joint wrongdoer. Id.

55. **Search Note:** See notes in 15 L. R. A. 643; 27 Id. 271; 50 Id. 501; 67 Id. 656; 1 L. R. A. (N. S.) 605; 2 Id. 804; 3 Id. 551, 1199; 57 A. S. R. 379; 6 Ann. Cas. 481; 10 Id. 168.

See, also, Corporations, Cent. Dig. §§ 463-546; Dec. Dig. §§ 111-149; 10 Cyc. 577-649.

with capacity to transfer the same,[56] and a person presenting the certificate with a proper assignment has at least a prima facie legal right to have the stock transferred to him on the books of the corporation,[57] and the motives and intention of the parties to the assignment are not subject to judicial scrutiny by the corporation.[58] The remedy for the conversion of corporate stock by the corporation [59] is restricted to the transfer.[60]

Sales of stock are controlled largely by the ordinary rules relating to the creation,[61] construction,[62] and enforcement [63] of contracts for the sale of other person-

56, 57. Mundt v. Commercial Nat. Bank [Utah] 99 P 454.

58. Corporation cannot set itself up as judge, and inquire into and pass upon motives of assignor and assignee which induced transfer, nor can it ordinarily inquire into or pass upon legality of transaction by which shares are transferred from one to another, nor question consideration upon which transfer is based. Mundt v. Commercial Nat. Bank [Utah] 99 P 454.

59. Conversion of corporate stock will be attributed to corporation if it sells or declares forfeiture of stock wrongfully, and where it wrongfully refuses to recognize a valid transfer and to register such transfer, and issue new certificate to transferee. Lewis v. Bidwell Elec. Co., 141 Ill. App. 33.

60. Seller cannot sue. Lewis v. Bidwell Elec. Co., 141 Ill. App. 33.

61. Definiteness: A contract for the transfer of stock, whereby defendants agreed that they "will, to the best of their ability, use their best energies toward securing the sale of treasury stock in such company, and do all in their power to assist in advancing the interests of such company," is not too indefinite to be binding though specifying no time for the acts to be performed, or just what the acts were. Turley v. Thomas [Nev.] 101 P 568. Specific performance. Id.

Consideration: Where discharge in bankruptcy did not discharge certain debt, payment of such debt is sufficient consideration to support transfer of stock to creditor by debtor after his discharge in bankruptcy. Hill v. Kerstetter [Ind. App.] 86 NE 858. A purchase consummated in good faith through an agent of the owner is not rendered incomplete by the fact that such agent temporarily retains the consideration upon learning of an adverse claim of ownership. Pease v. Chicago Crayon Co., 235 Ill. 391, 85 NE 619, afg. Chicago Crayon Co. v. Pease, 138 Ill. App. 513. Where after mutual negotiations stock was sold under written contract with no warranty or representation as to value of stock, and at that time such stock was worthless, but sale was in good faith, plaintiff could not recover the sum paid on ground that sale was without consideration. Field v. Turley [Ky.] 120 SW 338. Voluntary transfer of corporate stock in consideration of dividends to be paid donor and that donee render services during life of the donor is void where the agreement as to dividends and support is not reduced to writing. Groff v. Stitzer [N. J. Eq.] 72 A 970.

Fraud and undue influence: False **representations as to value** of stock made with reckless disregard as to their truth or falsity held to justify reconveyance of property transferred in payment thereof. Keyes v. Quinn, 154 Mich. 668, 15 Det. Leg. N. 894, 118 NW 615. Where director of corporation with approval of board of directors sent stockholder statement showing future success of corporation to be doubtful and then obtained sale of stock from such stockholder though he knew company's condition was better than stockholder had been led to believe and also obtained sale only on representation that he purchased for himself when he in fact purchased for "insiders" to whom he immediately sold at advance, he is liable for misrepresentation. Stewart v. Joyce, 201 Mass. 301, 87 NE 613. Where members of board are negligent but not dishonest in approving report showing future success of corporation to be doubtful and bought stock which plaintiff as a result of such report sold another upon latter's representation that he would not sell such directors, they were not liable for misrepresentation where they did not authorize purchase for them, did not contemplate it when report was made, and were not responsible for their vendor's fraud. Id. **Misrepresentation as to amount of corporation's indebtedness** to induce purchase of stock which if apportioned among total stock amounted to $3 per share held material misrepresentation sufficient to justify rescission of contract. Davis v. Butler, 154 Cal. 623, 98 P 1047. Purchaser of corporate stock upon representation of seller as to amount of corporate indebtedness, seller stating that no books showing indebtedness existed, is entitled to rely without investigation upon such representations and may rescind if such representations are false. Id. In suit by executors to set aside transfer of stock by testratrix because of **mental incapacity,** evidence held to show testatrix so enfeebled by disease that transaction of important business was improper unless with assistance of person who would give independent advice. Groff v. Stitzer [N. J. Eq.] 72 A 970. Voluntary transfer of stock to stepdaughter and son presumptively void, where donor enfeebled and victim of paralysis, so as to be dependent upon donees. Id. **Undue influence defined.** Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170.

Mistake: Transfer of stock is subject to rescission for mutual mistake where both parties relied upon false statements of directors of corporation that stock was at par value, being in fact worthless. Neale v. Wright [Ky.] 112 SW 1115.

62. Contract of **guaranty** with sale of stock, whereby defendant agreed to repurchase within one year if plaintiff so desired and providing further that dividends be not less than 8 per cent per annum, construed to continue for only one year, guaranty con-

alty. The purchaser of corporate stock is entitled to the certificates evidencing his

tract being collateral and construction that defendant guaranteed 8 per cent dividends indefinitely being unreasonable. Tilton v. Whittemore, 202 Mass. 39, 88 NE 329.

63. Specific performance is available to compel delivery of corporate stock where such stock has no market value, and an action for damages for breach of contract would be inadequate. Turley v. Thomas [Nev.] 101 P 568. Contract for delivery of corporate stock in payment for personal services to be rendered may be enforced specifically when services have been rendered, though unenforcible at time of making. Id. In action for specific performance of contract to deliver stock, decree directing delivery would not be disturbed because action had been brought when stock held in pool by third person, when pool had expired when decree was rendered. Id.

Recovery of damages: Where stock purchased and paid for but not delivered for nearly month, purchaser was entitled to damages for depreciation in value. Chapman v. Fowler, 132 App. Div. 250, 116 NYS 962. Purchaser did not by accepting delayed stock waive damages for depreciation in value. Id. Acceptance of delayed delivery held not **waiver** of damages for depreciation in value. Id. Acceptance of delayed delivery did not create **estoppel** to claim damages for depreciation in value. Id. **Measure of damages** for failure to deliver corporate stock according to contract of sale is difference between market price thereof at time delivery was due and purchase price. Sloan v. McKane, 131 App. Div. 244, 115 NYS 648. In action for damages arising from purchase of corporate stock induced by misrepresentations, the question is not whether stock was worth more or less than it cost but whether it was worth as much as it would have been had representations relied upon been true. Harlow v. Haines, 63 Misc. 98, 116 NYS 449. One induced to purchase corporate stock through false representations of stockholders and others interested is not required to make corporation **party** to a suit for damages arising out of the transaction. Id. Cause of action for deceit inducing purchase of corporate stock held not affected by failure to make sufficient **allegations** of advances to corporation as part of damages. Id. Value of assets of corporation is **evidence** of value of its stock, and hence allegations that value of assets was not as represented, or has liabilities it was represented not to have, is sufficient allegation that stock was induced to be purchased by false representations in that it was not worth as much as it would have been had representations been true. Id.

Rescission and cancellation: Reassignment of stock on repayment of purchase price will be directed where stockholder was induced to sell same for much less than its real value by fraudulent representations. Pellio v. Bulls Head Coal Co. [Pa.] 73 A 451. One who has bought corporate stock under false representations may, on discovering fraud, rescind and demand release from his promise to pay or retain stock, affirm the contract, and recover such damage as he has suffered as result of fraud. Rosenberg v. McKinney, 138 Wis. 381, 120 NW 230. Tender of return of stock is a **condition precedent** to enforcement of agreement to repurchase. Wright v. Berger, 114 NYS 912. **Burden of proof** is on children to show good faith in transfer of stock from mentally enfeebled father. Groff v. Stitzer [N. J. Eq.] 72 A 970. In suit by executors of deceased donor to set aside gift of corporate stock, **evidence** held to show same void as fraudulent in that donor did not understand nature of act, and that transfer was secured through influence of donee. Id. Bill to set aside written contract for purchase of stock, because of fraud, dismissed where allegations were unsupported by proof. Frey v. Stipp [Pa.] 73 A 460. Under P. L. 1900, p. 363, § 4, providing that party to transaction with decedent shall not be permitted to testify thereto, donees of corporate stock, in suit to set aside the gift, are incompetent to testify to the transactions with the donor. Groff v. Stitzer [N. J. Eq.] 72 A 970. Where certain powers of attorney testamentary in character provided for transfer of stock to deceased's children and such powers were attacked as having been made under undue influence, heirs could waive question of privilege as to such powers and have attorney testify as to transaction. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170. Heirs could properly testify to conversations with grantor, tending to show lack of mental capacity to execute such powers of attorney. Id. Evidence of conversations and transactions must be confined to those bearing directly on issue involved. Id. Remote evidence of improper conduct improperly admitted. Id. Fraud and good faith held **questions for jury.** Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170; Field v. Turley [Ky.] 120 SW 338. Sufficiency of mental capacity of deceased, who executed certain powers of attorney for transfer of corporate stock, held jury question. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170. Complainants held not precluded by **estoppel** to object that powers of attorney were secured by undue influence, by acceptance of stock which such powers were made to transfer to complainants and defendant, their brother, when at time of acceptance of stock they had no knowledge of powers of attorney. Id. In action to secure return of stock fraudulently purchased by directors, stockholder's right to recover moneys unlawfully appropriated by officers is not one of the **questions which may be adjudicated.** Pellio v. Bulls Head Coal Co. [Pa.] 73 A 451. **Instruction** as to lack of capacity approved. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170.

Options: Where purchasers of stock in oil company agreed, as deferred payment of portion of price, to pay sellers a sum of money on sale of oil produced, if certain amount were produced, and otherwise to exercise an option to make deferred payment or give back stock, purchasers, by the sale of stock to an innocent purchaser, thereby putting it out of their power to comply with the conditions of the agreement, rendered themselves absolutely liable for the deferred payment. Johnson v. Sharp [Tex. Civ. App.] 120 SW 518. Under the allegations of the complaint, an agreement whereby purchaser of I. stock agreed to sell certain S. stock, which he held subject to an option in favor

ownership,[64] but the retention of the certificates as security for the purchase price does not prevent title from passing to the vendee.[65] Certificates of stock may, under some circumstances, so approximate negotiable instruments that the ordinary rules of agency and estoppel which apply in the case of chattels will be applied with great liberality in behalf of innocent purchasers,[66] but a person receiving stock in a failing corporation as a gift is not an innocent purchaser and therefore holds such stock subject to equities in favor of the corporation or stockholder.[67] A gift is not to be presumed when a testatrix delivers certificates indorsed in blank to her executrix.[68] A majority stockholder seeking to purchase stock is charged with the duty of disclosing facts peculiarly within his knowledge.[69]

A trust may be created by parol in shares of a corporation, though the corporation itself owns real estate.[70] An action to establish a trust in corporate stock is an action quasi in rem.[71]

Mode of transferring shares, registration, new certificates. See 11 C. L. 852—In the absence of statute to the contrary [72] certificates of stock are not negotiable instru-

of third person, the consideration of the sale of the S. stock to be paid to seller of the I. stock, held binding on seller as to such option, so that such seller could not compel purchaser and broker to sell the S. stock in disregard of the option thereon. Kuker v. Snow, 149 N. C. 181, 62 SE 909. Disputed question of fact, as to interest of option holder, for jury. Id.

64. In action to recover back the price paid for stock where contract was rescinded because of defendant's refusal to deliver certificates, it was no defense that plaintiff had title to the stock, title being of no value without evidence thereof. Kinser v. Cowie, 295 Ill. 383, 85 NE 623.

65. Sherwood v. Graham, 106 Minn. 542, 118 NW 1011.

66. National Safe Deposit Savings & Trust Co. v. Hibbs, 32 App. D. C. 459. Rule that vendee is not bona fide **purchaser for value** of stock until he pays the purchase price or becomes irrevocably bound for its payment held applicable where vendor of stock sold might have been insolvent and transaction operate to delay and hinder his creditors. Everitt v. Farmers' & Merchants' Bank, 82 Neb. 191, 118 NW 869, reversing and remanding on rehearing 82 Neb. 191, 117 NW 401. Where stock **certificates indorsed** on blank are stolen from owner without culpable negligence on his part, an innocent purchaser from thief or his assignee does not take good title. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. D. C. 459. Where named owner of stock certificate executes transfer in blank and delivers it to broker or an agent for certain limited purposes, and that broker or agent in violation of his duty and obligation to depositor delivers it to another person without notice and for a valuable consideration, purchaser takes good title. Id. Where employe of trust company fraudulently procured stock certificates assigned in blank by owner and sold them through stockbroker who believed holder to be true owner, proceeds being converted, title to certificates passed to bona fide purchaser for value from broker. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. D. C. 459. Under rule that where loss occurs through wrongful act of third person, and must be borne by two innocent persons, one by whose negligence wrongdoer secured power to perpetrate wrong should suffer loss, and also in view of fact that certificates were by general usage saleable by holder. Id. Where sale through stockholder of stock assigned in blank and placed in the hands of such broker by employe of trust company, who procured same fraudulently, was held to pass title to a bona fide purchaser, the broker would be afforded equal protection and was not liable for conversion. Id.

67. Avery v. Central Bank [Mo.] 119 SW 1106.

68. Ownership of stock in testatrix being proved, fact that executrix had possession of stock transferred in blank and witnessed by executrix does not raise presumption of intended gift of sale to executrix, particularly where executrix had equal access with testatrix to safety vault in which stock was placed. In re Perry, 129 App. Div. 587, 114 NYS 246.

69. Steinfeld v. Nielson [Ariz.] 100 P 1094. Evidence held insufficient to show that one not officer or director but who held fiduciary relation toward corporation violated his duty to officer and director of corporation by misrepresenting any fact not within latter's knowledge or presumptively ascertainable by him which would reasonably have effect of causing latter to dispose of his stock to former. Id.

70. De Lacroix v. Eid Concrete Steel Co., 8 Ohio N. P. (N. S.) 489.

71. Gassert v. Strong, 38 Mont. 18, 98 P 497. Action brought by New Jersey corporation to establish trust in shares of New Jersey corporation is action quasi in rem, provided corporation, the stock of which is in litigation, is made party to suit, and is lawfully subjected to jurisdiction of court in which suit is brought by service of process within state or by voluntary appearance. Amparo Min. Co. v. Fidelity Trust Co. [N. J. Eq.] 71 A. 605.

72. Act 1904, p. 370, No. 180, has made stock certificates of corporations negotiable instruments transferable by delivery, with a written transfer of certificate or written power to sell, assign and transfer same. Succession of Desina, 123 La. 468, 49 S 23. Forced heirs cannot force contribution on

ments [73] and are not rendered such by the custom of so treating them,[74] but they are so generally used as collateral and passed from hand to hand when endorsed with a power of attorney that the custom is to regard the holder as the owner for the purpose of selling or pledging.[75] Generally the requirement of transfer on the books of the corporation is intended for the benefit of the corporation alone [76] and may be waived by it.[77] As between the parties, a transfer of stock by delivery and indorsement in blank passes title,[78] even where the by-laws of the corporation provide to the contrary.[79] A by-law necessitating the production of an old certificate of stock before the issuance of a new one will not impair a court's power to order a new certificate issued when the holder of the old certificate after service of notice fails to appear.[80] Of course the corporation should exercise ordinary care in making transfers on its books,[81] but the refusal to do so must be based upon good

stock which has passed by gift inter vivos from their intestate and thence into hands of innocent purchasers. Id.

73. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. D. C. 459. Certificates of shares in cemetery association transferable only on books of association upon surrender of certificate are non-negotiable and subject to all equities available against their assignor. American Exch. Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 NE 107.

74. Custom of so treating them will not render certificates of stock negotiable instruments in strictly legal sense. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. D. C. 459.

75. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. D. C. 459.

76. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. D. C. 459; Loeb v. German Nat. Bank [Ark.] 113 SW 1017; Reilly v. Absecon Land Co. [N. J. Eq.] 71 A 248. Ballinger's Ann. Codes & St. § 4261 (Pierce's Code, § 7063), as to entry of transfer of stock on corporation's books, is intended for benefit and protection of corporation and its creditors. Van Horn v. New Western Shingle Co. [Wash.] 103 P 42. The entry of transfer on the books of the company is required not for the translation of title but for the protection of the parties and others dealing with the company, and to enable it to know who are its stockholders and entitled to vote at meetings and to receive dividends when declared. Merchants' Nat Bank v. Williams, 110 Md. 334, 72 A 1114. Kirby's Dig. § 849, providing for recording of transfers of stock, **applies only to actual sales,** not transfers for collateral security. Loeb v. German Nat. Bank [Ark.] 113 SW 1017.

77. Van Horn v. New Western Shingle Co. [Wash.] 103 P 42. Under proofs that stock was issued to subscriber and assigned to plaintiff, who was recognized by officers of corporation as stockholder, corporation was precluded by **estoppel** from denying that plaintiff was stockholder. Id.

78. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750. Such blank transfer on back of certificate to which holder has affixed his name is good assignment, and party to whom it is delivered is authorized to fill it up with name of remote transferee, name to be inserted concerning only purchaser. Id. Though transfer of stock to be perfect in every respect may be required by corporation charter to be registered upon books of corporation, assignee of stock, upon delivery with transfer and power of attorney to transfer on the books that has been formally executed by party in whose name it stands, takes entire equitable, if not legal, title thereto. National Safe Deposit, Savings & Trust Co. v. Hibbs, 32 App. D. C. 459. While it is essential to perfect and legal title to stock that transfer stock should be made upon books of company, yet, since certificate issued by company is not stock, but simply evidence of owner's right to stock, where stock is sold by holder or pledged, and as evidence of transaction certificate is delivered to purchaser or creditor, transaction will be upheld between parties. Hill v. Kerstetter [Ind. App.] 86 NE 858. The equitable owner of a certificate of stock, which is not transferred on the books of a company, is, as against everybody but the corporation itself and those having a superior right to have the corporation make the transfer to them, the real owner, entitled to sue at law for its possession. Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 A 1114. Sale of corporate stock accompanied by delivery of certificate and usual power of attorney without further steps toward completing transaction by notice of transfer to company or causing actual transfer on books of company is **valid as against creditors of assignor,** and the sale gives assignee precedence over subsequent judgments, executions, or attachments by creditors of assignor. Reilly v. Absecon Land Co. [N. J. Eq.] 71 A 248. Statute does not require registration of **transfer as collateral** security. Loeb v. German Nat. Bank [Ark.] 113 SW 1017.

79. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750.

80. By-law of national bank enacted pursuant to act of congress. Letcher's Trustee v. German Nat. Bank [Ky.] 119 SW 236.

81. Mundt v. Commercial Nat. Bank [Utah] 99 P 454. Liable for negligence. Id. It is the duty of officers of corporation to protect stock of its members, and, if they permit an unauthorized transfer on books of stock from one of stockholders to another person not legally entitled thereto, corporation itself is thereby rendered liable. Snyder v. Chareston & Southside Bridge Co., 65 W. Va. 1, 63 SE 616. Fact that corporation permitted executrix to sell stock, knowing administration was pending, held not to render corporation liable to creditors defrauded

cause.[82] Equity has jurisdiction to compel a transfer on the corporate books,[83] and to compel the issuance of a certificate and the payment of dividends to which a stockholder is entitled because of an illegal transfer,[84] or otherwise to grant alternative relief by way of damages.[85] In the case of delay, an indemnity may be required before a transfer will be allowed,[86] and a stockholder's rights as to issuance of stock certificates may be lost by laches.[87] An unauthorized act of officers of a corporation in canceling stock certificates, originally issued to one person, and issuing other certificates to another person, gives the latter no legal right to take the stock.[88]

Pledge or mortgage of shares. See 11 C. L. 852—The pledging of shares does not divest the pledgor of his general property therein,[89] nor does it invest the pledgee with powers or incidents of ownership which the pledgor himself does not possess.[90] Whether a pledge is intended by the transfer of stock may involve the construction of the entire transaction,[91] and the indorsements are not conclusive.[92] A pledgee's transfer of stock to his agent does not necessarily effect a conversion.[93] A blank

by appropriation of stock by executrix. Myers v. Martinez [Miss.] 48 S 291.

82. Mundt v. Commercial Nat. Bank [Utah] 99 P 454. If corporation has some claim upon stock, or some rights against assignor that would or might be affected or lost by transfer, or if it is notified by some third person that he claims some interest in it which would or might be lost by making transfer, then it may refuse to make transfer, but when it is called into court because of such refusal it should present these matters as defense and not rely merely upon denial of ownership for want of knowledge or upon averment upon information and belief. Id.

83. On theory that buyer is equitable owner and entitled to consummation of his legal title. Reilly v. Absecon Land Co. [N. J. Eq.] 71 A 248. Officer's act in directing transfer of corporate stock to person purchasing same under writ of attachment would not prevent enforcement of right of person who purchased such stock prior to attachment to have transfer of same. Id. One who has become equitable owner of stock can compel its delivery and transfer on books of company. Ryan v. Martin, 165 F 765. Where there is no allegation that complainant is stockholder, or that he ever paid corporation anything by way of services, cash, or otherwise, or that it ever agreed to issue to him any of its stock or that it ever in any way ratified or assented to contracts of others to give complainant shares of its stock in compensation for services, or that it ever agreed to carry out that contract, complainant cannot maintain his suit in equity under rule 94 to compel the performance of the agreement. Id.

Mandatory injunction lies to compel a corporation to transfer stock. Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 SE 894.

84. Snyder v. Charleston & Southside Bridge Co., 65 W. Va. 1, 63 SE 616. Seller of stock which purchaser pledged as security for purchase price held entitled to have same transferred to him upon books of corporation by issuance of new certificate showing such transfer. Goetzinger v. Donahue, 138 Wis. 103, 119 NW 823.

85. Where for any reason relief cannot be granted by requiring registration and issue of new certificates. Snyder v. Charleston & Southside Bridge Co., 65 W. Va. 1, 63 SE 616.

86. Where buyer of corporate stock failed for long time to demand transfer on corporate books, such stock being in the meantime sold under attachment, court would require indemnity to protect corporation before allowing transfer. Reilly v. Absecon Land Co. [N. J. Eq.] 71 A 248.

87. Right of stockholder to compel corporation to issue certificate of stock to him held lost by laches where he delayed six years and knew for at least five years that he was not recognized by company as stockholder. Snyder v. Charleston & Southside Bridge Co., 65 W. Va. 1, 63 SE 616.

88. Evidence held sufficient to show act canceling certificate to have been unauthorized. Hill v. Kerstetter [Ind. App.] 87 NE 695.

89. Pledgor still remains owner of shares subject to pledgee's lien. Booth v. Consolidated Fruit Jar Co., 62 Misc. 252, 114 NYS 1000.

90. Where corporation pledged its own stock to another corporation. Thomas v. International Silver Co., 72 N. J. Eq. 224, 73 A 833.

91. Act of transfer and power of attorney delivered with stock certificates which are pledged to secure payment of note are to be construed with reference to entire transaction, including recitals on face and back of note. Citizens' Bank v. Folse, 123 La. 918, 49 S 641. Transfer held pledge, not sale of stock. Id.

92. Indorsements on corporate stock do not necessarily mean that pledgee takes absolute title. Shattuck & Desmond Ware house Co. v. Gillelen, 154 Cal. 778, 99 P 348. Contention that **parol evidence** was inadmissible to show transferee as pledgee is not maintainable, and parties may show absolute transfer to be pledge. Id.

93. Where stock was pledged as collateral security for loan and pledgee transferred such stock to his agent without consideration, transfer being affected on books of company and agent indorsed certificates in blank and redelivered them to pledgee, such act did not constitute conversion since pledgee might hold such stock in name of his agent and there was no tender or refusal to deliver. Jones v. Seaman, 133 App. Div. 127, 117 NYS 283. Pledgee's agent who

assignment delivered to a broker as a pledge does not clothe the broker with the indicia of absolute ownership,[94] and a person accepting such stock as security for a loan to the broker is chargeable with notice of the rights of the real owner.[95] A corporation accepting the pledge of stock by a donee and having knowledge of the donor's enfeebled condition is put upon inquiry as to the validity of the gift.[96]

An equitable mortgage on shares of stock [97] may be foreclosed without the joinder of the corporation or other stockholders,[98] and in such a suit chancery has plenary power to protect the purchaser at the sale ordered by it.[99]

§ 15. *Management of corporations. A. Control of corporations by stockholders or members.*[1]—See 11 C. L. 853—Except by exercising the right to vote, a stockholder, as such, has no direct power of management of the corporation,[2] even when he owns practically all of the stock.[3] The rights and duties of two purchasers of all the stock of a corporation, who are not partners, cannot be determined in a proceeding in equity treating them as partners.[4]

accepts stock with notice of situation takes no other or greater title or interest in stock than was held by his principal. Id.

94. Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 A 1114. Gives no right to broker to pledge such security as his own stock. Id.

95. Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 A 1114. Where a bank accepted stock of pledgee for its own benefit, with notice of pledgee's want of authority to hypothecate, it became jointly liable with pledgee for **conversion** of pledgor's stock. Id. Where wife's corporate stock was pledged by husband as security for his general debit account in addition to specific sum for which wife was indebted, in an action for conversion of such stock, pledgee was entitled to deduct such amounts due, with interest to the date of trial. Id.

96. Where donee of corporate stock delivered it to bank as collateral security for loan and stock remained on corporation's books as property of donor, the bank, having knowledge of the fact and also of the enfeebled condition of the donor, was chargeable with the knowledge it might have obtained by inquiry and could not hold stock as collateral against executors of owner seeking to set aside transfer as fraudulent. Groff v. Stitzer [N. J. Eq.] 72 A 970.

97. Where defendant transferred certain corporate stock to plaintiff for value and undertook to encumber same with mortgage on physical property of corporation, transaction constituted an equitable mortgage in favor of complainant on shares of stock or interest that defendant owned. Thompson v. Grace [Ark.] 120 SW 397.

98. Under Kirby's Dig. § 6011, providing that a controversy may be determined by parties before court if it can be done without prejudice to rights of others or by saving their rights, suit to foreclose an equitable mortgage on corporate stock was maintainable without joinder of corporation or other stockholders, inasmuch as they could not be affected by transfer and sale of stock under the mortgage. Thompson v. Grace [Ark.] 120 SW 397.

99. Thompson v. Grace [Ark.] 120 SW 397. Has power to see that purchaser secures correct transfer on books of corporation and that he gets a perfect legal title. Id.

1. Search Note: For all cases from federal courts and from other states since 1902 see Current Law, vol. 11, p. 853.

See, also, Corporations, Cent. Dig. §§ 665-705; Dec. Dig. §§ 180-188; 10 Cyc. 374, 375, 770, 936, 954-962; 21 A. & E. Enc. L. (2ed.) 833; 26 Id. 899, 945.

2. Cannot bind or release company by making contracts or controlling investments. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Subscriber has no voice in corporate management and cannot participate in its affairs. Owensboro Seating & Cabinet Co. v. Miller [Ky.] 113 SW 423. Under Code 1906, § 2497, providing that **sale of corporation,** assets, etc., can only be made by vote of 60 per cent of outstanding stock in general or special meeting regularly called, complaint of one suing for breach of contract of sale of corporation alleging that defendant claiming to own more than 60 per cent of corporate stock entered into written contract to sell corporation, assets, etc., and to call meeting of corporation to cause proper resolution directing sale to be made, is demurrable where it fails to allege defendant represented and acted for all of stockholders. Bias v. Atkinson, 64 W. Va. 486, 63 SE 395.

3. In re Roanoke Furnace Co., 166 F 944. Creditor of such stockholder cannot by the latter's individual act be made a creditor of corporation so as to entitle him to prove his claim against corporation in bankruptcy proceedings. Id.

4. Where plaintiff and defendant agreed to purchase the stock of a corporation, share and share alike, but the agreement did not constitute a partnership, and a new board of directors was elected after the purchase which managed the affairs of the company, the duties of plaintiff to provide a working capital and the right of defendant to act as manager for a salary could not be determined in a proceeding in equity treating them as partners. McManus v. Doughten [Pa.] 72 A 853. Where pursuant to agreement, which did not constitute partnership, a corporation was purchased and new board of directors elected, if rights of one purchaser to be manager and duty of the other to supply working capital could not be settled on basis of amicable adjustment between board of directors and parties, the

Power of majority.[See 11 C. L. 853]—In a contest between shareholders over the management of a corporation's affairs, it is elementary that the charter, which is the contract between the shareholders, is the controlling factor,[5] and that the voice of the majority must prevail.[6] Courts will not interfere therefore unless the control of the majority is improper,[7] but the majority are considered to be trustees for the minority in matters of management,[8] and hence minority stockholders may always obtain relief in case of fraud or oppression,[9] and it is held that minority stockholders

only resort was to receivership and winding up of affairs of corporation. Id. This section should be considered in connection with ante, § 14D, subd. Remedies for Injuries to Stockholders or to the Corporation, and subdivisions following, including Receivers and Injunctions.

5. Dreifus v. Colonial Bank & Trust Co., 123 La. 61, 48 S 649; Garig v. Truth Print. & Pub. Co., 123 La. 895, 49 S 632.

6. Dreifus v. Colonial Bank & Trust Co., 123 La. 61, 48 S 649; Garig v. Truth Print. & Pub. Co., 123 La. 895, 49 S 632; Secord v. Wheeler Gold Min. Co. [Wash.] 102 P 654. In absence of contrary provision majority of stockholders control in deciding corporate questions requiring their action. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266; Brindley v. Walker, 221 Pa. 287, 70 A 794; Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 NE 670, afg. 129 App. Div. 36, 113 NYS 439. Single stockholder cannot maintain bill in equity attacking agreement entered into by street railway with city where from allegations of bill registered owners of nine-tenths of stock approved such action. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266.

7. Garig v. Truth Print. & Pub. Co., 123 La. 895, 49 S 632; Dreifus v. Colonial Bank & Trust Co., 123 La. 61, 48 S 649. Minority stockholders will not be permitted to displace corporate authority except in plain cases of fraud or oppression. Van Horn v. New Western Shingle Co. [Wash.] 103 P 42.

8. White v. Kincaid, 149 N. C. 415, 63 SE 109. Majority of stockholders dictating action of directors, thereby causing breach of fiduciary duty, are especially trustees for minority stockholders. Id.

9. Secord v. Wheeler Gold Min. Co. [Wash.] 102 P 654. Courts of equity have always had jurisdiction to prevent and correct fraud and mismanagement of trustees and agents of corporations in control of their affairs. Cobe v. Guger, 237 Ill. 516, 86 NE 1071. Courts will restrain majority stockholder of company from voting stock for purpose of oppressing or defrauding minority stockholders. South & N. A. R. Co. v. Gray [Ala.] 49 S 347. Court of equity at suit of stockholder may enjoin threatened acts of mismanagement or waste. Welche v. Trageser, 131 App. Div. 731, 116 NYS 166.

Relief granted: Where corporation had but three stockholders, one being mere tool of majority stockholder, all of whom were directors, and the majority stockholder and his tool discharged third from all his positions except that of director and raised salary of majority stockholder and set aside large surplus for other purposes to prevent its being used for dividends, such acts clearly constituted fraud. Lawton v. Bedell [N. J. Eq.] 71 A 490. Majority stockholder and his tool, in corporation having three directors, who votes himself a salary of $1,200 during period when profits of business amounted to but $300 and pays the same out of a surplus properly payable as dividends but which he has set aside for other purposes in order to prevent its payment for such purposes, is clearly acting in fraud of rights of minority stockholder and may be compelled to refund same. Id. Complaint and evidence of minority stockholder held to authorize conclusion of wrongful collusion preventing complainant from receiving his just share of profits, etc. Hampton v. Buchanan, 51 Wash. 155, 98 P 374.

Relief denied: Complaint expressly alleging that certain parties owned corporation, purchasing entire property of another, and that substantially entire capital stock came into their possession, held manifestly to have no reference to their stockholders since such parties must have acquiesced, as stockholders, in their own acts, now alleged to be fraudulent, and hence, since it must refer to future stockholders, if any, but fails to allege that innocent public was deceived or that plaintiff was, by alleged acts, fraudulent as to purchasing corporation, deceived or induced to purchase stock, held to state no cause of action against directors for fraud. Schlesinger v. Fisk, 60 Misc. 442, 113 NYS 578. Bill by minority stockholder of trading corporation complaining of **management of majority,** in which no ultra vires nor prima facie fraudulent act is sufficiently and specifically alleged, pleader dealing only in general suggestions and allegations of fraud and conspiracy, is insufficient to warrant retention of bill to ascertain value of complaintiff's stock to compel corporation or majority stockholders to buy or pay for same. Thomas & Barton Co. v. Thomas [C. C. A.] 165 F 29. Plan of **reorganization** by majority stockholders contemplating acquisition of properties of bankrupt corporation at trustees' sale cannot be prevented by minority stockholder having the privilege of participating in reorganization. Schuler v. Woodward, 169 F 1012. No indication of fraud or failure of duty to minority. Id. **Liquidation** of bank at instance of majority held not to oppress minority, as there was no assumption that liquidators would not do duty. Dreifus v. Colonial Bank & Trust Co., 123 La. 61, 48 S 649. Rule allowing stockholders of company to avoid contracts made by common directors on behalf of both companies, and which is applied when contract binding upon company and stockholders is made through directors alone, is **not applicable** to statutory proceeding where final action is that of stockholders themselves, acting as they are entitled in their individual

are entitled to sue, regardless of improper motive or actual fraud where such a conflict of interest arises that the corporate officers cannot or should not act.[10] As a general rule single or minority stockholders may have corporate contracts or other action in excess of the corporation's powers, declared invalid or restrained.[11] In the case of a sale, by the action of the majority of the entire assets of a corporation, a minority stockholder has generally the right to insist that only a monetary consideration shall be received,[12] and a sale of corporate property is subject to injunction by a minority holder, until the status of the corporate vendor is determined, as where a suit for an accounting is pending.[13] A contract to sell the corporate property, made without the knowledge and consent of minority stockholders is void as against public policy.[14] In the absence of fraud or other illegal action, complaint will not lie because of the obtaining of control of a corporation by a combination of stockholders or by cumulative voting.[15] The right to expel members has already been treated.[16]

(§ 15) *B. Dealings between a corporation and its stockholders.*[17]—See 11 C. L. 855—Corporations may contract with their stockholders and such contracts will be

rights and according to their individual interests. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934.

10. Where two competing corporations enter into contract and before same is fully performed and debt thereby contracted is due one of corporations obtains control of other and elects board of directors, and thereafter directors and officers of one corporation refuse to pay debt contracted and directors and officers of other corporation refuse to prosecute as action for collection of such debt and obligation. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381.

11. Knapp v. Supreme Commandery, U. O. G. C. [Tenn.] 118 SW 390.; De Lacroix v. Eid Concrete Steel Co., 8 Ohio N. P. (N. S.) 489.

Relief granted: Objecting members of fraternal association after unsuccessful application to officers to act may maintain bill to have **merger** of order with another unauthorized by charter or statute set aside, and also for accounting. Knapp v. Supreme Commandery, U. O. G. C. [Tenn.] 118 SW 390. Suit to prevent union of one fraternal society with similar one. Knapp v. Supreme Commandery, U. O. G. C. [Tenn.] 118 SW 390. Minority stockholder might prevent consummation of scheme for **increase of corporation's capital stock** by organization of another stockholder, act being without powers. Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 NE 670, afg. 129 App. Div. 36, 113 NYS 439. Unauthorized **sale of stock** by directors and majority holders will be enjoined at suit of minority holder. South & N. A. R. Co. v. Gray [Ala.] 49 S 347. Statutes construed and, in view of property rights guaranteed by state and federal constitutions, held not to authorize directors of a corporation with assent of majority of stockholders to sell stock of minority stockholder in railroad without his consent. South & N. A. R. Co. v. Gray [Ala.] 49 S 347. Code 1907, §§ 3502, 3503, authorizing merger or consolidation of railroads, not applicable to justify such sale. Id. In suit by minority stockholders to enjoin sale of their stock to railroad, where no special prayer to enjoin voting of their stock as for sale, but bill showed that complainant was entitled to such relief and bill contained general prayer, granting of such injunctive relief was not inconsistent. Id.

Relief denied: Conveyance of property not needed by corporation held authorized, and relief denied. Little v. Old Colony R. Co., 202 Mass. 277, 88 NE 896. Majority stockholders of bank held to have power under charter to appoint **liquidators.** Dreifus v. Colonial Bank & Trust Co., 123 La. 61, 48 S 649. Minority stockholders in railroad company held not entitled to complain of **lease** made by such company. Little v. Old Colony R. Co., 202 Mass. 277, 88 NE 896. Injunction to restrain majority stockholders from voting **sale of railroad** at suit of small minority refused, since latter could set sale aside or enjoin its consummation if fraudulent or oppressive. South & N. A. R. Co. v. Gray [Ala.] 49 S 347. Policyholder of domestic life insurance corporation conducted on mutual plan above limited dividend to stockholders cannot sue to restrain **transfer of assets** of corporation to foreign stock insurance corporation pursuant to contract for merger. Russell v. Pittsburgh Life & Trust Co., 132 App. Div. 217, 116 NYS 841. Business of insurance held subject to public supervision, with ample authority in state officers to protect same. Id.

12. Schuler v. Woodward, 169 F 1012.

13. In action by stockholders to enjoin contemplated sale of railroad where purchasing company was largely indebted to selling company and it would be impossible to determine if consideration for sale would be adequate until accounting was struck, sale would be enjoined until pending suit for accounting was determined. South & N. A. R. Co. v. Gray [Ala.] 49 S 347.

14. Bias v. Atkinson, 64 W. Va. 486, 63 SE 395.

15. Hall v. Hall, 11 Ohio C. C. (N. S.) 335. Nor will sale of treasury stock in furtherance of such design be set aside by court, where made in presence of all parties and by proper officers, and in absence of any claim that stock would have sold for more in the open market or that it would bring more at a resale. Id. But see post, § 15E, Right to Vote.

16. See ante, § 14A, Membership in Corporations in General.

17. Search Note: See note in 6 A. S. R. 838.

enforced as others,[18] and are subject to the usual rules as to creation [19] and legality.[20] When a contract whereby a corporation is given the right to use property belonging to a stockholder is rescinded, the parties resume their original status with regard to the property [21] in the absence of any estoppel.[22]

(§ 15) *C. By-laws.*[23]—See 11 C. L. 855—By-laws of a corporation are laws for the regulation of its officers and the management of its property.[24] They must usually be adopted by the members of the corporate body [25] and have much the same force and effect as between the members and officers that a public statute has.[26] All the members of the corporation are chargeable with notice and knowledge thereof.[27] By-laws should not contravene the corporate charter [28] or public statutes,[29] or impair the contract obligations of members.[30] By-laws can only be repealed or amended in the manner provided by law.[31]

(§ 15) *D. Corporate meetings and elections.*[32]—See 11 C. L. 856—The necessity of a meeting to transact corporate business may be waived,[33] but a meeting held in a foreign state in defiance of the articles of incorporation and laws of a state is illegal and invalid.[34]

*Notice.*See 11 C. C. 856—Under general law and custom, notice of a corporate

See, also, Corporations, Cent. Dig. §§ 691-705; Dec. Dig. §§ 183-188; 10 Cyc. 374, 375; 26 A. & E. Enc. L. (2ed.) 899.

18. Bobzin v. Gould Balance Valve Co. [Iowa] 118 NW 40.

19. Contract with stockholder held too indefinite to guarantee right to particular office for particular time to be held by such stockholder. Hampton v. Buchanan, 51 Wash. 155, 98 P 374.

20. Equity will not assume jurisdiction to compel specific performance of illegal contract entitling stockholder to certain office for certain time. Hampton v. Buchanan, 51 Wash. 155, 98 P 374. See, also, post, § 15R.

21. Where agreement to turn over certain property to corporation was rescinded, corporation had no title to property. Zeckendorf v. Steinfeld [Ariz.] 100 P 784.

22. Fact that purchaser of certain property gave corporation right to mine same, that purchaser acquiesced in map and reports showing property was part of corporation's property for purpose of effecting sale of whole, held not to estop purchaser from denying as against corporation or its stockholders that corporation had title where corporation had not prejudiced itself in any way. Zeckendorf v. Steinfeld [Ariz.] 100 P 784.

23. Search Note: See notes in 25 L. R. A. 48; 43 A. S. R. 152.

See, also, Corporations, Cent. Dig. §§ 151-159; Dec. Dig. §§ 54-58; 10 Cyc. 349-364; 5 A. & E. Enc. L. (2ed.) 86.

24. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co. [N. D.] 119 NW 1048; Smoot v. Bankers' Life Ass'n [Mo. App.] 120 SW 719. Rules and regulations which corporation adopts are generally enacted for government of corporation in its dealing with third parties and for third parties dealing with it. Smoot v. Bankers' Life Ass'n [Mo. App.] 120 SW 719.

25. Klix v. Polish Roman Catholic St. Stanislaus Parish [Mo. App.] 118 SW 1171. By-laws cannot be adopted by directors unless charter or fundamental law so provides. Id.

26. In conduct of corporate affairs. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co. [N. D.] 119 NW 1048.

27. Smoot v. Bankers' Life Ass'n [Mo. App.] 120 SW 719. Where by-laws have been duly adopted, they are obligatory upon all members of corporation. Id. Corporation is chargeable with knowledge of by-laws of another corporation of which it is stockholder. Kroger Co. v. Butchers' Hide Ass'n, 8 Ohio N. P. (N. S.) 222. Members of an assessment life insurance company are conclusively presumed to know its laws and rules. Smoot v. Bankers' Life Ass'n [Mo. App.] 120 SW 719. **Acquiescence** of stockholders in provisions of by-law held sufficient to create contract. Kroger Co. v. Butchers' Hide Ass'n, 8 Ohio N. P. (N. S.) 222.

28. By-laws must not contravene charter. Thayer v. Thompson, 220 Pa. 241, 69 A 758.

29. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co. [N. D.] 119 NW 1048.

30. Cannot be enforced against member without his consent. Smoot v. Bankers' Life Ass'n [Mo. App.] 120 SW 719. This is particularly true as to nonstock associations, associations not for profit and assessment life insurance companies. Id.

31. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co. [N. D.] 119 NW 1048.

32. Search Note: See notes in 18 L. R. A. 582; 21 Id. 174; 3 A. S. R. 69; 56 Id. 138; 9 Ann. Cas. 290.

See, also, Corporations, Cent. Dig. §§ 732-776, 1292-1319; Dec. Dig. §§ 191-201, 298; 10 Cyc. 318-349, 774-787; 26 A. & E. Enc. L. (2ed.) 986.

33. A corporation, its board of directors, and shareholders, may waive any necessity of a meeting of its board of directors for transaction of company's business by permitting the directors to establish habit or usage of assenting separately to making or performance of contracts by their agents. Winer v. Bank of Blytheville [Ark.] 117 SW 232.

34. Kent v. Honsinger, 167 F 619. Treasurer of corporation cannot exonerate himself from liability for funds and property of corporation wrongfully removed from state by action taken at such meetings electing another to take his office of treasurer and his turning property over to such other. Id.

meeting is essential,[35] but requisites as to notice may be waived when the charter contains no provision to the contrary.[36] An undisclosed owner of stock is not entitled to notice.[37]

*Elections.*See 9 C. L. 775—Statutory provisions requiring representation of a majority of stock at a corporate election are mandatory,[38] and the withdrawal of such stock by the holders operates to terminate a meeting,[39] but this does not mean that a majority of the stock must be voted.[40] Statutory remedies for new elections are usually held exclusive,[41] and resort must be had thereto before appealing to the courts for relief.[42] Objections, pursuant to statute, to the voting of stock at an election are usually sufficient if made within a reasonable time after the vote is tendered.[43] Where a resolution required votes to be by written ballot, a person, questioning the election for the failure to count his vote, must show that he voted by written ballot.[44] An election will be set aside if it appear that the officers elected were ineligible,[45] and, in such case, the candidates receiving the next highest number of votes will not be decmed to have been elected.[46] Generally, a mandamus or mandatory injunction lies to compel a corporation to elect officers,[47] but to obtain such relief the necessary facts must be alleged.[48]

(§ 15) *E. Right to vote.*[49]—See 11 C. L. 856—The right to vote stock is one of

35. Hero v. Consumers' Lumber Manufacturing & Export Co., 123 La. 359, 48 S 989. By analogy to Revisal 1905, § 1190, and by general custom, notice should be mailed to all stockholders when address is known. Bridgers v. Staton, 150 N. C. 216, 63 SE 895.

36. Short notice of election held sufficient, time being ample to secure presence of members. Hero v. Consumers' Lumber Manufacturing & Export Co., 123 La. 359, 48 S 989.

37. Wright v. Tacoma Gas & Elec. L. Co. [Wash.] 101 P 865. Where stock was held in name of another who was notified of meeting, and was voted by proxy at a meeting where sale of corporation was decided on. Id.

38. Election cannot be held when required statutory amount of stock is not represented. Bridgers v. Staton, 150 N. C. 216, 63 SE 892.

39. Immaterial that adjournment is illegally voted. Bridgers v. Staton, 150 N. C. 216, 63 SE 892.

40. That only minority of stock of corporation was voted on at election of directors does not make election illegal; stockholders attending or represented make a quorum. Ashcroft v. Hammond, 132 App. Div. 3, 116 NYS 362. Stock Corporation Law (Laws 1892, p. 1828, c. 688, § 20). Id.

41. Under Revisal 1905, § 1188, on failure to elect directors at designated time, if directors fail or refuse for 30 days to call meeting for that purpose after receipt of written request from owners of one-tenth outstanding stock, judge may on application of any stockholder and on notice to directors order election, or make such order as justice may require. Bridgers v. Staton, 150 N. C. 216, 63 SE 892. Order of judge held not warranted where there was no application to directors or refusal for 30 days to call meeting by them. Id. Where new meeting is held after failure to elect officers, such meeting must be composed of majority of those who are stockholders of record 30 days before such meeting. Id. In election called by court under Revisal 1906, § 1188, any stockholder whose certificate has been issued to him more than twenty days before such meeting will be entitled to vote whether he was stockholder when election should properly have been held or not. Id. In action of mandamus under Revisal 1905, §§ 1188, 1189, to compel reconvening of meeting of stockholders of private corporation for election, corporation was proper but not necessary party. Id.

42. No application to directors for meeting. Bridgers v. Staton, 150 N. C. 216, 63 SE 892.

43. Under Act May 26, 1893 (P. L. 141), objection to voting of stock at election of directors need not be made simultaneously with offer of ballot, and protest after delay of few minutes is not too late. Coolbaugh v. Herman, 221 Pa. 496, 70 A 830.

44. Dunbar v. American Tel. & T. Co., 142 Ill. App. 6.

45. Directors elected who disregarded statutory provisions (Corporation Act, § 33; P. L. 1896, p. 288) as to election, and were by statute thereby rendered ineligible. In re Schwartz [N. J. Law] 72 A 70.

46. Where election of directors of corporation is set aside because certain directors were ineligible and certain others, after deducting illegal votes, failed to receive majority of votes, candidates receiving next highest number of votes are not elected since votes cast for ineligible candidates must be counted in determining who has majority. In re Schwartz [N. J. Law] 72 A 70.

47. Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 SE 894.

48. Bill to restrain directors from acting, because illegally elected, held defective, there being no by-law of corporation set forth, and no facts averred in relation to election. West End Athletic Ass'n v. Geiger, 140 Ill. App. 378. Averment that election is void is a mere conclusion. Id.

49. **Search Note:** See notes in 15 L. R. A. 665, 683; 29 Id 844; 2 L. R. A. (N. S.) 121; 16 Id. 1136; 4 Ann. Cas. 667.

See, also, Corporations, Cent. Dig. §§ 747, 749-763, 767-776, 1313; Dec. Dig. §§ 197, 198.

the personal rights incident to membership,[50] by which the stockholder may protect his investment.[51] The legislature cannot under ordinary circumstances impair, either directly or indirectly, the right to vote,[52] since to absolutely deprive the stockholder of this right is to deprive him of an essential attribute of his property.[53] The right to vote is, however, often subject to statutory regulations.[54] Such enactments may be designed to prevent the voting of stock by one not the owner or who is an undisclosed trustee.[55] Thus statutes often provide that the ownership of stock be evidenced on the corporate books,[56] and in many jurisdictions a stockholder who is not a registered holder on the company's books is not entitled to vote, although he may be a bona fide owner of the shares.[57] A corporation which acquires shares of its own stock cannot vote or authorize others to vote such stock,[58] either by pledging it[59] or otherwise.[60] The right to vote pledged stock usually depends on the terms of agreement entered into,[61] but a pledgee of stock, acquiring the same because of the failure to pay the debt secured, is of course entitled to vote such stock.[62] The transferee of stock who has received the same in violation of the public policy of the state cannot, after the transfer has been adjudicated illegal, vote such stock,[63] nor

298(6); 10 Cyc. 331-343, 774-787; 23 A. & E. Enc. L. (2ed.) 996; 26 Id. 996.

50. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934; Bigelow v. Calumet & Hecla Min. Co. [C. C. A.] 167 F 721, afg. 167 F 780.

51. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Right to vote is right to protect property from loss and make it effective in earning dividends. Id.

52. Legislature cannot by direct action essentially impair right to vote, nor can it do so indirectly by authorizing directors, with consent of only majority of stockholders, to so amend charter as to have that effect. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Where statute and charter does not authorize such procedure, directors of insurance company mutualizing same cannot disenfranchise stockholders from their right to vote for some of directors by giving policyholders only right to vote for certain directors and stockholders only right to vote for certain others. Id.

53. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Unless the stockholder can protect his investment in this way he cannot protect it at all, and his property might be wasted by feeble administration, and he could not prevent it. Id.

54. Act May 26, 1893 (P. L. 141) is merely regulative of exercise to vote stock, and destroys no property right. Coolbaugh v. Herman, 221 Pa. 496, 70 A 830.

55. Object of Act May 26, 1893 (P. L. 141). Coolbaugh v. Herman, 221 Pa. 496, 70 A 830. If trust be not active, right to vote is expressly reserved to real owner. Id. Under Act May 26, 1893 (P. L. 141), it was clear duty of election judges to reject votes offered in name of undisclosed trust. Id. Act being passed to further define evidence of stock ownership and right to vote thereon. Id.

56. Under Rev. Code, § 2735, every bona fide stockholder "having stock in his own name on the stock books of the corporation at least ten days prior to the election" of directors is entitled to vote at such election. Haynes v. Griffith [Idaho] 101 P 728.

57. In re Schwartz [N. J. Law] 72 A 70.

58. Clark v. National Steel & Wire Co. [Conn.] 72 A 930. Under Corporation Act § 38 (P. L. 1896, p. 290), shares of stock of a corporation belonging to said corporation shall not be voted directly or indirectly. Thomas v. International Silver Co., 72 N. J. Eq. 224, 73 A 833.

59. Right which law gives pledgor to empower "pledgee to vote thereon" (Corporation Act, § 37 [P. L. 1896, p. 290]) is limited to such pledgors as are themselves possessed of right to vote on stock which they own. Thomas v. International Silver Co., 72 N. J. Eq. 224, 73 A 833. Evidence held to show pledgees of corporate stock were not bona fide holders as collateral for loans made, but that stock was taken solely to aid in indirect voting of stock of corporation owned by corporation itself. Id. In violation of Corporation Act, § 38. Id. Pledgees held to hold stock in trust, without any real interest therein. Id.

60. Corporation owning its own stock cannot put it into voting trust or assist any of its stockholders to do so, and identify itself with their interest by binding itself to assume expenses incident to attainment of their purpose. Clark v. National Steel & Wire Co. [Conn.] 72 A 930.

61. Under Act Apr. 21, 1896 (P. L. 1896, p. 290, § 37), corporate stock may be placed in pledge, and pledgor and pledgee may agree between themselves as to how it shall be voted. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153. Evidence held to show that pledgor of stock was to have power to vote same. Goetzinger v. Donahue, 138 Wis. 103, 119 NW 823.

62. Where stock was pledged as security for note in escrow agreement and pursuant to such agreement was delivered to person designated on failure to pay note, such person had right to vote same and to give proxy for vote. Haynes v. Griffith [Idaho] 101 P 728. Where an escrow agreement is entered into whereby a certificate of stock is to be held by a bank as security for a promissory note, with power and instructions to deliver same, upon failure to pay the note at maturity such certificate was properly delivered to the person specified. Id.

63, 64. Dunbar v. American Tel. & T. Co., 142 Ill. App. 6.

can such stock be voted by the assignor of the same until the sale by him has been set aside.[64] Unless expressly forbidden by statute, preferred stockholders may be entirely deprived of voting power in consideration of other preferences.[65] Generally a stockholder may vote as he pleases,[66] so long as he does not seek to oppress or defraud minority stockholders.[67] The right of cumulative voting is given by statute in certain cases.[68]

The right to vote by proxy was not recognized by the common law,[69] but is often given by statute,[70] various restrictions, however, being imposed upon such right,[71] such as that a proxy shall be of no effect when not given by the owner of record on the company's books,[72] or that the proxy shall be valid for only a certain length of time.[73] Where proxies are authorized, a stockholder is ordinarily bound by corporate action at a meeting at which he is represented by proxy, whether it be extraordinary or not, provided it is not forbidden by the charter or some general law.[74] A proxy is usually revocable [75] regardless of provisions therein to the contrary,[76] and revocation, of course, renders the proxy invalid.[77] Revocation may be effected by the giving of a later proxy,[78] and if it cannot be determined which proxy is the

65. People v. Keonig, 118 NYS 136. Arrangement does not concern public or violate any rule of common law or public policy. Id. Consol. Laws, p. 1381, c. 23, § 3, subd. 8 and §§ 23, 24, held to permit certificate of incorporation to provide what voting right classes of stockholders should possess. Id. Legislature did not intend every class of stockholders to be compelled to hold right to vote or to prohibit formation of corporation which deprived preferred stockholders of voting power. Id. Certificate of corporation construed and preferred stockholders as such held to have no authority to vote for sale or other disposition of whole or any part of assets of company, or on any question affecting its business or affairs. Morrell v. Geo. Brooks & Son Co., 164 F 501.

66. South & N. A. R. Co. v. Gray [Ala.] 49 S 347.

67. South & N. A. R. Co. v. Gray [Ala.] 49 S 347. See ante, § 15A, subd. Power of Majority.

68. Under Laws 1907, p. 666, c. 457 (Pell's Rev. 1905, § 1183), right of cumulative voting is given minority stockholders at election of officers when any one person owns or controls more than one-fourth of capital stock. Bridgers v. Staton, 150 N. C. 216, 63 SE 892. Under statute, voter cannot vote cumulatively on question of adjournment. Id.

69. At common law, all votes were required to be given in person. In re Schwartz [N. J. Law] 72 A 70.

70. Corporation Act, § 17, provides that absent stockholders may vote at all meetings by proxy in writing. In re Schwartz [N. J. Law] 72 A 70. Comp. Laws 1907, § 335, expressly provides that stockholders may vote by proxy unless right is restricted in articles of incorporation. White v. Snell [Utah] 100 P 927.

71. At the election of directors of the Md. S. P. C. A. under Acts 1908, p. 1210, c. 77, proxies to which no ballots were attached could not be counted. Pope v. Whitridge, 110 Md. 468, 73 A 281.

72. Where stock was transferred to certain parties on corporation's books by administrator before election, they not being deceased, administrator could not sign proxy authorizing another to vote stock for them. In re Schwartz [N. J. Law] 72 A 70. No proper evidence held offered to show who was decedent represented by administrator signing such proxy. Id.

73. Proxy good only for 3 years (Rev. 1905, § 1184). Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 SE 894; Bridgers v. Staton, 150 N. C. 216, 63 SE 892. Under Revisal 1905, § 1185, instruments assigning stock for a period of years with authority to vote same reserving right to draw dividends thereon during such period and also retaining possession of stock in assignors are proxies. Bridgers v. Staton, 150 N. C. 216, 63 SE 892. Invalid after three years. Id.

74. Crook v. International Trust Co., 32 App. D. C. 490. A stockholder represented by an authorized proxy is **estopped** to contend that his proxy could not lawfully be recognized, or that proxies of other stockholders ought not to have been recognized. Farish v. Cieneguita Copper Co. [Ariz.] 100 P 781. Proxy granting "all the power he would possess if personally present at such meeting" does not authorize proxy to vote for reorganization of corporation since latter business **not within scope of ordinary meeting.** Id.

75. Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 SE 894.

76. Even when proxy is by its terms made irrevocable, law allows stockholder to revoke it. Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 SE 894.

77. At special election of directors where revocation of proxy is duly presented to judges of election, or was in possession of holder of proxy, or known by him to be revoked, ballot attached to such proxy should not counted. Pope v. Whitridge, 110 Md. 468, 73 A 281.

78. Under Acts 1908, p. 1210, c. 77, as to the special election of directors of the Md. S. P. C. A., where member gave proxies to both sides, proxy last given was revocation of all other former proxies given by such member. Pope v. Whitridge, 110 Md. 468, 73 A 281.

latest, neither should be admitted.[79] When an enabling statute is limited to absent stockholders, it follows that when a shareholder who has given a proxy attends in person, his proxy becomes void.[80] As between the parties, and in the absence of express statute to the contrary, voting trust agreements are not inherently invalid[81] but, where they deprive the stockholders of the right to vote, they are as a general rule contrary to public policy and are void,[82] especially when entered into for the purpose of oppressing or defrauding minority stockholders.[83] A trust company managing a corporation pursuant to a valid voting trust agreement has a lien for its services, on the stock deposited,[84] but the action of directors alone, in creating such a trust, will not bind the corporation to pay for such services,[85] unless it appears that the stockholders were benefited thereby. The amount of stock required to be deposited pursuant to a voting trust agreement depends upon the terms of the

79. At special election of directors of Md. S. P. C. A., pursuant to Acts 1908, p. 1210, c. 77, where two proxies of member with ballots attached, one for each side, were presented, and it could not be determined from the proxies themselves which was latest, neither of ballots could be counted. Pope v. Whitridge, 110 Md. 468, 73 A 281.

80. In re Schwartz [N. J. Law] 72 A 70.

81. White v. Snell [Utah] 100 P 927. Under Comp. Laws 1907, §§ 330, 335, relative to proxies and to stock as personal property, agreement by majority stockholders with other stockholders, placing stock of former in hands of latter to vote, collect dividends, etc., it being agreed by latter that stock should not be voted for assessment or indebtedness not payable before expiration of contract and that proportion of any indebtedness represented by such stock so incurred would be paid by latter, is not void as against public policy. Id. Agreement did not contain any conditions for which voting pools and other combinations have been held void. Id.

82. Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 SE 894. Agreement which separates beneficial ownership of stock from legal title is contrary to public policy and is void. Id. Voting trust agreement **cannot be justified as a proxy,** since proxy is good for three years only (Rev. 1905, § 1184), and is revocable. Id. Agreement between owners of majority of stock to **pool** their stock and divide directors between them is void as against public policy. Bridgers v. Staton, 150 N. C. 216, 63 SE 892. Pooling arrangement to last ten years. Id. Where voting trust agreement was illegal, court properly granted **injunction** restraining trustees from using or exercising control over stock or voting same in any meeting, and adjudged bona fide owners to be entitled to vote. Sheppard v. Rockingham Power Co., 150 N. C. 776, 64 SE 894. That voting trustees deny any intention of voting stock, causing same to be voted, or to bring about reorganization of company, and that they have been advised that they have no power to vote such stock pursuant to agreement unless with assent of holders, is not a sufficient answer for their refusal to assign and deliver stock held on demand of plaintiff. Id.

83. Agreement under consideration not subject to such claim. White v. Snell [Utah] 100 P 927. No complaint by stockholders. Id.

84. Clark v. National Steel & Wire Co. [Conn.] 72 A 930.

85. Clark v. National Steel & Wire Co. [Conn.] 72 A 930. Corporation has no legal interest in determination of who shall be chosen as its officers at any particular annual election. Id. Trustees are not guardians of shareholders in that respect. Id. Where defendant, National Wire Company, could not pay dividends on its preferred stock and organized Consolidated Company, which acquired such preferred stock, and then mortgaged it with other property to trust company to secure an issue of certain bonds, which mortgage provided that mortgagor pay reasonable compensation to trust company or that, in default thereof, trust company should have first lien for its services as trustee, vote by directors of National Company during subsequent two years, authorizing loan to finance Consolidated Company, did not impose an obligation to pay for trustee's services to Consolidated Company. Id. That agreements for management of corporations by voting trust are common and customary is insufficient to create contract for services between corporation so managed and trust company, but fact that corporation made two payments to trustees for their services was insufficient to create an **implied obligation** to pay for future services. Id. When parties have come into a contractual relation, existence of custom may serve to define what contract is, but **custom** is insufficient to create a contract Id. Payments were mere gratuities and could not work **estoppel** operating as admission of liability since trust company did not gain or lose by receiving such payments, and also such payments constituted a patent misuse of corporate funds. Id. Finding by claims committee on insolvency of corporation that trust company's services were worth $500 constituted finding that shareholders and not corporation were benefited to that extent. Id. Fact that trustees voted and that trust agreement recited that its execution would be for benefit of all its shareholders did not establish that fact against latter, and, if large minority declined to enter into agreement, they would not be bound, even equitably, by such action of directors. Id. An oral promise by one corporation to pay for services of transfer agent of another corporation is **within statute of frauds.** Id.

agreement entered into.[86] Injunction is available to prevent a trustee from violating the conditions of its trust as to voting stock.[87]

A complaint with allegations which, when denied, properly raise an issue as to title of stock and the right to vote, should not be dismissed,[88] but corporate action is not attacked by allegations of voting of stock by one who is not the owner thereof, where there is no allegation of lack of authority to so vote or that the authority given was not genuine, or was fraudulent.[89] In the case of a dispute as to the right to vote, the books of the corporation are prima facie evidence.[90] Stockholders not represented at the first meeting are nevertheless entitled to vote at an adjourned meeting.[91] If a vote as to some measure or in an election of officers has been illegally announced because of the illegal admission or rejection of certain votes, the court can declare the true result.[92]

(§ 15) *F. Appointment, election and tenure of officers.*[93]—See 11 C. L. 857—Directors of corporations are ordinarily chosen by election[94] by the members of the corporation,[95] while other officers may be selected by the directors or elected by the stockholders.[96] When elected by the corporation, such officers hold their office on the terms and conditions prescribed by the corporation.[97] Eligibility may be dependent upon the performance of statutory requirements.[98] In the absence of a statute or rule of the corporation, a member of a board of directors or trustees does not necessarily have to be a member or shareholder of such corporation,[99] and an

86. Under voting trust agreement whereby stockholders agreed to deposit $21,000 of certificates of stock, such agreement did not require a deposit of that amount of stock by each of three parties to agreement. Wood v. Cook, 132 App. Div. 318, 117 NYS 51.

87. Where certain shares of stock were deposited with trustee to vote for "re-election of present board of directors" and "annually for the present first permanent board of directors," such trustee is not authorized to vote such stock on proposition to increase number of directors, where purchasers of stock purchased same in reliance upon such trust agreement. Byington v. Piazza, 115 NYS 918.

88. Complaint alleging that defendants are attempting to vote two shares of plaintiff's stock in bankrupting company, and that this stock with plaintiff's other stock would give him majority, which allegations were denied by answer, made direct issue as to title of two shares, and right to vote such shares, and dismissal because no issue in which plaintiff was separately interested, was erroneous. Hinsdale Elec. L. & P. Co. v. Ogle [Colo.] 101 P 786.

89. Where bill in equity by one claiming under foreclosure of second mortgage seeks to cancel first mortgage, demurrer thereto is properly sustained where it alleges only that action of directors was illegal because at meeting electing directors and at meeting ratifying such directors' action regarding execution of mortgage large part of stock voted belonged to married woman who was not present, and was voted by one claiming to act for her but which does not allege that such stock was in fact voted without her authority. Florida Clay Co. v. Vause [Fla.] 49 S 35.

90. Haynes v. Griffith [Idaho] 101 P 728. Corporation cannot be required to decide disputed right. Id. Upon any other rule it would never be known who were entitled to vote, until courts had decided dispute. Id. Where evidence clearly supported findings showing certain stock in books of corporation in name of two stockholders, holder of proxy from such stockholders had right to vote such stock. Id.

91. Bridgers v. Staton, 150 N. C. 216, 63 SE 892. Meeting held not to be adjourned meeting. Id.

92. Bridgers v. Staton, 150 N. C. 216, 63 SE 892.

93. Search Note: See notes in 95 A. S. R. 578; 4 Ann. Cas. 707.

See, also, Corporations, Cent. Dig. §§ 1187-1266; Dec. Dig. §§ 281-295; 10 Cyc. 318-349, 736-757; 2 A. & E. Enc. L. (2ed.) 16; 21 Id. 836; 20 A. & E. Enc. P. & P. 672.

94. See ante, § 15D, subd. Elections.

95. Directors must be chosen by members, that is by corporators, unless latter have authorized some other mode of choice which law will tolerate. Klix v. Polish Roman Catholic St. Stanislaus Parish [Mo. App.] 118 SW 1171.

96. Brindley v. Walker, 221 Pa. 287, 70 A 794.

97. Title is derived from same source as directors. Brindley v. Walker, 221 Pa. 287, 70 A 794.

98. Directors who fail to produce at any corporate election an alphabetical list of all stockholders entitled to vote, with the residences and number of shares held by each, are ineligible to any office at such election. P. L. 1896, p. 277. In re Schwartz [N. J. Law] 72 A 70.

99. Wright v. Floyd [Ind. App.] 86 NE 971. Proceedings to reduce number of directors held ineffective, since thereby majority would not have been members of lodge. In re Manoca Temple Ass'n, 128 App. Div. 796, 113 NYS 172. Under Laws 1892, pp. 1801, 1828, c. 687, 688, §§ 2, 20, Laws 1906, p. 469, c. 238, § 1, **policy holders** of insurance company are eligible as directors whether stock-

owner of stock is ordinarily eligible as director though the stock has not been transferred on the company's books.[1] The acts of de facto officers of a corporation, within the power of the officers they assume to hold, are valid and binding upon the corporation.[2]

The duration of office is sometimes governed by statute,[3] and sometimes by by-laws.[4] Officers in possession usually hold over until successors are elected,[5] such holding over usually being provided for by the corporate by-laws,[6] and hold-over directors are sometimes authorized to elect successors of officers holding over.[7] Charter provisions as to holding over do not however prevent the vacation of office by resignation.[8] Dissolution terminates a corporate office,[9] though corporate officers are often rendered trustees thereby.[10] The suspension or removal of directors may be provided for by statute,[11] and a court of equity may, if necessary, remove directors of a corporation for unfaithfulness.[12] The directors and managing agents of a corporation have undoubted authority to revoke the powers of inferior agents whom they have appointed,[13] but they have no implied authority to revoke

holders or not. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443.

1. In re Schwartz [N. J. Law] 72 A 70.

2. De facto board of directors of corporation may exercise powers of de jure board in matter of levying assessments on corporate stock. Sherwood v. Wallin, 154 Cal. 735, 99 P 191. Rule held also to apply to calling corporate meeting to consider and act upon any matter pertaining to corporation such as increasing stock issue. Id. Where officers had held office, with corporate consent, under color of election, had exercised all functions of officers, and were in peaceable possession of corporate property as such, and there was no indication that their assumption was not acquiesced in by all stockholders, such officers are de facto officers. Id. Owner of corporate stock on books of corporation held entitled to certificate for same and issuance of same being mere ministerial act which officers were bound to perform, certificate held to have been legally issued by de facto officers. Holder of such certificate held entitled to vote at corporate meeting. Id. Acts of de facto officers are binding upon corporation and its creditors. Copper Belle Min. Co. v. Costello [Ariz.] 100 P 807. Persons elected directors though were not de jure officers, not being stockholders, were authorized to sign petition for dissolution. In re Manoca Temple Ass'n, 128 App. Div. 796, 113 NYS 172. Situation known at time of election. Id.

3. In absence of provision of contrary in certificate of incorporation, directors of corporation hold office for one year and until others are chosen and qualified in their stead. Corporation Act, § 12. In re Schwartz [N. J. Law] 72 A 70.

4. Where by-law of savings bank provided that attorney hold office "at pleasure of trustees," appointment for one year merely fixed maximum term. Rebadow v. Buffalo Sav. Bank, 63 Misc. 407, 117 NYS 282. Appointment in connection with by-law meant that attorney should hold office at pleasure of trustees but not longer than one year. Id.

5. When a private corporation fails to hold its regular annual meeting for election of officers, those already occupying such positions hold over until their successors are elected. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563. Directors hold over until successors are chosen and qualify. Corporation Act, § 12. In re Schwartz [N. J. Law] 72 A 70.

6. By-laws provided that officers and directors hold offices until successors are elected. Dunbar v. American Tel. & T. Co., 142 Ill. App. 6.

7. Where articles of incorporation provided that board of directors should serve for one year and until successors were elected and qualified, and that officers of corporation should be chosen by directors at first meeting after their appointment or election, and hold office for one year, or until their successors are elected and qualified, held that stockholders, having failed to elect board of directors at annual meeting, hold-over directors were authorized, at meeting called for that purpose, subsequent to annual meeting, to elect new officers as successors of those holding over. State v. Guertin, 106 Minn. 248, 119 NW 43.

8. Even in case corporate charter provides that officer shall hold till his successor is elected and qualified, he, nevertheless, by resignation without any acceptance, unless acceptance is specially required by such charter, vacates office for all general purposes. In re McNaughton's Will, 138 Wis. 179, 120 NW 288.

9. President. Sullivan Timber Co. v. Black [Ala.] 48 S 870.

10. See ante, § 12, subd. Winding Up and Receivers.

11. Suspension or removal of directors can only be had in an action brought by the attorney general under Code Civ. Proc. §§ 1781, 1782, 1811. Welcke v. Trageser, 131 App. Div. 731, 116 NYS 166.

12. California Fruit Growers' Ass'n v. Superior Ct., 8 Cal. App. 711, 97 P 769.

13. Power is implied. Brindley v. Walker, 221 Pa. 287, 70 A 794. Generally, officers below grade of directors and such officers as are elected by corporation at large hold their offices at pleasure of directors, being removable without cause. Id. Power of removal of inferior officers by directors is discretionary, and rightfulness cannot be investigated by courts. Id. Secretary and treasurer of business corporation merely ministerial officers, removable without as-

the powers of agents appointed by vote of stockholders or whose office is fixed and regulated by charter.[14] The managing agent of a corporation, like any other agent appointed, is subject to removal when the term of his employment has expired.[15] In a proper case mandamus is the proper remedy to compel the delivery of the seal, books, and papers of a corporation by an officer who refuses to deliver them to his successor in office,[16] and injunction may be available for a like purpose.[17] Certiorari is not the proper remedy to question the title of directors actually in possession of office.[18] An employe wrongfully discharged is entitled to recover from the corporation the damages occasioned thereby,[19] but such an employe should, as in other cases of a wrongful discharge, lessen his damages as much as possible by securing other employment.[20]

(§ 15) *G. Salary or other compensation of officers.*[21]—See 11 C. L. 858—Officers interested in the corporation usually receive no compensation for their services,[22] unless there is an express agreement or provision therefor,[23] and compensation may be recovered on an implied contract only for services outside the officer's usual duties and rendered under circumstances clearly showing an implied promise to pay,[24]

signed cause. Id. Act May 14, 1901 (P. L. 61) and Act Apr. 29, 1874 (P. L. 73), requiring corporation to have certain named officers, does not define duties of such officers and could not be construed to render secretary and treasurer discretionary officers. Id.

14. Brindley v. Walker, 221 Pa. 287, 70 A 794.

15. Magpie Gold Min. Co. v. Sherman [S. D.] 121 NW 770.

16. When it does not appear that he holds them under any color of right to office. State v. Guertin, 106 Minn. 248, 119 NW 43. Mandamus by a foreign corporation against resident officer will lie to compel such officer to turn over books, papers, etc., belonging to the corporation, though title to office incidentally involved. Potomac Oil Co. v. Dye [Cal. App.] 102 P 677. Court must be able to obtain jurisdiction of officer. Id.

17. Where a managing agent refuses to give up his office on discharge, court of equity may restrain him from further action and, as incident thereto, may appoint person to take care of property until trial. Magpie Gold Min. Co. v. Sherman [S. D.] 121 NW 770.

18. Overman v. Manly Drive Co. [N. J. Law] 71 A 1125.

19. Where employe is wrongfully discharged, judgment for damages must be against corporation, and not individual trustee. Hampton v. Buchanan, 51 Wash. 155, 98 P 374.

20. Hampton v. Buchanan, 51 Wash. 155, 98 P 374.

21. Search Note: See notes in 6 L. R. A. (N. S.) 524; 3 Ann. Cas. 734; 11 Id. 773.

See, also, Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308; 10 Cyc. 898-902, 934-952; 21 A. & E. Enc. L. (2ed.) 905.

22. Officer of corporation is not entitled to compensation for his services, though he owns nearly all stock. Gaul v. Kiel & Arthe Co., 133 App. Div. 621, 118 NYS 225. No presumption of agreement to pay arises from rendition of services as president. Notley v. First State Bank, 154 Mich. 676, 15 Det. Leg. N. 838, 118 NW 486. President performing services of general superintendent as prescribed by the by-laws was not entitled to salary therefor. Ebner v. Alaska Mildred Gold Min. Co. [C. C. A.] 167 F 456. **Directors** of corporations usually receive no compensation and law will not raise an implied contract to pay for same, however valuable they may be. Notley v. First State Bank, 154 Mich. 676, 15 Det. Leg. N. 838, 118 NW 486.

23. Dial v. Inland Logging Co., 52 Wash. 81, 100 P 157; Bair & Gazzam Mfg. Co. v. Vandersaal, 36 Pa. Super. Ct. 615. Services presumed gratuitous, in absence of express agreement. Gaul v. Kiel & Arthe Co., 133 App. Div. 621, 118 NYS 225. Quantum meruit not maintainable when neither by-laws nor resolution authorized salary. Bair & Gazzam Mfg. Co. v. Vandersaal, 36 Pa. Super. Ct. 615.

Held no agreement. Ebner v. Alaska Mildred Gold Min. Co. [C. C. A.] 167 F 456. By-laws and evidence in case held to show that it was intention of incorporators to devote their talent and energies to prosecution of corporate business without wages except by way of profits. Dial v. Inland Logging Co., 52 Wash. 81, 100 P 157. Conversation between corporators wherein one later claiming wages stated he always reckoned wages to be deducted before computing profit held too indefinite to constitute express contract for compensation of him by corporation. Id. Suggestion by stockholders that president be paid salary, etc., and resolution by stockholder's meeting to same effect, amount to be fixed at any regular stockholders' or directors' meeting to be held at future time, does not authorize president to retain corporate money for such purposes where no further action was ever taken. Ebner v. Alaska Mildred Gold Min. Co. [C. C. A.] 167 F 456. Bank **held liable** for expenses of automobile used by officer in attending to bank's business where directors by resolution authorized such officer to employ all persons necessary to resume and conduct business temporarily suspended where it abundantly appeared that such automobile was necessary to enable officer to cover territory. Seadale v. Montgomery, 113 NYS 600.

24. Dial v. Inland Logging Co., 52 Wash. 81, 100 P 157; Notley v. First State Bank, 154 Mich. 676, 15 Det. Leg. N. 838, 118 NW 486.

but where these requisites exist the corporation will be held liable,[25] without any formal resolution to such effect.[26] A corporation endeavoring to reduce profits realized by showing disbursements made has the burden of showing that an agreement was made to pay an officer for services.[27] The compensation of officers may be in the form of a salary,[28] and is sometimes subject to legislative control.[29] A director is disqualified to vote as such on a resolution to increase his salary.[30] A contract of employment by a corporation continues, unless otherwise legally terminated, until a substituted contract takes its place,[31] and an employe who is induced to remain in his position by an unauthorized offer of the president can not recover from the corporation on quantum meruit.[32] The right to compensation ceases when an office is terminated, as where dissolution is effected.[33]

(§ 15) *H. How directors must act; directors' meetings, records and stock books.*[34]—See 11 C. L. 859—Except as to innocent persons dealing in good faith and misled by the acts of corporate directors or trustees,[35] such directors or trustees can bind their corporation only when sitting or acting as a board or body,[36] and the will of the corporation must be expressed by a majority of such board, or at least by a majority of those present,[37] but an officer may be authorized by previous reso-

Evidence insufficient to establish implied contract of corporation to pay official for services rendered as president. Notley v. First State Bank, 154 Mich. 676, 15 Det. Leg. N. 838, 118 NW 486.

25. Where one owning only two shares of corporate stock performed services for corporation for 18 months, implied contract to pay for such services arose though he was officer. Argo Mfg. Co. v. Parker, 52 Wash. 100, 100 P 188. Conduct of all stockholders held to show that it was their intention that each should devote his time to promotion of enterprise and that each should be paid the reasonable value of his services. Id. Evidence held ample to sustain finding that there was contract of employment at annual salary per year, implied from conversation with directors and subsequent conduct of officers and directors. In re Gouverneur Pub. Co., 168 F 113.

26. In re Gouverneur Pub. Co., 168 F 113.

27. Gaul v. Kiel & Arthe Co., 133 App. Div. 621, 118 NYS 225.

28. Salary is fixed sum to be paid by year, or periodically, for services. Rebadow v. Buffalo Sav. Bank, 63 Misc. 401, 117 NYS 282. Compensation of attorney of bank, consisting of various sums paid from time to time when services rendered, in no proper sense a salary. Id.

29. See ante, § 11, Legislative Control Over Corporations.

30. Under Rev. Code, §§ 1619, 1623, prohibiting trustee or his agent from acting in transaction in which he or one for whom he acts has adverse interest, director, his wife, also director, and his agent, also director, cannot act to increase former salary. Ritchie v. People's Tel. Co. [S. D.] 119 NW 990.

31. Minshull v. New Jersey Terminal R. Co., 76 N. J. Law, 684, 71 A 663.

32. Old contract is not rescinded. Minshull v. New Jersey Terminal R. Co., 76 N. J. Law, 684, 71 A 663.

33. President of corporation dissolved at his instance and request and who is appointed receiver is not entitled to salary as president in addition to compensation as receiver, since upon dissolution corporate affairs passed into hands of trustees of whom he was one, office of president was terminated and no duties were performable. Sullivan Timber Co. v. Black [Ala.] 48 S 870. If party has any right in such case it would be in law and not in equity. Id.

34. Search Note: See Corporations, Cent. Dig. §§ 1292-1319, 1676, 1739; Dec. Dig. §§ 298, 402, 403; 10 Cyc. 774-787, 917, 944, 1004-1002, 1024-1031, 1037-1043, 1049; 21 A. & E. Enc. L. (2ed.) 865.

35. Schott & Sons Co. v. Insurance Co., 7 Ohio N. P. (N. S.) 548.

36. Schott & Sons Co. v. Insurance Co., 7 Ohio N. P. (N. S.) 548; Ebner v. Alaska Mildred Gold Min. Co. [C. C. A.] 167 F 456; Jeanerette Rice & Milling Co. v. Durocher, 123 La. 160, 48 S 780. Corporate act cannot be performed by directors of corporation acting separately or individually. Schott & Sons Co. v. Insurance Co., 7 Ohio N. P. (N. S.) 548. Member of board of trustees or directors has no authority to bring **suit** on behalf of corporation to protect interests of corporation and members, in his trust capacity or in his personal capacity, solely because of his interest on account of such membership, since such membership gives him no interest. Wright v. Floyd [Ind. App.] 86 NE 971. Majority cannot undertake to act in their individual names for board itself. Where president of defunct corporation is shown to have no authority to bring suit except such as was derived from majority of directors acting individually and separately, defendant is entitled to have suit dismissed as brought without authority. Jeanerette Rice & Milling Co. v. Durocher, 123 La. 160, 48 S 780.

37. Wright v. Floyd [Ind. App.] 86 NE 971; Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448. Law requires majority of directors to authorize any proposed act. Singers-Bigger v. Young [C. C. A.] 166 F 82. Corporation cannot be said to be prosecuting suit where it is apparent from averments of complaint that plaintiffs are suing as minority trustees for the benefit of the corporation. Wright v. Floyd [Ind. App.] 86 NE 971.

lution or by-laws to contract on behalf of the directors.[38] The necessity of notice of a director's meeting may be dispensed with by the manner of holding meetings,[39] or notice may be waived by directors not receiving the same.[40] When all the directors are present and participate in a meeting, sufficient notice will be presumed.[41]

Evidence.[See 11 C. L. 859]—Statutory provisions sometimes provide for the punishment of officers who make false entries in the minute books of a corporation,[42] but a record of corporate resolutions and acts, though usually made, is not essential to their validity,[43] and, ordinarily, acts of a corporation may be proved the same as acts of individuals.[44] The minutes of a corporate meeting are only prima facie evidence of a proceeding,[45] and parol testimony is admissible for the purpose of proving what actually occurred.[46] The minutes, however, are the best evidence,[47] and it is necessary first to offer them in evidence when attached.[48] Minutes are properly admissible to show the extent of authority conferred upon an officer,[49] or to show other corporate action.[50] Entries in a stock book cannot be attacked by showing other entries to be inaccurate, when such entries are not connected with the matter involved.[51]

Penalties for refusal of inspection of books.[52]—A statute imposing a penalty for the failure to offer books for inspection will be strictly construed.[53] Such a penalty may be enforced by a pledgor of stock.[54]

38. Ebner v. Alaska Mildred Gold Min. Co. [C. C. A.] 167 F 456.

39. Where under by-laws of corporation special meetings of directors might be held at any time by oral notice or by notice in writing duly signed by each director and do not provide that such meeting must be held in place of business of corporation and where meeting was similar to others previously held, oral notice to distant directors is not necessary in absence of bad faith where majority of directors after consulting with counsel thought immediate action necessary. In re Lisk Mfg. Co., 167 F 411. Record held to show that meeting held at certain time by majority of directors at which meeting resolution was adopted, admitting in writing the inability of corporation to pay its debts and its willingness to be adjudged bankrupt, was assembled to adopt such resolution, that corporation was in fact so embarrassed, and meeting was called and held in usual manner and attended by quorum. Id.

40. Director who knew of proposed meeting and its object held to have acquiesced in action of other directors or to have waived notice of meeting though not notified. In re Lisk Mfg. Co., 167 F 411.

41. In absence of evidence to contrary. Illinois Commercial Men's Ass'n v. Perrin, 139 Ill. App. 543.

42. Under Pen. Code, § 563, punishing corporate officers who make false entries in corporation's book of accounts, record or documents, and considering Civ. Code, § 377, requiring a record of business transactions and a journal of corporation meetings, and § 316, imposing liability for damages for false entries in records or books, such section applies not only to book of account but also to minute book entries as to director's meetings authorizing transaction of business. Ex parte McKenney [Cal. App.] 101 P 927.

43. Flakne v. Minnesota Farmers' Mut. Ins. Co., 105 Minn. 479, 117 NW 785.

44. Flakne v. Minnesota Farmers' Mut. Ins. Co., 105 Minn. 479, 117 NW 785. Where there is no record evidence, they may be proved by testimony of individuals. Id.

45. State v. Guertin, 106 Minn. 248, 119 NW 43.

46. Where minutes showed only that informal vote for secretary had been taken, parol evidence of directors present and voting held admissible to show that actual formal vote was taken. State v. Guertin, 106 Minn. 248, 119 NW 43. Where verity of corporate records is attacked by minority stockholders, who deny that transactions recorded occurred, and contend that true minutes of given meeting show very contrary of official record, parol evidence is admissible to show what actually occurred. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381.

47. Best evidence of contents of resolution if correctly recorded. Durbrow v. Hackensack Meadows Co. [N. J. Law] 71 A 59.

48. Durbrow v. Hackensack Meadows Co. [N. J. Law] 71 A 59.

49. Fleming v. Reed [N. J. Err. & App.] 72 A 299. Though minutes of board of directors will not bind strangers, and business transactions of a corporation with its members stand on same footing as those with strangers, they are admissible to show extent of authority of officers appointed to carry out corporate action. Id. Sale of entire corporate property and power to give deed for same. Id.

50. Exclusion of minutes of corporation to show broker's employment harmless where such employment subsequently made. Lawson v. Black Diamond Coal Min. Co. [Wash.] 102 P 759.

51. Such evidence was too remote. Parsons v. Utica Cement Co. [Conn.] 73 A 785.

52. See 7 C. L. 916. See, also, ante, § 14, Right to Inspect Books.

53. Stock Corporation Law (Laws 1892, p. 1840, c. 688, § 53, as amending Laws 1897, p. 314, c. 384), imposing penalty for failure of foreign corporation to offer books for inspection, is to be strictly construed, and will not be extended by implication. Henry

(§ 15) *I. Powers of the directors or trustees.*[55]—See 11 C. L. 860—The directors are the general or managing agents of the corporation,[56] such duty being imposed either by statute or because such is an imperative implication of law.[57] Their authority is very extensive,[58] and includes generally the power to do any act or make any contract within the limits of the powers conferred upon the corporation,[59] and contracts so made will bind the corporation, in the absence of any express restriction, though not assented to or ratified by stockholders.[60] With respect to the management of the corporate property, directors are, in a sense, trustees,[61] and they must use the powers conferred upon them solely in the interest of the corporation.[62] The action of a board of directors is not binding, therefore, on the corporation when effected by "dummies," who are really the agents of the person desiring such action,[63] or when the self-interest of the directors precludes disinterested action.[64] The duty of a director to a shareholder is conclusively determined by law and cannot be added to or lessened by personal contract,[65] but no authority would permit

v. Babcock & Wilcox Co., 125 App. Div. 538, 109 NYS 853.

54. Pledgor is entitled to enforce penalty for refusal of inspection of books as provided by Laws 1891, p. 1071, c. 564, § 29, as amended by Laws 1892, p. 1824, c. 688; Laws 1900, p. 218, c. 128, and Laws 1901, p. 961, c. 354. Booth v. Consol. Fruit Jar Co., 62 Misc. 252, 114 NYS 1000.

55. Search Note: See note in 15 L. R. A. 418.

See, also, Corporations, Cent. Dig. §§ 1274-1291, 1585-1762; Dec. Dig. §§ 297, 397-433; 10 Cyc. 373, 374, 758-770, 818, 823, 903-918, 922-950, 1000-1085, 1198-1203; 21 A. & E. Enc. L. (2ed.) 863.

56. Sullivan Timber Co. v. Black [Ala.] 48 S 870. Managing board is usually called directors, though sometimes trustees. Id. Management of corporate affairs is ordinarily in board of directors. Black v. Harrison Home Co. [Cal.] 99 P 494. Assets and affairs of private corporation are in hands of board of directors and they have full management and disposal thereof. Winer v. Bank of Blytheville [Ark.] 117 SW 232. By-laws and articles of incorporation vested management of affairs and business in trustees, who alone were empowered to employ and discharge servants. Francis v. Spokane Amateur Athletic Club [Wash.] 102 P 1032.

57. Mills' Ann. St. § 481, confides business management of corporations to boards of directors. Singers-Bigger v. Young [C. C. A.] 166 F 82. General provision that "the business of every corporation shall be managed by its directors" is deemed written into charters of corporations, either by express mandate of general Corporation Act of Apr. 21, 1896 (P. L. p. 281), § 12, or because such is an imperative implication of law of corporations. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80.

58. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266.

59. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266; Sullivan Timber Co. v. Black [Ala.] 48 S 870. In absence of charter, statutory or constitutional restrictions, directors have all authority of corporation itself in conduct of its business. Corporation had right to sell its property, and its directors must be **presumed** to have had power to authorize executive officers to enter into contract for sale thereof and to employ persons to obtain customers. Lyon v. West Side Transfer Co., 132 App. Div. 777, 117 NYS 648.

60. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266. Acceptance of ordinance by directors of street railway binding upon stockholders, where Laws 1859, p. 530, provided that all corporate powers of said corporation be vested in and exercised by directors. Id.

61. White v. Kincaid, 149 N. C. 415, 63 SE 109. They are bound to manage affairs of corporation in interests of creditors and stockholders, but, in case of public service corporation, interests of public are to be considered also. Pollitz v. Wabash R. Co., 167 F 145.

62. McCloskey v. Goldman, 62 Misc. 462, 115 NYS 189.

63. Where entire board of directors consisted of five members and one was absent when matter of rescinding contract whereby creditor received stock in payment of debt came up, purpose thereof being to relieve such creditor of liability for unpaid balance on stock, action of board was not binding on corporation where, if four members present, one voted against rescinding and two were tools of creditor desiring action. Moore v. U. S. One Stave Barrel Co., 238 Ill. 544, 87 NE 536.

64. Nueces Val. Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633. Where advances made by first officers and directors were agreed to be repaid out of net proceeds of sale of ore but corporation received nothing from sale of ore, resolution adopted by three directors directing president and secretary to execute notes of corporation for such advances is void where two of three directors voting for resolution were interested in them and had made some of advances in question. Gold Glen Min. Co. v. Stimson, 44 Colo. 406, 98 P 727. Acts done by directors interested personally in effect of their acts are **not void unless unfair** to corporation. Zeckendorf v. Steinfeld [Ariz.] 100 P 784. See, also, post, § 15R, Dealings Between a Corporation and the Directors or Other Officers, and Personal Interest in Transactions.

65. Where corporation had right to renew lease, director, entering into contract with shareholder to protect latter's right as such by renewing lease, owes shareholder nothing

contracts placing the directors under obligation to disregard their duties,[66] nor will directors be allowed to take advantage of the knowledge he acquires in their official capacity to defraud stockholders.[67] Courts will not undertake to interfere with the honest exercise of discretionary powers vested by statute in the management of a corporation, however unwise or improvident it may seem,[68] action of the management in bad faith, or to oppress the minority stockholders, is the subject of judicial scrutiny.[69]

Each member of the board of directors has equal rights and powers,[70] and a director has the right at all reasonable times to investigate the corporate property, funds, books, correspondence and papers.[71] Corporate action is not invalidated by the fact that not all the directors voting were stockholders when a statute permitted other persons to be eligible as directors.[72]

with respect to his duty as director. Singers-Bigger v. Young [C. C. A.] 166 F 82.

66. Hampton v. Buchanan, 51 Wash. 155, 98 P 374. Effect of contract prohibiting dismissal of employe. Id. Contract which would tend to deprive stockholders of director's independent and impartial judgment and subordinate interests of corporation, which director must serve to individual interests of employer, would be contrary to public policy and void. Singers-Bigger v. Young [C. C. A.] 166 F 82. Employment of director by stockholder to protect his rights is necessarily in subordination to his duty as director. Id. If contract of employment obligates director to assist another to control corporate action of company regardless of his duty as director to represent and act for all stockholders alike, it is against the policy of the law. Id. Agreement with director of corporation to pay him certain sum if contract is awarded by his corporation in certain manner is void and unenforcible though directors of corporation knew of agreement, since director occupies fiduciary relation with reference to corporation and is trustee for corporation, stockholders, and creditors. Landes v. Hart, 131 App. Div. 6, 115 NYS 337.

67. See ante, § 14E, Transfers of Shares. Cannot either directly or indirectly in their dealings in behalf of corporation acquire any benefit or advantage not also enjoyed by other stockholders. Nueces Val. Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633. "Insidious machinations" within P. I. Code, art. 1269, may be said to be a deceitful scheme or plot with an evil design, or with a fraudulent purpose. Strong v. Repide, 213 U. S. 419, 53 Law. Ed. —. Where a director and owner of three-fourths of the capital stock of a corporation, who was also administrator general of the company and who engaged in the sale of the company's lands to the Philippine government at a price which increased the value of stock, employed an agent to make purchase of stock, concealing his identity and the negotiations as to the sale, the purchase was fraudulent within P. I. Code, art. 1269, defining deceit. Id. Undoubtedly law makes it duty of an officer or director of corporation, who is seeking to purchase from stockholder the latter's holdings of stock to disclose to latter facts which have come to him by virtue of his relation to company and not known to stockholder, or which may not be readily ascertained by stockholder, and to disclose such plans and purposes as corporation may have for future which have bearing upon value of stock of company; but underlying principle upon which this duty rests is that officer or director, being the agent of corporation and so in a sense agent of stockholder, may not take advantage of knowledge which he thus acquires and which every member of corporation is entitled to know. Steinfeld v. Nielsen [Ariz.] 100 P 1094. Duty to disclose general knowledge as to value of shares if conceded not to exist in ordinary cases, nevertheless exists under certain facts. Strong v. Repide, 213 U. S. 419, 53 Law. Ed. —. Where director purchased corporate stock, he could not escape liability for his fraud in concealing facts affecting value of stock which he was in good faith bound to disclose on the theory that because of insistence of seller that her agent was not authorized to sell stock, she had never consented; court found agent to be authorized and that, in legal effect, seller's consent was induced by fraud. Id.

68. Dissolution. White v. Kincaid, 149 N. C. 415, 63 SE 109.

69. White v. Kincaid, 149 N. C. 415, 63 SE 109. See ante, this section, A, subd. Power of Majority.

70. State v. Grymes, 65 W. Va. 451, 64 SE 728.

71. State v. Grymes, 65 W. Va. 451, 64 SE 728. Right to investigate corporate affairs is not abrogated by Code 1906, § 2276, as to powers of directors. Id. Code 1906, § 2276, as to investigation of corporation by "board of directors," construed to apply to board as a unit and also individually. Id. Directors of corporation are undoubtedly entitled to access to all books of corporation, being charged with duty of knowing what is going on. Lawton v. Bedell [N. J. Eq.] 71 A 490. Majority stockholder and his tool, being two of three directors, and stockholders, cannot refuse other director and stockholder permission to see books in fraud of his right to have certain surplus distributed as dividends. Id. Director has right to make copies for his own information. State v. Grymes, 65 W. Va. 451, 64 SE 728.

72. See Laws 1892, pp. 1801, 1828, cc. 687, 688, §§ 2, 20, Laws 1906, p. 469, c. 238, § 1, providing that policy holders of insurance company shall be eligible as directors whether or not they be stockholders. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443.

(§ 15) *J. Powers of officers and agents other than directors or trustees.* [73] See 11 C. L. 860—The rules governing the authority of an agent to act for a corporation are in many respects the same as between agents of natural persons.[74] Generally, therefore, corporations are bound only by acts and contracts of their agents, done and made within the scope of their authority, express or implied,[75] and persons dealing with agents of corporations are bound to know their powers and the extent of their authority.[76] In this connection it is held that a chief officer of a corporation is one who has charge and control of his business, is its managing officer, and is not one who is charged with other or subordinate duties,[77] and the mere fact of temporary absence from the place of business of the chief officer does not cause his mantle to fall on a subordinate officer.[78] The power to bind the corporation may be conferred ou an agent by express resolution,[79] or may be assumed when germane to the usual duties of an office,[80] though such authority is in fact limited by the by-laws.[81] The emergency or necessity of a situation may authorize an agent to bind the corporation by contract,[82] and the corporation will be bound when an agent is clothed with apparent authority to act,[83] or when the corporation ratifies an unauthorized act,[84] and a corporation, as an undisclosed principal, may be held

73. Search Note: See notes in 11 C. L. 861; 14 L. R. A. 356; 36 Id. 561; 4 L. R. A. (N. S.) 58.

See, also, Corporations, Cent. Dig. §§ 1320-1328, 1333, 1585-1762, 2022, 2023; Dec. Dig. §§ 299-304, 397-443, 513(4); 10 Cyc. 373, 374, 758-770, 772-774, 818, 823, 903-952, 1000-1085, 1198-1203; 21 A. & E. Enc. L. (2ed.) 851.

74. Winer v. Bank of Blytheville [Ark.] 117 SW 232.

75. Fischer v. Motor Boat Club, 61 Misc. 66, 113 NYS 56. Corporation, like an individual, may be bound by act of its agent acting within scope, express or implied, of his authority as such. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232.

76. Fischer v. Motor Boat Club, 61 Misc. 66, 113 NYS 56. Person dealing with officer of corporation, who assumes to act for it in matters in which interests of corporation and officer are adverse, is put upon inquiry as to authority and good faith of officer. McCloskey v. Goldman, 62 Misc. 462, 115 NYS 189. Duty of defendant held to be to investigate authority of officer to release debt in which he was interested. Id.

77. Stanley v. Sedalia Transit Co., 136 Mo. App. 388, 117 SW 685.

78. So as to be subject to process. Stanley v. Sedalia Transit Co., 136 Mo. App. 388, 117 SW 685.

79. Authority to indorse note conferred on executive committee by directors pursuant to charter and by-laws. Tilden v. Goldy Mach. Co., 9 Cal. App. 9, 98 P 39. Treasurer held to have authority to indorse notes on corporation's behalf and to render it liable thereon. Van Norden Trust Co. v. Rosenberg, 62 Misc. 285, 114 NYS 1025.

80. Where claim agent had authority to minimize damages, **employment of physician** was step in minimizing damage and was germane to employment. Southern R. Co. v. Hazlewood [Ind. App.] 88 NE 636. "Assistant law agent" of railroad with duty of visiting injured persons and compromising claims held to have power reasonably incident to scope of employment so as to employ physician. Id. President of manufacturing corporation held to have implied authority to engage physician to care for injured employe. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461. Corporation held bound where president ordered physician to attend employe and intended corporation should pay therefor though there was no express promise. Id. Corporation held liable for services of physician ordered by president in attending wounded servant although corporation was not negligent with reference to injury. Id. **Bill of sale** executed in name of corporation by its president and general manager, shown to be active financial agent of corporation with general charge, control, and supervision of its business affairs, held properly admitted in suit of one claiming property under such bill of sale as against another. Burgin v. Marx [Ala.] 48 S 348. Agent of corporation exclusively in charge of buying and selling grain for it held to have **authority to bind company to pay for reports of Interstate Commerce Commission** necessary to give him complete information as to certain rates, charges, etc., since such power was one reasonably necessary and proper to carry into effect his main power. Law Reporting Co. v. Elwood Grain Co., 135 Mo. App. 10, 115 SW 475.

81. Third parties held justified in assuming that president and treasurer had authority to execute note and discharge note of another corporation in which it was interested, and that they were not bound by by-laws limiting powers of such officers in absence of knowledge thereof. Bacon v. Montauk Brew. Co., 130 App. Div. 737, 115 NYS 617.

82. If express authority of inspector of street railway company did not invest him with express authority to dispose of body of person killed, provide for its burial and bind company for its expense, emergency of the accident invested representative of company highest in authority who was then present with power to do everything proper to free the track and relieve the employes from the custody of the body. Heinrich v. Pittsburg R. Co., 36 Pa. Super. Ct. 612.

83. See post, § 15K.

84. See post, § 15L.

liable at the election of a party dealing with the agent.[85] So also, the corporation may ratify the acts of its agent in the latter case and make them its own.[86] When acting in the interest of themselves or third parties, subject to exception in favor of innocent parties, the general rule is that acts of officers of a corporation, in any transaction in which both the corporation and they themselves individually are interested, do not bind the corporation unless specially authorized or ratified.[87] The corporation is not bound when acts of officers and agents are not authorized by it,[88] or when the persons upon whose acts the liability in question is predicated are not the corporation's agents,[89] or when it clearly appears that the corporation was not intended to be bound.[90] Acts of corporate officers which do not violate any statute

85. Agent contracting is primarily liable, but corporation principal can also be held. Bryant Lumber Co. v. Crist, 87 Ark. 434, 112 SW 965; Mississippi Val. Const. Co. v. Abeles & Co., 87 Ark. 374, 112 SW 894.

86. Contract was by agent with third person for undisclosed principal, and corporation might have recovered sums due and unpaid to agent, but, where corporation refused to recognize contract or accept sum due agent, it was estopped from subsequently asserting claim to same. Wilcox-Rose Const. Co. v. Evans, 9 Cal. App. 118, 98 P 83.

87. Cancellation of debt owing corporation, by its secretary for his own benefit, held not binding on corporation. McCloskey v. Goldman, 62 Misc. 462, 115 NYS 189. President of corporation held to have no authority to confess judgment against corporation on claim in which he was interested, even though there was no fraud on his part, particularly in absence of authority. Arizona Mining & Trading Co. v. Benton [Ariz.] 100 P 952. Rule of commercial law is that one who receives from an officer of corporation the note of such corporation in payment or as security for personal debt of such officer does so at his peril, and prima facie act is unlawful and void in hands of payee. De Jonge & Co. v. Woodport Hotel & Land Co. [N. J. Law] 72 A 439. Evidence that corporation treasurer executed note for personal debt held improperly excluded in suit by one claiming as bona fide holder and admissible to shift burden of showing holding in good course upon plaintiff. Id.

88. Where it was not part of president's duty, there was no agreement or authorization that he should do it, no agreement to pay for it or any showing that benefit inured to corporation, it was not liable for sums spent by president for dinners, entertainment and incidentals, to stockholders and prospective buyers of stock. Ebner v. Alaska Mildred Gold Min. Co. [C. C. A.] 167 F 456. Agent of corporate directors in **drawing contract** cannot bind them by arrangement with other party intended to deceive directors as to binding effect of contract. Callanan v. Keeseville, etc., R. Co., 131 App. Div. 306, 115 NYS 779. Actual authority of agent or manager of corporation organized for buying grain, etc., held not to authorize **speculations** in grain. Farmers' Co-Op. Shipping Ass'n v. Adams Grain Co. [Neb.] 122 NW 55. Defendant corporation held not liable on **note** where there was no evidence that note was executed by any of its authorized officers. Schwartz v. Horn Michael Co., 113 NYS 611. In absence of authority of president of corporation in question to enter into **contract with agents for sale of property**, deposit of money in escrow under contract made by agent does not bind corporation. Black v. Harrison Home Co. [Cal.] 99 P 494. Resolution authorizing sale of property held not to authorize contract not for sale of property and entirely outside ordinary course of business of company. Durbrow v. Hackensack Meadows Co. [N. J. Law] 71 A 59. Where supreme general manager of fraternal benefit society had power to perform duties only subject to approval of board of trustees, **employment of attorney** for certain services, which was promptly declined by the trustees, was unauthorized. Red Cross Protective Soc. v. Wayte [C. C. A.] 171 F 643. Judgment against corporation held properly stricken from record in absence of evidence connecting corporation with **account** sued on, or from which amount corporation ought to pay, if any, might be determined except record of judgment by another against plaintiff for such amounts. Ebner v. Alaska Mildred Gold Min. Co. [C. C. A.] 167 F 456. Incorporated body is not liable for **false representations** of agents unless authorized. Mutual Reserve Life Ins Co. v. Seidel [Tex. Civ. App.] 113 SW 945. Bank held not liable for fraudulent misrepresentations of its officer to one who was referred to such officer individually and not to bank, where he went to individual and not to bank and representations were made by individual and not to bank and there was no proof that individual acted in his official capacity for bank. Simons v. Cissna, 52 Wash. 115, 100 P 200.

89. Where two persons built building and transferred same to corporation of which they owned stock, they by such transfer extinguished their individual interest in building and became owners of stock. Such persons were not agents of corporation in construction of building. Young v. Rohrbough [Neb.] 121 NW 585.

90. Where president lent money to defendant, and corporation had not authorized president to loan its money but owed more than the amount of the loan to the president, and bookkeeper was directed to charge the sum to the president, the indebtedness was to president, not corporation. Laughlin v. Ledgerwood, 240 Ill. 118, 88 NE 463. Evidence held to show that original agreement entered into between officer of corporation and another was entered into by former in his individual capacity, and not as officer of corporation. In re Roanoke Furnace Co., 166 F 944.

will not be presumed to violate the corporate by-laws or resolutions.[91] The acts of a person who practically owns and controls several corporations and deals with them in a transaction are binding upon the corporation he assumes to act for.[92]

The president.[See 11 C. L. 862]—The president of a private corporation is the presiding officer of its board of directors and of its shareholders, when convened in general meeting.[93] The office itself, however, confers no authority to bind the corporation or to control its property.[94] The president's power as an agent must be derived from the organic law of the corporation,[95] or its by-laws,[96] or by delegation from the directors,[97] and hence, particular acts, like those of other agents, must either be expressly authorized,[98] or implied from the powers expressly conferred,[99] and acts not within the one or the other of these two classes are not binding upon the corporation.[1]

91. Deposit of funds with another corporation where treasurer was officer. In re Smith, Thorndike & Brown Co. [C. C. A.] 170 F 900.

92. Haynes v. Kenosha St. R. Co. [Wis.] 119 SW 568.

93. Ex parte Rickey [Nev.] 100 P 134.

94. Ex parte Rickey [Nev.] 100 P 134; Black v. Harrison Home Co. [Cal.] 99 P 494; Jeanerette Rice & Milling Co. v. Durocher, 123 La. 160, 48 S 780.

95. Ex parte Rickey [Nev.] 100 P 134.

96. Black v. Harrison Home Co. [Cal.] 99 P 494.

97. Ex parte Rickey [Nev.] 100 P 134; Black v. Harrison Home Co. [Cal.] 99 P 494; Jeanerette Rice & Milling Co. v. Durocher, 123 La. 160, 48 S 780.

98. Arizona Mining & Trading Co. v. Benton [Ariz.] 100 P 952. President of corporation, in absence of statutory authority, has no **power to confess judgment** for his corporation without express authority of corporation. Id. Provision of resolution of directors that president have direction of corporate affairs, subject to advice of directors, held not to validate president's **signature of contract** alone where directors had by resolution, under by-law authorizing president to sign contract only when approved by directors, authorized signing of valid contracts by president and secretary. Black v. Harrison Home Co. [Cal.] 99 P 494. Neither president nor treasurer of corporation, in absence of authority, under its charter, by-laws, or resolution of directors has power to make a **sale of property** of the corporation. Brown v. Bass [Ga.] 63 SE 788. In absence of evidence that president or treasurer of corporation was authorized to execute in its behalf contracts of sale, upon which plaintiff's action was founded, such contracts were properly excluded from evidence, and nonsuit properly granted. Id. Where president had **power to employ servants** necessary to conduct of business, such employment is within scope of his authority as between employe and corporation. Model Clothing House v. Hirsch, 42 Ind. App. 270, 85 NE 719.

99. President's power may be implied from habit or custom of doing business. Jeanerette Rice & Milling Co. v. Durocher, 123 La. 160, 48 S 780; Black v. Harrison Home Co. [Cal.] 99 P 494. **Assignments and pledges** by president held under evidence to have implied, if not express, approval of directors. In re Cincinnati Iron Store Co. [C. C. A.] 167 F 486. Showing that officer is "active head" of corporation held insufficient to raise presumption that he had authority to make **sale** of company's rights or property. Brown v. Baas [Ga.] 63 SE 788. Sale of cut trees and logs found on land purchased in state by nonresident land company held to be administrative act within power of its president and chief administrative officer. Jefferson Sawmill Co. v. Iowa & Louisiana Land Co., 122 La. 983, 48 S 428. Ignorance of board of directors of nonresident land company, purchasing timber lands in state, as to acts of president in state relating to sale of logs and as to all litigation growing out of such sale, held to show that board confided all such matters to him and hence were bound by sale of certain logs by him. Id. In absence of any regulation of company, it will be presumed that president of construction company had full **authority to purchase** wire for construction purposes, and that act was not one that required consent and direction of board of directors. Tuttle v. Bracey-Howard Const. Co., 136 Mo. App. 309, 117 SW 86. Evidence held to show president had authority to act for corporation. Id. Where president had **power to hire employes** to conduct firm business, it was within scope of his employment to increase salary of such employes to retain them in firm's employment. Model Clothing House v. Hirsch, 42 Ind. App. 270, 85 NE 719. President is presumed to have **authority to deliver bonds** when issue is authorized. McCormick v. Unity Co., 239 Ill. 306, 87 NE 924. Where neither of signers of **note** of corporation is, in terms, authorized to execute promissory notes, and, so far as record discloses, none of officers, nor all combined, were specifically authorized to do so, yet since power to contract necessarily involves power to create debt, facts of particular instance will be looked to in determining validity of note; hence held, where note was signed by president and secretary, and sealed, though person actually sealing same does not appear, by authority of board of directors, such note is prima facie note of corporation. Second Nat. Bank v. Snoqualmie Trust Co., 83 Neb. 645, 120 NW 182. **Indorsement of notes** considered with agreement of directors, stockholders and officers, and by-law conferring general management of property on president, held to completely authorize such indorsement. Union Iron Works Co. v. Union Naval Stores Co. [Ala.] 47 S 652.

1. Unauthorized **contract to give stock and bonds to employe,** if he would continue in

The vice-president,[See 9 C. L. 784] acting as president and general manager, may bind the corporation by a contract within the scope of his general authority of the offices thus being filled by him.[2]

The secretary [See 11 C. L. 863] is the keeper of the seal and books of the corporation and the general organ of communication with the public.[3] He often performs a wide range of duties,[4] and is sometimes declared to be a general officer,[5] but, on the other hand, it is held that he is not an officer of general power and authority.[6] In most cases, however, his authority to do particular acts must be derived by a proper delegation thereof.[7]

The treasurer.[See 9 C. L. 784]

Business manager, salesman, etc.[See 11 C. L. 863]—A general manager's authority is as broad as the scope of his employment and agency, and the nature of the corporate business,[8] that is to say, it is co-extensive with general scope of the corporation's business[9] or the particular branch thereof instrusted to his management.[10]

service, held not binding when not ratified by directors. Minshull v. New Jersey Terminal R. Co., 76 N. J. Law, 684, 71 A 663. President held without **authority to institute suit** where no powers were expressly delegated to him by board and he is not shown to have had management of entire business of corporation. Jeanerette Rice & Milling Co. v. Durocher, 123 La. 160, 48 S 780.

2. Has authority to sell stock in trade in ordinary course of business and to receive and accept in payment therefor cash or accounts against any other person, and where vice-president in such manner sells goods and agrees to accept account of purchaser against president of corporation in part payment and contract is fulfilled and such partial payment received, corporation cannot question authority of vice-president to make such contract in suit for amount represented by account due from president to purchaser after accepting part payment of amount due above such amount in cash. Valley Lumber Co. v. McGilvery [Idaho] 101 P 94. Such authority of vice-president will be presumed in absence of limitations upon his power. Id. Such power to sell held to imply power to accept payment, and power to sell and accept payment held to imply power to determine nature and character of payment. Id. Corporation cannot escape liability in such case because of lack of knowledge or concurrence of corporation in sale, but officers will be presumed to have authority to so act. Id.

3. Stanley v. Sedalia Transit Co., 136 Mo. App. 388, 117 SW 685.

4. Performs much the same functions as partners in general copartnership. Swedish-American Nat. Bank v. Koebernich, 136 Wis. 473, 117 NW 1020; Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Authority to assign note is presumed. Swedish-American Nat. Bank v. Koebernick, 136 Wis. 473, 117 NW 1020.

5. Swedish-American Nat. Bank v. Koebernick, 136 Wis. 473, 117 NW 1020; Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853.

6. Stanley v. Sedalia Transit Co., 136 Mo. App. 388, 117 SW 685.

7. Secretary of corporation has no implied authority to execute and deliver lease on behalf of his corporation. Fischer v. Motor Boat Club, 61 Misc. 66, 113 NYS 56. Secretary held to have no authority to abrogate contract made by majority of board of directors. Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448. Power to make agreements modifying franchise and contract between waterworks company and city is not incident to office of secretary or of superintendent of company. Illinois Trust & Sav. Bank v. Burlington [Kan.] 101 P 649. Such agreement not binding in absence of authority or ratification. Id. No presumption that secretary of corporation has power either to appoint agents or to ratify appointments previously made without authority. Carroll v. Manganese Steel Safe Co. [Md.] 73 A 665.

8. Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 SE 887.

9. Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234. **Power to dispose of corporation's property** depends upon character of business, charter by law, etc. Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 SE 887. General manager held not authorized by virtue of his position, or otherwise to attend bankrupt sale and by acts and declarations create **estoppel precluding corporation from asserting title** to its property. Id. **Building and operation of cotton gin** held so far beyond scope of business manager of corporation whose business was limited to buying, selling, etc., lands, securities, bonds, etc., and also selling and buying general merchandise, that same could only be authorized by express consent of directors. Harrill v. Davis [C. C. A.] 168 F 187. Corporations whose business is stationary are under no duty to furnish **medical services, for employes,** and general officers of corporation cannot bind corporation by contracting for same. Sourwine v. McRoy Clay Works, 42 Ind. App. 358, 85 NE 782. A manager of a private corporation engaged in such business as the selling of lumber at retail has, by virtue of his employment merely, no **authority to borrow money** on the credit of his principal or give the latter's note therefor. Rizzuto v. English Lumber Co., 44 Colo. 413, 98 P 728. Joint note signed by manager and corporation held not binding on corporation where manager had no authority to borrow, corporation did not hold him out as possessing such power, there was nothing in manner

Pleading and evidence of authority. See 11 C. L. 864—Want of power in an officer to make a contract is not available by the corporation as a defense unless pleaded.[11] The rules governing the proof of a corporate agent's authority are in many respects the same as those of ordinary agents,[12] and the authority of an officer to act for a corporation may be established by proof that he was held out to the public as possessing those powers, which he exercised in a given case,[13] or that the corporation has acquiesced in or ratified such acts.[14] In such cases proof of specific authority is not required,[15] and the apparent authority is not affected by secret instructions or limitations.[16] A person relying upon the validity of an act not within the scope of an officer's powers must prove actual authority,[17] and clear, affirmative or strong circumstantial evidence that an agent is acting within the scope of his authority is requisite when seeking to hold a corporation for the illegal act.[18] If the contract is regular in form, the burden rests on the corporation attempting to repudiate it to rebut the presumption of an officer's authority.[19] A presumption of authority is indulged in where a contract is under the seal of the corporation.[20] The authority of an officer or agent, however, is usually a question of fact,[21] to be established by proper evidence.[22]

of conducting business to warrant presumption that manager had such power, and money was not needed to carry on corporate business. Id.

10. Asheville Supply & Foundry Co. v. Mahin, 150 N. C. 738, 64 SE 887.

11, 12. Winer v. Bank of Blytheville [Ark.] 117 SW 232.

13. Winer v. Bank of Blytheville [Ark.] 117 SW 232. Indorsement of note. Id. Authority of subordinate agent of corporation may be established by proof of usage which corporation has permitted to grow up with acquiescence of board of directors. Robert Gair Co. v. Columbia Rice Packing Co. [La.] 50 S 8.

14. Winer v. Bank of Blytheville [Ark.] 117 SW 232. Recognition of agent's contract is sufficient proof of his agency and authority to make contract. Kimball Bros. Co. v. Citizens' Gas & Elec. Co. [Iowa] 118 NW 891. Long continued acquiescence of corporation in judicial sale, after notice to all stockholders and four of five directors, is evidence of original authority. Underfeed Stoker Co. v. American Ship Windlass Co., 165 F 65.

15. See, also, post, next section. Lyon v. West Side Transfer Co., 132 App. Div. 777, 117 NYS 648.

16. See post, this section, subs. K., Apparent Authority, etc. Evidence of cautionary instruction by president to manager of corporation held inadmissible to impeach latter's authority to make contract with plaintiff where such instructions were given in plaintiff's absence and without his knowledge. Forrester-Duncan Land Co. v. Evatt [Ark.] 119 SW 282.

17. Sale of corporation's tangible property not within the apparent scope of the corporation's business (transfer business), not conducted through a broker or for a fixed or customary fee, but under an agreement that all above a certain price should go to the customer procuring the purchaser, was such an unusual contract that party asserting it was required to prove the officer's authority to contract. Lyon v. West Side Transfer Co., 132 App. Div. 777, 117 NYS 648.

18. Bailey v. William Lynch's Sons, 115 NYS 131. Evidence held insufficient to show liability of corporation for act of officers in destroying office partitions. Id.

19. Greensboro Gas Co. v. Home Oil & Gas Co., 222 Pa. 4, 70 A 940. Where contract is one which directors of corporation could authorize officers to make, burden was on person denying contract to show that it was unauthorized. Lyon v. West Side Transfer Co., 132 App. Div. 777, 117 NYS 648.

20. Imbrie v. Schlicht Combustion Process Co., 130 App. Div. 675, 115 NYS 333. Assignment of cause of action in favor of corporation, signed by vice-president and attested by secretary, made by the corporation for purpose of instituting suit and under seal, is valid though not authorized by board of directors where by-law of corporation authorized officers to sign as above to all contracts and conveyances whenever necessary and where there is no evidence that instrument was improperly executed. Id. Deed executed by president of corporation and bearing corporate seal raises presumption that he was authorized to execute instrument. Sibly v. England [Ark.] 119 SW 820. Seal of corporation prima facie evidence that officers executing instrument were duly authorized, and that the execution thereof was act of corporation. Stone v. Gray [Cal. App.] 103 P 155. Evidence held to show that vice-president and cashier of bank had authority to assign note. Id.

21. Whether president acted as agent is question for jury. Loh v. Broadway Realty Co. [N. J. Law] 71 A 112. Whether an agent acted within the scope of his employment as to ascertain matter is a matter of proof. Southern R. Co. v. Hazlewood [Ind. App.] 88 NE 636. Where one is shown to be in charge of corporation's office, to be local manager, and to have control of power and service furnished by corporation, evidence is sufficient to send question to jury. Kimball Bros. Co. v. Citizens' Gas & Elec. Co. [Iowa] 118 NW 891. Evidence insufficient to show authority conferred or agreement binding water company to extend mains in city. Illinois

(§ 15) *K. Apparent authority of officers and agents and estoppel of corporation and of others.*[23] See 11 C. L. 864—A corporation is bound by the acts of agents or officers within the scope of their apparent authority,[24] and is estopped to deny

Trust & Sav. Bank v. Burlington [Kan.] 101 P 649.

22. Witness who has shown some competency may testify that another is manager of corporation, and that he signed letters and acted as such. Kimball Bros Co. v. Citizens' Gas & Elec. Co. [Iowa] 118 NW 891. In action against hotel company for services rendered lessee of hotel, where recovery was sought from company on ground that secretary had agreed that company would pay plaintiffs, admission of unpaid orders signed by lessee and addressed to company's cashier, calling for payment to other servants, was irrelevant and immaterial. Curry v. Congress Hall Hotel Co., 75 N. J. Law, 735, 73 A 124. Such evidence, operating to induce the jury to believe that the secretary possessed the necessary authority, was prejudicial. Id.

23. Search Note: See note in 5 Ann. Cas. 223.

See, also, Corporations, Cent. Dig. §§ 1588, 1602-1610; Dec. Dig. § 399; 10 Cyc. 903-952, 1001; 21 A. & E. Enc. L. (2ed.) 853.

24. Black v. Harrison Home Co. [Cal.] 99 P 494; Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853; Lyon v. West Side Transfer Co., 132 App. Div. 777, 117 NYS 648; Francis v. Spokane Amateur Athletic Club [Wash.] 102 P 1032. Corporation must act through its officers and agents and cannot deny acts of its officers when acting within corporate powers, and another has dealt with such officers in good faith, such act not being ultra vires. Spencer v. Alki Point Transp. Co. [Wash.] 101 P 509. Secretary and treasurer of real estate corporation shown to have been accustomed to handle all correspondence, make and accept offers on lands held for sale, held to have been authorized to make contract in question. Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Agent authorized to receive and dispose of corporate correspondence, who answered letter addressed to corporation offering it reports of Interstate Commerce Commission, and ordered copy thereof, held to have bound corporation by act since corporation had, by permitting him to control their correspondence, permitted third persons to reasonably conclude he was acting within scope of authority. Law Reporting Co. v. Elwood Grain Co., 135 Mo. App. 10, 115 SW 475. Where business of corporation, composed of few persons, is loosely conducted mainly by an officer called "general manager," who is urged by the other members to make contracts and incur obligations on behalf of the corporation, pursuant to a policy approved by them, and not ultra vires, and, such an obligation having been incurred, and the consideration therefor having been accepted by the board of directors, composed of practically all the members of the corporation, and having inured to its benefit, the corporation will be considered bound therefor. Crusel v. Houssiere-Latreille Oil Co., 122 La. 913, 48 S 322. Evidence that treasurer was "active head" of corporation held not to bring case within rule that where corporate officer has been accustomed to make certain contracts for corporation and it has acquiesced in them it will be bound by new contract of that kind entered into by him where it does not appear that officer ever before assumed to so act. Brown v. Baas [Ga.] 63 SE 788. Where assistant bank cashier had charge of bank and represented it in all negotiations for erection of bank building, which bank took possession of subsequently, such facts were sufficient to raise presumption of authority on him to contract for **construction of building.** Merchants' Bank v. Acme Lumber & Mfg. Co. [Ala.] 49 S 782. Building of bank part of legitimate business of bank. Id. Evidence showed agent of construction company clothed with apparent authority to make **purchase of material.** Mississippi Val. Const. Co. v. Abeles & Co., 87 Ark. 374, 112 SW 894. Where general manager was sole active manager of all affairs, and directors knew of the authority assumed, and that he orally contracted for **work on corporation's building which was not in specifications,** and such work was accepted by the corporation, it was bound to pay therefor. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766. Where general manager of corporation had apparent authority to order **extra work,** directions by him for performance of such work were necessarily and of themselves a waiver of requirements that such work be undertaken only on written orders from architects. Id. Labor and materials not "alterations" within contract, requiring written order of architects. Id. Scope and character of business allowed general agent held to fully warrant any one dealing with him, without actual knowledge, to believe he had authority to collect as well as to sell lumber, and **indorsement and collection of check** by general agent constituted valid payment, though same was misappropriated. Perry v. Sumrall Lumber Co. [Miss.] 49 S 263. Change of relation not published until 10 days after conversion. Id. Where auditor of corporation, acting within scope of apparent authority, made contract with servant for **settlement of claim for injuries** and agreed to pay him sum of money and to care for him until well, in consideration of release, corporation could not avoid liability on ground that auditor could only settle on cash basis. Maloney v. Hudson River Water Power Co., 133 App. Div. 499, 117 NYS 601. Where corporate **notes** secured by mortgage were assigned by payee to maker's president with knowledge and intention that he should negotiate them for the corporation's benefit, such corporation cannot complain as against an innocent purchaser that the president used the notes for his own benefit. Spencer v. Alki Point Transp. Co. [Wash.] 101 P 509. Corporate maker of negotiable instrument cannot complain that bona fide purchaser relied upon officer's assurance that notes were valid obligations, where maker held officer out to world as man worthy of trust and confidence. Id. Evidence held to clearly show that agent of corporation organized

that its agents possess all the authority which it gives them the appearance of having,[25] regardless of secret limitations,[28] but provided, of course, the person so dealing with such agent has not actual knowledge of the limits of the latter's authority.[27] The authority of an agent, therefore, need not be express, but may be implied from the conduct of the corporation's affairs, or from the knowledge of its directors and their neglect to make objection.[28] So, also, a corporation is bound by the acts of proper officers who represent that corporate action has been taken and thereby mislead another into acting on the faith of it,[29] and the same rule may be invoked to establish an estoppel against a stockholder.[30] A corporation cannot claim that it should not be bound or estopped by the action of its executive committee, merely because a member thereof is a competitor in business, when such member was selected with full knowledge of the facts.[31] A corporation which waives statutory requisites, as to service of notice upon it, will be estopped from insisting that the notice for that reason was void.[32]

Acceptance of benefits See 11 C. L.865 will preclude the repudiation of contracts [33] or transactions [34] of officers and agents in the corporation's behalf.

for buying grain, etc., had no apparent authority to engage in **speculation in grain.** Farmers' Co-Op. Shipping Ass'n v. Adams Grain Co. [Neb.] 122 NW 55.

25. Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853; Southern R. Co. v. Hazlewood [Ind. App.] 88 NE 636. If president acted as agent of corporation in directing and supervising construction of building contracted for, corporation was estopped from complaining as to same. Loh v. Broadway Realty Co. [N. J. Law] 71 A 112. Corporation **held estopped** to question sale made by agent having apparent authority to sell. Wilcox-Rose Const. Co. v. Evans, 9 Cal. App. 118, 98 P 83. Corporation **held not estopped** to deny unauthorized contracts signed by president where such contracts were first and only contracts signed without authority, all other contracts having been in strict accord with by-laws and resolutions of directors. Black v. Harrison Home Co. [Cal.] 99 P 494.

26. Where corporation clothed agent with apparent authority, it was liable for material purchased, regardless of secret instructions to agent to purchase from another. Mississippi Val. Const. Co. v. Abeles & Co., 87 Ark. 374, 112 SW 894. Where person had complete charge of and was full manager of corporation engaged in buying and selling land on commission and was so held out to the world, a contract by him as manager was binding on the corporation, regardless of private instructions by the president. Forrester-Duncan Land Co. v. Evatt [Ark.] 119 SW 282.

27. Custom of manager to hire servants insufficient to bind corporation on contract of employment for specified time, when employe had actual knowledge of manager's authority. Francis v. Spokane Amateur Athletic Club [Wash.] 102 P 1032.

28. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766; Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853; In re Gouverneur Pub. Co., 168 F 113. Rule applied to **acts of president.** Robert Gair Co. v. Columbia Rice Packing Co. [La.] 50 S 8. President has such power as may arise from assumption and exercise with apparent consent and acquiescence of corporation. Black v. Harrison Home Co. [Cal.] 99 P 494; Jeanerette Rice & Milling Co. v. Durocher, 123 La. 160, 48 S 780. Evidence held to show that corporation was bound by **acts of treasurer** and sole manager who with wife was owner of substantially all stock. Winer v. Bank of Blytheville [Ark.] 117 SW 232. Authority to make certain **contracts.** Black v. Harrison Home Co. [Cal.] 99 P 494. Evidence held to warrant conclusion that **guaranty** of corporation was given by secretary with knowledge and acquiescence of president and directors. Robert Gair Co. v. Columbia Rice Packing Co. [La.] 50 S 8.

29. Crook v. International Trust Co., 32 App. D. C. 490. Officers are representatives of corporation charged with dealing with others, and persons dealing with them have right to assume validity of their actions, in respect to matter within their power and authority. Id.

30. Where false statement of action at a corporate meeting is made and another party is misled thereby to his detriment, parties making same, in person or by proxy, may be estopped to deny that action was taken. Crook v. International Trust Co., 32 App. D. C. 490.

31. Bankers' Money Order Ass'n v. Nachod, 128 App. Div. 281, 112 NYS 721.

32. Notice of attorney's lien which was insufficient being sent by mail, but which was acted upon in seeking settlement. Abbott v. United R. Co. [Mo. App.] 119 SW 964. Agreed statement of facts held to conclusively show actual receipt of notice by corporation before settlement with injured person seeking recovery. Id.

33. Corporate contract of employment entered into at meeting at which stockholders and directors were present was not invalid because no record evidence was made of it at that time, since plaintiff performed and the corporation received the benefits contemplated. Kropp v. Hermann Brew. Co. [Mo. App.] 119 SW 1066.

34. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945. Corporation knowingly receiving money on note, indorsed by executive committee, is estopped

(§ 15) *L. Ratification of unauthorized acts.*[35]—See 11 C. L. 865—A corporation, like an individual, may become bound by the ratification of unauthorized acts of its agents,[36] provided such acts are within the corporate powers.[37] It is often said that a corporation may ratify even an ultra vires act so as to bind itself when it has received and retained benefits on account thereof,[38] but this principle properly involves estoppel rather than ratification,[39] and ratification in any case usually is an estoppel in pais.[40] Unauthorized acts cannot be ratified except by a person or persons having authority to authorize the same or to bind the corporation originally;[41] unauthorized acts of a board of directors require, therefore, ratification by the stockholders,[42] and ratification cannot be inferred from the acts of the very officer who did the unauthorized act.[43] Nor can the corporation itself ratify an action on its part fraudulent as to its stockholders, without their acquiescence and consent.[44] Briefly stated, ratification may be effected by recognition of the obligation,[45] acquiescence,[46] or acceptance of benefits.[47] Full knowledge of the facts is essential in

to question authority of such committee. Tilden v. Goldy Mach. Co., 9 Cal. App. 9, 98 P 39. Corporation accepting fruits of license is estopped to say it did not execute instrument. Belzoni Oil Co. v. Yazoo & M. V. R. Co. [Miss.] 47 S 468. Where manager of corporation hired attorney to perform certain services, without authority, and act was promptly repudiated by trustees, corporation did not receive fruits of services or do any act estopping it from denying the manager's authority. Red Cross Protective Soc. v. Wayte [C. C. A.] 171 F 643.

35. **Search Note:** See Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426; 10 Cyc. 820-823, 913, 1069-1085, 1202; 21 A. & E. Enc. L. (2ed.) 853.

36. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232; Parsons Mfg. Co. v. Hamilton Ice Mfg. Co. [N. J. Law] 73 A 254; Lyon v. West Side Transfer Co., 132 App. Div. 777, 117 NYS 648; Black v. Harrison Home Co. [Cal.] 99 P 494.

37. Where one corporation has no right to organize another, its acts attempting to do so cannot be ratified. Schwab v. E. G. Potter Co., 194 N. Y. 409, 87 NE 670.

38. Bolzin v. Gould Balance Valve Co., [Iowa] 118 NW 40.

39. See ante, § 8, subd. Estoppel to Assert Ultra Vires.

40. Parsons Mfg. Co. v. Hamilton Ice Mfg. Co. [N. J. Law] 73 A 254.

41. Unauthorized admission of insolvency by corporate officer, like treasurer, cannot be made effective by ratification by board of directors, who also are unauthorized to create bankruptcy. In re Burbank Co., 168 F 719. Knowledge of board of directors that manager violated by-laws cannot constitute ratification, since by-laws governed entire corporation. Hoffman v. Farmers' Co-Op. Shipping Ass'n [Kan.] 97 P 440. Officer and practically only stockholder cannot approve assignment of obligation from himself to corporation not authorized by any act of corporation as such so as to bind corporation therefor. In re Roanoke Furnace Co., 166 F 944.

42. Unauthorized act of prior board of directors in selling corporate property to certain of their numbers without whom quorum would not have been present cannot be ratified by new board not composed of entire number of stockholders of corporation but ratification of such acts can only be by all of stockholders. Nueces Val. Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

43. In re Roanoke Furnace Co., 166 F 944.

44. Fraudulent issuance of stock by corporation without consideration. Shaw v. Staight, 107 Minn. 152, 119 NW 951.

45. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 282. Corporation undertaking to furnish power under contract made by its local manager held to have ratified contract. Kimball Bros. Co. v. Citizens' Gas & Elec. Co. [Iowa] 118 NW 891. Purchase by one newspaper of another and assumption of indebtedness growing out of it to officer of corporation held binding where there was no fraud or concealment, and approval and assumption were **by express resolution** of board of directors. In re Gouverneur Pub. Co., 168 F 113. Ratification held to have been effected by **declaration of officer** so as to validate the act of inspector in disposing of body of one killed by it, and arranging for its burial at the company's expense where plaintiff went to superintendent of division before he took any action with reference to the burial of the body and superintendent told him it would be all right and that some one would be up to see him at time of burial. Heinrich v. Pittsburg R. Co., 36 Pa. Super. Ct. 612. **Part payment** of principal of note, indorsed by treasurer in corporation's name, after consultation with other officers, directors, and stockholders of corporation, held ratification of indorsement. Van Norden Trust Co. v. Rosenberg, 62 Misc. 285, 114 NYS 1025.

46. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232. Long continued acquiescence of corporation in judicial sale which was made after notice to all stockholders, including four out of five directors, is sufficient proof of ratification if original authority was lacking. Underfeed Stoker Co. v. American Ship Windlass Co., 165 F 65. Where a traction company shifted its right of way to corporation's property with latter's knowledge and consent, or if it shifted such right of way without corporation's knowledge but latter consented after being advised of facts, traction company could not be ousted from possession. Knowles v. Northern Texas Trac. Co. [Tex.

all cases.[48] The question of ratification is often one of fact,[49] and may be evidenced from the facts and circumstances, the acts of the parties, and the nature of the subject-matter involved,[50] but a presumption of ratification will arise from slight circumstances, when the unauthorized act of an agent is beneficial to a corporation.[51] A person denying a contract which a corporation's agents could make or ratify has the burden of showing that there was no ratification.[52]

(§ 15) *M. Notice to or knowledge of officers or agents as notice to or knowledge of corporation.*[53]—See 11 C. L. 806—Notice to or knowledge of officers or agents as to matters pertaining to their duties is usually chargeable to the corporation,[54]

Civ. App.] 121 SW 232. Contract for sale of gas by natural gas company, though invalid as being entered into at directors' meeting, when quorum was not present, held ratified by subsequent acts of purchaser pursuant to agreement. Greensboro Gas Co. v. Home Oil & Gas Co., 222 Pa. 4, 70 A 940. Unanimous **acquiescence of stockholders** as well as by vote of majority in corporate meeting. Kidd v. New York Security & Trust Co. [N. H.] 71 A 878.

Failure to repudiate promptly: When knowledge is brought home to corporation of unauthorized act of an agent, it must promptly disavow it, or it will be held to have ratified it. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232. Unauthorized act of secretary presumed ratified unless corporation dissented within reasonable time. Fischer v. Motor Boat Club, 61 Misc. 66, 113 NYS 56. Where party does work or furnishes material to corporation to knowledge of its officers, without proper dissent on part of corporation, it will be held to have ratified contract and be liable thereunder. Id. Where president of agent corporation was vice-president of vendor corporation and relations between two corporations and their officers were close, and where after contract had been drawn up by agent corporation and negotiations broken off by its president and upon application to seller corporation purchasers were referred back to president of agent, contract of sale drawn up by latter prior to breaking off negotiations held binding on seller corporation. Bittrick v. Consolidated Imp. Co., 51 Wash. 469, 99 P 303. Corporation held to have acquiesced in or ratified action of its secretary in signing resolution setting forth admission of inability to pay debts and willingness to be adjudicated bankrupt, where, although new board of directors was elected three months after filing petition in bankruptcy, nothing was done to vacate receivership established at time petition was filed. In re Lisk Mfg. Co., 167 F 411.

47. Consideration of obligation accepted by directors and inured to corporation's benefit. Crusel v. Houssiere-Latreille Oil Co., 122 La. 913, 48 S 322. Corporation by newspaper advertisements, representative of president who together with his wife was majority stockholder, acts of corporation in improving and beautifying tract in question, and by accepting benefits of sale of land upon representation of its president and selling agents, held to have ratified acts of agents and dedicated tract as park. Shertzer v. Hillman Inv. Co., 52 Wash. 492, 100 P 982. Principle of receipt of benefits as ratification of unauthorized act held inapplicable under facts. Rizzuto v. English Lumber Co., 44 Colo. 413, 98 P 728. Ratification by acceptance of benefits resulted where general manager of corporation knew of negotiations of its attorney with attorney for opposite party as to compromise, and ordered settlement without objection to terms, and company accepted benefit by seeking to enforce it. Trenton St. R. Co. v. Lawlor [N. J. Err. & App.] 71 A 234. Suit by corporation to recover value of material sold by manager to himself ratifies sale. Argo Mfg. Co. v. Parker, 52 Wash. 100, 100 P 188.

48. Corporation held to have notice of facts. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232. Evidence held to show that lease by secretary was with knowledge of corporate officer. Fischer v. Motor Boat Club, 61 Misc. 66, 113 NYS 56.

49. Evidence held to warrant submission to jury. Fischer v. Motor Boat Club, 61 Misc. 66, 113 NYS 56.

50. Parsons Mfg. Co. v. Hamilton Ice Mfg. Co. [N. J. Law] 73 A 254. Meeting of corporation at premises leased without authority was evidence of possession and ratification. Fischer v. Motor Boat Club, 61 Misc. 66, 113 NYS 56. In action against public service corporation and light company for personal injuries by electric wires, receipts of latter company as agent of former were admissible in evidence, for, if conceded to be incompetent on question of agency, they were admissible to show acquiescence in statement on such receipts, that public service company held itself out as principal which with other evidence was apparent, and therefore such receipts were competent as link in establishing ratification of acts of ostensible agent. Laughlin v. Southern Public Service Corp. [S. C.] 64 SE 1010. Evidence held to support finding of corporation's ratification of agent's act in consenting to appropriation of land for railway right of way. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232.

51. Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232.

52. Lyon v. West Side Transfer Co., 132 App. Div. 777, 117 NYS 648.

53. **Search Note:** See notes in 2 L. R. A. (N. S.) 993; 6 Ann. Cas. 679.

See, also, Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 423; 10 Cyc. 915, 1053-1065; 21 A. & E. Enc. L. (2ed.) 913.

54. Where person representing corporation in purchase of personal property had **knowledge of fraud** in the transfer, corporation will be held to have such notice also and not to be innocent purchaser. Beinert v. Tivoli & Co., 62 Misc. 616, 116 NYS 4. **Where cashier has information sufficient to put him**

but the rule is inapplicable when the officers act individually and not as representatives,[55] nor does it apply where the presumption of communication, upon which the rule is based, is rebutted by the circumstances.[56] Notice to the partner of a corporate officer will not be imputed to the corporation,[57] nor will the corporation and innocent stockholders be charged with the knowledge of other stockholders.[58]

(§ 15) *N. Admissions, declarations, and representations of officers and agents.* [59]—See 11 C. L. 867—The mere fact that one is an officer does not make his declarations or admissions binding upon the corporation,[60] and hence the corporation's responsibility therefor must be predicated upon express authorization [61] or authority implied from the nature and scope of the declarant's office or agency,[62] or else upon ratifica-

on inquiry, bank was bound to make inquiry. Groff v. Stitzer [N. J. Eq.] 72 A 970. **Where corporation holds stock in another corporation,** the former is chargeable with notice of business methods of such other corporation under certain by-law which are known by its officer. Kroger Co. v. Butchers' Hide Ass'n, 8 Ohio N. P. (N. S.) 222. Corporation has **knowledge of violation of rules** and acquiesces therein whenever particular agent of corporation who is charged with enforcement of rule in question knows of its violation and acquiesces therein. Central of Georgia R. Co. v. Mobley [Ga. App.] 64 SE 300. Agent's breach of duty in failing to inform corporation of violation of switching rules cannot effect rights arising from his knowledge which are imputable to corporation. Central of Georgia R. Co. v. Mobley [Ga. App.] 64 SE 300. **Notice to corporation attorney** regarding matters within his authority. Vogemann v. American Dock & Trust Co., 131 App. Div. 216, 115 NYS 741. Where record shows defendant to be domestic corporation consisting solely of judgment debtor, his wife, and attorney, and that latter, who was secretary of corporation, and judgment debtor, who was president, filed affidavits opposing certain motion, it must be held that company had **notice of proceedings** through its officers. Brady v. Shary, 62 Misc. 236, 114 NYS 852.

55. Knowledge incidentally acquired by **officers of corporation** when they are not acting officially is not notice to corporation. Chaffee v. Berkley [Iowa] 118 NW 267. Corporation held not served with notice where notice was addressed to individual as manager without stating of whom or what he was manager and officer served same according to return, not on corporation but upon individual. Cole v. Utah Sugar Co. [Utah] 99 P 681. Evidence that plaintiff's counsel told defendant's treasurer prior to latter's purchase of land that there was great danger in doing so held inadmissible against corporation in absence of proof that treasurer was defendant's representative. Bunker v. Manchester Real Estate & Mfg. Co. [N. H.] 71 A 866.

56. When agent forms purpose of dealing with corporation's property for his own benefit or for the advantage of other persons opposed in interest, he ceases in fact to be agent in good faith, and presumption of disclosure of facts to corporate principal no longer prevails. Brooklyn Distilling Co. v. Standard Distilling & Distributing Co., 193 N. Y. 551, 86 NE 564. Where president of one corporation is also interested in another and forms purpose of establishing monopoly, and in furtherance of such purpose but without notice to the corporation of which he is president procures a lease from the latter corporation to the corporation in which he is only interested, the latter cannot defend a suit for the collection of rent on the grounds that the lease was in furtherance of a monopoly, since wrongful purpose of president will not be imputed to corporation. Id.

57. Though notice to one partner is usually constructive notice to the other. Baskins v. Valdosta Bank & Trust Co., 5 Ga. App. 600, 63 SE 648.

58. Seeger Refrigerator Co. v. American Car & Foundry Co., 171 F 416.

59. Search Note: See Corporations, Cent. Dig. §§ 1685-1691; Dec. Dig. § 422; 10 Cyc. 373, 374, 915, 947-949; 21 A. & E. Enc. L. (2ed.) 9, 3.

60. Blanchard-Carlisle Co. v. Garritson [Ind. App.] 87 NE 151.

61. Declarations of corporate officers would impose liability upon corporation in action of slander of title if made by officers in their official capacity and by direction of corporation. Continental Realty Co. v. Little [Ky.] 117 SW 310.

62. Admissibility of declarations and admissions of agents or officers depends upon whether they are within scope of such persons' powers and duties and constitute part of res gestae. Blanchard-Carlisle Co. v. Garritson [Ind. App.] 87 NE 151; Rapp v. Easton Transit Co. [N. J. Law] 72 A 38; Case Plow Works v. Pulsifer [Kan.] 98 P 787. Corporate officer cannot bind corporation by declarations or admissions unless they accompany the doing of an authorized act. In re Coventry Evans Furniture Co., 166 F 516. Not binding unless within scope of agency. McCloskey v. Goldman, 62 Misc. 462, 115 NYS 189. Admission made by secretary and treasurer of company is inadmissible where it does not appear what his duties were or whether he was engaged in his own or company's business, or that he had any connection with transaction either before or after alleged admission. Blanchard-Carlisle Co. v. Garritson [Ind. App.] 87 NE 151. Whether corporation's liability for **slander of title** can be predicated upon declarations of officer depends, if not expressly authorized, upon whether such declarations were within scope of officer's apparent authority. Continental Realty Co. v. Little [Ky.] 117 SW 310.

Declarations relative to past transactions are inadmissible where they do not relate to matters under charge of declarant and with respect to which he is authorized to

tion.[63] A shareholder cannot bind his corporation by his acts or admissions in the mere capacity of a shareholder.[64]

(§ 15) *O. Delegation of authority by directors.*[65]—See 9 C. L. 791.

(§ 15) *P. Personal liability of officers and agents.*[66]—See 11 C. L. 867—An officer of a corporation is usually not bound by agreements entered into on behalf of the corporation,[67] except when he is held for acts beyond his authority,[68] though of course an agent may, by the form of promise and manner of signature, fix upon himself a personal liability,[69] and the agent's or officer's intention not to be bound personally must be expressed clearly and unequivocally,[70] even though the agent or officer is avowedly acting as such;[71] but sometimes parol evidence is admissible to show the intention of the parties,[72] and in some cases the liability of officers and

give information. Case Plow Works v. Pulsifer [Kan.] 98 P 787. Statement of officer of corporation as to cause of accident made day after same, with nothing to show that company delegated authority to him to make admissions generally, or that he personally knew anything about what caused accident, is not part of res gastae or binding on corporation. Rapp v. Easton Transit Co. [N. J. Law] 72 A 38. Recitals of past events in letter by an officer of corporation while acting wholly in personal capacity, and not in discharge of an official duty, are wholly incompetent evidence to charge defendant corporation of negligence in a personal injury action. Statler v. Ray Mfg. Co., 195 N. Y. 478, 88 NE 1063. Statements made by traveling agent while engaged in business of company but not in particular business referred to in the conversation, as to which his statements were narrative of past transaction or knowledge gained in past transaction, are not binding on corporation. Case Plow Works v. Pulsifer [Kan.] 98 P 787. Declarations or admissions made by president and general manager of corporation, who was the corporation's alter ego as distinguished from mere agent, relating to subject-matter of controversy, would be binding though made subsequent to negotiations. Home Ice Factory v. Howells Min. Co. [Ala.] 48 S 117. In assumpsit for price of coal sold, conversations of president wherein he acknowledged that he got order not to ship, explaining why he shipped and whether he expected defendant to pay contract price, held admissible. Id.

63. Admissions and conversations by officer of corporation held binding under evidence, since if unauthorized they were ratified. Dornfeld-Kunert Co. v. Volkmann, 138 Ill. App. 421.

64. Shareholder held to have no authority to release debt due corporation. McCloskey v. Goldman, 62 Misc. 462, 115 NYS 189.

65. Search Note: See Corporations, Cent. Dig. §§ 1329-1332; Dec. Dig. § 305; 10 Cyc. 770-774; 21 A. & E. Enc. L. (2ed.) 856.

66. Search Note: See notes in 28 L. R. A. 421, 422; 55 Id. 751; 1 L. R. A. (N. S.) 258; 6 Id. 872; 48 A. S. R. 913; 74 Id. 610; 6 Ann. Cas. 1000; 8 Id. 383.

See, also, 21 A. & E. Enc. L. (2ed.) 879; 12 A. & E. Enc. P. & P. 60.

67. In making contract or conveyance. Falls City Lumber Co. v. Watkins [Or.] 99 P 884. Where one signs for corporation in his capacity as its president and not in its individual capacity, corporation alone is bound. Pease v. Globe Realty Co. [Iowa] 119 NW 975. Promissory note. Id.

68. Falls City Lumber Co. v. Watkins [Or.] 99 P 884. Where president and secretary of corporation executed note of corporation and signed same as officers without authority, they were manifestly not liable as makers of the note, and if liability be predicated upon doctrine of agency, rendering agent liable for unauthorized act, the signer's liability would be for breach of implied warranty as to authority, and such liability could not be enforced in suit seeking to hold them as indorsers. McDonald v. Luckenbach [C. C. A.] 170 F 434. Liability of agent as exceeding authority of undisclosed principal held not available, since officers in signing corporation were only doing acts necessary to make corporate note, and payee had knowledge as to infirmity of paper, if any, Id.

69. Gavazza v. Plummer [Wash.] 101 P 370.

70. Gavazza v. Plummer [Wash.] 101 P 370. Contract reciting "I, W. H. P., Treasurer of S. S. & C. Co., agree, etc.," signed by W. H. P., Treas., held binding as individual obligation of W. H. P., word "Treas." not affecting same, since it was mere descripto personae. Id. Evidence held to show indorsement of corporate notes by owners individually authorizing recovery against them. Reedy Elevator Co. v. Silberstein, 117 NYS 245. Petition against defendant on note indorsed by him and others who were directors of corporation, alleging that note was indorsed with intention that indorsers should be liable for deficiency after foreclosure of mortgage held sufficient on demurrer. Kalkaska County State & Sav. Bank v. Kalkaska Canning Co., 154 Mich. 703, 15 Det. Leg. N. 931, 118 NW 577. No specific allegation of defendant's intention necessary. Id.

71. Gavazza v. Plummer [Wash.] 101 P 370.

72. Where contract between corporation and individual on one part and attorney on other part was signed by individual as president and as stockholder, question whether such individual wished to be bound as stockholder must be determined by parol evidence. Lynch v. McDonald [Cal.] 102 P 918.

73. Under Neg. Inst. Act Pa. May 16, 1901 (P. L. 203), § 63 et seq., providing that person placing signature on instrument other than maker, drawer, or acceptor, shall be deemed indorser, unless he clearly indicates intention to be otherwise bound, etc., presi-

agents in this regard must be determined with reference to the statutory provisions applicable to the transaction in hand.[73] On the other hand, an individual who accepts a contract of a corporation with full knowledge of the circumstances cannot object that the president virtually owns all the stock and should be personally bound.[74]

A corporate officer is not relieved from personal responsibility for a tort merely by the fact that he acted in behalf of the corporation,[75] but such liabiltiy is usually predicated upon misfeasance as distinguished from nonfeasance,[76] and an officer cannot be held liable for the torts of his corporation merely because he is such officer at the time the torts are committed.[77]

A misjoinder of counts in suing directors affords cause for general demurrer.[78]

Statutory liabilities. See 11 C. L. 867

(§ 15) *Q. Liability of officers for mismanagement.*[79] See 11 C.L. 867—Officers are personally liable for losses due to mismanagement, as where they are guilty of actual fraud[80] or conspiracy,[81] or where funds are misappropriated[82] in disregard

dent and secretary who executed note of corporation and signed their names in blank did not enlarge their individual liability as indorsers and could not be held except on presentment, demand and notice of nonpayment. McDonald v. Luckenbach [C. C. A.] 170 F 434. Corporation in such transactions is a distinct entity. Id.

74. Contract for attorney's services. Lynch v. McDonald [Cal.] 102 P 918. Attorney deceived as to net earnings of corporation. Id.

75. Fact that president of corporation was acting in behalf of corporation in converting certain goods does not serve to relieve him from personal responsibility. McCrea v. McClenahan, 131 App. Div. 247, 115 NYS 720. Where corporation mortgaged property not owned by it and issued bonds secured thereby, president signing and director voting in favor of execution of such mortgage and issuance of bonds, relying upon statements of manager who thereafter issued prospectus misrepresenting facts which induced certain parties to purchase bonds, director and president were guilty of such conduct as rendered them liable for **fraud.** Lynch v. Southern Mining, Land & Lumber Co., 135 Mo. App. 672, 117 SW 624. Sale of bonds on mortgage covenanting that corporation was "owner" of more than 47,000 acres is fraud on purchasers which will support suit against guilty officers of corporation, where corporation in fact owned less than 1,000 acres. Slater Trust Co. v. Randolph-Macon Coal Co., 166 F 171.

76. Weston Elec. Instrument Co. v. Empire Elec. Instrument Co., 166 F 867.

77. Infringement of patent. Weston Elec. Instrument Co. v. Empire Elec. Instrument Co., 166 F 867. Neither disposition of property by officers of corporation liable for tort, nor defense of suit against corporation, rendered such officers liable as infringers. Id. Proof of actual acts of management is required in seeking to hold officers of a corporation for libel printed in a newspaper published by the corporation. People v. Warden of City Prison, 118 NYS 487. Under Penal Code, § 246, officers of corporation which publishes newspaper are not liable to criminal prosecutions for libels printed in newspaper merely because they are officers, without any further proof to connect them with management of newspaper. Id.

78. Plaintiff cannot, in suing directors, join all of them in one count, and only some of them in another. Marter v. Henry Sanchez Co. [N. J. Law] 71 A 41. Under P. L. 1896, p. 306, § 92, plaintiff may sue any one or more of directors. Id. Under P. L. 1896, p. 295, § 55, plaintiff may sue all directors by name of corporation or in their own names or individual capacities. Id.

79. Search Note: See Corporations, Cent. Dig. §§ 1352-1441; Dec. Dig. §§ 312-324; 10 Cyc. 787-802, 807-820, 823-838, 952, 963-1000, 1335; 21 A. & E. Enc. L. (2ed.) 884.

80. One who by payment of excessive compensation to another secures surrender of latter's official position in corporation, assumes it himself, and by raising salary of president induces him to acquiesce in sale of practically worthless property for an exhorbitant consideration, is guilty of an unlawful act for which all who participated therein are liable for the full amount so taken. Field v. Western Life & Indemnity Co., 166 F 607. Officer of insurance company, who was practically whole corporation so far as manipulation of its affairs was concerned, who for money consideration surrendered his position in order that another might succeed to his opportunities for a sum so excessive as to put him upon notice that some raid upon the company's reserves was intended, and to a man whose record was such as to cast suspicion upon the transaction, is guilty of fraud, actual and constructive, and is liable to the company to the extent of the remuneration received. Id.

81. Directors and other persons entering into conspiracy for wrongful and ulterior purposes are liable to corporation for damages caused thereby. Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. [C. C. A.] 166 F 254. Action of directors detrimental to corporate interests is act of corporation in name only. Id. Corporation whose directors have controlled its actions so that it has violated the federal anti-trust act is not in pari delicto so that it cannot maintain an action for damages recoverable for injuries occasioned by such act. Id.

82. Payment of erroneous claims by offi-

of the corporate charter [83] or by-laws.[84] The same liability is imposed as to any ultra vires transaction,[85] but the manager of a business cannot be held liable for the failure to make such business profitable, where there is no fraud or mismanagement.[86] Threatened mismanagement is subject to restraint by injunction.[87] The liability for mismanagement of the corporate property is joint and several.[88] As a general rule the corporation alone can maintain the suit for damages occasioned to it by the wrongful acts of its officers,[89] though action may be compelled by shareholders.[90] In pleading, the usual rules apply as to the sufficiency of facts [91] and

cers of fire insurance company would be misappropriation of corporate funds. Sleet v. Farmers' Mut. Fire Ins. Co. [Ky.] 113 SW 515. President of corporation who, on day decree appointing receiver was rendered, took $500 of company's money and applied it as his salary under claim that he accepted office upon express condition and understanding that he should be paid a reasonable salary, and that $5,000 yearly was reasonable salary, may be sued by receiver and compelled to refund amount so taken, though he was neither stockholder nor director. Bair & Gazzan Mfg. Co. v. Vandersaal, 36 Pa. Super. Ct. 615. Where corporation issued and sold bonds or certificates of indebtedness and buyers agreed to pay for same by monthly instalments, and corporation, while insolvent, paid dividends by checks which were turned in and credited on instalments, such dividends were in fact cash and appellant stockholder and officer of corporation must account for amount so received. Ebelhar v. German-American Security Co.'s Assignee [Ky.] 119 SW 220.

83. Officers who authorize loan which is ultra vires would undoubtedly be liable for waste or misapplication of corporate funds if same were lost. Earle v. American Sugar Refining Co. [N. J. Eq.] 71 A 391.

84. No defense that losses arose out of speculative transactions which were made in good faith, when entirely forbidden by by-laws. Hoffman v. Farmers' Co-Op. Shipping Ass'n [Kan.] 97 P 440. By-law of corporation with prohibition containing words "or shall engage in speculating, or in options on grain, stock, or produce," are well understood to mean making of contracts in which parties speculate on rise and fall of prices. Id. Where company under defendant's management engaged in speculating in options on grain, question at issue was not whether transactions were illegal, but whether company's by-laws were violated. Id. Evidence held to justify finding that it was not possible for manager to discover speculations of assistant earlier with due diligence. Id.

85. Payment of "hush money" by amusement corporation for permission to operate in defiance of Sunday laws was ultra vires and bad in morals, and parties making such payment are absolutely liable to refund to corporation, regardless of any question of consent to such payment. Roth v. Robertson, 64 Misc. 343, 118 NYS 351.

86. One who takes over management of business of corporation under an agreement by which he has an option to purchase controlling interest in its capital stock within given time for nominal consideration, and agrees to use his best endeavors to make its business pay and put value into its stock, in absence of fraud or mismanagement, is not liable for failure to make its business profitable. Ring v. Brown [Neb.] 121 NW 965. Evidence held to show defendant not liable for failure to make business profitable. Id.

87. At suit of stockholder. Welcke v. Trageser, 131 App. Div. 731, 116 NYS 166. Court of equity has jurisdiction to restrain managing agent who refuses to surrender corporation's property and threatens to continue as such managing agent, to divert funds, incur debts, and otherwise injure plaintiff. Contention that court would not remove corporate officer before instituting proceedings through corporate channels and unless such proceedings were unavailing held not to apply. Magpie Gold Min. Co. v. Sherman [S. D.] 121 NW 770.

88. All directors and legal representatives need not be joined. Sigwald v. City Bank, 82 S. C. 382, 64 SE 398. For ultra vires acts. Roth v. Robertson, 64 Misc. 343, 118 NYS 351.

89. Right to renew certain leases being in corporation rather than in shareholder contracting with director to renew same to protect former's rights as shareholder injury for failure to renew was to corporation. Singers-Bigger v. Young [C. C. A.] 166 F 82. A shareholder cannot maintain an action at law against the directors for any loss sustained by him through the waste of the assets of the corporation, the deprivation of dividends or the diminution of the value of his shares in consequence of the mistake, negligence, fraud or other nonfeasance or malfeasance of the directors in the discharge of the duties of their office. Id. Shareholder cannot enforce claim for damage occasioned by not having use of certain money which he ultimately received in dividends from the time the income was wrongfully cut off by director until they were finally paid out of the proceeds of litigation to the stockholders. Id.

90. Any stockholder who was not present and who has never assented to unauthorized act of board of directors in selling corporate property to certain of their members, without whom quorum of board would not have been present, may require corporation to institute suit to cancel conveyance and upon failure of company to sue bring action himself. Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633. A corporation may be compelled to recover moneys unlawfully appropriated by its officers at the instance of a stockholder. Pellio v. Bulls Head Coal Co. [Pa.] 73 A 451. See ante, § 14D, subd. Shareholders Suing for Corporation.

91. Complaint charging trustee and vice-president of corporation with neglect of of-

the joinder of causes of action,[92] and, as in other cases, fraud must be clearly established when alleged.[93] A finding indicative of lax and improper discharge of duties in an action of deceit against directors is not inconsistent.[94] Officers who are held individually liable for an unlawful shifting of securities have no right to subrogation so that innocent stockholders will be compelled to bear the burden.[95]

(§ 15) *R. Dealings between a corporation and the directors or other officers, and personal interest in transactions.*[96]—See 11 C. L. 868.—Directors occupy a fiduciary relation to the corporation,[97] and a director cannot properly use the information acquired in his official capacity for the purpose of speculating in the property of the corporation,[98] either directly or indirectly.[99] This fiduciary relation preventing freedom of contract may apply in some cases also to persons who are not directors or officers,[1] such as the majority stockholder.[2] It is often held that it is so far contrary to public policy to permit directors to freely contract with the corporation which they represent that such contracts are voidable at the option of the corporation,[3]

ficial duty and wasting of assets held to sufficiently state cause of action though payment alleged to have been made was not also alleged to have been made wrongfully, carelessly, etc. Mutual Life Ins. Co. v. Granniss, 60 Misc. 187, 112 NYS 1074.

92. In action against manager of corporation for losses caused by speculation with company's funds, contrary to by-laws, demurrer to petition because of misjoinder of causes of action sounding in tort and on contract was properly overruled, since separate causes alleged all resulted from manager's failure to perform his duties. Hoffman v. Farmers' Co-Op. Shipping Ass'n [Kan.] 97 P 440.

93. In action of deceit against directors of corporation amounting to fraud, the plaintiff should establish that defendants entered into conspiracy for purpose of putting out false statements, and that act was done knowingly to produce fraudulent result. Bell v. James, 128 App. Div. 241, 112 NYS 750. Evidence insufficient, since motive for such conspiracy was established only as to one director. Id.

94. Bell v. James, 128 App. Div. 241, 112 NYS 750.

95. Where officer and associates of building association, without knowledge of stockholders and without right, canceled mortgage on certain property, and same officers acting for trust company transferred certain securities to building association without knowledge of stockholders and without right, and such officer was held individually liable for mortgage, he should not be subrogated to the rights of the building association against the trust company whereby stockholders of latter company would be held liable for debt attempted to be created of which they had no knowledge. Brinckerhoff v. Holland Trust Co., 171 F 781. Since stockholders of building association were not entitled to securities and director had made good all stock of building association relieving trust company from its obligations, latter was not in equity entitled to such securities, but same might be decreed to director. Id.

96. **Search Note:** See notes in 33 L. R. A. 788; 17 A. S. R. 298; 2 Ann. Cas. 877; 7 Id. 1121.

See, also, Corporations, Cent. Dig. §§ 1387, 1393-1425; Dec. Dig. §§ 313-319; 10 Cyc. 787-802, 807-820, 823-838, 1335; 21 A. & E. Enc. L. (2ed.) 897.

97. Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633; Canton Roll. & Mach. Co. v. Rolling Mill Co. [C. C. A.] 168 F 465. Director is considered in equity as trustee for stockholders and creditors. Fagan v. Stuttgart Normal Inst. [Ark.] 120 SW 404; Hazelhurst Lumber Co. v. Carlisle Mfg. Co. [Ky.] 112 SW 934. Director's duties are trust duties. Stephany v. Marsden [N. J. Eq.] 71 A 598. Speaking accurately, director's duties are so nearly of the nature of the duties of a trustee to his cestui que trust that a fiduciary relation with its attendant responsibilities is appropriately said to exist between corporation and directors. Id.

98. Canton Roll. & Mach. Co. v. Rolling Mill Co. [C. C. A.] 168 F 465.

99. Agent or partner of director cannot escape liability arising from source of his knowledge. Canton Roll. & Mach. Co. v. Rolling Mill Co. [C. C. A.] 168 F 465.

1. The rule that one holding fiduciary or confidential relations to a corporation is held to the same liability as though he were himself an officer or director applies to one who, though not director or officer, dominated corporate affairs as managing partner of firm to which corporation was largely indebted. Zeckendorf v. Steinfeld [Ariz.] 100 P 784. Evidence held insufficient to bring one not director or officer within rule, where such person purchased property which would have increased value of corporate property if acquired by it. Id.

2. One who, though not actually an officer or director of a corporation yet actually dominates its affairs as a majority stockholder, sustains such a relation to the corporation as he would have sustained had he been an officer or director. Steinfeld v. Nielsen [Ariz.] 100 P 1094.

3. Stephany v. Marsden [N. J. Eq.] 71 A 598. Generally contracts between corporations and their directors dealing with the corporate assets are voidable. Ward v. McPherson, 87 Ark. 521, 113 SW 42. Voidable contract by corporation with its directors as to assets will be closely scrutinized, and burden is upon person claiming under it to prove that it was made in good faith and fair to corporation. Id.

and, while this rule is doubted in some states,[4] it cannot be doubted that the corporation can avoid contracts where the personal interest of the directors prevents fair dealing;[5] and the rule is well established that officers cannot represent the corporation in matters in which they are interested.[6] Of course stockholders may co-operate to enable the corporation to contract with one of its directors,[7] or to ratify such a contract already made.[8] A corporation seeking to avoid a contract with directors must exercise its option within a reasonable time,[9] and the relief, if granted, must be upon equitable terms.[10]

Purchase of corporate property.[See 11 C. L. 869]—The fiduciary relation will prevent officers or directors from purchasing property which they are in duty bound to purchase for the corporation,[11] but an officer or director is under no obligation to lend money to the corporation or to purchase with his own funds property for the corporation's use.[12] In a proper case a director who through manipulation secures corporate property will be held a trustee for the stockholders,[13] and so also

4. Corporation cannot at its mere option without inquiring into its fairness avoid contract made with directors. Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

5. Probably true spirit of rule as to trustee and cestui que trust. Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633. Purchase of property in representative capacity, approved by directors, for themselves, might be avoided. Id.

6. Where trust duties of officers and personal interest conflicts, latter must give way. Young v. Columbia Land & Inv. Co. [Or.] 99 P 936. It is illegal for directors of corporation to act as committee to induce corporation to purchase another's contract for purchase of land without disclosing that they were interested in sale to extent of sharing in profits, and they are liable to such corporation for amount of gain they thus made. Colonizers' Realty Co. of Brooklyn v. Shatzkin, 129 App. Div. 609, 114 NYS 71. Improper for secretary of corporation to cancel debt owing it from another corporation for his own benefit. McCloskey v. Goldman, 62 Misc. 462, 115 NYS 189.

7. Stephany v. Marsden [N. J. Eq.] 71 A 598.

8. Stephany v. Marsden [N. J. Eq.] 71 A 598. Stockholders delaying five years with full knowledge of all facts asserted in avoidance of contract or with knowledge of sufficient facts to put them on notice held to have ratified contract with directors. Id. Participation of stockholders in organization meeting held not to constitute ratification or direction upon part of stockholders for purchase of property from directors. Id. Resolution of approval of new board of directors held ineffective to preclude maintenance of suit to cancel conveyance, it not appearing that such new board constituted all stockholders. Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

9. Stephany v. Marsden [N. J. Eq.] 71 A 598.

What is reasonable time involves particular circumstances, and it is manifest that in case of long delay changed conditions may render restoration impossible. Stephany v. Marsden [N. J. Eq.] 71 A 598. Where corporation was organized and contract now sought to be avoided entered into in Oct., 1902, and stockholder and director now suing was present at each meeting of corporation and was director and secretary of company during most of time and had ample knowledge of value of property transferred to corporation by directors on organization, and did not seek to avoid same until 1907, and corporation was paying high profits during entire time, stockholders will be held not to have brought action within reasonable time and to have ratified agreement, particularly where director could not be placed in statu quo as result of changes. Id. Corporation cannot be charged with laches in failing to question transaction in which directors were interested, where delay was due to latter. Young v. Columbia Land & Inv. Co. [Or.] 101 P 212.

10. Stephany v. Marsden [N. J. Eq.] 71 A 598. Right to avoid must be exercised subject to rule of equity requiring corporation to repay consideration received. Id. Corporation as condition precedent to cancellation of conveyances authorized by board of directors to several of their number will be required to refund purchase price received by it, but without interest, where there was no finding of positive fraud. Nueces Valley Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

11. Zeckendorf v. Steinfeld [Ariz.] 100 P 784. Whether in any case an officer of a corporation is in duty bound to purchase property for corporation, or to refrain from purchasing property for himself, depends upon whether corporation has an interest, actual or in expectancy, on property, or whether purchase of property by officer or director may hinder or defeat plans or purposes of corporation in carrying on or development of legitimate business for which it was created. Id. Manager's purchase of property adjacent to mine owned by corporation could not be said as matter of law to be violation of duty owing corporation, where there was no showing that he prevented the corporation from obtaining such property, though he closed down the corporation's business in order to secure the property at a less price. Id.

12. Zeckendorf v. Steinfeld [Ariz.] 100 P 784.

13. Where director through his sons, also directors, is alleged to have so manipulated corporation as to secure its property, such allegation justifies claim that director as well as corporation received property of

a purchase by a director may result in a trust in favor of the corporation,[14] but an expression of intention as to the purchase of property by one occupying a fiduciary relation to the corporation will not constitute him a trustee ex maleficio, unless his failure to carry out the intention would operate as a constructive fraud.[15] A director cannot, as a general rule, make a valid purchase of the property of the corporation at a public or judicial sale,[16] such purchase being subject to disaffirmance at the instance of the corporation or its stockholders,[17] pursuant to equitable rules,[18] provided, of course, there be no estoppel.[19]

Purchase of corporate obligations. See 11 C. L. 870—Directors will not be allowed to purchase corporate obligations for their own benefit and in disregard of their duty to the corporation,[20] and a purchase of securities, to be valid, must at least be in all respects free and clear from any fraud or taint of unfair dealing.[21] Directors cannot avoid their fiduciary duties by acting through the instrumentality of agents.[22] Statutes sometimes prohibit officers from purchasing the corporate obligations at less than par value.[23]

§ 16. *Rights and remedies of creditors of corporations. A. The relation of creditors.*[24]—See 11 C. L. 870—Indorsers of a corporate note secured by a mortgage

plaintiff through their joint wrong and may be held to have become trustee thereof in favor of plaintiff. Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257.

14. Evidence held sufficient to show that director purchasing certain stock in his own and corporation's name held same as trustee of corporation. Zeckendorf v. Steinfeld [Ariz.] 100 P 784.

15. Zeckendorf v. Steinfeld [Ariz.] 100 P 784. Evidence held insufficient to show that one holding fiduciary relation toward corporation by expression of intention of buying certain property for corporation, intended thereby to affect in some way the subsequent relation and conduct of company to property. Id.

16, 17. Fagan v. Stuttgart Normal Inst. [Ark.] 120 SW 404.

18. Purchase is good at law and is only voidable in equity at suit of some party in interest and with equitable rights. Fagan v. Stuttgart Normal Inst. [Ark.] 120 SW 404.

19. Where director purchased corporate property at judicial sale to satisfy claim of another and subsequently sought to transfer such property, which transfer was encouraged by corporation and stockholders, such corporation and stockholders were estopped from attacking validity of purchase by director. Fagan v. Stuttgart Normal Inst. [Ark.] 120 SW 404.

20. Young v. Columbia Land & Inv. Co. [Or.] 101 P 212. Where two directors of corporation purchased certain corporate obligations and other three directors connived at and consented to purchase and were only persons by whom corporation could act, and it was their fault that provision was not made by corporation to care for notes as it was well able to do, directors were precluded from purchasing at discount for their own benefit. Id. Evidence held not to show notes were purchased at face value but that they were purchased at a discount. Id. Where majority stockholders purchased corporate indebtedness, which corporation was well able to take care of, at discount, original offer being made to corporation but changed in favor of stockholders at request of stockholders, directors being either interested or acquiescing, corporation was entitled to benefits of transaction. Young v. Columbia Land & Inv. Co. [Or.] 99 P 936. Evidence held to show that stockholders purchasing notes of corporation and suing corporation for face value thereof purchased same for less than face value and were consequently entitled to recover only amount paid. Id.

21. Canton Roll. & Mach. Co. v. Rolling Mill Co. [C. C. A.] 168 F 465. Sale of collateral by corporation to prevent insolvency, and purchase by directors, held fraudulent. Id.

22. Fact that director succeeded in acquiring interest in bonds through third person would not relieve him from fiduciary relation or validate his acts. Canton Roll. & Mach. Co. v. Rolling Mill Co. [C. C. A.] 168 F 465. Copartner cannot escape consequence of source of knowledge. Id. Partner of president of corporation pledging $100,000 bonds to secure $21,500 borrowed from trust company in which president was interested, which bonds were later improperly sold, held to be affected by fiduciary relation in which his partner stood so that he could derive no benefit from purchase but could recover his purchase money paid. Id.

23. Rev. St. § 3313, is manifestly to prevent creation and sale to directors of capital stock or other obligations of company for less than par value, such transactions being rendered void. Such statute applies only to capital stock, bonds, notes, or other securities of the company. Cincinnati, H. & D. R. Co. v. Klyebolte, 80 Ohio St. 311, 88 NE 879. "Securities" is synonym of "evidence of indebtedness." Id. Stocks, bonds, notes or other securities issued by company and guaranteed by another company of which purchaser is director, not within inhibition of § 3313. Id.

24. Search Note: Corporations, Cent. Dig. §§ 2178-2181; Dec. Dig. § 547; 10 Cyc. 1258; 7 A. & E. Enc. L. (2ed.) 824.

become creditors contingently at the time of indorsement.[25] Officers and stockholders may become creditors of the corporation.[26] The relation of general creditor and general debtor is inevitable when a treasurer, pursuant to his authority, deposits funds with another corporation as a general deposit.[27]

(§ 16) *B. Rights and remedies of creditors against the corporation.*[28]—See 11 C. L. 870—A simple contract creditor cannot sue to make the directors or officers account for ultra vires or illegal acts.[29] Creditors may, however, attack the purchase by a corporation of its own stock, if injury results to them,[30] but they cannot object to the action of officers who have assumed office and are de facto officers, though properly ineligible.[31] A creditor who with full knowledge of the facts gives credit to an agent rather than to the corporation cannot hold the corporation liable, though it receives the benefits,[32] and a corporation's liability for a debt, clearly its own, is not affected by the fact that stockholders gave their individual notes for the money.[33] The relief of creditors is usually worked out in equity,[34] but, where creditors have a lien upon the property, different rule may prevail,[35] and courts of law and equity have concurrent jurisdiction to relieve against frauds upon creditors.[36] Where one of two parties jointly interested in a corporation compromises the corporate debts he cannot enforce contribution from the other party in the absense of promise, express or implied.[37] As in other cases, mere delay on the part of a creditor in enforcing his claim is not necessarily laches.[38]

It is the policy of the law to keep intact the property belonging to and essential in the operation of a public service corporation.[39]

*Assets for creditors.*See 11 C. L. 870—The broad assertion that the assets of a corporation constitute a trust fund for the payment of its debts [40] has been repudiated

25. In re Farmers' Supply Co., 170 F 502.

26. See post, § 16D, Officers and Stockholders as Creditors.

27. Evidence held to show general deposit, not special fund for safe-keeping. In re Smith, Thorndike & Brown Co. [C. C. A.] 170 F 900. On bankruptcy of company with whom funds were deposited. Id.

28. **Search Note:** See cases in 11 C. L. 870; 22 L. R. A. 802; 5 L. R. A. (N. S.) 520; 11 Id. 863; 42 A. S. R. 767; 45 Id. 826.

See, also, Corporations, Cent. Dig. §§ 1916, 2150-2289; Dec. Dig. §§ 537-569; 10 Cyc. 527, 672, 675, 732, 766, 803-807, 884, 888, 928, 988-990, 1236-1269; 7 A. & E. Enc. L. (2ed.) 848.

29. Winer v. Bank of Blytheville [Ark.] 117 SW 232. Assets and affairs of private corporation are in hands of board of directors of corporation and they have full management and disposal thereof, and their acts cannot be questioned by simple contract creditor. Id. Makers of note cannot set up invalidity of assignment thereof by payee corporation merely because they are also creditors of coropration. Id. That makers of note are creditors of corporation does not entitle them to set up defense of invalidity of indorsement by corporation payee. Id.

30. Copper Belle Min. Co. v. Costello [Ariz.] 100 P 807. Evidence held not to show that creditors were injured. Copper Belle Min. Co. v. Costello [Ariz.] 100 P 807; Moses v. Soule, 63 Misc. 203, 118 NYS 410.

31. Copper Belle Min. Co. v. Costello [Ariz.] 100 P 807. Held no defense to mortgage given by directors on land in another state that such directors were irregularly elected, they not being residents of state of incorporation, particularly where stockholders have acquiesced. Id.

32. Hazelhurst Lumber Co. v. Carlisle Mfg. Co. [Ky.] 112 SW 934.

33. Where money is borrowed for corporation, and used by it, and corporation's property is pledged for security, corporation is liable therefor though stockholders gave their individual notes for money. Russell's Adm'r v. Frankfort & Sub. R. Co. [Ky.] 116 SW 289.

34, 35, 36. Ward v. McPherson, 87 Ark. 521, 113 SW 42.

37. McGeehan v. Reed, 42 Colo. 224, 95 P 348. Evidence held insufficient to show promise to contribute. Id.

38. Creditor's claim not barred by laches, where debtor's interests in continuous litigation, where creditor's claim if prevented was due to pugnacious attitude of debtor corporation's successors, and stockholders were advised of claim. Boyd v. Northern Pac. R. Co., 170 F 779.

39. Vulcanite Pav. Co. v. Philadelphia Rapid Transit Co., 220 Pa. 603, 69 A 1117. Creditors cannot seize and sell same piecemeal and by disabling it defeat its purpose of creation by rendering it unable to perform its duties to public. Id.

40. Property of every corporation is trust fund for payment of its debts. Hubbard v. United Wireless Tel. Co., 62 Misc. 538, 115 NYS 1016; Boyd v. Northern Pac. R. Co., 170 F 779. Assets of corporation in hands of stockholder are regarded in equity as property of corporation and subject to claims of creditors. Standard Distilling &

to a considerable extent,[41] and it seems well settled that a simple contract creditor has no specific interest in any specific corporate property,[42] or any specific lien thereon,[43] but it is very generally held that in certain cases creditors have an equitable right or lien upon the assets of a corporation.[44] A corporation, however, may transfer its property in good faith to a bona fide purchaser, and such purchaser will hold it free from the debts of the corporation,[45] though it has not, any more than an individual, the right to dispose of its property to the prejudice of creditors,[46] and such property may be followed into the hands of any one who is not a good faith holder in the ordinary course of business.[47] The general trust doctrine will not permit of a more extended application, however, than that imposing personal liability upon the transferee when the property is disposed of, misapplied or converted.[48] The rule as to disposition of property is equally applicable in the case of a transfer to another corporation in disregard of creditor's rights.[49] In the lat-

Distributing Co. v, Springfield Coal Min. & Tile Co., 239 Ill. 600, 88 NE 236.

41. Repudiated in Iowa. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. As between itself and its creditors, a corporation is simply a debtor, and does not hold its property or any portion thereof in trust, in any sense other than as an individual debtor. Winer v. Bank of Blytheville [Ark.] 117 SW 232.

42. Winer v. Bank of Blytheville [Ark.] 117 SW 232. Has no lien on property of solvent corporation. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Conveyance by action of board of directors, not attacked by corporation or its stockholders but acquiesced in and upheld, could not be attacked by creditor. El Cajon Portland Cement Co. v. Robert F. Wentz Engineering Co. [C. C. A.] 165 F 619.

43. The lien of general creditors of an insolvent corporation is but a mere lien upon assets remaining after payment of debts having priority. Galvin v. McConnell [Tex. Civ. App.] 117 SW 211. A **constitutional provision** preventing the alienation of corporate franchises or property so as to relieve such property from liabilities incurred does not necessarily give a creditor a lien on the corporate assets. Const. § 203. Russell's Adm'r v. Frankfort & Sub. R. Co. [Ky.] 116 SW 289.

44. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. May follow it into hands of directors or stockholders. Hubbard v. United Wireless Tel. Co., 62 Misc. 538, 115 NYS 1016.

45. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456.

46. Cooper v. Utah L. & R. Co. [Utah] 102 P 202.

47. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. Transferee of all property of corporation takes and holds same subject to rights of creditors. Boyd v. Northern Pac. R. Co., 170 F 779. Transfer of corporate property held merely colorable, and, there being no visible change of ownership, same was subject to payment of debts (property treated as that of debtor). Eggert v. Cleveland, 138 Ill. App. 434. Fact that officers and stockholders of corporation liable for tort have disposed of and divided proceeds of corporate property as in other cases merely renders proceeds of corporate property held by them trust fund reachable for its debts. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 166 F 867. Lease by insolvent corporation to its chief officer of quarry owned by it held fraudulent as to creditors. Ward v. McPherson, 87 Ark. 521, 113 SW 42. Stockholders who deal with corporate property and assets in such a way as to place them beyond reach of creditor may be held liable in equity for such property. Standard Distilling & Distributing Co. v. Springfield Coal Min. & Tile Co., 239 Ill. 600, 88 NE 236.

48. Boyd v. Northern Pac. R. Co., 170 F 779.

49. A creditor of selling corporation may complain when such corporation agrees with the purchasing corporation to convey all property on a consideration whether cash, shares of stock, or other property, which is not to be paid and received as assets and property of the selling corporation, but which is to be distributed among stockholders. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Under Comp. Laws 1907, § 4411, making it a misdemeanor for directors or persons having direction of corporate affairs "to divide, withdraw or in any manner, except as provided by law, pay to the stockholders or any of them any part of the corporation's capital stock," such agreement is not only fraudulent but unlawful. Id. Where an employe recovered a judgment for personal injuries against a corporation and such corporation undertook to convey its franchise and property to another corporation, plaintiff under general principles of equity was entitled to have the property including the franchises acquired by the purchasing corporation, subjected to the payment and satisfaction of such judgment. Id. Where consideration is adequate, creditor of selling corporation cannot complain on ground that consideration was not paid in cash, but was other valuable property, unless creditor is prejudiced. Id. Where one corporation causes a dummy corporation of small capital to be incorporated of which it owns stock, controlling corporation remains liable at suit in equity of judgment creditor of the dummy corporation for obligations of latter. Barrie v. United Rys. Co. [Mo. App.] 119 SW 1020. Where railroad company (lessee) diverted income of lessor by gradual diminution until lessor became insolvent, such conduct was mani-

ter case the purchasing corporation which takes over the assets with knowledge of the indebtedness existing, takes such assets cum onere,[50] and, in case of conversion of such assets, a personal liability arises.[51] The creditor is not required to follow and recover the shares of stock given by the purchasing corporation,[52] and his rights are not barred by the fact that his claim is excluded from liabilities assumed by agreement.[53] Statutes forbidding diversion of assets by insolvent corporations usually may be invoked only by the creditors.[54]

fest fraud on creditors of lessor who had right to subject surplus revenues of lessor to payment of their just claims. Boyd v. Northern Pac. R. Co., 170 F 779. Creditors had equitable lien on property of railroad company. Id.

50. Parsons Mfg. Co. v. Hamilton Ice Mfg. Co. [N. J. Law] 73 A 254; American Creosote Works v. Lembcke & Co., 165 F 809; Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. Creditor is not precluded from his suit to subject assets to payment of his claim, where corporation takes over assets of debtor corporation, by fact that at that time he was creditor at large. Barrie v. United Rys. Co. [Mo. App.] 119 SW 1020. Distinction that **consideration** paid by defendant company was inadequate, or that no consideration was paid, is immaterial, since in either event, right of creditor attaches. Id. Evidence held to show that when debtor corporation turned over its business to defendant corporation, assets exceeded liabilities assumed as consideration for transfer by at least $750,000. Id. Surrender of lease by corporation pursuant to agreement and on arbitrary demand held voluntary, and lessor corporation had no right to look to lease for ascertainment of what it should have received on surrender. Id. Even if surrender had been made in accordance with lease, lessor would not be entitled to cash in hands of lessee, nor bonds held by it, legally owned by the lessee, cash and bonds being personal property but not of class of such property described in lease and contracted to be turned over. Id. Deed of surrender of street railway corporation held not deed of bargain and sale. Id. An assumption of liabilities is a good and valuable consideration, provided that the liabilities assumed bear a fair relation in value to the assets taken over. Id. Corporation purchasing assets of another corporation and issuing its own stock in payment therefor to sole stockholder in selling corporation **held not a purchaser in good faith for value** so as to cut off rights of creditors of selling corporation. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. Court of equity will interpose to prevent the dissipation and concealment of the property of corporation by means of organization of another corporation to attempt to take property of old corporation in **fraud** of complainant's right to damages. American Creosote Works v. Lembcke & Co., 165 F 809. Where corporation creates **dummy corporation** of small capital, stock of which it owns, to exercise franchises of original company and then subsequently takes over all property of the dummy corporation, it will be liable for obligations of such dummy corporation. Barrie v. United Rys. Co. [Mo. App.] 119 SW 1020. Evidence held to show that corporation which defendant took over was dummy corporation. Id. In such case a creditor would not be prevented from reaching assets by creditor's suit, and subjecting them to the satisfaction of his claim, because of his failure to prove that corporation took such assets without any, or adequate, consideration. Id. **Bill by creditors** of old corporation, alleging that property conveyed amounted to considerably more than mortgage assumed and which seeks to subject such property to payment of judgment indebtedness of old corporation, held not demurrable for lack of equity. J. I. Kelley Co. v. Pollock [Fla.] 49 S 934.

51. When railroad company, which leased property of navigation company and, having acquired its stock, converted its revenue, thus rendering itself personally liable to a general creditor of navigation company, was reorganized, the stock of the new company being exchanged for that of the old company, the new company acquired the assets of the navigation company, subject to the equities of the general creditor of the navigation company. Boyd v. Northern Pac. R. Co., 170 F 779. Foreclosure proceedings in which such reorganization occurred held on such general creditor binding, since the reorganization plan was in fraud of creditors, and such general creditor was not party to the foreclosure proceedings. Id.

52. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. Where purchasing corporation gave its own stock as consideration to owner of stock of corporation purchased and was not purchaser for value in usual course of business, creditor need not have followed the consideration so paid. Id.

53. Where corporation takes over property of another corporation composed of practically same stockholders and directors, fact that it excluded certain claims by its agreement to assume liabilities would not absolve it from liability therefor. Barrie v. United Rys. Co. [Mo. App.] 119 SW 1020.

54. Where plaintiff contracted for real estate with corporation known to be insolvent, agreement providing for return of earnest money if title was not insured by trust company, but such title was approved and conveyance assented to by all creditors but one, whose claim trust company agreed to care for, plaintiff could not demand return of money on theory that conveyance by insolvent corporation was prohibited by statutes of corporation's domicile. Scharrath v. Dermondy, 117 NYS 968. Where contract by corporation to convey real estate was rescinded by purchaser on ground that valid title could not be conveyed, plaintiff could not recover earnest money paid on implied contract from representatives of

The question of parties to actions by creditors seeking to subject corporate assets depends upon the nature of the particular remedy pursued.[55] A complaint seeking to follow assets as having been fraudulently transferred [56] need not specifically characterize the transfer as fraudulent where acts deemed in equity fraudulent are alleged.[57] An averment that a purchasing corporation took over the assets is not inconsistent with an averment of agreement to pay the liabilities.[58] Competent evidence of the nature of the transaction and the disposition of assets is admissible.[59] The question of assumption of obligations by the purchaser is often one of fact,[60] or it may be precluded under the doctrine of novation as well as estoppel.[61] Recovery of judgment is usually essential to the maintenance of a creditor's suit.[62]

Corporate creditors are entitled in equity to payment of their debts before any distribution of corporate property is made among stockholders,[63] and in this connection statutes frequently prohibit the diversion of corporate funds.[64]

corporation's creditors who had paid money to liquidating trustee who had applied same to satisfy debts, such representatives not being the vendors, and there being no implied contract under facts of case. Id.

55. In an action at law in damages against corporation, new or second corporation taking over all assets of former in an attempt to defraud claimants of damage against it is not proper party or directly concerned, but in an action in equity to enforce judgment obtained in such a suit, both corporations are necessary and proper parties. American Creosote Works v. Lembcke & Co., 165 F 809.

56. Complaint held to state cause of action for fraudulent transfer of corporate assets. Kelso v. American Inv. & Imp. Co., 50 Wash. 381, 97 P 294. Interests of contract holders and judgment creditors sufficient to warrant relief, since otherwise there would be no assets to pay claims. Id.

57. In a creditor's bill aimed at discovery of assets alleged to have been disposed of without provision for payment of plaintiff's demand, petition which averred that debtor transferred his property without consideration or on an inadequate consideration, leaving debt unpaid, sets out a state of facts that equity holds to be fraudulent. Barrie v. United R. Co. [Mo. App.] 119 SW 1020.

58. Barrie v. United Rys. Co. [Mo. App.] 119 SW 1020.

59. Where in creditor's suit to charge assets taken over by defendant corporation with judgment obtained against corporation in whose hands assets formerly were it appeared that such assets had been taken over by virtue of a tripartite agreement between two corporations and a syndicate, which was the financial agent of both companies and one of original promoters of the consolidation, an agreement provided for by the tripartite agreement creating a voting trust which was submitted to all of the parties in interest in the two companies, stockholders and bondholders, and signed by the voting trustees, syndicate managers and others, was properly admitted in evidence as a material step in the transaction, throwing light upon the whole matter. Barrie v. United Rys. Co. [Mo. App.] 119 SW 1020. Purpose of suit was to trace debtor company's assets, and certain papers relating to transactions subsequent to the consolidation of two companies pursuant to tripartite agreement, which properly threw light on disposition of assets of debtor company, were admissible in evidence. Id.

60. Whether corporation taking over assets of a former company for purpose of carrying on its business, without apparent change in personnel of the concern, assumed payment of a note purchased by former concern, held question for jury. Parsons Mfg. Co. v. Hamilton Ice Mfg. Co. [N. J. Law] 73 A 254.

61. Corporation was bound for payment of note given by former company for certain machinery, on principles of novation as well as estoppel. Parsons Mfg. Co. v. Hamilton Ice Mfg. Co. [N. J. Law] 73 A 254.

62. If corporation caused foreclosure suit to be instituted to avoid payment of judgment recovered in personal injury action, plaintiff in such action had remedy by judgment creditor's action for relief, but judgment must be first recovered. Clinton v. South Shore Natural Gas & Fuel Co., 61 Misc. 339, 113 NYS 289.

63. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. It is well settled principle of common law that stockholders cannot divide corporation's assets or property among themselves without first paying corporate debts. Id. Stockholders of an insolvent corporation cannot retain an interest in its property to exclusion of creditors, and this principle applies to lien and general creditors alike. Boyd v. Northern Pac. R. Co., 170 F 779. As between corporation and its creditors, corporation has no right to carry its stock as liability, because stockholders of a corporation in no event can be paid or receive any of assets or property of company until creditors are paid in full. Barrie v. United Rys. Co. [Mo. App.] 119 SW 1020.

64. See Code, § 1621. Luedecke v. Des Moines Cabinet Co. [Iowa] 118 NW 456. Civ. Code, § 1621, as to diversion of corporate funds held inapplicable to impose any liability as to transaction which amounted to no more than retirement of outstanding stock. Commercial Nat. Bank v. Gilinsky [Iowa] 120 NW 476. No evidence of insolvency. Id. Fact that corporation was found to be insolvent year after such sale held not to warrant inference it was so at time of sale. Id.

Voluntary preferences See 11 C. L. 872 by insolvent corporations are usually rendered invalid by statute.[65]

Priorities between claims. See 11 C. L. 872—Preference is sometimes given by statute to claims for labor and services.[66] Permanent additions to a corporation's property are generally subject to the lien of mortgage bondholders, such lien being superior to any contract between the vendor and the corporation as to the property acquired,[67] and even a conditional sale takes no priority to such mortgage liens where the recording statutes are not complied with,[68] unless the subject-matter of such sale is loose, separable personalty.[69]

Winding up proceedings, assignment, receivership. See 11 C. L. 873—It should be noted that the appointment of a common-law receiver pendente lite of a corporation to prevent the unlawful disposition and waste of property is radically different from the appointment of a permanent receiver.[70] A receiver may be demanded by bondholders where there is such extravagant and inefficient management that danger of ultimate loss to such creditors is apparent.[71] Mere insolvency of a corporation is insufficient ground for the appointment of a receiver in equity,[72] but is often made so by statute.[73] A receiver in supplementary proceedings is also sometimes authorized by statute.[74] The remedy of a receivership is to be cautiously applied in all cases,[75] and the application therefor must usually be supported by affidavit or other

65. Under New York Stock Corporation Law (Laws 1892, p. 1838, c. 688), § 48, transfer of property by insolvent corporation or when insolvency is imminent with intent to prefer creditors, is void. Irish v. Citizens' Trust Co., 163 F 880. Payments held to be with intent to prefer creditor in violation of statute. Id.

66. Under Rev. Law, N. C. 1905, § 1131, providing that mortgages of corporations upon their property or earnings shall not have power to exempt same from execution to satisfy judgments for labor or torts, claims for labor, seasonably presented by persons entitled to present them, may be given precedence over mortgage without being reduced to judgment. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193. Decree of court of equity equivalent to judgment. Id.

67. Materials that are affixed to and made part of railroad which is subject to mortgage. Haynes v. Kenosha St. R. Co. [Wis.] 119 NW 568.

68. Unrecorded conditional sales agreements cannot be allowed priority as against bondholders secured in mortgage existing upon property at time of delivery of goods. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193. Such property became subject to provisions of "after-acquired" clause in mortgage. Id. Rev. 1905 (N. C.), § 983, expressly providing for registration of conditional sales agreements, and § 1040, as to registration under decisions of North Carolina, render conditional sales agreements of personal property in effect chattel mortgages. Id.

69. Conditional sale contracts of loose personal property, though not recorded as required by statute, are entitled to priority over bondholders claiming under provisions of "after-acquired" clause of mortgage. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193. Such property susceptible of separate ownership and lien. Id.

70. Howell v. German Theatre, 64 Misc. 110, 117 NYS 1124. Common-law receiver pendente lite of foreign corporation appointed to prevent waste has not analogous power of permanent receiver to maintain action as specified in Gen. Corp. Law, § 104 (2 Consol. L. p. 1410, superseding Code Civ. Proc. § 1788). Gen. Corp. Law, § 240, defining powers of receiver appointed under § 306, subd. 3, authorizing suit to collect property, inapplicable. Id. Appointment of temporary receiver pendente lite does not affect the right to maintain supplementary proceedings under Code Civ. Proc. § 2441. Id.

71. Union Trust Co. v. Charlotte Gen. Elec. Co., 152 Mich. 568, 15 Det. Leg. N. 263, 116 NW 379. No showing of extravagant or ineffectual management or disposition to let property depreciate in value. Id.

72. Galvin v. McConnell [Tex. Civ. App.] 117 SW 211.

73. Rev. St. 1895, art. 1465, cl. 3, in general terms seems to make insolvency ground for appointment of receiver. Calvin v. McConnell [Tex. Civ. App.] 117 SW 211. Summary proceeding "for dissolution of insolvent corporation" at instance of creditors, is provided by Corporation Act, § 65 (Laws 1896, p. 298, c. 185). O'Grady v. U. S. Independent Tel. Co. [N. J. Err. & App.] 71 A 1040.

74. Code Civ. Proc. § 2463, is so amended by Laws 1908, p. 766, c. 278, that limitation against appointing receiver in supplementary proceedings against foreign or domestic corporations is withdrawn, and such receiver may now be appointed to property of corporation judgment debtor. Rabbe v. Astor Trust Co., 61 Misc. 650, 114 NYS 131.

75. Galvin v. McConnell [Tex. Civ. App.] 117 SW 211. Appointment of receiver refused where allegations were insufficient to enable court to determine that liabilities exceeded assets, that corporation was unable to pursue its ordinary business, or that director, not managing officer of corporation, acted so fraudulently in permitting himself to be held out as director as to warrant

evidence,[76] and the grounds of the receivership must, of course, be sufficiently alleged,[77] but defects in the petition will not be considered on an application for a writ of prohibition on the ground that the court had no jurisdiction to appoint a receiver.[78] Statutory provisions subjecting certain corporations to state control will not impair federal jurisdiction in a suit by nonresident creditors for the payment of debts through a receiver.[79] The appointment of a temporary receiver because of insolvency is not affected by the fact that statutory dissolution proceedings also undertaken were ineffective because of irregularity.[80]

A statute authorizing the seizure of assets of an insolvent corporation at the instance of unsecured creditors is in derogation of the common law, to be strictly construed,[81] but a corporation may waive the objection that receivership is demanded by unsecured creditors.[82] A receivership may be demanded by the real creditor, though the legal title to his claim is in another.[83]

The administration of a receiver is a proceeding in rem.[84] The term used to designate the taking and holding possession of the property is immaterial.[85] The rights and duties conferred upon receivers of insolvent corporations are largely the same as those of trustee in bankruptcy.[86] The title of the property of the insol-

such appointment of receiver, there being no affirmative act as a result thereof from which liability or loss can be deduced, director's lien upon corporate assets having been duly recorded prior to accrual of those of complainant. Id.

76. Under Code Civ. Proc. § 1788, court may not appoint temporary receiver in sequestration proceeding upon complaint alone, unsupported by affidavit or other evidence. Federman v. Standard Churn Mfg. Co., 128 App. Div. 493, 112 NYS 834.

77. Allegations of complaint held to show insolvency or imminent danger thereof warranting receivership under statute (Ballinger's Ann. Codes & St. § 5456; Pierce's Code, § 575). Kelso v. American Inv. & Imp. Co., 50 Wash. 381, 97 P 294. Allegations in bill that corporation cannot pay its current obligations as they mature, and that it is unable in ordinary course of its business to pay its existing and enforcible liabilities, constitute proper and sufficient allegations of insolvency. American Can Co. v. Erie Preserving Co., 171 F 540.

78. State v. Goodrich [Mo. App.] 120 SW 646.

79. Acts Pa. Feb. 11, 1895 (P. L. 24), subjecting banking corporations to state supervision and providing for their dissolution by suit of state in case of insolvency, etc., does not impair federal jurisdiction. Lyon v. McKeefrey [C. C. A.] 171 F 384.

80. Knickerbocker Trust Co. v. Tarrytown, etc., R. Co., 117 NYS 871. Where Laws 1883, p. 559, c. 378, § 8, required an order to show cause to be served on attorney general, which was neglected, on petition to dissolve a railroad corporation, but the court acting under Code Civ. Proc. § 2423, appointed a temporary receiver, such order appointing the receiver was not affected by the fact that the order to show cause was void. Id. Since appointment of temporary receiver under Code Civ. Proc. § 2423, was valid, court could regulate and control his action. Id.

81. Farmers' Union Warehouse Co. v. Coweta Fertilizer Co. [Ga.] 65 SE 291. Civ. Code 1895, § 2716, when construed strictly, cannot by expression "unsecured debt" mean one which is secured by collateral security, although such security is of less value than debt; but statute confers right to proceed upon creditor whose debt is unsecured. Id. Appointment of receiver error when at instigation of creditor whose debt was secured by collateral. Id. In action under Civ. Code 1895, § 2716, for appointment of receiver against insolvent traders, one or more creditors representing one-third in amount of unsecured debts of insolvent corporation, trader, or firm of traders, whose debts are matured and unpaid, shall be **necessary parties.** Id.

82. Corporation appearing, interposing no objection to institution of unsecured creditors' suit, for appointment of receiver, in advance of securing lien, consents to action taken. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193. Ordinarily receiver cannot be appointed for corporation at instance of creditor who has not recovered judgment upon his claim and exhausted his legal remedy, yet, where defendant who is confessedly insolvent has waived objection that complainant is not judgment creditor, federal court has jurisdiction to appoint receiver. American Can Co. v. Erie Preserving Co., 171 F 540.

83. Trustee of mortgage bondholders, who has recovered deficiency judgment, holds such judgment not for his own benefit but for benefit of those whose trustee he is, who are in equity owners of judgment, the cestui que trustent are real creditors and as such entitled to file bill under Corporation Act, § 65 (Laws 1896, p. 298, c. 185). O'Grady v. U. S. Independent Tel. Co. [N. J. Err. & App.] 71 A 1040.

84. Buist v. Williams, 81 S. C. 495, 62 SE 859.

85. Receiver enters into and holds possession by virtue of mandate of court, and whether it be called an equitable execution, equitable attachment, sequestration or impounding, is immaterial. H. K. Porter Co. v. Boyd [C. C. A.] 171 F 305.

86. Herf & Frerichs Chemical Co. v. Brewster [Tex. Civ. App.] 117 SW 880.

vent corporation is vested in the receiver,[87] and he represents not only the corporation[88] but also its stockholders[89] and creditors.[90] The receiver is properly said, therefore, to act in a fiduciary relation,[91] and it is his duty to assert and protect the rights of each of these several classes of persons.[92] In the matter of allowance of claims, equality or pro rata distribution of assets is the most equitable result attainable, and no liens or preferences should be recognized unless satisfactorily established,[93] in which latter case, however, they must be allowed,[94] but it is incumbent on the receiver to protect the funds or assets in his hands against attempts to defeat equality of distribution by the assertion of secret liens.[95] The appointment of a receiver fixes the rights of parties to controversies then existing,[96] but such an order in a foreign jurisdiction will not be construed to deprive the courts of the control of assets for the benefit of domestic creditors.[97] Comity requires that a foreign receiver should be acknowledged and aided,[98] and in such case assets will be so administered that domestic and foreign creditors will share alike.[99]

The compromise of claims and suits against the corporation may be authorized if for the best interest of all parties concerned,[1] the principle being apparent in

87. Herf & Frerichs Chemical Co. v. Brewster [Tex. Civ. App.] 117 SW 880. Appointment of receiver vests property of corporation in such persons. Courtright v. Vreeland, 64 Misc. 46, 117 NYS 952.

88. Buist v. Williams, 81 S. C. 495, 62 SE 859; Spencer v. Alki Point Transp. Co. [Wash.] 101 P 509; H. K. Porter Co. v. Boyd [C. C. A.] 171 F 305. Receiver represents corporation in matters of title. American Can Co. v. Erie Preserving Co., 171 F 540.

89. Spencer v. Alki Point Transp. Co. [Wash.] 101 P 509; H. K. Porter Co. v. Boyd [C. C. A.] 171 F 305. Interests or rights of stockholders not affected by fact that receiver was appointed at instance of creditor. Buist v. Williams, 81 S. C. 495, 62 SE 859.

90. Buist v. Williams, 81 S. C. 495, 62 SE 859; H. K. Porter Co. v. Boyd [C. C. A.] 171 F 305.

91. Receiver of an insolvent corporation acts in fiduciary relation towards both creditors and stockholders of insolvent concern. Converse v. Elward [Kan.] 103 P 140. Receiver holds title of property in trust for benefit of creditors. Herf & Frerichs Chemical Co. v. Brewster [Tex. Civ. App.] 117 SW 880.

92. Spencer v. Alki Point Transp. Co. [Wash.] 101 P 509. Funds identified as **trust funds** can be collected to enable the receiver to pay creditors and equitably settle the business affairs of company. S. M. Jones Co. v. Home Oil & Development Co. [La.] 49 S 1009. Receiver **is proper party to bring suit** for damage to corporation in his hands for benefit of corporation's creditors, and stockholder not proper party. Ames v. American Tel. & T. Co., 166 F 820. In action to reach money deposited to corporation's credit, corporation was not necessary party defendant, title to its property being in receiver. Rabhe v. Astor Trust Co., 61 Misc. 650, 114 NYS 131.

93. H. K. Porter Co. v. Boyd [C. C. A.] 171 F 305.

94. Receivership proceedings do not destroy lien of creditor on corporate property. Galvin v. McConnell [Tex. Civ. App.] 117 SW 211. Receiver takes property of corporation subject to all valid liens. American Can Co. v. Erie Preserving Co., 171 F 540.

95. H. K. Porter Co. v. Boyd [C. C. A.] 171 F 305. Secret lien unenforcible at law is defeated by seizure of property by "hand of the court" as effectually as by making of an attachment or levying of an execution by sheriff. Id. Receiver appointed for an insolvent corporation in suit for dissolution **may contest validity of pledges** made by such corporation in behalf of general creditors. American Can Co. v. Erie Preserving Co., 171 F 540. Where treasurer of corporation issued warehouse receipts for goods manufactured which remained in warehouse without any visible change of possession, and such receipts were pledged by corporation as collateral security for money borrowed, owners of such receipts could not have equitable lien declared upon goods stored. Claimant's rights could not affect general creditors when receiver appointed, corporation being insolvent. Id.

96. Courtright v. Vreeland, 64 Misc. 46, 117 NYS 952.

97. Courtright v. Vreeland, 64 Misc. 46, 117 NYS 952. Where receivers of a corporation appointed in Pennsylvania sued in New York on an undertaking of defendant to pay damages sustained by corporation from attachment, defendant could set off judgment obtained in New York against corporation. Id.

98. Stone v. New Jersey & H. R. & Ferry Co., 75 N. J. Law, 172, 66 A 1072. Courts will appoint ancillary receiver where necessary. Id.

99. Stone v. New Jersey & H. R. & Ferry Co., 75 N. J. Law, 172, 66 A 1072. Resident corporation entitled to no advantage. Id. Member of mutual insurance company held not entitled to set off amount due under policy against assessments, though company was a foreign corporation and suit was brought by foreign receiver. Id.

1. Spencer v. Alki Point Transp. Co. [Wash.] 101 P 509. In action to foreclose corporate mortgage, in which receiver of corporation and several stockholders intervened, stipulation between parties, except

statutory provisons allowing just set-offs.[2] A court having jurisdiction of the parties and assets through a receiver may properly allow a purely legal claim,[3] or may in its discretion require a claimant to litigate in a separate suit.[4] The intervention of creditors is unnecessary where a special master has been appointed to hear claims.[5] A claimant is properly entitled to a sum of money which is turned over to a receiver without authority and in disregard of express conditions.[6] Claims of several creditor corporations against an insolvent must be proved separately, though their stock is owned by one corporation.[7] Expenditure for betterments on the property of an insolvent corporation cannot be allowed and paid from the corpus of the property so as to displace a prior mortgage debt.[8]

A receiver may be authorized to continue business temporarily for the purpose of winding up, provided sufficient assets are available,[9] but such authority must be given in express and concise language,[10] and losses sustained by a receiver continuing business temporarily without the court's order or authority must be borne by the receiver himself.[11] If it should be necessary to borrow money to continue business, the receiver's certificates should not displace prior liens,[12] except in those cases where money is required to save the property from destruction.[13] In the former

stockholders, sanctioned by court, that amount of corporate indebtedness to party was certain sum, was binding upon stockholders. Id. Receiver was authorized to make lawful compromise of claims against officers, stockholders, or customers of corporation. Brown v. Allebach, 166 F 488.

2. Right of set-off against receiver of insolvent corporation rests upon provisions of Corporation Act authorizing receiver to settle debts due company on terms most beneficial to corporation, and in case of mutual dealings to allow just set-offs. Stone v. New Jersey & H. R. & Ferry Co., 75 N. J. Law, 172, 66 A 1072. Stockholders of corporation whose stock is not fully paid have no right of set-off against receiver of insolvent corporation. Id.

3. Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 NE 107.

4. De Forrest v. Coffey, 154 Cal. 444, 98 P 27.

5. An application to intervene by creditors holding certificates of indebtedness on ground that claim of original plaintiff for operating materials furnished within four months of receivership is about to be paid will be denied where moving parties have filed their claims, are proving or have proved them before special master, and an interlocutory decree has been entered and there is nothing in changed circumstances resulting from payment of original plaintiff likely to cause delay. American Hay Co. v. Dry Dock, etc., R. Co., 165 F 486. Inaccuracies in original bill may be brought to attention of master. Id.

6. Where stockholder and patron of corporation was accustomed to make corporation advances on uncompleted work to pay laborers, and prior to appointment of receiver sent manager customary check with instructions to pay same to receiver only on order of court, etc., but manager paid same without complying with conditions, patron was entitled to credit for same against receiver on work finished and shipped by latter. Bush v. Harrison Granite Co. [Vt.] 71 A 1042.

7. Central Trust Co. v. Third Ave R. Co., 165 F 478. Position of independent corporations is not changed by fact that same individual is receiver of them all. Id.

8. Expenditures by receiver in creditors' suit to which mortgage creditors were not parties. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193. Where pleadings do not specifically present any issue respecting betterments upon property, and in any case evidence is clearly insufficient to justify making allowance on that account, and expenditures for betterments were made by receiver before trustees under mortgage, or bondholders were before court, and during period of receivership when property was operated at great loss, allowance of betterments out of corpus to detriment of bondholders will not be made. Id.

9. Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980.

10. Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 S 162. Order appointing receiver "with power to administer affairs for best interests of parties" does not confer authority to continue business and incur liabilities. Id.

11. Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 S 162. To be deducted from commission. Id. Losses not to be imposed on creditors. Id.

12. Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980; Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193. Receiver's certificate issued for indebtedness incurred before court took charge of property, and for which creditor had no lien, was erroneously allowed priority over vested liens. Bernard v. Union Trust Co. [C. C. A.] 159 F 620.

13. Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980. Court may authorize borrowing of money and issuance of certificates displacing prior liens and incumbrances when necessary for preservation of property and expenses of realizing upon it by sale. Id.

Note: In Porch v. Agnew Co. [N. J. Eq.] 57 A 546, the issuance of receiver's certificates was granted as necessary to preserve the corporate property, though opposed by

case the receiver's certificate when issued, is merely evidence of indebtedness and has no higher character than the debts which it represents.[14] As a general rule, and in the absence of special equities, the claims against each of several successive receivers should be paid out of the property in his hands.[15] The right to displace prior liens by receiver's certificates in the case of insolvent quasi-public corporations is well established.[16] Such certificates should not, however, displace a first lien for

bondholders. A similar application was dealt with in Raht v. Attrill, 106 N. Y. 423, 13 NE 282, 60 Am. Rep. 456, where the case was considered by the ordinary legal methods, and the fact that workmen deprived of their pay had threatened to burn the corporate property was held not to create a paramount necessity. In Karn v. Rorer Iron Co., 86 Va. 754, 11 SE 431, the corporate property (a mine) had no marketable value independent of a railroad for the transportation of ore, and the court authorized its receiver to protect the title to the railroad, repair it, and to borrow money on certificates, which should be a first lien on the company's property. The court of appeals held the action valid, saying, "It was necessary to raise money in some way to preserve the property from destruction or serious injury and to put it in salable condition, and the only practicable method of accomplishing that fact was by issuing receiver's certificates." In Daliba v. Winschell, 11 Idaho, 364, 82 P 107, 114 Am. St. Rep. 267, it was said that courts of equity have power to direct their receivers to care for, protect and preserve the property, and to decree that charges and expenses thereof be prior and preferred liens over other subsisting liens, mortgages, or incumbrances, but to go beyond the preservation of the property and issue certificates for money to be used in paying running expenses is beyond the power of the court. The supreme court of Maryland goes further, and in Hooper v. Central Trust Co., 81 Md. 559, 32 A 505, 29 L. R. A. 262, Mr. Justice McSherry says, "When the property of private corporations or of individuals has been placed in the hands of receivers, all expenses for safe-keeping and preservation, are properly payable out of the income, if there be any, or, if there be none, then out of the proceeds of the corpus of the estate when sold, but this necessary power by no means includes authority in such instances to allow the creation of liens through the medium of receiver's certificates which will take priority over existing antecedent liens. Extensive as the powers of the courts of equity are, they do not authorize the chancellor to thus impair the force of solemn obligations and destroy vested rights." Other cases in the state courts are Osborne v. Big Stone Cap Colliery Co., 96 Va. 58, 30 SE 446; International Trust Co. v. United Coal Co. 27 Colo. 246, 60 P 621, 83 Am. St. Rep. 59; Merriam v. Victory Placer Min. Co., 37 Or. 321, 56 P 75, 58 P 37, 60 P 997.

The point has received the largest illustration in the federal courts, the doctrine above stated having been adhered to in many cases in the several circuits. In Farmers' Loan & Trust Co. v. Grape Creek Coal Co., 50 F 481, 16 L. R. A. 603, where the subject-matter of the suit was the foreclosure of a mortgage, the receiver sought an order to issue certificates, which should be a first lien, to pay taxes then due, to take up certain outstanding certificates, and to continue the operation of the mine. Gresham, circuit judge, quotes Judge McSherry in the Maryland case, discusses public corporations, and proceeds: "Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. It is only against railroad mortgages that the supreme court of the United States has sustained orders giving priority to receiver's certificates representing particular indebtedness, and as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public." In Fidelity Ins. Trust & Safe Deposit Co. v. Roanoke Iron Co., 68 F 623, the issuance of receiver's certificates, displacing a subsisting mortgage, was denied as beyond the power of the court, the petition being, however, merely to borrow money to carry on the business of the company. A like conclusion was reached in Hanna v. State Trust Co., 16 C. C. A. 586, 70 F 2, 30 L. R. A. 201. The preference of receiver's certificates as displacing prior liens, and as against the consent of prior lienors, was denied in Doe v. Northwestern Coal Co., 78 F 62, and in International Trust Co. v. Decker Bros., 152 F 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152, the certificates have been authorized, but the court of appeals followed. Baltimore Building & Loan Ass'n v. Alderson, 32 C. C. A. 542, 90 F 142, where it was held that the court could not authorize receiver's certificates for improving, adding to, or carrying on the business of a company, without having the consent of creditors whose liens would be affected thereby. The English rule will be found in the judgment of Mr. Justice Kekewich, in Securities & Properties Corporation v. Brighton Alhambra, 62 L. J. Ch. 566, Kerr on Receivers 195.—From Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980.

14. Bernard v. Union Trust Co. [C. C. A.] 159 F 620. Where debts were for supplies secured by no lien, they were entitled to no preference. Id.

15. Knickerbocker Trust Co. v. Tarrytown, etc., R. Co., 117 NYS 871.

16. Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980. Receiver's certificates held superior in lien to general and collateral trust mortgage and refunding mortgage. Pennsylvania Steel Co. v. New York City R. Co., 161 F 787. Receivers of two street railway companies, one leased to the other, held authorized to issue receiver's certificates and make them a preferred lien where necessary to keep the railways in operation for the benefit of creditors. Pennsylvania Steel Co. v.

supplies and materials furnished the receiver.[17] Unsecured claims accruing prior to the appointment of a receiver cannot be paid out of the proceeds of the sale of certificates, in the absence of the consent of bondholders.[18] Consent of the court is necessary for the issuance of receiver's certificates,[19] and the court has no authority to hear an application of this nature unless the security holders whose rights are affected are notified.[20] The court cannot authorize the issuance of receiver's certificates which shall be a lien on lands in another state.[21] An order for the issuance of certificates in dissolution proceedings which is unappealed from is res judicata and cannot be attacked in a subsequent mortgage receivership.[22]

When creditors secure the liquidation and payment of debts through the agency of a receiver in a federal court and the corporation is subsequently dissolved because of insolvency in a state court, another receiver being appointed, the federal court should turn over the surplus assets to the receiver appointed in the state court.[23] Stockholders are entitled to be heard on the accounts of a receiver and to attack those which are excessive,[24] and the appointment of a referee to examine a receiver's accounts at the instance of an objecting creditor is sometimes provided for by statute.[25]

(§ 16) *C. Rights of corporate mortgagees and bondholders.*[26] See 11 C. L. 875

New York City R. Co. [C. C. A.] 163 F 242. Deemed expedient to issue receiver's certificates having priority over bondholder's liens to enable the efficient operation of a street railway. Pennsylvania Steel Co. v. New York City R. Co., 165 F 455. Money acquired by certificates issued by receivers of a street railway and made a prior lien to mortgages on the property may be used to maintain leased property where its maintenance is essential to the proper operation of the entire property and especially where such expenditure is required by the lease. Pennsylvania Steel Co. v. New York City R. Co., 165 F 477. Where a gas and light company was one of several in a large system and was heavily mortgaged, its condition being such that it was dangerous and inadequate to furnish good service, the court had jurisdiction to refuse permission to foreclose the mortgage and might authorize certfiicates to raise money to repair. Gay v. Hudson River Elec. Power Co., 166 F 771.

17. Pennsylvania Steel Co. v. New York City R. Co., 165 F 455.

18. Knickerbocker Trust Co. v. Tarrytown, etc., R. Co., 117 NYS 871. Fact that railroad had been in control of temporary receiver appointed in dissolution proceedings for year prior to mortgage receivership did not call for establishment of different rule. Id.

19. Formal enabling decree is requisite. Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980.

20. Notice given. Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980. Prior lienholders entitled to contest issuance. Bernard v. Union Trust Co. [C. C. A.] 159 F 620. Issuing of receiver's certificates in railroad and other quasi-public receiverships, amount thus raised to have priority over other liens, should only be granted after notice to lienholders, and full hearing and investigation. Knickerbocker Trust Co. v. Tarrytown, etc., R. Co., 117 NYS 871.

21. No jurisdiction. Lockport Felt Co. v. United Box Board & Paper Co. [N. J. Eq.] 70 A 980. Application must be made where property lies. Id.

22. Knickerbocker Trust Co. v. Tarrytown, etc., R. Co., 117 NYS 871.

23. Where state secured dissolution of banking corporation, under Acts Pa. Feb. 11, 1895 (P. L. 4). Lyon v. McKeefrey [C. C.] 171 F 384. Suit in federal court did not contemplate dissolution of corporation, and such court was bound to pay surplus assets to the corporation, but since corporation did not exist, surplus assets must be paid to receiver, who might be likened to administrator. Id. Where nonresident creditors of banking corporation instituted suit to liquidate assets and secure payment of corporate debts through agency of receiver, and state instituted suit for dissolution of such corporation under Act Pa. Feb. 11, 1895 (P. L. 4), federal court could not, after payment of corporate debts, allow **amendment of bill to obtain distribution of surplus** assets to stockholders, since such amendment constituted a new cause of action. Id.

24. Stockholders entitled to be heard in suit to subject them to liability when not parties to suit in behalf of creditors where expenses allowed. Buist v. Williams, 81 S. C. 495 62 SE 859.

25. Under Rev. St. (vol. 2, 1st ed.) c. 8, pt. 3, tit. 4, § 86, and §§ 66 to 85 and 87 to 89, as to conduct of receivers in voluntary dissolution of corporations which are made applicable to receiver appointed under Code Civ. Proc. § 2429, by Laws 1880, p. 367, c. 245, being expressly excepted from repeal, referee may be appointed to take and state receiver's accounts where objections of judgment creditor are offered. In re Home Book Co., 60 Misc. 560, 112 NYS 1012. Objections held sufficiently specific. Id.

26. **Search Note:** See Corporations, Cent. Dig. §§ 1842-1853, 1855, 1869-1888; Dec. Dig. §§ 473, 479-482; 10 Cyc. 1173-1181.

The ordinary mortgage bond of a corporation represents a loan of money from the holder to the borrower.[27] Unless conditional,[28] it becomes a valid obligation and must be regarded as issued when actually delivered[29] for a valid consideration,[30] which validity must be determined with reference to statutory requirements in such regard,[31] but usually bonds rendered invalid by the disregard of such provisions may be validated by supplying the consideration.[32] A resolution of directors authorizing the execution and delivery of bonds contemplates their sale.[33] The invalidity of a mortgage executed in disregard of statutory provisions for the benefit of stockholders cannot be attacked by a general creditor.[34] Bonds and mortgages given for honest debts are legal, though their execution reduces assets to less than the capital in disregard of a statute rendering directors liable to creditors for loss, if any, caused thereby.[35] Bondholders secured by a trust deed have such an interest in the corporate property that they may maintain a suit to prevent striking employes from illegally preventing the operation of such company,[36] without applying to the corporation to bring such suit.[37] A judgment creditor is entitled to sue for the value of bonds when a corporation repudiates its express agreement as to issue such bonds to pay the judgment.[38] If no time is specified in a contract, whereby a cor-

27. Zimmermann v. Timmermann, 193 N. Y. 486, 86 NE 540.

28. Evidence held to support finding that subscription contract for purchase of bonds was conditional where supported by testimony of one witness strongly corroborated. Real Estates Trust Co. v. Riter-Conley Mfg. Co. [Pa.] 72 A 695.

29. Zimmermann v. Timmermann, 193 N. Y. 486, 86 NE 540. Although completely executed in due form to be used as security for borrowed money, such bonds acquire no validity before delivery and do not constitute property capable of seizure under attachment or execution. Id. Valid after delivery and enforcible at instance of lender or whoever may acquire them. Id. Delivery of bonds in pledge for security of debt is an "issue" of them. Gilchrist Transp. Co. v. Phenix Ins. Co. [C. C. A.] 170 F 279.

30. Zimmermann v. Timmermann, 193 N. Y. 486, 86 NE 540. Issue of bonds by street railway to certain person, who agree to save that company, harmless under its contract with a construction company, both corporations being owned by the indemnitor, held based upon sufficient consideration. Haynes v. Kenosha St. R. Co. [Wis.] 119 NW 568. Issue of bonds substantially equal to debt due construction company. Id.

31. Bonds issued are void unless in consideration of money or its equivalent to extent of 75 per cent of par value. Haynes v. Kenosha St. R. Co. [Wis.] 119 NW 568. Statute requires that no corporation issue bonds except for money paid, labor done, or property actually received, and all fictitious increases shall be void. Pollitz v. Wabash R. Co., 167 F 145. Issue not fictitious but based on valid consideration. Id. Under circumstances of case, exchange of $22,125,000 bonds, and $30,900,000 stock for $30,000,000 bonds, held not violative of Mo. Const. art. 12, § 8 (Ann. St. 1906, p. 304), where necessary improvements had prevented payment of interest in past, litigation was threatened, and new and necessary projects blocked because of attitude of bondholders. Id.

32. Void bond issue rendered valid by substitution of good for insufficient consideration. Haynes v. Kenosha St. R. Co. [Wis.] 119 NW 568.

33. McCormick v. Unity Co., 239 Ill. 306, 87 NE 924. Resolution authorizing execution and delivery of trust deeds and bond held to authorize sale also, by implication. Such implication held particularly warranted where power of sale was necessary to save corporation from ruin and used for such purpose. McCormick v. Unity Co., 239 Ill. 306, 87 NE 924, afg. 142 Ill. App. 159.

34. Provision of Stock Corporation Law (Laws 1892, p. 1824, c. 688), § 2, requiring assent of two-thirds of stockholders of mortgage, etc., is not available to general creditor of corporation but only to stockholders or persons representing them. Glover v. Ehrlich, 62 Misc. 245, 114 NYS 992.

35. Moses v. Soule, 63 Misc. 203, 118 NYS 410.

36. Carter v. Fortney, 170 F 463.

37. Need not allege that application has been made to company to sue, which was refused. Carter v. Fortney, 170 F 463. Are principals in interest, not compelled to act through representative having no substantial interest. Id. Corporation is not necessary party. Id.

38. Where corporation obligated itself to issue $150,000 of bonds, paying plaintiff's judgment with $35,000 of issue and agreeing to use $50,000 for betterments, and then by its acts and conduct repudiated arrangement by pledging portion of such bonds, plaintiffs could declare contract at an end and sue for value of bonds. South Texas Tel. Co. v. Huntington [Tex. Civ. App.] 121 SW 242. Such action was **not suit upon bonds,** and such bonds need not have been introduced in evidence. Id. Since corporation expressly bound itself, it was not necessary for plaintiffs suing for repudiation of such contract to show that such issue would net an amount sufficient to be expended in such improvement. Id.

poration agrees to invest a portion of a bond issue in improvements, a reasonable time will be implied.[39] Where a judgment is rendered on the bond of a corporation, such bond is merged in the judgment, and loses all force and vitality, and cannot be made the basis of a subsequent recovery.[40] Bondholders may sue in equity where corporate officers fraudulently induce the purchase of bonds,[41] and, since such a suit is against the officers personally,[42] the corporation is not a necessary party.[43] Foreclosure being an equitable proceeding, the court may dispose of a case on equitable considerations.[44] Individual bondholders need not be made parties to a foreclosure suit where the general issues involve merely priority between the mortgage and receiver's certificates.[45] An unsecured creditor having merely a claim in litigation against a corporation is not a necessary or proper party in an action to foreclose a mortgage on such corporation.[46] On foreclosure, the corporation has the burden of proving special defense relied upon such as nonexecution of the bonds[47] or bad faith in the purchase by present holders.[48] Denial of the validity of bonds may be precluded by the application of the doctrine of estoppel.[49] A corporation denying liability on certain bonds held by a trustee as security under a mortgage being foreclosed, which bonds are overdue, will not be permitted to intervene in the foreclosure proceeding, its defenses being available against whomsoever acquires the bonds.[50]

(§ 16) *D. Officers and stockholders as creditors.*[51]—See 11 C. L. 876—Officers[52]

39. South Texas Tel. Co. v. Huntington [Tex. Civ. App.] 121 SW 242. Reasonable time a **question of law and fact** dependent upon circumstances. Id. Where plaintiffs alleged that one year was reasonable time in which to have performed agreement and defendant filed general denial, the **burden of proof** was upon them to establish their allegations. Id. Where defendant entered a **general denial,** it could show thereunder as defense that its failure to perform its obligation was due to acts and conduct of one plaintiff. Id. **Instruction** as to issue of reasonable time should have been given. Id. Instruction as to issue that failure to perform obligation in reasonable time was due to acts of plaintiff was warranted by evidence and should have been given. Id.

40. Suit leading to judgment against corporation on its bonds held to bar subsequent suit on same bonds seeking to enforce stockholder's liability. Hayward v. Sencenbaugh, 141 Ill. App. 395.

41. To prevent multiplicity of suits. Slater Trust Co. v. Randolph-Macon Coal Co., 166 F 171.

42. Slater Trust Co. v. Randolph-Macon Coal Co., 166 F 171. Personal Liability of Officers. See ante, § 15P.

43. Corporation is not necessary party to suit by bondholder against directors for fraud and deceit, and a decree in such an action will not necessarily detrimentally affect it, and it cannot be brought into court in the district of suit in which directors reside and in which it refuses to appear voluntarily. Slater Trust Co. v. Randolph-Macon Coal Co., 166 F 171.

44. Cause remanded for determination of other lien, etc. Haynes v. Kenosha St. R. Co. [Wis.] 121 NW 124, modifying [Wis.] 119 NW 568.

45. Nowell v. International Trust Co. [C. C. A.] 169 F 497. Refusal to open decree two months after entry to permit joinder of such bondholders not abuse of discretion. Id.

46. Clinton v. South Shore Natural Gas & Fuel Co., 61 Misc. 339, 113 NYS 289. Under Code Civ. Proc. § 452, as to intervenors, court cannot permit creditor of corporation who has mere claim against such company to intervene and defend foreclosure suit. Id.

47. McCormick v. Unity Co., 239 Ill. 306, 87 NE 924, afg. 142 Ill. App. 159. There is no statute by which verified denial of execution and delivery requires complainant in foreclosure proceeding to prove execution and delivery of bonds otherwise than by production of bonds themselves. Id. Even in common law proceeding, proof showing authority to execute and deliver corporate bonds, any other defense which would make bonds void or voidable cannot be raised by verified plea of non est factum. Id. Proof that president and secretary of corporation actually executed bonds establishes a prima facie case, notwithstanding **verified denial.** Id.

48. McCormick v. Unity Co., 239 Ill. 306, 87 NE 924, afg. 142 Ill. App. 159. Burden held to be upon corporation in foreclosure proceedings upon its bonds to show bad faith on part of present holders. Id.

49. Corporation paying interest for four years and half on certain bonds, taken in consideration with facts appearing on record, held estopped to deny in foreclosure proceedings that bonds were valid obligations against it. McCormick v. Unity Co., 239 Ill. 306, 87 NE 924, afg. 142 Ill. App. 159.

50. Petition for intervention by denial is unnecessary. Morton Trust Co. v. Metropolitan St. R. Co., 168 F 941.

51. Search Note: See notes in 3 C. L. 933; 10 Ann. Cas. 145.

See, also, Corporation, Cent. Dig. §§ 658-662, 1366-1373; Dec. Dig. §§ 178, 309; 10 Cyc. 374, 803-807; 21 A. & E. Enc. L. (2ed.) 911; 26 Id. 947.

and stockholders [52] may become creditors of the corporation if the transaction is bona fide, and a stockholder is not estopped from assuming the relation of creditor because of the fact that he knew of the sale of stock by the corporation at less than par value.[54] Parties who become entitled to stock for services rendered pursuant to agreement do not become creditors by the fact that receivership takes place before the stock is in fact issued.[55] Officers and stockholders who become creditors are entitled to all the rights incident to that relation.[56]

Preferences. See 11 C. L. 877—It is held that a corporation may prefer its own officers as creditors provided that the transaction is in good faith,[57] but such a transaction will not be sustained when it constitutes a violation of the fiduciary relations held by corporate officers.[58] A transaction whereby officers check out the corporate funds to pay a debt for which they are personally liable is within a statute prohibiting preferences.[59] Statutory provisions giving priority to a claim for wages sometimes expressly bar corporate officers from such advantage.[60]

(§ 16) *E. Liability of stockholders on account of unpaid subscriptions, and remedies.*[61] See 11 C. L. 877—It is usually held that the unpaid subscriptions of capi-

52. Director may become creditor of corporation if transaction is bona fide. Fagan v. Stuttgart Normal Institute [Ark.] 120 SW 404. Director may become creditor. S. M. Jones Co. v. Home Oil & Development Co. [La.] 49 S 1009.

53. Stockholder may become creditor. S. M. Jones Co. v. Home Oil & Development Co. [La.] 49 S 1009. Stockholder of corporation may advance money to it, may become its creditor, may take from it mortgage or other security, or may indorse same like any other creditors, but always subject to severe scrutiny under obligation of acting in utmost good faith. Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 S 162.

54. S. M. Jones Co. v. Home Oil & Development Co. [La.] 49 S 1009.

55. Such parties stand in same position as other stockholders so far as collection of claims against corporation is concerned. Villere v. New Orleans Pure Milk Co., 122 La. 717, 48 S 162.

56. Mere fact that creditor was stockholder does not entitle other creditors to priority when stockholder acted in good faith. Villere v. New Orleans Pure Milk Co., 122 La 717, 48 S 162. Has right to payment of his claim concurrently with other creditors. S. M. Jones Co. v. Home Oil & Development Co. [La.] 49 S 1009. Director creditor may protect himself by purchase at judicial sale of corporate property. Fagan v. Stuttgart Normal Institute [Ark.] 120 SW 404.

57. Fact that creditor preferred was director and corporation insolvent does not make preference void under law in Michigan, but merely requires that circumstances of the conveyance and bona fides of transaction be subjected to closest scrutiny. El Cajon Portland Cement Co. v. Wentz Engineering Co. [C. C. A.] 165 F 619.

58. Breach of trust for trustee to pay his own debt out of trust fund and leave other debts unpaid. Hazelhurst Lumber Co. v. Carlisle Mfg. Co. [Ky.] 112 SW 934. Officers have no right to take advantage of their knowledge of its financial condition to secure preference for themselves on all its property as pre-existing debt. Edwards v. Snow Hill Supply Co., 150 N. C. 171, 63 SE 742. Where company borrowed money on note indorsed by certain officers with consent of stockholders who agreed to deposit certain stock in company as collateral for such officers in consideration of the indorsement, and board of directors later when assets were known to be less than liabilities without vote of stockholders, or entry on minute book executed mortgage to such officers, mortgage is not valid lien. Id. A mortgage for pre-existing debt upon stock of goods continually being depleted and renewed, possession being retained by mortgagor, and mortgage being upon all corporate property and in favor of its officers, held void as to other creditors. Id. **Presumption** of validity of corporation's deed executed pursuant to statute (Rev. 1905, § 1130) is rebutted when grantees are corporate officers. Id.

59. Payment of debt held void. Hazelhurst Lumber Co. v. Carlisle Mfg. Co. [Ky.] 112 SW 934. **Intent** of transferror controls. Id. **Notice of intent to prefer** transferee is immaterial. Id.

Parties to suit to vacate preference: In a suit to set aside such a preference, the corporate transferror and the transferee are the necessary parties. Hazelhurst Lumber Co. v. Carlisle Mfg. Co. [Ky.] 112 SW 934. Directors were properly joined and given opportunity to defend, but their interest could not defeat suit. Id.

60. Under Ky. St. 1909, §§ 2487, 2488, director, stockholder and sole manager of corporation is not entitled to prior lien for wages before creditors. Trust Co. of America v. Casey [Ky.] 115 SW 780.

61. Search Note: See notes in 7 C. L. 943; 34 L. R. A. 694; 36 Id. 139; 42 Id. 595; 45 Id. 647; 47 Id. 246; 50 Id. 273; 66 Id. 971; 8 L. R. A. (N. S.) 271; 11 Id. 230, 818; 3 A. S. R. 808; 97 Id. 463; 5 Ann. Cas. 667; 10 Id. 90.

See, also, Corporations, Cent. Dig. §§ 874-892(9), 1084-1098, 2265-2279; Dec. Dig. §§ 227-234, 264, 562; 10 Cyc. 485, 539, 541-543, 659-661, 678, 1245; Limitation of Actions, Cent. Dig. §§ 327, 343, 347, 349; Dec. Dig. §§ 2(2), 4(2), 22(2) 24(3), 28(1), 34(5),

tal stock constitute a trust fund for the benefit of creditors,[62] and they may compel the payment of such subscriptions so far as necessary to satisfy debts due.[63] This liability is sometimes expressly declared by statute,[64] but properly arises by virtue of the stockholder's contract of membership.[65] Those registered on the books of the company as the holders of stock are prima facie the real owners, to whom creditors are entitled to look for the payment of their claims in case of insolvency.[66] A transferror of stock is liable, therefore, to corporate creditors up to the time of registry of the transfer, to the same extent as though no transfer had been made.[67] So, also, a pledgee of stock appearing as owner on the corporate books is liable for an unpaid balance,[68] provided there be no satutory provision to the contrary.[69] A transferee of stock with knowledge that it has not been paid for in full is liable to creditors for the unpaid balance thereon,[70] and a bill of discovery is available when stock is purchased but not transferred on the corporate books.[71] After the

35(3), 39(14), 58(4), 65(2), 83(2), 103(2, 4), 105(1), 118(2), 170, 177(1), 182(2, 5), 199(1), 25 Cyc. 985-997, 999, 1018-1023, 1034-1037, 1043, 1052-1056, 1061, 1149, 1169-1173, 1198-1201, 1278, 1279, 1292, 1394-1396, 1401, 1434-1439; 26 A. & E. Enc. L. (2ed.) 1007; 20 A. & E. Enc. P. & P. 672.

62. Burke v. Maze [Cal. App.] 101 P 438; State v. Goodrich [Mo. App.] 120 SW 646; Herf & Frerichs Chemical Co. v. Brewster [Tex. Civ. App.] 117 SW 880; Mountain Lake Land Co. v. Blair [Va.] 63 SE 751; In re Eureka Furniture Co., 170 F 485.

63. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751; Burke v. Maze [Cal. App.] 101 P 438. Unpaid subscriptions are part of corporate assets which creditor may pursue in equity. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918.

64. See post, next section. Statute (Hurd's Rev. St. 1908, c. 32, § 8, p. 526) makes every stockholder or assignee liable for debts of corporation to extent of amount unpaid on his stock, and such amount constitutes fund to which creditors may resort without regard to when they accrued or creditor's knowledge of fact that stock has not been paid for. Moore v. U. S. One Stave Barrel Co., 238 Ill. 544, 87 NE 536, afg. 141 Ill. App. 104. Stockholders cannot escape their liability to pay full amount unpaid upon stock held by them so long as any creditor of the corporation remains unpaid. Id. Under Ann. Code 1892, §§ 843, 844, 850, every subscriber is liable for debts contracted during his ownership of stock and for year after he transfers it to amount of his subscription not paid according to its terms. Allen v. Edwards [Miss.] 47 S 382. Stock subscription is means of company and faith on which credit was given. Id.

65. Burke v. Maze [Cal. App.] 101 P 438; Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918; Mountain Lake Land Co. v. Blair [Va.] 63 SE 751. Obligation of stockholder, even if created by operation of law, under constitution, is essentially contractual. Converse v. Nichols, 202 Mass. 270, 89 NE 135.

66. Where stock, though placed originally in another's name without his knowledge or consent, is not repudiated when knowledge of fact is acquired nor issued in another's name, and registered holders appeared as stockholders while indebtedness causing insolvency was contracted, such registered owners are liable to creditors. Brown v. Allebach, 166 F 488. Corporation is not required to investigate as to real ownership of stock at the time certificate is issued, and creditors are entitled to the security afforded by the stock list. Id. Provision that after payment of certain sum subscribers shall not be liable for balance of subscription, except upon such shares as stand of record on company's books in their name at time subsequent assessment or call is made, but holders of shares of record on company's books at that time and they alone shall be liable, is lawful and renders registered holder liable therefor. Id.

67. Fact holders sold stock, or that stock had been placed in present holder's name merely for purposes of sale, held no bar or defense as against creditors. Brown v. Allebach, 166 F 488.

68. See Tierney v. Ledden [Iowa] 121 NW 1050.

69. Under Code, §§ 1626, 1627, 1631, holder of stock as pledgee is exempt from liability as stockholder, though stock is issued directly to him, and so appears on company's books. Tierney v. Ledden [Iowa] 121 NW 1050. Code, § 1626, was designed to enable stockholders to hypothecate their shares of stock without cancellation thereof and issuance of new stock, and yet protect pledgee against claims of creditors of pledgor and purchaser without notice. Id.

70. Moore v. U. S. One Stave Barrel Co., 141 Ill. App. 104, afd. 238 Ill. 544, 87 NE 536; Mountain Lake Land Co. v. Blair [Va.] 63 SE 751. Evidence held to show **notice** to transferee. Moore v. U. S. One Stave Barrel Co., 141 Ill. App. 104. Evidence held sufficient to support finding of master that transfer of stock from corporation was in **consideration** of transfer to it by them of patents whose value did not equal that of the stock transferred to them. Id.

71. Receiver of corporation held entitled to bill of discovery to compel discovery by defendant brokers of names of clients for whom they purchased stock, but did not take same to office of corporation to have it placed in anyone's name, but simply accepted certificate in name in which it was when purchased, since before receiver can enforce stockholder's liability he must know whom to sue, and for that reason adequate relief could not be obtained by calling

rights of creditors have intervened, the stockholder's liability cannot be released by the corporation,[72] by its directors,[73] or by other stockholders.[74] Denial of liability may be precluded by reason of an estoppel,[75] and the stockholder cannot, as against creditors, avoid liability on the ground that he was defrauded in his purchase.[76] It is no defense against subscription liability that the receiver compromised a claim for an insufficient amount, or that collection from other subscribers is impossible [77] or has not been undertaken,[78] but settlement of the sum due is available.[79] The liability of a stockholder for the unpaid balance, is a debt provable in bankruptcy proceedings.[80]

The jurisdiction of equity of proceedings to enforce the subscription liability of corporations is fundamental,[81] and, while various other remedies have been provided by statute,[82] the jurisdiction of equity is not necessarily taken away thereby.[83] Even where the courts of common law are, by statute, given exclusive jurisdiction

broker as witness since without disclosure called for by bill no suit could be brought at all. Brown v. Huey, 166 F 483.

72. Moore v. U. S. One Stave Barrel Co., 238 Ill. 544, 87 NE 536. Where creditor accepted stock in payment of debt and thereafter when claims of other creditors accrued the corporation endeavored to restore him to his status as creditor, he was nevertheless liable to creditors to full amount of his unpaid for stock. Id. Creditor who lent corporation certain sum with agreement that he might receive ten times amount of loan in stock instead of payment thereof, and who accepted stock by round about process, namely, the issuance to another drawing of check for full par value of stock, which check was afterwards surrendered, unpaid, etc., held liable for unpaid portion of stock. Id.

73. Directors of an insolvent corporation cannot release transferee of corporate stock with knowledge that it has not been fully paid for by accepting his surrender thereof, from his liability to existing creditors, particularly where such surrender was accepted by votes of such transferee as director and the votes of two other directors under his control. Moore v. U. S. One Stave Barrel Co., 141 Ill. App. 104, afd. 238 Ill. 544, 87 NE 356.

74. In re Eureka Furniture Co., 170 F 485.

75. Stockholder holding himself out as such and as director held estopped to deny that he was valid holder. Allen v. Edwards [Miss.] 47 S 382. Stock subscribers estopped to deny their liability where such subscriptions are the cause of a loan to corporation. Rutenbeck v. Hohn [Iowa] 121 NW 698. Subscription not invalid for nonacceptance where same was necessary to validity of corporation, and was used to procure loan. Id. If acceptance was necessary, it was conclusively implied from conduct of parties. Id.

76. In re Eureka Furniture Co., 170 F 485. Defense of fraud unavailable where stockholders permitted names to remain upon company's books for nearly year. Brown v. Allebach, 166 F 488.

77. Brown v. Allebach, 166 F 488.

78. Fact that receiver failed to enforce liability of former officer of corporation on stock subscribed by him in full is no defense where stock was subscribed in full and 120,000 shares are outstanding in names of original subscribers. Brown v. Allebach, 166 F 488.

79. Brown v. Allebach, 166 F 488. Evidence held insufficient to show settlement of assessment claimed to have been made by deceased. Id.

80. Is released by discharge. Burke v. Maze [Cal. App.] 101 P 438.

81. State v. Goodrich [Mo. App.] 120 SW 646; Rutenbeck v. Hohn [Iowa] 121 NW 698. Single suit rather than various actions against stockholders is properly brought in equity to ascertain contribution due. Rutenbeck v. Hohn [Iowa] 121 NW 698.

82. Direct execution: Where an execution shall have been issued against property or effects of a corporation except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, the execution may be issued against any of stockholders to an amount equal to amount of stock unpaid. Rev. St. 1895, art. 671. Galvin v. McConnell [Tex. Civ. App.] 117 SW 211. Execution under Rev. St. 1899, § 985 (Ann. St. 1906, p. 870), is general in respect that it is not limited to any specific property, but it is limited to amount of unpaid subscription. Frogge v. Big Joe Mining & Milling Co., 136 Mo. App. 431, 117 SW 1194. Allegation in **motion for execution** against stockholder for unpaid portion of stock after execution against corporation was returned, no goods found, that stockholder was such prior to date of suit against corporation and that he never paid and still owes for stock, held sufficient allegation of ownership prior to and at time execution was asked. Id.

Garnishment: Under statute authorizing the creditor of a corporation to subject an unpaid balance on stock to garnishment, the creditor must show that there is something due. Trotter Bros. v. Blount [Ala.] 50 S 130. Evidence insufficient to show anything due on stock to corporation. Id. In suit where it is sought to subject an unpaid balance on stock to garnishment, purchaser from an original stockholder is not liable to garnishment unless it is shown that his vendor, the original holder, had not paid for stock. Id. Payment by purchaser to vendor immaterial. Id.

83. Since Rev. St. 1899, § 985 (Ann. St. 1906, p 870), affording creditors a remedy against delinquent stockholders, contains no language indicative of legislative inten-

in certain cases, the jurisdiction of equity still attaches to cases not covered by the statute.[84] Suits to enforce a stockholder's liability are maintainable anywhere that jurisdiction of the party ultimately liable can be obtained.[85] The liability of a stockholder for the unpaid amount of his stock is several,[86] and other stockholders or creditors, if any, are not necessary parties to a suit to enforce the liability.[87] Such suit may be brought by an assignee of a judgment against the corporation,[88] by one creditor for the benefit of all,[89] or by the corporation's receiver [90] or trustee in bankruptcy,[91] and, when the estate is being administered by the courts, the receiver or trustee alone has the right to pursue the remedy provided for the collection of unpaid stock subscriptions.[92] An action for unpaid subscriptions by a receiver after insolvency is not barred by the fact that an action for an assessment levied by directors before insolvency is pending.[93] Creditors are usually not bound by the rule requiring a call before the liability of the stockholder becomes fixed,[94] unless statutory provisions so require,[95] nor need they show that they have endeavored to induce the corporation to make a call, as a prerequisite to a suit in equity.[96] Usually, proof that the stock was issued and not paid for makes out a prima facie case,[97] and whether a subscription is fully paid must be determined from the facts of the case.[98] The stockholder may usually offset against such liability a debt due from the corporation.[99] A cause of action against incorporators for fraud and deceit,

tion to render remedy therein exclusive, it must be deemed merely cumulative. State v. Goodrich [Mo. App.] 120 SW 646.

84. Acts 1897-98, c. 20, p. 16 (Va. Code 1904, § 1103a), held not to exclude jurisdiction of equity to enforce by foreign attachment the liability of a resident stockholder in a foreign corporation who has assigned his stock to a nonresident, though the assignment is for the benefit of the assignor, since the statute applies only to the enforcement of liability against resident stockholders. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751.

85. Being contract liability. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751. Domestic creditor of foreign corporation may sue domestic corporation equitably owning practically all of stock of foreign corporation, legal titles to which is in another for its benefit and which it has not paid for, to enforce satisfaction of his claim, in equity in domestic courts. Id. Actions upon stockholder's liability must perforce be brought where defendant resides or can be served with process. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

86. One stockholder sued cannot complain that others are not joined. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751.

87. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751.

88. Moore v. U. S. One Stave Barrel Co., 141 Ill. App. 104, afd. 238 Ill. 544, 87 NE 356.

89. When a suit is for the benefit of all the creditors, it is immaterial that one of the creditors who later became a co-complainant did not recover his judgment until after the filing of the original bill. Moore v. U. S. One Stave Barrel Co., 141 Ill. App. 104.

90. Right and duty of receiver. Herf v. Frerichs Chemical Co. v. Brewster [Tex. Civ. App.] 117 SW 880.

91. Tierney v. Ledden [Iowa] 121 NW 1050.

92. Herf v. Frerichs Chemical Co. v. Brewster [Tex. Civ. App.] 117 SW 880.

93. Brown v. Allebach, 166 F 488. Pendency of action in state court is not ground for abatement of suit upon same matter in federal court. Id.

94. No previous call need be shown by creditors. Daggett v. Southwest Packing Co. [Cal.] 103 P 204. Even if assessment be considered prerequisite, court of equity could, after obtaining jurisdiction, make call required. Id.

95. Receiver's first notice for call being insufficient was valid when extended to full 30 days required by statute. Brown v. Allebach, 166 F 488.

96. Daggett v. Southwest Packing Co. [Cal.] 103 P 204.

97. Tierney v. Ledden [Iowa] 121 NW 1050.

98. One who has option to sell certain patents and who sells them to corporation for amount greatly in excess of what he was required to sell them for and takes stock in corporation for purchase price is not a purchaser for value of stock so as to escape liability for unpaid balance thereof not represented by actual value given or payments made by him since having mere option to sell patents he had no interest therein which he could transfer to corporation for a consideration. Moore v. U. S. One Stave Barrel Co. 238 Ill. 544, 87 NE 536.

99. Austin-Powder Co. v. Commercial Lead Co., 134 Mo. App. 183, 114 SW 67. Holder of unpaid shares may avail himself by way of offset of debt company owes him and which accrued prior to return nulla bona of execution against company. Stinebaker v. National Restaurant Co., 133 Mo. App. 250, 113 SW 237. Evidence held to show that payments were treated as creating indebtedness, and were not voluntary. Id. Stockholder receiving nothing from

which is not sustained, cannot be changed to a suit for unpaid balances due by such incorporators as stockholders.[1] For the purpose of a judgment creditor's action in equity, the judgment of deficiency against the corporation would seem to be res judicata as to the debt owed to plaintiff.[2] Enforcement of subscription liability does not render it necessary to wind up the affairs of the corporation.[3]

Bonus and fictitiously paid up stock.[See 11 C. L. 879]—When paid up stock is issued for property received pursuant to statutory authority, there must be actual fraud in the transaction to render the stockholder liable,[4] but otherwise the stockholder is liable for the face value of his stock less what he has actually paid thereon.[5]

Limitations.[See 11 C. L. 880]—When subscribers are not liable on their subscriptions until a call is made, limitations do not begin to run until such call has been made.[6] Laches will not bar the right to enforce a stockholder's liability when the statutory period of limitations has not expired and no equitable circumstance why a shorter period should bar is shown.[7]

(§ 16) *F. Personal liability of stockholder for debts of corporation and remedies.*[8]—[See 11 C. L. 880]—Aside from liability for unpaid subscriptions, the individual liability of stockholders for the debts of the corporation is purely statutory.[9] Such statutes are usually strictly construed,[10] and even if they be considered as creating a contractual obligation, they are nevertheless subject to repeal whenever vested rights are not affected.[11] The statutory liability is sometimes limited to debts payable within a specified time [12] or, in amount, to the balance due on subscriptions,[13]

corporation but losing all he put into it is **not liable** to judgment creditors of corporation. Russell's Adm'r v. Frankfort & S. R. Co. [Ky.] 116 SW 289.

1. McKee v. Rudd [Mo.] 121 SW 312.

2. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918.

3. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751. A resident creditor of foreign corporation seeking to impose liability upon resident subscriber does not present suit interfering with domestic affairs of foreign corporation. Id.

4. In re Beachy & Co., 170 F 825.

5. Unpatented receipt held not property within Const. art. 12, § 6, and hence one receiving stock in exchange therefor held liable for face value of such stock. O'Bear-Nester Glass Co. v. Antiexplo Co. [Tex.] 108 SW 967.

6. Brown v. Allebach, 166 F 488.

7. Moore v. U. S. One Stave Barrel Co., 238 Ill. 544, 87 NE 536. Bill to enforce stock liability of shareholders held not subject to defense of laches where company ceased to do business in 1897 or 1898, and original bill was filed Oct. 1, 1901, and that of co-complainant Jan. 22, 1902. Moore v. U. S. One Stave Barrell Co., 141 Ill. App. 104.

8. **Search Note:** See notes in 7 C. L. 949; 17 L. R. A. 549; 6 L. R. A. (N. S.) 1003; 8 Id. 263; 16 Id. 898; 3 A. S. R. 806; 37 Id. 168; 2 Ann. Cas. 28; 3 Id. 1120; 5 Id. 324; 6 Id. 428; 7 Id. 84; 10 Id. 783.

See, also, Corporations, Cent. Dig. §§ 826-1186; Dec. Dig. §§ 215-280; 10 Cyc. 374, 541-543, 649-736; 26 A. & E. Enc. L. (2ed.) 1007.

9. Leyner Engineering Works v. Kempner, 163 F 605.

Double liability of stockholders does not exist unless imposed by statute. De Haven v. Pratt [Pa.] 72 A 1068; Rowland v. Forest Park Creamery Co. [Kan.] 99 P 212. Act May 11, 1874 (P. L. 135), which imposes double liability upon "all stockholders in banks, banking companies, saving fund institutions, trust companies and all other incorporated companies doing the business of banks or loaning and discounting moneys," does not impose double liability upon stockholders of modern trust companies. De Haven v. Pratt [Pa.] 72 A 1068. Trust companies, as used in Act of May 11, 1874 (P. L. 135), refers only to those trust companies created prior to adoption of constitution by special acts for banking business. Id.

10. Statutes imposing double liability. De Haven v. Pratt [Pa.] 72 A 1068.

Burden of showing liability of stockholder is upon person asserting it, and he must point out the statute upon which he relies. De Haven v. Pratt [Pa.] 72 A 1068.

11. Const. art. 12, § 2, is not self-executing but amounts to mere direction to legislature, and its provisions are ineffectual until enforced by appropriate legislative action. and therefore liability of stockholders therein provided for may be imposed, modified or withdrawn at will of legislature, whenever vested rights are not affected thereby. Rowland v. Forest Park Creamery Co. [Kan.] 99 P 212. Where statute imposing double liability upon stockholders has been repealed, creditor whose claim against corporation originated after such repeal has no vested right under law repealed and could not be injured thereby. Id.

12. Under stock corporation law (Laws 1890, c. 564, p. 1079), § 58, stockholder's liability is limited to debts payable within two years, and hence stockholders of build-

in which respect the statutory liability and the equitable liability are alike.[14] The distinction as to forms of action may be retained, however,[15] and the corporation itself can never invoke the statutory remedy against stockholders, which is given only to the creditors, and is exercised by them without the aid of the corporation or its presence as a party.[16] The "debts" of a corporation for which its members are made liable by statute usually do not include a judgment against the company for tort.[17] The statutes sometimes provide for creditor's suits against stockholders or persons in any way liable for the debts of the corporation, when dissolution takes place.[18] The law of the state in which the corporation is created, either in its constitutional provisions or legislative enactments, usually fixes and determines the liability of the shareholder,[19] but a different rule prevails where a corporation is incorporated in one state to do business in another state.[20]

Stockholders are not as such personally liable upon the specific contracts or obligations of the corporation,[21] but they are liable on transactions negotiated on their own credit,[22] and may also be held liable for deceit in making false representations as to the credit of the corporation,[23] but such liability cannot be predicated upon misstatements in the charter,[24] unless reliance thereon is caused by the acts of the party sought to be charged.[25]

Persons liable as stockholders. See 11 C. L. 881—Statutory liability attaches to all who are stockholders,[26] and is sometimes extended even to others.[27] A pledgee who

ing and loan association are not liable for purchase of real estate by association not payable until ten years after purchase. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918. Rule also applied to promissory note. Id. Stockholders of corporation incorporated under Laws 1851, c. 122, p. 234, are not individually liable for debt contracted for period in excess of that permitted by statute. Leighton v. Knapp, 115 NYS 1040. Complaint against stockholder held demurrable where it appears therefrom that stockholder is not liable. Id.

13, 14, 15, 16. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918.

17. Avery v. McClure [Miss.] 47 S 901. Under Code 1906, §§ 909, 923, 924, providing for liability of stockholder for various corporate debts, stockholder is not liable personally for payment of judgment for infringing patent by corporation, since such judgment is not within statutory meaning of "debt." Id.

18. Corporation Act, § 25 (Hurd's Rev. St. 1905, c. 32). Standard Distilling & Distributing Co. v. Springfield Coal Min. & Tile Co., 239 Ill. 600, 88 NE 236.

19. Leyner Engineering Works v. Kempner, 163 F 605. The liability of a stockholder is governed by the law of the domicile of the corporation. Hayward v. Sencenbaugh, 141 Ill. App. 395.

Proof of foreign law relative to liability of stockholders must be made; otherwise the law of the state of the stockholder's residence and in which the action is brought will be applied. Peck v. Noee, 154 Cal. 351, 97 P 865.

20. Individual liability of stockholders in such case for debts created in state in which corporation is intended to do business is governed by laws of such state. Peck v. Noee, 154 Cal. 351, 97 P 865.

21. Stockholder is not bound by representation of which she knew nothing and to which she did not consent and may assert easement in property acquired in violation of representation. Falls City Lumber Co. v. Watkins [Or.] 99 P 884.

22. Where holders of majority of common stock of small corporation executed instrument guaranteeing repayment of money purporting to have been invested by one of their number in preferred stock issued in his name, together with dividends thereon, for purpose of enabling him to borrow money for use of corporation, the guarantors were liable to innocent third person for money so borrowed and used. Citizens' Bank v. Folse, 123 La. 918, 49 S 641.

23. McKee v. Rudd [Mo.] 121 SW 312.

Statute of frauds: Rev. St. 1899, § 3422 (Ann. St. 1906, p. 1965), applies to representations made by incorporators to credit of corporation. Id. In action by creditor of corporation who relied upon representations of incorporators, statute of frauds held not waived by answer which was general denial, but which also specifically denied representations. Id.

24. Such statements are not for purpose of securing credit but to procure the charter. McKee v. Rudd [Mo.] 121 SW 312.

25. Evidence insufficient to show fraud and deceit of incorporators in pointing to corporate charter and by its representations inducing creditor to be deceived, so that representations of charter were those of incorporators. McKee v. Rudd [Mo.] 121 SW 312.

26. Building and loan associations formed under Act of 1851, p. 234, c. 122, are stock corporations within general corporation law (Laws 1890, p. 1060, c. 563), § 2, defining liability of stockholders. Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918.

Definition of stockholder: Under Civ. Code, § 322, stockholder is person who knowingly and willingly permits his name to appear on corporate books as such. Shattuck &

permits himself to appear as an owner of the pledged stock is liable as a stockholder,[28] but the rule is otherwise where the pledgee is in no wise responsible for his apparent status as a stockholder,[29] and in such a case parol evidence will be permitted to show that the holder is merely a pledgee.[30] A fortiori the pledgee is not liable as a stockholder where the nature of his holding appears from the corporation's stock records.[31] In case of the death of a stockholder, the estate of the deceased is liable as a stockholder for a proportionate share of corporate indebtedness arising since the stockholder's death.[32]

Ascertainment of corporate and stockholders' liabilities and exhaustion of remedy against corporation.[See 11 C. L. 881]—Ordinarily the ascertainment of the corporation's liability and the exhaustion of the remedies against the corporation are prerequisites to recourse against the stockholders individually,[33] but the exhaustion of corporate assets is not always required,[34] especially where such requirement is rendered impossible by law.[35]

Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 99 P 348.

27. Hurd's Rev. St. 1905, c. 32, § 25, for protection of creditors where dissolution takes place. Standard Distilling & Distributing Co. v. Springfield Coal Min. & Tile Co., 239 Ill. 600, 88 NE 236. Where one of two owners of entire stock of corporation sold to other, who sold to stockholders of another corporation, who paid therefor with corporation's money, and latter had deed of all former corporation's property, assets, etc., made to latter, persons concerned in transaction were liable in equity for debts of absorbed corporation. Id.

28. On ground of estoppel. Marshall Field & Co. v. Evans, Johnson, Sloane & Co., 106 Minn. 85, 118 NW 55. Under Civ. Code, § 322, pledgee who allows himself to appear on corporate books as owner of pledged stock is to be deemed owner for all purposes of Const. art. 12, § 3, and Civ. Code, § 322, as to liability to creditors. Shattuck & Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 99 P 348.

29. Under Civ. Code, § 322, defining "stockholder," and Const. art. 12, § 3, making stockholders liable for corporate debts, pledgee directing proper corporate officer to issue certificate in his name as pledgee is not stockholder because such officer enters his name as stockholder without his knowledge, and as soon as such pledgee learned of mistake he moved to have same corrected. Shattuck & Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 99 P 348. Secretary of corporation having positive instructions to transfer stock to pledgee could not assume that indorsement on back of stock was transfer of ownership. Id. Where secretary of corporation issued stock to pledgee as owner, and latter immediately gave notice of error, whereupon secretary promised to rectify mistake as soon as signature of vice-president could be obtained, there was no laches as to having change made. Id. No evidence or circumstances to estop pledgee from showing he was not owner of stock as erroneously entered on corporate books. Id.

30. Shattuck & Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 99 P 348. Pledgee in suit on stockholder's liability by creditor may show stock to have been pledged only and that stock appearing in his name as owner was in violation of his instructions that it appear as pledgee. Id.

31. Marshall Field & Co. v. Evans, Johnson, Sloane & Co., 106 Minn. 85, 118 NW 55. Finding that stock was held as collateral security sustained by evidence. Id. Finding that stock was entered on corporate books as held by pledgee held sustained by evidence. Id.

32. Miller v. Katz [Cal. App.] 102 P 946. Although executrix did not have possession of stock, never exercised ownership, and did not know of its existence until creation of indebtedness sued upon. Id.

33. A cause of action under a statute rendering stockholders jointly and severally liable for the debts of a corporation upon the failure to publish an annual notice of existing debts will accrue only after the claims are judicially ascertained and the property of the corporation judicially exhausted. Cobbey's St. 1907, § 4128. Talmage v. Minton-Woodward Co., 83 Neb. 29, 118 NW 1099. Ordinarily statute required rendition of judgment and return unsatisfied. Id. Allowance of claims in assignment proceedings under Cobbey's St. 1907, §§ 3500-3545, c. 4, where deed of assignment is held void, does not amount to judgment. Id. Distribution of assigned estate and discharge of assignee under orders of court not judicial exhaustion of property of corporation. Id.

34. Not required **where corporation is insolvent.** Buist v. Williams, 81 S. C. 495, 62 SE 859. When bank is insolvent, creditors have two remedies which are enforcible simultaneously; they may sue bank and have receiver appointed to collect assets and apply same on debts, and at same time sue stockholders upon their individual liability. Buist v. Williams, 81 S. C. 495, 62 SE 859. The requirement of obtaining judgment against the corporation is not requisite under a statute to charge stockholders and others for the corporate debts **in case of dissolution of corporation.** Standard Distilling & Distributing Co. v. Springfield Coal Min. & Tile Co., 239 Ill. 600, 88 NE 236.

35. Compliance with Laws 1892, p. 1841, c. 688, §§ 54, 55 (Laws 1901, p. 97, c. 354, § 54), is rendered impossible by bankruptcy act and action of courts thereunder. Firestone Tire & Rubber Co. v. Agnew, 194 N. Y. 165, 86 NE 1116, rvg., 128 App. Div. 518, 112 NYS 907.

*Enforcement of liability.*See 11 C. L. 882—The statutory liability is always unenforcible in foreign jurisdictions,[36] though this objection is not available on demurrer when the liability is pleaded as contractual,[37] especially where the demurrer is not grounded thereon.[38] One who becomes a stockholder assumes the liability attached to such relation and becomes subject to regulations for the purpose of making such liability effectual,[39] and the doctrine of representation is applicable in that the stockholder is represented and bound by all decrees and findings made where the corporation is being dissolved and assessments are necessary.[40] A special remedy provided by the statute creating the liability is exclusive.[41] The substitution of a creditor suing for himself and other creditors in the place of a receiver suing in behalf of creditors is discretionary.[42] When a complaint states a good cause of action under the state laws,[43] defenses under the foreign law must be pleaded and proved.[44] The effect of a statute may be such as to render an action to enforce the statutory liability contractual in nature,[45] and when so held the action will lie against the personal representative of a deceased stockholder.[46] A statute requiring the joinder of stockholders on foreclosure of a mortgage does not necessarily preclude a subsequent suit against such stockholder to enforce their personal liability.[47] The remedy of a creditor by further decree is proper when an assessment levied upon stockholders to pay corporate debts proves insufficient.[48]

36. Gen. Laws Minn. 1899, p. 315, c. 272, providing for assessment of stockholders when assets are insufficient, with enforcement of liability by receiver, provides a statutory liability and remedy and courts of another state may refuse to entertain same, and are not required as matter of comity to entertain the action. Converse v. Hamilton, 136 Wis. 589, 118 NW 190. Action of contract by creditors of insolvent Colorado banking corporation against Massachusetts stockholder to enforce original statutory liability held not maintainable where Colorado statute merely established rule of practice and no judgment had been rendered. Miller v. Aldrich, 202 Mass. 109, 88 NE 441. Where defendant was resident of New York and was a stockholder of an Arizona corporation which contracted an indebtedness in California, where Const. art. 12, §§ 3, 15, and Civ. Code Cal. § 322, provided for personal liability of stockholders, there was no contractual relation between plaintiff and defendant which would support suit to enforce personal liability in New York. Thomas v. Matthiessen, 170 F 362.

37, 38. Converse v. Elward [Kan.] 103 P 140.

39. Irvine v. Putnam, 167 F 174.

40. Though stockholder is nonresident and not served with process. Irvine v. Putnam, 167 F 174. Ohio St. §§ 3260c-3260f, contemplate and provide for enforcement of stockholder's liability and winding up of corporation, and since by becoming stockholder person contracts with reference to remedies which are or may be provided for enforcement of individual liabilities as well as collection of unpaid subscriptions, stockholder in question contracted for stock with reference to above statute and is bound thereby with reference to collection of assessment. Id.

41. Leyner Engineering Works v. Kempner, 163 F 605. Liability can be enforced in no other manner **in federal court.** Leyner Engineering Works v. Kempner, 163 F 605.

42. Buist v. Williams, 81 S. C. 495, 62 SE 859.

43. Complaint held to state good cause of action to enforce stockholder's statutory liability if laws of foreign state were same as in state where action brought (under Const. art. 12, § 3; Civ. Code, § 323). Peck v. Noee, 154 Cal. 351, 97 P 865.

44. Peck v. Noee, 154 Cal. 351, 97 P 865.

45. Is contractual in nature. Miller v. Katz [Cal. App.] 102 P 946.

46. Under Code Civ. Proc. § 1582, as to actions of contract against testators or intestates, an action may be brought against an executrix without joining heirs. Miller v. Katz [Cal. App.] 102 P 946.

Jurisdiction of such an action will not be affected by pendency of probate proceedings, where liability sought to be enforced accrues after decedent's death. Id.

Presentation to estate of decedent for allowance is not necessary when claim accrues after decedent's death. Id.

47. Code Civ. Proc. § 1628, read in connection with § 1627, does not apply to action supplemental to and in aid of judgment of deficiency to reach assets of corporation and apply them to payment thereof, which could not be reached by execution issued in first action (since stockholders could not have been joined as parties to foreclosure suit upon mere allegation that they were indebted to corporation for money due on stock subscriptions or for purchase of land, and there could have been no personal judgment against them in foreclosure action for any part of mortgage debt). Leighton v. Leighton Lea Ass'n, 62 Misc. 73, 114 NYS 918.

48. Where some of stockholders do not pay and have no property within jurisdiction. Johnson v. Tennessee Oil, Gas & Mineral Development Co. [N. J. Eq.] 73 A 60. Creditor's right to recover against stockholders severally the whole amount of an assessment, in so far as necessary to pay debt, would be unjustly limited if complainant was required to sue upon decree against

Stockholders of a corporation are entitled to credit on their liability for assets of the corporation realized by a receiver.[49]

Limitations See 11 C. L. 882 begin to run when the debt or obligation becomes enforcible against the stockholder.[50] When the stockholder's liability is held to be in the nature of that of a surety,[51] his liability will be barred when the liability of the corporation no longer exists.[52]

(§ 16) *G. Rights and remedies of creditors against directors and other officers.*[53] See 11 C. L. 883—Directors may be rendered personally liable by statute if loss is caused by the reduction of assets to less than the capital.[54] Statutes of this nature present a secondary security for creditors,[55] and cannot be joined with a penal liability imposed when officers disregard the act of incorporation.[56] The liability thus imposed upon corporate officers is not enforcible by a trustee in bankruptcy.[57] A question of fact is presented in an action under a statute rendering directors personally liable for knowingly consenting to excessive indebtedness,[58] and usually a recovery is not permitted for mere inattention or negligence.[59] Corporate officers disregarding statutory regulations as to filing annual reports are often rendered liable thereby for the corporation's debts,[60] and officers are sometimes ren-

nonresident stockholder in state of his residence. Id.

49. Net amount of assets after deducting the expenses of administration. Buist v. Williams, 81 S. C. 495, 62 SE 859.

50. Statutory liability of stockholders of an Ohio corporation is complete when corporate property has been placed in hands of receiver, and statute of limitation runs from that time. McNutt v. Bakewell [Pa.] 72 A 639. Under statute providing that action upon stockholder's liability can be brought only within eighteen months after debt or obligation is enforcible against stockholders. Id. In proceedings under Ohio statute to enforce stockholder's liability, limitations do not begin to run until entry of decree fixing amount of assessment. Irvine v. Putnam, 167 F 174.

51. So held. Hayward v. Sencenbaugh, 141 Ill. App. 395.

52. Hayward v. Sencenbaugh, 141 Ill. App. 395. Suit to recover on stockholder's liability held barred by limitations barring corporate liability to suit on its bonds. Id.

53. Search Note: See notes in 28 L. R. A. 426; 8 A. S. R. 604; 17 Id. 95.

See, also, Corporations, Cent. Dig. §§ 1442-1510; Dec. Dig. §§ 325-369; 10 Cyc. 823-902, 933, 951, 952; 21 A. & E. Enc. L. (2ed.) 881.

54. Stock Corporation Law, § 23 (Laws 1890, p. 1066, c. 564, as am'd Laws 1901, p. 965, c. 354, § 1). Moses v. Soule, 63 Misc. 203, 118 NYS 410.

55. Hurd's Rev. St. Ill. 1908, c. 32, § 16, rendering officers personally liable for creation of debts in excess of capital stock of corporation as construed by Illinois courts, is remedial in its nature, giving cause of action exclusively to creditors and presents secondary security which is not an asset of estate. In re Beachy & Co., 170 F 825.

56. Hurd's Rev. St. Ill. 1908, c. 32, § 18, rendering officers of pretended corporation organized in disregard of act jointly and severally liable for all debts of corporation as construed by Illinois courts, is penal in its character and presents legal cause of action enforcible by creditors. In re Beachy & Co., 170 F 825. Remedy under Hurd's Rev. St. 1908, c. 32, § 18, not enforcible in equity. Improperly joined with action under § 16. Id.

57. Remedial statute (Hurd's Rev. St. Ill. 1908, c. 32, § 16), rendering officers liable to creditors when debts created in excess of capital stock, does not present asset passing to trustee in bankruptcy. In re Beachy & Co., 170 F 825. Claim enforcible by creditors independently of bankruptcy. Id. Penal liability (Hurd's Rev. St. Ill. 1908, c. 32, § 18), for disregard of incorporation statute presents cause of action enforcible by creditors, not by trustee in bankruptcy. Id.

58. Equity action under Code, § 1622, held no evidence of consent to indebtedness. Hines Lumber Co. v. Marquardt [Iowa] 117 NW 666.

59. Under Code, § 1622. Hines Lumber Co. v. Marquardt [Iowa] 117 NW 666. Constructive knowledge insufficient. Id.

60. President held liable where Kirby's Dig. § 859, as to filing of annual statement by corporation president and secretary, was disregarded. Mississippi Val. Const. Co. v. Abeles & Co., 87 Ark. 374, 112 SW 894. Under Mont. Civ. Code 1895, § 451, requiring directors to make annual report showing certain items and providing that they shall be jointly and severally liable for all debts then existing or contracted until report is made, etc., is not intended to render **directors** liable for debts contracted prior to their election, but liability is limited to debts contracted while he is director and while default continues, and hence where former board failed to make report, new board will be liable for debts contracted by them unless they make report upon assuming office. Risdon Iron & Locomotive Works v. Von Storch, 166 F 936. Corporate indebtedness for property purchased becomes such not later than date of delivery of property, and directors taking office after such date are not liable personally therefor on account of predecessors' failure to file required report, even though indebtedness is not payable until after they assume office. Id. **Obligations** cannot rightfully be said to be contracted or incurred by subsequent board so as to

dered absolutely liable during the period of default.[61] The repeal of such a statute with a saving clause permitting creditor's actions within six months does not provide a limitation but a condition precedent, subject to waiver.[62]

Directors holding nonassessable stock become severally liable upon the adoption of a resolution assessing such directors a specific amount to meet expenses,[63] which liability is available to a creditor recovering a decree against the corporation.[64] The question of contribution between directors in such a case would not affect the creditor's rights,[65] and when assessments are levied but are insufficient to satisfy the debt, a further decree is available to levy additional assessments, provided they do not exceed the amount fixed by the resolution.[66]

CORPSES AND BURIAL.[67]

The scope of this topic is noted below.[68]

While a dead body is not property in the usually recognized sense of the word,[69] yet it may be considered as a sort of quasi property, to which certain persons may have rights.[70] However, neither the right of sepulture nor the right to have the body remain unmolested, is an absolute one,[71] but they must yield where they con-

make them liable simply because it matures by performance and becomes payable after they have come in. Id. Incoming directors are not liable until reasonable time has elapsed enabling them to discover items omitted by predecessors and also to enable them to become familiar with company's business. Id. Two days not such reasonable time. Id. Directors are not liable for extra freight on goods shipped and received during predecessors' term but not adjusted until after they had assumed office. Id. Directors held liable under Mont. Civ. Code 1895, § 451, for debts incurred after they assumed office, where predecessors failed to make required annual report and they failed to protect themselves by making same prior to creating indebtedness. Id.

61. Under Kirby's Dig. § 859, liability of officers of corporation for failure to file annual statement required by § 848 is primary and not secondary, and defaulting officers become by reason thereof absolutely liable for debts of corporation incurred during period of default, and hence have no right to postpone enforcement of statute against them and no equities can arise in their favor as against creditors of corporation. Jones v. Harris [Ark.] 117 SW 1077.

62. Laws 1901, p. 961, c. 354, repealing liability of directors for corporate debts because of failure to file an annual report, but saving right of creditors against such directors if action be commenced within six months after taking effect of act, is not statute of limitations but imposes condition precedent to action which may be waived. Watertown Nat. Bank v. Bagley, 62 Misc. 380, 116 NYS 772. Agreement to waive such condition precedent was not temporary, but converted right of creditor to sue into absolute right. Id.

63. In sense that each director is liable to extent of his own assessment under resolution and not liable beyond that sum for assessment made against any other director under resolution. Johnson v. Tennessee Oil, Gas & Mineral Development Co. [N. J. Eq.] 73 A 60.

64. Where creditor recovered decree against corporation, each defendant director liable to company under resolution was separately liable for whole amount of his subscription, so far as necessary to pay debts or obligations covered by resolution. Johnson v. Tennessee Oil, Gas & Mineral Development Co. [N. J. Eq.] 73 A 60.

65. Does not affect or impair right of creditor to recover from each of defendant directors liable up to amount of his separate assessment under resolution, if necessary, for payment of his debt. Johnson v. Tennessee Oil, Gas & Mineral Development Co. [N. J. Eq.] 73 A 60. Director of corporation holding nonassessable stock, who is liable to creditor for whole amount of his subscription and who by reason of recovery in a suit at law pays more than his proportion of debt, would then be put to an action for contribution against his codirectors or coobligors. Id.

66. Johnson v. Tennessee Oil, Gas & Mineral Development Co. [N. J. Eq.] 73 A 60. Decree should also contain provision requiring creditor to assign, if necessary, the benefit of the decree so as to render the enforcement of contribution possible. Id.

67. See 11 C. L. 884.

Search Note: See notes in 7 C. L. 954, 955; 5 L. R. A. (N. S.) 727; 6 Id. 883; 16 Id. 332, 405; 75 A. S. R. 424; 78 Id. 241; 3 Ann. Cas. 132; 6 Id. 1008.

See, also, Dead Bodies, Cent. Dig.; Dec. Dig.; 13 Cyc. 267-282; 8 A. & E. Enc. L. (2ed.) 834; 3 A. & E. Enc. P. & P. 910.

68. This topic includes only the right of sepulture and property rights in dead bodies; rights in cemetery lots being elsewhere treated (see Cemeteries*).

69. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635.

70. Such persons have right to possession of body as death leaves it. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635.

71. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635; Swits v. Swits, 81 Conn. 598, 71 A 782.

* Always begin with the latest article on the subject. Use the latest topical index.

flict with the public good or where the demands of justice require subordination.[72] The right to possession of the dead body of a deceased husband or wife for preservation and burial[73] and to the control of the remains after interment[74] is generally in the surviving spouse. The legislature cannot under the police power arbitrarily deny a person the right to contract for the burial of the dead.[75] A burial permit is ordinarily required before interment.[76]

The lawful custodian of a dead body may maintain an action for its mutilation.[77] The unlawful disinterment of a dead body is generally made an indictable offense.[78]

Corpus Delicti; Corroborative Evidence, see latest topical index.

COSTS.

The scope of this topic is noted below.[79]

§ 1. Nature and Definition, 1088.
§ 2. Power to Award Costs, 1088.
§ 3. Prepayment or Security and Suits in Forma Pauperis, 1089.
§ 4. Right to or Liability for Costs in General, 1090.
§ 5. Right Dependent on Event or upon Certain Conditions, 1092.
A. Prevailing Party in General, 1092.
B. Waiver of Right and Effect of Tender or Offer of Judgment, 1093.
§ 6. Right Dependent on Minimum Amount of Demand or Recovery, 1095.
§ 7. Right Affected by Nature of Action or Proceeding, or Character of Tribunal, 1095.
A. In General, 1095.
B. In Equity and Equitable Code Actions, 1095.
C. In Inferior Courts, 1097.
D. In Interlocutory or Special Proceedings, or Proceedings Other Than Actions, 1097.
E. On Appellate Review, 1098.
F. In Criminal Prosecutions, 1100.
§ 8. Amount and Items, 1101.
§ 9. Procedure to Tax Costs; Correction and Review, 1108.
§ 10. Enforcement and Payment, 1111.

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72. Courts may order an exhumation for the purpose of determining whether a homicide has been committed. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635; Gray v. Phillips [Tex. Civ. App.] 117 SW 870.

73. Swits v. Swits, 81 Conn. 598, 71 A 782.

74. "Custody and control" as used in Gen. St. 1902, § 363, is not limited to the possession of the dead body prior to burial, but gives right of control after interment. Swits v. Swits, 81 Conn. 598, 71 A 782. Held that widow had right to remove husband's body from lot of husband's mother. Id.

75. Rule adopted by board of registration in embalming, created by St. 1905, p. 483, providing that no permits for burial shall be issued to any person who is not a registered embalmer, is unwarranted and illegal. Wyeth v. Cambridge City Board of Health, 200 Mass. 474, 86 NE 925.

76. When undertaker obtained burial permit in city where person died and undertook to bury body in cemetery in neighboring borough, he could be required to obtain a permit from the borough and pay fee as provided by borough ordinance. Yeadon v. White, 36 Pa. Super. Ct. 360. Requirements for burial provided in Act of May 1, 1905, P. L. 330, is not in conflict with borough ordinance passed under authority of Act of April 3, 1851, P. L. 320, requiring burial permit and a reasonable fee therefor. Id.

77. Plaintiff's case held not to disclose cause of action against hospital, where there was no evidence that hospital authorities performed the autopsy, but that all they did was to inform coroner's office of death of patient and that coroner's physician performed autopsy without request of hospital authorities. Darcy v. Presbyterian Hospital, 130 App. Div. 496, 114 NYS 1052. A slight incision by attendant surgeon in hospital to ascertain cause of death of plaintiff's wife, authorized by board of health, and in obedience to requirements of ordinance in order that certificate of burial might be obtained, where there is no removal of any limb or organ, does not give cause of action. Rushing v. Medical College, 4 Ga. App. 823, 62 SE 563.

NOTE. Damages for mutilation of corpse: In Long v. Chicago, etc., R. Co., 15 Okl. 512, 86 P 289, 6 L. R. A. (N. S.) 883, it is held that the parents of an infant child are not, as a matter of law, entitled to recover for mental anguish occasioned by mutilation of its dead body by reason of careless handling by railway employes. In addition to the cases cited in this decision, the question of recovery for mental distress by reason of the mutilation of the body of a deceased relative is discussed in Palenzke v. Bruning, 98 Ill. App. 644, and Louisville & N. R. Co. v. Wilson, 123 Ga. 62, 51 SE 24, in both of which cases the complaint was held to state a cause of action.

Damages for injury to feelings of relatives by reason of mutilation of a corpse were allowed in Larson v. Chase, 47 Minn. 307, 50 NW 238, 28 Am. St. Rep. 370, 14 L. R. A. 85, and in Koerber v. Patek, 123 Wis. 453, 102 NW 40, 68 L. R. A. 956, but disallowed in Young v. College of Physicians & Surgeons, 81 Md. 358, 32 A 177, 31 L. R. A. 540, and Cook v. Walley, 1 Colo. App. 163, 27 P 950.—Adapted from Long v. Chicago, etc.,

§ 1. *Nature and definition.*[80]—See 11 C. L. 886—Costs are distinguishable from fees[81] and comprise that compensation allowed to the successful litigant to indemnify him for his expenses in maintaining an action or vindicating a defense.[82]

§ 2. *Power to award costs.*[83]—See 11 C. L. 886—Since costs were not recoverable at common law,[84] they are purely statutory,[85] both in respect to the award[86] and to the items taxable.[87] The power to award discretionary costs usually rests solely in the court or tribunal where such costs are made.[88] As a general rule there is no power to award costs when the cause of action has ceased to exist.[89]

The municipal court of New York is given power to award costs upon a judgment sustaining a demurrer as upon a default, and discretionary power, within the statutory limit, to award costs when leave to plead over is granted,[90] but it has no power to award costs upon the denial of a motion to open a default,[91] or upon dismissal of the case for defect in the summons.[92]

R. Co., 15 Okl. 512, 86 P 289, 6 L. R. A. (N. S.) 883.

78. Evidence held to show such instructions to a laborer who had disinterred body as to warrant a conviction of superintendent of cemetery. Callahan v. State, 83 Neb. 246, 119 NW 467.

79. The term costs, as used in this article, includes not only costs proper but disbursements and allowances made to litigants as a part of or incident to the judgment by way of compensation to one of the parties as against the other. The topic is confined, however, to the consideration of costs as thus defined. Fees and compensation for particular services, except with regard to their taxability as such costs, are treated elsewhere (see such topics as Officers and Public Employes,* § 13; Justices of the Peace,* § 2; Clerks of Court,* § 2; Jury,* § 13; Witnesses,* § 7).

80. Search Note: See Costs, Cent. Dig. §§ 1, 4, 5, 26; Dec. Dig. §§ 2, 3; 5 A. & E. Enc. P. & P. 106.

81. Costs have reference to expenses of litigation between litigants and are distinct from fees which apply to items chargeable by law between officer and party whom he serves. Bohart v. Anderson [Okl.] 103 P 742.

82. Sommer v. Compton [Or.] 100 P 289; In re Board of Water Supply, 62 Misc. 324, 116 NYS 640. Principal underlying award of costs is that their purpose is to indemnify successful party against expenses of maintaining his rights in courts. In re Pine's Stream & East Meadow Stream, 129 App. Div. 929, 62 Misc. 61, 114 NYS 681.

83. Search Note: See note in 11 C. L. 887. See, also, Costs, Cent. Dig. §§ 1-26, 30, 31, 33-35; Dec. Dig. §§ 3-15; 11 Cyc. 25-27, 36-38, 99, 100; 5 A. & E. Enc. P. & P. 110.

84. Branson v. Branson [Neb.] 121 NW 109; Cronan v. District Ct., 15 Idaho, 462, 98 P 614. At common law each party was liable for his own costs. Scatcherd v. Love [C. C. A.] 166 F 53.

85. Branson v. Branson [Neb.] 121 NW 109. Not taxable unless given by statute. State v. Anderson [Conn.] 73 A 751.

86. Recovery of costs by one party against the other is dependent upon statute. Scatcherd v. Love [C. C. A.] 166 F 53; Bruck v. Lambeck, 63 Misc. 185, 116 NYS 784.

87. Power to impose items of cost must be found in some statute, or some rule of court, in which legislature has given power in general terms to court to make rules and orders in regard thereto. Cronan v. District Ct., 15 Idaho, 462, 98 P 614. In absence of statute authorizing, costs not taxed for items. Schmelzel v. Ada County Com'rs [Idaho] 100 P 106; Campbell v. State [Ind.] 87 NE 212; Converse v. Hindes, 139 Ill. App. 370.

88. By statute, compensation of guardian ad litem must be fixed in court in which litigation is had. In re McNaughton's Will, 138 Wis. 179, 118 NW 997. Court refused to allow costs where referee, having discretion to allow or disallow costs, did not award any. Taylor v. Taylor, 63 Misc. 182, 116 NYS 530.

89. Court had no jurisdiction to award costs where defendant had paid and plaintiff accepted full amount claimed and sued for. Hayes County v. Wileman, 82 Neb. 669, 118 NW 478.

Costs were allowed where compromise settlement was secured after reversal, if judgment for defendant. Scatcherd v. Love [C. C. A.] 166 F 53.

90. Under § 334, p. 1587, of Municipal Court Act, where a final judgment is rendered in municipal court as result of trial on demurrer and without trial of issues of fact, costs must be as upon default; that is, where leave to plead over is not granted, or where defeated party upon demurrer does not avail himself of privilege of pleading over, judgment must pass as of course, and costs are as upon default. Great Northern Moulding Co. v. Bonewur, 128 App. Div. 101, 112 NYS 466. Under § 334, p. 1587, where leave to plead over is granted, the municipal court may, in its discretion, award costs, not to exceed $10 as a condition for the favor. Id.

91. Zimmerman v. Dutchess Costume Co., 117 NYS 117; Martin v. Lefkowitz, 62 Misc. 490, 115 NYS 64. Statute giving municipal court power to award costs on opening default (Municipal Court Act, Laws 1902, p. 1563, c. 580, § 256) gives it no authority to award costs upon denial of motion to open default. Klotz v. Frolich, 108 NYS 1023.

92. There was no power to award costs to defendant where municipal court summons was dismissed because not made returnable at proper date, the municipal court act not providing for costs in such case. Feldmark v. Weissman, 61 Misc. 321, 113 NYS 761.

§ 3. *Prepayment or security and suits in forma pauperis.*[93] See 11 C. L. 887 Although discretion may ordinarily control in the requiring of additional security during the litigation,[94] it does not usually enter into the matter of the requiring of advance security,[95] the giving of which in written form,[96] at the commencement of an action,[97] is in many cases jurisdictional.[98] The courts will not impose unauthorized limitations in respect to security,[99] nor apply statutes exempting certain persons from giving security to persons not included under its terms.[1] The successful party is sometimes required to advance the jury fees before judgment will be rendered.[2] Costs need not be paid or security given in certiorari until the petition has been sanctioned.[3] An order to require a plaintiff trustee in bankruptcy to give security for costs is not necessarily of right.[4] The motion for security should be accompanied by the requisite supporting affidavits,[5] and should not be withdrawn and refiled without leave of court.[6] No appeal lies from an order of the municipal court of New York denying a motion to give security for costs.[7]

In forma pauperis. See 11 C. L. 889—Under various statutes and dependent thereon,[8] a plaintiff, appearing from the circumstances [9] to be acting in good faith,[10] may be permitted to sue in forma pauperis,[11] and a defendant may be permitted to answer without filing a required defense bond, upon his making a proper poor person's affidavit.[12] The federal statute in respect thereto does not apply to appellate proceedings.[13] The test of the sufficiency in title of a pauper's affidavit is whether

93. Search Note: See notes in 2 L. R. A. (N. S.) 939, 8 Ann. Cas. 944.

See, also, Costs, Cent. Dig. §§ 400-566; Dec. Dig. §§ 105-145; 11 Cyc. 170-204; 16 A. & E. Enc. P. & P. 673; 19 Id. 337.

94. Court in his discretion may during progress of litigation require additional security for costs to be given, under Comp. Laws, § 9992. Clark v. Bay Circuit Judge, 154 Mich. 483, 15 Det. Leg. N. 811, 117 NW 1051.

95. Security provided for by Code Civ. Proc. § 3268, belongs to defendant as matter of right and in no wise depends upon discretion of court. Craig v. Du Cros, 63 Misc. 524, 117 NYS 384.

96. Security contemplated in election contest under Code 1907, § 462, must be in writing, hence deposit in lieu thereof was insufficient. Pearson v. Alverson [Ala.] 49 S 756.

97. This requirement cannot be supplied later. Pearson v. Alverson [Ala.] 49 S 756.

98. Giving of security for costs in an election contest according to Code 1907, § 462, is jurisdictional. Pearson v. Alverson [Ala.] 49 S 756.

99. Since Code Civ. Proc. § 3268, does not limit right to require security to resident defendants, the court has no power to impose such limitation. Craig v. Du Cros, 63 Misc. 524, 117 NYS 384.

1. Code Civ. Proc. § 3160, exempting nonresident having office in city of New York from giving security for costs in action in city court, does not apply to exempt dock laborer employed by the hour, whose employment has ceased but who has reasonable expectation of re-employment. Crow v. New York Transp. Co., 64 Misc. 34, 117 NYS 947.

2. Required under Gen. St. 1868, c. 39, § 18, which is yet in force and unrepealed. State v. Hoover [Kan.] 98 P 276.

3. Bush v. Roberts, 4 Ga. App. 531, 62 SE 92.

4. Obtaining of ex parte order for security under Code Civ. Proc. § 3268, subd. 4, held improper, the action being brought to set aside conveyances claimed to be in fraud of creditors of bankrupt, and the cause of action not being one "arising before the assignment, the appointment of the trustee, or the adjudication in bankruptcy." Riker v. Gwynne, 116 NYS 10.

5. Laws 1898, p. 55, c. 100, require all supporting affidavits to be filed with motion. Beans v. Denny [Iowa] 117 NW 1091.

6. Beans v. Denny [Iowa] 117 NW 1091.

7. Chapman v. Preszburg, 115 NYS 160.

8. Right to prosecute action in forma pauperis depends upon statute. Taylor v. Adams Ex. Co. [C. C. A.] 164 F 616.

9. Clerk or judge may consider former dismissal of action in determining good faith in bringing second action under Revisal 1905, § 451. Rich v. Morisey, 149 N. C. 37, 62 SE 762.

10. Party not acting in good faith will not be permitted to bring repeated actions in forma pauperis. Rich v. Morisey, 149 N. C. 37, 62 SE 762.

11. Under Revisal 1905, § 451, plaintiff may bring suit by showing clerk of court that he has good cause of action and making affidavit that he is unable to give bond or make deposit required by § 450. Rich v. Morisey, 149 N. C. 37, 62 SE 762.

12. Under Revisal 1905, § 454, such affidavit must state "that he is not worth the amount of said undertaking in any property whatsoever, and is unable to give the bond." Rich v. Morisey, 149 N. C. 37, 62 SE 762.

13. Taylor v. Adams Exp. Co. [C. C. A.] 164 F 616. See U. S. Comp. St. 1901, p. 706. Id.

14. Selman v. Barnett, 4 Ga. App. 375, 61 SE 501. Affidavit was held sufficient, though surname of defendant was misstated, where number, terms and court mentioned are identical with rest of record. Id.

it is sufficient to be the basis of an indictment for perjury.[14] Where a writ of error is sued out on behalf of a minor by his next friend, the friend and not the minor is required to make the affidavit in lieu of security for costs,[15] and it is not essential that such affidavit show that the minor is also a pauper.[16]

§ 4. *Right to or liability for costs in general.*[17]—See 11 C. L. 889—Costs are ordinarily taxed against any one who makes contention and is defeated [18] and not in his favor.[19] The court is sometimes given discretion to award costs against either party,[20] or, in cases not otherwise controlled [21] and for good cause stated in the record,[22] to award costs otherwise than against the unsuccessful party.[23] The costs of unsuccessful actions brought on the relation of the state are taxed against the relators [24] and not against the state.[25] This does not, however, prevent the requiring of a state board to pay costs connected with its preparation of a case, even though the fund for their payment be derived from the state.[26] The federal circuit courts usually follow the state rule as to awarding costs.[27] The payment of costs as a condition to further proceedings is treated in another section.[28]

*Liability of fund or estate.*See 11 C. L. 889—The allowance of costs against an estate or fund is sometimes discretionary.[29] An estate or fund, for the benefit of which proceedings are carried on, will ordinarily be taxed with the costs,[30] but, al-

15. Biggins v. Gulf, etc., R. Co. [Tex. Civ. App.] 110 SW 561. Construing Rev. St. 1895, art. 3498u, in respect to suits by minors through next friends. Id.

16. Poverty affidavit filed by next friend, showing that he was unable to pay costs of writ of error, or give security therefor, is not invalid for failure to show that infant was also a pauper. Biggins v. Gulf, etc., R. Co. [Tex. Civ. App.] 110 SW 561.

17. **Search Note:** See notes in 5 C. L. 845, 14 L. R. A. 696; 42 Id. 41; 61 Id. 489; 62 Id. 618; 8 Ann. Cas. 398.

See, also, Costs, Cent. Dig. §§ 333-399; Dec. Dig. §§ 78-104; 11 Cyc. 85-90; 5 A. & E. Enc. P. & P. 148.

18. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153. Under Laws 1907, p. 509, c. 24. Id. Guardian's sureties who voluntarily opposed proceedings to require accounting from guardian were, jointly with guardian, taxable with costs. Id. Unsuccessful intervening claimant, rather than defendant who was ready and willing to convey land sued for, was liable for costs. Cushing v. Houston [Wash.] 102 P 29. The costs of an unsuccessful action by remaindermen of personal property against the executors, life tenant and another, charging misconduct, should be charged against the plaintiffs. In re Knowles' Estate, 148 N. C. 461, 62 SE 549. Judgment for costs was properly awarded against the unsuccessful plaintiff. Bank of Latham v. Milligan [Iowa] 118 NW 404.

19. Judgment for costs to trustee improperly brought in, where he filed answer and not disclaimer, was erroneous. Springer v. Ayer, 50 Wash. 642, 97 P 774.

20. Under Shannon's Code (Tenn.), § 4962, it is within sound discretion of court to award costs against either party where statute elsewhere is silent. Scatcherd v. Love [C. C. A.] 166 F 53.

21. Discretion vested in court by Sayles' Ann. Civ. St. 1897, art. 1438, cannot extent to cases where statute itself determines what costs shall be awarded. Lumpkin v. Williams [Tex. Civ. App.] 119 SW 917.

22. Cause must be stated as reviewing court will indulge in no presumption in regard thereto. Lumpkin v. Williams [Tex. Civ. App.] 119 SW 917.

23. Lumpkin v. Williams [Tex. Civ. App.] 119 SW 917.

24. Under Burns' Ann. St. 1908, § 620. Ex parte Fitzpatrick [Ind.] 86 NE 964.

25. Under both the policy of the law and express provisions of statute. Ex parte Fitzpatrick [Ind.] 86 NE 964.

26. Ex parte Fitzpatrick [Ind.] 86 NE 964. State board was properly required to pay clerk's fees for furnishing it copies of supreme court's opinions. Id.

27. Scatcherd v. Love [C. C. A.] 166 F 53.

28. As condition to amendment, new trial, opening default, discontinuance, and to maintaining second action, see post, § 10.

29. Allowance from fund in equity held discretionary. Weiss v. Haight & Freese Co. [C. C. A.] 165 F 432. Allowance of costs to be paid out of trust fund rests in sound discretion of court. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

30. Where proceedings are maintained by one or few for benefit of many, liability for costs may attach to general fund involved so that each of those benefited may bear his proportionate share. In re Shedaker [N. J. Eq.] 70 A 659. Miller's Comp. Laws, § 9440, does not take away court's discretion to tax costs against estate. More v. Luther, 153 Mich. 215, 15 Det. Leg. N. 757, 117 NW 932. Counsel fees, as well as costs of case, were allowed to be paid out of general fund, where services of attorney in overthrowing decree of orphans' court and establishing right to participate in distribution of decedent's estate resulted to benefit of many entitled to such general fund and not just to benefit of few who sustained issue. In re Shedaker [N. J. Eq.] 70 A 659. Orphans' court properly deducted costs in equity case from balance of fund. Thomas' Estate, 36 Pa. Super. Ct. 186. **Cost of distribution** or litigation necessary to determine the proper disposition of trust fund are properly

though the legislature may have the power to prescribe differently,[31] in the absence of statute, the costs of a party not interested in such fund will not be taxable against it,[32] nor will the courts usually recognize an invalid stipulation, as to costs, made by a representative of the owner of a trust fund.[33] The liability of an entire fund for costs may depend upon the litigation being of general value to it, instead of to some individual share in the fund.[34] The taxation of costs against an estate must usually be authorized by an express order of the court,[35] but is not always entirely dependent upon the event of the action.[36]

chargeable against such fund. Smullin v. Wharton, 83 Neb. 328, 119 NW 773. Costs of determination of amount due to be paid for annual support and maintenance of party was chargeable against fund and not against party. Id. Expense of ascertaining unknown owners of fund in hands of court and of distributing fund was properly chargeable against fund. House v. Amsdell Brewing & Malting Co., 133 App. Div. 486, 117 NYS 796. Costs of trustee in securing court's direction as to disposition of estate was properly charged against estate, where will provided that expenses of trust should be paid out of estate. Keys v. Wohlgemuth, 240 Ill. 586, 88 NE 1041. Costs of suit to distribute assets of insolvent corporation shall be paid out of assets of such corporation before distribution, under Revisal 1905, §§ 1207, 1226. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 63 SE 1048. **Disbursement to secure settlement** from executor by successful beneficiary was allowed out of fund. In re Bass, 57 Misc. 531, 109 NYS 1084. Suit presenting proper case for **construction of will** should be paid out of estate. Emert v. Blair [Tenn.] 118 SW 685. Where it is necessary for trustees to go into court of chancery to obtain construction of will, costs of litigation must be borne by estate. Converse v. Hindes, 139 Ill. App. 370. Reasonable and necessary expenses of **will contest** were chargeable against estate. Smullin v. Wharton, 83 Neb. 328, 119 NW 773. **Expenses of protecting estate** are taxable against it, hence, where interests of estate were protected by legatees in suit by executrixes who claimed adversely thereto, legatees were entitled to reasonable counsel fees and expenses out of trust fund. Bean v. Bean [N. H.] 68 A 409. **Costs of receivership** are ordinarily taxable out of fund realized in court, even though order appointing receiver is reversed, the receivership having gone on, pending appeal. Palmer v. Texas, 212 U. S. 118, 53 Law. Ed. —. **Fees of master** in connection with fund in hands of court were payable out of fund. Colehour v. Bass, 143 Ill. App. 530. Costs and expenses of **partnership accounting** are properly chargeable against copartnership assets. Masters v. Brooks, 132 App. Div. 874, 117 NYS 585. Under general rule of equity, where one creditor institutes **creditors' suit** for benefit of all creditors, those creditors who claim benefit of fruit of action must contribute to expenses, including counsel fees, and court will direct payment of fees and expenses before division of property recovered. Buist v. Williams, 81 S. C. 495, 62 SE 859. Attorney who filed complaint against bank asking for appointment of receiver and distribution of assets among creditors should be paid from funds realized for creditors before distribution among them. Buist v. Williams, 81 S. C. 495, 62 SE 859. Fund derived from **foreclosure** sale of mortgaged property is taxable with costs and disbursements of successful moving party only. Terry v. Fuller, 60 Misc. 562, 112 NYS 450. If a minor, though not required to execute bond in order to have **appeal prosecuted by next friend or guardian,** has estate sufficient to pay cost of appeal that may be adjudged against him, this estate would be liable to party to whom costs might be due, unless suit was instituted under conditions which would not be binding on minor. Biggins v. Gulf, etc., R. Co. [Tex. Civ. App.] 110 SW 561.

31. In re McNaughton's Will. 138 Wis. 179, 118 NW 997. It is within power of legislature to make reasonable regulations for compensating guardian ad litem out of trust fund, regardless of whether infant had any interest in such fund. Id.

32. In re McNaughton's Will, 138 Wis. 179, 118 NW 997. Compensation cannot be made for payment of guardian ad litem out of fund in which infant has no interest. Walter v. Frank, 118 NYS 268. Creditors who were in no sense agents, trustees, or representatives of bank or stockholders, could not have their counsel fees paid from bank fund. Buist v. Williams, 81 S. C. 495, 62 SE 859. Estate of bankrupt held not liable for attorney fees of unsuccessful claimant. In re Coventry Evans Furniture Co., 171 F 673.

33. As general rule, representatives of owners of trust fund cannot stipulate for payment of costs out of such fund which are not properly taxable against it. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

34. Costs of suit by testamentary trustees to obtain construction of will, which suit involves only question as to share of beneficiary, must be borne by such share. Davies v. Davies, 129 App. Div. 379, 113 NYS 872. As general rule it is improper for expenses of litigation of defeated party, except to extent of his interest in such fund, to be paid out of fund. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

35. Not paid out of estate on decree modifying decree of surrogate court settling account of executrix, with costs to appellant, where not expressly provided. In re Perry, 131 App. Div. 284, 115 NYS 744.

36. Estate held liable for costs of intervening legatees, though they were not successful in one of two suits in which they intervened. Bean v. Bean [N. H.] 68 A 409. Failure to succeed in suit did not conclusively show parties not to be entitled to compensation out of estate, but to be merely a circumstance bearing upon reasonableness of service and good faith. Id.

Liability of representative. See 11 C. L. 889—While it is ordinarily discretionary whether costs shall be taxed personally against one acting in a representative capacity or against the estate which he represents,[37] a representative is usually personally liable for costs, when he prosecutes in his representative capacity a suit which he might have brought in his individual name [38] when he is sued individually [39] and is not a mere nominal party,[40] when the litigation is caused by his failure to properly perform his duties without unreasonable contention,[41] or when the court makes no special order in regard to costs.[42] Costs on an adverse judgment should be rendered against the next friend and not against the minors whom he represents.[43] A guardian ad litem is not liable for the costs of his ward.[44] A trustee in bankruptcy is not liable for more of the costs of a pending action than accrued after he became trustee,[45] nor is he at all liable unless he accepts the action under authority of the court.[46]

§ 5. *Right dependent on event or upon certain conditions. A. Prevailing party in general.*[47] See 11 C. L. 891—As a general rule, costs abide the final event of the action.[48] They are usually allowed to the defendant upon the dismissal [49] or discontinuance of a proceeding against him.[50] As a general rule, the prevailing

37. Miller's Comp. Laws, § 9440, does not take away such discretion. More v. Luther, 153 Mich. 215, 15 Det. Leg. N. 757, 117 NW 932.

38. Lakin v. Sutton, 132 App. Div. 557, 116 NYS 820.

39. Quo warranto proceedings against drainage commissioners to test legality of law was against them individually and not in their official capacity. People v. Strandstra, 238 Ill. 341, 87 NE 286.

40. Sheriff was not nominal party and was subject to personal judgment for costs, in suit against him and judgment creditor to restrain execution sale and to quiet title against certificate of sale issued. Bender v. Ragan [Wash.] 102 P 427.

41. Defendant, though mere trustee for codefendants virtually confessing judgment for costs, was liable for costs where he persisted in controverting plaintiff's claim. Zeno v. Adoue [Tex. Civ. App.] 117 SW 1039. **Administrator** is ordinarily liable for costs only where he has unreasonably resisted or neglected claim duly presented, under Code Civ. Proc. §§ 1835, 1836. Lightfoot v. Davis, 112 NYS 289. Administrator who fails to consent to settlement of claim by surrogate and compels bringing of suit is liable for costs. Id. Costs were awarded against **executor** who had failed to pay over proper amount due to beneficiary, such award being a matter of right. In re Bass, 57 Misc. 531, 109 NYS 1084.

42. Under Miller's Comp. Laws, § 9440. More v. Luther, 153 Mich. 215, 15 Det. Leg. N. 757, 117 NW 932.

43. Thompson v. Rabun, 131 Ga. 713, 63 SE 215.

44. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

45. Construing Code Civ. Proc. § 3247, providing that transferee of pending cause of action shall be liable for costs. Kessler v. Herklotz, 132 App. Div. 278, 117 NYS 45.

46. Kessler v. Herklotz, 132 App. Div. 278, 117 NYS 45. Not liable where not authorized by federal court to intervene and where action was not brought in reliance on responsibility of trustee. Id.

47. Search Note: See Cost, Cent. Dig. §§ 93-136, 165-296, 304-334; Dec. Dig. §§ 26-41, 43-70, 72-77; 11 Cyc. 27-38, 53-71, 82-90, 97, 98, 132, 133, 145-153; 2 A. & E. Enc. P. & P. 122.

48. Miller v. Buffalo, 129 App. Div. 833, 113 NYS 1056; Berrent v. Simpson, 61 Misc. 611, 113 NYS 1065. When appeal is taken on issues of case, costs of trial in lower court abide event. Berthold v. Burton, 169 F 495; Smith v. Cashie & C. R. & Lumber Co., 148 N. C. 334, 62 SE 416. Party who recovers final judgment in trial court recovers all costs of that court. Id. Costs of first trial would be awarded as were costs of second trial after remand. Berrent v. Simpson, 61 Misc. 611, 113 NYS 1065. "Costs to abide the event" signifies the event of final determination of the action, and hence successful party on new trial is not entitled to costs where appeal perfected from new trial is pending, and prevents any effective determination of the action below. Miller v. Buffalo, 129 App. Div. 833, 113 NYS 1056. Applying Code Civ. Proc. §§ 3228, 3229, where appellate term of supreme court reverses judgment of city court of city of New York, "with costs to appellant to abide the event," the costs conditional on event are only those of appellate court and does not include costs awarded at first trial. Berrent v. Simpson, 61 Misc. 611, 113 NYS 1065.

49. In dismissal of action for tort as against one of several defendants, such defendant is entitled to his costs as in a separate action as of course. Tanzer v. Breen, 131 App. Div. 654, 116 NYS 110.

50. Defendant was entitled to costs where plaintiff proceeded under rule 27 which gave him right to discontinue upon trial with right to amend, although had plaintiff proceeded under Comp. Laws, § 11263, he would have been protected by its provisions and defendant would not have been entitled to his costs unless judgment had been entered that he was unreasonably and unnecessarily made a party to the action. Townsend v. Jackson Circuit Judge [Mich.] 16 Det. Leg. N. 318, 121 NW 483.

party recovers costs [51] where he has made a sufficient appearance in the case.[52] A party prevails where he is successful [53] and brings about a satisfaction of his claim,[54] or makes a sufficiently substantial recovery, but the rule is not uniform in all cases as to what is a sufficient recovery.[55] Where each party prevails in part, the costs may be divided,[56] or, in some cases, refused to either party.[57] Each of several prevailing defendants, whose interests are not identical and who appear by different attorneys, may be entitled to costs.[58]

(§ 5) *B. Waiver of right and effect of tender or offer of judgment.*[59]—See 11 C.

51. Code Civ. Proc. §§ 3228, 3229, gives costs to prevailing party. Berrent v. Simpson, 61 Misc. 611, 113 NYS 1065. Costs were properly allowed by circuit court to successful party in appeal from judgment of county court in matter of construing will. In re Moore's Estate, 138 Wis. 602, 120 NW 417. Costs were allowed trustee in bankruptcy prevailing in suit to set aside fraudulent conveyance. Parker v. Travers [N. J. Err. & App.] 71 A 612. Shannon's Code, Tenn. § 4938, awards to successful party in all civil actions full costs, unless otherwise provided by law. Scatcherd v. Love [C. C. A.] 166 F 53. While there is no act of congress requiring taxation of costs against either party in an action at law, except in special cases, it has been the practice of the circuit courts to follow the state rule and award successful party his costs. Id. Under Rev. St. 1895, art. 1425, successful plaintiff in suit to recover sequestered cattle was entitled to recover all costs. Rudolph v. Snyder, 47 Tex. Civ. App. 438, 20 Tex. Ct. Rep. 720, 106 SW 763.

52. Under Municipal Court Act (Laws 1902, p. 1585, c. 580), § 332, for appearance of defendant to be sufficient he must have appeared by an attorney at law, who filed verified pleading or written notice of appearance. Tabachnick v. Brand, 129 App. Div. 620, 114 NYS 445; Smith v. Herring-Hall-Marvin Safe Co., 115 NYS 204. Indorsement of name and address of plaintiff's attorney on bill of particulars filed by plaintiff in action was sufficient appearance for such purpose, though pleadings were oral. Smith v. Herring-Hall-Marvin Safe Co., 115 NYS 204. Appearance was made in substantial compliance with statute where record showed filing and service of bill of particulars, signed by plaintiff's attorneys, whose general appearance was recognized by defendant's attorneys and by the court. Haas v. Read, 63 Misc. 342, 117 NYS 106. No costs are allowed the prevailing party unless he has appeared by filing a verified pleading or has filed his written notice of appearance, under Municipal Court Act (Laws 1902, p. 1585, c. 580), § 332. Id.

53. Under Shannon's Code, § 4938 (Tenn.), defendant is successful party in cases of nonsuit, dismission, abatement by death of plaintiff, or discontinuance. Scatcherd v. Love [C. C. A.] 166 F 53. Defendant was not successful party where he acknowledged his liability by payment of claim sued on. Id. Defendant held to be successful and entitled to costs of first hearing when he succeeded on vital issues of case, though on subsequent hearing plaintiff was successful through urging a point not urged at first hearing. Castell v. Faher [C. C. A.] 166 F 281.

54. Plaintiff is successful party when his suit brings about a satisfaction of his claim by defendant. Scatcherd v. Love [C. C. A.] 166 F 53. Plaintiff was successful party when defendant after suit begun acknowledged his liability by payment of claim upon which he was sued, without any agreement being made as to accrued costs. Id.

55. Plaintiff suing for balance due on goods sold, who recovers judgment in any amount, is entitled to judgment for costs. Moroney Hardware Co. v. Goodwin Pottery Co. [Tex. Civ. App.] 120 SW 1088. Plaintiff was not allowed costs where, although he succeeded on one item, the defendant prevailed on major portion of claims. Roth v. Robertson, 64 Misc. 343, 118 NYS 351.

56. When suit is brought upon several claims of one or more patents, and complainant succeeds in obtaining relief upon some of the claims but fails to recover upon others, an equitable division of costs proportionate to expense of litigating respective claims should be made. J. L. Owens Co. v. Twin City Separator Co. [C. C. A.] 168 F 259. Costs are apportioned in accordance with court's discretion when both parties prevail in part. Ashdown v. Ely [Iowa] 117 NW 976. Apportioned where plaintiff recovered on his claim and defendant on his counterclaim. Id. Where plaintiff recovered on only one of two distinct issues, he was entitled to recover costs upon only the one issue and defendant recovered costs on other (under Comp. Laws, § 11267, providing wherein costs may be allowed or divided). Besser v. Alpena Circuit Judge [Mich.] 15 Det. Leg. N. 1081, 119 NW 902. Where each party secures judgment against the other, they may each be required to pay costs of the respective judgments secured against them. Gilly v. Hirsh, 122 La. 966, 48 S 422.

57. Where judgment was in part for plaintiff and in part for defendant (city), no costs were allowed. Cataract Power & Conduit Co. v. Buffalo, 131 App. Div. 485, 115 NYS 1045. Where city appellant failed to object to certain award below, which award was reversed and held unlawful on appeal, costs were awarded to neither party. In re Belmont Street, 128 App. Div. 636, 112 NYS 858. No costs will be allowed to either party where each claimed more from the other party than he was found entitled to. Condon v. New Rochelle Water Co., 116 NYS 142. Where each party suceeded in part, neither was entitled to costs at law as against the other. Diocese of Trenton v. Toman [N. J. Eq.] 70 A 881.

58. Each was entitled to costs under Code Civ. Proc. § 3229, providing that defendant is entitled to costs upon rendition of final judgment unless plaintiff is entitled to costs. Jacobs v. Feinstein, 133 App. Div. 416, 117 NYS 823.

L. 892—A party may waive his right to costs by an express agreement, unless such agreement be invalid [60] or unauthorized,[61] by failing to claim his right in due time [62] or as provided by statute,[63] or by failing to file a cost bill therefor.[64] The effect of a sufficient tender of the amount sued for is to relieve the defendant from the payment of costs accruing thereafter,[65] and to make the plaintiff liable for such costs of the defendant where his recovery is less than the amount tendered.[66] A tender to be sufficient must be continuing, equal in amount to the sum found by the jury, and made in the required manner,[67] and must usually include interest and costs up to the time made.[68] An admission of the debt and an offer to pay may be sufficient to constitute tender, without actual tender, where it appears that actual tender would have been useless.[69] An offer to confess judgment, which does not definitely state to whom the amount offered is due, is insufficient to relieve from costs.[70] Failure to accept a tender of certain relief may estop a party from recovering costs upon his being decreed such relief,[71] and may entitle the adverse party to his costs which accrue after the tender.[72]

Effect of not performing conditions precedent to suit. See 12 C. L. 891—In some cases the right and liability in respect to costs depend upon a demand having been made [73] or the claim sued on having been properly presented prior to suit,[74] unless

59. **Search Note:** See Costs, Cent. Dig. §§ 137-164, 297-303; Dec. Dig. §§ 42, 71; 11 Cyc. 71-82, 98, 99; 15 A. & E. Enc. P. & P. 32.

60. Such agreement is valid unless shown to be unjust and induced by fraud. Crane v Gurnee [N. J. Eq.] 71 A 338.

61. Counsel for municipal corporation was not authorized to agree that in case of affirmance or reversal of judgment no costs should be awarded to either party as against the other, § 689, of the Greater New York charter making it mandatory upon judge hearing appeal to give $30 costs to appellant upon reversal and $25 costs to respondent upon affirmance. People v. Steinhart, 57 Misc. 292, 109 NYS 539.

62. Party may waive his right to have disbursements taxed as costs by failing to assert such right until after judgment has been rendered and satisfied, no excuse being shown for delay. Missouri, K. & T. R. Co. v. Jenkins [Kan.] 101 P 630.

63. Butte Northern Copper Co. v. Radmilovich [Mont.] 101 P 1078. See Rev. Codes, § 7170, providing that party shall give notice of his disbursement within five days. Id.

64. Under rules supreme court, No. 28, party waived right to have disbursements taxed as costs by his failure to file cost bill before mandate issued. Sommer v. Compton [Or.] 100 P 289.

65. Costs accruing after tender were taxed against plaintiff, those accruing before tender, against defendant. Gillilland v. Brantner [Iowa] 121 NW 1047. Where parties agreed of record upon amount due in case plaintiff recovered, which amount was deposited in court, defendant was not liable for costs of appeal by reason of fact that lower court rendered judgment for less than agreed amount. Snider v. Smith [Ark.] 115 SW 679.

66. Heller v. Katz, 62 Misc. 266, 114 NYS 806.

67. Livingston Bros. v. Salter [Ga. App.] 65 SE 60. Defendant must have duly filed plea of tender. Id.

68. Tender held invalid as not complying with Municipal Court Act (Laws 1902, p. 1537, c. 580), § 148, requiring interest and costs, to be included. New York Public Bank v. Birnbaum, 117 NYS 237.

69. Smith v. Eiger, 143 Ill. App. 552. Actual tender held unnecessary. Id.

70. Flannery v. New England Transp. Co., 168 F 397.

71. Party sought mandatory injunction which was refused except as alternative relief for damages offered him, whereupon he elected to appeal and lost, and then sought and received relief first offered. Held that he was not entitled to costs of attempt to secure mandatory injunctive relief. Andrus v. Berkshire Power Co., 169 F 732.

72. Defendant was entitled to costs he was put to by plaintiff's unsuccessful attempt to secure mandatory injunctive relief after relief obtained was tendered. Andrus v. Berkshire Power Co., 169 F 732.

73. In action for possession of property, where defendant, without demand, was rightfully in possession, and there being no evidence of demand, he is entitled to costs. Citizens' State Bank v. Chattanooga State Bank [Okl.] 101 P 1118. If no demand is made, and original possession of defendant be lawful, and he tenders property to plaintiff, and upon its delivery by proper answer or plea discharges the action, costs should be taxed against plaintiff. Id.

74. Under Comp. St. 1881, c. 14, p. 121, applicable to cities of the second-class, costs cannot be recovered against city in suit on claim based on contract unless claim be filed with city prior to institution of suit. Butterfield v. Beaver City [Neb.] 121 NW 592. Plaintiff in action against board of education can recover his costs, if his claim was duly presented to auditing department, construing Code Civ. Proc. § 3245. Eagan v. Board of Education, 115 NYS 167. Costs not allowed against administrator where certificate of referee does not show that claim was filed in due time. Lightfoot v. Davis, 112 NYS 289. Certain costs not allowed where claim had not been filed with administrator before filing of suit. Id.

Claim for tort need not be presented to city before commencing suit. Butterfield v. Beaver City [Neb.] 121 NW 592.

the defendant in some way, as by contesting the action,[75] or by omitting to plead such failure in the cases required,[76] relieves the plaintiff from the effect of his omission.

Although in an action to set aside a tax sale the unsuccessful defendant is properly taxable with all costs accruing subsequent to a tender of the amount due,[77] he is not taxable with any costs where no such tender is made.[78]

§ 6. *Right dependent on minimum amount of demand or recovery.*[79]—See 11 C. L. 893—In certain cases the right to recover costs is, by statute, made to depend upon the amount of recovery.[80]

§ 7. *Right affected by nature of action or proceeding, or character of tribunal. A. In general.*[81]—See 11 C. L. 894

(§ 7) *B. In equity and equitable code actions.*[82]—See 11 C. L. 894—The awarding of costs in equity is within the proper exercise[83] of the discretion[84] of the trial court,[85] except as otherwise provided by law.[86] While, as a general rule, the costs follow the judgment,[87] the court may tax the costs against a prevailing defend-

75. If defendant contests action, the writ will be sufficient demand, and defending suit a refusal. Citizens' State Bank v. Chattanooga State Bank [Okl.] 101 P 1118.

76. Ann. St. 1906, § 1575, providing that failure to make demand must be pled to be available, does not apply to those cases wherein no previous demand was required at common law and is not construed to release defendant from liability for costs in such cases. Downs v. Pacific Exp. Co., 135 Mo. App. 330, 116 SW 9.

77. Defendant was properly taxed with all costs accruing subsequent to tender of amount due under tax sale certificate. Glos v. Larson, 138 Ill. App. 412.

78. In action to have certain tax deeds canceled, held error to decree one-third of costs against defendant where complainant made defendant no tender before filing bill of amount equitably due for taxes paid. Bauer v. Glos, 236 Ill. 450, 86 NE 116.

79. **Search Note:** See Costs, Cent. Dig. §§ 47-92; Dec. Dig. §§ 20-25; 11 Cyc. 39-46; 5 A. & E. Enc. P. & P. 157.

80. In the application of Code Civ. Proc. § 3228, subd. 5 (providing that actions in supreme court, triable in county of New York or in county of Kings, which, except for amount claimed, could have been brought in county court of Kings county, plaintiff shall recover no costs unless he recover $500 or more), each county stands separate and actions are "triable" where venue is laid; hence, where action was brought and venue laid in Queen's county, costs were recoverable, though plaintiff recovered only $100. Burgdorf v. Brooklyn, etc., R. Co., 130 App. Div. 253, 114 NYS 718. Under Code Civ. Proc. subd. 5, of § 3228, the plaintiff, the amount claimed and for which he could recover being under $250, could not recover costs in appellate court. Fidelity & Deposit Co. v. Art Metal Const. Co. [Ala.] 50 S 186. Code Civ. Proc. § 3228, subd. 5, applies only to cases in which plaintiff is deprived of costs under terms of such subdivision and only to cases in which refusal to allow costs to plaintiff result from its application, it being read as if it provided that fact that in any action plaintiff is not entitle to costs solely because subdivisions of such section shall not entitle defendant to costs; hence, in case at bar defendant was entitled to costs if plaintiff recovered less than $50, but was not so entitled if plaintiff recovered more than $50 but less than $500. Streat v. Wolf, 132 App. Div. 872, 117 NYS 449.

81. **Search Note:** See notes in 54 L. R. A. 817; 5 Ann. Cas. 834.

See, also, Costs, Cent. Dig. §§ 26-46, 106, 107, 252-260, 665-690; Dec. Dig. §§ 16-18, 52-55, 57, 58, 172, 173; 11 Cyc. 47-63, 104; 5 A. & E. Enc. P. & P. 168.

82. **Search Note:** See Costs, Cent. Dig. §§ 27, 33; Dec. Dig. § 56; 11 Cyc. 32-38; 8 A. & E. Enc. P. & P. 184.

83. Sullivan Timber Co. v. Black [Ala.] 48 S 870. Exercise of discretion to be proper must be in accordance with general rules and precedents and not arbitrarily. Id. Apportionment must not be made to rest upon unsound grounds. Converse v. Deep River, 139 Iowa, 732, 117 NW 1078. It was improper to tax party with costs because of his filing an amended petition which added nothing to the legal effect of original petitioner to costs, but aided the court in that it emphasized and specified the particular relief sought. Id. There was no abuse of discretion in refusing costs to plaintiff **in admiralty,** though defendant's defense of desertion failed, where plaintiff was at fault for failing to return to vessel and in bringing suit in forma pauperis without demanding his wages. The Charles K. Schull, 166 F 374.

84. Mills v. Britt [Fla.] 47 S 799. Disposition of question of costs is discretionary. Harvey v. Beckman, 64 Misc. 395, 118 NYS 602; Weiss v. Haight & Freese Co. [C. C. A.] 165 F 432. Giving of costs in equity is within discretion of chancellor. Mt. Nebo Anthracite Coal Co. v. Martin, 86 Ark. 608, 112 SW 882. Awarding or withholding of costs **in admiralty** is discretionary. The Eva D. Rose [C. C. A.] 166 F 101.

85. Apportionment is discretionary with trial court. Converse v. Deep River, 139 Iowa, 732, 117 NW 1078.

86. Made discretionary by chancery act (P. L. 1902, p 538, § 84), except as otherwise provided. Diocese of Trenton v. Toman [N. J. Eq.] 70 A 881.

87. St. Louis & S. F. R. Co. v. Hadley, 168 F 317.

ant who has removed the cause for complaint after suit was begun,[88] may divide expenses resulting from the fault of both parties,[89] may deny costs to the prevailing party who has been guilty of serious fault,[90] or whose right to the relief obtained did not exist at the institution of the suit,[91] may deny costs to all parties where all are materially benefited,[92] where each succeeds in part,[93] or where the decree does not conform to the prayer of either,[94] and may adjudge costs against one of several defendants who was solely at fault.[95] Costs will be allowed in such way as may be most just to the parties concerned in creditor's suits,[96] foreclosure suits,[97] suits to quiet title,[98] partition proceedings,[99] suits involving rights connected with a fund or an estate,[1] and suits maintained or defended by one acting in a representative capacity.[2] Usually no presumption will be indulged in that costs have been awarded against a party cast in chancery.[3] The legislature may prescribe for the payment of the costs of each party by the husband in action for alimony and divorce.[4] In such proceeding costs may be allowed against an intervening correspondent.[5] The petitioner for limitation of liability cannot recover his costs unless his petition be contested.[6]

88. Defendant was properly taxed with costs where he removed ground for injunction after suit was begun. Woods v. Lincoln Trac. Co., 83 Neb. 23, 118 NW 1067.

89. It was in court's discretion to divide expenses of unnecessarily large and expensive record resulting from fault of both parties. St. Louis & S. F. R. Co. v. Hadley, 168 F 317.

90. Plaintiff, owner, who sat by and saw defendant making improvements without objection, is not entitled to his costs although he prevailed in suit to secure relief from invalid tax title or claim by adverse possession. Cook Land Construction & Producing Co. v. McDonald [Mich.] 15 Det Leg. N. 953, 118 NW 959.

91. Harvey v. Beckman, 64 Misc. 395, 118 NYS 602.

92. Hough v. Porter, 51 Or. 318, 102 P 728.

93. Plaintiff succeeded on one issue and defendant on another. Harvey v. Beckman, 64 Misc. 395, 118 NYS 602. If complainant succeeds on one or more substantial issues and defendant likewise succeeds on one or more substantial issues, neither is entitled to costs against the other. Diocese of Trenton v. Toman [N. J. Eq.] 70 A 881.

94. Neither was entitled to costs. Farmer v. Ward [N. J. Eq.] 71 A 401.

95. All costs of suit, to enjoin foreclosure sale, brought by purchaser against vendor, who fraudulently sold him mortgaged property, and against holders of mortgage, were properly adjudged against such vendor. Thomas v. Ellison [Tex.] 116 SW 1141.

96. In creditors' suit to subrogate debt owing by innocent third party to judgment debtor such third party is not liable but is entitled to his costs, which will be primarily collectible against the debtor. Coldren Land Co. v. Royal [Iowa] 118 NW 426. Debtor's wife to whom debtor had delivered money which was loaned to third party and became basis of debt was liable for costs jointly with her husband. Id.

97. In action by mortgagor to establish his equitable right of redemption, defendant is entitled to his costs even though mortgagor prevail, except where such defendant is clearly at fault for the litigation. Lynch v. Ryan, 137 Wis. 13, 118 NW 174. Defendant was clearly at fault where he denied plaintiff's right of redemption and compelled him to establish it by protracted and expensive litigation. Id. Equity has the power to impose the costs on contractor, who through his resistance of foreclosure of mechanic's lien mainly causes the costs. Rieser v. Commeau, 129 App. Div. 490, 114 NYS 154. In delinquent tax foreclosure, no personal judgment should be entered for costs, but may be declared a lien on the property. Sound Inv. Co. v. Bellingham Bay Land Co. [Wash.] 102 P 234. Successful moving party only is entitled to his costs and disbursements to be paid before distribution out of a fund derived from the sale of land under mortgage. Terry v. Fuller, 60 Misc. 562, 112 NYS 450.

98. Plaintiff who is decreed to own fee in action involving title to land is entitled to costs, although easement be decreed to defendants, under Code Civ. Proc. § 1022. Petitpierre v. Maguire [Cal.] 100 P 690.

99. Defendants were not entitled to costs or attorneys' fees where beneficiary seeking partition and removal of trustee secured partition but not such removal. Nagle v. Von Rosenberg [Tex. Civ. App.] 119 SW 706. However, where there is substantial contest over easement and defendant prevails, he should not be required to pay part of plaintiff's counsel fees. Smith v. Roath, 238 Ill. 247, 87 NE 414.

1. As to liability of fund or estate for costs, see ante, § 4.

2. As to liability of representative for costs, see ante, § 4.

3. In such cases in federal courts, there is no implication that the unsuccessful party was adjudged to pay the costs, unless there be a rule specially so providing. Santa Clara Val. Mill & Lumber Co. v. Prescott, 238 Ill. 625, 87 NE 851.

4. Statute so providing (Ky. St. 1903, § 900) is not violative of either state or federal constitution. Gorbrandt v. Gorbrandt [Ky.] 115 SW 210.

5. Costs, including attorney's fees, were allowed. Duke v. Duke [N. J. Eq.] 73 A 837.

6. The W. A. Sherman [C. C. A.] 167 F 976.

(§ 7) *C. In inferior courts.*[7]—See 11 C. L. 895—The power of inferior courts to award costs is treated in a previous section.[8]

(§ 7) *D. In interlocutory or special proceedings, or proceedings other than actions.*[9]—See 11 C. L. 896—Costs in interlocutory and special proceedings are largely discretionary[10] and may be awarded to an unsuccessful party in a proceeding to set aside the probate of a will,[11] or awarded to an only partially successful party in trespass to try title,[12] and against the successful plaintiff in condemnation proceedings.[13] As a general rule, a party is entitled to his costs who is drawn into a proceeding without fault of his own, such as a garnishee without fault[14] or a claimant in condemnation proceedings,[15] and costs will be taxed against the party who is unsuccessful,[16] guilty of fault,[17] or who has procured a favor through the proceeding.[18] The costs awarded may be apportioned among several successful litigants.[19] Costs

7. Search Note: See notes in 3 Ann. Cas. 51, 6 Id. 683, 7 Id. 183.

See, also, Costs, Cent. Dig. § 45; Dec. Dig. § 19; 5 A. & E. Enc. P. & P. 224.

8. See § 2, ante.

9. Search Note: See Costs, Cent. Dig. §§ 28, 29, 229-249, 257-260; Dec. Dig. §§ 57, 58; 11 Cyc. 53-63; 5 A. & E. Enc. P. & P. 221.

10. Imposition of costs upon plaintiff upon his withdrawal of count in his complaint is discretionary. Franck v. Stout, 139 Wis. 223, 120 NW 867. Under Code Civ. Proc. § 3230, it is in discretion of court to award costs to either party in proceeding to set aside probate of will. Senter v. Petheram, 64 Misc. 294, 118 NYS 347. P. L. p. 277, makes discretionary the taxation of costs on taking of **depositions,** whether depositions be taken by order of court or by consent of parties. Hite v. Dell [N. J. Law] 73 A 72. Taxation of costs in **mandamus** proceedings rests in sound discretion of court. State v. Chicago & N. W. R. Co., 83 Neb. 518, 120 NW 165. Equitable rules which place matter in sound discretion of court control taxation of costs in mandamus proceedings in federal supreme court, on mere order to show cause, there being no statute of rule of court giving costs to prevailing party in such case. In re Haight & Freese Co. [C. C. A.] 164 F 688. It was in discretion of court to tax costs against defendant where at time of determination of appeal, by reason of lapse of time, judgment for plaintiff would have been ineffective, and where defendant was at fault and had the facts in its possession, few of which were known to plaintiff. State v. Chicago & N. W. R. Co., 83 Neb. 518, 120 NW 165. In **trespass to try title,** taxation of costs against plaintiff on rendering judgment for him on his alternative demand and for defendant (purchaser at tax sale) for possession of land was discretionary. Patton v. Minor [Tex. Civ. App.] 117 SW 920.

11. In action to set aside probate of will, the court has power to award costs even to unsuccessful plaintiff, under Code Civ. Proc. § 3230. Senter v. Petheram, 64 Misc. 294, 118 NYS 347.

12. In trespass to try title, when defendant claims whole premises and plaintiff recovers part, plaintiff was entitled to all costs except fee to guardain ad litem of infant defendants (applying Sayles' Ann. Civ. St. 1897, arts. 1425, 1438, 5270). Perry v. Rogers [Tex. Civ. App.] 114 SW 897. Costs should be awarded to plaintiff where defendant claims whole premises and plaintiff shows himself entitled to recover part, under Sayles' Ann. Civ. St. 1897, art. 5270. Lumpkin v. Williams [Tex. Civ. App.] 119 SW 917.

13. Public corporation as plaintiff is liable for costs of condemnation proceeding, although it may prevail in action. In re Monongahela Water Co. [Pa.] 72 A 625.

14. Garnishee who has obeyed summons is entitled to costs. Kelley v. Tarrington, 81 Conn. 615, 71 A 939. Garnishee who answers and is discharged is entitled to costs. Maury v. McDonald [Tex. Civ. App.] 118 SW 812. Reasonable allowance is made to garnishee for answering, where he admits owing defendant, or plaintiff fails to obtain judgment against garnishee (under Ann. St. 1906, p. 1984). Cope v. Shoemate [Mo. App.] 119 SW 503.

15. In condemnation proceedings, each claimant is allowed his costs, especially where interests of claimants are not united and identical. In re Pine's Stream & East Meadow Stream, 129 App. Div. 929, 62 Misc. 61, 114 NYS 681.

16. Any one making opposition to appointment of guardian for incompetent and being defeated therein is liable for costs, under Rev. St. 1895, art. 2785. Hefly v. Hugen [Tex. Civ. App.] 120 SW 956. Party making unsuccessful attempt to secure guardianship and to defeat right of incompetent's father thereto was properly taxed with costs. Id. Costs of **guarnishee,** who is discharged, are taxable against plaintiff, under Rev. St. 1895, art. 253. Maury v. Mc. Donald [Tex. Civ. App.] 118 SW 812. Unsuccessful party in **election contest** is liable for costs (contestant who dies during pendency, abatement of action resulting, is considered unsuccessful). Galvin v. Shafer [Ky.] 113 SW 485. All costs were taxed against individual bringing **inquisition proceedings** under Code 1906, § 2430, where incompetency of alleged insane person was not established. Baum v. Greenwald [Miss.] 49 S 836.

17. In suits to adjust conflicting claims to water rights, costs may be taxed against party guilty of knowingly wrongful act. Hough v. Porter, 51 Or. 318, 98 P 1083.

18. Party securing the favor of a change of venue is liable for costs of transfer, under Code Civ. Proc. § 399. Chase v. Superior Ct., 154 Cal. 789, 99 P 355.

19. Costs awarded against respondents in eminent domain proceedings were ordered

may be denied where the proceeding fails through some act of the adverse party done after the proceeding was commenced,[20] where a party withdraws only after the weakness of his case has been disclosed,[21] where an action of public concern fails though instituted upon reasonable grounds,[22] or where the relief is granted in justice to both parties,[23] or as a favor to the party seeking costs.[24] In some proceedings of public interest costs are allowed to the petitioner,[25] and in others no costs whatever are allowed.[26] The costs of a mandamus proceeding cannot be taxed against a judge of a constitutional federal court by reason of any failure to apprehend the law correctly.[27] Nor can the costs of condemnation proceedings in inferior courts be taxed against the landowners.[28] Costs may be awarded upon the issuance of an alternative writ of mandmus,[29] and upon the granting of a change of venue from a county in which a proceeding was wrongfully brought.[30] The liability for costs in disbarment proceedings is determined by statute.[31] Costs will not be allowed in special proceedings to a representative who has not been duly authorized to act.[32] Liability of one acting in a representative capacity, of a fund, or of an estate, for costs, is treated in another section.[33]

(§ 7) *E. On appellate review.*[34]—See 11 C. L. 895—The costs of an appeal are usually awarded to the party prevailing or held to be in the right therein,[35] though

divided between two appellants who each succeeded. Wendel v. Binninger, 132 App. Div. 785, 117 NYS 616.

20. Denial of motion to quash writ of certiorari should be without costs where amendments to petition removed grounds for motion. People v. Buffalo, 62 Misc. 313, 114 NYS 1077.

21. Abandonment of claim after trial had progressed far enough to disclose weakness of defense did not entitle defendant to judgment for costs. Lumpkin v. Williams [Tex. Civ. App.] 119 SW 917.

22. Where there was reasonable ground to believe person insane at institution of inquisition proceedings, costs will not be awarded against petitioner, although person may be adjudged to be sane. In re Hammond, 112 NYS 296.

23. No costs should be imposed on motion for new trial where new trial is granted in justice to both parties. Joseph v. New York City R. Co., 61 Misc. 440, 115 NYS 101. Parties benefited by general result of adjustment of water rights were each adjudged to pay their own costs. Hough v. Porter, 51 Or. 318, 98 P 1083.

24. Where plaintiff has failed to serve bill of particulars as ordered, costs should not be allowed defendant on order precluding plaintiff from giving any evidence in support of particulars required to be furnished by order, such order being a favor to defendant. Hosner v. Keahon, 63 Misc. 253, 116 NYS 720.

25. Petitioner was allowed his costs to date of order in inquisition proceedings to determine a person's sanity. In re Hammond, 112 NYS 297.

26. Certiorari proceeding to determine whether statute relative to construction, etc., of bridges and highways had been repealed, was of public interest. Reimink v. Strabbing [Mich.] 16 Det. Leg. N. 406, 122 NW 183. Applications to compel registration of qualified voters or to purge registration rolls of names illegally placed thereon are without costs, both in the court below and on appeal, under Const. art. 201; Act No. 199, p. 461, of 1898, §§ 17, 18. Lorio v. Sherburne, 122 La. 434, 47 S 760; Bishop v. Sherburne, 122 La. 429, 47 S 759.

27. In re Haight & Freese Co. [C. C. A.] 164 F 688.

28. Under construction of Const. art. 1, § 16. Kitsap County v. Melker, 52 Wash. 49, 100 P 150.

29. Under express provisions of Code Civ. Proc. § 2086. People v. Deutscher Krieger Bund New York, 129 App. Div. 80, 113 NYS 367.

30. Chase v. Superior Ct., 154 Cal. 789, 99 P 355.

31. Construing Rev. Pol. Code, § 694, Rev. Civ. Code Proc. § 291, and § 415, county was liable for compensation of referee, and accused for clerk's fees, cost of depositions and witnesses. In re Egan [S. D.] 119 NW 42.

32. Costs will not be awarded to unsuccessful will contestant unless he be duly appointed guardian appointed by court as required, under Code Civ. Proc. § 2558. In re Davis' Will, 60 Misc. 297, 113 NYS 287. Costs were not allowed to committee of lunatic not properly appointed. Id.

33. See ante, § 4.

34. Search Note: See note in 4 Ann. Cas. 79.

See, also, Costs, Cent. Dig. §§ 832-1008; Dec. Dig. §§ 221-264; 11 Cyc. 204-249; 5 A. & E. Enc. P. & P. 192.

35. Costs of appeal are awarded to him who prosecutes his appeal with effect. Texas S. P. R. Co. v. Butler [Tex. Civ. App.] 114 SW 671. Reading together Code Civ. Proc. § 3228, providing that on appeal from final judgment in action specified in § 3228 respondent is entitled to costs on affirmance and appellant to costs upon reversal of judgment appealed from, and § 3239, providing that where appeal is taken from order granting or refusing new trial and the decision upon appeal refuses new trial the respondent is entitled as of course to costs of appeal, upon appeal to supreme court, which included appeal heard by justices of appellate term as directed by appellate di-

he does not succeed in the final determination,[36] and against the party unsuccessful in the appeal [37] on any issue of material importance,[38] although he finally prevails in the action.[39] For the purpose of taxing costs, a party is not prevented from being considered the prevailing party by the fact that the decree which he seeks to sustain is slightly modified,[40] especially where the error corrected was inadvertent [41] or induced by the adverse party,[42] or because, where he is attacking the decree, his contention is only substantially upheld,[43] or the case is dismissed for want of jurisdiction below.[44] Nor is his right to costs affected by events beyond his control subsequent to the appeal, although they may cause the decision of the case to go against him.[45] Costs may be taxed against a prevailing appellant who was willfully at fault for the appeal.[46] A successful party who is at fault for unnecessary matter

vision and subsequent appeal to appellate division from determination of appellate term if final result refuses new trial and affirms judgment of municipal court, the respondent in whose favor judgment was entered is entitled to costs of appeal, in both courts, which became necessary to obtain final determination of supreme court. Greenwald v. Weir, 131 App. Div. 568, 116 NYS 172.

36. Costs allowed to party who secured correction of improper decree as sought by appeal, although he is not successful in main suit. Parker v. Travers [N. J. Err. & App.] 71 A 612.

37. Where judgment for plaintiff below is affirmed and there was no separate appeal by plaintiff but a mere consent assignment of errors on defendant's appeal under rule 3, defendant below is taxed with all costs of appeal. Western Union Tel. Co. v. Crowley [Ala.] 48 S 381. Judgment and order affirmed with costs. Nassar v. Elias, 129 App. Div. 912, 114 NYS 1139.

38. Exclusion of interest from erroneous judgment was alteration of judgment on material issue, and appellee was taxable with costs of appeal. Bommarius v. New Orleans R. & L. Co., 123 La. 615, 49 S 213. Where on appeal from entire order allowing amendment to complaint, order was only modified by requiring payment of additional costs as condition to proceeding with case, was not such material alteration in judgment as entitled appellant to costs. Audley v. Townsend, 131 App. Div. 79, 115 NYS 145.

39. Under Civ. Code 1902, § 540. Smith v. Cashie & C. R. Lumber Co., 148 N. C. 334, 62 SE 416.

40. Appellee held to substantially prevail where judgment rendered below was slightly modified. Towner v. Towner, 65 W. Va. 476, 64 SE 732. Modification of judgment by fixing time for removal of obstruction did not affect respondent's right to recover costs on appeal. Judson v. Tide Water Lumber Co., 51 Wash. 164, 98 P 377; Ami Co. v. Tide Water Lumber Co., 51 Wash. 171, 98 P 380.

41. Prevailing defendant was not taxed with costs of modification of decree by striking out of order which was inadvertently inserted. Latta v. Coffeen [Iowa] 118 NW 881.

42. Towner v. Towner, 65 W. Va. 476, 64 SE 732.

43. Plaintiff was entitled to costs where he prevailed on main issue and secured injunction sought, although his right to stream was held to be inferior to the right of navigation. Trullinger v. Howe [Or.] 99 P 880. Judgment for costs was allowed to plaintiff in error where there was merit in certiorari brought and in writ of error, and judgment below was affirmed with directions to amend. Georgia, F. & A. R. Co. v. Stanton & Co., 5 Ga. App. 500, 63 SE 655.

44. Appellant was entitled to costs of appeal where suit was dismissed on appeal for want of jurisdiction below although this objection was not raised below. Price v. Madison County Bank [Ark.] 118 SW 706.

45. Party entitled to injunctive relief at commencement of suit was entitled to costs of appeal, although relief was denied by reason of intervening change of laws. Lehman v. Chambersburg & G. Elec. R. Co. [Pa.] 73 A 440. Appellee was chargeable with costs of appeal where there was error cured by his remittitur, although judgment was affirmed. Weatherford, etc., R. Co. v. White [Tex. Civ. App.] 118 SW 799. Party was entitled to costs where he was in right in instituting mandamus suit to compel revocation of license, although at hearing on appeal mandamus was refused by reason of fact that license had expired. State v. Wausau, 137 Wis. 311, 118 NW 810.

46. Defendant, though he secured correction of clerical error to which he did not call the attention of court below, was liable for costs both on appeal and below. Blain v. Lowery [Tex. Civ. App.] 120 SW 247. Where judgment below was modified and affirmed in respect to matter not called to attention of trial court, such modification did not relieve appellant from being taxed with costs of appeal. McKee v. West [Tex. Civ. App.] 118 SW 1135. Defendant, though entitled to modification of judgment, was not entitled to costs on appeal, where error in judgment was caused by his failure to furnish trial judge certain evidence as requested. Olympia Brew. Co. v. Pioneer Mut. Ins. Ass'n [Wash.] 101 P 371. Where a plaintiff intentionally neglects to make out a case in order that he may appeal and practically have his first trial in the higher court, the costs of such appeal may be taxed against him though he succeeds therein (under Rev. St. 1895, art. 1438, so providing where good cause therefor is stated in record). Missouri, K. & T. R. Co. v. Milliron [Tex. Civ. App.] 115 SW 655.

in the transcript is taxable therefor.[47] A party not appealing from a decree which is affirmed may be awarded his costs connected with his appearance in the appeal,[48] but no costs will be awarded in favor of a person not appearing.[49] Where both parties appeal on a single record on affirmance, the costs of the record may be apportioned.[50] Costs may be divided on appeal in equity where the parties are equally benefited.[51] The unsuccessful party may be made to bear the costs of an unsuccessful appeal in divorce proceedings [52] and in condemnation proceedings.[53]

(§ 7) *F. In criminal prosecutions.*[54]— See 11 C. L. 897—Ordinarily there are statutory provisions regulating the liability of the prosecutor and the defendant for costs [55] and specifying the rate per day for which convicted persons shall be sentenced therefor.[56] A convicted defendant [57] is liable for the costs of his prosecution [58] but not for illegal costs paid by the commonwealth,[59] nor for the costs of an appeal for which he was not responsible.[60] Each of several defendants may be held liable, with rights of contribution,[61] for the entire costs of a joint prosecution.[62] A judgment for costs in such case may be valid although it does not specify that payment of the costs by one defendant will release all.[63] The prosecuting witness is liable for costs when he brings the prosecution in a court not having jurisdiction of the offense committed,[64] and also in certain cases specified by statute where the defendant is acquitted.[65] But the state is not liable to the defendant for his costs,[66] nor is it liable for costs which should be paid by the prosecuting witness.[67] In the

47. Wallace v. Reed Bros. [Tex. Civ. App.] 117 SW 1019.

48. Defendant not appealing from decree which was affirmed was allowed costs of printing his brief and usual counsel fee. Hamilton v. Deinzer [Mich.] 16 Det. Leg. N 437, 122 NW 104.

49. Inasmuch as respondent did not appear in case by brief or otherwise, he was not entitled to recover costs on appeal on affirmance. Johnson v. Collier [Wash.] 103 P 818.

50. Cost of record was equally divided. Hamilton v. Deinzer [Mich.] 16 Det. Leg. N. 437, 122 NW 104.

51. Campbell v. Moorehouse [Iowa] 120 NW 79.

52. Husband as defendant, in action for divorce, was not taxed with costs of appeal where he filed no brief, and dismissal of suit below was affirmed. Hoffman v. Hoffman [Mich.] 15 Det. Leg. N. 1031, 118 NW 990.

53. Under Ball. Ann Codes & St. § 5643 (Pierce's Code, § 5108). Kitsap County v. Melker, 52 Wash. 49, 100 P 150.

54. **Search Note:** See Costs, Cent. Dig. §§ 1082-1209; Dec. Dig. §§ 284-325; 8 A. & E. Enc. P. & P. 979.

55. In case of acquittal under indictment containing counts charging offenses other than larceny, jury has no power to impose payment of costs on either defendant or prosecutor (P. L. 89, relating to imposition of costs in criminal cases applying only to prosecutions for larceny). Commonwealth v. Harrison, 38 Pa. Super. Ct. 17. See statutes subsequently cited in this subdivision.

56. Gen. Acts Sp. Sess. 1907, p. 179; Cr. Code 1907, p 422, note, fixing 40 cents as rate per day at which convicts shall be sentenced for costs of prosecution repeals law fixing rate at 30 cents. Phillips v. State [Ala.] 50 S 326.

57. Under Shannon's Code, § 7619, defendant is not liable for costs until final conviction. State v. Cooper [Tenn.] 113 SW 1048.

58. Under Code 1904, § 4087. Commonwealth v. McCue's Ex'rs [Va.] 63 SE 1066.

59. Commonwealth v. Mitchell, 33 Pa. Super. Ct. 345.

60. Defendant in criminal case was not liable for costs of appeal where record was inadvertently filed. Singleton v. State [Tex. Cr. R.] 116 SW 572.

61. Defendant required to pay more than his share may recover against joint defendant. Newman v. State [Ala.] 49 S 786.

62. It was proper to require each defendant to confess judgment for costs of entire prosecution. Newman v. State [Ala.] 49 S 786.

63. Since attempt to coerce further payment would be abuse of process which court will not permit. Newman v. State [Ala.] 49 S. 786.

64. See P. L. 859, relating to suits improperly brought before justice of the peace. Commonwealth v. Dunmire, 38 Pa. Super. Ct. 155.

65. Rev. St. 1899, § 2778, means that in prosecutions for petit larceny the prosecuting witness is not liable for costs of proceeding wherein defendant is discharged and construed with § 2836, means that in case defendant is acquitted or discharged judgment shall be rendered against prosecutor wherein he is liable for costs according to § 2778 (in all cases not amounting to felony and except for petit larceny). State v. Butler, 133 Mo. App. 566, 113 SW 668.

66. General statute fixing liability for costs will not be construed to refer to state as party. State v. Anderson [Conn.] 73 A 751.

67. Rev. St. 1899, § 2836, which provides that "in no case shall the same be paid by either the county or the state," merely refers to cases wherein prosecutor is liable for costs under § 2778 (in all cases not amounting to felony and except for petit larceny). State v. Butler, 133 Mo. App. 566, 113 SW 668.

absence of a statute, a city is not liable for the costs of a prosecution for the violation of a city ordinance.[68]

§ 8. *Amount and items.*[69]—See 11 C. L. 897—With possibly a rare exception in chancery court,[70] the items for which costs may be taxed depend entirely upon statute[71] strictly construed,[72] and applied under the general rule that special statutes will be given precedence over general statutes.[73] Hence, the statutes and decisions must be looked to, in some instances, in the light of the circumstances of the particular case, in order to determine the taxable fees,[74] expenses,[75] and disburse-

68. Since it is acting as agent for the state. Booze v. Yazoo City [Miss.] 49 S 518.

69. Search Note: See Costs, Cent. Dig. §§ 567-749, 951-982; Dec. Dig. §§ 146-194, 247-258; 11 Cyc. 100-146, 224-235; 1 A. & E. Enc. P. & P. 211; 5 Id. 224.

70. Only exception to rule that nothing can be taxed as costs but items designated by statutes is in cases brought by trustees for construction of wills where will is so ambiguous as to make it necessary to go into court of chancery to obtain construction thereof. Converse v. Hindes, 139 Ill. App. 370.

71. Engholm v. Ekrem [N. D.] 119 NW 35.

72. Such statutes are not extended by implication. Downey v. Coykendall, 81 Neb. 648, 116 NW 503. Statute will not be construed so as to permit police judge to charge excess fee for complaint because more than one defendant is charged therein. Id.

73. St. 1898, § 4398c, in regard to costs in actions for certain infringements on civil rights, takes precedence over § 2918 previously enacted, and regulating allowance of costs in general. Jones v. Broadway Roller Rink Co., 136 Wis. 595, 118 NW 170. Code, § 2815, makes its own provisions concerning costs in condemnation proceedings, and they are substantially the same as provisions of § 2007, except as to item of attorney's fees; held that § 2815 being special will control. Jones v. Liberty Tp. School Board [Iowa] 118 NW 265. Laws 1905, c. 724, p. 2027, as amended by Laws 1906, c. 314, p. 736, in allowing parties such sums "as expenses and disbursements, including reasonable compensation for witnesses," and amounts for counsel fees not exceeding limits prescribed by Code Civ. Proc. § 3253, applicable to proceedings by city board to acquire land for public use, takes precedence over the general statute (Code Civ. Proc. § 3240) in regard to allowance of costs in special proceedings. In re Board of Water Supply, 62 Misc. 324, 116 NYS 640. In condemnation proceedings by city of New York to acquire land, under Laws 1905, p. 2027, c. 724, court cannot allow costs as authorized by Code Civ. Proc. § 3240, since former statute is special and covers whole subject. In re Simmons, 130 App. Div. 350, 114 NYS 571.

74. Under St. § 2921, authorizing costs for necessary pleadings, entries and proceedings in an action, according to practices of the court, costs were properly allowed for drafting requests for instructions, drafting affidavits on motion to modify order, drafting notice of examination of adverse party, drafting order denying motion to limit examination of adverse party, attending motion out of term to limit examination and attendance on examination of witnesses out of court. Gould v. Merrill R. & L. Co., 139 Wis. 433, 121 NW 161.

Held taxable: Witness fees of an attorney not employed in the case, although Code Civ. Proc. § 3288, provided that attorney employed in case shall not receive witness fees. Kennedy v. Jarvis, 126 App. Div. 551, 110 NYS 894. Fees of witnesses produced to dispute grounds alleged in complaint. Hoskins v. Northern Pac. R. Co. [Mont.] 102 P 988. **Stenographer's fees** allowed under Sayles' Ann. Civ. St. arts. 1295, 1296. Baird v. Blair [Tex. Civ. App.] 120 SW 1081. **Fee for publication notice,** allowed under Kirby's Dig. §§ 4919, 4921. Reed v. Doniphan Lumber Co. [Ark.] 121 SW 275. **Entry fees** of court to which change of venue is taken. Chase v. San Francisco Super. Ct., 154 Cal. 789, 99 P 355. **Jury fees** advanced under Gen. St. 1868, c. 39, § 18, by successful party. State v. Hoover [Kan.] 98 P 276. **Master's fee of** $15 in foreclosure proceeding. Sanford v. Dickinson, 124 Ill. App. 77. **Fees in admiralty** in suit for limitation of liability including witness fees, mileage, deposition fees and proctor's fee. The W. A. Sherman [C. C. A.] 167 F 976.

Held not taxable: Fee for filing cost bill, Linforth v. San Francisco Gas & Elec. Co., 9 Cal. App. 434, 99 P 716.

75. No allowances are made for expenses in absence of statutory provision. Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811.

Allowed: Expenses of officers in military service as witnesses in case wherein United States recovers judgment, under Rev. St. § 850; U. S. Comp. St. 1901, p. 655. United States v. National Surety Co., 168 F 314. Expenses of securing documents as evidence for trial where judgment of dismissal was entered, though ante trial agreement was afterwards made making their use as evidence unnecessary. Hamilton v. Witner, 50 Wash. 689, 97 P 1084. Expense of procuring opinion copied for district court (see Gen. St. 1901, §§ 1904, 3030). St. Clair v. Craig [Kan.] 101 P 3. Reasonable expenses of **referee,** in foreclosure suit in survey of premises and search for unpaid taxes, provided they be charged by him in his report. Mayer v. Jones, 132 App. Div. 106, 116 NYS 300. **In inquisition proceedings,** allowance for expenses comprising fees of petitioner's attorney and physician and bills of real estate appraiser and stenographer. In re Hammond, 112 NYS 297.

Not allowed: Expense of garnishee in resisting proper demands of plaintiff. Cope v. Shoemate [Mo.] 119 SW 503. In municipal court expense of drawing interrogatories for depositions. Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811. Expenses of board of jury while sitting in the case.

ments,[78] and also to determine any limitation upon the amount taxable.[77] As a general rule, to which there are exceptions,[78] the right to witness fees which are properly proven [79] does not depend upon the subpoena,[80] when it appears that the attendance of the witness was procured in good faith [81] for a time when the case was properly set for trial.[82] Costs cannot be taxed for the fees of expert witnesses not called by the court or by agreement of the parties.[83] No costs will be allowed for disbursements which are unreasonable,[84] improper, unlawful,[85] or which do not represent an actual expenditure.[86] The allowance should be properly made,[87] not ordi-

Irrgang v. Ott, 9 Cal. App. 440, 99 P 528. Expenses of survey of premises and of searching records for unpaid taxes when such expenses were not included by **referee** in his expenses of sale. Mayer v. Jones, 132 App. Div. 106, 116 NYS 300. Expense of record copied for court (see Gen. St. 1901, § 1904). St. Clair v. Craig [Kan.] 101 P 3.

76. Judgment "with costs" includes disbursements, except on appeals from orders. In re Perry, 131 App. Div. 284, 115 NYS 744. Where the statute (see Code Civ. Proc. § 3256) authorized one entitled to costs to include in his bill of costs his necessary disbursements, an award of "costs" on appeal from surrogates' decree included disbursements. Id. Only ordinary taxable costs and disbursements will be allowed **executor** in defending action to set aside probate of will. Senter v. Petheram, 64 Misc. 294, 118 NYS 347.

Held taxable: In municipal court, fees paid to commissioners for taking depositions, under Municipal Court Act (Laws 1902, p. 1584, c. 580) § 330. Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811. **In admiralty,** reasonable disbursements made in giving stipulations for value, even if not to surety companies. The Hurstdale, 171 F 607.

Held not taxable: In action to recover land, mesne profits, and expenses of litigation, evidence held not to authorize recovery of expenses of litigation against defendant. Hansen v. Owens [Ga.] 64 SE 600.

77. Costs taxable against eloigner in foreclosure action should not exceed amount recoverable in action at law. Grimm v. Pacific Creosoting Co., 50 Wash. 415, 97 P 297. Code Civ. Proc. § 3251, having application to any reference specified in § 3236, including reference under § 623 to determine damages resulting from injunction, provides that costs may be awarded not exceeding $10 besides necessary disbursements for referee's fees. Harrison v. Hind & Harrison Plush Co., 128 App. Div. 460, 112 NYS 834. Code Civ. Proc. § 3230, making amount in part discretionary, does not authorize allowance in actions to set aside probate of will of amount in excess of that permitted by §§ 3253, 3254. Senter v. Petheram, 64 Misc. 294, 118 NYS 347. Amount of costs allowed defendant is based upon amount for which he recovers judgment, under Municipal Court Act (Laws 1902, p. 1586, c. 580), § 332, subd. 7. Madison Paper Stock Co. v. Maurice O'Meara Co., 63 Misc. 277, 116 NYS 672. Not based on amount of defendant's counterclaim but on difference between amount recovered by plaintiff and that recovered by defendant. Id.

78. Fees of witnesses not subpoenaed are not taxable under Civ. Code 1902, §§ 2863, 3130, 2861. Atherton v. Atlantic Coast Line R. Co., 82 S. C. 474, 64 SE 411.

79. Under Code 1906, § 2200, witnesses who have neither proved their attendance nor received certificates, cannot have their mileage fees taxed as costs. Hubbard v. Hemphill [Miss.] 47 S 657. Witness fees were not properly proven and there was no liability therefor in absence of affidavit by witnesses as to per diem and mileage, affidavit of counsel not being sufficient. Atherton v. Atlantic Coast Line R. Co., 82 S. C. 474, 64 SE 411.

80. Fees of witnesses, requested to attend, are taxable though witnesses were not subpoenaed. See St. 1895, p. 273, c. 207. Linforth v. San Francisco Gas & Elec. Co., 9 Cal. App. 434, 99 P 716. Mileage of witnesses is taxable as costs although the subpoenaes were issued in contravention of Code 1907, § 4021. Elliott v. Howison [Ala.] 48 S 508.

81. Witness fees not taxed unless it appear prima facie that their attendance was procured in good faith. Atherton v. Atlantic Coast Line R. Co., 82 S. C. 474, 64 SE 411.

82. Witness fees were not taxable for term at which case was not properly on calendar, under Code Civ. Proc. § 3251, fixing amount of costs, where nothing was done to take case out from under general rule. Kennedy v. Jarvis, 126 App. Div. 551, 110 NYS 894. Case not at issue was not properly on calendar. Id. Case was not taken out from under rule so as to allow defendant costs by reason of oral agreement with plaintiff for trial of cause at that term if it could be done, where it was not shown that plaintiff's counsel knew case was set or that he acquiesced in setting, and where defendant had failed to serve his answer though requested to do so. Id.

83. Linforth v. San Francisco Gas & Elec. Co., 9 Cal. App. 434, 99 P 716.

84. Allowance made to party for disbursements must be reasonable, under Code Civ. Proc. § 3256. Valk v. Erie R. Co., 128 App. Div. 470, 112 NYS 792. $23.20 allowed to notaries for simply administering oaths to witnesses was unreasonable. Id.

85. Valk v. Erie R. Co., 128 App. Div. 470, 112 NYS 792. Allowance for commissioner's fees was improper where no commissioner had been appointed, but depositions of certain witnesses were taken in office of defendant's attorney, acknowledged before notary in employ of such attorney, and testimony taken down by stenographers in employ of each attorney. Id.

86. Linforth v. San Francisco Gas & Elec. Co., 9 Cal. App. 434, 99 P 716. Plaintiff could not tax fees for witnesses who refused to accept fees. Id. Defendant was not entitled to allowance for mileage of witnesses which he had not paid and which it was improbable he would be called upon to pay. Valk v. Erie R. Co., 128 App. Div. 470, 112 NYS 792.

87. Approval of compensation fixed by

narily include items necessary to the case,[88] and not exceed the limit fixed by statute.[89] A docket fee is recoverable in admiralty only when the court has in some way passed upon the merits of the controversy.[90] In federal courts, docket fees are allowed on a trial before a jury,[91] and a discontinuance fee when a case is discontinued.[92] Costs before and after notice of trial may be limited to a single taxation.[93] As a general rule, only one bill of costs is allowed in equity suits.[94]

Attorney's fees.[See 11 C. L. 899]—The allowance of attorney's fees as costs is sometimes discretionary,[95] but they are not recoverable as costs in the absence of a statute[96] or an agreement authorizing the same.[97] Some of the instances in which counsel fees are allowed are in such proceedings to secure a settlement from an executor,[98] to ascertain the owners of,[99] or adjudicate conflicting claims against, a fund,[1] to enforce a right to inspect the books of a corporation,[2] to construe,[3] but not

clerk was sufficiently proper act of allowance. Baird v. Blair [Tex. Civ. App.] 120 SW 1081.

88. On original proceedings in the supreme court, printed petition, certificate to record, printed brief, and transcript of testimony of witness, **held unnecessary** under provisions of statute and rule of court. Cronan v. Kootenai County Dist. Ct., 15 Idaho, 462, 98 P 614. In action to determine water rights, proper disbursements of state engineer under irrigation law and in obedience to order of trial court, which disbursements included expenses incurred in making surveys, maps, and plats, though they were not used in evidence, **held taxable,** the general rule applicable to witnesses and other evidence not applying. Farmers' Co-Op. Ditch Co. v. Riverside Irr. Dist. [Idaho] 102 P 481.

89. Court cannot allow amount in excess of that fixed by the statute. Reed v. Donlphan Lumber Co. [Ark.] 121 SW 275.

90. O'Flaherty v. Hamburg-American Packet Co., 168 F 411.

91. Under Rev. St. § 823; U. S. Comp. St. 1901, p. 632. Howley v. Chicago, etc., R. Co., 166 F 828. There is no "trial before a jury" where there is no final submission and case is settled pursuant to stipulation before submission. Id.

92. Under Rev. St. § 824, U. S. Comp. St. 1901, p. 632. Howler v. Chicago, etc., R. Co., 166 F 828. Case was not "discontinued" when settled pursuant to stipulation before submission. Id.

93. Berrent v. Simpson, 115 NYS 693. One fee term only is taxable in city court, under Code Civ. Proc. § 3251, subd. 3. Id. Upon new trial after reversal, the prevailing party, who is entitled to costs of both trials, cannot tax two items of cost before and after notice of trial. Id.

94. Since parties on one side are usually united in interest. In re Pine's Stream & East Meadow Stream, 129 App. Div. 929, 62 Misc. 61, 114 NYS 681. An order of court of appeals "with costs to the respondents" means in equity suits that only one bill of costs is to be allowed. Id.

95. Allowance of attorney's fees in equity held discretionary. Weiss v. Haight & Freese Co. [C. C. A.] 165 F 432. Allowance to trustee for disbursements for counsel fees where **creditor's bill** was instituted was discretionary. Cashman v. Bangs, 200 Mass. 498, 86 NE 932. Laws 1901, c. 397, p. 569 (St. 1898, § 4041a) makes discretionary an allowance for attorney fee out of estate to proponent of will in **will contest.** In re Muellenschlader's Estate, 137 Wis. 32, 118 NW 209.

96. Hollander v. Central Metal & Supply Co., 109 Md. 131; 71 A 442; Schmoll v. Lucht, 106 Minn. 188, 118 NW 555; Branson v. Branson [Neb.] 121 NW 109; Engholm v. Ekren [N. D.] 119 NW 35. There is **no statutory provision** authorizing taxation of attorney's fee in case in equity to set aside deed and contract. Power v. King [N. D.] 120 NW 543. No statutory provision authorizing taxation of fee of $7.00 for prosecuting attorney in proceeding to seize and destroy intoxicating liquors. Campbell v. State [Ind.] 87 NE 212. In appeal from proceeding to condemn land for school purposes, there is no statute permitting attorney fees to be taxed as costs. Jones v. Liberty Tp. School Board [Iowa] 118 NW 265. The statute (see Code Cr. Proc. §§ 719, 720) does not authorize taxation of counsel fees against complainant on verdict of malicious prosecution. People v. Kranz, 63 Misc. 146, 118 NYS 499. Statute controlling Code Civ. Proc. § 1255 does not authorize allowance of attorney's fees to defendant on dismissal of condemnation proceedings. Lincoln Northern R. Co. v. Wiswell, 8 Cal. App. 578, 97 P 536.

97. Branson v. Branson [Neb.] 121 NW 109. In absence of statute, attorney's fees are not considered as costs, and taxable as such, unless authorized by contract express or implied. Schmoll v. Lucht, 106 Minn. 188, 118 NW 555. In absence of contract, court has no power to require defendant to pay counsel fees of prevailing plaintiff. Buist v. Williams, 81 S. C. 495, 62 SE 859. Attorney's fees were allowable as costs only by special agreement. Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 A 442.

98. Counsel fees of successful beneficiary to secure settlement from executor were allowed. In re Bass, 57 Misc. 531, 109 NYS 1084.

99. Held that special proceedings to ascertain owners of fund resulting from foreclosure sale warranted taxation of attorney's fees therefor independent of fees taxed in foreclosure matter. Gennert v. Butterick Pub. Co., 133 App. Div. 86, 117 NYS 801.

1. Attorney fee of plaintiff was allowed in an action to adjudicate conflicting claims against a fund. Grooms v. Mullett, 133 Mo. App. 477, 113 SW 683.

2. On petition for writ of mandamus by stockholder to enforce his right to inspect books of bank, relator was entitled, under

to set aside, a will,[4] to condemn property for public use,[5] to recover on certain kinds of insurance policies,[6] to recover the wages of an employe,[7] to foreclose certain liens,[8] and to partition property.[9] In a partition suit in which counsel fees are taxable as costs,[10] such fees may be taxed for the services of a nonresident attorney when associated with local counsel, though he has not procured a license in the state.[11] In some cases, an attorney's fee is taxable for a garnishee [12] or third party required to answer in the proceeding.[13] The general rule is that an attorney who acts for himself is not entitled to a counsel fee against his adversary.[14] A party is not entitled to have a counsel fee awarded him who does not prevail [15] or recover costs.[16] The extensive power of the legislature to authorize the taxation of attorney's fees as costs [17] must not be exercised so as to work an unjust discrimination.[18] Very often the amount is left to the court's discretion,[19] but in some cases it is limited by statute [20] and in all cases it should be reasonable.[21] The amount may be fixed

order in supreme court giving him costs in both courts, to reasonable attorney fee in circuit court. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 906, 118 NW 581.

3. Converse v. Hindes, 139 Ill. App. 370.

4. In proceeding to set aside, not to construe, a will and in absence of statute, allowance of solicitor's fees was improper. Converse v. Hindes, 139 Ill. App. 370. Counsel fees of unsuccessful plaintiff were disallowed in action to set aside probate of will, where allowance would improperly lessen amount to be allowed to defendants. Senter v. Petheram, 64 Misc. 294, 118 NYS 347. Counsel fees of executor in defending action to set aside probate of will were not allowed, since such fees will be allowed on accounting of estate. Id.

5. Taxable costs should be allowed in all cases where award is so small that allowance of 5 per cent would not give reasonable compensation for attorney's services regardless of how little may be the value of the property, holding that in proceedings under Laws 1905, p. 2027, c. 724, Code Civ. Proc. § 3240, applies to permit award of costs, even though not allowable under New York City Charter, § 496. In re Simmons, 61 Misc. 352, 113 NYS 890.

6. Statute allows reasonable fee to be taxed against insurance company for prosecution of suit to collect amount of loss on fire insurance policy. Merchants' Fire Ins. Co. v. McAdams [Ark.] 115 SW 175. Attorney's fees in action on accident insurance policy improperly allowed. Brotherhood Acc. Co. v. Jennings, 44 Colo. 144, 96 P 985.

7. Attorney's fee allowed in suit by transit man and topographer to recover compensation due under contract of employment, under Employment Act of 1889 (Hurd's St. c. 14, § 13; S. & C. St. c. 48, § 1). Goodridge v. Alton, 140 Ill. App. 373.

8. Rev. Laws 1905, § 3517, authorizes court to allow reasonable fees to plaintiff's attorney on foreclosure of mechanic's lien. Schmoll v. Lucht, 106 Minn. 188, 118 NW 555.

Not allowable to claimants for mechanic's lien. Olson v. Nilson, 142 Ill. App. 436. Not allowable against eloigner in action to foreclose a lien. Grimm v. Pacific Creosoting Co., 50 Wash. 415, 97 P 297.

9. Branson v. Branson [Neb.] 121 NW 109.

10. Counsel fees of defendant in partition proceedings which are not amicable are not taxable as costs. Branson v. Branson [Neb.] 121 NW 109.

11. Partition suit. Baldauf v. Peyton, 135 Mo. App. 492, 116 SW 27.

12. See Maury v. McDonald [Tex. Civ. App. 118 SW 812.

13. Bank was entitled to have its attorney fees taxed against unsuccessful plaintiff, where it was made party by plaintiff, compelled to employ attorney to file its answer, and answered to effect that it was ready and willing to pay check sued on to persons entitled to receive same, and to this end stood ready to pay said sum into court to be paid to party entitled thereto. Newton v. Dickson [Tex. Civ. App.] 116 SW 143.

14. An executor, administrator, guardian, or trustee, who is an attorney, cannot recover for professional services rendered the estate, but the rule does not apply when such costs are not payable out of the trust funds. Ordinary v. Connolly [N. J. Eq.] 72 A 363.

15. Attorney fees of creditor whose claim in **bankruptcy** was unsuccessfully contested will not be allowed as costs. In re Coventry Evans Furniture Co., 171 F. 673.

16. Diocese of Trenton v. Toman [N. J. Eq.] 70 A 881

17. Laws 1903, p. 524, c. 338, providing for attorney fee in action to abate nuisance maintained in violation of prohibitory liquor law is not repugnant to constitutional guaranty of equal protection of law. State v. Fritz [Kan.] 101 P 1013.

18. Code 1896, § 4561, providing for attorney's fee of $50 in securing conviction of corporation violating law of state, where same section by another clause provides for fee of $7.50 for conviction of misdemeanor not otherwise provided for, is invalid as unjust discrimination. Birmingham Waterworks Co. v. State [Ala.] 48 S 658.

19. Amount to trustee for counsel fees was discretionary. Cashman v. Bangs, 200 Mass. 498, 86 NE 932. In action by stockholders against officers of corporation to recover money and shares of stock misappropriated, amount of attorney fee was discretionary. Zeckendorf v. Steinfeld [Ariz.] 100 P 784.

20. Statute fixes attorney fees that may be allowed to successful litigant as costs in civil actions, and no additional fees should be allowed without statutory authority. State v. Will [Wash.] 103 P 479.

21. Reasonable fee means such fee as

by agreement between the parties,[22] which amount the court may for proper cause reduce[23] but not increase.[24] An attorney is usually entitled to have but one fee taxed in one action,[25] and the amount allowable in a default judgment is limited by the amount prayed for.[26] The allowance of compensation to a guardian ad litem and the amount thereof rests in the discretion of the court,[27] but the fee allowed must not be unreasonable.[28]

*Interlocutory proceedings.*See 9 C. L. 824—A trial fee is not taxable for an interlocutory proceeding.[29]

*Extra allowances.*See 11 C. L. 901—In New York, extra allowances are made in difficult and extraordinary cases[30] after the usual costs have been regularly taxed.[31] Extra allowances are not made for trouble which a party is put to in a separate and distinct proceeding,[32] or in special proceedings,[33] or in proceedings to review a tax as distinguished from a tax assessment,[34] or to defendants in proceedings to construe a will,[35] or on behalf of persons not interested in the action or its proceeds,[36] or not finally successful,[37] or who do not appear to have performed requisite condi-

would be reasonable for litigant to pay his attorney for prosecuting case, and not a speculative or contingent fee based upon uncertainty of result of litigation. Merchants' Fire Ins. Co. v. McAdams [Ark.] 115 SW 175. $1,000 fee was reasonable where services consisted of attending twelve hearings before referee, preparing thirty-nine page brief, preparing 130 pages of motion papers, and incidental labor necessary in preliminary examination of witnesses and other labor incidental to preparation of papers in case. Dollard v. Koronsky, 61 Misc. 392, 113 NYS 793. Attorney's fee of $750 to successful garnishee, for preparing answer and defense was reasonable. Maury v. McDonald [Tex. Civ. App.] 118 SW 812.

22. Crane v. Gurnee [N. J. Eq.] 71 A 338.

23. May reduce it when excessive. Baldauf v. Peyton, 135 Mo. App. 492, 116 SW 27.

24. Baldauf v. Peyton, 135 Mo. App. 492, 116 SW 27. Procurement of greater amount than agreed, with view of imposing undue proportion on party without his consent, was improper. Id.

25. Under Mills' Ann. St. §§ 1025, 1026. Washington County v. Murray [Colo.] 100 P 588. Attorney was entitled to but one fee for defending three defendants in one criminal action. Id.

26. Partition suit. Deputy v. Dollarhide, 42 Ind. App. 554, 86 NE 344.

27. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

28. In re McNaughton's Will, 138 Wis. 179, 118 NW 997. Reasonableness is determined from comparison with similar services in official life. Id. Under Laws 1907, c. 267, p. 909, compensation is required to be reasonable in accordance with established judicial policy. Id. Reasonableness is not necessarily governed by rules in respect to taxing other costs. Id. Allowance of unreasonable fee is abuse of discretion. Id. Eight per cent of estate of $40,000, in case which involved no intricate question of law or fact, was unreasonable, $500 being reasonable fee in such case. Id.

29. Reference was held to be interlocutory, and not "trial" within meaning of Code Civ. Proc. 3251, providing that $30 costs may be taxed for trial of issue of fact. Boissevain v. Pope, 64 Misc. 292, 118 NYS 577.

30. Boocock v. Wood, 113 NYS 46. Case was so difficult and extraordinary as to entitle first mortgagee to extra allowance in foreclosure proceeding, where second mortgagee sought by motion to require an assignment to which he was not entitled, that assignment to which he was entitled having been tendered him. Id. Extra allowances held proper in action for conversion of $10,000 worth of corporate bonds pledged by mortgagee, action lasting during several years and involving rights of several parties. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801.

Case was not such as to warrant extra allowances where action was for difference between contract price and price party was compelled to pay after repudiation of contract, and where rights depended on construction of contract. Secor v. Ardsley Ice Co., 133 App. Div. 136, 117 NYS 414.

31. Extra allowances not allowed until costs allowed by referee had been regularly taxed. Lightfoot v. Davis, 112 NYS 289.

32. Extra allowances were not allowable in civil proceeding by reason of trouble defendant was put to in criminal proceeding brought on same grounds. Metcalfe v. Klaw, 130 App. Div. 502, 114 NYS 955.

33. Proceeding for voluntary dissolution of corporation is special. In re Tarrytown, etc., R. Co., 117 NYS 695.

34. Extra allowance authorized by Code Civ. Proc. § 3252, in proceedings to review tax assessment, is not allowable where subject-matter of proceeding is the tax and not the assessment. People v. Hall, 130 App. Div. 360, 114 NYS 511; People v. Failing, 114 NYS 514.

35. Under Code Civ. Proc. § 3253, allowances in addition to costs cannot be made to defendants in action for construction of will. Walter v. Frank, 118 NYS 268.

36. Allowance in addition to taxable costs cannot be made to guardian ad litem of infant defendants who have no present interest in proceeds of sale in partition action. MacFarlane v. Brower, 63 Misc. 183, 116 NYS 34.

37. Granting of extra allowances held erroneous in action for injury from trespass, the judgment in which action was reversed.

tions precedent to the commencement of the action.[38] Where the right to make extra allowances exists, the amount to be granted rests in the discretion of the trial court,[39] subject only to the limitations of the statute.[40] Allowances in addition to actual costs may be made in an action to partition [41] or to compel the determination of a claim to real property.[42]

*On appeal or error.*See 11 C. L. 902—As a general rule, the costs incident to an appeal and which arise in the trial court [43] are taxable in such court,[44] and not in the reviewing court.[45] The most important items for which costs connected with an appeal are taxable [46] are those connected with the preparation of the transcript or record,[47] and necessary additions thereto.[48] Costs are taxable for the separate transcripts, when necessary, of several cases consolidated on appeal.[49] Expenses incident to showing the status of a case in another court,[50] attorney's fees [51] including reargument fees,[52] and special fees on appeal in misdemeanor cases,[53] are some-

Miller v. Twiname, 129 App. Div. 623, 114 NYS 151.

38. Extra allowances were not allowed in suit against administrator where it did not affirmatively appear that plaintiff had filed his claim with administrator within time allowed. Lightfoot v. Davis, 112 NYS 289.

39. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801; Hapgood v. Lusch, 123 App. Div. 23, 107 NYS 331.

40. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801. In partition action, additional cost allowances made to all parties must not exceed in aggregate five per cent of whole value of property sought to be partitioned. MacFarlane v. Brower, 63 Misc. 183, 116 NYS 34. Held in action to set aside probate of will that extra allowance could not exceed $2,000, as authorized by Code Civ. Proc. §§ 3253, 3254. Senter v. Petheram, 64 Misc. 294, 118 NYS 347. As to limitations on amount in general, see ante, first subd. of this section.

41. MacFarlane v. Brower, 63 Misc. 183, 116 NYS 34.

42. Code Civ. Proc. § 3252, providing for additional allowances, authorizes the clerk to tax such allowances in accordance therewith in case wherein easement is claimed and its value found. Furniss v. Fogarty, 63 Misc. 527, 117 NYS 385.

43. Such costs of appeal, from the federal circuit court to the circuit court of appeals, include fees paid to clerk of circuit court for citation, writ of error, and for certifying transcript of record. Berthold v. Burton, 169 F 495. Where appeal was taken from city court of New York, such costs included expense of obtaining copy of stenographer's minutes for purpose of properly preparing amendments to case on appeal. Price v. Western Distillery Co., 114 NYS 714. Included expenses of securing copy of stenographer's notes filed as part of the record on appeal. Allen v. Standard Box & Lumber Co. [Or.] 98 P 509; Sommer v. Compton [Or.] 100 P 289. Included cost of transcribing stenographic notes of testimony, under B. & C. Comp. St. 906. McGee v. Beckley [Or.] 103 P 61. Included costs of printing on an appeal. Parker v. Travers [N. J. Err. & App.] 71 A 612. Such costs include the cost of transcript and certificate, which are necessary part of appeal. Smith v. Cashie & C. R. & Lumber Co., 148 N. C. 334, 62 SE 416.

44. Smith v. Cashie & C. R. & Lumber Co., 148 N. C. 334, 62 SE 416; Price v. Western Distillery Co., 114 NYS 714. Costs of obtaining a review are taxable in trial court. Scatcherd v. Love [C. C. A.] 166 F 53.

45. Cost of transcribing stenographic notes of testimony held not taxable in reviewing court, being taxable in court below. McGee v. Beckley [Or.] 103 P 61. Expense of securing transcript of stenographer's notes, which was used in preparing bill of exceptions, held not taxable in reviewing court, being taxable in court below. Allen v. Standard Box & Lumber Co. [Or.] 98 P 509; Sommer v. Compton [Or.] 100 P 289.

46. Costs were taxed for procuring a copy of the testimony necessary for the purpose of settling the bill of exceptions, under Comp. Laws, §§ 363-414. Scott v. University of Michigan Athletic Ass'n, 154 Mich. 328, 15 Det. Leg. N. 748, 117 NW 729. Under Laws 1905, p. 90, § 1, subd. 4, costs were taxed for transcript of entire testimony required by order of court. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 101 P 390.

47. Costs taxed for procuring a record conforming to the statutory requirements, under Act Apr. 15, 1907, P. L. 83. Smith v. Illinois Cent. R. Co., 36 Pa. Super. Ct. 584. Statute cited in next preceding note is limited in its application to appeals taken subsequent to approval of statute. Id.; Barto v. Beaver Trac. Co., 37 Pa. Super. Ct. 447. Does not apply to actions pending before but determined after passage of act referred to in preceding notes. Miller v. Jackson, 38 Pa. Super. Ct. 477.

48. Cost of additional abstract filed by appellee was taxable against appellant where abstract filed by him was incomplete and defective. Bonato v. Peabody Coal Co., 143 Ill. App. 163. Plaintiff in error was taxed with costs of so much of counter abstract as he unnecessarily required. Madison Bank v. Price [Kan.] 98 P 222.

49. Held necessary. Etmund v. Etmund, 83 Neb. 151, 119 NW 239.

50. Certified copy of declaration was necessary to show status of case in federal court and continued necessity for examination of bank books. Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 15 Det. Leg. N. 906, 118 NW 581.

51. Court ruled to fix attorney's fees on application. In re Shedaker [N. J. Eq.] 70 A 659.

52. Reargument fee was properly allowed

times allowed. But no costs can be taxed against the losing party for matter unnecessary to the record or transcript[54] included therein through no fault of such party,[55] or for additions to the record not pertinent thereto[56] or necessary to the appeal.[57] Nor will costs be taxed for printing matter which fails to conform to the rules of the reviewing court, such as a brief not referring to the record by page or line,[58] or a case filed without excuse,[59] in unabridged form where abridgment was required.[60] No costs are taxable for a transcript illegally prepared,[61] or not authorized by statute,[62] for disbursements, improper or unauthorized,[63] for vacating an erroneous judgment entry to which appellant did not object below,[64] or for services of no apparent value.[65] No items are taxable as costs which are not au-

to plaintiff where necessity for reargument was not caused by any act or omission on defendant's part and where the two arguments were in fact made. Schwartz v. Ribaudo, 63 Misc. 64, 116 NYS 585. Party cannot object to reargument fee because he did not have opportunity to argue his appeal orally. Id.

53. Ten dollar fee allowed clerk, $10 fee allowed attorney general, and costs for issuing writ of execution and return thereof, held properly taxable against sureties of appellant's bond. Prater v. State, 54 Tex. Cr. R. 16, 111 SW 735.

54. No costs allowed for unnecessary matter set forth in transcript. Knutsen v. Phillips [Idaho] 101 P 596. Costs not allowed for printing pleadings having no bearing on issues on appeal, not being required by Supreme Ct. Rule 9. Litherland v. Morton Cohn Real Estate & Inv. Co. [Or.] 102 P 303. Costs of filing two motions and of seventy-eight per cent of transcript were not taxed against unsuccessful party, such costs being occasioned by unnecessary matter in transcript. Wallace v. Reed Bros. [Tex. Civ. App.] 117 SW 1019.

55. Costs occasioned by unnecessary matter in transcript, not taxed against unsuccessful party, not at fault therefor. Wallace v. Reed Bros. [Tex. Civ. App.] 117 SW 1019. Losing party was not taxable with costs of including unnecessary matter in record at request of opposite party. Griffith v. Dale 109 Md. 697, 72 A 471. Losing party was not taxable with costs of copying and printing certain matter inserted in record at request of opposite party, which he did not request and which was not part of record. Estep v. Tuck, 109 Md. 528, 72 A 459.

56. Losing party was not taxable with costs of additional abstract because of his failure to number pages of abstract filed, where additional abstract had no reference to such defect. National Life Ins. Co. v. Donovan, 238 Ill. 283, 87 NE 356.

57. Costs not taxable for printing unnecessary part of additional abstract. Huntley v. Chicago, B. & Q. R. Co. [Iowa] 121 NW 377. Costs were not taxed for any part of additional abstract, a large part of which was unnecessary, since court would not undertake task of separating necessary part so as to tax for it. Fish v. Fish, 235 Ill. 396, 85 NE 662. Losing party could not be taxed with that part of amended abstract furnished by other party which contained testimony on issue not involved in appeal. Collins v. Collins, 139 Iowa, 703, 117 NW 1089. Supplemental abstract of record was unnecessary, where abstract previously filed was amply sufficient. Warner v. Warner, 235 Ill. 448, 85 NE 630.

58. Meyers v. Fogarty [Iowa] 119 NW 159.

59. It was excusable to file record containing unnecessary matter where, by reason of necessary laspe of time in taking appeal and the limited time remaining in which appeal might be taken, it was impossible for court to separate necessary matter from that which was immaterial to appeal. Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 SE 887.

60. Under Rule 44 (108 NW viii) which forbids allowance of costs for printing a case which does not contain an abridgment of the record instead of the complete record. Swanke v. Herdeman, 138 Wis. 654, 120 NW 414; Johanson v. Webster Mfg. Co., 139 Wis. 181, 120 NW 832; Sparks v. Wisconsin Cent. R. Co., 139 Wis. 108, 120 NW 858; Steinberg v. Salzman, 139 Wis. 118, 120 NW 1005; Herring v. Du Pont de Nemours Powder Co., 139 Wis. 412, 121 NW 170. Costs not allowed for printing case not an abridgment but the whole testimony printed in extenso, question and answer, with all its needless and unhelpful repetitions, to unnecessary extension of case by nearly one-half and to the very considerable aggravation of routine labors of appellate court. Swanke v. Herdeman, 138 Wis. 654, 120 NW 414. Defendant who had not filed abstract abridged in accordance with rule of court (Rule 68) was allowed no costs for the printing thereof. Hills v. Allison [Kan.] 100 P 651.

61. Where stenographer copied questions and answers in full instead of in narrative form, costs therefor was properly disallowed. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156.

62. Cost of transcript for accusers not being authorized by statute was disallowed. In re Egan [S. D.] 119 NW 42.

63. Expense of carbon copy of transcript of evidence on appeal held not authorized disbursement. Litherland v. Morton Cohn Real Estate & Inv. Co. [Or.] 102 P 303. Record copied for court was not authorized disbursement (see Gen. St. 1901, §§ 1904, 3030). St. Clair v. Craig [Kan.] 101 P 3.

64. Hopkins v. Crane, 50 Wash. 636, 97 P 772.

65. Charge for indexing transcript was not taxable where it could not be determined from inspection of transcript that such service had been performed. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 101 P 390.

thorized by statute [66] or warranted under the statute by bad faith or otherwise.[67] Nor will disbursements made in the lower court usually be taxed as costs of an appeal.[68] In New York, it may be important to note the distinction and application of the various statutes controlling.[69]

In some cases damages are allowed where an appeal is prosecuted merely for delay [70] and not in good faith.[71] Where the statute confines such damages to cases wherein there was a money judgment, the fact that the judgment was in the alternative, for money or property, will not affect the right to damages.[72] Such damages will not necessarity be imposed upon the dismissal of a writ of error [73] or where they would be a burden upon a party primarily liable who has not appealed.[74]

§ 9. *Proceedings to tax costs; correction and review.*[75]—See 11 C. L. 903—The

66. Interest on award of commissioners in eminent domain proceedings by city was not taxable, there being no statute authorizing such interest to be taxed as part of costs of court of appeals or of appellate division. In re Pine's Stream & East Meadow Stream, 129 App. Div. 929, 62 Misc. 61, 114 NYS 681.

67. A party is not taxable with adverse party's expense of printing a brief and argument in rebuttal of cross errors filed by him in good faith, but afterwards withdrawn. McKnight v. Drake, 143 Ill. App. 10.

68. Under Code Civ. Proc. § 2558, subd. 1, not taxable. In re Moran's Estate, 60 Misc. 298, 113 NYS 276. Costs awarded on reversal of decree of distribution of surrogate's court held not to include costs of lower court but to include only costs for making and serving case before and after argument. Id.

69. Hearing of appeal to appellate division was regarded as motion for purpose of costs and same sum allowed as on decision of motion, $10 and disbursements (see Code Civ. Proc. § 3251). In re Van Dusen, 132 App. Div. 592, 116 NYS 915. Costs upon appeal to supreme court are controlled by Municipal Court Act, § 346, Laws 1902, c. 580, p. 1590, which provides that costs upon appeal are awarded to appellant upon reversal, $30, and to respondent upon affirmance, $25; but where application is made to appellate division for new trial, Code Civ. Proc. § 3251, applies. Greenwald v. Weir, 131 App. Div. 568, 116 NYS 172. Costs are regulated by Code Civ. Proc. § 3251, subd. 4, on appeal to appellate term of supreme court from city court of New York. Schwartz v. Ribaudo, 63 Misc. 64, 116 NYS 585. Costs of order overruling objections to application for appointment of commissioners to determine necessity of proposed highway and appointing commissioners must be awarded in accordance with Code Civ. Proc. § 3239, providing for costs on appeal from interlocutory order, and not according to § 3240 providing for costs in special proceeding. In re Van Dusen, 132 App. Div. 592, 116 NYS 915.

70. By legislative enactment, damages are imposed upon the unsuccessful litigant for having delayed litigation and for having kept successful litigant from sooner collecting his debt. Commonwealth v. French [Ky.] 114 SW 255. Statutory damages awarded where appeal is for delay. Sanford v. Dickinson, 124 Ill. App. 77. Ten per cent damages were allowed where frivolous appeal, taken on exceptions without merit, appeared to have been taken for delay only. Atlantic Coast Line R. Co. v. Smith [Ga. App.] 65 SE 44. Fifty dollars damages were allowed where it appeared that appeal was taken only for purpose of delaying execution. Bell v. Camm [Cal. App.] 102 P 225. Clerk of supreme court was ordered to enter up a penalty judgment of $500 in favor of defendant in error and against plaintiff in error who prosecuted appeal for delay. Smythe v. Parish & Co., 237 Ill. 419, 86 NE 754. Where plaintiff in error did not appear by brief or counsel, no fundamental error was shown by record, defendant in error filed brief asking affirmance and damages, and it appeared from record that writ of error was sued out for delay, ten per cent damages were allowed. Montgomery v. Buckskin Breeches Co. [Tex. Civ. App.] 116 SW 139.

Delay case not shown by mere fact that appeal bond and transcript were filed on last day permissible, and no brief filed below or on appeal at time of filing transcript, a postponement of action not thereby being caused. Nichols v. Paine [Tex. Civ. App.] 113 SW 972. Not shown where case presented questions fairly worthy of consideration. St. Louis S. W. R. Co. v. Cobb [Ark.] 115 SW 939. Not shown where questions of law were involved and verdict large. Chicago Union Trac. Co. v. Mee, 136 Ill. App. 98.

71. Ferrandini v. Bankers' Life Ass'n, 51 Wash. 442, 99 P 6. Fifteen per cent damages are allowed in such case under Ballinger's Ann. Codes & St. § 6522 (Pierce's Code, § 1070). Appeal held to be in good faith and allowance of damages improper. Id. Double costs must be charged where there was no plausible ground for appeal. Porter v. Stuart [Mass.] 89 NE 118 Damages are taxable in case of frivolous appeal. Fell v. McIlhenny, 123 La. 364, 48 S 991.

72. Under Civ. Code Proc. § 764, ten per cent damages were allowed upon affirmance of superseded judgment in alternative for recovery of specific personal property or its specified value. Cunningham v. Clay's Adm'r [Ky.] 116 SW 299.

73. Upon dismissal of writ of error, damages for delay are not recoverable. Jones v. Poole, 5 Ga. App. 113, 62 SE 711.

74. Statutory damages will not be awarded upon affirmance of decree where appeal has been taken for delay when such award would impose additional burden upon defendant, primarily liable, who has not appealed. Stepina v. Conklin Lumber Co., 134 Ill. App. 173.

75. Search note: See notes in 5 C. L. 853; 6 Ann. Cas. 100.

See, also, Costs, Cent. Dig. §§ 750-831; Dec.

awarding of costs is a judicial function performed by the court,[76] not by the jury,[77] and is distinct from the taxation of costs by a ministerial officer, which is a purely administrative matter.[78] A verified memorandum of costs is prima facie evidence of the correctness of the items of disbursements.[79] A judgment specifically declaring a party's liability for costs is not always necessary,[80] nor is an award erroneous for uncertainty merely because the taxation thereunder is difficult.[81] It is the duty of the clerk to properly tax costs although no objections are made to an erroneous cost bill filed, where the items charged in the cost bill exceed the statutory maximum rate, but not when they are within such rate.[82]

Since a motion to retax costs applies only to the ministerial taxation,[83] not to a specific judgment for costs,[84] and is in the nature of an appeal from the action of the clerk,[85] bringing up only matters which were before the clerk,[86] such motion, properly supported,[87] and made in the court that had jurisdiction of the suit,[88] is the proper remedy, where the complaint is as to the amount that should be taxed [89] or to the taxation as made by a ministerial officer, but not where the controversy is as to whether any particular item is taxable [90] or where the allowance of costs has been made by the court in the form of a judgment.[91] The remedy for improper taxation of costs on dismissal is by motion for retaxation and not by appeal.[92] Objections to attorney's right to any fee should not be raised for the first time on a motion to retax costs.[93] A motion for a new trial is the only way for obtaining revision of a specific judgment for costs.[94] The trial court has no jurisdiction to retax costs after an appeal has been perfected.[95] The jurisdiction of adjusting and correcting a taxation of costs must be left to the forum which determines the suit.[96]

Dig. §§ 195-220; 11 Cyc. 143-170; Appeal and Error, Cent. Dig. §§ 270, 425, 433, 480, 481, 596, 823-839, 991, 1324, 2949, 3782, 3787, 3815, 3881-3888, 4116; Dec. Dig. §§ 78(7), 82(4), 87(10), 119, 136-152, 157, 226, 239, 270(4), 440, 709, 719(10), 783(1), 840(4), 936, 984, 1043(2), 1092; 2 Cyc. 593, 600, 601, 626-642, 732, 976-978, 980-985; 3 Id. 175, 342, 343, 392, 393; 5 A. & E. Enc. P. & P. 239, 246.

76. Cauthorn v. Bierhaus [Ind. App.] 88 NE 314.

77. Rudolph v. Snyder, 47 Tex. Civ. App. 438, 20 Tex. Ct. Rep. 720, 106 SW 763.

78. As taxation by clerk. Cauthorn v. Bierhaus [Ind. App.] 88 NE 314. Clerk in taxing costs under statute (Rev. Codes, § 7170) acts in ministerial capacity. Butte Northern Copper Co. v. Radmilovich [Mont.] 101 P 1078.

79. Hoskins v. Northern Pac. R. Co. [Mont.] 102 P 988.

80. Where party brought, in his representative capacity, a suit which might have been brought in his individual name and was unsuccessful therein, an order declaring him individually liable for such costs was unnecessary. Lakin v. Sutton, 132 App. Div. 557, 116 NYS 820.

81. Judgment held not uncertain though taxation was difficult. Cauthorn v. Bierhaus [Ind. App.] 88 NE 314.

82. Sommer v. Compton [Or.] 100 P 289.

83. That is, to taxation of costs by clerk after entry of judgment. Beecham v. Evans, 136 Mo. App. 418, 117 SW 1190.

84. Beecham v. Evans, 136 Mo. App. 418, 117 SW 1190.

85. Levittas v. Hart, 64 Misc. 36, 117 NYS 1027.

86. Upon motion for retaxation, only such papers can be used as were used before clerk. Levittas v. Hart, 64 Misc. 36, 117 NYS 1027. Such appeal to court is intended to review errors actually committed before clerk at time of taxation, and he cannot be put in error by proof furnished to the court afterwards. Id.

87. Motion to retax costs must be supported by affidavits bringing before court all items of costs. Cauthorn v. Bierhaus [Ind. App.] 88 NE 314.

88. State v. Richards [Tenn.] 113 SW 370.

89. As where amount of attorney fee is in controversy. Rogers v. Crandall [Iowa] 121 NW 1092.

90. Rogers v. Crandall [Iowa] 121 NW 1092.

91. Branson v. Branson [Neb.] 121 NW 109. Motion to retax not necessary to secure review of error in rendering judgment on plaintiff's cost bond, under Ball. Ann. Codes and St. § 5051, making exception to judgment unnecessary. Hamilton v. Witner, 50 Wash. 689, 97 P 1084.

92. Under Municipal Court Act (Laws 1902, p. 1589, c. 580), § 342. Loewer v. New York Taxicab Co., 115 NYS 127.

93. Baldauf v. Peyton, 135 Mo. App. 492, 116 SW 27.

94. Beecham v. Evans, 136 Mo. App. 418, 117 SW 1190.

95. Hewitt v. Wheeler School & Library [Conn.] 72 A 935; Fell v. McIlhenny, 123 La. 364, 48 S 991. Application for damages to be taxed as costs filed number of days after transcript had been filed, and case fixed for argument on appeal was filed too late. Id.

96. Chancery court cannot entertain jurisdiction to retax costs when their taxation has been especially committed to judge and

An allowance of costs may constitute a reviewable error when the court has failed to exercise the discretion given him,[97] when the existence of the alleged error depends upon the proper construction of positive law,[98] and when costs have been assessed against a party personally instead of against him in his representative capacity,[99] but does not ordinarily constitute reviewable error when the awarding or withholding of costs was discretionary [1] in the absence of clear abuse.[2] The courts have refused to review matters where costs was the sole question involved,[3] where the judgment was for costs only,[4] where the objections to an allowance were not appealed from [5] or not properly presented,[6] where the showing made did not overcome the presumption in favor of the judgment,[7] where the correctness of the taxation objected to depended upon matters not shown in the record,[8] and where the costs were made on an issue in equity which was decided adversely to the complainant.[9] Usually, no appeal can be taken from an order concerning costs that is not a final order.[10] The court may review an order settling a cost bill, upon an appeal from a judgment rendered after such order.[11] The New York court of appeals will review a grant of extra allowances made without right, but not otherwise.[12] In some states a retaxation of costs by the trial court may be reviewed by mandamus.[13]

attorney general of criminal court, there being ample statutory remedy for correction and retaxation of costs improperly certified. State v. Richards [Tenn.] 113 SW 370. Suit cannot even be brought in another forum for refund where costs have already been paid. Id.

97. Taxation may be reviewed where it appears that lower court misconstrued the law and did not exercise his discretion. Hite v. Dell [N. J. Law] 73 A 72.

98. As where it appeared that court misconstrued law. Hite v. Dell [N. J. Law] 73 A 72. Writ of error will lie from judgment for costs only where existence of alleged error depends upon proper construction of positive law. Scatcherd v. Love [C. C. A.] 166 F 53.

99. Luther v. Wolcott, 151 Mich. 71, 14 Det. Leg. N. 817, 114 NW 673.

1. Scatcherd v. Love [C. C. A.] 166 F 53; Patton v. Minor [Tex. Civ. App.] 117 SW 920; The Eva D. Rose [C. C. A.] 166 F 101; Mt. Nebo Anthracite Coal Co. v. Martin, 86 Ark. 608, 112 SW 882; Andersen v. Silcox, 82 S. C. 109, 63 SE 128. Allowance of costs in equitable action against administrator and guardian was discretionary. Id. Discretionary allowance of attorney's fees not disturbed where judge making same presided throughout proceedings and had knowledge of services rendered. Weiss v. Haight & Freese Co. [C. C. A.] 165 F 432.

2. Zeckendorf v. Steinfeld [Ariz.] 100 P 784; Mills v. Britt [Fla.] 47 S 799; Scatcherd v. Love [C. C. A.] 166 F 53. It was **no abuse of discretion** to refuse to allow witness and counsel fees of executor in will contest where executor also had other counsel, and counsel whose fees were denied also represented legatee of will, and where such executor also had personal interest in sustaining will. In re Muellenschlader's Estate, 137 Wis. 32, 118 NW 209. It is self-evident that there was no abuse of discretion in court ordering party to give security where party later gave it. Smith v. Trustees of Wisconsin Veterans' Home, 138 Wis. 628, 120 NW 403. There was not such abuse in denying defendant's motion to offset costs as to warrant interference by reviewing court. Feist v. Weingarten Bros., 115 NYS 539.

3. The Eva D. Rose [C. C. A.] 166 F 101.

4. Such appeal will not lie in Kentucky. Galvin v. Shafer [Ky.] 113 SW 485.

5. Grooms v. Mullett, 133 Mo. App. 477, 113 SW 683.

6. Supreme court of Oklahoma cannot, on original motion filed in the supreme court, re-examine taxation of costs in trial court, but review must be by means of bill of exceptions on case made. Bruner v. Kansas Moline Plow Co. [Okl.] 103 P 673.

7. Though jury found against defendant on one count and for him on two, judgment failing to apportion costs will not be be disturbed in absence of showing as to what costs were incurred in relation to the one count. Steele v. Andrews [Iowa] 121 NW 17.

8. Commonwealth v. Mitchell, 33 Pa. Super. Ct. 345.

9. Converse v. Deep River, 139 Iowa, 732, 117 NW 1078.

10. Interlocutory order of municipal court refusing to tax costs was not appealable. Great Northern Moulding Co. v. Bonewurt, 128 App. Div. 101, 112 NYS 466. Order of municipal court denying motion to retax costs is not appealable, not being one of orders from which an appeal is allowed by municipal court act. Averbuck v. Hochlick, 63 Misc. 327, 117 NYS 187. No appeal is allowed from order to pay or secure adjudged costs with stay until paid, it not being final order. Clark v. Bay Circuit Judge, 154 Mich. 483, 15 Det. Leg. N. 811, 117 NW 1051.

11. It not being necessary to appeal from order. Irrgang v. Ott, 9 Cal. App. 440, 99 P 528.

12. In case where there is no power of trial court to grant extra allowance, the right to review that question extends to court of appeals, but, when the power exists and the question arises whether it was properly exercised, the appellate division is court of last resort. MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 NE 801.

13. Townsend v. Jackson Circuit Judge [Mich.] 16 Det. Leg. N. 318, 121 NW 483.

Ordinary conditions precedent to the right to a review of an erroneous assessment are that a motion to retax shall have been made below,[14] where the costs were taxed by a ministerial officer,[15] that any required notice of an intention to appeal from the assessment shall have been properly given,[16] and, where the costs have been divided, that the costs assessed against the complainant shall be specified,[17] but not that costs shall have been paid in the court below when such costs are involved in the appeal.[18] Where the decision of the lower court on the main issue is reversed, a corresponding reversal may be had of the award of costs made below.[19] When a cause has been remanded, the lower court cannot change an award of the costs of appeal made by the higher court.[20]

On motion to retax costs on appeal, the items as originally taxed will be presumed to be correct in the absence of evidence to the contrary.[21] No formal motion is necessary in such case to secure the exclusion of illegal items.[22] Costs illegally collected from a party may be recovered back [23] together with costs of such recovery to be taxed proportionately against those who received the illegal costs.[24]

§ 10. *Enforcement and payment.*[25]—See 11 C. L. 008—The party in whose favor the costs of a special proceeding are awarded by a final order [26] ordinarily has the same rights as a judgment creditor.[27] The payment of the costs of taking a change of venue is enforcible in the court to which the change is taken.[28] The surrogate has no authority to enforce payment of costs by contempt proceedings.[29] Every award of costs does not create a judgment or a judgment lien.[30] When the time allowed for payment has expired,[31] the party recovering judgment for costs is en-

14. Motion must usually have been made and denied (see Municipal Court Act, § 342). Averbuck v. Hochlick, 63 Misc. 327, 117 NYS 187.

15. Where costs have been taxed by ministerial officer, it is essential that motion to retax shall have been filed, but not where allowance has been made by the court in form of judgment, the distinction being that latter is act of court, reviewable on appeal and may be presented in record by motion for new trial, while former is ministerial act of clerk which may be corrected by court upon motion. Branson v. Branson [Neb.] 121 NW 109. Purely administrative error was not reviewable where no motion to tax costs was filed in lower court. Cauthorn v. Bierhaus [Ind. App.] 88 NE 314.

16. Where party desires to secure review of taxation of costs by clerk, it is essential that he serve notice on clerk, in writing, of his desire to appeal Coney v. Maling, 104 Me. 332, 71 A 887.

17. Rudolph v. Snyder, 47 Tex. Civ. App. 438, 20 Tex. Ct. Rep. 720, 106 SW 763.

18. Not required to pay costs provided for by Code Pub. Gen. Laws, 1904, art. 16, § 154, upon overruling of demurrer, when appeal is taken from such overruling. Stinson v. Ellicott City & Clarksville Co., 109 Md. 111, 71 A 527.

19. Party losing on appeal was required to pay costs of opposite party who lost below. Jacob Tome Institute v. Whitcomb [C. C. A.] 160 F 835.

20. Scatcherd v. Love [C. C. A.] 166 F 53; Berthold v. Burton, 169 F 495.

21. It was presumed that folios charged for were counted correctly. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 101 P 390.

22. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 101 P 390.

23. Where clerk has illegally collected costs, proper practice is to file petition against clerk and his sureties in same court where costs were taxed for an account of retaxation of all costs alleged to have been illegally collected. State v. Richards [Tenn.] 113 SW 370.

24. Party securing writ of restitution in criminal action in which he has paid fine and costs, which were divided among several prosecutors, is entitled to recover costs from them in proportion in which they received such amounts so divided. New Jersey Soc. for Prevention of Cruelty to Animals v. Knoll [N. J. Law] 71 A 116.

25. Search Note: See notes in 27 L. R. A. 601; 29 Id. 593; 34 Id. 655; 35 Id. 567; 2 L. R. A. (N. S.) 1051, 1067.

See, also, Costs, Cent. Dig. §§ 1017-1081; Dec. Dig. §§ 267-283; 11 Cyc. 253-267; 5 A. & E. Enc. P. & P. 253.

26. No application to award on interlocutory order. In re Stoddard, 128 App. Div. 759, 113 NYS 157.

27. Under Civ. Proc. § 2432. In re Stoddard, 128 App. Div. 759, 113 NYS 157. Proceedings in aid of execution available to judgment creditor are available on final order for costs but not on interlocutory order. Id.

28. Under Code Civ. Proc. § 399. Chase v. San Francisco Super. Ct. [Cal.] 99 P 355.

29. In re Grant, 130 App. Div. 706, 115 NYS 283.

30. Under Code Civ. Proc. §§ 779, 1251, providing for collection of awards of costs out of personal property of party, such awards do not constitute lien against debtor's real property. Clinton v. South Shore Natural Gas & Fuel Co., 61 Misc. 339, 113 NYS 289.

31. Under Code, § 1299, time expired 60 days after final judgment not appealed, re-

titled to an execution therefor, or its equivalent,[32] although he may be entitled to only a part of such costs.[33] A lower court ordinarily has power to collect the costs of an appeal only upon a special mandate issued from the reviewing court directing the same.[34] Mandamus may lie in favor of the party against whom judgment for costs has been rendered [35] to compel the trial judge to stay execution for costs until the liability therefor is finally determined on appeal.[36] Since an order staying proceedings is not a final order, the trial judge may in his discretion modify it for failure to pay the costs within the time limited thereby.[37] In a separate suit for costs upon a decree where the plea is nul tiel record, the record offered must stand or fall by itself,[38] and in such suit, a judgment for costs, being a contract, may be set up as a counterclaim.[39]

The payee may be held liable to the maker of a negotiable note, who has a defense valid against such payee, for his costs and disbursements in resisting payment.[40]

Payment as condition to further or subsequent proceedings. See 11 C. L. 906, 890. The payment of costs, usually limited to those thereby rendered futile,[41] is sometimes required as a condition precedent to the granting of a new trial [42] to the opening of a default,[43] to the granting of a discontinuance,[44] and to the permitting of a party to file an amended [45] or supplemental petition made necessary by reason of

moved, or reversed. Charles City v. Security Trust & Sav. Bank [Iowa] 120 NW 114.

32. Charles City v. Security Trust & Sav. Bank [Iowa] 120 NW 114. Under Code, § 1299, fee bill issued by clerk shall have effect of execution. Id.

33. Since collection inures to benefit of all entitled to the costs. Charles City v. Security & Sav. Bank [Iowa] 120 NW 114.

34. Circuit court has no authority to issue execution for costs awarded by circuit court of appeals except under authority of such special mandate directed to it (applying Rev. St. § 701; U. S. Comp. St. 1901, p. 552). American Trust & Sav. Bank v. Zeigler Coal Co., 165 F 512.

35. Judgment held to be against relator personally for costs although main judgment was against him as administrator. Luther v. Wolcott, 151 Mich. 71, 14 Det. Leg. N. 817, 114 NW 673.

36. Under Comp. Laws, § 10355. Luther v. Wolcott, 151 Mich. 71, 14 Det. Leg. N. 817, 114 NW 673.

37. Goldie v. Bay Circuit Judge [Mich.] 15 Det. Leg. N. 1034, 119 NW 430.

38. Santa Clara Valley Mill & Lumber Co. v. Prescott, 238 Ill. 625, 87 NE 851. Where record fails to state against whom costs are awarded, it cannot be aided by rule of court applicable to such cases. Id.

39. Under Municipal Court Act (Laws 1902, p. 1538, c. 580) § 151, and Code Civ. Proc. § 501, providing contracts proper subject of counterclaim. Braun v. Finger, 113 NYS 573.

40. Payee was held liable to maker for costs and attorney fee of maker in endeavor to prove that plaintiff in suit to collect note was not innocent holder. Bourke v. Spaight [Kan.] 102 P 253.

41. That is costs of services which will have to be performed again. Myers v. Fox, 129 App. Div. 31, 113 NYS 116. Payment of costs, after notice of trial, and term fee was required, but not payment of costs and term fees before notice of trial. Id. Plaintiff was required to pay defendant's attorney fees, costs, and disbursements of former trial and $10 costs of motion, such costs not to include costs before notice of trial, or costs after notice and before trial, or any costs taxed for taking depositions, or for any term fee prior to trial, or costs of either appeal. Henson v. Lehigh Val. R. Co., 117 NYS 119. Party filing amendment is not thereby made liable for costs other than those rendered abortive by such amendment. Louisville & N. R. Co. v. Brown [Ky.] 113 SW 465. Party amending was not made liable for costs where adverse party lost neither time nor money by filing of amendment. Id.

42. Myers v. Fox, 129 App. Div. 31, 113 NYS 116; Henson v. Lehigh Val. R. Co., 117 NYS 119.

43. Under Municipal Court Act (Laws 1902, pp. 1562, c. 580) § 253, limiting such award to $10.00. Klein v. Spiegel, 63 Misc. 259, 116 NYS 550. Opening of default resulting from attorney's dereliction of interests of his client was permitted upon condition that plaintiff pay to defendant $30 penalty costs, and $10 costs of motion. Salkind v. Levy, 116 NYS 581.

But award of $10 costs and taxable disbursements as condition was improper. Klein v. Spiegel, 63 Misc. 259, 116 NYS 550.

44. Court has power to impose payment of such costs as it may deem equitable as condition to discontinuance of injunction suit. American West Indies Trading Co. v. Porto Rican American Cigar Co., 63 Misc. 518, 117 NYS 614.

45. Party amending was required as a condition to amendment to pay costs and disbursements made since original complaint was served and $10 costs of motion. Lyall v. Wood, 130 App. Div. 294, 114 NYS 272. Court may usually not amend complaint after trial and appeal without imposing upon applicant as condition the payment of costs and disbursements to date of granting relief sought. Purcell v. Hoffman House, 131 App. Div. 239, 115 NYS 778. Where judgment was reversed because complaint alleged employ-

some act or omission of such party.[46] When such condition has been prescribed, it should not be ignored by another justice subsequently presiding in the case.[47]

As a general rule, the satisfying[48] or paying of costs is a condition precedent to a second trial[49] upon identically the same cause,[50] even though the second trial sought be in a new action commenced before the award of costs in the first action.[51] Such payment may also be required before a discontinuance is granted,[52] unless the right thereto is waived,[53] before the removal of a cause is permitted even though costs have been awarded to abide the event,[54] and before a new trial will be permitted after a cause has been remanded.[55] This rule does not exist, however, in the absence of statute, to give the courts any arbitrary power[56] or to give such power to a municipal court,[57] nor will it be applied in an action in the state court where the former action was one brought in a federal court.[58]

Counterclaim, see latest topical index.

ment to sell entire tract of property and proof showed only partial performance, amendment of complaint after remand should be allowed only on terms. Carpenter v. Atlas Imp. Co., 132 App. Div. 112, 116 NYS 454. Amendments were required to be permitted upon such terms as to costs as to the court seemed just. Ball v. Rankin [Okl.] 101 P 1105.

It was held proper at special term to permit amendment to conform with statute without imposition of payment as condition. Baum v. Elias, 64 Misc. 43, 117 NYS 935.

46. Imposition proper, if filing of supplemental petition had been rendered necessary by party procuring settlement behind opposite counsel's back. Schmitz v. Wyckoff, 128 App. Div. 324, 112 NYS 681. **Imposition improper** where based on filing of supplemental petition rendered necessary by release of joint tort feasor subsequent to commencement of action. Id.

47. Where payment was imposed as condition to leave to plead over, it was improper for another justice of court to permit violation of this order. State Board of Pharmacy v. Lurie, 61 Misc. 71, 112 NYS 1092.

48. Where it was conceded that costs of prior suit had been "satisfied," it was not essential that they appear to have been "paid." Birmingham Waterworks Co. v. State [Ala.] 48 S 658; City Council of Montgomery v. Shirley [Ala.] 48 S 679.

49. Plea in abatement was sustained and action dismissed where costs of former suit had not been paid. Richie v. Du Bose [Ga. App.] 65 SE 254. Payment of costs of former trial or review can be made condition precedent to second trial. Clark v. Bay Circuit Judge, 154 Mich. 483, 15 Det. Leg. N. 811, 117 NW 1051.

50. Civ. Code 1895, § 5043; but rule applies only to suits identical both as to parties and cause of action. Moore v. Bower [Ga. App.] 65 SE 328. Code of Practice, § 5043, and Civ. Code, § 3786; but rule has no application to different suit begun by same plaintiff upon different cause of action although against same defendant Bunting v. Hutchinson, 5 Ga. App. 194, 63 SE 49. Rule does not apply where the first action was in equity and the second action is at law, on grounds which could not constitute a right of action in equity. Mass v. Rosenthal, 62 Misc. 350, 115 NYS 4.

51. Conlon v. National Fireproofing Co., 128 App. Div. 270, 112 NYS 652.

52. Defendant has right to ask payment of costs before discontinuance is granted, under rule 27, subd. b. Townsend v. Jackson Circuit Judge [Mich.] 16 Det. Leg. N. 318, 121 NW 483.

53. Was waived by counsel of defendant permitting order of discontinuance to be entered without protest. Townsend v. Jackson Circuit Judge [Mich.] 16 Det. Leg. N. 318, 121 NW 483.

54. Costs not awarded to abide event may be set off against judgment obtained by other party, and their payment may be made condition to his right to move cause. Donegan v. Patterson, 129 App. Div. 349, 113 NYS 830.

55. Upon remand for new trial upon amended complaint, the complaint can usually be amended only upon payment of all accrued costs, including costs of application. Audley v. Townsend, 131 App. Div. 79, 115 NYS 145.

When a case has been remanded on appeal, it is **discretionary** to stay or to refuse to stay further proceedings until accrued costs have been paid, and it was not abuse of discretion to refuse to stay proceedings where party liable for costs was poor person and other party was a man of substantial means. Brinsfield v. Howeth, 110 Md. 520, 73 A 289.

56. Court has no arbitrary power to dismiss action because plaintiff failed to pay costs of former action dismissed without prejudice. Wilson v. Sullivan [Ky.] 112 SW 1120.

57. Exclusion of defendants from participation in trial in municipal court because of nonpayment of costs, imposed as terms for continuance, was without warrant of law. Pfeiffer v. Joline, 114 NYS 219. There was no power in municipal court to stay proceedings until costs of former action had been paid. Goldman v. Brooklyn Heights R. Co., 129 App. Div. 657, 114 NYS 182.

58. Webb v. Pacific Mut. Life Ins. Co. [Mo. App.] 119 SW 491. Especially where it appears that plaintiff has meritorious case and has no means with which to pay costs. Id. Failure to pay full costs of suit removed to federal court was not ground for abatement of second suit brought in state court. Bradford v. Louisville & N. R. Co. [Ga.] 65 SE 127.

COUNTERFEITING.[59]

The scope of this topic is noted below.[60]

It is a crime to have counterfeit money in possession with intent to defraud, and intent to pass or utter it is not essential.[61]

COUNTIES.

The scope of this topic is noted below.[62]

§ 1. Creation and Organization, 1114. Boundaries, 1116. Location and Removal of County Seats, 1118. County Buildings, 1120.
§ 2. Officers; Personal Rights and Liabilities, 1122.
§ 3. Public Powers, Duties and Liabilities, 1124.
A. General Powers, Duties and Liabilities, 1124.
B. Public Powers and Duties of Officers, 1126. County Boards, 1126. Powers and Duties of Other County Officers, 1129.
C. Suits and Demands, 1129.
D. Contracts, Debts and Expenditures, 1130. Bonds, 1131. Debts and Expenditures, 1131.
E. Torts, 1133.
F. Property and Funds, 1134. Depositories, 1135.
G. Presentation, Allowance, Enforcement and Payment of Claims, 1136.
H. Warrants; Issuance and Enforcement, 1139.
I. Appeals from Orders of County Boards, 1139.

§ 1. *Creation and organization.*[63]—See 11 C. L. 908—Counties are subordinate, political subdivisions of the state, created for public purposes.[64] They are public corporations,[65] but, when considered with respect to their corporate powers, counties rank low down in the scale of corporate existence, and are frequently termed "quasi" corporations.[66] The designation of "municipal corporation" is applicable to coun-

59. See 11 C. L. 908.
Search Note: See notes in 25 L. R. A. 341; 35 Id. 571.
See, also, Counterfeiting, Cent. Dig.; Dec. Dig.; 11 Cyc. 300-323; 7 A. & E. Enc. L. (2ed.) 875; 5 A. & E. Enc. P. & P. 266.

60. It includes all matters relating to the crime of counterfeiting, excluding matter common to all crimes (see Criminal Law;* Indictment and Prosecution*).

61. Rev. St. § 5431 construed. United States v. Provenzano, 171 F 675.

62. Matters peculiarly applicable to counties only are treated in this article. As to laws relating to public corporations generally, see Municipal Corporations;* as to public securities, see Municipal Bonds;* as to contracts, see Public Contracts;* as to facilities, see Public Works and Improvements;* Bridges;* Highways and Streets;* Sewers and Drains;* Toll Roads and Bridges.* As to public officers, see Public Officers and Employes,* and as to taxation, see Taxes.* As to county attorneys, see Attorneys and Counselors,* § 11B; as to the general rules regarding elections when applied to county seat removals, or changes, see Elections.* As to the duties of county commissioners in connection with the incorporation of a municipality, see Municipal Corporations,* § 2A. As to the exercise of the police power by counties as municipal corporations, see Municipal Corporations,* § 10; and that topic also includes county ordinances, §§ 5D, 5E, 5F, etc. As to action of a county board in acting upon a petition for a local option election, see Intoxicating Liquors.* As to taxpayer's actions to restrain county contracts as unauthorized, see Public Contacts,* § 6A. As to service of process upon a county or county board, see Process,* § 4B. As to venue in actions against counties, see Venue and Place of Trial.*

63. **Search Note:** See Counties, Cent. Dig. §§ 1-85, 161-173; Dec. Dig. §§ 1-60, 103-110; 11 Cyc. 340-467; 7 A. & E. Enc. L. (2ed.) 904, 1011.

64. Marion County v. Rives [Ky.] 118 SW 309. Local subdivisions of state. State v. Goldthait [Ind.] 87 NE 133. Political divisions exercising a part of the sovereign power of state. Fleming v. Floyd County, 131 Ga. 545, 62 SE 814. Subdivisions of state created for administrative and other public purposes. McSurely v. McGrew [Iowa] 118 NW 415. Merely political agents of state created for governmental purposes and charged with certain duties for and on behalf of state. Yamhill County v. Foster [Or.] 99 P 286.

65. County is not private corporation. Yamhill County v. Foster [Or.] 99 P 286. County is body corporate. McSurely v. McGrew [Iowa] 118 NW 415. Is declared by statute (Hurd's Rev. St. 1908, c. 34, § 22) to be body politic and corporate. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708; People v. Wells, 140 Ill. App. 235. Under constitution (Const. art. 11, § 1, par. 1; Civ. Code 1895, § 5924), county is not merely division of state, but is body corporate. De Kalb County v. Atlanta [Ga.] 65 SE 72. County is municipal corporation. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. County Law (Laws 1892, p. 1744, c. 686) § 2; General Corp. Law (Laws 1890, p. 1061, c. 563) § 3, subd. 1. Id.

66. State v. Goldthait [Ind.] 87 NE 133.

ties,[67] but, since their creation is effected without the particular solicitation or consent of the inhabitants,[68] they are in this respect distinct from municipal corporations proper.[68, 70] The purpose of investing a county with corporate powers is to create a legal entity, the better to further the purposes of their creation.[71]

Since a county owes its creation to the state,[72] it is subject at all times to legislative control and change,[73] as where offices are abolished and a new system of government provided.[74] A county which is made the judicial unit by the constitution cannot be divided into judicial districts.[75] An unorganized county may be attached to another county for all legal purposes generally and to protect public and private interests.[76] An enactment sufficiently designating the boundaries of a proposed county and providing for its organization and government is not invalidated by such a defect as the failure to provide compensation for an officer of such county.[77] Constitutional provisions often require that a change of boundaries and erection of a new county receive the majority vote [78] of the electors of the county.[79]

County is quasi corporation. Breathitt County v. Noble [Ky.] 116 SW 777.

67. Counties are public municipal corporations created for the purposes of convenient local government, and existing only for public purposes connected with the administration of the state government. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. County as corporate organization is governmental agency of state and in sense a municipal corporation. Kumpe v. Bynum [Ala.] 48 S 55.

68. Counties are created by the sovereign power of state, of its own sovereign will for governmental purposes, without particular solicitation, consent or concurrence of the inhabitants of the county. State v. Goldthait [Ind.] 87 NE 133.

69, 70. Municipal corporation proper is asked for or at least assented to by people who inhabit it, but county is superimposed by sovereign and paramount authority. Marion County v. Rives [Ky.] 118 SW 309. Municipal corporation proper is mainly for benefit of locality and its people, while county is created almost exclusively with view to policy of state at large. Id.

71. State v. Goldthait [Ind.] 87 NE 133. Fact that counties are made corporations by statute does not change conditions or results. Id.

72. State v. Goldthait [Ind.] 87 NE 133; McSurely v. McGrew [Iowa] 118 NW 415. Formation of counties and other subdivisions of state are peculiarly functions of state government. City of Pond Creek v. Haskell, 21 Okl. 711, 97 P 338.

73. McSurely v. McGrew [Iowa] 118 NW 415. Under Const. art. 7, any changes which legislature may make in county governments are lawful. Fooshe v. McDonald, 82 S. C. 22, 63 SE 3.

74. 25 Stat. p. 1203, abolishing office of county supervisor and providing new system of government, is valid. Fooshe v. McDonald, 82 S. C. 22, 63 SE 3.

75. Laws 1909, p. 82, c. 49, as to dividing counties into districts for judicial purposes, is violative of Const. art. 4, § 5, providing one superior court in each county, but permitting several sessions of it. State v. Chehalis Superior Ct. [Wash.] 103 P 464. Intent to make county judicial unit which cannot be divided. Id. Legislature cannot deprive superior court of jurisdiction of county (Const. art. 4, § 6). Id.

76. Statutes considered. First Nat. Bank v. McElroy [Tex. Civ. App.] 112 SW 801. Registration of instruments should be in organized county to which it is attached for that purpose. Id.

77. Act March 9, 1909 (Laws 1909, p. 193), is not invalidated by failure to provide compensation for county superintendent of schools. State v. Erickson [Mont.] 102 P 336.

78. Under Const. § 168, as to change in boundaries, "votes cast" are totals of separate votes or expressions of voters' preferences for or against change. State v. Blaisdell [N. D.] 119 NW 360. Since Const. § 168, relates only to subject-matter of change in county boundaries, words "votes cast" as used therein should be limited to that subject. Id. Const. § 168, does not require over half as many affirmative votes to be cast in favor of change as are cast on any other subject at same election. Id. Although vote on change in county boundaries is cast at general election, it is in strictly legal sense holding of a **"separate election,"** held in connection with general election, to save expense and because more complete expression of preference is then obtained, there being numerous objects at issue. Id. Elector who does not vote acquiesces in result of votes of those who participate. Id. To hold otherwise would be to render act of elector who does not vote equivalent to negative vote. Id. Question as to change of boundaries and erection of new county held carried where affirmative vote was 4,207 and negative 4,024, though 9,259 votes were cast as to candidate for governor at same election. Id.

79. Where Const. § 168, reads, "All changes in boundaries of organized counties, before taking effect, shall be submitted to the electors of the county or counties to be affected thereby at a general election and be adopted by a majority of all legal votes cast in each county at such election," word "electors" means all persons possessing qualifications as to age, etc., prescribed by Const. § 121, entitling them to vote. State v. Blaisdell [N. D.] 119 NW 360. Under Const. § 168, words "shall be submitted to the electors" means that all persons qualified to vote

If the statute gives electors the right to vote upon all petitions in reference to division of a county,[80] a county officer cannot refuse to give notice of the submission of the question upon the ground that the petitions conflict as to the territory to be embraced,[81] and his duty may be compelled by mandamus.[82] Such an application does not effect the sovereignty of the state within a constitutional provision as to the issuance of original writs of mandamus by the supreme court,[83] but may be allowed by that tribunal in the case of emergency.[84] Legislative recognition of the existence of a county will preclude the right of private suit attacking its organization,[85] and leave to test the legality of organization of a county will not be granted at the instance of private relators having no interest in the subject distinct from the public.[86] The creation of a new county will entitle a resident guardian therein to an option to change the jurisdiction over him as guardian to the court of the new county.[87] Individual taxpayers cannot enjoin an election submitting the question of the creation of a new parish on the ground of unconstitutionality of some of the provisions in the statute.[88]

Boundaries.[See 11 C. L. 909]—What are county boundaries is a matter of law, but where they are is a matter of fact,[89] and, where different laws upon the subject are so doubtful that the boundary cannot be ascertained with certainty, parol evidence is admissible.[90] Meridians are frequently employed in defining boundaries of counties,[91] and such a boundary is free from ambiguity, a survey being necessary only to practically locate the boundary.[92] Such a survey may be undertaken by one county for its own guidance,[93] and, while not binding as to the adjoining county or

in counties affected shall, in legal manner, be given an opportunity to vote on change in question. Id.

80. Under Rev. Codes 1905, § 2329, as amended by Laws 1907, p. 85, c. 60, electors have right to have submitted to them, and to vote upon, all petitions in reference to division of county that conform to statute. State v. Fabrick [N. D.] 117 NW 860. Such right exists although petition last presented may conflict, as to territory to be embraced within proposed counties, with petitions first presented and acted upon. Id.

81. Where petition for division of county is ordered to be submitted to vote by county commissioners, county auditor has no right to refuse to give notice of submission of question on ground that another petition on file conflicted therewith as to territory to be embraced. State v. Fabrick [N. D.] 117 NW 860.

82. Facts of case held to authorize issuance of writ of mandamus to auditor to compel notice of submission of proposition as to division of county to electors. State v. Fabrick [N. D.] 117 NW 860.

83. Under Const. §§ 86, 87, authorizing supreme court to issue original writs where questions affect sovereignty or franchises of state. State v. Fabrick [N. D.] 117 NW 860.

84. Supreme court has power to issue an original writ of mandamus in case of emergency, or where exceptional circumstances arise, so that denial of writ might be denial of justice. State v. Fabrick [N. D.] 117 NW 860. Writ allowed to compel auditor to issue notice of election upon question of division of county. Id.

85. State v. Olson, 107 Minn. 136, 119 NW 799.

86. State v. Olson, 107 Minn. 136, 119 NW 799. Fact that relator is under indictment by grand jury of alleged defectively organized county does not vest him with any special right, within meaning of law, to question organization. Id.

87. Where domiciles of guardian and ward are in new county which is detached and formed under statute (Acts 1905, pp. 46-52), guardian has an option (under § 7 of Act) to change jurisdiction over him as guardian to court of ordinary of new county. Maloy v. Maloy, 131 Ga. 579, 62 SE 991. Upon failure to exercise option, jurisdiction remains as it was before formation of new county. Id.

88. Election under Acts 1908, p. 53, No. 53. Dubuisson v. St. Landry Parish Board of Sup'rs, 123 La. 443, 49 S 15.

89. Location of boundary line, defined as beginning at source of stream and following down stream to junction with another stream, is question of fact. Sierra County v. Nevada County [Cal.] 99 P 371. Evidence held to support finding that source of stream, named in statute as point of boundary, was certain snow-fed springs and not subterranean lake several miles lower down stream. Id.

90. Puget Sound Nat. Bank v. Fisher, 52 Wash. 246, 100 P 724. Assumption and continuous exercise of jurisdiction over territory by one county for many years, acquiescence in such jurisdiction, and facts showing exercise, are **competent evidence.** Id. Facts of case, showing exercise of jurisdiction over territory, held to justify finding that such territory was part of county. Id.

91. Crook County Com'rs v. Sheridan County Com'rs, 17 Wyo. 424, 100 P 659.

92. Crook County Com'rs v. Sheridan County Com'rs, 17 Wyo. 424, 100 P 659. Surveys of county boundary lines are for the purpose only of marking lines established by legislature. Id.

93. Crook County Com'rs v. Sheridan County Com'rs, 17 Wyo. 424, 100 P 659.

the public,[94] it may be admissible in evidence to show the line in a collateral proceeding.[95] A description of the boundary line of a county by the reference to the boundary line of another county refers to the true line of the latter county as defined by law.[96] Whether a proviso in a statute is intended to make an ex parte survey by a county conclusive as to the location of a boundary line involves a construction of the act.[97] Statutory actions for the location of boundaries are provided,[98] and may be maintained where the boundary is clearly defined [99] and the action is not barred by estoppel.[1] Assertion and exercise of jurisdiction in the territory of a county coupled with uncertainty as to the boundary is sufficient to warrant a suit in equity to determine the location of the line.[2]

The change of county boundaries when a new county is erected has been referred to.[3] A statute providing for the change of county lines when a city lies partly within two counties, by the holding of a municipal election, must conform to constitutional requirements,[4] and may by such provisions be prevented from applying to a city which is a county site of one of the two counties.[5] A prerequisite as to the number of inhabitants in a city seeking to avail itself of such a statute will render the act applicable to cities only when the population is determined by an official census.[6] The acts of officials,[7] or the election seeking to change the boundary,[8] will be enjoined when unauthorized by law, and that remedy is available even

94. Crook County Com'rs v. Sheridan County Com'rs, 17 Wyo. 424, 100 P 659. One county interested in division line may not settle its location without consent of other party interested. Id.

95. Crook County Com'rs v. Sheridan County Com'rs, 17 Wyo. 424, 100 P 659.

96. Irrespective of errors of location. Crook County Com'rs v. Sheridan County Com'rs, 17 Wyo. 424, 100 P 659. Where meridian was boundary of Crook county which caused ex parte survey to be made for its own benefit, and Sheridan county was created out of such county, its boundary was meridian and not practical line determined by Crook county. Id.

97. Proviso in statute (Laws 1886, p. 344, c. 87) as to settlement of boundary disputes, that act shall not apply to counties of Crook and Johnson until latter county makes survey, in which case dispute, if any, may be settled as other disputes, does not render prior survey by Crook county alone conclusive. Crook County Com'rs v. Sheridan County Com'rs, 17 Wyo. 424, 100 P 659. Legislative intent is clear by reference to Laws 1890, p. 79, c. 47; Rev. St. 1899, § 893, creating another county and referring to meridian in question. Id.

98. County may maintain action to establish boundary under Rev. St. 1899, §§ 994-1001. Crook County Com'rs v. Sheridan County Com'rs, 17 Wyo. 424, 100 P 659.

99. Remedy provided by Pol. Code, §§ 3969-3972, as to determination of boundaries, can only be availed of when language defining same is clear. Sierra County v. Nevada County [Cal.] 99 P 371. Not available remedy. Id.

1. Under evidence there was no such long acquiescence in ex parte survey of line by county as would preclude adjoining county from maintaining action for determination of boundary. Crook County Com'rs v. Sheridan County Com'rs, 17 Wyo. 424, 100 P 659. Action under Rev. St. 1899, §§ 994-1001, is proceeding to locate boundary never before conclusively established, and such action cannot be said to be barred by ex parte survey of one county. Id.

2. Sierra County v. Nevada County [Cal.] 99 P 371.

3. See ante, preceding subdivision.

4. Act Aug. 7, 1906 (Acts 1906, p. 121), providing for change of county lines lying within limits of incorporated towns or cities of more than 500 population, is not unconstitutional as referring to more than one subject-matter in its title. Town of Maysville v. Smith [Ga.] 64 SE 131. As containing matter different from that contained in its title. Id. As being a special law operating upon a subject-matter provided for by an existing general law. Id.

5. Act Aug. 7, 1906 (Acts 1906, p. 121), providing for change of boundary line of county where city is partly in two counties, by holding of municipal election, has no application where county line passes through city which is county site of one of two counties. De Kalb County v. Atlanta. [Ga.] 65 SE 72. Would be violative of constitution as to change of county site (Civ. Code 1895, § 5927). Id.

6. Act Aug. 7, 1906 (Acts 1906, p. 121), providing for change of county lines lying within limits of incorporated towns or cities of more than 500 population, applies only to such cities when population is determined by an official census. Town of Maysville v. Smith [Ga.] 64 SE 131. Where no official state census resort must be had to census of United States. Id.

7. Act of officials of city seeking to change county boundaries when city of over 500 population is in two counties (authorized by Acts 1906, p. 121) may be enjoined when there is no official census of population. Town of Maysville v. Smith [Ga.] 64 SE 131.

8. Court of equity will enjoin municipal election to change county line when without authority of law, though holding election

after an election has been held, where other acts are necessary to change the county line.[9] Such a suit is maintainable by the county,[10] or a citizen and taxpayer.[11]

The result of an election whereby property is detached from one county and added to another is a matter of public interest which cannot be enjoined by a taxpayer.[12]

Location and removal of county seats.[See 11 C. L. 911]—A county site is the place where the courthouse and county buildings are required to be located, and courts held and county business transacted.[13] The location of county seats and the regulation of such matters being peculiarly functions of the state government,[14] a designation by congress in a territory would not be permanent when a state is formed.[15] A county seat need not be located in buildings or upon a site owned by the county,[16] but the statutes usually authorize the procurement of land by purchase or gift, which statutes will authorize location upon land already owned by the county such as swamp land.[17] A county seat is permanent only so long as people permit it to remain so.[18] Its location and removal and the procedure therefore may be provided by the people of the state, either through the constitution [19] or by legislative enactments,[20] which conform to constitutional requirements.[21] An enactment as to the

as general rule will not be enjoined. De Kalb County v. Atlanta [Ga.] 65 SE 72. Where city was county site and act did not apply. Id.

9. Injunction will not be denied on ground that act sought to be enjoined has been completed where, though election might have been held, other acts are necessary to change county line. De Kalb County v. Atlanta [Ga.] 65 SE 72.

10. County may enjoin change of county line under Acts 1906, p. 121, which is without authority, operating as removal of county seat. De Kalb County v. Atlanta [Ga.] 65 SE 72.

11. Citizen and taxpayer held entitled to sue to prevent change of county boundary. De Kalb County v. Atlanta [Ga.] 65 SE 72. Where limits of municipality extended into another county and proceeding then instituted to include entire municipality in one county. Id.

12. Where election held and territory detached from one county and added to another, neither resident taxpayer of territory affected nor resident of county, nor both, can enjoin public officials from publishing result pursuant to law. Thompson v. Haskell [Okl.] 102 P 700.

13. De Kalb County v. Atlanta [Ga.] 65 SE 72. County seat is building where court of record is held. Smith v. Roberts, 60 Misc. 427, 113 NYS 672.

14. City of Pond Creek v. Haskell, 21 Okl. 711, 97 P 338.

15. Action of congress (Act Mar. 3, 1893; 27 Stat. 645, c. 209), in opening Cherokee outlet and designating county seat in territory, would not render such designation permanent when state was formed. City of Pond Creek v. Haskell, 21 Okl. 711, 97 P 338.

16. Smith v. Roberts, 60 Misc. 427, 113 NYS 672.

17. Where Rev. St. 1855, c. 44, provided for organization of counties and authorized county to procure land by purchase or gift for county seat, it must necessarily be assumed that such county seat could be located on land already owned by county. Van Pelt v. Parry, 218 Mo. 680, 118 SW 425. Under Acts of 1855 and 1857, absolute title was vested in respective counties to state swamp lands. Id. Where county appropriated swamp land owned by it for county seat, its power to deal with such land as swamp land was functus officio. Id.

18. City of Pond Creek v. Haskell, 21 Okl. 711, 97 P 338.

19. City of Pond Creek v. Haskell, 21 Okl. 711, 97 P 338. Const. art. 17, § 6, providing for elections for relocation or removal of county seats, is self-executing. Id.

20. City of Pond Creek v. Haskell, 21 Okl. 711, 97 P 338. County seat is designated in manner provided by Code Civ. Proc. art. 3, § 31, et seq. Smith v. Roberts, 60 Misc. 427, 113 NYS 672.

21. Acts 1908, p. 594, c. 336, as to removal of county seat, held to embrace subjects germane to title, wherefore act was not violative of Const. 1902, § 52 (Code 1904, p. ccxxi). Conek v. Skeen [Va.] 63 SE 11. Acts 1908, p. 594, c. 336, as to removal of county seat, is not unconstitutional because title speaks of removal of "courthouse," such term being synonymous with county seat. Id. Statute providing for elections for removal of county seats, purpose being to secure permanent location, and which is applicable to all counties, is not special legislation prohibited by Const. art. 5, §§ 32, 46. City of Pond Creek v. Haskell, 21 Okl. 711, 97 P 338. Not invalid as to title of act. Id. Act independent in form and not violative of Const. art. 5, § 57, as to form of amendatory acts. Id. Senate Bill, No. 234, intended to supplement Const. art. 17, § 6, as to relocation of county seats, is merely directory, and such statute not retroactive in effect. Id. Laws 1905, p. 159, c. 77, as to removal of county seats in counties having not more than 6,500 inhabitants and in which no court house has been constructed by majority vote, is **unconstitutional** as special legislation. Ex parte Connolly [N. D.] 117 NW 946. Act includes counties to be subsequently organized, but classification of counties having no court house upon certain date, and which perpetu-

removal of a county seat which fails to provide a sinking fund for the bonds to be issued does not violate a constitutional provision which is held applicable only to the state.[22] Usually removal is effected by the requisite majority vote at an election,[23] where proper ballots must be used.[24] The petition may be dependent upon a self-executing constitutional provision.[25] The statutes usually require the petition to be signed by taxpayers,[26] whereupon a county official notifies the county board [27] who consider it [28] and call the election.[29] When filed, the petition cannot usually be withdrawn,[30] nor can a signer withdraw his name from it.[31] The official charged with notifying the county board may not be enjoined from such duty where a petition is lost,[32] and a second petition is not to be considered until it is determined that the first petition has been withdrawn or abandoned.[33] The statutes sometimes permit a vote on successive selections.[34] A larger majority is usually required when the proposed county seat is some distance from the center of the county, wherefore the statutes often require some official to approximately determine such center by issuing a certificate [35] which is conclusive as to such fact.[36] Such certifi-

ally precludes them from passing out of such class after erection of such buildings, is purely arbitrary. Id.

22. Acts 1908, p. 594, c. 336, as to removal of county seat and authorizing acquisition of land and erection of buildings, is not unconstitutional for failure to provide sinking fund for bonds, but Const. 1902, § 187 (Code 1904, p. cclxix), refers only to debt contracted by state. Conek v. Skeen [Va.] 63 SE 11. Authority to provide sinking fund is given by Code 1904, § 834d. Id.

23. To effect removal of county seat under Const. art. 17, § 6 (Bunn's Ed. §§ 328-334), it must affirmatively appear that majority of all votes cast were in favor thereof. Town of Eufaula v. Gibson [Okl.] 98 P 565. General principles of elections, such as qualifications of voters and like matters in so far as applicable to election for county seat removal, are treated in topic Elections.

24. Act Feb. 2, 1899 (Sess. Laws 1899, p. 60), § 118, as to special and general elections, is still in force as to form, size, and manner of preparing ballots for county seat removals. Whitla v. Quarles, 15 Idaho, 604, 98 P 631. Sess. Laws 1899, p. 44, § 48, as amended by Act Feb. 27, 1905 (Sess. Laws 1905, p. 311), does not apply. Id.

25. Petition for election on question of removal of county seat depends upon Const. art. 17, § 6. City of Pond Creek v. Haskell, 21 Okl. 711, 97 P 238. Not dependent upon Senate Bill, No. 234, intended to supplement constitution, which was passed subsequent to filing of petition. Id.

26. Under Comp. Laws, § 5007, as to petition for removal of county seat, words "each elector being a taxpayer" refer to preceding word electors, wherefore petition is sufficient when signed by three-fifths of qualified taxpaying electors. State v. Martin [Nev.] 103 P 840.

27. Where petition filed, county auditor is required by statute to issue proper notice for meeting of commissioners. Evenson v. O'Brien, 106 Minn. 125, 118 NW 364.

28. Statute (Rev. Laws 1905, § 398) requires commissioners to determine whether signatures to petition are genuine, and whether petition contains requisite percentage of legal voters. Evenson v. O'Brien, 106 Minn. 125, 118 NW 364. After filing of petition, power to determine whether it has been lost or abandoned rests alone with commissioners. Id.

29. Comp. Laws, § 5007, directs board to call election if petition is filed by three-fifths of voting taxpayers as shown by roll and certified registration. State v. Martin [Nev.] 103 P 840.

30. Where petition filed, promoters of plan to move county seat have no authority to withdraw petition and abandon proceedings. Evenson v. O'Brien, 106 Minn. 125, 118 NW 364.

31. After filing of petition and before consideration by commissioners, no signer has authority to withdraw name from it. Evenson v. O'Brien, 106 Minn. 125, 118 NW 364.

32. County auditor cannot be enjoined from giving notice of meeting of commissioners to consider petition for removal of county seat by fact that petition has been taken from office and could not be found. Evenson v. O'Brien, 106 Minn. 125, 118 NW 364.

33. Filing of second petition for same purpose does not authorize its consideration until commissioners determine that first petition has been lost or that proceedings under first petition have been withdrawn and abandoned. Evenson v. O'Brien, 106 Minn. 125, 118 NW 364.

34. Under County Law, §§ 31, 32 (Laws 1892, p. 1753, c. 686), as to changing sites of county buildings, electors may vote on successive selections, and county is not required to build on site first selected. Smith v. Roberts, 60 Misc. 427, 113 NYS 672. Under County Law, §§ 31, 32 (Laws 1892, p. 1753, c. 686), where new site of buildings is selected, supervisors may again submit question as to change of site. Id. Fact that no land is purchased, buildings erected, or offices removed under first change, is immaterial. Id.

35. Certificate of commissioner of land office designating center of county (pursuant to Const. art. 9, § 2, and Rev. St. 1895, art. 813), as point within boundaries of 320-acre survey, near center of such survey, is not indefinite, since it would be impracticable to determine exact spot. Kilgore v. Jackson [Tex. Civ. App.] 118 SW 819. "Near" is relative term, meaning adjacent or close by, and is determined only from surrounding

cate is sometimes held to be merely for the guidance of the officials who determine the result of the election.[37] The requirement that a town be within a certain distance from the center of the county is not a jurisdictional fact, the absence of which would render an order by a commissioner's court declaring the result of an election void,[38] but such declaration may necessarily involve a finding that the town selected was within the prescribed radius,[39] which finding would be conclusive in the absence of contradictory evidence.[40] A statutory duty such as calling the election may be compelled by mandamus,[41] but that remedy is not available where the duty, such as issuing a certificate of the center of the county, is merely an anticipated duty which the law may never require to be performed.[42] The matter of the change of county seat is not a question affecting the franchises or liberties of the people of the state, so as to authorize the supreme court of a state to issue mandamus to compel an election,[43] and a petition will be denied by that tribunal when the facts do not show the existence of an emergency requiring the writ to issue.[44] The constitutionality of an act providing for the relocation of a county seat will not be determined in a mandamus proceeding by a private party against county officers to compel a change of the location of their offices.[45] A taxpayer cannot enjoin the submission of the question as to the removal of county seat, which is authorized by law.[46] An election contest is not a bar to an equitable proceeding to enjoin the issuance of bonds relating to a county seat removal.[47]

County buildings.[See 11 C. L. 910]—The erection and repair of county buildings is usually committed to the county boards,[48] and their incidental or discretionary

facts and circumstances. Id. Law makes no provision that commissioner in determining center should exclude land covered by water. Id.

36. Certificate of land commissioner is intended by legislature to be conclusive. Kilgore v. Jackson [Tex. Civ. App.] 118 SW 819. Evidence held inadmissible to contradict such conclusion. Id.

37. Certificate of secretary of state as to geographical center of county provided for by Const. art. 17, § 6 (Bunn's Ed. § 333), requiring 60 per cent of votes to effect removal when seat is within 6 miles of center, is for guidance of those who declare result of election. City of Blackwell v. Cross [Okl.] 98 P 905. Secretary is not required to prepare same until it is needed. Id.

38. Order by court of limited jurisdiction. Kilgore v. Jackson [Tex. Civ. App.] 118 SW 819. In election pursuant to Const. art. 9, § 2, and statute as to removal of county seat, order for election and counting of votes were jurisdictional facts. Id.

39. Kilgore v. Jackson [Tex. Civ. App.] 118 SW 819.

40. Where no evidence was introduced to contradict it. Kilgore v. Jackson [Tex. Civ. App.] 118 SW 819. Two-thirds vote is requisite when county seat is removed to place not within five miles of center, but finding of county judge must be held conclusive as to that effect when not attacked. Id.

41. Where requisite petition is filed. State v. Martin [Nev.] 103 P 840.

42. Mandamus would not lie to compel secretary of state to issue certificate as to geographical center of county, before election, when such certificate is for guidance of those declaring result. City of Blackwell v. Cross [Okl.] 98 P 905.

43. Within constitutional provision as to original writs of mandamus. State v. Gottbrecht [N. D.] 117 NW 864.

44. Facts in case held not to show exceptional circumstances warranting supreme court to issue mandamus to compel submission of question as to removal of county seat. State v. Gottbrecht [N. D.] 117 NW 864.

45. Dean v. Dimmick [N. D.] 122 NW 245. Proceeding not on behalf of other citizens of county or in name of state. Id.

46. No waste of public funds, and submission clearly authorized. Smith v. Roberts, 60 Misc. 427, 113 NYS 672.

47. Election contest was special proceeding, and brought by other parties. Kilgore v. Jackson [Tex. Civ. App.] 118 SW 819.

48. County board has duty to erect or otherwise provide, when necessary and finances of county permit, and keep in repair, suitable courthouse, jail, and other necessary buildings. Hurd's Rev. St. 1908, c. 34, § 26. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. Statutory duty to erect necessary buildings is imperative. Id. By Code 1907, § 131, county buildings are to be erected and kept in repair at county's expense under direction of court of county commissioners, which is authorized to make necessary contracts. Weeks v. Bynum [Ala.] 48 S 489. Code 1907, § 133, makes it duty of court of county commissioners to erect courthouses and other buildings. Id. Act March 19, 1901 (P. L. p. 79), as amended by Act March 18, 1902 (P. L. p 42), authorizing county authorities to provide adequate accommodations for carrying on public business, does not require county jail to be placed **under same roof** as court rooms, but permits erection of separate jail. Christie v. Bergen County Chosen Freeholders [N. J. Err. & App.] 72 A 45. Where county courthouse includes

authority, in regard to such matters,[49] is not subject to control by the courts.[50] The same rule is applicable to the care and management of county buildings,[51] and, when a statute confers the duty of designating rooms to be occupied by particular officers,[52] the decision of the board is exclusive,[53] being unaffected by the desires of the particular officers,[54] or even by a presentment of a grand jury.[55] The duty of a board in such a respect is continuing.[56] The authority of the board in caring for the buildings will empower them to insure the buildings,[57] and a fiscal court charged with the power of regulation and control of the buildings may institute the necessary actions thereto.[58] The land upon which the county buildings are situated is often acquired by dedication,[59] and usually eminent domain proceedings are available.[60] Sometimes a separate scheme is provided for the erection of buildings by means of a building commission.[61] The changing of the site of county buildings is

jail, and building ceases to be adequate. Id. Under Rev. St. 1899, § 6736 (Ann. St. 1906, p. 3322), as to control over buildings, county court **may construct vaults** in courthouse and establish fund to pay for same, when sufficient funds are on hand for improvement. State v. Bollinger, 219 Mo. 204, 117 SW 1132.

49. Code 1906, § 313, as to erection of courthouse, etc., gives board of supervisors incidental power to fix cost. Wells v. McNeill [Miss.] 48 S 184. Under Cobbey's St. 1907, § 4443, charging county board with duty of providing suitable buildings, etc., questions of necessity and of finances permitting expenditures are for county board to determine. Roberts v. Thompson, 82 Neb. 458, 118 NW 106. Board has discretion as to cost, size and other conditions of buildings. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708.

50. In all cases in discharge of statutory duties as to county buildings, court of county commissioners exercise discretion which cannot be controlled in absence of fraud, corruption, or unfair dealing. Weeks v. Bynum [Ala.] 48 S 489. Court will not interfere with discretion vested in county board as to what buildings are suitable, if funds are available for new buildings and the like. Roberts v. Thompson, 82 Neb. 458, 118 NW 106. Board's incidental power to fix cost of courthouse (Code 1906, § 313) is not reviewable. Wells v. McNeill [Miss.] 48 S 184. Where legislative question as to what is suitable jail, its necessity, location, size, cost, etc., is committed to decision of county board, courts cannot question same. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. Condemnation proceedings by county. Id. Bill in taxpayer's action to enjoin erection of courthouse held to have **no sufficient averments of fraud,** corruption or unfair dealing on part of commissioners in determining that erection was necessary. Weeks v. Bynum [Ala.] 48 S 489.

51. Usually entrusted to county commissioners whose discretion will not be interfered with. Werts v. Feagle [S. C.] 65 SE 226.

52. Civ. Code 1902, § 812, conferred duty upon county commissioners to designate rooms to be occupied by particular officers. Werts v. Feagle [S. C.] 65 SE 226. Authority to provide suitable rooms necessarily carries with it authority to designate which room is suitable. Id. Acts 1906, p. 295, § 2, conferring power upon commission for erection of new courthouse, to provide fireproof vaults, etc., **did not authorize designation** of room to be occupied by particular officer. Id.

53. Werts v. Feagle [S. C.] 65 SE 226. Discretionary power of board of county commissioners in designating room to be occupied by particular officer will not be disturbed unless fraudulent, or otherwise unfair. Id.

54. County officers have no authority in selection of rooms to be occupied for their official use. Werts v. Feagle [S. C.] 65 SE 226.

55. Presentment of grand jury that room assigned to county auditor was unsuitable had no binding effect upon county commissioners. Werts v. Feagle [S. C.] 65 SE 226.

56. Duty of board of county commissioners in assigning offices for particular officers being continuing is not exhausted when once exercised. Werts v. Feagle [S. C.] 65 SE 226.

57. Adams v. Helms [Miss.] 48 S 290. Under Code 1906, § 307, board of supervisors have authority as to county courthouse and jail and by § 319 they **may insure** same. Id.

58. Ky. St. 1903, §§ 127, 1834, 1840, considered, and while Ky. St. 1903, § 3948, requires jailer to institute actions in name of county for possession of county property, it was not intended to deprive fiscal court of power to regulate and control buildings and institute necessary actions thereto. Owen County v. Greene [Ky.] 112 SW 854. Action of forcible detainer to recover possession of certain room in courthouse held maintainable. Id.

59. Trustees of town of Liberty, by virtue of act of incorporation and authority to provide county jail, might dedicate public lands to county. Vasser v. Liberty [Tex. Civ. App.] 110 SW 119. City of Victoria held to have dedicated property. City of Victoria v. Victoria County, 100 Tex. 438, 18 Tex. Ct. Rep. 16, 101 SW 190. Dedication. City of Victoria v. Victoria County [Tex. Civ. App. 115 SW 67.

60. Eminent Domain Act (Hurd's Rev. St. 1908, c. 47), § 2, permitting corporate authority or public body to avail itself of provision of act in construction of public work, applies to county seeking to erect jail. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. Jail is public necessity. Id.

61. Act April 18, 1904 (97 Ohio Laws, p. 111), amended March 8, 1906 (98 Ohio Laws, p. 53), provides a separate and complete scheme for building courthouses which shall cost $25,000 or over by means of a building

distinct from removal of the county seat,[62] but is usually regulated by statutory provisions.[63] The erection of county buildings is subject to limitations as to indebtedness to be incurred,[64] and may be enjoined by a taxpayer.[65] Where a statute as to the erection of a public building fails to provide for its payment,[66] the only method authorized may be by an issue of bonds.[67]

§ 2. *Officers; personal rights and liabilities.*[68]—See 11 C. L. 911—The general principles relative to county officers, in so far as the law governing the same is equally applicable to other public officers, are treated in a separate article.[68a] The vacancy created by the failure of a county commissioner to qualify for his position cannot be filled by the county board, in the absence of statutory authority,[69] and constitutional provisions sometimes require all county officers to be elected by the electors of the respective counties.[70] Statutory provisions sometimes authorize the board of supervisors to abolish the supervisor districts and provide for the election of supervisors by the county at large [71] in which case candidates for such offices, nominated in the various districts at a primary election, would be entitled to have their names placed on the ballot, if at all, as candidates for the entire county.[72] Various officers and employes may be appointed by the county board,[73] as where trustees must be appointed for a highschool which is acquired upon the organization of a new county.[74] A civil service act using the words "head of department" has been held not to apply to a county board.[75] On appointing employes, a board with continuing power [76] may, as a general rule, anticipate the future and make appoint-

commission. Mackenzie v. State, 76 Ohio St. 369, 81 NE 638. Procedure for building courthouse, under Rev. St. §§ 794-803, applies when building shall cost $10,000 or more, and is by supervision of county commissioners. Id. Both acts are independent. Id. Act April 13, 1888 (85 Ohio Laws, p. 218), § 2, does not make Rev. St. §§ 794-801, applicable to building commissions under Act of April 18, 1904, as amended. Id. Act April 18, 1904, as amended, is constitutional. Id.

62. Smith v. Roberts, 60 Misc. 427, 113 NYS 672.

63. Changing of site of county buildings is purely matter of business and is regulated by County Law, §§ 31, 32 (Laws 1892, p. 1753, c. 686). Smith v. Roberts, 60 Misc. 427, 113 NYS 672.

64. See post, § 3D, subd. Debts and Expenditures.

65. Erection of courthouse enjoined where debt created was in excess of constitutional limitation. Hagan v. Limestone County Com'rs Ct. [Ala.] 49 S 417.

66. Code 1906, § 313, as to erection of courthouse, etc., has no aspect towards ways and means for payment, nor to matter of taxation. Wells v. McNeill [Miss.] 48 S 184.

67. Only way in which burden of future taxes can be laid on people is prescribed by Code 1906, § 331, as to bonds and providing for election. Wells v. McNeill [Miss.] 48 S 184.

68. Search Note: See notes in 15 L. R. A. (N. S.) 62; 91 A. S. R. 555.

See, also, Counties, Cent. Dig. §§ 48-54, 83-160; Dec. Dig. §§ 38-46, 59-102; 11 Cyc. 380, 381-387, 411-457; 7 A. & E. Enc. L. (2ed.) 975.

68a. See topic Officers and Public Employes.

69. Where board of county commissioners is composed of five members from various districts. Swedback v. Olson, 107 Minn. 420, 120 NW 753.

70. In so far as Rev. St. § 845, attempts to authorize appointment of legal counsel by county commissioners, it contravenes Const. art. 10, § 2, providing that all county officers shall be elected by electors of their respective counties. State v. Cannon, 12 Ohio C. C. (N. S.) 103.

71. Code, § 416, expressly provides that board of supervisors may divide county into supervisor districts or may abolish such districts and provide for election of supervisors for county at large. Lahart v. Thompson [Iowa] 118 NW 398. Act not effected by primary election law, either directly or indirectly. Id.

72. Lahart v. Thompson, [Iowa] 118 NW 398.

73. Where board of county commissioners has control of public morgue, etc. (Rev. Laws 1905, §§ 435, 436), it may employ morgue keeper. Manley v. Scott [Minn.] 121 NW 628. In an action in which board is party and in which prosecuting attorney says he is willing and able to prosecute, board is **without authority** to employ other legal counsel. Ireton v State, 12 Ohio C. C. (N. S.) 202. Statute does not grant authority to county court to employ an expert to audit and examine books and accounts of county and officers. Blades v. Hawkins, 133 Mo. App. 328, 112 SW 979.

74. County commissioners have duty of appointing trustees for high school, which property was acquired upon organization of county from another county. Wilhite v. Mansfield [Okl.] 99 P 1087.

75. Civil Service Act 1908 (P. L. 1908, p. 235), as to appointment of employes, when using words "head of department," does not apply to board of chosen freeholders, they being legislative body. McKenzie v. Elliott [N. J. Law] 72 A 47.

76. Board of county commissioners of H. county is continuing body and its existence

ments to take effect in the future [77] or contract for services,[78] but outgoing officers may not encroach upon the first day of the ensuing official year for the purpose of tying the hands of their successors.[79] An officer who is a financial agent of the county cannot purchase property at an execution sale in favor of the county,[80] the title so acquired inuring to the benefit of the county.[81] Whether a jailer who is superintendent of public buildings may demand an appropriation to keep public buildings in repair involves the statutory provisions relative thereto.[82] If a county is not the owner of a school fund or the trustee for its distribution, and the treasurer of the county is to be regarded as to such fund as an officer of state, the county cannot maintain an action for its recovery when misappropriated any more than a stranger.[83] The compensation of county officers is governed by statute.[84] An expenditure by a county officer, if unauthorized, is at the officer's own risk, though conceived to be necessary,[85] but the county board may approve such expenditure, and it thereupon becomes a valid county charge.[86] A statute construed as prescribing a rule by which the compensation of a county officer may be determined and allowed, and permitting the county board to fix such salary,[87] does not violate a constitutional provision as to the delegation of legislative power.[88] Sometimes, the statutory provisions require a fiscal court to fix the salary of county officers at the beginning of his term,[89] and a subsequent change will violate constitutional provisions.[90] In the case of an illegal reduction, the incumbent may appeal from such order [91] or sue the county.[92] When the jurisdiction of the fiscal court to fix a salary is

is not effected by election of new members or election of chairman and vice-chairman at first session in each year. Manley v. Scott [Minn.] 121 NW 628.

77. Authority exists only where vacancy occurs at time when board as then constituted is vested with full legal authority. State v. McIntosh [Minn.] 122 NW 462. Board may employ morgue keeper for one year on last day of year, regardless of fact that new members will qualify and succeed present incumbents soon after first of year. Manley v. Scott [Minn.] 121 NW 628.

78. Board, being continuing body, may contract for services for one year, during which morgue keeper may only be discharged for causes which will justify county in refusing to carry out contract. Manley v. Scott [Minn.] 121 NW 628. Contract being reasonable and not contrary to public policy cannot be legally rescinded after new members qualify. Id.

79. State v. McIntosh [Minn.] 122 NW 462.

80. Under duty created by law and facts of case, county judge had no right to purchase property at execution sale in favor of county, his principal or client. Bell County v. Felts [Tex. Civ. App.] 120 SW 1065. County judge purchasing land at execution sale in favor of county is not entitled to reimbursement for expenditures, where receipts were in excess therefrom and claim for fees was uneffected. Id.

81. Where county officer, who was financial agent, purchased property at execution sale in favor of county, title so acquired inured to benefit of principal, and was held in trust for it. Bell County v. Felts [Tex. Civ. App.] 120 SW 1065.

82. Acts 1908, p. 116, c. 44, amending Ky. St. § 3948, rendering jailer superintendent of public buildings, etc., does not give authority to demand appropriation for keeping public buildings in repair, but fiscal court must make appropriation for that purpose (§ 1840). Frizzell v. Holmes [Ky.] 115 SW 246.

83. Connor v. Zackey [Tex. Civ. App.] 117 SW 177.

84. Where there is change of venue and accused is acquitted, sheriff has no claim for fees, under Rev. St. § 7264, as amended, 93 Vol. Ohio Laws, page 7, against county where indictment was found, his fee in such cases being provided for by Rev. St. § 1231. County Com'rs v. Thurlow, 11 Ohio C. C. (N. S.) 223.

85, 86. People v. Fuller, 141 Ill. App. 374.

87. Laws 1903, p. 272, c. 207, amending Rev. Pol. Code, § 894, permitting county commissioners to allow salary not exceeding $1,500 per annum to county auditor, must be construed in connection with limitation of preceding provisions as to computation on basis of taxable valuation, and when so construed merely prescribes rule by which compensation may be determined and allowed. Brookings County v. Murphy [S. D.] 121 NW 793.

88. Not violative of Const. art. 9, § 6, as delegation of legislative power. Brookings County v. Murphy [S. D.] 121 NW 793.

89. Ry. St. § 4419. Breathitt County v. Noble [Ky.] 116 SW 777. If not so fixed may be fixed subsequently but cannot be changed. Id. Where fiscal court allowed county school superintendent salary of 15 cents for each child, it could not be reduced. Id.

90. Cannot be changed during term of incumbent because of Const. §§ 161, 235. Breathitt County v. Noble [Ky.] 116 SW 777.

91. Reduction of allowance to county school superintendent by fiscal court. Breathitt County v. Noble [Ky.] 116 SW 777. See post, § 31.

92. Breathitt County v. Noble [Ky.] 116 SW 777. Where fiscal court illegally changed county school superintendent's sal-

exclusive, though subject to appeal,[93] it cannot be revised by a direct action,[94] nor can a void order be annuled by mandamus.[95] Estoppel is often relied upon to prevent an officer's recovery of compensation due.[96] A county seeking to recover excessive compensation received by an officer must plead the facts.[97] A settlement of a county treasurer with his board of county commissioners, while unimpeached, is prima facie evidence that he has duly accounted to the proper officers,[98] but such a settlement, if shown to have been made under misapprehension of facts, fraud, and mutual mistake, has no binding force,[99] and the rule applies though the settlement is made regularly, by way of compromise, to avoid litigation.[1]

§ 3. *Public powers, duties, and liabilities. A. General powers, duties, and liabilities.*[2]—See 11 C. L. 913—Counties, being subordinate political subdivisions of the state,[3] have only such powers as are expressly granted or are necessarily implied,[4] and the fact that counties are made corporations by statute does not enlarge their powers.[5] The administration of justice and the enforcement of criminal laws are committed in large measure to counties,[6] and usually counties are authorized to purchase and hold the real estate necessary for the uses of the county,[7] and do all other acts in relation to the property and concerns which are necessary to the exercise of corporate powers.[8] The power to make police regulations is sometimes con-

ary, action was properly brought against county for same, and not against members of fiscal court. Id.

93. County judge's salary. Monroe County Ct. v. Miller [Ky.] 116 SW 272.

94. Where statute makes it duty of fiscal court to fix salary of county judge (Ky. St. § 1072), and provides for appeal by person aggrieved (Ky. St. § 978), circuit court will have jurisdiction to revise action on such appeal; but action on petition filed against county by judge is without jurisdiction and void. Monroe County Ct. v. Miller [Ky.] 116 SW 272. Since county judge's salary is regulated by statute, rule allowing suits on other claims does not apply. Id. **County attorney could not consent** so that order of fiscal court be set aside. Id.

95. Monroe County Ct. v. Miller [Ky.] 116 SW 272.

96. Acceptance of reduced salary will not preclude recovery of balance due county superintendent of schools where compensation illegally reduced by fiscal court. Breathitt County v. Noble [Ky.] 116 SW 777. County attorney is not estopped to sue for salary and office rent due him, by failure to abolish fiscal system through which county funds were mismanaged. Strong v. Thurston County [Neb.] 120 NW 922. Sheriff would not be prevented from recovering expenses for which county was liable where judge of county court told officer that court would furnish the things required. Harkreader v. Vernon County, 216 Mo. 696, 116 SW 523. Mere offer. Id. Sheriff not estopped from recovering expenses paid for water and gas by statement that he would supply same "if he had to pay for it himself," when complaining because of refusal. Id.

97. Petition in action by county against officers mentioned in act of 1877 (Laws 1877, p. 215; Comp. St. 1907, c. 28, § 42 et seq.), to recover fees received by such officer, must state facts sufficient to show that amount sought to be recovered is in excess of amount such officer is entitled to retain for his own compensation. Saunders County v. Slama, 82 Neb. 724, 118 NW 573. Petition insufficient. Id.

98. Heritage v. State [Ind. App.] 88 NE 114. In making settlement, a power given by statute, board is **presumed** not to violate law. People v. Wells, 140 Ill. App. 235.

99. Heritage v. State [Ind. App.] 88 NE 114. Such settlement not conclusive by Burns' Ann. St. 1908, § 6086. Id. Statute is for protection of officers as well as county. Id. In action on relation of county auditor to recover moneys not turned in by county treasurer where settlement averred and that same was made under mutual mistake, such **averments** might be disregarded as surplusage. Id.

1. Heritage v. State [Ind. App.] 88 NE 114.

2. Search Note: See notes in 5 C. L. 868; 14 L. R. A. 70; 4 L. R. A. (N. S.) 339; 7 Ann. Cas. 743.

See, also, Counties, Cent. Dig. § 24; Dec. Dig. §§ 21½-24; 11 Cyc. 365; 7 A. & E. Enc. L. (2ed.) 926.

3. See ante, § 1.

4. Marion County v. Rives [Ky.] 113 SW 309. Counties have only such powers as are granted by statute or implied as necessary and incidental to due performance of powers granted or duties enjoined. Blades v. Hawkins, 133 Mo. App. 328, 112 SW 979.

5. State v. Goldthait [Ind.] 87 NE 133. Statute investing county with corporate powers was evidently not for purpose of extending powers. Id. Burns' Ann. St. 1908, § 5974, expressly **restricts** functions of counties to matters not inconsistent with provisions directing their exercise of powers. Id.

6. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708.

7. Hurd's Rev. St. 1908, c. 34, § 24. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. It is within powers of each county to own and maintain **buildings** for use of various public officers and for use of courts. Smith v. Roberts, 60 Misc. 427, 113 NYS 672.

8. People v. Wells, 140 Ill. App. 235. Hurd's Rev. St. 1908, c. 34, § 24. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708.

ferred on counties.[9] Other important powers are hereinafter referred to.[10] Powers granted must be exercised in the manner provided by statute.[11] A county owning property in a city will be liable for special assessments for local improvements,[12] when the city is clearly authorized to levy the same.[13] The legislature may take charge of and provide for the indigent insane and feeble-minded by general taxation, relieving the several counties from such burden except as they bear their proportion through such taxation,[14] or the legislature may require each county to maintain its own indigent persons, or to reimburse the state in whole or in part for so doing,[15] when constitutional restrictions are observed.[16] When county officers are designated as convenient agencies through or by whom levies of taxes may be made and their collection enforced in relation to local improvements, the county has no interest in such proceedings and incurs no liability for the failure of such officers to perform their duties.[17] In the absence of statute a county is not liable for expenses of enforcing quarantine against the county, when infected with a contagious animal disease,[18] or for the closing of a highway for repairs,[19] but liability, is sometimes imposed for the expenses of repairing a bridge extending into an adjacent county, where statutory requisites are followed,[20] for the expenses of county officers,[21] expenses of collecting taxes,[22] or for stenographer's fees.[23] The expense

9. Under Const. art. 11, § 11, county can constitutionally pass all such local, police, sanitary and other regulations as are not in conflict with general laws. Ex parte Young, 154 Cal. 317, 97 P 822; Denton v. Vann, 8 Cal. App. 677, 97 P 675.

10. As to power to contract, see post, § 3D; as to power to borrow money, see post, § 3D, subd. Debts and Expenditures; as to power to sue and be sued, see post, § 3C.

11. State v. Goldthait [Ind.] 87 NE 133.

12. County having legal title and possession of public square, upon which courthouse is built and maintained, has such ownership of property that city may make special assessment for improvements of abutting streets. Jefferson County Com'rs v. Oskaloosa [Kan.] 102 P 1095.

13. County is not liable for assessment for public improvement where city is not clearly authorized to levy same. City of La Grange v. Troup County [Ga.] 64 SE 267. Where municipality is given power to levy local assessments upon property benefited and there is no provision rendering public property subject to assessment, there is an implied exception in favor of its exemption. Id. Act Aug. 17, 1906 (Act 1906, p. 119), does not give city power. Id.

14. State v. Lewis [N. D.] 119 NW 1037.

15. State v. Lewis [N. D.] 119 NW 1037. The fact that institution for feeble-minded is state institution does not limit power of legislature. Id. Const. § 174, in no way deprives legislature of exercise of such power. Id.

16. Laws 1907, p. 374, c. 237, requiring payments for support of indigent persons from counties, is not unconstitutional as violating Const. § 174, being in excess of taxes specified. State v. Lewis [N. D.] 119 NW 1037. Does not violate Const. § 69, subd. 23, as to special legislation. Id. Does not violate Const. § 172, providing that fiscal affairs of county be transacted by board of county commissioners. Id. Does not violate Const. § 186, as to itemizing of claims to be allowed. Id. If act fixes excessive sum, that is legislative question. Id.

17. Canal Const. Co. v. Woodbury County [Iowa] 121 NW 556. County is not liable for failure of officer to legally assess levy and collect tax for drainage district. Id.

18. Various statutory provisions considered and expenses in hiring deputies of sheriff to enforce quarantine against county infected with animal disease held not a county charge. People v. Erie County Sup'rs, 134 App. Div. 12, 118 NYS 35. Chargeable to state. Id.

19. No liability is imposed on a county independent of statute, on account of the closing of a highway made necessary by reasonable repair. Herbert v. Rockland County, 64 Misc. 352, 118 NYS 358.

20. Counties may be rendered liable by statute for failing or refusing to repair a bridge across a stream dividing it from the adjacent county, where statutory requisites are followed. Buffalo County v. Kearney County, 83 Neb. 550, 120 NW 171; Cass County v. Larpy County, 83 Neb. 435, 119 NW 685. County not liable for expenses of repairing where practically new bridge was built after notice to repair was served. Colfax County v. Butler County, 83 Neb. 803, 120 NW 444.

21. Statutes held to authorize recorder of deeds to maintain and provide for his office in reasonable way for benefit of public, at public expense. Ewing v. Vernon County, 216 Mo. 681, 116 SW 518. "Keep" means "to maintain," "to provide for" sheriff. Harkreader v. Vernon County, 216 Mo. 696, 116 SW 523. County held bound to provide janitor service for office of recorder of deeds. Ewing v. Vernon County, 216 Mo. 681, 116 SW 518. Where county court failed to do so, recorder might reimburse himself for such expenses. Id.

22. Items of expense of county attorney in collecting taxes were properly chargeable to county. Rogers v. Slaton [Ky.] 113 SW 509.

23. Stenographer's Act of 1903 (Gen. Laws 28th Leg. p. 84, c. 60) construed and held to be legislative intention to relieve districts consisting of more than one county of liability for stenographer's fees in excess of

of barber's services to jurors is not a necessary expense in the administration of justice, so as to render the county liable therefor.[24] When a portion of the territory of one county is annexed to another the county gaining the territory neither acquires any rights nor comes under any obligations to the county losing it, unless the legislative act so provides,[25] and the same rule applies to a new county which is created.[26] The transferred territory incurs liabilities and shares in the property to which it is attached, and is equally subject to assessment and taxation for that purpose.[27] The state's right of priority over other creditors in collecting revenue upon a defaulting public officer's bond, does not extend to a county.[28]

(§ 3) *B. Public powers and duties of officers.*[29] *County boards.* See 11 C. L. 913 County boards[30] are the representatives of counties.[31] They constitute the governing board of the county,[32] exercising its powers[33] and having general charge of the county property, funds, and business.[34] Being agents in the public business,[35] their powers must be expressly conferred by statute,[36] or necessarily implied,[37] all other

those collected. Shock v. Colorado County [Tex. Civ. App.] 115 SW 61. Where county has one or more district courts of its own it becomes responsible out of general fund for fees due stenographer, but in case of other class of districts, each county becomes liable for payment of fees incurred only to extent of fees collected. Id.

24. Schmelzel v. Ada County Com'rs [Idaho] 100 P 106. Rev. Codes, §§ 7900, 7901, as to care of jurors, are not sufficiently broad to render expense of barber's services to jurors a charge against county. Id.

25. Houston County v. Henry County [Ala.] 47 S 710.

26. In absence of statutory provision, new county is not entitled to participate in general fund of old county, unless it is averred that it, or part thereof, had been specifically collected for payment of bonds or applied to sinking fund for that purpose. Houston County v. Henry County [Ala.] 47 S 710. Houston county held not entitled to share in moneys in treasury of Henry county at time of creation of new county of Houston. Id. Bill not maintainable under general prayer for relief upon doctrine of **equitable set-off.** Houston County v. Henry County [Ala.] 50 S 311. Even if Code 1896, §§ 1398, 1399, were inapplicable, defense would be available in court of law, and bill by new county founded upon such theory is without equity. Id.

27. Houston County v. Henry County [Ala.] 47 S 710.

28. United States Fidelity & Guar. Co. v. Rainey [Tenn.] 113 SW 397.

29. Search Note: See note in 16 L. R. A. 161.

See, also, Counties, Cent. Dig. §§ 55-85, 118-160, 174-180; Dec. Dig. §§ 47-60, 81-102, 113, 114; 11 Cyc. 388-414, 436-457, 467-476; 7 A. & E. Enc. L. (2ed.) 975.

30. Board of revenue of L. county has like powers and jurisdiction as courts of county commissioners of various counties of state. Loc. Acts 1898-99, p. 30. Kumpe v. Bynum [Ala.] 48 S 55.

31. In an enlarged sense. Werts v. Feagle [S. C.] 65 SE 226.

32. Supervisors are governing board of county. Laws 1892, p. 1732, c. 685, § 1. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. Board of chosen freeholders of county is **county legislature.** McKenzie v. Elliott [N. J. Law] 72 A 47.

33. County's powers are exercised by board of supervisors. People v. Wells, 140 Ill. App. 235. Under statutes, corporate powers of various counties are to be exercised by fiscal courts thereof. Owen County v. Greene [Ky.] 112 SW 854. Board of county commissioners ordinarily exercise corporate powers of county. Werts v. Feagle [S. C.] 65 SE 226.

34. County commissioners have general charge of county property and management of county funds and business (Ballinger's Ann. Codes & St. § 342; Pierce's Code, § 4098). State v. Major, 50 Wash. 355, 97 P 249. Except as otherwise provided, statutes confer upon county boards duty of looking after business and property of several counties. Roberts v. Thompson, 82 Neb. 458, 118 NW 106. County court is general fiscal agent of county, and is possessed of supervisory power over collection and preservation of its funds. Blades v. Hawkins, 133 Mo. App. 328, 112 SW 979. Various county officials are required to report to and make settlements with court. Id. Const. § 172, providing that fiscal affairs of county be transacted by county board, merely vests in such officers the business transactions of county, the performance of such duties as law has placed on such persons, or as uniformly pertain to that office. State v. Lewis [N. D.] 119 NW 1037. "Fiscal affairs" not limited to matters solely pertaining to public revenue. Id.

35. Board of supervisors is agent of county with powers defined by statute. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. County boards are limited governmental agents. State v. Goldthait [Ind.] 87 NE 133. County boards are recognized as agents in public business by Const. art. 6, § 10; Rev. St. 1843, p. 181, c. 7, art. 1. Id.

36. State v. Boerlin, 30 Nev. 473, 98 P 402; Lund v. Washoe County [Nev.] 101 P 550; State v. Goldthait [Ind.] 87 NE 133. County boards have no implied or discretionary powers in their governmental contractual relations as agents. State v. Goldthait [Ind.] 87 NE 133. Boards of county commissioners are limited in their jurisdiction to legislative authority conferred upon them. State v. McBride [Nev.] 99 P 705. Boards of supervisors have only such powers of local legislation and administration as legislature may from time to time confer (Const. art. 3, § 27). People v. Reoux, 60 Misc. 139, 112 NYS 1025. Jurisdiction of board of supervisors is statu-

acts being void.[38] When the law prescribes a mode which they must pursue in the exercise of their powers, it excludes all other modes of procedure,[39] and whoever deals with them does so with full notice of the extent of their power and the manner of its exercise.[40] The administrative functions [41] include implied or discretionary powers,[42] and such discretionary powers are not to be delegated.[43] County boards, also, usually have limited powers of quasi-judicial character,[44] being often designated as inferior tribunals of special and limited jurisdiction.[45] In addition to those specific powers which are elsewhere treated herein,[46] county boards are frequently required to determine the sufficiency of petitions for local option elections,[47] and the legislature may authorize the county boards to lay taxes for the corporate purposes,[48] though such power is usually limited.[49] The statutes may also authorize a county commissioner to cause action to be brought in the name of the county to prevent its unlawful dismemberment.[50] A grant of the power to make police regulations is an authorization to the county board to enact ordinances pursuant thereto.[51] A duty to furnish county officers with necessary requisites for their work must be imposed by statute,[52] and, when so imposed,[53] is not relieved from by the officer's act in furnishing his own necessities.[54]

County boards ordinarily speak by written record,[55] which is presumed regular

tory. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. Power and control of county boards of revenue over county revenues is derived solely and exclusively from state. Kumpe v. Bynum [Ala.] 48 S 55. Where there is no constitutional provision, it is derived from statute. Id.

37. Blades v. Hawkins, 133 Mo. App. 328, 112 SW 979.

38. Acts beyond statute are illegal and void. Wadsworth v. Livingston County Sup'rs, 115 NYS 8.

39. State v. Boerlin, 30 Nev. 473, 98 P 402. Exercise of power is restricted to method prescribed by statute. Lund v. Washoe County [Nev.] 101 P 550.

40. Lund v. Washoe County [Nev.] 101 P 550.

41. Boards of county commissioners as governmental agents have limited powers of an administrative character. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966.

42. State v. Goldthait [Ind.] 87 NE 133.

43. Passing upon correctness of reports and charges for services was part of duty of board of supervisors which could not be delegated. Dubuque County v. Fitzpatrick [Iowa] 121 NW 15.

44. Board as governmental agent has limited power of quasi-judicial character. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966.

45. State v. Boerlin, 30 Nev. 473, 98 P 402.

46. County Buildings and County Seat Removals, ante, § 1; Contracts, post, § 3D; Claims, post, § 3G; Appointment of Employes, ante, § 2; Suits and Demands, post, § 3C.

47. Local Option Act, § 6 (Pub. Acts 1889, p. 286, No. 207; Comp. Laws, § 5417), requires an examination and determination by county board of supervisors as to whether requisite number of electors have signed petition for election and their action is final. Madill v. Midland Common Council [Mich.] 16 Det. Leg. N. 32, 120 NW 355. Finding of clerk not prerequisite to action. Id.

48. By Const. art. 10, § 5, general assembly has power to vest power to lay taxes for corporate purposes in municipal authorities of county. State v. Goodwin, 81 S. C. 419, 62 SE 1100.

49. Power to tax is not vested right in board of supervisors and is subject to restriction by legislation. Wells v. McNeill [Miss.] 48 S 184. General assembly has not conferred power to lay taxes on municipal authorities of county, except limited power to lay special tax of one mill for roads (23 Stat. 1012). State v. Goodwin, 81 S. C. 419, 62 SE 1100. County board is not authorized to levy taxes to pay expenses of subsequent years. Unlawful by Cobbey's St. 1907, § 4452. Roberts v. Thompson, 82 Neb. 458, 118 NW 106. See, also, post, § 3D, subd. Debts and Expenditures.

50. Under Act Aug. 21, 1906 (Acts 1906, p. 407, § 4), as to power conferred upon county commissioner. De Kalb County v. Atlanta [Ga.] 65 SE 72.

51. Direct constitutional grant of power to make police regulations (Const. art. 11, § 11) is an authorization to local legislative body, i. e., board of supervisors, as representative of county, to exercise powers granted in enacting local laws. Denton v. Vann, 8 Cal. App. 677, 97 P 675.

52. State v. Major, 50 Wash. 355, 97 P 249.

53. Under Ballinger's Ann. Codes & St. § 342 (Pierce's Code, § 4098), giving county commissioners general charge of county property and funds, and § 499 (§ 4220), entitling county surveyor to all necessary cases and other suitable articles, county commissioners have duty of procuring surveyor's transit for such officer. State v. Major, 50 Wash. 355, 97 P 249. Surveyor's transit is included within meaning of words "other suitable articles." Id.

54. Duty of county commissioners to supply surveyor with transit, imposed by statute, is not abolished by surveyor's act in purchasing such instrument. State v. Major, 50 Wash. 355, 97 P 249.

55. Colfax County v. Butler County, 83 Neb. 803, 120 NW 444.

when collaterally attacked,[56] and, when a written record is required,[57] parol evidence cannot be received to contradict it.[58] Usually action taken at a place other than the usual meeting place is not for that reason illegal.[59] Action by the majority is usually sufficient,[60] and, since the board is a public body vested with authority to discharge public functions, death, absence, or disability of a member, does not deprive the remainder of their power.[61] A meeting where a board elects a chairman is a regular meeting.[62] A rule as to adjournments promulgated by a board is subject to suspension,[63] and such a rule will not apply when conflicting with a statutory proceeding.[64] Authority to publish the proceedings of a board in a foreign language must be conferred by statute.[65] An itemized report in writing is sometimes required from a county board.[66]

The discretionary action of a county board will not be interferred with by a court of equity,[67] unless such action is arbitrary and amounts to an abuse of discretion,[68] and action, when performed within the limits of jurisdiction or power conferred and in the manner pointed out by statute, is conclusive against collateral attack.[69] Duties imposed by statute are enforcible by mandamus,[70] and not pro-

56. Molyneux v. Grimes [Kan.] 98 P 278.
Held collateral attack: Petition for mandamus by liquor dealer who had been refused bond, attacking election resulting in prohibition on ground that official record of supervisors was defective. Derosia v. Loree [Mich.] 16 Det. Leg. N. 546, 122 NW 357.

57. Comp. Laws, § 2502 (Acts 1851, p. 242, No. 156), defining powers and duties of supervisors, requires every order, resolution, and determination in pursuance of act to be recorded in record of such board and signed by chairman and clerk. Derosia v. Loree [Mich.] 16 Det. Leg. N. 546, 122 NW 357.

58. Parol evidence in collateral action cannot be received to contradict record of county, required by statute to be in writing, or to show mistake in matters as therein recorded. Ex parte Young, 154 Cal. 317, 97 P 822. Parol evidence is inadmissible to contradict official record properly signed by showing that same was not signed by clerk within time prescribed. Derosia v. Loree [Mich.] 16 Det. Leg. N. 546, 122 NW 357.

59. Smith v. Roberts, 60 Misc. 427, 113 NYS 672.

60. By Act Apr. 15, 1834, P. L. 537, § 19, it is expressly provided that two of three of commissioners shall form board to transact business, and when convened pursuant to notice or according to adjournment shall be competent to transact all regular business. Jacoby v. Lehigh County, 36 Pa. Super. Ct. 194. Rev. Laws 1905, § 5513, provides that power conferred upon public officers be construed as conferred on majority, and § 424 provides that majority constitute quorum, etc. Swedback v. Olson, 107 Minn. 420, 120 NW 753.

61. Provided a sufficient number be present. Swedback v. Olson, 107 Minn. 420, 120 NW 753. Where board of county commissioners consists of five members, each representing a district, and one representative fails to qualify, remaining four members may exercise legislative powers of board. Id.

62. Meeting of board of county commissioners at which they are required to elect chairman (Gen. St. 1901, § 1636) is regular meeting within meaning of phrase as to presentation of petition for road (Gen. St. 1901, § 6018). Molyneux v. Grimes [Kan.] 98 P 278.

63. Same power that makes rule may suspend. Madill v. Midland Common Council [Mich.] 16 Det. Leg. N. 32, 120 NW 355. Rule of board that it shall adjourn for term when it remains in session for two hours without any business is subject to suspension. Id.

64. Rule inapplicable to adjournment for recordation of proceedings under local option act. Madill v. Midland Common Council [Mich.] 16 Det. Leg. N. 32, 120 NW 355.

65. Hyman v. Susemihl, 137 Wis. 296, 118 NW 837. Under Sanborn's St. Supp. 1906, § 674a, requiring publication of proceedings of county board, and St. 1898, § 675, permitting publication of notices as to tax sales, redemption, and other affairs in foreign language, etc., county board is not authorized to print report of its proceedings in foreign language. Id. St. 1898, § 675, providing what publications may be printed in foreign language and prescribing conditions as to permission, shows legislative intent to exclude publications in foreign language other than those provided for. Id.

66. Under Rev. St. § 917, as amended, requiring county commissioners to make an annual report in writing to common pleas court, payments made by them must be "itemized" to extent of giving names of persons to whom money is paid, aggregate amount paid for any single purpose, and purpose for which payment was made. State v. Sollars, 7 Ohio N. P. (N. S.) 567.

67. Action within sphere of legally delegated powers. Dyer v. Martin [Ga.] 64 SE 475; Roberts v. Thompson, 82 Neb. 458, 118 NW 106. Courts will not interfere with boards in lawful exercise of jurisdiction conferred by law, on sole ground that judgment is not wise or is unsound. Werts v. Feagle [S. C.] 65 SE 226.

68. Dyer v. Martin [Ga.] 64 SE 475; Roberts v. Thompson, 82 Neb. 458, 118 NW 106.

69. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966.

70. Mandamus is proper remedy. State v. Bollinger, 219 Mo. 204, 117 SW 1132. Duty

hibition,[71] but mandamus will not lie to regulate official discretion or judgment which has been exercised, though such judgment is excessive or erroneous.[72] Unauthorized acts may be restrained,[73] but an equitable injunction will not issue where there is an adequate remedy at law,[74] and injunction will not lie to restrain anticipated action of a board unless expressly authorized by statute.[75] The unauthorized act of a board in entering into a contract is not the exercise of a judicial function, reviewable by certiorari.[76] Prohibition will not lie to prevent acts of a county court which are within jurisdiction.[77]

Powers and duties of other county officers. See 11 C. L. 916—The powers and duties of county officers, such as a treasurer, are entirely dependent upon statute.[78] When an ordinary contracting in behalf of the county for the erection of a courthouse had no authority to accept a bank as creditor in lieu of the contractor,[79] such a bank could not maintain mandamus to cause an entry of acceptance upon the ordinary's minutes.[80] County officers usually have no authority in selecting rooms for their use.[81] An officer, who is a financial agent of a county, has the duty of looking to the interest of the county in all matters pertaining to its property and internal affairs.[82]

(§ 3) *C. Suits and demands.*[83]—See 11 C. L. 917—As a political subdivision of the state, a county cannot be sued unless authority is found in the statutes,[84] but usually counties have the right to sue and be sued.[85] Such power may be incidental

clearly imposed to supply county surveyor with transit. State v. Major, 50 Wash. 355, 97 P 249.

71. Performance of duty as to apportionment of funds (Rev. St. 1899, § 9283; Ann. St. 1906, p. 4264) cannot be secured by prohibition. State v. Bollinger, 219 Mo. 204, 117 SW 1132.

72. State v. Boerlin, 30 Nev. 473, 98 P 402. Mandamus will not lie to compel meeting of commissioners and abatement of special tax for courthouse bond fund (created by Sp. Act Feb. 28, 1907; St. 1907, p. 57, c. 30), where meeting has been held and petition denied. Id. Whether tax is totally void or excessive. Id.

73. Under Civ. Code 1901, par. 955, an action by injunction may be brought whenever a board of supervisors order money paid out of the county treasury without authority. Santa Cruz County v. Burgoon [Ariz.] 100 P 792. **Complaint insufficient** when failing to allege order for such payment. Id.

74. Where Civ. Code 1901, par. 955, authorizes injunction when supervisors order money paid out of treasury without authority, an equitable injunction will not issue. Santa Cruz County v. Burgoon [Ariz.] 100 P 792.

75. Santa Cruz County v. Burgoon [Ariz.] 100 P 792.

76. Since certiorari will only lie to review proceedings of an inferior tribunal exercising "judicial functions" (Comp. Laws, § 3531), that remedy is unavailable to review an act of a board of supervisors in entering into a contract which is alleged to be in excess of powers conferred. State v. White Pine County [Nev.] 101 P 104.

77. Where county court may construct improvements in courthouse (under Rev. St. 1899, § 6736; Ann. St. 1906, p. 3322), prohibition will not lie to prevent such action. State v. Bollinger, 219 Mo. 204, 117 SW 1132.

78. County treasurer has exclusive power under statute to negotiate sale of refunding bonds. St. Okl. 1893, § 395. Theis v. Beaver County Com'rs [Okl.] 97 P 973. County treasurer held unauthorized to invest money deposited with him by court to credit of infants and lunatics, in bonds and mortgages, except upon order of court of competent jurisdiction. Erie County v. Diehl, 129 App. Div. 735, 114 NYS 80.

79. Ordinary contracting for erection of courthouse on behalf of county had no authority to accept written orders given by contractor to bank in consideration of loan made and authorizing delivery of warrants to bank. Jones v. Bank of Cumming, 131 Ga. 614, 63 SE 36.

80. Jones v. Bank of Cumming, 131 Ga. 614, 63 SE 36.

81. See ante, § 1, subd. County Buildings.

82. Bell County v. Felts [Tex. Civ. App.] 120 SW 1065. County judge as member of the commissioners' court is one of financial agents of county. Id.

83. **Search Note:** See Counties, Cent. Dig. §§ 309-367; Dec. Dig. §§ 197-228; 11 Cyc. 586-614; 7 A. & E. Enc. L. (2ed.) 957, 5 A. & E. Enc. P. & P. 294.

84. Marion County v. Rives [Ky.] 118 SW 309. No liability at common law. Fleming v. Floyd County, 131 Ga. 545, 62 SE 814. County is not liable to suit for any cause of action unless made so by statute. Id. Demurrer properly sustained to suit on account held by transferee, where no statute by which county might be sued on claim. Id.

85. Counties have right to sue and be sued. Sierra County v. Nevada County [Cal.] 99 P 371. Under Const. art. 11, § 1, par. 1; Civ. Code 1895, § 5924, county may sue and be sued. De Kalb County v. Atlanta [Ga.] 65 SE 72. Under Rev. St. c. 24, county may by name sue and be sued in law or equity. People v. Wells, 140 Ill. App. 235.

as where a county is authorized to contract.[86] The right to sue is usually much larger than the right to be sued.[87] The county may ratify a suit brought in its own name, even if originally unauthorized.[88] The statutes sometimes require actions against counties to be brought in courts of general jurisdiction.[89] An objection that a suit should have been brought in the name of the county rather than the board of supervisors is purely technical, since the title may be amended.[90] The plea of limitations cannot be successfully invoked against a county seeking to enforce taxes.[91] Counties are sometimes relieved from the necessity of giving an appeal bond,[92] and usually the county board has authority to dismiss an appeal.[93] A county board authorized to transact the county's business is vested with discretionary authority to compromise a judgment.[94] The right of citizens or taxpayers to sue[95] is sometimes constitutional.[96] Such intervention is wholly unnecessary where the county is efficiently protecting their rights,[97] and it is held that such suits are not maintainable where the act complained of affects only the interests of the public in general and not of private persons in particular.[98] The expenses of a taxpayer's action are not to be paid by a county unless such liability is expressly imposed by statute.[99]

(§ 3) *D. Contracts, debts and expenditures.*[1]—See 11 C. L. 918—Contracts by public governmental bodies are fully treated in a separate article.[2] Whether a

86. County with authority to contract has incidental power to sue or be sued concerning it. Marion County v. Rives [Ky.] 118 SW 309.

87. This follows from fact that such power is invested as needful in respect to control of bridges, highways, public buildings, etc. Marion County v. Rives [Ky.] 118 SW 309.

88. County held to have ratified suit brought in its name. Harrigan v. County of Peoria, 128 Ill. App. 651. Suit prosecuted with its knowledge. Id.

89. In Rev. St. c. 34, § 31, providing that all actions local or transitory may be commenced and prosecuted to final judgment in circuit court or any court of general jurisdiction in county against which action is brought, word "may" means "must." Wetzel v. County of Hancock, 143 Ill. App. 178. Justice of peace has no jurisdiction of subject-matter in suit in which county is defendant. Id. Jurisdiction could not be given by consent or appearance. Id.

90. On mandamus to compel county treasurer to deposit public moneys with designated depositary. Gratiot County Sup'rs v. Munson [Mich.] 16 Det. Leg. N. 435, 122 NW 117.

91. Plea not available against party subrogated to county's rights. Childs v. Smith, 51 Wash. 457, 99 P 304.

92. Under Rev. St. c. 110, § 72, county upon appeal is relieved from necessity of giving bond. Wetzel v. County of Hancock, 143 Ill. App. 178.

93. Under Ball. Ann. Codes & St. § 342, subd. 6 (Pierce's Code, § 4098), authorizing board of county commissioners to prosecute and defend all suits for or against county, such board may direct dismissal of appeal in an action against it. Prentice v. Franklin County [Wash.] 103 P 831. County board bringing suit alone has power to discontinue such action if public interests so require. People v. Wells, 140 Ill. App. 235. Board of supervisors having ordered suit dismissed by formal resolution, writ of error would be dismissed. Id. State's attorney could not without authority from board begin and carry forward proceeding instituted by direction and for use of county. Id.

94. Taylor v. Kelleher, 43 Colo. 424, 97 P 253.

95. Suits in connection with the creation of counties, boundaries, buildings, removal of county seats, county funds, etc., are elsewhere treated herein, see ante, § 1.

96. Under Const. art. 16, § 13, any citizen of county, city or town, may institute suit in behalf of himself and others interested to protect inhabitants from illegal exactions. Huddleston v. Coffman [Ark.] 118 SW 1010.

97. Intervention is wholly unnecessary where county through its legally constituted authorities is vigorously and ably doing everything that could be done to protect their rights. Buffalo County v. Kearney County, 83 Neb. 550, 120 NW 171.

98. A private person cannot, by virtue of being a citizen and taxpayer, maintain an action against public officers where act complained of affects only interests of public in general, and not those of private person in particular. Thompson v. Haskell [Okl.] 102 P 700.

99. Taxpayer undertaking to prevent illegal expenditure of money, or to recover money illegally expended, cannot, without express authority in the statute, expect his expenses to be paid by the county. Marion County v. Rives [Ky.] 118 SW 309. Attorney cannot have lien on money recovered for county, but taxpayer must pay it. Id.

1. Search Note: See notes in 7 C. L. 991; 6 L. R. A. (N. S.) 791; 15 Id. 567; 3 Ann. Cas. 157; 4 Id. 140.

See, also, Counties, Cent. Dig. §§ 174-203, 214-240, 260-308; Dec. Dig. §§ 111-140, 149-162, 171-196; 5 Cyc. 1066-1069; 11 Cyc. 467-496, 502-530, 549-584; 7 A. & E. Enc. L. (2ed.) 942.

2. See Public Contracts.

county is the responsible contracting party in the case of a local improvement may involve the statutes relative thereto.[3]

Bonds.[See 11 C. L. 920]—The general power of a county as a municipal corporation to issue bonds and the purposes for which they may be issued together with the preliminaries to issuance is treated in another topic.[4-13]

Debts and expenditures.[See 11 C. L. 918]—The power to borrow money must be granted by statute,[14] and notes issued without authority are void,[15] even though a custom of borrowing has existed.[16] The necessary money for the county expenses must usually be raised by taxation,[17] but the power to levy taxes is a limited one,[18] and a county board may not usually contract with reference to subsequent levies.[19] Expenses which are a general county charge must be paid from the county fund [20] and a county may not levy a special tax therefor.[21] A county's loss of money collected would not affect its liability for debts.[22] A requirement that the branches of the county government must prepare an estimate of expenses to be incurred during the fiscal year,[23] will permit of an estimate of probable expenses,[24] and sometimes past indebtedness must be included in such estimates.[25] A provision that contracts by county boards shall create no liability against the county, unless there is an existing appropriation to pay for same,[26] should receive a reasonable and practi-

3. Missouri Drainage Act, Rev. St. 1899, § 8283 (Laws 1905, p. 182; Ann. St. 1906, p. 3918), construed, and county held to be responsible contracting party for drain. Wills v. Bates County, 170 F 812. No intention to create quasi corporation of drainage district, and act otherwise contemplated action by county. Id. Engineer of drainage district in contracting for drain held to be agent of county, and, considering contract, statute authorizing same, and allegation of transaction, it sufficiently appeared that county contracted for work. Id.

4-13. See Municipal Bonds.

14. County has no power to borrow money by notes under resolution of board of supervisors unless power is granted by statute. McCurdy v. Shiawassee County, 154 Mich. 550, 15 Det. Leg. N. 873, 118 NW 625. Where power not granted, none will be implied. Id.

15. Where notes were issued by supervisors without authority, in disregard of Comp. Laws 1897, § 2484, whereby necessary money must be raised by taxation, they were void. McCurdy v. Shiawassee County, 154 Mich. 550, 15 Det. Leg. N. 873, 118 NW 625. **Denial of execution under oath is unnecessary,** where notes issued by supervisors are void. Id.

16. Custom of borrowing money by county held not to raise obligation to pay entitling lender to equitable relief, where no proof that money borrowed was used by county. McCurdy v. Shiawassee County, 154 Mich. 550, 15 Det. Leg. N. 873, 118 NW 625. Lender of money to county held not entitled to equitable relief. Id.

17. Under Comp. Laws 1897, § 2484, board of supervisors has no power to borrow money necessary to defray expenses and charges of county, but same must be raised by taxation. McCurdy v. Shiawassee County, 154 Mich. 550, 15 Det. Leg. N. 873, 118 NW 625.

18. Const. art. 10, § 11, in imposing limitation on amount of tax assessments, uses words "for county purposes" which include all subdivisions of the county for the use of which taxes may be imposed. State v. Piper, 214 Mo. 439, 114 SW 1.

19. Prohibited by Cobbey's St. 1907, § 4452. Roberts v. Thompson, 82 Neb. 458, 118 NW 106. County board is not authorized to create an obligation which would bind county to levy taxes in future years. Id.

20. Cincinnati, etc., R. Co. v. Hamilton County [Tenn.] 113 SW 361.

21. County has no authority to levy special tax for payment of expenses of circuit court. Cincinnati, etc., R. Co. v. Hamilton County [Tenn.] 113 SW 361.

22. It would remain bound until payment or otherwise legally discharged. Lawrence County v. Lawrence Fiscal Ct. [Ky.] 113 SW 824.

23. Cobbey's St. 1907, § 4443, requires county boards to prepare estimate of necessary expenses. Roberts v. Thompson, 82 Neb. 458, 118 NW 106. "Ordinary county expenses" are those to be incurred for current fiscal year (words in Civ. Code 1902, § 799). State v. Goodwin, 81 S. C. 419, 62 SE 1100.

24. Under Cobbey's St. 1907, § 4443, requiring county boards to prepare estimate of necessary expenses, county board may provide for probable expenses, exact amounts of which are unknown. Roberts v. Thompson, 82 Neb. 458, 118 NW 106.

25. Civ. Code 1902, § 799, as to preparation of estimate by board of commissioners, clearly includes past indebtedness. State v. Goodwin, 81 S. C. 419, 62 SE 1100. "Expenses already incurred" by board embraces claims legally approved by board up to date of estimate. Id.

26. Under County Reform Law, § 27 (Acts 1899, p. 352, c. 154; Burns' Ann. St. 1908, § 5944), appointment of attorney and rendition of services by county council creates no liability against county unless there is an existing appropriation to pay for same. Clay County Com'rs v. McGregor [Ind.] 87 NE 1. Contracts in excess of appropriation are void. Id. Contracts with board of commissioners under Burns' Ann. St. 1908, § 6016,

cal construction,[27] and an estimate or approximation of the money needed is usually sufficient.[28] The power of a county board of revenue to make an appropriation out of general funds to aid in the construction of a public building, such as a high school, is dependent upon statute.[29] Contracts for public buildings,[30] or legislative enactments, providing for such improvements,[31] must not violate constitutional provisions as to the amount of indebtedness which a county may incur.[32] Such provisions may be for the prevention of indebtedness to an amount exceeding the yearly income and revenue,[33] or may prohibit indebtedness in excess of a certain amount, except in the case of an emergency,[34] and the existence of a prior legislative enactment as to a duty to repair public buildings will not permit the disregard of such constitutional restrictions.[35] An excessive tax levy may be prevented by a

should be in conformity with County Reform Act (Laws 1899, p. 343, c. 154). State v. Goldthait [Ind.] 87 NE 133. Acts are not inconsistent. Id. Acts 1905, p. 15, c. 15 (Burns' Ann. St. 1908, § 10271), as to deductions of expenses of collecting taxes, was not intended to affect County Reform Act (Laws 1899, p. 343, c. 154), so as to render no appropriation necessary in contract for collection of taxes. Id. Estimate is required in case of percentage contract. Id. While judgments may be rendered against county on valid claims in advance of any appropriation to pay for same, cause of action must not be founded upon any contract or order of court made since County Reform Law, § 27 (Acts 1899, p. 352, c. 154; Burns' Ann. St. 1908, § 5944), became effective. Clay County Com'rs v. McGregor [Ind.] 87 NE 1. Under County Reform Law, § 27 (Acts 1899, p. 352, c. 154; Burns' Ann. St. 1908, § 5944), **complaint** for services by an attorney must show an unexpended appropriation to pay for such services at time of appointment to create valid obligation against county. Id. Recovery cannot exceed amount then on hand. Id.

27. County Reform Act (Laws 1899, p. 343, c. 154), Burns' Ann. St. § 5933. State v. Goldthait [Ind.] 87 NE 133.

28. County Reform Act (Laws 1899, p. 343, c. 154), Burns' Ann. St. § 5933, only requires an estimate or approximation of amount of money required by branches of county government. State v. Goldthait [Ind.] 87 NE 133.

29. Various statutes considered and no power held to exist by express grant or necessary implication whereby board of revenue could make an appropriation out of general funds to aid in construction of certain high school building. Kumpe v. Bynum [Ala.] 48 S 55.

30. Contract for erection of courthouse entered into pursuant to authority conferred by Code 1907, §§ 133-139, held to create debt within Const. § 224, and was void as exceeding limitation therein. Hagen v. Limestone County Com'rs Ct. [Ala.] 49 S 417. Contract clearly created obligation on part of county to make levy in future for benefit of company erecting courthouse. Id. Contract by county for courthouse repairs held void as violating Const. art. 11, § 5, requiring provision to meet interest and sinking fund of debt created. Ault v. Hill County [Tex.] 116 SW 359.

31. Sess. Laws Okl. 1897, p. 256, c. 32, art. 8, § 2 (Gen. St. Ann. 1908, § 2958), providing that counties may construct courthouses or jails to be paid for by annual rental which shall be proper charge against court fund, and an additional levy be made for that purpose, is repugnant to Const. art. 10, § 26 (Bunn's Ed. § 292; Snyder's Ed. p. 316; Gen. St. Okl. 1908, p. 124), requiring assent of three-fifths of voters of county to incurring of indebtedness. Campbell v. State [Okl.] 99 P 778.

32. Under Const. art. 13, § 5, county may not incur any indebtedness for any single purpose in excess of $10,000. Jenkins v. Newman [Mont.] 101 P 625. Obvious intent of Const. § 224, is to restrain counties from obtaining money by creation of debt which would either directly or indirectly involve increased taxation. Hagan v. Limestone County Com'rs Ct. [Ala.] 49 S 417.

33. Const. § 157, provides that no county shall become indebted in any manner, in any year, to an amount exceeding in any year the income and revenue provided, unless two-thirds of voters consent thereto. Lawrence County v. Lawrence Fiscal Ct. [Ky.] 113 SW 824; Franklin County Fiscal Ct. v. Com. [Ky.] 117 SW 301. If liabilities incurred in year did not exceed income and revenues provided by law, plus available funds on hand, nothing subsequently occurring could render liability void as contravening Const. § 157. Lawrence County v. Lawrence Fiscal Ct. [Ky.] 113 SW 824. Income and revenues of year include resources which are reasonably solvent, and in ordinary events may be fairly relied on as equivalent of cash. Id. Where county lost taxes levied, but subsequently recovered same, such sum should be applied to indebtedness unpaid for that year. Id. Const. § 180, requiring resolution levying tax to specify purpose for which it is levied, **does not confine revenues of year** to payment of liabilities incurred during that year. Id.

34. Const. §§ 157, 158, limit tax rate and indebtedness of counties, prohibiting indebtedness in excess of certain amount except in case of emergency. Franklin County Fiscal Ct. v. Com. [Ky.] 117 SW 301. **No emergency:** Where courthouse had been used for many years, and while community had outgrown it, there was no such necessity for new courthouse as to bring case within proviso of emergency, where public health and safety required it. Id. Fiscal court held to be without authority to create indebtedness or make levy sufficient to build courthouse. Id.

35. Act of Virginia legislature passed in

legislative restriction.[36] In determining whether a debt is created in excess of the constitutional limitation, the aggregate amount of the contract is to be considered,[37] including sums expended for the services of additional inspectors.[38]

When a portion of the territory of one county is annexed to another, the transferred territory is usually relieved from indebtedness of the parent county,[39] unless the previously contracted debts are a lien upon the detached property,[40] or express provision to the contrary is made.[41] The act detaching the territory and joining it to another county need not provide for the apportionment of debts, but same may be provided for later,[42] and, when the act of apportionment is passed, the cause of action for the debt arises.[43]

(§ 3) *E. Torts.*[43a] See 11 C. L. 920—Counties acting as public agencies in the performance of governmental functions are not liable for the torts of their officers,[43b] unless liability is imposed by statute.[43c] A county may not escape liability for a duty that is imposed by law by letting work out to an independent contractor,[43d] but, in the absence of such a duty, the usual rules as to independent contractors apply.[43e] A county appropriating a portion of a tax belonging to a city or village, by trans-

1751, requiring fiscal court to maintain and keep in repair good courthouse, would not permit disregard of Const. §§ 157, 158. Franklin County Fiscal Ct. v. Com. [Ky.] 117 SW 301.

36. Restriction of Act of 1908 (Acts 1908, p. 56, c. 72) is mandatory and prevents levy of tax in excess of eighteen mills in any one year. Wells v. McNeill [Miss.] 48 S 184. Restriction applies to special taxes such as courthouse tax authorized by Code 1906, § 324. Id.

37. Hagan v. Limestone County Com'rs Ct. [Ala.] 49 S 417. Under Rev. Codes, § 1416, bridges includes approaches thereto, and contract for bridge alone which is within $2 of limit of indebtedness **will exceed** that limit and require an additional expenditure for completion. Jenkins v. Newman [Mont.] 101 P 625.

38. Under Const. art. 13, § 5, prohibiting county from incurring any indebtedness for any single purpose in excess of $10,000, sums expended for employment of inspectors, other than county officers, in carrying out contract, must be regarded as part of cost. Jenkins v. Newman [Mont.] 101 P 625. Under Const. art. 13, § 5, prohibiting indebtedness for any single county purpose in excess of $10,000, necessary services of officers in connection with such work is **not to be considered** in arriving at cost. Id.

39, 40. Houston County v. Henry County [Ala.] 47 S 710.

41. Houston County v. Henry County [Ala.] 47 S 710. Code 1907, § 124 (Code 1896, § 1398), provides that, on formation of **new county,** inhabitants cut off from any county are liable for pro rata amount of existing debt of county from which they have been severed. Id. Code 1896, § 1399, makes provision for ascertainment and collection of said indebtedness. Id. Code 1896, § 1399, renders new county liable for said indebtedness and subject to suit for same, upon failure to comply with statute as to ascertainment. Id. "Existing debts" as referred to in Code 1907, § 124, means anything owing by old county, regardless of assets or ability to pay same. Id.; Houston County v. Henry County [Ala.] 50 S 311.

42. Cullman County v. Blount County [Ala.] 49 S 315. Act Feb. 27, 1907 (Loc. Acts 1907, p. 290), merely recognizes moral obligation existing and **does not impair vested rights.** Id. Not within constitutional inhibition against retroactive laws. Id.

43. Act Feb. 27, 1907 (Loc. Acts 1907, p. 290), apportioning debts of county which was passed subsequent to detachment of territory, gave right of action for debt. Cullman County v. Blount County [Ala.] 49 S 315. Plea of statute of **limitations** held unavailable. Id.

43a. Search Note: See notes in 39 L. R. A. 33; 2 L. R. A. (N. S.) 95.

See, also, Counties, Cent. Dig. §§ 209-213; Dec. Dig. §§ 141-148; 11 Cyc. 497-500; 7 A. & E. Enc. L. (2ed.) 947.

43b. Hubbard v. Crawford County, 221 Pa. 438, 70 A 805; Shawnee County Com'rs v. Jacobs [Kan.] 99 P 817. Generally, county is not liable for torts committed by or under order of supervisors or other officers. Wenck v. Carroll County [Iowa] 118 NW 900. County engaged in building bridge is not liable for tort. Shawnee County Com'rs v. Jacobs [Kan.] 99 P 817. County is not liable for failure to guard and light footwalk to polling place. Hubbard v. Crawford County, 221 Pa. 438, 70 A 805. County is not liable for property destroyed by local board of health as a nuisance. Louisa County v. Yancey's Trustee [Va.] 63 SE 452. County is not liable for unlawful act of extending drain beyond boundaries of drainage district to injury of land outside. Wenck v. Carroll County [Iowa] 118 NW 900. **Remedy** of persons injured is against person guilty of unlawful intrusion. Id.

43c. Shawnee County Com'rs v. Jacobs [Kan.] 99 P 817; Louisa County v. Yancey's Trustee [Va.] 63 SE 452.

43d. Herbert v. Rockland County, 64 Misc. 352, 118 NYS 358.

43e. County is not liable for acts of independent contractors in closing road while making repairs where **no duty** to keep highway open while reasonable repairs are undertaken. Herbert v. Rockland County, 64 Misc. 352, 118 NYS 358.

ferring same to its general fund, is liable therefor and may be proceeded against directly.[43f] A county rendered liable and compelled to pay damages for its negligence [43g] has a remedy over against the primary wrongdoer who was principally in fault,[43h] even though the county failed to notify the principal delinquent.[43i]

(§ 3) *F. Property and funds.*[44]—See 11 C. L. 920—Particular kinds of properties are treated elsewhere.[45] County property is often acquired by dedication.[46] A county which devotes public lands to a county seat can not subsequently sell such lands to a purchaser with notice, as public lands,[47] and, if such a person takes a deed from the county of such lands with notice of the use of portion thereof, he acquires only a seisin to the use of the county in such lands, at most.[48] Power to sell county property which becomes unserviceable is sometimes conferred,[49] and surplus land which is not used for, or dedicated to, a public purpose may be lost by adverse possession.[50] The manner provided by statute for disposing of county property should be followed.[51] When a county retains a superior equitable title to land sold in disregard of the statute,[52] a county board cannot waive or relinquish same, and thus convey,[53] nor can title be acquired by adverse possession.[54] Generally and in the absence of express provision to contrary, detached territory loses all

43f. City of Chadron v. Dawes County, 82 Neb. 614, 118 NW 469. Fact that county treasurer and bondsmen may also be liable is immaterial. Id.

43g. Negligence in maintenance of streets. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656.

43h. Rule as to contribution between joint tort feasors will not prevent county (codelinquent) from recovering amount of damages paid to person injured by street from railroad (principal delinquent). Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656.

43i. Omission to notify does not affect right of action but simply imposes burden of again litigating matter and establishing actionable facts. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656. Judgment recovered against county commissioners not conclusive in action for indemnity but properly admissible as **evidence.** Id. Record of action proper evidence to prove that suit was brought and recovery had. Id. Evidence of agreement to repair highway entered into by county and railroad subsequent to alleged negligence held harmless. Id.

44. Search Note: See Counties, Cent. Dig. §§ 161-173, 214-240; Dec. Dig. §§ 103-110, 153-162; 11 Cyc. 457-467, 502, 509-530; Depositaries, Cent. Dig.; Dec. Dig.; 13 Cyc. 792-820; 7 A. & E. Enc. L. (2ed.) 933.

45. See such titles as Parks and Public Grounds; Bridges, etc.

46. Dedication of block in town plat designated as "public square" and certification of dedication to use of public vests legal title to square in county. Jefferson County Com'rs v. Oskaloosa [Kan.] 102 P 1095.

47. Van Pelt v. Parry, 218 Mo. 680, 118 SW 425.

48. Van Pelt v. Parry, 218 Mo. 680, 118 SW 425. Widow is **not entitled to dower** in such property. Id. Where person conveyed portion of land to county for county seat which was accepted and so used, and failed to acquire patent to such lands, they being state swamp lands, and county subsequently as owner conveyed such land to such person, who still later gave deed of confirmation to county as to portion used for county seat, such deed was in legal effect an **admission** that fee simple estate did not pass to him by county's conveyance, and that he was merely seized to use of county, if at all. Van Pelt v. Parry, 218 Mo. 680, 118 SW 425.

49. Acts 1886, p. 265, creating commissioners of roads and revenues of Hall county, confers power to sell public property which becomes unserviceable, according to Pol. Code 1895, §§ 278, 348. Dyer v. Martin [Ga.] 64 SE 475. Public property becomes "unserviceable" within Pol. Code 1895, § 278, when it cannot be beneficially or advantageously used under all circumstances. Id.

50. Title acquired by adverse possession to surplus land. Hardin County v. Nona Mills Co. [Tex. Civ. App.] 112 SW 822.

51. Bell County v. Felts [Tex. Civ. App.] 120 SW 1065. Where power to sell and dispose of land is lodged in county court and mode prescribed for exercise of power, sale otherwise made would not pass title. Hardin County v. Nona Mills Co. [Tex. Civ. App.] 112 SW 822. Statute requires county land to be sold at public auction and sale otherwise made is void. Id. Evidence held to show **proper sale** of land. Id. Sale and purchase of land would not be invalidated by failure to properly execute deed. Id. If sale is not void, purchaser acquired beneficial interest in land upon compliance with terms of sale. Id. **Attempted sale** not made in public as prescribed confers no title, wherefore, purchase at execution sale is ineffective. Bell County v. Felts [Tex. Civ. App.] 120 SW 1065.

52. Where land purchased at execution sale by county officer. Bell County v. Felts [Tex. Civ. App.] 120 SW 1065.

53. Commissioners' court could not indirectly by waiver or relinquishment extinguish equity of county in land held in trust, and thus convey. Bell County v. Felts [Tex. Civ. App.] 120 SW 1065.

54. Adverse possession could not ripen into legal title where county was owner of superior equitable title. Sayles' Ann. Civ. St. 1897, art. 3351. Bell County **v. Felts** [Tex. Civ. App.] 120 SW 1065.

claim to share in the property belonging to the parent county,[55] and, when a new county is created, the parent county owns only such property as is located within its borders.[56]

County funds are subject to legislative control [57] within constitutional limits,[58] and neither the county nor any inhabitant thereof has any vested interest in such funds.[59] Since a county which collects a road tax for a city or village holds the sum so collected as a public trust and is charged with the continuing duty to pay the same to such village or city,[60] it cannot acquire such fund by lapse of time.[61] When county buildings are destroyed by fire, the insurance money does not become a part of the general county fund, but constitutes a trust fund to replace the property.[62] Where a county is dissolved, the fund arising from delinquent taxes, redemption and sales, is in the nature of trust fund for the payment of creditors and others claiming the right to participate therein,[63] and a court of equity has jurisdiction to administer the same.[64] Creditors having a valid, enforcible judgment against the county being disorganized need not submit such claim to an auditing board provided by the act of disorganization.[65] The illegal disposition or wasting of public funds may be restrained at the instance of a taxpayer.[66]

Depositories.[See 11 C. L. 921]—The legislature may insure the safety of public funds by providing depositories therefor,[67] provided that such acts are not violative

55. Houston County v. Henry County [Ala.] 47 S 710.

56. Wilhite v. Mansfield [Okl.] 99 P 1087. Where high school was established in territorial county under Sess. Laws 1901, p. 187, c. 28, art. 1 (Wilson's Rev. & Ann. St. 1903, §§ 6219-6223), and portion of such county containing such high school was detached and formed into county called Alfalfa county, under Const. art. 17, § 8 (Bunn's Ed. § 337; Snyder's Ed. p. 342), such high school became school of Alfalfa county. Id.

57. McSurely v. McGrew [Iowa] 118 NW 415. Revenues of county may be changed, diverted to other uses, or taken away by state. Id.

58. County may be required by law to apply all or part of its funds to any legitimate public purpose, so long as it does not conflict with some constitutional provision. Yamhill County v. Foster [Or.] 99 P 286. Money collected by taxes is not property in sense of property of private person, but is **public property** subject to legislative control within constitutional limits. Id. State has **no power to divert funds** received by taxation for benefits of citizens of another county. Id.

Held unconstitutional: Municipal Corporations Act (Gen. Laws 1907, p. 847), entitled to provide for the organization, government, and regulation of towns, etc., provides in § 120 for the diversion of county funds, such section relating to duties of boards of revenue of counties, wherefore act is violative of Const. 1901, § 45, as to title. State v. Miller [Ala.] 48 S 496.

59. McSurely v. McGrew [Iowa] 118 NW 415. No citizen has any vested interest in the revenues of county. Id. No one can complain that his rights are affected or that contract rights are destroyed. Id.

60. Cities of second-class and villages are road districts within Comp. St. 1899, c. 78, § 76, and entitled to one-half of road tax levied within their limits. City of Chadron v. Dawes County, 82 Neb. 614, 118 NW 469.

61. Where county holds tax collected in trust for city or village, possession of one is possession of other. City of Chadron v. Dawes County, 82 Neb. 614, 118 NW 469. Limitations held not to bar action. Id.

62. Where county courthouse and jail is destroyed by fire, insurance money constitutes trust fund to replace property. Adams v. Helms [Miss.] 48 S 290. Does not become part of general county fund. Id. No order of board is required to render insurance money a trust fund. Id.

63. Curtis v. Charlevoix County Sup'rs, 154 Mich. 646, 15 Det. Leg. N. 941, 118 NW 618. Disorganization Act (Acts 1905, p. 132, No. 362), providing that certain counties receive assets of county dissolved, charged with trust in favor of creditors, is simply declaratory of common law. Id.

64. Curtis v. Charlevoix County Sup'rs, 154 Mich. 646, 15 Det. Leg. N. 941, 118 NW 618. Judgment creditor need not resort to mandamus to compel payment but could bring suit in equity. Id.

65. Curtis v. Charlevoix County Sup'rs, 154 Mich. 646, 15 Det. Leg. N. 941, 118 NW 618. Purpose accomplished by direct notice to interested parties. Id.

66. Illegal disposition of public money, or creation of debt which must be paid by taxation, may be restrained at instance of taxpayer. Roberts v. Thompson, 82 Neb. 458, 118 NW 106. Illegal acts of county officers resulting in the wasting of public funds may be restrained. Id. Misappropriation of county funds by county officers may be enjoined. Kumpe v. Bynum [Ala.] 48 S 55. Citizen of county owning land in drainage district might appeal from order allowing fees to attorneys of district. Huddleston v. Coffman [Ark.] 118 SW 1010. Constitutional right. Id. Removal of county seat **does not involve waste** of public funds. Smith v. Roberts, 60 Misc. 427, 113 NYS 672.

67. Under Comp. Laws, § 1197, et seq., segregation of public funds is provided for, and it is clearly within legislative power to insure safety of such funds. Gratiot County Sup'rs v. Munson [Mich.] 16 Det. Leg. N. 435,

of constitutional restrictions.[68] When a county has full security for its deposit, a treasurer cannot raise technical irregularities as to bond of the bank and thus evade the deposit of funds.[69] The county treasurer is often required to select the depositaries,[70] and such action cannot be controlled by the supervisors,[71] though the statutes may also permit designation by supervisors.[72] Liability of sureties upon the statutory bond of a county depositary cannot be enlarged or changed,[73] and, if the bond as executed does not express the intent of the parties, it must be reformed before it can be enforced.[74] Books of a banker receiving county funds as a depositary are admissible against sureties on the bond for the purpose of establishing a prima facie case.[75] Constitutional provisions are sometimes determinative of the jurisdiction of an action to compel a county depository to pay interest in currency rather than warrants.[76]

(§ 3) *G. Presentation, allowance, enforcement, and payment of claims.*[77]—See 11 C. L. 922—Mandatory statutes frequently require the claims presented to be itemized and verified,[78] in which case substantial compliance with the statute is the test.[79] An item claiming compensation for loss of time will refer to loss of time

122 NW 117. Fact that office of county treasurer is constitutional, that bond is required and that he is insurer of money deposited in his hands, does not deprive legislature of power to insure safety of funds by designating depositary. Id. Legislature in its control over county funds may permit same to be deposited in banks and **may absolve county officials from liability** therefor. McSurely v. McGrew [Iowa] 118 NW 415.

68. Loc. Acts 1907, p. 362, No. 461, as to county depositaries, is not invalid in that act is broader than its title, since § 5, making it the "duty of all other officers" of county to deposit funds, will be construed to include deputies of treasurer and persons appointed under Comp. Laws, § 2537, who perform duties of, but are not designated as, treasurers. Gratiot County Sup'rs v. Munson [Mich.] 16 Det. Leg. N. 435, 122 NW 117. Loc. Acts 1907, p. 362, No. 461, as to designation of county depositary and requiring deposit of county funds therein, could not operate to impair rights of county treasurer when in force before such officer became an incumbent. Id.

69. Gratiot County Sup'rs v. Munson [Mich.] 16 Det. Leg. N. 435, 122 NW 117.

70. Under County Law, § 143 (Laws 1892, p. 1776, c. 686), county treasurer must select depositaries within first 20 days of his official term. People v. Reoux, 60 Misc. 139, 112 NYS 1025.

71. Under County Law, § 143 (Laws 1892, p. 1776, c. 686), supervisors cannot by resolution direct how county treasurer shall perform his duties, or limit designation of depositaries. People v. Reoux, 60 Misc. 139, 112 NYS 1025. To hold otherwise would be to render treasurer responsible for depositary he did not select. Id.

72. No attempt to withdraw or exempt county from operation of statute, requiring treasurer to select depositary, which is permissible. People v. Reoux, 60 Misc. 319, 112 NYS 1025. Authority of county supervisors to designate banks as depositaries must be by legislation in accordance with statute. Id.

73. Kuhl v. Chamberlain [Iowa] 118 NW 776. Where banker executed bond as county depositary, pursuant to Code, § 1457, but was not appointed, and treasurer deposited funds in such bank which were lost, sureties of bond were not liable as if same was common-law bond since thereby their liability would be increased. Id. Bond being clearly to insure official duty, it could not be extended to impose liability for private debt. Id.

74. Kuhl v. Chamberlain [Iowa] 118 NW 776.

75. Kuhl v. Chamberlain [Iowa] 118 NW 776. Exclusion harmless where no recovery against sureties could be had. Id.

76. Action to compel depositary to pay interest on funds deposited in currency rather than warrants is within jurisdiction of circuit court (Const. art. 7, § 11), not county court (§ 28.) Price v. Madison County Bank [Ark.] 118 SW 706.

77. Search Note: See note in 37 L. R. A. 207. See, also, Counties, Cent. Dig. §§ 309-337; Dec. Dig. §§ 197-207; 11 Cyc. 586-606.

78. Civ. Code 1902, § 806, requiring claims to be itemized and verified, is mandatory. State v. Goodwin, 81 S. C. 419, 62 SE 1100. Under Civ. Code 1902, § 1354, claims for work done on bridges must refer to contract, so that it may be identified. Id.

Itemizing: To "itemize an account" means to state in detail the particulars of it, so that the account may be examined and its correctness tested. State v. Goodwin, 81 S. C. 419, 62 SE 1100. Dates of different items are essential particulars. Id. Considering Civ. Code 1902, § 806, requiring itemizing of claims with § 808 as to time of presentation, no claim can be said to be "made out in items" which does not indicate year in which it arose. Id. Claim for lumber held sufficient though failing to set forth date, where bills of lading showed date of shipment. Id.

79. In determining whether claims are itemized and verified as required by law (Civ. Code 1902, § 806), substantial compliance with the statute is the test since commissioners are usually not learned in law. State v. Goodwin, 81 S. C. 419, 62 SE 1100. **Verification** held to be in substantial compliance with statute, though more explicit following of words of statute would have been better. Id.

when the claim is presented.[80] The fact that an officer, charged with the duty of paying claims, acquired same, would not cause their payment,[81] and such claims would be assignable.[82] Though a claim is not negotiable, its assignment will be binding in equity in the absence of any defense.[83] Current claims allowed are not affected as to their constitutional validity by the fact that an unexpected contingency arises whereby the county will not be able to pay in full.[84] The presentation of false claims with intent to defraud a county is sometimes rendered a felony.[85]

The legislature may create a board of audit and finance to examine the accounts of officers and authorize payment,[86] but usually the county board is required to audit and adjust all accounts to which the county is a party.[87] The powers exercised by a county board in this respect are limited to those conferred by statute.[88] The allowance of claims which are unauthorized[89] is of no effect,[90] and should be disregarded by county officials charged with the duty of auditing same,[91] though a county treasurer cannot refuse an order of a board of audit and finance merely because he has no knowledge of the transaction.[92] A county board cannot allow claims indirectly when it is not lawfully authorized to do so directly.[93] A county board in passing upon claims is usually held to act judicially[94] or quasi-judicially,[95] and the

80. In presentation of claim against county, plaintiff itemized same as "loss of time and doctor bill, $50, and for personal injuries, $5,000." Held that instruction was proper in damage suit in that loss of time only referred to loss at time of claim, and subsequent loss would be included under personal injuries. Hubbard v. Montgomery County [Iowa] 118 NW 912.

81. Where sheriff of county having no treasurer took up claims as credits for county levy, when he had no money to pay, would not cause such claims to be paid. United States Fidelity & Guar. Co. v. Salyer [Ky.] 115 SW 767.

82. Assignment by sheriff held valid. United States Fidelity & Guar. Co. v. Salyer [Ky.] 115 SW 767.

83. Shock v. Colorado County [Tex. Civ. App.] 115 SW 61.

84. Where constitution forbade indebtedness in excess of income of current year. Lawrence County v. Lawrence Fiscal Ct. [Ky.] 113 SW 824.

85. Under Penal Code, § 72. People v. Lanterman, 9 Cal. App. 674, 100 P 720. Pen. Code, § 72, contemplates that claim presented "if genuine" must be one which board is authorized to allow. Id. "Genuine" means true, real, correct, as distinguished from false or fictitious. Id. Question as to whether board had authority to allow claim if genuine is question of law, depending upon existence of facts which should be directly averred, and established by legal evidence upon trial unless admitted. Id. **Indictment** must present such facts. Id. **Evidence insufficient** to sustain conviction. Id.

86. Though Const. art. 7, § 2, gives county commissioners general supervision and control of county finances, and control must be exercised "as may be prescribed by law," and § 14 of same article authorizes legislature to change provisions of such article, with certain exceptions, wherefore legislature had power to enact Pub. Laws 1907, p. 714, c. 488, creating board of audit and finance with power to examine accounts of officers and authorize payment. Southern Audit Co. v. McKensie, 147 N. C. 461, 61 SE 283.

87. Rev. St. 1899, § 6790 (Ann. St. 1906, p. 3236), requires court to audit and adjust all accounts to which county shall be party, etc. Blades v. Hawkins, 133 Mo. App. 328, 112 SW 979. Under Rev. St. c. 24, boards of supervisors are legally competent to audit, adjust and settle claim as to compensation of an officer. People v. Wells, 140 Ill. App. 235.

88. Wadsworth v. Livingston County Sup'rs, 115 NYS 8.

89. County board allowing **increase of compensation to public officer** acts without jurisdiction, and acts are void. People v. McCord, 143 Ill. App. 28. Supervisors are not authorized to settle claim of an officer which exceeds compensation provided by law. People v. Wells, 140 Ill. App. 235. A board cannot allow claims which grew out of an **unauthorized contract.** Theis v. Beaver County Com'rs [Okl.] 97 P 973. Void contract for services entered into by board of supervisors creates no claim against county. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. **Compromise** of claim by supervisors is illegal and void, where original claim is void. Id.

90. Allowance of claim by board when violating specific statute is of no consequence, and should be disregarded. State v. Goldthait [Ind.] 87 NE 133. County board allowing claim not authorized by law acts without jurisdiction, and acts are void. People v. McCord, 143 Ill. App. 28.

91. It is duty of auditor to disregard claim allowed in violation of specific statute. State v. Goldthait [Ind.] 87 NE 133.

92. Act of board in issuing order prima facie correct in absence of showing that it acted beyond power of that order was obtained fraudulently. Southern Audit Co. v. McKenzie, 147 N. C. 461, 61 SE 283.

93. Shift or devise will not be permitted to accomplish an unlawful end. People v. McCord, 143 Ill. App. 28.

94. Powers exercised by supervisors in auditing are judicial. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. Action of county board of commissioners in approving or disallowing claim presented in proper

allowance of a claim is an adjudication in favor of the claimant that such claim is not in excess of the tax levied or amount appropriated for the purpose under which the claim falls.[96] The action taken is usually final and binding, unless there be an appeal,[97] and is conclusive against collateral attack,[98] being unaffected by the conclusions of an investigating committee that the claim upon which it rests is invalid for fraud or other reasons.[99] Such a decision may be set aside for fraud in a direct proceeding instituted for that purpose,[1] and in some states an illegal audit may be attacked both directly or collaterally.[2] As an inferior tribunal, the facts necessary to give the county board jurisdiction must appear on the record, or its judgment will be treated as a nullity.[3] The acts of the boards in allowing or rejecting claims are more or less informal and should be liberally construed.[4] The law sometimes requires the claims to be registered and paid by the county treasurer in the order in which they are registered.[5]

Claims erroneously allowed may be recovered by the county,[6] and the doctrine of voluntary payment will not prevent such recovery.[7] Payment may also be restrained by a taxpayer.[8] Usually presentation of the claim is a prerequisite to action thereon,[9] but, when not required,[10] an owner may sue thereon,[11] and an original

form is an adjudication. State v. Goodwin, 81 S. C. 419, 62 SE 1100.

Contra: Allowance of claim by board of county commissioners is not judicial determination. Heritage v. State [Ind. App.] 88 NE 114. Board of county commissioners in hearing claims acts in administrative capacity. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966. Audit and allowance of claims against county is exercise of administrative or executive, not of judicial, power. State v. Goldsmith [Ala.] 50 S 394. Code 1907, c. 45, art. 16, § 2340, providing that person who has paid money not due for taxes by mistake may file petition in court of county commissioners asking for warrant, etc., refers to clerical mistake and was not intended to clothe commissioners or board of revenue with judicial function of passing upon validity of tax law. Id.

95. Under Rev. Laws 1905, § 620, board in passing upon claim acts quasi judicially. State v. Peter, 107 Minn. 460, 120 NW 896.

96. State v. Goodwin, 81 S. C. 419, 62 SE 1100. Upon presentation of claim, question of fact arises as to whether it rests upon contract in excess of tax levy or amount appropriated for purpose under which claim falls. Id.

97. Under Rev. Laws 1905, § 620, when board of county commissioners in passing upon claims has once acted without fraud or mistake in premises, upon claim, its action is final and binding, unless there be an appeal. State v. Peter, 107 Minn. 460, 120 NW 896. Power to act exhausted by action. Id.

98. Decision of board as to claims if unappealed from as provided by statute is conclusive against collateral attack. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966.

99. State v. Goodwin, 81 S. C. 419, 62 SE 1100. Finding of investigating committee appointed under statute (24 Stat. p. 1109), as to merits of claims, has no effect. Id. Act of 1905 (24 Stat. p. 1109) confers no authority upon commission appointed pursuant thereto, except to investigate. Could not pass on merits of claims. Id.

1. State v. Goodwin, 81 S. C. 419, 62 SE 1100.

2. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. Order of settlement by commissioners, allowing unauthorized claims, is open to explanation and can be inquired into by county, without first setting aside order. Bell County v. Felts [Tex. Civ. App.] 120 SW 1065.

3. State v. Goodwin, 81 S. C. 419, 62 SE 1100.

4. Record held to show rejection of claim. Maynard v. Jefferson County [Wash.] 103 P 418. Claim acted upon by commissioners and recorded in minutes should not be subjected to technical rules of construction, and, where record clearly indicates action on claim, it will suffice, though language lacks technical exactness of court procedure. Id. Record erroneously referring to claim of wife, rather than husband of wife. Id.

5. Sayles' Ann. Civ. St. 1897, arts. 851-856. Shock v. Colorado County [Tex. Civ. App.] 115 SW 61.

6. Unauthorized increase of public officers' salary. People v. McCord, 143 Ill. App. 28.

7. Doctrine that payment voluntarily made cannot be recovered has no application to suit by county for sums paid on claims unlawfully authorized. People v. McCord, 143 Ill. App. 28.

8. Action by taxpayer to restrain levying assessment and collection of claim allowed by supervisors is statutory action, brought to prevent illegal acts of officers or waste of its funds. Wadsworth v. Livingston County Sup'rs, 115 NYS 8.

9. Claim against county, payment of which was alleged to have been assumed by defendant county, must be presented for payment, pursuant to Mills' Ann. St. § 801, before action thereon is maintainable. City & County of Denver v. Bottom, 44 Colo. 303, 98 P 13. **Pleadings fatally defective** where no averment of proper presentation of claim as required by statute. Id.

10. In action by sheriff for reimbursement for expenses such as janitor service, it was not essential that claim be allowed by cir-

action to recover a judgment against a county on claims allowed by the county board, but not paid, may be maintained.[12] The allowance of a portion of a claim would not preclude original action for the balance.[13] Action is sometimes barred by limitations.[14] Payment may be compelled by mandamus,[15] but that remedy is unavailable to compel an act which is unauthorized by statute,[16] and mandamus will not lie to compel a county official to pay when a prerequisite such as the issuance of a warrant is not shown.[17] An allowance of mandamus to compel a county board to include claims and items as adjudicated debts and expenses in its annual estimate does not affect the county's right to assail the board's judgment directly for fraud,[18] nor would it affect a petitioner's right to resubmit claims in a proper form.[19]

(§ 3) *H. Warrants; issuance and enforcement.*[20]—See 11 C. L. 924.—A statute authorizing proceedings for cancellation and reissue of warrants must be strictly complied with,[21] and all facts necessary to give court jurisdiction must affirmatively appear in the record of proceedings.[22] Warrants issued for claims growing out of contracts which are not authorized create no liability against the county.[23] Payment of warrants may be compelled by mandamus.[24]

(§ 3) *I. Appeals from orders of county boards.*[25]—See 11 C. L. 924.—The lodging of an appeal in a court, after the disallowance of a claim, is the institution of a suit,[26] and, under a statute permitting a county to repair bridges and "recover by suit from the county in default," such suit may be instituted by an appeal from the

suit court, determination of suit being sufficient audit. Harkreader v. Vernon County, 216 Mo. 696, 116 SW 523.

11. Owner of valid claim has statutory authority to bring suit thereon in any court of competent jurisdiction where he is not required to present it to county board in first instance. Comp. St. 1907, c. 18, art. 1, § 20. Strong v. Thurston County [Neb.] 120 NW 922.

12. Strong v. Thurston County [Neb.] 120 NW 922. A county board which exhausts current funds, allows claim in full, fails to issue warrant therefor, and refuses to pay claim, cannot by that means prevent claimant from recovering his due. Id.

13. Washington County v. Murray [Colo.] 100 P 588.

14. Claim barred by failure to take action thereon within 3 months after rejection. Ball. Ann. Codes & St. § 359 (Pierce's Code, § 4113). Maynard v. Jefferson County [Wash.] 103 P 418.

15. Plaintiff held entitled to peremptory writ of mandamus to county treasurer, as to claim allowed by board of audit and finance. Southern Audit Co. v. McKensie, 147 N. C. 461, 61 SE 283.

16. Mandamus will not lie to compel county supervisors to levy tax to pay claim, which act is not within their official power. State v. Goodwin, 81 S. C. 419, 62 SE 1100. Mandamus will not lie to compel issuance and payment of check for past county indebtedness, where act is prohibited under statutory provisions (Civ. Code 1902, §§ 609, 809). Id.

17. Where statute requires warrant to be drawn (Kirby's Dig. § 7627) whereupon treasurer shall pay same (§ 7628), mandamus will not lie to compel treasurer to pay where petition does not show warrant drawn. Ferrell v. Laughinghouse, 87 Ark. 379, 112 SW 894. Where person had judgment against directors on warrant, it was used as basis of and became merged in judgment. Id.

18, 19. State v. Goodwin, 81 S. C. 419, 62 SE 1100.

20. Search Note: See note in 3 Ann. Cas. 450. See, also, Counties, Cent. Dig. §§ 241-259; Dec. Dig. §§ 164-170; 11 Cyc. 531-541, 544-549; 7 A. & E. Enc. L. (2ed.) 957.

21. Chicago, etc., R. Co. v. Perry County, 87 Ark. 406, 112 SW 977.

22. Chicago, etc., R. Co. v. Perry County, 87 Ark. 406, 112 SW 977. No presumption as to existence of facts can be indulged in aid of record, nor, on other hand, to defeat validity of proceedings. Id. Where county court calls in county warrants for cancellation and reissue, **order is not invalid** because record of proceedings of county court did not show that similar order had been made by court within year. Id. **Record is not invalid** because not showing that places where notice was posted were all townships of county. Id. Where return of sheriff shows that copy of order was posted at each of election precincts in townships named, county court will take **judicial notice** whether or not these constitute all of townships in county. Id. Rule is also applicable to election precincts though subject to change, since these are also political subdivisions of county. Id.

23. Theis v. Beaver County Com'rs [Okl.] 97 P 973.

24. Mandamus against county treasurer is proper remedy to enforce payment of claim when warrants have been issued. City & County of Denver v. Bottom, 44 Colo. 308, 98 P 13.

25. Search Note: See Counties, Cent. Dig. §§ 76-80; Dec. Dig. § 58; 7 A. & E. Enc. L. (2ed.) 1009.

26. Proceeding for enforcement of right. Cass County v. Sarpy County, 83 Neb. 435, 119 NW 685.

disallowance of a claim.[27] The right of appeal is usually given from all final[28] orders of a county board, such as the allowance of fees to attorneys for a drainage district,[29] when a fiscal court illegally reduces the salary of an official,[30] and the like. Under a statute, permitting appeals by a taxpayer or by the person aggrieved by an order,[31] an order for the incorporation of a village is appealable.[32] Upon appeal, the act or order must usually be heard anew,[33] whereupon the order appealed from may be affirmed, reversed, or modified.[34] The judgment rendered by a district court on appeal from an action by a county board is usually appealable to the supreme court.[35]

Counts and Paragraphs; County Commissioners or Supervisors; County Seat; Coupling Cars; Coupons; Court Commissioners, see latest topical index.

COURTS.

The scope of this topic is noted below.[36]

§ 1. Creation, Change and Alteration, 1140.
§ 2. Officers and Instrumentalities of Courts, 1141.
§ 3. Places, Terms and Sessions of Courts, 1141.
§ 4. Conduct and Regulation of Business, 1142. Under the Conformity Act, 1143.
§ 5. Rules of Decision; Decisions and Reports Thereof, 1144. Publication of Judicial Opinions, 1144.

§ 1. *Creation, change and alteration.*[37]—See 11 C. L. 925—The presence of a judge is essential to a court,[38] but a court is more than an officer or board,[39] though the board possess functions nominally judicial,[40] and a judge during vacation is not

27. Cobbey's Ann. St. 1907, § 6147. Cass County v. Sarpy County, 83 Neb. 435, 119 NW 685.

28. Under Mills' Ann. St. § 802, an appeal must be from definite and certain finding or order of disallowance in whole or in part. Washington County v. Murray [Colo.] 100 P 588. Order allowing $50 in full payment of claim for $300 is not disallowance of definite and certain part of claim, though perhaps a disallowance by implication. Id.

29. Under Const. art. 7, §§ 14, 33, there is right of appeal from order of county court to circuit court. Huddleston v. Coffman [Ark.] 118 SW 1010. Order allowing fees to attorneys for drainage district is appealable under general act (Kirby's Dig. §§ 1487-1493) though right is not conferred by § 1428 as to drains. Id.

30. Where fiscal court illegally reduces salary, incumbent may appeal from order. Breathitt County v. Noble [Ky.] 116 SW 777; Monroe County Ct. v. Miller [Ky.] 116 SW 272.

31. Under Rev. Codes, § 1950, appeal may be taken from any act or order of board, by taxpayer or person aggrieved, when any demand is allowed against county, or where any act or order is illegal or prejudicial to public interests. Gardner v. Blaine County, 15 Idaho, 698, 99 P 826.

32. Order for incorporation of village under Rev. Codes, § 2222, is appealable to district court by person aggrieved or by taxpayer, within territory affected. Gardner v. Blaine County, 15 Idaho, 698, 99 P 826.

33. Under Rev. Codes, § 1953, appeal must be heard anew. Gardner v. Blaine County, 15 Idaho, 698, 99 P 826. "Heard anew" means retrial. Id. Error for trial court to require party having negative to take affirmative to disprove facts as found by board of commissioners. Id. Under Mills' Ann. St. § 803, appeals from orders of county commissioners are **triable same as an appeal case from justice to county courts.** Washington County v. Murray [Colo.] 100 P 588. Such appeal is classed not as special proceeding but as a case. Id.

34. Gardner v. Blaine County, 15 Idaho, 698, 99 P 826.

35. Supreme court, having jurisdiction to review final judgment of inferior courts of record in all civil and criminal cases (Const. art. 6, § 2), may review judgment of district court rendered on appeal from action of board of county commissioner's disallowing claim. Washington County v. Murray [Colo.] 100 P 588.

36. Treats of courts generally, without particular reference to particular kinds of courts (see Justices of the Peace,* § 1; Appeal and Review,* § 5; Municipal Corporations,* § 13, as to city fiscal courts or boards; Counties,* § 2, as to county boards; United States Marshals and Commissioners;* Reference,* § 1). It excludes the jurisdiction of courts (see Jurisdiction;* Appeal and Review,* § 5), and the powers of judges (see Judges*), and judicial functions in their constitutional aspect (see Constitutional Law.* § 4C).

37. **Search Note:** See Courts, Cent. Dig. §§ 162-170, 181-183; Dec. Dig. §§ 41-53.

38. Court not constituted for business while judge is out of jurisdiction. People v. Rotole, 61 Misc. 579, 115 NYS 859.

39. Within meaning of Rev. Codes, § 262, authorizing employment of help "for any state officer or board." State v. Cunningham [Mont.] 101 P 962.

40. Determinations of board of county canvassers constituted by Revisal 1908, § 4350, to "judicially determine" election results, are

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* Topics begin with the latest article on the subject. Use the latest topical index.

a court.[41] Subject to constitutional limitations, the legislature may create courts,[42] and the legality of a court's creation cannot be questioned collaterally.[43] Upon a change of constitution, express provision is often made for the continuance[44] or abolition of existing courts.[45] Territorial courts cease to exist upon territory's admission to statehood.[46] Mere change of name does not necessarily abolish a court.[47] Upon the abolition of a court, a transfer of pending causes is usually provided for by statute.[48]

§ 2. *Officers and instrumentalities of courts.*[49]—See 11 C. L. 927

§ 3. *Places, terms and sessions of courts.*[50]—See 11 C. L. 927—Authorities conflict as to the validity of court proceedings had at a place designated by an invalid statute.[51] Frequently the number[52] of terms and time of beginning,[53] and sometimes the duration[54] and date of termination,[55] are fixed by statute or otherwise.

open to collateral attack. Barnett v. Midgett [N. C.] 65 SE 441.

41. Cannot hear motion for new trial under Rev. St. Me. c. 84, § 53. Mitchell v. Emmons, 104 Me. 76, 71 A 321.

42. Constitution held not violated: Laws 1907, p. 823, c. 104, creating corporation courts in Texarkana with jurisdiction to try offenses against state law, does not violate Const. art. 5, § 1, as amended in 1891. Ex parte Abrams [Tex. Cr. App.] 120 SW 883. Laws 1907, p. 1258, c. 860, § 4, creating recorder's court, valid under Const. art. 4, § 12. State v. Shine, 149 N. C. 480, 62 SE 1080. Creation of "terms" of court at Prague by house bill No. 460, 1909, not a creation of a separate county court in violation of constitution. Rakowski v. Wagoner [Okl.] 103 P 632.

Constitution held violated: Laws 1861, c. 31, p. 50, creating police justice for Sangerties, violated Const. 1846, art. 6, § 14, in giving exclusive jurisdiction of criminal cases. People v. Boice, 63 Misc. 357, 118 NYS 500. Code 1904, § 2639a, empowering clerk of chancery court of Richmond to admit wills to probate, violates Const. § 98, in creating court different in character from those provided by constitution. McCurdy v. Smith, 107 Va. 757, 60 SE 78. Laws 1909, p. 82, c. 49, violates Const. art. 4, § 6, in creating a superior court with jurisdiction over less than a county, and § 5 in virtually authorizing several superior courts in one county. State v. Chehalis County Superior Ct. [Wash.] 103 P 464. Sp. Sess. Laws 1908, c. 52, p. 50, creating second court of general jurisdiction for Wyandotte county, violates Const. art. 2, § 17. State v. Hutchings [Kan.] 98 P 797.

43. Habeas corpus by one imprisoned under court's sentence. State v. Bailey, 106 Minn. 138, 118 NW 676.

44. Courts under Const. of 1879 same as those of same name under present constitution. Schwing v. Dunlap, 123 La. 495, 49 S 134.

45. Police court established at Clifton by Laws 1888, c. 158, §§ 3, 5, abolished by Const. §§ 135, 142. Morris v. Randall [Ky.] 112 SW 856.

46. Courts of Indian Territory and Oklahoma upon Oklahoma's admission being creatures of congress rather than of U. S. Const. Western Union Tel. Co. v. Parsley [Tex. Civ. App.] 121 SW 226.

47. Municipal courts of the city of New York are continuation of former district courts, and governed by Code Civ. Proc. § 2434, referring thereto. Hottenroth v. Flaherty, 61 Misc. 108, 112 NYS 1111.

48. Oklahoma Enabling Act (34 Stat. 276, as amended by 34 Stat. 1286), transferred cause from United States court of appeals for Indian Territory. Choctaw, O. & G. R. Co. v. Sittel, 21 Okl. 679, 97 P 362.

49. Search Note: See Courts, Cent. Dig. §§ 193-203; Dec. Dig. §§ 55-58; Court Commissioners, Cent. Dig.; Dec. Dig.; 11 Cyc. 622-626.

50. Search Note: See notes in 5 C. L. 872; 8 Ann. Cas. 939.

See, also, Courts, Cent. Dig. §§ 206-273; Dec. Dig. §§ 61-77; 11 Cyc. 726-739; 8 A. & E. Enc. L. (2ed.) 34; 1 A. & E. Enc. P. & P. 238.

51. Conviction void by Washington county court sitting at St. Stephens in accordance with Soc. Acts Sp. Sess. 1907, p. 28, passed in violation of Const. 1901, § 45. Patton v. State [Ala.] 49 S 809. Conviction valid by Torrance county court sitting at Estancia in accordance with Acts 1905, c. 2, p. 2, passed in violation of U. S. Comp. Laws 1897, p. 60. Territory v. Clark [N. M.] 99 P 697.

52. Commissioner's court authorized under Const. art. 5, § 29, and Rev. St. 1895, arts. 1167-1169, to create additional term of county court in 1907, not having changed number since 1904. Potts v. State, 52 Tex. Cr. R. 368, 108 SW 695. Const. art. 5, § 29, prevails over § 17 in fixing terms of county court, having been more recently amended. Kilgore v. State, 52 Tex. Cr. R. 447, 108 SW 662.

53. Kilgore v. State, 52 Tex. Cr. R. 447, 108 SW 662. Order of Feb. 10, 1885, by commissioner's court, changing terms fixed by order of Feb. 12, 1884, valid after 20 years, in spite of Const. art. 5, § 29, prohibiting second change within one year. Biddy v. State [Tex. Cr. R.] 108 SW 689. Sessions of fifteenth circuit of Alabama governed by Code 1907, § 3245, rather than by Acts 1907, p. 255. State v. Pearson [Ala.] 49 S 236. Terms of city court of Montgomery fixed by Act Feb. 28, 1907, repealing Acts 1900-01, p. 222. Montgomery Trac. Co. v. Knabe [Ala.] 48 S 501. Acts 1888-89, p. 64, authorizing opening after 10 o'clock in the fifth circuit, not repealed by Acts 1890, p. 68, nor violative of Const. 1875, art. 4, § 19. Letcher v. State [Ala.] 48 S 805.

54. Kilgore v. State, 52 Tex. Cr. R. 447, 108 SW 662. Under St. 1898, § 2424, as amended by Laws 1905, c. 6, pp. 8, 12, a regu-

Extraordinary terms may be convened by the governor in some cases.[56] The sessions of a court of record, sitting as such and performing its functions, are presumed lawful.[57] At common law a term lapses on failure of judge to appear on the opening day.[58] The intervention of a special term during the pendency of a general term does not terminate the latter.[59] Court is not open for business during absence of judge from its jurisdiction.[60] The term may be adjourned by the court,[61] or by operation of law,[62] and adjourned sessions may be held after an intervening term for another county in the same district,[63] and at other times than those fixed for regular sessions.[64] A special term may be held during the general session of the same court in another county.[65] A general term for one county may be a special term for another county,[66] and as such will be deemed a part of a general term for the latter county during whose continuance it is held.[67] Court cannot take a recess till it has organized for the term.[68] The powers of a judge in vacation are elsewhere treated.[69]

§ 4. *Conduct and regulation of business.*[70]—See 11 C. L. 926—A court has a broad discretion in the adoption and enforcement of reasonable rules for the transaction of its business,[71] provided they violate no statute,[72] and the construction of its own rules will not be disturbed unless clearly erroneous,[73] or unjust.[74] Court rules, if mandatory, have the force of law,[75] bind all litigants, even the sovereign,[76] and gen-

lar term of circuit court lasts till commencement of next general term, unless terminated by express order of adjournment. Frost v. Meyer, 137 Wis. 255, 118 NW 811; American States Security Co. v. Milwaukee Northern R. Co., 139 Wis. 199, 120 NW 844.

55. "Until Saturday" held to include Saturday in Act Feb. 28, 1907, fixing terms of city court of Montgomery. Montgomery Trac. Co. v. Knabe [Ala.] 48 S 501.

56. Supreme court of New York. People v. Neff, 191 N. Y. 210, 83 NE 970.

57. Session valid where its record recited prior adjournment but record of previous session did not show adjournment, both being within fixed term. State v. Bush, 136 Mo. App. 608, 108 SW 670.

58. Forbus v. State [Ala.] 48 S 592.

59. Under Laws 1905, c. 6, p. 8. American States Security Co. v. Milwaukee Northern R. Co., 139 Wis. 199, 120 NW 844.

60. Indictment found in his absence void, notwithstanding order that court be continued open, but stand in recess. People v. Rotole, 61 Misc. 579, 115 NYS 854.

61. Bidwell v. Love [Okl.] 98 P 425.

62. Under Code 1896, § 922, Code 1907, § 3260, on failure of county judge to attend, court stands adjourned from day to day until 3 o'clock on the third day, when it is adjourned to the next succeeding term. Forbus v. State [Ala.] 48 S 592.

63, 64. Bidwell v. Love [Okl.] 98 P 425.

65. Conviction of murder at special term called under Laws 1905, c. 83, p. 116, affirmed. McIntosh v. State [Tex. Cr. R.] 120 SW 455.

66. Frost v. Meyer, 137 Wis. 255, 118 NW 811.

67. Order made at general term of Ashland county which was a special term for Iron county held made at the pending general term of Iron county. Frost v. Meyer, 137 Wis. 255, 118 NW 811.

68. Lapse of term on nonappearance of judge not a recess. Forbus v. State [Ala.] 48 S 592.

69. See Judges, § 3.

70. This section treats of conduct and regulation of judicial business, as distinguished from course and conduct of trials (see Trial; Argument and Conduct of Counsel; Appeal and Review, § 12).

Search Note: See notes in 8 C. L. 1003; 22 L. R. A. 398; 10 L. R. A. (N. S.) 791; 41 A. S. R. 639; 2 Ann. Cas. 543; 6 Id. 592.

See, also, Courts, Cent. Dig. §§ 274-305; Dec. Dig. §§ 78-86; 8 A. & E. Enc. L. (2ed.) 28; 18 A. & E. Enc. P. & P. 1235.

71. Rule 17 of city court, requiring cause on second appearance to be disposed of, postponed, or go to foot of calendar, and that all but first four causes on calendar be passed for the day, upheld. In re Rubenstein, 129 App. Div. 326, 113 NYS 554. Rules regulating assignment of cases and making up of trial calendars held proper. Frost v. Pennington [Ga. App.] 65 SE 41.

72. Rule 22, U. S. Circuit Court, 9th judicial district, deeming special appearance general, if its purpose not sustained, violates U. S. Comp. St. 1901, p. 488. Davidson Bros. Marble Co. v. U. S., 213 U. S. 10, 53 Law. Ed. —. Code Civ. Proc. § 977, violated by order for new calendar omitting actions already on calendar, unless affirmative action taken, order held void. Willner v. Mink Restaurant Co., 61 Misc. 73, 113 NYS 31, rvg. 60 Misc. 358, 113 NYS 633.

73. Booth v. Wolff Process Leather Co. [Pa.] 73 A 959.

74. Frost v. Pennington [Ga. App.] 65 SE 41. Construction that under rule 17, note 33, supra, cause must be one of first four, before motion to postpone could be finally disposed of, criticised. In re Rubenstein, 129 App. Div. 326, 113 NYS 554.

75. General rules of practice, No. 7, prohibiting judgment for a separation by consent, held binding. Boyer v. Boyer, 129 App. Div. 647, 114 NYS 15; United States v. Barber Lumber Co., 169 F 184.

erally the court itself,[77] and rules once established continue in existence with the court promulgating them until expressly altered, in spite of a change of judges.[78] A court is not bound to point out proper future procedure peculiar to a particular case.[79] A court may appoint special attendants[80] and incur proper expenses in connection with their compensation.[81]

Under the conformity act. See 11 C. L. 930—Unless expressly regulated by congress,[82] the practice and procedure in actions at law brought in or removed to a federal court sitting in a particular state or territory, must conform to the practice and procedure of the courts of such state or territory,[83] but only "as near as may be,"[84] under which limitation subordinate provisions obstructing the administration of justice in a particular case may be rejected without standing rule,[85] or a remedy may be given where the state practice provides none,[86] though customary conformity will not be abandoned without warning, though discretionary.[87] State decisions are not conclusive as to the state practice, unless construing a local statute,[88] nor is the federal court required to conform to the state practice in the matter of procedure to acquire jurisdiction,[89] or to secure review,[90] but procedure supplementary to execution conforms as specially provided by act of congress.[91] State

76. United States as plaintiff bound by equity rule No. 66. United States v. Barber Lumber Co., 169 F 184.

77. Boyer v. Boyer, 129 App. Div. 647, 114 NYS 15.

Contra: When violation will wrong no one. Steele v. Wynn, 139 Ill. App. 428.

78. Rule of district court under Const. 1879 binding in same district court under present constitution, courts being the same though not reaffirmed by present judge. Schwing v. Dunlap, 123 La. 485, 49 S 134.

79. Motion denied for order prescribing method of service. Milovich v. American Servian Soc., 61 Misc. 393, 115 NYS 851.

80. Bailiff, though St. 1898, § 725, subd. 3, authorizes court to order greater number of deputies. Stevenson v. Milwaukee County, 140 Wis. 14, 121 NW 654. Official stenographer under Rev. Codes, § 6248. State v. Cunningham [Mont.] 101 P 962.

81. At common law or under Rev. Codes, § 6248, Const. art. 7, § 20, and Rev. Codes, § 226, not applying. State v. Cunningham [Mont.] 101 P 962.

82. Rev. St. U. S. § 954, regulating amendments of pleadings, prevails over Wisconsin St. 1898, § 2830, thereon. Manitowoc Matting Co. v. Fuechtwanger, 169 F 983. Rev. St. U. S. § 954, prevails over Rev. Laws Mass. c. 173, § 121, as to effect of allowance of amendment to declaration. De Valle Da Costa v. Southern Pac. Co., 167 F 654.

83. Under Const. Okl. §§ 1, 2, case pending in courts of that part of Indian Territory now included in state of Oklahoma is governed by law of Indian Territory, after removal to federal court on admission of Oklahoma as state. St. Louis & S. F. R. Co. v. Cundieff [C. C. A.] 171 F 819. Error to violate state practice allowing plaintiff to become **nonsuited** before jury retire. Meyer v. National Biscuit Co. [C. C. A.] 168 F 906. Pennsylvania Practice Act of April 22, 1905, in effect extending **time in which court may direct verdict.** Fries-Breslin Co. v. Bergen, 168 F 360. New Jersey practice applied with reference **to striking of plea** of limitations before trial. Snare & Triest Co. v. Friedman [C. C. A.] 169 F 1. Code Iowa 1897, § 4140, authorizing supreme court on affirmance of judgment on appeal to render **summary judgment against appellant and his sureties on supersedeas bond** for amount of judgment below and costs, followed. Egan v. Chicago G. W. R. Co., 163 F 344. Rule for **taxation of costs** adopted. Scatcherd v. Love [C. C. A.] 166 F 53. North Carolina statute authorizing **prosecution of suit by pendente lite assignee** of demand in name of assignor. City of Greensboro v. Southern Paving & Const. Co. [C. C. A.] 168 F 880.

84. Rev. Laws Mass. c. 173, § 121, on effect of allowance of amended declaration, held not binding, whether or not Rev. St. U. S. § 954 applied. De Valle Da Costa v. Southern Pac. Co., 167 F 654.

85. Illinois requirement of separate replications disregarded where over 150 required, each repeating 37 pages of facts. Hein v. Westinghouse Air Brake Co., 164 F 79, 168 F 766.

86. Presentation of issues not shown by record allowed by plea in abatement. United States v. Wells, 163 F 313.

87. Illinois practice as to nonsuits not to be set aside without adoption of rule after long adherence. Meyer v. National Biscuit Co. [C. C. A.] 168 F 906.

88. Held court could compel plaintiff to submit injured knees to surgical examination after exposing them to jury, contrary to state decision. Chicago & N. W. R. Co. v. Kendall [C. C. A.] 167 F 62.

89. Sufficiency of service determined adversely to decision of court of state whence removed. West v. Cincinnati, etc., R. Co., 170 F 349.

90. Detroit United R. Co. v. Nichols [C. C. A.] 165 F 289. Question when exceptions need be taken, and how motions and rulings, not in themselves part of the record, may be made such. Ghost v. U. S. [C. C. A.] 168 F 841. **Equity appeal** from United States courts of appeals in Indian Territory governed by Act March 3, 1905, c. 1479, § 12. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. [C. C. A.] 165 F 162.

91. Follows state practice on Jan. 1, 1878, unless subsequent state statutes adopted **by**

statutes fixing the rights of the parties are binding upon federal equity courts as well as upon those of law,[92] but not so as to state statutes relative to equity procedure,[93] though the state procedure may be followed in the absence of any settled procedure in the federal court.[94] Proceedings before a United States inspector of immigration need not conform.[95]

§ 5. *Rules of decision; decisions and reports thereof.*[96]—See 11 C. L. 930—The necessity and sufficiency of findings by the trial court,[97] and of findings and opinions by appellate courts,[98] are treated elsewhere, as is also the doctrine of stare decisis, and the effect of decisions as precedents.[99]

Courts are sometimes imperatively required to render decisions [1] within a certain time [2] after submission,[3] under penalty of loss of jurisdiction upon failure to comply with such requirement,[4] but where a statute requiring decisions to be filed within a certain time is merely directory,[5] failure to comply with the same will not affect the validity of the judgment.[6] An opinion upon a question submitted by the legislature or executive of a state must be seasonably rendered,[7] though in a proper case it may be rendered after the immediate reason for asking it has ceased to exist.[8] Where the court's decision is required to be in writing,[9] an oral decision does not preclude the court from thereafter filing a different decision in writing.[10] Trial courts are sometimes required to give opinions.[11]

*Publication of judicial opinions.*See 9 C. L. 845—A reporter's labor in publishing decisions, in so far as essential to the discharge of his statutory duty, is public property, which he cannot copyright.[12]

general rules of court, under Rev. St. U. S. § 916. Meyer v. Consolidated Ice Co., 163 F 400.

92. U. S. Rev. St. § 721 (U. S. Comp. St. 1901, p. 581), in terms applies only to actions at law, yet actions in equity are fully within its principle. Hobe-Peters Land Co. v. Farr, 170 F 644. St. Wis. 1898, § 1210h, creating conditions precedent to right of action to cancel tax deeds, applied. Id.

93. Question when suit is begun is one of equity procedure. United States v. Miller, 164 F 444. Revival of federal equity suit. Miller v. Wather, 165 F 359.

94. Federal court held to have acquired jurisdiction of foreign corporation by state method of service. Hollister v. Vermont Bldg. Co. [Iowa] 119 NW 626.

95. Minnesota statute terminating female's minority at 18 not controlling. Ex parte Peterson, 166 F 536.

96. **Search Note:** See Courts, Cent. Dig. §§ 306-374; Dec. Dig. §§ 87-117; 5 A. & E. Enc. P. & P. 936; 15 Id. 304.

97. See Verdicts and Findings, § 9.

98. See Appeal and Review, § 15D.

99. See Stare Decisis.

1. When a justice of the municipal court communicates, orally or in writings, his decision to the clerk of such court, he thereby fulfills the judicial duty imperatively required to be performed within certain time. Collins v. Davis, 114 NYS 792.

2. Under Laws 1902, p. 1486, c. 580, requiring judge of municipal court to render decision within fourteen days after submission of cause, unless time is extended by agreement of parties, decision rendered two weeks after submission of last brief, pursuant to stipulation of parties, held in time. Beinert v. Tivoli & Co., 62 Misc. 616, 116 NYS 4. Stipulation on appeal showing that case was decided within time required by municipal court act, plus additional time given for filing briefs, held to preclude objection that decision was not rendered within time specified by statute. Barnes v. Summit Silk Mfg. Co., 113 NYS 977.

3. Where it appears that a case was tried on a certain day and that decision was reserved, the case will be deemed to have been submitted on such day. Barnes v. Summit Silk Mfg. Co., 113 NYS 977.

4. Under Municipal Court Act (Laws 1902, p. 1557, c. 580), § 230, court loses jurisdiction if it fails to render decision within 14 days after submission of case, in absence of extension of time by agreement. Barnes v. Summit Silk Mfg. Co., 113 NYS 977.

5. Statute requiring decision to be filed within 30 days after submission of case held directory. Carney v. Twitchell [S. D.] 118 NW 1030.

6. Carney v. Twitchell [S. D.] 118 NW 1030.

7. Three days before reply requisite held insufficient. In re Senate Bill No. 416 [Colo.] 101 P 410.

8. Opinion rendered as possibly useful on question of eligibility of public official at time of his appointment, though alleged ground of ineligibility had since been removed. In re Opinion of Justices [N. H.] 72 A 754.

9. Code Civ. Proc. § 1010. Bascombe v. Marshall, 129 App. Div. 518, 113 NYS 993.

10. Bascombe v. Marshall, 129 App. Div. 518, 113 NYS 993.

11. On reversing findings of master. Rankin v. Rankin [Pa.] 73 A 920. When deciding a case involving construction of a state statute and of its own rules. Sulzner v. Cappran Lemley & Miller Co. [Pa.] 72 A 270.

12. United States supreme court reporter's copyright cannot cover paging or arrangement of cases. Banks Law Pub. Co. v. Lawyer's Co-op. Pub. Co. [C. C. A.] 169 F 386.

COVENANT, ACTION OF.[13]

The scope of this topic is noted below.[14]

A wife who joins in a conveyance for the purpose of conveying her inchoate right of dower or of homestead is a necessary party in an action on a covenant contained therein.[14a]

Covenants, see latest topical index.

COVENANTS FOR TITLE.

The scope of this topic is noted below.[15]

§ 1. **Making of Covenants; Persons and Estates Benefited or Bound,** 1145.
§ 2. **Performance or Breach,** 1146. Against Incumbrances, 1146. The Covenant of Seisin and Right to Convey, 1147. The Covenant of Warranty, 1147. The Covenant for Quiet Enjoyment, 1148.
§ 3. **Enforcement of Covenants,** 1148.

§ 1. *Making of covenants; persons and estates benefited or bound.*[16]—See 11 C. L. 981—In some states, covenants are implied from the use of certain words, unless a contrary intent is clearly manifest.[17] Covenants of title do not apply to land not included in the conveyance.[18] A covenant in a mortgage of real property that the mortgagor is the owner of the property is a covenant of absolute ownership of all the property described.[19] If a deed purports to convey the right, title, and interest

13. See 9 C. L. 845.

Search Note: See Covenant, Action of, Cent. Dig.; Dec. Dig.; 11 Cyc. 1022-1034; 5 A. & E. Enc. P. & P. 342.

14. This topic includes matters relating to the nature of the remedy by action of covenant and procedure peculiar thereto. It excludes the validity, interpretation and performance of covenants (see Covenants for Title;* Buildings and Building Restrictions*) and matters common to all actions (see such topics as Pleading;* Evidence,* and the like). It also excludes the measure of damages for breach of covenant (see Damages *).

14a. Necessary party plaintiff in action for breach of covenant to construct underway cattle pass. Ellis v. Springfield S. W. R. Co., 130 Mo. App. 221, 109 SW 74.

15. Treats only of covenants usually contained in deeds. Excludes covenants peculiar to leases (see Landlord and Tenant,* § 2), covenants restrictive of the use of land (see Buildings and Building Restrictions,* § 2), and covenants relative to affirmative burden not pertaining to title and covenants running with the land generally (see Real Property,* § 4), warranty covenants on sale of personal property (see Sales,* § 8), and covenants and warranties generally between vendors and purchasers of land (see Vendors and Purchasers,* § 6). Excludes, also, damages for breach of covenants for title (see Damages,* § 4c).

16. Search Note: See notes in 5 C. L. 876; 7 Id. 1005; 18 L. R. A. 343; 22 Id. 779; 23 Id. 396; 62 Id. 763; 67 Id. 369; 9 L. R. A. (N. S.) 1092; 10 Id. 964; 13 Id. 1003; 14 Id. 878; 15 Id. 1129.

See, also, Covenants, Cent. Dig. §§ 1-92; Dec. Dig. §§ 1-84; 11 Cyc. 1042-1102; 8 A. & E. Enc. L. (2ed.) 54.

17. The words **"grant, bargain, and sell"** contained in a deed have by virtue of a Missouri statute the force and effect of a covenant that the grantor was, at date of deed, seised of an indefeasible estate in fee simple in the premises conveyed, that the same was free from incumbrance done or suffered by the grantors, his heirs and assigns, and all claiming under him. Stoepler v. Silberberg, 220 Mo. 258, 119 SW 418. The words "grant, bargain, and sell," in a deed, have under Rev. St. 1899, § 907 (Ann. St. 1906, p. 838), the effect of a covenant that the grantor is seised of an indefeasible estate in fee simple, unless it appears that an absolute estate in fee was not conveyed. Held that widow joining in deed of trust merely released dower interest. Waldermeyer v. Loebig [Mo.] 121 SW 75. A mortgage reciting that mortgagor bargains, sells, and conveys all right, title, and interest that he may have, is not converted into a warranty under Code 1907, § 3421. Vary v. Smith [Ala.] 50 S 187. Where instrument only purported to include personal property, the terms "grant, bargain, sell, and convey," held not to imply a covenant or an assurance of title or right to convey any interest in real estate. Falls City Lumber Co. v. Watkins [Or.] 99 P 884. Recital **in quitclaim deed** at close of description of land of the words "and being part of the land purchased by me of the town of Foxcroft" held not to imply a covenant by grantor that he then had and was conveying actual title to the land. Manson v. Peaks, 103 Me. 430, 69 A 690. While **in lease** by an original lessor covenants may be implied as against such lessor from the use of certain words in conveyancing, yet, when lessee assigns the lease to a third person, no covenants by implication can arise. Shannon v. Mastin, 135 Mo. App. 50, 114 SW 1127.

18. White v. Stewart & Co., 131 Ga. 460, 62 SE 590.

19. Slater Trust Co. v. Randolph-Macon Coal Co., 166 F 171.

* Always begin with the latest article on the subject. Use the latest topical index.

of the grantor in and to certain described realty, instead of conveying the realty itself, the covenants will be limited to the right or interest which the grantor has in the property.[20] Where one sells an inclosed tract of land, intending only to sell such land as is inclosed and purchaser intending to purchase only the land surrounded by the inclosure, the warranty in the deed only warrants the title to the land so inclosed, and not the number of acres represented,[21] but, if the deed purports to convey a certain number of acres, the rule is otherwise,[22] unless the covenant of warranty is limited to a specific number of acres.[23] The intention of the parties, however, controls in ascertaining the scope of a covenant.[24] The estate of a deceased grantor is not bound by a warranty in the deed for which there was no consideration,[25] and a covenant of warranty binds only the grantor's heirs to the extent of the property received by them from his estate.[26] If a wife joins in a deed merely for the purpose of releasing her dower, she is not liable upon the covenants contained in the deed.[27] Where a conveyance is void, the covenants contained therein are also void,[28] but where a grantor has no title at the time of executing a conveyance with covenant of general warranty, any title subsequently acquired by him will inure to the benefit of his grantee,[29] and, for the purposes of the warranty, it is immaterial whether a contingent interest in the grantor becomes absolute prior or subsequently to the execution of the conveyance.[30]

§ 2. *Performance or breach.*[31] *Against incumbrances.* See 11 C. L. 932—A covenant against incumbrances is a covenant in praesenti,[32] broken,[33] if at all, when when made by the existence of the incumbrance,[34] without regard to future or ulti-

20. General warranty of title held not to apply to certain lots of land as operative words indicated that intention of parties was that only the right, title, and interest which the grantor had was conveyed. White v. Stewart & Co., 131 Ga. 460, 62 SE 590.

21. In such case a timely action for shortage only can be maintained, but no action on the warranty can be. Hannes v. Scholz [Tex. Civ. App.] 120 SW 1056.

22. Where one sells a tract of land, the field notes of which cover a certain number of acres as stated in the deed, the seller selling the field notes and the purchaser buying the field notes, an action may be maintained on the warranty for any part of the title that failed. Hannes v. Scholz [Tex. Civ. App.] 120 SW 1056.

23. Where the covenant of warranty expressly warranted 1,000 acres and deed was for 1,276 acres, the warranty was limited to 1,000 acres. Folk v. Graham, 82 S. C. 66, 62 SE 1106.

24. Deed construed and held that warranty was as to the number of acres of land, and not necessarily lands covered with timber. Perkins Co. v. Wilcox [Ga.] 63 SE 831.

25. Conveyance from father to child. Rice v. Rice [Iowa] 119 NW 714.

26. Estate being insolvent, the heir is not estopped from acquiring a title adverse to that conveyed by his ancestor. Cleveland v. Smith [Tex. Civ. App.] 113 SW 547.

27. Adam v. Rockey, 139 Ill. App. 507.

28. Conveyance of an expectancy. Spears v. Spaw [Ky.] 118 SW 275.

29. Frey v. Meyers [Tex. Civ. App.] 113 SW 592.

30. Immaterial, as against heirs of grantor, whether birth of child, upon which the vesting of absolute title in him depended, took place prior or subsequently to execution of conveyance with warranty of title. English v. McCreary [Ala.] 48 S 113.

31. **Search Note:** See notes in 60 L. R. A. 750; 4 L. R. A. (N. S.) 309; 14 Id. 514; 53 A. S. R. 113; 10 Ann. Cas. 1079.

See, also, Covenants, Cent. Dig. §§ 93-169; Dec. Dig. §§ 85-103; 11 Cyc. 1102-1130; 8 A. & E. Enc. L. (2ed.) 86.

32. Tuskegee Land & Security Co. v. Birmingham Realty Co. [Ala.] 49 S 378.

33. Where purchaser received deed with special warranty against incumbrances and paid purchase price to grantor's agent who failed to pay and secure release of an incumbrance, there was a breach. Babson v. Cox, 32 App. D. C. 542. Evidence held to sustain judgment of trial court that there was no breach of covenant against incumbrances. Katz v. Ish [Neb.] 121 NW 239. Evidence of flooding of land below a milldam **held not to show a breach** of covenant against incumbrances. Corse v. Dexter, 202 Mass. 31, 88 NE 332. Party wall extending not more than nine inches, allowed by statute, onto adjoining land, is not an incumbrance constituting a breach of covenant of warranty. Capital City Inv. Co. v. Burnham [Iowa] 121 NW 708.

34. An incumbrance, within the meaning of the law relating to covenants and warranties, does not depend for existence upon the extent or amount of the diminution in value, but extends to cases in which, by reason of the burden, claim, or right, the owner does not acquire complete dominion over the land which the grant apparently gives. Tuskegee Land & Security Co. v. Birmingham Realty Co. [Ala.] 49 S 378. Where deed conveyed no part of adjacent streets, but, prior to execution of deed, grantor had executed a release releasing railroad company

mate disturbance or damage,[35] and does not of itself run with the land,[36] but if coupled with a covenant for quiet enjoyment, it is then a covenant in futuro, and runs with the land until a breach.[37] An express covenant against taxes imposes the duty upon the covenantor to pay taxes due and payable at time of conveyance,[38] and, where a covenantee has been compelled to pay a street assessment on a reapportionment after purchase, he may have recourse against the covenantor.[39] A covenant against encumbrances in the broadest sense of the term extends to all adverse claims and liens on the estate conveyed, whereby the same may be defeated in whole or in part.[40]

The covenant of seisin and right to convey. See 11 C. L. 932—A covenant of ownership in fee simple is a covenant of seisin,[41] and one in praesenti,[42] which is broken, if at all, when made.[43]

The covenant of warranty. See 11 C. L. 933—A mere cloud upon the title or a colorable claim, when not accompanied by a substantial, legal, or equitable claim capable of enforcement, is not a breach of the covenant of warranty.[44] An eviction, in order to constitute a breach of covenant of warranty, must be by parmount title,[45] and the covenantee must be compelled to yield to such title or else be placed in a situation requiring him to do so presently.[46] Where it is apparent that the covenantee must presently yield to the paramount title, the covenant is broken,[47] and in such case a voluntary surrender of the premises to the holder of the pramount title constitutes a constructive eviction.[48] A judgment in favor of the holder of the paramount title constitutes an eviction.[49] An incumbrance is not a breach of a covenant of warranty unless the covenantee has been evicted under such incumbrance or has actually extinguished it, in whole or in part, in order to protect his title and possession,[50] but a covenant of warranty against all claims whatsoever is broken by the mere existence of a valid claim against the land.[51] A covenant of

from damages resulting to land conveyed from operation of trains on adjacent street, there was an incumbrance and a breach. Id. Widow's dower, which is a life estate, is not an incumbrance against her deceased husband's lands. Combs v. Combs [Ky.] 114 SW 334. Evidence held insufficient to show that party wall was incumbrance as not being on true boundary line. Capital City Inv. Co. v. Burnham [Iowa] 121 NW 708.

35, 36, 37. Tuskegee Land & Security Co. v. Birmingham Realty Co. [Ala.] 49 S 378.

38. Rambo v. Armstrong [Colo.] 100 P 586.

39. Comley v. American Standard Asphalt Co. [Ky.] 113 SW 125.

40. May include act which involves breach of covenant of warranty and thus the title to the land, as where certain buildings and fences were removed. Birkel v. Norton [Neb.] 120 NW 927.

41, 42. Wick v. Rea [Wash.] 103 P 462.

43. Wick v. Rea [Wash.] 103 P 462. Covenant of seisin and good right to convey held not broken by release executed by grantor, releasing railroad company from damages caused by operation of trains on adjoining street, where release was executed prior to deed and deed conveyed no part of street. Tuskegee Land & Security Co. v. Birmingham Realty Co. [Ala.] 49 S 378.

44. De Steaguer v. Pittman [Tex. Civ. App.] 117 SW 481.

45. Where covenantee reconveyed land in trust to secure purchase-money payments and land was sold by trustee and covenantee was ejected, there was no eviction by paramount title. Savage v. Cauthorn [Va.] 64 SE 1052.

46. Burns v. Vereen [Ga.] 64 SE 113.

47. Where demand was made upon the covenantee and preparations had been commenced to sue him and oust him and covenantor was called upon to exhibit a title under which the covenantee could defend, and admitted he could not do so, the purchase of paramount title was equivalent to an eviction. Joyner v. Smith [Ga.] 65 SE 68.

48. Herbert v. Handy [R. I.] 72 A 1102.

49. Judgment against covenantor secured by third person holding paramount title. Meeks v. Meeks, 5 Ga. App. 394, 63 SE 270. Where a judgment in favor of the grantee against an adverse claimant was reversed by supreme court and title adjudged to be in claimant, in law the grantee had been evicted, and the filing of the mandate of the supreme court in the lower court was not a condition precedent to the maintaining of an action against his grantor, and the fact that there was a clerical error in the mandate of the supreme court in describing the land made no difference. Beach v. Nordman [Ark.] 117 SW 785. Covenant of warranty is broken as soon as made if there is a superior, outstanding title or an incumbrance diminishing the value of the enjoyment. Fidelity & Deposit Co. v. Walker [Ala.] 48 S 600.

50. Brown v. Thompson, 81 S. C. 380, 62 SE 440.

51. Where taxes were liens upon the land at time of conveyance and grantor refused

warranty of possession is not broken by possession of a tenant when the covenantee, at the time of the covenant, has knowledge of such possession.[52] A general warranty by an heir upon conveyance of his designated "interest" in the property of the ancestor to a coheir is broken by a sale of such property for the debts of the ancestor,[53] but not by the existence of the widow's dower [54] or by a paramount title in a third person, which existed at the time of the ancestor's death.[55] A covenantor is not bound to notify a person about to purchase the land described in his deed, that the land of which the covenantor is in possession is not conveyed by his deed.[56]

The covenant for quiet enjoyment. See 11 C. L. 934—A covenant for quiet enjoyment, being itself in futuro [57] when coupled with covenants in praesenti, may operate to render the latter prospective.[58] Where the grantor uses and asserts a right to use the land conveyed by virtue of a lease from the grantee, the question of breach of covenant of quiet enjoyment is not involved.[59]

§ 3. *Enforcements of covenants.*[60]—See 11 C. L. 934—In an action on a general warranty of title against the claim of all persons, an eviction or equivalent disturbance by an outstanding paramount title must be alleged.[61] If the covenantee relies upon a nonsuit rendered against him in an action against third persons, he should show that the court necessarily passed upon the validity of the covenantor's title,[62] and, if he claims to have discharged an incumbrance, he must show that it was a valid and subsisting incumbrance when the deed was executed.[63] But a covenantor to whom due notice has been given to come in and defend an action against his covenantee, involving the title of land conveyed in which judgment is rendered adversely to the covenantee, is in a subsequent action on his covenant concluded by such judgment,[64] and where the covenantee and covenantor are made defendants and judgment is rendered against both, the covenantee is entitled to recover on the warranty though he did not give the covenantor notice of the suit,[65] and, also, where a suit against third persons is instituted by the covenantee at the instigation of the covenantor to test his right and paramount title to the land, he is concluded by the judgment rendered therein in a subsequent action on his covenant.[66] Where a covenantee fails to record his deed and is evicted by a subsequent vendee of the same

to discharge same, his failure to do so was a breach of his covenant of warranty, and fact that tax sale was invalid did not alter the case. Seldon v. Dudley E. Jones Co. [Ark.] 116 SW 217.

52. Baldwin v. Smith [Tex. Civ. App.] 119 SW 111.

53, 54, 55. Combs v. Combs [Ky.] 114 SW 334.

56. Covenantor not bound to notify purchaser, though he knows purchaser thinks he is getting the land of which the covenantor is in possession. Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857.

57. See 11 C. L. 934.

58. Covenant against incumbrances is rendered prospective by being coupled with covenant for quiet enjoyment. Tuskegee Land & Security Co. v. Birmingham Realty Co. [Ala.] 49 S 378.

59. Entwisle v. Margolies, 117 NYS 192.

60. **Search Note:** See notes in 24 A. S. R. 266; 13 L. R. A. (N. S.) 732.

See, also, Covenants, Cent. Dig. §§ 170-274; Dec. Dig. §§ 104-140; 11 Cyc. 1131-1183; 8 A. & E. Enc. L. (2ed.) 171, 197.

61. Joyner v. Smith [Ga.] 65 SE 68. Held that petition failed to allege eviction or an equivalent disturbance of the plaintiff's possession. White v. Stewart & Co., 131 Ga. 460, 62 SE 590.

62. Nonsuit in action of trespass. Burns v. Vereen [Ga.] 64 SE 113.

63. Evidence of a judgment against the grantee alone, and to which the grantor was in no way a party, is not sufficient to establish a remote vendor's lien, and the liability of the grantor thereunder. Rife v. Diamond Flint Glass Co., 42 Ind. App. 346, 85 NE 726.

64. Covenantee was sued in ejectment and covenantor was called on to defend, but failed to do so. Leet v. Gratz [Mo. App.] 117 SW 642. Judgment is conclusive, especially where defense urged by the covenantor was passed upon in such action. Farwell v. Bean [Vt.] 72 A 731. Where grantor was notified of pendency of suit and consultations were had with him in regard to conduct of case and his deposition was taken as evidence in the case and grantee put up a bona fide defense, a right to recover was shown. Carpenter v. Carpenter [Ark.] 113 SW 1032.

65. Rice v. Cook [Mo. App.] 120 SW 1191.

66. Landes v. Matthews, 136 Mo. App. 637, 118 SW 1185. Evidence held to show that prior unsuccessful suit by covenantee against third persons claiming title to the land was instituted by covenantor's request. Id.

property, the covenantor cannot urge as a defense the failure of the covenantee to record the conveyance.[67] The failure of a covenantee to complete the title as agreed is a good defense.[68] In certain cases the fraud of the covenantee is available as a defense against a breach of a covenant of warranty.[69] The usual rules as to the admissibility of evidence apply.[70]

Coverture; Credit Insurance, see latest topical index.

CREDITORS' SUIT.

The scope of this topic is noted below.[71]

§ 1. Nature and Grounds of Remedy, 1149. General Creditors' Suits, 1150. **§ 2. Property Which May be Reached, 1150.** **§ 3. Pleading and Procedure, 1151.**

§ 1. *Nature and grounds of remedy.*[72] See 11 C. L. 936—A creditor's bill upon a decree or judgment is a distinct suit and differs little from an auxiliary bill,[73] its purpose being to reach assets which cannot be reached by ordinary process.[74] As a general rule, in order to maintain the suit, three things are necessary, first, the obtaining of a judgment,[75] second, the return of execution unsatisfied,[76] and third, a showing that complainant has no adequate remedy at law to enforce collection of the judgment.[77] The requirement that the complainant must have reduced his claim to a lien is for the debtor's benefit, and may be waived by him,[78] and in some

67. Covenantor having executed another deed to the same property, he was estopped. Madden v. Caldwell Land Co. [Idaho] 100 P 358.

68. Where grantee as part consideration for the deed agreed to complete title knowing conditions, and title failed through its negligence, it was a good defense to an action for breach of warranty of title. Menasha Wooden Ware Co. v. Nelson [Wash.] 101 P 720.

69. Where covenantee, by fraud and misrepresentation, induces covenantor to execute instrument which latter did not intend to execute and did not know he was signing. Prestwood v. Carlton [Ala.] 50 S 254.

Plea that covenantor was, by the fraud of the covenantee, induced to execute an instrument which he did not intend to execute, need not allege that he was prevented from reading it, nor need it negative the fact of such reading. Prestwood v. Carlton [Ala.] 50 S 254.

70. When the incumbrance alleged consisted of a lien of a street assessment, the warrant, assessment, diagram, and certificate of the city engineer, together with the affidavit of demand and nonpayment, were admissible to show lien on the property. Berkeley Development Co. v. Marx [Cal. App.] 102 P 278.

71. This topic includes only creditor's bills in aid of execution; suits to set aside fraudulent conveyances generally (see Fraudulent Conveyances *) or to obtain the appointment of a receiver (see Receivers *), or to subject corporate assets to debts (see Corporations,* § 16). As to statutory proceedings supplementary to execution, see Supplementary Proceedings.*

72. Search Note: See notes in 17 L. R. A. 345; 45 Id. 193; 66 A. S. R. 271.

See, also, Creditors' Suit, Cent. Dig. §§ 1-11, 42-99; Dec. Dig. §§ 1-7, 9-23; 12 Cyc. 5-25, 33, 34, 43-45, 61; 5 A. & E. Enc. P. & P. 388-438, 460-555.

73. Merchants' Nat. Bank v. Manning, 139 Ill. App. 277.

74. It is proper for a creditor to proceed in equity where what he seeks to charge with the payment of his judgment is merely a lien upon property in the hands of another than the debtor. Merchants' Nat. Bank v. Crist [Iowa] 118 NW 394.

75. Hultberg v. Anderson, 170 F 657. Same is true as to the **enforcement of foreign judgment.** Id. The suit cannot be maintained by an **attaching creditor** until recovery of judgment. Hart v. Clarke & Co., 194 N. Y. 403, 87 NE 808.

76. Provided by Code Civ. Proc. § 1871. Clinton v. South Shore Natural Gas & Fuel Co., 61 Misc. 339, 113 NYS 289.

77. Holland v. Grote, 193 N. Y. 262, 86 NE 30. Suit is available only after exhaustion of all legal remedies. Hubbard v. Limited Wireless Tel. Co., 62 Misc. 538, 115 NYS 1016. The right of a creditor to maintain **suit in federal court** where he has exhausted his remedy at law in a state court cannot be defeated because he might invoke the equity powers of the state court, the distinction between actions at law and equity having been abolished therein. Hultberg v. Anderson, 170 F 657.

78. Failure to reduce claim to judgment before bringing suit may be waived. Pennsylvania Steel Co. v. New York City R. Co., 157 F 440. Corporate debtor made no objection that creditor had not obtained lien. Union Trust Co. v. Southern Sawmills & Lumber Co. [C. C. A.] 166 F 193.

states the requirement is entirely dispensed with by statute in certain cases.[79] It seems, moreover, that this requirement may be dispensed with by the court in a case of urgent necessity, as where it is legally impossible to secure a judgment.[80] Where a creditor's bill is authorized by statute it is no objection that the creditor may have an action at law.[81] A return of no property found, as a basis for the right of a creditor to enforce his judgment against lands of the debtor, is conclusive between the parties.[82] A suit in equity cannot be maintained in aid of execution where the judgment lien has lapsed,[83] or where the creditor has no right to execution.[84] The aid of equity will not be given a judgment creditor who has been grossly negligent in enforcing his claim against the judgment debtor, where the rights of subsequent purchasers have intervened.[85] What constitutes laches[86] depends upon the circumstances of each particular case,[87] and one who has by ignorance, or other sufficient reasons, failed to collect a judgment during the time limited by law for its collection, may, nevertheless, be given the aid of equity to remove a fraudulent conveyance which stands as a barrier to the present enforcement of the judgment.[88]

General creditors' suits. See 11 C. L. 938

§ 2. *Property which may be reached.*[89] See 11 C. L. 938—It may be stated generally that any property in which the debtor has an assignable interest may be reached by a creditors' suit.[90] It is available to reach property fraudulently conveyed by the debtor,[91] and property held in the name of a fictitious person,[92] and also property held in trust[93] for the debtor,[94] regardless of any question of fraud,[95]

79. Code 1907, § 3739, allows creditor to subject property fraudulently conveyed, though he has secured no judgment or lien. Green v. Wright [Ala.] 49 S 320.

80. Where corporation was dissolved and could not be sued, a creditor without judgment or lien was allowed to sue the statutory trustees for an accounting. American Ice Co. v. Pocano Spring Water Ice Co., 165 F 714. See Corporations, §§ 12, 16.

81. Bill authorized by Code 1907, § 3739. Exchange Nat. Bank v. Stewart [Ala.] 48 S 487.

82. Code 1906, § 4147, provides that a return showing no property found is a sufficient basis for such suit. Hall v. McGregor, 65 W. Va. 74, 64 SE 736.

83. General Elec. Co. v. Hurd, 171 F 984.

84. Under Oregon statute, where five years have elapsed without execution on judgment, creditors' right to execution is conditioned upon leave of court, and until he has obtained such leave he cannot be said to have such right. General Elec. Co. v. Hurd, 171 F 984.

85. Foote v. Harrison, 137 Wis. 588, 119 NW 291.

86. See, generally, Equity, § 3.

87. A deed from a third person to its judgment debtor's children, made ten years before action to enforce judgment was brought, was not too late in view of the fact that the judgment creditor had no knowledge of the transfer. Foote v. Harrison, 137 Wis. 588, 119 NW 291.

88. Holland v. Grote, 193 N. Y. 262, 86 NE 30.

89. **Search Note:** See notes in 7 C. L. 1009; 9 A. S. R. 405; 29 Id. 360; 90 Id. 497.
See, also, Creditors' Suit, Cent. Dig. §§ 12-41; Copyrights, Cent. Dig. § 48; Dec. Dig. § 8; 9 Cyc. 889-976; 5 A. & E. Enc. P. & P. 439.

90. A judgment creditor upon a return of nulla bona has the right by a bill in chancery to have a mortgage upon the land of the judgment creditor, which has matured, foreclosed, and, without the consent of the mortgagee, have the land sold and the proceeds applied, first, to the payment of the mortgage debt, and the surplus to his judgment. Schoolfield v. Cogdell [Tenn.] 113 SW 375. Under Rev. Laws, c. 134, § 2, any estate in expectancy so limited to a person that, in the event of his death before the contingency happens, the estate descends to his heirs, and he may sell the land subject to the contingency, is subject to sale for his debts. Cashman v. Bangs, 200 Mass. 498, 86 NE 932.

91. Westcott v. Sioux City [Iowa] 119 NW 749; Allen v. Lyness, 81 Conn. 626, 71 A 936; Kennard v. Curran, 239 Ill. 122, 87 NE 913. See Fraudulent Conveyances, § 6. Fraudulent conveyance by corporation. Exchange Nat. Bank v. Stewart [Ala.] 48 S 487; Hubbard v. United Wireless Tel. Co., 62 Misc. 538, 115 NYS 1016. See Corporations, § 16B. Personal property as well as real property may be reached where alleged that same was disposed of to defraud rights of the judgment creditor. Hubbard v. United Wireless Tel. Co., 62 Misc. 538, 115 NYS 1016. The grounds upon which a judgment creditor may subject property conveyed by the debtor to the payment of his judgment are fraud, or want of consideration, or that such third party holds the title in that subject to the payment of all just debts. Westcott v. Sioux City [Iowa] 119 NW 749.

92. Anderson v. Wilson [Iowa] 120 NW 677. Evidence held to sustain finding that record owner of property was fictitious and that property was really owned by defendant. Id.

93. See Trusts, §§ 2-6.

94. Kennard v. Curran, 239 Ill. 122, 87 NE 913.

95. It is no defense, in an action to sub-

but not that which is held in trust to receive the rents, profits, and income thereof and apply them to the support of the cestui qui trust.[96]

§ 3. *Pleading and procedure.*[97]—See 11 C. L. 999—The bill must set forth with particularity every material fact which it will be necessary to prove in order to establish the right to the relief prayed for.[98] The suit of one creditor may be for the benefit of all,[99] and in such case the suit cannot be discontinued without leave of court,[1] but, while a creditor may be allowed to share in the fund any time before it has been distributed, he cannot come in at a subsequent term and after a decree has been made disposing of the matters in controversy.[2] A creditors' suit may be maintained by an assignee of a judgment,[3] or by an administrator who has secured a judgment.[4] When the property or interest sought to be subjected is sufficiently described in the bill,[5] the lien obtained on the equitable assets of a debtor by a creditor's suit attaches at the time of filing of the bill,[6] and is superior to the rights of personal representatives of the debtor except as to property exempted by statute.[7] The adequacy of consideration paid by the assignee of a judgment obtained in a creditors' suit cannot be questioned by the defendant in a proceeding by the assignee to enforce same.[8] Where a trust deed creditor has been made a party to an actior brought by a subsequent judgment creditor, he cannot sell the land under the trust deed out of court but must await the finding of the court as to the priority of liens.[9] Upon a judgment for the complainant in a creditors' suit against trustees of the debtor, the allowance of costs and disbursements to the trustees[10] is discretionary with the court.

A discovery usually may be had in aid of the relief sought by a creditors' suit,[11] and an injunction will be granted in a proper case.[12]

Criminal Conversation, see latest topical index.

ject property transferred by debtor to another to be held in trust for him, that at the time of the transfer he had sufficient property to pay his debts. Kelley v. Bell [Ind.] 88 NE 58.

96. If the trustee can transfer the property by assignment or otherwise, it can be reached by the creditors of the cestui que trust. Bergmann v. Lord, 194 N. Y. 70, 86 NE 828. Beneficiaries under will of mother holding property subject to lien for care and support of aged father cannot be compelled to pay creditor of father money value of such care and support. Merchants' Nat. Bank v. Crist [Iowa] 118 NW 394. The husband's election to accept provisions made by his deceased wife's will for his care during the remainder of his life in lieu of his statutory interest in her estate is binding upon his creditors and cannot be controlled by them, and fact that husband surrendered right of property which might have been subjected to payment of debts in exchange for benefits which his creditors could not so subject to payment of debts held immaterial. Id.

Spendthrift trusts: See Trusts, §§ 2, 6.

97. Search Note: See note in 5 L. R. A. (N. S.) 89.

See, also, Creditors' Suit, Cent. Dig. §§ 100-221; Dec. Dig. §§ 24-59; 12 Cyc. 35-43, 46, 48-65; 5 A. & E. Enc. P. & P. 556.

98. Hageman v. Brown [N. J. Eq.] 73 A 862.

99. American Hay Co. v. Dry Dock, etc., R. Co., 165 F 486. Where claims against a corporation for which a receiver had been appointed was being proved, it was unnecessary for other creditors to intervene and file pleadings as complainants, even though their claims were entitled to priority. Id.

1. Deane v. Perkins [Mich.] 15 Det. Leg. N. 1084, 119 NW 1093. Other creditors who had filed claims acquired an interest in the suit so that it could not be discontinued without a consideration of their rights. Id.

2. United States Fidelity & Guar. Co. v. Rainey [Tenn.] 113 SW 397.

3. Moore v. U. S. One Stave Barrel Co., 141 Ill. App. 104.

4. Administrator held to have the right to prosecute creditors' bill without reference to whom he should account to. Walker v. Montgomery, 236 Ill. 244, 86 NE 240.

5. Description of property in bill held sufficient to sustain lien. Saginaw County Sav. Bank v. Duffield [Mich.] 16 Det. Leg. N. 431, 122 NW 186.

6. Plummer v. School Dist. No. 1 [Ark.] 118 SW 1011.

7. Saginaw County Sav. Bank v. Duffield [Mich.] 16 Det. Leg. N. 431, 122 NW 186. Either appointment of a receiver or issue of injunction held to create a lien upon debtor's estate so as to prevent **abatement** upon death of debtor. Id. Filing claims with commissioners on claims held not **waiver of lien** obtained in creditor's suit. Id.

8. Champagne Lumber Co. v. Jahn [C. C. A.] 168 F 510.

9. Stafford v. Jones, 65 W. Va. 567, 64 SE 723.

10. Allowance of costs in such action held analogous to process of foreign attachment under Rev. Laws, c. 189, § 67. Cashman v. Bangs, 200 Mass. 498, 86 NE 932. Allowance

CRIMINAL LAW.

The scope of this topic is noted below.[13]

§ 1. Elements of Crime, 1152. Sources of the Criminal Law, 1152. Attempts, 1153. Criminal Intent, 1153. Felonies and Misdemeanors, 1154. Infamous Crimes, 1155.
§ 2. Defenses, 1155.
§ 3. Capacity to Commit Crime, 1155.
§ 4. Parties to Crime, 1156.
§ 5. Former Adjudication and Second Jeopardy, 1158.
§ 6. Punishment of Crimes, 1161. Extent of Punishment, 1161. Place of Imprisonment, 1162. Second Offense, 1162.
§ 7. Rights in Property the Subject of Crime, 1163.

§ 1. *Elements of crime.*[14]—See 11 C. L. 940—The terms crime, offense, and criminal offense, are ordinarily used interchangeably and include any breach of a law established for the protection of the public.[15] A quasi crime is an offense not constituting a crime at law but which is in the nature of a crime.[16] The elements of a crime ordinarily include a joint operation of act and intention [17] or criminal negligence,[18] but not a future possibility.[19] The same act may constitute different offenses,[20] subject to the doctrine of former jeopardy.[21]

*Sources of the criminal law.*See 11 C. L. 940—Crimes may be created and defined by municipalities within the scope of their delegated power [22] and by state and federal government within the respective province of each,[23] subject to constitutional limitations,[24] especially those prohibiting discrimination,[25] but an act to constitute

of only taxable costs to trustees held not error. Id.

11. Comp. Laws, §§ 436, 437. Saginaw County Sav. Bank v. Duffield [Mich.] 16 Det. Leg. N. 431, 122 NW 186. Where **answer** was a general denial, plaintiff's remedy was, under Code, § 4088, to require full discoveries by process of contempt, and not a motion to strike. W. A. Jordan Co. v. Sperry Bros. [Iowa] 119 NW 692. The defendant must answer with fullness and particularity a creditor's bill that property is being fraudulently concealed. Hageman v. Brown [N. J. Eq.] 73 A 862.

12. Against transfer of property by defendant. Saginaw County Sav. Bank v. Duffield [Mich.] 16 Det. Leg. N. 431, 122 NW 186.

13. This topic includes only the general principles of the substantive law of crimes; criminal procedure (see Arrest and Binding Over;* Indictment and Prosecution *) and matters relating to particular crimes (see topics dealing with particular crimes in question as Homicide;* Larceny,* etc.) being treated elsewhere, as is also criminal capacity and liability of corporations (see Corporations,* § 9).

14. Search Note: See notes in 5 C. L. 884; 11 L. R. A. 807; 17 Id. 764; 19 Id. 775; 20 Id. 52; 25 Id. 434; 41 Id. 650; 3 L. R. A. (N. S.) 530; 6 Id. 804; 5 A. S. R. 899; 20 Id. 741; 40 Id. 656; 78 Id. 235, 236; 110 Id. 149.

See, also, Criminal Law, Cent. Dig. §§ 1-34, 51, 52; Dec. Dig. §§ 1-30, 44, 45; 12 Cyc. 129-164, 176-183; 15 Id. 540; 28 Id. 49; 3 A. & E. Enc. L. (2ed.) 250; 7 Id. 861; 8 Id. 274; 16 Id. 245; 19 Id. 623; 25 Id. 1153; 26 Id. 764.

15. They are distinguished from an infringement of private rights only. State of Ohio v. Ward, 8 Ohio N. P. (N. S.) 561.

16. It is class of offenses against public, which though not declared crimes are wrongs against local or general public, which it is proper should be repressed or punished by forfeitures and penalties. Southern R. Co. v. McNeeley [Ind. App.] 88 NE 710.

17. Carbo v. State, 4 Ga. App. 583, 62 SE 140.

18. Criminal negligence necessarily implies not only knowledge of probable consequences which may result from use of a given instrumentality, but also willful or wanton disregard of probable effects of such instrumentality upon others likely to be affected thereby. Carbo v. State, 4 Ga. App. 583, 62 SE 140.

19. Obstruction of highway not public nuisance because it may possibly be dangerous in future. People v. Eckerson, 117 NYS 418.

20. Sturgis v. State [Okl. Cr. R.] 102 P 57. Same act may constitute offense under both state and federal law. United States v. Haas, 167 F 211. By one criminal act a person may violate more than one criminal statute, since more than one statute may cover same act. State v. Johns [Iowa] 118 NW 295.

21. See post, § 5.

22. See Municipal Corporations, § 10. City has no power under ordinance over offense punishable under criminal law of state. State v. Black, 150 N. C. 866, 64 SE 778.

23. See Constitutional Law, § 5. Punishment by state of crime committed through mails does not infringe on federal province. Rose v. State, 4 Ga. App. 588, 62 SE 117.

24. See Constitutional Law.

25. Criminal law must not improperly discriminate or deny equal protection of law to all parties. Greene v. State, 83 Neb. 84, 119 NW 6; Ex parte Mallon [Idaho] 102 P 374. Code 1896, § 4561, prescribing greater penalty for misdemeanors committed by corporation than is prescribed for like offenses committed by individual, is improperly discriminating. Birmingham Waterworks Co. v. State [Ala.] 48 S 658. Laws 1901, p. 494, c. 93, prescribing punishment for blackmail, contravenes state and federal constitution in that it discriminates and is made to apply only when offense is committed against citizen or resident of state. Greene v. State, 83 Neb. 84, 119 NW 6. Statute cited in preceding note held not discriminating in that it embraces commodities only and excludes labor. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Rev. St. 1899, §§ 8965, 8966, 8971, 8978; Ann. St. 1906, pp. 4150, 4152, 4153,

an offense must come within the spirit and letter of the statute,[26] and must ordinarily be clearly defined thereby,[27] although in some cases reference may be had to the common law for such definition.[28] The common law of crimes has been repealed in most states either by express statutory provisions[29] or by necessary implications therefrom.[30]

No public officer can, by consent or connivance in a criminal act, nullify the effect of a criminal law.[31] Nor will the mere transition from a territorial to a state form of government of itself abolish any crime.[32]

*Attempts.*See 11 C. L. 940—An attempt is an act tending toward the accomplishment of a purpose which exceeds a mere design and implies an endeavor, but falls short of the complete execution of the thing intended.[33] Mere intent where there is no act done in furtherance of the crime,[34] or mere preparatory acts for the commission of a crime, and not proximately leading to its consummation, do not constitute an attempt to commit the crime.[35] Nor is it always essential to criminality that the act attempted shall have been a possibility.[36]

*Criminal intent.*See 11 C. L. 941—While one is chargeable with criminal intent only where the act is voluntary,[37] such intention may be inferred from circum-

4157, prohibiting pooling, trusts, etc., held not to discriminate or to impose greater or different punishment on corporations than on individuals. Id. Reasonable **classification of offenses** is permissible under equality clause of federal constitution. Id. While state may classify offenses according to their nature and affix penalties according to its discretion, such classification cannot be made arbitrarily, but must rest upon some difference which bears a reasonable and just relation to act in respect to which classification is proposed. Birmingham Waterworks Co. v. State [Ala.] 48 S 658. Laws 1902, Act No. 107, p. 162, is an unconstitutional discrimination in so far as it attempts **grading felonies.** State v. Evans, 122 La. 273, 47 S 603.

26. Sutherland v. Com. [Va.] 65 SE 15. Act must come plainly under statute. Withers v. Com. [Va.] 65 SE 16. Criminal statutes apply only to cases which must, with strict construction, come within their language. Wright v. Com. [Va.] 65 SE 19. Violation of lawful regulation is not crime in absence of specific statutory declaration. United States v. Keitel, 157 F 396. One cannot commit statutory offense except under circumstances specified by statute. Peinhardt v. State [Ala.] 49 S 831. Crime cannot exist in absence of any fact made essential thereto by statute, even though it should appear that such fact would have been brought into existence had accused done or not done certain things. Stewart v. State [Miss.] 49 S 615. Carrying pistol in saddle bag, carried in hand, held not to come within statute forbidding carrying pistol concealed "about the person." Sutherland v. Com. [Va.] 65 SE 15.

27. Brown v. State, 127 Wis. 543, 119 NW 336. There can be no crime against authority of United States except where forbidden act is defined and penalized by statute. United States v. Grimaud, 170 F 205. 30 St. 35 (U. S. Comp. St. 1901, p. 1540) for protection of forest reserves is void for failure to define acts which shall construe offense. Id.

28. Shires v. State [Okl. Cr. R.] 99 P 1100.

29. State v. Dalton, 134 Mo. App. 517, 114 SW 1132.

30. Repealed by implication where it appears that both cannot stand or that there was an intention to substitute statute for common law. State v. Dalton, 134 Mo. App. 517, 114 SW 1132. Not repealed by statute unless express or there be a revision of whole subject covered, and such statute is in inclusive or negative terms, or so repugnant to common law as to imply a negative. Id.

31. Cannot destroy criminal character of act done or free perpetrator from prosecution, as by conniving at sale of liquor. De Graff v. State [Okl. Cr. R.] 103 P 538.

32. Ex parte McCarty [Tex. Cr. R.] 119 SW 682.

33. Flower v. Continental Casualty Co. [Iowa] 118 NW 761. It is ordinarily an act done in part execution of a crime. Id. In attempt to commit crime, three elements are involved, viz., the intent to commit the crime, the performance of some act toward its commission, and failure to consummate its commission. State v. Thompson [Nev.] 101 P 557. Attempt of defendant to procure another to kill third party, his act in procuring and loading gun and starting with party procured to point of intended killing where killing was prevented by arrest, held to constitute "attempt" within meaning of Code 1906, § 1049. Stokes v. State [Miss.] 46 S 627.

34. However clear the intention, if no act be done in furtherance of such intention, there is no attempt, but, where intent or design is clearly shown, slight acts done in furtherance thereof will constitute an attempt. Stokes v. State [Miss.] 46 S 627.

35. Moss v. State [Ga. App.] 65 SE 300.

36. Not essential where commission becomes impossible through outside interference or because of miscalculation as to supposed opportunity. Stokes v. State [Miss.] 46 S 627.

37. Louisville R. Co. v. Com. [Ky.] 114 SW 343. Person doing act which is otherwise criminal, through accident or mistake, or under compulsion and not with free exer-

stances,[38] and an intention to accomplish the natural results of an act will be presumed.[39] Where the offense charged is the violation of a statute, the only intent necessary is the intent to do the prohibited act.[40] The mere doing of the prohibited act is not, however, sufficient to constitute the offense where intent is essential,[41] unless intent be shown,[42] but, where intent is not essential, the rule is otherwise,[43] and in such cases ignorance of fact will not generally constitute a defense,[44] especially where an illegal motive exists.[45] However, where a party through fraud is induced to do an apparently lawful act with no intimation that he is thereby assuming any risk, no crime is committed.[46] If any crime was intended, it is not always essential that there was specific intent to commit the particular injury.[47]

Felonies and misdemeanors. See 11 C. L. 941—At comman law, felony was an offense against life, property, habitation and public justice,[48] which occasioned a total forfeiture of land or goods, or both, and a misdemeanor was an offense less than a felony.[49] According to the present general use of the terms, a felony is a crime punishable by death or imprisonment in a state prison,[50] and every other offense is a misdemeanor.[51]

cise of his own will, is not guilty of criminal intent. Commonwealth v. New York Cent. & H. R. R. Co., 202 Mass. 394, 88 NE 764.

38. May be inferred from conduct of parties and other facts and circumstances disclosed by evidence. State v. Thompson [Nev.] 101 P 557. Intent to commit crime perpetrated in systematic manner may be proven from other similar transactions. People v. Sidelinger, 9 Cal. App. 298, 99 P 390.

39. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823. Malicious and guilty intent may be conclusively presumed from deliberate commission of unlawful act, under Code Civ. Proc. § 1962. People v. Botkin, 9 Cal. App. 244, 98 P 861. Railway running cars without separate compartments for negroes held presumptively to have knowingly and willfully violated statute. Louisville R. Co. v. Com. [Ky.] 114 SW 343.

40. Knight & Jillison Co. v. Miller [Ind.] 87 NE 823.

41. See Homicide, §§ 2, 4, and like topics. **Intent is essential** element of attempt. Stokes v. State [Miss.] 46 S 627. Intent based on knowledge of proper rate is essential to criminal violation by shipper of Elkin's Act, 32 St. 847, § 1 (U. S. Comp. St. Supp. 1907, p. 880), making it a crime to receive benefit of discrimination in rates of common carrier. Standard Oil Co. v. U. S. [C. C. A.] 164 F 376. Intent based on knowledge of insolvency of bank held essential to offense of receiving deposits while bank was insolvent. Stewart v. State [Miss.] 49 S 615. Intent is essential to crime of committing or maintaining public nuisance. People v. Eckerson, 117 NYS 418. Intent held essential to crime of criminal libel by officers of newspaper corporation. People v. Warden of City Prison, 118 NYS 487. Intent being essential, publication of criminal libel was not crime on part of officers of newspaper corporation not shown to have had anything to do with active management of paper. Id. Intent to deprive owner and knowledge of theft is essential to crime of receiving stolen property. People v. Sidelinger, 9 Cal. App. 298, 99 P 390. Premeditated intent is essential to first degree murder. Morris v. Ter., 1 Okl. Cr. R. 617, 101 P 111. License Law (Laws 1886, Act. No. 85, p. 124) makes intent part of crime of its violation. State v. Monfre, 122 La. 513, 47 S 876.

42. Intent to steal package held to have been shown in case where party placed false label upon it. People v. Zuckerman, 133 App. Div. 615, 118 NYS 127.

43. Where intent is not essential and act is unlawful, honesty of purpose is not complete defense. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634. Where statute does not by use of such words as "willfully" or "maliciously" make intent essential element, act may constitute a crime although party had no design to disobey law. Commonwealth v. New York Cent. & H. R. R Co., 202 Mass. 394, 88 NE 764.

44. Under Pen. Code, § 261, it is not essential to constitute crime of rape that accused knew facts which constituted his act a crime. People v. Sheffield, 9 Cal. App. 130, 98 P 67. Defendant held guilty of carrying pistol at prohibited time and place though he did not know he had no right to carry it. McCallister v. State, 55 Tex. Cr. R. 392, 116 SW 1154.

45. People v. Sheffield, 9 Cal. App. 130, 98 P 67. Ignorance of fact held no defense where party knew he was committing an offense and only effect of matter of which he was ignorant was to make the offense greater. State v. Audette, 81 Vt. 400, 70 A 833.

46. Man marrying woman having living husband, but who represented herself as single and whom he believed to be single, was not guilty of adultery. State v. Audette, 81 Vt. 400, 70 A 833.

47. Intent to kill may be shown from evidence of act of shooting into crowd without aiming at any specific person. Phillips v. U. S. [Okl. Cr. R.] 103 P 861.

48. As for example, murder, robbery, burglary, and breach of prison. Leeman v. Public Service R. Co. [N. J. Law] 72 A 8.

49. State v. Biggs [Or.] 97 P 713.

50. People v. Craig, 60 Misc. 529, 112 NYS 781. Under B. & C. Comp. § 1230. State v. Biggs [Or.] 97 P 713. Under Penal Code, §§ 4, 5, 6. People v. Craig, 129 App. Div. 851, 114 NYS 833.

But offenses of illicit liquor dealing and

Infamous crimes.[See 11 C. L. 941]—Whether an offense is infamous is now important only with reference to the necessity of prosecuting by indictment and its determination is elsewhere treated.[52]

§ 2. *Defenses.*[53]—[See 11 C. L. 941]—Coercion may constitute a sufficient defense when it is such as to put the accused in danger of his life or member or in reasonable fear thereof.[54] It is no defense that the accused has violated another law besides the one charged,[55] or that another has been charged with the same crime [56] or is also punishable therefor.[57]

§ 3. *Capacity to commit crime.*[58]—[See 11 C. L. 942]—Since an insane person cannot legally be guilty of a criminal intent,[59] insanity existing at the time of the commission of the act [60] may constitute a defense,[61] where the degree was so great as to have controlled the will of the subject and to have taken away from him the freedom of moral action.[62] The burden is on the accused [63] to overcome the pre-

of receiving and concealing smuggled property in violation of federal law, though punishable by term in penitentiary greater than one year, are not felonies within meaning of Code Cr. Proc. 1895, art. 768, making persons convicted of felonies incompetent to testify in criminal cases. Cabrera v. State [Tex. Cr. R.] 118 SW 1054.

51. Under B. & C. Comp. § 1231. State v. Biggs [Or.] 97 P 713.

52. See Indictment and Prosecution, § 4a.

53. Search Note: See notes in 11 C. L. 941; 19 L. R. A. 357; 25 Id. 341; 72 A. S. R. 700; 106 Id. 721.

See, also, Criminal Law, Cent. Dig. §§ 35-49; Dec. Dig. §§ 31-43; 12 Cyc. 155-164; 8 A. & E. Enc. L. (2ed.) 296; 9 Id. 15.

54. Henderson v. State, 5 Ga. App. 495, 63 SE 635.

55. State v. Burns [Conn.] 72 A 1083.

56. Arrest of defendant's son for unlawful sale of intoxicating liquors held not bar to conviction of defendant. People v. Boos [Mich.] 15 Det. Leg. N. 1048, 120 NW 11.

57. Fact that agent also is punishable for the crime does not relieve corporation. Rose v. State, 4 Ga. App. 588, 62 SE 117.

58. Search Note: See notes in 5 C. L. 887; 18 L. R. A. 224; 36 Id. 196, 465; 38 Id. 577; 39 Id. 262; 40 Id. 269; 45 Id. 579; 10 L. R. A. (N. S.) 999, 1032; 13 Id. 1024; 63 A. S. R. 100; 69 Id. 386; 76 Id. 83; 89 Id. 386; 3 Ann. Cas. 926.

See, also, Criminal Law, Cent. Dig. §§ 40, 41, 53-70; Dec. Dig. §§ 46-58; 12 Cyc. 164-176; 8 A. & E. Enc. L. (2ed.) 296; 17 Id. 403.

59. State v. Brown [Utah] 102 P 641.

60. Insanity not manifest until after act was committed is no defense. Commonwealth v. De Marzo [Pa.] 72 A 893. **Evidence** that insanity is continuous and incurable is admissible as bearing upon its existence at time of commission of act. People v. Chanler, 117 NYS 322. Condition of mind at time of commission may be determined from evidence previous thereto for a period within sound discretion of court. State v. Crowe [Mont.] 102 P 579.

61. Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600; State v. Arnold [Kan.] 100 P 64. Admissible under **plea** of not guilty. People v. Carlin, 194 N. Y. 448, 87 NE 805.

62. Commonwealth v. Lewis, 222 Pa. 302, 71 A 18. To constitute defense, must be such mental unsoundness as denotes mind so devoid of understanding that it cannot distinguish right from wrong and has no freedom of moral action. Commonwealth v. Hallowell [Pa.] 72 A 845. Constituted defense only where defendant had not mind sufficient to comprehend his relation to others and to know criminal character of act and that he was doing wrong. State v. Cloninger, 149 N. C. 567, 63 SE 154; Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600. **Evidence** of information imparted to defendant three months prior to offense charged and tending to affect his mental condition held admissible as bearing on question of sanity. State v. Smith [Kan.] 102 P 1098. Evidence as to whether defendant had sufficient mental capacity to distinguish right from wrong, and whether he knew it was wrong to shoot a man or to steal or to commit burglary, held material to determine sufficiency of defense. State v. Crowe [Mont.] 102 P 679.

Held no defense: Where defendant knew that in doing act he was doing wrong. State v. Brown [Utah] 102 P 641. Where defendant had sufficient capacity at time he committed act to discern between right and wrong with reference to act. State v. Craig, 52 Wash. 66, 100 P 167. Delusion or mental weakness which does not render mind incapable of knowing nature and quality of act and that it is wrong. State v. Arnold [Kan.] 100 P 64. Where defendant, though laboring under partial hallucination or delusion, understood nature and character of his act, had knowledge that it was wrong and criminal and mental power sufficient to apply that knowledge to his own case, and knew if he did act he would do wrong and would receive punishment, and if further he had sufficient power of memory to recall relation in which he stood to others, and others stood to him, and that act in question was contrary to plain dictates of justice and right, injurious to others, and in violation of dictates of duty. Commonwealth v. Lewis, 222 Pa. 302, 71 A 18. Under Pen. Code, § 21, where it was not such defect of reason that defendant did not know act or quality of act or know that act was wrong. ("Defect of reason" means a disease of the mind). People v. Carlin, 194 N. Y. 448, 87 NE 805. Where accused knew nature of act and that it was wrong, although it is claimed his act resulted from **incontrollable impulse.** Smith v. State [Miss.] 49 S 945. Irresistible impulse is no longer a defense in Texas. Thomas v. State, 55 Tex. Cr. R. 293, 116 SW

sumption which exists in favor of his sanity,[64] but, for this purpose, such evidence as will create a reasonable doubt is sufficient.[65] When he has overcome this presumption, the state must usually establish his sanity beyond a reasonable doubt [66] and submit the issue to the jury.[67]

At common law intoxication was not a defense and it is now usually effective only for the purpose of affecting the degree of guilt.[68]

§ 4. *Parties to crime.*[69]—See 11 C. L. 942—A party may be a guilty participant in a crime which he could not have committed alone,[70] and one who uses an innocent party to consummate a crime may be guilty as principal, whether he be present or not.[71] Since there are no accessories in misdemeanors,[72] all who procure, counsel, command, encourage, aid, or abet [73] in the commission of a misdemeanor, are principals.[74] To constitute one an accessory or accomplice,[75] there must have been guilty purpose and knowledge,[76] and mere presence is insufficient unless the presence is such that it may be regarded as an act of encouragement.[77] An accessory after the fact is one who, knowing a felony to have been committed, assists the

600. **Epilepsy** alone held no defense, since no presumption of insanity arises therefrom. Commonwealth v. Snyder [Pa.] 73 A 910.

63. Accused has burden of proving insanity. Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600; State v. Brown [Utah] 102 P 641; Johnson v. State [Fla.] 49 S 40. Defendant has burden of overcoming presumption, unless evidence of state raises doubt as to his sanity. Johnson v. State [Fla.] 49 S 40.

64. Defendant is presumed to have been sane. State v. Brown [Utah] 102 P 641. Accused is presumed to have had sufficient degree of reason to be responsible for his acts. Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600.

65. Burden is on defendant to rebut presumption of sanity, but he need not establish insanity beyond reasonable doubt. State v. Barker, 216 Mo. 532, 115 SW 1102. Defense may be sufficient where defendant raises reasonable doubt as to his sanity, since he is not required to sustain burden of satisfactorily establishing his insanity. State v. Crowe [Mont.] 102 P 579. Sufficient that defendant raise reasonable doubt. Johnson v. State [Fla.] 49 S 40.

66. State v. Brown [Utah] 102 P 641.

But where defendant raised reasonable doubt as to his sanity, state was held not required to remove this doubt by preponderance of evidence. State v. Craig, 52 Wash. 66, 100 P 167.

67. Question of sanity is for jury. O'Connel v. State, 5 Ga. App. 234, 62 SE 1007; State v. Barker, 216 Mo. 532, 115 SW 1102.

68. In Pennsylvania it cannot entirely absolve perpetrator of murder from responsibility to answer in some degree for his crime. Commonwealth v. Nazarko [Pa.] 73 A 210. **Instruction** held not explicit enough in that it did not show on account of what particular feature of case defense of drunkenness was admissible. State v. Wilson [La.] 49 S 986.

69. **Search Note:** See notes in 5 C. L. 889; 2 L. R. A. (N. S.) 897; 6 Id. 1154; 15 Id. 1013. See, also, Criminal Law, Cent. Dig. §§ 71-111; Dec. Dig. §§ 59-82; 12 Cyc. 183-194; 1 A. & E. Enc. L. (2ed.) 257, 389; 2 Id. 29; 20 A. & E. Enc. P. & P. 278.

70. Woman procuring a girl to minister to sexual desires of a man was held guilty of rape. State v. Burns [Conn.] 72 A 1083.

71. Under Pen. Code 1895, art. 77. Farris v. State, 55 Tex. Cr. R. 481, 117 SW 798. Party selling animal running at large to innocent purchaser was guilty of theft upon the animal being taken in charge by alleged purchaser. Id.

72. Loeb v. State [Ga. App.] 64 SE 338. There cannot be accessory after commission of misdemeanor. Sturgis v. State [Okl. Cr. R.] 102 P 57.

73. "Aid" and "abet" taken together comprehend all assistance given by acts, words, encouragement, or by presence, actual or constructive. Loeb v. State [Ga. App.] 64 SE 338. "Abet" includes knowledge of the wrongful purpose of perpetrator and counsel and encouragement in the crime. Id.

74. Loeb v. State [Ga. App.] 64 SE 338; Southern Exp. Co. v. State [Ga. App.] 64 SE 341; Strong v. State [Ark.] 114 SW 239. Parties present aiding and abetting were principals. Reed v. State, 53 Tex. Cr. R. 4, 108 SW 368. At common law, also under Kirby's Dig. § 1561, all persons concerned in crime less than felony are principals. Strong v. State [Ark.] 114 SW 239. Party for whom liquor was sold by another as his agent was principal. Schwulst v. State, 52 Tex. Cr. R. 426, 108 SW 698. One who joins with others in purchasing liquor in five-gallon quantity to be divided up among contributors in less than five-gallon quantities was liable as principal for aiding and abetting in sale of liquor in less than five gallon quantities. Strong v. State [Okl.] 114 SW 239.

75. As to what constitutes one an accomplice under the rule of admissibility of testimony, see Indictment and Prosecution, § 9.

76. Held that party must have aided and abetted with knowledge that his codefendant was robbing. Williams v. Com., 33 Ky. L. R. 330, 110 SW 339. Mere picking up bill from floor where complaining witness had thrown it upon demand of codefendant armed with gun, and handing it to such codefendant, is insufficient alone to constitute one an accomplice. Id.

77. Presence was sufficient where bystander was friend of perpetrator and knew that his

felon,[78] but mere failure to give information of a crime will not, in the absence of other acts of comfort or assistance, constitute one such an accessory.[79] At common law an accessory after the fact may also be an accessory before the fact.[80] A party abandoning an undertaking ceases to be an accessory from the time of such abandonment.[81] The dividing line between principal and accessory in the commission of a felony, is the commencement of the commission of the principal offense.[82] In some states the common-law distinction between principal and accessory has been abolished,[83] and an accessory may be convicted as a principal[84] of aiding[85] or abetting[86] in the perpetration of a crime, even though not present at its commission.[87] In some cases the prior conviction of a principal is essential to the convic-

presence would be regarded by perpetrator as an encouragement and protection. State v. Cloninger, 149 N. C. 567, 63 SE 154.

78. State v. Naughton [Mo.] 120 SW 53. As where he harbors the felon or renders him any other assistance to elude punishment. Levering v. Com. [Ky.] 117 SW 253. At common law, as where he, knowing a felony has been committed by another, shelters, receives, relieves, comforts, or assists the felon. State v. Jones [Ark.] 120 SW 154. Two things are necessary at common law to constitute one an accessory after the fact: First, the felony must be complete; second, the defendant must know that the felon is guilty. Id. See Kirby's Dig. § 1562, for definition of accessory after the fact. Id. It is not necessary for legal charge to be made against felon before the crime of being accessory after fact can be committed. State v. Jones [Ark.] 120 SW 154.

79. Levering v. Com. [Ky.] 117 SW 253. One is not accessory who merely neglects to make known to authorities that felony has been committed, or forbears to arrest felon. Id.

80. State v. Naughton [Mo.] 120 SW 53.

81. Party abandoning undertaking after breaking into house, although guilty of burglary for such offense, was liable as accessory of parties with him who later broke into house a second time. Schwartz v. State, 55 Tex. Cr. R. 36, 114 SW 809.

82. For party to be principal to theft it was essential that he be present and assist in theft or be keeping watch or doing something that makes him principal under the statute, it not being sufficient that he entered into conspiracy to commit the theft. O'Quinn v. State, 55 Tex. Cr. R. 18, 115 SW 39.

NOTE. Principal and accessory distinguished: If parties acted together in commission of offense, they are principals. If they agreed to commit offense together, but did not act together in its commission, the one who actually committed it is principal, while the other, who was not present at the commission, and who was not in any way aiding in its commission, as by keeping watch, or by securing safety or concealment of the principal, would be an accomplice. To constitute a principal, the offender must either be present where crime is committed, or he must do some act during time when offense is being committed which connects him with act of commission in some of ways named in statute Where acts committed occur prior to commission of principal offense, or subsequent thereto, and are independent of and disconnected with actual commission of principal offense, and no act is done by party during commission of principal offense in aid thereof, such party is not a principal offender, but is an accomplice or an accessory, according to the facts. This definition was approved in case of Smith v. State, 21 Tex. App. 107, 17 SW 552. This case has been followed by a great number of decisions by this court. See Wright v. State, 40 Tex. Cr. R. 45, 48 SW 191; Bell v. State, 39 Tex. Cr. R. 677, 47 SW 1010; Tittle v. State, 35 Tex. Cr. R. 96, 31 SW 677; Gentry v. State, 24 Tex. App. 478, 6 SW 321; Yates v. State [Tex. Cr. App.] 42 SW 296; Criner v. State, 41 Tex. Cr. R. 290, 53 SW 873; Walton v. State, 41 Tex. Cr. R. 454, 55 SW 566; McIver v. State [Tex. Cr. App.] 37 SW 745; Fruger v. State, 50 Tex. Cr. R. 621, 99 SW 1014; McDonald v. State, 46 Tex. Cr. R. 4, 79 SW 542; Eddens v. State, 47 Tex. Cr. R. 529, 84 SW 828; Barnett v. State, 10 Tex. Cr. R. 560; Id., 46 Tex. Cr. R. 459, 80 SW 1013; McAlister v. State, 45 Tex. Cr. R. 258, 76 SW 760, 108 Am. St. Rep. 958.—From O'Quinn v. State, 55 Tex. Cr. R. 18, 115 SW 39.

83. Gen. St. 1902, § 1583, abolishes distinction. State v. Burns [Conn.] 72 A 1083. Penal Code, §§ 971, 30, 31, abrogated distinction between accessory before fact and principal. People v. Lewis, 9 Cal. App. 279, 98 P 1078. Abolished in Oklahoma. Sturgis v. State [Okl. Cr. R.] 102 P 57.

84. Aider and abettor in crime of housebreaking may be convicted as principal, although he did not enter house. Vance v. Com. [Ky.] 115 SW 774. Under 1 Mills' Ann. St. § 1168 (Rev. St. § 1620), one who aids and abets in commission of crime may be treated as principal. Griffin v. People, 44 Colo. 533, 99 P 321.

85. "Aid" does not imply guilty knowledge or felonious intent. People v. Lewis, 9 Cal. App. 279, 98 P 1078.

86. "Abet" includes knowledge of wrongful purpose of perpetrator and counsel and encouragement in the crime. People v. Lewis, 9 Cal. App. 279, 98 P 1078. One who knowingly rents premises to be used for purpose of prostitution, and which with his knowledge are conducted as a bawdy house, and is guilty of aiding and abetting in the crime. Griffin v. People, 44 Colo. 533, 99 P 321.

87. Party encouraging and inducing the commission of rape held guilty, though not present at time of rape. People v. Lewis, 9 Cal. App. 279, 98 P 1078.

tion of an accessory;[88] while in others an accessory may be tried and convicted before the trial of the principal or after the principal has been acquitted.[89]

§ 5. *Former adjudication and second jeopardy.*[90]—See 11 C. L. 944.—Form and timeliness of the plea and proceedings to try the same are elsewhere treated.[91] The plea of former jeopardy may operate to prevent subsequent prosecutions in the same tribunal or in a tribunal deriving its power from the same jurisdiction,[92] but not, ordinarily, where the offense offends against two jurisdictions,[93] unless the statute so provides,[94] or where it is punishable by a fine only.[95] This rule does not prevent the same act from constituting different offenses,[96] although it may, in some cases, prevent a double prosecution [97] and a double conviction.[98] Nor will it prevent the punishment of habitual criminals as such,[99] or make a conviction of one crime a bar to the prosecution for another distinct crime.[1] The fourteenth amendment to the federal constitution will apply to require an accused to be given the benefit of a

88. Essential in trial for having feloniously aided and abetted the crime of bigamy. State v. Warady [N. J. Law] 72 A 37.

89. As where accessory was aider and abettor in commission of felony. Steely v. Com. [Ky.] 116 SW 714.

90. **Search Note:** See notes in 44 L. R. A. 694; 2 L. R. A. (N. S.) 111; 4 Id. 402; 5 Id. 571; 11 Id. 257, 653; 14 Id. 209, 551; 15 Id. 227; 11 A. S. R. 228; 28 Id. 213; 49 Id. 213; 92 Id. 89; 103 Id. 19, 418; 1 Ann. Cas. 118, 664; 4 Id. 778; 6 Id. 134, 996; 9 Id. 130; 10 Id. 1086; 11 Id. 645, 993.

See, also, Criminal Law, Cent. Dig. §§ 285-409; Dec. Dig. §§ 161-204; 12 Cyc. 259-290; 17 A. & E. Enc. L. (2ed.) 580.

91. See Indictment and Prosecution, § 5.

92. Operates to prevent appeal by municipality from acquittal of violation of ordinance prohibiting sale of food with liquors. City of St. Paul v. Stamm, 106 Minn. 81, 118 NW 154. Under Ballinger's Ann. Codes & St. § 6904 (Pierce's Code, § 2157), verdict or judgment on verdict is bar to another prosecution for same felony. State v. Burns [Wash.] 102 P 886.

93. Conviction in federal court under Rev. St. U. S. § 5478, of breaking into post office, will not bar subsequent conviction in state court upon charge of burglary based on same facts. State v. Moore [Iowa] 121 NW 1052. Technically, conviction and punishment in state court is no bar to punishment for same offense through federal court, but in absence of extraordinary circumstances such double punishment will not be inflicted. United States v. Palan, 167 F 991. Conviction of violation of city ordinance is not bar to subsequent conviction of violation of state statute, though offenses are based on same facts. In re Henry, 15 Idaho, 755, 99 P 1054. Where offense was committed in two states, acquittal in one does not warrant plea of jeopardy in other. Strobhar v. State, 55 Fla. 167, 47 S 4.

94. By terms of statute, acquittal of murder in state court is bar to indictment for conspiracy in violation of Rev. St. §§ 5508, 5509, U. S. Comp. St. 1901, p. 3712, when the murder was committed in carrying out such conspiracy. United States v. Mason, 213 U. S. 115, 53 Law Ed. —.

95. Rule held not to prevent court from setting aside verdict of acquittal of offense punishable by fine only. Fenix v. State [Ark.] 120 SW 388. Does not prevent government from prosecuting writ of error to district court to review proceeding in action of debt to recover pecuniary penalty. United States v. Illinois Cent. R. Co. [C. C. A.] 170 F 542.

96. Veasy v. State, 4 Ga. App. 845, 62 SE 561. Same act may constitute different offenses, see ante, § 1. Constitution (Dec. of Rights, art. 1, § 8) does not prevent second prosecution for same act or group of acts but only for same offense. State v. Jellison, 104 Me. 281, 71 A 716.

97. Where state could elect whether to prosecute party for obtaining money under false pretense (see Code 1907, § 6920), or for fraudulently entering into written contract for performance of service and without refunding money received thereunder, refusing to perform service (see § 6845), prosecution under one section of statute was bar to prosecution under the other. Pierson v. State [Ala.] 48 S 813. Conviction or acquittal of less offense held to bar prosecution of greater. Hughes v. Com. [Ky.] 115 SW 744. Commonwealth cannot divide one offense into two or more parts and prosecute for each. Id. Where same act constitutes more than one offense, commonwealth may make **election for which to prosecute,** but having elected to prosecute for one cannot later prosecute for the other. Id. But an election by state is not essential except to prevent prosecution of defendant for like offenses under one count. Burt v. State [Ala.] 48 S 851.

98. Where prosecution is for single act violating two statutes, verdict should not be guilty as to more than one such offense. Burt v. State [Ala.] 48 S 851. There can be but one conviction for single act which violates more than one penal statute. Id. Where use of abusive language was basis of charge of violating abusive language statute and anti-boycott statute, but one conviction was permissible. Id.

99. Laws 1903, p. 125, c. 86, providing for such punishment, is not invalid. State v. Le Pitre [Wash.] 103 P 27.

1. No bar to crime committed before or during imprisonment. State v. **Keefe,** 17 Wyo. 227, 98 P 122.

plea of former jeopardy in the state courts,[2] but the fifth amendment applies only to the federal government.[3]

The general rule is that the determination of an issue of fact in a criminal case is conclusive in a subsequent proceeding,[4] in the same jurisdiction,[5] but this rule has no application to a prosecution for perjury.[6] In order to sustain the plea of former jeopardy, the trial must have been for the same identical act and crime,[7] or the same testimony must be required to support the charge in each case.[8] The test of identity is whether the transaction might have been investigated and adjudicated in the former trial.[9] Jeopardy attaches from the discharge of a jury[10]

2. Keerl v. Montana, 213 U. S. 135, 53 Law. Ed. —.

3. Does not apply to state governments. State v. Armeno [R. I.] 72 A 216. Const. U. S. 5th Amend., providing that no person shall twice be put in jeopardy for same offense, has reference only to United States and not to states. People v. Botkin, 9 Cal. App. 244, 98 P 861; Brantley v. State [Ga.] 64 SE 676.

4. Acquittal of murder on ground of insanity was res judicata that at time of commission of homicide he did not know nature and quality of act or that it was wrong. People v. Lamb, 118 NYS 389. But denial of motion to quash to which no exceptions were taken is not res judicata of jurisdictional questions raised in motion in arrest so as to prevent review thereof (applying St. 1864, p. 239, c. 250, §§ 2, 3, and Court and Practice Act 1905, § 301). State v. Smith [R. I.] 72 A 710.

5. Conviction in criminal action in another jurisdiction is not conclusive evidence of guilt in civil proceeding for disbarment of accused, but is such only where conviction was in state. In re Ebbs, 150 N. C. 44, 63 SE 190.

6. State v. Sargood, 80 Vt. 415, 68 A 49; State v. Bevill [Kan.] 100 P 476. See Perjury.

7. Hughes v. Com. [Ky.] 115 SW 744. Not identical unless there was identity of time, place and circumstance. Id.

Held identical: Offense of maintaining pool room in designated place. Ehrlich v. Com. [Ky.] 115 SW 797.

Held not identical: Assaults on two individuals, even if they occur very near each other in one continuing attempt to defy the law (Phillipine Bill of Rights not to the contrary). Flemister v. U. S., 207 U. S. 372, 52 Law. Ed. 252. Offenses alleged to have occurred in different years. Smith v. State, 55 Tex. Cr. R. 320, 116 SW 593. Commitment for an attempted escape, although punishment for later offense was made equal to time for which he was originally confined. Ex parte Mallon [Idaho] 102 P 374. Sales of liquor by one who had formed club to different members of club. Wathen, Mueller & Co. v. Com. [Ky.] 116 SW 339. Offense of "willfully shooting at" (see Rev. St. 1870, § 792), and offense of shooting at with dangerous weapon with intent to murder (see § 791).. State v. Hill, 122 La. 711, 48 S 160. Defacing different public records, the offenses consisting of altering different certificates made out to different doctors by inserting different names. Ex parte Dreesen, 54 Tex. Cr. R. 612, 114 SW 806. Offenses of carrying concealed pistol and of carrying concealed pistol to church, though based on same act. Veasy v. State, 4 Ga. App. 845, 62 SE 561. Offense of keeping and offense of selling intoxicating liquors. Taylor v. State, 5 Ga. App. 237, 62 SE 1048. Forgery in violation of Code, § 4854, and of § 4853, though based on same instrument. State v. Blodgett [Iowa] 121 NW 685. Killing one person with one shot and another person with a second shot. Morris v. Ter., 1 Okl. Cr. R. 617, 99 P 760. Offense of unlawful assembly and riot under Rev. St. 1903, c. 124, § 2, and offense of assault and battery, based on same acts. State v. Jellison, 104 Me. 281, 71 A 716. Larceny and receiving stolen property. People v. Feinberg, 237 Ill. 348, 86 NE 584. Attempt to steal government property and theft of private property. Ex parte Roach, 166 F 344. Gaming and gaming with minor based on same game. Sparks v. State [Ark.] 114 SW 1183.

8. Evidence necessary to support second charge must be such as would have been admissible under and would have proven the former charge. Piper v. State, 53 Tex. Cr. R. 550, 110 SW 899. Plea of former jeopardy held to lie where charges were sales of intoxicating liquors, made between same parties, occurring only 2 or 3 hours apart, same amount of whisky in each case, and same price paid, the state introducing same testimony in each case. Id.

But such plea will not prevail where proof in case shows that transactions were different, though sales of liquor were made to same party on same day. Robinson v. State, 53 Tex. Cr. R. 565, 110 SW 908.

9. Mance v. State, 5 Ga. App. 229, 62 SE 1053. Jeopardy attaches with regard to every offense of which accused could have been convicted at former trial. Thomas v. State, 5 Ga. App. 840, 63 SE 1124.

Jeopardy held to attach: Where indictment was sufficient in former case to make it possible to investigate the transaction thereunder, although cattle alleged to have been stolen were defectively described. Burch v. State, 4 Ga. App. 384, 61 SE 503. To subsequent prosecution for same sale as a second offense where defendant had pleaded guilty of selling intoxicating liquor on Sunday in action which was prosecuted as first offense, but might have been prosecuted as second offense. State of Ohio v. Lynch, 7 Ohio N. P. (N. S.) 365. Where indictment was not so defective as to make it impossible to investigate transaction thereunder. Burch v. State, 4 Ga. App. 384, 61 SE 503. Where, though description of cattle alleged to have been stolen was defective, investigation of offense was not precluded thereby. Id.

Jeopardy held not to attach: Where offenses occurring in different years could not have been investigated and adjudicated at

without legal necessity for such discharge,[11] or from an unnecessary mistrial[12] declared without the consent of the defendant,[13] and where there was an actual acquittal or conviction.[14] Acquittal of a crime of greater degree may bar prosecution for a lessor degree,[15] and conviction of a lesser degree may on retrial serve as a bar to a conviction of any greater degree.[16] On a second trial, however, an accused may be, in some cases, convicted under the same facts of another offense carrying an increased penalty.[17] No jeopardy attaches in respect to a charge where the jury has been discharged on motion of the accused,[18] or for failure to agree,[19] or by reason of a variance between the allegations of the indictment and the testimony introduced,[20] where the facts alleged were not sufficient to constitute a crime,[21] where the court did not have jurisdiction of the offense,[22] where there has been no actual trial[23] on the merits,[24] or judgment,[25] and where the case is pending on appeal[26] or on new trial granted.[27] Mere dismissal is in some cases a bar to further

one trial. Smith v. State, 55 Tex. Cr. R. 320, 116 SW 593. Where evidence introduced under second indictment would have constituted fatal variance from allegations of first indictment. Tudor v. Com. [Ky.] 119 SW 816.

10. Under B. & C. Comp. § 953, failure to convene court for two days, not holidays, discharges jury. State v. Turpin [Or.] 103 P 438.

11. State v. Turpin [Or.] 103 P 438.

12. Mistrial occurred where jury returned nugatory finding through one member after separation, without defendant having chance to poll jury. Hopkins v. State [Ga. App.] 65 SE 57.

13. Was declared over defendant's objection. Hopkins v. State [Ga. App.] 65 SE 57.

14. Under Const. 1890, § 22. Sherrod v. State [Miss.] 47 S 554. Jeopardy attached where receipt of verdict in capital case during defendant's absence rendered it nugatory, such being an actual conviction or acquittal within meaning of Const. 1890, § 22. Id.

15. Jeopardy attached to prevent party acquitted of larceny from person from being tried for simple larceny based on same transaction. Thomas v. State, 5 Ga. App. 840, 63 SE 1124.

16. Conviction of manslaughter held bar to conviction of first or second degree murder. People v. Huntington, 8 Cal. App. 612, 97 P 760. Conviction of aggravated assault held in substance and effect to be acquittal of assault with intent to murder (see Code Cr. Proc. 1895, art. 762). De Leon v. State, 55 Tex. Cr. R. 39, 114 SW 828. Where conviction of murder in second degree was reversed on appeal, accused could not then be prosecuted for murder in first degree. Jackson v. State, 55 Tex. Cr. R. 79, 115 SW 262.

17. Not being in conflict with 32 St. at L. 692, c. 1369, applied to Phillipine Islands. Flemister v. U. S., 207 U. S. 372, 52 Law. Ed. 252.

18. Since accused is by such motion estopped from pleading former jeopardy. Stone v. State [Ala.] 49 S 823.

19. People v. Ham Tong [Cal.] 102 P 263. Having been out 24 hours. Keerl v. Montana, 213 U. S. 135, 53 Law. Ed. —. Although discharged without consent of accused. State v. Barnes [Wash.] 103 P 792.

20. Ex parte Johnson, 1 Okl. Cr. R. 286, 97 P 1023. As where trial begun was discontinued upon discovery of fact that whereas perjury was alleged to have been committed in circuit court, it was committed in county court. Tudor v. Com. [Ky.] 119 SW 816.

21. Roberts v. State, 82 Neb. 651, 118 NW 574. At common law there is no jeopardy under indictment so defective that it does not charge facts sufficient to constitute a crime. No jeopardy where indictment is dismissed for failure to charge offense, after jury has been sworn, but before submission of case. United States v. Rogoff, 163 F 311. No jeopardy where case dismissed because affidavit charging commission of two or more things in disjunctive is bad for uncertainty. Gilliam v. State, 7 Ohio N. P. (N. S.) 482.

22. United States v. Rogoff, 163 F 311. No jeopardy where court did not have jurisdiction of offense and of person of defendant. Strobhar v. State, 55 Fla. 167, 47 S 4. Trial by court marshal was not bar to subsequent indictment based on same transaction, since court marshal did not have complete jurisdiction in matter of punishment for offense. People v. Wendel, 59 Misc. 354, 112 NYS 301.

23. None where felony charge has been dismissed without trial (See Ballinger's Ann. Codes & St. § 6904; Pierce's Code, § 2157). State v. Burns [Wash.] 102 P 886.

24. None where accused was discharged on **habeas corpus** by court of another jurisdiction or unless inquiry on petition for writ shall have involved fullest investigation as to guilt or innocence of accused. Benson v. Palmer, 31 App. D. C. 561.

25. No jeopardy from mere conclusion of committing magistrate, it being in no sense a judgment. State v. Nast, 209 Mo. 708, 108 SW 563. No jeopardy attaches from mere finding of **indictment.** Territory v. West [N. M.] 99 P 343. Mere pendency of indictment or information is no bar to subsequent indictment and prosecution thereunder for same offense. Reed v. Ter., 1 Okl. Cr. R. 481, 98 P 583.

26. Dupree v. State [Tex. Cr. R.] 120 SW 871.

27. Johnson v. State, 1 Okl. Cr. R. 321, 97 P 1059. No jeopardy where accused voluntarily seeks and obtains new trial, construing Const. Ga. art. 1, par. 8 (Civ. Code 1895, § 5705), providing that no person shall be put in jeopardy of life or liberty more than once for same offense, save on his own motion for new trial after conviction, or in case of mistrial. Brantley v. State [Ga.] 64 SE 676.

prosecution for a misdemeanor.[28] Former jeopardy must appear from the record.[29] The burden of proof is upon him who pleads former adjudication or jeopardy as a defense.[30] Where there is no question as to the identity of the party or of the offense, the issue of former jeopardy is one of law,[31] but is one of fact where the evidence thereon is conflicting [32] and must be submitted to a jury,[33] unless the accused consent to a determination by the court.[34] According to the rules of strict criminal procedure, this question cannot be submitted to the same jury as is the plea of not guilty,[35] unless the accused consent thereto.[36] A writ of habeas corpus is not the proper remedy under a plea of former jeopardy.[37]

§ 6. *Punishment of crimes.*[38]—See 11 C. L. 948—Insanity will stay the infliction of capital punishment [39] only when the prisoner is unable to understand the nature of the proceedings against him and his impending fate and execution,[40] and in no case will it effect his discharge.[41]

*Extent of punishment.*See 11 C. L. 947—Under the provisions of the state [42] and federal constitutions,[43] punishments are prohibited which are cruel and unusual, excessive,[44] or double.[45] The extent of punishment may in some cases depend upon

None where verdict rendered in former trial was reversed at defendant's own request, jeopardy being waived by such request. People v. Ham Tong [Cal.] 102 P 263.

28. Bar under Ballinger's Ann. Code & St. § 6904 (Pierce's Code, § 2157). State v. Burns [Wash.] 102 P 886.

29. Not from ex parte affidavits. De Leon v. State, 55 Tex. Cr. R. 39, 114 SW 828.

30. Ex parte Stevenson, 20 Okl. 549, 1 Okl. Cr. R. 127, 94 P 1071; Storm v. Ter. [Ariz.] 99 P 275; Territory v. West [N. M.] 99 P 343; Mance v. State, 5 Ga. App. 229, 62 SE 1053.

31. Issue for jury, not court. State v. Blodgett [Iowa] 121 NW 685. Question of law where it appears that offenses were different. Morris v. Ter., 1 Okl. Cr. R. 617, 99 P 760.

32. Territory v. West [N. M.] 99 P 343.

33. Question is for jury in case of disputed identity. State v. Cale, 150 N. C. 805, 63 SE 958.

34. Plea of former jeopardy is in nature of civil issue in that accused may waive his right to jury thereon and have it determined by court. State v. Cale, 150 N. C. 805, 63 SE 958.

35. State v. Cale, 150 N. C. 805, 63 SE 958.

36. This issue partakes of nature of civil matter in that accused may waive his right by giving consent to have it determined at same time as plea of not guilty. State v. Cale, 150 N. C. 805, 63 SE 958.

37. Ex parte Johnson, 1 Okl. Cr. R. 286, 97 P 1023.

38. Search Note: See notes in 27 L. R. A. 593; 34 Id. 398, 509; 35 Id. 561; 45 Id. 136; 1 L. R. A. (N. S.) 520, 540; 7 Id. 124; 14 Id. 268; 16 Id. 304; 64 A. S. R. 378; 1 Ann. Cas. 220, 3 Id. 77; 6 Id. 891.

See, also, Criminal Law, Cent. Dig. §§ 3268-3336; Dec. Dig. §§ 1205-1225; 12 Cyc. 953-973; 8 A. & E. Enc. L. (2ed.) 436, 479.

39. See P. L. 1906, p. 722. In re Lang [N. J. Law] 71 A 47.

40. Under common-law rule which is not abrogated by P. L. 1906, p. 722. In re Lang [N. J. Law] 71 A 47.

41. In re Herron [N. J. Law] 73 A 599.

42. Cruel and unusual punishments are prohibited by Const. Md. Decl. of Rights, art. 16. Lanasa v. State, 109 Md. 602, 71 A 1058.

43. Cruel and unusual punishments are prohibited by U. S. Const. Amend. 8. Lanasa v. State, 109 Md. 602, 71 A 1058.

44. Punishment prescribed by legislature should be natural, not arbitrary, with due regard to the gravity of offense, and not based on matters disconnected therewith. Ex parte Mallon [Idaho] 102 P 374. Punishment should not be so grossly excessive as to deprive person of property without due process of law. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 Law. Ed. —.

Excessive penalty was not permitted by statute (Rev. Laws 1905, § 1519) which fixed no maximum penalty for sale of liquor without license where general statute (Rev. Laws 1905, § 4763) prescribed maximum penalty for all misdemeanors. State v. Kight, 106 Minn. 371, 119 NW 56.

Held excessive: Three years in penitentiary for permitting female to enter and remain in bawdyhouse. State v. Ferguson [Mo.] 120 SW 753.

Held not excessive: Maximum penalty where defense is without merit and clearly indicates that it has been manufactured. Lamma v. State, 8 Ohio N. P. (N. S.) 69. Fine of $300 for malicious mischief in destruction of household goods, in violation of Rev. Pen. Code, § 712. State v. Tarlton [S. D.] 118 NW 706. Disbarment of attorney on account of conviction of felony. In re Henry, 15 Idaho, 755, 99 P 1054. Ten years for assault with intent to commit murder. People v. Johnson, 9 Cal. App. 233, 98 P 682. Penalties of $1,500 and $50 per day, for violations of Texas Anti-trust Laws lasting during several years, where value of property exceeds $40,000,000 and annual dividends exceed 700 per cent. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 112, 53 Law. Ed. —. Sentence of 2 years in county jail for theft of $5. Merriweather v. State, 55 Tex. Cr. R. 438, 116 SW 1148. Life sentence for rape on stepdaughter 14 years of age. Price v. State [Tex. Cr. R.] 119 SW 99. Statutory penalties for failure to furnish cars (Rev. St. 1895, arts. 4497-4502) and art. 4499, providing penalty of $25 per day in addition to dam-

the value of the property involved.[46] The severity of a sentence and the placing of a defendant on probation are in many cases discretionary with the trial court.[47] In case of an excessive sentence, the accused should be remanded for a legal sentence.[48]

Place of imprisonment See 11 C. L. 948 is generally designated by statute.[49] The word "imprisonment" ordinarily refers to confinement in the common jail rather than in the state penitentiary.[50]

Second offense. See 11 C. L. 948—The statutes frequently impose increased penalties [51] where there has been a prior conviction [52] for the commission of an offense of like character,[53] in violation of the same law,[54] but such statutes do not necessarily authorize increased penalties by reason of a prior conviction of the same offense under a different law.[55] Such statutory provisions are valid [56] and constitutional.[57]

ages for failure to furnish cars. Texas & P. R. Co. v. Andrews, Reynolds & Co. [Tex. Civ. App.] 118 SW 1101. Higher punishment prescribed by statute for sale of intoxicating liquors by means of "blind tigers" than for sales otherwise made. Schwulst v. State, 52 Tex. Cr. R. 426, 108 SW 698. Nine year penitentiary sentence for recklessly shooting out of car window and killing girl, **not being cruel or unusual** punishment. State v. Lance, 149 N. C. 551, 63 SE 198. Additional punishment for habitual criminals under Laws 1903, p. 125, c. 86. State v. Le Pitre [Wash.] 103 P 27. Two years at hard labor for cattle stealing, under statute prescribing from 1 to 5 years. Hendrix v. U. S. [Okl. Cr. R.] 101 P 125. Minimum punishment under city ordinance which exceeds minimum punishment under state law for same act. Thomas v. Yazoo City [Miss.] 48 S 821. Punishment prescribed by Act No. 85, p. 124, of 1886, directed against physician who prescribed to enable persons to evade payment of license. State v. Monfre, 122 La. 513, 47 S 876. Greater punishment for **conspiracy** to commit offense than for commission of offense. Shields v. People, 132 Ill. App. 109. Ten-year jail sentence on conviction of member of Black Hand of conspiracy to destroy by bomb man who refused to pay money under threats. Lanasa v. State, 109 Md. 602, 71 A 1058. St. 1907, p. 125, c. 102, § 7, regulating sale of poisons and fixing punishment at not less than $30 or 15 days' imprisonment, since, although it does not specify any maximum punishment, it does not itself provide for the imposition of excessive fines. In re Hallawell, 8 Cal. App. 563, 97 P 320.

45. Laws 1903, p. 125, c. 86, providing increased punishment for offense of habitual criminal, cannot be considered as prescribing double punishment for same offense. State v. Le Pitre [Wash.] 103 P 27. Pub. Laws 1903, p. 28, c. 1100, § 4, declaring unsanitary barber shop to be common nuisance and providing that "proprietor thereof shall be subject to prosecution and punishment therefor" and § 15, providing that penalty for maintaining this nuisance shall be "fine of not more than $20," do not provide different punishments for same offense. State v. Armeno [R. I.] 72 A 216.

46. As where prosecution is for larceny. State v. Nicholas [Mo.] 121 SW 12.

47. Held discretionary in case where defendant was convicted of assault with intent to commit murder. People v. Johnson, 9 Cal. App. 233, 98 P 682.

48. Not discharged. State v. Black, 150 N. C. 866, 64 SE 778.

49. Under act relating to city of Oakland, one convicted of practicing dentistry without license was properly imprisoned in city jail. Ex parte Hornef, 154 Cal. 355, 97 P 891. Under Laws 1907, p. 2356, c. 755, §§ 476, 477, one convicted of a second offense of petit larceny is punishable by confinement in county penitentiary. People v. Craig, 60 Misc. 529, 112 NYS 781.

50. Ex parte Cain, 20 Okl. 125, 1 Okl. Cr. R. 7, 93 P 974.

51. 2 Rev. St. (1st Ed.) pt. 4, c. 1, tit. 7, § 9, subd. 3, makes subsequent conviction of petit larceny a felony. People v. Craig, 195 N. Y. 190, 88 NE 38. Penal Code, § 688, provides that one convicted of second offense of petit larceny shall be imprisoned not less than longest nor less than twice shortest period prescribed for first conviction. People v. Craig, 60 Misc. 529, 112 NYS 781. Increased penalty is provided for by P. L. 327, § 7. Commonwealth v. McDermott [Pa.] 73 A 427. Pub. St. 1901, c. 112, § 15, restricting sale of liquor, provides increased penalty by reason of prior conviction thereunder. State v. Maltais [N. H.] 72 A 1023.

52. State v. Maltais [N. H.] 72 A 1023. Increased penalty does not depend upon guilt or innocence but on historical fact of whether there has been a prior conviction. Id. No prior conviction where sentence has not yet been imposed. Commonwealth v. McDermott [Pa.] 73 A 427, rvg. Id., 37 Pa. Super. Ct. 1.

53. Pen. Code 1895, art. 1014, authorizing increased punishment for second and third conviction for "same offense," does not mean identical offense, but one of like character. Muckenfuss v. State, 55 Tex. Cr. R. 216, 117 SW 853. Prior conviction of violation of Sunday law which does not indicate nature of offense held to be sufficient to authorize increased punishment where accused was convicted of keeping theater open on Sunday. Id.

54. State v. Maltais [N. H.] 72 A 1023. Conviction of violation of another but similar law is not prior conviction. Id.

55. Not authorized where offenses were identical, that is provable by same evidence, if prior conviction was had under a different law. State v. Maltais [N. H.] 72 A 1023.

56. Laws 1903, p. 125, c. 86, providing increased punishment for offense of habitual criminal, is not invalid. State v. Le Pitre [Wash.] 103 P 27. Application of law was

While they do not necessarily change the nature of the offense,[58] they make the prior conviction an ingredient of the second offense.[59] Proof of former conviction is admissible only as bearing upon the penalty, and if the defendant concedes the fact all reference thereto will be excluded.[60]

§ 7. *Rights in property the subject of crime.*[61]—See C. L. 948—Where money obtained through a felony has been transferred to an innocent taker, such taker acquires a good title to it as against the one from whom it was stolen.[62] The right of a murderer to inheritance from,[63] or insurance of,[64] his victim is elsewhere treated.

Criminal Procedure; Crops; Cross Bills and Complaints; Crossings; Cruel and Unusual Punishments; Cruelty; Cumulative Evidence; Cumulative Punishments; Cumulative Votes; Curative Acts, see latest topical index.

CURTESY.[65]

The scope of this topic is noted below.[66]

The requisites of curtesy are, a valid marriage,[67] the birth of issue alive,[68] and the seisin of the wife.[69] Curtesy is not derived out of the estate of the wife but is created by law.[70] It is not an estate of inheritance,[71] and, strictly speaking, does not "descend" to the husband,[72] but it is, nevertheless, regarded more in the nature of an estate by descent than by purchase.[73] Curtesy is initiate from time of seisin and birth of issue alive,[74] becoming consummate upon the death of the wife,[75] and dating back to the time when it was initiate.[76]

not invalid or extraterritorial because other offenses proven were committed outside state. Id.

57. People v. Craig, 195 N. Y. 190, 88 NE 38.

58. Do not make second conviction of petit larceny a felony. People v. Craig, 60 Misc. 529, 112 NYS 781.

59. People v. Craig, 195 N. Y. 190, 88 NE 38.

60. Howard v. State, 139 Wis. 529, 121 NW 133.

61. Search Note: See Criminal Law, Cent. Dig. § 3334; Dec. Dig. § 1221; 12 Cyc. 972; Larceny, Cent. Dig. § 209.

62. Bad faith alone will defeat the right of the taker without knowledge, since mere ground of suspicion of defect of title, or knowledge of circumstances which would excite suspicion in mind of prudent man or gross negligence on part of taker, will not defeat his title, the test being honesty and good faith, not diligence. First Nat. Bank v. Gibert, 123 La. 845, 49 S 593.

63. See Descent and Distribution, § 2.

64. See Insurance, § 10.

65. See 11 C. L. 948.

Search Note: See notes in 3 C. L. 988; 19 L. R. A. 256; 23 Id. 642; 27 Id. 340; 7 L. R. A. (N. S.) 659; 84 A. S. R. 444; 112 Id. 571; 6 Ann. Cas. 93.

See, also, Curtesy, Cent. Dig.; Dec. Dig.; 12 Cyc. 1001-1021; 8 A. & E. Enc. L. (2ed.) 506; 5 A. & E. Enc. P. & P. 698.

66. Treats of curtesy at common law, and also of statutory substitutes therefor. In some of the states dower or an interest analogous thereto has been substituted for curtesy, and in this connection the topic dealing with dower should also be consulted. See Dower.* See, also, Husband and Wife,* § 3, as to the husband's rights in the wife's property generally, and § 4, as to rights under community system.

67. In re Starbuck's Estate, 63 Misc. 156, 116 NYS 1030.

68. In re Starbuck's Estate, 63 Misc. 156, 116 NYS 1030. It is immaterial whether the issue be living at time of seisin or at time of death of wife, or whether it was born before or after seisin. Donovan v. Griffith, 215 Mo. 149, 114 SW 621.

69. In re Starbuck's Estate, 63 Misc. 156, 116 NYS 1030. Where one left surviving him his widow and one daughter, his widow being in possession of and remaining in possession of the homestead until after the death of the daughter, the husband of the daughter was not entitled to curtesy in said homestead as she was never seised of an estate of inheritance therein. Owens v. Jabine [Ark.] 115 SW 383.

70. In re Starbuck's Estate, 63 Misc. 156, 116 NYS 1030. Recognized in Real Property Law (Laws 1896, p. 619, c. 547), § 280, which provides that said article does not effect a limitation by tenancy by the curtesy. Id.

71. Not provided for in the general rules of descent in Laws 1896, p. 619, c. 547, § 281. In re Starbuck's Estate, 63 Misc. 156, 116 NYS 1030. Life estate of husband under Code 1907, § 3765, is an estate by curtesy and **husband is not tenant in common with children,** as he would be, under § 3762, if he took by inheritance. Fies v. Rosser [Ala.] 50 S 287.

72, 73. Beam v. U. S. [C. C. A.] 162 F 260.

74. In re Starbuck's Estate, 63 Misc. 156, 116 NYS 1030. At common law, by birth of issue, the husband became tenant by curtesy initiate to a separate estate for his own life in his wife's lands, the usufruct or profit of which, during that period, was absolutely his

* Always begin with the latest article on the subject. Use the latest topical index.

Curtesy attaches to equitable estates of inheritance [77] as well as legal estates.[78] As the husband's estate by the curtesy in his wife's real estate is given by law as distinguished from contract.[79] for reasons of public policy no presumption of intention to preclude it arises from the mere fact of a conveyance from the former to the later.[80]

A decree of divorce a mensa et thoro, with perpetual separation, pronounced against the husband, does not bar curtesy in lands belonging to the wife at the time of the decree,[81] but upon lands thereafter acquired by her it operates like an absolute divorce, barring claim to curtesy.[82] Under some of the statutes the wife may destroy the husband's curtesy by conveyance or devise.[83] The doctrine of election of estates generally is treated elsewhere.[84]

A husband's curtesy interest is chargeable with a balance due to the estate by him,[85] and it is his duty, if there be a mortgage upon the land, to pay the interest on the same.[86] Where the court has no jurisdiction to pass upon the husband's right to rents as against the heirs,[87] such right is unaffected by an order authorizing the wife's administrator, as against her heirs, to collect rents.[88]

own property. Richardson v. Richardson, 150 N. C. 549, 64 SE 510.

75. In re Starbuck's Estate, 63 Misc. 156, 116 NYS 1030. Marriage, seisin of the wife, issue, and death of the wife, are the four requisites to make a tenancy by the curtesy consummate. Richardson v. Richardson, 150 N. C. 549, 64 SE 510.

76. Husband's right being thus acquired, it was not subject to taxation under Laws 1896, p. 868, c. 908, § 220, imposing tax on transfer by will or by intestate laws. In re Starbuck's Estate, 63 Misc. 156, 116 NYS 1030.

77. Indian allotment held equitable estate of inheritance. Beam v. U. S. [C. C. A.] 162 F 260. The husband is entitled to curtesy in the wife's equitable separate estate, and this right is not impaired by the married woman's statute. Donovan v. Griffith, 215 Mo. 149, 114 SW 621. Right not taken away by Married Woman's Act (Rev. St. 1889, § 6869; Rev. St. 1899, § 4340 [Ann. St. 1906, p. 2382]). Id. Where one holding land in trust for himself and others conveyed same to his mother by absolute deed, his equitable interest passed to his mother, and on her death her husband was entitled to curtesy in such equitable interest. Baker v. Baker [N. J. Eq.] 72 A 1000.

78. Where wife took determinate fee, husband held entitled to curtesy. Carter v. Couch [Ala.] 47 S 1006.

79. Depue v. Miller, 65 W. Va. 120, 64 SE 740.

80. Held that husband had estate by the curtesy in lands which he had voluntarily settled upon his wife, he not having in express terms or by plain implication relinquished such right in the instrument of conveyance. Depue v. Miller, 65 W. Va. 120, 64 SE 740. Where, in conveyance from husband to wife, the wife took fee simple estate, husband was entitled to curtesy. Hughes v. Saffell [Ky.] 119 SW 804.

81. Right of curtesy held not barred. Hartigan v. Hartigan, 65 W. Va. 471, 64 SE 726.

Adjustment of property rights generally on divorce, see Divorce, § 6.

82. Hartigan v. Hartigan, 65 W. Va. 471, 64 SE 726.

83. Const. 1868, art. 10, § 6, provides that property of wife before marriage shall be her separate property, with power to will it. Held that there being no birth of issue until after the adoption of the constitution, and the wife having bequeathed the property to other persons, the husband had no rights in the property as tenant by curtesy. Richardson v. Richardson, 150 N. C. 549, 64 SE 510. In New York the husband's right of curtesy still exists, subject, however, to the right of the wife to divest him of it by will or deed. In re Starbuck's Estate, 63 Misc. 156, 116 NYS 1030. Statute, 16 Stat. at L. 45, c. 23, declaring the right of a married woman in her property, did not expressly or impliedly abolish tenancy by the curtesy, but it gave the married woman the power to destroy it either by conveyance of her estate by deed or by devise of it in her will. Balster v. Cadick, 29 App. D. C. 405. Where wife acquired property by gift from her husband after enactment of 16 Stat. at L. 45, c. 23, D. C. Rev. St. §§ 727, 728, such property passes by her devise free of any right of her husband as tenant by the curtesy. Id.

84. See Election and Waiver, § 2B.

85. Where husband's interest in decedent's personal property was not sufficient to pay his indebtedness to the estate. Richardson v. Trubey, 240 Ill. 476, 88 NE 1008.

86. Decree subrogating decedent's executrix to rights of mortgagee held to have erroneously included interest paid by decedent while tenant by the curtesy. Wilder's Ex'x v. Wilder [Vt.] 72 A 203.

87. Probate court has no such jurisdiction under Rev. St. 1899, § 130 (Ann. St. 1906, p. 379). Strom's Estate v. Strom, 134 Mo. App. 340, 114 SW 581. See Jurisdiction, § 9C.

88. Strom's Estate v. Strom, 134 Mo. App. 340, 114 SW 581. Hence husband is not prejudiced by failure to give him notice of administrator's application or by refusal of court to grant husband's motion to vacate order granting such application. Id.

CUSTOMS AND USAGES.

The scope of this topic is noted below.[89]

§ 1. Definition and Elements, 1165.
§ 2. Application to Contracts and Other Dealings, 1165.
§ 3. Pleadings and Proof, 1167.

§ 1. *Definition and elements.*[90]—See 9 C. L. 857—A custom is evidence of fact, not of law.[91] A custom or usage is something more than a mere customary exchange of courtesies.[92] A custom or usage, in order to be binding, must be general and uniform,[93] and must have existed a sufficient length of time to have become generally known,[94] for, while a person will be bound by personal knowledge of a custom,[95] in order that knowledge will be presumed the custom must be general, notorious, and well established.[96] A binding custom cannot be predicated upon unconstitutional acts[97] or upon illegal acts.[98]

§ 2. *Application to contracts and other dealings.*[99]—See 11 C. L. 850—Where parties deal together for some time in accordance with the prevailing custom of their business, such custom becomes a part of their contracts,[1] or it may be shown that a contract was made in view of a generally known custom of trade,[2] and, where a contract is made in view of a general custom, it is no defense that in the past the party to be charged had never complied with such custom,[3] or that he had secretly refused to be bound by such custom.[4] One is not usually held bound, however, by

89. Treats generally of customs and usages, without reference, except by way of illustration, to the concrete application of the general principles (see such topics as Agency;* Carriers;* Sales,* §§ 1-9; Telegraphs and Telephones*). Excludes customs and usages as bearing upon questions of negligence (see Negligence,* §§ 2, 4), and estoppel under custom (see Estoppel,* § 4).

90. **Search Note:** See notes in 34 L. R. A. 137; 4 L. R. A. (N. S.) 880.

See, also, Customs and Usages, Cent. Dig. §§ 1-10; Dec. Dig. §§ 1-8; 12 Cyc. 1030, 1031, 1033-1056; 29 A. & E. Enc. L. (2ed.) 365.

91. Western R. Co. v. Hart [Ala.] 49 S 371.

92. Evidence of a custom as to mutual exchange of courtesies not binding upon the parties could not effect a subsequent contract between them. Pitch Pine Lumber Co. v. Wood Lumber Co. [Fla.] 48 S 993.

93. Eckstein v. Schleimer, 62 Misc. 635, 116 NYS 7.

94. Merchants' Grocery Co. v. Ladoga Canning Co. [Ark.] 117 SW 767.

95. Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833.

96. Western R. Co. v. Hart [Ala.] 49 S 371; Corbitt v. Hanson [La.] 49 S 995; Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833.

97. Since it is unconstitutional to assess whole of local assessment upon abutting owners regardless of benefits, custom of relieving abutters who paid whole of initial street assessments from further assessments was not binding so as to preclude subsequent assessments. Manufacturers' Land & Imp. Co. v. Camden [N. J. Law] 73 A 77.

98. Wilson v. Jernigan [Fla.] 49 S 44; Western R. Co. v. Hart [Ala.] 49 S 371. Insurance company held not liable for loss to a building which was torn down by lightning, but not burned, the policy covering destruction by fire only, because of an alleged custom under which prior invalid claims of the kind had been paid. Sleet v. Farmers' Mut. Fire Ins. Co. [Ky.] 113 SW 515. A custom among miners as to removal of pillars destroying surface support, being void, could not be shown. Southwest Missouri R. Co. v. Big Three Min. Co. [Mo. App.] 119 SW 982. Custom under which holders of certificates of stock assigned in blank were regarded as owners held to follow law governing such transactions. National Safe Deposit, Sav. & Trust Co. v. Hibbs, 32 App. D. C. 459.

99. **Search Note:** See notes in 3 C. L. 988, 989; 5 Id. 895, 897; 21 L. R. A. 440; 2 L. R. A. (N. S.) 194; 16 Id. 140.

See, also, Customs and Usages, Cent. Dig. §§ 11-39; Dec. Dig. §§ 10-17; 12 Cyc. 1041-1046, 1056-1096; Evidence, Cent. Dig. §§ 1945-1952; Shipping, Cent. Dig. § 147; 29 A. & E. Enc. L. (2ed.) 420.

1. Weir v. Dwyer, 62 Misc. 7, 114 NYS 528; Broussard v. South Texas Rice Co. [Tex. Civ. App.] 120 SW 587. Evidence of custom held admissible to show that an order for crockery calling for 60 per cent discount applied only to white, and not decorated, ware. Moroney Hardware Co. v. Goodwin Pottery Co. [Tex. Civ. App.] 120 SW 1088. Implied contract to insure rice, left with defendant to be milled and sold, could be shown by proving custom to insure rice under such circumstances and that charge was made in accordance with such custom. Id.

2. Smith & Co. v. Russell Lumber Co. [Com.] 72 A 577.

3. Broussard v. South Texas Rice Co. [Tex. Civ. App.] 120 SW 587.

4. That defendant had secretly refused to be bound by custom did not affect rights of parties where their transaction was entered

* Always begin with the latest article on the subject. Use the latest topical index.

a custom of which he is ignorant,[5] though where parties to a contract are engaged in the same trade, they will be presumed to have knowledge of customary usages relating thereto,[8] even though such usages are not universal.[7] Where there is a contract but a dispute as to the contract price, evidence of custom is inadmissible to establish the price.[8] Compensation for services, claimed by virtue of a general custom, applies only to persons regularly engaged in the business,[9] and such a customary charge must be reasonable in any case.[10]

Evidence of custom or usage is admissible as bearing upon the question as to whether a certain contract was made [11] to explain a contract not otherwise clear,[12] as where there is an ambiguity therein [13] to ascertain matters not expressed but which will be implied [14] or regarding which the contract is silent,[15] and to explain the meaning of words and terms,[16] but customs and usages cannot create the contract relation,[17] nor can they be invoked to vary the express terms of a contract,[18] or to enlarge a contract,[19] or to explain a contract which is clear and unambiguous.[20]

into with knowledge of the custom. Broussard v. South Texas Rice Co. [Tex. Civ. App.] 120 SW 587.

5. Party to express contract is not bound by custom not known to him when he executed contract. Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875. **Rule of Institute of Architects** that drawings and specifications remain the property of the architect did not become part of contract with architect when owner had no knowledge of it. Hill v. Sheffield, 117 NYS 99.

6. Smith & Co. v. Russell Lumber Co. [Conn.] 72 A 577; Ankeny v. Young Bros., 52 Wash. 235, 100 P 736. Purchaser of coffee through a San Francisco broker held bound by the customary usage of the trade at that point. Ankeny v. Young Bros., 52 Wash. 235, 100 P 736.

7. Smith & Co. v. Russell Lumber Co. [Conn.] 72 A 577.

8. So held because court did not desire to depart from established rule. Peyser v. Western Dry Goods Co. [Wash.] 102 P 750.

9. The customary commission for the sale of property held not recoverable by a person not engaged in the real estate business. Fleming v. Wells [Colo.] 101 P 66.

10. A charge of 25 cents per folio for transcribing testimony upon a reference, where 10 cents was fixed by statute for official stenographers, held unreasonable. Eckstein v. Schleimer, 62 Misc. 635, 116 NYS 7.

11. Custom as to employment of masters for vessels at close of season. Carney v. Ionia Transp. Co. [Mich.] 16 Det. Leg. N. 243, 121 NW 806. Evidence of customary commission charge in excess of that alleged to have been agreed upon held admissible upon issue as to whether agreement to pay alleged commission was made. Knight v. Knight, 142 Ill. App. 62.

12. Stockton Lumber Co. v. California Nav. & Imp. Co. [Cal. App.] 101 P 541. Code Civ. Proc. § 1870, subd. 12. Ellsworth v. Knowles, 8 Cal. App. 630, 97 P 690.

13. Steele v. Andrews [Iowa] 121 NW 17; Peyser v. Western Dry Goods Co. [Wash.] 102 P 750; Western R. Co. v. Hart [Ala.] 49 S 371. Evidence held admissible to explain a latent ambiguity in a written instrument. St. Paul Fire & Marine Ins. Co. v. Balfour [C. C. A.] 168 F 212.

14. Steele v. Andrews [Iowa] 121 NW 17.

15. Rose v. Lewis [Ala.] 48 S 105. As to how the quantity of bricks in a wall shall be determined. City of Richmond v. Barry [Va.] 63 SE 1074. In the absence of a provision in a contract as to delivery upon credit, a lawful and reasonable custom of the trade relating thereto will be regarded as a part thereof, such as a custom to refuse delivery until past due bills have been paid. Smith & Co. v. Russell Lumber Co. [Conn.] 72 A 577. Evidence of custom as to length of logs cut for sawing into lumber held admissible, where contract was silent as to length. Thomas v. Charles [Ky.] 119 SW 752.

16. Farmers' and Merchants' Bank v. Wood Bros. & Co. [Iowa] 118 NW 282, rehearing denied [Iowa] 120 NW 625. Meaning of **"sight draft against papers,"** when used in connection with sale of commodity. Ellsworth v. Knowles, 8 Cal. App. 630, 97 P 690. Omission of **ditto marks** where several items having no date in margin immediately follow item having such date, such being custom of bookkeepers and readily understood. Sorg v. Crandall, 233 Ill. 79, 84 NE 181. Meaning of 2/4, 2/6 held to be well understood and to sufficiently express **dates** in claim for mechanic's lien. Held custom of bookkeepers understood by all. Id.

17. When parties have come into a contractual relation, custom may serve to define what the contract is, but it cannot create the relation. Clark v. National Steel & Wire Co. [Conn.] 72 A 930. A custom among real estate brokers to divide commissions, where one has a piece of property to sell and the other has a buyer, is not sufficient to create a contract to divide commissions when otherwise there was no contract. Hedenberg v. Seeberger, 140 Ill. App. 618.

18. Hirsch v. Georgia Iron & Coal Co. [C. C. A.] 169 F 578; Gammino v. Dedham [C. C. A.] 164 F 593. Custom or trade usage admissible to explain doubtful or technical terms, but not to vary or defeat express terms. Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 118 NW 282, rehearing denied, [Iowa] 120 NW 625; Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co., 105 Minn. 483, 117 NW 825; Fowler Utilities Co. v. Chaffin Coal Co. [Ind. App.] 87 NE 689; Stockton Lumber Co. v. California Nav. & Imp. Co. [Cal. App.] 101 P 541; Smith

§ 3. *Pleadings and proof.*[21]—See 11 C. L. 951—A general usage or custom need not be pleaded in order to admit evidence thereof to explain a contract, the terms of which are obscure,[22] but, where a custom is invoked as a part of an express contract which is complete and unambiguous so far as it goes, such custom must be pleaded,[23] and a fortiori one invoking any exception to the general rule that a custom or usage is not admissible to defeat, contradict, or vary an ambiguous contract, must plead the custom or usage relied on for this purpose.[24] In passing upon a demurrer, the court will take judicial notice of a custom which is otherwise a proper subject of judicial notice, though such custom is not pleaded,[25] but it will not judicially notice a local custom or usage of a particular trade.[26] In pleading a custom or usage, all the essential elements thereof[27] must be pleaded.[28] The custom must be unequivocally established,[29] and cannot be shown by evidence of particular transactions,[30] unless they are sufficiently numerous to indicate a fairly regular course of business.[31]

CUSTOMS LAWS.

The scope of this topic is noted below.[32]

§ 1. Interpretation and Operation of Customs Laws in General, 1168.
§ 2. Dutiable Articles and Classification of the Same, 1168.
§ 3. Administration of Customs Laws, 1171. Entry and Appraisement, 1171. Reliquidation, 1171. Enforcement of Duties, 1172. Refunds, Allowance and Drawbacks 1172. Protests and Appeals, 1172.
§ 4. Violations of Customs Laws and Consequences Thereof, 1172.

& Co. v. Russell Lumber Co. [Conn.] 72 A 577. Custom or usage could not be shown by defendant that there was a custom among breeders that where blooded cows were sold which could not be bred they should be returned in order to give seller a chance to breed them, where sale was under express warranty that they were breeders. Steele v. Andrews [Iowa] 121 NW 17. Contract of employment for a season held not subject to variation by evidence of a custom that party could be discharged on two weeks' notice. Camp v. Baldwin-Melville Co., 123 La. 257, 48 S 927.

19. Contract for hauling logs being proved by undisputed testimony, it was proper to exclude proof of custom of putting certain stipulations in contracts of that kind. Dayton Lumber Co. v. Stockdale [Tex. Civ. App.] 118 SW 805.

20. Steele v. Andrews [Iowa] 121 NW 17; Metz v. Miller, 113 NYS 527; Postal Tel. Co. v. Willis [Miss.] 47 S 380; Bowers Hydraulic Dredging Co. v. U. S., 211 U. S. 176, 53 Law. Ed. 136.

21. **Search Note:** See note in 3 L. R. A. (N. S.) 248.

See, also, Customs and Usages, Cent. Dig. §§ 40-48; Dec. Dig. §§ 18-22; 12 Cyc. 1097-1102; 29 A. & E. Enc. L. (2ed.) 410.

22. Ryder-Gougar Co. v. Garretson [Wash.] 101 P 498. Local custom or usage of general application need not be pleaded in order to render evidence thereof admissible where contract is ambiguous. City of Richmond v. Bang [Va.] 63 SE 1074. Evidence held inadmissible to establish a local custom. Vaughan's Seed Store v. Stringfellow [Fla.] 48 S 410.

23. Where broker employed to sell land claimed, in action for commission, that he was authorized by custom to bind principal by certain stipulations with purchaser with regard to title. Johnson v. Buchanan [Tex. Civ. App.] 116 SW 875.

24. Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 118 NW 282.

25, 26. Poland v. Hollander, 62 Misc. 523, 115 NYS 1042.

27. See ante, § 1, Definitions and Elements.

28. Evidence of a custom is not admissible to remedy a defect in a pleading, such as failure to allege consideration, when such custom is not pleaded as being general or as having existed a sufficient time to charge a person with notice thereof. Poland v. Hollander, 62 Misc. 523, 115 NYS 1042. Plea of carrier that invoice indicated sale by shipper to certain person, and that carrier, according to custom between it and shipper and such third person, which custom was known to shipper, delivered the goods to such third person, held to sustain defense of estoppel under custom. Mobile, etc., R. Co. v. Bay Shore Lumber Co. [Ala.] 48 S 377. Such a plea held insufficient where it failed to identify property delivered with that described in complaint. Id.

29. Spiero v. New York Cent. & H. R. R. Co., 64 Misc. 53, 117 NYS 1039; Arkansas Midland R. Co. v. Moody [Ark.] 117 SW 757.

30. Rose v. Lewis [Ala.] 48 S 105.

31. Broussard v. South Texas Rice Co. [Tex. Civ. App.] 120 SW 587. When there were only two stores in a community, evidence as to their customary hours of business was proper to establish the custom of that territory. Capital Fire Ins. Co. v. Kaufman [Ark.] 121 SW 289.

§ 1. *Interpretation and operation of customs laws in general.*[33]—See 11 C. L. 952—The statutes must be construed according to their plain meaning although such construction may lead to inconsistencies.[34]

§ 2. *Dutiable articles and classification of the same.*[35]—See 11 C. L. 953—Kegs and other containers of imported liquids and stone jars and tin cans containing vegetables and meat paste are to be included in the dutiable value of the imports,[36] but stone bottles in which liquids subject to ad valorem duty are imported are not "coverings" and hence their value should not be added to the dutiable value of their contents.[37] The destined use to which an article is to be put, does not necessarily control its classification,[38] and classification of an article having a definite character cannot be changed by giving it a particular commercial designation,[39] and that articles slightly exceed the sizes given is immaterial where no advantage results thereby to either the seller or buyer.[40] The dutiable value is the market value at wholesale, in the principal market where such merchandise is bought for import.[41] Imported articles are to be charged with duties according to the law in force at the time of entry for consumption.[42] Proof as to the meaning of a commercial term used in a tariff act must be as of the time of the passage of the act,[43] and, in a re-enactment of a tariff schedule, congress is presumed to have intended a word to be used in the meaning given it by a previous decision of the supreme court.[44] The term "articles" in the tariff act may include woven fabrics in the piece.[45] The similitude section, when applicable, is to be preferred to the section relating to unenumerated articles,[46] and may be invoked if similarity be found in any one of the particulars mentioned.[47] The amount of duty is not a test for the application of the similitude clause,[48] and the fact that the standard for comparison is of a better grade and more expensive than the article in question, and has additional uses, will not prevent the application of the similitude paragraph,[48] and articles identical with a class of articles provided for, except that they exceed the weight limit fixed for such class, may be included in such class by similitude where not otherwise provided for.[50] Under the provision for countervailing duty on petroleum, a product of petroleum is subject to the duty of the country of manufacture rather than that of the country where the crude petroleum was produced.[51] Wares not susceptible

32. This topic includes all matters relating to federal import duties. It excludes internal revenue (see Internal Revenue Laws*) and taxation generally (see Taxes*).

33. **Search Note:** See 24 A. & E. Enc. L. (2ed.) 887.

34. Horrax v. U. S. [C. C. A.] 167 F 526.

35. **Search Note:** See 24 A. & E. Enc. L. (2ed.) 887, 892.

36. Such containers being "coverings" within meaning of Act June 10, 1890, c. 407, § 19, 26 Stat. 139. Kimpton v. U. S., 165 F 236; Austin, Nichols & Co. v. U. S. [C. C. A.] 171 F 79.

37. Kimpton v. U. S. [C. C. A.] 171 F 78.

38. Boker & Co. v. U. S., 168 F 573.

39. Preserved fruit classified as such, although commercially designated as "chutney." Park v. U. S., 164 F 910.

40. Gloves exceeding, by a fraction of an inch, the length described. United States v. Mayer & Co., 164 F 905.

41. Where all but 4 per cent of output of manufacturer of china was exported to United States directly from L., balance wholesaled at P., L. was principal market. United States v. Haviland & Co., 167 F 414.

42. Coal landed during the time that Act Jan. 15, 1903, providing for rebate of duties on foreign coal for period of one year, was in force, but not entered until year had expired, is subject to duty. North American Commercial Co. v. North American Transp. & Trading Co., 52 Wash. 502, 100 P 985.

43. Johnson & Co. v. U. S. [C. C. A.] 166 F 728.

44. Von Bremen, MacMonnies & Co. v. U. S. [C. C. A.] 168 F 889.

45. United States v. Vantine & Co. [C. C. A.] 166 F 735; G. Hirsch Sons v. U. S. [C. C. A.] 167 F 309.

46. Vandegrift & Co. v. U. S., 164 F 65.

47. Exact similarity as to use should govern rather than vague similarity as to material. Paterson & Co. v. U. S. [C. C. A.] 166 F 733.

48. United States v. Behrend [C. C. A.] 167 F 317.

49. F. Rosenstern & Co. v. U. S. [C. C. A.] 171 F 71.

50. United States v. Behrend [C. C. A.] 167 F 317.

51. United States v. Marsily & Co. [C. C. A.] 165 F 186; United States v. Swan & Finch Co. [C. C. A.] 169 F 108.

of decoration cannot be classified with "mineral substances, if not decorated, thirty-five percent * * * if decorated, forty-five percent" by similitude.[52] Under Act July 24, 1897, household effects not similar to "books, libraries and furniture" are no longer exempt.[53] The classification of particular imports is shown in the note.[54]

52. Kirschberger & Co. v. U. S., 166 F 1012; United States v. Behrend [C. C. A.] 167 F 317.

53. Ch. 11, § 2, free list, par. 504. United States v. Grace & Co. [C. C. A.] 166 F 748.

54. Agricultural and vegetable products and food products: Cauliflower, trimmed, washed and packed in brine for temporary preservation, is dutiable as "vegetables in their natural state" and not as "vegetables prepared or preserved." United States v. Strohmeyer & Arpe Co. [C. C. A.] 167 F 533. Cocoanut oil, refined, with melting point of 78.8 degrees, sold to confectioners, dutiable as "cocoa-butterine," not as "cocoanut oil." Fuerst Bros. & Co. v. U. S., 166 F 1014. "Dragees," dutiable as "confectionery." United States v. La Manna [C. C. A.] 166 F 751. Pineapples in hermetically sealed cans, in their own juice with sugar added for flavoring only, dutiable as "pineapples preserved in their own juice," not as "fruits preserved in sugar." United States v. Johnson & Co., 166 F 1002. Fruit preserved in jars surrounded with syrup containing no juice or alcohol, preservation being due to hermetical sealing, dutiable as "fruit * * * prepared," not as "fruits preserved in sugar, spirits or their own juices." United States v. Reiss [C. C. A.] 166 F 746. "Chutney" consisting of fruits preserved with sugar and spices, dutiable as "fruits preserved" not as "edible fruits." Park v. U. S., 164 F 910. Thick soy used as ingredient for sauces or in flavoring food while cooking as dutiable as "unenumerated manufactured articles" and not as "sauces." United States v. Woon & Co. [C. C. A.] 167 F 314. Pickled walnuts are dutiable as unenumerated manufactured articles and not as "pickles" since the latter classification covers only vegetables. United States v. Acker, Merrall & Condit Co. [C. C. A.] 171 F 77. Truffles in tin packages are dutiable by similitude as "mushrooms * * * preserved in tins," and not as "vegetables." Von Bremen, MacMonnies & Co. v. U. S. [C. C. A.] 168 F 889.

Animals and animal products: The growth on cabretta skins, dutiable as "wool." Johnson & Co. v. U. S. [C. C. A.] 166 F 728. Cooked meat of poultry and game, preserved in tins, and goose livers prepared as pate de foie gras, dutiable as "meats of all kinds, prepared or preserved, not specially provided for," and not as "poultry * * * dressed." Smith & Co. v. U. S., 168 F 462. Guinea fowl and turkeys not shown to have been in a wild state are dutiable as "poultry" and not as "birds and land * * * fowls." Silz v. U. S., 167 F 686. Salmon, mackerel and halibut, packed in ice, are dutiable as "fish, fresh * * * frozen, packed in ice, or otherwise prepared for preservation, not specially provided for," and not, as "mackerel, halibut or salmon, fresh." United States v. Perry, 171 F 303.

Art goods, toys and ornaments: Artificial shamrocks are dutiable as "artificial leaves" and not as "toys" although sold in toy shops. United States v. Cattus [C. C. A.] 167 F 532. Bone swords used as curios and ornaments, dutiable as "manufactures of bone," and not as "swords." Morimura Bros. v. U. S., 165 F 64. Hand painted panels to which are affixed small calendars, composing a trifling part of the entire article, are classified as "paintings in oil or water colors." Vantine & Co. v. U. S., 168 F 562. Ornamental florists' supplies, consisting of leaves and plants arranged in form of wreaths, are dutiable as "ornamental leaves." Bayersdorfer & Co. v. U. S., 171 F 286. "Statics wreaths" having the appearance of "natural flowers * * * preserved," should be classified as such. Id. Articles of paste, cut in imitation jewels, are dutiable as manufactures of "paste" and not as cut "glass." United States v. New York Merchandise Co., 167 F 684. Loose drilled pearls imported in separate packages, which had been assembled into a string abroad, and sold and imported with intention to be again assembled, which was in fact done, dutiable as "pearls in their natural state" and not as "jewelry" or "pearls set up or strung." Citroen v. U. S. [C. C. A.] 166 F 693. "Carmelite ware" is not dutiable as "common brown earthenware." Thurnauer & Co. v. U. S., 165 F 62. "Earthenware finished with a single color glaze" is dutiable as "earthenware * * * stained * * * or otherwise decorated." United States v. Straus & Co., 168 F 569. Sarreguemines ware, being of superior quality dutiable as "china, porcelaine * * * earthen stone and crockery ware," and not as "common yellow earthenware." United States v. Reugger, 167 F 142.

Books and papers: Duplex lithographic transfer paper used in manufacture of ceramic decalcomanias is dutiable as "paper" rather than "manufactures of paper." Drakenfeld & Co. v. U. S. [C. C. A.] 167 F 798. Paper subjected to a crepeing process, and resembling crepe paper in appearance although heavier and treated with sizing to render it waterproof, is dutiable as "crepe paper." Fiegel v. U. S. [C. C. A.] 167 F 537. Plain paper, stamped into lace-like effects, and known as tops or doilies and used on tops of packages of candy or under finger bowls, is dutiable as "paper" rather than as "manufactures of paper," and where they contain printed trademarks and business names or decorative designs are dutiable as "printed matter." Hamilton v. U. S. [C. C. A.] 167 F 796. Post cards with printing and pictures, dutiable as "printed matter" although ornamented with feathers giving them their chief value. Ringk & Co. v. U. S., 164 F 1021.

Beverages: Liquid extract of coffee bean, dutiable as unenumerated manufactured article, not as "articles used as coffee, or as substitutes for coffee." Hazard & Co. v. U. S., 164 F 907.

Chemicals, drugs and medicines: "Adeps lanae" a refined product from wool grease is dutiable as "medicinal preparations * * * not specifically provided for" and

not as "wool grease." Zinkeisen & Co. v. U. S. [C. C. A.] 167 F 312. Crystalized chrome alum is dutiable as a "chemical salt" and not as an "article in a crude state." Kuttroff, Pickhardt & Co. v. U. S. [C. C. A.] 169 F 283. "Euquinine," though not chemically a salt, is classified as a "salt of chincona bark." United States v. Merck & Co. [C. C. A.] 168 F 244. Glycerophosphate of lime, mostly used in preparation of elixirs, is dutiable as a "chemical compound" and not as a medicinal preparation. Klipstein & Co. v. U. S. [C. C. A.] 167 F 535. Herbs immersed in alcohol, the whole to be used in making tinctures and extracts, dutiable as unenumerated manufactured articles, and not as "chemical compound." United States v. Stone & Downer Co., 171 F 293. Orchil and Persian berry extracts, dutiable as unenumerated manufactured articles, not as "drugs" nor as "paints and colors" nor as "orchil or orchil liquid." Siegle & Co. v. U. S., 166 F 1015. Synthetic camphor when containing impurities bringing it below standard of refined camphor is subject to classification as "camphor crude." United States v. Schering, 163 F 246. Toilet waters are dutiable as unenumerated manufactured articles rather than as "waste." Burr v. U. S. [C. C. A.] 167 F 801.

Minerals, metals, and manufactures thereof: Where mineral waste has been converted into a valuable commodity by a special process, it is no longer a crude mineral but a manufactured article. United States v. Graser-Rothe, 164 F 205. Granito or terrazo, being crushed waste of marble quarries, dutiable as unenumerated manufactured article, not as "waste" or as minerals "crude." Id. Mexican onyx is dutiable as "onyx" rather than as "marble." Blochman Banking Co. v. Blake, 168 F 572. Miners', glaziers' and engravers' diamonds, whether whole or split, are classified as "diamonds rough or uncut * * * and not advanced * * * by splitting * * * including miners', glaziers' and engravers' diamonds." Sullivan Mach. Co. v. U. S., 168 F 561. Retort settings, being fire brick, although weighing more than ten pounds, are dutiable by similitude as "fire brick weighing not more than ten pounds." United States v. Behrend [C. C. A.] 167 F 317. "Iron sand" dutiable as "iron manufactured," not as "iron in * * * forms less finished than iron in bars and more advanced than pig iron," nor as "unwrought metals." Harrison Supply Co. v. U. S., 164 F 155; Harrison Supply Co. v. U. S. [C. C. A.] 171 F 406. Ferro-chrome. ferro-tungsten and ferro-vanadium, are dutiable by similitude as "ferro-manganese," and not as "metals unwrought" although they have been experimentally wrought. Lavino & Co. v. U. S., 171 F 245. Circular steel plates resembling saw plates in size, shape, and quality, are dutiable as such although the importer does not intend to put them to that use. Boker & Co. v. U. S., 168 F 573. Steel plates manufactured into tables or other completed commercial articles are dutiable as manufactured articles of steel and not as "plates and steel in all forms and shapes." Morris & Co. v. U. S., 169 F 666. Steel stampings dutiable as "pressed or stamped shapes" rather than as manufactures of metal. United States v. Veith, 169 F 665. Steel cylinders, 19 feet long and 4 feet in diameter, and others 35 feet long and 8 feet in diameter, are dutiable as "tubes." United States v. Knauth [C. C. A.] 168 F 539. Rough bored rifle barrels suitable for no other purpose but not wholly finished nor ready to use are dutiable as "parts of rifles." United States v. Riga, 171 F 783. Wire made by inserting iron wire in nickel tube and then drawing down until nickel becomes welded to iron is dutiable as "coated wire." Boker & Co. v. U. S., 168 F 464. Zinc ores consisting of carbonate and silicate of zinc, dutiable as "calamine" and that known as sulphide of zinc dutiable as "minerals crude," except where they contain lead when they are dutiable as "lead bearing ore of all kinds." United States v. Brewster [C. C. A.] 167 F 122.

Stones and manufactures thereof: Pieces of soapstone cut in regular sizes for manufacture into gastips dutiable as unenumerated manufactured articles. Kirschberger & Co. v. U. S., 166 F 1012. Japanese garden lanterns of dressed granite, imported in separate pieces for convenience, dutiable as unenumerated manufactured articles, not as "building or monumental stone * * * hewn, dressed," etc. United States v. Vantine & Co. [C. C. A.] 166 F 751.

Textile and manufactures thereof; wearing apparel: "Trimmings" in c. 11, § 1, schedule L, par. 390, Act 1897, used in commercial rather than descriptive sense. Naday v. U. S. [C. C. A.] 164 F 44. Articles with edges plainly stitched merely to prevent ravelling, are not dutiable as "embroideries." United States v. Waentig, 168 F 570. Drawnwork in which the open spaces at corners are filled with additional threads worked into conventional designs, not dutiable as "embroidery." United States v. Simon & Co. [C. C. A.] 169 F 106. Ornaments and loops, manufactured separately but stretched together for convenience in importing, to be separated before used are dutiable as "manufactures of silk," and not as "trimmings or galloons." United States v. Hilbert [C. C. A.] 171 F 69. Silk fabric to which gilt cord has been basted in irregular loops without conventional design is dutiable as "article appliqueed" and not as "woven fabrics of silk." United States v. Vantine & Co. [C. C. A.] 166 F 735. Feather boas made by stringing feathers, subject to classification as "feathers dressed." Legg v. U. S. [C. C. A.] 163 F 1006. Millinery articles made almost wholly of feathers but with wire as an important feature of their construction, dutiable as "articles in part metal" and not as "feathers advanced or manufactured." United States v. Berlinger [C. C. A.] 167 F 800. Curtains made chiefly of rice paste made in the form of beads is dutiable as "articles in part of beads" and not as paste since the latter classification includes only that form of paste which is a variety of glass. Morimura Bros. v. U. S. [C. C. A.] 169 F 279. "Panne velvet" dutiable as "plush" and not as "velvets." United States v. Passavant & Co., 164 F 912. Fabrics in the piece composed of silk warp and metal thread weft, the latter constituting its chief value, dutiable as laces, braids or other articles in chief value of * * * metal threads," and not as "woven fabrics * * * not specially provided for * * * containing not more than thirty per centum in weight of silk." G. Hirsch's Sons

§ 3. *Administration of customs laws.*[55] *Entry and appraisement.* See 11 C. L. 956—A declaration of a passenger's baggage as a "trunk" is a sufficient declaration of its contents.[56] An addition by the importer of certain items to the invoice "to make market value" is conclusive although the appraisers found that such added items were not dutiable.[57] The duty of five cents per pint or fraction thereof on excess over one quart found in bottles of vermuth is to be assessed on each bottle containing such excess and not on the total excess per case or in the whole importation.[58] A notice of an advance in invoice value, sent by mail, to an address given in the entry, is sufficient.[59] That a reappraisement on appeal was invalid is immaterial where the value found was the same as on the original appraisement and the latter is not shown to have been incorrect,[60] and an error of procedure by a general appraiser does not affect his jurisdiction.[61]

Reliquidation. See 11 C. L. 956—A reliquidation made more than a year after entry, although within a year after payment of duty, is void.[62]

v. U. S. [C. C. A.] 167 F 309. Camel's hair press cloth dutiable as manufactures of "wool" and not as "hair press cloth." Oberle v. U. S. [C. C. A.] 165 F 53. Fabric consisting of cotton warp and calf hair filling is dutiable by similitude as "manufactures made wholly or in part of wool." Rosenstern & Co. v. U. S. [C. C. A.] 171 F 71. Horsehair braids used exclusively in manufacture of hats, dutiable by similitude, as "braids * * * wholly of straw suitable for making hats," not as "braids made of silk." Paterson & Co. v. U. S. [C. C. A.] 166 F 733; Rheims Co. v. U. S., 169 F 662; Wanamaker v. U. S., 169 F 664. Artificial horsehair made from cotton waste is dutiable by similitude as "cotton yarn" rather than as "silk yarn." Eckstein v. U. S. [C. C. A.] 167 F 802. Braids of cotton and rubber, the latter constituting the chief value, are dutiable "manufactures (in which) India rubber is the component material of chief value," par. 449, and not as braids "wholly or in chief value of cotton * * * whether composed in part of India rubber." Horrax v. U. S. [C. C. A.] 167 F 526. Schedule I, par. 313, relating to "cotton cloth in which other than the ordinary warp and filling threads have been introduced," includes cloth in which threads introduced to form figure have been clipped off where they appear at intervals on back of fabric. R. B. Maclea Co. v. U. S., 167 F 688. The extra duty charged on cotton fabric, the foundation of which is uncolored, but containing colored figures superimposed and woven into the fabric, should be added to duty applicable to uncolored rather than colored cotton. United States v. Ruch & Co. [C. C. A.] 167 F 523. Ramie sliver dutiable as cotton sliver by similitude. Vandegrift & Co. v. U. S., 164 F 65.

Miscellaneous manufactures: Automobile tires, detached from automobile but crated with it, are dutiable as part thereof and not separately as manufactures of India rubber. United States v. Auto Import Co. [C. C. A.] 168 F 242. Baskets of twisted hinskl wood shavings, dutiable as "manufactures of chip," and not as manufacture of "wood." Morimura Bros. v. U. S., 167 F 687. Blown glass flasks for chemical laboratories, dutiable as "Blown glassware," not as "bottles." Eimer v. U. S. [C. C. A.] 168 F 240. Carnauba wax substitute compounded of carnauba wax, a vegetable wax, and paraffin, a mineral wax, is classified as "wax, vegetable or mineral." United States v. Morningstar & Co. [C. C. A.] 168 F 541. Casein is "lactarene" of Act July 24, 1897, c. 11, § 2. United States v. Browneli, 159 F 219. Enamel white paint ground in oil, and containing zinc but not lead, and also other ingredients to increase the gloss, is dutiable as "white paint * * * containing zinc but not containing lead * * * ground in oil," and not as "paints * * * ground * * * with solutions other than oil." United States v. Bird & Co. [C. C. A.] 167 F 319. Miniature penknives with odd shaped handles though useless for most purposes for which penknives are used, but not in fact used as playthings, are dutiable as "penknives" rather than as "toys." Kastor & Bros. v. U. S., 167 F 993. Plank linoleum dutiable as "linoleum figured or plain," not as "inlaid linoleum." United States v. Scott, 164 F 285. Schedule D, par. 208, 30 Stat. 168, "furniture of wood * * * and manufactures of wood, or of which wood is the component material of chief value," covers furniture made of wood although its component part of chief value is its metal ornamentation. Hempstead v. U. S., 168 F 450; Woodruff & Co. v. U. S., 168 F 452.

55. **Search Note:** See 24 A. & E. Enc. L. (2ed.) 895, 898, 921; 22 A. & E. Enc. P. & P. 405.

56. United States v. One Trunk, 171 F 772.

57. This rule is not altered by fact that items were not included in value per se, but were stated separately. Daloz v. U. S., 171 F 275.

58. Act July 24, 1897, c. 11, § 1, schedule H, par. 296. De Fremery & Co. v. U. S., 171 F 677.

59. United States v. Independent Importing Co., 165 F 63.

60. Grubnau v. U. S., 171 F 284.

61. Failure of appraiser to consider the portion of the testimony which had been taken before another appraiser is merely error of procedure. United States v. Chas. M. Taylor's Sons, 171 F 152.

62. Act June 22, 1874, c. 391, § 21, 18 Stat. 190, not being repealed by Act Mar. 3, 1875, c. 136, § 1, 18 Stat. 469. United States v. Vandegrift & Co., 166 F 1017.

Enforcement of duties. See 9 C. L. 867

Refunds, allowance and drawbacks. See 11 C. L. 956—Allowance for decay on examination of only five per cent of the fruit imported should not be extended to the portion not examined.[63] Where portions of an importation were so damaged by sea-water that they were condemned and destroyed by the health officer, they should be treated as if no importation had been made,[64] and breach of a bond given under Rev. St. § 2899, does not affect the right of the importer to this allowance.[65]

Protests and appeals. See 11 C. L. 957—A protest is sufficient if it may be understood when read in connection with the statute referred to therein,[66] and in determining the sufficiency of the protest, the fact that the collector understood it is relevant.[67] Where on the hearing of a protest the importer rested after introducing evidence as to a portion only of the items, the board may assume that the protest was abandoned as to the other items.[68] Where an error of a general appraiser is one of procedure only, the remedy is by appeal to the board of general appraisers, and not by protest.[69] A reappraisement by a board of general appraisers is subject to review and may be impeached if based upon a wrong principle of law.[70] Applications for review of decisions of the board of general appraisers must be filed within the time prescribed by statute.[71] Lack of jurisdiction is not waived by going to trial on the merits.[72] On appeal challenging the correctness of a classification, the burden is on the importer to establish the correctness of his contention,[73] but, in making proof of the character of the imported articles, it is not essential that samples be produced.[74] If an importer introduced some evidence before the board of general appraisers, he may introduce additional evidence in support of his contention on appeal to the circuit court,[75] but no evidence is admissible as to items of merchandise in respect to which no evidence was introduced before the board.[76]

§ 4. *Violation of customs laws and consequences thereof.*[77] See 11 C. L. 958—Rev. St. § 2865, making it an offense to "smuggle or clandestinely introduce" merchandise, does not include a fraudulent entry at the customs house.[78] To constitute the offense of smuggling, there must be clandestine introduction of goods subject to duty with intent to defraud the government.[79] A fraudulent "entry" embraces the entire transaction of passing goods through the custom house.[80] To work a forfeiture, it is not essential that fraudulent entry should have been successful in defrauding the government,[81] but merchandise innocently entered on an invoice fraudulently made out by the foreign shipper is not liable to forfeiture,[82] and the falsification must be such that, if consummated, it would deprive the

63. Denuncio Fruit Co. v. U. S., 164 F 909.
64. There was nothing left to "abandon" under Act June 10, 1890, c. 407, § 23, 26 Stat. 140. Habicht, Braun & Co. v. U. S., 171 F 441.
65. Habicht, Braun & Co. v. U. S., 171 F 441.
66, 67. Lothrop v. U. S., 164 F 99.
68. Plummer & Co. v. U. S. [C. C. A.] 166 F 730.
69. United States v. Chas. M. Taylor's Sons, 171 F 152.
70. United States v. Haviland & Co., 167 F 414.
71. Customs Administrative Act June 10, 1890, c. 407, § 15, requiring such application within 30 days, being mandatory. Carriere v. U. S., 163 F 1009.
72. Carriere v. U. S., 163 F 1009.
73. Legg v. U. S. [C. C. A.] 163 F 1006.
74. Rheims Co. v. U. S., 169 F 662.
75. Wolff & Co. v. U. S., 168 F 970.
76. Objection to such evidence not waived because not raised until after some evidence had been introduced. Plummer & Co. v. U. S. [C. C. A.] 166 F 730.
77. **Search Note:** See note in 3 C. L. 996. See, also, 24 A. & E. Enc. L. (2ed.) 929.
78. United States v. 646 Half-Boxes of Figs, 164 F 778.
79. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.
80. Act June 10, 1890, includes act of weigher in making false return of weights to collector. United States v. Mescall, 164 F 580.
81. Under Act June 10, 1890, c. 407, § 9. United States v. Sixty-Six Cases of Cheese, 163 F 367.
82. United States v. Twenty Boxes of Cheese, 163 F 369.

United States of lawful duties.[83] Forfeiture may be had when a consignee falsely describes himself as owner,[84] or when the invoice falsely describes the goods with intent to evade payment of duty, although it was corrected before entry,[85] but an importer does not make a false entry subjecting his goods to forfeiture by swearing to a false invoice before an American consul, where he presents at the customs house an invoice to which has been added a sum sufficient to make the true value.[86] Application for remission of forfeiture cannot be instituted until a forfeiture has been declared.[87] The fact that an owner of goods, although notified for forfeiture proceedings, failed to appear does not bar him from petitioning for a remission of the penalty.[88] Invoices provided by the act of 1897 need not be verified.[89] An information for forfeiture for conspiracy to evade payment of duties must name some one with whom the claimant conspired [90] and, to work a forfeiture on the ground that an entry is made by an agent, it must be so charged in the information.[91] That an indictment in describing property "as subject to duty and which should have been invoiced" presupposes the existence of some law does not render it objectionable,[92] and an allegation that defendants knowingly smuggled the goods is a sufficient allegation that they knew that the goods were dutiable,[93] and an allegation of conspiracy to defraud the United States out of merchandise "to be imported into the United States without invoicing or entering the same" is sufficient.[94] On trial of an information for forfeiture, an importer is entitled to a hearing, and where a motion is seasonably made a new trial should be granted for that purpose.[95] In proceedings for forfeiture, the burden is on claimant to prove that the importation is legal.[96] The government may go behind the bill of lading to show that the consignee is not the true owner.[97] A customs weigher making false returns of weights in assisting an importer to make an illegal entry is not punishable under the act relating to the crime of making an illegal entry,[98] and, even though the attempted result is not accomplished, he may be prosecuted under Rev. St. § 5444,[99] or under § 5445.[100]

DAMAGES.

The scope of this topic is noted below.[1]

§ 1. Kinds of Damages and Their Characteristics, 1174. Nominal Damages, 1174. Liquidated Damages, 1174. Exemplary Damages, 1177. Statutory, Double and Treble Damages, 1178.

83. If such result could not follow the acts, forfeiture is not incurred although wrongful intent. Hence false statement of weight will not work forfeiture. United States v. Twenty Boxes of Cheese, 163 F 369.

84. Act June 10, 1890, c. 407, § 9. United States v. One Bag of Crushed Wheat, 166 F 562.

85. Concealment of silk among packages invoiced as preserved fruit. United States v. One Bag of Crushed Wheat, 166 F 562.

86. Since entry does not begin until owner, after goods reach this country, begins acts through which, by application to officials, he gains possession of goods. United States v. One Trunk, 171 F 772.

87. Hence the right is not lost by failure to make application before that time. United States v. 150 7-12 Dozen Long Gloves, 168 F 1010.

88. United States v. 150 7-12 Dozen Long Gloves, 168 F 1010.

89. United States v. 646 Half-Boxes of Figs, 164 F 778.

90. United States v. One Bag of Crushed Wheat, 166 F 562.

91. United States v. 646 Half-Boxes of Figs, 164 F 778.

92, 93, 94. United States v. White, 171 F 775.

95. United States v. Two Bales of Rugs, 167 F 689.

96. United States v. One Bag of Crushed Wheat, 166 F 562.

97. Section 1 of the Act of 1897, providing that the consignee shall be deemed the owner, not making such presumption conclusive. United States v. One Bag of Crushed Wheat, 166 F 562.

98. Act June 10, 1890, c. 407, § 9. United States v. Mescall, 164 F 580.

99. Providing punishment for "every officer of the revenue" who "admits or aids in admitting to entry" goods upon payment of less than amount due. United States v. Mescall, 164 F 584.

100. Providing punishment for "every person" who "effects or aids in effecting any entry" at less than the true weight. United States v. Mescall, 164 F 587.

1. This topic treats exhaustively of the measure of damages both for tort and for

§ 2. **General Principles for Ascertaining, 1179.** Difficulty or Uncertainty of Proof of Amount as Bar, 1179. Avoidable Consequences, 1180. Mental Suffering, 1181. Interest, 1181. Attorney's Fees, 1182.
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A. Pleading, 1222.
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D. Trial, 1240.
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§ 1. *Kinds of damages and their characteristics.*[2] See 11 C. L. 958—Damage sustained without the infraction of a legal right is damnum absque injuria, for which no remedy is provided by law.[3]

Nominal damages See 11 C. L. 959 are such as are awarded in recognition of a legal right and for the technical infraction of it.[4] Such damages are awarded where a breach of duty owed is established but no actual damages are proven [5] or where there is a failure of proof as to the amount of damages sustained.[6]

Liquidated damages See 11 C. L. 959 are those the amount of which has been determined by anticipatory agreement between the parties.[7] A provision for liqui-

breach of contract. A few specific exceptions are, however, made because of the impossibility of separating the matter of damages from certain subject-matters. These are the measure of recovery for taking of property by eminent domain (see Eminent Domain,* § 6), the measure of damages for death by wrongful act (see Death by Wrongful Act,* § 4), damages for mental anguish in telegraph cases (see Telegraphs and Telephones,* § 3B), and damages recoverable on dissolution of an injunction (see Injunction,* § 4D).

2. Search Note: See notes in 2 L. R. A. (N. S.) 210; 3 Id. 1119; 4 Id. 907; 6 Id. 883; 9 Id. 1134, 1218; 10 Id. 204, 403; 11 Id. 497; 12 Id. 184, 886; 16 Id. 440; 28 A. S. R. 870; 59 Id. 589; 101 Id. 730; 108 Id. 46; 1 Ann. Cas. 244; 9 Id. 638; 10 Id. 225.

See, also, Damages, Cent. Dig. §§ 1-33, 154-221, 354-405, 574, 575; Dec. Dig. §§ 1-14, 74-94, 127-140, 227; 13 Cyc. 12-21, 89-135, 253; 8 A. & E. Enc. L. (2ed.) 541, 694; 12 Id. 163; 19 Id. 394.

3. See Torts, § 1.

4. Where at commencement of suit for injunction and damages cause of action exists, plaintiff is entitled to an award of nominal damages and costs, though before trial the condition had been remedied. Majenica Tel. Co. v. Rogers [Ind. App.] 87 NE 165. Purchasers of carload of horses are entitled to at least nominal damages for wrongful stoppage in transitu thereof, by the seller. Edwards Bros. v. Erwin, 148 N. C. 429, 62 SE 545. For illegal invasion of property rights, the injured person is entitled to at least nominal damages. Price v. High Shoals Mfg. Co. [Ga.] 64 SE 87.

5. See post, §§ 4, 5. In absence of any evidence of damage by breach of contract, award of five cents held proper. Waters v. Susman [N. C.] 65 SE 623. Nominal damages can be recovered unless there is proof of actual damages. Harrison v. Clarke [N. J. Law] 73 A 43. Where grantee released railroad company from liability for damages to land by reason of operation of steam railroad on street, grantee could recover nominal damages because of the incumbrance, though actual damage was not shown. Tuskegee Land & Security Co. v. Birmingham Realty Co. [Ala.] 49 S 378.

6. See post, §§ 4, 5.

7. Where a contract for sale stipulated that on failure of seller to fill orders buyer should purchase elsewhere, at cheapest price and seller would pay the difference, held such stipulation is a law between the parties fixing the measure of damages, and loss of profits cannot be recovered. Gartner v. Richardson, 123 La. 194, 48 S 886. Contract requiring contractor to pay $50 per day for every day in excess of 70 days it required him to construct a building, and allowing him $50 for every day of 70 days if he completed it within such period, provides for liquidated damages. United Surety Co. v. Summers, 110 Md. 95, 72 A 775. That an executory contract for purchase of land provides that in case of breach by the vendee the vendor may retain all payments made

dated damages differs from a contract for indemnity.[8] Whether a sum stipulated to be paid in case of breach of contract is to be regarded as liquidated damages or as a penalty is to be determined from the intention of the parties[9] as gathered from the entire contract,[10] and the question of such intention may be one of fact[11] or of law.[12] Where damages are uncertain and not readily capable of ascertainment by any known or safe rule[13] or where it appears that the damages have already been the subject of actual estimate and adjustment,[14] and it also appears that the sum stipulated is not disproportionate to the actual damage sustained,[15] the provision

as liquidated damages, which the law would allow him to do without such provision, does not transform such damages into a penalty. Beveridge v. West Side Const. Co., 130 App. Div. 139, 114 NYS 521. Where the attitude of a purchaser of machinery showed that he would not accept the machinery, the seller was under no obligation to ship it to him before claiming the liquidated damages stipulated for in the contract. McDuffie v. Dilley [Tex. Civ. App.] 115 SW 612. Where contract provided for liquidated damages, held on breach that such amount was the limit of recovery. West Coast Manufacturers' Agency v. Oregon Condensed Milk Co. [Wash.] 103 P 4. Question of **liquidated damages is not involved** where a mining lease requires that 8,000 tons of coal be taken out annually or a royalty paid on such amount. Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604.

8. Stipulation for attorney's fees in a note is a contract for indemnity. First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887.

9. Salzer v. Sheffield Farms Slawson Decker Co., 115 NYS 81. Construed as damages where amount of damages is uncertain and difficult to prove. Doan v. Rogan, 79 Ohio St. 372, 87 NE 263. The general principle is that, whenever a penalty is inserted merely to secure the performance of a collateral object, the latter is considered as the principal intent and the penalty only an accessory to secure performance, or damage. Potomac Power Co. v. Burchell [Va.] 64 SE 982. **Forfeitures are not favored,** and conditions for which a forfeiture is claimed is to be strictly construed. Denecke v. Miller [Iowa] 119 NW 380. As a general rule, a forfeiture, when declared, relates back to the date of the breach. Id.

10. Each case is to be considered in the light of its own facts in determining whether the provision is for liquidated damages or a penalty. Fehlinger v. Boos, 118 NYS 167. Intention of the parties as gathered from the contract itself and surrounding circumstances. Traub-Dittmar Const. Co. v. Hartman, 61 Misc. 173, 112 NYS 919. Where one contracted to purchase 6 automobiles, one to be delivered immediately and others at various times, and $500 was deposited on each car with a provision that buyers should have 5 per cent discount, and if they did not take the six cars ordered they should refund 2½ per cent on the price of cars taken, held on their refusal to take the five cars the provision for refund of 2½ per cent was not liquidated damages. Klauder v. C. V. G. Import Co., 61 Misc. 255, 113 NYS 716.

11. Where each party to contract for sale of land deposited $500 to be paid over to the other in case of breach but it was not stipulated as liquidated damages, whether it was intended as liquidated damages, or as a penalty, held for the jury. McMillan v. First Nat. Bank [Tex. Civ. App.] 119 SW 709.

12. Whether per diem payment to be made for failure to complete paving contract on time is a penalty or liquidated damages is a question for the court. Barber Asphalt Pav. Co. v. Wabash [Ind. App.] 86 NE 1034.

13. Where damages are uncertain and not readily susceptible of proof and not disproportionate to the probable damage suffered, the provision will be regarded as one for liquidated damages. Madler v. Silverstone [Wash.] 104 P 165. Where damages are uncertain in nature and cannot be well ascertained by any pecuniary standard, and parties themselves are better able to estimate them. Illinois Trust & Sav. Bank v. Burlington [Kan.] 101 P 649. Where a seller of property deposited a sum in escrow to be paid to him if he did certain work on the premises and to the buyer if he did the work. Levy v. Freiman, 131 App. Div. 298, 115 NYS 996. Where damages contemplated are uncertain and dependent upon extrinsic circumstances and the stipulated sum is not disproportionate to the actual damages. Id. It is competent to stipulate a certain sum as damages for breach of oil and gas lease requiring lessee to drill well to a certain depth within a specified time. Blodget v. Columbia Live Stock Co. [C. C. A.] 164 F 305.

14. Judgment for stipulated damages held proper under the evidence. Union Sawmill Co. v. Summit Lumber Co., 123 La. 663, 49 S 278.

15. The amount stipulated must not be disproportionate to the actual loss sustained. Traub-Dittmar Const. Co. v. Hartman, 61 Misc. 173, 112 NYS 919. Those damages only are positively liquidated which the parties after breach and with full knowledge of all the facts agree upon as the measure of damages. In other cases the question is whether the sum stipulated is proportionate to the actual loss. Holland Torpedo Boat Co. v. Nixon, 61 Misc. 469, 115 NYS 573. Where actual damages cannot be definitely ascertained and the amount stipulated is not wholly disproportionate to probable loss. Salzer v. Sheffield Farms Slawson Decker Co., 115 NYS 81. To ascertain whether the stipulated amount is proportionate to actual damage sustained, **there must be some evidence of damage,** and, if there is no evidence de hors the contract, the penalty or forfeiture, no matter how described, will not be allowed. Traub-Dittmar Const. Co. v. Hartman, 61 Misc. 173, 112 NYS 919.

Held not disproportionate: $50 per day for every day in excess of 70 days is not unreasonable liquidated damages for failure to complete within such period a building cost-

will be regarded as one for liquidated damages.[16] If no damages are sustained, the provision will be regarded as a penalty.[17] The fact that the sum is designated as one or the other is not conclusive.[18]

A provision for liquidated damages applies only in case of breach of the provisions to which it is made applicable.[19] A provision for liquidated damages will be deemed waived where breach is caused by mutual default of the parties[20] or by acts indicative of an intention not to enforce it,[21] or where the owner asserts rights

ing $13,625. United Surety Co. v. Summers, 110 Md. 95, 72 A 775. A contract of employment that if the employe quits without giving one week's notice he shall forfeit one week's pay. Gleaton v. Fulton Bag & Cotton Mills, 5 Ga. App. 420, 63 SE 520. Three dollars per day for failure to complete a $13,000 hotel on time. Illinois Surety Co. v. Garrard Hotel Co. [Ky.] 118 SW 967.

16. Liquidated damages: Provision for forfeiture of five hundred dollars for failure to comply with a contract for exchange of properties. Madler v. Silverstone [Wash.] 104 P 165. Provision in water supply contract that if company shall be temporarily unable to supply water no rental shall be paid during the period, and if the disability be the fault of the company the rebate shall be for double time. Illinois Trust & Sav. Bank v. Burlington [Kan.] 101 P 649. Provision in contract for sale of trees on a large tract that buyer would pay the seller $1 per tree for isolated trees left standing on cut over tract. Blackwood v. Liebke, 87 Ark. 545, 113 SW 210. Promissory note for $1,500 to become due and payable immediately if $8,000 was not paid for 100 shares of stock as per contract. Moyses v. Schendorf, 142 Ill. App. 293. Provision for per diem damages for delay in completion of the construction of a waterworks system. City of Washington v. Potomac Engineering & Const. Co. [Ga.] 65 SE 80. Provision for payment of certain sum in case of termination of contract. In re Van Horn, 167 F 1021. Provision in commission mortgage for payment of additional commission in case of default. Russell v. Wright [S. D.] 121 NW 842. $1,500 given to secure performance of contract to purchase a stock and business for $8,000. Moyses v. Schendorf, 238 Ill. 232, 87 NE 401. Agreement that deposit made by bidder on public work should be forfeited, if his bid is accepted and he fails to enter into the contract. Turner v. Fremont [C. C. A.] 170 F 259. Under a contract whereby a wife dismissed a divorce suit and condoned adultery in consideration of the husband conveying a one-half interest in certain property and agreeing to convey the remainder if he renewed the relations, the conveyance of the latter interest. Darcey v. Darcey [R. I.] 71 A 595.

Held a penalty: Contract for sale of business and agreement to forfeit $1,000 per year if he engaged in the same business in the same city for five years. Buckhout v. Witwer [Mich.] 16 Det. Leg. N. 417, 122 NW 184. Provision held for a penalty. Cunningham v. Hill [Kan.] 102 P 1102.

17. Fehlinger v. Boos, 118 NYS 167.

18. The term "forfeiture" does not exclude a purpose to make the sum named a penalty to which the parties may resort to recover actual damages. McMillan v. First Nat. Bank [Tex. Civ. App.] 119 SW 709. Whether provision is for damages or penalty depends upon intent as evidenced by their agreement. Brownold v. Rodbell, 130 App. Div. 371, 114 NYS 846. Provision to "forfeit" $25 per day for failure to complete paving contract on time held liquidated damages regardless of use of word "forfeit," the meaning of which is to be determined from connection in which it is used. Barber Asphalt Pav. Co. v. Wabash [Ind. App.] 86 NE 1034.

19. A provision for liquidated damages in case of breach of a particular provision does not apply in case of breaches in other particulars. Moses v. Autuono [Fla.] 47 S 925. Where the provision is for failure to complete a contract within a time specified, it does not apply to a refusal to perform any part of the contract. Id. Under a contract by which one agreed to work for another as manager for three years, and devote his entime time to the interests of the hirer and if he should violate his agreement to pay $1,500, held that specified damages were to be paid upon breach of the contract as a whole and not upon breach of one of the obligations imposed. Brownold v. Rodbell, 130 App. Div. 371, 114 NYS 846. If the entire sum was to be paid for breach of any one condition as for failure to obey a single order which would result in no damage, the breach would be so out of proportion to the amount to be paid that the provision would be a penalty. Id. Provision for liquidated damages in a contract to organize a corporation and deed property to it, and one of the organizers sell his stock to the other, held not to apply in an action by the land conveyed to it. Thompson-Spencer Co. v. Thompson, 49 Wash. 170, 94 P 935.

20. Delays in construction of an ice plant. Vilter Mfg. Co. v. Tygart's Val. Brew. Co., 168 F 1002. Court will not apportion delays of owner and contractor. Id. Where a party to a contract is partly responsible for the delay, and has waived completion on the date fixed. Holland Torpedo Boat Co. v. Nixon, 61 Misc. 469, 115 NYS 573. Stipulated damages for delay in work held not recoverable where owner contributed to delay, and the damages were conditioned upon his not doing so. H. G. Vogel Co. v. Standard Cordage Co., 118 NYS 343.

21. If an owner delays a contractor or permits him to complete the work after the expiration of the time limited. Traub-Dittmar Const. Co. v. Hartman, 61 Misc. 173, 112 NYS 919. Where contractor for public work abandoned the work after the city had breached the contract by refusing to make payments, and thereafter the city notified him to quit the work, he was not liable for liquidated damages, for delay in completion. Shea v. Sewerage & Water Board [La.] 50 S 166.

under another provision to complete the contract himself,[22] but not by changes in plans where the contractor does not protect his rights under the contract,[23] and the provision may be enforced though the breach results from no fault of the contractor.[24]

A contract for the sale of land which stipulates liquidated damages in case of breach cannot be specifically enforced.[25]

Exemplary damages.[See 11 C. L. 961]—Exemplary, punitive, or vindictive damages are those awarded not as compensation but as punishment, and are ordinarily recoverable only in actions ex delicto.[26] Such damages may be awarded where a wrongful act is committed willfully, wantonly, or maliciously,[27] or under circumstances of aggravation,[28] and may be awarded for omission as well as for acts of

22. Provision for liquidated damages for failure to complete contract in time specified does not apply where owner asserts rights under another provision to take charge of the work and complete it for failure of the contractor to comply with specifications. Moore v. Board of Regents for Normal School in Dist. No. 2, 215 Mo. 705, 115 SW 6. If owners complete a contract under a provision authorizing them to do so, upon the contractor's failure to complete within the period prescribed, and claim the expense thereof, they cannot also claim liquidated damages for delay. Gillett v. Young [Colo.] 101 P 766.

23. Under a contract stipulating per diem damages for delay in completion and giving the contractor a right to an extension where plans were changed, held where he made no application for extension where plans were changed, such change did not waive provision requiring completion within a certain period. Ward v. Haren [Mo. App.] 119 SW 446.

24. Provision in building contract that contractor shall forfeit a stipulated sum per day for delay in completion will be enforced though delay results from honest mistake of architect, whose decision is conclusive. Boston Store v. Schleuter [Ark.] 114 SW 242.

25. Moss v. Wren [Tex.] 120 SW 847, rvg. [Tex.] 113 SW 739; Moss v. Wren [Tex. Civ. App.] 118 SW 149.

26. See post, § 5. But see, also, post, § 4, for allowance of such damages for breach of duty arising out of contract in certain cases. Exemplary, punitive or vindictive damages are those in excess of actual damage, and are allowed where a tort is aggravated by evil motive, actual malice, violence, oppression or fraud. Murphy v. Booth [Utah] 103 P 768.

27. "Willfulness" or "wantonness" means direct intent to inflict injury, or an act done or omitted with consciousness that it will probably result in injury. Anniston Elec. & Gas Co. v. Rosen [Ala.] 48 S 798. Malice justifying punitive damages against a master for an act of his servant is shown by proof of an act to gratify some grudge, or that it was committed recklessly and wantonly. Magagnos v. Brooklyn Heights R. Co., 128 App. Div. 182, 112 NYS 637. In such case, the award of punitive damages is in the discretion of the jury. Id. Where there was no evidence of willfulness, wantonness, or oppression in an action for injuries, it was error to charge relative to punitive damages. Southern R. Co. v. Davis [Ga.] 65 SE 131. Both malice and want of probable cause must exist to entitle one to exemplary damages for wrongful suing out of writ of sequestration. Webb v. Wiginton & Co. [Tex. Civ. App.] 118 SW 856. To justify punitive damages, it must appear that the negligent act was done with such recklessness as to amount to criminality. Held not recoverable for taking of sand not his own. Adams v. Lorraine Mfg. Co. [R. I.] 71 A 180. Exemplary damages were properly awarded where employes of one gas company destroyed fixtures of another company in plaintiff's house, depriving her of heat, and failed to make repairs when notified. Kentucky Heating Co. v. Hood [Ky.] 118 SW 337. Where willfulness or wantonness is not the substantive cause of the action, it is not necessary to allege that the act was willful or wanton in order to recover exemplary damages. Exemplary damages may be recovered under section 9 of the dramshop act without charging willfulness. Rude v. Fakes, 143 Ill. App. 456. **Instruction** that "If you believe defendant alienated from plaintiff her husband's affections in manner set forth in above instruction and further believe that defendant's conduct in causing such alienation was wanton and malicious towards, and with design to humiliate, plaintiff, then, in addition to compensatory damages, you may, in your discretion, award plaintiff punitive damages," held proper. Scott v. O'Brien, 33 Ky. L. R. 450, 110 SW 260. Instruction permitting jury to award punitive damages in suit for alienation of affections not error in Washington, since federal court is not bound where decisions of state courts to the contrary are not bound by constitution or statutes of state but one of general jurisprudence. Woldson v. Larson [C. C. A.] 164 F 548.

28. Where a special officer of a railroad company in making an arrest severely beat the person without provocation, punitive damages could be recovered. Baltimore & O. R. Co. v. Strube [Md.] 73 A 697. Punitive damages are recoverable where superintendent of a corporation persists in using heavy blasts of dynamite with full knowledge that they are shattering buildings, and does so because it is easier to pay damages than do the work in a different manner. Funk v. Kerbaugh, 222 Pa. 19, 70 A 953. Punitive damages properly allowed where defendant was found guilty of unlawful interference with plaintiff's contract of employment.

commission [29] and in actions of a purely statutory character.[30] But they cannot be awarded in case of mere negligence,[31] and that the wrongful act was done deliberately and with unnecessary force is not sufficient.[32] An injured person is not entitled in any case to such damages as a matter of right,[33] and whether they shall be awarded rests wholly in the discretion of the jury.[34] The recovery of actual damages is essential to sustain a recovery of exemplary damages.[35] The amount to be awarded is to be determined by the jury in the light of all the circumstances.[36] Punitive damages may be awarded against corporations for acts of its agents,[37] or against a principal for the act of his agent.[38] To justify punitive damages against a master for a tort of his servant, the act must have been wanton or malicious and the master must have participated in it or authorized or ratified it.[39]

Statutory, double and treble damages. See 11 C. L. 963—Statutes commonly provide for the recovery of multifold damages in certain cases.[40] Recovery in such case is confined to cases strictly within the statutes.[41]

Illinois Steel Co. v. Brenshall, 141 Ill. App. 36. Punitive damages properly allowed for carrying away fish nets in owner's presence and in face of his protest. Smalling v. Jackson, 133 App. Div. 382, 117 NYS 268.

29. Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264.

30. Evidence held to warrant recovery of exemplary damage under dramshop act, actual damage having been found. Naughton v. Lochiel, 143 Ill. App. 402; Rude v. Fakes, 143 Ill. App. 456.

31. Cannot be based upon mere negligence however gross. It is essential that injury result from willful wrong—conscious indifference to results. Greer v. White [Ark.] 118 SW 258. If one when accusing another of arson believed he was speaking of a third person, his conduct amounted to no more than gross negligence. Id. No ground for punitive damages where one is injured by driving into a telephone pole at the side of the road. Bevis v. Vanceburg Tel. Co. [Ky.] 113 SW 811.

32. Assault on passenger in waiting room. Philadelphia, B. & W. R. Co. v. Green, 110 Md. 32, 71 A 986.

33. Such imposition is discretionary with the jury. Coleman v. Pepper [Ala.] 49 S 310; Tilton v. Gates Land Co., 140 Wis. 197, 121 NW 331.

34. Tilton v. Gates Land Co., 140 Wis. 197, 121 NW 331. In action for injuries by coming in contact with electric wire, evidence held for the jury on the question of reckless disregard of rights of the public warranting punitive damages. Laughlin v. Southern Public Service Corp. [S. C.] 64 SE 1010. Against master for act of servant. Magagnos v. Brooklyn Heights R. Co., 128 App. Div. 182, 112 NYS 637.

35. Duffy v. Frankenberg, 144 Ill. App. 103; Beckham v. Collins [Tex. Civ. App.] 117 SW 431.

36. In submitting the question of punitive, the court should charge the jury to consider the enormity of the wrong, and the necessity of preventing similar wrongs, and impose such sum as the exigencies of the case demand. Coleman v. Pepper [Ala.] 49 S 310. Charge disapproved as giving no rule for guidance of the jury. Id. Where there is a breach of duty giving rise to a cause of action and punitive damages are claimed, all surrounding circumstances must be submitted to the jury. Louisville & N. R. Co. v. Forrest [Ga. App.] 65 SE 808.

37. Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264. Vindictive damages held recoverable against corporation whose agent knowingly appropriated car to the corporation's use, said car at the time belonging to rival grain dealer. Aygarn v. Rogers Grain Co., 141 Ill. App. 402.

38. Without a showing of his notice of the fraud or opportunity to repudiate it. Brown v. American Tel. & T. Co., 82 S. C. 173, 63 SE 744.

39. Charge held erroneous where street car employe imprisoned a passenger. Lewine v. Interborough Rapid Transit Co., 61 Misc. 77, 113 NYS 15. In an action against a street railway company for an arrest by its employe, punitive damages could not be recovered unless the employe acted through malice which the company shared. Magagnos v. Brooklyn Heights R. Co., 128 App. Div. 182, 112 NYS 637. Punitive damages cannot be recovered in suit in rem for injury done by a vessel though the tort was malicious, where owner of the vessel had no knowledge of or part in the injury. The Seven Bros., 170 F 126. A different rule applies to assault by a conductor of a railway train upon a passenger in transit upon his train than to ordinary cases of injuries inflicted by servants acting in other capacities, and where a conductor makes an assault upon a passenger whose conduct is peaceable and who is not violating any of the rules of the company, he must be held to have acted within the scope of his authority and to have rendered the company liable for punitive as well as actual damages. Baltimore & O. R. Co. v. Reed, 12 Ohio C. C. (N. S.) 177.

40. Act Feb. 27, 1907, providing for double damages for stock killed by trains unless certain conditions are complied with is not void. St. Louis, etc., R. Co. v. Wyne [Ark.] 119 SW 1127. Awarding treble damages for infringement of a patent, under Rev. St. § 4921 (U. S. Comp. St. 1901, p. 3395), is discretionary with the trial court and will not be interfered with on appeal. Fox v. Knickerbocker Engraving Co. [C. C. A.] 165 F 442. One is entitled to treble damages under Ball. Ann. Codes & St. § 5656, where a trespasser cuts timber without probable cause to be-

§ 2. *General principles for ascertaining.*[42]—See 11 C. L. 963—The damages recoverable for breach of contract are such as result directly and proximately therefrom,[43] or such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made as a probable result of the breach.[44] The right to recovery has its basis in the idea of compensation,[45] and there can be but one recovery for the loss suffered.[46]

*Difficulty or uncertainty of proof of amount as bar.*See 11 C. L. 965—In estimating damages, the judgment and discretion of the jury must be based on facts.[47] Abso-

lieve the land is his own. Northern Pac. R. Co. v. Myers-Parr Mill Co. [Wash.] 103 P 453. Evidence held to show that the trespasser did not have probable cause to believe the land to be his. Nethery v. Nelson, 51 Wash. 624, 99 P 879. Under a statute making an absolute liability against the owner of a dog for damages, such damages are compensatory only. Puls v. Powelson [Iowa] 121 NW 1. Under Code, § 4306, making one who willfully injures trees on land of another liable in treble damages, the measure is fixed where the thing injured has a value independent of the land. Koonz v. Hempy [Iowa] 120 NW 976. Under Act of Mar. 29, 1824, P. L. 152, plaintiff, in an action of trespass to recover double or treble damages for the cutting of timber, cannot recover unless his declaration is sufficient to apprise the defendant of the fact that the action was brought under the statute. Henning v. Keiper, 37 Pa. Super. Ct. 488. Under such declaration, either the jury or the court may double or treble the damages as the facts of the case may demand, but the court cannot do so unless it clearly appears that the verdict of the jury was for single damages. Id. Act of Mar. 29, 1824, P. L. 152, allowing double and treble damages, being highly penal, is strictly construed. Id.

41. In order to recover treble damages under Code, § 4306, for willfully injuring timber, etc., the injury must have been wanton. Koonz v. Hempy [Iowa] 120 NW 976.

42. Search Note: See notes in 7 C. L. 1036; 20 L. R. A. 752; 43 Id. 706; 45 Id. 87; 52 Id. 33, 209; 53 Id. 33, 626; 67 Id. 87; 2 L. R. A. (N. S.) 1087; 3 Id. 1092; 11 Id. 670; 6 A. S. R. 364; 7 Id. 534; 8 Id. 158; 30 Id. 711; 36 Id. 807; 91 Id. 714; 9 Ann. Cas. 1051.

See, also, Damages, Cent. Dig. §§ 134-153; Dec. Dig. §§ 15-73; 13 Cyc. 22-89; 8 A. & E. Enc. L. (2ed.) 544.

43. See post, § 5A.

44. See post, § 4A.

45. The general rule aims to put the injured person in as nearly as possible the same condition as before. Prestwood v. Carlton [Ala.] 50 S 254.

46. There can be but one recovery for present and prospective damages arising from breach of an entire contract, based on values as they existed at the time of the breach. In fixing the amount of prospective damages, allowance should be made for fluctuations likely to occur. Wilkinson v. Dunbar, 149 N. C. 20, 62 SE 748. Evidence as to change in market values of cost of materials, etc., after the breach, is not admissible. Id. Husband suing for loss of services and society of his wife because of injuries resulting in death cannot recover both loss of services and sums paid a domestic to take her place while she was injured. Indianapolis & Martinsville Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 NE 1042.

Double damages are not recoverable: Expenses incidental to the conduct of the business in the making of profits cannot be recovered in addition to profits. Tygart v. Albritton, 5 Ga. App. 412, 63 SE 521. One entitled to recover on a quantum meruit for services rendered is not entitled to recover a share of the profits made in the transaction as provided by contract. Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831. Where defendant, a newspaper publisher, agreed to furnish space for advertisements procured by plaintiff, it was error in addition to the general damages to allow special damages for the advertising contracts which plaintiff's canvassers had obtained, and which defendant had used and carried out, as such special damages formed a part of the general damages. Patten v. Lynett, 133 App. Div. 746, 118 NYS 185. Under contract by a foundry company to erect furnaces to manufacture steel ingots for a steel company, the latter guaranteeing that profit of former should not be less than a stipulated sum, on breach of such contract the foundry company cannot recover both the profits and cost of plant. Pittsburg Steel Foundry v. Pittsburg Steel Co. [Pa.] 72 A 813. One employing a contractor to erect a building is not entitled to damages for the loss of rental value of the new building while he is kept out of it, and also to liquidated damages therefor. United Surety Co. v. Summers, 110 Md. 95, 72 A 775. On bill to enjoin unfair competition, equity upon granting an injunction may not decree that defendant account for damages suffered by plaintiff in addition to accounting for profits made by defendant. L. Martin Co. v. L. Martin & Wilckes Co. [N. J. Err. & App.] 72 A 294.

47. In action for injuries to butter in storage, evidence as to damage held too uncertain to afford basis for computation of damage. Disbrow v. People's Ice, Storage & Fuel Co. [Mo. App.] 119 SW 1007. Under Civ. Code, § 3301, providing that no damages can be recovered which are not ascertainable in nature and origin, recovery cannot be had against an attorney for breach of contract of employment on the ground that proceeding in which he was engaged to act terminated adversely because of such breach. Lane v. Storke [Cal. App.] 101 P 937. Where owner of building under construction let large amount of work and furnishing of materials to independent contractors, and their delay caused principal contractor to be delayed, he would be relieved from liability for the contract penalty for delay as the court would

lute certainty of proof is not essential,[48] and the fact that damages are uncertain and difficult of ascertainment is no ground for disallowance.[49]

Avoidable consequences.[See 11 C. L. 966]—It is the duty of an injured person to minimize damages which he may sustain by reason of the wrongful acts of another,[50] and his failure to do so precludes recovery for all damages which might have been thereby prevented.[51] But he is not required to anticipate that a wrong will be done and may rely upon the other performing his duty,[52] and he is required to exercise only ordinary care;[53] and where one incurs expense in an attempt to prevent

not attempt to apportion the same. Jefferson Hotel Co. v. Brumbaugh [C. C. A.] 168 F 867.

48. Damages for delay in delivering telegram, which resulted in cancellation of a theater engagement, held proved with sufficient certainty. Western Union Tel. Co. v. Austlet [Tex. Civ. App.] 115 SW 624.

49. For destruction of a fish trap recovery may be had for loss of fish, where it can be proved. The Seven Bros., 170 F 126. Where the cause of the damage is reasonably certain, recovery will not be denied merely because of difficulty in ascertaining the amount. Swift & Co. v. Redhead [Iowa] 122 NW 140. That estimation of damages is difficult is no reason for denying them. Smalling v. Jackson, 133 App. Div. 382, 117 NYS 268. Damages for fraud need not be accurately measurable in money. Spreckels v. Gorrill, 152 Cal. 383, 92 P 1011.

50. City of Garrett v. Winterich [Ind. App.] 87 NE 161. Purchaser of a patent held justified in not increasing amount of damage because of breach of warranty by resisting an action brought to establish a paramount title, to which a successful defense was plainly impossible. National Metal Edge Box Co. v. Gotham, 125 App. Div. 101, 109 NYS 450. One whose property is endangered through the negligence of another is required to exercise reasonable care to avoid or lessen the threatened injury. Western Real Estate Trustees v. Hughes [C. C. A.] 172 F 206. Must make reasonable exertions to render the injury as light as possible. Kimball Bros. Co. v. Citizens' Gas & Elec. Co. [Iowa] 118 NW 891. Contract to supply electricity to run an elevator. Id. It is the duty of one whose property is injured to exercise all reasonable effort to minimize his damage. Sullivan v. Anderson, 81 S. C. 478, 62 SE 862. For breach of contract for hauling goods. Smith v. Carter & Co., 136 Mo. App. 529, 118 SW 527. Injured person is required to minimize damages as much as the exercise of reasonable diligence will permit without sacrifice of substantial right. Hellerbach & May Con. Co. v. Wilkins [Ky.] 112 SW 1126.

51. City of Garrett v. Winterich [Ind. App.] 87 NE 161. Where an owner of property which is burning has notice of the fire and makes no attempt to extinguish it, he cannot recover for property destroyed after he received such notice. Aune v. Austin-Williams Timber Co., 52 Wash. 356, 100 P 746. In an action for breach of contract to lease lands if the lessee could have prevented damages by exercising reasonable care, he cannot recover therefor. Moses v. Autuono [Fla.] 47 S 925. It is permissible to show that an injured party could have minimized damages after notice that the other party was not going to comply with the contract. Dickerson v. Finley [Ala.] 48 S 548. In action for price of cattle feed defendant could not counterclaim damages caused by feeding it to his cattle after he learned of its injurious effects upon them, though plaintiff advised him to keep using it. Swift & Co. v. Redhead [Iowa] 122 NW 140. Where a wall of a building encroached upon adjacent land and fell because the owner of such land built after giving the owner of the wall notice, the latter could not recover the cost of rebuilding his wall. Chaves v. Terlina [N. M.] 99 P 690. Where process was served on one who was not the proper corporate agent but the corporation had notice of it, held he could not recover against the officer making the service for false return. State v. McCarthy, 134 Mo. App. 630, 114 SW 1110. For fraudulent representations as to the condition of a cotton gin sold, the buyer cannot recover expenses incurred in trying to operate it after ascertaining its condition. Wimple v. Patterson [Tex. Civ. App.] 117 SW 1034.

52. City of Garrett v. Winterich [Ind. App.] 87 NE 161. Where an upper riparian owner continuously detains the natural flow of the stream, there is an illegal invasion of property rights and a lower owner is under no duty to use care to avoid or lessen the injury. Price v. High Shoals Mfg. Co. [Ga.] 64 SE 87. Where one in lumbering operations knocks down fences of another, the latter is not required to anticipate that they would be negligently left down, nor on ascertaining that they were down to do more than exercise reasonable care to protect his crops. Crayar-Smith Lumber Co. v. Frith [Ky.] 118 SW 307.

53. An injured person is required to exercise only ordinary care to avert further injury. International & G. N. R. Co. v. Duncan [Tex. Civ. App.] 121 SW 362. Shipper whose goods were misdelivered by carrier to another carrier and taken to wrong destination is not required to reship to starting point and then to proper destination, instead of from wrong to correct destination. Spiero v. New York Cent. & H. R. R. Co., 64 Misc. 53, 117 NYS 1039. A seller of goods under duty to sell the hay and apply the proceeds in reduction of damages is relieved of any such duty where the buyer refuses to allow him to do so. Allen v. Rushforth, 82 Neb. 663, 118 NW 657. A party whose rights have been violated is not bound to take steps to reduce damages which the other party without his fault may sustain if the contract is performed. Stoomvart Maatschaffy Nederlandsche Lloyd v. Lind [C. C. A.] 170 F 918.

injury, he may recover therefor.[54] One may not needlessly increase the damage suffered.[55]

Mental suffering See 11 C. L. 966 as an element of damages is regarded differently in various jurisdictions. In some states it is not an element unless accompanied by physical injury;[56] and in others it must be accompanied by injury to person, reputation or estate.[57] Where fright results in physical injury, recovery may be had therefor.[58] Mere injury to feelings[59] or humiliation are held not to be grounds for recovery.[60]

Interest See 11 C. L. 967 as an element of damages is recoverable if the damages are liquidated,[61] or have an ascertainable money value,[62] and in certain cases it may be allowed as a corollary, so to speak, to the principal damages,[63] but the right to interest is not inherent to a claim for unliquidated damages,[64] and where the principal of the damages is accepted as such, all claim for interest is extinguished.[65] Interest is not allowable as a matter of law in tort actions unless so provided by statute.[66] In some states such recovery is precluded by statute.[67] Interest is only given by way of damages for the detention of a debt.[68]

54. Where he incurs expense to minimize his damage, the wrongdoer is liable though the effort is unsuccessful if the effort was in good faith. Sullivan v. Anderson, 81 S. C. 478, 62 SE 862. Where one receives injuries while endeavoring to protect his property from fire negligently set out by another, he may recover therefor. Wilson v. Central of Georgia R. Co. [Ga.] 63 SE 1121.

55. One who purchases a check negligently issued by another and transfers it to a third person cannot recover expenses incurred in an unjustifiable defense of a suit brought by the third person and thereby increase his damages occasioned by such negligence. Gallo v. Brooklyn Sav. Bank, 129 App. Div. 698, 114 NYS 78.

56. For delay in delivering a telegram. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. Evidence held to show no bodily injury where a passenger was merely required to wait at a station. Black v. Atlantic Coast Line R. Co., 82 S. C. 478, 64 SE 418.

57. Not an element in the absence of recoverable damages to person, reputation or estate. Western Union Tel. Co. v. Jackson [Ala.] 50 S 316. Actual damages from failure of a carrier to unload baggage at a proper station is not "other element of recoverable damage," within the rule that mental anguish alone is not an element. Chicago, etc., R. Co. v. Moss [Ark.] 116 SW 192, There may be a recovery for mental suffering due to torts against property when the acts complained of were wrongful and malicious. Carter v. Oster, 134 Mo. App. 146, 112 SW 995. Where nonunion laborer was discharged from different employments because of the wrongful, willful and malicious acts of union men adopted to cause him fear and anxiety about both his personal safety and his means of earning a livelihood, it was proper to allow damages for mental suffering. Id. Whether the acts of defendants were willful and malicious so as to justify damages for metal suffering held for the jury. Id. In actions on contracts, if the breaches were of a sort which would cause mental pain as a proximate and natural result. Id.

58. Where physical injury results from fright or shock, though there be no actual rupture or change in substance of any organ. St. Louis S. W. R. Co. v. Murdock [Tex. Civ. App.] 116 SW 139. If fright was the reasonable and natural consequence of blasting near a person's dwelling and injury to health was the natural consequence of the fright. Green v. Shoemaker & Co. [Md.] 73 A 688.

59. Caused by breach of contract. Southwestern Tel. & T. Co. v. Solomon [Tex. Civ. App.] 117 SW 214.

60. Humiliation without injury to feelings resulting from insulting conduct of railroad conductor. Chicago, etc., R. Co. v. Moss [Ark.] 116 SW 192.

61. For breach of contract of sale, interest is recoverable from date of breach and not from date of contract. Loomis v. Norman Printers' Supply Co., 81 Conn. 343, 71 A 358.

62. Where damages for injury to property have an ascertainable money value, interest thereon may be allowed from date of injury. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. In an action for loss of property by fire, it was proper to charge the jury to allow interest upon the value of the property from date of destruction to trial. Albany & N. R. Co. v. Wheeler [Ga. App.] 64 SE 1114. The rule that interest may be allowed on the value of personalty wrongfully attached does not apply to a wrongful attachment of realty. Tilton v. Gates Land Co., 140 Wis. 197, 121 NW 331.

63. Louisville & N. R. Co. v. Alford & Co., 5 Ga. App. 428, 63 SE 524.

64. Louisville & N. R. Co. v. Alford & Co., 5 Ga. App. 428, 63 SE 524. Interest is not recoverable where the claim is liquidated by the jury deducting therefrom an unliquidated claim of the opposite party. H. G. Vogel Co. v. Lockport Glass Co., 118 NYS 351. On ejectment bill to establish title to land and recover value of timber cut, not error for chancellor to disallow interest. Whitaker v. Poston [Tenn.] 110 SW 1019.

65. Louisville & N. R. Co. v. Alford & Co., 5 Ga. App. 428, 63 SE 524.

66. De Palma v. Weinman [N. M.] 103 P 782.

67. Under Civ. Code, §§ 3308, 3311, 3357, interest cannot be allowed on damages recovered for breach of a seller's contract. Ellsworth v. Knowles, 8 Cal. App. 630, 97 P 690.

Attorney's fees See 11 C. L. 968 are a proper element in an action on an injunction bond,[69] but not in an action on a note [70] nor on a covenant,[71] nor in a suit to abate a private nuisance.[72] Where attorney's fees that may be allowed as costs are fixed by statute, more cannot be allowed as damages.[73] As a general rule costs of litigation other than court costs are not recoverable, but where wrongful acts have involved one in litigation requiring him to incur expense in order to protect his rights, such expense should be treated as results of the original act.[74]

§ 3. *Recovery as affected by status of plaintiff or limited interest in property affected.*[75]—See 11 C. L. 968—Recovery is allowed only to the extent of the plaintiff's ownership in the subject-matter of the action;[76] consequently an individual owner of a patent suing for infringement for himself alone cannot recover damages sustained by a corporation licensee in which he is a stockholder.[77] One who has an interest or estate in land may recover for injury thereto to the extent of such interest;[78] hence a lessor may recover for injury to a crop to the extent of his interest[79] only,[80] and a lessee has a similar right of action.[81] A life tenant may recover

68. Tuttle v. Bisbee [Iowa] 120 NW 699. Where a building contract provided that nothing should be due until completion of the work, but agreed to pay 80 per cent of progress certificates from time to time, held the retained percentage not being due until work was completed, interest could not be recovered thereon in action for damage by the contractor because of interference with the work. O'Rourke v. New York, 130 App. Div. 673, 115 NYS 398. The retained percentage having been paid on completion of the contract and release given therefor and not being the amount sued for, interest thereon would not be allowed as part of the damages. Id.

69. Attorney's fees paid in procuring dissolution of an injunction. Fidelity & Deposit Co. of Maryland v. Walker [Ala.] 48 S 600.

70. Attorney's fees and expense of collection may not be included in a judgment in an action on a note. Nesbitt v. Nesbitt [Ind. App.] 86 NE 867.

71. An evicted grantee has no claim against his warrantor for attorney's fees. Citizens' Bank v. Jeansonne, 120 La. 393, 45 S 367.

72. Barnette v. Tedeschi, 154 Ala. 474, 45 S 904.

73. State v. Will [Wash.] 103 P 479.

74. McGaw v. Acker, Merrall & Condit Co. [Md.] 73 A 731. Where one was about to lose possession of premises and was obliged to employ counsel and incur expense, such attorney's fees and expenses were proper elements. Id. In absence of malice, want of probable cause and bad faith, one cannot recover the expenses of suit brought and dismissed without prejudice. Deere Plow Co. v. Spatz [Kan.] 99 P 221.

75. **Search Note:** See note in 5 Ann. Cas. 579.

See, also, Husband and Wife, Cent. Dig. §§ 756-783; Dec. Dig. §§ 207-210; 21 Cyc. 1520-1539; 28 Id. 45; Parent and Child, Cent. Dig. §§ 80-99; Dec. Dig. § 7; 29 Cyc. 1637-1653.

76. When by terms of a logging permit the landowner retains title to the logs until the operator fully performs his obligations, but leaves to him the right to any balance after deducting any sums due the owner, the owner in trover against the operator can recover only the amount so due him. Bradley Land & Lumber Co. v. Eastern Mfg. Co., 104 Me. 203, 71 A 710. Profits of a business cannot be recovered by one who had disposed of it prior to the taking effect of an injunction restraining its operation. Lewis v. Collier [Ala.] 47 S 790. Where a buyer pays for corporate stock and accepts delivery subsequent to date fixed, he does not waive his right to damages for refusal to deliver it on a designated date. Chapman v. Fowler, 132 App. Div. 250, 116 NYS 962.

77. To warrant such recovery the bill should indicate the rights of the licensee. Brookfield v. Novelty Glass Mfg. Co. [C. C. A.] 170 F 960. An owner of a patent not engaged in the manufacture of the article cannot recover from an infringer the profits of which an incorporation in which he was a stockholder is deprived, where such corporation is not a party to the suit. Brookfield v. Novelty Glass Mfg. Co. [C. C. A.] 170 F 830.

78. A mill owner who has a prescriptive right to flood lands of another and is injured by filling of his pond may recover for decrease in storage and reservoir facilities. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426. A sole owner of a crop injured may recover therefor, though he owns only a fractional interest in the land. Central of Georgia R. Co. v. Carroll [Ala.] 50 S 235. Persons who own lands having access to public streets over private ways only have a cause of action for damages for closing such ways by raising the street at the junction point. Cutter v. Boston, 200 Mass. 400, 86 NE 798.

79. A landlord who is entitled to a part of the crop as rent. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. Instruction disapproved. Id.

80. A lessor is not entitled to damages for injury to grass. Seaboard Air Line R. Co. v. Brown [Ala.] 48 S 48.

81. For injury to a leasehold damages are assessed only for injury to the lessee's interest at the time of injury. Cornell-Andrews Smelting Co. v. Boston & P. R. Co., 202 Mass. 585, 89 NE 118. A lessee may recover for injury to the leased premises though the damage exceeds the value of the

for injury to the freehold,[82] but not for injury to the precedent estate.[83] A parent suing for injuries to his child may recover compensation for services up to majority and medical expense,[84] if sustained,[85] but not for loss of society.[86] A husband suing for injuries to his wife may recover for loss of services, society, and medical expense.[87] Where a married woman has the status of a feme sole, she may recover for impaired earning capacity,[88] and such impairment may be an element if she intends to continue her vocation,[89] but not for medical expense unless she is liable therefor.[90] One who destroys property of another may not diminish recovery by showing that it was insured.[91] Joint tort feasors are each liable for the entire damage.[92]

§ 4. *Measure of damages for breach of contract. A. In general; miscellaneous contracts.*[93]—See 11 C. L. 969—The damages recoverable for breach of contract are such as may be fairly and reasonably considered to arise naturally from the breach [94] and likely to result therefrom in the ordinary course of events,[95] or

lease and gives a right of action to the landlord. Carter v. Cairo, V. & C. R. Co., 240 Ill. 152, 88 NE 493.

82. Where land was cut up and rendered more inaccessible, a life tenant can recover therefor. Daffin v. Zimmerman M'f'g. Co. [Ala.] 48 S 109.

83. Cannot recover for timber cut from the land. Daffin v. Zimmerman Mfg. Co. [Ala.] 48 S 109.

84. See Parent and Child, § 3. For injuries to an infant child a parent can recover the value of his own services in caring for it. Gorman v. New York, etc., R. Co., 128 App. Div. 414, 113 NYS 219. Also the value of his wife's services in nursing the child. Id. A parent may recover, for injuries to a child, compensation for his services up to majority, amounts expended in nursing and caring for it, and the value of their own services while caring for it. Birmingham R., L. & P. Co. v. Chastain [Ala.] 48 S 85.

85. Parent may not recover for loss of services of child past or future, where child was seven years of age and injury was healed except for scar at time of trial. Werbolovsky v. New York & Boston Despatch Exp. Co., 63 Misc. 329, 117 NYS 150.

86. For temporary injury to child seven years of age, parent's recovery is limited to actual loss and no recovery can be had for loss of society. Werbolovsky v. New York & Boston Despatch Exp. Co., 63 Misc. 329, 117 NYS 150. A parent may recover for injury to his four months' old child for loss of services, nursing and medical expenses, but not for loss of society. Birmingham R., L. & P. Co. v. Baker [Ala.] 49 S 755.

87. See Husband and Wife, § 9A. A husmand may sue for injuries to his wife for loss of services and society and expense to which he may have been put. Mageau v. Great Northern R. Co., 103 Minn. 290, 115 NW 651. The fact that injuries resulted in death, and action for wrongful death has been prosecuted, is no bar to an action by the husband. Id. Husband suing for injuries to wife may recover medical expense incurred in her treatment. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62. For injuries to wife, husband may recover for loss of society and medical expense. Lagergren v. National Coal & Coke Co., 117 NYS 92.

88. In action for injuries to a married woman, held under Comp. St. 1907, c. 53, § 4, that it was not error to permit recovery for loss of earning capacity. Montgomery v. Miller, 83 Neb. 625, 120 NW 197.

89. The marriage of a woman who has been a music teacher and intends to continue such employment does not preclude her recovery for impairment of her earning capacity. Niemeyer v. Chicago, B. & Q. R. Co. [Iowa] 121 NW 521.

90. Married woman suing for injuries cannot recover for hospital expenses and medicines where it does not appear how she became liable for them, since under Rev. St. 1899, § 4335, she is not liable unless she makes the contract. Engelman v. Metropolitan St. R. Co., 133 Mo. App. 514, 113 SW 700.

91. Where railroad destroys buildings by fire, it cannot diminish recovery by showing that they were insured. Erhart v. Wabash R. Co., 136 Mo. App. 617, 118 SW 657.

92. Joint trespassers. Pinkerton v. Randolph, 200 Mass. 24, 85 NE 892.

93. Search Note: See notes in 10 C. L. 378; 18 L. R. A. 385; 37 Id. 233; 69 Id. 126; 1 L. R. A. (N. S.) 246; 4 Id. 755; 7 Id. 1163; 9 Id. 113; 16 Id. 210; 6 A. S. R. 495; 3 Ann. Cas. 413.

See, also, Damages, Cent. Dig. §§ 285-353; Dec. Dig. §§ 117-126; 6 Cyc. 108-115; 13 Id. 155-169; 8 A. & E. Enc. L. (2ed.) 632.

94. Such as fairly arise and were contemplated. Dickerson v. Finley [Ala.] 48 S 548. Such as may reasonably be considered as arising naturally from the breach, or supposed to have been contemplated. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. Such as are the natural, direct, and proximate result of the breach. George v. Lane [Kan.] 102 P 55. Such as naturally flow from the nonperformance and are proximate, certain or capable of ascertainment and not speculative or remote, and special damages contemplated. Delafield v. J. K. Armsby Co., 131 App. Div. 572, 116 NYS 71. Where a contract gives one party an alternative and such party breaks the contract, that alternative must be accepted in fixing the measure of damages, which will least injure the party having the choice. Holliday & Co. v. Highland Iron & Steel Co. [Ind. App.] 87 NE 249. In an action on a bond, given on obtaining an injunction against foreclosure of a mortgage, recovery cannot be had for depreciation of the property, where security was not thereby rendered insufficient. Fi-

such as may reasonably be supposed to have been in contemplation of the parties at the time the contract was made as a probable result of the breach,[96] and where no injury results no damages can be recovered.[97] Special damages may be recovered where the party in default had notice of the special circumstances out of which such damages naturally arose [98] but not in the absence of such notice.[99] Remote,[1] specu-

delity & Deposit Co. of Maryland v. Walker [Ala.] 48 S 600.

95. Such as arise naturally and in usual course of things and were contemplated. Alkahest Lyceum System v. Curry [Ga. App.] 65 SE 580. Such as arise in the natural course of things or such as may be supposed to have been contemplated as a probable result of the breach. Kimball Bros. Co. v. Citizens' Gas & Elec. Co. [Iowa] 118 NW 891. Under ordinary circumstances damages are limited to such as may be considered to arise according to the usual course of things from such breach and so must be regarded as having been in the contemplation of the parties at the time the contract was made as a probable result of the breach, or in case of special circumstances such as may have been contemplated in view thereof. Anderson v. Savoy, 137 Wis. 44, 118 NW 217. For breach of an executory contract a party may sue at once for damages already sustained and also such as he can show with reasonable certainty will result. H. T. Smith Co. v. Minetto-Meriden Co., 168 F 777. Such as might naturally be expected to follow the breach, having regard to the benefit which the parties contemplated when the contract was made. Bigham v. Wabash-Pittsburg Terminal R. Co. [Pa.] 72 A 318.

96. Such as may reasonably be considered as arising naturally from the breach or as may be reasonably supposed to have been contemplated by the parties. Southwestern Tel. & T. Co. v. Solomon [Tex. Civ. App.] 117 SW 214. For breach of contract to furnish telephone service the company could not have foreseen that it would result in delay of attendance of a physician at childbirth. Id. For only such consequences as may be reasonably supposed to have been in contemplation of both parties when the contract was made. Franklin v. Louisville & N. R. Co. [Ky.] 116 SW 765. Compensation for loss sustained, which includes such damages as reasonably flow from the breach and were in the contemplation of the parties at the time. C. B. Coles & Sons Co. v. Standard Lumber Co., 150 N. C. 183, 63 SE 736. Breach of contract to supply sufficient water for fire protection. Inhabitants of Milford v. Bangor R. & Elec. Co. [Me.] 71 A 759. Where notice was given when a contract was made that it was made with reference to a subcontract on breach thereof, recovery could be had because of the necessity of breaching such subcontract. Feland v. Berry [Ky.] 113 SW 425. Losses directly incurred, as well as gains prevented, may furnish a legitimate basis for compensation for repudiation of a contract. Holt v. United Security Life Ins. & Trust Co., 76 N. J. Law, 585, 72 A 301. Evidence sufficient to show that certain damages were within the contemplation of the parties. American Bridge Co. v. American Dist. Steam Co., 107 Minn. 140, 119 NW 783. One who recommends an agent pursuant to an agreement to furnish an experienced and successful agent is not liable for loss occasioned by the dishonesty of the agent unless he acted negligently or fraudulently. John Slaughter Co. v. Standard Mach. Co., 148 N. C. 471, 62 SE 599.

97. Where railroad company breaches contract for construction of an embankment, the cost to the contractor of tools, supplies and camp outfit is not an element, as they are not deprived of such value by the breach. Tucker v. Deering S. W. R. Co., 133 Mo. App. 122, 113 SW 242. An owner was not damaged by failure of contractor to commence work at the time stipulated, where a change was made in the plans and the same condition would have arisen had he commenced on time. Missouri Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 114 SW 1119. For failure to complete house in time where no loss is shown to owner because of the delay, proof of rental value is not admissible. Kann v. Bennett [Pa.] 72 A 342.

98. Notice of circumstances from which special damages may reasonably be expected to result makes them recoverable on the ground that they were contemplated. Towles v. Atlantic Coast Line R. Co. [S. C.] 65 SE 638. Where a company contracted with a third person to perform certain work which the company had agreed to perform for another, of which fact the third person had notice, it would be liable to the company on its breach for damages the company would be liable for. Klauck v. Federal Ins. Co., 131 App. Div. 519, 115 NYS 1049.

99. For damages arising from special circumstances, the wrongdoer must have had notice. Dickerson v. Finley [Ala.] 48 S 548. Loss of profits may be recovered if reasonably within the contemplation of the parties, and established with legal certainty. Jefferson Sawmill Co. v. Iowa & Louisiana Land Co., 122 La. 983, 48 S 428.

1. Too remote: For failure to pay money when due, damages resulting from the fact that workmen quit because of inability to pay them. Federal Lumber Co. v. Reece [Ky.] 116 SW 783. Commission paid broker for procuring the contract broken. South Brooklyn Realty Co. v. Casper Iba Const. Co., 128 App. Div. 895, 112 NYS 1147. For failure of landlord to deliver possession of premises to a tenant. Sloan v. Hart, 150 N. C. 269, 63 SE 1037. In action for damages by fire caused by failure of telephone operatives to make prompt connection, whereby fire department was delayed. Lebanon, Louisville & Lexington Tel. Co. v. Lanham Lumber Co. [Ky.] 115 SW 824. Evidence of difference in amount of sales in two different locations. Bromberg v. Eugenotto Const. Co. [Ala.] 50 S 314. Complainant for infringement of a patent sold the article for $2. Defendant sold it at $1.70. Complainant was awarded the difference between cost of production and $1.70. Held it could not be assumed that complain-

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lative or conjectural damages are not recoverable.[2] As a general rule, mere prospective profits are too remote to be considered in estimating damages.[3] Profits are not excluded because of anything inherent in their nature, but because they are remote and contingent,[4] and they may be recovered if proven with reasonable certainty.[5] Profits must be certain in their nature, and in respect to the cause from which they proceed.[6] The application of these general principles to specific contracts is illustrated in the foot note.[7]

ant would have sold it for more but for the infringement. Yesbera v. Hardesty Mfg. Co. [C. C. A.] 166 F 120.

Not too remote: Damage to crop because of failure to furnish water. Dunbar v. Montgomery [Tex. Civ. App.] 119 SW 907.

2. Consequential, remote or speculative. Alkahest Lyceum System v. Curry [Ga. App.] 65 SE 580. Loss caused by lack of heat and elevator service in office building held, under the evidence, too speculative. Rush v. Masonic Temple Ass'n [Ala.] 48 S 118.

3. Purely speculative profits cannot be recovered. Favar v. Riverview Park, 144 Ill. App. 86. Usually considered too remote (Dickerson v. Finley [Ala.] 48 S 548) and uncertain (Id.). Profits which could have been made had a contract been complied with are speculative where the evidence supplied no data from which loss could be determined. Albertype Co. v. Gust Feist Co. [Tex.] 114 SW 791. Held too speculative where a business had run sometimes at a profit and sometimes at a loss, and had moved locations several times. Lewis v. Collier [Ala.] 47 S 790. Where there is insufficient evidence to establish a uniform license fee or royalty, a master is justified in refusing to award damages for use of an infringing machine. Brown Bag-Filling Mach. Co. v. Drohen, 171 F 438.

4. As in case of anticipated profits from collateral engagements or from current sales dependent on the uncertainty of trade, etc. Wilkinson v. Dunbar, 149 N. C. 20, 62 SE 748.

5. Loss of profits may be recovered where shown with reasonable certainty and it appears that the loss was contemplated. Reagan Round Bale Co. v. Dickson Car Wheel Co. [Tex. Civ. App.] 121 SW 526. For destruction of business. De Palma v. Weinman [N. M.] 103 P 782. Profits which would have been realized but for defendant's breach of the contract are recoverable. Tygart v. Albritton, 5 Ga. App. 412, 63 SE 521. Where they can be determined with certainty or are the direct and immediate results of the contract, and were contemplated by the parties, they may be recovered. Wilkinson v. Dunbar, 149 N. C. 20, 62 SE 748. Where an infringement is deliberate and every means is taken to avoid being responsible, if there is any uncertainty on the question of profits made, it is for the infringer to clear up. Novelty Glass Mfg. Co. v. Brookfield [C. C. A.] 170 F 946. In computing profits realized by an infringer from use of a bag-filling machine, it was held proper to take as the basis the saving as compared with cost of hand labor. Brown Bag-Filling Mach. Co. v. Drohen, 171 F 438. The general rule that anticipated profits cannot be recovered is subject to many exceptions. Eagan v. Browne, 128 App. Div. 184, 112 NYS 689. For breach of contract to supply cans to a cannery. Pacific Sheet Metal Works v. Californian Canneries Co. [C. C. A.] 164 F 980. For breach of contract to select sites for portable sawmills on which to land logs, held the profits which might have been made in the performance of the contract are not too speculative or conjectural. Herron v. Raupp [Mich.] 16 Det. Leg. N. 66, 120 NW 584. Where contractor abandons the work on failure of the owner to pay as the work progressed as agreed, he could recover such profits as would result from full performance. Schlesinger v. Ritchie, 115 NYS 116. For failure of owner to furnish contractor with piling to drive as per contract, thereby delaying him, the loss of profits he was prevented from making and loss or expense incurred in work done. Williams v. Yates [Ky.] 113 SW 503. Where innkeeper had been wrongfully evicted, evidence from record of cash register of the bar receipts during corresponding months of previous years, bills and memoranda tending to show at least the proximate cost of what was sold, coupled with the testimony of defendant, sufficient to enable jury to determine profits. Hendler v. Quigley, 38 Pa. Super. Ct. 39.

6. C. B. Coles & Sons Co. v. Standard Lumber Co., 150 N. C. 183, 63 SE 736.

7. In suit to restore **status quo on rescission of contract,** measure of damages is value of bonds which plaintiff exchanged for stock. Chrystal v. Level, 144 Ill. App. 533. The measure of damages for an **unauthorized sale of stock by a broker** is the difference between the amount obtained and that at which the owner, within a reasonable time after learning of the sale, could have replaced the stock. Schaefer v. Dickinson, 141 Ill. App. 234. Where holder of **notes negotiated** them **before fulfilling conditions precedent,** maker could recover from payee amount he had been compelled to pay for breach of agreement not to negotiate. Hughes v. Crooker, 148 N. C. 318, 62 SE 429.

Where a defendant has **prevented the performance of a contract,** the measure is, for the work performed, such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, and, for work not performed, such profit as would have been made. Harrison v. Clarke [N. J. Law] 73 A 43. In such case the amount of recovery must be regulated by the contract price though circumstances may exist which make it impracticable to ascertain what sum would be due at the contract price as in case the work done was in such an unfinished state as to be incapable of measurement, in which case recovery may be had as upon a quantum meruit. Id

Building and construction contracts: Where a contractor does not complete the

building, his measure is the reasonable value of the building as taken possession of by the other party not exceeding contract price and extras, less what it would cost to make it comply with plans and specifications. German v. Stanton City Union School Dist. [Mich.] 16 Det. Leg. N. 575, 122 NW 524. In action by a contractor for the contract price, a charge that such sum could be deducted from the contract price as was necessary to make a building as good as was contracted for, etc., held erroneous as he was required to construct the building according to plans and specifications though it exceeded the contract price. Id. For breach of building contract by improper construction, the difference between the value of the building as constructed and its value had it been constructed according to contract. Hartford Mill Co. v. Hartford Tobacco Warehouse Co. [Ky.] 121 SW 477. For breach of builder's contract, the cost of completing the building less the contract price. Franks v. Harkness [Tex. Civ. App.] 117 SW 913. Where an owner breached a contract by which a contractor was to construct a building for him and appropriated labor and material, the value thereof was an element recoverable as damages. Tutwiler v. Burns [Ala.] 49 S 455. Where one employs another to furnish materials and do certain work and breaches the contract before the contractor has incurred any expense, the measure is the difference between the contract price and what it would cost to do the work, but, if the contractor has incurred expense, such expense should be added. Campbell & Co. v. Mion Bros. [Ga. App.] 64 SE 571. For breach by owner of contract for furnishing of material and constructing a building, the reasonable value of material furnished and work performed together with profits which he would have made had he been permitted to complete the contract. Carlin v. New York, 132 App. Div. 90, 116 NYS 346. A contractor prevented from completing the work may recover for work already done and the full contract price less the cost of completing the contract. Thacke v. Hernsheim, 115 NYS 216. The rule by which to measure the owner's loss in case of substantial performance only of a building contract is the reasonable cost of remedying the defects so as to make the structure conform to the agreement. The judicial rule permitting recovery on an entire building contract but substantially performed aims to give the owner what he contracted for, not merely in value, but in form and character. Foeller v. Heintz, 137 Wis. 169, 118 NW 543. Where written contract for construction of a building was void, the measure of recovery on a quantum meruit was value of labor and materials furnished. Vickery v. Ritchie, 202 Mass. 247, 88 NE 835. For breach of contract to build an embankment over mouth of a mine causing it to be flooded, a lessee of the mine may recover the cost of restoring it to its proper condition, unless it exceeded value of his leasehold. Carter v. Cairo, V. & C. R. Co., 240 Ill. 152, 88 NE 493. A contractor suing a subcontractor for abandoning his contract can recover cost of completing the work less the balance of the contract price remaining in his lands. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Where a subcontractor abandoned his contract, the contractor could show that work done by him in completing the contract was necessary and that he paid prevailing prices for labor and materials. Id.

Miscellaneous contracts: For breach of **contract to fill premises** to a designated grade, the difference in value of the premises with fill completed and value with fill partially completed, and not cost of completing the filling. Bigham v. Wabash-Pittsburg Terminal R. Co. [Pa.] 72 A 318. Where profits lost by **repudiation of a contract** cannot be recovered because of want of definite proof, expenditures fairly incurred in preparation for performance are to be considered. Holt v. United Security Life Ins. & Trust Co., 76 N. J. Law, 585, 72 A 30. Where a foundry company had a **contract** with a steel company **to deliver steel ingots** at actual cost of labor and materials plus 15 per cent, and purchased materials to fill such contract, it may recover cost thereof on breach of the contract. Pittsburg Steel Foundry v. Pittsburg Steel Co. [Pa.] 72 A 813. Where a **vessel sailed with only a part of the cargo** it contracted to carry and a shipper signed a bill of lading under protest, covering the entire cargo, such bill did not supersede the original contract and he was entitled to recover freight paid on cargo not taken and damages for failure to take it. Equi Val. Marble Co. v. Becker [C. C. A.] 165 F 437. For breach **of contract to enter into a partnership** to build a summer resort and operate it, held plaintiff could not recover profits as they were too uncertain but could recover value of services. Harrison v. Clarke [C. C. A.] 164 F 539. Where owners of periodicals sold **advertising space** and thereafter used some of the space, the buyer was entitled to receive for the excess the price uniformly received for similar space. Gardner v. Roycrofters, 134 App. Div. 45, 118 NYS 703. Where a buyer executed notes and a chattel mortgage on machinery under an agreement that if the machinery was not as represented the **notes would be returned,** but the seller transferred the notes, the buyer could recover all damages sustained including cost of defending an action on the note. Rectenbaugh v. Northwestern Port Huron Co. [S. D.] 118 NW 697. For breach of **contract to keep houses rented** at a certain rental, the difference between such sum and the amount received. Williams v. Arnold, 139 Wis. 177, 120 NW 824. For breach of **contract** of lessee **to keep premises insured,** the loss sustained by the lessor. Franck v. Stout, 139 Wis. 223, 120 NW 867. For **failure of insurance agent to comply with instructions** in writing policies, the amount with interest that the company under the policy in excess of the sum it would have been required to pay had instructions been followed. Queen City Fire Ins. Co. v. First Nat. Bank [N. D.] 120 NW 545. Proof of breach of **contract of sale of a stallion with warranty** that he was an average foal getter to replace him if he was not or refund $600 of the purchase money and take the horse back establishes a right to recover $600. Smith v. Goldberg, 139 Wis. 423, 121 NW 173. Where owner breached a **contract for installation of fixtures,** the actual loss sustained considering value of materials used and profits which would have been realized had the contractor been permitted

(§ 4) *B. Contracts for sale or purchase of land.*[8]—See 11 C. L. 972—As a general rule, the measure of damages for breach of contract to sell or purchase land is the difference between the contract price and market value,[9] but for breach to complete the work. Goldstein v. Godfrey Co., 61 Misc. 64, 113 NYS 123. Where an owner **leases a wall for advertising purposes** and refuses permission to put up a sign for another, allowing the lessee the full amount it was to receive for the space without any deduction for cost of erecting the sign is an improper measure. Wineburgh Advertising Co. v. Faust Co., 113 NYS 709. For **failure to furnish water for irrigation** causing loss of crop, the value of the matured crop at the closest market less the cost of raising and marketing the same. Smith v. Hicks [N. M.] 98 P 138. For breach of **contract to sell and deliver water,** the difference between the contract price and the price the water right could have been purchased for at the date of breach together with whatever sum the purchaser had paid on the purchase price. Gagnon v. Molden, 15 Idaho, 727, 99 P 965. In such case it is error to admit evidence of value of buildings and improvements made by plaintiff in order to show damages unless it appears that no other water right could have been purchased. Id. For breach of **contract to supply water** to irrigate a rice crop, all damages sustained. Sisk v. Gravity Canal Co. [Tex. Civ. App.] 113 SW 195. For **refusal of customer to deliver to a broker stock** which he had directed him to sell, the increased price which the broker is required to pay for other stock. Bank of Bisbee v. Graf [Ariz.] 100 P 452. Where buyer of lumber furnished seller duplicate orders which by mistake limited freight the seller was to pay, held the buyer was entitled to recover freight paid in excess of limit in duplicate orders. Michigan Lumber Co. v. Waite Lumber Co. [Wash.] 102 P 450. For breach of **contract to sell cotton** raised as the result of a joint adventure, damages measured by the price of cotton on date of breach. Baker v. Keever, 130 Ga. 257, 60 SE 551. In action for present and prospective damages for breach of **contract to pay a certain price per thousand for cutting and delivering timber,** prospective damages are to be estimated on the basis of present values. Instruction disapproved. Hawk v. Pine Lumber Co., 149 N. C. 10, 62 SE 752. For breach of contract to pay a certain price for cutting and delivering timber at a certain place before all timber was cut, prospective damages are recoverable. Wilkinson v. Dunbar, 149 N. C. 20, 62 SE 748. In such case where it would have taken several years after the breach to have completed the contract, prospective damages would be the present value of the difference between the contract price and cost of performance. Id. For **failure to loan money** the extra expense to which the borrower is put to obtain the money, unless the lender had notice of special circumstances. C. B. Coles & Sons Co. v. Standard Lumber Co., 150 N. C. 183, 63 SE 736. For breach of **contract to maintain millidams,** etc., an appropriate standard is the difference between rental value of the mill, as conditions existed and if the contract had been observed. Hurxthal v. St. Lawrence Boom & Mfg. Co., 65 W. Va. 346, 64 SE 355. For negligence or **default of collecting agent of a note,** the face of the note unless it is proved to be of less value. First Nat. Bank v. Henry [Ala.] 49 S 97. Where by terms of a **cropping contract** one party assumed one-half the expense of supporting the family of the other, where such other added members to his family, he first could recover for additional expense. Feland v. Berry [Ky.] 113 SW 425. For wrongful **dismissal of a school teacher,** held he was entitled to recover loss sustained though he had not paid it. Peacock v. Coltrane [Tex. Civ. App.] 116 SW 389. For **failure to pay money when due,** legal interest. Federal Lumber Co. v. Reece [Ky.] 116 SW 783. For breach of **contract of mortgagee to permit mortgagor to remove mortgaged property from the county for** sale the difference between the market price at time and place he wished to sell and what they brought at sale with shrinkage during delay. Ramsey v. Maberry, 135 Mo. App. 569, 116 SW 1066. For breach of **contract to sublease land for mining** on contingency that paying ores were found the actual expense incurred in the work. Ragland v. Conqueror Zinc Co., 136 Mo. App. 631, 118 SW 1194. Prospective profits would be too uncertain. Id. For **failure of railroad to construct levee** in consideration of transfer of right of way, the cost of constructing it, but no loss for injury to crops due to failure to construct. St. Louis, etc., R. Co. v. Sanders [Ark.] 121 SW 337.

8. **Search Note:** See notes in 2 L. R. A. (N. S.) 713; 8 Id. 864; 16 Id. 768, 818; 106 A. S. R. 663; 2 Ann. Cas. 634.

See, also, Vendor and Purchaser, Cent. Dig §§ 953-956, 1047-1058; Dec. Dig. §§ 330, 351, 29 A. & E. Enc. L. (2ed.) 719.

9. "Market value" is the price which would in all probability result from fair negotiations where vendor was willing to sell and the buyer desired to buy. Maxon v. Gates, 136 Wis. 270, 116 NW 758. Evidence held to sustain finding that property was of less value than agreed price, and hence vendee was not damaged by vendor's breach. Stewart v. Davies, 52 Wash. 96, 100 P 176. Where it appears that there have been no sudden change in values, evidence of sales made about the time of the breach is admissible to establish actual value. Maxon v. Gates, 136 Wis. 270, 116 NW 758. Under Civ. Code, § 3306 providing for recovery for loss of bargain in case of bad faith by the vendor where the vendor undertook to sell land to which title stood in another, the vendee could recover purchase money paid with interest and the difference between the price and value of the land at time of breach. Kiger v. McCarthy Co. [Cal. App.] 101 P 928. For misrepresentation as to boundaries of land, the difference between the amount paid and the value of the land if it had been as represented. West v. Carter [Wash.] 103 P 21. In determining lesion, the value of the land at the date the option was accepted, and not at the date of offer to sell, is controlling. Ronaldson & Puckett Co. v. Bynum, 122 La. 687, 48 S 152. The value at that date should be proved with reasonable certainty. Id. Where a vendor conveys to one and subse-

of contract to sell, where there is no fraud [10] or title fails,[11] the measure is stated to be the portion of the purchase price paid with interest and special damages. Where the vendor wrongfully refuses to convey, equity may treat him as a trustee and charge in an accounting for profits received,[12] but where specific performance is denied to purchaser he cannot recover rentals.[13] Where there has been a resale, the measure is the difference between the price agreed to be paid by the vendee and that obtained on the resale.[14] Where the measure of damages is prescribed by the contract such measure controls.[15] Where parties agree as to the values of their properties in a contract for exchange, such values are conclusive.[16] In Louisiana a statute fixes the damages in certain cases.[17]

(§ 4) *C. Breach of covenant as to title.*[18]—See 11 C. L. 972—The measure of damages for breach of covenant of warranty is the purchase price paid [19] for the part as to which title fails [20] together with interest and costs of litigation [21] and

quently to another who first records his deed, and the prior vendee is evicted, the measure is the same as where the vendor contracts to convey and then refuses to do so. Madden v. Caldwell Land Co. [Idaho] 100 P 358. In such case the measure to be applied is that of adequate compensation, or, as it is some times expressed, "damages for loss of bargain." Id. The difference between the purchase price and the market value at the time of the contract of sale is the measure of damages in an action by the vendee against the vendor for the latter's refusal to perform. Harten v. Loffler, 212 U. S. 397, 53 Law. Ed. —.

10. For breach of vendor to sell land because he cannot convey good title, all money paid on the contract, and for taxes and the value of improvements placed on the premises in good faith, with interest together with such sum as will indemnify him for loss of his bargain. Anderson v. Ohnoutka [Neb.] 121 NW 577. But not insurance premiums paid to insure the property while he was in possession. Id. The vendor may offset reasonable rental value. Id. For breach of contract to convey the purchase money paid. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236. That seller knows he has no title is not such fraud as authorizes recovery for loss of bargain. Id.

11. Where vendee rescinds because the vendor cannot give title, he is entitled to recover purchase money paid with interest together with the value of improvements made before learning of the defective title. Snarski v. Washington State Colonization Co. [Wash.] 101 P 839. Where vendor contracted to sell land which he did not own, the purchase money paid with interest and such special damages as was sustained. Clifton v. Charles [Tex. Civ. App.] 116 SW 120. For breach of contract to sell farm and products, the amount of the deposit with interest, and expense caused by the breach. Ruggerio v. Leuchtenburg, 61 Misc. 298, 113 NYS 615. Where an owner contracted to sell land and water rights, but was unable to make title to the water rights, and there was no fraud and his attempt to carry out the contract was in good faith, the purchaser can recover purchase money paid and expense incurred, but nothing for loss of bargain. Babcock-Cornish Co. v. Urquhart [Wash.] 101 P 713.

12. Waterworks plant. City of Eau Claire v. Eau Claire Water Co., 137 Wis. 517, 119 NW 555.

13. Cummings v. Roeth [Cal. App.] 101 P 434.

14. Must be predicated on the undisputed facts in the case that the resale was a public one, fairly conducted, after full notice to the public and the vendee upon same or advantageous terms as the first. Clever v. Clever, 38 Pa. Super. Ct. 66.

15. Where a contract for the sale of land provided for return of purchase price if title was not good, the earnest money paid with interest and special damages. Hamburger v. Thomas [Tex. Civ. App.] 118 SW 770. Vendor was entitled to recover stipulated damages. Beauchamp v. Couch [Tex. Civ. App.] 117 SW 924.

16. Where parties agree on the value of their respective properties for a sale, such value is conclusive in case of breach, but if the agreement is a mere trading contract and the value is merely estimated, neither party is bound by such value, and the measure in case of purchase is quantum meruit. Robbins v. Selby [Iowa] 121 NW 674.

17. Under Rev. Civ. Code, art. 2463, where earnest money is given, either party may recede, the giver by forfeiting the earnest, and the receiver by returning double its amount. Legier v. Braughn, 123 La. 463, 49 S 22.

18. Search Note: See notes in 24 A. S. R. 266; 53 Id. 116.

See. also, Covenants, Cent. Dig. §§ 225-262; Dec. Dig. §§ 124-132; 11 Cyc. 1158, 1161-1173, 1176-1178; 8 A. & E. Enc. L. (2ed.) 53.

19. Recovery is limited to purchase price of the land. Folk v. Graham, 82 S. C. 66, 62 SE 1106. Payments made with interest and costs. Prestwood v. Carlton [Ala.] 50 S 254.

20. The grantee's recovery on account of the loss of part of the land is such a part of the purchase price as the value of the land last bore at the time of purchase to the entire value and interest from that time. Sullivan v. Hill, 33 Ky. L. R. 962, 112 SW 564.

21. Grantee can recover costs and expenses, including attorney's fee incurred in bona fide defense of his title, though the grantor had expressly agreed to pay such expenses aside from his covenant. Beach v. Nordman [Ark.] 117 SW 785. The purchaser may recover costs of suits in which he determined the extent of an easement. Saccoccio v. Sprague [R. I.] 71 A 1057. For

compensation for improvements [22] or the amount necessary to procure the outstanding title,[23] and, where the breach is as to part of the land only the proportionate part of the purchase price.[24] For breach of the covenant against incumbrancers, at least nominal damages [25] or the sum paid to discharge the incumbrance [26] may be had. The right of action for substantial damages for breach of a covenant against incumbrances which runs with the land is regarded as distinct from the technical breach occurring at the time of the delivery of the deed and the time when the cause of action to remedy one accrues bears no relation to the time when the cause of action arises to remedy the other.[27]

(§ 4) *D. Contracts to give lease and liabilities as between lessor and lessee.*[28]—See 11 C. L. 973—For breach of contract to rent premises [29] or to give possession according to terms of a lease,[30] or to keep premises in a tenantable condition,[31] the damage is measured by the difference between the rental value and the rent reserved, or damages proximately resulting; [32] for breach of the tenant's covenant to surrender possession on termination of the lease, the rental value [33] and costs; [34]

breach of warranty against all lawful claims, grantee may recover value of premises at time of eviction with costs in action of eviction. Farwell v. Bean [Vt.] 72 A 731.

22. For breach of covenant of warranty, the amount paid with interest from time of payment, and for improvements placed upon the land in good faith. Blanton v. Nunley [Tex. Civ. App.] 119 SW 881.

23. Grantee held entitled to recover attorney's fees in procuring outstanding title. Leet v. Gratz [Mo. App.] 117 SW 642. Where grantor sold in good faith and both parties in executing deed or contract of sale took into consideration a superior title, the grantee could only recover the amount paid for the better title. Brown v. Thompson, 81 S. C. 380, 62 SE 440. On breach of warranty of title to land which vendor had contracted to purchase from the state and sold to plaintiff, held plaintiff could recover no more than unpaid purchase money under defendant's contract. Tatum v. Kincannon [Tex. Civ. App.] 119 SW 113.

24. Where there is a deficiency of area, the difference between the value of the area held and the area warranted. Folk v. Graham, 82 S. C. 66, 62 SE 1106.

25. Hasselbusch v. Mohmking [N. J. Err. & App.] 73 A 961. Where grantee had paid nothing towards extinguishing it. Seldon v. Dudley E. Jones Co. [Ark.] 116 SW 217.

26. For fraud or breach of warranty in selling land having an incumbrance, the sum paid to discharge the incumbrance. Thomas v. Ellison [Tex.] 116 SW 1141.

27. Cause of action for breach of covenant against incumbrance made by a person subsequently deceased does not arise so as to be enforcible against his estate until the covenantee or some person entitled to the benefit of the covenant shall have suffered damages. In re Hanlin's Estate, 133 Wis. 140, 113 NW 411.

28. **Search Note:** See Landlord and Tenant, Cent. Dig. §§ 119, 515, 563, 666, 723-727; Dec. Dig. §§ 49(3), 142(7), 154(4), 169(9), 180(4); 24 Cyc. 922, 923, 1072, 1073, 1095-1097, 1123, 1124, 1134-1136; 18 A. & E. Enc. L. (2ed.) 604.

29. For breach of contract to lease the difference between the rent stipulated and the rent reserved. Moses v. Autuono [Fla.] 47 S 925. But not certain improvements made. Graves v. Brownson [Tex. Civ. App.] 120 SW 560.

30. For breach of covenant that floor of leased premises was of a certain carrying capacity, the rent paid in advance, expense of adapting the place to his use and difference between rental value and rent reserved, but not the difference between the rent reserved and the rent paid for other premises. Scheffler Press v. Perlman, 130 App. Div. 576, 115 NYS 40. For failure of landlord to deliver possession of premises, the difference between the rent reserved and the rental value of the term plus special damages alleged and proved. Sloan v. Hart, 150 N. C. 269, 63 SE 1037. The measure of damages for failure to give possession of leased premises is the difference between the actual rental value and the rent reserved. Favar v. Riverview Park, 144 Ill. App. 86. For **breach of covenant by lessor as to dimensions of a store room,** the difference between the rental value as it was and as it should have been and possibly expense of alterations in fixtures. Bromberg v. Eugenotto Const. Co. [Ala.] 50 S 314. Damages for the period during which he had an option for the extension of the lease are also recoverable. Id.

31. For eviction from boarding house because of conduct of occupants of adjoining assignation house rented by the landlord, not the profits which might have been made from the intended business, but the difference between rental value and rent reserved. Milhelm v. Baxter [Colo.] 103 P 376.

32. For breach of contract to lease lands, recovery may be had for losses which are the natural, direct, and necessary consequences, when they can be ascertained, and were contemplated. Moses v. Autuono [Fla.] 47 S 925.

33. Where lessee wrongfully holds over against the protest of the landlord the rental value. Jackson Brew. Co. v. Wagner, 123 La. 798, 49 S 529.

34. For breach of tenant's covenant to surrender the premises in good condition, in an action brought after his removal in summary proceedings, landlord may recover rental value and cost of removing the tenant's

for wrongful eviction, damages proximately resulting;[35] for wrongful eviction of a tenant on shares, the value of his crop;[36] less what he could have earned during the season;[37] for breach of covenant to repair, the cost of repairs;[38] for breach of covenant to destroy noxious weeds, the cost of doing so;[39] and for refusal of the landlord to permit removal of buildings, the rental value thereof.[40]

(§ 4) *E. Contracts for sale or purchase of chattels.*[41]—See 11 C. L. 973—The measure of damages for breach of contract to sell or purchase chattels is governed by the general rules applicable to all contracts,[42] and is also subject to the general rules as to the duty of the party injured to minimize his damages.[43] The measure

property, but not costs of summary proceeding. Livingston v. Robb, 61 Misc. 81, 113 NYS 137.

35. For wrongful ejectment by landlord, evidence that at time of eviction the weather was cold and disagreeable, and that aged mother of tenant, who was living with him, died from result of exposure, was properly admitted where the jury were charged that damages accruing to other members of plaintiff's family. Sanders v. Cline [Okl.] 101 P 267. Innkeeper wrongfully evicted held entitled to recover whatever he lost as a consequence of his eviction. Hendler v. Quigley, 38 Pa. Super. Ct. 39. Where defendant, a purchaser at administrator's sale, before deed was delivered to him evicted plaintiff under a void legal process, he was liable for the consequences of his fault which were natural and probable, such as reasonable forecast and prudence might have foreseen, such as loss of crop, fruit and vegetables, injury to furniture by rain, etc. Behrens v. Mountz, 37 Pa. Super. Ct. 326.

36. For wrongful eviction by landlord of tenant on shares, the value of tenant's share of crop less what he could earn and his expenses had he stayed. Crews v. Cortez [Tex.] 113 SW 523. Expenses of the landlord are evidence of what tenant's expense would have been. Id.

37. For wrongful eviction by landlord of tenant on shares, only the sum that tenant could earn can be deducted from the value of his share of the crop at date of eviction. Crews v. Cortez [Tex.] 113 SW 523. The measure for conversion does not apply where landlord wrongfully evicts a farm tenant on shares. Id.

38. Where lessor fails to observe his contract to repair, he is liable for the expense of doing the work, but not for personal injuries resulting from the defective condition of the premises arising from his failure to repair. Nagle v. Davies, 60 Misc. 479, 113 NYS 834. For breach of tenant's covenant to repair, the landlord may recover the reasonable cost of making the repairs regardless of whether he expended money in making them. Niles v. Iroquois Realty Co., 130 App. Div. 744, 115 NYS 602. For failure of lessee to repair, the injury to the reversion. Wechsler v. O. J. Gude Co., 117 NYS 1037.

39. For failure of tenant to destroy thistles in season, what it would cost the landlord to do so after the tenant's failure to perform his contract duty. Prudoehl v. Randall [Minn.] 121 NW 913.

40. Where tenant was entitled to recover value of buildings which landlord refused to permit him to remove, the rental value thereof, and not merely the value of the materials therein. Hegan Mantel Co. v. Alford [Ky.] 114 SW 290.

41. Search Note: See notes in 57 L. R. A. 193; 3 L. R. A. (N. S.) 709, 1047; 4 Id. 740; 5 Id. 151; 8 Id. 255.

See, also, Sales, Cent. Dig. §§ 1098-1107, 1174-1201, 1284-1301; Dec. Dig. §§ 384, 418, 442; 8 A. & E. Enc. L. (2ed.) 586, 587, 590, 592; 24 Id. 1094, 1125, 1127, 1149-1163.

42. See ante, § 4A. For breach of executory contract of sale, compensation to the other party for his loss. Frederick v. Willoughby, 136 Mo. App. 244, 116 SW 1109. Where a seller has notice that goods are purchased for a particular purpose, such damages as would naturally flow from the refusal to deliver and would naturally be expected to flow from it. Delafield v. J. K. Armsby Co., 131 App. Div. 572, 116 NYS 71. For failure to deliver goods purchasable on the open market, the difference between the sale and market price unless it appears from the terms of the contract that other damages are likely to result. Bushnell v. King Bridge Co. [Iowa] 118 NW 407. Interest on amount invested in knitting mills is in no event the measure of recovery for delay in shipping machinery necessitating closing of the mills. Oxford Knitting Mills v. American Wringer Co. [Ga. App.] 65 SE 791. For failure to deliver grade of lumber purchased, the buyer could not recover expense of hiring night watchman for the bridge it was using during delay in completion where the seller had no notice that such expense was likely to follow. Bushnell v. King Bridge Co. [Iowa] 118 NW 407.

43. Where a buyer asks profits lost for failure of seller to deliver, he must minimize his damages by purchasing in the open market, but where he asks only the difference between the contract and market price he need not attempt to buy other goods. Stahr v. Hickman Grain Co. [Ky.] 116 SW 784. Where buyers were informed by seller's agent that the seller did not have the goods at the time, they should have purchased elsewhere, and, where they waited until the market rose, they could not recover the difference between the contract price and the market price. Aronson v. H. B. Claplin Co., 115 NYS 97. Where a buyer of goods cancelled the order before they were manufactured because the seller failed to sell samples as agreed, the seller could not complete the manufacture and recover the contract price as he was bound to reduce his damages. Woolf v. Hamburger, 129 App. Div. 883, 114 NYS 186. A purchaser can recover no more for breach of contract than it would cost him to supply himself with the goods from the open market. Kimball Bros. Co. v. Citizens'

generally allowed is the difference between the contract price and market value [44] at the time and place of delivery [45] as shown by the evidence,[46] or if there is no market value the difference between the contract price and actual value,[47] and in some cases lost profits [48] and special damages may be recovered.[49] Where a buyer refuses

Gas & Electric Co. [Iowa] 118 NW 891. That a buyer tried to purchase particular goods sold and not delivered, on the open market, but could not, took his measure of damages out of the general rule. Schwartz v. Morris & Co., 61 Misc. 335, 113 NYS 524.

44. Great Western Coal & Coke Co. v. St. Louis & Big Muddy Coal Co., 140 Ill. App. 368; Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401.

Breach by seller: For failure of seller to deliver butter sold. Barton-Child Co. v. Scarborough, 61 Misc. 334, 114 NYS 1043. For failure to deliver stock according to contract. Sloan v. McKane, 131 App. Div. 244, 115 NYS 648. For breach of contract to sell. Richner v. Plateau Live Stock Co., 44 Colo. 302, 98 P 178. For breach of contract to deliver poles. Carney v. Vogel, 52 Wash. 571, 100 P 1027. For failure to deliver cattle. Gibbens v. Hart [Tex. Civ. App.] 117 SW 168. On failure of seller to deliver property according to contract of sale. Eaver & Co. v. W. H. Harris & Sons Co. [Miss.] 49 S 258. Where the seller fails to deliver goods sold, the measure of damages for the breach of contract, if the price has not been paid, is the difference between the contract price and the market price of the goods at the time and place of delivery (Hagan v. Rawle, 143 Ill. App. 543); but when at the time the contract of sale is entered into a resale of the property was in contemplation of the parties, the proper measure of damages is the difference between the contract price in the original contract and the contract price on such resale (Id.). Measure of damages held to be the difference between the original contract price of certain stone and the price plaintiff would have received for such stone on resale. Id. For breach of contract to sell hay. Bucyrus Hay & Grain Co. v. Cincinnati Grain Co. [Ky.] 119 SW 182. For failure of seller to deliver ice, as to ice not delivered the difference between the contract price when it should have been delivered and the fair market value at such time with interest, if ice was obtainable, otherwise the difference between the contract price, and what it was worth to the buyer. Anderson v. Savoy, 137 Wis. 44, 118 NW 217. Where there was no proof of what ice would have been worth to the buyer, and it did not appear that ice was obtainable in the open market, the evidence was insufficient to permit the court to determine damages. Id. For breach of executory contract to deliver pig iron not yet manufactured. Sharpsville Furnace Co. v. Snyder [Pa.] 72 A 786. Where an article sold can be purchased on the open market. Delafield v. J. K. Armsby Co., 131 App. Div. 572, 116 NYS 71. After a bankrupt's breach of contract for the sale of wire, claimant diverted to some extent wire ordered in advance from another company from its original destination in order to protect itself. Held he was not required to accept the price paid for such wire as his basis of damages. In re National Wire Corp., 166 F 631.

Breach by buyer: For failure of a buyer of lumber to be cut, measured and manufactured to make the advances called for not profits which the seller might have made in his lumbering operations if advances had been made. C. B. Coles & Sons Co. v. Standard Lumber Co., 150 N. C. 183, 63 SE 736. For failure to purchase a launch. Bonney v. Blaisdell [Me.] 73 A 811. For failure to furnish a buyer for a one-half interest in a stock of goods the difference between the market value of such interest and the sum for which it was to have been purchased with interest. George v. Lane [Kan.] 102 P 55. Amount received at an auction sale of such interest is some evidence of value, but not conclusive. Id. Where a vendee refuses to accept goods ready for delivery, the measure is the difference between the sale price and the market value. Toledo Computing Scale Co. v. Tyden, 141 Ill. App. 21. For breach of contract to take cotton purchased. Gate City Cotton Mills v. Rosenau Hosiery Mills [Ala.] 49 S 228.

45. Where seller had a right to deliver at any time prior to a certain date, market price on such date is to be considered in determining damages for failure to deliver at all. Stahr v. Hickman Grain Co. [Ky.] 116 SW 784. Where one breached a contract for the sale of San Francisco bonds, the loss was properly estimated with reference to the price of bonds in San Francisco. Zimmermann v. Timmermann, 193 N. Y. 486, 86 NE 540. Best available market. Id.

46. For failure to deliver cotton sold, the difference between the contract price and the market price at time and place of delivery. Ford & Co. v. Lawson [Ga.] 65 SE 444. If there was no market at place of delivery, the price at the nearest market together with costs of transportation. Id. Where it appears that market price is the same in two towns, evidence as to the price in one is admissible as tending to show what it is in the other. Id. For breach of contract to accept steel beams, evidence of a sale elsewhere was not admissible on an issue of the seller's damage. Isaacs v. Terry & Tench Co., 113 NYS 731.

47. Where one contracted to sell goods to another at a certain price and ordered them of another, telling him of his agreement, held his measure was the difference between the contract price and the price he had agreed to sell them at, the goods having no market value. Schutzman v. Lehman, 61 Misc. 648, 113 NYS 1014.

48. For failure of manufacturer to deliver automatic bailing systems during cotton season, held the buyer could recover loss of profits resulting from inability to use the systems during that season. Reagan Round Bale Co. v. Dickson Car Wheel Co. [Tex. Civ. App.] 121 SW 526. For breach of contract to deliver goods which could not be purchased on the open market and which the buyer had resold, it was held that the buyer was entitled to recover profits he lost. Delafield v. J. K. Armsby Co., 131 App. Div. 572, 116 NYS 71.

49. Where buyer of lumber to be cut,

to accept the goods, the seller may resell them and recover the difference between the contract price and the price received on resale,[50] but the contract of the parties may be such as to make this rule inapplicable.[51] Where at the time of performance the cost of manufacture has increased so that the contract would yield no profit, only nominal damages are recoverable.[52] For breach of warranty the measure is the difference between the actual value and the value of the goods if they had been as warranted,[53] together with incidental loss sustained [54] or the sum paid and incidental loss;[55] for refusal to accept goods specially manufactured the contract price less the value of the goods [56] or the difference between the cost of manufacture and the con-

graded and piled by the seller, failed to comply with his contract, the difference between the contract price and what it cost the seller to place it in his yard together with value of use of yard for storage after buyer's failure to remove it. C. B. Coles & Sons Co. v. Standard Lumber Co., 150 N. C. 183, 63 SE 736. For failure of seller to deliver hay to be used by the buyer to feed his cattle and the buyer was unable to procure hay elsewhere, the damages to the buyer for want of hay, including expenses of procuring other hay, cost of taking the cattle elsewhere, and loss and shrinkage of cattle from starvation. Richner v. Plateau Live Stock Co., 44 Colo. 302, 98 P 178. If goods cannot be purchased on the open market and the seller knew that the buyer purchased them for a particular purpose, he is liable for any special damages naturally resulting. Id.

50. Where buyer refuses to take goods and seller treats them as the buyers and resells, he may recover the contract price, less what he got on resale, and in addition cost of storage, interest, and value of his time as selling agent. Vanstory Clothing Co. v. Stadiem, 149 N. C. 6, 62 SE 778.

51. Where vendee refused chattels sold under executory contract, title to remain in vendor until payment of contract price by vendee, and the contract in express terms inhibited the right of vendee to abrogate or rescind it, the vendor could recover contract price and usual rule as to damages did not apply. Toledo Computing Scale Co. v. Tyden, 141 Ill. App. 21.

52. Lehmaier v. Standard Specialty & Tube Co., 123 App. Div. 431, 108 NYS 402.

53. For breach of warranty of cow. Mitchell v. Rowley, 63 Misc. 643, 118 NYS 751. For delivery of an inferior grade of oats. Browne v. Allen [Tex. Civ. App.] 116 SW 133. Evidence insufficient to show a difference of 14 cents per bushel. Id. For breach of warranty of an engine. Hardie-Tynes Mfg. Co. v. East. Cotton Oil Co., 150 N. C. 150, 63 SE 676. For breach of warranty of a piano. Mathes v. McCarthy, 195 N. Y. 40, 87 NE 768. For breach of warranty that an animal is a breeder, where the buyer elects to keep it, cost of keeping it until the fact was ascertained is not an element. Steele v. Andrews [Iowa] 121 NW 17. For breach of warranty of melons sold to be delivered at a certain place. Davidson Bros. Co. v. Smith [Iowa] 121 NW 503. For breach of warranty of chattel. McClatchey v. Anderson [Neb.] 122 NW 67. On question of breach of warranty of goods sold, the price at which the buyer resold them is immaterial. Bodger v. Hills, 113 NYS 879. For breach of warranty of quality of goods sold. Id. For refusal of seller to deliver goods of quality purchased. Strohmeyer & Arpe Co. v. Hartley Silk Mfg. Co., 130 App. Div. 102, 114 NYS 287. The buyer was not required to purchase other goods in order to fix his damages. Id. For breach of warranty as to quality, the difference between the value of the goods and the contract price. Oxford Knitting Mills v. Wooldridge [Ga. App.] 64 SE 1008. Where a seller delivers goods of an inferior grade, the buyer may recover the difference between the contract price and the market value of the substituted article. Springfield Shingle Co. v. Edgecomb Mill Co., 52 Wash. 620, 101 P 233. For breach of warranty that feed sold would fatten cattle, the damages naturally flowing from their failure to take on flesh where it appeared that they lost flesh when fed upon it and gained when fed ordinary feed. Swift & Co. v. Redhead [Iowa] 122 NW 140.

54. For breach of warranty of quality of seed, the value of the crop that would have been produced less the value of the crop produced. Vaughan's Seed Store v. Stringfellow [Fla.] 48 S 410. For breach of warranty, the cost of repairs may be considered as an element, with other facts. Hardie-Tynes Mfg. Co. v. Easton Cotton Oil Co., 150 N. C. 150, 63 SE 676. Where goods are sold by description for purposes of resale and do not answer the description, the vendee may recover anticipated profits and in addition damages he is required to pay his subvendee when such damages were contemplated. Lissberger v. Kellogg [N. J. Law] 73 A 67. On breach of warranty of a machine, the buyer may recover freight paid. Houser & Haines Mfg. Co. v. McKay [Wash.] 101 P 894. For breach of warranty that animals were breeders, the buyer may recover the expense incurred in attempting to breed animals after the sale. Steele v. Andrews [Iowa] 121 NW 17.

55. For breach of warranty that threshing machine would operate the sum paid and freight. Pennebaker Bros. v. Bell City Mfg. Co. [Ky.] 113 SW 829. For breach of warranty of quality of seed sold, which wholly falls to germinate, the price of the seed, expense of preparing the soil, and loss because of the land lying idle for the year. Vaughan's Seed Store v. Stringfellow [Fla.] 48 S 410.

56. For refusal of buyer to accept staves contracted for, the contract price of those delivered, and for staves not manufactured the contract price less the cost of making and delivering. Gibson v. Purifoy [Tex. Civ. App.] 120 SW 1047. For breach of contract to take certain springs to be manufactured by plaintiff at a certain price, the difference

tract price.[57] Where a manufacturer delays in shipping machinery purchased, the purchaser must exercise ordinary care to minimize damages.[58]

(§ 4) *F. Liability of bailees, carriers and telegraph companies.*[59]—See 11 C. L. 975—Where a bailee injures or fails to return property, the value or amount of the injury is the measure of damages,[60] and, in case of delay in delivery, it is the difference in value at the time when delivery was due and that at the time of actual delivery.[61] For loss of or nondelivery of goods, a carrier is liable for their value at the time and place they should have been delivered[62] with interest,[63] unless circumstances require the application of a different rule.[64] For delay in delivery[65] or for

between what it would cost plaintiff to manufacture the springs and the contract price. Cleveland-Canton Springs Co. v. Goldsboro Buggy Co., 148 N. C. 533, 62 SE 637. For breach of executory contract for construction and delivery of railroad equipment, prior to time of delivery, the seller could recover his outlay and expense less the value of materials on hand, and profits which might have been realized. Portland Co. v. Searle, 169 F 968. Where buyer repudiated purchase of pig iron before any part of it had been delivered, the difference between the market price of entire amount at time of repudiation and price at which iron wae sold though it was to be delivered in installments. Moffat v. Davitt, 200 Mass. 452, 86 NE 929. For refusal to accept beams to be manufactured abroad and imported, the contract price less cost to seller and profit realized on beams after buyer refused to take them. Isaacs v. Terry & Tench Co., 132 App. Div. 657, 117 NYS 369.

57. In action for buyer's breach of contract to purchase bar iron which he knew defendant intended to manufacture to fill the contract, the measure of the seller's damage was the difference between the cost of manufacture and the contract price. Holliday & Co. v. Highland Iron & Steel Co. [Ind. App.] 87 NE 249. Where the evidence was sufficiently clear to enable the jury to estimate such difference, it was not error to authorize the jury to apply that measure. Id.

58. Where a manufacturer delays in shipping machinery to a manufacturing plant, ordinary diligence to lessen damages would require the latter to replace its old machines and continue operations. Oxford Knitting Mills v. American Wringer Co. [Ga. App.] 65 SE 791. Fixed charges of operating the factory cannot be recovered where it does not appear that the factory could not have been operated without the machines. Id.

59. Search Note: See notes in 5 C. L. 921; 11 Id. 977; 2 L. R. A. (N. S.) 773, 1072; 3 Id. 1111; 4 Id. 262, 569; 7 Id. 188; 8 Id. 249, 880; 9 Id. 1060; 11 Id. 1119; 13 Id. 159; 14 Id. 499, 533, 927; 15 Id. 277; 117 A. S. R. 286.

See, also, Bailment, Cent. Dig. § 133; Dec. Dig. § 32; 5 Cyc. 220; Carriers, Cent. Dig. §§ 218, 239, 389, 451-458, 557-559, 599-604½, 790, 930, 963, 964, 1082-1084, 1338-1345, 1478, 1483-1491, 1568, 1569; Dec. Dig. §§ 69(4), 94(4), 105, 135, 186, 229, 277, 319, 382; 6 Cyc. 449-452, 525-533, 566-569, 589, 590, 632-635; Telegraphs and Telephones, Cent. Dig. §§ 64-74; Dec. Dig. §§ 67-71; 8 A. & E. Enc. L. (2ed.) 635; 27 Id. 1009, 1013, 1033, 1062; 5 Id. 690.

60. For conversion of books by a bailee, evidence of their retail price without proof of public demand therefor or net profits does not constitute the proper measure. Cohn v. Wolff, 115 NYS 122.

61. Porter v. Duval Co., 60 Misc. 122, 111 NYS 825.

62. For loss of **household goods** in transit. Missouri, K. & T. R. Co. v. Dement [Tex. Civ. App.] 115 SW 635. For loss of household goods in transit, the actual loss in money to the owner and not the price suggested by his partiality for them nor what he could sell them for. Id. For failure to deliver cotton shipped, only the market value. Mobile, etc., R. Co. v. Robbins Cotton Co. [Miss.] 48 S 231. For loss of household effects, clothing and personal belongings, the actual value, considering cost, expense of replacing, etc. Lloyd v. Haugh & Keenan Storage & Transfer Co. [Pa.] 72 A 516. Evidence sufficient to sustain a finding as to value of freight lost in transit at place of shipment. Weinberg v. Atlantic Coast Line R. Co. [S. C.] 65 SE 634.

63. Interest properly allowed as an element of damages for loss of shipment of potatoes. Coats v. Chicago, etc., R. Co., 144 Ill. App. 81.

64. Where a shipper by **express represented that goods were worth** but $55, his recovery was properly limited to that amount. Harrington v. Wabash R. Co. [Minn.] 122 NW 14. Shipper may not recover the actual value of property injured where he has deceived the carrier as to value. Southern Exp. Co. v. Fox [Ky.] 115 SW 184. For **failure of carrier to furnish cars for coal mine,** held the owner could recover net profits of operation, the carrier having notice of all facts. Midland Val. R. Co. v. Hoffman Coal Co. [Ark.] 120 SW 380. Evidence of the effect of failure to furnish cars and cost of maintenance and cost of mining held admissible on issue of determining profits. Id. Under the evidence, it was held not error to refuse to limit a shipper to the **damages specified in the bill of lading** where it appeared that some values had been erroneously entered therein. Louisville & N. R. Co. v. Venable [Ga.] 64 SE 466. For **delay in transportation of machinery intended for special use** known to the carrier, such damages as are fairly attributable to the delay, though it was bound to accept the shipment when tendered and under the Hepburn Act could have made a special contract. Chicago, etc., R. Co. v. Planters' Gin & Oil Co. [Ark.] 113 SW 352. For delay in delivering goods, held the fact that they were of a kind that would depreciate in value with change of the season was not contemplated. Wolfe v. Weir, 61 Misc. 57, 112 NYS 1078. Where owing to **delay in transportation of mill ma-**

injury to goods in transit,[66] the measure is the depreciation in value or the value of the use of the goods during delay [67] together with such consequential damages as naturally result.[68] There is a conflict of authority as to whether a carrier can limit its liability for its negligence.[69] Special damages may be recovered if the carrier had notice of the special circumstances,[70] but not otherwise.[71] Mental suffering is

chinery owner was required to duplicate it, the measure was the cost of the duplicated machinery less the value of the delayed machinery. Chicago, etc., R. Co. v. Planters' Gin & Oil Co. [Ark.] 113 SW 352.

65. Damages for delay in transportation and delivery: If the goods are intended for sale on the market at destination and the market price has fallen, the difference between the market price when they should have arrived and when they did arrive together with incidental damages proximately resulting; and if because of the delay there is no market and the goods are shipped to another market, the difference between the market value at their destination when they should have arrived and what they sold for in the other market. Missouri, K. & T. R. Co. v. Carpenter [Tex. Civ. App.] 114 SW 900. For negligent delay in the transportation of marketable **perishable freight,** the difference between the market value when delivered and the market value when it should have been delivered. Parsons Applegate Co. v. Louisville & N. R. Co., 136 Mo. App. 494, 118 SW 101. For breach of duty to deliver goods within a reasonable time, the damages sustained whether by **falling of market price** or injury to goods. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193; Id., 109 Md. 494, 72 A 458. For unreasonable delay in delivering freight where no actual damages were sustained, nominal damages. Aultman Engine Thresher Co. v. Chicago, etc., R. Co. [Iowa] 121 NW 22. For delay of carrier in delivering **log wagons** to mill company, the difference between their value if they depreciated during delay when they should have been delivered and when they were delivered. Chicago, etc., R. Co. v. New-House Mill & Lumber Co. [Ark.] 119 SW 646. Where carrier has no notice of special use to be made of a **shipment of machinery,** the only damages recoverable for delay is the difference between the value when delivery should have been made and its value when delivered. Bracco v. Merchants' Despatch Transp. Co., 61 Misc. 60, 113 NYS 131. For delay in **shipment of buggies.** Rutland v. Southern R. Co., 81 S. C. 448, 62 SE 865.

66. Where car of potatoes was damaged in transit, and after arrival the consignee failed to care for them and they were further injured, the carrier was not liable for damages accruing after arrival. Gulf, etc., R. Co. v. Chinski [Tex. Civ. App.] 114 SW 851. The consignee cannot recover the cost of labor and sacks for resacking the potatoes, but only the cost of labor, and sacks rendered necessary by the condition of the potatoes at the time he could have taken possession of them. Id. In such case the carrier is entitled to a special instruction to distinguish between damage to the potatoes at time of their arrival and damages from consignee's delay in unloading them. Id. For injuries to freight in transit, the difference between the value of the goods as delivered and their value in the condition in which they should have been delivered. Texas Cent. R. Co. v. Watson [Tex. Civ. App.] 118 SW 175; Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1. If goods are liable to breakage, usual breakage is to be deducted from the recovery. Blackmer & Post Pipe Co. v. Mobile & O. R. Co. [Mo. App.] 119 SW 1; St. Louis S. W. R. Co. v. Phoenix Cotton Oil Co. [Ark.] 115 SW 393. For injury to **peaches** in transit because of failure to re-ice car, market value on date of delivery. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193. The rule that the measure for injury to goods is the difference between the value at destination in their injured condition and their value if they had been uninjured applies where goods are taken for delivery at a point beyond the initial carrier's line. Southern Exp. Co. v. Jacobs [Va.] 63 SE 17.

67. For delay in transportation of **household goods,** the value of the use of the goods. Missouri, K. & T. R. Co. v. Dement [Tex. Civ. App.] 115 SW 635.

68. For delay in transporting carload of cans to a cannery, the difference between market value of cans when they should have been delivered and their value when delivered, and expense of consignee in endeavoring to locate the car. Illinois Cent. R. Co. v. Hopkinsville Canning Co. [Ky.] 116 SW 758. Shipper claiming special damages for delay in a shipment of goods to be sold by him cannot recover expenses incurred with notice that goods had been misdirected. Franklin v. Louisville & N. R. Co. [Ky.] 116 SW 765. Nor can he recover for loss on goods returned to him undamaged, in absence of proof that market price was greater at destination than at point of shipment. Id. Nor is the carrier liable for expenses of the shipper incurred in ignorance of the delay, where it had no notice that he intended to follow the goods. Id. Where a contract between buyer and seller provided that buyer should have a right to inspect the goods before delivery and such fact was communicated to the carrier, who refused such inspection, held the company was liable for damages resulting. Missouri, K. & T. R. Co. v. Hopkins [Tex. Civ. App.] 113 SW 306. Where the carrier refused to permit inspection until too late to inspect and unload on Saturday, it was liable for damages until the goods were taken by the consignees Monday. Id. That carrier wrongfully delivering goods recovered and tendered them to the shipper may be shown in mitigation but does not relieve the carrier or the shipper's damages in excess of the value of the goods. Midland Val. R. Co. v. Fay & Egan Co. [Ark.] 116 SW 1171.

69. See Carriers, § 11.

70. Where a carrier had 35 or 40 employes in the freight office, only 3 of whom were authorized to make shipping contracts, notice of special damages to one who caused the bill of lading to be executed was sufficient. Chicago, etc., R. Co. v. Planters' Gin & Oil Co. [Ark.] 113 SW 352. An express company which has notice that **a steam**

not an element for loss of baggage.[72] The general rule as to the duty of the consignee to minimize damages applies.[73] The liability of connecting carriers is fully treated elsewhere.[74]

shovel shaft it has accepted for transportation is required for operation of a shovel is liable in special damages for rental value of the outfit and wages of the crew. Elzy v. Adams Exp. Co. [Iowa] 119 NW 705. Rental of cars held not profits but damages, but in the nature of rental, and properly allowed. Id. The express company was **sufficiently notified** of the special damages where it was told that the shaft was not shipped by freight because it was necessary to get it to its destination in a hurry. Id. Where a shipment of freight is lost and the company is notified of special damage because thereof such notice is sufficient as to a second shipment made a few days later to supply the loss. McMeekin v. Southern R. Co., 82 S. C. 468, 64 SE 413. **Special damages** due to delay in shipment of machinery for construction of mill is not loss of business of running the mill, but to the business of constructing it, which is interest on money, wages, etc. Id. More than nominal damages can be recovered for unreasonable delay in shipment of goods when **special purpose** for use of goods is **made a part of the negotiations.** Story Lumber Co. v. Southern R. Co. [N. C.] 65 SE 460. Evidence held to show that the carrier had notice of special use to be made of the property. Id.

71. Special damages are recoverable only on a showing that the carrier had notice of the special circumstances. Kolb v. Southern R. Co., 81 S. C. 536, 62 SE 872. Notice that gin machine was badly needed is insufficient to show special need. Id. **Special damages not recoverable for delay** of a carrier in delivering goods, where it was given no notice that such damages would result. Chicago, etc., R. Co. v. New-House Mill & Lumber Co. [Ark.] 119 SW 646. For **loss of freight** unless the carrier had notice of the special circumstances. Shieder v. Southern R. Co. [S. C.] 65 SE 631. Where it had no notice of facts from which they were likely to result. Towles v. Atlantic Coast Line R. Co. [S. C.] 65 SE 638. It must have been given notice of such special circumstances at time of shipment. Green v. Atlantic Coast Line R. Co. [S. C.] 65 SE 639. A carrier is not liable for special damages where it had no notice that a shipment of cabbages was made to fill a special sale at a special price. Missouri, K. & T. R. Co. v. McLean [Tex. Civ. App.] 118 SW 161. Consignee cannot recover special damages for delay when carrier had no notice that special damages would result. Wells Fargo & Co. Exp. v. Thompson [Tex. Civ. App.] 116 SW 607. To render a carrier liable for special damages for delay in carrying freight, notice of special circumstances must be given it at the time. Pacific Exp. Co. v. Jones [Tex. Civ. App.] 113 SW 952. Notice held insufficient. Id. If a shipper would charge the carrier with special damages, **he must have given it notice** of the particular circumstances. Williams v. Atlantic Coast Line R. Co. [Fla.] 48 S 209. For failure to deliver shipment of orange boxes within a reasonable time, recovery cannot be had for loss of time by packers where the carrier was not notified of the circumstances. Id. Freezing of oranges on trees held not the natural result of delay in delivering shipment of orange boxes. Id. For delay in delivery of freight no special damages can be recovered where notice thereof is not given until after the freight is lost, unless the company is negligent in attempting to trace it. McMeekin v. Southern R. Co., 82 S. C. 468, 64 SE 413. Interest on capital invested in a plant during time it was idle as a result of delay in shipment of iron, and wages paid during such time, is not the measure where it does not appear to what use the iron was to be put, or that special damages resulted from delay in prompt shipment. Asheboro Wheelbarrow & Mfg. Co. v. Southern R. Co., 149 N. C. 261, 62 SE 1091. For delay in **shipment of cans to a cannery,** special damages due to shutting down of the plant and spoiling of tomatoes are not recoverable in the absence of notice of such facts to the carrier. Illinois Cent. R. Co. v. Hopkinsville Canning Co. [Ky.] 116 SW 758. Notice to carrier that consignments of cans should be rushed during packing season held not sufficient notice of special damages. Id. Where carrier had no notice that if **shipment of wagons** was delayed the owner would be unable to store them, it is not liable for loss due to lack of storage facilities. Rutland v. Southern R. Co., 81 S. C. 448, 62 SE 865. For **delay in transportation of cotton gin machinery,** shipper could not recover as special damages losses on contracts for seed made subsequent to notice to carrier and after its default. Chicago, etc., R. Co. v. Planters' Gin & Oil Co. [Ark.] 113 SW 352. Where one delivered a camping outfit to an expressman and notified him that he "required those things urgently," the driver was **not sufficiently notified** that special damages would follow from delay. Harris v. Fargo, 113 NYS 577. Idleness of the plant was an element. Id. Loss of saving of operation of the plant as a two press mill, instead of a one press mill, held too remote. Id. Carrier is not liable in special damages caused by loss of machinery in transportation because of failure of agent at destination to notify owner of such loss, unless it appear that agent had such knowledge. Pacific Exp. Co. v. Jones [Tex. Civ. App.] 113 SW 952. The owner could not recover for lost time and expense of making repeated calls at the freight office without proving that the agent had notice of the value of the time and expense. Id.

72. Mental suffering is not an element for injury to trunk and contents by a carrier. Chicago, etc., R. Co. v. Whitten [Ark.] 119 SW 835. Where company made an earnest effort to trace lost baggage, an inference of willful misconduct is not warranted. Black v. Atlantic Coast Line R. Co., 82 S. C. 478, 64 SE 418.

73. Where buyer of potatoes shipped refuses to accept them because of injury in transit, the seller must, as against the carrier, exercise ordinary care in disposing of them. Texarkana & Ft. S. R. Co. v. Shivel [Tex. Civ. App.] 114 SW 196. The measure

For delay or failure to furnish cars for transportation of cattle to market [75] or for injuries to stock in transit,[76] the measure is the difference between the market value in the condition and at the time they should have arrived and the actual market value when they did arrive,[77] but there is no inflexible rule for ascertaining the damages recoverable.[78] A carrier is not liable for injuries caused by the natural propensities of animals to injure themselves.[79]

For breach of a carrier's duty toward a passenger, compensation of all injuries sustained may be recovered [80] if they were within the contemplation of the parties at the time.[81] Such damages include compensation for physical inconvenience and

of damages against the carrier in such case is the contract price less freight paid and what should have been realized from a sale of the potatoes in the exercise of ordinary diligence. Id. For negligence of carrier in delaying passenger, held the value of her time and expense was the measure of recovery as sickness resulting from a drive was not the result of such delay and could have been avoided. Cincinnati, etc., R. Co. v. Rose [Ky.] 115 SW 830. Consignee can recover no damages for injury to oats by fermentation when he permits them to lay for four weeks in the car. Hardin Grain Co. v. Chicago & A. R. Co., 134 Mo. App. 681, 114 SW 1117.

74. See Carriers, § 3.

75. For one day's negligent delay in transporting cattle to market, the difference between the market value when they should have been delivered and their market value the succeeding day. Missouri, K. & T. R. Co. v. Fry [Kan.] 98 P 205.

76. In an interstate shipment of horses under a contract limiting liability of each carrier to injuries on its own line, a connecting carrier is not liable for injuries not developed until the horses were in its custody though incurred prior thereto. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767. A carrier contracting to carry horses to a point beyond its line, is presumed to have contracted in view of the contemplation that in case of breach damages would be estimated according to the value at such market. Id. Where a shipper agreed to pay a through charge for delivery of horses at a point beyond the initial carrier's line, the measure for injury to the horses was to be based on the value of the horses at the point of destination. Southern Exp. Co. v. Jacobs [Va.] 63 SE 17. Where a carrier billed stock to its destination, though it was only a connecting carrier, for injuries from delay, the depreciated market value at destination. Texas & P. R. Co. v. Moore [Tex. Civ. App.] 119 SW 697. Where initial carrier knew that destination of a shipment of horses was a point beyond its destination, the measure for injury at junction was properly submitted as basis of market value at destination. El Paso & N. E. R. Co. v. Lumbley [Tex. Civ. App.] 120 SW 1050. That a shipper was permitted to substitute other horses for those lost at junction would not change his measure of damages for horses lost. Id. For injury to animals in transit, the difference between their market value at destination uninjured, and their value there as injured. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856. For injury to mules in transit, the difference between the market value at destination and their market value if they had been transported without negligence. Gulf, etc., R. Co. v. Gillespie [Tex. Civ. App.] 118 SW 628. For injury to stock in transit by negligent delay and rough handling, the difference between their value in the condition in which they reached their destination and in the condition in which they should have arrived. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 118 SW 759.

77. Where carrier negligently placed cattle in quarantine pens so that they had to be sold under regulations of quarantine authorities, the value of the cattle less the freight at the time and place where they should have been delivered. St. Louis, etc., R. Co. v. Adams [Tex. Civ. App.] 118 SW 1155.

78. All that is required is that it be proved with reasonable certainty what the market or intrinsic value is. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 117 SW 459. Where it is doubtful whether the jury would find a market value, the shipper may prove actual or intrinsic value. Id.

79. Southern Exp. Co. v. Fox [Ky.] 115 SW 184. Not for injuries to horse in consequence of its kicking the stall loose because of fright. Id.

80. For breach of carrier's contract to carry a passenger, the **sum paid for transportation over another road.** Barney v. Delaware, L. & W. R. Co., 61 Misc. 62, 113 NYS 138. Where passenger was delayed in journey at junction point because of initial carrier's error in sale of ticket, she was entitled to recover **expenses incurred** there. International & G. M. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118. Actual and punitive damages may be recovered **where a passenger is assaulted** while voluntarily leaving the train after inability to find his ticket. Bolles v. Kansas City S. R. Co., 134 Mo. App. 696, 115 SW 459.

81. For breach of a carrier's contract to carrier, a passenger, he cannot recover loss sustained because of his failure to reach his destination in time to close a contract, where such damage was not contemplated. Barney v. Delaware, L. & W. R. Co., 61 Misc. 62, 113 NYS 138. A sleeping car company which breaches its contract to furnish an apparently healthy woman with accommodations is not required to anticipate that her health will be injured as a result of such breach. Smith v. Pullman Co. [Mo. App.] 119 SW 1072. Through error of railroad agent complainants were unable to use return coupons of their round-trip special excursion tickets with stop-over privilege, but without additional cost were supplied by carrier with regular limited tickets. Upon complaint filed

discomfort [82] and mental and physical pain,[83] providing the circumstances are such as give rise to mental suffering.[84] But it is not liable for injuries not resulting from such breach of duty [85] nor for injuries that should have been avoided by the passenger.[86] Punitive damages may be awarded if the rights of the passenger are wantonly transgressed,[87] but not otherwise,[88] and whether the evidence warrants punitive damages is a question for the jury.[89]

setting up claim for damages for loss of employment as fruit pickers which complainants hoped to secure at point where their original tickets permitted stop-over, held that such damages are altogether too speculative to be accepted either as basis for order by the commission or for judgment in court of law. Allender v. Chicago, B. & Q. R. Co., 16 I. C. C. 103.

82. For **carrying passenger beyond his destination,** compensation for actual loss sustained; discomfort, inconvenience and extra expense. Central of Georgia R. Co. v. Morgan [Ala.] 49 S 865. **Personal injuries** are an element for breach of contract of carrier to transport a passenger safely. El Paso & N. E. R. Co. v. Sawyer [Tex. Civ. App.] 119 SW 110. Impaired earning capacity. El Paso & N. E. R. Co. v. Sawyer [Tex. Civ. App.] 119 SW 107. Where passenger was **negligently set down at the wrong station** and required to walk to her destination, she could recover for inconvenience, sickness, or injury resulting. St. Louis S. W. R. Co. v. Pearson [Ark.] 114 SW 211. In the **absence of malice, willfulness, or inhumanity** on part of sleeping car company breaching its contract to furnish sleeping car accommodations, no recovery can be had for anxiety, or distress of mind unaccompanied by physical injury. Smith v. Pullman Co. [Mo. App.] 119 SW 1072.

83. For wrongful failure to carry passenger to his destination, he may recover for both fright and mental distress, the two elements being distinct. Pullman Co. v. Cox [Tex. Civ. App.] 120 SW 1058. Damages for mental suffering and ignominy may be recovered where conductor took up ticket of passenger after a public altercation. Harris v. Delaware, L. & W. R. Co. [N. J. Law] 72 A 50.

84. Where passenger was directed to alight in a ditch containing water, it was proper to direct the jury to consider the place where she alighted, condition of the weather, sickness and suffering. Dye v. Chicago & A. R. Co., 135 Mo. App. 254, 115 SW 497.

85. Evidence held not to show that a passenger's sickness was the result of riding in a chair car, thereby precluding recovery for mental distress and annoyance for failure to furnish sleeping car accommodations. Smith v. Pullman Co. [Mo. App.] 119 SW 1072.

86. Where passenger contracted a severe cold because she was required to stop at an intermediate station where there were good accommodations, held her physical condition did not result from carrier's default and she could recover only expense and value of time. Cincinnati, etc., R. Co. v. Raine [Ky.] 113 SW 495. For failure of carrier to stop on flag, it is liable for the direct and immediate consequences, but not for resulting exposure unnecessarily incurred. Berley v. Seaboard Air Line R. Co. [S. C.] 65 SE 456. Where a passenger was set down at the wrong station, held she could not recover for suffering from cold and exposure if she could have avoided it. Campbell v. Seaboard Air Line R. Co. [S. C.] 65 SE 628. A passenger sustaining injury must endeavor to make his loss as light as possible. Central of Georgia R. Co. v. Morgan [Ala.] 49 S 865.

87. Where ticket **agent gave passenger a wrong ticket** which the conductor refused to honor and ejected the passenger, held she could recover compensatory damages and punitive damages on showing wantonness and malice. St. Louis, etc., R. Co. v. Baty [Ark.] 114 SW 218. If a **conductor is unreasonably peremptory** in demanding a passenger's ticket and ejects him before giving him time to find it, he may recover actual damages and if unnecessary force or insulting language was used. Bolles v. Kansas City S. R. Co., 134 Mo. App. 696, 115 SW 459. Where carrier **evicted a passenger who had become suddenly insane,** and did nothing to care for her but permitted her to roam about and injure herself, punitive damages were recoverable. St. Louis, etc., R. Co. v. Woodruff [Ark.] 115 SW 953. Where **eviction** of passenger is not only wrongful but is malicious. Leyser v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 1068. Where carrier's servants in **ejecting a passenger** from a train treated him in a brutal manner. Louisville & N. R. Co. v. Cottongin [Ky.] 119 SW 751. Where a **passenger was set down at a wrong station** and the train failed to stop after signal by the agent. Campbell v. Seaboard Air Line R. Co. [S. C.] 65 SE 628. Where a passenger is **ejected against his will,** evidence that he immediately tendered a second fare is admissible for the purpose of showing aggravating circumstances. Georgia R. & Elec. Co. v. Davis [Ga. App.] 65 SE 785. Compensation and punitive damages are recoverable for **illegal expulsion** from street car. Savannah Elec. Co. v. Badenhoop [Ga. App.] 65 SE 50. Where there was evidence that a flagman was **guilty of wantonness** in leaving a passenger at a station short of her destination, it was proper to refuse to charge that punitive damages could not be claimed. Southern R. Co. v. Wooley [Ala.] 48 S 369.

88. Negligent violation of the duties of a carrier to a passenger will not warrant punitive damages unless it is guilty of wantonness or conscious indifference to consequences. Chicago, etc., R. Co. v. Whitten [Ark.] 119 SW 835. In action against carrier for carrying a passenger beyond her destination, held there was no evidence to authorize a charge on punitive damages. Southern R. Co. v. Bankston, 131 Ga. 604, 62 SE 1027. Held not recoverable for ejection of passenger where evidence showed only gruff but not insulting language used. Louisville & N. R. Co. v. Summers [Ky.] 118 SW 926. Not recoverable where a passenger is rightly required to leave the train and no force is used. Bolles v. Kansas City S. R. Co., 134 Mo. App. 696, 115 SW 459. Instruction

Actions for failure to, or delay in delivering telegrams, are ex contractu, and damages recoverable are measured by the general rules applicable to contracts.[90] Recovery may be had for all ill consequences which could not have been avoided by the injured party.[91] The damages recoverable are such as arise naturally and directly from the wrongful act or negligence of the telegraph company[92] or such as may reasonably be supposed to have been contemplated as a probable result of the breach.[93] Special damages may be recovered if the company had notice of the special circumstances[94] but not in the absence of such notice.[95] In some states

disapproved. Id. Where failure of carrier to stop at a flag station was not accompanied by abuse or contumely. Berley v. Seaboard Air Line R. Co. [S. C.] 65 SE 456. Not recoverable for setting a passenger down at the wrong station in the absence of wilful negligence. St. Louis S. W. R. Co. v. Pearson [Ark.] 114 SW 211.

89. Whether failure to stop a train on signal was willful and reckless so as to authorize punitive damages held for the jury. Burns v. Alabama & V. R. Co. [Miss.] 47 S 640. Evidence as to punitive damages and mental suffering held for jury in action for putting passenger off at wrong station. Davis v. Yazoo & M. V. R. Co. [Miss.] 49 S 179.

90. See ante, § 4A. See, also, Telegraphs and Telephones, § 3B. For delay in delivering a telegram requesting sendee to make arrangements for a funeral, the sender is entitled to nominal damages at least. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349

91. For negligence in missending a message, the damage sustained because of loss of contract. Western Union Tel. Co. v. Blackwell Milling & Elevator Co. [Okl.] 103 P 717. Where error in a message resulted in the awarding of a contract to another on a higher bid, the company was held not liable where the only loss was an opportunity to make an advantageous contract. Western Union Tel. Co. v. Webb [Miss.] 48 S 408. Where by mistake of telegraph company the price in telegram is less than that stated by seller, and receiver of telegram orders at lesser price, but seller delivers goods invoiced at true price and receiver of telegram accepts goods at invoice price, he cannot recover from telegraph company the difference between purchase price and price given by mistake. Joynes v. Postal-Telegraph Cable Co.,37 Pa. Super. Ct. 63. Where failure to deliver a message caused the sendee to deliver a shipment of stock to an unfavorable market, the difference between what he received and what he would have received in a favorable market. Marriott v. Western Union Tel. Co [Neb.] 121 NW 241. Where contractor wired "Will ship outfit Tuesday" and owner wired back "Company shut down" which latter telegram was not delivered, held contractor could recover expense of shipping outfit. Postal Telegraph-Cable Co. v. Sunset Const. Co. [Tex.] 114 SW 98; Postal Telegraph-Cable Co. v. Sunset Const. Co. [Tex.] 116 SW 797.

92. For breach of contract to correctly transmit and promptly deliver a message, damages naturally arising and contemplated. El Paso & N. E. R. Co. v. Sawyer [Tex. Civ. App.] 119 SW 110. For breach of contract to furnish **correct market quotations,** the difference between the incorrect price quoted and the correct price on that date. Western Union Tel. Co. v. Bradford [Tex. Civ. App.] 114 SW 868. Where in transmission the price of a commodity is misquoted to a proposed buyer, who accepts the offer, the difference between the actual state of the market and the price erroneously etated. Rule applied. Western Union Tel. Co. v. Truitt, 5 Ga. App. 809, 63 SE 934. Where **price of lomber was misquoted** resulting in sale at the figure stated, the difference between the price received and the fair market value. Western Union Tel. Co. v. Fischer [Ky.] 119 SW 189. Where **delay in telegram offering to buy** results in failure to sell, the loss sustained. Western Union Tel. Co. v. Hoyt [Ark.] 115 SW 941. For **negligent transmission** of a message "son very well" causing it to read "son very ill" held the company was liable for expense of the parents' journeying to the son. Duncan v. Western Union Tel. Co. [Miss.] 47 S 552. Where a company **refused to transmit a message** because it was not in proper form though the address and body of the message indicated urgency, the company was guilty of an aggravated breach of duty and she was entitled to recover damages proximately resulting. Cordell v. Western Union Tel. Co., 149 N. C. 402, 63 SE 71. Where one was compelled to get up at midnight and go in search of a doctor because the telephone company **negligently failed to answer his call,** he could recover for the annoyance. Cumberland Tel. & T. Co. v. Jackson [Miss.] 48 S 614.

93. For delay in delivering death message (1) nominal damages, (2) such damages as arise naturally or was contemplated, (3) punitive damages in a proper case. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. For failure to promptly transmit and deliver a message, recovery may be had for injuries which proximately result and which should have been contemplated from the character of the message, or other information as a probable result of delay. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820. The plaintiff has the burden to prove such facts. Id. For negligent delay of a telegram which resulted in a contractor shipping his outfit to a place where there was no work, he could not recover profits which he would have made on another job. Postal Telegraph-Cable Co. v. Sunset Const. Co. [Tex.] 114 SW 98.

94. For failure to deliver a message requesting sendee to meet the sender and his sick wife at station where weather was inclement, held the company was liable for injuries resulting from such inclement weather. Western Union Tel. Co. v. Powell [Tex. Civ. App.] 118 SW 226.

95. Unless the meaning or import of a mes-

mental suffering alone will not warrant a recovery.[96] As a general rule, however, mental anguish is an element,[97] especially where the company has notice that it will result if the message is not promptly delivered,[98] but not otherwise.[99] Such element applies to social messages [1] and to death messages when they concern the death of blood relatives,[2] if the company has notice of such relationship.[3] Only

sage is shown by its terms or made known to the agent receiving it, no damages can be recovered for failure to transmit or deliver it except the price paid for the service. Holler v. Western Union Tel. Co., 149 N. C. 336, 63 SE 92. Where there is nothing in a telegram to give notice that special damages will result for failure to deliver it, such damages cannot be recovered. Lewin-Cole Com. Co. v. Western Union Tel. Co. [Tex. Civ. App.] 115 SW 313. For delay in delivering a telegram stating that sendee would pay a certain price for cotton seed, the fact that seed could have been bought at slight excess of price named and that storage charges had been lost held not elements. Clio Gin Co. v. Western Union Tel. Co., 82 S. C. 405, 64 SE 426. Loss of sale by reason of nondelivery of a telegram held special damages and not recoverable where the company had no notice of the facts either from the message or otherwise. Guilford v. Western Union Tel. Co. [Ala.] 50 S 112.

96. See ante, § 1. No damages can be recovered for mental anguish because of delay of a telegram. Duncan v. Western Union Tel. Co. [Miss.] 47 S 552.

97. Kirby's Dig. Ark. § 7947, making telegraph companies liable for mental suffering for negligence relative to telegrams, is valid, and is not an interference with interstate commerce. Ivy v. Western Union Tel. Co., 165 F 371. Mental anguish is an element for delay in transmission of a message, which resulted in humiliation, and made it impossible for parent to see his daughter's remains before burial. Cumberland Tel. & T. Co. v. Quigley [Ky.] 112 SW 897. Where because of delay in delivering a telegram no opportunity was given a mother to have her son's body shipped home for burial or to attend the funeral, she was entitled to damages for mental suffering. Western Union Tel. Co. v. Arant [Ark.] 115 SW 136. Evidence sufficient to show that remains would have been shipped for burial but for the delay. Id. Where a telegraph company negligently failed to deliver a telegram announcing a sister's death and hour of her funeral, compensation for mental anguish from being deprived from attending the funeral. Western Union Tel. Co. v. Teague [Ky.] 121 SW 484. For failure to deliver a death message which resulted in the sendee being denied the privilege of seeing her dead husband, mental anguish is an element. Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833. For negligent delay in delivering a death message thereby depriving one of the privilege of attending her sister's funeral, mental anguish is an element. Bailey v. Western Union Tel. Co., 150 N. C. 316, 63 SE 1044. Delay of twenty hours in message to a wife stating that her husband was not expected to live through the night and requesting her to come at once presumptively causes mental suffering. Talbert v. Western Union Tel. Co. [S. C.] 64 SE 862; Id. [S. C.] 64 SE 916. Mental anguish proximately caused by delay in delivering a telegram. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. Mental suffering is an element for delay in delivering a message where it resulted in no relative being present to meet the sendee with the dead body of his child, and no preparations made for the funeral. Western Union Tel. Co. v. Crowley [Ala.] 48 S 381.

98. In order that mental suffering may constitute an element of damage for failure to promptly deliver a telegram, the fact that it will occur must appear from the message. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820. For delay in delivering message from wife to husband, "Baby dying," held husband was entitled to recover for mental anguish. Western Union Tel. Co. v. Hill [Ala.] 50 S 248. Where a telegraph company was notified that unless a message was delivered the same day mental anguish would result, and it agreed to deliver the message on that day, the sendee could recover for failure to deliver until the next day. Suttle v. Western Union Tel. Co., 148 N. C. 480, 62 SE 593. Where a woman made unusual efforts to send a message to her husband announcing serious illness of their child and the company wrongfully refused to transmit it, the message constituted notice that mental anguish would result. Cordell v. Western Union Tel. Co., 149 N. C. 402, 63 SE 71. Telegram, "I am feeling better, don't come," sent in reply to message of wife, asking how husband was, puts the company on notice that wife will suffer mental anguish if the message is not delivered. Fass v. Western Union Tel. Co., 82 S. C. 461, 64 SE 235. Telegram announcing death and directing addressee to come at once held to charge the company with notice of the relationship, and that mental anguish would probably result. Surnames of sender, sendee and decedent, the same. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Where a telegram gave notice that a person was badly hurt and also carried notice that sendee was his mother and of necessity of prompt delivery, the sendee could recover for pain resulting from absence of his mother's care where but for delay she would have been with him. Postal Telegraph-Cable Co. v. Beal [Ala.] 48 S 676. Telegram to injured person's (sender's) mother held to charge the company with notice of the relationship and that pain and mental suffering would result from delay in delivery of it. Id.

99. Telegram from wife to husband "Will be home on Canon Ball Sunday" did not charge company with notice that mental anguish would be suffered for delay in delivery. Western Union Tel. Co. v. Oastler [Ark.] 119 SW 285.

1. Mental anguish is an element for delay in delivering a social telegram. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789.

2. It is limited to certain degrees of relationship, and brothers fall within the degree. Western Union Tel. Co. v. McMorris [Ala.]

mental anguish suffered as a result of the negligence of the company can be recovered for.[4] To authorize recovery for mental suffering, it is not necessary that there be positive or direct evidence of mental pain,[5] and whether mental anguish existed is generally a question for the jury.[6]

In some states it is held that punitive damages cannot be recovered for mere delay in transmitting or delivering a telegram,[7] but, as a general rule, such damages are recoverable for gross breach of duty toward a patron [8] or for willful delay.[9]

48 S 349. Mental suffering held inferable from delay in delivering death message, relative to brothers. Id. Mental suffering caused by absence of one whose presence would be consoling in time of grief is a subject of recovery for delay in a message, where a cause of action exists independently thereof; but the parties must have been closely related and the delayed telegram must have given notice. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Mental anguish is an element for failure to deliver a death message from one brother to another announcing death of a third brother. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. For delay in delivering a death message, the sender can recover for mental anguish suffered during the time between when relatives could have arrived and the time when they did arrive. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553.

3. Where one's relationship to a contract is not disclosed to the company, and did not appear from the telegram, she could not recover for mental anguish caused by delay. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 558..

4. Where a corpse arrived an hour before the time set for the funeral and the widow of deceased postponed the funeral, she cannot recover for mental suffering because of delay, though prior to arrival of the corpse some of the mourners had departed. Alabama City, G. & A. R. Co. v. Brady [Ala.] 49 S 351. Nor can she recover expense of embalming the body, necessitated by postponement of the funeral. Id. Negligence in transmitting a telegram from husband to wife reading that he would be home "today," instead of "Sunday," causing her to worry for fear he was sick when he did not arrive, held not to show ground for mental anguish. Western Union Tel. Co. v. Oastler [Ark.] 119 SW 285. Where there was no proof that sendees of death message were at home or at their place of business when death message arrived or could have responded to it, no recovery could be had for mental anguish. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. In such case, evidence that funeral was postponed and that it rained on day of funeral is not admissible. Id. For delay in delivering a telegram whereby body of sender's wife was a day late in arriving, he cannot recover for mental anguish caused by mistaken belief that the body never would be shipped to him. Hart v. Western Union Tel. Co. [Tex. Civ. App.] 115 SW 638. Recovery cannot be had for mental anguish for delay in sending a telegram where there was no evidence that the sender would have acquired any further information had it been sent. Leland v. Western Union Tel. Co., [Ala.] 49 S 252. If a brother sending a death message suffers mental pain through being deprived of the presence of the sendee at a funeral, because of delay, he may recover therefor but such grief should not be confused with mental anguish naturally arising from the death. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Where because of delay in delivering a telegram announcing illness of child parent was unable to take train to her for six hours, he cannot recover for mental anguish during such period for failure of company to return an answer to his telegram asking as to her condition where the answer would have been that she was no better. Western Union Tel Co. v. Barrett [Tex. Civ. App.] 118 SW 1089.

5. The jury may apply their own knowedge of human nature and experience to the circumstances. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Where delay in delivery of a telegram announcing death resulted in absence of relatives from a funeral, direct evidence of mental suffering caused by such nonattendance is not admissible. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553.

6. Even where there is evidence of mental suffering, the question of whether it existed is for the jury. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Evidence that child whose death was announced in message was niece of sendee to whom he was much attached presented a case for the jury as to whether he suffered mental anguish because of inability to attend the funeral because of delay. Pierson v. Western Union Tel. Co., 150 N. C. 559, 64 SE 577. In action for delay in delivering a death message, the addressee may testify that he would have gone to the funeral if the message had been delivered and could have made proper train connections. Western Union Tel. Co. v. Benson [Ala.] 48 S 712.

7. Exemplary damages are not recoverable for delay in sending a telegram. Leland v. Western Union Tel. Co. [Ala.] 49 S 252. Punitive damages are not recoverable for breach of contract to promptly deliver a message. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Instruction disapproved as permitting such recovery. Id.

8. Evidence held to show gross negligence in failing to transmit a death message, warranting punitive damages. Western Union Tel. Co. v. Crowley [Ala.] 48 S 381. Evidence sufficient to warrant punitive damages for failure to deliver a telegram. Johnson v. Western Union Tel. Co., 82 S. C. 87, 63 SE 1. Where one delivered a message and paid the toll for sending and the company failed to transmit it, exemplary damages may be recovered. Western Union Tel. Co. v. Bodkin [Kan.] 101 P 652.

9. Punitive damages held recoverable for negligent delay of over 12 hours in delivery of a telegram. Western Union Tel. Co. v. Hiller [Miss.] 47 S 377. Where a message was delayed from 4 p. m. Sunday until 10:06

But intentional wrong or reckless disregard of the patron's rights must appear,[10] and whether such damages may be recovered may be a question of fact.[11]

One for whose benefit a message is sent may recover for negligence relative thereto if the company has notice of such fact,[12] but not otherwise.[13]

(§ 4) *G. Contracts for services.*[14]—See 11 C. L. 982—The measure for wrongful discharge is compensation for the remainder of the term,[15] less what the employe has or could by the exercise of ordinary diligence have earned,[16] together with incidental damages necessarily incurred.[17] This rule applies to contracts to teach a

Monday morning and such delay was unexplained, it was proper to submit the question of punitive damages. Ogilive v. Western Union Tel. Co. [S. C.] 64 SE 860.

10. That words "726 Pine St." were omitted from address of sendee for some unaccountable reason does not show intentional wrong or reckless disregard of the sender's rights warranting punitive damages. Strauss v. Postal Telegraph-Cable Co. [S. C.] 64 SE 913. Telephone company held not liable in punitive damage for politely refusing free country service as required by its franchise. Cumberland Tel. & T. Co. v. Paine [Miss.] 48 S 229. Punitive damages are not recoverable where cause of delay was a strike by the employes of the telegraph company. Sullivan v. Western Union Tel. Co., 82 S. C. 569, 64 SE 752. Evidence insufficient to show willful or wanton neglect in failing to deliver a telegram, warranting punitive damages. Oxner v. Western Union Tel. Co., 82 S. C. 510, 63 SE 545.

11. Whether failure of company's agent to make an effort to correct the address on an undelivered telegram showed wanton indifference to duty justifying punitive damages held for the jury. Mims v. Western Union Tel. Co., 82 S. C. 247, 64 SE 236.

12. A sendee of a message can recover for negligent delay where it shows on its face that it was intended for his benefit, or the company had notice of such fact. Holler v. Western Union Tel. Co., 149 N. C. 336, 63 SE 92. The addressee of a message may sue for mental anguish resulting from breach of contract to promptly deliver it. Western Union Tel. Co. v. Parsley [Tex. Civ. App.] 121 SW 226.

13. Undisclosed principal of both sender and sendee of death message cannot recover for mental anguish for delay. Western Union Tel. Co. v. Potts [Tenn.] 113 SW 789. Where a parent telegraphed money to an agent for the purpose of preparing the body of his deceased child for burial, such agent could not recover for mental anguish caused by delay, as the contract was not made for her benefit. Curd v. Cumberland Tel. & T. Co. [Ky.] 119 SW 746. Sendee could not recover tolls paid for delay, in the absence of proof of contractural relations between himself and the company. Western Union Tel. Co. v. Jackson [Ala.] 50 S 316. Overcharges paid by the sendee held recoverable and to constitute basis for recovery for mental anguish due to delay. Id.

14. Search Note: See notes in 35 L. R. A. 516; 5 L. R. A. (N. S.) 439, 529; 6 Id. 82, 94, 703.

See, also, Master and Servant, Cent. Dig. §§ 50-56; Dec. Dig. §§ 41, 42; 26 Cyc. 1009-1016; 2 A. & E. Enc. L. (2ed.) 37.

15. For breach of contract to permit carpenters to do work on a house for a certain sum, such sum less what they earned at other employment during the period. Womble v. Hickson [Ark.] 121 SW 401.

16. Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 NE 877. Where employe testified that he did not think he could have secured other employment, and before expiration of contract period he engaged in preliminaries of establishing business of his own, a verdict for substantial damages, but less than contract salary, was not unsupported. Id. Where landlord evicts a tenant on shares, he is entitled to offset the amount of such tenant's subsequent earnings and may show that they were greater than accounted for by the tenant. Crews v. Cortez [Tex. Civ. App.] 115 SW 609. Where one employed to do work was prevented by the other party from doing it, she may recover the difference between what she would have earned and what she did earn. King v. Block Amusement Co., 115 NYS 243. An employe wrongfully discharged must lessen his damages as much as possible by obtaining other employment. Hampton v. Buchanan, 51 Wash. 155, 98 P 374. For wrongful discharge the employe may show in mitigation that the servant had or could have obtained other employment. Texas Life Ins. Co. v. Roberts [Tex. Civ. App.] 119 SW 926. Where after discharge an employe purchased stock in a corporation under an agreement that he should be elected an officer and receive a salary, but the corporation became insolvent before he received salary sufficient to pay for the stock, he will not be required to deduct salary received from his recovery from defendant. Development Co. of America v. King [C. C. A.] 170 F 923. An employe who breaches his contract has the burden to prove that similar employment could have been obtained by reasonable effort and that it was refused, or reasonable effort to procure it was neglected. Altes v. Blumenthal, 113 NYS 574. Such burden is satisfied where the employe admits on cross-examination that he had not sought other employment. Pindar v. Jenkins, 128 App. Div. 711, 113 NYS 588. For wrongful discharge an instruction permitting recovery of the value of two months' services, less what he earned or should have earned, held proper. Eastern Kentucky Realty Co. v. Bueris [Ky.] 119 SW 739. An employe who is improperly discharged before the term of service expires is prima facie entitled to recover the stipulated compensation for the whole term if it appears that he honestly endeavored to secure employment during that period and as honestly failed. Millert v. Augustinian College, 36 Pa. Super. Ct. 511.

17. For wrongful discharge where the servant had constructed a house in which to

public school,[18] but is not of universal application.[19] For breach of contract to allow one to do certain work, the difference between the contract price and what it would cost to do the work is allowed,[20] and for breach of contract on the part of the employe, the difference between the contract price and the cost of procuring another workman.[21]

(§ 4) *H. Promise of marriage.*[22]—See 11 C. L. 983—Compensatory damages may be recovered.[23] The fact of seduction may be considered in aggravation of damages.[24]

§ 5. *Measure and elements of damages for torts. A. In general. Miscellaneous torts.*[25]—See 11 C. L. 983—Generally speaking, in actions ex delicto damages may be recovered for all the natural and probable consequences of the wrongful act[26] which are shown by the evidence,[27] and if the tort was willful punitive dam-

live pursuant to agreement, the cost of such house is an element. Enyart v. Inman-Poulsen Logging Co. [Wash.] 102 P 1050. For breach of an executory contract to hire teams, an excessive price paid for an outfit in reliance upon such contract is not an element. H. T. Smith Co. v. Minetto-Meriden Co., 168 F 777.

18. The rules applicable to ordinary contracts of employment as to damages apply to cases of breach of contract to teach a public school. Byrne v. Struble Independent School Dist., 139 Iowa, 618, 117 NW 983. The teacher must find other employment to mitigate damages, but damages are not to be diminished if he fails to procure other employment. Id.

19. A broker may recover anticipated profits for breach of contract of employment. Blumenthal & Co. v. Bridges [Ark.] 120 SW 974. For breach of contract of employment of sales agent, the commissions he had earned and commissions on all sales of the employer's goods in such agent's territory during the period of employment. Oberfelder v. J. G. Mattingly Co. [Ky.] 120 SW 352.

20. For breach of contract to employ one to haul wood, the difference between the contract price and what it would cost to perform the work. Gibson v. Wheldon [Vt.] 72 A 909. Where an owner prevents a contractor from removing a ledge and from crushing the rock and delivering it to him, the contractor may recover the difference between the contract price and the cost of doing the work. Gaffey v. United Shoe Mach. Co., 202 Mass. 48, 88 NE 330. For breach of contract for work, the difference between the contract price and what it would cost to do the work. Goldstein v. Godfrey Co., 61 Misc. 64, 113 NYS 123.

21. Cost of securing another equally skilled workman. Mendenhall v. Davis, 52 Wash. 169, 100 P 336.

22. Search Note: See note in 4 L. R. A. (N. S.) 616.

See, also, Breach of Marriage Promise, Cent. Dig. §§ 38-47; Dec. Dig. §§ 24-36; 5 Cyc. 1013-1015, 1017-1022; 1 A. & E. Enc. L. (2ed.) 896.

23. Compensatory damages may be recovered against the heirs of a decedent for breach of marriage promise where obligor has been put in default as provided by law, but not punitive damages. Johnson v. Levy, 122 La. 118, 47 S 422. In action for breach of marriage promise, the jury may consider the pecuniary advantage of the marriage, the wealth of the defendant, the money value the marriage would have given, and the advantage of a domestic establishment. McKenzie v. Gray [Iowa] 120 NW 71. Instruction approved. Id.

24. That plaintiff was seduced and seduction followed by pregnancy is admissible in aggravation of damages. Johnson v. Levy, 122 La. 118, 47 S 422.

25. Search Note: See notes in 18 L. R. A. 275; 32 Id. 142, 545; 51 Id. 801; 5 L. R. A. (N. S.) 1100; 13 Id. 253; 14 Id. 1242; 16 Id. 674; 28 A. S. R. 878.

See, also, Assault and Battery, Cent. Dig. §§ 52-55; Dec. Dig. §§ 37-40; 3 Cyc. 1106-1109; Damages, Cent. Dig. §§ 222-284; Dec. Dig. §§ 95-116; 13 Cyc. 136-155; False Imprisonment, Cent. Dig. §§ 109-115; Dec. Dig. §§ 33-36; 19 Cyc. 368, 369, 371, 372; Fraud, Cent. Dig. §§ 60-65; Dec. Dig. §§ 59-62; 20 Cyc. 130-146; Husband and Wife, Cent. Dig. §§ 1125, 1134; Dec. Dig. §§ 334, 349; 21 Cyc. 1621, 1622, 1628, 1629; Malicious Prosecution, Cent. Dig. §§ 154-158; Dec. Dig. §§ 66-69; 26 Cyc. 61, 64, 65; Rape, Cent. Dig. § 112; Dec. Dig. § 67; Seduction, Cent. Dig. §§ 45-49; Dec. Dig. §§ 19-22; 8 A. & E. Enc. L. (2ed.) 640.

26. In any case predicated upon a wrong an injured person may recover damages necessarily and usually following such act and damages directly traceable thereto, but other damages are too remote. McKinney v. Carson [Utah] 99 P 660. In an action for a wrongful act it is not material whether the wrongdoer contemplated that loss of business or profits would result. Kentucky Heating Co. v. Hood [Ky.] 115 SW 337. Remote or conjectural consequences are not elements. Vaughan's Seed Store v. Stringfellow [Fla.] 48 S 410. For **injury to singer's voice** causing it to become coarse and husky, such damage as is reasonably certain. Rhinesmith v. Erie R. Co., 76 N. J. Law, 783, 72 A 15. In statutory action for **selling liquor to an intoxicated person,** plaintiff may prove that necessaries were supplied to the family by charity and may also show suffering caused by the husband's neglect. Acken v. Tingletoff, 83 Neb. 296, 119 NW 456. In action under Cobbey's Ann. St. 1907, § 7168, for damages for selling liquor to an intoxicated person, it is sufficient to prove sale to an intoxicated person from whose act damage arose. Davis v. Borland, 83 Neb. 281, 119 NW 454. Charge as to measure of damages in action for selling liquor to an intoxicated person held erroneous. Id. It

ages may be awarded.[28] This rule is subject to the limitation that the injured person must exercise ordinary diligence to minimize his damages.[29] There can be but one recovery for the same injury.[30] In civil actions for damages, motive or intent is material only where the act is not unlawful or where it affects the recovery.[31]

Assault and battery.[See 11 C. L. 984]—For unjustified assault and battery the measure recoverable is compensation for all injuries sustained.[32] Disgrace and

is error in an action for **seduction** to permit recovery for loss of character where there is no evidence that person was of previous chaste character. Olson v. Rice [Iowa] 119 NW 84. In action for **alienation of wife's affections,** the jury in estimating the damage may take into consideration the social relation of the parties and the apparent affection existing between the husband and wife before the separation. Keath v. Shiffer, 37 Pa. Super. Ct. 573. In action on official bond for **false return by sheriff,** costs incurred in proceedings in equity to set aside judgment illegally obtained thereby, and expense in following such cause on appeal, may be recovered. People v. Barrett, 141 Ill. App. 168. For **exclusion of ticket holder to a theater,** where no special damages are claimed, price of ticket and other actual expense, but not for humiliation and disappointment. Luxenberg v. Keith & Proctor Amusement Co., 64 Misc. 69, 117 NYS 979. Where one **lumber company wrongfully places its mark upon logs** of another, preventing a sale, the difference between the market price at the time of marking and at the time of subsequent sale. Ironton Lumber Co. v. Wagner [Ky.] 119 SW 197. For **obstruction of a navigable stream** requiring a logger to stay near and watch his logs, the value of his time while so engaged. Orange Lumber Co. v. Thompson [Tex. Civ. App.] 113 SW 563. Damages may not be recovered from a railroad company for **flooding land** with surface water where it necessarily resulted from construction of the road, as such damages are part of the original injury. Blunck v. Chicago & N. W. R. Co. [Iowa] 120 NW 757. **Destroying recorded evidence of title** and causing to be recorded a fraudulent title authorizes damages, under Civ. Code, arts. 21, § 2315. Lacroix v. Villio, 123 La. 459, 49 S 20. For **mutilation of dead body,** compensation for mental anguish and punitive damages if the act was willful and wanton. Kyles v. Southern R. Co., 147 N. C. 394, 61 SE 278. Evidence insufficient to warrant punitive damages. Id. In determining damages to one's business resulting from **fire** communicated from another's premises, the time it would take to re-establish the business at the place where the fire occurred or at another place cannot be considered. Simplex R. Appliance Co. v. Western Rawhide & B. Co. [Ind.] 88 NE 682. In a civil action for conspiracy, the damages recoverable must result directly from the wrong and not those which are uncertain, contingent or remote. Von Ou v. Magenheimer, 126 App. Div. 257, 110 NYS 629. For **conspiracy to procure a member's expulsion from a beneficial association,** he may recover exemplary damages against those actuated by malice in making and prosecuting charges. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144. For **wrongful expulsion** of a member from a beneficial association, he may recover for pecuniary loss, mental suffering, humiliation and the value of his insurance and traveling card. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144. For **slander of title,** expenses of suit to establish title cannot be recovered. Cohen v. Minzesheimer, 118 NYS 385.

27. In action for refusal of corporation to transfer corporate stock on its books where plaintiff alleged damages in the sum of 20 cents per share, and the only proof was the stock certificate reciting par value $1 fully paid, there was a failure of proof. Uncle Sam Oil Co. v. Forrester [Kan.] 100 P 512. It was held error to permit recovery for probable cost of a surgical operation where physicians testified that the condition did not result from the injury. Hoyt v. Independent Asphalt Pav. Co., 52 Wash. 672, 101 P 367.

28. See subsequent subsections for application of this rule to specific torts. Punitive damages are recoverable where store proprietor forcibly searched a saleswoman's pocket for money claimed to have been embezzled after she told him he would find it in the cash drawer. Kress v. Lawrence [Ala.] 47 S 574. In action under Code, § 2418, for selling liquor to parents of a minor child, the awarding of punitive damages is in the discretion of the jury. Peterson v. Brackey [Iowa] 119 NW 967. Under Comp. Laws, § 5398, exemplary damages may be recovered for sale of liquor to a minor, though the seller did not know of his minority. Scahil v. Aetna Indemnity Co. [Mich.] 16 Det. Leg. N. 390, 122 NW 78.

29. See ante, § 2.

30. It is error to authorize recovery of compensation for wounded feelings and additional punitive damages in the event of aggravating circumstances. Georgia R. & Elec. Co. v. Davis [Ga. App.] 65 SE 785.

31. Walbridge v. Walbridge [Kan.] 103 P 89.

32. Only such damages as are the usual and ordinary result of the injury, and not such as might possibly follow. Rutledge v. Rowland [Ala.] 49 S 461. Defendant is liable for all the natural and proximate consequences of his wrongful act, whether they were foreseen or injuries are more serious than were intended. Walbridge v. Walbridge [Kan.] 103 P 89. Question asked a physician as to what is the effect of a bone constantly pressing on the brain held not objectionable as an attempt to prove special damages. Rutledge v. Rowland [Ala.] 49 S 461. **Future pain** and mental anguish are not elements where there are no evidences that such results will follow. Luttermann v. Romey [Iowa] 121 NW 1040.

humiliation,[33] and mental anguish,[34] are elements, but not insulting language used by the assailant.[35] Insulting language and provocation used by the injured person may be shown in mitigation,[36] unless induced by the assailant.[37] The wealth of the assailant may be considered on the question of punitive damages.[38]

For alienation of affections See 11 C. L. 984 mental anguish and humiliation are elements.[39]

Fraud and deceit. See 11 C. L. 984—The measure of damages for fraud and deceit is the loss sustained by the injured person,[40] ordinarily measured by the value of the bargain had the facts been as represented,[41] but loss not resulting proximately from

33. Johnson v. Daily, 136 Mo. App. 534, 118 SW 530.

34. Such sum as will compensate for physical and mental suffering endured as result of injuries. Renfro v. Barlow [Ky.] 115 SW 225. The jury may consider not only mental distress, which is a part of the bodily pain, but also that other condition of the mind caused by insult at the blows and tends to humiliation. Stewart v. Watson, 133 Mo. App. 44, 112 SW 762.

35. Profane words and epithets used by the assailant. Galvin v. Starin, 132 App. Div. 577, 116 NYS 919.

36. Insulting language. Norfolk & W. R. Co. v. Brame [Va.] 63 SE 1018. Defendant may prove abusive language or words used by plaintiff in order to justify his conduct or mitigate damages. It is for the jury to determine whether the language amounts to justification or only to mitigation. Thompson v. Shelverton, 131 Ga. 714, 63 SE 220. That plaintiff brought on assault by altercation with officer and resisting arrest. Baltimore & O. R. Co. v. Strube [Md.] 73 A 697. Under Laws 1906, p. 262, c. 32, defendant in an action for assault and battery may prove any matter of provocation in mitigation of punitive damages, but not in mitigation of actual damages. Renfro v. Barlow [Ky.] 115 SW 225.

37. Where assault was provoked by insulting language brought on in consequence of liquor furnished defendant by plaintiff, defendant cannot shield himself by such provocation in mitigation of damages. Robichaud v. Maheux, 104 Me. 524, 72 A 334.

38. In assault and battery, evidence of wealth of defendant is competent on the question of what would be sufficient as punishment. Thomas v. Williams, 139 Wis. 467, 121 NW 148. In action for assault the question of defendant's wealth may be considered and the damages may be apportioned in proportion to his ability to pay. Id.

39. Adkins v. Kendrick [Ky.] 115 SW 814.

40. Measure of damages for representing land as unincumbered when incumbered is amount paid in discharge of incumbrance and interest. Crane v. Schaefer, 140 Ill. App. 647. Difference between what one parted with and what he received. Hanson v. Hellie, 107 Minn. 375, 120 NW 341. In an action for fraud inducing the purchase of notes drawing 6 per cent prior and 7 per cent after maturity, it is error to allow a recovery of a rate of interest greater than 5 per cent on the face of the notes at the time of transfer. Siltz v. Springer, 236 Ill. 276, 85 NE 748. Where mortgagee of goods sold them in bulk and mortgagor sues to recover the difference between selling price and market value on the ground that the mortgage was fraudulent, it is proper to charge to consider the value of the goods in bulk and not the price at which they might sell at retail. Corny v. Paxton & Gallagher Co., 83 Neb. 88, 119 NW 14. Where a third person by fraud **induced a mortgagor to neglect to pay interest when due** causing the mortgagee to exercise an option to declare the whole debt due and foreclose, the mortgagor could recover foreclosure costs and possibly attorney's fees. Nearing v. Hathaway, 128 App. Div. 745, 113 NYS 318. Where **purchase is induced,** the difference between the value of the land and the sum paid. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023. Fraudulent representations **in sale of house** that it was occupied by tenant at will, who in fact held a lease, the difference between the rental market value and the rent paid by the tenant under his lease. Bridges v. Pafford [Ga. App.] 65 SE 700. Where sale of one-half the **corporate stock** of a corporation was induced by false representations that the corporation was not liable on any notes, one-half the amount of such liability. Mills v. Knudson [Wash.] 103 P 1123. Under Civ. Code, §§ 3313, 3314, for fraudulent representations **that stallion sold was a foal getter,** the actual damages sustained based on value of breeding season and money lost because of incapacity of the horse. Hodgkins v. Dunham [Cal. App.] 103 P 351. Where **employer fraudulently represented to employes that he had taken out accident insurance** for them and deducted the premium from their wages, they could recover only such premium. Williams v. Detroit Oil & Cotton Co. [Tex. Civ. App.] 114 SW 167. Exemplary damages not recoverable. Id. For fraudulent representations **as to condition of a gin** traded for land, the difference between the market value of the gin and the value of the land. Wimple v. Patterson [Tex. Civ. App.] 117 SW 1034.

41. In an action to cancel an instrument for fraud, plaintiff may recover the amount he would have received had the contract been completed in good faith. Johnson v. Carter [Iowa] 120 NW 320. Difference in value between stock purchased and its hypothetical value had the company owned 25 acres of land which it falsely represented to own. Chrystal v. Level, 144 Ill. App. 533. Where vendor misrepresented as to amount of rent reserved on lease, the measure of damages was the difference between the real value of the property purchased and the value which the property would have had if the representations had been true. Under the evidence held error to direct verdict

the fraud cannot be recovered.[42] When malice is a part of the gist of the action, punitive damages may be recovered, though the act complained of is indictable.[43]

False imprisonment.[See 11 C. L. 985]—The measure is compensation for injury sustained.[44] One causing an arrest to be made is liable for the natural and probable consequences of such arrest[45] and expense of procuring release.[46] The amount to be awarded for false imprisonment, especially under circumstances causing humiliation, is for the jury.[47] Punitive damages may be awarded in case of malice.[48]

Malicious prosecution and abuse of process.[See 11 C. L. 985]—The measure of recovery is compensation for injury sustained,[49] including compensation for mental distress,[50] physical injury,[51] expenses and attorney's fees,[52] but attorney's fees are

for nominal damages. Batura v. McBride, 75 N. J. Law, 480, 68 A 113. In action for fraud and deceit, injured party held entitled to benefit of his bargain, to real value which he was led by appellant's misconduct to suppose he was getting in notes given him when deal was consummated, together with interest on such notes where party was induced to sign notes for $75,000 for transfer of leasehold. Springer v. Schwitters, 137 Ill. App. 103. Where **a contract has been induced** by fraud at least nominal damages. Isman v. Loring, 130 App. Div. 845, 115 NYS 933. For false representations **concerning property sold,** the difference between its actual value and its value if it had been as represented. Ettinger v. Weil, 131 App. Div. 784, 116 NYS 328. In action for fraud in **inducing the purchase of stock** the question is whether it was worth as much as it would have been if it had been as represented, and not whether it was worth what was paid for it. Harlow v. Haines, 63 Misc. 98, 116 NYS 449. Inducing an **exchange of lands,** the difference in the values of the property. George v. Hesse [Tex. Civ. App.] 115 SW 314. As to **property sold,** the difference in value between the property conveyed and its value if it had been as represented. Howe v. Martin [Okl.] 102 P 128. Where the vendor of a milldam and race falsely represented to a purchaser that he owned a 14-foot head, the measure was the difference between the value as it actually existed and what it would have been worth if as represented. Peters v. Birkett, 153 Mich. 61, 15 Det. Leg. N. 328, 116 NW 538. For fraud inducing purchase of **worthless notes,** the difference between actual value of notes and their value if as represented, with interest. Schwitters v. Springer, 236 Ill. 271, 86 NE 102.

42. A purchaser induced by fraud to purchase land cannot recover loss sustained in consequence of a sale of his own land at a sacrifice in order to raise money. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023.

43. Crane v. Schaefer, 140 Ill. App. 647.

44. Under the rule that one may recover for false imprisonment all natural and probable consequences, where an officer made an illegal arrest and thereafter one swore to a complaint falsely charging him, the imprisonment under such charge may be regarded as a continuation of the original wrong. Knickerbocker Steamboat Co. v. Cusack [C. C. A.] 172 F 358. For false imprisonment, nominal damages at least, together with expense of procuring release, loss of time, interruption of business, and mental and bodily suffering. Gold v. Campbell [Tex. Civ. App.] 117 SW 463.

45. Simper v. Carroll, 12 Ohio C. C. (N. S.) 140. It is competent for a plaintiff in an action for false arrest to testify as to the effect of the arrest upon her mental and nervous condition. Id. For false imprisonment damages to business are **too remote.** Gold v. Campbell [Tex. Civ. App.] 117 SW 463.

46. For false imprisonment under a void warrant where plaintiff was held to bail on his own recognizance, held he was under restraint from time of his arrest to discharge on appeal and could recover expenditures in defending himself during that period. Worden v. Davis, 195 N. Y. 391, 88 NE 745. That warrant was void did not relieve the person causing his arrest from liability for sums expended in defense pending appeal. Id.

47. Gomez v. Scanlan [Cal.] 102 P 12. The measure of damages for false imprisonment is for the jury to determine. Gold v. Campbell [Tex. Civ. App.] 117 SW 463.

48. For false arrest, treatment accorded the prisoner in the lockup and his suffering from being put in a cold damp cell is admissible on question of punitive damages. Philadelphia, B. & W. R. Co. v. Green, 110 Md. 32, 71 A 986. Where officer in making an arrest acted recklessly, maliciously, and with design to oppress and injure, exemplary damages may be awarded. Gold v. Campbell [Tex. Civ. App.] 117 SW 463. If an officer acts recklessly, wantonly or maliciously in making an arrest without a warrant, exemplary damages may be recovered. Schnider v. Montross [Mich.] 16 Det. Leg. N. 557, 122 NW 534.

49. For wrongful execution against the person whereby one was restrained of her liberty, such damages as she sustained. Allen v. Fromme, 195 N. Y. 404, 88 NE 645.

50. One may recover for mental distress suffered during a continuance of the criminal case obtained at his request. Cramer v. Barmon, 136 Mo. App. 673, 118 SW 1179.

51. Pneumonia contracted, on account of impaired health, months after the imprisonment, is not too remote, and entitles plaintiff to damages. Equitable Life Assur. Soc. v. Lester [Tex. Civ. App.] 110 SW 499.

52. In malicious prosecution it was proper to charge the jury to consider employment of an attorney to defend plaintiff and other expense, though there was no evidence of the value of such services nor the amount of other expense. Blazek v. McCartin, 106 Minn. 461, 119 NW 215. The amount recov-

not recoverable as such [53] nor are such fees paid for prosecuting a claim for damages recoverable as punitive damages.[54] Punitive damages may be recovered in case of malice,[55] but the awarding of such damages is discretionary with the jury.[56, 57]

(§ 5) *B. Loss of, or injury to, property.*[58]—See 11 C. L. 965—The measure of damages for temporary injury to land is the depreciation in rental value,[59] or value of use and occupation,[60] or cost of repairs or restoration [61] together with compensation for other injuries which naturally result.[62] If the injury is permanent, the measure

erable as attorney's fees is the sum proved to be reasonable. Tutwiler Coal, Coke & Iron Co. v. Tuvin [Ala.] 48 S 79.

53. Beckham v. Collins [Tex. Civ. App.] 117 SW 431. **Nor for the suing out** maliciously of a writ of attachment. Id.

54. Attorney's fees promised for prosecuting the claim for damages. Beckham v. Collins [Tex. Civ. App.] 117 SW 431.

55. Evidence sufficient to authorize recovery of exemplary damages for malicious prosecution. Murphy v. Booth [Utah] 103 P 768. **Vexation** is not an element of punitive damages for malicious prosecution. Beckham v. Collins [Tex. Civ. App.] 117 SW 431.

56, 57. Bosch v. Miller, 136 Mo. App. 482, 118 SW 506. Where constable illegally sold exempt property, no facts appearing which would justify vindictive damages, compensatory damages were only recoverable. Keenan v. Drew, 144 Ill. App. 388.

58. **Search Note:** See notes in 11 C. L. 987, 989; 15 L. R. A. 612; 17 Id. 426; 19 Id. 653; 68 Id. 673; 3 L. R. A. (N. S.) 973; 8 Id. 369; 11 Id. 930; 12 Id. 88, 267; 5 A. S. R. 537; 9 Id. 144; 19 Id. 459; 22 Id. 50; 62 Id. 791; 85 Id. 291; 5 Ann. Cas. 416; 9 Id. 1148.

See, also, Damages, Cent. Dig. §§ 260-284; Dec. Dig. §§ 103-116; 13 Cyc. 148-155.

59. Where railroad company rendered a highway unsafe by excavating too close to it, the company could be compelled to remedy the danger and the injury was not permanent, and recovery for permanent injury could not be had. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 979. Where injury caused to land by flooding is abatable, no recovery can be had for depreciation in value. Sloss-Sheffield Steel & Iron Co. v. Mitchell [Ala.] 49 S 851. For **flooding land** just and fair compensation for the injury. Quinn v. Chicago, etc., R. Co. [S. D.] 120 NW 884. For **discharging sewage upon land,** the damages sustained, though sewage consisted only of water and other innocuous substances. Ruthven v. Farmers' Co-Op. Creamery Co. [Iowa] 118 NW 915.

60. Under Civ. Code, § 3333, for injury to **building by trespass, the cost of repairs,** and loss of rental. Linforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320. For flooding land and deposit of limestone, etc., thereon, where only permanent injury shown was the filling of certain springs, and their value was not shown, the difference in rental value before and after the injury is the proper measure. Perry, Matthews, Buskirk Stone Co. v. Smith, 42 Ind. App. 413, 85 NE 784. Where no crop was raised on land because of wrongfully flooding it, the rental value though it was in possession of a tenant on shares. Quinn v. Chicago, etc. R. Co. [S. D.] 120 NW 884. In trespass for flooding land and destroying timber which a lessee had a right to cut, damages for timber destroyed could be recovered. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548. Owners of water power are entitled to damages for all injuries directly and naturally resulting from wrongful impairment thereof (Lancaster & J. Elec. L. Co. v. Jones [N. H.] 71 A 871), but cannot recover for subsequent occurrences of which the wrongful act furnished merely the occasion upon which other causes operated to produce the injurious result (Id.). Where defendant wrongfully stopped a drain leading from the premises of plaintiff past those of the defendant, the measure of damages is not the cost of a new drain but the damage sustained by plaintiff in the enjoyment of the use of his property while the consequences of the wrongful act continues. Delamarre v. Bott [N. J. Law] 73 A 74.

61. Measure of damages for injury to land caused by seepage is the cost of restoring the property to its former condition, unless such cost exceeds the value of the land, in which case the value of the land is the value. Welliver v. Irondale Elec. L., etc., Co., 38 Pa. Super. Ct. 26. For **destruction by fire of roots of timothy and blue grass** meadow, the cost of reseeding and loss of rental value for season lost during that process. Mattis v. St. Louis & S. F. R. Co. [Mo. App.] 119 SW 998. For **pollution of a spring,** if the owner could have cleaned it out, he can recover only for pollution up to time he should have cleaned it. Cincinnati, etc., R. Co. v. Gillespie [Ky.] 113 SW 89. For injuries by **flooding land** and causing floors of houses to swell, piers to settle and sills to rot, where there was no loss of or injury to the soil, the cost of restoring the premises, and loss of income pending repair. Sloss-Sheffield Steel & Iron Co. v. Mitchell [Ala.] 49 S 851. The measure of damages to property due to increasing the flow upon it of surface water is the cost of restoration to its former condition and where cost of restoration and necessary repairs are both allowed the latter should be eliminated from the verdict. Cincinnati v. McLaughlin, 12 Ohio C. C. (N. S.) 220.

62. For depositing dirt in a millpond, the difference in value before and after the injury, and also loss of custom, expenses, etc. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426. For injury to residence by flood, (1) the difference between the value of the property before and after; or (2) if the building can be repaired, the cost of repairs with loss of rent; or (3) if repairs have been made but the building cannot be restored to its former value, the difference between the value before the injury and after repair, together with cost of repairs and loss of rent. Kerns v. Kansas City [Kan.] 100 P 624.

is the difference between the value of the property immediately before and after the injury;[63] for the destruction of fruit trees,[64] or standing timber,[65] the depreciation in the value of the land, unless the timber has a value apart from the land.[66] The measure being largely dependent upon whether or not the trespasser acted in good faith, which question is ordinarily one of fact,[67] willfulness is implied from a trespass,[68] and the burden is on the trespasser to show that it was not willful.[69] Recovery may be limited by the interest of the person claiming damages;[70] for injury to a leasehold, the value of the unexpired term[71] or the diminished value.[72] The

63. Seaboard Air Line R. Co. v. Brown [Ala.] 48 S 48; Buck v. Louisville & N. R. Co. [Ala.] 48 S 699. It is only for permanent injury to land that depreciation in value is the measure. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 979. For permanent injury to land by flooding. St. Louis S. W. R. Co. v. Clayton [Tex. Civ. App.] 118 SW 248; Missouri, K. & T. R. Co. v. Chilton [Tex. Civ. App.] 118 SW 779. For trespass. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. Especially where the injuries are caused by a legally authorized construction, which may not be abated as a nuisance. Hart v. Wabash So. R. Co., 143 Ill. App. 503. Evidence of depreciation in market value of land may be given in action against railroad company caused by ditches and embankment. Id. For injury to land **by discharge of sewage** in a creek which ran through it. Morris v. Missouri Pac. R. Co., 136 Mo. App. 393, 117 SW 687. For **obstruction of a navigable stream** causing land formed by accretion to be washed away, the value thereof. Ami Co. v. Tide Water Lumber Co., 51 Wash. 171, 98 P 380. For **impairment of use of property** by operation of a railroad in front of it, the depreciation in its market value. Morris v. Oregon Short Line R. Co. [Utah] 102 P 629. Where a city **deposits sewage in a stream** and injures property of a riparian owner, he may recover for permanent injury, and depreciation in the value of his land is a proper element. Kellogg v. Kirksville, 132 Mo. App. 519, 112 SW 296. In action for damages caused by fire where **property injured was attached to the land,** it was error to refuse to permit defendant to inquire into the value of the land before and after the fire Missouri, K. & T. R. Co. v. McDowell [Kan.] 98 P 201. In action for **maintaining a nuisance,** a charge submitting question of permanent injury only held proper. Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897. For permanent injury to land, present and prospective damages. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 979. The fact that a railway embankment and bridge causing injury to land by flooding are permanent does not necessarily render the injuries permanent. "Permanent" means not only the character of the structure, but also the character of the injury. Hughes v. Chicago, etc., R. Co. [Iowa] 119 NW 924. Where one suffered injury because of flooding caused by construction of a railroad embankment and bridge only at flood stages of the stream, the injury was not permanent. Id.

64. For injury to and destruction of apple trees and fruit, the difference between the value of the fruit before and after injury, and the difference between value of land before and after the injury. Doty v. Quincy, etc., R. Co., 136 Mo. App. 254, 116 SW 1125. Instruction held erroneous. Id. Where peach trees and grape vines are wholly destroyed, the difference between the value of the land just prior to and after the burning. Texas & P. R. Co. v. Graffeo [Tex. Civ. App.] 118 SW 873.

65. For injury to growing timber by fire, the diminution in the value of the land caused by the injury to the timber. Miller v. Neale, 137 Wis. 426, 119 NW 94. For injury to standing timber by fire, the owner is not limited to the difference in the lumber value of the trees. Manitou & P. P. R. Co. v. Harris [Colo.] 101 P 61. For destruction of timber and grass by fire. the difference between the value of the land before and after the fire. Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166.

66. Where something is destroyed or removed from real estate which though a part thereof has a value which can be measured apart from the land, the measure may be its value instead of the decreased value of the land. Koonz v. Hempy [Iowa] 120 NW 976. For injury to growing trees by fire, the court may decline to charge that the measure is the diminished value of the land where the trees have a value separate from the land. Hart v. Chicago & N. W. R. Co., 83 Neb. 652, 120 NW 176.

67. Whether purchaser of standing timber was justified in relying upon statements of person who claimed to be owner, without examining records, question for jury subject to ordinary rules governing courts in reviewing verdicts. Hoyt v. Duluth & I. R. R. Co., 103 Minn. 396, 115 NW 263. Defendant held competent witness to fact of his own belief and good faith in cutting timber on another's land. Id.

68, 69. Hoyt v. Duluth & I. R. R. Co., 103 Minn. 396, 115 NW 263.

70. Where owner of fee to center of street was entitled to maintain trees and shrubs thereon at sufferance of abutting owners, and such trees were removed by municipal authorities, he could recover on the basis of his qualified right and not the decreased value of the land. Pinkerton v. Randolph, 200 Mass. 24, 85 NE 892. The rule that the measure for flooding land is the difference between the value of the land and crops before and after the overflow does not apply to a tenant from year to year. Wilson v. Chicago, etc., R. Co. [Iowa] 121 NW 1102.

71. For injury to leasehold by blasting on adjoining premises, the diminution in the value of the unexpired term. Probst v. Hinesley [Ky.] 117 SW 389.

72. For injury to a leasehold by abolition of grade crossing, the difference between its value before and after the abolition.

measure for injury to a crop is the difference between the value of the crop raised and the crop which would have been raised,[73] less the cost of harvesting and marketing the greater crop,[74] or the value of the part destroyed,[75] and compensation for other injuries necessarily attendant.[76] No recovery can be had, however, if no injury was sustained.[77] For the destruction of a crop the measure is the market value at the time.[78] In North Dakota the damages recoverable for injuries done by trespassing cattle are limited to actual damages.[79]

The measure for the destruction of personal property is its actual value at the time it was destroyed,[80] together with compensation for other loss which naturally

Cornell-Andrews Smelting Co. v. Boston & P. R. Co., 202 Mass. 585, 89 NE 118.

73. For injury to crops, the difference between the value of the crop that would have been raised and the crop actually made, less the difference in cost between harvesting the crop made and that which would have been made but for the injury. Jonesboro, etc., R. Co. v. Cable [Ark.] 117 SW 550. For failure of railroad to maintain cattle guards, whereby cattle trespass and injure crops, the difference between the market value of the crop that would have been raised and the value of the crop that was raised. Central of Georgia R. Co. v. Carroll [Ala.] 50 S 235. For destruction of and injury to onion crop, the market value of the part destroyed at the time of destruction at the nearest market, and for the part injured, the difference between the market price before and after the injury at such place. Missouri, K. & T. R. Co. v. Riverhead Farm [Tex. Civ. App.] 117 SW 1049.

74. Under the evidence, held that the rule that the criterion of the value of a growing crop is what the character of the crop was worth when matured, making allowance for cultivation and care, was not violated. Missouri, K. & T. R. Co. v. Hagler [Tex. Civ. App.] 112 SW 783.

75. For injury to crops, the value of the thing destroyed, if it has a value which can be ascertained without reference to the soil. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73.

76. For injury to crops by trespassing cattle because of failure of railroad company to keep up cattle guards, expense in trying to prevent the trespass is an element, provided no more can be recovered than could have been recovered had the expense not been incurred. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. For injury to crops by trespassing animals, defendant can show in partial defense plaintiff's breach of contract to repair fence, and plaintiff may recover other damages which the evidence establishes. Meyer v. English, 83 Neb. 163, 119 NW 255.

77. Issue that no damage resulted from burning over pasture land properly submitted where there was evidence that new grass sprung up soon and cattle liked it better than the old grass. Pfeiffer v. Aue [Tex. Civ. App.] 115 SW 300.

78. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. For destruction of standing hay crop, its market value less cost of harvesting and marketing. Mattis v. St. Louis & S. F. R. Co. [Mo. App.] 119 SW 998. For wrongfully withholding water for irrigating purposes, the value of the use of the water during the time he is deprived of it, and not the value of the crop at the time he is deprived of the water. Clague v. Tri-State Land Co. [Neb.] 121 NW 570. For **destruction of annual crops,** the value thereof, but for destruction of perennial crop, such as alfalfa, the difference between the value of the land before and after the destruction of the crop. Thompson v. Chicago, B. & Q. R. Co. [Neb.] 121 NW 447. Where one was prevented from cultivating his land by trespassing cattle, what he lost and not the rental value of the land. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. For **destruction of turpentine and resin,** produced but still remaining on the trees, where owner does not own the land, the market value of the turpentine and resin. Atlantic Coast Line R. Co. v. Davis, 5 Ga. App. 214, 62 SE 1022.

79. Under Rev. Codes 1905, § 6582, such damages can be recovered for injuries caused by trespassing animals as result from the trespass, and no other. Peterson v. Conlan [N. D.] 119 NW 367. Instructions disapproved. Id.

80. For property destroyed, its value at the time. Southern Hardware & Supply Co. v. Standard Equipment Co. [Ala.] 48 S 357. For destruction and injury to **household furniture,** the value of that destroyed and the cost of repairing that injured. Western Maryland R. Co. v. Martin, 110 Md. 554, 73 A 267. For destruction of household goods, the expense to the owner of replacing them. Birmingham R., L. & P. Co. v. Hinton [Ala.] 47 S 576. Where household goods are injured in transit, the difference between their actual value just before and just after injury. Atchison, etc., R. Co. v. Smythe [Tex. Civ. App.] 119 SW 892. For **sinking a launch,** where market value could not be shown, damages may be fixed by taking cost of construction and allowing reduction for deterioration and value of parts saved. The Lucille, 169 F 719. In action for **cow killed,** requested instruction excluding any value predicated on the pedigree of the cow was properly refused. Cleveland, etc. R. Co. v. Van Natta [Ind. App.] 87 NE 999. For **killing a horse,** the market value at time and place of killing if there was such market, and, if not, at the nearest market. St. Louis B. & H. R. Co. v. Droddy [Tex. Civ. App.] 114 SW 902. Where full value of **horse injured** is recovered, there can be no recovery for loss of his use. Gould v. Merrill R. & L. Co., 139 Wis. 433, 121 NW 161. Charge held not to authorize double damages. Id. For injury to horse resulting in death, its value, and not difference in value before and after injury. Texas & P. R. Co. v. Webb [Tex.

results;[81] for injury to personal property, the depreciation in value[82] or the value of its use and cost of repairs,[83] and such special damages as are necessarily attendant.[84] Punitive damages are recoverable where the injury is malicious.[85] Recovery may not be had for injury which might have been avoided.[86]

(§ 5) *C. Maintaining nuisance.*[87]—See 11 C. L. 990—The damages recoverable for a private nuisance are measured by the extent of injury to the property for the

Civ. App.] 114 SW 1170. For loss of **goods which have no market value** but cannot be replaced, the actual loss to the owner and not any fanciful price that he might place on them. Missouri, K & T. R. Co. v. Dement [Tex. Civ. App.] 115 SW 635.

81. For killing a mare, the increased cost and trouble of raising a suckling colt is a proximate result. McDonnell v. Minneapolis, etc., R. Co. [N. D.] 118 NW 819.

82. For injuries to leased **steam roller,** the difference between the fair market value before and after the injury. Cadwell v. Canton, 81 Conn. 288, 70 A 1025. For injury to a **dry dock** by a vessel, no allowance can be made for loss of use of the dock while being repaired, where all work which might have been done in it was taken care of in another dock owned by libelant. The Ferguson, 167 F 234. For injury to **peaches** for failure to re-ice cars, damages depended on market value at destination. Henry J. Perkins Co. v. American Exp. Co., 199 Mass. 561, 85 NE 895. Evidence of price paid for peaches in orchard or point of shipment two weeks before they were sold at destination is too remote. Id. For injury to **chattels,** the difference in their value immediately before and immediately after the injury. Hespen v. Union Pac. R. Co., 82 Neb. 495, 118 NW 98. Against warehouseman for injury to **meat** stored, the fair market value of the meat at the time it was sold, not later than the date the bailment terminated. Patterson v. Wenatchee Canning Co. [Wash.] 101 P 721. For injury to **cattle** in transit, the difference between the market value at the terminus and their value if uninjured. St. Louis & S. F. R. Co. v. Lieurance [Kan.] 102 P 842. For injury to **race horse,** the difference in value before and after injury. Southern Exp. Co. v. Fox [Ky.] 115 SW 184. For injury to **boat,** the difference in the value of the boat before and after the burning. Sharp v. Layne [Ky.] 117 SW 292. For injury to **stock in transit,** the difference between the market value of the stock in the condition in which they reached destination and in the condition in which they should have arrived. Missouri, K. & T. R. Co. v. Light [Tex. Civ. App.] 117 SW 1051.

83. For **injury to building** so slight that it can be repaired at cost less than depreciation in value, and where repairs will not enhance value beyond value at time of injury, cost of repairs is measure. Bates v. Warrick [N. J. Law] 71 A 1116. For injuries to **vessel,** evidence held to warrant recovery for nine days' detention, less cost saved by not being obliged to pay overtime charges. American-Hawaiian S. S. Co. v. Morse Dry Dock & Repair Co., 169 F 678. For injury to steam **traction engine,** the cost of repairs. Layton v. Sharpy County, 83 Neb. 628, 120 NW 179. For injuries to **personal property,** usuable value may constitute an element. De Witt Allen Auto Co. v. Canavan, 113 NYS 1002. For injury to **toll bridge,** requiring repairs before it could be used, the cost of repairs plus profits lost during suspension of traffic. West v. Martin, 51 Wash. 85, 97 P 1102. For wrongfully destroying **gas fixtures,** depriving the owner and tenants of light and heat, the cost of replacing them, together with compensation for inconvenience and lost profits. Kentucky Heating Co. v. Hood [Ky.] 111 SW 337. For injury to **steamboat** and pile-driver by collision, the per diem shown to be its net earnings for the number of days it was laid up. Carscallen v. Coeur D'Alene & St. Joe Thansp. Co., 15 Idaho, 444, 98 P 622. The measure for wrongful flowage by lower riparian owners resulting in **water power** developed by upper owner's dam to that of lower owners, the rental value of the power taken. Upon question of value, the income received by those appropriating it is evidence of, but not the measure of, recovery. Lancaster & J. Elec. Light Co. v. Jones [N. H.] 71 A 871.

84. For injury to **stock of merchandise** through injury to building, the value of stock destroyed, injury to that not completely destroyed, and expense of moving to another location. De Palma v. Weinman [N. M.] 103 P 782. For injury to **horse,** the difference in market value before and after the injury; and where by care and treatment the horse is partially restored, the difference in value before injury and after partial restoration, together with expense of treatment and care. Sullivan v. Anderson, 81 S. C. 478, 62 SE 862. Reasonable expense of endeavoring to cure an **injured animal** is a proper item of recovery, though the owner may ultimately recover the value of the animal. Ulit v. Biggs [Tex. Civ. App.] 116 SW 126. For injury to animal resulting in its death, expenses reasonably incurred in an endeavor to cure it may be recovered in addition to its value. Southern Hardware & Supply Co. v. Standard Equipment Co. [Ala.] 48 S 357.

85. Question of punitive damages properly submitted in action for destruction of rafts. Ackerman v. Atlantic Coast Line R. Co. [S. C.] 65 SE 265.

86. See ante, § 2. Where land is flooded, the owner must exercise reasonable care to prevent accumulation of damages. Sloss-Sheffield Steel & Iron Co. v. Mitchell [Ala.] 49 S 851. Where one maintains a boom in a navigable stream and at flood time it deflects the current against a bank, the owner is not required to make extraordinary effort nor incur extraordinary expense to protect his property, and failure to do anything would at most deprive him of recovery of all damages claimed. Kuhnis v. Lewis River Boom & Logging Co., 51 Wash. 196, 98 P 655.

87. Search Note: See Nuisance, Cent. Dig. §§ 118-127, 185-188; Dec. Dig. §§ 50, 76; 29 Cyc. 1254-1277; 21 A. & E. Enc. L. (2ed.) 725.

purpose for which it is used,[88] but depreciation in value is not the only element.[89] If a nuisance causes permanent injury, the measure is the depreciation in the rental value,[90] and if the injury is temporary, the depreciation in the rental value during continuance of the nuisance.[91]

(§ 5) *D. Trespass on lands.*[92]—See 11 C. L. 991—For a technical trespass nominal damages only may be recovered.[93] Where timber is wrongfully cut from land and carried away, the measure of damages varies according to the nature of the remedy employed.[94] If the owner sues on the theory of trespass to realty, the measure is the diminution in its value, unless the value of the trees at the time and place exceeds such diminution,[95] or if he elects to sue in trover he may recover the specific property or damages for its conversion[96] in its improved or manufactured condition.[97] If he brings action against an innocent purchaser, such purchaser may offset such sum as he has expended in enhancing its value.[98] If timber is taken in good faith, the stumpage value is the measure;[99] but if the taking is willful, the value at the time and place of demand.[1] Exemplary damages are recoverable for trespass to land where attended by aggravating circumstances of malice or wantonness.[2]

(§ 5) *E. Conversion.*[3]—See 11 C. L. 991—The measure of damages for conversion is the value of the goods converted, with interest[4] at the time[5] and place[6] of con-

88. Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897. Where a nuisance causes permanent injury, both past and prospective damages may be recovered in one action. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548. An abatable nuisance is not a permanent injury and recovery cannot be had for such injury. Sanders v. Miller [Tex. Civ. App.] 113 SW 996.

89. Jones v. Royster Guano Co. [Ga. App.] 65 SE 361. Elements stated. Id.

90. Czarnecki v. Bolen-Darnall Coal Co. [Ark.] 120 SW 376.

91. Czarnecki v. Bolen-Darnall Coal Co. [Ark.] 120 SW 376. Instruction in action for maintaining a nuisance held erroneous because eliminating damage to the value of the use of the property pending the nuisance. Jones v. Royster Guano Co. [Ga. App.] 65 SE 361. For maintaining a nuisance, where property is not injured, the depreciation in the rental value which results from interference with the reasonable use of the property. McGill v. Pintsch Compressing Co. [Iowa] 118 NW 786.

92. **Search Note:** See Trespass, Cent. Dig. §§ 128-148; Dec. Dig. §§ 47-63; 28 A. & E. Enc. L. (2ed.) 603.

93. Steenburgh v. McRorie, 60 Misc. 510, 113 NYS 1118; Fortescue v. Kings County Lighting Co., 128 App. Div. 826, 112 NYS 1010.

94. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270. For trespassing and cutting timber, the value thereof. McGee v. Louisiana Lumber Co., 123 La. 696, 49 S 475. For trespass where only evidence is as to cost of restoration, such measure may be adopted. Manda v. Orange [N. J. Law] 72 A 42.

95, 96. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270.

97. But in such case if the trespass was not willful and intentional, the wrongdoer may offset the value of labor and expense of enhancing its value. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270. Under St. 1898, § 4279, where a trespasser cuts timber willfully, the owner may recover its manufactured value while in the trespasser's possession, and not merely the stumpage value. McNaughton v. Borth, 136 Wis. 543, 117 NW 1031. Under St. 1898, § 4269, where a trespasser wrongfully cuts timber, the owner may recover the highest market value of the cord wood into which it is cut. Pettingill v. Goulet, 137 Wis. 285, 118 NW 845.

98. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270. Civ. Code 1895, § 3918, is a codification of the foregoing rules. Id.

99. Taken in good faith under belief of ownership. Callen v. Collins [Tex. Civ. App.] 120 SW 546. For timber **taken by mistake,** its value while standing. Werner Stave Co. v. Pickering [Tex. Civ. App.] 119 SW 333. For cutting and carrying away timber, its value when first cut without deducting cost of severing it from the land. Peters v. Tilghman [Md.] 73 A 726.

1. Ripy v. Less [Tex. Civ. App.] 118 SW 1084. Owner has the burden to prove value of manufactured timber. Id. Evidence insufficient to show that cutting and conversion of timber was willful. Williams v. Monks [Minn.] 122 NW 5.

2. Coleman v. Pepper [Ala.] 49 S 310. Where it is accompanied by abusive language inspired by malice. Steenburgh v. McRorie, 60 Misc. 510, 113 NYS 1118. Under the evidence, held no ground for punitive damages for trespassing and cutting timber. McGee v. Louisiana Lumber Co., 123 La. 696, 49 S 475.

3. **Search Note:** See notes in 43 L. R. A. 768; 10 L. R. A. (N. S.) 458; 3 Ann. Cas. 891. See, also, Trover and Conversion, Cent. Dig. §§ 245-282; Dec. Dig. §§ 41-62; 28 A. & E. Enc. L. (2ed.) 730.

4. Taylor v. Hills, 148 N. C. 415, 62 SE 556; Hitson v. Hunt, 45 Tex. Civ. App. 360, 18 Tex. Ct. Rep. 279, 101 SW 292; Robinson v. Alexander, 141 Ill. App. 192; Smith v. Duke [Ga.

version, less amount of liens;[7] and in some cases the highest value between the date of conversion and date of trial may be recovered.[8] The value must be proved;[9] for conversion of goods held under conditional sale, their value less the unpaid purchase price.[10] For conversion of mortgaged chattels, the mortgagee can recover the face of his mortgage with interest and costs.[11] Where a note is lost

App.] 64 SE 292; Swartz v. Gottlieb-Bauern-Schmidt-Straus Brew. Co., 109 Md. 393, 71 A 854; Merchants' Nat. Bank v. Williams, 110 Md. 334, 72 A 1114; Schwitters v. Springer, 236 Ill. 271, 86 NE 102; Lee v. Fidelity Storage & Transfer Co., 51 Wash. 208, 98 P 658. Instruction approved. Lee v. Fidelity Storage & Transfer Co., 51 Wash. 208, 98 P 658; Long v. McIntosh, 129 Ga. 660, 59 SE 779; Crouch Hardware Co. v. Walker [Tex. Civ. App.] 113 SW 163; Sigel-Campion Live Stock Co. v. Holly, 44 Colo. 580, 101 P 68. For conversion of proceeds of mortgaged cattle, the proceeds of the sale by defendant could not be taken as the value. Sigel-Campion Live Stock Co. v. Holly, 44 Colo. 580, 101 P 68. For conversion of **a non-negotiable note,** the face thereof less any partial payments or failure of consideration which might be pleaded as an offset. Capps v. Vasey Bros. [Okl.] 101 P 1043. For conversion of **bonds,** the par value. Collins v. Smith, 158 F 872. Recovery for **conversion of wheat and stocks by a broker** who purchased on margin was properly based on highest market price within periods varying from a few days to within two months of the conversion. Mullen v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078. For wrongful sale by stockbrokers of stock held on a margin, the difference between the price realized and the highest price reached within a reasonable time after the principal learned of the sale. Keller v. Halsey, 130 App. Div. 598, 115 NYS 564. What constituted a reasonable time within which he could have repurchased the stocks was a question of law. Id. For **conversion of timber,** its market value at time and place of taking. Moss Tie Co. v. Myers [Ky.] 116 SW 255. Where timber is stolen and sold to an innocent purchaser, the owner may recover from him its value when taken by the purchaser. Godwin v. Taenzer [Tenn.] 119 SW 1133. For conversion **by assignee of bankrupt** by sale of goods for an insufficient amount, the value as of date of sale at what the goods would sell for at forced sale. Comingor v. Louisville Trust Co., 128 Ky. 697, 33 Ky. L. R. 884, 111 SW 681. For conversion of **notes,** the actual value thereof. Citizens' Bank v. Shaw [Ga.] 65 SE 81. The amount of principal and interest appearing from the face of the notes to be unpaid, plus interest to date of trial, is prima facie the amount of recovery. Id. The converter may show partial payment, release, or inability of makers to pay. Id. Where purchaser of land at tax sale took possession though he acquired no title, and thereafter **converted a house** on the premises, the value of such house, together with the value of its use prior to removal. Cavins v. Trice [Tex. Civ. App.] 119 SW 896.

5. Where time of conversion was in January or February, 1905, and witness testified that between December 1, 1904, and July, 1905, there was not time when lumber of the kind converted was worth less than $35 per 1,000 feet, it was sufficient to show value of lumber at time of conversion. Acme Lumber Co. v. Montgomery, 123 App. Div. 620, 107 NYS 1074. Material to prove that prior to time of conversion such improvements had been made as to render machine antiquated and of small value, and that its design was such that it did not operate smoothly and that new machine could then have been bought at price much less than that for which converted one had been sold. Hallwood Cash Register Co. v. Prouty, 196 Mass. 313, 82 NE 6.

6. The measure of damages for knowingly and wrongfully mining the coal of another is the value of the coal at the mouth of the pit less the cost of conveying it there from the place where mined, the only deduction allowed from the value at the mouth of the pit being the amount paid for hauling the coal to the foot of the shaft, hoisting and dumping it into the car at the top. The expense of operating the mine must be charged to mining and not to transportation. McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174.

7. For conversion of tram road, the reasonable value thereof less amount of liens against it. Duff v. Venters, 32 Ky. L. R. 924, 107 SW 238.

8. For trover, the highest proved value between time of conversion and time of trial. Thompson v. Carter [Ga. App.] 65 SE 599.

9. For conversion of stock where there was no evidence of its value at the time of conversion or within a reasonable time thereafter, no recovery could be had. Swartz v. Rosseau, 112 NYS 1065.

10. For conversion by seller of piano sold under conditional sale, the value at date of conversion less unpaid instalments, such value may be shown to be in excess of purchase price, but not less, unless damaged by use. Smith v. Goff [R. I.] 72 A 289. For conversion of piano held under conditional sale, its value less the amount of vendee's indebtedness to the vendor. Goggan v. Garner [Tex. Civ. App.] 119 SW 341. For conversion of personalty held under conditional sale, the amount of unpaid purchase money with interest and costs, if less than its value, and the value of the personalty with interest, if greater. Higdon v. Garrett [Ala.] 50 S 323.

11. For conversion of mortgaged property of greater value than the debt, the mortgagee can recover the amount of the debt. Watkins v. Citizens' Nat. Bank [Tex. Civ. App.] 115 SW 304. In action by mortgagee of chattels for conversion thereof, if the value exceeded the debt and costs the amount of the debt, interest and costs. Maddox v. Dunklin [Ala.] 50 S 277. For conversion of mortgaged cotton, defendant was properly allowed his rent and expenses of marketing the cotton. McDaniel v. Staples [Tex. Civ. App.] 113 SW 596.

while in the unlawful possession of one, such a one has the burden of proving that the note was not worth its face value, otherwise recovery may be had for its face value.[12] Exemplary damages may be recovered if malice is shown.[13]

(§ 5) *F. Wrongful taking or detention of property.*[14]—See 11 C. L. 992—For the wrongful taking of property, its value may be recovered.[15] For wrongful detention, the measure is generally the value of the use of the property,[16] together with compensation for other injury naturally resulting,[17] and special damages where provided for,[18] or the difference between the value at the time of taking and at the time of return.[19] If no damages are sustained, none can be recovered.[20]

12. Hoff v. Frank Parmelee Co., 140 Ill. App. 458.

13. Evidence held to warrant exemplary damages for conversion of a building and its contents. Crawford v. Thomason [Tex. Civ. App.] 117 SW 181. Where a buyer believing he had a just claim against a seller obtained possession of the goods with fraudulent intent of withholding the value thereof, the seller could recover exemplary damages. Werkheiser-Polk Mill. Co. v. Langford [Tex. Civ. App.] 115 SW 89. Complaint for conversion by wrongful attachment, which alleges willful and malicious taking and refusal to return after repeated demands, held to warrant exemplary damages as for malicious detention after demand. Shandy v. McDonald, 38 Mont. 393, 100 P 206.

14. Search Note: See note in 11 C. L. 992. See, also, Damages, Cent. Dig. § 272; Dec. Dig. § 106; 28 Cyc. 47; Replevin, Cent. Dig. §§ 296-319; Dec. Dig. §§ 73-84; 28 A. & E. Enc. L. (2ed.) 730.

15. For wrongful seizure and sale of property, its value at the time of seizure and not the price received at judicial sale. Werner Stave Co. v. Pickering [Tex. Civ. App.] 119 SW 333. For wrongful taking of goods of a third person from one's possession. Temple v. Duran [Tex. Civ. App.] 121 SW 253. For wrongfully taking corn under execution, held, the value of the corn at the time less what it brought at the sale. Davis v. Gott [Ky.] 113 SW 826. Where purchaser at execution sale of mortgaged property took possession, the value of the property less amount of his bid. Id. In bail trover where defendant does not replevy, and plaintiff does not prove a right to recover, defendant may recover the highest proved value between the date he took it and trial or the market value at the date he took it, with interest or hire. Bank of Blakely v. Cobb, 5 Ga. App. 289, 63 SE 24. Where property depreciates in value after being replevied and before judgment for its return, its value at time of suit can be recovered, with interest. Lindsey v. Hewitt, 42 Ind. App. 573, 86 NE 446. Defendant in replevin suing on the replevin bond is entitled to the value of the property from the time it was awarded to him, with interest to trial on the bond. Id. For **taking oil from land** pending action to cancel the lease, the royalty. In re St. Louis & Kansas Oil & Gas Co., 168 F 934. Where trespassers on oil land went on in good faith under void assignment of a lease, they will not be required to account for the full value of the oil taken, but only for its value on the ground measured by the royalty plaintiff was to receive under the lease. Turner v. Seep, 167 F 646.

16. For wrongful use and occupation of land under Rev. Codes, § 6069, the value of the use. Leyson v. Davenport, 38 Mont. 62, 98 P 641. In replevin, damages for detention should be computed from date of filing complaint and not from judgment entered. Compressed Air Mach. Co. v. West San Pablo Land & Water Co., 9 Cal. App. 361, 99 P 531. Where landowner recovers from one holding possession under a void tax title, the rental value of the land as improved less the value of permanent improvements made by him. Rafferty v. Davis [Or.] 102 P 805. For detention of upland on a tidal stream, its value as a boom site may not be considered. Lownsdale v. Grays Harbor Boom Co. [Wash.] 103 P 833. One in possession under a void tax deed is liable to the owner for reasonable profits of the property. Smith v. Cox [S. C.] 65 SE 222. For wrongful attachment, depreciation in value of the goods is an element of actual but not of exemplary damages. Rainey v. Kemp [Tex. Civ. App.] 118 SW 630. Where a chattel mortgagee wrongfully takes possession of the property prior to breach of the mortgage, the fact that he returns it prior to action brought is to be considered in mitigation. Aylesbury Mercantile Co. v. Fitch [Okl.] 99 P 1089. Tenant's measure of damage for seizure of hotel furniture under an alleged illegal distress warrant for rent is the loss arising from deprivation of the use of the property and deterioration. Johnson v. Hulett [Tex. Civ. App.] 120 SW 257.

17. At common law, rents and profits were not recoverable by way of damages in ejectment. Cape Girardeau, etc., R. Co. v. St. Louis & S. R. Co. [Mo.] 121 SW 300. For wrongful attachment under Ann. St. 1906, p. 1652, the value of the goods, legal interest and attorney's fees. State v. Flarsheim [Mo. App.] 119 SW 17. For failure of a sheriff to take from claimant of attached property a forthcoming bond on delivery of such property to him, all damages sustained. Hightower, Pratt & Co. v. Hodges, 5 Ga. App. 408, 63 SE 541.

18. Under 25 Stat. p. 483, special damages are recoverable in claim and delivery. Shieder v. Southern R. Co. [S. C.] 65 SE 631.

19. For wrongfully taking property and placing it in the hands of a receiver, the difference between the value at the time of taking and their value when the receiver comes into possession. Aylesbury Mercantile Co. v. Fitch [Okl.] 99 P 1089. For wrongful attachment of a stock of merchandise, the difference between the value at time of seizure and at time of release, with interest. Rainey v. Kemp [Tex. Civ. App.] 118 SW 630. For detention of lumber, the difference between

Punitive damages may be recovered if malice is shown,[21] or where authorized by statute,[22] but not otherwise.[23]

(§ 5) *G. Libel and slander.*[24]—See 11 C. L. 992—The measure of damages for libel is compensation for actual damages sustained,[25] including compensation for injury to feelings[26] and mental anguish[27] if proximately resulting from the libel.[28] Attorney's fees are not an element in Michigan.[29] If a publication is libelous per se, at least nominal damages may be recovered.[30] Where a newspaper article is not libelous per se, it is not actionable unless special damages are the immediate and legal consequences of its publication.[31] If a publication tends to injure one's reputation, financial injury need not be alleged.[32] Punitive damages may be recovered if the publication was made maliciously[33] and actual damages are sus-

its value at time and place of detention and its value at time of refusal to deliver on demand. Cooper v. Ratliff [Ky.] 116 SW 748. When the goods are regained, the damages are the difference between the value of the property when defendant wrongfully took possession and its value when taken on the writ. Taylor v. Welsh, 138 Ill. App. 190.

20. In ejectment for filing mineral claims against land, held that it appeared that no damage had been sustained as the land was steadily increasing in value. Guy v. McDuffie, 123 La. 641, 49 S 222.

21. Exemplary damages may be allowed where an assault was committed while levying execution under a void writ. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. In action for selling exempt property, malice may be implied so as to authorize punitive damages from the fact that the officer sold it, knowing he had no right to do so or in disobedience of an imperative statute. Johnson v. Collier [Ala.] 49 S 761. For wrongful attachment, that one acted on advice of counsel is no defense to exemplary damages unless he made full disclosure. Rainey v. Kemp [Tex. Civ. App.] 118 SW 630.

22. Civ. Code 1902, § 2434, relative to excessive distress for rent, authorizes punitive as well as compensatory damages for excessive distress. Jones v. McCreery Land & Inv. Co., 82 S. C. 456, 64 SE 225.

23. In action for damages to personal property wrongfully removed from a leased building, instrument executed by an employe of the lessee conveying to defendant, held admissible on question of punitive damages, though his authority was not shown. Temple v. Duran [Tex. Civ. App.] 121 SW 253. In action for wrongful execution sale of exempt property, where justification is that the debt was contracted by reason of false pretenses, punitive damages are not recoverable unless malice appears on the part of the person causing the sale. Galvin v. Tibbs, Hutchins & Co. [N. D.] 119 NW 39. Good faith necessary to defeat claim of punitive damages may be shown in other ways than by showing a full statement of facts to counsel, who advised the action complained of. Id.

24. Search Note: See note in 30 L. R. A. 529.

See, also, Libel and Slander, Cent. Dig. §§ 342-354; Dec. Dig. §§ 113-121; 25 Cyc. 530-539; 18 A. & E. Enc. L. (2ed.) 1091.

25. In an action for charging one with smuggling, compensation for such injury as would ordinarily and naturally result, including mental suffering. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Punitive damages are not recoverable. Id. In libel, **present and future injury** may be considered. Bloomfield v. Pinn [Neb.] 121 NW 716.

26. Good intentions of a publisher of statements selected from other journals affect only the question of damages, and, where no special damages have been sustained, the libeled party is entitled to such actual damages for injury to feelings as must be inferred from the nature of the libel. Levert v. Daily States Pub. Co., 123 La. 594, 49 S 206.

27. In view of the settled law that damages may be allowed for mental suffering in libel, the plaintiff may testify as to his feelings on reading the libelous articles and also a subsequent article retracting it as bearing on the question whether the retraction diminished the injury. S. S. McClure Co. v. Philipp [C. C. A.] 170 F 910.

28. In libel, grief experienced by plaintiff's wife, or the influence of her grief upon his mind, are not elements. Dennison v. Daily News Pub. Co., 82 Neb. 675, 118 NW 568.

29. Under Comp. Laws, § 10423, attorney's fees are not recoverable in an action for slander. Warren v. Ray [Mich.] 15 Det. Leg. N. 935, 118 NW 741.

30. James v. Ft. Worth Telegram Co. [Tex. Civ. App.] 117 SW 1028. Where libelous words are actionable per se, the law implies damage. Smith v. Singles [Del.] 72 A 977. The absence of actual malice in the publication of a libelous article on a matter of public concern will be considered in mitigation of damages, and, where no special damages have been sustained, nominal damages at least will be awarded in vindication. Levert v. Daily States Pub. Co. 123 La. 594, 49 S 206.

31. Fagan v. New York Evening Journal Pub. Co., 129 App. Div. 28, 113 NYS 62.

32. If a publication tends to injure one's reputation, and expose him to public hatred and contempt, or impeach his honesty, it is unnecessary to allege financial injury therefrom. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. For publishing statement that one imported goods without paying custom duties. Id.

33. Evidence sufficient to show malice in an action for libel, justifying punitive damages. Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 NW 938. Where one wantonly and recklessly published one person's picture as that of a disreputable woman, punitive damages may be awarded. Burk-

tained.[34] That the publisher acted in good faith may be shown in mitigation of punitive damages [35] but is no answer to the claim for actual damages.[36]

(§ 5) *H. Personal injuries.*[37]—See 11 C. L. 993—The measure of damages recoverable for personal injury is such sum as will compensate the injured person.[38] The wrongdoer is liable for all ill consequences resulting from his wrongful act,[39] but for none other.[40] It is the province of the jury to determine the sum to be

hardt v. Press Pub. Co., 130 App. Div. 22, 114 NYS 451. If slanderous words are uttered wantonly and maliciously and with intent to injure, punitive damages may be recovered. Smith v. Singles [Del.] 72 A 977. In libel for publishing plaintiff's picture as that of another, evidence held to authorize charge on punitive damages. Burkhardt v. Press Pub. Co., 130 App. Div. 22, 114 NYS 451.

34. Exemplary damages may be recovered in libel where actual damage and malice is shown. Thompson v. Rake [Iowa] 118 NW 279.

35. For libel by publication of a forged recommendation of a patent medicine, that it was published at the instigation of an agent honestly believing it to be genuine, may be shown in mitigation. Foster-Milburn Co. v. Chinn [Ky.] 120 SW 364.

36. Where punitive damages are not recoverable, neither evidence of defendant's refusal to publish a retraction nor evidence that others who had published the libel had published a retraction is admissible. Dennison v. Daily News Pub. Co., 82 Neb. 675, 118 NW 568.

37. Search Note: See notes in 11 C. L. 995; 17 L. R. A. 71; 2 L. R. A. (N. S.) 898; 6 Id. 552; 7 Id. 518; 8 Id. 1228; 9 Id. 1193; 11 Id. 623; 15 Id. 451, 775; 77 A. S. R. 859; 101 Id. 730; 11 Ann. Cas. 45.

See, also, Damages, Cent. Dig. §§ 222-259; Dec. Dig. §§ 95-102; 13 Cyc. 136-148; 8 A. & E. Enc. L. (2ed.) 640.

38. Compensation is the guide. San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716.

Statements of general rule enumerating the elements: Compensation for injuries, loss of time and wages, past and future pain and suffering, permanent injuries and impairment of ability to earn. Valente v. American Bridge Co. [Del.] 73 A 395. Bodily pain, injury to feelings and mental anguish, are inferred from personal injury. Stewart v. Watson, 133 Mo. App. 44, 112 SW 762. Charge held to correctly state the measure recoverable. San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716. Charge renumerating elements of damage for injuries and charging that whole verdict should not exceed amount of prayer, approved. Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 SW 932. Charge submitting elements of damages, approved. Scott v. Metropolitan St. R. Co. [Mo. App.] 120 SW 131. Pain and suffering, injury, permanent disability, loss of time, and medical expense. Whiteley Malleable Castings Co. v. Wishon, 42 Ind. App. 288, 85 NE 832. Compensation for injuries, physical and mental pain, and reasonable sums expended for medical attendance. Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777. Compensation for loss of earnings and mental and physical pain. Cincinnati, etc., R. Co. v. Fortner [Ky.] 113 SW 847. Mental and physical suffering and the value of time lost or incapacity to attend to business. Houston Elec. Co. v. Seegar [Tex. Civ. App.] 117 SW 900. Only just compensation for injuries, pain and suffering. Partello v. Missouri Pac. R. Co., 217 Mo. 645, 117 SW 1138. Impaired earning capacity, physical condition, nature and character of injury, and compensation for past and future pain and suffering. St. Louis, etc., R. Co. v. Grimsley [Ark.] 117 SW 1064. Compensatory damages are confined to expense of cure, value of lost time, physical and mental suffering, and impaired earning power. Louisville & N. R. Co. v. Crow [Ky.] 118 SW 365. Past and present pain and such future suffering as would result, medical expense and impairment of ability to earn money. Elliott v. Wilmington City R. Co. [Del.] 73 A 1040. For **injury to child,** compensation for suffering, past and future, and permanent impairment of earning power. Southern R. Co. v. Lee [Ky.] 119 SW 170. For personal **injuries to a wife** plaintiffs should be awarded such sum as will compensate them for pain and suffering, past and future, permanent disability, money paid for medical expenses, and in procuring help to do work which she would have otherwise performed. White v. People's R. Co. [Del.] 72 A 1059. Limitation in Burns' Ann. St. 1908, § 285, in actions for wrongful death, does not apply to an action for injuries, but where an action is brought by a husband for injuries to his wife it cannot be ignored. Indianapolis Trac. & T. Co. v. Menge [Ind.] 88 NE 929.

39. It is competent to show that injured person's **capacity to conceive** would continue but that she would continually suffer from miscarriages. Devine v. Brooklyn Heights R. Co., 131 App. Div. 142, 115 NYS 263. If injured person's **living expenses are increased,** such increase is an element. Irrgang v. Ott, 9 Cal. App. 440, 99 P 528. Evidence sufficient to show that **varicose veins** resulted from an injury. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Where severe injury is shown and it would be speculative in the highest degree to question whether **nervous shock** came through or with injury, recovery for the shock may be had. Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452, 113 SW 730. Evidence sufficient to show that **sickness** was the result of injury. Missouri, K. & T. R. Co. v. Craig [Tex. Civ. App.] 114 SW 850. For loss of an eye, it is not error to permit to be considered as an element, **humiliation** resulting from disfigurement. United States Exp. Co. v. Wahl [C. C. A.] 168 F 848.

40. Only such **mental anguish** as is fairly and reasonably the consequences of the injury may be recovered for. St. Louis, etc., R. Co. v. Buchner [Ark.] 115 SW 923. In action for being delayed in a cold waiting room causing a severe cold which developed

awarded.[41] The elements to be considered are physical and mental pain and suffering,[42] permanent impairment of mental and physical powers,[43] necessary expenditures for medical care and attention,[44] if reasonable,[45] and have been paid[46] or incurred[47] for loss of time and wages,[48] and where injuries are permanent, loss

into fever, evidence of mental anguish through fear of consumption and death was not admissible. Id. Mental anguish is not an element where it is not connected with the injury but is caused by contemplation of physical condition. Gulf, etc., R. Co. v. Dickens [Tex. Civ. App.] 118 SW 612. Only such **special damages** may be shown as are the natural and proximate, not the necessary, consequences of the act complained of. Wells v. Boston & M. R. Co. [Vt.] 71 A 1103. An injured person cannot recover for **effects of a disease** contracted after the injury unless it was the natural and probable consequences of the negligent act. People's R. Co. v. Baldwin [Del.] 72 A 979. For **aggravation of a previous disease** recovery may be had only to the extent that such aggravation resulted from defendant's negligence. Id. Only the damages which are the **natural and proximate result** of the injury complained of. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Ordinarily the **expenses of a trip** for the benefit of an injured person's health is too remote and indefinite. Statler v. Ray Mfg. Co., 195 N. Y. 478, 88 NE 1063. For **miscarriage,** recovery may be had for mental and physical suffering attendant but not for injured feelings or lamented loss of offspring. Hosty v. Moulton Water Co. [Mont.] 102 P 568. For injury resulting in miscarriage, injured person is not entitled to recover for loss of her child but may recover for her own injury including mental and physical pain. Big Sandy & C. R. Co. v. Blankenship [Ky.] 118 SW 316. **Mental anguish** to be suffered upon meeting others because of deformity caused by injury held too remote. Gulf, etc., R. Co. v. Dickens [Tex. Civ. App.] 118 SW 612. It is error to permit the jury to award compensation for any **diminution of power to pursue the course of life** the injured person might have otherwise pursued, speculative. Town of Belleview v. England [Ky.] 118 SW 994.

41. The amount to be awarded. San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716. There is no fixed rule for the measure of damages occasioned by pain. Bayard v. Franklin [Neb.] 120 NW 914. Assessment for injury is peculiarly within the province of the jury. Knight v. Continental Automobile Mfg. Co. [Conn.] 72 A 751.

42. Mental pain and fright are elements. Denver City Tramway Co. v. Martin, 44 Colo. 224, 98 P 836. Physical and mental suffering, loss of wages, etc. Instruction approved. Chesapeake & O. R. Co. v. Hoffman [Va.] 63 SE 432. Physical pain and mental anguish. Fink v. Busch, 83 Neb. 599, 120 NW 167. Pain endured. City of Louisville v. Lambert [Ky.] 116 SW 261. Injured person may testify that he suffered mental anguish for fear blood poison would set in and prove fatal. Southern K. R. Co. v. McSwain [Tex. Civ. App.] 118 SW 874. Charge that fright or mental anguish could not be recovered for, but that bodily suffering from cold and wet was an element, is proper. Dye v. Chicago & A. R. Co., 135 Mo. App. 254, 115 SW 497.

43. Such sum as will compensate for injury and consequences that will naturally and probably result. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Where a consequence of an injury is **permanent impairment of the nervous system,** it should be considered. Brininstool v. Michigan United R. Co. [Mich.] 16 Det. Leg. N. 340, 121 NW 728. Where damages are sought for injuries to the nervous system, the utmost care must be exercised to avoid injustice which is likely to result from denial of substantial damages, and in awarding damages for cunning fraud. Johnson v. Great Northern R. Co., 107 Minn. 285, 119 NW 1061. Testimony of physician that injury would cause headaches, affect sight, and would remain, held to require submission of permanency of injuries. Missouri, K. & T. R. Co. v. Allen [Tex. Civ. App.] 115 SW 1179. That injured person's **mind** was not as accurate after as before injury may be considered. Houston & T. C. R. Co. v. Shapard [Tex. Civ. App.] 118 SW 696. Evidence of broken leg and sprained ankle, and that it caused trouble more than two years after the injury, held to justify submission of the question of permanent injury. St. Louis S. W. R. Co. v. Marshall [Tex. Civ. App.] 120 SW 512.

44. Foley v. Everett, 142 Ill. App. 250. Nursing and attendance by members of injured person's family are elements. Scurlock v. Boone [Iowa] 121 NW 369. Actual expense of nursing, medical expense, loss of time and earning capacity, mental and physical suffering. Rushing v. Seaboard Air Line R. Co., 149 N. C. 158, 62 SE 890. Where physician who attended injured person had not rendered a bill, held proper to permit the jury to determine from their common knowledge what services would cost. St. Louis, etc., R. Co. v. Stell, 87 Ark. 308, 112 SW 876.

45. The jury may determine from the value of past medical services what the value of future services will be where value of past services are proven. Scurlock v. Boone [Iowa] 121 NW 369.

46. Expenses incurred for medical attendance, hospital bills, etc., cannot be recovered before payment. Nelson v. Western Steam Nav. Co., 52 Wash. 177, 100 P 325. Where it appeared that an injured person had been in the hospital and was attended by a physician, but it did not appear that he had paid for the services, nor was there any evidence of such value, it was error to submit such item. Olson v. Erickson [Wash.] 102 P 400.

47. Only necessary to prove liability to pay; not necessary to prove payment or assumption of obligation to pay. Wilson v. Chicago City R. Co., 144 Ill. App. 604.

48. The plaintiff is entitled to all the earnings he has lost by reason of his loss of time since the injury and all that he will lose in the future. Foley v. Everett, 142 Ill. App. 250. In action by husband for loss of services of wife because of personal injury, medical expenses and loss of parental care of his child are elements. Indianapolis & Martinsville Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 NE 1042. In action by husband

resulting from impaired earning ability.[49] Compensation for future pain and suffering,[50] and for future loss and expense, may be recovered,[51] if proved with reasonable certainty.[52] An aggravation of an existing injury may be recovered for,[53] and recovery may be had for injury resulting from the injury sustained,[54] or from negligence of an attending physician,[55] but not for aggravation of an injury resulting from negligence of the injured person.[56] Punitive damages may be awarded if

for loss of services of wife because of injuries, "services" means wifely services due him and includes loss of society. Id.

49. Loss of earning capacity is an element. Lincoln v. Central Vermont R. Co. [Vt.] 72 A 821; Dallas Consol. Elec. St. R. Co. v. Motwiller [Tex. Civ. App.] 112 SW 794; St. Louis S. W. R. Co. v. Niblack [Tex. Civ. App.] 117 SW 188; El Paso & N. E. R. Co. v. Sawyer [Tex. Civ. App.] 119 SW 107. Where there is no evidence as to an injured person's ability to pursue his usual vocation or earn money in any other, it is proper to limit consideration of loss of future earning capacity, to his occupation prior to injury. O'Connor v. Chicago, etc., R. Co. [Iowa] 117 NW 979. **Evidence held insufficient** to show that prior to the injury the injured person had any earning capacity. El Paso & N. E. R. Co. v. Sawyer [Tex. Civ. App.] 119 SW 107.

50. Where there was evidence tending to show that plaintiff had not entirely recovered, an instruction authorizing recovery for future pain and suffering was proper. Sebastian v. Chicago Coated Board Co., 144 Ill. App. 504; Wallace v. Pennsylvania R. Co., 222 Pa. 556, 71 A 1086; Arkansas City v. Payne [Kan.] 102 P 781. In determining whether future pain and suffering is an element and the amount to be awarded therefor, whether the injury is permanent or temporary may be considered. Southern R. Co. v. Wright [Ga. App.] 64 SE 703. Where it appeared that an injury resulted in a serious stricture which was permanent, it was proper to charge that he was entitled to compensation for past suffering and for such future suffering as will result from his injury and from operations therefor. Knudsen v. Muskegon [Mich.] 16 Det. Leg. N. 610, 122 NW 519.

51. Where a more **serious nervous disorder** than is presently shown is a reasonably certain future consequence, it is an element. Brininstool v. Michigan United R. Co. [Mich.] 16 Det. Leg. N. 340, 121 NW 728. **Disability to follow usual vocation** does not include compensation for loss of earning capacity. Montague v. Hanson, 38 Mont. 376. 99 P 1063. Resulting prospective loss is an element. Rushing v. Seaboard Air Line R. Co., 149 N. C. 158, 62 SE 890. It is proper to consider evidence tending to show that there was reasonable **prospect of an increase in earnings** from what they were at the time of injury. Schauffle v. Central of Georgia R. Co. [Ga. App.] 65 SE 708. Damages for future suffering must be limited to such as is reasonably certain to follow. Charge erroneous for allowing jury to enter into the field of speculation. Williams v. Clarke County [Iowa] 120 NW 306. Charge to award fair and reasonable compensation for injuries, and in determining such compensation to consider impairment in future use of injured arm, held proper. Northern Texas Trac. Co. v. Hunt [Tex. Civ. App.] 118 SW 827.

52. Where injured person claimed that because of her injury she suffered additional pain in child birth, the jury should be charged that recovery could be had only for such additional pain as was shown by a preponderance of evidence. Etzkorn v. Oelwein [Iowa] 120 NW 636. Apprehended future consequences cannot be considered unless it appears with reasonable certainty that such consequences will follow. Brininstool v. Michigan United R. Co. [Mich.] 16 Det. Leg. N. 340, 121 NW 728. Evidence that injured person would be subject to miscarriages could not be used as a basis of damages for pecuniary loss resulting from deprivation of future offspring, though it could be used as a basis of damages for pain and suffering. Devine v. Brooklyn Heights R. Co., 131 App. Div. 142, 115 NYS 263. Recovery can be had for only such future apprehended consequences as will reasonably result. Rapid Transit R. Co. v. Allen [Tex. Civ. App.] 117 SW 486. Charge authorizing recovery for future pain is warranted by evidence that injured person has jerky sensations in his body and has no circulation. Missouri, K. & T. R. Co. v. Bush [Tex. Civ. App.] 120 SW 224.

53. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Though the wrongdoer had no notice of it. Atlantic Coast Line R. Co. v. Dees [Fla.] 48 S 28. That an injured person had a diseased leg would not bar recovery for injury to the other leg or other parts of his body, though he was susceptible to suffering because of his diseased condition. Rawlings v. Clyde Plank & Macadamized Road Co. [Mich.] 16 Det. Leg. N. 607, 122 NW 504. That one already diseased has suffered from an injury does not preclude him from recovering for the results of the injury and for aggravation of the existing bodily condition. Murphy v. Southern Pac. Co. [Nev.] 101 P 322.

54. Where **hernia** results, the injured person is not precluded from recovering full damages because he was predisposed to hernia. St. Louis S. W. R. Co. v. Lewis [Ark.] 121 SW 268.

55. Consequences of second operation held result of injury where railroad surgeon set broken leg of passenger. Wallace v. Pennsylvania R. Co., 222 Pa. 556, 71 A 1086.

56. An injured person must use all reasonable care to lessen his injury. Sullivan v. Old Colony St. R. Co., 200 Mass. 303, 86 NE 511. An injured person must use reasonable means to protect himself from aggravation of the injuries. Must use all reasonable means to affect a cure. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Injured person may not recover for aggravation of injury due to careless nonobservance of advice of physician. Wise v. Wabash R. Co. 135 Mo. App. 230, 115 SW 452.

the injury results from gross negligence,[57] but mere negligence alone, however gross, will not justify infliction of punitive damages.[58] In some municipalities notice of injury sustained is required.[59]

§ 6. *Inadequate or excessive damages.*[60]—See 11 C. L. 997—Verdicts for damages will be interfered with only where they show willful disregard of the evidence [61] or are so grossly disproportionate to the damages shown as to indicate passion or prejudice.[62] Concurrence of several juries strengthens the presumption in favor of the verdict.[63] An excessive verdict may be cured by a remittitur.[64] Holdings as to the excessiveness of verdicts are grouped in the notes.[65]

57. Where a train, without warning or lookout, backed onto a brakeman, there was evidence warranting the submission of the question of punitive damages. Louisville & N. R. Co. v. Shroader [Ky.] 113 SW 874.

58. There must be conscious indifference in the face of discovered peril from which malice can be inferred. St. Louis, etc., R. Co. v. Dysart [Ark.] 116 SW 224. Evidence insufficient in action for injuries sustained in a collision. Id. Exemplary damages cannot be recovered where one is injured by the moving of a car he is unloading without giving warning. Louisville & N. R. Co. v. Crow [Ky.] 118 SW 365.

59. Under charter provision requiring notice of claim for injuries to be filed within 30 days after the injury, a notice filed January 25, 1905, and by mistake stated date of injury as December 27, 1905, instead of 1904, is sufficient. Joliffe v. Northern Pac. R. Co., 52 Wash. 433, 100 P 977. Where notice of claim filed with a municipal corporation did not set up, and the complaint did not allege, excessive menstruation as an element, evidence thereof should be excluded or a continuance should be granted to enable defendant to meet the issue. Horton v. Seattle [Wash.] 101 P 1091.

60. Search Note: See notes in 14 L. R. A. 677; 47 Id. 33; 2 Ann. Cas. 675; 5 Id. 225; 8 Id. 903.

See, also, Damages, Cent. Dig. §§ 354-405; Dec. Dig. §§ 127-140; 13 Cyc. 121-135; 8 A. & E. Enc. L. (2ed.) 628.

61. See Appeal and Error, § 13F2. Where the evidence is insufficient to sustain the damages awarded, the judgment will be reversed. Gartner v. Novick, 113 NYS 479. It is the duty of the court in case of inadequate damages for a plaintiff to set aside the verdict when the jury either disregarded the evidence or acted from passion or prejudice. Leavitt v. Dow [Me.] 72 A 735.

62. See Appeal and Error, § 13F2. A verdict will not be set aside as inadequate unless passion or prejudice is apparent. Morris v. Missouri Pac. R. Co., 136 Mo. App. 393, 117 SW 687; Gomez v. Scanlon [Cal.] 102 P 12; Seaboard Air Line R. Co. v. Miller, 5 Ga. App. 402, 63 SE 299; Piering v. Dunham Mfg. Co., 113 NYS 713; Goshorn v. Wheeling Mold & Foundry Co., 65 W. Va. 250, 64 SE 22. Not excessive for cotton lost by carrier. Central of Georgia R. Co. v. Manchester Mfg. Co. [Ga. App.] 64 SE 1128. Verdict in action for conversion held not erroneous because in excess of value fixed by any one witness where money was spent in pursuit of the property and exemplary damages could have been allowed. Shandy v. McDonald, 38 Mont. 393, 100 P 203. But a verdict clearly inadequate under the evidence and measure of damages will be vacated. Morris v. Missouri Pac. R. Co., 136 Mo. App. 393, 117 SW 687. Finding of punitive damages may be set aside if excessive. Billings v. Charlotte Observer, 150 N. C. 540, 64 SE 435. **New trial** will not be granted unless verdict is so excessive as to shock the conscience of the court, or the jury was improperly influenced or acted from passion and prejudice. Hickey v. Booth [R. I.] 72 A 529. To warrant a new trial under Mill's Ann. Code, § 217, on ground that damages are excessive, it must appear that the verdict is not only excessive but was the result of passion or prejudice. Denver & R. G. R. Co. v. Hackman [Colo.] 101 P 976. New trial may be granted if damages are clearly excessive (Injury). Knight v. Continental Automobile Mfg. Co. [Conn.] 73 A 751.

63. See Appeal and Review, § 13F2. Where court on appeal determined a verdict not excessive, a verdict on new trial for a less sum, though injury was shown to be greater, would not be held excessive. Langhorn, Johnson & Co. v. Wiley [Ky.] 115 SW 759.

64. Misconduct of counsel in argument, inducing the jury to award excessive damages may be cured by a remittitur of the excess. Producers' Oil Co. v. Barnes [Tex. Civ. App.] 120 SW 1023. Where answers to special interrogatories are inconsistent with the general verdict, the court may give plaintiff an option of accepting a reduced sum or granting a new trial. Francis v. Brock [Kan.] 102 P 472. Civ. Code, § 2734, authorizes the trial court to grant a new trial if a plaintiff refuses to remit a part of a verdict deemed excessive. Hall v. Northwestern R. Co., 81 S. C. 522, 62 SE 848.

65. Held adequate.

$1,265.45 for failure of seller to promptly deliver goods sold. Gregory Vinegar Co. v. J. Weller Co. [Ky.] 116 SW 247. $2,500 for crushing of left leg below knee. Schmidt v. Chicago, etc., R. Co. [Minn.] 122 NW 9. $17,242 for services of nurse based upon promise to compensate her at death of decedent whom she nursed. In re McNamara's estate [Mich.] 15 Det. Leg. N. 1116, 119 NW 1074. Where evidence of damages in action for breach of contract to purchase coke was so uncertain as to warrant a finding of no damage or any damages up to 90 cents a ton, a verdict of 10 cents a ton was not inadequate. McKeefrey v. Dimmick, 166 F 370.

Held inadequate.

Where 54 acres of land was damaged to an extent of $100 per acre, a verdict for $1,000

was inadequate. Morris v. Missouri Pac. R. Co., 136 Mo. App. 393, 117 SW 687. $1 where plaintiff was injured, her buggy damaged, and physician's bill for treating her injuries amounted to $88.50. Kilmer v. Parrish, 144 Ill. App. 270. $100 for woman injured by fall, $80 outlay. Maher v. Schulang, 117 NYS 928. $1 for injuries to crops by flooding where evidence showed damage to the extent of $1,000. Corley v. Yazoo-Mississippi Delta Levee Com'rs [Miss.] 49 S 266. One cent for trespass. Hardeman v. Williams [Ala.] 48 S 108. $300 where there was a doctor's bill of $100, and $204 lost in earnings, and injured person was entitled to something for pain and suffering. Harris v. Scher, 63 Misc. 288, 116 NYS 722. $3,450 for compound fracture of kneecap, and other service and permanent injuries. Alton v. Chicago, etc., R. Co., 107 Minn. 457, 120 NW 749. Six cents for assault without provocation, knocking out one tooth and loosening another, and injuries to the face. Lerner v. Cohen, 116 NYS 567. One cent for assault and battery. Leavitt v. Dow [Me.] 72 A 735.

Recoveries Held Not Excessive.

Breach of contract: $351 for refusal to accept hay purchased. Allen v. Rushfort, 82 Neb. 663, 118 NW 657. $300 for breach of contract to cut and haul timber. Freeborn Coal & Coke Co. v. Phillips, 32 Ky. L. R. 589, 106 SW 302. $3,718.05 for breach of contract for sale of tobacco. German Ins. Bank v. Martin [Ky.] 114 SW 319. $8,000 for **breach of marriage promise,** where evidence showed a continuous engagement for 13 years and defendant was worth $75,000 to $90,000. McKenzie v. Gray [Iowa] 120 NW 71. For **breach of warranty** of a heating plant, $275. Cooper v. Scott Co. [Iowa] 120 NW 631. $3,000 for breach of warranty of grade of lumber sold. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92.

Breach of duty owed a passenger: $500 for annoyance, illness, and some expense, due to negligence of a carrier in failing to notify a passenger where to change cars. Central of Georgia R. Co. v. Ashley [Ala.] 48 S 981. $700 for placing a passenger in smoking car over his protest that smoke made him sick, and he was made sick. Louisville & N. R. Co. v. Weathers [Ala.] 50 S 268. $500 for ejecting mother and two children from railroad waiting room; insulting circumstances. St. Louis S. W. R. Co. v. Foster [Tex. Civ. App.] 112 SW 797. $1,000 for ejecting passengers from train causing humiliation and distress. International & G. N. R. Co. v. Hood [Tex. Civ. App.] 118 SW 1119. $200, $100, respectively, and $5 each for two others, where passengers were compelled to stay in a caboose over night and caught cold. Arkansas Cent. R. Co. v. Janson [Ark.] 119 SW 648. $2,500 for ejecting passenger in brutal manner, severely injuring his leg. Louisville & N. R. Co. v. Cottongim [Ky.] 119 SW 751.

Breach of duty owed shipper: $6,000 damages and $2,500 penalties for failure of a carrier to furnish cars. Chicago, etc., R. Co. v. Risley Bros. & Co. [Tex. Civ. App.] 119 SW 897. $400 for delay in transporting carload of shingles. International & G. N. R. Co. v. Beasley [Tex. Civ. App.] 120 SW 1199.

Delay in delivering of telegrams: $1,000 for mental anguish for delay in delivering death message. Western Union Tel. Co. v. Hill [Ala.] 50 S 248. $200 for delay in transmission of money to defray funeral expenses. Cumberland Tel. & T. Co. v. Quigley [Ky.] 112 SW 897. $1,200 for delay in message preventing parent from reaching death bed of his son. Western Union Tel. Co. v. Cobb [Tex. Civ. App.] 118 SW 717.

Torts in general: $2 for **injury to sidewalk** in front of one's lot held sustained by the evidence. Goulding v. Ferrell, 106 Minn. 44, 117 NW 1046. $484.30 for **injuries to animals.** McDonnell v. Minneapolis, etc., R. Co. [N. D.] 118 NW 819. $400 for bull killed. Huntley v. Chicago, B. & Q. R. Co. [Iowa] 121 NW 377. $100 for damage to shipment of 30 head of cattle alleged to have been caused by rough handling and delay. Gulf, etc., R. Co. v. Thomas [Tex. Civ. App.] 118 SW 730. $550 for **overflowing farm land.** Casey v. Mississippi & Rum River Boom Co. [Minn.] 122 NW 376. $450 for **malicious prosecution.** Orefice v. Savarese, 61 Misc. 88, 113 NYS 175. $1,500 held proper treble damages for **willful cutting of timber.** Nethery v. Nelson, 51 Wash. 624, 99 P 879. $800 where **landlord removed roof of building,** compelling tenant to vacate. Walterscheid v. Crupper [Kan.] 100 P 623. $600 for changing course of an **irrigation ditch.** Denver & R. G. R. Co. v. Hickman [Colo.] 101 P 976. $2,000 for **false imprisonment,** very aggravating circumstances. Gomez v. Scanlan [Cal.] 102 P 12. $800 for forcibly and **wrongfully searching a saleswoman's** pocket for money claimed to have been embezzled by her. Kress v. Lawrence [Ala.] 47 S 574. $2,500 for **injury to abutting property** by operating trains in the street. Fontenot v. Colorado Southern, etc., R. Co., 122 La. 779, 48 S 205. $500 for **destruction of trees** where there was evidence that they were worth $2,000. Cumberland Tel. & T. Co. v. Shirley [Ky.] 112 SW 1109. $600 for **injury to cattle,** being carried under a limited liability contract. St. Louis & S. F. R. Co. v. Vaughan [Ark.] 113 SW 1035. $2,000 punitive damages for **leaving up gates at a railroad crossing.** Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264. $81 for **conversion** of logs where evidence showed value from $50 to $100. Moss Tie Co. v. Myers [Ky.] 116 SW 255. $665 for injury to **steamboat.** Sharp v. Layne [Ky.] 117 SW 292. $3,500 for **malpractice of a physician** in performing operation. Sameuls v. Willis [Ky.] 118 SW 339. $725 for **cutting trees** where evidence was conflicting as to value. Ford Lumber & Mfg. Co. v. Griggs [Ky.] 118 SW 920. $500 for **annoyance and discomfort** caused by oil flowing down a ravine near a residence. Houston & T. C. R. Co. v. Crook [Tex. Civ. App.] 120 SW 594. $2,500 for **wrongful detention** for seven years of a girl 16 years old in a reformatory. Gallon v. House of Good Shepherd [Mich.] 16 Det. Leg. N. 638, 122 NW 631. $10,800 for **injury to building** where it would cost over $7,000 for repairs and the building would not be as good as before. Linforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320. $250 for **expulsion of ticket holder from theater.** Weber-Stair Co. v. Fisher [Ky.] 119 SW 195.

Libel and slander: $3,500 for libel. Bloomfield v. Finn [Neb.] 121 NW 716. $10,000 compensatory and $5,000 punitive damages for libel of prominent business

man, where there followed no retraction. Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 NW 938. $40,000 actual and $10,000 punitive for false statements to one's customers. American Freehold Land Mortgage Co. v. Brown [Tex. Civ. App.] 118 SW 1106.

Assault: $500 for brutal assault and battery. Chauvin v. Caldwell, 122 La. 709, 48 S 159. $2,000 for criminal assault by a hackman upon a female passenger. Beardmore v. Barton [Minn.] 121 NW 228. $443.50 for assault and battery. Robichaud v. Maheux, 104 Me. 544, 72 A 334.

Personal injuries in general: $441.67 for sprained shoulder and injury to hips and back. Hignett v. Norridgewock [Me.] 73 A 1086. $750 for serious external and internal injuries. Baker v. Fritts, 143 Ill. App. 465. $2,000 where plaintiff was confined to his bed about four months, was prevented from pursuing his occupation for seventeen or eighteen months, at time of injury was strong man, earning $6 to $7 per day, and at time of trial, more than two years after he was injured, had not fully recovered. Hagen v. Schlueter, 140 Ill. App. 84. $2,250 for injuries. Williams v. Granite City, 140 Ill. App. 288. $7,500 where plaintiff suffered serious injuries of a permanent character reducing her ability to work and permanently impairing her health. Shaughnessy v. Holt, 140 Ill. App. 572. $6,000 where plaintiff who was scalded suffered intense pain of long duration, lost the use of his hands to a large extent, which permanently disabled him for manual labor, and was also disfigured for life. Ragsdale v. Illinois Cent. R. Co., 140 Ill. App. 71. $1,000 for permanent injuries rendering one partially crippled. Weil v. Kreutzer [Ky.] 121 SW 471. $1,500 for serious injury causing great pain and impairment of capacity to labor. St. Louis S. W. R. Co. v. Browning [Tex. Civ. App.] 118 SW 245. $658 for injuries confining one to bed for three weeks; great pain. Arkansas Midland R. Co. v. Rambo [Ark.] 117 SW 784. $5,000 for broken ribs, internal injuries, and injury to head. Texas & N. O. R. Co. v. Reed [Tex. Civ. App.] 116 SW 69. $2,500 for severe injuries, causing continual suffering and distress. Yazoo & M. V. R. Co. v. Beattie [Miss.] 49 S 609. $6,300 for permanent injuries to boarding house keeper, intense pain, and extensive doctor's bills. St. Louis & S. F. R. Co. v. Richards [Okl.] 102 P 92. $500 for being struck by street car. Ross v. Joline, 115 NYS 106. $650 for injuries confining woman to her bed and requiring medical attendance. Scurlock v. Boone [Iowa] 121 NW 369. $225 for person struck by an automobile. Arseneau v. Sweet, 106 Minn. 257, 119 NW 46. $1,300 for injuries causing severe suffering for several days and medical expenses of from $60 to $80 incurred. Washington v. Rhode Island Co. [R. I.] 70 A 913. $700 for general bodily injuries. Illinois Cent. R. Co. v. Smith [Ky.] 118 SW 933. $2,700 for permanent injuries caused by fall of a car door upon a person. Louisville & N. R. Co. v. Freppon [Ky.] 121 SW 454. $205 for injuries to **person, horse, and wagon.** Bilhimer v. Metropolitan St. R. Co. [Mo. App.] 119 SW 502. $1,000 for three **ribs broken,** other cuts and bruises. Dahmer v. Metropolitan St. R. Co., 136 Mo. App. 443, 118 SW 496. $1,500 for **severe burns** in explosion. Curvin v. Grimes [Ky.] 116 SW 725. $3,000 for **body bruised** and cut, ankle badly injured, health greatly impaired. Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264. $500 for bruises and **sprained muscle.** St. Louis, etc., R. Co. v. Fambro [Ark.] 114 SW 230. $2,500 for **injury to lungs,** general health impaired. Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452, 113 SW 730. $500 for painful **bruises** on body, probably permanent. Florida R. Co. v. Sturkey [Fla.] 48 S 34. $7,000 for injury resulting in **epileptic convulsions.** Romona Oolitic Stone Co. v. Shields [Ind.] 88 NE 595. $2,500 for permanent injuries to **kidneys** and other internal injuries. Krisinger v. Creston [Iowa] 119 NW 526. $2,500 for severe injuries resulting in **paralysis** of lower limbs. Doherty v. Des Moines City R. Co. [Iowa] 121 NW 690. $4,500 for injuries **resulting in tuberculosis,** $300 medical expense. Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 118 SW 116. $2,500 for exposure **resulting in Bright's disease,** kidneys and back affected. Southern R. Co. v. Miller [Ky.] 120 SW 278. $1,000 for injuries **causing phlebitis.** Ozan Lumber Co. v. Bryan [Ark.] 119 SW 73.

Hearing and eyesight: $8,000 for loss of one eye and injury to another, and 12 teeth knocked out. Froeberg v. Smith, 106 Minn. 72, 118 NW 57. $2,500 for severe injury to drum of ear resulting in permanent impairment of hearing and suffering of pain. Wilson v. Chicago City R. Co., 144 Ill. App. 604. $6,000 for injuries to head and loss of one eye. Starnes v. Pine Woods Lumber Co., 122 La. 284, 47 S 607. $5,250 for loss of eye. Brough v. Baldwin [Minn.] 121 NW 1111. $3,682 for loss of an eye. Potvin v. West Bay City Shipbuilding Co. [Mich.] 16 Det. Leg. N. 82, 120 NW 613.

Injuries to head and face: $1,400 for broken nose, hands and face lacerated. Southern R. Co. v. Cash [Va.] 65 SE 601. $3,000 for broken nose and deformed foot. Juul v. Kitsap Transp. Co. [Wash.] 104 P 191. $4,000 for fractured jaw and loss of ear. Well v. Moran Bros. Co. [Wash.] 104 P 172. $15,000 for injuries disfiguring the face of female child 13 years of age; head and limbs seriously injured. James v. Oakland Trac. Co. [Cal. App.] 103 P 1082. $7,500 for fractured skull. Phelps v. Conqueror Zinc & Lead Co., 218 Mo. 572, 117 SW 705. $9,000 for fractured skull, eyesight, mind and hearing impaired. Texas & N. O. R. Co. v. McCoy [Tex. Civ. App.] 117 SW 446. $10,000 for fractured skull and loss of leg below knee. International & G. N. R. Co. v. Morin [Tex. Civ. App.] 116 SW 656. $1,500 for permanent injury to head. Missouri, K. & T. R. Co. v. Allen [Tex. Civ. App.] 115 SW 1179. $1,000 for injury to teeth of child 11 years of age; face and mouth disfigured. Frankfort Councilmen v. Kendrick [Ky.] 114 SW 289. $8,000 for disfigurement and serious and permanent impairment of earning capacity. St. Louis, etc., R. Co. v. Glossup [Ark.] 114 SW 247. $2,000 for severe injuries to body and head; varicocele resulting. McNamara v. Metropolitan St. R. Co., 133 Mo. App. 645, 114 SW 50. $3,250 for fractured skull, loss of right hand; boy 9 years of age. Birmingham R., L. & P. Co. v. Chastain [Ala.] 48 S 85. $1,200 for injuries to hip and scalp, probably permanent. Hiroux v. Baum, 137 Wis. 197, 118 NW 533.

$600 for injuries to child leaving a scar on forehead. The North Star, 169 F 711. $4,000 for injuries to head. Wyman v. Pike [Minn.] 122 NW 310. $5,000, ear torn from head, face disfigured, arm broken, subject to epileptic fits. Wankowski v. Crivitz Pulp & Paper Co., 137 Wis. 123, 118 NW 643. $3,250, left side injured, one ear gone, bones of head and face broken, arm injured, and nervous system shocked. Robinson v. Morris & Co. [R. I.] 73 A 611.

Spinal and nervous injuries: $400 for injuries to **back** and neck. Marcus v. Omaha & C. B. R. & Bridge Co. [Iowa] 120 NW 469. $5,000 for fractured thigh bone and injury to spine. Eilerman v. Farmer [Ky.] 118 SW 289. $10,000 for permanent hysteric neurasthenia. Houston Elec. Co. v. Seegar [Tex. Civ. App.] 117 SW 900. $450 for injury to back. St. Louis, etc., R. Co. v. Grimsley [Ark.] 117 SW 1064. $8,000 for permanent injuries to back, spine, and head. Southern R. Co. v. Brewer [Ky.] 117 SW 958. $10,000 for injury to nerves incapacitating locomotive engineer. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 116 SW 365. $1,125 for nervous shock, and painful bruises. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83. $500 for slight injury to back reduced to $250. Southern R. Co. v. Turner [Miss.] 49 S 113. $20,000 for injury to back resulting in paralysis of lower limbs and loss of control of bowels, urinary, and other organs. Tills v. Great Northern R. Co., 50 Wash. 536, 97 P 737. $10,000 for mental and brain trouble of a permanent character. Bochat v. Knisely, 144 Ill. App. 551.

Fractures, dislocations and injuries to or loss of limbs: $2,000 for bruises and contusions on knee joint rendering it permanently stiff. Wilcox v. Rhode Island Co. [R. I.] 70 A 913. $6,000 for dislocation and permanent injuries to right hip, plaintiff's left leg prior to injury having been amputated below knee. Molway v. Chicago, 144 Ill. App. 509. $3,000 for loss of right index finger and use of thumb on same hand, incapacitating plaintiff, 19 years of age, as a carpenter. Finkelstein v. Kramer, 133 App. Div. 565, 118 NYS 152. $750 for crooked arm, weak and still painful at times. Fraser v. Harper House Co., 141 Ill. App. 390. $1,500 for injury to hand, loss of time, and for pain suffered. O'Shaugnnessy v. Chicago City R. Co., 144 Ill. App. 174. $3,000 for broken arm, dislocated wrist, loss of time, suffering, loss of the use of three fingers, and expense for being treated, it appearing that plaintiff was a structural iron workman, earning $4.85 per day, previous to accident. Malloy v. Kelly-Atkinson Const. Co., 144 Ill. App. 226. $5,000 for loss of leg and for suffering of boy 16 years of age. Brophy v. Illinois Steel Co., 144 Ill. App. 309. $1,000 for serious injury to ankle. Walters v. Ottawa, 144 Ill. App. 379. $275 for fracture of leg and injury to hip and back. City of Madisonville v. Stewart [Ky.] 121 SW 421. $700 for laceration of hand, no bones broken. Hillerbrand v. May Mercantile Co. [Mo. App.] 121 SW 326. $1,000 for severe injury to shoulder. Eagle Distillery v. Hardy [Ky.] 120 SW 336. $7,595 for oblique fracture of bones of leg above knee, leaving it shorter. Loftus v. Metropolitan St. R. Co., 220 Mo. 470, 119 SW 942. $7,500 for Potts' fracture of ankle. City of Ft. Worth v. Williams [Tex. Civ. App.] 119 SW 137. $10,000 for loss of arm. Waggoner v. Porterfield [Tex. Civ. App.] 118 SW 1094. $10,000 for right leg of carpenter. Missouri, K. & T. R. Co. v. Redus [Tex. Civ. App.] 118 SW 208. $9,000, loss of use of right arm, three ribs broken. Burke v. City & County Contract Co., 133 App. Div. 113, 117 NYS 400. $800 for mashed hand, fracture of bones of finger. Louisville & N. R. Co. v. Shelburne [Ky.] 117 SW 303. $12,000 for loss of two fingers and use of hand. San Antonio & A. P. R. Co. v. Beauchamp [Tex. Civ. App.] 116 SW 1163. $10,170 for loss of arm near shoulder. Louisville & N. R. Co. v. Cason [Ky.] 116 SW 716. $9,000 for loss of both legs. Southern Pac. Co. v. Hart [Tex. Civ. App.] 116 SW 415. $1,200 for injury to leg. City of Owensboro v. Williams [Ky.] 116 SW 280. $1,000 for broken leg; permanent injury. Hobart Lee Tie Co. v. Keck [Ark.] 116 SW 183. $6,000 for loss of toes and permanent injury to foot and leg. St. Louis, etc., R. Co. v. Pell [Ark.] 115 SW 957. $11,500, loss of right arm and other injuries. Louisville & N. R. Co. v. Daniel [Ky.] 115 SW 804. $14,000 for loss of leg between knee and hip joint. Galveston, H. & N. R. Co. v. Murphy [Tex. Civ. App.] 114 SW 443. $505 for skinned arm, bruised hip, sprained knee. St. Louis, etc., R. Co. v. Fambro [Ark.] 114 SW 230. $6,583.33 for child's ankle smashed; made a cripple for life. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27. $12,000 for loss of leg of young man, paralysis of other parts, and nervous injury. Louisville & N. R. Co. v. Schroader [Ky.] 113 SW 874. $10,000 for loss of foot; man 23 years of age. Louisiana & A. R. Co. v. Hobbs, 87 Ark. 641, 113 SW 46. $7,000 for loss of thumb, forefinger, and portions of next two fingers; boy 13 years of age. Rossey v. Lawrence, 123 La. 1053, 49 S 704. $3,000 for permanent injury to leg. City Council of Montgomery v. Shirley [Ala.] 48 S 679. $14,000 for leg broken in three places, making injured person cripple for life. Yazoo & M. V. R. Co. v. Scott [Miss.] 48 S 239. $16,777.75 for loss of arm above elbow. Goshorn v. Wheeling Mold & Foundry Co., 65 W. Va. 250, 64 SE 22. $2,500 for mashed arm, shoulder blade dislocated, injured head, ankle sprained. Chesapeake & O. R. Co. v. Hoffman [Va.] 63 SE 432. $15,000 for loss of leg below knee; woman 31 years of age. Bugge v. Seattle Elec. Co. [Wash.] 103 P 824. $500 for a finger. Yount v. Strickland, 17 Wyo. 526, 101 P 942. $7,500 for injury to leg, varicose veins resulting. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. $2,000 for loss of great toe and two other toes. Nelson v. Western Steam Nav. Co., 52 Wash. 177, 100 P 325. $25,000 for loss of both legs. Seaboard Air Line R. Co. v. Reid [Ga. App.] 63 SE 1130. $4,000, both legs broken. Atchison, etc., R. Co. v. Hastings [Kan.] 100 P 68. $941.70 for dislocated shoulder. Montague v. Hanson, 38 Mont. 376, 99 P 1063. $7,500 for fractured kneecap and elbow. Pearson v. Alaska Pac. S. S. Co., 51 Wash. 560, 99 P 753. $2,080 loss of tips of four fingers. Duskey v. Green Lake Shingle Co., 51 Wash. 145, 98 P 99. $250 for injuries to leg and elbow and head. Maloney v. Silberman, 115 NYS 1075. $10,000 for loss of hand. Deegan v. Gutta Percha & Rubber Mfg. Co., 131 App.

Div. 101, 115 NYS 291. $500 for loss of two fingers of left hand of carpenter. Plering v. Dunham Mfg. Co., 113 NYS 713. $2,947.60 for loss of one finger and injury to others so as to interfere with normal use of hand; boy 16 years of age. Lund v. Sargent Mfg. Co. [Mich.] 16 Det. Leg. N. 520, 122 NW 372. $1,500 for permanent injuries to hip. Armstrong v. Auburn [Neb.] 122 NW 43. $1,250 for probable permanent injury to ankle. Butterfield v. Beaver City [Neb.] 121 NW 592. $10,000 for loss of arm of child together with cut on head. Schwind v. Chicago, etc., R. Co., 140 Wis. 1, 121 NW 639. $2,500 for both legs broken. Patterson v. Melchior, 106 Minn. 437, 119 NW 402. $1,750 injury to ankle; blood poison. Carlson v. Great Northern R. Co., 106 Minn. 254, 118 NW 832. $4,000 for loss of leg below knee. Cleveland, etc., R. Co. v. Foland [Ind. App.] 88 NE 787. $500 severe injury to ankle and arm; other bodily ailments. Morton v. Pusey, 237 Ill. 26, 86 NE 601. $7,500 for loss of leg at hip. Corn Products Refining Co. v. King [C. C. A.] 168 F 892. $17,500 for right arm of seaman earning $150 per month. The Fullerton [C. C. A.] 167 F 1. $1,100 for injuries to leg, hip and side requiring an operation. Williams v. Shaw [R. I.] 71 A 207. $1,000 for injury to knee and stomach; in bed under physician's care for five days. Rogers v. Mann [R. I.] 70 A 1057. $5,000 for **fractured pelvis,** permanent injury. Waligora v. St. Paul Foundry Co., 107 Minn. 554, 119 NW 395.

Complete and permanent disability: $2,000 for permanent injury causing deformity of boy four years of age. City of Chicago v. Reid, 141 Ill. App. 514. $5,000 for injury to woman 35 years old who prior to accident was in good health and kept boarders, who after injury was bedridden for 14 months and up to time of trial, several years after, had not been able to do any work. Karczenska v. Chicago, 144 Ill. App. 516. $2,500, where before accident plaintiff was a strong, healthy, hard-working woman, earning $9 per week by washing, and that since accident she has been practically an invalid with slight prospect of recovery. Fuhry v. Chicago City R. Co., 144 Ill. App. 521. $12,500, where at time of accident plaintiff was thirty-one years of age, strong and healthy, earning $3.40 per day of eight hours, and pay for overtime, as laborer, and accident made him physical wreck and a constant sufferer. His pelvis was broken at left hip and he is compelled to use crutch urinal bag all the time because of injury to bladder. Foley v. Everett, 142 Ill. App. 250. $25,000 injury to foot, loss of one eye and injury to the other, injury to spine and internal injuries. Perkins v. Sunset Tel. & T. Co. [Cal.] 103 P 190. $25,000 for loss of one leg and the other rendered worse than useless. Reeks v. Seattle Elec. Co. [Wash.] 104 P 126. $20,000 for broken ribs, serious and permanent internal injuries, rendering injured person incapable of doing hard work and rendering him subject to tuberculosis. Beaumont, etc., R. Co. v. Olmstead [Tex. Civ. App.] 120 SW 596. $23,750 for injuries making young man a cripple for life, spine injured, lower part of legs paralyzed. Missouri, K. & T. R. Co. v. Farris [Tex. Civ. App.] 120 SW 535. $20.000 for loss of use of both legs, paralysis of lower limbs and of bowels and bladder. San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716. $20,000 for being struck by a timber, knocked unconscious and paralyzed and rendered unable to walk for nine months up to time of trial; permanent injury. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. $15,000 for permanent internal injuries, moving kidneys; hands atrophied. Galveston, etc., R. Co. v. Harper [Tex. Civ. App.] 114 SW 1168. $10,000 for loss of leg and general invalidity and infirmity resulting. Montgomery Trac. Co. v. Knabe [Ala.] 48 S 501. $20,000 for arm broken and loss of both legs below knees. Southern R. Co. v. Brock [Ga.] 64 SE 1083. $16,500 for injury to throat of attorney, permanent and resulting in loss of successful practice. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. $40,000 for injury to skull of private secretary of firm of brokers. Hughes v. Harbor & Suburban Bldg. & Sav. Ass'n, 131 App. Div. 185, 115 NYS 320. $7,000 for permanent injury to skull, affecting sight and hearing. Weeks v. Fletcher [R. I.] 71 A 881.

Injuries peculiar to women: $5,000 for injuries to womb. Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 SW 932. $9,500 for injuries resulting in **misplacement of uterus,** dislocation of shoulder, resulting in paralysis. Crozier v. Minneapolis St. R. Co., 106 Minn. 77, 118 NW 256. $4,156 for injuries causing **retroversion of uterus** and rendering necessary a major surgical operation. O'Malley v. Rhode Island Co. [R. I.] 70 A 915. $500 for injury resulting in **miscarriage.** Big Sandy & C. R. Co. v. Blankenship [Ky.] 118 SW 316. $2,500 for injuries resulting in miscarriage; probably permanent. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62. $3,500 for injury to womb and other internal injury. Southern R. Co. v. Wright [Ga. App.] 64 SE 703. $4,250 for injuries resulting in a miscarriage. Webb v. Minneapolis St. R. Co., 107 Minn. 282, 119 NW 955.

Recoveries held Excessive.

Breach of contract: $1,680 reduced to $1,200 for breach of contract to sell land listed with brokers because listers did not have title as represented. Peavey v. Greer [Minn.] 121 NW 875. $20,000 for **breach of marriage promise.** Johnson v. Levy, 122 La. 118, 47 S 422.

Delay in delivering telegram: $1,000 reduced to $500 for punitive damages for delay in delivering telegram. Western Union Tel. Co. v. Hiller [Miss.] 47 S 377. $750 reduced to $300 for failure to deliver death message; all injured party could have done was to follow body to the grave. Western Union Tel. Co. v. Rhine [Ark.] 117 SW 1069.

Breach of duty to passenger: $350 reduced to $100 for negligence resulting in delay of a passenger. International & G. N. R. Co. v. Williams [Tex. Civ. App.] 118 SW 758. $1,000 reduced to $250 for ejection of passenger. St. Louis, etc., R. Co. v. Baty [Ark.] 114 SW 218. $500 reduced to $250 for carrying passenger beyond destination. Central of Georgia R. Co. v. Morgan [Ala.] 49 S 865. $1,750 for failure of carrier to permit passenger to alight at his destination for indignities, etc., from which no ill effects were suffered. North Alabama Trac. Co. v. Daniel [Ala.] 48 S 50. $1,000 where prospective passenger was caught in raln

§ 7. *Pleading, evidence and procedure. A. Pleading.*[66]—See 11 C. L. 1003—: Pleadings in actions for damages are governed by the rules applicable to pleadings

storm because of failure to stop a train, and became sick. Burns v. Alabama & V. R. Co. [Miss.] 47 S 640. $1,000 reduced to $500 for imprisonment and mistreatment of passenger by officers of vessel. Norfolk & Washington Steamboat Co. v. Ragland [C. C. A.] 169 F 286.

Torts in general: $553 for **injury to stock in transit** where evidence failed to show such damage. Missouri, K. & T. R. Co. v. Light [Tex. Civ. App.] 117 SW 1058. $16,000 for **loss of shipment** of potatoes. Coats v. Chicago, etc., R. Co., 144 Ill. App. 81. $1,000 reduced to $500 for **injury to land and crops.** Southern R. Co. v. Curtis [Miss.] 49 S 269. $400 for slight inconvenience resulting from **obstruction of a right of way.** Schaaf v. Pennsylvania R. Co. [N. J. Law] 71 A 114. $240 held excessive by $100 for **maintaining telephone pole** in front of a place of business, damaging rental value to extent of $10 per month for 14 months. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238. $1,000 for **assault and battery.** Matson v. Matson [Me.] 73 A 867.

Personal injuries in general: $7,500 for injuries while permanent did not wholly incapacitate a man earning $1.50 to $1.75 per day. Heck v. International Smokeless Powder Co. [N. J. Law] 71 A 150. $3,000 where no bones were broken, no permanent injury proved, and evidence suggested complete recovery in time. Graham v. Rockford, 142 Ill. App. 306. $500 where proof showed but slight injuries. Donovan v. Lambert, 139 Ill. App. 532. $7,000 reduced to $2,500 for injuries resulting in female trouble. Wellman v. Metropolitan St. R. Co., 219 Mo. 126, 118 SW 31. Evidence insufficient to sustain a verdict for $4,000 for **internal injuries.** Bucher v. Wisconsin Cent. R. Co., 139 Wis. 597, 120 NW 518. $1,000 reduced to $300 for **dog bite,** fully recovered in two weeks. Puls v. Powelson [Iowa] 121 NW 1. $2,000 reduced to $1,500 for **injury to back.** Marshall v. Saginaw Val. Trac. Co. [Mich.] 16 Det. Leg. N. 357, 122 NW 131. $3,500 reduced to $2,000, where only objective manifestation was a slight abrasion of the **knee,** but injured person developed neurasthenia which might have been induced by the injury. Billings v. Snohomish, 51 Wash. 135, 98 P 107. $3,000 reduced to $1,500 for temporary pain and suffering. Ferringer v. Crowley Oil & Mineral Co., 122 La. 441, 47 S 763. $3,000 for injuries keeping one from his work but 15 days. Kentucky & I. Bridge & R. Co. v. Singheiser [Ky.] 115 SW 192. $1,000 reduced to $100 for slight bruises and injuries. St. Louis, etc., R. Co. v. Woodruff [Ark.] 115 SW 953. $20,000 for **internal injuries** to woman. Partello v. Missouri Pac. R. Co., 217 Mo. 645, 117 SW 1138. $4,700 for **injury to eyesight,** it appearing that eyesight was weak prior to accident. McGrew v. Chicago & Milwaukee Elec. R. Co., 142 Ill. App. 210.

Face and head: $5,000 excessive by $2,000 for slight injuries to face and head. Briscoe v. Metropolitan St. R. Co. [Mo.] 126 SW 1162. $250 for slight injury to head. De Noyelles v. Joline, 116 NYS 662. $3,500 for injuries to child; loss of four teeth and face bruised; not permanent. Southern R. Co. v. Lee [Ky.] 119 SW 170.

Fractures, dislocations and injury to limbs: $9,000 reduced to $7,500 for loss of three fingers and wrist sprained. Producers' Oil Co. v. Barnes [Tex. Civ. App.] 120 SW 1023. $4,500 reduced to $3,500 for injury to leg and spine. De Courcy v. Prendergast Const. Co. [Mo. App.] 120 SW 632. $6,000 excessive by $2,500 for loss of foot of ordinary laborer, 54 years of age. Mullin v. Central R. Co. [N. J. Law] 72 A 426. $3,000 reduced to $1,925 in view of injured person's failure to have his wound (burn on leg) treated for six months. Putz v. St. Paul Gaslight Co. [Minn.] 121 NW 1109. $250 reduced to $100 for cut on hands by a piece of glass. Catzer v. Brooklyn, etc., R. Co., 112 NYS 1088. $4,000 held excessive by $3,000 for bruises on shin, knee and hip. Pate v. Columbia & P. S. R. Co., 52 Wash. 166, 100 P 324. $9,500 reduced to $6,000 for loss of leg above ankle of man 64 years old. Rangenier v. Seattle Elec. Co., 52 Wash. 401, 100 P 842. $25,000 reduced to $15,000 for loss of part of foot, earning power greatly impaired, other injuries. Missouri, K. & T. R. Co. v. Lee [Tex. Civ. App.] 119 SW 144. $4,500 for injury to forefinger, healed and gave little trouble after 60 days. Georgetown Water, Gas, Elec. & P. Co. v. Forwood [Ky.] 113 SW 112. $25,000 reduced to $17,500 for severely fractured leg and severe burns on body. Houston & T. C. R. Co. v. Shapard [Tex. Civ. App.] 118 SW 596. $20,320 reduced to $12,000 for loss of leg; railroad engineer. Aluminum Co. v. Ramsey [Ark.] 117 SW 568. $10,000 held excessive by $4,000 for injuries to right hand of a minor. Texas & N. O. R. Co. v. Geiger [Tex. Civ. App.] 118 SW 179.

Permanent disability: $10,000 for permanent injuries incapacitating a wife having 18 years expectancy and earning $8 to $10 per week. Indianapolis Trac. & T. Co. v. Menze [Ind.] 88 NE 929. $25,000 reduced to $12,500 for serious injury, not causing permanent disability. Yazoo & M. V. R. Co. v. Cobb [Miss.] 48 S 522. $26,000 for forcing a trespasser to jump from a moving train. Barrett v. Minneapolis, etc., R. Co., 106 Minn. 51, 117 NW 1047. $49,000 for permanent injuries and incurable sores, incapacitating section hand with no education earning $36.40 per month. Canfield v. Chicago, etc., R. Co. [Iowa] 121 NW 186.

Spinal and nervous injury: $3,000 for injury to spine and nervous system. Gay v. Milwaukee Elec. R. & L. Co., 138 Wis. 348, 120 NW 283. $35,000 reduced to $25,000 for injury to back resulting in paralysis of lower part of body. Gordon v. Kansas City So. R. Co. [Mo.] 121 SW 80. $34,000 reduced to $27,500 for injuries to brain and spinal column resulting in paralysis of lower limbs. Missouri, K. & T. R. Co. v. Dalton [Tex. Civ. App.] 120 SW 240. $5,000 reduced to $2,500 for severe shock and bruises. Gulf & S. I. R. Co. v. Leeke [Miss.] 49 S 845. $4,060 for injury to back and conjectural nervous trouble. Johnson v. Great Northern R. Co., 107 Minn. 285, 119 NW 1061.

66. Search Note: See note in 10 Ann. Cas. 219.

in general.[67] Conclusions must not be alleged.[68] No greater sum can be recovered than is demanded,[69] and no damages not demanded can be recovered.[70] The elements of damages should be definitely alleged [71] and with certainty.[72] If not suffi-

See, also, Damages, Cent. Dig. §§ 406-453; Dec. Dig. §§ 141-162; 13 Cyc. 173-191; 5 A. & E. Enc. P. & P. 700, 703.

67. In **actions for libel** a special allegation of malice is necessary. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Claims should be supported by sufficient allegations. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820. Where a complaint contains a general allegation of damages and also alleges special items claimed, the **special allegations control.** Houston & T. C. R. Co. v. Rogers [Tex. Civ. App.] 117 SW 1053. Complaint for refusal of buyer to accept goods purchased **held sufficient** as against general demurrer. M. D. & H. L. Smith Co. v. Strickland Cotton Mills [Ga. App.] 65 SE 320. Complaint alleging breach of contract is **good for nominal damages,** though no special damages are alleged. Louisville & N. R. Co. v. Holland [Ga.] 63 SE 898. Complaint for breach of contract held to state a cause of action for at least nominal damages. Wessel v. Wessel Mfg. Co., 106 Minn. 66, 118 NW 157. A complaint showing that a legal right has been violated entitles plaintiff to nominal damages. Williams v. Atlantic Coast Line R. Co. [Fla.] 48 S 209. Complaint for fraud **held insufficient** to state a cause of action because it did not show damage. Anderson v. Heileman Brew. Co., 104 Minn. 327, 116 NW 655. Where a buyer of a machine was entitled to recover freight paid because of breach of warranty, the **fact that he pleaded items not recoverable** does not preclude recovery of the freight. Houser & Haines Mfg. Co. v. McKay [Wash.] 101 P 894.

68. An allegation that one was damaged in a certain sum is a conclusion. Connor v. National Roofing & Supply Co. [Ky.] 113 SW 122.

69. Smith v. Cox [S. C.] 65 SE 222.

70. A recovery of an item of damages not pleaded is improper. Gorman v. New York, etc. R. Co., 128 App. Div. 414, 113 NYS 219.

71. Held insufficient.

Complaint by parent for **wrongful suspension** of his child from school does not state a cause of action where it fails to show that damage was sustained. Douglas v. Campbell [Ark.] 116 SW 211. Complaint held insufficient to warrant judgment authorizing retention of certain money as liquidated damages. Walker v. Burtless, 82 Neb. 211, 118 NW 113. Complaint for **breach of contract** that stock sold would pay certain dividends does not state a cause of action where there was no allegation as to value of the stock, as failure to declare dividends would not necessarily affect its intrinsic value. Forster v. Flack, 140 Wis. 48, 121 NW 890. In action for **trespass to personalty,** complaint for lost time, expenses and attorney's fees, held insufficient. Malone & Grant Co. v. Hammond [Ga. App.] 64 SE 666.

Personal injuries: Where a complaint does not show whether ailment was result of injury or of mental disturbance, it is subject to special demurrer. Hesty v. Moulton Water Co. [Mont.] 102 P 568. On allegations of internal and external injuries, shock to spine and nervous system, and as a result plaintiff was sick, sore, lame and disordered, evidence of injuries to knees, ribs and nerves was admissible. Fitzgerald v. Chicago, 144 Ill. App. 462. Under allegation of injury to head, evidence of injury to hearing is not admissible except to show extent of injury to the head. Louisville R. Co. v. Gaugh [Ky.] 118 SW 276. Under complaint alleging injury to hips, knee and shoulder, etc., held evidence of injury to testicle was not admissible where that was the principal injury and immediately known. Cincinnati, etc., R. Co. v. Bennette [Ky.] 119 SW 181.

Held sufficient.

Personal injuries: Evidence of **injury to hearing** held admissible though not alleged specifically. Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418. Allegation that use of hand has been destroyed, and great mental and physical pain caused, authorizes recovery for **future physical pain.** San Antonio & A. P. R. Co. v. Beauchamp [Tex. Civ. App.] 116 SW 1163. Complaint alleging that injured person had obligated herself to pay and would be compelled to pay for medical services authorizes recovery of **reasonable value of medical aid** which had been, and might thereafter be, rendered. Herndon v. Springfield [Mo. App.] 119 SW 467. Future mental and physical pain may be shown under an allegation that one has been seriously crippled in a manner affecting his future comfort. San Antonio & A. P. R. Co. v. Beauchamp [Tex. Civ. App.] 116 SW 1163. Complaint alleging permanent incapacity to perform mental or physical labor authorizes evidence that **mental condition was impaired** in every way. Texas & N. O. R. Co. v. McCoy [Tex. Civ. App.] 117 SW 446. Complaint alleging serious and painful permanent injuries, head, neck, shoulders, etc., burned, held sufficient to include **injury to hearing.** Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418. Proof of **impairment of mental faculties** is admissible under allegations of grievous or permanent bodily injury. Rapid Transit R. Co. v. Allen [Tex. Civ. App.] 117 SW 486. Allegations of serious and permanent internal and external injuries in or on back, spine and head, and serious impairment of nervous system, warranted proof that injured person was a mental wreck, and if condition was not cured insanity would result. Rapid Transit R. Co. v. Allen [Tex. Civ. App.] 117 SW 486. Complaint alleging fracture of bones of ankle, muscles and ligaments torn and strained, held to authorize **evidence of a Potts' fracture.** City of Ft. Worth v. Williams [Tex. Civ. App.] 119 SW 137. Statement in statement of claims that plaintiff was injured internally, bruised and wounded, had fainting spells, headaches, impaired internal organs, etc., held to authorize evidence of **irregular menstruation.** Morton v. Pusey, 237 Ill. 26, 86 NE 601. Complaint for injuries though subject to motion to make more definite and certain, where such motion was not made, held evidence admissible under the allegations could not

ciently specific, a bill of particulars may be required.[73] The items of damage should be alleged,[74] but it is not necessary that the complaint itemize each matter

be excluded. Dralle v. Reedsburg [Wis.] 122 NW 771. Under a complaint alleging permanent disability and permanently unable to follow usual occupation, evidence as to amount injured person was earning at the time is admissible to prove the **value of his time.** Town of Newcastle v. Grubbs [Ind.] 86 NE 757. Under allegations of serious, painful and permanent internal injuries, **displaced or retroverted womb** is admissible. Price v. Metropolitan St. R. Co., 220 Mo. 435, 119 SW 932. Where complaint alleged injury to spine and hip, any symptom or condition of the lower part of the leg which would corroborate testimony as to **condition of the spine** and hip was admissible, and evidence that one leg was smaller below the knee than the other was admissible. Lexington R. Co. v. Woodward [Ky.] 118 SW 965. Where complaint alleged injuries to arms, body and lower limbs, a general allegation of injury to the body held broad enough to include **injury to back.** Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83. Under an allegation that injured person "had" or "would" **lose earnings,** held he was entitled to recover for such loss from date when it began. Smith v. St. Louis Transit Co., 133 Mo. App. 202, 113 SW 216. Complaint for **mental anguish** resulting from passenger being carried beyond destination held sufficient in the absence of timely objection on the ground of uncertainty. St. Louis S. W. R. Co. v. Franks [Tex. Civ. App.] 114 SW 874. Where a complaint alleges specific injuries other injuries cannot be shown, but under an allegation of shock to entire nervous system, and testimony that weakness in limbs was a symptom of **injury to spine,** plaintiff could testify that one of her limbs had given out completely, causing her to fall. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961. Complaint alleging that by reason of the wrongful act plaintiff became sick, sore and disordered, which condition continued hitherto, allows evidence of **resulting nervous condition.** Norfolk & W. R. Co. v. Spears [Va.] 65 SE 482.

Torts in general: In **libel** it is sufficient to allege mental suffering without alleging the nature, character or extent thereof. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Where a complaint for **assault and battery** charges willful and unprovoked assault, humiliation, bodily pain and mental anguish are elements. Stewart v. Watson, 133 Mo. App. 44, 112 SW 762. Allegations that plaintiff was humillated, mortified and ashamed by being put off a train at a place where she was compelled to expose her person, shows "mental distress." International & G. N. R. Co. v. Hood [Tex. Civ. App.] 118 SW 1119. Under a complaint alleging **loss of business,** evidence as to the extent thereof is admissible. Standard Amusement & Mfg. Co. v. Champion, 76 N. J. Law, 771, 72 A 92. Under allegation that **horses killed** were then and there of specified reasonable values, evidence of market or intrinsic values held admissible. Missouri, K. & T. R. Co. v. Crews [Tex. Civ. App.] 120 SW 1110. A general averment of damages in the ad damnum in an action for **breach of contract** is sufficient where there are prior allegations showing liability, unless special damages are claimed. Sherlag v. Kelley, 200 Mass. 232, 86 NE 293. Complaint against carrier for loss of a horse in transit held sufficient to appraise defendant of character of evidence of value to be tendered. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 117 SW 459. Complaint for **delay in sending a telegram** summoning a physician held sufficient. Western Union Tel. Co. v. Griffith [Ala.] 50 S 91. Complaint for delay in dellvering a death message held sufficient as against general demurrer. Western Union Tel. Co. v. Hughey [Tex. Civ. App.] 118 SW 1130.

Injuries to property: Complaint alleging that sewer was so choked that it would not carry off water and because thereof it flooded plaintiff's lot and dwelling held broad enough to cover all damage to lot and building. City of Richmond v. Wood [Va.] 63 SE 449. Complaint for **flooding premises,** while not specifically claiming permanent injury, held sufficient after verdict to sustain an award for permanent injury. Hart v. Wabash So. R. Co., 238 Ill. 336, 87 NE 367. Pleading **damages to apple trees** and apples thereon, while not in express terms speaking of wind falls, includes injury to fruit on the ground. Doty v. Quincy, etc., R. Co., 136 Mo. App. 254, 116 SW 1126.

72. Injured person should so describe his injuries that defendant will have notice of injuries for which recovery is sought. Louisville R. Co. v. Gaugh [Ky.] 118 SW 276. Allegation that injured person was confined to her room for some time because of injury, if not clearly referable to the nature and extent of injury rather than asserting special damages, is, at least, **ambiguous,** and is to be resolved against the pleader. Central Kentucky Trac. Co. v. Chapman [Ky.] 113 SW 438. Complaint for breach of three contracts for purchase of goods to be resold held to sufficiently allege **general damages.** Harrison v. Argyle Co., 128 App. Div. 81, 112 NYS 477.

73. Where a complaint for fallure of seller to deliver goods was so drafted that items and amount of damage could be computed, no bill of particulars was necessary. Strohmeyer & Arpe Co. v. Hartley Silk Mfg. Co., 130 App. Div. 102, 114 NYS 287. Under Code 1904, § 3249, if defendant is not sufficiently advised as to particulars of damage, he should request a bill of particulars. City of Richmond v. Wood [Va.] 63 SE 449.

74. Items not sued for cannot be recovered. Beckham v. Collins [Tex. Civ. App.] 117 SW 431. Allegation that because of injuries plaintiff "has had to pay for physician's bills, and nurse and medicine, $55 or other large sum," is subject to special demurrer for failing to specify how much plaintiff has had to pay for each. Louisville & N. R. Co. v. Barnwell, 131 Ga. 791, 63 SE 501. For family portraits lost in transit, the value of each should be separately alleged. Missouri, K. & T. R. Co. v. Dement [Tex. Civ. App.] 115 SW 635. Where it ap-

of expense claimed as damages.[75] Recovery is limited to elements of damages alleged.[76] All damages that necessarily flow from the wrong complained of may be recovered under the ad damnum clause without special averment,[77] but damages which result naturally and proximately but not necessarily or by implication must be specially pleaded.[78] Hence, medical expenses[79] and loss of time or earnings[80]

peared without contradiction that a "Bible and Testament" was one book an allegation of the value thereof as a single sum was sufficient. Id.

75. Dickerson v. Finley [Ala.] 48 S 548. Complaint for injuries to person and property which definitely enumerates the elements of damage suffered **is sufficient** without designating the sum claimed for each. Anniston Elec. & Gas Co. v. Rosen [Ala.] 48 S 798. In trespass for damage to timber, the damage and amount may be alleged generally without alleging each item. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548.

76. Where a plaintiff sues for special damages alone which are not recoverable under the allegations of the complaint, he is limited to the **special damages** alleged and cannot recover general damages. Christophulos Cafe Co. v. Phillips, 4 Ga. App. 819, 62 SE 562. Where injured person alleged **amount of medical expenses and wages lost,** recovery was confined to such amount and it was error to authorize recovery of reasonable compensation for time lost. South Covington & C. R. Co. v. Raymer [Ky.] 116 SW 281. If a complaint pleads **specific items** of damage, recovery is restricted to elements alleged. Parsons Applegate Co. v. Louisville & N. R. Co., 136 Mo. App. 494, 118 SW 101. Though a plaintiff may make out a case showing a right to recover general damages, yet if he has not sued therefor but for **special damages** only, which are not recoverable under the evidence, a verdict for him is unauthorized. Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 SE 1056. Averment that stone contracted for was intended by the plaintiffs for resale and that plaintiffs had orders therefor, that by reason of defendant's fault plaintiffs were prevented from fulfilling contracts for the resale of said stone and thereby lost profits and were compelled to pay damages to parties to whom they had resold the said stone, etc., was sufficient to support proof of special damages. Hagen v. Rawle, 143 Ill. App. 543. Complaint for injuries and evidence thereof and of medical expenses up to the date of trial will not authorize recovery for **future suffering** and probable expense. Miller v. McConnell [S. D.] 120 NW 888. Not damages not put in issue by pleadings. Lownsdale v. Grays Harbor Boom Co. [Wash.] 103 P 833. Under an allegation of damages from mingling of defendant's bucks with plaintiff's ewes, that the ewes brought forth lambs of an inferior grade and at an unseasonable period, it was held not admissible to prove hiring of extra men at lambing season and building of sheds, as it went **beyond the scope of damages alleged.** McKinney v. Carson [Utah] 99 P 660. Held also special damages which should have been pleaded. Id. Claims for damages which have **no legal basis** and cannot be predicated upon the allegations of a complaint may be stricken. Hildreth v. Western Union Tel. Co. [Fla.] 47 S 820. Farm landlord could not recover from a tenant for corn alleged to have been destroyed because of failure of the tenant to repair fences, where the **value of the corn was neither alleged nor proved.** Ashdown v. Ely [Iowa] 117 NW 976.

77. Moses v. Autuono [Fla.] 47 S 925; McKinney v. Carson [Utah] 99 P 660. Those which are the natural and proximate result of the wrongful act. Norfolk & W. R. Co. v. Spears [Va.] 65 SE 482. General **allegation of injury** admits proof of only such damages as naturally and necessarily result, but it is not necessary that all results of an injury be pleaded in detail. Rapid Transit R. Co. v. Allen [Tex. Civ. App.] 117 SW 486. Damages may be recovered for **permanent injuries** though they are not alleged to be permanent. De Courcy v. Prendergast Const. Co. [Mo. App.] 120 SW 632. Under a general allegation of **assault and battery,** such damages as naturally result may be recovered. Stewart v. Watson, 133 Mo. App. 44, 112 SW 762. On a general allegation of **damages for fraud,** those which naturally and necessarily result may be recovered. Isman v. Loring, 130 App. Div. 845, 115 NYS 933. Amount paid for **sending telegram** is general damages for negligent delay. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349. Physical **pain and mental anguish** need not be specially alleged where the injury sustained necessarily imports such elements. Fink v. Busch, 83 Neb. 599, 120 NW 167. An injury not alleged may be proven when its physical connection with injuries alleged is such as tends to show that the latter was sustained. Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418. For temporary injury to land, **diminution of rental value** may be recovered without being specially pleaded. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238.

78. Louisville & N. R. Co. v. Holland [Ga.] 63 SE 898; Moses v. Autuono [Fla.] 47 S 925; Isman v. Loring, 130 App. Div. 845, 115 NYS 933; McKinney v. Carson [Utah] 99 P 660. Evidence of epilepsy, paralysis and mental impairment, not admissible under allegation of injury to head, limbs and nervous system. Long v. Fulton Cont. Co., 133 App. Div. 842, 117 NYS 1118. The only **difference between general and special damages** is that the former are the necessary and usual result of the wrongful act, and the latter need be only the proximate result of or traceable to such act. McKinney v. Carson [Utah] 99 P 660. Whether shortening of limb as result of injury was general or special damage depended on whether it was a necessary consequence of the wrongful act, and not upon whether it was a necessary sequel to the fracture. Fleddermann v. St. Louis Transit Co., 134 Mo. App. 198, 113 SW 1143. Held special. Id. For breach of covenant in lease that floor of leased building had a certain carrying capacity, any special damages must be pleaded. Scheffler Press v.

must be pleaded in an action for injuries. Exemplary damages need not be specially pleaded.[81] In order to recover multifold damages,[82] the complaint must allege facts bringing the case within the statute by which they are authorized. A complaint may be amended to set up an additional element of damages.[83] Special matters of defense must be specially pleaded.[84] Unliquidated damages for breach of contract are not the subject of a set-off.[85] Failure to deny amount of damages alleged does not admit them.[86] An answer which denies nothing but the amount of damages raises no issue.[87]

Perlman, 130 App. Div. 576, 115 NYS 40. In **malicious prosecution** where special damages are not alleged, evidence that plaintiff could not sleep nor do as much work after as before his imprisonment is not admissible. Moneyweight Scale Co. v. McCormick, 109 Md. 170, 72 A 537. The injured person must allege the consequences which he claims resulted from the wrongful act in order to recover consequential damages. Farrington v. Cheponis [Conn.] 73 A 139. In action for special damages for **loss of freight,** expense of telephone message could not be recovered where it was not pleaded. Pacific Exp. Co. v. Jones [Tex. Civ. App.] 113 SW 952. Complaint **alleging bruised body, fractured arm, and leg broken near hip,** all permanent, held sufficient allegation of special damage to recover for shortening of leg due to the fracture. Fleddermann v. St. Louis Transit Co., 134 Mo. App. 199, 113 SW 1143.

79. Complaint for injuries alleging that injured person sustained described injuries, causing pain and sickness and rendering him unable to work, and that he was compelled to employ a physician, etc., held to authorize recovery for loss of time and medical expense. Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40. General damages for injury are confined to physical and mental suffering, etc., and other loss, such as medical attention, loss of earning, etc., are regarded as special. Fleddermann v. St. Louis Transit Co., 134 Mo. App. 199, 113 SW 1143. Future medical attendance and hospital services must be alleged and proved. Moellman v. Gieze-Henselmeier Lumber Co., 134 Mo. App. 485, 114 SW 1023.

80. Loss of earnings. Moellman v. Gieze-Henselmeier Lumber Co., 134 Mo. App. 485, 114 SW 1023; Hitchings v. Maryville, 134 Mo. App. 712, 115 SW 473; Cole v. Metropolitan St. R. Co., 133 Mo. App. 440, 113 SW 684. Loss of time from an injury. Central Kentucky Trac. Co. v. Chapman [Ky.] 113 SW 438. Recovery for lost time and medical expenses cannot be had unless allegations warrant such recovery. Pittsburgh, etc., R. Co. v. Lynch [Ind. App.] 87 NE 40. Where complaint alleged that an injured person was prevented from attending to his affairs and its sufficiency was not attacked, held recovery for loss of time was proper. Id. Loss of time and medical treatment. Lexington R. Co. v. Britton [Ky.] 114 SW 295. Complaint for injuries **held sufficient** to permit recovery for time lost because thereof. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 115 SW 57. Allegation that because of injuries "plaintiff is and ever will be incapacitated from earning her livelihood" sustains recovery for lost earnings from date of injury. Hitchings v. Maryville, 134 Mo. App. 712, 115 SW 473. Permanent **impairment of earning capacity.** Central Kentucky Trac. Co. v. Chapman [Ky.] 113 SW 438.

81. Need not be pleaded distinct from general damages. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548; Johnson v. Collier [Ala.] 49 S 761.

82. Complaint for treble damages under 26 Stat. 209 sufficiently charged general damages, under Rev. St. § 914, for unlawful combination or conspiracy to monopolize interstate commerce, under Code Civ. Proc. Ky. § 134, providing for making more definite and certain indefinite allegations. Monarch Tobacco Works v. American Tobacco Co., 165 F 774. Complaint under federal antitrust act for treble damages for combination in restraint of foreign commerce held to sufficiently allege that plaintiff had suffered damage because of violation of the act. Thomsen v. Union Castle Mail S. S. Co. [C. C. A.] 166 F 251.

83. In action for injuries it was held proper to permit plaintiff to amend after remand to set up time lost and its value. Louisville & N. R. Co. v. Hurst [Ky.] 116 SW 291.

84. Where a contract provides for a per diem for future where the owner is kept out of possession after the date set for completion, such damages cannot be recovered by the owner in an action by the contractor to foreclose his lien unless affirmatively pleaded by way of defense or cross complaint. Steltz v. Armory Co., 15 Idaho, 551, 99 P 98. In an action for breach of contract to take springs to be manufactured, in order for the buyer to rely on the defense that the seller could not have complied with its contract, or was otherwise profitably employed, or that it could have sold the goods at as high a price, he must plead the same. Cleveland-Canton Springs Co. v. Goldsboro Buggy Co., 148 N. C. 533, 62 SE 637. Release held to constitute a valid defense to a claim. Klauck v. Federal Ins. Co., 60 Misc. 182, 111 NYS 1037.

85. Taylor-Stites Glass Co. v. Manufacturers' Bottle Co., 201 Mass. 123, 87 NE 558.

86. Bigham v. Wabash-Pittsburg Terminal R. Co. [Pa.] 72 A 318.

87. Under Code, § 3622, providing that allegation of amount of damages is not deemed true because not denied, an answer in an action for breach of contract which denies nothing but the amount of damages raises no issue. Byrne v. Struble Independent School Dist., 139 Iowa, 618, 117 NW 983.

The method of raising objections to pleadings is governed by the general rules of pleadings.[88] The question of measure of damages cannot be raised by demurrer.[89]

(§ 7) *B. Evidence as to damages.*[90] *Burden of proof and sufficiency of evidence.*[See 11 C. L. 1007]—A plaintiff has the burden to prove that he has sustained damage,[91] and the extent thereof,[92] and that his injury is the result of the wrongful act of the defendant.[93] Damages must be proved with some degree of certainty,[94] but reasonable rather than absolute certainty is all that is required.[95] The quantum of proof required is a preponderance of the evidence.[96] Whether

88. See Pleading, § 10. Objection **that damages claimed are too remote** must be taken by motion to strike or special charges. Central of Georgia R. Co. v. Ashley [Ala.] 48 S 981. Objection **that complaint for libel does not sufficiently plead special damages** may be raised by demurrer. Fagan v. New York Evening Journal Pub. Co., 129 App. Div. 28, 113 NYS 62. An **objection of no allegation of damage** should be made by the pleading and not by requested instruction. Adams Mach. Co. v. Turner [Ala.] 50 S 308.

89. West v. Johnson, 15 Idaho, 681, 99 P 709.

90. **Search Note:** See notes in 11 C. L. 1012; 3 A. S. R. 554; 10 Id. 64; 85 Id. 835; 1 Ann. Cas. 213; 2 Id. 55; 3 Id. 554; 9 Id. 323; 10 Id. 794.

See, also, Damages, Cent. Dig. §§ 454-514, 531; Dec. Dig. §§ 163-192, 206; 13 Cyc. 191-220, 229-233; Discovery, Cent. Dig. §§ 92-98; Dec. Dig. § 78; 14 Cyc. 364-366; Evidence, Cent. Dig. § 677; Dec. Dig. § 192; 17 Cyc. 295; 8 A. & E. Enc. L. (2ed.) 643, 652; 20 Id. 883.

91. In an action for **mental anguish** caused by delay in sending a telegram, plaintiff has the burden of proof. Western Union Tel. Co. v. Long [Ark.] 118 SW 405. Under 24 Stat. 387 (U. S. Comp. St. 1901, p. 3398), making an infringer, with knowledge that the article is patented, liable for profits and $250, it is necessary to show such knowledge in order to recover the $250. Lichtenstein v. Straus, 166 F 319. Evidence held to show that infringer did not have such knowledge. Id. The injured person has the burden to prove the nature and extent of his injuries. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Under a **plea of recoupment** the burden of showing the extent of his legal damage is on the defendant. Farrar Lumber Co. v. Johnstone & Co. [Ga. App.] 65 SE 60. In action against correspondence school scholar for tuition, defendant has burden to prove in mitigation that plaintiff could have devoted its time to education of another scholar. International Text-Book Co. v. Martin, 82 Neb. 403, 117 NW 994.

92. A plaintiff has the burden to prove the **amount of damages** sustained. Bigham v. Wabash-Pittsburg Terminal R. Co. [Pa.] 72 A 318. Expenditures for physician's services and medicines cannot be recovered in the absence of **proof that they are reasonable.** Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777. For injury to stock in transit, there can be no recovery in the absence of proof of value at destination. Gulf, etc., R. Co. v. Gillespie [Tex. Civ. App.] 118 SW 628.

93. An injured person has the burden to prove that his injury is the proximate result of the wrong complained of. Smith v. Pullman Co. [Mo. App.] 119 SW 1072. No recovery can be had for medical expenses incurred in the absence of proof that they are reasonable. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118.

94. There must be some proof of diminished earnings or earning capacity, or the value of lost time. Atlanta & W. P. R. Co. v. Haralson [Ga.] 66 SE 437. That one using a trade mark after his license to do so had expired had agreed to pay a certain sum for such use is some evidence of the damages sustained by the owner because of such wrongful use. Nelson v. Winchell & Co. [Mass.] 89 NE 180.

95. Where evidence shows injuries which justify the conclusion that earning capacity in any vocation has been lessened, a right to recover is established. St. Louis S. W. R. Co. v. Niblack [Tex. Civ. App.] 117 SW 188. Evidence sufficient to justify recovery of at least nominal damages. Id. Substantial damages may be recovered though plaintiff shows his loss proximately, but the cause and amount must be shown with reasonable certainty. Wilkinson v. Dunbar, 149 N. C. 20, 62 SE 748. It is enough if from proximate estimates of witnesses a specific conclusion can be reached. Richner v. Plateau Live Stock Co., 44 Colo. 302, 98 P 178. The question of values is to a great extent a matter of opinion. Kelley v. Colorado, etc., R. Co., 123 La. 1138, 49 S 717. Sufficient if loss is shown approximately. Hurxthal v. St. Laurence Boom & Mfg. Co., 65 W. Va. 346, 64 SE 355.

96. That a dog killed was not assessed did not prove that it had no value in the face of testimony that it did have a value. El Dorado & B. R. Co. v. Knox [Ark.] 117 SW 779. **Evidence sufficient** to warrant recovery for entire destruction of a crop. Jonesboro, etc., R. Co. v. Cable [Ark.] 117 SW 550. To show that injuries were serious and real and not simulated. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961. To show impairment of earning capacity. Dallas Consol. Elec. St. R. Co. v. Motwiller [Tex. Civ. App.] 112 SW 794. To show that injured person's condition was the result of injuries complained of. Frankfort Councilmen v. Downey [Ky.] 118 SW 284. In action for injuries to abutting property caused by a railroad in the street, evidence held to show that its value had been impaired. Lewis v. Colorado So., etc., R. Co., 122 La. 572, 47 S 906. Evidence that an injured person had suffered intense physical pain and was suffering at time of trial was sufficient to warrant submission of probable future suffering. Missouri, K. & T. R. Co. v. Reynolds [Tex. Civ. App.] 115 SW 340. **Evidence held insufficient** to show the value of property converted. Sigel-Campion Live Stock Co. v.

the plaintiff has sustained his burden of proof[97] and the weight to be given testimony are questions for the jury.[98] Damages not proved cannot be recovered.[99] Mental anguish may be presumed from circumstances.[1] Injury is not presumed to have ended at the time of the action therefor.[2]

Hally, 44 Colo. 580, 101 P 68. Bold statement of plaintiff as to lost profits held insufficient to sustain a verdict therefor. De Palma v. Weinman [N. M.] 103 P 782. To establish value in conversion. Fertitta v. Schnurmacher, 117 NYS 161.

97. Questions held for the jury: Issue as to **permanency of injury.** Williamson v. St. Louis & M. R. Co., 133 Mo. App. 375, 113 SW 239. Permanent **diminution of capacity to labor** is for the consideration of the jury along with pain, suffering, disfigurement and the like. Atlanta & W. P. R. Co. v. Haralson [Ga.] 65 SE 437. Issue of **loss of earnings.** Smith v. St. Louis Transit Co., 133 Mo. App. 202, 113 SW 216. Where impaired earning capacity in a particular vocation is alleged, proof of salary before and after injury is essential, but, under a general allegation of such impairment, the **question of amount** is for the jury. Dallas Consol. Elec. St. R. Co. v. Motwiller [Tex. Civ. App.] 112 SW 794. Whether injured person's **hearing was permanently impaired.** Houston, etc., R. Co. v. Roach [Tex. Civ. App.] 114 SW 418. Whether one's performance of his work as a riveter after loss of an eye disproves his testimony that the loss affected his ability. Potvin v. West Bay City Shipbuilding Co. [Mich.] 16 Det. Leg. N. 82, 120 NW 673. Permanent **diminution of capacity to earn** is for the jury to determine, though there be no proof of loss of earning after the injury, or the value thereof. Atlanta & W. P. R. Co. v. Haralson [Ga.] 65 SE 437. For destruction of peach trees by fire, evidence that 26 trees were destroyed and that yield of each tree was about six dollars held sufficient to authorize submission of **depreciation of value** of the land. Texas & P. R. Co. v. Graffeo [Tex. Civ. App.] 118 SW 873. In action for **destruction of an asparagus** bed by fire, evidence that the heat killed the roots and that it would cost $300 or $400 to repair. Id. Evidence of good health prior to an injury and of suffering shortly thereafter carries to the jury the question whether a **bodily condition** was the result of an injury. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. **Whether a particular disease resulted** from an injury is for the jury where the evidence tends to show that it followed the injury and might have been produced by it. Id. Impaired **capacity to labor** properly submitted, on evidence of injury, extent thereof and earnings. Lowenstein v. Missouri Pac. R. Co., 134 Mo. App. 24, 119 SW 430. The **value of services** of members of the family of an injured person, rendered in the usual way of unskilled nurses, is of common knowledge which a jury may determine without proof. Scurlock v. Boone [Iowa] 121 NW 369. Testimony that plaintiff had paid an attorney a certain sum for defending an action against him by defendant though unaccompanied by testimony as to the value of such services was sufficient to present a question of fact **as to the value.** Curtley v. Security Sav. Soc., 51 Wash. 242, 98 P 667.

98. The weight of the evidence as to impairment of eyesight after the injury is for the jury. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. Where plaintiff's expert testified that hemorrhage might have been caused by the injury, the weight of the testimony was for the jury, and it was not error to refuse to charge that there was no evidence that the hemorrhage resulted from the injury. Casey v. Chicago City R. Co., 237 Ill. 140, 86 NE 606. One who lived on premises can better determine the character and extent of annoyance and discomfort caused by flow of oil down a ravine near her premises than persons passing by. Houston & T. C. R. Co. v. Crook [Tex. Civ. App.] 120 SW 594.

99. Wichaler v. O. J. Gude Co., 117 NYS 1037. Only such as are proved. H. P. Smith Co. v. Suttich [Cal. App.] 102 P 683. Recovery cannot be had for breach of provision of bill of lading where there is a total failure of proof of damages. Pisapia v. Hartford & N. Y. Transp. Co., 62 Misc. 607, 116 NYS 26. Where there was no evidence upon which to base an allowance for permanent injuries, it was proper to charge that none could be made. Marcus v. Omaha & C. B. R. & Bridge Co. [Iowa] 120 NW 469. For tearing up of pipe line, recovery may be had for loss of oil or market therefor, but the mere fact that the owner was temporarily prevented from marketing oil does not show damages. Brookshire Oil Co. v. Casmalia Ranch Oil & Development Co. [Cal.] 103 P 927. It is error to permit consideration of doctor's bills and medical expense where there is no evidence as to the reasonableness thereof. Missouri, K. & T. R. Co. v. Willis [Tex. Civ. App.] 117 SW 170. Buyer of goods cannot counterclaim on implied warranties without proof of damage. Rapp v. Platt, 117 NYS 987. Where there was no evidence establishing freight charges sought to be recovered, the action was properly dismissed. Wright v. Anderson, 117 NYS 209. A plaintiff should not be awarded the entire contract price under a contract not performed, without proof of his actual loss. Harrison v. Clarke [N. J. Law] 73 A 43. In action for breach of warranty of title where there is no evidence of the value of the strip to which title failed, there can be no recovery. Capital City Inv. Co. v. Burnham [Iowa] 121 NW 708. Damages cannot be recovered for breach of contract unless proved. Long v. Charles Kaufman Co. 122 La. 281, 47 S 606. This rule is not changed by Civ. Code, art. 2749. Id. For injury to person, horse and harness, there can be no recovery for injury to the harness, where the evidence does not show to what extent it was injured or damaged. Birmingham R., L. & P. Co. v. Camp [Ala.] 49 S 846.

1. There is a presumption of mental anguish on failure to deliver a telegram which announces serious illness of child, where parent is thereby prevented from being present at her death. Western Union Tel. Co. v. Blair [Tex. Civ. App.] 113 SW 164.

Admissibility in general.[See 11 C. L. 1009]—A plaintiff may prove his loss under any proper theory as to the measure thereof.[3] Proof should be confined to the issues made by the pleadings.[4] Opinion testimony is competent on the various elements of damages claimed,[5] where the witness is qualified.[6] Holdings as to the admissibility of evidence in general,[7] as to the pecuniary condition of parties,[8]

The mere fact that the parent did not attend the funeral because she was sick did not rebut such presumption. Id. Where mental anguish forms an element, direct proof is not necessary, as it may be inferred from the circumstances. Western Union Tel. Co. v. McMorris [Ala.] 48 S 349.

2. Rushing v. Seaboard Air Line R. Co., 149 N. C. 158, 62 SE 890.

3. Kerns v. Kansas City [Kan.] 100 P 624.

4. Where **no claim of damage to grass** was made, it was error to admit evidence of such damage. Seaboard Air Line R. Co. v. Brown [Ala.] 48 S 48. Where complaint left amount of medical bills blank, it was error to admit evidence thereof. Lexington R. Co. v. Britton [Ky.] 114 SW 295. Evidence in action for fraud held not to affect the amount of damages. Vaupel v. Mulhall [Iowa] 118 NW 272. It is error to permit an injured person to prove how long he was prevented from performing his work as newspaper carrier where such damages were not alleged. Farrington v. Cheponia [Conn.] 73 A 139. In an action for the price of printing done by plaintiff for defendant, evidence that parties for whom defendant had the work done refused to accept it, their grounds for refusal, and their damage because of imperfect work, was not admissible where the contract between plaintiff and defendant contained no reference to such contract. Zippert v. Acme Advertising, Engraving & Print. Co., 113 NYS 998.

5. In action **for injuries to orchard** by fire, witnesses were properly permitted to state their opinions as to the market value of the orchard before and after the fire. St. Louis & S. F. R. Co. v. Shore [Ark.] 117 SW 515. An expert in ores may testify to the approximate **percentage of copper in ore.** Consolidated Kansas City Smelting & Refining Co. v. Gonzales [Tex. Civ. App.] 109 SW 946. A witness, though not an expert on land values, may give his opinion as **to extent of injury,** and may testify as to value of the land before and after the injury. Tennessee Coal, Iron & R. Co. v. McMillion [Ala.] 49 S 880. In action for **injury to trees** by fire, a qualified witness may testify to the number of trees destroyed and the difference in their value before and after the fire. Hart v. Chicago & N. W. R. Co., 83 Neb. 652, 120 NW 176.

6. Held competent: A salesman of 10 years' experience at stockyards is competent to testify as to the market value of cattle at such yards. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. One who has been in the **cattle business for several years** may testify as to what effect delay in shipment of cattle would have on their saleable appearance. Id. **Owner of household goods** destroyed is competent to testify as to their value. Birmingham R., L. & P. Co. v. Hinton [Ala.] 47 S 576. One who has had **experience in putting up hay,** knew how much a tract would produce, cost of baling and value, may testify as to value of grass destroyed. Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166. One **who lives in the vicinity of land** and knows the market value of lands may testify as to such value before and after land has been burned over. Id. A witness, otherwise qualified, may testify as to **value of mules** described to, but not seen by, him. Gulf, etc., R. Co. v. Gillespie [Tex. Civ. App.] 118 SW 628. A witness **familiar with the market value** of property at a particular place is competent to give an opinion. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 118 SW 759. **Raiser, breeder and shipper of horses,** who saw a shipment and was familiar with the market value, is competent to testify as to their value in the condition in which they arrived and in the condition in which they should have arrived but for delay and rough handling. Id. Witnesses showing **familiarity with value of lands** and probable injury thereto from division by a railroad are qualified to state their opinion as to damages. Wolf v. Green Bay, etc., R. Co. [Wis.] 122 NW 743. Shipper **who knows the value of goods** before and after injury, and whose testimony showed that he referred to such difference when speaking of amount of damages, his testimony was competent on the measure of damages. St. Louis & S. F. R. Co. v. Cash Grain Co. [Ala.] 50 S 81. **Experienced shippers,** familiar with the value of horses at a certain point, held competent to testify as to the value of a shipment at such point. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767. **Witnesses who saw horses** on their arrival and knew the market value at such point held competent to testify as to what would have been their value had they arrived in good condition. Id. One who has purchased **precious stones** in different cities and had purchased the stone in question about 2½ years before held competent to testify as to value. Sullivan v. Girson [Mont.] 102 P 320. Testimony of a **witness who had seen horses** immediately before shipment and six weeks afterwards is admissible as to their condition. Southern Exp. Co. v. Jacobs [Va.] 63 SE 17. **Stock dealers** are competent to testify as to impairment of value of animals by injury. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856. A **farmer engaged in raising crops** and live stock is competent to testify as to the value of such crops and stock. Anderson v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 1114.

Not qualified: Witness who had not seen a drove of cattle for two years was not competent to estimate the number of cattle. Gibbens v. Hart [Tex. Civ. App.] 117 SW 168. A witness may not testify as to value where his only knowledge comes from hearsay. Gulf, etc., R. Co. v. Gillespie [Tex. Civ. App.] 118 SW 628.

7. In action **for injuries to a building** by an explosion, evidence of injuries to an adjacent building was not admissible. Linforth v. San Francisco Gas & Elec. Co.

as to value of property,[9] or the extent of injury thereto,[10] loss of profits,[11] and dam-

[Cal.] 103 P 320. In action for wrongful expulsion of a member from a beneficial association, where there is an issue of exemplary damages, **evidence that expelled member had a home, wife and children,** is admissible as bearing on the effect such expulsion would have on his mind and reputation. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144. In action for delay in message announcing injury to a son, testimony as to **mental suffering** by the mother held not to violate rules as to peculiar and abnormal fears and apprehensions. Ogilvie v. Western Union Tel. Co. [S. C.] 64 SE 860.

Cause of injury: In action for injuries to building by an explosion of gas, defective pipe couplings held admissible. Linforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320. Evidence in conversion held inadmissible as **irrelevant to issue of punitive damages.** Crawford v. Thomason [Tex. Civ. App.] 117 SW 181. For wrongful ejection of passenger for nonpayment of fare, testimony that one not called as a witness told the conductor that he saw another conductor take up plaintiff's fare held **inadmissble** on question of punitive damages. Wells v. Boston & M. R. Co. [Vt.] 71 A 1103. As to the admissibility of evidence in mitigation of damages. In an action for wrongful levy on exempt property, that defendant acted under **advice of counsel** may be shown in mitigation. Grimestad v. Lofgren, 105 Minn. 286, 117 NW 515. In **statutory action for damages for selling liquor to a minor,** defendant could show in mitigation that such minor was in the habit of getting drunk at other places. Liebler v. Carrel [Mich.] 15 Det. Leg. N. 976, 118 NW 975. In **libel,** evidence that the article was copied from another paper under belief that it was true is admissible in mitigation. Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 NW 938. In action for **delay in delivering a death message,** evidence that sendee could have traveled cross country some 25 or 30 miles and attended the funeral was admissible in mitigation of damages only. Bailey v. Western Union Tel. Co., 150 N. C. 316, 63 SE 1044. In action for delay in transporting stock to market, evidence that owner was notified of delay and advised as to what to do with the cattle held admissible to show that he **refused to avail himself of opportunity to minimize damages.** Vencill v. Quincy, etc., R. Co., 132 Mo. App. 722, 112 SW 1030.

8. In action for injuries where punitive damages are recoverable, evidence of injured person's pecuniary condition is admissible. Bolles v. Kansas City So. R. Co., 134 Mo. App. 696, 115 SW 459. Evidence of wealth of defendant is not admissible in an action by a passenger for wrongful ejection from a street car. Savannah Elec. Co. v. Badenhoop [Ga. App.] 65 SE 50. In trespass for assault and battery, where punitive damages are recoverable, evidence of the pecuniary condition and social relations of the plaintiff may be given. Schmitt v. Kurrus, 140 Ill. App. 132. Where the plaintiff makes no effort to increase the damage by showing that the defendant is rich, the latter cannot show his financial standing in mitigation of damages. Harter v. Whitebread, 38 Pa. Super. Ct. 10.

9. **Admissible:** In action for delay in shipment of cattle, **market reports** showing list of sales, including sale of stock in question, was admissble to show that a market existed. St. Louis & S. F. R. Co. v. May [Tex. Civ. App.] 115 SW 900. Where contract for the sale of real property intended not only the real estate but also the benefits of **liquor license, business, and good will,** it was proper to give evidence of the value of each of them, in an action by the vendee against the vendor for the latter's refusal to perform. Harten v. Loffler, 212 U. S. 397, 53 Law. Ed. —. For wrongful taking of personal property, the value thereof at the time, and evidence of efforts to sell it several months thereafter, is not admissible. Burgin v. Marx [Ala.] 48 S 348. In action for injury to grazing land by sheep tramping down grass and polluting water and injuring tanks, where there was **no market value** of such items, price plaintiff was paying to state for pasturage was inadmissible where lease was entered into two years before. Tippett v. Corder [Tex. Civ. App.] 117 SW 186. But one familiar with sheep business was competent to testify as to such value. Id. In the absence of witnesses having personal knowledge of the market price, the **market quotations** or reports in newspapers of general circulation are admissible to establish market price at certain place. Tully v. Western Union Tel. Co., 141 Ill. App. 312. **Card published by an individual quoting prices** of a commodity held inadmissible in absence of a showing that dealers acted on such report. Merchants' Grocery Co. v. Ladoga Canning Co. [Ark.] 117 SW 767. In determining **market value of a crop** before and after injury, it is admissible to show the probable yield under proper cultivation, the expense of cultivation and the value when matured, and cost of marketing. Missouri, K. & T. R. Co. v. Riverhead Farm [Tex. Civ. App.] 117 SW 1049. That the court set out such evidence in its findings and indicated that it was controlled by it does not show that it resorted to an improper measure of damages. Id. In action for **injury to cabbages** because of delay in shipment, testimony that the amount realized from sale at destination was the cash market price and that they were sold for the best price obtainable. Missouri, K. & T. R. Co. v. McLean [Tex. Civ. App.] 118 SW 161. In action for **burning over pasture land,** where both real and market value was alleged, evidence that the grass had a real but no market value. Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166. In action for **damages caused by fire** set out by a railroad, testimony of a witness who had estimated damage for the company as to whether he had instructions from the stock claim agent held proper cross-examination. Southern R. Co. v. Dickens [Ala.] 49 S 766. In estimating **damage to growing crops,** evidence of the value of matured crops of like kind in the same neighborhood. Smith v. Hicks [N. M.] 98 P 138. In action for **injury to a building** caused by an explosion, evidence of original cost and that it was as good as new at time of injury. Linforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320. In action for **injuries to a**

ages sustained by breach of contract,[12] are illustrated in the footnotes. A witness may not testify as to an issue to be determined by the jury,[13] nor give his opinion as to the amount of damage,[14] but this rule is subject to the exception that a shipper suing for injury to goods may state his opinion as to the amount of damage.[15]

Personal injury actions. See 11 C. L. 1010—An injured person may testify as to his injuries.[16] Expert testimony[17] is admissible as to the extent of injuries,[18] their

steam roller, evidence of cost of repairs less increased value of the repaired machine above its value before injury. Cadwell v. Canton, 81 Conn. 288, 70 A 1025. In trover, evidence of **amount goods converted** brought at auction sale is evidence of value in absence of showing that they brought unusual prices. Swartz v. Gottlieb-Bauren-Schmidt-Straus Brew. Co., 109 Md. 393, 71 A 854.

Inadmissible: Unauthenticated **item of sale** held inadmissible in an action for injury to cattle in transit. Gulf, etc., R. Co. v. Lampkin [Tex. Civ. App.] 116 SW 128. In action in trover for cutting logs, held error to permit proof of **value of lumber** at mill in absence of proof that logs had been converted into lumber. Craze v. Alabama State Land Co., 155 Ala. 431, 46 S 479. Where there is a **market value** for goods which a seller falls to deliver, evidence of what the buyer paid for other goods. Strohmeyer & Arpe Co. v. Hartley Silk Mfg. Co., 130 App. Div. 102, 114 NYS 287. For **injury to land** in May by flooding, where the only evidence that conditions were the same up to the following March was the testimony of one witness that there had been practically no change in values, evidence of value in March. Missouri, K. & T. R. Co. v. Chilton [Tex. Civ. App.] 118 SW 779. Testimony of an expert on an issue of **depreciation in the value** of fixtures that there would be a depreciation of 40 per cent, qualified by the statement that he meant all he would pay for the property was 60 per cent of the purchase price, was not proper evidence of value. Bernstein v. Feldstein, 113 NYS 729.

10. In an action for failure to re-ice a car of fruit, evidence as to what the fruit would have sold for is admissible. Pennsylvania R. Co. v. Orem Fruit & Produce Co. [Md.] 73 A 571. In action for injuries to standing timber by fire, evidence of the damage to the timber itself was admissible, though diminished value of the land was the measure of damages. Miller v. Neale, 137 Wis. 426, 119 NW 94. A paper offered by defendant on subject of estimate for repairs of an article injured held inadmissble where the proof failed to identify the estimate with the article damaged. Gershel v. White's Exp. Co., 113 NYS 919.

11. In action for present and prospective damages arising from breach of contract to pay a certain price per thousand for cutting and delivering timber, prospective damages are to be determined on the basis of value at date of breach; and evidence that cost of logging after breach had increased is not admissible though fluctuation may be considered in estimating prospective damages. Hawk v. Pine Lumber Co., 149 N. C. 10, 62 SE 752. In action against landlord for refusing to permit plaintiff to occupy premises and for breaking up personal property, books of account showing agreement and extent of business held admissible. Standard Amusement & Mfg. Co. v. Champion, 76 N. J. Law, 771, 72 A 92. Evidence of amount of a tenant's restaurant business and profits held admissible on question of value of the unexpired term. Probst v. Hinesley [Ky.] 117 SW 389.

12. For breach of **contract to deliver** goods, market value at other than place of delivery may in some cases be shown in determining measure. United States Commercial Co. v. Joachimstahl [N. J. Law] 72 A 46. In action by purchase for **difference between contract** price of rejected goods and goods purchased to replace them, evidence that seller sold rejected goods for more than the contract price was inadmissible. Merchants' Grocery Co. v. Ladoga Canning Co. [Ark.] 117 SW 767. In action for **failure to re-ice a car of tomatoes,** the original account of sales of a car of tomatoes at the destination was admissible. Pennsylvania R. Co. v. Orem Fruit & Produce Co. [Md.] 73 A 571. For **delay of carrier in delivering threshing outfit,** evidence that because of delay consignee was prevented from doing threshing held admissible. St. Louis, etc., R. Co. v. Hutson [Tex. Civ. App.] 120 SW 213. Where contractor stipulated with a subcontractor that expense incurred on failure of latter to perform should be audited and certified by architect and the architect refused to give such certificate, the contractor in suing for damages could show expense incurred. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

13. In action for injuries to land, testimony as to what extent the value of the use of the premises had depreciated was properly excluded as being an opinion upon an issue to be determined by the jury. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100. Testimony as to how far healthful and comfortable enjoyment of the premises had been impaired was inadmissible for the same reason. Id.

14. A witness may not give his opinion as to amount of damages. Seaboard Air Line R. Co. v. Brown [Ala.] 48 S 48. Damages done to crops by trespassing cattle. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. Where a witness detailed the damage to his wagon, his statement that "the wagon was easily damaged $50" was not objectionable as an opinion. Bilhimer v. Metropolitan St. R. Co. [Mo. App.] 119 SW 502. In action for alienation of affections, testimony as to amount of damages are mere expressions of opinion and incompetent. Adkins v. Kendrick [Ky.] 115 SW 814.

15. St. Louis & S. F. R. Co. v. Cash Grain Co. [Ala.] 50 S 81.

16. Questions asked injured person as to whether injury was temporary or permanent were proper on question of extent of injury. Birmingham R., L. & P. Co. v. Pritchett [Ala.] 49 S 782. Injured person may testify on his own behalf as to his

effect,[19] and probable cause,[20] and nonexperts may testify as to the effects thereof.[21] Miscellaneous holdings as to the admissibility of evidence to show the extent of injuries,[22] their cause,[23] their effect,[24] loss of time and earnings,[25] and medical treat-

physical condition, within a reasonable time prior and subsequent, that he had done no work since the accident. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. That he has not been capable of following his usual occupation, nor other designated labor since injury, to show diminished earning capacity. St. Louis S. W. R. Co. v. Norvell [Tex. Civ. App.] 115 SW 861. A nonexpert may testify that his ribs were broken in an accident. Wise v. Wabash R. Co., 135 Mo. App. 230, 115 SW 452. Following question held proper: "What were your services just prior to this time fairly and reasonably worth?" Barnes v. Danville St. R. & L. Co., 143 Ill. App. 259.

17. An osteopath of 23 years' experience who treated an injured person is qualified to testify as to his subjective symptoms observed during treatments. Barnes v. Danville St. R. & L. Co., 235 Ill. 566, 85 NE 921. Physician was properly not permitted to testify as to whether he had seen a chancre on injured person's person where the question was not limited to a time somewhere near the date of injury. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. Proper to refuse to permit a physician to testify as to whether injured person was a hard drinker where there was no evidence that injury might have resulted from drink, though such testimony might have been admissible later. Id. Testimony of attending physician as to physical condition of plaintiff based upon what he observed and ascertained by tests was not incompetent because conclusion was based in part upon statements of plaintiff. Fuhry v. Chicago City R. Co., 144 Ill. App. 521.

18. A duly qualified expert who has examined an injured person may testify to any physical fact he found to exist. Lexington R. Co. v. Woodward [Ky.] 118 SW 965.

19. A physician may give an opinion as to the condition of an injured person's health and as to the probable result of her illness. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. That witnesses were physicians did not disqualify them to testify that plaintiff walked with a limp, and dragged her foot and that the toe of her right shoe was worn. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. Attending physician may testify as to his knowledge, acquired as such physician, of plaintiff's suffering pain from the injury. Wilson v. Chicago City R. Co., 144 Ill. App. 604.

20. Expert may testify that an injured person's condition might have been caused by an injury. De Courcy v. Prendergast Const. Co. [Mo. App.] 120 SW 632. Experts may testify as to cause of injured person's impaired physical condition subsequent to the injury. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113.

21. The parent of an injured person may testify that before injury her health was good and her disposition bright and cheerful and that since the injury it had been the reverse. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. One who has seen an injured person nearly every day for a year may state the apparent condition of her health. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961. A nonexpert who is acquainted with an injured person may give his opinion as to whether his voice is weak or strong and compare his physical condition before and after his injury. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. One may testify that since injury the injured person often complained of suffering. St. Louis S. W. R. Co. v. Norvell [Tex. Civ. App.] 115 SW 861. A nonexpert may testify as to the apparent health of a person whom he has had opportunity to observe. Partello v. Missouri Pac. R. Co., 217 Mo. 645, 117 SW 1138.

22. **Held admissible: X-ray photographs** in an action for injuries. Houston & T. C. R. Co. v. Shapard [Tex. Civ. App.] 118 SW 596. It was proper to refuse to permit a physician to state whether, judging from a wound when injured person first came to see him, it **could have been cured if it had been treated** when injured person went to defendant's regular physician, who dressed it and gave injured person no directions about coming again. Sloss-Sheffield Steel & Iron Co. v. Salser [Ala.] 48 S 374. Evidence of injured person's **physical condition a reasonable time after the injury.** St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. Where injured person returned to work, he was **not bound to remain until discharged,** but could seek other employment as soon as he ascertained that he could not perform the service required, and to render evidence of such other employment admissible it need not appear that he procured the highest wages possible. Roth v. Buettel Bros. Co. [Iowa] 119 NW 166. On issue as to extent of personal injuries, **compensation received by the injured person in new employment** after his injury is presumed to be the value of his services. Id. In **assault and battery** a witness may testify that shortly after the fight she washed the blood from plaintiff's hand, telephoned for the doctor, and statement as to what she observed as to other injuries and pain is admissible. Yount v. Strickland, 17 Wyo. 526, 101 P 942. For **injuries to an infant,** evidence as to length of time he was unable to work is competent to show extent of injury and effect on future earning capacity though he could not recover for loss of time. Ferrari v. Beaver Hill Coal Co. [Or.] 102 P 1016. **Expressions of bodily and mental feelings** some time after the injury. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83. Expressions of injured person while being taken from the wreck and immediately thereafter are res gestae. Denver City Tramway Co. v. Martin, 44 Colo. 324, 98 P 836. Statements made by injured person to her physician while he was treating her. Marshall v. Saginaw Val. Trac. Co. [Mich.] 16 Det. Leg. N. 357, 122 NW 131. Involuntary shrieks and exclamations of pain of an injured person. Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452, 113 SW 730. Complaints or statements of present

symptoms by injured person to his physician held admissible in connection with opinion of physician. De Courcy v. Prendergast Const. Co. [Mo. App.] 120 SW 632. Testimony of expressions of pain and suffering of an injured person are not inadmissible as self-serving declarations. Missouri, K. & T. R. Co. v. Dalton [Tex. Civ. App.] 120 SW 240. Declarations of the injured person in a personal injury action when made as a part of the res gestae, or to a physician during treatment or upon an examination prior to, and without reference to, the bringing of an action for damages, may be introduced in evidence. Shaughnessy v. Holt, 236 Ill. 485, 86 NE 256. Declaration made by an injured person on her return home **is not res gestae.** Miller v. McConnell [S. D.] 120 NW 888. Evidence of declarations of present pain is admissible, but declarations of past pain or reasons for a particular course of conduct, etc., is not. Etzkorn v. Oelwein [Iowa] 120 NW 636.

23. In action for injury to one affected by hysteria, evidence of physical condition of her mother unaccompanied by offer to prove such condition of mother as would be competent on the question whether her condition was caused by the injury or inherited was not admissible. James v. Boston El. R. Co., 201 Mass. 263, 87 NE 474. Plaintiff held not to have preponderately proven that the condition of his knee was due exclusively to the fall as alleged. Hynes v. State, 63 Misc. 592, 118 NYS 621. Evidence of a prior injury and experiencing persistently thereafter symptoms similar to some of those of which plaintiff complained after alleged injury to him by defendant held admissible to show that plaintiff's condition may have been caused by something other than defendant's negligence. Wheeler v. Milner, 137 Wis. 26, 118 NW 187. A passenger set down at a wrong station may testify whether anything had happened to her that she knew of that could cause the injury complained of other than alighting from the train. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315.

24. Where injured person claimed that by reason of blow in region of the lungs he contracted tuberculosis, it was proper on cross-examination of expert to ask whether tuberculosis ever resulted from such causes. Missouri, K. & T. R. Co. v. Dalton [Tex. Civ. App.] 120 SW 240. Evidence that one was made nervous and had to go to bed and send for a physician on account of alleged mistreatment is admissible under an allegation that mental pain was caused by the mistreatment. Georgia So. & F. R. Co. v. Ransom, 5 Ga. App. 740, 63 SE 525. Evidence that since the injury injured person had done no work and could do none is admissible. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. Evidence that injured person suffered loss of weight, pain down to time of trial, and insomnia. Id. In action for injuries, question asked injured person to show that she was out evenings and directly engaged in occupations indicating that she was not seriously hurt, etc., properly excluded as not bearing on the case. McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223. Radiographs held admissible to show that second operation was necessary. Wallace v. Pennsylvania R. Co., 222 Pa. 556, 71 A 1006. In an action for being bitten by a dog, testimony as to plaintiff's **fear of acquiring hydrophobia** was relevant. Buck v. Brady, 110 Md. 568, 73 A 277. Evidence that before she was injured she was strong and healthy and afterwards she walked with a limp. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. In action for injuries to a woman it was held **not admissible** to permit her to testify that by her fall her unborn child was forced into an unnatural position and that she suffered additional pain during childbirth. Etzkorn v. Oelwein [Iowa] 120 NW 636.

25. That one suing for impaired earning capacity was a tramp is admissible as to his credibility and as to measure of damages. Central of Georgia R. Co. v. Moore, 5 Ga. App. 562, 63 SE 642. On an issue of permanent **diminution of earning capacity,** it was held admissible to permit the injured person to state that he could not do more than one-half as much work in his usual vocation as before injury. Atlanta, W. P. & R. Co. v. Haralson [Ga.] 65 SE 437. Record evidence of injured person's **conviction in a federal court** for losing a letter while in the mail service five years prior to trial held too remote on question of earning capacity. Missouri, K. & T. R. Co. v. Adams, 42 Tex. Civ. App. 274, 114 SW 453. Brakeman **in line for promotion** to conductor could show what a conductor earns, on question of future earnings. Missouri, K. & T. R. Co. v. Lasater [Tex. Civ. App.] 115 SW 103. Where one sued to recover for injuries to his mind and nervous system as well as to his body, held evidence as to money invested and interest which were liable to suffer because of his sickness tended to show that business anxieties rather than the injury affected his system and was not admissible. Statter v. Ray Mfg. Co., 195 N. Y. 478, 88 NE 1063. To establish diminished earning capacity, injured person may show **wages received prior to injury** and at time of trial. Rushing v. Seaboard Air Line R. Co., 149 N. C. 158, 62 SE 890. Where injured person testified that he was unable to pursue his occupation or perform as hard work as before, evidence as to what he earned since injury and what work he had been able to do was admissible. Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005. What plaintiff had been earning prior to injury is competent, on issue of general damages. Barnes v. Danville St. R. & L. Co., 235 Ill. 566, 85 NE 921. In fixing damages on question of comparative earning capacity at time of and after injury, all evidence tending to show ordinary pursuits and extent to which injury incapacitated him is admissible. Knox v. American Rolling Mill Corp., 236 Ill. 437, 86 NE 90. Evidence of former occupation in which he could have obtained employment but which he was not following. Id.

Too remote: Evidence that prior to injured person's marriage, 23 years before, she worked for certain compensation, improperly admitted to show earning capacity. Buck v. McKeesport [Pa.] 72 A 514. Where injured person was building contractor and sometimes furnished work and labor and at others only the work or labor, his income preceding the injury must be classified as uncertain business profits which could not

ment,[26] are noted below. No evidence is admissible which simply appeals to the sympathies of the jury.[27]

Proof of life expectancy. See 11 C. L. 1012 is admissible where injuries are permanent.[28] Mortality tables are admissible [29] but are not conclusive on the question of

be considered. Gombert v. New York Cent. & H. R. R. Co., 195 N. Y. 273, 88 NE 382.

26. Under complaint that injured person had contracted debt for medical expenses, it is admissible to show such debt though it has not been paid. Standard Distilling & Distributing Co. v. Hill [C. C. A.] 166 F 99. Where complaint for injuries alleged expense incurred for medical aid and medicines, evidence of the reasonable value of the physician's services was admissible. City Council of Montgomery v. Shirley [Ala.] 48 S 679.

27. Evidence that injured person had arranged to go into business. United R. & Elec. Co. v. Riley, 109 Md. 327, 71 A 970. Evidence that injured person was married after the injury. United R. & Elec. Co. v. Riley, 109 Md. 327, 71 A 970.

28. Carlisle Tables of Mortality are admissible in action for **selling liquor to intoxicated person.** Acken v. Tinglehoff, 83 Neb. 296, 119 NW 456. In action by minors for damages for sale of liquor to their father causing his death, mortality tables were admissible. Peterson v. Brackey [Iowa] 119 NW 967. Mortality tables are admissible where there is ample evidence that the **injury is permanent.** Haney v. Pinckney [Mich.] 15 Det. Leg. N. 1130, 119 NW 1099. Mortality tables are admissible where evidence shows the **loss of tips of four fingers** and that the injury is permanent. Duskey v. Green Lake Shingle Co., 51 Wash. 145, 98 P 99.

29. Robinson v. Helena L. & R. Co., 38 Mont. 222, 99 P 837. Mortality tables are competent to show life expectancy. Piper v. Boston & M. R. Co. [N. H.] 72 A 1024. Wigglesworth life tables are admissible **without proof of accuracy.** Winn v. Cleveland, etc., R. Co., 239 Ill. 132, 87 NE 954. Mortality tables giving expectancy of persons in ordinary occupations are admissible as to expectancy of railroad fireman notwithstanding extra hazardous occupation, which is to be considered in connection therewith. Louisville & N. R. Co. v. McMillen [Ky.] 119 SW 221.

NOTE. Mortality tables. Admissibility and effect: As a general rule, mortality tables are admissible whenever the probable duration of a person's life is material. Richmond & D. R. Co. v. Hissong, 97 Ala. 187, 13 S 209; Arkansas Midland R. Co. v. Griffith, 63 Ark. 491, 39 SW 550; Townsend v. Briggs [Cal.] 32 P 307; McMahon v. Bangs, 5 Pen. (Del.) 178, 62 A 1098; Duval v. Hunt, 34 Fla. 85, 15 S 876; Atlanta Consol. St. R. Co. v. Beauchamp, 93 Ga. 6, 19 SE 24; Chicago, B. & Q. R. Co. v. Jounson, 36 Ill. App. 564; Louisville, etc., R. Co. v. Miller, 141 Ind. 533, 37 NE 343; McDonald v. Chicago, etc., R. Co., 26 Iowa, 124; Coffeyville Min. & Gas Co. v. Carter, 65 Kan. 565, 70 P 635; Greer v. Louisville & N. R. Co., 94 Ky. 169, 21 SW 649, 42 Am. St. Rep. 345; Haynes v. Waterville & O. St. R. Co., 101 Me. 335, 64 A 614; Banks v. Braman, 195 Mass. 97, 80 NE 799; Mott v. Detroit, etc., R. Co., 120 Mich. 127, 79 NW 3; Scheffler v. Minneapolis & St. L. R. Co., 32 Minn. 518, 21 NW 711; Boettger v. Scherpe & Koken Architectural Iron Co., 136 Mo. 531, 38 SW 298; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; Sellars v. Foster, 27 Neb. 118, 42 NW 907; Camden & A. R. Co. v. Williams, 61 N. J. Law, 646, 40 A 634; Johnson v. Hudson River R. Co., 6 Duer [N. Y.] 633; Kraut v. Frankford & S. R. City Pass. R. Co., 160 Pa. 327, 28 A 783; Sweet v. Providence & S. R. Co., 20 R. I. 785, 40 A 237; Bussey v. Charleston & W. C. R. Co., 78 S. C. 352, 58 SE 1015; Tenney v. Rapid City, 17 S. D. 283, 96 NW 96; Mississippi, etc., R. Co. v. Ayres, 16 Lea [Tenn.] 725; San Antonio & A. P. R. Co. v. Moore [Tex. Civ. App.] 72 SW 226; Norfolk & W. R. Co. v. Spencer's Adm'x, 104 Va. 657, 52 SE 310; Mills v. Catlin, 22 Vt. 98; Snell v. Jones, 49 Wash. 582, 96 P 4; Crouse v. Chicago & N. W. R. Co., 102 Wis. 196, 78 NW 446, 778; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 Law. Ed. 257. Any standard table is admissible but those most frequently approved by the courts are those based on American experience. Georgia R. & Bkg. Co. v. Oaks, 52 Ga. 410; Shover v. Myrich, 4 Ind. App. 7, 30 NE 207; Scheffler v. Minneapolis & St. L. R. Co., 32 Minn. 518, 21 NW 711; Sellars v. Foster, 27 Neb. 118, 42 NW 907; Mississippi, etc., R. Co. v. Ayres, 15 Lea [Tenn.] 725; Gulf, etc., R. Co. v. Smith [Tex. Civ. App.] 26 SW 645; Whelan v. New York, etc., R. Co., 38 F 15. Mortality tables prepared pursuant to § 1471a, Code Supplement, are admissible. Clark v. Van Vleck, 135 Iowa, 194, 112 NW 648. Mortality statutes contained in How. Ann. St. 1882, § 4225, admitted. Hunn v. Michigan Cent. R. Co., 78 Mich. 513, 44 NW 502, 7 L. R. A. 500. Tables of American Legion of Honor admitted. San Antonio & A. R. R. Co. v. Bennett, 76 Tex. 151, 13 SW 319. Tables in Flatchcraft Insurance Manual admitted. Missouri, K. & T. R. Co. v. Ransom, 15 Tex. Civ. App. 689, 41 SW 828. Tables in Wis. St. 1898, § 3871, admitted. Crouse v. Chicago & N. W. R. Co., 102 Wis. 196, 78 NW 446, 778. Table of mortality based on **American** experience (see 3 Rev. St. N. Y. [Bank's 7th Ed.] p. 1497) admitted. Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Smiser v. State, 17 Ind. App. 519, 47 NE 229; Kreuger v. Sylvester, 100 Iowa, 647, 69 NW 1059; Alexander v. Bradley, 3 Bush. [Ky.] 667; Andrews v. Brough, 84 Mo. App. 640; Attorney General v. North America Life Ins. Co., 82 N. Y. 172; Kraut v. Frankford, etc., R. Co., 160 Pa. 327, 28 A 783; Mississippi, etc., R. Co. v. Ayres, 16 Lea [Tenn.] 725; Galveston, etc., R. Co. v. Johnson, 24 Tex. Civ. App. 180, 58 SW 622; Southern Pac. Co. v. Cavin [C. C. A.] 144 F 348. **Carlisle tables** admitted. Denver, etc., R. Co. v. Woodward, 4 Colo. 1; Central R. Co. v. Crosby, 74 Ga. 734; Louisville, etc., R. Co. v. Miller, 141 Ind. 533, 37 NE 343; Allen v. Ames C. R. Co., 106 Iowa, 602, 76 NW 848; Scheffler v. Minneapolis & St. L. R. Co., 32 Minn. 518, 21 NW 711; O'Melilla v. Kansas City, etc., R. Co., 115 Mo. 205, 21 SW 503, 55 Am. Dec. 142; Sellars

v. Foster, 27 Neb. 118, 42 NW 907; Roose v. Perkins, 9 Neb. 304, 2 NW 715, 31 Am. Rep. 409; Camden & A. R. Co. v. Williams, 61 N. J. Law, 646, 40 A 634; Sauter v. New York, C. & H. R. Co., 6 Hun, 446, 66 N. Y. 50, 23 Am. Rep. 18; Steinbrunner v. Pittsburgh & W. R. Co., 146 Pa. 504, 23 A 239, 28 Am. St. Rep. 806; Sweet v. Providence & S. R. Co., 20 R. I. 785, 40 A 237; Galveston, etc., R. Co. v. Leonard [Tex. Civ. App.] 29 SW 995; Brown v. Blaine, 41 Wash. 287, 83 P 310; McKeigue v. Janesville, 68 Wis. 50, 31 NW 298; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 554, 30 Law. Ed. 257.

Most courts take judicial notice of the standard tables and hence no preliminary proof is ordinarily necessary. Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Louisville & N. R. Co. v. Miller, 141 Ind. 533, 37 NE 343; Kreuger v. Sylvester, 100 Iowa, 647, 69 NW 1059; Atchison, etc., R. Co. v. Ryan, 62 Kan. 682, 64 P 603; Scheffler v. Minneapolis & St. L. R. Co., 32 Minn. 518, 21 NW 711; Wager v. Schuyler, 1 Wend. [N. Y.] 608, 19 Am. Dec. 537; Ferryboat, D. S. Gregory, etc., 2 Ben. (U. S.) 239. Where such tables are not judicially noticed, they may ordinarily be shown by any standard work containing them and experts may be allowed to testify to their authenticity and value. Central R. Co. v. Richards, 62 Ga. 306; Shover v. Myrich, 4 Ind. App. 7, 30, NE 207; Erb v. Popritz, 59 Kan. 264, 52 P 871, 68 Am. St. Rep. 362. Mortality tables are not conclusive but are competent to be weighed with all the other evidence. Birmingham Mineral R. Co. v. Wilmer, 97 Ala. 165, 11 S 886, 38 Am. St. Rep. 179; Central R. Co. v. Crosby, 74 Ga. 737, 58 Am. Rep. 463; Joliet v. Blower, 155 Ill. 414, 40 NE 619, 31 L. R. A. 70, 40 Am. St. Rep. 348; Smiser v. State, 17 Ind. App. 519, 47 NE 229; Keyes v. Cedar Falls, 107 Iowa, 509, 78 NW 227; Atchison, etc., R. Co. v. Hughes, 55 Kan. 491, 40 P 919; Greer v. Louisville & N. R. Co., 94 Ky. 169, 21 SW 649, 42 Am. St. Rep. 345; Hunn v. Michigan Cent. R. Co., 78 Mich. 513, 44 NW 502, 7 L. R. A. 500, 41 Am. & Eng. R. Cas. 452; Scheffler v. Minneapolis & St. L. R. Co., 32 Minn. 518, 21 NW 711, 19 Am. & Eng. R. Cas. 452; Friend v. Ingersoll, 39 Neb. 717, 58 NW 281; Camden & A. R. Co. v. Williams, 61 N. J. Law, 646, 40 A 634; Steinbrunner v. Pittsburgh & W. R. Co., 146 Pa. 504, 23 A 239, 28 Am. St. Rep. 806; Bussey v. Charleston & W. C. R. Co., 78 S. C. 352, 58 SE 1015; Texas-Mexican R. Co. v. Higgins, 44 Tex. Civ. App. 523, 17 Tex. Ct. Rep. 685, 99 SW 200; McKeigue v. Janesville, 68 Wis. 50, 31 NW 298; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 554, 30 Law. Ed. 257.

Life Expectancy Tables.

Ages.	Actuaries' Table.	American Table.	Carlisle Table.
15	44.96	45.50	45.00
16	44.27	44.85	44.27
17	43.58	44.19	43.57
18	42.88	43.53	42.87
19	42.19	42.87	42.17
20	41.49	42.20	41.46
21	40.70	41.53	40.75
22	40.09	40.85	40.04
23	39.39	40.17	39.31
24	38.08	39.49	38.59
25	37.98	38.81	37.86
26	37.27	38.12	37.14
27	36.56	37.43	36.41
28	35.86	36.73	35.69
29	35.15	36.03	35.00
30	34.43	35.33	34.34
31	33.72	34.63	33.68
32	33.01	33.92	33.03
33	32.30	33.21	32.36
34	31.58	32.50	31.68
35	30.87	31.78	31.00
36	30.15	31.07	30.32
37	29.44	30.35	29.64
38	28.72	29.62	28.96
39	28.00	28.90	28.28
40	27.28	28.18	27.61
41	26.56	27.45	26.97
42	25.84	26.72	26.34
43	25.12	26.00	25.71
44	24.40	25.27	25.09
45	23.69	24.54	24.46
46	22.97	23.81	23.82
47	22.27	23.08	23.17
48	21.56	22.36	22.50
49	20.87	21.63	21.81
50	20.18	20.91	21.11
51	19.50	20.20	20.39
52	18.82	19.49	19.68
53	18.16	18.79	18.97
54	17.50	18.09	18.28
55	16.86	17.40	17.58
56	16.22	16.72	16.89
57	15.59	16.05	16.21
58	14.97	15.30	15.55
59	14.37	14.74	14.92
60	13.77	14.10	14.34
61	13.18	13.45	13.82
62	12.61	12.86	13.31
63	12.05	12.26	12.81
64	11.51	11.67	12.30
65	10.97	11.10	11.79
66	10.46	10.54	11.27
67	9.96	10.00	10.75
68	9.47	9.47	10.23
69	9.00	8.97	9.70
70	8.54	8.48	9.18
71	8.10	8.00	8.65
72	7.67	7.55	8.16
73	7.26	7.11	7.72
74	6.86	6.68	7.33
75	6.48	6.27	7.01
76	6.11	5.88	6.69
77	5.76	5.49	6.40
78	5.42	5.11	6.12
79	5.09	4.74	5.80
80	4.78	4.39	5.51
81	4.48	4.05	5.21
82	4.18	3.71	4.93
83	3.90	3.39	4.65
84	3.53	3.08	4.39
85	3.36	2.77	4.12
86	3.10	2.47	3.90
87	2.84	2.18	3.71
88	2.59	1.91	3.59
89	2.35	1.66	3.47

diminished earning capacity,[30] and are not the only evidence of life expectancy,[31] nor are they the proper basis for computing future suffering or other prospective damages.[32, 33]

Physical examination and exhibition of injuries. See 11 C. L. 1012—Requiring physical examination of an injured person rests in the discretion of the court,[34] unless the injured person voluntarily exhibits his injury to the jury.[35] It is generally proper to permit exhibition of an injured member to the jury.[36]

(§ 7) *C. Instructions.*[37] See 11 C. L. 1013—An injured person may submit the question of damages in a separate instruction.[38] The jury should be given instructions stating the law governing the measure of damages,[39] but the court need not direct the process by which a verdict shall be reached.[40] Instructions should be so framed as not to permit of double recovery.[41] They should limit recovery to the

Ages.	Actuaries' Table.	American Table.	Carlisle Table.
90	2.11	1.42	3.28
91	1.89	1.19	3.26
92	1.67	.98	3.37
93	1.47	.80	3.48
94	1.28	.64	3.53

30. Are to be considered in connection with the habits, general health, etc., of injured person. Robsinson v. Helena L. & R. Co., 38 Mont. 222, 99 P 837.

31. Question of life expectancy need not be shown by mortality tables, but may be submitted on evidence of age, health, habits and physical condition. St. Louis, etc., R. Co. v. Glossup [Ark.] 114 SW 247.

32, 33. They being based upon lives of healthy men. Canfield v. Chicago, etc., R. Co. [Iowa] 121 NW 186.

34. Where demand therefor was refused prior to trial but the court intimated that it would grant such motion if necessary, its action was held within its discretion. Atlantic Coast Line R. Co. v. Dees [Fla.] 48 S 28; Macon & B. R. Co. v. Ross [Ga.] 65 SE 146. After plaintiff has testified to his injuries, he may be compelled to exhibit injured parts. Larson v. Salt Lake City, 34 Utah, 318, 97 P 483. In action for injuries defendant cannot require the court to appoint physicians to examine the injured person nor compel him to submit to such examination. Missouri, K. & T. R. Co. v. Rogers [Tex. Civ. App.] 117 SW 939. Physical examination of injured party may be made by physician appointed by the court if injured party consents unconditionally. San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716. **Not an abuse of discretion** to refuse to require an injured person to submit to a third physical examination by defendant's physicians. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Not error to refuse to require injured person to undergo physical examination by defendant's physicians. Taylor v. White [Tex. Civ. App.] 113 SW 554. Held not error to refuse examination which would tend to augment illness of plaintiff. Logan v. Agricultural Soc. of Lenawee County [Mich.] 16 Det. Leg. N. 192, 121 NW 485.

35. Where an injured person voluntarily exhibited his injured knee to the jury, the defendant was entitled to require him to submit to surgical examination. Chicago & N. W. R. Co. v. Kendall [C. C. A.] 167 F 62.

36. Where injured person lost both legs below the knee, it was not error to permit him to exhibit the loss to the jury and to walk before them. Southern R. Co. v. Brock [Ga.] 64 SE 1083.

37. Search Note: See Damages, Cent. Dig. §§ 537-562; Dec. Dig. §§ 210-218; 13 Cyc. 234, 236, 240, 244, 246, 247; 5 A. & E. Enc. P. & P. 780.

38. Scott v. Metropolitan St. R. Co. [Mo. App.] 120 SW 131.

39. Where there are different rules of measuring damages, the court should first hear the evidence and then instruct the jury as to the measure to be applied. Bigham v. Wabash-Pittsburg Terminal R. Co. [Pa.] 72 A 318. In action for breach of a business contract, the court must charge some measure of damages for the guidance of the jury. C. B. Coles & Sons Co. v. Standard Lumber Co., 150 N. C. 183, 63 SE 736. The court must charge as to what elements and within what limits damages may be estimated. Western Maryland R. Co. v. Martin, 110 Md. 554, 73 A 267; Rock Creek Steamboat Co. v. Boyd [Md.] 73 A 662. In action for breach of contract, it is error to instruct jury that "you can adopt such estimate of damages as you think proper" without instructing as to legal measure of damages. Seligman v. Beecher, 36 Pa. Super. Ct. 475. In action for pollution of a spring, a charge to award such amount as would fairly compensate the owner was erroneous as fixing no measure of damages. Cincinnati, etc., R. Co. v. Gillespie [Ky.] 113 SW 89.

40. It is sufficient if the court lays down the proper measure of damages. Reeks v. Seattle Elec. Co. [Wash.] 104 P 126.

41. Double damages not allowed: Charge to award compensation for expense incurred for medical treatment, mental and physical pain, loss of time, future pain, mental anguish and impaired ability to earn money. St. Louis S. W. R. Co. v. Stanley [Tex. Civ. App.] 114 SW 676. Not authorized by charge to award damages for mental and physical pain suffered because of fright and getting wet and for humiliation and pain caused by being expelled from a waiting room. Texas Midland R. Co. v. Geraldon [Tex. Civ. App.] 117 SW 1004. In action for expulsion from railroad waiting room, instruction as to damages for mental and physical pain and humiliation. Id. To allow compensation for mental and physical suffering, past and future, and for diminished earning capacity in the future. Lyon v. Bedgood [Tex. Civ.

amount claimed [42] and should not exclude the idea of nominal [43] or punitive damages,[44] and, in a close case, the duties of the parties should be defined with precision.[45] They should be predicated on issues made by the pleadings and evidence [46]

App.] 117 SW 897. Charge permitting recovery for "any pain of body, any mental distress, any humiliation or shame," held not to authorize double recovery for mental distress. International & G. N. R. Co. v. Hood [Tex. Civ. App.] 118 SW 1119.

Held erroneous: In action for injuries to minor charge stating items of damage and authorizing consideration of diminished earning capacity and also to inability to pursue the course of life he might. Stamford Oil Mill Co. v. Barnes [Tex. Civ. App.] 119 SW 872. Instruction in an action for fraud. Simons v. Cissna, 52 Wash. 115, 100 P 200. In an action for breach of contract where the jury is specifically directed as to damages according to the evidence, it is error to further instruct to award any other damage which they find had been sustained. National Handle Co. v. Huffman [Mo. App.] 120 SW 690. Charge in action for injuries held objectionable as authorizing double damages for same pain of body or mind and same injury and for mental distress disconnected from any injury. Westervelt v. St. Louis Transit Co. [Mo.] 121 SW 114.

42. It is error to authorize recovery of the reasonable value of the thing destroyed without limiting recovery to the amount alleged. Texas & P. R. Co. v. Graffeo [Tex. Civ. App.] 118 SW 873.

43. Charge excluding idea that nominal damages can be assessed is erroneous. Smith v. Wolf [Ala.] 49 S 395.

44. Charge in trespass held to exclude an award of punitive damages. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548.

45. Where injured person's condition was such as was likely to appeal to the jury, defendant had the right to have her duties in the situation defined with precision. Dooley v. Boston El. R. Co., 201 Mass. 429, 87 NE 586.

46. Held proper: Instructions held within the pleadings. Neal v. Davis Foundry & Mach. Works, 131 Ga. 701, 63 SE 221. It is not error to authorize consideration of impaired earning capacity, where such impairment is alleged as to all occupations. Dallas Consol. Elec. St. R. Co. v. Motwiller [Tex. Civ. App.] 112 SW 794. It is proper to charge the jury to fix the damages within the evidence under the pleadings. Whitney v. Woodmansee, 15 Idaho, 735, 99 P 968. Where charge did not authorize consideration of damages not proved, it will not be presumed on appeal that jury considered them. Missouri, K. & T. R. Co. v. Craig [Tex. Civ. App.] 114 SW 850.

Based on evidence: For loss of finger of a marine fireman where he testified to some pain and weakness of his hand, it was proper to charge on future suffering and loss of earning capacity. Passage v. Stimson Mill Co., 52 Wash. 661, 101 P 239. Instruction as to recovery of medical services held supported by the evidence. Fitzgerald v. Chicago, 144 Ill. App. 462. Objection in personal injury action that instructions were not based on the evidence held not sustainable. Sebastian v. Chicago Coated Board Co., 144 Ill. App. 504. Instruction in personal injury action as to loss of time and inability to work held based on evidence. Fitzgerald v. Chicago, 144 Ill. App. 462. Where an attending surgeon testified that injured person's shoulder was dislocated, neck injured, face cut and bruised, a charge permitting him to recover for any injuries proved, or pain and suffering therefrom, was proper. Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038. Instruction authorizing recovery for permanent injury held not erroneous where the wrong complained of was the sole cause. Acken v. Tinglehoff, 83 Neb. 296, 119 NW 456. Request to charge that injured person could not recover for bronchitis or expense incident thereto properly refused, where facts as to such disease were brought out as part of physical history since the injury. Robinson v. Morris & Co. [R. I.] 73 A 611. Where evidence warranted a finding that injured person's impaired capacity to work might be permanent, it was proper to submit impaired future earning ability. Galveston, etc., R. Co. v. Schuessler [Tex. Civ. App.] 120 SW 1147. Charge to permit recovery for diminished earning capacity held not erroneous because there was no direct proof of life expectancy, as the jury could determine such fact from the circumstances. Missouri Val. Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93. Charge that injured person was entitled to recover for medical expenses held proper where though defendant paid for expenses incident to amputation injured person was treated for erysipelas in the stump thereafter. Kennedy v. Laclede Gaslight Co., 215 Mo. 688, 115 SW 407. Where there is evidence of mental anguish, it is proper to refuse a charge denying damages therefor. Western Union Tel. Co. v. Griffith [Ala.] 50 S 91.

Erroneous: For injuries to crop by trespassing cattle where there was no evidence what the land would have brought for hay and pasture, it was error to charge that recovery could be had therefor. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73. Where married woman did not allege that she was engaged in any independent occupation, it was error to charge that she could recover for inability to follow any vocation other than keeping house for her husband. Burke v. Mally [Iowa] 120 NW 305. Charge that the law allows damages for mental suffering in connection with bodily pain the amount of which is left "to the judgment of an enlightened jury to be assessed in such reasonable sum" permits an award without regard to the evidence. Denver City Tramway Co. v. Martin, 44 Colo. 324, 98 P 836. Charge authorizing special damages held erroneous where such damages were not recoverable. Shieder v. Southern R. Co. [S. C.] 65 SE 631. Where no permanent injury is charged in action for injury to real property, it is error to give instruction as to depreciation of property in value. Fields v. Johnston City, 143 Ill. App. 485. Where attorney's fees are recoverable and there is no evidence of their value, it is error to permit

and should require the jury to base their findings upon the evidence [47] and not upon passion or prejudice.[48] They should clearly and properly submit the issues [49] in

the jury to consider such item. State v. Flarsheim [Mo. App.] 119 SW 17. It is error to submit a rule for estimating damages, including the element of lost earnings for which there is no foundation in the evidence. Leach v. St. Louis & S. F. R. Co. [Mo. App.] 118 SW 510. Error to submit the question of decreased earning capacity for which no claim was made in the complaint. St. Louis S. W. R. Co. v. Samuel [Tex. Civ. App.] 116 SW 133. Where a complaint for injuries to a car of tomatoes alleged specific elements of damage, a charge directing assessment of damages at the depreciated value was erroneous as enlarging the cause of action. Parsons Applegate Co. v. Louisville & N. R. Co., 136 Mo. App. 494, 118 SW 101. Where there was no evidence that cattle suffered damage on a terminal railroad, a charge to subtract such damages from the recovery was erroneous. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. Where 20 days lost time was claimed but the evidence showed 60 days lost, it was error to refuse to limit recovery to 20 days. Missouri, K. & T. R. Co. v. Willis [Tex. Civ. App.] 117 SW 170.

Not based on evidence: Where the evidence in an action for delay in delivering a telegram discloses no element of punitive damages, it is error to submit such question. Western Union Tel. Co. v. Jackson [Miss.] 49 S 737. In an action for assault, it was error to charge that the jury might consider provocation in mitigation, where there was no evidence of provocation. Glassey v. Dye, 83 Neb. 615, 119 NW 1128. Where a creek was polluted by several sources and there was no evidence as to how much it was polluted by one, only the question of damage from obnoxious odors arising from the open ditch should be considered. Phillips v. Armada [Mich.] 15 Det. Leg. N. 983, 118 NW 941. For loss of great toe where evidence showed that only a scar was left and there would be no future pain, a charge to consider future pain, probable loss of earnings, etc., held erroneous. Arkansas & L. R. Co. v. Sain [Ark.] 119 SW 659. There must be some evidence of earning capacity in order to justify a charge authorizing recovery for impairment thereof. El Paso & N. E. R. Co. v. Sawyer [Tex. Civ. App.] 119 SW 107. Where evidence showed that a horse had no market value, an instruction predicated upon a market value was erroneous. Western Union Tel. Co. v. Hoyt [Ark.] 115 SW 941. In action for injury to oats in transit, charge based on condition of oats when they reached their destination held erroneous when there was no evidence of such condition. Hardin Grain Co. v. Chicago & A. R. Co., 134 Mo. App. 681, 114 SW 1117. In the absence of evidence, it is error to authorize expense incurred for nursing. Heidbrink v. United R. Co., 133 Mo. App. 40, 113 SW 223.

47. Where a physician testified at length to speculative and possible consequences and disorders likely to occur, the jury should be charged to consider such evidence only so far as it showed probable results. Brininstool v. Michigan United R. Co. [Mich.] 16 Det. Leg. N. 340, 121 NW 728.

48. Instructions in assault and battery held bad as leading the jury to base a verdict on passion and prejudice. Hickey v. Booth [R. I.] 72 A 529.

49. A charge that life expectancy may be considered in assessing damages for lost earning capacity should limit the jury to a finding of the present worth of his earnings. Williams v. Clarke County [Iowa] 120 NW 306.

Issues properly submitted: Charge limiting recovery to bodily pain and mental suffering which an injured person had or would endure on account of injuries, properly limited the damages for mental suffering. Denver City Tramway Co. v. Martin, 44 Colo. 324, 98 P 836. Where injured person had been attended by several doctors and evidence showed reasonableness of charges of all except two, instructions held not to allow recovery of their charges. Missouri, K. & T. R. Co. v. Craig [Tex. Civ. App.] 114 SW 850. Instruction as to liability for aggravation of existing injuries of an injured person held to fully protect defendant's rights. Rawlings v. Clyde Plank & Macadamized Road Co. [Mich.] 16 Det. Leg. N. 607, 122 NW 504. An instruction in an action for loss of the tips of fingers, to consider the difference in earning capacity caused by the injury, sufficiently charged to consider previous loss of tips of the same fingers. Duskey v. Green Lake Shingle Co., 51 Wash. 145, 98 P 99. Charge to award such damages as would compensate for "the injuries complained of." Linforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320. Instruction as to mental anguish for delay in delivering a message held to sufficiently cover the issue. Ogilive v. Western Union Tel. Co. [S. C.] 64 SE 860. Charge to award compensation for mental and physical suffering and impairment of earning power is not objectionable as authorizing recovery for loss of time. Louisville & N. R. Co. v. Brown [Ky.] 113 SW 465. Charge that injured person could recover for "time he has lost because of injuries" held not bad as not limiting recovery therefor to date of verdict. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 115 SW 57. Charge as to permanent injuries held not erroneous as allowing jury to award such sum as they believe "may" accrue. Missouri, K. & T. R. Co. v. Allen [Tex. Civ. App.] 115 SW 1179. Use of word "continuance" in instruction held not to authorize recovery for permanent injury. Moore v. Missouri Pac. R. Co., 136 Mo. App. 210, 116 SW 440. Instruction reciting elements of damage held not erroneous as permitting jury to consider injured person's prior diseased condition. Wellman v. Metropolitan St. R. Co., 219 Mo. 126, 118 SW 31. Charge that measure for goods wrongfully taken was the reasonable market value held not objectionable because not stating that it was such value at the place where taken. Temple v. Duran [Tex. Civ. App.] 121 SW 253. Question as to future suffering of child three years of age because of injury to hand held properly submitted under the evidence. Hildebrand v. May Mercantile Co. [Mo. App.] 121 SW 326. Modification of requested instruction in ac-

such manner as not to confuse or mislead the jury,[50] and should not invade the province of the jury,[51] and should not be argumentative in form.[52] If a charge is

tion by father for negligent killing of his minor children by adding that "the amount of damages cannot be fixed by the evidence, but must be the result of your own judgment" when read in connection with prior instruction, did not inform jury that they possessed power to capriciously fix the amount of damage. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. —. An instruction which names "mental suffering due to the injury" as an element is not bad as permitting mental suffering which is independent from the injury. United States Smelting Co. v. Parry [C. C. A.] 166 F 407.

Instructions held erroneous: Where no loss of time was alleged or proved, and there was no proof of permanent injury, charge held erroneous as permitting jury to award such sum as they might deem right. Lexington R. Co. v. Britton [Ky.] 114 SW 295. Where evidence showed that injured person could lessen the occurrence of "fits" by resisting the impulse by her will, a charge that if "fits" were entirely under her control she could not recover was erroneous as disregarding "fits" as could have been prevented by exercise of self-control. Dooley v. Boston El. R. Co., 201 Mass. 429, 87 NE 586. Instruction in action for breach of promise to marry held bad for uncertainty of meaning. Lauer v. Banning [Iowa] 118 NW 446. In action against master for excessive force used by his special officer in making an arrest, a charge that if jury believed that assault was unprovoked, and excessive punitive damages could be awarded, was objectionable in form. Baltimore & O. R. Co. v. Strube [Md.] 73 A 697. Instruction as to punitive damages for ejection of a passenger held erroneous for failure to hypothesize aggravating circumstances. Bolles v. Kansas City S. R. Co., 134 Mo. App. 696, 115 SW 459. Where evidence authorized punitive damages, it was error to give a charge confining the jury to an award of actual damages. Beard v. Hicks [Ala.] 50 S 232. Where complaint alleged pain, suffering, doctor's bills and medicine, but there was no evidence as to the latter items, it was error to charge that the measure of damages in such cases was left to the enlightened conscience of the jury without charging that such rule was not applicable to such items. Southern R. Co. v. Davis [Ga.] 65 SE 131.

50. Held not confusing nor misleading: Omission of word "place" in charge that measure for flooding land is the value of the crops at the time and place of the flood. Missouri, K. & T. R. Co. v. Hagler [Tex. Civ. App.] 112 SW 783. Charge relative to consideration of mortality tables. Peterson v. Brackey [Iowa] 119 NW 967. Charge in action for injuries to "allow plaintiff" by way of compensation "as the evidence satisfies you with a degree of certainty was the natural and probable consequences of the injury" was faulty in form. Sufferling v. Heyl, 139 Wis. 510, 121 NW 251. Instruction to take in consideration "loss of time, if any," held not inconsistent with instruction that plaintiff could not recover for loss of time when he drew salary for that time. Fraser v. Harper House Co., 141 Ill. App. 390. Charge that if injured person's condition resulted from impairment of his system and would not have happened but for such impaired condition he could not recover was properly refused as implying that he could not recover if he had been in good physical condition when injured. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76. It is proper to charge that injured woman is entitled to recover for deprivation of her natural powers, even if limited to a particular delicate meaning, and does not intimate that damages may be given for pecuniary loss by being deprived of future children. Devine v. Brooklyn Heights R. Co., 131 App. Div. 142, 115 NYS 263.

Confusing and misleading: In action for injury causing partial loss of eyesight, nervousness and inability to follow previous occupation, it was inapt to charge that for injuries to peace, happiness and feelings no measure was prescribed except the conscience of the jury. Southern R. Co. v. Davis [Ga.] 65 SE 131. Charge in assault that a preponderance of the evidence which satisfied the jury of the existence of the damage to plaintiff might form a basis of recovery held erroneous as charging the jury to use that basis for recovering future damages. Thomas v. Williams, 139 Wis. 467, 121 NW 148. Instruction in action for injuries by fire. Simplex R. Appliance Co. v. Western Rawhide & Belting Co. [Ind.] 88 NE 682. In an action for pain and suffering of an injured person during her lifetime, charge properly refused as confusing. People's R. Co. v. Baldwin [Del.] 72 A 979. Charge to award for future suffering such sum as would compensate injured person for suffering she "would undergo" was erroneous; "as she would reasonably and probably undergo" should be used. Weatherford, etc., R. Co. v. White [Tex. Civ. App.] 118 SW 799. Instruction as to damages for injuries to goods in transit held erroneous, as leading the jury to include injuries necessarily incident to shipping the goods. Texas Cent. R. Co. v. Watson [Tex. Civ. App.] 118 SW 175. Instruction as to right of injured person to recover for aggravation of injury due to nonobservance of advice of physician. Wise v. Wabash R. Co., 135 Mo. App. 230, 115 SW 452. Charge that jury could not assess damages for value of timber cut or for digging holes in plaintiff's land, as specific damages, held misleading as term "specific damages" was confusing. Wilmer Lumber Co. v. Eisely [Ala.] 50 S 225.

51. Charge in action for mental anguish because of delay in delivering a telegram held to **invade the province** of the jury. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. In an action for injuries a charge that upon finding for plaintiff to award such damages as would compensate her for bodily and mental anguish, not to exceed the sum demanded, did not charge that evidence warranted a verdict for any sum up to that amount. Partello v. Missouri Pac. R. Co., 217 Mo. 645, 117 SW 1138. Charges as to damages resulting from burning over land held **not on the weight of evidence.** Mis-

not as full and complete as desired, an amplification should be requested.[53] Controverted facts should not be assumed.[54] Material evidence should not be ignored.[55] In construing instructions given, they should be considered as a whole.[56] An erroneous charge as to the measure of damages is prejudicial error,[57] but may be rendered harmless by the verdict [58] or cured by a remittitur.[59]

(§ 7) *D. Trial.*[60]—See 11 C. L. 1017—Where there is an absolute breach of an entire contract, all damages, present and prospective, must be recovered in one ac-

souri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166. Charge in conversion as to exemplary damages held not on the weight of evidence. Werkheiser-Polk Mill Co. v. Langford [Tex. Civ. App.] 115 SW 89. Charge in action for family relics lost in transit held not upon weight of evidence. Missouri, K. & T. R. Co. v. Dement [Tex. Civ. App.] 115 SW 635.

52. Charge that jury could not assess damages for mental pain and anguish held argumentative. Western Union Tel. Co. v. Griffith [Ala.] 50 S 91.

53. In action by parent for death of child, a charge authorizing recovery of such sum as would fairly compensate him for pecuniary loss, though technically wrong because not limiting recovery for services to minority, is not prejudicial in absence of request. Texas & Pacific Coal Co. v. Kowsikowsiki [Tex. Civ. App.] 118 SW 829. Where evidence tends to show amount of medical bills and that they are reasonable, a charge that all reasonable and necessary medical bills could be recovered held not too broad in absence of a requested charge. Missouri, K. & T. R. Co. v. Dalton [Tex. Civ. App.] 120 SW 240. A charge stating elements of recovery held good as far as it went, and, if defendant desired a more specific charge as to certain elements, he should have requested it. Beaumont, etc., R. Co. v. Olmstead [Tex. Civ. App.] 120 SW 596. In action for injury to minor where court charged that he could not recover for his time prior to majority, held a charge as to decreased earning capacity did not authorize recovery during such period where defendant did not call attention to the omission. Braasch v. Michigan Stove Co., 153 Mich. 652, 15 Det. Leg. N. 748, 118 NW 366. Where the court instructed without objection as to measure of damages for breach of a contract, the charge cannot be objected to on appeal. Harrison v. Argyle Co., 128 App. Div. 81, 112 NYS 477.

54. Charge held erroneous as assuming some damage. Ozmore v. Coram [Ga.] 65 SE 448. In action for injury to cattle, charge held erroneous in assuming that animals, if injured, suffered in market value. Missouri, K. & T. R. Co. v. Light [Tex. Civ. App.] 117 SW 1058.

55. Where evidence showed that future injuries complained of only had a tendency to aggravate the condition of the injured person, it was error to direct the jury to allow nothing for such injuries without reference to whether ordinary care had been used to prevent aggravation. International & G. N. R. Co. v. Duncan [Tex. Civ. App.] 121 SW 362. In an action for cutting timber, an instruction which deprives plaintiff of the right to recover value of timber cut is erroneous where evidence shows him entitled to such recovery. Clevenger v. Blount [Tex. Civ. App.] 114 SW 868. In action for injury to land caused by pollution of a stream, a charge that confined the right to recover for pollution of the water to the extent of impairing its purity was properly refused. Tennessee Coal, Iron & R. Co. v. McMillion [Ala.] 49 S 880. Where a complaint charged the willful and malicious obstruction of an alley and also obstruction without malice, it was error to ignore the latter count. Beard v. Hicks [Ala.] 50 S 232.

56. Charge on exemplary damages in action for assault and battery held not prejudicial when considered as a whole. Thomas v. Williams, 139 Wis. 467, 121 NW 148. Charge while technically objectionable as giving a roving commission to award damages held not prejudicial when considered as a whole. Phelps v. Conqueror Zinc Co., 218 Mo. 572, 117 SW 705. Instructions construed as a whole held not misleading. Rock Island Plow Co. v. Rankin Bros. [Ark.] 115 SW 943.

57. Error in charge as to measure of damages is not cured by other instructions. Doty v. Quincy, etc., R. Co., 136 Mo. App. 254, 116 SW 1125.

58. The adoption of an erroneous measure of damages in instructions is not ground for reversal where the judgment is less than it would have been had the correct rule been given. Hebron Mfg. Co. v. Powell Knitting Co. [C. C. A.] 171 F 817. Where plaintiff was severely injured and was awarded but $1,500, held defendant was not prejudiced by a charge which failed to limit the jury to damages shown by the evidence. Louisville & N. R. Co. v. Carter [Ky.] 112 SW 904. Error in abstract instruction as to measure of damages for injury to crops was harmless where the crop was totally destroyed and the jury did not base their verdict on injury thereto. Jonesboro, etc., R. Co. v. Cable [Ark.] 117 SW 550. Where amount of verdict was less than plaintiff was entitled to recover, error in charges was not prejudicial to defendant. Western Union Tel. Co. v. Bradford [Tex. Civ. App.] 114 SW 686.

59. Error in submission of elements of damage is cured by remittitur of sum claimed therefor. Weatherford, etc., R. Co. v. White [Tex. Civ. App.] 118 SW 799. Error in submitting value of lost time is cured by requiring a remittitur of the sum. International & G. N. R. Co. v. Williams [Tex. Civ. App.] 118 SW 758. In action for injuries to a minor, a charge permitting him a recovery for time lost during minority was cured by a remittitur from the judgment of such sum. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83.

60. Search Note: See Damages, Cent. Dig. §§ 515-579; Dec. Dig. §§ 193-228; 13 Cyc. 220-254.

tion.[61] The allowing of experiments rests in the discretion of the court.[62] The quantum of damages, beyond nominal, is for the jury,[63] and though the only evidence offered is incompetent it is error to direct a verdict.[64] Under some statutes where a defendant fails to answer, the plaintiff may have damages assessed on his pleading[65] but under others proof must be interposed.[66] Where evidence of personal injuries rests largely in the mind and conscience of the injured person, the court must closely scrutinize all phases of the claims.[67]

(§ 7) *E. Verdicts and findings.*[68]—See 11 C. L. 1017—Verdicts and findings are governed by the general rules.[69] A special verdict controls a general one in case of conflict.[70] The pleadings and charge, but not the testimony, may be looked to in construing a verdict.[71] A compromise verdict will not be permitted to stand.[72] Where a verdict is in different sums against codefendants, the judgment must be against each for the amount of the verdict.[73] Where joint tort feasors are sued, separate verdicts for different amounts may be awarded against them, and punitive damages awarded against one and not against the other.[74] A verdict will not be held erroneous if predicated upon the evidence.[75] An excessive verdict may be cured by requiring a remittitur.[76]

Damnum Absque Injuria; Dams; Date; Days; Dead Bodies, see latest topical index.

61. Wilkinson v. Dunbar, 149 N. C. 20, 62 SE 748.

62. Watch-ticking test held admissible, plaintiff having affirmed that from the injury he had a permanent impairment of his hearing. Wilson v. Chicago City R. Co., 144 Ill. App. 604.

63. Not involved in motion for a nonsuit. Edwards Bros. v. Erwin, 148 N. C. 429, 62 SE 545.

64. Where only evidence of damage offered was absolutely incompetent, held error to direct verdict and not submit question of damages to the jury. Canole v. Allen, 222 Pa. 156, 70 A 1053.

65. Under Civ. Code, Prac. § 126, where defendant failed to answer in an action for alienation of affections, plaintiff was entitled to have damages assessed on allegations of his complaint. Adkins v. Kendrick [Ky.] 115 SW 814.

66. Under Kirby's Dig. § 6137, declaring that allegations of damage are not to be taken as true because not controverted, proof must be interposed. Greer v. Strozier [Ark.] 118 SW 400.

67. Wellman v. Metropolitan St. R. Co., 219 Mo. 126, 118 SW 31.

68. Search Note: See Damages, Cent. Dig. §§ 563-566; Dec. Dig. §§ 220-222; 11 A. & E. Enc. P. & P. 196; 22 Id. 833.

69. See Verdicts and Findings. Judgment for damages for failure to deliver stock purchased and for stock tendered held within the issues made by the pleadings. Shuler v. Allam [Colo.] 101 P 350. Verdict apportioning damages between connecting carriers held **sufficiently definite** to support judgment. St. Louis, etc., R. Co. v. Hutson [Tex. Civ. App.] 120 SW 213.

70. Where in answer to a special interrogatory as to what sum would compensate an injured person the jury answered $600 and the general verdict was for $600 for certain doctor's bills and expenses, some of which were not proved, held there was no conflict between the general and special verdict, and the special findings would not control. Irrgang v. Ott, 9 Cal. App. 440, 99 P 528.

71. In action for breach of contract to purchase land, a verdict finding for plaintiff for the land at $5 per acre, but not stating the total value of the land or number of acres, is insufficient. Slayden & Co. v. Palmo [Tex. Civ. App.] 117 SW 1054.

72. Where damages are liquidated and there is evidence that it was agreed that one should receive a specified sum upon the performance of the contract and defendant testifies that a smaller sum was to be paid, or where it appears that plaintiff is not entitled to anything, a verdict in a sum not claimed by either as being the price stipulated, if any, is clearly the result of compromise. Lawson v. Wells Fargo & Co., 113 NYS 647. But where damages are unliquidated and testimony as to their extent is expert opinions which are merely advisory, a verdict for a less sum than testified to is not improper. Id.

73. A verdict against one defendant for a specified sum and against a codefendant for a specified sum does not authorize a joint judgment against both defendants for a total sum. City of Ft. Worth v. Williams [Tex. Civ. App.] 119 SW 137.

74. Louisville & N. R. Co. v. Roth [Ky.] 114 SW 264.

75. It is no objection to a verdict in an action for injury to personalty that it is less than the lowest amount of damages proved by plaintiff and higher than the highest amount shown by defendant's evidence. Minter v. Bush, 5 Ga. App. 129, 62 SE 731. Verdict cannot be set aside on the ground that evidence afforded no basis for ascertainment of amount when data indicates that amount found is just and reasonable compensation. Hurxthal v. St. Lawrence Boom & Mfg. Co., 65 W. Va. 346, 64 SE 355.

76. Proper for the trial court to require verdict to be remitted to the extent that it was in excess of the amount justified by the proof. Miller v. Smith [Ga. App.] 65 SE 292.

DEAF MUTES.[77]

DEATH AND SURVIVORSHIP.[78]

The scope of this topic is noted below.[79]

Death is presumed from unexplained absence for seven years,[80] but there is no presumption as to the time when death occurred,[81] this being a question for the jury on the facts of the particular case.[82] Mere proof of absence is not sufficient but it must appeal that one was not heard from by those who would be most likely to hear,[83] and if the proof is made by one not of this class there must be a showing of diligent inquiry.[84] That all the circumstances of the person's condition negatived a voluntary disappearance may warrant a finding that death occurred at the time of the disappearance.[85] That one brought judicial proceedings on a theory inconsistent with the death of an absentee does not estop him to assert that death occurred before that time.[86] The presumption is not conclusive, and does not preclude the absentee from recovering his property on his return.[87] There is no presumption of survivorship in common disaster,[88] the presumption being that deaths were simultaneous.[89]

DEATH BY WRONGFUL ACT.

The scope of this topic is noted below.[90]

§ 1. Nature and Elements of Liability and Release or Bar Thereof, 1242.
§ 2. Who May Bring Action, 1245.
§ 3. Beneficiaries of the Right of Action, 1247.
§ 4. Damages, 1248.
§ 5. Remedies and Procedure, 1252.
§ 6. Distributive Rights in Amount Recovered, 1256.

§ 1. *Nature and elements of liability and release or bar thereof.*[91]—See 11 C. L. 1019—At common law, an action for damages for death by wrongful act, abated upon

77. No cases have been found for this subject since the last article. See 11 C. L. 1018. Includes only contractual capacity. As to execution of will by deaf mute, see Wills.* As to fraud upon deaf mutes, see Fraud and Undue Influence.* As to rules of care and negligence in general, see Negligence.*

Search Note: See Insane Persons, Cent. Dig.; Dec. Dig.; 8 A. & E. Enc. L. (2ed.) 842.

78. See 11 C. L. 1018.

Search Note: See notes in 5 C. L. 944, 945; 104 A. S. R. 198; 7 Ann. Cas. 573.

See, also, Death, Cent. Dig. §§ 1-9; Dec. Dig. §§ 1-6; 13 Cyc. 295-310; 22 A. & E. Enc. L. (2ed.) 1251; 5 A. & E. Enc. P. & P. 783.

79. It treats of the presumption and proof of death and of survivorship. It excludes liability for death (see Death by Wrongful Act*) and statutory administration of the estates of absent persons (see Absentees*).

80. Butler v. Supreme Ct. I. O. F. [Wash.] 101 P 481; Holland v. Nance [Tex.] 114 SW 346. Family history that one had perished at sea and fact that he had not been heard of for fifty years held sufficient. Hess v. Webb [Tex. Civ. App.] 113 SW 618.

81. Butler v. Supreme Ct. I. O. F. [Wash.] 101 P 481. No evidence or presumption of death of husband at time of remarriage of wife thirteen months after disappearance. Dietrich v. Dietrich, 128 App. Div. 564, 112 NYS 968.

82. Butler v. Supreme Ct. I. O. F. [Wash.] 101 P 481.

83. Hansen v. Owens [Ga.] 64 SE 800. That one relative living in another state had not heard of a person for twelve years is not sufficient. Hess v. Webb [Tex. Civ. App.] 113 SW 618.

84. Evidence held insufficient to raise presumption. Hansen v. Owens [Ga.] 64 SE 800.

85. Sober, industrious man in prosperous circumstances and devoted to his family. Butler v. Supreme Ct. I. O. F. [Wash.] 101 P 481.

86. Wife of absentee by bringing divorce suit held not estopped to assert death at an earlier date when insurance policy was still in force. Butler v. Supreme Ct. I. O. F. [Wash.] 101 P 481.

87. Grimes v. Miller [Mo.] 121 SW 21; Hollowell v. Adams [Ky.] 119 SW 1179.

88. Dunn v. New Amsterdam Casualty Co., 63 Misc. 225, 118 NYS 491.

89. Walton & Co. v. Burchel [Tenn.] 121 SW 391.

90. It is limited to the nature and extent of the liability, including damages for tortiously causing death. It excludes the general law of negligence or tort on which the wrongful character of the defendant's act is predicated, and all question of practice, pleading and evidence not peculiar to the action for death (see Carriers;* Master and

the death of the person aggrieved or upon the death of the tort feasor,[92] whether caused by breach of contract or by a tort.[93] The right of recovery, therefore, is purely statutory,[94] and whether a right of action exists depends upon the particular statute applicable,[95] and the relations of the parties at the time and place of injury.[96] The purpose of such statutes is generally conceded to be to provide compensation for the injury resulting to heirs at law of the deceased from the death,[97] so they are construed with reasonable strictness.[98] Most of the courts hold that the statute does not create a new cause of action,[99] but that it is a survival of the action which the victim could have instituted if he were not dead,[1] the incident of survivorship being derived from the statute itself,[2] and, unless the deceased could have maintained an action for the injury had death not ensued, no right of action survives.[3] If the right of action exists, it will be enforced in another jurisdiction, unless it is penal in character or contrary to the established policy of the state wherein the action is brought,[4] the merits and rights involved being governed by the lex loci,[5] except in mere matters of procedure.[6] In some states it is said that the foreign stat-

Servant;* Negligence;* Railroads,* and other topics dealing with actionable negligence). The survivability of particular causes of action is also excluded (see Abatement and Revival,* § 3).

91. Search Note: See notes in 15 L. R. A. 262; 34 Id. 788; 8 L. R. A. (N. S.) 384; 9 Id. 1078; 14 Id. 893; 70 A. S. R. 669; 1 Ann. Cas. 232, 490; 7 Id. 1089.

See, also, Death, Cent. Dig. §§ 10-34, 49; Dec. Dig. §§ 7-30, 33; 14 Cyc. 311-313, 316-320, 322-328, 337; 8 A. & E. Enc. L. (2ed.) 854-885, 906.

92. Devine v. Healy, 241 Ill. 34, 89 NE 251; Perkins v. Oxford Paper Co., 104 Me. 109, 71 A 476.

93. Sherlag v. Kelley, 200 Mass. 232, 86 NE 293.

94. Code of Civil Proc. § 1902. Cunningham v. Sheltering Arms, 61 Misc. 501, 115 NYS 576. In Kentucky, right of action embodied in constitution. De Valle Da Costa v. Southern Pac. Co., 167 F 654.

95. Actions for wrongful death against street railways can only be brought under St. 1906, p. 506, c. 463, pt. 1, § 63, amended by St. 1907, p. 338, c. 392. Brooks v. Fitchburg & L. St. R. Co., 200 Mass. 8, 86 NE 289. Law held not repealed by latter acts. Id. St. 1907, p. 375, c. 375, held inapplicable to street railways. Id. Under federal employer's liability act (Act Cong. June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), widow of employe killed may sue employer as administratrix for use of herself as widow. Gutierrez v. El Paso & N. E. R. Co. [Tex.] 117 SW 426. Cause of action accruing to administrator by virtue of injuries act to recover damages for benefit of widow or next of kin is separate and distinct from one under mines and miners' act accruing to widow, lineal heirs, or persons dependent on deceased. Chicago-Virden Coal Co. v. Bradley, 134 Ill. App. 234. Cause of action under mines and miners' act cannot be amended by substitution of one under injuries act where statute of limitation is a bar. Id.

96. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754.

97. Satterberg v. Minneapolis, etc., R. Co. [N. D.] 121 NW 70.

98. By Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637), parents may join in suing for death of minor child. Held, where parents were divorced and father refused to join, mother could not maintain action alone. Clark v. Kansas City, etc., R. Co., 219 Mo. 524, 118 SW 40.

99. Millar v. St. Louis Transit Co., 216 Mo. 99, 115 SW 521. Construing § 2, Rev. Codes, § 5252. Dillon v. Great Northern R. Co., 38 Mont. 485, 100 P 960.

1. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678. Section 1902, Code of Civil Procedure. Cunningham v. Sheltering Arms, 61 Misc. 501, 115 NYS 576.

2. Williams v. Alabama Great So. R. Co. [Ala.] 48 S 485.

3. Suell v. Derricott [Ala.] 49 S 895. Where wife died from childbirth and husband sued for death because of inability to get physician by phone, held, under general contract to furnish telephone service, breach complained of would not warrant decedent to recover because too remote. Southwestern Tel. & T. Co. v. Solomon [Tex. Civ. App.] 117 SW 214.

4. Code Civ. Proc. N. Y. §§ 1902-1904, enforced in Massachusetts for death caused in New York. Walsh v. Boston & M. R. Co., 201 Mass. 527, 88 NE 12. Methods of procedure indicated do not render statute unenforcible. Id. Fact that damages are punitive does not render statute which prescribes them penal. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678. Action to recover for negligent homicide not repugnant to public policy of Georgia, since such action is provided by Civ. Code 1895, § 3828. Id. In construing statutes of foreign state, courts will determine for themselves whether statutes as construed and applied in foreign state are penal or violative of public policy of own state. Id.

5. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754. Action brought in South Carolina for death which occurred in North Carolina held law of latter state governed. Free v. Southern R. Co. [S. C.] 65 SE 212. Law of Alabama governs action brought in Georgia for death which occurred in former. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678.

6. Johnson v. Phoenix Bridge Co., 133 App. Div. 807, 118 NYS 88.

ute must be similar to the one prevailing in the state wherein the action is brought.[7] Ordinarily, the privilege of bringing an action in one state for wrongful death caused in another is based on comity,[8] but in some cases it is expressly provided by statute, provided always there is a cause under the lex loci,[9] as shown by proper proof.[10] The wrongful act complained of need not be the sole cause of the decedent's death,[11] but must have been the proximate cause thereof,[12] and the action is barred by the contributory negligence of the deceased or of the beneficiary of the right of action.[13] By federal statute, the doctrine of contributory negligence is abrogated and the doctrine of comparative negligence substituted in actions involving wrongful death by railways engaged in interstate commerce.[14] The question as to what constitutes contributory negligence is treated elsewhere.[15] The rule that

7. Howlan v. New York & New Jersey Tel. Co., 131 App. Div. 443, 115 NYS 316. Statutes of Province Quebec shown to be similar to right of action conferred by New York statutes. Johnson v. Phoenix Bridge Co., 133 App. Div. 807, 118 NYS 88. Laws of Tennessee relating to injuries resulting in death substantially same as laws of Texas. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403.

8. Courts have tendency to broader comity in enforcement of rights created by legislation in sister state, and if there is substantive right it is held there is corresponding liability which follows person against whom it is sought to be enforced into another state. Walsh v. Boston & M. R. Co., 201 Mass. 527, 88 NE 12. Section 1902, N. Y. Code Civil Proc., giving right of action for wrongful death, enforced in Massachusetts. Id. Difference in methods of procedure in two states does not render statute unenforcible. Id.

9. Rev. St. 1899, § 547 (Laws 1905, p. 95; Ann. St. 1906, p. 586). In administering laws of state where accident occurred, they are to be administered in manner similar to that employed by courts of that state. Newlin v. S. Louis & S. F. R. Co. [Mo.] 121 SW 125.

10. Howlan v. New York & New Jersey Tel. Co., 131 App. Div. 443, 115 NYS 316.

11. Where, at time of accident, deceased sustained broken leg which developed blood-poisoning from which he died, held injury was proximate cause of death. Mooney v. Chicago, 144 Ill. App. 472. Fall from car held proximate cause of hastening death though wife died 13 months later from tuberculosis. Birmingham R., L. & P. Co. v. Lavender [Ala.] 47 S 1026. Where person committed suicide following illness resulting from personal injuries, held, in order to recover for death by wrongful act under Burns' Ann. St. 1908, § 285, there must appear to be something more than unsound mind; suicide must have been result of uncontrollable influence, caused by defendant's act or omission, and without conscious volition of purpose to take life. Brown v. American Steel & Wire Co. [Ind. App.] 88 NE 80. Where person committed suicide nine months after injury alleged to have produced insanity. Held not enough to show negligence and injury; must show negligence proximately caused death. Evidence failed. Id. Where evidence showed decedent was killed by dynamite explosion ignited by lightning, held act of God did not absolve defendant from liability for placing dynamite in dangerous place. Explosion proximate cause, not lightning. Brown v. West Riverside Coal Co. [Iowa] 120 NW 732.

12. Proximate cause of injury is that which in natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which injury would not have occurred. Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 P 971. If deceased was forced to jump to avoid danger in which he was placed by reason of defendant's negligence, his act will not defeat recovery since defendant's negligence was proximate cause of death. Yongue v. St. Louis & S. F. R. Co., 133 Mo. App. 141, 112 SW 985. Failure to guard dangerous machinery in accordance with statute held not proximate cause of death, where evidence showed negligence of deceased. Fulwider v. Trenton Gas. L. & P. Co., 216 Mo. 582, 116 SW 508. Deceased was killed by electric shock transmitted to tank under which he was working by extension electric light wire. Held evidence showed wire was not properly insulated or tank would not have been charged; negligence of defendant in not repairing wire held proximate cause of death. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841. Where employe fell into mine-shaft and knew of danger, held evidence failed to show proximate cause. Mt. Marion Coal Min. Co. v. Holt [Tex. Civ. App.] 118 SW 825. Telegraph operator failed to deliver orders to train crew and head-on collision occurred. Held deceased, who was engineer, not guilty of negligence for failure to jump sooner; proximate cause was neglect to deliver orders. Yazoo & M. V. R. Co. v. Farr [Miss.] 48 S 520.

13. Where one-year-old child was killed while on railroad right of way, held parents not negligent under circumstances of case. Illinois Cent. R. Co. v. Warriner, 132 Ill. App. 301. Evidence held to show sectionhand not guilty of contributory negligence in being run down by train. Cleveland, etc., R. Co. v. Bosert [Ind. App.] 87 NE 158.

14. Act Congress April 22, 1908, c. 149, 35 Stat. 65, held to supersede state legislation. Fulgham v. Midland Val. R. Co., 167 F 660. Right of action perishes with injured person. Id.

Note. This case was decided before the statute was declared unconstitutional. [Ed.]

15. See Carriers, § 25B; Master and Servant, § 3G; Negligence, § 4; and other topics dealing with actionable negligence.

actions for wrongful death are barred, when caused by the negligence of a fellow-servant,[16] is superseded by statutes to the contrary in some instances,[17] and is of course abrogated by statutes which abolish it in actions for negligence.[18] Damages may be recovered in case of homicide, unless it is justifiable.[19] An action is barred by a release, if not contrary to public policy,[20] but where it is agreed in an instrument that one of the parties is not to be sued, it is not a release.[21] The release of one joint tort feasor is the release of all,[22] but a release of one joint tort feasor from liability for injuries sustained does not bar an action against the other joint tort feasors which accrues to the next of kin by virtue of death ensuing from such injury.[23] Compromises are carefully scrutinized into by the courts.[24]

In some states an action for wrongful death may be maintained against the legal representative of the wrongdoer.[25]

§ 2. *Who may bring action.*[26]—See 11 C. L. 1022—Most of the statutes giving the right of action designate the person or persons who may bring the action.[27] An ad-

16. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754.

17. Rev. St. 1895, art. 3017, subd. 1, authorizing action for wrongful death caused by negligence of proprietor, owner, charterer, or hirer of any "railroad, steamboat, stagecoach or other vehicle for the conveyance of goods or passengers," or by negligence of their servants, held to embrace logging railroad used only in course of defendant's business. Kirby Lumber Co.'s Receivers v. Owens [Tex. Civ. App.] 120 SW 936. Act 9th Leg. Assem. (Laws 1905, p. 1), § 1, Rev. Codes, § 5251, makes every railroad liable for damages sustained by any employe because of neglect, willful wrongs, etc., of other employes, when such negligence is in any manner connected with use and operation of road. Dillon v. Great Northern R. Co., 38 Mont. 485, 100 P 960. In order to recover for wrongful death under employers' liability act, decedent must have been acting in service of defendant at time of death. Gooch v. Citizens' Elec. St. R. Co., 202 Mass. 254, 88 NE 591. Where motorman, paid by hour, had asked to be relieved for day, and later was killed in telephone booth on company's premises by electric shock, held, could not recover under Rev. Laws, c. 106, § 73. Id. Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637), giving right of action for death resulting from negligence of any officer, agent, or servant, while managing any car or train, applies to street railways both before and after passage of Act Feb. 11, 1905 (Laws 1905, p. 135; Ann. St. 1906, § 2864). McKenzie v. United R. Co., 216 Mo. 1, 115 SW 13.

18. See Master and Servant, § 3E.

19. In action by administrator for intestate's death who was shot by defendants, held to sustain verdict for defendants on their pleas of excuse and justification, since they were attempting to arrest decedent for burglary. Suell v. Derricott [Ala.] 49 S 895. Deceased was shot while fleeing from deputy sheriffs who had come to arrest him. Held evidence must show justification and compliance with statute in executing warrant of arrest. Richards v. Burgin [Ala.] 49 S 294. Ky. St. 1903, § 4, gives widow and minor children, or either, of one killed by wanton, careless, or malicious use of deadly weapon, right of action against him who caused death. Held to have action against town marshal for killing husband. Bolton v. Ayers, 33 Ky. L. R. 591, 110 SW 385. Not necessary to join the town or commonwealth as parties plaintiff. Id. In order to defeat action, defendant must show killing was in self-defense. Gray v. Phillips [Tex. Civ. App.] 117 SW 870.

20. Contract by parents with employer, in which former waive all claim against latter for possible wrongful death of minor son, held without consideration and void because contrary to public policy. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841.

21. Instrument whereby plaintiff agreed not to sue unless it should be held as matter of law that plaintiff could not recover damages against defendant, and unless consideration paid should be returned, construed to be covenant not to sue, and not release. Musolf v. Duluth Edison Elec. Co. [Minn.] 122 NW 499.

22. Musolf v. Duluth Edison Elec. Co. [Minn.] 122 NW 499.

23. Decedent released employer from liability for injury which subsequently caused death. Administrator held to have action against those not released. Mooney v. Chicago, 144 Ill. App. 472.

24. Compromise was arranged by administratrix, decedent's widow, and defendant corporation. Latter had furnished attorney for plaintiff and he urged approval of compromise by court. Held expediency of settlement should be proved by evidence. In re Stanley, 62 Misc. 593, 116 NYS 1126.

25. Hurd's Rev. St. 1908, § 122, c. 3, provides for survival of any action therein designated, if aggrieved party or wrongdoer, or both, should die. Devine v. Healy, 241 Ill. 34, 89 NE 251. Where tort feasor died, held action survived against legal representative, he being "the person who would have been liable," if death of party injured had not been occasioned by injuries, as provided by Hurd's Rev. St. 1908, c. 70, § 1. Id.

26. **Search Note:** See notes in 3 C. L. 1036; 11 Id. 91; 41 L. R. A. 807; 54 Id. 934; 1 L. R. A. (N. S.) 1161; 3 Id. 473; 2 Ann. Cas. 682; 3 Id. 54; 9 Id. 1180; 10 Id. 810.

See, also, Death, Cent. Dig. §§ 35-46; Dec. Dig. § 31; 13 Cyc. 335-337; 8 A. & E. Enc. L. (2ed.) 885, 887; 5 A. & E. Enc. P. & P. 851.

27. Under Rev. Codes 1905, § 7688, action shall be brought by following persons in or-

ministrator may be appointed to enforce the right,[28] or one may be substituted for the deceased where there has been a judgment in a cause of action,[29] and a special administrator may bring the action until a general administrator is substituted,[30] but where the right of action is treated as a personal right, an administrator cannot recover damages for the benefit of decedent's estate.[31] An administrator can assign the right to sue.[32] Unless personal representative can sue, all of the beneficiaries of the right of action should be joined.[33] An administrator brings the action in a representative capacity for the benefit of the heirs of deceased,[34] so, unless it is shown that there are heirs who can take, an administrator has no right of action.[35] A use plaintiff can recover only as the cause of action in the legal plaintiffs is established on the trial.[36] In some states a foreign administrator is not permitted to bring an action in his representative capacity,[37] and even in states where he is qualified to bring an action for a death caused in a foreign state, courts are not bound to exercise the jurisdiction.[38] There being no presumption of survivorship in common

der named: Surviving husband or wife; surviving children; personal representative. And if any person entitled to bring action refuses or neglects to do so for period of 30 days after demand of person next in order, such person may bring same. Satterberg v. Minneapolis, etc., R. Co. [N. D.] 121 NW 70. Administrator not proper person under Rev. St. Ohio 1908, § 301, but action must be brought by widow and children. Brown v. Sunday Creek Co., 165 F 504. Construing Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637), giving parents right to join in suit for death of minor child, held mother could not prosecute suit alone where husband refused to join. Clark v. Kansas City, etc., R. Co., 219 Mo. 524, 118 SW 40. Action must be brought in name of personal representative of deceased for the exclusive benefit of widow and next of kin. Devine v. Healy, 241 Ill. 34, 89 NE 251. By Rev. St. 1903, c. 89, par. 8, personal representative can prosecute action brought in lifetime of injured party or bring it after death. Perkins v. Oxford Paper Co., 104 Me. 109, 71 A 476. Construed to cover cases of immediate death, including total unconsciousness following immediately on accident and continuing until death. Id. Kirby's Dig. § 6290, provides action shall be brought by and in name of personal representative, and if there is none, then by heirs at law. Kansas City So. R. Co. v. Henrie, 87 Ark. 443, 112 SW 967.

28. Code Civil Proc. N. Y. §§ 1902-1904, enforced in Massachusetts for death caused in New York, administrator bringing action. Walsh v. Boston & M. R. Co., 201 Mass. 527, 88 NE 12.

29. After verdict, defendant granted new trial and plaintiff appealed from order and died pending appeal. Held administrator could not revive action in his name because no merger of original cause of action in dollars and cents; property rigths could not be read into it. Millar v. St. Louis Transit Co., 216 Mo. 99, 115 SW 521.

30. Special administrator held to be personal representative within Rev. Laws 1905, § 4503. Jones v. Minnesota Transfer R. Co. [Minn.] 121 NW 606.

31. Construing Rev. St. 1899, § 96 (Ann. St. 1906, p. 869), providing for survival of actions, held to refer only to property rights and interests, and administrator cannot sue for death by wrongful act. Gilkeson v. Missouri Pac. R. Co. [Mo.] 121 SW 138.

32. If administrator of estate consents to permit sole beneficiary to prosecute suit in his name for her sole benefit, he cannot claim half proceeds after recovery for benefit of estate. Hackett v. McIlwain [Mich.] 16 Det. Leg. N. 580, 122 NW 551.

33. Under Kirby's Dig. § 6290, where there is no personal representative, all heirs at law who could take as distributees of estate under laws of descent must be joined in action. Kansas City So. R. Co. v. Henrie, 87 Ark. 443, 112 SW 967. Where decedent's widow and son brought action for themselves and use of decedent's mother and latter asked no recovery and evidence proved she was not pecuniarily damaged, held, since verdict was only for widow and son, mother's action was disposed of; not necessary her husband should join. Houston & T. C. R. Co. v. Lemair [Tex. Civ. App.] 119 SW 1162.

34. Lahti v. Oliver Min. Co., 106 Minn. 241, 118 NW 1018. Administrator brings action only because statute says so. He is made statutory trustee to recover damages for benefit of heirs. Jones v. Leonardt [Cal. App.] 101 P 811.

35. Jones v. Leonardt [Cal. App.] 101 P 811.

36. Where case appeared on trial list to use of another than legal plaintiff, defendant cannot claim surprise and get continuance because amendment omitted name of use plaintiff. Bracken v. Pennsylvania R. Co., 222 Pa. 410, 71 A 926.

37. Where administrator brought action in foreign state, but did not qualify as administrator until one year after death of intestate, held cause of action barred. Hall v. Southern R. Co., 149 N. C. 108, 62 SE 899. Foreign administrator held not within purview of act allowing action for damages for death by wrongful act. Id.

38. Where decedent left small property in New York and administrator was appointed who sued in New York court for death which occurred in New Jersey, all of parties interested being nonresidents, held, should refuse to exercise jurisdiction. Pietraroia v. New Jersey & H. R. R. & Ferry Co., 131 App. Div. 829, 116 NYS 249.

disaster, the right to sue devolves in such case under a presumption that the deaths were simultaneous.[39]

§ 3. *Beneficiaries of the right of action.*[40]—See 11 C. L. 1023—The action can be maintained only for the benefit of those designated by statute.[41] Some courts hold that the recovery is limited to such heirs as were dependent upon deceased, or who sustained pecuniary loss,[42] but the majority hold to the contrary.[43] In some of the states several causes of action may arise out of a wrongful death.[44] The rule is not uniform in all of the states as to whether a cause of action for death may arise in favor of a nonresident alien.[45]

39. Father and son, killed in common disaster, died at same time. Held right of action for death of son survived to mother, brothers and sisters, owing to absence of presumption of survivorship. Walton & Co. v. Burchel [Tenn.] 121 SW 391.

40. Search Note: See notes in 11 C. L. 1024; 2 L. R. A. (N. S.) 640; 16 Id. 199.

See, also, Death, Cent. Dig. § 47; Dec. Dig. § 32; 13 Cyc. 335-337; 8 A. & E. Enc. L. (2ed.) 887.

41. Damages recovered are for benefit of estate. Carbary v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 485, 122 NW 367. Unless statute limits right of recovery to minor children, adult children may recover. Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142. Rev. Codes, § 3751, imposed on father of any poor person duty to maintain such person to best of ability. Held such poor child, though an adult, entitled to recovery for father's death under Rev. Codes, § 6486. Id. Damages exclusively for benefit of husband or wife, or next of kin. J. B. & J. M. Cornell Co. v. Ward [C. C. A.] 168 F 51. Shall revert to heirs-at-law. Rev. Codes 1905, §§ 7686-7691. Satterberg v. Minneapolis, etc., R. Co. [N. D.] 121 NW 70. During first six months following death, right is in widow, during next six in minor children. Fulwider v. Trenton Gas, L. & P. Co., 216 Mo. 532, 116 SW 508. Widow or widower, if there be any such persons, or, others, next of kin. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 88 NE 1080. Grandchildren held to come within words "next of kin," under § 285, Burns' Ann. St. 1908. Id. Next of kin. Herlihy v. Little, 200 Mass. 284, 86 NE 294.

Right of illegitimate to recover for wrongful killing of relative: By Acts 1906, p. 156, § 3, a mother is given right of action for wrongful death of illegitimate child, and vice versa. Held constitutional where attacked on ground that section did not relate to subject expressed in title of act. Croft v. Southern Cotton Oil Co. [S. C.] 65 SE 216.

42. Adult children cannot recover where decedent contributed nothing to their support and they received no benefits from him. Missouri, K. & T. R. Co. v. James [Tex. Civ. App.] 120 SW 269. Where decedent left four adult sons and three minor grandchildren and former were self-supporting, while grandchildren lived with deceased up to time of death, held sons sustained no pecuniary loss, but grandchildren did, and latter were entitled to damages. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 88 NE 1080. Dependence of parent upon child need only be **partial dependence**; sufficient if there be substantial contribution. Construing § 3828, Civ. Code 1895. Western Union Tel. Co. v. Harris [Ga. App.] 64 SE 1123. Evidence held to show minor son had not abandoned mother at time of his death. Id. After correctly stating to jury matters which should be considered in awarding damages, court said: "All of these are proper elements in determining value of life taken." Held to mean value of decedent's life to dependents, and not error. St. Louis, etc., R. Co. v. Garner [Ark.] 117 SW 763.

43. Statute (§§ 7686-7691, Rev. Codes 1905) held applicable to heirs at law who are prevented by death from receiving pecuniary aid, support, or benefit which deceased was either legally obligated to render, or which they were receiving, or had any reasonable expectation of receiving as duty, or from recognized sense of obligation. Satterberg v. Minneapolis, etc., R. Co. [N. D.] 121 NW 70. Where deceased left sisters who had lived with him and were dependent upon him, held pecuniarily injured, although deceased not legally obligated to maintain them. Id.

44. One by executor or administrator for damages sustained by deceased in his lifetime for benefit of estate, and other by state for use of certain equitable plaintiffs for damages sustained by death of party injured. Dronenburg v. Harris, 108 Md. 597, 71 A 81. Resident of Maryland killed in District of Columbia, and a settlement made with administrator appointed in Maryland held, under Code D. C. § 1303, money belonged to mother and not to estate of deceased, except sum paid for injuries by deceased, or damages to his estate. Id. Damages for death, and action for damages for injury itself, both for benefit of estate. Carbary v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 485, 122 NW 367.

45. Statute of California (§ 377, Code Civ. Proc.) does not expressly exclude nonresidents or aliens from prosecuting action for wrongful death. Held not to be implied. Kaneko v. Atchison, etc., R. Co., 164 F 263. Not entitled to benefit of Act Pa. Apr. 15, 1851 (P. L. 674), §§ 18, 19, nor Act Apr. 26, 1855 (P. L. 309), § 1, and Italian Treaty 1871 (Act Feb. 26, 1871, 17 Stat. 846), held not to have reference to right of action for death by wrongful act. Fulco v. Schuylkill Stone Co. [C. C. A.] 169 F 98. Construing treaty between United States and Italy (17 Stat. 845), held not to require state to give nonresident alien relatives of Italian subject right of action for damages for his death by wrongful act. Maiorano v. Baltimore & O.

§ 4. *Damages.*[46]—See 11 C. L. 1025—Since at common law no right of action existed for a wrongful death,[47] the damages recoverable for such a death, as distinguished from damages accruing from the injuries which resulted in the death, are entirely dependent upon statute.[48] Pending cases are usually not affected by statutory changes as to damages.[49] The measure of damages for death and the maximum recovery is prescribed by the statutes of the various states,[50] although with considerable variation. Generally, the damages are strictly compensatory, and limited to the pecuniary loss to the beneficiaries.[51] Where deceased died from a cause not the

R. Co., 213 U. S. 72, 53 Law. Ed. —. The plea of alienage is not favored in law. Anustasakas v. International Contract Co., 51 Wash. 119, 98 P 93.

Held to have no cause of action. Kaneko v. Atchison, etc., R. Co., 164 F 263.

To the same effect, see Deni v. Pennsylvania R. Co., 181 Pa. 525, 37 A 558, 59 Am. St. Rep. 676; Maiorano v. Baltimore & O. R. Co., 216 Pa. 402, 65 A 1077, 116 Am. St. Rep. 778; McMillan v. Spider Lake Mill & Lumber Co., 115 Wis. 332, 91 NW 979, 95 Am. St. Rep. 947, 60 L. R. A. 589; Brannigan v. Union Gold Min. Co., 93 F 164; Roberts v. Great Northern R. Co., 161 F 239; Zeiger v. Pennsylvania R. Co., 151 F 348; Adam v. British, etc., S. S. Co., 2 Q. B. Div. 430.—Taken from Kaneko v. Atchison, etc., R. Co., 164 F 263.

Held to have cause of action. Kaneko v. Atchison, etc., R. Co., 164 F 263.

To the same effect, see Mulhall v. Fallon, 176 Mass. 266, 57 NE 386, 79 Am. St. Rep. 309, 54 L. R. A. 934 (in this case, it should be noted, the opinion was delivered by Holmes, Chief Justice of Massachusetts, now one of the Associate Justices of the United States Supreme Court); Pittsburgh, etc., R. Co. v. Naylor, 73 Ohio St. 115, 76 NE 505, 112 Am. St. Rep. 701, 3 L. R. A. (N. S.) 473; Philpott v. Missouri P. R. Co., 85 Mo. 164, 167; Chesapeake, etc., R. Co. v. Higgins, 85 Tenn. 620, 622, 4 SW 47; Augusta R. Co. v. Glover, 92 Ga. 132, 18 SE 406; Kellyville Coal Co. v. Petraytis, 195 Ill. 215, 63 NE 94, 88 Am. St. Rep. 193; Luke v. Calhoun Co., 52 Ala. 115; Szymanski v. Blumenthal, 3 Pen. [Del.] 558, 52 A 347; Romano v. Capitol City Brick & Pike Co., 125 Iowa, 591, 101 NW 437, 106 Am. St. Rep. 323, 68 L. R. A. 132; Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 NYS 1053; Bonthron v. Phoenix L. & Fuel Co., 8 Ariz. 129, 71 P 941, 61 L. R. A. 563; Renlund v. Commodore Min. Co., 89 Minn. 41, 93 NW 1057, 99 Am. St. Rep. 534; Pocahontas Collieries Co. v. Rukas, 104 Va. 278, 51 SE 449; Vetaloro v. Perkins, 101 F 393; Davidson v. Hill, 2 K. B. Div. 606.—Taken from Kaneko v. Atchison, etc., R. Co., 164 F 263.

Note. The authorities are collated in an annotation in 11 C. L. 91.

46. Search Note: See notes in 17 L. R. A. 71; 15 Id. 451; 12 A. S. R. 375; 3 Ann. Cas. 103; 6 Id. 194, 201; 8 Id. 749; 10 Id. 113.

See, also, Death, Cent. Dig. §§ 97-131; Dec. Dig. §§ 78-100; 13 Cyc. 362-380; 28 Id. 47, 48; 8 A. & E. Enc. L. (2ed.) 908, 933.

47. See ante, § 1.

48. Action for mother's death may be maintained under P. L. 1848, p. 151 (Gen. St. 1895, p. 1188, § 10), for benefit of minor children, for deprivation of reasonable expectation of pecuniary advantage, which would have resulted by continuance of life of deceased. Carter v. West Jersey & S. R. Co., 76 N. J. Law, 602, 71 A 253. Under "Death Act" (P. L. 1848, p. 151; Gen. St. 1895, p. 1188, § 10), action may be maintained by administrator of deceased wife for benefit of next of kin, although husband still living. Id. Damages such as intestate alone might have recovered held not recoverable under Pub. Acts 1905, p. 120, No. 89, prescribing measure of damages and distribution of same. Norblad v. Minneapolis, etc., R. Co. [Mich.] 15 Det. Leg. N. 887, 118 NW 595.

49. Measure of damages for wrongful death, while Pub. Acts 1905, p. 120, No. 89, was in force, are governed thereby, and its subsequent repeal by Pub. Acts 1907, p. 287, n. 217, did not restore right to recover under rule existing prior to its enactment. Norblad v. Minneapolis, etc., R. Co. [Mich.] 15 Det. Leg. N. 887, 118 NW 595.

50. $5,000, whether instantaneous or otherwise. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754. Not exceeding $10,000 by §§ 6134 and 6135, Rev. St. Ohio 1908. Brown v. Sunday Creek Co., 165 F 504. Not less than $2,000 nor more than $10,000, in the discretion of jury. (Acts 1905, p. 136 [Ann. St. 1906, § 2864]). Held, under this act, court cannot limit recovery. Potter v. St. Louis & S. F. R. Co., 136 Mo. App. 125, 117 SW 593.

51. Damages are those which plaintiffs sustained and not those which decedent himself sustained. Dillon v. Great Northern R. Co., 38 Mont. 485, 100 P 960. "A fair and just compensation for pecuniary injuries, resulting from decedent's death, to persons for whose benefit action is brought." Code Civ. Proc. § 1904. De Luna v. Union R. Co., 130 App. Div. 386, 114 NYS 893. Must be determined from evidence, which, as general rule, is limited to age, sex, general health and intelligence of person killed, situation and condition of survivors, and their relation to deceased. Id. Next of kin of decedent, unmarried woman 32 years old, consisted of two married sisters and brother, for whose support she had never contributed. Decedent earned only $9 a week and left no estate. She lived with married sister and paid her own board. Funeral expenses were paid by sister, who sues for death as administratrix. Held verdict of $189.75, representing funeral expenses, not inadequate. Id. Pecuniary value of father to family is not dollars he brings in. Clancy v. New York, etc., R. Co., 133 App. Div. 119, 117 NYS 233. In action where mother was one of plaintiffs, instruction that measure of mother's damage was reasonable value of pecuniary benefits she had reasonable expectation of receiving during son's lifetime, had he lived, held not to warrant inference that jury was misled in rendering verdict greater than her life expectancy. Missouri, K. & T. R.

result of the injuries complained of, his personal representatives may recover what deceased might have recovered had he lived until the trial.[52] In determining the pecuniary loss sustained, the jury may consider direct financial outlays,[53] the decedent's earning capacity,[54] age and habits,[55] health,[56] occupation,[57] expectation of life,[58] age and expectancy of life of the heirs, with reference to the life of the deceased,[59] mental and physical capacity for and disposition of labor,[60] care and attention,[61] value of plaintiff's support and protection during time deceased might have lived,[62] contributions to family by deceased,[63] income of deceased,[64] the addition that earnings of deceased would probably have made to his propery and ultimate

Co. v. Wallace [Tex. Civ. App.] 115 SW 302. Where court instructed jury they might "return such sum as compensatory damages as you believe from evidence will reasonably compensate estate of deceased, for destruction of his power to earn money, in any sum in your discretion not to exceed $30,000," held, use of language "in any sum in your discretion" did not give jury unlimited discretion. Louisville & N. R. Co. v. Stewart's Adm'x [Ky.] 115 SW 775. Where court charged jury that plaintiff might recover value of her "support and protection" by her husband during time he might have lived, held not error. Keeley v. Great Northern R. Co., 139 Wis. 448, 121 NW 167. Where testimony showed deceased's business averaged $8.700 a year for several years before death, was 49 years old and in good health, held not error to instruct jury that measure of damages was present value of such sum as deceased probably would have earned in his business during his natural lifetime, and left as his estate at time of death, considering his age, ability, disposition to work, habits of living, and expenditures, the capital he had at his command and risks incident to his business. Yergy v. Helena L. & R. Co. [Mont.] 102 P 310. Compensation is value of life of deceased, as measured and fixed by his earning capacity, actual and prospective. Atlantic Coast Line R. Co. v. Jones [Ga.] 63 SE 834. Where amount is to benefit estate, measure of damages is value of life to estate, measured by earning capacity, thriftiness, and probable length of life. Jennings v. Alaska Treadwell Gold Min. Co. [C. C. A.] 170 F 146.

52. Instruction as to measure of damages under such circumstances held to lay down true measure of recovery. Savage v. Chicago & J. R. Co., 142 Ill. App. 342.

53. Expenses of medical attention and value of nursing. Indianapolis & Martinsville Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 NE 1042.

54. Settlemeyer v. Public Service R. Co. [N. J. Law] 73 A 50; Kansas City So. R. Co. v. Henrie, 87 Ark. 443, 112 SW 967. Where decedent was locomotive engineer, held proper to admit testimony showing schedule of wages in order to furnish data for damages. Atlantic Coast Line R. Co. v. Jones [Ga.] 63 SE 834. Jury should not be allowed to indulge in extravagant speculation, not warranted by evidence, as to what increased earning capacity might be. St. Louis, etc., R. Co. v. Freeman [Ark.] 116 SW 678. Burden of proof on plaintiff to produce evidence to substantially show what future earnings will probably be, and present value to those dependent on decedent. Id. Prospects for increased wages held properly considered. LaBelle v. Rhode Island Co. [R. I.] 73 A 306. Amount deceased would have earned during his lifetime. Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142.

55. Kansas City So. R. Co. v. Henrie, 87 Ark. 443, 112 SW 967; Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142; LaBelle v. Rhode Island Co. [R. I.] 73 A 306.

56, 57, 58. Kansas City So. R. Co. v. Henrie, 87 Ark. 443, 112 SW 967.

59. Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142. Expectancy of one who died soonest must control. Mississippi Cotton Oil Co. v. Smith [Miss.] 48 S 735. Where record did not show age of mother, or her health or constitution to show probable length of life, held error to include as damages for death of minor son supposed value of his services up to majority. Id. Competent to show ages of children and that they were dependent on deceased. Harrison v. New York Cent. & H. R. R. Co., 195 N. Y. 86, 87 NE 802. Not proper to admit evidence showing one child was in orphan asylum. Id. See note ante, p. 1234.

60. Kansas City So. R. Co. v. Henrie, 87 Ark. 443, 112 SW 967; Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142.

61. Kansas City So. R. Co. v. Henrie, 87 Ark. 443, 112 SW 967.

62. Ryan v. Oshkosh Gaslight Co., 138 Wis. 466, 120 NW 264.

63. Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142. In allowing payment for future earnings and contributions of deceased, simply multiplying his expectancy by his yearly contribution from earnings would be excessive and not as reliable as determining what would buy with some responsible life insurance company a yearly income equal to what he would earn and contribute to them during joint expectancy of himself and all and any of his heirs and leave nothing at death of any as to allowance made on account of such as would have died before he would have died. Id.

64. Nilson v. Chicago, B. & Q. R. Co. [Neb.] 121 NW 1128. Where decedent's brother is ony next of kin, jury could consider fact that decedent might have died, married, or given his money to some one else, or spent it all on himself, so that plaintiff would never have received anything. Conklin v. Central New York Tel. & T. Co., 130 App. Div. 308, 114 NYS 190.

advantage of sharing as an heir,[65] the loss of society and companionship,[66] the condition of the family,[67] and his own expenditures;[68] but grief caused by the death,[69] sympathy and pity,[70] nor the amount of property left by deceased, should not be considered.[71] It has been held that loss of society is not a proper element of damage.[72] Double damages for the same period cannot be allowed.[73] For the death of a parent, pecuniary loss to minor children includes reasonable pecuniary value of the nurture, care and training they would have received from deceased.[74] A parent may recover for the death of a child the pecuniary value of its life during minority, which includes the value of the child's prospective services,[75] and these are not always limited to the child's minority;[76] nor is the recovery limited to the actual pecuniary loss.[77] Where the recovery is for the benefit of decedent's estate the measure of damages for a minor's death is the value of his life to his estate from the time of his death up to the time he is twenty-one years old.[78] In awarding damages for the death of a minor child, allowance should be made for all reasonable expense of its maintenance and education.[79] Exemplary damages are usually not recoverable.[80]

65. Ryan v. Oshkosh Gaslight Co., 138 Wis. 466, 120 NW 264.

66. Where evidence tended to show at least three-fourths of $5,000, verdict was based on loss of society and companionship of wife during year preceding death. Held excessive. Indianapolis & Martinsville Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 NE 1042; Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142; Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 P 971. Instruction by court to jury they were to consider loss of comfort, society, support and protection suffered by widow and children of deceased, held proper. Jones v. Leonardt [Cal. App.] 101 P 811.

67. Where husband, in suing for wife's death, included loss of parental care, training and comfort to daughter, held properly included; had to be furnished from other source. Indianapolis & Martinsville Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 NE 1042.

68. Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142. Some statutes allow no deduction on account of necessary living expenses of deceased. Civ. Code 1895, §§ 3825, 5035. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678.

69. Butte Elec. R. Co. v. Jones [C. C. A.] 164 F 308.

70. Neither desire to help plaintiff nor punish defendant is proper. Hollingsworth v Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142.

71. It is not amount of estate which person owns in lifetime and leaves at his death which determines amount of damages. Nilson v. Chicago, B. & Q. R. Co. [Neb.] 121 NW 1128. Jury should not consider fact that deceased had his life insured for plaintiff's benefit, in reducing damages. Houston & T. C. R. Co. v. Lemair [Tex. Civ. App.] 119 SW 1162.

72. Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 117 SW 1043; Missouri, K. & T. R. Co. v. Wallace [Tex. Civ. App.] 115 SW 302.

73. Cannot recover for loss of wife's services and also for sums paid domestics who were hired. Indianapolis & Martinsville Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 NE 1042. Rights of action under Survival Act (Comp. Laws, § 10117) and Death Act (Comp. Laws, § 10427) are assets of estate vested in administrator, and acts do not give double cause of action. Carbary v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 485, 122 NW 367.

74. Missouri, K. & T. R. Co. v. Wallace [Tex. Civ. App.] 115 SW 302. Proper to consider the instruction and training one of disposition and character of deceased would give to his children during minority. Kansas City So. R. Co. v. Henrie, 87 Ark. 443, 112 SW 967. Under statute authorizing recovery of such damage "as under all circumstances of case may be just," held, recovery not limited to pecuniary loss by minor prior to majority; jury may consider fact that he was deprived of home by mother's death, that she was educating him and intended sending him to college. Butte Elec. R. Co. v. Jones [C. C. A.] 164 F 308.

75. In Delaware, recovery may be had for loss of minor child's services during minority, but if death is simultaneous with accident, recovery is limited to loss up to time of demise. Peoples' R. Co. v. Baldwin [Del.] 72 A 979. Where father was next of kin of minor daughter held, surgical services rendered to child not element of damage. Hutchinson v. West Jersey & S. R. Co., 170 F 615.

76. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787.

77. Where court instructed jury they should consider age, health and intelligence of minor, degree of intimacy existing between father and child, loss of companionship, etc., held not error. Anderson v. Great Northern R. Co., 15 Idaho, 513, 99 P 91. Request that court instruct jury they "have no right to consider anything but actual pecuniary loss plaintiff sustained on account of death of minor child." Held properly refused. Id.

78. Kalis v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 1107, 119 NW 906. Instruction assuming that deceased child might live beyond age of 21 years held proper. Illinois Cent. R. Co. v. Warriner, 132 Ill. App. 301.

79. Failure to so charge held reversible error. Galveston, H. & N. R. Co. v. Olds

The amount of recovery.[See 11 C. L. 1029]—Since the measure of damages is the pecuniary loss sustained by the equitable plaintiff,[81] unless there is a pecuniary loss, only nominal damages can be recovered.[82] In some cases, damages are presumed from the relation of the parties.[83]

Excessiveness.[See 11 C. L. 1029]—The jury should allow such damages as under all the circumstances of the case would be just.[84] The amount of the damages cannot exceed that limited by the statute in force at the time the right of action accrues,[85] nor be in excess of the amount prayed for in the complaint.[86] While the measure of damage is, in a sense, a speculation,[87] the amount must be based upon the evidence.[88]

[Tex. Civ. App.] 112 SW 787; Walker v. Lansing & S. Trac. Co. [Mich.] 16 Det. Leg. N. 187, 121 NW 271.

80. Law does not permit recovery of remote or speculative damages or damages as punishment. Nilson v. Chicago, B. & Q. R. Co. [Neb.] 121 NW 1128.

81. Financial means of plaintiff not to be considered. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. Under § 285, Burns' Ann. St. 1908, there can be no recovery except for pecuniary loss, and if there be no survivors who have sustained such loss, there is no right of action. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 88 NE 1080.

82. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 88 NE 1080.

83. Presumption that widow or minor children have sustained pecuniary injury. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 88 NE 1080. Adult children not favored by presumption. Id. Where parents died, held pecuniary injury to infant children, and not necessary to show loss of money or things purchased with same. Carter v. West Jersey & S. R. Co., 76 N. J. Law, 602, 71 A 253. Where the deceased is a minor and leaves a father entitled to his services, law presumes there has been pecuniary loss from his death. Held, evidence did not rebut presumption. Savage v. Hayes Bros. Co., 142 Ill. App. 316. Where next of kin is lineal descendant, law presumes substantial damage. Dukeman v. Cleveland, etc., R. Co., 237 Ill. 104, 86 NE 712.

84. Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142.

85. By § 4256, St. 1898, damages limited to $5,000, and by Laws 1907, p. 602, c. 581, increased to $10,000. Held, where action accrued before amendment, damages limited to original statute. Keeley v. Great Northern R. Co., 139 Wis. 448, 121 NW 167.

86. Yergy v. Helena L. & R. Co. [Mont.] 102 P 310.

87. Southern R. Co. v. Decker, 5 Ga. App. 21, 62 SE 678.

88. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 88 NE 1080.

Held not excessive.

Adults: $4,800 for husband's death, who died at 28 and earned $65 month. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. $7,000 for husband's death who earned $18 a week and was 35 years old. LaBelle v. Rhode Island Co. [R. I.] 73 A 306. $7,000 to widow where husband was 46 years old and provided well for her. Ryan v. Oshkosh Gaslight Co., 138 Wis. 466, 120 NW 264. $18,000, where husband left widow and three children between two and seven years of age; was in good health and 40 years old and earned $2.30 a day. Clancy v. New York, etc., R. Co., 133 App. Div. 119, 117 NYS 233. $12,958 for death of husband 35 years old, apparently in perfect health, conducting profitable business and leaving widow and daughter. McCormick v. Rochester R. Co., 117 NYS 1110. $1,200, where wife's death from tuberculosis was hastened by fall from car. Birmingham R., L. & P. Co. v. Lavender [Ala.] 47 S 1026. $3,000 for death of laborer who was sole support of widow and three children. Potter v. St. Louis & S. F. R. Co., 136 Mo. App. 125, 117 SW 593. $25,000, where husband was locomotive engineer 31 years old with life expectancy of 33.72 years; good health, industrious, good business habits; left widow 28 years old and three children, aged 10, 3 and 1 year, respectively; earned $165 to $175 a month. Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 117 SW 1043. $5,000, where husband left widow and six children, was 46 years old, had life expectancy of 23 years, and contributed from $700 to $900 a year to family. St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 665. $500 for death of son 21 years old, normal physique, good health, although he contributed little to parent's support. Pittsburg Vitrified Pav. & B. Brick Co. v. Fisher [Kan.] 100 P 507. $15,000 for husband who left widow and two children; was 41 years old and earned $115 a month. Harris v. Puget Sound Elec. R. Co., 52 Wash. 289, 100 P 838. $17,500 for death of husband who left widow, children and mother and there was nothing on trial calculated to inflame minds of jury or show they were prejudiced. Missouri, K. & T. R. Co. v. Wallace [Tex. Civ. App.] 115 SW 302. $25,000 for death of husband leaving widow, two children and mother. International & G. N. R. Co. v. White [Tex. Civ. App.] 120 SW 958. $10,000 for death of married woman 31 years old. Norfolk & W. R. Co. v. Munsell's Adm'r [Va.] 64 SE 50. $10,000, where deceased was 38 years old, in good health, earned $125 to $130 a month, and left widow and seven-year-old child. Smith v. Chicago, etc., R. Co., 143 Ill. App. 128. $2,000 for the wrongful death of widow 57 years old, whose income, with the aid of two sons and one daughter, amounted to only $500 a year. Cincinnati Trac. Co. v. Kettler, 11 Ohio C. C. (N. S.) 516. $11,490 for death of man 63 years of age whose management of vast estate was of great pecuniary value. Chicago, etc., R. Co. v. Tripfett [Tex. Civ. App.] 111 SW 761.

§ 5. *Remedies and procedure.*[89]—See 11 C. L. 1030—Since the right to recover depends on statutory authority, the statute must be strictly complied with.[90] The action must be begun within the time limited,[91] such limitation being an integral part of the cause of action and a condition precedent to its maintenance.[92] It is a limitation on the liability of the defendant and does not merely affect the remedy.[93]

Infants: $5,500 for death of infant two years old, where father was 31 and mother 27 years old and were poor. Galveston, H. & N. R. Co. v. Olds [Tex. Civ. App.] 112 SW 787. $1,500 for death of girl 13 years old who was employed as cash girl. Winkle v. Peck Dry Goods Co., 132 Mo. App. 656, 112 SW 1026. $1,660 for death of 18½-year-old unmarried son. Dando v. Home Tel. Co. [Mo. App.] 120 SW 644. $2,500 to mother for death of minor son. Western Union Tel. Co. v. Harris [Ga. App.] 64 SE 1123.

Held excessive.

Adults: $6,000, where decedent was 50 years old, earned $10 a week and in three months had given family only $40. Settlemeyer v. Public Service R. Co. [N. J. Law] 73 A 50. $8,250, where deceased was 46 years old at time of death, was earning $1,000 a year and had accumulated $2,000 in property. Held, estimating life expectancy at 24 years, the verdict was equivalent to finding he would have left estate of $20,000. Reduced to $6,000. Engvall v. Des Moines City R. Co. [Iowa] 121 NW 12. Where decedent left estate of $70,000, was 49 years old at death, and for several years prior thereto his business averaged $8,700 a year, held $40,000 verdict excessive. Reduced to $15,000. Yergy v. Helena L. & R. Co. [Mont.] 102 P 310. $32,500 for death of husband 35 years old with 31 years expectancy of life; robust health, earned $175 a month and contributed about $1,500 a year to support of family, consisting of widow and three children, 13, 11 and 7 years old. Reduced to $25,000. Kansas City So. R. Co. v. Henrie, 87 Ark. 443, 112 SW 967. $20,000 where husband was 24 years old and left no children, earned $900 a year and was in line for promotion. Held, according to annuity tables, placing contributions at $900 a year, computing at rate of 6 per cent, recovery should have been $10,845. Making due allowance for increase in earning capacity, verdict should not exceed $15,000. St. Louis, etc., R. Co. v. Freeman [Ark.] 116 SW 678.

Infants: $10,000 for death of son 20 years old, where parents were 57 and 65 years old, and son earned $22 to $29 a month and used it to support family. Reduced to $7,500. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841.

89. Search Note: See notes in 11 C. L. 1035; 2 L. R. A. (N. S.) 905; 15 Id. 1003; 2 Ann. Cas. 805.

See, also, Death, Cent. Dig. §§ 50-96, 141-154; Dec. Dig. §§ 34-77, 102-109; 13 Cyc. 329-334, 338-361, 382-387; 5 A. & E. Enc. P. & P. 848.

90. Where decedent brought action for damages for injuries and after demise this suit was dismissed and suit for death instituted by children. Held contrary to § 19, Act 1851 (P. L. 669). Black v. Baltimore & O. R. Co. [Pa.] 73 A 903. In some states a notice of an intent to sue for death of servant is required to be served, as condition precedent to recovery. Held not to be construed with technical refinement. Herlihy v. Little, 200 Mass. 284, 86 NE 294. By c. 23, Acts of 35th Legislative Assembly of New Mexico, no civil liability for death unless person claiming damages serves affidavit containing specified information on defendant within 90 days from date of injury. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —.

91. Within two years after the act or omission by Rev. Laws 1905, § 4503. Jones v. Minnesota Transfer R. Co. [Minn.] 121 NW 606. One year. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754. Although right of action given by Const. Ky. 1891, § 241, and by Ky. St. 1903, § 6, does not limit time within which action must be brought, held to embody provision of original Act March 10, 1854, specifying one year limit. De Valle Da Costa v. Southern Pac. Co., 167 F 654. By § 2801, Code 1896, must be brought within one year from day of injury. Williams v. Alabama Great So. R. Co. [Ala.] 48 S 485. During first six months right to appropriate action is in widow, during next six months in minor children, statute of limitations being one year. Fulwider v. Trenton Gas, L. & P. Co., 216 Mo. 582, 116 SW 508. Pendency of suit by widow would be matter to be pleaded in abatement of subsequent suit by children. No presumption that widow appropriated action. Id. One year by c. 23, Acts of 35th Legislative Assembly of New Mexico. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —. Rev. St. 1892, c. 48, art. 2 (Ann. St. 1906, pp. 2345-2365), relating to limitations in personal actions, provides (§ 4285) in case of nonsuit plaintiff may commence new action from time to time within one year after nonsuit. Held not to apply to c. 17 (pp. 1637-1658), relating to damages for torts, since that chapter carries its own one year limitation. Clark v. Kansas City, etc., R. Co., 219 Mo. 524, 118 SW 40.

92. Where administrator brought suit for death more than one year after injury. Held barred by § 2801, Code 1896, prescribing one year limitation from date of injury. Williams v. Alabama Great So. R. Co. [Ala.] 48 S 485. Administrator's suit barred although brought within one year of date of death; held not original cause of action accruing at decedent's death. Id. Action held barred by limitation of one year provided by Gen. St. § 1725. Kirton v. Atlantic Coast Line R. Co. [Fla.] 49 S 1024.

93. Suit brought in name of administratrix, decedent's widow. More than year after intestate's death, summons amended, making plaintiffs parties in order to conform to statute. Held, administratrix had no cause of action, and as proper plaintiffs were not parties within one year limitation, action barred. Johnson v. Phoenix Bridge Co., 133 App. Div. 807, 118 NYS 88; Bowen v. Phoenix Bridge Co., 134 App. Div. 22, 118 NYS 93.

Generally, the law of the forum governs as to limitations, but this rule has exceptions.[94] Under some of the statutes, several causes of action may be joined in the same declaration or petition.[95] Parents must join in action for death of a minor child.[96] Joint tort feasors are both jointly and severally liable, and either or all may be sued in the same action.[97] The declaration must allege all of the substantial facts essential to a right of action, such as, the plaintiff's capacity to sue,[98] the existence of beneficiaries capable of taking under the statute,[99] the relationship of the beneficiary,[1] the alleged negligent acts,[2] and that death resulted from the injuries complained of.[3] It has been held that it is not necessary that the plaintiff specify in his declaration the acts constituting the negligence,[4] but, if specific acts of negligence are alleged, a recovery can only be had when such acts are established by substantial proof,[5] and damages need not be specifically alleged.[6] Where the action is brought by a personal representative, due appointment and qualification must

94. Where statutory liability is sought to be enforced, and statute prescribes time within which suit must be brought and extinguishes cause of action after such time, law of place where action arose governs as to limitations. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403.

95. Where damages for death are treated as part of estate, the action may be joined with action for damages for injury itself, also for benefit of estate. Carbary v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 485, 122 NW 367. Rights of action under Survival Act (Comp. Laws, § 10117) and Death Act (Comp. Laws, § 10427) are assets of estate vested in administrator, and acts do not give double cause of action. Id. Fact that damages to be recovered under two separate counts are not distributed in same manner does not preclude joinder, as probate court has power to compel proper application. Id. Husband may join cause of action for damages for death of wife, with action for recovery of sums spent for treatment of injury resulting in death. Gulf, etc., R. Co. v. Farmer [Tex.] 115 SW 260.

96. Where parents were divorced and father refused to join in suit for death of minor child, held, mother could not maintain action alone under Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637). Clark v. Kansas City, etc., R. Co., 219 Mo. 524, 118 SW 40.

97. Fulwider v. Trenton Gas, L. & P. Co., 216 Mo. 582, 116 SW 508.

98. Action must be prosecuted by persons named in statute. Satterberg v. Minneapolis, etc., R. Co. [N. D.] 121 NW 70.

99. Two classes of beneficiaries recognized, by § 285, Burns' Ann. St. 1908: Widow or widower and children, if there be any such persons, or other persons who are next of kin. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 88 NE 1080. Damages must be exclusive to persons of one class or other. Id. Where original bill declared intestate left "parents and sisters," held sufficient to support amendment that he left next of kin. Byrne v. Marshall Field & Co., 237 Ill. 384, 86 NE 748.

1. Complaint alleged deceased left surviving him certain person as next of kin and heir at law but did not state relationship. Held open to motion to make more definite, but good on demurrer. Lahti v. Oliver Iron Min. Co., 106 Minn. 241, 118 NW 1018.

2. In action for death by derailment of car, petition did not specifically allege derailment was caused by rock on rails, as evidence showed, but alleged negligence in excessive speed of train and permitting space between rails to be filled that rock might have rolled therefrom onto rail. Held to sustain charge that defendants were liable if derailment was caused by rock. International & G. N. R. Co. v. White [Tex. Civ. App.] 120 SW 958.

3. Where death does not ensue from injuries complained of, but from other causes, different action survives from that given by statute in case of death. McLaughlin v. Hebron Mfg. Co., 171 F 269. Not necessary to inquire whether injuries complained of caused death of decedent, where no damages for death are claimed and suit is for damages for pain and suffering resulting from injuries or for loss of services and expenses while disabled. People's R. Co. v. Baldwin [Del.] 72 A 979.

4. Sufficient to state negligence in general terms. Beck v. Johnson, 169 F 154.

5. In action for death of fireman in collision, alleging negligence on part of engineer to keep lookout ahead. Held evidence insufficient to sustain charge. Evans v. Wabash R. Co. [Mo.] 121 SW 36. In action for death of switchman, evidence held not to sustain allegations that switch at which decedent was killed had been blocked, that blocking was allowed to decay and disappear, and that defendant was negligent in not repairing same. Newlin v. St. Louis & S. F. R. Co. [Mo.] 121 SW 125. In action brought for death from defendant's negligence or "criminal intent," under Rev. St. 1899, § 2864 (Ann. St. 1906, p. 637), evidence must show a criminal intent, followed by criminal conduct resulting in fatal injury. Garrett v. St. Louis Transit Co., 219 Mo. 65, 118 SW 68.

6. Where petition stated extent of decedent's earnings, and alleged plaintiffs had lost services and earnings, and also alleged death, character, relation to plaintiffs, their ages, and said "by reason of premises" plaintiffs have been damaged $40,000, held declaration sufficient to authorize recovery of all damages legally recoverable, including such as law allows for loss of assistance, care and nurture of husband and father. Houston & T. C. R. Co. v. Davenport [Tex.] 117 SW 790.

be shown.[7] Since there is a presumption that the law of a sister state is the same as that of the forum,[8] and as courts do not take judicial notice of the laws of another state,[9] the foreign statute creating the right of action and entitling the plaintiff to sue must be pleaded.[10] The court is invested with discretion in allowing or refusing amendments,[11] but a change of the cause of action is usually not permitted.[12] One suing for wrongful death must not only show an injury, but that it was proximately caused by defendant's negligence,[13] unless negligence is presumed.[14] He must also show how it occurred,[15] and that the deceased exercised due care.[16] Proximate cause may be shown by inferences,[17] but inferences may not be drawn from

7. Although guardian ad litem is not properly appointed for minors, it will not defeat an action where complaint states cause of action in favor of widow. Anustasakas v. International Contract Co., 51 Wash. 119, 98 P 93.

8. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754.

9. Rankin v. Central R. Co. [N. J. Law] 71 A 55.

10. Rankin v. Central R. Co. [N. J. Law] 71 A 55. In order to entitle plaintiff to prove such facts, necessary they should be alleged. Howlan v. New York & New Jersey Tel. Co., 131 App. Div. 443, 115 NYS 316. Mere statement in complaint that statute of foreign state exists, giving its title and date of passage, not sufficient allegation to constitute cause of action. Id. In action brought in New York for death by negligence in New Jersey, held incumbent on plaintiff to prove New Jersey statute contains provisions which will authorize action to be brought in New York, also that administrator is entitled to recover damages. Id.

11. Where action for death erroneously brought in name of administratrix instead of next of kin, held may amend. Herlihy v. Little, 200 Mass. 284, 86 NE 294. Not error to refuse to allow amended answer to be filed, alleging contributory negligence, as developed at trial, where plaintiff had concluded her evidence. Louisville & N. R. Co. v. Stewart's Adm'x [Ky.] 115 SW 775.

12. Where death is treated as new cause of action, a declaration for damages sustained from an injury caused by defendant's negligent act cannot be amended so as to authorize recovery for death resulting from such injury. Fournier v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 480, 122 NW 299.

13. Mississippi Cotton Oil Co. v. Smith [Miss.] 48 S 735. Casual connection must be shown between negligence charged and injury. Yongue v. St. Louis & S. F. R. Co., 133 Mo. App. 141, 112 SW 985. One suing for death of child struck by train has burden of proving failure of trainmen to exercise due care after discovery of child's peril. Southern R. Co. v. Smith [Ala.] 50 S 390. Burden on plaintiffs to show defendant's employes were negligent in failing to give crossing signals. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33. After proof of failure to comply with law relating to giving signals at crossings and proof of accident at crossing, burden is cast on defendant to show disobedience of law was not proximate cause of injury. Id. Instruction that burden was on defendant to prove death was not caused by its own negligence held error. Day v. Consolidated L., P. & Ice Co., 136 Mo. App. 274, 117 SW 81. Where decedent was asphyxiated in sewer while employed by defendant, held evidence failed to show which of two causes resulted in death and defendant was responsible for only one of them. Chester v. Cape May Real Estate Co. [N. J. Law] 73 A 836. Plaintiff is required only to make out prima facie case to make it appear more probable that injury was proximate result of defendant's negligence than from any other cause. Milton's Adm'x v. Norfolk & W. R. Co., 108 Va. 752, 62 SE 960. Evidence held sufficient to warrant finding by jury that defendant's negligence caused death of plaintiff's intestate. Id.

14. Weight of authority seems in favor of rule that breach of statute is actionable negligence, whenever it is shown injuries were sustained on account of such breach. Smith's Adm'r v. National Coal & Iron Co. [Ky.] 117 SW 280. Infant employed in coal mine, contrary to statute; held to have cause of action for his death. Id.

15. In action for decedent's death by being killed in defendant's cable elevator, where plaintiff asserted decedent was crushed between elevator and gate which descended as elevator ascended, held, evidence did not show accident was due solely to defendant's negligence. Nichols v. Searle Mfg. Co., 134 App. Div. 62, 118 NYS 651.

16. Ralph v. Cambridge Elec. L. Co., 200 Mass. 566, 86 NE 922. Where circumstances point as much to negligence of deceased as to its absence, or point in neither direction, nonsuit should be granted. Lamb v. Union R. Co., 195 N. Y. 260, 88 NE 371. An infant is only required to exercise such care as may reasonably be expected from one of his age under like circumstances. Smith's Adm'r v. National Coal & Iron Co. [Ky.] 117 SW 280. In action for wrongful death, burden of proving due care on decedent's part is upon plaintiff, yet if no eyewitnesses to the accident, no positive act of due care need be shown; it may be inferred from the absence of fault when sufficient circumstances are shown to exclude idea of his negligence. Prince v. Lowell Elec. L. Corp., 201 Mass. 276, 87 NE 558. Evidence held to justify finding that decedent did not deliberately expose himself to danger from live wire. Id. May establish ordinary care by highest proof of which case is capable. Collision v. Illinois Cent. R. Co., 239 Ill. 532, 88 NE 251.

17. Evidence held to support finding that death was caused by explosion of dynamite negligently stored, and not by being struck by lightning. Brown v. West Riverside Coal Co. [Iowa] 120 NW 732.

mere presumptions.[18] Gross negligence need not be shown.[19] The question of negligence is usually for the jury,[20] as is also the question of proximate cause,[21] but, where the facts are undisputed, the question of proximate or intervening cause is for the court.[22] The rule that contributory negligence is an affirmative defense is open to exceptions.[23] While the doctrine of comparative negligence is not generally followed, some states adhere to the last chance doctrine.[24] Where there are no eyewitnesses, the manner and cause of the accident may be shown by circumstantial evidence,[25] and it is presumed that death was not self-inflicted.[26] Coroner's inquisitions are inadmissible to prove the cause of death in civil actions.[27] Mortality tables are admissible to show life expectancy.[28] Instructions should be given in as specific

18. Walton & Co. v. Burchel [Tenn.] 121 SW 391.

19. Fact that pleader in some portion of petition characterizes defendant's conduct as grossly negligent does not change rule of evidence upon subject of defendant's duty. Held, where petition charged willful negligence, not necessary to prove greater degree of negligence than was involved in failure to use ordinary care. Western Union Tel. Co. v. Harris [Ga. App.] 64 SE 1123.

20. Alabama Great So. R. Co. v. Hanbury [Ala.] 49 S 467; La Belle v. Rhode Island Co. [R. I.] 73 A 306.

21. Where passenger on railway was injured in collision and died four months later from apoplexy, held evidence showed health declined from date of accident which was proximate cause. McCormick v. Rochester R. Co., 117 NYS 1110; South Georgia R. Co. v. Niles, 131 Ga. 599, 62 SE 1042.

22. Brown v. American Steel & Wire Co. [Ind. App.] 88 NE 80.

23. Where petition or evidence shows prima facie case of contributory negligence on part of plaintiff, then rule does not prevail. Huber v. Texas & P. R. Co. [Tex. Civ. App.] 113 SW 984. Rule as to sufficiency of evidence necessary to establish absence of contributory negligence is not to be held so strictly in death cases as in cases where injured persons are witnesses upon trial. Vandenbout v. Rochester R. Co., 129 App. Div. 844, 114 NYS 760. There must be some evidence which tends legitimately to prove fact. Nichols v. Searle Mfg. Co., 134 App. Div. 62, 118 NYS 651.

24. Where decedent's negligence was conceded and reliance was placed on defendant's negligence in failing to discover decedent's peril in time to avoid striking him in collision between defendant street car and decedent's vehicle, held right to recover for defendant's negligence. Felver v. Central Elec. R. Co., 216 Mo. 195, 115 SW 980.

25. Where decedent was struck by falling joist which precipitated him through light shaft in building where he was working, held, evidence showed joist fell at about spot where decedent was standing and that he disappeared about that time. Sufficient to show proximate cause. Jones v. Leonhardt [Cal. App.] 101 P 811. Evidence held to warrant inference deceased was caught in cog of machinery while working about same, and that he did not fall and come in contact with same accidentally. Mississippi Cotton Oil Co. v. Smith [Miss.] 48 S 735. Evidence held to show deceased was thrown off car by rapid and oscillating motion, due to condition of track and brakes, and did not commit suicide by jumping, nor fall off through carelessness. Yongue v. St. Louis & S. F. R. Co., 133 Mo. App. 141, 112 SW 985. Decedent overloaded dummy elevator so that it fell. Immediately afterwards decedent placed her head in shaft and fell backwards from force of blow from which she died. Held, evidence warranted inference decedent was hit by falling counterweight. Winkle v. Peck Dry Goods Co., 132 Mo. App. 656, 112 SW 1026.

26. Collison v. Illinois Cent. R. Co., 239 Ill. 532, 88 NE 251. Presumption that decedent did not commit suicide in falling down elevator shaft, although he knew of unguarded opening. Devine v. National Safe Deposit Co., 240 Ill. 369, 88 NE 804. Presumption decedent did not jump off moving train with suicidal intent. Hart v. St. Louis & S. F. R. Co. [Kan.] 102 P 1101.

27. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109.

Note: To the same point see Memphis & C. R. Co. v. Womack, 84 Ala. 149, 4 S 618; Germania Life Ins. Co. v. Lewin, 24 Colo. 43, 51 P 488, 65 Am. St. Rep. 215; In re Dolbeer's Estate, 149 Cal. 227, 86 P 695; Central R. Co. v. Moore, 61 Ga. 151; Union Cent. Life Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 NE 277; Aetna Life Ins. Co. v. Kaiser, 115 Ky. 539, 74 SW 203; Wasey v. Travelers' Ins. Co., 126 Mich. 119, 85 NW 459; State v. Cecil Co., 54 Md. 426; Louis v. Connecticut Mut. Life Ins. Co., 58 App. Div. 137, 68 NYS 683; Insurance Co. v. Schmidt, 40 Ohio St. 112; Cox v. Royal Tribe, 42 Or. 365, 71 P 73, 95 Am. St. Rep. 752, 60 L. R. A. 620; Aetna Life Ins. Co. v. Milward, 118 Ky. 716, 82 SW 364, 68 L. R. A. 285; Kane v. Supreme Tent K. of M. of W., 113 Mo. App. 104, 87 SW 547; Boehme v. Sovereign Camp W. of W., 98 Tex. 376, 84 SW 422; Kinney v. Brotherhood of American Yeomen, 15 N. D. 21, 106 NW 44; Chambers v. Modern Woodmen, 18 S. D. 173, 99 NW 1107; Wigmore on Evidence, § 1671.—From Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109.

28. Decedent must be within class of persons for whom mortuary tables were prepared. Held error to admit tables where decedent was an asthmatic and not included. Mississippi Cotton Oil Co. v. Smith [Miss.] 48 S 735. Held error to refuse to admit mortality tables to show life expectancy. Huber v. Texas & P. R. Co. [Tex. Civ. App.] 113 SW 984; Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28. Not error to admit "life tables." Southern R. Co. v. Adkin's Adm'r [Ky.] 117 SW 321. See note 13 C. L. 1234, in which the tables are given and authorities on their admissibility collated.

and concrete a form as possible,[29] and the court should not express an opinion in instructions.[30] It is important that the jury be instructed for what elements no recovery can be allowed.[31]

§ 6. *Distributive rights in amount recovered.*[32]—See 11 C. L. 1037—The statutes allowing the recovery usually provide for the distribution of the proceeds.[33] In some states the court is given discretionary power to distribute the damages recovered to the heirs at law.[34] Some statutes specify that the damages recovered shall revert to the decedent's estate and be distributed as such,[35] while others provide that the damages recovered shall be distributed as personalty.[36] Some statutes permit a recovery both for the benefit of decedent's estate and for his heirs.[37]

Death Certificates; Debentures; Debt, see latest topical index.

DEBT, ACTION OF.[38]

The scope of this topic is noted below.[39]

Neither nil debet nor non assumpsit is a proper plea in debt on a specialty.[40]

Debts of Decedents, see latest topical index.

29. Where court instructed jury on facts constituting defendant's negligence, held facts constituting contributory negligence on part of plaintiff should also have been embraced in instructions. Louisville & N. R. Co. v. King's Adm'r [Ky.] 115 SW 196.

30. Statement of necessary legal conclusion arising from undisputed facts held not to be erroneous. Western Union Tel. Co. v. Harris [Ga. App.] 64 SE 1123.

31. Error for court to refuse defendant's request to instruct that no damages could be recovered for mental suffering, nor sorrow or distress of mind. Gulf, etc., R. Co. v. Farmer [Tex.] 115 SW 260.

32. Search Note: See 4 L. R. A. (N. S.) 814. See, also, Death, Cent. Dig. §§ 132-140; Dec. Dig. § 101; 13 Cyc. 380-382; 8 A. & E. Enc. L. (2ed.) 955.

33. Recovery under Code Civ. Proc. § 377, is for benefit of heirs, and bringing of action by personal representative of deceased does not make damages part of estate of deceased. Jones v. Leonardt [Cal. App.] 101 P 811. Damages exclusively for husband or wife or next of kin. J. B. & J. M. Cornell Co. v. Ward [C. C. A.] 168 F 51. By Gen. St. 1902, par. 399; Pub. Acts 1903, p. 149, c. 193, half to husband or widow and half to lineal descendants of decedent, per stirpes; if no descendants, whole to husband or widow, and if no husband or widow, to heirs according to law regulating distribution of personal estate. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754. Act Cong. Apr. 22, 1908, c. 149, 35 Stat. 65, held not to give remedy in state courts for death by wrongful act, because inconsistent with laws of state as to devolution of estate of decedent. Id.

34. Rev. Codes 1905, § 7689. Satterberg v. Minneapolis, etc., R. Co. [N. D.] 121 NW 70. Brothers and sisters, in the absence of parents, wife or children, are heirs-at-law within meaning of Rev. Code 1905, § 7689. Id.

35. Kalis v. Detroit United R. Co. [Mich.] 119 NW 906.

36. Code Civ. Proc. Alaska, par. 353, provides amount recovered should be for decedent's husband, wife or children, and in default thereof, to estate. Jennings v. Alaska Treadwell Gold Min. Co. [C. C. A.] 170 F 146. Rev. Codes 1905, §§ 7686-7691. Satterberg v. Minneapolis, etc., R. Co. [N. D.] 121 NW 70. Rev. Laws 1905, § 4503. Lahti v. Oliver Iron Min. Co., 106 Minn. 241, 118 NW 1018; Jones v. Minnesota Transfer Co. [Minn.] 121 NW 606. Code 1896, § 27, provides damages recovered are not liable for payment of decedent's debts. Suell v. Derricott [Ala.] 49 S 895. Kirby's Dig. § 6290. Kansas City So. R. Co. v. Henrie, 87 Ark. 443, 112 SW 967. Whoever brings action does so in representative capacity for exclusive benefit of heirs-at-law. Satterberg v. Minneapolis, etc., R. Co. [N. D.] 121 NW 70. Damages recovered not estate in hands of administrator and not subject to debts or liabilities of deceased. Thompson v. Mann, 65 W. Va. 648, 64 SE 920. Judgment against administrator held not to bind fund recovered under Code 1906, §§ 3488, 3489. Id.

37. $1,000 awarded to estate for suffering of deceased and $3,000 to widow and next of kin for his death. St. Louis, etc., R. Co. v. Pate [Ark.] 118 SW 260. Where decedent was run over by train and suffered excruciating pain for 30 or 40 minutes, held $1,000 for estate not excessive. Id.

38. See 11 C. L. 1038.

Search Note: See note in 5 C. L. 952. See, also, Debt, Action of, Cent. Dig.; Dec. Dig.; 13 Cyc. 402-424; 8 A. & E. Enc. L. (2ed.) 982; 5 A. & E. Enc. P. & P. 894.

39. It includes matters relating peculiarly to the action of debt. The action of book debt is treated in the topic Accounts Stated and Open Accounts,* § 4. General matters of practice are treated in such topics as Evidence,* Instructions,* Pleading and Trial.*

40. Error to enter judgment for refusal to reply thereto. Smith v. Woman's Medical College, 110 Md. 441, 72 A 1107.

* Always begin with the latest article on the subject. Use the latest topical index.

DECEIT.

The scope of this topic is noted below.[41]

§ 1. Nature and Elements, 1257. | **§ 2. Action and Procedure, 1257.**

§ 1. *Nature and elements.*[42]—See 11 C. L. 1038—Fraud is a willful, malevolent act directed to perpetrating a wrong to the rights of another.[43] The essential elements of an action for deceit are [44] representation, falsity, scienter, intent, deception and damage.[45] Actual intentional fraud is essential to the action.[46] The false representations must have been made with intent to deceive,[47] and must have been made with actual knowledge of their falsity,[48] or recklessly and without regard to their truth or falsity,[49] and they must have been relied upon by one, ignorant of their falsity, to his injury.[50]

§ 2. *Action and procedure.*[51]—See 11 C. L. 1042—As a general rule courts of equity and courts of law have concurrent jurisdiction of actions concerning fraud,[52] and a defrauded person has an election of remedies. He may rescind [53] or he may sue for rescission and recover what he has parted with by reason of the fraud,[54] or he may affirm the transaction in which he has been defrauded and maintain an action at law

41. It embraces only the remedial law of fraud or deceit as a ground of action at law for damages. The elements of fraud (see Fraud and Undue Influence,* § 1), and fraud as a ground for relief other than the recovery of damages, are fully treated elsewhere (see Fraud and Undue Influence,* § 3; Cancellation of Instruments;* Reformation of Instruments*), as is the measure of damages (see Damages,* § 5A).

42. Search Note: See notes in 5 C. L. 954; 15 L. R. A. 795; 28 Id. 421; 35 Id. 417; 37 Id. 593; 57 Id. 675; 8 L. R. A. (N. S.) 452; 10 Id. 245, 640.

See, also, Fraud, Cent. Dig. §§ 1-26; Dec. Dig. §§ 1-30; 20 Cyc. 8-86; 14 A. & E. Enc. L. (2ed.) 12, 148, 152, 156, 177, 190, 205.

43. Such an act in a vendor is actionable as against mere negligence of a purchaser in failing to prevent fraud. Judd v. Walker, 215 Mo. 312, 114 SW 979.

44. The elements are representations, falsity, knowledge, deception and injury. Mussiller v. Rice, 116 NYS 1028. Representations must be false, must be known to be false, made with intent to deceive, must deceive, and injury result. Remmers v. Remmers, 217 Mo. 541, 117 SW 1117. The statement must have been false, must have been made with knowledge of its falsity, and must have misled or deceived. Southern Exp. Co. v. Fox [Ky.] 115 SW 184. False representations by a vendor of land made with knowledge of their falsity, and with the intention that they should be acted upon, are actionable where acted upon in ignorance of their falsity. Judd v. Walker, 215 Mo. 312, 114 SW 979.

45. For a full and complete discussion of these various elements, see Fraud and Undue Influence, § 1.

46. Representations, though designed to influence, if honestly made are insufficient. Moran v. Brown, 113 NYS 1038.

47. Hodgkins v. Dunham [Cal. App.] 103 P 351.

48. Vincent v. Corbitt [Miss.] 47 S 641. Civ. Code 1895, c. 10, § 10, relative to fraud done by mistake or innocently, is not applicable to deceit to which scienter is an essential element. Camp v. Carithers [Ga. App.] 65 SE 583.

49. Vincent v. Corbitt [Miss.] 47 S 641. While scienter must be alleged and proved, it is not necessary that defendant knew the falsity of his representations. It is sufficient if they were made as of his knowledge, when he had no knowledge or should have known of their falsity. Id.

50. In an action for false representations by the agent of the seller of a cotton gin, a charge that if the buyer could on inspection have understood its condition he could not recover was erroneous, since defendants were responsible only in so far as plaintiff's inability to understand the machine was due to their fraudulent acts. Wimple v. Patterson [Tex. Civ. App.] 117 SW 1034.

51. Search Note: See notes in 37 L. R. A. 613; 6 L. R. A. (N. S.) 556, 872; 7 Id. 646.

See, also, Fraud, Cent. Dig. §§ 27-78; Dec. Dig. §§ 31-69; 20 Cyc. 86-146; 8 A. & E. Enc. P. & P. 883.

52. Courts of law and equity have concurrent jurisdiction of cases arising out of fraud. Daniel v. Gillespie, 65 W. Va. 366, 64 SE 254.

53. See Fraud and Undue Influence, § 1. A defrauded party may sue for rescission or affirm the contract and sue for damages. West v. Carter [Wash.] 103 P 21. Where a contract for the sale of land is induced by fraud. Judd v. Walker, 215 Mo. 312, 114 SW 979. Conveyance induced by fraud may be set aside on return of consideration or an action for damages for deceit will lie. Marvel v. Cobb, 200 Mass. 293, 86 NE 360.

54. See Fraud and Undue Influence, § 1. A purchaser may repudiate, return the property and recover what he parted with. Cheney v. Dickinson [C. C. A.] 172 F 109; Siltz v. Springer, 236 Ill. 276, 85 NE 748. A

for damages.[55] The gist of the action for fraud is the damage which has been wrongfully done the injured person.[56] A cause of action for deceit is transitory.[57] It must be brought within the period prescribed by the statute of limitations,[58] the running of which is generally suspended until the fraud is or should have been discovered,[59] but the right to maintain an action is lost by no lapse of time short of the period of limitations prescribed.[60] All persons concerned in the perpetration of the fraud are jointly liable.[61] A fraud is not waived by asking a modification of the contract induced by it.[62] Return of the consideration received is not a condition precedent.[63]

Pleading. See 11 C. L. 1042—All of the essential elements of the tort must be pleaded,[64] and facts showing the existence thereof must be specifically alleged.[65] It

defrauded person may rescind and recover what he has parted with. Del Vecchio v. Savelli [Cal. App.] 101 P 32.

55. Del Vecchio v. Savelli [Cal. App.] 101 P 32; Cheney v. Dickinson [C. C. A.] 172 F 109; Siltz v. Springer, 236 Ill. 276, 85 NE 748. One induced by fraud to purchase notes may keep them and sue for damages sustained, and that he has not the notes in his possession at the trial is no bar to his action. Siltz v. Springer, 236 Ill. 276, 85 NE 748.

56. Brackett v. Perry, 201 Mass. 502, 87 NE 903.

57. Hodgkins v. Dunham [Cal. App.] 103 P 351. Under Sayles' Ann. Civ. St. 1897, art. 1194, an action for fraud may be brought in the county where the fraud was committed, though the wrongdoer lives elsewhere. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023.

58. See Limitation of Actions. Under Rev. Laws 1902, c. 202, §§ 2, 10, an action is barred in six years. Marvel v. Cobb, 200 Mass. 293, 86 NE 360. Where a contract is induced by fraud, a cause of action accrues immediately. Isman v. Loring, 130 App. Div. 845, 115 NYS 933. Cause held barred by the four-year statute. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023. Failure to discover the fraud not excused. Id.

59. Evidence of notice of fraud held admissible on the question as to when the period of limitations commenced to run. Comfort v. Robinson, 155 Mich. 143, 15 Det. Leg. N. 951, 118 NW 943. Evidence held to show that plaintiff knew of the fraud more than the statutory period prior to commencing action. Day's Committee v. Exchange Bank [Ky.] 116 SW 259. Limitations run from the time the defrauded person should by the exercise of reasonable diligence have discovered the fraud. Garbutt Lumber Co. v. Walker [Ga. App.] 64 SE 698.

60. Jacobsen v. Whitely, 138 Wis. 434, 120 NW 285.

61. If an agent in the prosecution of his principal's business misrepresents a material fact, the **agent and principal** are jointly liable. Willard v. Key, 83 Neb. 850, 120 NW 419. A corporation and its controlling officer who so fraudulently manipulated its funds as to deprive a stockholder of his interest are each liable for the entire injury. Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257. The stockholder was not required to pursue them separately or seek relief against those into whose hands he could trace the funds. Id.

62. Where, after ascertaining that representations that a horse was a sure foal getter were not true, a buyer asked for modification of a contract to permit breeding of mares to another horse, held he did not waive the fraud. Hodgkins v. Dunham [Cal. App.] 103 P 351.

63. One defrauded into accepting worthless notes need not tender or surrender same prior to suit. Springer v. Siltz, 133 Ill. App. 552.

64. Pleading must show all of the elements. Southern Exp. Co. v. Fox [Ky.] 115 SW 184; Power v. Turner, 37 Mont. 521, 97 P 950. Answer held not to state facts sufficient to constitute a defense on the ground of fraud. Power v. Turner, 37 Mont. 521, 97 P 950. Under Rev. Codes, § 6532, requiring a complaint to state facts constituting a cause of action, a common-law count for money had and received which does not state facts creating an indebtedness does not state a cause of action for fraud. Truro v. Passmore, 38 Mont. 544, 100 P 966.

Complaint held sufficient: Held to sufficiently allege the elements of deceit. Camp v. Carithers [Ga. App.] 65 SE 583. All elements of fraud alleged. Simons v. Cissna, 52 Wash. 115, 100 P 200. Complaint for fraudulent representations in the sale of land. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023. Complaint alleging that a contract was induced by fraud, and that damage resulted in consequence thereof. Isman v. Loring, 130 App. Div. 845, 115 NYS 933. Complaint held to state a cause of action for fraudulent representations by which one was induced to part with corporate stock. Newstrom v. Turnblad [Minn.] 121 NW 236. Complaint against corporation and its managing officer by a stockholder held to state a cause of action for fraud committed by them jointly. Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257. Allegations that because of false representations upon which one relied she delivered stock to another which he appropriated and intended to appropriate when he made the representations. Maxwell v. Martin, 130 App. Div. 80, 114 NYS 349. Complaint alleging that a check was given on account in order to induce extension of further credit, that there were no funds on deposit to pay it, that further credit was given, etc. Mussiller v. Rice, 116 NYS 1028. Where owners of corporate stock induced another to purchase it by representations that the corporation was not indebted, in an action for fraud it was not necessary to allege that debts were paid subsequent to the purchase (Mills v. Knudson [Wash.] 103 P 1123), nor was it necessary to allege the value of the stock (Id.).

must show knowledge of the falsity,[66] intent to deceive,[67] reliance on the representations,[68] and injury.[69] A general denial is not robbed of its efficacy because another distinct defense is set up,[70] and that one cause of action joined is not sufficiently pleaded does not affect another cause that is.[71] The corporation need not be joined in an action against stockholders for fraud in the sale of stock.[72]

Evidence.[See 11 C. L. 1043]—One who alleges fraud has the burden to prove all the essential elements of the cause of action[73] by a preponderance of the evidence.[74]

nor was it necessary to allege that the stock was of less value because of the outstanding debts (Id.). Declaration for fraud and deceit alleging that defrauded person relied upon truth of statement in deed and upon statements and representations made to him by third person at defrauder's instance, and that so relying was caused to execute deed and receive certain notes, held to state good cause of action. Springer v. Schwitters, 137 Ill. App. 103.

Held insufficient: Complaint by lessee of sheep that sheep were infected with disease, which affected his lands and corrals, that lessor knew they were so infected and led lessee to believe that they were not, held not to state a cause of action. Power v. Turner, 37 Mont. 521, 97 P 950.

65. Chapman v. Meyers [Neb.] 121 NW sufficient. Graves v. Horton [Ga.] 65 SE 245. Allegations held conclusions and not 112.

66. Complaint which does not allege that representations were made with knowledge of their falsity or facts sufficient to impute such knowledge is demurrable. Vincent v. Corbitt [Miss.] 47 S 641.

67. Complaint held to charge intent to deceive under Civ. Code, §§ 572, 1709, defining fraud. Hodgkins v. Dunham [Cal. App.] 103 P 351.

68. A complaint must show that one parted with his money on the faith of the false representation. Garbutt Lumber Co. v. Walker [Ga. App.] 64 SE 698.

69. Complaint held insufficient in that it failed to show injury to plaintiff. Rowell v. Haines, 63 Misc. 102, 116 NYS 446. Complaint must show damages. Swift v. Swift [Ga.] 64 SE 559. Complaint for fraud in obtaining an absolute assignment of securities as collateral instead of an assignment of them as security held not to state a cause of action where the loan had not been repaid. Doherty v. Wing, 140 Wis. 227, 122 NW 716. Complaint setting forth facts and alleging damage by reason of the false representations, and that the sum was due, sufficiently alleges damages. Ford v. Freeman, 138 Wis. 503, 120 NW 234.

70. General denial held not robbed of its efficacy by a separate paragraph denying that representations were written as required by Ann. St. 1906, p. 1965. McKee v. Rudd [Mo.] 121 SW 312.

71. In an action against corporate stockholders for false representations by which one was induced to purchase stock and make advancements to the corporation, that the advancements were not sufficiently pleaded did not affect the right of action for deceit. Harlow v. Haines, 63 Misc. 98, 116 NYS 449.

72. Harlow v. Haines, 63 Misc. 98, 116 NYS 449. Allegations that stockholders of a corporation falsely represented its assets so as to induce another to purchase stock held not to state a cause of action against the corporation so as to render the complaint defective for failure to join it. Id.

73. Has the burden to prove not only the false representations but the amount of damages suffered. Brandon v. McCausland [C. C. A.] 171 F 402. Cannot recover on proof of facts which might justify recovery upon some other theory. Moran v. Brown, 113 NYS 1038. One induced by false representations as to the profits of a business to purchase an interest therein, who bases his case on negative averments that profits since the purchase had not been equal to representations, has the burden to show that averments are prima facie true. Del Vecchio v. Savelli [Cal. App.] 101 P 32. In an action for fraud alleged to have been practiced by a promise made with secret intention not to fulfill the same, a charge the plaintiff must prove the promise and that it was deceitfully made held not to impose too great a burden of proof. Cerny v. Paxton & Gallagher Co., 83 Neb. 88, 119 NW 14.

Evidence held sufficient: To show that one was entitled to and did rely upon false representations. Mason v. Gates [Ark.] 119 SW 246. To show that representations that a horse was a sure foal getter were false. Hodgkins v. Dunham [Cal. App.] 103 P 357. To show that one was entitled to rely on false representations as to the solvency of a third person. Simons v. Cissna, 52 Wash. 115, 100 P 200. To show that a seller who made representations had no reasonable grounds to believe them true. Hodgkins v. Dunham [Cal. App.] 103 P 351. To show that representations were made with intent that they should be acted upon and that they were acted upon in ignorance of their falsity. Id. Evidence that profits of a business had for no week since its purchase equaled the representations held sufficient to support an inference that representations were false. Del Vecchio v. Savelli [Cal. App.] 101 P 32. Proof of statement by vendor of land that it contained a certain area of cleared land is sufficient though the vendee testified that he believed the statement was made in good faith. Vincent v. Corbitt [Miss.] 47 S 641.

Evidence held insufficient: To show constructive fraud where a stockholder of a corporation purchased the stock thereof as agent of a syndicate. Heckscher v. Edenborn, 131 App. Div. 253, 115 NYS 673. To prove fraud alleged. Chapman v. Meyers [Neb.] 121 NW 245. To show an intentional misrepresentation so as to make out a case of fraud. Moran v. Brown, 113 NYS 1038. To sustain a verdict for plaintiff for false representations of a vendor that property was leased for a certain rental. Ettlinger v. Weil, 131 App. Div. 784, 116 NYS 328. To show fraud inducing executors to delay in

Plaintiff may recover on proof of any one of several false representations alleged.[75] Fraud is generally proved by inference from facts and circumstances, and not by direct proof,[76] and the greatest liberality is permitted in the scope of inquiry,[77] but the evidence introduced must conform to the pleadings.[78] If pleadings do not state a cause of action, evidence of fraud should be excluded.[79] A charge of fraud may be established by a preponderance of evidence,[80] and the question whether any element of the tort is or is not established is one for the jury.[81] A negative allegation does not require the same degree of proof to sustain it as an affirmative allegation.[82]

Instructions.[83]—Should cover all the essential elements of the tort[84] and define the true measure of recovery.[85]

The measure of damages[88] is the loss sustained by reason of the deceit[87] and

paying a legacy. Feldman v. Kiefer, 137 Mo. App. 609, 119 SW 44. In suit against incorporators for fraud, evidence insufficient to show that they pointed to the charter and made representations therein their own. McKee v. Rudd [Mo.] 121 SW 312. Allegation that one falsely represented that he owned land held not proved. Britton v. Poore [Fla.] 49 S 507.

74. Preponderance only is necessary. Crane v. Schaefer, 140 Ill. App. 647.

75. Crane v. Schaefer, 140 Ill. App. 647.

76. Del Vecchio v. Savelli [Cal. App.] 101 P 32.

77. **Held admissible:** As tending to show that one who represented a note as collectible knew that it was not, it was competent to show that he received the note from the maker in satisfaction of a judgment he had recovered against him. Corey v. Boynton [Vt.] 72 A 987. On the question of whether one had an opportunity to know the truth, his intelligence or acuteness and the confidence reposed by him in the other are matters to be considered. Jacobsen v. Whitely, 138 Wis. 434, 120 NW 285. Evidence as to price paid for land held admissible to show that false representations were made and relied upon. Vaupel v. Mulhall [Iowa] 118 NW 272. For fraud in inducing one to purchase notes secured by a worthless lease, one who had had charge of the leasehold property held properly permitted to testify as to facts affecting its value. Schwitters v. Springer, 236 Ill. 271, 86 NE 102. Parol evidence as to false representations as to value of property sold. Batura v. McBride [N. J. Err. & App.] 73 A 600. False representations as to acreage of a tract sold made prior to a contract of purchase are not merged in the deed. Judd v. Walker, 215 Mo. 312, 114 SW 979.

Held inadmissible: A financial statement with which defendants were not shown to have been connected held not admissible to corroborate a charge of fraud in the sale of corporate stock. Jacobsen v. Whitely, 138 Wis. 434, 120 NW 285. In action for fraudulent representations relative to sheep, evidence that the sheep were affected by tapeworms was inadmissible where it did not appear that tapeworms were a symptom of lip and foot ulcerations, the disease complained of. Power v. Turner, 37 Mont. 521, 97 P 950. In action for falsely representing solvency of a corporation on a certain date, evidence as to its subsequent condition. Simons v. Cissna, 52 Wash. 115, 100 P 200.

78. Allegations that defendant gave plaintiff a mortgage on property represented to be free from incumbrances, whereas it was incumbered for more than its value or did not exist, is not sustained by proof that defendants sold the property and diverted the proceeds. Brandom v. McCausland [C. C. A.] 171 F 402.

79. Power v. Turner, 37 Mont. 521, 97 P 950.

80. The preponderance which overcomes the presumption of innocence and all opposing evidence and is such as will lead a reasonable man to the conclusion that fraud exists is sufficient. Tanton v. Martin [Kan.] 101 P 461.

81. In action for deceit in sale of land, evidence held for jury on the question of confidential relations between the parties. Clinkscales v. Clark, 137 Mo. App. 12, 118 SW 1182. Evidence held for the jury as to whether one purchasing corporate stock was entitled to rely on representations made. Jacobsen v. Whitely, 138 Wis. 434, 120 NW 285.

82. Del Vecchio v. Savelli [Cal. App.] 101 P 32.

83. See 11 C. L. 1044. See, also, Instructions.

84. Where a complaint set out all of the elements of deceit, it was not error to fail to charge that recovery could not be had if the statement was made by mistake or innocently. Camp v. Carithers [Ga. App.] 65 SE 583.

85. Instruction, the clear import of which was to charge that a defrauded person was entitled to recover the difference between what he parted with and what he received, held proper. Hanson v. Hellie, 107 Minn. 375, 120 NW 341.

86. See 11 C. L. 1044. See, also, Damages, § 5A. A defrauded person is entitled to at least nominal damages. Isman v. Loring, 130 App. Div. 845, 115 NYS 933.

87. For fraudulent representations inducing the purchase of notes, the difference between their actual value and their value had they been as represented. Schwitters v. Springer, 236 Ill. 271, 86 NE 102. A defrauded person can recover on the basis of the value of the thing as represented, regardless of the price paid. Vaupel v. Mulhall [Iowa] 118 NW 272. Where one gives an option on land not owned by him, profits on a resale can be recovered only in an action for deceit. Scherck v. Moyse [Miss.] 48 S 513. Where a third person by false representations induced a mortgagor not to pay interest thereon when due which resulted in the foreclosure of the mortgage, the mort-

proximately resulting therefrom.[88] Exemplary damages cannot be recovered unless the deception is accompanied by malicious or oppressive conduct, or an abuse of a trust.[89] One induced to purchase land in gross cannot recover for deficiency in acreage.[90]

Declarations; Decoy Letters, see latest topical index.

DEDICATION.

The scope of this topic is noted below.[1]

§ 1. Definition and Nature, 1261.
§ 2. The Right to Dedicate, 1261.
§ 3. The Purposes of Dedication, 1261.
§ 4. Mode of Dedication, 1261. Intention, 1262. Acceptance, 1263. Revocation, 1263. Filing of Plat, or Sale of Lots with Reference to a Plat, 1264.
§ 5. Effect of Dedication, 1265.
§ 6. Remedies, 1266.

§ 1. *Definition and nature.*[2]—See 11 C. L. 1044—Dedication is the intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use.[3]

§ 2. *The right to dedicate.*[4]—See 11 C. L. 1045—The Utah statute authorizing the platting of land into lots, streets and alleys, applies to land outside of as well as in incorporated cities and towns.[5] A life tenant cannot dedicate any interest in the fee,[6] and one tenant in common cannot make a dedication without the consent of his cotenant.[7]

§ 3. *The purposes of dedication.*[8]—See 11 C. L. 1045—The purpose of a dedication must be a public one.[9]

§ 4. *Mode of dedication.*[10]—See 11 C. L. 1045—To constitute a statutory dedication, the requirements of the statute must be complied with,[11] as to the entire tract.[12]

gagor could recover foreclosure costs and probably attorney's fees. Nearing v. Hathaway, 128 App. Div. 745, 113 NYS 318.

88. One induced by fraud to purchase land cannot recover for loss sustained by sale of his own land to raise money to make the purchase. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023. Where an employer falsely represented to an employe that he was carrying accident insurance for his benefit, on being injured the employe could recover the amount of insurance purchasable or the sum deducted from his wages for premiums. Williams v. Detroit Oil & Cotton Co. [Tex. Civ. App.] 114 SW 167.

89. Williams v. Detroit Oil & Cotton Co. [Tex. Civ. App.] 114 SW 167.

90. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023.

1. It deals with the dedication of land to public use. It excludes private ways and incorporeal rights (see Easements*), the legal establishment of highways and streets (see Highways and Streets,* § 2), and the rights of the public in streets (see Highways and Streets,* § 12), and other public places (see Parks and Public Grounds*).

2. Search Note: See Dedication, Cent. Dig. § 8; Dec. Dig. § 1; 13 Cyc. 437-440; 9 A. & E. Enc. L. (2ed.) 20, 21.

3. Northport Wesleyan Grove Campmeeting Ass'n v. Andrews, 104 Me. 342, 71 A 1027; McKinney v. Duncan [Tenn.] 118 SW 683.

4. Search Note: See notes in 11 C. L. 1045; 8 L. R. A. 966.

See, also, Dedication, Cent. Dig. §§ 5-7; Dec. Dig. §§ 12, 13; 13 Cyc. 442-444; Mortgages, Cent. Dig. § 714; 9 A. & E. Enc. L. (2ed.) 28.

5. Laws 1890, p. 76, c. 50. Sowadzki v. Salt Lake County [Utah] 104 P 111.

6. McKinney v. Duncan [Tenn.] 118 SW 683.

7. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610.

8. Search Note: See note in 3 C. L. 1050.

See, also, Dedication, Cent. Dig. §§ 1, 2; Dec. Dig. §§ 4-10; 13 Cyc. 444, 446-449; 9 A. & E. Enc. L. (2ed.) 23.

9. The word "square" used in plat of a city addition indicates a public use. Frauenthal v. Slaten [Ark.] 121 SW 395. The doctrine is applicable to public parks as well as highways. Northport Wesleyan Grove Campmeeting Ass'n v. Andrews, 104 Me. 342, 71 A 1027.

10. Search Note: See notes in 3 C. L. 1052, 1053; 5 Id. 959; 18 L. R. A. 510; 14 L. R. A. (N. S.) 1067; 10 A. S. R. 189; 57 Id. 749; 3 Ann. Cas. 792.

See, also, Dedication, Cent. Dig. §§ 12-88; Dec. Dig. §§ 15-45; 13 Cyc. 451-485, 489, 490; 9 A. & E. Enc. L. (2ed.) 34, 52.

11. Acknowledgment of plat by attorneys in fact is not sufficient compliance with statute requiring acknowledgment by owners. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272. A plat not conforming

Statutory provisions as to methods of dedication do not, however, prevent common-law dedication,[13] nor is a statute regulating certain dedications by user retroactive.[14] Common-law dedication may be by implication [15] as from long continued use by the public [16] with acquiescence of the owner,[17] or by throwing open a strip for use as a street or road,[18] but construction of fences leaving a strip for a highway raises no conclusive presumption of a dedication of the entire strip, even after twenty years user.[19] To give title to the public by mere user, it must be continuous for the full period of limitation.[20] A dedication need not be by formal grant,[21] and a parol dedication accompanied by user may be shown.[22]

Intention. See 11 C. L. 1046—Dedication rests primarily upon an intention, express or implied,[23] to absolutely and irrevocably set apart the land for public use.[24] To establish dedication by implication, proof of intention must be clear and satisfac-

to the statute does not constitute a statutory dedication. Thomas v. Metz, 236 Ill. 86, 86 NE 184.

12. Compliance with requirements as to part of the property cannot operate as dedication of that part. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272.

13. That statutory provisions have been violated in attempted dedication will not affect rights of innocent purchaser of lots with references to streets attempted to be dedicated. Presumption of innocence of violation of statute is only matter of evidence as to intention to dedicate, and is not conclusive. East Birmingham Realty Co. v. Birmingham Mach. & Foundry Co. [Ala.] 49 S 448. Rev. St. 1899, § 9472, providing that lapse of time shall not divest an owner of title unless the road shall have been worked for ten years, has no application to voluntary dedication. State v. Muir, 136 Mo. App. 118, 117 SW 620.

14. Statute providing that road worked for certain time shall be deemed to have been dedicated, to a width of four rods, does not apply to a road which had become an established highway when such statute took effect. Gilbert v. White Bear, 107 Minn. 239, 119 NW 1063.

15. Evidence held insufficient to show dedication by acquiescence in use. McKinney v. Duncan [Tenn.] 118 SW 683. Knowledge of the owner of the proposed location of a street and the route thereof, and failure to object, is dedication. Gillman v. Bloomfield [N. J. Law] 73 A 604.

16. Evidence held to show user sufficient to constitute a public way. Hruska v. Minneapolis & St. L. R. Co. [Minn.] 119 NW 491. When land is used for particular purpose without objection from dedicator, his intention to dedicate it for that purpose will be inferred. Lanesville Highway Com'rs v. Kinahan, 240 Ill. 593, 88 NE 1044. A strip of land occupied by a street and public place from 1796 down to the recording of a town plat in which it was located as a street in 1800 and continued to be so used until 1814, when the town was incorporated as a village by act of the legislature making reference to such plat and was so used in 1836 when the village became incorporated as a city, if not a statutory dedication thereof, becomes dedicated as such at common law. Cleveland v. Cleveland, etc., R. Co., 8 Ohio N. P. (N. S.) 457.

17. Acquiescence in use of land for school purposes, and continuing offer to convey to school trustees, is dedication which is not affected by use for religious purposes also. Sanders v. Cauley [Tex. Civ. App.] 113 SW 560. Political Code, § 2621, providing that no road used by persons over another's land shall become public road unless declared so by supervisors, or dedicated by owner, is not opposed to this rule. Leverone v. Weakley [Cal.] 101 P 304. Presumption strengthened by acts of owner in erecting fence and planting trees along side of strip and working road under direction of supervisor. Kendall-Smith Co. v. Lancaster County [Neb.] 121 NW 960.

18. Opening by railroad company of strip across right of way, to connect streets leading up thereto, construction of sidewalk thereon, and erection of cattle guards. Michigan Cent. R. Co. v. Hammond, etc., R. Co., 42 Ind. App. 66, 83 NE 650. Evidence held sufficient to show such dedication. Benton v. St. Louis, 217 Mo. 687, 118 SW 418.

19. Neale v. State, 138 Wis. 484, 120 NW 345.

20. Evidence held insufficient to show user for 20 years. Cochran v. Purser [Ala.] 49 S 353.

21. Hence, an instrument showing receipt of consideration for such dedication admissible as evidence of intention, though not complying with requirement of statute of frauds. Menczer v. Poage [Tex. Civ. App.] 118 SW 863.

22. By proof of selling lots on opposite sides of strip of ground with representation that it would be reserved for street, and permitting its use for such purpose. Morse v. Whitcomb [Or.] 102 P 788.

23. Brown v. Oregon Short Line R. Co. [Utah] 102 P 740. May be inferred without express designation. People v. Chicago & N. W. R. Co., 239 Ill. 42, 87 NE 946; Myers v. Oceanside, 7 Cal. App. 87, 93 P 686.

24. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610. Grant to private owner of easement across land as means of egress "for an alleyway or street, said alleyway to be used for any and all purposes for which a street is commonly used," is not a dedication as a public highway. Brown v. Oregon Short Line R. Co. [Utah] 102 P 740. Plat showing reservation of railroad right of way held not to indicate intention to dedicate land for streets across the same. City of Atlanta v. Texas & P. R. Co. [Tex. Civ. App.] 120 SW 923.

tory,[25] and must be that manifested by acts and not that hidden in mind of owner.[26] It will be presumed that the dedicator intended to dedicate only such property as he owned.[27]

*Acceptance.*See 11 C. L. 1047—A dedication is only complete upon an acceptance [28] within a reasonable time after the offer and before revocation,[29] but the dedication may be made in praesenti to be accepted and used in futuro.[30] Acceptance is indicated by use of the land by the public for the designated purpose.[31] User by individual as members of the unorganized public is sufficient,[32] and working of the land for highway use is not essential.[33] User need not be of the entire tract dedicated,[34] but must be for the purpose for which the dedication was made.[35] An acceptance after a revocation of the offer is ineffective.[36] Acceptance may be by ordinance accepting in general terms all streets, etc., theretofore offered for dedication,[37] and filing of a map by the city showing the streets as dedicated constitutes an acceptance.[38] Where dedication is by filing of a plat in accordance with statute, no formal acceptance is necessary.[39]

*Revocation.*See 11 C. L. 1048—A mere offer to dedicate may be revoked at any time before acceptance,[40] and is revoked by the death of the owner before acceptance.[41] After acceptance the dedication cannot be recalled,[42] and a dedication by making a plat becomes irrevocable whenever lots are sold with reference thereto.[43] Dedication by public bodies are usually held to be irrevocable.[44]

25. McKinney v. Duncan [Tenn.] 118 SW 683; City of Chicago v. Wildman, 240 Ill. 215, 88 NE 559. Evidence held insufficient to show parol dedication of street across railroad right of way. O'Malley v. Dillenbeck Lumber Co. [Iowa] 119 NW 601. Mere leaving of a blank in a plat is not evidence of intention to devote such tract to public use. Poole v. Lake Forest, 238 Ill. 305, 87 NE 320.

26. Frauenthal v. Slaten [Ark.] 121 SW 395; East Birmingham Realty Co. v. Birmingham Mach. & Foundry Co. [Ala.] 49 S 448.

27. That there was no intention that street should extend upon other property. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610.

28. Which must be unequivocal and clear. People v. Johnson, 237 Ill. 237, 86 NE 676. Until accepted by public authorities, it remains a private easement. Mason v. Ross [N. J. Eq.] 71 A 141. Recital in deed to lot, that it also covers interest in another block as a public park, no plat having been filed showing such park, is a mere offer to dedicate. Myers v. Oceanside, 7 Cal. App. 87, 93 P 686. So as to impose on municipality duty to maintain street in safe condition. Benton v. St. Louis, 217 Mo. 687, 118 SW 418. So as to devolve upon municipality duty of keeping it in safe condition. Atkinson v. Nevada, 133 Mo. App. 1, 112 SW 1022. Evidence held insufficient to show acceptance by town of street dedicated to it. Town of Exira v. Whitted [Iowa] 118 NW 917.

29. Need not be immediate. People v. Johnson, 237 Ill. 237, 86 NE 676. Under Act May 9, 1889, failure of the public to accept for 21 years renders the dedication inoperative. Scott v. Donora So. R. Co., 222 Pa. 634, 72 A 282.

30. Mason v. Ross [N. J. Eq.] 71 A 141.

31. Clarke v. Evansville Boat Club [Ind. App.] 88 NE 100. Evidence held sufficient to show implied acceptance. Benton v. St. Louis, 217 Mo. 687, 118 SW 418. Dedication of town plat is accepted by building of town and opening and use of streets to extent necessary to needs of population. McClenehan v. Jesup [Iowa] 120 NW 74. Clearing of land dedicated as park, by village authorities, and use thereof for picnics, is an acceptance. Village of Berrien Springs v. Ferguson, 154 Mich. 472, 13 Det. Leg. N. 829, 118 NW 262.

32. User by pedestrians only, at particular seasons of year only, is sufficient. Phillips v. Stamford, 81 Conn. 408, 71 A 361.

33. Phillips v. Stamford, 81 Conn. 408, 71 A 361; State v. Muir, 136 Mo. App. 118, 117 SW 620.

34. Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602.

35. Dedication of land for park is not accepted by use for highway, or as camping place for strangers. Myers v. Oceanside, 7 Cal. App. 87, 93 P 686.

36. Myers v. Oceanside, 7 Cal. App. 87, 93 P 686.

37. City of Los Angeles v. McCollum [Cal.] 103 P 914.

38. In re Walton Ave., 136 App. Div. 696, 116 NYS 471.

39. Sowadzki v. Salt Lake County [Utah] 104 P 111.

40. Offer made in deeds to lots, to dedicate another tract as public park, is revoked by subsequent filing of plat showing such tract subdivided into building lots. Myers v. Oceanside, 7 Cal. App. 87, 93 P 686. Before sale of lots abutting on an alley indicated in a plat, the owner has complete power of disposition of alley. Le Roy v. Collins, 154 Mich. 77, 15 Det. Leg. N. 643, 117 NW 579.

41. People v. Johnson, 237 Ill. 237, 86 NE 676.

42. Michigan Cent. R. Co. v. Hammond, etc., R. Co., 42 Ind. App. 66, 83 NE 650.

43. Frauenthal v. Slaten [Ark.] 121 SW 395; City of Paragould v. Lawson [Ark.] 115 SW 379.

44. Dedication of square by a town to a

Filing of plat, or sale of lots with reference to a plat,[See 11 C. L. 1048] usually indicates the intention of the owner to dedicate the streets, alleys and parks shown therein,[45] and it is not always necessary that the spaces shown on the plat be specifically designated as such,[46] since the intention of owners in platting land must control in determining the extent of the streets,[47] but the plat must indicate an intention to dedicate the land,[48] and filing of a plat is not sufficient without a showing that the person filing it had title to the land included.[49] Where an alley is designated, it will be presumed that it runs from one street to another.[50] After a lapse of twenty years from the subdivision, streets and alleys referred to in a deed will be presumed to be the same as those of similar name indicated in the plat.[51] Dedication may also result from a sale of lots at auction with an announcement that a tract would be kept as a public park,[52] or by reference to streets in a petition for partition,[53] but reference to streets in designating lots in partition proceedings is not a rededication of the streets.[54]

Dedication as question of fact.[See 11 C. L. 1049]—It is a question for the jury whether a public easement has been acquired by user,[55] or whether dedication was for use as a park or merely of an unobstructed view,[56] but acceptance is a mixed question of law and fact.[57]

county for county purposes is irrevocable. City of Victoria v. Victoria County [Tex. Civ. App.] 115 SW 67. Dedication of property by municipality to the Roman Catholic church in Porto Rico is irrevocable. Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 52 Law. Ed. 1068.

45. Rudolph v. Elyton [Ala.] 50 S 80; Shertzer v. Hillman Inv. Co., 52 Wash. 492, 100 P 982; Lacey v. Oskaloosa [Iowa] 121 NW 542; Thomas v. Metz, 236 Ill. 86, 86 NE 184; Gillman v. Bloomfield [N. J. Law] 73 A 604; Mason v. Ross [N. J. Eq.] 71 A 141; Northport Wesleyan Grove Campmeeting Ass'n v. Andrews, 104 Me. 342, 71 A 1027; Alexander v. Tebeau [Ky.] 116 SW 356. Recital in certification signed by one owner, that the streets and public square designated are dedicated to use of public, and acquiescence by other owner therein by selling lots with reference thereto, amounts to dedication. Board of Jefferson County Com'rs v. Oskaloosa [Kan.] 102 P 1095. Not essential that description be so precise that identity be apparent from description alone. City of Paragould v. Lawson [Ark.] 115 SW 379. A sale of lots for enhanced price, on the representation that an adjoining strip of land, shown on the plat as a narrow lot, would be reserved as a street, followed by its use for such purpose, estops the seller to deny the dedication of such strip. Morse v. Whitcomb [Or.] 102 P 788. Recital that certain tract is to remain open for benefit of public for use of springs therein and that nothing shall be built thereon to obstruct view is dedication. Village of Berrien Springs v. Ferguson, 154 Mich. 472, 15 Det. Leg. N. 829, 118 NW 262. The word "square" used in plat indicates a public use as a park. Frauenthal v. Slaten [Ark.] 121 SW 395.

46. Dedication of public square may be inferred by leaving a blank or unplatted space in a plat, although without designation. People v. Willison, 237 Ill. 584, 86 NE 1094. May appear from relative location of blank spaces, and lots and blocks, and from lines and courses indicated, although streets are not designated by name. East Birmingham Realty Co. v. Birmingham Mach. & Foundry Co. [Ala.] 49 S 448; City of Los Angeles v. McCollum [Cal.] 103 P 914. Blank strip along front of Chicago river in plat of Chicago constitutes continuation of North Water street. People v. Chicago & N. W. R. Co., 239 Ill. 42, 87 NE 946.

47. Intention held to be to extend streets along edge of plat so that all lots should have street frontage. Osborne v. Seattle, 52 Wash. 323, 100 P 850.

48. Plat reserving right of way for railroad, indicating no streets across same, held not to show intention to dedicate such streets. City of Atlanta v. Texas & P. R. Co. [Tex. Civ. App.] 120 SW 923. Mere leaving of a blank in a plat is not proof of a dedication thereof to the public. Poole v. Lake Forest, 238 Ill. 305, 87 NE 320. Merely noting a certain tract, in a plat, as depot grounds did not endow the entire tract set apart, with the incidents of a public use, where it has not been occupied as such. Chicago, etc., R. Co. v. Hanken [Iowa] 118 NW 527.

49. De Nefe v. Agency City [Iowa] 121 NW 1049.

50. Since a cul de sac too narrow to turn around in would be practically useless. Alexander v. Tebeau [Ky.] 116 SW 356.

51. Alexander v. Tebeau [Ky.] 116 SW 356.

52. Borough of Belmar v. Barnett [N. J. Err. & App.] 72 A 77.

53. Description as bounded by certain streets "according to the plan of the city" was dedication of such streets as indicated by the plan. Bailliere v. Atlantic Shingle Cooperage & Veneer Co., 150 N. C. 627, 64 SE 754.

54. After original dedication became inoperative by nonacceptance. Scott v. Donora So. R. Co., 222 Pa. 634, 72 A 282.

55. Beard v. Hicks [Ala.] 50 S 232.

56. Borough of Belmar v. Barnett [N. J. Err. & App.] 72 A 77.

57. One of law as to acts necessary to constitute, and of fact as to whether such acts have been done. Phillips v. Stamford, 81 Conn. 408, 71 A 361.

§ 5. *Effect of dedication.*[59]—See 11 C. L. 1049—Dedication of an undesignated area for a specified purpose includes such space as is necessary for its convenient use [59] to be determined by the conditions existing at the time and not by those subsequently arising.[60]

A reservation will not be extended by construction.[61]

Dedication of a street does not vest the fee thereof in the city,[62] but after dedication and acceptance of streets the dedicator has no title therein which is subject to conveyance,[63] and cannot assert any ownership therein inconsistent with public use.[64] A widow has no dower in land dedicated by the husband as a public highway.[65]

Property cannot be appropriated to a use inconsistent with the purpose for which it was dedicated,[66] and the dedicator may limit the use,[67] but, where dedication by user is unlimited, it cannot afterwards be restricted or limited.[68]

The rights of the public in property dedicated may be lost by abandonment or nonuser,[69] but mere failure to demand the opening of streets until the growth of the village makes them necessary is not an abandonment,[70] and abutting owners having notice of the dedication acquire no rights by delay of the city in opening the street,[71] and a mayor of a town cannot bind the town by an abandonment of a street.[72] A use not inconsistent with the purpose for which it was dedicated is not an abandonment.[73] Action of a common council in vacating an alley is a repudiation of an acceptance of the dedication tendered by the plat.[74] Persons acquiring property in another part of the town, after the streets had been vacated, acquire no right to have them opened.[75]

58. **Search Note:** See notes in 3 C. L. 1055, 1056; 1 Ann. Cas. 455.

See, also, Dedication, Cent. Dig. §§ 89-111; Dec. Dig. §§ 46-65; 13 Cyc. 459-461, 486-494, 500-503; 9 A. & E. Enc. L. (2ed.) 74.

59. The area dedicated by a town to a county by building a courthouse and clerk's office therein includes such additional space as is necessary for the convenient use of the buildings. Extent thereof is question of fact. Evidence held to show that entire square was dedicated. City of Victoria v. Victoria County [Tex. Civ. App.] 115 SW 67.

60. Dedication by town to county of land for courthouse and jail. City of Victoria v. Victoria County [Tex. Civ. App.] 115 SW 67.

61. In plat bounding on shore land belonging to state, a reservation of all riparian and littoral rights is not a reservation of fee in street bordering on such land. Gifford v. Horton [Wash.] 103 P 988.

62. In re Walton Ave., 131 App. Div. 696, 116 NYS 471. Cannot divert property to other uses, or sell it. East Chicago Co. v. East Chicago, 171 Ind. 654, 87 NE 17.

63. Quitclaim deed to adverse occupant gives such occupant no rights. McClenehan v. Jesup [Iowa] 120 NW 74.

64. Has no exclusive right to grass grown in dedicated part, nor right to insist that such grass be allowed to ripen into hay before being cut. Northport Wesleyan Grove Campmeeting Ass'n v. Andrews, 104 Me. 342, 71 A 1027.

65. Benton v. St. Louis, 217 Mo. 687, 118 SW 418.

66. Construction of tunnel for subway under land dedicated for a common to be used as training field and cow pasture held not inconsistent. Codman v. Crocker [Mass.] 89 NE 177.

67. Dedication of race way for use by boats propelled by hand is not dedication for use by power boats. Trenton Water Power Co. v. Donnelly [N. J. Err. & App.] 73 A 597.

68. Railroad dedicating street across right of way cannot afterwards object to use by street railway. Michigan Cent. R. Co. v. Hammond, etc., R. Co., 42 Ind. App. 66, 83 NE 650.

69. Nonuser for 10 years following quitclaim of streets by dedicator and also by city authorities is abandonment, no lots abutting on such streets having been sold. State Co. v. Finley, 150 N. C. 726, 64 SE 772. Comp. Laws 1907, § 1116, providing that a highway once established shall continue until abandoned by order of commissioners, and that road not used for five years ceases to be a highway, applies to highways created by statutory dedication. Sowadzki v. Salt Lake County [Utah] 104 P 111. A statute providing that a dedication shall be sufficient to vest the "fee" in the streets does no prevent abandonment by nonuser. Id.

70. McClenehan v. Jesup [Iowa] 120 NW 74; Bailliere v. Atlantic Shingle, Cooperage & Veneer Co., 150 N. C. 627, 64 SE 754.

71. City of Paragould v. Lawson [Ark.] 115 SW 379.

72. Refusal of mayor to compel opening of street on ground that town had lost right thereto not an abandonment. McClenehan v. Jesup [Iowa] 120 NW 74.

73. Dedication of river front as street, not abandoned by use of a portion thereof as a parkway. Clarke v. Evansville Boat Club [Ind. App.] 88 NE 100.

74. Le Roy v. Collins, 154 Mich. 77, 15 Det. Leg. N. 643, 117 NW 579.

75. State Co. v. Finley, 150 N. C. 726, 64 SE 772.

§ 6. *Remedies.*[76] See 11 C. L. 1050—Where a plat is ambiguous, surrounding circumstances may be considered in determining the intention of the owner,[77] but the owner can testify as to his intention only where his acts do not manifestly indicate an intention to dedicate.[78]

DEEDS OF CONVEYANCE.

The scope of this topic is noted below.[79]

§ 1. Nature, Form and Requisites, 1266. Deeds Distinguished from Other Instruments, 1266. Requisites, 1268. Description, 1271. Delivery, 1271. Validity of Assent, 1274. Acceptance, 1274. Consideration, 1275.
§ 2. Recordation, 1276.
§ 3. Interpretation and Effect, 1276. Covenants, 1280. Designation of Parties, 1281. Description of Property Conveyed, 1281. Quantum of Estate Conveyed, 1282. Reservations, Conditions and Restrictions, 1286. Extinguishment of Rights, 1289.

§ 1. *Nature, form and requisites.*[80] *Deeds distinguished from other instruments.* See 11 C. L. 1051—In order to be good as a deed, an instrument must take effect presently,[81] and, if it is not to become operative until the happening of some event, it is not a deed.[82] But if the grantor intends an instrument to take effect presently, it is not rendered testamentary in character because enjoyment of the estate granted

76. Search Note: See Dedication, Cent. Dig. §§ 103-111; Dec. Dig. §§ 63-65; 13 Cyc. 495-503; 13 A. & E. Enc. P. & P. 293, 294.

77. Osborne v. Seattle, 52 Wash. 323, 100 P 850.

78. City of Los Angeles v. McCollum [Cal.] 103 P 914.

79. It treats of the form, requisites, validity and interpretation of deeds of conveyance. Matters common to all contracts are excluded (see Contracts;* Names, Signatures and Seals;* Frauds, Statute of;* Fraud and Undue Influence;* Incompetency;* Mistake and Accident*). Deeds of trust (see Trusts*) and conveyances as security (see Mortgages*) are also excluded, as are deeds by particular classes of persons (see Husband and Wife,* §§ 3E, 7D; Infants,* § 4; Insane Persons,* § 6), transfers of public lands (see Public Lands;* also, Counties,* § 3F; Municipal Corporations,* § 11; States,* § 2), creation and conveyance of homesteads (see Homesteads*) and equitable relief (see Cancellation of Instruments;* Reformation of Instruments*).

Certain matters relating to deeds are also treated in separate topics (see Acknowledgments;* Escrow;* Notice and Record of Title;* Covenants for Title*).

The determination of the estates created by particular language (see Real Property;* Tenants in Common and Joint Tenants*) and of language defining boundaries (see Boundaries*) is excluded, as is the admissibility of parol evidence to aid interpretation (see Evidence,* § 5).

80. Search Note: See notes in 3 C. L. 1058, 1059; 5 Id. 964, 968, 969; 9 Id. 945; 19 L. R. A. 489; 39 Id. 423; 44 Id. 48; 54 Id. 865; 68 Id. 825; 1 L. R. A. (N. S.) 157; 3 Id. 172; 4 Id. 816; 7 Id. 712; 9 Id. 224, 317, 945; 13 Id. 298; 23 A. S. R. 82; 31 Id. 26; 49 Id. 219; 53 Id. 527; 65 Id. 798; 84 Id. 236; 1 Ann. Cas. 868; 7 Id. 226. See, also, Deeds, Cent. Dig. §§ 1-209, 648; Dec. Dig. §§ 1-78; 13 Cyc. 519-594; 9 A. & E. Enc. L. (2ed.) 107.

81. Givens v. Ott [Mo.] 121 SW 23. That deed is not acknowledged in such manner as to authorize its registration is a circumstance tending to show that it was not intended as a completed deed. Lipscomb v. Fuqua [Tex. Civ. App.] 121 SW 193. Where it is not to take effect until after the death of the grantor it is void. Ackman v. Potter, 239 Ill. 578, 88 NE 231.

Held testamentary: If a deed deposited in a bank **to be delivered to the grantee after the grantor's death** is deposited with the intention that the grantor shall retain title until his death. Felt v. Felt [Mich.] 15 Det. Leg. N. 944, 118 NW 953. Where deed was delivered to third person to be delivered to grantees on grantor's death providing he paid him a sum annually, and if not the land to revert. Sullivan v. Medford [Iowa] 121 NW 569. Deed and agreement for support deposited in escrow to be delivered after the grantor's death construed and held to show that the grantor intended to retain title during his life. Felt v. Felt [Mich.] 15 Det. Leg. N. 994, 118 NW 953.

82. Where an instrument does not operate inter vivos but is made to depend for its operation upon the event of the death of the maker. Hearn v. Purnell, 110 Md. 458, 72 A 906. Where it becomes operative only on death of the grantor, it is not a deed. Givens v. Ott [Mo.] 121 SW 23.

Held testamentary: Deed providing that title should not pass until grantor's death, but that he should have control of the land and the rents and profits. Boon v. Castle, 61 Misc. 474, 115 NYS 583. Evidence sufficient to show that parties to a deed did not intend that it should take effect until death of one of the grantors. Ackman v. Potter, 239 Ill. 578, 88 NE 231.

is postponed.[83] The usual test is whether the grantor intended to make the instrument his deed.[84]

A deed absolute on its face may be shown to have been in fact a trust,[85] but the evidence must be clear and satisfactory.[86]

A deed absolute on its face may be given effect as a mortgage [87] if it was so intended at its inception;[88] but it is presumed to be what it purports on its fact to be,[89] and, while its character may be changed to a mortgage by parol evidence,[90]

83. Held to constitute deeds: An instrument in form a deed is not testamentary because it is not to take effect until the grantor's death. Garrison v. McLain [Tex. Civ. App.] 112 SW 773. Though deed recites "This deed is not to have effect until my death," it vests a fee presently with life estate reserved in the grantor. Merck v. Merck [S. C.] 65 SE 347. Provision in deed reserving to grantor and survivors use of premises and providing that full title shall become operative only on the death of the grantor and his survivors held not to change the nature of the instrument to a will, as a present interest passed by delivery. In re McIntyre's Estate [Mich.] 16 Det. Leg. N. 95, 120 NW 587. **Reservation of grantor of life interest** and use of premises does not render a deed testamentary in character nor prevent title in remainder from vesting, if there has been actual delivery. Ackman v. Potter, 239 Ill. 578, 88 NE 231. Conveyance by father to his children, reserving to himself a life estate. Lefebure v. Lefebure [Iowa] 121 NW 1025. Instrument conveying property and providing that its purpose was to convey property to the grantee but that title was vested in the grantor during his life. Dick v. Miller, 150 N. C. 63, 63 SE 176. Deed of trust conveying a present interest and being plain and unambiguous on its face and unexplained by contemporaneous writing held a deed, though placed in the hands of a third person with instructions to deliver if the grantor did not survive his sickness. Dexter v. Witte, 138 Wis. 74, 119 NW 891. Instrument which purports to be a deed and conveys to grantee in trust to collect the income for the benefit of the grantor during life and distribute the corpus on his death. Hall v. Hall [Va.] 63 SE 420. Such instrument operated to divest the grantor of title and invest it in the grantee for uses designated. Id.

84. Did the grantor by acts or words, or both, manifest an intention to make the instrument his deed. Doty v. Barker [Kan.] 97 P 964.

85. Deed of advancement. Cole v. Thompson, 169 F 729.

86. Evidence insufficient to show that a deed absolute was partially a trust and delivered under an understanding that sisters of the grantee were to have a mortgage thereon. Licari v. McMonigle, 115 NYS 914. Where a deed between relatives clearly indicates that an absolute estate was intended to pass, no trust will be implied though no consideration was paid. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028.

87. May be declared a mortgage. Froidevaux v. Jordan, 64 W. Va. 388, 62 SE 686. Though made subject to a mortgage which the grantee assumes and agrees to pay. Veeder v. Veeder [Iowa] 120 NW 61. Where a grantee agrees to reconvey on payment of an existing debt, transaction is conclusively presumed a mortgage. Beidleman v. Koch, 42 Ind. App. 423, 85 NE 977.

Deed held to constitute a mortgage. Copeland v. Bruning [Ind. App.] 88 NE 877; Porter v. Farmers' & Merchants' Sav. Bank [Iowa] 120 NW 633; Calhoun v. Anderson [Kan.] 98 P 274. Deed considered in connection with a contract. Horn v. Bates [Ky.] 114 SW 763. Deed reserving a vendor's lien. Honaker v. Jones [Tex.] 113 SW 748. Where given as security. White v. Walsh, 62 Misc. 423, 114 NYS 1015. Where a grantee executed at the same time a title bond for a reconveyance. Wysong v. Sells [Ind. App.] 88 NE 954. Deed from husband to wife. Cramer v. Cale, 72 N. J. Eq. 210, 73 A 813. Mortgage and not a conditional sale. Tucker v. Witherbee [Ky.] 113 SW 123; Scholl v. Hopper [Ky.] 119 SW 770. Provision for nonpayment held not to change character of deed as a mortgage to that of a conditional sale. Moorhead v. Ellison [Tex. Civ. App.] 120 SW 1049. If maker of a note conveyed land in fee simple to payee as collateral security and if on same day payee executed and delivered to maker a defeasance agreement declaring that the premises were conveyed to payee as collateral security for the payment of the note, the deed was a mortgage. Doty v. Norton, 133 App. Div. 106, 117 NYS 793.

88. Where a deed constitutes a mortgage at its inception, it remains such. Clambey v. Copeland, 52 Wash. 580, 100 P 1031. Whether deed of a business homestead is absolute or a mortgage which would be void against the grantors does not depend wholly upon the intention of the grantors regardless of the grantee's intent. Nagle v. Simmank [Tex. Civ. App.] 116 SW 862.

89. Funk v. Harshman, 110 Md. 127, 72 A 665.

Held to be deeds: Deed providing that grantees should pay balance due on price and that the grantors could occupy the premises during their lives. Gustin v. Crockett, 51 Wash. 67, 97 P 1091. Where one by quitclaim deed conveys to another who enters into a concurrent agreement to reconvey on condition and there is nothing to indicate that the deed was given as a mortgage. Donovan v. Boeck, 217 Mo. 70, 116 SW 543. Quitclaim deed held a conditional conveyance. Id. Where creditor wrote to a debtor offering a price for his land and requested him to go to an attorney and prepare a deed which he did, and there was nothing to show that it was intended as a mortgage. Elliott v. Morris [Tex. Civ. App.] 121 SW 209. Where mortgagor was unable to pay and deed to mortgagee in payment of the debt provided that if the property should sell for more than sufficient to pay

the proof must be clear, satisfactory, and convincing.[91] Where a deed is declared to be a mortgage, the rights of the parties are governed by an instrument of that character.[92]

Requisites. See 11 C. L. 1052—No particular form of instrument is necessary [93] other than those required by the statute of frauds.[94] A quitclaim deed was not considered a conveyance at common law,[95] but in the United States, by statute and common usage it is recognized as one of the modes of transferring title,[96] but it charges the grantee with notice that he is acquiring a doubtful title.[97] The essentials of a deed [98] are competent parties [99] having an interest in the land sought to be con-

the debt the grantee should account. Weltner v. Thurmond, 17 Wyo. 268, 98 P 590; Weltner v. Thurmond, 17 Wyo. 268, 99 P 1128.

90. May be shown to be a mortgage by parol evidence. Thompson v. Burns, 15 Idaho, 572, 99 P 111; Spencer v. Schuman [Ga.] 64 SE 466; Bashinski v. Swint [Ga.] 65 SE 152; Harrison v. Maury [Ala.] 47 S 724; Nagle v. Simmank [Tex. Civ. App.] 116 SW 862. Parol evidence is not subject to the objection that it is an attempt to create an interest in land by parol. Heron v. Weston, 44 Colo. 379, 100 P 1130.

91. To show that it was intended as a mortgage, there must be clear, convincing and unequivocal testimony. Funk v. Harshman, 110 Md. 127, 72 A 665; Tribble v. Singleton [Ala.] 48 S 481; Guarantee Gold Bond Loan & Sav. Co. v. Edwards [C. C. A.] 164 F 809; Jones v. Gillett [Iowa] 118 NW 314; Rathbone v. Maltz [Mich.] 15 Det. Leg. N. 1023, 118 NW 991.

Evidence sufficient. Maples v. O'Brien, 116 NYS 175; Griffin v. Welch [Ark.] 114 SW 710; Kahn v. Metz [Ark.] 114 SW 911; Heron v. Weston, 44 Colo. 379, 100 P 1130; Miller v. Peter [Mich.] 16 Det. Leg. N. 670, 122 NW 780; Richardson v. Beaber, 62 Misc. 542, 115 NYS 821; Bascombe v. Marshall, 129 App. Div. 516, 113 NYS 991.

Evidence insufficient. Elliott v. Bozorth [Or.] 97 P 632; Tribble v. Singleton [Ala.] 48 S 481; Rushton v. McIllvene [Ark.] 114 SW 709; Rathbone v. Malty [Mich.] 15 Det. Leg. N. 1023, 118 NW 991.

92. Sewell v. Buyck [Ala.] 50 S 127. Deed may be shown to be a mortgage, and foreclosed as such. Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

93. As between the parties a formal deed is not essential to transfer title. Witmer v. Shreves [Iowa] 120 NW 86. Agreement between landowner and railroad company whereby he "does hereby discharge and forever release" the company, etc., held a deed. Sherman v. Sherman [S. D.] 122 NW 439. Title may be transferred by deed executed pursuant to the statute of frauds and the operation thereon of the statute of uses, both of which are in force in Florida. Skinner Mfg. Co. v. Wright, 56 Fla. 561, 47 S 931. "Deeds" in Act May 28, 1715 (1 Smith's Laws, p. 94), providing for acknowledgment and recordation of deeds, includes leases exceeding 21 years, and any deed intended to grant an estate for life or years. Lease for 999 years. St. Vincent's Roman Catholic Congregation v. Kingston Coal Co., 221 Pa. 349, 70 A 838.

94. See Frauds, Statute of. § 7.

95. Sherman v. Sherman [S. D.] 122 NW 439. Where granting clause of a deed was "do hereby sell and convey unto, etc., the following described land," it is **not a quitclaim.** McBride v. Caldwell [Iowa] 119 NW 741.

96. Sherman v. Sherman [S. D.] 122 NW 439; Hosman v. Willett, 32 Ky. L. R. 906, 107 SW 334. Passes whatever title the grantor has at the time. Starr v. Bartz, 219 Mo. 47, 117 SW 1125; Starr v. Kisner, 219 Mo. 64, 117 SW 1129; Grand Lodge I. O. O. F. v. Troutman [Kan.] 103 P 94. Is as effectual as a deed of bargain and sale. Myers v. Oceanside, 7 Cal. App. 87, 93 P 686.

97. Abernathy v. South & W. R. Co., 150 N. C. 97, 63 SE 180. Purchaser who holds by quitclaim is bound to take notice of all superior outstanding titles shown by the records. Peck v. Ayres [Kan.] 100 P 283. A purchaser by quitclaim from a purchaser at tax sale takes subject to all equities between the owner and his grantor. Zweigart v. Reed [Mo.] 119 SW 960. A quitclaim does not pass title as against a prior unrecorded deed of the grantor. McMurrey v. Columbia Lumber Co. [Tex. Civ. App.] 120 SW 246.

See, also, Notice and Record of Title.

98. Essentials stated: Competent parties, lawful subject-matter, consideration, apt words of conveyance and proper execution. Morison v. American Ass'n [Va.] 65 SE 469. Instrument executed by one claiming by virtue of a location and survey, which recited that he had constituted his grantee, his attorney, to sell, convey, execute deed and a full and free administration of the rights and privileges pertaining to the land, held a deed, and not a mere power. Sims v. Sealy [Tex. Civ. App.] 116 SW 630. An "executed" deed is one that is signed, sealed, acknowledged if necessary, and delivered. Creamer v. Bivert, 214 Mo. 473, 113 SW 1118. Where a lumber company was deeded certain standing timber and indorsed on such deed an assignment of their rights therein, but the signature was not attested, held the title was not thereby transferred to the assignee. Smythe Lumber Co. v. Austin [Ala.] 49 S 875.

99. Where a deed has been executed for 40 years and county records have been destroyed, it is presumed that the **agent for the county** who executed it had authority to do so. Hardin County v. Nona Mills Co. [Tex. Civ. App.] 112 SW 822. Under Acts 1907, p. 1131, making deeds by **public officers** prima facie evidence of recitals therein, etc., recital in deed held to prima facie show authority of the officer to execute it. Hill v. Moore [Tenn.] 113 SW 788. Cobbey's St. 1907, § 4129, prescribing manner in which **deeds by corporations** may be executed, held

veyed,[1] consideration,[2] a sufficient description,[3] apt words of conveyance,[4] and proper execution in accordance with statutory requirements as to attestation,[5] sealing,[6] acknowledgment,[7] and recordation.[8] The parties must be designated,[9] but a deed may be executed in blank as to grantee[10] with authority given to fill in such blank.[11] Where a deed is made to two or more grantees as joint tenants and one of the grantees is incapable of taking, the whole estate goes to the others.[12] A deed absolutely void from its inception cannot be validated by the legislature.[13]

not exclusive nor to preclude execution by executive officer with whom secretary joins. Lincoln Upholstering Co. v. Baker, 82 Neb. 592, 118 NW 321. Deed by **married woman** of her separate property was void where not joined in by her husband. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552. Husband may convey life estate in **community property** to his wife with remainder to their children. Lindly v. Lindly [Tex.] 113 SW 750. A simple remark to a grantee by a grantor after attaining his majority held not sufficient as a **ratification of a deed made during minority.** Steele v. Poe, 79 S. C. 407, 60 SE 951.

1. If grantor has no title, his grantee acquires none. Kendall Lumber Co. v. Smith, 87 Ark. 360, 112 SW 888. Where a purported deed of a wife's land conveyed no title, a reconveyance by the grantee to the husband after the wife's death passed no title. Kirby v. Kirby, 236 Ill. 255, 86 NE 259. Deed of master in chancery held not evidence of title where there was no evidence of title or possession in any party to the tax proceedings in which the deed was executed. Bauer v. Glos, 236 Ill. 450, 86 NE 116.

2. See post, this section, Consideration.

3. See post, this section, Description, and § 3, Description.

4. Instrument reciting that signer had conveyed all claim on his father's property for a stated sum was not a deed, as it contained no words of conveyance, description, or name of the grantee. First Nat. Bank v. Phillpotts [Mich.] 15 Det. Leg. N. 1027, 119 NW 1. Deed by a disseisee purporting to "remise, release, and forever quitclaim" to a stranger, "all rights, title, and interest to" the premises, held sufficient in Hawaii to pass title. Spreckels v. Brown, 212 U. S. 208, 53 Law. Ed. —.

5. Deed executed in New York in 1857 was insufficient to convey land in Connecticut where attested by but one witness. New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788. Under Alaska Civ. Code, § 82, requiring deeds to be attested by two witnesses, such witnesses need not be disinterested persons. The ancient rules so requiring have been abrogated. Halla v. Cowden [C. C. A.] 170 F 559. Assignment of mining lease is not void because subscribing witnesses were members of the partnership assignee. Id. Civ. Code Alaska, § 82, requiring attestation, does not make attestation essential to validity but only to entitle the instrument to recordation. Eadie v. Chambers [C. C. A.] 172 F 73.

6. The mere recital in the testimonium clause of an instrument signed and delivered for a deed, that parties have affixed their seals, will not make it a sealed instrument, if no scroll or mark is affixed. Comley v. Ford, 65 W. Va. 429, 64 SE 447. Seal is essential part of a deed. Hudson v. Webber, 104 Me. 429, 72 A 184.

7. See Acknowledgments. Deed defectively acknowledged by wife held admissible in absence of issue that it was wife's separate property or homestead. Colville v. Colville [Tex. Civ. App.] 118 SW 870. Unacknowledged deed is good between the parties. Graves v. St. Louis, etc., R. Co., 133 Mo. App. 91, 112 SW 736.

8. See Notice and Record of Title. Deed by man and wife not filed within 8 months as required by 1 Stanton's Rev. St., c. 24, §§ 15, 23, was void as to the wife. Burton-Whayne Co. v. Farmers' & Drovers' Bank [Ky.] 113 SW 445; Id. [Ky.] 114 SW 288.

9. Deed signed, acknowledged, and delivered with amount of consideration and name of grantee left blank and with no directions as to how such blank should be filled, is void at common law. Robinson v. Yetter, 238 Ill. 320, 87 NE 363. A deed which omits the name of the grantor in the granting clause is valid as against strangers where the name appears in the warranty and is signed and acknowledged. Runyan v. Snyder [Colo.] 100 P 420. Where grantor was described in the granting clause as party of the first part and his name was given in the warranty clause and appeared in the acknowledgment, it sufficiently appeared. Id. Variance between names of grantors as named in the deed and as signed held not fatal where the certificate of acknowledgment and other facts showed them to be the same persons. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552.

10. Where a deed is executed with the grantee in blank and the grantee has authority to insert any name he desires, it is not void. Mahoney v. Salsbury, 83 Neb. 488, 120 NW 144.

11. Where a deed is in blank as to grantees with power in the agent of the grantor to fill in names before delivery, the filling in by him of different names at different times is valid. Derry v. Fielder, 216 Mo. 176, 115 SW 412. Evidence held to show that grantors did not authorize their agent to fill in names of grantees left blank, but left to the purchaser such authority after the deed was turned over to him. Id. Where deed is left blank as to grantee with authority in grantor's agent to fill the blanks before delivery, and such agent fills in name, the subsequent adding of names as grantees by the purchaser will not make them grantees. Id.

12. Conveyance by married woman direct to husband and daughter is void as to the husband. McCord v. Bright [Ind. App.] 87 NE 654.

13. Klumpp v. Stanley [Tex. Civ. App.] 113 SW 602.

A deed must be genuine.[14] Where execution is denied[15] or its genuineness is questioned,[16] the issue must be raised in the appropriate manner,[17] and such facts must be established[18] by testimony admissible under the rules of evidence,[19] and on conflicting evidence they are questions for the jury.[20] On who asserts a deed to be a forgery has the burden to prove it.[21] A presumption of genuineness arises from the fact of due attestation[22] or recordation,[23] but such presumption may be rebutted.[24]

14. Where vendors under contract of sale of land to A had no definite understanding of documents they were to execute except that they understood that they were to deed direct to A, but were willing to sign any papers prepared by their attorney, instruments prepared conveying direct to the United States, and providing for selection of lien land, were not forgeries. United States v. Conklin, 169 F 177. Where a forger of a deed produces before a notary public another than the grantor to make a fraudulent acknowledgment, the certificate of acknowledgment is not conclusive against the true owner in favor of a bona fide purchaser. Smith v. Markland [Pa.] 72 A. 1047. Evidence held not to show that grantor's signature, which was made by mark, was a forgery. Mulligan v. Mulligan, 117 NYS 338. Evidence insufficient to show forgery. Files v. Jackson, 84 Ark. 587, 106 SW 950.

15. Evidence sufficient to disprove claim of execution of a deed. Reaves v. Baker [Ky.] 112 SW 609.

16. Evidence insufficient to show a deed to be a forgery. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. Statement made by deceased grantor that grantee had no papers signed by her can have no force to show that a deed was not genuine or was canceled, as against proof of execution, and that it remained from then on in the grantee's possession. Potter v. Barringer, 236 Ill. 224, 86 NE 233. Mere nonclaim under a deed does not weaken the presumption against its being a forgery. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662.

17. Where a deed is 30 years old and otherwise entitled to be admitted in evidence as an ancient document, or if it was recorded on proper probate, the party against whom it is tendered must file an affidavit of forgery in order to cast the burden of proving genuineness upon the opposite party. Leverett v. Tift [Ga. App.] 64 SE 317. The burden of proving genuineness of a deed is placed upon one by an affidavit of forgery made by another. West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228.

18. Execution may be shown by circumstances. McMahon v. McDonald [Tex. Civ. App.] 113 SW 322. Proof of an unacknowledged deed by subscribing witness as provided by Cobbey's Ann. St. 1907, § 10807, shows prima facie due execution. Wilson v. Wilson, 83 Neb. 562, 120 NW 147. A finding that a deed was executed may be based on proof of conduct of parties relative to the land, claim by one and nonclaim by the other, etc. Hayward Lumber Co. v. Bonner [Tex. Civ. App.] 120 SW 577. In proving the **existence of an ancient deed** by circumstances, it is not required that the evidence be sufficient to remove all reasonable doubt. White v. McCullough [Tex. Civ. App.] 120 SW 1093. In order to presume existence of a deed, it is not necessary that there be evidence of a deed or other writing. McCollum v. Buckner's Orphans' Home [Tex. Civ. App.] 117 SW 886. **Evidence sufficient** to establish execution and delivery. Nolan v. Garrison, 151 Mich. 138, 14 Det. Leg. N. 915, 115 NW 58. To show that land had been deeded to one under whom plaintiff in trespass to try title claimed. Ryle v. Davidson [Tex. Civ. App.] 116 SW 823. To show that a deed was signed and acknowledged as it purported to have been. Gould v. Hurley [N. J. Eq.] 73 A 129.

19. On issue as to whether a deed was a forgery, evidence as to circumstances surrounding its execution held admissible. Watkins v. Watkins [Mont.] 102 P 860. Evidence of any facts tending to show reasonableness of grantor's claim to the land, such as payment of taxes, held admissible. Id. Declarations of an alleged grantor made in the absence of his grantee to the affect that he had not executed a deed but had allowed the grantee to use the property held not admissible to impeach the deed. Hughes Bros. v. Redus [Ark.] 118 SW 414. That a purported grant referred to in a deed and which was delivered with it was a forgery, which grant, as well as the deed, contained a description which the grantor must have known was wrong, is some evidence that the deed was a forgery. West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228.

20. Question of genuineness. West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228. Whether a deed was executed and accepted as a substitute for a prior deed, or solely to give a more accurate description of the land, held for the jury. Poitevent v. Scarborough [Tex. Civ. App.] 117 SW 443.

21. Blackburn v. Cherry, 87 Ark. 641, 113 SW 25. As against persons in possession under a deed, the witnesses to which are dead, the widow of the grantor asserting that the deed is a forgery must sustain the contention by undoubted proof. Blomquest v. Gardner [Miss.] 48 S 724.

22. If a deed purports to be executed in the presence of, and is attested by, an officer authorized to make such attestation and another witness, and is recorded, it is presumptively genuine. Hansen v. Owens [Ga.] 64 SE 800.

23. Recordation makes the record or certified copy presumptive evidence of execution. Blount v. Blount [Ala.] 48 S 581.

24. Blount v. Blount [Ala.] 48 S 581. May be shown to be a forgery. Evidence that purported grantor could not write is admissible on such question. Hansen v. Owens [Ga.] 64 SE 800. If the jury believe that from the evidence the purported grantor could not write, there is no presumption

Description. See 11 C. L. 1053—A deed must contain a definite and certain description of the property,[25] but, within this rule, that is certain which can be made certain,[26] and a description is sufficiently certain if the subject-matter can be identified by the aid of parol evidence [27] or if a surveyor can locate the land from the calls given [28] or where the calls can be closed by supplying a line.[29]

Delivery [30]—See 11 C. L. 1053 to the grantee or to some person for him,[31] with in-

that he authorized another person to sign for him. Id.

25. The deed must, within itself or by reference to other instruments, contain a sufficient description. Harriman Land Co. v. Hilton [Tenn.] 120 SW 162. Description as "Lot No. 3, containing two acres more or less bounded as follows: North by land of J. M. Glover, east by street, south by railroad, west by land of W. R. Leob, Sr.," without county, town, or state, held insufficient. Glover v. Newsome [Ga.] 65 SE 64. Deed held not void for want of description. Evans v. Ashe [Tex. Civ. App.] 108 SW 398.

26. Land may be described by reference to another recorded deed, judgment, or decree. Kimbell v. Powell [Tex. Civ. App.] 121 SW 541. To identify land in a recorded deed, resort may be had to an unrecorded judgment, distinctly referred to therein. Id. **Description held sufficiently definite.** McCollum v. Buckner's Orphans' Home [Tex. Civ. App.] 117 SW 886. Deed held to sufficiently refer to another deed to make such other a part of the description, and where it described the land by metes and bounds, the description was sufficient. Harriman Land Co. v. Hilton [Tenn.] 120 SW 162. Description as "one sitio and labour of land surveyed" for the grantor where he lived held sufficient where grantor lived on a league of land which was subsequently patented to him. Sims v. Sealy [Tex. Civ. App.] 116 SW 630. A description of the boundary of land conveyed as the land of another is sufficient though the title of such other is defective if it appear that the grantor recognized him as the owner. Moody v. Vondereau, 131 Ga. 521, 62 SE 821. Description "a certain tract or parcel of land in the county aforesaid, fronting on the farm of C. W. T. adjoining the farm of T. H. R. and others, and known as the B. H. T. place, being 150 acres." Grimes v. Bryan, 149 N. C. 248, 63 SE 106. Additional provisions in certain deeds that it was the intention of the grantor to convey all land inherited by them from a certain party corrected a misdescription by which a part of the land was omitted. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552.

27. A deed will be held void for insufficiency of description only when after resort to oral proof it still remains a matter of conjecture what was intended to be conveyed. Wetzler v. Nichols [Wash.] 101 P 867. **Held sufficient** where there was but one line to locate. Cleveland v. Shaw [Tex. Civ. App.] 119 SW 883. Description giving boundaries by metes and bounds held not void for uncertainty, where corners could be located by parol. Babb v. Gay Mfg. Co., 150 N. C. 139, 63 SE 609. Deed held to describe the land with sufficient certainty to be identified by the aid of extrinsic evidence. McDonald v. Hanks [Tex. Civ. App.] 113 SW 604. Description as lots 30, 31, also all the remaining town tract not theretofore sold in lots designated on the plat or survey of said town, etc., held not void. Hardin County v. Nona Mills Co. [Tex. Civ. App.] 112 SW 822. **Parol evidence** is admissible to identify property described and to ascertain to what property the description applies. Wetzler v. Nichols [Wash.] 101 P 867. To apply the description to the subject-matter. Hubbard v. Whitehead [Mo.] 121 SW 69. Under deed describing land as the T. place containing 150 acres more or less, parol evidence was admissible to show that the grantor had constituted a certain 30 acres a part of the T. place. Grimes v. Bryan, 149 N. C. 248, 63 SE 106.

28. The calls are sufficient if they are certain and definite enough to enable a surveyor to locate and identify the lands attempted to be described. Harris v. Iglehart [Tex. Civ. App.] 113 SW 170. A description as a certain number of acres giving east, west, and south boundaries, and on the north by land of the grantor, held not void for uncertainty. Moody v. Vondereau, 131 Ga. 521, 62 SE 821.

29. Description defective for omission to state length of two lines and entire omission of a line necessary to close the survey held not fatally defective but would be sustained by supplying the necessary line. Tompkins v. Thomas [Tex. Civ. App.] 118 SW 581.

30. Seibel v. Higham, 216 Mo. 121, 115 SW 987; Hearn v. Purnell, 110 Md. 458, 72 A 906. Mere preparation or execution does not affect the grantor's title. Satterly v. Dewick, 129 App. Div. 701, 114 NYS 354. Mere intention of the grantor that it shall be effective is insufficient. Fortune v. Hunt, 149 N. C. 358, 63 SE 82. If a deed is altered after delivery so as to include other land, it should be re-executed and redelivered. Waldron v. Waller, 65 W. Va. 605, 64 SE 964. Where in consideration of a son staying at home a father agreed to deed him land and did so and the deed was recorded and the son made extensive improvements and held possession for 20 years, he had an equitable title though it was adjudged that the deed was never delivered. Stonehouse v. Stonehouse [Mich.] 16 Det. Leg. N. 21, 120 NW 23.

31. Held sufficient: Delivery to third person with unconditional directions to deliver to the grantee. Crozer v. White, 9 Cal. App. 612, 100 P 130. Delivery by grantor to scrivener who drafted it for the purpose of having it recorded held sufficient, though at grantee's suggestion it is not recorded until after death of grantor. Bates v. Winters, 138 Wis. 673, 120 NW 498. The delivery by a grantor to a third person to be delivered by him to the grantee on the grantor's death will operate as a valid delivery where there is no reservation by the grantor of any control over the instrument, though the grantee had not empowered such third person to act. Rowley v. Bowyer [N. J. Eq.] 71 A 398.

tent to pass title,[32] and in such manner as to terminate the grantor's control over the instrument,[33] is essential. The question of delivery is one of intention [34] to be determined from the circumstances of each particular case,[35] and no particular form or ceremony is necessary.[36] An unauthorized delivery may be ratified.[37] What

32. The act of delivery must be accompanied by an intent that the deed shall become operative as such. Mere transfer of possession is insufficient. Melvin v. Melvin, 8 Cal. App. 684, 97 P 696. Delivery to a third person with instructions to deliver to the grantee on the grantor's death is valid delivery where the grantor's intention was to pass title presently. Klabunde v. Casper, 139 Wis. 491, 121 NW 137. Delivery to a third person or recordation by the grantor with intent to divest himself of control of it is sufficient. McCord v. Bright [Ind. App.] 87 NE 654.

33. There can be no delivery so long as the deed is subject to the authority and control of the grantor. Hearn v. Purnell, 110 Md. 458, 72 A 906. The deed must pass from the control of the grantor to that of the grantee, or some one for him with intent to pass title. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028. It is essential that the deed pass out of the possession and control of the grantor and into the actual or constructive control of the grantee. Smith v. Moore, 149 N. C. 185, 62 SE 892. There must be a parting with control by the grantor with intention that the deed shall operate presently, and an acceptance by the grantee or by some one for him. Id.

No delivery: If deed was delivered to grantee's mother as grantor's agent to place it among his papers without intention of parting with control of the instrument. Pittmon v. Flowers [Ky.] 115 SW 786. Where a deed is handed to the grantee with intent that he should hold it as a depository or subject to the control of the grantor. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028. It is not delivered where he retains control of it with intent that it shall be taken at his death by the grantee. Merck v. Merck [S. C.] 65 SE 347. Evidence held to show no delivery where grantor signed, acknowledged and registered a deed, but kept it in his own hands and never intended to deliver it. McGuire v. Clark [Neb.] 122 NW 675.

34. The intention of the grantor is controlling. Ackman v. Potter, 239 Ill. 578, 88 NE 231. What constitutes a sufficient delivery is largely a matter of intention (Doty v. Barker [Kan.] 97 P 964) to be gathered from the circumstances (Brown v. North [Iowa] 119 NW 629) and from the deed itself (Maxwell v. Harper, 51 Wash. 351, 98 P 756). If a grantor delivered deeds to a depositary and never saw them again or attempted to exercise control over them, they were effectual to pass title, unless he did not intend to part with control over them. Callerand v. Piot, 241 Ill. 120, 89 NE 266.

35. Delivery is a question of intention to be determined from the deed itself and from circumstances surrounding its execution. Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 SE 873. Delivery depends largely on the intent of the grantor and is not conclusively established by physical or manual delivery. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028. Whether a deed deposited with a bank under an agreement relating to the deposit, and providing for repayment of the consideration to the grantee if the deed was withdrawn, was delivered with intent to pass title, is to be determined from the agreement and circumstances. Felt v. Felt [Mich.] 15 Det. Leg. N. 994, 118 NW 953.

36. Delivery is complete when there is an intention manifested by the grantor to make the instrument his deed. Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 SE 873. The act and fact of delivery is independent of the language thereof and consists of an act and purpose. Shute v. Shute, 82 S. C. 264, 64 SE 145. Delivery may be actual or constructive. Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 SE 873. Where parties meet, make, read, sign and acknowledge, it usually amounts to delivery. Id.

Held not to constitute delivery: Where a grantor employed a lawyer to draft a deed, which he did and sent it by a justice to be acknowledged, but before the justice made his certificate or delivered the deed to the lawyer the grantor died, held there was no delivery during the life of the grantor. Givens v. Ott [Mo.] 121 SW 23. Deeds deposited with agent until satisfactory abstracts of title were procured. Cordes v. Cushman [Kan.] 101 P 460. There was no actual delivery of a deed until it was recorded where it was turned over to the purchaser with authority to fill in name of grantee left blank, which he did and recorded the deed before turning it over to the persons whose names he filled in. Derry v. Fielder, 216 Mo. 176, 115 SW 412. Where grantor handed deed to a third person and directed him to keep it, and if grantor never called for it to deliver it to grantee, and grantor died without calling for it. Fortune v. Hunt, 149 N. C. 358, 63 SE 82. Where one left a deed with an attorney to be delivered if his wife signed it, which she refused to do, and the attorney delivered it to the grantee. Marble v. Marble [Tex. Civ. App.] 114 SW 871. Unauthorized delivery by an escrow. Seibel v. Higham, 216 Mo. 121, 116 SW 987. Where grantees surreptitiously took deed from grantor. White v. Holder [Ky.] 118 SW 995.

Evidence insufficient: On question of delivery of a deed executed by a single man, evidence held not to show delivery until after his marriage, hence his wife was entitled to dower therein. Brown v. North [Iowa] 119 NW 629. Evidence held to show that an attorney with whom a deed was deposited had no authority to deliver it. Marble v. Marble [Tex. Civ. App.] 114 SW 871. Evidence held to show that a deed left with an attorney was never delivered and its cancellation on repurchase by the grantor left title in him. Barnhart v. Anderson [S. D.] 118 NW 31. Evidence held to show no delivery. Shute v. Shute, 82 S. C. 264, 64 SE 145.

Held to constitute delivery: Delivery in escrow to be so held until grantor's death

constitutes delivery is a mixed question of law and fact,[38] and evidence of surrounding circumstances,[39] and of the acts and conduct of the parties,[40] is admissible on the question of intent. A presumption of delivery arises from the fact of possession of the instrument by the grantee,[41] or from the fact of recordation,[42] but such presumptions may be rebutted.[43] The law makes stronger presumptions in favor of

and then delivered to the grantee is sufficient where the grantee knew the conditions and accepted the same in writing. Fitzgerald v. Allen, 240 Ill. 80, 88 NE 240. Where executed and left with an attorney to record when he obtained a certain map. Sewell v. Home Ins. Co., 131 App. Div. 131, 115 NYS 345. Grantor's deposit with third party to be delivered to grantee after his death. Maxwell v. Harper, 51 Wash. 351, 98 P 756. Where a father having put property in his daughter's name, she, at his request, executed a deed to a third person and gave it to the father, who sent it to the third person's attorney. Gould v. Hurley [N. J. Eq.] 73 A 129. Where deceased grantor had allowed a deed to remain of record for 20 years, evidence held insufficient to impeach it on the ground of nondelivery or nonacceptance. Carstens v. Luckhart [Iowa] 119 NW 266. Delivery to third person to be delivered to grantee on death of grantor. Seibel v. Higham, 216 Mo. 121, 115 SW 987. Where grantor delivers to a third person for delivery to the grantee without condition, there is delivery though the grantee is not given the deed until the grantor's death. Id. Where deed was executed and delivered and placed in grantee's trunk and he took possession. Tipton v. Tipton [Tex. Civ. App.] 118 SW 842. Where a deed was executed and recorded without the knowledge of the grantee, who was grandson of the grantor, such fact did not show delivery, but subsequent sale of a portion of the property and division of the proceeds was such recognition of delivery as to make it effectual. Gillen v. Gillen, 238 Ill. 218, 87 NE 388. **Evidence sufficient** to show unconditional delivery. Plunkett v. Mountain Park Land Co. [Ark.] 119 SW 272; Schumacher v. Draeger, 137 Wis. 618, 119 NW 305; Doty v. Barker [Kan.] 97 P 964; Leggat v. Blomberg, 15 Idaho, 496, 98 P 723; Nash v. Yellow Poplar Lumber Co. [Va.] 63 SE 14; Morehead v. Allen, 131 Ga. 807, 63 SE 507; Davis' Heirs v. Davis' Heirs, 123 La. 1091, 49 S 718. To show that a grantor waived a life estate reserved and redelivered the deed to the grantee with intent to pass a fee simple title. Lamb's Estate v. Morrow [Iowa] 117 NW 1118. Deed from brother to sister. Creamer v. Bivert, 214 Mo. 473, 113 SW 1118. To show absolute delivery without power to recall. Young v. Young [Mich.] 16 Det. Leg. N. 228, 121 NW 264. To show that a grantor who delivered deeds to a depositary to be delivered to the grantees at his death relinquished all control over them and intended to do so. Callerand v. Piot, 241 Ill. 120, 89 NE 266. Evidence that grantor intended to deliver a deed, that the deed was recorded and afterwards in the possession of the grantee, held sufficient to show delivery. Fitzgerald v. Tvedt [Iowa] 120 NW 465. Where grantor deposited deed with a third person to be delivered to the grantee after his death, the fact that depositary entertained a mistaken view as to his duty, and regarded the deed as being in its possession subject to the control of the grantor, is insufficient to show that grantor reserved control over it. Maxwell v. Harper, 51 Wash. 351, 98 P 756.

37. Unauthorized delivery by agent of grantor may be ratified. Lowman v. Nye & Ormsby County Bank [Nev.] 102 P 967.

38. Smith v. Moore, 149 N. C. 185, 62 SE 892. Evidence as to delivery held for the jury. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028.

39. Parol evidence is admissible to prove or disprove delivery. Shute v. Shute, 82 S. C. 264, 64 SE 145. Evidence as to inability of grantee to pay consideration and other facts held inadmissible on question of delivery. Leathers v. Leathers [Ga.] 63 SE 1113.

40. On issue of delivery, evidence that other deeds made by the grantor at the same time were never delivered, and evidence that the purpose of the deed was to evade creditors, held admissible. Napier v. Elliott [Ala.] 50 S 148. Where evidence as to delivery is conflicting, the conduct of the grantees in surreptitiously recording it is to be considered in determining weight to be given it. Engelke v. Engelke [Neb.] 120 NW 1019. On issue of delivery, evidence that subsequent to making of the deed the grantee's husband tried to rent the land from the grantor, and other facts, **held not admissible** against the grantee as she could not be prejudiced by her husband's acts. Napier v. Elliott [Ala.] 50 S 148.

41. Possession by the grantee is prima facie evidence of delivery. In re Brigham's Estate [Iowa] 120 NW 1054. Deeds duly acknowledged and recorded and in the grantee's possession are presumed to have been delivered. Burrow v. Hicks [Iowa] 120 NW 727; Potter v. Barringer, 236 Ill. 224, 86 NE 233; Irvin v. Johnson [Tex. Civ. App.] 120 SW 1085.

42. Recordation is prima facie evidence of delivery. Morgan v. Morgan [Vt.] 73 A 24; Ackman v. Potter, 239 Ill. 578, 88 NE 231; Kirby v. Kirby, 236 Ill. 255, 86 NE 259. Delivery to recording officer is prima facie good delivery. Sparkman v. Jones, 81 S. C. 453, 62 SE 870. A deed proved, recorded and offered in evidence, is presumed to have been delivered. Fortune v. Hunt, 149 N. C. 358, 63 SE 82.

43. Recordation does not of itself establish delivery. Ackman v. Potter, 239 Ill. 578, 88 NE 231. The fact that it has been recorded even at the grantor's direction does not constitute delivery. Morgan v. Morgan [Vt.] 73 A 24. Where town clerk received a deed from a grantor with instructions to file it but to delay recording, the clerk's subsequent recordation and delivery to the grantee at her request did not constitute delivery. Id. Where grantee did not know of recordation until years thereafter, when he agreed to reconvey for the convenience of the grantor, had never seen

delivery in case of voluntary settlements than in cases of bargain and sale.[44] But if grantees are of age, the presumption does not obtain to the extent that it would if they were minors.[45] One who asserts that an unrecorded deed in possession of the grantee was not delivered has the burden to prove it,[46] and the evidence must be clear and satisfactory.[47] A deed is presumed to have been delivered as of the day of its date,[48] and the fact that the certificate of acknowledgment bears a later date, is not sufficient to rebut such presumption.[49] If a deed is delivered in escrow, it can have no binding effect until the happening of the condition.[50] There can be no delivery in escrow to the grantee.[51] The common-law rule of livery of seisin has been abolished.[52]

Validity of assent See 9 C. L. 950 is elsewhere treated.[53]

Acceptance See 9 C. L. 950 is essential,[54] but may be presumed from the fact that the deed is beneficial to the grantee.[55] The acceptance of a deed by the grantee makes it as binding upon him as though he had signed it.[56]

the deed or known of it, and had never had possession of the premises. Kirby v. Kirby, 236 Ill. 255, 86 NE 259. The **presumption of delivery from possession by the grantee** before and after death of the grantor is not overcome by grantor's statements that she did not intend to leave the grantee any thing, and letters and statements of grantee that he did not expect anything, and of fact of retention of possession by the grantor. Potter v. Barringer, 236 Ill. 224, 86 NE 233. Parol evidence is admissible to show that a deed in possession of a grantee was never delivered, but is not competent to control its effect if delivered. Id. Declarations of grantor in absence of grantee are competent to show his intention on question of delivery, but are not competent to invalidate the deed if delivered. Id.

44. Ackman v. Potter, 239 Ill. 578, 88 NE 231. Where it appeared that conveyance was made by husband to wife in the nature of a voluntary settlement, when he intended to leave and desert her, the presumption was that the delivery of deed was absolute. McComb v. McComb, 141 Ill. App. 160.

45. Ackman v. Potter, 239 Ill. 578, 88 NE 231.

46. In re Brigham's Estate [Iowa] 120 NW 1054.

47. In re Brigham's Estate [Iowa] 120 NW 1054. Failure to record a deed in possession of the grantee will not overcome the presumption of delivery. Id. Where grantee in an unrecorded deed had parted with title, the fact that he did not assert title nor produce his deed when the land was claimed as part of the grantor's estate was not sufficient to overcome such presumption. Id.

48. Harriman Land Co. v. Hilton [Tenn.] 120 SW 162; Boye v. Andrews [Cal. App.] 102 P 551; Beall v. Chatham [Tex. Civ. App.] 117 SW 192. On the date it was acknowledged. Miller v. Peter [Mich.] 16 Det. Leg. N. 670, 122 NW 780. Deed found among grantee's papers after his death is presumed to have been delivered on its date, though recorded years later. In re Brigham's Estate [Iowa] 120 NW 1054. Where deed conveyed land for highway, the fact that the records of highway commissioners showed that deed was formally accepted at a day later than that named in deed did not rebut presumption that deed was delivered on day of its date. Bennett v. Millard, 142 Ill. App. 282.

49. Bennett v. Millard, 142 Ill. App. 282.

50. Delivery in escrow is delivery to a third person to await the performance of some condition, and the deed is ineffectual until such condition is performed. Seibel v. Higham, 216 Mo. 121, 115 SW 987. A deed delivered in escrow to be delivered to the grantee after the death of the grantors has no effect until that event happens, and the grantee has no right by a delivery prior to such event. Grindle v. Grindle, 240 Ill. 143, 88 NE 473. Death of grantor removes all authority to deliver a deed. Givens v. Ott [Mo.] 121 SW 23.

51. If a deed absolute be delivered by grantor to grantee to take effect on any event, the condition becomes void and the deed is absolute and title passes immediately. Dorr v. Middleburg [W. Va.] 65 SE 97. The common-law rule that there can be no delivery in escrow to the grantee is in force in Georgia. Heitman v. Commericial Bank of Savannah [Ga. App.] 65 SE 590. Where a deed is actually delivered to the grantee, a verbal understanding that it was to take effect only upon happening of certain conditions will not defeat passing of title. Potter v. Barringer, 236 Ill. 224, 86 NE 233.

52. Is not in force in Arkansas. Moore v. Sharpe [Ark.] 121 SW 341.

53. See Fraud and Undue Influence; Duress; Incompetency; Mistake and Accident.

54. Evidence insufficient to show acceptance. Pullis v. Somerville, 218 Mo. 624, 117 SW 736. On question of acceptance evidence that counsel for grantee took the deeds under an agreement to accept them if satisfactory, and that there were numerous objections to the title, held admissible. Id.

55. Acceptance on the part of a minor is presumed. Fitzgerald v. Tvedt [Iowa] 120 NW 465. Delivery to a grantee's mother without any directions as to the purpose of delivery is presumed to be for the grantee's benefit, and acceptance is presumed. Pittman v. Flowers [Ky.] 115 SW 786. Where grantee is an infant, acceptance is presumed from the fact that delivery of the deed is beneficial to him. McCord v. Bright [Ind. App.] 87 NE 654. Conveyance to an infant of an undivided one-half interest in a tract

Consideration See 11 C. L. 1055 is not essential to the validity of a deed,[57] the seal importing a consideration;[58] but the existence of a sufficient consideration is frequently important in determining whether there was fraud on the grantor or his creditors,[59] and a deed on an illegal consideration is invalid,[60] and likewise a deed may be canceled and set aside for a failure of consideration amounting to a fraud on the grantor.[61] The recitals in the deed are evidence of consideration [62] but are not conclusive thereof [63] and are not sufficient to establish payment thereof,[64] but this

is beneficial as compared to a mere right of inheritance of a greater share. Id.

56. Where by its terms he assumes a mortgage, he is liable for the debt. Hendricks v. Brooks [Kan.] 101 P 622.

57. That a deed is without consideration is not sufficient to avoid it. McDonell v. McDonell [Cal.] 101 P 40. But such fact may be considered on the question of fraud and undue influence. Id. Not necessary to support a deed fully executed and delivered. Robertson v. Hefley [Tex. Civ. App.] 118 SW 1159. No consideration is necessary to support a **partition deed.** Eggner v. Hovekamp [Ky.] 119 SW 818.

58. A deed under seal imports a consideration. Golle v. State Bank of Wilson Creek, 52 Wash. 437, 100 P 984. A deed properly acknowledged imports a consideration. Prewitt v. Morgan's Heirs [Ky.] 119 SW 174. The law implies a consideration in absence of evidence to the contrary. Robertson v. Hefley [Tex. Civ. App.] 118 SW 1159.

59. Where a husband joins in a deed of his wife's separate property, notes given for the consideration were property of the wife. Templeman v. McFerrin [Tex. Civ. App.] 113 SW 333.

Held sufficient: Love and affection is sufficient as between husband and wife. Robertson v. Hefley [Tex. Civ. App.] 118 SW 1159. Love and affection is sufficient. Burrow v. Hicks [Iowa] 120 NW 727. A deed supported by love and affection is not invalidated for reciting a money consideration which did not pass. Id. Fact that a husband had misappropriated defendant's money which had been the means by which property conveyed by the husband to his wife had been acquired and his duty to make restitution was sufficient consideration for the wife's deed conveying such property to defendants. Bishop v. Howe, 117 NYS 996. Deed to one for life, remainder to her children in consideration of future support for the grantor, is founded on a good consideration, and the fact the minor grantees of the remainder were not parties to the consideration is immaterial. Strothers v. Woodcox [Iowa] 121 NW 51. Agreement to care for the grantor for life is sufficient. Ames v. Moore [Or.] 101 P 769. Delivery of deed based on such consideration passes title. Id. Such consideration held fully performed though the grantor died two days later. Id. A recital as to consideration is sufficient if it recites a fact sufficient to create either a good or a valid consideration. Robertson v. Hefley [Tex. Civ. App.] 118 SW 1159. A deed given in settlement of a claim of title to a greater tract is supported by a sufficient consideration though the claim prove not as good as supposed. Jones v. Gatliff [Ky.] 113 SW 436. If a consideration is necessary in deeds to a railroad for right of way purposes the enhancement of value of land in the neighborhood is sufficient. United Inv. Co. v. Los Angeles Interurban R. Co. [Cal. App.] 101 P 543.

60. Under Civ. Code 1895, §§ 2488, 5990, a deed by a married woman to extinguish her husband's debts is void. Bond v. Sullivan [Ga.] 65 SE 376.

61. Where grantor, 70 years of age, conveyed to one in consideration of future support and one-half the proceeds of the land. Cumby v. Cumby, 240 Ill. 235, 88 NE 549. Where a grandmother conveys to her grandson in consideration of support and he fails to support her. Gillen v. Gillen, 238 Ill. 218, 87 NE 388.

62. Expression of a money consideration imports that such consideration was paid. Stauffer v. Martin [Ind. App.] 88 NE 363. The recital of the consideration in a deed is prima facie evidence of the amount obtained by the grantor. Leeman v. Page [Kan.] 100 P 504.

63. The consideration may be shown. Bashinski v. Swint [Ga.] 65 SE 152. Varied or explained by parol. Haslam v. Jordan, 104 Me. 49, 70 A 1066; Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149; Friedman v. Ender, 116 NYS 461. Written acknowledgment of receipt of consideration may be rebutted. Magill Lumber Co. v. Lane-White Lumber Co. [Ark.] 119 SW 822. Under Ky. St. 1909, § 470, providing that consideration need not be stated, a recital that it was $—— in hand paid is sufficient. Prewitt v. Morgan's Heirs [Ky.] 119 SW 174. Parol evidence is admissible to show that when a grantor inserted consideration in a deed and recital of its payment when it had not been paid he intended to indicate an intent that it was not to be paid. Koogle v. Cline, 110 Md. 587, 73 A 672. A mere preponderance of evidence is sufficient to show an additional consideration not mentioned. Magill Lumber Co. v. Lane-White Lumber Co. [Ark.] 119 SW 822. **Evidence sufficient** to show no consideration for a deed from brother to sister. Creamer v. Bivert, 214 Mo. 473, 113 SW 1118. To show that deed was made in consideration of future support and not in trust under contract for reconveyance on demand. Baker v. Baker [Mich.] 16 Det. Leg. N. 272, 121 NW 287. **Evidence insufficient** to show no consideration. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. To show that the true consideration was less than that expressed in the deed. Combs v. Combs [Ky.] 114 SW 334.

64. Recital of consideration is not sufficient to prove payment thereof. McAdoo v. Williams [Tex. Civ. App.] 118 SW 625. Recital of receipt by grantor, shown to be dead, of the purchase money, is inadmissible against those claiming under a prior deed,

rule has limitations,[65] and such recitals are not evidence as against third parties.[66] The burden of showing want of consideration is upon the person contesting the deed.[67]

§ 2. *Recordation*[68]—See 9 C. L. 951 is elsewhere treated.[69]

§ 3. *Interpretation and effect.*[70] *General rules.*See 11 C. L. 1055—A deed supersedes all prior contracts and negotiations of which it is the consummation,[71] but this rule is subject to the exception that the question of merger is one of construction.[72] The construction of a deed is a question of law.[73] A deed is to be construed as a whole[74] and all parts given effect if possible.[75] The object and purpose of construction is to ascertain and give effect to the intention of the parties[76] as evinced

as a declaration against interest by grantor. Ryle v. Davidson [Tex.] 115 SW 28. Recital that certain amount of consideration was cash, paid while prima facie proof, is not conclusive. Rhodes v. Walker [Ky.] 115 SW 257.

65. Where a deed conveys absolutely to a railroad for a right of way, it cannot be shown that it was part of the consideration that the grantor was to have a right of way over land conveyed, and that the company was to maintain crossings. Louisville & N. R. Co. v. Willbanks [Ga.] 65 SE 86.

66. Recital in deed of consideration is not evidence against grantee in prior unrecorded deed from same grantor, but such recital is hearsay and must be proved independently. Bugg v. Leay, 107 Va. 648, 60 SE 89.

67. Boye v. Andrews [Cal. App.] 102 P 551. Under Ky. St. 1903, § 472, providing that consideration recited may be contradicted, one who asserts it to be incorrect must prove it by clear proof. Combs v. Combs [Ky.] 114 SW 334.

68. **Search Note:** See note in 54 L. R. A. 865.

See, also, Deeds, Cent. Dig. §§ 214-228; Dec. Dig. §§ 79-88; 13 Cyc. 594-599; 24 A. & E. Enc. L. (2ed.) 73.

69. See Notice and Record of Title.

An unrecorded deed vests title from delivery. Warren v. Williford, 148 N. C. 474, 62 SE 697. A deed is not duly recorded unless the record shows that the certificate of proof or acknowledgment is sufficient. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552.

70. **Search Note:** See notes in 3 C. L. 1062; 5 Id. 980; 15 L. R. A. 652; 23 Id. 396; 57 Id. 332; 62 Id. 763; 1 L. R. A. (N. S.) 315, 319; 3 Id. 649; 4 Id. 207, 477; 5 Id. 156, 603; 6 Id. 436; 7 Id. 1109; 8 Id. 1038; 12 Id. 283, 661, 956; 13 Id. 551, 1003; 14 Id. 909; 16 Id. 941; 28 A. S. R. 631; 31 Id. 46; 66 Id. 59; 70 Id. 329; 79 Id. 747; 81 Id. 764; 93 Id. 372; 95 Id. 214; 97 Id. 584; 102 Id. 366; 105 Id. 854; 111 Id. 770; 2 Ann. Cas. 470, 918; 3 Id. 338; 7 Id. 790; 8 Id. 444; 10 Id. 97, 459.

See, also, Deeds, Cent. Dig. §§ 229-555; Dec. Dig. §§ 90-183; 13 Cyc. 600-724; 9 A. & E. Enc. L. (2ed.) 165.

71. The rights of the parties are thereafter to be determined from the deed. Savage v. Cauthorn [Va.] 64 SE 1052. Where a deed has been accepted as performance of a contract to convey, the rights of the parties thereafter are controlled by the deed though it varies from the one provided for in the contract. Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp. [Va.] 64 SE 56.

72. The rule that all prior contracts are merged in a deed is subject to the exception that the question of merger is one of construction to be gathered from consideration of the instruments. Davis v. Lee, 52 Wash. 330, 100 P 752. The covenants of a previous article of sale are not merged in the deed within the rule that merger of a preliminary contract bars the grantor from alleging the true consideration and from proving that by mistake various covenants to be performed by the grantee were omitted. Townsend v. Lacock, 222 Pa. 330, 71 A 187.

73. Cadwalader v. Price [Md.] 73 A 273; Fuelling v. Fuesse [Ind. App.] 87 NE 700. Error to submit it to the jury. Folk v. Graham, 82 S. C. 66, 62 SE 1106. To determine the description of land conveyed. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617. Location of a right of way reserved. McWilliams v. McNamara, 81 Conn. 310, 70 A 1043. Way claimed held the natural and convenient one and the one contemplated. Id.

74. The intention is to be gathered from the entire instrument and every word given effect. Condor v. Secrest, 149 N. C. 201, 62 SE 921; Folk v. Graham, 82 S. C. 66, 62 SE 1106. A single word or phrase will not be looked to alone. Brown v. Reeder, 108 Md. 653, 71 A 417. But the entire instrument will be considered to find the intention of the parties and especially the grantor. Id. Is to be construed in the light of all its parts. Stoepler v. Silberberg, 220 Mo. 258, 119 SW 418.

75. Williams v. Grimm [Ky.] 112 SW 839; Lewman v. Owens [Ga.] 64 SE 544; Lyford v. Laconia [N. H.] 72 A 1085. Deed of gift to a religious society and its assigns so long as it occupies the land with a house of public worship and on failure to do so the land to revert construed and full effect given to every part. Held so long as it occupied the land with a house of worship, it could use it for other purposes. Lyford v. Laconia [N. H.] 72 A 1085. Words deliberately inserted for a purpose are not to be lightly considered or arbitrarily thrust aside. Triplett v. Williams, 149 N. C. 394, 63 SE 79. Unless a positive rule of law will be thereby infringed. Waldermeyer v. Loebig [Mo.] 121 SW 75. It should be so construed as to harmonize and give effect to all parts. White v. Bailey, 65 W. Va. 573, 64 SE 1019. In construing an ambiguous deed to ascertain what estate was conveyed, the intent of the grantor must be ascertained by giving every word of the deed its appropriate meaning regardless of mere formal divisions of the instrument. Teague v. Sowder [Tenn.] 114 SW 484.

76. Towns v. Brown [Ky.] 114 SW 773;

by the language employed,[77] the subject-matter and the surrounding circumstances,[78] and in the light of the purpose for which it was given.[79] Arbitrary rules will not be applied where the real intention can be gathered from the language used.[80] If the intention requires a transposition of words, such transposition will be made.[81] An interpretation which will give a deed effect will be adopted rather than one which will render it ineffective.[82] Although a stricter construction is applied to deeds than to wills, yet in deeds, the intent of the grantor, when legal, is a governing principle in their construction.[83] The context may be examined to determine the true

Druecker v. McLaughlin, 235 Ill. 367, 85 NE 647; Pack v. Whitaker [Va.] 65 SE 496; Hubbard v. Whitehead [Mo.] 121 SW 69. In construing a description. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617. The courts will first, by inspection, ascertain the intention and then expound it so as to accomplish that intention unless expressions are employed which positively forbid it. Brown v. Reeder, 108 Md. 653, 71 A 417. When the intention is ascertained, nothing remains but to effectuate it. Triplett v. Williams, 149 N. C. 394, 63 SE 79. Each word and sentence is to be given such meaning as will carry into effect the true intent of the parties. Benedict v. Minton, 83 Neb. 782, 120 NW 429. In construing, it is the duty of the court to place itself as nearly as possible in the situation of the parties when the deed was made, so that it may gather the intention from the language used in the light of surrounding circumstances. Lancaster & J. Elec. L. Co. v. Jones [N. H.] 71 A 871. Should be so construed as to give effect to intent unless inconsistent with some rule of law or repugnant to the terms of the grant. Simonds v. Simonds, 199 Mass. 552, 85 NE 860; Cotting v. Boston, 201 Mass. 97, 87 NE 205.

Deeds construed: Recitals in conveyance of railroad right of way of agreement of the company to maintain drainage ditches, etc., held not a waiver of the statutory duty of the company to construct necessary culverts and sluices. Missouri, K. & T. R. Co. v. Riverhead Farm [Tex. Civ. App.] 117 SW 1049. Where a deed recited that it was made in lieu of a deed to a certain third person which had never been recorded, it is presumed that the latter had been surrendered and treated as naught. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930. Where the creation of a tenancy in common by deed to one and his heirs is sought to be drawn from a deed, and the intention of the grantor becomes a matter of construction, omission to name grantees becomes a matter of construction. Wallace v. Hodges [Ala.] 49 S 312. A description as a certain number of acres, more or less, constitutes a sale by the acre unless it plainly appears from the whole deed that a sale in gross was intended. Pack v. Whitaker [Va.] 65 SE 496. Where in caption of a deed A and wife are named as parties of the second part but in the granting clause only A is named, the deed is to him alone. Loughridge v. Ball [Ky.] 118 SW 321. Deed in consideration of an annuity "payable annually on the first of March of each year" until death of the grantor shows an intention that payments should continue until the grantor's death, and that annuity should be apportioned where he died prior to time of payment. Lynch v. Huston [Mo. App.] 119 SW 994. Clause providing that on the death of the parties the property shall revert to the grantee's heirs is repugnant to a prior grant of the entire fee. Gaylord v. Barnes, 128 App. Div. 810, 113 NYS 605.

77. Lancaster & J. Elec. L. Co. v. Jones [N. H.] 71 A 871. If the intention is definitely expressed, the expression should control. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617. The rule for interpretation if the deed is unambiguous is to ascertain the grantor's intention from the words employed. Bernero v. McFarland Real Estate Co., 134 Mo. App. 290, 114 SW 531. Where terms are clear and unambiguous, its effect cannot be altered by the unexpressed intention of the parties. City of Geneva v. Henson, 195 N. Y. 447, 88 NE 1104. Generally, a provision, effect, or purpose will not be read into a deed as having been implied, unless necessity therefor is found in terms used. White v. Bailey, 65 W. Va. 573, 64 SE 1019. Functions and purposes not expressed nor necessarily implied should not be added after a reasonable function for every clause has been perceived. Id.

78. Brown v. Reeder, 108 Md. 653, 71 A 417. Construction is not confined to language used. Ray v. Jaeger, 131 App. Div. 294, 115 NYS 737. Intention of the parties may be ascertained by reference to accompanying facts and circumstances. Darling v. Alexander, 130 App. Div. 85, 114 NYS 334. The situation at the time of execution is to be considered in finding the intention. Blauvelt v. Passaic Water Co. [N. J. Eq.] 72 A 1091. The purpose and object of the parties as shown by the instrument itself read as a whole, at the time of its execution, in the light of the subject-matter, the situation of the parties, and the circumstances, is the best guide to their intention. White v. Bailey, 65 W. Va. 573, 64 SE 1019. The court, so far as it can, will place itself in the position of the parties and ascertain their intent from the context, language and surrounding circumstances. Shinnecock Hill & Peconic Bay Realty Co. v. Aldrich, 132 App. Div. 118, 116 NYS 532.

79. Must be construed in the light of the purpose for which it was given. Friedman v. Ender, 116 NYS 461. Evidence held to show that a deed was a bargain and sale and not a partition deed. Eggner v. Hovekamp [Ky.] 119 SW 818.

80. Dickson v. Van Hoose [Ala.] 47 S 718.

81. Folk v. Graham, 82 S. C. 66, 62 SE 1106.

82. Maxwell v. Harper, 51 Wash. 351, 98 P 756.

83. This applies as well to the words "heirs" or "children" as any other part of the deed. Smith v. Lindsey, 37 Pa. Super. Ct. 171.

meaning of ambiguous words.[84] Where executed contemporaneously with other instruments, they are to be construed together,[85] and instruments referred to therein,[86] and laws in force at the time,[87] are to be considered as a part thereof. The practical construction given an instrument by the parties is to be considered.[88] A latent ambiguity[89] may be explained by parol evidence of surrounding circumstances.[90] Technical words are presumed to have been used in their technical sense.[91] Words should be taken in their grammatical and ordinary sense unless

84. Price v. Griffin, 150 N. C. 523, 64 SE 372.

85. Deed and contract for support of the grantors as part of the consideration are to be considered together. Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149. Where a deed is delivered in escrow to be delivered to the grantee after the death of the grantor and at the time the deed is executed a written agreement is entered into stating the terms upon which such deed is made, the deed and contract are to be construed together. Grindle v. Grindle, 240 Ill. 143, 88 NE 473. Though the assumption of a mortgage debt by a purchaser is absolute and unqualified in a deed, it will be controlled by a collateral contract between him and his grantor not embodied in the deed and the mortgagee cannot enforce the contract of assumption unless the grantor could. Klemmer v. Kerns, 71 N. J. Eq. 297, 71 A 332.

86. The two become one in determining the intention of the grantor. Waldermeyer v. Loebig [Mo.] 121 SW 75. Where a deed refers to the deed under which grantor acquired title, the latter is admissible to identify the land conveyed. Steele v. Bryant [Ky.] 116 SW 755. In construing a deed the court must consult the language in deeds linked together by express terms. Drake v. Russian River Land Co. [Cal. App.] 103 P 167. Where lots are transferred by reference to plan or plat, such plan forms part of the contract to be incorporated into the deed by reference. Downey v. Hood [Mass.] 89 NE 24.

87. Where grantors intended to convey land to a railroad company under the power conferred to purchase by Comp. Laws 1887, § 2980, the deed will be construed in the light of that statute which became a part of it. Sherman v. Sherman [S. D.] 122 NW 439.

88. Practical construction by parties as to location of boundary lines used in the description held to control. Dundas v. Lankershim School Dist. [Cal.] 102 P 925. Where grantee took possession and held for 14 years, the construction was, as between the parties, controlling. Schlossmacher v. Beacon Place Co., 52 Wash. 588, 100 P 1013. In determining whether a deed conveyed certain lots, the fact that the grantee took possession, fenced and improved them, and that the grantor made no claim to them for 46 years, may be considered. Hubbard v. Whitehead [Mo.] 121 SW 69.

89. When an ambiguity is made to appear by the introduction of parol proof, it is a latent one and may be explained in the same way that it is shown. Wetzler v. Nichols [Wash.] 101 P 867. Use of technical terms by scrivener who drew the deed held to render it sufficiently ambiguous to permit introduction of parol evidence of surrounding circumstances, to show grantor's intent to make a delivery. Maxswell v. Harper, 51 Wash. 351, 98 P 756. Description "my dwelling house and land appurtenant thereto" may be explained by parol. Crozer v. White, 9 Cal. App. 612, 100 P 130. Owner of double tenement conveyed one tenement as "the northerly tenement" and describing the dividing line as "running a westerly course by the partitions as they now stand." There were two partitions running westerly. Held a latent ambiguity was revealed as to which was intended. Getchell v. Atherton, 104 Me. 198, 71 A 767. Northern of the two partitions held to have been intended in view of the fact that unless so found the southern tenement would have no yard. Id. Description held not to contain a latent or patent ambiguity. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662.

90. If a deed is ambiguous on its face, it is to be construed in the light of surrounding circumstances. Maxwell v. Harper, 51 Wash. 351, 98 P 756. Evidence of the situation and circumstances and of the acts of the parties previous and subsequent to conveyance. Getchell v. Atherton, 104 Me. 198, 71 A 767. If the **description** is ambiguous, the intention should be sought for by a consideration of all the calls, the state of the property and the circumstances under which the deed was made. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617. In construing an ambiguity as to **subject-matter** granted, the facts and circumstances which surrounded the subject-matter and attended upon the use of the words employed by the grantor may be considered. Bernero v. McFarland Real Estate Co., 134 Mo. App. 290, 114 SW 531. This rule applies to deeds creating easements. Id. In construing an ambiguity, the conduct of the parties with respect to the subject-matter of the grant, contemporaneous with and recently thereafter, may be considered. Bernero v. McFarland Real Estate Co., 134 Mo. App. 290, 114 SW 531. Such facts may be considered in determining whether the grantor intended to create an affirmative or negative easement. Id.

Held inadmissible: Inventory made by an administrator of a grantor held not admissible on the question of the grantor's intention when she executed a deed. Lewman v. Owens [Ga.] 64 SE 544. Another deed executed by relatives of the grantor in a deed in controversy held inadmissible on the question of what estate the grantor intended to convey. Id.

91. Words "remise," "release" and "quitclaim," each mean to discharge. Sherman v. Herman [S. D.] 122 NW 439. "Quit" means "acquit," to discharge. Id. In a deed to a grantee and her heirs, a restriction upon alienation by the grantee is not alone sufficient to show that "heirs" was used otherwise than in its usual meaning or as meaning "children." Hauser v. St. Louis [C. C. A.] 170 F 906. "Heirs" is often used as

such construction would lead to an absurdity or be repugnant to the rest of the instrument,[92] but terms used whether technical or common will be given such meaning as will effectuate the intention of the parties,[93] except where words have been given a definite meaning by law.[94] Except in cases of public grants,[95] a deed is to be construed against the grantor and favorably to the grantee,[96] and all ambiguities are to be resolved in the grantee's favor,[97] but this rule is not to be applied until the application of other rules fail to show the grantor's intent.[98] Where repugnant clauses cannot be reconciled, the clause conferring on the grantee the greatest estate will prevail,[99] and a prior clause will prevail over a subsequent one.[1]

"children" but that is not a correct use of it and it requires knowledge of the intention of the user to warrant the court to ascribe to it such meaning. McFerrin v. Templeman [Tex.] 120 SW 167. Use of "assigns" in granting clause and habendum imports an intention to give the grantees power to sell the property. Teague v. Sowder [Tenn.] 114 SW 484.

92. In such case they should be modified only so far as necessary to avoid absurdity or repugnancy. Cotting v. Boston, 201 Mass. 97, 87 NE 205. That word "east" in a description clearly meant "west" raised no presumption that there was a further mistake in that the description should have read further in that direction. Brown v. Myers, 150 N. C. 441, 64 SE 374. On the issue of such mistake, a second deed containing what was contended to be the true description, written in the absence of the grantee and without his request, was not admissible. Id.

93. Where words are used indiscriminately, the court will construe it without regard to the technical meaning of legal terms appearing, if there is any thing to show that he intended to use them in a different sense. Wallace v. Hodges [Ala.] 49 S 312. The grantor's intent when apparent and not repugnant to any rule of law controls technical terms. Williams v. Grimm [Ky.] 112 SW 839; Maxwell v. Harper, 51 Wash. 351, 98 P 756. Use of **"remainder"** in habendum clause is not conclusive that a technical remainder was intended where the whole clause construed together shows a different intent. Simonds v. Simonds, 199 Mass. 552, 85 NE 860. The word **"children"** as generally used is a word of purchase, but is frequently used as a synonym for "heirs" and such use may be shown by or deduced from the entire instrument. Where caption of deed was to one and her children but in all other parts of the deed "heirs" was used, held that "children" meant "heirs." Wilson v. Shumate [Ky.] 113 SW 851. Under Revisal 1905, § 946, providing that a conveyance is construed to be in fee, whether **"heirs"** be used or not, unless a contrary intention appears, the intention of the grantor and not technical words of the common law control. Triplett v. Williams, 149 N. C. 394, 63 SE 79. Deed to grantee "and her assigns forever * * * to have and to hold the same," during the life of the grantee, remainder over, conveys a life estate only. Id. Words **"child, children and assigns"** held to have been used in the sense of "heirs and assigns" and that a fee was conveyed. Hughes v. Saffell [Ky.] 119 SW 804. The word **"about"** as used to define a beginning point in a description should be so construed as to carry out the intent of the parties. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617. "About" as used to define a beginning point in a description held not to be equivalent to "at" as used. Id. Where the intention in employing the word **"use"** is to indicate complete dominion, it is sufficient to pass a fee. Blauvelt v. Passaic Water Co. [N. J. Eq.] 72 A 1091.

94. They will then be given effect according to their legal signification. Condor v. Secrest, 149 N. C. 201, 62 SE 921.

95. Except in case of a reservation in a grant by a public officer or public body. Younger v. Moore [Cal.] 103 P 221.

96. Dickson v. Van Hoose [Ala.] 47 S 718; Hopkins v. Hopkins [Tex. Civ. App.] 114 SW 673. Where it admits of more than one construction. Maxwell v. Harper, 51 Wash. 351, 98 P 756. To convey the greatest estate which it can be construed to pass. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552.

97. Where there is any ambiguity, every uncertainty must be resolved in favor of the grantee. Inter-City Realty Co. v. Newman, 128 App. Div. 195, 112 NYS 481; Gaylord v. Barnes, 128 App. Div. 810, 113 NYS 605. Any uncertainty as to description or meaning of a reservation. Towns v. Brown [Ky.] 114 SW 773. Attempted reservation of mining privileges held a mere limitation on the covenant of warranty and not a reservation where no claim was made thereto for 50 years. Id. Where language in grant of an easement is ambiguous as to the nature or extent of the right, it is to be construed most favorable to the claimant of the easement. Frisbie v. Bigham Masonic Lodge No. 256 [Ky.] 118 SW 359.

98. Bernero v. McFarland Real Estate Co., 134 Mo. App. 290, 114 SW 531.

99. Hopkins v. Hopkins [Tex. App.] 114 SW 673. The warranty in a deed "and we warrant the title to our respective estates * * * against all persons * * * J. to her dower estate as widow of said C. and Z. L. & E. their several estates in full as children and heirs of said C." is not inconsistent with the deed as shown by the granting clause. McBride v. Caldwell [Iowa] 119 NW 741.

1. If two clauses be utterly inconsistent, the former will prevail. Lewman v. Owens [Ga.] 64 SE 544. Where there is conflict between the premises and habendum as to estate granted. Teague v. Sowder [Tenn.] 114 SW 484. Repugnancy between the granting and habendum clauses will be reconciled if possible, if not the former controls. Wallace v. Hodges [Ala.] 49 S 312. Where there is conflict between prefatory clause, granting clause and habendum, the granting clause prevails. Dickson v. Van

A recital following the signature is no part of the deed.[2] Recitals concerning prior deeds are prima facia evidence of the facts stated,[3] but a recital to the effect that the parties understood a certain fact to exist is no evidence of such fact.[4]

The purpose of the habendum is to define the estate granted.[5] If the granting part of the deed contains proper words of limitation, the habendum may be omitted,[6] but if the latter is used and the limitation is repugnant to the premises, it will be treated as void.[7] At common law an habendum was not allowed to divest an estate already vested, and was void if repugnant to the estate granted in the premises,[8] but this rule has been superseded by the rule that a deed is to be construed as a whole.[9] The habendum cannot introduce one who is a stranger to the premises to take as grantee,[10] but one not named in the premises as grantee may take a remainder by limitation in the habedum where such appears to be the intent.[11]

The effect of a deed to pass title is controlled by the laws of the state or county where the land is situated.[12] But what the parties at the time of execution understood to be its effect is to be determined by the law they had in mind as governing its construction and operation.[13] Where a deed executed in one state to land in another does not show what should be the governing law, it must be determined under the principles of private international law,[14] and the principle governing such a contract is that it will be governed by the laws by which they may justly be presumed to have meant to bind themselves.[15]

Covenants See 11 C. L. 1057 may be implied.[16] A covenant to run with the land

Hoose [Ala.] 47 S 718. Where grantor had a fee, and prefatory words stated that he had a life estate, the granting clause described all the right, title and interest of the grantor, the habendum called for a life estate, held the deed conveyed all title of the grantor. Id.

2. An N. B. following the signature and above the acknowledgment, reciting that the grantee shall not sell the land but that it shall descend to heirs by his wife, is no part of the deed. Moody v. Mossey [Pa.] 72 A 555.

3. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552.

4. A recital that a town was laid off on the land merely shows that the parties understood that the land covered the townsite and was not evidence of that fact. Uvalde County v. Oppenheimer [Tex. Civ. App.] 115 SW 904.

5. If the entire instrument shows that it was intended by the habendum to restrict or enlarge the estate conveyed by the granting clause, the habendum controls. Pack v. Whitaker [Va.] 65 SE 496. Prior to Burn's Ann. St. 1908, §§ 3958-3960, making use of "heirs and assigns" necessary to create an estate of inheritance, it was necessary to use such term in the premises, or if they were inserted in the habendum it was sufficient to insert words of purchase only in the premises, the purpose of the habendum being to limit and define the interest in the premises granted. Adams v. Merrill [Ind. App.] 87 NE 36. Where a grant is indefinite as a simple grant to a person named without particular words of limitation in the premises, it may be defined and controlled by the habendum. Id.

6, 7. Adams v. Merrill [Ind. App.] 87 NE 36.

8. Triplett v. Williams, 149 N. C. 394, 63 SE 79.

9. The rule that the granting, habendum and tenendum clauses are independent portions of the deed with special functions has been superseded by the rule of construction that the intent must be ascertained from the whole deed. Triplett v. Williams, 149 N. C. 394, 63 SE 79.

10, 11. Condor v. Secrest, 149 N. C. 201, 62 SE 921.

12. New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788.

13. New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788. While the effect of a choice by parties to a deed of land in one state to execute it in another and to establish their domicile there cannot make the deed pass title there under the laws of the former state, it could make it establish a relation between the parties out of which important rights respecting the land might arise. Id. Where there is nothing in a deed to Connecticut land, executed in New York between parties residing there, to rebut the presumption that they had in mind the law of New York as governing the deed, and the law being such that the grantee would take a fee, it is presumed that the parties intended such estate. Id.

14. The question is not what the parties intended but what would necessarily have been the intention of sensible persons in their position if their attention had been directed to contingencies which escaped their notice. New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788.

15. New Haven Trust Co. v. Camp, 81 Conn. 539, 71 A 788. Where a deed to land in Connecticut was executed in New York by parties residing there, and was sufficiently attested under the law of that state, it is presumed the parties had in mind the law of that state as that which would control. Id. See, also, Covenants for Title.

16. Conveyance of lots according to a map upon which "camp ground" is laid out im-

must concern the land so that the thing required to be done will enhance its value or render it more convenient or beneficial to the owner.[17] A grantee is as much bound by a covenant imposing duties on him as though he signed and sealed the instrument.[18] A covenant by which a grantee assumes a mortgage creates an obligation upon which he may be sued by the mortgagor.[19]

Designation of parties. See 11 C. L. 1057—A deed by one in a representative capacity is valid though he signs as an individual.[20] Recitals as to the identity of parties are conclusive.[21]

Description of property conveyed. See 11 C. L. 1057—A description is to be construed with reference to instruments referred therein,[22] and in such manner as to effectuate the intention of the grantor.[23] A general description will not be restricted by a particular one where the intent was that it should not be.[24] When a deed conveying platted ground refers to an alley, the fair inference is that an alley platted for public purposes is intended.[25] The customary method in describing lands by govern-

plies a covenant on the part of the grantor that the land is to be used in the manner indicated. Freeman v. Island Heights Hotel & Imp. Co. [N. J. Eq.] 72 A 974. The grantee may enforce such covenant though the lots are a part of premises formerly laid out and dedicated as an avenue. Id.

17. Covenant by railroad company to maintain a station on land and that grantor should be station agent held not to run with the land, since it extended to something not in existence and "heirs and assigns" was not used. Maryland & P. R. Co. v. Silver, 110 Md. 510, 73 A 297.

18. Druecker v. McLaughlin, 235 Ill. 367, 85 NE 647. The purchaser of a railroad is bound to perform a covenant in a right of way deed to maintain certain structures for the benefit of other land of the grantor. Illinois Cent. R. Co. v. Davidson [Ky.] 115 SW 770. Covenant charging the grantee with support of a person named as part of the consideration creates a lien on the land for such support. Webster v. Cadwallader [Ky.] 118 SW 327.

19. Curry v. Lafon, 133 Mo. App. 163, 113 SW 246. A grantee who accepts a deed reciting his agreement to assume and pay a mortgage on the premises conveyed as part of the consideration is primarily liable for the mortgage debt and the grantor is his surety. Perry v. Ward [Vt.] 71 A 721. Assumption by grantee of timber lien held not to enlarge the claim to a lien on the land. Leiberman v. Bowden [Tenn.] 119 SW 64.

20. Deed containing recital that it was made by grantor as an executor by virtue of a will is admissible in evidence though the maker signed in his individual name without adding his representative capacity. Dodge v. Cowart, 131 Ga. 549, 62 SE 987.

21. Recital in deed conveying land devised to "Mary E. Newlin" that the grantor "Mary E. Kurtz" was formerly "Mary E. Newlin" is conclusive in the absence of controverting evidence. Haney v. Gartin [Tex. Civ. App.] 113 SW 166. See, also, post, § 1.

22. A village plat so defective as not to be entitled to record, but according to which deeds were executed and streets noted thereon were used for 20 years, is admissible as an instrument referred to in the deeds to show the description and location of the land. Pere-Marquette R. Co. v. Graham. 150 Mich. 219, 14 Det. Leg. N. 741, 114 NW 58. Where a patent, the calls of which are incorrect, referred to a surveyor's certificate and plat showing correct courses and distances, and the patent was referred to in a deed, the certificate and plat became a part of the description in the deed and could be referred to, to correct erroneous calls. Hensley v. Burt & Brabb Lumber Co. [Ky.] 116 SW 316. Where plaintiff and defendant claimed title from common grantor and there was evidence that grantor had had two plats made of the land, on one of which plaintiff relied, the defendant being prior in title could only be effected by the plat on which the plaintiff relied when it was shown that that was the one by which her land was described. Metcalf v. Buck, 36 Pa. Super. Ct. 58. References to a plan contained in a deed have the effect of making such plan a part of the deed. McGuire v. Wilkes-Barre, 36 Pa. Super. Ct. 418.

23. When land is described by a designated subdivision of a section, it ordinarily means government subdivision, but where the intent is to convey a definite parcel actually located, such intent will prevail. Town v. Greer [Wash.] 102 P 239. Description by metes and bounds construed, where objects were given as boundaries. Bell v. Redd [Ga.] 65 SE 90. The description must be sufficient to identify the land, but the court will place itself as nearly as possible in the position of the parties and consider circumstances and interpret words in the light thereof. Hubbard v. Whitehead [Mo.] 121 SW 69. Where grant was made of a league of land May 27, 1835, by the commissioner of Javalla Colony, and the grantee sold the league so conveyed to him by deed dated May 28, 1835, the discrepancy in dates did not show that the same league was not involved in both grants. Ryle v. Davidson [Tex. Civ. App.] 116 SW 823.

24. Where a particular description following a general description contains nothing to show an intent to restrict the general description but is intended merely as an additional description, whatever is included in the general description will pass. Sumner v. Hill [Ala.] 47 S 565.

25. Deed specifically describing right of way back of track sold and "to alley" held distinct assertion of existence of alley. Talbert v. Mason, 136 Iowa, 373, 113 NW 918.

ment survey is to first give the number of the township and then the number of the range.[26] Parol evidence is admissible to identify the property [27] or to fit the description to the premises,[28] but not to contradict a description.[29] A description is sufficient if the location of the land can be proved by reference to it.[30] Though a title once conveyed cannot be lessened by a subsequent conveyance,[31] yet, where the description in a deed is so vague and uncertain that one of the boundaries cannot be ascertained, a subsequent deed, accepted and acted upon by the parties, making such boundary definite and certain, will determine the property transferred.[32] Where land is conveyed by acreage to successive grantees by the same grantor, any deficiency of acreage falls on the last grantee.[33]

Quantum of estate conveyed. See 11 C. L. 1058—The sufficiency of the language used to create particular estates is more fully treated in another topic.[34] A deed passes title to all it purports to convey,[35] but it conveys no greater estate [36] and no

26. Hull v. Croft, 132 Ill. App. 509.

27. Where a boundary is given as the land of another person, it is competent to show what such lands were for the purpose of locating the boundary. Glover v. Newsome [Ga.] 65 SE 64. Where a deed contains an accurate but general description, extrinsic evidence is admissible to identify it. Hardin County v. Nona Mills Co. [Tex. Civ. App.] 112 SW 822. Evidence sufficient to identify land intended to be conveyed. Id. Notary who took acknowledgment of a deed held competent to testify that by mistake he omitted to describe a tract intended to be conveyed. Partridge v. Partridge, 220 Mo. 321, 119 SW 415. Inaccurate description made certain by reference to other recorded deeds. McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 NE 174.

Note: The application of this rule to validate an otherwise insufficient description is treated in § 1, ante.

28. If a deed contains sufficient descriptive matter to authorize its admission in evidence, it is competent by extrinsic evidence to apply such description to the subject-matter. Glover v. Newsome [Ga.] 65 SE 64. Evidence held to show that a deed excluded a tract in controversy. Daniel v. Trunnell [Ky.] 113 SW 51.

29. Declarations of grantor at the time the deed was made that it erroneously embraced a 12-foot strip held inadmissible to contradict the description. Foster v. Carlisle [Ala.] 48 S 665. Description of lot conveyed held unambiguous, and parol evidence was not admissible to contradict it. Id.

30. Description as part of a tract of land called "Kings Hill" in a designated county, known as the landing on King's Creek, is on its face admissible in evidence, and if the location of the land can be proved by reference to it, it is sufficient. Cadwalader v. Price [Md.] 73 A 273.

31. Town of Babylon v. Darling, 63 Misc. 553, 117 NYS 250.

32. Where description in patent was uncertain, the boundary was properly fixed by subsequent patent. Town of Babylon v. Darling, 63 Misc. 553, 117 NYS 250.

33. Hudson v. Webber, 104 Me. 429, 72 A 184. See Tenants in Common and Joint Tenants, § 2.

34. See Real Property.

35. All title of grantors: Deed reciting that grantors were heirs of a certain person, and that they sold, quitclaimed, etc., all their interest in the land and warranted against claims of a minor heir, held to convey all title of grantors in the land from whatever source acquired, and not merely such rights as they acquired from the ancestor named. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552. Such deed held not a mere quitclaim. Id. Where original holder of a league of land deeded absolutely to another, who deeded to a third person, reciting that he executed as agent of the original owner, etc., held the last grantee took a fee, since, whether the first deed was absolute or, in trust, it passed all the grantor's title. Ryle v. Davidson [Tex. Civ. App.] 116 SW 823. Conveyance by heirs held to pass a **one-half interest** in community property owned by their deceased parents. Merrill v. Bradley [Tex.] 119 SW 297. Effect of a deed to a railroad company conveying a **fee,** and providing that the land was to be held by it, "its successors and assigns," etc., and not limiting its use, was not reduced by prior description of the premises as covered by the location of a railroad. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563. A grant of the rents, issues and profits of land is a grant of the land itself, and a grant of the use of and dominion over land carries the land itself. McWilliams v. McNamara, 81 Conn. 310, 70 A 1043. Provision in deed to railroad that it was to trestle a pond did not reduce its title from a **fee** but merely imposed a contractual duty or condition subsequent. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563. Under Civ. Code 1895, §§ 5432, 5433, where a deed is executed to secure a debt and bond given to reconvey on payment thereof, the grantor in the deed has not a leviable interest in the property until reinvested with the title. Buchan v. Williamson, 131 Ga. 501, 62 SE 815.

36. An assignment on the back of a deed by two heirs of the grantee's window, to which was added a certificate by a third person to stand good that other minor heirs would sign when they reached maturity, was, at most, effective to invest the assignee with the interest of the two heirs. Hellard v. Nance [Ky.] 114 SW 277. Deed of "all minerals" held to show that grantor did not intend to convey natural gas. McKinney's Heirs v. Central Kentucky Natural Gas Co. [Ky.] 120 SW 314. Grant to railroad for right of way land contained within 100 feet on each side of the track, measuring from

more land than it purports to convey.[37] A deed can convey no greater estate than the grantor has.[38] A deed of the freehold passes all appurtenant rights.[39] Whether a right passes as an appurtenant depends upon the circumstances and intent of the parties.[40] Land cannot pass as appurtenant to land.[41] A warranty deed passes a title subsequently acquired by the grantor.[42] Whether a conveyance of land bounded

the center of any lot thereafter described through which the railroad might be "constructed, run or operated," held to convey only a right of way through the particular part of the land actually touched by the grantee's main line. American Spinning Co. v. Southern R. Co., 81 S. C. 482, 62 SE 787. Where a fee is granted subject to an easement, it carries the right to use the servient estate in any manner that does not interfere with the easement. Duross v. Singer [Pa.] 73 A 951.

37. Deed of trust conveying all lands of grantor situated on a designated avenue, with appurtenances, conveys all lands situated on such avenue previously acquired by the grantor under deed describing the land, but does not convey lands not situated on such avenue. In re Jones [R. I.] 73 A 353. Where an owner conveyed land to T, an heir, during his lifetime, and T and other heirs subsequently conveyed all their interest in the real property of deceased, held the deed did not convey the tract conveyed by deceased to T, since it operated merely to convey the grantor's interest at the time of his death. Potter v. Long, 217 Mo. 607, 117 SW 724. Where deeds called for a description extending a certain number of chains north and south and a certain number of chains east and west, and no survey had ever been made, held it could not be contended that unit of measurement expressed was intended to be longer than the standard surveyor's chain. Clark v. Boosey [Or.] 97 P 754. Deed of assignment for benefit of creditors executed in Wisconsin in 1893, in accordance with Wis. St. 1898, c. 80, and amendments, has no extra territorial effect and does not pass title to land in North Dakota. Adams v. Hartzell [N. D.] 119 NW 635.

38. Like any other grantor, the federal government can convey no greater title than it has. Hough v. Porter, 51 Or. 318, 98 P 1083. Where title was in S, acquired by adverse possession under tax deed, a quitclaim deed of former owner of such land to S's wife conveyed nothing. Walker v. Helms, 84 Ark. 614, 106 SW 1170. Where a wife's adverse possession of a tract after unexecuted order of partition in divorce was sufficient to vest one-half of the tract in her, her subsequent grantee of one-half took good title. Callen v. Collins [Tex. Civ. App.] 120 SW 546. Where a grantor conveyed all her unsold interest in certain lands; a subsequent deed of a portion of such lands conveyed nothing. Roberts v. Blount [Tex. Civ. App.] 120 SW 933. Deed of land "together with all improvements thereon, party-wall agreements, and party ownership agreements thereunto appertaining and easements," does not grant an easement where none existed. Binder v. Weinberg [Miss.] 48 S 1013.

39. Everything pertaining to the thing granted and necessary to its enjoyment passes. Foote v. Yarlott, 238 Ill. 54, 87 NE 62. "Appurtenant" means attached to or belonging to, and "appurtenance" means appertaining to another thing as principal and passing as an incident to such principal. Whittlesey v. Porter [Conn.] 72 A 593. A water privilege not before attached to land may be made an appurtenant to it by separate grant if such is the intent. Id. Lease for 999 years held to make water right an appurtenant. Id. **The right to take water from a spring** may be an appurtenance and pass with a conveyance of the land, though carried from a trough, into which it runs from the spring, into the buildings in parts. Corevo v. Holman [Vt.] 71 A 718. Instructions excluding such idea held erroneous. Id. Deed describing premises as bounding upon a passageway conveys at least a **right of way** over the entire extent of the passage. Flagg v. Phillips, 201 Mass. 216, 87 NE 598. A grantee of a lot with all rights and appurtenances thereto acquired the **right to use a water main** constructed in the street by a former owner to supply the lot with water, but did not acquire any right to the main itself to the prejudice of others who were entitled to use it. Hunstock v. Limburger [Tex. Civ. App.] 115 SW 327. On conveyance of land abutting on a public street **easements of light, air and access** pass, though the grantor attempted to reserve the same. Anderson v. New York & H. R. R. Co., 132 App. Div. 183, 116 NYS 954. Deed to lot containing restrictive covenant as to depth of building on adjoining lot of grantor "when sold or built upon" creates an **easement for light and air** which passes with "appurtenances." Davis v. McCarthy, 131 App. Div. 755, 116 NYS 149. Deed conveying parcel of land "also water power and dam on said property" conveys **dam and right to flowage** though part of the structure is on adjacent land of the grantor. Monuments control quantity. Wellman v. Blackmon [Mich.] 15 Det. Leg. N. 1126, 119 NW 1102. A **water privilege** so connected with the land as to constitute an appurtenance passes with a conveyance of the land though not expressly mentioned. Whittlesey v. Porter [Conn.] 72 A 593.

40. Where deed specifically described water rights granted, additional rights held not to pass by implication. Davis v. Randall, 44 Colo. 488, 99 P 322. Deed to riparian land by description by reference to a plat held not to pass riparian rights. Oliver v. Klamath Lake Nav. Co. [Or.] 102 P 786.

41. City of Geneva v. Henson, 195 N. Y. 447, 88 NE 1104.

42. Warranty deed purporting to convey land as distinguished from the grantor's interest estops him from claiming an after-acquired title. Stoepler v. Silberberg, 220 Mo. 258, 119 SW 418. Though one got no title at execution sale, where he sells to another by warranty deed and afterwards gets a quitclaim to the property, the title acquired inures to the benefit of his grantee. Frey v. Meyers [Tex. Civ. App.] 113 SW 592. Bargain and sale deeds without words of

on a public way passes title to the center thereof depends on the intention of the grantor [43] as determined from the language used [44] and statutes affecting such rights.[45] A deed to land does not pass personal rights connected with it.[46] In de-

reservation held to pass title subsequently acquired by the grantor by inheritance. Younger v. Moore [Cal.] 103 P 221. Agreement for sale of land to railroad company for a right of way held a bargain and sale deed of the fee in view of Comp. Laws 1887, §§ 2854, 2980, 3002, 3238, 3254. Sherman v. Sherman [S. D.] 122 NW 439. Conveyance by state of part of its swamp lands by bargain and sale deed which purports to deal with full title passes an after-acquired title. Morrow v. Warner Val. Stock Co. [Or.] 101 P 171.

43. See, also, Boundaries. Whether a conveyance of land bounded upon a street delineated upon a map, to which reference is made in the deed, includes land to the center line of the street as delineated, is a question of intention. Ocean City Hotel & Development Co. v. Sooy [N. J. Err. & App.] 73 A 236.

44. Deed of lot giving the boundaries as the outside boundaries of streets and alleys **held not to pass any part of the streets or alleys.** Tuskegee Land & Security Co. v. Birmingham Realty Co. [Ala.] 49 S 378. Description of lot as commencing at the northeasterly corner of G and D streets, thence along north line of G street, thence north, thence west to D street, held not to pass title to the center of D street. O'Leary v. Glens Falls, 128 App. Div. 683, 112 NYS 932. Description as bounded by the exterior line of a street does not pass title to any part of the street, though it has been discontinued. Schonleben v. Swain, 130 App. Div. 521, 115 NYS 23. Description as running "on the easterly bounds of said alley" held not to convey any part of the alley. Rupprecht v. St. Mary's Church Soc., 131 App. Div. 564, 115 NYS 926. Where an alley is laid out and opened and is appurtenant to property abutting upon it, a deed calling for the alley will **pass title to the center line of it.** Oliver v. Ormsby [Pa.] 73 A 973. Under a description as bounded by an alley laid out across one end of the lot, the fee to the alley passes unless expressly or impliedly excepted. Saccone v. West End Trust Co. [Pa.] 73 A 971. Deed, order and inventory construed and held to pass title to land subject to an easement for bicycle path, which easement had been forfeited. Salter v. California Cycleway Co., 7 Cal. App. 170, 93 P 1045.

45. Under Ball. Ann. Codes & St. § 1269, land constituting an alley becomes property of abutting owner when alley is vacated, and a conveyance by such owner after vacation passes the alley. Norton v. Gross, 52 Wash. 341, 100 P 734.

46. Deed to lot abutting on a street does not carry right to collect award of damages on account of the taking of the street confirmed before the deed was made. Beverly Road in City of New York, 131 App Div. 147, 115 NYS 208.

47. Held to pass a fee: Deed to dam and canals and water power reciting "it be the intention to convey the entire interest in all of said property" held to carry a fee to a lock constituting part of the canals and not simply an easement to carry water through the canals. Winnebago Paper Mills v. Kimberly-Clarke Co., 138 Wis. 425, 120 NW 411. Words "used for carrying water" and "canal" construed. Id. Where granting clause conveyed a fee to the wife but the habendum provided that if she died without heirs the title should vest in her husband if living, if not, to others, held to give husband and wife a fee. Hamilton v. Sidwell [Ky.] 115 SW 204. Where granting clause recited that grantor's husband and wife "bargain and sell" to grantee, their heirs and assigns forever with the exception of mine and my wife's homestead for lifetime, it conveyed a fee. Teague v. Sowder [Tenn.] 114 SW 484. Conveyance with restriction that land shall be used only for a road passes the fee and not a mere easement. Aumiller v. Dash, 51 Wash. 520, 99 P 583. Description as "all that real property, etc., described as follows: being all the land," etc., shows an intent to grant the fee. Van Slyke v. Arrowhead Reservoir & P. Co. [Cal.] 102 P 816. Deed from husband in trust for wife held to convey an absolute title, a reservation being void for repugnancy to the first estate conveyed. Hunter v. Hicks [Va.] 64 SE 988. Deed construed and held to pass a fee subject to the right of the grantor to a reconveyance upon performance of certain conditions. Peterson v. Lott [Ga.] 64 SE 268. Deed construed and held to convey an undivided one-fourth interest which grantor owned, and a certain clause held to reserve no title in her. Lewman v. Owens [Ga.] 64 SE 544. Conveyance of land with restriction upon its use passes a **fee, subject to be defeated,** where the land ceases to be used for the purposes specified. Aumiller v. Dash, 51 Wash. 520, 99 P 583. **Deed to standing timber** subject to conditions that timber not cut within five years should revert to grantor passed a base or qualified fee determinable as to timber not cut within five years. Davis v. Frazier, 150 N. C. 447, 64 SE 200.

Miscellaneous: Deed by a wife to her husband passes only the **equitable title.** Mathy v. Mathy [Ark.] 113 SW 1012. Where a grantor conveys without consideration and the grantee also, without consideration, and as part of the same transaction reconveys, a momentary seisin only vests, and the **grantee does not become invested with any title** which will inure to the benefit of one to whom he has made a prior conveyance. Haslam v. Jordan, 104 Me. 49, 70 A 1066. A deed may not be varied or contradicted by parol, but the character of the grantee's seisin may be explained by evidence of external circumstances and the relation of the parties to each other. Id.

48. Construed to create certain estates: Deed conveying to trustees for benefit of a married woman, and providing that it should be for the sole and separate use of her and her heirs, but not her assigns, construed and held to show that it was to be held free from marital rights, and the restriction continued during coverture only, and after death of her husband she could sell, trustees having conveyed to her. Hauser v. St. Louis [C. C. A.] 170 F 906. Deed to school trustees

termining the nature of the estate granted [47] or created [48] or the quantum of land conveyed,[49] the rule of construction, that the intention of the grantor governs, applies. Under the rule in Shelley's Case, a limitation to the heirs of the grantee created a fee in him,[50] but this rule has been abolished in some states.[51] At common

"so long as it shall be used as a schoolhouse site and whenever it shall be discontinued as a schoolhouse site, then it shall revert to the grantors," creates a **base or determinable fee with possibility of reverter,** incapable of alienation but capable of descent. Dees v. Cheuvronts, 240 Ill. 486, 88 NE 1011.

Fee simple: By habendum clause in deed to E, he was to have estate for life, and if by any means it should come to an end during his life remainder of his life estate to A, and after death of E, to E and his heirs. Held E took not only a life estate but also the remainder under Laws 1896, p. 593. Ray v. Jaeger, 131 App. Div. 294, 115 NYS 737. His interest, other than a life estate, was a future estate termed a "remainder" which was descendable and alienable and passed by his deed. Id. Deed to one and her assigns and heirs forever held to pass a fee notwithstanding recitals repugnant thereto. Gaylord v. Barnes, 128 App. Div. 810, 113 NYS 605. Evidence insufficient to show that property was conveyed from grandmother to grandson, subject to life estate reserved to her. Gillen v. Gillen, 238 Ill. 218, 87 NE 388.

Life estate: Deed construed to convey a life estate to grantee, remainder to her children. Williams v. Grimm [Ky.] 112 SW 839. Deed to grantee for life, unless she should deed to heirs of a third person, and, if she did not, remainder to such third person and his heirs, gives first grantee a life estate only which was not enlarged by the power of disposition. Beatson v. Bowers [Ind. App.] 88 NE 966. Under Ky. St. §§ 2343, 2345, an estate to one for life, then to her bodily heirs, the first grantee has a life estate, fee to her heirs. Eggner v. Hovekamp [Ky.] 119 SW 818. A deed to A and wife B and B's heirs held to show an intent that if A survived his wife he should have a life estate, remainder to heirs of the wife and A did not take a fee. Sprinkle v. Spainhour, 149 N. C. 223, 62 SE 910. In deed to one for life and at her death to children and heirs of her body and, if there were none, to others, held the provision that in case of her death without heirs of her body living, etc., did not designate those who were to take in indefinite succession, but defined those who were to take on termination of life estate and was not void for repugnancy. Adams v. Merrill [Ind. App.] 87 NE 36. Deed to A and B with general warranty, also providing that said A shall have this land for life, remainder to their children, held to give A and B a life estate, the name of B being omitted from the latter clause by mistake. Pack v. Whitaker [Va.] 65 SE 496. Where trust deed directed that after death of grantors property should be held in trust for children, and that 10 years after the youngest child reached majority the trust should cease and the title vest in children then living and the heirs of such as were dead, held heirs of deceased children took as purchasers. Buxton v. Kroeger, 219 Mo. 224, 117 SW 1147.

Joint tenancy: Deed to "H" and her children jointly vests in her and each of her living children title to an equal share of the land. Yarborough v. Whitman [Tex. Civ. App.] 110 SW 471.

Contingent remainder: Deed by husband and wife to trustee for benefit of the wife, and contingent use to children, held to give children a contingent remainder. Buxton v. Kroeger, 219 Mo. 224, 117 SW 1147. Conveyance to one for life, remainder to his children on condition that the grantee perform certain conditions, creates a contingent remainder in the children. Lumsden v. Payne [Tenn.] 114 SW 483.

49. Grant of all "that portion of a tract of 150 acres" described, excepting certain parcels previously conveyed, and excepting further "three acres upon which our residence now is and adjoining the same," is a grant of the entire 150 acres excepting what had been conveyed and the three acres and not the portion of the 150 acres remaining after such exceptions. De Roach v. Clardy [Tex. Civ. App.] 113 SW 22. A deed will be treated as conveying all land intended to pass though the course of a line is incorrectly stated. Thurman v. Leach [Ky.] 116 SW 300. Deed of **all timber located on certain designated lots** of land construed and held to convey all timber on such land and that warranties applied to the number of acres and not to lands covered by timber. Perkins Co. v. Wilcox [Ga.] 63 SE 831. Deed to **water right** construed and held to convey the entire power furnished by the river and not one-half thereof. Lancaster & J. Elec. L. Co. v. Jones [N. H.] 71 A 871. Where intent of the grantor was to convey **all land covered by a patent,** any mistake in the patent as to description would not effect the transfer of the grantor's title. Hensley v. Burt & Brabb Lumber Co. [Ky.] 116 SW 316. Though a deed purports to convey **"all minerals,"** natural gas would not pass where it appeared that the parties did not intend that it should and did not contemplate a conveyance of it. McKinney's Heirs v. Central Kentucky Natural Gas Co. [Ky.] 120 SW 314. Evidence held to show that "my **dwelling house and land appurtenant** thereto" meant the entire farm of 110 acres. Crozer v. White, 9 Cal. App. 612, 100 P 130. Description in deed held to convey a portion of a plank road. Green v. Horn, 128 App. Div. 686, 112 NYS 993.

50. The rule in Shelley's Case is a rule of law overruling the intention of the parties. Hopkins v. Hopkins [Tex. Civ. App.] 114 SW 673. Where land was conveyed to a trustee to collect rents and pay them to the beneficiary during her life and convey to her appointee by will, and in default of appointment the land to go to her heirs, the beneficiary took an equitable fee. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Where conveyance was to one for life and at his death to his surviving heirs, the rule in Shelley's Case applies. Price v. Griffin, 150 N. C. 523, 64 SE 372. Deed to son and his heirs held to vest him with a fee under the rule

law, the use of the word "heirs" was necessary to create an estate of inheritance,[52] but by statute in some state such rule has been abrogated,[53] and a deed is presumed to create a fee unless a contrary intention is apparent.[54] Deeds creating entailed estates are by statutes converted into a fee.[55] Where an estate in fee is granted by proper and sufficient words, a clause which is in restraint of alienation is void.[56]

Reservations, conditions and restrictions. Reservations. See 11 C. L. 1060—A reservation is something taken back out of that clearly granted.[57] An exception is some part of an estate not granted at all.[58] A reservation must be in favor of the grantor or party executing the conveyance.[59] It must contain words of inheritance or it exists only in favor of the grantor and during his life.[60] Implied reservations as against the express covenants of a deed are not favored [61] but may

in Shelley's Case, notwithstanding subsequent clauses apparently limiting the etsate. Hopkins v. Hopkins [Tex. Civ. App.] 114 SW 673. Under deed to grantee "and his lawful heirs and their lawful heirs forever," the grantee took a fee. Williams v. Gause [S. C.] 65 SE 241. The term "lawful issue" is not a technical term and does not necessarily bring a deed within the operation of the rule in Shelley's Case, like the word "heirs." Hopkins v. Hopkins [Tex. Civ. App.] 114 SW 673.

51. The rule in Shelley's Case has been abolished in Tennessee, and, where an estate is to one and his heirs, the heirs may take a remainder if that was the intent of the grantor. Teague v. Sowder [Tenn.] 114 SW 484. Revisal 1905, § 1583, expressly provides that a limitation to "heirs" of a living person means children of such person unless a contrary intent appears. Condor v. Secrest, 149 N. C. 201, 62 SE 921. Under deed to grantee and "his lawful issue and their lawful issue forever," the grantee took a life estate, issue being a word of limitation and not of purchase. Williams v. Gause [S. C.] 65 SE 241.

52. Teague v. Sowder [Tenn.] 114 SW 484. At common law, a grant without limitation in either the premises or habendum would create a life estate only. Adams v. Merrill [Ind. App.] 87 NE 36. Habendum "to have and to hold the same in full right, title, interest and demand of what nature soever, as against the said parties of the first part, in fee simple forever" does not create an estate of inheritance. Ivey v. Peacock, 56 Fla. 440, 47 S 481. Deed which did not in premises or habendum express that it was to grantee and her heirs, though the warranty was to her heirs and assigns, conveys only a life estate. Sullivan v. Moore [S. C.] 65 SE 108.

53. Under Shannon's Code, § 3672, a fee simple estate may be created without the use of "heirs." Teague v. Sowder [Tenn.] 114 SW 484. Under Burns' Ann. St. 1908, §§ 3959, 3960, use of "heirs and assigns" is unnecessary to create an estate of inheritance, and a deed not using such words would pass an estate of inheritance unless it appeared from other words in the habendum, or other expressions in the deed that a different estate was intended. Adams v. Merrill [Ind. App.] 87 NE 36. Prior to Laws 1903, c. 5145, the word "heirs" was indispensable to the conveyance of an estate of inheritance. Ivey v. Peacock, 56 Fla. 440, 47 S 481.

54. Deed to a trustee for benefit of grantor's children, with power to sell and manage the proceeds, held to convey a fee, especially in view of Ky. St. 1903, § 2342, providing that every deed creating an estate of inheritance shall be deemed a fee unless a different purpose appear. Maxwell's Committee v. Centennial Perpetual Bldg. & Loan Ass'n [Ky.] 114 SW 324.

55. Deed to L and her bodily heirs after creates a fee tail which is converted into a fee simple by statute. Manteuffel v. Grieb [Ky.] 119 SW 739. Deed to one and the children of his body, their heirs and assigns forever, held to convey an estate tail which was converted into a fee by the statute. Wallace v. Hodges [Ala.] 49 S 312.

56. Hill v. Gay [Ala.] 49 S 676. Where the granting clause conveyed a fee but there was inserted over the signature of the grantor a clause requiring a deed by the grantee to be signed by his youngest child, held such requirement was void. Id.

57. Bardon v. O'Brien, 140 Wis. 191, 120 NW 827; Pitcairn v. Harkness [Cal. App.] 101 P 809. A "reservation" is something extracted from the whole recovered by the general terms of the grant, lessening the thing granted from what it would otherwise have been. Hough v. Porter, 51 Or. 318, 98 P 1083. "Reservation" and "exception" defined and distinguished. Van Slyke v. Arrowhead Reservoir & P. Co. [Cal.] 102 P 816. Deed containing reservation held not to have used that term in its technical sense but in its popular sense. Id. A grantor may reserve a right of way through a basement, as to which he grants the exclusive use, as well as from the fee. McWilliams v. McNamara, 81 Conn. 310, 70 A 1043.

58. Where timber is "reserved" it is an exception, since it is part of the realty and would have passed but for the exception. Bardon v. O'Brien, 140 Wis. 191, 120 NW 827; Pitcairn v. Harkness [Cal. App.] 101 P 809. Deed of land "excepting a certain lot of timber" on a designated portion for the use and benefit of a certain person creates an exception and not a reservation, and such exception terminated on death of the party in whose favor it was made. Stone v. Stone [Iowa] 119 NW 712.

59. Stone v. Stone [Iowa] 119 NW 712.

60. Stone v. Stone [Iowa] 119 NW 712. Reservation of the use of a tract, free of rent, as long as grantors or others holding under them may want to use it for the purpose of running machinery, reserved a personal right which died with the grantor. Field v. Morris [Ark.] 114 SW 206.

61. Are to be limited to ways of strict necessity. Dabney v. Child [Miss.] 48 S 897.

exist where the intent is clear.[62] A reservation of minerals severs them in ownership from the land creating two estates.[63] A growing crop may be reserved by parol.[64] A reservation in public lands by legislative act is as effective as if expressly stated in the grant.[65] A reservation is to be construed according to the intent of the grantor,[66] and, in case of ambiguity, against him.[67] The estate or right reserved or excepted must be definitely described.[68] If an exception is susceptible of more than one meaning, it should be construed most favorably to the grantee,[69] and if it is so vague as to identify nothing, it excepts nothing.[70] Where a particular part of land conveyed is reserved in general terms, the physical conditions must be considered.[71] If the land excepted is not described with sufficient certainty, the exception and not the grant will fail.[72]

To entitle a grantor conveying a part of a tract of land to claim an easement therein for the benefit of his remaining land, he must show that the servitude was apparent, continuous and necessary to the enjoyment of land retained. Covell v. Bright [Mich.] 16 Det. Leg. N. 447, 122 NW 101. Though a reservation of easements of light, air and access, and of actions for injury thereto, was ineffective, yet the grantee becomes trustee as to all rights of recovery for invasion thereof. Anderson v. New York & H. R. R. Co., 132 App. Div. 183, 116 NYS 954.

62. Where grantor reserved right of maintaining dam and of carrying water in a race course, it reserved by necessary implication the right of seepage upon the land conveyed. Welliver v. Irondale Elec. L., H. & P. Co., 38 Pa. Super. Ct. 26.

63. The owner of the surface cannot obstruct the owner of the minerals from necessary use of the surface to extract the minerals. Porter v. Mack Mfg. Co., 65 W. Va. 636, 64 SE 853.

64. A standing crop of corn. Grabow v. McCracken [Okl.] 102 P 84. Agreement as to crop of rye held to amount to a constructive severance of it and to effectually reserve or except it. Beck v. McLane, 129 App. Div. 745, 114 NYS 44.

65. Hough v. Porter, 51 Or. 318, 98 P 1083.

66. Reservation of right to live on land during life of grantors and use the same as they wished, held to reserve the right to use timber and mineral privileges, and sell timber. Chappell v. Chappell [Ky.] 119 SW 218. Deed to land **reserving the timber growing** thereon for two years held to reserve to the grantor the right to enter and cut the timber for two years only, which right then expired. Noyes v. Goding, 104 Me. 453, 72 A 181. A reservation of **all minerals** includes petroleum, oil and gas. Weaver v. Richards [Mich.] 16 Det. Leg. N. 117, 120 NW 818. Reservation in basement and cellar construed and held that property above the main floor was to be divided by north and south line through center of a brick wall in the cellar, and basement should be divided east and west, the grantor reserving the north basement with right of way through the south cellar. McWilliams v. McNamara, 81 Conn. 310, 70 A 1043. Deeds construed and held not to except a strip of land for street purposes but to reserve a mere **easement** therein. Pitcairn v. Harkness [Cal. App.] 101 P 809. Right to pass through "these conveyed premises" held to reserve the **right to pass through** east middle basement as well as other parts conveyed. McWilliams v. McNamara, 81 Conn. 310, 70 A 1043.

67. Reservation of "the right to use the cedar timber on said land" refers to timber then existing and not timber thereafter growing. Jacobs v. Roach [Ala.] 49 S 576. Where the owner of the soil of an alley conveys the fee reserving the right to use the same, but with privilege to the grantee to build over the alley "at the same height and of the same depth as the same is now built over," he does not restrict the right of the grantee to build over it to a greater depth. Duross v. Singer [Pa.] 73 A 951.

68. Reservation **held void for uncertainty.** Hunter v. Hicks [Va.] 64 SE 988. Mere reference to occupancy of premises granted by monthly tenants was not notice that he claimed the entire month's rent received in advance. Anderson v. Carell, 114 NYS 198

Held sufficient: Description of property excepted is sufficiently certain when it shows the intention of the grantor as to what property is excepted and makes its identification practicable. Hollywood Cemetery Corp. v. Hudson [Ga.] 65 SE 777. Grant of a tract excepting three acres upon which a house was located, which was to be thereafter surveyed, held when construed in the light of surrounding circumstances to show that the grantor had the right to select such three acres. De Roach v. Clardy [Tex. Civ. App.] 113 SW 22. Reservation "only the proprietors reserve forever convenient driftways to the above said Lowaner meadows and gravel to mend the milldam and highways as there may be occasion" is sufficient to create a valid reservation. Brown v. Sudbury, 201 Mass. 149, 87 NE 483. Exception held not void for indefiniteness but to sufficiently identify land excepted. Shinnecock Hill & Peconic Bay Realty Co. v. Aldrich, 132 App. Div. 118, 116 NYS 532. Where a deed excepted from land granted all such meadows as had theretofore been allotted to and were then owned by certain persons, one claiming under such exception must show the allotment to and ownership by such persons. Id. Whether certain land excepted was land in controversy in a suit to quiet title held for the jury. Gillespie v. Powell [Ga.] 64 SE 80.

69, 70. Shinnecock Hills & Peconic Bay Realty Co. v. Aldrich, 132 App. Div. 118, 116 NYS 532.

71. Where land is sold subject to an existing right of way marked on the ground, such marking is ordinarily sufficient to identify it. Rio Grande Western R. Co. v.

*Conditions.*See 11 C. L. 1061—A condition precedent is one to be performed before the estate vests.[72] A condition subsequent is one to be performed after the vesting of the estate and the intent of which is to defeat it.[74] Conditions subsequent are not favored [75] and will not be extended beyond their terms,[76] and if it is doubtful whether terms used create a condition or a covenant, they will be construed as creating a covenant.[77] But where the condition clearly exists, it will be enforced according to its terms.[78] Whether a clause is a covenant or a condition is a question of intent to be gathered from the whole instrument by following out the object or spirit of the instrument.[79] The right to declare a forfeiture and re-enter for breach of condition is personal to the grantor and his privies in blood [80] or succession [81] and is not assignable.[82] The estate conveyed by a deed on condition subsequent is not

Salt Lake Inv. Co. [Utah] 101 P 586. Reservation construed and held to apply only to a fenced right of way. Id.

72. De Roach v. Clardy [Tex. Civ. App.] 113 SW 22. Where a tract was granted except three acres which the grantor had a right to select, he could not defeat the grant by failing to make the selection. Id.

73. Instrument in form of a deed, but providing that if grantee should pay certain notes it should be of full force, otherwise void, was a conveyance on condition precedent. Rankin v. Dean [Ala.] 47 S 1015. Deed to railroad company in consideration of establishment and maintenance of a depot held on condition precedent. Maxwell v. Mississippi Val. Co. [Miss.] 48 S 610. Evidence held to show that a deed was executed in reliance upon representations of the grantor's mother and pursuant to a plan calling for execution of deeds by other members of the family which were not executed. Lockhart v. Buckner, 33 Ky. L. R. 678, 110 SW 850.

74. Potomac Power Co. v. Burchell [Va.] 64 SE 982. Deed in consideration of future support, and to be void in case such support was not furnished, held on condition subsequent. Jones v. Williams [Ga.] 64 SE 1081. Conveyance to one for life on condition that he pay taxes, keep up repairs, pay grantor an annual rent for life, etc., and on his failure to so do the grantor may at his option declare a forfeiture, creates an estate upon condition. Lumsden v. Payne [Tenn.] 114 SW 483. Provision for the payment of a certain sum of money to the owner within five years or the estate should revert held a penalty or forfeiture, the object of which was to secure the payment of money. Potomac Power Co. v. Burchell [Va.] 64 SE 982.

75. Potomac Power Co. v. Burchell [Va.] 64 SE 982.

76. One who seeks forfeiture for breach thereof must bring himself clearly within the terms of the condition, and especially where one is not a party to the deed. People's Pleasure Park Co. v. Rohleder [Va.] 63 SE 981. Under a condition for future support, clothing, etc., grantor held not bound to live with grantee but could live where she pleased so long as needless expense was not incurred. Stuart v. Abbey, 62 Misc. 84, 116 NYS 259. Where parents voluntarily deeded land to their son, reserving the right to use it for life, the deed would not be canceled because the son treated his parents disrespectfully. Chappell v. Chappell [Ky.] 119 SW 218.

77. Druecker v. McLaughlin, 235 Ill. 367, 85 NE 647; Haydon v. St. Louis & S. F. R. Co. [Mo.] 121 SW 15; Freer v. Glen Springs Sanitarium Co., 131 App. Div. 352, 115 NYS 734. Deed of land for cemetery purposes construed, and held the provision for use for such purposes was not a condition subsequent. Id. Provision in deed to railroad company that it is made in consideration of the agreement of the company to erect and maintain a station on the land is not a condition subsequent but a covenant or agreement. Shreve v. Norfolk & W. R. Co. [Va.] 64 SE 972.

78. Deed to relative in part consideration that grantors might occupy the premises during their lives will be rescinded for willful violation of the agreement by grantors. Gustin v. Crockett, 51 Wash. 67, 97 P 1091. Where the condition of a deed is the operation of a manufacturing plant in the village for 10 years, the grantee is not absolved from performance because of destruction of the plant by fire. Fowler v. Coates, 128 App. Div. 381, 112 NYS 849. Where father deeded to his daughter in consideration of future support, evidence held to show that she failed to perform the conditions of the grant and that the father was entitled to a reconveyance. Ebert v. Gildemeister, 106 Minn. 83, 118 NW 155. Where land was conveyed to the United States in fee for a specified purpose, and provided that if it was not used for such purpose it should revert, and more than 20 years have elapsed and it has not been so used, the grantor and his heirs have a right of re-entry for breach of condition. Fay v. Locke, 201 Mass. 387, 87 NE 753. Neither the reservation of a lien for maintenance, made in consideration of a covenant to maintain, nor the clause giving a right to re-enter for breach of such covenant, cuts off the right of the grantor to rescind for breach thereof. White v. Bailey, 65 W. Va. 573, 64 SE 1019.

79. Haydon v. St. Louis & S. F. R. Co. [Mo.] 121 SW 15.

80. Van Meter v. Kelly, 115 NYS 943; Moore v. Sharpe [Ark.] 121 SW 341. Where a deed creates an estate on condition subsequent or a possibility of reverter, the grantor or his heirs alone can declare a forfeiture and re-enter on breach of the condition. O'Donnell v. Robson, 239 Ill. 634, 88 NE 175.

81. Where the grantor was a trustee and subsequently conveyed to a committee of which he was a member, the right of reentry passed to them. Fowler v. Coates, 128 App. Div. 381, 112 NYS 845.

82. Does not pass by conveyance. O'Donnell v. Robson, 239 Ill. 634, 88 NE 175

affected until condition broken [83] and forfeiture declared.[84] At common law, in order to forfeit a conditional conveyance for condition broken, a re-entry was essential,[85] but in some states a re-entry is not necessary.[86] Where a grantor declares a forfeiture, he acquires an assignable estate.[87] Forfeiture resulting from breach of condition may be released or waived.[88] Acceptance of a deed ordinarily binds the grantee to conditions therein.[89]

Restrictive covenants See 11 C. L. 1082 must be clear and satisfactory in order that injunctive powers of the court may be invoked to enforce them.[90] An unreasonable restriction upon the power of alienation is void.[91] Restrictions are to be construed according to the intention of the parties.[92]

Extinguishment of rights. See 11 C. L. 1082—After a deed has been executed and delivered, the title of the grantee can be divested only by the proper execution of a deed by him,[93] and cannot be divested by a return of the deed to the grantor,[94] or an offer to return it,[95] or by the destruction [96] or alteration of the instrument,[97] or by any subsequent act of the grantor.[98] A fortiori, rights of third persons that have

83. The estate conveyed by a deed passing title upon condition subsequent is not affected by the conditions until they have been broken. Aumiller v. Dash, 51 Wash. 520, 99 P 583.

84. Where land was conveyed to a school district on certain conditions which were broken, and an incompetent son of the grantor locked the schoolhouse, held not to constitute a re-entry. Van Meter v. Keily, 115 NYS 943. Where a railway company in good faith takes possession of a right of way granted it on certain conditions but no time of performance is stated, the grantor cannot declare a forfeiture and recover the land without notice of the breach of which the company is guilty, and opportunity to remedy the defect. Treat v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 419, 122 NW 93.

85. Moore v. Sharpe [Ark.] 121 SW 341.

86. Under Kirby's Dig. §§ 736, 737, a grantor in a conditional deed may, on condition broken, declare a forfeiture by conveying to another. Moore v. Sharpe [Ark.] 121 SW 341.

87. Where a grantor on breach of condition elects to declare a forfeiture, and with the consent of the grantee re-enters, he acquires an estate which is subject to assignment. Lowe v. Stepp [Ky.] 116 SW 293. After he makes such assignment he cannot affect the title of his purchaser by efforts to waive the cause of forfeiture. Id.

88. Waiver may be express or implied. Jones v. Williams [Ga.] 64 SE 1081. Where land was deeded to a trustee to be deeded to a company to be organized upon performance of certain conditions, held the grantee by attending corporate meetings, accepting stock, etc., waived fuller compliance with the conditions. Jackson v. Badham [Ala.] 50 S 131.

89. Where lots belonging to religious society were conveyed upon condition that "They are subject to an annual tax, which shall be a lien thereon of a sum not exceeding five dollars," grantee accepting deed containing such condition thereby became liable to pay back taxes. Silver Lake Assembly v. Hard, 132 App. Div. 475, 116 NYS 1061.

90. Newbery v. Barkalow [N. J. Eq.] 71 A 752.

91. Clause in deed from parents to child prohibiting its sale to any one except their heirs held an unreasonable restriction and not binding. Chappell v. Chappell [Ky.] 119 SW 218.

92. Simons v. Mutual Const. Co., 132 App. Div. 719, 117 NYS 567.

93. Where the grantor was uninfluenced by fraud or error, title vested can be divested only upon the production of a counter letter or upon the basis of answers to interrogatories. Maskrey v. Johnson, 122 La. 791, 48 S 266. Where deed to standing timber transferred it to the grantees, their heirs and assigns, also the right to maintain logging roads, held an assignee of such instrument had the right to cut the timber. Rush v. Hilton [S. C.] 65 SE 525.

94. Rothbard v. Abels-Gold Realty Co., 128 App. Div. 887, 112 NYS 526. Where deed was executed and delivered to the grantee, its subsequent return to the grantor and turning over by him to the person named as his executor did not affect the title of the grantee. Boye v. Andrews [Cal. App.] 102 P 551.

95. An offer to return a deed does not divest the grantee nor reinvest the grantor with title. Howe v. Martin [Okl.] 102 P 128.

96. Burning of deed by grantee, even if done with the approval of the grantor, had no effect upon title. Lutz v. Matthews, 37 Pa. Super. Ct. 354.

97. The unauthorized alteration of a deed by the grantee after delivery so as to make it describe other land does not disturb the title vested by it. It only deprives him of all future benefits of an executory nature. Waldron v. Waller 65 W. Va. 605, 64 SE 964. Nor will it entitle the grantor to have the deed set aside and be reinvested with title. Id. Intent and purpose of a valid deed cannot be defeated by the unauthorized alteration by a third person. Young v. Young [Mich.] 16 Det. Leg. N. 228, 121 NW 264.

98. Where a deed of gift is fully executed and delivered, the grantee cannot be defeated of his title by any subsequent deed of the grantor or other act. Strothers v. Woodcox [Iowa] 121 NW 51. Grantor who has made a valid delivery of a deed by depositing the deed with a third person to be delivered after his death, cannot withdraw the deed without the grantee's consent nor

accrued in the meantime cannot be so extinguished,[99] but a voluntary surrender of the deed by the grantee may work an estoppel against him.[1] A delivered deed can be canceled only with the grantee's consent,[2] and cancellation with such consent gives the grantor merely an equitable title.[3] The extinction of the right of a railroad company to build its road does not extinguish its property rights in land conveyed to it in fee.[4]

DEFAULTS.

The scope of this topic is noted below.[5]

§ 1. **Elements and Indicia of Default, 1290.**
§ 2. **Procedure on Default; Taking Judgment,** 1291.
§ 3. **Opening Defaults, 1293.** Grounds, 1293. Procedure, 1296. Appeal, 1298.
§ 4. **Operation and Effect of Default, 1299.**

§ 1. *Elements and indicia of default.*[6]—See 11 C. L. 1063—A default results from the failure of a party to appear[7] or to file an effective answer,[8] a timely[9] affidavit of merits,[10] or a reply,[11] or to plead over when required;[12] but usually no default results against a party who has entered an effective appearance in any manner,[13] except

affect his title by subsequent transfers. Maxwell v. Harper, 51 Wash. 351, 98 P 756.

99. Lutz v. Matthews, 37 Pa. Super. Ct. 354.

1. A voluntary surrender of a deed by the grantee to the grantor with the intention of reliquishing title estops him from claiming any further rights under the deed. Brown v. Brown [Iowa] 120 NW 724.

2, 3. Potter v. Barringer, 236 Ill. 224, 86 NE 233.

4. New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 A 563.

5. Treats generally of defaults, without particular reference to the particular proceedings in which they occur (see the topics dealing with such proceedings, such as Attachment,* § 15C; Divorce,* § 4; Ejectment [and Writ of Entry],* § 6; Garnishment,* § 15; Replevin,* § 11). Excludes confession of judgment (see Confession of Judgment*), judgment on the pleadings (see Pleading,* § 14; Judgments,* § 2B), and the vacation of judgments generally (see Judgments,* § 5).

6. Search Note: See note in 5 C. L. 982.

See, also, Judgment, Cent. Dig. §§ 151-201; Dec. Dig. §§ 92-109; 23 Cyc. 734-751; 13 A. & E. Enc. L. (2ed.) 47; 6 A. & E. Enc. P. & P. 1.

7. Results where party fails to make general appearance. Wade v. Wade's Adm'r, 81 Vt. 275, 69 A 826. Defendant held in default where he failed to appear for trial immediately after denial of motion pending which stay was granted. Tuska v. Jarvis, 61 Misc. 224, 113 NYS 767. In suit to determine conflicting claims to water rights, parties having been served and failing to appear were held to be in default. Hough v. Porter, 51 Or. 318, 98 P 1083.

8. In suit to settle estate, widow held in default for **failure to answer** petition. Compton v. Lancaster [Ky.] 114 SW 260. Defendant held in default for **failure to answer in time** allowed by rule 59. Tampa & J. R. Co. v. Harrison, 55 Fla. 810, 46 S 592. Defendant was in default **where answer tendered offered no defense.** Plunkett v. State Nat. Bank [Ark.] 117 SW 1079. Answer verified by attorney **held effective** to prevent default. Zichermann v. Wohlstadter, 60 Misc. 362, 113 NYS 403.

9. Under P. L. 88, § 4, default may be entered against defendant who fails to file affidavit of defense within 15 days, even though no return day has intervened. Griesmer v. Hill, 36 Pa. Super. Ct. 69.

10. Where action was on assigned claim for services and pleadings were unverified, defendant was in default for failing to file and serve affidavit of merits required by rule 28 of general rules of practice. Ziegler v. Smith, 115 NYS 99. Upon failure of defendant to file affidavit with his plea as required by statute, court is authorized to enter judgment as in case of default. Practice Act, § 36. Snow v. Merriam, 133 Ill. App. 641. Under Practice Act, § 36, plaintiff is entitled to default without moving to strike defendant's plea unsupported by affidavits from files, where plaintiff has filed affidavit in support of his action. Id. By statute, plaintiff, unless he waives his right, is entitled to default judgment in suit in assumpsit where defendant does not file sufficient affidavit of defense. Jackson v. Dotson [Va.] 65 SE 484.

11. Default may be taken on cross-bill to which no reply is made. Stevens v. Fitzpatrick, 218 Mo. 708, 118 SW 51.

12. Defendant was in default where he failed to plead over after his plea was stricken out. Ney v. Clere Clothing Co., 5 Ga. App. 325, 63 SE 143. Defendant was in default where he did not ask leave to file new plea after his sole plea was properly stricken out as frivolous and irrelevant. Brash v. Ehrman, 56 Fla. 153, 47 S 937. There was **no default** for want of plea where demurrer to plea was sustained and subsequent plea stricken, the proper judgment in such case being judgment of demurrer. Hays v. Weeks [Fla.] 48 S 997.

13. There was no default where defendant presented motion for dismissal of summary proceeding though he took no further part in the trial. Altschuler v. Lipschitz, 113 NYS 1058. No default where defendant pleaded illegality of contract sued on, appeared by counsel, and offered in evidence

* Always begin with the latest article on the subject. Use the latest topical index.

in certain cases where he has failed to comply with specific requirements.[14] It is essential to a default that the court shall have acquired jurisdiction [15] by the legal service [16] of a valid process.[17] The default judgment must be sustained by the pleadings,[18] and it is not sufficient that the supporting cause of action be set forth for the first time in the reply.[19] When taken on service by publication the default must be sustained by the petition as it existed when the order of publication was made,[20] but a defendant personally served with a summons has been held to be in court for every purpose connected with the action.[21]

§ 2. *Procedure on default; taking judgment.*[22]—See 11 C. L. 1004—Since the effect of a default is to admit the truth of the allegations of the adverse party,[23] its

contract which was excluded, although defendant made no further appearance. Perry v. U. S. School Furniture Co., 232 Ill. 101, 83 NE 444. No default where, although defendant was not present at the final trial, he had appeared in response to summons, demurred to complaint, which being overruled interposed his answer, and in open court arranged with opposing counsel upon a day certain for trial of cause, and for summoning and impanelment of a jury. Luke v. Coffee [Nev.] 101 P 555. No default where defendant remained in court after denial of his motion for adjournment, interposed objections to questions and cross-examined witnesses. Scheckter v. Reiter, 113 NYS 729.

14. Under Code Civ. Proc. § 1778, held applicable to municipal court, defendant is in default unless he serves with copy of his answer a copy of judge's order directing issues to be tried. Blenderman v. J. R. Bellis Co., 64 Misc. 65, 117 NYS 897. Defendant held not in default where he answered denying none of allegations of complaint but setting up counterclaim, although answer was not accompanied by order directing issues to be tried as provided by Code Civ. Proc. § 1778, no proper issue being joined until plaintiff replied to counterclaim. Pennypacker v. Levis & Co., 63 Misc. 384, 116 NYS 771.

15. Latham Co. v. Radford Grocery Co. [Tex. Civ. App.] 117 SW 909. Court has no jurisdiction to render default judgment where defendant has been sued by wrong name. Martin v. Lefkowitz, 62 Misc. 490, 115 NYS 64. No default will be entered on an **attachment** not supported by proper affidavits. Leavitt v. Matzkin, 114 NYS 687.

16. Default judgment presupposes legal service, actual or constructive. Wade v. Wade's Adm'r, 81 Vt. 275, 69 A 826. Default not entered where summons not personally served. Leavitt v. Matzkin, 114 NYS 687. Defendant corporation was not in default where person served was proved not officer of corporation and had no connection with it in any manner whatever, although affidavit alleged that party served was proper officer. National Bridge Works v. Atlas Const. Co., 117 NYS 956. Service of process not made 20 days previous to return day is insufficient to sustain default judgment in circuit court. Lawrence v. Stone [Ala.] 49 S 376. As to legality or sufficiency of service in general, see Process, § 4.

Proof of service is essential to the jurisdiction to enter a default. Shanholtzer v. Thompson [Okl.] 103 P 595. Jurisdiction depends upon actual service and not upon return which is simply evidence of jurisdictional fact and subject to amendment to make it speak the truth. Call v. Rocky Mountain Bell Tel. Co. [Idaho] 102 P 146. As to proof of service in general, see Process, § 5.

Presumption as to legality of judgment carries with it presumption as to legality of service essential to acquire jurisdiction. Roman v. Morgan [Ala.] 50 S 273.

17. Epstein v. Prosser, 133 App. Div. 859, 117 NYS 1115. As to validity of process in general, see Process, §§ 1, 2, 6.

18. Petition or amended petition. Spiess' Adm'x v. Bartley [Ky.] 113 SW 127. To sustain default judgment, declaration must show right to recover, since nothing will be assumed as proven except that which is shown on face of declaration. Penn. Mut. Life Ins. Co. v. Keeton [Miss.] 49 S 736. Default judgment not sustained by pleadings is void. Id. Pleadings held insufficient to sustain judgment on note which was neither due when complaint was filed or default judgment rendered. Harris v. Munro Co. [Cal. App.] 102 P 821. Allegation that plaintiff was injured by careless and negligent handling of ice by defendant in such manner as to cause large block to fall on plaintiff, held sufficient to support judgment. Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539. Complaint held to sufficiently allege that plaintiff was directed to do certain work, though it did not contain specific words of direction, to sustain judgment rendered upon hearing in damages after default, it being unnecessary to make separate allegation that plaintiff was not guilty of negligence. Simeoli v. Derby Rubber Co., 81 Conn. 423, 71 A 546. Complaint on insurance company's bond given to secure prompt payment of claims held not affected by fact that the bond sued on shows on its face that it is not in force. Neimeyer v. Claiborne, 87 Ark. 72, 112 SW 387.

19. Spiess' Adm'x v. Bartley [Ky.] 113 SW 127.

20. Cooper v. Gunter, 215 Mo. 558, 114 SW 943.

21. Shellabarger v. Sexsmith [Kan.] 103 P 992. Defendant in default is bound to take notice of cross-petition filed against him by party admitted as defendant after answer day named in summons. Id.

22. Search Note: See Judgment, Cent. Dig. §§ 208-245; Dec. Dig. §§ 115-134; 23 Cyc. 754-768; 6 A. & E. Enc. P. & P. 1.

23. Wolf v. Powers, 144 Ill. App. 168; Madison v. Octave Oil Co., 154 Cal. 768, 99 P 176; McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Trustee and cestui que trust, by default in appearance in suit to quiet title to

entry in most cases entitles such party to judgment [24] upon the pleadings without proof,[25] though in some cases proof is required,[26] as where the plaintiff's right to sue is not apparent [27] or the damages are unliquidated,[28] but the averments of the declaration are admitted even though there are damages to be inquired into.[29] The plaintiff is not required to make out a complete case merely because he offers some evidence other than that required.[30] The right to a judgment on default may, however, be waived by delay [31] or by inconsistent action.[32] A defendant in default ordinarily has no standing to ask for any proceeding in his favor,[33] nor is he entitled to notice on an amendment in a matter of form,[34] or of the disposition made of a pending motion whereby he is left in default; [35] and, while he may examine witnesses on the question of damages [36] and has the burden of proving contributory negligence,[37] he has no right to examine on matters in support of special pleas.[38] No

land purchased by complainant from a cestui que trust, admitted truth of allegations that legal title never vested in purported trustee. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Respondents by their default conclusively admitted truth of allegations in information in nature of quo warranto. People v. O'Connor, 239 Ill. 272, 87 NE 1016. Default judgment imports truth of allegations contained in petition, but inferences beyond this cannot be indulged in. United States Fidelity & Guar. Co. v. Jasper [Tex. Civ. App.] 120 SW 1145.

24. Default of defendant maker of note and trust deed sued on entitled plaintiff to judgment against him as prayed. Brant v. Lane [Tex. Civ. App.] 118 SW 229. In suit to determine adverse claims to water rights, judgment is rendered against parties defaulting and in favor of parties appearing. Hough v. Porter, 51 Or. 318, 98 P 1083. Where rule has been made against constable requiring him to show cause why he should not pay to plaintiff amounts due on certain fi. fas., if he is in default in making answer, the court may proceed to grant rule absolute against him. Puckett v. State Banking Co., 130 Ga. 586, 61 SE 465.

25. In suit on account, where defendant is in default, plaintiff is not required to make out his case by proof. Civ. Code 1895, § 5078. Horn v. Mound City Paint & Color Co. [Ga.] 64 SE 666. Entered without proof in suit on mechanic's lien (see Code Civ. Proc. § 3406) and in action on contract where copy of verified complaint has been served on defendant. People v. Wells, 61 Misc. 356, 113 NYS 880. Plaintiff was entitled to judgment without assessment of damages where defendant after answering failed to appear at trial and introduce evidence, Code § 3791 not being applicable. Andres & Co. v. Schlueter [Iowa] 118 NW 429.

26. Required **under Municipal Court Act** (Laws 1902, p. 1537, c. 580) § 147, where suit is not on mechanic's lien or on contract. People v. Wells, 61 Misc. 356, 113 NYS 880. Required where defendant's offer to confess judgment is not filed with court as specified in Municipal Court Act, § 148. Id. **In action against carriers** for negligent handling of shipment, to sustain default judgment, proof not only of damages but of liability of defendant was essential. Pecos & N. T. R. Co. v. Epps [Tex. Civ. App.] 117 SW 1012; Pecos & N. T. R. Co. v. Harlan [Tex. Civ. App.] 117 SW 1013.

27. Default judgment was not proper where there was no proof of assignment or of plaintiff's right to sue on contract to which he was not a party. Anglo-American Author's Ass'n v. Slutsky, 116 NYS 31.

28. Proof of damages required under St. 1898, § 2891. Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539. By statute, inquiry as to damages in actions of assumpsit on contract for payment of money is dispensed with unless defendant file plea in bar verified by affidavit. Jackson v. Dotson [Va.] 65 SE 484. Where action in assumpsit on promissory note is brought against maker and indorser under Hurd's Rev. St. 1905, p. 1407, c. 98, § 76, providing for entering default against certain defendants and severing and proceeding to trial as to others, and default was taken but no judgment entered against indorser, and trial proceeded, jury should have been sworn to try issues joined and assess damages against indorser. First Nat. Bank v. Miller, 235 Ill. 135, 85 NE 312.

29. Although amount of damages was to be ascertained by inquiry, the indebtedness being admitted by the default, party could not complain that evidence of facts admitted of record was insufficient or did not support the essential averments of the declaration. Wolf v. Powers, 144 Ill. App. 168.

30. Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539.

31. Delay of one and one-half years held to be mere irregularity and not to substantially prejudice defendant. Burton v. Cooley [S. D.] 118 NW 1028.

32. Defendant waived his right to judgment on his cross-complaint by not requesting same and proceeding in manner inconsistent with intent to assert such right. Madison v. Octave Oil Co., 154 Cal. 768, 99 P 176.

33. Defendant in replevin after default has no standing to ask for order or proceeding in his favor. Standard Varnish Works v. Cushing, 202 Mass. 576, 89 NE 163.

34. Pine Tree Lumber Co. v. Central Stock & Grain Exch., 140 Ill. App. 462. Amendment which simply raised amount of ad damnum held to be merely formal. Id.

35. Tuska v. Jarvis, 61 Misc. 224, 113 NYS 767.

36. First Nat. Bank v. Miller, 235 Ill. 135, 85 NE 312.

37. Cutler v. Putnam L. & P. Co., 80 Conn. 470, 68 A 1006.

38. First Nat Bank v. Miller, 235 Ill. 135, 85 NE 312. Held not error to refuse to per-

default judgment should be granted where proceedings have been stayed,[39] or where the issues are not presented as required by law,[40] or where the issues of law have not been disposed of,[41] unless such issues be frivolous.[42] The case must, furthermore, be ready for such disposition as is made of it by the judgment entered.[43]

§ 3. *Opening defaults.*[44]—See 11 C. L. 1065—When proper grounds exist therefor, a default judgment may be vacated as are other judgments.[45]

*Grounds.*See 11 C. L. 1065—The court may, in the proper exercise of its sound discretion,[46] open a default judgment which has been taken against a party through his mistake, inadvertence, surprise, or excusable neglect,[47] when of such nature as to present a sufficient excuse.[48] A default will be opened where the judgment

mit one in default to examine witnesses where no evidence has been offered as to the amount due. Id.

39. Record held not to show that any stay of proceedings was ordered. Ansley v. Stuart, 123 Fla. 330, 48 S 953.

40. Statute in regard to contest of answer of garnishee (Code 1896, § 2196; Code 1907, § 4325) provides that plaintiff may controvert answer by making oath that he believes it to be untrue, and thereupon an issue must be made up, under direction of court, in which plaintiff must allege in what respect answer is untrue, and Code 1907, § 4055, relative to defaults in failure to answer interrogatories. Sun Ins. Co. v. Aberdeen Clothing Co. [Ala.] 47 S 722.

41. Defendant held not in default while demurrer and motion were pending. Smith v. Clyne [Idaho] 101 P 819.

42. Entry of default judgment before disposition of motion frivolous on its face, which could not have been granted, and disposition of which either way could not affect plaintiff's right to recover in the cause, held not reversible error. Rice v. Simmons [Ark.] 116 SW 673.

43. Although a default may be adjudged against the garnishee prior to the rendition of judgment in the main action, and he, on default, may be adjudged to be in possession of funds or property sought to be impounded, no judgment enforcible by execution can be rendered against him prior to judgment against the principal defendant. Nashville, etc., R. Co. v. Brown, 3 Ga. App. 561, 60 SE 319.

44. Search Note: See notes in 61 L. R. A. 746; 4 L. R. A. (N. S.) 196.

See, also, Judgment, Cent. Dig. §§ 246-340; Dec. Dig. §§ 135-177; 23 Cyc. 889-976; 17 A. & E. Enc. L. (2ed.) 824; 6 A. & E. Enc. P. & P. 149.

45. Warren v. Hershberg, 52 Wash. 38, 100 P 149; Wallace v. Wallace [Iowa] 119 NW 752; Le Master v. Dalhart Real Estate Agency [Tex. Civ. App.] 121 SW 185. As to vacation of judgments generally see Judgments, § 5.

46. Setting aside of default is in sound discretion of trial court. Aaron v. Holmes [Utah] 99 P 450; Pecos & N. T. R. Co. v. Pearce [Tex. Civ. App.] 117 SW 911; Varney v. Hutchinson Lumber & Mfg. Co., 64 W. Va. 417, 63 SE 203; Hollowell v. Darling, 32 App. D. C. 405; Lemon v. Hubbard [Cal. App.] 102 P. 554; Anderson v. McClellan [Or.] 102 P 1015; Harvey v. Gillies, 117 NYS 204; Zachermann v. Wohlstadter, 60 Misc. 362, 113 NYS 403; Corson v. Smith [S. D.] 118 NW 705; Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539. Setting aside of default is largely discretionary, dependent upon facts and circumstances of each case. Quealy v. Willardson [Utah] 100 P 930. Setting aside of default judgment for inadvertence and alleged merits is discretionary. Carton v. Day [Mich.] 16 Det. Leg. N. 234, 121 NW 295. Discretionary under Rev. Code Civ. Proc. § 151. Burton v. Cooley [S. D.] 118 NW 1028. Made discretionary with city court of Bainbridge by Acts 1900, p. 112. Horn v. Mound City Paint & Color Co. [Ga.] 64 SE 666. **Discretion not arbitrary** but should be exercised so as to aid substantial justice. Voorhees v. Geiser-Hendryx Inv. Co. [Or.] 98 P 324. Discretion is not unlimited. Prager v. Beardsley, 133 App. Div. 592, 118 NYS 232.

47. Burton v. Cooley [S. D.] 118 NW 1028. Under Code Civ. Proc. § 473, which may be taken advantage of by either party and should be liberally construed. Lemon v. Hubbard [Cal. App.] 102 P 554. Excuses sufficient under Rev. St. 1887, § 4229, are mistake, inadvertence, and excusable neglect. Beck v. Lavin, 15 Idaho, 363, 97 P 1028. Under B. & C. Comp. § 103. Voorhees v. Geiser-Hendryx Inv. Co. [Or.] 98 P 324; Dietzel v. Conroy [Or.] 101 P 215. Under Rev. Codes, § 6589. State v. Second Judicial Dist. Ct., 38 Mont. 415, 100 P 207. Under Code Civ. Proc. § 724. Prager v. Beardsley, 133 App. Div. 592, 118 NYS 232; Salkind v. Levy, 116 NYS 581. Under Code § 135 (Burns' Ann. St. 1908, § 405). Mutual Reserve Life Ins. Co. v. Ross, 42 Ind. App. 621, 86 NE 506. Under Code Civ. Proc. 1902, § 195, grounds are inadventence, surprise or excusable neglect. Turner v. Bolton, 82 S. C. 502, 64 SE 412. Excusable neglect is ground under Revisal 1905, § 513. White v. Hans Rees' Sons, 150 N. C. 678, 64 SE 777. Grounds under Code 1907, § 5372, are surprise, accident, mistake or fraud, without fault on part of applicant or his attorney. Traub v. Fabian [Ala.] 49 S 240.

48. For excuse to be sufficient it must appear that defendant was prevented from making defense by fraud, accident, or acts of other party, that he was free from fault or negligence, and that he had a good defense to cause of action. Jones v. Curtis [Tex. Civ. App.] 120 SW 530. Law requires diligence from suitors and parties must, if necessary in preparation of their cases, combat and overcome difficulties. Traub v Fabian [Ala.] 49 S 240.

Excuse held sufficient: Error in docketing case, as where case, through error, was improperly placed on calendar. Herman v.

Hyman, 112 NYS 1077. In original proceedings in supreme court to vacate judgment in estate matter, where petitioners had **no notice** of decedent's death until after default and had used utmost diligence to assert their claims in trial court. State v. Second Judicial Dist. Ct., 38 Mont. 415, 100 P 207. **Absence of counsel,** as where defendants' attorney was subpoenaed as witness in another court and court denied continuance asked for. Goldmann v. Shiffer, 128 App. Div. 249, 112 NYS 666. Where affidavit had been filed showing that defendant's counsel was on day set for trial obliged to argue case before court of appeals. Bock v. Bock, 116 NYS 1090. Counsel was unable to reach court on day trial was set, the applicant having promptly moved to open default and set up a proper defense. Pecos & N. T. R. Co. v. Pearce [Tex. Civ. App.] 117 SW 911. Defendant's affidavit of merits was not filed through **oversight of attorney's clerk** and imposition of costs would prevent plaintiff being injured by opening of default. Ziegler v. Smith, 115 NYS 99. Summons was served during fatal **illness** of husband and wife not knowing nature of papers or that she was party to suit kept papers in trunk until after death of husband and execution was issued on judgment. Turner v. Bolton, 82 S. C. 502, 64 SE 412. **Ignorance,** as where defendant through not understanding English was unable to read summons and had no knowledge of pending action. Reichenbach v. Harris, 112 NYS 1069. Where judgment was taken against party to his **surprise** in violation of agreement with his adversary. Voorhees v. Geiser-Hendryx Inv. Co. [Or.] 98 P 324. Plaintiff failed to serve notice on defendant that he intended to rely on defendant's failure to file copy of court's order under Code Civ. Proc. § 1778, such notice being required by fairness and good practice. Blenderman v. J. R. Bellis Co., 64 Misc. 65, 117 NYS 897. When default was caused by **mistake** of defendant's attorney as to date before which answer must be served, the defendant having promptly consulted his attorney after being served with complaint, and after default having promptly moved to vacate the judgment and presented a good cause of action. Pengelly v. Peeler [Mont.] 101 P 147. Defendant and his counsel, without negligence, were misled as to time of holding court by change therein of which they did not have knowledge and it appeared that defendant had a good defense. Varney v. Hutchinson Lumber & Mfg. Co., 64 W. Va. 417, 63 SE 203. Defendant intending to file motion requiring original notes to be filed, pending which default could not have been entered, in reality filed motion to require copies of notes to be filed which had already been done, application to set aside default having been promptly made and stating a meritorious defense. Rice v. Simmons [Ark.] 116 SW 673. Where plaintiff had secured default judgment against defendant through representing to the court that defendant was a nonresident and proceeding against him as such, when in fact he was a resident, such representation constituting **fraud inducing mistake.** Graff v. Dougherty [Mo. App.] 120 SW 661. Defendant was diligent in procuring attorney and in looking after case until informed by his attorney that case had been abandoned, such attorney having been fraudulently led to so believe by plaintiff. Le Master v. Dalhart Real Estate Agency [Tex. Civ. App.] 121 SW 185. Defendant who could not read was misled by his codefendant who informed him that suit did not concern him, his application stating a good defense to the suit. Knupp v. Miller, 133 Mo. App. 256, 113 SW 725. Default judgment was secured by plaintiff through change of front after defendant and his counsel had been misled by him in supposing that cause stood for trial upon issues already made. Hauser v. Newman [Mont.] 102 P 334.

Refusal to open default held abuse of discretion: Where defendant was prevented from defending without fault of his own and used due diligence in moving to set aside default. Pecos & N. T. R. Co. v. Faulkner [Tex. Civ. App.] 118 SW 747. Sufficient grounds were properly shown and court appeared not to have acted on his discretion but on erroneous idea as to his authority to open default. Goldman v. Shiffer, 128 App. Div. 249, 112 NYS 666. Where defendant was prevented from getting to trial by reason of change of schedule of train without his knowledge, and it was impossible to reach trial by other conveyance on account of impassibility of roads from excessive rains, and an attempt to reach plaintiff's counsel by telephone had failed, application to set aside default having been promptly made. Pecos & N. T. R. Co. v. Faulkner [Tex. Civ. App.] 118 SW 747. Default was rendered on April 30th subject to being set aside if defendant presented his defense within three weeks, and defendant presented a proper defense on May 21st, offering as excuse for delay that his attorneys had been devoting most of their time in the interval to preparation of answer, barring time imperatively demanded to look after other litigation, and it appearing that many papers, books and accounts were required to be examined in preparation of answer. Bowman v. Straight Creek Coal & Coke Co. [Ky.] 118 SW 344. Defendant filed his plea before suit was filed, it thereby appearing not that he was too lazy but that he was too smart, and plaintiff not being hurt or delayed in ascertaining defense against him. Lee & Co. v. Grice [Ga. App.] 63 SE 514. Although defendant had been served with summons 6 years before, it was understood between the parties that suit was not brought for purpose of securing judgment, and taking of judgment without special notice had effect, so far as real merits of controversy were concerned, of taking judgment without summons or any notice whatever. Quealy v. Willardson [Utah] 100 P 930. Defendant attended wrong part of court, was willing to try cause, was financially responsible, and set up defense of payment. Zimmerman v. Dutchess Costume Co., 117 NYS 117.

Excuse held insufficient: Where plaintiff, the mover, without excuse refused to appear. Prager v. Beardsley, 133 App. Div. 592, 118 NYS 232. Defendants and their counsel, a firm composed of three members, were notified by telegram that case would be called at all events on next day, and member of law firm who had special charge of case was too sick to attend, but no sufficient excuse was shown for failure of other two members of firm to attend, nor did it

has been taken upon insufficient pleadings[49] without jurisdiction,[50] or upon insufficient proof where proof is required,[51] and where the ends of justice demand it.[52]

appear why defendants did not attend court. White v. Hans Rees' Sens, 150 N. C. 678, 64 SE 777. Where mover had delayed action by filing dilatory motions, withdrew motions and secured permission to file answer which was not filed, and then secured extension of time to file answer, but filed no answer and made no further appearance until 6 weeks after default was taken. Lawsen v. Rush [Kan.] 101 P 1009. Inquest was taken and judgment entered after denial of defendant's motion that plaintiff be required to pay costs of former action. Goldman v. Brooklyn Heights R. Co., 129 App. Div. 657, 114 NYS 182. Where defendants, **in reliance on invalid stay,** failed to get ready for trial. Goldstein v. Rosenthal, 113 NYS 1012. **Where defendant failed to comply with his compromise agreement** and knew date set for trial and ignored the matter. Lazaroff v. Shapiro, 113 NYS 572. Where there was a **defective return,** but application showed that summons was in fact legally served. Marin v. Titus [S. D.] 122 NW 596. **Defect in petition** filed by plaintiff which when liberally construed was found to be sufficient. Sloan v. Hallowell, 83 Neb. 762, 120 NW 449. Where case was dismissed through **fault of applicant's attorney.** Salkind v. Levy, 116 NYS 581. Party's failure to appear which was due to his own default and to neglect of his attorney. Andres & Co. v. Schlueter [Iowa] 118 NW 429. **Withdrawal of counsel** of which party had notice three days before trial. Id. Where default resulted from **misunderstanding between client and attorney,** as where attorney when **requested to look after case thought client** referred to another pending case. Traub v. Fabian [Ala.] 49 S 240. **Mistake of law,** rather than of fact, such as failure of counsel to appear through forgetting statutory provision relating to assignment days. McKeough v. Gifford [R. I.] 73 A 1085. **Where service was by publication but defendant had actual notice** of pendency of suit in time to appear in court and make its defense. Garrett Biblical Inst. v. Minard [Kan.] 100 P 55. Though defendant's attendance was prevented by **sickness,** but no good reasen appeared why he could not have had his answer filed by his attorneys and thus prevented the default. Manry v. Twitty [Ga.] 64 SE 273. Defendant claimed he was prevented from being present by illness of his wife, but it did not appear that his wife's illness required his presence at heme and defendant was present at beginning of trial. Forman v. Berson, 113 NYS 976.

Refusal held not abuse of discretion: Where applicant for relief does not affirmatively show that default was unintentional and excusable and that he had a good defense, which he may reasonably expect to prove on trial. Harvey v. Gillies, 117 NYS 204. Defendant, 19 years of age, was served by service on his mother, afterwards appointed guardian ad litem, and upon her failure to appear another guardian ad litem was appointed who announced no defense and declined to plead, and defendant throughout manifested no interest in the matter, though counsel had been consulted. Anderson v. McClellan [Or.] 102 P 1015. Judgment was taken before time postponed to by agreement, after such agreement was abandened by mover's attorney, who notified adverse attorney that he intended to abandon case because his fees had not been paid and that such other attorney could try case at any time he desired. Dietzel v. Conroy [Or.] 101 P 215. Default occurred through failure of attorney's stenographer to write letter as directed where due diligence on part of atterney to guard against such failure or its effects was not shown. Mutual Reserve Life Ins. Co. v. Ross, 42 Ind. App. 621, 86 NE 506. Defendant's only mistake was failure to inform atterneys of alleged settlement before their withdrawal from case. Corsen v. Smith [S. D.] 118 NW 705. Where plaintiff had reduced his judgment down to amount to which defendant had no substantial defense. Carton v. Day [Mich.] 16 Det. Leg. N. 234, 121 NW 295.

49. Amendment to pleading held not to constitute sufficient ground for setting aside default where, although it prayed for larger amount, it appeared that such larger amount was deductible from facts stated alike in both petitions. Le Master v. Dalhart Real Estate Agency [Tex. Civ. App.] 121 SW 185. As to requirements and sufficiency of pleadings, see ante, § 1.

50. As where judgment was taken without service. St. Louis Jewelry Co. v. Imbraguglie, 123 La. 389, 48 S 1007. Default opened where court had no jurisdiction of defendant. Newmark v. Herowitz Bros., 116 NYS 564. As to jurisdiction essential to default, see ante, § 1.

51. Default opened where testimony taken at inquest clearly showed that plaintiff failed to prove cause of action against the defendants. Markel v. Laden, 117 NYS 916. Default should be opened where minutes taken on inquest fail to show cause of action. Anglo-American Authors' Ass'n v. Slutsky, 116 NYS 31. Default should be opened where cause of action was not proven. Merritt & Chapman Derrick & Wrecking Co. v. Keronsky, 113 NYS 744. As to when proof is required, see ante, § 2. **Burden of showing insufficiency** of proof is on mover. Ansley v. Stuart, 123 La. 330, 48 S 953.

52. Rules as to opening defaults should be enforced so as to promote justice. Quealy v. Willardson [Utah] 100 P 930. Default opened where plaintiff though negligent has not had his day in court. Salkind v. Levy, 116 NYS 581. In discretion of court to open default rendered on failure to file affidavit of defense in replevin and thus prevent manifest injustice of permitting judgment to stand compelling defendant to pay amount of bond or value of goods before it had been finally determined that goods were not claimant's. Gain v. Steinberger, 36 Pa. Super. Ct. 303. Justice requires opening of default judgment in action for services performed at request of third person not shown to be in privity with defendant. Davies v. Myers, 113 NYS 9.

Where justice does not demand it, default will not be opened. Phillips v. Portage Transit Co., 137 Wis. 189, 118 NW 539. Justice does not require opening of default to

*Procedure.*See 11 C. L. 1066—The trial court may for good cause shown, or in some cases on its own motion for cause, set aside a default judgment at any time during the term at which it was rendered,[53] but cannot set aside a judgment on its own motion at a subsequent term,[54] but it is usually essential that an application be made [55] in proper time,[56] sufficient in form and substance,[57] and sufficiently supported by affidavits,[58] and that there be a showing of a just cause of action [59] or defense [60] and of sufficient grounds to excuse the default.[61] In some cases the appli-

permit defendant to show illegality of contract sued on where it appears that defendant was particeps criminis. Tedford v. Lichtenstein, 131 App. Div. 805, 116 NYS 361.

53. Knupp v. Miller, 133 Mo. App. 256, 113 SW 725.

54. State v. Quillen [Tex. Civ. App.] 115 SW 660.

55. Court has no power to open default unless such relief be specifically applied for. Bloch v. Weinstein, 113 NYS 1067. Held error to set aside default judgment rendered at previous term without motion being made therefor and upon agreement between the parties when such agreement was not made in open court or made of record over objection of counsel for plaintiff. State v. Quillen [Tex. Civ. App.] 115 SW 660.

56. Time sometimes may be a controlling factor, and at other times may not be entitled to much, if any, consideration, in all doubtful cases the general rule being to incline toward granting relief from default and to bring about judgment on merits. Quealy v. Willardson [Utah] 100 P 930.

Time fixed in particular cases: Under Chancery Rule 7, subd. d, where personal service was had on defendant, application must be made within 6 months. St. Louis Hoop & Stave Co. v. Donovan [Mich.] 15 Det. Leg. N. 1017, 118 NW 989. Under Circuit Court Rule 12, default judgment against garnishee defendant as well as against other defendants shall not be set aside unless application be made within 6 months after personal service. Caille Bros. Co. v. Gage [Mich.] 15 Det. Leg. N. 1123, 120 NW 6. Under Code, § 4091, motion on grounds other than unavoidable casualty or misfortune must be made within three days after default judgment. Andres & Co. v. Schlueter [Iowa] 118 NW 429. Application to vacate default judgment, made after two years without attempt to excuse delay, was **not timely.** Warren v. Hershberg, 52 Wash. 38, 100 P 149. Motion made three years after default judgment quieting title of party in possession under tax deed void on its face. Brenholts v. Miller [Kan.] 101 P 998. Motion not filed until after second day of term following (Under Code, §§ 3790, 4093). Wallace v. Wallace [Iowa] 119 NW 752. Motion filed 6 months after default alleged to have been prematurely entered, such delay showing laches. California Casket Co. v. McGinn [Cal. App.] 100 P 1077; Id. [Cal.] 100 P 1079. Motion not made for 6 weeks after judgment, delay showing lack of diligence where taken in connection with negligence previous to default. Lawson v. Rush [Kan.] 101 P 1009.

57. Motion in writing setting up sufficient grounds under Rev. St. 1895, art. 1370, held essential to setting aside of judgment rendered at previous term. State v. Quillen [Tex. Civ. App.] 115 SW 660. Petition of intervention filed by stockholders of defendant corporation held not sufficient as a motion to set aside default judgment under Ballinger's Ann. Codes and St. § 5153 (Pierce's Code, § 1033). Seattle & N. R. Co. v. Bowman [Wash.] 102 P 27.

58. Motion was not sufficiently supported where affidavits upon which it was based were radically defective. Liebling v. Borg, 113 NYS 549.

Affidavits of merits: As to affidavits of merits generally, see Affidavits of Merits of Claim or Defense. Affidavits to support motion should set up meritorious defense. Vogelsang v. Fredkyn, 133 Ill. App. 356. Affidavits must show meritorious defense and grounds to excuse default. Beck v. Lavin, 15 Idaho, 363, 97 P 1028. Affidavit must support showing due diligence on the part of the moving party. Colehour v. Bass, 143 Ill. App. 530. Affidavits supporting motion should set forth form of proposed answer. Steinman v. Blumenfeld, 61 Misc. 220, 113 NYS 550. Where affidavit of merits fails to state that defendant has or had stated all facts of case to her counsel, but states "that affiant had fully and fairly stated facts constituting her defense to cause of action set out in the complaint in said action, to her counsel," denied. Cooper-Power v. Hanlon, 7 Cal. App. 724, 95 P 678. As advised by his attorney to whom facts have been stated, it should appear from affidavit of defendant, and of his attorney, that he has meritorious defense. Page v. Dempsey, 117 NYS 1052. Denied where affidavit merely stated that defendant "had a counterclaim for goods sold and delivered." Lazaroff v. Shapiro, 113 NYS 572. The affidavit of merits may be made **by attorney** and upon information and belief. State v. Second Judicial Dist. Ct., 38 Mont. 415, 100 P 207. May be in the **form** of a verified answer, since form is immaterial, the law looking only to substance. Id.

59. Moving party must show merits of his claim and that he will be injured if default be not opened. State v. Second Judicial Dist. Ct., 38 Mont. 415, 100 P 207. Motion to vacate default judgment must show cause of action under Code, § 4096. Andres & Co. v. Schlueter [Iowa] 118 NW 429.

60. Essential that motion be accompanied by showing of defense as answer or affidavit of merit. California Casket Co. v. McGinn [Cal. App.] 100 P 1077. Must show meritorious defense. Beck v. Lavin, 15 Idaho, 363, 97 P 1028; Vogelsang v. Fredkyn, 133 Ill. App. 356; Page v. Dempsey, 117 NYS 1052. Defendant must show prima facie meritorious defense. Ziegler v. Smith, 116 NYS 99. Should show meritorious defense to whole or part of action. Sloan v. Hallowell, 83 Neb. 762, 120 NW 449. Under Code, § 4096. Andres & Co. v. Schlueter [Iowa]

cation must be accompanied by a copy of the proposed answer.[62] A party may be permitted to renew an application insufficiently supported,[63] and a defect in an order to show cause may be cured by the contents of accompanying affidavits.[64] Since the court cannot consider whether the judgment was right or wrong or whether the defendant will ultimately establish his defense,[65] counter affidavits will be heard only upon the question of excuse for permitting the default.[66] The vacation of the judgment and setting of the case for trial necessarily opens the default without a specific order.[67] In some states the setting aside of a default has the effect of setting aside the judgment,[68] but where this is not true and final judgment has been rendered, such judgment must be vacated before the default is opened.[69] If a default judgment be set aside as to one of several joint defendants, it must be set aside as to all.[70] Relief from a default is usually granted upon terms[71] dependent upon the nature and circumstances of the case.[72] The court will not be permitted to impeach its discretionary ruling in opening a default.[73]

118 NW 429. **Motion denied** where it did not appear that defendant could have sustained by evidence the allegations of his answer. Id. Denied where defendant made no showing that he had defense. Horton v. Haines [Okl.] 102 P 121. Denied where motion set up no defense other than that stated in answer which had been refused as insufficient. Plunkett v. State Nat. Bank [Ark.] 117 SW 1079. **Motion allowed** and defense held to be sufficiently shown though there was some discrepancy between affidavit of merits and proposed answer. Pengelly v. Peeler [Mont.] 101 P 147.

61. Colehour v. Bass, 143 Ill. App. 530; Beck v. Lavin, 15 Idaho, 363, 97 P 1028. Must excuse delinquency. State v. Second Judicial Dist. Ct., 38 Mont. 415, 100 P 207. Showing of excuse is required by good practice. Sloan v. Hallowell, 83 Neb. 762, 120 NW 449. Defendant must show reasonable excuse for his neglect. Zeigler v. Smith, 115 NYS 99.

62. Required in chancery. Colehour v. Bass, 143 Ill. App. 530. Motion should be accompanied by proposed answer when none has theretofore been interposed. Bloch v. Weinstein, 113 NYS 1067. Essential that copy of proposed answer be annexed motion papers. Tuska v. Jarvis, 61 Misc. 224, 113 NYS 767.

63. Where affidavits supporting motion were insufficient, defendant should be permitted to renew it unless it appear that he had no defense or acted in bad faith in seeking adjournment. Liebling v. Borg, 113 NYS 549.

64. Defect in order in asking only that judgment be vacated was cured by statement in affidavit served with order that he desired cause to be restored to calendar and set for trial. Smith v. Geraty, 64 Misc. 40, 117 NYS 902.

65. Court can consider only whether defendant presents meritorious defense in answer tendered and sufficient excuse for not presenting it seasonably. Quealy v. Willardson [Utah] 100 P 930. Issue of fact going to merits of case, such as whether controversy had been settled, cannot be determined at hearing on motion. Corson v. Smith [S. D.] 116 NW 705.

66. Will not hear affidavits rebutting defense set out. Beck v. Lavin, 15 Idaho, 363, 97 P 1028. Court will not consider counter-affidavits with respect to merits. Finkelstein v. Schilling, 135 Ill. App. 543. Court will consider counteraffidavits with respect to question of diligence. Id.

67. Hence, order made under Municipal Court Act, § 253, was not defective for not expressly stating that it opened the default. Smith v. Geraty, 64 Misc. 40, 117 NYS 902.

68. Curtin v. Dunne [Cal. App.] 102 P 825. In such case, **notice** to set aside default is sufficient to support order setting aside judgment. Id.

69. Docket entry stating that default was opened but not stating that final judgment was vacated held insufficient. Horn v. Mound City Paint & Color Co. [Ga.] 64 SE 666.

70. Merrifield v. Western Cottage Piano & Organ Co., 238 Ill. 526, 87 NE 379.

71. Plaintiff held entitled to relief upon terms from judgment of dismissal. Damsky v. Dochterman, 61 Misc. 597, 114 NYS 170. Opened on terms prescribed by Municipal Court Act, § 326. Goldstein v. Rosenthal, 113 NYS 1012.

72. Where facility with which defendant has repeatedly permitted its default to be taken and feebleness of its excuses therefor suggest suspicion that real object in view is delay, and where there are also technical defects in moving papers, terms heavier than usual may be imposed as condition to opening default. Van Hoven v. Faust Co., 111 NYS 837. Default judgment should not be opened except on payment of taxable costs and disbursements to date. Page v. Dempsey, 117 NYS 1052. Where case had been twice dismissed, plaintiff was penalized as condition to opening his default and required to pay defendant $30 costs, $10 costs of motion, and case was placed at foot of general calendar. Salkind v. Levy, 116 NYS 581. Plaintiff's default, the only excuse for which was illness of attorney, should be opened only upon his indemnifying defendant against charges of attorney for attending call of calendar and taking dismissal, in addition to defendant's other disbursements. Fennell v. Reinhardt, 130 App. Div. 444, 114 NYS 1023. Terms cannot comprise $10 costs and taxable disbursements since under Municipal Court Act, §§ 253, 256, costs which court may award as condition to opening default are limited to $10. Klein v. Spiegel, 63 Misc. 259, 116 NYS 550. Plaintiff was

In New York the municipal court may open a default[74] at any time,[75] but cannot absolutely set aside the judgment.[76] Nor has it power to hear more than one motion to open a default.[77] A motion to open a default may be heard before any justice of the same municipal court.[78] In other courts, where the ground alleged is neglect or misconduct of the applicant's attorney, it may be heard before another judge of the same court,[79] but cannot be so heard where to permit such hearing would have the effect of allowing an appeal from one judge to another.[80] On motion at special term a plaintiff may be entitled to relief from a default judgment rendered after the denial of an adjournment.[81]

Appeal. See 11 C. L. 1087—As a general rule a default judgment is not appealable,[82] but in California the rule is otherwise.[83] When an appeal is allowed the only question presented is the sufficiency of the pleadings to support the judgment.[84] Where there has been no abuse of discretion affirmatively shown,[85] the action of the trial court upon a motion to set aside a default judgment will not be disturbed, whether the motion be granted[86] or refused,[87] unless imperatively demanded by the rules of procedure.[88] An order denying a motion to open a default judgment rendered in

given leave to have her default opened on payment of $10 costs within 10 days. Herman v. Hyman, 112 NYS 1077. Where the defendant **in ejectment** has a meritorious defense, the courts are very liberal in setting aside a regular default upon just and equitable terms to let in the tenant to defend his possession. Tennessee Coal, Iron & R. Co. v. Wise [Ala.] 49 S 253. See Ejectment, § 6.

73. Improper for court to undermine its previous ruling by statement inserted in its certificate to statement of facts months afterward. Starr v. Long Jim, 52 Wash. 138, 100 P 194.

74. Bloch v. Weinstein, 113 NYS 1067. Under Municipal Court Act, § 253. Lindenborn v. Vogel, 131 App. Div. 75, 115 NYS 962.

75. Could open default although satisfaction piece had been executed and filed where its execution and filing was unnecessary, unauthorized, and not requested by judgment debtor. Lindenborn v. Vogel, 131 App. Div. 75, 115 NYS 962.

76. Bloch v. Weinstein, 113 NYS 1067.

77. Under Municipal Court Act (Laws 1902, p. 1562, c. 580), § 253, when it decides one motion on its merits, its powers in such reepect are exhausted. Steinman v. Blumenfeld, 61 Misc. 220, 113 NYS 550.

78. Under Municipal Court Act (Laws 1902, p. 1562, c. 580), § 253, hearing may be had before justice of same court other than one presiding when default was taken. Goldman v. Shiffer, 128 App. Div. 249, 112 NYS 666.

79. Nahe v. Bauer, 133 App. Div. 375, 117 NYS 635. May be heard at special term where ground is wrongful neglect or misconduct of attorney. Id.

80. Default cannot be opened on application to other than the trial judge where such action would have effect of appealing from one judge to another. People v. Millard, 133 App. Div. 139, 117 NYS 474. Not heard by other than trial judge where neglect and misconduct of attorney is not alleged and where trial judge has ruled on motion to postpone supported by affidavits. Nahe v. Bauer, 133 App. Div. 375, 117 NYS 635.

81. On motion at special term, plaintiff was entitled to relief from judgment of dismissal rendered after denial of adjournment. Damsky v. Dochterman, 61 Misc. 597, 114 NYS 170. City court of New York at special term has power to open defaults and vacate default judgments though motion for postponement, the denial of which is complained of, was not in reviewable form. In re Rubenstein, 129 App. Div. 326, 113 NYS 554.

82. Liebling v. Borg, 113 NYS 549; Merritt & Chapman Derrick & Wrecking Co. v. Koronsky, 113 NYS 744; Goldstein v. Rosenthal, 113 NYS 1012; Lindenborn v. Vogel, 131 App. Div. 75, 115 NYS 962. See, generally Appeal and Review, § 4. Not appealable when rendered in municipal court. Goldman v. Brooklyn Heights R. Co., 129 App. Div. 657, 114 NYS 182; Martin v. Lefkowitz, 62 Misc. 490, 115 NYS 64; Davies v. Myers, 113 NYS 9.

83. Default judgment is appealable in California. Lemon v. Hubbard [Cal. App.] 102 P 554.

84. Neimeyer v. Claiborne, 87 Ark. 72, 112 SW 387. Whatever proof that may be necessary will be presumed to have been offered. Id.

85. Order denying motion to set aside a default held appealable where there was abuse of discretion. Voorhees v. Geiser-Hendryx Inv. Co. [Or.] 98 P 324.

86. Discretionary in setting aside default not reviewable where no abuse affirmatively shown. Knupp v. Miller, 133 Mo. App. 256, 113 SW 725. Order opening default judgment on motion not appealable. Smith v. Geraty, 64 Misc. 40, 117 NYS 902. Interlocutory order vacating default judgment obtained on service by publication held not appealable. Wolf v. Sahm [Tex. Civ. App.] 120 SW 1114.

87. Granting or refusing the motion to open a default where there is no abuse of discretion held not appealable. Anderson v. McClellan [Or.] 102 P 1015; Turner v. Bolton, 82 S. C. 502, 64 SE 412; Hallowell v. Darling, 32 App. D. C. 405. Order denying motion to set aside default where there is no abuse of discretion held not appealable. Aaron v. Holmes [Utah] 99 P 450.

88. Light v. Stevens, 8 Cal. App. 74, 103 P 361.

the municipal court of New York is appealable.[89] Formal errors not objected to below are not reviewable.[90]

§ 4. *Operation and effect of default.*[91]—See 11 C. L. 1068—The effect of defaults as related to the taking of judgments is treated in another section, as is also the necessity of proof or inquiry of damages after default.[92] Where the court has acquired complete jurisdiction, a default judgment is not void because entered erroneously [93] or prematurely.[94] When void as to one joint defendant, it is void as to all.[95] The default of a party will not affect the right of an intervenor who is his successor in interest.[96]

Defenses; Definite Pleading; Del Credere Agency; Demand; Demurrage; Demurrers; Demurrer to Evidence; Dentists; Departure; Depositaries, see latest topical index.

DEPOSITIONS.

The scope of this topic is noted below.[97]

§ 1. Occasion or Necessity; Right to Take, 1299.
§ 2. Procedure to Obtain Deposition, 1300.
§ 3. Taking the Testimony or Evidence Adduced, 1300. Officers Authorized to Take, 1300. Notice of Hearing and Attendance of Witness, 1301. Proceedings at Hearing, 1301. Cost of Taking and Transcribing, 1302.
§ 4. Returning and Filing, 1302.
§ 5. Suppression and Objections Before Trial, 1302.
§ 6. Use as Evidence, 1303. Objections, 1304.

§ 1. *Occasion or necessity; right to take.*[98]—See 11 C. L. 1069—The fundamental basis of the practice of allowing the taking and use of depositions is the impossibility or inconvenience of securing the personal attendance of the witness,[99] and in order to render a deposition admissible it must appear that the defendant was one whose deposition was authorized to be taken,[1] and reason must be shown for the absence

89. Davies v. Myers, 113 NYS 9..

90. As alleged error in form of notice to set aside default judgment. Curtin v. Dunne [Cal. App.] 102 P 825. See, generally, Saving Questions for Review, § 4.

91. **Search Note:** See note in 11 L. R. A. (N. S.) 803.

See, also, Damages, Cent. Dig. §§ 515-527; Dec. Dig. §§ 194-204; 13 Cyc. 220, 221, 223-226; Judgment, Cent. Dig. §§ 202-207, 226-230; Dec. Dig. §§ 111-113, 124-126; 23 Cyc. 751, 752, 754, 760-762; 6 A. & E. Enc. P. & P. 111.

92. See ante, § 2.

93. So held in suit to quiet title where it was alleged that court erred in its judgment of matters considered. Brenholts v. Miller [Kan.] 101 P 998.

94. Held not void where court had acquired jurisdiction of defendant by service of summons. California Casket Co. v. McGinn [Cal. App.] 100 P 1077.

95. Lawrence v. Stone [Ala.] 49 S 376.

96. Risdon v. Steyner, 9 Cal. App. 344, 99 P 377.

97. Includes various proceedings to take testimony of witness before trial to be used therein, including the taking of testimony de bene esse. Excludes equitable remedy of discovery (see Discovery and Inspection,* § 1), statutory examination of parties before trial (see Discovery and Inspection,* § 3), depositions in supplementary proceedings (see Supplementary Proceedings,* § 1-4), and depositions in criminal proceedings (see Indictment and Prosecution,* §§ 9, 10A. See, also Homicide,* § 7C, as to dying declarations).

98. **Search Note:** See notes in 7 C. L. 1130; 35 L. R. A. 340; 6 Ann. Cas. 577.

See, also, Depositions, Cent. Dig. §§ 1-39; Dec. Dig. §§ 1-29; 13 Cyc. 832-848, 854-859, 879-882, 889-892; 9 A. & E. Enc. L. (2ed.) 297, 308; 6 A. & E. Enc. P. & P. 479.

99. Where witness' attendance cannot be compelled, his deposition may be taken under rule of circuit court. Miller v. Moise, 168 F 940. Deposition of a party residing in a foreign country may be taken. Hite v. Keene, 137 Wis. 625, 119 NW 303. Where the statute provides that a witness cannot be required to attend if he resides more than 20 miles from the place where the court sits, the deposition of a witness living 40 miles away may be taken. Sealy v. Williston [Ky.] 117 SW 959. Under Rev. St. Utah 1898, §§ 3466, 3467, testimony of a person injured and not expected to live may be perpetuated for use in an anticipated suit by his wife and children to recover for the injury. Ohio Copper Min. Co. v. Hutchings [C. C. A.] 172 F 201. Admissibility of such testimony is to be determined by the laws of the state wherein the cause is pending. Rev. St. U. S. § 867, does not otherwise limit such use. Id.

1. Under a rule of court authorizing depositions of ancient, infirm and going witnesses. Lyttle v. Denny, 222 Pa. 395, 71 A 841.

of a resident witness,[2] but where the statute gives the absolute right to take a deposition, such right will not be defeated by the attendance of the witness.[3] Deposition of a party to the suit may be taken in his own behalf,[4] but where the mental capacity of the party is in issue, and her oral testimony available, her deposition should not be used.[5] Pending an appeal, the lower court may issue a commission to take the deposition of a witness necessary in case of a new trial.[6]

§ 2. *Procedure to obtain deposition.*[7]—See 11 C. L. 1070—Depositions may be taken before issue is joined,[8] and a court may in its discretion delay trial until a deposition can be taken,[9] such discretion, however, being subject to review for abuse.[10] A bill to perpetuate testimony must state a case of necessity under the statute.[11] Under the practice in some states an open commission rarely issues.[12] Application may be made by the attorney of the party,[13] but the affidavit in support thereof should usually be made by the party himself.[14] The affidavit must allege that the witnesses are not within the state,[15] or show the circumstances rendering the examination of a witness before trial proper.[16] Where the court has no discretion to deny the commission, mandamus lies to compel its issuance.[17] Although appointment of a commissioner to take depositions is not authorized by statute, yet, if the person appointed is an officer authorized by statute to take depositions, the deposition is valid.[18]

§ 3. *Taking the testimony or evidence adduced.*[19] *Officers authorized to take.*See 11 C. L. 1071—In some states a very liberal practice is indulged, according to which it is presumed that an officer of another state who has taken a deposition

2. Foringer v. New Kensington Stone Co. [Pa.] 72 A 797.

3. Defendant under Civ. Code Prac. § 606, subsec. 8, is absolutely entitled to take plaintiff's deposition, plaintiff living more than 20 miles from trial, and such right is not defeated by fact that plaintiff appears at the trial, testifies and subjects himself to cross-examination. Western Union Tel. Co. v. Williams, 33 Ky. L. R. 1062, 112 SW 651.

4. Fell v. McIlhenny, 123 La. 364, 48 S 991.

5. Holland v. Riggs [Tex. Civ. App.] 116 SW 167.

6. Where witness is under sentence of death. Gas & Elec. Co. v. Superior Ct. [Cal.] 99 P 359. The question is not whether the testimony is material to issues already tried, but whether it will be material to issues to be tried. Id.

7. **Search Note:** See Depositions, Cent. Dig. §§ 40-71; Dec. Dig. §§ 30-47; 13 Cyc. 854-882, 884-892, 894-899; 9 A. & E. Enc. L. (2ed.) 316; 6 A. & E. Enc. P. & P. 487.

8. Freeman v. Brown [N. C.] 65 SE 743.

9. Pine Bluff & W. R. Co. v. McCaskill [Ark.] 114 SW 208.

10. Since defendant had absolute right, under Civ. Code Proc. § 537, to take plaintiff's deposition, held error to refuse continuance which was necessary for the taking of such deposition. Western Union Tel. Co. v. Williams, 33 Ky. L. R. 1062, 112 SW 651. As to discretion of court in granting continuances generally, see Continuance and Postponement, § 1, and as to grounds of continuance generally, see same topic, § 2.

11. A bill which alleges a threat by defendant to sue for infringement of a patent and a delay in doing so, and that plaintiff can establish the invalidity of the patent only by witnesses living in another state, is sufficient. Westinghouse Mach. Co. v. Electric Storage Battery Co. [C. C. A.] 170 F 430, rvg. 165 F 992.

12. Open commission to take depositions of unknown witnesses, to be disclosed by testimony of named witness, unlimited as to number, time or place, except that they were to be taken in France within five months, is unwarranted. Chaskin v. Mackay, 130 App. Div. 50, 114 NYS 457.

13. A guardian, employing an attorney for his ward, cannot object that the deposition of the ward, procured by such attorney, should have been procured on application of the guardian. Williams v. Smith [R. I.] 72 A 1093.

14. The affidavit should be made by the party, or reason shown why the attorney makes it. Downing v. McKillop, Walker & Co., 117 NYS 961.

15. Reference to proposed witnesses as being "of Berlin, Germany," is insufficient. Downing v. McKillop, Walker & Co., 117 NYS 961.

16. Affidavit reciting that witness had evaded subpoena in a prior action, and was under the control of the adverse party who refused to disclose his whereabouts, held sufficient. Automobile Club of America v. Canavan, 128 App. Div. 426, 112 NYS 785.

17. Gas & Elec. Co. v. Superior Ct. [Cal.] 99 P 359. See, generally, Mandamus, § 2A.

18. Pine Bluff & W. R. Co. v. McCaskill [Ark.] 114 SW 208.

19. **Search Note:** See notes in 1 L. R. A. (N. S.) 1142; 6 Ann. Cas. 610.

See, also, Depositions, Cent. Dig. §§ 72-164; Dec. Dig. §§ 49-7; 13 Cyc. 848-854, 899-913, 915-923, 925-941; 9 A. & E. Enc. L. (2ed.) 301, 314, 322, 332; 6 A. & E. Enc. P. & P. 552.

is lawfully entitled to the official character which he assumes and that he had authority to take depositions.[20] A notary in the employ of an attorney for one of the parties cannot take a deposition.[21]

*Notice of hearing and attendance of witnesses.*See 11 C. L. 1071—Notice must be given to each party against whom the deposition is to be used,[22] unless waived.[23] The notice must usually [24] contain the names of the witnesses whose testimony is to be taken,[25] and, in some states, must be served by an officer authorized to serve processes of the court in which it is to be used.[26] Necessity for taking the deposition at the time designated may be waived,[27] and it may be taken at a later date if the opposite party is not prejudiced by the delay.[28] Disobedience by a witness of an order to appear and testify may be punished as a contempt,[29] and the commitment may be for refusal to answer questions although he was attached for failure to appear.[30] Where the commitment is for refusal to be sworn, a privilege based upon the character of the questions anticipated constitutes no defense.[31]

*Proceedings at hearing.*See 11 C. L. 1072—The statutory method of taking cannot be modified by order of court.[32] The deposition must show that the witness was sworn, and must contain a caption and certificate,[33] and must be signed by the witness,[34] and where transcribed by the officer taking it, it need not be sworn to by the person stenographically reporting it.[35] The answers must be responsive.[36] State-

20. Carpenter v. Gibson [Vt.] 73 A 1030. Depositions held not objectionable on account of failure of notary, of another state, to affix his seal opposite his notarial signature. See P. S. 1609, 1612, 1613, dispensing with necessity of seal, and providing that depositions taken in other states shall be allowed if taken according to laws of Vermont, and that officers of other states authorized to take depositions shall have powers of justice of peace in this regard. Id.

21. It need not appear that such employer is attorney in particular case in which deposition is sought to be used. Huntington Consol. Lime Co. v. Powhatan Coal Co. [Ind. App.] 87 NE 1047.

Proof of relationship may be made by affidavit, and need not be shown by the records. Huntington Consol. Lime Co. v. Powhatan Coal Co. [Ind. App.] 86 NE 857.

22. Where one party was not notified, the deposition when read in evidence could not be considered as against him. Millspaugh v. Missouri Pac. R. Co. [Mo. App.] 119 SW 993.

23. Objection for want of notice is personal and available only to the person affected. Williams v. Smith [R. I.] 72 A 1093; McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269. Failure to notify guardian of witness waived by offer of the deposition by the guardian. Williams v. Smith [R. I.] 72 A 1093. Attendance and cross-examination in response to oral notice waives written notice. Pine Bluff & W. R. Co. v. McCaskill [Ark.] 114 SW 208.

24. See ante, § 2, as to open commissions to take testimony of unknown witnesses.

25. Donaldson v. Winningham [Wash.] 102 P 879.

26. Constable cannot serve notice in action in superior court. Brown v. Myers, 150 N. C. 441, 64 SE 374.

27. An agreement between the attorneys that it may be taken at a later date constitutes a waiver. Flowers v. Poorman [Ind. App.] 87 NE 1107.

28. Under Burns' Ann. St. 1898, § 463. Flowers v. Poorman [Ind. App.] 87 NE 1107.

29. The statute authorizing it is not in violation of Const. art. 6, § 1. In re Hammond, 83 Neb. 636, 120 NW 203. Under Rev. Civ. St. 1895, arts. 2292-2294. Johnson v. State, 54 Tex. Cr. R. 113, 111 SW 743. As to authority to punish for contempt in disobedience of court generally, see Contempt, § 1C.

Powers of particular courts: As to power of courts to punish for contempt in general, see Contempt, § 3. **Probate court** may order witness to appear and testify before commissioner and enforce such order by commitment for contempt, under Act March 6, 1893, §§ 9 and 10, expressly conferring such authority. In re Niday, 15 Idaho, 559, 98 P 845. **Justice of the peace** may commit a witness who refuses to attend or testify, and Code Civ. Proc. §§ 966, 967, limiting his powers to imposing a fine only, does not apply. In re Hammond, 83 Neb. 636, 120 NW 203.

30. In re Hammond, 83 Neb. 636, 120 NW 203.

31. No defense that the deposition was for an improper purpose and would require disclosure of private matters, since such privilege should be raised by refusal to answer objectionable questions. In re Hammond, 83 Neb. 636, 120 NW 203.

32. Where the statute requires interrogatories to be in writing, the court cannot permit oral cross-examination. Burnham v. Stoutt [Utah] 99 P 1070.

33. Lowrance v. Richardson [Okl.] 100 P 529.

34. May be signed in absence of opposite party, if latter has been given an opportunity to be present. Williams v. Smith [R. I.] 72 A 1093. Sufficient if transcribed copy of deposition, made from stenographic notes, be signed by witness, it not being necessary that stenographic notes be signed. Id.

35. Williams v. Smith [R. I.] 72 A 1093.

36. Where no objection was made to an

ments attached as exhibits are admissible although not submitted for examination with the interrogatories, where the opposite party had knowledge of the statements and that they would be the basis of the testimony.[37]

Cost of taking and transcribing.[See 9 C. L. 987]—One rendering the taking of his deposition necessary, by refusal to comply with an order to disclose, may be charged with the costs thereof.[38]

§ 4. *Returning and filing.*[39]—[See 11 C. L. 1073]—The citation need not be returned to the officer issuing it, if it appears that it was received by the officer taking the deposition,[40] but the depositions must be returned directly to the court if required by statute,[41] a reasonable time therefor being allowed,[42] but objection that the deposition was not properly returned may be waived.[43] It is not a fatal defect that the title of the case was not indorsed on the envelope,[44] or that the envelope was not fastened with a seal.[45] A deposition not filed in time may be filed nunc pro tunc only when it is properly taken and certified.[46] The deposition may be withdrawn under order of court, and irregularities corrected by the officer taking them,[47] or may be returned for further hearing.[48]

§ 5. *Suppression and objections before trial.*[49]—[See 11 C. L. 1073]—A deposition will generally be suppressed for failure of the witness to answer a cross interrogatory,[50] but not for mere indefiniteness in his answers,[51] and the remedy in the federal courts of equity and bankruptcy for refusal to testify or to produce evidence is not by suppression of the deposition, but by an order of the proper court compelling the witness to testify or produce the evidence.[52] The deposition should not be suppressed for irregularities not prejudicial.[53] The motion to suppress must be made before the deposition is offered in evidence [54] but is in time if made before the

interrogatory, an answer not responsive thereto should be excluded. Montgomery Moore Mfg. Co. v. Leeth [Ala.] 50 S 210.

37. Title Guaranty & Surety Co. v. Nichols [Ariz.] 100 P 825.

38. Refusal of attorney to disclose whereabouts of his client for purpose of service of process. In re Malcolm, 60 Misc. 324, 113 NYS 255.

39. **Search Note:** See Depositions, Cent. Dig. §§ 165-212; Dec. Dig. §§ 73-81; 13 Cyc. 942-957, 959-971; 9 A. & E. Enc. L. (2ed.) 346; 6 A. & E. Enc. P. & P. 532, 560.

40. Where it is returned with the deposition, in envelope properly subscribed, it will be presumed to have been in the hands of the officer when he took the deposition. Carpenter v. Gibson [Vt.] 73 A. 1030.

41. A return to the master commissioner is a fatal defect. Sealy v. Williston [Ky.] 117 SW 959.

42. Seventeen days for such return held sufficient. Fell v. McIlhenny, 123 La. 364, 48 S 991.

43. Sealy v. Williston [Ky.] 117 SW 959. See post, § 5, Suppression and Objections Before Trial.

44. Weinberg v. Atlantic Coast Line R. Co. [S. C.] 65 SE 637.

45. Under Civ. Code 1902, § 992, requiring that the envelope be "sealed up." Weinberg v. Atlantic Coast Line R. Co. [S. C.] 65 SE 637.

46. It cannot be so filed when the judge failed to certify that it was read over to the witness, and where it fails to show that it was subscribed by the person and certified by the judge taking the same. Lowther v. Sullivan, 63 Misc. 51, 116 NYS 588.

47. Gray v. Phillips [Tex. Civ. App.] 117 SW 870.

48. Where the commission to examine witnesses without written interrogatories has been imperfectly executed by failure to examine as to all the issues involved, it should be returned for further examination of witnesses. Smith v. Star Co., 116 NYS 730. Depositions should be returned for cross-examination, where no prejudice results, although failure of the attorney to appear at the original taking was not the fault of the party taking them. The additional cost should be taxed to the party for whose benefit the depositions are returned for cross-examination. Pennsylvania Sugar Refining Co. v. American Sugar Refining Co., 171 F 579.

49. **Search Note:** See Depositions, Cent. Dig. §§ 213-233; Dec. Dig. §§ 81-85; 13 Cyc. 969-979; 6 A. & E. Enc. P. & P. 587.

50. Missouri, K. & T. R. Co. v. Davis [Tex. Civ. App.] 116 SW 423.

51. Deposition should not be excluded because answers to cross interrogatories are not deemed sufficiently specific. Mundt v. Commercial Nat. Bank [Utah] 99 P 454.

52. Scherer & Co. v. Everest [C. C. A.] 168 F 822.

53. Refusal to suppress not an abuse of discretion where appellant was not prejudiced. Missouri, K. & T. R. Co. v. Davis [Tex. Civ. App.] 116 SW 423. Not suppressed for **insufficiency of time of notice,** where full cross interrogatories were in fact filed within the time. Stewart v. Beggs, 56 Fla. 565, 47 S 932.

54. Under Revisal 1908, § 1647. Freeman v. Brown [N. C.] 65 SE 743. A motion to

trial.[55] Formal objections must be made in proper time [56] usually before the trial on the merits,[57] or submission for such trial,[58] and are sometimes required to be made before the jury is impaneled.[59] In Georgia objection to the form of interrogatories must be taken before the commission issues.[60] That the party received a copy of the interrogatories and saw the original when opened by the notary is not necessarily ground for excluding the deposition.[61] When depositions are quashed, they cannot, against the order of the court, be retaken on the same interrogatories.[62]

§ 6. *Use as evidence.*[63]—See 11 C. L. 1675—A deposition of the defendant is admissible as an admission, although he is present in court at the trial.[64] A party may introduce a part only of his deposition, unless such part is unintelligible without the context,[65] but if the party taking the depositions declines to read them in evidence, the other party may do so.[66] The cross-examination and exhibits produced during such examination may be read as part of the deposition.[67] Admission of a deposition containing leading questions is within the discretion of the court.[68] It is sometimes permissible to allow a statement of a summary of the testimony contained in the depositions.[69] In some cases it is also permissible to

suppress, made after argument is begun, may be overruled unless a reason for the delay is shown. McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269.

55. Delay does not estop, where the ground of the motion was known to the party taking the deposition. Huntington Consol. Lime Co. v. Powhatan Coal Co. [Ind. App.] 86 NE 857.

56. Objection to the introduction of a deposition should be overruled where the deposition was on file during two terms of court, and no motion to suppress was made. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403.

57. Objection on account of **defective return.** Sealy v. Williston [Ky.] 117 SW 959. **Insufficiency of notice** to take. Cayouette v. Raddant Brew. Co., 136 Wis. 634, 118 NW 204. Under a court rule requiring **objections to the form** in which interrogatories are "conceived" to be made before deposition is taken, an objection that deposition of two witnesses was taken on joint interrogatories cannot be first made when it is offered in evidence. Canon v. Green, 56 Fla. 211, 47 S 935. Under Rev. St. 1895, art. 2284, requiring objections to form or manner of taking to be made in writing, on notice given before trial, an objection to the form and manner of taking, not made until the deposition is offered in evidence, is too late. St. Louis, etc., R. Co. v. Adams [Tex. Civ. App.] 118 SW 1155. An **objection that deposition was not taken in accordance with law** should be made by motion to suppress, and not as a ground for its exclusion when offered in evidence. Hammond v. Vetsburg, 56 Fla. 369, 48 S 419. An objection **that answer is not responsive** must be made upon notice, before the trial commences. Kirby v. Blake [Tex. Civ. App.] 115 SW 674.

58. Objection to the manner of taking is waived by a stipulation for submission to the court upon the deposition. Steele v. Crabtree [Iowa] 120 NW 720.

59. After the jury has been impaneled, it is too late to object to depositions on ground that they were taken on joint interrogatories and answered jointly instead of severally. Canon v. Green, 56 Fla. 211, 47 S 935.

60. Under Circuit Court Practice Rule 44, in common-law actions, objections to interrogatories or form in which they are "conceived" must be assigned in writing before the commission issues or the deposition is taken. Canon v. Green, 56 Fla. 211, 47 S 935. "Conceived," as used in such rule, means "formulated." Id.

61. Homan v. Wayer, 9 Cal. App. 123, 98 P 80.

62. The fact that the attorney had stipulated that such depositions might be taken, in the first instance, without notice, is not binding on a retaking. First Nat. Bank v. Thomas [Tex. Civ. App.] 118 SW 221.

63. **Search Note:** See notes in 3 C. L. 1079, 1080; 11 Id. 1077; 14 L. R. A. (N. S.) 488; 10 Ann. Cas. 960.

See, also, Depositions, Cent. Dig. §§ 234-339; Dec. Dig. §§ 86-111; 13 Cyc. 979, 981-1026; 9 A. & E. Enc. L. (2ed.) 351; 6 A. & E. Enc. P. & P. 562.

64. That another person has been added as a party defendant, since the deposition was taken, does not affect this rule. Black v. Epstein [Mo.] 120 SW 754.

65. Crotty v. Chicago G. W. R. Co. [C. C. A.] 169 F 593. Introduction of a part only of the deposition is cured by the introduction of the entire deposition by the opposite party. Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 118 NW 282.

66. Bowler v. Osborne, 75 N. J. Law, 903, 70 A 149. On failure to introduce, opposite party may introduce part or all of it. Scherer & Co. v. Everest [C. C. A.] 168 F 822. Where only a portion of an answer is offered, the opposite party may introduce the remainder. Birge-Forbes Co. v. St. Louis & S. F. R. Co. [Tex. Civ. App.] 115 SW 333.

67. Crites v. Modern Woodmen of America [Neb.] 121 NW 591.

68. St. Louis, etc., R. Co. v. Stell, 87 Ark. 308, 112 SW 876.

69. Where depositions of a large number of witnesses are taken to prove payments made by them. Fidelity & Deposit Co. v. Champion Ice Mfg. & Cold Storage Co. [Ky.] 117 SW 393.

limit its use to prove certain issues.[70] In the absence of evidence as to the mental capacity of the witness, his deposition should not be excluded for incapacity.[71] The deposition should not be excluded because a stricken interrogatory was included and answered.[72] An appellate court is as well qualified as a jury to consider depositions taken out of court.[73]

Objections. See 11 C. L. 1078—Objections to competency, credibility or propriety of the answers, may be made at the trial.[74] A general objection is insufficient where the deposition contains some legal evidence,[75] and objections going to the weight of the deposition are not ground for its exclusion.[76] An objection to the withdrawal of depositions without leave of court is waived by allowing them to be read without objection.[77] Objection that one joint party was not served with notice may be taken by motion for an instruction to disregard the deposition as to such party,[78] and improper exhibits may also be reached by motion to strike.[79] A stipulation waiving objections to the competency of a portion of memorandum used in connection with a deposition will not render the entire memorandum admissible.[80] Objection is waived if not made in the lower court.[81] Formal objections must usually be made before trial.[82]

Deposits; Deputy, see latest topical index.

DESCENT AND DISTRIBUTION.

The scope of this topic is noted below.[83]

§ 1. Laws Governing Descent, 1305.
§ 2. Persons Entitled to Share or Inherit, 1305.
§ 3. Inheritable and Distributable Property, 1306.
§ 4. Course of Descent and Distribution, 1307.
§ 5. Quantity of Estate or Share Acquired, 1308.
§ 6. Husband or Wife as Heir, 1308.

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70. Limitation of use as evidence to prove certain issues is not error as against a party objecting to its introduction. Hodgkins v. Dunham [Cal. App.] 103 P 351.

71. Williams v. Smith [R. I.] 72 A 1093.

72. It is sufficient to exclude the objectionable answer. Burnham v. Stoutt [Utah] 99 P 1070.

73. Deposition of witness taken out of court before trial of cause may be considered by supreme court as well as by jury. Jones v. New Orleans G. N. R. Co., 122 La. 354. 47 S 679.

74. Under Gen. St. 1906, § 1559, objections to competency or credibility of witness, or to propriety of questions or answers, may be made when deposition is produced, in same manner as if witness were personally being examined on the trial. Canon v. Green, 56 Fla. 211, 47 S 935.

75. An objection "to each question of each witness" is nothing more than a general objection. Hammond v. Vetsburg, 56 Fla. 369, 48 S 419. A general objection to the deposition as a whole cannot be applied to a single question therein, where there are other questions to which it does not apply. Hilliboe v. Warner [N. D.] 118 NW 1047.

76. That it is indefinite, contradictory and irrelevant, or does not support the issues. Williams v. Smith [R. I.] 72 A 1093.

77. McClure v. Great Western Acc. Ass'n [Iowa] 118 NW 269.

78. It was not necessary that objection be made to the admission of the deposition in evidence. Millspaugh v. Missouri Pac. R. Co. [Mo. App.] 119 SW 993.

79. No error in striking deed and affidavit from deposition where deed did not cover land in controversy and affidavit stated that deed to defendant was executed when affiant thought he was duplicating former deed. Cross v. Robinson Point Lumber Co., 55 Fla. 374, 46 S 6.

80. Shockley v. Pennsylvania R. Co., 109 Md. 123, 71 A 437.

81. Objection that the deposition was taken after the depositions of other witnesses. Hall v. Wilson [Ky.] 116 SW 244. See, generally, Saving Questions for Review, § 4.

82. See ante, § 5.

83. Treats only of the devolution of property of intestates. Excludes wills (see Wills*), the administration and management of the estates of decedents (see Estates of Decedents*), the reservation or creation of estates by deeds of conveyance (see Deeds of Conveyance,* § 3; Real Property,* § 3), the effect of joint inheritance as creating tenancy in common or joint tenancy (see Tenants in Common or Joint Tenants,* § 1), survivorship as to estates held by the entirety or in common by husband and wife (see Husband and Wife,* § 3D), rights of surviving spouse under community system (see Husband and Wife,* § 4E), rights of surviving tenant in common or joint tenant (see Tenants in Common and Joint Tenants,* § 2), and election of rights and estates (see Election and Waiver,* § 2B; Wills,* § 4D, as to election for or against will).

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§ 1. *Laws governing descent.*[84] See 11 C. L. 1078—The right to inherit the property of an intestate is generally regarded as conferred solely by statute,[85] though the terms of such statutes are presumed to be used in their common-law signification.[86] Being statutory, such right may be regulated and changed in the discretion of the legislature.[87] Even, where regarded as inherent, the right is held subject to reasonable taxation by the legislature.[88] One alleging intestacy, where a will has been estabished, must prove it,[89] and the question is determined as to personalty by the law of the decedent's domicile,[90] and as to realty by the law of the situs.[91] The determination of the persons entitled to realty is likewise determined by the situs.[92] The law is taken in each case as it stood at the death of the decedent.[93] A person's capacity to inherit is governed by the law of his domicile,[94] if not in conflict with the law governing the descent.[95]

§ 2. *Persons entitled to share or inherit.*[96] See 11 C. L. 1079—One becomes an heir only upon the death of his ancestor.[97] The presumption is that no one dies without leaving heirs [98] or next of kin,[99] but not that he leaves a widow or descendants.[1] An heir may be estopped by his conduct,[2] or by that of one through whom he claims by right of representation,[3] from asserting title to his share.

84. As to the general principles of conflict of laws, see Conflict of Laws.

Search Note: See notes in 11 C. L. 1079; 31 L. R. A. 85, 32 Id. 177; 9 L. R. A. (N. S.) 121; 9 Ann. Cas. 726.

See, also, Descent and Distribution, Cent. Dig. §§ 1-32; Dec. Dig. §§ 1-7; 14 Cyc. 15-18, 20-25; 27 A. & E. Enc. L. (2ed.) 294.

85. Truelove v. Truelove [Ind.] 86 NE 1018, mandate modified [Ind.] 88 NE 516.

86. "Brother" and "sister" held confined to legitimate, in Burns' Ann. St. of 1908, §§ 2992, 2993, making them heirs. Truelove v. Truelove [Ind.] 86 NE 1018, mandate modified [Ind.] 88 NE 516.

87. In re McWhirter's Estate, 235 Ill. 607, 85 NE 918. Legislature may place burdens upon right of succession. State v. Second Judicial Dist. Ct., 38 Mont. 415, 100 P 207.

88. Laws 1903, p. 65, c. 44, as amended by p. 403, c. 249, §§ 1, 4, taxing "any transfer of any property," held constitutional, notwithstanding classification and progressive features. Beak v. State, 139 Wis. 544, 121 NW 347. See Taxes, § 15.

89. Intestacy set up against intervening executor. Boye v. Andrews [Cal. App.] 102 P 551.

90. Murdoch v. Murdoch, 81 Conn. 681, 72 A 290.

91. Mississippian's holographic will valid as to Connecticut land, under Gen. St. 1902, § 293, recognizing validity of wills executed according to law of domicile. Murdoch v. Murdoch, 81 Conn. 681, 72 A 290.

92. Unlocated land certificates held realty for this purpose. Waterman v. Charlton [Tex.] 120 SW 171, afg. [Tex. Civ. App.] 112 SW 779.

93. Rather than at time he acquired the property. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372.

94. Simpson v. Simpson, 9 Ohio C. C. (N. S.) 137.

Domicile of adopted child is that of its foster parents. Simpson v. Simpson, 9 Ohio C. C. (N. S.) 137. See, generally, Domicile.

95. Ohio law held to permit child adopted elsewhere to inherit Ohio land. Simpson v. Simpson, 9 Ohio C. C. (N. S.) 137.

96. Search Note: See notes in 3 C. L. 1082, 1083; 11 Id. 1080; 23 L. R. A. 753; 29 Id. 541, 3 L. R. A. (N. S.) 726; 8 Id. 117; 12 A. S. R. 82, 97; 115 Id. 579; 2 Ann. Cas. 658; 6 Id. 735; 7 Id. 976; 9 Id. 726.

See, also, Adoption, Cent. Dig. §§ 35-42; Dec. Dig. §§ 21-23; 1 Cyc. 931-935; Bastards, Cent. Dig. §§ 250-264; Dec. Dig. §§ 100-105; 5 Cyc. 636, 639-643; Descent and Distribution, Cent. Dig. §§ 10-13, 57-134; Dec. Dig. §§ 18-51; 14 Cyc. 18-20, 34-61; Indians, Cent. Dig. § 49; Dec. Dig. § 18; 22 Cyc. 137; 15 A. & E. Enc. L. (2ed.) 318; 17 Id. 542; 21 Id. 537; 27 Id. 307, 336.

97. Templeman v. McFerrin [Tex. Civ. App.] 113 SW 333. One can have no heirs of his body while he is alive, but the term is sometimes construed to mean children. Adams v. Merrill [Ind. App.] 87 NE 36. Word "surviving" held surplusage in phrase "surviving heirs." Price v. Griffin, 150 N. C. 523, 64 SE 372. Son acquires no present interest in note payable to his mother's heirs and by her delivered to a third person "for my children," as against her subsequent release of maker. Templeman v. McFerrin [Tex. Civ. App.] 113 SW 333.

98. Where escheat is essential to title, claimant must disprove existence of heirs capable of inheriting. In re Clarke, 131 App. Div. 688, 116 NYS 101.

99. Failure to discover them does not rebut presumption so as to avoid transfer tax under Tax Law, § 220, subd. 6 (Laws 1896, p. 868, c. 908, as amended by Laws 1908, p. 808, c. 310, § 1). In re Lind's Estate, 132 App. Div. 321, 117 NYS 49.

1. In re Lind's Estate, 132 App. Div. 321, 117 NYS 49.

2. Mother, whose agreement at son's deathbed that his wife have all, led him to make no will. McDowell v. McDowell [Iowa] 119 NW 702.

3. Receipt in full by one predeceasing partially intestate ancestor. Norfleet v. Callicott, 90 Miss. 221, 43 S 616. By giving receipt in full for advancement, though less than the amount of eventual share. Simon

The right of aliens,[4] adopted children,[5] bastards,[6] and Indians,[7] to inherit, and of others to inherit from them, is fully treated elsewhere. Children born to a testator after the making of his will are often given the same share as in case of intestacy, if he dies without making provision for them.[8]

§ 3. *Inheritable and distributable property.*[9] See 11 C. L. 1080.—Subject to the legitim of forced heirs under the civil law,[10] and statutory extensions thereof,[11] only such property descends as was owned by the intestate at his death,[12] irrespective of the motive of his previous conveyances,[13] and it comes to the heir subject to all incumbrances which existed against it in the hands of the ancestor.[14] Realty descends to the heirs,[15] and personalty vests in the personal representative,[16] unless the whole does not exceed the family allowance,[17] and from him to the next of kin in due course;[18] but neither heirs nor next of kin can sue to recover personal assets of the intestate in the absence of misconduct of the personal representative.[19] The devolution of the legal title to land held in trust for third persons is often excepted from the ordinary rules of descent by judicial construction,[20] or express statutory provision.[21] The title reserved by a vendor of land,[22] the right in equity to a reconveyance of intestate's land standing in the name of a third person,[23] the right to enforce building restrictions reserved in favor of intestate's land,[24] and undivided interests in land,[25] are inheritable. The right, however, to join in an action on a

v. Simon's Estate [Mich.] 16 Det. Leg. N. 605, 122 NW 544.

4. See Aliens, § 2.

5. See Adoption of Children, § 2.

6. See Bastards, § 2.

7. See Indians, § 4.

8. 2 Rev. St. [1st Ed.] p. 65, pt. 2, c. 6, tit. 1, § 49, as amended by Laws 1869, p. 40, c. 22. Tavshanjian v. Abbott, 59 Misc. 642, 112 NYS 583. As to right of legislature to control and regulate disposition of property by will, see Wills, § 1.

9. **Search Note:** See notes in 10 C. L. 1117; 11 Id. 1081; 4 L. R. A. (N. S.) 919; 112 A. S. R. 727; 112 Id. 1017.

See, also, Descent and Distribution, Cent. Dig. §§ 7-9, 33-56, 206-532; Dec. Dig. §§ 8-17, 68-157; 14 Cyc. 25-33, 90-225; 27 A. & E. Enc. L. (2ed.) 296.

10. Restricting possibility of donation by ancestor, where two children survive, to one-half. Stewart v. Crump, 123 La. 983, 49 S 663. The right of forced heirs under the civil law to immediate possession of the property of the succession is in abeyance pending the determination of the validity of of a will offered for probate. Succession of Drysdale [La.] 50 S 35.

11. Civil Code, art. 1494, restricting to two-thirds donations by one leaving a surviving father, but no children. Succession of Desina, 123 La. 468, 49 S 23. Civil Code, art. 2239, as amended by Act No. 5, p. 12, of 1884, giving forced heirs right to set aside simulated sales by father. Rion v. Reeves, 122 La. 650, 48 S 138.

12. Deed by ancestor not attachable by heir for want of consideration. Schumacher v. Draeger, 137 Wis. 618, 119 NW 305. Petition admitting but not attacking deed from ancestor to defendant demurrable. Buchan v. Williamson, 131 Ga. 509, 62 SE 819. Gift of land unsuccessfully attacked by child born thereafter. Lefebure v. Lefebure [Iowa] 121 NW 1025.

13. Widow barred of share in personalty conveyed away to cut her off, though life estate retained by husband. Hall v. Hall [Va.] 63 SE 420.

14. Garretson v. Garretson [Ind. App.] 88 NE 624; Maxwell's Committee v. Centennial Perpetual Building & Loan Ass'n [Ky.] 114 SW 324. Heirs take **incorporal hereditaments** subject to all conditions affixed thereto. Payne v. Neuval [Cal.] 99 P 476.

15. Under B. & C. Comp. §§ 1147, 1221. De Bow v. Wallenberg, 52 Or. 404, 97 P 717. Title to undivised lands vests at once in the heirs upon the owner's death. McMillian v. State [Ala.] 49 S 680.

16. De Bow v. Wollenberg 52 Or. 404, 97 P 717. See Estates of Decedents, § 4C.

17. First $300 given to widow and minor children. Bertig v. Higgins [Ark.] 115 SW 935.

18. Where bequeathed to executors on void trust. In re Wilcox, 194 N. Y. 288, 87 NE 497.

19. Land purchased by defendant with intestate's money is not realty for this purpose. Buchanan v. Buchanan [N. J. Eq.] 71 A 745.

20. Does not descend to wife as statutory heir, R. L. c. 140, § 3, providing for distribution of intestate property not being applicable. Crandall v. Ahern, 200 Mass. 77, 85 NE 886.

21. Under Code 1896, § 1044, heir of surviving trustee of express trust does not inherit, fee remaining in abeyance. Consequently adverse possession impossible. Lecroix v. Malone [Ala.] 47 S 725.

22. Passes to heir in trust for transferee of note secured thereby. Atteberry v. Burnett [Tex.] 113 SW 526, afd. [Tex. Civ. App.] 114 SW 159.

23. Where held under deed from intestate's mortgagee executed after satisfaction of the mortgage. Rion v. Reeves, 122 La. 650, 48 S 138.

24. Codman v. Bradley, 201 Mass. 361, 87 NE 591.

25. Heir of cotenant may sue for partition. Russell v. Bell [Ala.] 49 S 814.

judgment recovered by several tenants in common does not pass to the personal representative of one of them,[26] nor is a mere, personal right to use land inheritable.[27] The heirs of a homestead entryman under the federal statutes, who dies before the patent is issued or final proof made, take title direct from the government, and not by inheritance,[28] but an heir does not acquire actual seisin of an estate until the expiration of his right of homestead therein.[29] Statutory rights, under the rule of strict construction, generally do not descend;[30] and damages given by statute for the benefit of those dependent on one killed by wrongful act are not part of the decedent's estate nor received by inheritance.[31]

§ 4. *Course of descent and distribution.*[32]—See 11 C. L. 1082—One claiming as heir must prove his relationship to the intestate by sufficient evidence,[33] and if as a collateral heir, the extinction of all lines which could claim any preference to him.[34] Death may be established prima facie by hearsay evidence from the immediate family of the ancestor.[35] The children or decendants of one predeceasing an intestate are often given, by right of representation, the share to which he would have been entitled had he survived,[36] but among collaterals this right is frequently restricted by judicial construction,[37] or by express statutory provision,[38] and will not be raised by implication in favor of the children of an illegitimate, where not expressly conferred.[39] Realty may ascend to a father in the absence of issue.[40] As between persons related in equal degree to the intestate, those in the nearer collateral line are sometimes preferred,[41] but commonly, where the intestate leaves no immediate

26. Goes to survivors, at least where they are the next of kin. Semon v. Daggett, 62 Misc. 55, 114 NYS 763.

27. Right reserved by grantor. Field v. Morris [Ark.] 114 SW 206.

28. Act June 21, 1866, c. 127, § 2, 14 Stat. 66. Rev. St. § 2291 [U. S. Comp. St. 1901, p. 1390]. Release by heirs of all interest in estate held not to bar them. Council Imp. Co. v. Draper [Idaho] 102 P 7.

29. Hence, where a wife died during her minority, she was never seised of an estate of inheritance in land occupied by her father as a homestead, as her homestead right continued, under the law, until her majority. Owens v. Jabine [Ark.] 115 SW 383. See Homesteads, § 8. In such case the estates did not merge so as to extinguish the homestead. Id. See Real Property, § 9.

30. Right to file bill to contest a will, conferred by Hurd's Rev. St. 1908, c. 148, § 7. Selden v. Illinois Trust & Sav. Bank, 239 Ill. 67, 87 NE 860. Right to have gift by ancestor revoked for ingratitude of donee not enforcible against heirs of donee (Rev. Code, arts. 1559, 1560, 1561), conferring right on heirs of donor only as against donee. Grandchampt v. Administrator of Billis' Succession [La.] 49 S 998.

31. By Burns' Ann. St. 1908, § 285. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 88 NE 1080.

32. Search Note: See note in 12 A. S. R. 82.

See, also, Descent and Distribution, Cent. Dig. §§ 57-134; Dec. Dig. §§ 20-51; 14 Cyc. 34-61; 27 A. & E. Enc. L. (2ed.) 316.

33. Vague family tradition insufficient. Osborne v. McDonald [C. C. A.] 167 F 894.

34. Four of eight children must account for other brothers and sisters and their descendants, where claiming to convey entire interest of father, who predeceased all. Hansen v. Owens [Ga.] 64 SE 800.

35. Letters and funeral cards to other members of family. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819. See, generally, Death and Survivorship.

36. Deceased daughter's children. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 88 NE 1080. Child of deceased aunt shares with surviving uncle and aunt as "kindred," under Ky. St. 1909, § 1401 (Russell's St. § 3819). Carnes v. Bingham [Ky.] 119 SW 738.

37. Laws 1789, p. 77, limiting right to children of brothers and sisters, construed not to give right to persons related in third degree generally; and construction not affected by Laws 1883, p. 48, c. 72, extending right to grandchildren of brothers and sisters. Green v. Bancroft [N. H.] 72 A 373. Children of deceased nieces and nephews do not share with those surviving, under Rev. St. 1903, c. 77, § 1, rule 6, giving property to "next of kin in equal degree." Appeal of Fairbanks, 104 Me. 333, 71 A 933.

38. Code Civ. Proc. § 2732, subd. 12, denying representation among collaterals beyond descendants of brothers and sisters, whereby second cousins cannot share with first cousins. In re Schlosser, 63 Misc. 166, 116 NYS 796; In re Underhill, 62 Misc. 456, 116 NYS 798. Nor cousins with uncles and aunts. In re Nichols' Estate, 60 Misc. 299, 113 NYS 277.

39. Where father would have been entitled as a "brother" under Burns' Ann. St. 1908, § 2993, by virtue of §§ 2992 and 2998. Truelove v. Truelove [Ind.] 86 NE 1018, mandate modified, 88 NE 516.

40. After death of five of six children who survived mother, father held interested in property either of mother's separate estate or held by her in trust for eldest child, it not appearing which child survived. Irvin v. Johnson [Tex. Civ. App.] 120 SW 1085.

41. Grandnieces preferred to first cousins. As to realty under Code, art. 46, §§ 19, 21. As to personalty under Code, art. 93, §§ 126,

family, his property goes to his next of kin in equal degree [42] in equal shares.[43] In the case of ancestral [44] realty, however, those of the blood of such ancestor are usually given priority.[45]

§ 5. *Quantity of estate or share acquired.*[46]—See 11 C. L. 1083—Advancements, as distinguished from gifts,[47] received by them from the intestate inter vivos, may vary [48] or extinguish [49] the shares of the heirs or next of kin; but even under the civil law, those receiving inter vivos more than their eventual shares are not required to collate for the benefit of the other heirs, except in certain cases.[50] Under the civil law the legitim of forced heirs is a definite percentage of the intestate's estate, fixed with reference to the relatives who survive him.[51] Advancements and hotchpot are particularly treated in another topic.[52]

§ 6. *Husband or wife as heir.*[53]—See 11 C. L. 1083—The right to curtesy [54] and dower,[55] the widow's right of quarantine, family allowance, and the like,[56] the descent of the homestead [57] and community property,[58] and property held in common or by entirety,[59] and the effect of antenuptial and other agreements on the rights of the surviving spouse,[60] are fully trusted elsewhere.

Upon renunciation,[61] or failure to elect the provision of a will,[62] or failure to elect dower,[63] the surviving spouse is frequently given a statutory interest in the estate of the decedent.

In many states a surviving husband takes a fee in a portion of his diseased wife's realty, subject, however, in varying degrees, to her debts,[64] and sometimes to

127. Hoffman v. Watson, 109 Md. 532, 72 A 479.

42. Under Rev. St. 1903, c. 77, § 1, rule 6, where no father, mother, issue, brother, sister, nor wife. Appeal of Fairbanks, 104 Me. 333, 71 A 933. Under Code Civ. Proc. § 2732, subd. 5, where no widow, nor children, nor representative of a child. In re Schlosser, 63 Misc. 166, 116 NYS 796.

43. Code Civ. Proc. § 2732, subd. 10. In re Schlosser, 63 Misc. 166, 116 NYS 796; In re Nichols' Estate, 60 Misc. 299, 113 NYS 277.

44. Partition deed to decedent from his coparcener does not destroy ancestral character. King v. Anderson, 7 Ohio N. P. (N. S.) 333.

45. Decedent's brothers and sisters preferred to wife, except as to her widow's life interest. King v. Anderson, 7 Ohio N. P. (N. S.) 333. Under Ky. St. 1909, § 1401 (except where remotely related). Ancestor's brother, sister and niece preferred to husband's second wife and children by her. Carnes v. Bingham [Ky.] 119 SW 738.

46. **Search Note:** See note in 9 Ann. Cas. 34.

See, also, Descent and Distribution, Cent. Dig. §§ 57-134, 389-432; Dec. Dig. §§ 20-51, 93-118; 14 Cyc. 34-61, 162-184.

47. Support of adult idiot child by mother not an advancement within St. 1903, § 1407. Crain v. Mallone [Ky.] 113 SW 67.

48. Payment to child of sum equivalent to expense incurred in obligatory care of idiot brother must be deducted as an advancement under St. 1903, § 1407. Crain v. Mallone [Ky.] 113 SW 67. Land and money given to son-in-law and jointly receipted for by him and his wife by way of advancement is an advancement to him of interest of daughter of intestate, with her acquiescence. Fisher v. Fisher, 11 Ohio C. C. (N. S.) 375.

49. Where heir gives receipt in full. Norfleet v. Callicott, 90 Miss. 221, 43 S 616; Simon v. Simon's Estate [Mich.] 16 Det. Leg. N. 605, 122 NW 544.

50. Only where children or grandchildren succeed to their mothers and fathers and other descendants, not to sister. Rev. Civ. Code, art. 1227. Succession of Watt, 122 La. 952, 48 S 335.

51. Equals one-half whole estate plus donations after payment of debts, where two children survive. Stewart v. Crump, 123 La. 938, 49 S 663. Father takes one-third of whole estate plus donations, after payment of debts, where no children survive. Succession of Desina, 123 La. 468, 49 S 23.

52. See Estates of Decedents, § 17B.

53. **Search Note:** See Descent and Distribution, Cent. Dig. §§ 135-205; Dec. Dig. §§ 52-67; 14 Cyc. 62-90, 123-127; 15 A. & E. Enc. L. (2ed.) 785; 27 Id. 307; 6 A. & E. Enc. P. & P. 667.

54. See Curtesy.

55. See Dower, §§ 1, 2, 3.

56. See Estates of Decedents, § 5D.

57. See Homesteads, § 8.

58. See Husband and Wife, § 4E.

59. See Husband and Wife, § 3D.

60. See Husband and Wife, § 2B.

61. By wife. Norfleet v. Callicott, 90 Miss 221, 43 S 616.

62. By husband. Under Burns' Ann. St. 1901, § 2642. Bright v. Justice [Ind. App.] 85 NE 794. See Wills, § 5D. By wife. Rev. St. §§ 5963, 5964. Geiger v. Bitzer, 80 Ohio St. 65, 88 NE 134.

63. Rev. Laws, c. 140, § 3, cl. 3, giving widow one-third of whole estate in case of issue, and $5,000 plus one-half remaining property where no issue. Peabody v. Cook, 201 Mass. 218, 87 NE 466.

64. One-third subject to antenuptial debts, under 1 Burns' Ann. St. 1901, § 2642. Bright v. Justice [Ind. App.] 85 NE 794. Under Burns' Ann. St. 1908, § 3016. one-third subject to antenuptial debts, and mortgages in

the survival of her kindred.[65] And so, also, the surviving wife is sometimes made the deceased husband's heir where there are no descendants.[66] Similarly a widower,[67] or widow,[68] is commonly given a share in the personalty of the deceased spouse. The extent of a widow's statutory interest in her husband's realty is usually dependent upon the survival of issue,[69] and often does not attach to realty held by him as trustee for third persons.[70] Where his entire estate does not exceed a fixed amount, she is sometimes given the whole, free from his general debts.[71]

Detectives; Determination of Conflicting Claims to Realty, see latest topical index.

DETINUE.[72]

The scope of this topic is noted below.[73]

The gist of the action of detinue is the wrongful or tortious detention of the property, not the original caption.[74] Plaintiff must usually show title,[75] but as against a wrongdoer, prior possession is sufficient.[76] The defendant's right of possession must be sufficiently proven.[77] Showing title in a third person at the time of the institution of the suit is a good defense.[78] The judgment in the action of detinue is in the alternative, either for the property and the value of the detention up to the time of judgment or for the value of the property as assessed by the jury

which he joined (Hampton v. Murphy [Ind. App.] 86 NE 436, rehearing denied, 88 NE 876), and to mortgages existing thereon when wife acquired it, but not to taxes, cost of administration, expenses of last illness and funeral (Kinney v. Heuring [Ind. App.] 87 NE 1053, rehearing denied, 88 NE 865).

65. By Code Pub. Gen. Laws 1904, art. 46, § 23, only where wife leaves no descendants nor kindred. Vogel v. Turnt, 110 Md. 192, 72 A 661.

66. Smith v. Winsor, 239 Ill. 567, 88 NE 482. **Divorced wife** is not heir of husband so long as divorce remains unimpeached. Uecker v. Thiedt, 137 Wis. 634, 119 NW 878.

67. One-half surplus under St. § 2132. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372.

68. By Rev. St. § 4176, one-half of first $400, and one-third of the balance, where there are surviving children or their legal representatives. But held, not to share in proceeds of realty remaining after assignment of dower. Geiger v. Bitzer, 80 Ohio St. 65, 88 NE 134. Child's share under Ann. Code 1892, § 1545, construed to mean share of child entitled to interest in estate, those having given receipts in full not counted. Norfleet v. Callicott, 90 Miss. 221, 43 S 616. By Code Pub. Gen. Laws 1904, art. 93, § 121, one-half, where no descendant of intestate, but he leaves a father, mother, brother, sister, or child of brother or sister. Vogel v. Turnt, 110 Md. 192, 72 A 661. By St. 1903, § 1403, claims for money, where no other personalty. Manns v. Manns [Ky.] 115 SW 715. By Burns' Ann. St. 1908, § 3025, one-third after paying debts and her $500 statutory allowance. In re Roberts' Estate [Ind. App.] 88 NE 870. By Rev. St. 1899, § 2939, one-half, and need not file election required by §§ 2942, 2943. Brown v. Tucker's Estate, 135 Mo. App. 598, 117 SW 96.

69. Where no issue, entitled to have whole realty set aside for her, if not exceeding $5,000 in value after deducting mortgages. Pub. St. 1882, c. 124, § 3, as amended by St. 1894, p. 143 c. 170. Bury v. Sullivan, 201 Mass. 327, 87 NE 577. Where no direct descendants, entitled to one-half in fee, under Kirby's Dig. § 2709, otherwise only to dower. Starrett v. McKim [Ark.] 119 SW 824. Where children survive, widow who remarries may not alienate her fee in one-third during subsequent marriage, and upon her death during subsequent marriage, children of former marriage inherit the property as against her grantee. Burns' Ann. St. 1908, § 3015. Rozell v. Cranfill [Ind. App.] 85 NE 792, rehearing denied 86 NE 864.

70. Under Rev. Laws, c. 140, § 3. Crandall v. Ahern, 200 Mass. 77, 85 NE 886.

71. If under $500, not subject to materialman's lien, by Burns' Ann. St. 1908, §§ 2945, 2946. Lloyd v. Arney [Ind. App.] 87 NE 989.

72. See 11 C. L. 1084.

Search Note: See Detinue, Cent. Dig.; Dec. Dig.; 9 A. & E. Enc. L. (2ed.) 416; 6 A. & E. Enc. P. & P. 643.

73. Statutory substitutes are treated in the topic Replevin,* while substantive rulings as to right of property are discussed in such topics as Sales.*

74. Though the taking of a horse, whether with or without the knowledge and consent of defendant, was tortious, yet, if he afterwards seized the horse under a valid execution, it was a good defense. Pruett v. Gunn [Ala.] 48 S 492.

75. Held that plaintiff failed to establish title to mule. Montgomery v. Patterson [Ala.] 49 S 1027.

76. Blair v. Williams [Ala.] 49 S 71.

77. A valid mortgage and right of possession by virtue of mortgage foreclosure held not sufficiently proven. Blair v. Williams [Ala.] 49 S 71.

78. Where in detinue against constable there was evidence tending to show that the horses belonged to a third person from whom it had been taken by the constable under an execution levy, it was error to exclude the execution as evidence. Pruett v. Gunn [Ala.] 48 S 492.

* Always begin with the latest article on the subject. Use the latest topical index.

and the amount for the detention up to the time of judgment,[79] and must show the value of each article sued for and provide for an alternative recovery.[80] Where verdict is found in plaintiff's favor and that he is entitled to the property no matter what its value, it is necessary that the value of the property be fixed by the finding or judgment in order to support the verdict.[81] In Kentucky by statute an alternative judgment for the value may be rendered,[82] and the verdict need not award to plaintiff property which has been disposed of by defendant.[83] Nor need it find as to articles proven to be the property of defendant, though it is better practice to do so.[84].

Deviation; Dilatory Pleas, see latest topical index.

DIRECTING VERDICT AND DEMURRER TO EVIDENCE.

The scope of this topic is noted below.[85]

§ 1. Directing Verdict, 1310. In general, 1310. Grounds and Occasions, 1310. The Motion or Request, 1319. The Order or Instruction, 1322. Effect of Direction, 1322. Appeal, 1322.
§ 2. Demurrers to Evidence, 1322.

§ 1. *Directing verdict.*[86]—See 11 C. L. 1085—*In general.*—The right to direct a verdict may depend on the character of the action or proceeding.[87] In some jurisdictions the motion is said to be directed to the court's discretion to the extent that the denial thereof will not be reversed.[88]

Grounds and occasions. See 11 C. L. 1085—A verdict should be directed only where it is imperatively demanded as a matter of law by the undisputed evidence,[89] or

79. Plaintiff having elected to take the assessed value of the property could not recover for the use of the property pending the affirmance of the judgment on appeal, though a bond was given securing it from all damages resulting from the taking of the appeal. Fidelity & Deposit Co. of Maryland v. Art Metal Const. Co. [Ala.] 50 S 186.

80. Where the complaint claimed oxen in yokes and the value was proven per yoke, and the verdict and judgment responded to the complaint and proof, there was no error in assessing the oxen by the yoke. Boswell v. Thompson [Ala.] 49 S 73. Code 1907, § 3781. Jernigan v. Willoughby [Ala.] 48 S 812.

81. Cefalu v. Dearborn [Ala.] 49 S 1030.

82. Civ. Code Prac. § 388. Gambrell v. Gambrell [Ky.] 113 SW 885.

83, 84. Gambrell v. Gambrell [Ky.] 113 SW 885.

85. Only the general rules applicable are treated in this article, the sufficiency of the evidence in particular cases to justify withdrawal from the jury being treated in appropriate topics (see Carriers,* § 32; Master and Servant,* § 3H; Negligence,* § 5; Railroads,* § 11; Street Railways,* § 7; Appeal and Review,* § 13F2).

86. **Search Note:** See notes in 3 C. L. 1095; 6 Ann. Cas. 545.

See, also, Appeal and Error, Cent. Dig. §§ 3417, 3474, 3475, 3748, 3846, 4024, 4211; Dec. Dig. §§ 548(5), 854(5), 856(3), 866, 927(6, 7), 973, 997, 1061(4); 2 Cyc. 1083; 3 Id. 221, 306, 340; Trial, Cent. Dig. §§ 317-345, 376-406, 983; Dec. Dig. §§ 134-149, 167-181, 420; 11 A. & E. Enc. L. (2ed.) 499.

87. Action to recover penalty for violation of safety appliance act held criminal prosecution, so that court had no power to direct verdict against defendant. Atchison, etc., R. Co. v. U. S. [C. C. A.] 172 F 194. Action by government to recover penalty for inducing violation of alien contract labor law is civil, so that verdict may be directed for plaintiff in proper case. Hepner v. U. S., 213 U. S. 103, 53 Law Ed. —. Action for violation of city ordinance held civil. Lloyd v. Canon City [Colo.] 103 P 288. Court may not direct verdict in proceedings for removal of public officer. Comp. Laws 1907, §§ 4574, 4575. Law v. Smith, 34 Utah, 394, 98 P 300.

88. While trial judge may within restrictions imposed by Civ. Code 1895, § 5331, direct a verdict, supreme court will in no case reverse a refusal to do so. Cureton v. Cureton [Ga.] 65 SE 65; Gate City Fire Ins. Co. v. Thornton, 5 Ga. App. 585, 63 SE 638.

89. McCallum v. Corn Products Co., 131 App. Div. 617, 116 NYS 118; Hepner v. U. S., 213 U. S. 103, 53 Law. Ed. —. Where no other verdict possible under evidence. Leathers v. Leathers [Ga.] 63 SE 1118. Where in no aspect of case as presented by evidence is plaintiff entitled to recover. State v. Baltimore Mfg. Co., 109 Md. 404, 72 A 602. If evidence is without conflict and such that no conflicting inferences are permissible. Law v. Smith, 34 Utah, 394, 98 P 300. Only when all reasonable men can draw but one inference from undisputed facts. Catholic University v. Waggaman, 32 App. D. C. 307; City & S. R. Co. v. Cooper, 32 App. D. C. 550. Where facts are undisputed and such that reasonable minds can draw but

one conclusion therefrom. Davis v. Chicago, B. & Q. R. Co., 83 Neb. 611, 119 NW 1121. Where question is presented by pleadings, and there is no conflict in evidence and but one inference can be drawn from the facts. Olson v. Nebraska Tel. Co., 83 Neb. 735, 120 NW 421. When evidence is practically undisputed, or such that different minds might not draw different conclusions therefrom. Eggland v. South [S. D.] 118 NW 719. Where is no substantial conflict in evidence which admits of but one reasonable interpretation and conclusion. Muskogee Land Co. v. Mullins [C. C. A.] 165 F 179. Where facts are admitted, or evidence upon controlling question is documentary and its construction a matter for the court, and but one conclusion is reasonably deducible therefrom. Farmers' Nat. Bank v. Coyner [Ind. App.] 88 NE 856. Where jury would have been bound to find such verdict under the proof. Sinclair's Adm'r v. Illinois Cent. R. Co. [Ky.] 112 SW 910. Where minds of reasonable jurors could not fail to agree. Stewart v. Balfour, 51 Wash. 127, 98 P 103. Undisputed or uncontradicted evidence must be such as to preclude any other conclusion of reasonable and fair-minded men. Galveston, etc., R. Co. v. Thompson [Tex. Civ. App.] 116 SW 106. To entitle plaintiff to reversal of directed verdict for defendant, record must show that there was evidence from which jury would have been warranted in finding proven every fact essential to plaintiff's recovery and no proved and undisputed fact which would prevent his recovery. Kelley v. Torrington, 81 Conn. 615, 71 A 939. Fact that plaintiff makes out prima facie case does not necessarily require its submission to jury, since it may be so destroyed by uncontradicted evidence of defendant as to demonstrate beyond peradventure of doubt that plaintiff has no case at all, in which event is duty of court to instruct for defendant. Keith v. Guedry [Tex. Civ. App.] 114 SW 392. Where evidence as to particular issue is uncontradicted, it is proper to withdraw same from jury. Rock Island Plow Co. v. Rankin Bros. [Ark.] 115 SW 943. Where facts are conclusively determined in manner not affected by material error, application of law to facts is for court. Cincinnati Gas & Elec. Co. v. Archdeacon, 80 Ohio St. 27, 88 NE 125. Verdict for plaintiff properly directed where complaint was sufficient and was not met by plea interposed, and in absence of other proof on part of defendant and uncontradicted proof on part of plaintiff. New Jersey Board of Health v. Vandruens [N. J. Law] 72 A 125. Where sufficiency of plea to merits is not questioned, but issue is joined thereon, if such plea is proven without contradiction, it is not error to direct verdict thereon for defendant. American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 S 942. Where evidence is sufficient to warrant recovery, and is no conflict in evidence tending to prove any defense. Fowler Utilities Co. v. Chaffin Coal Co. [Ind. App.] 87 NE 689. Motion by defendant at close of all the evidence must be denied unless whole evidence makes it clear that there is in law no liability. Kluska v. Yeomans [Wash.] 103 P 819. Notwithstanding provision of Rev. Civ. Code, § 2371, that in all cases arising under § 991, or under title relating to fraudulent conveyances, except as otherwise provided in § 2369, question of fraudulent intent is one of fact and not of law, where counsel virtually agree that facts are undisputed, court may as a matter of law declare legal effect of such facts by directing verdict. Hall v. Feeney [S. D.] 118 NW 1038. Held that under evidence court was not authorized to direct verdict for plaintiff, but should have directed one for defendant. Id. In action against carrier for delay in delivering goods shipped defendant held not entitled to directed verdict on ground that it had delivered goods to connecting carrier up to which time no damage was shown, where it was alleged that defendant had contracted to carry goods to their destination, and it was not alleged in answer that it had contracted not to be responsible for damages on connecting lines. Aultman Engine Thresher Co. v. Chicago, etc., R. Co. [Iowa] 121 NW 22. Defendant in claim and delivery held not entitled to directed verdict because it appeared that before trial plaintiff had recovered possession of property, and not through lawful process, since action must proceed to determine who was entitled to costs and whether defendant was entitled to have property returned to him. Kimmitt v. Deitrich [S. D.] 119 NW 986.

Direction of verdict held proper, or refusal improper. McGrory v. Ultima Thule, A. & M. R. Co. [Ark.] 118 SW 710; Dye v. Peacock, 5 Ga. App. 417, 63 SE 520; Smith v. Duke [Ga. App.] 64 SE 292; City of Valdosta v. Southern Pav. & Const. Co. [Ga.] 64 SE 326; Moss v. Dunavant [Ga.] 64 SE 549; Kreis v. Ray [Ga.] 65 SE 281; Eggland v. South [S. D.] 118 NW 719; Gray v. Tribue [Tex. Civ. App.] 118 SW 808. For defendant, on ground of contributory negligence. Miller v. White Bronze Monument Co. [Iowa] 118 NW 518; Cincinnati, etc., R. Co. v. Harrod's Adm'r [Ky.] 115 SW 699; Schaub v. Kansas City So. R. Co., 133 Mo. App. 444, 113 SW 1163; McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33; Gessner v. Metropolitan St. R. Co. [Mo. App.] 119 SW 528; McCreery v. United R. Co. [Mo.] 120 SW 24; Chicago, B. & Q. R. Co. v. Cook [Wyo.] 102 P 657. Where plaintiff's own evidence showed contributory negligence. Gleason v. Suskin, 110 Md. 137, 72 A 1034. Where evidence conclusively showed plaintiff's compliance with contract sued on. Yancey v. Warner Elevator Mfg. Co. [Ga. App.] 64 SE 663. Where no material fact bearing on construction of contract sued on and essential to validity of plaintiff's action was in dispute. Goldstein v. D'Arcy, 201 Mass. 312, 87 NE 584. Where undisputed evidence showed that plaintiff was bona fide holder of note sued on. Second Nat. Bank v. Snoqualmie Trust Co., 83 Neb. 645, 120 NW 182; Simmons v. Council, 5 Ga. App. 386, 63 SE 238. Where execution of note sued on was admitted, and evidence that it was without consideration was insufficient to authorize finding for defendant on that plea. Allen v. People's Bank of Talbotton [Ga.] 65 SE 379. In action on insurance policy, where was undisputed evidence of breach of warranty and no evidence of waiver. Rodier v. Life Ins. Co., 32 App. D. C. 159. Where undisputed evidence in action on fire insurance policy showed that proofs of loss were submitted within reasonable time. American Ins. Co. v. Peebles & Co. [Ga. App.] 64 SE 304. Where, under undisputed facts shown by evidence, defendant

where there is a total want of evidence to sustain a material issue,[90] or where the

was not liable under terms of insurance policy as matter of law. Diddle v. Continental Casualty Co., 65 W. Va. 170, 63 SE 962. On ground of plaintiff's prior possession of land. Roe v. Doe [Ala.] 48 S 49. Where correctness of account sued on was admitted, and defense of res adjudicata, which was only one interposed, was not available to defendant. Kerr v. Blair [Tex. Civ. App.] 118 SW 791. Where plaintiffs testified that they had no right of action against one of defendants. Bowman v. Saigling [Tex.] 119 SW 295. Held that court could not have submitted as issue truth or credibility of such testimony. Id. Defendant held entitled to general affirmative charge on special plea which was established beyond conflict and beyond doubt. Alexander v. Woodmen of the World [Ala.] 49 S 883. Refusal to give affirmative charge for defendant in respect to count alleging that name of defendant's superintendent was unknown held error, where his name was shown by plaintiff's testimony, as was fact that it was known to him. Central Foundry Co. v. Bailey [Ala.] 50 S 346.

90. Pike v. Tallassee Falls Mfg. Co. [Ala.] 49 S 857; Alexander v. Woodmen of the World [Ala.] 49 S 883; Stearns v. Hazen [Colo.] 101 P 339; Kelley v. Torrington, 81 Conn. 615, 71 A 939; Dougherty v. Gaffney, 239 Ill. 640, 88 NE 150; Fosbury v. Aurora, E. & C. R. Co., 141 Ill. App. 98; Brase v. Chicago Union Trac. Co., 142 Ill. App. 117; Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448; People v. Equitable Life Ins. Soc. of U. S., 143 Ill. App. 496; Weber v. Illinois Cent. R. Co., 143 Ill. App. 498; Ketterman v. Ida Grove [Iowa] 120 NW 641; Wildharber v. Lunkenheimer, 128 Ky. 344, 32 Ky. L. R. 1221, 108 SW 327; Shockley v. Pennsylvania R. Co., 109 Md. 123, 71 A 437; Darby Candy Co. v. Hoffberger [Md.] 73 A 565; Schnitjuis v. Fisher Paper Box Co. [Minn.] 121 NW 1134; McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33; Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969; Turner v. Pope Motor Car Co., 79 Ohio St. 153, 86 NE 651; Fee v. Adams Exp. Co., 38 Pa. Super. Ct. 83; Williams v. Patterson, 38 Pa. Super. Ct. 322; Williams Typewriter Co. v. Cleaver, 38 Pa. Super. Ct. 876; Krikorian v. Rhode Island Co. [R. I.] 71 A 369; Watters v. Dancey [S. D.] 122 NW 430; St. Louis & S. F. R. Co. v. Finley [Tenn.] 118 SW 692; Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767; Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186; Law v. Smith, 34 Utah, 394, 98 P 300; Long v. McCabe, 52 Wash. 422, 100 P 1016.

Regardless of right to demur to evidence, as provided by Code 1907, §§ 5342-5345, when plaintiff fails to make out prima facie case, it is not error to exclude the evidence on defendant's motion and to give affirmative charge when requested in writing by defendant. Merrill v. Smith [Ala.] 48 S 495. Such action held proper. Id. Is only where it is so clearly established from undisputed testimony as to admit of no other reasonable hypothesis or conclusion, that either a fact essential to plaintiff's cause of action is not proven or one which is a complete defense has been shown, that it becomes duty of court to direct verdict for defendant. San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569. Whether there is any evidence upon an essential issue is question for trial judge. If he decides that there is, he must submit it to jury, but if he decides there is not, he should peremptorily instruct verdict for defendant. Producers' Oil Co. v. Barnes [Tex. Civ. App.] 120 SW 1023. As against motion for judgment at close of plaintiff's case and renewed at close of all the evidence, prima facie showing is to be determined as matter of law by court in light of explanations made by defendant. Long v. McCabe, 52 Wash. 422, 100 P 1016. Is duty of court to measure evidence, not as to its weight but as to its legal effect. Id. Refusal to direct verdict for defendant as to first count of declaration not supported by evidence held harmless where jury found for plaintiff as to both counts and evidence was sufficient to sustain verdict as to second. Mueller v. Jordan Shoe Co., 143 Ill. App. 332.

Direction of verdict held proper: Directed verdict proper where plaintiffs fail to establish title. Where heirs failed to show death of life tenant without issue, giving them right of possession. Watkins v. Gilmore, 130 Ga. 797, 62 SE 32. Where receivers of lessor street railway corporation, lessee street railway company, and receivers of latter who were operating car of latter occasioning injuries for which action was brought, directed verdict in favor of first two defendants should have been given. Eckels v. Henning, 139 Ill. App. 660. Where evidence was insufficient to sustain judgment for plaintiff, and only one reasonable inference could be drawn therefrom. Ogden v. Sovereign Camp W. of W. [Neb.] 121 NW 973. Where count was not proved in its conjunctive form. Central Foundry Co. v. Bailey [Ala.] 50 S 346. Where evidence was insufficient to take question of defendant's adverse possession of land in controversy to jury or to justify verdict for defendant. Kipp v. Hagan [Minn.] 122 NW 317. For plaintiff where was insufficient evidence to establish defense of fraud. Murphy v. Greybill, 34 Pa. Super. Ct. 339. Where evidence insufficient to raise issue of fraud interposed as defense. Dayton Lumber Co. v. Stockdale [Tex. Civ. App.] 118 SW 805. As to issue raised by plea, where was no evidence in support thereof. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. For one defendant in action for wrongful death. Bruton's Adm'r v. Eddington-Griffiths Const. Co. [Ky.] 118 SW 1001. Where evidence showed contributory negligence. Baltimore & O. R. Co. v. Stewart, 12 Ohio C. C. (N. S.) 250. Where complaint in action for personal injuries alleged relation of carrier and passenger, while proof conclusively showed that relation existing between parties at time of injury was that of master and servant. Birmingham R., L. & P. Co. v. Stanfield [Ala.] 50 S 51. In action against three railroads as partners for negligent carriage of cattle, held that, where evidence failed to show any negligent handling by one of them, it was entitled to peremptory instruction on its plea for judgment over against its co-defendants. Texas Cent. R. Co. v. Pool [Tex. Civ. App.] 114 SW 685. Where cause of plaintiff's injury was not so definitely ascertained as to make defendant liable. Knepper v. Tamaqua Borough, 36 Pa. Super. Ct. 183.

party having the burden of proof fails to sustain it,[91] and accordingly such direction is improper where the evidence is conflicting,[92] or raises a question of fact,[93] or

For defendant, where was no evidence whereby jury could have fixed amount of damages, and verdict in favor of plaintiff would have been mere guess. Whitmore v. William Waters' Estate, 142 Ill. App. 288. Refusal to submit counterclaim based on alleged malicious prosecution held proper, evidence not showing want of probable cause. Wickstrom v. Swanson, 107 Minn. 482, 120 NW 1090.

91. Court should determine whether or not, under the law, verdict might be found for party having onus, and if not, direct verdict against him. Noble v. Crane & Co. [C. C. A.] 169 F 55. Where upon material point is failure of proof in evidence of party having burden of an issue. Farmers' Nat. Bank v. Coyner [Ind. App.] 88 NE 856. Where replications went only to certain special pleas, one of the other pleas being the general issue as to which there could be no special replication and which placed burden on plaintiff to prove averments of complaint, held that fact that there was evidence in support of the replications would not prevent giving of general affirmative charge for defendant. Alexander v. Woodmen of the World [Ala.] 49 S 883. There being no demurrer or special replication to plea going only to amount of damages, so that issue was consequently joined thereon, held that if defendant proved such plea he was entitled to verdict though plaintiff proved his special replications to the other pleas, so that it would not have changed proper verdict had plaintiff been entitled to general affirmative charge as to such replications. Id.

Direction of verdict held proper, or refusal improper. Where plaintiff's evidence was such that neither court nor jury could base verdict thereon. Chesapeake Transit Co. v. Mott [C. C. A.] 169 F 543. For defendant, on failure of plaintiff to rebut evidence which was sufficient to overcome presumption of defendant's negligence. Western Union Tel. Co. v. Elliott [Ky.] 115 SW 228. For defendant, where evidence was equally consistent with existence or nonexistence of negligence causing decedent's death. Watson's Adm'r v. Louisville & N. R. Co. [Ky.] 114 SW 292. Where was no evidence tending to sustain only defense as to which defendant had burden of proof. Burress v. Diem [Okl.] 101 P 1116. In favor of one claiming land sought to be sold on execution, plaintiff in execution having failed to sustain burden of proof resting on him to show either title or possession in defendants after rendition of judgment, and claimant showed possession and claim of title. Whitley v. Foster [Ga.] 63 SE 698.

92. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109; Central of Georgia R. Co. v. Ashley [Ala.] 49 S 388; Higdon v. Garrett [Ala.] 50 S 323; Bell v. Old [Ark.] 113 SW 1023; Merchants' Fire Ins. Co. v. McAdams [Ark.] 115 SW 175; Roe v. Phelps [Conn.] 73 A 138; McKinnon v. Johnson [Fla.] 48 S 910; Wilson v. Jernigan [Fla.] 49 S 44; American Ins. Co. v. Peebles & Co. [Ga. App.] 64 SE 304; Rastetter v. Peoria R. Co., 142 Ill. App. 417; Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723; Dillman v. Chicago I. & L. R. Co. [Ind. App.] 88 NE 873; Burger v. Omaha, etc., R. Co., 139 Iowa, 645, 117 NW 35; Mason & Hodge Co. v. Highland [Ky.] 116 SW 320; Chesapeake & O. R. Co. v. Meyer [Ky.] 119 SW 183; Phenix Jellico Coal Co. v. Lemp [Ky.] 121 SW 418; Gatz v. Harris [Ky.] 121 SW 462; Smiddy v. Pearlstein, 201 Mass. 246, 87 NE 572; Rumsey v. Fox [Mich.] 16 Det. Leg. N. 598, 122 NW 526; Roach v. Aetna Ins. Co. [Minn.] 121 NW 613; Skipworth v. Mobile & O. R. Co. [Miss.] 48 S 964; Bell v. Southern R. Co. [Miss.] 49 S 120; Landrum v. St. Louis & S. F. R. Co., 132 Mo. App. 717, 112 SW 1000; Meily v. St. Louis & S. F. R. Co., 215 Mo. 567, 114 SW 1013; Kaufman v. Cooper, 38 Mont. 6, 98 P 1135; Doyle v. Franek, 82 Neb. 606, 118 NW 468; Tarnoski v. Cudahy Packing Co. [Neb.] 122 NW 671; Friedman v. Guth, 113 NYS 11; Markowitz v. Miller, 113 NYS 1037; New York Produce Exch. Bank v. Twelfth Ward Bank, 62 Misc. 69, 115 NYS 998; Gooler v. Eidness [N. D.] 121 NW 83; Philadelphia v. Bilyeu, 36 Pa. Super. Ct. 562; Dring v. St. Lawrence Tp. [S. D.] 122 NW 664; Texas & P. R. Co. v. Taylor [Tex. Civ. App.] 118 SW 1097; Fowlie's Adm'x v. McDonald, Cutler & Co. [Vt.] 72 A 989; McKay v. Anderson Steamboat Co., 51 Wash. 679, 99 P 1030; Harkins v. Seattle Elec. Co. [Wash.] 101 P 836; Bell v. Carter [C. C. A.] 164 F 417; American Trust & Sav. Bank v. Zeigler Coal Co. [C. C. A.] 165 F 34; Chicago, etc., R. Co. v. Anderson [C. C. A.] 168 F 901. Though number of witnesses preponderates in favor of defendant. Cohen v. Sioux City Trac. Co. [Iowa] 119 SW 964. Where plaintiff's evidence is equiponderant with defendant's on points at issue. Cincinnati, N. & C. R. Co. v. Cooke [Ky.] 121 SW 467. Where testimony leaves any matter material to issue in substantial dispute. Piver v. Pennsylvania R. Co., 76 N. J. Law, 713, 71 A 247; More-Jonas Glass Co. v. West Jersey & S. R. Co., 76 N. J. Law, 708, 72 A 65. Where controverted questions of fact. Cooper v. Flesner [Okl.] 103 P 1016. Verdict should not be directed where any material facts are in dispute, even though evidence be open to debate and leaves mind in some doubt. Jordan v. Reed [N. J. Err. & App.] 71 A 280. Where existence of material and controlling fact is affirmed by positive testimony, and weakly denied by other testimony, though somewhat negative in character, question is issuable, and it is error to direct verdict, jury not being bound to accept positive in preference to negative testimony. Pendergrast v. Greeson [Ga. App.] 64 SE 282. Conflict in evidence due to plaintiff's testimony alone sufficient to take case to jury. United States Exp. Co. v. Wahl [C. C. A.] 168 F 848. Mandatory instruction not justified by fact that one of plaintiff's witnesses contradicted others, conflict being for jury. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33. Even if court may direct verdict for total divorce in any case, held error to do so where suit was predicated on desertion of husband by wife, and defendant pleaded and introduced testimony tending to show that separation was rendered necessary by husband's cruelty. Rorie v. Rorie [Ga.] 64 SE

reasonable men might draw different conclusions therefrom,[94] or where the weight

1070. Evidence held not so clear and undisputed as to warrant direction. Golding v. Russell, 131 App. Div. 540, 115 NYS 359. Evidence held at least equivocal if not conflicting so that question was for jury. Moreland v. Newberger Cotton Co. [Miss.] 48 S 187. Verdict is not to be directed except where there is no conflict on material points in evidence, and that introduced, with all the reasonable deductions and inferences therefrom, demands particular verdict. Civ. Code 1895, § 5331. Alabama Const. Co. v. Continental Car & Equipment Co., 131 Ga. 365, 62 SE 160. Letter set out in declaration held not, as matter of law, a waiver of defendant's right to damages, so that direction of verdict for plaintiff for full amount claimed on theory that it was, error. Id.

Conflict must be real, not merely apparent, and a mere dogmatic assertion, which does not appeal to reason or have substance and relevant consequence, or fitness to induce conviction, is not proof, even if uncontradicted, and does not preclude direction of verdict. Noble v. Crane & Co. [C. C. A.] 169 F 55. Conflict held unsubstantial and evidence so clearly preponderant that no other conclusion was reasonably admissible, so that verdict was properly directed for plaintiff. Bell v. Carter [C. C. A.] 164 F 417.

93. Where evidence requiring submission of disputed questions of fact. Massey v. Luce [Mich.] 16 Det. Leg. N. 572, 122 NW 514.

Questions held for jury under the evidence. Byrd v. Beall [Ala.] 50 S 53; Ernst v. Rathgeber, 114 NYS 51; Crosby v. Portland R. Co. [Or.] 100 P 300; Harrier v. Dale [Pa.] 73 A 945; Roth v. Travelers' Protective Ass'n [Tex.] 115 SW 31; Boardman v. Woodward [Tex. Civ. App.] 118 SW 550; Town of Rolling v. Wunderlich, 138 Wis. 667, 120 NW 515; Box v. Postal Tel.-Cable Co. [C. C. A.] 165 F 138. Whether there was such use of wharf as to make defendant liable for wharfage. City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21. Negligence under humanitarian doctrine. Dahmer v. Metropolitan St. R. Co., 136 Mo. App. 443, 118 SW 496. Negligence, proximate cause, assumption of risk, and contributory negligence. Rase v. Minneapolis, etc., R. Co., 107 Minn. 260, 120 NW 360. Negligence and contributory negligence. Central Foundry Co. v. Bailey [Ala.] 50 S 346; Johnson v. Desmond Chemical Co. [Mich.] 16 Det. Leg. N. 236, 121 NW 269. Contributory negligence. Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 542; San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569; Missouri, K. & T. R. Co. v. Bratcher [Tex. Civ. App.] 118 SW 1091; Murphy v. Herold Co., 137 Wis. 609, 119 NW 294; Detroit United R. Co. v. Nichols [C. C. A.] 165 F 289. Contributory negligence by minor's parents. McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33; Day v. Consolidated L., P. & Ice Co., 136 Mo. App. 274, 117 SW 81. Fellow-servant. Stewart v. Balfour, 51 Wash. 127, 98 P 103. Motion to direct verdict for defendant in action against master for death of servant on ground that plaintiff failed to show servant's ignorance of defects in machinery properly denied. Fowlie's Adm'x v. McDonald, Cutler & Co. [Vt.] 72 A 989. In action for damages by trespasser who was forced to jump from moving train, defendant held not entitled under evidence to directed verdict on ground that plaintiff and brakeman were cotrespassers, nor because of rule of defendant forbidding brakeman to eject any person except by direction of conductor. Barrett v. Minneapolis, etc., R. Co., 106 Minn. 51, 117 NW 1047. Held error under pleadings and evidence to direct verdict for defendant in action to recover land, it being question for jury whether land in dispute was that excepted from deeds under which plaintiff claimed, and defense of adverse possession not being established as matter of law. Gillespie v. Powell [Ga.] 64 SE 80. In action for money had and received to plaintiff's use, held error to direct verdict for defendant, where plaintiff's proof tended to show that he had prior lien on personalty seized and sold by defendants under chattel mortgage, evidence disclosing express agreement by defendants to pay plaintiffs proceeds of such sale, and breach of such promise, and there also being an implied promise under such circumstances. Hyde v. Thompson [N. D.] 120 NW 1095. Evidence held sufficient to sustain allegations of complaint as to existence of plaintiff's lien, and said promise. Id. Directed verdict for plaintiff properly refused where evidence tended to show adverse possession by defendant, and relinquishment of disputed property by agreement. Reynolds v. Hood, 209 Mo. 611, 108 SW 86.

94. Aluminum Co. v. Ramsey [Ark.] 117 SW 568; Paolini v. Fresno Canal & Irr. Co., 9 Cal. App. 1, 97 P 1130; Nichols v. Chicago, B. & Q. R. Co., 44 Colo. 501, 98 P 808; Starks v. Sawyer, 56 Fla. 596, 47 S 513; McKinnon v. Johnson [Fla.] 48 S 910; American Ins. Co. v. Peebles & Co. [Ga. App.] 64 SE 304; Wheeler v. Oregon R. & Nav. Co. [Idaho] 102 P 347; McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459; Maryland, D. & V. R. Co. v. Hammond, 110 Md. 124, 72 A 650; Bremer v. St. Paul City R. Co., 107 Minn. 326, 120 NW 382; Monday v. St. Joseph R. Co., 136 Mo. App. 692, 119 SW 24; Olson v. Nebraska Tel. Co., 83 Neb. 735, 120 NW 421; Harris v. Missouri, K. & T. R. Co. [Okl.] 103 P 758; Missouri, K. & T. R. Co. v. Ford [Okl.] 103 P 602; Rodgers v. Portland Lumber Co. [Or.] 102 P 601, rehearing denied [Or.] 103 P 514; San Antonio Trac. Co. v. Levyson [Tex. Civ. App.] 113 SW 569. If will admit of different reasonable inferences. Starks v. Sawyer, 56 Fla. 596, 47 S 513; Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723. Where inference of defendant's negligence may be fairly drawn from evidence by reasonable minds, case is for jury though contrary inference can be drawn. Sambos v. Cleveland, etc., R. Co., 134 Mo. App. 460, 114 SW 567. Where fair minded men might honestly differ as to conclusions to be drawn from facts, whether controverted or uncontroverted. More-Jonas Glass Co. v. West Jersey & S. R. Co., 76 N. J. Law, 708, 72 A 65. Where evidence on contested issues is uniform but different inferences may reasonably be deducted therefrom. Moellman v. Gieze-Henselmeier Lumber Co., 134 Mo. App. 485, 114 SW 1023. If on whole case reasonable minds might differ regarding weight

of the evidence [95] or the credibility of the witnesses [96] is involved, or where there is

of testimony or inferences to be drawn therefrom, conclusions are for jury unless, giving testimony its most favorable aspect, but one conclusion may be fairly drawn therefrom. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. Held error to give general affirmative charge for plaintiff where burden of proof was on plaintiff and there were several material allegations of complaint as to which there was no direct proof, but which, if proven, were proven only by inference from other facts, it being for jury to draw such inferences. Western Union Tel. Co. v. Louisell [Ala.] 50 S 87. Direction of verdict upon interpretation of foreign statute as matter of law held erroneous, where such law and interpretation could be determined only by considering numerous decisions, more or less conflicting, bearing on subject only collaterally or by way of analogy and where inferences may be drawn from them, since in such case question is for jury. Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947.

95. Weight of evidence is for the jury. Aluminum Co. v. Ramsey [Ark.] 117 SW 568; Rastetter v. Peoria R. Co., 142 Ill. App. 417; Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448; General Accident, Fire & Life Assur. Corp. v. Homely, 109 Md. 93, 71 A 524; Reynolds v. Metropolitan St. R. Co., 136 Mo. App. 282, 116 SW 1135. If substantial evidence has been introduced prior to motion which in any way or manner tends to support plaintiff's contention, weight of evidence is for jury, and motion to direct verdict for defendant should be denied. Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038. Is error to direct verdict where evidence has reached such a point that it must be weighed, and inferences deduced therefrom. Missouri, K & T. R. Co. v. Watkins Merchandise Co., 76 Kan. 813, 92 P 1102. Motion to direct verdict for defendant raises question of law as to sufficiency of evidence favorable to him to sustain verdict in his favor, and does not call on court to weigh conflicting evidence to determine preponderance. Donelson v. East St. Louis & S. R. Co., 235 Ill. 625, 85 NE 914. Court does not weigh evidence to determine what facts are thereby established, but merely determines whether evidence is such as to justify its submission to jury for a finding, and in directing verdict simply rules that from undisputed or conceded facts but one conclusion is legally permissible, and directs jury what that conclusion must be. Law v. Smith, 34 Utah, 394, 98 P 300. Court does not weigh evidence in passing on motion. Balsewicz v. Chicago, B. & Q. R. Co., 240 Ill. 238, 88 NE 734; Galveston, etc., R. Co. v. Thompson [Tex. Civ. App.] 116 SW 106. Supreme court will not weigh evidence in reviewing ruling. McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459; Wilkinson v. Aetna Life Ins. Co., 240 Ill. 205, 88 NE 550; Millar v. Sollitt, 131 Ill. App. 196; Leistikow v. Zuelsdorf [N. D.] 122 NW 340; Law v. Smith, 34 Utah, 394, 98 P 300. Court will not pass on weight of evidence except where honest minds cannot differ. Putnam v. Phoenix Preferred Acc. Ins. Co. [Mich.] 15 Det. Leg. N. 980, 118 NW 922.

96. Supreme court will not consider credibility of witnesses in reviewing ruling. Leistekow v. Zuelsdorf [N. D.] 122 NW 340. Credibility of witnesses is for jury. Reynolds v. Metropolitan St. R. Co., 136 Mo. App. 282, 116 SW 1135. Where determination of issue involves credibility of witnesses and rests upon inferences and deductions to be drawn from facts proved, is invasion of province of jury to direct verdict. Farmers' Nat. Bank v. Coyner [Ind. App.] 88 NE 856. Inferences to be drawn from undisputed facts and credibility of witnesses are for jury. Roach v. Aetna Ins. Co. [Minn.] 121 NW 613. Testimony of witnesses need not necessarily be taken as true because not expressly contradicted by other witnesses, but should be weighed in connection with facts and circumstances tending to contradict or corroborate them. Id. Fact that plaintiff's contention was unsupported by evidence other than his own testimony which was contradicted by that of other witnesses held not to require direction of verdict for defendant, jury having right to base verdict on plaintiff's uncorroborated testimony and it being for them to weigh the evidence. De Lamar v. Herdeley [C. C. A.] 167 F 530. Fact that there was no evidence contradicting that of defendant held not to justify direction of verdict in his favor since jury were not bound to believe it. McGourty v. De Marco, 200 Mass. 57, 85 NE 891; Lewis v. Coupe, 200 Mass. 182, 85 NE 1053. Testimony of interested witness, consisting largely of opinions and conclusions, not necessarily binding on jury though undisputed. Texas & P. R. Co. v. Taylor [Tex. Civ. App.] 118 SW 1097. Though unimpeached witness is not contradicted, verdict should not be directed on his testimony where he is interested in result, or facts are shown which might bias his testimony, or from which inference may be drawn unfavorable to his testimony or against facts testified to by him. Merchants' Fire Ins. Co. v. McAdams [Ark.] 115 SW 175. Conceding that defendant's evidence, introduced after plaintiff has made out prima facie case, may in a proper case entitle him to directed verdict, held that he was not so entitled where witness on whose testimony he relied was interested, and testified to what he knew could not be contradicted, and were circumstances in evidence tending to contradict his story. Lally v. Prudential Ins. Co. [N. H.] 72 A 208. Where in action against three persons as partners to recover money lost at gambling plaintiff was not contradicted as to statements which he claimed were made to him by two of them, but was as to statement claimed to have been made by other, held that there was issue as to credibility of witnesses, and hence evidence was not all one way, and it was proper to refuse peremptory instruction against said two defendants. Roberts v. Respass [Ky.] 114 SW 341. Held that in action for wrongful death verdict should have been directed for defendant in view of fact that testimony of witness for plaintiff was contradictory of his testimony at first trial, and was self-contradictory, and so manifestly insincere and absurd that no person could candidly believe it, though jury

any substantial [97] evidence which tends to sustain the opposite party's cause of action or defense,[98] or where the moving party has failed to make out his case or defense.[99]

is ordinarily judge of credibility of witnesses. Graham v. Chicago & N. W. R. Co. [Iowa] 119 NW 708.

97. Evidence held not to have left question as to what caused injury wholly in conjecture as distinguished from inference, so that question of negligence was properly left to jury. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. Testimony of plaintiff held to tend to show defendant's negligence and not such as to compel jury to reach verdict by conjecture or guesswork, so that peremptory instruction for defendant was properly refused. Reynolds v. Metropolitan St. R. Co., 136 Mo. App. 282, 116 SW 1135. In action for injuries to plaintiff's intestate, verdict properly directed for defendant where to have submitted case to jury on evidence introduced would have been to permit them to draw from conjectural and not from proven facts inference that defendant's negligence was cause of such injuries. Morse v. Consolidated R. Co., 81 Conn. 395, 71 A 553. Defendant's evidence in support of its offset held to have raised only a surmise or suspicion of facts sought to be proved and that its probative force was so weak that in legal contemplation it fell short of being "any evidence" from which jury could reasonably infer existence of alleged fact, so that it was not error to direct verdict for plaintiff. Dayton Lumber Co. v. Stockdale [Tex. Civ. App.] 118 SW 805. Where there was no evidence other than mere surmise or speculation that fire for which damages were sought to be recovered was due to defendant's negligence, held proper to direct verdict for defendant. Torrans v. Texarkana Gas & Elec. Co. [Ark.] 115 SW 389. Evidence in action for wrongful death held to leave cause of decedent's death mere matter of speculation and conjecture, and to be insufficient to sustain finding for plaintiff, so that verdict was properly directed for defendant. Weckter v. Great Northern R. Co. [Wash.] 102 P 1053. Though court should not draw arbitrary conclusions from physical facts at variance with testimony, where conclusion from conceded physical facts is so plain and incontrovertible that reasonable minds cannot differ about it, testimony in conflict therewith should be rejected as wholly barren of evidentiary value, and conclusion accepted as undisputed and indisputable. Gessner v. Metropolitan St. R. Co. [Mo. App.] 119 SW 528. Testimony of plaintiff held such that it should be disregarded. Id.

98. Chambers v. Morris [Ala.] 48 S 687; Western Union Tel. Co. v. Louisell [Ala.] 50 S 87; Starks v. Sawyer, 56 Fla. 596, 47 S 513; McKinnon v. Johnson [Fla.] 48 S 910; Ehlin v. American Car & Foundry Co., 238 Ill. 176, 87 NE 385; Wilkinson v. Aetna Life Ins. Co., 240 Ill. 205, 88 NE 550; Millar v Sollitt, 131 Ill. App. 196; Donelson v. East St. Louis & S. R. Co., 140 Ill. App. 185; Moore v. Centralia Coal Co., 140 Ill. App. 291; Offner v. Erie R. Co., 140 Ill. App. 562; Rastetter v. Peoria R. Co., 142 Ill. App. 417; Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448; Slavik v. Cal Hirsch & Sons Iron & Rail Co., 143 Ill. App. 509; Cleveland, etc., R. Co. v. Gossett [Ind.] 87 NE 723; Supreme Lodge, K. of P. v. Bradley [Ky.] 117 SW 275; Bruton's Adm'r v. Eddington-Griffiths Const. Co. [Ky.] 118 SW 1001; City of Louisville v. Brown [Ky.] 119 SW 1196; Carlson v. Great Northern R. Co., 106 Minn. 254, 118 NW 832; Batesville Gin Co. v. Whitten [Mass.] 48 S 616; Parsons Applegate Co. v. Louisville & N. R. Co., 136 Mo. App. 494, 118 SW 101; Tyson v. Jones, 150 N. C. 181, 63 SE 734; Leistekow v. Zuelsdorf [N. D.] 122 NW 340; Hanna v. Mosher [Okl.] 98 P 358; Baynes v. Billings [R. I.] 73 A 625; Producer's Oil Co. v. Barnes [Tex. Civ. App.] 120 SW 1023; Cowles v. Cowles' Estate, 81 Vt. 498, 71 A 191; Fowlie's Adm'x v. McDonald, Cutter & Co. [Vt.] 72 A 989; Nelson v. A. H. Stange Co., 137 Wis. 309, 118 NW 1119; Dolbins v. Thomas, 30 App. D. C. 511. Where evidence tended to support verdict for plaintiff under one count of complaint. Smith v. Snyder, 143 Ill. App. 85. Though great preponderance of evidence against it. Jones v. Lewis [Ark.] 117 SW 561. Where evidence in favor of plaintiff amounted to more than mere scintilla, though weight of evidence was decidedly against him. Papajian v. Scott, 37 Pa. Super. Ct. 560. Where evidence such that inference of defendant's negligence may be fairly and reasonably drawn therefrom. Galvin v. Brown [Or.] 101 P 671. Where plaintiff has established state of facts from which jury can draw reasonable inferences tending to sustain his contention. Catholic University v. Waggaman, 32 App. D. C. 307. Particularly true in case of motion at close of plaintiff's evidence where evidence of defendant must be such as to eliminate issues and assist jury in arriving at proper verdict. Id. Rule is not changed by fact that one of plaintiff's witnesses contradicts others. Bruton's Adm'r v. Eddington-Griffiths Const. Co. [Ky.] 118 SW 1001. Question is whether there is enough competent evidence to reasonably sustain a verdict should jury find in accordance therewith. Harris v. Missouri, K. & T. R. Co. [Okl.] 103 P 758; Cooper v. Flesner [Okl.] 103 P 1016. On review of direction of verdict only question is whether evidence was sufficient to have warranted verdict for unsuccessful party. McGrory v. Ultima Thule, A. & M. R. Co. [Ark.] 118 SW 710; Crawford v. Sawyer & Austin Lumber Co. [Ark.] 121 SW 286. Question presented by motion in personal injury case is not whether judge would infer that defendant had been negligent, but whether jury might legitimately find from testimony that such was case. Dirigolano v. Jersey City, etc., R. Co., 76 N. J. Law, 505, 71 A 257. Where plaintiff makes out prima facie case. Aldrich v. Shoe Mart Co. [Minn.] 121 NW 422. Giving general affirmative charge for defendant held improper where plaintiff was entitled to some damages and there was proof from which jury could infer that defendant was liable for trespass sued for. Daffin v. Zimmerman Mfg. Co. [Ala.] 48 S 109. Where is evidence tending to support every material averment of sufficient plea. Suell v. Derricott [Ala.] 49 S 895. Peremptory instruction for plaintiffs held improper, where clear preponderance of evidence was

in favor of defendant. Clark v. Moyse [Miss.] 48 S 721. Verdict should never be directed for defendants unless it is clear that there is no evidence whatever adduced that could in law support a verdict for plaintiff. Starks v. Sawyer, 56 Fla. 596, 47 S 513; McKinnon v. Johnson [Fla.] 48 S 910. Where in action on note given for purchase price of horse there is evidence warranting finding that it was obtained through material, false representations, to justify direction of verdict for plaintiff on ground that defendants had not been diligent to ascertain fraud and had not rescinded promptly, such facts must appear conclusively and without any evidence which, in any view, and with most favorable intendments and inferences to defendants, tends to prove the contrary. Swanke v. Herdeman, 138 Wis. 654, 120 NW 414. Direction of verdict held improper. Id.

Questions held for jury under the evidence. Bruton's Adm'r v. Eddington-Griffiths Const. Co. [Ky.] 118 SW 1001. Whether defendant's train killed plaintiff's horse. Birmingham Belt R. Co. v. Norris [Ala.] 50 S 91. Negligence and contributory negligence. Cinkovitch v. Thistle Coal Co. [Iowa] 121 NW 1036; City & S. R. v. Cooper, 32 App. D. C. 550. Negligence, contributory negligence, and assumption of risk. Charrier v. Boston & M. R. Co. [N. H.] 70 A 1078. Negligence. Louisville & N. R. Co. v. Smith [Ala.] 50 S 241; Crawford v. Sawyer & Austin Lumber Co. [Ark.] 121 SW 286; Robinson v. Omaha [Neb.] 121 NW 969; Dirigolano v. Jersey City, etc., R. Co., 76 N. J. Law, 505, 71 A 257; Tucker v. Brooklyn Heights R. Co., 131 App. Div. 97, 115 NYS 224; Walton & Co. v. Burchel [Tenn.] 121 SW 391; Galveston, etc., R. Co. v. Thompson [Tex. Civ. App.] 116 SW 106. Contributory negligence. Place v. Grand Trunk R. Co. [Vt.] 71 A 836. Recklessness and consequent right to punitive damages. Laughlin v. Southern Public Service Corp. [S. C.] 64 SE 1010. Fellow-servant. Crawford v. Sawyer & Austin Lumber Co. [Ark.] 121 SW 286. Whether telegraph company was negligent in failing to deliver message promptly. Western Union Tel. Co. v. Downs [Tex. Civ. App.] 119 SW 119. Authority of agent. Moyer v. Fogarty [Iowa] 119 NW 159. Whether broker had complied with contract so as to be entitled to commissions. Lieuwen v. Kline [Iowa] 120 NW 312. Defense of duress. Callendar Sav. Bank v. Loos [Iowa] 120 NW 317. Refusal to order verdict for defendant held proper where there was evidence upon which jury could find that his contention was not made out, though action could not be maintained if it was made out. Lewis v. Coupe, 200 Mass. 182, 85 NE 1053. In action on fire insurance policy, refusal to direct verdict for defendant held proper, though property destroyed was not within terms of policy, where was evidence warranting finding of estoppel. Wilson v. Farmers' Mut. Fire Ins. Co. [Mich.] 16 Det. Leg. N. 215, 121 NW 284. Motion to direct verdict for defendant in action on promissory note held properly denied where, at time it was filed, plaintiff had introduced note and shown that it had been delivered as defendant's individual obligation, and was no evidence to contrary. Zimbleman v. Finnegan [Iowa] 118 NW 312. Manner of accident as alleged by plaintiff held not so contrary to natural laws as to require direction of verdict for defendant. Pennsylvania Co. v. Whitney [C. C. A.] 169 F 572. In action to recover on contract of sale which defendant claimed to have rescinded on discovering that goods were not of kind contracted for, held error to direct verdict for plaintiff. Ziehme v. Simms [Minn.] 122 NW 458. Where was evidence tending to support both simple and wanton negligence on part of defendant, and thus to authorize actual and punitive damages, held that general affirmative charge could not properly have been given for defendant as to any count of complaint. Louisville & N. R. Co. v. Weathers [Ala.] 50 S 268. Plaintiff's evidence, though circumstantial, held reasonably sufficient and cogent enough to require submission of issue to jury. Texas & G. R. Co. v. Pate [Tex. Civ. App.] 113 SW 994. Where was no motion for nonsuit and no request to withdraw from jury any of grounds of defendant's negligence alleged in complaint, held that defendant's motion for directed verdict was properly denied, if was testimony sufficient to go to jury on any of said alleged grounds. Forquer v. Slater Brick Co., 37 Mont. 426, 97 P 843. Even though plaintiff in action against carrier for loss of goods shipped was not entitled to recover for all so lost, held that that fact would not authorize direction of verdict for defendant on entire case, where plaintiff was entitled to recover as to some of them. Way v. Southern R. Co. [Ga.] 64 SE 1066. Evidence in action to enforce mechanic's lien held not to wholly fail to show continuity of account for materials or to conclusively establish that certain item was not contemplated as an item of such account, so as to bar foreclosure, and hence direction of verdict for defendant was improper. Darlington Lumber Co. v. Smith Bldg. Co., 134 Mo. App. 316, 114 SW 77.

99. To reverse refusal to direct verdict for party having burden of proof, evidence essential to discharge of burden must be such as would authorize court to assume as matter of law that facts in issue have been established by evidence offered. Western Union Tel. Co. v. Parsley [Tex. Civ. App.] 121 SW 226. Evidence held insufficient to discharge burden resting on defendant so that refusal to direct verdict for it was proper. Id. Since in action against last of several connecting carriers based on its common-law liability plaintiff made out prima facie case by showing delivery of goods to initial carrier for transportation over entire line, and failure of final carrier to deliver all of them, thereby shifting burden to defendant to show that it did not receive lost articles or otherwise was not liable for loss, which it did not do, held error to direct verdict for defendant. Way v. Southern R. Co. [Ga.] 64 SE 1066. Where, in action of ejectment to recover possession of lands, defendant claimed under tax deed which was introduced in evidence, plaintiff's evidence as to failure to give sufficient notice of application held to have overcome effect of prima facie presumption in favor of regularity of proceedings placing burden on defendant to show that notice was given or was not necessary, and defendant failed to sustain burden or to show title by adverse

A test frequently adopted is whether the court would have been required to set aside a contrary verdict.[1] In some states a verdict may not be directed where the evidence is oral.[2] In others it may not be directed in favor of the party having the burden of proof where it must be based wholly or partially on verbal evidence.[3] There is a conflict of authority as to whether a mere scintilla of evidence in a party's favor precludes the direction of a verdict against him.[4] A directed verdict based on inadmissible evidence,[5] or on the absence of evidence improperly excluded,[6] cannot be sustained. Mere failure of plaintiff to make out his case will ordinarily lead to a nonsuit rather than a directed verdict,[7] but the contrary is true where defendant shows himself entitled to a judgment on the merits.[8] It has been held that where in ejectment plaintiff is entitled to a verdict, but not to recover all the land sued for, a peremptory instruction in his favor may be refused,[9] but that it is not error to give it.[10] Subsequent instructions based on a different theory will not affect the

possession. Held error to direct verdict for defendant. Starks v. Sawyer, 56 Fla. 596, 47 S 513. Direction of verdict for plaintiff held error where was fatal variance as to one point urged by him and failure of proof as to other. Jordan v. Reed [N. J. Err. & App.] 71 A 280. Where plaintiff might have been nonsuited had such a motion been made, held that direction of verdict in his favor was error. Id.

1. Weston v. Livezey [Colo.] 100 P 404; Lloyd v. Canon City [Colo.] 103 P 288; Currie v. Consolidated R. Co., 81 Conn. 383, 71 A 356; Roe v. Phelps [Conn.] 73 A 138; Weber v. Illinois Cent. R. Co., 143 Ill. App. 498; Inhabitants of Wellington v. Corinna, 104 Me. 252, 71 A 889; Clark v. Moyse [Miss.] 48 S 721; Kropp v. Hermann Brew. Co. [Mo. App.] 119 SW 1066; Davis v. Chicago, B. & Q. R. Co., 83 Neb. 611, 119 NW 1121; McMillin v. Titus, 222 Pa. 500, 72 A 240; Hoylman v. Kanawha & M. R. Co., 65 W. Va. 264, 64 SE 536; Noble v. Crane & Co. [C. C. A.] 169 F 55; Robinson v. Denver City Tramway Co. [C. C. A.] 164 F 174. Test whether court properly directed verdict of its own motion on denial of defendant's motion for nonsuit and his refusal to introduce evidence is whether, if jury, in absence of special direction, should find any other verdict, it ought to be set aside. Patty v. Salem Flouring Mills Co. [Or.] 100 P 298, for former opinions [Or.] 96 P 1106, [Or.] 98 P 521.

2. Philadelphia v. Bilyen, 36 Pa. Super. Ct. 562. Particularly where question involved is one of fraud. Fry v. National Glass Co., 219 Pa. 514, 69 A 56.

3. Collins v. Catholic Order of Foresters [Ind. App.] 88 NE 87; Fowler Utilities Co. v. Chaffin Coal Co. [Ind. App.] 87 NE 689.

4. Mere scintilla of evidence cannot sustain verdict, but it must be substantial. Pennsylvania Co. v. Whitney [C. C. A.] 169 F 572. Whether it is only scintilla of evidence is for court to say, and, where court so finds, its duty is to withdraw case from jury. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. Cannot submit case to jury because court finds there is more than scintilla, and yet instruct that, if they find there is only a scintilla, they will not be justified in a verdict for plaintiff. Id. Verdict held properly directed for plaintiff where was no substantial evidence to support defendant, though was mere scintilla. Strauss v. American Chewing Gum Co., 134 Mo. App. 110, 114 SW 73. Evidence held sufficient under scintilla rule to warrant court in refusing peremptory instruction for defendants. Mason & Hodge Co. v. Highland [Ky.] 116 SW 320. Where verdict of jury accords with overwhelming weight of evidence and also court's knowledge and experience, affirmative charge will not be held erroneous, though there is slight evidence to contrary. Stewart v. Beggs, 56 Fla. 565, 47 S 932.

5. Glover v. Newsome [Ga.] 65 SE 64. Verdict improperly directed where alleged undisputed proof consisted of inadmissible evidence, and was also conflict of evidence. American Trust & Sav. Bank v. Zeigler Coal Co. [C. C. A.] 165 F 34.

6. Direction of verdict for plaintiff for insufficiency of defendant's evidence held improper, where defendant offered to supply additional testimony but was not permitted to do so. Callendar Sav. Bank v. Loos [Iowa] 120 NW 317. Held that though in action against owner of private tramroad for killing of stock by tram engine, there was no evidence of negligence other than fact of the killing, and hence plaintiff did not make out prima facie case, it was error to dispose of case by directing verdict for defendant where court erroneously refused to allow plaintiff to prove that defendant's engines and cars were not equipped with brakes. Dean v. Hilton & Dodge Lumber Co. [Ga. App.] 65 SE 300.

7. See, also, Discontinuance, Dismissal and Nonsuit. Defendant not being entitled to judgment concluding case on merits. Gay v. Peak, 5 Ga. App. 583, 63 SE 650.

8. Where in partition certain of the defendants set up claim of title in themselves and plaintiff's testimony was insufficient to support their claim, held that motion to direct verdict was proper remedy, and granting of nonsuit was error. Windham v. Lafferty [S. C.] 65 SE 526.

9. Though in ejectment plaintiff was entitled to recover all land except few acres claimed by defendant by adverse possession, held not error to refuse general affirmative charge to find for plaintiff since it might have misled jury to infer that he was entitled to recover all the land sued for. Cochran v. Kimbrough [Ala.] 47 S 709.

10. Giving of general affirmative charge in favor of plaintiff in ejectment held not reversible error, where he was in fact entitled to a verdict, though not to recover entire

correctness of a ruling denying the motion.[11] Where the issues in consolidated actions are tried separately, the correctness of the direction of a verdict in either case must depend on the facts of that case alone.[12] A verdict may be directed for defendant on plaintiff's opening statement provided the facts therein deliberately conceded are such as, if proven, would not entitle plaintiff to a recovery,[13] but in ruling on such motion the material facts alleged in the complaint which counsel offers to prove must be taken as true,[14] and he must be given an opportunity to prove them.[15]

The motion or request. See 11 C. L. 1089—In order to put the court in error for refusal to direct a verdict, there must be a motion or request therefor,[16] in proper form,[17] which should ordinarily specify the grounds on which it is based.[18] The motion raises a question of law.[19] It admits the truth of the evidence of the party against whom it is directed[20] with such conclusions and inferences as may reason-

subject-matter claimed in the complaint. Swift v. Doe [Ala.] 50 S 123.

11. Aultman Engine Thresher Co. v. Chicago, etc., R. Co. [Iowa] 121 NW 22.

12. Where action on contract was consolidated with one by other party to recover damages for its breach, but issues were tried separately, held that direction of verdict for plaintiff in first action on defendant's admission that account under contract was correct could not be disturbed because of error in directing verdict in other action. American Trust & Sav. Bank v. Zeigler Coal Co. [C. C. A.] 165 F 34.

13. Such power should be exercised sparingly, and never without full consideration and opportunity for counsel to explain and qualify his statement so far as truth will permit. Barrett v. Minneapolis, etc., R. Co., 106 Minn. 51, 117 NW 1047. Statement held not to entitle defendant to directed verdict. Id.

14. Material facts alleged in declaration which counsel offered to prove before ruling must be taken as correct. Barto v. Detroit Iron & Steel Co. [Mich.] 15 Det. Leg. N. 912, 118 NW 738. Held error to direct verdict for defendant in view of allegations of declaration which plaintiff offered to prove. Id. Statement made after verdict was directed held entitled to same consideration as if made before, where court ruled that it must be made thereafter. Id.

15. Held improper to reject proof offered by counsel to sustain allegations of declaration before direction of verdict. Barto v. Detroit Iron & Steel Co. [Mich.] 15 Det. Leg. N. 912, 118 NW 738.

16. Haley v. American Agricultural Chemical Co. [Pa.] 73 A 557.

17. Requested instruction that on the evidence and pleadings in the case verdict must be for defendant properly refused as too general, proper form being that there was no evidence legally sufficient to entitle plaintiff to recover under the pleadings in the case. Pearre v. Smith, 110 Md. 534, 73 A 141. Requested instruction that upon the whole evidence jury should answer issue as to former adjudication in the affirmative held properly refused as not improper form, since it deprived jury of right to pass on credibility of witnesses. Hawk v. Pine Lumber Co., 149 N. C. 16, 62 SE 754. Requested charge "The court charges the jury that they must find for the defendant as to the second count of the complaint" held bad in form. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. Prayer for directed verdict held not objectionable as segregating testimony of plaintiff herself and ignoring that of the other witnesses. Gleason v. Suskin, 110 Md. 137, 72 A 1034.

18. Motion properly denied where no grounds stated. Jones v. Whittier [N. J. Err. & App.] 73 A 497. Fact that motion was general on whole record without any specification of grounds thereof held not to preclude review of ruling denying it, where it was apparent that same propositions had been brought to attention of both tribunals. O'Halloran v. McGuirk [C. C. A.] 167 F 493. On appeal from direction of verdict, respondent cannot ask that it be sustained on ground that judge erred in admission of evidence. Mitchell v. Allen, 81 S. C. 340, 61 SE 1087.

19. Granting of motion held holding that plaintiff was guilty of contributory negligence as matter of law. Stewart v. Balfour, 51 Wash. 127, 98 P 103.

20. Nichols v. Chicago, B. & Q. R. Co., 44 Colo. 501, 98 P 808; Catholic University v. Waggaman, 32 App. D. C. 307; City & S. R. Co. v. Cooper, 32 App. D. C. 550; Savage v. Chicago & J. Elec. R. Co., 238 Ill. 392, 87 NE 377; Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 542; Farmers' Nat. Bank v. Coyner [Ind. App.] 88 NE 856; Moyers v. Fogarty [Iowa] 119 NW 159; Dickinson v. Stevenson [Iowa] 120 NW 324; Gatz v. Harris [Ky.] 121 SW 462; Lynch v. Boston & M. R. Co., 200 Mass. 403, 86 NE 781; Johnson v. Desmond Chemical Co. [Mich.] 16 Det. Leg. N. 236, 121 NW 269; Rumsey v. Fox [Mich.] 16 Det. Leg. N. 598, 122 NW 526; Reynolds v. Metropolitan St. R. Co., 136 Mo. App. 282, 116 SW 1135; Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038; Kinner v. Whipple, 128 App. Div. 736, 113 NYS 237; Sheldon v. George, 132 App. Div. 470, 116 NYS 969; Hanna v. Mosher [Okl.] 98 P 358; Harris v. Missouri, K. & T. R. Co. [Okl.] 103 P 758; Cooper v. Flesnor [Okl.] 103 P 1016. Entitled to full force of his own competent testimony, though contradicted, and benefit of all uncontradicted testimony including most favorable inferences to be rationally deduced from all the evidence. Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969. On reviewing ruling directing verdict for defendant must be assumed that jury might believe plaintiff's testimony. Powers v. Wyman & Gordon Co., 199 Mass. 591, 85 NE 845.

ably be drawn therefrom,[21] and such evidence must be considered in the aspect most favorable to him.[22] The moving party's evidence cannot be considered [23] except in so far as it may be available to support the adverse party's case or defense.[24] Where additional evidence is received after the motion is made, a renewal of the motion is ordinarily required.[25] A request by both parties for a directed verdict is equivalent to a withdrawal of the case from the jury and the submission thereof to the

21. Nichols v. Chicago, B. & Q. R. Co., 44 Colo. 501, 98 P 808; Catholic University v. Waggaman, 32 App. D. C. 307; City & S. R. Co. v. Cooper, 32 App. D. C. 550; Alabama Const. Co. v. Continental Car & Equipment Co., 131 Ga. 365, 62 SE 160; Wilkinson v. Aetna Life Ins. Co., 240 Ill. 205, 88 NE 550; Fosbury v. Aurora, E. & C. R. Co., 141 Ill. App. 98; Brase v. Chicago Union Trac. Co., 142 Ill. App. 117; Gilmer Creamery Ass'n v. Quentin, 142 Ill. App. 448; Farmers' Nat. Bank v. Coyner [Ind. App.] 88 NE 856; Kern v. Des Moines City R. Co. [Iowa] 118 NW 451; Gatz v. Harris [Ky.] 121 SW 462; Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969; McCallum v. Corn Products Co., 131 App. Div. 617, 116 NYS 118; Sheldon v. George, 132 App. Div. 470, 116 NYS 969; Hanna v. Mosher [Okl.] 98 P 358; Harris v. Missouri, K. & T. R. Co. [Okl.] 103 P 758; Cooper v. Flesner [Okl.] 103 P 1016; Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186; Law v. Smith, 34 Utah, 394, 98 P 300; Swanke v. Herdeman, 138 Wis. 654, 120 NW 414; Noble v. Crane & Co. [C. C. A.] 169 F 55. Is entitled to every inference that can fairly be drawn in his favor from evidence, but not to mere conclusion that witness may draw when facts stated show that such conclusion is without any reason. McCreery v. United R. Co. [Mo.] 120 SW 24.

22. Torrens v. Texarkana Gas & Elec. Co. [Ark.] 115 SW 389; Jones v. Lewis [Ark.] 117 SW 561; Aluminum Co. of North America v. Ramsey [Ark.] 117 SW 568; McGrory v. Ultima Thule, A. & M. R. Co. [Ark.] 118 SW 710; Crawford v. Sawyer & Austin Lumber Co. [Ark.] 121 SW 286; Simmons v. Council, 5 Ga. App. 386, 63 SE 238; Balsewicz v. Chicago, B. & Q. R. Co., 240 Ill. 238, 88 NE 734; Fosbury v. Aurora, E. & C. R. Co., 141 Ill. App. 98; Kern v. Des Moines City R. Co. [Iowa] 118 NW 451; McDivitt v. Des Moines City R. Co. [Iowa] 118 NW 459; Miller v. White Bronze Monument Co. [Iowa] 118 NW 518; Lieuwen v. Kline [Iowa] 120 NW 312; Cincinnati, etc., R. Co. v. Harrod's Adm'r [Ky.] 115 SW 699; Johnson v. Desmond Chemical Co. [Mich.] 16 Det. Leg. N. 236, 121 NW 269; Schaub v. Kansas City So. R. Co., 133 Mo. App. 444, 113 SW 1163; McGee v. Wabash R. Co., 214 Mo. 530, 114 SW 33; Sambos v. Cleveland, etc., R. Co., 134 Mo. App. 460, 114 SW 567; Meily v. St. Louis & S. F. R. Co., 215 Mo. 567, 114 SW 1013; Day v. Consolidated L., P. & Ice Co., 136 Mo. App. 274, 117 SW 81; Parsons Applegate Co. v. Louisville & N. R. Co., 136 Mo. App. 494, 118 SW 101; Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038; Charrier v. Boston & M. R. Co. [N. H.] 70 A 1078; Dirigolano v. Jersey City, etc., R. Co., 76 N. J. Law, 505, 71 A 257; Tucker v. Brooklyn Heights R. Co., 131 App. Div. 97, 115 NYS 224; McCallum v. Corn Products Co., 131 App. Div. 617, 116 NYS 118; Hyde v. Thompson [N. D.] 120 NW 1095; Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186; Law v. Smith, 34 Utah, 394, 98 P 300; Place v. Grand Trunk R. Co. [Vt.] 71 A 836; Town of Rolling v. Wunderlich, 138 Wis. 667, 120 NW 515; Noble v. Crane & Co. [C. C. A.] 169 F 55. On review of refusal to direct verdict for defendant, must take as true strongest legitimate view of evidence in favor of verdict for plaintiff, and disregard all countervailing evidence. Walton & Co. v. Burchel [Tenn.] 121 SW 391. Proof most favorable alone stands in consideration of motion for directed verdict. Zetsche v. Chicago, etc., R. Co., 238 Ill. 240, 87 NE 412.

23. Eblin v. American Car & Foundry Co., 238 Ill. 176, 87 NE 385; Carroll v. Manganese Steel Safe Co. [Md.] 73 A 665; Rumsey v. Fox [Mich.] 16 Det. Leg. N. 598, 122 NW 526; Laughlin v. Southern Public Service Corp. [S. C.] 64 SE 1010. Where evidence is conflicting, all facts and inferences in conflict with evidence against which action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving solely for consideration evidence favorable to party against whom motion is directed. Harris v. Missouri, K. & T. R. Co. [Okl.] 103 P 758; Cooper v. Flesner [Okl.] 103 P 1016. Court looks only to evidence supporting claim of party against whom it is directed, and contradictory evidence, however strong, cannot be considered. Balsewicz v. Chicago, B. & Q. R. Co., 240 Ill. 238, 88 NE 734. Motion to direct verdict for defendant raises question whether evidence tending to support cause of action is sufficient in law to sustain verdict, taking no account of contradictory evidence. Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 542. If evidence at close of plaintiff's case does not justify direction of verdict for defendant, no evidence which defendant may introduce will do so, except uncontradicted evidence of an affirmative defense. Balsewicz v. Chicago, B. & Q. R. Co., 241 Ill. 238, 88 NE 734. The only evidence to be considered on motion to direct verdict is that tending to sustain contention of opposite party. Casey v. Kelly-Atkinson Const. Co., 240 Ill. 416, 88 NE 982.

24. Carroll v. Manganese Steel Safe Co. [Md.] 73 A 665. On motion at close of evidence, plaintiff held entitled to benefit of all the proofs in his favor, by which ever party introduced. Kluska v. Yeomans [Wash.] 103 P 819. Request to direct verdict for insufficiency of evidence made at close of all evidence properly refused, where there was evidence on part of defendant tending to sustain plaintiff's case. Pennsylvania R. Co. v. Cecil [Md.] 73 A 820.

25. Though it was irregular to direct verdict after receiving additional evidence without renewal of either party's motion, held that such irregularity, under circumstances, should be disregarded as not affecting any substantial right. Dring v. St. Lawrence Tp. [S. D.] 122 NW 664.

court for a finding on the facts,[26] and the same is true where one party moves for a directed verdict and the other for a nonsuit or dismissal.[27] The application of this rule will, however, be restricted to cases coming within its evident spirit and intent,[28] and a timely objection to the court finding the facts in case his motion is overruled may render the direction of a verdict against the objecting party improper.[29] In New York the defeated party may, by a timely [30] request [31] therefor, procure the submission to the jury of specific disputed questions of fact.[32] Where motions by both parties are denied and the court submits issues of fact to the jury, the verdict is binding on him to the same extent as any verdict in a law action.[33]

26. Kinner v. Whipple, 128 App. Div. 736, 113 NYS 337; Sewell v. Home Ins. Co., 131 App. Div. 131, 115 NYS 345; Coffey v. Burke, 132 App. Div. 128, 116 NYS 514; Secor v. Ardsley Ice Co., 133 App. Div. 136, 117 NYS 414. Decision on facts has same weight as verdict. Sheldon v. George, 132 App. Div. 470, 116 NYS 969. Practically concession that none of the essential facts are controverted. Buffalo Glass Co. v. Assets Realization Co., 117 NYS 1087. May assess damages where no request to go to jury. Clancy v. New York, etc., R. Co., 133 App. Div. 119, 117 NYS 233. Trial term held to have right to direct verdict where direction was requested by both parties. People v. Dooling, 132 App. Div. 50, 116 NYS 371. Only questions open for consideration on appeal are whether there was substantial evidence supporting the finding, and whether court committed any error of law during the trial. Chicago, B. & Q. R. Co. v. U. S. [C. C. A.] 170 F 556; Interstate Life Assur. Co. v. Dalton [C. C. A.] 165 F 176; Segear v. Westcott, 83 Neb. 515, 120 NW 170.

27. Where defendants moved for discharge of jury and entry of judgment in their favor, and plaintiff for directed verdict and there was no conflict in evidence as to any material fact. Easterly v. Mills [Wash.] 103 P 475. Where on conclusion of plaintiff's case defendant moved for nonsuit and on denial thereof rested without offering any evidence, and plaintiff then moved for direction of verdict in its favor, held that court was authorized to determine case as one of law on facts in evidence, and his determination was conclusive if there was any evidence to sustain it. Mullen v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078. Where, in proceedings by city to ascertain damages resulting from regrade of street, defendant moved to dismiss on ground that city had failed to show any damage to his property, and plaintiff moved for directed verdict of no damages for same reason, held that defendant could not contend that court erred in taking question of damages from jury and directing verdict of no damages. City of Seattle v. Buty, 50 Wash. 139, 96 P 962. If is any evidence to uphold decision, it is not error to direct verdict for plaintiff where defendant's motion for nonsuit is denied, and he declines to introduce any evidence, and does not request that cause be submitted to jury. Patty v. Salem Flouring Mills Co. [Or.] 98 P 521, for former opinion see [Or.] 96 P 1106, rehearing denied [Or.] 100 P 298. Appeal in such case brings up only denial of nonsuit, which ruling will be sustained if there is any evidence to support judgment. Id.

28. Defendant moved for directed verdict at close of plaintiff's case and at close of all evidence. Both motions were denied and rulings excepted to. Plaintiff then asked court to instruct that only questions for their consideration were extent of injuries and amount of damages, contending that evidence was conclusive in his favor on all other issues, which request was granted. Held error, court not being warranted in assuming that by making such motions defendant waived jury and submitted all issues to court for decision, he having resisted plaintiff's request and excepted to giving of his instruction. Umstead v. Colgate Farmers' Elevator Co. [N. D.] 122 NW 390. Where both parties move for directed verdict, one whose motion is denied must specifically request submission to jury of such questions of fact as he desires to have submitted, and if he does not, and court directs verdict for other party, he cannot predicate error upon failure to submit issues on which evidence is conflicting to jury. Duncan v. Great Northern R. Co. [N. D.] 118 NW 826.

29. Defendant held not to have waived findings by jury where he objected to court finding facts and insisted on case being submitted to jury if his motion was overruled. Gooler v. Eidness [N. D.] 121 NW 83.

30. Request is in time if made at any time before directed verdict is actually rendered by jury. Maxwell v. Martin, 130 App. Div. 80, 114 NYS 349. Not too late when made before verdict was entered, though after it was directed. Strohm v. Zoellner, 61 Misc. 56, 112 NYS 1063.

31. Request must be specific, so that court may pass directly upon it. Kinner v. Whipple, 128 App. Div. 736, 113 NYS 337. Suggestion of counsel that there was disputed question of fact held not to amount to withdrawal of his request for direction of verdict, and request to go to jury on that question. Id. Failure of defendant to request submission of issue to jury held not to preclude review of order directing verdict for defendant, where, owing to exclusion of evidence by court, there was nothing to submit to jury. City of New York v. Mechanics' & Traders' Bank, 130 App. Div. 748, 115 NYS 769.

32. While he cannot ask to go to the jury generally, is not precluded from asking to go to the jury upon any specific question of fact which he points out to the court. Maxwell v. Martin, 130 App. Div. 80, 114 NYS 349.

33. New York Produce Exch. Bank v. Twelfth Ward Bank, 62 Misc. 69, 115 NYS 998. Waiver of jury trial through united motions for directed verdict cannot be ef-

A verdict cannot ordinarily be directed after the jury has been discharged or at a subsequent term.[34]

Waiver. See 11 C. L. 1091—Defendant ordinarily waives an objection to the overruling of a motion to direct a verdict made at the close of plaintiff's case by thereafter introducing evidence in his own behalf,[35] unless he renews the motion at the close of all the evidence.[36] The right to object to the refusal to direct a verdict is waived by failure to renew the motion, accompanied by the proper instruction, at the close of all the evidence.[37]

The order or instruction. See 11 C. L. 1091—On directing a verdict, the court may fix the amount of recovery where it is a mere matter of computation.[38] Credits to which the unsuccessful party is concededly entitled should be deducted.[39] The failure to give a reason for granting the motion cannot be taken advantage of by the successful party.[40] The proper judgment to be entered on the verdict is for the determination of the court.[41]

Effect of direction. See 11 C. L. 1091—The direction of a verdict is equivalent to a judgment on the merits.[42] The court may vacate a directed verdict and grant a new trial.[43]

Appeal See 11 C. L. 1091 involves particularly the question of the appealability of the order,[44] the necessity of showing in the record the evidence and the grounds of the motion,[45] and the extent of the appellate review of the question of fact,[46] which are all fully treated elsewhere.

§ 2. *Demurrers to evidence.*[47]—See 11 C. L. 1092—The practice of demurring to evidence is not an invasion of the right to a jury trial.[48] A demurrer to the evi-

fected in law action without court's consent. Id.

34. Where both parties moved for directed verdict, and court stated that he would direct verdict but reserved decision as to which party he would direct it for until after submission of briefs, in which procedure both parties acquiesced, held that defendant could not object that court could not direct verdict after jury had been discharged and after the term, though such was probably the rule. Secor v. Ardsley Ice Co., 133 App. Div. 136, 117 NYS 414.

35. Fuller v. Margaret Min. Co., 64 W. Va. 437, 63 SE 206; Pennsylvania R. Co. v. Cecil [Md.] 73 A 820.

36. Is not waived if motion is renewed. Detroit United R. Co. v. Nichols [C. C. A.] 165 F 289. Question not mere matter of procedure or practice and hence not within federal conformity act, and not affected by any state statute or practice on the subject. Id. Though where requested instruction in nature of demurrer to plaintiff's evidence is overruled better practice is to renew it at end of whole case, it may be considered though this is not done where defendant's evidence does not aid plaintiff's case, and where overruling of said demurrer is urged as error in motion for new trial. Matz v. Missouri Pac. R. Co., 217 Mo. 275, 117 SW 584; Quinn v. Metropolitan St. R. Co., 218 Mo. 545, 118 SW 46.

37. Reavely v. Harris, 239 Ill. 526, 88 NE 238.

38. Where court correctly ruled that plaintiff was entitled to recover rent due under lease and correctly directed verdict accordingly, held proper for him to compute said amount according to terms of lease and to direct jury to find accordingly. Burress v. Diem [Okl.] 101 P 1116.

39. Where it appeared on face of account sued on that defendant was entitled to credit of certain amount, directing verdict for full amount of account without allowing such credit held error. Bryant v. Enochs Lumber & Mfg. Co. [Miss.] 49 S 113.

40. Rule requiring giving of some reason, either in motion or otherwise, when motion for directed verdict is granted, is for benefit of party against whom motion is directed. Morris v. Salt Lake City [Utah] 101 P 373.

41. American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 S 942.

42. Where at close of plaintiff's case each of the defendants moves for directed verdict on ground that plaintiff has failed to make case for jury, after motions have been submitted and court has ruled thereon, plaintiff cannot dismiss without prejudice to future actions. Rev. St. 1906, § 5314, construed. Turner v. Pope Motor Car Co., 79 Ohio St. 153, 86 NE 651. Action of plaintiff in asking for peremptory instruction against one of two defendants held tantamount to dismissal of other. Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960.

43. Court directing verdict may set it aside, but on doing so should grant new trial where case presents question for jury. People v. Dooling, 132 App. Div. 50, 116 NYS 371.

44. See Appeal and Review, § 4B.

45. See Appeal and Review, § 9D.

46. See Appeal and Review, § 13F2.

47. Search Note: See note in 3 C. L. 1096. See, also, Appeal and Error, Cent. Dig. §§ 3748, 3846, 4023, 4137; Dec. Dig. §§ 548(4), 927(5), 973, 997, 1061(1); 2 Cyc. § 1083; 3 Cyc. §§ 306, 340; Trial, Cent. Dig. §§ 346-358, 981; Dec. Dig. §§ 150-158, 418; 9 A. & E. Enc. L. (2ed.) 272; 6 A. & E. Enc. P. & P. 438.

48. Demurrer does not invade province of

dence may properly be sustained where there is no evidence for plaintiff authorizing any recovery whatsoever in his favor.[49] It should be overruled where the evidence is conflicting [50] or presents an issue of fact,[51] or where there is any substantial evidence tending to support the cause of action pleaded,[52] or where reasonably fair minded men might differ as to the facts,[53] or where the weight of the evidence is involved.[54] Ordinarily a demurrer may be sustained as to one or more of several demurrants and overruled as to the others,[55] but a joint demurrer by several defendants should be overruled if the evidence fairly tends to establish a cause of action against one or more of them.[56] The demurrer goes only to the sufficiency of the evidence, and is not a proper proceeding to test the sufficiency of the complaint [57] nor does it raise questions going only to the amount of damages.[58] An issue on which the demurrant has the burden of proof under the pleadings cannot be determined in his favor on demurrer.[59] The fact that defendant has demurred to the evidence does not ipso facto deprive plaintiff of the right to amend the complaint.[60] The demurrer admits the truth of the evidence to which it is directed,[61] with

jury as triers of disputed facts, but, assuming that evidence demurred to is true, court is called on to determine whether it warrants judgment for demurree as matter of law. Lynchburg Milling Co. v. National Exch. Bank [Va.] 64 SE 980.

49. Where facts are undisputed and court can see that injury resulting from defendant's alleged act or omission was not probable, but remote, it is court's duty to determine question of proximate cause. Comes v. Dabney [Kan.] 102 P 488. Demurrer held improperly overruled. Id.

Demurrer held properly sustained. Theis v. Beaver County Com'rs [Okl.] 97 P 973; Lynchburg Milling Co. v. National Exch. Bank [Va.] 64 SE 980. Where plaintiff's evidence showed affirmatively that he could not recover, though matter was not pleaded as defense. Bond v. Sandford, 134 Mo. App. 477, 114 SW 570. Where plaintiff's evidence showed such contributory negligence as to defeat recovery, though there was no plea of contributory negligence. Sissel v. St. Louis & S. F. R. Co., 214 Mo. 515, 113 SW 1104. Where plaintiff's evidence was insufficient to show negligence on part of defendant and showed contributory negligence. Id. Where evidence showed that decedent was guilty of contributory negligence. Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007.

50. Felver v. Central Elec. R. Co., 216 Mo. 195, 115 SW 980.

51. Demurrer held properly overruled. Bond v. Sandford, 134 Mo. App. 477, 114 SW 570; Meily v. St. Louis & S. F. R. Co., 215 Mo. 567, 114 SW 1013; Kinlen v. Metropolitan St. R. Co., 216 Mo. 145, 115 SW 523; Merritt v. Matchett, 135 Mo. App. 176, 115 SW 1066. Demurrer improperly sustained where evidence did not conclusively show contributory negligence. Johnson v. Chicago, etc., R. Co. [Kan.] 103 P 90.

52. Kerr v. Kerr [Kan.] 101 P 647; Milton's Adm'x v. Norfolk & W. R. Co., 108 Va. 752, 62 SE 960. If pleadings, liberally construed, present any issue upon which a verdict and judgment may be based, and there is any evidence fairly tending to support said issue in favor of plaintiff. Hennis v. Bowers [Kan.] 100 P 71. If evidence is such that jury might have found verdict for demurree, court must so find and grant judgment in his favor. Milton's Adm'x v. Norfolk & W. R. Co., 108 Va. 752, 62 SE 960; Phillips v. Southern R. Co. [Va.] 63 SE 998; City of Richmond v. Barry [Va.] 63 SE 1074; Virginia Iron, Coal & Coke Co. v. Munsey [Va.] 65 SE 478. On appeal in law case court will only examine record to see if evidence supports verdict. City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21. Demurrer to evidence, whether regarded as such or as motion to find for defendant for want of any evidence to prove cause of action, held properly overruled, where even on defendant's theory it was liable for part of damages claimed. Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 NE 740.

Questions held for jury: Negligence. Felver v. Central Elec. R. Co., 216 Mo. 195, 115 SW 980; Nelson Vitrified Brick Co. v. Mussulman [Kan.] 99 P 236. Negligence and contributory negligence. Crawford v. Kansas City Stockyards Co., 215 Mo. 394, 114 SW 1057; Virginia Iron, Coal & Coke Co. v. Munsey [Va.] 65 SE 478.

53. Milton's Adm'x v. Norfolk & W. R. Co., 108 Va. 752, 62 SE 960; Virginia Iron, Coal & Coke Co. v. Munsey [Va.] 65 SE 478.

54. Demurrer properly overruled, where evidence had reached point where it must be weighed and conclusions deduced therefrom. Missouri, K. & T. R. Co. v. Watkins Merchandise Co., 76 Kan. 813, 92 P 1102.

55. Where are several defendants and evidence does not fairly tend to support any issue upon which judgment may be rendered against one or more of them, demurrer should be sustained as to such one or more, and trial may proceed as to remainder. Code Civ. Proc. § 396 (Gen. St. 1901, § 4845). Hennis v. Bowers [Kan.] 100 P 71.

56. If petition liberally construed states cause of action against all of them. Hennis v. Bowers [Kan.] 100 P 71.

57. Hennis v. Bowers [Kan.] 100 P 71.

58. In action against hotel for loss of handbag and contents, whether defendant was liable for loss of jewelry therein. Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 NE 740.

59. Theis v. Beaver County Com'rs [Okl.] 97 P 973.

60. Atlas Coal Co. v. O'Rear [Ala.] 50 S 63.

61. Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 NE 740; City of St. Louis v. Eagle

every reasonable inference that may be drawn therefrom,[62] and such evidence must be considered most favorably to plaintiff.[63] The demurrant's evidence cannot be considered [64] except in so far as it aids the plaintiff's case.[65]

The demurrer must ordinarily be in writing [66] and must set out particularly the facts which the evidence demurred to fairly tends to prove.[67] In some states it must contain a statement of all the evidence.[68] It may be amended in proper case.[69]

The judgment rendered on sustaining the demurrer may ordinarily be vacated at the same term.[70]

Waiver. See 11 C. L. 1092—The motion is waived by proceeding with the trial upon its denial,[71] it being usually necessary in such case to renew the motion at the close of the case.[72]

Disclaimers, see latest topical index.

Packet Co., 214 Mo. 638, 114 SW 21; Kinlen v. Metropolitan St. R. Co., 216 Mo. 145, 115 SW 523; Chesapeake & O. R. Co. v. Hall's Adm'r [Va.] 63 SE 1007; City of Richmond v. Barry [Va.] 63 SE 1074; Norfolk & W. R. Co v. Holmes' Amd'r [Va.] 64 SE 46; Virginia Iron, Coal & Coke Co. v. Munsey [Va.] 65 SE 478. Admits all facts which evidence tends to prove and all reasonable deductions which may be naturally drawn therefrom, and at same time maintains that there is no legal liability under the admitted facts. Meily v. St. Louis & S. F. R. Co., 215 Mo. 567, 114 SW 1013. Cannot weigh conflicting evidence or regard case as though submitted by defendant upon plaintiff's showing, but must consider as true all portions of the evidence which tend to prove allegations of petition. Kerr v. Kerr [Kan.] 101 P 647. Same rule applies in case tried by court without a jury. Id. Attorney's demurrer to evidence in proceedings to disbar him on ground of his conviction of crime held not an admission of his guilt, since under statute he could not deny it in such proceedings. In re Ebbs, 150 N. C. 44, 63 SE 190. In reviewing refusal to grant prayer in the nature of demurrer to evidence, it must be assumed that evidence of opposing party, though contradicted, is true. United R. & Elec. Co. v. Carneal, 110 Md. 211, 72 A 771.

62. City of St. Louis v. Eagle Packet Co., 214 Mo. 638, 114 SW 21; Meily v. St. Louis & S. F. R. Co., 215 Mo. 567, 114 SW 1013; Kinlen v. Metropolitan St. R. Co., 216 Mo. 145, 115 SW 523; City of Richmond v. Barry [Va.] 63 SE 1074.

63. Merritt v. Matchett, 135 Mo. App. 176, 115 SW 1066; Dahmer v. Metropolitan St. R. Co., 136 Mo. App. 443, 118 SW 496.

64. Theis v. Beaver County Com'rs [Okl.] 97 P 973. In so far as it conflicts with that of his adversary. City of Richmond v. Barry [Va.] 63 SE 1074; Norfolk & W. R. Co. v. Holmes' Adm'r [Va.] 64 SE 46; Hot Springs Lumber & Mfg. Co. v. Sterrett, 108 Va. 710, 62 SE 797. Demurrer in action of ejectment does not exclude from consideration of court the title papers of demurrant. Fentress v. Pocahontas Fowling Club, 108 Va. 155, 60 SE 633. Fact that junior grant from commonwealth covers land embraced in senior grant is not a conflict of evidence nor do the grants contradict each other. Id.

65. Crawford v. Kansas City Stockyards Co., 215 Mo. 394, 114 SW 1057. Where defendant does not stand on his demurrer but puts in his own evidence, all the evidence will be considered on appeal. Felver v. Central Elec. R. Co., 216 Mo. 195, 115 SW 980; Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969. Where evidence introduced by defendants after overruling of demurrer to plaintiff's evidence, question on such ruling must be determined from both plaintiff's and defendant's evidence, as defendants by introducing evidence assumed risk of aiding plaintiff's evidence. Foust v. Lee [Mo. App.] 119 SW 505.

66. Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 NE 740.

67. Not the evidence which tends to prove the facts. Rockhill v. Congress Hotel Co., 237 Ill. 98, 86 NE 740.

68. Newport News & Old Point R. & Elec. Co. v. Nicolopoolos [Va.] 63 SE 443. Plaintiff should not be required to join in demurrer until there is such a statement. Id. Party demurring is not required to have notes taken and transcribed by his own stenographer copied into and made part of demurrer, but all that is required of him is to have evidence correctly stated therein. Id. Practice of inserting evidence as taken down and transcribed by stenographer is not to be commended, but as general rule is better practice to state substance of oral testimony material to issues raised. Id.

69. Refusal to allow amendment held not prejudicial, where additional ground thereby sought to be added was proper to be made and was made under other grounds of demurrer. Virginia Iron, Coal & Coke Co. v. Munsey [Va.] 65 SE 478.

70. See, also, Judgments, § 5A. Where demurrer was sustained and jury discharged and plaintiff's motion for new trial was overruled and judgment rendered against him for costs, held that court had power, at same term, on plaintiff's motion, to vacate judgment against him, grant his motion to dismiss without prejudice, and render new judgment against him for costs. Missouri Pac. R. Co. v. Berry [Kan.] 98 P 204.

71. By introduction of evidence by defendant. Allen v. Knott [C. C. A.] 171 F 76.

72. Better practice is to renew demurrer to evidence at end of whole case, but where there has been no aid to prima facie case by subsequent evidence, demurrer may be considered where this is not done where it is urged as error in motion for new trial.

DISCONTINUANCE, DISMISSAL, AND NONSUIT.

The scope of this topic is noted below.[73]

§ 1. Voluntary Nonsuit or Discontinuance, 1325. Where Parties Intervene, or Affirmative Relief is Demanded, 1326. When Right to Voluntary Nonsuit is Lost, 1327. Discontinuance by Operation of Law, 1327. Retraxit, 1327. Effect of Discontinuance, 1327. Reinstatement, 1328.

§ 2. Involuntary Dismissal or Nonsuit, 1328. Grounds in General, 1328. Want of Jurisdiction, 1329. Defects in Pleadings; Parties, 1329. Failure of Prosecution, 1330. Nonsuit for Failure of Proof, 1331. Variance, 1334. Motion for Nonsuit or Dismissal, 1334. Order or Judgment, 1336. Effect of Dismissal or Nonsuit, 1337. Setting Aside Order; Reinstating Cause, 1338.

§ 1. *Voluntary nonsuit or discontinuance.*[74]—See 11 C. L. 1093—Plaintiff[75] is ordinarily entitled to dismiss his action[76] at any time before submission on the merits[77] or before judgment[78] on leave granted[79] and on payment of costs,[80] pro-

Matz v. Missouri Pac. R. Co., 217 Mo. 275, 117 SW 584.

73. Dismissal in equity is treated in the article Equity,* § 9; dismissal on reference in Reference,* § 10; limitation of time to bring new action in Limitation of Actions,* § 5C; the question of costs in Costs,* § 5. The effect of dismissal or nonsuit as an adjudication is more fully treated in the article Former Adjudication.*

74. Search Note: See notes in 3 C. L. 1097; 46 L. R. A. 839; 4 L. R. A. (N. S.) 244; 5 Id. 390; 14 Id. 1095; 78 A. S. R. 781; 4 Ann. Cas. 510; 5 Id. 211.

See, also, Dismissal and Nonsuit, Cent. Dig. §§ 1-91; Dec. Dig. §§ 1-43; 14 Cyc. 391-425; 9 A. & E. Enc. L. (2ed.) 467; 21 Id. 547; 6 A. & E. Enc. P. & P. 833.

75. Ordinarily, the use of plaintiff in an action on an administrator's bond may not discontinue it, since only one action is permitted which is for the use of all parties interested. Commonwealth v. Magee [Pa.] 73 A 346. But since such an action brought when there has been no default and no one has right of action is premature, party who brought it should be permitted to correct error by discontinuing it and commencing de novo. Id. Right of alleged insane person to have suit instituted in her behalf by next friend dismissed held to depend on whether or not she was sane at that time. Holland v. Riggs [Tex. Civ. App.] 116 SW 167.

76. Under Pierce's Code, § 727 (Bal. Ann. Codes & St. § 5085), plaintiff has absolute right to dismiss or take judgment of nonsuit at any time before case is submitted, where no set-off or counterclaim is interposed. McPherson v. Seattle Elec. Co. [Wash.] 101 P 1084. Statute held to apply to case tried before court without jury. Id. Denial of motion held error, so that any further proceeding by court thereafter was without jurisdiction and void. Id. Judgment for defendant in municipal court reversed, where, before case was finally submitted, plaintiff asked leave to discontinue the action, which was denied. Municipal Court Act, § 248 (Laws 1902, p. 1561, c. 580). Josephson v. Hebrew Gemilath Chassodim Ass'n, 117 NYS 99. Withdrawal of paragraphs of complaint by plaintiff at close of evidence is dismissal thereof. Pittsburgh, etc., R. Co. v. O'Conner, 171 Ind. 686, 85 NE 969. Plaintiff filed summons and complaint on May 3, and clerk signed summons and delivered it and complaint to sheriff for service on same day. No service was had, and on Aug. 31, clerk, at plaintiff's direction, erased date May 3 from summons and complaint, inserted date Aug. 31 in lieu thereof, refiled paper and signed summons and placed same in sheriff's hands, by whom they were subsequently served. Held, if not a discontinuance of first cause of action, plaintiff's conduct was dismissal in vacation under Code, § 5357. Farmers' Oil Mfg. Co. v. Melton [Ala.] 49 S 225. Refusal to grant motion to dismiss without prejudice after improperly refusing him a continuance held error. Morrow v. Sneed [Tenn.] 114 SW 201. Statement by plaintiff's counsel that he had been informed that his client desired case dismissed, and that client might give case any direction he saw proper, held not to have relieved counsel for defendant from obligation of seeing that case was actually dismissed, or prevent counsel for plaintiff, where client has abandoned or settled case, from prosecuting same for recovery of conditional fee. Penn v. McGhee [Ga. App.] 65 SE 686. After reversal of refusal of defendant's application to remove case to federal court, and before remittitur of supreme court had been made judgment of lower court, held that plaintiff could not dismiss so as to defeat removal by entry of dismissal made by his attorney on original papers. Louisville & N. R. Co. v. Newman [Ga.] 64 SE 541.

77. Under Rev. St. 1906, § 5314, subd. I, cannot as matter of right dismiss after final submission. Turner v. Pope Motor Car Co., 79 Ohio St. 153, 86 NE 651. Where after close of plaintiff's case each of the defendants moves for directed verdict on ground that plaintiff has failed to make out case for jury, after motions have been submitted to court and its conclusions thereon announced, plaintiff cannot dismiss without prejudice to future actions. Rev. St. 1906, § 5314, construed. Id. Cannot dismiss after whole case has been submitted to court and before final judgment. Rev. St. 1899, § 639. State v. Riley, 219 Mo. 667, 118 SW 647. Where decree adjudged that deeds were mortgages and appointed referee to take testimony as to value of improvements placed on lands and

* Always begin with the latest article on the subject. Use the latest topical index.

vided defendant has acquired no rights which would be prejudiced thereby.[81] No notice to the adverse party is necessary where there has been no service of process.[82]

Where parties intervene, or affirmative relief is demanded.[See 11 C. L. 1094]—Leave to dismiss may be denied where a counterclaim has been interposed [83] or where other parties have intervened.[84]

amount of mortgage debt. Held that there was no submission before hearing on report and exceptions thereto. Id. Case held not to have been submitted where all testimony was not in. McPherson v. Seattle Elec. Co. [Wash.] 101 P 1084. Court held to have right, after motion for peremptory instruction was made and sustained and before case was finally submitted to jury, to dismiss action without prejudice on plaintiff's motion. Civ. Code Prac. § 371. Wilson v. Sullivan [Ky.] 112 SW 1120. Held that federal court sitting in Illinois should have permitted plaintiff to take nonsuit after judge announced decision sustaining motion for directed verdict, even though conformity act may not require following of state practice in that regard. Meyer v. National Biscuit Co. [C. C. A.] 168 F 906. Under St. 1898, § 2856, providing that plaintiff shall have no right to submit to a nonsuit after argument to jury has been concluded or waived, held that plaintiff had no right to dismiss after special verdict. Anderson v. Horlick's Malted Milk Co., 137 Wis. 569, 119 NW 342. In action against several defendants as partners, allowing plaintiff to enter nolle prosequi as to one of them after trial nunc pro tunc as at time of trial, held not ground for reversal where it was shown and admitted that he was not a partner. Scrantonian v. Brown, 36 Pa. Super. Ct. 170.

78. Where there has been a final judgment, order of dismissal at later term is coram non judice. State v. Riley, 219 Mo. 667, 118 SW 647.

79. Strictly, a discontinuance is always by leave of court, but in practice leave to discontinue is assumed in first instance without the formality of an appplication but subject to be withdrawn on cause shown. Commonwealth v. Magee [Pa.] 73 A 346. Discharge of rule to strike off discontinuance is equivalent to grant of leave. Id. Causes that will move court to withdraw its assumed leave are addressed to its discretion, and usually involve some disadvantage to other interested parties. Id. Discharge of rule to strike off discontinuance held proper where only advantage of which defendant was deprived was right to assert that action was prematurely brought. Id. Under Code Civ. Proc. 1902, § 453, providing that generally, where there is conflict between rules of equity and of common law, those of equity shall prevail, motion to discontinue is addressed to discretion of court. State v. Southern R. Co., 82 S. C. 12, 62 SE 1116. Order, and fact that plaintiff stated no reason and defendants showed that discontinuance would be seriously prejudicial to them, held to show that court did not exercise its discretion but granted motion on ground that it had no power to refuse it, which was error. Id. Right of discontinuance is not absolute, but requires consent of the court in so far as judicial action is necessary to save the rights of the adverse party. Is discretionary, and should be granted or withheld according to justice of situation. Anderson v. Horlick's Malted Milk Co., 137 Wis. 569, 119 NW 342. Where certain plaintiffs ordered brought in by court took voluntary nonsuit, held that court had right to refuse to dismiss as to them, and in event of their further declining to appear, to enter such decree against them as would determine their relative rights with those of other parties, but it not appearing that they were necessary parties court acted within its discretion in granting nonsuit. Hough v. Porter, 51 Or. 318, 98 P 1083, former opinion, 51 Or. 318, 95 P 732.

80. See, also, Costs. Where plaintiff discontinued as against one defendant, under Rule 27, subd. d, giving him right to do so and to amend and proceed against others, held that Comp. Laws, § 1123, was not applicable, and said defendant was entitled to costs though court did not certify that he was unreasonably and unnecessarily made a party. Townsend v. Jackson Circuit Judge [Mich.] 16 Det. Leg. N. 318, 121 NW 483. On dismissal as to one defendant under Rule 27, subd. b, he may insist on payment of costs before discontinuance, but where he does not do so but permits entry of order of discontinuance, amendment of declaration, and trial against other defendants without protest, he thereby waives condition of immediate payment and must depend on execution for their collection. Id. Plaintiff's motion to discontinue granted only on condition that it payed single bill of taxable costs to date and $2,000 to partly reimburse defendants for their outlays, and gave stipulation that, if it subsequently began similar suit, defendants might use evidence already taken. American West Indies Trading Co. v. Porto Rican American Cigar Co., 63 Misc. 518, 117 NYS 614. Civ. Code 1895, § 5043, requiring payment of costs before recommencement of suit which has been dismissed or discontinued, applies only where the two suits are identical both as to parties and ca ses of action. Moore v. Bower [Ga. App.] 65 SE 328.

81. Where new trial was granted after special verdict favorable to defendant, and defendant appealed and obtained order fixing amount of supersedeas bond, held abuse of discretion to thereafter permit plaintiff to discontinue. Anderson v. Horlick's Malted Milk Co., 137 Mich. 569, 119 NW 342.

82. Dismissal in vacation. Farmers' Oil & Mfg. Co. v. Melton [Ala.] 49 S 225.

83. Denial of motion held abuse of discretion. Zuckerman v. Witkowski, 115 NYS 157. Denial of motion in summary proceedings by landlord to recover possession of leased premises for nonpayment of rent held not abuse of discretion. American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 NYS 236.

84. Where in creditor's suit by plaintiff, in behalf of himself and other creditors who should make themselves parties against corporation and stockholders, receiver was appointed, held that creditors who exhibited

When right to voluntary nonsuit is lost. See 11 C. L. 1094
Discontinuance by operation of law. See 5 C. L. 1018
Retraxit. See 11 C. L. 1094

Effect of discontinuance. See 11 C. L. 1094—A voluntary [85] dismissal terminates the case and leaves the parties as if no such action had been brought,[86] and is no bar to a subsequent action [87] unless it was on the merits.[88] In actions ex delicto a discontinuance as to one of several defendants does not ordinarily work a discontinuance as to all.[89]

their claims pursuant to order of court had at least acquired an interest which court was bound to consider on application for leave to discontinue and that complainants could not discontinue without leave of court. Deane v. Perkins [Mich.] 15 Det. Leg. N. 1084, 119 NW 1093. Purpose of stipulation for dismissal held to settle question of costs and that it did not give complainant right to dismiss without leave. Id. Since only effect claimed for stipulation was that it entitled stockholders to dismissal as to them, and complainant was not entitled to dismiss as of right, held that stockholders were not injured by order striking dismissal from files. Id.

85. Nonsuit will be deemed involuntary only when prompted by adverse ruling of court which precludes recovery by plaintiff. Netzow Mfg. Co. v. Baker [Mo. App.] 119 SW 450. Instruction submitting issue of fact contested in the evidence held not to have precluded recovery. Id. Nonsuit taken by plaintiff on exclusion of deposition, which ruling precluded her from recovering, held not voluntary one, but compulsory, and where excepted to reviewable on overruling of motion to set it aside. County of Pettis v. De Bold, 136 Mo. App. 265, 117 SW 88. Fact that plaintiff declined to amend and asked that declaration be dismissed held not to preclude him from complaining of ruling sustaining demurrer to declaration, it appearing that he asked for dismissal only because he believed that declaration was sufficient, and that was no necessity for any further pleading. Davis v. Woods [Miss.] 48 S 961.

86. Wawrzynlakowski v. Hoffman & Billings Mfg. Co., 137 Wis. 629, 119 NW 350. Judgment rendered thereon not appealable. Netzow Mfg. Co. v. Baker [Mo. App.] 119 SW 450. Where plaintiffs took nonsuit as to their cause of action, held that all issues upon their pleadings, except such as related to defendant's cross-action and the answer thereto, were eliminated, and there was no error in refusing to direct jury to find for plaintiffs for land as to which defendant disclaimed in original action. Gray v. Tribue [Tex. Civ. App.] 118 SW 808.

87. See, also, Former Adjudication. Smalley v. Rio Grande W. R. Co., 34 Utah, 423, 98 P 311; Farmers' Oil & Mfg. Co. v. Melton [Ala.] 49 S 225. Held error to dismiss second action on ground of discontinuance, since if it had been discontinuance of first action plaintiff had right to bring second, and, if not, remedy was by plea in abatement. Id. Where suit was removed to federal court and there dismissed by plaintiff before trial without prejudice to right to sue again, held that he could bring second suit in state court for same cause of action laying damages at sum less than would authorize removal, and that former suit would furnish no ground for plea in abatement. Bradford v. Louisville & N. R. Co. [Ga.] 65 SE 127. Where plaintiff voluntarily discontinued action in state court after judgment in her favor and granting of new trial, held that she was not precluded from bringing new suit in federal court based on same cause of action. Snare & Triest Co. v. Friedman [C. C. A.] 169 F 1. Motion for dismissal without prejudice held proper, that being settled practice in equity whenever bill is dismissed without consideration of the merits. Harding v. Corn Products Refining Co. [C. C. A.] 168 F 658.

Limitations: 2 Gen. St. N. J. 1895, p. 1975, § 4, providing that in case of minors two-year limitation in case of personal injury suits shall not begin to run until they become of age, construed and held that voluntary dismissal by minor of action brought during minority did not start running of such limitation, but that he could sue again at any time within two years after reaching his majority. Snare & Triest Co. v. Friedman [C. C. A.] 169 F 1. Suit brought in state court and properly removed by defendant to federal court, and there dismissed on plaintiff's motion, cannot, under Civ. Code 1895, § 3786, be renewed in state court within six months of such dismissal so as to avoid bar of limitations. Webb v. Southern Cotton Oil Co., 131 Ga. 682, 63 SE 135. Same held true of case removed to federal court in which plaintiff is nonsuited after running of limitations. Id. Statute held to apply only to cases pending in state courts. Id.

88. See, also, Former Adjudication. Where, after case was dismissed without costs on stipulation, judgment of dismissal on merits was entered on consent of counsel who had no authority to act for plaintiff, held not abuse of discretion to correct judgment to conform to first and only authorized order. Wawrzyniakowski v. Hoffman & Billings Mfg. Co., 137 Wis. 629, 119 NW 350.

89. Wright v. Sample [Ala.] 50 S 268; Walton v. Miller's Adm'x [Va.] 63 SE 458. Where evidence showed that one defendant was only acting as agent of other. Atlas Coal Co. v. O'Rear [Ala.] 50 S 63. If plaintiff fails to prove commission of joint tort as alleged, he may elect at trial as to which of the defendants he will proceed against, and may move court to instruct jury to find against part of them and in favor of others or move for leave to amend complaint, and, if granted, proceed against one or more of said defendants. Krebs Hop Co. v. Taylor, 52 Or. 627, 98 P 494. Where, in action of claim and delivery against two defendants jointly, evidence showed that one of them held it merely as bailee of other, held error

Reinstatement.—The vacation of the judgment and reinstatement of the case is largely discretionary.[90]

§ 2. *Involuntary dismissal or nonsuit.*[91] *Grounds in general.* See 11 C. L. 1094 Where the grounds are specified by statute, the court has authority to render judgment of nonsuit only in the cases therein specified.[92] An action may in proper case be dismissed or a nonsuit granted for defects in process,[93] where it is barred by limitations [94] or is prematurely brought,[95] where only moot questions are involved,[96] for failure to pay costs of a previous suit,[97] for failure to appear,[98] for disobedience by plaintiff of an order concerning the proceedings in the action,[99] for failure to comply with an order of discovery,[1] or refusal to answer interrogatories on examination before trial,[2] or where the only effect of continuing the action will be to sub-

to refuse to allow plaintiff to elect to proceed against latter and to dismiss as to former, in view of B. & C. Comp. §§ 180, 181. Id. Where all promisors on joint and several note are sued, but only part of defendants are served, return as to others being not found, plaintiff may, under Code 1906, § 2020, proceed to judgment as to those served and dismiss as to the others, and such dismissal will not release person served and against whom judgment is taken. Watkins v. Angotti, 65 W. Va. 193, 63 SE 969. Civ. Code Prac. § 363, providing that plaintiff in action other than on contract against more than one defendant, can demand trial at any time, as to a part of the defendants, only by dismissing on the first day of such term as to the others, does not apply where the defendants have all been summoned. Adkins v. Kendrick [Ky.] 115 SW 814. Hence, in such action, where both defendants were summoned on same day, it was not error to permit dismissal as to one and recovery against other at same term. Id.

90. Ruling will not be disturbed unless discretion has been plainly abused. Anderson v. Shields, 51 Wash. 463, 99 P 24. Refusal held not abuse of discretion. Id.

91. Search Note: See notes in 3 C. L. 1105; 11 L. R. A. (N. S.) 844.

See, also, Appeal and Error, Cent. Dig. §§ 372, 471, 717-723, 777, 2363, 3418, 3419, 3838, 4024, 4209, 4210; Dec. Dig. §§ 70(5), 78(4), 105, 113(4), 189(3), 257, 286, 339(3), 347(2), 520(5), 548(4), 726, 854(5), 856(4), 962, 997(2), 1061(2, 3); 2 Cyc. 595-597, 600, 601, 718, 796, 1061, 1062, 1083; 3 Cyc. 221, 340; 29 Cyc. 751, 752; Dismissal and Nonsuit, Cent. Dig. §§ 92-192; Dec. Dig. §§ 44-81; 14 Cyc. 393, 425-465; Trial, Cent. Dig. §§ 317-345, 359-375; Dec. Dig. §§ 134-149, 159-166, 419; 6 A. & E. Enc. P. & P. 875.

92. Only in cases specified by Code Civ. Proc. § 581. In re Higgins' Estate [Cal.] 104 P 6.

93. Where writ issued as capias on which defendant's body was arrested set up defendant as of named town in named county, held that it sufficiently showed, for purpose of motion to dismiss on ground that action was founded on contract, that he was resident of United States and so within exemption. Caldbeck v. Simanton [Vt.] 71 A 881.

94. Webb v. Southern Cotton Oil Co., 131 Ga. 682, 63 SE 135.

95. Coman v. Peters, 52 Wash. 574, 100 P 1002. Where account sued on was not due at time of institution of suit. Howes v. Union Mfg. Co. [Ky.] 113 SW 512. Where plaintiff's evidence showed that his claim had not matured and that he had no present right of recovery. Blackwell v. Banks Bros. [Ga.] 65 SE 84.

96. Suit for injunction held properly dismissed where, pending proceeding and before final decree, complainant voluntarily paid tax it was seeking to enjoin, but that dismissal should have been without prejudice. Thomas, Andrews & Co. v. Norton [Va.] 65 SE 466.

97. Court held to have no right to arbitrarily dismiss action for failure of plaintiff to pay costs of former action dismissed by him without prejudice within few hours after motion to dismiss was made. Wilson v. Sullivan [Ky.] 112 SW 1120. Dismissal of action in state court for failure of plaintiff to pay costs in suit on same cause of action previously instituted in state court and removed to federal court and there voluntarily dimissed held abuse of discretion, plaintiff having meritorious case and no means. Webb. v. Pacific Mut. Life Ins. Co. [Mo. App.] 119 SW 491.

98. Since under Municipal Court Act, § 248, subd. 2 (Laws 1902, p. 1561, c. 580), upon failure of plaintiff to appear upon adjourned day, court should have dismissed action, permitting defendant to introduce her testimony did not avail either party. Anderson v. Thorps. 113 NYS 730.

99. Civ. Code Prac. § 371, subsec. D. Dismissing petition and counterclaim, pursuant to ruling at previous continuance that case would be dismissed if parties were not ready for trial at time fixed, though parties stipulated for further continuance, held proper under rule that no case set down for trial should be continued without consent of court and legal or sufficient reasons shown therefor. Conrad Schopp Fruit Co. v. Bondurant [Ky.] 121 SW 482.

1. Code Civ. Proc. § 808, applies to absolute and contumacious refusal, and not to case where party proceeded against makes discovery of paper on which he relies for prosecution or defense of action. Banes v. Rainey, 130 App. Div. 465, 114 NYS 986. Order of dismissal cannot be granted on theory that papers so filed are forgeries, that being vital question in case which cannot be decided summarily upon testimony taken before referee. Id.

2. Burns' Ann. St. 1901, § 336. Carlstedt v. Rohsenberger [Ind. App.] 85 NE 996. Striking complaint held proper and to have operated to discontinue case. Id.

ject defendants to the annoyance, danger, and expense of protecting themselves from groundless, vexatious, and harrassing litigation.[3] A nonsuit should not ordinarily be granted on counsel's opening statement,[4] at least unless it clearly shows that no case can be made out or that recovery is precluded.[5] A champertous agreement between plaintiff and his attorney is not ground for dismissal.[6] Where the same act renders one liable both civilly and criminally, a failure to prosecute criminally is no ground for dismissing an action for damages based thereon.[7]

Want of jurisdiction See 11 C. L. 1095 apparent of record[8] is ground for dismissal.[9]

Defects in pleadings; parties. See 11 C. L. 1005—Dismissal may be ordered where a pleading fails to state a cause of action or defense,[10] but not for defects of pleading

3. Has inherent power to dismiss in such case, particularly where concededly plaintiff has no existence. Wells v. Bushe, 118 NYS 486. Complaint in action by administrator dismissed, where order appointing him was reversed and his letters canceled. Id.

4. Failure to state facts entitling plaintiff to recover is not ground for nonsuit. Wheeler v. Oregon R. & Nav. Co. [Idaho] 102 P 347. Rev. Codes, § 4354, which prescribes grounds on which judgment of nonsuit may be entered, does not so provide, and under it motion cannot be entertained until all the evidence for plaintiff has been put in or offered and plaintiff rests his case. Id. Where petition states cause of action, it is error to sustain motion to dismiss case and render judgment against plaintiff on opening statement. Sullivan v. Williamson, 21 Okl. 844, 98 P 1001.

5. Motion will be granted only where statement, by its omissions or admissions, renders it clearly evident that no case can be made out, or that recovery is precluded. Jordan v. Reed [N. J. Err. & App.] 71 A 280. Statement held such that, if followed by legal proof of facts stated, case would have been presented for jury, so that motion was properly denied. Id.

6. Baltimore, etc., R. Co. v. Trennepohl [Ind. App.] 87 NE 1059.

7. Failure to prosecute defendant criminally for assault can at most be urged merely to delay trial of civil action. Leeman v. Public Service R. Co. [N. J. Law] 72 A 8.

8. Motion to dismiss does not lie where proof de hors the writ is necessary to support or resist it. For insufficiency of replevin bond sufficient on its face. Littlefield v. Maine Cent. R. Co., 104 Me. 126, 71 A 657.

9. Motion to dismiss will lie only when it is apparent on the record that court has no jurisdiction. Littlefield v. Maine Cent. R. Co., 104 Me. 126, 71 A 657. In statutory proceedings where jurisdiction rests upon allegations and proof of statutory requirements, a motion to dismiss may serve the purpose of a demurrer. Id. Motion will lie where, assuming allegations to be true, court has no jurisdiction. Id. Motion lies on ground that replevin bond is not signed with sufficient sureties. Id. Where complaint contains proper jurisdictional allegations in order to justify dismissal for want of jurisdiction, under Act March 3, 1875, c. 137, § 1; 18 St. 470; U. S. Comp. St. 1901, p. 508, evidence must be produced which convinces mind to legal certainty that suit does not really and substantially involve controversy within jurisdiction of circuit court. Hill v. Walker [C. C. A.] 167 F 241. Evidence held sufficient to show plaintiff's citizenship as alleged. Id. Said statute held to cover entire field of dismissals for defects of jurisdiction arising on evidence, and to declare duty of federal courts on that subject and to prescribe showing necessary to exercise of power granted. Id. Since, in proceedings by administrator for discovery of assets under Code Civ. Proc. § 2710, where petitioner's right to property is in dispute, proceedings must end unless parties consent to its determination by surrogate, where they do not so consent proceeding will be dismissed. In re McGee's Estate, 63 Misc. 494, 118 NYS 423. Held that surrogate would not pass on construction of will on summary proceedings to revoke letters of administration cum testamento annexo where same question was pending before supreme court in another action, but would dismiss proceeding without prejudice to renewal thereof after termination of that action. In re Dunn's Estate, 63 Misc. 180, 118 NYS 561.

10. Sufficiency of complaint may be tested by motion to dismiss made at special term in advance of the trial. Code Civ. Proc. § 547, as amended by Laws 1908, p. 462, c. 166, Jones v. Gould, 130 App. Div. 451, 114 NYS 956. Where complaint fails to state cause of action, defendant is entitled to dismissal on merits under Code Civ. Proc. § 547, added by Laws 1908, p. 462, c. 166. Abramowitz v. Abramowitz, 113 NYS 798. Motion presents question of law. Abbott v. Easton, 195 N. Y. 372, 88 NE 572. Admits truth of all allegations of fact. De Wolf v. Ford, 193 N. Y. 397, 86 NE 527. Is same as demurrer and admits all issuable facts and such as are fairly inferable therefrom. Staiger v. Klitz, 129 App. Div. 703, 114 NYS 486; Ampersand Hotel Co. v. Home Ins. Co., 131 App. Div. 361, 115 NYS 480. Must be presumed on review that allegations would have been established. Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. [C. C. A.] 166 F 254. Motion cannot be sustained unless it appears that, admitting all the facts alleged, no cause of action whatever is stated. Abbott v. Easton, 195 N. Y. 372, 88 NE 572. Is erroneous if, in any aspect, upon facts stated therein, plaintiff is entitled to recover. Glyn v. Title Guarantee & Trust Co., 132 App. Div. 859, 117 NYS 424. That complaint fails to state cause of action triable at law at trial term no ground for dismissal if it stated any cause of action either at law or in equity. Doty v. Norton, 133 App. Div. 106, 117 NYS 793. Where relief asked is such as equity only can grant as

curable by amendment,[11] nor for misjoinder of causes of action,[12] nor for failure to allege in the petition to what term of court the same is returnable.[13] In New York a municipal court case may be dismissed for failure of plaintiff to file a complaint.[14]

A dismissal may be granted where plaintiff has no legal existence[15] or no capacity to sue,[16] or for failure to join necessary parties,[17] unless they may be brought in,[18] but not for misnomer of defendant,[19] nor for failure to properly serve the guardian ad litem of infant plaintiffs where the complaint states a cause of action as to the others.[20]

Failure of prosecution. See 11 C. L. 1095—The court has discretionary power to dismiss for failure to diligently prosecute the action.[21]

injunction, action will be dismissed if facts are not such as to entitle plaintiff to that relief, though he may have remedy in proper action at law. Hall v. Henninger [Iowa] 121 NW 6. Ordinarily a bill should not be dismissed without giving complainant opportunity to take proofs, but where bill fails to state cause for relief, and opening statement of counsel negatives cause for relief, dismissal will not be reversed. Public Schools of Wyandotte v. Harding [Mich.] 16 Det. Leg. N. 306, 121 NW 296.

Dismissal held improper. Glyn v. Title Guarantee & Trust Co., 132 App. Div. 859, 117 NYS 424; Doty v. Norton, 133 App. Div. 106, 117 NYS 793. In action for treble damages under anti-trust act. Thomsen v. Union Castle Mail S. S. Co. [C. C. A.] 166 F 251; Pennsylvania Sugar Refining Co. v. American Sugar Refining Co. [C. C. A.] 166 F 254.

Dismissal held proper. Dunn v. Knights of Gideon Mut. Aid Soc. [N. C.] 65 SE 761. As to counts held insufficient on demurrer where plaintiff fails to plead over. Wapello State Sav. Bank v. Colton [Iowa] 122 NW 149. Where plaintiff attempted to sue on contract and at same time to allege that it was void for fraud. Statham v. Southern States Life Ins. Co., 5 Ga. App. 357, 63 SE 250.

11. Remedy in such case is by demurrer. Littlefield v. Maine Cent. R. Co., 104 Me. 126, 71 A 657. Motion to dismiss and demurrer are not interchangeable, but former can be used to abate action only when appears from record that court has no jurisdiction, while latter admits jurisdiction but attacks pleadings. Id. In common-law action of replevin, motion held not to lie for insufficient description of property taken, want of allegation of ownership or right to possession in plaintiff, want of allegation of demand before suit, or want of allegation of value. Id. Peremptory judgment of dismissal is not proper on sustaining special demurrer to petition. McSwain v. Edge [Ga. App.] 64 SE 116.

12. Remedy is by division of action. Revisal 1908, § 476. Dunn v. Knights of Gideon Mut. Aid Soc. [N. C.] 65 SE 761. Where cause of action for dower was improperly joined with one to set aside will, held not abuse of discretion to refuse to dismiss former and to divide causes of action into two separate actions, plaintiff being entitled to maintain both at same time, but one for dower not being triable until after other, when plaintiff will be required to elect whether to take dower or distributive share. Williams v. Newton, 82 S. C. 227, 64 SE 219.

13. Since law makes case returnable to next term after lapse of certain time from date of filing suit. Booth v. State, 131 Ga. 750, 63 SE 502.

14. Though he files bill of particulars. Johnson v. Pelletreau, 115 NYS 129. Held that parties elected to try certain issue, which they might do. Id.

15. Complaint in action by administrator dismissed, where order appointing him was reversed and his letters canceled. Wells v. Bushe, 118 NYS 486.

16. Where it was held on appeal that plaintiff could not maintain action, held that on remittitur going down trial court was justified in dismissing action, there being no substitution of parties plaintiff. Olympia Min. Co. v. Kerns, 15 Idaho, 371, 97 P 1031.

17. Bill in equity may be dismissed when it appears that relief prayed for cannot be granted without injuriously affecting persons not parties. Jackson v. Hooper, 171 F 597. Motion by resident defendant properly served, based on absence of certain nonresident parties as to whom bill was dismissed, denied, where it was not clear that complainant might not be entitled to some relief against him, regardless of other defendants, especially as proper remedy was by demurrer. Id.

18. Where trustee sued to compel issuance of corporate stock and payment of dividends to him, and former trustee who had been removed notified defendant that she claimed interest in such stock, held error to dismiss because she was not made party, but court should have required her to be brought in. Letcher's Trustee v. German Nat. Bank [Ky.] 119 SW 236.

19. Remedy by plea in abatement. Dunn v. Knights of Gideon Mut. Aid Soc. [N. C.] 65 SE 761.

20. In action by widow and minor children to recover for wrongful death of husband and father. Amustasakas v. International Contract Co. 51 Wash. 119, 98 P 93.

21. Courts have power independently of statute or rules to dismiss an action whenever it appears that plaintiff has, without sufficient excuse, failed to prosecute it to final judgment. State Sav. Bank v. Albertson [Mont.] 102 P 692. Mere lapse of time is not in itself sufficient to justify dismissal. Id. Court's action will not be disturbed in absence of apparent abuse. Id. Burden is

Nonsuit for failure of proof.[See 11 C. L. 1096]—As a general rule a nonsuit may be ordered for failure of proof,[22] as where plaintiff fails to make out a prima facie case,[23] or to produce sufficient evidence to support his cause of action[24] or where

on appellant to show abuse. Id. Overruling of motion to dismiss for failure to prosecute within year after case was reversed and remanded for new trial held error, no sufficient excuse for delay having been shown. Rev. Codes 1895, § 7228. Bessie v. Northern Pac. R. Co. [N. D.] 121 NW 618. Code Civ. Proc. § 581, providing for dismissal where summons has not been served and return made within three years after commencement of action, held not to apply to actions in justices' courts. Statutes construed. Hubbard v. Superior Ct., 9 Cal. App. 166, 98 P 394. That defendant has interposed counterclaim does not affect his right to move to dismiss. Fleischman v. Mengis, 113 NYS 515. On nonappearance of plaintiff at first appearance day, the proper practice is to dismiss for want of prosecution rather than enter judgment for defendant on his demurrer and cross-petition. Robinson v. Collier [Tex. Civ. App.] 115 SW 915.

Dismissal held proper or refusal error. Loose v. Cooper [Iowa] 118 NW 406; May v. Hubbard [Miss.] 49 S 619; Williamson v. New York Edison Co., 128 App. Div. 900, 112 NYS 658. Where younger issues had been prosecuted and excuse offered was insufficient. McGrath v. Murtha & Schmohl Co., 128 App. Div. 278, 112 NYS 679. Where in consequence of delay defendant would be unable to produce her most important and material witness at trial, and no reasonable excuse was presented. Brown v. Herzberg, 130 App. Div. 894, 114 NYS 901. Motion made about five years after issue was joined, and long after younger issues had been reached and tried. Ferber v. Newgold, 133 App. Div. 739, 118 NYS 214.

Dismissal held improper. Green v. Rou, 56 Fla. 319, 48 S 207. Dismissal for failure to comply with void rule requiring new note of issue to be filed in order to have case placed on new calendar, on ground that younger issues had reached trial, failure not affecting place of case on calendar governed by statute, and it not appearing that younger issues on general calendar had been tried. Willner v. Mink Restaurant Co., 61 Misc. 73, 113 NYS 31, rvg. 60 Misc. 358, 113 NYS 633.

Excuses: Burden held on plaintiff to show reasonable excuse for delay, and that without such excuse court had no discretion to deny motion. Mannion v. Steffens, 115 NYS 1087. Held that complaint should have been dismissed where only excuse was that offers of settlement had been made prior to service of summons and renewed subsequently from time to time, there being no statement in affidavit as to when said offers ceased, and an opposing affidavit to effect that they were concluded before filing of answer. Mannion v. Steffens, 115 NYS 1087. Excuse held insufficient. McGrath v. Murtha & Schmohl Co., 128 App. Div. 278, 112 NYS 679. Twelve years' delay held ground for dismissal, only explanation being that defendant was insolvent and had promised to pay claim in suit when his financial condition improved, there being nothing to show that defendant requested delay. Fleischman v. Mengis, 113 NYS 515. Request of defendant's attorney to plaintiff's attorney not to prosecute held to justify denial of motion. Schulz v. Griffith, 112 NYS 1054. Oral agreement of council for written stipulation for continuance of trial being void, held that it did not constitute good cause for denial of motion to dismiss under Code Civ. Proc. § 465, for failure to proceed within year after reversal and remand. Meadows v. Osterkamp [S. D.] 122 NW 419.

Waiver: Admission of service of notice of trial by defendant's attorneys after expiration of year from date of filing remittitur held not waiver of right to insist on dismissal for failure to proceed within year after reversal and remand. Bessie v. Northern Pac. R. Co. [N. D.] 121 NW 618. Letters written after expiration of year held not to constitute waiver. Id. Fact that defendant's attorneys appeared at preliminary call of calendar and asked that case be set for trial on day certain held not to constitute waiver of right to insist on dismissal. Bessie v. Northern Pac. R. Co. [N. D.] 121 NW 618. Service of notice of trial by plaintiff after year had expired held no ground for denying motion, where service was not accepted. Meadows v. Osterkamp [S. D.] 122 NW 419. Fact that note of issue was filed subsequent to motion to dismiss for delay held no reason for denial of motion. Mannion v. Steffens, 115 NYS 1087.

22. Brooke v. Nashville, etc., R. Co., 5 Ga. App. 253, 62 SE 1002; Rosengarten v. Delaware, L. & W. R. Co. [N. J. Law] 71 A 35; Boyle & Co. v. Schueler, 117 NYS 225; Rippy v. Southern R. Co., 80 SE 539, 61 SE 1010. Where variance as to one point and failure of proof as to other. Jordan v. Reed [N. J. Err. & App.] 71 A 280. Where, when plaintiff rests, facts which it is incumbent upon him to establish appear from evidence as merely possible. Patty v. Salem Flouring Mills Co. [Or.] 98 P 521. For former opinion see [Or.] 96 P 1106, rehearing denied [Or.] 100 P 298.

23. Wallace v. Southern R. Co. [Ga. App.] 65 SE 299; Spongberg v. First Nat. Bank, 15 Idaho 671, 99 P 712. If plaintiff fails to make out prima facie case, or if admitting all facts proved and all reasonable deductions from them, plaintiff ought not to recover. Civ. Code 1895, § 5347. Lunday v. Foreman, 129 Ga. 595, 59 SE 276. Case should end by a nonsuit and not by direction of verdict for defendant, latter not being entitled to judgment concluding case on merits. Gay v. Peak, 5 Ga. App. 583, 63 SE 650.

24. Elie v. Cowles & Co. [Conn.] 73 A 258; Brandenburg v. Central of Georgia R. Co. [Ga.] 65 SE 429; Brazelton v. Patrick [Ga.] 65 SE 402; Central of Georgia R. Co. v. Henderson [Ga. App.] 65 SE 297; Kuflick v. Glasser, 114 NYS 870; Williams v. Patterson, 38 Pa. Super. Ct. 322. If evidence taken by itself, with all inferences which can be legitimately drawn from it, would not be sufficient to sustain verdict for plaintiff. White v. Spreckels [Cal. App.] 101 P 920. Is only

a defense is established beyond question;[25] but it should not be granted where there is any substantial evidence tending to support plaintiff's claim,[26] or where the evi-

where is no evidence in law which, if believed, will sustain a verdict, that court is called upon to nonsuit, and to justify such action evidence must be undisputed or so certain and convincing that reasonable mind could come to but one conlusion. Hallett v. S. Liebmann's Sons Brew. Co., 129 App. Div. 617, 114 NYS 232. Where plaintiff's evidence with all inferences which jury could have justifiably drawn therefrom was insufficient to support verdict in his favor, so that would have been court's duty to set aside such verdict had it been rendered. Golden v. Ellis, 104 Me. 177, 71 A 649. Where plaintiff not entitled to recovery under undisputed evidence. Davis v. Randall, 44 Colo. 488, 99 P 322. Where but one conclusion is deducible from facts. Wheeler v. Oregon R. & Nav. Co. [Idaho] 102 P 347. When court has determined what are material facts of case presented by pleadings, question is whether or not there is substantial evidence in support of all the material facts. Elie v. Cowles & Co. [Conn.] 73 A 258. During jury trial legal sufficiency of material facts put in issue by complaint and answer cannot be questioned, material facts in this connection meaning facts constituting part of plaintiff's cause of action as he presents it. Id. On appeal from dismissal at close of plaintiff's evidence on ground that he has failed to make out a case, question is whether evidence was such as to require verdict against plaintiff as matter of law. Woodworth Elevator Co. v. Theis [Minn.] 122 NW 310. Provision of Laws 1907, p. 495, c. 254, that in all cases thereunder question of negligence and contributory negligence is for jury, in no way affects judicial power of court to determine legal sufficiency of evidence to prove such facts, and no jury question can arise unless court first determines that evidence legally tends to prove such facts. Haring v. Great Northern R. Co., 137 Wis. 367, 119 NW 325; Kiley v. Chicago, etc., R. Co., 138 Wis. 215, 119 NW 309. Statute does not preclude dismissal where evidence shows that defendant was not negligent and that plaintiff was. Haring v. Great Northern R. Co., 137 Wis. 367, 119 NW 325. Upon exceptions to order of nonsuit, question is whether report of evidence contains evidence to prove all propositions essential to maintenance of the action, and if any one of such propositions is unsupported by evidence reported, exceptions must be overruled. Moore v. Archer, 104 Me. 285, 71 A 863.

Nonsuit held properly granted. Brooks v. Schlernitzauer, 113 NYS 484; Larzelere v. Wood, 136 Wis. 541, 117 NW 1013. Personal injury action. White v. Spreckels [Cal. App.] 101 P 920; Golden v. Ellis, 104 Me. 177, 71 A 649. Negligence. Wilson v. Brown, 222 Pa. 364, 71 A 540; Haring v. Great Northern R. Co., 137 Wis. 367, 119 NW 325. Action for wrongful death. Munns v. Pittsburg R. Co., 222 Pa. 369, 71 A 545; Fink v. Wilkes Barre & W. V. Trac. Co. [Pa.] 73 A 936. Where evidence in action for wrongful death left cause of accident wholly to conjecture. Pryor v. Murnane [Conn.] 72 A 571. Where evidence did not furnish basis for judgment for plaintiff in any definite amount. Fitzpatrick v. Letten, 123 La. 748, 49 S 494. Complaint properly dismissed for failure to show damages according to proper measure thereof. Wechsler v. O. J. Gude Co., 117 NYS 1037. Plaintiffs held properly nonsuited as to one of defendants for failure to connect him with alleged trespass and damage to their property for which recovery was sought. Abrashkov v. Ryan, 130 App. Div. 429, 114 NYS 973.

25. Nonsuit held properly granted or improperly refused. Contributory negligence. Bush v. Wood, 8 Cal. App. 647, 97 P 709; McKahan v. Baltimore O. R. Co. [Pa.] 72 A 251; Hause v. Lehigh Val. Transit Co., 38 Pa. Super. Ct. 614; Dimuria v. Seattle Transfer Co., 50 Wash. 633, 97 P 657. Assumption of risk. Dryden v. Pelton-Armstrong Co. [Or.] 101 P 190. Where plaintiff's evidence showed that he was injured either by his own negligence, the negligence of a fellow-servant, or by joint negligence of both, and without any contributory negligence of master. Stevens v. Bunn [Ga. App.] 64 SE 1002. Plaintiff not entitled to recover under statute of frauds. Broderius v. Anderson [Wash.] 103 P 837.

26. Southern R. Co. v. Brock [Ga.] 64 SE 1083; Merrill v. Leisenring [Mich.] 16 Det. Leg. N. 348, 121 NW 820; Woodworth Elevator Co. v. Theis [Minn.] 122 NW 310; Hess v. Kaufherr, 128 App. Div. 526, 112 NYS 832; Hyman v. New York Mortgage & Security Co., 128 App. Div. 254, 112 NYS 669; Schwartz v. Onward Const. Co., 130 App. Div. 588, 115 NYS 380; Griffin v. Flank, 132 App. Div. 334, 117 NYS 36; Marum v. Granitz, 117 NYS 726; Weiner v. Scherer, 64 Misc. 82, 117 NYS 1008; Nagle v. Richards, 134 App. Div. 25, 118 NYS 53; Thompson v. Aberdeen & A. R. Co., 149 N. C. 155, 62 SE 883; Wade v. McLean Cont. Co., 149 N. C. 177, 62 SE 919; Cooper v. Rowland, 149 N. C. 353, 63 SE 6; Tyson v. Jones, 150 N. C. 181, 63 SE 734; Ford v. Stroud, 150 N. C. 362, 64 SE 1; Settle v. Southern R. Co., 150 N. C. 643, 64 SE 759; Jennings v. Trummer, 52 Or. 149, 96 P 874; Manning v. Portland Ship Bldg. Co., 52 Or. 101, 96 P 545; Galvin v. Brown [Or.] 101 P 671; Rippy v. Southern R. Co., 80 S. C. 539, 61 SE 1010; Puryear v. Ould, 81 S. C. 456, 62 SE 863; Laughlin v. Southern Public Service Corp. [S. C.] 64 SE 1010; Owens v. Laurens Cotton Mills [S. C.] 64 SE 915; Morris v. Salt Lake City [Utah] 101 P 373. Question presented by motion in negligence case is not whether judge would infer that defendant had been negligent, but whether jury might legitimately find from testimony that such was case. Dirigolano v. Jersey City, etc., R. Co., 76 N. J. Law, 505, 71 A 257. Motion for nonsuit in ejectment on ground that plaintiff had only proved title to tide lands, while those sought to be recovered were below low tide and therefore incorporeal and not recoverable in ejectment, properly denied, where answer conceded that lands were tide lands. Seabrook v. Coos Bay Ice & Cold Storage Co. [Or.] 102 P 175, rehearing denied [Or.] 102 P 795. Where plaintiff makes out prima facie case. Bush v. Wood, 8 Cal. App. 647 97 P 709; Hubbard v. Macon R & L. Co., 5 Ga. App. 223, 62 SE 1018; Slnkovitz v. Peters' Land Co. [Ga. App.] 64 SE 93; Brad-

dence is conflicting,[27] or such that different minds may reasonably draw different

v. Brady, 110 Md. 656, 73 A 567; Molostowsky v. Grauer, 113 NYS 679; Seager v. Solvay Process Co., 129 App. Div. 813, 114 NYS 591; Halprin v. Sarner, 117 NYS 995; Stanbridge v. Nassau Elec. R. Co., 117 NYS 94. Error to grant nonsuit as to entire case, where evidence makes out prima facie case as to one item sued for. Harris v. Evans [Ga. App.] 65 SE 802. Should not be granted merely because court would not allow verdict for plaintiff, but only when, admitting all facts proved and all reasonable deductions and inferences therefrom, plaintiff has not made out prima facie case. Civ. Code, § 5347. Smith v. Atlantic Coast Line R. Co., 5 Ga. App. 219, 62 SE 1020. In action against warehouse keeper to recover value of articles stored with him and not returned on demand, held that preponderance of evidence clearly showed delivery of goods to defendant and his failure to return them, so that dismissal of complaint for failure of proof was error. Wheeler v. Blumenthal, 107 NYS 57. Where evidence would support verdict in plaintiff's favor. Du Breuille v. Ripley, 106 Minn. 510, 119 NW 244; Paolini v. Fresno Canal & Irr. Co., 9 Cal. App. 1, 97 P 1130; White v. Spreckels [Cal. App.] 101 P 920; Togni v. Taminelli [Cal. App.] 103 P 899; City of Manchester v. Duggan [N. H.] 70 A 1075. Where it appears from plaintiff's evidence that facts which he is required to establish are quite probable. Patty v. Salem Flouring Mills Co. [Or.] 98 P 521, former opinion [Or.] 96 P 1106, rehearing denied [Or.] 100 P 298. In action on life insurance policy, motion for nonsuit because of breach of contract by plaintiff properly denied where there was some substantial evidence that defense had been waived or abandoned so that it formed no part of contract. Lally v. Prudential Ins. Co. [N. H.] 72 A 208. Motion on ground that plaintiff's evidence showed that payment was not due under terms of contract when payment was demanded and that plaintiff was not justified in refusing to proceed under contract by reason of nonpayment, properly denied, in view of evidence as to custom in construction of buildings. Jones v. Whittier [N. J. Err. & App.] 73 A 497. Nonsuit is not granted merely because court would not allow verdict for plaintiff to stand. Lunday v. Foreman, 129 Ga. 595, 59 SE 276. Nonsuit is properly granted only where facts are such that verdict for plaintiff would compel court to set it aside. Paolini v. Fresno Canal & Irr. Co., 9 Cal. App. 1, 97 P 1130. Held that proceedings to condemn easements should not have been dismissed on determining that defendant was owner of premises in fee, but plaintiff should have been allowed to continue them for purpose of acquiring whatever title defendant had, though amendment of petition might have been necessary for that purpose. City of Geneva v. Henson, 195 N. Y. 447, 88 NE 1104.

Questions held for jury: Negligence. McDuffie v. Ocean S. S. Co., 5 Ga. App. 125, 62 SE 1008; Myrick v. Macon R. & L. Co. [Ga. App.] 64 SE 296; Self v. Adel Lumber Co. [Ga. App.] 64 SE 112; Hobbs v. Blanchard & Sons Co. [N. H.] 70 A 1082; Dirigolano v. Jersey City, etc., R. Co., 76 N. J. Law, 505, 71 A 257; Decou v. Dexheimer [N. J. Law] 73 A 49; Jacobs v. Smith Cont. Co., 113 NYS 531; Cotton v. North Carolina R. Co., 149 N. C. 227, 62 SE 1093; Manning v. Portland Ship Bldg. Co., 52 Or. 101, 96 P 545; Castor v. Schaefer [Pa.] 73 A 329; Thompson v. Seaboard Air Line R. Co., 81 S. C. 333, 62 SE 396; Cleary v. General Cont. Co. [Wash.] 101 P 888; Harkins v. Seattle Elec. Co. [Wash.] 101 P 836. Contributory negligence. Ellenberg v. Southern R. Co., 5 Ga. App. 389, 63 SE 240; Jackson v. Georgia, S. & F. R. Co. [Ga.] 63 SE 841; Normand v. Hudson Val. R. Co., 133 App. Div. 474, 117 NYS 1076; Castor v. Schaefer [Pa.] 73 A 329; Thompson v. Seaboard Air Line R. Co., 81 S. C. 333, 62 SE 396; Murphy v. Herold Co., 137 Wis. 609, 119 NW 294. Whether certain person was defendant's superintendent or fellow-servant of plaintiff. Rippy v. Southern R. Co., 80 S. C. 539, 61 SE 1010. Negligence and contributory negligence. Devine v. Hayward, 128 App. Div. 705, 113 NYS 898. Contributory negligence and assumption of risk. Rippy v. Southern R. Co., 80 S. C. 539, 61 SE 1010. Contributory negligence, assumption of risk and release of defendant. Borchardt v. People's Ice Co., 106 Minn. 134, 118 NW 359. Negligence, contributory negligence, and assumption of risk. Anustasakas v. International Cont. Co., 51 Wash. 119, 98 P 93. Conversion. Bowe v. Palmer [Utah] 102 P 1007. Abandonment, in divorce suit. Easter v. Easter [N. H.] 73 A 30. Sanity. Lunday v. Foreman, 129 Ga. 595, 59 SE 276. Undue influence and fraud in suit to set aside deed. Massey v. Rae [N. D.] 121 NW 75. Whether toy-pistol was a pistol within meaning of statute prohibiting selling of pistol to minor. Mathews v. Caldwell, 5 Ga. App. 336, 63 SE 250. In action for death of child killed by exploding defendant's dynamite, where it appeared as probable that explosion was caused by child intentially striking dynamite as by accidentally coming in contact with it, held that defendant's motion for nonsuit should have been granted unless plaintiff might recover on either theory, and hence on review of denial of motion it must be assumed that child intentially struck it. Hobbs v. Blanchard & Sons. Co. [N. H.] 70 A 1082. Held that fact that under evidence defendant could have gone to jury in suit against child to recover value of dynamite so exploded would not require granting of nonsuit on theory of child's contributory negligence, but that to have that effect evidence must be such that in supposed case verdict would be directed against child as matter of law. Id. Held that under evidence it might be found that act of child was not wrongful, so that denial of nonsuit was proper. Id.

27. Mechonznik v. Weintraub, 113 NYS 174; Schwartz v. Morris & Co., 61 Misc. 335, 113 NYS 524; Hallett v. Liebmann's Sons Brew. Co., 129 App. Div. 617, 114 NYS 232; Schwartz v. Onward Const. Co., 130 App. Div. 588, 115 NYS 380; Owens v. Laurens Cotton Mills [S. C.] 64 SE 915; Baker v. Brown [N. C.] 65 SE 520; Jennings v. Trummer, 52 Or. 149, 96 P 874; Castor v. Schaefer [Pa.] 73 A 329; Sloan v. Philadelphia & R. R. Co. [Pa.] 73 A 1069. Plaintiff's contributory negligence for jury.

conclusions therefrom,[28] or where the credibility of witnesses is involved.[29] The motion is directed to the proof of the cause of action and not to ancillary matters,[30] nor to the quantum [31] or measure [32] of damages. A nonsuit for failure of proof is not justified where such failure is due to the erroneous exclusion of evidence,[33] and plaintiff should ordinarily be allowed to produce additional proof where he offers to do so.[34] A directed verdict rather than a nonsuit is proper where defendants show themselves entitled to a judgment on the merits.[35]

Variance.[See 11 C. L. 1097]—A nonsuit should not be granted because of a variance which has been cured by amendment.[36]

Motion for nonsuit or dismissal.[See 11 C. L. 1097]—Motions for nonsuit are governed by the law of the place of trial.[37] The motion is in effect a demurrer to the evidence,[38] and presents for decision a question of law.[39] There must ordinarily be a timely [40] motion [41] which must specifically state the grounds on which it is based.[42]

where debatable because of conflicting statements of plaintiff's witness. Meitzner v. Baltimore & O. R. Co. [Pa.] 73 A 434.

28. Elie v. Cowles & Co. [Conn.] 73 A 258; Sinkovitz v. Peters' Land Co. [Ga. App.] 64 SE 93; Wheeler v. Oregon R. & Nav. Co. [Idaho] 102 P 347; Charrier v. Boston & M. R. Co. [N. H.] 70 A 1078; Wilson v. New York Cont. Co., 129 App. Div. 125, 113 NYS 349; Hallett v. Liebmann's Sons Brew. Co., 129 App. Div. 617, 114 NYS 232; Galvin v. Brown [Or.] 101 P 671; Rodgers v. Portland Lumber Co. [Or.] 102 P 601, rehearing denied. Id. [Or.] 103 P 514.

29. American Mfg. Co. v. S. Morgan Smith Co., 33 Pa. Super. Ct. 469; Woodworth Elevator Co. v. Theis [Minn.] 122 NW 310; Sloan v. Philadelphia & R. R. Co. [Pa.] 73 A 1069.

30. That affidavit for attachment alleged breach of contract and proof showed tort cannot be taken advantage of by motion for nonsuit. Edwards Bros. v. Erwin, 148 N. C. 429, 62 SE 545.

31. Quantum of damages beyond those which are nominal is not involved in motion, which is addressed always to evidence of cause of action which is complete when plaintiff has alleged and shown facts upon which he is entitled to nominal damages. Edwards Bros. v. Erwin, 148 N. C. 429, 62 SE 545. Where plaintiff entitled to at least nominal damages, motion should be denied. Story Lumber Co. v. Southern R. Co. [N. C.] 65 SE 460. Dismissal of complaint and giving judgment on counterclaim held error though counterclaim was not disputed, where evidence showed that plaintiff was entitled to at least nominal damages. G. & W. Mfg. Co. v. Denman, 113 NYS 128.

32. Judgment of nonsuit relates to cause of action and not to measure of damages. Hoss v. Palmer, 150 N. C. 17, 63 SE 171.

33. Refusal to permit plaintiff to introduce any further testimony after he had himself testified, and then dismissing complaint on ground that he had failed to prove his case, held error. Halprin v. Sarner, 117 NYS 995. Where court has erroneously excluded evidence without which plaintiff cannot possibly recover, plaintiff's failure to go on and prove other essential facts will not cure the error and justify a judgment of nonsuit. Georgia Iron & Coal Co. v. Ocean Acc. & Guar. Corp. [Ga.] 65 SE 775.

34. Except in rare cases, as where defendant would be subjected to unfairness or undue prejudice, or where plaintiff has given evidence of intention deliberately to trifle with court or to delay the progress of the trial, is abuse of discretion to refuse to allow him to do so. Ellenberg v. Southern R. Co., 5 Ga. App. 389, 63 SE 240.

35. Where in partition certain of defendants set up claim of title in themselves and plaintiffs' evidence was insufficient to establish their claim. Windham v. Lafferty [S. C.] 65 SE 526.

36. After plaintiff had been permitted to amend at close of evidence to conform to proof. Leslie v. Grover, 132 App. Div. 448, 116 NYS 868.

37. Is matter of procedure. Dryden v. Pelton-Armstrong Co. [Or.] 101 P 190.

38. Patty v. Salem Flouring Mills Co. [Or.] 98 P 521, former opinion [Or.] 96 P 1106, rehearing denied [Or.] 100 P 298; Hause v. Lehigh Val. Transit Co., 38 Pa. Super. Ct. 614. Is tantamount to demurrer, or an objection that, admitting all the material proved facts to be true, such facts do not entitle plaintiff to relief asked. Bush v. Wood, 8 Cal. App. 647, 97 P 709; Kramm v. Stockton Elec. R. Co. [Cal. App.] 101 P 914.

39. Bush v. Wood, 8 Cal. App. 647, 97 P 709. Ball. Ann. Codes & St. § 5029 (Pierce's Code, § 645), requiring court in giving decision on questions of fact to separately state findings of fact and conclusions of law, does not require findings and conclusions on granting nonsuit for failure of plaintiff to prove facts sufficient to entitle him to recover. Broderius v. Anderson [Wash.] 103 P 837.

40. Motion to dismiss held too late when not made until after judgment. Baltimore, etc., R. Co. v. Trennepohl [Ind. App.] 87 NE 1059. Motion to dismiss for failure to prosecute within year after case reversed and remanded for new trial may be made at any time before trial. Bessie v. Northern Pac. R. Co. [N. D.] 121 NW 618. Where judge improperly denied motions to dismiss complaint and for direction of verdict for insufficiency of evidence, held that he could not dismiss complaint on merits after verdict for plaintiff, but could only set such verdict aside and order new trial. Brown v. Grossman, 128 App. Div. 496, 112 NYS 827.

41. Except in certain cases specified by statute, plaintiff is entitled to motion specifying grounds upon which nonsuit is asked in order that he may have opportunity to

When based on the insufficiency of the evidence, it admits the truth of the evidence against which it is directed[43] which should be construed most favorably to him.[44] It has been held that the motion is an express waiver of the right to a jury trial rendering a request for submission to the jury necessary to revive the right,[45] and that the motion is not waived by making such a request after it has been denied.[46] A motion by one party for a nonsuit and by the other for a directed verdict is a submission of the case to the court for determination on the facts.[47] The motion

supply any defect suggested, and court cannot grant nonsuit of its own motion. In re Higgins' Estate [Cal.] 104 P 6. Rule has no application where evidence has been fully presented, and plaintiff has totally failed to make out a case which would support findings in his favor. Id. Held that, though in will contest, court should not, in absence of request by proponent, have taken issue of undue influence from jury, fact that he did so did not require reversal, since evidence on that issue was so conclusive in favor of proponent that court would have been bound to set aside verdict in favor of contestants. Id.

42. Motion on ground that plaintiff had failed to make out case properly denied, there being nothing to direct court's attention to any essential feature of plaintiff's case as to which proof was lacking. Jones v. Whittier [N. J. Err. & App.] 73 A 497. Motion to dismiss complaint on ground that plaintiffs "have failed to establish a cause of action" held sufficient to entitle defendants to benefit of their exception to its denial. Kuflick v. Glasser, 114 NYS 870. On appeal from refusal of nonsuit, only grounds which can be considered are those relied on when motion was made. Owens v. Laurens Cotton Mills [S. C.] 64 SE 915. Where prayer for nonsuit at close of plaintiff's case did not refer to pleadings, held that court on appeal would consider only the evidence, and not whether under pleadings evidence was sufficient to entitle plaintiff to recover. Brady v. Brady, 110 Md. 656, 73 A 567.

43. Togni v. Taminelli [Cal. App.] 103 P 899; Jacobs v. Smith Cont. Co., 113 NYS 531; Molostowosky v. Grauer, 113 NYS 679; Schmerler v. Barasch, 113 NYS 745; Cotton v. North Carolina R. Co., 149 N. C. 227, 62 SE 1093; Ford v. Stroud, 150 N. C. 362, 64 SE 1; Settle v. Southern R. Co., 150 N. C. 643, 64 SE 759. Of all facts proved and all reasonable deductions and inferences therefrom. Smith v. Atlantic Coast Line R. Co., 5 Ga. App. 219, 62 SE 1020; Central of Georgia R. Co. v. Henderson [Ga. App.] 65 SE 297. Evidence submitted by plaintiff is deemed uncontroverted, and every fact and every reasonable inference that may be drawn from any fact must be regarded as proven. Paolini v. Fresno Canal & Irr. Co., 9 Cal. App. 1, 97 P 1130. On review of dismissal of complaint before close of plaintiffs' case, must be assumed that plaintiffs, had they been permitted to proceed, would have established that which they alleged, unless negatived by their evidence or admissions at the trial. Thomsen v. Union Castle Mail S. S. Co. [C. C. A.] 166 F 251.

44. Bush v. Wood, 8 Cal. App. 647, 97 P 709; Kramm v. Stockton Elec. R. Co. [Cal. App.] 101 P 914; White v. Spreckels [Cal. App.] 101 P 920; Togni v. Taminelli [Cal. App.] 103 P 899; Central of Georgia R. Co. v. Henderson [Ga. App.] 65 SE 297; Charrier v. Boston & M. R. Co. [N. H.] 70 A 1078; Purdy v. New York, 193 N. Y. 521, 86 NE 560; Wilson v. New York Cont. Co., 129 App. Div. 125, 113 NYS 349; Jacobs v. Smith Cont. Co., 113 NYS 531; Rosenblum v. New York Butchers' Dressed Meat Co., 61 Misc. 263, 113 NYS 604; Molostowsky v. Grauer, 113 NYS 679; Schmerler v. Barasch, 113 NYS 745; Devine v. Hayward, 128 App. Div. 705, 113 NYS 898; Griffin v. Flank, 132 App. Div. 334, 117 NYS 36; Marum v. Granitz, 117 NYS 726; Weiner v. Scherer, 64 Misc. 82, 117 NYS 1008; Normand v. Hudson Val. R. Co., 133 App. Div. 474, 117 NYS 1076; Nagle v. Richards, 134 App. Div. 25, 118 NYS 53; Thompson v. Aberdeen & A. R. Co., 149 N. C. 155, 62 SE 883; Cotton v. North Carolina R. Co., 149 N. C. 227, 62 SE 1093; Settle v. Southern R. Co., 150 N. C. 643, 64 SE 759; Patty v. Salem Flouring Mills Co. [Or.] 98 P 521, former opinion [Or.] 96 P 1106, rehearing denied [Or.] 100 P 298; Castor v. Schaefer [Pa.] 73 A 329; Meitzner v. Baltimore & O. R. Co. [Pa.] 73 A 434; Hause v. Lehigh Val. Transit Co., 38 Pa. Super. Ct. 614. Full probative force must be given to all plaintiff's testimony. Golden v. Ellis, 104 Me. 177, 71 A 649. On motion for nonsuit at close of plaintiff's case, evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given benefit of its full probative strength, and any question arising from fact of variation of testimony of witnesses cannot be raised or considered. Bush v. Wood, 8 Cal. App. 647, 97 P 709; Kramm v. Stockton Elec. R. Co. [Cal. App.] 101 P 914. Plaintiff is entitled to benefit of any fact that jury might have found from evidence, and to all inferences warranted thereby. Thedford v. Herbert, 195 N. Y. 63, 87 NE 798. Must consider only such testimony as is favorable to plaintiff, and in light of most favorable inferences of which it is legitimately susceptible. Dirigolano v Jersey City, etc., R. Co., 76 N. J. Law, 505, 71 A 257. Evidence favoring defendant not considered. Thompson v. Seaboard Air Line R. Co., 81 S. C. 333, 62 SE 396.

45. Expressly waives jury trial in manner prescribed by B. & C. Comp. § 157. Patty v. Salem Flouring Mills Co. [Or.] 100 P 298; former opinions [Or.] 96 P 1106, [Or.] 98 P 521. If, on denial of motion for nonsuit at close of plaintiff's evidence, defendant declines to offer any evidence, and there is no controversy in respect to the questions of recovery, court may direct verdict for plaintiff, since by such motion defendant waives his right to jury trial on ground that proof is insufficient to be submitted to jury. Id.

46. Patty v. Salem Flouring Mills Co. [Or.] 100 P 298, former opinions [Or.] 96 P 1106, [Or.] 98 P 521.

47. Court is authorized to determine case as one of law on facts in evidence, and his

is waived by the introduction of evidence after its denial,[48] at least to the extent of giving plaintiff the benefit of such evidence.[49]

*Order or judgment.*See 11 C. L. 1098—A formal order of dismissal is sometimes,[50] though not always,[51] essential. Refusal to submit an issue to the jury is equivalent to granting a nonsuit as to it.[52] A judgment disposing of the action and silent as to one defendant is tantamount to a dismissal as to him,[53] but a mere phrase in the statement of the recovery which might exclude one party is not to be so taken where the verdict was against all.[54] On dismissing the case on his own motion, the court

determination is conclusive if was any evidence to support it. Mullen v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078. Defendant's motion for nonsuit, being in fact motion to dismiss complaint. Sheldon v. George, 132 App. Div. 470, 116 NYS 969. Where in proceedings by city to ascertain damages resulting from regrade of street defendant moved to dismiss for reason that city had failed to show any damage to his property, and plaintiff moved for directed verdict of no damages for same reason, held that defendant could not contend that court erred in taking question of damages from jury and directing verdict of no damages. City of Seattle v. Buty, 50 Wash. 139, 96 P 962.

48. Lane v. Manchester Mills [N. H.] 71 A 629; Morgan v. Onward Const. Co., 115 NYS 1069; Dimuria v. Seattle Transfer Co., 50 Wash. 633, 97 P 657; Schon v. Modern Woodmen of America, 51 Wash. 482, 99 P 25; Levy v. Larson [C. C. A.] 167 F 110. Where fails to renew motion at close of all the evidence. Teal v. Templeton, 149 N. C. 32, 62 SE 737. Error, if any, in refusing nonsuit at close of plaintiff's case for lack of proof, held cured by defendant's evidence, justifying submission of case to jury. Van Ness v. North Jersey St. R. Co. [N. J. Err. & App.] 73 A 509. Exception to denial of motion for nonsuit made at close of plaintiff's evidence held waived by failure to renew motion at close of all the evidence. Revisal 1905, § 539. Bordeaux v. Atlantic Coast Line R. Co., 150 N. C. 528, 64 SE 439.

49. Error in overruling motion waived where defendant proceeds and supplies defect in plaintiff's proof by evidence introduced by himself. Lowe v. San Francisco & N. W. R. Co., 154 Cal. 573, 98 P 678. In such case, if all evidence given at trial by both parties supports verdict, order denying motion will not be disturbed, however weak case may have been at close of plaintiff's evidence. Id. Refusal to grant motion not reviewed where plaintiff's evidence was supplemented and insufficiency supplied by that of defendant. Yergy v. Helena L. & R. Co. [Mont.] 102 P 310. Operates as waiver only to extent of allowing plaintiff benefit of any evidence subsequently introduced by defendant or himself in rebuttal. Dryden v. Pelton-Armstrong Co. [Or.] 101 P 190. Denial will not be reviewed where defect has been cured by subsequent testimony disclosed by record. Jennings v. Trummer, 52 Or. 149, 96 P 874; Crosby v. Portland R. Co. [Or.] 100 P 300, rehearing denied [Or.] 101 P 204. If when motion is interposed and denied proofs are insufficient to sustain verdict for plaintiff, waiver goes only to extent of allowing plaintiff benefit of any evidence thereafter introduced. Dimuria v. Seattle Transfer Co., 50 Wash. 633, 97 P 657. If, on consideration of such additional evidence, it appears that defects in plaintiff's case have not been cured, motion without any renewal thereof may on proper assignment of error be sustained and nonsuit granted on appeal. Id. Case will thereafter be reviewed on entire testimony only. Ryan v. Lambert, 49 Wash. 649, 96 P 232; Dignam v. Shaff, 51 Wash. 412, 98 P 1113; Cleary v. General Cont. Co. [Wash.] 101 P 888. Is not waiver unless defect in plaintiff's proof is thereby cured. Patty v. Salem Flouring Mills Co. [Or.] 100 P 298, former opinions [Or.] 96 P 1106, [Or.] 98 P 521.

50. When, upon call of case pending in superior court, neither party appeared, and court merely entered on trial docket "dismissed for want of prosecution," and case was stricken from docket, but no order was ever taken or entry made on minutes by judge, held that such entry, without more, was insufficient to accomplish dismissal. Dixon v. Minnesota Lumber Co. [Ga.] 64 SE 71. Refusal to re-enter case on docket held error. Id.

51. Ruling at trial granting motion of one of defendants to dismiss as to him held not to have required entry of formal order, but to be alone sufficient for entry of judgment. Abrashkov v. Ryan, 130 App. Div. 429, 114 NYS 973. Sustaining of demurrer to complaint in which only relief asked was an injunction, refusing injunction, and adjudging that plaintiff pay costs, held in effect a dismissal though action was not in terms dismissed. Jones v. North Wilkesboro, 150 N. C. 646, 64 SE 866. Order striking complaint and that defendant recover costs held equivalent to dismissal. Carlstedt v. Rohsenberger [Ind. App.] 85 NE 996.

52. In re Higgins' Estate [Cal.] 104 P 6.

53. Where court in rendering judgment in suit against two defendants, one a street railway company and the other the receivers of another street railway company, renders it against the latter defendants only, court thereby treats other defendant as dismissed out of case regardless of whether any formal dismissal was entered. West Chicago St. R. Co. v. Muttschall, 131 Ill. App. 639. See Eckels v. Muttschall, 230 Ill. 462, 82 NE 872; Eckels v. Henning, 139 Ill. App. 660.

54. Where clause in judgment stated amount of judgment was "to be [paid] in due course of administration," insertion of such clause is not to be taken as tantamount to dismissal as to defendant who was not a receiver, where verdict of jury was against all defendants, judgment was expressly entitled against all defendants, and separate motions in arrest of judgment were filed by each. Eckels v. Henning, 139

should ordinarily state the grounds therefor.[55] Amounts admittedly due one party should be deducted on rendering judgment for the other.[56] A nonsuit or dismissal on plaintiff's case should ordinarily be without prejudice.[57]

Effect of dismissal or nonsuit.[See 11 C. L. 1098]—A nonsuit or dismissal puts an end to the action.[58] A judgment of nonsuit[59] or of dismissal without prejudice[60] does not ordinarily operate as a bar to a subsequent suit for the same cause,[61] but

Ill. App. 660. See Eckels v. Muttschall, 230 Ill. 462, 82 NE 872, and West Chicago St. R. Co. v. Muttschall, 131 Ill. App. 639.

55. Loose v. Cooper [Iowa] 118 NW 406.

56. Where plaintiff's claim was admitted and defendant's counterclaim for same amount alone was litigated, held error to dismiss complaint and render judgment for defendant for full amount of counterclaim. Darlington v. Hamilton Bank, 112 NYS 1097.

57. Dismissal for want of prosecution. May v. Hubbard [Miss.] 49 S 619. On refusal of plaintiff to answer interrogatories on examination before trial. Carlstedt v. Rohsenberger [Ind. App.] 85 NE 996. Dismissal of complaint for failure of proof. Hexter Stable Co. v. New York Taxicab Co., 114 NYS 859. Dismissal of complaint for failure of proof, which may be supplied at another trial. Boyle & Co. v. Schueler, 117 NYS 225. Dismissal in municipal court for failure of proof. Municipal Court Act, § 248 (Laws 1902, p. 1561, c. 580). McLaughlin v. Rosenbloom, 114 NYS 10. Held error to dismiss complaint on merits at close of plaintiff's case on ground that he had not made out cause of action, defendants having introduced no evidence, and there being no motion for dismissal on merits but only motion for nonsuit. Hyman v. New York Mortgage & Security Co., 128 App. Div. 254, 112 NYS 669. Held that dismissal of bill seeking to enjoin enforcement of statute regulating gas rates as confiscatory for failure to show that such was case should be without prejudice, where it was possible that practical experience of effect of act by operation thereunder might show that it was in fact confiscatory. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —.

58. Order granting nonsuit as to one of two defendants held to have withdrawn cause of action predicated on his negligence alone. Forsell v. Pittsburgh & Montana Copper Co., 38 Mont. 403, 100 P 218. Held that, in view of dismissal of complaint for nonprosecution, refusal to compel defendants to accept notice of trial in same action was proper. Kalvin v. Meyers, 117 NYS 141. Order of dismissal is finality, ending the action, while sustaining of demurrer is not since there may still be opportunity for amendment, and action remains on docket until further steps are taken. Littlefield v. Maine Cent. R. Co., 104 Me. 126, 71 A 657.

59. See, also, Former Adjudication. Brooks v. Schlernitzauer, 113 NYS 484. Nonsuit is judgment rendered against plaintiff on his failure to maintain his case or his failure or refusal to proceed to trial after issue joined, and without determination of the issues. McGuire v. Bryant Lumber & Shingle Mill Co. [Wash.] 102 P 237. Where supreme court held that nonsuit was properly granted for variance, it would not send case back for new trial, plaintiff having remedy both at common law and under Gen. St. 1902, § 1127, if he had cause of action. Elie v. Cowles & Co. [Conn.] 73 A 258. Judgment of nonsuit in action for divorce held not bar to subsequent suit based on different grounds. In re McNeil's Estate [Cal.] 100 P 1086. Judgment rendered as result of granting defendant's motion for nonsuit made at close of plaintiff's case and before defendant rested or offered any evidence, based on ground that plaintiff's own evidence showed contributory negligence, held not judgment of dismissal on merits but judgment of involuntary nonsuit. Gratz v. Parker, 137 Wis. 104, 118 NW 637.

60. See, also, Former Adjudication. For want of prosecution. Ellis & Co. v. Brannen [Ala.] 49 S 1034. Dismissal for want of prosecution of action removed from state to federal court held not bar to subsequent action in state court. Shotwell v. Chesapeake & O. R. Co. [Ky.] 113 SW 512. Dismissal of petition on demurrer for failure to state cause of action. Standard Lumber Co. v. Coldwell [Ky.] 118 SW 999, for former opinion see Id. [Ky.] 117 SW 286. Judgment dismissing complaint held not equivalent to one for plaintiff for nominal damages and not to have been on merits, so that it was not bar to new action. Code Civ. Proc. § 1209. Hopedale Elec. Co. v. Electric Storage Battery Co., 132 App. Div. 348, 116 NYS 859. Dismissal of petition in summary proceedings in municipal court by landlord to recover possession of leased premises from tenant does not prevent petitioner from again commencing proceedings. Simon v. Schmitt, 118 NYS 326. No provision is made in Municipal Court Act for dismissing summary proceedings on the merits, § 249 (Laws 1902, p. 1561, c. 580), providing for dismissal of actions where court is of opinion that plaintiff is not entitled to recover as matter of law having no application. Id. Dismissals under Code Civ. Proc. § 581, on ground that summons has not been served and return made within three years after commencement of action, are without prejudice, except when dismissal is in effect a retraxit. Hubbard v. Superior Ct., 9 Cal. App. 166, 98 P 394. Judgment dismissing cause without prejudice where there was no hearing held to reserve to parties right to litigate all questions which might have been therein tried and determined. Easter v. Easter [N. H.] 73 A 30. Judgment of dismissal without prejudice held not res judicata, though judgment entry further recited that testimony was taken, and that plaintiff's testimony was not sufficient to entitle it to the relief asked. Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 P 1082. Mere dismissal in general terms of suit will not, after expiration of six months from such dismissal, bar second suit by same plaintiff against same defendant for same cause of action where cause is not barred by limitations when second suit is brought. Lewis v. Lewis [Ga.] 63 SE 1114.

61. See, also, Former Adjudication.

the contrary is true of a judgment of dismissal on the merits.[62] A dismissal of the complaint as to one of several defendants for failure to state a cause of action is not res adjudicata as to the others on motion for judgment on the pleadings.[63]

Setting aside order; reinstating cause. See 11 C. L. 1099—The court ordinarily may, in its discretion, set aside a nonsuit or dismissal and reinstate the case [64] during the same term.[65]

DISCOVERY AND INSPECTION.

The scope of this topic is noted below.[66]

§ 1. Discovery in Equity, 1338.
§ 2. Production and Inspection of Books and Papers or Survey of Property, 1339.
§ 3. Examination or Interrogation of Parties Before Trial, 1340.
§ 4. Physical Examination to Prepare for Trial, 1344.

§ 1. *Discovery in equity.*[67]—See 11 C. L. 1100—Equity has jurisdiction of a de-

62. Judgment of dismissal on failure of plaintiff to prove any negligence entitling him to a verdict held in no sense a nonsuit but final and conclusive adjudication of rights of parties and a bar to another action. McGuire v. Bryant Lumber & Shingle Mill Co. [Wash.] 102 P 237. Judgment of dismissal on sustaining of demurrer to certain counts and failure to plead over may be pleaded in bar to another action based on substantially same facts. Wapello State Sav. Bank v. Colton [Iowa] 122 NW 149. Where dismissal of actions was regular and application to set aside dismissal was denied and no appeal taken from order of denial, held that there was final determination of action authorizing entry of judgment, though there might not have been final determination of rights of parties as might be presented in other actions. Rosenthal v. Friedman, 60 Misc. 553, 112 NYS 449.

63. Perrin v. Whipple, 64 Misc. 289, 118 NYS 551.

64. Where demurrer to evidence was sustained and jury discharged, and plaintiff's motion for new trial was denied and judgment rendered against him for costs, held that court had power at same term to vacate judgment, grant plaintiff's motion to dismiss without prejudice, and render new judgment against him for costs. Missouri Pac. R. Co. v. Berry [Kan.] 98 P 204. Only ground on which nonsuit granted under Gen. St. 1902, c. 52, § 761, can be set aside is that plaintiff's evidence made out prima facie case. Lynahan v. Church [Conn.] 72 A 726. Judgment dismissing complaint and order refusing to open plaintiff's alleged default, where plaintiff's attorney failed to present legal excuse for withdrawing from trial, and in view of fact that dismissal was not on merits. Alexander v. Costello, 114 NYS 799. Held that judgment of nonsuit for failure to give notice of trial would not be set aside where it appeared that plaintiff could not recover without such an amendment of pleadings as would create and institute new suit with new question in controversy between different parties which would not be allowed. Rankin v. Central R. Co. [N. J. Law] 71 A 55. Denial of motion to reinstate case dismissed for want of prosecution held not abuse of discretion, where it did not appear that plaintiff objected or excepted to dismissal though present, or that notice of motion to reinstate was served on defendant, and circumstances warranted belief that issues were fictitious. Loose v. Cooper [Iowa] 118 NW 406. Decision on motion to nonsuit was reserved and certain questions of fact submitted to jury under Code Civ. Proc. § 1187, which found for plaintiff and assessed damages. Thereafter court granted motion on ground of insufficiency of evidence to show that person whose alleged negligence caused injury was servant of defendant. Held that court could not, thereafter, on motion of defendant to set aside verdict, pass on weight of evidence or excessiveness of damages, but remedy was by appeal. Jones v. New York Cent. & H. R. R. Co., 61 Misc. 139, 114 NYS 756.

65. Motion to reinstate made after expiration of term at which order of dismissal was entered stands, as to excuses for delay, on same footing as extraordinary motion for new trial. Waller & Co. v. Clarke [Ga.] 64 SE 1096. Refusal to reopen case and allow plaintiff to amend after expiration of time fixed when demurrer was sustained held not to be error, no good excuse being shown. Id. Order made at October term, sustaining demurrer to petition and ordering same to be dismissed unless amended within 30 days, held not a December order or to permit dismissal to be treated as December dismissal, though 30 days expired during December term. Id.

66. Treats of discovery in equity and statutory modifications thereof and substitutes therefor. Excludes depositions as such (see Depositions *), reference (see Reference *), production of documentary evidence (see Evidence,* § 7D; Witnesses,* § 7, as to subpoenas duces tecum), examination of parties at trial (see Witnesses,* § 2, as competency of parties as witnesses; Examination of Witnesses,* § 2, as to cross-examination of the adverse party), power of court to compel a contumacious witness to answer (see Trial,* § 3; Contempt,* §§ 1, 2, 3), interrogatories under the admiralty practice (see Admiralty,* § 3), and proceedings supplementary to execution (see Supplementary Proceedings *).

67. Search Note: See notes in 5 C. L. 1019; 11 Ann. Cas. 578.

See, also, Discovery, Cent. Dig. §§ 1-40; Dec. Dig. §§ 1-27; 14 Cyc. 305-339; 16 A. &

* Always begin with the latest article on the subject. Use the latest topical index.

mand otherwise cognizable at law where necessity for a discovery is shown,[68] but a bill asking both relief and a discovery cannot be maintained where there is no right to the relief,[69] and the remedy, being practically obsolete, will not be granted where the information can be otherwise readily obtained,[70] or where to do so would be inequitable.[71] Nor can the remedy be invoked in aid of an action at law which has been settled.[72] The bill will lie against any person having possession of the evidence,[73] and one who has acquired information through confidential relations cannot escape disclosure on the ground that he was not a party to the transaction.[74] Allegation in the bill of facts showing the materiality and indispensability of a discovery is sufficient.[75]

§ 2. *Production and inspection of books and papers or survey of property.*[76]—See 11 C. L. 1101—A court of equity has the power, upon motion, to order the production or inspection of books and records in the hands of one party, whenever it satisfactorily appears that such inspection is necessary to enable the other party to meet the issues raised,[77] and such power is distinct from and independent of the statutory power to order a discovery where the parties are not before the court,[78] the statutory power being usually given as a substitute for a bill of discovery.[79] One is entitled to a discovery by inspection of books and records whenever necessary to enable him to prepare for trial[80] upon issues essential to his case,[81] but it can

E. Enc. L. (2ed.) 810; 6 A. & E. Enc. P. & P. 728; 8 Id. 35.

68. Dudley v. Niswander, 65 W. Va. 461, 64 SE 745. Refusal of insurance agent to disclose name of company with which insurance on plaintiff's property was placed. Bill suggesting insurance with defendant company and praying discovery held not demurrable. Niagara Ins. Co. v. Warren-Gee Lumber Co. [Miss.] 47 S 551.

69. Although discovery was asked by motion and not in the prayer of the bill. Griesa v. Mutual Life Ins. Co. [C. C. A.] 169 F 509. That such discovery has been obtained is no ground for retaining the suit for relief where remedy at law is otherwise adequate, since evidence so obtained may be taken into action at law. Id.

70. By taking depositions, by cross-examination of plaintiff at or before trial, by examination of public records, or by notice to produce documents. Miller v. Moise, 168 F 940.

71. Option to lease coal land on terms offered by any other person. Notice to lessee of proposition which failed by reason of claim of his rights made by him, but which he failed to exercise. On notice of another proposition, held that he was not entitled to discovery as to name of proposed lessee. Taylor & McCoy Coal & Coke Co. v. Hartman, 222 Pa. 172, 70 A 1001.

72. Bill for discovery in aid of defense to action at law cannot be maintained where defendant has voluntarily paid the claim involved in the action at law though such action has not been stricken from files. Sherman v. Delaware & Atlantic Tel. & T. Co., 36 Pa. Super. Ct. 487.

73. Will lie against widow, owning cemetery lot in which husband is buried, to procure examination of body to obtain evidence to use in defense of action on insurance policy, although she is not party to such action. Griesa v. Mutual Life Ins. Co. [C. C. A.] 169 F 509.

74. Bill by receiver of corporation to compel broker to disclose names of persons for whom he bought stock. Huey v. Brown [C. C. A.] 171 F 641, afg. 166 F 483.

75. Sufficient compliance with rule that it must be averred that the discovery is indispensable for lack of other evidence where the remedy would otherwise be at law. Dudley v. Niswander, 65 W. Va. 461, 64 SE 745.

76. As to subpoenas duces tecum, see Witnesses, § 7.

Search Note: See notes in 1 C. L. 936; 7 Id. 1170; 11 Id. 1101; 29 L. R. A. 811; 10 L. R. A. (N. S.) 99; 5 Ann. Cas. 739.

See, also, Discovery, Cent. Dig. §§ 103-140; Dec. Dig. §§ 80-108; 14 Cyc. 368-380; 23 A. & E. Enc. L. (2ed.) 167.

77. Same power is vested in courts having both common-law and equity powers. McGeary v. Brown [S. D.] 122 NW 605.

78. Code Civ. Proc. § 477, seems to be intended to cover cases where discovery is sought from persons not parties to the suit. McGeary v. Brown [S. D.] 122 NW 605.

79. McGeary v. Brown [S. D.] 122 NW 605. When under a given state of facts, Rev. St. § 5293, together with §§ 5289, 5290 and 5101, will afford the same relief as was formerly administered in chancery by a bill of discovery under the same facts, the provisions of said sections must be pursued. Stark Rolling Mill Co. v. Ocean Acc. & Guar. Co., 11 Ohio C. C. (N. S.) 443.

80. Action against city for electricity furnished under contract. Denial of contract and of reasonableness of charges. Defendant entitled to discovery. New York Edison Co. v. New York, 133 App. Div. 728, 118 NYS 238. In action for share of profits from defendant's business, examination of defendant's books may be had. Webb v. Homer W. Hedge Co., 133 App. Div. 420, 117 NYS 643. In action by stockholders, for receiver, on ground of waste of assets by officers, held that necessity for examination of the company's books was shown. McGeary v. Brown [S. D.] 122 NW 605. Under Rev. St. U. S.

be had only where it is material to the decision of the action or is competent evidence of the trial thereof, or is necessary to enable a party to prepare for trial,[82] and must be limited to such books as contain the desired information.[83] It is improper for the court to attach as a condition to an order to permit the inspection of a document that the party inspecting it shall introduce it in evidence.[84] Constitutional limitations with respect to searches and seizures,[85] due process of law,[86] and equal protection of the laws,[87] are not necessarily violated by orders for the production or inspection of books and records.[88]

*Procedure.*See 11 C. L. 1102—An affidavit upon which an application for inspection is predicated must state the facts entitling the applicant to such inspection,[89] and must show that the application is made in good faith and will or may have a tendency to accomplish the result desired.[90] Formal notice is not essential to the exercise of the equitable power to require a party to the suit to allow an examination of his books or papers.[91] The complaint can be dismissed on refusal of plaintiff to comply with the order to produce papers only when such refusal is absolute and contumacious,[92] and an order of dismissal for such refusal is appealable.[93] An honest but unavailing effort by defendant to produce books and papers and procure attendance of witnesses is sufficient to prevent the striking out of his answer.[94]

§ 3. *Examination or interrogation of parties before trial.*[95]—See 11 C. L. 1103—Statutes authorizing the examination of the adverse party before trial are remedial and must be liberally construed,[96] and, where properly applied for upon sufficient

§ 724, a party may be required to produce his books and papers before trial. Carpenter v. Winn [C. C. A.] 165 F 363, following Bloede v. Bancroft, 98 F 175, and overruling Cassatt v. Mitchell Coal & Coke Co. [C. C. A.] 150 F 32.

81. Action for price of goods sold to alleged agent of defendant. Discovery allowed to procure evidence as to agency. Societe Anonyme Des Glaces Nationales Belges v. Kahn, 128 App. Div. 919, 112 NYS 830.

82. Action to declare absolute conveyance a mortgage, and require reconveyance on payment of amount due. Discovery to determine amount due not allowed, since not necessary to main issue. Fogarty v. Fogarty, 128 App. Div. 272, 112 NYS 742. In action for accounting the examination is not necessary until right to accounting is established. Moore v. Reinhardt, 132 App. Div. 707, 117 NYS 534; Fogarty v. Fogarty, 128 App. Div. 275, 112 NYS 744.

83. In action for commissions on sales, order giving access to all of defendant's business books and papers is improper. Funger v. Brooklyn Bottle Stopper Co., 132 App. Div. 837, 117 NYS 799. In action by agent for commissions, the plaintiff cannot have a general examination of all the business books of his employer. Strauss v. Von Tobel, 131 App. Div. 823, 116 NYS 95.

84. Wimpfheimer v. Harris, 62 Misc. 5, 114 NYS 441.

85. See, generally, Constitutional Law, § 20.

86. See Constitutional Law, § 15.

87. See Constitutional Law, § 10.

88. Granting a stockholder an examination of the company's books is not an infringement of the constitutional provision against searches and seizures. McGeary v. Brown [S. D.] 122 NW 605. See, generally, Corporations, § 14D. Order under Arkansas Anti-trust Act of January 23, 1905, directing defendant corporation to produce certain employes as witnesses, and any books or papers in possession of such witnesses, is not unconstitutional as unreasonable search and selzure, or as denial of due process of law, or equal protection of law. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —. See Combinations and Monopolies, § 4.

89. Affidavit of plaintiff, suing for commissions, that defendant promised him "a piece of any new business" obtained by him, held insufficient. Lane v. Jonasson & Co., 128 App. Div. 266, 112 NYS 655.

90. Affidavit of defendant's former bookkeeper that he believes an examination of books will show fraudulent entries insufficient. Brickner v. Sulzbacher, 130 App. Div. 393, 114 NYS 958.

91. Code Civ. Proc. § 477, requiring notice as part of procedure provided for therein, would seem to apply only where the order is against persons not party to the suit, and does not apply to an order against defendant. McGeary v. Brown [S. D.] 122 NW 605.

92. Finding of referee that papers produced are forgeries will not justify dismissal. Banes v. Rainey, 130 App. Div. 465, 114 NYS 986.

93. Banes v. Rainey, 130 App. Div. 465, 114 NYS 986.

94. Hence Act Ark. Jan. 23, 1905, §§ 8, 9, authorizing such striking, on failure of defendant to comply with the order, is not so arbitrary and unreasonable as to be denial of due process of law. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —.

95. **Search Note:** See notes in 3 C. L. 1109; 24 L. R. A. 183; 12 L. R. A. (N. S.) 636.

See, also, Discovery, Cent. Dig. §§ 41-91, 99-102; Dec. Dig. §§ 28-77, 79; 14 Cyc. 339-363; 8 A. & E. Enc. L. (2ed.) 57.

96. St. 1898, § 4096, authorizing plaintiff to

facts, the order for examination must issue as a matter of right,[97] without regard to ulterior motives.[98]

The examination is proper where it is necessary to establish the moving party's cause of action [99] or defense.[1] The examination is not limited to the affirmative cause of action or defense of the moving party,[2] but the plaintiff will not be allowed to examine the defendant upon the latter's affirmative defenses,[3] and the defendant cannot be compelled to disclose his theories of the case, or the facts upon which he relies to establish his defense.[4] Where, however, the defendant admits a contract but denies that plaintiff has correctly stated it, plaintiff is entitled to examine him as to what it actually was,[5] and his admission that a contract existed between him and a third person is a sufficient showing that he has knowledge of its contents.[6] An order for examination must be predicated upon a sufficient cause of action [7] or defense,[8] and upon some issue of fact to be tried,[9] must be confined to the issues,[10] and will not be granted unnecessarily [11] or before occasion arises therefor.[12] There seems to have been some confusion or conflict as to whether the New York statute authorizes an examination for the purpose of enabling the moving party to prepare his pleadings or for trial,[13] and even recently it has been declared that the examination is authorized only for the purpose of securing evidence to be used on the trial,[14]

examine defendant in order to be able to frame complaint. Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257.

97. Regan v. Gorham Co., 129 App. Div. 315, 113 NYS 738; Loeny v. Gordon, 129 App. Div. 459, 114 NYS 211.

98. Examination of defendant by plaintiff. Ellinger v. Equitable Life Assur. Soc., 138 Wis. 390, 120 NW 235.

99. Should be allowed only in such case. Armstrong v. Portland R. Co., 52 Or. 437, 97 P 715. In action to recover margins from bucket shop, examination of defendant allowed as to manner in which he conducted business. Grant v. Leopold, 61 Misc. 79, 113 NYS 167.

1. Defendant in foreclosure entitled to discovery as to claim that plaintiff had extended time to one to whom defendant had conveyed property subject to mortgage. Cohen v. Hecht, 128 App. Div. 511, 112 NYS 809.

2. Strodl v. Farrish-Stafford Co., 63 Misc. 54, 116 NYS 570. Where plaintiff sued on contract to purchase plaintiff's stock in defendant corporation, alleged to have been made by defendant corporation's predecessor, which contract the defendant denied, it was proper to allow examination of defendant's officers and books. Id. Evidence for plaintiff to support cause of action on contract by avoiding defense of cancellation set up in answer is necessary and material. Schweinburg v. Altman, 131 App. Div. 795, 116 NYS 318.

3. Caldwell v. Glazier, 128 App. Div. 315, 112 NYS 655; Skolny v. Richter, 132 App. Div. 680, 117 NYS 297. Plaintiff not entitled as to matters of defense in which burden of proof is on defendant. Caldwell v. Glazier, 128 App. Div. 315, 112 NYS 655. Fischer v. American Exch. Nat. Bank, 128 App. Div. 268, 112 NYS 668; Skolny v. Richter, 132 App. Div. 680, 117 NYS 297.

4. Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793. Cannot be used to compel party to disclose names of his witnesses, manner in which he expects to establish his case, or confidential communications of his agents. Armstrong v. Portland R. Co., 52 Or. 437, 97 P 715.

5, 6. Anderson v. Lisman, 130 App. Div. 134, 114 NYS 348.

7. Could not be predicated upon a promise of defendant to give plaintiff "a piece of" any new business that latter should obtain for defendant. Lane v. Jonasson, 128 App. Div. 266, 112 NYS 655.

8. Interrogotories to plaintiff cannot be predicated upon an answer that tenders no defense. Dye v. Buchwalter, 8 Ohio N. P. (N. S.) 630.

9. Allegation in affidavit that a demurrer, undisposed of, was interposed for delay, held not sufficient to justify order. Sprague v. Currie, 129 App. Div. 365, 113 NYS 789.

10. Action to enjoin conspiracy to deprive plaintiff of trade name and for accounting. Discovery not allowed to show amount of damages, nor as to defendant's legitimate trade secrets and methods. Solar Baking Powder Co. v. Royal Baking Powder Co., 128 App. Div. 550, 112 NYS 1013.

11. Plaintiff not entitled to discovery merely to enable him to allege the exact amount due. Brick v. Shaff, 128 App. Div. 264, 112 NYS 642.

12. Order in suit for separation, for examination of defendant with view of amount of alimony, held premature where defendant counterclaimed for absolute divorce and such counterclaim had not been tried. Haff v. Haff, 132 App. Div. 338, 116 NYS 1100.

13. See Chittenden v. San Domingo Imp. Co., 132 App. Div. 169, 116 NYS 829, where former uncertainty as to this question is adverted to.

14. Bock v. Bock, 130 App. Div. 229, 114 NYS 473.

Note: It should be noted in connection with this case that the real purpose of the application appeared to be to obtain evidence, and that the only question necessarily adjudicated was that the affidavit was not sufficient for this purpose. [Ed.]

but it seems that it is now fairly well settled that an examination may be had to enable a party either to frame his pleadings [15] or to prepare for trial; [16] but examination of defendant for purpose of framing the complaint cannot be had where the moving papers show that plaintiff is fully advised as to all necessary facts.[17] It is also held that an attorney may be compelled to disclose his client's address.[18] The New York statute authorizes the examination of persons not parties; [19] but in Indiana only the parties may be examined.[20]

Where the statute requires it, an affidavit is essential.[21] Such affidavit must properly disclose the purpose for which the examination is desired,[22] and must show, by allegations of facts as distinguished from conclusions,[23] that the information sought is necessary,[24] affiant's statement to that effect not being conclusive.[25] The affidavit need not, however, state facts sufficient to constitute a cause of action, nor that such facts are not within plaintiff's knowledge,[26] and in allegation as to the general nature and object of the action will not amount to an election of that remedy.[27] A motion for an order to examine a corporation should point out which officers are likely to have knowledge of the matters desired.[28] Payment or tender of the statutory fee for attendance is essential to proper service of the order.[29] The examination must be had at the place prescribed by law.[30] That answers might tend to incriminate is not ground for disallowing discovery,[31] and when an

15. Chittenden v. San Domingo Imp. Co., 132 App. Div. 169, 116 NYS 829, citing Glenny v. Stidwell, 64 N. Y. 124, as having settled in the affirmative the question as to whether examination is available for the purpose of enabling a party to prepare his pleadings or to prepare for trial. To enable plaintiff to prepare his complaint. Karst v. Prang Educational Co., 132 App. Div. 197, 116 NYS 1049. Under Code Civ. Proc. §§ 870-873, may be taken to enable plaintiff to comply with an order of court to furnish **bill of particulars.** Chittenden v. San Domingo Imp. Co., 132 App. Div. 169, 116 NYS 829.

16. In action for conspiracy, examination of defendant allowed with respect to its acts in furtherance of conspiracy. Solar Baking Powder Co. v. Royal Baking Powder Co., 128 App. Div. 550, 112 NYS 1013.

17. In re La Grave, 132 App. Div. 108, 116 NYS 465.

18. Bohling v. Bronson, 130 App. Div. 895, 115 NYS 29. To enable plaintiff to serve order requiring payment of counsel fees. O'Connor v. O'Connor, 62 Misc. 53, 115 NYS 965.

19. Chittenden v. San Domingo Imp. Co., 132 App. Div. 169, 116 NYS 829.

Officers of corporation party may be examined. Mithertz v. Goldschmidt Bros. Co., 64 Misc. 460, 118 NYS 610; Strodl v. Farrish-Stafford Co., 63 Misc. 54, 116 NYS 570. Examination of former officers of defendant corporation allowed. Chittenden v. San Domingo Imp. Co., 132 App. Div. 169, 116 NYS 829.

20. Relatrix in bastardy is not a party within Burns' Ann. St. 1908, § 533. Walker v. State [Ind. App.] 86 NE 502.

21. Notice of motion referring to pleadings which contain recital of necessary facts is not sufficient. Loewy v. Gordon, 129 App. Div. 459, 114 NYS 211.

22. Allegation that "deponent intends to preserve and use such testimony," that the purpose of examination is "to properly prepare for trial" and "to prepare and obtain other evidence to meet the defense herein," held insufficient to authorize examination to secure evidence to use on trial. Bock v. Bock, 130 App. Div. 229, 114 NYS 473.

23. Affidavit that testimony is necessary to enable plaintiff to prove certain facts must show that proof of such facts is relevant and material to some issue. Irving v. Higgins, 131 App. Div. 184, 115 NYS 254.

24. In suit to enjoin strike of employes, information sought by defendants held unnecessary. Badger Brass Mfg. Co. v. Daly, 137 Wis. 601, 119 NW 328. Also in action on tontine policy, where it appears that plaintiff has already had discovery as to number and amounts of policies issued and forfeitures, and total expenses and benefits, although he has no information as to mode of apportionment. Ellinger v. Equitable Life Assur. Soc., 138 Wis. 390, 120 NW 235.

25. Badger Brass Mfg. Co. v. Daly, 137 Wis. 601, 119 NW 328; Ellinger v. Equitable Life Assur. Soc., 138 Wis. 390, 120 NW 235.

26. Under St. 1898, § 4096, requiring an affidavit stating the general nature and object of action which affiant proposes to bring. Gratz v. Parker, 137 Wis. 104, 118 NW 637; Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257.

27. Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257.

28. Order should not be for examination of all the officers at same time and place. Solar Baking Powder Co. v. Royal Baking Powder Co., 128 App. Div. 550, 112 NYS 1013.

29. Affidavit of process server that he made such payment insufficient to sustain order for punishment for contempt where contradicted by affidavits of defendant and a disinterested third person. Kaplan v. Sher, 114 NYS 910.

30. Examination of a witness not a party cannot be taken at a place other than his place of residence, or where he has an office for regular transaction of business. Chittenden v. San Domingo Imp. Co., 132 App. Div. 169, 116 NYS 829.

31. Privilege may be claimed at examination. Solar Baking Powder Co. v. Royal

order for the appearance of a third person for examination has been complied with, a subsequent order to further appear as provided in the original order cannot be resisted by plaintiff on the ground that such person is not a party.[32] The order may be accompanied by a subpoena duces tecum,[33] and is not thereby rendered irregular as calling for an examination of books and papers,[34] but the order for such a subpoena should not be allowed until, upon examination, it appears that the papers are necessary.[35] Disobedience of the subpoena may be punished as a contempt,[36] but a referee or notary has no power to punish for contempt in refusing to answer interrogatories, unless such power is conferred by the statute.[37] A corporation ordered to appear by a certain agent ordered to be served with a copy is not in contempt for not producing him when he was not served.[38] A witness on refusal to answer fully cannot be charged with the costs of the examination.[39] On refusal of plaintiff to answer interrogatories, his complaint should be stricken,[40] but the answer cannot be stricken out on disobedience of the order by a witness other than defendant.[41] Answers, if pertinent, cannot be stricken because not entirely responsive to the interrogatory,[42] but hearsay testimony included in a party's answer to interrogatories may be excluded on his objection when offered in evidence.[43] On refusal of defendant to answer interrogatories, plaintiff does not have an absolute right to judgment.[44] Where the order for examination is too broad, it should be modified, not vacated.[45] Right to move to vacate the order is waived by requesting an adjournment of the examination with a stipulation that it should take place on a certain day.[46] Where, after interrogatories are stricken as immaterial, the complaint is amended so as to make them material, there must be a motion to resubmit them or the right to demand them will be waived,[47] but where the order is vacated upon grounds other than upon the merits, without appeal, the party may move on new papers without obtaining leave to renew.[48] In Ohio interrogatories attached to a pleading cannot be stricken on motion.[49]

Baking Powder Co., 128 App. Div. 559, 112 NYS 1013.

32. Wilkens v. American Bank of Torreon, 133 App. Div. 646, 118 NYS 210.

33. Grant v. Leopold, 61 Misc. 79, 113 NYS 167. The referee may issue a subpoena duces tecum requiring production of books and papers, although the order directing examination indicated court's refusal at that time to order production of such books and papers. Littlefield v. Gansavoort Bank, 62 Misc. 339, 114 NYS 769.

34. Grant v. Leopold, 61 Misc. 79, 113 NYS 167.

35. Wilson v. Nevins, 63 Misc. 380, 118 NYS 421.

36. Although subpoena was too broad, where refusal was based on ground that referee had no power to issue a subpoena. Littlefield v. Gansevoort Bank, 62 Misc. 339, 114 NYS 769.

37. Under Rev. Civ. St. 1895, arts. 2292-2294, 2297, the penalty for refusal to answer interrogatories or for evasive answers is that the interrogatories shall be taken as confessed, and the notary has no power to punish for contempt on such account. Johnson v. State, 54 Tex. Cr. R. 113, 111 SW 743. Act of notary in punishing defendant for contempt in refusing to answer codefendant's interrogatories held unauthorized. Id. As to powers of notary or referee where witness is contumacious, see Depositions, § 3; Reference, § 7.

38. Wilkens v. American Bank of Torreon, 133 App. Div. 646, 118 NYS 210.

39. Attorney refusing to give address of persons who had been his clients in other cases. In re Malcolm, 129 App. Div. 226, 113 NYS 666, rvg. 60 Misc. 324, 113 NYS 255.

40. But defendant is not thereupon entitled to judgment on the merits. Carlstedt v. Rohsenberger [Ind. App.] 85 NE 996.

41. Action against corporation. Disobedience of order by secretary of defendant not ground for dismissal of answer, under B. & C. Comp. § 826, providing for dismissal if witness be a party. Armstrong v. Portland R. Co., 52 Or. 437, 97 P 715.

42. Since the witness is not bound to confine himself to admission or denial, but may confess and avoid. Prestwood v. Carlton [Ala.] 50 S 254.

43. Birmingham R., L. & P. Co. v. Morris [Ala.] 50 S 198.

44. Since Code 1907, § 4055, gives the court discretion as to which of several courses it shall adopt. City of Bessemer v. Southern R. Co. [Ala.] 48 S 103.

45. Cohen v. Hecht, 128 App. Div. 511, 112 NYS 809. Either when attention of court is drawn to fact that order is too broad or on its own motion. Solar Baking Powder Co. v. Royal Baking Powder Co., 128 App. Div. 550, 112 NYS 1013.

46. Schweinburg v. Altman, 131 App. Div. 795, 116 NYS 318.

47. Murrilla v. Guis, 51 Wash. 93, 98 P 100.

48. Order vacated because containing im-

§ 4. *Physical examination to prepare for trial.*[50] See 11 C. L. 1107—Discretionary power to order a physical examination [51] is not abused by a refusal to grant such examination without prejudice to a renewal upon a proper showing.[52]

Discretion; Disfranchisement; Dismissal and Nonsuit, see latest topical index.

DISORDERLY CONDUCT.[53]

The scope of this topic is noted below.[54]

Disorderly conduct as the offenses exist in various jurisdictions includes not only the common-law offense of breach of the peace but also violations of statutes [55] and ordinances [56] prohibiting specific acts of disorderly conduct,[57] as using profane language in or near any public place,[58] neglecting to provide for one's wife according to his means,[59] or doing acts generally tending to disturb the public peace.[60] A complaint for disorderly conduct, in violation of a city ordinance, must allege that the disorderly conduct charged was within the city limits,[61] and must, with reasonable certainty, state the act or acts which constitute the offense,[62] but it is usually held sufficient if the charge is in the language of the statute or of the ordinance.[63] A count for disturbing the peace and one for drunkenness may be joined

proper order for production of books and papers. Regan v. Gorham Co., 129 App. Div. 315, 113 NYS 738.

49. Neither § 5099, giving the right to attach interrogatories to a pleading, nor any other section to the statutes, authorizes the striking out of interrogatories on motion, proper practice being by demurrer to the interrogatories. Dye v. Buchwalter, 8 Ohio N. P. (N. S.) 630.

50. Search Note: See notes in 5 C. L. 1022; 14 L. R. A. 466; 2 L. R. A. (N. S.) 386; 1 Ann. Cas. 266; 4 Id. 611; 11 Id. 844.

See, also, Discovery, Cent. Dig. §§ 92-98; Dec. Dig. § 78; 14 Cyc. 364-366; 16 A. & E. Enc. L. (2ed.) 811.

51. Under Gen. St. 1906, § 3151, requiring examination, is discretionary with the trial court. Atlantic Coast Line R. Co. v. Dees, 56 Fla. 127, 48 S 28.

52. Atlantic Coast Line R. Co. v. Dees, 56 Fla. 127, 48 S 28.

53. See 11 C. L. 1108.

Search Note: See Disorderly Conduct, Cent. Dig.; Dec. Dig.; 14 Cyc. 466-478; 4 A. & E. Enc. L. (2ed.) 902; 9 Id. 507; 7 A. & E. Enc. P. & P. 1.

54. It excludes lewd and obscene conduct (see Indecency, Lewdness and Obscenity*), profane swearing (see Profanity and Blasphemy*) and vagrancy (see Vagrants*). Bonds to keep the peace are treated in a separate topic (see Surety of the Peace*).

55. Act No. 59, Gen. Assem. 1868, approved July 23, 1868, entitled "An act to define and punish offenses against the public peace and tranquility," held legally enacted. State v. Bowman [Ark.] 118 SW 711.

56. Ordinance No. 17192, enacted by the city council of Los Angeles, making it unlawful to hold any assemblage or make any public speech in any public park or street of the city within a defined district, was valid exercise of police powers. Ex parte Thomas [Cal. App.] 102 P 19.

57. Under the Consolidation Act (Laws 1882, p. 366, c. 410), § 1459, "disorderly conduct" is such conduct as in the opinion of the magistrate tends to a breach of the peace, and this section is not limited to the acts specified in § 1458. People v. Mansi, 129 App. Div. 386, 113 NYS 866. Defendants' statement that they had money and wanted to change it, and asking prosecutor if he had any money and to put all his money and watch and chain in package and give it to them, constituted disorderly conduct under § 1459. Id.

58. Evidence held to justify judgment that defendant was guilty of disturbance of the peace as defined by Pen. Code 1895, art. 334. James v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 116 SW 642.

59. In order to sustain a conviction under Code Cr. Proc. § 899, subd. 1, it is necessary to prove that the wife is likely, because of such neglect, to become a public charge. Evidence held insufficient. People v. De Wolf, 118 NYS 75.

60. Mere playing of baseball on Sunday is not of itself and necessarily a breach of the peace, justifying arrest and indictment. Yerkes v. Smith [Mich.] 16 Det. Leg. N. 467, 122 NW 223. Calling one a liar and raising a stick to strike him is a breach of a bond to keep the peace, under Pen. Code 1895, §§ 1238, 1239. Rumsey v. Bullard, 5 Ga. App. 802, 63 SE 921.

61. Complaint held defective. Borough of Vineland v. Kotok [N. J. Law] 72 A 959.

62. Complaint, which charged that defendant did unlawfully and willfully make, aid, countenance, and assist in making a noise, riot, disturbance, and improper diversion in a public place, and did collect with bodies and crowds for unlawful purposes, and to the disturbance of citizens, etc., contrary to provisions of certain city ordinance, held insufficient. State v. Swanson, 106 Minn. 288, 119 NW 45.

63. The offense charged being a minor misdemeanor. City of Wellsville v. Seyler [Kan.] 102 P 52.

in the same indictment.[64] The general rules of evidence applicable to criminal prosecutions apply.[65]

DISORDERLY HOUSES.[66]

The scope of this topic is noted below.[67]

Any place of public resort in which illegal practices are habitually carried on is a disorderly house,[68] and it is not necessary that the unlawful practices must contain an element of criminality, or of moral turpitude,[69] it being sufficient if the practices are interdicted by statute.[70] In some states the keeper of a house of prostitution[71] is liable for suffering or permitting[72] an unmarried female[73] under eighteen years of age to become an inmate thereof;[74] and the displaying of a sign of an honest occupation on an assignation house is also made an offense,[75] but it is held that the accused's knowledge of the character of the place must be established.[76] One who knowingly rents premises to be occupied for the purpose of prostitution, and which with his knowledge are conducted as a bawdyhouse, aids, abets, and assists in keeping such a house,[77] and he may be proceeded against as a principal.[78] The Texas statute prohibiting the keeping of disorderly houses is not unconstitutional because of uncertainty of the punishment prescribed,[79] nor is the statute providing for the suppression of disorderly houses by injunction[80] unconstitutional.[81] A

64. Jarrett v. State, 55 Tex. Cr. R. 550, 117 SW 833.

65. Not error to admit unsworn testimony of police officer that the photograph of defendants was in the rogue's gallery, it being obvious that the information was solely for the purpose of determining what sentence ought to be imposed. People v. Mansi, 129 App. Div. 386, 113 NYS 866.

66. See 11 C. L. 1109.

Search Note: See notes in 11 C. L. 1109; 35 L. R. A. 571; 39 Id. 521; 11 L. R. A. (N. S.) 1060.

See, also, Disorderly House, Cent. Dig.; Dec. Dig.; 14 Cyc. 479-514; 9 A. & E. Enc. L. (2ed.) 508; 3 A. & E. Enc. P. & P. 678.

67. This topic includes the keeping or frequenting of bawdyhouses and other places designated by statute or otherwise as disorderly. Excludes offenses of indecency, lewdness, and obscenity in general (see Indecency, Lewdness and Obscenity *), and specific offenses relative to gambling (see Betting and Gaming*), and the keeping and sale of intoxicating liquors (see Intoxicating Liquors*). As to the general principles relative to nuisances, see Nuisance.*

68. State v. Martin [N. J. Err. & App.] 73 A 548. Though unlawful isolated sales of liquor incident to business of drug store do not render it disorderly house, a room maintained in such store for unlawful sale of liquor to public is disorderly house. Walt v. People [Colo.] 104 P 89. Keeping place where public were habitually permitted to assemble and buy liquor sold in violation of law held disorderly house within Mills' Ann. St. § 1323. Id.

69. State v. Martin [N. J. Err. & App.] 73 A 548.

70. One who maintains a place of business in which the law against usury is habitually violated is guilty of keeping a disorderly house. State v. Martin [N. J. Err. & App.] 73 A 548.

71. Verdict was defective in not finding that defendant was keeper of house of prostitution. People v. Lee, 237 Ill. 272, 86 NE 573. Verdict as first returned held insufficient in that it failed to show that accused was keeper of house of prostitution. People v. Davidson, 240 Ill. 191, 88 NE 565.

72. The word "harboring" used in verdict held sufficient as an equivalent of "suffering or permitting to live, board, stop, or room" as used in Hurd's Rev. St. 1905, c. 38, § 57d. People v. Lee, 237 Ill. 272, 86 NE 573.

73. Verdict defective in that it did not show that female was unmarried. People v. Lee, 237 Ill. 272, 86 NE 573.

74. Book in which accounts of various inmates of alleged house of prostitution were kept was admissible in evidence to show that female was an inmate. People v. Lee, 237 Ill. 272, 86 NE 573.

75. Rev. St. 1899, § 2201 (Ann. St. 1906, p. 1407). State v. Olds, 217 Mo. 305, 116 SW 1080. Testimony of inmates of house that accused both solicited and had sexual intercourse with them during time covered by information was admissible to show his knowledge of the character of the women therein. Id.

76. State v. Olds, 207 Mo. 305, 116 SW 1080.

77. Griffin v. People, 44 Colo. 533, 99 P 321.

78. Under Rev. St. § 1620, providing that whoever aids, abets, or assists in the perpetration of a crime shall be deemed a principal, and § 1776, prohibiting the keeping of a lewd house, such a one may be proceeded against as a principal. Griffin v. People, 44 Colo. 533, 99 P 321.

79. Acts 30th Leg. 1907, p. 246, c. 132, amending and re-enacting arts. 359a, 361. Pen. Code 1895, not unconstitutional. Wilson v. State, 55 Tex. Cr. R. 176, 115 SW 837.

80. Petition describing the house as being situated on the north side of designated street in the town and giving the name by which the locality was generally known

bawdyhouse may be both a public [82] and a private nuisance,[83] and may be enjoined by the owner of adjoining land,[84] and the right to enjoin is not affected by the lapse of time,[85] or by the fact that the authorities tolerate its maintenance.[86] The information should not charge more than one separate and distinct offense.[87] The precise date not being essential,[88] it need not be specifically stated.[89] An information charging the accused with displaying the sign of an honest occupation upon a common assignation house need not allege that a decent person was enveigled into the house by the sign.[90] Where the indictment charges the offense in the language of the statute and sets forth the specific acts constituting the disorder, the effect thereof is to limit the proof.[91] The keeping of a house or place which is reputed to be of an unlawful character is not, in itself, the real criminal offense charged,[92] even in cases where such reputed character may properly be alleged and proved.[93] Such reputation is nothing more than an evidential fact which may serve to establish a prima facie case,[94] but which is of no weight if it appears to be unfounded in fact.[95] The general reputation of a house being kept as a lewd house is admissible in corroboration of other facts and circumstances,[96] but in order to authorize a conviction, the jury must be satisfied, either by direct evidence or by the circumstances, that the house was kept for the practice of adultery or fornication.[97] The general character of a house may be proved by evidence of various circumstances,[98] by its general reputation,[99] or by reputation of its inmates.[1] The refusal of a witness to

sufficiently described the premises, the petition containing further allegation that plaintiff was unable to give better description. Lane v. Bell [Tex. Civ. App.] 115 SW 918.

81. Act 1907, 30th Leg. p. 147, c. 132, does not relate to more than one subject within prohibition of Const. art. 3, § 35. Lane v. Bell [Tex. Civ. App.] 115 SW 918.

82. As general rule bawdyhouse is a public nuisance. Seifert v. Dillon, 83 Neb. 322, 119 NW 686.

83. Seifert v. Dillon, 83 Neb. 322, 119 NW 686.

84. Fact that defendant's property was used as a bawdyhouse before plaintiff purchased adjoining land held no defense to an action to enjoin the same. Seifert v. Dillon, 83 Neb. 322, 119 NW 686.

85, 86. Seifert v. Dillon, 83 Neb. 322, 119 NW 686.

87. Information charging that accused kept a "house which was and was reputed to be a house of ill fame, which was resorted to, and was reputed to be resorted to, by divers persons to the attorney unknown for the purposes of prostitution and lewdness, * * *," charges but one offense under Gen. St. 1902, § 1316, as amended by Pub. Acts 1907, p. 674, c. 122. State v. Anderson [Conn.] 72 A 648.

88. Proof therefore of obscene language uttered on the premises by the defendant after the date charged in the indictment, and before it was found, was competent. People v. Jones, 129 App. Div. 772, 113 NYS 1097.

89. Code Cr. Proc. § 280. People v. Jones, 129 App. Div. 772, 113 NYS 1097.

90. State v. Olds, 217 Mo. 305, 116 SW 1080.

91. Where information in language of the statute charged defendant with keeping and maintaining a common, ill-governed, and disorderly house, and also alleged specific facts constituting the disorder, the effect was to limit people's proof and not to make information defective. Walt v. People [Colo.] 104 P 89.

92, 93, 94. State v. Anderson [Conn.] 72 A 648.

95. Where there was conflicting evidence as to the real character of the house kept by the accused, it was error not to give instruction that, upon the information charging accused with keeping a "house which was reputed to be a house of ill fame," she could not lawfully be convicted of keeping a house which was merely reputed to be a house of prostitution, but which was not so in fact. State v. Anderson [Conn.] 72 A 648.

96. Evidence of general reputation of house and of women living therein is admissible. Coleman v. State [Ga. App.] 64 SE 828.

97. Instruction that "it is not necessary for the state to prove that there were acts of adultery or fornication committed at such house" held erroneous. Coleman v. State [Ga. App.] 64 SE 828. Reputation of lewdness may be a circumstance tending to show character of the house, but the probative value of this circumstance is for the jury alone. Id.

98. Evidence that defendant sold cider or some beverage in the house, and that men were often intoxicated on the premises, was admissible. People v. Jones, 129 App. Div. 772, 113 NYS 1097. Fact that evidence might tend to prove defendant guilty of another offense was no reason for its exclusion. Id. Proof showing that place was frequented by men addicted to the drink habit, and that quarrels were of common occurrence, and indecent language used on the premises was heard by those living in the neighborhood, was sufficient to establish crime of keeping disorderly house. Id. Held not error to refuse to permit accused to prove by sheriff that the search and seizure were made with the consent of the occupant of the building and of the accused. Bumbaugh v. State, 55 Tex. Cr. R. 227, 116 SW 1152.

99. Evidence of the general reputation of the house is admissible to show its character in a prosecution under Laws 1907, p. 246,

answer a question on the ground that to answer would tend to his degradation may be considered by the jury in making up their verdict.[2] Disputed questions of facts are for the jury.[3] An instruction should not assume the existence of a material fact in issue.[4] The punishment should not be excessive.[5]

Dissolution; Distress; District Attorneys; District of Columbia, see latest topical index.

DISTURBANCE OF PUBLIC ASSEMBLAGES.[6]

The scope of this topic is noted below.[7]

One who willfully disturbed a religious assemblage was indictable at common law,[8] and the statutes generally make it an offense to disturb a congregation,[9] or any part of a congregation,[10] of persons lawfully assembled for divine services,[11] but summary seizure of private property cannot be authorized because its use tends to such a disturbance.[12] It is not sufficient to charge the offense in the language of the statute when such statute is not specific as to the prohibited acts.[13]

Ditches; Dividends; Division of Opinion, see latest topical index.

DIVORCE.

The scope of this topic is noted below.[14]

§ 1. **Jurisdiction and Domicile of Complainant, 1348.** Service of Process on a Nonresident Defendant, 1349.
§ 2. **Grounds for Divorce, 1349.** Desertion, 1349. Cruel and Inhuman Treatment and Indignities, 1351. Conviction of Crime, 1352. Adultery, 1352. Impotency, 1353. Pregnancy of the Wife Before Marriage, 1353. Prohibition to Remarry, 1353. Failure or Refusal of the Husband to Support the Wife. 1353. Insanity, 1353.

c. 132, for keeping a disorderly house by unlawfully selling intoxicating liquors. Bumbaugh v. State [Tex. Cr. R.] 120 SW 423.

1. Judgment against a woman who occupied a room in accused house on the charge of vagrancy and entries on the justice's docket against her were inadmissible against one accused of keeping a disorderly house in violation of Acts 30th Leg. 1907, p. 246, c. 132. Young v. State, 55 Tex. Cr. R. 383, 116 SW 1158. Evidence of specific acts of immorality committed elsewhere by women who obtained admission to defendant's public house was inadmissible to establish the general reputation of the women. State v. Baans [N. J. Law] 71 A 111.

2. Instruction that the refusal might be so considered held proper in a prosecution for keeping bawdyhouse. State v. Hardy [Mo. App.] 120 SW 105.

3. Whether accused controlled house and permitted lewd women to go there. Young v. State, 55 Tex. Cr. R. 383, 116 SW 1158.

4. Instruction held erroneous as assuming that accused was the keeper of a common bawdyhouse. State v. Ferguson [Mo.] 120 SW 753.

5. Evidence held not to justify sentence of three years for permitting female under 18 to enter and remain in a bawdyhouse. State v. Ferguson [Mo.] 120 SW 753.

6. See 11 C. L. 1111.

Search Note: See Disturbance of Public Assemblages, Cent. Dig.; Dec. Dig.; 14 Cyc. 539-552; 9 A. & E. Enc. L. (2ed.) 664; 7 A. & E. Enc. P. & P. 38.

7. It includes all matter relating to the offense named. It excludes prosecutions for disorderly acts as such (see Disorderly Conduct;* Assault and Battery*), and for riot (see Riot*).

8. Sunday school. State v. Branner, 149 N. C. 559, 63 SE 169.

9. Instruction as applied to the facts of the case held not to show reversible error. Daniel v. State, 4 Ga. App. 844, 62 SE 567. Under Revisal 1905, §§ 3704, 3706, one may be indicted for willfully disturbing a Sunday school. State v. Branner, 149 N. C. 559, 63 SE 169.

10. Any member of an assembled congregation is part thereof. Wyatt v. State [Tex. Cr. R.] 119 SW 1147. Where defendant with intent to mortify prosecuting witness unhitched her shabby horse and buggy and drove same in front of place where Sunday school was held and before a large part of the audience had left, he violated the statute. Id.

11. Evidence held to show "a congregation of persons lawfully assembled for divine services." McDaniel v. State, 5 Ga. App. 831, 63 SE 919.

12. Sections 10, 11, and 12 of the "Act for the suppression of vice and immorality" (3 Gen. St. 1895, pp. 3710, 3711), providing that it shall be lawful to seize any booth, tent, etc., of any person, other than those pursuing their regular business in the usual place, who shall have same within three miles of any place of religious worship while a meeting is being held therein, is unconstitutional in that it deprives owner of property without judicial hearing. Berry v. De Maris, 76 N. J. Law, 301, 70 A 337.

13. Information in language of statute held insufficient in that it did not state the act or means by which the defendant disturbed and interrupted the meeting of the board of aldermen. State v. Carroll [Conn.] 73 A 780.

§ 3. **Defenses and Facts Constituting a Bar, 1353.** Collusion, 1353. Consent, Connivance, Privity and Procurement, 1353. Condonation, 1354. Recrimination, 1354.
§ 4. **Practice and Procedure, 1354.** Pleading, 1355. Evidence and Proof, 1356. Conclusiveness of Decrees; Vacation and Modification, 1356. Appeal and Review, 1358.
§ 5. **Custody and Support of Children, 1358.**
§ 6. **Adjustment of Property Rights, 1361.**
§ 7. **Effect of Divorce, 1362.** Proof of Divorce in Collateral Proceedings, 1363.
§ 8. **Foreign Divorces, 1363.**

§ 1. *Jurisdiction and domicile of complainant.*[15] See 11 C. L. 1111—It is usually provided by statute that the complainant in a divorce suit must be an actual bona fide resident of the state,[16] and residence [17] for a specified period before suit is a usual requirement.[18] After the filing of the petition, it is immaterial where a residence is established.[19] Where a husband deserts his wife, her domicile continues in the state of the matrimonial domicile for the purpose of the dissolution of the marriage, even though he may acquire a new domicile,[20] until she has established a residence elsewhere; [21] but the domicile of the husband is the domicile of the wife until after separation.[22] While the parties to a divorce suit may, by consent or by appearance,

14. The subject of alimony is separately treated (see Alimony *), though the final division of property between the parties is here discussed. Suits for annulment (see Marriage,* § 4) and proceedings to compel support (see Husband and Wife,* § 11) are elsewhere treated.

15. Search Note: See notes in 16 L. R. A. 497; 18 Id. 95; 19 Id. 814; 23 Id. 287; 25 Id. 800; 59 Id. 146; 7 L. R. A. (N. S.) 1127; 12 Id. 1100; 53 A. S. R. 182; 9 Ann. Cas. 1200.

See, also, Divorce, Cent. Dig. §§ 198-226; Dec. Dig. §§ 57-65; 14 Cyc. 581-591; 9 A. & E. Enc. L. (2ed.) 723, 732, 739.

16. No divorce granted to any person who has not been bona fide resident of state 12 months before filing application for divorce. Civ. Code 1895, § 2431. Rorie v. Rorie [Ga.] 64 SE 1070. Where plaintiff and defendant were married outside of state and were never domiciled therein, held plaintiff was not entitled to maintain action because not within any class of cases provided by Code Civ. Proc. § 1763. Conrad v. Conrad, 123 App. Div. 384, 107 NYS 1093.

17. Word "residence," employed in divorce statute, means "domicile." King v. King [N. J. Err. & App.] 71 A 687.

18. Party applying for divorce must have resided in state one year immediately preceding filing of bill, under § 8624, Comp. Laws, as amended by Act No. 210, p. 326, Pub. Acts 1899. Hoffman v. Hoffman [Mich.] 15 Det. Leg. N. 1031, 118 NW 990. Evidence held to show residence for statutory period of one year where traveling man maintained room in certain place which he considered as place of residence. Stone v. Stone, 134 Mo. App. 242, 113 SW 1157. Evidence held to show six months' residence in county where suit was brought, preceding filing of petition, under art. 2973, Rev. Civ. St. 1895. Gamblin v. Gamblin [Tex. Civ. App.] 114 SW 408. Wife did not lose her residence in state by going to another state to work, where she regarded former place as home and returned occasionally. Held, could bring divorce action under statute requiring one year's residence. Cummings v. Cummings [Ky.] 117 SW 289. Defendant held to be resident of state within subd. 3, Code Civ. Proc. § 1763, so as to give court jurisdiction. McColl v. McColl, 112 NYS 519. Testimony of complainant that he had been resident of state for statutory period held sufficiently corroborated. MacDonald v. MacDonald [Cal.] 102 P 927. Where husband deserted wife in New York and she came to New Jersey to live but had no settled place of abode, held evidence showed intention to make New Jersey permanent home, and moving about in one city did not defeat required statutory residence before bringing suit. King v. King [N. J. Err. & App.] 71 A 687.

19. Case where wife left husband because of extreme cruelty and took up temporary residence with parents in another state following filing of petition for divorce distinguished from case where parties never resided in state but one of them attempts to establish such residence. Duxstad v. Duxstad, 17 Wyo. 411, 100 P 112.

20. Griffin v. Griffin [Tex. Civ. App.] 117 SW 910.

21. Although wife may establish separate residence when husband has given her cause for divorce, and bring action for same in another jurisdiction, her husband, by his wrongful acts, cannot compel her to do so. Duxstad v. Duxstad, 17 Wyo. 411, 100 P 112. In order to constitute change of residence, one must have intention to make such change. Id. Where wife left husband on account of extreme cruelty and went to live with parents in another state, but intended only to stay there temporarily, though she did not intend to live with husband on return, held, did not lose Wyoming residence so as to prevent bringing action under Rev. St. 1899, § 2989, as amended by Sess. Laws 1901, p. 4, c. 2, requiring one year's residence immediately preceding filing of petition. Id.

22. Husband moved to another state to benefit health. Wife joined him but returned to parents' home in Indiana and then brought suit there. Held that she acquired no statutory residence. Petty v. Petty, 42 Ind. App. 443, 85 NE 995.

vest the court with jurisdiction of their persons, they cannot, by consent or by waiver, confer jurisdiction of the res.[23]

Service of process on a nonresident defendant.[See 11 C. L. 1112]—Service upon a nonresident defendant is usually provided for by statute,[24] and so also where a defendant's residence is unknown.[25] Under a statute requiring personal service on a nonresident defendant, a decree of divorce obtained by service by publication is void if it appears upon the face of the judgment roll that personal service could have been made.[26] Irregularities of the process and service thereof are waived by appearance and pleading.[27] A divorce suit is a proceeding in rem, and the res is the status of the plaintiff in relation to the defendant, so that service of process by publication on a nonresident defendant, as in an action in rem, gives the court jurisdiction.[28] The notice of the order of publication on a nonresident defendant is required to state the object of the suit,[29] and if the notice of publication on an absent defendant undertakes unnecessarily to assert the grounds upon which relief is sought, it must state grounds which give jurisdiction to the court to decree relief.[30]

§ 2. *Grounds for divorce.*[31]—[See 11 C. L. 1112]—The right to divorce is purely statutory, jurisdiction to grant a divorce being only exercised at common law where the marriage was void ab initio.[32]

Desertion.[See 11 C. L. 1112]—Abandonment or desertion,[33] by either spouse of the other, constitutes a ground for divorce under most statutes,[34] if willful,[35] unex-

23. Jurisdiction of subject-matter can be acquired only by filing of petition stating all jurisdictional facts set forth in Rev. St. 1899, §§ 2922, 2924 (Ann. St. 1906, pp. 1681, 1682). Sharpe v. Sharpe, 134 Mo. App. 278, 114 SW 584. Jurisdiction of court cannot be waived so as to permit suit for divorce to be brought in county other than that of residence of defendant. Odum v. Odum [Ga.] 64 SE 470.

24. Under order for service by publication of summons for two months, where first publication was made March 29, 1899, and last on May 28, 1899, held publication was made for two months so as to satisfy statute. Harpold v. Doyle [Idaho] 102 P 158.

25. Decree for desertion, rendered in state of matrimonial domicile upon service by publication, held binding. Griffin v. Griffin [Tex. Civ. App.] 117 SW 910.

26. Not necessary that affidavit for publication state conclusion that personal service could not well be made on defendant, where it did state defendant could not be found in Minnesota and designated supposed residence and stated copy of summons and complaint had been addressed and mailed to him. State v. Doyle, 107 Minn. 498, 120 NW 902.

27. Civ. Code 1895, § 4981. Odum v. Odum [Ga.] 64 SE 470.

28. Stone v. Stone, 134 Mo. App. 242, 113 SW 1157.

29. Where notice declared action was for separation, instead of divorce, held defective. Brant v. Brant, 71 N. J. Eq. 66, 71 A 350.

30. Where notice stated action was on account of cruel and inhuman treatment, held no cause for divorce under divorce act; should state extreme cruelty. Brant v. Brant, 71 N. J. Eq. 66, 71 A 350.

31. **Search Note:** See notes in 11 C. L. 1113, 1115; 14 L. R. A. 685; 18 Id. 375; 21 Id. 515; 34 Id. 161, 449; 39 Id. 264; 42 Id. 814; 2 L. R. A. (N. S.) 669; 4 Id. 145; 6 Id. 914; 7 Id. 272; 12 Id. 820; 13 Id. 222; 16 Id. 1071; 65 A. S. R. 69, 71; 116 Id. 241; 119 Id. 617; 5 Ann. Cas. 852; 7 Id. 1165; 9 Id. 1090.

See, also, Divorce, Cent. Dig. §§ 1-139; Dec. Dig. §§ 1-38; 14 Cyc. 573-581, 592-627; 9 A. & E. Enc. L. (2ed.) 746.

32. Circuit courts having no common-law jurisdiction to dissolve marriages, statutes must confer power. Sharpe v. Sharpe, 134 Mo. App. 278, 114 SW 584.

33. Desertion is an actual abandonment of matrimonial cohabitation with intent to desert, willfully and maliciously persisted in without cause for statutory period. The guilty intent is manifested when, without cause or consent, either party withdraws from residence of other. King v. King, 36 Pa. Super. Ct. 33.

34. Evidence held to show abandonment of husband by wife for more than statutory period. Dugan v. Dugan [Ky.] 119 SW 801. Unexcused absence of wife for two years and statement at trial that she could not live with husband held sufficient to establish desertion. Wilkins v. Wilkins [Neb.] 120 NW 907. Evidence held to show desertion by wife where husband tried to get her to return, although she alleged cruelty and indignities. Gorbrandt v. Gorbrandt [Ky.] 115 SW 210.

35. A finding in divorce of willful desertion for statutory period held not so clearly against preponderance of evidence as to warrant setting it aside. Karnes v. Karnes, 140 Wis. 280, 122 NW 717. Where wife left husband of own accord, without his consent and against his will, and she refused to return when requested, although he was not at fault, held to show fixed determination to abandon him. Craig v. Craig [Ark.] 117 SW 765. Charge held not established by clear preponderance of credible testimony, since it appeared husband either drove wife from home or she departed with his consent. King v. King, 36 Pa. Super. Ct. 33.

cused,[36] and against the will of the deserted spouse,[37] without his or her fault,[38] and continued for the statutory period,[39] despite the efforts of the deserted spouse to procure a reconciliation.[40] Neither an invitation to return,[41] nor an offer by the deserting spouse to do so,[42] is efficient to change the status caused by the desertion if coupled with unreasonable conditions. The intent to desert need not have been formed at the time of leaving.[43] Where the separation had its inception under cir-

36. That wife had ceased to love her husband not sufficient ground for abandoning him. Richardson v. Richardson, 114 NYS 912. Divorce granted husband where evidence showed he gave wife no cause for leaving him, although not wholly free from fault. Rose v. Rose [Ark.] 117 SW 752. Held that no legal justification for desertion appeared. Dillinger v. Dillinger, 140 Ill. App. 6. If husband is able and does provide comfortable home for wife, treats her kindly, and maintains her in manner suitable to her station in life, desertion by wife was inexcusable. Burton v. Burton [Ky.] 112 SW 1102. Refusal of wife to abandon reasonable place of residence which has been established by husband and is suitable for family and affords advantages for children for schooling and employment, and to follow him to another locality affording no such advantages, is not ground for divorce. Imler v. Imler, 8 Ohio N. P. (N. S.) 409. Wife failed to show abandonment was husband's fault because evidence did not sustain allegation of cruelty on account of excessive sexual intercourse. Held she was not entitled to divorce. Coles v. Coles [Ky.] 113 SW 417. The burden is upon husband to prove that wife deserted him without good cause, where in previous action for divorce on same ground it was decided defendant left home for good reason. Baurens v. Giroux, 123 La. 879, 49 S 605.

37. Mutual consent, not revoked by either party, is fatal to application for divorce upon ground of desertion. King v. King, 36 Pa. Super. Ct. 33. Mutual consent may be inferred from conduct of parties. Id. Where there was no evidence to show wife willfully deserted husband and latter leased home few days later and did not let her know of his whereabouts, although he knew where she was, held fair inference that separation was by mutual consent. Cooper v. Cooper, 37 Pa. Super. Ct. 246. Evidence held to show parties voluntarily lived apart. Patrick v. Patrick, 139 Wis. 463, 121 NW 130. Where wife asked divorce for cruel and inhuman treatment and failure to support, an adverse judgment is not conclusive that she is living separate from husband without cause, so as to entitle husband to divorce in subsequent action on ground of desertion, but such judgment is a bar to a counterclaim on same grounds to husband's complaint charging desertion. Id. Agreement in writing, whereby wife granted extension of time to husband before going to housekeeping, held that wife did not acquiesce to permanent separation, and failure of husband to return to her constituted willful desertion. Caffrey v. Caffrey [N. J. Err. & App.] 70 A 922. Pendency of application for divorce may, under some circumstances, compel inference that separation during pendency was consented to or was with sufficient cause. Easter v. Easter [N. H.] 73 A 30. Where, in libel for divorce for abandonment, it appeared libelant had instituted prior suit on same ground, and it was dismissed without hearing, but there was nothing to show separation was caused by former suit but resulted from defendant's wrongful act prior to commencement of former suit, held pendency of former suit was but evidentiary, fact bearing on question whether absence complained of was such an abandonment as Pub. St. 1901, c. 175, § 5, makes cause for divorce. Id.

38. Not indispensable that plaintiff prove cause that induced defendant to abandon him. Burton v. Burton [Ky.] 112 SW 1102. Husband not without fault in respect to wife's removal from home. Mayes v. Mayes [Ky.] 115 SW 717. The conditions which will justify wife's abandonment of husband are those only which would support decree of divorce in her favor where she is libelant. Golden v. Golden, 36 Pa. Super. Ct. 648. A reasonable cause, which within divorce statutes will justify one of married parties in abandoning other, must be such conduct as could be made foundation of judicial proceeding for divorce. Craig v. Craig [Ark.] 117 SW 765.

39. One year by Ky. St. 1903, § 2117. Burton v. Burton [Ky.] 112 SW 1102. Husband entitled to divorce where evidence showed wife had lived in another state for three years and he had previously provided good home for her. Id. Evidence held to show abandonment by wife for two years and sufficient under statute. Sharp v. Sharp [Ky.] 113 SW 417. Not entitled to divorce for desertion where wife returned within statutory period of two years and made bona fide offer to resume marital relation which was not accepted. King v. King, 36 Pa. Super. Ct. 33.

40. Evidence held to show effort on part of petitioner to induce defendant to return. Lee v. Lee [N. J. Eq.] 71 A 605. Evidence held not to show attempt at reconciliation. Baurens v. Giroux, 123 La. 879, 49 S 605.

41. Where wife left husband and later offered to return if he would provide quarters, and husband made as condition precedent that she return certain household goods, which she declined to do, held abandonment by husband without good cause, since she could not return goods. Louis v. Louis, 134 Mo. App. 566, 114 SW 1150.

42. Wife agreed to return but only on condition she could occupy separate portion of house. Held husband not bound to accept such conditions and desertion established. Seeds v. Seeds, 139 Iowa, 717, 117 NW 1069.

43. Wife defended charge of desertion by alleging she was not conscious of what she was doing when she left home. Held, where evidence showed she remained away after recovering consciousness, sufficient to constitute desertion. Seeds v. Seeds, 139 Iowa, 717, 117 NW 1069.

44. No testimony which would warrant finding that wife refused without reasonable

cumstances which forbid the presumption of an intention to desert, it must be shown that something occurred later from which such intention may be inferred.[44] The husband's conduct may be such as to justify the wife in leaving the home provided by him,[45] or in refusing to join him, in which case it is desertion by the husband.[46]

Cruel and inhuman treatment and indignities See 11 C. L. 1115 constitutes ground for divorce in most states, what constitutes such treatment varying under different statutes.[47] Some hold that one act is sufficient to justify a divorce on ground of

cause to come with, or follow, husband to United States, or any other fact showing willful and malicious intention to desert. Hagman v. Hagman, 38 Pa. Super. Ct. 519.

45. Evidence held sufficient to justify wife in leaving, and husband not entitled to divorce for desertion. Golden v. Golden, 36 Pa. Super. Ct. 648.

46. Wife not compelled to leave son's home and join husband who has been guilty for years of extreme cruelty towards her, although he has established home elsewhere and has asked her to join him. Arrowsmith v. Arrowsmith [N. J. Eq.] 71 A 702.

47. Act May 8, 1854, P. L. 644, allows divorce to husband where wife "shall have, by cruel and barbarous treatment, rendered condition of husband intolerable or life burdensome." Shaw v. Shaw, 36 Pa. Super. Ct. 122. Cruel treatment, as ground of divorce, is willful infliction of pain, bodily or mental, upon complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health. The intention to wound is necessary element of cruel treatment for which divorce is allowed. Cureton v. Cureton [Ga.] 65 SE 65. Evidence held insufficient to show cruel treatment. Id. For an indignity to be intolerable in statutory sense, it must amount to species of mental cruelty. Holschbach v. Holschbach, 134 Mo. App. 247, 114 SW 1035. Wranglings, due to lack of conciliatory temper in both parties, not an indignity. Id. Actual personal violence or such conduct on part of husband as renders it dangerous or unsafe for wife to continue to live with him not necessary to constitute cruel treatment. Sullivan v. Sullivan, 52 Wash. 160, 100 P 321. Any unjustifiable conduct on part of husband or wife which so grievously wounds mental feelings of other, or such as in any other manner endangers life of other, or so utterly destroys peace of mind of other as to seriously impair bodily health or endanger life of other, or such as utterly destroys legitimate ends and objects of matrimony, constitutes extreme cruelty under statutes. Id. Finding that husband's conduct to wife was "improper" held not to conform to requirements of second subd. § 3598, Rev. Laws 1905, specifying conduct must be unsafe, as well as improper, for her to cohabit with him. Heinze v. Heinze, 107 Minn. 43, 119 NW 489. Wrongful infliction of grievous mental suffering, even though no injury to health of party injured is caused thereby. MacDonald v. MacDonald [Cal.] 102 P 927. Any unjustifiable conduct on part of either spouse which so grievously wounds mental feelings of other, or so utterly destroys peace of mind of other as seriously to impair bodily health or endanger life of other, or which utterly destroys legitimate ends and objects of matrimony, constitutes cruelty, although no physical or personal violence may be inflicted, or even threatened or reasonably apprehended. Russell v. Russell, 37 Pa. Super. Ct. 348. While incompatability of temperament furnishes no ground for divorce in California, it may properly be taken into consideration as explaining defendant's course of conduct. Blanchard v. Blanchard [Cal. App.] 101 P 536. Husband's conduct in dividing his time between home and office would not amount to statutory indignity, unless neglect of wife amounted to desertion, or he displayed contempt or aversion for her, or unless neglect was so extreme as to constitute cruelty and prey on her health and spirits. Holschbach v. Holschbach, 134 Mo. App. 247, 114 SW 1035.

Evidence held sufficient to warrant divorce for cruel treatment. Gamblin v. Gamblin [Tex. Civ. App.] 114 SW 408. Allegations in petition that defendant called plaintiff "an old gray-headed devil" and "blind fool," when considered under all circumstances of case, held sufficient to support charge of extreme cruelty. Fagan v. Fagan, 82 Neb. 388, 117 NW 992. Evidence held to show husband guilty of cruelty justifying divorce, and that wife was not guilty of conduct which would excuse husband's acts. Caldwell v. Caldwell [Iowa] 119 NW 599. Petition for divorce charging wife with series of acts alleged to constitute outrage and cruelty, the wife charging plaintiff with infidelity, dishonesty and acts of violence, held sufficient, though showing frequent condonations. Crossett v. Crossett [Tex. Civ. App.] 121 SW 358. Where husband **treated wife as menial in presence of servants,** circulated reports that she was insane, and kept her in constant fear he would resort to legal proceedings to test her sanity and was generally arrogant towards her. Russell v. Russell, 37 Pa. Super. Ct. 348. Plaintiff's nervous debility held result of wife's cruel and inhuman treatment and personal indignities towards him. Acts consisted of forging grandfather's name to note payable to herself, **false accusation of marital infidelity,** intercepting his mail and spying on him, attempting to enter public office he was occupying by means of transom and constant nagging. Andrew v. Andrew [Or.] 99 P 938. There must be some form of violence, coupled with false charge of adultery; but there need be no actual infliction of physical injury but may be threatened only, provided there be reasonable ground to apprehend it will be inflicted. Spence v. Spence [N. J. Eq.] 70 A 990. The mere fact that the parties are living separate and apart when false charges are made by one spouse against other does not necessarily prevent them con-

cruel treatment;[48] while under other statutes the course of ill treatment complained of must have been long continued and of a serious character.[49] In Pennsylvania the acts or conduct must not only be such as render the marital condition intolerable and life burdensome, but they must amount to legal cruelty.[50]

*Conviction of crime.*See 11 C. L. 1110

*Adultery.*See 11 C. L. 1116—The adultery of either party, if clearly shown, usually entitles the other to a divorce.[51] The elements of desertion as an independent

stituting extreme cruelty. MacDonald v. MacDonald [Cal.] 102 P 927. Such fact may be relevant in determining question whether grievous mental suffering was inflicted. Id. Held extreme cruelty, rendering cohabitation intolerable and tending to damage health, where husband **accused wife of contracting loathsome venereal disease** by means of adultery. Wetherington v. Wetherington [Fla.] 49 S 549. Complaint held sufficient where wife alleged defendant took her by throat and **forced her out of house,** threatened her and commanded her to leave, called her vile names, thereby causing her to become weak and nervous and fearful of bodily injury. Kapp v. Seventh Judicial Dist. Ct. [Nev.] 103 P 235. **Personal violence** and threats which make complainant nervous and constantly afraid constitute cruelty. Utley v. Utley [Mich.] 15 Det. Leg. N. 984, 118 NW 932. Where husband persistently mistreated wife, beating her and calling her vile names, held to warrant decree. Rolfsen v. Rolfsen [Ky.] 115 SW 213. Held cruel and barbarous treatment where wife **assaulted husband with dagger** and drove him from house, threw valise at him, used profane and obscene language, interfered with his business and humiliated him publicly. Shaw v. Shaw, 36 Pa. Super. Ct. 122. Wife left home, taking children and going to live with mother, saying husband objected to certain of her friends, and she went where she could entertain them. She refused to return and subsequently **attacked husband with horsewhip on street.** Wells v. Johnson, 122 La. 385, 47 S 690.

Evidence held insufficient to justify decree on ground of cruel and inhuman treatment, both parties being at fault. Wheeler v. Wheeler [Ark.] 119 SW 1113. Although defendant was fault finding. Watrous v. Watrous [Mich.] 15 Det. Leg. N. 934, 118 NW 725. Excessive sexual intercourse did not amount to cruelty. Coles v. Coles [Ky.] 113 SW 417. Divorce refused wife, where evidence failed to show physical violence by husband towards her, and failed to show such cruel treatment by him as will produce a degree of mental distress threatening to impair her health. Ryan v. Ryan [Tex. Civ. App.] 114 SW 464. Act of husband in stealthily abandoning wife and **taking infant child** held not cruel treatment to authorize divorce under Sayles' Ann. Civ. St. art. 2977. Slaughter v. Slaughter [Tex. Civ. App.] 118 SW 193. Where wife feared danger because **husband kept revolver in house,** held insufficient, since he never threatened her directly with it. Spence v. Spence [N. J. Eq.] 70 A 990. Testimony that defendant exhibited **austerity of temper,** petulance of manners, rudeness of language, a want of civil attention and accommodation, and sallies of passion, while not of themselves sufficient to justify divorce, add strength to contention of plaintiff of uniform course of ill treatment. Blanchard v. Blanchard [Cal. App.] 101 P 536. That wife exhibited temper under aggravating circumstances did not preclude divorce. Rolfsen v. Rolfsen [Ky.] 115 SW 213. Wife's **jealousy** of husband's family, calling him names, refusing to drive and attend theatres with him, and fault finding, not statutory intolerable indignities, unless carried too far. Holschbach v. Holschbach, 134 Mo. App. 247, 114 SW 1035.

48. False charge maliciously made in writing by wife against husband, for sole purpose of lowering him in estimation of his friends, to effect that he is a drunkard, of lewd and dissolute character, and like charges, held to constitute extreme cruelty. MacDonald v. MacDonald [Cal.] 102 P 927.

49. Russell v. Russell, 37 Pa. Super. Ct. 348.

50. Evidence that wife was irritable, "nagging," bad tempered and lacking in affection for libelant for considerable period, but never indulged in physical violence, held insufficient to constitute "legal cruelty." Platt v. Platt, 38 Pa. Super. Ct. 551. Refusal to have sexual intercourse held not to constitute legal cruelty. Platt v. Platt, 38 Pa. Super. Ct. 551.

51. Where adultery was testified to by two eyewitnesses, and other incidents, although not connected in time or place with alleged act of adultery, tended to show disposition to commit offense, held sufficiently proved. Houlton v. McGuirk, 122 La. 359, 47 S 681. Fact of adultery held sustained by proof of actual act, and by proof by other witnesses of defendant's visits to houses of ill fame, going to rooms with female inmates and having them in their night clothes on his lap. Murphy v. Murphy, 65 W. Va. 354, 64 SE 1135. Evidence held to show wife guilty of lewd behavior as proved her to be unchaste, as alleged in husband's counterclaim to suit for alimony. Kerby v. Kerby [Ky.] 112 SW 927. Evidence held to establish adultery on part of wife with party charged as corespondent. Duke v. Duke [N. J. Err. & App.] 73 A 840, afg. [N. J. Eq.] 73 A 837. Evidence held to show adultery on part of wife and absence of cruel treatment and excesses on part of husband. Sawyers v. Her Husband, 122 La. 200, 47 S 464. Where adultery is basis of action for divorce, evidence of opportunity for carnal intercourse is of little probative force, unless there is also evidence of such relation between the parties and such conduct as would tend to establish willingness to engage in such an act when opportunity came. Lunham v. Lunham, 117 NYS 396. Testimony of witness that he saw defendant committing adultery at date between times alleged in complaint she committed acts with same person held admissible to explain previous relations. Kinney v. Kinney, 149 N. C. 321, 63 SE 97.

ground of divorce are not essential where abandonment and living in adultery is made a ground.[52]

*Impotency.*See 11 C. L. 1116—Impotency at the time of marriage is a statutory ground for divorce in some states,[53] but under most statutes is ground for annulment.[54]

*Pregnancy of the wife before marriage.*See 11 C. L. 1116

*Prohibition to remarry.*See 11 C. L. 1116

Failure or refusal of the husband to support the wife See 11 C. L. 1116 is, in some states, a good ground for divorce.[55]

*Insanity.*See 11 C. L. 1117

Violent and ungovernable temper, in order to constitute cause for divorce, must be such indulgence by defendant towards the other consort as renders marital duties impracticable.[56]

§ 3. *Defenses and facts constituting a bar.*[57]—See 11 C. L. 1117—Where persons are not married, they cannot be legally divorced.[58] The right to be relieved from a marriage contract, as in all cases of contract, must be predicated as well upon the good faith and honest performance of the complaining party as upon the bad faith and nonperformance of the other party.[59]

*Collusion.*See 11 C. L. 1117—There must be no consent in matter of divorce.[60] Defendant is not permitted to contribute in obtaining the divorce by assisting in proving his own violation of his marriage ties.[61]

*Consent, connivance, privity and procurement.*See 11 C. L. 1117—Under a statute making it obligatory upon plaintiff seeking a divorce for adultery to prove that the adultery was without his or her consent,[62] connivance,[63] privity,[64] or procurement,[65] the existence of either condition is sufficient to defeat recovery.

52. Neither an intention of abandonment nor absence for statutory period are required to be proved where action is brought under statute authorizing divorce for abandonment and living in adultery. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899.

53. Under subd. 6, § 82, Civil Code, necessary to allege and prove that physical incapacity continues and appears to be incurable. Hobbs v. Hobbs [Cal. App.] 101 P 22.

54. See Marriage, § 4.

55. Evidence held to show complainant was defendant's legal wife, so as to make him liable for nonsupport, where divorce from former husband was attacked on ground that service of summons in action was not regular. State v. Doyle, 107 Minn. 498, 120 NW 902. Evidence held insufficient to sustain divorce decree for nonsupport under Comp. Laws 1897, § 8622, authorizing divorce when husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to suitably maintain wife. Stewart v. Stewart [Mich.] 15 Det. Leg. N. 1061, 119 NW 444.

56. Evidence held insufficient. Prall v. Prall, 56 Fla. 521, 47 S 916.

57. **Search Note:** See notes in 12 L. R. A. 524; 60 Id. 406; 5 L. R. A. (N. S.) 729; 84 A. S. R. 136; 86 Id. 333; 120 Id. 520; 6 Ann. Cas. 171; 10 Id. 819.

See, also, Divorce, Cent. Dig. §§ 140-197; Dec. Dig. §§ 39-56; 14 Cyc. 628-652; 9 A. & E. Enc. L. (2ed.) 816, 839.

58. Divorce denied where evidence failed to prove marriage. Holtman v. Holtman [Ky.] 114 SW 1198. Slaves were incapable of contracting marriage prior to Act Feb. 14, 1866 (Laws 1865-66, p. 37, c. 556), and so could not be legally divorced previous to act. Lindsey's Devisee v. Smith [Ky.] 114 SW 779.

59. Where wife first broke marriage contract by abandoning husband without legal cause, held, she forfeited right to demand relief from husband's subsequent breach of contract. Richardson v. Richardson, 114 NYS 912. Held evidence disclosed conduct on part of each party which disentitled them to divorce. Miles v. Miles [Mo. App.] 119 SW 456.

60. Rev. Civ. Code, art. 140. State v. Richardson, 122 La. 1064, 48 S 458.

61. Attorney for husband produced evidence to assist in proving husband guilty of adultery. State v. Richardson, 122 La. 1064, 48 S 458.

62. "Consent" is a thinking together, an agreement of one with another to the doing of something, leaving something undone, waiving something, or permitting some act or deed or course of conduct. It need not be written, but may be spoken or acted, or may be implied. Richardson v. Richardson, 114 NYS 912. Where wife admittedly knew that by leaving husband he would naturally seek embraces of other women, and was satisfied that while she lived with him, keeping her marital obligations, he had kept all obligations to her, and yet deliberately abandoned him, held her act constituted her consent to his subsequent adultery. Id.

63. "Connivance" means "winking at," failing to prevent, helping by not hindering, taking no active hand, but standing by and knowingly promoting, aiding and abetting, by not opposing or using means to prevent

*Condonation.*See 11 C. L. 1117—Condonation is the remission or forgiveness, by one of the parties of a marital offense which he knows the other has committed.[66] A reconciliation, followed by a resumption of the marriage relation, is a condonation of past causes of divorce.[67]

*Recrimination.*See 11 C. L. 1118

§ 4. *Practice and procedure.*[68]—See 11 C. L. 1118—There is a marked difference between proceedings to obtain a divorce and ordinary actions to enforce or rescind contracts, or to recover damages for torts.[69] In granting divorces, courts will consider the interest of a public as well as that of the parties, as marriage is an institution in which the public is interested,[70] and in some states the local prosecuting attorney is authorized to appear as amicus curiae.[71] Two distinct and separate trials, with concurrent verdicts of two juries at different terms of the court, are required in Georgia in oder to procure a total divorce.[72] The parties are entitled to have some final determination of the questions presented and some judgment entered from which an appeal can be taken.[73] Either party in a divorce proceeding, at any time prior to the entering of the decree, has the right to withdraw a demand for a divorce.[74] The right to a jury trial may be waived.[75] Personal

or protesting against; a condition where all power, authority, influence, and action to prevent execution of a thought or purpose are intentionally withheld. Richardson v. Richardson, 114 NYS 912.

Desertion as connivance for adultery: Husband abandoned wife and then sued for divorce for subsequent adultery. Defense was that first breach of marriage contract was by husband and, therefore, adultery was consented to by deserter. Held law does not expressly make adultery excusable under such circumstances and not implied. Mattison v. Mattison, 60 Misc. 573, 113 NYS 1024.

Contra: Where wife deserted husband and he subsequently committed adultery, held wife not entitled to divorce because by her abandonment she connived husband's adultery. Richardson v. Richardson, 114 NYS 912.

64. "Privity" expresses a condition where one knows or believes that another contemplates committing an act, and wrongfully conceals such knowledge, or pays no intention to information, or covertly aids in the work. Richardson v. Richardson, 114 NYS 912.

65. "Procurement" denotes direction, influences, personal exertion, interference, or other action, with knowledge or belief that such action would produce certain results, which results are produced. Richardson v. Richardson, 114 NYS 912. Wife chargeable with privity and procurement by having deliberately and confessedly influenced husband's conduct by her own conduct and aided him in and brought about his immoral behavior. Id.

66. Laycock v. Laycock, 52 Or. 610, 98 P 487. There can be no condonation without knowledge. Id. Husband contracted loathsome venereal disease and told plaintiff it was caused by infected clothing, who believed him and lived with him until she ascertained he had frequented houses of ill fame. Held no condonation on account of absence of knowledge. Id.

67. Husband and wife condoned adultery of each other. Mathy v. Mathy [Ark.] 113 SW 1012. Husband and wife, after separation and institution of divorce proceedings, became reconciled and resumed conjugal relations. Held they condoned each other's previous misgivings. Holschbach v. Holschbach, 134 Mo. App. 247, 114 SW 1035.

68. Search Note: See notes in 11 C. L. 1120; 57 L. R. A. 583; 60 Id. 294; 1 L. R. A. (N. S.) 551; 12 Id. 1197; 3 A. S. R. 556; 1 Ann. Cas. 252; 5 Id. 892; 11 Id. 799.

See, also, Divorce, Cent. Dig. §§ 227-584; Dec. Dig. §§ 66-198; 14 Cyc. 591-593, 653-742; 9 A. & E. Enc. L. (2ed.) 844, 847, 851; 7 A. & E. Enc. P. & P. 47.

69. Civ. Code 1895, §§ 2431-2436. Rorie v. Rorie [Ga.] 64 SE 1070.

70. Bacon v. Bacon [Ind. App.] 86 NE 1030.

71. Where prosecuting attorney appeared and filed pleas of former adjudication, setting up prior suit, held proper under Acts 1901, p. 336, c. 151. Yeager v. Yeager [Ind. App.] 87 NE 144.

72. Const. art. 6, § 15, par. 1; Civ. Code 1895, § 5867. Rorie v. Rorie [Ga.] 64 SE 1070. Each trial is so far distinct that quad hoc it may be treated as a termination of the case within the meaning of statute, so as to allow motion for new trial to be made and exception taken to judgment thereon, or direct exception taken to direction of verdict. Id. Where court directed verdict for plaintiff in first trial of suit for total divorce, held defendant could bring such ruling to supreme court for review by direct bill of exceptions. Id.

73. Referee, to whom divorce action was referred, filed report and directed judgment in favor of plaintiff, but court refused to enter judgment on report. Held new trial should be had before new referee. Perkins v. Perkins, 130 App. Div. 193, 114 NYS 960.

74. Court ordered divorce in favor of defendant on cross complaint, after she had refused to amend cross complaint so as to ask for divorce, although she had requested to amend in this respect. Milliman v. Milliman [Colo.] 101 P 58.

75. Defendant in action for divorce on ground of adultery, who permitted entry of

service is required upon a resident insane person in a divorce proceeding.[76] Under the civil law, where a summons is issued to the wife in an action for divorce mensa et thoro, citing her to return to the matrimonial domicile, it must specify the place where she is to go.[77]

Pleading. See 11 C. L. 1118—The petition must allege residence for the statutory period before the filing of the petition in order to show jurisdiction,[78] but allegations of residence need not be in the language of the statute; a substantial compliance suffices.[79] Failure to allege that plaintiff is an actual bona fide inhabitant of the state constitutes a substantial omission of which court is bound to take notice.[80] Insufficiency of a pleading does not defeat the court's jurisdiction of the case unless there is some express statutory provision to that effect.[81] The pleadings in the action present the issues which should be submitted to a jury.[82] If defendant relies on a wrongful abandonment to defeat the action, it must be pleaded in the answer.[83] Under a statute requiring that plaintiff should have knowledge of defendant's adultery for six months before bringing suit, it is not necessary to allege such knowledge in the complaint; the court has jurisdiction if such knowledge is alleged in the verification.[84] It is not required that the statutory language be used in describing the character of the ill treatment complained of.[85] A bill for divorce on the ground of violent and ungovernable temper must state facts from which the court can judge whether they constitute a case of the existence of such temper.[86] Conduct subsequent to the filing of a suit for divorce may be properly assigned in an amended petition as grounds for divorce.[87] It is not necessary to plead laches in bringing suit to set aside a decree of divorce,[88] but to avail a defendant of the

default interlocutory judgment which was subsequently set aside, and who thereafter obtained setting aside of second interlocutory judgment rendered after hearing before court at which she testified and was represented by counsel, held to have waived jury trial. Fischer v. Fischer, 64 Misc. 121, 117 NYS 1103. Noticing a cause for trial at special term does not constitute waiver of party's right to have issues framed for trial by jury. Haff v. Haff, 64 Misc. 122, 118 NYS 52. Code Civ. Proc. § 970, and Gen. Prac. Rule 31, requiring notice of motion to frame issues for a jury to be made within 10 days after issue joined, do not apply to divorce action. Id.

76. Rev. Codes, § 6519, subd. 5 and 7. State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291.

77. Art. 145, Rev. Civ. Code. King v. King, 122 La. 582, 47 S 909. Wife entitled to exercise her right to go to husband until judgment has been rendered by trial court ordering her to do so, and legal notices of that judgment had been served upon her. Id. Final judgment from bed and board should not have been rendered until after all provisions of that article had been complied with. Id.

78. By § 2924, Rev. St. 1899 (Ann. St. 1906, p. 1682), one year, unless offense or injury complained of was committed within this state, or while one or both parties resided within state. Stone v. Stone, 134 Mo. App. 242, 113 SW 1157.

79. Where petition alleged plaintiff and defendant owned homestead in Texas and it was plaintiff's only home, held sufficient. Gamblin v. Gamblin [Tex. Civ. App.] 114 SW 408.

80. Gamblin v. Gamblin [Tex. Civ. App.] 114 SW 408.

81. Mengel v. Mengel [Iowa] 120 NW 72. Failure to allege in petition that application was made in good faith and for purpose set forth in petition does not deprive court of jurisdiction to grant relief. Id. Pleading can be attacked on that ground, but it is for defendant to object at proper time and manner. Id.

82. Where plaintiff failed to allege in complaint he had knowledge of wife's adultery six months preceding bringing of action, as required by statute, held not an issue. Kinney v. Kinney, 149 N. C. 321, 63 SE 97. Where plaintiff alleged commission of adultery at certain time and place with certain man, and answer denied same, held properly submitted to jury. Id.

83. Not relieved from pleading new matter constituting defense, by Rev. 1905, § 1564, providing that in divorce actions material facts alleged in complaint shall be deemed denied by defendant, whether actually denied in pleading or not. Kinney v. Kinney, 149 N. C. 321, 63 SE 97. Issue of abandonment held not raised by allegation in complaint that plaintiff had not voluntarily cohabited with defendant since discovery of adultery, although denied by answer. Id.

84. Kinney v. Kinney, 149 N. C. 321, 63 SE 97.

85. Gamblin v. Gamblin [Tex. Civ. App.] 114 SW 408.

86. Words of statute not sufficient. Prall v. Prall, 56 Fla. 521, 47 S 916.

87. No defense that conduct was provoked by filing of original petition. Hicks v. Stewart [Tex. Civ. App.] 118 SW 206.

88. Where laches were pleaded, held not

benefit of estoppel by former judgment, it must be pleaded in the subsequent action.[89] Courts do not agree on the proposition whether or not a cross action for divorce can be grafted on the statutory action brought by the wife against her husband for maintenance.[90] Where the same charge is ground for either an absolute divorce, or a divorce a mensa et thoro, the court may in its discretion grant either.[91]

Evidence and proof. See 11 C. L. 1119—Plaintiff has the burden of proof to show statutory residence,[92] and in some states the proof must be by resident witnesses.[93] Absolute divorce should not be granted unless the right thereto be fully, fairly, and clearly made out,[94] and where the bill is taken as confessed absence of collusion must clearly appear.[95] but if the evidence clearly shows the existence of grounds for a divorce, it is a statutory right, and the court must enforce the same.[96] Corroboration of plaintiff's evidence should be demanded when it can be reasonably produced, though it is not always essential.[97]

Conclusiveness of decrees; vacation and modification. See 11 C. L. 1120—An adjudication by a court having jurisdiction of the subject-matter of the action and of the parties, of the matters which are set up in the case at bar, is conclusive.[98] A finding

improper or grounds for reversible error in overruling demurrer to plea. Tausick v. Tausick, 52 Wash. 301, 100 P 757.

89. No estoppel by former judgment, where matter alleged as ground for divorce in such former action occurred previous to matters alleged in action at issue. In re McNeil's Estate [Cal.] 100 P 1086.

90. Demurrer to cross bill waives all matters of irregularity or impropriety of bill, but does not waive right to question jurisdiction of court to grant divorce on same. Sharpe v. Sharpe, 134 Mo. App. 278, 114 SW 584. Procedure under Rev. St. 1899, c. 20 (Ann. St. 1906, pp. 1678-1689), relating to divorce, alimony, and custody of children, and Rev. St. 1899, c. 51 (Ann. St. 1906, pp. 2375-2388), relating to wife abandonment and maintenance, are special proceedings, and courts or parties, by consent or otherwise, cannot ingraft any other action on it, by way of counterclaim or otherwise, therein not specially provided for. Id. On a complaint for separate maintenance and a cross complaint for divorce, both founded on alleged cruelty of adverse party, the wife is not required to repeat allegations of cruelty contained in her complaint in her answer to cross complaint in order to admit proof of them in defending against cross complaint. Austin v. Austin, 42 Colo. 130, 94 P 309.

91. Under complaint for absolute divorce on ground of cruel and inhuman treatment, court may grant limited divorce. Heinze v. Heinze, 107 Minn. 43, 119 NW 489.

92. Testimony that plaintiff had resided in state "all her life" held sufficient. Gamblin v. Gamblin [Tex. Civ. App.] 114 SW 408.

93. Burns' Ann. St. 1908, § 1066, requiring two resident witnesses, held mandatory. Blauser v. Blauser [Ind. App.] 87 NE 152. No express or formal proof in support thereof is necessary so long as qualifications of required number of witnesses are clearly shown and their testimony, with proper inferences and presumptions that arise therefrom with regard to residence, is sufficient to fully prove it to court. Id.

94. Richardson v. Richardson, 114 NYS 912. One seeking divorce a vinculo on ground of abandonment must not only allege but must prove that abandonment was without his fault. Mayes v. Mayes [Ky.] 115 SW 717. A judge should not allow a divorce to be granted by mere consent or default or collusion, or where no ground therefor is made out. Rorie v. Rorie [Ga.] 64 SE 1070. Error to direct verdict for plaintiff in suit brought by husband against wife, alleging desertion, where defendant introduced testimony tending to show separation was rendered necessary by reason of cruel conduct on part of husband. Id.

Sufficiency of evidence to establish particular grounds of divorce is treated in § 2.

95. Case v. Case [Mich.] 16 Det. Leg. N. 570, 122 NW 538.

96. Evidence held sufficient to entitle plaintiff to divorce on grounds of cruelty and nonsupport. Morgan v. Morgan, 134 Mo. App. 160, 113 SW 722.

97. Stone v. Stone, 134 Mo. App. 242, 114 SW 1157. If a plaintiff establishes a case for divorce by his own testimony, a decree should not be denied on the sole ground that the testimony is uncorroborated. Id. A divorce on the ground of cruelty may be granted on the testimony of complainant alone. MacDonald v. MacDonald [Cal.] 102 P 927. Civil Code, § 130, satisfied when testimony of complainant is corroborated by circumstantial evidence. Id. Where the cruelty consists of successive acts of ill treatment, it is sufficient corroboration if considerable number of important and material facts are so testified to by other witnesses, or there is other evidence which strongly tends to strengthen statements of plaintiff. Blanchard v. Blanchard [Cal. App.] 101 P 536.

98. After adverse judgment applicant for divorce cannot apply to another court, or for change of judge, and try same issues again. Yeager v. Yeager [Ind. App.] 87 NE 144. Where wife's suit for divorce on ground of cruelty was dismissed and she had left home for alleged cruelty and failed to return, she could not maintain action for constructive abandonment where it was predicated on acts of cruelty alleged in previous suit. Stay v. Stay [Wash.] 102 P 420. A divorce judgment is conclusive on question of

of jurisdictional residence is not necessary to a valid decree of divorce, if there are findings in the decree which show that the cause for divorce arose in the state where the decree was obtained.[99] Where an interlocutory judgment under the California statute has stood for six months, judgment must enter thereon and plaintiff is not entitled on a showing of subsequent adultery to additional relief.[100] A divorce may be vacated for fraud or imposition [101] where such fraud is extrinsic and collateral,[102] or for undue influence which amounts to fraud,[103] notwithstanding remarriage of the guilty party.[104] A decree is liable to be vacated for defective service of process.[105] A judgment obtained by request, through coercion, will be set aside.[106] It is not a sufficient ground that the divorce was obtained by perjury.[107] A clerical error will not avoid a decree of divorce.[108] A decree will be modified where it imposes a harsh condition.[109] Facts necessary to a modification of a judgment may be shown by affidavit, and no new action is required for the purpose.[1] A voidable decree may become effective through conduct amounting to a waiver or estoppel.[2] The right to have a decree of divorce vacated may be lost by laches.[3] Some courts hold that

whether plaintiff had acquired statutory residence. In re McNeil's Estate [Cal.] 100 P 1086.

99. Where complaint alleged extreme cruelty occurred in "City of Chicago" and specific finding was that "defendant has been guilty of extreme and repeated cruelty in manner and form as charged in complainant's bill of complaint," held jurisdiction sufficiently appears. Milashwskis v. Milashwskis, 140 Ill. App. 501.

100. Reed v. Reed, 9 Cal. App. 748, 100 P 897.

101. Where wife alleged she was subjected to cruel treatment by husband in order to induce her to agree to separation, which agreement was introduced by husband in divorce action, and that husband, after judgment, asked for modification of same, producing affidavit falsely stating amount of his property, held fraud not sufficient to justify relief against judgment. Uecker v. Thiedt, 137 Wis. 634, 119 NW 878. Not fraud where defendant in foreign divorce was brought in by substituted service under name by which she commonly went, although not her true name. Douglas v. Teller [Wash.] 102 P 761. Complaint of wife that she had been induced to bring divorce action by husband's threats to commit suicide, when in fact he desired to marry another woman, and that she signed a general denial through attorney procured by husband, held sufficient to justify vacation of decree and rehearing on merits. Graham v. Graham [Wash.] 102 P 891.

102. Falsity of affidavit offered in support of application for relief held intrinsic, and not grounds for vacation. Mengel v. Mengel [Iowa] 120 NW 72.

103. Husband told wife to get a divorce or he would. She consented in order to avoid notoriety and aspersions on her character and husband directed entire procedure through his attorney. She agreed to property settlement and accepted under such contract after decree. Held acceptance under settlement not equivalent to confirmation of decree. Holt v. Holt [Okl.] 102 P 187.

104. Parish v. Parish, 9 Ohio St. 534, and earlier Ohio decisions not followed. Mulligan v. Mulligan, 11 Ohio C. C. (N. S.) 585.

105. Error, where process was served only on guardian ad litem of resident insane person. State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291.

106. After judgment decreeing divorce, wife presented affidavits showing husband coerced her into bringing suit, threatening to leave her and their child unless she consented. Lake v. Lake, 124 App. Div. 89, 108 NYS 964. Fact that defendant is again married held immaterial, since marriage took place seven days after entry of judgment which forbade remarriage. Id.

107. Where there was a marriage upon faith of decree and a child of marriage, held strong objection to vacating decree. Zeitlin v. Zeitlin, 202 Mass. 205, 88 NE 762.

108. Decree was never recorded and filed because of omission or error of clerk. Douglas v. Teller [Wash.] 102 P 761.

109. Decree provided for alimony for wife and support of child as long as they resided in county where defendant did business, object being to enable defendant to visit child. On showing that defendant frequently had to go to New York on business and plaintiff was teacher of French and could earn more in that city, decree modified to enable plaintiff to reside there. De Lamoutte v. De Lamoutte, 129 App. Div. 283, 113 NYS 321.

1. Marks v. Marks [S. D.] 118 NW 694.

2. Where decree of divorce by court within jurisdiction of which person seeking divorce was resident at times involved is voidable only, because of fraud in connection with service of summons or conduct of case, victim of fraud by unexplained delay lasting until after death of perpetrator of fraud, or by other conduct operating as waiver or estoppel, may be prevented from sucessfully asserting a right to distributive share of estate of original wrongdoer. Sammons v. Pike [Minn.] 120 NW 540, adhered to in [Minn.] 122 NW 168, on defendant's motion for reargument. Where neither spouse was resident of state where divorce was procured by husband who committed perjury in obtaining decree, and wife never married again and did not recognize decree, although living apart from husband, held husband's conduct justified living apart from him and her conduct did not validate decree, so that she did not lose distributive share in property and her rights could be enforced against grantees of husband. Id.

3. Complainant did not file bill until 18 months after learning of decree and did not show excuse for failing to do so sooner.

a decree prohibiting the parties from marrying third persons during a stated period makes void a subsequent marriage which occurred in another state during the prohibited time.[4]

Appeal and review. See 11 C. L. 1121—The right of appeal from a decree of divorce is statutory and all conditions precedent must be complied with.[5] On appeal, the presumption is that a decree of the lower court was supported by the evidence, where a judgment could be properly entered on the pleadings.[6] An appellate court will not disturb a divorce decree because of conflicts in the evidence.[7] The disposition of the community property by the trial court is subject to revision on appeal.[8] A suit for divorce is triable de novo on appeal in some states.[9] The appellate court will not remand the case on appeal from a decree denying a divorce, in order to admit newly-discovered evidence which is merely cumulative.[10] The appellate court will not reverse except for plain abuse of discretion.[11] In Pennsylvania the appellate court must review the evidence, but where there is a trial by jury it need not be reviewed with reference to its credibility.[12]

§ 5. *Custody and support of children.*[13] See 11 C. L. 1122—Where persons have been divorced, their children become in a sense the wards of the court,[14] and their disposition rests largely in the discretion of the court.[15] The primary object sought in awarding custody is the welfare of the children.[16] Where neither parent is

Held injury from delay presumed to charge claimant with laches, especially where defendant had married again and at death left widow surviving. McNeil v. McNeil [C. C. A.] 170 F 289.

4. Husband was prohibited from marrying for one year after decree but went into another state and got married, being subsequently cited for contempt. The court then set aside decree of divorce. Held court had power to vacate decree made in same term. Botts v. Botts, 142 Ill. App. 216.

5. Under § 4840, Wilson's Rev. Ann. St. Okl. 1903, party desiring to appeal from judgment granting divorce must file written intention to do so with clerk of such court within 10 days after judgment. La Due v. La Due [Okl.] 100 P 513. Appeal from interlocutory judgment in divorce suit must be taken within six months as if it were final, and after a year from its entry court may enter final judgment granting divorce, and such other relief as may be necessary. Reed v. Reed, 9 Cal. App. 748, 100 P 897. By § 2931, Rev. St. 1899 (Ann. St. 1906, p. 1689), writ of error must be taken within term or 60 days after order was made or judgment rendered, if divorce is objected to, or if complaint is to order of alimony, custody of children or their maintenance. Elliott v. Elliott, 135 Mo. App. 42, 115 SW 486.

6. Where answer alleged prior judgment of divorce granted defendant in Iowa, and averred that plaintiff herein was duly and legally served in that action, held allegations sufficient to sustain judgment pleaded, in absence of bill of exceptions showing evidence. Hanks v. Hanks, 218 Mo. 670, 117 SW 1101.

7. Wetherington v. Wetherington [Fla.] 49 S 549.

8. Error in classing as community property that part of gains which was derived from the "issues and profits" of husband's separate property. Pereira v. Pereira [Cal.] 103 P 488.

9. All of testimony offered on trial below must be presented on appeal. Held, where certain exhibits were lost after trial below, presumption decree was correct. Lowery v. Lowery [Iowa] 118 NW 749.

10. Respondent asked opportunity to contradict witness who had testified in behalf of libelant; not allowed. Catts v. Catts, 37 Pa. Super. Ct. 598.

11. Jones v. Jones, 37 Pa. Super. Ct. 442; Catts v. Catts, 37 Pa. Super. Ct. 598. Where court refused to grant a divorce. Bacon v. Bacon [Ind. App.] 86 NE 1030. Where court found defendant guilty of extreme cruelty. MacDonald v. MacDonald [Cal.] 102 P 927.

12. Shaw v. Shaw, 36 Pa. Super. Ct. 122.

13. Search Note: See notes in 11 C. L. 1123, 1124; 58 L. R. A. 939; 2 L. R. A. (N. S.) 201; 15 Id. 744; 5 Ann. Cas. 91.

See, also, Divorce, Cent. Dig. §§ 773-806; Dec. Dig. §§ 289-312¾; 14 Cyc. 804-814; 9 A. & E. Enc. L. (2ed.) 866; 7 A. & E. Enc. P. & P. 129.

14. Keesling v. Keesling, 42 Ind. App. 361, 85 NE 837. Where in decree of divorce court includes order concerning custody or maintenance of minor children, those infants in a sense become wards of that court, and it has authority at any subsequent period of their minority, upon application of either parent and sufficient notice to other to revise and alter decree so far as it relates to care, custody, and maintenance of children. Connett v. Connett, 81 Neb. 777, 116 NW 658.

15. Father entitled to custody of child where mother voluntarily parted with it when child was two weeks old and father took care of same up to time of divorce. Rose v. Rose [Ark.] 117 SW 752. Evidence held to show mother not fit to have custody of child pending outcome of divorce proceeding for adultery. Moyer v. Moyer [N. J. Eq.] 72 A 965. This function usually discharged by judge in entering decree on final verdict. Johnson v. Johnson, 131 Ga. 606, 62 SE 1044.

16. Pierce v. Pierce, 52 Wash. 679, 101 P 358; Beyerle v. Beyerle [Cal.] 100 P 702;

shown to be disqualified from being awarded the custody of a minor child, the award should be made subject to the further order of the court.[17] Courts are inclined to award the custody of children to the innocent party,[18] while some statutes provide that the party not in default shall be entitled to the custody of the minor children of the marriage,[19] and it has been held that all else being equal, the father's rights are superior.[20] If necessary to promote the welfare of the children, the court may take them away from both parents and award their custody to a third party.[21] Courts also have the right to determine who shall have the custody of the minor children pending the outcome of divorce proceedings.[22] By force of statutes in most states, a court has power to change the decree awarding the disposition of children upon a regular proceeding and hearing for that purpose,[23] upon proof that changed conditions make such course advisable for the best interests of the child.[24] The fact that a decree awarding the custody of the child is uncongenial to the parents is no ground for a modification.[25] There is a direct conflict of authority as to whether or not the award of the custody of minor children to a spouse is effective beyond the life of the one to whom awarded.[26] Where one to whom the custody of

Keesling v. Keesling, 42 Ind. App. 361, 85 NE 837.

17. Decree modified where it limited mother's custody up to time child attained eight years. Wilkins v. Wilkins [Neb.] 120 NW 907.

18. Boy, five years old, awarded to mother where evidence showed her ability to provide for him and father's ability did not appear, and wife was granted decree for cruelty. Caldwell v. Caldwell [Iowa] 119 NW 599.

19. Civ. Code 1895, § 2452. Johnson v. Johnson, 131 Ga. 606, 62 SE 1044. But court, in exercise of sound discretion, after hearing both parties, may make different disposition of children, withdrawing them from custody of either or both parties, and placing them, if necessary, in possession of guardians appointed by ordinary. Id.

20. Conditions surrounding father held by no means equal to mother to whom custody was awarded as prayed. Brenneman v. Hildebrandt [Mo. App.] 119 SW 452.

21. Child taken away from mother, who lived with her mother and stepfather, and given into custody of grandfather, on proof of better surrounding. Keesling v. Keesling, 42 Ind. App. 361, 85 NE 837.

22. Comp. Laws, § 8630. Griffin v. Griffin, 154 Mich. 536, 15 Det. Leg. N. 810, 118 NW 1.

23. Under § 2932, Rev. St. 1899 (Ann. St. 1906, p. 1689), new facts must have developed or a change in situation must have occurred which makes it proper, and to ascertain this there must be notice to the parties and a hearing had. State v. Ramey, 134 Mo. App. 722, 115 SW 458. Where a hearing was set and a continuance granted, court had no power to change decree and award children to different person than one to whom awarded in divorce decree. Id.; Brenneman v. Hildebrandt [Mo. App.] 119 SW 452. Where original motion for change of custody is continued with consent of parties, to permit court to be further advised, when taken up subsequently it was not improper to consider whole evidence in making order. Brenneman v. Hildebrandt [Mo. App.] 119 SW 452. Under Civ. Code, § 138, court can, during pendency of action, or at any time after final hearing, during minority of child, make such order for its custody as may seem proper and may modify or vacate such order. Beyerle v. Beyerle [Cal.] 100 P 702. Where mother was awarded custody of child, but by subsequent agreement father assumed charge and kept child for 2½ years, and plaintiff petitioned to obtain child, defendant's answer controverting allegations in petiton that he was not proper person to have charge of child, and asking that he be allowed to retain her custody, held application for modification of decree and error to strike it out as sham and irrelevant. Id. Under Rev. Civ. Code 1903, §§ 91, 92, it was proper for court to modify decree which had been rendered some three years before so as to provide for child in custody of wife, though the complaint omitted to claim an allowance. Marks v. Marks [S. D.] 118 NW 694. Under §§ 8631-8632, court can make such decree for custody of children as it shall deem just and proper and may subsequently revise and alter such decree. Griffin v. Griffin, 154 Mich. 536, 15 Det. Leg. N. 810, 118 NW 1. Civ. Code, § 138, authorizing court, in action for divorce, before and after judgment, to give directions for custody, care and education of children, and at any time vacate or modify same, authorizes such action by court after judgment, whether or not decree referred to subject. Harlan v. Harlan, 154 Cal. 341, 98 P 32. Mere fact that plaintiff allowed 10 years to elapse without making effort to compel payment for support of children, provided by modified decree, is no ground for contention that court abused its discretion in ordering execution to issue under Code Civ. Proc. § 685. Id.

24. Evidence held to indicate no change in condition from that which existed at time decree was rendered, except that mother had taken children out of court's jurisdiction and court exceeded discretion in awarding custody to father. Stanfield v. Stanfield [Okl.] 98 P 334. Material facts must be disclosed which, at time decree was rendered, were unknown and could not have been reasonably ascertained by reasonable diligence. Id.

25. Goerig v. Goerig, 51 Wash. 333, 98 P 742

26. Mother given custody of children and when she died father brought habeas corpus

children is awarded acquires a residence in another jurisdiction than the one of the court which made the award, the former court alone has power to enforce an order as to their custody.[27] The court may order the children to be kept within the state, or, if absent, brought within it.[28] If a husband permits a minor son to remain with his wife, pending determination of a divorce suit, he must furnish her with necessary means for his support,[29] and the dissolution of marriage does not dissolve the obligation of support.[30] It is the duty of the court to provide for the support of minor children in divorce cases, whether demanded or not in the complaint.[31] In adjusting the property rights of the parties to the divorce, the court may impose the entire obligation to support and maintain the minor children on either the father or mother.[32] A wife will be allowed alimony for the permanent support of the minor children of the marriage, although her right to alimony for herself may be barred by settlement or otherwise,[33] since she cannot forfeit or abandon the claims of the children.[34] A husband is not excused from the support of his children because he lacks an estate; capacity to labor is sufficient.[35] It is immaterial whether the decree for the support of children is incorporated in the decree by the consent of the parties, or by a determination of the court, the court having jurisdiction to revise it in any case.[36] There is a conflict of authority as to whether or not a mother may maintain a separate action against the father for such support.[37] The

against guardians, who contended mother had expressed desire children remain with them. Held mother had no power to dispose of children at her death, but, for other reasons, petition dismissed. Clarke v. Lyon, 82 Neb. 625, 118 NW 472. A mother may make testamentary disposition of children whose custody is awarded her after decree of divorce obtained for husband's fault. People v. Small, 237 Ill. 169, 86 NE 733. In habeas corpus by husband for custody of child of marriage, awarded by divorce decree to wife, who appointed third person testamentary guardian, court cannot consider whether circumstances authorize modification of decree as to child's custody. Id.

27. Order obtained by father, transferring custody of children to him on mother's death, held of no effect because not obtained from court of mother's residence. Clarke v. Lyon, 82 Neb. 625, 118 NW 472.

28. Mother having custody of children took them to another state and father, who was living apart from mother, asked modification of order. Held no change in absence of showing that mother intended to keep children out of state permanently to prevent father from visiting them. Dixon v. Dixon, 72 N. J. Eq. 588, 66 A 597.

29. Rutledge v. Rutledge [Mo. App.] 119 SW 489.

30. Parent's obligation to support child arises from fact of paternity and not from marriage, as provided by Rev. Civ. Code, art. 227.. State v. Seghers [La.] 49 S 998. Where wife's petition for reimbursement did not specify different items of expense, held demurrable. Brown v. Brown [Ga.] 64 SE 1092. If judgment for alimony to wife be void because allowing alimony to wife when husband got divorce for her fault, and if joining alimony judgment with that for support of children, so that they cannot be separated, avoids judgment for support of children, yet wife could recover against husband for their support in action for that purpose. Elliott v. Elliott, 135 Mo. App. 42, 115 SW 486.

31. Marks v. Marks [S. D.] 118 NW 694. Not relieved where decree is silent on subject. Kirkpatrick v. Kirkpatrick, 83 Neb. 578, 119 NW 1118.

32. If both are able to contribute to support, they must do so in equal parts. If both are not able, the party who has the ability must bear entire burden as between parents and public. Hector v. Hector, 51 Wash. 434, 99 P 13.

33. As support of children is among family expenses, wife's separate estate may be considered in estimating allowance for support of children. Johnson v. Johnson, 131 Ga. 606, 62 SE 1044.

34. Where divorce decree gave father custody of children, subject to further order of court, and required him to maintain and educate them, and decree was subsequently modified so as to give custody to mother, the father must continue to support the children, although wife relinquished claim for herself. Evans v. Evans, 154 Cal. 644, 98 P 1044.

35. Where wife made settlement in lieu of alimony and was awardeed $10 a month for support of child, held evidence showed allowance was father's total earning capacity and excessive. Johnson v. Johnson, 131 Ga. 606, 62 SE 1044.

36. Camp v. Camp [Mich.] 16 Det. Leg. N. 558, 122 NW 521.

37. Almost all of the cases holding that mother may recover from father the entire expense of maintaining minor children are from jurisdictions where father is primarily liable for such maintenance. Hector v. Hector, 51 Wash. 434, 99 P 13. Under § 4508, Ballinger's Ann. Codes & St. (Pierce's Code, § 3874), expenses of family and education of children are chargeable upon property of both husband and wife. Held obligation same after as before divorce, unless decree provides otherwise, and under circumstances of case wife could only recover one-half of

amount to be recovered should be determined from all the facts and circumstances in the case.[38]

§ 6. *Adjustment of property rights.*[39]—See 11 C. L. 1124—Generally the court granting the divorce has exclusive jurisdiction over the adjustment of property rights growing out of the divorce,[40] and in the exercise of such power may set aside [41] or compel conveyances,[42] or grant injunctions.[43] An agreement between the parties to a divorce suit for a division of their property is valid,[44] if not contrary to public policy.[45] In adjusting the property rights of the parties, the courts exercise a wide discretion in making as equitable adjustment as possible,[46] the origin of the property being only a circumstance in the case.[47] A court may render an interlocutory

sums spent on child since date of divorce. Id.; Brown v. Brown [Ga.] 64 SE 1092.

NOTE. Right of wife to maintain separate action against husband. Action maintainable. Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 NE 471, 4 Am. St. Rep. 542; Courtright v. Courtright, 40 Mich. 633; Plaster v. Plaster, 47 Ill. 290; Holt v. Holt, 42 Ark. 495; Maddox v. Patterson, 80 Ga. 719, 6 SE 581; Thomas v. Thomas, 41 Wis. 229, 24 Am. Rep. 386; Stanton v. Willson, 3 [Conn.] Day, 37; 3 Am. Dec. 255; Cowls v. Cowls, 3 [Ill.] Gilm. 435, 44 Am. Dec. 708; Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652; Conn v. Conn, 57 Ind. 323; Welch's Appeal, 43 Conn. 342.

Action not maintainable. Wilson v. Wilson, 45 Cal. 399; Call v. Call, 65 Me. 407; Harvey v. Lane, 66 Me. 536; Cox v. Cox, 25 Ind. 303; Husband v. Husband, 67 Ind. 583, 33 Am. Rep. 107; Brow v. Brightman, 136 Mass. 187; King v. Miller, 10 Wash. 274, 38 P 1020; Erkenbrach v. Erkenbrach, 96 N. Y. 456; Chester v. Chester, 17 Mo. App. 657.—Adapted from Hall v. Green, 87 Me. 122, 32 A 796, 47 Am. St. Rep. 311.

38. Brown v. Brown [Ga.] 64 SE 1092. In considering amount that should properly be allowed in such cases, court should consider ability of parents, care and attention mother must give children, assistance mother will receive from children, and all surrounding facts and circumstances, and equalize burden between them as nearly as may be. Hector v. Hector, 51 Wash. 434, 99 P 13.

39. **Search Note:** See notes in 3 C. L. 1138; 34 L. R. A. 110; 5 Ann. Cas. 536; 6 Id. 954; 9 Id. 139.

See, also, Divorce, Cent. Dig. §§ 701-772; Dec. Dig. §§ 248-288; 14 Cyc. 789-803; 15 Id. 379; 9 A. & E. Enc. L. (2ed.) 855, 860; 7 A. & E. Enc. P. & P. 128.

40. In action for divorce and alimony appellate court, having reversed judgment ordering sale of land, title to which was in plaintiff, and division of proceeds, the judgment being based on expenditures of labor and money by defendant in respect to such land, will remand cause for new trial for determination of question whether such expenditures were made in pursuance of agreement that defendant should receive interest in land, thereby making it community property. Carlson v. Carlson [Cal. App.] 101 P 923. Where wife during marriage conveyed property to husband who paid off incumbrances thereon, and parties are divorced for wife's fault, held husband's equitable title only is divested, and property should vest absolutely in wife when she repays him for outlays. Mathy v. Mathy [Ark.] 113 SW 1012.

41. Statute providing that after separation no transfer by husband of any property except bona fide in payment of pre-existing debts shall pass title so as to avoid vesting thereof according to final verdict of jury in cause does not restrict transfer by a husband of his property made bona fide for value prior to institution of divorce suit, but is operative only on conveyances made by husband during pendency of libel for divorce. Singleton v. Close, 130 Ga. 716, 61 SE 722.

42. Where consent decree charged wife with support and education of child and husband agreed to convey piece of property for her support, wife may preserve life interest and provide for conveyance to child, and where consent decree required both to convey to child and husband died without conveying, decree should be enforced by ordering conveyance. Miller v. Miller, 234 Ill. 16, 84 NE 681.

43. A wife who has sued for separation from bed and board has right to injunction if there is danger that husband will dispose of property on which she has a right during pendency of suit. McClelland v. Gasquet, 122 La. 241, 47 S 540.

44. Evidence held to show voluntary execution of deed by wife where she brings action to set aside property settlement with husband, made after entry of divorce decree making no property disposition. Tausick v. Tausick, 52 Wash. 301, 100 P 757.

45. Wife brought divorce action against husband and parties became reconciled and suit dismissed. Subsequently wife signed agreement limiting amount to be recovered from husband to $10,000 in case she succeeded in obtaining divorce for his fault at any future time. Held this agreement was inducement for husband to commit anew offenses against wife, since he was worth $77,000 and had an income of $11,000 a year, and was in effect an agreement to sever marital relation and, therefore, void. Pereira v. Pereira [Cal.] 103 P 488.

46. Where court considered fact that husband's life expectancy was less than wife's, and latter had reared family of children of latter by former wife, held her share not excessive. Rullman v. Rullman [Kan.] 102 P 1102. On granting divorce, court should make a just and equitable division of their property and property rights, having regard to their respective merits, condition in which they would be left by divorce, the party through whom property was acquired, and the burdens imposed upon it for benefit of child. Dodds v. Dodds, 51 Wash. 293, 98 P 748.

47. Where community property was of

judgment declaring the parties' rights with respect to property and need not wait until the judgment becomes final.[48] Under statutes which permit a court rendering a divorce decree to set aside the homestead to either plaintiff or defendant, the same remains in the husband if the decree is silent on the subject.[49] Each spouse is entitled to the possession of his or her own individual articles.[50] When persons are divorced without any settlement or adjustment of their property rights, their community property becomes common property,[51] and their separate property remains separate,[52] and the rights of the parties with reference to the common property can be determined in a subsequent proceeding without vacating the decree.[53] In some instances statutes regulate the interest which one spouse shall have in the realty of the other upon obtaining a divorce.[54] If the parties remarry before conveyance, the decree dividing their property becomes void.[55] A wife suing for a divorce may intervene in a suit in which property of the husband is attached.[56] A wife is not entitled to dower in her husband's lands by reason of a divorce decree.[57] In some states property obtained by one spouse from the other by reason of their marital relation must be restored when a divorce is obtained.[58] One suing to annul an extrajudicial partition of community property made after a judgment of separation, on the ground of error, fraud and lesion, bears the burden of proving the same.[59]

§ 7. *Effect of divorce.*[60]—See 11 C. L. 1125—An interlocutory decree of divorce does not dissolve the marriage relation.[61] A wife who obtained a divorce has no interest in the estate of a deceased husband[62] while the judgment awarding ali-

value of $204,000 and defendant had separate property valued at $20,000, award of $92,500 to wife held not excessive. Sullivan v. Sullivan, 52 Wash. 160, 100 P 321.

48. Pereira v. Pereira [Cal.] 103 P 488.

49. Construing Wilson's Rev. & Ann. St. Okl. 1903, § 4839. Goldsborough v. Hewitt [Okl.] 99 P 907. Wife retained no right in homestead because statute expressly reserves it to head of family and by decree she ceased to be member of family. Id.

50. Error where decree did not point out individual articles of each spouse. Cole v. Cole, 139 Iowa, 609, 117 NW 988.

51. James v. James, 51 Wash. 60, 98 P 1115. Where community property is concealed, it remains common property. Meisenheimer v. Meisenheimer [Wash.] 104 P 159.

52. Fact that community funds were used to purchase timber claim which was husband's separate property would not give wife interest in, or lien upon, property itself. James v. James, 51 Wash. 60, 97 P 1113.

53. Meisenheimer v. Meisenheimer [Wash.] 104 P 159.

54. Under § 511, Code (B. & C. Comp.), party not in fault entitled to undivided one-third interest in realty of other. Taylor v. Taylor [Or.] 103 P 524. Where property involved consists of choses in action, and hence is personalty, court has no power to enter decree affecting interest therein. Id.

55. Decree of divorce divided property and directed conveyance of certain real estate to trustee for benefit of minor children and parties remarried before conveyance. Held court lost jurisdiction to compel conveyance. Lowe v. Lowe [Wash.] 101 P 704.

56. Under Rev. St. 1887, § 4111, providing any person may intervene in action who has an interest in matter in litigation. Pittock v. Buck, 15 Idaho, 47, 96 P 212.

57. Husband bought and sold land as single man while living apart from wife, who sues grantees for undivided one-half interest. Held, could not recover. Kessinger v. Schrader [Kan.] 98 P 236.

58. Civ. Code Prac. § 228. Lankford v. Lankford [Ky.] 117 SW 962. Held not to apply to property conveyed by husband to wife to defraud his creditors. Id. That wife rendered valuable services to husband not sufficient to show valuable consideration for conveyance by him to her; must also appear services were moving cause of conveyance to defeat action for restoration. Dunker v. Schuff [Ky.] 119 SW 742. Where wife's money went into husband's property, equities should be balanced before restoration. Id. Mansf. Dig. Ark. § 2568 (Ind. T. Ann. St. 1899, § 1856). Ecker v. Ecker [Okl.] 98 P 918.

59. Haddad v. Haddad, 120 La. 218, 45 S 109.

60. Search Note: See notes in 23 L. R. A. 239; 24 Id. 831; 50 Id. 552; 55 Id. 169; 2 L. R. A. (N. S.) 851; 3 Id. 478; 4 Id. 396, 786; 10 Id. 463; 11 Id. 103.

See, also, Divorce, Cent. Dig. §§ 807-826; Dec. Dig. §§ 313-324; 14 Cyc. 727-730; 9 A. & E. Enc. L. (2ed.) 851.

61. Where decree read "plaintiff shall have final decree, unless this court shall otherwise order," held to show interlocutory decree did not dispose of case. Jordan v. Missouri & Kansas Tel. Co., 136 Mo. App. 192, 116 SW 432. Marriage of wife to second husband after interlocutory decree from first spouse held void. Id.

62. Brown v. Brown [Ga.] 64 SE 1092. A decree from bonds of matrimony has effect to bar curtesy or dower in existing property, even for supervenient cause. Hartigan v. Hartigan, 65 W. Va. 471, 64 SE 726. Hurd's St. 1908, c. 41, § 14, deprives party at fault of dower in lands of other party. Chicago & N. W. R. Co. v. Garrett, 239 Ill. 297, 87 NE 1009. Strangers to divorce decree granted

mony stands unimpeached,[63] but a divorce between the husband and wife does not bar the children from being heirs of the deceased father.[64] If the wife obtains a total divorce, the husband is no longer under legal obligation to support her, except such support as may be imposed upon him in the divorce proceedings.[65] A divorce decree has no retroactive effect and does not per se legally restore the status quo of the parties before marriage, or annul their voluntary and legal acts during coverture.[66]

Proof of divorce in collateral proceedings. See 11 C. L. 1126—A decree of divorce cannot be collaterally attacked,[67] not even where it was obtained by fraud and conspiracy,[68] nor upon proof that there was a former action pending at the time of the institution of the action in which it was rendered,[69] unless its invalidity is apparent from an inspection of the judgment roll.[70] But a decree of divorce may be impeached collaterally in the courts of another state by proof that the court granting it had no jurisdiction because of the want of plaintiff's domicile even when the record purports to show jurisdiction.[71]

§ 8. *Foreign divorces.*[72] See 11 C. L. 1126—An implied prohibition against a second marriage, resulting from a divorce decree not expressly authorizing it, will not be given extraterritorial effect.[73] A divorce obtained in another state, without personal service upon the defendant in that state, and after his nonappearance personally or by attorney in the said action, is wholly void.[74] While courts are not bound to recognize divorces decreed by courts of foreign states, they usually do so as a matter of comity.[75]

wife for fault of husband, in good faith acquiring title to wife's property, whether with or without notice of writ of error sued out by husband without supersedeas, were not affected by reversal of decree, and their title was not subject to husband's claim of dower. Id.

63. Uecker v. Thiedt, 137 Wis. 634, 119 NW 378.

64, 65. Brown v. Brown [Ga.] 64 SE 1092.

66. Wife during coverture voluntarily conveyed property to her husband. Held decree for divorce did not vest in her an equitable title to such property. Reed v. Reed, 109 Md. 690, 72 A 414. Where wife purchased property and had it conveyed to herself and her husband as tenants by entireties, and they were thereafter divorced, they held property as tenants in common. Id.

67. Long v. Barton, 142 Ill. App. 606.

68. Remedy is by motion in original case within such time as may be allowed by law, or by action in equity assailing decree and seeking relief. In re McNeil's Estate [Cal.] 100 P 1086.

69. That is ordinarily understood to be a matter which must be pleaded in abatement in second action. In re McNeil's Estate [Cal.] 100 P 1086.

70. Judgment roll held not defective, although neither complaint nor affidavit for service of summons by publication showed cause of action, since at time of action neither affidavit nor order for publication of summons constituted any part of judgment roll. In re McNeil's Estate [Cal.] 100 P 1086.

71. Sammons v. Pike [Minn.] 120 NW 540; adhered to in [Minn.] 122 NW 168, on defendant's motion for reargument.

72. **Search Note:** See notes in 5 C. L. 1037; 19 L. R. A. 515; 59 Id. 135; 2 L. R. A. (N. S.) 325; 83 A. S. R. 616; 94 Id. 553; 4 Ann. Cas. 864; 5 Id. 26.

See, also, Divorce, Cent. Dig. §§ 827-844; Dec. Dig. §§ 325-332; 14 Cyc. 814-822; 13 A. & E. Enc. L. (2ed.) 914.

73. Wife divorced from first husband by Alabama decree, where statute provides second marriage is prohibited unless decree expressly authorizes same, held, where wife moved to Georgia and was married, Alabama decree of no extraterritorial effect. Wingo v. Rudder [Tex. Civ. App.] 120 SW 1073.

74. Where plaintiff sued defendant for breach of marriage promise, alleging he agreed to marry her when she obtained divorce from her then husband, and after divorce he failed to do so, but defended on ground that divorce was not valid, held husband not served with process and did not appear in divorce suit, wherefore it was void. Williams v. Igel, 62 Misc. 354, 116 NYS 778. Where husband abandoned wife in New York and became domiciled in another state, decree of divorce there obtained by him, based on substituted service, by publication, of process on the wife, who remained domiciled in New York and who had no actual notice of action, was void. Halter v. Van Camp, 64 Misc. 366, 118 NYS 545.

75. Foreign decree was entered on husband's petition, who resided in Illinois three years, and wife was brought in by substituted service, and foreign court had jurisdiction in rem. Held courts of domestic state would recognize such decree as valid when attacked 40 years after entry, evidence showing wife knew of decree long before questioning validity. Douglas v. Teller [Wash.] 102 P 761.

DOCKETS, CALENDARS AND TRIAL LISTS.[76]

The scope of this topic is noted below.[77]

Placing Cause on Calendar, 1364.
Posting or Printing of Trial Lists, 1364.
Preference, 1364.
Passing or Advancing Cause, 1365.
Special or Short-Cause Calendars, 1365.
Transfer, Correction or Striking Off, 1365.
Reinstatement and Restoration, 1366.

*Placing cause on calendar.*See 11 C. L. 1127—The statutes usually prescribe the conditions upon which causes are entitled to go on the calendar,[78] but matters not within the statute may be regulated by rules of court,[79] unless in the application of such rules there is manifest abuse of discretion.[80]

Notice of trial[81] may be served at any time after joinder of issues, during the pendency of the action.[82] Though notice of trial is regular,[83] yet, if new issues are created by subsequent pleadings, the case must be again noticed for trial before it can be placed upon the calendar. The notice may be waived.[84]

*Posting or printing of trial lists.*See 11 C. L. 1127

*Preference.*See 11 C. L. 1127—By federal statute[85] and by statute in many states, a preference is given to certain classes of cases.[86] An application for a preference

76. See 11 C. L. 1126.

Search Note: See Trial, Cent. Dig. §§ 11-36; Dec. Dig. §§ 5-15; 5 A. & E. Enc. L. (2ed.) 106; 9 Id. 875; 3 A. & E. Enc. P. & P. 801; 14 Id. 1063.

77. This topic treats only of calendars of trial courts (see Appeal and Review,* § 11D), and excludes docket entries as judicial records (see Records and Files*), docketing of judgments (see Judgments,* § 4), justices' dockets (see Justices of the Peace,* § 4), and consolidation and severance of actions at trial (see Trial,* § 1).

78. Rule of New York City court, requiring new notes of issue to be filed for purpose of placing actions on the general calendar upon new calendar, held void as conflicting with Code Civ. Proc. § 977. Willner v. Mink Restaurant Co., 61 Misc. 73, 113 NYS 31, rvg. 60 Misc. 358, 113 NYS 633.

79. While as a general rule cases should be called and tried in the order docketed, the rules of practice adopted by the trial courts regulating the assignment of cases and making up of trial calendars will not be interfered with. Frost v. Pennington [Ga. App.] 65 SE 41.

80. Will not be interfered with unless there is abuse of discretion. Frost v. Pennington [Ga. App.] 65 SE 41; Ex parte Petition to Prohibit the Sale of Intoxicating Liquors in Hyde Park, 12 Ohio C. C. (N. S.) 248. Though a court in which a case is pending has the inherent power to assign it for trial on a particular day of a future term, it cannot so assign it when there is no answer on file nor any order of court requiring an answer to be filed by any particular time. Smith v. Redmond [Iowa] 119 NW 271.

81. Issue is not joined until the last pleading presenting the issues to be tried is served. Grant v. Cananea Consol. Copper Co., 129 App. Div. 77, 113 NYS 502. Where action was at issue as to all defendants except one who had defaulted, notice of trial was regular. Id.

82. Upon dismissal of complaint, court properly refused to compel defendant to accept notice of trial in the same action. Kalvin v. Meyers, 117 NYS 141.

83. Though case was in condition to be noticed for trial when notice was served, new issues created by subsequent reply had to be noticed for trial. Grant v. Cananea Consol. Copper Co., 129 App. Div. 77, 113 NYS 502.

84. Plaintiff, by procuring a postponement of the trial when the cause appeared for first time on day calendar, waived notice of trial by defendant. Rosenthal v. Friedman, 60 Misc. 553, 112 NYS 449.

85. Act Cong. Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1907, p. 951), providing that any equity suit in any federal circuit court to protect trade and commerce against unlawful restraint may be given precedence upon the filing of a certificate by the attorney general, construed. Southern Pac. Terminal Co. v. Interstate Commerce Commission, 166 F 134.

Constitutionality: Act Cong. Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1907, p. 951), providing that, in any equity suit in any federal circuit court to protect trade and commerce against unlawful restraints and monopolies, the attorney general may file a certificate that the case is one of public importance, thereupon the case shall be given precedence, is not unconstitutional. United States v. New York, etc., R. Co., 165 F 742.

86. Under Code Civ. Proc. § 791, subd. 5, a preference is given "in an action to determine the validity of the probate of a will in which the * * * executor of the will is joined as plaintiff or defendant with other parties." Held that right to preference was not defeated by fact that executor was a party defendant, both individually and in his representative capacity. Specht v. Heifer, 112 NYS 457. Either party is entitled to claim said preference. Id. Under Code Civ. Proc. § 791, subd. 2, the police commissioner

is, however, addressed to the discretion of the court,[87] but other facts than the pleadings should be presented to enable the court to exercise such discretion,[88] and, where a notice that an application would be made must be served with the notice of trial, the requirements must be complied with.[89] A cause which has been reached for trial and set down peremptorily for trial the next day has precedence over a cause assigned to another part of the court on the day.[90]

Passing or advancing cause.[See 11 C. L. 1128]—The passing or advancing of a cause is within the sound discretion of the trial court.[91] A rule that no cause shall be reset without good cause shown is reasonable.[92]

Special or short-cause calendars.[See, 11 C. L. 1128]—The right to go on such calendars rests largely in the discretion of the court.[93]

Transfer, correction, or striking off.[See 11 C. L. 1129]—Where an equity case is erroneously brought in the law court,[94] or a law action in the chancery court,[95] it may be transferred to the proper docket[96] by order of the court, but if the case is one which may be tried either in a law or equity, in the absence of a motion, the

of New York, being made a party to the action, is entitled to a preference of the trial of the same. National Athletic Club v. Bingham, 63 Misc. 62, 115 NYS 1103. Mills' Ann. St. § 1034, gives preference to causes in matters of probate appealed to district court over all other civil causes, and is not modified by Code 1877, §§ 156, 157, substantially re-enacted in Code 1887, §§ 175, 176, requiring clerk to enter clauses on the calendar according to date of issue, etc. In re Shapter's Estate, 44 Colo. 547, 99 P 35.

87. Peck v. Maher, 116 NYS 574.

88. Where no special reason was set forth in the moving papers, the motion was denied, though case was one which might be preferred under Code Civ. Proc. § 791. Peck v. Maher, 116 NYS 574.

89. Preference not allowed under Code Civ. Proc. § 791, subd. 10, where no notice was served with notice of trial as required by § 793. Cohen v. Thomas, 63 Misc. 378, 116 NYS 725.

90. Nahe v. Bauer, 133 App. Div. 373, 117 NYS 355.

91. Court is justified in advancing a cause where a party is restrained from constructing a building, a hearing upon ex parte affidavits having been unsatisfactory and temporary injunction granted to maintain status quo between the parties. Kneip v. Schroeder, 144 Ill. App. 620.

92. Conrad Schopp Fruit Co. v. Bondurant [Ky.] 121 SW 482.

93. Where it was obvious that an amended answer was interposed solely for delay, an order striking out defendant's amended answer, and placing the cause on the short-cause calendar unless defendant complied with its terms, was proper, it being apparent that if the amended answer was permitted to remain plaintiff would lose the benefit of the term for which he had theretofore noticed the cause. Tillinger v. London, 114 NYS 130.

94. Allegations of complaint held appropriate to an action seeking equitable relief by way of rescission of contract and for injunction against an alleged continuous breach of contract. Hickson Lumber Co. v. Stallings [S. C.] 64 SE 1015. Under Code, § 3427, where amendment to petition in law case sought establishment and foreclosure of vendors' liens, case was properly transferred. State Bank v. Brown [Iowa] 119 NW 81.

Transfer properly refused: Where defense in action on note presented issue of estoppel. Security Sav. Bank v. Smith [Iowa] 119 NW 726. Answer in action on notes held not to state cause for equitable accounting. Loeb v. German Nat. Bank [Ark.] 113 SW 1017. In action for work and labor, answer held not to show such a complicated state of accounts as to require transfer. Leola Lumber Co. v. Bozarth [Ark.] 120 SW 152. Not error to refuse to transfer cause to chancery on the ground it involved long accounts, the evidence having sufficiently developed for the court to see whether accounts were too complicated for jury to understand. Smith v. Stack [Ark.] 115 SW 1145. Cause **held erroneously transferred** to equity side of docket, on ground that there were a number of parties who might become proper or necessary parties, there being no showing why such person might become necessary parties. Faville v. Lloyd [Iowa] 118 NW 871. In replevin by divorced wife, answer held to raise issue of law only. Cole v. Cole, 139 Iowa, 609, 117 NW 988.

95. Where no facts are alleged upon which the plaintiff would be entitled to equitable relief, if the facts show a cause of action at law, the case should be stricken from the equity calendar and transferred to the trial term calendar. Karst v. Prang Educational Co., 132 App. Div. 197, 116 NYS 1049. Where an injunction is the sole relief sought, the case cannot be transferred to the law docket. Hall v. Henninger [Iowa] 121 NW 6. Where petition stated cause of action in equity for fraud, it was error to transfer same to law docket. Dickinson v. Stevenson [Iowa] 120 NW 324.

96. Kirby's Dig. §§ 5991, 5992, does not authorize plaintiff to transfer an action without order of court but merely to amend pleadings without motion, but even if statute authorized transfer without order the separation of chancery courts from circuit courts abrogated the statute to that extent. Ayers v. Anderson-Tully Co. [Ark.] 116 SW 799. Clerk has no authority to order transfer. Id.

court is not required to transfer it on its own motion,[97] though the court may in its discretion without motion order the transfer.[98] For the purpose of a motion to transfer a case from the equity to the law side of the docket, the allegation of the petition and the prayer for relief are conclusive on the court.[99] Where, by statute, it is the duty of a defendant, when sued at law, to make all the defenses he has, both legal and equitable, a demurrer to an equitable defense should be treated as a motion to transfer to the chancery court.[1] Where the cause is properly noticed for the trial term, an order striking the cause from the calendar will not be granted for the purpose of trying issues, arising under an equitable counterclaim, at the special term.[2] If new issues are created by subsequent pleadings, either party is entitled to have the case stricken from the calendar,[3] unless the order requiring the subsequent pleadings provides that the case should remain on the calendar without further notice.[4] An order which strikes a case from the docket of a court is not a final decision.[5]

*Reinstatement and restoration.*See 11 C. L. 1130—A case erroneously dismissed may be restored to the calendar by the court.[6]

Documents in Evidence, see latest topical index.

DOMICILE.[7]

The scope of this topic is noted below.[8]

*Definition, elements and establishment.*See 11 C. L. 1130—"Domicile" is nearly synonymous with "home" [9] or "residence." [10]

97. Not required to transfer case involving complicated account. Stevenson v. Moore [Ky.] 118 SW 951.

98. Under Civ. Code Prac. § 10, the court may order the transfer on its own motion when it appears that such transfer is necessary because of the peculiar questions involved or because the case involves such great detail of facts as to render it impracticable for jury to try case. Finley v. Meadows [Ky.] 119 SW 216.

99. Gigray v. Mumper [Iowa] 118 NW 393.

1. Crawford County Bank v. Bolton, 87 Ark. 142, 112 SW 398.

2. Plaintiff was entitled to jury trial of issues arising upon the complaint and answer, therefore it was error to strike cause from calendar. Wasserman v. Taubin, 129 App. Div. 691, 114 NYS 447.

3. Where new issues were created by service of reply, defendant's motion to have case stricken from calendar should have been granted. Grant v. Cananea Consol. Copper Co., 129 App. Div. 77, 113 NYS 502. Fact that defendant had demurred to reply did not effect position of action on calendar. Id.

4. Order requiring plaintiff to reply not so providing, such condition could not be imposed after order was acted upon. Grant v. Cananea Consol. Copper Co., 129 App. Div. 77, 113 NYS 502.

5. Such order is therefore not reviewable in the national courts. Loflin v. Ayres [C. C. A.] 164 F 841.

6. Where case was dismissed by the clerk under rule 39, and thereafter restored by order of the court, it was held that in view of the lower court's familiarity with the ordinary interpretation and application of its rules it could not be said that it erred. Welch v. Lynch, 30 App. D. C. 122.

7. **Search Note:** See notes in 3 C. L. 1143; 5 Id. 1041, 1042; 11 Id. 1113; 1 L. R. A. (N. S.) 778; 8 Id. 1245; 9 Id. 1159; 10 Id. 874; 48 A. S. R. 711, 712; 84 Id. 27; 85 Id. 559; 89 Id. 278.

See, also, Domicile, Cent. Dig.; Dec. Dig., 14 Cyc. 831-866; 10 A. & E. Enc. L. (2ed.) 6; 24 Id. 692.

8. Domicile for particular purposes, such as voting (see Elections,* § 2), jurisdiction (see Jurisdiction,* § 5; Divorce,* § 1), and the probate of wills (see Wills,* § 4A), is more fully treated in appropriate topics. Effect of the lex domicilii in foreign jurisdictions is also treated elsewhere (see Conflict of Laws*).

9. Ex parte Petterson, 166 F 536. In Rev. St. c. 27, § 1, par. 6, relating to paupers. City of Rockland v. Deer Isle [Me.] 73 A 885.

10. **Residence** is a term colored by its context. Elements common to or foreign to domicile are often attached to residence for special purposes by statute. Tax Law, § 8, declaring presumption of continuance. City of New York v. Brinckerhoff, 63 Misc. 445, 118 NYS 449. Rev. Codes, § 481, rule 8, creating presumption of identity with residence of family. Carwile v. Jones, 38 Mont. 590, 101 P 153. Laws 1906, p. 97, No. 102, § 1, creating derivative residence of married woman pauper. City of Montpelier v. Worcester [Vt.] 72 A 321.

Construed as equivalent to domicile: For the purpose of the following decisions, "residence" was expressly or tacitly held equivalent to domicile. In Rev. St. 1899, c. 149, taxing personalty. State v. Shepherd, 213 Mo. 656, 117 SW 1169. In P. L. 1902, p. 503,

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* Always begin with the latest article on the subject. Use the latest topical index.

Every person must have a domicile somewhere,[11] but, subject to the possibility of separate domiciles of different unit,[12] can have but one at a given time,[13] and consequently cannot lose one till he acquires another,[14] and vice versa.[15] At birth the law attributes to every person, as his domicile of origin, that of his parents.[16] In general, one under a disability cannot change his domicile; thus, during minority, the law attributes to an infant the domicile of his parents[17] and of the survivor of them,[18] unless he is abandoned by them to another,[19] and upon the death of both, that of one standing in loco parentis,[20] or such of several as is awarded custody by the court.[21] Likewise, an insane person's domicile can be changed only by authority of the court having jurisdiction;[22] and that of a wife, acquired by operation of law from her husband upon marriage,[23] can be changed by her only when she has grounds for divorce or legal separation,[24] and even then only by going to another place,[25] with the intention of making it her separate domicile.[26] Married women aside, any person of full age and sound mind may acquire a domicile of choice by living in a place with the intention of remaining indefinitely,[27] and abandoning any inconsistent[28] intention of returning to the former domicile.[29] It follows that removal for a temporary purpose does not work a change of domicile,[30] though pending an event of uncertain date.[31] Both the intention[32] and the act of residence[33]

fixing divorce jurisdiction. King v. King [N. J. Err. & App.] 71 A 687. In tax statute. Pendleton v. Com. [Va.] 65 SE 536. In 2 Mo. Ann. St. 1906, § 3435, limiting garnishment of wages of resident, construed in light of § 334, exempting wages from attachment, except of "nonresident defendant or a defendant who is about to remove from the state with intent to change his domicile." McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 115 SW 1028. In election law, notwithstanding Rev. Codes, § 481, rule 8, establishing prima facie presumption of identity with residence of family. Carwile v. Jones, 38 Mont. 590, 101 P 153. In removal act of congress. Willingham v. Swift & Co., 165 F 223. In law fixing eligibility to hold office. State v. Scott, 171 Ind. 349, 86 NE 409.

Not equivalent to domicile: Under Const. art. 10, § 1, granting exemptions, residence of fugitive from justice held lost, though no new domicile acquired, his whereabouts being unknown. Cromer v. Self, 149 N. C. 164, 62 SE 886. In Bankruptcy Act, July 1, 1898, c. 541, § 45, requiring trustee to reside or have an office within district. In re Seider, 163 F 138. In Const. 1898, art. 197, § 1, "actual bona fide" residence for voting not satisfied by absence with intention to return. State v. Joyce, 123 La. 631, 49 S 219.

11. State v. Scott, 171 Ind. 349, 86 NE 409.

12. State domicile acquired without acquiring any municipal domicile therein. King v. King [N. J. Err. & App.] 71 A 687.

13. First Nat. Bank v. Hinton, 123 La. 1018, 49 S 692.

14. State v. Scott, 171 Ind. 349, 86 NE 409; Smidt v. Benenga [Iowa] 118 NW 439.

15. First Nat. Bank v. Hinton, 123 La. 1018, 49 S 692; State v. Shepherd, 218 Mo. 656, 117 SW 1169.

16. Smidt v. Benenga [Iowa] 118 NW 439; Ex parte Petterson, 166 F 536.

17. Ex parte Petterson, 166 F 536.

18. Mother's. Churchill v. Jackson [Ga.] 64 SE 691.

19. Domicile of child of eleven held that of person rearing it by father's consent, though father is alive. Smidt v. Benenga [Iowa] 118 NW 439.

20. Maternal grandfather and next of kin of child under 14. Smith v. Young, 136 Mo. App. 65, 117 SW 628.

21. Of maternal grandfather who removed child to another county and was awarded custody, rather than of paternal grandfather without custody, there being no nearer next of kin. Churchill v. Jackson [Ga.] 64 SE 691.

22. Unchanged by removal to new location of asylum, with acquiescence of committee appointed after commitment. City of New York v. Brinckerhoff, 63 Misc 445, 118 NYS 449.

23. First Nat. Bank v. Hinton, 123 La. 1018, 49 S 692.

24. In re Bushberg, 59 Misc. 317, 112 NYS 262; Petty v. Petty, 42 Ind. App. 443, 85 NE 995.

25. Petty v. Petty, 42 Ind. App. 443, 85 NE 995.

26. Husband cannot elect to treat removal as so intended. Duxstad v. Duxstad, 17 Wyo. 411, 100 P 112.

27. Pendleton v. Com. [Va.] 65 SE 536; King v. King [N. J. Err. & App.] 71 A 687.

28. Occasional return for outing of few days not fatal. Pendelton v. Com. [Va.] 65 SE 536. Return to get family consistent. Carwile v. Jones, 38 Mont. 590, 101 P 153.

29. First Nat. Bank v. Hinton, 123 La. 1018, 49 S 692; State v. Shepherd, 218 Mo. 656, 117 SW 1169.

30. Stewart v. Kleinschmidt, 51 Wash. 90, 97 P 1105. For care pending childbirth. Duxstad v. Duxstad, 17 Wyo. 411, 100 P 112. Bachelor's spending nights with feeble parents. State v. Shepherd, 218 Mo. 656, 117 SW 1169. Two months' visit to husband's domicile to arrange for divorce suit, after acquiring separate domicile. White v. Glover, 116 NYS 1059.

31. Till daughter's health restored. McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 115 SW 1028.

32. Duxstad v. Duxstad, 17 Wyo. 411, 100 P

are essential and must concur, though it is sufficient if the intention supervene at any time during the continuance of the act.[34] The intention must clearly define the place,[35] but given the requisite intention, slight acts are sufficient.[36]

Issues and evidence. See 11 C. L. 1131—A domicile once established, whether of origin[37] or choice,[38] or by operation of law,[39] is presumed to continue till the contrary is shown, and the burden of proof of change is upon the party alleging it.[40] The intention accompanying a change of residence is a question for the jury upon all the evidence,[41] in the determination of which the party's declarations, whether oral[42] or written,[43] have some evidential value, but are less weighty than his conduct[44] and do not conclude him though made under oath.[45] On this question the jury may consider such circumstances as fixity of residence at some place within the alleged domicile,[46] time consumed in its alleged acquisition,[47] nature of the place of residence,[48] relative time spent there and elsewhere,[49] payment there of one's poll tax,[50] but not its assessment,[51] and fact of voting there,[52] and there living in his own house with his wife and children.[53]

DOWER.

The scope of this topic is noted below.[54]

§ 1. Nature of Right; Persons Entitled; Election, 1369.
§ 2. In What Dower May be Had, 1370.
§ 3. Extinguishment, Release or Bar, and Revival of Dower, 1371.
§ 4. Liens and Charges on Dower, 1372.
§ 5. Assignment of Dower and Money Awards, 1373.
§ 6. Remedies and Procedure, 1373.

112; First Nat. Bank v. Hinton, 123 La. 1018, 49 S 692.

33. McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 115 SW 1028; State v. Scott, 171 Ind. 349, 86 NE 409.

34. McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 115 SW 1028; Pendleton v. Com. [Va.] 65 SE 536.

35. "Southwest" too indefinite, and not remedied by visits to schools of places in several states. State v. Scott, 171 Ind. 349, 86 NE 409. Choice of state sufficient. King v. King [N. J. Err. & App.] 71 A 687.

36. Shifting residence within state chosen for domicile without choice of city. King v. King [N. J. Err. & App.] 71 A 687. Moving into leased apartment. Webster v. Columbian Nat. Life Ins. Co., 131 App. Div. 837, 116 NYS 404.

37. Unchanged by father's death. Churchill v. Jackson [Ga.] 64 SE 691.

38. During subsequent insanity. City of New York v. Brinckerhoff, 63 Misc. 445, 118 NYS 449.

39. Wife going to another state after cause for divorce held to retain husband's. Duxstad v. Duxstad, 17 Wyo. 411, 100 P 112.

40. First Nat. Bank v. Hinton, 123 La. 1018, 49 S 692. Sustained by evidence that with intent to effect permanent separation wife had maintained separate household in another state for some time, during which husband contributed nothing to her support, and that she later secured divorce. White v. Glover, 116 NYS 1059.

41. Whether intention to return was "floating" or settled. McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 115 SW 1028.

42. Duxstad v. Duxstad, 17 Wyo. 411, 100 P 112; Pendleton v. Com. [Va.] 65 SE 536.

43. Divorce libel signed by party reciting residence. City of Rockland v. Deer Isle [Me.] 73 A 885.

44. Leaving money and property at long occupied home is more significant than casual reference to new boarding place as "house," to which decedent came four months before death with trunk and bicycle. In re Ayers' Estate [Neb.] 120 NW 491.

45. In affidavit to plaintiff insurance company. Webster v. Columbian Nat. Life Ins. Co., 131 App. Div. 837, 116 NYS 404.

46. Constant shifting within state not conclusive against intention to remain therein. King v. King [N. J. Err. & App.] 71 A 687.

47. Continuance at house of prostitution one day after attaining majority insufficient. Ex parte Petterson, 166 F 536.

48. House of prostitution. Ex parte Petterson, 166 F 536.

49. Wife domiciled in California, though husband on his Nevada ranch more than half the year, and postmaster for ranchmen. Dean v. Dunn, 9 Cal. App. 352, 99 P 380. Domicile not at daughter's college city where she lived during school year, returning to old home for summer. First Nat. Bank v. Hinton, 123 La. 1018, 49 S 692.

50, 51. City of Rockland v. Deer Isle [Me.] 73 A 885.

52. Lewis v. Beach, 112 NYS 200.

53. Lewis v. Beach, 112 NYS 200.

54. This topic excludes right and duty of widow to elect between the will and the statute (see Wills,* § 5D; Election and Waiver,* § 2B), rights of homestead (see Homesteads*), and quarantine (see Estates of Decedents,* § 5D).

§ 1. *Nature of right; persons entitled; election.*[55]—See 11 C. L. 1182.—Under statutes declaratory of the common law, dower is a life estate given to the widow in a third part of all lands whereof the husband was seised of an estate of inheritance at any time during coverture,[56] but the term is sometimes used in other senses,[57] as is also its colloquial synonym "thirds."[58] During the husband's life dower is only an inchoate right which gives the wife no title,[59] and though it becomes consummate upon his death, it is then only a chose in action,[60] and, in the absence of statute,[61] does not, until assigned, give the widow any estate or right of possession which she can convey to a third person.[62] It is, however, an independent interest rather than an incumbrance[63] or lien or indebtedness,[64] and upon assignment it may be conveyed,[65] subject to statutory homestead rights.[66] The land assigned for dower may, however, be sold under order of the court, subject to the widow's life estate.[67]

The right of dower being in general coextensive with the existence of the marriage relation, it may be acquired by the wife, though insane[68] or living apart by virtue of a judicial separation,[69] but not if divorced,[70] and a decree of divorce will be deemed valid until the contrary is shown.[71] The dower of a nonresident wife is sometimes curtailed by statute.[72]

As the law favors dower,[73] the widow need not elect between dower and provisions not expressly in lieu thereof, made by her husband by will[74] or otherwise,[75] unless he clearly so intended, or unless so required by statute,[76] and not then before the alternatives can be fairly understood.[77] Upon failure to make election, where requisite, some statutes give the widow dower rather than her husband's testa-

55. **Search Note:** See notes in 5 C. L. 1043; 19 L. R. A. 256; 2 L. R. A. (N. S.) 459, 959; 84 A. S. R. 446; 92 Id. 695.

See, also, Dower, Cent. Dig. §§ 1-13, 81-84, 87, 88, 155, 156, 176-202; Dec. Dig. §§ 1-9, 21, 22, 29-33, 36, 54-64; 14 Cyc. 880-896, 925, 926; 10 A. & E. Enc. L. (2ed.) 122, 125, 126, 128, 141.

56. By Gen. St. 1895, "Dower," § 1, p. 1275. Burton v. Mellis [N. J. Eq.] 72 A 13.

57. Meaning husband's right in property of wife. Chicago & N. W. R. Co. v. Garrett, 239 Ill. 297, 87 NE 1009.

58. Held to refer to widow's statutory interest in California land, dower not existing in that state. Gail v. Gail, 127 App. Div. 892, 112 NYS 96.

59. Within statute conferring on supreme court jurisdiction of cases involving title to real estate. Brannock v. Magoon, 216 Mo. 722, 116 SW 500.

60. Neal v. Davis [Or.] 101 P 212, afg. [Or.] 99 P 69.

61. Right to continue in possession with children, of land in which entitled to dower, given by St. 1898, § 3872. Harley v. Harley, 140 Wis. 282, 122 NW 761.

62. Such as to make him tenant in common with the heirs and thereby prevent ejectment for adverse possession. Neal v. Davis [Or.] 99 P 69, afd. [Or.] 101 P 212.

63. Not covered by covenant of warranty in deed from heir to coheir of undivided share. Combs v. Combs [Ky.] 114 SW 334.

64. Not excluded by devise "free from any lien or indebtedness." Rice v. Rice [Iowa] 119 NW 714.

65. Phillips v. Williams [Ky.] 113 SW 908.

66. Of infant children. Phillips v. Williams [Ky.] 116 SW 688.

67. Where necessary to pay debts. Walker v. Shearer's Adm'x [Ky.] 119 SW 240.

68. Crenshaw v. Kener, 127 Ga. 742, 57 SE 57.

69. Where no division of property made, though alimony decreed, dower given in after-acquired land. Killackey v. Killackey [Mich.] 16 Det. Leg. N. 73, 120 NW 680.

70. In property acquired after husband obtained divorce. Johnston v. Jickling [Iowa] 119 NW 746.

71. Johnston v. Jickling [Iowa] 119 NW 746.

72. Limited to land owned by husband at death, by Comp. St. 1903, c. 23, § 20. Miner v. Morgan, 83 Neb. 400, 119 NW 781.

73. Harley v. Harley, 140 Wis. 282, 122 NW 761.

74. Bequest of annuity, less valuable than dower, till remarriage, and thereafter dower. Schreiner v. Schreiner, 63 Misc. 601, 118 NYS 603. Civ. Code 1895, § 4687. Falligant v. Barrow [Ga.] 65 SE 149. Though will made ample provision. Scott v. Vaughn [S. C.] 65 SE 269.

75. Equitable gift of land inter vivos. Cowdrey v. Cowdrey [N. J. Err. & App.] 67 A 111, rvg. 71 N. J. Eq. 353, 64 A 98.

76. By Rev. St. § 5963, unless will shows intention that she have both. Geiger v. Bitzer, 80 Ohio St. 65, 88 NE 134. By Civ. Code 1902, § 2386. Williams v. Newton, 82 S. C. 227, 64 SE 219. By Rev. Laws, c. 132, § 1, must take statutory substitute, unless files election of dower. Downey v. King, 201 Mass. 59, 87 NE 468.

77. Not till action to set aside will decided. Williams v. Newton, 82 S. C. 227, 64 SE 219.

mentary provision.[78] Where election between dower and homestead is required,[79] it is ascertained from all the facts,[80] and once made it cannot be changed.[81]

§ 2. *In what dower may be had.*[82]—See 11 C. L. 1134.—Ordinarily there is dower in all legal estates of inheritance of which the husband was actually seised[83] at any time during coverture,[84] though by some statutes he must have been seised at death.[85] There is, therefore, no dower in a remainder, though vested, until the husband is entitled to possession,[86] nor in a conditional estate divested during the husband's life,[87] though dower has been allowed in a defeasible fee which the issue of the marriage, had there been any, would have inherited.[88] As the husband's seisin must also be beneficial,[89] there can be no dower in an inheritance assigned by the husband before the ancestor's death,[90] nor in property held in trust,[91] nor, by some statutes, in property which the husband contracted to convey before marriage.[92] A legal title will be presumed beneficial, however, unless the contrary is shown.[93] An equitable title is sufficient to support dower if coupled with a right to the immediate conveyance of the legal title,[94] but part payment under a contract of purchase is sometimes held insufficient where no conveyance has been made.[95] Dower does not extend to improvements made after the termination of the husband's ownership,[96] but is sometimes given by statute in the surplus over the lien of a mortgage in which the wife joined.[97]

78. By Rev. St. 1906, § 5964. Geiger v. Bitzer, 80 Ohio St. 65, 88 NE 134.

79. Phillips v. Williams [Ky.] 113 SW 908; White v. Holder [Ky.] 118 SW 995. Under Code, § 2985. Gray v. Wright [Iowa] 119 NW 612.

80. Occupation of whole farm till remarriage held election of homestead. White v. Holder [Ky.] 118 SW 995. Occupation of husband's house for about a year after his death, coupled with conveyance of "entire interest" in the husband's property, "being the life estate," in which word "homestead" not used, held election of dower. Phillips v. Williams [Ky.] 113 SW 908. Where homestead comprised whole estate, occupation thereof for seven years, coupled with devise of her undivided third interest, held election of dower. Gray v. Wright [Iowa] 119 NW 612.

81. White v. Holder [Ky.] 118 SW 995.

82. **Search Note:** See notes in 16 L. R. A. 247; 56 Id. 67.

See, also, Dower, Cent. Dig. §§ 15, 20-65; Dec. Dig. §§ 10-20; 14 Cyc. 896-915; 10 A. & E. Enc. L. (2ed.) 155.

83. Under a devise to wife for life, then to executors in trust for ten years to pay income to children equally, then to all children in equal shares, where wife survived, held that a son who survived the wife was seised upon death of testator so as to entitle son's wife to dower upon his death during the ten years, under St. 1898, §§ 2086, 2087, relative to vesting of devise subject to trust. In re Prasser's Will, 140 Wis. 92, 121 NW 643. Statute construed to permit dower, though bore legal title outstanding. Harley v. Harley, 140 Wis. 282, 122 NW 761.

84. Bennett v. Bennett [Ky.] 121 SW 495; McKlevey v. McKelvey [Kan.] 99 P 238. By Gen. St. 1895, § 1, p. 1275. Burton v. Mellis [N. J. Eq.] 72 A 13. By St. 1898, § 2159. In re Prasser's Will, 140 Wis. 92, 121 NW 643.

85. By Comp. St. 1903, c. 123, § 20, in case wife was a nonresident. Miner v. Morgan, 83 Neb. 400, 119 NW 781.

86. Wife not a necessary party plaintiff in suit by husband and life tenant against purchaser for specific performance. Ochs v. Kramer, 32 Ky. L. R. 762, 107 SW 260.

87. Reverted to grantor on husband's nonfulfillment of condition subsequent, according to terms of grant. Sullivan v. Sullivan, 139 Iowa, 679, 117 NW 1086.

88. Executory devise upon death without legal heirs, which event happened. Rice v. Rice [Ky.] 118 SW 270.

89, 90. Baker v. Bagg, 61 Misc. 186, 114 NYS 660.

91. Conveyed to husband on parol agreement to reconvey according to grantor's directions. Held provable by parol after execution. Johnston v. Jickling [Iowa] 119 NW 746. Under Rev. St. 1899, §§ 2933, 2956, defining dower, where granted property by county, which was inalienable because held for public purpose. Van Pelt v. Parry, 218 Mo. 680, 118 SW 425.

92. By Ky. St. 1903, § 2135, denying dower in property "sold but not conveyed" before marriage. Mineral Development Co. v. Hall [Ky.] 115 SW 230.

93. Johnston v. Jickling [Iowa] 119 NW 746.

94. Husband given land by parol on condition of marriage and occupancy and improvement thereof. Condition fulfilled at his death. Harley v. Harley, 140 Wis. 282, 122 NW 761. Land taken from husband by eminent domain by fraud practiced on court. Justis v. Georgia Industrial Realty Co. [Va.] 63 SE 1084.

95. Husband's assignment of contract cannot be annulled in suit by both, though she did not join. Nortnass v. Ploneer Townsite Co., 82 Neb. 382, 117 NW 951.

96. Under Code Civ. Proc. §§ 1600, 1609. Emrich v. Emrich, 129 App. Div. 557, 113 NYS 1052. By allenee. Burton v. Mellis [N. J. Eq.] 72 A 13.

97. By Ky. St. § 2135, "unless received or disposed of by the husband in his lifetime." Hiller v. Nelson [Ky.] 118 SW 292.

§ 3. *Extinguishment, release or bar, and revival of dower.*[98] See 11 C. L. 1134 Excepting its extinguishment by the assertion of paramount rights existing potentially when it attached, such as that of a third person to exercise after the marriage an option of purchase acquired for value from the husband before the marriage,[99] or that of the person entitled upon the happening of a condition subsequent to which the husband's title was subject to re-enter,[1] or that of the sovereign to sell for future unpaid taxes,[2] or to acquire the property for public purposes by eminent domain [3] or otherwise,[4] or that given by some statutes to a purchaser at a judicial sale,[5] or from the husband of a nonresident wife [6] to take free of dower, or the effect of divorce,[7] the inchoate right of dower cannot be extinguished by any one but the person entitled thereto, not excepting the husband.[8] Even equity cannot compel a wife to release her dower except in cases of fraud or when authorized by statute,[9] though it may order the husband to deliver a deed already signed and acknowledged by the wife.[10] Dissolution of the marriage by divorce, however, not only extinguishes dower in lands previously acquired by the husband,[11] but bars its acquisition in lands acquired thereafter,[12] though a judicial separation leaves the interest of the wife unimpaired.[13] Dower inchoate, may, however, be barred or released voluntarily by the wife for valuable consideration, either by antenuptial contract with the husband [14] or by transactions during coverture, whether with the husband [15] or with third persons;[16] but it is not so released by the delivery in escrow condi-

98. Search Note: See notes in 3 C. L. 1145; 5 Id. 1045; 15 L. R. A. 542; 16 Id. 209, 776; 18 Id. 75; 25 Id. 573; 3 L. R. A. (N. S.) 971; 10 Id. 1206; 13 Id. 723; 5 Ann. Cas. 230; 7 Id. 354; 9 Id. 149.

See, also, Dower, Cent. Dig. §§ 89-175; Dec. Dig. §§ 37-53; 14 Cyc. 929-958; 10 A. & E. Enc. L. (2ed.) 200.

99. Under Ky. St. 1903, § 2135, providing "the wife shall not be endowed of land sold, but not conveyed by the husband before marriage." Mineral Development Co. v. Hall [Ky.] 115 SW 230.

1. Where granted to husband subject to condition that it would revert to grantor on husband's failure to make certain payments. Sullivan v. Sullivan, 139 Iowa, 679, 117 NW 1086.

2. Under Revision 1860, §§ 719, 737, 756, 781, 784, and § 759, as amended by Acts Extra Sess. 8th Gen. Assem. p. 33, c. 24, § 6, making taxes on realty a perpetual lien against all persons except United States and state, grantee under tax deed held to take free from dower. Lucas v. Purdy [Iowa] 120 NW 1063.

3. Wife not a necessary party to condemnation proceedings. Justis v. Georgia Industrial Realty Co. [Va.] 63 SE 1084.

4. Dedication or prescription. Benton v. St. Louis, 217 Mo. 687, 118 SW 418.

5. Under Gen. St. 1901, § 2510, denying dower in lands "sold under execution or other judicial sale." McKelvey v. McKelvey [Kan.] 99 P 238.

6. Under Gen. St. 1901, § 2510, denying dower to nonresident widow in lands conveyed by husband. McKelvey v. McKelvey [Kan.] 99 P 238.

7. See § 1, ante.

8. Lien of vendee for part payments made under husband's contract of sale held subject to widow's dower where she did not join. Villone v. Fenistein, 132 App. Div. 31, 116 NYS 384. Not barred under Gen. St. 1901, § 2510, by collusive judgment and execution sale suffered by husband (McKelvey v. McKelvey [Kan.] 99 P 238), nor by his parol gift without the conveyance required by § 2510 in case of nonresident wife (Id.), nor by his murdering her, where his antenuptial provision in lieu of dower was conditional upon her surviving him, her personal representative being allowed to enforce the contract (Logan v. Whitley, 129 App. Div. 666, 114 NYS 255).

9. Krah v. Wassmer [N. J. Eq.] 71 A 404. Signature of wife to executory contract for sale, in which she was not mentioned, insufficient under Rev. Laws 1905, § 3648, requiring her written consent. Stromme v. Rieck, 107 Minn. 177, 119 NW 948.

10. Krah v. Wassmer [N. J. Eq.] 71 A 404.

11. Where alimony was fixed by agreement, divorce being in favor of wife. Kessinger v. Schrader [Kan.] 98 P 236.

12. Decree in favor of husband. Johnston v. Jickling [Iowa] 119 NW 746. Where condemned while decree in favor of wife in force, though afterward reversed, husband's so-called dower interest held barred as wife's would have been by Hurd's St. 1908, c. 41, § 14. Chicago & N. W. R. Co. v. Garrett, 239 Ill. 297, 87 NE 1009.

13. Decree of separate maintenance in favor of wife, where no division of property made, property in question having been subsequently acquired. Killackey v. Killackey [Mich.] 16 Det. Leg. N. 73, 120 NW 680.

14. For consideration of $2,000 where estate of $25,000. Settles v. Settles [Ky.] 114 SW 303.

See Husband and Wife, § 2B.

15. Present acceptance of property in lieu of larger amount to be paid later under antenuptial contract. Stokes v. Stokes, 240 Ill. 330, 88 NE 829.

16. By waiver of bond given in lieu of dower when she signed first mortgage, in consideration of obligor's taking second mortgage and indemnifying husband.

tional upon her death of a deed in which she joined.[17] Similarily, dower consummate may be released by the widow's deed, though unassigned.[18] A widow may estop herself from claiming dower by failure to assert her rights seasonably,[19] or by conduct inconsistent with such a claim.[20] But equivocal transactions between husband and wife will be construed favorably to the retention of dower; thus, her deed to him does not release her dower in the land conveyed,[21] nor does her release of his antenuptial provision in lieu of dower necessarily bar her dower in lands which he subsequently inherits;[22] and, similarly, her acceptance from him of land, whether by gift[23] or devise,[24] or of a bequest,[25] will not be deemed a waiver of dower unless it clearly appears that such was his intention, though a contrary construction is sometimes required by statute.[26] By statute, also, the widow is sometimes held to relinquish dower by failure to elect it,[27] or by election of a distributive share;[28] and in some states election of homestead is interpreted as waiver.[29] The death of the wife has been held not to extinguish her rights when she is murdered by the husband.[30] Where, however, dower is relinquished, provisions in lieu of dower are also released.[31]

§ 4. *Liens and charges on dower.*[32]—See 11 C. L. 1135—While dower has priority over the general debts of the deceased husband,[33] it is subject to all specific liens which existed upon the land when it attached,[34] unless discharged before it becomes consummate.[35] But it it not subject to a mortgage in which the wife joined while under age.[36] By statute it is sometimes subject to the homestead rights of minor children.[37]

Druckamiller v. Coy, 42 Ind. App. 500, 85 NE 1028. By joining in a mortgage, where no surplus upon foreclosure. Glascock v. Glascock, 217 Mo. 362, 117 SW 67.

17. Though improperly delivered by holder to grantee before fulfillment of condition, and though she accepted rent from grantee. Grindle v. Grindle, 240 Ill. 143, 88 NE 473.

18. Burel v. Baker [Ark.] 116 SW 181; Beauchamp v. Bertig [Ark.] 119 SW 75; Smith v. Lamb, 87 Ark. 344, 112 SW 884.

19. By appearing in proceedings for sale after husband's death and failing to claim it. Oldham v. McElroy [Ky.] 121 SW 414. Failure to have dower assigned for twenty years after an interlocutory judgment for dower held to raise presumption of settlement or death. Port Jefferson Realty Co. v. Woodhull, 128 App. Div. 188, 112 NYS 678.

20. Acceptance of monthly payments fixed by unenforcible contract in lieu of dower. Barnes v. Klug, 129 App. Div. 192, 113 NYS 325.

21. Glascock v. Glascock, 217 Mo. 362, 117 SW 67.

22. Release of charge placed by husband in favor of wife on lands conveyed by him just before marriage. Killackey v. Killackey [Mich.] 16 Det. Leg. N. 73, 120 NW 680.

23. Equitable gift inter vivos. Cowdrey v. Cowdrey [N. J. Err. & App.] 67 A 111, rvg. 71 N. J. Eq. 353, 64 A 98.

24. Fact that land devised was very ample provision held not to show intention to require election. Scott v. Vaughn [S. C.] 65 SE 269.

25. Where annuity given till remarriage and dower thereafter, held not in lieu of dower where annuity less than dower. Schreiner v. Schreiner, 63 Misc. 601, 118 NYS 608. By Civ. Code 1895, § 4687. Falligant v. Barrow [Ga.] 65 SE 149.

26. By Rev St. § 5963, cannot take both dower and provisions of will, unless such was clear intention of husband from will. Geiger v. Bitzer, 80 Ohio St. 65, 88 NE 134.

27. Under Rev. Laws, c. 132, § 1, whereby takes statutory interest on failure to elect. Downey v. King, 201 Mass. 59, 87 NE 468.

28. By Civ. Code 1902, § 2386. Williams v. Newton, 82 S. C. 227, 64 SE 219.

29. White v. Holder [Ky.] 118 SW 995; Phillips v. Williams [Ky.] 113 SW 908.

30. Her personal representative permitted to enforce contract providing for money payment in lieu of dower, conditioned upon her surviving, where husband suicided after murder. Logan v. Whitley, 129 App. Div. 666, 114 NYS 255.

31. Acceptance of sum decreed by court granting divorce in lieu of all claims against husband's realty bars right to larger sum fixed by antenuptial contract. Long v. Barton, 236 Ill. 551, 86 NE 127, afg. 142 Ill. App. 606.

32. **Search Note:** See Dower, Cent. Dig. §§ 66-79; Dec. Dig. §§ 23-28; 14 Cyc. 915-926; 10 A. & E. Enc. L. (2ed.) 153.

33. Half interest given by Rev. St. 1899, § 2939, held not dower because expressly subject to husband's debts. Brown v. Tucker's Estate, 135 Mo. App. 598, 117 SW 96.

34. Lien for purchase money, and consequently wife not a necessary party to proceedings for specific performance, where property on being sold by vendor fails to bring enough to satisfy lien. Ochs v. Kramer, 32 Ky. L. R. 762, 107 SW 260.

35. Direction in will that all incumbrances on realty be satisfied out of personalty held to entitle widow to dower in gross value of land. Pfefferle v. Herr [N. J. Eq.] 71 A 689.

36. Eversole v. First Nat. Bank [Ky.] 118 SW 961.

37. Phillips v. Williams [Ky.] 113 SW 908.

§ 5. *Assignment of dower and money awards.*[38] See 11 C. L. 1138—Common-law jurisdiction of applications for the assignment of dower is often conferred by statute upon probate courts.[39] The rule whereby a widow is entitled to a separate assignment of dower from each parcel of land is sometimes held not to apply to the modified dower interest given by statute,[40] and the assignment of the latter is often required to include the husband's dwelling house.[41] The question whether dower shall be assigned out of lands or rents is frequently left to the discretion of the court.[42] The assignment is made from rents when the right of possession is suspended,[43] or where the property is not divisible,[44] the amount awarded being one-third of the net rentals.[45] Failure to have dower assigned for twenty years after securing an interlocutory judgment therefor has been held to raise a presumption of death or settlement.[46]

§ 6. *Remedies and procedure.*[47] See 11 C. L. 1138—Statutory remedies for possession,[48] or for damages for detention of dower,[49] must be strictly followed. Where the statute enlarges the dower interest to a fee,[50] and where the wife's survival is prevented by the husband,[51] the rights of the wife are held enforcible by her personal representative; and, conversely, the husband's personal representative may be sued at law [52] or in equity,[53] upon the husband's contract to pay money in lieu of dower, in jurisdictions where such a contract would be enforcible against the husband while living. The widow's rights and correlative remedies where dower has not been assigned are often enlarged by statute.[54] Where the widow is given dower in an equity of redemption, she is usually permitted to redeem the property after foreclosure.[55] Collateral attack may be made upon a judgment of condemnation where secured by fraud practiced on the court.[56] Dower may be recovered for an insane person by the next friend.[57]

Drains; Drugs, Druggists; Drunkenness, see latest topical index.

38. Search Note: See notes in 21 L. R. A. 180; 8 L. R. A. (N. S.) 1101; 39 A. S. R. 25; 9 Ann. Cas. 490.

See, also, Dower, Cent. Dig. §§ 176-378; Dec. Dig. §§ 54-118; 14 Cyc. 960-1016; 10 A. & E. Enc. L. (2ed.) 171.

39. By Rev. St. 1857, c. 202, § 16, as amended by Pub. Laws 1866, p. 224, c. 607. Willoch v. Willoch [R. I.] 72 A 817.

40. The "one-third in value" given by Code, § 3366, held assignable from one of several parcels. Rice v. Rice [Iowa] 119 NW 714.

41. By Code, § 3367, subject, however, to widow's preference. Rice v. Rice [Iowa] 119 NW 714.

42. By Gen. Laws 1896, c. 264, § 18. Willoch v. Willoch [R. I.] 72 A 817.

43. Where husband held title subject to title of trustee to hold for ten years and pay husband income. In re Prasser's Will, 140 Wis. 92, 121 NW 643.

44. Single house on small lot. Burton v. Mellis [N. J. Eq.] 72 A 13.

45. Computed by deducting from gross rentals the taxes and the interest on necessary repairs and permanent improvements. Burton v. Mellis [N. J. Eq.] 72 A 13.

46. In action between subsequent holders of land. Port Jefferson Realty Co. v. Woodhull, 128 App. Div. 188, 112 NYS 678.

47. Search Note: See notes in 63 L. R. A. 697; 11 Ann. Cas. 411.

See, also, Dower, Cent. Dig. §§ 176-378; Dec. Dig. §§ 54-118; 14 Cyc. 960-1016; 7 A. & E. Enc. P. & P. 148.

48. Error, under Rev. St. 1899, § 2963 (Ann. St. 1906, p. 1706), to issue writ of possession for more than the tract set off as dower. Reineman v. Larkin [Mo.] 121 SW 307.

49. Error, under Rev. St. 1899, § 2977 (Ann. St. 1906, p. 1710), to award damages against defendants personally. Reineman v. Larkin [Mo.] 121 SW 307.

50. Administrator allowed to continue equitable proceeding for partition. Rice v. Rice [Iowa] 119 NW 714.

51. By murder. Logan v. Whitley, 129 App. Div. 666, 114 NYS 255.

52. Logan v. Whitley, 129 App. Div. 666, 114 NYS 255. For each payment as it falls due. Barnes v. Klug, 129 App. Div. 192, 113 NYS 325.

53. To reserve from distribution a fund sufficient to provide for monthly payments agreed to be made during widow's life. Barnes v. Klug, 129 App. Div. 192, 113 NYS 325.

54. Right under St. 1898, § 3872, to continue with children in occupancy of land in which entitled to dower, without having dower assigned, gives legal defense to ejectment, by St 1898, § 3094. Harley v. Harley, 140 Wis. 282, 122 NW 761.

55. By Ky. St. § 2364, as "representative" of husband because entitled to surplus proceeds under § 2135. Hiller v. Nelson [Ky.] 118 SW 292.

56. Court deceived as to publicity of purpose in taking husband's land by eminent domain. Justis v. Georgia Industrial Realty Co. [Va.] 63 SE 1084.

57. Crenshaw v. Kener, 127 Ga. 742 57 SE 57.

DUELING.[58]

The scope of this topic is noted below.[59]

A duel is a combat with deadly weapons, fought according to the terms of a precedent agreement and under certain agreed or prescribed rules and has none of the elements of sudden heat and passion.[60] If there is any doubt as to whether accused intended to challenge[61] another to fight a duel with deadly weapons, the question is ordinarily for the jury.[62]

Due Process; Duplicity, see latest topical index.
Due Process of Law (defined), see 13 C. L. 849, n. 95; Id. 858, n. 33a.

DURESS.[63]

The scope of this topic is noted below.[64]

Duress implies a restraint which overcomes the will[65] of an ordinary man.[66] The condition of mind must have been superinduced by some affirmative act[67] of the other party himself, or of his agent, or must be imposed with his knowledge and taken advantage of by him for the purpose of obtaining the agreement.[68] Duress may consist of a threat to destroy[69] or retain property,[70] to injure crops,[71] to seize

58. See 3 C. L. 1147.
Search Note: See Dueling, Cent. Dig.; Dec. Dig.; 14 Cyc. 1111-1118; 10 A. & E. Enc. L. (2ed.) 311; 7 A. & E. Enc. P. & P. 232.

59. Related offenses distinguished by the absence of either preappointment or deadly weapons are assault (see Assault and Battery*) and prize fighting (see Prize Fighting*).

60. Ward v. Com. [Ky.] 116 SW 786.

61. Where accused went up to another and partially drawing his pistol, said: "God dam you, you started to draw a gun this morning; now, God dam you, shoot," it was not a challenge to fight a duel under St. 1909, § 1269 (Russell's St. § 3190). Ward v. Com. [Ky.] 116 SW 786. Evidence held insufficient to sustain a conviction of sending a challenge to fight a duel with deadly weapons. Daughtry v. State, 54 Tex. Cr. R. 394, 113 SW 14.

62. Held that under the facts there was question for jury. Ward v. Com. [Ky.] 116 SW 786.

63. See 11 C. L. 1138.
Search Note: See notes in 3 C. L. 1147; 5 Id. 1047; 11 Id. 1140; 1 L. R. A. (N. S.) 867; 2 Id. 574; 5 Id. 1179; 16 Id. 938; 30 A. S. R. 337; 94 Id. 419.
See, also, Bills and Notes, Cent. Dig. §§ 242-247; Dec. Dig. § 104; Chattel Mortgages, Cent. Dig. §§ 142, 143; Dec. Dig. § 72; 6 Cyc. 1099-1104; Contracts, Cent. Dig. §§ 431, 440; Dec. Dig. § 95; 9 Cyc. 443-453; Deeds, Cent. Dig. §§ 183-189; Dec. Dig. § 71; 13 Cyc. 584, 585; Marriage, Cent. Dig. § 21; Dec. Dig. § 35; 26 Cyc. 866, 906; Mortgages, Cent. Dig. §§ 182-185; Dec. Dig. § 79; 27 Cyc. 1123-1125; Payment, Cent. Dig. §§ 283-287; Dec. Dig. § 87; 10 A. & E. Enc. L. (2ed.) 320; 7 A. & E. Enc. P. & P. 245.

64. Treats of duress invalidating contracts. Undue influence (see Fraud and Undue Influence,* § 2), duress affecting testamentary capacity (see Wills,* § 2B), or constituting defense to crime (see Criminal Law,* § 2), the implied duress of a married woman (see Husband and Wife,* §§ 7, 8, and see Acknowledgment,* § 3, as to separate acknowledgment), are elsewhere treated, as is the recovery back of money involuntarily paid (see Implied Contracts,* § 3).

65. Roloson v. De Hart, 134 Mo. App. 633, 114 SW 1122; Kwentsky v. Sirovy [Iowa] 121 NW 27; Green v. Byers [Idaho] 101 P 79; Griffin v. Griffin, 130 Ga. 527, 61 SE 16; Fenwick Shipping Co. v. Clarke Bros. [Ga.] 65 SE 140; Van Alstine v. McAldon, 141 Ill. App. 27. A release had been read and was fully understood before it was executed. Bonney v. Bonney, 237 Ill 452, 86 NE 1048, afg. 141 Ill. App. 476. Mortgage secured by parental duress while plaintiff lived with her parents, soon after her majority, to obtain loan for her father. Lane v. Reserve Trust Co., 10 Ohio C. C. (N. S.) 512.

66. Kwentsky v. Sirovy [Iowa] 121 NW 27.

67. Mere fear of punishment is not sufficient. Roloson v. De Hart, 134 Mo. App. 633, 114 SW 1122. Payment of taxes before delinquent and without any demand or threat merely to prevent imposition of a penalty and interest was voluntary. Cincinnati, etc., R. Co. v. Hamilton County [Tenn.] 113 SW 361. A wife made certain conveyances in order to avoid possible criminal proceedings against her husband, on account of his defalcations. Bishop v. Howe, 117 NYS 996.

68. A wife assigned an insurance policy because her husband threatened suicide otherwise. Held, duress. Ely v. Hartford Life Ins. Co., 128 Ky. 799, 33 Ky. L. R. 272, 110 SW 265.

69. Insurance policies. Moore v. Putts, 110 Md. 490, 73 A 149.

70. Where captain of vessel, holding possession of property of shipper, demanded larger amount of freight than was due before delivering property and shipper paid same in order to obtain possession, held compulsory payment and shipper could recover. Clancy v. Dutton, 129 App. Div. 23, 113 NYS 124.

71. Where a person was made to sign a special contract in order to get water from a ditch company, when he was entitled to

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* Always begin with the latest article on the subject. Use the latest topical index.

goods,[72] to arrest,[73] or of an illegal demand by a person holding an official position with power to enforce the same,[74] and the guilt or innocence of the person threatened is immaterial.[75] There may be duress of goods or of the person without the display of firearms.[76] It can also result from a promise to release a prisoner from custody.[77] Where one's free will is overcome by oppression or fraudulent advantage, in time of extreme necessity or distress, the transaction is void for duress.[78] There is duress where a judgment debtor is forced into a settlement rather than answer questions under the compulsion of a referee who is acting under a void order.[79] The force used must be unlawful,[80] but imprisonment that is suffered through the execution of a threat, which was made for the purpose of forcing a guilty person to enter into a contract, may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime.[81] A threat to bring suit[82] or the instigation of a suit,[83] by one who has a legal right to sue, is not duress, neither is a threat to prosecute criminally, made to a third person.[84] Duress cannot be pleaded when a court enforces its orders by imprisonment for contempt.[85] A contract made or a judgment obtained under duress is voidable. It may be affirmed[86] and must be rescinded within a reasonable time,[87] but neither can be avoided against the rights of third persons, acquired for value and without notice.[88] A threat to refuse performance of a contract cannot be made the predicate of legal duress.[89] A party may not voluntarily act upon a contract which he has been constrained to sign, and voluntarily take the benefit of it and then avoid it for duress.[90] What elements constitute duress is a matter of law.[91] Whether these elements are present is a question of fact.[92] Courts

the water by virtue of a compliance with the necessary laws. Green v. Byers [Idaho] 101 P 79.

72. Fenwick Shipping Co. v. Clarke Bros. [Ga.] 65 SE 140.

73. Adultery. Kwentsky v. Sirovy [Iowa] 121 NW 27. Evidence held to show that payments of license fee under ordinance were made voluntarily and not because of threats or duress. Eslow v. Albion, 153 Mich. 720, 15 Det. Leg. N. 608, 117 NW 328.

74. A person paid fees, under an unconstitutional statute, for having papers filed, which, according to law, had to be filed within a stated time. Held not voluntary payment. Trower v. San Francisco, 152 Cal. 479, 92 P 1025.

75. Kwentsky v. Sirovy [Iowa] 121 NW 27.

76. Note given to avoid litigation. Callendar Sav. Bank v. Loos [Iowa] 120 NW 317.

77. Where a husband is arrested for fraud and his wife is induced to give security in excess of the amount involved in the order of arrest, in order to secure the husband's release, the excess security is void for duress. Bianchi v. Leon, 63 Misc. 73, 118 NYS 386.

78. Advantage taken of financial straits. Lappin v. Crawford [Mo.] 120 SW 605.

79. In re Stoddard, 128 App. Div. 759, 113 NYS 157.

80. Where a man, lawfully arrested on a warrant for seduction, marries the woman in order to procure his discharge, the marriage is valid. Griffin v. Griffin, 130 Ga. 527, 61 SE 16.

81. Liability of imprisonment must be used by way of threat. Kwentsky v. Sirovy [Iowa] 121 NW 27.

82. Money paid voluntarily in order to avoid litigation. Monroe Nat. Bank v. Catlin [Conn.] 73 A 3. A discharged agent threatened to sue on his contract. Walla Walla Fire Ins. Co. v. Spencer, 52 Wash. 369, 100 P 741; Van Alstine v. McAldon, 141 Ill. App. 27.

83. Suit brought to contest a will. Wright v. Bayless [Ky.] 118 SW 918.

84. A county judge threatened to instigate contempt proceedings. Hessig v. Hessig's Guardian [Ky.] 115 SW 748.

85. Supersedeas bond executed in order to procure release from custody. Hand v. Haughland, 87 Ark. 105, 112 SW 184.

86. Kwentsky v. Sirovy [Iowa] 121 NW 27.

87. Contract held to have been ratified by laches, because what was paid under the same was retained. Kwentsky v. Sirovy [Iowa] 121 NW 27.

88. Kwentsky v. Sirovy [Iowa] 121 NW 27.

89. Where one voluntarily pays the market price for goods, he cannot recover the difference between that price and the price to deliver the same goods under an alleged contract, on the ground that said payment was compulsory. Standard Box Co. v. Mutual Biscuit Co. [Cal. App.] 103 P 938.

90. But things done in apparent recognition of the contract, while the pressure of the hardship which overcomes the mind continues, will not amount to an affirmance. St. Louis & S. F. R. Co. v. Gorman [Kan.] 100 P 647. In order to constitute a confirmation, the acts must indicate an intention to condone the wrong and a purpose to abide the consequences. Id.

91, 92. Atwood v. Jarrett, 81 Conn. 532, 71 A 569.

of equity require clear, cogent, and convincing evidence in cases of duress.[93] Duress is an affirmative defense and must be specially pleaded.[94] The facts tending to show the duress must be alleged.[95] It is permissible to introduce evidence showing duress though a contract is under seal.[96] A judgment procured by duress may be collaterally attacked.[97] The fraud or duress which will authorize the setting aside of a decree or judgment must be such as really prevented the unsuccessful party from having a trial.[98] Duress is a personal matter, and rights arising therefrom are not assignable.[99]

Dying Declarations, see latest topical index.

EASEMENTS.

The scope of this topic is noted below.[1]

§ 1. Nature and Creation, 1376. Easements Resting in Grant, Covenant or Agreements, 1378. A Way of Necessity, 1378. Creation by Prescription, 1379. Creation by Estoppel, 1380. Natural Easements, 1380. Negative Easements, 1380. The Condemnation of Lands for Private Ways, 1380.

§ 2. Location, Maintenance, and Extent of Right, 1380.

§ 3. Transfer and Assignment, 1382.

§ 4. Extinguishment and Revival, 1382.

§ 5. Interference with Easements and Remedies and Procedure in Respect Thereto, 1384.

§ 1. *Nature and creation.*[2]—See 11 C. L. 1140—An easement is a right in one person to do certain acts on another's land or to compel such other to refrain from doing certain acts thereon.[3] An affirmative easement is said to be one which entitles the owner of a dominant estate to make active use of the servient tenement, or to do some act which, in the absence of the easement, would be a nuisance or a tres-

93. A general statement that a deed of trust and note were procured by threats is not sufficient. Glascock v. Glascock, 217 Mo. 362, 117 SW 67.

94. General denial insufficient. Timson v. Manufacturers' Coal & Coke Co., 220 Mo. 580, 119 SW 565. Where a complaint against two defendants alleges an act was procured by duress, it is necessary to allege a conspiracy between the two in order to charge them both. Welcke v. Trageser, 131 App. Div. 737, 116 NYS 161.

95. Mere conclusions not sufficient. Roland v. Roland, 131 Ga. 579, 62 SE 1042.

96. Moore v. Putts, 110 Md. 490, 73 A 149.

97. Cannot be attacked if the fraud was inherent in the cause of action. Kwentsky v. Sirovy [Iowa] 121 NW 27.

98. Exceptions to general rule where there was no adverse decision of the issue in the case. Kwentsky v. Sirovy [Iowa] 121 NW 27.

Evidence held insufficient. Bishop v. Howe, 117 NYS 996; Van Alstine v. McAldon, 141 Ill. App. 27; Bonney v. Bonney, 237 Ill. 452, 86 NE 1048.

Evidence held sufficient. Burke v. Fay, 128 Mo. App. 690, 107 SW 408.

99. Schmidt v. Gaukler [Mich.] 16 Det. Leg. N. 97, 120 NW 746.

1. Treats of the general law of easements. Excludes public easements (see Dedication;* Highways and Streets;* Navigable Waters *), mutual rights in boundary fences (see Fences *), and party walls (see Party Walls *), easements of drainage (see Waters and Water Supply,* § 9), of irrigation (see Waters and Water Supply,* § 13), riparian rights (see Waters and Water Supply;* Riparian Owners *), and lateral and subjacent support (see Adjoining Owners *), and easements affecting particular kinds of property (see Mines and Minerals,* § 6; Waters and Water Supply,* and like topics).

2. Search Note: See notes in 7 C. L. 1204, 1205; 20 L. R. A. 631; 22 Id. 536; 60 Id. 496; 67 Id. 119; 2 L. R. A. (N. S.) 832, 976, 983; 3 Id. 461, 1082, 1148; 4 Id. 872; 8 Id. 327; 12 Id. 482; 13 Id. 333, 990; 14 Id. 878; 21 A. S. R. 593; 34 Id. 708; 41 Id. 323; 95 Id. 318; 3 Ann. Cas. 643.

See, also, Easements, Cent. Dig. §§ 1-94; Dec. Dig. §§ 1-37; 14 Cyc. 1139-1200; 10 A. & E. Enc. L. (2ed.) 397, 398, 409; 19 Id. 112; 23 Id. 2, 186; 7 A. & E. Enc. P. & P. 256; 22 Id. 1180.

3. German Savings & Loan Soc. v. Gordon [Or.] 102 P 736. Easement is a right without profit, created by grant or prescription which owner of one estate may exercise in or over estate of another for benefit of former. Yeager v. Tuning, 79 Ohio St. 121, 86 NE 657.

Examples: Right of owner of land to erect and maintain line of telephone poles over land of another for benefit of former is an easement. Yeager v. Tuning, 79 Ohio St. 121, 86 NE 657. Street railway franchise in a street to be improved is a mere easement. In re City of Seattle [Wash.] 103 P 807. Under constitution, railway right of way is a mere easement. St. Louis, etc., R. Co. v. Cape Girardeau Bell Tel. Co., 134 Mo. App. 406, 114 SW 586. Right to use portion of land included in land granted, free of rent so long as such portion should be used for running machinery thereon, is a personal right. Field v. Morris [Ark.] 114 SW 206.

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pass.[4] A private easement implies, as an essential quality, a dominant tenement to which the right belongs and a servient tenement upon which the obligation rests.[5] If an easement can fairly be held to be appurtenant, it will not be held to be in gross.[6] The owner of the entire tract may rearrange the quality of any possible servitudes,[7] and where he so uses part of it as to create a seeming servitude in favor of another part, such servitude constitutes a quasi easement.[8] An easement works no dispossession of the owner,[9] although it is a property right.[10] An easement may arise by covenant as well as by grant,[11] but it cannot be created by parol license, though the licensee has relied thereon to his expense,[12] and some easements can be acquired only by grant, express or implied, or by prescription presupposing a grant.[13] As against adjacent owners, the doctrine of easement in light, air and view is not recognized.[14] An easement is distinguished from a mere license in that the former is an interest in land while the latter is not.[15] A grant of an easement is distinguished from a grant of land in that in the latter the land itself, as distinguished from a mere interest therein, is granted.[16]

4. Stipulation in grant that strip of land shall "forever remain vacant as an easement between property of grantor and grantee" held affirmative easement in light of use to which put. Bernero v. McFarland Real Estate Co., 134 Mo. App. 290, 114 SW 531.

5. Covenant in deed to maintain railway depot being for benefit of public, there was no dominant tenement to which right belonged, and hence no easement was created. Maryland & P. R. Co. v. Silver, 110 Md. 510, 73 A 297. Where a right of way has been granted by an instrument in writing, fact that dominant tenement has not been acquired at date of instrument cannot, after it has been actually acquired, prevent the servitude becoming a legal accessory to the dominant tenement, provided servitude was so used as to give reasonable notice of burden to any person in whom property might subsequently become vested. Kalinowski v. Jacobowski, 52 Wash. 359, 100 P 852.

6. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272. An easement of way is appurtenant if dominant estate is clearly indicated and easement is beneficial to such estate. Id.

7. Oliver v. Burnett [Cal. App.] 102 P 223. In such case there can be no dominant and servient tenement between different portions. Id.

8. German Savings & Loan Soc. v. Gordon [Or.] 102 P 736.

9. Grant of easement in water not a demise of the tract on which water flowed. Country Homes Land Co. v. De Gray, 71 N. J. Eq. 283, 71 A 340. Grantor of passway to enable grantee to pass over his lands does not thereby lose his rights to use such passway, but has free use of same so long as he does not interfere with grantee's rights. Rice v. Ford [Ky.] 120 SW 288. Where owner places stairs and walk on property of which he retains title, his authority to use them is not an easement within strict meaning of word. German Savings & Loan Soc. v. Gordon [Or.] 102 P 736.

10. Easement of right of way is property within protection of Const. pt. 1, art. 10, providing for compensation for taking property. Durgin v. Minot [Mass.] 89 NE 144. Easement is "property" within Code Civ. Proc. § 3252, providing that when action is brought to compel determination of claim to real property, plaintiff may recover certain percentages, in addition to costs, to be estimated upon value of the property. Furniss v. Fogarty, 63 Misc. 527, 117 NYS 385. Is property within constitutional limitations with respect to taking private property for public use. Smyth v. Brooklyn Union El. R. Co., 193 N. Y. 335, 85 NE 1100.

11. Easement of light and air may be created by covenant. Bryan v. Grosse [Cal.] 99 P 499. May be created by contract. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272.

12. Yeager v. Tuning, 79 Ohio St. 121, 86 NE 657. Parol agreement by tenants in common not to use their lands for grazing and watering of sheep creates no servitude on land. Long v. Cramer Meat & Packing Co. [Cal.] 101 P 297.

13. Right to back up water on lands of another. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426.

14. Railway company had right to place viaduct over street, and such action does not interfere with rights of adjacent owners. Crofford v. Atlanta, B. & A. R. Co. [Ala.] 48 S 366.

15. Belzoni Oil Co. v. Yazoo & M. V. R. Co. [Miss.] 47 S 468. Agreement to give railway company needed ground to lay sidetrack, giving company exclusive possession so long as agreement shall last, company to own tracks and ties and to have right to remove same on 30 days' notice, confers a mere license and not an easement. Id.

16. Held grant of land: Grant with mere possible right of reverter or re-entry. Lyford v. Laconia [N. H.] 72 A 1085. Grant of "use" of land. Blauvelt v. Passaic Water Co. [N. J. Eq.] 72 A 1091. Deed discharging and forever releasing railroad company from all claims whatsoever for land when used for railroad purposes and no other. Sherman v. Sherman [S. D.] 122 NW 439. Conveyance of a strip of land itself in explicit terms with restriction that it should be used for private way. Aumiller v. Desh, 51 Wash. 520, 99 P 583. Grant of land bounded by alley held not to indicate intention to retain fee of bed of alley. Saccone v. West End Trust Co. [Pa.] 73 A 971.

Held grant of easement: Mere easement,

Easements resting in grant, covenant or agreements. See 11 C. L. 1143—Whether an easement is created by a grant, covenant or agreement will be determined with reference to the purposes of such grant, covenant or agreement [17] and in the light of the surrounding circumstances,[18] and, in case of ambiguity, the practical construction adopted by the parties,[19] and so, also, in such case, the grant will be construed most favorably to the grantee,[20] but there must, in any case, be a meeting of the minds of the parties.[21] Whether an easement is created by implication must be determined with reference to circumstances at the time of the grant,[22] but where there is a grant of land with full covenants of warranty and without express reservation of easement, there can be no reservation by implication unless the easement is strictly one of necessity.[23] Where words sufficient to create an estate of inheritance are used, a perpetual easement is created.[24] A grant of land, with all "easements" appurtenant thereto, will not create an easement where none existed prior to such grant.[25]

A way of necessity See 11 C. L. 1144 is created by implication from a grant [26] of lands accessible only over lands belonging to the grantor,[27] or of lands the enjoyment

and not land itself, is conveyed by agreement giving option to purchase right of way and to permanently retain it, provided that grantor should convey another permanent right of way with reservation to lay pipe lines. Buffalo City Mills v. Toadvine Lumber Co., 150 N. C. 114, 63 SE 678.

17. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272. Acceptance of deed to certain lands with restriction that no fence should be built thereon, east of a certain fence then existing, for period of twenty-five years, created an enforcible easement for benefit of remaining land. Beck v. Heckman [Iowa] 118 NW 510. Where adjacent owners orally agreed to build a two-story building with common hallway, such agreement did not constitute an easement by grant. Binder v. Weinberg [Miss.] 48 S 1013. Reservation of roadway in deed held to create easement. Pitcairn v. Harkness [Cal. App.] 101 P 809. Easement of way held to be created by agreement under seal for valuable consideration. Kalinowski v. Jacobowski, 52 Wash. 359, 100 P 852.

18. Easement of way given in deed construed. McWilliams v. McNamara, 81 Conn. 310, 70 A 1043. Agreement of grantees to build switch track to be used in common with grantees by all owners of lots facing a certain street construed with reference to fact that land was used for lumber yards, and that track was to be used as outlet for business, created easement for benefit of all lots. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272.

19. D. M. Goodwillie Co. v. Com. Elec. Co., 241, Ill. 42, 89 NE 272.

20. Where writing indicates evident intention to grant easement, but its language is ambiguous as to nature or extent, it should be given such a meaning as would be most favorable to claimant of easement. Frisbie v. Bigham Masonic Lodge No. 256 [Ky.] 118 SW 359.

21. Where one supposed he was granting passway for foot passengers and the other supposed he was obtaining passway for vehicles, horses and foot passengers, there was no contract. Allen v. Stailey [Ky.] 119 SW 755.

22. Intent of parties must be gathered from nature of transaction, situation of parties and state of thing granted. Talbert v. Mason, 136 Iowa, 373, 113 NW 918. On conveyance of one of two parcels of land owned by same person, there was implied reservation of easement in driveway between the two parcels, such driveway having been used by owner during continuity of possession, though it could have no legal existence apart from generai ownership. Teachout v. Duffus [Iowa] 119 NW 983.

23. Cherry v. Brizzolara [Ark.] 116 SW 668; Dabney v. Child [Miss.] 48 S 897.

24. Under Hurd's Rev. St. 1908, p. 491, c. 30, § 13, an agreement giving an easement "forever" creates perpetual easement. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272.

25. Binder v. Weinberg [Miss.] 48 S 1013.

26. Is based on implied grant. McIlquham v. Anthony Wilkinson Live Stock Co. [Wyo.] 104 P 20. Way of necessity being created at time of grant, hence, where way granted to lessee was afterwards extinguished by eminent domain, he was not entitled to way of necessity. Cornell-Andrews Smelting Co. v. Boston & P. R. Co., 202 Mass. 585, 89 NE 118.

27. Where owner leased house to tenant and knew that only means of access was by means of customary ways. Commonwealth v. Burford, 38 Pa. Super. Ct. 201, afd. [Pa.] 73 A 1064. Where portion of land surrounded by other lands of grantor is leased, a right of way of necessity attaches, unless the circumstances negative the implication. Tutwiler Coal, Coke & Iron Co. v. Tuvin [Ala.] 48 S 79. Owners of land adjacent to point on lake laid out in commons, parks and streets, including a triangular tract lying between point and lots, who had also acquired land on point, had thereby acquired easement of passage over triangular piece. Morse v. Swanson, 129 App. Div. 835, 114 NYS 876.

Pleading: In action to establish way of necessity, allegation that plaintiff has no access to highway is necessary. McIlquham v. Anthony Wilkinson Live Stock Co. [Wyo.] 104 P 20.

of which necessitates the use of grantor's property.[28] Whether a particular grant implies a way of necessity must be determined in the light of the circumstances attending the grant.[29] As a general rule no way of necessity arises where the grantee already has a way to reach the land,[30] even though the first way is held by sufferance,[31] but sometimes a new way is allowed on account of the inadequacy of the existing way.[32] A way of necessity cannot be had over the land of a stranger.[33]

Creation by prescription. See 11 C. L. 1145—As in case of adverse possession in general,[34] in order to give rise to a prescriptive easement the use[35] must be adverse,[36] open,[37] exclusive,[38] and continuous,[39] under claim of right,[40] with the knowledge of the owner[41] for the statutory or prescriptive period.[42] An easement cannot be acquired by permissive use[43] or under a license,[44] and, to make up the required period,

28. Owner of south half of flat building had an easement of beneficial use of heating plant installed on north half after trust deeds on the two parts had been executed, plant being necessary to enjoyment of both halves. Foote v. Yarlott, 238 Ill. 54, 87 NE 62. Lot owner has no right as of necessity to lay sewer pipe from lot to pipes on his own lots across intervening property where his lot is equipped with cesspool not shown to be inadequate. Flitcraft v. Sylvan Beach Resort Co. [Mich.] 16 Det. Leg. N. 238, 121 NW 278.

29. Whether tenant had easement of way over lands of landlord. Tutwiler Coal, Coke & Iron Co. v. Tuvin [Ala.] 48 S 79. Evidence held not to show facts giving rise to way of necessity. Dabney v. Child [Miss.] 48 S 897.

30. No way of necessity to reach the public highway arises where the grantee already has access thereto. McIlquham v. Anthony Wilkinson Live Stock Co. [Wyo.] 104 P 20.

31. Dabney v. Child [Miss.] 48 S 897.

32. In proceedings to establish private road, evidence held to show that way proposed was one of necessity, although petitioner had access to public road in another and less convenient direction. Fitzmaurice v. Turney, 214 Mo. 610, 114 SW 504.

33. McBurney v. Glenmary Coal & Coke Co. [Tenn.] 118 SW 694. No way of necessity will be granted over lands of another for purpose of allowing stock to gain access to uninclosed government lands for grazing purposes. McIlquham v. Anthony Wilkinson Live Stock Co. [Wyo.] 104 P 20.

34. See Adverse Possession.

35. That private passageway was closed at both ends by gates does not negative claim of easement by prescription, gates not interfering with use of passageway. Smith v. Roath, 238 Ill. 247, 87 NE 414. In order to establish a **right of way** by prescription, the user must have been in the same place and within definite limits. Sassman v. Collins [Tex. Civ. App.] 115 SW 337. Where there had never been a contiguous, well-defined track across lot used in passage to another lot to get to it for purpose of cultivation, such line of travel had varied but slightly, and easement existed. Nellis v. Countryman, 63 Misc. 564, 118 NYS 596.

36. Stewart v. Andrews, 239 Ill. 186, 87 NE 864. Occupation of passageway by maintenance of flower stand originating in permission subject to existing right of passage is not adverse so as to serve as foundation for acquirement of prescriptive right to maintain obstruction. Flagg v. Phillips, 201 Mass. 216, 87 NE 598.

37. Silva v. Hawn [Cal. App.] 102 P 952.

38. Where owners of lots to which easement to use of switchtrack was appurtenant used track as it was constructed for more than 20 years, a showing that some of lots were in possession of tenants did not defeat the owners' prescriptive rights. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272. Adverse possession of alleys owned in common, to be effective by one against the other, must be open, unequivocal, continuous and equivalent to an ouster of plaintiff, and apparent to him that such was the purpose and incompatible with possession held in common with plaintiff. Keughes v. Galusha Stove Co., 133 App. Div. 814, 118 NYS 109. **Use in common** with others is not sufficient to create prescriptive right, however long continued. Sassman v. Collins [Tex. Civ. App.] 115 SW 337. Use of way is not deemed adverse where way is also used by owner of land. Id.

39. Rio Grande W. R. Co. v. Salt Lake Inv. Co. [Utah] 101 P 586; Pitser v. McCreery [Ind.] 89 NE 317.

Evidence held not to show uninterrupted use of passageway between two houses. Mullen v. Clark [Mass.] 89 NE 112.

40. Intention to claim ownership under prescriptive right requires some visible act evidencing such intention. Silva v. Hawn [Cal. App.] 102 P 952.

41. To establish an easement by prescription, the right must have been asserted under claim of title with the knowledge and acquiescence of the owner of the land. Irrigation ditch. Silva v. Hawn [Cal. App.] 102 P 952. When use is not secret or clandestine, but open, visible and notorious, **presumption of knowledge** follows. Id.

42. Twenty years. Rio Grande W. R. Co. v. Salt Lake Inv. Co. [Utah] 101 P 586; Pitser v. McCreery [Ind.] 89 NE 317; Mullen v. Clark [Mass.] 89 NE 112; Thomas v. Metz, 236 Ill. 86, 86 NE 184; Stewart v. Andrews, 239 Ill. 186, 87 NE 864. Easement in alley held acquired by 20 years' user. Thomas v. Metz, 236 Ill. 86, 86 NE 184.

43. Stewart v. Andrews, 239 Ill. 186, 87 NE 864.

Evidence held to show that use of alley for delivering coal was permissive merely, and created no easement. Stewart v. Andrews, 239 Ill. 186, 87 NE 864.

44. Use of roadway under naked license. Bone v. James, 82 Neb. 442, 118 NW 83.

a period of permissive use cannot be tacked to a period of hostile use,[45] but where the use has continued through a long period of years, only slight evidence is required to show that it was enjoyed under a claim of right,[46] and in such case the burden is upon the owner of the land to show that the use was merely permissive.[47] A right by prescription can only arise where a valid grant could have been made in the first instance.[48]

*Creation by estoppel.*See 11 C. L. 1147—Where land is sold with reference to a plat or map showing streets, an easement may arise by estoppel,[49] and so, also, where a deed specifically recognizes the existence of an easement.[50]

Natural easements See 11 C. L. 1147 of drainage[51] and of lateral and subjacent support[52] are treated elsewhere.

*Negative easements.*See 11 C. L. 1147—A negative easement is a right in the owner of a dominant tenement to restrict owner of the servient tenement in respect of the tenement in the exercise of general and natural rights of property.[53]

*The condemnation of lands for private ways.*See 11 C. L. 1147—Statutes may authorize the opening of ways in order to afford private persons access to public highways.[54]

§ 2. *Location, maintenance, and extent of right.*[55] *Location.*See 11 C. L. 1147 —The grantor has in the first instance the privilege of locating a way of necessity,

45. Claim of right of way, based on fact that complainant had used way for 30 years without objection, but where he did not claim under express grant and there was no proof that he had asserted adverse claim until shortly before it was closed, and where land had been in possession of tenants, there was no easement by prescription. McKinney v. Duncan [Tenn.] 118 SW 683. Way by prescription cannot be obtained by one who for part of time is tenant of owner of land, and the period of such **tenancy** must be excluded from computation of time. Sassman v. Collins [Tex. Civ. App.] 115 SW 337.

46. 25 or 30 years' use without objection sufficient. Stewart v. Brumley [Ky.] 119 SW 798. Passageway used for 30 years. Vance v. Adams [Ky.] 112 SW 927.

47. Vance v. Adams [Ky.] 112 SW 927. Evidence insufficient to show mere permissive use. Stewart v. Brumley [Ky.] 119 SW 798.

48. In order to establish prescriptive right, complainant must show that during the 20 years he used road, owners of land were capable of contracting and granting the easement, that they had the estate in the land which he claims to have acquired, and that his use of road was under claim of right in himself and adverse to true owners. McKinney v. Duncan [Tenn.] 118 SW 683.

49. Grant of land divided into lots with street running through sold with reference to such division carries easement of passage in such street for entire distance, by estoppel. Downey v. Hood [Mass.] 89 NE 24. Grantor who describes land as bounded by street or way not expressly defined in deed but shown on plat referred to, as laid out over his land, is estopped to deny grantee's right to use of way as shown on plat. Schreck v. Blun, 131 Ga. 489, 62 SE 705. Where owner has dedicated portion of his property to widening of adjoining street and then conveys property abutting on such street and restricted grantees in use of property, reserving five feet for courtyards, each of owners acquires easement appurtenant to his property. Batchelor v. Hinkle, 132 App. Div. 620, 117 NYS 542. Where one lays out tract of land owned by him into lots and makes plan thereof showing streets, and sells according to such plan lots as bounding on such street without limitation, he irrevocably devotes portions marked as streets to such use. Petitpierre v. Maguire [Cal.] 100 P 690.

50. Deed specifically describing right of way in rear of tract sold and to alley held distinct assertion of existence of alley so as to estop grantor from asserting that there was no alley. Talbert v. Mason, 136 Iowa, 373, 113 NW 918.

51. See Waters and Water Supply, § 9.

52. See Adjoining Owners.

53. Berners v. McFarland Real Estate Co., 134 Mo. App. 290, 114 SW 531.

54. Rev. St. 1899, § 9460 (Ann. St. 1906, p. 4345). Fitzmaurice v. Turney, 214 Mo. 610, 114 SW 504.

Procedure: Averment in **petition** that petitioner's father had reserved strip did not show that way sought was not one of necessity where such reserved road did not reach highway unless extended through defendant's land. Fitzmaurice v. Turney, 214 Mo. 610, 114 SW 504. Where defendant was a foreign railway company but had road, depot, and agent in charge within county, **service** on agent was sufficient under Rev. St. 1899, § 9460. Id. County court need not wait until damages have been actually paid by petitioner before rendering **judgment** establishing private road, under Rev. St. 1899, § 9462, though such judgment cannot be enforced until damages are paid. Id. Where judgment referred to description in petition and report of commissioners which were part of record, failure to give description did not invalidate it. Id.

55. **Search Note:** See notes in 15 L. R. A. 93; 2 L. R. A. (N. S.) 832; 3 Id. 510; 5 Id. 851; 15 Id. 292, 992; 1 Ann. Cas. 681; 7 Id. 853.

See, also, Easements, Cent. Dig. §§ 61, 62, 95-120; Dec. Dig. §§ 38-55; 14 Cyc. 1200-1211; 10 A. & E. Enc. L. (2ed.) 428.

but if he fails to do so within a reasonable time the grantee may exercise the right.[56] If neither designate it, but a way is used by common consent, such use locates the way,[57] and it cannot thereafter be changed without the consent of both parties.[58] Where the location is contested,[59] or is not fixed by the grantee within a reasonable time,[60] equity will take jurisdiction to locate it. Where the way first assigned is extinguished, the grantee cannot compel the assignment of another way.[61]

Maintenance.[See 11 C. L. 1147]—Where the intention of the parties is clear, equity will enforce agreements creating easements.[62]

Extent of use.[See 11 C. L. 1146]—The extent[63] and use to which an easement may be put depend upon the purpose for which it was created.[64] The owner of the servient estate retains the right to use it in any manner that does not interfere with the easement,[65] and the grantee of the easement does not acquire the right to use the servient estate without limitation,[66] nor can he place an additional servitude

56. Tutwiler Coal, Coke & Iron Co. v. Tuvin [Ala.] 48 S 79. Where complaint alleged that right of way retained in conveyance to be located by grantee within reasonable time had not been located for three years, that defendants refused to join in location, that before suing plaintiff had already located way and now sued for confirmation, stated good cause of action. Davidson v. Ellis, 9 Cal. App. 145, 98 P 254.

57. Tutwiler Coal, Coke & Iron Co. v. Tuvin [Ala.] 48 S 79.

58. Where easement granted in general terms without definite location has once been exercised in fixed and definite course with consent of both parties, it cannot be changed at grantee's pleasure. Rhoades v. Baines [Wash.] 102 P 884. Location by user of passageway within limits prescribed by lease and acquiescence therein by lessor operated as an assignment of a way from which without lessor's consent there could be no departure. Cornell-Andrew Smelting Co. v. Boston & P. R. Co., 202 Mass. 585, 89 NE 118. Where passageway has been acquired by prescription, owner of land cannot alter same without consent of beneficiary, even though better one provided. Vance v. Adams [Ky.] 112 SW 927. It is only **when way is obstructed by owner of servient estate** that owner of dominant estate may depart from located way and pass over other portions of the land. Cornell-Andrews Smelting Co. v. Boston & P. R. Co., 202 Mass. 585, 89 NE 118.

59. Owner of either estate may procure decree affirmatively fixing the right including width where location of granted right of way is contested. Davidson v. Ellis, 9 Cal. App. 145, 98 P 254. Where land was conveyed together with right of way "north to" a street, and there were buildings which prevented a way due north but did permit one in a northerly direction, grantee was entitled to a way in a northerly direction only, but not to one due north. Smith v. Duncan [Utah] 99 P 673.

60. Davidson v. Ellis, 9 Cal. App. 145, 98 P 254.

61. Where covenant in lease assigning passageway provided for assignment of equally convenient ways in alternative which were then in existence, lessee could not compel assignment of another way, where way first assigned was extinguished. Cornell-Andrews Smelting Co. v. Boston & P. R. Co., 202 Mass. 585, 89 NE 118.

62. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272.

63. Evidence held to sustain finding as to rights of parties to easement in gangway. McElroy v. McCarville [R. I.] 71 A 646. If alley be actually laid out and opened, and is appurtenant to properties abutting on it, call for alley will carry title to center line in absence of expressed intention of grantor to the contrary. Oliver v. Ormsby [Pa.] 73 A 973. No evidence to show that grantor intended to except alley. Id. Grantee who takes land described as bounded by street or way as shown on plat has a right to use entire way, notwithstanding that at time of grant grantor maintained gate thereon. Schreck v. Blun, 131 Ga. 489, 62 SE 705. Where streets abutting plaintiff's property, bought with reference to grantor's map and through which he has access to public highway, were not interfered with, injunction will not lie as to other streets. Foerster v. Ellers, 113 NYS 480.

64. In construing nature of an easement, circumstances may be considered bearing upon use for which intended. Bernero v. McFarland Real Estate Co., 134 Mo. App. 290, 114 SW 531. Although extent of right is fixed by character of user in which it originated, where dam was constructed pursuant to statute for benefit of public, easement is not limited to that purpose as to owners of submerged lands. Simmons v. Munch, 107 Minn. 370, 120 NW 373. By terms of deed grantee held to be authorized to lay more than one pipe line for gas over strip granted, if desired. Winnett v. Carnegie Natural Gas Co., 37 Pa. Super. Ct. 204.

65. Limitation in grant that alley should not be built over to greater depth than that at time of conveyance not binding. Duross v. Singer [Pa.] 73 A 951. Alley may be built over to greater depth than that provided for by deed where it does not interfere with passage. Id.

66. Where easement in land is granted in general terms so that part of land over which it is to be exercised cannot be definitely ascertained, grantee does not acquire right to use servient estate without limitation as to place or mode in which easement is to be enjoyed. Rhoades v. Barnes [Wash.] 102 P 884. Pipe lines for oil can only be laid under contract as actually necessary. Brookshire Oil Co. v. Casmalia Ranch Oil & Development Co. [Cal.] 103 P 927. Servitude created by grant must correspond to the

thereon.[67] A prescriptive easement is limited to the use which brought the prescriptive right into existence.[68] Where an easement is made appurtenant to more than one property, neither of the owners has a right to alter its character so as to impose an increased servitude.[69] A way of necessity continues only so long as the necessity exists,[70] and includes a right of access in favor of those who visit the owner of the easement at his invitation.[71]

§ 3. *Transfer and assignment.*[72] See 11 C. L. 1149—A conveyance of property carries with it all easements appurtenant thereto,[73] but whether or not a quasi easement passes by implied grant with quasi dominant tenement depends upon whether such servitude is reasonably necessary to the enjoyment of property conveyed.[74] An invitation of the holder of a way of necessity to others to visit him is not an assignment of the easement.[75]

§ 4. *Extinguishment and revival.*[76] See 11 C. L. 1149—An easement may be extinguished by the exercise of the power of eminent domain,[77] by adverse possession,[78] or may be lost by estoppel,[79] or a change of the character and relation of the estates.[80] A servitude created by deed cannot be extinguished by a parol agreement between the owners of the dominant and servient tenements.[81]

benefits or burdens existing at the time of the transfer. Oliver v. Burnett [Cal. App.] 102 P 223.

67. Erection of telephone poles and wires by telephone company through consent of one of two railroad companies that used easement of way in common did not constitute additional servitude upon easement of nonconsenting company. St. Louis, etc., R. Co. v. Cape Girardeau Bell Tel. Co., 134 Mo. App. 406, 114 SW 586. Tenant having right of way by necessity cannot put such way to a use that would put additional servitude upon servient estate, but it may be used for purposes that were in reasonable contemplation of parties. Tutwiler Coal, Coke & Iron Co. v. Tuvin [Ala.] 48 S 79. Where easement was in switch track used to haul lumber, was used by owner of one of dominant estates to haul coal for generating electricity, additional burden was placed upon servient estate. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272.

68. Smith v. Gloucester, 201 Mass. 329, 87 NE 626.

69. Construction of hotel fire escape so as to extend into alley was without legal warrant, since interfering with use of alley by adjoining owners. Gebhart v. Graves, 36 Pa. Super. Ct. 228.

70. Tutwiler Coal, Coke & Iron Co. v. Tuvin [Ala.] 48 S 79.

71. Bill collector had right to enter at tenant's invitation. Tutwiler Coal, Coke & Iron Co. v. Tuvin [Ala.] 48 S 79.

72. Search Note: See notes in 14 L. R. A. 300, 333; 6 L. R. A. (N. S.) 410; 8 Id. 418.

See, also, Easements, Cent. Dig. §§ 59-69; Dec. Dig. §§ 21-24; 14 Cyc. 1184, 1185, 1190; 10 A. & E. Enc. L. (2ed.) 400, 409, 418; 29 Id. 548.

73. Transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of person whose estate is transferred in same manner, as such property was used by person whose estate is transferred. Tarpey v. Lynch [Cal.] 101 P 10. Where in agreement for sale of lots vendor agreed to convey same with all improvements, an express covenant for perpetual right of way over 20-foot strip did not negative conveyance of easement in cement sidewalk as appurtenant to lots. Rollo v. Nelson, 34 Utah, 116, 96 P 263. Description in deed conveying property extending to middle of unopened street, thence along middle line thereof, gave to grantee an easement in the other half of the street. Clymer v. Roberts, 220 Pa. 162, 69 A 548. Easement of light, air, and access passes to grantee of land abutting on public street, though grantor attempts to reserve right of action for their injury. Anderson v. New York & H. R. R. Co., 132 App. Div. 183, 116 NYS 954.

74. Right of passage held to be quasi-easement and to pass by grant. German Savings & Loan Socfl v. Gordon [Or.] 103 P 736.

75. Tutwiler Coal, Coke & Iron Co. v. Tuvin [Ala.] 48 S 79.

76. Search Note: See notes in 18 L. R. A. 535; 1 L. R. A. (N. S.) 565; 14 A. S. R. 278.

See, also, Easements, Cent. Dig. §§ 70-87; Dec. Dig. §§ 25-34; 14 Cyc. 1185-1196; 10 A. & E. Enc. L. (2ed.) 432.

77. Where street grading was raised so as to cut off passway, such easement was extinguished by eminent domain. Cornell-Andrews Smelting Co. v. Boston & P. R. Co., 202 Mass. 585, 89 NE 118.

78. Where owner of lot adjoining alley had held adverse possession to part of it for 20 years by projection of house into alley, easement of other lot owners was to that extent extinguished. Rupprecht v. St. Mary's Church Soc., 131 App. Div. 564, 115 NYS 926.

79. Where parties who had easement of passageway saw owner of land close up road and put valuable permanent improvements where road was laid, but made no protest and failed to bring action for three years. Trimble v. King [Ky.] 114 SW 317. Where abutting property owner consented to construction of elevated railroad structure which interfered with his easement of light, air, etc. Smyth v. Brooklyn Union El. R. Co., 193 N. Y. 336, 85 NE 1100.

80. Easement granted to give ingress and

*Abandonment.*See 11 C. L. 1150—An easement may be lost by abandonment,[82] but the abandonment must be evidenced by unequivocal acts showing clearly such purpose.[83] Mere nonuser of an easement acquired by grant will not extinguish it however long continued,[84] but it may be evidence of abandonment,[85] and if coupled with adverse enjoyment by another person nonuser for twenty years will extinguish the easement.[86] Questions of adverse possession and abandonment are for the jury.[87] The burden is on owner of servient estate to show abandonment.[88]

*Merger.*See 11 C. L. 1150—In order that unity of title of dominant and servient estates may work an extinguishment of the easement, the ownership of both must be coextensive.[89]

*Revival.*See 9 C. L. 1024—Where an easement has been abandoned, subsequent acts of dominion exercised over the subject-matter of the easement do not necessarily revive the right.[90]

*Reverter.*See 9 C. L. 1025—A right of way conveyed by deed reverts to the grantor upon the securing of a private way as required by limitation in this deed,[91] but a mere condition subsequent that the easement shall cease when another way is acquired imposes no active duty upon the grantee to acquire another way.[92]

egress to owners of certain lots to and from public street was **extinguished** where land passed to railroad company and all dwellings on lots removed and strip over which easement ran is used for railway purposes. Brown v. Oregon Short Line R. Co. [Utah] 102 P 740. Easement created by deed granting use of passageway from store conveyed to adjoining store extinguished by erection of new building and destruction of the old one. Cotting v. Boston, 201 Mass. 97, 87 NE 205. Easement to right of way to public highway is **not extinguished** by taking of part thereof for railway right of way, owner retaining his right to remainder. Downey v. Hood [Mass.] 89 NE 24. Easement in favor of abutting lot owners is not extinguished by fact that city accepts street which is thereafter legally vacated. D. M. Goodwillie Co. v. Com. Elec. Co., 241 Ill. 42, 89 NE 272.

81. Verbal assent by lot owner to abolish building line not binding upon purchaser. Fogal v. Swart, 37 Pa. Super. Ct. 217.

82. Mason v. Ross [N. J. Eq.] 71 A 141. Erection and maintenance for six years of abutment wall over private way and maintenance of embankment for twelve years thereafter held to show abandonment. Id.

83. Abandonment of alley. Heughes v. Galusha Stove Co., 133 App. Div. 814, 118 NYS 109. Evidence held to show abandonment. Norris v. Hoffman, 62 Misc. 385, 115 NYS 890. Signing petition for appointment of viewers to lay out public highway across railway right of way and otherwise participating in proceedings extinguishes petitioner's right to a private way across tracks embraced by such proposed highway. McKinney v. Pennsylvania R. Co., 222 Pa. 48, 70 A 946. Evidence held to fail to show abandonment of easement on alley. Ruprecht v. St. Mary's Church Soc., 131 App. Div. 564, 115 NYS 926. Where deed reserved use of private carriage way to be used for benefit of three adjoining houses, to give access to private stables in rear, erection of large apartment house in place of two residences constituted abandonment of easement since act was inconsistent with terms of reservation. Norris v. Hoffman, 133 App. Div. 596, 118 NYS 156. Under Code Civ. Proc. § 1638, providing for determination of adverse claim of easement in use of carriage way, complaint alleging that plaintiffs are owners in fee simple, having acquired title by purchase, that premises have been in their possession for year next preceding commencement of action, and facts upon which claim is based, is sufficient in action to have easement declared abandoned. Id.

84. Brown v. Oregon Short Line R. Co. [Utah] 102 P 740; Petitpierre v. Maguire [Cal.] 100 P 690. Granted easement of right of way will not be impaired by mere nonuser. Davidson v. Ellis, 9 Cal. App. 145, 98 P 254. Mere fact that one who has an easement in alley does not use it does not operate to extinguish it, especially as against another who has a like easement therein, easement being acquired by grant. Heughes v. Galusha Stove Co., 133 App. Div. 814, 118 NYS 109. Easement granted in strip of land not lost by fact that grantee cultivated strip and did not use it for roadway. Pitcairn v. Harkness [Cal. App.] 101 P 809.

85. Brown v. Oregon Short Line R. Co. [Utah] 102 P 740.

86. Private way. Mason v. Ross [N. J. Eq.] 71 A 141.

87. Heughes v. Galusha Stove Co., 133 App. Div. 814, 118 NYS 109.

88. Davidson v. Ellis, 9 Cal. App. 145, 98 P 254.

89. Transfer of absolute title of dominant estate to owner of two-thirds of servient estate does not extinguish easement of private alley between the two. Smith v. Roath, 238 Ill. 247, 87 NE 414.

90. Where right of way to dock had been abandoned by town and re-entered by grantor, easement was not revived in favor of town by mere fact that person who had contract with it repaired dock and unloaded two barges of stone thereon. Ellis v. Pelham, 116 NYS 87.

91. Stewart's Private Road, 38 Pa. Super. Ct. 339.

92. Where deed granted right of way over adjacent land to a turnpike on condition that

§ 5. *Interference with easements and remedies and procedure in respect thereto.*[93]—See 11 C. L. 1151—The beneficiary of an easement has a right to its proper use free from interference by the owner of the servient estate,[94] and may maintain an action to prevent interference therewith by the owner of the property [95] provided such interference must be material.[96] Where a right of action for inquiry to an easement is reserved in the grantor, a trust in his favor results although the easement passes to the grantee.[97] Easements are within the constitutional guaranty that property shall not be taken without compensation.[98]

*Form of remedy.*See 11 C. L. 1151—An action at law for damages [99] or a suit in equity [1] for injunction,[2] or other appropriate remedy,[3] will lie for interference with an easement. That plaintiff has himself encroached on a common easement by mistake does not constitute a defense.[4]

right should cease when such way ceased to be only outlet to public highway, and purchaser subsequently acquired other lands, the deed to which reserved to grantor thereof a way which was the only outlet thereover to the public highway, the purchaser's right of way acquired on his first purchase was not terminated by failure to purchase entire tract on second purchase so as to acquire outlet to highway. Beard v. Mason [Ky.] 113 SW 473.

93. Search Note: See notes in 15 L. R. A. 487; 30 Id. 129; 3 L. R. A. (N. S.) 98; 5 Id. 486; 8 Id. 149; 11 Id. 129; 16 Id. 193.

See, also, Easements, Cent. Dig. §§ 121-149; Dec. Dig. §§ 56-73; 14 Cyc. 1211-1225; 10 A. & E. Enc. L. (2ed.) 430; 22 A. & E. Enc. P. & P. 1184.

94. Purchaser of tract of land with easement of right of way common to other parcels cannot obstruct such passageway although he offers to provide one equally convenient. Downey v. Hood [Mass.] 89 NE 24. Where private alley ran across rear of lots of plaintiff at lower grade than sidewalk, defendant had no right to build guttered and curbed sidewalk across it, thereby obstructing it, although walk was laid at grade directed by city engineer. Rabich v. Stone [Mo. App.] 117 SW 1195. Lot owners have an easement in street fronting their property of reasonable ingress and egress, and railway running through street has no right to interfere therewith. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733. Common hallway constructed by adjacent owners, necessary for light and ventilation, was obstructed by one of owners on his side of building. Held that such owner was estopped from erecting such obstruction. Binder v. Weinberg [Miss.] 48 S 1013.

95. Encumbrance of private way by lumber, stone, and iron, so as to obstruct travel, may be enjoined. City of Manchester v. Hodge [N. H.] 71 A 864. Borough restrained from interfering with right of way over surface in connection with coal lease, by platting public streets. Delaware & Hudson Co. v. Olyphant Borough [Pa.] 73 A 458. Charge of variant fees and additional fees, depending upon what part of amusement pier visitor wished to go, enjoined, since easement deed provided that only entrance fee should be charged. Atlantic City v. Associated Realties Corp. [N. J. Err. & App.] 72 A 61.

96. Slight inconvenience caused by elevation of railway tracks on easement of way without proof of substantial damage will only justify nominal damage. Schaaf v. Pennsylvania R. Co. [N. J. Law] 71 A 114. Where owner moved fence post two inches into passway and put small quantity of dirt therein which was allowed to remain there a short time, no cause of action for obstructing easement is shown. Rice v. Ford [Ky.] 120 SW 288.

97. Anderson v. New York & H. R. R. Co., 132 App. Div. 183, 116 NYS 954.

98. Smyth v. Brooklyn Union El. R. Co., 193 N. Y. 335, 85 NE 1100.

99. Where elevated street railway company erected permanent structure along street and interfered with such easements, owner is entitled to damages. Rourke v. Holmes St. R. Co. [Mo.] 119 SW 1094.

1. Case of conflicting easements is one of equitable cognizance and equity may use any remedy appropriate to the circumstances. City of Newark v. Erie R. Co. [N. J. Eq.] 71 A 620.

2. City of Newark v. Erie R. Co. [N. J. Eq.] 71 A 620. Where lot was bought with reference to descriptive pamphlet, showed open street with which purchaser's lot was directly connected by another street, and deed referred to recorded map showing same street, purchaser could enjoin closing of such street. Kelly v. Penfield, 133 App. Div. 367, 117 NYS 379. Easement created by restriction in deed that no fence should be built on land granted will be protected by injunction regardless of whether such right has any substantial money value. Beck v. Heckman [Iowa] 118 NW 510.

3. In action to enjoin closing of street in which complainant had easement where it would be inequitable to compel respondent to remove house built on such closed street, complainant was entitled to damages or to have respondent purchase lot at valuation fixed by court. Kelly v. Penfield, 133 App. Div. 367, 117 NYS 379.

4. Though plaintiff had encroached on alley by mistake by building barn on part thereof, such fact constituted no defense in action to abate nuisance caused by defendant obstructing alley by building sidewalk at higher grade across its mouth. Rabich v. Stone [Mo. App.] 117 SW 1195.

Parties.[See 5 C. L. 1055]—Suits for damages for invasion or impairment of easements must be brought in the name of the owner of the dominant estate.[5]

Pleading and evidence.[See 11 C. L. 1152]—The petition must definitely describe the easement [6] and allege the plaintiff's ownership, although it need not set out the manner in which title was acquired.[7] The judgment establishing an easement must be definite and certain as to the property affected.[8]

Ecclesiastical Law; Eight-Hour Laws, see latest topical index.

EJECTMENT (AND WRIT OF ENTRY).

The scope of this topic is noted below.[9]

§ 1. Cause of Action and Nature of Remedy, 1385. Title or Prior Possession in Plaintiff, 1385. Nature of the Remedy, 1386.
§ 2. Defenses, 1388.
§ 3. Parties, 1389.
§ 4. Process and Pleading, 1389.
§ 5. Evidence, 1391.
§ 6. Trial and Judgment, 1394.
§ 7. New Trial, 1395.
§ 8. Mesne Profits and Damages, 1395.
§ 9. Allowance for Improvements and Expenditures, 1396.

§ 1. *Causes of action and nature of remedy.*[10] *Title or prior possession in plaintiff.*[See 11 C. L. 1153]—Unless the defendant is estopped to assert his title,[11] the plaintiff must recover on the strength of his own title and not on the weakness of that of his adversary,[12] even though such adversary be a mere trespasser.[13] The ordinary essentials to recovery are a title,[14] valid [15] and subsisting,[16] a right of possession [17] at the commencement of the action,[18] former possession in the plaintiff,[19]

5. In re Water Front on North River, 193 N. Y. 117, 85 NE 1064.

6. In suit to restrain closing of passageway, petition must describe way either by metes and bounds or in some other definite way. Sassman v. Collins [Tex. Civ. App.] 115 SW 337. Complaint to establish private way held fatally defective for uncertainty. Leverone v. Weakley [Cal.] 101 P 304.

7. Beard v. Hicks [Ala.] 50 S 232.

8. Judgment for private way "sufficient in width for convenient travel" is insufficient. Leverone v. Weakley [Cal.] 101 P 304.

9. Includes all matters as to grounds for and procedure in the remedies named. The right of an unsuccessful defendant to recover under occupying claimants' acts for improvements and expenditures (see Accession and Confusion of Property*), and substantive questions of title (see Adverse Possession;* Deed of Conveyance;* Real Property,* and like topics), have been excluded.

10. **Search Note:** See notes in 3 C. L. 1159, 1160; 5 Id. 1056; 7 Id. 1213; 11 Id. 590; 13 L. R. A. 664; 18 Id. 781, 787; 66 Id. 40; 67 Id. 125; 11 L. R. A. (N. S.) 129, 917, 920; 47 A. S. R. 72; 116 Id. 568; 1 Ann. Cas. 863; 5 Id. 824; 7 Id. 999, 1125.

See, also, Ejectment, Cent. Dig. §§ 1-80, 118, 120-126; Dec. Dig. §§ 1-21, 30-35; 15 Cyc. 12-56, 59-61; 20 Id. 666; Entry, Writ of, Cent. Dig. §§ 1-11, 16, 17; Dec. Dig. §§ 1-6, 8, 9; 15 Cyc. 1059-1071, 1075, 1077; 10 A. & E. Enc. L. (2ed.) 467, 470, 472, 481, 524; 7 A. & E. Enc. P. & P. 267.

11. Landlord is not required to prove title against his tenant, since tenant will not be permitted to deny landlord's title or acquire or set up against his landlord a superior title, unless it is done to protect him in his lease. Card v. Deans [Neb.] 120 NW 440.

12. Seymour v. Dufur [Wash.] 102 P 756; Sloan v. Chitwood, 217 Mo. 462, 116 SW 1086; Florida Finance Co. v. Sheffield, 56 Fla. 285, 48 S 42; Skinner Mfg. Co. v. Wright, 56 Fla. 561, 47 S 931; Delay v. Felton [Ga.] 65 SE 122; Stockand v. Hall [Wash.] 102 P 1037; Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574; Card v. Deans [Neb.] 120 NW 440.

13. Coulthard v. McIntosh [Iowa] 122 NW 233.

14. Plaintiff must show title. Harris v. Mason [Tenn.] 115 SW 1146; Masephol v. Heimbach [Ind. App.] 88 NE 316. Plaintiff must have good paper title or such title by adverse possession as would enable him to recover in trespass. Hellard v. Nance [Ky.] 114 SW 277. Recovery not dependent on any opinion of title possessed by those through whom it passed. People v. Chicago & N. W. R. Co., 239 Ill. 42, 87 NE 946. Legal titles alone are adjudicated. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Title through patent held sufficient legal title. Northern Pac. R. Co. v. George, 51 Wash. 303, 98 P 1126. Mortgage puts legal title in mortgagee. Warren v. Williford, 148 N. C. 474, 62 SE 697.

15. Plaintiff had no valid legal title under deed from husband in which wife did not join. St. 1898, § 2203. Wilburn v. Land, 138 Wis. 36, 119 NW 803.

16. Plaintiff had subsisting title as against defendant although he had given deed which conferred no rights against such defendant. Car v. Miller [Ala.] 49 S 802.

17. Card v. Deans [Neb.] 120 NW 440;

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* Always begin with the latest article on the subject. Use the latest topical index.

and ouster by the defendant.[20] In some jurisdictions an equitable title is insufficient,[21] but in many states the rule is otherwise.[22] Possession may give a superior right[23] and may authorize a presumption of title[24] which is sufficient against all who do not show a better title,[25] but either title or prior possession in the plaintiff is essential to his recovery.[26]

Nature of the remedy. See 11 C. L. 1155—Ejectment is a possessory action.[27] Where united with trespass it constitutes an action distinctively to try title.[28] It may sometimes be consolidated in the same petition with an action to partition the same land.[29] While statutory provision for ejectment[30] does not necessarily oust the original jurisdiction existing in equity,[31] equity will not assume jurisdiction where only legal remedies are implied.[32]

Demps v. Hogan [Fla.] 48 S 998; Harris v. Mason [Tenn.] 115 SW 1146. Essential under St. 1898, § 3074. Wilburn v. Land, 138 Wis. 36, 119 NW 803. Right of possession necessarily arises from legal title. Norton v. Frederick, 107 Minn. 36, 119 NW 492. Plaintiff had no right of possession under deed from husband in which wife did not join. St. 1898, § 2203. Wilburn v. Land, 138 Wis. 36, 119 NW 803. Held not to have right of entry where he had contracted with defendant to convey land and had executed receipt to effect that purchase price had been paid in full. Graham v. Peacock, 131 Ga. 785, 63 SE 348.

18. Essential. Harley v. Harley, 140 Wis. 282, 122 NW 761. Action against one claiming under life tenant is prematurely brought if begun during life of such tenant. Currier v. Teske [Neb.] 120 NW 1015.

19. Essential to recovery by plaintiff that he shall have been in possession of land when entry thereon was made by defendant. Ohio River Junction R. Co. v. Pennsylvania Co., 222 Pa. 573, 72 A 271. Actual prior possession within 15 years of vacant and unoccupied land **held not essential** as against trespasser. Norton v. Frederick, 107 Minn. 36, 119 NW 492.

20. Essential. Ohio River Junction R. Co. v. Pennsylvania Co., 222 Pa. 573, 72 A 271. Transfer by widow of estate left her under invalid will was such divesting of other heirs of their rights as gave them immediate right to begin action for its recovery. Neal v. Davis [Or.] 101 P 212, afg. original decision [Or.] 99 P 69.

21. Insufficient. Taylor v. Russell, 65 W. Va. 632, 64 SE 923. Person who has mere executory agreement for purchase of land, not deed conveying legal title, has mere equitable title. Taylor v. Russell, 65 W. Va. 632, 64 SE 923.

22. Equitable title held sufficient. Ohio River Junction R. Co. v. Pennsylvania Co., 222 Pa. 573, 72 A 271; Whitehead v. Callahan, 44 Colo. 396, 99 P 57. Equitable title was sufficient where plaintiff took possession and made valuable improvements thereunder. Gonella v. Simmons [Cal. App.] 101 P 685. Under certain circumstances equitable title may be determined in and the basis of an ejectment suit. Llewellyn v. Sunnyside Coal Co. [Pa.] 73 A 198. Where grantee in deed knew grantor had previously sold land to another and that such purchaser was in possession, proper remedy was ejectment based on such equitable title. Id. B. & C. Comp. §§ 391, 392, authorize equitable defense by cross bill. Zeuske v. Zeuske [Or.] 103 P 648.

23. Where neither party has true title, the older possession gives better right. Roe v. Doe [Ala.] 48 S 49. Plaintiff may recover upon prior possession alone against one who subsequently acquires possession by mere entry without any lawful right whatever. Civ. Code 1895, § 5008. Delay v. Felton [Ga.] 65 SE 122. Plaintiff having had possession held to have right to maintain ejectment against one who without title wrongfully ousted him. Gonella v. Simmons [Cal. App.] 101 P 685.

24. Possession is prima facie evidence of title. Dodge v. Irvington Land Co. [Ala.] 48 S 383.

25. Plaintiff upon proof of prior actual possession under color of title and proof of prior actual possession by his grantor was entitled to judgment against defendant who showed no title in himself, or superior outstanding title in a third person, although his entry and occupancy was under color of title. Dodge v. Irvington Land Co. [Ala.] 48 S 383. Where neither has true title, only title by adverse possession will defeat older possession. Roe v. Doe [Ala.] 48 S 49.

26. Florida Finance Co. v. Sheffield, 56 Fla. 285, 48 S 42. To recover possession of land against one in actual possession, plaintiff should have title in himself and right to possession, or have been in actual bona fide possession of land and have been ousted by defendant. Skinner Mfg. Co. v. Wright, 56 Fla. 561, 47 S 931. Plaintiff must deraign title from an original source or from one having possession and right to convey title. Id.; Florida Finance Co. v. Sheffield, 56 Fla. 285, 48 S 42.

27. Under Ann. St. 1906, pp. 1756, 1758, 1759. Mann v. Doerr [Mo.] 121 SW 86.

28. Lavin v. Dodge [R. I.] 73 A 376.

29. Although land sued for comprised two distinct lots of land, title to which came into A by two distinct claims of title, a single suit seeking recovery of possession of land, injunction, receiver, and other equitable relief, could be maintained for recovery of both lots against same defendant. Ford v. Commercial Industrial Co. [Ga.] 63 SE 1120. Under Rev. St. 1899, § 593 (Ann. St. 1906, p. 619), may be united in the same petition with an action to partition the same land. Grimes v. Miller [Mo.] 121 SW 21.

30. Shannon's Code 1896, § 4972, provides for bringing ejectment against actual occupant, if any, and, if none, against any person claiming interest of exercising acts of ownership at commencement of action. American Ass'n v. Williams [C. C. A.] 166 F 17.

31. Held not to oust jurisdiction of equity

Propriety of remedy; conditions precedent to suit.—Ejectment has been held to be the proper remedy by a tenant in common who has been ousted from the land or whose rights have been totally denied by a cotenant,[33] by an assignee of a mortgagee to recover possession from the mortgagor,[34] by parties claiming adverse rights to property as trustees thereof,[35] and by an owner of land for the right of way of a railroad;[36] but not to recover possession of an incorporeal heriditament,[37] to determine the rights of a mortgagor who has surrendered possession to the mortgagee,[38] or by a judgment creditor[39] against tenants holding title acquired by the foreclosure of a prior mortgage.[40] The owner of land subject to an easement for public use may maintain ejectment against a person who has wrongfully appropriated such land exclusively to other use,[41] even though the defendant be a public officer[42] and the appropriation be for other public use,[43] but such action cannot be maintained against the municipality or other public authority which is occupying the land within the limits of the public right, or against the state without its consent.[44]

Demand before suit is unnecessary where the possession was wrongful in its inception[45] or afterwards becomes so.[46] Ejectment may in some cases be brought by a widow to recover her dower before admeasurement,[47] by remaindermen without the consent of any executor having been first obtained,[48] and by the devisees of land against third parties though the inheritance tax shall not have been paid;[49] but not by a vendor against a vendee who is not in default on an executory contract of purchase.[50] In the absence of statute,[51] actual possession by the defendant is essential,[52] although he claims title.[53]

under same circumstances. American Ass'n v. Williams [C. C. A.] 166 F 17.

32. Only legal remedies were implied where complaint described by metes and bounds particular land, averred ownership in complainants, and that defendant had taken possession under claim of ownership. Nicholls v. Boyne City Lumber Co. [Mich.] 16 Det. Leg. N. 321, 121 NW 742.

33. Under Kirby's Dig. § 2746. La Cotts v. Pike's Estate [Ark.] 120 SW 144.

34. Warren v. Williford, 148 N. C. 474, 62 SE 697.

35. Proper remedy in controversy between parties claiming to be trustees of church. Yanthis v. Kemp [Ind. App.] 86 NE 451.

36. Action in such case not being barred by any supposed interest of the public in continuous operation of road. Mapes v. Vandalia R. Co., 238 Ill. 142, 87 NE 393.

37. Coquille Mill & Mercantile Co. v. Johnson, 52 Or. 547, 98 P 132. Right to continued enjoyment of franchise of waters of navigable stream is incorporeal hereditament. Id. Dock built as part of real property and intended for permanent use and capable of delivery by sheriff held not incorporeal hereditament. Chism v. Lamb, 63 Misc. 209, 118 NYS 458.

38. Remedy of mortgagor being suit in equity to redeem. Becker v. McCrea, 193 N. Y. 423, 86 NE 463. Not where mortgagee or those claiming under him have taken possession. Brouillard v. Stimpson, 201 Mass. 236, 87 NE 493.

39. Under Rev. Laws, c. 178, § 47. Brouillard v. Stimpson, 201 Mass. 236, 87 NE 493.

40. Remedy being in equity. Brouillard v. Stimpson, 201 Mass. 236, 87 NE 493.

41. Existence of such easement is no bar to suit. Weyler v. Gibson, 110 Md. 636, 73 A 261. City having paramount title could maintain ejectment against railroad having an easement which it misused. Cleveland v. Cleveland, etc., R. Co., 8 Ohio N. P. (N. S.) 457.

42. As warden of state penitentiary. Weyler v. Gibson, 110 Md. 636, 73 A 261.

43. As where land subject to easement for public highway was used by warden to build addition to state penitentiary thereon without it being condemned for such purpose. Weyler v. Gibson, 110 Md. 636, 73 A 261.

44. Weyler v. Gibson, 110 Md. 636, 73 A 261.

45. Mapes v. Vandalia R. Co., 238 Ill. 142, 87 NE 393. Possession is not wrongful where taken with owner's consent until after demand. Id.

46. Where possession was held upon consent of life tenant, it became wrongful after her death so that no demand by remainderman was necessary in order to bring ejectment. Mapes v. Vandalia R. Co., 238 Ill. 142, 87 NE 393.

47. Under B. & C. Comp. § 337. Neal v. Davis [Or.] 99 P 69, afd. [Or.] 101 P 212.

48. As where though 14 years had elapsed, no executor had qualified and all debts of estate had been discharged, no one's rights being injured by such bringing. Brown v. Hooks [Ga.] 65 SE 780.

49. Altheugh under Pub. Acts 1903, p. 277, No. 195, payment of tax may be enforced by sale of land. Weller v. Wheelock [Mich.] 15 Det. Leg. N. 856, 118 NW 609.

50. Talley v. Kingfisher Imp. Co. [Okl.] 103 P 591.

51. Ejectment may be brought against either a party in possession or one claiming adversely, under Gen. St. 1906, § 1966. Dallam v. Sanchez, 56 Fla. 779, 47 S 871.

52. Ejectment will not lie against defendant who is not in actual possession of land at commencement of action. Haden v.

§ 2. *Defenses.*[54]—See 11 C. L. 1155—Good defenses are made out by showing a valid contract giving the defendant a superior right,[55] an outstanding title to the land superior to that of the plaintiff, although the defendant be not connected therewith,[56] provided he be holding under color of title or right,[57] a barring of the action by the statute of limitation,[58] or, in some cases, conduct of plaintiff whereby he is estopped,[59] but not by setting up an equitable title,[60] or defense,[61] except in those jurisdictions where such defense is made available by statute.[62] Nor is a good defense presented by setting up a deed void [63] or ineffective,[64] an invalid contract,[65] a prior premature action involving the same property,[66] a judgment in purely simple ejectment between the same parties,[67] or a decreased price paid by plaintiff in view of the occupancy of the defendant.[68] A defense good at law is not available on

Goodwin, 217 Mo. 662, 117 SW 1129. Ejectment did not lie where defendant has never entered into possession. Myers v. Mayhew, 32 App. D. C. 205. Act of defendant causing land of plaintiff, originally upland, to be converted into channel of tidal river, held to constitute possession or use and occupancy of land by defendant. Lownsdale v. Grays Harbor Boom Co. [Wash.] 103 P 833.

53. Proper remedy being a bill in equity where defendant merely claims title but has never attempted to oust plaintiff from possession. Myers v. Mayhew, 32 App. D. C. 205.

54. Search Note: See note in 5 C. L. 1059. See, also, Ejectment, Cent. Dig. §§ 81-119; Dec. Dig. §§ 22-29; 15 Cyc. 61-79; Entry, Writ of, Cent. Dig. §§ 12-15; Dec. Dig. § 7; 15 Cyc. 1071-1073; 10 A. & E. Enc. L. (2ed.) 532.

55. Written contract to purchase held to constitute legal defense. Zueske v. Zueske [Or.] 103 P 648.

Oral contract to purchase real property, unenforcible at law under statute of frauds, held not to constitute valid defense. Id. Outstanding title by adverse possession in third person with which title defendant is not connected is good defense. Scott v. Herrell, 31 App. D. C. 45.

56. As prior grant. Steele v. Bryant [Ky.] 116 SW 755.

57. Not where party in possession is intruder or trespasser. Kinney v. Munch, 107 Minn. 378, 120 NW 374. Individuals maintaining dam on land without color of right and causing land to overflow cannot secure right by setting up any right that village might have to maintain dam on land. Id.

58. Action was barred under Ind. T. Ann. St. 1899, § 2942, in force in Indian Territory prior to statehood, when plaintiff, his testator or intestate, had been 5 years out of possession. Tynon v. Hall [Okl.] 98 P 895. Not barred where laches is not such as to constitute bar under statute. Illinois Cent. R. Co. v. Cavins, 238 Ill. 380, 87 NE 371.

59. Sullivan v. Moore [S. C.] 65 SE 108. As to what constitutes estoppel by conduct, see Estoppel. Plaintiff was estopped where he gave railroad permission to build on land and where afterwards railroad offered to come to an amicable agreement. Cape Girardeau, etc., R. Co. v. St. Louis & G. R. Co. [Mo.] 121 SW 300. Vendor's oral agreement to convey and his knowledge without protest of defendant's possession and making improvements held not to constitute **equitable defense** of estoppel. Zueske v. Zueske [Or.] 103 P 648. Estoppel in pais not good defense, being equitable. City of Amboy v. Illinois Cent. R. Co., 236 Ill. 236, 86 NE 238.

60. Equitable title is no defense against plaintiff holding legal title unless defendant can bring himself within terms of statute (Code, § 2741), requiring him to vouch a contract in writing, stating purchase and terms thereof, as signed by vendor or his agent. Hurley v. Charles [Va.] 65 SE 468. Widow's right to equitable title of her deceased husband in homestead **held not equitable,** but to constitute a legal defense, and to be proper defense even were there no statute making equitable defenses available. Harley v. Harley, 140 Wis. 282, 122 NW 761.

61. As estoppel in pais. City of Amboy v. Illinois Cent. R. Co., 236 Ill. 236, 86 NE 238.

62. Equitable defense is made available by statute (Code, § 2741) in those cases where defendant vouches a contract in writing, stating purchase and terms thereof, signed by vendor or his agent. Hurley v. Charles [Va.] 65 SE 468. Under Code Pub. Gen. Laws 1904, art. 75, § 86, defense may be made on equitable grounds. Falck v. Barlow, 110 Md. 159, 72 A 678. St. 1898, § 3078, permits equitable defenses. Harley v. Harley, 140 Wis. 282, 122 NW 761. Statute cited in preceding note permits defense showing that in equity plaintiff is not entitled to possession because such right is in defendant or those under whom he claims. Id. Defendant was permitted to set up as equitable defense the fraud of predecessor in title of plaintiff as result of which deed secured was made not to include land in controversy. Cassin v. Nicholson, 154 Cal. 497, 98 P 190.

63. Tax deed void on its face is no defense to damages sought in ejectment suit for ouster and detention. Whitehead v. Callahan, 44 Colo. 396, 99 P 57.

64. Carr v. Miller [Ala.] 49 S 802. Deed to third person made by plaintiff while defendant was in adverse possession was void against defendant under statute then in effect (Code 1896, § 1530; Code 1907, § 10, not affecting existing right, remedy or defense). Id.

65. As oral contract affecting interest in real estate void under statute of frauds. Hampton v. Glass [Ky.] 116 SW 243.

66. Currier v. Teske [Neb.] 120 NW 1015.

67. Judgment in simple ejectment is not a bar to another action in ejectment for same land between same parties, especially where no equitable defenses were plead. Stone v. Perkins, 217 Mo. 586, 117 SW 717.

68. So held in action against railroad for

equitable grounds.[69] When adverse possession is claimed of only a part of the lands sued for, the proper defense is upon warrant.[70]

§ 3. *Parties.*[71] See 11 C. L. 1156—All persons should be made parties who are essential to a complete determination of the controversy.[72] Two parties may join as plaintiff where the right of possession is in one and the title in the other,[73] or where one is merely a grantor who has reserved certain rights on the land in controversy.[74] A party may be plaintiff although he do not have an absolute [75] and exclusive title [76] or right.[77] At common law a wife cannot maintain an action in ejectment without joining with her husband.[78] The plaintiff need not make party defendant a tenant at will who disclaims all other interest in the property sued for,[79] and he has no right to make party defendant a landlord whose tenant is in possession, since such landlord's right to come in is optional.[80] The parties in their general relation to the propriety of the remedy is treated in another section.[81]

§ 4. *Process and pleading.*[82] See 11 C. L. 1156 *Process.* See 5 C. L. 1059—The subject of process is fully treated in a separate topic.[83]

The complaint See 11 C. L. 1156 should contain all facts essential to the existence of the cause of action [84] and must so describe the land in controversy that it may be identified,[85] but may be sufficient although it alleges in substance only that the de-

part of right of way. Mapes v. Vandalia R. Co., 238 Ill. 142, 87 NE 393.

69. Falck v. Barlow, 110 Md. 159, 72 A 678. Possession and occupancy for 7 years under 10-year lease, acceptance of rent from lessee and from lessee's wife after his death, held to give wife, defendant, implied legal estate in land in nature of tenancy from year to year and to constitute legal defense in ejectment by owner. Id.

70. Cadwalader v. Price [Md.] 73 A 273.

71. Search Note: See Ejectment, Cent. Dig. §§ 132-146, Dec. Dig. §§ 40-51; 15 Cyc. 80-87, 155; Entry, Writ of, Cent. Dig. §§ 18, 19; Dec. Dig. § 12; 15 Cyc. 1073, 1074; 10 A. & E. Enc. L. (2ed.) 481, 524; 7 A. & E. Enc. P. & P. 277.

72. Waggoner v. Tinney [Tex] 115 SW 1155. County as grantor held to be proper party to suit where plaintiff claimed under contract with county and subsequent deed which failed to include land in controversy included in contract. Id. Essential to judgment for plaintiff that all heirs of equitable estate in land in controversy be not brought in, though no request therefor was made by either party. Harley v. Harley, 140 Wis. 282, 122 NW 761. Where answer alleges defendant only claims undivided interest and that land belongs to several parties as heirs, better practice is to bring in all such parties as provided by Kirby's Dig. § 6011. Westmoreland v. Plant [Ark.] 116 SW 188. Where ejectment by lessee was in reality brought on behalf of lessor, court properly brought in lessor as party, and later another who succeeded to lessor's interests before appearance of lessor was permitted to be substituted in place of such lessor and to appear in person. Cassin v. Nicholson, 154 Cal. 497, 98 P 190.

73. Ford v. Commercial Industrial Co. [Ga.] 63 SE 1120. Held not misjoinder. Id.

74. As where timber was reserved. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930.

75. Indian patentee whose land is held in trust by the United States for 25 years could maintain ejectment alone. Frazee v. Piper, 51 Wash. 278, 98 P 760.

76. Person holding only undivided interest in real estate may be plaintiff. O'Donohue v. Smith, 130 App. Div. 214, 114 NYS 536.

77. City may maintain action against railway company under § 5781, Rev. St., to recover possession of land of which former has paramount title and latter an easement for certain purposes therein. Cleveland v. Cleveland, etc., R. Co., 8 Ohio N. P. (N. S.) 457. Owner of land could maintain ejectment in case of misuse of easement outstanding against land. Weyler v. Gibson, 110 Md. 636, 73 A 261.

78. Burt v. Cumberland Coal & Coke Co. [C. C. A.] 159 F 905.

79. Wallin v. Reagan, 171 F 758.

80. See Ann. St. 1906, p. 1757. Mann v. Doerr [Mo.] 121 SW 86.

81. See ante, § 2.

82. See, also, Ejectment, Cent. Dig. §§ 147-149, 154-237; Dec. Dig. §§ 52-54, 62-85; 15 Cyc. 88-104, 107-123; Entry, Writ of, Cent. Dig. §§ 20-38, Dec. Dig. §§ 13-20; 15 Cyc. 1075-1081; 7 A. & E. Enc. P. & P. 325.

83. See Process.

84. As to what essential to cause of action, see ante, § 1. Complaint by city alleging that city is owner of easement for street and highway purposes, describing it, asserting that city is entitled to immediate possession of ground, and that defendant has taken possession of and wrongfully withholds same, held sufficient. City of Butte v. Mikosowitz [Mont.] 102 P 593.

85. Essential that premises be described with such certainty that, in event of recovery by plaintiff, writ of possession issued upon judgment and describing premises as laid in declaration shall so identify premises that sheriff, in execution of writ, can deliver possession in accordance with its mandate. Hollywood Cemetery Corp. v. Hudson [Ga.] 65 SE 777. Description held sufficient from reference to which location of land could be proven, though it did not give legal description or name by which land was patented. Code Pub. Gen. Laws 1904, art. 75, § 22. Cadwalader v. Price [Md.] 73 A 273. Description of land as "beginning at a stake

fendant unlawfully keeps the plaintiff out of possession,[86] alleges right of possession in one plaintiff and title in another,[87] alleges title in plaintiff without alleging prior possession,[88] or does not specifically allege that the defendant was in possession at the time of the commencement of the action.[89]

Answer and other pleadings by defendant. See 11 C. L. 1167—A defendant is entitled to file a disclaimer when he is without interest in the land,[90] and may specifically deny possession [91] where he does not desire his title litigated,[92] but he should ordinarily be required to either disclaim or allege title.[93] Where the defendant denies the plaintiff's right to any part of the land, he need not describe it [94] nor need he affirmatively allege ownership in himself or in another.[95] A defect in the answer may be cured by the reply [96] and all parts of it will be construed together to determine its sufficiency.[97] Under a plea of not guilty, all matters of legal defense, excepting special denials of possession and denials of adverse claim under the statute, are admissible,[98] and special pleas affecting the legal title or in estoppel are superfluous.[99] A plea of not guilty has the effect of admitting the possession of all the land sued for [1] but does not admit the nature or extent of such possession.[2] The defendant may be permitted to withdraw such plea when inadvertently filed and to file a plea of disclaimer.[3] The effect of an answer denying plaintiff's title and right of possession is to admit the possession of the defendant.[4] A denial of plaintiff's title opens the way for any defense that wild defeat his action.[5] Equitable defenses [6] only are required to be plead as counterclaims or by cross bill.[7]

near a branch, B's corner and running thence N. 19½ E. along the old W. line about 140 poles to a small hickory on the hill side, W's old corner, thence S. 24 degrees E. 14 poles, thence S. 19½ degrees W. 140 poles, thence N. 81 degrees W. 14 poles to the beginning," held sufficient. Latham v. Lindsay [Ky.] 113 SW 878. Incomplete description held sufficient by reason of aid given thereto by admissions of answer. Seabrook v. Coos Bay Ice & Cold Storage Co. [Or.] 102 P 175, afd. on rehearing [Or.] 102 P 795.

86. Complaint held sufficient which stated that "the defendant wrongfully keeps the plaintiff out of possession," instead of using language of statute (Gen. St. 1901, 5082) "that the defendant unlawfully keeps" him out of possession. Rhea v. Williams [Kan.] 103 P 119.

87. Complaint held sufficient which alleged right of possession in one plaintiff and title in another and that defendant refused to deliver possession. Ford v. Commercial Industrial Co. [Ga.] 63 SE 1120.

88. Where complaint alleges legal title in plaintiff, it is not essential that it allege possession. Code 1896, § 1530. Jackson v. Tribble [Ala.] 47 S 310.

89. Sufficient under code system and statutes of 1893. Asheville Land Co. v. Lange, 150 N. C. 26, 63 SE 164.

90. Even though he may have given warranty deed to same to codefendants. Wright v. Johnson, 108 Va. 855, 62 SE 948.

91. Under Burns' Ann. St. 1908, §§ 1101-1103. Masephol v. Heimbach [Ind. App.] 88 NE 316.

92. Where defendant desires his title litigated, must not deny possession, since to permit otherwise would be to permit him to trifle with court. Asheville Land Co. v. Lange, 150 N. C. 26, 63 SE 164.

93. In view of the code system and statutes of 1893. Asheville Land Co. v. Lange, 150 N. C. 26, 63 SE 164.

94. Answer merely denying plaintiff's ownership or right to possession of any part of land claimed held sufficient to present good defense. Holland v. Coleman [Ky.] 114 SW 305.

95. Holland v. Coleman [Ky.] 114 SW 305.

96. Defect in answer in failing to fully describe lands claimed by defendant was cured by admissions in reply and verdict for defendant after evidence on the issue. Bryant v. Prewitt [Ky.] 117 SW 343.

97. Answer was insufficient where denial of plaintiff's right of possession was based on invalid contract, though denial and allegation of contract were contained in separate paragraphs, since whole answer must be construed together. Hampton v. Glass [Ky.] 116 SW 243.

98. McKinnon v. Johnson [Fla.] 48 S 910. Admissible though special pleas containing such matters have been struck out. Id. Plea of not guilty puts in issue title of lands in controversy and admits possession or adverse claim of defendant at time of institution of action, under Gen. St. 1906, § 1968. Dallam v. Sanchez, 56 Fla. 779, 47 S 871.

99. Should be struck out. McKinnon v. Johnson [Fla.] 48 S 910. Special plea of statute of limitations held unnecessary along with plea of not guilty and subject to being struck out. Vadeboncoeur v. Hannon [Ala.] 49 S 292.

1. Cochran v. Kimbrough [Ala.] 47 S 709.

2. Dallam v. Sanchez, 56 Fla. 779, 47 S 871.

3. Wright v. Johnson, 108 Va. 855, 62 SE 948.

4. Chicago, etc., R. Co. v. Latta, 83 Neb. 104, 118 NW 1115.

5. Chicago, etc., R. Co. v. Welch, 83 Neb. 106, 118 NW 1116.

6. Cross bill, and not answer, is proper

*Pleadings subsequent to answer.*See 11 C. L. 1158—On demand a party may sometimes be required to furnish an abstract of title sufficiently specific to inform the party making the demand of the title upon which his adversary will rely.[8]

*Amendments.*See 9 C. L. 1031—The subject of amendments is fully treated elsewhere.[9]

§ 5. *Evidence.*[10]—See 11 C. L. 1158—The burden is upon the plaintiff to prove his own title,[11] the right of possession,[12] and the identity of the land,[13] and to disprove any apparent title in the defendant,[14] but he need not prove title beyond a common source,[15] or prove his source of title when the defendant claims under a title derived from him,[16] or when the defendant admits his title.[17] Nor, where the defendant pleads the general issue, need he prove demand before bringing suit [18] or possession by the defendant,[19] and in some cases where the defendant makes any defense, he need not prove the adverse possession of a defendant.[20] The burden of proof shifts to the defendant when the plaintiff has established his title,[21] and identified the land with reasonable certainty,[22] or has shown his prior possession under legal right and

method of setting up equitable defense, under B. & C. Comp. §§ 391, 392. Zeuske v. Zeuske [Or.] 103 P 648.

7. Under St. 1898, § 3078. Harley v. Harley, 140 Wis. 282, 122 NW 761. Facts showing plaintiff had no right to possession is not equitable defense. Id. Filing of cross complaint is not essential to authorize the court to determine conflicting claims where one party claims exclusive ownership and the other claims an easement. Pitcairn v. Harkness [Cal. App.] 101 P 809.

8. Provided by Code 1896. Jackson v. Tribble [Ala.] 47 S 310. Abstract held sufficiently specific to cover mortgage from defendants to plaintiff and deed executed by mortgagee though not a complete abstract in technical sense. Id.

9. See Pleading, § 7.

10. **Search Note:** See notes in 10 L. R. A. (N. S.) 404; 14 Id. 1187.

See, also, Ejectment, Cent. Dig. §§ 238-298; Dec. Dig. §§ 86-96; 15 Cyc. 123-154; Entry, Writ of, Cent. Dig. §§ 39-42; Dec. Dig. § 21; 15 Cyc. 1081-1083; 10 A. & E. Enc. L. (2ed.) 484.

11. Plaintiff is not entitled to recover until he establishes his title. Seabrook v. Coos Bay Ice & Cold Storage Co. [Or.] 102 P 175, afd. on rehearing [Or.] 102 P 795.

12. In ejectment by vendor against vendee under executory contract of purchase, burden on plaintiff to show default of vendee giving him right to possession. Talley v. Kingfisher Imp. Co. [Okl.] 103 P 591.

13. Burden was on plaintiff to show survey by which land was described in deed upon which plaintiff based his title. Hayes v. Martin [Ala.] 48 S 681. Burden was on plaintiff to show deeds introduced as evidence of title embrace land claimed. Winchester v. Payne [Cal. App.] 102 P 531.

14. Burden is on plaintiff claiming under deed from common grantor subsequent to that of defendant to show invalidity of defendants deed. Seymour v. Dufur, 53 Wash. 646, 102 P 756. Burden is on plaintiff alleging fraud in connection with defendant's title to allege and prove defendant's knowledge of or participation in such fraud. Denike v. Santa Clara Val. Agricultural Soc., 9 Cal. App. 228, 98 P 687.

15. Hurley v. Charles [Va.] 65 SE 468. Where both parties rely in whole or in part upon common title, neither party need prove his title back of source under which both claim. Hellard v. Nance [Ky.] 114 SW 277. When both parties claim from common source, title back of the common source need not be shown. Sloan v. Chitwood, 217 Mo. 462, 116 SW 1086; Watkins v. Northern Coal & Coke Co. [Ky.] 119 SW 225.

16. Need not prove their title derived from government. Cape Girardeau, etc., R. Co. v. St. Louis & G. R. Co. [Mo.] 121 SW 300.

17. Plaintiff was entitled to verdict in any case for that part of land to which defendant admitted plaintiff had legal title. Le Croix v. Malone [Ala.] 47 S 725.

18. Under statute. Carroll v. Rabberman, 240 Ill. 450, 88 NE 995.

19. Such plea being admission of the fact. Code 1896, § 1532. Jackson v. Tribble [Ala.] 47 S 310.

20. Not necessary under Burns' Ann. St. 1908, § 1102. Masephol v. Helmbach [Ind. App.] 88 NE 316.

21. Judgment for defendant was improper where plaintiff proved title and defendant failed to controvert it. Chicago, etc., R. Co. v. Latta, 83 Neb. 104, 118 NW 1115. Where plaintiff proved grant to abandoned river bed secured from state under Acts Gen. Assem. 1904, p. 166, c. 185, burden was on defendant claiming land not in jurisdiction of state to prove such fact. Coulthard v. McIntosh [Iowa] 122 NW 233. Plaintiff established his title where he showed grant to state and patent to him from state, and description in patent corresponded with description in declaration. Black v. Chicago, B. & Q. R. Co., 237 Ill. 500, 86 NE 1065. Plaintiff held to have established title superior to parties claiming under tax deed where there was no question as to decedent's title, as to fact that he left no children other than plaintiff, as to his wife being dead, or as to his not having disposed of property. Dunn v. Garnett [Ky.] 112 SW 841. Where plaintiff proved title of both came from their father who was deceased, burden was then on defendant to show any way in which plaintiff had been divested of title. Watkins v. Northern Coal & Coke Co. [Ky.] 119 SW 225.

22. As when he has shown with reasonable certainty that land is within his patent and

forcible dispossession by the defendant.[23] When the defendant admits the plaintiff's title, he has the burden of showing a lawful possession,[24] and when he denies plaintiff's title and claims an adverse right of possession, the plaintiff need not prove ouster and adverse possession.[25] While the defendant need not prove his adverse possession [26] unless he relies on it for title,[27] a defendant claiming title by adverse possession must sustain burden of proving same in order to recover against one shown to be the true owner.[28] That evidence is sufficient which sustains the burden resting on the party introducing it of proving such matters as title,[29] possession [30]

not within any prior grant excepted therefrom. Steele v. Bryant [Ky.] 116 SW 755. Burden is on defendant, where plaintiff has introduced his grant and it corresponds with description in declaration, to prove his claim that there is no property such as that described. Black v. Chicago, B. & Q. R. Co., 237 Ill. 500, 86 NE 1065.

23. Defendant then required to show his right to possession. Ohio River Junction R. Co. v. Pennsylvania Co., 222 Pa. 573, 72 A 271. Defendant attempting to show right to possession by virtue of terms of contract was bound by interpretation of such contract as understood by parties themselves. Id.

24. Masephol v. Helmbach [Ind. App.] 88 NE 316.

25. Kraus v. Birnbaum, 132 App. Div. 567, 116 NYS 916.

26. Since bringing of action by plaintiff admits defendant's possession. Roe v. Doe [Ala.] 50 S 230.

27. Roe v. Doe [Ala.] 50 S 230.

28. Defendant required to show to satisfaction of jury that he had been in open, adverse, and exclusive possession of premises for 20 years at least. City of Manchester v. Duggan [N. H.] 70 A 1075. Defendant held to have such burden though he had not waived any right he may have supposed he had. Id.

29. Warren v. Williford, 148 N. C. 474, 62 SE 697.

Sufficient: Plaintiff sustains burden where he shows prior title from same source as defendant. Warren v. Williford, 148 N. C. 474, 62 SE 697. Where it appeared that plaintiff and defendant owned adjoining lots each of a certain width, and that defendant's lot as he claimed exceeded such width by so much as plaintiff's lot was less than such width, such difference being the strip of land in controversy. Kennedy v. Schwab, 38 Pa. Super. Ct. 638. Where evidence was that plaintiff's ancestor in title acquired deed to farm in '40's, which included locus, that subsequent grantees had been in possssion and cultivated it, that, after deed to plaintiff, defendant paid rent to plaintiff for occupation of locus. City of Manchester v. Duggan [N. H.] 70 A 1075. In action by heirs, where sufficient title in decedent as set out in petition was not disputed and evidence showed that decedent had claimed ownership and been in possession of land for several years, and that decedent's father under whom he claimed had owned boundary including boundary in dispute and allotted to decedent. McIntosh v. King [Ky.] 119 SW 193. Evidence of possession as against all who do not show prior possession or better title. Dodge v. Irvington Land Co. [Ala.] 48 S 383.

Insufficient: Plaintiff did not prove title where he showed that tax deeds under which he claims were made on sales in name of parties which such evidence shows were not owners at time of such sale. Bursey v. Lyon, 32 App. D. C. 231. Where evidence of title was by deed and complaint alleged title by adverse possession. Westmoreland v. Plant [Ark.] 116 SW 188. Where it appeared that plaintiff's ancestors had received pay for land 50 years before, the rules of evidence being relaxed in defendant's favor to permit his showing his equitable defense. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104. Where plaintiff not having prior possession failed to show possession or right of possession or control in either his grantor or such grantor's grantor at the time when conveyances made by them under which he claimed were made. Delay v. Felton [Ga.] 65 SE 122. Where it appeared that there was mistake as to land included in deed under which plaintiff claimed. Town v. Greer, 53 Wash. 350, 102 P 239. Where it is not shown that grantor of plaintiff had prima facie right to recover, since plaintiff must trace his title back to source or to grantor in possession at or near time of his grant. Florida Finance Co. v. Sheffield, 56 Fla. 285, 48 S 42. Where it appeared that defendant had legal title, although it appeared also that defendant's predecessors had doubted such title. People v. Chicago & N. W. R. Co., 239 Ill. 42, 87 NE 946. Plat under which plaintiff bought was insufficient **to affect defendant's title** where it was not shown that it was the plat by which defendant's land was described, where both claimed under same grantor. Metcalf v. Buck, 36 Pa. Super. Ct. 58. Evidence was insufficient **to support defendant's claim of title,** where testimony of defendant as to clause in deed under which defendant claimed was contradicted by every other witness and it appeared that such deed had been destroyed by defendant, since party who destroys evidence by which his claim or title may be impeached thereby raises strong presumption against his claim. Kyle v. Slaughter [Ala.] 48 S 343. Where title by **adverse possession** was not shown. Larzelere v. Wood, 136 Wis. 541, 117 NW 1013. Where evidence does not show character of adverse possession claimed by defendant. Wilson v. Jernigan [Fla.] 49 S 44. As to adverse possession sufficient to give title, see Adverse Possession. To prove **outstanding title,** where evidence was mere hearsay by defendant that trust deed was outstanding and unsatisfied. Swearingin v. Swearingin, 217 Mo. 565, 117 SW 704.

30. Evidence sufficient to show possession in defendant where plaintiff (defendant in previous forcible entry action and unsuccessful therein) surrendered possession of prem-

or right thereto,[31] identity of the land,[32] or fraud.[33] All competent evidence[34] is admissible which affects matters in issue such as the title,[35] the identity of the land,[36] the right of possession,[37] and the question of possession in the defendant at the commencement of the suit.[38]

ises to defendant and defendant enjoyed all rights and privilges belonging thereto, although his possession was not secured by writ of entry. Haden v. Goodwin, 217 Mo. 662, 117 SW 1129. Evidence insufficient to show holder of mortgage to be mortgagee in possession, where mortgagee secured possession as tenant. Barson v. Mulligan, 133 App. Div. 44, 117 NYS 723, afg. 191 N. Y. 306, 84 NE 75.

31. Trust deed reserving right of possession in grantor until default, where no default is shown, was insufficient to show right of possession in plaintiff. Bursey v. Lyon, 32 App. D. C. 231.

32. Sufficient when it identified land with that described in petition. Cadwalader v. Price [Md.] 73 A 273. Sufficient to show land in controversy was included in patent, where two surveyors testified that land was included in survey, they having personally run the old lines, and there was no evidence going to show land was included in other grants. Steele v. Bryant [Ky.] 116 SW 755. Not sufficient to sustain verdict for plaintiff where there was no proof of survey by which land was described in deed relied on by plaintiff. Hayes v. Martin [Ala.] 48 S 681. Not sufficient to show identity of land in controversy with that described in instrument of title. Seabrook v. Coos Bay Ice & Cold Storage Co. [Or.] 102 P 175, afd. on rehearing [Or.] 102 P 795. Not sufficient to show that the description in the deed included the tract in controversy, where plaintiff did not locate land with reference to official map referred to in deed or survey made therefrom. Winchester v. Payne [Cal. App.] 102 P 531.

33. Sufficient to raise question of fraud in acquisition of legal title, in suit by purchaser at sale by trustee in bankruptcy, where evidence was that grantor, heavily in debt, deeded property to corporation whose books show no authority for or record of such purchase and thereafter remained in possession and control of property. Schock v. Solar Gaslight Co., 222 Pa. 271, 71 A 94. Insufficient to show that defendant was guilty of fraud in procurement of deed, where plaintiff could read and deed was read to her and, while she testified she did not understand certain parts of it, there was no evidence to show that anything was done to prevent her having a full understanding of it. Bond v. Sullivan [Ga.] 65 SE 376.

34. Assessor's books showing that tax was assessed against defendant was incompetent and prejudicial. City of Manchester v. Duggan [N. H.] 70 A 1075. Receipt to tenant for rent which does not in terms refer to lots in controversy was incompetent. Scott v. Harrell, 31 App. D. C. 45. "Court order" where defendant refused to avow that defendant or those under whom he claimed were subsequent locators. Code Va. 1904, § 2339, was incompetent. Hurley v. Charles [Va.] 65 SE 468.

35. Graham v. Peacock, 131 Ga. 785, 63 SE 348.

Admissible: Evidence by plaintiff showing common source of title. Hurley v. Charles [Va.] 65 SE 468. Evidence showing defendant's right as heir of decedent as well as his being purchaser. Graham v. Peacock, 131 Ga. 785, 63 SE 348. Plaintiff's evidence as to whether conditions of deeds had been met where defendant claimed under deeds containing conditions precedent. Maxwell v. Mississippi Val. Co. [Miss.] 48 S 610. **Deed** showing conveyances of lots 5 and 6, both of which were sued for, where it appeared that grantor had derived his title to lot 6 from patentee but no clear chain of title was shown to lot 5. Sloan v. Chitwood, 217 Mo. 462, 116 SW 1086. Evidence of tax deed offered by plaintiff of date subsequent to ripening of defendant's alleged adverse possession, where conceded question is title by adverse possession of person under whom defendant claims. Scott v. Herrell, 31 App. D. C. 45.

Inadmissible: Evidence of **opinion** of title of those through whom it passed. People v. Chicago & N. W. R. Co., 239 Ill. 42, 87 NE 946. **Parol evidence** to vary terms of written contract in so far as they relate to condition under which land will be conveyed. Graham v. Peacock, 131 Ga. 785, 63 SE 348. By plaintiff, **parol contract** of sale of land to defendant, to show common source of title when such evidence would not have been admissible to prove title in defendant. See Code 1904, § 2741. Hurley v. Charles [Va.] 65 SE 468. **Deeds** under which defendant claimed where it did not appear that grantors were ever in possession. Roe v. Doe [Ala.] 48 S 49. Deed issued on decree after more than 50 years, where decree did not authorize its issuance, where another person occupied office of register and who in issuing deed undertook to determine who were lawful heirs of person who might have been entitled to deed under decree. Sims v. Mobile, etc., R. Co., 155 Ala. 233, 46 S 494. Evidence showing **outstanding title** paramount to the common source from which both claim, unless party seeking to introduce such evidence can connect himself with such outstanding title. Bursey v. Lyon, 32 App. D. C. 231.

36. Evidence by defendant admissible, where both claim from same grantor and defendant's title is older, to effect that grantor set stakes indicating boundaries of land sold to defendant, and that owners including plaintiff erected fences in accordance with lines claimed by defendant. Metcalf v. Buck, 36 Pa. Super. Ct. 58. Patent taken out by plaintiff on recent survey held admissible, being some evidence of an admission that land included therein was not within older surveys referred to in other evidence. Steele v. Bryant [Ky.] 116 SW 755. Admission not error, where plat for purpose of identifying land, although it appeared that preliminary steps for legally platting such land were not taken where such evidence was not vital to plaintiff's recovery. Black

§ 6. *Trial and judgment.*[39] See 11 C. L. 1159—In ejectment as in other actions, the determination of equitable issues[40] raised by either the plaintiff or by the defendant is for the court,[41] but all legal issues[42] involving questions of fact[43] upon which the evidence is conflicting[44] should be submitted to the jury.

Instructions. See 11 C. L. 1160—The instructions should not be prejudicial[45] or give an unfair synopsis of the testimony.[46] An error in admitting evidence, inadmissible to prove title, may be cured by an instruction barring its application to the question of title.[47]

Verdict and judgment. See 11 C. L. 1160—The judgment must be consistent with the pleadings,[48] limited to the land described in the declaration and writ,[49] and

v. Chicago, B. & Q. R. Co., 237 Ill. 500, 86 NE 1065. **Parol evidence** admissible as to identity of land to clear away patent ambiguity in instrument claimed under, where it appears that description is equally applicable to two different locations. Hunter v. Hunter, 37 Pa. Super. Ct. 311.

37. Evidence of matters putting end to defendant's right to possession of premises, as notes secured by mortgage relied on to show that debt was past due and unpaid held inadmissible. Jackson v. Tribble [Ala.] 47 S 310. Where plaintiff's right to possession is based upon mortgage, evidence that name of transferee of plaintiff was intended to be inserted in blank on back of note secured was **immaterial,** where transfer of note and mortgage was made merely for purposes of collateral and they had been redeemed by plaintiff, title to mortgage never having passed. Id.

38. Evidence admissible to show that in former action in forcible entry plaintiff who was there unsuccessful defendant delivered possession to defendant without necessity of writ of restitution. Haden v. Goodwin, 217 Mo. 662, 117 SW 1129. Conveyances admissible under which each claim, where plaintiff and defendant are owners of adjoining lots, defendant's lot was last conveyed, and controversy is over strip bordering line between the two lots. Kennedy v Schwab, 38 Pa. Super. Ct. 638.

39. Search Note: See notes in 4 A. S. R. 382; 15 Id. 56.

See, also, Ejectment, Cent. Dig. §§ 299-345, 352-435; Dec. Dig. §§ 97-111, 113-123; 15 Cyc. 154-160, 163-172; Entry, Writ of, Cent. Dig. §§ 43-50; Dec. Dig. §§ 22, 23, 26, 27; 16 Cyc. § 1081; 7 A. & E. Enc. P. & P. 344, 723.

40. In action in ejectment where plaintiff prays for affirmative equitable relief, and pleads facts entitling him thereto, issues are triable by court without jury. Killackey v. Killackey [Mich.] 16 Det. Leg. N. 73, 120 NW 680.

41. Issue raised by answer presenting equitable defense is for court. O'Banion's Committee v. Tolbert [Ky.] 119 SW 740; Cassin v. Nicholson, 154 Cal. 497, 98 P 190. See St. 1898, § 3078. Harley v. Harley, 140 Wis. 282, 122 NW 761.

42. After determination of equitable issues by court, any material legal issues remaining may be submitted to jury. Cassin v. Nicholson, 154 Cal. 497, 98 P 190. There is absolute right to jury trial on legal issue that cannot be taken away by pleading legal issue as equitable. Harley v. Harley, 140 Wis. 282, 122 NW 761.

43. Defendant's good faith when he seeks pay for improvements, where he paid for land under deeds approved by counsel and asserted absolute ownership for 30 years, was question of fact. Faison v. Kelly, 149 N C. 282, 62 SE 1086. Whether property was deeded to defendant to conceal real ownership and to defraud owner's creditors held question of fact. Schock v. Solar Gaslight Co., 222 Pa. 271, 71 A 94. Question of whether plaintiff's possession would sustain allegation of ouster held question of fact. Ohio River Junction R. Co. v. Pennsylvania Co., 222 Pa. 573, 72 A 271.

44. Where there was some evidence going to show possession as that uncleared land was put to such use as it was then susceptible in way of firewood, rail timber, etc., question of adverse possession was for jury. Chambers v. Morris [Ala.] 48 S 687.

45. Charge wherein terms "color of title" and "claim of title" are used indiscriminately was not prejudicial where plaintiffs conceded that deed evidenced by defendant constituted color of title. Scott v. Herrell, 31 App. D. C. 45.

46. Where defense was adverse possession and plaintiff relied on record title, instruction giving fair synopsis of defendant's evidence and not referring to plaintiff's claim was not open to objection that it was unfair in that it selected for jury detached and inconclusive facts and circumstances favorable to defendant, since it was obvious that there were no facts and circumstances put in evidence on behalf of plaintiff to which attention of jury might have been directed in such charge. Scott v. Herrell, 31 App. D. C. 45.

47. Alleged error in admitting evidence of assessment held cured by charge that assessment of property as building on "William's land" was "no evidence whatever that the land was William's and not Duggan's." City of Manchester v. Duggan [N. H.] 70 A 1075. Such instruction may be just as effective to cure the error as though the evidence were stricken out. Id. **On review,** the court exercised its power to determine whether jury had observed instruction to not consider certain evidence as bearing on title, and as party objecting failed to sustain burden decided against him. Id.

48. Judgment for defendant held not inconsistent with pleadings where petition was ordinary petition in ejectment, answer a general denial, and plea of statute of limitations and reply a general denial. Coleman v. Roberts, 214 Mo. 634, 114 SW 39.

49. Where in ejectment, plaintiff's declaration, praecipe and writ describe the land claimed as bounded on the east by a particu-

against only those who are parties to the suit or who voluntarily appear.[50] Where the plaintiff's right is subject to an easement, the judgment shall conform thereto,[51] and where the plaintiff parts with his rignt pending the action the judgment shall be accorded to the fact.[52] The court may decree the cancellation of a void deed relied on by the defendant though such relief be not requested in the complaint.[53] Failure of the judgment to properly describe the land may be corrected by the record.[54]

Costs.[See 9 C. L. 1036]—This subject is fully treated elsewhere.[55]

Writ of possession.[See 11 C. L. 1160]—A writ of possession should be executed against all persons in possession under the defendant and persons entering pendente lite unless it is clear that they did not enter under or in collusion with the defendant.[56] Eviction may be stayed where equity or public interest demands it.[57]

§ 7. *New trial.*[58]—[See 11 C. L. 1161]—In some cases special statutes provide for the granting of new trials in ejectment upon the payment of certain costs and the giving on an undertaking [59] entered into by sureties who properly justify,[60] but such statutes do not always preclude the granting of a new trial under the general statutes.[61]

§ 8. *Mesne profits and damages.*[62]—[See 11 C. L. 1161]—Rents and profits were not recoverable at common law,[63] but by statute a judgment for plaintiff [64] may now usually include those rents and profits [65] of which the defendant secured the bene-

lar warrant and survey, the plaintiff cannot recover any land east of that line. Updegraff v. Snyder, 36 Pa. Super. Ct. 30.

50. Where landlord voluntarily appears as defendant, he becomes responsible if possession of his tenant be adjudged wrongful, though he was not originally a party to suit. Mann v. Doerr [Mo.] 121 SW 86. Judgment cannot be against one not party to suit and who does not voluntarily appear, though he be tenant in possession. Tennessee Coal, Iron & R. Co. v. Wise [Ala.] 49 S 253.

51. Should also be subject to such easement. Weyler v. Gibson, 110 Md. 636, 73 A 261.

52. Code Civ. Proc. § 740. Cassin v. Nicholson, 154 Cal. 497, 98 P 190. Where rights of nominal plaintiff have passed to another after the commencement of an action, which other appears in person, no judgment can be rendered in favor of such nominal plaintiff. Id.

53. Whitehead v. Callahan, 44 Colo. 396, 99 P 57.

54. Failure of judgment to describe the land when such description may be obtained by reference to the pleadings and verdict, being mere clerical error, may be corrected. Latham v. Lindsay [Ky.] 113 SW 878.

55. See Costs.

56. Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574. All members of defendant's family and his employes may be removed under the writ, and persons holding under him, the presumption being that any person entering pendente lite holds under him. Id.

57. Judgment against railroad for right of way stayed 30 days to enable parties to agree upon price of land or permit institution of condemnation proceedings. Mapes v. Vandalia R. Co., 238 Ill. 142, 87 NE 393. Stayed pending payment of allowances for improvements. Id.

58. Search Note: See note in 40 L. R. A. 825.

See, also, Ejectment, Cent. Dig. §§ 346-351; Dec. Dig. § 112; 15 Cyc. 172-174; 7 A. & E. Enc. P. & P. 355.

59. St. 1898, § 3092, provides for granting of new trial in ejectment upon payment of certain costs and execution of undertaking for costs and damages. Frost v. Meyer, 137 Wis. 255, 118 NW 811.

60. St. 1898, § 3092, requires undertaking to which sureties justify as condition to new trial. Dickinson v. Smith, 139 Wis. 1, 120 NW 406. Justification under statute cited in preceding note held sufficient when approved by judge though sureties failed to state that property was over and above debts and liabilities. Id.

61. St. 1898, § 3092, applicable to granting new trial in ejectment, held not to prevent granting of new trial in ejectment under general statute. Frost v. Meyer, 137 Wis. 255, 118 NW 811.

62. Search Note: See notes in 6 L. R. A. (N. S.) 710; 9 A. S. R. 795.

See, also, Ejectment, Cent. Dig. §§ 436-535; Dec. Dig. §§ 124-153; 15 Cyc. 200-239; Entry, Writ of, Cent. Dig. §§ 51-54; Dec. Dig. § 24; 10 A. & E. Enc. L. (2ed.) 535.

63. Remedy after recovery in ejectment being by trespass for rents and profits. Cape Girardeau, etc., R. Co. v. St. Louis & G. R. Co. [Mo.] 121 SW 300.

64. Recovery of rents and profits depends upon plaintiff's recovery of possession. Cape Girardeau, etc., R. Co. v. St. Louis & G. R. Co. [Mo.] 121 SW 300.

65. Mills' Ann. Code, §§ 267, 269, providing for damages for ouster and detainer held to include rents and profits. Whitehead v. Callahan, 44 Colo. 396, 99 P 57. Rents and profits are recoverable under Ann. St. 1906, pp. 1758, 1764, 1765. Cape Girardeau, etc., R. Co. v. St. Louis & G. R. Co. [Mo.] 121 SW 300. Judgment for plaintiff must determine rents and profits for which defendant may be liable. Waits v. Moore [Ark.] 115 SW 931. Judgment may determine liability for rent. Gervaise v. Brookins [Cal.] 103 P 332.

fit[66] and interest thereon,[67] where such matter is in issue by the pleading or by tacit consent[68] and the evidence thereon is sufficient.[69] A defendant is usually allowed to offset any taxes paid by him against the rent for which he is liable.[70] In estimating damages based on the value of land, the proper measure is its value to the plaintiff and not as used by the defendant.[71]

§ 9. *Allowance for improvements and expenditures.*[72]—See 11 C. L. 1162.—The right of the unsuccessful occupant to recover under the occupying claimants' acts for improvements and the nature of the improvements for which recovery may be had is fully treated elsewhere.[73] The right to pay for improvements may generally be determind in the judgment in ejectment.[74] The burden is on the defendant seeking pay for improvements to show that the improvements were made in good faith[75] and to establish his right to such payment by sufficient evidence.[76] Allowances may be made for taxes paid[77] but not for growing crops.[78] When it has been adjudged that the defendant is entitled to pay for improvements, no final judgment for the recovery of land should be rendered until the value of such improvements has been ascertained.[79] Eviction may be stayed pending the payment of the allowances made for improvements.[80]

ELECTION AND WAIVER.

The scope of this topic is noted below.[81]

§ 1. Election in General, 1397.
§ 2. Occasions for Election, 1397.
A. Of Remedies, 1397.
B. Of Rights and Estates, 1399.
§ 3. Waiver in General, 1400.
§ 4. Acts, Indicia and Consequences of Election and Waiver, 1400.
§ 5. Pleading and Proof, 1403.

66. Plaintiff held not entitled to mesne profits of land antedating time when defendant went into possession and was entitled to receive profits of land. Bowman v. Owens [Ga.] 65 SE 156. Under agreed statement that defendant occupied property to certain date when he moved out retaining key, and while he did not rent property to another, yet with his knowledge and consent other parties occupied premises, held that judgment taxing rent only to such date was not erroneous. Haish v. Pollock [Kan.] 101 P 3.

67. Plaintiff was entitled to interest on rental value of land. Nunn v. Lynch [Ark.] 115 SW 926.

68. Judgment in respect to rent held proper in view of fact that case was tried on theory that this was in issue though answer was not technically sufficient to place it in issue. Gervaise v. Brookins [Cal.] 103 P 332.

69. Sufficient to enable jury to find rental value where there was evidence of value of land for rent with improvements placed thereon, and of value of improvements, and also of value of land with and without these improvements, of quantity of land cleared and suitable for cultivation and of value of land for rent suitable for cultivation per acre. Bowman v. Owens [Ga.] 65 SE 156.

70. Allowed. Nunn v. Lynch [Ark.] 115 SW 926.

71. In estimating damages based on value of land, value to plaintiff, and not to defendant, by reason of use made of it for boom site, held proper measure. Lownsdale v. Grays Harbor Boom Co. [Wash.] 103 P 833.

72. Search Note: See note in 14 A. S. R. 53. See, also, Ejectment, Cent. Dig. §§ 436-535; Dec. Dig. §§ 124-153; 15 Cyc. 200-239; Entry, Writ of, Cent. Dig. §§ 55-60; Dec. Dig. § 25; 10 A. & E. Enc. L. (2ed.) 542.

73. See Accession and Confusion of Property.

74. Under Revisal 1905, § 652, claim for improvements may be determined at trial of ejectment. Faison v. Kelly, 149 N. C. 282, 62 SE 1086. Judgment for plaintiff must determine right of either or both plaintiff or defendant to value of improvements. Waits v. Moore [Ark.] 115 SW 931.

75. Must show he had good reason to believe he owned the land. Faison v. Kelly, 149 N. C. 282, 62 SE 1086.

76. Sufficient, to show defendant entitled to allowance for money paid to plaintiff, it not appearing from evidence that such payments were for benefit of plaintiff's husband instead of plaintiff as claimed. Bond v. Sullivan [Ga.] 65 SE 376.

77. Defendant allowed for taxes paid. Nunn v. Lynch [Ark.] 115 SW 926.

78. Wright v. Johnson, 108 Va. 855, 62 SE 948. As to what allowances may or may not be made for, see Accession and Confusion of Property.

79. Brown v. Norvell [Ark.] 115 SW 372.

80. Stayed by injunction where allowances made to defeated tax deed holder in possession. Ross v. Kelson [Kan.] 98 P 772.

81. Only a general treatment of the doctrines of election and waiver is here attempted. For more specific application of the principles involved reference should be had to the topics dealing with the subject-matter concerned, such as Contracts,* §§ 6B,

§ 1. *Election in general.*[82] See 11 C. L. 1162—The doctrine of election of remedies is that a party is held to the remedy adopted by him where he had a choice of remedies proceeding upon opposite and irreconcilable claims of right.[83] It does not arise except where two or more irreconcilable remedies are open,[84] and an attempt to enforce a remedy not in fact available is not an election.[85]

§ 2. *Occasions for election. A. Of remedies.*[86] See 11 C. L. 1182—One may in certain cases have more than one remedy.[87] A clear, ample, and expeditious statutory remedy is usually held to be exclusive,[88] but some times there is a right of election between this and the common-law remedy.[89] Where one has several remedies, he may then choose between them,[90] and if the remedies are consistent he may pursue

9B; Insurance,* § 16C; Sales,* §§ 8E, 11H; and the like. Election between counts (see Pleading,* § 2), and elections by a surviving spouse between testamentary and statutory provisions (see Wills,* § 5D), and for or against dower (see Dower,* § 1), the homestead (see Homesteads,* §§ 5, 7), or rights under antenuptial or other contracts (see Husband and Wife*), together with the manner and effect of such elections are specially treated elsewhere, as are also the waiver of objections in judicial proceedings (see Saving Questions for Review;* Appeal and Review,* § 1B; Jury,* § 1C), waiver of rights secured to persons accused of crime (see Indictment and Prosecution,* §§ 3, 5, 6, 10A, 14), and the doctrines of estoppel (see Estoppel*), and laches (see Equity,* § 13).

82. Search Note: See Election of Remedies, Cent. Dig. §§ 1-5; Dec. Dig. §§ 1-4; 15 Cyc. 251-267; 11 A. & E. Enc. L. (2ed.) 57, 59; 29 Id. 1089.

83. Henry v. Herrington, 193 N. Y. 218, 86 NE 29. Where a party has an election between two inconsistent remedies, he is bound by that which he first chooses. Whalen v. Stuart, 194 N. Y. 495, 87 NE 819. See, also, post, § 4.

84. Moon v. Hartsuck, 137 Iowa, 236, 114 NW 1043. Not after one has been lost. Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 P 994.

85. In re Strickland, 167 F 867; Harrill v. Davis [C. C. A.] 168 F 187; Hays v. Weeks [Fla.] 48 S 997; Babcock, Cornish & Co. v. Urquhart, 53 Wash. 168, 101 P 713. Remedy is not available when there is a good defense to it. Id. Unsuccessful replevin held no bar to suit for price of goods. Hays v. Weeks [Fla.] 48 S 997. Attempt to perfect a lien against a corporation not existing held not to preclude suit against members as partners. Harrill v. Davis [C. C. A.] 168 F 187. Action for conspiracy to defraud plaintiff of goods, dismissed because plaintiff had sold the goods, held not to preclude subsequent action for price. Henry v. Herrington, 193 N. Y. 218, 86 NE 29. Attempt to enforce chattel mortgage not covering the property involved in suit held not to preclude reliance on reservation of title under farm contract. McFadden v. Thorpe Elevator Co. [N. D.] 118 NW 242. Mistaken action against owners of land for failure to convey to purchaser found by plaintiff, under agreement with one assuming to act as owners' agent, and payment of a certain sum by owners to buy place, held no election so as to preclude action against would-be agent. Wilson v. Ewald, 61 Misc. 286, 113 NYS 687. One who sues for value of services under contract for compensation at employer's death need not elect for or against suit for breach of contract, there having been no breach by decedent. Bunting v. Hutchinson, 5 Ga. App. 194, 63 SE 49. Doctrine of election inapplicable in case of appeal and certiorari since certiorari is unavailable where appeal is available and pursuit of certiorari does not bar right to appeal. Moon v. Hartsuck, 137 Iowa, 236, 114 NW 1043.

86. Search Note: See notes in 6 L. R. A. (N. S.) 782; 1 A. S. R. 626; 5 Ann. Cas. 962; 6 Id. 212.

See, also, Election of Remedies, Cent. Dig. §§ 2-11; Dec. Dig. §§ 2-6; 15 Cyc. 253-257, 259, 264-267; 20 Id. 187; 10 A. & E. Enc. L. (2ed.) 550; 7 A. & E. Enc. P. & P. 361.

87. One induced by fraud to purchase property may either rescind sale and return the property or retain property and sue for damages. Del Vecchio v. Savelli [Cal. App.] 101 P 32. Landowner from whose land timber is wrongfully cut and removed may maintain trespass quare clausum, or trover, or other form of action appropriate for recovering personalty or its value, or he may waive tort and sue in assumpsit. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270. See, also, Trespass. Injured passenger may sue carrier either on contract or for breach of public duty to exercise care. Canaday v. United R. Co. of St. Louis, 134 Mo. App. 282, 114 SW 88. See Carriers. Where money is paid by a bank to a depositor after notice of assignment of deposit, assignee may either ignore payment and sue bank or he may ratify and sue original depositor for money had and received. Hochberger v. Ludvigh, 63 Misc. 313, 116 NYS 696.

See Contracts, § 9B; Fraud and Undue Influence, § 3; Sales, §§ 10, 11; and the like.

88. Thayer v. Kitchen, 200 Mass. 382, 86 NE 952. Summary remedy in probate court for production of concealed will held exclusive. Id.

89. Owner whose property is levied on as belonging to another may either file claim affidavit with officer and pursue statutory remedy or sue in replevin, but must elect. Studebaker Bros. Mfg. Co. v. Davis, 137 Mo. App. 58, 119 SW 532.

90. Rule that where legal and equitable remedies are concurrent plaintiff may elect which he will pursue, held not applicable where plaintiff had adequate remedy at law for fraud so that there was no concurrent remedy in equity. Griesa v. Mutual Life Ins. Co. [C. C. A.] 169 F 509. Though one may be required to elect between prosecuting

them concurrently,[91] being of course limited to one satisfaction,[92] but if they are inconsistent he will be put to his election,[93] and having once elected he cannot thereafter revert to the untried remedies.[94] Thus one may not pursue a remedy based on rescission of a contract and one based on its enforcement,[95] or one based on the breach of a contract and one based on its continuation,[96] but there is no inconsistency between a suit for reformation of a contract and an action for its enforcement.[97] One who has recovered on a chose in action cannot sue for its previous conversion by another,[98] nor can an obligation be defeated by one who has recovered damages for its fraudulent procurement.[99] But an action to obtain chattels does not preclude one to recover for false representation as to their value,[1] nor is an action to recover money fraudulently diverted an election precluding one for damages for permitting the diversion.[2] An action to recover money due is not inconsistent with one to enforce a lien securing it,[3] though attachment is issued in the first mentioned action.[4]

Waiver of tort. See 11 C. L. 1164—In some instances a right of action may be en-

law or equity suit, equity **court cannot make election** and stay equity suit until law action is determined. State v. Morse [Utah] 103 P 969.

91. Building contractor held entitled to enforce mechanic's lien pending action for debt. Morrison Co. v. Williams, 200 Mass. 406, 86 NE 888. That a creditor proved his claim in bankruptcy held not to preclude withdrawal of claim for purpose of enforcing it against exemptions set apart to bankrupt, by virtue of waiver of such exemptions contained in notes securing claim. In re Strickland, 167 F 867.

92. Recovery on a draft held limited to balance due after deducting dividend received on claim filed in insolvency of debtor. Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 118 NW 282.

93. Question whether remedies are inconsistent should be determined by considering relation of parties with reference to right sought to be enforced as asserted in pleadings. American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 S 942. Action against common carrier held contractual, and not in tort, so as not to be inconsistent with previous contract action in another state. Missouri, K. & T. R. Co. v. Sealy [Kan.] 99 P 230.

94. See post, § 4.

95. Held Inconsistent: One may not both rescind and enforce a contract. Olsen v. Sortedahl [Iowa] 121 NW 559. Purchaser of machinery not conforming to warranty cannot both rescind and recover damages for breach of the contract. Houser v. Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 P 894. **Seller of goods** must elect between retaking and suing for price. Nashville Lumber Co. v. Robinson [Ark.] 121 SW 350; American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 S 942; Madison Live Stock Co. v. Osler [Mont.] 102 P 325. Action for price of goods and for conversion are inconsistent, and seller must elect. Frisch v. Wells, 200 Mass. 429, 86 NE 775.

96. May not affirm and at same time take advantage of breach. Voss v. Northwestern Nat. Life Ins. Co., 137 Wis. 492, 118 NW 212. See, also, post, § 2B.

97. Equity suit for **reformation of a contract** is not inconsistent with pending law action on contract as complainant claims it should have been written. Florida Home Ins. Co. v. Bozeman [Fla.] 50 S 413. Plea of pending law action on insurance policy as written held properly overruled, it appearing action was on policy in form plaintiff claimed it should have been written. Id.

98. In action against defendant for **conversion of a note,** held error to preclude defendant from showing that in a former suit by makers to whom defendant had delivered the note, to recover collaterals, plaintiff had claimed he was still owner of note and entitled to the collaterals. Hill v. Wiley, 202 Mass. 243, 88 NE 838.

99. One who recovered damages for fraud inducing execution of a note cannot thereafter defeat recovery on note because of the fraud. Loy v. Alston [C. C. A.] 172 F 90.

1. Where defendant obtained stock from plaintiff by fraud, action against a bank to recover the stock or its value held no bar to action against defendant for his false representations. Maxwell v. Martin, 130 App. Div. 80, 114 NYS 349.

2. Action by bank against officers and directors **for** negligently permitting cashier to purchase bonds with bank funds held not inconsistent with action against seller to recover purchase money received with notice it belonged to bank. Davenport v. Walker, 132 App. Div. 96, 116 NYS 411.

3. Action against estate of a devisee to recover amount of annuity held not inconsistent with, nor bar to, subsequent action to enforce lien on land on which annuity was charged. Stringer v. Gamble [Mich.] 15 Det. Leg. N. 1030, 118 NW 979. Action at law for price of materials sold does not bar **foreclosure of mechanic's lien** (State v. Morse [Utah] 103 P 969), though plaintiff may be required to elect whether he will proceed with the action at law or with equity suit (Id.). Court cannot elect. Id.

4. Attachment and foreclosure of a lien are inconsistent remedies. Consignee's Favorite Box Co. v. Speer, 5 Ga. App. 156, 62 SE 1006. Not error to refuse to require election (Id.), especially where but few items of account constituted lawful basis for lien (Id.). Attachment or other recognized process for collection of debts is not inconsistent with enforcement of a mortgage on other property securing debt. Kansas City Live Stock Com. Co. v. Bank of Hamlin [Kan.] 101 P 617.

forced either by an action ex contractu or an action ex delicto.[5] A tort may be waived in many cases and recovery had in assumpsit,[6] and one may often sue in tort for violation of contractual duty,[7] as where the contract obligation is negligently performed.[8]

(§ 2) *B. Of rights and estates.*[9]—See 11 C. L. 1165—In addition to its application to inconsistent remedies,[10] the doctrine of election applies to claims of rights or estates which are antagonistic.[11] Thus, one may not claim under and against a will at the same time,[12] nor may he maintain that an instrument is void and also assert rights under it,[13] and the same rule applies to a statute.[14] Election to take under the will of a deceased spouse or under the law,[15] or between dower and provisions made by antenuptial or other contracts,[16] or between dower and a child's part,[17] is treated elsewhere.

5. Damages for delay in shipment or for loss of goods by carrier. Wernick v. St. Louis & S. F. R. Co., 131 Mo. App. 37, 109 SW 1027; Owens Bros. v. Chicago, etc., R. Co., 139 Iowa, 538, 117 NW 762.

6. Owner of goods in possession of another who wrongfully refuses to deliver them to owner on demand may sue for conversion or waive tort and sue on account for value of goods, treating wrongdoer as a purchaser. First Nat. Bank of Decatur v. Henry [Ala.] 49 S 97. Assumpsit will not lie for personalty converted unless it appears wrongdoer disposed of property for money or its equivalent, and owner cannot elect but must sue ex delicto. Woodruff v. Zaban [Ga.] 65 SE 123. Where complaint in such case expressly waived tort, action could not be maintained as one ex delicto. Id. Where property has been wrongfully converted and sold, owner may waive tort and sue for the money, but foundation of action is tort and action proceeds not on contract but on equitable obligation to pay over proceeds of sale. Avery v. McClure [Miss.] 47 S 901. Though remedy of a seller for failure of buyer to discharge legal duty to remove property sold sounds in tort, court does not say that tort might not be waived and implied assumpsit maintained. Kellerman Cont. Co. v. Chicago House Wrecking Co., 137 Mo. App. 392, 118 SW 99. **Trustee in bankruptcy,** where property has been wrongfully converted may waive tort and sue in assumpsit, he standing in bankrupt's place. Dittemore v. Cable Mill. Co. [Idaho] 101 P 593. Case of a mere creditor distinguished. Id. **Executor** held entitled to sue for conversion of personalty of testator or to waive tort and sue on implied contract. Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328.

7. Inhabitants of Milford v. Bangor R. & Elec. Co., 104 Me. 233, 71 A 759.

8. Case would lie for negligent performance of contract to maintain water supply for extinguishment of fires, resulting in loss of property. Inhabitants of Milford v. Bangor R. & Elec. Co., 104 Me. 233, 71 A 759.

9. Search Note: See notes in 5 C. L. 1080; 11 L. R. A. (N. S.) 379; 92 A. S. R. 695; 4 Ann. Cas. 1037; 5 Id. 82; 6 Id. 336.

See, also, Dower, Cent. Dig. §§ 129, 207; Homestead, Dec. Dig. § 138; 21 Cyc. 574, 580; Wills, Cent. Dig. §§ 2004-2048; Dec. Dig. §§ 778-790; 11 A. & E. Enc. L. (2ed.) 64, 81.

10. See ante, § 2A.

11. Owner of land on both sides of railway right of way held not entitled to claim protection for land on one side by a dike maintained by railroad and at same time recover damages for overflow of land on other side by reason of the dike. Bones v. Chicago, etc., R. Co. [Iowa] 120 NW 717. Employe held required to elect between insurance purchasable with deductions from his wages and recovery of such deductions, employer having falsely represented he was carrying accident insurance for employe's benefit. Williams v. Detroit Oil & Cotton Co. [Tex. Civ. App.] 114 SW 167.

12. One may not take under will and at same time have it declared void. Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049. Where husband's will disposed of property belonging to wife and forfeited all rights of any contestant under will, child contesting on ground will disposed of mother's property elected to take as mother's heir and forfeited his rights under will. Massie v. Massie [Tex. Civ. App.] 118 SW 219. Doctrine of election between inconsistent benefits held not applicable where mortgagee devises part of mortgaged property to holder of equity of redemption and remainder to others. Rich v. Morisey, 149 N. C. 37, 62 SE 762.

13. Tenant cannot hold possession under a lease and also maintain it is void. Hutchinson v. Wilson [Wash.] 103 P 474. One may not sue on a contract and at same time allege it is void for fraud. Statham v. Southern States Life Ins. Co., 5 Ga. App. 357, 63 SE 250. Contractor cannot enforce lien for work under express contract and by virtue of notice of lien affirm such contract and at same time allege contract void for fraud. Shackleton v. Baggaley [C. C. A.] 170 F 57. Surety cannot rely on drawings and specifications as part of contract and also question their identity because they were not signed as contract required. Aetna Indemnity Co. v. Waters, 110 Md. 673, 73 A 712. Patent licensee cannot repudiate license in part for fraud and claim under it in part. Ferry-Hallock Co. v. Progressive Paper Box Co. [N. J. Eq.] 73 A 230.

14. One may not claim under a statute and at same time question its constitutionality. Ross v. Lipscomb [S. C.] 65 SE 451. Taxpayer recovering taxes under a statute as having been wrongfully exacted cannot contend that statute is unconstitutional if it does not provide for payment of interest. Home Sav. Bank v. Morris [Iowa] 120 NW 100.

15. See Wills, § 5D.

16, 17. See Dower, § 1.

§ 3. *Waiver in general.*[18] See 11 C. L. 1165—A legal right may be waived.[19] A waiver is an intentional relinquishment of a known right.[20] Its essence is voluntary choice, as distinguished from mere negligence.[21] Though the intention need not be expressed,[22] it must be evidenced by conduct of an unequivocal character,[23] and the waiving party must have acted with knowledge of all material facts affecting his rights.[24] Though it has been held that a waiver must arise either by contract or by estoppel,[25] facts amounting to a technical estoppel need not be shown.[26] A consideration is not always essential.[27] Where language or conduct is equivocal, the question of waiver is for the jury,[28] but where the facts and circumstances are admitted or clearly established, waiver becomes a question of law.[29]

§ 4. *Acts, indicia and consequences of election and waiver.*[30] See 11 C. L. 1165—An election usually consists of some decisive and unambiguous conduct indicating a choice [31] of an available remedy [32] by a person fully cognizant of the facts and of

18. Search Note: See Estoppel, Dec. Dig. § 52; 16 Cyc. 710-719; 29 A. & E. Enc. L. (2ed.) 1091, 1107, 1108.

19. Madison v. Octave Oil Co., 154 Cal. 768, 99 P 176.

20. List & Son Co. v. Chase, 80 Ohio St. 42, 88 NE 120; Barber v. Vinton [Vt.] 73 A 881; Swedish-American Nat. Bank v. Koebernick, 136 Wis. 473, 117 NW 1020. Voluntary relinquishment of a known right benefit or advantage (Voss v. Northwestern Nat. Life Ins. Co., 137 Wis. 492, 118 NW 212) is where one in possession of any right conferred by law or contract and with knowledge of all material facts does or forbears something inconsistent with existence of the right or intention to rely on it (Charlotte Harbor & N. R. Co. v. Burwell, 56 Fla. 217, 48 S 213).

21. Barber v. Vinton [Vt.] 73 A 881; Voss v. Northwestern Nat. Life Ins. Co., 137 Wis. 492, 118 NW 212. Waiver is a voluntary act, and not one forced on a party by the court. McKee v. Rudd [Mo.] 121 SW 312. Waiver of objections in judicial proceedings, see scope note, for this article.

22, 23. Barber v. Vinton [Vt.] 73 A 881. See post, § 4.

24. Barber v. Vinton [Vt.] 73 A 881. See, also, post, § 4. Must be voluntary with knowledge of facts and rights or must be implied from conduct amounting to estoppel. List & Son Co. v. Chase, 80 Ohio St. 42, 88 NE 120.

25. Atlantic Coast Line R. Co. v. Boyan [Va.] 65 SE 30.

26. Waiver of employe's notice to master of injury as per contract of employment. Missouri, K. & T. R. Co. v. Walker [Kan.] 99 P 269. Waiver not necessarily predicated on estoppel, former having as its essence voluntary choice. Voss v. Northwestern Nat. Life Ins. Co., 137 Wis. 492, 118 NW 212.

27. While waiver of a right often requires consideration, this element is not always essential. Whitsett v. People's Nat. Bank [Mo. App.] 119 SW 999. Depositor in bank could by acquiescence and conduct waive right to deposit transferred by bank to another. Id. No consideration held necessary for waiver of provision in contract of employment requiring 30 days' notice of injuries. Missouri, K. & T. R. Co. v. Walker [Kan.] 99 P 269. Where estoppel arises **by contract,** it must be supported by such a valuable consideration as is essential for any other contract. Atlantic Coast Line R. Co. v. Bryan [Va.] 65 SE 30.

28. For jury whether a master intended to consent that statutory notice by employe of injury in course of employment be delayed so as to waive notice within statute time. Wolven v. Gabler, 132 App. Div. 45, 116 NYS 359. Waiver is a proper question for jury. Missouri, K. & T. R. Co. v. Walker [Kan.] 99 P 269.

29. Swedish-American Nat. Bank v. Koebernick, 136 Wis. 473, 117 NW 1020.

30. Search Note: See notes in 5 L. R. A. (N. S.) 603; 10 A. S. R. 487; 11 Ann. Cas. 828. See also, Dower, Cent. Dig. §§ 129, 207; Dec. Dig §§ 58, 59; 14 Cyc. 930, 931, 952-958; Election of Remedies, Cent. Dig. §§ 12-15; Dec. Dig. §§ 7-12; 15 Cyc. 259-262, 264, 265; Wills, Cent. Dig. §§ 2049-2070; Dec. Dig. §§ 791-797; 11 A. & E. Enc. L. (2ed.) 96, 107, 109; 29 Id. 1092.

31. Acts held election: Prosecution of first of two actions brought against a carrier held election to abandon the second. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. Motion to compel election properly overruled, second action being subject to dismissal. Id. Suing undisclosed principal with full knowledge of facts and law, thus affirming agency, constitutes election to resort to him alone and precludes subsequent action against agent. Murphy v. Hutchinson [Miss.] 48 S 178. Bringing action for deceit in purchase of a horse held election to affirm contract of sale. Corey v. Boynton [Vt.] 72 A 987. Action for reformation of contract for conveyance so as to enable complainant to recover amount paid because of unmarketability of title held election to rescind so as to bar specific performance. Whalen v. Stuart, 194 N. Y. 495, 87 NE 819.

Acts held not election: Mere notice by a purchaser of rescission of contract held not to preclude action for damages for fraud, purchaser not having in fact adopted remedy by rescission. Del Vecchio v. Savelli [Cal. App.] 101 P 32. Assignee of note reserving title to property sold, by suing to recover property from purchaser at foreclosure of a mortgage consented to by payee of note, held not to elect to rely on property so as to be precluded from subsequently suing maker on note and assignor on his guaranty of payment, which guaranty referred to note as retaining a "vendor's lien." Bell v. Old [Ark.] 113 SW 1023. Statement in affidavit for examination of corporate officer to enable plaintiff to frame complaint, that general nature of action was for rescis-

his rights.[33] An election evidenced by an action is made by the commencement of the action.[34] The first of two or more actions determines the election.[35] and where a second action is set up as an election barring a third, plaintiff may show that the first constituted the election and was consistent with the third.[36] An election once made is final and precludes resort to the alternative inconsistent remedy [37] or to any

sion of stock subscription contract and recovery of money paid, held not election of remedies precluding relief by charging such officer as trustee of profits fraudulently retained or for damages for fraud in connection with subscription and manipulation of corporate assets. Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257. Filing and proving claim against cattle shipper **in insolvency proceedings** held not election depriving creditor of right to sue shipper for wrongfully diverting proceeds of a shipment to which creditor was entitled as security. Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 118 NW 282. Recovery limited to balance after deducting dividend received on claim against insolvent estate. Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 120 NW 625. Where in bankruptcy a creditor was entitled to put in double proof of its claim against bankrupt firm and also against partners individually, acceptance of a dividend under a composition held not to preclude enforcement of balance of claim against a partner for settlement of whose indebtness composition did not propose to make any arrangement. In re Coe, 169 F 1002. **In replevin** against a levying officer, defense that plaintiff had elected to file affidavit of ownership with officer and rely on statutory remedy held not made out, it not appearing affidavit conformed to statute. Kesse v. Wilson [Mo. App.] 119 SW 508. **Attachment** by assignee of part of a judgment, against judgment creditor, to reach money paid to latter by debtor, held not to estop assignee from suing to enforce his rights against realty made subject to judgment, judgment debtor not having been prejudiced. Alexander v. Munroe [Or.] 101 P 903. **Forcible entry** not brought to judgment held not such election as to preclude amendment converting proceeding into action of right to recover the land. Denecke v. Miller [Iowa] 119 NW 380. **Garnishment** not pursued further than to notify defendants they were garnished, held not election precluding subsequent equitable levy on property. W. A. Jordan Co. v. Sperry Bros. [Iowa] 119 NW 692. **Injunction** against condemnation for schoolhouse site held not election excluding certiorari to quash record of board of education. Southworth v. Ogle County Board of Education, 238 Ill. 190, 87 NE 403.

32. See ante, § 2A, rule that mistake of remedy is not election.

33. Feme covert devisee is entitled to full information of value of land and of her right of redemption, before being required to elect under will disposing of part of property to others. Rich v. Morisey, 149 N. C. 37, 62 SE 762.

34. Commencement of action, and not judgment, is determinative of election of inconsistent remedies. Frisch v. Wells, 200 Mass. 429, 86 NE 775. Suit for price of goods, begun but not prosecuted, held to preclude replevin. Id.

35, 36. Babcock, Cornish & Co. v. Urquhart, 53 Wash. 168, 101 P 713.

37. Fidelity & Deposit Co. v. Art Metal Const. Co. [Ala.] 50 S 186; Madison Live Stock Co. v. Osler [Mont.] 102 P 325; Henry v. Herrington, 193 N. Y. 218, 86 NE 29; Whalen v. Stuart, 194 N. Y. 495, 87 NE 819. Detinue plaintiff electing to take value of property cannot recover for its use pending affirmance on appeal, despite appeal bond securing against all damages. Fidelity & Deposit Co. v. Art Metal Const. Co. [Ala.] 50 S 186. Election to pursue property in hands of sheriff in foreclosure of mortgage and claim of proceeds of sale held to preclude remedy under forthcoming bond given by mortgagee. Barnes v. Vandiver, 5 Ga. App. 162, 62 SE 994. An owner's service of statutory notice of claim on officer for property seized as another's bars replevin. Studebaker Bros. Mfg. Co. v. Davis, 137 Mo. App. 58, 119 SW 532. Action by bank against estate of cashier for conversion of bonds cashier had bought with bank funds held bar to subsequent action against seller on ground he had received bank funds with notice. Davenport v. Walker, 132 App. Div. 96, 116 NYS 411. Election of stockholder of a corporation to demand cash for his withdrawn stock held to preclude him from receiving bonds therefor after institution of bankruptcy proceedings against corporation, he having previously refused the bonds. In re Reading Hosiery Co., 171 F 195.

Relitigation: Parties entitled to sue either at law or in equity cannot relitigate a question in equity after having pursued their remedy at law. Carr v. Arnold, 239 Ill. 37, 87 NE 870. Litigant prosecuting suit to final determination in state supreme court held not entitled, after remand by such court, to remove cause to federal court. Daugherty v. Sharp, 171 F 466. One who with full knowledge of facts and the law elects to sue a principal and proceeds to judgment cannot, on being defeated, sue agent on same cause of action. Murphy v. Hutchinson [Miss.] 48 S 178, reviewing authorities.

Vendor and vendee: Conditional vendor cannot sue for price after retaking the property. Nashville Lumber Co. v. Robinson [Ark.] 121 SW 350. Evidence held to sustain finding plaintiff had elected to retake property. Id. Filing claims in bankruptcy for price of property held bar to subsequent action for recovery of same propriety American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 S 942. Action for price of goods conditionally sold held to preclude subsequent replevin. Frisch v. Wells, 200 Mass. 429, 86 NE 775. Rule precluding resort to remedy inconsistent with one previously adopted held not violated though journal entry stated that court allowed change of election, where what actually took place was that court allowed defendant to change amendment declaring he had disaffirmed contract of sale to amend-

of its incidents,[38] though the right to revoke an election is sometimes conferred by contract.[39]

Waiver may be shown by conduct signifying a purpose not to stand on a right [40] and permitting the inference that the right in question will not be insisted on.[41] It may be made by express words or by conduct rendering impossible performance by the other party,[42] or which seems to dispense with complete performance at a

ment declaring he had affirmed it. Fetzer & Co. v. Williams [Kan.] 103 P 77. Action for damages for breach of contract precludes subsequent **rescission for fraud.** Smith v. Gray, 52 Wash. 255, 100 P 339. Plaintiff knowing of fraud in sale of land and suing for damages held not entitled thereafter to sue to rescind. Id. Where a vendor elected to affirm contract of sale induced by fraud, by suing for deceit, he could not thereafter disaffirm. Corey v. Boynton [Vt.] 72 A 987. Though by silence after discovery of fraud a buyer affirms contract and cannot thereafter rescind (Hodgkins v. Dunham [Cal. App.] 103 P 351), he may sue for deceit practiced on him to induce execution of contract (Id.). Vendee's rescission of contract and demand of return of deposit held bar to specific performance. Whalen v. Stuart, 194 N. Y. 495, 87 NE 819.

38. Where tort was waived and suit brought on implied contract for value of timber cut, action was one of assumpsit and governed by rules of venue pertaining to transitory actions. Asher v. Cornett [Ky.] 113 SW 131.

39. Mortgagee held entitled under express terms of mortgage to revoke an election to declare entire sum due on default. Philadelphia Sav. Fund Soc. v. Lasher, 144 Ill. App. 653.

40. Swedish-American Nat. Bank v. Koebernick, 136 Wis. 473, 117 NW 1020.

Acts held waiver: Breach of insurance contract by increase of premiums held waived by payments for four years without objection. Voss v. Northwestern Nat. Life Ins. Co., 137 Wis. 492, 118 NW 212. Failure to rescind purchase of land for fraud until an unreasonable time after fraud could have been discovered, and reliance on promise that notes given for land could be paid out of proceeds of resale, held waiver of alleged fraud. State Bank v. Brown [Iowa] 119 NW 81. Settlement of account with bank holding note and renewals of note after knowledge, actual or constructive of fraud, held also waiver. Id. Where one held note reserving title to property sold, his consent that buyer mortgage the property held to waive reservation of title as against mortgagee. Bell v. Old [Ark.] 113 SW 1023. Such consent by holder of vendor's lien waives such lien as against holder thereof and his transferee. Id. Evidence held to show waiver by defendant of right to give new notes to take place of original ones given for machinery, under contract for substitution made on return of part of machinery. Swedish-American Nat. Bank v. Koebernick, 136 Wis. 473, 117 NW 1020. Failure to object held waiver by lot owners of right to avoid assessments for street repair. City of Akron v. Barber Asphalt Pav. Co. [C. C. A.] 171 F 29. Oral agreement permitting railroad to cross land and subsequent occupation of the land by railroad company held convincing evidence of landowner's waiver of compensation. United States Peg Wood, Shank & Leather Board Co. v. Bangor & A. R. Co., 104 Me. 427, 72 A 190.

Acts held not waiver: Where purchaser of a business affirmed contract of sale induced by fraud and did not rescind, mere fact that he remained in business some time before suing for damages for the fraud held not to show waiver of the fraud. Del Vecchio v. Savelli [Cal. App.] 101 P 32. Letter by indorser to indorsee of a note written after maturity of note and asking indorsee to forbear held not waiver of presentment, demand, and notice, indorser not knowing that presentment and demand had not been made. Nevius v. Moore, 221 Mo. 330, 120 SW 43. Taking of chattel mortgage on crops held not waiver of landowner's rights under provision of cropping contract reserving title until division. McFadden v. Thorpe Elevator Co. [N. D.] 118 NW 242. Receipt of dividends in bankruptcy does not waive fraud and false representations inducing debt, so as to bar action for such fraud. Standard Sewing Mach. Co. v. Kattell, 132 App. Div. 539, 117 NYS 32. See, also, Bankruptcy. Insurer held not to waive breach of warranty by examining insured after such breach was admitted by insured, nothing being done to lead plaintiff to suppose breach would not be taken advantage of. Bacouby v. U. S. Fidelity & Guar. Co., 61 Misc. 75, 113 NYS 20. Waiver of notice of hearing on question of necessity for a highway held not established by mere proof that landowner subsequently appeared at hearing on question of damages. Barber v. Vinton [Vt.] 73 A 881. That carrier sent tracer for lost goods after its nonliability had attached under shipping contract for failure of shipper to give timely notice of loss held not waiver of exemption. Atlantic Coast Line R. Co. v. Bryan [Va.] 65 SE 30. Delay in making claim not waived by agent's request for information and promise to attend to the matter. Id. Counterclaim for plaintiff's breach of contract for sale of lumber in case defendant should be required to take the lumber and pay agreed price held not waiver of right to insist that plaintiff's recovery be limited to damages for breach by defendant. Badger State Lumber Co. v. Jones Lumber Co., 140 Wis. 73, 121 NW 933. Not within rule that such counterclaim waives right to "rescind." Id. **For jury** whether bank depositor by conduct and acquiescence in bank's transfer of deposit waived right to recover deposit. Whitsett v. People's Nat. Bank [Mo. App.] 119 SW 999.

41. Swedish-American Nat. Bank v. Koebernick, 136 Wis. 473, 117 NW 1020.

42. List & Son Co. v. Chase, 80 Ohio St. 42, 88 NE 120. Since waiver may be with or without agreement, a depositor may by conduct in acquiescing in bank's transfer of

time when the obligor might fully perform.[43] It must appear that the waiving party had knowledge of his rights and that he intended to waive them.[44] One who has waived a right cannot thereafter claim anything by reason of it,[45] much less can a mere stranger do so.[46]

§ 5. *Pleading and proof.*[47]—See 11 C. L. 1169—Election must be pleaded[48] by setting forth facts sufficient to show an election.[49] Waiver must also be pleaded,[50] but the rule does not apply where the adverse party furnishes the evidence showing waiver.[51]

ELECTIONS.

The scope of this topic is noted below.[52]

§ 1. Definition of Election, Legal Authorization, Time, Place and Notice, 1404.
§ 2. Eligibility and Registration of Electors, 1407.
§ 3. Nomination by Convention or Petition, 1412.
§ 4. Official Ballot, 1414.
§ 5. Primary Elections, 1416.
§ 6. Officers of Election, 1420.
§ 7. Polling and Receiving the Vote, 1421.
§ 8. Marking and Signing Ballot; Irregularities and Ambiguities Therein, 1422.
§ 9. Secrecy of Ballot and Distinguishing Marks, 1423.
§ 10. Count, Return and Canvass; Custody of Ballots and Recount; Determination of Result and Certificates, 1424.
§ 11. Judicial Control and Supervision, 1428.
§ 12. Judicial Proceedings to Contest or Review, 1429.
§ 13. Offenses Against Election Laws, 1437.

deposit to another waive right to deposit without express assent. Whitsett v. People's Nat. Bank [Mo. App.] 119 SW 999.

43. List & Son Co. v. Chase, 80 Ohio St. 42, 88 NE 120.

44. Atlantic Coast Line R. Co. v. Bryan [Va.] 65 SE 30. Fraud in sale of stallion held not waived by applying for modification of contract, plaintiff not knowing representations were fraudulent. Hodgkins v. Dunham [Cal. App.] 103 P 351. Failure of vendor of land sold by agent to base refusal to convey on fact contract was not in writing held not to preclude right to subsequently assert that defense, he not having previously known there was no written contract. Fletcher v. Underwood, 240 Ill. 554, 88 NE 1030. Evidence held not to show intention to abandon title to crops by taking chattel mortgage on cropper's undivided interest. McFadden v. Thorpe Elevator Co. [N. D.] 118 NW 242.

45. Charlotte Harbor & N. R. Co. v. Burwell, 56 Fla. 217, 48 S 213.

46. Where lot owners by failure to object waived right to avoid assessments for street repairs, paving company paid in full for the repair could not set up illegality of assessments when sued on guaranty contained in contract with city. City of Akron v. Barber Asphalt Pav. Co. [C. C. A.] 171 F 29.

47. **Search Note:** See notes in 15 L. R. A. 89; 32 Id. 471; 5 L. R. A. (N. S.) 1161; 8 Id. 144, 582; 12 Id. 1038.

See, also, Judgment, Cent. Dig. §§ 1787-1807; Dec. Dig. §§ 948-950; 23 Cyc. 1524-1525, 1529-1531; Pleading, Cent. Dig. §§ 208-236; Dec. Dig. §§ 101-111; Wills, Cent. Dig. § 2048; 29 A. & E. Enc. L. (2ed.) 1098.

48. Election of remedies. Henry v. Herrington, 193 N. Y. 218, 86 NE 29. Evidence of a first action as being plaintiff's election of remedy held admissible for him under his general denial of defendant's answer setting up in third action that second action was election inconsistent with third. Babcock, Cornish & Co. v. Urquhart, 53 Wash. 168, 101 P 713.

49. In action by a bank against seller of bonds to cashier on theory seller knew buyer was using bank funds, answer held to sufficiently identify bonds in question as being included among bonds for conversion of which bank had brought suit against cashier's estate on theory bonds belonged to bank, so as to state good defense of election on part of bank to ratify purchase and claim the bonds. Davenport v. Walker, 132 App. Div. 96, 116 NYS 411.

50. State Bank v. Brown [Iowa] 119 NW 81. Waiver of contract conditions. Poheim v. Meyers, 9 Cal. App. 31, 98 P 65; List & Son Co. v. Chase, 80 Ohio St. 42, 88 NE 120. Plaintiff held not entitled to recover money paid for land on ground defendant had waived provision requiring plaintiff to report objections to title within prescribed time, he not having pleaded waiver. Poheim v. Meyers, 9 Cal. App. 31, 98 P 65. In action by indorsee of a note against indorser, allegation that latter, after maturity of note, promised to pay held insufficient to raise issue of waiver of presentment, demand, and notice: Nevius v. Moore, 221 Mo. 330, 120 SW 43.

51. Gillett v. Young [Colo.] 101 P 766. As where in attempt to prove counterclaim for defects in construction of a building owners show they had waived the defects. Id.

52. Includes elections, both general and special, without particular reference, however, to elections of particular officers (see Counties,* § 2; Municipal Corporations,* § 5; States,* § 4; United States,* § 3; Territories,* etc., § 2; Officers and Public Employes,* § 4), or to elections for particular purposes (see Counties,* § 1, as to change of boundaries and removal of county seats; Municipal Bonds, § 2; Intoxicating Liquors,* § 2, as to local option). As to crimes with regard to elections, see such topics as Bribery;* Conspiracy;* Perjury.*

§ 1. *Definition of election, legal authorization, time, place and notice.*[53] See 11 C. L. 1170—Legal authorization,[54] and compliance with statutory requisites,[55] are essential to the validity of an election, but election laws should be construed liberally with the view of giving effect to the will of the people,[56] and this rule is especially applicable to elections for the purpose of advancing educational interests.[57] The submission of a specific proposition is in a strictly legal sense a "separate election," though submitted at a general election from motives of convenience, economy and to secure a fuller expression of the people's will.[58]

Constitutional and statutory requirements. See 11 C. L. 1170—The legislature usually has power to provide for special elections,[59] provided the enactments in question do not violate constitutional limitations.[60] Different methods for the election of municipal officers in the various cities of a state may be provided for,[61] and such elections are subject to reasonable regulations.[62] Constitutional provisions

53. **Search Note:** See notes in 33 L. R. A. 141; 49 Id. 244; 53 Id. 660; 4 L. R. A. (N. S.) 571; 14 Id. 850; 15 Id. 691; 35 A. S. R. 64; 120 Id. 794.

See, also, Elections, Cent. Dig. §§ 1-442; Dec. Dig. §§ 1-48; 15 Cyc. 280-288, 309, 316-326, 341-344; 2 A. & E. Enc. L. (2ed.) 478; 8 Id. 494; 9 Id. 477; 10 Id. 552, 562, 588, 624, 679, 684; 7 A. & E. Enc. P. & P. 361.

54. Election held without authority of law is void. Brumby v. Marietta [Ga.] 64 SE 321.

55. Disregard of prerequisite will render an election void. Brumby v. Marietta [Ga.] 64 SE 321.

56. As general rule statutory provisions as to conduct of elections, if not expressly made mandatory, will be construed as directory, so that election will not be nullified by mere irregularities. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

57. It is policy of law to uphold elections for purpose of advancing educational interests of children of state. Taylor v. Sparks [Ky.] 118 SW 970.

58. Change of county boundaries. State v. Blaisdell [N. D.] 119 NW 360.

59. Where there is no constitutional provision for general election and no inhibition upon authority to provide special election, latter may be provided for by legislature. State v. Fountain [Del.] 69 A 926. Fact that constitution requires certain questions to be determined at general election does not limit legislative power to provide for special elections where same are not prohibited. Id. Where constitution authorizes legislature to submit question of prohibition of sale of liquor to vote and does not require general election, legislature may authorize special election. Id. Const. art. 13, § 1, construed and held to authorize submission of question of prohibition of sale of liquors at special election, though where majority of members of each house from any district request submission, it shall be at general election. Id.

60. Act April 10, 1908 (P. L. p. 266), providing for special election to determine upon rejection or retention of voting machines, is not unconstitutional as **special act.** Mara v. Bayonne [N. J. Law] 71 A 1131. Statute as to local option election held not special legislation though providing different laws and penalties in various subdivisions of state if "no license" adopted. State v. Fountain [Del.] 69 A 926. Act April 10, 1908 (P. L. p. 266), providing for special election to determine upon rejection or retention of voting machines is not unconstitutional as to **title of act.** Mara v. Bayonne [N. J. Law] 71 A 1131. Statute as to local option elections held not violative of constitutional provision as to title of act in providing both for elections and penalties in case "no license" was adopted, but provision as to penalties was germane to primary object of act. State v. Fountain [Del.] 69 A 926. Act April 29, 1903 (P. L. p. 338), not only amended title of Acts of June 10, 1893, and July 9, 1897, but re-enacted entire fourteenth section thereof, giving notice of **title of amendment,** and is therefore valid, repealing Act June 9, 1891. McLaughlin v. Summit Hill Borough [Pa.] 73 A 975. Act March 21, 1907 (24 Del. Laws, p. 135, c. 65), providing for submission of local option question, held not invalid as **delegation of legislative power** in that penalties provided for in act would be enforcible only if majority of people voted for no license, but such act only provided for contingency. State v. Fountain [Del.] 69 A 926.

61. Under Declaration of Rights, art. 9, pt. 1, while all inhabitants with prescribed qualifications have equal rights in reference to election of officers of state government, constitution recognizes fact that proper application of principle of local self-government may call for election of different officers in different ways in cities of state. Graham v. Roberts, 200 Mass. 152, 85 NE 1009. Const. Amend. art. 2, recognizes that different cities may have different kinds of officers and different modes of election. Id. St. 1908, p. 542, c. 574, gives voters of Haverhill equal rights to elect others to offices and to be elected themselves in accordance with system of government which is established for all alike, and does not violate constitution. Id.

62. St. 1908, p. 542, c. 574, § 1, requiring that only names of two candidates chosen at preliminary election shall appear on final official ballot, is simply regulation of election which people may adopt. Graham v. Roberts, 200 Mass. 152, 85 NE 1009. St. 1908, p. 542, c. 574, § 4, prohibiting statement of candidate's party or political principle, is mere regulation of election. Id. It is not unreasonable or unconstitutional to require (St. 1908, p. 542, c. 574, § 5) candidate to request and swear and to have requisite pe-

frequently require that certain propositions be submitted to the electors.[63] Enactments which contain uncertain and indefinite provisions [64] are sustainable under the general principles of statutory construction [65] if a complete statute remains after the elimination of the invalid portions.[66] The construction of statutory or constitutional provisions is sometimes necessary in order to determine whether an election is authorized [67] or whether particular statutes are applicable.[68] Questions as to whether the number of votes required in order to carry an election have been cast are treated in a subsequent section.[69]

Time. See 11 C. L. 1170

Place. See 9 C. L. 1043—The designation of polling places is an essential part of an election.[70] Such place must be fixed by the proper authorities [71] and fully advertised,[72] and the election should be held at the place so designated [73] and a change

tition showing that he is person of good moral character and qualified to perform duties of office. Id. St. 1908, p. 542, c. 574, §§ 2, 3, prohibiting use of names of candidates nominated by nomination or caucus of political party, is simply regulation of election which people or legislature may adopt. Id.

63. Const. § 168, requiring all changes in county boundaries to be "submitted to the electors," means that all persons qualified to vote in territory affected shall in legal manner be given an opportunity to vote on question. State v. Blaisdell [N. D.] 119 NW 360. Pub. Laws 1888, p. 728, § 12, cl. 2, providing for election of members of school committee by city council, is not violative of Const. art. 7, § 1, providing that electors shall have right to vote in election of all civil officers. In re Election of School Committee of Woonsocket [R. I.] 72 A 417. Const. art. 7, § 1, gives electors right to vote "in election of all civil officers" not "a right to vote for all civil officers." Id.

64. Portion of Gen. Laws 1896, c. 102, § 4, as to local option election upon petition, held invalid as incapable of reasonable construction and containing no language from which court could deduce rule applicable to state as to number of names required for petition, or how clerk should determine number or qualifications of signers. Ruhland v. Waterman [R. I.] 71 A 1.

65. See Statutes, § 5H.

66. Gen. Laws 1896, c. 102, § 4, held to form complete statute after elimination of portion which was void for uncertainty. Purpose of section was to require submission of local option question at general elections, with general provisions as to effect of majority vote. Ruhland v. Waterman [R. I.] 71 A 1. Act held not to be so joined with provision as to notice of election as to be inseverable. Id.

67. Election of municipal officers pursuant to Sess. Laws 1907-08, p. 183, c. 12, held invalid, since city upon admission to state became city of first-class under Const. § 10, with sufficient officers to administer its government, and incorporation under statute referred to was unauthorized. State v. Ledbetter [Okl.] 97 P 834; State v. Chestnutt [Okl.] 98 P 435; State v. Walrond [Okl.] 98 P 435; Ryan v. Casaver [Okl.] 98 P 928. Act Aug. 13, 1907 (Gen. Laws 1907, pp. 790, 875), as to organization of cities, construed and election of city council in April, 1908, held unauthorized, since § 2 postpones going into effect of act until officers elected in September, 1908, enter upon duties. State v. Waldrop [Ala.] 48 S 394.

68. General Law (Rev. 1905, §§ 2944-2967, tit. 7, etc.), and provisions of municipal charter (Priv. Laws 1901, p. 216, c. 97), which are not inconsistent therewith, held to apply to election by town of Hendersonville. Town of Hendersonville v. Jordan, 150 N. C. 35, 63 SE 167. Where statute provided method of holding elections for location of schoolhouse site, Hurd's Rev. St. 1908, c. 46, §§ 428, 429, as to submission of questions of public policy, did not impliedly repeal such act. Southworth v. Board of Education, 238 Ill. 190, 87 NE 403. Where Code, §§ 645, 646, providing two aldermen from each ward in cities of second-class, was repealed by Acts 32d Gen. Assem. (Laws 1907, p. 20) c. 26, providing one alderman from each ward and two at large, which act became effective from publication (March, 1907), election of councilmen and other officers in cities where mayors are elected in even-numbered years was to be held in 1908 pursuant to § 646, and in 1910 according to new amendment. Construing act. State v. Payton, 139 Iowa, 125, 117 NW 43. Act May 29, 1908 (Laws 1907-08, p. 316, c. 31), providing general election law, did not repeal Wilson's Rev. & Ann. St. Okl. 1903, c. 12 (§ 354), art. 1, § 9. State v. Barnes [Okl.] 97 P 997.

69. As to what constitutes majority, see post, § 10, as to count of votes, subd. Determination of Result. See, also, 11 C. L. 1170.

70. Town of Hendersonville v. Jordan, 150 N. C. 35, 63 SE 167.

71. Elvick v. Groves [N. D.] 118 NW 228. Rev. 1905, § 2946, clearly contemplates that polling place should be fixed by governing authorities of town. Town of Hendersonville v. Jordan, 150 N. C. 35, 63 SE 167. Facts and judgment held to show that polling place was properly designated as required by statute. Id. Election as to issuance of bonds by school district, where votes were received at courthouse, held in compliance with statute. Taylor v. Sparks [Ky.] 118 SW 970.

72. See post, this section, subd. Notice.

73. Whitcomb v. Chase, 83 Neb. 360, 119 NW 673; Elvick v. Groves [N. D.] 118 NW 28. Where voting place is established by county commissioners, an election held three miles distant pursuant to resolution of voters at political meeting is unauthorized, and

of a voting place should not be upheld except in case of emergency or extraordinary circumstances.[74] There is some conflict of authority as to the effect of holding an election at the wrong place, it being held on the one hand that an election held at a place other than that designated may be upheld where no one was misled;[75] and on the other that where there is no excuse for holding the election at an unauthorized place, evidence that no one was injured is not admissible.[76]

Election districts. See 11 C. L. 1170

Resubmission. See 7 C. L. 1233

Notice. See 11 C. L. 1170—Notice of the time and place of an election is ordinarily essential,[77] and notice should also be given when a polling place is changed in the case of an emergency.[78] Ordinarily the statute prescribing a notice must be substantially complied with,[79] but the effect of a failure in this regard involves a consideration of whether the requirement as to notice is directory [80] or mandatory;[81] and irregularities as to notices do not usually invalidate an election when the result is not affected thereby,[82] unless the statutory requirement is mandatory.[83] Elections de-

returns from such place should not be canvassed. Elvick v. Groves [N. D.] 118 NW 228.

74. Elvick v. Groves [N. D.] 118 NW 228.

75. Fact that election was held at other place than at lawfully authorized precincts held mere irregularity. Coleman v. Board of Education, 131 Ga. 643, 63 SE 41. Change of polling place in case of emergency will not render election void, when election is fairly and honestly conducted and legal voters are not deprived of their right to vote. Whitcomb v. Chase, 83 Neb. 360, 119 NW 673.

76. Elvick v. Groves [N. D.] 118 NW 228.

77. State v. Salt Lake City [Utah] 99 P 255. To establish validity of election where board sought power to locate schoolhouse site, giving of notice pursuant to statute (Hurd's Rev. St. 1908, c. 122, § 218) was a jurisdictional prerequisite. Southworth v. Board of Education, 238 Ill. 190, 87 NE 403. Where statutory notice of election is not given at election to select schoolhouse site, such election is not "duly called and held" within proviso of Amendatory Act of 1908, amending Hurd's Rev. St. 1905, c. 122, § 166, cl. 5, legalizing selections pursuant to election. Id.

Sufficiency of notice: Place of election should be fully advertised. Town of Hendersonville v. Jordan, 150 N. C. 35, 63 SE 167. Notice of place of election for issuance of bonds by school district held sufficient. Taylor v. Sparks [Ky.] 118 SW 970.

78. Where board cannot procure place designated in notice for purpose of holding election, they may in such emergency change polling place, giving due notice of such change. Whitcomb v. Chase, 83 Neb. 360, 119 NW 673.

79. State v. Salt Lake City [Utah] 99 P 255. Statutory notice as to issue of bonds performs double function, viz., as giving binding constructive notice and as imparting actual notice, wherefore it should be substantially complied with. Id.

Held substantial compliance: Notice of election on proposition of issuing municipal bonds. State v. Salt Lake City [Utah] 99 P 255. Notice of election for issuance of bonds by school district. Taylor v. Sparks [Ky.] 118 SW 970. Removal of county seat. Town of Grove v. Haskell [Okl.] 104 P 56. Notices of local option election held posted with knowledge of clerk pursuant to Rev. St. 1895, art. 3387; Acts 29th Leg. p. 528, c. 11, § 33. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

80. Where object of an election and time and place are provided by general law, requirement as to notice is directory. Guernsey v. McHaley, 52 Or. 555, 98 P 158. Failure of officer charged with duty of posting or publishing notice to perform his duty will not invalidate an election where requirement of notice is directory. Id.

81. If time of election is to be fixed by some public authority after happening of some condition precedent, or if some special question is in like manner to be submitted to voters at regular election, law authorizing such election and providing for notice must be strictly followed. Guernsey v. McHaley, 52 Or. 555, 98 P 158. Election pursuant to Laws 1905, p. 41, c. 2 (local option law), **held invalid** because of failure to give notice required by law. Id.

82. Bauer v. Board of Denmark Tp. [Mich.] 16 Det. Leg. N. 407, 122 NW 121.

Result held not affected: Where notice of county seat removal was in substantial compliance with statute. Town of Grove v. Haskell [Okl.] 104 P 56. Defective notice failing to state that only "white" voters might vote as to issuance of bonds by school district. Taylor v. Sparks [Ky.] 118 SW 970. Where there was no allegation that colored voters participated and election officers must have been presumed to receive only votes of qualified electors, election would not be disturbed. Id. **By failure to properly post notices** for local option election. Roesch v. Henry [Or.] 103 P 439; McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Where notices were posted for less time than that required. Town of Grove v. Haskell [Okl.] 104 P 56. **By failure to indicate purpose of election.** Wightman v. Tecumseh [Mich.] 16 Det. Leg. N. 409, 122 NW 122. By **publication** of proclamation of election (under Wilson's Rev. & Ann. St. 1903, § 354) in sending paper. Stearns v. State [Okl.] 100 P 909. Publication of notice of local option election within

fective from the failure to give proper notice may be validated by a curative act,[84] provided such enactment does not violate constitutional restrictions.[85] The issuance of notice pursuant to the resolution of the duly authorized body ordering submission of a question is a ministerial duty,[86] and such notice should be in compliance therewith.[87] When compliance with the statute is affected, a notice is valid though it may not comply with the requisites of a city ordinance.[88] The official proclamation or call for an election need not specify the places of voting,[89] and the publication of such a proclamation does not constitute "process," being the part of a legislative proceeding.[90] Sometimes a board of elections is charged with the continuing duty of publishing the notices.[91]

§ 2. *Eligibility and registration of electors.*[92]—See 11 C. L. 1170—The word "electors" is usually applied to all persons who are qualified to vote within their respective political subdivisions,[93] while a "voter" is an elector who actually votes.[94] The right to vote is neither incidental to citizenship nor inherent, but is a political privilge which must be conferred by statute or constitution,[95] and as a general propo-

four days of period required by statute (Comp. Laws § 5417). Bauer v. Board of Denmark Tp. [Mich.] 16 Det. Leg. N. 407, 122 NW 121.

83. Contention that no substantial injury resulted from failure to post notices, as required by law at local option election, held not maintainable, since injury could not be ascertained. Guernsey v. McHaley, 52 Or. 555, 98 P 158. Failure of notice to state amount of bonds to be issued as required by statute rendered election void. Stern v. Fargo [N. D.] 122 NW 403. Failure of notice to state separately the different propositions to issue bonds pursuant to 25 Stat. p. 1274, §§ 6, 7, rendered election void. Ross v. Lipscomb [S. C.] 65 SE 451. Election held invalid where notice of election and ballot failed to state amount of bonds to be issued by city as required by statute. Stern v. Fargo [N. D.] 122 NW 403.

84. Curative Act (Laws 1909), which was passed to validate elections for adoption of commission plan of government (Laws 1907, p. 131, c. 114), is to be interpreted as intending to legalize all city elections which were defective from failure to give notice for full time by statute. Cole v. Dorr [Kan.] 101 P 1016.

85. Curative Act (Laws 1909) held not void as special legislation. Cole v. Dorr [Kan.] 101 P 1016.

86. Duties of auditor in issuing notice of election as to issuance of municipal bonds are purely ministerial. Stern v. Fargo [N. D.] 122 NW 403.

87. Stern v. Fargo [N. D.] 122 NW 403. Local option election held **invalid** where there was marked and substantial variance between order of county court calling election and notice thereof. State v. Renke [Mo. App.] 121 SW 159.

88. Notice as to issuance of bonds which complied with Rev. St. 1899, § 6353 (Ann. St. 1906, p. 3186), was valid, though failing to comply with requisites of ordinance as to stating interest. State v. Gordon, 217 Mo. 103, 116 SW 1099. Notice of election as to increase of city's indebtedness, which complied with Rev. St. 1899, § 6351 (Ann. St. 1906, p. 3185), requiring notice by publication, held valid. Id. Requirements as to notice in ordinance were unauthorized. Id.

89. Election does not fail because particular places of voting are not specified in governor's proclamation, which is official call for election. State v. Salt Lake City [Utah] 99 P 255.

90. Publication of proclamation calling an election does not constitute "process," being part of legislative and not judicial proceeding. Stearns v. State [Okl.] 100 P 909.

91. Under Election Law (Laws 1896, p. 899, c. 909, § 10, as amended by Laws 1906, p. 553, c. 259, § 1), as to publication of notices, duty of board is continuing. Morning Tel. Co. v. New York, 132 App. Div. 634, 117 NYS 496.

Expenses of publication of notices held proper charge against city under statutes, where board designated certain paper to publish such notices pursuant to writ of mandamus, which was improperly issued, and where authorization was afterward rescinded. Morning Tel. Co. v. New York, 132 App. Div. 634, 117 NYS 496. Under Election Law (Laws 1896, p. 900, c. 909, as amended by Laws 1901, p. 244, c. 95, § 5), § 11, subd. 2, cl. "j," expenses of board of elections are chargeable to city, and under § 18 (Laws 1896, p. 906, as amended by Laws 1901, p. 249, § 7), expenses are to be paid by city comptroller upon certificate of board. Id.

92. Search Note: See notes in 7 C. L. 1234; 21 L. R. A. 662; 23 Id. 215; 25 Id. 480; 29 Id. 404; 28 A. S. R. 260; 7 Ann. Cas. 665.

See, also, Elections, Cent. Dig. §§ 55-113; Dec. Dig. §§ 59-119; 15 Cyc. 290-307; 10 A. & E. Enc. L. (2ed.) 568, 589, 607, 611.

93. State v. Blaisdell [N. D.] 119 NW 360. Word "electors" means all persons possessing qualifications as to residence, age and citizenship required by Const. § 121, to entitle them to vote. Id.

94. State v. Blaisdell [N. D.] 119 NW 360. Word "electors" is sometimes used interchangeably or synonymously with "voters." Id.

Vote defined: Vote is registration, in accordance with law, of preference or choice of an elector on given subject. State v. Blaisdell [N. D.] 119 NW 360.

95. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349; Russell v. State, 171 Ind. 623, 87 NE 13; State v. Goldthait [Ind.] 87 NE 133; Gardina v. Board of Registrars [Ala.] 48 S 788. Exercise of elective franchise, as name

sition, such right may be regulated, modified or withdrawn by the authority which conferred it.[96] The state has not only the power to determine who are qualified electors,[97] but the method of conducting elections is a matter of general state concern and regulation.[98] Statutory regulations must be reasonable[99] and uniform,[1] but in protecting the purity of the ballot the legislature may consider not only the rights of individuals to vote but the right of public to have the elections properly conducted.[2] Regulations as to the elective franchise should not deny or abridge constitutional rights,[3] or violate constitutional restrictions,[4] and, when the qualifications of voters are constitutionally prescribed,[5] the legislature has no authority to impose additional qualifications.[6] The state's power to deal with the right of suffrage is in a measure limited by the federal constitution,[7] but the choice of presidential electors is wholly within the state jurisdiction.[8] An amending statute which re-enacts a former statute, but omits a prescribed qualification therein, repeals such requisite.[9] The question of whether a particular voter is disqualified is determined by the application of the constitutional or statutory provisions,[10] and some-

indicates, is right conferred by state. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. While sovereignty is in people theoretically, it practically resides only in those persons who are permitted to exercise right of elective franchise. Gardina v. Board of Registrars [Ala.] 48 S 788.

96. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349. Right may be limited or extended by statute. Russell v. State, 171 Ind. 623, 87 NE 13; Gardina v. Board of Registrars [Ala.] 48 S 788. Aliens are denied right. Gardina v. Board of Registrars [Ala.] 48 S 788.

97. Power to determine who are qualified electors and who may exercise elective franchise resides in state. Gardina v. Board of Registrars [Ala.] 48 S 788.

98. Mara v. Bayonne [N. J. Law] 71 A 1131. Reasonable regulations of constitutional rights which are necessary to preserve order at elections, guard against fraud and the like, are within legislative power. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349. Const. art. 6, § 4, is **grant of power** to make such regulations as are necessary to preserve purity of ballot, without limiting discretion conferred, wherefore such power includes judicial and executive attributes. Id.

99. Gardina v. Board of Registrars [Ala.] 48 S 788; Ahern v. Elder, 195 N. Y. 493, 88 NE 1059.

1. Gardina v. Board of Registrars [Ala.] 48 S 788.

2. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349. Validity of regulations must be also considered from standpoint of rights of public and general result in maintaining freedom of political institutions. Id.

3. Gardina v. Board of Registrars [Ala.] 48 S 788. Right to vote may be limited by statute except as guarded by constitutional restrictions. Russell v. State, 171 Ind. 623, 87 NE 13.

4. General statute containing provisions as to cities deemed necessary in light of local conditions and applying alike to all voters of locality is not private or **local act.** Ahern v. Elder, 195 N. Y. 493, 88 NE 1059.

5. Const. 1875, art. 6, as amended by Acts 1901, p. 322, determines who shall have right of suffrage. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

6. Ahern v. Elder, 195 N. Y. 493, 88 NE 1059; Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349; People v. Strassheim, 240 Ill. 279, 88 NE 821. Terrell Election Law, § 23, does not impose an additional qualification upon right to vote, and is therefore constitutional. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. St. 1905, p. 443, c. 368, creating Sacramento Drainage District, is not violative of Const. art. 1, § 24, which is an inhibition against requiring a property qualification for a voter. People v. Sacramento Drainage Dist. [Cal.] 103 P 207. Act Feb. 25, 1909, "Ward Act" (Laws 1908, p. 83, c. 73), prescribing additional qualifications of voters at local option act, does not contravene Schedule to Const. § 18. Willis v. Kalmbach [Va.] 64 SE 342. Various constitutional enactments as to suffrage considered, and constitutional schedule, § 18 (Code 1904, p. cclxxviii), making qualifications of electors in "all elections" those of Const. art. 2, held to mean only all elections ordained by constitution or mentioned in schedule. Id.

7. Only limitations of state's power to deal with right of suffrage at constitutional convention are U. S. Const. Amends. 14 and 15. Willis v. Kalmbach [Va.] 64 SE 342. U. S. Const. Amend. 14, secures right to vote for electors for president, etc., and Amend. 15 secures rights to vote in elections enumerated in fourteenth amendment. Id. Federal constitution merely prescribes regulations as to electors for representatives in congress, and forbids denial of right to vote on account of race, color and previous condition of servitude (Amend. 15). Gardina v. Board of Registrars [Ala.] 48 S 788.

8. State v. Bienstock [N. J. Law] 73 A 530.

9. Omission will not be presumed to have occurred by mistake. Martin v. Harsha [Kan.] 101 P 456. Where Senate Bill No. 52 (Laws 1909), § 10, omitted qualification of ownership of real estate contained in Laws 1907, p. 205, c. 123, § 7. Id.

10. Member of national guard employed in service of army of United States is not, under constitution, entitled to vote. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Voter who had declared his intention to become **citizen** and was otherwise eligible was qualified voter. Id. Since ratification of Const. of 1901, **foreigners** who have not perfected

times involves a question of fact.[11] The privilege of voting has been to some extent conferred upon women.[12] The validity of an election is not affected by the receipt of the votes of unqualified electors, when such reception does not affect the result.[13]

Residence.[14]—See 11 C. L. 1171—Residence is usually an electoral qualification or prerequisite,[15] and a statute requiring a proposition to be submitted to "resident" electors clearly contemplates permanent residents.[16] In many cases the elector is required to vote in the precinct of his residence,[17] though statutes often permit voting in another precinct where an affidavit of the right to vote is tendered,[18] the purpose being to require evidence of registration.[19] The voter's belief as to his residence will not justify his voting in the wrong precinct.[20] A change of residence is sometimes provided for,[21] in which case the intention to change residence is controlling.[22] Evidence that a man's family resides in another state is prima facie evidence against his right to vote.[23] Rules are sometimes provided for determining where a man's

their naturalization but have merely declared an intention to become citizens cannot vote. Gardina v. Board of Registrars [Ala.] 48 S 788. **Minor** whose twenty-first birthday will not occur until next day after date fixed for an election cannot register for purpose of voting thereat. State v. Joyce, 123 La. 637, 49 S 221.

11. Evidence held insufficient to show that certain voter was person who had been disfranchised by judgment of court. Farmer v. Pace [Ky.] 116 SW 324.

12. Ky. St. 1909, § 4458 (Russell's St. § 5672), permits widows and spinsters who are taxpayers to vote at election to issue bonds by school district. Taylor v. Sparks [Ky.] 118 SW 970. Under Village Law (Laws 1897, p. 411, c. 414), women may vote on question of incorporation of village (§ 12) or propositions for raising tax or assessment or for dissolution of village (§ 41). People v. Moir, 62 Misc. 35, 115 NYS 1029. Votes of women should not be received at election under Village Law (Laws 1897, p. 411, c. 414), § 128, as to issuance of bonds for village waterworks. People v. Moir, 62 Misc. 35, 115 NYS 1029, afd. 129 App. Div. 938, 115 NYS 1138. Where bonds contemplated by resolution of city for system of waterworks will, when lawfully issued, become funded debt for which taxes must be levied and collected, and such resolution must provide for raising taxes to pay principal and interest of such bonds, question is one "to raise money by tax or assessment" where women are entitled to vote (Village Law [Laws 1897, p. 377, c. 414, as amended by Laws 1906, p. 984, c. 404, § 1] § 41 subd. 2). Gould v. Seneca Falls, 118 NYS 648.

13. Where result is almost unanimously in favor of proposition. Taylor v. Sparks [Ky.] 118 SW 970. When number of votes denied will materially affect result, it will vitiate election. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

14. See, generally, Domicile; Citizens; Aliens.

15. Fact that person resided in state 12 months and in county six months, was citizen of United States and had other qualifications, entitled him to vote, though he had not decided where he would permanently reside. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. **Minor** who was resident for 12 months preceding arrival at his majority was entitled to vote. Id. **Foreigner who** had declared his intention to become citizen and had resided in state 12 months was qualified to vote. Id.

16. Where statute in proceeding for annexation of territory to city (St. 1889, p. 358, c. 247) required proposition to be submitted to resident electors in territory to be annexed, provisions in such statute clearly contemplated electors to be permanent residents, that is, residents who would be qualified to vote at general election. People v. Long Beach [Cal.] 102 P 664.

17. Const. art. 6, § 2. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Failure to vote in precinct of residence rendered votes illegal. Const. art. 6, § 2; Gen. Laws 1905, p. 522, c. 11, §§ 7, 10. Id. Residence is a usual qualification. Votes cast by nonresidents of precinct are illegal. Skelton v. Ulen, 217 Mo. 383, 117 SW 32. Const. 1898, art. 197, requires elector to be "an actual **bona fide resident"** of precinct where he offers to register. State v. Joyce, 123 La. 628, 49 S 218. Addition of words "bona fide" means more and are stronger than "actual residence." State v. Joyce, 123 La. 631, 49 S 219. Person moving to and residing in another state who has merely intention to return is not "an actual bona fide resident." Id.

18. Laws 1905, p. 136, c. 88, § 2, requires voter who votes in another precinct to tender certificate or affidavit of right to vote. Pratley v. State, 17 Wyo. 371, 99 P 1116.

19. Pratley v. State, 17 Wyo. 371, 99 P 1116.

20. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

21. Sole exception in Const. art. 197, is that removal to another precinct in same parish shall not divest right to vote in first precinct for six months. State v. Joyce, 123 La. 631, 49 S 219. Under Rev. Codes, § 481, rule 9, as to change of residence, "removal" means act of making change in place. Carwile v. Jones, 38 Mont. 590, 101 P 153.

22. Under Rev. Codes § 481, rule 9, providing for change of residence, where person engaged in business had formed intention of making certain place his home, he was entitled to vote therein. Carwile v. Jones, 38 Mont. 590, 101 P 153. Resident and householder who sold house and visited relatives in other states but was home occasionally held legal voter, there being no evidence of intention to change residence. West v. Sloan, 238 Ill. 330, 87 NE 323.

residence is,[24] but a statute, providing that the place where a man's family resides shall be presumed to be his place of residence, is in reality a rule of evidence,[25] and the determination of the question is usually a question of fact.[26] Rules as to computing time must often be invoked in this connection.[27]

Registration.[See 11 C. L. 1171]—The state may provide registration laws and require conformity thereto before a citizen may vote[28] provided that the enactments in question are reasonable[29] and do not violate constitutional restrictions.[30] The right to register is usually confined to citizens.[31] A construction of the statutes is sometimes necessary to determine whether an enactment as to registration applies to a special election.[32] The signature of an applicant is frequently required[33] and constitutional provisions sometimes require an applicant to demonstrate his ability to read and write,[34] in which case the test imposed must be literally complied with[35] or registration must be refused.[36] It is sometimes provided that citizens may apply to the courts without costs to compel registration,[37] or to purge the registration rolls of names illegally placed thereon.[38] Irregularities in registration do not invalidate

23. Carwile v. Jones, 38 Mont. 590, 101 P 153.

24. Election Law (Acts 29th Leg. 1905, p. 521, c. 11), § 4, provides that residence of single man is where he sleeps at night and that of married man is where he resides. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Evidence held to show that voter was resident of city where he testified that he lived there with his "family." Id.

25. Rev. Codes, § 481, rule 8. Carwile v. Jones, 38 Mont. 590, 101 P 153.

26. State v. Joyce, 123 La. 628, 49 S 218; Id., 123 La. 631, 49 S 219. Under evidence voter was **held resident** of city for six months preceding election wherefore he was qualified. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Held to show that voter was resident of certain school district though his land appeared to be outside of line as shown by plat. Buckingham v. Angell, 238 Ill. 564, 87 NE 285. Evidence held to show that voter was **not resident** of school district, though he had always voted therein, and had sent children to school there, etc. Id. Is question of fact which **will not be disturbed on appeal** unless clearly erroneous. State v. Joyce, 123 La. 628, 49 S 218; Id., 123 La. 631, 49 S 219. Finding of residence held conclusive though evidence conflicting. Buckingham v. Angell, 238 Ill. 564, 87 NE 285.

27. Day of arrival or day of election should be excluded in determining whether voter was resident six months preceding election. Voter held not resident. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

28. Gardina v. Board of Registrars [Ala.] 48 S 788.

29. Provisions of Laws 1908, p. 1903, c. 521, requiring **signature of applicant** who can write, or truthful answers to statutory questions when applicant cannot write, in cities of over million inhabitants, are not unreasonable. Ahern v. Elder, 195 N. Y. 493, 88 NE 1059.

30. Laws 1908, p. 1903, c. 521, is an amendment to Laws 1896, p. 893, c. 909 (Gen. Laws 1896, c. 6), and while it contains provisions affecting only cities of a million or more inhabitants which are necessary thereto, it is not a private or local bill prohibited by Const. art. 3, § 18. Ahern v. Elder, 195 N. Y. 493, 88 NE 1059.

31. Under Const. 1901, foreigners who have not become citizens, but have merely declared their intention to do so, cannot register. Gardina v. Board of Registrars [Ala.] 48 S 788. Foreigners declaring intention to become citizens are not citizens of state within U. S. Const. Amend. 14. Id. "Citizen" defined and as used in constitution means person born or naturalized in United States. Id.

32. Act May 29, 1908 (Laws 1907-08, p. 352, c. 31, art. 1), subarticle 8, as to registration, does not apply to special city elections. Applies only to primary and general elections. State v. Barnes [Okl.] 97 P 997. Act May 29, 1908 (Laws 1907-08, p. 316, c. 31), providing for a general election law, repeals Sess. Laws Okl. 1903, p. 157, c. 13, art. 2, as to registration. Id.

33. Act Mar. 28, 1903 (Laws 1903, p. 177; Ann. St. 1906, pp. 3505, 3506), § 10, requiring signature of applicant, is provided as means of identification and guaranty of truth to answers. State v. Judd, 221 Mo. 554, 120 SW 780.

34. Under Const. art. 197, § 3, and Acts 1908, p. 148, No. 98, § 29, applicant for registration must demonstrate his ability to read and write by filling in blanks prescribed, which also require sufficient intelligence to compute years, months, and days of his life. Bishop v. Sherburne, 122 La. 429, 47 S 759.

35. Test to be applied to applicants for registration (Const. art. 197, § 3, and Acts 1908, p. 148, No. 98, § 29) must be literally complied with. Bishop v. Sherburne, 122 La. 429, 47 S 759. Where application was not "dated and signed" by applicant as required by Const. art. 197, § 3, defect was fatal. Id.; Lorio v. Sherburne, 122 La. 434, 47 S 760.

36. Registrar has no discretion and must refuse to register applicant who is unable to fill out correctly blank form of application prescribed by law (Const. art. 197, § 3, and Acts 1908, p. 148, No. 98, § 29). Lorio v. Sherburne, 122 La. 434, 47 S 760.

37. Const. art. 201, and Acts 1898, p. 461, No. 199, §§ 18, 19, gives right to apply to courts to compel registration, without costs below or on appeal. Bishop v. Sherburne, 122 La. 429, 47 S 759; Lorio v. Sherburne, 122 La. 434, 47 S 760.

38. Const. art. 201, and Acts 1898, p. 461,

an election where the result is not affected.[39] The failure to register does not disqualify a voter, but merely deprives him of the right to vote at that election.[40]

Payment of taxes. See 11 C. L. 1171—As a condition precedent of the right to vote, poll taxes imposed by statute [41] or constitution [42] must be paid [43] in proper time,[44] though registration has taken place,[45] provided, of course, that such electors were liable therefor [46] and that the tax be a valid one.[47] The place of payment has been held immaterial.[48] The question as to whether payment has taken place is frequently one of fact.[49] An elector who makes affidavit of payment as required by statute is a legal voter, though his tax receipts have been destroyed.[50] Exemption from payment is sometimes provided for when the voter is permanently disabled.[51]

Payment of taxes as a prerequisite to the right to vote is ordinarily required to be made by the elector personally,[52] and while the use of the words "personally pay" does not require actual, physical payment in person [53] since such a requirement

No. 199, §§ 18, 19, give any citizen right to purge registration rolls of names illegally placed thereon, without costs in court below or on appeal. Bishop v. Sherburne, 122 La. 429, 47 S 759; Lorio v. Sherburne, 122 La. 434, 47 S 760.

39. Irregularities in manner of registering did not render election void where it did not appear that such persons voted, were not qualified, or that irregularity affected result. Brumby v. Marietta [Ga.] 64 SE 321.

40. "Qualified voter" is defined by Const. § 145. Meffert v. Brown [Ky.] 116 SW 779. May be "qualified voter" though not voting. Id.

41. Rev. Civ. St. 1895, art. 5048, as to levy of poll taxes, is not invalid as being nonuniform and unequal, but classification therein is proper. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349. Const. 1875, art. 6, § 2, as amended by Acts 1901, p. 322, as to payment of poll tax, is not added to by enactment requiring payment of city poll tax, since such tax is levied by authority of state. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Acts 29th Leg. 1905, p. 527, c. 11, § 23, as to when and how matter of exemption from poll tax shall be determined, is not unconstitutional, though Const. 1875, art. 6, § 2, as amended by Acts 1901, p. 322, is self-enacting. Id.

42. Const. art. 7, § 3, expressly levies poll tax, regardless of statute. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349. Const. art. 6, § 4, provides that no one shall be entitled to vote unless he has paid poll tax of previous year, which under Const. art. 5, § 1, is $2. Perry v. Franklin County Com'rs, 148 N. C. 521, 62 SE 608. Const. 1901, § 194, plainly disqualifies person who has not paid poll tax from being a "qualified elector." Finklea v. Farish [Ala.] 49 S 366. Rule is not affected by Gen. Acts Sp. Sess. 1907, p. 69, to further regulate elections. Id. Payment of poll tax by citizen, required by Const. Amend. of 1902, is condition precedent to right to vote. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349.

43. Voter failing to pay city poll tax held not legal voter, though state and county poll tax was paid. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Citizen owing state and county poll tax was not entitled to vote in another county. Id.

44. Evidence held to show that poll tax was not paid in time, wherefore certain votes were illegal. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

45. Registered elector's right to vote terminated when poll tax became delinquent, after which he was not "qualified elector." Finklea v. Farish [Ala.] 49 S 366.

46. Failure to pay poll tax did not disqualify voter where evidence showed that he was not resident of state at time same was levied, so as to be liable therefor. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

47. Under Const. art. 6, § 4, and art. 5, § 1, it is not possible by levy of exorbitant poll tax to deprive citizen of right to vote. Perry v. Franklin County Com'rs, 148 N. C. 521, 62 SE 608.

48. Where poll tax was paid within time required by law, it was immaterial which county it was paid in. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

49. Finding that voter failed to pay poll tax will not be reviewed on appeal where sustained by substantial evidence. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

50. Voter who had burned his poll tax receipts but who made affidavit as required by law (Acts 29th Leg. 1905, c. 11, § 71) was legal voter. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

51. Acts Leg. 1905, pp. 521, 523, c. 11, §§ 6, 12. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

Held not disabled: Voter who had had legs and arms broken but was cured. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Voter with afflicted right leg but otherwise robust and who did not use crutch. Id. Evidence held insufficient to show that voter was blind or was otherwise permanently disabled. Id. Evidence held not to show loss of arm or hand of voter or that he was otherwise permanently disabled. Id.

52. Person who did not pay poll tax in person and did not get receipt held illegal voter. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

53. Const. 1902, art. 2, § 20 (Code 1904, p. ccxii), using words "personally paid" and § 21 of same article (p. ccxiii) using words "personally pay," when referring to payment of taxes, does not require actual physical payment in person, but only that tax be paid by person's own funds. Tilton v. Herman [Va.] 64 SE 351. Taxes may be paid by check or by an agent. Id.

would be unreasonable,[54] the voluntary [55] and unauthorized payment by a third person will not confer the right of suffrage.[56] Such a payment does not disqualify the person assessed, but is a mere nullity,[57] and mandamus will lie to compel acceptance of payment so that the taxpayer may vote, though such tax has been paid previously by a volunteer.[58] The legislature may require an officer to keep a record of the payment of taxes.[59] Such official should certify that the taxes have been paid only when satisfied that payment was authorized,[60] and an improper authorization [61] may be quashed on certiorari,[62] as may also names improperly listed as tax payers.[63]

§ 3. *Nomination by convention or petition.*[64] *Conventions and nominations.* See 11 C. L. 1172—In holding a legal convention, statutory requirements as to who shall call the convention to order,[65] administer the oath to the temporary chairman,[66] and call the roll,[67] should be observed; but legislative regulations of nominating conven-

54. Requirement of payment by person himself as prerequisite to right to vote would be unreasonable. Tilton v. Herman [Va.] 64 SE 351.

55. Voluntary payment of personal property taxes by third person will not qualify the persons assessed to vote prima facie. Lennon v. Pawtucket Board of Canvassers & Registration [R. I.] 71 A 305. Const. art. 7, § 1, does not permit person to exercise right of suffrage by reason of payment made by volunteer. Barron v. White [R. I.] 72 A 644.

56. Lennon v. Pawtucket Board of Canvassers & Registration [R. I.] 71 A 305. Under Const. art. 7, § 1. Lennon v. Pawtucket Board of Canvassers & Registration [R. I.] 72 A 398.

57. Barron v. White [R. I.] 72 A 644. Acceptance of gratuitous payment by city from person not assessed has no effect upon right of suffrage, which is dependent upon Const. art. 7, § 1. Id. Const. art. 7, § 1, does not permit unauthorized payment by volunteer to disqualify person assessed. Id.

58. Mandamus issued to compel city treasurer to accept payment of tax so that petitioner might qualify as voter, though such tax had been paid by volunteer without authority. Barron v. White [R. I.] 72 A 644.

59. Legislature has power to require treasurer to keep record of payment of taxes entitling elector to register and vote. Tilton v. Herman [Va.] 64 SE 351.

60. Certificate of city treasurer as to payment of taxes by persons named held to be in compliance with Gen. Laws 1896, c. 7, § 9, and § 15, as amended by Pub. Laws 1900-01, p. 116, c. 808, § 4. Lennon v. White [R. I.] 72 A 998. Uncontradicted affidavits presented to city treasurer could not be said as matter of law to be insufficient to satisfy him of authorization of affiants to pay taxes. Id.

61. Certification by collector of board of canvassers that certain persons had paid taxes and were entitled to vote was unauthorized under law and facts, showing payment by members of political committee from political fund. Lennon v. Pawtucket Board of Canvassers & Registration [R. I.] 72 A 389.

62. Certification quashed on certiorari. Lennon v. Pawtucket Board of Canvassers & Registration [R. I.] 72 A 398. Persons affected might have names restored if they could satisfy collector of taxes that payment by third person was authorized. Id. On certiorari to quash certification of taxpayers as voters, defendants must show an authorization sufficient to satisfy constitutional requirements, as a **defense.** Lennon v. Pawtucket Board of Canvassers & Registration [R. I.] 71 A 305.

63. Writ of certiorari will issue against city treasurer to produce records in order that same may be quashed, where allegations of petition are true and show that no tax has been assessed against persons named in petition as personal property voters. Lennon v. White [R. I.] 72 A 998.

64. Search Note: See notes in 9 L. R. A. (N. S.) 916; 7 Ann. Cas. 839.

See, also, Elections, Cent. Dig. §§ 114-117, 119-136; Dec. Dig. §§ 120-125, 127-159; 15 Cyc. 326-328, 330, 332, 336-341; 10 A. & E. Enc. L. (2ed.) 633.

65. Under Primary Election Law (Laws 1898, p. 349, c. 179), § 10, before convention can be legally organized to transact business or make nominations, it must be called to order by chairman of committee with whom call originated, or by person designated in writing for that purpose by such chairman. In re Thomas, 128 App. Div. 330, 112 NYS 664; In re Byrne, 128 App. Div. 334, 112 NYS 699. Convention held not to be in compliance with statute and unable to make valid nomination. Id. Statute is not complied with where convention is called to order by person designated by county committee, who adjourns convention for lack of quorum, and at next meeting, when quorum is present, temporary chairman is elected by acclamation. In re Byrne, 128 App. Div. 334, 112 NYS 699.

66. Under Primary Election Law (Laws 1898, p. 352, c. 179), § 10, as to oath of temporary chairman, such oath must be reduced to writing and authenticated by officer before whom it is taken. In re Byrne, 128 App. Div. 334, 112 NYS 699. Oath annexed to convention minutes signed and sworn to on day following convention is insufficient. Id.

67. Person authorized to call convention pursuant to Primary Election Law (Laws 1898, p. 352, c. 179), § 10, is required to call official roll of convention provided for by § 8, subd. 4. In re Byrne, 128 App. Div. 334, 112 NYS 699. Convention held not to be in compliance with statute where there was no evidence that roll of convention prepared by board of elections was present, or that names of signers to minutes were those of

tions cannot be upheld where they violate constitutional guarantees of freedom in the exercise of the elective franchise [68] or freedom of speech and assemblage.[69] The candidate who receives the majority vote of the regularly constituted convention is entitled to the party nomination.[70]

Petitions. See 9 C. L. 1045—Nomination by petition is sometimes permissible though an enactment as to primary elections has been passed, where the latter act is inapplicable because of lack of time for operation.[71] Common requisites of nomination by petition are that the certificate must be signed by the proper number of qualified electors [72] who have not signed other petitions for nomination [73] or voted at a primary election.[74] Provisions as to certifying the oath of the signers should be liberally construed.[75]

Certificates, declination and vacancies. See 11 C. L. 1172—The certificate of nomination must usually state the party or principle of the candidate,[76] and, while such provisions are to be liberally construed,[77] entire disregard of a mandatory requirement in this regard will render the certificate void.[78] Verification is not always required,[79] but the certificate must usually be filed within a certain time,[80] and an offi-

proper delegates (Laws 1898, p. 349, c. 178, § 8, subd. 4). In re Thomas, 128 App. Div. 330, 112 NYS 664; In re Byrne, 128 App. Div. 334, 112 NYS 699.

68. Sess. Laws 1909, c. 53, held invalid. State v. Junkin [Neb.] 122 NW 473.

69. Nonpartisan Judiciary Act (Sess. Laws 1909, c. 53), held invalid. State v. Junkin [Neb.] 122 NW 473.

70. Candidate receiving 6 of 11 votes of regularly elected delegates in convention is party nominee, in preference to candidate receiving 5 votes from 5 seceding members Burns v. Board of Election Com'rs, 154 Mich. 471, 15 Det. Leg. N. 803, 117 NW 1050.

71. Held that candidates might be nominated by petition pursuant to Laws 1908, c. 54, § 2, subd. 2, and pre-existing statutes, and that election should be conducted as far as provisions of Senate Bill No. 52 (Laws 1909) could be made applicable, otherwise pre-exsisting statutes should be applied. State v. Harsha [Kan.] 101 P 454.

72. Mills' Ann. St. Rev. Supp. § 1625f (Laws 1891, p. 144, § 6; Election Laws 1908, p. 12, § 2154), requires nomination by certificate to contain at least 100 names. O'Connor v. Smithers [Colo.] 99 P 46. Nomination paper must be signed by sufficient number of duly qualified electors. Stone v. Waterman [R. I.] 70 A 1009. Nomination paper held **insufficient** where some of names did not appear on voting list, where some initials and abbreviations on nomination paper did not correspond with voting list, and where residences varied. Id.

73. Mills' Ann. St. Rev. Supp. § 1625g (Laws 1891, p. 144, § 6; Election Laws 1908, p. 12, § 2154), provides that no person shall sign more than one certificate of nomination for any office. O'Connor v. Smithers [Colo.] 99 P 46. Duplicate names on certificates of nomination must be eliminated as invalid. Id. Certificates of nomination held invalid as not containing requisite number of names, when invalid, i. e., duplicate names were eliminated. Id.

74. Rev. Laws 1905, § 215, provides that person who has voted at primary is not eligible as petitioner for nomination to office for which nominee was voted upon at primary. In re Quealy [Minn.] 118 NW 673. Under statute, certificate of nomination is not invalidated by fact that it did not appear that petitioners had not voted at primary election for any nominee to office for which nominee was voted upon at primary. Id.

75. Rev. Laws 1905, § 216, as to oath of signers when candidate is nominated by voters, is to be liberally construed to effectuate legislative intention. In re Quealy [Minn.] 118 NW 673. Under statute, certificate signed by voters reciting that voter was sworn and knew contents and purposes of certificate and signed same of his own free will, with current formula of jurat signed by notary public or justice of peace, is valid. Id. Taking of oath is important, not form of certifying to it. Id.

76. Certificate of nomination held to state party or principle of candidates as required when referring to "socialist" party. State v. Blaisdell [N. D.] 118 NW 225. While authorities differ as to what constitutes principles of socialist party, main tenets are sufficiently understood so that word "socialist" may be used to designate political party. Id.

77. Election Law (Rev. Laws 1905), § 214, requiring certificate of nomination to contain designation of party which candidate represents, etc., should be liberally construed to effectuate legislative intention and secure to people their right to freely express their choice. In re Quealy [Minn.] 118 NW 673. Words "independent party" is proper emblem for candidate nominated by petition. Id.

78. Rev. Laws 1905, § 214, requiring certificate of nomination of candidate for public office by electors to state party or political principle of nominee, is mandatory. State v. Grift, 106 Minn. 29, 117 NW 921. Certificate failing to state any party or political principle held void. Id.

79. Certificates of nomination pursuant to Rev. Codes 1899, § 501, need not be verified. State v. Blaisdell [N. D.] 118 NW 225.

80. Secretary of state under law is entitled to reasonable notice of application to file certificate of nomination. State v. Nichols, 51 Wash. 79, 97 P 1087. Under Sess. Laws 1899, p. 36, § 22, certificates of nomination must be filed with secretary of state not

cial whose office is open after business hours cannot refuse to file a certificate presented after closing time.[81] The official's duties upon receiving the certificate are often purely ministerial,[82] consisting merely of filing,[83] whereupon the certificate becomes prima facie evidence of the facts therein recited.[84] The nomination does not become complete under some statutes until acceptance is filed,[85] and since a person cannot be compelled to accept a nomination,[86] certification may be refused when the requisite of acceptance is lacking.[87] Certificates which are absolutely void cannot be cured or amended so as to be valid, when the time of filing has expired.[88]

Contests and disputes. See 11 C. L. 1172—Statutes sometimes provide for objections to nominations,[89] to be conclusively determined by a contest board.[90] Requisites as to notice of such a contest are waived by appearance.[91]

§ 4. *Official ballot.*[92]—See 11 C. L. 1172—A ballot[93] is distinguished from a vote.[94] Enactments as to the form of a ballot must not violate constitutional requirements,[95] but the names to be placed upon a ballot may be limited if the con-

more than 60 days and not less than 35 days before general election. Grant v. Lansdon, 15 Idaho, 342, 97 P 960. Where general election is held Nov. 3, 1908, filing of certificate on Sept. 28th is in time. Id.

81. When office is open, secretary of state cannot refuse to file certificate of nomination, though presented after closing time. Grant v. Lansdon, 15 Idaho, 342, 97 P 960. Under Rev. St. 1887, § 452, office of secretary of state must be open from 10 a. m. until 4 p. m. Id. Secretary of state need not keep his office open after 4 p. m. Id.

82. Official duties of secretary of state with reference to certificates of nomination pursuant to statute are purely ministerial. State v. Blaisdell [N. D.] 118 NW 225.

83. When certificates of nomination are legal in form, secretary of state need not examine same as to their truth or falsity, but must place such certificates on file for inspection of public. etc. State v. Blaisdell [N. D.] 118 NW 225.

84. State v. Blaisdell [N. D.] 118 NW 225.

85. Under 3 Mills' Ann. St. Rev. Supp. § 1625n (Laws 1891, p. 148, § 14; Election Laws 1908, p. 16, § 2162). O'Connor v. Smithers [Colo.] 99 P 46.

86. Right to run for office or to decline nomination is purely personal privilege. O'Connor v. Smithers [Colo.] 99 P 46. 3 Mills' Ann. St. Rev. Supp. § 1625n (Laws 1891, p. 148, § 14), is not to be construed to effect that candidate cannot decline nomination. O'Connor v. Smithers [Colo.] 99 P 46. Contention that voter may vote for whom he pleases held inapplicable to proposition under discussion. Id.

87. Secretary of state could not be required to certify list of nominations where there was no acceptance by nominee as required by statute. O'Connor v. Smithers [Colo.] 99 P 46.

88. 3 Mills' Ann. St. Rev. Supp. § 1625l (Laws 1891, p. 146, § 9; Election Laws 1908, p. 13, § 2157), as to filing certificates, and § 1625m (Laws 1897, p. 145, c. 49, § 1; Election Law 1908, p. 15, § 2161), as to amendments, do not contemplate that certificates of nomination which are absolutely void can be cured or amended so as to be valid, when time of filing has expired. O'Connor v. Smithers [Colo.] 99 P 46.

89. Under Acts 1898, p. 281, No. 152, § 55, as amended by Acts 1900, p. 201, No. 132, right to make objection to nomination paper is not confined to any particular individual or class. State v. Michel, 122 La. 199, 47 S 464.

90. Under Acts 1898, p. 281, No. 152, § 55, as amended by Act 1900, p. 201, No. 132, contest board must determine objections to nomination papers, and their decision is binding upon secretary of state. State v. Michel, 122 La. 199, 47 S 464. Where statute provides for new nomination papers, and nominees fail to procure same, they cannot complain or claim benefit of mandamus to compel secretary of state to accept defective papers. Id.

91. Where contestant appears before contest board to object to nomination papers under Acts 1898, p. 281, No. 152, § 55, as amended by Acts 1900, p. 201, No. 132, he must be presumed to have notice or to have waived it. State v. Michel, 122 La. 199, 47 S 464.

92. Search Note: See notes in 2 Ann. Cas. 369; 3 Id. 796; 4 Id. 144; 6 Id. 969.

See, also, Elections, Cent. Dig. §§ 137-168; Dec. Dig. §§ 160-196, 15 Cyc. 345-362, 365; 10 A. & E. Enc. L. (2ed.) 702; 7 A. & E. Enc. P. & P. 364.

93. A ballot is the printed or written expression of the voter's choice upon some material capable of receiving it and reasonably retaining it, prepared or adopted by each individual voter, and passing by act of voting from his exclusive control into that of election officers to be by them accepted as expression of his choice. State v. Board of Deputy State Sup'rs, 80 Ohio St. 471, 89 NE 33.

94. Ballot as distinguished from vote is sheet of paper on which voter expresses his choice of candidates, or for or against proposition, or both. State v. Blaisdell [N. D.] 119 NW 360.

95. Enactment prescribing form of ballot which operates to abridge constitutional rights of electors to nominate their candidates cannot be sustained. State v. Junkin [Neb.] 122 NW 473. Nonpartisan judiciary act (Sess. Laws 1909, p. 256, c. 53), § 3, prescribing form of ballot but operating to deprive electors of right to nominate candidates, is violative of Bill of Rights (Const. art. 1, § 22) as to free ballot. Id. Act Apr. 29, 1903 (P. L. p. 338) as to form of ballots which amends Act. June 10, 1893, and Act

stitutional right of a person to vote as he pleases is not destroyed.[96] The construction of statutes is sometimes involved in determining which statutes govern as to ballots[97] and how the names of candidates are to be placed upon the ballot.[98] Requirements as to the form of the ballot are frequently mandatory,[99] and an election will be invalidated when such requirements are disregarded.[1] The general rule that irregularities will not invalidate an election when the result is not affected is applicable to ballots.[2] Constitutional and statutory provisions govern as to who shall prepare the ballots,[3] their transmission,[4] and the like, but the fact that materials

July 9, 1897, is not unconstitutional though portions of latter two acts had been held unconstitutional. McLaughlin v. Summit Hill Borough [Pa.] 73 A 975.

96. Graham v. Roberts, 200 Mass. 152, 85 NE 1009. When there is space for writing in names not printed on ballot, this secures right of every one to vote as he pleases. Id.

97. Since Senate Bill No. 52 (Laws 1909) is impossible of application to nomination of candidates in ensuing election, owing to lack of time, previous statutes as to preparation of ballots must be followed. Martin v. Harsha [Kan.] 101 P 456. Ballots provided for determination of question whether city charter was to be accepted, printed according to Sp. Laws 1907, p. 81, c. 7, § 164 (Fort Worth Charter), were valid, Terrell Election Law (Laws 1905, p. 520, c. 11) being inapplicable. Orrick v. Ft. Worth [Tex. Civ. App.] 114 SW 677. Where Gen. Laws 1896, c. 102, § 4, formed complete statute as to local option elections though portion was invalid as uncertain, question should be placed on ballots as provided by Gen. Laws 1896, c. 11, § 22, as amd. by Pub. Laws 1904-05, p. 167, c. 1229, § 2, passed Apr. 26, 1905. Ruhland v. Waterman [R. I.] 71 A 1. Act Apr. 25, 1889 (Hurd's Rev. St. 1905, c. 24, p. 328), as to annexation of villages to cities is special in character and is not repealed by Ballot Law Act of 1891 (Laws 1891, p. 108), wherefore § 16 of latter act as to ballots does not apply. Village of East Springfield v. Springfield, 238 Ill. 534, 87 NE 349. Form, size, and manner of preparation of ballots for election relating to county seat removals is governed by Sess. Laws 1899, p. 60, § 118, and Scss. Laws 1899, p. 44, § 48, as to general and special elections as amended by Sess. Laws 1905, p. 311, does not apply. Whitla v. Quarles, 15 Idaho, 604, 98 P 631.

98. Laws 1907, p. 157, c. 109, § 13, construed and held to provide for placing names of candidates of each party receiving highest number of votes at primary election on general ballot separate and apart from other political parties. State v. Blaisdell [N. D.] 118 NW 141.

99. Const. 1901, § 222, as to issuance of bonds and using words "shall" in connection with form of ballot is mandatory. Coleman v. Eutaw [Ala.] 47 S 703. Rev. St. 1895, arts. 3388, 3390, as to form of ballot at local option elections, is mandatory. Griffin v. Tucker [Tex. Civ. App.] 119 SW 338.

1. Failure to use form of ballot mandatorily prescribed by Const. 1901, § 222, in election for issue of bonds, invalidated election. Coleman v. Eutaw [Ala.] 47 S 703. Where Rev. St. 1895, arts. 3388, 3390, as to form of ballot at local option elections, was disregarded, election was invalid. Griffin v. Tucker [Tex. Civ. App.] 119 SW 338. Ballots to be used at election to determine whether indebtedness of borough shall be increased must be official ballots, furnished by county commissioners and in form prescribed by Act Apr. 29, 1903, (P. L. p. 338). McLaughlin v. Summit Hill Borough [Pa.] 73 A 975. Ballots which were used held illegal. Id. St. 1900, p. 91, c. 133, as to extending civil service law, could only be accepted by town when vote was by "official ballot" (§ 4), wherefore acceptance by precinct voting was not valid. Sweeney v. Bigelow [Mass.] 88 NE 917.

Official ballot means "a ballot prepared for any election, caucus or primary by public authority at public expense." St. 1898, p. 541, c. 548, § 1; Rev. Laws, c. 11, § 1; St. 1907, p. 633, c. 560, § 1. Sweeney v. Bigelow [Mass.] 88 NE 917.

2. Mistake of election officers in preparing ballots. In re Town of Groton, 63 Misc. 370, 118 NYS 417. Mistake of election officers in having number of ballots printed upon their backs conforming to number upon stubs which were detached, an error which was manifest and yet was not objected to, will not render an election void though ballots might by reason of such error be compared and vote of elector ascertained. Id. Where ballots were not printed and furnished as legally required, but irregularities were due to acts of officers, and there was no penalty visited on elector for using ballot as prepared, and there was no proof that result would have been changed if correct ballots were used, election would not be held invalid. Town of Grove v. Haskell [Okl.] 104 P 56. Ballots as to county seat removal held not to be in substantial compliance with mandatory provisions of statute (Laws 1907-08, p. 329, c. 31, art. 3, § 2). Id. Where question of issuance of bonds by village had been fully discussed before election, omission of words "for sewer purposes" from ballot by mistake would not vitiate election. Wightman v. Tecumseh [Mich.] 16 Det. Leg. N. 409, 122 NW 122.

3. Under constitutional statutes, it is evidently duty of secretary of state to certify title and text of measure presented by initiative or referendum petition, or by legislature including constitutional amendments to state printer which shall be printed upon official ballots as contracted for by state printing board. Trapp v. Wells Fargo Exp. Co. [Okl.] 97 P 1003. State election board has complete supervision and charge of printing ballots, furnishing election supplies and distribution thereof. Senate Bill 23, c. 31, art, 3, § 1; Sess. Laws Okl. 1907-08, p. 328. Id. State election board in performing statutory duties as to ballots is subordinate to secretary of state, since constitution requires secretary to have such duties performed. Id. State

are transmitted at the instance of an unauthorized board is a harmless error when the charges therefor were reasonable.[5]

Questions submitted.[See 9 C. L. 1048]—The submission of a question must comply with statutory and constitutional requirements,[6] and questions cannot legally be submitted under an invalid statute.[7] Separate propositions may usually be submitted separately,[8] and, as a general rule, distinct and antagonistic propositions should not be submitted in such manner that a voter must give but one answer thereto,[9] the test as to whether a double question is submitted being whether the objects for which authority is sought have a natural or necessary connection with each other.[10] Double submissions, however, are sometimes authorized.[11]

Use of party name and emblem.[See 9 C. L. 1048]

§ 5. *Primary elections.*[12]—[See 11 C. L. 1172]—Primary elections are held to select candidates for the regular final election,[13] and were unknown to the common law.[14]

election board is part of executive department of state. Id.

4. State election board shall cause printed ballots to be shipped by express to secretary of county election board. Senate Bill 23, Sess. Laws Okl. 1907-08, c. 31, pp. 330, 331, § 3. Trapp v. Wells Fargo Exp. Co. [Okl.] 97 P 1003. Pamphlets and arguments as to questions submitted by initiative and referendum petitions should be transmitted by secretary of state, such duty being imposed by statute. Id.

5. Where charges for transmission of pamphlets and arguments relating to initiative and referendum petitions were reasonable error of state election board in issuing voucher for same, a duty imposed upon secretary of state was harmless. Trapp v. Wells Fargo Exp. Co. [Okl.] 97 P 1003.

6. Statutory requirements as to election for issuance of bonds by city, requiring amount of proposed indebtedness to be stated on ballot. Stern v. Fargo [N. D.] 122 NW 403. Failure to insert character of bond in blank space between "for" and "bond issue," as required by Const. 1901, § 222, held to invalidate election, though character of such bonds was shown by statement preceding words "for bond issue." Coleman v. Eutaw [Ala.] 47 S 703.

7. Where portion of Gen. Laws 1896, c. 102, § 4, as to local option elections was held invalid as uncertain, such portion conferred no jurisdiction upon town clerk to file certificate with secretary of state that question would be submitted. Ruhland v. Waterman [R. I.] 71 A 1.

8. Submission of three separate propositions on separate ballots as to bonds was proper, and was not in violation of Const. 1901, § 222. Coleman v. Eutaw [Ala.] 47 S 703.

9. Twitchell v. Sea Isle City [N. J. Law] 73 A 75; Stern v. Fargo [N. D.] 122 NW 403; Lozier v. Alexander Drug Co. [Okl.] 99 P 808; Armstrong v. Berkey [Okl.] 99 P 921. Every voter is entitled to vote for or against any question submitted, separately and independently from his vote for or against another proposition which is submitted. Stern v. Fargo [N. D.] 122 NW 403.

10. Stern v. Fargo [N. D.] 122 NW 403.

Held proper submission: Submission of proposition as to whether bonds be issued to "construct" or "buy" waterworks. Ryan v. Tuscaloosa, 155 Ala. 479, 46 S 638. Submission of proposition to issue bonds to purchase waterworks and electric light plant was not submission of double question, since purpose might be presumed to involve but one scheme of public improvement. Coleman v. Eutaw [Ala.] 47 S 703.

Held double question: Submission of question as to issuance of bonds for electric light plant and for water system. Stern v. Fargo [N. D.] 122 NW 403. Submission of question as to issuance of bonds for two distinct sewer systems in different parts of city as one proposition. State v. Wilder, 217 Mo. 261, 116 SW 1087. Submission of amendment to constitution as to state agency for sale of intoxicating liquors where coupled with proposition for approval, rejection, or repeal of enforcing act (Laws 1907-08, p. 594, c. 69 art. 1) as one proposition. Lozier v. Alexander Drug Co. [Okl.] 99 P 808; Armstrong v. Berkey [Okl.] 99 P 921. Failure to submit separately the different propositions for issue of bonds under 25 Stat. 1274, §§ 6, 7, rendered election void. Ross v. Lipscomb [S. C.] 65 SE 451. Under Act June 8, 1906 (P. L. p. 671), § 15, enabling city to acquire waterworks by submitting question of adoption of act to voters, city council cannot adopt act where question submitted is coupled with proposition as to issuance of bonds, effect being to mislead voters. Twitchell v. Sea Isle City [N. J. Law] 73 A 75.

11. Submission of proposal for issuance of bonds for combined light and water plant held within power of city trustees, charged with duty of determining necessity for expenditure and propriety of submitting it to electors, phraseology, etc., wherefore elector could not complain because he was not afforded an opportunity to vote for one proposition and against another. Cary v. Blodgett [Cal. App.] 102 P 668.

12. Search Note: See note in 5 Ann. Cas. 568.

See, also, Elections, Cent. Dig. § 118; Dec. Dig. § 126; 15 Cyc. 332, 333; 10 A. & E. Enc. L. (2ed.) 633; 7 A. & E. Enc. P. & P. 361.

13. Democratic Executive Committee v. Dougherty [Ky.] 120 SW 343; State v. Nugent [N. J. Law] 71 A 481. Words "primary election" have definite legal meaning and denote an election by ballot held by some party, organization, or association for nomination of candidates for public offices. Norton v. State, 5 Ga. App. 586, 63 SE 662.

14. Rest entirely upon statute providing

The legislature has power to provide such a method,[15] but a law providing for nomination of candidates by primary election, being an election law,[16] must not interfere with the free exercise of the elective franchise.[17] Such laws must, furthermore, conform to constitutional limitations applicable to statutes in general,[18] and, though regulations are usually authorized,[19] any regulation attempted must be just and reasonable,[20] though absolute equality in all things is not required.[21] In the absence

therefor. State v. Nugent [N. J. Law] 71 A 481.

15. D'Alemberte v. State, 56 Fla. 162, 47 S 489. Legislature has power to regulate nomination of party candidates for office and provide for holding party conventions or so-called primary elections. State v. Anderson [N. D.] 118 NW 22.

16. People v. Strassheim, 240 Ill. 279, 88 NE 821.

17. People v. Strassheim, 240 Ill. 279, 88 NE 821.

Held invalid: Primary Election Law 1908 (Laws 1908, p. 65), § 44, operates to disfranchise electors possessing constitutional qualifications who are not registered as qualified voters by failing to provide for registration, and is therefore unconstitutional and void **as adding to qualifications** of voters. People v. Strassheim, 240 Ill. 279, 88 NE 821. Proviso of § 44, providing for affidavit which will entitle voter to vote, affords no relief except where elector moves to another precinct. Id. Primary Election Law 1908 (Laws 1908, p. 65), § 44, if given effect, would deprive qualified voters in some parts of state of right to vote through failure to provide for registration, and is therefore unconstitutional **as impairing freedom and equality of elections.** Id.

Primary Election Law 1908 (Laws 1908, p. 55), § 11, restricts right of voter at primary to only one vote for each of candidates for representative that senatorial committee has decided shall be nominated, and is invalid **as impairing right to cumulative vote.** People v. Strassheim, 240 Ill. 279, 88 NE 821.

Held not invalid: Second choice provision of Primary Election Law (Laws 1907, p. 457, c. 209) is not unconstitutional **as interfering with freedom of election,** since elector has utmost freedom of choice in casting first choice ballot, though choice is unavailable unless 40 per cent of party agrees with him. State v. Nichols, 50 Wash. 508, 97 P 728. Primary Law (Laws 1907, p. 457, c. 209) held not invalid **as impairing right to vote for any candidate** that elector may desire to vote for. Id.

18. Primary Election Law (Laws 1908, p. 48) is entitled "An act to provide for holding primary elections by political parties," which **title** is sufficiently comprehensive to include election of managing party committees. People v. Strassheim, 240 Ill. 279, 88 NE 821. Act March 15, 1907, Primary Election Law (Laws 1907, p. 457, c. 209), held not violative of Const. art. 2, § 19, as to title of act. State v. Nichols, 50 Wash. 508, 97 P 728. Various sections of act, requiring itemized statement of candidates under penalty (§§ 30, 31), relating to nomination of congressional candidates (§§ 7, 9, 10, 24, 36), requiring fees from such candidates (§ 5), etc., held germane to title "An act relating to regulating, and providing for nomination for candidates for public office, and providing penalties for violation thereof and declaring an emergency." Id. Title does not necessarily refer to offices in state. Id. Provisions of Primary Election Law (Laws 1907, p. 151, c. 109) are all germane to subject embraced in title of act. State v. Blaisdell [N. D.] 118 NW 141. Provisions of Act March 24, 1909 (St. 1909, p. 691, c. 405), with reference to advisory vote as to United States senators, is germane to subject expressed in title and is not within inhibition of Const. art. 4, § 24. Socialist Party v. Uhl [Cal.] 103 P 181. Exemption of municipalities from operation of Primary Election Law (Laws 1909, p. 691, c. 405), enacted pursuant to Const. amend. 1908, art. 2, § 2½, did not render act unconstitutional for want of **general application** to all elections. Id. Under Const. art. 11, § 6, general laws are not binding upon municipalities as to matters which are strictly municipal affairs. Id. Election of municipal officers is strictly municipal affair. Id. Primary Election Law (Laws 1907, p. 457, c. 209) is complete act, and while it necessarily changes existing statutes, superseding some and limiting effect of others, it is not violative of Const. art. 2, § 37, as to **amendment of statutes.** State v. Nichols, 50 Wash. 508, 97 P 728.

19. Under Const. amend. 1908, art. 2, § 2½, it is provided that legislature may determine tests or conditions upon which "electors," "political parties" or "organizations of electors" may participate in primary elections. Socialist Party v. Uhl [Cal.] 103 P 181.

20. D'Alemberte v. State, 56 Fla. 162, 47 S 489; State v. Anderson [N. D.] 118 NW 22. Legislature under Const. amend. 1908, art. 2, § 2½, may provide different tests upon which electors or political parties may participate in primaries, provided same are reasonable. Socialist Party v. Uhl [Cal.] 103 P 181.

Regulations held valid: Primary Election Law (Laws 1907, p. 157, c. 109) § 12, requiring vote at primary to equal 30 per cent of votes cast at last election for secretary of state, is not so unreasonable as to be invalid. State v. Anderson [N. D.] 118 NW 22. Such statute is intended to prevent nominations by accident to restrain action of voters within parties to which they belong and to fix and define number of votes necessary to constitute expression of party will. Id. Primary Election Law (Laws 1907, p. 476, c. 209), § 38, operating to abolish all other forms of nomination except as therein prescribed, is reasonable, though it deprives minority parties of chance to nominate candidates and does away with nominations by petition. State v. Nichols, 50 Wash. 508, 97 P 728. Conditions whereby practically only political parties who had candidates for president at last preceding election, or political organizations represented at state or presidential election with certain vote, should be entitled to participate, Act March 24, 1909 (St. 1909, p. 691, c. 405), held in sub-

of constitutional limitations to the contrary, the legislature may provide for the secrecy of the ballot at primary elections.[22] Since the purpose of the primary is merely to select candidates, constitutional limitations relative to final elections are not directly applicable,[23] and electors may be required to call for their party ballots [24] or to take an oath of or to declare his party affiliation,[25] and candidates may also be required to take a similar oath [26] and may be required to pay filing fees.[27] Candidates are also frequently required to file statements of expenses,[28] but a reasonable time for filing expenses is required when the statute relating thereto is indefinite.[29] Void provisions are frequently separable,[30] but otherwise the entire act fails.[31] The vote cast must in some cases be equal to a certain percentage of that cast at the last general election.[32] The primary law may operate so that the nominee of

stantial compliance with constitution. Socialist Party v. Uhl [Cal.] 103 P 181.

21. State v. Anderson [N. D.] 118 NW 22.

22. State v. Taylor, 220 Mo. 618, 119 SW 373.

23. As to **qualification of voters.** State v. Nichols, 50 Wash. 508, 97 P 728. **Election of United State senators** by state legislatures is not interfered with by requirement that voters shall at primary indicate their choice as to such senators, such choice being merely a choice of party candidates. Socialist Party v. Uhl [Cal.] 103 P 181; State v. Blaisdell [N. D.] 118 NW 141. See United States, § 3.

24. Provisions of Primary Election Law (Laws 1907, p. 151, c. 109), as to calling for party ballot, are not violative of Const. § 129, as to secrecy of ballot. State v. Blaisdell [N. D.] 118 NW 141. Law protects secrecy of ballot, not secrecy of political party with which voters desire to affiliate. Id. Primary Election Law (Laws 1907, p. 457, c. 209) is not invalid as tending to destroy political parties, that being political rather than judicial question. State v. Nichols, 50 Wash. 508, 97 P 728. State is required to resort to some process to determine candidate and method employed by requiring party ballot, and putting some restraint upon demand for same is not unreasonable. Id.

25. Primary Election Law (Laws 1907, p. 457, c. 209), § 12, requiring oath of affiliation with party when right to vote is challenged, is not violative of constitutional provisions as adding qualifications to those required. State v. Nichols, 50 Wash. 508, 97 P 728. Pol. Code, § 1366a, requiring voter to declare party affiliation at primary election, is reasonable restriction of right. Socialist Party v. Uhl [Cal.] 103 P 181.

26. Affidavit of affiliation from candidate required by Primary Election Law (St. 1909, p. 691, c. 405), which was enacted pursuant to Const. Amend. 1908, art. 2, § 2½, is reasonable condition. Socialist Party v. Uhl [Cal.] 103 P 181. Const. art. 20, § 3, prescribing oath of office when person is elected, has nothing to do with oath required of candidates at primary election. Id.

27. State may ask candidates for office under particular law to reimburse it for part of expenses of carrying law into effect. Primary election law as to imposition of fees (Laws 1907, p. 457, c. 209, § 5). State v. Nichols, 50 Wash. 508, 97 P 728. Fees provided for by Primary Election Law (St. 1909, p 691, c. 405), for filing nomination papers, are authorized by Const. Amend. 1908, art. 2, § 2½, giving legislature right to fix conditions upon which right to participate in primary may be exercised. Socialist Party v. Uhl [Cal.] 103 P 181. Condition requiring fees for filing nomination papers, provided for by Primary Election Law (St. 1909, p. 691, c. 405), is reasonable restriction. Id. Primary Election Law (St. 1909, p. 691, c. 405), requiring fees for filing nomination papers, is not violative of Const. art. 1, § 24, providing that no property qualifications shall be required of any person to hold office. Id. Primary Law of 1907 (Laws 1907, pp. 458, 471, c. 209), §§ 5, 26, as to fees in case of declaration of candidacy, amount of which is fixed on basis of precentum of salary rather than being fixed for all candidates alike, is not an unreasonable exercise of legislative power. State v. Nichols, 50 Wash. 529, 97 P 733.

28. Upon certiorari to review proceedings of state democratic executive committee in contest, contestee held to have complied with statute and rules of democratic party in filing pledge and statement of expenses. Moore v. Griffin, 81 S. C. 393, 62 SE 545.

29. Primary Election (Laws 1907, p. 457, c. 209), is indefinite. State v. Nichols, 50 Wash. 508, 97 P 728.

30. Void provisions of Primary Election Law (Laws 1907, p. 151, c. 109, §§ 3, 4), which contravene state constitution (§ 211) as adding another qualification to office, are separable from provisions requiring oath and pledge of representative to vote for designated senator. State v. Blaisdell [N. D.] 118 NW 141.

31. Primary Election Law of 1908 (Laws 1908, p. 48) is wholly invalid in that its purpose cannot be accomplished when unconstitutional sections (§§ 11, 44) are eliminated. People v. Strassheim, 240 Ill. 279, 88 NE 821.

32. Primary Election Law (Laws 1907, p. 157, c. 109), § 12, applies to county and district officers and such candidates for local office must receive 30 per cent of their party vote cast at last general election for secretary of state, within such local subdivision. State v. Anderson [N. D.] 118 NW 22. Primary Election Law (Laws 1907, p. 157, c. 109), § 12, requiring vote at primary election to be equal to 30 per cent of vote cast at last general election for secretary of state, contains a proviso (cl. 3) which limits application of 30 per cent rate to candidates for offices of which there is not more than one to be filled. State v. Anderson [N. D.] 118 NW 29. Where more than one office of same name is to be filled, candidates receiving highest number of votes are nominess. Id.

one party becomes the legal candidate of another party.[33] The nomination of a primary election gives the person receiving it no vested interest in the office for which he is thus nominated,[34] nor in any place upon the official ballot,[35] and the legislature may abolish an office notwithstanding that candidates have been nominated therefor.[36] A fortiori nominations cannot legally be placed upon the primary ballot when the office in question has been abolished.[37] When the candidate is authorized to elect between a long and a short term, he will, in the absence of any express election, be presumed to have exercised his election in favor of the long term.[38] The reception of votes at a primary election, the counting of such votes, and like matters, are usually governed by the principles applicable to ordinary elections.[39]

The primary method of selecting candidates, when adopted, is usually exclusive,[40] but such an enactment may be temporarily inapplicable because of insufficient time for operation,[41] and party committees are sometimes authorized to make nominations where vacancies occur in the list of candidates selected at the primaries.[42]

Control by party committee. See 11 C. L. 1174

Ballots for primaries. Review and contest of primary. See 11 C. L. 1174—Objections must usually be filed within a certain time.[43] Authority to decide primary contests is often vested in some tribunal specifically designated by statute [44] as the final arbiter of the contest,[45] leaving to the courts only the power to compel a hear-

33. Under Primary Election Law, Feb. 17, 1906 (P. L. p. 36), whereby electors may write in name of their candidate and vote for him, where there was no candidate of democratic party and plurality of votes cast by democratic party was in favor of republican nominee, such nominee became legal candidate of democratic party. In re Henderson, 222 Pa. 307, 71 A 18.

34, 35. Lahart v. Thompson [Iowa] 118 NW 398.

36. Lahart v. Thompson [Iowa] 118 NW 398. County supervisors may, pursuant to statute, abolish supervisor districts after candidates for such offices have been selected at primaries in each district. Id. When so abolished, candidates nominated at primary were entitled to have names placed on ballot, if at all, as candidates for entire county. Id.

37. Pledge of candidate for office of supervisor properly refused by chairman of political party where office had been abolished (25 Stat. p. 1203). Fooshe v. McDonald, 82 S. C. 22, 63 SE 3.

38. State v. Nichols, 50 Wash. 508, 97 P 728. Under Primary Election Law (Laws 1907, p. 457, c. 209), § 2, act does not refer to special elections for filling vacancies for unexpired terms, and § 38 provides that candidates for office of judge when there is vacancy may announce themselves for long or short term. Id.

39. See post, §§ 7-10.

40. Statute requiring candidates of political parties to be nominated at primary election is exclusive. State v. Hayward [Iowa] 119 NW 620. Statute mandatory. Id. Primary Election Law (Laws 1907, p. 476, c. 209), § 38, is manifestly intended to do away with all other forms of nomination except as therein prescribed. State v. Nichols, 50 Wash. 508, 97 P 728.

41. Where amendatory statute providing for primary election is temporarily inapplicable by reason of insufficient time for its operation, and repealed provisions provide applicable method of nominating candidates as by petition, it will be presumed that legislature did not intend amendment to take effect as to such nominations. State v. Harsha [Kan.] 101 P 454.

42. Code Supp. 1907, § 1087a24. State v. Hayward [Iowa] 119 NW 620. Code Supp. 1907, § 1087a24, does not authorize party committee to make nomination of candidate in first instance. Id. Code, § 1102, confers no power on central committee in first instance to nominate candidate, since Code Supp. 1907, § 1087a26, provides for nomination by convention when there is failure to nominate at primaries. Id. Secretary of state rightfully refused to recognize and file certificate of nomination made by district central committee of party without authority. Id.

43. Candidate who did not, within three days, file affidavit requesting and giving reasons for recount, was not entitled to a recount under Cobbey's St. 1907, c. 52, § 5887, as amended. Whedon v. Brown, 83 Neb. 130, 118 NW 1086. In contest of nomination of candidate for representative under Gen. St. 1901, § 2703, three days' time allowed for filing objections after nomination is filed begin to run from filing of certified determination of state board of canvassers with secretary of state. Griffin v. Gesner [Kan.] 97 P 794.

44. Under provisions in Primary Election Law, § 10 (Laws Sp. Sess. 1908, p. 71, c. 54), nomination of candidate for representative in district comprising single county may be contested before tribunal created by Gen. St. 1901, § 2703. Griffin v. Gesner [Kan.] 97 P 794. Cobbey's St. 1907, § 5892, provides for contesting primary elections. Crosby v. Haverly, 82 Neb. 565, 118 NW 123.

45. Decision of such tribunal is not reviewable by courts. Democratic Executive Com-

ing [46] where the contestant is legally entitled thereto [47] and the designated tribunal has not determined the contest as required.[48] On certiorari from the refusal to grant a rehearing on a petition of exceptions to a nomination, the supreme court can pass only upon the regularity of the record,[49] and the action of the lower court will be sustained if there is no error or abuse of discretion.[50] Where the statute providing for contests does not include candidates for a certain office,[51] the courts are not necessarily given jurisdiction to decide a contest for such office,[52] and in any event they will not, in the exercise of their general powers, take jurisdiction of a contest that must of necessity be unavailing.[53]

§ 6. *Officers of election.*[54]—See 11 C. L. 1175—Questions as to the eligibility of election officers,[55] their oath,[56] and the officials which are necessary,[57] often involve merely a construction of the statutes relative thereto. Election officers are often authorized by law to administer the official oath to each other.[58] Where the choice of election commissioners depends upon the question as to what parties received the largest vote at the last preceding election, and the statute does not specify how such question must be determined, resort may be had to extrinsic evidence when the strictly official records do not furnish the requisite data.[59] Irregularities in the qualification of officers will not invalidate an election where there is no fraud and the result is not affected,[60] unless the statutory provisions are clearly mandatory

mittee v. Dougherty [Ky.] 120 SW 343. Under Ky. St. 1909, § 1563 (Russell's St. § 4083), decision of contest committee at primary election is final. Id. Democratic Executive Committee v. Baughman [Ky.] 121 SW 468. Code Supp. 1907, § 1087a1, provides that Code tit. 6, cc. 3, 4, shall apply to primary elections same as general elections, and under Code, § 1103, tribunal is created for determination of all questions in relation to nomination papers or certificates, which determination is final. State v. Hayward [Iowa] 119 NW 620.

46. Court may only compel committee to hear contest. Democratic Executive Committee v. Dougherty [Ky.] 121 SW 468.

47. Award of mandamus compelling hearing of contest held erroneous. Democratic Executive Committee v. Dougherty [Ky.] 120 SW 343. Contestant was not entitled to recount where party rules were not complied with as to making petition signed by requisite number of voters part of notice of proceeding. Democratic Executive Committee v. Baughman [Ky.] 121 SW 468.

48. Where demurrer was sustained and proceeding dismissed, action was final. Democratic Executive Commitee v. Baughman [Ky.] 121 SW 468. Under statute, decision dismissing grounds of contest as insufficient is not reviewable. Democratic Executive Committee v. Dougherty [Ky.] 120 SW 343. Decision that contestant did not secure necessary signers to petition to secure recount within time prescribed by party rule was determination of contest. Id.

49, 50. In re Foy [Pa.] 73 A 324.

51. Quaere whether Cobbey's St. 1907, c. 52, § 5887, as amended, applies to legislative candidates. Whedon v. Brown, 83 Neb. 130, 118 NW 1086.

52. If failure of Cobbey's St. 1907, c. 52, § 5887, specifically to refer to legislative candidates was intentional, the court cannot take jurisdiction of a contest for such office, since the legislature has power to deny legislative candidates the right of candidates, and, if the omission was accidental, the court has no power to supply the omission. Whedon v. Brown, 83 Neb. 130, 118 NW 1086. District court is without power to consider and determine original action instituted for purpose of contesting nomination of legislative candidate at primary election. Id.

53. As where contest could not be heard and decided before the final elections. Whedon v. Brown, 83 Neb. 130, 118 NW 1086.

54. Search Note: See notes in 11 C. L. 1176; 11 L. R. A. (N. S.) 501.

See, also, Elections, Cent. Dig. §§ 43-54; Dec. Dig. §§ 49-58; 15 Cyc. 310-314, 316; 10 A. & E. Enc. L. (2ed.) 665.

55. Under Election Law (Acts 29th Leg. 1905, p. 535, c. 11), § 60, any one who holds office of trust under United States, state or city, shall not act as election officer. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

56. As to oath of primary election inspector see Jewett's Election Manual, p. 226, and Laws 1899, p. 983, c. 473, § 5, subd. 2. People v. Foster, 60 Misc. 3, 112 NYS 706.

57. Under Rev. 1905, § 2958, city election was properly held under charge of registrar and two judges, and registrar need not have been freeholder. Town of Hendersonville v. Jordan, 150 N. C. 35, 63 SE 167.

58. Phillips v. State, 5 Ga. App. 597, 63 SE 667. Where three election officers sign oath in presence of each other, though only one purports to attest it, legal effect is administration of oath to each other. Id.

59. Where candidate received vote of two parties, any matter in the election returns and the records thereof, though not strictly a part of such records, which threw light on question as to how many votes were cast by each of such parties, was available to mayor under San Francisco charter in determining from what parties to appoint election commissioners. Independence League v. Taylor [Cal.] 100 P 860. Evidence held to entitle Independence League to two appointees as election commissioners. Id.

60. Though election judge was disqualified

and the regulation involved is reasonable.[61] As a rule, no personal liability is imposed when an election officer in good faith and in the exercise of his discretionary powers rejects a vote,[62] and an elector cannot sue such officer in tort to determine the constitutionality of the statute under which the officer acted in rejecting the vote.[63] An action against election officers by virtue of the federal statute, for the wrongful rejection of a vote,[64] is governed by the usual jurisdictional requisites.[65] The right to vote must be properly alleged [66] but since the statute does not so require,[67] and the rules of pleading applicable to common-law suits do not apply,[68] it is not necessary that the paintiff should allege that the rejection of his vote was maliciously or intentionally wrongful.[69] The public is interested in the performance of their duties by primary officers as well as by the final election officers,[70] and, hence, the duties of officers of a primary election cannot be shirked or avoided without incurring liability.[71] The same person may be a primary officer and a final election officer.[72]

§ 7. *Polling and receiving the vote.*[73]—See 11 C. L. 1177.—The method of polling and receiving votes must insure the free exercise of the elective franchise.[74] Voting machines [75] may be used [76] unless their use violates some specific constitutional limitation, such as a requirement that elections shall be held by ballot,[77] or that the voting shall be secret.[78] Statutory provisions as to opening and closing the polls should be observed,[79] but irregularities therein will not necessarily invalidate an

under statute, election should not be declared invalid where no allegation that result might have been changed and other judge was presumed competent. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Lack of qualification of registrar as freeholder, if required by statute, would be mere irregularity. Town of Hendersonville v. Jordan, 150 N. C. 35, 63 SE 167. Election will not be pronounced invalid where officers holding same were de facto, and no actual fraud or misdemeanor is imputed. Ryan v. Tuscaloosa, 155 Ala. 479, 46 S 638. Failure of election officers to take oath prescribed does not invalidate an election in absence of fraud, collusion, or willful neglect. State v. Barnes [Okl.] 97 P 997.

61. Senter v. Board of Canvassers, 64 W. Va. 499, 63 SE 284.

62. Blake v. Mason [Conn.] 73 A 782. Where quasi-judicial action is required of an official as a preliminary to other action resulting from his conclusion, he may, if he acts bona fide, invoke protection of rule, whether in strictness particular act when subject to analysis would be classed as quasi-judicial or ministerial. Id.

63. Elector is not left remediless by such rule. Blake v. Mason [Conn.] 73 A 782.

64. Under Rev. St. of U. S. § 1979 (U. S. Comp. St. 1901, p. 1262), persons who deprive others of rights, privileges, and immunities secured by constitution and laws shall be liable in action at law, suit in equity, or other proceeding for redress. Brickhouse v. Brooks, 165 F 534.

65. Federal court has jurisdiction where damages are laid in excess of $2,000. Brickhouse v. Brooks, 165 F 534.

66. Complaint held sufficiently comprehensive in alleging right to vote. Brickhouse v. Brooks, 165 F 534.

67. Rev. St. § 1979 (U. S. Comp. St. 1901, p. 1262), does not require that rejection of vote be alleged to be maliciously or intentionally wrongful. Brickhous v. Brooks, 165 F 534.

68, 69. Brickhouse v. Brooks, 165 F 534.

70. D'Alemberte v. State, 56 Fla. 162, 47 S 489.

71. D'Alemberte v. State, 56 Fla. 162, 47 S 489. Responsibility cannot be avoided by appointment of proxies. Id.

72. Office of primary election inspector has separate oath and is office which is superimposed upon election inspector. People v. Foster, 60 Misc. 3, 112 NYS 706.

73. Search Note: See notes in 11 C. L. 1177; 1 L. R. A. (N. S.) 656; 7 Id. 621; 8 Id. 888; 2 Ann. Cas. 840; 5 Id. 864; 9 Id. 275.

See, also, Elections, Cent. Dig. §§ 169-205; Dec. Dig. §§ 197-234; 15 Cyc. 362-374; 10 A. & E. Enc. L. (2ed.) 690.

74. Any method of holding an election which would deprive electors, free from personal fault or misfortune, of right of casting their ballots, and having given effect to votes cast, would be unconstitutional. People v. Wintermute, 194 N. Y. 99, 86 NE 818.

75. See note, 11 C. L. 1177.

76. Use of voting machine does not necessarily impair constitutional rights as to voting. People v. Wintermute, 194 N. Y. 99, 86 NE 818.

77. Act Apr. 25, 1898 (93 Ohio Laws, p. 277), and amendments thereto (Rev. St. §§ 2966—54 to 2966—67 inc.), providing for voting machines at elections held void as violative of Const. art. 5, § 2, requiring all elections to be by ballot. State v. Board of Deputy State Sup'rs, 80 Ohio St. 471, 89 NE 33.

78. Use of voting machine does not necessarily violate secrecy of voting. People v. Wintermute, 194 N. Y. 99, 86 NE 818. That use of voting machine is unconstitutional as violating secrecy of ballot **should be determined in direct proceeding** by mandamus, or otherwise to cause rejection of machine and use of ballots, and not on collateral attack. Id.

79. Under Election Law ([Laws 1896, p. 894, c. 909], § 3, as amended by Laws 1901,

election [80] unless the result is effected.[81] The same rule applies to other irregularities in receiving the vote.[82] Where a refusal to receive a ballot is based on reasonable grounds, it will not be reviewed by an election contest court.[83] A written report from the election officers at a primary election is sometimes required.[84]

Ballots are "cast" or "taken" when delivered and accepted by the judges on election day [85] or when deposited in the ballot box,[86] and a voter cannot thereafter withdraw or change his ballot.[87] Similarly an elector's vote is complete when he complies with the prescribed regulations in indicating his choice on a voting machine,[88] and he cannot be deprived of his vote by reason of the voting machine's failure to register it.[89]

§ 8. *Marking and signing ballot; irregularities and ambiguities therein.*[90]—See 11 C. L. 1177—Statutes prescribing rules for voters in the preparation of ballots are generally held to be directory,[91] and effect must be given to the intent of the voter if ascertainable from the ballot,[92] especially where there are mandatory statutory requirements to such effect,[93] but such intent must usually be expressed substan-

p. 1668, c. 654, as to closing of polls at 5 P. M.; § 104, subd. 1 [Laws 1896, p. 953, c. 909], limiting delivery of ballot to electors who enter guard rail while polls are open; and § 106 [p. 956], entitling elector who has received ballot to vote), it is intention of legislature to close polls at 5 P. M., that is, delivery of ballots to electors must cease at that time. Newcomb v. Leary, 128 App. Div. 329, 112 NYS 657. Election Law (Laws 1896, p. 894, c. 909), § 3, as amended by Laws 1901, p. 1668, c. 654, as to closing of polls at 5 P. M., seems to be mandatory, but point is immaterial since direction must be obeyed as well as mandate. Id.

80. Statute as to opening and closing polls is so far directory that irregularities which do not deprive voter of his vote, or permit casting of illegal vote, will not vitiate an election. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

81. Where departure from statute as to opening and closing polls is so great as to affect result, election is invalid. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

82. Fact that registrars fail to purge registration list because of insufficient time will not render an entire election invalid where performance of duty would not affect result. Coleman v. Board of Education, 131 Ga. 643, 63 SE 41. Violations of charter provisions prohibiting electioneering within 50 feet of polling place would not render election void where no proof that result would be otherwise. Brumby v. Marietta [Ga.] 64 SE 321.

83. Nichols v. Pennington [Ky.] 118 SW 382.

84. Gen. St. 1906, § 263, requiring written report with ballots, etc., is intended to preserve evidence of what occurred at polling places. D'Alemberte v. State, 56 Fla. 162, 47 S 489.

85. Pratley v. State, 17 Wyo. 371, 99 P 1116.

86. People v. Wintermute, 194 N. Y. 99, 86 NE 818.

87. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

88, 89. People v. Wintermute, 194 N. Y. 99, 86 NE 818.

90. Search Note: See notes in 16 L. R. A. 754; 47 Id. 806; 10 A. S. R. 317; 90 Id. 46; 91 Id. 682.

See, also, Elections, Cent. Dig. §§ 137-164, 168; Dec. Dig. §§ 160-190, 196; 15 Cyc. 345-362, 365; 10 A. & E. Enc. L. (2ed.) 690, 766, 774, 776, 780.

91. Phillips v. Board of Canvassers, 64 W. Va. 715, 63 SE 392. Unless statutes are mandatory by prohibitive rules inhibiting counting of ballots in case of deviation from prescribed rules, they will be held directory. Id. Comp. St. 1907, c. 26, § 155, prohibiting marking of ballots so that same may be identified, and "Instructions to Voters" Schedule B, § 159, that voter shall not mark ballot except as above directed, are directory only. Gauvreau v. Van Patten, 83 Neb. 64, 119 NW 11.

92. Phillips v. Board of Canvassers, 64 W. Va. 715, 63 SE 392. Ballot like any other written instrument is to be construed so as to give effect to voter's intent, if ascertainable from face of ballot. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

Held unintelligible: Under Rev. Codes, § 575, any ballot from which it is impossible to determine voter's choice should not be counted. Carwile v. Jones, 38 Mont. 590, 101 P 153. Where ballots were marked in square before name of each candidate for office, they should not be counted for either. West v. Sloan, 238 Ill. 330, 87 NE 323. Where there is a cross before name of every candidate of two parties, and names of candidates of two other parties are crossed out by various marks, vote should not be counted. Carwile v. Jones, 38 Mont. 590, 101 P 153. That one of parties had no candidate for office in question does not militate against rule. Id.

93. Code 1899, c. 3, § 34 (Code 1906, § 53), as amended by Acts 1908, p. 95, c. 21, mandatorily requires effect to be given to intention of voter if ascertainable from ballot which is otherwise valid. Phillips v. Board of Canvassers, 64 W. Va. 715, 63 SE 392; Shore v. Board of Canvassers, 64 W. Va. 705, 63 SE 389. Statute requires great liberality in interpretation of ballots. Phillips v. Board of Canvassers, 64 W. Va. 715, 63 SE 392.

Votes for particular candidates: Where voter selects ticket of one party by marking cross in circle and votes for candidate of another party, there being two or more offices to be filled, ballot is countable for all candidates on ticket selected, except vote for candidate of the other party. Shore v. Board

tially as indicated by statute.[94] Statutes as to indorsement of the ballot by poll clerks are sometimes mandatory in some respects [95] and directory in others.[96]

The writing in of names. See 11 C. L. 1178—Statutes as to the writing in of names, being for the purpose of providing for the exercise of a constitutional right,[97] must be liberally construed,[98] and the use of "posters" as indicating the voter's intention is permissible.[99]

§ 9. *Secrecy of ballot and distinguishing marks.*[1] See 11 C. L. 1178—Distinguishing marks, in order to warrant the rejection of a ballot, must have been made by the voter [2] for the purpose of identification.[3] The secrecy of the ballot is not neces-

of Canvassers, 64 W. Va. 705, 63 SE 389. Where there was no selection of party ticket, ballots were properly counted only for candidates whose names were marked. Id. Where ballot was selected and candidates for justice was voted for, and also opposing candidates on another ticket were voted for, vote was to be counted for candidates whose names were marked, intention being indicated by secondary marking of particular candidates. Id. Where there are crosses in circles of two party tickets and particular candidates are voted for on both tickets, selection of party ticket may be ignored. Id. Under Rev. Laws 1905, § 302, subd. 8, as to **erasures** or attempt to erase, in which case ballot shall be counted as intended, where vote for contestant had been obliterated by scratches and pencil marks and vote for contestee was properly marked, such vote was properly counted for contestee. In re Lannon [Minn.] 120 NW 1082.

Votes for party tickets: Cross in circle designating party ticket showed intention to vote for all candidates of such party. Phillips v. Board of Canvassers, 64 W. Va. 715, 63 SE 392; Shore v. Board of Canvassers, 64 W. Va. 705, 63 SE 389. Straight mark in circle indicated intent to vote straight ticket. Shore v. Board of Canvassers, 64 W. Va. 705, 63 SE 389. Word "straight" written in circle. Id. Cross placed under or near emblem outside of circle. Id. Placing cross marks in all circles but one. Id. Where there was cross designating party ticket and candidate on another ticket was voted for but name was blackened out with pencil, intention was to vote for candidate on ticket of party selected. Phillips v. Board of Canvassers, 64 W. Va. 715, 63 S 392. Where there was large cross over circle of every ticket except that of R. party, which had no mark of any kind, and another ticket was obliterated by marks except as to one candidate, intention was to vote straight R. ticket. Id. Ballot marked with cross in circle of two parties, one of which bore evidence of an attempted **erasure,** should be counted for other party. Id. Crossing out headings of all tickets but one indicated intention to vote for latter. Shore v. Board of Canvassers, 64 W. Va. 705, 63 SE 389. Defacing all tickets but one by lines drawn from top to bottom or partially through them held to show intent to vote for ticket not erased. Id. Covering all tickets but one with large "X" held vote for one not covered. Id.

94. Carwile v. Jones, 38 Mont. 590, 101 P 153. In order to constitute substantial compliance with law (Rev. Codes, § 552), point of intersection of two lines forming cross must be within square before candidate's name. Id.

Held substantial compliance: Any mark which consists of a cross is sufficient since legislature did not intend to require perfect letter "X." Carwile v. Jones, 38 Mont. 590, 101 P 153. Cross containing third line sufficiently complies with statute where there is no purpose to identify ballot. Id.

Held not compliance: "X" marked after name and without column of party. Carwile v. Jones, 38 Mont. 490, 101 P 153. Marking cross after candidate's name is not in substantial compliance with statute requiring same to be in square before name. Id. Where cross is in square before blank space for writing names and below contestee's name. Id. Cross in every square of two parties with lines drawn through candidates of two other parties, but no cross in front of contestant's name. Id. Writing name of candidate in another column under different party, with no "X" mark. Id. Crossing out names of all other candidates where there is failure to mark "X" before remaining name. Id. Drawing perpendicular lines through names of opposing candidate where there was no "X" mark. Id.

95. Clause of Code of 1899, c. 3, § 34 (Code 1906, § 53), as amended by Acts 1908, p. 95, c. 21, relating to indorsement of ballots by poll clerk, is mandatory in so far as it requires signature to be in handwriting of clerks. Senter v. Board of Canvassers, 64 W. Va. 499, 63 SE 284.

96. Clause of Code of 1899, c. 3, § 34 (Code 1906, § 53), as amended by Acts 1908, p. 95, c. 21, relating to indorsement of ballots by poll clerks, is directory in so far as it requires signatures to be on lines provided, and requires same to be in ink. Senter v. Board of Canvassers, 64 W. Va. 499, 63 SE 284.

97. Rev. Laws 1905, § 275, subsec. 3, provides for exercise of constitutional right. Snortum v. Homme, 106 Minn. 464, 119 NW 59.

98. Snortum v. Homme, 106 Minn. 464, 119 NW 59.

99. Under Rev. Laws 1905, § 275, subsec. 3, providing for writing in of names, ballots in form of "posters" were legal and were properly counted by canvassers. Snortum v. Homme, 106 Minn. 464, 119 NW 59. Construing statute liberally, words "write" or "written" include any mode of representing words or letters, as provided by Rev. Laws 1905, § 5514, subsec. 24. Id.

1. Search Note: See notes in 13 L. R. A. 761; 47 Id. 820; 49 A. S. R. 240.

See, also, Elections, Cent. Dig. §§ 165-167; Dec. Dig. §§ 192-195; 15 Cyc. 357-360; 10 A. & E. Enc. L. (2ed.) 708, 734, 766.

2. Law as to identifying marks refers only to marks by voters. Carwile v. Jones,

sarily violated by the use of voting machines,[4] even where it is necessary by reason of the defective working of the machine, to resort to extrinsic evidence in order to ascertain in whose favor the votes were cast.[5]

§ 10. *Count, return and canvass; custody of ballots and recount; determination of result and certifiates.*[6]—See 11 C. L. 1179—It is frequently required that the votes be publicly counted.[7] Votes which are void because of distinguishing marks,[8] or disqualification of the voter,[9] or which are illegal,[10] or insufficiently identified,[11] should not be counted. The sufficiency of markings to indicate the voter's intention is treated in another section.[12] Ballots mutilated by the voters should not be counted,[13] but in the absence of proof that the ballot was mutilated by the voter, it will be presumed that it was torn afterwards.[14] The mistakes or omissions of the election officers in handling the ballots should not render the votes uncountable,[15] unless it appears that a fair election and an honest count were thereby prevented.[16]

A designated official is the custodian of the returns,[17] and he is sometimes

38 Mont. 590, 101 P 153. Distinguished ballot is one which bears an identification mark made by voter or made with his consent, connivance, or knowledge, to distinguish such ballot from others counted. Town of Eufaula v. Gibson [Okl.] 98 P 565. Ballots improperly marked by election officials without consent or knowledge of voter are not to be held invalid as distinguished. Id.

3. Gauvreau v. Van Patten, 83 Neb. 64, 119 NW 11. Obliteration of vote for contestant by pencil mark in pursuance of evident intention to vote for contestee **held not distinguishing mark.** In re Lannon [Minn.] 120 NW 1082. Writing in of names was not distinguishing mark where there was no intention to identify. Gauvreau v. Van Patten, 83 Neb. 64, 119 NW 11.

4. People v. Wintermute, 194 N. Y. 99, 86 NE 818. Constitution 1895, art. 2, § 4, amending previous constitution and providing that elections might be "by such other method as may be prescribed by law, provided secrecy in voting is preserved," was solely to enable substitution of voting machines if practicable, and not to safeguard secrecy of ballot. Id.

5. Vote is complete when requirements of law as to manner of voting on machine are complied with, and failure of machine to register vote does not pertain to act of voting. People v. Wintermute, 194 N. Y. 99, 86 NE 818.

6. Search Note: See notes in 47 L. R. A. 551; 13 L. R. A. (N. S.) 1013; 3 Ann. Cas. 70. See, also, Elections, Cent. Dig. §§ 206-244, 306, 307; Dec. Dig. §§ 235-268, 299; 15 Cyc. 374-392, 429-431; 10 A. & E. Enc. L. (2ed.) 734, 752, 760, 761, 766.

7. Under Pol. Code 1895, § 114, managers of primary election must count votes publicly. Norton v. State, 5 Ga. App. 596, 63 SE 666.

8. Under statute ballots bearing distinguishing marks are not to be counted. Town of Eufaula v. Gibson [Okl.] 98 P 565; Gauvreau v. Van Patten, 83 Neb. 64, 119 NW 11; Wightman v. Tecumseh [Mich.] 16 Det. Leg. N. 409, 122 NW 122.

9. Town of Eufaula v. Gibson [Okl.] 98 P 565. Votes cast by persons not qualified as electors because of nonresidence should not be counted. People v. Long Beach [Cal.] 102 P 664; McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Vote of voter who had not paid poll tax and who from preponderance of evidence was not exempt from such payment should not be counted. Id.

10. Fraudulent votes should not be counted. Town of Eufaula v. Gibson [Okl.] 98 P 565. Vote secured by **bribery** should not be counted. Town of Grove v. Haskell [Okl.] 104 P 56.

11. Ballot, unattached to those counted by election officers and which would exceed number of ballots shown by poll list, held in view of facts to be not sufficiently identified as lawfully cast ballot. In re Lannon [Minn.] 120 NW 1082.

12. See ante, § 8.

13. Since statute provides for supplying new ballot. Carwile v. Jones, 38 Mont. 590, 101 P 153.

14. Carwile v. Jones, 38 Mont. 590, 101 P 153. Ballot appearing to have been mutilated will be presumed torn after it was counted. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Torn ballot is not invalid when it can be placed together so as to show how it was voted and its number is apparent. Id.

15. Carwile v. Jones, 38 Mont. 590, 101 P 153. Mistake or misconduct of election officer in failing to detach stub from ballot (required by Rev. Codes, § 552) should not deprive innocent voter of his right. Id. **Omission to remove stub** of ballot will be presumed to have happened by mistake. Id. Where ballot was evidently **torn by judge** in detaching stub, elector should not suffer. Id. Ballot indorsed as voted with assistance of two judges with words "for illegibility of voter" should be counted since statute does not require reason for judge's assistance, and additional words may be stricken as **surplusage.** Id. Statutes considered (Rev. St. 1899, §§ 285, 345, 334, 341), and under amendments ballot accepted and deposited is not to be invalidated because of **absence of proper indorsement,** where there is no evidence of fraud. Pratley v. State, 17 Wyo. 371, 99 P 1116.

16. Unless it shall appear that fair election and an honest count were thereby prevented. Carwile v. Jones, 38 Mont. 590, 101 P 153.

17. County clerk, under Act of 1905, p. 136, c. 88, receives returns and is custodian of all returns to be considered by county can-

charged with the duty of certifying the names of registered voters to the canvassing board.[18] In the absence of fraud or suspicious circumstances, a mere irregularity in the delivery of precinct returns will not invalidate the vote.[19]

The canvass of the votes is purely ministrial,[20] and the fact that power is conferred to determine whether the papers transmitted to them are genuine, which power is in a sense judicial or quasi-judicial, does not alter the general rule,[21] nor is this rule changed by the fact that the board of canvassers is vested with a quasi-judicial power to pass upon the right to vote,[22] and such board in considering the genuineness of returns[23] has no power to consider matters not shown by the returns for the purpose of declaring an election void.[24] As a general rule, therefore, the board of canvassers should count the ballots without reference to their illegality[25] or eligibility of candidates.[26] Where the election officers have im-

vassing board. Pratley v. State, 17 Wyo. 371, 99 P 1116.

18. Duty of clerk to furnish canvassing board with certificate of additional voters' names under statute (Act Mar. 14, 1907; St. 1907, p. 260, c. 214, as to election relative to change of county boundary) is mandatory. Cerini v. De Long, 7 Cal. App. 398, 94 P 582. Under Pol. Code, § 1094, as applied to election on proposition of change of county boundary lines (under St. 1907, p. 260, c. 214), county clerk was only required to certify to canvassing board names of voters who had registered until within 40 days prior to election, when registration ceased. Id.

19. Pratley v. State, 17 Wyo. 371, 99 P 1116. Under statute and general rule, delivery by courier rather than by mail and delivery to wrong officer by mistake would not invalidate vote of precinct where canvassing board was satisfied as to genuineness. Id.

20. Cerini v. De Long, 7 Cal. App. 398, 94 P 582; Humbolt Board of Education v. Klein [Kan.] 99 P 222; Stearns v. State [Okl.] 100 P 909; Pratley v. State, 17 Wyo. 371, 99 P 1116. Merely tabulates and certifies returns of election. Dorian v. Walters [Ky.] 116 SW 313; Cerini v. De Long, 7 Cal. App. 398, 94 P 582. Action of local option election inspectors in rejecting ballots as defective is ministerial act rather than quasi-judicial. State v. Emerson, 137 Wis. 292, 118 NW 836. Canvass of votes cast at **primary election** is ministerial duty. D'Alemberte v. State, 56 Fla. 162, 47 S 489. Duty of speaker of house of representatives to canvass **election of state executive officers** is ministerial. State v. Dean [Neb.] 121 NW 719.

21. Cerini v. De Long, 7 Cal. App. 398, 94 P 582.

22. Investigation of person's right to vote (under Gen. St. 1906, § 260) at primary election by election judges is ministerial or at most quasi-judicial. D'Alemberte v. State, 56 Fla. 162, 47 S 489.

23. Board may consider genuineness of returns. Pratley v. State, 17 Wyo. 371, 99 P 1116.

24. Exercise of judicial power. Cerini v. De Long, 7 Cal. App. 398, 94 P 582. City council in hearing evidence and going behind returns to determine if votes were properly counted would act judicially, which act is not authorized. Stearns v. State [Okl.] 100 P 909. Canvassing board can have no exclusive and ultimate power to pass upon question whether votes at an election are legally cast, that being judicial question. D'Alemberte v. State, 56 Fla. 162, 47 S 489. Canvassing board need not go behind entry in poll books or pass upon validity of ballots cast. Pratley v. State, 17 Wyo. 371, 99 P 1116. Board of canvassers held to be without authority to declare election as to change of county lines (under St. 1907, p. 260, c. 214) void. Cerini v. De Long, 7 Cal. App. 398, 94 P 582. Gen St. 1906, § 263, does not authorize county committee to seek evidence outside of returns as far as legality of vote is concerned. D'Alemberte v. State, 56 Fla. 162, 47 S 489. Laws 1907, p. 95, c. 5613, § 8, does not authorize congressional committee to take testimony outside returns as to votes cast at **primaries.** Id. Under Laws 1907, p. 95, c. 5613, § 8, requirement as to forwarding certified copy of evidence from county to congressional committee refers to copy of evidence which inspectors are authorized to take upon challenge of vote. Id.

25. Leaving question of legality to be determined by the tribunal duly authorized to make such determination. Pratley v. State, 17 Wyo. 371, 99 P 1116. Failure of election judges to enclose **affidavit of right to vote** when voter resides in another precinct (required by Laws 1905, p. 137, c. 88, § 3) would not prevent vote from being counted. Id. Laws 1905, p. 137, c. 88, §§ 5 and 6, considered, and votes are "taken" when cast on election day, not when same are canvassed, wherefore under law votes in question must be counted. Id. Canvassing board should not reject ballots voted at another precinct in absence of certificate of right to vote (required by Laws 1905, p. 136, c. 88, § 2), as such requirement is merely to furnish judges of election with evidence of registration. Id. Absence of required affidavit is not conclusive that same was not made. Id. Fact that other or different affidavits from those required by law were enclosed with ballot would not justify board in refusing to count same. Id

26. Cannot reject a majority of votes cast for a candidate for senator, on the ground that such candidate is ineligible, where Const. art. 4, § 9, makes senate judge of "qualifications, elections and returns of its members." Attorney General v. Board of Canvassers, 155 Mich. 44, 15 Det. Leg. N. 923, 118 NW 584. See States, § 4.

properly refused to allow ballots to be cast, such ballots cannot be counted.[27] The rulings of committees having charge of the canvass of a primary election are not "final" in the sense that judicial inquiry is excluded.[28] The repeal of statutes sometimes operates to impose the duty of canvassing returns as to the adoption of a constitutional amendment upon the state board of canvassers, though such duty was formerly performed by a joint session of the legislature,[29] and in such a case the joint meeting of the legislature would be unauthorized to canvass returns[30] or to legislate with reference thereto.[31] The canvass of election returns for executive state officers is sometimes especially imposed upon speaker of house of representatives.[32] Irregularities as to canvassing returns resulting from the failure to observe directory statutory requirements will not invalidate an election.[33]

Recount of ballots. See 11 C. L. 1180—The recount of ballots is sometimes prohibited except in the case of a contested election.[34]

Determination of result; certificates. See 11 C. L. 1180—The majority vote which is necessary to effect the adoption of a measure is usually prescribed by constitutional or statutory provisions,[35] and the legal definition of a majority as defined by statute should be applied to subsequent legislation unless excluded either expressly or by necessary implication.[36] A majority of the votes cast upon a particular issue carries the election upon such issue,[37] unless constitutional or statutory provisions

27. But election must be declared invalid if such ballots would have changed result. Nichols v. Pennington [Ky.] 118 SW 382.

28. Under Laws 1907, p. 95, c. 5613, §§ 7, 8, decisions and rulings of committees are "final" in sense that they are final as to committee making them, so that there shall be no delay of canvass. D'Alemberte v. State, 56 Fla. 162, 47 S 489. Under Laws 1907, p. 95, c. 5613, §§ 7, 8, decisions of committees are not final in sense that rulings are absolute to exclusion of judicial inquiry. Id.

29. Where under statutes there is no specific provision for canvassing of election returns on constitutional amendments and no provision for such returns to be transmitted to or lodged elsewhere than with state board of canvassers, it is duty of such board to canvass returns. State v. Dean [Neb.] 121 NW 719. Act Apr. 5, 1895 (Sess. Laws 1895, p. 69, c. 4) held legally enacted, repealing Act of 1877, § 4 (Sess. Laws 1877, p. 114), and placing duty of canvassing vote on constitutional amendments with state board of canvassers but such act was in turn amended and repealed by Act of 1897 (Sess. Laws 1897, p. 45, c. 5). Id. Comp. St. 1907, c. 3, § 4, requires returns of election upon proposed constitutional amendments to be made to board of state canvassers directed to secretary of state. Id. Under Act of 1877 (Sess. Laws 1877, p. 114), § 4, while in force, and Const. art. 5, § 4, canvass of vote of people upon question of adoption of proposed amendments of constitution is required to be made by speaker of house of representatives in presence of majority of each house, when assembled for that purpose. Id.

30. Joint meeting of each house cannot canvass election returns or declare result of election as to adoption of proposed constitutional amendment. State v. Dean [Neb.] 121 NW 719. Law does not confer upon speaker of house of representatives any authority to canvass returns of election on proposed constitutional amendments. Id. Law does not permit returns of election on proposed constitutional amendments to be removed from office of secretary of state. Id.

31. Joint meeting of majority of each house to witness canvass of votes on constitutional amendment by speaker of house possesses no legislative authority and cannot impose duties of canvassing where it did not exist before. State v. Dean [Neb.] 121 NW 719.

32. State v. Dean [Neb.] 121 NW 719. Const. art. 5, § 4, requires returns of every election for officers of executive department of state to be sealed and transmitted by returning officers of secretary of state directed to speaker of house of representatives. Id.

33. Fact that superintendents of election failed to consolidate vote before noon of next day, and received votes from precinct which had been opened by ordinary, were mere irregularities. Coleman v. Board of Education, 131 Ga. 643, 63 SE 41.

34. If Const. art. 8, § 3 (Ann. St. 1906, p. 253), prohibiting opening of ballot boxes and counting of ballots only, except in case of contested election, does not apply to **primary election,** legislature had power to render same applicable, as in Laws 1907, p. 263. State v. Taylor, 220 Mo. 618, 119 SW 373.

35. Act to regulate elections (Rev. of 1898, Act Apr. 4, 1898 [P. L. p. 3197]), § 185, furnishes legislative definition of what shall be deemed majority of legal voters voting at election on any proposition which is submitted. Nugent v. Newark [N. J. Law] 72 A 11. Determination of what constitutes majority is referred to in Vol. 11, Current Law, under § 1, subd. Constitutional and Statutory Requirements.—Ed.

36. Nugent v. Newark [N. J. Law] 72 A 11. Legal definition of majority as defined by statute applied to election under Laws 1907, p. 686, c. 272, authorizing construction of city docks if desired by electors. Id.

37. State v. Fabrick [N. D.] 121 NW 65; State v. Blaisdell [N. D.] 119 NW 360. Under charter of Hendersonville (Priv. Laws 1901,

show clearly that different rule is intended to apply,[38] and courts will usually presume that electors failing to vote at an election assent to the affirmative vote as shown by the election returns.[39] "Votes cast" are the totals of the separate votes or expressions of the voters' preference,[40] and in determining the number of votes cast, all legal ballots should be counted, though some are unintelligible.[41] The certificate of the board of canvassers raises no presumption as to eligibility of the person receiving the same.[42] Unless the decision of the canvassing board is expressly declared by law to be final,[43] the ultimate determination of the result of an election rests with the courts,[44] and even when a committee is authorized to make final decisions upon election contests, such decisions are not necessarily exclusive of the power of the court, as the final arbiter, to determine the result of the election.[45] A governor's proclamation adds nothing to the conclusiveness of a certificate that a measure has been carried.[46] The general rule, therefore, is that while the canvass and declaration of the result of an election is usually conclusive against collateral attack,[47] a direct attack is permissible.[48] A fortiori a board's determination is not conclusive where it has acted under a misapprehension of the law as to what constitutes a majority.[49] The result of an election will not be disturbed because of ille-

p. 216, c. 97), proposition for issue of bonds only required majority vote of those voting. Town of Hendersonville v. Jordan, 150 N. C. 35, 63 SE 167. Under Const. § 111, providing for increase of jurisdiction of county courts when majority of voters so desire, words "majority vote" mean majority of votes cast on question, not majority cast at election. State v. Fabrick [N. D.] 121 NW 65. Proposition to issue bonds held carried when receiving two-thirds of votes cast on such proposition. Frost v. Central City [Ky.] 120 SW 367. St. 1904, p. 469, c. 457, authorizing town to purchase waterworks if act is accepted by two-thirds of voters present, and voting at town meeting is plain and does not require votes of two-thirds of all voters in town. Seward v. Revere Water Co., 201 Mass. 453, 87 NE 749.

38. Provision in city ordinance that waterworks company shall extend mains when so requested by majority of votes cast at an election requires majority of all those voting at such election on any proposition submitted. Illinois Trust & Sav. Bank v. Burlington [Kan.] 101 P 649. "A majority of voters voting at such election" means majority of all voters voting on any proposition at such election. Humbolt Board of Education v. Klein [Kan.] 99 P 222. Proposition to adopt "High School Law" (Laws 1905, p. 659, c. 397) requires majority of all voters voting. Act held not to pass. Id.

39. Treat v. De Jean [S. D.] 118 NW 709; State v. Blaisdell [N. D.] 119 NW 360.

40. State v. Blaisdell [N. D.] 119 NW 360.

41. In determining majority of votes cast at special election pursuant to Const. art. 17, § 6 (Bunn's Ed. §§ 328-334), as to relocation of county seats, all valid legal ballots cast, unintelligible as well as intelligible, should be considered. Town of Eufaula v. Gibson [Okl.] 98 P 565. Distinguished, illegal, or blank ballots should be excluded. Id.

42. Dorian v. Walters [Ky.] 116 SW 313. An official canvas of an election is only prima facie evidence of title. People v. Wintermute, 194 N. Y. 99, 86 NE 818.

43. Decision of board of supervisors acting as canvassers of local option election is final under statute (Local Option Law, § 13 [Pub. Acts 1889, p. 291, No. 207], as amd. by Pub. Acts, 1899, p. 278, No. 183, § 1), in absence of anything in record impugning regularity of proceedings or accuracy of canvass. Haehnle Brew. Co. v. Jackson County Sup'rs, 156 Mich. 493, 16 Det. Leg. 184, 121 NW 209.

44. McConaughhy v. Secretary of State, 106 Minn. 392, 119 NW 408.

45. Laws 1907, p. 95, c. 5613, § 8, providing that decisions of congressional committee upon election protests shall be final, is not intended to exclude jurisdiction of courts, but means only that such decisions shall be final as to committee making them so as not to delay canvass. D'Alembert v. State, 56 Fla. 162, 47 S 489.

46. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408.

47. Statement and certificate of state canvassing board as to passage of constitutional amendment is conclusive in collateral proceeding. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408. In absence of affirmative showing either by admission of parties or result of vote at election for other officers, upon other propositions submitted, vote appearing to have been given at election, if in favor of proposition, is conclusive and cannot be questioned collaterally. Treat v. De Jean [S. D.] 118 NW 709. It is not competent for taxpayer to show, either by registry list or by testimony of witnesses, that qualified electors failed to vote at municipal election in favor of proposition submitted. Id.

48. Statement and certificate of state board of canvassers and proclamation of governor held not final and conclusive as to passage of constitutional amendment. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408. Determination of county board acting as board of canvassers in declaring that proposition was carried is **not res judicata.** Humbolt Board of Education v. Klein [Kan.] 99 P 222.

49. Humbolt Board of Education v. Klein [Kan.] 99 P 222. County **board is not estopped by action** taken under misapprehension that act had been carried. Id.

gal votes received or legal votes refused, unless the number involved is such as to affect the result.[50]

§ 11. *Judicial control and supervision.*[51] *Mandamus and prohibition.*[52]—See 11 C. L. 1180.—Mandamus will lie to compel the performance of statutory duties such as the calling of an election,[53] the appointment of election commissioners,[54] or the duty of a clerk to furnish the canvassing board with a certificate of the names of voters,[55] but the remedy is not available where there is no duty imposed by law, as where it is sought to compel the acceptance of the pledge of a candidate for an office which has been abolished,[56] or to compel the counting of ballots which are not signed and indorsed as required by law.[57] Nor will it lie to compel the counting of votes where the remedy by contest of the election is adequate,[58] or to compel the acceptance of nomination papers which are refused because of invalidity, where there is a statutory tribunal for hearing objections thereto,[59] or where, by reason of unexcused delay in filing, such filing would be useless,[60] nor is the remedy available in any case for the vindication of abstract rights, such as the personal satisfaction of a candidate in knowing that he received a certain number of votes.[61] An application for mandamus cannot be converted into an election contest,[62] and a fortiori the court will not grant mandamus where, in order to do so, it must review questions which another tribunal is given sole power to determine.[63] Hence mandamus will be denied where it involves a review of the decision of the canvassers where such decision is final under the statute and there is nothing in the record impugning the regularity or accuracy of the canvass,[64] but mandamus is the proper remedy to compel canvassing officers to perform their duties[65] or to complete the performance thereof,[66] and the issuance of a certificate by a board of canvassers will not prevent

50. Town of Hendersonville v. Jordan, 150 N. C. 35, 63 SE 167.

51. Search Note: See notes in 5 C. L. 1074; 3 L. R. A. (N. S.) 382; 9 Ann. Cas. 123; 11 Id. 419.

See, also, Injunction, Cent. Dig. § 151; Dec. Dig. § 80; Mandamus, Cent. Dig. §§ 150-157; Dec. Dig. § 74; 26 Cyc. 270-279; 10 A. & E. Enc. L. (2ed.) 796, 827.

52. For the general principles of mandamus and prohibition, see Mandamus; Prohibition.

53. State v. Martin [Nev.] 103 P 840.

54. Independence League v. Taylor [Cal.] 100 P 860. Facts held to warrant appointment of two election commissioners from Independence League Party. Independence League v. Taylor [Cal.] 100 P 860.

55. Duty imposed by statute. Cerini v. De Long, 7 Cal. App. 398, 94 P 582. Election for change of county boundaries. Id.

56. Fooshe v. McDonald, 82 S. C. 22, 63 SE 3. Where 25 Stat. 1203 abolished office of town supervisor. Id.

57. Crosby v. Haverly, 82 Neb. 565, 118 NW 123. It was duty to reject. Id.

58. Where candidate claims that votes were not counted which should have been counted, he has complete remedy by contest of election under Cobbey's 1907, § 5892. Crosby v. Haverly, 82 Neb. 565, 118 NW 123.

59. State v. Hayward [Iowa] 119 NW 620. Secretary of state cannot be compelled by mandamus to accept nomination papers which have been objected to and under statute (Act 1898, p. 281, No. 152, § 55, as amended by Act 1900, p. 201, No. 132) are to be considered by contest board. State v. Michel, 122 La. 188, 47 S 460; Id., 122 La. 199, 47 S 464.

60. Where, if writ were granted, ticket could not be certified, printed, and distributed in time for election, and reason for failure to apply in time was not given. State v. Nichols, 51 Wash. 79, 97 P 1087.

61. Or in knowing that a certain ballot should be counted. Ice v. Marion County Canvassers, 64 W. Va. 544, 63 SE 331. Writ refused where effect would be merely to determine exact result. Phillips v. Raleigh County Canvassers, 64 W. Va. 715, 63 SE 392.

62. Stearns v. State [Okl.] 100 P 909.

63. Supreme court cannot determine basis for senate's decision or reject it when made, where senate is sole judge of "qualifications, elections and returns of its members" (Const. art. 4, § 9). Attorney General v. Seventh Senatorial Dist. Canvassers, 155 Mich. 44, 15 Det. Leg. N. 923, 118 NW 584.

64. Haehnle Brew. Co. v. Jackson County Sup'rs, 156 Mich. 493, 16 Det. Leg. N. 184, 121 NW 209.

65. Cerini v. De Long, 7 Cal. App. 398, 94 P 582.

Petition for mandamus to compel board to canvass returns is not fatally defective in failing to allege performance of clerk's duty in furnishing certificate of additional voters' names, since such duty is mandatory by statute and may be presumed to have been performed. Cerini v. De Long, 7 Cal. App. 398, 94 P 582.

Defense that board refused to act because of fraudulent counting by an inferior board should be stricken. Stearns & State [Okl.] 100 P 909.

66. Part canvass is no defense. Stearns v. State [Okl.] 100 P 909. Court may require canvassing board to reassemble and make canvass where board improperly refused

the issue of the writ.[67] The rights of candidates arising under and created by primary election laws are such that courts may be resorted to when such rights are violated.[68]

Injunction.[69]—See 11 C. L. 1181—The holding of an election will not be enjoined when the question involved is purely political [70] or legislative,[71] or where there is an adequate remedy at law and no property rights are involved,[72] nor will the courts allow the remedy by injunction to be substituted for the ordinary methods of contesting elections,[73] but otherwise an unauthorized election affecting the rights of taxpayers may be enjoined,[74] and so, also, where such an election has been held an injunction may be granted to prevent carrying it into effect.[75]

§ 12. *Judicial proceedings to contest or review.*[76] *Rights and remedies.* See 11 C. L. 1181—A suit which involves an inquiry into an election and which seeks a review of the result of such election is an election contest.[77] As a general rule courts of equity will not deal with election contests,[78] but there are exceptions,[79] and an election may be reviewed where there is no provision for the contest thereof.[80] An election may sometimes be investigated in a civil suit in the nature of quo warranto.[81] The remedy of mandamus is unavailable to contest an election where the relator has an adequate remedy at law.[82] Certiorari will not lie to review ministerial acts of election officers [83] or proceedings which are in compliance with statute.[84] Ordinary election contests are purely statutory [85] and statutes relating

some votes as illegal. Id. Adjournment of canvassing board would not deprive court of power to compel it to reassemble. Id. There has been no canvass until all votes cast have been canvassed. Mandamus will issue when board only partly performed duty. D'Alemberte v. State, 56 Fla. 162, 47 S 489.

67. D'Alemberte v. State, 56 Fla. 162, 47 S 489.

68. Are not political rights. D'Alemberte v. State, 56 Fla. 162, 47 S 489. Writ of mandamus will lie to compel performance of duties imposed upon member of congressional or standing committee of political party by primary law. Id.

69. For the general principles of injunctions, see Injunction.

70. Being political matter. De Kalb County v. Atlanta [Ga.] 65 SE 72.

71. De Kalb County v. Atlanta [Ga.] 65 SE 72.

72. Little v. Barksdale, 81 S. C. 392, 63 SE 308. Injunction to restrain holding of local option election on ground of insufficiency of petition held not to lie. Id.

73. De Kalb County v. Atlanta [Ga.] 65 SE 72.

74. Election to change of county line. De Kalb County v. Atlanta [Ga.] 65 SE 72.

75. Injunction available where election had been held but change of county line had not yet been effectuated. De Kalb County v. Atlanta [Ga.] 65 SE 72.

76. Search Note: See notes in 33 L. R. A. 386; 10 L. R. A. (N. S.) 1184; 11 A. S. R. 798. See, also, Elections, Cent. Dig. §§ 245-334; Dec. Dig. §§ 269-308; 15 Cyc. 393-441; 10 A. & E. Enc. L. (2ed.) 796, 827; 7 A. & E. Enc. P. & P. 377.

77. Where functionary vested with authority to pronounce result of election has done so, and a review and reversal of such decision is sought, which would involve an inquiry into the election, suit involving such inquiries is clearly an election contest. Dimmick v. Opelousas, etc., R. Co., 123 La. 123, 48 S 767. Suit to annul tax levied held election contest. Id.

78. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41.

79. Where statute authorizing tax was to become operative in county or school district if adopted at election, and levy of tax after pretended election was sought to be enforced, court of equity might inquire into validity of election in suit at instance of taxpayer. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41.

80. An election is subject to review in equity if statute (St. 1907, p. 260, c. 214), as to election on proposition of change of boundary lines, does not provide for contest. Cerini v. De Long, 7 Cal. App. 398, 94 P 582.

81. Barnett v. Midgett [N. C.] 65 SE 441. Use of word "judicially" in Rev. 1908, § 4350, as to duty of board of canvassers, does not render that body an inferior court, with judgments which are conclusive. Id.

82. Crosby v. Haverly, 82 Neb. 565, 118 NW 123.

83. Rejection of ballots as defective and subsequent canvass of result. State v. Emerson, 137 Wis. 292, 118 NW 836. Certiorari is ineffective to review canvass of local option election where there is no means of proving whether rejected ballots were or were not furnished by authorities, the court being confined to record which did not show such facts. Id. Certiorari will lie to review acts of board of education where, in addition to calling election and canvassing votes as to selection of schoolhouse site, board did other acts which were not ministerial. Southworth v. Ogle County School Dist. Board of Education, 238 Ill. 190, 87 NE 403.

84. Certiorari will not lie to review proceedings in county commissioners' court to order an election when such proceedings were in compliance with statute. Cushman v. Blount County Com'rs Ct. [Ala.] 49 S 311.

85. Were unknown at common law. Kehr

thereto should be construed by the courts so as to protect the elective franchise.[86] Usually the contest is an adversary proceeding where the defeated party is contestant and the candidate returned as elected is contestee,[87] but a contest, where the result of the vote of the people is a public matter, is not in strict legal sense an adversary proceeding,[88] being more in the nature of an investigation to discover the truth in which no individual has any direct personal interest antagonistic to the general public.[89] Thus it may be designated as an action in rem.[90] The existence of the right to contest sometimes involves a construction of the statutes relative thereto,[91] and a qualified elector is sometimes authorized to contest the election of certain officers.[92] Special proceedings to contest elections as to certain propositions are sometimes provided for.[93] Provision for contests sometimes fail because of their inappropriateness,[94] but, when adequate,[95] the contest must be carried on as authorized by statute.[96] The time of contesting an election is usually limited,[97] and the disregard of such provisions will bar action.[98] That an inquiry as to the result would be difficult or would occupy much time is no valid objection,[99] and a person's legal right to contest an election is not nullified by the fact that such person enjoined publication of the result, which order was subsequently dissolved.[1]

v. Columbia, 136 Mo. App. 322, 116 SW 428. Election contests are special statutory proceedings. Pearson v. Alverson [Ala.] 49 S 756. Proceedings to contest elections are regulated by statute. In re Cole's Election [Pa.] 72 A 510.

86. In re Cole's Election [Pa.] 72 A 510.

87. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408.

88. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408. Is neither suit in equity nor an action at law. Id.

89. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408.

90. Contest of result of local option election is an action in rem. Evans v. State, 55 Tex. Cr. R. 450, 117 SW 167.

91. Rev. Laws 1905, § 336, held to extend right of contest to village elections, though inconsistent with Rev. Laws 1905, § 343; § 336 being latest expression of legislature on subject. State v. Hennepin County Dist. Ct., 107 Minn. 437, 120 NW 894.

92. Under Code 1907, § 455, election of person to certain office including office of tax assessor may be contested by a "qualified elector." Finklea v. Farish [Ala.] 49 S 366.

93. Rev. St. art. 1804t, 1804u, authorizing contest of election to remove county seat, provides special proceeding which could only be instituted by residents of county. Kilgore v. Jackson [Tex. Civ. App.] 118 SW 819.

94. Primary Election Law, § 10 (Laws Sp. Sess. 1908, p. 71, c. 54), rendering Gen. St. 1901, c. 36, art. 6, applicable to contests, provides method which is not adaptable. Griffin v. Gesner [Kan.] 97 P 794. Election contest in case of local option election held not provided for since manner of contest provided in case of officers was inapplicable. Rev. St. 1899, § 3031 (Ann. St. 1906, p. 1737). Kehr v. Columbia, 136 Mo. App. 322, 116 SW 428. Acts 1903, p. 59, et seq., as to issuance of bonds, which attempts to provide for contest of elections, held pursuant to such act in same manner as elections of justice of peace provide method which is entirely inappropriate. Coleman v. Eutaw [Ala.] 47 S 703.

95. Statutory method for contesting declared result of election held adequate for contesting result of vote as to adoption of constitutional amendment. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408. Inadequacy of bond which contestant files is no argument against jurisdiction of court or applicability of statute. Id. Contention that court has no process to make judgment effective may be true, but such judgment will be respected. Id.

96. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408.

97. Validity of order of commissioners' court, declaring result of local option election pursuant to Sayles' Ann. Civ. St. 1897, cannot be contested after 60 days. Acts 1907, p. 447, c. 8. Evans v. State, 55 Tex. Cr. R. 450, 117 SW 167. Acts 1892, p. 140, No. 106, limits time to contest election until three months after proclamation of result. Dimmick v. Opelousas, etc., R. Co., 123 La. 123, 48 S 767. Acts 30th Leg. 1907, p. 447, c. 8, limiting contests to within 30 or 60 days after result is declared, is a proper limitation statute, and such act is **not unconstitutional** as being deprivation of life, liberty, or property without due process of law. Evans v. State, 55 Tex. Cr. R. 450, 117 SW 167.

98. Suit **held brought in time** when instituted by qualified voter under Laws 1907, p. 447, c. 8, providing for contest within 60 days after taking effect of act. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Notice of grounds of contest and filing of suit held served within time required (30 days) by law (Rev. St. 1895, arts. 1798, 1800, 1804t, 1804u, 3397). Id. Suit to annul tax levy held suit to contest election wherefore it was **barred** by Acts 1892, p. 140, No. 106. Dimmick v. Opelousas, etc., R. Co., 123 La. 123, 48 S 767. Though police jury's proclamation of result would of itself show insufficient majority, an action to annul tax levy pursuant to such election would involve issue as to whether majority of voters with requisite qualifications had voted for tax, which would be election contest. Id.

99. People v. Wintermute, 194 N. Y. 99, 86 NE 818.

1. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

Grounds for contest or review.[See 11 C. L. 1181]—While a substantial violation of mandatory statutory provisions affects the validity of an election,[2] the presumption is in favor of regularity,[3] and an election will not be held invalid because of acts or omissions, which do not deprive voters of the right of suffrage,[4] which are not fraudulent[5] and which do not affect the result.[6]

Jurisdiction.[See 11 C. L. 1181]—The power of courts over election contests is purely statutory,[7] and statutory provisions govern as to what tribunals have jurisdiction[8] and as to the scope of the jurisdiction conferred.[9] Statutory provisions as to inaugurating contests which are necessary to jurisdiction are strictly construed.[10] Courts have almost uniformly exercised the right to determine the validity of the proposal, submission or ratification of constitutional amendments.[11]

2. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41.

3. All reasonable presumptions are in favor of regularity of an election and it should not be held void unless clearly illegal. Town of Grove v. Haskell [Okl.] 104 P 56.

4. Whitcomb v. Chase, 83 Neb. 360, 119 NW 673; Taylor v. Sparks [Ky.] 118 SW 970.

5. Whitcomb v. Chase, 83 Neb. 360, 119 NW 673. Irregularities which are not fraudulent and which are not instigated by defendant or which do not increase his vote will not render an election void. Skelton v. Ulen, 217 Mo. 383, 117 SW 32. Failure to strictly comply with directory statutory provisions will not generally affect the validity of an election where there is no fraud. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41.

6. Coleman v. Emanuel County Board of Education, 131 Ga. 643, 63 SE 41; Brumby v. Marietta [Ga.] 64 SE 321; Whitcomb v. Chase, 83 Neb. 360, 119 NW 673; In re Town of Groton, 63 Misc. 370, 118 NYS 417; Roesch v. Henry [Or.] 103 P 439; State v. Salt Lake City [Utah] 99 P 255. Though votes were illegal, same might be deducted and contestee would still have majority. Skelton v. Ulen, 217 Mo. 383, 117 SW 32. Specific instances of the application of this rule are elsewhere illustrated. As to ballots see § 4; as to omissions of officers in receiving vote see § 7, etc.

7. Darbonne v. Oberlin, 121 La. 641, 46 S 679; McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408. Courts have no inherent common-law or equity powers over elections. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408. Legislature has not authorized judiciary to pass on local option elections. Darbonne v. Oberlin, 121 La. 641, 46 S 679.

8. County judge and two justices of peace are proper parties to hear contest of local option election. Derickson v. Conlee [Ky.] 117 SW 955. Gen. St. 1901, c. 36, art. 6, renders state senate tribunal to hear contested election of judge of district court. Yeager v. Aikman [Kan.] 103 P 132.

9. Under St. 1909, § 1596a (Russell's St. § 4046), giving courts power to try election cases in lieu of contest boards, prescribing rules of procedure, etc., court has no power to pass upon ineligibility of voter. Nichols v. Pennington [Ky.] 118 SW 382.

10. Pearson v. Alverson [Ala.] 49 S 756.

11. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408. Whether constitution shall be amended is political question, but whether it has been amended is judicial question. Id. Court held to have jurisdiction to determine whether constitutional amendment had been legally submitted to and adopted by people. Id.

Note: It has been judicially determined whether a proposed amendment received the constitutional majority of votes (Dayton v. St. Paul, 22 Minn. 400; Rice v. Palmer, 78 Ark. 432, 96 SW 396; Bott v. Wurtz, 63 N. J. Law, 289, 43 A 744, 881, 45 L. R. A. 251; State v. Foraker, 46 Ohio St. 677, 23 NE 491, 6 L. R. A. 422; Tecumseh National Bank v. Saunders, 51 Neb. 801, 71 NW 779; Green v. State Board of Canvassers, 5 Idaho, 130, 47 P 259, 95 Am. St. Rep. 169; In re Denny, 156 Ind. 104, 59 NE 359, 51 L. R. A. 722; Knight v. Shelton, 134 F 423); whether a proposed amendment is a single amendment, within the constitutional requirement that every amendment must be separately submitted (State v. Powell, 77 Miss. 543, 27 S 927, 48 L. R. A. 652; Gabbert v. Chicago, etc., R. Co., 171 Mo. 84, 70 SW 891; State v. Timme, 54 Wis. 318, 11 NW 785; In re Denny, 156 Ind. 104, 59 NE 359, 51 L. R. A. 722; Lobaugh v. Cook, 127 Iowa, 181, 102 NW 1121; People v. Sours, 31 Colo. 369, 74 P 167, 102 Am. St. Rep. 34; State v. Silver Bow County Com'rs, 34 Mont. 426, 87 P 450; State v. Winnett, 78 Neb. 379, 110 NW 1113, 10 L. R. A. (N. S.) 149); whether the failure to enter the resolution of submission upon the legislative journals invalidates the amendment (Koehler v. Hill, 60 Iowa, 543, 14 NW 738, 15 NW 609; Oakland Pav. Co. v. Hilton, 69 Cal. 479, 11 P 3; West v. State, 50 Fla. 154, 39 S 412; Durfee v. Harper, 22 Mont. 354, 56 P 582; State v. Tufly, 19 Nev. 391, 12 P 835, 3 Am. St. Rep. 895); whether the description of the amendment and the form of the ballot are sufficient (Russell v. Croy, 164 Mo. 69, 63 SW 849; State v. Winnett, 78 Neb. 379, 110 NW 1113, 10 L. R. A. (N. S.) 149; Murphy Chair Co. v. Attorney General, 148 Mich. 563, 14 Det. Leg. N. 262, 112 NW 127); whether the method of submission is sufficient (Lovett v. Ferguson, 10 S. D. 44, 71 NW 765; Russell v. Croy, 164 Mo. 69, 63 SW 849); whether the publication of the amendment or of a notice relative to it is sufficient (Commonwealth v. Griest, 196 Pa. 396, 46 A 505, 50 L. R. A. 568; Russell v. Croy, 164 Mo. 69, 63 SW 849); whether the submission may be as well by resolution as by a legislative act approved by the executive (Commonwealth v. Griest, 196 Pa. 396, 46 A 505, 50 L. R. A. 568; Warfield v. Vandiver, 101 Md. 78, 60 A 538; Ed-

Notice or summons; pleadings and issues. See 11 C. L. 1182—Statutory provisions as to notice are usually mandatory,[12] and the service of notice should be in compliance with statutory provisions.[13] The petition should distinctly and plainly aver the facts constituting the grounds of the contest,[14] and an allegation of contestant's capacity to sue is usually essential,[15] though objection to such capacity may be waived.[16] The overruling of an exception to an allegation of failure of voters to comply with statutory prerequisites is harmless where such requirements are held to be invalid.[17] Where the contestee relies upon illegality of votes cast against him, he must plead it.[18] A motion to bring in new parties should be denied when the proper parties required by statute are present.[19] While the state is not usually a party to an ordinary election contest,[20] provision therefor should be made when the contest is as to the result of the vote of the people on a public matter, in which no candidate is directly interested.[21] The amendment of pleadings is largely discretionary,[22] and is permissible in the case of mistake, though the grounds of contest are not subject to change,[23] but a petition which is defective as to any of the statutory requirements cannot be amended after the expiration of the time limited for commencing a contest.[24] An opportunity to verify should be given when objec-

wards v. Lesueur, 132 Mo. 410, 33 SW 1130, 31 L. R. A. 815; Hays v. Hays, 5 Idaho, 154, 47 P 732; State v. Dahl, 6 N. D. 81, 68 NW 418, 34 L. R. A. 97); at what election the amendment must be submitted (People v. Curry, 130 Cal. 82, 62 P 516).—From McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408.

12. Rev. Laws 1905, § 336, as to filing notice of appeal in election contest and service upon contestee, is mandatory. Odegard v. Lemire, 107 Minn. 315, 119 NW 1057.

13. Under statute, where county attorney was absent from state, notice was properly served on assistant. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Notice of contest held to comply with Ky. St. 1909, § 2566, subd. 2 (Russell's St. § 4063, subd. 2). Derickson v. Conlee [Ky.] 117 SW 955. Service of copy on judge before copy was filed with county clerk held immaterial. Id. Affirmative allegation in answer to effect that notice of grounds of contest was served on county judge does not constitute **traverse** of allegations as to notice in petition, since copy might have been filed with county clerk. Id.

14. In re Coles' Election [Pa.] 72 A 510. Under statute petition should "concisely set forth cause of complaint" showing wherein it is claimed election is undue or illegal. Id. Complaint to contest election under Rev. Codes, § 5026, subd. 2, providing for contest when incumbent is ineligible, must allege facts which disqualify incumbent or person declared elected at time of election. Bradfield v. Avery [Idaho] 102 P 687. Allegation of statutory grounds is jurisdictional. Sigsbee v. Birmingham [Ala.] 47 S 1036. Allegation of petition **held sufficient** to admit proof of fact that statutory requirement as to keeping polls open (Acts 29th Leg. 1905, p. 535, c. 11, § 64) had been disregarded, which omission was injurious. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Petition held to concisely set forth cause of complaint in compliance with statute. In re Coles' Election [Pa.] 72 A 510. Fact that only one of two tickets bearing same number was counted **held not to show any injury** in absence of allegation that other ticket was voted against prohibition. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. **Held not to show statutory grounds** for contest of election for annexation of territory to city, under Code 1907, § 1071, subd. 8, and § 455. Sigsbee v. Birmingham [Ala.] 47 S 1036.

15. Code 1907, § 460, requires petition to allege that petitioner is qualified voter when election was held. Pearson v. Alverson [Ala.] 49 S 756. Petition held defective. Id.

16. Objection to contestant's capacity to contest held waived where no plea in abatement or other objection was made by contestees. Rev. St. 1895, §§ 1265, 1269. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

17. Overruling of contestees' exception to allegation that persons exempted from poll tax had voted though they failed to procure exemption certificate held harmless, since court sustained contestees' exception that such requirement of law was unconstitutional. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

18. Evidence that unnumbered ballots had been counted was properly excluded where no pleading as to same. Not admissible under general denial. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Under allegation that voter had not paid poll tax in city of B., contestee could not prove failure to pay poll tax in city of C. Id.

19. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

20. Where contest is between rival claimants for office, interest of general public is remote, and legislature may waive right of state to be party to proceedings. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408.

21. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408.

22. Denial of amendment as coming too late was not an abuse of discretion. Rev. St. 1895, art. 1188. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

23. Grounds relied on are not subject to change (Ky. St. 1909, § 1596a, subsec. 12). Phillips v. Ratliff [Ky.] 121 SW 460.

24. Pearson v. Alverson [Ala.] 49 S 756. Amendment of petition to show that peti-

tion to such omission is made,[25] and the failure to verify an amended petition will not authorize dismissal where the original petition which was verified has been lost.[26] Objections to the omission to verify are subject to waiver.[27] The rendition of judgment on the pleadings is sometimes proper.[28]

Dismissal. See 9 C. L. 1038—A motion to dismiss may properly be amended by a contestee where there is no time limit upon the filing of such motion,[29] but such a motion should be denied when delay will be incurred and the statute requires speedy disposal of election contests.[30]

Preservation and production of ballots. See 11 C. L. 1182—Enactments which conform to constitutional requirements[31] sometimes forbid the opening of ballots except at the contest.[32] A county judge should not try a contest where an issue is presented as to tampering with the ballots while in his possession.[33]

Trial and evidence. See 11 C. L. 1183—While an orderly statutory proceeding as to the result of a vote as to a public matter requires that the general rules for the production of testimony shall be observed,[34] it is not necessary or desirable that every technical rule of evidence shall be observed with extreme nicety,[35] nor should the result of matters of public importance be determined by nice balancing of presumptions and probabilities,[36] since the presumption is in favor of regularity,[37] and clear, contrary proof is necessary to rebut the conclusiveness of election returns,[38] or the presumption of the legality of votes which have been received and counted,[39] or of the correctness of the poll list,[40] or the presumption in favor of the certificate of the canvassing board,[41] especially when there has been general acquiescence in the result stated in such certificate.[42] As a general rule the burden of proving the illegality of votes cast is upon the party asserting such illegality,[43] but this rule is

tioner was qualified elector when election was held (required by Code 1907, § 460) will not be allowed when operating to enlarge time limit for commencing contest. Id.

25. Where objection is made in time, plaintiff should be given opportunity to verify before cause is dismissed. Phillips v. Ratliff [Ky.] 121 SW 460.

26, 27. Phillips v. Ratliff [Ky.] 121 SW 460.

28. Vague and indefinite matter pleaded in answer as to reception of illegal votes and misconduct of election officer held insufficient to overcome averments of petition and entitle defendant to judgment on pleadings. Phillips v. Ratliff [Ky.] 121 SW 460.

29. Amendment so as to include other grounds of dismissal. Pearson v. Alverson [Ala.] 49 S 756.

30. Motion to quash proceedings and dismiss petition should be denied where no sufficient explanation for delay. In re Cole's Election [Pa.] 72 A 510.

31. Australian Ballot Law, § 25 (Laws 1893, p. 120, c. 78, now part of Laws 1905, p. 372, c. 222, § 3), requiring ballots to be sealed and preserved so that their identity and value as evidence may not be impaired, is within scope of title as to "manner of holding elections." Getty v. Holcomb [Kan.] 99 P 218.

32. Australian Ballot Law (Laws 1893, p. 120, c. 78), § 25, now part of Laws 1905, p. 372, c. 222, § 3), as to preservation of ballots, forbids opening of such ballots in proceeding for taking depositions before probate judge, preliminary to trial of contested election of senator. Getty v. Holcomb [Kan.] 99 P 218.

33. Nordloh v. Packard [Colo.] 101 P 787. Where statute imperatively required trial to commence, county judge who is disqualified and cannot secure another judge should not render final judgment, but contest should be completed by his successor. Id.

34, 35, 36. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408.

37. In absence of evidence as to question it must be presumed that voter presented proper evidence to election officers of payment of poll tax. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

38. Election officers are presumed to do their duty, and returns are conclusive in absence of clear proof to contrary. In re Lannon [Minn.] 120 NW 1082.

39. Votes received and counted are prima facie legal. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

40. Poll list (a record of names of electors as they voted) is in absence of clear contrary proof, conclusive of names and number of persons who voted. In re Lannon [Minn.] 120 NW 1082.

41. As to passage of constitutional amendment. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408.

42. Court should not permit finding of canvassing board to be overthrown, unless conclusive evidence of nonadoption is shown. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408. Findings of fact held not to sustain conclusion that constitutional amendment failed to pass. Id.

43. Contestant has burden of proving illegality of votes counted. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Person alleging that certain voter was not citizen has burden of proving that such voter's

subject to more or less variation by the circumstances.[44] The illegality of votes is usually attacked by proof of disqualification of the electors[45] or disregard of statutes.[46] The denial of the right to vote when a person is duly qualified may be shown[47] and evidence of how electors voted is frequently admissible,[48] as where a voting machine is defective,[49] but evidence of the defective working of a machine would not be competent to show an average loss of votes and to predicate thereon an approximate vote of a contestant.[50] It is against public policy to admit testimony of persons present as to the manner in which officials performed their duty in counting ballots.[51] The omisssion of evidence upon collateral matters not in issue is not necessarily reversible error,[52] nor is it prejudicial error to admit improper evidence of illegality of votes where such votes are disallowed on other grounds[53] or to exclude evidence of illegality where the votes are not counted.[54] The exclusion of evidence as to irregularities is not reversible error where there was no allegation of such irregularities and the contest was tried by the court without a jury.[55] The ballots are the best evidence of their contents[56] or of the result of an election,[57] but their probative force depends upon the care with which they have been preserved[58] and, if a contestant fails to prove proper preservation,[59] the effect

father was not citizen, since man is citizen of country to which his father owes allegiance. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

44. Circumstantial evidence may be sufficient to shift the burden upon party claiming that vote of alleged resident should be counted, and require affirmative showing of bona fide residence. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

45. Evidence held sufficient to overcome presumption that certain ballots were cast by legal voters. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Allegation that voter resided in B. and failed to pay poll tax is not supported by proof of failure to **pay poll tax** to city of C. where he resided. Id. Proof of failure to pay state poll tax was sufficient to render vote illegal whether county tax was paid or not. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

46. Evidence held to show that certain ballots were counted by election officers though unnumbered. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

47. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

48. Evidence of how voters voted is admissible in an action to determine title to office, such evidence not being in violation of the secrecy of the ballot. People v. Wintermute, 194 N. Y. 99, 86 NE 818. Ground of public policy which protects voter from being compelled to disclose his vote does not apply to illegal voter. Buckingham v. Angell, 238 Ill. 564, 87 NE 285. Where witness admitted that he had voted, and such vote was illegal, he could not rightfully decline to answer for whom he voted. Id. Where witness was not legal voter in school district and did not claim personal privilege on ground that evidence would incriminate him, he was properly required to state for whom he voted. Id.

49. Testimony of witnesses as to their vote is not conclusive, and may be discredited where machine is shown to work properly. People v. Wintermute, 194 N. Y. 99, 86 NE 818. Evidence of defective working of machine was competent where machine contradicted statements of witnesses who testified as to vote. Id.

50. Pure conjecture. People v. Wintermute, 194 N. Y. 99, 86 NE 818.

51. Action of commissioners' court in counting ballots should not be impeached by testimony of one who was present. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

52. Evidence as to intention of alien's father to become citizen was harmless, since only such alien's qualification was subject of inquiry. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

53. Admission of evidence as to where witness thought certain voter lived held harmless, since vote was held illegal and court was not influenced by evidence in question in excluding vote. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

54. Exclusion of evidence as to how voter voted held harmless where ballot was not counted. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Exclusion of evidence as to voter's intention to vote in his own precinct held harmless, vote not being counted. Id.

55. Exclusion of evidence as to certain irregularity held harmless where there was no allegation of such irregularity and contest was tried by court without jury. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

56. Contents of ballots can best be shown by ballots themselves. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

57. Where there is an allegation that the county seat selected did not in fact receive a majority, that certain ballots were not counted, etc., ballots become best evidence and should be counted. Town of Enfaula v. Gibson [Okl.] 98 P 565. Since ballots are best evidence of result of election as to county seat removal, it was proper and **necessary to open ballot boxes.** Id.

58. Under statute, ballots are admissible in evidence in any event. West v. Sloan, 238 Ill. 330, 87 NE 323. Their effect as evidence is destroyed when ballots carelessly kept so as to have been exposed to change. Id. If ballots are shown by satisfactory

of the ballots as evidence is destroyed.[60] In such a case the returns if not discredited may be determinative,[61] but if the returns and ballots are both affected by fraud or omissions the result must be determined from a consideration of both together with the surrounding facts and circumstances.[62] Parol evidence is admissible where the ballots are not in existence,[63] or have been tampered with.[64] In determining the number of votes cast, the names of voters appearing on the poll books furnishes the best evidence,[65] and when the legislature has failed to provide a method by which the number of qualified voters at an election may be determined, oral proof is not admissible, but the returns are to be accepted as conclusive.[66] A contestant who produces a county clerk to prove what the returns were, "for the information of the court," does not thereby assert the correctness of such returns and is not estopped from proving the true result by a recount.[67] The legal effect of ballots is a question of law which presents itself to the court free from any presumption arising out of the holding of a referee.[68] In the absence of statute, a court may proceed in the manner which is deemed most proper to ascertain which ballots in certain boxes are illegal.[69] The refusal to open ballot boxes from precincts where no votes are challenged is proper,[70] as is also the refusal to permit an examination of ballots whose validity has not been attacked.[71] Findings of fact by a court should conform to the evidence.[72] An election contest is not "civil suit or cause" within a constitutional provision granting the right to trial by jury,[73] and such right is dependent upon statute.[74] The court may properly consolidate two contests where the same parties and subject-matter are involved.[75]

evidence to be in identical condition at trial in which they were when canvassed, they are best evidence of result and count will be conclusive. Id.

59. Contestant is moving party and has burden of proving ballots offered in evidence at trial to be in identical condition which they were in when canvassed. West v. Sloan, 238 Ill. 330, 87 NE 323. It is **sufficient** if contestant who introduces ballots as best evidence of result shows that same have been in continuous possession of officers prescribed by statute and have been so kept that it is improbable that they were tampered with. Wheeler v. Lawrence [Kan.] 99 P 228.

60. Probative force of ballots destroyed in view of manner of keeping and fact that person so desiring might easily obtain access thereto and change result of election. West v. Sloan, 238 Ill. 330, 87 NE 323.

61. When returns and ballots left hands of judges with no reason existing for their being discredited, there being no fraud, unfairness, or misconduct on the part of such judges, and evidence showed that ballots might have been tampered with afterwards, finding of result should be in favor of count as shown by return. West v. Sloan, 238 Ill. 330, 87 NE 323.

62. Where evidence shows failure of duty both upon part of judges of election and custodian of ballots, so that neither return nor recount can prevail over other, result must be determined from consideration of both with surrounding circumstances and facts. West v. Sloan, 238 Ill. 330, 87 NE 323.

63. As in case of lost documents. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

64. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Parol evidence rule is much relaxed when fraud is alleged. Id. Evidence of voter that he voted for certain question is admissible where his ballot has been changed or another substituted therefor. Id. Voter cannot be permitted to testify that he voted one way when his unchanged ballot shows the opposite. Id.

65. Illinois Trust & Sav. Bank v. Burlington [Kan.] 101 P 649.

66. Fabro v. Gallup [N. M.] 103 P 271. Bond issue held passed by affirmative vote of "two-thirds of qualified voters" though number voting was in fact less than number who might have voted. Id.

67. Wheeler v. Lawrence [Kan.] 99 P 228.

68. Town of Eufaula v. Gibson [Okl.] 98 P 565.

69. Held proper to pass upon all ballots and deduct illegal ones. Savage v. Umphries [Tex. Civ. App.] 118 SW 893.

70. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

71. Refusal to allow contestants to examine affidavits of payment of poll taxes which were contained in ballot box and were not attacked as defective was not error. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

72. Finding of court that voter had paid poll tax should not be sustained where voter testified of failure to pay city poll tax. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Where voter testified that he would have voted for a proposition, court should have so found, not that he would probably have voted in such manner. McCormick v. Jester [Tex. Civ. App.] 116 SW 278. Evidence not conclusive, but sufficient to warrant finding that voter voted for certain school director. Buckingham v. Angell, 238 Ill. 564, 87 NE 285.

73. Const. art. 5, § 1. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

74. Rev. St. § 1426, have been abrogated and replaced by Acts 1898, p. 216, No. 135,

*Judgment.*See 11 C. L. 1183—Under some statutes the court is sometimes authorized to subtract illegal votes and add those which were improperly rejected, and to render judgment accordingly,[76] but under others the improper exclusion of legal votes will only authorize the court to declare that there was no election,[77] and an unsuccessful candidate who, on certiorari, procures the purging of voting lists and the quashal of the certificate of election for illegality does not thereby become entitled to the office.[78] A decision dismissing a contest for the failure of the contestant to state the grounds of his contest as required by a previous order is analogous to sustaining a general demurrer and is a final determination on the merits.[79] A judgment that a constitutional amendment was not adopted is self-executory, being determinative of the constitutionality of future legislation and the rights of parties thereunder.[80] A special contest proceeding authorized by statute [81] is not a bar to a taxpayer's suit to enjoin an act which is claimed to be unauthorized because the election was void.

*Costs.*See 11 C. L. 1183—Security for costs is frequently a jurisdictional requirement,[82] and cannot be supplied after the expiration of the time limit.[83] A requirement that the security be in writing [84] is not complied with by a cash deposit.[85]

*Decision and review thereof.*See 11 C. L. 1184—The jurisdiction of appellate courts is sometimes excluded by provisions whereby an inferior court has "final jurisdiction" of election contests,[86] and such enactments have been held constitutional.[87] Sometimes an appeal is authorized for errors of law alone,[88] and in such case a finding of an inferior court is binding if there be any evidence to support such finding.[89] A filing of a duly authenticated transcript is usually necessary to properly perfect an appeal,[90] but a court which is given appellate jurisdiction of election contests cannot be deprived of such jurisdiction by mistakes and irregularities in perfecting an appeal,[91] and such defects and irregularities may be waived.[92] An appeal of an

wherefore contestant in election contest has right to trial by special jury as therein provided. In re Deal, 123 La. 369, 48 S 999.

75. Consolidation held no abuse of discretion. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

76. Sayles' Ann. Civ. St. 1897, art. 3397, as amended by Gen. Laws 1907, p. 447, c. 8, relative to contest of local option elections, so construed. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

77. Under statute, court could not declare contestant elected. Nichols v. Pennington [Ky.] 118 SW 382. Result could only be determined from votes cast. Id.

78. Lennon v. Pawtucket Canvassers [R. I.] 72 A 398.

79. When state senate is authorized under Gen. St. 1901, c. 36, art. 6, to hear contested election of district judge. Yeager v. Aikman [Kan.] 103 P 132.

80. Will be respected by all whose actions are affected thereby. McConaughy v. Secretary of State, 106 Minn. 392, 119 NW 408.

81. Election contest under Rev. St. art. 1804t and 1804u is not bar to suit by taxpayer to enjoin issuance of bonds because election to remove county seat was void. Kilgore v. Jackson [Tex. Civ. App.] 118 SW 819.

82. Code 1907, § 462. Pearson v. Alverson [Ala.] 49 S 756. Security for costs is not required by statute. McCormick v. Jester [Tex. Civ. App.] 115 SW 278.

83. Pearson v. Alverson [Ala.] 49 S 756.

84. Pol. Code 1907, § 462, requiring security for costs to be "filed" shows that security must be in writing. Pearson v. Alverson [Ala.] 49 S 756.

85. Deposit of $100 with judge is not compliance with statute (Pol. Code 1907, § 462). Pearson v. Alverson [Ala.] 49 S 756.

86. Act May 16, 1907 (Laws 1907, p. 304, § 19), conferring upon county court "final jurisdiction" of contest of local option election, excludes jurisdiction of other courts, and no appeal lies. Saylor v. Duel, 236 Ill. 429, 86 NE 119.

87. Act May 16, 1907 (Laws 1907, p. 304, § 19), conferring final jurisdiction upon county court in case of contest of local option election, is not in violation of constitutional provisions (U. S. Const. Amend. 14 and Ill. Const. art. 4, § 22), forbidding laws which abridge privileges or immunities of citizens. Saylor v. Duel, 236 Ill. 429, 86 NE 119. Act is not in violation of constitutional provisions as being deprivation of life, liberty or property without due process of law. Id. Withholding of appeal would not be deprivation of constitutional right without due process of law. Id. Act is not special legislation within Const. art. 4, § 22. Id.

88. Under Election Law 1898 (P. L. p. 315), § 175. Somers v. Steelman [N. J. Law] 71 A 119.

89. Somers v. Steelman [N. J. Law] 71 A 119. Finding as to residence of voter held conclusive. Id.

90, 91. Whitcomb v. Chase, 83 Neb. 360, 119 NW 673.

92. Failure to make objection to jurisdic-

election contest abates where the contestee dies pending an appeal.[93] In the absence of statute a trial court may in its discretion allow a supersedeas pending an appeal where the contestant is entitled to office,[94] but an order for such a supersedeas is reviewable on certiorari.[95]

Security for appeal; costs. See 11 C. L. 1184

§ 13. *Offenses against election laws.*[96]—See 11 C. L. 1184—A state has power to enact criminal laws designed to preserve the purity of the ballot,[97] but such enactments must be reasonable[98] and must conform to constitutional limitations.[99] Common enactments are those regulating the expenses of candidates,[1] preventing the payment of taxes by third persons[2] and requiring votes to be publicly counted.[3] Special elections are usually included within provisions which render persons guilty of illegal voting subject to punishment[4] or which are enacted to prevent the colonization of voters.[5] Also, a primary election has been held "election authorized by law" within a statute punishing the making of false returns.[6] The matter involves a construction of the statutory provisions,[7] however as does also the applicability of

tion of district court will constitute waiver. Whitcomb v. Chase, 83 Neb. 360, 119 NW 673. Where transcript filed is not duly authenticated and no objection is made in district court, jurisdiction cannot be questioned on appeal to supreme court. Id.

93. Right does not survive at common law and no statute permits survivorship. Galvin v. Shafer [Ky.] 113 SW 485. That costs are involved does not give right of appeal. Id.

94. Statute does not authorize supersedeas as matter of right, but same is discretionary in any case. Palmer v. Harris [Okl.] 101 P 852.

95. Palmer v. Harris [Okl.] 101 P 852.

96. **Search Note:** See Elections, Cent. Dig. §§ 335-369; Dec. Dig. §§ 309-332; 15 Cyc. 442-465; 10 A. & E. Enc. L. (2ed.) 665, 766, 774, 776, 780, 796, 827, 845; 7 A. & E. Enc. P. & P. 397.

97. Const. art. 6, § 4, authorizes legislature to preserve purity of ballot. Solon v. State, 64 Tex. Cr. R. 261, 114 SW 349. The state has power to punish for illegal and fraudulent voting for presidential electors. State v. Bienstock [N. J. Law] 73 A 530.

98. Laws 1905, p. 561, c. 11, § 170, rendering person who loans money to another to pay poll tax guilty of misdemeanor, is reasonable regulation of elective franchise. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349.

99. Laws 1905, p. 1846, c. 689, amending Laws 1898, c. 676, authorizing state superintendent to subpoena and examine persons relative to cases of illegal registration, is constitutional. People v. Cahill, 193 N. Y. 232, 86 NE 39. Act does not provide a proceeding which is violative of constitutional provisions (Const. U. S. Amend. 5 and Const. N. Y. art. 1, § 6), providing that no person in any criminal case shall be compelled to be witness against himself. Id. Act Mar. 5, 1906 (P. L. p. 78), known as Corrupt Practice Act, held not violative of Const. art. 3, § 25, providing that special session of general assembly shall legislate only upon subjects designated in governor's proclamation of such session. In re Likins [Pa.] 72 A 858, afg. 37 Pa. Super. Ct. 625; Id. [Pa.] 72 A 862, afg. 37 Pa. Super. Ct. 636. Laws 1905, p. 561, c. 11, § 170, rendering person who pays another's poll tax guilty of misdemeanor, is not an interference with or an **impairment of obligations of contract.** Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349. Laws 1905, p. 561, c. 11, § 170, making payment of poll tax for another a misdemeanor, is not unconstitutional because it authorizes any deprivation of rights without **due process of law.** Id. Laws 1905, p. 561, c. 11, § 170, making it a misdemeanor to pay poll tax for another, is not unconstitutional because it works a denial of the **equal protection of the laws.** Id.

1. Act Mar. 5, 1906 (P. L. p. 78) provides for regulation of nomination and election expenses, requiring accounts of expenses to be filed and providing penalties for violation of act. In re Likins [Pa.] 72 A 858, afg. 37 Pa. Super. Ct. 625; Id. [Pa.] 72 A 862, afg. 37 Pa. Super. Ct. 636.

2. Laws 1905, p. 561, c. 11, § 170, renders person who loans money to pay poll tax to another guilty of misdemeanor. Solon v. State, 54 Tex. Cr. R. 261, 114 SW 349.

3. Under Pen. Code 1895, § 632, willful violation of duty to count votes publicly (required by Pol Code, 1895, § 114) is misdemeanor. Norton v. State, 5 Ga. App. 596, 63 SE 666.

4. Municipal election is included under provisions of Code 1906, § 1122, which render any person guilty of illegal voting "at any election" liable to indictment. Sample v. Verona [Miss.] 48 S 2.

5. B. & C. Comp. § 1907, is intended to prevent colonization of voters. State v. Reed, 52 Or. 377, 97 P 627. Under B. & C. Comp. § 1907, punishing person who induces nonresident to remove into precinct with intent that he vote at general election, a local option election held at such time is "general election." Id. Is not separate election. Id. Local Option Act (Sess. Laws 1905, p. 44), § 5, makes B. & C. Comp. § 1907, applicable to such act. Id. Under B. & C. Comp. § 1907, **gravamen of offense** is inducing voter to remove into any precinct in which he is not resident with intention of voting there. Id.

6. Primary election pursuant to Laws 1907, p. 263, is an "election authorized by law" within Rev. St. 1899, § 2116 (Ann. St. 1906, p. 1369), punishing making of false returns. State v. Taylor, 220 Mo. 618, 119 SW 373.

7. Penal Code, § 41m, as to false statement.

an enactment preventing the publication of the qualifications of candidates.[8] Statutory provisions are also determinative of the penalty imposed for neglect of duty[9] or the power of an official who may subpœna and examine persons relative to illegal registration.[10] Under an enactment punishing the offense of procuring the registration of persons not entitled to vote,[11] there may be a joint procuring.[12] Other general offenses which are sometimes involved in respect to elections are conspiracy,[13] bribery,[14] and perjury.[15]

The indictment. See 11 C. L. 1185—Acts constituting an offense must be clearly and precisely charged.[16] An averment clearly designating an election district may be necessary.[17] The nature of the offense may render an averment of intent unneces-

of result of canvass by election inspectors **held not relative to primary elections,** but only to special and general elections. People v. Foster, 60 Misc. 3, 112 NYS 706.

8. Primary Election Law (Laws 1907, p. 472, c. 209), § 28, prohibiting candidates from securing newspaper to publish qualifications of such candidate, and § 29, rendering newspaper guilty of misdemeanor for so doing, construed and held inapplicable to publication of picture of candidate and statement whom picture represented. State v. Hay, 51 Wash. 576, 99 P 748.

9. Statutes considered and penalty provided by Act June 10, 1893, P. L. p. 419, § 33, held to apply to charge of neglect of duty under Act Jan. 30, 184, P. L. p. 31, § 13. Commonwealth v. Scott, 38 Pa. Super. Ct. 303.

10. State superintendent of elections under Laws 1905, p. 1846, c. 689, amending Laws 1898, c. 676, as to illegal registration, has no power to punish or entertain proceedings to punish person guilty of illegal registration. People v. Cahill, 193 N. Y. 232, 86 NE 39.

11. P. L. 1905, p. 224, par. 2, makes misdemeanor complete when a person willfully and knowingly aids and assists in registration of person who is not entitled to vote. State v. Nugent [N. J. Law] 71 A 484. Procuring registering of person not entitled to vote need not directly affect board of registration, but if it puts in motion an act operating either upon board or voter, which results in getting false name upon registry list, it is within act. Id.

12. Under P. L. 1905, p. 224, par. 2, punishing the procuring of registration of persons not entitled to vote, there may be a joint procuring. State v. Nugent [N. J. Law] 71 A 484. A statutory offense is joint when each offender may be guilty in the same degree of the same crime so that he might be separately convicted. Id.

13. Fraudulent voting at election whether in shape of voting disqualified persons, repeating or voting upon names of other voters, is perversion or obstruction of due administration of law, and is one of purposes, a combination to effect which is a conspiracy within statute. State v. Nugent [N. J. Law] 71 A 485. See, generally, Conspiracy, § 2.

14. Under Const. art. 17, § 7 (Snyder's Const. Okl. p. 341), giving of land or other things of value, directly or indirectly, to influence voters, is bribery. Town of Grove v. Haskell [Okl.] 104 P 56. County seat removal. Id. See, generally, Bribery.

15. Election officers who take usual oath to conduct election honestly and who transmit false returns are subject to indictment for perjury, though oath is promissory. Norton v. State, 5 Ga. App. 586, 63 SE 662. See, generally, Perjury.

16. Harkness v. State [Miss.] 48 S 294. Indictment for purely statutory crime should charge with certainty and precision all matters in which illegality consists, where act per se is not unlawful. State v. Nugent [N. J. Law] 71 A 481. Code Cr. Proc. § 275, requires indictment to contain plain and concise statement of act constituting crime. People v. Foster, 60 Misc. 3, 112 NYS 706. Indictment alleging primary election by "certain political party of this state, viz., the Democratic party," **held defective** in failing to define political party in language of statute. State v. Nugent [N. J. Law] 71 A 481. Indictment does not conform to Code Cr. Proc. §§ 275, 276, as containing plain and concise statement of act constituting crime, when alleging violation of Penal Code, § 41m, as to false statement of result of canvass and stating facts showing another crime, viz., violation of Pen. Code, § 41, subd. 12. People v. Foster, 60 Misc. 3, 112 NYS 706. Affidavit charging violation of Code 1906, § 3728, which requires printed matter with reference to primary election to bear name of author and publisher, held indefinite and insufficient in alleging that primary election was held. Harkness v. State [Miss.] 48 S 294. If affidavit in language of statute, averments must be expanded in order to charge crime. Id. Information under Rev. St. 1899, § 2120j, as amended by Act Mar. 24, 1903, p. 158 (Ann. St. 1906, p. 1373), punishing false registration, **held repugnant in material matters** as charging registration under one name and signature under another. Where defendant J. registered as "Cohn" and signed as "Cohen," doctrine of idem sonans did not apply. State v. Judd, 221 Mo. 554, 120 SW 780.

17. Indictment under P. L. 1905 p. 224, par. 2, as to procuring registration of person not entitled to vote, held to sufficiently show that district was legally constituted election district when stating number of district and ward within which it was situated. State v. Nugent [N. J. Law] 71 A 484. Indictment for conspiracy describing election district by number and ward is sufficiently certain without setting out boundaries of district. State v. Nugent [N. J. Law] 71 A 485. To vote at primary election of political party not within terms of act would not be illegal, for such party could not hold an effective primary. State v. Nugent [N. J. Law] 71 A 481.

sary.[18] The fact that the authority of an attorney general to act is dependent upon the request of the governor need not be set forth.[19] When an indictment is against more defendants than one for an offense committed by them jointly, it need not employ the word "jointly" in describing the offense.[20] Unnecessary words in an indictment may be rejected as surplusage.[21] The grounds of demurrer are often governed by statute.[22] A conviction of illegal registration will not bar an indictment for false swearing at such registration, they being separate offenses.[23]

*Variance.*See 9 C. L. 1061—Proof necessary to sustain conviction for illegal registration will not sustain a conviction for false swearing.[24]

*Burden of proof and evidence.*See 11 C. L. 1185—The offense of inducing a nonresident voter to vote in another precinct is sustained by proof of intent and that the change was effectuated.[25] In establishing that ballots were falsely counted, tally sheets are admissible,[26] and also the testimony of bystanders[27] and registrars,[28] the ballots not being the only evidence of a count.[29] In some states the ballots cannot be opened and inspected in a criminal case.[30] A copy of the election laws is not admissible in charging an election officer with the failure to make returns where there is no evidence that same was read and acted upon.[31] On a charge of importing voters, evidence of the voter's intent to act properly is immaterial.[32] An ex-

18. In indictment under P. L. 1905, p. 224, par. 2, punishing persons who procure registration of persons who are not entitled to vote, it is not necessary to allege that false registration was made within intent to vote at general election, intention not being part of defined statutory offense. State v. Nugent [N. J. Law] 71 A 484.

19. If Executive Law, § 57 (Laws 1892, p. 1691, c. 683, as amended by Laws 1900, p. 1583, c. 737), renders right of attorney general to act in case of crimes against elective franchise dependent upon request by governor, such condition precedent need not be set forth in the indictment. People v. Foster, 60 Misc. 3, 112 NYS 706.

20. Indictment under P. L. 1905, p. 224, par. 2, for procuring registration of person not entitled to vote. State v. Nugent [N. J. Law] 71 A 484.

21. Where rejected words were words of aggravation of offense. Commonwealth v. Havrilla, 38 Pa. Super. Ct. 292. Where election officer is charged with willful fraud in not delivering election returns to prothonotary, and jury finds him guilty of neglect of duty, words "willful fraud" which are appropriate to indictment under Act July 2, 1839, P. L. p. 519, § 102, may be stricken as surplusage and indictment is good under Act Jan. 30, 1874, P. L. p. 31, § 13. Id.

22. A ground of demurrer that facts stated do not constitute crime of which attorney general has jurisdiction, because crime was committed under primary election law, and if any crime was committed it was under Penal Code, § 41, is not recognized by Code Cr. Proc. § 323. People v. Foster, 60 Misc. 3, 112 NYS 706. Indictment which does not substantially conform with requirements of Code Cr. Proc. §§ 275, 276, as to statement of act, is demurrable (Code Cr. Proc. § 323). Id.

23. Hughes v. Com. [Ky.] 115 SW 744.

24. Offenses are distinct. Hughes v. Com. [Ky.] 115 SW 744.

25. Since gravamen of offense under B. & C. Comp. § 1907, is inducing nonresident voter to vote at another precinct, it is only necessary to show beyond reasonable doubt defendant's intent to have change made and that same was effectuated. State v. Reed, 52 Or. 377, 97 P 627.

26. In trial under St. 1907, pp. 725, 767, c. 560, §§ 270, 410, charging election officer with falsely counting ballots, tally sheets were properly admitted as **best evidence** of defendant's count and report. Commonwealth v. Edgerton, 200 Mass. 318, 86 NE 768. Tally sheets used by registrars on recount of ballots were properly allowed to be **inspected by jury** for purpose of passing upon credibility of registrars. Id.

27. Testimony of bystanders was properly admissible as to whether defendant counted ballots wrongfully, though such bystanders were merely citizens. Commonwealth v. Edgerton, 200 Mass. 318, 86 NE 768.

28. Testimony of registrars as to recount was admissible as to proper count, their number being a matter of computation to be testified to by any one who made it. Commonwealth v. Edgerton, 200 Mass. 318, 86 NE 768. Registrars who recounted ballots might properly **refresh memory** from tally sheets used in counting. Id. Election officer "counted" votes though another officer called off votes while first officer marked same on tally sheet. Id. Legality of recount was not in issue, and failure to observe statutory requirements thereto would not affect same. Id.

29. Ballots are best evidence as to result, but not only evidence. Commonweatlth v. Edgerton, 200 Mass. 318, 86 NE 768.

30. Under Const. art. 8, § 3 (Ann. St. 1906, p. 253), court cannot open and have ballots inspected in criminal case. Where ballots were ordered to be opened in trial for violation of Rev. St. 1899, § 2116 (Ann. St. 1906, p. 1369), as to making false returns of primary election. State v. Taylor, 220 Mo. 618, 119 SW 373.

31. Copy of election laws showing duty of making returns to prothonotary's office was properly excluded. Commonwealth v. Scott, 38 Pa. Super. Ct. 303.

32. Where defendant is charged with importing voters under B. & C. Comp. § 1907,

cuse for the failure to make returns is a matter of defense[33] which must be established by the defendant.[34] The validity of an affidavit in respect to statements as to illegal registration of others is not destroyed by the fact that the affiant was at same time compelled to verify statements as to himself.[35] A conviction cannot stand where there is a total failure of proof.[36]

Question for jury. See 7 C. L. 1258—The court may usually instruct a jury that the evidence is insufficient to warrant a conviction[37] and may set aside a verdict found in opposition to such instructions,[38] but cannot direct a verdict of guilty.[39]

ELECTRICITY.

The scope of this topic is noted below.[40]

§ 1. Electric Franchise, 1440.
§ 2. Contracts, 1442.
§ 3. Duty of Care Respecting Electricity, 1442.
§ 4. Causes of Actions; Remedies and Procedure, 1445.

§ 1. *Electric franchise.*[41]—See 11 C. L. 1185—A municipality may maintain a plant to supply its inhabitants with light for private as well as public uses, when authorized by statute[42] on compliance with the statutory formalities,[43] and may

evidence of voter's right to vote, and that no crime was intended, is not material to issues. State v. Reed, 52 Or. 377, 97 P 627.

33. Legal or reasonable cause which will excuse election officer from performance of duty (as required by Act Jan. 30, 1874 [P. L. p. 31], § 13) is matter of defense. Commonwealth v. Scott, 38 Pa. Super. Ct. 303.

34. Where officer convicted of neglect of duty (violation of Act Jan. 30, 1874, P. L. p. 31), appellate court would assume that there was no evidence of excuse for such neglect. Commonwealth v. Scott, 38 Pa. Super. Ct. 303.

35. People v. Cahill, 193 N. Y. 232, 86 NE 39. If defendant was compelled to testify against himself, he secured immunity from harm by Penal Code, § 41q. Id. If defendant by his testimony might disclose criminal conduct on his own part, it was his right and duty to decline to answer. Id.

36. Conviction for false registration cannot stand where there was total failure of proof, it appearing that name of defendant was signed by election judge. State v. Judd, 221 Mo. 554, 120 SW 780. Verdict of guilty where person convicted of attempted fraudulent voting in name of another **held supported by substantial evidence,** wherefore it would not be set aside. State v. Scott, 214 Mo. 257, 113 SW 1069. Jury warranted in finding that election officer knowingly made false count of votes. Commonwealth v. Edgerton, 200 Mass. 318, 86 NE 768. Judge may in proper way express opinion as to weight of evidence, provided jury is permitted to render verdict uncontrolled by his opinion. Commonwealth v. Scott, 38 Pa. Super. Ct. 303. Opinion that defendant was guilty of neglect of duty. Id.

37, 38. Commonwealth v. Havrilla, 38 Pa. Super. Ct. 292.

39. Commonwealth v. Havrilla, 38 Pa. Super. Ct. 292. Error for court to give binding instruction to convict. Id. Where election officer is indicted for neglect of duty to deliver election returns to prothonotary. Id. Evidence held to warrant instruction to convict election judge of neglect of duty. Commonwealth v. Kloss, 38 Pa. Super. Ct. 307. No binding instruction given and judge may express opinion. Id.

40. This topic treats of electrical franchises and contracts (as to general principles, see, also, Franchises;* Public Contracts*), and of the duty owed by persons furnishing or using electricity toward those not in their employ (see Master and Servant,* as to injuries to employes), except as such rights and duties are peculiar to a specific application of electricity, such as its use in propelling street cars (see Street Railways*), in transmitting messages (see Telegraphs and Telephones*), or as a remedial agent (see Medicine and Surgery*). The measure of damages is also excluded (see Damages*).

41. Search Note: See notes in 3 C. L. 1181; 31 L. R. A. 798; 34 Id. 369; 38 Id. 306; 39 Id. 621; 9 L. R. A. (N. S.) 407; 14 Id. 448; 100 A. S. R. 515; 9 Ann. Cas. 1192.

See, also, Electricity Cent. Dig. §§ 1-5; Dec. Dig. §§ 1-10½; 15 Cyc. 467-481; Municipal Corporations, Cent. Dig. §§ 1482-1485; 10 A. & E. Enc. L. (2ed.) 861, 863, 866.

42. General Municipal Incorporation Act, § 862, gives such authority to cities of sixth class, and is not invalid as special legislation. Cary v. Blodgett [Cal. App.] 102 P 668.

43. Estimate of cost of combined plant for light and water sufficient although only combined cost estimated. Proposition for issue of bonds for such plant may be submitted as single proposition. Cary v. Blodgett [Cal. App.] 102 P 668. Charter provision authorizing city to acquire lighting plant "whenever two-thirds of the aldermen elect shall by resolution declare that it is expedient" is mandatory. Passage of resolution of expediency after making contracts is not in time. Bay City Trac. & Elec. Co. v. Bay City, 155 Mich. 393, 15 Det. Leg. N. 1039, 119 NW 440.

incur an indebtedness for that purpose.[44] Likewise on proper authority the right to maintain a lighting plant may be granted,[45] and such a right cannot be withdrawn after it has been been acted upon, unless there has been a forfeiture or the plant has become a nuisance.[46] A grant of a franchise must be in conformity with a statute[47] and cannot be for a term longer than that authorized by statute.[48] When the privilege granted by a city is not exclusive, it is not a special privilege or immunity within the constitutional prohibition,[49] nor is such privilege granted to a certain company or its assigns, limited in duration to the corporate life of such company.[50] An electric company must obtain the right to maintain its poles and wires in the streets,[51] consent of the municipality,[52] through the proper officers,[53] and, when required by statute, consent of abutting owners, being requisite.[54] The city may reserve the right to a joint use of the poles.[55] For acquiring private rights affected, the power of eminent domain is sometimes conferred.[56] Where the right has been properly obtained, any interference with the use of the wires is unlawful.[57] Franchise rights do not extend beyond what is reasonably implied in the grant.[58] The franchise must be exercised without discrimination,[59] and the company must fur-

44. Under Const. art. 14, § 4, and Comp. Laws 1907, § 308, a city may incur bonded indebtedness of 4 per cent for general purposes, including lighting, water and sewer, and additional indebtedness of same amount for lighting, water, and sewer alone. State v. Heber City [Utah] 102 P 309. Resolution and notice of election to vote bonds held insufficient. Id.

45. The transportation law authorizing municipal lighting plants did not repeal the statute authorizing such a grant. Wakefield v. Theresa, 125 App. Div. 38, 109 NYS 414.

46. Where contract provided for renewal and after expiration was treated as being in force, without formal renewal, municipality cannot remove poles and wires from street, on ground that contract was terminated. Wakefield v. Theresa, 125 App. Div. 38, 109 NYS 414.

47. Act 1905, p. 395, c. 129, § 253, requiring ordinance granting franchise to prescribe terms on which inhabitants may obtain service, held complied with by provision fixing maximum rate. Hester v. Greenwood [Ind.] 88 NE 493.

48. Burns' Ann. St. 1908, § 8939, restricting contracts by city for light to term of 25 years, does not prevent grant of franchise to light company for longer term. Hester v. Greenwood [Ind.] 88 NE 493.

49. Const. Neb. art. 3, § 15. Omaha Elec. L. & P. Co. v. Omaha, 172 F 494.

50. Omaha Elec. L. & P. Co. v. Omaha, 172 F 494.

51. Turnpike within limits of city is a highway within meaning of statute relating to use of highways "of Baltimore city" by such companies. Patapsco Elec. Co. v. Baltimore, 110 Md. 306, 72 A 1039.

52. Act May 13, 1898, curing irregularities in proceedings by municipalities purporting to authorize construction of poles in streets, legalized previous grant by city in form of motion instead of by necessary ordinance or resolution. City of Passaic v. Public Service Corp. [N. J. Eq.] 73 A 122.

53. Under Act Mar. 28, 1891, as amended by Act April 22, 1897, power to grant such right is lodged solely in board of street and water commissioners. United Elec. Co. v. Newark [N. J. Law] 71 A 237.

54. Act May 18, 1898, curing proceedings by municipalities purporting to authorize construction of poles, does not cure cases where consent of abutting owners was not obtained. Taylor v. Public Service Corp. [N. J. Eq.] 73 A 118.

55. Grant of right to erect poles upon approval of plan filed. Reservation of right for 10 years to use poles. Held that poles indicated by plan must be erected before expiration of 10 years or city might have additional time in which to use them. Cataract Power & Conduit Co. v. Buffalo, 131 App. Div. 485, 115 NYS 1045. Reservation of right to use poles without compensation for public purpose from which no revenue derived held not to give right to such use to transmit electricity, to pump water for private use for which "revenue" was paid, nor for power for private use, nor to drive pumps or light water bureau station. Id.

56. Where power furnished for public use, although not used by condemning corporation but sold to others. State v. King County Super. Ct., 52 Wash 196, 100 P 317.

57. Interference by wire of individual will be enjoined. Wettengel v. Allegheny County Light Co. [Pa.] 72 A 265.

58. An ordinance granting the right to maintain poles and wires for transacting "a general electric light business" does not confer a right to transmit a current for power or heating. Omaha Elec. L. & P. Co. v. Omaha, 172 F 494. City not estopped to deny such right, by passing general ordinances regulating such use, with knowledge that such right was being exercised nor because, under ordinance authorizing earning tax on companies furnishing electricity for lighting, heating, and power, it accepted taxes from such company based on income from electricity furnished for power. Id.

59. Not discrimination to allow discount to certain classes of users, in lieu of furnishing and renewing lamps, though customers not in such classes may also furnish lamps, cost of renewal being greater with such classes. Halpern v. New York Edison Co., 61 Misc. 288, 113 NYS 790.

nish service to consumers upon proper demand,[60] but may make a uniform minimum charge against all customers.[61] A right of a city to regulate or prohibit wires carrying more than a certain voltage must be by general ordinance.[62] A city cannot declare the right forfeited and enjoin maintenance of the lines, without first giving notice of the claim of forfeiture and an opportunity to be heard.[63] The company cannot by transferring its franchise relieve the property from liability for an injury already committed.[64] A city has a direct and special pecuniary interest, entitling it to bring suit to enjoin use of its streets for electric light poles and wires,[65] but abuse of the charter powers of a company can be taken advantage of by the state only and not by a city.[66] When in compliance with a statute, a city has by ordinance designated an officer to carry out the provisions of the statute requiring wires to be placed under ground, a bill to restain enforcement of the statute is not properly brought against the city.[67] Equity has jurisdiction to restrain an electric company from an unauthorized use of its poles.[68]

§ 2. *Contracts.*[69]—See 11 C. L. 1186—A purchaser of power is only required to pay according to the terms of the contract,[70] but must make payment according to such terms.[71] When a city by resolution attempts to cancel a contract for city lighting, the other party has an immediate right of action for breach of the contract.[72]

§ 3. *Duty of care respecting electricity.*[73]—See 11 C. L. 1186—A company furnishing electricity or operating electrical appliances is bound to guard against accident by a degree of care commensurate with the danger incident to its use,[74] which is usually held to be the highest degree of care.[75] The company failing to exercise the proper degree of care is liable for injuries proximately resulting[76] from its neg-

60. Application "I desire you to restore the connection and furnish the current as heretofore on the same terms and under the same conditions as heretofore" held a sufficient demand. Moffat v. New York Edison Co., 116 NYS 683.

61. Acts 1905, p. 700, requiring meters to be furnished without charge, and charges to be based on the meters as per the tables of charges to be furnished, does not prevent such charge. Little Rock R. & Elec. Co. v. Newman [Ark.] 120 SW 824.

62. In absence of ordinance, city cannot proceed in individual cases to restrain erection of such wires. City of Passaic v. Public Service Corp. [N. J. Eq.] 73 A 122.

63. City of Passaic v. Public Service Corp. [N. J. Eq.] 73 A 122.

64. Under Const. art. 12, § 7. Cooper v. Utah L. & R. Co. [Utah] 102 P 202.

65. Under statute authorizing city to charge fair price for franchises granted. Patapsco Elec. Co. v. Baltimore, 110 Md. 306, 72 A 1039.

66. City of Passaic v. Public Service Corp. [N. J. Eq.] 73 A 122.

67. Although right of appeal is given from such official to mayor and alderman. Postal Tel.-Cable Co. v. Worcester, 202 Mass. 320, 88 NE 777.

68. Taylor v. Public Service Corp. [N. J. Eq.] 73 A 118.

69. Search Note: See note in 7 Ann. Cas. 726.

See, also, Electricity, Dec. Dig. § 11; 15 Cyc. 470, 471; 10 A. & E. Enc. L. (2ed.) 866.

70. Method of computation held to have resulted in overpayment, which purchaser was entitled to recover. Payne v. Witherbee, Sherman & Co., 132 App. Div. 579, 117 NYS 15.

71. Provision for additional payment for power in excess of rated horsepower held binding. Kienle v. Gretsch Realty Co., 133 App. Div. 391, 117 NYS 500.

72. Since such resolution amounts to a renunciation of the contract. Block v. Meridian [C. C. A.] 169 F 516.

73. Search Note: See notes in 3 C. L. 1184; 7 Id. 1260; 11 Id. 1189; 31 L. R. A. 566; 32 Id. 400; 3 L. R. A. (N. S.) 988; 6 Id. 459; 11 Id. 449; 13 Id. 226; 100 A. S. R. 516, 518, 527; 4 Ann. Cas. 709; 6 Id. 532; 9 Id. 751; 10 Id. 925.

See, also, Electricity, Cent. Dig. §§ 6-9; Dec. Dig. §§ 13-16; 15 Cyc. 471-475; 10 A. & E. Enc. L. (2ed.) 869.

74. Hausler v. Commonwealth Elec. Co., 240 Ill. 201, 88 NE 561.

75. Walter v. Baltimore Elec. Co., 109 Md. 513, 71 A 953; Musolf v. Duluth Edison Elec. Co. [Minn.] 122 NW 499; Gentzkow v. Portland R. Co. [Or.] 102 P 614. Transmitting electricity along highway. Potera v. Brookhaven [Miss.] 49 S 617. In furnishing safe wire and making sufficient **inspections** thereof. Hodgins v. Bay City, 156 Mich. 687, 16 Det. Leg. N. 284, 121 NW 274; Lewis' Adm'r v. Bowling Green Gaslight Co. [Ky.] 117 SW 278. **To keep wires insulated** at places where persons might be expected to come in contact with them. Day v. Consolidated Light, Power & Ice Co., 136 Mo. App. 274, 117 SW 81; Thornburg v. City & E. G. R. Co., 65 W. Va. 379, 64 SE 358.

76. Held proximate cause: Telephone wire, breaking, came in contact with electric wire, conveyed current through guy wire to fence wire, killing person coming in contact with latter. Negligence of telephone company in permitting contact with electric wire held proximate cause of death. Mize v. Rocky

ligence,[77] unless negligence of the person injured contributed to the injury.[78]

Mountain Bell Tel. Co., 38 Mont. 521, 100 P 971. Where negligence of two concurs to cause injury, that of either or both is proximate cause. Southwestern Tel. & T. Co. v. Bruce [Ark.] 117 SW 564. Defective insulation of electric wire, coming in contact with telephone wire, being hauled up by telephone lineman working on telephone wires on same pole. Musolf v. Duluth Edison Elec. Co. [Minn.] 122 NW 499.

Held not proximate cause: Negligence of motorman in causing trolley wire to come in contact with a steel beam is not proximate cause of injury to eyesight of person 300 feet away, resulting from electric flash. Chittick v. Philadelphia Rapid Transit Co. [Pa.] 73 A 4.

77. Negligence proved: Evidence held sufficient to sustain finding that wire came in contact with plaintiff. United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606. Sufficient proof that defective attachment of wire to insulator was made by defendant's employe. Hodgins v. Bay City, 156 Mich. 687, 16 Det. Leg. N. 284, 121 NW 274. Span wire supporting **trolley wire dropping** by reason of bumping of trolley. United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606. Defective **insulation** of electric wire, causing death of telephone lineman. Musolf v. Duluth Edison Elec. Co. [Minn.] 122 NW 499; Hausler v. Commonwealth Elec. Co., 144 Ill. App. 643. Failure to insulate joint of electric light wire above telephone wires on same pole. Hausler v. Commonwealth Elec. Co., 240 Ill. 201, 88 NE 561. Person moving house coming in contact with uninsulated wire. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223. Defective insulation of wire above coping of bridge where boy walking along coping reached up and touched it. Thornburg v. City & E. G. R. Co., 65 W. Va. 379, 64 SE 358. Defective insulation on wire strung along roof used by occupants of adjoining building. Day v. Consolidated Light, Power & Ice Co., 136 Mo. App. 274, 117 SW 81. Defectively insulated wire permitted to remain in contact with limb of tree. Evidence sufficient to go to jury on question of reckless disregard of rights of public creating liability for punitive damages. Laughlin v. Southern Public Service Corp. [S. C.] 64 SE 1010. Proof of knowledge of defendant that insulation of wire was defective two weeks before accident. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. **Guy wire charged by contact** with electric light wire. Ryan v. Oshkosh Gaslight Co., 138 Wis. 466, 120 NW 264. **Permitting live wire to fall** on ground. Seith v. Commonwealth Elec. Co., 144 Ill. App. 612. **Telegraph wire down** in public highway for 18 days. Boy killed from electric shock on coming in contact with it. Source of current not shown. Western Union Tel. Co. v. Harris [Ga. App.] 64 SE 1123. **Displacement of circuit breaker** causing contact with telephone wire, continuing for two days. Gentzkow v. Portland R. Co. [Or.] 102 P 614. **Burning of building** from telephone wire coming in contact with electric wire. Staunton Mut. Tel. Co. v. Buchanan, 108 Va. 810, 62 SE 928.

Negligence not proved: Evidence not sufficient to show such customary resort to place where wire was situated as to devolve on defendant duty to protect it. Sheffield Co. v. Morton [Ala.] 49 S 772. Maintenance of unused telephone wire parallel to and 15 feet from trolley wire, contact between the two only resulting from a **violent storm** breaking former, not negligence. Strack v. Missouri & K. Tel. Co., 216 Mo. 601, 116 SW 526. Stringing **low voltage** uninsulated wires across roof. Lewis v. Nebraska City Water & L. Co., 82 Neb. 700, 118 NW 560. **Guy wire in contact with truss plate,** thus grounding it. Cincinnati Gas & Elec. Co. v. Archdeacon, 80 Ohio St. 27, 88 NE 125. Electric light company, allowing **charged wire in contact with guy wire,** which in turn came in contact with guy wire of telephone company. Reed v. Norristown Elec. L. & P. Co. [Pa.] 72 A 1045. Telephone company **attaching wire to tree** and failing to use ground wire on telephone. Rural Home Tel. Co. v. Arnold [Ky.] 119 SW 811.

78. Contributory negligence proved: Person going into transformer room to see superintendent, and stepping backward into machinery. Edmundson v. Monongahela L. & P. Co. [Pa.] 72 A 268. Plaintiff **picking up obviously live wire,** although it was insulated, to remove it from place where it was endangering passersby. Billington v. Eastern Wisconsin R. & L. Co., 137 Wis. 416, 119 NW 127. **Lineman of telephone company,** while standing on copper roof, touched telephone wire so near an electric wire that a slight breeze blew them together. Woodward v. Taunton [Mass.] 89 NE 114. Lineman standing on guy wire which had become grounded, instead of on stirrup. Cincinnati Gas & Elec. Co. v. Archdeacon, 80 Ohio St. 27, 88 NE 125. Lineman for telephone company coming in contact with guy wire charged from wire of defendant company. Reed v. Norristown Elec. L. & P. Co. [Pa.] 72 A 1045. Experienced lineman charged with knowledge of dangerous nature of work, and bound to exercise very high degree of care, such lineman held negligent in coming in contact with ground wire while working on heavily charged wire. Milne v. Providence Tel. Co. [R. I.] 72 A 716.

Contributory negligence not proved: Telephone lineman coming in contact with wire charged by contact with defective circuit breaker from electric service wire. Gentzkow v. Portland R. Co. [Or.] 102 P 614. Telephone lineman stringing wires not bound to inspect wires of another company to see that insulation was not worn. Hausler v. Commonwealth Elec. Co., 144 Ill. App. 643; Hodgins v. Bay City, 156 Mich. 687, 16 Det. Leg. N. 284, 121 NW 274; Gentzkow v. Portland R. Co. [Or.] 102 P 614. Telephone lineman coming in contact with defectively insulated electric wire. Hodgins v. Bay City, 156 Mich. 687, 16 Det. Leg. N. 284, 121 NW 274. Telephone lineman killed by shock from wire defectively insulated coming in contact with telephone wire which he was hauling up past electric wire. Musolf v. Duluth Edison Elec. Co. [Minn.] 122 NW 499. Lineman of telephone company throwing wire on cross arm so that it came in contact with defectively insulated electric wire.

Violation of an ordinance by an electric company renders it prima facie liable for an injury resulting therefrom,[79] and the fact that wires were strung without a license may be material,[80] but this does not preclude the defense of contributory negligence [81] nor render the company liable to a trespasser coming in contact with the wire.[82] There is no liability for defects resulting from act of God [83] or the unlawful act of a third person [84] until reasonable opportunity to correct the same. An electric light company must use care in constructing and maintaining its lines so as to prevent injury to third persons [85] who are in the exercise of their lawful rights [86] or whose presence it is bound to anticipate,[87] though under some circumstances written notice of an intention to move a building in a street occupied by electric wires is required by statute.[88] Its obligations to persons jointly using its

Hausler v. Commonwealth Elec. Co., 240 Ill. 201, 88 NE 561. Failure of lineman to use rubber gloves. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. **Attempt to raise wires** to enable building to be moved thereunder, under direction of one who came in response to request made to defendant. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223. **Pedestrian** killed by contact with a broken wire. Prince v. Lowell Elec. L. Corp., 201 Mass. 276, 87 NE 558. Pedestrian walking on street crossing under sagging trolley wire not low enough to touch him. Crosby v. Portland R. Co. [Or.] 100 P 300. **Boy 14 years old,** walking along coping of bridge, reaching up and touching defectively insulated wire. Thornburg v. City & E. G. R. Co., 65 W. Va. 379, 64 SE 358. **Use of telephone** during electrical storm in progress at some distance. Rural Home Tel. Co. v. Arnold [Ky.] 119 SW 811. On conflicting evidence of **warning to plaintiff,** contributory negligence held for jury. Seith v. Commonwealth Elec. Co., 144 Ill. App. 612.

79. Ordinance requiring guard wires over trolley wires. Telephone lineman injured by contact of telephone wire with trolley wire. Conrad v. Springfield Consol. R. Co., 240 Ill. 12, 88 NE 180. Failure to provide guard wires as required by ordinance held negligence. Seith v. Commonwealth Elec. Co., 144 Ill. App. 612. Requirement that electric wires, crossing telephone wires, be drawn taut, insulated, carried in trough, and be five feet away. Olson v. Nebraska Tel. Co., 83 Neb. 735, 120 NW 421.

80. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223.

81. Burnett v. Ft. Worth L. & P. Co. [Tex.] 112 SW 1040. See Negligence, § 4, as to availability of contributory negligence where statute or ordinance is violated.

82. Burnett v. Ft. Worth L. & P. Co. [Tex.] 112 SW 1040. A traction company maintained a high tension wire over the lands of another at a point where children were in the habit of congregating for play without objection from the landowner. Said wire was down within a few feet from the ground for some time, and a nine-year-old boy playing in that vicinity came in contact with the wire and was instantly killed. Held that said boy was not a trespasser or even a bare licensee as against said traction company, which had the right only to build its pole line and maintain its wire in the air on said poles. Smith v. Cleveland & S. W. Trac. Co., 8 Ohio N. P. (N. S.) 95. Boy in inclosed lot, not owned by defendant, where public are in habit of going, not a trespasser as to defendant. Sheffield Co. v. Morton [Ala.] 49 S 772.

See, also, Negligence, § 2C, as to liability to trespassers and licensees.

83. In case of storm, electrical company is entitled to a reasonable time to find defects and make repairs. Strack v. Missouri & K. Tel. Co., 216 Mo. 601, 116 SW 526. Telephone wire blown across trolley wire, evidence held insufficient to show notice to either company. Id.

84. Unauthorized cutting of wires by third person. Sullivan v. Narragansett Elec. L. Co. [R. I.] 73 A 306.

85. Telephone wire coming in contact with electric wire and conducting current to fence wire, killing person coming in contact therewith. Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 P 971.

86. Owes duty to one building house on vacant lot across which wires are stretched. Southwestern Tel. & T. Co. v. Bruce [Ark.] 117 SW 564. A person frequenting the roof of a building, with the tacit consent of the owner, is not a trespasser as to an electric company stringing its wires along such roof. Day v. Consolidated Light, Power & Ice Co., 136 Mo. App. 274, 117 SW 81; Burnett v. Ft. Worth L. & P. Co. [Tex. Civ. App.] 117 SW 175.

87. Employe of telephone company to whose poles it is licensed to attach its wires. Gentzkow v. Portland R. Co. [Or.] 102 P 614. Must be held to anticipate use of adjoining poles by telephone company. Hausler v. Commonwealth Elec. Co., 144 Ill. App. 643. If company knew, or by exercise of ordinary care should have known, that children were in the habit of congregating at point for play, and should reasonably have anticipated that they might come in contact with its wire and be injured if the same was near the ground, then the company owed to such children a duty greater than merely not to willfully or wantonly imperil their safety. The company not being the owner of the land and the children not being trespassers, the former owed the latter the duty of using ordinary care in maintaining its wire a proper distance from the ground, and is liable for a failure to discharge that duty. Smith v. Cleveland & S. W. Trac. Co., 8 Ohio N. P. (N. S.) 95.

88. Under Pub. St. 1901, c. 81, § 14, notice not necessary unless wires are to be disconnected or removed from supports. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223.

poles are, however, measured by the duty owed to an employe.[89] The liability extends to an employe of one to whom electricity is furnished,[90] unless the injury is due to defects in the employer's private wires[91] and for injuries caused by a current which has negligently been permitted to escape to the instrumentalities of another.[92] Where electric and telephone wires cross, the duty of preventing their contact devolves equally on both companies[93] and an ordinance requiring certain precautions on such crossing applies to both.[94] A municipality when engaged in furnishing electricity to its inhabitants for compensation is liable for the negligence of its employes,[95] and where a city owning an electric light plant employs a superintendent without special instructions, he has power to contract with a telephone company in respect to the manner of crossing its wires.[96]

§ 4. *Causes of action; remedies and procedure.*[97]—See 11 C. L. 1190

*Pleadings.*See 11 C. L. 1190—Defendant's negligence must be alleged.[98]

*Evidence.*See 11 C. L. 1190—The court will take judicial notice that an electric light wire sometimes coming in contact with a telephone wire is dangerously near.[99]

Plaintiff must prove all the material allegations of his complaint, including defendant's negligence [1] and freedom of the person injured, from contributory negligence.[2] The doctrine of res ipsa loquitur is, however, applicable where unusual injury is inflicted which with proper care could have been avoided,[3] and proof that the company maintains an uninsulated wire charged with a dangerous current in a public place where persons may come in contact with it,[4] or proof of the breaking or sagging of an electric wire raises a presumption of negligence.[5] The doctrine is not applicable where the injury resulted from a defect in a private wire inside a house.[6] Evidence of prior conditions [7] or subsequent repairs [8] may be admissible,

89. Cincinnati Gas & Elec. Co. v. Archdeacon, 80 Ohio St. 27, 88 NE 125. Under no obligation to notify telegraph linemen, working on the poles, that their wires are carrying high currents. South Shore Gas & Elec. Co. v. Ambre [Ind.] 87 NE 246.

90. Galveston, etc., R. Co. v. Pigott [Tex. Civ. App.] 116 SW 841.

91. Minneapolis General Elec. Co. v. Cronon [C. C. A.] 166 F 651.

92. Injury caused by a guy wire which becomes charged through its negligence, although it does not own or control such wire. Burnett v. Ft. Worth L. & P. Co. [Tex. Civ. App.] 117 SW 175. Negligence in turning its current into defective wires belonging to another company. Lewis' Adm'r v. Bowling Green Gaslight Co. [Ky.] 117 SW 278.

93. Telephone company liable jointly with electric company for injury from current transmitted through its wires from contact with electric wire. Mize v. Rocky Mountain Bell Tel. Co. 38 Mont. 521, 100 P 971.

94. Mize v. Rocky Mountain Bell Tel. Co., 38 Mont. 521, 100 P 971.

95. Hodgins v. Bay City, 156 Mich. 687, 16 Det. Leg. N. 284, 121 NW 274.

96. Hole dug by telephone company under agreement that superintendent would erect pole in it. City solely liable for injury to person falling in hole. Central Union Tel. Co. v. Conneaut [C. C. A.] 167 F 274.

97. **Search Note:** See notes in 5 L. R. A. (N. S.) 260; 6 Ann. Cas. 730.

See, also, Electricity, Cent. Dig. §§ 6-11; Dec. Dig. §§ 13-19; 15 Cyc. 471-475, 477-480; 10 A. & E. Enc. L. (2ed.) 869.

98. Complaint in action for death of boy coming in contact with insulated wire in uninclosed lot held sufficient as to defendant's negligence and plaintiff's right to be at place where injured. Sheffield Co. v. Morton [Ala.] 49 S 772.

99. Central Union Tel. Co. v. Conneaut [C. C. A.] 167 F 274.

1. Must show that telephone company is negligent in attaching telephone wire to tree and failing to provide ground wire for telephone. Rural Home Tel. Co. v. Arnold [Ky.] 119 SW 811; Lewis v. Nebraska City Water & L. Co., 82 Neb. 700, 118 NW 560.

2. Prince v. Lowell Elec. L. Corp., 201 Mass. 276, 87 NE 558. Burden of proof is on plaintiff to show that his intestate did not voluntarily grasp the obviously live wire, by which he was killed. Minneapolis General Elec. Co. v. Cronon [C. C. A.] 166 F 651.

3. Southwestern Tel. & T. Co. v. Bruce [Ark.] 117 SW 564.

4. Not liable where injury resulted from contact at unfrequented point on high bluff, being dangerous position for person, independently of wire. Sheffield Co. v. Morton [Ala.] 49 S 772. Injury to person coming in contact with defectively insulated wire at place where it ought to be insulated renders company prima facie liable. Thornburg v. City & E. G. R. Co., 65 W. Va. 379, 64 SE 358.

5. Burden then on defendant to prove absence of fault. Crosby v. Portland R. Co. [Or.] 100 P 300; Id. [Or.] 101 P 204; Walter v. Baltimore Elec. Co., 109 Md. 513, 71 A 953. Hence in absence of other evidence, question of negligence is not for jury. Potera v. Brookhaven [Miss.] 49 S 617.

6. Minneapolis General Elec. Co. v. Cronon [C. C. A.] 166 F 651.

7. Where defendant testified to perfect insulation two weeks before accident, evidence

but evidence of subsequent conditions usually is not.[9] Whether plaintiff made certain assumptions as to conditions is not admissible [10] nor can a third person state what plaintiff knew,[11] and what he said is proper only when part of the res gestæ.[12] A custom of linemen is admissible as bearing on contributory negligence, but not a custom of men in the employ of a particular company.[13]

Questions for jury. See 11 C. L. 1191—Questions of fact, such as negligence [14] and contributory negligence,[15] are for the jury.

Instructions. See 11 C. L. 1191—Instructions must be applicable to the facts in the case [16] and should submit the issues of negligence and contributory negligence,[17] and should not be argumentative.[18] Special interrogatories should be submitted when requested.[19]

Elevators, see latest topical index.

EMBEZZLEMENT.

The scope of this topic is noted below.[20]

§ 1. Nature and Elements of Offense, 1446. § 2. Prosecution and Punishment, 1448.

§ 1. *Nature and elements of offense.*[21] See 11 C. L. 1192—The distinction between larceny and embezzlement is that in the former there is trespass in the original taking.[22] The distinguishing element of the offense is that the money or

of cuts in insulation month before accident admissible in rebuttal. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651.

8. Where shown that insulation had been removed from wire, possibly to test it, **evidence of retaping after accident,** admissible; also as to **general custom** of linemen in regard to wearing rubber gloves. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651.

9. Evidence as to **condition of wires day after accident.** Annapolis Gas & Elec. L. Co. v. Fredericks, 109 Md. 595, 72 A 534.

10. Testimony that lineman assumed defendant would keep its equipment in safe condition. Milne v. Providence Tel. Co. [R. I.] 72 A 716.

11. Consolidated Gas. Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651.

12. What deceased said when taking hold of wire, admissible as **res gestae.** Lewis' Adm'r v. Bowling Green Gaslight Co. [Ky.] 117 SW 278.

13. As to use of rubber gloves. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651.

14. Southwestern Tel. & T. Co. v. Bruce [Ark.] 117 SW 564; Thornburg v. City & E. G. R. Co., 65 W. Va. 379, 64 SE 358. Whether defendant's wires sagged so as to be dangerous. Annapolis Gas & Elec. L. Co. v. Fredericks, 109 Md. 595, 72 A 534.

15. Whether the admitted act of plaintiff in grasping wire was negligent is question of fact. Lewis' Adm'r v. Bowling Green Gaslight Co. [Ky.] 117 SW 278.

16. Instructions as to degree of care necessary held too general. Annapolis Gas & Elec. L. Co. v. Fredericks, 109 Md. 595, 72 A 534. Contact between displaced wire and guy wire. Charge should be as to when displacement occurred, not when contact took place. Ryan v. Oshkosh Gaslight Co., 138 Wis. 466, 120 NW 264.

17. Instruction held to sufficiently submit question of contributory negligence. Hodgins v. Bay City, 156 Mich. 687, 16 Det. Leg. N. 284, 121 NW 274.

18. Charge that jury must consider that plaintiff had lived in city with opportunity to learn dangers from electricity held argumentative. Potera v. Brookhaven [Miss.] 49 S 617.

19. Questions as to whether defendant was negligent in permitting guy wire to become charged, whether such negligence was proximate cause of deceased's death, whether primary wire was displaced and in connection with guy wire, whether such condition had existed long enough to charge defendant with notice, held sufficient. Ryan v. Oshkosh Gaslight Co., 138 Wis. 466, 120 NW 264.

20. This topic includes, in addition to embezzlement proper, the equivalent statutory offenses denominated larceny, larceny by bailee, larceny after trust, etc., wherein the violation of a fiduciary relation between the offender and the owner of the property supplies the absence of the element of taking, which is a distinguishing essential of common-law larceny.

21. Search Note: See notes in 9 C. L. 1067; 13 L. R. A. (N. S.) 511; 87 A. S. R. 19; 4 Ann. Cas. 878.

See, also, Embezzlement, Cent. Dig. §§ 1-36; Dec. Dig. §§ 1-24; 15 Cyc. 488-510; 10 A. & E. Enc. L. (2ed.) 976, 978, 983, 994, 1023.

22. State v. Cothern, 138 Iowa, 236, 115 NW 890. A taking is rightful, even though the taker intended to make a wrongful disposition of the property once it was in his possession. Id.

property shall have been received by virtue of a fiduciary relation,[23] such as agency,[24] bailment,[25] or other employment.[26] An employe is estopped from denying the validity of the organization from which he embezzles,[27] though, under statutes denouncing the embezzlement of particular funds, lack of authority to receive such funds may bar the application of the statute.[28] The fiduciary relation of principal and agent is not changed by a subsequent incorporation of a partnership which acted as such agent.[29] One may be guilty of embezzling money in which he has a joint interest.[30] Statutes sometimes specifically punish embezzlement of particular kinds of property[31] or by particular classes of persons.[32] Criminal intent is essential,[33]

23. People v. O'Brian, 8 Cal. App. 641, 97 P 679. Immaterial that convicts did not voluntarily place their money in hands of prison clerk, who embezzled same, but were required to do so by prison commissioners; money was intrusted to his care so as to establish fiduciary relation. Roland v. Com. [Ky.] 119 SW 760. One who has been guilty of offense described by Rev. Laws, c. 208, § 47, prohibiting embezzlement or fraudulent conversion by stockbroker of money of his customer, may be convicted of larceny, described in Rev. Laws, c. 218, §§ 26, 38-40. Commonwealth v. King, 202 Mass. 379, 88 NE 454.

24. A clerk, servant or agent, who appropriates property, is not guilty of embezzlement unless he had possession of same, as distinguished from possession of master. Minor v. State, 55 Fla. 77, 46 S 297. Word "agent," as employed in Code 1907, § 6831, imports a principal and implies employment, service, and delegated authority to do something in the name and stead of principal. Echols v. State [Ala.] 48 S 347. Evidence held to show defendant was acting in concert with agent in scheme to deprive owner of promissory notes, intrusted to him for purpose of sale and discount. People v. Barry, 132 App. Div. 231, 116 NYS 870. Evidence held to show defendant received money as agent in regular course of business and converted same to own use with criminal intent. State v. Phillips, 105 Minn. 375, 117 NW 508. Where applications for purchase of stock were made to agent in regular course of business, and money was paid to agent by customer, held payment deemed made to principal, and agent had no authority to fill orders by delivering personal stock. Id. Where, in prosecution of broker for embezzlement, there was evidence he received money in question under trust and confidence it should be identically applied to purchase of certain stocks, and that he converted it to own use, fact that accused was a broker was not decisive that offense was embezzlement by broker, defined by Rev. Laws, c. 208, § 47, and not embezzlement generally. Commonwealth v. King, 202 Mass. 379, 88 NE 454. Alleged stockbroker sold customer's stock, deposited with him as collateral security in marginal dealings, although customer was not indebted to him by reason of losses. Held criminal intent proved. People v. Flynn, 64 Misc. 276, 118 NYS 533.

25. Mere borrower not a bailee as that word is used in Pen. Code 1895, § 191. Rice v. State [Ga. App.] 64 SE 575.

26. Bank clerk collected drafts from drawees and converted part of money. Held he acted as bank's agent in making collections, since money belonged to bank before it was deposited; conviction for embezzlement proper. Spencer v. U. S. [C. C. A.] 169 F 562. Collector for telegraph company held to have embezzled from employer and not from customers, where he failed to turn in money collected, as he occupied no position of trust to debtors of company. Hagood v. State, 5 Ga. App. 80, 62 SE 641.

27. No defense that employer carrying on business under fictitious name had failed to register, as required by Pub. Acts 1907, p. 119, No. 101. People v. Wolff [Mich.] 16 Det. Leg. N. 316, 121 NW 754.

28. Where authority to receive payment of fines assessed by court was vested by law in city marshal, fact that it had been customary for police officer, acting as jailer, to receive such moneys, did not estop him, when charged with embezzlement of same, alleged to have been received by virtue of his office, to deny it was so received. Held Pen. Code 1895, art. 103, not applicable. Hartnett v. State [Tex. Cr. R.] 119 SW 855.

29. When partnership transferred its business to corporation, incorporators not absolved from duties or liabilities existing prior to incorporation, and such fact of transfer was proper element for jury. Milbrath v. State, 138 Wis. 354, 120 NW 252.

30. Not error to refuse to direct verdict for defendant where prosecutor testified accused was to receive his pay after bills were collected and money turned over. People v. Wolff [Mich.] 16 Det. Leg. N. 316, 121 NW 754.

31. Comp. Laws 1897, § 11627, regarding embezzlement of passenger tickets by employes of railroads, held not to include transfer checks of street railways. People v. Beebehyser [Mich.] 16 Det. Leg. N. 312, 121 NW 751.

32. President of corporation is a "person" within Comp. Laws, § 4804, declaring that any person, agent, manager, or clerk of a corporation, with whom any money shall be deposited or intrusted, who shall appropriate it to own use, shall be guilty of embezzlement. State v. Weber [Nev.] 103 P 411. Section 3821—85, providing penalty for embezzlement, etc., by bank officers, employes and agents, held not unconstitutional because not of uniform operation. In re Application of Corwin D. Bachtel, 11 Ohio C. C. (N. S.) 537. Rev. St. § 903, denounces as crime act of officer who converts public money collected by him. State v. Dudenhefer, 122 La. 288, 47 S 614.

33. Henderson v. State, 55 Tex. Cr. R. 640, 117 SW 825. Evidence held to show absence of criminal intent to convert money, as plaintiff well knew, and that prosecution of defendant amounted to malicious prosecution

and must exist at the time of the conversion,[34] but may be inferred from the acts and circumstances of the case.[35] It is the fraudulent conversion that constitutes the offense,[36] and, where the conversion is complete without a refusal,[37] and a demand is not necessary unless made an element by statute.[38] It is not necessary to show what disposition was made of the money.[39] Subsequent restitution will not purge of criminality.[40] Some statutes require defendant shall be of a certain age to warrant prosecution for embezzlemnt.[41]

§ 2. *Prosecution and punishment.*[42] *Limitations and venue.*[See 11 C. L. 1194]—If the transaction constituting the offense extends through different counties, the county in which the conversion took place has not the exclusive jurisdiction.[43]

The indictment.[See 11 C. L. 1194]—The language of the statute is sufficient,[44] and when the offense is so charged, it is not necessary to allege the particulars or circumstances of the act constituting the offense.[45] The general rules as to uncertainty,[46] duplicity,[47] and surplusage,[48] apply. Venue of the crime must be alleged

for which he could recover. Moneyweight Scale Co. v. McCormick, 109 Md. 170, 72 A 537. Evidence held insufficient to show defendant was so intoxicated as to lack capacity to form criminal intent. Cohoe v. State, 82 Neb. 744, 118 NW 1088. Fraudulent intent disproved, where defendant agreed to settle with prosecutor after deducting his commissions, but latter refused and insisted upon receiving entire amount. White v. International Textbook Co. [Iowa] 121 NW 1104. Under Rev. Laws 1905, § 5078, subd. 2, guilty intent cannot be inferred from mere fact of possession of funds. State v. Barnes [Minn.] 122 NW 4.

34. If agent sold property in pursuance of his agency and in recognition of right of ownership of real owner, and subsequently conceived fraudulent intent to convert money derived from such sale, he would be guilty of embezzlement of money and not of property sold. Henderson v. State, 55 Tex. Cr. R. 640, 117 SW 825.

35. No defense by bailee that promissory notes were intrusted to him for purpose of sale and discount, and that he had made contracts for their disposition with others, which prevented him from returning them on demand, and that he acted on advice of attorney where evidence showed he tried to negotiate same after demand. People v. Barry, 132 App. Div. 231, 116 N[illegible] 870. Where a fraudulent conversion after a trust delegated has been shown, the evil intention will be presumed. Hagood v. State, 5 Ga. App. 80, 62 SE 641. Where money of a principal is intrusted to an agent and is knowingly used by agent in violation of duty, it is none the less embezzlement because he intended at time to restore it. Orr v. State [Ga. App.] 65 SE 582.

36. Prinslow v. State, 140 Wis. 131, 121 NW 637.

37. No demand necessary where attorney made settlement for client and kept all of money and acknowledged he could not pay same because financially embarrassed. People v. FitzGerald, 130 App. Div. 124, 114 NYS 476.

38. St. 1898, § 4419, has reference to cases where demand is necessary, and in that event the statute makes demand only prima facie evidence of embezzlement, leaving question of fraudulent conversion and proof respecting embezzlement undisturbed in cases where no demand has been made. Prinslow v. State, 140 Wis. 131, 121 NW 637. Especially where corporation was bankrupt and demand would be meaningless ceremony. Milbrath v. State, 138 Wis. 354, 120 NW 252.

39. State v. Dudenhefer, 122 La. 288, 47 S 614.

40. Note given to cover shortages held not accepted by employer, and immaterial to question of guilt if it had been. Guenther v. State, 137 Wis. 183, 118 NW 640. Offense was complete when money was fraudulently converted. Hagood v. State, 5 Ga. App. 80, 62 SE 641.

41. Rev. St. 1899, § 1912 (Ann. St. 1906, p. 1304), making minimum age 16 in order to permit prosecution for embezzlement, held complied with. State v. Gebhardt, 219 Mo. 708, 119 SW 350.

42. **Search Note:** See notes in 6 Ann. Cas. 349; 11 Id. 816.

See, also, Embezzlement, Cent. Dig. §§ 37-79; Dec. Dig. §§ 24½-52; 15 Cyc. 510-537; 10 A. & E. Enc. L. (2ed.) 1025, 1028; 7 A. & E. Enc. P. & P. 410.

43. In prosecution for larceny of money by bailee, where transaction constituting offense extends through different counties, venue may be laid and prosecution had in county where bailment arose, and where defendant has to account for and pay over money on demand to one entitled to it. Cohoe v. State, 82 Neb. 744, 118 NW 1088.

44. Hartnett v. State [Tex. Cr. R.] 119 SW 855. Word "embezzlement" alone will suffice under statute denouncing that crime. State v. Dudenhefer, 122 La. 288, 47 S 614.

45. It having been alleged in language of statute that defendant received certificate of deposit as bailee, held not necessary for pleader to allege nature of bailment or other circumstances thereof. People v. O'Brian, 8 Cal. App. 641, 97 P 679. By Cr. Code Prac. § 135, it is made sufficient to allege the embezzlement of money, without specifying the coin, or number, denomination, or kind thereof. Bailey v. Com. [Ky.] 113 SW 140.

46. Word "steal" has become a term of art, and includes criminal taking or conversion by way either of larceny, embezzlement or obtaining by false pretenses. Commonwealth v. King, 202 Mass. 379, 88 NE 454. Where indictment is for appropriating common

with certainty,[49] the information must apprise the accused of the charge,[50] and, where the indictment is for embezzling funds of a corporation, it must allege corporate existence and the nature of its business [51] but need not allege where incorporation took place.[52] As a general rule, an allegation of time is not material.[53] Where proof of a demand is not required, it need not be alleged.[54] It is within the discretion of the court to allow a bill of particulars.[55] Ownership of the property,[56] a description of the same,[57] wrongful appropriation,[58] and the nature of the fiduciary relation by virtue of which the defendant lawfully acquired possession of the property,[59] must be shown. A demurrer is the proper mode of objecting to an indictment for misjoinder of offenses.[60]

fund, held not necessary to name persons having interest in same. Roland v. Com. [Ky.] 119 SW 760.

47. In prosecution for larceny, no ground for quashing various counts of indictment that commonwealth claimed conviction could be had thereunder either by proof of larceny proper, embezzlement, obtaining money by false pretenses, or, as to some counts, by proof of embezzlement or fraudulent conversion by a broker. Commonwealth v. King, 202 Mass. 379, 88 NE 454. Where same act constitutes different offenses, the rule is they may be charged in separate counts in one information, and it is competent and proper to vary charge by means of several counts when offense is same, for purpose of meeting different phases of evidence which may be adduced at trial. Cohoe v. State, 82 Neb. 744, 118 NW 1088. Where it is doubtful whether an alleged offense is larceny or conversion by a bailee with intent to steal, information may contain two counts, one charging felonious taking, the other felonious conversion, and state will not be required to elect upon which count it will rely for conviction. Id. Under Cr. Code Prac. § 127, improper to join charge of embezzlement with other charges of alleged fraudulent appropriation of property and other offenses constituting misdemeanors or malfeasance in office. Commonwealth v. Bradley [Ky.] 116 SW 761. No attempt to state more than one offense where defendant was charged with appropriating money out of common fund belonging to persons having varying interest in same. Roland v. Com. [Ky.] 119 SW 760. It is only when it appears by indictment itself that two or more distinct acts are involved in commission of two or more crimes charged that an indictment or count therein charging two or more offenses is bad for duplicity. State v. Heiden, 139 Wis. 519, 121 NW 138.

48. If indictment contains sufficient to stand test of demurrer as to all facts constituting complete offense, other charges, not sufficiently pleaded to stand alone, may be disregarded as surplusage. Bailey v. Com. [Ky.] 113 SW 140.

49. Information held sufficiently certain. People v. O'Brian, 8 Cal. App. 641, 97 P 679.

50. Where information charged embezzlement of particular check, held improper to prove check was intended to cover up prior defalcations. State v. Laechelt [N. D.] 118 NW 240. Information sufficient which enables person of common understanding to know what was intended. People v. O'Brian, 8 Cal. App. 641, 97 P 679. Indictment did not conform to Cr. Code Prac. § 122, providing it must contain acts constituting offense, in ordinary and concise language, and in such manner as to enable person of common understanding to know what is intended. Commonwealth v. Bradley [Ky.] 116 SW 761. Where indictment for embezzlement, though sufficient to withstand demurrer, contained mere general charge and did not disclose particular transaction which would be asserted against accused, remedy is by application for bill of particulars. Bailey v. Com. [Ky.] 113 SW 140.

51. Indictment held sufficient to constitute public offense under Rev. Laws 1905, § 3045. State v. Barnes [Minn.] 122 NW 11. Not necessary where bank was not party defrauded of certificate of deposit but its relation to same was merely by description thereof. People v. O'Brian, 8 Cal. App. 641, 97 P 679.

52. Gray v. State [Ala.] 49 S 678. Indictment insufficient where it failed to allege society was corporation, joint-stock company, or partnership. Reese v. State, 55 Tex. Cr. R. 429, 116 SW 1147.

53. Where agent was charged with larceny of money received for purchase of stock, and money was paid to him subsequent to date of offense as stated in indictment, facts constituting contract of purchase may be shown, although time of such contract is prior to date of offense charged. State v. Phillips, 105 Minn. 375, 117 NW 508. Sufficient to state any date within three years prior to filing of information. State v. Gebhardt, 219 Mo. 708, 119 SW 350. Sufficient if offense was committed before finding of indictment. Bailey v. Com. [Ky.] 113 SW 140.

54. Hagood v. State, 5 Ga. App. 80, 62 SE 641.

55. Commonwealth v. King, 202 Mass. 379, 88 NE 454; Bailey v. Com. [Ky.] 113 SW 140.

56. Commonwealth v. Bradley [Ky.] 116 SW 761. Allegation that prosecutor was owner of certificate of deposit at time he intrusted it to defendant as bailee, that defendant cashed it, and received proceeds, for and on account of prosecutor, and thereupon converted such proceeds, held sufficient allegation of prosecutor's ownership of money. People v. O'Brian, 8 Cal. App. 641, 97 P 679. Refusal of court to instruct that if jury believed money taken by defendant did not belong to prosecutor, but belonged to another company, he should be acquitted, held error. Frink v. State, 56 Fla. 62, 47 S 514.

57. Commonwealth v. Bradley [Ky.] 116 SW 761.

58. Tardiness of agent in not paying over money held not embezzlement, though willful. Frink v. State, 56 Fla. 62, 47 S 514.

59. Indictment held to show defendant

*Variance.*See 11 C. L. 1195—The proof of the property embezzled,[61] the fiduciary relation,[62] and the ownership of the property at the time of the embezzlement, must substantially support the allegations in the indictment.[63] One may be convicted of embezzling a less sum than the amount charged.[64] The fact that defendant is charged with having embezzled money instead of the certificate of deposit is immaterial.[65]

*Evidence.*See 11 C. L. 1195—The burden is upon the state to prove all of the essential elements of the offense,[66] and show guilt beyond a reasonable doubt.[67] The nature of the fiduciary relation, by virtue of which the defendant lawfully acquired possession of the property,[68] the felonious intent,[69] and the value of the property appropriated,[70] must be shown. Evidence of other offenses of the same or similar nature is not generally admissible[71] but may be received as showing criminal in-

was bailee of sewing machine and sold same and appropriated money to own use and benefit. Collins v. State [Tex. Cr. R.] 118 SW 1038.

60. Commonwealth v. Bradley [Ky.] 116 SW 761.

61. Where information described check as drawn by "Stromen Bros." to "Bovey-Shute Lbr. Co.," while proof disclosed same was drawn by "Stromen Bros., by E. T. Stromen by A. T. Stromen," to "Bove-Shaut Lbr. Co.," held variance immaterial. State v. Laechelt [N. D.] 118 NW 240. Where indictment charged defendant was intrusted with 5,000 feet of sawed pine lumber of value of $50, and evidence showed he was intrusted with pine timber for purpose of sawing it into lumber, held no material variance. Chaffin v. State, 5 Ga. App. 367, 63 SE 230. One who was intrusted with property to be sold for at least $125, and who sold or pledged it for $60, retaining proceeds, embezzled property and not proceeds. Henderson v. State, 55 Tex. Cr. R. 640, 117 SW 825.

62. Where indictment charged embezzlement as agent, but proof was to effect that defendant was employed by prosecuting witness as attorney, and in that capacity received money which he fraudulently converted to own use, held variance. Orebaugh v. State, 11 Ohio C. C. (N. S.) 603.

63. Prosecutor held not owner of money so as to make defendant guilty of embezzlement. Mosbey v. State, 54 Tex. Cr. R. 433, 113 SW 276.

64. Prinslow v. State, 140 Wis. 131, 121 NW 637.

65. Since under Penal Code, § 507, he is liable in either event. People v. O'Brian, 8 Cal. App. 641, 97 P 679.

66. Must prove fraudulent conversion to defendant's own use. State v. Deutsch [N. J. Law] 72 A 5. Corpus delicti held sufficiently established. People v. Wilson [Mich.] 16 Det. Leg. N. 506, 122 NW 297. Fiduciary relation must be established. State v. White [Minn.] 122 NW 448. Evidence held insufficient to sustain conviction of president of corporation charged with misappropriating proceeds of treasury stock where state did not show money credited to defendant's bank account as proceeds of stock sold was applied in whole or in part to own use, or to that of another and demand and refusal had not been shown. State v. Weber [Nev.] 103 P 411.

67. State v. White [Minn.] 122 NW 448. Evidence conflicting as to whether money was intrusted to defendant for investment or was loaned to him. Id.; State v. Barnes [Minn.] 122 NW 4.

68. Under Penal Code of 1895, § 191, in cases of larceny after trust delegated, it must appear that there was a bailment of the article converted or stolen, and that delivery of property to defendant was for some purpose in which bailor had interest and benefit. Rice v. State [Ga.] 64 SE 575. Necessary to show defendant was either agent or bailee, as alleged in indictment and that in such capacity he embezzled particular money instrusted to him. State v. Deutsch [N. J. Law] 72 A 5. A mere temporary loan of property, without hire or other benefit to person loaning, is not such an interest or benefit as would make conversion or stealing of property larceny after trust, as distinguished from simple larceny. Rice v. State [Ga. App.] 64 SE 575. Relation of principal and agent held not to exist so as to sustain prosecution under Code 1907, § 6831, where accused agreed to make suit of clothes, received part payment and refused to return same or deliver suit until prosecutor had made further payment, relation being buyer and seller. Echols v. State [Ala.] 48 S 347. Evidence held to show defendant was agent of prosecutor. State v. Gebhardt, 219 Mo. 708, 119 SW 350.

69. Where officer of trust company was indicted under Rev. Laws, 1905, § 5078, subd. 2, which requires state to prove guilty intent beyond reasonable doubt, held error to permit jury to consider § 3045, under which felonious intent is inferred from fact that officer becomes indebted to company. State v. Barnes [Minn.] 122 NW 4.

70. Proof that defendant sold sewing-machine for $5 held criterion of its value. Collins v. State [Tex. Cr. R.] 118 SW 1038. Under Pen. Code, § 545, if thing stolen consists of written instrument, being evidence of debt, the amount of money due thereon or secured to be paid thereby is deemed value of thing stolen. Held, where promissory notes were stolen, it could not be claimed there was no evidence of their value, where issued by going concern which would be obliged to pay in hands of bona fide holders. People v. Barry, 132 App. Div. 231, 116 NYS 870.

71. Letters written by defendant, admitting other wrongdoing with reference to corporation's affairs, held irrelevant. Bailey v. Com. [Ky.] 113 SW 140.

tent and credibility of a witness,[72] or knowledge and a guilty intent.[73] The defendant has a right to introduce evidence of facts which might tend to show absence of criminal intent,[74] such as consent.[75] The offense may be established by circumstantial evidence.[76] A voluntary confession of defendant is competent evidence, and may, with slight corroborating circumstances, establish the corpus delicti.[77] Evidence is admissible bearing on the defendant's receipt of the money or property,[78] so a check cashed by defendant, the proceeds of which it is charged he embezzled, is admissible.[79] Legal organization of a corporation must be proved where incorporation is alleged.[80] Neglect or refusal to pay over on demand any public money in possession is deemed prima facie evidence of its conversion and embezzlement.[81] Where separate items of larceny are charged in the indictment, the state is not required to prove every one of such items.[82]

Questions for jury; instructions. See 11 C. L. 1198—The instructions should include every essential element of the offense,[83] but the court need not go beyond the words of the statute in defining fraudulent conversion,[84] and instructions are erroneous which give the jury wider latitude than is permitted by statute.[85] If the evidence warrants it, the court should grant requested instructions on defendant's theory of defense.[86] Questions of fact[87] such as, whether defendant is of the age required

72. Other acts testified to by defendant on cross-examination. State v. Laechelt [N. D.] 118 NW 240. Proper to admit evidence that accused during time of employment had repeatedly embezzled other property from his employers, in order to show intent. State v. Hight, 150 N. C. 817, 63 SE 1043.

73. Where bailee had converted money, held not error to admit testimony to show disposition he made of previous sums which came into his possession, so as to show he understood what course to pursue. Cohoe v. State, 82 Neb. 744, 118 NW 1088.

74. Error for court to refuse to permit defendant to propound questions to his witnesses tending to elicit facts which would have had bearing on question of intent. Frink v. State, 56 Fla. 62, 47 S 514.

75. Statement to agent that employer "doesn't want his men to live in poverty, so if you need little money, at first you may need some of money used for sales, and pay it back when able," held, did not authorize diversion of large sums for substantial repairs and remodeling of agent's house six months later. Guenther v. State, 137 Wis. 183, 118 NW 640.

76. Cohoe v. State, 82 Neb. 744, 118 NW 1088. Intent to steal is inferable where defendant borrowed article and, on leaving state, took it along, never offering to return it. Rice v. State [Ga. App.] 64 SE 575. Where defendant, as manager of corporation, bought real estate for it through agent, fact that he paid alleged excessive price, in absence of proof of fraudulent purpose, or that accused benefited from transaction at expense of corporation, held insufficient to sustain indictment for embezzlement charging conversion of corporation's funds to own use. Bailey v. Com. [Ky.] 113 SW 140.

77. Evidence held sufficient to corroborate voluntary confession of accused to establish corpus delicti. Cohoe v. State, 82 Neb. 744, 118 NW 1088.

78. Deposit slips in accused's handwriting and leaf from pass book with his entry thereon held admissible to show he had in his possession his employer's money to larger amount specified for deposit, and to show manner of perpetrating crime. People v. Carlson, 8 Cal. App. 730, 97 P 827.

79. State v. Ingram [La.] 49 S 955.

80. State v. Weber [Neb.] 103 P 411.

81. Defendant withheld settlement of his license account. State v. Dudenhefer, 122 La. 288, 47 S 614.

82. Hagood v. State, 5 Ga. App. 80, 62 SE 641.

83. Where court charged that it must appear accused acted with felonious intent, and that intent to convert funds to own use was necessary element, instructions that gist of offense is breach of trust, that there must be coupled with it intent to defraud, not erroneous. People v. Wolff [Mich.] 16 Det. Leg. N. 316, 121 NW 754.

84. Words "fraudulent intent," in statute, held to supply idea of intentional and willful wrongdoing, and no additional words were necessary to impress jury with fact. Hagood v. State, 5 Ga. App. 80, 62 SE 641.

85. Error to charge "embezzlement is wrongful conversion of property of another to one's own use which lawfully came into his possession or care as servant, bailee, or otherwise," since words "or otherwise" are not in statute under which defendant was prosecuted. Frink v. State, 56 Fla. 62, 47 S 514.

86. Held not error to refuse to give requested charges as to guilty intent, where jury must have understood that, though attorney appropriated money to own use, he was not guilty unless guilty intent existed. People v. FitzGerald, 130 App. Div. 124, 114 NYS 476. Requested charge that cashing of check by defendant that was payable to him would not constitute embezzlement of check should have been given, as such charge would not exonerate defendant from embezzling proceeds. Gray v. State [Ala.] 49 S 678.

87. Where defense to embezzlement charge was that defendant accepted money as banker and not as agent or bailee, as alleged

by statute,[88] and whether accused converted the money to his own use,[89] are for the jury.

EMBLEMENTS AND NATURAL PRODUCTS.[90]

The scope of this topic is noted below.[91]

Emblements are those crops of the earth which are produced annually, not spontaneously but by labor and industry, and for that reason are called "fructus industriales."[92] Growing ginseng is not an emblement.[93] Growing apple trees are a part of the realty,[94] but the mature fruit may be treated as personalty.[95] A sale of growing trees is prima facie at least a sale of an interest in land, unless under the agreement the title is not to pass until they are severed.[96] Under the Louisiana statute so long as timber remains standing, it is an immovable and is subject to all the laws of the state on the subject of immovables.[97] In the absence of contract to the contrary, standing corn is part of the realty,[98] but a severance from the realty makes it personalty.[99] Unless reserved,[1] crops standing upon ground, matured or not, pass to the grantee named in a deed of conveyance, or to a party to whom the land is devised,[2] and as between the plaintiff in an ejectment suit and the evicted defendant, the unsevered crops, although mature, are a party of the realty,[3] but

in indictment, question should have been submitted to jury. Held error to instruct to contrary, though defendant had no license to engage in such business. State v. Duetsch [N. J. Law] 72 A 5. The distinction between bailee of money and a banker is that bailee is bound to keep money as it is, and return identical money, or at least to retain amount and have it always ready, while banker is entitled to use money as his own, holding himself ready to make it good when called for. Id. Evidence held sufficient to warrant conclusion of jury that defendant and prosecutor were not partners. Chaffin v. State, 5 Ga. App. 368, 63 SE 230. No error where it was left to jury, under appropriate charge, to find facts. Henderson v. State, 55 Tex. Cr. R. 640, 117 SW 825.

88. Not necessary to prove age by direct evidence, where defendant is attorney at law, candidate for city attorney, and appeared before jury, since by statute attorneys at law are required to be 21 years old. State v. Gebhardt, 219 Mo. 708, 119 SW 350.

89. Instructions that money intrusted to partnership and subsequently turned over to a corporation and converted by it remained money of client and did not become corporate property, held proper. Milbrath v. State, 138 Wis. 354, 120 NW 252.

90. See 11 C. L. 1197.

Search Note: See notes in 1 C. L. 1001; 3 Id. 1188; 5 Id. 1096; 11 Id. 987; 11 L. R. A. (N. S.) 677; 98 A. S. R. 953, 954; 5 Ann. Cas. 400, 480; 6 Id. 949; 9 Id. 1139.

See, also, Crops, Cent. Dig.; Dec. Dig.; Landlord and Tenant, Cent. Dig. §§ 487-507; Dec. Dig. §§ 135-139; 24 Cyc. 1065-1071; Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3; 25 Cyc. 1547, 1548; Trover and Conversion, Cent. Dig. §§ 3-20; Dec. Dig. § 2; 8 A. & E. Enc. L. (2ed.) 301.

91. This topic excludes cropping contracts and liens (see Agriculture,* § 2), and leasing on shares (see Landlord and Tenant,* § 7). The law of fixtures (see Fixtures*) and that pertaining particularly to timber (see Forestry and Timber*) are more fully treated elsewhere

92. In re Andersen's Estate, 83 Neb. 8, 118 NW 1108.

93. Kuehn v. Antigo [Wis.] 120 NW 823.

94. Doty v. Quincy, etc., R. Co., 136 Mo. App. 254, 116 SW 1126.

95. Held that, in estimating damages to apple trees and its fruit by fire, the mature apples should be treated as personalty. Doty v. Quincy, etc., R. Co., 136 Mo. App. 254, 116 SW 1126.

96. Hurley v. Hurley [Va.] 65 SE 472.

97. Sale of timber though made with a view to its separation from the land is open to attack for lesion. Smith v. Huie-Hodge Lumber Co., 123 La. 959, 49 S 655.

98. Adams v. State [Ala.] 48 S 795.

99. Corn severed from the realty is a subject of larceny. Adams v. State [Ala.] 48 S 795.

1. Held that rye being personal property by oral agreement between tenant and grantor, an agreement between grantor and grantee recognizing tenant's right was equivalent to a constructive severance of the rye and was effective as a reservation although not contained in deed. Beck v. McLane, 129 App. Div. 745, 114 NYS 44. Parol evidence held admissible to show mature crop of corn was reserved by grantors as a part of consideration for conveyance. Grabow v. McCracken [Okl.] 102 P 84.

2. Crop of corn which was matured, but which remained ungathered upon the stalks, passed to devisee of land. In re Andersen's Estate, 83 Neb. 8, 118 NW 1108. Crop of corn passed to devisee and fact that land was being farmed by a cropper does not prevent the application of the rule. In re Pope's Estate, 83 Neb. 723, 120 NW 191, following In re Andersen's Estate, 83 Neb. 8, 118 NW 1108.

3. Plaintiff held entitled to mature crop of corn standing unsevered at time of final ouster and delivery of possession of premises under writ of restitution. Hartshorne v. Ingels [Okl.] 101 P 1045.

the occupier of land is the owner of all crops harvested during the term of his occupancy, whether he be a purchaser, tenant, or a mere trespasser in possession holding adversely,[4] unless the rights of the parties in this regard have been changed by contractual stipulations.[5] Where a tentant sows or plants a crop and it is possible for him to know that his estate will terminate before the crop can ripen, he is not entitled to emblements,[6] but the parties as between themselves may, by contract, constitute and deal with growing crops as personalty.[7] On sale of a crop to be grown, no title passes until it is grown and is by some act of the seller designated as the property sold.[8]

EMBRACERY.[9]

EMINENT DOMAIN.

The scope of this topic is noted below.[10]

§ 1. **The Power of the State and Delegations of It, 1454.**
A. Definitions and Nature of Power, 1454.
B. Who May Exercise the Right; Delegation of Power, 1454.
C. Extent of Power, 1455.
§ 2. **Purposes and Uses of a Public Character, 1457.**
§ 3. **Property Liable to Appropriation and Estates Therein Which May be Acquired, 1459.**
§ 4. **What is a "Taking," "Injuring," or "Damaging" of Property, 1460.** Exercises of Police or Taxing Power, 1463. Establishment or Vacation of Street, 1463. Change of Street Grade, 1463. Railroads or Other Structures on City Streets, 1464.
§ 5. **Conditions Precedent to the Exercise of the Power, 1465.**
§ 6. **Measure and Sufficiency of Compensation, 1465.** Particular Elements of Damage, 1468. Benefits, 1470. Amount of Damages as Depending Upon Estate or Interest Appropriated or Owned, 1470.
§ 7. **Who is Liable for Compensation, 1470.**
§ 8. **Condemnation Proceedings in General, 1471.**
§ 9. **Jurisdiction, 1472.**
§ 10. **Applications; Petitions; Pleadings, 1473.**
§ 11. **Process, Notice, Citation, Publication, 1474.**
§ 12. **Hearing and Determination of Right to Condemn, 1474.**
§ 13. **Commissioners or Other Tribunal to Assess Damages; Trial by Jury, 1475.**
§ 14. **The Trial or Inquest, and Hearings on the Question of Damages, 1475.** Admissibility of Evidence, 1477. Witnessee and Examination Thereof, 1478. Instructions, 1478.
§ 15. **View of Appropriated Premises, 1479.**
§ 16. **Verdict, Report or Award; Judgment Thereon and Lien or Enforcement of Judgment, 1479.**
§ 17. **Costs and Expenses, 1481.**
§ 18. **Review of Condemnation Proceedings, 1482.**
§ 19. **Remedy of Owner by Action or Suit, 1485.**
A. Actions for Tort, Damages or Trespass; Recovery of Property, 1485.
B. Suits in Equity; Injunction, 1486.
§ 20. **Payment and Distribution of Sum Awarded; Title or Interest Requiring Compensation, 1488.**
§ 21. **Ownership or Interest Acquired, 1489.**
§ 22. **Transfer of Possession and Passing of Title, 1490.**
§ 23. **Relinquishment or Abandonment of Rights Acquired, 1490.**

4. Purchaser. Lynch v. Sprague Roller Mills, 51 Wash. 535, 99 P 578.

5. Rights of parties to executory contract for sale of land depend upon terms of the contract. Lynch v. Sprague Roller Mills, 51 Wash. 535, 99 P 578. Provision that principal and interest should be paid from proceeds of sale of crops, and that parties should jointly designate storehouse where crops should be stored and time of sale, held not to vest title or interest to crop in vendor. Id.

Rule of construction: Construction which courts have placed upon contracts between landlord and tenant respecting crops apply to similar contracts between vendor and vendee. Lynch v. Sprague Roller Mills, 51 Wash. 535, 99 P 578.

6. Bristow v. Carriger [Okl.] 103 P 596.

7. Oral agreement between landlord and tenant made rye personal property. Beck v. McLane, 129 App. Div. 745, 114 NYS 44. Parol reservation of crop by agreement between landlord and tenant at sufferance prior to being dispossessed operated as a constructive severance thereof. Bristow v. Carriger [Okl.] 103 P 596.

8. Farmers' Nat. Bank v. Coyner [Ind. App.] 88 NE 856.

9. No cases have been found for this subject since the last article which treats of common-law offense of embracery and analogous statutory offenses. See 11 C. L. 1198.

Search Note: See Embracery, Cent. Dig.; Dec. Dig.; 10 A. & E. Enc. L. (2ed.) 1040; 12 A. & E. Enc. P. & P. 661.

10. This topic excludes powers given to drainage and reclamation districts (see Sewers and Drains,* §§ 4, 5), irrigation districts (see Waters and Water Supply,* § 14), and the like. See, also, Highways and Streets,* §§ 2, 5, 8, as to establishment of roads and streets, change of grade, and vacation thereof.

§ 1. *The power of the state and delegations of it. A. Definitions and nature of power.*[11]—See 11 C. L. 1199—Eminent domain is the sovereign power of a state to take private property for public use without the owner's consent,[12] and is distinct from the inherent sovereign power of taxation.[13] The exercise of the power is usually conditioned upon just compensation to the owner,[14] and the taking must be for a public use.[15]

(§ 1) *B. Who may exercise the right; delegation of power.*[16]—See 11 C. L. 1200—The power of eminent domain is an attribute of state sovereignty and can be exercised by a lesser authority only when properly delegated.[17] Subject to constitutional restrictions,[18] the right of delegation [19] and the advisability of so doing

11. Search Note: See notes in 5 C. L. 1098; 3 L. R. A. (N. S.) 404; 7 Id. 198.

See, also, Eminent Domain, Cent. Dig. §§ 1-23; Dec. Dig. §§ 1-5; 15 Cyc. 557-562, 564, 565; 10 A. & E. Enc. L. (2ed.) 1047, 1048; 7 A. & E. Enc. P. & P. 460.

12. City of Austin v. Nalle [Tex.] 120 SW 996; People v. New York, 134 App. Div. 75, 118 NYS 742.

13. Assessment of property abutting on street for proportionate part of cost of paving same is not an exercise of power of eminent domain. City of Austin v. Nalle [Tex.] 120 SW 996.

14. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610. For public road. Johnson v. Peterson [Neb.] 122 NW 683. State cannot take corporate property without just compensation under its reserved power to amend charter. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Act April 18, 1904 (97 Ohio Laws 138) construed so as not to render owner of land, otherwise wholly unfenced, liable for cost of one-half of partition fence, collectible as a tax on the land, to render it constitutional. Alma Coal Co. v. Cozad, 79 Ohio St. 348, 87 NE 172. Under Const. providing that private property shall not be taken for a public use without adequate compensation, city providing for pavement of street at cost of property benefited, cannot collect assessment without showing that adequate compensation will be made and proof that contract has been let without proof that it will be performed within a reasonable time is insufficient. City of Austin v. Nalle [Tex. Civ. App.] 115 SW 126. Under Act March 12, 1885 (St. 1885, p. 95, c. 115), use of all water appropriated for sale, rental, or distribution shall be a public use, company furnishing appropriated water for irrigation has only constitutional right that its property shall not be taken for public use without just compensation. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County [Cal.] 99 P 365.

15. Const. art. 1, § 21, prohibiting taking of property for public use without just compensation held to inhibit taking for private use. Alfred Phosphate Co. v. Duck River Phosphate Co. [Tenn.] 113 SW 410. In Tennessee, must be for public use and it is not sufficient that it results in public benefit or advantage. Id.

16. Search Note: See notes in 11 C. L. 1200; 24 L. R. A. 327; 2 L. R. A. (N. S.) 144; 10 Id. 909; 1 Ann. Cas. 537; 5 Id. 531; 7 Id. 750, 1191; 9 Id. 504, 689.

See, also, Eminent Domain, Cent. Dig. §§ 24-50, 131-170; Dec. Dig. §§ 6-11, 63-68; 15 Cyc. 566-583, 630-632; 10 A. & E. Enc. L. (2ed.) 1051.

17. Gasaway v. Seattle, 52 Wash. 444, 100 P 991. Municipality does not possess power unless expressly or by necessary implication vested therewith. City of Eatonton v. Griffith [Ga.] 64 SE 1085; Gasaway v. Seattle, 52 Wash. 444, 100 P 991. Ky. St. 1903, § 2831, providing that, whenever property shall be needed for appropriate municipal purposes in cities of first-class, board of public works, with consent, etc., of mayor or mayor and council, may order condemnation in name of city as provided for condemnation for parks, and § 2852, providing for condemnation for parks held to confer power on cities of first-class to condemn land. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743. Laws 1895, p. 142, c. 79, held to confer on counties which had constructed a ditch, except the acquisition of a right of way under the unconstitutional act of 1890, power of eminent domain. Lewis County v. McCutcheon, 53 Wash. 367, 101 P 1083. Where railroad may abandon station site and fix another anywhere within city, it has implied power to condemn site therefor. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

18. New York constitution, requiring that use be public and that just compensation be made, does not require uniformity in conferring power. People v. New York, 134 App. Div. 75, 118 NYS 742. Laws 1905, p. 2050, c. 724, § 42, amended by Laws 1906, p. 744, c. 314, § 9, giving city of New York power to acquire land for water supply, etc., entitling owners to right to all damages directly or indirectly resulting, held not violative of Const. U. S. Amend. 14, § 1, relating to privileges and immunities. Id. Kan. Laws 1908, p. 30, c. 33, as construed by state supreme court, authorizing cities of first-class having population of 50,000 to condemn for purpose of waterworks system, held not unconstitutional as special legislation although applicable to only one city Metropolitan Water Co. v. Kansas City, 164 F 738. Laws Kan. 1908, p. 30, c. 33, which expressly makes city liable for any increase award on appeal, held not invalid for failure to provide means to be employed in making payment. Id. Pub. St. 1901, c. 142, § 12, authorizing a corporation to erect and maintain a watermill and dam on non-navigable streams on its own property or on property of others with their consent, held constitutional. McMillan v. Noyes [N. H.] 72 A. 759. Acts 1906, p. 356, No. 262, authorizing city of Burlington to condemn land for public wharf, authorizing city council to de-

rests with the legislature,[20] and it may impose such conditions upon the grant as it sees fit.[21] The legislature, however, cannot delegate a greater power than it possesses, and hence cannot authorize the taking of private property for a private purpose,[22] and a general statute, permitting a taking for public and private uses, is void where the purposes are inseparable.[23] Where the legislature authorizes a corporation possessing the power of eminent domain to do an act causing private injury, it will be presumed that the power was to be exercised in so doing.[24] Power of eminent domain conferred by a general statute may be revoked,[25] or may be limited in duration.[26]

(§ 1) *C. Extent of power.*[27]—See 11 C. L. 1202—The extent of delegated power,[28] the purposes for which it may be exercised,[29] and the property which may be ac-

termine question of public convenience and necessity of proposed action, and to award damages, and allowing appeal by dissatisfied persons, held not unconstitutional as denying due process of law in that it makes interested city the judge in first instance of the necessity and extent of taking and of damages to be awarded. City of Burlington v. Central Vermont R. Co. [Vt.] 71 A 826. Const. art. 12, § 1, providing that all corporations may be regulated, limited, or restrained by law; Ball. Ann. Codes & St. § 4277, providing that chapter of which it is a part shall apply to all associations formed, or thereafter organized, to supply cities or towns or their inhabitants with water; § 4878, declaring that incorporated water company may condemn a right of way for pipes; and § 4279, requiring such companies to obtain privileges from corporate authorities of cities or towns to be furnished, held to constitute sufficient provisions for supervision of such companies, and eminent domain cannot be denied on that ground. State v. Pacific County Super. Ct., 51 Wash. 386, 99 P 3.

19. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933. Legislature has constitutional right to delegate to cities right to condemn property for parks, etc. Brunn v. Kansas City, 216 Mo. 108, 115 SW 446.

20. Extent to which power should be delegated and exercised, the use being in fact a public one, is for the legislature. Miller v. Pulaski [Va.] 63 SE 880.

21. Subject to constitutional guarantees of state constitution. People v. New York, 134 App. Div. 75, 118 NYS 742.

22. Legislature cannot authorize city, in conducting a busines enterprise, to appropriate private property interests in street without paying therefor. In re Law, 128 App. Div. 103, 112 NYS 619. Right to condemn for private use cannot be conferred on a private or public corporation. Alfred Phosphate Co. v. Duck River Phosphate Co. [Tenn.] 113 SW 410. Wisconsin River Improvement Company, possessing right of eminent domain to improve navigation, after contracting with a public service power company to construct dam at latter's expense, former to have tolls arising from navigation and later from furnishing of power, could exercise power of eminent domain to acquire property necessary to construct dam for other company, though tolls from sale of power will probably greatly exceed tolls from navigation. Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 NW 857.

23. Acts 1898, p. 210, c. 190, as amended by Acts 1906, p. 460, c. 262, authorizing town of Pulaski to condemn lands for furnishing of water, etc., to inhabitants thereof and to other persons and corporations, being unconstitutional in so far as it authorized condemnation to supply water, etc., to persons and corporations not inhabitants, and such part being inseparable, entire statute held void. Miller v. Pulaski [Va.] 63 SE 880.

24. Permission to construct and operate electric railway in borough of Brooklyn. People v. Transit Development Co., 131 App. Div. 174, 115 NYS 297.

25. Right of electric power company to exercise power of eminent domain, granted by its charter (Pub. Laws 1897, p. 391, c. 236), held taken away by Revisal 1905, § 1573, as amended by Pub. Laws 1907, p. 91, c. 74, providing that water powers shall not be condemned by electric companies (Yadkin River Power Co. v. Whitney Co., 150 N. C. 31, 63 SE 188), and same was not restored by Priv. Laws 1907, p. 425, c. 179, extending time for commencement of plant, and reaffirming charter as amended (Id.).

26. Power of eminent domain so far as granted a county by Laws 1895, p. 142, c. 79, being merely incidental to power thereby conferred to institute proceedings to obtain money to pay costs and expenses in constructing a ditch under void act of 1890, should be exercised within 10 years under Laws 1895, p. 270, c. 114 (Lewis County v McCutcheon, 53 Wash. 367, 101 P 1083), and, independent thereof, it must be exercised within a reasonable time and cannot be exercised 11 years and 8 months after approval of act (Id.).

27. Search Note: See note in 1 Ann. Cas 533.

See, also, Eminent Domain, Cent. Dig §§ 131-170; Dec. Dig. §§ 53-68; 15 Cyc. 576-578, 629, 630, 632-638; 10 A. & E. Enc. L. (2ed.) 1048, 1051, 1061.

28. Where operator of mine maintaining spur track from mine to a railroad needs land of another to reduce grades and curves, thereby eliminating danger to operatives, and also need other land for terminal facilities to avoid extraordinary outlay, a "necessity" existed therefor within Ky. St. 1909, § 815. Greasy Creek Mineral Co. v. Ely Jellico Coal Co. [Ky.] 116 SW 1189. Excessive taking is not within the power delegated by Ky. St. 1909, § 815. Id.

29. Under Hurd's Rev. St. 1908, c. 34, §§ 22,

quired,[30] depends largely upon the terms and construction of the conferring act,[31] which is strictly construed in favor of the landowner.[32] Where right to exercise the power is claimed under a general statute conferring it upon a particular class of persons or corporation, the claimant must come within such class.[33] A private

24, 26, making county a body politic and vesting it with power to condemn land for a "public work," county may condemn for county jail. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. Under Act March 17, 1869, § 1 (P. L. p. 12), authorizing railroad companies to condemn additional land for purpose of "improving their lines," held that railroad company could condemn land on which to maintain water supply tanks. Wilson v. Pittsburgh & L. E. R. Co., 222 Pa. 541, 72 A 235. Statute authorizing condemnation for highway purposes does not authorize a taking for any other purpose. Miller v. Cincinnati, etc., R. Co. [Ind. App.] 88 NE 102. Reduction of curvature of railroad company's track from 473 degrees to 150 degrees brings improvement within Act March 17, 1869 (P. L. p. 12), authorizing railroad to condemn land for straightening its line for better security of persons or property, although company had in mind other advantages without which improvement would not have been made. Scranton Gas & Water Co. v. Delaware, L. & W. R. Co. [Pa.] 73 A 1097. Where it is evident that purpose is to straighten line, as provided for by Act March 17, 1869 (P. L. p. 12), proceeding is regular and valid though purpose is not declared in resolution of executive committee of railroad company or of its board of directors, and though change is described as a relocation. Id. Act April 21, 1876 (P. L. p. 366) authorizing cities to supply inhabitants thereof with water, as broadened by P. L. 1885, p. 267, and P. L. 1886, p. 272, held to authorize Perth Amboy to exercise power of eminent domain to obtain water though it furnished same outside of corporate limits. Mundy v. Fountain, 76 N. J. Law, 701, 71 A 693. New York Cent. & H. R. R. Co. held to have power under the consolidation act and Laws 1846, p. 272, c. 216, creating one of constituent companies, to condemn land for 35 miles of track from its general depot in New York for an "additional main track" to afford more expeditious means of handling traffic. New York Cent. & H. R. R. Co. v. Untermeyer, 117 NYS 443. Neither act approved Aug. 29, 1879 (Laws 1878-79, p. 315) nor act approved Oct. 21, 1891 (Laws 1890-91, p. 900), constituting charter of city of Eatonton, held to confer power to condemn for sewers. City of Eatonton v. Griffith [Ga.] 64 SE 1085. Since a corporation granted power to condemn for railroad purposes, cannot convey land condemned for another use, in action to condemn, evidence of negotiations to exchange land for street to be vacated is immaterial. State v. Spokane County Super. Ct. [Wash.] 104 P 148.

30. Term "adjacent," in power of railroad to condemn adjacent land for enlargement of station and terminal facilities, should be construed as lying near, but not necessarily in contact. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933. Rev. Civ. Code, § 488, subd. 4, empowering any railroad to lay out its road, not exceeding 100 feet in width, and for the purpose of obtaining gravel to take as much land as may be necessary for proper construction and operation of road, etc., authorizes railroad to condemn land outside of right of way. Chicago, etc., R. Co. v. Mason [S. D.] 122 NW 601. Under Rev. St. 1883, c. 51, § 14, held that railroad could condemn over four rods where necessary by reason of embankments or excavation. Erskine v. Wiscasset & Q. R. Co. [Me.] 72 A 1019. Rapid Transit Act 1894 (Laws 1894, p. 1886, c. 752), § 39, as amended by Laws 1901, p. 1423, c. 587, § 1, authorizing city of New York to condemn for underground railways, etc., held to contemplate taking of property rights remaining in owners of fee of a street, as well as those of abutting on same, where fee is in third persons. In re Law, 128 App. Div. 103, 112 NYS 619. Where railroad charter merely fixed its terminus in Chicago, company could locate tracks and station in any part of city, and hence had power to condemn for new depot site in city when needs required same. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933. Code, § 784, authorizing cities to construct embankments necessary to retain street at grade and to purchase or condemn land therefor, contemplates acquisition by purchase or condemnation of adjacent land necessary to support such embankment. Patterson v. Burlington [Iowa] 119 NW 593. Under St. 1896, p. 652, c. 530, authorizing city of Boston to alter course of and make new channel for Stonybrook, to take any lands in the city which commissioners deem necessary for that purpose, etc., city has no right to condemn water rights, and hence that taking of water was not mentioned in proceeding does not make diversion of water to new channel unlawful so as to constitute a tort. Oelschleger v. Boston, 200 Mass. 425, 86 NE 883.

31. Where power is derived by railroad from state and not from city ordinance, validity of ordinance vacating certain alleys in rear of premises condemned is not material. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

32. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933; Macfarland v. Elverson, 32 App. D. C. 81; Fay v. Macfarland, 32 App. D. C. 295. If any doubt exists as to the authority to proceed under such statutes, such doubt must be resolved in favor of the person whose property is sought to be taken. Macfarland v. Elverson, 32 App. D. C. 81. A statute authorizing a municipality to condemn land for street extension, being in derogation of property rights, is therefore strictly construed. Macfarland v. Moore, 32 App. D. C. 213.

33. Erection of dam to develop water power to operate intricate machinery to develop electricity held a "water mill" within Flowage Act (Pub. St. 1901, c. 142), § 12, authorizing erection of water mills on nonnavigable streams, etc. McMillan v. Noyes [N. H.] 72 A 759. Corporation authorized

corporation cannot condemn an unqualified fee without express authority.[34] Right of way of a private railroad cannot be condemned without condemning entire road.[35] When the power to condemn and take property for public use has been conferred upon municipal officers, it rests with such officers to determine whether it shall be exercised,[36] and, so long as they do not exceed or abuse such power, the courts are powerless to inquire into the motives which actuate them or the propriety of the contemplated improvement.[37]

§ 2. *Purposes and uses of a public character.*[38]—See 11 C. L. 1203—The purposes and uses for which private property may be taken must be public.[39] Whether a particular use constitutes a public one is a judicial question,[40] although deference will always be had to legislative judgment thereon,[41] especially in cases of uncertainty.[42] While some uses are so essentially public in their character, such as public highways and streets, that generally the only question is one of necessity,[43] they are always open to judicial investigation.[44] To make a use a public one, it need not inure to the benefit of the whole public or any large part of it, but it may benefit the inhabitants of a restricted territory, provided the benefit is in common and not to particular persons.[45] Where a use is primarily public, it is sufficient to sustain an exercise of the power though a private purpose is incidentally served,[46]

by its articles to construct and operate a railroad as a common carrier, its primary purpose being to connect business enterprises on outskirt of city with railroad terminals within and to deliver freight in carload lots, and which has complied with Pierce's Code, §§ 7053, 7054 (Ball. Ann. Codes & St. §§ 4250, 4251), prescribing manner of executing articles of incorporation of railroads, held a "railroad corporation" within eminent domain statute. State v. King County Super. Ct. [Wash.] 103 P 469.

34. Hudson & M. R. Co. v. Wendel, 193 N. Y. 166, 85 NE 1020.

35. Where same is destroyed. Alfred Phosphate Co. v. Duck River Phosphate Co. [Tenn.] 113 SW 410.

36. Under D. C. Code, § 483 (31 Stat. 1265, c. 854), the commissioners of the district have power to condemn land without more specific direction of congress. Macfarland v. Elverson, 32 App. D. C. 81.

37. Macfarland v. Elverson, 32 App. D. C. 81.

38. Search Note: See notes in 5 C. L. 1104; 14 L. R. A. 487; 16 Id. 81; 20 Id. 434; 58 Id. 757; 1 L. R. A. (N. S.) 208, 969, 977; 2 Id. 842; 4 Id. 106; 5 Id. 512; 6 Id. 122; 15 Id. 616; 16 A. S. R. 610; 42 Id. 406; 88 Id. 926; 102 Id. 809; 1 Ann. Cas. 188; 2 Id. 50, 133; 3 Id. 1113; 4 Id. 1175; 7 Id. 835, 1191.

See, also, Eminent Domain, Cent. Dig. §§ 7, 51-90; Dec. Dig. §§ 12-52, 61, 62; 6 Cyc. 269; 15 Id. 578-583, 585-629; 10 A. & E. Enc. L. (2ed.) 1061.

39. See ante, § 1. "Public use" is not synonymous with "public benefit." Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 NW 857. One seeking to appropriate riparian rights under Pub. St. 1901, c. 142, § 12, authorizing a corporation or person to erect and maintain a water mill and dam on nonnavigable streams, etc., must show that use is for a public purpose. McMillan v. Noyes [N. H.] 72 A 759. Ky. St. 1909, § 815 (Russell's St. § 5352), authorizing any person operating mine within three miles of railroad to condemn land for spur track connecting with railroad, and providing the owner of such road should be governed by laws relating to other railroads, held to make use public. Greasy Creek Mineral Co. v. Ely Jellico Coal Co. [Ky.] 116 SW 1189.

40. McMillan v. Noyes [N. H.] 72 A 759.

41. Since Const. art. 3, § 15, declares use of water to be a public use, right may be acquired by condemnation. Prentice v. McKay, 38 Mont. 114, 98 P 1081. Use of company organized under St. 1898, §§ 1771-1791m, to furnish power, is a public, and not a private, use, in view of Laws 1907, p. 1130, c. 499, defining public utility. Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 NW 857.

42. Walker v. Shasta Power Co. [C. C. A.] 160 F 856.

43. Where court finds that ordinance directing street improvement was properly passed, it properly determined that use was public. In re Mercer St. [Wash.] 104 P 133. While under Const. art. 1, § 16, question whether use is really public is a judicial one, use as a public street is so essentially a public use that finding that proper municipal authorities had passed ordinance to take land for street authorized finding that proposed taking was for public use. City of Seattle v. Byers [Wash.] 103 P 791.

44. They will do so where it appears that it is for exclusive advantage of an individual. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

45. Miller v. Pulaski [Va.] 63 SE 880. To render furnishing of power by corporation a public use, it is not necessary that company's services be available to whole state, but only to those who require power and are willing to pay a reasonable rate therefor to full extent of capacity of enterprise. Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 NW 857.

46. Where opening of connecting street will benefit the public, it is immaterial that an individual will derive special benefit therefrom. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743. If public use justi-

and the fact that a person or corporation is also engaged in private business does not prevent it from asserting the power for a public purpose.[47] The description of the objects and purposes of a corporation as contained in its articles of incorporation is not conclusive.[48] Where the power is being exercised for a proper public use, the fact that condemnor also intends to devote it to an illegal use does not affect the right to condemn.[49] Condemnor need not itself serve the public.[50] Where condemnor is a public service corporation, a preliminary injunction will not ordinarily lie on ground that use is not public.[51]

Distinct from the question of public use is the question of the expediency of exercising the power and the necessity of taking the particular property.[52] In the absence of constitutional or statutory provisions,[53] the question of public necessity is a political one,[54] with which the courts will not interfere in the absence of bad faith.[55] Likewise, the question of how much [56] and what property [57] shall be taken is primarily for the condemnor, although an excessive taking may be prevented through the courts.[58]

Particular purposes and uses.—Among the more common uses generally deemed public are main irrigation ditches and canals,[59] generation [60] and trans-

fied erection of dam, such use is not impaired because dam incidentally furnishes a surplus of water used for private purpose. Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 NW 857.

47. Walker v. Shasta Power Co. [C. C. A.] 160 F 856. Fact that corporation may use some of the power developed by use of flowage rights sought to be established by eminent domain for its own private gain does not show that use for general lighting purposes is not a public use. McMillan v. Noyes [N. H.] 72 A 759.

48. Walker v. Shasta Power Co. [C. C. A.] 160 F 856.

49. Where corporation is condemning water rights to supply city, fact that it also intends to furnish water for a private purpose does not defeat right. State v. Pacific County Super. Ct., 51 Wash. 386, 99 P 3.

50. Generation and transmission of electricity is no less a public use because condemnor sells same to be devoted to such use. State v. King County Super. Ct., 52 Wash. 196, 100 P 317.

51. Matter for final hearing. Eastman v. Trotter Water Co., 222 Pa. 355, 71 A 543.

52. Question of public necessity and of public use are distinct questions, the former for the legislature, the latter for the courts. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743. Evidence held to show impracticability of enlarging old station and necessity for condemning new site. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

53. Determination of necessity for taking is delegated in Idaho to the courts. Portneuf Irr. Co. v. Budge [Idaho] 100 P 1046.

54. Miller v. Pulaski [Va.] 63 SE 880; Chicago, etc., R. Co. v. Mason [S. D.] 122 NW 601. For body having power to decide. Chicago, etc., R. Co. v. Mason [S. D.] 122 NW 601. Where county board has duly decided to construct new county jail, court cannot go into question whether county should construct new jail or repair old. Mercer county v. Wolff, 237 Ill. 74, 86 NE 708. In proceedings by county to condemn site for new jail, question whether finances of county justified building was not for court. Id. Under Act Mar. 17, 1869, determination of board of directors of railroad of necessity of taking land for straightening of line is conclusive in absence of bad faith. Scranton Gas & Water Co. v. Delaware, L. & W. R. Co. [Pa.] 73 A 1097. Ordinance determining that strip is necessary for a public use as a street, and ordering its condemnation therefor, is a decision for proper authority of necessity for opening of street and taking of land. City of Seattle v. Byers [Wash.] 103 P 791.

55. City of Tacoma v. Titlow, 53 Wash. 217, 101 P 827.

56. Condemnor may condemn less than is reasonably necessary. Spokane Val. Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 P 515. In condemning for a canal state cannot be compelled to take land outside of that certified as necessary, because of the possibility that if the high navigable stage is reached it may be flooded, it being too uncertain. Johnson v. State, 62 Misc. 15, 116 NYS 253.

57. Selection of particular land will not be interfered with by courts in absence of abuse. Chicago, M. & St. P. R. Co. v. Mason [S. D.] 122 NW 601. In proceeding to condemn land owned by railroad but leased to mill for loading purposes for tracks of another company, fact that adjoining land could be condemned for tracks and that appropriation of strip would greatly increase cost to mill of loading, etc., held not to go to necessity of taking. State v. King County Super. Ct. [Wash.] 103 P 469.

58. Chicago, etc., R. Co. v. Mason [S. D.] 122 NW 601.

59. Irrigating canals held a public use under constitution and statutes of Idaho. Portneuf Irr. Co. v. Budge [Idaho] 100 P 1046.

60. Use of land for ditch and flume to convey water used in furnishing electricity to public generally or to inhabitants of particular county for light and heating held a public use. Walker v. Shasta Power Co. [C. C. A.] 160 F 856.

mission of electricity for railroad operations and for municipal lighting,[61] supplying water to the inhabitants of a city, town, or village,[62] land for public library and city parks,[63] means of public communication,[64] etc., but not furnishing of water for purposes of private business [65] or a right of way for a private connection with steam railroad.[66]

§ 3. *Property liable to appropriation and estates therein which may be acquired.*[67]—See 11 C. L. 1205—Except where exempted by constitution or statute,[68] or in certain cases where already devoted to a public use,[69] any kind of property or interest therein may be taken. Condemnor exercising delegated power can take only such property as falls within the limitations of the right conferred.[70] While exception is sometimes made as to cemetery property, it is not effective after the use for cemetery purposes has been long abandoned.[71]

*Property in actual and necessary use for a public purpose.*See 11 C. L. 1205— While property devoted to one public use may be taken for another,[72] especially if the existing use will not be destroyed or materially interfered with thereby,[73] the power cannot ordinarily be exercised where the uses are co-ordinate.[74] Actual use and not ownership determines whether property is so devoted to public use as to

61. State v. King County Super. Ct., 52 Wash. 196, 100 P 317. Condemnation of land by a town to enable it to furnish light to inhabitants thereof. Miller v. Pulaski [Va.] 63 SE 880; McMillan v. Noyes [N. H.] 72 A 759.

62. State v. Pacific County Super. Ct., 51 Wash. 386, 99 P 3; Miller v. Pulaski [Va.] 63 SE 880. Acts 1898, p. 210, c. 190, as amended by Acts 1906, p. 460, c. 262, held unconstitutional in so far as it authorized town to condemn land to furnish water to corporations and persons not inhabitants thereof. Miller v. Pulaski [Va.] 63 SE 880.

63. Lyford v. Laconia [N. H.] 72 A 1085.

64. Telegraph. Western Union Tel. Co. v. Hill [Ala.] 50 S 248.

65. Furnishing of water to individuals or corporations to be used in boilers to generate steam to operate sawmills held a private use. State v. Pacific County Super. Ct., 51 Wash. 386, 99 P 3.

66. Right of way condemned by phosphate company to connect plant with railroad held a private use although other phosphate companies might ship over same. Alfred Phosphate Co. v. Duck River Phosphate Co. [Tenn.] 113 SW 410.

67. Search Note: See notes in 3 C. L. 1193; 58 L. R. A. 240; 66 Id. 897; 1 L. R. A. (N. S.) 605; 2 Id. 227; 13 Id. 197; 9 A. S. R. 137; 2 Ann. Cas. 946; 7 Id. 339.

See, also, Eminent Domain, Cent. Dig. §§ 91-130; Dec. Dig. §§ 45-52; 15 Cyc. 602, 611-629; 10 A. & E. Enc. L. (2ed.) 1088.

68. Execution of a deed of land for water supply purposes and acceptance of same by council without establishing use in manner specified in P. L. 1906, p. 133, does not secure immunity under act of April 24, 1897 (P. L. p. 318), exempting lands held for water supply purposes. Borough of Florham Park v. Madison [N. J. Law] 72 A 4. Laws 1905, p. 687, c. 419, as amended by Laws 1907, p. 1240, c. 646, held not to authorize condemnation for drainage of an artificial navigable pond which had become a natural condition. In re Shepard Drainage Dist., 140 Wis. 327, 122 NW 775.

69. See post this section, Property in Actual and Necessary Use for a Public Purpose.

70. Oregon statute authorizing certain public service corporations to condemn "land" for their use includes any interest in land, and an easement or right of way may be condemned. Pacific Postal Tel.-Cable Co. v. Oregon & C. R. Co., 163 F 967.

71. A cemetery wherein interments were made upon payment of a fee without the granting of any title to the ground, and in which no interments have been made for forty years may be appropriated by a village for use for parks and public buildings. Pansing v. Miamsburg, 11 Ohio C. C. (N. S.) 511.

72. Where power of eminent domain is conferred upon private or public corporation, state impliedly reserves right to take property for another public use, if it becomes necessary. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743. Under charter, power to take land in extension of streets, and Gen. St. 1902, § 3710, authorizing railroad commissioners to determine whether new highway should cross over or under road, etc., held that city had power to condemn land for purpose of extending street across a railroad and through station building. New York, etc., R. Co. v. New Haven, 81 Conn. 581, 71 A 780.

73. Telegraph company held entitled to condemn right of way over railroad's right of way for line, acquired under B. & C. Comp. Or. §§ 5074, 5075, 4750, as amended. Pacific Postal Tel.-Cable Co. v. Oregon & C. R. Co., 163 F 967. Street may be condemned over railroad right of way, since it does not destroy existing use. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

74. Railroad cannot, under general statutes, condemn land already devoted to railroad uses. Miller v. Cincinnati, etc., R. Co. [Ind. App.] 88 NE 102. Where necessity exists, one canal company will be allowed to condemn a part of right of way of another for purpose of enlarging same. Portneuf Irr. Co. v. Budge [Idaho] 100 P 1046.

be exempt.[75] The necessity which will authorize appropriation of land devoted to a public use is one existing in the nature of things and not created by condemnor.[76] Delegated power can be asserted against property devoted to a public use to the destruction thereof only when clearly and expressly authorized,[77] but, where the two uses are not inconsistent, a general grant of power is sufficient.[78] The existing use must not be interfered with more than is necessary.[79] Expense and care incident to crossing does not prevent the extension of a street across a railroad right of way.[80] Priority in time prevails where the same property is sought in condemnation by different persons.[81]

§ 4. *What is a "taking," "injuring," or "damaging" of property.*[82]—See 11 C. L. 1206.—While the constitution and laws of each state must be looked to in determining what constitutes private property[83] and a "taking" thereof,[84] generally speaking, any act which deprives the owner of the beneficial use and free enjoyment of his property,[85] or so restrains its use and enjoyment as to materially affect its value, is a taking,[86] unless done in the exercise of the sovereign police power,[87] improve-

75. Property owned by railroad but leased to mill held not devoted to a public use. State v. King County Super. Ct. [Wash.] 103 P 469. Condemnation of lands of water company held properly not restrained where not used in exercise of franchise and where other reservoir sites are available. Scranton Gas & Water Co. v. Delaware, L. & W. R. Co. [Pa.] 73 A 1097. Mere possibility that land of water company may at some future time be necessary to exercise of franchise does not prevent taking thereof, nor does present employment thereof, if use is not necessary to exercise of franchise. Id. Where mill dam in connection with gristmill secured by condemnation is used almost wholly for private purposes and very little grinding for toll is done, it may be taken for public use in effecting drainage. Zehner v. Milner [Ind.] 87 NE 209. Where it is sought to take property already devoted to a public use, necessity will not be measured by extent to which use is actually applied, but rather by nature and character thereof. Portneuf Irr. Co. v. Budge [Idaho] 100 P 1046.

76. Scranton Gas & Water Co. v. Delaware, L. & W. R. Co. [Pa.] 73 A 1097.

77. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743. Clear legislative authority is necessary. Scranton Gas & Water Co. v. Delaware, L. & W. R. Co. [Pa.] 73 A 1097.

78. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

79. New York, etc., R. Co. v. New Haven, 81 Conn. 581, 71 A 780.

80. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

81. State v. Pierce County Super. Ct., 53 Wash. 321, 101 P 1094. Purchase of land by individuals not vested with power of eminent domain for right of way for road for unorganized railroad which they are promoting does not withdraw land from power of state to condemn (Toledo & I. Trac. Co. v. Toledo & C. I. R. Co., 171 Ind. 213, 86 NE 54), and conveyance to company after its organization and after appropriation by another road passes it subject to the servitude of latter (Id.), and adoption by company of its promoters' acts in locating and purchasing of right of way does not relate back so as to defeat such servitude (Id.).

82. **Search Note.** See note in 5 C. L. 1109; 11 Id. 1209; 14 L. R. A. 370, 381; 17 Id. 474; 18 Id. 166; 24 Id. 721; 43 Id. 554; 48 Id. 698; 57 Id. 932; 2 L. R. A. (N. S.) 598; 3 Id. 323; 4 Id. 202; 5 Id. 1086; 7 Id. 87, 108, 506; 9 Id. 426, 496; 13 Id. 916; 15 Id. 49; 4 A. S. R. 399; 9 Id. 144; 19 Id. 459; 22 Id. 50; 25 Id. 478; 28 Id. 230; 30 Id. 837; 51 Id. 549; 84 Id. 924; 85 Id. 291; 106 Id. 232; 109 Id. 904; 2 Ann. Cas. 155, 163, 535, 972; 4 Id. 992; 5 Id. 841; 7 Id. 750, 1191; 8 Id. 956; 9 Id. 1033; 10 Id. 1060; 11 Id. 464.

See, also, Eminent Domain, Cent. Dig. §§ 161-164, 215-324; Dec. Dig. §§ 63, 81-121; 15 Cyc. 646-774, 786-788; 10 A. & E. Enc. L. (2ed.) 1102.

83. "Property" as used in constitutional provisions means right to use, dispose of, and have dominion over, to exclusion of others. Oakwood Drainage Com'rs v. Knox 237 Ill. 148, 86 NE 636. Word "property" as used in Const. 1906, art. 3, § 17, providing that private property shall not be damaged or taken, etc., includes every specie of value, right, or interest. Illinois Cent. R. Co. v. State [Miss.] 48 S 561. Abutter's easement of light, air, and access in street, is property. Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 SW 1094. Where fee in street is separate of abutting property, latter must be deemed to have an easement or right of subjacent support, which cannot be taken except upon just compensation. In re Law, 128 App. Div. 103, 112 NYS 619. Where landowner had purchased from canal company a water right entitling him to sufficient water to irrigate his land upon payment of fixed amount, it constitutes property of which he cannot be deprived without just compensation (Knowles v. New Sweden Irr. Dist. [Idaho] 101 P 81), and levying of assessment upon land by water district for purpose of purchasing canal and water system without first condemning his right, constitutes a "taking" (Id.).

84. Slaughter v. Meridian L. & R. Co. [Miss.] 48 S 6.

85. Though owner had no less of material thing than before. Lovett v. West Virginia Cent. Gas Co. [W. Va.] 65 SE 196. Any destruction, interruption, or deprivation of usual and ordinary uses of property amounts to a taking. Knowles v. New Sweden Irr. Dist. [Idaho] 101 P 81.

86. People v. Murphy, 129 App. Div. 260, 113 NYS 855.

Held a taking: Laying of gas pipes in soil

ment of navigation,[88] or in the exercise of legitimate control over public service corporations, etc.[89] There must usually be a direct invasion,[90] however, and of such a character as to charge those interested with notice thereof.[91] As against

without consent of owner. Lovett v. West Virginia Cent. Gas Co. [W. Va.] 65 SE 196. Acquisition of right to enter upon land and lay and maintain a tile ditch. Oakwood Drainage Com'rs v. Knox, 237 Ill. 148, 86 NE 636. Diversion of water of non-navigable stream, so as to deprive owner of natural flow adjacent to and upon his premises. Cohen v. U. S., 162 F 364. Laws 1908, p. 1221, c. 429, § 1, relating to protection of natural mineral springs, prohibiting acceleration of flow of percolating waters or natural carbonic acid gas from wells bored in rock, by pumping, etc., 1st, absolutely and without qualification, and 2nd, where result will be to impair natural flow or quality of water or gas in well of another, held unconstitutional as a taking of private property. Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 326, 87 NE 504. Under Const. § 242, providing that municipal corporations taking private property for public use must make compensation therefor, city cannot take underground stream flowing under ground of individual for a sewer without compensating him therefor. Kevil v. Princeton [Ky.] 118 SW 363. Where attorney is under no obligation to render gratuitous services for a pauper and may refuse without penalty of disbarment or contempt, denial of compensation because appointment was in excess of court's authority is not a violation of Const. art. 1, § 21, prohibiting taking of property without just compensation. Clay County Com'rs v. McGregor, 171 Ind. 634, 87 NE 1. New York, O. & W. R. Co. held authorized to construct bridge across Fish creek, under Laws 1850, p. 224, c. 140, § 28, subd. 5, same having been abandoned as a navigable stream, and hence entitled to compensation where canalizing creek required building of new bridge (People v. New York, O. & W. R. Co., 133 App. Div. 476, 117 NYS 1048), and it was not deprived of right to compensation by Laws 1869, p. 142, c. 84, § 3, giving it special authority to build but providing state had right to resume use of creek without compensation, since such authority was not necessary and canalization was not a resumption of a former use, a wider strip being taken (Id.).

87. See post, subsection, Exercises of Police or Taxing Power.

88. Change of flow of tide waters below low-water mark by government in improvement of navigation held not a taking of property of a riparian owner though it interferes with access, etc. such rights being subject to paramount right of government to improve navigation. Home for Aged Women v. Com., 202 Mass. 422, 89 NE 124. Extension of private title under tide water to low-water mark by colonial ordinance of 1647 held not to deprive state of right to increase depth of water in Charles river in improvement of navigation without making compensation, though it flooded such tide lands. Crocker v. Shamplin, 202 Mass. 437, 89 NE 129.

89. Valid regulation of railroad as a public carrier is not ordinarily a taking. Pittsburg, etc., R. Co. v. Railroad Com., 171 Ind. 189, 86 NE 328. Not entitled to compensation for its property necessarily taken in construction of connection with another road pursuant to valid order of railroad commission. Id. Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595 (U. S. Comp. St. Supp. 1907, p. 909), providing that any common carrier receiving property for interstate shipment shall be liable to holder of bill of lading for any damage caused by it or connecting carrier, etc., held not a taking of private property for a public use. Louisville & N. R. Co. v. Scott [Ky.] 118 SW 990.

Held a taking: Order of railroad commissioners fixing rate so as to require carrier to transport at less than cost or requiring shipper to pay more than is reasonable. Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966. St. 1898, § 1797-56, as amended by Laws 1907, p. 445, c. 454, providing that railroad commission in granting permission for a grade crossing between two railroads shall apportion expenses, does not authorize imposition of expenses upon senior road exempt therefrom by its charter, since it would constitute a taking of property. State v. Railroad Com., 140 Wis. 145, 121 NW 919. Rev. St. 1895, art. 4575, and rules of commissioners thereunder and under § 4574, if construed to require carrier to furnish its cars for points beyond own line, held a taking of private property without just compensation, since no compensation is provided. Gulf, etc., R. Co. v. State [Tex. Civ. App.] 120 SW 1028.

90. Depreciation in value of property because of unsightliness of deep cut on railroad right of way near land held not a damaging. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610. Mere indirect injuries from smoke, noise, vibration, and dirt from trains properly operated on own property, does not render company liable. Wunderlich v. Pennsylvania R. Co. [Pa.] 72 A 247. Under Laws 1903, p. 332, c. 147, one whose land does not abut on canal and no part of which is taken is not entitled to damages for destruction of access thereto from one direction. Vogel v. State, 61 Misc. 35, 114 NYS 548. Adjoining property owner held not entitled to recover for alleged injury to property arising from the construction and maintenance of a station and loop by a street car company upon its own land. Griveau v. Southern Chicago City R. Co., 130 Ill. App. 519. Loss of rents resulting from temporary obstruction erected by city was not a taking of private property for private use. Lefkovitz v. Chicago, 142 Ill. App. 27.

91. St. 1892 p. 164, c. 185, authorizing city of Pittsfield to take certain water for additional water supply, etc., contemplates such a taking that landowners and others interested would have notice thereof. Bryant v. Pittsfield, 199 Mass. 530, 85 NE 739. Taking of deed to land on brook, with right to lay pipe and construct an aqueduct, erection of dam and diversion of water through pipe, done professedly under St. 1892, p. 164, c. 185, providing for additional water supply for Pittsfield, held a "taking of the water" without some instrument or paper denoting transfer of title. Id.

one having a mere easement, the purposed use must interfere with the enjoyment thereof to amount to a taking.[92] An assumption of possession under a claim of ownership does not constitute a taking.[93] A possibility of a reverter on a determinable fee or a right of entry for breach of condition subsequent does not constitute one an "owner" within the New Hampshire statute,[94] but a tenant in possession is an "owner" within the New York code.[95] While the condemnor may put the property to all the contemplated uses and may assert all the rights acquired therein by the original taking,[96] any material changes in the conditions upon which damages were expressly assessed constitute a new taking, if prejudicial.[97] Where the state owns the bed of a river and its waters, it may divert water therefrom for a canal without making compensation.[98]

The constitutions of many states further conserve private property rights by inhibitions against the "damaging" or "injuring" thereof,[99] in which case an actual invasion is not necessary to give a right of damages,[1] although there must be an interference with the use or enjoyment by some physical inconvenience, discomfort, or detriment.[2]

92. Telephone poles and wire on right of way of railroad by consent held not to constitute additional burden on right of way of another railroad crossed, there being no interference with operation of road. St. Louis, etc., R. Co. v. Cape Girardeau Bell Tel. Co., 134 Mo. App. 406, 114 SW 586.

93. Where railroad company, which had been granted by Act Dec. 19, 1838 (8 Stat. 484), such lots and parts of lots in town of Columbia as belonged to state, inclosed land claimed by plaintiff, in action for damages, instruction that, if plaintiff was owner, company was not liable for value of land inclosed but not occupied, but only for damage thereto, held properly modified by statement that proposition of law was alright if defendant inclosed same merely for purpose of asserting title thereto, and not for purpose of appropriating. Mahoney v. Southern R. Co., 82 S. C. 215, 64 SE 228.

94. Not an "owner" within Pub. St. 1901, c. 45, § 2. Lyford v. Laconia [N. H.] 72 A 1085. Where land is conveyed to religious society in trust for religious purposes, to revert to donor or his heir upon ceasing to be so used, held that heir had no such ownership as entitled him to compensation. Id.

95. Tenant in possession under a lease for six years is an "owner," under Code Civ. Proc. § 3358, defining an owner as a person having any estate, interest, or easement in property to be taken on condemnation of land, etc. (Baker v. State, 63 Misc. 549, 118 NYS 618), and is entitled to compensation though condemnor has settled with owner of fee (Id.).

96. Assertion of rule that street extending to high-water mark of navigable water gradually extends as such mark recedes by accretion held not a taking of property without just compensation in violation of art. 1, § 21, of Const., since it will be presumed that original award covered same. State v. Yates, 104 Me. 360, 71 A 1018.

97. Where damages in condemnation proceedings are assessed on basis of an open passageway through railroad embankment, it cannot be thereafter closed without being condemned, though public will be served thereby. Missouri Pac. R. Co. v. Stone [Kan.] 101 P 666.

98. Fulton L., H. & P. Co. v. State, 62 Misc. 189, 116 NYS 1000.

99. Under Const. 1906, art. 3, § 17, municipality laying a street over a railroad right of way must proceed under eminent domain statute. Illinois Cent. R. Co. v. State [Miss.] 48 S 561. Under constitutional provision making railroad company liable for property taken or damaged, a legislative charter to operate a designated line does not exempt for damages to private property from operation of road in such manner as to constitute a private nuisance. Alabama & V. R. Co. v. King [Miss.] 47 S 857. Provisions of constitution forbid not only taking of private property of one but also laying of an imposition upon it. Alma Coal Co. v. Cozad, 79 Ohio St. 348, 87 NE 172. Under Const. art. 16, § 8, providing for compensation for property taken, injured, or damaged in the construction of a railroad, where abutter has no title in the street, he cannot recover damages as for property taken or injured. Willock v. Beaver Val. R. Co., 222 Pa. 590, 72 A 237. Notwithstanding amended constitution of Missouri (art. 2, § 21 [Ann. St. 1906, p. 148]), providing that private property shall not be taken or damaged for public use without just compensation, does not render city constructing sewer in alley adjoining building liable for cracking where lot in natural state would not have settled or crumbled, and where owner had notice of construction in time to have protected building. Johnson v. St. Louis [C. C. A.] 172 F 31.

1. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610.

2. Heilbron v. St. Louis S. W. R. Co. [Tex. Civ. App.] 113 SW 610. Interference with religious services by the annoyance from noises in rightful operation of trains near church, without physical interference with church property, does not constitute a "damaging" within Const. art. 1, § 22, providing that private property shall not be taken or damaged for public good without just compensation. Twenty-Second Corp. of Church of Jesus Christ of Latter-Day Saints v. Oregon Short Line R. Co. [Utah] 103 P 243.

Exercises of police or taxing power.[See 11 C. L. 1207]—In the exercise of its sovereign police power,[3] a state is not liable for private property incidentally taken and may even destroy property which is dangerous or harmful to the public;[4] where, however, property is harmless in itself and is properly used, it cannot be appropriated in the exercise of the power without compensation.[5]

Establishment or vacation of street.[See 11 C. L. 1208]—Rights under general statutes specifically providing for damages in the establishment and vacation of streets are treated elsewhere.[6] An abutting property owner has an interest in the street distinct from that of the general public, which is private property,[7] and he cannot be deprived of his right of access afforded thereby without just compensation,[8] especially if he has no right.[9] One is not entitled to compensation for the destruction of his rights as a member of the general public.[10] Right to compensation under special constitutional provisions depends upon the terms thereof.[11] A street may ordinarily be improved for public use without liability to abutters.[12]

Change of street grade.[See 11 C. L. 1208]—While the matter of damages arising from a change of grade is frequently regulated by statute,[13] under a constitutional provision requiring compensation to be made where private property is "taken, injured or damages," an abutter is entitled to damages[14] resulting from a change of grade.[15] It is a damaging rather than a taking, however.[16]

3. Police regulation: County ordinance prohibiting sale of intoxicating liquors within the county is not a taking of property without just compensation, though it practically destroys value of liquors on hand. Ex parte Young, 154 Cal. 317, 97 P 822. Act of city in preventing rebuilding and in removal of building partially destroyed by fire, done for fire protection, held not a condemnation of property for public use, but exercise of police power. Davison v. Walla Walla, 52 Wash. 453, 100 P 987. Iowa statute of 1904 (Acts 30th Gen. Assem. 1904, p. 61, c. 68), authorizing county boards to drain lands to promote public health, convenience and general welfare, as amended by Acts 32d Gen. Assem. 1907, p. 100, c. 95, providing that where drain crosses railroad right of way, no damages for bridging shall be allowed, being an exercise of police power, held not unconstitutional as a taking without just compensation. Chicago, B. & Q. R. Co. v. Appanoose County Sup'rs, 170 F 665. In abating public nuisance, public does not exercise power of eminent domain, but police power (Louisa County v. Yancey's Trustee [Va.] 63 SE 452), and there is no "appropriation to public use" though property is destroyed (Id.).

Not a police regulation: Ordinance absolutely prohibiting bill boards displaying any advertisement held a taking of private property without just compensation, in violation of Const. art. 1, § 14, and not sustainable as a police regulation. Varney v. Williams [Cal.] 100 P 867. Building Code of city of New York, § 144, prohibiting erection of "sky signs" over 9 feet high, being not justifiable as a police regulation, held a taking of property. People v. Murphy, 129 App. Div. 260, 113 NYS 855.

4. Crocker v. Champlin, 202 Mass. 437, 89 NE 129.

5. Crocker v. Champlin, 202 Mass. 437, 89 NE 129. Right of way is property, and cannot be destroyed or arbitrarily restricted in interest of public health without compensation, as provided by Const. pt. 1, art. 10. Durgin v. Minot [Mass.] 89 NE 144.

6. See Highways and Streets, § 2.

7. Lund v. Idaho & W. N. R. Co., 50 Wash. 574, 97 P 665. Abutter is entitled to use of street to its full width and cannot be deprived of any part thereof without just compensation. Brazell v. Seattle [Wash.] 104 P 155.

8. Landowner's right of egress and ingress from street is private property. Lund v. Idaho & W. N. R. Co., 50 Wash. 574, 97 P 665. Vacation of a street or alley depriving a property owner of access is a taking within constitution for which compensation must be made. Ridgway v. Osceola, 139 Iowa, 590, 117 NW 974.

9. Vacation of street not wholly depriving property owner of access does not entitle him to compensation. City of Newark v. Hatt [N. J. Law] 71 A 330.

10. Owners of private property in vicinity of public square, whose means of egress and ingress would not be destroyed by discontinuance of same, have no vested right in continuance thereof, and the discontinuance does not constitute a taking. East Chicago Co. v. East Chicago, 171 Ind. 654, 87 NE 17.

11. To enable owner of land not abutting on newly opened street to recover damages under Const. art. 16, § 8, injury complained of must be proximate, immediate, and substantial. In re Ogontz Ave. [Pa.] 73 A 1096. Claim that when street is filled to grade injuries may result is too remote. Id.

12. In the case and improvement of streets, city may remove shade trees therein without compensation to owner, and hence no notice to him need be given. Rosenthal v. Goldsboro, 149 N. C. 128, 62 SE 905.

13. See Highways and Streets, § 5.

14. Abutting property, no part of which is taken, is not damaged by separation of street and railroad grades, where equally valuable after change. City of Detroit v. Detroit

Railroads or other structures on city streets.[See 11 C. L. 1208]—Though an abutter owns the fee of a street, it is subject to the paramount right of the public to use the same for all proper street purposes,[17] but, for any additional burden thereon, he is entitled to compensation.[18] In determining what constitutes an additional burden, due deference must be given to legislative enactment,[19] since the legislature may, within reasonable limits, extend street uses without compensation.[20] Ordinarily the use of a street for commercial railroad purposes,[21] unusual and unforeseen permanent increase in traffic,[22] or the laying of additional tracks therein for such use,[23] constitutes such a burden, although the decisions are not all in harmony thereon.[24] Compensation, however, need be made only for the taking or damaging of private property rights in the street[25] as distinct from those enjoyed as a member of the public.[26] The construction of a telegraph line along a rural public highway is not deemed an additional burden in Georgia.[27]

United R. Co., 156 Mich. 106, 16 Det. Leg. N. 48, 120 NW 600.

15. Sievers v. Root [Cal. App.] 101 P 925; Slaughter v. Meridian L. & R. Co. [Miss.] 48 S 6; Cassell v. Nicholasville Councilmen [Ky.] 119 SW 788. It is immaterial that change was made by owner, under Ky. St. § 3567 (Russell's St. § 1589), authorizing certain cities to require abutting owners to make certain sidewalk improvements. Id. Although city has taken all steps necessary to affect change of street grade, save compensating abutter, finding that old grade existed in action to enjoin physical change held correct since proceeding was void as against abutter. Sievers v. Root [Cal. App.] 101 P 925. Where one has access to his property only over a private way appurtenant thereto, he is entitled to compensation for closing of same by raising of highway into which it leads. Cutter v. Boston, 200 Mass. 400, 86 NE 798.

16. Raising of grade of street to meet grade of bridge held not to constitute a taking of property of abutting owner, requiring compensation. Warner v. State, 132 App. Div. 611, 117 NYS 108.

17. Unforseen uses to which street is put are not within those for which compensation is made in original taking. In re Low, 128 App. Div. 103, 112 NYS 619. Use of street which would constitute a grave private nuisance to abutting property can be deemed to have been acquired by a taking for a street. Lentell v. Boston & W. St. R. Co., 202 Mass. 115, 88 NE 765. Since construction of a tunnel under the street is a proper use of the street, legislature may authorize same without making compensation. Fifty Associates v. Boston, 201 Mass. 585, 88 NE 427.

18. Oakwood Drainage Com'rs v. Knox, 237 Ill. 148, 86 NE 636. In determining whether an additional burden has been imposed, a distinction is recognized between elevated railways and other uses. Lentell v. Boston & W. St. R. Co., 202 Mass. 115, 88 NE 765.

19. Declaration of St. 1903, p. 124, c. 163, § 3, that trestle erected by street railway company to carry tracks over railroad should not be additional servitude or easement, but coupled with provision for compensation to any person legally damaged, held equivalent to statement that legislature did not assume to finally decide whether street could be so used without compensation. Lentell v. Boston & W. St. R. Co., 202 Mass. 115, 88 NE 765.

20. Lentell v. Boston & W. St. R. Co., 202 Mass. 115, 88 NE 765.

21. In re Low, 128 App. Div. 103, 112 NYS 619; Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733. Impairment of access by construction of steam railway in street held a taking of property. Foster Lumber Co. v. Arkansas Val. & W. R. Co. [Okl.] 100 P 1110; Morris v. Oregon Short Line R. Co. [Utah] 102 P 629.

22. Where dummy line for carriage of passengers, slightly used, through judicial and private sales became part of great railroad system and heavy trains were daily operated thereon, held that abutters could recover for increased use. Hutcheson v. International & G. N. R. Co. [Tex.] 119 SW 85.

23. Laying of additional railroad tracks in street is an additional burden unless provided for at time of original assessment of damages. Henry v. Mason City & Ft. D. R. Co. [Iowa] 118 NW 310. Properly constructed and maintained spur tracks leading from street car tracks to barn held not an additional servitude. Donner v. Metropolitan St. R. Co., 133 Mo. App. 527, 113 SW 669.

24. Railroad in street held not an additional burden unless it so occupies street as to exclude use by others. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733. Under Const. 1890, § 17, providing that private property shall not be taken or damaged, without just compensation, a **street railway** imposes an additional burden on a street. Slaughter v. Meridian, L. & R. Co. [Miss.] 48 S 6.

25. Where alley has been duly vacated, construction of railroad embankment across same is not an injury to persons deprived of right to travel thereover, since vacation and not construction of embankment deprived them of the right. Hall v. Atlanta, B. & A. R. Co. [Ala.] 48 S 365.

26. Railroad under municipal authority, arched street by a viaduct, leaving a sufficient passageway. Held no taking of property 50 feet away. Crofford v. Atlanta, B. & A. R. Co. [Ala.] 48 S 366. Where construction of elevated street railroad destroys abutters' easement in street of air, light and access, he may recover damages therefor. Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 SW 1094. Construction in street of trestle to carry street railway tracks over railroad, which impeded access to property abutting, partially shut off air and light, and which,

§ 5. *Conditions precedent to the exercise of the power.*[28] See 11 C. L. 1210 Since eminent domain involves the forcible taking of private property against the owner's consent, all conditions precedent must be strictly complied with.[29] Among the more common of such conditions are the filing of maps and profiles of the enterprise,[30] procurement of the consent of a designated percent of abutters to occupation of the street,[31] attempts to agree upon amount of damage,[32] etc. The failure to negotiate, however, may be waived, and especially proof thereof.[33] While the condemnor must have authority to prosecute the enterprise, all steps necessary to carry it to completion need not have been taken.[34]

§ 6. *Measure and sufficiency of compensation.*[35] See 11 C. L. 1211 The constitutional right to compensation may be waived [36] or released by agreement,[37] but, in the

by light and noise from cars, disturbed sleep, etc., held a taking. Lentell v. Boston & W. St. R. Co., 202 Mass. 115, 88 NE 765.

27. Southern Bell Tel. & T. Co. v. Nalley, 165 F 263.

28. Search Note: See note in 7 L. R. A. (N. S.) 639.

See, also, Eminent Domain, Cent. Dig. §§ 179-214, 461-467; Dec. Dig. §§ 69-80, 169, 170; 15 Cyc. 639-646, 812-829; 10 A. & E. Enc. L. (2ed.) 1050, 1053; 7 A. & E. Enc. P. & P. 467.

29. Vote of majority of legal voters of school district to purchase certain property is not equivalent to authority to condemn, as required by Act of Oct. 19, 1903 (Laws 2d Sp. Sess. 1903 [P. L. p. 32]). Fuller v. Burough of Chatham Board of Education [N. J. Law] 73 A 476.

30. Railroad Law (Laws 1890, p. 1084, c. 565), § 6, relating to condemnation of land by railroads, and requiring filing of a map and profile, does not apply to acquisition of land to construct a new section of main track. New York Cent. & H. R. R. Co. v. Untermyer, 117 NYS 443. Laws 1905, p. 2023, c. 723, § 2, requiring submission of maps and profiles and approval of state water commission before taking lands for new or additional "sources" of water, held not to exclude from its operation a whole territory in which city has only incidentally procured some part of its water supply. Queens County Water Co. v. O'Brien, 131 App. Div. 91, 115 NYS 495.

31. Act June 1, 1907 (P. L. p. 368), providing that before any street railway company shall exercise power of eminent domain to occupy highway, consents of owners of at least 51 per centum of foot frontage shall be obtained, refers to foot frontage of entire distance to be traversed and not to particular portion of it represented by foot frontage of complaining property owner. Lehman v. Chambersburg & G. Elec. R. Co. [Pa.] 73 A 440. Consents acquired prior to Act June 1, 1907 (P. L. p. 368), are sufficient. Id.

32. Fact that one owner could agree does not affect another that cannot agree. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. Where owner declined offer and stated that he could not give an answer within a week, held a failure to agree. Id. Where proceeding indicates intention to take land and pay for same, condemnor cannot excuse its failure to negotiate for a purchase on a plea that land had already been dedicated to the use. Beechwood Park Land Co. v. Summit [N. J. Law] 73 A 57.

33. Where owner appoints an assessor, entered into an arbitration and accepted award, he waives failure of condemnor to prove attempt to negotiate. Atlanta Terra Cotta Co. v. Georgia R. & Elec. Co. [Ga.] 64 SE 563. Direct proof of attempt to agree with owner as to compensation is waived by calling of jury to assess damages and going to trial thereon without objection. Kaschke v. Canfield [Colo.] 102 P 1061.

34. Where state has given its consent to bridging of navigable stream by projected railroad company in accordance with Pierce's Code, §§ 7091, 7814, it may proceed to condemn approaches although bridge could not be built until consent of secretary of war is acquired. State v. Puget Sound & G. H. R. Co. [Wash.] 103 P 809. That railroad company has not acquired right from city to cross streets, held not to prevent condemnation. State v. Spokane County Super. Ct. [Wash.] 104 P 148.

35. Search Note: See notes in 3 C. L. 1200; 15 L. R. A. 413; 16 Id. 805; 26 Id. 751; 47 Id. 782; 60 Id. 204; 3 L. R. A. (N. S.) 333, 912; 4 Id. 890; 5 Id. 922; 9 Id. 781; 10 Id. 1003; 11 Id. 996; 13 Id. 237; 15 Id. 531, 679; 19 A. S. R. 458; 1 Ann. Cas. 304, 741; 4 Id. 1174, 1185; 6 Id. 382; 8 Id. 696; 9 Id. 115; 11 Id. 697.

See, also, Eminent Domain, Cent. Dig. §§ 215-402; Dec. Dig. §§ 81-150; 15 Cyc. 646-774, 786-788; 10 A. & E. Enc. L. (2ed.) 1132.

36. Where owner tells attorney for railroad that it might go on with work, that he would not interfere, and stands by for years without obejction while expensive improvements are made, held a waiver. Pearl Oyster Co. v. Seattle & M. R. Co., 53 Wash. 101, 101 P 503.

37. Instrument executed by owner of lot extending to center of street by which he consents to maintenance of elevated railroad in street and operation of same "as it is now constructed," without compensation, held more than a revocable license and to release damages. Smyth v. Brooklyn Union El. R. Co., 193 N. Y. 335, 85 NE 1100. Where abutter has only an easement in street and gives consent to construction and maintenance of elevated railroad thereon, he releases so much of easement as is interfered with. Smyth v. Brooklyn Union El. R. Co., 193 N. Y. 335, 85 NE 1100. Provision in lease that railroad then being constructed should go through the premises and should not be opposed by lessee held not to lessen lessee's right to damages. Nelson v. New Jersey Short Line R. Co. [N. J. Err. & App.] 71 A 304.

absence thereof, the owner of the property taken is entitled to the fair market value [38] of the land under conditions existing [39] at the date of the issuance of the summons,[40] filing of the petition,[41] or the time of the trial,[42] according to the statute of the various states. The owner is entitled to actual damages, however small,[43] but where the property has no substantial value, he can recover only nominal damages.[44] Where the property taken is a part of a connected whole,[45] its value must be estimated as a part of such larger tract,[46] and the mere fact that the tract has been platted is not conclusive that its value should be assessed as lots.[47] Damages are not confined to the market value of the property for its present use,[48] but its adaptability for other uses should be considered,[49] not, however, as an independent element of damage, but

38. Instruction using terms "fair market value" and "full fair market value," and defining same as such sum as land was worth in the market to persons generally who would pay its "just and full value," held not erroneous. American States Security Co. v. Milwaukee Northern R. Co., 139 Wis. 199, 120 NW 844. In determining compensation for land taken for railroad purposes, jury must find fair market value of strip as parcel of whole tract, by considering what the land was worth in market to persons generally who would pay full market value therefor. Id. Measure of damages in taking part of land used for school purposes is diminution of value when used for school purposes. San Pedro, etc., R. Co. v. Salt Lake City Board of Education [Utah] 99 P 263. In determining value of the whole tract of land, held error to compute the number of lots into which it could be divided and value of each lot. Hamory v. Pennsylvania, M. & S. R. Co., 222 Pa. 631, 72 A 227.

39. Where value of property was assessed on basis of existence of certain alleys giving access, owners cannot complain in proceedings that ordinance vacating the alleys was void. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933. Evidence held not to sustain claim of landowner that her land received benefit from flow of water in adjacent stream which flowed only during rainy season and which overflowed her land during freshet. Cohen v. U. S., 162 F 364.

40. Code Civ. Proc. § 1249, providing that right to compensation shall be deemed to have accrued as of date of issuance of summons, held not violative of Const. art. 1, § 14, prohibiting taking of private property without first having made compensation. City of Los Angeles v. Gager [Cal. App.] 102 P 17. Under Street Opening Act (St. 1903, p. 376, c. 268), providing that said action shall be governed on such "rules of the Code of Civil Procedure" as may be applicable, held that compensation should be assessed as of date of issuance of summons, under Code Civ. Proc. § 1249 (City of Los Angeles v. Gager [Cal. App.] 102 P 17), the word "rules" not being limited to those governing pleading and practice (Id.).

41. Value of land taken for railroad purposes is assessed as of time of filing of petition. Kansas City So. R. Co. v. Boles [Ark.] 115 SW 375.

42. Under Const. art. 1, § 16, providing that no right of way shall be appropriated until full compensation therefor be made or ascertained, etc., damages must be assessed as of time of trial and not of filing of petition. Grays Harbor & P. S. R. Co. v. Kauppinen, 53 Wash. 238, 101 P 835.

43. Instruction that "if the injury be small or the mitigating circumstances be strong, nominal damages only are given," and "if the damages are only the imaginary or possible result of tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote," held inappropriate. Atlanta Terra Cotta Co. v. Georgia R. & Elec. Co. [Ga.] 64 SE 563.

44. Where naked fee in street has become separated from abutting property, owner is entitled only to nominal damages for taking thereof, it being of no substantial value to him. Beverly Road in City of New York, 131 App. Div. 147, 115 NYS 208.

45. Lots separated by alley may be considered as contiguous and parts of single track where used as a unit. Kansas City So. R. Co. v. Boles [Ark.] 115 SW 375.

46. Krier v. Milwaukee Northern R. Co., 139 Wis. 207 120 NW 847.

47. Although owner laid same out in plan and had plan recorded, it must be considered as a single tract where for 60 years it has been enclosed as one entire property and streets have never been opened. Scott v. Donora So. R. Co., 222 Pa. 634, 72 A 282. Although tract has been mapped into lots, where it has no market value as lots, evidence of value thereof as lots is inadmissible. In re Simmons, 117 NYS 64. Evidence that tract was rough and uneven and covered with dense woods, that no street had been opened and that no lot had been sold, held that tract had no value as bullding lots. Id.

48. In re Simmons, 130 App. Div. 356, 114 NYS 575.

49. In re Simmons, 130 App. Div. 356, 114 NYS 575. Damages must be awarded on basis of value of property for its present use or for purposes to which it could be most advantageously applied under existing conditions. New York, etc., R. Co. v. New Haven, 81 Conn. 581, 71 A 780. Where land is enhanced in value by reason of its peculiar location and adaptability for a particular use, which is destroyed by the taking, such fact is an element of damage. Minneapolis, St. P., R. & D. Elec. Trac. Co. v. Friendshuh [Minn.] 122 NW 451. Where property is suitable for warehouse or manufacturing purposes if trackage and switching facilities can be obtained, jury should consider possibility of effecting arrangements with railroad in same block. South Park Com'rs v. Ayer, 237 Ill. 211, 86 NE 704. In proceeding

only as affecting the present market value of the property.[50] Hence such contemplated use must not be remote or contingent,[51] and its value therefor must not arise from the fact that condemnor has decided to appropriate for such use.[52] One may purchase property and improve the same regardless of the probability of its being taken.[53] Damages cannot be lessened by an offer of other adjacent land in lieu of that taken,[54] nor can a railroad reduce its liability for dividing property by offering to provide conveniences not required by law.[55] In condemning the property of a water company, it is entitled to compensation for its physical property and for its franchise.[56] The condemnor is liable only for the damages growing out of the appropriation.[57]

Damages are not limited to the value of the land taken but include injuries to land not taken,[58] provided it is a part of the same general tract.[59] The two elements

to condemn land in tidal stream and the shore rights of owner of uplands, probable value as a mill site or for commercial purposes depending on use of tide lands cannot be considered. Grays Harbor Boom Co. v. Lownsdale [Wash.] 102 P 1041. Instruction in action for taking of part of church property in widening street that, in determining damages, jury should consider value of whole property for its most valuable use before taking and effect thereon by the taking, held not erroneous as limiting finding of value after the taking to particular use that had been most valuable before. First Presbyterian Church v. Pittsburg [Pa.] 72 A 347.

50. In re Simmons, 130 App. Div. 356, 114 NYS 575. Value for boom site. Grays Harbor Boom Co. v. Lownsdale [Wash.] 102 P 1041. While owner is entitled to fair market value for any use for which the land is adapted, the probability of a particular future use must be of such a character as to increase present market value. In re Simmons, 130 App. Div. 350, 114 NYS 571.

51. Contemplated use to constitute an element of damages must be valuable as well as available, and an available use means one probable and contingent on abandonment of use of adjoining property engaged by another in public service. Grays Harbor Boom Co. v. Lownsdale [Wash.] 102 P 1041.

52. In determining value of land for reservoir purposes, value for such purpose in connection with other parcels cannot be considered where its value for such purpose is due entirely to fact that city had decided to so use it (In re Simmons, 130 App. Div. 356, 114 NYS 575), and in absence of evidence that it enhanced the market value before appropriation (In re Simmons, 130 App. Div. 350, 114 NYS 571).

53. Krier v. Milwaukee Northern R. Co., 139 Wis. 207, 120 NW 847.

54. Where taking deprives owner of sufficient ground for his manufacturing plant, railroad cannot lessen its damages by offering owner benefit of option it has on adjoining land. Jeffery v. Chicago & M. Elec. R. Co., 138 Wis. 1, 119 NW 879.

55. Such as signals, bridges, etc. Jeffery v. Chicago & M. Elec. R. Co., 138 Wis. 1, 119 NW 879. Owner is entitled to compensation in money and hence need not accept promise of railroad to construct farm crossing and a water flume, but is entitled to damages for the reasonable cost thereof. Great Western R. Co. v. Ackroyd, 44 Colo. 454, 98 P 726. In condemnation to widen railroad right of way, instruction, to meet claim for damages for inconvenience caused by change of location of crossing, that company was bound to furnish him with crossing at such "point" as he should designate, held erroneous where Code, § 2022, used term "reasonable place" instead of point (Klopp v. Chicago, etc., R. Co. [Iowa] 119 NW 373), and reasonableness of farm crossing location, cannot be considered in condemnation proceeding to widen (Id.). In condemnation to widen right of way, jury may consider inconvenience caused by place of crossing, though under Code, § 2022, owner was still entitled to a crossing at such "reasonable place" as he might designate, since statute does not necessarily entitle him to crossing at old place. Id. In condemnation to widen railroad right of way, to defeat damages for inconvenience in changing location of crossing, company could not ask engineer if, eliminating expense, there was any engineering difficulty in locating new crossing at old location, since expense was material in determining whether company would have to locate thereat. Id.

56. In re Monongahela Water Co. [Pa.] 72 A 625. In determining value of waterworks system, the physical property as a going concern should be considered, and also the income based on reasonable tolls and market value of stock. Id.

57. Where highway is moved and railroad relocates its tracks, it is not liable for improvements and trees destroyed in establishment of highway. Miller v. Cincinnati, etc., R. Co. [Ind. App.] 88 NE 102. Damages against interurban railway for use of land previously condemned by railroad and then abandoned must not include changes made by railroad. Id.

58. Entitled to compensation for the land taken and damages to remainder. Jeffery v. Chicago & M. Elec. R. Co., 138 Wis. 1, 119 NW 879; Long Distance Tel. & T. Co. v. Schmidt [Ala.] 47 S 731. A taking for an underground railroad in street. In re Low, 128 App. Div. 103, 112 NYS 619. In proceedings by boom company to condemn lands in tidal stream and a way along shore for convenience of employes and shore rights of owner of upland, measure of damages are those resulting to shore rights from erosion and flooding, land actually taken, and added inconvenience to shore owner in getting to and from navigable channel. Grays Harbor

are frequently assessed together by rendering the condemnor liable for the difference between the value of the whole tract before the taking and the value of the remainder.[60] The damage to the remainder is the depreciation in the market value thereof.[61] Remote damages cannot be considered,[62] but all legitimate damages must be included in the original award, since there can be but one recovery.[63] The measure of damages is the same, whether arising in equitable actions or in condemnation proceedings.[64]

Particular elements of damage. See 11 C. L. 1214—In determining damages to the remainder, the nature and the effect of the proposed use may be considered,[65] and also all possible future uses to which the property may be put,[66] not constituting an

Boom Co. v. Lownsdale [Wash.] 102 P 1041. Where front of lot is more valuable than rear portion, in taking of front for street purposes, commissioners cannot take into consideration that portion adjoining that taken will face on street and be enhanced in value. In re New Street in City of New York, 63 Misc. 495, 117 NYS 409. Owner of banks of tidal stream is entitled to damages accruing from changed use of stream by construction of boom therein, though such use is lawful one. Grays Harbor Boom Co. v. Lownsdale [Wash.] 102 P 1041. Special verdict as (1) What was the fair market value of land condemned, considering the entire track, and (2) In what amount was fair market value of remainder depreciated by taking, held to duplicate damages under the evidence. Jeffery v. Chicago & M. Elec. R. Co., 138 Wis. 1, 119 NW 879.

59. Although tract is separated by railroad right of way, if valuable only for mining purposes, it must be treated as single piece, since drifts could be run under right of way. Missouri, K. & N. W. R. Co. v. Schmuck [Kan.] 100 P 282. Where land taken is a part of larger connected whole, owner may recover for injury done to whole, though a legal subdivision is taken. Kansas City So. R. Co. v. Boles [Ark.] 115 SW 375. Where land had been severed by prior condemnations into distinct pieces, in assessing damages to remainder only the piece from which a part is taken can be considered. In re Lehigh Val. R. Co. [N. J. Law] 72 A 39.

60. New York, etc., R. Co. v. New Haven, 81 Conn. 581, 71 A 780. Taken for railroad purposes. Klopp v. Chicago, etc., R. Co. [Iowa] 119 NW 373; Abermathy v. South & W. R. Co., 150 N. C. 97, 63 SE 180; American States Security Co. v. Milwaukee Northern R. Co., 139 Wis. 199, 120 NW 844.

61. Wolf v. Green Bay, etc., R. Co., 140 Wis. 337, 122 NW 743. Impairment of use of property by construction and operation of commercial railroad in street in front thereof. Morris v. Oregon Short Line R. Co. [Utah] 102 P 629.

62. Too remote: Dangers and annoyance from operation of road. Indianapolis & W. R. Co. v. Hill [Ind.] 86 NE 414. Use of word "annoyances" in sense of inconveniences in instructions authorizing jury to consider annoyances in assessing damages held injudicious. Toledo & C. I. R. Co. v. Wagner, 171 Ind. 185, 85 NE 1025. Dangers to occupants and stock on farm arising from lawful operation of railroad cannot be considered as being too remote. Toledo & C. I. R. Co. v. Wagner, 171 Ind. 185, 85 NE 1025. Incidental inconvenience and injury resulting from excavation made by a railroad across public alley, where no part of abutter's land is taken and where no additional burden is imposed, held consequential and unrecoverable. Choctaw, O. & W. R. Co. v. Castanien [Okl.] 102 P 88.

63. Indianapolis & W. R. Co. v. Branson [Ind.] 86 NE 834. Where relocation of highway contemplated removal of tracks of interurban railway, increased inconvenience and danger caused by relocation of tracks, held within damages awarded for establishment of highway. Miller v. Cincinnati, etc., R. Co. [Ind. App.] 88 NE 102.

64. In re Low, 128 App. Div. 103, 112 NYS 619.

65. Oelschleger v. Boston, 200 Mass. 425, 86 NE 883; In re Low, 128 App. Div. 103, 112 NYS 619. Where nature of use is such as will render homes on adjoining property uninhabitable for some time, owners are entitled to damages therefor. In re Low, 128 App. Div. 103, 112 NYS 619. Under Const. 1898, art. 167, providing that private property shall not be taken or damaged without just compensation, right of recovery includes damages caused by noise, smoke and vibrations incident to operation of railroad, which permanently depreciates value of property. Helmer v. Colorado, etc., R. Co., 122 La. 141, 47 S 443. In assessing damages in condemnation of land for a right of way, damages from discharge of cinders, ashes, smoke on premises and danger from fires, can be considered only as it affects market value. St. Louis & I. B. R. Co. v. Guswelle, 236 Ill. 214, 86 NE 230. Surface water necessarily cast back onto a land not taken by construction of railroad bed is an element of damage in determining value of land before and after taking. Blunck v. Chicago & N. W. R. Co. [Iowa] 120 NW 737.

66. Where railroad has right to lay as many tracks as it sees fit over condemned way, a present intention to lay but one does not lessen damages. Klopp v. Chicago, etc., R. Co. [Iowa] 119 NW 373. Where electric railway has power to use other motive power, jury should consider uses to which company may put the property. Pierce v. Chicago & M. Elec. R. Co., 137 Wis. 550, 119 NW 297. Where railroad has present right to electrify its road, fact that it may electrify upon acquiring land for additional track does not authorize full compensation for such electrifying, since effect of having additional track will not be material. New York Cent. & H. R. R. Co. v. Untermyer, 117 NYS 443.

additional burden.[67] While damages must be assessed for such inconveniences and injuries as are incident to the application of the property to the proposed use,[68] provided it affects the present market value of such remainder,[69] no award can be made for possible negligence.[70] That the land taken contains valuable deposits cannot be considered as an element of damage but only as it affects the market value of the land.[71] Where a street or highway is extended across a railroad right of way, the company is not entitled to compensation for cost of complying with crossing police regulations,[72] or damages for increased liability it might incur because of accidents thereat.[73] On the other hand, where property is taken for railroad purposes, no recovery can be had for the possibility of injury in crossing its tracks.[74] All rights incident to and dependent upon the land taken are proper elements of damages,[75] unless too remote and speculative.[76] Compensation must be made for all permanent immovable improvemnts,[77] but not for the cost incident to surrendering of the premises taken.[78] Although only an easement is taken, the possibility of a reverter should not be considered.[79]

67. In assessing damages to remainder, where land is taken for street purposes, commissioners cannot consider city's intention to so use as to impose additional burden, since damages therefor will then be assessed. In re New Street in City of New York 63 Misc. 495, 117 NYS 409.

68. Where, in extending street under railroad, adjoining land must be shored up to support tracks thereon, city is bound to pay cost thereof as part of compensation for the taking, and right to compensation is not affected by fact that railroad commissions order cut or that railroad might abandon use of tracks. New York, etc., R. Co. v. New Haven, 81 Conn. 581, 71 A 780. On proceeding to condemn land for widening street under Priv. Laws 1907, p. 934, c. 344, § 90, owner is entitled to damages for taking of and injury to his property, irrespective of whether work was skillfully done or not. Quantz v. Concord, 150 N. C. 539, 64 SE 433.

69. Where railroad company sinks great shafts in carrying on construction work in street, fact may be considered what market value of abutting premises would be if such fact was known. In re Low, 128 App. Div. 103, 112 NYS 619.

70. Where by statute a railroad is required to fence within a year and, if it fails, owner may fence at its expense, no damages can be allowed for possibility of landowner making same, since it will be presumed that company will comply with statute. Indianapolis & W. R. Co. v. Branson [Ind.] 86 NE 834. Where city extends street across railroad right of way, railroad company is not entitled to damages for possible injury by water which may be turned onto right of way during rainy season. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

71. Clay deposits. Atlanta Terra Cotta Co. v. Georgia R. & Elec. Co. [Ga.] 64 SE 563. Gravel deposit. Chicago, etc., R. Co. v. Mason [S. D.] 122 NW 601.

72. Constructing and maintaining of wing fences and cattle guards as required by statute. New York, etc., R. Co. v. Rhodes, 171 Ind. 521, 86 NE 840. Cost of constructing safety gates, signs, cattle guards, etc. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

73. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

74. Under Acts 1905 (Acts 1905, p. 62, c. 48), § 6, authorizing recovery of value of land taken for railroad purposes and for damages to remainder of tract, no damages can be recovered for possibility of injury to occupants in crossing track. Indianapolis & W. R. Co. v. Branson [Ind.] 86 NE 834.

75. Since, under Pierce's Code, § 8224a, upland owner of land on navigable stream has preference right to lease from state the harbor area, upon condemnation of tide lands, owner is entitled to value of statutory lease right. State v. Puget Sound & G. H. R. Co. [Wash.] 103 P 809. Where city, having previously acquired right to waters of lake, condemned strip of land surrounding same for the better protection thereof, it should pay a substantial sum for fee underlying water. In re Monroe, 131 App. Div. 872, 116 NYS 334.

76. Loss of future possible accretions is not an element of damages for lawful diversion of waters of stream. Cohen v. U. S., 162 F 364. In proceedings to condemn for a street land between a street and a cul-de-sac, evidence that, if cul-de-sac should at some future time be abandoned, land sought to be taken would be more valuable by reason of attaching thereto ownership of land in cul-de-sac, held speculative and not recoverable. City of Seattle v. Byers' [Wash.] 103 P 791.

77. Mining shafts on right of way taken. Missouri, etc., R. Co. v. Schmuck [Kan.] 100 P 282. Where upon condemnation of leasehold, tenant is given opportunity to remove machinery and other improvements but refuses to do so, and condemnor is compelled to sell same, condemnor is only liable for the price received, provided it used best efforts to obtain highest price. Consolidated Ice Co. v. Pennsylvania R. Co. [Pa.] 73 A 937.

78. Injury to and expense of removing personal property from land condemned are not recoverable. Kansas City So. R. Co. v. Anderson [Ark.] 113 SW 1030.

79. Hudson & M. R. Co. v. Wendel, 193 N. Y. 166, 85 NE 1020.

Benefits.[See 11 C. L. 1213]—While the right to assess benefits is largely dependent upon local statutes,[80] they cannot ordinarily be offset against damages for land taken [81] but only for injury to the remainder. The benefits must be actual [82] and must be peculiar to the particular property.[83] Where condemnation judgment determines that the property is damaged beyond special benefits, council in Seattle cannot thereafter assess same.[84]

Amount of damages as depending upon estate or interest appropriated or owned. [See 11 C. L. 1215]—The nature and extent of interest taken must always be considered,[85] as well as the character of the owner's interest.[86] Where only an easement is taken which does not interfere with the owner's use, the measure of damages is the difference in value of exclusive and joint user.[87] The amount condemned and not the extent of the user determines the taking.[88] A legacy dependent upon the use of particular property for a specified purpose is not usually lost by a forcible taking of the property.[89]

§ 7. *Who is liable for compensation.*[90]—[See 11 C. L. 1216]—The state or a political subdivision thereof is not liable unless the taking is fully authorized and accom-

80. Laws 1879, p. 397, c. 310, § 1, exempting cemeteries from benefit assessments for local improvements, can be asserted in eminent domain proceeding where benefits are sought to be offset against award of damages. In re Jerome Ave. in City of New York, 192 N. Y. 459, 85 NE 755. Where course of stream is changed, construction of culvert in new structure to carry off water from old course may be considered, and is not within Code Civ. Proc. § 3370, prohibiting deductions on account of benefits to accrue from use to which property is to be put. New York Cent. & H. R. R. Co. v. Domproff, 63 Misc. 211, 116 NYS 924. Question of power of city to assess lands within its limits to pay award does not arise in condemning land outside of city for street, as award must be paid before land can be taken. City of Tacoma v. Titlow, 53 Wash. 217, 101 P 827.

81. Have no right to offset against damages for land actually taken by indirection, benefits to accrue to remainder for facing on street. In re New Street in City of New York, 64 Misc. 268, 118 NYS 580.

82. Where ordinance merely provided for condemning of land for a certain street but did not provide for opening of such street, no benefits could be assessed. City of Chicago v. Kemp, 240 Ill. 56, 88 NE 284.

83. General benefits common to community cannot be offset. Pierce v. Chicago & M. Elec. R. Co., 137 Wis. 550, 119 NW 297; Minneapolis, St. P., R. & D. Elec. Trac. Co. v. Harkins [Minn.] 122 NW 450. Held error to instruct that measure of damages was difference in value of land with railroad near but not on it and value with railroad upon it. Minneapolis, St. P., R. & D. Elec. Trac. Co. v. Harkins [Minn.] 122 NW 450; Minneapolis, St. P., R. & D. Elec. Trac. Co. v. Forstrom [Minn.] 122 NW 451. Held error, in action for damages to abutting property from construction of elevated railroad in street, to admit evidence of enhanced value of properties abutting on other streets by virtue of such railway. Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 SW 1094.

84. Seattle & Puget Sound Packing Co. v. Seattle, 51 Wash. 49, 97 P 1093. Assessment cannot be sustained as a special proceeding. Schuchard v. Seattle, 51 Wash. 41, 97 P 1106.

85. Where owner retained right to use portion of strip taken for tile drain, he is not entitled to full market value. Oakwood Drainage Com'rs v. Knox, 237 Ill. 148, 86 NE 636. Where coal is owned separately from surface, condemning railroad must make compensation for any part necessary to sustain surface. Dilts v. Plumville R. Co., 222 Pa. 516, 71 A 1072.

86. Where land is subject to 99-year lease, having 80 years to run, reserving $2,000 annual rent, court did not err in permitting witnesses to fix value by capitalizing the ground rent on a percentage basis. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933. Grant by city of rights in existing pier did not confer right of access thereto over land under water owned by city in front of pier so as to render city liable therefor upon appropriation of the land under water. In re City of New York, 193 N. Y. 503, 87 NE 759.

87. Railroad taking easement merely for lateral support. New York Cent. & H. R. R. Co. v. Untermyer, 117 NYS 443. Where city extends street across railroad right of way, measure of damages is difference between exclusive and joint use. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 742. Where establisment of highway across railroad right of way does not destroy its use, railroad is not entitled to full value of land taken and damage to that not taken. New York, etc., R. Co. v. Rhodes, 171 Ind. 521, 86 NE 840.

88. Where drainage commissioners condemn strip 31 feet wide, fact that drain occupied but two feet and owner used rest of strip does not render it any less a taking of entire strip as far as assessment of damages are concerned. Oakwood Drainage Com'rs v. Knox, 237 Ill. 148, 86 NE 636.

89. Taking of land by condemnation will not work a forfeiture of legacies to construct and maintain a Sunday school room thereon so as to render county liable for such legacy. New Haven County v. Parish of Trinity Church of New Haven [Conn.] 73 A 789.

90. **Search Note:** See Eminent Domain,

plished as provided by statute.[91] Township authorities in Indiana represent the state in taking land for the improvement of highways,[92] and hence the township is not liable.[93] A lessee of a railroad is not liable for the destruction of access to property by the original construction by lessor.[94]

§ 8. *Condemnation proceedings in general.*[95]—See 11 C. L. 1216—Condemnation must be prosecuted in the proper court.[96] The proceeding to acquire property under the power of eminent domain is statutory,[97] and hence the statute must be strictly followed and all conditions precedent complied with, unless waived.[98] An unlawful trespass does not prevent the institution of condemnation proceedings.[99] Where proceedings are based upon an assumption of certain property ownership, petitioner is estopped to deny such ownership.[1] Where public authorities, after having taken property, fail or refuse to assess damages as required by statute, they may be compelled to do so by proper proceedings.[2] Where property has been taken, the owner is authorized by the statutes of many states to prosecute an action for damages,[3] provided it is timely commenced.[4] Under the Massachusetts statute, the petition for damages for taking of land for street purposes must be filed within one year from entry and commencement of work.[5] While condemnation proceedings are special statutory proceedings, general civil practice provisions usually apply so far as ap-

Cent. Dig. §§ 791; Dec. Dig. § 285; 10 A. & E. Enc. L. (2ed.) 1132, 1195.

91. Where, under Kirby's Dig. § 3009, county court refused to establish new road, county is not liable for property taken for such road. Craig v. Greenwood Dist., Sebastian County [Ark.] 121 SW 280.

92, 93. Posey Tp. v. Senour, 42 Ind. App. 580, 86 NE 440.

94. Wunderlich v. Pennsylvania R. Co. [Pa.] 72 A 247.

95. **Search Note:** See note in 8 Ann. Cas. 734.

See, also, Eminent Domain, Cent. Dig. §§ 448-469, 477-487, 499-506, 527, 647-657; Dec. Dig. §§ 166-171, 175-178, 185-188, 197, 246; 15 Cyc. 805, 808-810, 812, 831, 837-840, 866, 867, 937, 941, 942, 978; 10 A. & E. Enc. L. (2ed.) 1051; 7 A. & E. Enc. P. & P. 467.

96. Proviso of Pub. Acts 1907, p. 212, No. 161, that any and all suits, proceedings, causes, or actions pending a change of venue may be had in manner provided by Pub. Acts 1905, p. 483, No. 309, only authorizes a change in suits and actions pending under latter act, and does not apply to a condemnation proceeding. Grand Rapids & I. R. Co. v. Kalamazoo Circuit Judge, 154 Mich. 493, 15 Det. Leg. N. 814, 117 NW 1050.

97. Under express provisions Act March 6, 1905 (Acts 1905, p. 219, c. 129), which repealed Acts 1899, p. 270, c. 152, providing proceedings for condemnation by cities, action pending under repealed act was not affected. City of Terre Haute v. Sachs, 171 Ind. 679, 86 NE 45.

98. Notice provided by Burns' Ann. St. 1908, § 7775, authorizing town supervisors after notice to enter on land and take material for improvement of highway, damages to be assessed in prescribed manner, is for owner's benefit and may be waived. Posey Tp. v. Senour, 42 Ind. App. 580, 86 NE 440. Every requirement of a statute conferring jurisdiction upon a court to entertain a proceeding, providing a legal method of taking private property, must be complied with to the letter. Fay v. Macfarland, 32 App. D. C. 295.

99. Though suit has been instituted. Woodstock Hardwood & Spool Mfg. Co. v. Charleston L. & W. Co. [S. C.] 63 SE 548.

1. City of Geneva v. Henson, 195 N. Y. 447, 88 NE 1104.

2. Where township supervisor who has entered upon land and taken material for improvement of highway fails or refuses to assess damages as required by Burns' Ann. St. 1908, § 7775, he may be compelled to do so by proper proceedings. Posey Tp. v. Senour, 42 Ind. App. 580, 86 NE 440.

3. All damages must be recovered in single action. Missouri, K. & N. W. R. Co. v. Schmuck [Kan.] 100 P 282.

4. No action can be maintained for impairment of access by original construction of railroad where not prosecuted for 13 years. Scott v. Donora So. R. Co., 222 Pa. 634, 72 A 282. City commenced to take water from pond early in 1894 but did not, until July 7, make a formal order directing the taking. Rev. Laws, c. 48, § 28, provides that petition for damages must be brought within one year, to begin when possession is taken, in case of specific repairs from date when work is begun and in all other cases "from date of order providing for same." Held for jury whether petition filed after year from first taking but within year from order was timely. Town of Middleborough v. Taunton [Mass.] 89 NE 155.

5. Entry and commencement of work on land of one is sufficient under Rev. Laws, c. 111, § 153, as amended by St. 1903, p. 524, c. 478, as to all whose land is taken. Kenrick v. Boston & A. R. Co., 202 Mass. 1, 88 NE 430. Fact that work was or was not prosecuted continuously may be considered in determining whether work was commenced at particular time. Id. Where town engineer and superintendent of streets, pursuant to directions of town selectmen, entered on land taken and directed workmen to remove small quantity of soil at designated places, which was necessary in laying out of street, held a commencement of work of laying out. Id.

plicable.[6] In exercising the power for municipal purposes, cities are frequently authorized to adopt a code of procedure.[7] A change of procedure pending an action does not necessitate the dismissal thereof.[8]

*Parties.*See 11 C. L. 1218—Eminent domain proceedings are in rem, and hence only the persons designated by statute need be made parties,[9] and ordinarily, the omission of a party does not invalidate the proceedings as to those made parties.[10] A wife's inchoate right to dower does not make her a necessary party,[11] nor does the fact that a person may be assessed benefits for the improvement where no property is taken.[12] The proper party plaintiff to acquire land for state purposes is usually designated by statute.[13] Where an estate of a testator is entitled to damages, the proceedings should be prosecuted in the name of the executor and not that of the estate.[14]

*Abandonment of proceedings.*See 11 C. L. 1217—The right of condemnor to abandon or discontinue the proceedings is usually regulated by statute.[15]

§ 9. *Jurisdiction.*[16]—See 11 C. L. 1218—Jurisdiction is usually conferred by statute upon designated courts.[17] A proceeding under the Kansas statute, providing that, when authorized by resolution of mayor and city council, certain cities may apply to the judge of the district court for appointment of a commission to assess damages, is a judicial proceeding from its inception.[18]

6. Practice provisions of Civil Code apply so far as applicable. Toledo & I. Trac. Co. v. Indiana & C. I. R. Co., 171 Ind. 213, 86 NE 54.

7. Where grant to city of right to exercise eminent domain is made by constitution and enabling act, city may, in framing its charter, provide a code of procedure for exercising right (Brunn v. Kansas City, 216 Mo. 108, 115 SW 446), and, where such procedure is not inimical to the general scope of the policy of the constitution and laws, such special provisions govern as against general provisions (Id.). Power granted to Kansas City to exercise the right of eminent domain to establish parks, streets, etc., and charter provisions relating thereto, pertain to domestic affairs of city within Const. art. 9, § 16 (Ann. St. 1906, p. 265), giving city right to frame own charter for own government. Id.

8. Amendment of city charter affecting only procedure does not necessitate dismissal of existing proceedings. City of St. Louis v. Calhoun [Mo.] 120 SW 1152.

9, 10. Gasaway v. Seattle, 52 Wash. 444, 100 P 991.

11. Summers v. Sullivan [Mont.] 101 P 166; Justis v. Georgia Industrial Realty Co. [Va.] 63 SE 1084.

12. In condemnation for street or alley. City of St. Louis v. Calhoun [Mo.] 120 SW 1152.

13. Under Comp. Laws 1897, § 2685, subs. 3, authorizing trustee of express trust to sue in own name and without joining beneficiary, territory, by bringing suit under § 3693, authorizing board of regents of University of New Mexico to condemn for use of university, would create an express trust, and hence may maintain same without joining board of regents. Territory v. Crary [N. M.] 103 P 986. Where statute provides that "the commissioners of the District of Columbia may institute" the proceedings therein authorized, the proceedings may be instituted either in the name of the commissioners or in the name of the District of Columbia. Macfarland v. Moore, 32 App. D. C. 213.

14. Mengell's Ex'rs v. Mohnsville Water Co. [Pa.] 73 A 201.

15. Acts 1899, p. 312, c. 152, § 83 (Burns' Ann. St. 1901, § 4190E3), relating to proceedings by cities to condemn land, and providing that, if on appeal to circuit court the report of board of public works is greatly diminished or increased, city may discontinue proceedings, recognizes right to discontinue on final determination by circuit court; but city cannot discontinue where it delays seven months after final judgment when motion for new trial is denied and it has given notice of appeal. City of Terre Haute v. Sachs, 171 Ind. 679, 86 NE 45.

16. Search Note: See note in 9 Ann. Cas. 476.

See, also, Eminent Domain, Cent. Dig. §§ 470-474; Dec. Dig. §§ 172, 173; 15 Cyc. 810-812, 834; 10 A. & E. Enc. L. (2ed.) 1051; 7 A. & E. Enc. P. & P. 477.

17. Proceedings before justice of peace under Drainage Act (Hurd's Rev. St. 1908, c. 42), to assess damages does not involve a freehold, since assessment of damages is only function of court. Niles Drainage Com'rs v. Harms, 238 Ill. 414, 87 NE 277. Laws 1905, p. 446, c. 295, conferring on superior court of Lincoln county jurisdiction equal to circuit court of that county in "all civil actions and proceedings at law and in equity," held to confer jurisdiction in condemnation proceedings, as conferred upon circuit court by Laws 1880, p. 349, c. 292. Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 NW 857. Act Aug. 18, 1890, c. 797, 26 Stat. 315, 316 (U. S. Comp. St. 1901, p. 2518), authorizing secretary of war to institute condemnation proceedings for acquisition of land for fortifications, and requiring proceedings to conform to that of the state where land is situated, held not to oust federal circuit court of jurisdiction though state statute conferred jurisdiction on special court. United States v. Certain Land in Town of New Castle, 165 F 783.

18. Hence proceeding under Laws Kan. 1908, p. 30, c. 33, may be removed into fed-

§ 10. *Applications; petitions; pleadings.*[19] See 11 C. L. 1218—While a complaint or petition alleging the facts required by statute is sufficient,[20] it must usually show the petitioner's right to exercise the power,[21] performance of all conditions precedent,[22] describe the property with reasonable certainty,[23] but need not allege the interest of particular persons, if in dispute,[24] or aver funds sufficient to make compensation.[25] Defective pleadings may be aided by amendment,[26] admissions at trial,[27] or proof of the omitted fact without objections.[28] Under the statute of Colorado, a jurisdictional allegation may be supplied by amendment.[29] The ordinary rules applicable to demurrers,[30] motions,[31] cross petitions,[32] etc., apply. Where it develops that defendant is the owner of a larger estate than is sought to be condemned, petitioner may amend so as to include the same.[33] Irrelevant matters in the petition do not invalidate the same.[34] The constitutionality of the statute conferring the power is waived by a failure to properly raise the same.[35] In an action for damages, there can be no recovery except for the damages alleged.[36]

eral court at any time. Kansas City v. Metropolitan Water Co., 164 F 728.

19. Search Note: See Eminent Domain, Cent. Dig. §§ 508-524; Dec. Dig. §§ 190-195; 15 Cyc. 850-863; 7 A. & E. Enc. P. & P. 472, 513.

20. Petition in writing filed by county court in circuit court, pursuant to Code 1899, c. 42, § 5, to condemn land for a public road, containing substantially all required by § 5, held sufficient without alleging that proceedings prescribed by Code 1899, c. 42, §§ 35-38, had been taken, such fact being presumed. Mason County Ct. v. Thornburg, 65 W. Va. 185, 63 SE 975.

21. Petition under Mills' Ann. St. § 1716, to condemn lands for reservoir site which petitioner personally and in a private capacity proposes to construct and use for irrigation, held to raise no presumption that it was for use of irrigation district and hence to show no authority in petition to condemn. Kaschke v. Camfield [Colo.] 102 P 1061. Petition under Comp. Laws 1897, § 3693, giving board of regents of University of New Mexico power to acquire land by condemnation, whenever it deems such acquisition necessary, held demurrable where it fails to allege that such acquisition was deemed necessary by the board. Territory v. Crary [N. M.] 103 P 986.

22. In condemnation by railroad company, a general allegation of incorporation is not an allegation that whole of capital stock has been paid in, condition precedent under Pierce's Code, § 7053. State v. Puget Sound & G. H. R. Co. [Wash.] 103 P 809.

23. Spokane Val. Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 P 515.

24. Need only allege persons interested so far as is known. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

25. Lack of funds to make compensation is defensive matter at most. Territory v. Crary [N. M.] 103 P 986.

26. Where water company seeking to condemn another's water rights offered in evidence a proposed stipulation exempting from proceedings so much of water as would be necessary to irrigate defendant's land, held in effect an amendment to petition limiting water to be taken. Spokane Val. Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 P 515.

27. Where, in action for damages, counsel of defendant on trial admitted that plaintiff was owner of property at time of commencement of action and had been for a number of years, defendant could not object that complaint did not specifically aver ownership at time acts complained of were done. Morris v. Oregon Short Line R. Co. [Utah] 102 P 629.

28. Failure of petition to allege petitioner was a public service corporation is no ground for reversal on appeal where fact was duly proven at hearing. State v. Spokane County Super. Ct. [Wash.] 104 P 148. Water company sought to condemn riparian's rights in lake and then offered in evidence a stipulation exempting so much of water as was necessary to irrigate the defendant's land, offering to prove number of acres irrigable and amount necessary, held that there was sufficiently definite basis for decree. Spokane Val. Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 P 515.

29. Complaint is not utterly void. Goodman v. Ft. Collins [C. C. A.] 164 F 970.

30. Where only defense interposed by defendants to petition are motions to quash and dismiss same, they will be treated as demurrers confessing truth of matters alleged, and, upon overruling of same, petitioner is entitled to judgment. Mason County Ct. v. Thornburg, 65 W. Va. 185, 63 SE 975.

31. If plaintiff desired to test sufficiency of defendant's objections in respect to facts therein alleged, it should have demurred as provided in Civil Code in respect to answer in civil action; motion to strike is insufficient. Toledo & I. Trac. Co. v. Indiana & C. I. R. Co., 171 Ind. 213, 86 NE 54.

32. Under Eminent Domain Act, § 11 (Hurd's Rev. St. 1908, c. 47), providing that any one not a party and having an interest may assert same by cross petition, court has jurisdiction to inquire into validity of release of dower interest of cross petitioner, and to assess value of unassigned dower. Chicago & N. W. R. Co. v. Garrett, 239 Ill. 297, 87 NE 1009.

33. City of Geneva v. Henson, 195 N. Y. 447, 88 NE 1104.

34. No ground for dismissal, but should be stricken therefrom. Abernathy v. South & W. R. Co., 150 N. C. 97, 63 SE 180.

35. Where, in condemnation by city to acquire certain water rights, petitioner took

§ 11. *Process, notice, citation, publication.*[37]—See 11 C. L. 1220—As a general rule notice of proceedings to the adverse party is necessary and must be in strict conformity to statute, unless waived.[38] It must usually specify the estate and interest to be taken and the use to which it is to be put.[39] A mortgagee is not usually entitled to notice.[40]

§ 12. *Hearing and determination of right to condemn.*[41]—See 11 C. L. 1220—Unless waived [42] or admitted,[43] generally, as preliminary to the assessment of damages,[44] is the determination of petitioner's right to condemn.[45] If the question is properly raised,[46] the burden rests upon the petitioner to prove his right to condemn,[47] including the performance of all conditions precedent.[48] The statute usually specifies how such issue shall be determined,[49] and frequently makes the determination of necessity by designated boards or bodies conclusive or prima facie.[50] While the question

part in hearing and, being dissatisfied with the award, secured appointment of commissioners and accepted and retained the increased award, held to have waived constitutionality of statute under which power was exercised. Hardwood v. West Randolph [Vt.] 72 A 1076.

36. Where pleading alleged injury to property because of vibrations, noise and dirt from trains, and injury to shade trees, no recovery can be had for damage to access. Kough v. Pennsylvania R. Co., 222 Pa. 175, 70 A 1004.

37. Search Note: See notes in 16 L. R. A. 186; 5 Ann. Cas. 903.

See, also, Eminent Domain, Cent. Dig. §§ 488-498; Dec. Dig. 197-184; 15 Cyc. 841-849; 7 A. & E. Enc. P. & P. 481.

38. Where landowner filed claim and had hearing thereon, held that he was estopped to assert defective notice, though in present claim he attempted to reserve right. Robinson v. Sea View R. Co., 169 F 319.

39. Notice under Civ. Code 1895, § 4657, et seq., reciting that property was sought for the purpose of building, maintaining, and operating thereon a railroad, sidetracks, terminals, and necessary turnouts, held not demurrable for failure to specify whether defendant's property was desired for right of way, sidetrack, or connections and turnouts. Atlanta Terra Cotta Co. v. Georgia R. & Elec. Co. [Ga.] 64 SE 563.

40. In a proceeding to open a street under Act of May 16, 1891, P. L. p. 75, a mortgagee is not entitled to receive actual notice, therefore purchaser of mortgaged property has no standing to enjoin city because mortgagee did not receive notice. Jackson v. Pittsburg, 36 Pa. Super. Ct. 274.

41. Search Note: See note in 11 L. R. A. (N. S.) 940.

See, also, Eminent Domain, Cent. Dig. §§ 525-539; Dec. Dig. §§ 196, 198; 15 Cyc. 863-871; 7 A. & E. Enc. P. & P. 572.

42. Demand for jury to assess damages does not waive right to preliminary trial as to necessity of the taking, on demand being made before empaneling of jurors. Kern v. Minekime [Colo.] 101 P 341. Waiver of proof of incorporation and of payment of license fee is not a waiver of proof that petitioner's capital stock has been paid in, as required by Pierce's Code, § 7053, a condition precedent to right to condemn. State v. Puget Sound & G. H. R. Co. [Wash.] 103 P 809.

43. Right to condemn is admitted by request for and calling of jury to assess damages. Kaschke v. Camfield [Colo.] 102 P 1061.

44. Right to condemn is a preliminary question, under Mills' Ann. St. § 1720, to be decided before jury, is called under § 1721, to assess damages. Kaschke v. Camfield [Colo.] 102 P 1061. Determination of necessity for taking particular piece of property should be made by court in limine before appointment of commissioners to assess damages. Portneuf Irr. Co. v. Budge [Idaho] 100 P 1046.

45. In action to condemn land for ditch and flume, evidence that condemnor does not own any water rights is inadmissible since it may condemn same. Walker v. Shasta Power Co. [C. C. A.] 160 F 856. Denial that plaintiff is owner of "3,000 miner inches or any water or waters which are to be conducted, or can be conducted, by plaintiff, held not a denial of ownership. Id.

46. Where defendants timely demanded trial of necessity for taking, it is duty of court to summon board of commissions though not specifically asked for. Kern v. Minekime [Colo.] 101 P 341.

47. Kaschke v. Camfield [Colo.] 102 P 1061.

48. Objection that railroad corporation has no right to condemn because capital stock has not all been paid in, as required by Pierce's Code, § 7053, is not waived by failure to file plea in abatement. State v. Puget Sound & G. H. R. Co. [Wash.] 103 P 809.

49. Code Civ. Proc. § 3367, authorizing court to try any issues raised by the pleadings by reference to a referee, held only to refer to issues raised under § 3360, and not to permit reference of issue of ownership of defendant (City of Geneva v. Henson, 195 N. Y. 447, 88 NE 1104), but, where such issue is referred and tried without objection, the decision is binding (Id.). Irregularity that necessity of taking was determined by 11 jurors instead of 12, as required by Pub. Acts 1903, p. 237, No. 176, amendatory of general Village Act (Pub. Acts 1895, p. 56, No. 3, c. 13), held waived where no appeal was taken, justice's judgment of confirmation and award was paid and accepted without objection. Weber v. Detroit [Mich.] 16 Det. Leg. N. 620, 122 NW 570.

50. Power to determine necessity of taking land for a schoolhouse site is vested in school authorities by Mills' Ann. St. § 4013, and hence finding of commission thereon is immaterial. Kirkwood v. Summit County

must be submitted to a jury under the Michigan constitution, the court is not obliged to charge them relative thereto,[51] and the mere contention of counsel for an erroneous rule of law will not invalidate the proceedings.[52] Ordinarily, the various property owners are not entitled to separate trials.[53]

§ 13. *Commissioners or other tribunal to assess damages; trial by jury.*[54]—See 11 C. L. 1221—At common law, condemnation proceedings were inquisitorial and ex parte and without right to a jury trial,[55] and, hence, such right does not exist as a constitution of right unless the constitution expressly confers the same.[56] In many states, a jury may be had upon demand,[57] while, in others, damages are assessed by a statutory body of appraisers or commissioners.[58] Under the Illinois statute, the court, upon quashing a venire, may direct the issuance of a new venire returnable instanter.[59] A general objection to a venire is waived by failure to move to quash.[60]

Compensation awarded to commissioners is to compensate them for services actually and necessarily rendered,[61] and they cannot unnecessarily prolong the proceeding to increase their fees.[62]

§ 14. *The trial or inquest, and hearings on question of damages.*[63]—See 11 C. L. 1221—The owner is ordinarily entitled to due notice of time and place of assessment of damages,[64] since the burden rests upon him to prove his estate,[65] unless admitted,[66]

School Dist. [Colo.] 101 P 343. Under Act Mar. 17, 1869, § 1 (P. L. p. 12), resolution of board of directors of railroad company to condemn land for erection and maintenance of water tanks, is conclusive of the necessity of water tanks at point designated (Wilson v. Pittsburgh & L. E. R. Co., 222 Pa. 541, 72 A 235), but is only prima facie proof that amount designated is necessary (Id.).

51. Const. art. 18, § 12, held not to require probate judge in charge of the proceedings to charge the jury. McDuffee v. Fellows [Mich.] 16 Det. Leg. N. 473, 122 NW 276.

52. In absence of bad faith. McDuffee v. Fellows [Mich.] 16 Det. Leg. N. 473, 122 NW 276.

53. Denial of separate trial to owners held not prejudicial as far as determination of right to condemn was litigated. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

54. **Search Note:** See Eminent Domain, Cen. Dig. §§ 545-620; Dec. Dig. §§ 206-239; 15 Cyc. 872-894, 902-917, 967; 7 A. & E. Enc. P. & P. 472.

55. Portneuf Irr. Co. v. Budge [Idaho] 100 P 1046.

56. Portneuf Irr. Co. v. Budge [Idaho] 100 P 1046. Const. art. 1, § 7, providing that right of trial by jury shall remain inviolate, does not guarantee jury trial in condemnation proceedings, right not existing at time of adoption of constitution. Id.

57. Where defendant is in court at setting of case for trial and does not ask for a jury, held a waiver of right thereto. Fruitland Irr. Co. v. Smith [Wash.] 102 P 1031.

58. Omaha city charter provides for appointment of three appraisers, except where land is of value of $50,000 or more. Held that council must in first instance exercise judgment as to value, but, if only three are appointed and their report shows a value in excess of $50,000, a second appraisement by five must be made, which is conclusive whatever their award. Shannon v. Bartholomew, 83 Neb. 821, 120 NW 460.

59. Eminent Domain Act, § 7 (Hurd's Rev. St. 1908, c. 47). Mercer County v. Wolff, 237 Ill. 74, 86 NE 708.

60. Where party objected to the venire being made returnable within 10 days, and excepted to overruling of objection, but made no motion before trial to quash venire, objection thereto is waived. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708.

61. In re Riverside Drive & Parkway, 128 App. Div. 921, 112 NYS 869.

62. In re Riverside Drive & Parkway, 128 App. Div. 921, 112 NYS 869. Commissioners are not entitled to compensation for prolonged proceeding caused by encouraged opposition. Id. Evidence held to justify award to commmissioners of a specified sum and denial of compensation asked for by engineer employed by city. Id.

63. **Search Note:** See notes in 22 A. S. R. 49; 5 Ann. Cas. 971.

See, also, Eminent Domain, Cent. Dig. §§ 540-544, 562-567; Dec. Dig. §§ 199-205, 222; 15 Cyc. 898, 899, 902, 903; 7 A. & E. Enc. P. & P. 562.

64. That part of Cobbey's Ann. St. 1907, § 8605, authorizing city councils of cities of first-class to vacate assessment and to appoint a second set of assessors who shall meet on following day and, without further notice, proceed to assess damages, held unconstitutional as lacking due process of law. Wilber v. Reed [Neb.] 122 NW 53. Notice in condemnation of land for park purposes, stating that appraisers would meet at 2 p. m. on a certain day and commence their view across Nineteenth street from Kountz Park within city limits, and, after viewing, would adjourn to room 200, Omaha National Bank Building, etc., held sufficiently definite as to time and place. Shannon v. Bartholomew, 83 Neb. 821, 120 NW 460.

65. Where petition does not state claim or interest of one defendant or admit any title in her, burden rests on her to prove her claim of a leasehold interest and improvements under tax sale. Chicago & N. W. R. Co. v. Glos, 239 Ill. 24, 87 NE 881.

66. Village, by instituting proceeding to

and the value thereof [67] at the time at which damages are assessed.[68] In some states, commissioners are appointed only on due notice of owner.[69] Under the statute of New York, claims may be presented to the appraisers at any time within the statutory period,[70] and are separately assessed,[71] the appearance of the claimant and presentment of the claim conferring jurisdiction.[72] The right of each owner to a separate trial or assessment of damages depends largely upon local statute [73] and upon timely demand therefor.[74] In Illinois, issue of ownership is litigated prior to the impaneling of the jury.[75] Continuances are largely a matter of discretion.[76] The

acquire right of way for sewer impliedly admits title in owner, and cannot contend that it is part of public highway. Village of Medina v. Graves, 113 NYS 52. Where property is occupied by tenant of claimant to the exclusion of all others, claimant is entitled to full compensation without regard to a public easement. Id.

67. Kaschke v. Camfield [Colo.] 102 P 1061. Whether establishment of highway across railroad tracks will interfere with operation of road is a question of fact for jury. New York, etc., R. Co. v. Rhodes, 171 Ind. 521, 86 NE 840. Where highway is established across railroad right of way where there is only one main track and two switches, held that there is no such impairment of company's franchise as entitles it to compensation. Id.

68. Code Civ. Proc. § 1963, subd. 32, providing that a thing once shown to exist is presumed to continue as long as is usual for such things, is not retroactive so as to make evidence of value at time of trial sufficient to sustain finding as to value at time of taking. McDougald v. Southern Pac. R. Co., 9 Cal. App. 236, 98 P 685.

69. Two tracts of land were crossed by railroad, but title to land taken from one of them had never, however, been acquired by owner of remainder. In notice to sheriff in which he demanded appointment of commissioners, he described land as one entirety. Held that notice only claimed damages for taking of land to which he had title. Hall v. Wabash R. Co. [Iowa] 119 NW 927.

70. Under Laws 1905, pp. 2034, 2039, c. 724, §§ 12, 19, relating to acquisition of land for water supply, claimants have three years within which to present claim (In re Simmons, 116 NYS 439), and owners of fee cannot preclude owner of easement on question of value thereof when he has not yet presented claim (Id.). Provision of Rapid Transit Act (Laws 1891, p. 3, c. 4), barring claims not presented to commissioners within six months, except so far as claimant may be entitled to whole or a part of award as compensation for property owned by claimant or in which he is interested, merely protects a real party to the award, and does not apply to a lessee for whose interest no award was made. In re Willcox, 63 Misc. 16, 116 NYS 151. Provision of Rapid Transit Act (Laws 1891, p. 3, c. 4), that claims not presented within six months after appointment of commissioners of appraisal shall be considered waived, one failing to timely present claims is barred and excuses cannot be considered notwithstanding Code Civ. Proc. § 724, permitting courts to relieve from judgments taken through mistake or excusable neglect. Id.

71. Where fee owners appear before commissioners and present claims under Laws 1905, pp. 2034, 2039, payment of their claims should not be delayed because owner of easement fails to present his claim (In re Simmons, 116 NYS 439), but their claims should be assessed separately (Id.).

72. Under Laws 1905, pp. 2034, 2039, c. 724, relating to acquisition of land for water supply, jurisdiction is acquired by appearance of claimant and presentment of claim. In re Simmons, 116 NYS 439.

73. Under Hurd's Rev. St. 1908, c. 47, § 5, right of owners to separate trial lies within trial court's discretion, and his order will not be interfered with on appeal in absence of abuse. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933. Where proceedings involved a quantity of land and several owners, one of such owners was not entitled to a separate trial as to its interest only in one parcel of land. Id. Rev. Laws 1902, c. 48, § 20, providing that, if there are several cotemporaneous estates, they may be assessed by same jury, etc., held not to prevent lessee from recovering compensation, independent of lessor for taking of passageway from leased premises over other land of lessor to street. Cornell-Andrews Smelting Co. v. Boston & P. R. Corp., 202 Mass. 585, 89 NE 118. One having a distinct interest in the property may have same valued before others interested therein are brought into court. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933. Where statute leaves it to discretion of judge whether damages to different parcels shall be separately assessed or assessed by same jury, denial of motion for separate trials is not erroneous in absence of abuse of discretion. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. One claiming merely a leasehold interest cannot object to evidence relating to ownership offer. Chicago & N. W. R. Co. v. Glos, 239 Ill. 24, 87 NE 881.

74. Must move therefor. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

75. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933. Cannot be submitted to jury impaneled to assess damages. Id.

76. Where trial of issue of damages was set on February 10th for February 26th without objection, held not an abuse of discretion to deny a continuance on the 26th on ground that land was covered with snow so that witnesses could not be shown character of soil, etc., there being no showing that conditions had changed since 10th. Fruitland Irr. Co. v. Smith [Wash.] 102 P 1031.

jury are usually required to all agree upon the award returned,[77] and their assessment is usually conclusive except upon appeal.[78]

Admissibility of evidence. See 11 C. L. 1222—While commissioners and appraisers are not usually hampered by technical rules of evidence,[79] the evidence offered must be material and relevant to the issues.[80] Generally speaking, any fact which, if known to a prospective purchaser, would tend to increase or diminish the value of the property, may be shown,[81] such as the surrounding conditions,[82] uses to which the property is adapted,[83] etc. Offers and counter offers made in unsuccessful negotiations are inadmissible;[84] as are the offers and prices paid by petitioner for similar land.[85] While unaccepted offers for similar land cannot be shown,[86] evidence of re-

77. Davis v. Union Manufacturing & Power Co. [S. C.] 65 SE 234. Where verdict for $4,500 was signed by 10 assessors, the other two refusing to allow more than $4,000, it cannot be cured by owner agreeing to waive the $500 (Id.) unless condemnor agreed thereto (Id.).

78. In proceedings under St. 1897, p. 396, c. 426, assessment of damages is within exclusive province of jury (Minot v. Boston, 201 Mass. 10, 86 NE 783), and where charge does not include interest as an element of damages, the addition of interest to the award by the court is an invasion of province of jury (Id.).

79. They cannot disregard evidence adduced. In re Simmons, 132 App. Div. 574, 116 NYS 952.

80. **Immaterial:** Testimony of witness that he would not want farm with railroad through it. Dilts v. Plumville R. Co., 222 Pa. 516, 71 A 1072. Where ninety-nine-year lease, reserving $2,000 annual rent, has 80 years to run, court did not err in excluding question as to front foot value of land, including fee and lease, since fee may be considered valueless. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

Admissible: In condemnation for improvement of street, evidence of cost of building curb abutment so as to permit continuation of operation of defendant's plant without raising buildings held admissible, it being a question for jury whether plan was practicable. In re Mercer St. [Wash.] 104 P 133. Where taking of land of oil refining company necessitated reconstruction of plant, held for jury what particular items of reconstruction were necessary to give defendant equivalent for what it had lost by the taking. Edgewater & Ft. L. R. Co. v. Valvolene Oil Co., 76 N. J. Law, 789, 72 A 85.

81. In re Low, 128 App. Div. 103, 112 NYS 619. In determining compensation for land subjected to easement of railroad right of way, any evidence which aids jury in determining fair market value of land and its diminution by easement is admissible. Abernathy v. South & W. R. Co., 150 N. C. 97, 63 SE 180. Evidence of details of material used in house is admissible as bearing on value of land. Kansas City So. R. Co. v. Boles [Ark.] 115 SW 375.

82. In condemnation to widen railroad right of way, evidence that certain crossing had existed for 25 years is admissible to show condition, though company was under no legal obligation to continue same. Klopp v. Chicago, etc., R. Co. [Iowa] 119 NW 373. Where damages are claimed on theory that condemnation of strip will prevent extension of buildings of plant, and there is evidence that a right of way easement existed over a part of strip, existence of such easement should be submitted to jury, as it would prevent building. Jeffery v. Chicago & M. Elec. R. Co., 138 Wis. 1, 119 NW 879. In proceeding to condemn right of way for telephone line, evidence of value of trees destroyed is admissible on issue of diminution in value of remainder though not recoverable as independent element of damages. Long Distance Tel. & T. Co. v. Schmidt [Ala.] 47 S 731.

83. Long Distance Tel. & T. Co. v. Schmidt [Ala.] 47 S 731. Evidence as to value of property as prospective industrial property held admissible. Kansas City So. R. Co. v. Boles [Ark.] 115 SW 375. Evidence that farm was naturally adapted for truck farming and that it would be advantageous to dividing into small farms, facing road, which could not be done if railroad was laid out, held admissible. Minneapolis, St. P., R. & D. Elec. Trac. Co. v. Friendshuh [Minn.] 122 NW 451. In assessing value of lot so situated that, if certain switch permits across alley could be obtained, it would be suitable for warehouse or manufacturing purposes, evidence of witness that he had unsuccessfully attempted to get such permit in another part of city held inadmissible. South Park Com'rs v. Ayer, 237 Ill. 211, 86 NE 704.

84. Darien & W. R. Co. v. McKay [Ga.] 64 SE 785.

85. State v. Spokane County Super. Ct. [Wash.] 104 P 148; South Park Com'rs v. Ayer, 237 Ill. 211, 86 NE 704. Evidence of what plaintiff paid for other property for use in same enterprise is inadmissible, whether offered as substantive evidence or on cross-examination as test of an expert's knowledge. Oregon R. & Nav. Co. v. Eastlack [Or.] 102 P 1011. In condemnation of separate interests of two in same half block, held error to allow one to submit his claim of damages on evidence of other, as it would indirectly put before jury his opinion that value as shown by evidence was reasonable. South Park Com'rs v. Ayer, 237 Ill. 211, 86 NE 704. On value of land taken, evidence of price paid to others, when same included damages to adjoining lands, is inadmissible. Brown v. New Jersey Short Line R. Co., 76 N. J. Law, 795, 71 A 271. Witness cannot base opinion of value upon what he heard that plaintiff paid for similar land in same enterprise. Oregon R. & Nav. Co. v. Eastlack [Or.] 102 P 1011.

86. Private unaccepted offers for similar lands is inadmissible. Helena Power Trans-

cent sale thereof is admissible within the discretion of the court.[87] Price paid for the land in question is admissible,[88] unless so remote as not to create any presumption of present value.[89] Rental value of property situated on another street is inadmissible to show the damage arising from construction and operation of an elevated railroad.[90] Assessed value of land for taxation is inadmissible,[91] as is evidence of a general increase of land values in city not shown to be true in the vicinity of the land taken.[92] While buildings and improvements are to be considered, evidence of structural cost thereof is not usually admissible.[93] Evidence of value of deposits as such is not admissible.[94] Uses to which the property is to be put,[95] and its effect upon the remainder, may be shown. Witnesses cannot be interrogated as to matters calling for mere mathematical computation.[96] Where witness qualifies and gives his opinion as to value, he may be cross-examined as to elements of value which would not be competent as substantive evidence.[97]

Witnesses and examination thereof. See 11 C. L. 1223—Experts or persons sufficiently familiar with land values and acquainted with the land in question may give an opinion as to the value thereof,[98] but the commissioners are not bound by such opinion.[99]

Instructions. See 11 C. L. 1224—The rules applicable to instructions generally apply to proceedings to assess damages, such as relevancy to the issues,[1] consistency with

mission Co. v. McLean, 38 Mont. 388, 99 P 1061. Option showing price at which contiguous land could be obtained held inadmissible on value of land taken, where option was not supported by sworn testimony and its contents were not made known. Jeffery v. Chicago & M. Elec. R. Co., 138 Wis. 1, 119 NW 879.

87. American States Security Co. v. Milwaukee Northern R. Co., 139 Wis. 199, 120 NW 844. Exclusion of evidence of sales made from three to six years prior held not an abuse of discretion. St. Louis & I. B. R. Co. v. Guswelle, 236 Ill. 214, 86 NE 230.

88. Evidence of price paid by defendant for land about a year prior, with circumstances of sale, held admissible. State v. Spokane County Super. Ct. [Wash.] 104 P 148.

89. Grays Harbor Boom Co. v. Lownsdale [Wash.] 102 P 1041. What property is estimated to have brought in exchange made 10 or 12 years before. Oregon R. & Nav. Co. v. Eastlack [Or.] 102 P 1011.

90. Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 SW 1094.

91. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708.

92. State v. Spokane County Super. Ct. [Wash.] 104 P 148.

93. In re Simmons, 130 App. Div. 350, 114 NYS 571.

94. Where land is condemned for gravel, evidence of number of cubic yards in pit and value thereof per yard is inadmissible. Chicago, etc., R. Co. v. Mason [S. D.] 122 NW 601.

95. In proceeding to condemn by electric railway, evidence of charter power to use steam power, close proximity to steam railroads, traffic arrangement therewith, etc., held admissible to show what use land might be put to (Pierce v. Chicago & M. Elec. R. Co., 137 Wis. 550, 119 NW 297), and instruction that such evidence could only be considered on question of market value of land not taken held to properly limit it (Id.).

96. Where property was leased for 80 years at $2,000 annual rental, question as to present value of rents to accrue held properly excluded as being a mere mathematical computation. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

97. Evidence of cost of moving and replacing sheds and fences and danger to life and property incident to railroad crossing is too remote for independent elements of damage, but witness may be examined in respect thereto as bearing upon weight to be given his opinion. Pierce v. Chicago & M. Elec. R. Co., 137 Wis. 550, 119 NW 297.

98. In assessing damages to mill property, millers and manufacturers who are familiar with the property and the values in the locality are competent. Mengell's Ex'rs v. Mohnsville Water Co. [Pa.] 73 A 201. Farmer who had known farm for 40 years, who had some familiarity with land values and general selling price in neighborhood, and who had observed cut made by railroad, held qualified to express opinion as to market value. White v. Western Allegheny R. Co., 222 Pa. 534, 71 A 1081. Expert on land values in city may testify as to damages to abutting property caused by construction of elevated railway in street. Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 SW 1094. Witnesses showing familiarity with value of lands and probable injury to such lands by crossing of railroad may give an opinion thereon. Wolf v. Green Bay, etc., R. Co., 140 Wis. 337, 122 NW 743.

99. In re City of New York, 129 App. Div. 711, 114 NYS 68.

1. Statement in instruction that to sell real estate at market value sometimes requires offers and negotiations for weeks and even months held not prejudicial, though objectionable as in the abstract. Kansas City So. R. Co. v. Anderson [Ark.] 113 SW 1030. Where it appears that witnesses were influenced by benefits to be derived from location of railroad in testifying to damages,

one another,[2] etc. They should fairly apprise the jury of their duties,[3] and must not be misleading,[4] assume facts in issue,[5] or ignore elements of damage,[6] and should not indicate the opinion of the court.[7]

§ 15. *View of appropriated premises.*[8]—See 11 C. L. 1224—In many states the jury may view the premises,[9] and where such right is exercised, they may consider the observations in giving credit to the other evidence,[10] and may disregard testimony shown thereby to be false.[11] Such observations, however, should not be considered to the exclusion of other competent evidence.[12]

§ 16. *Verdict, report or award; judgment thereon and lien or enforcement of judgment.*[13]—See 11 C. L. 1224—An award or report should ordinarily specify items entering therein so as to facilitate objections,[14] and, where insufficient, may be referred back[15] or a supplemental report be demanded.[16] In most states, a specific

held proper to instruct as to difference between special and general benefits and that only former could be offset. American States Security Co. v. Milwaukee Northern R. Co., 139 Wis. 199, 120 NW 844. In condemnation to widen railroad right of way, instruction that crossing to be furnished might necessarily be overhead or underground held properly refused where necessity of such kind was purely speculative. Klopp v. Chicago, etc., R. Co. [Iowa] 119 NW 373.

2. Instruction in action for damages caused by construction of elevated railway in street, that measure of damages is difference between market value before and after the "construction, maintenance and operation," held not in conflict with instruction that if after "building and operation" property was of equal or greater value there could be no recovery, because of omission of word "maintenance." Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 SW 1094. Instruction that while question of indirect damage is ordinarily more difficult to determine than actual value of the land, it is governed by same rules, that amount must be just compensation for actual indirect damage, that jury should consider only those elements that would be agreed upon as reasonable by a reasonable buyer and seller, willing trading in open market, held meaningless. Helena Power Transmission Co. v. McLean, 38 Mont. 388, 99 P 1061.

3. Instruction that jury should not agree in advance to add values as testified to by various witnesses and divide sum by number of witnesses to find value but should consider all the credible evidence, etc., held not erroneous as authorizing them to take the average fair market value. Pierce v. Chicago & M. Elec. R. Co., 137 Wis. 550, 119 NW 297. Instructions on damages recoverable by railroad for establishment of highway across its right of way so vague as to authorize assessment of nonallowable damages held properly refused. New York, etc., R. Co. v. Rhodes, 171 Ind. 521, 86 NE 840.

4. Instruction that telephone company placing poles in the margin of a public road has a right to cut all growing timber within margin of road without liability to abutting owner held misleading, the issue being amount of damages owner is entitled to by reason of construction of line and not company's liability for cutting timber. Long Distance Tel. & T. Co. v. Schmidt [Ala.] 47 S 731. Instruction that owner must be compensated for property taken and damages resulting from the taking, and that jury might award such amount as would fully compensate owner and would leave him in as good a position as before appropriation, held not misleading. Toledo & C. I. R. Co. v. Wagner, 171 Ind. 185, 85 NE 1025.

5. Where parties treated land as in one track, instruction assuming such fact held not erroneous. Ellering v. Minneapolis, etc., R. Co., 107 Minn. 46, 119 NW 507.

6. Instruction that if telephone poles are placed in margin of public road the abutting owners are entitled only to nominal damages held erroneous as ignoring right to compensation for right of way outside of ground actually occupied by poles. Long Distance Tel. & T. Co. v. Schmidt [Ala.] 47 S 731.

7. Darien & W. R. Co. v. McKay [Ga.] 64 SE 785.

8. **Search Note:** See Eminent Domain, Cent. Dig. §§ 558, 559, 590, 591; Dec. Dig. §§ 220, 232; 15 Cyc. 879, 880, 889; 7 A. & E. Enc. P. & P. 579.

9. Where right to view exists, juror cannot be asked whether he would take evidence introduced on witness stand and law as given by the court and render a verdict thereon. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708.

10. American States Security Co. v. Milwaukee Northern R. Co., 139 Wis. 199, 120 NW 844; Mercer County v. Wolff, 237 Ill. 74, 86 NE 708.

11. Though known to be false only from observations. American States Security Co. v. Milwaukee Northern R. Co., 139 Wis. 199, 120 NW 844.

12. South Park Com'rs v. Ayer, 237 Ill. 211, 86 NE 704. Instruction authorizing jury viewing the premises to fix value on their judgment, based solely on inspection, is erroneous. Id.

13. **Search Note:** See Eminent Domain, Cent. Dig. §§ 568-579, 592-613, 621-646; Dec. Dig. §§ 223, 224, 234-237, 241-249; 15 Cyc. 881, 890-893, 904, 917-927, 929-934, 941, 942; 7 A. & E. Enc. P. & P. 534.

14. Should specify damages allowed for injury to buildings and machinery. In re New Street in City of New York, 63 Misc. 495, 117 NYS 409.

15. Reference back to commissioners to specifically state items entering into the award held authorized by § 1438a, Greater New York Charter (Laws 1897, p. 1, c. 378), as added by Laws 1901, p. 613, c. 466. In re New Street in City of New York, 63 Misc. 495, 117 NYS 409.

award should be made to each person having an estate or interest in the land taken,[17] but, in New Jersey, the commissioners assess the full value of the property, leaving to other tribunals the distribution thereof,[18] and, in Illinois, an award in gross is proper if the parties consent thereto.[19] Where estates become merged pending proceedings, they need not be separately assessed.[20] Upon the filing of an award, verdict, or report, it may be set aside for defects upon its face rendering it void.[21]

Effect or conclusiveness. See 11 C. L. 1225—Final order in proceedings for widening street in borough of Brooklyn in so far as it divested the title of the owners and fixed compensation has the force and effect of a judgment,[22] but, in so far as it apportioned costs and imposed assessments, it was but the legislative exercise of taxing power.[23]

Judgment or confirmation and enforcement. See 11 C. L. 1225—Confirmation of an award relates back to the time that title vested in condemnor.[24] No judgment can be entered on a verdict for the property owner where condemnor has right to abandon proceeding.[25] A confirmed award will ordinarily be treated as personalty.[26] Where, during trial, the condemnor restricts the taking by stipulation, such restriction should be included in the judgment.[27] One having merely a joint interest in a gross award cannot maintain a suit thereon under the New Jersey statute, authorizing a suit as on contract to recover award.[28]

Interest. See 11 C. L. 1228—The right to interest[29] and the date from which the

16. Sufficiency of report and necessity for a supplemental report are matters properly arising on hearing on motion to confirm. Application for order requiring supplemental report made before hearing held improper. In re Willis Ave. Bridge Across Harlem River, 117 NYS 1101.

17. Under Greater New York Charter (Laws 1897, pp. 347, 507, c. 378), §§ 980, 1438, award should be made direct to every person having a distinct interest, however small. In re New Street In City of New York, 63 Misc. 495, 117 NYS 409. Failure to adjudicate rights of a mortgagee in land taken is no ground for disturbing judgment of appeal, where it appears that parties stipulated that debt should be paid from award. Wolf v. Green Bay, etc., R. Co., 140 Wis. 337, 122 NW 743.

18. Commissioners, appointed under P. L. 1900, p. 79, §§ 5, 6. Zimmerman v. Hudson & M. R. Co., 76 N. J. Law, 251, 71 A 127.

19. Upon laying out a road, damages accruing to several owners of a single tract of land may be assessed in gross, if the several owners so agree and request. Com'rs of Highways of Town of Scott v. Sangamon Com'rs of Highways, 142 Ill. App. 489.

20. Leasehold terminated. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

21. Davis v. Union Manufacturing & Power Co. [S. C.] 65 SE 234. Owner who had accepted award in petition to have award set aside or that he be given real value of his lot, alleged that arbitrators assessed his property under mistake as to size of lot, that they awarded him less than they awarded another for a smaller lot, but did not allege that size was material in estimating damages or that he was induced by mistake or fraud to accept sum. Petition held insufficient. Smith v. Marianna [Ark.] 115 SW 938.

22. And was beyond legislative control. In re Lockitt, 58 Misc. 5, 110 NYS 32.

23. Subject to modification. In re Lockitt, 58 Misc. 5, 110 NYS 32.

24. So that interest is allowable therefrom. In re Edgecombe Road, 128 App. Div. 432, 112 NYS 845.

25. Klopp v. Chicago, etc., R. Co. [Iowa] 119 NW 373.

26. Unless there are equitable reasons for regarding it as realty. Wendel v. Binninger, 132 App. Div. 785, 117 NYS 616.

27. Where, in proceedings to condemn for change of street grade, city's action during trial amounted to stipulation not to extend grade farther north than 163 feet, judgment should impose such restriction unless further condemnation was had. In re Mercer St. [Wash.] 104 P 133.

28. Cannot sue under Act March 29, 1900 (P. L. p. 82). Daab v. Hudson County Park Com'rs [N. J. Law] 71 A 51.

29. Judgment affirming award and vesting title in condemnor is a judgment within statute requiring payment of interest thereon. Brunn v. Kansas City, 216 Mo. 108, 115 SW 446. Final order is not a "verdict," "report," or "decision," within Code Civ. Proc. § 1235, providing that, when judgment is rendered for a sum of money, awarded by a verdict, report, or decision, interest thereon shall be included by clerk, etc. In re Pines' Stream & East Meadow Stream, 129 App. Div. 929, 62 Misc. 61, 114 NYS 681. Kansas City charter provides that, pending appeal, no interest shall be allowed on judgment. City obtained judgment condemning lands, and one owner elected to abide thereby, but others appealed. City acted in good faith. Held that owner who elected to accept judgment was not entitled to interest thereon during appeal, notwithstanding Rev. St. 1899, § 3707, providing for payment on interest on judgments generally. Brunn v. Kansas City, 216 Mo. 108, 115 SW 446. Where condemnor deposits award with county treasurer for owner, but owner takes an appeal, has award set aside and secures a higher

same runs[30] differs in the various states. Where an award draws interest, no compensation is allowable for delay in paying same.[31] While technical interest does not run from the time of taking until time of trial in Pennsylvania, the delay may be considered in the assessment of damages,[32] unless caused by unreasonable acts of the owner.[33] Where an award is deposited for the benefit of the owner under a statute authorizing such deposit, it draws no interest,[34] although the owner is entitled to any actual earnings.[35] Acceptance of award does not bar claim for damages where the right is specifically reserved.[36] Under the New York statute a claim for interest must be presented to the commissioners and allowed as a part of the award.[37]

§ 17. *Costs and expenses.*[38]—See 11 C. L. 1226.—Costs are usually controlled by statute,[39] but it has been held that the constitutional obligation to make "just com-

award on repraisal, he is entitled to interest only on the excess. In re Board of Water Com'rs of Village of White Plains, 195 N. Y. 502, 88 NE 1102.

30. Although damages are assessed under Code Civ. Proc. § 1249, as of time of issuance of summons, interest is to be computed only from time of taking possession. City of Los Angeles v. Gager [Cal. App.] 102 P 17. Interest runs on damages from date of filing of report of committee appointed to assess same, on supreme court of errors advising superior court to accept same. New Haven County v. Parish of Trinity Church of New Haven [Conn.] 73 A 789. Interest should be computed from time of taking possession and not from time of judgment. San Pedro, etc., R. Co. v. Salt Lake City Board of Education [Utah] 99 P 263. Owner is not entitled to interest on interest on amount of compensation awarded from date of award until payment. Bishop v. New Haven [Conn.] 72 A 646. Since pending appeal to superior court for reassessment of compensation, owner retains possession and use of property, he is not entitled to interest on assessment from date of original assessment. Id.

31. In re Simmons, 61 Misc. 352, 113 NYS 890.

32. While interest is not allowable from time of taking to time of trial, the delay may be considered in assessing the damages, hence use of word "interest" in charge is no ground for reversal where it was not misleading and laid down correct rule. Mengell's Ex'rs v. Mohnsville Water Co. [Pa.] 73 A 201.

33. Mengell's Ex'rs v. Mohnsville Water Co. [Pa.] 73 A 201.

34. Where award is deposited with county treasurer to credit of owner, under Code Civ. Proc. § 3371, condemnor is not thereafter liable for interest. In re Board of Water Com'rs of White Plains, 132 App. Div. 75, 116 NYS 495

35. Code Civ. Proc. §§ 3375, 3377, providing that proceedings shall not be stayed on appeal, except by order of court and appeal shall not affect petitioner's possession, contemplates that owner shall accept award, and where it is deposited with county treasurer as provided by § 3371, owner is not entitled to interest pending appeal, but is entitled to earnings. In re Board of Water Com'rs of White Plains, 132 App. Div. 75, 116 NYS 495.

36. Grote v. New York, 128 App. Div. 885, 112 NYS 514.

37. Under Greater New York Charter (Laws 1901, p. 419, c. 466), § 990, providing that interest shall be allowed by commissions as part of award. In re Belmont Street, 128 App. Div. 636, 112 NYS 858. Subsequent order in collateral proceeding allowing interest is irregular (Id.), and city is not estopped from denying its liability though it does not oppose same (Id.).

38. Search Note: See Eminent Domain, Cent. Dig. §§ 690-693; Dec. Dig. § 265; 15 Cyc. 973-977; 7 A. & E. Enc. P. & P. 666.

39. Rapid Transit Act 1894 (Laws 1894, p. 1896, c. 721), § 62, held to expressly authorize attorney's fees. In re Low, 128 App. Div. 103, 112 NYS 619. Reasonable counsel fees, not exceeding 5 per cent of value of subject-matter, may be allowed, Laws 1905, p. 2051, c. 725, § 5, supplementary to Laws 1905, p. 2027, c. 724. In re Board of Water Supply of New York, 62 Misc. 326, 116 NYS 642. Laws 1905, p. 2027, c. 724, as amended by Laws 1906, p. 736, c. 314, providing for additional water supply for city of New York, authorizing allowance of sums "as expenses and disbursements," held to include costs, and hence Code Civ. Proc. § 3240, relating to costs in special proceeding generally. In re Board of Water Supply of New York, 62 Misc. 324, 116 NYS 640; Id., 62 Misc. 326, 116 NYS 642. Laws 1905, p. 2027, c. 724, providing for condemnation of reservoirs for city of New York, construed with New York City Charter (Laws 1901, p. 222, c. 466), relating to costs, attorney fees, etc., held to authorize court to allow costs covering attorney's fees. In re Simmons, 61 Misc. 352, 113 NYS 890. Costs should be allowed where award is so small that authorized allowance of 5 per cent would not compensate counsel. Id. Laws 1905, p. 2027, c. 724, authorizing appropriation of land for water supply and providing for expenses and disbursements, held complete in itself and that court could not allow costs as provided by Code Civ. Proc. § 3240., In re Simmons, 130 App. Div. 350, 114 NYS 571. Rapid Transit Act of 1891 (Laws 1891, p. 3, c. 4), as amended by Laws 1894, p. 1873, c. 752, authorizing cities of more than 1,000,000 inhabitants to take property for public purposes, etc., authorizes New York city to acquire property within 3 Laws 1901, p. 425, c. 466, § 998, as amended by Laws 1904, p. 1885, c. 736, § 1, permitting additional allowances. In re Low, 128 App. Div. 103, 112 NYS 619. Code, § 2815, providing that in condemnation for school purposes "either party may appeal to district court * * * as in case of taking private

pensattion" includes reasonable costs,[40] but not unnecessary and extravagant expenditures.[41] Where an injunction is properly granted because of lack of power of eminent domain in condemnor, upon dissolution thereof after acquisition of such power costs should be imposed on condemnor.[42] Since appeal is not a necessary part of the proceedings, the costs thereof may be imposed upon the property owner if unsuccessful.[43] Interest on award is no part of the costs of the appellant court on appeal from award.[44]

§ 18. *Review of condemnation proceedings.*[45] *The right to review.* See 11 C. L. 1227—While appeals are generally allowed by statute,[46] the right thereto is not inherent and hence the legislature may impose such conditions as it sees fit.[47] The right may be waived.[48] Appeals are usually only allowed to persons aggrieved.[49] Where payment or deposit of award is necessary to preserve rights, a deposit made to comply with the statute and not for present payment to owners does not bar appeal.[50]

Saving questions for review. See 11 C. L. 1228—The general rules governing saving questions for review are treated elsewhere.[51] Ordinarily, the question must be pre-

property for works of internal improvement," held not to adopt entire c. 4, tit. 10, relating to internal improvement appeals, including § 2007 making attorney's fees a part of costs (Jones v. School Board of Liberty Tp. [Iowa] 118 NW 265), notwithstanding no procedure in district court was adopted, the court having power to prescribe same (Id.). Where city condemns the property of a waterworks company, cost of proceedings must be paid by city. In re Monongahela Water Co. [Pa.] 72 A 625. Where Laws 1905, p. 2027, c. 724, providing for condemnation of lands for water supply purposes, provided for allowance for counsel fees, but not for costs, to be paid by city, Code Civ. Proc. § 3240, authorizing imposition of costs in any special proceeding was applicable. In re Simmons, 61 Misc. 352, 113 NYS 890.

40. "Just compensation" includes reasonable cost of fixing value. In re Low, 128 App. Div. 103, 112 NYS 619. Laws 1905, p. 2027, c. 724, as supplemented by Laws 1905, p. 2051, c. 725, providing for allowance of expenses and disbursements, including witness and counsel fees, held to satisfy constitutional requirement of "just compensation." In re Board of Water Supply of City of New York, 62 Misc. 326, 116 NYS 642. Owner is entitled to be reimbursed for expense of obtaining a clerk's search showing her title, such search being a prerequisite to payment by state. Burchard v. State, 128 App. Div. 750, 113 NYS 233.

41. Allowance of $400 for expert fees affirmed though owner had paid $3,000. Studwell v. Halsted, 62 Misc. 330, 116 NYS 68.

42. Lehman v. Chambersburg & Gettysburg Elec. R. Co. [Pa.] 73 A 440.

43. Costs fall upon unsuccessful party, under Ball. Ann. Codes & St. § 5643 (Pierce's Code, § 5108). Kitsap County v. Melker, 52 Wash. 49, 100 P 150. Where final order in condemnation proceedings by city against owners of separate parcels who appeared by separate counsel is affirmed "with costs" by court of appeals on city's appeal, each owner is entitled to a separate bill of costs. In re Pine's Stream & East Meadow Stream, 129 App. Div. 929, 62 Misc. 61, 114 NYS 681.

44. In re Pine's Stream & East Meadow Stream, 129 App. Div. 929, 62 Misc. 61, 114 NYS 681.

45. Search Note: See notes in 5 C. L. 1136; 2 L. R. A. (N. S.) 313.

See, also, Eminent Domain, Cent. Dig. §§ 658-689; Dec. Dig. §§ 251-264; 15 Cyc. 944-954, 959-973; 7 A. & E. Enc. P. & P. 628.

46. Whether owner of particular estate is entitled to appeal from award of commissioners, whether mandamus will lie to circuit court to compel framing of issues, and, if so, whether it ought to be allowed to applicant on ground that commissioners failed to apportion award, should not be determined on preliminary application for writ. Zimmerman v. Hudson & M. R. Co., 76 N. J. Law, 251, 71 A 127.

47. In re Board of Water Com'rs of White Plains, 132 App. Div. 75, 116 NYS 495.

48. Taking possession of land by commissioners, removing improvements thereon, converting it into public street, and paying the several awards, without waiting results of appeal, estopped them to prosecute appeal before taken. Macfarland v. Poulos, 32 App. D. C. 558.

49. Appeal from award must be taken by one entitled to damages, and hence under Pub. St. 1901, c. 45, § 2, et seq., appellant must show that he was owner of fee, remainder, or reversion, or a tenant for life or years. Lyford v. Laconia [N. H.] 72 A 1085. Although petitioner's interest in action has ceased by payment of award into county treasury for benefit of owners, persons claiming adversely to cross petitioner claiming dower may appeal from order finding him entitled to dower, fixing value thereof and directing payment. Chicago & N. W. R. Co. v. Garrett, 239 Ill. 297, 87 NE 1009.

50. Kirby's Dig. § 2954 provides that a railroad company must, within 30 days after assessment for land taken, deposit same in court or pay to owner, and § 2957, that, unless deposit is so made, all title or right in property shall be forfeited. Where deposit is made to comply with statute and not for present payment to owners' right of appeal is not lost. Kansas City & So. R. Co. v. Boles [Ark.] 115 SW 375.

51. See Saving Questions for Review.

sented to the trial tribunal [52] and due exception taken to the disposition there made of it.[53]

Taking and perfecting an appeal.[See 11 C. L. 1228]—A notice of appeal served before the service of the notice of filing of report is noneffective in Minnesota.[54] The appeal must be timely taken,[55] and, if so taken, no statute of limitations can bar damages.[56] All persons affected thereby must usually be made parties to the appeal.[57]

Decisions reviewable.[See 11 C. L. 1226]—Ordinarily, appeal will not lie from interlocutory orders,[58] but only from judgments [59] and final determinations.[60] The same question cannot be presented by successive appeals.[61]

Hearing and scope of review.[See 11 C. L. 1229]—The questions reviewable depend largely upon the scope of the appeal.[62] Where appeal vacates the proceedings and

52. Owner cannot complain for the first time on appeal that he was not given a separate trial. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933. Where evidence was introduced without objections on trial to condemn land for school house site that electors had duly authorized proceeding, petition cannot be attacked for first time on appeal for failure to allege such authorization. Kirkwood v. Summit County School Dist. [Colo.] 101 P 343.

53. Where appellant did not except to court's finding that corporation was duly organized, she could not object on certiorari that it was not properly formed. State v. Pacific County Super. Ct., 51 Wash. 386, 99 P 3. Water company seeking to condemn riparian rights offered in evidence stipulation exempting so much water as would be necessary to water defendant's lands. Court ruled that acceptance of offer was optional, company reserving exceptions and stating its position. Held that error was sufficiently saved for review. Spokane Val. Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 P 515. Under Eminent Domain Act, § 5 (Laws 1905, p. 61, c. 48; Burns' Ann. St. 1908, § 930), relating to objections, objections are intended to serve purpose of demurrer if directed to face of complaint, in which case they raise an issue of law, and hence if sustained plaintiff must except to preserve question for review. Toledo & I. Trac. Co. v. Indiana & C. I. R. Co., 171 Ind. 213, 86 NE 54.

54. Ellering v. Minneapolis, etc., R. Co., 107 Minn. 46, 119 NW 507.

55. Laws 1907, p. 338, c. 153, § 51, requiring appeals within 30 days, held to apply to an order dismissing proceedings on motion of city to set aside a judgment on a verdict assessing damages and to dismiss for lack of subject-matter. City of Tacoma v. William Birmingham Co., 50 Wash. 683, 97 P 971.

56. Missouri, etc., R. Co. v. Schmuck [Kan.] 100 P 282.

57. Burns' Ann. St. 1908, §§ 675, 676 (Acts 1895, p. 179, c. 86), changing rule that all parties affected by judgment appealed from must be included in appeal, does not apply to appeal from interlocutory order appointing or refusing to appoint appraisers, under Burns' Ann. St. 1901, § 650. Lake Shore Sand Co. v. Lake Shore & M. S. R. Co., 171 Ind. 457, 86 NE 754.

58. Order denying motion to dismiss petition of railroad to condemn land for want of authority to take same is interlocutory. Chicago Terminal Transfer R. Co. v. Preucil, 236 Ill. 491, 86 NE 117. Under Laws 1907, p. 316, c. 153, § 51, providing that, except as otherwise provided, practice in appeals shall be the same as in other civil actions, and Ballinger's Ann. Codes & St. § 6500, subd. 1, providing that appeal lies from final judgment which shall bring up all orders, etc., held that no appeal lies from order adjudging use to be a public one. City of Tacoma v. Nisqually Power Co. [Wash.] 103 P 49. Writ of certiorari to review determination overruling preliminary objections to a condemnation proceeding and ordering a jury to determine necessity of taking and to fix damages, no reason appearing for interference at that stage of the proceeding. Michigan Cent. R. Co. v. Miller [Mich.] 16 Det. Leg. N. 551, 122 NW 473.

59. Final order recited that court had denied a motion to dismiss and had found that petitioner was entitled to condemn property sought, and recited stipulation as to compensation. Owner appealed from order authorizing petitioner to condemn and from order denying motion to dismiss. Held that there was no appeal from final judgment. Chicago Terminal Transfer R. Co. v. Preucil, 236 Ill. 491, 86 NE 117.

60. Order determining that petitioner has the power to condemn is not a "final determination," within 1 Mills' Ann. St. § 1727, making only a final determination appealable. Burlington & C. R. Co. v. Colorado Eastern R. Co. [Colo.] 100 P 607.

61. Appeal from final order distributing fund is proper where former appeal was from mere finding that appellant had no interest and there being but one record. Chicago & N. W. R. Co. v. Glos, 239 Ill. 24, 87 NE 881.

62. On appeal from award only errors affecting the same can be considered. Fruitland Irr. Co. v. Smith [Wash.] 102 P 1031. Where commissioners made an award conditioned upon construction and maintenance of a described cattle chute and appeal is taken only from amount of award, evidence of sufficiency or insufficiency of cattle chute is inadmissible. Minneapolis, St. P., R. & D. Elec. Trac. Co. v. St. Martin [Minn.] 122 NW 452. On appeal from award, power of company to condemn and necessity for taking of the land cannot be raised. Atlanta Terra Cotta Co. v. Georgia R. & Elec. Co. [Ga.] 64 SE 563. Acts 1905, p. 62, c. 48, § 6 (Burns' Ann. St. 1908, § 934), providing that appraisers shall determine, first, value of each parcel appropriated; second, value of improvements thereon; third, damages to residue

results in a trial de novo, the issues are the same as below.[63] Upon an appeal in Minnesota from an award the opening and closing lies within the discretion of the court.[64] Regularity of proceedings in a court of general jurisdiction will be presumed,[65] and any error must be shown to have been prejudicial to work a reversal.[66] Case will not be reversed for errors which may be corrected on the appeal.[67] Although the award of the assessors has been paid, the jury on appeal must find for the full amount.[68] On appeal in Georgia, the jury can award compensation only in money.[69] Findings of fact will not be disturbed on appeal where the evidence is conflicting,[70] or where there is any competent evidence in support thereof.[71] Hence, while an award will be set aside if inadequate or excessive,[72] it will not be vacated where the evidence is conflicting,[73] or there is evidence supporting it,[74] unless assessed

from taking out of part; and fourth, such other damages as shall result from construction of improvement. Section 8 provides for trial upon filing of exceptions. Exceptions that damages were too low; that no damages were allowed for depreciations in value or remainder, etc., held sufficient to allow review of 4th element of assessment. Toledo & C. I. R. Co. v. Wilson [Ind. App.] 86 NE 508. Where trial court determined that it was necessary to take exclusive use and appeal is taken only on amount of award, railroad cannot offer to construct crossings on theory that owner still had easement left. Jeffery v. Chicago & M. Elec. R. Co., 138 Wis. 1, 119 NW 879.

63. On appeal to district court, issues are same as presented to sheriff's jury, though they are to be decided independent of award appealed from. Hall v. Wabash R. Co. [Iowa] 119 NW 927. Appeal to district court vacates proceedings, and hence all damages were within issues irrespective of any averment in bill of particulars. Missouri, etc., R. Co. v. Schmuck [Kan.] 100 P 282. Any diminution in value of use of property pending appeal to superior court for reassessment, caused by condemnation proceedings, is a proper subject of proof on reassessment hearing. Bishop v. New Haven [Conn.] 72 A 646.

64. Upon appeal by landowner from award in railroad condemnation proceedings, held no abuse of discretion to give landowner the opening and closing. Ellering v. Minneapolis, etc., R. Co., 107 Minn. 46, 119 NW 507.

65. Objection to entry of judgment because no order therefor appears of record held nonavailable. Wolf v. Green Bay, etc., R. Co., 140 Wis. 337, 122 NW 743.

66. Refusal to allow owner to open and close case before jury is no ground for reversal where no prejudice is shown. Kirkwood v. Summit County School Dist. [Colo.] 101 P 343. Admission of incompetent evidence does not require a reversal, unless it affirmatively appears that it was considered. In re Croton River Dam & Reservoir in New York, 129 App. Div. 707, 114 NYS 75. Certificate, made by commissioners after their report, that they granted reserved motion to exclude certain testimony, and disregarded same, can be considered to show that testimony was eliminated. Id. Admission of evidence of structural value or cost of reproducing buildings does not require reversal of award where there is other competent evidence supporting same, and it is not shown that commissioners considered such incompetent evidence. In re City of New York, 129 App. Div. 711, 114 NYS 68. Where it appears of record that plaintiff had no title to land taken from one piece crossed by railroad, it will be presumed that jury did not award damages therefor. Hall v. Wabash R. Co. [Iowa] 119 NW 927.

67. Refusal of trial court to insert in judgment in condemnation for change of street grade a stipulated restriction as to length of grade is no ground for reversal but may be imposed by appellate court. In re Mercer St. [Wash.] 104 P 133. If jury awarded damages for a strip which plaintiff did not own, same may be corrected on appeal to district court. Hall v. Wabash R. Co. [Iowa] 119 NW 927.

68. Court in its judgment adjusting the rights of the parties respecting the payment. Atlanta, B. & A. R. Co. v. Smith [Ga.] 64 SE 1073.

69. Under Civ. Code 1895, § 4678, providing that, on appeal from award of assessors, the issue is "the value of the property taken or the amount of damage done," jury must give compensation in money, and cannot award specified sum and privilege of removing improvements. Darien & W. R. Co. v. McKay [Ga.] 64 SE 785.

70. Indianapolis & W. R. Co. v. Hill [Ind.] 86 NE 414.

71. Zehner v. Milne [Ind.] 87 NE 209. Where commissioners viewed land, award will not be reversed because greatly under average of value fixed by owner's witnesses, being in excess of values testified to by condemnor's witnesses. In re Croton River Dam & Reservoir in New York, 129 App. Div. 707, 114 NYS 75.

72. Award may be set aside where excessive. New York Cent. & H. R. R. Co. v. Domproff, 63 Misc. 211, 116 NYS 924. Award will not be reversed because it seems too large or too small, unless grossly inadequate or excessive. In re Croton River Dam & Reservoir in New York, 129 App. Div. 707, 114 NYS 75. Court of claims cannot place value of land below that given by any witness. Burchard v. State, 128 App. Div. 750, 113 NYS 233.

73. City of St. Louis v. Calhoun [Mo.] 120 SW 1152. Where evidence is conflicting and jury viewed premises, verdict within range of the testimony will not be disturbed. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. Award of an amount between the values testified to by owner's witnesses and condemnor's witness sustained. In re New Street in New York, 63 Misc. 495, 117 NYS

on the wrong theory [75] or an improper element entered therein.[76] That assessment was made at a time when land values were high is no ground for setting aside the award.[77]

§ 19. *Remedy of owner by action or suit. A. Actions for tort, damages, or trespass; recovery of property.*[78]—See 11 C. L. 1230—Where a person or corporation, possessing the power of eminent domain, threatens to take private property without exercising such power, injunction will lie,[79] or, if it has been taken, the owner may ordinarily maintain ejectment [80] or trespass,[81] or, in some states, a statutory action for assessment of damages as for an appropriation,[82] unless the owner consented to such taking.[83] A few states make the latter remedy exclusive,[84] in which case only

409. Although lowest value placed on property by witness is $9,400, award of $7,750 will be sustained where it appears that it was assessed for taxation at $1,200. In re Simmons, 132 App. Div. 574, 116 NYS 952.

74. In re Mercer St. [Wash.] 104 P 133. Assessment of damages to lots by changing course of a stream on which they abutted equal to one-third of their value, exclusive of their improvements, held not sustained by the evidence. New York Cent. & H. R. R. Co. v. Domproff, 63 Misc. 211, 116 NYS 924. Award of $700, where taking would destroy wall of tenement house, and lowest estimate of cost of repair was $1,348.67, the estimate of condemnor's expert, held unsupported. In re New Street in New York, 63 Misc. 495, 117 NYS 409. Where owner's evidence fixed value of strip taken at $6,000 and depreciation of remainder at $3,000, while defendant's evidence fixed value of former at $300 with no depreciation in value of remainder, an award of $1,800 will not be disturbed. Krier v. Milwaukee Northern R. Co., 139 Wis. 207, 120 NW 847. Where right of way for railroad across 98 acres took 5.72 acres, and witnesses for petition placed value of land taken from $60 to $75 per acre, and damages to that not taken from nothing to $165, while witnesses of owner fixed value of former from $125 to $135 and damages to that not taken from $1,800 to $2,200, verdict fixing value of land taken at $592 and damages to remainder at $1,362 held not excessive. St. Louis & I. B. R. Co. v. Guswelle, 236 Ill. 214, 86 NE 230. Where property is subject to eighty-year lease, jury held not in error in not considering reversion of any value. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

75. Assessors had viewed land. New York Cent. & H. R. R. Co. v. Utermyer, 117 NYS 443.

76. Grays Harbor Boom Co. v. Lownsdale [Wash.] 102 P 1041.

77. In re Third, Fourth & Fifth Avenues, 49 Wash. 109, 95 P 862.

78. **Search Note:** See Eminent Domain, Cent. Dig. §§ 694-742, 775-833; Dec. Dig. §§ 266-271, 277-316; 15 Cyc. 979-995, 997-1004, 1006-1011, 1013-1018.

79. See, post, § 19B.

80. Ejectment will lie against railroad to recover land used in business of common carrier. Mapes v. Vandalia R. Co., 238 Ill. 142, 87 NE 393. Where railroad occupies right of way without right, fact that it so occupied when plaintiff purchased is no defense to ejectment. Id.

81. Where grade of street is changed, abutter may recover damages in action at law. Sievers v. Root [Cal. App.] 101 P 925. Damages resulting to an owner of land, no part of which is taken, are not within Eminent Domain Act, but he is remitted to action at law. Mercer County v. Wolff, 237 Ill. 74, 86 NE 708. Where a pipe line company without tender of bond or effort to agree as to damages laid pipe line on plaintiff's land with his knowledge, he had a right to waive his constitutional and statutory right to security for damages and make claim in his action of trespass for permanent injuries to his property as if the defendant had given such security. Truby v. American Natural Gas Co., 38 Pa. Super. Ct. 166.

82. Where telephone pole is so set in street as to constitute an additional burden, abutting property owner may sue in tort for damages or institute proceeding under Burns' Ann. St. 1901, § 893, etc., as for appropriation. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238. Location of telephone pole in street, close to and immediately in front of main entrance to plaintiff's saloon, does not constitute a permanent injury. Id. Act 1895 (Gen. St. 1895, p. 3539, § 214), § 63, providing that owner, who shall have presented written objections to award at time of meeting of town council to hear and determine objections, may institute action against town as on contract, etc., does not require presentment on day fixed for such meeting, but presentment at adjourned meeting is sufficient. Green v. Irvington [N. J. Err. & App.] 73 A 602.

83. Where railroad constructed coal pockets on land, in violation of agreement, it is liable for rental value from time of completion to attornment of its tenant following abandonment. Sprague v. Sea View R. Co. [R. I.] 72 A 818. Where railroad removes dirt in violation of agreement, it is liable for interest on value from time of taking. Id. Where, in complaint for construction of coal pockets on land in violation of agreement, answer admitted construction and offered to abandon same, such admission held to outweigh subsequent contention that she consented. Id.

84. Where city by condemnation changes course of water of stream, riparian owner is entitled in proceedings for damages for diversion of water, and cannot sue by way of tort. Oelschleger v. Boston, 200 Mass. 425, 86 NE 883. Compensation to which landowner is entitled to under St. 1892, p. 164, c. 185, providing for additional water supply for city of Pittsfield, cannot be recovered in action of tort for wrongful diversion. Bryant v. Pittsfield, 199 Mass. 530, 85 NE 739. Where a railroad company possessing the power of eminent domain has entered upon

the owner [85] of the property at the time of appropriation can recover.[88] As to future damages, a different rule prevails in the absence of special contract.[87] The procedure is generally prescribed or is analogous to condemnation proceedings.[88] The proceeding for assessment of damages is in effect a forced purchase, and upon making payment the defendant acquires such estate as was taken,[89] and, hence, all who are necessary to protect the defendant from further suits should be made parties.[90] Ejectment will not lie where entry was made and possession taken by a public service corporation under an honest belief that it had been duly condemned, especially if an offer to pay just compensation is made,[91] or where the owner has been guilty of inequitable conduct.[92] Where plaintiff prevails in ejectment against a common carrier, the company should be given a reasonable time to purchase or institute condemnation proceedings.[93] An action for trespass cannot be joined with a statutory proceeding to assess damages.[94] Where property is willfully taken in open disregard of private property rights, punitive damages may be recovered.[95] No action for damages can be maintained for an element included in the original assessment.[96]

(§ 19) *B. Suits in equity; injunction.*[97]—See 11 C. L. 1231—Injunction will ordinarily lie to prevent a threatened taking until compensation is made,[98] but, where

private property under claim of right and has constructed its road, it cannot be subjected to successive actions in trespass, but owner must recover as for permanent damages. Porter v. Aberdeen & R. R. Co., 148 N. C. 563, 62 SE 741.

85. Evidence that plaintiff's grantor, prior to conveyance to plaintiff, had conveyed to R, who went into possession; that witness took probate of such deed to R's attorney, where it was destroyed by freshet; that grantor's son saw deed to R; that it was lost; that plaintiff took quitclaim to land worth $20,000 for $10, was admissible on ownership. Abernathy v. South & W. R. Co., 150 N. C. 97, 63 SE 180.

86. Owner of land at time of construction of steam railroad in street can alone sue for damages because of additional burden. Tuskegee Land & Security Co. v. Birmingham Realty Co. [Ala.] 49 S 378.

87. Contract executed contemporaneous with conveyance of lots abutting on street in which was operated a street railroad, reciting that grantors claimed a cause of action "accruing to the date thereof" for damages because of such railroad, and that it was agreed that "said cause of action" should not pass, held that reservation was as to damages accruing to date of contract, and not thereafter. Anderson v. New York & H. R. R. Co., 132 App. Div. 183, 116 NYS 954.

88. In proceedings under Revisal 1905, § 2580, to assess compensation for land taken without condemnation for railroad right of way, court may, under § 2593, make rules of procedure in cases not provided for. Abernathy v. South & W. R. Co., 150 N. C. 97, 63 SE 180. Clerk passes in first instance upon question of plaintiff's title, and, if found not to have any, action should be dismissed, when appeal may be taken to superior court. Id. On appeal from clerk's finding as to plaintiff's title, judge of superior court may call in jury. Id. In proceedings under Revisal 1905, § 2580, defendant may dispute plaintiff's title by showing title in third person. Id. Third person in whom defendant contends rests true title is not necessary party, since plaintiff cannot recover if such person has title. Id.

89. Abernathy v. South & W. R. Co., 150 N. C. 97, 63 SE 180.

90. In action of trespass against railroad actually occupying with road in operation, all who have an interest in property and who are necessary to protect company from further suits are necessary parties. Porter v. Aberdeen & R. R. Co., 148 N. C. 563, 62 SE 741.

91. Jones v. Southern R. Co. [Ala.] 50 S 380.

92. Where owner contracts to convey right of way to railroad and permits construction of road at great expense thereunder, company may restrain him from suing in ejectment. Alabama Cent. R. Co. v. Long [Ala.] 48 S 363.

93. Mapes v. Vandalia R. Co., 238 Ill. 142, 87 NE 393.

94. Action for damages as for trespass cannot be joined with statutory proceedings under Revisal 1905, § 2580, for assessment of damages for land taken for railroad purposes without condemnation. Abernathy v. South & W. R. Co., 150 N. C. 97, 63 SE 180.

95. Statute authorizing water company to condemn land for erection of dam and making it liable to owners for all damage done does not prevent recovery of punitive damages in proper case where it entered and appropriated without condemnation. Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co. [S. C.] 63 SE 548.

96. Flooding of land not taken by water necessarily turned thereon in proper construction of railroad right of way held included in original assessment. Blunck v. Chicago & N. W. R. Co. [Iowa] 120 NW 737.

97. Search Note: See Eminent Domain, Cent. Dig. §§ 743-774; Dec. Dig. §§ 273-276; 15 Cyc. 987.

98. Abutter may enjoin change of grade of street until compensation is made. Sievers v. Root [Cal. App.] 101 P 925. Where city in condemning under Rapid Transit Act (Laws 1891, p. 3, c. 4) failed to designate a party-wall easement in favor of adjoining lot on its maps as required by the act, so as

property has been actually taken, the remedy will not lie where the owner has an adequate remedy for damages,[99] especially where the public will be directly inconvenienced thereby,[1] or where the owner has been guilty of inequitable conduct.[2] Proceedings under an unconstitutional statute may be restrained.[3] Likewise, injunction will lie to prevent appropriation of property outside of the strip condemned,[4] regardless of the question of damages,[5] and, where taken with full knowledge of owner's rights, a mandatory injunction will lie to compel surrender.[6] Where condemnor is insolvent,[7] and cannot pay awards, condemnation proceedings may be restrained. Injunctive relief will be refused where the petitioner has an adequate remedy by appeal.[8] The general rules applicable to pleadings [9] and relief obtainable thereunder [10] apply.

to acquire same, injunction will lie to restrain destruction of the wall until proceedings are properly amended. Seton v. New York, 61 Misc. 430, 114 NYS 1145. One owning a right to maintain a pier may enjoin city from making an improvement which will destroy such right, on failure of city to promptly move to condemn. American Ice Co. v. New York, 193 N. Y. 673, 87 NE 765. Where public authorities seek to take possession of land and open road thereover without first condemning and paying therefor, injunction will issue. Johnson v. Peterson [Neb.] 122 NW 683. Where railroad acting under an invalid proceeding had made no entry, owner was entitled to order restraining entry until compensation was made. Error to vacate temporary restraining order upon giving of bond securing payment. Lundberg v. Eastern R. Co., 139 Wis. 161, 120 NW 822. Under Const. art. 1, § 16, providing that private property shall not be taken or damaged for public use until compensation has been made or paid into court for owner, municipality may be enjoined from taking until it has made compensation as required. Ferry-Leary Land Co. v. Holt, 53 Wash. 584, 102 P 445. Where operation of steam railroad in street will materially interfere with access to premises of an abutter and will materially decrease value of property and render business less profitable, owner may enjoin same until compensation is made. Lund v. Idaho & W. N. R. Co., 50 Wash. 574, 97 P 665.

99. Proceedings under Rev. Codes, § 2412, et seq., to acquire right of way for public drain, is in exercise of eminent domain, and any impairment of plaintiff's water rights in irrigation ditch is an element to be considered in assessment of damages and no ground for injunction. Summers v. Sullivan [Mont.] 101 P 166. If use of street by railroad constitutes an additional servitude, abutter's remedy is damages, and not injunction. Griffin v. Southern R. Co., 150 N. C. 312, 64 SE 16. Under constitution and statutes of Arkansas, an owner injured by overflow as direct result of construction of levee has full and complete remedy at law by recovery of damages as for a taking for a public use. Meriwether v. St. Francis Levee Dist. Directors [C. C. A.] 165 F 317.

1. Where owner does not show that he will suffer more than nominal damages, city will not be enjoined from cutting certain slopes on the property abutting on a street. Ferry-Leary Land Co. v. Holt, 53 Wash. 584, 102 P 445. Before enjoining railroad from operation because of nonacquisition of right, company should be given a reasonable time to commence condemnation. Lund v. Idaho & W. N. R. Co., 50 Wash. 574, 97 P 665.

2. Where one owning nonrecord title to fee in street permitted street railway company to construct line in street without objection, which was done at great expense, rental and fee damages should be assessed and company given an opportunity to pay same and receive deed of uses, before being enjoined from using line. Shaw v. Rochester, S. & E. R. Co., 131 App. Div. 528, 115 NYS 1025.

3. Wilber v. Reed [Neb.] 122 NW 53.

4. Lovett v. West Virginia Cent. Gas Co. [W. Va.] 65 SE 196. Where a location for gas lines has been condemned across lands, owner need not stand by and see that pipes are not laid without the location, and is not thereby estopped from suing out an injunction. Id.

5. Lovett v. West Virginia Cent. Gas Co. [W. Va.] 65 SE 196. Question of right and not of damages being raised by application. Id.

6. Where gas company, restrained from laying pipes outside of condemned location, laid pipes with full knowledge of plaintiff's rights, mandatory injunction will lie. Lovett v. West Virginia Cent. Gas Co. [W. Va.] 65 SE 196.

7. City is not insolvent, so as to entitle property owners to injunction restraining grading of sidewalk until compensation is made, where it is a going concern discharging its functions, though it has no funds and has reached its taxing limit in providing for operating expenses. City of Marshall v. Allen [Tex. Civ. App.] 115 SW 849.

8. Where board of supervisors in assessing damages for opening of highway err in deciding that certain adjacent land is not damaged, owner has remedy by appeal under St. 1898, § 1285, and cannot enjoin opening of highway. Olson v. Curran, 137 Wis. 380, 119 NW 101. Where legality of proceedings may be tested by appeal and condemnor cannot take land until the appeal is decided, the proceedings will not be enjoined. Gorham v. New Haven [Conn.] 72 A 1012.

9. Complaint to enjoin construction of public drain on ground that it will deprive him of certain water rights, failing to allege that he was not party to proceedings, that he was not served with citation, or that award was insufficient, is insufficient. Summers v. Sullivan [Mont.] 101 P 166. Where

§ 20. *Payment and distribution of sum awarded; title or interest requiring compensation.*[11] See 11 C. L. 1232.—Payment in money[12] is required in some states before property can be taken.[13] Where city is dissatisfied with award, it cannot abandon proceedings and by an immaterial change in location of proposed street secure another assessment.[14] Where award in condemnation proceedings by city has been affirmed by the mayor and council, city cannot offset unpaid special assessment lien on land.[15] After compensation has been determined, a proper apportionment thereof may be made upon timely application,[16] and disputed titles determined.[17] Where fee in land taken for street purposes has become separated from adjoining land, an award to "unknown owners" is for all owners,[18] and should be apportioned one dollar to fee owner and remainder to the abutting lot owner.[19] One contesting claim to award deposited in court is estopped thereafter to assert directly or indirectly the invalidity of the proceedings.[20] Where property covered by trust deed is condemned, trustee need not execute a formal release.[21]

bill for injunction to prevent taking land is filed on ground that municipal consent has not been acquired and such consent is obtained before hearing, bill will be dismissed without ascertaining amount due petitioner, since that may be determined in regular way. Chapman Decorative Co. v. Philadelphia & R. Terminal R. Co. [Pa.] 73 A 952.

10. One suing to enjoin maintenance of elevated railway in street in front of premises and for damages for past maintenance is entitled to no greater relief than he would obtain in proceedings to condemn. Smyth v. Brooklyn Union El. R. Co., 193 N. Y. 335, 85 NE 1100.

11. Search Note: See notes in 18 L. R. A. 113; 21 Id. 212; 88 A. S. R. 363; 4 Ann. Cas. 944, 1011; 8 Id. 855.

See, also, Eminent Domain, Cent. Dig. §§ 188-214, 403-447; Dec. Dig. §§ 74-80, 151-165; 15 Cyc. 775, 782-804; 10 A. & E. Enc. L. (2ed.) 1188; 7 A. & E. Enc. P. & P. 624.

12. Offering in evidence in proceeding to condemn riparian's water rights of stipulation exempting such water as defendant would need to irrigate his land held not objectionable as making compensation other than in money. Spokane Val. Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 P 515. Fact that city did not have at all times sufficient funds in bank to pay orders is of no consequence to owner while he refuses to accept orders. Bishop v. New Haven [Conn.] 72 A 646.

13. Proceedings under Mills' Ann. St. §§ 3931-3943, for establishment of public highway, are in nature of condemnation proceedings, and principles relating to payment of award in latter cases apply. Boothroyd v. Larimer County Com'rs, 43 Colo. 428, 97 P 255. Fact that statute grants owner right to trial subsequent to assessment of damages by commissioners, and provides for taking of possession of land upon payment of award, held not violative of Const. art. 1, § 14, prohibiting taking of property until just compensation has been paid. Portneuf Irr. Co. v. Budge [Idaho] 100 P 1046. Rev. Codes, § 5226, providing for transfer of possession upon a tender of amount assessed to owner, or, if refused, deposit thereof in court to await determination of action, held sufficient compliance with Const. art. 1, § 14, prohibiting taking before payment of just compensation. Id. Const. art. 1, § 17, providing that property shall not be taken or damaged for public use without adequate compensation, and, when taken, compensation shall be first made or secured, does not require that compensation shall be first made or secured where property is merely "damaged." City of Marshall v. Allen [Tex. Civ. App.] 115 SW 849.

14. Northern Pac. R. Co. v. Georgetown, 50 Wash. 580, 97 P 659.

15. Award in condemnation proceedings by city under Cobbey's Ann. St. 1903, § 7478. State v. O'Fink [Neb.] 120 NW 938.

16. Gasaway v. Seattle, 52 Wash. 444, 100 P 991. Where fee simple absolute is condemned, both the owner of the fee and the owner of an easement are entitled to compensation, the award standing in place of the land. Seton v. New York, 130 App. Div. 148, 114 NYS 565. Where property is conveyed pending proceedings to condemn for bridge approaches and after structure has been built, damages belong to grantor. In re Newton Creek Bridge of New York, 128 App. Div. 150, 112 NYS 531. Where one partner sold all her interest in partnership property to partner and gave a general release, and such partner conveyed all his interest to defendant, held that defendant was entitled to entire award, though he had never received a conveyance from the releasing partner. Rosenbaum v. New York, 129 App. Div. 351, 113 NYS 364.

17. Where title in dispute is not determined before empaneling of jury, it may be determined on motion in distribution of award. Chicago & N. W. R. Co. v. Chicago Mechanics' Inst., 239 Ill. 197, 87 NE 933.

18. In re Decatur St. of New York, 133 App. Div. 321, 117 NYS 855.

19. Beverly Road in City of New York, 131 App. Div. 147, 115 NYS 208. On theory that assessments will be charged to abutting owners (In re Decatur St. of New York, 133 App. Div. 321, 117 NYS 855), and appellate court may resort to public records to ascertain whether such assessment has been made (Id.).

20. Where plaintiff applied to court for order directing payment of award deposited in court to him and not to his grantors, contestants, which was granted and money received, he is estopped to assert, directly or

§ 21. *Ownership or interest acquired.*[22]—See 11 C. L. 1233—The interest acquired depends largely upon the statute under which the power is exercised,[23] and the scope of the petition.[24] Condemnation of the fee simple absolute includes all interests therein,[25] but usually only an easement [26] or a limited special right of user [27] may be taken if it will suffice, and the owner may use the same in any manner not interfering with the public use.[28] Except as expressly provided by statute,[29] the duration of the interest acquired by a corporation is not limited to the term of its charter.[30] Where land is taken for strict, as distinguished from quasi public use, it is freed from tax liens.[31] A railroad does not acquire title to the waters of a spring within its right of way.[32] The condemnor may devote the property to the use for which it was acquired and exercise all rights incident thereto,[33] without liability except for negligence.[34] A contract provision for divestiture of title will be construed a condition subsequent if possible.[35]

indirectly, invalidity of proceedings. Cape Giradeau, etc., R. Co. v. Southern Illinois & Missouri Bridge Co., 215 Mo. 286, 114 SW 1084.

21. Where he does so he is chargeable only with amount of award and not with amount specified upon which release was to be given. Nix v. Thackaberry, 240 Ill. 352, 88 NE 811.

22. Search Note: See notes in 5 C. L. 1141; 25 L. R. A. 139; 66 Id. 44; 9 L. R. A. (N. S.) 1092.

See, also, Eminent Domain, Cent. Dig. §§ 834-850; Dec. Dig. §§ 317, 318; 15 Cyc. 1018-1021, 1023-1025; 10 A. & E. Enc. L. (2ed.) 1197.

23. Condemnation, under St. 1846, p. 113, c. 167, § 1, by city of Boston of the waters of Long Pond and all waters entering into or flowing therefrom and all water rights therein, held to take all private rights of fishery, etc., if any were acquired from Indians. Sprague v. Minon, 202 Mass. 467, 89 NE 93. Under Code 1887, § 1079 (Code 1904, p. 584), held fee simple title vested upon payment of award into court and order directing payment thereof to owner's attorney. Potomac Power Co. v. Burchell [Va.] 64 SE 982.

24. Where petition and other papers describe interest to be acquired as "an estate in fee simple absolute, free from all liens or incumbrances," and easement in the land is included. Seton v. New York, 130 App. Div. 148, 114 NYS 565. In action to condemn land, only such improvements thereon as are a part of the realty are condemned. Kansas City So. R. Co. v. Anderson [Ark.] 113 SW 1030. Petition, in proceedings by city to acquire land under water with all wharfage rights, incorporeal hereditaments, easements, privileges, or other appurtenances, does not authorize acquisition of right to maintain a pier and collect wharfage, which right is not appurtenant to land sought to be taken. In re City of New York, 193 N. Y. 503, 87 NE 759. Unfinished lumber owned by bridge company held not taken by proceedings condemning bridge, it appearing that no evidence concerning the lumber was submitted to board of viewers or jury. Big Beaver Creek Corp. v. Beaver County, 37 Pa. Super. Ct. 250.

25. Seton v. New York, 130 App. Div. 148, 114 NYS 565. When land is taken for public use, it is not the record title that is acquired, nor is it any person's title, but the land itself, irrespective of record or other ownership. Jackson v. Pittsburg, 36 Pa. Super. Ct. 274.

26. Where abutter owns fee in street, elevated railway takes only an easement. Smith v. Brooklyn Union El. R. Co., 193 N. Y. 335, 85 NE 1100. Railroad secures not only surface, but so much of underlying minerals as is necessary to support same. Dilts v. Plumville R. Co., 222 Pa. 516, 71 A 1072. In condemning crossing over railroad right of way for street, held that city acquired only an easement and hence it was immaterial that company owned fee. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

27. Interest acquired by railroad is not a fee nor an easement in ordinary sense of the term, but is an interest special and exclusive in its nature. Dilts v. Plumville R. Co., 222 Pa. 516, 71 A 1072.

28. On taking of land for public use under Pub. St. 1901, c. 40, § 6, authorizing taking for public park purposes, etc., by pursuing proceedings for taking land for highway purposes, owner retains right to use land for any purpose not inconsistent with purpose for which taken (Lyford v. Laconia [N. H.] 72 A 1085), and upon discontinuance of public use whole estate revests in original owner (Id.).

29. Railroad Law (Laws 1890, p. 1083, c. 565), and Rapid Transit Act (Laws 1891, p. 14, c. 4), as amended, construed and held that real property condemned under the latter act is held only during corporate existence of condemnor and only an easement is acquired. Hudson & M. R. Co. v. Wendel, 193 N. Y. 166, 85 NE 1020.

30. May renew charter. Atlanta Terra Cotta Co. v. Georgia R. & Elec. Co. [Ga.] 64 SE 563.

31. Hence county having a lien for taxes need not be made party under Laws 1893, p. 190, c. 84, § 4, requiring all persons having an interest to be joined. Gasaway v. Seattle, 52 Wash. 444, 100 P 991.

32. In assessing damages owner is not entitled to its value but only to damages resulting from interference with use. Dilts v. Plumville R. Co., 222 Pa. 516, 71 A 1072.

33. City condemning right of way for sewer acquires right to maintain manhole and right to enter at all times to inspect and repair. Village of Medina v. Graves, 113 NYS 52.

34. Touchberry v. Northwestern R. Co. [S. C.] 65 SE 341.

35. Where title has vested in water company by virtue of condemnation and contract,

§ 22. *Transfer of possession and passing of title.*[38] See 11 C. L. 1234—While the passing of title is generally regulated by statute,[37] and does not usually pass until "just compensation" is made or secured,[38] the legislature may authorize a prior taking where the power is exercised by the state or a political subdivision.[39] In New York the condemnor may take possession upon depositing amount stated in the answer as the value of the land, and the owner must act in good faith.[40] Where a deposit is made and appeal is taken merely from the award, title vests absolutely in the condemnor.[41]

§ 23. *Relinquishment or abandonment of rights acquired.*[42] See 11 C. L. 1234—Upon abandonment, which is a question of fact to be determined from all the circumstances of the particular case,[43] title usually revests in the owner of the fee especially if only an easement has been acquired.[44]

Employer's Liability; Entry, Writ of; Equitable Assignments; Equitable Attachment; Equitable Defenses, see latest topical index.

and provision in contract for divesting of title will be deemed a condition subsequent. Potomac Power Co. v. Burchell [Va.] 64 SE 982.

36. Search Note: See note in 16 L. R. A. (N. S.) 537.

See, also, Eminent Domain, Cent. Dig. §§ 851, 852; Dec. Dig. § 320.

37. Under Rapid Transit Act 1894 (Laws 1894, p. 1886, c. 752), § 39, as amended by Laws 1901, p. 1423, c. 587, § 1, authorizing New York City to condemn for underground railway, and § 47, amended by Laws 1895, p. 912, c. 519, § 20, providing that title shall vest upon filing of oaths of commissioners, title does not so vest as to defeat city's liability for damages accruing to property thereafter. In re Low, 128 App. Div. 103, 112 NYS 619. Although Laws 1905, p. 2033, c. 724, § 11, as amended by Laws 1906, p. 738, c. 314, § 2, provided, relative to acquirement of real estate in city of New York for public water supply reservoir, that, on filing the oaths of the commissioners, city shall become seised in fee, but not entitled to possession until it pays owner one-half of assessed valuation when it "may" enter, etc., held that after filing of oaths but before payment owner has such right to possession as to sustain a lease, and, where lease is executed, it is not affected by payment unless followed by entry. Stewart v. Briggs, 63 Misc. 107, 118 NYS 497.

38. Injunction should issue to prevent water company from appropriating water until it has filed security bond, as required by Act April 29, 1874, § 41 (P. L. 104). Bland v. Tipton Water Co., 222 Pa. 285, 71 A 101. Where railroad locates route and gives bond for damages, which is accepted, title passes (Dilts v. Plumville R. Co., 222 Pa. 516, 71 A 1072), owners only remedy being upon the bond (Id.), and condemnor cannot thereafter destroy owners' right to compensation by relinquishment (Id.). If an attempt to agree on amount of compensation is a condition precedent to filing of security bond and taking of property, approval thereof by court is an adjudication of such attempt. Bland v. Tipton Water Co., 222 Pa. 285, 71 A. 101. Where it appears from resolution of directors of railroad company attached to petition for approval of bond that they deem land necessary for purpose for which company may condemn and adoption thereof is duly proved and bond tendered after due notice is sufficient, it is duty of court to approve same. Wilson v. Pittsburgh & L. E. R. Co., 222 Pa. 541, 72 A 235.

39. If an adequate remedy by way of damages is provided. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471.

40. Where, under Code Civ. Proc. § 3380, authorizing taking of immediate possession where public interests will be prejudiced by delay upon deposit of sum stated in answer as value, answer designedly overstates value to prevent taking of possession, it may be disregarded and possession taken upon deposit of fair value. New York Cent. & H. R. R. Co. v. Lally, 62 Misc. 506, 115 NYS 897.

41. Jeffery v. Chicago & M. Elec. R. Co., 138 Wis. 1, 119 NW 879.

42. Search Note: See Eminent Domain, Cent. Dig. §§ 853-864; Dec. Dig. §§ 321-325; 15 Cyc. 1022, 1026-1029; 10 A. & E. Enc. L. (2ed.) 1203; 7 A. & E. Enc. P. & P. 673.

43. Gross v. Jones [Neb.] 122 NW 681. Finding of abandonment of mill flowage rights held supported by evidence that principal mill had been dismantled for 10 years, that for 8 years only occasional grists were ground, and that dam was washed out two years prior to suit and no steps to replace had been taken. Id.

44. Where railroad ceases to use property for railroad purposes, it reverts to owner of fee (Miller v. Cincinnati, etc., R. Co. [Ind. App.] 88 NE 102) and cannot be transferred (Id.). Upon abandonment of highway title revests in owner of fee, and where thereafter used by electric interurban, he is entitled to compensation (Id.). Flowage right acquired in ad quod damnum proceedings by one owning land on both sides of stream at point where he desired to construct dam may be lost by abandonment. Gross v. Jones [Neb.] 122 NW 681. When canal company abandoned land which it had condemned under Act of April 2, 1811, 5 Sm. L. 266, the land reverted to owner of fee, as canal company acquired only easement. Scholl v. Emerich, 36 Pa. Super. Ct. 404.

EQUITY.

The scope of this topic is noted below.[45]

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§ 1. *Nature of, and general principles controlling, equity.*[46] See 11 C. L. 1235 The powers of courts of equity are being constantly extended to meet new conditions,[47] and the principles of equity will be applied to new cases as they are presented, and relief will not be withheld merely on the ground that no precedent can be found.[48] The facts, however, must come within some recognized head of equity jurisprudence.[49] The equity powers of a court will be exercised only to protect or enforce some substantial right and to prevent a result which would be contrary to equity and good conscience,[50] and equitable relief must be administered upon equitable terms and not by way of punishment.[51]

§ 2. *Equity jurisdiction and occasion for relief. A. In general.*[52] See 11 C. L. 1235—It is difficult to lay down any general or definite rule as to what special circumstances will enable an injured party to invoke the aid of equity. Each case must

45. This topic is confined to a general treatment of equity principles and procedure, the specific application of such principles to particular subjects (see such topics as Estoppel;* Fraud and Undue Influence;* Fraudulent Conveyances;* Liens;* Mistake and Accident;* Trusts*), and the consideration of particular equitable remedies (see such topics as Accounting, Action for;* Cancellation of Instruments;* Creditors' Suit;* Foreclosure of Mortgages on Land;* Injunction;* Specific Performance*), being more particularly and exhaustively treated under their appropriate titles. Separate articles have also been devoted to certain matters of practice (see such titles as Appeal and Review;* Argument and Conduct of Counsel;* Continuance and Postponement;* Costs;* Interpleader;* Process;* Reference;* Trial;* Venue and Place of Trial*) and so far as procedure in equity has been made by statute to conform to the rules applicable to that in actions at law, it has been treated in connection therewith (see Evidence;* Pleading;* Judgments*). Masters in chancery is the subject of a separate article (see Masters and Commissioners*), and the equity jurisdiction of particular courts is also elsewhere treated (see Jurisdiction*).

46. Determination whether particular suits are legal or equitable, see Forms of Action.
Search Note: See note in 1 C. L. 1048.
See, also, Equity, Cent. Dig. § 1; Dec. Dig. § 1; 16 Cyc. 23-30; 11 A. & E. Enc. L. (2ed.) 145, 148; 18 Id. 95; 7 A. & E. Enc. P. & P. 812.

47. Harrison v. Woodward [Cal. App.] 103 P 933.

48, 49. Earle v. American Sugar Refining Co. [N. J. Eq.] 71 A 391.

50. Van Buren v. Posteraro [Colo.] 102 P 1067.

51. De Vita v. Loprete [N. J. Eq.] 72 A 1007.

52. Search Note: See notes in 7 L. R. A. (N. S.) 1001; 8 Id. 61; 12 Id. 50; 10 Ann. Cas. 976.
See, also, Equity, Cent. Dig. §§ 1-12, 316,

rest largely upon its own particular facts.[53] An appeal to equity is proper where equitable rights are involved of which court takes equitable cognizance,[54] and equity will suffer no wrong to go without a remedy when he who seeks relief comes into court seasonably and with clean hands.[55] There is a distinction between lack of jurisdiction, and the propriety of exercising equitable jurisdiction, in a particular case.[56] A determination of a court that it will not assume equitable jurisdiction is binding until reversed or set aside, or in some manner directly attacked.[57] Equitable jurisdiction will not be assumed to determine merely academic questions or merely to advise the parties of their rights,[58] nor will a court act unless its action can be supported by some general rule of law or public policy.[59] A court of equity has jurisdiction to enforce a legal right, the existence of which is clear and not in substantial dispute; but jurisdiction fails when it is made to appear that the legal right is not clear either by reason of substantial dispute as to the facts or uncertainty as to the controlling legal rules,[60] though in some cases a bill will be retained until the disputed legal rights have been settled.[61] When a law court has once been appealed to, the remedy there obtainable must be exhausted before equity will assume jurisdiction to grant relief which the law court has jurisdiction to afford if invoked to do so.[62] Jurisdiction cannot be conferred by consent where the subject-matter is not properly of equitable cognizance,[63] but parties defendant, who must resort to equity to protect their rights cannot object that another defendant should be sued at law, if he is willing to submit to suit in equity.[64] Jurisdiction in equity in the federal courts is concurrent with that of law.[65] If a charge is of a criminal nature, or an offense against the public, and does not touch the enjoyment of property or health, it is not within the jurisdiction of equity.[66] Except for some special reason, the court of chancery will not interfere with the ordinary jurisdiction of the probate courts in the settlement of the accounts of executors or administrators.[67] But if such special reason be apparent, it is not only the right but the duty of that

397, 497; Dec. Dig. §§ 1-3, 136, 160, 220; 16 Cyc. 23-30, 222, 266, 289; 11 A. & E. Enc. L. (2ed.) 190; 7 A. & E. Enc. P. & P. 812.

53. See post, § 2C.

54. Kent v. Honsinger, 167 F 619.

55. Boring v. Ott, 138 Wis. 260, 119 NW 865.

56, 57, 58. Tonnele v. Wetmore, 195 N. Y. 436, 88 NE 1068.

59. Equitable reason will not control against any well settled rule of law or public policy. General law, independent of contract, must impose obligation to do justice, or court will not act. McCurdy v. Shiawassee County, 154 Mich. 550, 15 Det. Leg. N. 873, 118 NW 625. Equity court has no power to fix or regulate charges of public warehouseman and will not assume jurisdiction merely because reasonableness of rates is raised. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477.

60. Redrow v. Sparks [N. J. Eq.] 72 A 442.

61. Where allegations of pleadings show disputed legal rights to flow lands, but there is an admission of right to protection against flowage above a certain limit, the court has no jurisdiction but will retain bill for protection of admitted right, after disputed rights have been determined in legal action. Defiance Fruit Co. v. Fox, 72 N. J. Eq. 297, 73 A 851.

62. Central Stock & Grain Exch. v. Pine Tree Lumber Co., 140 Ill. App. 471.

63. Failure to raise question of jurisdiction cannot confer jurisdiction. Fletcher v. Root, 240 Ill. 429, 88 NE 987. Where the subject-matter is not within the scope of equity jurisdiction, jurisdiction cannot be conferred by consent. Frank v. Frank [Ark.] 113 SW 640.

64. Where contractor submits to suit in equity by assignee of money due to subcontractor, mechanic's lien claimants, who are necessary parties and who must resort to equity, cannot object. Lovett v. New York, 128 App. Div. 157, 112 NYS 552.

65. London Guar. & Acc. Co. v. Bell Tel. Co., 171 F 278.

66. Criminal remedies must be deemed adequate. State v. Ehrlick, 65 W. Va. 700, 64 SE 935.

67. Filley v. Van Dyke [N. J. Err. & App.] 72 A 943. Error to transfer cause to equity side of court for trial on ground that it appeared that there were heirs of a decedent, and creditors of his estate, who had claims which ought to be determined, when record did not show necessity for bringing in such parties, and no attempt to implead them was made. Faville v. Lloyd [Iowa] 118 NW 871. In Michigan the probate court has exclusive jurisdiction of the settlement of estates of mentally incompetent persons under guardianship, unless its remedies are inadequate, in which case the chancery court has jurisdiction. Decree creditor of ward has adequate remedy in probate court. Nolan v. Garrison, 156 Mich. 397, 16 Det. Leg. N. 121, 120 NW 977.

court to interfere, and its action will be subject to review.[68] Courts of equity have jurisdiction to entertain bills to perpetuate testimony where the party seeking such relief cannot bring suit and testimony necessary in case of suit against him is in danger of being lost.[69]

A court of equity, having jurisdiction over the persons of defendants, may control them by decree in personam, whether within or without the jurisdiction.[70] Thus, the power of a court of equity in one state to restrain persons within the control of its process from the prosecution of suits in other states is clear, but upon grounds of comity it should be sparingly exercised.[71] A court will not restrain the prosecution of suits in another state on the theory that it can better weigh the evidence, or more justly apply any general rule of law or equity, nor upon the ground that it recognizes different rules of law or equity.[72] But where a party oppresses his adversary by suing him in jurisdiction other than that where they are domiciled, to escape some local policy, equity will in a proper case restrain the prosecution of such suit.[73] In a suit quasi in rem,[74] where jurisdiction of a nonresident defendant may be obtained by statutory proceedings, such as publication of notice,[75] such as a suit to establish a trust in shares of stock of a domestic corporation, where the trustee resides in another state,[76] a court of chancery has jurisdiction to determine rights in the stock [77] by decree which is enforcible without a decree in personam.[78]

Effect of code or statutory provisions.[See 11 C. L. 1237]—The distinction between legal and equitable relief still exists though the distinction between forms has been abolished.[79] Statutory remedies are not ordinarily exclusive [80] unless this inten-

68. Filley v. Van Dyke [N. J. Err. & App.] 72 A 943.

69. Westinghouse Mach. Co. v. Electric Storage Battery Co. [C. C. A.] 170 F 430.

70. Where plaintiffs had established rights in patent by decree in their favor, court of equity having jurisdiction over persons of defendants could control them, by decree in personam, from doing any act within or without the jurisdiction, by bringing suit or otherwise, even in another country, which would interfere with complainant's rights under their patent. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 F 869.

71. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

72. Court refused to restrain proceedings in Massachusetts court. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

73. Bigelow v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 71 A 153.

74. Jurisdiction in actions quasi in rem rest on power of state to control property to which its power can be directly applied, and necessity of court controlling power within its territorial jurisdiction. Amparo Min. Co. v. Fidelity Trust Co. [N. J. Eq.] 71 A 605. Essentials of action quasi in rem: (1) Res located within territorial limits of and subject to power of state; (2) course of judicial procedure, object and result of which are to subject res directly to power of state; (3) course of judicial procedure directed on its face to the res so as to disclose it to defendant when reasonably notified of action. Id.

75. Under Laws 1902, p. 514, §§ 12, 13, notice to nonresident defendant must apprise defendant of nature of suit against him as well as of fact that he is sued, and must also disclose the res toward which the action is directed. Amparo Min. Co. v. Fidelity Trust Co. [N. J. Eq.] 71 A 605.

76. Court of chancery has jurisdiction of suit to establish trust in shares of stock of New Jersey corporation though trustee resides out of state and cannot be served with process, but can only be brought in by statutory proceedings against absent defendants. Amparo Min. Co. v. Fidelity Trust Co. [N. J. Err. & App.] 73 A 249.

77. Action by domestic corporation against foreign corporation to establish title to stock of complainant, claimed by defendant, is an action quasi in rem though a transfer of the shares is asked for. Court of chancery has jurisdiction and defendant, notified by publication of notice and order of court to appear, will be bound by decree. Amparo Min. Co. v. Fidelity Trust Co. [N. J. Eq.] 71 A 605.

78. Court of chancery in New Jersey has jurisdiction to establish rights in shares of stock in custody of person in the state as against a nonresident. Decree in personam is not necessary to transfer legal title to complainant. Amparo Min. Co. v. Fidelity Trust Co. [N. J. Eq.] 71 A 605. Decree may be enforced by appointing receiver and enjoining custodian from interfering with his possession. Id. Possibility of decree being rendered nugatory by removal of property does not change nature of suit as one quasi in rem. Id. Nor is nature of suit changed by fact that it is brought by custodian; same remedy may be applied at instance of defendant. Id.

79. Craigo v. Craigo [S. D.] 118 NW 712. Distinctions between legal and equitable causes and the principles governing them are still preserved. Fowles v. Bentley, 135 Mo. App. 417, 115 SW 1090.

80. Circuit and chancery courts have concurrent jurisdiction to partition land, statutory remedy being cumulative, but both cannot be pursued concurrently. Dunbar v. Bourland [Ark.] 114 SW 467. Act Tenn.

tion is plain.[81] Statutes permitting enforcement of mechanic's liens in equity are constitutional.[82] Many statutes provide for the transfer of causes to a court of equity, or the equity side of the court, where relief sought is equitable in its nature.[83] The right to relief in equity may be waived.[84]

(§ 2) *B. Maxims and principles controlling the application of equitable relief.*[85] See 11 C. L. 1237—He who seeks equity must do equity; relief will not be granted to one who refuses to concede equitable rights and claims of his adversary,[86] or who refuses to do what justice and equity require,[87] or to be bound by his own covenants.[88] This maxim is applied in all cases except where it would work inequity.[89] Thus, it applies to a defendant who seeks affirmative relief.[90] The counter equity required as a condition of relief must be involved in or grow out of the transactions in respect to

1809, c. 101, authorizing reformation by court of law to give effect to deeds and grants, does not deprive equity of jurisdiction where errors to be corrected must be shown by extrinsic evidence. American Ass'n v. Williams [C. C. A.] 166 F 17. Code Tenn. 1858, § 3231, providing that ejectment may be brought against any occupant or person claiming any interest or exercising ownership over the land, does not oust original jurisdiction of equity in such cases. Id.

81. Mechanic's lien enforcible only by special statutory proceeding, not by ordinary suit in equity. Metz v. Criticher [S. C.] 65 SE 394.

82. Do not violate right to jury trial, since lien was not known to common law and not triable by jury when state constitution became effective. Milis v. Britt, 56 Fla. 839, 47 S 799.

83. See, also, post, § 2C. Suit for cancellation of contract, for money damages, and other incidental relief, was properly transferred to equity docket under Code, § 274. Hickson Lumber Co. v. Stallings [S. C.] 64 SE 1015. Motion to transfer to equity properly overruled where answer raised no issue of purely equitable cognizance, but only matters incidental to main issue at law. Ayer-Lord Tie Co. v. Greer, 87 Ark. 543, 113 SW 209.

84. In action to recover deposit paid on contract of sale, defendants waived right to equitable relief by specific performance by filing cross notice of trial by trial term, and by conveying, subsequent to their contract with plaintiff. Groden v. Jacobson, 129 App. Div. 508, 114 NYS 183.

85. **Search Note:** See notes in 7 C. L. 1327, 1333, 1336; 17 L. R. A. 129; 69 Id. 833; 5 L. R. A. (N. S.) 112, 1036, 1048; 13 Id. 909; 14 Id. 239, 304, 900; 7 A. S. R. 587; 116 Id. 877.

See, also, Equity, Cent. Dig. §§ 103-118, 121-190; Dec. Dig. §§ 38-41, 43-66; 16 Cyc. 30-64, 106-117, 127, 128, 133-148; 11 A. & E. Enc. L. (2ed.) 156; 14 A. & E. Enc. P. & P. 217; 18 Id. 108.

86. Court of equity will not give relief to complainant unless he concedes equitable rights and claims of defendant, but complainant will not be called upon to do or grant something to which defendant is not equitably entitled. Manternach v. Studt, 240 Ill. 464, 88 NE 1000.

87. Court of equity will not cancel lease without requiring other party to make compensation for improvements. Muskogee Development Co. v. Green [Okl.] 97 P 619. Persons, seeking to have deeds executed upon trustees' sale canceled, bound to repay to purchasers expenses of sale, etc. Hanson v. Neal, 215 Mo. 256, 114 SW 1073. Where surety took title to property on foreclosure of mortgage and sale, and satisfied debt, principal was not entitled to any relief against surety without reimbursing him. Shup v. Moon [Kan.] 103 P 1001. Plaintiff not entitled to have exercise of power of attorney, to assign future earnings, enjoined unless he pays money to secure which power was given. Cox v. Hughes [Cal. App.] 102 P 956. Where infant, seeking to have deed canceled, has been guilty of fraudulent misrepresentations which grantee relied on, equity will not grant relief unless consideration is returned. International Land Co. v. Marshall [Okl.] 98 P 951. Where railroad company settled claim for damages by construction of culvert under track to carry water on land, and bought from claimant strip of land on which to build drain to prevent injury to land, but seller had no title to this land so that drain could not be built, owner could not have equitable relief without returning consideration received from company. McCabe v. New York Cent. & H. R. R. Co., 114 NYS 303.

88. Equity will not aid those who do not regard their covenants. Harrison v. Woodward [Cal. App.] 103 P 933. Mortgagor cannot have mortgage held by foreign corporation canceled because corporation has not complied with statutory requirements governing foreign corporations, while admitting indebtedness and receipt of money. Tarr v. Western Loan & Sav. Co., 15 Idaho, 741, 99 P 1049. Plaintiff, who had conveyed standing timber, could not have grantee's assignees enjoined from cutting it on ground that legal title had not been transferred by assignment of deed. Rush v. Hilton [S. C.] 65 SE 525. Complainant not entitled to relief by injunction to prevent interference by defendant in harvesting fruit when he had not performed his own agreement to deliver half the fruit. Newby v. Laurence [Neb.] 121 NW 965.

89. Hanson v. Neal, 215 Mo. 256, 114 SW 1073.

90. Where plaintiff brings suit to quiet title and defendant prays to be declared the owner and to have her right to possession confirmed, such demand is for affirmative relief, and subjects defendants to operation of maxim that he who seeks equity must do equity. Kerr v. McCreary [Neb.] 120 NW 1117.

which relief is asked.[91] What should be required depends upon the facts of the case [92] and upon the controlling rules of law.[93] Equity will not displace one right for the purpose of upholding or asserting another.[94] Equity will not relieve a person from the results of his own deliberate act.[95] Equity looks to the substance, rather than to the form of the transaction in question.[96] Equity considers that as done which ought to be done [97] and will act accordingly in determining the rights of the parties.[98] Equity follows the law,[99] and courts of equity cannot disregard statutory provisions and requirements which define and establish rights of parties.[1] A purely equitable title cannot be maintained in a court of law and all relief with respect to the same must be sought in a court of equity.[2] Where equities are equal, the law prevails.[3] Where one of two innocent parties must suffer a loss, he whose act or omission made the loss possible must suffer.[4] It is only when equities are equal that priority in time will control.[5]

Clean hands.[See 11 C. L. 1238]—He who comes into a court of equity must come with clean hands.[6] The court will not lend its aid to one who has been guilty of fraud, wrongdoing, or unlawful or inequitable conduct,[7] provided such conduct re-

91. Cuthbertson v. Morgan, 149 N. C. 72, 62 SE 744.

92. For fraud in private settlement of partnership account, one defrauded may have relief in equity without restoring what he was paid in settlement. Daniel v. Gillespie, 65 W. Va. 366, 64 SE 254.

93. Where statute provides that only principal can be recovered where contract provides for usurious rate of interest, a mortgagor, seeking to redeem from usurious mortgage, need not tender principal and legal interest. First Nat. Bank v. Clark [Ala.] 49 S 807.

94. First Nat. Bank v. Fowler [Wash.] 102 P 1038. Where materialman, seeking to foreclose lien for materials furnished contractor, cannot obtain personal judgment against latter because he has been declared a bankrupt, the lien cannot be foreclosed in equity against property improved, since this would deprive owner of remedy against contractor. Pike Bros. Lumber Co. v. Mitchell [Ga.] 64 SE 998.

95. Where one in an action at law voluntarily pays a debt in order to protect his leasehold estate, he cannot maintain a bill in equity to recover back the money. Sherman v. Delaware & Atlantic Tel. & T. Co., 36 Pa. Super. Ct. 487.

96. Zellmer v. Patterson [N. D.] 122 NW 381. Where substantial merits of transaction bestow rights on the parties. McCord v. Bright [Ind. App.] 87 NE 654. In determining whether instrument creates lien, equity looks to its substance, not to form. Ward v. Stark Bros. [Ark.] 121 SW 382.

97. Will enforce clause in chattel mortgage covering after-acquired property. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 63 SE 1045.

98. Where one secondarily liable pays debt, he is subrogated to creditor's process right without an actual assignment. United States Fidelity & Guar. Co. v. Messick Grocery Co., 147 N. C. 510, 61 SE 375. Where plaintiff had intended to convey his interest in land which he and his mother had contracted to convey to defendant, equity would consider that he had done so, and would not give him possession of land. Lee v. Foushee [Ark.] 120 SW 160. Courts of equity recognize **legal estates and titles,** and in such courts such titles prevail over equitable ones. A title to land acquired by adverse possession is respected in courts of equity as well as in courts of law. Depue v. Miller, 65 W. Va. 120, 64 SE 740.

99. Allen v. Kitchen [Idaho] 100 P 1052. Equity follows the law as to **priority in garnishment** proceedings. Plummer v. Marianna School Dist. [Ark.] 118 SW 1011. As a general rule equity follows rules of law in allowing **interest,** though equity allows interest in some cases where it is not recoverable at law. Pryor v. Buffalo, 61 Misc. 162, 113 NYS 249.

1. Cannot give effect to oral agreement in case where statute of frauds requires writing. Allen v. Kitchen [Idaho] 100 P 1052. Suit for equitable partition of land devised by will is controlled by statute relating to partition; intention expressed in will governs. Stewart v. Jones, 219 Mo. 614, 118 SW 1.

2. Depue v. Miller, 65 W. Va. 120, 64 SE 740.

3. Clause in chattel mortgage covering after-acquired property will not be enforced against innocent purchasers. Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 63 SE 1045. Right to avoid equitable mortgage lost by merger thereof with legal title. Richardson v. Wren [Ariz.] 95 P 124.

4. Signing deed in blank. Creveling v. Banta, 138 Iowa, 47, 115 NW 598. Failure to record assignment of mortgage. Central Trust Co. v. Stepanek, 138 Iowa, 131, 115 NW 891.

5. Negligence of holder of equitable lien held to postpone it to junior equity. Rohde v. Rohn, 232 Ill. 180, 83 NE 465.

6. Action to annul marriage on grounds existing prior to marriage is equitable; one seeking relief must come with clean hands. Berry v. Berry, 130 App. Div. 53, 114 NYS 497. Mandamus being triable as an equitable action, one who seeks by this remedy to compel corporation to transfer on its books stock purchased by him must show clean hands. Funck v. Farmers' Elevator Co. [Iowa] 121 NW 53.

7. Court of equity will not aid one in committing a fraud but will closely scrutinize

lates to the subject-matter of the litigation.[8] This maxim may be applied by the court of its own motion.[9] The application of the maxim as a defense is only allowed for reasons of public policy as a preventive check upon fraud and wrongdoing.[10] The principle that equity will not lend its aid to establish a right growing out of a fraudulent transaction does not apply where the right already exists,[11] but only where the right is sought to be established and asserted.[12] Where contract is illegal, courts of equity may grant full affirmative relief, though parties are both implicated in illegality to some extent, where one is only slightly implicated.[13] Where a contract is illegal on grounds of public policy, courts may set it aside and grant the relief asked though parties are in pari delicto.[14] The rule in equity that contracts in restraint of trade are merely unenforcible does not require that the parties so contracting be deemed to be immune from ordinary equitable remedies when their violation of public policy is directed at, and actually works, a public injury.[15]

Existence of adequate remedy at law. See 11 C. L. 1238—Lack of adequate remedy at law is not only an independent ground of equity jurisdiction,[16] but is the funda-

transaction and see for itself whether it is in any manner based on fraud. Seibel v. Higham, 216 Mo. 121, 115 SW 987. Court of equity will deny relief if plaintiff's claim grows out of or is inseparably connected with any fraud or unconscionable conduct on his part. Sanders v. Cauley [Tex. Civ. App.] 113 SW 560. Equity will not lend its aid in any manner to one who has been guilty of any unlawful or inequitable conduct in the matter with relation to which he seeks relief. International Land Co. v. Marshall [Okl.] 98 P 951. He who comes into equity must come with clean hands and a pure conscience; one cannot have relief for fraud who is himself guilty of fraud with reference to same matter. A. N. Chamberlain Medicine Co. v. H. A. Chamberlain Medicine Co. [Ind. App.] 86 NE 1025. Court of equity never aids in commission of a wrong nor in protecting or preserving an unjust advantage wrongfully obtained. Sanders v. Cauley [Tex. Civ. App.] 113 SW 560. No contribution in equity between joint wrongdoers. Avery v. Central Bank, 221 Mo. 71, 119 SW 1106. One who purchased land had title placed in daughter and granddaughters, and in suit to establish trust claimed that he had done so because his wife had refused to sign deeds without being paid, and he desired to place title so that he could transfer without her being obliged to join in deed. Held he did not come into court with clean hands. Derry v. Fielder, 216 Mo. 176, 115 SW 412. Where plaintiff, seeking cancellation of deed, appeared to have conveyed premises in order to defeat enforcement of judgment for damages in threatened suit, court refused to give him any relief. Creamer v. Bivert, 214 Mo. 473, 113 SW 1118. Complainants, having wrongfully moved school house from tract dedicated to school purposes, could not have defendants enjoined from removing it back to old site. Sanders v. Cauley [Tex. Civ. App.] 113 SW 560. Where notes and mortgage were given in payment for intoxicating liquors, the purchase of which was solicited in violation of statute, court refused relief to assignee for creditors of purchaser and mortgagor, who sought to enjoin foreclosure. Downey v. Charles F. S. Gove Co., 201 Mass. 251, 87 NE 597. In suit to cancel sale of stock, purpose of which was to create monopoly, **relief would not be denied** on ground that parties were in pari delicto where one acted through attorney in fact, and was ignorant of secret connivance of agent with other party. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521. Where parties did not recognize any relation of cotenancy between them, conduct by complainant toward defendant which would be inequitable had such relation existed would not bar relief. Cunningham v. Pettigrew [C. C. A.] 169 F 335. One opening up new business gave up old and all his private property to pay creditors, there being sufficient to pay all his debts. He then opened account in another's name to prevent funds of new business from being tied up by attachment, etc. Held he was **not guilty of fraud** so as to bar relief in suit against person in whose name account stood to protect his interest in the business. Lord v. Smith, 109 Md. 42, 71 A 430.

8. Maxim applies only to conduct relating to subject of litigation. Moffatt v. Kansas City Board of Trade [Mo. App.] 111 SW 894. The inequity which will repel one from courts of equity under the maxim that he who comes into equity must come with clean hands must relate directly to the very transaction concerning which he complains. Cunningham v. Pettigrew [C. C. A.] 169 F 335.

9. Creamer v. Bivert, 214 Mo. 473, 113 SW 1118.

10. Since refusal of court to act always gives defendant an unfair advantage. Lord v. Smith, 109 Md. 42, 71 A 430.

11. Where deed, intended to place property beyond reach of creditors, litigation being expected, was never delivered, grantor's children could assert rights growing out of his title. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028.

12. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028.

13, 14. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521.

15. Such contract may be enjoined. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80.

16. Equity has jurisdiction if remedy at law is not plain and adequate. Hanson v. Neal, 215 Mo. 256, 114 SW 1073. Suit in equity may be maintained for enforcement

mental basis thereof, and equity will not assume jurisdiction where there is an adequate remedy at law,[17] though it has been said that the existence of an adequate

or protection of private right or prevention of or redress for an injury thereto in all cases where there is not a plain, speedy and adequate remedy at law. B. & C. Comp. § 390. Hall v. Dunn, 52 Or. 475, 97 P 811.

17. Tonnele v. Wetmore, 195 N. Y. 436, 88 NE 1068; Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477. Where merchandise in bulk is sold without complying with bulk sales law, creditor is not entitled to equitable relief without showing that legal remedy is inadequate. Bixler v. Fry [Mich.] 16 Det. Leg. N. 411, 122 NW 119. Injunction will not be granted where there is plain, speedy and adequate remedy at law. Hall v. Henninger [Iowa] 121 NW 6. Contract to convey shares of stock will not be specifically enforced unless facts show an unusual and exceptional situation in which damages recoverable at law would be clearly incomplete and inadequate. Bernier v. Griscom-Spencer Co., 169 F 889. In suit to enjoin enforcement of judgment, court will not pass on contention which, if true, is enforcible in action at law. M. Redgrave Co. v. Redgrave [N. J. Eq.] 71 A 147.

Remedy at law held adequate: Bill seeking to have it judicially declared that new county was not subject to certain debts of old without equity where facts alleged constituted good defense at law. Houston County v. Henry County [Ala.] 50 S 311. Where a carter assisted a thief in the felonious conversion of certain goods which made him civilly liable in damages to the owner of the stolen goods, equity would not restrain the carter from collecting his debt by regular legal process. Hoopes & Townsend Co. v. Ebel, 37 Pa. Super. Ct. 459. If compensation in money affords adequate relief, equity will not act. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477. One entitled **to recover money** in assumpsit cannot have relief in equity. Volker v. Fisk [N. J. Eq.] 72 A 1011. For the recovery of an aliquot part of a specific sum of money, realized from a joint transaction or venture as net profit, and set aside in hands of one party for distribution, remedies at law are adequate; equity will not take jurisdiction. Annon v. Brown, 65 W. Va. 34, 63 SE 691. Where bill for **rescission of deed** is based on mere breach of contract, there is adequate remedy at law by action for damages. Haydon v. St. Louis & S. F. R. Co. [Mo.] 121 SW 15. Statutes provide remedy for **recovery of money paid on stock gambling** transaction; equity will not intervene even though defendant is willing to return amounts shown due. Blessing v. Smith [N. J. Eq.] 70 A 933. Action at law **to recover excess charges by public warehouseman** is adequate remedy. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477. A purchaser of a tract of land with an outstanding lease thereon in possession of the tenant of the grantor has an adequate remedy at law **to test the right of possession and validity of lease.** Whitham v. Lehmer [Okl.] 98 P 351. If justice exceeds jurisdiction in altering judgment, relief may be had by **certiorari,** but not by injunction restraining enforcement. Van Buren v. Posteraro [Colo.] 102 P 1067. Equity will not assume jurisdiction of suit to **recover rents** due from defendants under contract where amount can be ascertained and recovered at law. Rudiger v. Coleman, 129 App. Div. 916, 114 NYS 689. Equity will not enjoin **wrongful transfer of stock** merely because it could not be replevied, where bill shows that remedy at law for damages would be adequate. Sisson v. Bassett, 134 App. Div. 53, 118 NYS 664. Cestui que trust has adequate remedy at law against attorney and trustee **to recover trust moneys** improperly invested; suit in equity for accounting will not lie. Mersereau v. Bennet, 62 Misc. 356, 115 NYS 20. **Title to real estate will not be tried in equity** when ejectment is open; merely asking an accounting as to personalty will not give equity jurisdiction. Moody v. Macomber [Mich.] 16 Det. Leg. N. 577, 122 NW 517. Where grantee in deed knows that another is in possession under contract of sale, his remedy to determine his right and title is by **ejectment,** not bill in equity. Llewellyn v. Sunnyside Coal Co. [Pa.] 73 A 198. **Refusal of tenant to allow landlord to make repairs,** failure to pay rent, and waste, give landlord adequate remedy at law; equity will not take jurisdiction and grant relief by way of accounting and injunction. Gault v. Gault [Mich.] 16 Det. Leg. N. 634, 122 NW 639. Where dispute concerned **boundary and title** to land, remedy was ejectment, not injunction to compel removal of structures. Nicholls v. Boyne City Lumber Co. [Mich.] 16 Det. Leg. N. 321, 121 NW 742. One injured by decision of road supervisors as to damages upon **opening of road** has remedy by appeal; cannot have opening of road enjoined. Olson v. Curran, 137 Wis. 380, 119 NW 101. **Contract will not be specifically enforced** where thing contracted for can be purchased and where damages for breach is adequate remedy. Butterick Pub. Co. v. Fisher [Mass.] 89 NE 189. Court of equity has no power **to enjoin written or spoken defamation** of one's credit or business standing; sole remedy is action at law for damages, or criminal prosecution. Citizens' L., H. & P. Co. v. Montgomery Light & Water Power Co., 171 F 553. After death of insured, suit will not lie for **cancellation of policy** for fraud, since insurer has adequate legal remedy by way of defense to action on policy. Griesa v. Mutual Life Ins. Co. [C. C. A.] 169 F 509. Remedy **where city officials arbitrarily refuse to issue permit** for blasting, under valid city ordinance, is by proceeding at law to compel issuance of permit; not by way of injunction restraining enforcement of ordinance. Pacific States Supply Co. v. San Francisco, 171 F 727. Equity has no jurisdiction **to enforce collection of tolls** due by street railroad company to bridge company, though amount to be paid has been fixed by decree; collectible by action at law. Pittsburg & W. E. R. Co. v. Point Bridge Co. [Pa.] 72 A 348. **Cancellation** of an instrument will not be decreed when party, if his theory of controversy is correct, has good defense at law to purely legal demand. Lawlor v. Merritt, 81 Conn. 715, 72 A 143. No relief in equity **to restrain enforcement of statute** against corporations failing to pay

legal remedy is not so jurisdictional that it can be raised for the first time on appeal.[18] Statutory and legal remedies must usually be first resorted to and exhausted before resort can be had to equity.[19] To oust a court of equity of jurisdiction, the legal remedy must be plain and speedy and as adequate as that afforded in equity.[20] The remedy at law must reach the whole mischief and secure the whole right of the party in a perfect manner at the present time and in the future.[21] In determining the adequacy of the legal remedy, a federal court will have recourse to principles of equity and not to laws of the state where the court sits.[22] Where there is concur-

license where, if civil action were commenced to collect tax, or criminal prosecution begun, complainant's rights as foreign corporation could be asserted and protected. Grand Trunk Western R. Co. v. Curry, 162 F 978. Equity will not enforce a mere **demand for money** unless there is some equity in relation to it, some remedy required, which court of law cannot give. Insolvency of one of joint promisors not enough to give equity jurisdiction. Teter v. Teter, 65 W. Va. 167, 63 SE 967. Owner of land in Arkansas has statutory legal remedy for **overflow of land** by building of levee; equity has no jurisdiction. Meriwether v. St. Francis Levee Dist. Directors [C. C. A.] 165 F 317.

Remedy at law held inadequate: Where lessee was entitled to have forfeiture of term enjoined, and also to have term reinstated, mere fact that estoppel of lessor could be asserted as defense to action of forcible entry and detainer did not afford adequate remedy at law, so as to bar relief in equity. Powers Shoe Co. v. Odd Fellows Hall Co., 133 Mo. App. 229, 113 SW 253. Equity has jurisdiction of **suit by administrator** to have property claimed by donee of decedent declared a trust fund, and to follow the fund and enforce payment against property purchased with it and restrain disposition of it, as against objection that there is adequate legal remedy. Chamberlain v. Eddy, 154 Mich. 593, 15 Det. Leg. N. 865, 118 NW 499. If small interior bank of the state wrongfully refuses to **transfer stock on its books,** transferee may maintain suit in equity to compel the transfer, since stock has no listed market value and there is no adequate legal remedy. Madison Bank v. Price [Kan.] 100 P 280. United States may maintain suit in equity to remove **cloud on its title** to land caused by invalid conveyance by heir of Indian allottee, legal title remaining in United States; no adequate legal remedy. United States v. Leslie, 167 F 670. National bank or stockholder has right to go into federal court of equity **to test validity of state tax on stock** of bank, notwithstanding remedy under state statute, federal question being involved and there being no legal remedy in federal court. Charleston Nat. Bank v. Melton, 171 F 743. Where ejectment or an action of trespass would not afford an adequate remedy, a bill to order one in **possession of market stall** to surrender possession, and to restrain him from remaining in possession, after lease to another, gives equity jurisdiction. McTighe v. Schwartz [Pa.] 72 A 630.

18. Rivers v. Campbell [Tex. Civ. App.] 111 SW 190.

19. Parties who are given by statute an adequate remedy by application to some legislative or administrative body must first apply for such relief before asking relief in court of equity. San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus County [Cal.] 99 P 365. Plaintiff could not sue to have conveyance by one of two defendants set aside as fraudulent until he had exhausted legal remedy against other by having execution issued against him. Lovejoy v. Chapin, 115 NYS 947. Judgment creditor of estate cannot impress trust on property claimed to have been bought with assets of estate until he has exhausted legal remedies. Farrelly v. Skelly, 130 App. Div. 803, 115 NYS 522.

20. Where one of the judgment debtors is a nonresident without leviable property in the jurisdiction, the remedy at law is not as prompt, efficient and adequate as a decree in equity to offset judgments. Loy v. Alston [C. C. A.] 172 F 90. Where state statute authorizes suit by assignee of mortgage who has foreclosed and bought it to cancel tax deeds and quiet title, but such suit would be barred by limitations before he could acquire legal title, federal court of equity has jurisdiction to entertain such suit, since there is no adequate legal remedy. Hobe-Peters Land Co. v. Farr, 170 F 644. Where plaintiff held an equitable assignment of a part of a fund and others asserted that they also held equitable assignment of part of same fund, and fund was not sufficient to pay both, and in addition there were other creditors who attached the fund, it was proper to overrule demurrer upon ground that there was adequate remedy at law. Trexler v. Kuntz, 36 Pa. Super. Ct. 352. The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances. Laughlin v. Brauer, 138 Ill. App. 524. Where court had jurisdiction both of parties and subject-matter, held that it would be abuse of discretion for court of equity to refuse to grant additional relief by way of requiring defendant alleged to have purchased stock in part with plaintiff's money to account for proceeds of sale of such stock. Id.

21. Where one must first go into equity court to vacate an assignment before he can sue at law, legal remedy is not adequate. Whitman v. United Surety Co., 110 Md. 421, 72 A 1042.

22. Empire Circuit Co. v. Sullivan, 169 F 1009. Where creditor had reduced demand to judgment in state court and exhausted legal remedies thereon, and was obliged to resort to court of purely equitable jurisdiction, suit in federal court was not barred though he might have resorted to equitable powers of state court. Hultberg v. Anderson, 170 F 657.

rent jurisdiction at law and in equity jurisdiction in equity may be exercised where there are special grounds of equitable cognizance,[23] or where the remedy at law would not be as efficient as relief in equity.[24] Jurisdiction of equity may in some cases be invoked in aid of the remedy at law,[25] and where it appears that purely legal rights are involved, a bill may be retained until such rights have been settled in a court of law.[26] When the undoubted jurisdiction of a court of equity is invoked, it must be exercised in the absence of a good reason for refraining to exercise it, based upon some principle of equity.[27] The mere fact that part of the relief asked cannot be granted and that a court of law can grant all the relief asked is no reason why equitable jurisdiction should not be exercised as far as possible, no objection on the ground of adequacy of remedy at law being raised.[28] A defendant in a legal action who has ground for equitable relief against plaintiff may maintain a suit in equity for such relief without waiving his legal defense or confessing judgment.[29] The rule that equity has jurisdiction where there is no plain, speedy and adequate remedy at law does not apply where a remedy at law is denied on grounds of public policy.[30]

Doing complete justice. See 11 C. L. 1241—When equity has obtained jurisdiction for any purpose, it will retain it in order to administer complete relief and do entire justice,[31] and for this purpose it will, at times, exercise powers ordinarily exercised

23. Where there is a **fiduciary relation** between parties, equity assumes jurisdiction of an **accounting** though there is also a remedy at law. Holt v. Hopkins, 63 Misc. 537, 117 NYS 177. Equity has no jurisdiction where there is an adequate remedy at law, unless it is shown that there is some feature of the case peculiarly within the province of equity. **Action merely for judgment for amount of preference by bankrupt,** not seeking discovery or injunction, is purely legal remedy. Detroit Trust Co. v. Old Nat. Bank, 155 Mich. 61, 15 Det. Leg. N. 38, 118 NW 729. Where bill for **accounting** showed that complainant had all information necessary, equity would not entertain jurisdiction on theory that **discovery** was necessary. Blessing v. Smith [N. J. Eq.] 70 A 933.

24. If a defense at law would not be as adequate and complete a remedy as that in equity, the equitable rights need not be relinquished and reliance solely had on the legal remedy. Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 SE 836. The right of an equity tribunal to hear and determine a cause of which a court of law may have concurrent jurisdiction is not defeated unless the legal remedy, in respect to final relief, and the mode of securing it, are as efficient as the redress which a court of equity can give. Hall v. Dunn, 52 Or. 475, 97 P 811.

25. Hanson v. Neal, 215 Mo. 256, 114 SW 1073.

26. If title to land is in dispute and the validity or nonvalidity of the title claimed must be determined by the application of legal as contradistinguished from equitable rules, complainant will be required to establish it at law before he can proceed in equity, but the equity court will in general retain the bill until he does so. Country Homes Land Co. v. De Gray, 71 N. J. Eq. 283, 71 A 340.

27, 28. Knikel v. Spitz [N. J. Eq.] 70 A 992.

29. Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 SE 836.

30. Adams v. Murphy [C. C. A.] 165 F 304.

31. Wehrs v. Sullivan, 217 Mo. 167, 116 SW 1104; Jewett v. Maytham, 64 Misc. 488, 118 NYS 635; De Roberts v. Cross [Okl.] 101 P 1114; Connor v. McCoy [S. C.] 65 SE 257; Ryan v. Martin, 165 F 765; Singers-Bigger v. Young [C. C. A.] 166 F 82. Will not ordinarily limit itself to execution of partial justice and turn parties over to court of law, but will go on and dispose of all matter at issue so as to do adequate and complete justice between all parties. Laughlin v. Brauer, 138 Ill. App. 524. Bill alleging stock purchased by defendant was purchased by money furnished in part by complainant and praying for accounting for proceeds of sale of such stock by defendant, where court has jurisdiction of both parties and subject-matters for other reasons, bill will be retained whether such bill and proof thereunder is sufficient cause for equitable relief or not. Id. When jurisdiction of equity court is invoked to distribute an estate, it may require payment of inheritance tax before decreeing distribution. Barret v. Continental Realty Co. [Ky.] 114 SW 750. Vendor, having assigned his lien, assigned it second time and gave second assignee quitclaim deed. In suit to set aside quitclaim, court could also grant relief to first assignee by giving him benefit of judgment obtained by second assignee in suit to enforce lien. Powell v. Powell, 217 Mo. 571, 117 SW 1113. Where court took jurisdiction of suit to declare assessments on stock void, it could also order transfer of stocks on books of corporation in order to make its decree effective. Farmers' Pawnee Canal Co. v. Henderson [Colo.] 102 P 1063. Court having jurisdiction of suit to enforce mechanic's lien may determine validity of claims that in any manner interfere with enforcement of lien. Concord Const. Co. v. Plante, 68 Misc. 120, 116 NYS 153. Equity may cancel certificate of stock in association on ground of fraud and award damages for fraud, as between plaintiff and defendant, without determining rights of creditors who are not in court. Nichols v. Buell [Mich.] 16 Det. Leg. N. 463, 122 NW 217. Court in granting relief

only by courts of law, but will do so only in aid of its chancery powers.[32] Whether the court will so proceed is a matter for the exercise of sound discretion which is subject to review, and which will ordinarily be exercised by retaining the cause and granting any necessary legal remedies.[33] A cause will not, however, be retained to grant purely legal relief when it appears that complainant is not entitled to the equitable relief prayed for,[34] unless the inability of the court to grant equitable relief is due to the acts of the party against whom it is sought.[35]

Multiplicity of suits. See 11 C. L. 1241—The prevention of a multiplicity of suits is a well settled ground of equity jurisdiction.[36] Jurisdiction will not be assumed on

by way of cancellation of contract, and decree for return of consideration paid, had power to make sum to be returned a lien on property. Wolfringer v. Thomas [S. D.] 115 NW 100. A court of equity having assumed jurisdiction will administer all the relief demanded by the nature of the case and the facts as they appear at the close of the litigation, though such facts differ from what they were at the commencement of the suit. Russell Hardware & Implement Mfg. Co. v. Utica Drop Forge & Tool Co., 195 N. Y. 54, 87 NE 788. Court having jurisdiction to enforce lien could settle all **incidental rights.** Norton Iron Works v. Moreland [Ky.] 113 SW 481. Where court had jurisdiction to enjoin removal of iron ore to prevent irreparable injury, it could also **settle title** to the ore. Morison v. American Ass'n [Va.] 65 SE 469. Where corporate stock is sold on foreclosure of equitable mortgage, court of chancery has plenary power to protect purchaser by requiring transfer on books of corporation and giving him perfect legal title. Thompson v. Grace [Ark.] 120 SW 397. Where court has jurisdiction of suit to enjoin collection of purchase price of land on account of deficiency in acreage and defect in title, it will retain jurisdiction and do complete justice by **compelling compensation** to be made for deficiency and defect in title. Pack v. Whitaker [Va.] 65 SE 496. Where plaintiff enjoined the prosecution of an action at law on certain notes, a cross bill praying a decree for the amount due under the notes was appropriate. Zollman v. Jackson Trust & Sav. Bank, 141 Ill. App. 265. In awarding injunction, bill may be retained for **assessment of damages** already suffered. Downey v. Hood [Mass.] 89 NE 24. Damages may be awarded as incidental relief where a nuisance is abated. Central of Georgia R. Co. v. Champion [Ala.] 49 S 415. Where stock was retransferred so that restitution could not be decreed, court may retain cause to assess money damages where fraud was found. Stewart v. Joyce, 201 Mass. 301, 87 NE 613. Where a court of equity has taken jurisdiction of a case based on fraud and given some relief, it will retain jurisdiction for the purpose of awarding damages. L. Martin Co. v. L. Martin & Wilckes Co. [N. J. Eq.] 71 A 409.

32. Fowles v. Bentley, 135 Mo. App. 417, 115 SW 1090.

33. Laughlin v. Brauer, 138 Ill. App. 524.

34. The rule that a court of equity having once obtained jurisdiction will retain it for all purposes applies only when that part of the cause which gave the court jurisdiction is sustained. Lewis Pub. Co. v. Wyman, 168 F 756. Where complainants fail to sustain demand which gives equitable jurisdiction, court may not retain jurisdiction to settle other rights. Rudiger v. Coleman, 129 App. Div. 916, 114 NYS 689. Where court finds that no trust relation exists between parties as alleged, and that there is no ground for relief in equity, it cannot give judgment for money, but must dismiss. Craigo v. Craigo [S. D.] 118 NW 712. Where bill seeking enforcement of parol trust in lands is dismissed, jurisdiction cannot be retained to enforce trust as to personalty, since as to that there is an adequate remedy at law. O'Briant v. O'Briant [Ala.] 49 S 317. Where, in suit for specific performance, evidence showed there was no enforcible contract, court could not retain jurisdiction to assess damages for breach. Sarkisian v. Teele, 201 Mass. 596, 88 NE 333. Suit by guardian to set aside deed by incompetent, and for waste, is in equity, and court will determine question of waste as incidental, but demand for waste cannot prevail unless deed is set aside. Kamman v. D'Heur & Swain Lumber Co. [Ind. App.] 88 NE 348. Where plaintiff knew that specific performance could not be had when he brought the action, and defendant has died, and his heirs and devisees and executors have been substituted, jurisdiction will not be retained to assess damages, but suit will be dismissed. Knudtson v. Robinson [N. D.] 118 NW 1051.

35. Though court cannot enjoin diversion of water from stream by city, it should retain jurisdiction to assess damages. Stock v. Hillsdale, 155 Mich. 375, 15 Det. Leg. N. 1043, 119 NW 435. Where equity has obtained jurisdiction and it is found that some act of the party charged has made the application of the specific remedy sought impossible or impracticable, the court will retain jurisdiction to assess damages in favor of the injured party or to decree such other relief as may be just in the premises. Johnson v. Carter [Iowa] 120 NW 320.

36. Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 SW 119. Equity may assume jurisdiction, determine the rights of all parties and grant the relief required to meet the ends of justice to prevent a multiplicity of suits. Steger & Sons Piano Mfg. Co. v. MacMaster [Tex. Civ. App.] 113 SW 337. Where orphans' court had power to settle personal estate of testator but no power to carry out provisions of will as to appraisal of property nor to construe will, equity court to prevent multiplicity of suits or conflict should construe will and retain jurisdiction to fully settle estate. Magin v. Niner, 110 Md. 299, 73 A 12. Though bill seeking to have trust declared invalid, and for an accounting, was premature and could not be maintained as to

this ground, unless justice may be thus promoted, and the court is required to exercise a sound legal discretion in passing upon the facts of each case.[37] Jurisdiction will be assumed only when the prevented successive or numerous actions involve the same questions of law and a similar state of facts,[38] and where the decree would necessarily determine the controverted questions as to all the defendants.[39] Community of interest as to the joint parties is requisite, and such community of interest exists only where some right common to all joint parties is involved.[40] Where the same person is sued or is liable to be sued by several persons upon separate causes of action, equity cannot interfere.[41] Equity will not grant relief because of a multiplicity of actions, where such actions may be consolidated at law.[42] Complainant cannot urge that court of equity should take jurisdiction to save defendant from multiplicity of suits, where defendant does not complain or urge such objection.[43] A defendant in numerous actions to enforce a primary statutory liability cannot have the prosecution of such actions enjoined when he asserts no defense.[44]

(§ 2) *C. Occasions for, and subjects of, equitable relief.*[45]—See 11 C. L. 1242— The very origin and fundamental basis of equity precludes any attempt at exhaustive classification of its remedies, but some of these remedies have assumed such definite form as to be susceptible of specific classification, such as specific performance,[46] discovery,[47] subrogation,[48] reformation,[49] cancellation and rescission,[50] establish-

former relief, jurisdiction was retained for purpose of accounting. Gillen v. Hadley [N. J. Eq.] 73 A 847.

37. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47. Where question of illegality of costs taxed in criminal cases may be disposed of by motion in a few cases, equity will not assume jurisdiction to prevent multiplicity of suits. State v. Richards [Tenn.] 113 SW 370. Court of equity should not assume jurisdiction in order to prevent multiplicity of suits, unless it is clearly necessary to protect complainant against continued and vexatious litigation. The beginning of one suit in good faith to settle differences finally is not enough. Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 53 Law. Ed. —. One who has been overcharged by public warehouseman may recover all overcharges in one action; equity will not act on theory of avoiding multiplicity of suits. Gulf Compress Co. v. Harris, Cortner & Co. [Ala.] 48 S 477.

38. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47. To warrant interference of equity to prevent multiplicity of suits, same principles of law must control each case and facts must be similar. Gulf & S. I. R. Co. v. Barnes [Miss.] 48 S 823. Bill does not lie to compel adjudication of several claims in one suit when same law and facts do not apply to all. Id.

39. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47.

40. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47. Equity has jurisdiction to determine controversies arising out of a right claimed by one as against many or by many as against the one. Id. Equity takes jurisdiction on ground of the prevention of a multiplicity of actions: (1) Where the controversy is between but two persons and plaintiff has established his right at law, and (2) where persons controverting plaintiff's right are so numerous as to require injunction. Id. Equity has jurisdiction of suit by one holder of bonds of corporation on behalf of himself and others similarly situated to compel officers to make good false representations in mortgage concerning ownership of land which was security. Slater Trust Co. v. Randolph-Macon Coal Co., 166 F 171. Equity takes jurisdiction to prevent a multiplicity of actions where such actions are against same parties defendant, not where they are against different defendants. Caleo v. Goldstein, 61 Misc. 582, 114 NYS 605. Equity has no jurisdiction to settle boundaries where plaintiff alleges that one of two parties have encroached on his land, and he does not know which. Id.

41. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47. Bill to restrain infringement of patent in circuit court does not draw within the jurisdiction of the court a proceeding to restrain unfair competition, though same acts are relied on as constituting both wrongs; they are legally independent. Cushman v. Atlantis Fountain Pen Co., 164 F 94.

42. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47.

43. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —.

44. Jones v. Harris [Ark.] 117 SW 1077.

45. Search Notes: See notes in 5 C. L. 1153; 7 Id. 1342, 1343, 1345, 1346; 25 L. R. A. 800; 37 Id. 783; 63 Id. 697; 69 Id. 673; 3 L. R. A. (N. S.) 382; 5 Id. 1172; 6 Id. 463, 1115; 8 Id. 398, 739; 9 Id. 115, 1071; 13 Id. 1089; 14 Id. 213; 15 Id. 599, 876; 16 Id. 414; 34 A. S. R. 196; 42 Id. 234; 55 Id. 494; 74 Id. 387; 86 Id. 48; 106 Id. 639; 117 Id. 227; 120 Id. 654.

See, also, Equity, Cent. Dig. §§ 1-120; Dec. Dig. §§ 1-42; 16 Cyc. 23-30, 66-132; 11 A. & E. Enc. L. (2ed.) 190.

46. See, also, Specific Performance.

47. See, also, Discovery and Inspection. Equity has jurisdiction of a bill seeking to substitute an equitable for a legal forum when there is a prayer for discovery and there are averments showing indispensability thereof. Dudley v. Niswander, 65 W. Va. 461, 64 SE 745.

ment of lost instruments,[51] creditors' bills,[52] marshaling assets,[53] accounting,[54] creation [55] and foreclosure of liens,[56] injunctions,[57] quieting title and removal of clouds.[58] Another and broader classification may be based upon the nature of the subject-matter in connection with which equitable relief may be invoked, such suits concerning relations of confidence [59] and trust,[60] duties and liabilities of corporate agents and officers [61] and of stockholders,[62] and stockholders' rights as against the corporation,[63] settlement of partnership estates.[64] Equity has ju-

48. See Subrogation.

49. See, also, Reformation of Instruments. Equity has power to reform and correct written instruments. Remm v. Landon [Ind. App.] 86 NE 973.

50. See, also, Cancellation of Instruments. Equity has jurisdiction to set aside conveyance by husband with wife's aid to hinder, delay and defraud creditors. Solenberger v. Strickler's Adm'r [Va.] 65 SE 566. Allegation in complaint to recover on notes that plaintiff had given receipt in full on defendants giving notes, and prayer for cancellation of receipt, does not make action one in equity, since receipt is not contract but merely evidence of payment. Ross v. McCaldin, 195 N. Y. 210, 88 NE 50.

51. Jurisdiction in equity to establish lost instruments extends to lost negotiable instruments. In re Ellard, 62 Misc. 374, 114 NYS 827.

52. See, also, Creditors' Suit. Equity has jurisdiction of suit by creditor of corporation to reach assets of corporation which had been transferred to dummy corporation. Barrie v. United R. Co. [Mo. App.] 119 SW 1020.

53. Right to marshal assets is based upon principles of equity. First Nat. Bank v. Fowler [Wash.] 102 P 1038. Suit involving recognition and marshaling of privileges under Louisiana laws should be tried on equity side of federal court. Iberville Planting & Mfg. Co. v. Monongahela Coal Co. [C. C. A.] 168 F 12.

54. See, also, Accounting, Action for. Equity takes jurisdiction of an accounting growing out of fiduciary relations. Dickinson v. Stevenson [Iowa] 120 NW 324. Assignee of moneys due to subcontractor may maintain suit in equity against owner of land, contractors, and lien claimants, to determine rights to fund, and need not await bringing of suits to enforce liens. Lovett v. New York, 128 App. Div. 891, 112 NYS 552. Equity will entertain suit against estate by one whom decedent had contracted to support, and upon proper proof will grant relief by decreeing against the estate the reasonable cost of such support. Cooper v. Cooper, 65 W. Va. 712, 64 SE 927. Suit in equity will lie by widow to compel executors of deceased husband to recognize separation agreement by which husband agreed to make payments to wife, and have an amount set aside from estate sufficient to meet overdue and future payments. Barnes v. Klug, 129 App. Div. 192, 113 NYS 325.

55. Equity has jurisdiction of bill to charge separate estate of wife with cost of improvements thereon, made with her knowledge. Const. art. 11, § 2. McGill v. Art Stone Const. Co. [Fla.] 49 S 539.

56. Where amendment to petition in law case sought establishment and foreclosure of vendor's lien, case was properly transferred to equity calendar for trial, equity having jurisdiction in such cases before the Code (§ 3427.) State Bank v. Brown [Iowa] 119 NW 81.

57. See, also, Injunction.

58. See, also, Quieting Title. Suit to quiet title is in equity. Hankins v. Helms [Ariz.] 100 P 460. Bill to quiet title is subject of equitable jurisdiction by statute. Berger v. Butler [Ala.] 48 S 6... Court of equity has jurisdiction of suit to determine adverse claim to irrigation ditch across another's land and to grant full relief by way of enjoining interference with right to maintain such ditch. Cottonwood Ditch Co. v. Thom [Mont.] 101 P 825.

59. Equity will often assume jurisdiction because of relation of trust and confidence, and imposes higher duty with regard to disclosure of facts than does the law. Dickinson v. Stevenson [Iowa] 120 NW 324. Equity had jurisdiction where agent, by fraudulent misrepresentations, retained part of money to be paid by third person to principal. Id. Mere relation of principal and agent does not give equity jurisdiction, but where fiduciary relation exists, and matters as to which accounting is sought are peculiarly within knowledge of agent, suit for accounting will lie. Phillips v. Birmingham Industrial Co. [Ala.] 60 S 77.

60. Where general land office has confirmed title of state in certain land through an erroneous interpretation of law, one who had acquired vested equitable right to land under homestead laws could sue in equity to have state's transferee declared trustee, and to compel conveyance by him. Morrow v. Warner Val. Stock Co. [Or.] 101 P 171.

61. Remedy given by Hurd's Rev. St. Ill. 1908, c. 32, §§ 16, 18, 20, against officers and agents of corporations not properly organized, or where fraud has been perpetrated, to render them personally liable, is peculiarly one to be enforced in a court of equity in a proceeding where all creditors can be joined and fund equitably distributed. In re Beachy & Co., 170 F 825.

62. Unpaid subscriptions to capital stock of corporation constitute trust fund for benefit of creditors which court of equity has power to administer. State v. Goodrich [Mo. App.] 120 SW 646.

63. Equity has jurisdiction of suit by stockholder to compel corporation to issue certificate for shares of stock and to account for dividends, and if this relief cannot be granted equity will grant relief by way of damages. Snyder v. Charleston & Southside Bridge Co., 65 W. Va. 1, 63 SE 616.

64. Settlement of partnership estates is within exclusive jurisdiction of courts of equity. Daniel v. Gillespie, 65 W. Va. 366, 64 SE 254.

risdiction to construe and enforce trusts[65] and supply defects in their execution.[66] Equity will not enjoin a sale by a substituted trustee on the ground that the original trustee was improperly removed.[67] Courts of equity have jurisdiction to relieve in cases of fraud and, in so far as the law affords relief, jurisdiction is concurrent.[68] However, the tendency now is for courts of equity to decline to consider the case where there is an adequate remedy at law.[69] Equity will often interfere and give relief against an inequitable and unconscionable advantage gained by another, although the law would not have afforded a remedy.[70] Equity will treat as fraudulent many transactions which would not be so regarded at law.[71] Thus, fraud, in equity, includes all acts, omissions and concealments which involve a breach of either legal or equitable duty, trust or confidence, justly reposed.[72] The court of chancery of New Jersey has general jurisdiction in all cases of fraud.[73] Equity will relieve from mutual mistake of fact, or of mixed law and fact, and sometimes, of law.[74] Usually, however, ignorance or mistake of law is not ground for relief.[75] Inadequacy of consideration is not alone ground for equitable relief.[76] An equitable estoppel is ground for relief[77] where it cannot be set up in a court of law.[78] Equity

65. Equity may intervene to compel due execution of trusts under which funds are held. Ryan v. Knights of Columbus [Conn.] 72 A 574. The general jurisdiction of a court of equity over express private trusts necessarily includes the power to construe and enforce such trusts. Warren v. Warren [N. J. Eq.] 72 A 960.

66. When there has been a defective attempt to carry out and execute a trust, equity will supply defects in its execution (Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655), and in doing so will consider as done what ought to have been done, and carry out obligations as of the date when they should have been performed (Id.).

67. Brown v. Click, 65 W. Va. 459, 64 SE 613.

68. Dickinson v. Stevenson [Iowa] 120 NW 324. Generally courts of law and equity have concurrent jurisdiction of causes of action arising out of fraud, accident or mistake. Daniel v. Gillespie, 65 W. Va. 366, 64 SE 254. It must appear that complainant has been injured by collusive acts of others to give equity jurisdiction on that ground. Patterson v. Northern Trust Co., 238 Ill. 601, 87 NE 843. Though law affords remedy by action for fraud and deceit, perpetrated in effecting a settlement of partnership affairs, jurisdiction of law courts is not exclusive, and resort may be had to equity to correct account by surcharging and falsifying it as to certain items or to set it aside wholly and judicially settle accounts. Daniel v. Gillespie, 65 W. Va. 366, 64 SE 254. Equity will grant relief against a judgment at law procured by fraud, mistake or by accident. Central Stock & Grain Exch. Co. v. Pine Tree Lumber Co., 140 Ill. App. 471.

69. Dickinson v. Stevenson [Iowa] 120 NW 324. While equity has concurrent jurisdiction with courts of law in fraud cases, yet equity will not interfere when a court of law has already obtained jurisdiction and there appears to be an adequate remedy at law. Biermann v. Guaranty Mut. Life Ins. Co. [Iowa] 120 NW 963. Equity does not take jurisdiction in cases of fraud when relief properly obtainable can be had as well in court of law, and discovery, if necessary, can also be there had. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —. Fraud in obtaining a life insurance policy is a complete legal defense; and a cross petition by defendant in an action on the policy asking cancellation will not be considered where the facts have already been set up in the answer. Biermann v. Guaranty Mut. Life Ins. Co. [Iowa] 120 NW 963.

70, 71, 72. Dickinson v. Stevenson [Iowa] 120 NW 324.

73. L. Martin Co. v. L. Martin & Wilckes Co. [N. J. Eq.] 71 A 409.

74. McCord v. Bright [Ind. App.] 87 NE 654. Equity may relieve against mistake and grant such relief as the ends of justice require. Norton Iron Works v. Moreland [Ky.] 113 SW 481. Bill in equity may be maintained to set aside award of arbitrators on ground of mutual mistake. Rolfe v. Patrons' Androscoggin Mut. Fire Ins. Co. [Me.] 72 A 732. If terms of instrument are according to parties' intentions, but there is mistake of one or both as application, such as boundaries, amount, value, location, etc., equity will grant appropriate relief if mistake is material. Allen v. Luckett [Miss.] 48 S 186. Mistake of fact is a recognized ground of equity jurisdiction, but in order that relief may be afforded upon that ground it must appear that the mistake was not due to the negligence of the party asking relief, that is, that it was such a mistake as the exercise of reasonable diligence would not have prevented. Omission from appeal bond of description of certain lands. Benting v. Bell, 137 Ill. App. 600.

75. Ignorance of law, with full knowledge of facts, is not ground for equitable relief. Appeal of Pennsylvania Stave Co. [Pa.] 73 A 1107; In re Mulholland's Estate [Pa.] 73 A 932. Where statute imposes penalty but relieves therefrom for mistake of fact, impliedly providing that mistake of law is no excuse, court of equity cannot relieve for mistake of law. Texas & N. O. R. Co. v. Sabine Tram Co. [Tex. Civ. App.] 121 SW 256.

76. Hanson v. Neal, 215 Mo. 256, 114 SW 1073.

77. Equity has jurisdiction of a suit the object of which is to vest title to land from

delights to relieve against penalties and forfeitures[79] and will grant such relief where compensation can be decreed,[80] and where equitable grounds for relief are found to exist.[81] But a forfeiture will be enforced when parties have contracted for it and have not waived the right to it.[82] Courts of equity will construe wills where necessary to direct the conduct or execution of trusts created thereby;[83] but where no trust is created equity will not take jurisdiction to construe a will simply because of uncertainty of the devisee or to settle merely legal titles.[84] A court of equity has no jurisdiction to declare a will void for fraud;[85] fraudulent wills constitute the great exception to the jurisdiction of courts of equity in cases of fraud.[86] The right to contest a will in chancery is, in Illinois, conferred by statute, and is not one of the general chancery powers of the court.[87] Hence such jurisdiction can only be entertained and exercised in the mode and within the time prescribed by the statute.[88] Equity will not assume jurisdiction in boundary disputes where ejectment is open to try the title.[89] But where some ground of equity jurisdiction is stated, the mere fact that a boundary dispute is involved will not oust the court of jurisdiction.[90] Courts of equity have concurrent jurisdiction with courts of law in suits to recover money lost in gaming contracts regardless of necessity for discovery.[91] A court of equity will not entertain a bill merely to vindicate an abstract principle of justice.[92] Some specific right must be involved.[93] In matters requiring an account-

one person into another on grounds of equitable estoppel in pais. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104.

78. Mere existence of an estoppel does not warrant resort to equity; there must be some additional ground whereby such defense cannot be successfully set up in a court of law. Sullivan v. Moore [S. C.] 65 SE 108.

79. Equity delights to relieve against forfeitures by requiring compensation for failure to comply rather than destroying rights. Cuthbertson v. Morgan, 149 N. C. 72, 62 SE 744.

80. The true test by which to ascertain whether relief against a penalty for nonperformance of a contract can be had in equity is whether compensation can be made, and if it cannot be made equity will not interfere, but, if it can, it will grant relief. Potomac Power Co. v. Burchell [Va.] 64 SE 982. Courts of equity will not enforce a forfeiture of an estate. Pyle v. Henderson, 65 W. Va. 39, 63 SE 762. If a penalty provided for in a contract is merely to secure payment of money, courts of equity will relieve the party on payment of principal and interest. Potomac Power Co. v. Burchell [Va.] 64 SE 982.

81. Equity does not relieve against the forfeiture of a term because of an assignment without the lessor's consent unless there are special grounds, such as accident, fraud or mistake. Powers Shoe Co. v. Odd Fellows Hall Co., 133 Mo. App. 229, 113 SW 253. But equity may grant relief where any of such grounds exist. Id.

82. Equity will enforce a forfeiture when parties have so contracted, but before rendering a decree will consider carefully whether right to forfeiture has not been waived. Spedden v. Sykes, 51 Wash. 267, 98 P 752.

83. Strawn v. Trustees of Jacksonville Female Academy, 240 Ill. 111, 88 NE 460. Superior courts, by reason of equitable powers vested in them, may construe wills at instance of executors and trustees in order to determine legacies and instruct trustees as to their duties. Haywood v. Wachovia L. & T. Co., 149 N. C. 208, 62 SE 915. Jurisdiction in equity to construe wills depends upon its general jurisdiction over trusts, etc., and can be invoked only when relief is required in behalf of executor, trustee, cestui que trust or legatee. Buskirk v. Ragland, 65 W. Va. 749, 65 SE 101.

84. Strawn v. Trustees of Jacksonville Female Academy, 240 Ill. 111, 88 NE 460. Court of chancery has no jurisdiction to construe will when titles conferred thereby are purely legal. Frank v. Frank [Ark.] 113 SW 640. Court of equity has no jurisdiction to construe wills where there is no trust. Fletcher v. Root, 240 Ill. 429, 88 NE 987.

85, 86. Kinkel v. Spitz [N. J. Eq.] 70 A 992.

87, 88. Selden v. Illinois Trust & Sav. Bank, 239 Ill. 67, 87 NE 860.

89. Where possession has been in defendant and ejectment is open to try the title, equity will not take jurisdiction to determine the boundary line. Cullen v. Ksiaszkiewicz, 154 Mich. 627, 15 Det. Leg. N. 844, 118 NW 496.

90. Cullen v. Ksiaszkiewicz, 154 Mich. 627, 15 Det. Leg. N. 844, 118 NW 496. Where boundary between counties is in dispute and depends upon construction of an uncertain statute, and one county is exercising jurisdiction by levying and collecting taxes in disputed territory, equity has jurisdiction to determine boundary. Sierra County v. Nevada County [Cal.] 99 P 371.

91. Berns v. Shaw, 65 W. Va. 667, 64 SE 930.

92. Allott v. American Strawboard Co., 237 Ill. 55, 86 NE 685.

93. Bill seeking to enjoin interference with complainant's right to an office in a fraternal beneficial society was not without equity when it alleged that office carried with it exemption from dues and insurance, a property right being thus shown to be involved. Houston v. Howze [Ala.] 50 S 266.

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ing which would be difficult or impracticable for a jury to make, a court of equity will entertain jurisdiction.[94] The court is not, however, bound to transfer a cause to equity on this ground of its own motion.[95] A court of equity has power to stay proceedings at law when there is occasion to do so upon principles of equity.[96] A court of equity may relieve against a judgment obtained by fraud and perjury,[97] or by fraud, accident, or mistake,[98] but it will not review issues which were or might have been presented and tried in the action at law.[99] A court of equity will cancel a judgment at law when the complainant alleges and proves that he had no notice of the suit and has a meritorious defense.[1] Courts of equity have original jurisdiction to offset judgments between the same parties.[2]

§ 3. *Laches and acquiescence.*[3]—See 11 C. L. 1246—Equity does not favor stale demands [4] and will deny relief to one who has been guilty of gross and inexcusable laches.[5] What constitutes laches which will bar an equitable demand in a particular case depends upon the facts peculiar to the case.[6] The terms "limitations" and

94. Such accounting necessary where accounts and books of large concern from 1897 to 1902 were involved. London Guar. & Acc. Co. v. Bell Tel. Co., 171 F 278. Equity will take jurisdiction in all cases where the accounts are intricate and a discovery is demanded or where there should be an accounting for money held in trust, and same principle applies where trust is created by contract for an accounting for receipts. Empire Circuit Co. v. Sullivan, 169 F 1009. In action for work and labor, **accounts held not so complicated** as to require transfer to equity where evidence concerning them could be obtained. Leola Lumber Co. v. Bozarth [Ark.] 120 SW 152. Action by receiver of bank on personal account with bank, presenting no equitable features or complicated accounts, was not transferable to the equity side, under Code, § 3735, providing for compulsory reference in cases involving examination of accounts. Faville v. Lloyd [Iowa] 118 NW 871. In action to recover money, where trial had proceeded 2½ days, and court could see what was involved, motion to transfer to equity court was properly overruled, accounts not being so long or involved that jury could not understand them. Smith v. Stack [Ark.] 115 SW 1145.

95. Court is not bound to transfer of its own motion to the equity side case involving complicated account. Stevenson v. Moore [Ky.] 118 SW 951.

96. Griesa v. Mutual Life Ins. Co. [C. C. A.] 165 F 48.

97. Court of equity has power to vacate judgment obtained by fraud and perjury. Harden v. Card, 17 Wyo. 210, 97 P 1075. Equity will enjoin enforcement of judgment obtained by fraud and perjury. Boring v. Ott, 138 Wis. 260, 119 NW 865.

98. Where a judgment is obtained through accident, fraud, or mistake, relief may be had in equity whether bill asking it is called bill of review or original bill in equity, provided there is no adequate remedy at law. State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291. Fraudulent alteration of judgment, which invades substantial rights of party, may warrant injunction against enforcement. Van Buren v. Posteraro [Colo.] 102 P 1067.

99. Harden v. Card, 17 Wyo. 210, 97 P 1075. Equity will not set aside a judgment for fraud or perjury which is intrinsic, as where based on perjured testimony, and thus reopen entire controversy. Proof of extrinsic and collateral fraud only will be received. French v. Raymond [Vt.] 72 A 324. Equity will not enjoin collection of a judgment obtained by perjury though bill alleges an admission of the perjury. Steele v. Culver [Mich.] 16 Det. Leg. N. 400, 122 NW 95.

1. Fields v. Henderson [Ala.] 50 S 56.

2. Loy v. Alston [C. C. A.] 172 F 90.

3. Search Note: See notes in 5 C. L. 1158; 10 Id. 1677; 5 L. R. A. (N. S.) 799; 6 Id. 463; 8 Id. 1091; 9 Id. 606; 2 A. S. R. 795; 23 Id. 148; 32 Id. 384.

See, also, Equity, Cent. Dig. §§ 191-245; Dec. Dig. §§ 67-88; 16 Cyc. 150-181; 18 A. & E. Enc. L. (2ed.) 95; 12 A. & E. Enc. P. & P. 828.

4. Equity does not favor suit long after transaction in question, and after death of original parties, for reason that testimony can be easily fabricated. Elliott v. Bunce [Cal. App.] 103 P 897; Geter v. Simmons [Fla.] 49 S 131.

5. Laches will in equity bar a suitor of his remedy as effectually as the statute of limitations. Kelly's Estate, 37 Pa. Super. Ct. 320. Equity will not lend its aid to one who has been guilty of gross laches and will discourage stale demands. Foote v. Harrison, 137 Wis. 588, 119 NW 291. A court of equity may and should refuse to upset consummated and completed transactions to the hurt of those who have acted in good faith at the suit of plaintiffs who, by laches or failure to protest upon opportunity before the acts were done, have induced or justified a belief that they acquiesced in and approved such acts. Dorner v. Luxemburg School Dist., 137 Wis. 147, 118 NW 353.

6. Foote v. Harrison, 137 Wis. 588, 119 NW 291; Depue v. Miller, 65 W. Va. 120, 64 SE 740. What constitutes laches which will bar an express trust depends upon circumstances. Roush v. Griffith, 65 W. Va. 752, 65 SE 168. What is reasonable time within which to attack fraudulent transaction by trustee depends upon circumstances. Branch v. Bulkley [Va.] 65 SE 652.

Relief barred by laches: Where one who

paid money to a bank to be applied on an unmatured note acquiesced in the entry of the money to a general deposit, he had no standing in equity upon liquidation of the affairs of the bank other than that of a general creditor. Peterson v. Grapser [Iowa] 118 NW 411. Where legatee learned that administratrix no longer admitted that she held the legacy for him and that it was actually claimed by others, waiting twelve years barred any recovery on account of the legacy. Kelly's Estate, 37 Pa. Super. Ct. 320. Where defendant believing itself immune from final process waited nearly two years before moving to avoid judgment, in verity of which a court of a sister state had in the meantime pronounced judgment. Central Stock & Grain Exch. Co. v. Pine Tree Lumber Co., 140 Ill. App. 471. Where not sufficiently explained, failure of creditors for twenty years to enforce their claims against estate of deceased debtor. Goodrum v. Mitchell, 143 Ill. App. 134. Members of religious society lose right **to contest action of society** when they fail to act promptly. Vargo v. Vajo [N. J. Eq.] 73 A 644. Where **abutting property owner allowed tracks to remain** in street 10 years, and permitted expenditures and improvements and then waited 5 years more, he was not entitled to relief. Good v. Queen's Run Fire Brick Co. [Pa.] 73 A 906. Where taxpayers knew that school district officers had paid out money to maintain a sectarian school, contrary to constitutional provision, but had approved expenditure and voted more money, knowing the facts, the school officers would not be compelled, after 20 years, **to reimburse district.** Dorner v. Luxemburg School Dist., 137 Wis. 147, 118 NW 353. Where plaintiff in suit **to quiet title,** and his grantors, had waited 10 years, and had not paid taxes or claimed land, which had meantime greatly increased in value, right to relief was barred. Craig v. Hedges [Ark.] 119 SW 645. Where heirs of intestate orally **partition** land, neither heirs nor others who have recognized partition as valid for 20 years can thereafter attack it. Wooton v. Murrell [Ky.] 119 SW 191. Parties who stood by for 17 years with full knowledge of facts could not then attack conveyance to assignee of purchaser at execution sale, and sue **to redeem** after assignee's death, land having been resold several times. Tate v. Logan [Ark.] 114 SW 696. Suit **to prevent infringement of trade mark** barred by delay. New Orleans Coffee Co. v. American Coffee Co. [La.] 49 S 730. Relief sought by **setting aside decree** barred, where facts on which bill was based had been known for 3½ years. Woods v. Chesborough [Miss.] 48 S 613. Suit for **rescission of contract,** 18 years after its execution, barred, no excuse for delay appearing. Hagan v. Taylor [Va.] 65 SE 487. Where ward acquiesced in settlement of **guardian's account** for 9 years, he could not maintain suit to surcharge and falsify it. Plant v. Fittro, 65 W. Va. 147, 63 SE 768. Order of distribution of property of estate was filed in 1892, and complainants deeded interest in property to widow. In 1907 they sued **to set aside orders in probate proceedings** and their deeds, alleging that property was not community property, etc. Barred by laches. Kline v. Galland, 53 Wash. 504, 102 P 440. Suit **to vacate decrees,** orders, and judgments, barred when complainants waited many years and were guilty of gross and unexplained laches. Washington Dredging & Imp. Co. v. State, 53 Wash. 346, 101 P 884. Grantor made no claim to land for 20 years and told creditors he had no interest in it. Suit **to establish trust** barred. Spaulding v. Collins, 51 Wash. 488, 99 P 306. Where defendants had used words "War Cry" and "Salvation Army" in their names for 25 years, complainants were not entitled to **injunction.** Salvation Army v. American Salvation Army, 62 Misc. 360, 114 NYS 1039. Owner of lot in tract subject to building restrictions knew that other lots were to be sold under different restrictions but allowed sales to proceed without objection or giving notice of his rights. Laches barred right to **enforce restrictions** against innocent purchasers. Stott v. Avery, 156 Mich. 674, 16 Det. Leg. N. 295, 121 NW 825. Suit **to enjoin unlawful use of trade name** or trade mark not barred where it appeared that complainant had been diligent in protecting it. Avenarius v. Kornely, 139 Wis. 247, 121 NW 336. One who signed drainage petition, had actual and implied notice of all subsequent steps in the making of the improvement and assessment, and failed to object, could not have enforcement of **assessment enjoined.** Cotzhausen v. Dick, 138 Wis. 127, 119 NW 822. Suit **to quiet title** barred where complainants waited 30 years, with full knowledge, parties by whom good faith in occupying land could be shown having died. McBride v. Caldwell [Iowa] 119 NW 741. Suit for **accounting** by joint purchaser of mine barred when plaintiff had made no reasonable effort to locate defendant for 12 years. Dowse v. Gaynor, 155 Mich. 38, 15 Det. Leg. N. 897, 118 NW 615. Principal allowed deed to agent to stand 24 years during his life, and his devisees waited 13 years longer, until after principal and agent were dead. Suit **to cancel deed** barred. Lancaster v. Springer, 239 Ill. 472, 88 NE 272. Complainant guilty of laches in seeking **injunctive relief** against use of name on beef product which had been openly used by defendant for long time without objection. Liebig's Extract of Meat Co. v. Liebig Extract Co., 172 F 158. Bill **to set aside mortgage foreclosure** barred by laches when complainants did not act for 5 years after knowledge of facts on which suit was brought. Bower v. Stein, 165 F 232. Where judgment creditor allows grantee of debtor to treat property conveyed as his own for 13 years, while paying off an incumbrance, he is barred by laches from maintaining a bill **to set aside the deed** as fraudulent. Montgomery v. Gardner [R. I.] 71 A 67. Right to relief by way of **equitable lien on land** barred where complainant waited 5 years after deed to property had been recorded, contrary to contract, both husband and wife, debtors, having died. Stieff Co. v. Ullrich, 110 Md. 629, 73 A 874. Where vendee asked her husband to see vendor regarding mistake in consideration of contract but failed to take any other steps for two years, she was barred from relief by **reformation.** Kunz v. Mason [N. J. Err. & App.] 73 A 869. Suit **to cancel deed** of tide lands transferred for shares of stock in corporation barred when complainant had known of corporation's financial condition for year and a half, and exchange had been made two years before. Romaine v. Excelsior Carbide & Gas Mach. Co. [Wash.] 103

"laches" when applied to the period of time within which an equitable right must be asserted do not denote the same thing.[7] The former signifies that fixed period specified in the statute, and this is so whether the statute is expressly applicable to suits in chancery or is followed in such suits by analogy.[8] The latter signifies unreasonable delay, independent of the statute or any fixed period of time.[9] Laches partakes of the characteristics of both limitations and estoppel[10] involving prejudice, actual or implied, resulting from the delay,[11] or such delay, without regard to the

P 32. Bill **to establish trust in realty** barred by laches where property was bought 28 years before and trust was repudiated and quitclaim deeds given and no claim asserted during purchaser's lifetime. Maggini v. Jones [Pa.] 72 A 559. Life tenant in personalty invested funds in land but recognized its trust character as to remaindermen. She could not thereafter assert acquiescence so as to bar **suit to compel election to take realty in lieu of funds.** Small v. Hockinsmith [Ala.] 48 S 541.

Relief not barred by laches: Where trustees placed certain certificates in hands of party to make arrangement for present payment of the same, not commencing suit within less than one year and eight months after certificates were placed in hands of such party, to recover said certificates from him, was not laches. Henshaw v. Christian, 143 Ill. App. 558. Where complainant had no knowledge of assignment for its benefit until after death of trustee, when **breaches of trust** were first discovered and actions to recover promptly brought, they were not barred by laches. Russel v. Huntington Nat. Bank [C. C. A.] 162 F 868. Delay of two or three months in tendering amount due did not bar suit for **specific performance** when no special circumstances, such as increase in value of land, were shown. Tacoma Water Supply Co. v. Dumermuth, 51 Wash. 609, 99 P 741. Suit **to surcharge or falsify stated or settled account** not barred when brought within 3 years and error was clearly shown, and no evidence appeared to have been lost. Branner v. Branner's Adm'r, 108 Va. 660, 62 SE 952. Where claim had been in almost continuous litigation for 20 years, contested by defendant and its predecessor in interest, direct suit **to charge it with liability** was not barred, though first proceeding had been commenced 20 years before. Boyd v. Northern Pac. R. Co., 170 F 779. Action **to determine adverse claims** to real property not barred by laches. Hodgson v. State Finance Co. [N. D.] 122 NW 336. No laches in suit **to enforce trust** where parties had no knowledge of it until after trustee's death. In re Fisk, 81 Conn. 433, 71 A 559. In suit **to subject property** transferred to judgment, complainants were not barred by laches when their assignors had no knowledge of the facts set up, and the assignment was only year before suit. Ewald v. Ortnysky [N. J. Eq.] 71 A 179. Suit **to establish trust,** based on fraudulent concealment of facts, not barred by laches, when brought within 3 years after discovery of fraud, the analogous limitation statute allowing three years. Cunningham v. Pettigrew [C. C. A.] 169 F 335. Where grantee had suffered nothing by 15 years' delay, and grantor claimed throughout that deed had never been delivered, **suit to cancel** was not barred. Shute v. Shute, 82 S. C. 264, 64 SE 145. Delay of 6½ months in commencing suit for **accounting,** and failure to push prosecution of it with diligence, did not bar suit when plaintiff had been endeavoring to adjust the matter. Stitzel v. Ehrman [Ky.] 114 SW 280. Delay of seven years after attaining majority did not bar suit by grantor **to cancel deed** made when a minor when nothing had been said or done by him which would operate as an estoppel. Lake v. Perry [Miss.] 49 S 569. One seeking **specific performance** of an agreement to convey land by his father in consideration of services not barred by laches, where he entered upon land, obtained a deed which he believed valid, and improved and occupied land for 20 years. Stonehouse v. Stonehouse, 156 Mich. 43, 16 Det. Leg. N. 21, 120 NW 23. Suit **to subject property to judgment** claim not barred where plaintiff had no knowledge of facts warranting suit. Foote v. Harrison, 137 Wis. 588, 119 NW 291. Where agent of owner of land took tax title in his own name, and refused offer to redeem on ground that he had money of owner in his hands sufficient to redeem, and thereafter conveyed to others, lapse of time less than limitation period did not bar suit **to cancel tax deed.** Compton v. Johnson, 240 Ill. 621, 88 NE 991. Where plaintiff claimed under void tax deed, and there was no actual possession sufficient to give notice to defendant of plaintiff's claim, defendant was not barred by laches from **asserting** his own **title.** Himmelberger-Harrison Lumber Co. v. McCabe, 220 Mo. 154, 119 SW 357; Himmelberger-Harrison Lumber Co. v. Deneen, 220 Mo. 184, 119 SW 365; Himmelberger-Harrison Lumber Co. v. Jones, 220 Mo. 190, 119 SW 366. Owner of wild and unoccupied land is not bound to resort to legal or equitable remedies to establish title until it is attacked and cannot be charged with laches for not so doing. Chatfield v. Iowa & Arkansas Land Co. [Ark.] 114 SW 473.

7, 8, 9, 10. Wilder's Ex'x v. Wilder [Vt.] 72 A 203.

11. Does not arise from delay alone but from delay that works a disadvantage to another. Wilder's Ex'x v. Wilder [Vt.] 72 A 203. Such delay in the enforcement of one's right as works a disadvantage to another. Snyder v. Charleston & Southside Bridge Co., 65 W. Va. 1, 63 SE 616. Laches is negligence by which another has been led into changing his condition with respect to the property or right in question so that it would be inequitable to allow the negligent party to be preferred upon his legal right to the one whom his negligence has misled. Hughes v. Wallace [Ky.] 118 SW 324. It is only prejudicial delay which constitutes laches, but prejudice will be presumed in some cases, as where rights of innocent third persons intervene. McNeil v. McNeil [C. C. A.] 170 F 289.

effect it may have upon another, as will warrant the presumption that the party has waived his right.[12] Mere lapse of time, without resulting prejudice, and insufficient to raise a presumption of a waiver, does not constitute a bar.[13] The defense of laches implies a negative course of action while that of acquiescence implies an affirmative one.[14] There can be no laches or acquiescence without knowledge of one's rights,[15] and an opportunity to efficiently assert them.[16] Laches is a purely equitable defense and cannot be pleaded in an action at law to enforce a strict legal right.[17] Being purely matter of defense, it cannot be invoked by complainant as a ground of relief.[18] Laches cannot be set up against the state.[19] The doctrine of laches may be invoked by the court of its own motion,[20] but the defense is not available as a matter of right unless properly raised by the pleadings.[21]

Application of analagous statutes.[See 11 C. L. 1149]—While statutes of limitation do not apply in the case of rights as to which courts of equity have exclusive jurisdic-

12. Snyder v. Charleston & Southside Bridge Co., 65 W. Va. 1, 63 SE 616. Mere delay without resulting prejudice is no bar, but delay such as to raise inference of abandonment of claim is bar. Depue v. Miller, 65 W. Va. 120, 64 SE 740. Mere delay working no injury to defendant bars relief only on presumption of abandonment which may be overcome by proof to the contrary. White v. Bailey, 65 W. Va. 573, 64 SE 1019.

13. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266; Compton v. Johnson, 240 Ill. 621, 88 NE 991; Cordiner v. Finch Inv. Co. [Wash.] 103 P 829; Geter v. Simmons [Fla.] 49 S 131. Doctrine of laches does not apply when delay does not equal limitation period and where relative positions of parties have not changed since right accrued and right can be enforced without doing wrong, and substantial justice meted out. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381. Other considerations besides lapse of time enter into question of laches, such as whether rights of third persons have intervened, whether witnesses are dead or have disappeared, whether situation has changed, etc. Cunningham v. Pettigrew [C. C. A.] 169 F 335. Moral as well as legal considerations such as ignorance of law or regard for feelings of relatives will be given weight in determining whether plaintiff has abandoned a claim, but such considerations cannot relieve from or stay limitations or excuse delay resulting in prejudice to defendant. Depue v. Miller, 65 W. Va. 120, 64 SE 740. Delay for less than 20 years, in the assertion of a purely equitable right, fully proven by documentary evidence, under circumstances not in any way operating to the prejudice of defendants, and tending to negative inference of intent to abandon claim or demand, will not bar relief. Id. If the right of plaintiff is clear and not dependent upon oral evidence and no injury or prejudice to the defendant has resulted from the delay, as by death of parties, change of conditions, loss of evidence, or the like, the cause of action is not barred by laches, unless the lapse of time or circumstances are such as to raise a presumption of intent to abandon or relinquish the right. Id.

14. West Pub. Co. v. Edward Thompson Co., 169 F 833.

15. There can be no laches so long as there is no knowledge of the wrong complained of, and no lack of diligence to avail of opportunities to learn the facts. Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 89 NE 193. To constitute acquiescence in fraudulent transaction by trustee such as to bar relief, there must have been knowledge of fraud and right to attack, and injury to trustee from delay. Branch v. Bulkley [Va.] 65 SE 652. Where there has been a distinct repudiation by the trustee of even a direct trust and knowledge of the repudiation has been brought home to the cestui que trust, the case comes within the ordinary rules of limitation and laches. Kelly's Estate, 37 Pa. Super. Ct. 320.

16. Laches is not predicated upon a failure to act when to act would have been futile. Town of Cicero v. Grisko, 144 Ill. App. 564. Laches cannot be imputed when there is no one to sue or be sued. Le Croix v. Malone [Ala.] 47 S 725. Remainderman cannot be called upon to assert any claim or title to property until falling in of life estate; hence not guilty of laches for not doing so. Teague v. Sowder [Tenn.] 114 SW 484.

17. Not a defense in action to recover possession of real estate. Waits v. Moore [Ark.] 115 SW 931.

18. Not ground for relief against city by way of injunction against removing encroachment on street. City of Paragould v. Lawson [Ark.] 115 SW 379.

19. Nor against county supervisors representing the states. Norfolk & W. R. Co. v. Carroll County Sup'rs [Va.] 65 SE 531.

20. Rule as to laches may be applied and relief denied to one who has been guilty of gross laches though defense is not raised by pleadings or demurrer. Geter v. Simmons [Fla.] 49 S 131. Though the defense of laches is not raised by the pleadings, the court may, in its discretion, deny relief on that ground at the trial where it clearly appears that it would be inequitable to grant the desired relief. Stewart v. Joyce, 201 Mass. 301, 87 NE 613.

21. Where defendants failed to raise the defense of laches by demurrer or answer, or before the master, it was too late after the filing of the master's report to ask the court to dismiss the bill as a matter of right. Stewart v. Joyce, 201 Mass. 301, 87 NE 613.

tion,[22] yet, in cases where there is both a legal and an equitable remedy, equity follows the law,[23] and under ordinary circumstances a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law.[24] But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it.[25]

§ 4. *Practice and procedure in general.*[26]—See 11 C. L. 1250—Practice in state courts is largely controlled by statute.[27] State statutes and rules are not followed in federal courts of equity.[28] In the federal courts the distinction is maintained between actions at law and suits in equity,[29] though, where the court has jurisdiction or takes cognizance of a case because equitable relief is solely appropriate to the main issue or cause of complainant, it will retain the case and take an account of damages growing out of or following from the wrong which is the basis of equitable relief.[30] Where a suit is one of equitable jurisdiction when instituted, the court has no discretion to refuse to entertain jurisdiction because of a change of conditions after the bill is filed.[31] The commencement of a suit in equity in a federal court is

22. Depue v. Miller, 65 W. Va. 120, 64 SE 740. No limitation statute applicable to application to revive suit in equity in federal court after death of parties, nor is matter controlled by local statute, and such application will not ordinarily be denied for laches. Miller v. Wattier, 165 F 359.

23. Equity follows law in applying limitations. Burrus v. Cook, 215 Mo. 496, 114 SW 1065. Law limitation statute applicable where there is concurrent jurisdiction and remedy at law is adequate. Holt v. Hopkins, 63 Misc. 537, 117 NYS 177. Where there is both a legal and an equitable remedy for the same cause of action, if the legal remedy is barred by lapse of time, the equitable remedy will also be held to be barred. Clark v. Van Cleef [N. J. Eq.] 71 A 260. The statutes of limitation are available as bar in suits in equity as well as in actions at law in Kentucky. Hughes v. Wallace [Ky.] 118 SW 324.

24. Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963. Laches is independent of statutes of limitations ordinarily; whether it is good defense depends upon facts of each case. Romaine v. Excelsior Carbide & Gas Mach. Co. [Wash.] 103 P 32. Bill for foreclosure of mechanics' lien, filed after time allowed by statute for foreclosing it, no excuse for delay being alleged, is demurrable. Armstrong Cork Co. v. Merchants' Refrigerating Co., 171 F 778. Statutes of limitation do not apply to proceedings to enforce equitable claims except so far as resort may be had to them by way of analogy. In re Fisk, 81 Conn. 433, 71 A 559. Where inactivity of plaintiffs and their grantors, and failure to pay taxes, had extended over period of less than seven years, they were not barred. Craig v. Hedges [Ark.] 119 SW 645. The doctrine of stale equity or laches does not apply to an action at law governed by the statute of limitations, which does not begin to run during coverture. Miller v. McLean, 11 Ohio C. C. (N. S.) 424.

25. Mere increase in value of property involved is not such an extraordinary circumstance as will induce departure from analogous rule of limitations. Indiana & Arkansas Lumber & Mfg. Co. v. Brinkley [C. C. A.] 164 F 963. Claim may be stale so that equity will not enforce it though not barred by limitations. East Jellico Coal. Co. v. Hays [Ky.] 117 SW 307.

26. **Search Note:** See note in 3 C. L. 1220. See, also, Equity, Cent. Dig. §§ 246-1144; Dec. Dig. §§ 89-466; 16 Cyc. 181-370, 375-469, 471-500, 508-534.

27. **Notice by publication to nonresident defendants** in equity case need not, under Laws 1893, p. 60, § 4129, be made returnable to a rule day. Smith v. Elliott, 56 Fla. 849, 47 S 387. In action at law on promissory note (Code, § 3428, providing for ordinary proceedings in such action), where there was no issue of fact, and **cause was submitted on pleadings,** court could determine whether items of account could be allowed as equitable set-off, under § 3435, that issues formerly cognizable in equity are to be tried in mode prescribed for equitable proceedings. Tuttle v. Bisbee [Iowa] 120 NW 699.

28. Practice in federal courts of equity is controlled by principles, rules and usages, of high court of chancery of England, except as modified by federal statute and rules of supreme court; state laws of procedure are not followed. Westall v. Avery [C. C. A.] 171 F 626.

See Courts, § 4, as to application of Conformity Act.

29. American Creosote Works v. Lembcke & Co., 165 F 809. An action at law for damages for breach of contract cannot be joined with cause of action for relief by way of enjoining disposition of property. Id. Bill to foreclose mechanic's lien, filed on law side in federal court, demurrable. Armstrong Cork Co. v. Merchants' Refrigerating Co., 171 F 778.

30. Such as suit to restrain infringement of patent and for damages. American Creosote Works v. Lembcke & Co., 165 F 809.

31. Carnegie Steel Co. v. Colorado Fuel & Iron Co. [C. C. A.] 165 F 195.

not governed by the local statute for commencement of actions in the state court, but by equity practice and procedure.[32] Chancery subpœnas cannot be issued by the clerk until the bill has been filed in his office.[33] A suit is "commenced" in the federal court when the bill has been filed, and process duly issued and placed in the hands of the serving officer with intent that it shall be served.[34] Further, to stay the statute of limitations there must be a bona fide attempt to serve the writ of subpœna which, if unsuccessful, must be followed by timely proceedings or reasonable diligence to procure service through further or additional process.[35] When the United States voluntarily comes into court, seeking relief against an individual, it becomes subject to the rules governing all litigants relative to the filing of pleadings.[36] Proceedings in federal courts in the exercise of the customary jurisdiction of probate courts are proceedings in equity.[37]

§ 5. *Parties.*[38]—See 11 C. L. 1250—In general, all persons having rights in the subject-matter should be joined, in order to prevent a multiplicity of suits,[39] and persons having a common right may join in one bill for its protection.[40] In equity, a distinction is made between indispensable and necessary parties.[41] Persons whose presence as parties is essential to the granting of the relief sought and whose absence would render impossible or nugatory any decree for such relief are indispensable in contradistinction to necessary parties.[42] A party cannot be made a party complainant without his consent, and when he is a necessary party and refuses to be made a party complainant, the proper course is to make him a defendant[43] and to allege the reason for so doing.[44] To give the court jurisdiction over unknown

32. United States v. Miller, 164 F 444.

33. Armstrong Cork Co. v. Merchants' Refrigerating Co., 171 F 778.

34. United States v. Miller, 164 F 444.

35. Evidence held to show bona fide effort and reasonable diligence to procure service. United States v. Miller, 164 F 444.

36. United States v. Barber Lumber Co., 169 F 184. Where, in suit to set aside patents, government failed to file replication within required time, owing to change in district attorney's office, he was allowed to file it nunc pro tunc but court made order requiring subsequent proceedings to be taken within certain fixed time. Id.

37. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. [C. C. A.] 165 F 162.

38. **Search Note:** See notes in 3 C. L. 1221; 50 A. S. R. 737.

See, also, Equity, Cent. Dig. §§ 246-292, 554, 590; Dec. Dig. §§ 89-118; 16 Cyc. 181-189, 191-193, 196-208.

39. Owner of patent who has granted an exclusive license thereunder, but reserved right to part of damages recovered from infringers, and right to cancel patent under certain conditions, is proper party to bill to enjoin infringement. Kaiser v. General Phonograph Supply Co., 171 F 432.

40. Two corporations, one of which is successor of other in business, may join in bill to enjoin acts of defendants injurious to both. Sipe & Co. v. Columbia Refining Co., 171 F 295. Where complainants ask that defendants, directors of corporation, be enjoined from issuing new stock without giving complainants, who are stockholders, a preferential right to buy it, complainants have common interest and are properly joined in one bill. Snelling v. Richard, 166 F 635.

41. Distinction recognized in equity between necessary and indispensable parties for purpose of ascertaining whether same deemed necessary may not, under established rules of equity pleading and practice, be dispensed with as parties in order that equitable relief may not wholly fail. Mathieson v. Craven, 164 F 471.

42. Mathieson v. Craven, 164 F 471. To suit by long distance telephone company to enjoin other long distance companies from doing business with local companies with which complainant had exclusive contracts, local companies were **indispensable** parties, validity of contracts between them and complainant being necessarily involved. United States Tel. Co. v. Central Union Tel. Co., 171 F 130. In suit by bondholders to compel directors of corporation to make good false representations concerning ownership of property recited in mortgage, corporation was **not indispensable** party. Slater Trust Co. v. Randolph-Macon Coal Co., 166 F 171. In suit against harbor and land commissioners, under Rev. Laws 1902, c. 96, § 7, to cause them to enforce stipulations in deed from commonwealth, by removing structure built on certain land, the owner of the structure is a **necessary** party. Lawrence v. Smith, 201 Mass. 214, 87 NE 623. Where A. alleges that he ordered C. to buy certain stocks, that C. transmitted order to defendant, and that defendant bought and kept stocks, though he was paid therefor, and that C. was paid, and had no right to stock, C. is **necessary** party in suit by A. to recover stock. Jenney v. Hayden, 171 F 898. Parties who have parted with all interest in patent are **not necessary** to suit for infringement of patent. Kaiser v. General Phonograph Supply Co., 171 F 432.

43. Bentley v. Barnes [Ala.] 50 S 361.

44. Persons whose interests are concurrent with those of complainants should be joined

persons, appropriate allegations must be made.[45] If a defendant against whom substantial relief is sought is personally served court ought to proceed to decree though he is a nonresident.[46] A demurrer to a bill cannot be sustained on the ground that one against whom process is prayed as a codefendant and whose presence is essential to the relief prayed has not been served and has not appeared, since he may be served or may voluntarily appear.[47]

Bringing in new parties. See 11 C. L. 1251—The court may direct that all parties interested or claiming any interest in the subject-matter of the litigation be brought in, and may require them to interplead.[48] One who has acquired an interest subsequent to the filing of the bill may be brought in by supplemental or amended bill.[49]

Intervention. See 11 C. L. 1252—One having an interest in the subject-matter, may be allowed to intervene.[50] An intervener takes the pleadings as made by the parties as he finds them when made a party; and, where there is a waiver of process by appearance and pleading, the intervener cannot urge want of process.[51] Third persons cannot be allowed to intervene after final decree, especially where their intersts or claims have accrued or originated subsequently.[52]

§ 6. *Pleading. A. General rules.*[53]—See 11 C. L. 1252

(§ 6) *B. Original bill, petition or complaint.*[54]—See 11 C. L. 1252—Every fact material to the right to relief must be alleged [55] with fullness, particularity and clearness,[56] though circumstances which are properly matters of evidence need not

as complainants unless they refuse to be so joined, in which case they should be made defendants, and the reason therefor alleged. Improper to make them defendants without such allegation. Knikel v. Spitz [N. J. Eq.] 70 A 992.

45. Complainant must allege, under Laws 1905, c. 5393, that he believes that there are persons interested in property, other than known defendants, whose names are unknown to him. Cobb v. Hawsey, 56 Fla. 159, 47 S 484.

46. Roland v. Roland, 131 Ga. 579, 62 SE 1042.

47. Mathieson v. Craven, 164 F 471.

48. Hough v. Porter, 51 Or. 318, 98 P 1083.

49. Kaiser v. General Phonograph Supply Co., 171 F 432.

50. In suit by administrator for recovery of fund belonging to estate of decedent, it is proper to allow creditor, seeking to charge fund with payment of debt of decedent, to intervene by petition. Dudley v. Niswander, 65 W. Va. 461, 64 SE 745.

51. Booth v. State, 131 Ga. 750, 63 SE 502.

52. Smith v. Elliott, 56 Fla. 849, 47 S 387.

53. See Pleading.

Search Note: See Equity, Cent. Dig. §§ 307, 308, 390, 391, 446-449, 478; Dec. Dig. §§ 128, 154, 195, 207; 16 Cyc. 216, 217, 258, 259, 320, 324-327.

54. Search Note: See Equity, Cent. Dig. §§ 307-389, 614, 615, 621-626; Dec. Dig. §§ 128-153, 313, 319; 16 Cyc. 216-258, 318-366; 3 A. & E. Enc. P. & P. 335, 556, 569, 599; 10 Id. 856; 14 Id. 194.

55. Hageman v. Brown [N. J. Eq.] 73 A 862. A complaint seeking relief in equity must allege in distinct terms the facts necessary for such relief. Campbell v. Timmerman, 139 Ill. App. 151. The bill must state clearly plaintiff's right to the relief prayed. Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 A 442. Bill alleging accomplishment of joint venture, and making of profit, which is in hands of one party, and asking receiver, injunction and accounting, is demurrable, insolvency or any fact showing there is no legal remedy not being alleged; bill will be regarded as pretext to collect legal claim in equity court. Annon v. Brown, 65 W. Va. 34, 63 SE 691. Relief cannot be granted when complainant's own showing in the bill shows a want of equity in his prayer. Murrell v. Peterson [Fla.] 49 S 31. Where bill is filed asking, against two defendants, an accounting, damages, partition of lands, and general relief, the bill is demurrable if it shows that complainant has parted with all his interest in the property out of which controversy arose. Id.

56. Hageman v. Brown [N. J. Eq.] 73 A 862. Relief cannot be granted for facts not charged with reasonable distinctness though they may be suggested in the bill. Electric Goods Mfg. Co. v. Kaltonski, 171 F 550. Bill for specific performance held sufficiently definite and certain as against demurrer. Wilkins v. Hardaway [Ala.] 48 S 678. Rule that bill must contain clear statement of facts upon which plaintiff relies for relief is applied with much rigor in case of bill for injunction. Stinson v. Ellicott City & Clarksville Co., 109 Md. 111, 71 A 527. One who seeks relief on ground of fraud must state **facts constituting fraud.** Hageman v. Brown [N. J. Eq.] 73 A 862. Allegation in bill to set aside decree of naturalization that it was "fraudulently and illegally procured" was **mere conclusion,** of no avail unless facts alleged sustained it. United States v. Rose, 166 F 999. Where the aid of equity is invoked upon the ground of **mistake,** it is not sufficient for the pleader simply to allege that the instrument sought to be corrected was drafted in a certain particular by mistake, but the particular circumstances which gave rise to and occasioned such mistake should be alleged. Benting v. Bell, 137 Ill. App. 600. Allegation in general terms that

be alleged.[57] In determining whether a bill states a cause of action, the legal effect of its allegations must be considered,[58] but it is a fair presumption that a plaintiff, who files a bill, states his case as favorably for himself as the facts will warrant.[59] Exhibits attached to or referred to in bill ordinarily control over allegations in the bill.[60] An allegation cannot be said to be impertinent if, when proved, it can exercise any proper influence on the decision of the cause.[61] If the case stated in the bill is one within the equitable jurisdiction of the court either by general principles of equity or by statute,[62] or if the facts alleged show that complainant is entitled to the equitable relief prayed for, he need not allege that he has no adequate remedy at law.[63] One party need not seek out and plead the equities of his adversary.[64] It is only when the adversary's equities are so blended and intertwined with his own as to make them inseparable that the pleader need offer to do equity as a condition precedent to relief.[65] A general offer to do equity is usually sufficient.[66] Whether a bill is an original bill or purely ancillary is determined by the bill itself and not the name given it by the pleader.[67] Affidavits in support of a motion, and statements in argument of counsel, cannot supply deficiencies in a bill.[68]

Multifariousness.[See 11 C. L. 1254]—Multifariousness may consist in uniting in the same bill distinct and disconnected subjects, matters or causes,[69] or in joining in the same suit, either as complainants or defendants, parties who are without a common interest in the subject of the litigation and have no connection with each other.[70] But the rule as to multifariousness is largely one of convenience,[71] and no positive or

by reason of mistake on part of scrivener who drew appellant's appeal bond a large portion of appellant's land was omitted from said appeal bond is mere conclusion and demurrable. Id. Bill held to allege no facts showing diligence in preventing mistake in appeal bond. Id. Bill alleging that stock bought up by defendant was purchased with money furnished by complainant and defendant, and praying that defendant account for proceeds of sale of such stock by him, held to state grounds for equitable relief. Laughlin v. Brauer, 138 Ill. App. 534.

57. General charge or statement of facts is usually sufficient. Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 A 442.

58. United States v. Conklin, 169 F 177.

59. Reynolds v. Craft, 38 Pa. Super. Ct. 46.

60. Exhibits attached to bill control bill so far as legal effect is concerned. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945. Where written contract referred to in bill contained waiver of lien, it controlled over allegations of cause of action on quantum meruit. Shackleton v. Baggaley [C. C. A.] 170 F 57.

61. South & N. A. R. Co. v. Alabama Railroad Com., 171 F 225. In suit involving constitutionality of statute fixing freight rates, where large number of questions of law and fact are involved, greater latitude is allowed in pleading, and no allegation will be held impertinent which may have bearing on question. Id. Allegations of motive and personal activity of governor in having statute enacted are impertinent in suit to test constitutionality of statute, but allegations that statute is being enforced so as to discriminate between different railroads are proper. Id. Where in suit to test constitutionality of freight rate statute an injunction was sought restraining officials from prosecuting criminal proceedings pending decision of case, an allegation of threats by governor to take such steps was proper. Id.

62. As suit for restitution of notes, stocks and bonds, sustainable under general principles and under statute. Farnsworth v. Whiting, 104 Me. 488, 72 A 314.

63. Sullivan v. Bitter [Tex. Civ. App.] 113 SW 193; Hanson v. Neal, 215 Mo. 256, 114 SW 1073.

64. Nueces Val. Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

65. Nueces Val. Irr. Co. v. Davis [Tex. Civ. App.] 116 SW 633.

66. Where bill to set aside contract and deed contained general offer to do equity, its failure to offer to put defendant in statu quo was not ground for demurrer to introduction of evidence. Haydon v. St. Louis & S. F. R. Co. [Mo.] 121 SW 15.

67. Kent v. Hansinger, 167 F 619.

68. Jackson v. Hooper, 171 F 597.

69. Murrell v. Peterson [Fla.] 49 S 31; Baker v. Berry Hill Mineral Springs Co. [Va.] 65 SE 656. The fact that a bill embodies claims that may be enforced in separate suits is not in and of itself sufficient to uphold the defense of multifariousness, but it is sufficient where it also appears that they are so separate and distinct that they cannot be united in one general object. Bill seeking to establish equitable interests in property of corporation defendant, and also seeking damages against another defendant for breach of contract to which corporation is not a party, is multifarious. Groom v. Wittmann, 164 F 523.

70. Murrell v. Peterson [Fla.] 49 S 31. As when bill impleads several defendants touching matters of distinct and independent nature. Baker v. Berry Hill Mineral Springs Co. [Va.] 65 SE 656.

71. Murrell v. Peterson [Fla.] 49 S 31. This is especially true in those cases of mul-

inflexible definition or rule can be laid down.[72] Each case must be considered with reference to its own peculiar facts and circumstances.[73] Misjoinder of parties plaintiff is not, strictly speaking, multifariousness.[74]

tifariousness more properly called misjoinder. Knikel v. Spitz [N. J. Eq.] 70 A 992. Rule against multifariousness is merely one of convenience; if court can make a decree on a bill which joins what might otherwise be independent causes of action, it will not consider the bill multifarious, but if decree cannot be made, court may raise objection of its own motion. Collins v. Leary [N. J. Err. & App.] 71 A 603.

72. Murrell v. Peterson [Fla.] 49 S 31.

73. **Bill held not multifarious: Bill for partition and to remove cloud from title.** Fies v. Rosser [Ala.] 50 S 287. Bill **to construe deed of trust and quiet title** not multifarious when each relief was part of other. Berger v. Butler [Ala.] 48 S 685. Bill by purchaser of land praying for **relief for deficiency in acreage and also for defect in title.** Pack v. Whitaker [Va.] 65 SE 496. Where land attempted to be conveyed by wife to husband is reconveyed by him and by his grantees, and wife's heirs claim land, they can assert their equitable title in one **suit against several persons asserting legal title** to portions of the land. Depue v. Miller, 65 W. Va. 120, 64 SE 740. Where contractor transferred notes and mortgage and all claims against owner to plaintiff, bill seeking to establish and **enforce mechanic's lien and also equitable lien.** Keily v. Smith [Ala.] 50 S 145. Bill to **cancel deed** on ground of fraud not multifarious because joining as defendants subsequent grantees of parts of land, with allegations that they bought with notice of the fraud; all rights may be determined in one action. United States v. Rea-Read Mill & Elevator Co., 171 F 501. Bill for **cancellation of deed** on ground of grantor's mental incompetency not multifarious because alleging by way of inducement, aggravation or argument, other foreign and immaterial matter, no relief being asked on these grounds. Towner v. Towner, 65 W. Va. 476, 64 SE 732. A bill seeking **cancellation of deeds** for fraud is not multifarious because it also asks cancellation of a will for fraud, though the latter relief cannot be granted in equity. Knikel v. Spitz [N. J. Eq.] 70 A 992. Where defendants who took deeds at trustee's sale had understanding between them, they were properly joined as defendants in one suit **to set aside deeds,** causes depending on same evidence. Hanson v. Neal, 215 Mo. 256, 114 SW 1073. **Creditor's bill** to set aside transfers is not multifarious because it joins two or more defendants alleged to be fraudulent grantees in different transactions. Exchange Nat. Bank v. Stewart [Ala.] 48 S 487. **Bill by judgment creditor to subject prop** alleged to have fraudulently conveyed, to ment, not multifarious though portions of property were held by different persons. Hultberg v. Anderson, 170 F 657. Bill against corporation and two promoters **to compel transfer of shares** of stock as compensation for services not multifarious. Ryan v. Martin, 165 F 765. Bill not multifarious though it sought **specific performance** and also **accounting,** where it was based on one contract, and decree could be made against different sets of defendants joined therein. Collins v. Leary [N. J. Err. & App.] 71 A 603. Bill seeking **accounting** to ascertain amount of premiums due on casualty policies not multifarious though several policies were involved, relief being similar in all cases, and examination of same books and accounts being involved. London Guar. & Acc. Co. v. Bell Tel. Co., 171 F 278. Bill by principal against agent for an **accounting** of divers sums of money sent the agent for investment for principal, and misapplied by agent, is not multifarious, because several remittances may have been separate and independent transactions. Brock v. Wildey [Ga.] 63 SE 794. A bill for a **discovery, account and payment,** into court of a single debt and for cancellation of an assignment, and injunction against assignee, is not multifarious. Whitman v. United Surety Co., 110 Md. 421, 72 A 1042. Allegation in **bill to enjoin infringement of several patents** that they are capable of conjoint use and have been so used by defendant sufficient on demurrer, though it was not alleged that they were used in same structure. Foundation Co. v. O'Rourke Engineering Const. Co., 171 F 425. Merely setting out several patents alleged to have been infringed does not make bill for injunction multifarious, where all are set out as one cause of action, and one defense is applicable to all. Id. Bill not multifarious which alleges infringement of two patents when it also alleges that they are capable of conjoint use and are so used. Southern Plow Co. v .Atlanta-Agricultural Works, 165 F 214. Bill to **enjoin defendant from using secret formula** fraudulently obtained, and from so dressing and naming product as to constitute unfair competition, not necessarily multifarious, where acts are alleged to be parts of same enterprise. Sipe & Co. v. Columbia Refining Co., 171 F 295. Bill not multifarious which **asked relief against several, on grounds of fraud** in which all were implicated. Baker v. Berry Hill Mineral Springs Co. [Va.] 65 SE 656. Petition which charges defendants with having combined and conspired together to commit some wrong, especially a fraud, on plaintiff. Greer v. Andrew [Ga.] 65 SE 416. Bill against several persons involved matters of similar nature forming connected series of acts intended to defraud and injure plaintiff; held bill not multifarious, all defendants being connected therewith, though not jointly interested in each act. Field v. Western Life Indemnity Co., 166 F 607.

Bill held multifarious: Bill which seeks to have **set aside different conveyances** by different judgment debtors of separate pieces of property. Hobbs Mfg. Co. v. Gooding, 166 F 933. Bill by United States to **cancel deeds** by Indians to several different grantees for fraud multifarious, being in effect several suits. United States v. Allen, 171 F 907. Claims against **different defendants,** in no way connected, made bill multifarious. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266. Where bill asked **ac-**

Prayer.[See 11 C. L. 1255]—Under equity rules of pleading it is proper to frame a bill with a double aspect so that if the court cannot grant relief on one view of the case it may do so on the other.[75] In such case it is necessary to state separately and distinctly each different aspect of the bill.[76] The equity of a bill is to be determined on the facts stated in the bill and not on the prayer for relief alone.[77] A defective prayer need not make the bill demurrable,[78] nor will a general prayer save a bill when its allegations are insufficient to warrant the specific relief prayed for.[78] A prayer for general equitable relief is as broad as the powers of the court,[80] but the relief grantable is limited by the terms of the prayer.[81] A bill which omits prayer for process is demurrable.[82] An amendment of the prayer so as to ask for the relief properly demanded by the facts alleged is not repugnant nor is it a departure.[83]

(§ 6) *C. Amended or supplemental bills, complaints or petitions.*[84]—[See 11 C. L. 1255]—When the bill is sworn to the right to amend does not exist as a matter of course[85] but rests in the discretion of the court, amendments being usually freely allowed in the interest of justice.[86] Amendments may be allowed to correct errors,[87]

counting among members of firm operating mine, and also set out that certain purchasers alleged fraud in the sale of an interest to them, and asked to have question of **fraud** adjudicated, it was multifarious; fraud having occurred prior to formation of partnership could not be adjudicated in suit for account. Howard v. Luce, 171 F 584. Bill for **infringement of two patents** bad which alleged they were capable of conjoint use, but did not allege that defendant had so used them. Electric Goods Mfg. Co. v. Benjamin Elec. Mfg. Co., 169 F 832. Where interests of complainants in **several patents** were not set out with such clearness that defendant could make answer to their claims, or that right to join in bill appeared, bill was multifarious. Foundation Co. v. O'Rourke Engineering Const. Co., 171 F 425. Bill to compel one company, as trustee, to **account,** and to have it determined that another company is not legally organized and to have its **affairs wound up,** and to require first to **comply with statute** requiring filing of reports, is multifarious. Patterson v. Northern Trust Co., 238 Ill. 601, 87 NE 843. Bill multifarious where religious society asked for **accounting** against individual defendant, and that certain **officers be restrained** from interfering with property and money of society, and individual complainants asked that certain form of **religious ceremony be established** and confirmed. Saltman v. Nesson, 201 Mass. 534, 88 NE 3. Bill to **restrain amendment of charter** of corporation to provide an increase of capital to be used for an alleged illegal transaction, and also to obtain an **adjudication of insolvency for appointment of receiver, for injunction** against exercise of any of its franchises, and continuance of its business, states inconsistent causes of action and is multifarious. Rodman v. Manganese Steel Safe Co. [N. J. Err. & App.] 72 A 963.

74. Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 SW 119.

75. Bill may ask for reformation or cancellation. Electric Goods Mfg. Co. v. Koltonski, 171 F 550. Prayer of bill may properly be framed in alternative when circumstances demand it. Baker v. Berry Hill Mineral Springs Co. [Va.] 65 SE 656. A bill may be framed with a double aspect but the alternative case stated therein must be the foundation for precisely the same relief. Shackleton v. Baggaley [C. C. A.] 170 F 57.

76. Electric Goods Mfg. Co. v. Koltonski, 171 F 550.

77. Bromberg v. Eugenotto Const. Co. [Ala.] 48 S 60.

78. Bill not demurrable merely because prayer for relief is vague, uncertain, repetitious and prolix. McPherson v. Davis [Miss.] 48 S 625.

79. Where bill for injunction also asked for general relief, but was so defective that injunction could not be granted, and no other relief was proper, a demurrer was properly sustained. Stinson v. Ellcott City & Clarksville Co., 109 Md. 111, 71 A 527.

80. Converse v. Deep River, 139 Iowa, 732, 117 NW 1078.

81. See post, § 13.

82. Armstrong Cork Co. v. Merchants' Refrigerator Co., 171 F 778.

83. Sharpe v. Miller [Ala.] 47 S 701.

84. Search Note: See note in 1 Ann. Cas. 976.

See, also, Equity, Cent. Dig. §§ 541-611, 615, 619; Dec. Dig. §§ 265-309, 318; 16 Cyc. 335-375.

85. Robinson v. McKenney, 239 Ill. 343, 88 NE 264.

86. Amendment properly allowed which set out facts admittedly true. Robinson v. McKenney, 239 Ill. 343, 88 NE 264.

87. Where mistake was made in pleadings in alleging date of mortgage, and answer did not specifically call attention thereto, proper to allow amendment to bill to correct error rather than exclude mortgage from evidence. Spencer v. Dell, 55 Fla. 790, 46 S 729. Within discretion of court to allow amendment of bill to correct clerical error in name of complainant corporation where no plea in abatement had been filed, and answer went to merits and no prejudice would result. Mellwood Distilling Co. v. Harper, 167 F 389. If the identity of the originally intended cause of suit is preserved, the particular allegations of a bill in equity may be changed by amendment in order to cure imperfections and mistakes in the manner of stating plaintiff's case. Hall v. McGregor, 65 W. Va. 74, 64 SE 736.

to cure defects,[88] to make the bill more specific,[89] or to bring in other parties,[90] and amendments may be required to make the allegations conform to the proof.[91] An amendment which constitutes a new or different cause of action will not be allowed.[92] Whether an amendment should have a foot note [93] or be accompanied by an affidavit [94] depends upon the local rules of practice.

Supplemental bill.[See 11 C. L. 1256]—The chief object of a supplemental bill is to set up facts or transactions affecting the rights or interests involved which have arisen since the filing of the original bill.[95] Such bills are usually permitted to be filed [96] in order that complete justice may be done,[97] but the matter is one resting largely in discretion.[98] Where the original bill shows that complainants are not entitled to relief, a supplemental or amended bill setting up facts subsequently occurring

88. When a demurrer is sustained on the ground of **multifariousness,** complainant may amend, selecting such purpose of the bill as he sees fit, and such amendment is not objectionable as a departure. Bentley v. Barnes [Ala.] 50 S 361. Where the defense of **laches** is raised by the pleadings, plaintiff may be allowed to amend if he can by alleging an excuse for the delay. Stewart v. Joyce, 201 Mass. 301, 87 NE 613.

89. An amendment asking for particular relief, but adding nothing new to the bill, but constituting rather an aid to the court, may be allowed at any time without costs. Converse v. Deep River, 139 Iowa, 732, 117 NW 1078.

90. Amendment may be allowed on hearing so as to make complainants sue on behalf of themselves and the rest of the class interested with them, and attorney general may now be charged as defendant and brought in by process. Larkin v. Wikoff [N. J. Eq.] 72 A 98. Where complainant appeared to be entitled to some relief against a party, bill was not dismissed, though other parties were not properly served; leave given defendant to demur and complainants to amend. Jackson v. Hooper, 171 F 597.

91. Where complainant is entitled to relief on the facts shown by the evidence, but the pleadings are glaringly defective, amendment thereof will be first required. Krah v. Wassmer [N. J. Eq.] 71 A 404. Though a case is argued on the assumption that a bill of complaint has been amended, the amendment must be actually made before a decree is advised. Farmer v. Ward [N. J. Eq.] 71 A 401.

92. Proper to refuse to allow amendment which would constitute new and wholly different cause of action. Lyon v. McKeefrey [C. C. A.] 171 F 384. Bill seeking enforcement of parol trust in lands and personalty cannot be amended so as to state cause for cancellation of conveyance. O'Briant v. O'Briant [Ala.] 49 S 317. Statutory bill to quiet title; **amendment properly allowed** looking to relief from alleged void mortgage under which defendant claimed property. State Land Co. v. Mitchell [Ala.] 50 S 117. Where original bill was to enjoin sale of property by corporation until taxes were paid, an amended bill seeking as additional relief personal decree based on judgment which had been rendered, meantime finding taxes legal, did not present wholly new case from that presented by original bill. Delta & Pine Land Co. v. Adams [Miss.] 48 S 190. Amended bill does not change purpose of original bill, when facts alleged show cause of action for same general relief, though pleader sets up different conclusions and makes different specific prayers for relief. Belzoni Oil Co. v. Yazoo & M. V. R. Co. [Miss.] 47 S 468.

93. Where the foot note to the original bill required defendants to answer all the allegations of the bill, amendments setting up same matters more in detail, but covering only matters already more generally set out, were not objectionable as having no foot note. Enslen v. Allen [Ala.] 49 S 430.

94. A bill for an injunction may be amended in matters of mere form without an affidavit to the amendment. Amendment adding words "and therefore alleges" after the words "is informed and believes" allowable without affidavit. Farnsworth v. Whiting, 104 Me. 488, 72 A 314.

95. Bibb v. American Coal & Iron Co. [Va.] 64 SE 32.

96. In suit to enforce payment of price of coal land and gas well, where defendant claimed damages for plaintiff's defective title to well, the abandonment and exhaustion of the well, which occurred pending the litigation, could be set up by supplemental bill. Bibb v. American Coal & Iron Co. [Va.] 64 SE 32. Original bill, in nature of supplemental bill, to bring in new facts, may be allowed to stand, where it is stipulated that proof previously taken may be considered, defendant not being prejudiced thereby. Vigneron v. Auto Time Saver Repair Kit Co., 171 F 580.

97. The right of the parties to a chancery suit are determined by the facts existing at the commencement of the suit, unless something has occurred subsequent thereto, affecting the matter which the court may consider if set up by supplemental bill, but not otherwise. Bannon v. Jackson [Tenn.] 117 SW 504.

98. Amendment or supplement to a bill in equity fitting the developments of the case, if the identity of the cause of suit is preserved, may in the sound discretion of the court as to propriety and time thereof be allowed. Dudley v. Niswander, 65 W. Va. 461, 64 SE 745. In suit for accounting for infringement of patent, whether leave shall be granted to file supplemental bill to charge individual members of defendant company personally is discretionary with trial court; refusal not error, there being remedy in nature of independent creditor's suit. Brookfield v. Novelty Glass Mfg. Co. [C. C. A.] 170 F 960.

will not generally cure the defect.[99] Under strict practice a supplemental bill to add to the terms of a decree cannot be filed without notice, at least to parties adversely interested.[1]

(§ 6) *D. Cross bill or petition.*[2]—See 11 C. L. 1256—The purpose of the cross bill is usually to set up some matter that is not disclosed by the original bill which is effective to give the defendant in the original suit or complainant in the cross bill some further or additional relief.[3] As a general rule a defendant can obtain affirmative relief only by filing a cross bill,[4] though relief merely incidental to that prayed for in the bill may be granted a defendant without the filing of a cross bill.[5] The filing of a cross bill in proper time is a matter of right and requires no leave of court,[6] but after all the issues raised by a cross bill have been heard and a decree ordered, a defendant has no right to file a cross bill and obtain a rehearing.[7] The cross bill is auxiliary to the original suit and dependent upon it, and is always brought in the court in which the original suit, of which it becomes a part, is pending.[8] Its subject-matter must be germane to that of the original bill.[9] When properly brought it invests the court with jurisdiction commensurate with its averments.[10] A cross bill disclaiming any interest in the property which is the subject of controversy, and seeking to inject a wholly new cause of action into the suit, is improper.[11] It must be preferred by a defendant to the original bill against the plaintiff in the same suit, or against other defendants, or against both.[12] It is not proper to allow one not a party to the original suit to be brought in by cross bill.[13] It should state the parties to the original bill, the object, prayer and proceeding thereon, as also the facts and the rights of the party exhibiting it, and which are necessary to be made the subject of the cross litigation, or the ground upon which he resists the claim of the plaintiff, and it should pray for hearing at the same time

99. Harper v. Raisin Fertilizer Co. [Ala.] 48 S 589.

1. Atwood v. Carmer [N. J. Eq.] 73 A 114.

2. Search Note: See notes in 5 C. L. 1166; 7 Id. 1360; 12 L. R. A. (N. S.) 64.

See, also, Equity, Cent. Dig. §§ 446-477; Dec. Dig. §§ 195-206; 16 Cyc. 324-335; 5 A. & E. Enc. P. & P. 624.

3. United State v. Reese, 166 F 347.

4. Mitchell v. International Tailoring Co., 169 F 145; Monoghan v. Collins [N. J. Eq.] 71 A 617.

5. Where sale of stock was set aside, selling stockholders could be protected in their rights without a cross bill. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521.

6, 7. Nix v. Thackaberry, 240 Ill. 352, 88 NE 811.

8. United States v. Reese, 166 F 347.

9. In suit for specific performance of contract to transfer, defendant may by cross bill seek to have title quieted, both remedies being equitable and relating to same subject-matter. Gish v. Ferrea [Cal. App.] 101 P 27. Plaintiff brought suit to remove trust deed as cloud on title and to cancel note. Defendant, who claimed to be innocent holder, brought action on note and was enjoined by order in plaintiff's suit. Held, plaintiff could not object to cross bill asking for money judgment in plaintiff's suit; such cross bill was germane to bill. Zollman v. Jackson Trust & Sav. Bank, 238 Ill. 290, 87 NE 297. In suit in equity to recover money lost in gaming transaction, defendant may by cross bill recover money similarly lost by him to plaintiff. Berns v. Shaw, 65 W. Va. 667, 64 SE 930. In a suit by a street railway company to restrain a city from moving the company's poles and wires from a street, equity has no jurisdiction to declare a forfeiture of the company's franchise on a cross bill alleging abandonment and nonuser. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552. The general rule is that a cross bill is filed with the answer to enable the defendant to obtain affirmative relief arising out of the subject-matter of the original bill, is heard with it, and must be for causes of action which would sustain an original bill; defendant will not be allowed to raise defense of laches by cross bill and have it heard before original bill is heard. Under-Feed Stoker Co. v. American Stoker Co., 169 F 891.

10. In action by subcontractors to establish lien on fund in hands of city, cross complaint by holder of vouchers issued to principal contractors asking for determination of bank's right to surplus after satisfaction of subcontractors gives court jurisdiction to determine bank's rights and validity of bank's vouchers as claim on fund in hands of city. First Nat. Bank v. Elgin, 136 Ill. App. 453.

11. Defendants cannot disclaim interest in realty, conveyances of which are sought to be cancelled, and at same time seek to have title confirmed in another defendant. Hellman v. Somerville, 212 Mo. 415, 111 SW 30.

12. United States v. Reese, 166 F 347.

13. Central Trust Co. v. Cincinnati, H. & D. R. Co., 169 F 466.

as upon the original bill in order that the entire controversy may then be settled.[14] Unless a cross bill states facts entitling the cross complaint to relief, it cannot be aided by the prayer asking for such relief.[15] Sworn allegations of a cross bill, not controverted by answer, are to be taken as prima facie true.[16] In some states the cross bill need not be a separate and distinct pleading but may be a part of the answer.[17] The dismissal of a cross bill on the ground that it was unnecessary is not an adjudication that the complainant in the cross bill has no rights in the subject-matter of the litigation.[18] Interveners, asking affirmative relief, must procure a standing in court by a cross bill framed and filed in practical accord with the rules of equity pleading.[19]

(§ 6) *E. Demurrer.*[20] *Grounds.*See 11 C. L. 1258—A demurrer lies for defects and objections appearing on the fact of the pleading, such as a want of equity,[21] laches,[22] limitations,[23] multifariousness,[24] or defect of parties.[25] A defect remediable by bill of particulars is not ground of demurrer.[26]

*Forms.*See 11 C. L. 1258—A demurrer specifying grounds thereof is bad unless it points out specific defects in the information demurred to.[27] A demurrer on the ground of want of equity is too general and indefinite to raise the objection that there is an adequate legal remedy, when the court of equity has undoubted jurisdiction to grant some of the relief asked.[28] Where the attorney general files an information in a chancery court asking relief against a corporation, under a statute giving the court jurisdiction and warranting the relief asked in proper cases, defendants may demur generally alleging that informant has not made or stated such a case as entitles him to relief.[29] A demurrer which goes to the whole of the information and raises the question of want of power in the court to grant relief will not be stricken on motion unless it is frivolous, nor will it be stricken when the argument is confined alone to the question of form, if the form be good.[30] A demurrer to a bill, in so far as it attempts to raise collateral questions of fact, is not good plead-

14, 15. United States v. Reese, 166 F 347.

16. Citizens' State Bank v. First Nat. Bank [Tex. Civ. App.] 120 SW 1141.

17. Under Code 1906, § 587, that defendant may make his answer a cross bill, the cross bill need not be a separate and distinct pleading, and allegations of the answer need not be repeated in the cross bill. Phoenix Ins. Co. v. Smith [Miss.] 48 S 1020.

18. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521.

19. United States v. Reese, 166 F 347.

20. Search Note: See Equity, Cent. Dig. §§ 487-520; Dec. Dig. §§ 214-248; 16 Cyc. 259, 261-285, 315; 6 A. & E. Enc. P. & P. 391.

21. When a bill is insufficient on its face to support equitable jurisdiction or relief, it should be demurred to. Redrow v. Sparks [N. J. Eq.] 72 A 442. Defendant may, however, answer, but if on final hearing the bill is found insufficient, costs may be denied defendant by reason of his failure to demur. Since he might have prevented necessity for hearing. Id. Objection that there is **adequate remedy at law** may be taken by demurrer. Law v. Ware, 238 Ill. 360, 87 NE 308.

22. Laches appearing on face of bill may be taken advantage of by demurrer, special or general. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266. Statute of limitations or laches may be raised by demurrer where defense appears on face of bill. Van Ingen v. Duffin [Ala.] 48 S 507. Where it plainly appears from allegations of bill that complainant has been guilty of laches, and no excuse is alleged, bill is demurrable. Murrell v. Peterson [Fla.] 49 S 31. Defense of laches may be raised by demurrer if bill on its face shows demand is stale and no sufficient excuse for the delay is pleaded. Stewart v. Joyce, 201 Mass. 301, 87 NE 613.

23. The bar of the statute of limitations may be raised by demurrer when the facts are disclosed on the face of the bill. Wilder's Ex'x v. Wilder [Vt.] 72 A 203.

24. Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 SW 119. When multifariousness plainly appears in bill, it is ground for demurrer. Murrell v. Peterson [Fla.] 49 S 31. That bill joins separate and inconsistent causes of action, and is therfore multifarious, may be raised by demurrer. Saltman v. Nesson, 201 Mass. 534, 88 NE 3.

25. A demurrer, and not a motion to dismiss, is the proper way to reach a defeat of parties appearing on the face of the bill. Wood v. Wood, 56 Fla. 882, 47 S 560.

26. Foundation Co. v. O'Rourke Engineering Const. Co., 171 F 425.

27. McCarter v. United New Jersey R. & Canal Co. [N. J. Eq.] 71 A 291.

28. Knikel v. Spitz [N. J. Eq.] 70 A 992.

29, 30. McCarter v. United New Jersey R. & Canal Co. [N. J. Eq.] 71 A 291.

ing;[31] but it is held that a demurrer may protest the truth of the facts pleaded, though it qualifiedly admits the truth of such fact for the purpose of denying their legal sufficiency.[32] Defendant will not be allowed to set up in a second demurrer matters which he could have pleaded in the first.[33]

*Effect of, and procedure on, demurrer.*See 11 C. L. 1258—A demurrer admits all facts well pleaded,[34] but does not admit argumentative conclusions or inferences from facts,[35] but the admission of the truth of facts pleaded is only for the purpose of denying their legal sufficiency as the basis of relief.[36] In passing upon a demurrer to a bill, every presumption is against the bill.[37] Where there are contradictory or inconsistent allegations in a bill, its equity will be tested by the weaker rather than by the stronger allegations of the bill.[38] A demurrer to a bill as a whole is properly overruled if the bill is good in part.[39] A demurrer directed to the entire bill but pointing out objections only to certain parts, in some of which there is equity, is properly overruled.[40] Questions going to the merits of the case need not be considered on demurrer,[41] especially where they may properly be raised by answer,[42] nor will the question of the relief to be finally granted be considered.[43] All matters which go to the jurisdiction of the court may be taken advantage of by demurrer, whether specially pointed out by the demurrer or not, and the objection may be called to the court's attention on the argument.[44]

(§ 6) *F. Plea.*[45]—See 11 C. L. 1258—Facts constituting a legal defense to an action of ejectment cannot be set up as an equitable plea.[46] A plea setting up only

31. Steele v. Culver [Mich.] 16 Det. Leg. N. 400, 122 NW 95.

32. Demurrer containing such protestation of the truth of the facts, while thus qualifiedly admitting them, is not bad as a denial of the facts pleaded, but is good in form. McCarter v. United New Jersey R. & Canal Co. [N. J. Eq.] 71 A 291.

33. But may plead such matters in answer to be filed within fixed time, 20 days. Victor Talking Mach. Co. v. Hoschke, 169 F 894.

34. Kaufmann v. Kaufmann, 222 Pa. 58, 70 A 956; London Guar. & Acc. Co. v. Bell Tel. Co., 171 F 278; Camden Safe Deposit & Trust Co. v. Dialogue [N. J. Err. & App.] 72 A 358; Myers v. Martinez [Miss.] 48 S 291; Ryan v. Knights of Columbus [Conn.] 72 A 574. Upon demurrer to a whole bill, every presumption is against the bill, but such demurrer admits the truth of all facts well pleaded, and it should be overruled if the bill makes any case for equitable relief. Holt v. Hillman-Sutherland Co., 56 Fla. 801, 47 S 934. Where bill to enjoin trespass alleged title and right to possession, demurrer thereto admitted title and equity would not require resort to action at law to establish it. Cragg v. Levinson, 238 Ill. 69, 87 NE 121.

35. Allegation that parties had seized deceased partner's interest in business and property arbitrarily and unjustly not admitted, being conclusion. Kaufmann v. Kaufmann, 222 Pa. 58, 70 A 956. Allegation in bill that money contributed was to be capital in partnership not admitted by demurrer when papers annexed showed money was merely deposited. Id. Demurrer admits allegations of facts but not mere conclusions of law or fact. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945. Demurrer admits only facts well pleaded, not opinions or conclusions of law. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. —. Reasoning or deductions of bill cannot be adopted by court as against demurrer; court must look to facts alleged. Continental Securities Co. v. Interborough Rapid Transit Co., 165 F 945.

36. A demurrer admits the truth of facts in a bill or information only for the purpose of denying that the law arising upon those facts entitles the complainant or informant to relief. McCarter v. United New Jersey R. & Canal Co. [N. J. Eq.] 71 A 291.

37, 38. Murrell v. Peterson [Fla.] 49 S 31.

39. Dudley v. Niswander, 65 W. Va. 461, 64 SE 745.

40. Leahart v. Deedmeyer [Ala.] 48 S 371.

41. Whether or not premium due on certain policies was ascertainable in accounting asked for to recover premiums due on casualty policies related to merits and was not considered on demurrer. London Guar. & Acc. Co. v. Bell Tel. Co., 171 F 278. **Defense of laches** need not necessarily be considered on demurrer. Id.

42. Laches not considered on demurrer where bill alleged that defendant had refused examination of books and accounts; matter more properly raised by answer. London Guar. & Acc. Co. v. Bell Tel. Co., 171 F 278.

43. Question of what relief, if any, is to be granted, upon final determination of suit, is to be raised on final hearing and not on demurrer to bill. Hays v. Bowden [Ala.] 49 S 122.

44. Law v. Ware, 238 Ill. 360, 87 NE 308.

45. **Search Note:** See note in 7 C. L. 1364 See, also, Equity, Cent. Dig. §§ 390-412, 436-445, 616; Dec. Dig. §§ 154-176, 192-194, 314; 16 Cyc. 258-260, 286-297, 313, 314, 368; 16 A. & E. Enc. P. & P. 585.

46. Under Code Pub. Gen. Laws 1904, art. 75, § 86. Falck v. Barlow, 110 Md. 159, 72 A 678.

one excuse or exemption from liability is not multifarious because it set out a number of acts or details of evidence.[47] A plea may be overruled because it is too broad.[48] A plea which assumes to go to the equity of the entire bill, but which answers only a part of it, is insufficient.[49] Where complainant has had the plea set down for argument without having taken issue thereon, all material statements of fact therein are admitted however inconsistent with allegations of the bill.[50]

(§ 6) *G. Answer.*[51]—See 11 C. L. 1359—An answer may either deny the facts stated in the bill [52] or show some new matter in avoidance of the fact submitted.[53] Nothing is regarded as admitted by an answer unless it is expressly admitted.[54] Defendant is bound to answer the allegations of the bill fully, though it contains only a general requisition and is not followed by particular interrogatories.[55] Matter in answer to charges of fraud is proper.[56] Laches may be pleaded as a defense.[57] There seems to be a conflict as to whether it must be specially pleaded in order to be available.[58] Defendant cannot plead his own wrongful act as a defense.[59] A court of equity will permit an equitable set-off whenever justice requires it, even in a case not coming within the statute of set-offs.[60] That matters alleged in answer would be judicially noticed is not ground for an exception based on impertinency.[61] A sworn answer may be waived in some jurisdictions.[62] The object of complainant in waiving answer under oath is merely to deprive defendant of the advantage of his answer as evidence.[63] The defendant is bound by admissions in his answer, though not under oath.[64] Admissions which are mere conclusions of law may be disregarded.[65] In some states, an answer, sworn or unsworn, is not evidence for defendant, but merely puts plaintiff on proof of material allegations denied by the answer.[66] An answer of a guardian ad litem may put complainant to proof though personal knowledge of facts is denied.[67] When a case is heard upon bill and answer without replication and no proof is taken, the allegations of the answer must be taken as true.[68] In some cases the jurisdiction of the court of equity can only be accurately measured by the ascertainment of matters which may be appropriately contained in

47. Underwood Typewriter Co. v. Manning, 165 F 451.

48. Upon bill to have receiver appointed and to enforce mortgage lien, plea to entire bill, denying personal liability for debt, may be overruled. Lott v. Barnes & Jessup Co. [Fla.] 48 S 994.

49. Francis v. White [Ala.] 49 S 334.

50. Stephens v. Smartt, 172 F 466.

51. **Search Note:** See Equity, Cent. Dig. §§ 413-435, 617, 618; Dec. Dig. §§ 177-191, 315; 16 Cyc. 297-320, 369, 370; 1 A. & E. Enc. P. & P. 863.

52. While defendant's answer in divorce proceedings did not conform to the exact language of the bill in denying desertion and used some additional words, yet upon the whole it was a denial of the charge of desertion. Dillinger v. Dillinger, 140 Ill. App. 6.

53. Dillinger v. Dillinger, 140 Ill. App. 6.

54. Pirola v. Turner, 142 Ill. App. 657.

55. Hageman v. Brown [N. J. Eq.] 73 A 862.

56. Where the bill alleged fraud in procuring decree for partition of property but did not specify fraudulent acts, answer was not objectionable for allegations of facts and circumstances to show good faith in procuring decree. Mound City Co. v. Castleman, 171 F 520.

57. Stewart v. Joyce, 201 Mass. 301, 87 NE 613.

58. See, also, ante, § 6E. Demurrer. Laches as a defense need not be specially pleaded. Tate v. Logan [Ark.] 114 SW 696. The defense of laches must be specially pleaded; it cannot be interposed by demurrer. Wilder's Ex'x v. Wilder [Vt.] 72 A 203.

59. Central of Georgia R. Co. v. Champion [Ala.] 49 S 415.

60. Piotrowski v. Czerwinski, 138 Wis. 396, 120 NW 268.

61. Mound City Co. v. Castleman, 171 F 520.

62. Answer treated as unsworn, where it contained statement at end of it, "answer under oath waived," signed by counsel, and there was no stipulation in record to give it same effect as sworn answer. Delta & Pine Land Co. v. Adams [Miss.] 48 S 190.

63, 64. Hageman v. Brown [N. J. Eq.] 73 A 862.

65. Admissions in answer by guardian ad litem. Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 SE 873.

66. Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 SE 873.

67. Answer by guardian ad litem for infant defendants alleging want of personal knowledge, but that he is advised that defendants have material interests, admitting nothing in bill, but calling for proof of all allegations and submitting interests of defendants to protection of court, is sufficient to put plaintiff to proof. Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 SE 873.

68. Brown v. Click, 65 W. Va. 459, 64 SE 613.

the answer.[69] In such case a prayer for the benefit of a demurrer, in the answer is proper.[70] A paragraph of an answer praying the benefit of a demurrer cannot be treated as a demurrer when it fails to comply with the statute touching demurrers.[71] If a paragraph of the answer praying for the benefit of a demurrer cannot possibly be material, it will be deemed impertinent and may be stricken on motion.[72] Permitting the filing of a supplemental answer, after decree, is discretionary.[73]

(§ 6) *H. Replication, exceptions and motions.*[74]—See 11 C. L. 1261—Under federal equity rule 66, the interposition of a general replication is taken as denying every allegation in the answer or plea not responsive to the bill, and these allegations must be proved by the party making them.[75] The sufficiency of an answer in equity cannot be tested by a demurrer, but only by exceptions.[76] General exceptions to matter, part of which is responsive and proper as defensive matter, are too broad.[77] A motion to dismiss for want of jurisdiction appearing on the face of the bill is not a plea to the jurisdiction, and an order overruling such motion is not appealable.[78] A motion to strike a demurrer as insufficient is proper practice.[79] That the claim is barred by limitations is properly made a separate ground of a motion to strike a cross bill.[80] A motion to strike a cross bill on the ground that it does not set forth any ground for equitable relief, and that it is barred by limitations, is equivalent to a demurrer.[81] The motion can prevail, on the first ground only if all the facts taken together do not make a case on which complainant is entitled to relief.[82] The objection that there is an adequate remedy at law must be asserted by defendant in some manner.[83]

(§ 6) *I. Issues, proof and variance.*[84]—See 11 C. L. 1261—The proof must conform to the allegations of the bill,[85] and the relief granted must be based upon and conform to the pleadings and proof.[86] Matters set up in an answer to a bill which are not responsive to the bill, such as matters by way of avoidance, must be proved by defendant by a preponderance of testimony.[87]

(§ 6) *J. Objections and waiver thereof.*[88]—See 11 C. L. 1261—An answer to the merits is a waiver of objections that should properly be raised by demurrer, motion, or special plea,[89] and an objection which does not go to the merits is waived by an

69. Redrow v. Sparks [N. J. Eq.] 72 A 442. Where bill sought rescission of contract on ground that fraud induced it, answer denied fraud, equity would lose jurisdiction if fraud were not proved; hence proper in such answer to ask benefit of demurrer on ground that there is adequate legal remedy (on covenants in deed). Id.

70. As where legal right sought to be enforced is uncertain because of dispute as to facts or law. Redrow v. Sparks [N. J. Eq.] 72 A 442. A prayer in the answer for the benefit of a demurrer is not proper unless there are special circumstances which require an answer and hearing to determine question of equitable jurisdiction. Id.

71, 72. Redrow v. Sparks [N. J. Eq.] 72 A 442.

73. Within discretion of single justice to allow filing of supplemental answer, after decree, where such answer sets up decision resting on decision of federal supreme court, though decision of lower federal court was rendered prior to hearing of facts. Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 89 NE 193.

74. **Search Note:** See Equity, Cent. Dig. §§ 478-486, 521-540; Dec. Dig. §§ 207-213, 249-264, 317; 16 Cyc. 315-324, 370.

75. Lewis Pub. Co. v Wyman, 168 F 756.

76. City of Woodlawn v. Durham [Ala.] 50 S 356.

77. Mound City Co. v. Castleman, 171 F 520.

78. Meyers v. Martinez [Ala.] 50 S 351.

79. McCarter v. United New Jersey R. & Canal Co. [N. J. Eq.] 71 A 291.

80, 81, 82. Clark v. Van Cleef [N. J. Eq.] 71 A 260.

83. Redrow v. Sparks [N. J. Eq.] 72 A 442.

84. **Search Note:** See Equity, Cent. Dig. §§ 635-652; Dec. Dig. §§ 324-327; 16 Cyc. 370-375, 403-406.

85. Cooper v. Cooper, 65 W. Va. 712, 64 SE 927.

86. Frey v. Stipp [Pa.] 73 A 460.

87. Davis v. Horne [Fla.] 49 S 505.

88. **Search Note:** See Equity, Cent. Dig. §§ 653-673; Dec. Dig. §§ 328-335.

89. By answering without demurrer and going to trial on merits, defendants waive right to object **that complainants have adequate remedy at law.** Bauer v. International Waste Co., 201 Mass. 197, 87 NE 637. Objection that court ought not to assume jurisdiction because there is an adequate remedy at law comes too late after defendant has filed an answer in which the objection is not raised and relied on. Law v. Ware, 238 Ill. 360, 87 NE 308. Objection to the exercise of

answer to the merits.[90] Objections and defenses which may properly be raised by answer are not waived by failure to raise them by previous motion or pleading.[91] Demurrers to pleas to bills in equity are not permissible but if the complainant in the bill thinks the plea insufficient, instead of demurring, he should have it set down for argument as to its sufficiency.[92] By so doing he admits the truth of the matters averred in the plea, but denies their sufficiency in law to bar the relief sought.[93] If the plea is held good, he may then reply to it denying the truth of its allegations, and if he does not reply a decree will be entered dismissing the bill.[94] By replying to the plea a party waives his objections to its sufficiency and admits the plea to be good, but denies its truth.[95] A court of equity will not lend its aid in the enforcement of claims or rights which arise out of contracts that are contrary to the public policy of the state.[96]

§ 7. *Taking bill as confessed or on default.*[97]—See 11 C. L. 1263—The time and manner of setting aside a default are regulated by rules and statutes.[98] Where exceptions to portions of an answer are allowed and the remainder of the answer presents a material issue, it is improper to decree that the bill of complaint be taken as confessed for want of an answer.[99]

§ 8. *Abatement and revival.*[1]—See 9 C. L. 1143—A pending bill relating to corporate affairs is not a bill for relief by individuals.[2]

jurisdiction of a court of equity in a fraud case on the ground that the remedy at law is adequate must be made in limine; the court will proceed to exercise its unquestioned jurisdiction unless, of its own motion, it exercises its discretionary power to remand the parties to a court of law. Knikel v. Spitz [N. J. Eq.] 70 A 992. Though complainant may have a legal remedy where he seeks relief in equity, and defendant raises no objection, this is a consent that court may exercise its equitable powers and grant such relief as is proper under the circumstances. Mahn v. Chicago & M. Elec. R. Co., 140 Wis. 8, 121 NW 645. When defendant files a cross bill alleging title to the subject-matter in himself and praying equitable relief, he waives **objection to jurisdiction over subject-matter.** Original Consol. Min. Co. v. Abbott, 167 F 681. Bill in equity on behalf of state signed by counsel other than attorney general is not demurrable for **lack of disclosure of authority** or direction from him to file same. Such objection must be raised by motion to dismiss or plea in abatement. State v. Ehrlick, 65 W. Va. 700, 64 SE 935. Objection that bill for infringement of several thousand copyrights was **multifarious,** waived, where answer was to merits and court had equitable jurisdiction, and objection was not raised until after hearing on merits. West Pub. Co. v. Edward Thompson Co., 169 F 833.

90. Error in overruling **motion to require** election waived by answering to merits. Hanson v. Neal, 215 Mo. 256, 114 SW 1073. An answer to the merits waives a pending and unheard special **plea to strike previous pleadings** filed by an attorney for defendant on the ground that such attorney had no authority. Sanderson v. Bishop, 171 F 769. Where order overruling **special demurrer,** without prejudice to right to raise objections at hearing, is entered by consent, and master hears cause and overrules demurrer, it is proper for final decree to treat demurrer as abandoned. Saltman v. Nesson, 201 Mass. 534, 88 NE 3. Where demurrers raising objection of **multifariousness** are overruled and defendant answers to merits, objection on that ground is waived. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291.

91. Demurrer lies on ground **that bill does not state cause for equitable relief,** though objection may be raised at hearing. Saltman v. Nesson, 201 Mass. 534, 88 NE 3. In Colorado, if suit is brought within time fixed by limitation statute, defense of **laches** must be raised by answer; cannot be raised by demurrer. Allen v. Blanche Gold Min. Co. [Colo.] 102 P 1072. **Multifariousness,** joining separate and inconsistent demands, and want of equity, are defenses that may be raised by answer. Saltman v. Nesson, 201 Mass. 534, 88 NE 3. Where **multifariousness** is raised by answer, court may or may not consider the objection, as it chooses. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291.

92, 93, 94, 95. Perry v. U. S. School Furniture Co., 232 Ill. 101, 83 NE 444.

96. Equity will not aid in enforcement of judgment obtained on bonds issued by unlawful combination in favor of one of guilty parties. Perry v. U. S. School Furniture Co., 232 Ill. 101, 83 NE 444.

97. Search Note: See note in 3 C. L. 1231. See, also, Equity, Cent. Dig. §§ 952-985; Dec. Dig. §§ 418-420; 16 Cyc. 490, 497, 513-516.

98. In Michigan, under Chancery Rule 7, subd. "d," a default, regularly entered after personal service, cannot be set aside after six months from date of entry. St. Louis Hoop & Stave Co. v. Wayne Circuit Judge, 155 Mich. 311, 15 Det. Leg. N. 1017, 118 NW 989.

99. Dillinger v. Dillinger, 140 Ill. App. 6.

1. See Abatement and Revival.

Search Note: See Abatement and Revival, Cent. Dig.; Dec. Dig.; 1 Cyc. 10-137.

2. Bill relating to receivership of corporation not bar to bill relating to individual interests only. Stokes v. Dimmick [Ala.] 48 So. 66.

§ 9. *Dismissal.*[3] *Voluntary.* See 11 C. L. 1264—Complainants, in case no cross bill is filed, may dismiss at any time prior to the entry of the decree.[4] Interveners cannot object to a dismissal of the original bill without prejudice, unless they have obtained a standing in court by filing a proper cross bill entitling them to affirmative relief.[5] When whatever rights, if any, interveners had acquired in a suit were acquired upon the pleadings only, and not by reason of any order or decree of the court, complainants could dismiss without prejudice.[6]

Involuntary dismissal. See 11 C. L. 1264—A bill may be dismissed for want of equity,[7] though no objection has been raised in the pleadings [8] for defect of parties [9] or for delay in prosecution.[10] Where a demurrer is sustained with leave to amend, and complainant declines to amend, no other course is open but to dismiss the bill.[11] Failure of petition to state term of court to which it is returnable is not ground for dismissal.[12] Ordinarily a bill should not be dismissed without giving complainant an opportunity to take proofs, where it is brought on for hearing and pleadings and proofs to be taken in open court.[13] It is not ground for dismissal that a demurrer successfully challenges an incidental portion of the relief prayed.[14] A defendant should not be dismissed on a mere statement of interest in the property involved.[15] On a motion to dismiss for want of equity, the facts stated in the bill are to be taken as admitted.[16] In considering question of dismissal on that ground only, the bill, not the answer, can be looked to.[17] A motion to dismiss the bill at the close of plaintiff's case is in the nature of a motion for nonsuit in a law case.[18] Such motion admits every fact which the evidence proves or tends to prove, and every fact which may naturally and rationally be inferred from the facts proved.[19] Error in granting

3. Search Note: See note in 5 Ann. Cas. 850.

See, also, Equity, Cent. Dig. §§ 749-775; Dec. Dig. §§ 359-368; 16 Cyc. 460-469.

4. Allott v. American Strawboard Co., 237 Ill. 55, 86 NE 685. Irrespective of any purpose to have another one brought in the state court. Harding v. Corn Products Refining Co. [C. C. A.] 168 F 658. Complainant may dismiss where dismissal would leave jurisdiction and rights acquired through cross bill for affirmative relief undisturbed. Id.

5, 6. United States v. Reese, 166 F 347.

7. Where the relief asked is such as only equity can grant, plaintiff's action will be dismissed if the facts are not such as to entitle him to that relief, although he might have a remedy in a proper action at law. Hall v. Henninger [Iowa] 121 NW 6.

8. If a bill fails to state a case proper for relief in a court of equity, the court will dismiss it at the hearing though defendant has raised no objection in his pleadings. Ward v. Hotel Randolph Co., 65 W. Va. 721, 63 SE 613.

9. Bill may be dismissed when it appears that relief cannot be granted without injuriously affecting the interests of persons not made parties to the suit. Jackson v. Hooper, 171 F 597.

10. Where answer denying all material allegations of the bill is filed, and complainants take no further steps for six months, defendant, after time for taking testimony has passed, may have cause set down for hearing on bill and answer, and the bill may be dismissed if no excuse for delay is shown. Myers v. Julian [Fla.] 48 S 998. Where answer denying all material allegations of bill was filed, and complainants did nothing further for a year and a half, and defendants then set cause down for hearing on bill and answer, it was proper to enter final decree dismissing the bill. Garcia v. Garcia [Fla.] 49 S 749. Circuit court has **power to vacate dismissal of bill** as to some of the defendants after lapse of 30 days, where it appears that dismissal was on ground that complainants had failed to set down or reply to plea, having instead filed "exceptions" thereto, which had not been called to court's attention upon application for order of dismissal. Silver Springs & W. R. Co. v. Koonce, 56 Fla. 845, 47 S 390.

11. Underwood v. Underwood [Ala.] 50 S 305.

12. Booth v. State, 131 Ga. 750, 63 SE 502.

13. But dismissal not error where pleadings and counsel's statement showed that complainant was not entitled to relief. Public School of Wyandotte v. Harding [Mich.] 16 Det. Leg. N. 306, 121 NW 296.

14. In foreclosure proceedings, error to dismiss bill of complaint, the prayer of which contained clause asking for "a reasonable solicitor's fee" to which a demurrer was sustained, there being then left a perfect bill. Kollehner v. Brown, 143 Ill. App. 425.

15. In suit to foreclose trust deed on south half of building and to establish an easement in heating plant in north half, one who held trust deed on north half was made defendant. Held error to dismiss such defendant on her plea merely stating her interest. Foote v. Yarlott, 238 Ill. 54, 87 NE 62.

16. Fuller v. Clemmons [Ala.] 48 S 101.

17. Houston v. Howze [Ala.] 50 S 266.

18. Thomas v. Borden, 222 Pa. 184, 70 A 1051.

19. Motion to dismiss at close of plaintiff's

such motion is not to be corrected by entering a decree for plaintiff, but by setting aside the dismissal and reinstating the bill with a procedendo.[20] The dismissal of an original and amended bill does not carry with it an answer setting up facts calling for affirmative relief.[21]

§ 10. *Trial by jury or master, their verdicts and findings.*[22]—See 11 C. L. 1264—An issue submitted to a jury in an equity case is called a "feigned issue."[23] Whether issues shall be submitted is a question addressed to the discretion of the chancellor,[24] and the findings or verdict of the jury are merely advisory.[25] Several issues should be separately submitted and answered.[26] The question whether a contract should be reformed should not be submitted to the jury being addressed to the equitable jurisdiction of the court.[27] It is proper to refuse requested instructions to the jury.[28]

The right to take oral proof at the trial is not violated where party has opportunity to take such proof before the master.[29] Where a cause is referred to a master to take all the evidence and report his conclusions thereon, he must take all the evidence.[30] Where no conclusions by the master are requested, the court may refer the cause after hearing part of the evidence, and, after the master has reported the evidence taken by him, the court may hear further evidence.[31] Court may refer issue to be retried back to referee to take additional evidence, or may take such evidence itself, or may make its own findings on the evidence contained in the referee's report.[32] The order of a court to a master to report the evidence, his report of it, and the legal presumption of his faithful discharge of his official duty, constitute competent proof in the absence of countervailing evidence, that he has reported all the evidence that was taken before him.[33] A reference by a general order before commencement of suit, without the knowledge or consent of any party, is not a reference by consent, though parties proceed thereunder without objections.[34] In such case the rule that findings by the referee, based on conflicting evidence, are conclusive, does not apply.[35] A master may, without further evidence before him, disregard, modify or reverse a previous finding.[36] Where exceptions to a master's report raise inferences of fact to be drawn from the facts found by the master, it is for the court which has to deal with such exceptions to draw inferences of fact from

ease, under Code Civ. Proc. Alaska, § 378. Cook v. Klonos [C. C. A.] 164 F 529.

20. Thomas v. Borden, 222 Pa. 184, 70 A 1051.

21. Pyle v. Henderson, 65 W. Va. 39, 63 SE 762.

22. **Search Note:** See Equity, Cent. Dig. §§ 776-931; Dec. Dig. §§ 369-414; 16 Cyc. 407-459, 508-512.

23. Nashville R. & L. Co. v. Bunn [C. C. A.] 168 F 862.

24. Bristol v. Pitchard, 81 Conn. 451, 71 A 558; Winburn v. Witt [Ky.] 120 SW 293; Heron v. Weston, 44 Colo. 379, 100 P 1130; Central Life Assur. Soc. v. Mulford [Colo.] 100 P 423; Cogan v. Cogan, 202 Mass. 58, 88 NE 662. It is not an abuse of discretion to refuse to refer an issue of fraud or deceit, in an equity case to a jury. Lawrence v. Lawrence, 82 S. C. 150, 63 SE 690.

25. Dooley v. Burlington Gold Min. Co. [Ariz.] 100 P 797; John King Co. v. Louisville & N. R. Co. [Ky.] 114 SW 308; Nashville R. & L. Co. v. Bunn [C. C. A.] 168 F 862; Central Life Assur. Soc. v. Mulford [Colo.] 100 P 423. Verdict of jury in equity case is advisory only though based only on legally competent evidence. Larson v. Glos, 235 Ill. 584, 85 NE 926. Verdict of jury may be rejected or adopted. Blood v. Sovereign Camp, W. O. W. [Mo. App.] 120 SW 700. The verdict of a jury upon an issue framed in equity is merely advisory and must be such as to satisfy the conscience of the court. Rolfe v. Patrons' Androscoggin Mut. Fire Ins. Co. [Me.] 72 A 732. In determining whether or not verdict shall be set aside, the vital question is whether there is sufficient legal evidence to sustain decree. Id.

26. Error to require general verdict under Civ. Code Prac. § 12. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170.

27. Rubensteln v. Radt, 133 App. Div. 57, 117 NYS 893.

28. Blood v. Sovereign Camp, W. O. W. [Mo. App.] 120 SW 700.

29. Kenealy v. Glos, 241 Ill. 15, 89 NE 289.

30. Construing Hurd's Rev. St. 1908, c. 22, § 39, and c. 51, § 38. Kenealy v. Glos, 241 Ill. 15, 89 NE 289.

31. Kenealy v. Glos, 241 Ill. 15, 89 NE 289.

32. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906.

33. 34. Guarantee Gold Bond Loan & Sav. Co. v. Edwards [C. C. A.] 164 F 809.

35. Court may examine evidence and make contrary findings. Guarantee Gold Bond Loan & Sav. Co. v. Edwards [C. C. A.] 164 F 809.

36. Scoville v. Brock, 81 Vt. 405, 70 A 1014.

the facts found.[37] A master's findings cannot be impeached unless all the evidence heard by him is presented.[38] Where a matter has been referred to a master, exceptions to matters depending upon proof are waived unless objection is made before the master;[39] but as to matters of law appearing on the face of the record no objection before the master is necessary.[40] A clerk, while acting as master, exercises judicial functions and may be disqualified by relationship to act.[41] A commissioner is a quasi-judicial officer.[42] He should not allow a party to assist him in the preparation of his report.[43] Where a commissioner reports all the evidence taken by him, refusal to strike an analysis of the evidence from his report is not prejudicial.[44] It is proper to refuse to pass upon a great number of exceptions to a report, except generally, where evidence supports conclusions, and exceptions are without merit.[45] Decisions regarding examination of witnesses before the master,[46] and, the weighing of testimony,[47] are given in the notes.

§ 11. *Evidence.*[48]—See 11 C. L. 1266—A party is a competent witness.[49] Documentary evidence filed after the closing of proofs should not be considered.[50] Defendant need not except to the sufficiency of the evidence upon which plaintiff submits his case, since this will appear upon the hearing.[51] Cases dealing with the sufficiency of evidence under certain rules and statutes are cited in the note.[52]

§ 12. *Hearing or trial.*[53]—See 11 C. L. 1267—A court of equity has inherent power to consolidate suits for purposes of trial,[54] and, in the absence of a statute authorizing such procedure, an order allowing or denying consolidation will not be reversed on appeal except for a palpable abuse of discretion.[55] Where an equitable counterclaim is interposed in an action at law, the proper practice is to procure an order directing separate trials of the different issues, and, if the equitable counterclaim, if established, will determine the whole controversy, the equitable issues should be

37. Rosenberg v. Schraer, 200 Mass. 218, 86 NE 316.

38. A master's finding of facts upon evidence taken by him cannot be impeached in the absence from the record of his certificate, or other competent proof, either that the evidence presented is the entire evidence taken by him, or that it contains all the evidence which was before him relative to the specific finding or findings challenged. Guarantee Gold Bond Loan & Sav. Co. v. Edwards [C. C. A.] 164 F 809.

39, 40. Lehman & Co. v. Powe [Miss.] 49 S 622.

41. Clerk of chancery court, while acting as master, has power to enter decree pro confesso and also to set such decree aside, and hence has judicial function; where chancellor was disqualified, being defendant, clerk and deputy were also disqualified to act as master. Morrow v. Sneed [Tenn.] 114 SW 201.

42. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751.

43. Improper to allow party to assist in preparing analysis of evidence. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751.

44, 45. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751.

46. In a hearing before a master, counsel should not direct witnesses not to answer questions, but should place his objections on the record, and the questions should be answered, and the court may then decide whether or not the matter objected to is competent and material. Eddy v. Eddy [C. C. A.] 168 F 590.

47. Effect on weight of testimony of inconsistency in witness' testimony is for master before whom it is given. Scoville v. Brock, 81 Vt. 405, 70 A 1014.

48. **Search Note:** See Equity, Cent. Dig. §§ 674-748; Dec. Dig. §§ 336-358; 16 Cyc. 375-402.

49. It has never been the rule in chancery in Illinois that one is incompetent as witness because party to cause. Ackman v. Potter, 239 Ill. 578, 88 NE 231.

50. Wellman v. Blackmon, 155 Mich. 672, 15 Det. Leg. N. 1126, 119 NW 1102.

51. Despard v. Pearcy, 65 W. Va. 140, 63 SE 871.

52. In suit in equity to foreclose trust deed, Practice Act, § 52, relating to proof of execution of writing which is basis of suit, and effect of verified denial of execution, does not apply. McCormick v. Unity Co., 239 Ill. 306, 87 NE 924. An answer which is fully responsive to allegations of the bill is conclusive in favor of defendant unless overcome by testimony of two witnesses or of one witness and such corroborating facts and circumstances as are equal to the testimony of another witness. Real Estate & Mortgage Co. v. Cook [Pa.] 72 A 345.

53. **Search Note:** See Equity, Cent. Dig. §§ 776-832; Dec. Dig. §§ 369-391; 16 Cyc. 383, 407, 409-428, 466.

54, 55. Butler v. Secrist [Neb.] 120 NW 1109.

tried first.[56] A cause may be set down for hearing on the bill and answer without taking proof,[57] and, where a case is so submitted, the truth of the facts alleged in the answer is taken to be admitted.[58] Leave to take testimony may be refused on the ground of unreasonable delay.[59]

§ 13. *Findings by the court and decree, judgment, or order.*[60]—See 11 C. L. 1267— *Findings* are to be construed together.[61]

Decree; form. See 11 C. L. 1267—It is not improper for the decree itself to contain the reasons for the decision made.[62] A decree is not final until approved and filed for record.[63]

Measure of relief. See 11 C. L. 1268—The granting of relief is controlled by equitable considerations,[64] is limited by the province of equity,[65] and by the pleadings,[66] and proof,[67] and the facts found by the court.[68] Under a prayer for general relief, a complainant, though not entitled to the relief specifically prayed for, may be granted any relief to which he shows himself entitled, consistent with the facts pleaded and proved.[69] Though the special prayer asks relief which may not be granted under

56. Rubenstein v. Radt, 133 App. Div. 57, 117 NYS 893.

57. City of Woodlawn v. Durham [Ala.] 50 S 356.

58. Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 A 442.

59. Where nearly six years elapsed after issues were joined before any action was taken toward taking testimony, and no application for enlargement of time was made, leave to take testimony was refused. Munroe v. Atlanta Mach. Works, 170 F 863.

60. **Search Note:** See notes in 7 C. L. 1379; 8 L. R. A. (N. S.) 866; 93 A. S. R. 154.

See, also, Equity, Cent. Dig. §§ 932-1064; Dec. Dig. §§ 415-441; 16 Cyc. 471-500, 513-516; 5 A. & E. Enc. P. & P. 946.

61. Kidd v. New York Security & Trust Co. [N. H.] 71 A 878.

62. Jackson v. Valley Tie & Lumber Co., 108 Va. 714, 62 SE 964.

63. Under Code Civ. Proc. c. 1010, decree must be in writing and filed in the clerk's office. Bascombe v. Marshall, 129 App. Div. 518, 113 NYS 993. Oral declaration of court of its intended disposition of case not conclusive upon court, and did not preclude it from such decision as it finally concluded to render. Id.

64. Where application is to a court of equity, equitable considerations guide and control in granting relief, and a strict legal right, however clear, will not be enforced, if injustice and inequity will result therefrom. Dorner v. Luxemburg School Dist., 137 Wis. 147, 118 NW 353. Court will not grant cancellation of contract for fraud where parties stood on equal footing, and any relief is as likely to be wrong as right, under evidence. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. In granting equitable relief under a contract, a court should go only so far as is just and equitable. Work v. Fidelity Oil & Gas Co. [Kan.] 98 P 801. Neither a court of law nor of equity will enforce an unconscionable contract. Id.

65. See ante, § 2.

66. Decree cannot make any finding or order on matters not raised by allegations or prayer of bill, nor by allegations of answer. Gillespie v. Fulton Oil & Gas Co., 239 Ill. 326, 88 NE 192. Court cannot grant provisional relief when bill is so fatally defective that it must fall on demurrer. Rodman v. Manganese Steel Safe Co. [N. J. Err. & App.] 72 A 963. Complainant cannot have relief by specific performance where he demands injunction. Kienle v. Gretsch Realty Co., 133 App. Div. 391, 117 NYS 500. Where wife brought action of assumpsit against her husband, but failed to maintain it, she could not be given decree on verdict in her favor, by way of relief in equity, on a bill filed by her in aid of the legal action, since different questions were involved in equity proceeding. Kimball v. Kimball [N. H.] 73 A 408. Error to enjoin one of the plaintiff's in a bill at the court's own instance without any allegation or prayer in the pleadings to that end, and without a cross bill, from conveying real estate standing in his name. Makof v. Sherman, 36 Pa. Super. Ct. 624.

67. Relief cannot be granted on proof at variance with the bill, unless an amendment is allowed. Where cause is remanded and reinstated, amendment may be allowed below, if complainant desires to amend. Schmitt v. Weber, 239 Ill. 377, 88 NE 268. Though causes have been misjoined, where there has been full hearing on merits, it is proper for final decree to give full relief and avoid further litigation. Saltman v. Nesson, 201 Mass. 534, 88 NE 3.

68. A decree granting affirmative relief must be justified either by facts which it specifically finds or by evidence appearing in the record. Warden v. Glos, 236 Ill. 511, 86 NE 116. Presumed that facts necessary to sustain decree were found. Kidd v. New York Security & Trust Co. [N. H.] 71 A 878. Special findings should be consistent with facts necessary to sustain decree. Id. Special finding held not inconsistent with decree for defendants dismissing suit. Id.

69. South & N. A. R. Co. v. Gray [Ala.] 49 S 347; Kimmerly v. McMichael, 83 Neb. 789, 120 NW 487; Mason v. Gates [Ark.] 119 SW 70. Under prayer for general relief, court may give any relief consistent with case made by bill, even if it is less, more or different from that specifically prayed for. Underground Elec. R. Co. v. Owsley, 169 F 671. Where bill alleged that stock bought by defendant was purchased with money furnished by both plaintiff and defendant and prayed for accounting for proceeds of

the facts alleged,[70] relief may be conditioned upon the doing of equity by complainants.[71]

*Effect and construction.*See 11 C. L. 1268—A decree entered by agreement is not in a strict legal sense a judicial decree but is in the nature of a contract between the parties entered by the court.[72] A consent decree must appear to be such from the face of the decree itself.[73] Such a decree is as binding on the parties upon all questions involved as is a contested decree.[74] It admits the truth of the definite and certain allegations of facts contained in the bill of complaint that tend to establish the equities of the case,[75] and the allegations of the bill and the exhibits properly made a part thereof may be considered in ascertaining the rights and interests of the parties.[76]

*Enforcement.*See 11 C. L. 1268—A court of equity has power to enforce its decrees by ancillary proceedings.[77] By statutes, in some states, an execution may issue upon a decree for the payment of money.[78] A decree should specify a time where the doing of a particular act is required.[79] Where no time is specified, execution of the decree is deemed reserved until further order of the court.[80] Execution of any part of the decree should be reserved until the rights of the parties are finally settled.[81]

*Modification and amendment; vacation and setting aside; collateral attack.*See 11 C. L. 1289—Until a final decree, all former decretal orders in the cause are before the court and may be altered, modified or vacated as circumstances may require.[82] A motion to modify findings and an interlocutory decree is addressed to the court's discretion.[83]

stock sold by defendant, such relief may be granted under general prayer where sustained by proof. Laughlin v. Brauer, 138 Ill. App. 524. Complainant may have, under prayer for general relief, only such relief as the facts pleaded by him as the basis of the relief asked, warrant; relief not responding to issues and supported by facts pleaded and proved will not be granted. Mason v. Gates [Ark.] 119 SW 70. Relief must be within case made by bill. Lewis Pub. Co. v. Wyman, 168 F 756. Cannot sue for specific performance of contract, and recover for services performed as upon quantum meruit. McKinney v. Big Horn Basin Development Co. [C. C. A.] 167 F 770.

70. Sharpe v. Miller [Ala.] 47 S 701.

71. Court may require complainant to submit to equitable terms as condition of relief granted. Haydon v. St. Louis & S. F. R. Co. [Mo.] 121 SW 15.

72. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717.

73. Patterson v. Northern Trust Co., 238 Ill. 601, 87 NE 843.

74. Harrington v. Dickinson, 155 Mich. 161, 15 Det. Leg. N. 996, 118 NW 931.

75, 76. Hale v. Yeager [Fla.] 49 S 544.

77. Where court, by decree, foreclosed mortgage securing bonds, in suit against trustee, representing bondholders, and ordered property sold free from claims of any person claiming through or under them, it had jurisdiction of ancillary bill by purchaser to enjoin certain bondholders from prosecuting second foreclosure, claiming they were not bound by previous decree. Alton Water Co. v. Brown [C. C. A.] 166 F 840. The original jurisdiction of the court over subject-matter and parties may thus be invoked and exercised to ascertain the fact and extent of the jurisdiction there acquired for all purposes of the decree, and what questions were settled, and to grant relief for assurance and protection of such rights from any person or interest bound by the decree. Id. A court of equity has ample jurisdiction to protect and effectuate its decrees, standing unreversed, in favor of a purchaser thereunder by ancillary proceedings against any party to the litigation who interferes with rights therein determined. Id.

78. Hall v. McGregor, 65 W. Va. 74, 64 SE 736.

79, 80. Maas v. Lonstorf [C. C. A.] 166 F 41.

81. The proper practice, where a cause is heard upon the merits and the rights and equities of the parties are adjudged, is to withhold the execution of any part of the decree whereby property may be sold or title transferred or money paid over until the entire litigation is determined, so that it may be carried up by one appeal. Maas v. Lonstorf [C. C. A.] 166 F 41.

82. Price v. Springer, 241 Ill. 230, 89 NE 296. A decree for an accounting in a federal court, under rule 9, after decree that bill be taken pro confesso, is interlocutory only, except that order that bill be taken pro confesso is made absolute, and may be modified by court where it directs an accounting not warranted by allegations of the bill. Webster v. Oilver Ditson Co., 171 F 895.

83. Nelson v. Winchell & Co. [Mass.] 89 NE 180. Where single justice made findings and interlocutory decree and referred cause to master to assess profits and damages for use of trademark, and no attack was made on findings before master, counsel disclaiming any attempt to attack them, motion to modify findings was properly overruled. Id.

§ 14. *Rehearing.*[84]—See 11 C. L. 1269—A rehearing may be granted on questions which were left unsettled.[85] A rehearing will not be allowed on a decree entered by agreement.[86] Surprise, as ground for rehearing, must be something unexpectedly arising under circumstances which the party was not reasonably called upon to anticipate, and which ordinary prudence and foresight could not guard against.[87]

§ 15. *Bill of review.*[88]—See 11 C. L. 1270—An application for leave to file a bill of review is addressed to the sound discretion of the court.[89] A bill of review can be brought only for error of law appearing on the face of the proceedings or for new matter [90] such as fraud.[91] New matter must not only be new but such that it could not have been known and used by the exercise of reasonable diligence.[92] Leave will not be granted to file a bill of review on the ground of new matter without an affidavit that the new matter could not be produced or used by the party claiming the benefit of it in the original cause.[93] The affidavit must also state the nature of the new matter.[94] A decree entered by agreement cannot be impeached or set aside upon a bill of review for errors of law apparent on its face or an account of additional evidence.[95] It can only be set aside by an original bill in the nature of a bill of review.[96] A petition to open a decree in the court of chancery cannot be filed after the expiration of the statutory period within which an appeal can be taken from such decree.[97] One not a party to the original bill, but who is interested in the subject-matter, may be allowed to file a bill of review,[98] and his rights may thereupon be properly protected by decree.[99]

§ 16. *Other equitable remedies for which no specific title is provided.*[1]—See 11 C. L. 1271—The object of a *bill quia timet* is to protect a party from anticipated probable future injury to his rights or interest.[2] This remedy, in modified form, has

84. Search Note: See Equity, Cent. Dig. §§ 834-851; Dec. Dig. § 392; 16 Cyc. 508-512.

85. Where suit for infringement of patent was against corporations and president of one as an individual, and interlocutory decree found infringement by corporations only, and referred case to master for accounting, it was competent, at any time before final decree, to open case for rehearing on question of liability of individual. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 166 F 867.

86. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717.

87. Anderson Land & Stock Co. v. McConnell, 171 F 475. Where evidence offered on hearing related to physical facts which could have been previously investigated, and no claim of surprise was then made, it was proper to refuse rehearing. Id.

88. Search Note: See notes in 5 C. L. 1178; 7 Id. 1380, 1382; 5 Ann. Cas. 944; 6 Id. 330.

See, also, Equity, Cent. Dig. §§ 1065-1144; Dec. Dig. §§ 442-466; 16 Cyc. 517-534.

89, 90. Lanahan v. Lanahan, 110 Md. 176, 72 A 672.

91. Allegations of fraud held not sustained upon application for bill of review of proceeding for partnership accounting. Lanahan v. Lanahan, 110 Md. 176, 72 A 672.

92, 93. Lanahan v. Lanahan, 110 Md. 176, 72 A 672.

94. So that court may pass upon its materiality and relevancy. Lanahan v. Lanahan, 110 Md. 176, 72 A 672.

95, 96. Hohenadel v. Steele, 237 Ill. 229, 86 NE 717.

97. Sparks v. Fortescue [N. J. Err. & App.] 73 A 595.

98. A person interested in the subject-matter of a bill in equity and a decree thereon, but not made a party thereto, may, after final decree, file an original bill in the nature of a bill of review for correction of any adjudication therein to his prejudice and vindication of his rights, and have it treated as a cross bill in the original cause. Kanawha Hardwood Co. v. Evans, 65 W. Va. 622, 64 SE 917.

99. Where one not a party to an original suit, but interested in the subject-matter and affected by the decree, files a bill of review, the court may make any order or decree necessary to effectuate equity whether or not such relief is specifically prayed for, it being based on errors appearing in the record. Kanawha Hardwood Co. v. Evans, 65 W. Va. 622, 64 SE 917.

1. Search Note: See Equity, Cent. Dig. §§ 167-171, 1058-1064; Dec. Dig. §§ 51, 441; 16 Cyc. 60-64, 288, 500; Injunction, Cent. Dig. §§ 31, 32, 60; Dec. Dig. § 26(5); 22 Cyc. 786-809; 11 A. & E. Enc. L. (2ed.) 156, 190.

2. As to canceled instrument creating prima facie liability or cloud on title, or where surety is fearful that principal will not pay debt. Gagossian v. Arakelian, 9 Cal. App. 571, 99 P 1113. Where there is a future right of enjoyment of personal property, courts of equity will interpose and grant relief upon a bill quia timet, where there is any danger of loss or deterioration or injury in the hands of the party entitled to present possession. Underwood v. Underwood [Ala.] 50 S 305.

been incorporated in some codes.[3] A bill of this kind must allege facts making a case within the scope of the statutory remedy.[4]

Bills of peace were used for two purposes, to prevent a vexatious recurrence of litigation by several persons asserting the same right, and to prevent the reiteration of an unsuccessful claim.[5]

Error Coram Nobis; Error, Writ of, see latest topical index.

ESCAPE AND RESCUE.*

The scope of this topic is noted below.[7]

One furnishing implements to aid in an escape is guilty of assisting therein.[8] Separate acts committed in the presence of each may make defendants jointly guilty of a single offense of aiding an escape.[9] Under the Ohio statute one is not guilty of rescue unless the person rescued was charged or convicted of an offense.[10] As in other criminal cases the testimony of accomplices [11] must be corroborated.[12] Some statutes fix the punishment of a person escaping from the state prison at the same term for which he is serving at the time of his escape.[13]

ESCHEAT.[14]

The scope of this topic is noted below.[15]

The state may take lands subject to the dower interest of the widow.[16] Under some statutes where there is no evidence of the existence at the time of the death of

3. Code Civ. Proc. § 1050, provides for action to determine adverse claims, or proceeding by surety to compel payment of debt by principal. Gagossian v. Arakelian, 9 Cal. App. 571, 99 P 1113.

4. Bill seeking to have ownership of membership certificate in association established held not good bill quia timet. Gagossian v. Arakelian, 9 Cal. App. 571, 99 P 1113.

5. Vandalia Coal Co. v. Lawson [Ind. App.] 87 NE 47.

6. See 11 C. L. 1271.

Search Note: See notes in 3 C. L. 1237; 15 L. R. A. 190; 39 Id. 33; 3 Ann. Cas. 416, 512; 5 Id. 11.

See, also, Escape, Cent. Dig.; Dec. Dig.; Rescue, Cent. Dig.; Dec. Dig.; 16 Cyc. 537-547; 11 A. & E. Enc. L. (2ed.) 258; 7 A. & E. Enc. P. & P. 913.

7. It includes the crimes of escape and rescue and of assisting or abetting therein. Excludes escape or attempt to escape as inculpatory evidence against one charged with other crimes (see Indictment and Prosecution,* § 9), and the dismissal of an appeal by one who has escaped after conviction (see Indictment and Prosecution,* § 17G).

8. Evidence held sufficient to sustain conviction of one prisoner for aiding another prisoner to escape by giving him a tool. Veal v. State [Tex. Cr. R.] 120 SW 173.

9. Where one defendant furnished prisoners with a chisel and hammer and the other at a different time passed in some keys, each act being done in the presence of each other, they were jointly guilty of a single offense of aiding an escape. State v. Ballew [S. C.] 63 SE 688, rehearing denied [S. C.] 64 SE 1019.

10. An indictment charging a defendant with having rescued another who was in the lawful custody of a constable under a warrant issued by a justice of the peace in bastardy proceedings is insufficient under § 6903, Rev. St., because the person so rescued was not charged with an "offense." State of Ohio v. Ward, 8 Ohio N. P. (N. S.) 561.

11. Where a prisoner gave to another prisoner a tool by which the latter effected the escape of himself and other prisoners, the prisoners who escaped with him were not accomplices with the one furnishing the tool. Veal v. State [Tex. Cr. R.] 120 SW 173.

12. Evidence of accomplices that defendants furnished prisoners with bunch of keys and chisel to use in attempting to escape held sufficiently corroborated. State v. Ballew [S. C.] 63 SE 688, rehearing denied [S. C.] 64 SE 1019.

13. Rev. Codes, § 6465, is unconstitutional in that it denies equal protection of the law. Ex parte Mallon [Idaho] 102 P 374.

14. See 11 C. L. 1272.

Search Note: See notes in 2 L. R. A. (N. S.) 643; 9 Id. 186; 11 Id. 183; 15 Id. 379.

See, also, Escheat, Cent. Dig.; Dec. Dig.; 16 Cyc. 549, 559; 11 A. & E. Enc. L. (2ed.) 315; 8 A. & E. Enc. P. & P. 1.

15. Disability of particular classes of persons to inherit is elsewhere treated. See Aliens,* § 2; Bastards,* § 2.

16. Under Laws 1845, c. 115, p. 94, if an owner of real estate died leaving a widow and only alien heirs, such property escheated to the state subject to the widow's dower. Criswell v. Noble, 61 Misc. 483, 113 NYS 954.

the testatrix of the person to whom the bequest was made, such share will be paid into the treasury of the state.[17] The holding by a corporation of real property not necessary to its business for more than five years[18] is a ground of escheat in Kentucky.[19] The petition must allege that the corporation has held the title to the land for five years and that during that time the property was not necessary for its legitimate business.[20]

ESCROWS.[21]

The scope of this topic is noted below.[22]

To constitute an escrow it is absolutely necessary that its deposit be irrevocable[23] and conditional.[24] The mere giving of a deed to a third party cannot constitute per se a delivery in escrow,[25] for the vital element in the act is the intention with which the parting with the instrument was done.[26] While in most cases the condition is to be performed by the grantee, yet the delivery may be conditioned upon the performance of an act by the grantor.[27] A deed cannot be delivered to the grantee in escrow.[28]

An instrument delivered in escrow, to be delivered to the obligee upon the happening of an event or the performance of a condition, is not operative to transfer title until the event happens or the condition is fulfilled, and the second delivery is made or at least the obligee becomes absolutely entitled to such delivery,[29] and the

17. Code Civ. Proc. § 2747. In re Beaver's Estate, 62 Misc. 155, 116 NYS 424.

18. The expression in section 192 of the constitution, "as may be proper and necessary," has no reference to the future but deals with a situation five years next preceding the time it may be invoked. Commonwealth v. Louisville Property Co. [Ky.] 121 SW 399.

19. If railroad company provided the money to buy the land and caused the title to be conveyed to a dummy corporation created at the instance of the railroad company, whether its stockholders and those of the railroad company were the same or not, so that the railroad company might hold the title to the land in spite of the constitution and statute, the land would be subject to escheat. Commonwealth v. Louisville Property Co. [Ky.] 121 SW 399. The power of the dummy corporation to which the property was conveyed was immaterial so far as the right of the state to escheat was concerned. Id.

20. Petition fatally defective. Commonwealth v. Louisville Property Co. [Ky.] 121 SW 399.

21. See 11 C. L. 1273.

Search Note: See notes in 3 C. L. 1338; 5 Id. 1181, 1182; 11 Id. 1274; 17 L. R. A. 511; 2 L. R. A. (N. S.) 628; 11 Id. 1183; 12 Id. 1120; 11 A. S. R. 314; 53 Id. 555.

See, also, Escrows, 16 Cyc. 561-588; 11 A. & E. Enc. L. (2ed.) 333.

22. Includes all matters as to rights and liabilities resulting from the delivery of contracts and conveyances in escrow.

23. Instruments deposited, to be delivered not on the happening of a certain event or the performance of a condition, but on the joint order of the grantor and grantee, were not escrows. Masters v. Clark [Ark.] 116 SW 186. The leaving of deed by grantor in hands of his agent for delivery or awaiting payment of purchase price not an escrow because revocable. Watson v. Chandler [Ky.] 119 SW 186. Grantor delivered deeds to depository to be delivered after his death. Held, under the evidence, that he intended to part with all control over them. Callerand v. Piot, 241 Ill. 120, 89 NE 266.

24. Evidence held to sustain finding that deed was delivered unconditionally. Plunkett v. Mountain Park Land Co. [Ark.] 119 SW 272.

25. Baker v. Baker, 9 Cal. App. 737, 100 P 892.

26. Evidence held to sustain finding that plaintiff did not intend to deliver deed in escrow though at the time she left deed with third party she signed the words "This deed that is inclosed in this envelope is to be delivered to Zachariah D. Baker at my death." Baker v. Baker, 9 Cal. App. 737, 100 P 892.

27. Tooker v. Siegel-Cooper Co., 194 N. Y. 442, 87 NE 773.

28. Potter v. Barringer, 236 Ill. 224, 86 NE 233.

29. Grindle v. Grindle, 240 Ill. 143, 88 NE 473; Sullivan v. Mefford [Iowa] 121 NW 569. An instrument in escrow is not a deed until the condition is performed. Selbel v. Higham, 216 Mo. 121, 115 SW 987. Deed was to be delivered to grantee on his exercising his option to purchase within certain time. Grantor died and grantee failed to purchase within specified time. Held that deed was ineffective to pass title. Id. Where deed was to be delivered when vendee paid purchase money, notes, etc., title remained in vendor until fulfillment of contract. Foxley v. Rich [Utah] 99 P 666. A deed, bill of sale, or note becomes effective on the fulfillment of the conditions, though there is no actual delivery. Ketterson v. Inscho [Tex. Civ. App.] 118 SW 626. Where bill of sale and note for the price were placed in escrow to be delivered on buyer securing indorser of

depositing of title deeds does not create an equitable lien or mortgage.[30] As to instruments of other than deeds, the law does not hold to its ancient strictures as regards the delivery,[31] hence it has been held that a promissory note may be delivered to the payee [32] or his agent [33] in escrow, to become effective if certain conditions are fulfilled, and it is said that such delivery can be made to the agent of either party.[34] The depositary is not, strictly speaking, an agent, but he is a trustee of an express trust with duties to perform for each party which neither can forbid without the consent of the other.[35] The depositary may make a delivery upon the performance of the condition or the happening of the event.[36] In an action against a depositary to compel delivery it is not necessary to allege the value of the instrument.[37] A depositary claiming no interest in the instrument beyond the right to hold the possession until the happening of a certain contingency cannot defend on the ground that the action is to enforce a forfeiture.[38] The doctrine of delivery in escrow cannot be successfully invoked to render a mortgage valid as against creditors where by statute it would be void;[39] and when the conditions are performed a deed will relate back to the time of its execution only when justice requires that the doctrine of relation be enforced.[40] Where, by contract of the parties, land is conveyed by an escrow deed, a conveyance from the grantee only operates as an assignment of the grantee's right under the contract.[41]

ESTATES OF DECEDENTS.

The scope of this topic is noted below.[42]

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note, the buyer having secured indorser and delivery of note being made to seller, the buyer and indorser were liable on the note, though bill of sale continued in escrow according to agreement to which seller was not a party. Ketterson v. Inscho [Tex. Civ. App.] 118 SW 626.

30. Deposit of deed to a partner to be held in escrow until firm's debts were paid merely operated to hold deed in abeyance and furnished no security for debts paid by grantor. Tuller v. Leaverton [Iowa] 121 NW 515.

31. St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 A 145. The rule of the common law that there could be no delivery in escrow of a deed to the grantee is still in force in Georgia, but it has no application to ordinary simple contracts in writing, especially those not reciting delivery. Heitman v. Commercial Bank [Ga.. App.] 65 SE 590.

32. St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 A 145.

33. St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 A 145. Contract of purchase of machine and notes for purchase price delivered to seller's agent to become effective on certain conditions held valid delivery in escrow. Case Threshing Mach. Co. v. Barnes [Ky.] 117 SW 418.

34. St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 A 145; Case Threshing Mach. Co. v. Barnes [Ky.] 117 SW 418. Fact that one was the agent of the promisor did not preclude his being the depositary of the note, provided he received it not in his capacity as agent but in his individual capacity. St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 A 145.

35. Seibel v. Higham, 216 Mo. 121, 115 SW 987.

36. On failure of maker to pay certain note, depositary held authorized to deliver to payee stock certificate placed in escrow to secure note. Haynes v. Griffith [Idaho] 101 P 728. The grantee acquires no right by an **unauthorized delivery** before the happening of the event upon which the delivery is to take place. Grindle v. Grindle, 240 Ill. 143, 88 NE 473. Where condition required payment of consideration, delivery of deed without payment passed no title. Bradford v. Durham [Or.] 101 P 897. Evidence held to show that delivery of deed to grantee was unauthorized. Morris v. Blunt [Utah] 99 P 686.

37. Harrison v. Woodward [Cal. App.] 103 P 933.

38. Harrison v. Woodward [Cal. App.] 103 P 933.

39. Delivery of mortgage to third party to be delivered to mortgagee if debt was not paid before a future date held inoperative as against creditors because of lien law. Laws 1897, p. 536, c. 418, § 90, as amended by Laws 1900, p. 499, c. 248. Tooker v. Siegel-Cooper Co., 194 N. Y. 442, 87 NE 773.

40. Foxley v. Rich [Utah] 99 P 666.

41. Sullivan v. Mefford [Iowa] 121 NW 569.

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§ 1. *Necessity or occasion for administration and kinds thereof.*[43] See 11 C. L. 1276—Regular administration proceedings are often rendered unnecessary or im-

under the interstate laws (see Descent and Distribution*), the validity, probate and interpretation of wills (see Wills*), testamentary trusts (see Trusts*), administration of partnership property by surviving partner (see Partnership,* § 7D2), and of community property by the survivor of the community (see Husband and Wife,* § 4E), administration on estates of absentees (see Absentees*), and inheritance and succession taxes (see Taxes,* § 15), are treated in separate articles. General principles regulating costs (see Costs,* §§ 4, 7D), and counsel fees (see Attorneys and Counselors,* § 7), in actions by or against the representative, are excluded, but allowances to the representative for such expenses incurred on behalf of the estate (see post, § 9D), are elsewhere treated.

43. **Search Note:** See notes in 15 L. R. A. 490; 24 Id. 684; 1 L. R. A. (N. S.) 885; 3 Ann. Cas. 1126; 6 Id. 263; 7 Id. 861, 881.

See, also, Executors and Administrators, Cent. Dig. §§ 1-20, 106-140, 267-278, 2583-2603; Dec. Dig. §§ 1-7, 21-23, 87, 538-544; 18 Cyc. 55-74, 98-114, 1354-1367; 1 A. & E. Enc. L. (2ed.) 786; 2 Id. 156; 8 Id. 1003; 11 Id. 720,

* Always begin with the latest article on the subject. Use the latest topical index.

proper by the absence of debts [44] or of assets subject to administration,[45] or by valid settlement of the affairs of the estate out of court.[46] It will not be presumed, however, that an intestate left no creditors or that particular property will not be needed for the payment of debts and administration expenses.[47] The same necessity for administration exists where a nonresident decedent leaves property in the state as would have existed had he lived and died within the state,[48] and the pendency of domiciliary administration proceedings is immaterial.[49] Where by statute a legacy to one who predeceases testator goes directly to the persons entitled to take through the legatee, it is not necessary to appoint an administrator for the receipt and distribution of the legacy.[50] The right of an heir to recover personalty when there is no administrator is treated in a subsequent section.[51]

Where for some reason the regular representative fails or ceases to act, there may be appointed an administrator with the will annexed [52] or an administrator de bonis non.[53]

Temporary administrators.[54]—See 9 C. L. 1155—A temporary or special adminis-

741; 12 Id. 875; 13 Id. 915; 17 Id. 616; 19 Id. 1288; 22 Id. 156, 23 Id. 109, 117.

44. Record held not to disclose reason for disturbing finding of lower court that administration was necessary against objection there were no valid claims. In re McWhirter's Estate, 235 Ill. 607, 85 NE 918. Allegations by objectors that they were ready and willing to pay any valid existing claims and denying that there were any held not to justify denial of administration. Id. Pleadings in action on note held to show existence of debts. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372. Absence of **debts of nonresident decedent** as affecting necessity for administration of assets within the state can be judicially established only by administrators in due course and not by affidavit. State v. Thurston County Super. Ct., 52 Wash. 149, 100 P 198.

45. Term "bona notabila" means notable goods or property worthy of notice or of sufficient value to be accounted for. Neal v. Boykin [Ga.] 64 SE 480. Not proper to grant letters c. t. a. unless there are unministered assets. In re Bedford, 130 App. Div. 642, 115 NYS 472. A certain money obligation held still part of decedent's estate though withheld from distribution on agreement of another to pay same, rendering appointment of administrator de bonis non proper on failure of payment. Spring v. Perkins, 156 Mich. 327, 16 Det. Leg. N. 127, 120 NW 807. Pleadings in action on note held by deceased wife against husband held to show that there were debts against estate and that decedent left personalty to be administered. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372. Where decedent died leaving mortgaged homestead and no estate subject to administration, it was unnecessary to have administrator appointed and made party in foreclosure of mortgage, surplus, if any, going to widow. Hardy v. Atkinson, 136 Mo. App. 595, 118 SW 516. Rev. St. 1899, c. 52, § 4346 (Ann. St. 1906, p. 2392), requiring mortgagor's representative to be made party defendant, held not controlling. Id.

46. Persons interested in estate may settle their rights out of probate court, administration not being essential. Prichard v. Mulhall [Iowa] 118 NW 43. For questions disconnected with necessity or occasion for administration and arising out of contracts between persons interested in estate, see post, § 17A.

47. Where mother and daughter each owned half of stock of a corporation and mother was daughter's sole heir, mere showing that daughter had died intestate did not estop corporation to deny authority of mother to convey realty of corporation on theory mother owned all the stock. Black v. Harrison Home Co. [Cal.] 99 P 494.

48. Where testator died in California leaving property in Washington, there was same necessity for administration in Washington as would have existed had testator lived and died there. State v. Thurston County Super. Ct., 52 Wash. 149, 100 P 198.

49. State v. Thurston County Super. Ct., 52 Wash. 149, 100 P 198.

50. Under Code Pub. Gen. Laws 1904, art. 93, § 320, providing that legacies to persons predeceasing testator shall have same effect as if legatee had survived, held not necessary to appoint administrator of deceased legatee, legacy going immediately to persons entitled to take under legatee. Vogel v. Turnt, 110 Md. 192, 72 A 661.

51. See post, § 5B.

52. Probate court may grant administration with will annexed under Ky. St. 1909, § 3891 (Russell's St. § 3937), only where no executor is appointed by will, or in case all executors die, refuse the trust, or fail to give bonds. Adams v. Readnour [Ky.] 120 SW 279. Letters c. t. a. should not be granted unless there are assets remaining unadministered. In re Bedford, 130 App. Div. 642, 115 NYS 472.

53. Appointment of administrator d. b. n. held proper after discharge of administrator, a certain money obligation still being part of estate and remaining unpaid. Spring v. Perkins, 156 Mich. 327, 16 Det. Leg. N. 127, 120 NW 807. Personalty unadministered at death of an executor must be transferred to legatees by administrator de bonis non. Choses in action for residuary legatees. Stillman v. Westerly Probate Ct. [R. I.] 72 A 417.

54. General powers and duties of temporary administrators, see post, § 4.

trator is a representative of decedent appointed by the probate court to care for and preserve his estate until the appointment of an executor or general administrator.[55] Will contests often necessitate the appointment of such a representative.[56]

§ 2. *Jurisdiction and courts controlling administration.*[57] See 11 C. L. 1276 Jurisdiction over the settlement of estates of decedents is usually regulated either by statute [58] or by constitutional provisions,[59] and, of course, assumes the death of some person [60] within the county or state [61] leaving assets,[62] or the existence in the county or state of property left by a nonresident decedent.[63] Where there are assets of a a nonresident in two counties, administration can be granted in either,[64] and the court or ordinary which first takes jurisdiction retains it.[65] There cannot, as a

55. Jones v. Minnesota Transfer R. Co. [Minn.] 121 NW 606. Under § 5045, Cobbey's St. 1907, whenever it appears to probate court that for any reasonable cause interests of estate demand action by some one authorized to act, prior to time when letters can be issued, it is duty of court to appoint a special administrator to act until regular executor or administrator can be appointed. Keegan's Estate v. Welch, 83 Neb. 166, 119 NW 252. That will could not be probated until after three weeks' published notice and a farm was unrented held sufficient cause. Id. Where next of kin unsuccessfully attempted to recover property alleged to belong to estate, evidence held to entitle them to amend bill so as to pray for **receiver** pending appointment of administrator. Buchanan v. Buchanan [N. J. Eq.] 71 A 745.

56. Fact that all persons interested in estate had not been made parties to suit to contest will at time court appointed administrator pendente lite held not prejudicial, all heirs being subsequently made parties by amended petition. Achor v. Sullenger, 137 Mo. App. 372, 117 SW 1191. Kirby's Dig. §§ 13, 36, held not to require appointment of temporary administrator to take place of executor during will contest, after will has once been probated and letters have issued to executor. Id.; Steen v. Springfield [Ark.] 120 SW 408.

57. See Jurisdiction.

Search Note: See notes in 12 L. R. A. (N. S.) 154; 2 Ann. Cas. 870; 5 Id. 192; 6 Id. 878.

See, also, Courts, Cent. Dig. §§ 469-486; Dec. Dig. §§ 198-202; 11 Cyc. 791-799; Equity, Cent. Dig. §§ 51-62; Dec. Dig. § 22; 16 Cyc. 91-101; Executors and Administrators, Cent. Dig. §§ 21-28, 336-338, 714, 893-895, 1274-1277, 1372-1375, 1555, 1716-1725, 2000-2013, 2507-2509; Dec. Dig. §§ 9-13, 76, 194(2), 250, 314(2), 333, 380(2), 435, 469, 537(4); 18 Cyc. 65, 67, 69-73, 399-402, 525, 640-658, 700, 812-818, 905-911, 1115-1119; 1280-1309; 23 A. & E. Enc. L. (2ed.) 113; 4 A. & E. Enc. P. & P. 537; 19 Id. 1005.

58. Power to grant letters of administration is purely statutory. In re Guye's Estate [Wash.] 103 P 25. Orphans' court is restricted to exercise of powers expressly delegated which cannot be extended by construction or implication. Flater v. Weaver, 108 Md. 668, 71 A. 309. Orphans' court has only such powers as are given by statute, expressly or by necessary implication. In re Cutler's Estate [Pa.] 73 A 1111. But after its jurisdiction has once attached, it may determine all questions standing directly in the way of a conversion and distribution of property of decedent. Id. Probate court of Cook county has general jurisdiction of settlement of decedents' estates. Balsewicz v. Chicago, B. & Q. R. Co., 240 Ill. 238, 88 NE 734. County court has exclusive jurisdiction of personalty of a decedent's estate and determination of what constitutes the personal estate and respective shares of heirs therein. De Bow v. Wollenberg, 52 Or. 404, 97 P 717. Such matters not determinable in suit by heirs to set aside conveyance by decedent. Id. District court is without original jurisdiction to distribute funds of estates of decedents. In re Manning's Estate, 83 Neb. 417, 119 NW 672.

59. Under Const. art. 4, § 40, legislature may not only make changes in powers of orphans' courts, but may grant additional powers. Savings Bank v. Weeks, 110 Md. 78, 72 A 475. Const. § 111, confers authority upon county courts in probate, testamentary and guardianship matters only, and legislature cannot enlarge such jurisdiction. Finn v. Walsh [N. D.] 121 NW 766. Revised Codes 1905, § 8083, held not to enlarge constitutional powers of county court. Id.

60. Conclusiveness of decrees adjudicating death, see post, § 15, Administration Orders and Decrees.

61. Appointment of administrator by probate court of county other than that of decedent's domicile held void. Anderson v. Walter [Kan.] 99 P 270. Release of mortgage by such administrator held ineffectual. Id.

62. See ante, § 1. What are assets, see post, § 5A.

63. Under Act March 23, 1897, authorizing settlement of estate of a nonresident by court in any county where estate may be, appointment of administrator by court of county other than that in which nonresident died or left property held unauthorized. In re Bailey's Estate [Nev.] 103 P 232. If there are assets of nonresident's estate in county in which application for letters is made, at time of such application, court will have jurisdiction though property was not there at time of his death (Neal v. Boykin [Ga.] 64 SE 480), provided such property was not fraudulently transferred to such county for purpose of improperly conferring colorable jurisdiction (Id.). Charge of fraud held not sustained by proof. Id. Evidence held to show existence of assets at time of application. Id.

64, 65. Neal v. Boykin [Ga.] 64 SE 480.

66. This rule is, however, inapplicable to case of temporary commitment of estate to sheriff, as curator, pending county court's determination of right of administration.

rule, be two valid grants of administration on the same estate at the same time within the same state jurisdiction.[66]

The power of the courts [67] to appoint representatives [68] and control [69] or charge them,[70] to allow commissions,[71] to act on claims,[72] to adjudicate title to property,[73] real [74] or personal,[75] to refer issues,[76] to charge,[77] appraise,[78] partition,[79] or order sale

Butcher v. Kunst, 65 W. Va. 384, 64 SE 967. It being duty of an executor to administer undevised as well as devised property, judgment declaring partial intestacy and appointing administrator of property undevised, without removing executor, is void on its face. Knowles v. Knowles [Ga.] 65 SE 128.

67. Questions as to the rightful or wrongful exercise of conceded general powers are treated in the different sections dealing with the particular subject-matter involved.

68. Circuit court on appeal from probate court cannot exercise power to grant letters pending will contest conferred on probate court by Kirby's Dig. § 13. Steen v. Springfield [Ark.] 120 SW 408. Appointment of stranger as special administrator in disregard of petitions of relatives and beneficiaries, though error of law, held not jurisdictional so as to be reviewable by certiorari. Dahlgren v. Santa Cruz County Super. Ct., 8 Cal. App. 622, 97 P 681.

69. Surrogate has no power to direct or control administrator as to property to which he has no title and no right of possession as administrator. In re Sergeant's Estate, 62 Misc. 173, 116 NYS 273.

70. Superior court has jurisdiction, in settling accounts of an administrator, to determine amount of money or property of estate which came into his hands and to charge him therewith. In re Hall's Estate, 154 Cal. 527, 98 P 269.

71. Surrogate has implied power to allow compensation by way of commissions to trust company with which securities of estate are deposited, under Code Civ. Proc. § 2595, for purpose of reducing representative's bond. In re Butman's Estate, 130 App. Div. 156, 114 NYS 533.

72. Though surrogate's court has no jurisdiction to determine merits of claims presented against estate, it has authority to decide whether they have been properly presented, allowed or rejected. In re Scheetz's Estate, 62 Misc. 166, 116 NYS 428. Under Code Civ. Proc. § 2722, requiring dismissal of creditor's petition in surrogate's court where representative files answer establishing doubt as to validity of claim, answer setting up discharge in bankruptcy held to oust further jurisdiction of surrogate's court. In re Peterson's Estate, 62 Misc. 161, 116 NYS 286. Allegation of insufficient assets held not to require dismissal. Id. Surrogate's court has jurisdiction on settlement of executors' accounts to determine whether a judgment against testator was discharged in bankruptcy, though it cannot pass on validity of judgment, etc. In re Williams' Estate, 118 NYS 562. Allowance of a claim by tribal probate court of Chickasaw Indian nation after Atoka agreement held not reversible for want of jurisdiction after such court and territorial courts of Indian Territory had passed out of existence. Elliott v. Garvin, [C. C. A.] 166 F 278. As incidental to its jurisdiction to administer a decedent's estate by virtue of its chancery powers, circuit court has power to require creditors to prove their claims, and, if advisable, to enjoin them from proceeding elsewhere. Jenkins v. Jenkins [S. C.] 65 SE 736.

73. Probate court cannot inquire into rights of third persons in property descending to heirs, acquired since the ancestor's death. State v. Donahue [Conn.] 73 A 763. Court of ordinary is without power to pass on issue of title to property claimed by third person on widow's application for year's support. Dix v. Dix [Ga.] 64 SE 790. Probate court is not proper place for trial of title to realty or personalty, either against administrator or strangers. Mitchell v. Bay Probate Judge, 155 Mich. 550, 16 Det. Leg. N. 2, 119 NW 916. County court cannot determine title to property as between administrator and third persons. Harrington v. Jones [Or.] 99 P 935. While orphans' court may ascertain whether a substantial dispute exists as to decedent's title to property omitted from inventory on ground it belongs to others (In re Cutler's Estate [Pa.] 73 A 1111), on such fact appearing, it is without power to determine issue of ownership but should direct such issue to court of common pleas (Id.), regardless of whether claimant of the property asks for such direction (Id.). Orphans' court held without jurisdiction of issue as to decedent's mental capacity to make a valid gift to his daughter of securities which she, as executrix, omitted from inventory on ground her father had given them to her. Id.

74. Probate court is without jurisdiction to pass on husband's right to curtesy as against heirs. Strom's Estate v. Strom, 134 Mo. App. 340, 114 SW 581. Cannot determine title to land order for sale of which is sought by representative. In re Wood's Estate [Mo. App.] 120 SW 635. Const. art. 6, § 16, precluding county court from adjudicating title to realty, does not apply to cases where title is involved only incidentally in consideration of an important litigable question of which county court has exclusive original jurisdiction. In re Buerstetta's Estate, 83 Neb. 287, 119 NW 469.

75. Probate court held without jurisdiction over question as to whether administrator was owner of securities found among decedent's effects but payable to administrator's order. Hartwig v. Flynn [Kan.] 100 P 642. Orphans' court cannot determine title to personalty except under Code Pub. Gen. Laws 1904, art. 93, § 243. Fowler v. Brady, 110 Md. 204, 73 A 15. While an inventory returned by an administrator may on his application to orphans' court be corrected, the court has no authority on petition of one claiming the property to determine question of title against claim of administrator that it belongs to estate. Id. County court held without jurisdiction to determine title to fund derived from fraternal beneficiary cer-

of land,[80] or to set aside sales,[81] to compel accounting,[82] to vacate or modify previous orders or decrees,[83] or to grant other equitable relief,[84] varies in the different states. The presumptions in favor of the jurisdiction of courts of general jurisdiction apply to probate courts having exclusive jurisdiction over probate proceedings.[85] Where the issue of heirship is pending in probate proceedings another court is without jurisdiction to determine it collaterally.[86]

Jurisdiction of courts of equity.[87]—See 11 C. L. 1278—The administration of estates is within the general powers of courts of chancery[88] and an equity court may

tificates held by decedent in his lifetime. Finn v. Walsh [N. D.] 121 NW 766. District court on appeal held without jurisdiction. Id. Orphans' court has power to determine ownership of stock included in executor's inventory and accounted for, and therefore in gremio legis. In re Paxton's Estate [Pa.] 73 A 1114.

76. Orphans' court can send issues of fact to a court of law only in cases where orphans' court has jurisdiction to determine the matter. Fowler v. Brady, 110 Md. 204, 73 A 15. If orphans' court, acting within its jurisdiction, on petition of claimant to personalty, has ordered the property stricken from inventory of decedent's estate, it cannot order same issue sent to a jury for trial on petition of a creditor. Id.

77. In accounting proceedings surrogate's court held without jurisdiction to determine whether legacies were charges against residuary realty. In re Taber, 132 App. Div. 495, 116 NYS 960.

78. Jurisdiction of orphans' court to appraise realty is limited to cases arising under Code Pub. Gen. Laws 1904, art. 81, § 125, and art. 93, §§ 158, 205. Magin v. Niner, 110 Md. App. 299, 73 A 12. Is without jurisdiction to exercise power to appraise for purpose of allowing devisees to take property at appraised value, where power is testamentary and no donee is named. Id.

79. Partition in district court will not lie where it appears that estate is still in process of administration in probate court having exclusive jurisdiction. District court could not entertain suit for partition and to determine heirship. Wilkinson v. McCart [Tex. Civ. App.] 116 SW 400. Plea to jurisdiction not waived by failure to present it at first term of court after it was filed. Id. That application of heirs for partition of lands was contested by purchaser of land under judgment against administrator held not to destroy all jurisdiction of probate court so that all subsequent proceedings could be collaterally attached in ejectment against purchaser, though Code 1896, § 3176, provides that no partition can be made when adverse claim is asserted. Taylor v. Taylor [Ala.] 50 S 375.

80. Husband who joined wife in mortgage on her land held estopped to deny jurisdiction of probate court to order sale of land to discharge lien. Hampton v. Murphy [Ind. App.] 86 NE 436.

81. Authority of probate court to set aside sale made under testamentary power is only coextensive with its power over sales under its own orders. In re Mulholland's Estate [Pa.] 73 A 932.

82. See post, § 11A.

83. Probate court on final settlement may exercise all powers of a court of equity and may review, set aside, or modify, previous judgments allowing claims, and require final report to be surcharged with all matters improperly allowed by previous orders. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228. Probate court held empowered to set aside prior ex parte order allowing a claim. In re Coryell's Estate [Idaho] 101 P 723. See, also, post, § 15, Administration Orders and Decrees. Courts of probate in the settlement of final accounts possess all the powers of a court of equity and may vacate fraudulent orders previously made. Whittemore v. Coleman, 144 Ill. App. 109.

84. Probate court has powers of court of equity in settlement of final account. Whittemore v. Coleman, 144 Ill. App. 109. Michigan probate court held without plenary equity power to grant widow relief against election to take under husband's will. Eddy v. Eddy [C. C. A.] 168 F 590. Surrogate's court has no jurisdiction of claim for injury alleged to have been inflicted on estate by executor's purchase of realty for his own profit. In re McInerney, 62 Misc. 441, 116 NYS 1039. Surrogate's court held without jurisdiction **to vacate deed** alleged to have been made by executrix without consideration, and instruments whereby legatees acknowledged receipt of proceeds. Farrelly v. Skelly, 130 App. Div. 803, 115 NYS 522.

85. Magee v. Big Bend Land Co., 51 Wash. 406, 99 P 16. Since territorial probate court had full authority over probate and testamentary proceedings, its judgment in selling and confirming sale of land must be presumed to have been based on jurisdiction conferred, unless it affirmatively appears it acted without jurisdiction in matters subsequent to inauguration of probate proceedings. Id.

86. Thomas v. Olenick, 140 Ill. App. 385.

87. See, also, Equity, § 2. For equity powers in particular proceedings see, also, ante, this section.

88. Circuit court by virtue of its chancery powers has jurisdiction over administration of estates of decedents. Jenkins v. Jenkins [S. C.] 65 SE 736. Jurisdiction of chancery in administration of estates is original, and representative may apply to such court for relief and have administration removed thereto at any time before jurisdiction of probate court has attached, where affairs of estate are so much involved that he cannot safely administer except under directions of court of equity. Hurt v. Hurt [Ala.] 47 S 260. Equity held to have jurisdiction of bill by administrator against person claiming property as a gift to declare such property a trust fund and have a trust enforced, to follow property purchased with such fund

exercise jurisdiction when matters beyond the cognizance of the probate court are involved,[89] or where administration is not provided for by statute.[90] In cases where probate and equity jurisdictions are concurrent, resort to the latter must be founded on special circumstances.[91] Though the court will usually retain jurisdiction until complete relief is granted,[92] its interference should not extend beyond the necessities of the case,[93] and the substantive law regulating the conduct and settlement of administrations in the probate court will be applied.[94] Where adjudication of a question by the probate court would embarrass subsequent equitable proceedings, it is properly reserved for adjudication in equity.[95]

Jurisdiction of federal courts.[96]—See 11 C. L. 1279—Though federal courts have no general jurisdiction to administer the estates of decedents,[97] receivers may be appointed to preserve an estate for the benefit of creditors pending an abeyance or dispute in state probate or administration proceedings.[98]

§ 3. *The persons who administer and their letters. A. Selection and nomination.*[99]—See 11 C. L. 1279—The right to administer a decedent's estate is not a natural right, but resides first in the state.[1] Letters should be issued to the executor named in a will if he is competent.[2] Such persons should be given an opportunity to accept or decline the trust,[3] and mere delay on his part in qualifying is ordinarily not justi-

and restrain alienation, as against objections of adequate remedy at law and right to jury trial. Chamberlain v. Eddy, 154 Mich. 593, 15 Det. Leg. N. 865, 118 NW 499.

89. Equity may exercise testamentary power of appraisal of realty where no donee is named and orphans' court is without jurisdiction. Magin v. Niner, 110 Md. 299, 73 A 12. Bill by executor against certain distributees for discovery and accounting held in effect to withdraw administration from probate court to court of equity. Hurt v. Hurt [Ala.] 47 S 260. Equity will take jurisdiction where testamentary trusts are doubtful or difficult to execute, or discovery or accounting is necessary. Id. Circumstances such as value of realty, lapse of time, etc., held to require legatee to proceed in equity for sale of land to pay legacy, it appearing also that land had passed beyond control of representative. Walker v. Follett's Estate [Me.] 73 A 1092.

90. Settlement of estates is had under equity power of circuit court where not directed by statute. Hildebrand v. Kinney [Ind.] 87 NE 832.

91. Strawn v. Jacksonville Academy Trustees, 240 Ill. 111, 88 NE 460. Except for special reasons, equity courts will not interfere with ordinary jurisdiction of probate courts in settlement of accounts of executors and administrators. Filley v. Van Dyke [N. J. Err. & App.] 72 A 943. If such special reasons are apparent, it is both right and duty of chancery court to interfere. Id. Unexplained delays, failure to turn property over to substituted representative, action of judge in passing an item of account in which he was personally interested, etc., held special causes. Id. Grounds sufficient to justify equitable interference are determinable by court of equity. Hurt v. Hurt [Ala.] 47 S 260. Objection that supreme court will not entertain suit to settle accounts but leave same to surrogate except under special circumstances cannot be taken by demurrer. Mildeberger v. Franklin, 130 App. Div. 860, 115 NYS 903.

92. Hurt v. Hurt [Ala.] 47 S 260. Where equity court and orphans' court had concurrent jurisdiction of certain matters relating to settlement of estate, but equity court had exclusive jurisdiction to carry out provision of will relative to appraisement of land and of other questions which might arise, and had taken jurisdiction over these matters, it should retain control over settlement of whole estate. Magin v. Niner, 110 Md. 299, 73 A 12.

93. Court of equity setting aside for fraud deed of interest of a beneficiary under a will held without authority to close administration of testator's estate then pending in probate court. Coppedge v. Weaver [Ark.] 119 SW 678.

94. Hurt v. Hurt [Ala.] 47 S 260.

95. Question as to executor's right to commissions in view of his alleged conduct should be reserved for equity adjudication, where surrogate's findings will conclude parties in any equity suit involving his transactions. In re McInerney, 62 Misc. 441, 116 NYS 1039.

96. See, also, Jurisdiction.

97, 98. Underground Elec. R. Co. v. Owsley, 169 F 671.

99. Search Note: See notes in 16 L. R. A. 538; 24 Id. 289; 1 L. R. A. (N. S.) 341; 78 A. S. R. 171; 108 Id. 413; 113 Id. 562; 3 Ann. Cas. 988; 4 Id. 550; 5 Id. 497.

See, also, Executors and Administrators, Cent. Dig. §§ 29-82, 106-143; Dec. Dig. §§ 14-19, 21-25; 18 Cyc. 74-77, 80, 81, 83-103, 106, 108-118, 127, 1351; 19 Cyc. 1250; 11 A. & E. Enc. L. (2ed.) 744; 19 A. & E. Enc. P. & P. 827.

1. In re McWhirter's Estate, 235 Ill. 607, 85 NE 918.

2. In absence of statute, power of testator to name executor is coextensive with his power to devise or bequeath his property. In re Guye's Estate [Wash.] 103 P 25. That executor's children had an interest adverse to certain claimants held no ground for withholding letters. In re Bennett's Will, 60 Misc. 28, 112 NYS 592.

3. Adams v. Readnour [Ky.] 120 SW 279.

fication for appointment of another without citing the former to accept or decline.[4] As a rule intestacy is a prerequisite to the granting of letters of general administration.[5] In case of intestacy, letters must be granted in the order of preference prescribed by statute.[6] Since the object of statutory regulations is to secure the right of administration to persons beneficially interested in the estate,[7] the right is generally given first to the surviving spouse, if not disqualified,[8] then to heirs, next of kin,[9] or distributees,[10] or persons nominated by them,[11] then to creditors[12] or other

4. Where executor failed to qualify before convening of second term of county court, appointment of administrator c. t. a. was not thereby warranted until executor had been cited to appear and show cause why he should not accept or decline the trust. Adams v. Readnour [Ky.] 120 SW 279. Ky. St. 1909, §§ 3891, 3896, 3897 (Russell's St. §§ 3937, 3919, 3920), regulating appointment of administrators, held not to authorize appointment of creditor or other person in such case. Id.

5. In re Guye's Estate [Wash.] 103 P 25. Court, on application of surviving spouse, held without power to grant letters of general administration of community property where will of husband designated executor to administer both community property and his separate estate, and after such executor had been appointed. Id.

6. Statute fixing order of preference is mandatory, and court may not arbitrarily refuse applicants coming within its terms and issue letters to persons postponed thereby. In re Ellis' Estate [Ind. App.] 88 NE 341.

7. In re Ellis' Estate [Ind. App.] 88 NE 341. In view of such purpose, a creditor is entitled to preference over relative having no interest in estate. Id. Appointment of successor to executor removed for good cause will not be disturbed where satisfactory to person entitled to more than four-fifths of estate. In re Rice's Estate [Mich.] 16 Det. Leg. N. 528, 122 NW 212. Half-sister entitled to share in estate in absence of will is "interested in estate" within Code Civ. Proc. § 2643, relating to grant of letters c. t. a. though she took nothing under will. In re Brown, 60 Misc. 628, 113 NYS 937. Daughter who had received her full share under will held not entitled to petition for appointment of administrator with will annexed. Diem v. Drogmiller [Mich.] 16 Det. Leg. N. 635, 122 NW 637. Under Code Civ. Proc. § 1365, providing that relatives are entitled to administer only where they succeed to some portion of estate, child taking under will held entitled to preference over widow taking nothing. In re Crites' Estate [Cal.] 101 P 316.

8. Letters of administration to father held revocable at instance of husband as to whom evidence failed to show disqualification. In re O'Hare, 60 Misc. 269, 113 NYS 281.

9. Primarily "next of kin" are persons nearest in degree of blood. In re Weaver's Estate [Iowa] 119 NW 69. If decedent left neither parents nor lineal descendants, brothers and sisters are "next of kin." Id. In practical use in public statutes "next of kin" ordinarily means those who take personal estate under statute of distribution. Id. "Next of kin" within statute, means those next of kin at intestate's death, and who inherit estate, words "having an inheritable interest" adding nothing. In re Ellis' Estate [Ind. App.] 88 NE 341. Brother is not "next of kin" within Code, § 3297, where a son survives, and hence cannot complain of appointment of nominee of son as administrator, in absence of showing such appointment was improper, or that change is required by interests of estate or of beneficiaries. In re Weaver's Estate [Iowa] 119 NW 69. Brother held not entitled to administer as next of kin where father was living but had not applied for administration, because he could inherit as next of kin if father was dead. Colbert v. Thornley [R. I.] 71 A 65. Brother held entitled to letters of administration where decedent left only a brother and some sisters, under Code Pub. Gen. Laws 1904, art. 93, § 21, preferring brothers and sisters in such cases, and § 23 preferring males to females, it not being shown brother was incapable. Stouffer v. Stouffer, 110 Md. 368, 72 A 843. Evidence held to show that applicant was decedent's child, and issue of her marriage with the one he claimed was his father. Succession of Ledet, 122 La. 200, 47 S 506. **Appointment of stranger** within time allowed relatives to apply for administration is not void under Ky. St. 1903, §§ 3896, 3897, but only voidable. McFarland's Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 82. Appointment of stranger in disregard of relatives held not jurisdictional error. Dahlgren v. Santa Cruz County Super. Ct., 8 Cal. App. 622, 97 P 681. Order appointing administrator without giving next of kin opportunity to accept position held not void though erroneous. Cunningham v. Clay's Adm'r [Ky.] 112 SW 852.

10. Heirs of sole distributee held not entitled to preference over creditor, as distributees of first decedent. Butcher v. Kunst, 65 W. Va. 384, 64 SE 967. At any rate, they would have to apply to county court. Id.

11. Under § 5351, Rev. St. 1887, only persons mentioned in subdivision thereof can by nominating some other person advance him to their own rank so as to exclude the other classes. In re Daggett's Estate, 15 Idaho, 504, 98 P 849. Persons falling under subds. 4, 5, cannot nominate one falling under subd. 11, and thus advance him. Id. Where person entitled to administer files application under § 5365, Rev. St. 1887, requesting appointment of some other competent person, application is addressed to discretion of court, and statute is not mandatory. Id. In view of § 5366, Rev. St. 1887, providing for revocation of letters on application of any person falling within any of first five subdivisions of § 5351 when letters have been granted to any other person, where numerous persons are requesting appointment of strangers falling under sub-

persons,[13] and finally to the public administrator [14] or other person taking charge of the estate for the benefit of the public,[15] and administration granted to one outside the preferred class before their exclusive right has expired is of no effect.[16] The preferential right of heirs to administer the estate of the ancestors is, however, a purely personal privilege [17] which may be lost by waiver or renunciation,[18] but a waiver of the right to administer may ordinarily be retracted at any time before it is acted upon.[19] One interested against the heirs should not be appointed administrator.[20] Nonresidents [21] and persons convicted of crime [22] are often barred by stat-

division 11 of said section, and only one of such petitioners falls within the first five subdivisions, such person is entitled to nominate. Id. First proviso of Hurd's Rev. St. 1905, c. 3, § 18, limiting right to nominate administrator to only such persons as are entitled to administer, held applicable to whole act and not only to section preceding it. In re McWhirter's Estate, 235 Ill. 607, 85 NE 918. Held, under Code Civ. Proc. §§ 1365, 1367, 1379, that where three daughters survived and one of them applied for administration she should be appointed, though competent person nominated by other two daughters also applied, court being without discretion. In re Myer's Estate, 9 Cal. App. 694, 100 P 712.

12. Under Code 1906, § 3258, if no distributee applies within 30 days from death of intestate, county court may grant administration to a creditor or to some other person. Butcher v. Kunst, 65 W. Va. 384, 64 SE 967. Need not wait for adjudication as to sanity of resident or nonresident distributee. Id. Though county court may rightfully require evidence of creditor's claim as condition to his appointment (Id.), appointment without such proof is not invalid if appointee is otherwise competent, statute authorizing appointment of any other person (Id.). "Creditor" in Burns' Ann. St. 1908, § 2742, subd. 3, and § 2744, providing for appointment as administrator of largest creditor applying and residing in the state, is used in usual sense as one whom decedent owed. Hildebrand v. Kinney [Ind.] 87 NE 832. Hence, if one who had incurred expense of decedent's burial could procure appointment of administrator, it would not be under statute but under equity powers of court. Id.

13. Appointment without proof that applicant is creditor is not invalid, statute authorizing appointment of creditor "or any other person." Butcher v. Kunst, 65 W. Va. 384, 64 SE 967. Under Ky. St. §§ 3896, 3897 (Russell's St. §§ 3919, 3920), preferring husband or wife and then other relatives, and providing that if no such person applies for administration at second county court from decedent's death court may in its discretion grant letters to a creditor or any other person, on failure of surviving spouse or any person next entitled, to apply for appointment of an administrator, court may appoint a stranger who need not be creditor (Bennett v. Bennett's Adm'r [Ky.] 120 SW 372), though fact he is a creditor adds to his right over one not a creditor (Id.).

14. See post, this section, The Public Administrator. Second cousins though not entitled to share in estate are entitled to letters in preference to public administrator. In re Blake's Estate, 60 Misc. 627, 113 NYS 944.

15. Under Code Pub. Gen. Laws 1904, art. 93, § 134, providing that, in absence of creditors or relatives, estate shall be paid to school commissioners for use of schools, letters held properly granted to agent or attorney of mayor and city council of Baltimore, city charter making school board a department of mayor and city council. Savings Bank v. Weeks, 110 Md. 78, 72 A 475.

16. Balsewicz v. Chicago, B. & Q. R. Co., 144 Ill. App. 219.

17. Right under Rev. St. 1899, § 7 (Ann. St. 1906, p. 341). State v. Romjue, 136 Mo. App. 650, 118 SW 1188.

18. State v. Romjue, 136 Mo. App. 650, 118 SW 1188. Renunciation under Rev. St. 1899, § 7 (Ann. St. 1906, p. 341), when once made cannot be recalled (Id.), and an heir cannot renounce on condition that court appoint a person nominated by him (Id.). Written authorization that decedent's surviving partner continue business and waiver of right to administration with request that surviving partner be appointed, if acted on by surviving partner by obtaining letters or taking steps to that end, will preclude signer. Rowell v. Adams [S. C.] 65 SE 207. Person asserting petitioner's relinquishment of right to administer held not bound to show relinquishment was signed by petitioner himself. Id. Petitioner held entitled in rebuttal to again deny facts testified to by respondent as to petitioner's signature of relinquishment. Id.

19. Application for administration after person in whose favor waiver was made had done nothing for three years held retraction. Rowell v. Adams [S. C.] 65 SE 207. Renunciation once made under Rev. St. 1899, § 7 (Ann. St. 1906, p. 341), cannot be recalled or revoked. State v. Romjue, 136 Mo. App. 650, 118 SW 1188.

20. Surviving partner denying that decedent had any interest in the business. Rowell v. Adams [S. C.] 65 SE 207.

21. Letters **cannot be granted** to a nonresident. Rev. St. 1899, § 10 (Ann. St. 1906, p. 341). State v. Romjue, 136 Mo. App. 650, 118 SW 1188. Nonresident distributee is wholly disqualified to act as administrator by amendment of c. 13, p. 83, Acts 1903 (Code 1906, § 3258). Butcher v. Kunst, 65 W. Va. 384, 64 SE 967. But appointment of nonresident administrator by county court, though voidable, is not void and cannot be questioned collaterally. Cicerello v. Chesapeake & O. R. Co., 65 W. Va. 439, 64 SE 621. Special plea in defense to action for wrongful death, brought by such administrator, held properly rejected. Id. Right of nonresident to be representative is not a "privilege" or "immunity," denial of which is prohibited by federal constitution. In re McWhirter's Estate, 235 Ill. 607, 85 NE 918. Letters of administration **may be granted**

ute, but one interested as distributee is entitled to be heard in the matter of appointing a proper and competent person to administer, though he may himself be disqualified to act as administrator by reason of nonresidence.[23] The court is necessarily given considerable discretion in making appointments,[24] except where the right to appointment is absolute under the statute.[25] A court in one state need not grant letters to the same person to whom letters were granted by the court of another.[26]

The public administrator. See 11 C. L. 1281—Since the right to administer a decedent's estate resides first in the state,[27] the latter may in certain cases place the administration in the hands of its own officer, the public administrator.[28]

(§ 3) *B. Procedure to obtain administration and grant of letters.*[29]—See 11 C. L. 1281—A proceeding for the administration of the estate of a decedent is in the nature of an action in rem,[30] and all persons interested must be made parties[31] by proper citation.[32] As bearing on the question as to when proceedings were instituted, mere supplemental petitions are immaterial.[33] In a petition for appointment of an administrator de bonis non, the statutory grounds must be alleged.[34] If no form of application is prescribed but the statute merely requires applicant to be ex-

to a nonresident, he not being disqualified by statute. In re Bailey's Estate [Nev.] 103 P 232.

22. Misdemeanor entailing $50 fine held not within Code Civ. Proc. § 2661, prohibiting granting of letters of administration to a person convicted of infamous crime. In re O'Hare, 60 Misc. 269, 113 NYS 281.

23. Was entitled to protest and appeal. Butcher v. Kunst, 65 W. Va. 384, 64 SE 967.

24. Order of county court appointing administrator, whether distributee, creditor or other person, will not be set aside on writ of error to supreme court unless abuse of discretion plainly appears. Butcher v. Kunst, 65 W. Va. 384, 64 SE 967. Where heirs renounced right to administer, court's appointment made in exercise of sound judgment, and not in abuse of power, would not be disturbed on appeal. State v. Romjue, 136 Mo. App. 650, 118 SW 1188.

25. Right to administer is statutory, and, where application is seasonably made by parties designated by statute, court has no discretion to deny same. State v. Thurston County Super. Ct., 52 Wash. 149, 100 P 198. Husband of married woman dying intestate is entitled to administer her estate, but if he is dead, or does not apply, grant of letters must be to next of kin in absence of personal disqualification, and probate court has no discretion. In re Degnan [N. J. Eq.] 71 A 668.

26. Probate of foreign will in foreign state and appointment of executrix held not to require probate court in another state in which testator left property to issue letters to same executrix, since it could approve or disapprove the appointment. Murdoch v. Murdoch, 81 Conn. 681, 72 A 290.

27. See preceding paragraph.

28. As where no relatives reside within its jurisdiction. In re McWhirter's Estate, 235 Ill. 607, 85 NE 918. Administration properly granted to public administrator under Hurd's Rev. St. 1905, c. 3, § 18, intestate being nonresident who left nonresident widow and heirs. Id. Statute not unconstitutional for depriving nonresidents of right to nominate representative. Id. Supreme court will not consider whether Act of 1903 creating office of public administrator for Wyandotte county is violative of constitutional inhibition against special legislation adopted after its passage. State v. Cox [Kan.] 99 P 1128.

29. Search Note: See notes in 81 A. S. R. 535; 4 Ann. Cas. 1117.

See, also, Executors and Administrators, Cent. Dig. §§ 83-140, 171-185; Dec. Dig. §§ 20-24, 27-30; 18 Cyc. 98-103, 108-127, 138-144; 19 A. & E. Enc. P. & P. 827.

30. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

31. Infants must be represented by guardians ad litem. In re McNaughton's Will, 138 Wis. 179, 118 NW 997. One not party to proceeding for appointment of administrator for after-discovered assets held not bound thereby. In re Brigham's Estate [Iowa] 120 NW 1054.

32. Citation commanding applicants for letters to appear and "answer unto the applications for letters of administration" held not in proper form, as it required each claimant to answer to his own as well as his rival's petition. In re Degnan [N. J. Eq.] 71 A 668. Should have recited that a dispute having arisen as to right of administration, parties were cited and warned to appear before orphans' court on date named, at which time and place court would hear and determine matter in controversy. Id. **Special administrator** may be appointed under § 5045, Cobbey's St. 1907, immediately and **without notice** to heirs or devisees. Keegan's Estate v. Welch, 83 Neb. 166, 119 NW 252.

33. On question as to whether an attachment had been dissolved, administration held to have been granted on petition filed within one year, though decree appointing an administrator four years after death recited that it was made on petition filed after the year, such petition being in substance a supplemental one urging action on petitions already filed. Institution for Sav. v. Puffer, 201 Mass. 41, 87 NE 562.

34. Petition failing to allege there were assets within state which had not and should be administered, or to describe property not accounted for in final report, held insufficient under Burns' Ann. St. 1908, § 2757. Clark v. Schindler [Ind. App.] 87 NE 44.

amined under oath, failure of the application to show qualification and competency is not fatal.[35] Where the facts alleged in a petition for the appointment of an administrator with the will annexed are denied by answer, evidence should be taken.[36] Intestacy must be proven before letters of administration can be granted.[37] The court cannot make an original appointment of an executor but can only approve or disapprove testator's appointment.[38] It is for the court of decedent's domicile to determine whether a will designates executors and to approve or disapprove them.[39] A widow notified of a proceeding merely to appoint an administrator on the ground that decedent owned land is not bound to anticipate that claims will be allowed or her interest in the land affected in such proceeding.[40] The grant of letters of administration is conclusive of the necessity of the appointment,[41] but not as to what property the administrator may take possession of.[42] An ex parte order for the publication of an application for active executorship is revocable by the court ex parte if found to have been improvidently made.[43] Questions relating to appeal or review are treated in another section.[44]

(§ 3) *C. Security or bond, and oath.*[45]—Sec 11 C. L. 1282—The statutory security must be given,[46] in the absence of lawful testamentary exemption,[47] and the fact that the estate is of small value does not dispense with it.[48] A special bond may be required in a proper case,[49] it being for the court to determine to what extent additional security is necessary.[50] By statute assets may be placed in charge of a trustee for the purpose of reducing the administrator's bond.[51]

*Oath.*See 9 C. L. 1164

(§ 3) *D. Removals and resignation.*[52]—See 11 C. L. 1282—Removal may be predi-

35. In re Ellis' Estate [Ind. App.] 88 NE 341.

36. Held error to accept allegations of petition of creditor under Code Civ. Proc. § 2643, as proof of facts authorizing appointment. In re Bedford, 130 App. Div. 642, 115 NYS 472.

37. Under Code Pub. Gen. Laws, art. 93, § 16, party applying must prove intestacy to satisfaction of court. Stouffer v. Stouffer, 110 Md. 368, 72 A 843.

38. Murdoch v. Murdoch, 81 Conn. 681, 72 A 290.

39. Murdoch v. Murdoch, 81 Conn. 681, 72 A 290. Evidence going to qualification of person appointed executrix at decedent's domicile held improper in proceedings in foreign state to revoke letters granted there to same person, where bearing only on proper construction of will with respect to designation of such person as executrix. Id.

40. In re Brigham's Estate [Iowa] 120 NW 1054.

41. Bertig v. Higgins [Ark.] 115 SW 935.

42. Did not authorize his taking possession of property exempt to widow and children. Bertig v. Higgins [Ark.] 115 SW 935. See post, § 5D.

43. Succession of Downing, 122 La. 275, 47 S 604. After discovered provision, "I hereby appoint G. M. as 'testator' of my will," held sufficient to justify revocation. Id.

44. See post, § 16.

45. For rights and liabilities of sureties and actions on bonds, see post, § 9G.

Search Note: See, also, notes in 13 L. R. A. (N. S.) 438; 81 A. S. R. 535.

See, also, Executors and Administrators, Cent. Dig. §§ 141-170; Dec. Dig. §§ 25, 26; 18 Cyc. 127-138; 11 A. & E. Enc. L. (2ed.) 862; 8 A. & E. Enc. P. & P. 717; 19 Id. 846.

46. Order issuing letters of administration held void where no bond was required as provided by statute. In re Bailey's Estate [Nev.] 103 P 232.

47. Under Code 1904, § 2642, giving effect to testamentary directions exempting executor from giving bond unless court shall think security necessary, held no abuse of discretion to require widow to give bond for security of estate of husband adjudged bankrupt but not discharged prior to his death. Schnurman's Executrix v. Biddle & Co. [Va.] 64 SE 977.

48. That principal asset was claim for wrongful death held not ground for exempting administrator from giving bond. In re Bailey's Estate [Nev.] 103 P 232.

49. In absence of devastavit or well grounded apprehension therefor, special bond will not be required. In re Knowles' Estate, 148 N. C. 461, 62 SE 549. Where on settlement of administrator's account additional security was found necessary, it could be required though appeal was pending from order settling account. In re McPhee's Estate [Cal. App.] 101 P 530. Discretion of court not disturbable except for abuse. Id.

50. In re McPhee's Estate [Cal. App.] 101 P 530.

51. Power of surrogate to allow commissions to trustee under New York statute, see ante, § 2.

52. **Search Note:** See Executors and Administrators, Cent. Dig. §§ 186-262; Dec. Dig. §§ 31-35; 18 Cyc. 145-170, 1354; 11 A. & E. Enc. L. (2ed.) 818; 19 A. & E. Enc. P. & P. 846, 850.

cated on maladministration,[53] failure to obey orders,[54] or withdrawal of assets from the state,[55] but where security by way of bond is available a strong showing must be made.[56] An executor will not be removed on the ground of insolvency known to testator when the will was executed unless it appears that the executor is wasting or misapplying the assets.[57] That the representative claims title to certain property alleged to belong to the estate is not ground for removal where other remedies are available.[58] The filing of a caveat to a will does not suspend the powers of the executor [59] or furnish ground for revocation of his letters.[60] Where a representative dies and a successor is appointed, the former's personal representative must turn over the first estate to such successor less proper credits.[61]

That one petitioned for the appointment of an executor will not estop him to petition for his removal for grounds subsequently appearing.[62] A petition for revocation of letters cannot be dismissed merely because one of two or more petitioners is incapable of maintaining the proceedings by reason of infancy.[63] Grounds not alleged cannot be relied on to sustain an order of revocation.[64] On a summary application, the probate court will not pass on doubtful questions pending in another court of general jurisdiction.[65] After the probate of a will has been set aside on appeal,

53. Neglect, embezzlement, or mismanagement, held ground for revocation of letters. In re McPhee's Estate [Cal. App.] 101 P 530. Evidence held not to justify revocation of letters for mismanagement. In re Bottoms' Estate [Cal.] 103 P 849. Payment of excessive attorney's fee held not ground for removal in absence of bad faith, same being subject to correction on filing of administrator's report. Scott v. Smith, 171 Ind. 453, 85 NE 774. That a loan was improperly made held not ground for removal of administrator, money having been repaid with interest. Id.

54. Could revoke letters for failure of administrator to obey order requiring him to give additional bond. In re McPhee's Estate [Cal. App.] 101 P 530.

55. Court may remove executor who becomes nonresident, withdraws funds from court's jurisdiction, and fails to file accounts. In re Rice's Estate [Mich.] 16 Det. Leg. N. 528, 122 NW 212.

56. Stigma of removal can be placed on executor only in a flagrant case, in view of statute providing for his giving bond where property in his hands is insecure. Pfefferle v. Herr [N. J. Eq.] 71 A 689. Payment to children of sums in excess of income of estate in violation of terms of will held not to justify removal in absence of bad faith and wanton and wasteful invasion of corpus. Id. Delay in having widow's dower interest ascertained, and excessive payments to her without such ascertainment, held not to justify removal at least until it was ascertained what facts were as to such payments and delay. Id. Failure to pay taxes held insufficient, it appearing property had been redeemed and executor surcharged. Id. Giving of security held sufficient. Id.

57. In re Knowles' Estate, 148 N. C. 461, 62 SE 549.

58. Creditor could not have administratrix removed where she in good faith claimed land under deed, and statute authorized direct proceeding against her for settlement of title. See post, § 4C. McFarlan v. McFarlan, 155 Mich. 652, 15 Det. Leg. N. 1103, 119 NW 1108. Petition for removal being improper, questions relating to laches of petitioner, good faith of conveyance, etc., held out of place. Id.

59, 60. Grill v. O'Dell [Md.] 73 A 876. On filing of caveat after granting of letters, it becomes duty of executor to defend will (Id.), and his letters cannot be revoked pending contest except for legal or sufficient cause (Id.). Statute authorizing granting of letters pending will contest held applicable only to cases where caveat was filed before probate of will and granting of letters, and held not to authorize revocation of letters already granted and appointment of caveator as administrator on her mere assertion she could not otherwise have justice done her. Id

61. Executrix of administratrix on accounting with estate of intestate held entitled to credit for funeral expenses, attorney's fees, and doctor's bill, though some of these items had been paid by executrix after death of administratrix. In re McDonough's Estate, 132 App. Div. 614, 117 NYS 258. Immaterial that administratrix paid certain of the items with her own money. Id. Held entitled also to credit for a certain bank account of intestate as having been administered by transaction in nature of a family settlement, except amount necessary to satisfy claim of heir not known at the time of such settlement. Id.

62. Petitioner for appointment of one who at the time spent part of his time in a sister state held not estopped to petition for removal on ground executor had changed his residence to such state, removed assets, and failed to account. In re Rice's Estate [Mich.] 16 Det. Leg. N. 528, 122 NW 212.

63. Joint petition of infant legatee and father, legatee of nominal amount. In re Denyse, 62 Misc. 595, 116 NYS 1127.

64. Where petitions for revocation of letters testamentary and appointment of caveator as administrator pendente lite did not pray for revocation of probate, order granting petition could not be sustained on theory probate was invalid for want of proper notice. Grill v. O'Dell [Md.] 73 A 876.

65. Surrogate's court on summary applica-

the letters of an administrator with the will annexed may be revoked and a regular administrator appointed.[68]

§ 4. *The authority, title, interest, and relationship of personal representatives. A. In general.*[87]—See 11 C. L. 1283—An administrator derives his authority solely from the statute and is a public officer with respect thereto.[88] One may be subject to the laws of one state as an individual, and as executor to the laws of another.[89]

A representative, as such, is not estopped by admissions made by him individually,[70] nor by admissions made by him as representative where the essential elements of estoppel in general are absent.[71] No privity exists between represntatives in different states as to property administered by them respectively,[72] and estoppels by judgment or limitations for or against the representative in one state will not preclude or favor the representative in another.[73]

At common law an executor could do anything before probate of the will which did not call upon him to produce the evidence of his authority.[74] It is the duty of an executor to administer undevised as well as devised property.[75] A representative may not ordinarily administer an estate of which his decedent was representative.[76] A representative who without authority continues decedent's business must account for all profits derived therefrom and is personally liable for all losses sustained.[77] The lawful acts of an administrator holding under a voidable appointment are valid, notwithstanding his subsequent removal,[78] but acts under a void appointment are ineffectual.[79]

The authority of a special or temporary administrator is usually limited to collecting and conserving the estate,[80] and terminates when the regular representative is appointed.[81]

tion to revoke letters of administration, etc., will not pass on doubtful questions of construction of will, where question is also before supreme court, but proceeding will be dismissed without prejudice to renewal after termination of that action. In re Dunn's Estate, 63 Misc. 180, 118 NYS 561.

66. Hamilton v. Williams [Ky.] 118 SW 358.

67. **Search Note:** See notes in 14 L. R. A. 414; 98 A. S. R. 190, 193; 5 Ann. Cas. 58.

See, also, Executors and Administrators, Cent. Dig. §§ 323-338, 456-532; Dec. Dig. §§ 74-82, 114-128; 18 Cyc. 206-208, 211-214, 287-296, 1309-1323, 1325, 1326, 1330-1350, 1352; 11 A. & E. Enc. L. (2ed.) 903, 944.

68. Holz v. Burling [Neb.] 120 NW 954.

69. Commonwealth v. Peebles [Ky.] 119 SW 774.

Control of courts of residence of representative of nonresident decedent over assets in state of decedent's death, see post, § 5E, subd. Control by Courts.

70. Judicial admissions in previous individual suit against creditor seeking enforcement of a judgment against estate held not to preclude executor from attacking validity of judgment. Harris v. Woodard [Ga.] 65 SE 250.

71. Not estopped to enforce judgment sought to be enforced against estate by admissions made by him in prior judicial proceeding against judgment creditor, it not appearing estate was benefited or that creditor was prejudiced. Harris v. Woodard [Ga.] 65 SE 250. See Estoppel.

72. Claim barred in one state held not barred in another. Wilson v. Hartford Fire Ins. Co. [C. C. A.] 164 F 817.

73. Wilson v. Hartford Fire Ins. Co. [C. C. A.] 164 F 817.

74. Dodd v. Anderson, 131 App. Div. 224, 115 NYS 688.

75. Civ. Code 1895, § 3313. Knowles v. Knowles [Ga.] 65 SE 128.

76. Executor of administratrix does not succeed to her duties or powers as such. Sanford v. Bergin [Cal.] 103 P 333.

77. In re McGovern, 118 NYS 378.

78. Both under Ky. St. 1903, § 3848, and independent thereof. McFarland's Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 82. Compromise for decedent's wrongful death held valid. Id.

79. Release of mortgage belonging to estate by administrator appointed by probate court of wrong county and under order of such court held without effect. Anderson v. Walter [Kan.] 99 P 270.

80. Pending decision in a will contest, an administrator, whether general or special, can only conserve estate. Zimmer v. Saier, 155 Mich. 388, 15 Det. Leg. N. 1077, 119 NW 433. Cannot take part in will contest, not being named in will as executor. Id. Special administrator appointed under Comp. Laws, § 9326, to collect and hold estate until appointment of executor or administrator, can only conserve the estate and cannot employ himself or any other attorney in contest over will. Zimmer v. Saier, 155 Mich. 388, 15 Det. Leg. N. 1077, 119 NW 433.

81. Where temporary administrator was appointed pending probate of will, his right to collect assets terminated on appointment of executor. In re Grant, 132 App. Div. 739, 116 NYS 767.

Letters have no effect beyond the limits of the state in which they were granted,[82] and hence the representative cannot by virtue of them alone recover property [83] or sue or be sued [84] in foreign jurisdictions.

(§ 4) *B. Contracts, conveyances, charges and investments.*[85] *Contracts.* See 11 C. L. 1284—The presumption is that parties to a contract intend to bind their personal representatives as well as themselves,[86] but before the representative can be held it must appear that decedent was bound.[87] A contract entered into by decedent while of unsound mind may be avoided by his representative where the incompetency continued until death.[88]

Executory contracts made with the representative on new and independent considerations are usually held to be his own personal obligations as between the parties,[89] he having recourse to the estate for proper outlays,[90] and this rule obtains

82. Filing of copy of foreign probated will under Rev. St. 1895, art. 5353, held effective only to make will muniment of title in favor of devisees, and not to empower executor to act as such in Texas. Mason v. Rodriguez [Tex. Civ. App.] 115 SW 868. To authorize him to so act, probate in Texas, under Rev. St. 1895, art. 1909, held necessary. Id.

83. See post, § 5B.

84. See post, § 10.

85. **Search Note:** See notes in 15 L. R. A. 850; 64 Id. 554; 1 Ann. Cas. 406, 769.

See, also, Executors and Administrators, Cent. Dig. §§ 409-650½; Dec. Dig. §§ 94-172; 18 Cyc. 210, 211, 245, 247-373, 1309-1323, 1325, 1326, 1330-1350; 11 A. & E. Enc. L. (2ed.) 903, 944, 1068; 19 A. & E. Enc. P. & P. 929.

86. See, also, post. § 6A, Claims Provable.

87. Where descendant could not have been held for quantum meruit in his lifetime, his representative cannot be so held by reason of decedent's liability. Where services were performed after decedent's death. Herrlich v. Hyman, 61 Misc. 606, 113 NYS 971.

88. Wilson v. Fahnestock [Ind. App.] 86 NE 1037.

89. Lawson v. Cobban, 38 Mont. 138, 99 P 128. Where administrator signed contract to convey land belonging to estate, he was personally liable for breach thereof, whether he acted in personal or representative capacity. Id. The general rule, subject to few exceptions, is that a personal representative cannot charge the estate by contracts originating with himself after decedent's death, though for the benefit of the estate, he being bound only in his private capacity. Thompson v. Mann, 65 W. Va. 648, 64 SE 920. Executor is without power ex officio to bind estate by promissory note, but must have testamentary authority. Harris v. Woodard [Ga.] 65 SE 250. Executor's **contract employing brokers** to sell realty of estate as authorized by will held his own individual contract. Hickman-Coleman Co. v. Leggett [Cal. App.] 100 P 1072. Broker's right to commission held not affected by fact that court confirmed sale to purchaser produced by other brokers who bid higher sum, such brokers not having been employed by executor, and plaintiffs having fully performed. Id. Court could not allow brokers commission for selling land under contract with executor. Id. Personal representative is individually liable for **attorney's services** rendered at his instance on behalf of estate. Hall v. McGregor, 65 W. Va. 74, 64 SE 736. Administrator's attorneys have no claims for services enforcible directly against estate. Brown v. Quinton [Kan.] 102 P 242. Petition held to state cause of action against defendant individually, though it referred to him as administrator both in caption and body. Id. Representative cannot create any direct liability against estate by employment of attorneys, brokers or others to assist him in performance of his duties. Hickman-Coleman Co. v. Leggett [Cal. App.] 100 P 1072. Code 1906, § 2131, providing that in annual and final accounts administrator shall have credit for reasonable attorney's fees paid out by him, etc., does not apply where attorney seeks direct enforcement of claim against estate over administrator's protest (Murphy v. Harris [Miss.] 48 S 232), and where claim is disputed by administrator it must be enforced against him by attorney in proper legal proceedings (Id.). Ex parte order of chancery court requiring administrator to pay attorney's fees, made on petition presented and heard in vacation without notice, held void. Id. Not authorized by Code 1906, § 507, conferring powers on chancellors in vacation (Id.), nor validated by denied petition of administrator to set aside order (Id.). Claim for legal services in collection of indemnity for intestate's death is against administrator personally and not against estate. Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46. Only purpose of Code Civ. Proc. § 1616, authorizing attorney to apply for order allowing compensation for services rendered to representative, was to enable attorney to obtain compensation directly, and did not alter liability of estate. In re Hite's Estate [Cal.] 101 P 448. On application of attorney for compensation for other than ordinary probate services, court has same discretion as in allowing executor for fees by him already paid out. Id.

Where administratrix was insolvent and had not obtained credit from estate, attorneys who rendered necessary services under contract with administratrix held entitled to recover against administratrix's successor. Code 1907, §§ 6085, 6086. Leahart v. Deedmeyer [Ala.] 48 S 371. Not necessary to allege insolvency of successor or the other defendants. Id. Where execution against administratrix for legal services was returned unsatisfied and administratrix was insolvent, judgment could be recovered against her in her representative capacity

whether the representative can lawfully bind the estate or not,[91] unless the agreement contravenes public policy.[92] The rule that public officers are not personally liable on their official contracts, though in excess of their powers, applies to administrators.[93]

*Conveyances.*See 11 C. L. 1284—The representative may not sell nor convey realty except where authorized by statute [94] for the payment of debts,[95] or for distribution,[96] or under testamentary power of sale.[97] By statute decedent's contracts to purchase or convey land may be enforced by or against his representative.[98] A representative who assumes to convey land as the property of the estate without mentioning any interest of his own therein will not thereafter be permitted to assert any such interest,[99] and the fact that he warrants and defends only to the extent that he is bound to do as administrator does not render the rule inapplicable.[1]

*Charges.*See 11 C. L. 1285

*Investments.*See 11 C. L. 1285

(§ 4) *C. Title, interest, or right in decedent's property.*[2]—See 11 C. L. 1285— Except as controlled by will [3] or statute, the legal title to the personalty rests in the representative,[4] and the title to realty usually vests in the heirs immediately on decedent's death,[5] subject to sale for debts [6] or for purposes of distribution,[7] and to any powers of sale conferred by will.[8] A foreign domiciliary administrator is without title to personalty located in states other than his own,[9] and has no authority to receive payment of debts due his decedent from persons residing in such states.[10] If the representative claims property adversely to creditors, the latter cannot deny controversy settled in equity [11] or under statute.[12] An administrator cannot deny the title of the estate to property he received as its representative.[13] The trust character of the representative is treated in connection with his rights and liabilities as against the estate.[14]

§ 5. *The property, its collection, management and disposal by personal representatives. A. Assets.*[15]—See 11 C. L. 1285—Unless testamentary directions otherwise

to be paid out of estate. Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46.

90. See post, § 9D.

91. Lawson v. Cobban, 38 Mont. 138, 99 P 128.

92. Written agreement for valuable consideration and signed L, administrator of estate of B, to convey at future date realty belonging to estate, held not contrary to public policy. Lawson v. Cobban, 38 Mont. 138, 99 P 128. That administrator could not personally profit from estate held not to affect status of obligee. Id.

93. Deed in administrator's official capacity and not as individual held not to convey her individual estate. Holz v. Burling [Neb.] 120 NW 954.

94. See post, § 5E.

95. See post, § 7.

96. See post, § 12.

97. See post, § 5E. For construction of wills as to powers of sale, see Wills, § 5E.

98. See post, § 5E, subd. Contracts for Sale or Conveyance of Land By or To Decedent.

99. Millican v. McNeill [Tex.] 114 SW 106.

1. Life estate not reserved held to pass to purchaser by deed of fee, notwithstanding such limited covenant of warranty. Millican v. McNeill [Tex.] 114 SW 106.

2. Search Note: See notes in 27 L. R. A. 340; 28 Id. 99, 105, 136; 40 Id. 321, 343; 7 Ann. Cas. 703.

See, also, Executors and Administrators, Cent. Dig. §§ 533-556, 621-633, 650½; Dec. Dig. §§ 129-135, 152-156, 172; 18 Cyc. 297-310, 312-316, 347-355, 371-373; 11 A. & E. Enc. L. (2ed.) 944.

3. See Wills, § 5D.

4. See post, § 5A.

5. See post, § 5A.

6. See post, §§ 7, 8.

7. See post, § 12.

8. See post, § 5E, also Wills, § 5E.

9. Crohn v. Clay County State Bank, 137 Mo. App. 712, 118 SW 498.

10. See post, § 5B.

11. McFarlan v. McFarlan, 155 Mich. 652, 15 Det. Leg. N. 1103, 119 NW 1108.

12. Laws 1905, p. 504, Act No. 326, authorizing creditors to sue to set aside fraudulent conveyances where representative refuses to do so, held broad enough to cover case where administratrix claimed land deeded to her and her husband as tenants by entirety. McFarlan v. McFarlan, 155 Mich. 652, 15 Det. Leg. N. 1103, 119 NW 1108.

13. See post, § 9A.

14. See post, § 9A.

15. Search Note: See notes in 40 L. R. A. 33; 9 L. R. A. (N. S.) 997; 12 A. S. R. 311.

See, also, Executors and Administrators, Cent. Dig. §§ 279-310; Dec. Dig. §§ 38-61; 18 Cyc. 171, 172, 174-195; 11 A. & E. Enc. L. (2ed.) 828.

provide,[16] or the rule is changed by statute,[17] the title to and right to possession of realty generally go to the heirs or devisees,[18] and they alone may maintain or defend actions relating thereto,[19] except in certain cases where the land may be recovered for administration purposes.[20] As to personalty, the representative takes the title and right to possession [21] as well as the right to litigate respecting it,[22] unless a will

16. As to realty directed by will to be held intact and not sold by executors unless necessary, held executors had no right to possession so as to enable them to maintain ejectment. Schorb v. Haurand, 76 N. J. Law, 768, 71 A 242. It is the right and duty of executor taking seisin by will to take control and possession of all the property of the succession. Entire community property of husband and wife on former's death. Succession of Bertrand, 123 La. 784, 49 S 524. Mere allegation that one was executrix under a will held not to show that decedent's realty had come to him. Brinkerhoff v. Tiernan, 61 Misc. 586, 114 NYS 698. Mere proof of executorship does not raise presumption that title was devised to executor as such. McMillan v. State [Ala.] 49 S 680.

17. In suit to foreclose a mortgage, where intestate had a vested though defeasible title, his administratrix was presumed to have been in possession for benefit of creditors and heirs, under Gen. St. 1902, § 362, possession being presumed to follow title. Downey v. Moriarty, 81 Conn. 442, 71 A 581.

18. In absence of will or statute, title to realty vests in heirs immediately on owner's death, subject, however, to right of representative to sell for debts. McMillan v. State [Ala.] 49 S 680; Taylor v. Taylor [Ala.] 50 S 375; Grant v. Hathaway, 215 Mo. 141, 114 SW 609; De Bow v. Wollenberg, 52 Or. 404, 97 P 717. Execution against administrator as such or personally held not to affect lands of estate. Taylor v. Taylor [Ala.] 50 S 375. Executor cannot hold legal title to devised land for use of beneficiary unless will expressly or impliedly creates in him a trust distinct from that of executor. In re Buerstetta's Estate, 83 Neb. 287, 119 NW 469. Unless reserved, **crops,** matured or not, but standing on ground, pass to devisee of land and not to executor. In re Pope's Estate, 83 Neb. 723, 120 NW 191. That land was farmed by cropper held not to prevent application of rule. Id. Though administratrix as such has no right to **rents,** she is not accountable therefor before surrogate where she is also tenant in common. In re Dunn's Estate, 63 Misc. 179, 118 NYS 560. **Leases,** for perpetual annual rental, held by testator, of land in Japan, held not assets in hands of executor but realty in a foreign jurisdiction passing to heirs. In re Vivanti's Estate, 63 Misc. 618, 118 NYS 680.

19. Executrix of deceased claimant of land cannot maintain action to quiet title, Code 1896, §§ 809-813, providing that such actions must be brought by one claiming to own the land. Gulf Coke & Coal Co. v. Appling [Ala.] 47 S 730. Where an incompetent died, leaving no debts, administrator had no interest entitling him to sue to set aside incompetent's conveyance of realty, such realty passing to heirs. Kamman v. D'Heur & Swain Lumber Co. [Ind. App.] 88 NE 348. Administrator could not be substituted as plaintiff where incompetent died pending suit to set aside conveyance, right to sue passing to heirs. Id. Administrator, as such, cannot maintain ejectment for possession of land belonging to decedent at time of his death. Grant v. Hathaway, 215 Mo. 141, 114 SW 609. Rev. St. 1899, § 130 (Ann. St. 1906, p. 379), prohibiting administrator from renting or controlling decedent's real estate, unless probate court orders renting and authorizing him to maintain action for recovery of the land in such case, negatives right in him to bring such action for any other purpose (Id.), hence administrator cannot maintain ejectment against heirs for recovery of land for payment of debts (Id.). Testamentary remainderman held entitled to sue to recover realty, against objection executor should have brought action. Schorb v. Haurand, 76 N. J. Law, 768, 71 A 242. Heirs and devisees are necessary parties to appeal from judgment awarding land to decedent in his lifetime where appeal is taken after his death. Buchanan v. Boyd's Ex'r [Ky.] 115 SW 222.

20. Sale of land for debts, see post, § 7. In suit by heirs and executor to recover realty conveyed by decedent shortly before his death, where evidence showed absence of claims against estate and expiration of time for presenting claims, executor could not recover unless decedent at time of his death had ownership and right of possession and land was subject to testamentary disposition. Boyce v. Andrews [Cal. App.] 102 P 551. In administrator's suit against widow of son of decedent to recover land, nonsuit was properly granted where plaintiff did not show he had ever had possession, or that it was necessary for him to have it for purpose of paying debts or making distribution. Civ. Code 1895, § 3358. Adams v. Phillips [Ga.] 64 SE 467. In ejectment by administrator of father against son, held not error to admit evidence that it was necessary for administrator to recover the land for administration and distribution, if decedent could have recovered it, in view of defendant's contentions. Graham v. Peacock, 131 Ga. 785, 63 SE 348.

21. Crohn v. Clay County State Bank, 137 Mo. App. 712, 118 SW 498; De Bow v. Wollenberg, 52 Or. 404, 97 P 717. And be only can assert title on behalf of estate for benefit of creditors. Fowler v. Brady, 110 Md. 204, 73 A 15. Personal representative is legal owner for time being of all personal assets of decedent, and succeeds to all his rights and responsibilities with reference thereto for **purposes of taxation.** Commonwealth v. Peebles [Ky.] 119 SW 774. Interest of distributees of personalty held not subject to legacy tax under federal war revenue act prior to expiration of time for proving claims when estate becomes ready for distribution. Farrell v. U. S., 167 F 639. Interest of a son in **trust fund,** as remainderman, held on his death to pass to his personal representative and not to his heirs. In re Wilcox, 194 N. Y. 288, 87 NE 497. **Husband's debt to wife,** se-

controls.[23] The representative is entitled to the undisturbed possession and control of all the property so far as may be necessary for the proper administration of the estate,[24] unless it is already in the custody of a court of competent jurisdiction.[25] Thus a chattel mortgagee cannot replevy the mortgage property from the representative who has taken possession for administration purposes, but the mortgagee's interest and lien will be transferred to the fund arising from sale by the administrator.[26]

Though all property found in one's possession at his death presumably belongs to his estate,[27] property not in fact owned by decedent when he died,[28] nor made part of his estate pending administration,[29] such as money recovered for his wrongful death,[30] trust funds,[31] or property held by decedent as representative of another de-

cured by mortgage, is a personal asset vesting in wife's administrator. Sharpe v. Miller [Ala.] 47 S 701.

Executor and residuary legatee who gives bond under § 165, Comp. St. 1907, conditioned on payment of debts and legacies, is in duty bound to surrender possession of property specifically devised to another, and cannot claim right to possession until final settlement of estate. In re Pope's Estate, 83 Neb. 723, 120 NW 191. Cannot retain such property for debts he undertook to discharge. Id.

22. Right of action for conversion passes to personal representative (Devlin v. Houghton, 202 Mass. 75, 88 NE 580), and right of action to set aside conveyance and mortgage procured by fraud or for damages for deceit (Marvel v. Cobb, 200 Mass. 293, 86 NE 360). **Action for waste** committed in decedent's lifetime passes to administrator. Kamman v. D'Heur & Swain Lumber Co. [Ind. App.] 88 NE 348. Where a husband insures his life for benefit of his wife and dies before policy issues, cause of **action on contract of insurance,** or for refusal to issue policy, vests in wife and not in administrator of deceased husband. Carter v. Bankers' Life Ins. Co., 83 Neb. 810, 120 NW 455.

Right to sue for assets, see post, § 5B.

23. Right of collateral heirs to possession of succession held dependent on validity of will in litigation. Succession of Drysdale [La.] 50 S 35.

See Wills, § 5D.

24. For questions relating to sales for debts, for distribution or under will, see post, §§ 7, 8, 12, 5E. That suit was instituted in supreme court to set aside probate of will held not ground for preventing executor from taking possession of estate on giving sufficient bond. Aubuchon v. Murphy, 64 Misc. 286, 118 NYS 553. Contestant could have executor restrained from making final distribution. Id. Rev. Laws 1902, c. 167, § 112, dissolving attachments by debtor's death before execution if administration is granted within a year, etc., was designed to prevent interference with orderly settlement of estates and bring all property under control of representatives. Institution for Sav. v. Puffer, 201 Mass. 41, 87 NE 562.

25. Representative is not entitled to property on which a lien was perfected by creditors' bill before decedent's death. Where receiver had been appointed and injunction had issued, creditors' lien was superior to rights of representative. Saginaw County Sav. Bank v. Duffield [Mich.] 16 Det. Leg. N. 431, 122 NW 186.

26. Lingler v. Wesco, 79 Ohio St. 225, 86 NE 1004.

27. Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382.

28. Evidence insufficient to show that claimant was entitled to money represented by certificates of deposit retained and used by decedent as his own property. Lattin v. Lattin's Estate, 156 Mich. 223, 16 Det. Leg. N. 90, 120 NW 609. Where land was conveyed to a wife alone but really for joint benefit of herself and her husband, and when land was again sold, notes were made payable to husband and wife jointly, husband's estate was prima facie entitled to half of amount of notes. Brown v. Orr [Va.] 65 SE 499. Certain land certificates held property of estate and not taken therefrom by special act of legislature passed in recognition of state's obligation to defenders of republic of Texas. Bailie v. Western Live Stock & Land Co. [Tex. Civ. App.] 119 SW 325. Where will gave personalty to legal heirs of a housekeeper, latter's executor was entitled to income therefrom from date of last payment to her of income to time of her death. In re Schnitzler, 61 Misc. 218, 114 NYS 934.

29. Where estate of a husband's father held bond and mortgage against land quitclaimed by husband to wife, and after husband's death the securities were assigned to wife as administratrix of her husband's estate on account of husband's share in father's estate, the amount thereof was assets of husband's estate for which wife was accountable. In re Sloane, 63 Misc. 472, 118 NYS 555. Rev. Codes 1905, § 8083, held not to make proceeds of life and beneficiary certificates therein mentioned portion of estate of insured, but merely to exempt from debts all such proceeds as might become assets of such estate. Finn v. Walsh [N. D.] 121 NW 766.

30. **Not assets.** Jones v. Leonardt [Cal. App.] 101 P 811; Thompson v. Mann, 65 W. Va. 648, 64 SE 920. Probate court cannot distribute money recovered by administrator for decedent's wrongful death, such distribution being for district court in which recovery was had. In re Mayer's Estate [Minn.] 119 NW 217. Rights of action under survival Act (Comp. Laws, § 10117), and Death Act (Comp. Laws, § 10427), **are assets** of estate vested in administrator. Carbary v. Detroit United R. [Mich.] 16 Det. Leg. N. 485, 122 NW 367.

31. Property held by decedent in trust is not part of his estate and cannot be administered as such. Elizalde v. Murphy [Cal.

cedent,[32] and property not subject to his debts, such as the homestead,[33] and the statutory allowances for the surviving spouse and children,[34] cannot be considered assets subject to administration. Where a husband and his wife hold community property, the death of either subjects the whole community estate to administration.[35] A surviving partner is entitled to possession of the partnership assets as against the heirs and representatives of the deceased.[36]

(§ 5) *B. Collection and reduction to possession.*[37]—See 11 C. L. 1287—The construction of testamentary provisions relating to the powers and duties of executors is treated elsewhere,[38] and matters of procedure peculiar to actions by or against representatives are postponed for subsequent discussion.[39]

An action for the recovery of money or other personalty due or belonging to the estate must be brought by the personal representative [40] in whom title and right to possession is vested,[41] unless he refuses to sue,[42] in which case creditors or heirs may bring the action [43] making the representative defendant [44] and alleging his refusal to proceed.[45] Where no representative has been appointed, the creditor or heir must make application to the proper court for an appointment.[46] It has been held, however, that where there are no debts an heir may recover personalty from a stranger wrongfully detaining it, though there has been no administration.[47] An administrator de bonis non cannot sue the estate of his predecessor, for conversion

App.] 103 P 904; Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382. No liability on executor's bond by reason of improper dealings with property held by decedent as trustee or life tenant. Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382. Personal representative of one who held a claim for collection, on realizing on the claim, holds fund in trust for real owner and not for his decedent's estate. Wood v. Sheidley [Kan.] 97 P 800. It is, however, **duty of administrator** to maintain right of estate to trust property until it has been judicially determined it does not belong to estate (Elizalde v. Murphy [Cal. App.] 103 P 904), and to account for it to his successor (Id.). That he is also individually liable to owner of fund held not to release him or his sureties from primary obligation incurred as administrator (Id.).

32. Executor held not to succeed to powers or duties of decedent as administratrix. Sanford v. Bergin [Cal.] 103 P 333.

33. Decedent's homestead forms no part of his estate for administration purposes. Could not be sold to pay widow's allowance. In re Hadsall, 82 Neb. 587, 118 NW 331. Homestead on which final proof was made by heirs after entryman's death held not part of estate. Council Imp. Co. v. Draper [Idaho] 102 P 7. Not subject to sale under order of probate court. Id. Not covered by heirs' relinquishment of all interest in estate. Id.

34. See post, § 5D.

35. Not merely half interest of decedent. Magee v. Big Bend Land Co., 51 Wash. 406, 99 P 16; Wiley v. Verhaest, 52 Wash. 475, 100 P 1008. Administration of only undivided half held, however, not subject to collateral attack. Wiley v. Verhaest, 52 Wash. 475, 100 P 1008. Community of property existing between husband and wife, who were both dead, held subject to settlement in succession of husband. Grandchampt v. Administrator of Succession of Billis [La.] 49 S 998. On death of husband entire community property passes under administration of executor or administrator and wife's interest cannot be taken out until settlement. Succession of Bertrand, 123 La. 784, 49 S 524. For discussion of **administration of community estate,** see Husband and Wife, § 4E.

36. Administration of a partnership estate being for surviving partner, county court in administration of deceased partner's estate has no control over partnership assets. In re Dobert, 165 F 749. Could not make allowances therefrom to widow and children except from residue belonging to deceased partner's estate after payment of firm debts. Id. For full discussion, see **Partnership,** § 7D2.

37. Search Note: See notes in 11 L. R. A. (N. S.) 148; 45 A. S. R. 664; 115 Id. 208.

See, also, Executors and Administrators, Cent. Dig. §§ 339-396; Dec. Dig. §§ 83-89; 18 Cyc. 215-233, 1317-1319; 11 A. & E. Enc. L. (2ed.) 944; 19 A. & E. Enc. P. & P. 863.

38. See Wills, § 5E.

39. See post, § 10, Actions By and Against Representatives.

40. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372. Heirs, next of kin or creditors, cannot in their own names sue at law or equity to recover unadministered property or collect debts or choses in action. Buchanan v. Buchanan [N. J. Eq.] 71 A 745. Next of kin could not sue to impress trust on realty and personalty bought by third person with decedent's money. Id.

41. See ante, § 5A.

42. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372.

43. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372. Where by reason of collusion with defendant or otherwise representative is derelict in his duty, next of kin may sue, joining administrator as defendant. Buchanan v. Buchanan [N. J. Eq.] 71 A 745.

44, 45, 46. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372.

47. Graves v. Davenport [Colo.] 100 P 429.

of assets except on the bond as authorized by statute.[48] Personal liability of an administrator for selling property before taking out letters will not preclude him from suing the purchaser for the value of the property.[49] Though the representative has no general power to recover land,[50] he may sue on equitable grounds to set aside a deed of land he is authorized by will to sell.[51] Questions relating to the recovery of property by heirs or beneficiaries from third persons when no rights of the representative are involved are discussed in a subsequent section.[52]

Personalty held by a legatee under valid settlement with colegatees cannot be recovered for farther division,[53] nor can the administrator recover from a third person property exempt from administration.[54] Where property needed for debts has been improperly removed to another state in which administration is also pending, the representative may have it returned on petition to the probate court in that state.[55]

It is the administrator's duty to collect all obligations due to the estate,[56] and in the discharge of this duty he may in good faith employ counsel,[57] compromise claims,[58] and make redemptions;[59] but a foreign domiciliary administrator is without authority to receive payment of debts due the estate from all debtors residing in states other than that in which he was appointed,[60] and a payment made to him is no protection against the subsequent demands of the resident administrator,[61] though the latter was not appointed at the time of the payment.[62]

48. Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382.

49. Not precluded by any personal liability under Code 1896, § 2100, for value of property sold. McGraw v. Robinson Mercantile Co. [Miss.] 49 S 260.

50. See ante, § 5A.

51. Could sue in equity to set aside for failure of consideration testator's deed of such land. White v. Bailey, 65 W. Va. 573, 64 SE 1019.

52. See post, § 18.

53. In suit by representative against heir and legatee for conversion of property of estate given by will jointly to defendant and his mother, evidence held to show settlement by defendant with his mother so as to leave him in possession and ownership of personalty. Diem v. Drogmiller [Mich.] 16 Det. Leg. N. 635, 122 NW 637. Administrator appointed at instance of daughter for sole purpose of suing for personalty, for over 13 years in defendant's possession under settlement with defendant's mother to whom will gave the property jointly with defendant, held not entitled to sue for such personalty, daughter having no interest in the estate. Id.

54. Where personalty did not exceed $300 and therefore passed to widow and children. Bertig v. Higgins [Ark.] 115 SW 935. Grant of letters held not conclusive of right of administrator to take possession of such property. Id. What are assets, see ante, § 5A. Property set apart for widow or children, see post, § 5D.

55. Courts of Colorado may require administrator appointed there to return such assets where necessary to pay debts in state from which they were removed. Moore v. Ingram [Colo.] 102 P 1070. Property would be returned to Missouri where removed by heir, subsequently appointed administrator in Colorado, before Missouri creditors could enforce their rights under statutes of that state. Id. No objection that it had not been inventoried by Colorado representative (Id.), nor that Missouri creditor presented its claim in Colorado court where it was disallowed both below and on appeal (Id.).

56. Though such estate has been declared insolvent. McGraw v. Robinson Mercantile Co. [Miss.] 49 S 260.

57. Allowance of counsel fees, see post, § 9D. Administrator should aid rather than obstruct attorney in collection of his fees for acceptable and successful services under proper contract of employment. Where contract for contingent fee for collecting a claim was held proper. Pennebaker v. Williams, [Ky.] 120 SW 321.

58. Compromise for wrongful death made with woman who lived with decedent as his wife at time of his death and who had been duly appointed administratrix held binding on subsequent administrator, where no circumstances appeared leading to belief that decedent had a lawful wife and a child in a distant state. McFarland's Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 82. Administrator acting under voidable appointment may compromise claim for decedent's death. Id. Though attorney for defendant may legally represent administratrix in securing court's approval of her compromise of action for decedent's wrongful death, something besides views of such attorney as to expediency of such settlement should be presented to court. In re Stanley, 62 Misc. 593, 116 NYS 1126.

59. Where deceased wife held second mortgage on husband's land, her representative could redeem from foreclosure of first mortgage. Sharpe v. Miller [Ala.] 47 S 701.

60, 61. Crohn v. Clay County State Bank, 137 Mo. App. 712, 118 SW 498. Debtor not protected on ground money went where it would ultimately have to go (Id.), or on ground resident administrator is trustee for heirs and foreign administrator (Id.).

62. Crohn v. Clay County State Bank, 137 Mo. App. 712, 118 SW 498.

Special proceedings for discovery are provided for in some states,[63] but equitable proceedings independent of these are maintainable in proper cases for the collection of assets.[64] Want of administration does not suspend the running of limitations against a mortgage in favor of the estate.[65] Interventions [66] and counterclaims [67] may be allowed, and the usual rules of pleading [68] and evidence [69] apply.

(§ 5) *C. Inventory and appraisal.*[70]—See 11 C. L. 1289—The representative is usually required to file an inventory [71] which must include all the assets,[72] and he may be required to appear and answer as to omitted property;[73] but an executor who claims certain property as his own should not be compelled to unqualifiedly in-

63. In proceedings under Code Civ. Proc. §§ 2707, 2709, by administrator to discover property withheld, surrogate has power to prosecute inquiry of person cited to point of determining truth of allegations of answer, and examination cannot be defeated by answer of ownership or right of possession. In re Stiens' Estate, 60 Misc. 631, 113 NYS 1105. Where answer admits control of property but petitioner's right thereto is in dispute, surrogate cannot, in absence of consent that he determine the question, make any order adverse to person cited, unless it conclusively appears as matter of law that his claim of title is not well founded. Id. Administrator's proceeding for discovery of assets under Code Civ. Proc. § 2707, dismissed, each witness claiming title to property in his possession and disputing administrator's right. In re McGee's Estate, 63 Misc. 494, 118 NYS 423. Not necessary that written answer be filed by claimant. Id.

64. Suit in equity by administrator to compel delivery of notes, bonds, keys, etc., belonging to estate, is not for discovery and can be maintained without first citing defendant for examination under Rev. St. c. 66, § 70. Farnsworth v. Whiting, 104 Me. 488, 72 A 314. Evidence held to sustain finding that decedent was owner of a certain note at time of her death and that maker's pretended payment thereof was void and illegal. Dudley v. Niswander, 65 W. Va. 461, 64 SE 745.

65. Sanford v. Bergin [Cal.] 103 P 333.

66. In equity suit by administrator to recover amount of a note owned by decedent at time of her death and fraudulently paid by makers, held proper to allow a creditor of decedent to intervene. Dudley v. Niswander, 65 W. Va. 461, 64 SE 745.

67. A debtor cannot buy up claims against decedent and interpose them when sued on his indebtedness to estate (Printy v. Cahill, 235 Ill. 534, 85 NE 753), neither can he set up claims due him from decedent against debts growing out of his dealings with administrator (Id.), but where in lifetime of decedent credits were mutually extended under circumstances giving rise to just presumption that debt on one side was understood to liquidate that on the other, set-off should be allowed in equity (Id.). Evidence held to require set-off of claim for services and advancements against note and mortgage belonging to estate. Id. Maker of note given decedent for personal services to be by him performed held entitled, in action on note, to counterclaim for difference between consideration for services and what it would cost to procure services of another equally competent. Mendenhall v. Davis, 52 Wash. 169, 100 P 336. Though under statute surviving husband was entitled to one-half of wife's surplus personal estate, including note held by wife against him, husband was not entitled to credit on account thereof in action by representative on the note, debts not having been ascertained or paid. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372. Could not set off value of personalty of estate converted by brothers and sisters of deceased wife. Id.

68. See, also, post, § 10. In action against surviving husband by wife's administrator to recover on note executed by husband to wife, answer that on wife's death husband became entitled to her personal estate as her husband held not a denial of allegation of petition that administrator's wife was decedent's sister and heir at law. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372. Allegation that neither deceased wife nor her estate were indebted to any person at date of qualification of administrator held not specific denial of averment of petition that administrator and his wife were creditors of estate. Id.

69. In action by representative to recover securities executed in name of defendant, evidence as to decedent's intention to buy an interest in a bank, his financial standing, etc., held inadmissible as foreign to the issues. Baker v. Baker [Ind. App.] 86 NE 864.

70. Search Note: See Executors and Administrators, Cent. Dig. §§ 311-322; Dec. Dig. §§ 62-73; 18 Cyc. 197-205; 11 A. & E. Enc. L. (2ed.) 854; 19 A. & E. Enc. P. & P. 860.

71. Code, § 3310, expressly requires filing of inventory by executor before his discharge (In re Duncanson's Estate [Iowa] 120 NW 88), and it is duty of court to order him to do so no matter from what source complaint comes (Id.). Report showing receipt of personalty is sufficient to invoke statute. Id.

72. If property belonging to estate is improperly left out of inventory, it is administrator's duty to make return thereof as required by Code Pub. Gen. Laws 1904, art. 93, § 215 (Fowler v. Brady, 110 Md. 204, 73 A 15), and on failure to do so after notice a creditor of estate may file petition against him in orphans' court under § 259 to require him to do so (Id.).

73. Heirs may require administrator to appear before probate court and answer relative to ownership of realty and personalty alleged to have been wrongfully omitted from inventory. Comp. Laws, §§ 9355, 9356, 9357. Mitchell v. Bay Probate Judge, 155 Mich. 550, 16 Det. Leg. N. 2, 119 NW 916. Dismissal, without prejudice, of petition filed in probate court alleging failure of administratrix to inventory property, held not bar to subsequent petition for discovery of assets against administratrix. Id.

ventory it as assets of the estate.[74] The inventory is not always conclusive on the representative[75] but may be denied or explained where made under mistake as to the status of the property,[76] or if made by a former administrator.[77] Jurisdiction to determine title to property included in or omitted from the inventory has already been considered.[78]

(§ 5) *D. Property allowed surviving spouse or children.*[79]—See 11 C. L. 1289—In many states the widow is entitled to the possession of the mansion house and adjacent land for a specified period after her husband's death or until the assignment of her dower,[80] and sometimes an extended homestead estate is given.[81] Other statutory allowances are usually made to the surviving spouse and children pending administration,[82] and these are not assets subject to administration,[83] nor can they be otherwise appropriated for debts.[84]

74. Held sufficient for basis of order directing proceedings to try title that executor filed schedule of securities fully describing them, stating they never came into his hands as executor, but belonged to himself by gift from decedent and that he could not make sworn return of same as part of estate because such return would not be true. Hartwig v. Flynn [Kan.] 100 P 642.

75. Widow could show cash item in inventory was not received by her. In re Fletcher's Estate, 83 Neb. 156, 119 NW 232.

76, 77. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156.

78. See ante, § 2.

79. Search Note: See note in 21 L. R. A. 241.

See, also, Executors and Administrators, Cent. Dig. §§ 651-729; Dec. Dig. §§ 173-201; 18 Cyc. 373-405; 2 A. & E. Enc. L. (2ed.) 156; 19 A. & E. Enc. P. & P. 931.

80. Right of a widow to possession and occupancy of messuages and plantation is incidental to and dependent upon her possession and occupancy of mansion house, and without latter she has no right to the possession and occupancy of former by virtue of her quarantine. Givens v. Ott [Mo.] 121 SW 23. If she occupies plantation without the mansion house she has no quarantine, and limitations will run in her favor. Id. Widow who accepts devise of all the realty has no claim for 40 days' sustenance under real property law. In re Meuschke's Estate, 61 Misc. 9, 114 NYS 722. Rights of widow until assignment of dower, given by Ky. St. 1903, § 2138, allowing her one-third of rents and profits of husband's dowable estate and free use of mansion house and yard, are personal to widow and she cannot convey them. Phillips v. Williams [Ky.] 113 SW 908.

81. See 11 C. L. 1289. See, also, Homesteads, § 8. Where widow did not abandon homestead but elected to take dower, purchaser of her dower interest and an infant heir were entitled to use and enjoyment of homestead and dower in proportion that widow's third bore to value of portion set apart to infant to make the whole worth $1,000, if any. Phillips v. Williams [Ky.] 116 SW 688. Portion set apart to them should include dwelling house, if it could be done without material injury to interests of others. Id.

82. Under statute, where personalty does not exceed $300 in value, it vests in widow and minor children without order of court, subject to funeral expenses. Bertig v. Higgins [Ark.] 115 SW 935. Civ. Code 1895, § 3466, allowing widow for support for years subsequent to the first where the estate "is to be kept together for more than 12 months," applies where estate is kept together for over 12 months by reason of litigation over a will for which widow is not responsible. Edenfield v. Edenfield, 131 Ga. 571, 62 SE 980. In determining amount allowable, first year's allowance, whether consumed, size of estate, etc., are properly considered. Id. Exemption under Ky. St. 1903, § 1403, subsec. 5, to be set apart to "widow or infant child," to infant child if no "mother" survives, and "widow" if there be no infant children, held not applicable to husband and children of wife dying intestate. Thaxton's Guardian v. Walters' Adm'r [Ky.] 113 SW 118. Widow's allowance under Pub. Acts 1905, p. 516, No. 331, pending settlement of estate, is for her sole benefit and is not payable to any one else. In re Service's Estate, 155 Mich. 179, 15 Det. Leg. N. 990, 118 NW 948. Though widow's allowance pending administration was paid to her attorney, she in fact received it where she received credit on an amount previously advanced her by him. Id. Under subd. 1, § 176, c. 23, Comp. St. 1905, widow is entitled to $200 in cash and also wearing apparel and ornaments of deceased and all household furniture. In re Manning's Estate [Neb.] 122 NW 711. Statute applies to cases where decedent dies testate as well as to estates of intestates. In re Fletcher's Estate, 83 Neb. 156, 119 NW 232. Discretionary with court to allow anything for support of widow during administration where she was maintained at cost of state in hospital for insane during that period. In re Manning's Estate [Neb.] 122 NY 711.

83. Widow's allowance of $200 in cash and other personalty, under subd. 1, § 176, c. 23. Comp. St. 1905, is not assets in executor's hands. In re Manning's Estate [Neb.] 122 NW 711. Personalty not exceeding $300 held exempt from administration, precluding recovery thereof by representative from third person. Bertig v. Higgins [Ark.] 115 SW 935.

84. Act Aug. 17, 1903 (Acts 1903, p. 76), denying year's support to widow or children of vendee of personalty where vendor takes mortgage, stating that it secures the purchase price, held not retroactive. Corbitt v. Nebern [Ga.] 64 SE 479. Held not applicable

The personalty owned by decedent at his death [85] must be resorted to exclusively under some statutes,[86] while under others the realty may be charged where the personalty proves inadequate.[87] Property pledged to secure a debt of decedent and in the possession of the pledgee cannot be applied to the payment of a widow's allowance as against the right of the pledgee.[88]

A widow's remarriage [89] or an antenuptial contract entered into by her [90] may bar her allowance, but mere delay in making application,[91] or an improper loan or gift to her by a former representative, is not sufficient.[92]

Notice of application for a widow's allowance is not jurisdictional where the statute is silent.[93] The facts justifying the allowance must be stated in the petition,[94] and the order should conform to the statute.[95] Under a will providing generally for an allowance sufficient for household expenses, the amount of the allowance is for the court in the exercise of its sound discretion.[96] The widow's award does not bear interest before an election by her to take it in cash.[97]

to mortgage taken before its passage though mortgagor died after its passage. Id. Statute providing that no exemption shall exist against execution for purchase money does not give vendor an equitable lien either on the property or its proceeds enforcible by independent suit against widow holding proceeds by order of court. Code, § 4015. Haggard v. Scott [Iowa] 121 NW 375.

85. Personalty in which decedent has only an undivided fractional interest may be set apart to widow under Code Civ. Proc. § 2713. In re Hallenbeck, 195 N. Y. 143, 88 NE 16. Under Rev. St. Tex. 1895, arts. 2037, 2062, allowances to widow and children can be made only out of decedent's individual estate under control of county court. In re Dobert, 165 F 749. County court cannot award allowances to widow and children of a deceased partner out of partnership assets except residue after payment of firm debts. Id.

86. Allowance of $300 to widow under Kirby's Dig. § 3, can be out of personalty only. Kitchens v. Jones, 87 Ark. 502, 113 SW 29. Not out of surplus from foreclosure of mortgage on decedent's land after his death, such surplus being distributable as realty. Id. Widow's allowance pending administration can be paid only from assets of estate, and not from decedent's homestead. In re Hadsall, 82 Neb. 587, 118 NW 331.

87. Maintenance of widow and minor children may be charged against realty if income therefrom and other personalty prove insufficient. Comp. St. 1905, c. 23, construed. In re Fletcher's Estate, 83 Neb. 156, 119 NW 232. Will held not to restrict widow or children to income for support pending settlement so as to preclude resort to realty. Id. Where decedent had conveyed land to secure a debt, fact that vendee brought foreclosure in federal court held not to transfer deed into mere mortgage not conferring title so as to let in widow's claim to allowance out of the land. British & American Mortgage Co. v. Worrill, 168 F 120. Allowance made in proceedings in which grantee was not party held applicable only to grantor's equity of redemption. Id.

88. Widow's right to yearly allowance in lieu of homestead held inferior to claim of bank holding life policy in pledge. Clark v. Southwestern Life Ins. Co. [Tex. Civ. App.] 113 SW 335. Widow could not attack form of assignment of policy, insurer having waived requirements prescribed. Id.

89. Held, under facts of the case, that widow's remarriage did not deprive her of statutory allowances. Bente v. Sullivan [Tex. Civ. App.] 115 SW 350.

90. Widow's allowance out of personal estate held barred by antenuptial agreement. Bright v. Chapman [Me.] 72 A 750. Antenuptial agreement by which widow was to receive certain property as "all that she shall receive of the estate" held not to bar allowance for one year under Code, § 3314. In re Miller's Estate [Iowa] 121 NW 700.

91. That family allowance to widow was not applied for until more than three years after letters of administration had issued held not to impair widow's right thereto. Crabtree v. Fretwell, 154 Cal. 638, 98 P 1058.

92. That former administratrix had improperly given or loaned to widow certain money held no bar to her right to statutory family allowance. Crabtree v. Fretwell, 154 Cal. 638, 98 P 1058.

93. In re Fletcher's Estate, 83 Neb. 156, 119 NW 232.

94. Allegations of petition to probate court for setting apart homestead to widow under Code 1896, § 2097, that decedent owned property which did not exceed value of exemptions allowed widow, and that he left no minor children, held to negative ownership of any other property. Singo v. McGehee [Ala.] 49 S 290. Decedent's residence in county in which application is made held not jurisdictional, it being sufficient that such fact be set out in decree. Id.

95. Where family allowance to widow was not applied for until after three years from issuance of letters, fact that order granting it provided it should run for 12 months from decedent's death was without prejudice, though Code Civ. Proc. § 1466, provides that where estate is insolvent family allowance shall be for not more than one year from granting of letters testamentary. Crabtree v. Fretwell, 154 Cal. 638, 98 P 1058.

96. Evidence held not to justify disturbance of allowance made by orphans' court for household expenses of testator's family pursuant to will providing for an allowance for such purpose out of income. In re Dorris' Estate [Pa.] 72 A 623.

97. Turner v. Fell, 142 Ill. App. 458.

(§ 5) *E. Management, custody and control of estate.*[98]—See 11 C. L. 1291—Testamentary provisions are elsewhere construed.[99] In the absence of statutory restriction, the administration of an estate may continue for many years.[1] An administrator is personally liable for negligent failure to keep in a safe condition realty of which he is lawfully in possession,[2] and his admitted control and possession is presumptively lawful.[3]

*Control by courts.*See 11 C. L. 1291—Administration in the state of decedent's domicile does not govern administration of property of dececent in another state.[4] As executor of a nonresident decedent, one may have the legal ownership of property over which the courts of the state in which he resides have no jurisdiction.[5] A receiver may be appointed in a proper case by a federal court of equity to preserve the estate for the benefit of creditors until disposition thereof by the probate court.[6]

*Contracts for sale or conveyance of land by or to decedent.*See 11 C. L. 1292—At common law these contracts must be enforced by or against the heirs,[7] but by statute the representative may sue or defend.[8] Executors and trustees in whom complete legal title to realty is vested in trust may carry out a contract of decedent to convey part of the land without the assistance or intervention of the beneficiaries.[9]

*Sale or other disposal of realty.*See 11 C. L. 1292—In the absence of special statutory provision,[10] the disposition of realty by representatives is limited to sales under

98. Search Note: See notes in 5 C. L. 1215; 3 L. R. A. (N. S.) 704.

See, also, Executors and Administrators, Cent. Dig. §§ 323-338, 397-650½; Dec. Dig. §§ 74-82, 90-172; 18 Cyc. 206-208, 210-214, 233-245, 247-373, 1309-1323, 1325, 1326, 1330-1350, 1352; 11 A. & E. Enc. L. (2ed.) 944.

99. See Wills, § 5D.

1. Act Feb. 5, 1840 (Laws 1840, p. 110, § 32), fixing term at one year, was repealed by Act Mar. 20, 1848 (Laws 1848, p. 235, c. 157) (Edwards v. Gates [Tex. Civ. App.] 120 SW 585), and as no act fixes term of administration, lapse of 15 years is not an abandonment (Id.). Sale of land for debts held valid though made after that time. Id.

2. Bannigan v. Woodbury [Mich.] 16 Det. Leg. N. 571, 122 NW 531. Where he was admittedly in possession of a building, his possession was presumptively lawful. Id. In action for injury from falling glass, allegation that defendant was administrator and as such in possession of the building held not to necessarily negative his personal liability. Id.

3. In action against him for injury due to nonrepair of a building, presumption obtains though usually administrators are not entitled to possession of realty. Bannigan v. Woodbury [Mich.] 16 Det. Leg. N. 571, 122 NW 531.

4. Under Kansas statute requiring administration of nonresidents' property in state to be according to law of the state. Wilson v. Hartford Fire Ins. Co. [C. C. A.] 164 F 817.

5. Commonwealth v. Peebles [Ky.] 119 SW 774. Resident executor of nonresident decedent held not required to list for taxation in state of his residence capital stock owned by decedent but never brought into state of residence of executor. Id.

6. Evidence held to entitle creditor to federal receiver to preserve property in another state. Underground Elec. R. Co. v. Owsley, 169 F 671.

7. Heirs must be made parties to suit to compel performance of decedent's contract to convey land. McQuitty v. Wilhite, 218 Mo. 586, 117 SW 730. Administrator alone cannot defend suit for specific performance of decedent's oral contract to convey land merely by virtue of his statutory right to sell lands to pay debts. Id. Even if he could defend title, petition is defective where it fails to allege debts, order of sale, etc. Id. Authority of administrator under Rev. St. 1899, §§ 129, 130, 146 (Ann. St. 1906, pp. 379, 380, 384), under order of court to rent or sell land for debts, does not give authority to convey in performance of decedent's contract (Id.), and, hence, he cannot be compelled to do so by decree in equity (Id.).

8. Rev. St. 1899, § 173 (Ann. St. 1906, p. 394), authorizing proceedings by vendee in probate court to require administrator to perform contract of decedent to convey land, refers to only written contracts. McQuitty v. Wilhite, 218 Mo. 586, 117 SW 730. Petition under Rev. Code, § 7614, for order requiring administrator to convey land pursuant to decedent's contract, need not negative instances in which, under § 6103, specific performance of contracts will not lie. In re Grogan's Estate, 38 Mont. 540, 100 P 1044. Sufficient where petition set out contract and alleged consideration to be $20,000. Id. Unnecessary to make actual tender of amount due where before trial he paid it into county treasury for administrator's use. Id. Allegation of payment of certain instalments and readiness to pay remainder held to sufficiently show compliance with agreement on petitioner's part. Id. Petition not premature though agreement supplementary to contract provided that final payment should not be made until final determination of a suit in a federal court. Id.

9. In purchaser's suit against executors for specific performance, held not error to refuse to make widow and heirs parties defendant. Hald v. Claffy, 131 App. Div. 251, 115 NYS 561.

10. Provision added to Howell's Ann. St.

wills [11] or under order of court for the payment of debts,[12] or for division among beneficiaries.[13] No license of court is necessary to sell land where power is given by will.[14] The successor of an executor given testamentary power to sell land may exercise such power if the will does not indicate that special confidence was reposed in the executor.[15] Property not part of the estate cannot be sold.[16] Failure of an executor to sign a deed in his representative capacity is not necessarily fatal.[17] Whether the representative exercised a power under will or conveyed merely his own interest is a question of intention.[18] One who fails to assert his interest in a proceeding to sell land may be estopped to do so thereafter.[19] Sales should be confirmed by the court in the regular way [20] unless confirmation is rendered unnecessary by will.[21] When return of sale is made and filed, any person interested may file written objections to confirmation and may be heard thereon.[22] A purchaser who stipulates against consummation of the transaction until determination of the sufficiency of the title cannot have the sale and its confirmation set aside by the probate court so long as no action is taken by either party to have the title established by the proper tribunal.[23] Where the executors purchase land and charge the same with a lien for a portion of the purchase money, the grantees hold subject to such lien.[24]

Sale or other disposal of personalty. See 11 C. L. 1203—Power to sell may be under will [25] or statute.[26] The court may fix an upset price.[27] What property passes by

§ 6025, relating to sale of realty for debts, by Pub. Acts 1897, p. 138, No. 121, so as to authorize sale to preserve the estate, or where sale would be for best interests of all concerned, held void for not being embraced in title of amending act. Bresler v. Delray Real Estate & Inv. Ass'n, 156 Mich. 3, 16 Det. Leg. N. 28, 120 NW 21.

11. Construction of particular testamentary provisions. See, also, Wills, § 5E. Direction for sale of land, proceeds to go into residuary estate, held void, will containing no residuary disposition and sale thereunder held not to pass title of heirs. In re Green, 63 Misc. 638, 118 NYS 747. Executor taking residuary estate "in trust to receive, hold, invest, and reinvest," has implied power to sell realty for purpose of discharging trust. Powell v. Woodcock, 149 N. C. 235, 62 SE 1071. Testamentary power held not validly exercised, contingency contemplated by will not having arisen. Satterfield v. Tate [Ga.] 64 SE 60.

12. See post, § 7. There being no debts, personal representative has no interest in sale of land or division of proceeds among heirs. Bayne v. Stratton [Ky.] 115 SW 728.

13. See post, § 12. Written contract by administrator to convey land when he should have obtained permission of surrogate's court held void and unenforcible after permission obtained, administrator having no power to contract to sell land until after giving bond under Code Civ. Proc. § 2750, et seq., and obtaining order empowering him to sell. Bauman v. Goldthrope, 129 App. Div. 19, 113 NYS 136.

14. In re Manning's Estate [Neb.] 122 NW 711. Neither authorization nor confirmation held necessary unless ald of court is required to supply omissions in will. In re Mulholland's Estate [Pa.] 73 A 932.

15. Administrator with will annexed. In re Manning's Estate [Neb.] 122 NW 711.

16. Separate property of predeceased wife held not subject to sale in administration of husband's estate. Vivion v. Nicholson [Tex. Civ. App.] 116 SW 386. Court held without authority to order sale of realty on which heirs made final proof under homstead law after decedent's death, such property not being part of estate. Council Imp. Co. v. Draper [Idaho] 102 P 7.

17. Executor's deed reciting it was made by grantor as executor and by virtue of will held admissible as color of title though representative character was not designated in signature. Dodge v. Cowart, 131 Ga. 549, 62 SE 987.

18. For jury whether executor conveyed land under power in will or merely his own individual interest. Mims v. Hair, 80 S. C. 460, 61 SE 968.

19. See post, § 7.

20. In suit by legatees to require executors to account for rents and profits of realty they had sold to third person, judgment by which deeds conveying the land were adjudged valid held not a confirmation of this sale, the law prescribing method for return of sales and confirmation. In re Richard's Estate, 154 Cal. 478, 98 P 528.

21. Confirmation of sale under will held not necessary. In re Mulholland's Estate [Pa.] 73 A 932. Executors held required to report sale of realty to court and have same confirmed in order to pass legal title, though will empowered them after a fixed time to sell any portion of realty at public auction without order of court or without being required to account to any court. In re Richard's Estate, 154 Cal. 478, 98 P 528.

22. In re Christensen's Estate, 15 Idaho, 692, 99 P 829. Return to order of sale and objections filed constitute issues triable by probate court. Id.

23. In re Hostetter's Estate, 222 Pa. 197, 70 A 1006.

24. Leavell v. Carter [Ky.] 112 SW 1118.

25. See Wills, § 5E.

26. Executors are without authority to sell

the assignment or transfer depends upon its terms [28] and the nature of the property.[29] Whether the property had been previously transferred by decedent so that the purchaser got nothing is a question of evidence.[30] An executor cannot donate property of the estate merely because he supposes testator would have done so had he lived.[31]

§ 6. *Debts and liabilities of estate; their establishment and satisfaction. A. Claims provable.*[32]—See 11 C. L. 1294—These embrace the personal obligations of decedent [33] growing out of contracts, express [34] or implied,[35] which are not extinguished by his death,[36] and torts which survive.[37] They may be such as are imposed by law,[38] but must be enforcible against a plea of limitations,[39] the statute of frauds,[40] or other like defense.[41] An estate is not liable for personal injuries inflicted after decedent's death by reason of its nonrepair.[42] One who renders services

notes held by deceased, these being assets transferable only under order of probate court in absence of testamentary direction. Jones v. Wheeler [Okl.] 101 P 1112.

27. Probate court may fix an upset price in order for sale of personalty at auction. Epperson v. Jackson [S. C.] 65 SE 217.

28. Accounts and claims "in hands of" administrator held not to include interest of estate in a fund held in trust by third person. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156. Whether trust fund was in hands of administrator at time of sale held for jury. Id. Words "in hands of administrator" held subject to explanation by parol evidence as to what claims were contemplated. Id. Where purchaser did not know of claim of estate against trust fund, held not error to refuse to submit question as to his intention to buy the claim. Id. Where transfer of claims and accounts pursuant to administrator's sale did not on its face transfer interest of estate in a trust fund, burden was not on distributees to show that such interest was reserved or excepted. Id.

29. Sheriff's mortgage foreclosure certificate of sale is personalty and transferable as such by executor of deceased mortgagee. Boschker v. Van Beek [N. D.] 122 NW 338. Assignment of certificate by executor with approval of probate court and consent of devisees held to divest interests of devisees, though it did not definitely appear certificate was held by executor in the state. Id.

30. Evidence held to show previous transfer of homestead certificate. Clark v. Welch, 154 Mich. 537, 15 Det. Leg. N. 816, 118 NW 137.

31. Could not deliver up note to church and release lien on church property though testator probably intended to donate the amount of note to church. Dealy v. Shepherd [Tex. Civ. App.] 116 SW 638. Guardian of insane heir could recover his interest, right not being restricted to executor. Id.

32. **Search Note:** See note in 13 L. R. A. (N. S.) 643.

See, also, Executors and Administrators, Cent. Dig. §§ 730-746, 901-903½, 1858-1876; Dec. Dig. §§ 202-221; 18 Cyc. 405-447; 19 A. & E. Enc. P. & P. 956.

33. Unpaid assessments for street improvements held not property demandable of adm. c. t. a., not being testatrix's personal obligations but enforcible only out of the property. Hessig v. Hessig's Guardian [Ky.] 115 SW 748. Obligation of personal judgment against decedent held to be against his estate after his death, and not against his heirs. Hernly v. Pierce, 42 Ind. App. 603, 86 NE 443.

34. See, also, Contracts. Estate held liable on claim of one who had given decedent an accommodation note on his promise to pay and protect it at maturity, where maker was compelled to pay subsequent holder. Klein v. Runk, 130 App. Div. 474, 114 NYS 1062.

35. See, also, Implied Contracts. Estate is liable on all contracts of decedent broken in his lifetime, and on all those broken after his death except such as require personal skill or taste. Mendenhall v. Davis, 52 Wash. 169, 100 P 336. Daughter's claim for repairs and other expenses incurred by testator and paid by daughter out of her own earnings held properly allowed against estate (In re Meuschke's Estate, 61 Misc. 9, 114 NYS 722), but not claim for money for household expenses where evidence showed voluntary contribution for family use (Id.). Where consideration for land was paid to decedent but title failed, purchaser's right to return of consideration held a proper claim. Elliott v. Garvin [C. C. A.] 166 F 278. Claim held not maintainable for services rendered grandmother without hope of pecuniary reward. Shutts v. Franke, 42 Ind. App. 275, 85 NE 781.

36. Agreement of husband to support wife for her life held enforcible against his personal representative, though not in terms so stating. Barnes v. Klug, 129 App. Div. 192, 113 NYS 325. Equity will entertain suit against estate by one whom deceased had contracted to maintain and support, and on proper proof will grant relief by decree against estate for reasonable value of such support. Cooper v. Cooper, 65 W. Va. 712, 64 SE 927. Sufficiency of evidence, see post, § 6B, subd. Contests and Actions.

37. See, also, Abatement and Revival. Estate held liable for special damages accruing prior to decedent's death, from decedent's obstruction of highway. Leverone v. Weakley [Cal.] 101 P 304.

38. Funeral expenses, see post, next paragraph.

39. See Limitation of Actions.

40. See Frauds, Statute of.

41. See Duress; Fraud and Undue Influence; and like topics.

42. Bannigan v. Woodbury [Mich.] 16 Det. Leg. N. 571, 122 NW 531. See ante, § 5E, as to liability of representative.

to another under agreement for compensation out of the latter's estate may recover from the estate the reasonable value of such services, no provision being made by will.[43] Upon the death of a stockholder, his estate succeeds to his stock and is liable with the other stockholders for corporate debts thereafter arising so long as the stock is part of the estate.[44] Payments in the adjustment of conflicting claims to an estate by those asserting title thereto cannot be construed as debts or treated as administration expenses.[45]

Funeral expenses[46]—See 9 C. L. 1180 are chargeable against the estate,[47] and not against the surviving spouse.[48]

(§ 6) *B. Exhibition, establishment, allowance and enforcement of claims.*[49] *Jurisdiction.*See 11 C. L. 1294—General questions pertaining to the jurisdiction of the various courts to pass on or allow claims have been discussed in an earlier section.[50] Administration proceedings in the state of decedent's domicile cannot bar the claims of creditors in another state in so far as property in the latter state is concerned.[51]

*Occasion and necessity of proving claims.*See 11 C. L. 1295—Claims and demands, including individual claims held by the representative,[52] must be presented to the court or representative for allowance in most jurisdictions,[53] regardless of the administrator's familiarity with the claim,[54] and the representative is without authority to pay claims not regularly presented or proven;[55] but under a statute covering only contract claims, tort claims need not be presented,[56] and presentation has also been held unnecessary as to claims secured by lien,[57] or interposed by way of set-off,[58]

43. Walker v. Ganote [Ky.] 116 SW 689. Evidence held to show agreement for payment out of estate. Id. Award of $1,350 reduced to $1,000. Id. Where decedent promised that plaintiff should have one-third of his estate on his death for services, and services were duly rendered, value of services measured by such third could be recovered against representative where survivor waived specific performance. Bunting v. Hutchinson, 5 Ga. App. 194, 63 SE 49. See, also, Wills.

44. Though executrix never had possession of, or dominion over, stock nor knew of its existence until after creation of indebtedness sued on. Miller v. Katz [Cal. App.] 102 P 946.

45. In re Wells' Estate [Iowa] 120 NW 713.

46. For allowance to representative on accounting, see § 9D, ante.

47. Funeral expenses whether burial is provided by kindred or others are charges against decedent's estate imposed by law, as distinguished from decedent's contract obligations, and administrator is trustee for their payment. Hildebrand v. Kinney [Ind.] 87 NE 832.

48. A husband's estate, not his widow, is liable for expenses of his funeral. Compton v. Lancaster [Ky.] 114 SW 260.

49. **Search Note:** See notes in 58 L. R. A. 82; 3 Ann. Cas. 576, 850.

See, also, Executors and Administrators, Cent. Dig. §§ 746-922, 1858-1876; Dec. Dig. §§ 222-257; 18 Cyc. 448-541; 8 A. & E. Enc. L. (2ed.) 1007, 1062.

50. See ante, § 2.

51. State v. Thurston County Super. Ct., 52 Wash. 149, 100 P 198.

52. Administratrix holding claims individually against estate must present them in regular way and have them allowed. In re Hodges' Estate [Mich.] 16 Det. Leg. N. 338, 121 NW 748. Comp. Laws 1897, § 9380, limiting time for presentation of claims, and Pub. Acts 1901, p. 102, No. 70, authorizing revival of commission for allowance of claims, make no exception as to claims due an administratrix. Id.

53. Under Rev. St. 1895, arts. 2015-2018, 2082, suit cannot be maintained on a claim unless it has been presented to the representative and rejected. Whitmire v. Powell [Tex. Civ. App.] 117 SW 433. "Any claim for money" held to mean only the debt and not both debt and lien. Id. On death of person who has executed a deed of trust, claim must be proven against estate. Foreclosure after death of owner held ineffectual to pass title. Whitmire v. Powell [Tex. Civ. App.] 117 SW 433. Held necessary to file judgment for alimony against estate. Wilson v. Fahnestock [Ind. App.] 86 NE 1037.

54. In re Brown's Estate, 60 Misc. 35, 112 NYS 599.

55. Administrator is without authority to pay claims not presented in accordance with Code 1906, § 2106, requiring presentation of written evidence thereof or statement in writing (Lehman & Co. v. Powe [Miss.] 49 S 622), § 2105, prohibiting payment until claim has been probated, allowed and registered (Id.).

56. Claim for damages for obstruction of highway need not be presented to executor prior to suit thereon, Code Civ. Proc. § 1493, referring only to claims arising on contract. Leverone v. Weakley [Cal.] 101 P 304. Legatee's suit for distributive share brought against administrator of estate of executrix is founded on contract and not maintainable in absence of prior presentation of claim to administrator for allowance, as required by Code Civ. Proc. § 1493. Burke v. Maguire, 154 Cal. 456, 98 P 21.

57. Where before decedent's death execu-

and as to claims for trust property.[59] Claims arising against an estate after decedent's death need not be presented for allowance,[60] such as a claim for legal services during the administration.[61] So, also, presentation is unnecessary where the estate is being administered out of court by independent executor,[62] but if a claim is presented in such case claimant's right to sue thereon is not thereby affected.[63] The commencement of suit is sometimes held equivalent to presentation.[64]

By and against whom claim is presentable. See 11 C. L. 1295—The claim is properly presented by the owner or his duly constituted agent,[65] and presentation is complete when the claim has been exhibited to the administrator and filed.[66] In some states commissioners on claims are appointed [67] who serve for compensation.[68] A creditor may become entitled to relief in equity from the consequence of neglect on the part of the commissioners.[69]

Time for presentation; limitations. See 11 C. L. 1296—Claims must be presented or filed [70] and actions must be brought thereon [71] within the time prescribed by statute,

tion was levied on debts due him, judgment creditor had a lien within Code Civ. Proc. § 1500, excepting demands secured by lien from necessity of presentation. Nordstrom v. Corona City Water Co. [Cal.] 100 P 242. Presentation is necessary under Rev. St. 1895, arts. 2015-2018, 2082, though claim is secured by lien. Whitmire v. Powell [Tex. Civ. App.] 117 SW 433. Deed of trust on homestead held not a "lien" thereon within Code Civ. Proc. § 1475, requiring presentation of claim against estate as condition to enforcing lien or incumbrance on homestead. Athearn v. Ryan, 154 Cal. 554, 98 P 390. Trust deed by husband and wife held enforcible without presenting claim to husband's administrator for debt secured. Id. Where husband and wife mortgaged homestead, mortgagee, after death of both, could foreclose without presenting claim against wife's estate, husband having died first and claim having been presented against his estate and allowed. Raggio v. Palmtag [Cal.] 103 P 312. Where by failure of executor and residuary legatee to pay off a mortgage on realty out of personalty for benefit of devisee of the land he made himself personally liable for the debt, right of devisee to enforce payment was not barred by failure of mortgagee to file claim against estate. Schade v. Connor [Neb.] 120 NW 1012.

58. Where life insurance policy provided for reduction of amount of premium notes from amount due thereunder, claim for amount of such note was not required to be presented to insured's administrator to entitle insurer to set-off. Union Cent. Life Ins. Co. v. Washburn [Ala.] 48 S 475. Pierce's Code, § 1093, authorizes a set-off or counterclaim to extent of administrator's recovery, though defendant's claim has not been presented for allowance. Mendenhall v. Davis, 52 Wash. 169, 100 P 336.

59. Claimant of property held by decedent in trust is not "creditor" within probate law requiring filing of claims. Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382.

60. Liability of estate as stockholder for corporate debts. Miller v. Katz [Cal. App.] 102 P 946.

61. Claim directly against estate for legal services in administration is of second class within Mills' Ann. St. § 4780, and section requiring filing of claims within specified time applies only to claims of fourth class. United States Fidelity & Guar. Co. v. People, 44 Colo. 557, 98 P 828.

62, 63. Taylor v. Davidson [Tex. Civ. App.] 120 SW 1018. Effect of presentation on priority of claim, see post, § 6C.

64. Commencement of action in federal court, on claim held by foreign creditor, is presentation within Minnesota statute. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 171 F 1. Equity suit after expiration of time allowed by Minnesota statute held mere continuation of original action at law and not a new proceeding. Id.

65. Decree appointing receiver for foreign corporation held sufficient to authorize receiver to present to probate court petition on liability of deceased stockholder. Converse v. Nichols, 202 Mass. 270, 89 NE 135.

66. Actual presentation to judge and hearing not being contemplated. Keys v. Keys' Estate, 217 Mo. 48, 116 SW 537.

67. "Claim" and "demand" held synonymous within P. S. §§ 2814, 2820, 2824, providing for commissioners to receive and adjust claims and demands and for limitation of time for presentation of claims. Batchelder v. White's Adm'r [Vt.] 71 A 1111.

68. Commissioner appointed to report on claims should be given only statutory allowance and should be required to file statement showing number of days he was engaged. Hessig v. Hessig's Guardian [Ky.] 115 SW 748.

69. Creditor duly presenting claim to commissioners, who failed to allow or disallow same and omitted to mention it in their report, held entitled to equitable relief, not having discovered commissioner's failure to act until expiration of statutory remedies. Batchelder v. White's Adm'r [Vt.] 71 A 1111. Previous mistaken application to probate court held no bar. Id.

70. Administrator could not object to presentation of claim to him 13 days before his appointment where he held it a year thereafter before rejecting it. Scott Stamp & Coin Co. v. Leake, 9 Cal. App. 511, 99 P 731. Burns' Ann. St. 1908, § 2828, held to give creditors one year from notice of appointment of administrator in which to present claims, and to bar claims not filed prior to expiration of year unless filed 30 days before filing of final settlement. Tilson v.

in the absence of peculiar equitable circumstances,[72] or extension of time for good cause shown,[73] and this rule applies to claims held by the representative as an individual as well as to other claims.[74] Under some statutes claims may be exhibited on notice after the time fixed by the administrator,[75] and provision is usually made for contingent claims.[76] A general statute limiting the time for presentation of claims applies to nonresident as well as to resident creditors,[77] and to property and rights involved in an ancillary as well as in the domiciliary administration.[78] No such privity exists between representatives in two states that the bar of a claim in one state precludes its establishment in the other.[79] Where a claim has been filed

Hoosier Tropical Fruit Co. [Ind. App.] 88 NE 524. Where last day for filing a claim fell on Sunday, claimant had all of following Monday for filing. Keys v. Keys' Estate, 217 Mo. 48, 116 SW 537. In absence of fraud, etc., and apart from equitable relief under Pub. St. 1901, c. 191, § 27, proof of presentation of claim within one year from grant of letters, excluding time administration may have been suspended as required by § 2, is essential to suit against debtor's representative under § 4, authorizing commencement of suit within two years from grant of administration. Cummings v. Farnham [N. H.] 71 A 632. Also essential to suit under § 6 referring to suits where right of action existed in favor of or against decedent at his death and survived. Id. Only privileges conferred by § 6 are that if plaintiff is executor or administrator he may sue within two years after administration is taken out on creditor's instead of debtor's estate, and consequent extension of time for demand of payment. Id. "Suspension" of administration contemplated by §§ 2, 4, is one caused by death, resignation, etc., of administrator of deceased debtor's estate, and does not refer to administration of estates of deceased creditors. Id. Mere failure to apply for administration is not suspension. Id. Plaintiff as one interested in estate of deceased creditor could, before her appointment as executrix, exhibit claim against debtor's administrator within one year from time latter took letters, and, after taking out letters testamentary, could demand payment and sue within two years from that time. Id. Evidence held to show solicitor of executrix had authority to waive verification authorizing recovery on claim against objection it had not been properly presented in time. Seymour v. Goodwin [N. J. Err. & App.] 72 A 123. A creditor may assert his claim in a suit where estate is being administered at any time before assets of estate have been disbursed. Commonwealth v. McCue's Ex'rs [Va.] 63 SE 1066. Applied to claim of commonwealth for costs in criminal prosecution of decedent. Id. After time for presentation of claims against estate, all claims become barred and existinguished. In re Leiser's Estate, 138 Wis. 401, 120 NW 274. Where mortgage deficiency judgment was obtained against estate after expiration of time for filing claims, and was unreversed, allowance of such judgment subsequently, as a claim against estate, held not prejudicial, since judgment was otherwise enforcible against estate. Id. Limitation under Minnesota statute relates to time claim is presented and not to time of trial and judgment, nor to time the court determines whether good cause for extension of time exists. Shurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 171 F 1.

71. See post, subd. Contests and Actions on Claims.

72. Equitable relief afforded by Pub. St. 1901, c. 191, § 27, to creditors who fail to present claims within time allowed by law, is based on justice and equity and want of culpable negligence on claimant's part. Cummings v. Farnham [N. H.] 71 A 632.

73. Claim on notes and mortgage not maturing until after expiration of time fixed by Minnesota probate court for filing claims held allowable under facts shown, estate not having been closed and there being no defense on merits. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 171 F 1.

74. Under Code Civ. Proc. § 1493, providing that all claims must be presented within time limited in notice to creditors, and § 1510, requiring representative to present his own claims to judge of superior court, claim of an administrator must be presented within same time as claim of any other creditor. In re Long's Estate, 9 Cal. App. 754, 100 P 892. Where administratrix did not present her claims until after time allowed by statute, they were barred and could not be allowed in her final account. In re Hodges' Estate [Mich.] 16 Det. Leg. N. 338, 121 NW 748.

75. See post, Notice.

76. A contingent claim is one where the liability depends on some future event which may or may not happen, so that it is uncertain whether there will ever be any liability. Davis v. Davis, 137 Wis. 640, 119 NW 334. Mere fact accounting is necessary to determine amount due does not render claim contingent. Id.

77. St. 1898, § 3844. Davis v. Davis, 137 Wis. 640, 119 NW 334.

78. St. 1898, § 3844. Davis v. Davis, 137 Wis. 640, 119 NW 334. Wife's claim for husband's share in firm against estate of surviving partner held barred so as to preclude recovery in Wisconsin against distributee of surviving partner's estate. Id.

79. Claim against estate of decedent in hands of administrator with will annexed in one state is not barred because it was not presented and has become barred against estate in hands of domicilliary executors in another state. Wilson v. Hartford Fire Ins. Co. [C. C. A.] 164 F 817. Gen. St. Kansas 1901, § 4450, barring in Kansas causes of action arising in other states and barred there by limitations, held inapplicable, no cause of action against property in Kansas having arisen in state of decedent's domicile. Id.

within the statutory time, an amendment to represent the true amount due may be filed after the limitation has expired.[80]

Notice.[See 11 C. L. 1297]—Provision is usually made for the publication of notice to creditors requiring them to prove their claims within a specified time.[81] Where a statute allows claims to be exhibited on notice after the day fixed by the representative, such notice must be given within the time contemplated.[82]

The claim; its form and substance.[See 11 C. L. 1288]—The creditor is usually required to file or present a written statement of his claim,[83] setting forth the particulars prescribed by the statute,[84] if any,[85] or the written evidence of the claim,[86] so that the representative may act upon the claim intelligently,[87] and covering the whole demand.[88] Verification is also essential[88] unless waived.[90] This must be

80. Correction by striking erroneous credit held not filing of new claim or to limit recovery to amount originally claimed. In re Blackman's Estate [Iowa] 120 NW 664.

81. Provision of act March 16, 1897 (Laws 1897, p. 285, c. 98, § 1), for notice to creditors by executor administering without intervention of court and barring claims not presented within a year after first publication, held constitutional, whether applicable to estates already being administered or estates to be administered. Strand v. Stewart, 51 Wash 685, 99 P 1027. Does not interfere with vested rights as to estate of one dying after act took effect, though will was executed prior to its passage. Id. Executor must publish notice immediately after his appointment, whether estate is solvent or insolvent, and need not delay until after adjudication of solvency. Id.

82. Under Mills' Ann. St. § 4784, allowing exhibition of claims after day fixed by administrator on 10 days' notice, notice must be within one year from grant of letters or claim will be barred under § 4780. Altvater v. First Nat. Bank [Colo.] 103 P 378.

83. Written statement must be presented to administrator. In re Brown's Estate, 60 Misc. 35, 112 NYS 599. Under Burns' Ann. St. 1901, § 2465, and Burns' Ann. St. 1908, § 2828, requiring claimant to file succinct and definite statement of claim in clerk's office, formal complaint is not necessary, and statement is sufficient where showing claim is not barred by limitations and exhibiting net amount of sums claimed and nonpayment. Leimgruber v. Leimgruber [Ind.] 86 NE 73. "Present" and "exhibit," as used in §§ 2820, 2824, indicating how creditors shall get claims before commissioners, held synonymous. Batchelder v. White's Adm'r [Vt.] 71 A 1111.

84. Failure of verified claim to give particulars prescribed by statute held not fatal where claim was accompanied by note and mortgage showing such details. Raggio v. Palmtag [Cal.] 103 P 312. Statement of claim for money had and received, setting out nature of demand, dates, and amounts of sums paid, etc., held sufficiently specific. Leimgruber v. Leimgruber [Ind.] 88 NE 593.

85. Statute requires no particular formalities to constitute sufficient presentation of a claim. Batchelder v. White's Adm'r [Vt.] 71 A 1111. Note held sufficiently presented by statement showing date and amount thereof, amount of payment, and interest due. Id.

86. Certain canceled checks held not sufficient "written evidence" of a claim within Code 1906, § 2106, requiring presentation of written evidence thereof, or a statement thereof in writing. Lehman & Co. v. Powe [Miss.] 49 S 622. Under Mills' Ann. St. § 4787, requiring claimant to file in county court the account or instrument, or "an exemplification of the record" whereon claim is founded, transcript of judgment docket of district court is insufficient as presentation of claim based on judgment of such court. Altvater v. First Nat. Bank [Colo.] 103 P 378. Filing of claim insufficient where based on judgment not entered. Id. Where claim was on a note, claimant could not recover on stating account. Keys v. Keys' Estate, 217 Mo. 48, 116 SW 537.

87. Claim presented to representative should contain sufficient information to enable him to act upon it intelligently. Scott Stamp & Coin Co. v. Leake, 9 Cal. App. 511, 99 P 731. Where, when claim was presented for allowance, it was not barred by limitations either actually or apparently, but was barred on its face a year thereafter when it was acted upon by administrator and rejected, but not actually because of intestate's absence from the state, administrator could not, in view of his delay, contend that claim was insufficient for failure to show it was not barred when acted upon. Id. Omission of dollar sign or word "dollars" held harmless where attached affidavit gave amount due in dollars and cents. Id. Where facts stated in a claim presented to commissioners show constructive fraud on part of decedent as matter of law, it is not material that fraud is not specifically charged. In re Fisk, 81 Conn. 433, 71 A 559.

88. Claim for specified sum "& Int." held sufficient to cover interest. Raggio v. Palmtag [Cal.] 103 P 312. Where a creditor filed claim showing full amount of debt but that by previous foreclosure part had been paid, and thereupon was required to return to estate amount received at suit of administratrix and other creditors attacking mortgage, such creditor should be permitted to participate in distribution to full amount of claim. In re Blackman's Estate [Iowa] 120 NW 664. Verification could not be presumed on appeal, judgment having been rendered against claimant. Id.

89. Claim when presented must be verified by affidavit required by Rev. St. 1895, art. 2070. Whitmire v. Powell [Tex. Civ. App.] 117 SW 433. Verification of demands in actions against heirs, see post, § 8.

made by the creditor [91] or his duly authorized agent,[92] but the reason for verification by agent is sometimes required to be stated.[93] The statutory allegations must appear,[94] but defects in a written affidavit may be supplied by parol where the verification could have been oral in the first instance.[95]

Allowance and rejection. See 11 C. L. 1298—Allowance of a claim is not inferable without affirmative recognition thereof.[96] Persons interested may contest allowance,[97] and hence are entitled to notice and hearing.[98] Where objections and exceptions are duly filed, the issue should be tried by the probate judge,[99] and is pending before him until so heard and tried.[1] Acquiescence in the transaction out of which the claim arose may preclude objection to its allowance.[2] That a stipulation for the allowance of certain claims is not binding on persons not parties does not affect its validity as against heirs who sign.[3] An allowance by the representative, whether verbal or written, stops the running of the general statute of limitations,[4] and the allowance of a claim not barred when presented will relate back to the time of presentation or filing,[5] but in many states a creditor whose claim is rejected must sue thereon within a prescribed time after the rejection.[6] The representative is not required, in the absence of statute, to specify the objections to a claim.[7]

The conclusiveness of orders of court allowing or disallowing claims is treated in subsequent sections.[8] Allowance with interest up to the time of the allowance does not preclude the recovery of interest after that time.[9] A claim duly presented to and allowed by the representative thereby becomes liquidated and established against

90. Bill seeking enforcement of claim after decree of orphans' court barring claims, on theory solicitor of executrix had waived verification of claim, and alleging solicitor acted as business agent for executrix, held sustained by proof that solicitor was agent in transaction involving presentation of claim. Seymour v. Goodwin [N. J. Err. & App.] 72 A 123. Evidence held to show solicitor had authority to waive verification. Id.

91. Affidavit on which claim is probated must be that of creditor. Saunders v. Stephenson [Miss.] 47 S 783. Affidavit by husband as her agent is fatally defective, regardless of excuse. Id.

92. Under Act Mar. 13, 1867 (Laws 1866-67, p. 318), amending Gould's Dig. c. 4, §§ 102, 103, attorneys or agents of all persons, including corporations, may authenticate claims of their principals. Orene Parker Co. v. Emerson [Ark.] 120 SW 968.

93. Code Civ. Proc. § 1494, requiring statement of reason why affidavit to a claim is not made by claimant, is inapplicable where affidavit is by officer of a corporation claimant. Scott Stamp & Coin Co. v. Leake, 9 Cal. App. 511, 99 P 731.

94. Affidavit required by Rev. St. 1895, art. 2070, must contain the statutory allegations as to justness, credits, etc., and if any requisite is omitted claim cannot be legally allowed. Whitmire v. Powell [Tex. Civ. App.] 117 SW 433. Affidavit that account is "just and true," and that amount named "is justly due after all just credits have been given," held sufficient under Kirby's Dig. § 114, requiring affidavit to state that nothing has been paid on demand except what is credited thereon, and that sum demanded is due. Eddy v. Loyd [Ark.] 119 SW 264.

95. Under statute allowing verification of claims either by affidavit or by oath in open court, defects in written affidavit may be supplied by oral oath. Wagoner Undertaking Co. v. Jones, 134 Mo. App. 101, 114 SW 1049. Plea to jurisdiction, made on appeal in circuit court on ground it did not appear that claim was verified by agent of corporation claimant, held properly overruled and amendment properly allowed, such defect not being jurisdictional. Id.

96. Representative's voluntary incorporation of claims in schedule of unpaid debts in account held insufficient. In re Brown's Estate, 60 Misc. 35, 112 NYS 599.

97. On ground of fraud and collusion. In re Douglas' Estate [Iowa] 117 NW 982.

98. Allowance of claim by administrator and later by probate judge without notice or hearing held merely to rank claim among acknowledged debts of estate. In re Coryell's Estate [Idaho] 101 P 723. Heirs held entitled under statute to appear and contest claim on settlement of administrator's account (Id.), and probate court held empowered to set aside its prior order allowing the claim (Id.).

99, 1. In re Coryell's Estate [Idaho] 101 P 723.

2. Widow and children acquiescing in executor's carrying on business of decedent under direction of will held not entitled to object to allowance of claims of creditors based on transactions with executor. In re Levi's Estate [Pa.] 73 A 334.

3. In re McNamara's Estate, 154 Mich. 671, 15 Det. Leg. N. 924, 118 NW 598.

4, 5. In re Nelson, 63 Misc. 627, 118 NYS 673.

6. See post, this section, subd. Contests and Actions on Claims.

7. Such objections as he may have may be orally interposed by him at any time before hearing or at the hearing. Altvater v. First Nat. Bank [Colo.] 103 P 378.

8. See post, §§ 11E, 15.

9. Raggio v. Palmtag [Cal.] 103 P 312.

the estate,[10] and the burden is on contestants to show fraud, mistakes, or collusion.[11] A petition to set aside the report of commissioners appointed to adjust claims must specifically and definitely set out the grounds for such relief.[12] Judgment on claim may be vacated for fraud at any time during the pendency of the administration proceedings.[13]

Contests and actions on claims. See 11 C. L. 1298—The doctrine of laches may bar a claim.[14] In the absence of laches or statutory rule, an action is timely if brought before the close of the administration,[15] provided the claim is not barred by the general statute of limitations.[16] As to debts existing at decedent's death, limitations will continue to run though no administrator is appointed,[17] in the absence of a statute of suspension.[18] As to claims arising after decedent's death, general limitations will not run until administration though creditors have the right to take out letters.[19] Payment on a claim by one of two or more joint executors has the same effect as payment by all,[20] but a payment by an executor to himself is voidable.[21] In many states action on rejected claims must be commenced within a specified time after the rejection.[22]

10, 11. In re Nelson, 63 Misc. 627, 118 NYS 673.

12. Allegations of petition to vacate report of commissioners, accepted by probate court, held not sufficiently definite or full to justify action on ground fraudulent claim had been allowed in favor of administrator of which petitioner had no knowledge until long after expiration of time for appeal. In re Hayes' Estate [Vt.] 71 A 1047.

13. Whittemore v. Coleman, 144 Ill. App. 109.

14. After 32 years claimants held barred from charging certain land, decedent having left other property which could have been appropriated. Goodrum v. Mitchell, 236 Ill. 183, 86 NE 217. Proceedings required to be instituted within reasonable time, though there was no statute of limitations. Id. Mere fact that lands sought to be held for debts were occupied by decedent and subsequently by his widow as homestead held not to excuse delay. Id. Laches held not imputable as to claim arising from trust agreement, decedent having concealed agreement so that claimants were not informed thereof until after death. In re Fisk, 81 Conn. 433, 71 A 559.

15. There is no limit of time upon right of a creditor to bring suit against an independent executor on a valid and existing debt of deceased except that it must be before full administration and disposal of estate. Lang v. Light [Tex. Civ. App.] 117 SW 1038.

16. See Limitation of Actions. Cause of action for services rendered under agreement for compensation out of employer's estate does not accrue until death of the employer (Walker v. Ganote [Ky.] 116 SW 689), and limitations will not commence to run until that time (Id.).

17. Statutes held to require that where limitations have begun before decedent's death, and a creditor seeks to prevent bar, he must procure appointment of an administrator, either his own appointment, if eligible, or appointment, after 20 days from decedent's death, of competent inhabitant of county, by having clerk or court exercise duty placed on them by statute. Hildebrand v. Kinney [Ind.] 87 NE 832.

18. Under Revisal, § 367, suspending limitations for a year after issuance of letters provided letters issue within ten years, and becoming effective Aug. 1, 1905, justice judgments entered Nov. 13, 1888, were barred March 23, 1906, where decedent died July 12, 1895, and letters issued Sept. 25, 1905. Matthews v. Peterson, 150 N. C. 132, 63 SE 722. Such judgments not barred where decedent died July 10, 1894, and letters issued March 27, 1905, 10-year provision not becoming effective until Aug. 1, 1905. Id.

19. Statutory right of creditors to take out letters held a mere right and not a duty. Hildebrand v. Kinney [Ind.] 87 NE 832.

20. Haskell v. Manson, 200 Mass. 599, 86 NE 937.

21. Joint payment by plaintiff and daughter as executrices of husband's estate to plaintiff as representative of estate of son, and acknowledgment of notes as existing debts, made to avoid limitations, held voidable. Haskell v. Manson, 200 Mass. 599, 86 NE 937.

22. Holder of claim rejected by administrator must bring suit thereon in proper court within three months after rejection, if it is then due, or two months after it becomes due. Rev. Codes 1909, § 5468. Idaho Trust Co. v. Miller [Idaho] 102 P 360. Rejection of claim does not change its character or action required to be brought. Id. Court referred to in Rev. Codes 1909, § 5468, limiting time within which suit must be brought in "proper court" on rejected claims, is court having jurisdiction of actions for recovery of debts of class of that sued on. Id. Statutory limitation for bringing suit on claims disputed by administrator within three months from notice that claim is disputed applies to claims establishable in equity as well as at law. Mathis v. Stevenson [N. J. Eq.] 71 A 267. Claim for money loaned husband in his lifetime held barred. Id. Evidence held not to show rejection of claim so as to bring it within Code Civ. Proc. § 1822, providing that where claims are disputed or rejected suit must be brought thereon within six months. In re Scheetz's Estate, 62 Misc. 166, 116 NYS 428. Limitation barring action on claim after six months

The representative is the proper party to represent the estate in defense of claims,[23] and he may ordinarily be sued alone on claims ex contractu,[24] but beneficiaries are properly made parties where the representative refuses to answer.[25]

Plaintiff must perform conditions precedent as in other cases unless performance is waived or otherwise rendered unnecessary.[26] He must recover, if at all, upon the claim presented to the representative.[27] The extent of a demand and the credits allowable [28] must necessarily depend on the facts of each case.[29]

To a large extent, the ordinary rules apply to pleadings,[30] evidence,[31] instructions,[32] costs [33] and counsel fees.[34] One who sues on a claim must allege not only

from rejection thereof by representative held suspended during infancy of claimant. In re Cashman, 62 Misc. 598, 116 NYS 1128. Undertaker's claim held barred under Code Civ. Proc. § 1822, where proceedings thereon were not brought within six months after dispute thereof by executor, term "other remedy" being held to include summary proceedings by undertaker to compel payment under § 2729. In re Mudge 118 NYS 568. Executor's notice that he disputed claim held sufficient to start six months' limitation though offering an unauthorized reference of the claim. Id. Rev. St. 1895, art. 2082, requiring suit on a claim within 90 days after rejection by representative, extinguishes claims not sued on within that time and does not merely affect remedy. Whitmire v. Powell [Tex. Civ. App.] 117 SW 433. Pleadings held not to justify presumption that action was timely. Id. Bar created by Rev. St. 1895, art. 2082, requiring action on rejected claims to be brought within 90 days after rejection, cannot be waived by administrator either by agreement or failure to plead. Id.

23. Hall v. Rutherford [Ark.] 117 SW 548.

24. Joinder of heirs not necessary in action against executrix to enforce liability of estate as stockholder, such liability being contractual, within Code Civ. Proc. § 1582, providing that actions founded on contract may be enforced against representative where they might have been maintained against decedent. Miller v. Katz [Cal. App.] 102 P 946. Representative of deceased joint contractor may be sued separately during lifetime of the other joint contractors for nonperformance. Gen. St. p. 2336, § 3. Fleming v. Reed [N. J. Err. & App.] 72 A 299.

25. Proper to permit widow and heirs to be made defendants and to answer where administrator refused to answer in action against him to foreclose mortgage previously canceled by judicial proceeding. McArthur v. Griffith, 147 N. C. 545, 61 SE 519.

26. Where payment of certain notes was on condition that certain stock be tendered, and decedent at his death already had the stock in his possession for the purpose of selling it, executrix could not object that plaintiff did not offer to transfer the stock to the estate, she being in possession and refusing to produce it at trial for formal transfer to herself. Dickson v. Eames,. 134 Mo. App. 373, 114 SW 574.

27. Where claim was not barred actually or apparently when presented to administrator but was barred on face when acted upon and rejected, subsequent action thereon was on same claim though complaint alleged decedent's absence from state so as to take claim out of statute. Scott Stamp & Coin Co. v. Leake, 9 Cal. App. 511, 99 P 731.

28. Where testator was manager of his wife's property and his will recited that he had $13,000 in notes and contracts belonging to wife and required estate to pay it with interest from date of will, held dividends on bank stock of wife accruing after date of will were not part of original debt but an additional charge against estate. Harding's Adm'r v. Harding [Ky.] 116 SW 305. Wife not entitled to credit for amount of checks drawn by husband on her account as her agent, proceeds of which were used for her benefit to procure notes, etc., or to pay her taxes, etc., such checks not being evidences of indebtedness from husband to wife. Id. Estate chargeable with principal and interest on certain notes referred to in will as being in wife's possession, it appearing husband had collected some and that none of them were in existence, especially in view of fact he had indorsed them and guaranteed payment. Id. Wife not entitled to rent of land occupied by husband, in absence of showing she had expected it or that husband expected to pay it. Id. Wife's having received and indorsed checks payable to her for stock in a turnpike road estate was not indebted to her on account thereof. Id. Wife not entitled to credit for proceeds of a note, amount of which was included in original indebtedness acknowledged by will. Id. Administrator not entitled to credit for taxes personally paid by testator on wife's property when he had control of her money. Id.

29. See, also, post, Evidence and Proof.

30. See, also, Pleading. County court rules held to show intention that circuit court practice as to pleadings should be followed on objection being interposed to claims filed in county court. Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328. Use of word "owes" only instead of customary phrase "owes and detains" in complaint against administrator based on debt or obligation made by decedent held a mere formal defect. Town of Cameron v. Hicks, 65 W. Va. 484, 64 SE 832. Declaration held defective for alleging only that deceased did not pay note sued on, and failing to allege that administrator had not paid same. Junkins v. Sullivan, 110 Md. 539, 73 A 264. In action on note to be paid by administrator after maker's death, plea that instrument was executed for fraudulent purpose, and that plaintiff had knowledge thereof, held good, where not demurred to. Id.

31. See, post, Evidence and Proof.

32. See, also, Instructions. On appeal from probate court, allowing plaintiff's claim

its presentation and rejection [85] but also its proper authentication when presented.[86] When joint executors make different pleas, the court will proceed upon the plea most favorable to the estate.[87] Holdings vary as to whether the representative must set up the general statute of limitations.[88] He is liable as for devastavit if the estate suffers through his failure to plead the statute of frauds.[89] A claim for undertaker's services is not a debt due from decedent within a statute providing for the reference of disputed claims.[90]

Evidence and proof. See 11 C. L. 1299—Except as modified by statute, the usual rules apply as to proof of execution of instruments, the burden of proof,[91] and the admissibility of evidence.[92] A prima facie case must be made,[93] and the general rule is that claims must be established by very clear and convincing proof.[94]

Set-off. See 9 C. L. 1184

after hearing, requested instruction that what happened in probate court was "purely formal" held properly refused, court having instructed jury to consider evidence as if before them in first instance. Tiffany v. Morgan [R. I.] 73 A 465. Instruction on issue as to testator's promise to pay for legal services held properly modified to read that question was one of veracity and jury could consider testator's express statements as well as other circumstances including testator's habits of mind and business. Id.

33. See, also, Costs, §§ 4, 7. Plaintiff held not entitled to costs on recovering judgment against administrator on a claim, there having been no formal presentation of claim and payment thereof not having been unreasonably delayed or resisted. Code Civ. Proc. § 1836. Cornwell v. Sheldon, 134 App. Div. 58, 118 NYS 707.

34. See, also, Attorneys and Counselors, § 7. Attorney's fee stipulated for in note in case it should be placed in hands of attorney for collection held not recoverable, evidence not showing necessity for placing claim in hands of attorney. Adoue v. Kirby [Tex. Civ. App.] 114 SW 163.

35, 36. Whitmire v. Powell [Tex. Civ. App.] 117 SW 433.

37. Haskell v. Manson, 200 Mass. 599, 86 NE 937.

38. Representative is not bound to plead statute. Haskell v. Manson, 200 Mass. 599, 86 NE 937. See 11 C. L. 1299.

39. Haskell v. Manson, 200 Mass. 599, 86 NE 937.

40. Not referable under Code Civ. Proc. § 2718. In re Mudge, 118 NYS 568. Though parties consent to reference, jurisdiction is not conferred against subsequent objection of either party. Id.

41. The burden of establishing the execution of a written instrument is on claimant in the first instance. Burden on one suing on note to make prima facie showing it was signed by decedent (Jenkins v. Jenkins [S. C.] 65 SE 736), and until such prima facie showing is made forgery relied on by objectors need not be proven (Id.). Objectors not required to prove forgery of note sued on until claimant shows prima facie that note was signed by decedent. Id.

42. See, also, Evidence. In action to enforce a conditional church subscription letter by executor to church officer, held admissible as tending to show claim had been presented for allowance. St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 A 145. In action on claim for funeral expenses, evidence calculated to show whether funeral was appropriate to decedent's station in life held improper and prejudicial as being outside the issues. Wagoner Undertaking Co. v. Jones, 134 Mo. App. 101, 114 SW 1049. In proceedings to establish claim under alleged agreement by decedent to give claimant "his farm or its value" for services, held not error to admit evidence that decedent had agreed "to do well by her" if claimant would remain in household until decedent's death. Forsythe v. Thompson's Estate [Mich.] 16 Det. Leg. N. 490, 122 NW 219. Evidence that decedent had asked witness if he did not think claimant would always have an income if decedent gave her a farm and certain stock held not erroneously admitted as negativing any previous contract. Id. In proceedings to establish claim against mother's estate for money loaned in 1887, to release mortgage on a fishery, record of mortgage on property connected with fishery owned by plaintiff's father, discharged in 1888, held inadmissible to show loan to father and not to mother, there being nothing to connect loan with discharge of father's mortgage. McGregor v. McGregor's Estate, 156 Mich. 487, 16 Det. Leg. N. 179, 120 NW 1071. On trial of issues as to claim of decedent's next of kin to damages for wrongful death, submitted by orphans' court to circuit court sitting as a jury, evidence of what railroad company first offered in settlement, reason for granting letters to decedent's stepfather, what administrator did with money received, and whether he had accounted in orphans' court, held inadmissible as of no assistance to court. Dronenburg v. Harris, 108 Md. 597, 71 A 81.

43. Proof of due allowance of claim by commissioners prima facie establishes claim. Warren v. Sheehan, 156 Mich. 432, 16 Det. Leg. N. 151, 120 NW 810.

44. In re Nelson, 63 Misc. 627, 118 NYS 673. To establish parol contract by decedent to support complainant, proof must be so clear, cogent and convincing as to leave no doubt that contract as averred was made. Cooper v. Cooper, 65 W. Va. 712, 64 SE 927. Claim for money alleged to have been loaned decedent must be established by clear and convincing evidence more cogent than will suffice in suits against the living. Russell v. Amlot, 132 App. Div. 584, 116 NYS 1080. To authorize recovery by sons against estate of invalid mother for services rendered her,

Judgments in actions on claims and enforcement thereof. See 11 C. L. 1801—Plaintiff is entitled to judgment when there are no pleadings and the evidence shows a liability of decedent to him.[45] When the action is against the estate only, a personal judgment against the representative is improper,[46] and judgments must be justified by the evidence adduced as in other actions.[47] Unliquidated claims draw interest from the time of presentation to the representative.[48] Appeals are treated hereafter.[49]

(§ 6) *C. Classification, preferences and priorities.*[50] See 11 C. L. 1801—Claims are variously classified by statute,[51] but funeral expenses,[52] and the costs and ex-

actual contract to pay must be shown. Conway v. Conway [Ky.] 113 SW 94. While child's claim against parent's estate for money loaned is generally regarded with suspicion unless clearly established (McGregor v. McGregor's Estate, 156 Mich. 487, 16 Det. Leg. N. 179, 120 NW 1071), a question of fact is not raised by mere suspicion of fraud or incapacity where the claim is supported by testimony fair on its face (Id.). Claim of son against estate of his mother for services will be scrutinized with great care. More v. Shepard, 133 App. Div. 471, 117 NYS 1095.

Evidence sufficient: To establish claim based on receipt for notes against third person and agreement of decedent to account for proceeds. Welsinger v. Harding's Adm'r [Ky.] 115 SW 800. To establish claimant's ownership of funds deposited in name of deceased wife as "special" and "agent," and of money paid on building and loan stock. Leimgruber v. Leimgruber [Ind.] 86 NE 73. That husband had dishonest purpose in changing style of his account held not to give wife right to account. Leimgruber v. Leimgruber [Ind.] 88 NE 593. Evidence held not to negative loan by claimant to his mother. McGregor v. McGregor's Estate, 156 Mich. 487, 16 Det. Leg. N. 179, 120 NW 1071. Held not to show mental incapacity or undue influence. Id. Evidence held clear and satisfactory that wife had loaned money to husband from her separate property so as to justify recovery thereof from husband's estate. In re Levi's Estate [Pa.] 73 A 334. Evidence sufficient to justify finding of jury that intestate had agreed with plaintiff, his son, to give him his farm in consideration of services thereon. Freeman v. Brown [N. C.] 65 SE 743.

Evidence insufficient: To show that decedent, maker of a note, had taken and held possession of it for plaintiffs for over 30 years and never accounted for it to plaintiffs. Wheeler v. Bettis' Ex'rs [Ky.] 116 SW 252. To establish executrix's individual claim against decedent, her husband, for having paid alleged accommodation note. In re Nelson, 63 Misc. 627, 118 NYS 673. To sustain finding of court, contrary to master's, that note was signed by intestate. Jenkins v. Jenkins [S. C.] 65 SE 736. To justify recovery against estate for services rendered by ward of decedent's sister on theory decedent was responsible as head of family, it appearing decedent was not head of family and that services were not rendered in expectation of compensation. Pearre v. Smith, 110 Md. 531, 73 A 141. To show contract to pay for services in caring for mother. Conway v. Conway [Ky.] 113 SW 94. To establish claim based on decedent's agreement to pay part of family expenses for 18 years. Welsinger v. Harding's Adm'r [Ky.] 115 SW 800. Dismissal of claim not erroneous, proof being insufficient to warrant judgment for any sum. Id. Claim for three years' board and nursing held not allowable without satisfactory evidence to overcome presumption payments had been made thereon at stated periods. In re Cummisky's Estate [Pa.] 73 A 916. Claim of niece for clerical and housekeeping services held not allowable where based on indefinite declarations of decedent, and where services were trifling. In re Miller's Estate, 222 Pa. 334, 71 A 185.

Extent of recovery: Evidence as to value of services rendered decedent held not such as to preclude allowance of less than that testified to by claimant's witnesses. Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328. In proceedings to establish claim under agreement by decedent to give claimant his farm or its value for taking care of household, etc., evidence held to render verdict of $9,000 excessive and to require reduction to $7,000. Forsythe v. Thompson's Estate [Mich.] 16 Det. Leg. N. 490, 122 NW 219.

45. Klein v. Runk, 130 App. Div. 474, 114 NYS 1062.

46. Pleading setting up breach of covenant, alleging that P qualified as executrix of L and that there was property of L's estate in P's hands subject to the debt, held insufficient to support personal judgment against P. Lang v. Light [Tex. Civ. App.] 117 SW 1038.

47. See Judgments. Where evidence showed that services for which joint claim was filed were performed by only one of the claimants, judgment in favor of both was improper. Jackson v. Byrne, 130 App. Div. 364, 114 NYS 888.

48. Interest on claim for legal services held improperly allowed from decedent's death. Jackson v. Byrne, 130 App. Div. 364, 114 NYS 888.

49. See post, § 17.

50. **Search Note:** See Executors and Administrators, Cent. Dig. §§ 927-1022; Dec. Dig. §§ 259-265; 18 Cyc. 546-570; 8 A. & E. Enc. L. (2ed.) 1007, 1033.

51. Statutory demands of fourth class under Mills' Ann. St. § 4870, are limited to debts contracted by decedent or resulting from obligations by him incurred. United States Fidelity & Guar. Co. v. People, 44 Colo. 557, 98 P 828. Statutory classification of claims applies alike to solvent and insolvent estates, unless specific liens absorb the property. Hildebrand v. Kinney [Ind.] 87 NE 332.

52. Statute requires funeral expenses to be paid before other classes of claims more

penses of administration,[53] judgment liens,[54] claims against decedent as guardian or trustee,[55] and claims for services,[56] usually have priority over other ordinary claims. Creditors of heirs will be postponed to creditors of the estate.[57] Presentation of a claim to an independent executor administering the estate out of court and such executor's approval thereof does not give it priority over unpresented claims of other creditors.[58] The obtaining of judgment against the representative does not give a creditor any preference over creditors owning claims of the same class not reduced to judgment.[59]

(§ 6) *D. Funds, assets and securities for payment.*[60]—See 11 C. L. 1301—It is the policy of the law to preserve local assets for the satisfaction in the first instance of local claims.[61] The personalty is primarily subject to be taken for debts,[62] if assets subject to administration;[63] but a mortgage assumed by decedent as grantee is presumptively payable by heirs and devisees of the land and not out of the personalty,[64] and when the personalty proves insufficient the realty may be resorted to.[65]

properly obligations of decedent. Hildebrand v. Kinney [Ind.] 87 NE 832.

53. Costs and proper expenses of administration are charge on estate prior to creditors' claims, except those who have prior special liens. In re Blackman's Estate [Iowa] 120 NW 664. Attorney's fees in proper cases are legitimate administration expenses. Id. Expenses accruing after decedent's death and in connection with administration are "demands against estate" within Mills' Ann. St. § 4870, dividing such demands into four classes. United States Fidelity & Guar. Co. v. People, 44 Colo. 557, 98 P 828.

54. Judgment creditors are entitled to payment before general creditors, under Code Civ. Proc. § 2719, requiring executors to pay debts in order named and giving judgments priority over unliquidated demands. Bergmann v. Lord, 194 N. Y. 70, 86 NE 828. Revisal 1905, § 87, fixing order of payment of debts and placing in fifth class judgments so far as they are liens, applies only where there are funds in hands of representative. Matthews v. Peterson, 150 N. C. 134, 63 SE 721.

55. Under Civ. Code 1895, § 3424, debts due by decedent as guardian for estate committed to him as such are prior to judgments obtained against deceased in his lifetime. W. A. Doody Co. v. Green, 131 Ga. 568, 62 SE 984.

56. Claim for services to intestate as bookkeeper, rendered for four months immediately preceding death, held not allowable as preferred claim against his insolvent estate. Lehman & Co. v. Powe [Miss.] 49 S 622.

57. Where realty was needed to pay debts of estate, judgment creditor of an heir could not enforce judgment lien against it. Yoder v. Kalona Sav. Bank [Iowa] 119 NW 147.

58. Taylor v. Davidson [Tex. Civ. App.] 120 SW 1018.

59. Judgment against administratrix for attorney's services in collecting indemnity for intestate's death. Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46.

60. **Search Note:** See notes in 3 L. R. A. (N. S.) 898; 3 Ann. Cas. 719.

See, also, Executors and Administrators, Cent. Dig. §§ 1044-1073; Dec. Dig. §§ 271-274; 18 Cyc. 590, 591, 594; 8 A. & E. Enc. L. (2ed.) 1097; 19 Id. 1300.

61. Testamentary provision held invalid if construed to require payment first of nonresident creditors. Coombs v. Carne, 236 Ill. 333, 86 NE 245. Residue after payment of local claims held removable from state for benefit of nonresident creditors. Id. Construction of testamentary directions, see Wills, § 5E.

62. See, also, post, § 7. Personal estate primarily liable for debts, whether secured by real estate mortgage or not, and heirs may require executor, who is also residuary legatee, to pay such debts out of personalty. Schade v. Connor [Neb.] 120 NW 1012. Right to enforce payment of mortgage lien by executor, in foreclosure against heirs and devisees, held not barred by failure of mortgagees to file claim against estate. Id. Administrator does not need help of court of equity to sell personalty when necessary for payment of debts. Hessig v. Hessig's Guardian [Ky.] 115 SW 748. Rev. Codes, §§ 4799, 7546, considered, and held that, with exceptions of homestead and family allowances, all of decedent's property is **equally liable** for payment of debts. Plains Land & Imp. Co. v. Lynch, 38 Mont. 271, 99 P 847. Existence of debts and inadequacy of available funds to pay them shows necessity of sale of property and authorizes sale of realty as well as personalty. Id.

63. See, also, ante, §§ 5A, 5D. Judgment de bonis testatoris against administrator held no charge on money recovered for decedent's wrongful death, such fund not being assets. Thompson v. Mann, 65 W. Va. 648, 64 SE 920. See ante, § 5A.

64. Monoghan v. Collins [N. J. Eq.] 71 A 617. Grantee assuming mortgage as part of consideration, heirs and devisees cannot enforce payment thereof by representative out of personalty in exoneration of land unless decedent assumed mortgage with clear intention to make debt his own. Monoghan v. Collins [N. J. Eq.] 72 A 109. Testator's acts and declarations held to show clear intention to purchase realty free from incumbrances out of proceeds of other property sold. Id. Widow and devisee held entitled to compel payment of mortgage out of personalty. Id. That widow claimed as a gift funds placed in her hands by testator to discharge mortgage held not to defeat his intention. Id.

65. See, also, post, § 7. In absence of personal assets, expenses of administration

Attorney's fees incurred in the recovery of assets for the estate are properly chargeable against such assets.[66] The giving of a bond by an executor who is residuary legatee conditioned to pay all debts and legacies and entitling him to all the assets charged with such payments, while it may constitute an admission of the existence of assets sufficient to pay the debts and legacies,[67] does not preclude him from disproving waste suggested by a judgment creditor under a statute rendering the executor personally liable for the amount of the judgment in case of waste.[68] Abatement of legacies for debts is treated elsewhere.[69]

(§ 6) *E. Payment and satisfaction.*[70]—See 11 C. L. 1302—A mere advance of money to a creditor on his agreement to repay it does not constitute payment.[71] A representative who overpays a creditor under a mistaken belief that the estate is solvent may recover the amount of the overpayment.[72] A payment by the representative of a debt to himself is always reviewable by the court.[73]

§ 7. *Subjection of realty to payment of debts under orders of court. A. Right to resort to realty.*[74]—See 11 C. L. 1302—The personalty proving insufficient[75] for the discharge of valid and subsisting debts,[76] unexempt realty[77] owned by decedent at his death[78] may be resorted to.[79] An account by the administrator is not prerequi-

are payable from proceeds of sale of land to pay debts and funeral expenses. In re Liscomb, 60 Misc. 647, 113 NYS 941. Surplus arising from foreclosure against decedent's realty should be so used. Code Civ. Proc. § 2799. Id.

66. Suit attacking chattel mortgage and for conversion of mortgaged chattels. In re Blackman's Estate [Iowa] 120 NW 664.

67. Lothrop v. Parke, 202 Mass. 104, 88 NE 666.

68. On writ of scire facias under Rev. Laws 1902, c. 172, § 8. Lothrop v. Parke, 202 Mass. 104, 88 NE 666. Evidence held to justify finding that there had been no waste. Id.

69. See Wills, § 5F.

70. Search Note: See note in 26 A. S. R. 22. See, also, Executors and Administrators, Cent. Dig. §§ 923-926, 1023-1043, 1076-1134; Dec. Dig. §§ 258, 266-269, 275-287; 18 Cyc. 541, 570-589, 629-636.

71. Administrator's advance to creditor of amount of latter's debt held not payment where creditor agreed in writing to refund amount advanced on final settlement of estate. Golding v. McCall, 5 Ga. App. 545, 63 SE 706. Creditor could not set off his debt against estate when sued on written obligation. Id.

72. Especially where creditor knew that estate funds were used. Woodruff v. H. B. Claflin Co., 118 NYS 48. Absence of special statute or previous case on the subject held not fatal to recovery. Id.

73. Haskell v. Manson, 200 Mass. 599, 86 NE 937.

74. Search Note: See note in 79 A. S. R. 82. See, also, Executors and Administrators, Cent. Dig. §§ 1332-1368; Dec. Dig. §§ 319-931; 18 Cyc. 675-698; 11 A. & E. Enc. L. (2ed.) 1068; 19 Id. 1300; 19 A. & E. Enc. P. & P. 869.

75. See, also, ante, § 6D, Funds, etc., for Payment of Debts. Also post, § 7B, Procedure. Personalty should be first exhausted. Hessig v. Hessig's Guardian [Ky.] 115 SW 748.

76. Order will not be made for sale of realty to pay justice judgment entered more than ten years before application. Matthews v. Peterson, 150 N. C. 134, 63 SE 721. Sale not necessary where pleadings and commissioner's report showed there were no debts remaining unpaid. Row v. Back [Ky.] 115 SW 806.

77. License to sell property constituting decedent's homestead for debts held void and purchaser held to take no title as against minor heirs. Holz v. Burling [Neb.] 120 NW 954.

78. Land not part of estate cannot be sold as part of administration of such estate. Separate property of predeceased wife. Vivion v. Nicholson [Tex. Civ. App.] 116 SW 386. Agreement between widow and heirs giving former life use of farm which on her death should "revert" to heirs held to pass whole farm to heirs on widow's death, including widow's third, which consequently could not be sold for debts of widow's estate. Warrum v. White, 171 Ind. 574, 86 NE 959. Where decedent by his will elected to purchase a remainderman's interest for a certain sum as authorized by his father's will devising land for life with remainders over, such election could be carried into effect in administrator's suit for settlement of estate and sale of realty to pay debts, and remainderman's title could be passed directly to purchasers of the land where all interested persons were made parties, and it was not necessary to first have title vested in administrator by separate proceeding. Union Trust & Sav. Co. v. Marshall's Adm'r [Ky.] 113 SW 73. Objection that decedent did not own such land held untenable. Id. On trial of issue raised by claim to property sought to be sold, interposed by third person, held not error to charge that if decedent died in possession of the land it raised presumption of title. Rexford v. Bleckley, 131 Ga. 678, 63 SE 337.

79. Husband joining in wife's mortgage on her land held estopped to deny power of probate court to order sale of land to discharge lien. Hampton v. Murphy [Ind. App.] 86 NE 436. Appellant made party to proceedings by administrator to sell realty, but not setting up claim of interest therein, held estopped thereafter to assert title.

site if it appears that the personalty has been exhausted.[80] Liens properly enforcible in independent proceedings, such as liens for street improvements, should not be enforced by administrator's sale.[81]

(§ 7) *B. Procedure to obtain order.*[82]—See 11 C. L. 1303—Proceedings must be timely.[83] They should be instituted either by the representative or the creditors,[84] and the steps indicated by the statute must be at least substantially followed.[85] Persons interested must be duly cited[86] and made parties,[87] and if the statute requires a bond for the protection of infants, this must be executed.[88] The petition, though not always jurisdictional,[89] must state facts sufficient to authorize the in-

Hampton v. Murphy [Ind. App.] 88 NE 876. Purchaser at administrator's sale to pay debts held to take title as against prior grantee of widow and children. Rio Grande Western R. Co. v. Salt Lake Inv. Co. [Utah] 101 P 586. Administrator's deed held not to except what had been previously conveyed by widow and children. Id. Husband claiming land by curtesy cannot object to wife's executor proceeding, as against heirs, under Rev. St. 1899, § 130 (Ann. St. 1906, p. 379), for order of probate court allowing him to use **rents for debts.** Strom's Estate v. Strom, 134 Mo. App. 340, 114 SW 581.

80. Turner v. Fell, 142 Ill. App. 458.

81. Land subject to lien for street improvements held not subject to sale on account thereof in suit to settle estate. Hessig v. Hessig's Guardian [Ky.] 115 SW 748. Administrator should be directed to apply rents to payment of such liens if they can thus be extinguished within reasonable time. Id. If not, claimants may bring independent action against the property. Id.

82. Search Note: See Executors and Administrators, Cent. Dig. §§ 1369-1443, 1456-1480; Dec. Dig. §§ 332-344, 350-359; 18 Cyc. 699, 700, 704-733, 735, 737, 739-745, 755-756, 758, 759, 795; 11 A. & E. Enc. L. (2ed.) 1068; 19 A. & E. Enc. P. & P. 869.

83. Gen. St. 1901, § 4446, par. 6, providing that in absence of other provisions actions must be brought within five years after accrual of cause of action, is inapplicable to proceedings for sale of land to pay debts. In re Jones' Estate [Kan.] 103 P 772. There being no controlling statute, proceedings must be within a reasonable time. Id. Delay of six years by foreign executor held not unreasonable where occasioned by litigation involving the indebtedness. Id. That land may increase in value does not ordinarily excuse delay in applying to have it sold for debts beyond statutory time. In re Brigham's Estate [Iowa] 120 NW 1054. Application to sell to pay notes on which decedent was primarily liable, postponed for nearly 10 years pending suit to enforce liability of a surety, held too late in view of statute fixing time for allowance of claims and settling estate. Id. Mere lapse of time after appointment of representative and before sale for debts is made will not invalidate sale if administration is still pending. Edwards v. Gates [Tex. Civ. App.] 120 SW 585. Sale under order of court over 15 years after appointment of administrator held valid, there being no statute limiting administration term. Id. Lapse of time held not to bar application to have homestead sold to pay debts. Turner v. Fell, 142 Ill. App. 458.

84. A single creditor may proceed in superior court to compel representative to sell land to pay debts. Yarborough v. Moore [N. C.] 65 SE 763. That creditor's petition stated facts showing that a third person had a valid claim held insufficient, Code Civ. Proc. § 2750, requiring that petitioner be either decedent's representative or any other creditor except a mortgage creditor. In re Pirie, 133 App. Div. 431, 117 NYS 753.

85. While right of administrator to sell land to pay debts where personalty is insufficient relates back to intestate's death, and sale under order of court and execution of deed to purchaser passes title as against heirs (Grant v. Hathaway, 215 Mo. 141, 114 SW 609), title remains in heirs until such steps are taken (Id.). Jurisdiction of surrogate's court to entertain petition by a creditor to sell realty for debts must be exercised as prescribed by statute. In re Pirie, 133 App. Div. 431, 117 NYS 753.

86. Where judgment creditor of an heir was not notified of proceeding by representative to sell realty to pay debts, his rights, whatever they were, were not affected by the sale. Yoder v. Kalona Sav. Bank [Iowa] 119 NW 147. Presumed on motion made after lapse of many years, to set aside decree of sale, that minors were old enough to authorize service of process by reading it to them. Yarborough v. Moore [N. C.] 65 SE 763. Presumed, in collateral proceeding to recover land sold by representative, that infant defendants were summoned, and properly before court. Dennis v. Alves [Ky.] 113 SW 483. Judgment for sale of land to pay a mortgage held void where guardian ad litem for infants was appointed without issuance of summons for them. Roy v. Allen's Adm'r [Ky.] 118 SW 981. Probate decree for sale of land of insolvent estate held not void, so as to justify vacation thereof by probate court, for failure to give an heir notice of application for sale made after insolvency. King v. Gilreath [Ala.] 49 S 860.

87. Unborn remaindermen are sufficiently represented where life tenant is made party. Yarborough v. Moore [N. C.] 65 SE 763.

88. Suit to sell land for debts is excepted from requirements of Civ. Code Prac. § 493, relating to bond in favor of infants in certain sales of realty. Oldham v. McElroy [Ky.] 121 SW 414.

89. Proof of due publication of notice to interested persons to show cause as required by statute confers jurisdiction, and court's subsequent action on defective petition is within its jurisdiction and reversible only for error of law on direct appeal. Dane v. Layne [Cal. App.] 101 P 1067.

tended sale,[90] it being especially essential that the necessity therefor be made to appear both by the pleadings and the proof.[91] Failure to allege prior presentation of a claim to the representative for allowance may be reached by general demurrer.[92] Heirs may plead limitations against the debts for the payment of which the administrator petitions to sell realty.[93] Issues as to the validity or amount of claims are usually for the court.[94] Where the personalty is insufficient to pay undisputed debts, the existence of other debts is immaterial on the issue of the right to resort to the realty.[95] Statements in a commissioner's report on debts are presumptively true.[96] The allowance of claims by the probate court is prima facie sufficient as against the heirs to authorize a sale of realty to pay them.[97] The incompetency of evidence as to the value of the personalty may be waived by parties sui juris.[98]

90. Failure of application to state which of heirs or devisees were married women held not to affect jurisdiction of court, existence of debts and insufficiency of personalty being alleged. Curtis v. Hunt [Ala.] 48 S 598. Under Code Civ. Proc. § 1537, sale is not invalid for failure of petition to state "condition and value" of the property or any other of matters enumerated to be stated, provided facts showing necessity of sale are proved and found. Dane v. Layne [Cal. App.] 101 P 1067. Held sufficient under Burns' Ann. St. 1908, § 2854, prescribing contents. Hampton v. Murphy [Ind. App.] 86 NE 436. Petition demurrable for failure to allege matters required by Burns' Ann. St. 1908, § 2854, as to decedent's realty and personalty, amount of claims, etc. Warrum v. White, 171 Ind. 574, 86 NE 959. Allegations that decedent owed some debts and that sale of land would be necessary to pay them held mere conclusions. Row v. Back [Ky.] 115 SW 806. Petition held fatally defective for not stating amount or value of personalty or of what it consisted, and not naming or making parties creditors, if any. Id. Substantial compliance with Rev. Codes § 7562, prescribing what shall be stated in petition for sale of realty to pay debts, is sufficient. Plains Land & Imp. Co. v. Lynch, 38 Mont. 271, 99 P 847. Petition sufficient on face to show necessity of sale is adequate against collateral attack on order of sale. Id. Family allowance being charge against estate, where petition assumes to state full amount of all such charges, it will be presumed either that there was no family allowance or that it is included in charges enumerated. Id. Allegation decedent died seised of certain described realty, less a railroad right of way and parcel set apart for school ground and appraised at $2,000, held too indefinite as statement of condition of real estate. Id. Requirement that condition and value of decedent's real estate be stated held not jurisdictional. Id. Petition held to sufficiently state present value of property to be sold. Id. Facts necessary to establish existence of debts must be set forth in petition, under Code Civ. Proc. §§ 2752, 2756, requiring petition to set forth amount of unpaid debts, etc. In re Pirie, 133 App. Div. 431, 117 NYS 753. Petition by creditor merely alleging that petitioner was creditor to a certain amount held insufficient. Id. Failure to describe certain land either in petition or in order approving sale held fatal to validity of sale. Wilkin v. Owens [Tex.] 114 SW 104. Application, when considered with administrator's inventories, held on collateral attack capable of being construed so as to cover all of a certain survey. Millwer v. Phelps [Tex. Civ. App.] 115 SW 891.

91. Carter v. Crow's Adm'r [Ky.] 112 SW 1098. Held error to direct sale before value of personalty had been ascertained and before it had been ascertained, at least approximately what claims against estate amounted to. Id. Pleadings held too vague and indefinite on subject of indebtedness to authorize judgment directing sale of all his land. Id. Defect not supplied by report of commissioner as to claims. Id. Before sale is ordered, validity of claims should be passed upon by court. Id. Under Civ. Code Prac. § 429, authorizing sale if it appears to satisfaction of court that personalty is insufficient, realty could be sold where pleadings which were not controverted alleged that decedent's debts were greater than value of his whole estate, though there was no commissioner's report on claims, no rights of infants being involved. Union Trust & Sav. Co. v. Marshall's Adm'rs [Ky.] 113 SW 73. Finding on positive testimony that deceased owned only a cow and a calf held not overcome by testimony merely tending to show large income to him, and frugal habits. Curtis v. Hunt [Ala.] 48 S 598. Undenied answer affirmatively alleging payment of all debts held to entitle defendants to dismissal on pleadings. Row v. Back [Ky.] 115 SW 806.

92. Not necessary to specify the particular objection. Burke v. Maguire, 154 Cal. 456, 98 P 21.

93. As fully as administrator could plead against creditors. Matthews v. Peterson, 150 N. C. 134, 63 SE 721.

94. Where validity or amount of a claim against estate is disputed, surrogate must determine it. In re Pirie, 133 App. Div. 431, 117 NYS 753. Reference to determine amount of indebtedness held unnecessary where answer setting up payment of all debts was undenied. Row v. Back [Ky.] 115 SW 806.

95. Error in rulings as to validity of other debts held harmless in absence of objection to selling more land than was necessary. Curtis v. Hunt [Ala.] 48 S 598.

96. Statement that proof was taken. Row v. Back [Ky.] 115 SW 806.

97. In re Jones' Estate [Kan.] 103 P 772.

98. Where all parties interested were adults and of sound mind receiving testimony of administratrix as to value of personalty and grounding order of sale there-

Though the probate court cannot ordinarily pass on the question of title to the land sought to be sold,[99] a sale should not be ordered where a substantial dispute exists on the question of title.[1] The Georgia statute provides for the filing of a claim affidavit by a third person who asserts title to the land proceeded against,[2] but one who interposes a claim solely for delay is liable in damages.[3] An administrator who seeks to reach land alleged to have been fraudulently conveyed cannot question the mental capacity of decedent's grantee to deed the land to others.[4] The fact that lienholders do not answer does not prevent the court from ordering sale.[5] While the rights of lienholders should ordinarily be determined before the sale is made, where it can be done without prejudice to the estate,[6] the court has a wide discretion in the matter and may in proper cases allow the sale to be made before determination of the rights of creditors and lienholders.[7]

(§ 7) *C. The order.*[8]—See 11 C. L. 1304.—There must be an order or judgment[9] properly entered,[10] directing a public or private sale[11] on prescribed terms,[12] and sufficiently describing the land.[13] Relief not asked for is properly left for subsequent adjudication,[14] but the judgment must protect the interests of infants in any

on, held mere irregularity in absence of objection to competency. Curtis v. Hunt [Ala.] 48 S 598.

99. See ante, § 2, Jurisdiction and Courts.

1. Sale in such case would sacrifice land. In re Wood's Estate [Mo. App.] 120 SW 635. Where other persons claimed under deed tending strongly to support their claim, application was properly denied. Id.

2. Claim affidavit to prevent administrator's sale of land should be filed in court of ordinary and claim should be transmitted to superior court under Civ. Code, § 4631. Beach v. Lott [Ga.] 63 SE 627. Order of superior judge allowing formal entry, by ordinary, of filing, nunc pro tunc, held proper, claim affidavit having been in fact filed. Id.

3. Where claim to land advertised by administrator is interposed for delay only, claimant is subject to damages assessable as in sales under execution, to be calculated on basis of value of property claimed. Rexford v. Bleckley, 131 Ga. 678, 63 SE 337. Where, however, administrator voluntarily named a specific sum as damages, he could not recover more. Id.

4. In re Brigham's Estate [Iowa] 120 NW 1054.

5. Where petition for settlement of estate and sale of land made certain lien holders parties and set up their liens, sale could be ordered though such lienholders had not answered and set up their lien claims (Union Trust & Sav. Co. v. Marshall's Adm'rs [Ky.] 113 SW 73), and though lienholders could not share in proceeds of sale until they had shown their right thereto by answer and cross petition (Id.).

6. In order that they may know how much to bid. Union Trust & Sav. Co. v. Marshall's Adm'rs [Ky.] 113 SW 73.

7. Sale proper before determination of consolidated suit to have certain mortgages and acts declared an assignment for benefit of creditors, attorneys residing in other counties, and estate being subject to diminution during long time required for adjudication of numerous alleged preferences. Union Trust & Sav. Co. v. Marshall's Adm'rs [Ky.] 113 SW 73.

8. **Search Note:** See note in 3 Ann. Cas. 234.

See, also, Executors and Administrators, Cent. Dig. §§ 1444-1455; Dec. Dig. §§ 346-349; 18 Cyc. 746, 749; 11 A. & E. Enc. L. (2ed.) 1068; 19 A. & E. Enc. P. & P. 899.

9. Signature by clerk, of judge's name, to order to show cause why realty should not be sold, held surplusage, and entry regarded as sufficient evidence that order was made, statute not requiring judge's signature to orders made in open court. Plains Land & Imp. Co. v. Lynch, 38 Mont. 271, 99 P 847.

10. Absence of affidavit showing judge's absence before issuing order of sale by clerk held not fatal in collateral proceeding to recover the land from purchaser. Hibernia Bank & Trust Co. v. Whitney, 122 La. 890, 48 S 314.

11. Court may order in alternative public or private sale. Plains Land & Imp. Co. v. Lynch, 38 Mont. 271, 99 P 847.

12. Failure of order of sale to state terms and conditions on which sale was to be made as required by Rev. Codes, § 7569, held cured, return of sale showing cash sale for more than appraised value, and court having confirmed sale after full hearing. Plains Land & Imp. Co. v. Lynch, 38 Mont. 271, 99 P 847.

13. Obvious clerical error in description of land in order for sale held correctable by nunc pro tunc order at instance of purchaser. Lambert v. Rice [Iowa] 120 NW 96. Order considered in light of inventories and application held construable on collateral attack, as authorizing sale of all of a certain survey. Millwer v. Phelps [Tex. Civ. App.] 115 SW 891. Where notices of sale, order of confirmation, and deed, correctly described land as in range 26, proceedings held not void on collateral attack because order described land as being in range 25. Plains Land & Imp. Co. v. Lynch, 38 Mont. 271, 99 P 847.

14. Where petition did not ask for accounting and distribution of debts owing by widow and administrator, or for determination of title to rates claimed by an heir. Row v. Back [Ky.] 115 SW 806.

surplus.[15] An order of court prima facie shows the administrator's right to recover the land from the purchaser of an heir for the purpose of having it sold for debts.[16] A distinction must be observed between a void order and one which is merely erroneous.[17] The remedy of one who objects to a mere erroneous judgment is by seasonable appeal,[18] and he cannot allow such remedy to lapse and then sue the purchaser to recover the lands.[19] A lienholder whose lien would be extinguished without full satisfaction may assert the invalidity of a judgment for sale to satisfy his lien.[20]

(§ 7) *D. The sale.*[21]—See 11 C. L. 1804.—The sale must be made at the proper time and place.[22] An unnecessary amount of land should not be sold unless it is indivisible.[23] The sale of more land than is authorized by the application and order is not necessarily void as to that authorized,[24] and, if not void, the purchaser becomes an owner in common with the legal representative and may hold the entire tract as against strangers.[25] Appraisers may not purchase [26] nor may the representative do so.[27] If the purchase price is paid,[28] a deed is usually executed, but, by payment of the price in accordance with the terms of the sale, the purchaser acquires an equitable title though he receive no deed from the administrator.[29] An order permitting the representative in his individual capacity to join in the deed is usually unnecessary.[30] The proceeds should be applied in discharge of the debts and expenses [31] according to their legal priority,[32] and any surplus is payable to the

15. Otherwise sale in excess of amount required to pay debts is void though land be indivisible. Carter v. Crow's Adm'r [Ky.] 112 SW 1098.

16. Cochran v. Bugg, 131 Ga. 588, 62 SE 1048.

17. See, also, post, § 15, Administration Orders and Decrees. Decree not avoided merely because jurisdictional facts were defectively stated. Gartman v. Lightner [Ala.] 49 S 412. Where all persons interested were made parties, judgment held not void, though erroneous, court having jurisdiction. Dennis v. Alves [Ky.] 113 SW 483. Judgment ordering sale held erroneous where it directed deed to purchaser before expiration of redemption period, but held not void. Disman v. Flippin's Adm'x [Ky.] 116 SW 740. If it was necessary to execute bond required by Civ. Code Prac. § 410, regulating entry of judgments against nonresidents constructively summoned before judgment for sale of land for debts could be rendered against nonresident heirs, failure to execute such bond would not render judgment void, but merely erroneous. Oldham v. McElroy [Ky.] 121 SW 414.

18. See post, § 16. Disman v. Flippin's Adm'x [Ky.] 116 SW 740.

19. Disman v. Flippin's Adm'x [Ky.] 116 SW 740. Collateral attack of judgments or orders, see post, § 15.

20. Mortgagee for whose debt land was ordered sold held entitled to assert invalidity of judgment of sale based on failure to summon infant heirs, he being a defendant and sale destroying his lien without realizing enough to pay debt, interest and costs. Roy v. Allen's Adm'r [Ky.] 118 SW 981. Judgment being void, proper practice was to move to set it aside before taking appeal. Id.

21. Search Note: See notes in 5 C. L. 1234; 4 L. R. A. (N. S.) 820; 5 Ann. Cas. 708.
See, also, Executors and Administrators, Cent. Dig. §§ 1481-1613; Dec. Dig. §§ 360-407; 18 Cyc. 757-846; 11 A. & E. Enc. L. (2ed.) 1098; 19 A. & E. Enc. P. & P. 907.

22. Sale made not at county seat held valid despite Rev. Code 1871, § 1038, requiring judicial sales to be made at county seat, if no directions are given as to place of sale, where decree authorized administrator to name such place. Ladd v. Craig [Miss.] 47 S 777.

23. Held error to direct sale of all of decedent's land for debts in absence of proof they were indivisible. Carter v. Crow's Adm'r [Ky.] 112 SW 1098. Where rights of infants were involved, burden was on plaintiff to affirmatively establish that land was not susceptible of division. Id.

24, 25. Millwee v. Phelps [Tex. Civ. App.] 115 SW 891.

26. Sale of land to appraiser held voidable only. Dane v. Layne [Cal. App.] 101 P 1067.

27. See post, § 9A.

28. Payment of consideration held sufficiently shown in collateral attack, by decree of confirmation, purchaser's deed, and administrator's accounting, in which they were charged with $924, as received from buyer. Ladd v. Craig [Miss.] 47 S 777.

29. Edwards v. Gates [Tex. Civ. App.] 120 SW 585.

30. In re Metcalf's Estate [Iowa] 120 NW 104.

31. When jurisdiction of court to order sale is either undoubted or not open to question, proceeds will be applied in discharge of debts. Surviving husband who had joined in wife's mortgage on her land held not entitled to proceeds of sale of land to pay off lien, where such proceeds were not sufficient to discharge the debt. Hampton v. Murphy [Ind. App.] 86 NE 436.

32. See, also, ante, § 6C. Statutes held to require proceeds of sale of realty to pay debts to be applied first in satisfaction of widow's statutory allowance, and next of

heirs or devisees [33] or otherwise secured to them.[34] Heirs cannot recover on a purchase-money note given to the representative whose final account treats it as cash in his hands.[35]

The right to question a sale may be barred by lapse of time [36] or by acquiescence or estoppel.[37] Estoppel may arise from the receipt and retention of benefits from the sale.[38] but heirs are not estopped to assert title to land illegally sold by reason of having received and disposed of the remainder of the estate.[39]

Irregularities, not jurisdictional, are not sufficient to avoid the sale in a collateral proceeding,[40] especially where the rights of innocent purchasers have intervened.[41] By statute, a mistake in the description of the land sold may be corrected on petition of the purchaser.[42] The motive of the representative in procuring a sale of lands cannot be inquired into if he acted within his legal rights.[43] Where separate parcels are sold to different purchasers under an irregular judgment, the sale will not be set aside as to one purchaser and not as to the others.[44]

One who seeks to recover the land on the ground that the sale was a nullity is bound to prove with legal certainty the grounds on which he relies.[45] Where a sale

judgment liens, before payment therefrom of expenses of administration, funeral and last sickness. Snyder v. Thieme & Wagner Brew. Co. [Ind. App.] 87 NE 155.

33. Kolars v. Brown [Minn.] 121 NW 229.

34. On sale of land for debts, a lien should be, and, by law, is reserved for infant's share of excess above intestate's debts until bond is executed on behalf of infants as required by §§ 493, 497, Civ. Code Prac. Oldham v. McElroy [Ky.] 121 SW 414. Court should not collect sale bonds in excess of enough to pay debts and administration costs before bond in favor of infants, required by Civ. Code Prac. § 493, is executed to protect their interest in surplus. Id.

35. Though administrator had made no attempt at collection and had not settled with heirs. Steinberg v. Salzman, 139 Wis. 118, 120 NW 1005.

36. Surviving husband's right to recover his interest in wife's land sold for debts held barred under Burns' Ann. St. 1908, § 295, requiring actions to recover realty thus sold to be brought within five years from confirmation of sale, even though sale was void. Hampton v. Murphy [Ind. App.] 86 NE 436. Action to set aside administrator's deed is barred after five years from sale or five years after maturity of minors. Steinberg v. Salzman, 139 Wis. 118, 120 NW 1005.

37. Widow who appeared in proceedings but made no claim for dower could not thereafter claim dower against purchaser. Oldham v. McElroy [Ky.] 121 SW 414. Widower permitting petition to sell wife's realty to go by default, actively participating in administrator's sale, etc., held estopped to question validity of sale for debts. Hampton v. Murphy [Ind. App.] 86 NE 436; Id. [Ind. App.] 88 NE 876. Held estopped to deny jurisdiction of court to sell, he having joined in wife's mortgage. Hampton v. Murphy [Ind. App.] 86 NE 436. Where there was no evidence in support of administrator's controverted allegations of consent of adult heirs to his purchase at his own sale, it could not be said heirs were estopped to assert title to the land. Baker v. Lane [Ky.] 118 SW 963.

38. Adult heirs who with knowledge of the facts accept and retain as part of their distributive share money from administrator's sale of realty cannot have sale set aside on ground land was homestead and not liable to sale for debts or charges. Mote v. Kleen, 83 Neb. 585, 119 NW 1125. Acceptance by heirs of money for land sold held not to estop them from bringing ejectment against purchaser, latter being entitled to lien for price and improvements. Pearson v. Caldwell [Miss.] 47 S 436.

39. Wilkin v. Owens [Tex.] 114 SW 104.

40. Where county court had jurisdiction to grant letters of administration and order sale of land by administrator, sale could not be attacked collaterally in trespass to try title. Holland v. Nance [Tex.] 114 SW 346. Judgment held not impeachable, in action to recover land, on ground land was not subject to sale, court being one of general probate jurisdiction. Edwards v. Gates [Tex. Civ. App.] 120 SW 585. Irregularities as to amount of land sold and manner of sale held only error of judgment immaterial on collateral attack and remediable only by review as provided by law. Dane v. Layne [Cal. App.] 101 P 1067. Decrees for sale of realty to pay debts under Colorado Statute (Mills' Ann. St. § 4750, et seq.), held not subject to collateral attack for treating certain taxes as debts, or because rendered without awaiting next term as provided by statute or because notice of sale did not conform to statute, jurisdiction having attached. Kretsinger v. Brown [C. C. A.] 165 F 612.

41. Lanier v. Heilig, 149 N. C. 384, 63 SE 69.

42. Failure of either petition or decree of confirmation to embrace land sold held not "mistake in description" within Code 1906, § 2072. Pearson v. Caldwell [Miss.] 47 S 436.

43. That administratrix might have contemplated oppressing and humiliating party claiming under rejected will could not be considered in suit to recover the land. Disman v. Flippin's Adm'x [Ky.] 116 SW 740.

44. Lanier v. Heilig, 149 N. C. 384, 63 SE 69.

45. If case is doubtful, presumption against official misconduct prevails. Higgins v. Carbajal, 123 La. 733, 49 S 489.

proves void, the purchaser is not bound by his assumption of prior liens.[46] In such case he should be made whole if possible by subrogation to the rights of the creditors,[47] by return of the purchase price from the heirs,[48] or by a lien on the land for the money paid.[49]

§ 8. *Subjection of property in hands of heirs or beneficiaries to payment of debts.*[50]—See 11 C. L. 1306—Heirs and beneficiaries take subject to decedent's debts,[51] at common law and under statutes,[52] to the extent of the property they receive,[53] the

46. Holz v. Burling [Neb.] 120 NW 954.

47. If sale is set aside after purchase money has been applied to payment of debts, purchasers are entitled to subrogation to rights of creditors. Lanier v. Heilig, 149 N. C. 384, 63 SE 69.

48. Hibernia Bank & Trust Co. v. Whitney, 122 La. 890, 48 S 314; Millican v. McNeill [Tex.] 114 SW 106. Heirs chargeable with interest from time money was applied in payment of charges. Millican v. McNeill [Tex.] 114 SW 106. Heirs are not required, in first instance, to tender repayment of purchase money. If purchaser wishes to assert equity of subrogation, he must plead it. Wilkin v. Owens [Tex.] 114 SW 104. Held on rehearing that appellee should have opportunity to amend pleading so as to claim money paid administrator for the land as condition to its recovery. Wilkin v. Owens [Tex.] 115 SW 1174. On further rehearing, judgment rendered on appeal that plaintiff in error have and recover of defendants in error the land in controversy on condition he pay amount paid administrator with interest. Wilkin v. Owens [Tex.] 117 SW 425.

49. Where administrator in good faith brought action to have land sold to settle estate and purchased land with his own funds, he was entitled, on avoidance of sale, to lien for price, subject to homestead right of an infant heir. Baker v. Lane [Ky.] 118 SW 963. Also for sum paid out by him as administrator on account of funeral expenses. Id. Not for improvements paid for out of rents. Id. Where sale was set aside on ground that land was not part of estate but belonged to certain minors not parties to judgment for sale, purchaser was not entitled to equitable lien on such land though minors had received some benefit from proceeds. Vivion v. Nicholson [Tex. Civ. App.] 116 SW 386.

50. Search Note: See note in 8 Ann. Cas. 592.

See, also, Descent and Distribution, Cent. Dig. §§ 433-532; Dec. Dig. §§ 119-157; 14 Cyc. 184-225; 8 A. & E. Enc. L. (2ed.) 1093; 19 Id. 1293, 1300, 1335, 1336, 1370.

51. Rights of creditors cannot be affected by decree directing distribution before payment of claims duly proven. As to such claims estate remains unadministered. Oliver v. Smith [Miss.] 49 S 1. Rule not inapplicable because creditor was administrator and had filed final account, this having been filed in representative capacity. Id. Husband of devisee who died before distribution held to take only what devisee would have taken, namely, devise less devisor's debts and expenses of administration. In re Metcalf's Estate [Iowa] 120 NW 104. Husband's statutory interest in land of deceased wife held subject to payment of its proportionate share of taxes, mechanics' liens and mortgages, as between husband and children, though under previous decision husband's interest could not be subjected to payment of funeral expenses, costs of administration, etc. Kinney v. Heuring [Ind. App.] 87 NE 1053. Maxim that express mention of one thing excludes all others held not applicable to construction of Burns' Ann. St. 1908, § 3016, providing that widower takes subject to debts of wife contracted before marriage. Id.

52. Demand for breach of covenant of quiet enjoyment is a "debt" within Court and Practice Act 1905, § 984, rendering beneficiaries liable for debts. Herbert v. Handy [R. I.] 72 A 1102. Estate of a married man descends on his death to his heirs burdened with his debts. Rev. St. 1895, art. 1869. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176. Under express provisions of Ky. St. 1909, § 2089 (Russell's St. 3865), heirs may be sued in equity for any liability of decedent. Hill's Adm'r v. Grizzard [Ky.] 119 SW 168. Right of creditors to proceed against heirs or legatees is purely statutory. Converse v. Nichols, 202 Mass. 270, 89 NE 135. Right under Rev. Laws, c. 141, §§ 26-28, does not extend to claims coming within § 13, providing for presentation to probate court of claims on which right of action does not accrue until after two years from giving of administrator's bond, and for retention of assets to pay same if found to be due or liable "to become due." Id. Liability of stockholder of foreign corporation held within § 13, and hence not enforcible against heirs or legatees. Id. Code Civ. Proc. § 1843, rendering heirs and devisees liable for decedent's debts to extent of estate received by them, does not create a new absolute liability, but merely provides another method of enforcing an existing liability in addition to selling decedent's realty to pay debts. Hill v. Moore, 131 App. Div. 365, 115 NYS 289.

53. Where each of several heirs received less than amount allowed claimant for services rendered decedent, personal judgment against each for sum allowed was not justified, but court should determine amount each was liable for and give judgment accordingly. Walker v. Ganote [Ky.] 116 SW 689. Where decedent's estate is insolvent, due to ante-mortem conveyance, without consideration, of all of decedent's property, such property cannot be held liable for debts of estate in absence of proof of amount and value of property transferred. Warner v. Norwegian Cemetery Ass'n Trustees, 139 Iowa, 115, 117 NW 39. Where it is sought to charge beneficiary to whom deceased transferred all his property before his death, thus rendering his estate insolvent, liable for claims against deceased,

personalty being first exhausted.[54] Innocent purchasers from devisees may be protected by statute,[55] but one who buys from devisees land in another state is charged with notice that it may be needed for debts.[56]

Proceedings must be commenced before the claim is barred.[57] The nature of the demand will determine the forum.[58] The general statute requiring verification of claims presented to the representative for allowance does not apply where the creditor proceeds directly against the heir.[59] A creditor who has no lien is entitled only to personal judgment.[60]

§ 9. *Rights and liabilities between representative and estate. A. Management of and dealings with estate.*[61]—11 C. L. 1307—Occupying, as he does a trust position,[62] the representative must exercise prudence and diligence in his management of the estate,[63] and may not disobey proper orders of the court,[64] purchase at his own sales,[65]

amount and value of property so transferred must be proved. Id.

54. Where a debtor died pending proceedings to enforce a judgment against his land, sale could not be made until administration of personalty. Schilb v. Moon, 65 W. Va. 564, 64 SE 739.

55. Statute protecting purchasers without notice from heirs or devisees two years after death of ancestor held not applicable to proceeding against executor and devisees to redeem mortgaged land, such proceeding not being one to collect a debt. Rich v. Morisey, 149 N. C. 37, 62 SE 762.

56. Lapse of seven years did not justify negative presumption. In re Jones' Estate [Kan.] 103 P 772.

57. Three years after issuance of letters, within which, under Code Civ. Proc. § 1844, action cannot be brought against heirs, is not part of time limited for action on the debt. Hill v. Moore, 131 App. Div. 365, 115 NYS 289. Action on note under Code Civ. Proc. § 1843, held barred, over nine years having expired since last payment on note in decedent's lifetime, though not from decedent's death. Id.

58. Demand for breach of covenant of quiet enjoyment is a "debt" within § 984, rendering heirs, devisees and legatees liable for debts after settlement of estate and after two years from publication of notice of qualification of administrator, and suit must be brought in equity, within §§ 985, 987, giving a creditor holding a contingent claim, right of action on which did not accrue during period within which suit could be brought against representative, right to sue in equity all persons liable. Herbert v. Handy [R. I.] 72 A 1102.

59. Ky. St. 1909, §§ 3870, 3872, 3874 (Russell's St. §§ 3901, 3903, 3905), requiring verification of claims and presentation to administrator, and constituting part of chapter on personal representatives, held not applicable where no administrator had been appointed and action was against heirs on claim against decedent. Hill's Adm'r v. Grizzard [Ky.] 119 SW 168.

60. Creditors having no lien on realty and failing to enforce judgment within three years from issuance of letters testamentary held not entitled to lien on award in eminent domain proceedings but only to personal judgment against devisees to extent of property received by them. Wendel v. Binninger, 132 App. Div. 785, 117 NYS 616.

61. Search Note: See notes in 14 L. R. A. 103; 7 L. R. A. (N. S.) 617; 52 A. S. R. 118; 98 Id. 371.

See, also, Executors and Administrators, Cent. Dig. §§ 397-650½, 2582-2603; Dec. Dig. §§ 90-172, 538-544; 18 Cyc. 210, 211, 233-245, 247-373, 1309-1323, 1325, 1326, 1330-1350, 1354-1367; 8 A. & E. Enc. L. (2ed.) 1062; 11 Id. 944.

62. See 11 C. L. 1307.

63. Administrator held chargeable with **rent lost** by his neglect. Zimmer v. Saier [Mich.] 16 Det. Leg N. 569, 122 NW 563. Executors chargeable with taxes and penalties where, instead of **paying taxes,** they permitted widow to take gross rentals. In re Wagner, 132 App. Div. 306, 117 NYS 53. Where widow and executrix holding possession of land under will giving her net income until son should arrive at maturity failed to pay taxes, coexecutors should be compelled to pay arrears of taxes only in case they could not be collected from widow. Id. Executor held responsible for interest and penalties incurred through failure to pay **inheritance tax** within statutory time. Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388. Executors holding mortgages and **permitting mortgagors to default in payment of taxes** held not liable in absence of showing estate suffered loss. In re Wagner, 132 App. Div. 306, 117 NYS 53. Administratrix held accountable for **failure to resist foreclosure** of chattel mortgage invalid as against decedent's creditors, property having been sold. In re McGovern, 118 NYS 378. Conflict of authorities as to rights of creditors on failure of a mortgagee to refile mortgage held no excuse, it not appearing advice of counsel was sought or that failure to act was due to such conflict. Id. Claim of statutory damages against executor for alleged **failure to deposit funds** as required by law cannot be considered for first time on appeal from order settling executor's account, and be thus disposed of on mere presumptions, executor being entitled to hearing. Succession of Bertrand, 123 La. 784, 49 S 524. Failure of executrix to deposit in bank funds of husband's estate held not ground for imposition of penalties of destitution and damages where she was advised by counsel that it belonged to her by gift, and promptly deposited the money on being better advised. Succession of Arnemann, 123 La. 430, 49 S 10. **Selling** from grocery stock left by husband **without order of court** held not to justify such penalties and damages, stock be-

commingle trust and individual funds,[66] or otherwise convert assets to his own use,[67] or deal with the property of the estate to his own personal advantage.[68] He must

ing very small and heirs having consented. Id.

64. Administrator sued for accounting is properly charged with appraised value of property sold in violation of order fixing that amount as upset price, where appraisement is only evidence of value introduced. Epperson v. Jackson [S. C.] 65 SE 217. Bill against administrator of executrix held insufficient to establish a trust in favor of legatees against executrix's estate, where it merely alleged that executrix had been directed by court to pay over certain money to trustees on their giving bond, but that they did not give bond and that executrix as such retained possession of the fund until her death. Burke v. Maguire, 154 Cal. 456, 98 P 21. Did not state cause of action against administrator personally, it not being alleged any of the fund had come into his possession. Id.

65. Neither administrator nor his attorney can purchase property in course of litigation in which he is engaged, or of which property he has the management. Bank of Pine Bluff v. Levi [Ark.] 118 SW 250. Where in partition by heirs administrator was defendant both as such and individually, and judgment expressly authorized any party to proceeding to purchase, administrator could buy as individual without becoming trustee for plaintiff heirs. La Forge v. Latourette, 129 App. Div. 447, 114 NYS 146. That in joint answer of administrators they asked for substantially same relief as demanded in complaint held insufficient to require administrator to refrain from buying as individual. Id. In subsequent suit, heirs could not urge that representative's true relation was not brought to attention of court on confirmation of the sale. Id. Where executors have express testamentary authority to sell realty, only restraint court or parties in interest can exercise is with respect to accounting (Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261), and where selling price reported is inadequate, any one interested may object, and question must then be determined by surrogate, who may either charge executors with land purchased by one of them or with fair value thereof, regardless of selling price (Id.). Where executors sold realty pursuant to directions in will and their accounts were settled on due notice, sale to one of the executors was not voidable at election of contingent remainderman who had released his right to question the title and who was interested only in proceeds of sale. Id. Executor who bought in at foreclosure land on which estate held mortgage and had certificates issued to him personally and reported land as belonging to estate and received credit therefor in his account should be required to make proper conveyance to estate or heirs. In re Richmond's Estate, 9 Cal. App. 413, 99 P 558.

Evidence insufficient to show that executor purchased through third person or acted as agent of purchaser. Higgins v. Carbajal, 123 La. 733, 49 S 489. Evidence held not to show fraud by which administrator procured his wife to purchase realty of estate with community money and not with the money given her as gift. Hipkins v. Estee, 51 Wash. 1, 97 P 1089.

Sale voidable only: Purchase by one of three executors is voidable only. In re Richards' Estate, 154 Cal. 478, 98 P 528. In case of return to sale, those interested could on such return elect to have sale confirmed or rejected. Id. If no return of sale was made, executors could rescind at any time for fraud of coexecutor. Id. Where sale by executors to coexecutor was confirmed without knowledge of those interested in estate, these could sue to rescind sale or have it declared executor held land in trust. Id. Executor's purchase held not to render sale void. Dennis v. Alves [Ky.] 117 SW 287. Executors held required to return purchase price paid for land by coexecutor on their rescinding sale, though confirmation of sale was refused (In re Richards' Estate, 154 Cal. 478, 98 P 528), estate not being entitled to possession of property without returning or offering to return purchase money after proper accounting (Id.).

Ratification: Heirs at law solely interested may ratify purchase by administrator at his own sale by moving for confirmation. La Forge v. Latourette, 129 App. Div. 447, 114 NYS 146. Forty years' acquiescence by heirs held ratification of purchase by administratrix of land on which estate held purchase-money lien. Prewitt v. Morgan's Heirs [Ky.] 119 SW 174. Title held to pass to administratix, and any claim of heirs against her held personal. Id.

66. Executor renewing notes and mortgages in own name without order of court in effect mingles trust property with his own as if he had deposited trust funds to his own credit. In re Richmond's Estate, 9 Cal. App. 402, 99 P 554.

67. Delivery of check signed in name of estate and executor as such in payment of executor's individual debt, followed by collection of check by payee, is appropriation of amount of check to executor's individual use. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435. Check held prima facie to charge payee as joint tort feasor, placing on him burden to establish transaction was not conversion or that amount of check had been returned to estate. Id. Evidence insufficient to show return of money. Id. No presumption arose that check was in satisfaction of legacy to executor, though of same amount, statute providing no legacy should be paid until after one year from grant of letters. Id. Residuary legatee's assignee held entitled to sue executor and another for conversion of trust funds. Id. Administrator de bonis non cannot sue estate of his predecessor for conversion of assets except on bond as authorized by Court and Practice Act, § 830. Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382.

68. One who as former administrator purchased mortgage claim against estate at one-fourth face value held not entitled to recover more than amount paid and interest, whether claim be legal or equitable, and though beneficiaries refused to ratify purchase and com-

account [69] for all money or other property coming into his hands [70] as representative,[71] being entitled to credit on such accounting for all assets properly disposed of,[72] including sums actually paid on account of valid claims [73] and administration expenses.[74] A representative, while holding possession of property received by him as such, is estopped to dispute decedent's title.[75] Executors who permit a coexecutor to handle the estate should be held responsible for property squandered by the coexecutor only in case the latter fails to make good the loss.[76] While a representative is not responsible for losses to the estate due entirely to the conduct of volunteers or

pelled him to incur costs to collect the smaller amount, Civ. Code, § 1618, prohibiting trustees to deal with trust property for own benefit. Bidwell v. Smith [S. D.] 120 NW 880. Though liquor license is not of itself an asset of estate, it may add materially to fixtures, unexpired lease, etc., which it is duty of representative to realize on (Aschenbach v. Carey [Pa.] 73 A 435), and representative can make no personal profit therefrom (Id.), neither can profits made by him be reached by his creditors (Id.). Proceeds of sale of license which administrator had caused to be transferred to himself individually but in good faith for benefit of estate held not attachable as his individual property. Id. Representative who forecloses a mortgage and buys the property as an individual under judgment taxing attorney's fees on the basis of the notes secured cannot thereafter set up for his own benefit an agreement with him as executor as to attorney's fees. Rogers v. Crandall [Iowa] 121 NW 1092. And as individual she could not enter main case for purpose of modifying decree rendered. Id.

69. Accounting proceedings, see post, § 11.

70. On issue, whether all of decedent's property was accounted for by executrix, evidence held to show that testatrix owned certain shares of stock at her death. In re Perry, 129 App. Div. 587, 114 NYS 246. Evidence as to amount of a note and proceeds of certain land, held so improbable and inconsistent as to require finding for executrix. In re Sergent's Estate, 62 Misc. 173, 116 NYS 273. Where will gave widow entire income from estate until son should become of age and provided that thereafter income should be divided between widow and son, executors were not chargeable with interest on corpus enjoyed by widow before son's majority, but with only one-half of interest for benefit of son after he became of age. In re Wagner, 132 App. Div. 306, 117 NYS 53. On question whether administrator failed to account for proceeds of a lottery ticket, evidence held not to show ticket belonged to decedent. In re Gerstenberg, 133 App. Div. 372, 117 NYS 190.

71. Executor as such is not accountable for assets which did not come into his hands as executor, such as proceeds of land sold without authority. In re Green, 63 Misc. 638, 118 NYS 747. Proceeds of realty not sold by representative in her capacity as executrix held not chargeable against her in account. In re Sergant's Estate, 62 Misc. 173, 116 NYS 273. Executrix **succeeding to a life estate** in decedent's homestead as widow need not account for **rents and profits** thereof accruing after her husband's death. In re Fletcher's Estate, 83 Neb. 156, 119 NW 232. Administratrix is not accountable for rents where she is also life tenant. In re Dunn's Estate, 63 Misc. 179, 118 NYS 560.

72. Property distributed under valid agreement between heirs and widow prior to latter's appointment as administratrix should be credited to her in stating her account, same having been included in inventory. Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847. Stock subsequently administered should also be credited. Id. Executors held entitled to credit for stocks delivered by them to persons declared owners thereof by supreme court. In re Williams' Estate, 118 NYS 562. Where court could have granted administrator permission to pay out money to complete purchase of realty, such payment without permission was not improper, but merely left propriety open on settlement of account. In re Bottom's Estate [Cal.] 103 P 849. Administrator is directly responsible to estate for **money improperly loaned or given** to widow. Crabtree v. Fretwell, 154 Cal. 638, 98 P 1058.

73. Claims provable, see ante, § 6A. Liability for unauthorized payments, see ante, § 6E. See, also, post, § 9D. Administrator not chargeable with amounts paid in good faith on claims established by litigation defended by administrator in exercise of due care. Wight v. Shaw, 202 Mass. 541, 89 NE 96. Executors who in good faith settled a claim, fearing litigation against estate, held entitled to credit for sum paid though claim was in fact unfounded. In re Baruth, 62 Misc. 596, 116 NYS 1125. Evidence held not to justify allowance of $550 as having been paid by representative as such to himself as guardian of a child. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228. Where a claim was excessive and unjust and administrator aided third person in presenting it and fraudulently induced probate court to allow it, his account was properly surcharged with amount paid thereon. Id.

74. See post, § 9D. Good faith expenditure for benefit of estate and duly allowed will not be reviewed unless there is no ground in record on which it can be supported. In re, Bottom's Estate [Cal.] 103 P §49. Payment by administratrix of share of amount necessary for administration expenses on death of vendor of realty, in order to secure conveyance of land contracted for by her decedent instead of proceeding to compel conveyance by vendor's administrator, held justifiable and properly allowable as a credit. Id.

75. Wiseman v. Swain [Tex. Civ. App.] 114 SW 145.

76. In re Wagner, 132 App. Div. 306, 117 NYS 53.

trespassers before his appointment and without his knowledge or consent,[77] he will be held accountable for any assets wasted or lost through his own acts before the issuance of letters,[78] and for failure to exercise reasonable diligence to recover assets squandered before he was appointed.[79] Where an administrator is sole heir and his wife and children have no interest in the property they cannot complain of voluntary conveyances under color of proceedings to sell land to pay debts,[80] neither has a substituted administrator any standing after the death of the first administrator, there being no debts unpaid.[81]

Subrogation of representative to rights of estate or third persons. See 11 C. L. 1808 An executor who uses his own funds to pay valid debts and legacies is entitled to subrogation to the rights of creditors and legatees.[82]

Executors de son tort. See 9 C. L. 1185

(§ 9) *B. Representative as debtor or creditor.*[83] See 11 C. L. 1808 Credit is due the representative for valid claims of his own based on transactions with decedent in the latter's lifetime,[84] but such claims must be presented and proven in regular course.[85] Limitations will not bar a claim of an administrator for an individual debt duly probated and not barred at the time of his appointment.[86] An administrator is chargeable with the amount of personal claims of decedent against him if they are still valid and subsisting obligations.[87] A representative who invests funds of the estate in his own name instead of collecting securities representing such funds thereby creates himself a debtor to the estate,[88] and as bearing on his liability it is immaterial whether he was or was not negligent in collecting the securities taken in his own name.[89]

(§ 9) *C. Interest on property or funds.*[90] See 11 C. L. 1808 Ordinarily representatives are not liable for interest[91] in the absence of unreasonable delay in the settlement of the estate,[92] or other neglect of duty,[93] or improper conduct;[94] but in

77, 78, 79. In re McGovern, 118 NYS 378. Where immediately after decedent's death relatives decided that sister should be administratrix and should continue decedent's business, and she was appointed four months thereafter, she was responsible for losses incurred in continuing the business either before or after letters issued. Id.

80. Widow, barred by antenuptial agreement, and afterborn child, held not defrauded. Lefebure v. Lefebure [Iowa] 121 NW 1025.

81. Lefebure v. Lefebure [Iowa] 121 NW 1025.

82. As against undevised realty. Earle v. Coberly, 65 W. Va. 163, 64 SE 628.

83. Search Note: See notes in 61 L. R. A. 313; 112 A. S. R. 406; 6 Ann. Cas. 810.

See, also, Executors and Administrators, Cent. Dig. §§ 302, 393, 393½, 760, 1012-1022; Dec. Dig. §§ 50, 88, 219, 265; 18 Cyc. 177, 230, 231, 446, 563-570; 8 A. & E. Enc. L. (2ed.) 1072.

84. Premiums paid by wife on husband's life policy payable to her but without husband's request or promise of repayment held not allowable to widow in her account as administratrix. In re Brown's Estate, 60 Misc. 35, 112 NYS 599. Expenditures by administratrix in decedent's lifetime for benefit of decedent and family on decedent's promise they should be repaid out of estate held allowable. Id.

85. See ante, § 6B, subd. Occasion and Necessity of Proving Claims.

86. Oliver v. Smith [Miss.] 49 S 1.

87. Administrator not chargeable with amount of note held by intestate against him but paid in decedent's lifetime. Wight v. Shaw, 202 Mass. 541, 89 NE 96.

88. Where he took notes in his own name in lieu of notes belonging to estate. Elizalde v. Murphy [Cal. App.] 103 P 904.

89. Elizalde v. Murphy [Cal. App.] 103 P 904.

90. Search Note: See note in 29 L. R. A. 622.

See, also, Executors and Administrators, Cent. Dig. §§ 423-432; Dec. Dig. § 104; 18 Cyc. 255-263; 11 A. & E. Enc. L. (2ed.) 1211.

91. Stevens v. Ottawa Probate Judge, 156 Mich. 526, 16 Det. Leg. N. 207, 121 NW 477.

92. Where executrix was reasonably diligent in settling estate, she should not be charged with interest on small balance remaining in her hands. In re Nelson, 63 Misc. 627, 118 NYS 673.

93. Administrator properly charged with interest on funds of estate he failed to deposit and which he had mingled with his own funds thereby losing to estate three per cent on semi-annual balances. Zimmer v. Saier [Mich.] 16 Det. Leg. N. 569, 122 NW 563. Also with interest on a claim, he did not pay though ordered by court to do so. Id.

94. Executor who without authority renewed notes and mortgages in his own name including accrued interest held liable as for loan of entire sum and chargeable with interest thereon. In re Richmond's Estate, 9 Cal. App. 402, 99 P 554.

some states the rule is that an administrator is chargeable with interest on any balance remaining in his hands after the expiration of a specified time from the date of his appointment,[95] unless the court in its discretion disallows interest in view of special circumstances.[96] Where the representative may be called upon at any moment to pay over money in his hands to those entitled thereto, mere failure on his part to invest the funds is not ground for charging him with interest,[97] and where he settles his account promptly, he should not be charged with interest on moneys coming to his hands in varying sums as securities are paid.[98] If an executor takes commissions before he is entitled thereto, he is liable for interest thereon until the time of his accounting.[99]

(§ 9) *D. Allowance for expenses, costs, counsel fees, and funeral expenses.*[1]—See 11 C. L. 1309—The representative is entitled to reasonable allowances for expenses properly or necessarily incurred in the course of his administration,[2] except such as are covered by his commissions.[3] Reasonable * attorney's fees should be allowed [5]

95. In the absence of special circumstances an administrator is chargeable with interest from beginning of year succeeding that in which he was appointed. Anderson v. Silcox, 82 S. C. 109, 63 SE 128. All funds received during current year are regarded as unproductive until end of the year (Id.), and interest is chargeable only on balance struck after deduction of proper expenditures made during the year (Id.). Sums improperly expended will be treated as still on hand. Id. Administrator held chargeable with interest on amount received by him, after two years from date of administration to dates of settlement, and held entitled to credit for sums paid out with like interest from date of payment. Nickell v. Nickell [Ky.] 118 SW 966.

96. Allowance of interest against administrator is within discretion of court. Epperson v. Jackson [S. C.] 65 SE 217. Court may refuse to charge interest from beginning of year succeeding that in which administrator was appointed, where his effort to account soon after administrative year failed because of inability of probate judge to attend to his duties. Id.

97. In re Sexton, 61 Misc. 569, 115 NYS 973. That he was chief owner of bank in which the money was kept held immaterial, neither bank nor executor having derived any revenue therefrom. Id.

98. Not required to make temporary investments. Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388.

99. Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388. See post, § 9F.

1. Search Note: See notes in 5 C. L. 1246, 1247; 33 L. R. A. 660; 6 L. R. A. (N. S.) 917.

See, also, Executors and Administrators, Cent. Dig. §§ 435-462, 2061-2068, 2257-2266; Dec. Dig. §§ 109-111, 475-487; 18 Cyc. 265, 273-283, 1136-1139; 11 A. & E. Enc. L. (2ed.) 1232.

2. Expenses of administration should be allowed as credit to administrator. Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847. An executrix may keep for current expenses $25 of estate of deceased husband on hand at his death. Succession of Arnemann, 123 La. 430, 49 S 10. Payments in adjustment of claims to an estate by those asserting title thereto cannot be treated as expenses of settlement. In re Wells' Estate [Iowa] 120 NW 713. Administratrix held entitled to reimbursement for funeral expenses and attorney's fees for procuring letters subject to approval of surrogate. In re McDonough's Estate, 132 App. Div. 614, 117 NYS 258. Her executrix held to occupy same position. Id. Immaterial whether administratrix procured the funds from intestate's bank account or from her own pocket. Id. Probate court may determine without jury what are reasonable burial and administration expenses. Hildebrand v. Kinney [Ind.] 87 NE 832. Representative who employs and pays for **services** in connection with estate is equitably entitled to reimbursement from estate under order of court, if services were proper and amount charged reasonable. United States Fidelity & Guar. Co. v. People, 44 Colo. 557, 98 P 828. "Costs and charges" for **collecting** and **defending claims** to be allowed under Mills' Ann. St. § 4805, as other expenses of administration means advances made by the representative from his own funds, or for which he has made himself individually liable. Id. **Broker's commissions** necessarily incurred in carrying out provisions of will relative to sale of realty held necessary expense of administration to be deducted in appraising estate for transfer tax. In re Rothschild's Estate, 63 Misc. 615, 118 NYS 654. Evidence insufficient to justify allowance of **traveling expenses.** Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388. Held entitled to credit for **taxes paid.** Pennebaker v. Williams [Ky.] 120 SW 321. Taxes paid by widow in husband's lifetime and for benefit of estate held properly allowable to her on final accounting as administratrix without proof that decedent requested such payments. In re Brown's Estate, 60 Misc. 35, 112 NYS 599.

3. See post, § 9F. Administrator not entitled to sum paid for his bond, this being covered by his regular commission, though not expressly. Pennebaker v. Williams [Ky.] 120 SW 321. Prior to Act March 20, 1905 (Laws 1905, p. 477), allowing executors for cost of official bond as administration expense, expense of procuring bond fell on him personally. In re Richmond's Estate, 9 Cal. App. 402, 99 P 554. Statute not retrospective. Id. Claim for expenses incurred by administrator in looking after collection of a claim held not allowable in absence of showing services were extraordinary, he re-

where an attorney was properly employed [6] and performed services for the benefit of the estate.[7] Credit should also be given for other expenses of necessary litigation.[8]

ceiving regular statutory commission. Pennebaker v. Williams [Ky.] 120 SW 321.

4. While administrator's attorney should have more liberal allowance for advising in settlement of large than of small estate, fee should in the main be regulated by character of services rendered. Harding's Adm'r v. Harding [Ky.] 116 SW 305. $5,000 held proper in view of protracted administration and continued and spirited litigation involving large amounts and incidentally involving attorney in family quarrel. Id. $400 held not excessive. Barbin v. Couvillon, 122 La. 407, 47 S 698. $50 per day for attending court and $25 for settling decree held not so excessive as to warrant disturbance of allowance thereof. Warren v. Sheehan, 156 Mich. 432, 16 Det. Leg. N. 157, 120 NW 810. $100 for attorney's fees allowed. In re Meuschke's Estate, 61 Misc. 9, 114 NYS 722. $3,750 held fair and reasonable for attorney serving in litigation involving disposition of a large sum collected on a claim against federal government. Pennebaker v. Williams [Ky.] 120 SW 321. In proper case administrator may agree to pay attorney a contingent fee. Where claim was against federal government and had been rejected by court of claims and supreme court, and especially where heirs had previously made same agreement. Id. Allowance of attorney's fees is largely in discretion of probate judge, he having right to consider value of estate, time necessary for administration, and services rendered by attorney. In re Richmond's Estate, 9 Cal. App. 413, 99 P 558. Allowance will not be disturbed on appeal in absence of abuse of discretion by probate court. Id.

5. Attorney's fees in proper cases are legitimate expenses of administration (In re Blackman's Estate [Iowa] 120 NW 664), and, where necessary for representative to employ attorney, court should allow reasonable compensation for attorney's services (Pennebaker v. Williams [Ky.] 120 SW 321; Brown v. Quinton [Kan.] 102 P 242; Harding's Adm'r v. Harding [Ky.] 116 SW 305). That attorneys for administratrix in action attacking validity of chattel mortgage were also representing interested creditors and agreed to release administratrix from personal liability for the services held no reason for disallowing fee to them against estate. In re Blackman's Estate [Iowa] 120 NW 664. Administrator should be allowed but one attorney's fee, confined to services rendered by the attorney. Hessig v. Hessig's Guardian [Ky.] 115 SW 748. Administrator held entitled to allowance for fee paid attorney in suit by persons interested in estate to determine right to proceeds of a claim previously collected by assistance of other attorneys. Pennebaker v. Williams [Ky.] 120 SW 321.

Counsel fees in will contests: Code Civ. Proc. § 1616, authorizing allowance for legal services to an executor comprehends services in performing any duty under the will, including prosecution of necessary and proper proceedings to establish will. In re Riviere's Estate, 8 Cal. App. 773, 98 P 46. Executor held not entitled to counsel fees incurred in unsuccessful attempt to prove a will. In re Hill's Estate [Cal.] 101 P 448. Mere fact that statute authorizes executor to resist opposition to probate of will does not entitle him to attorney's fees. Id. Executor's attorney held not entitled to fees out of estate for resisting contest of codicils where estate had no interest in contest and a certain legatee was only person benefited by sustaining of codicils. Id. Special administrator held not entitled to counsel fees for defending will, he having no authority in the contest. Zimmer v. Saier, 155 Mich. 388, 15 Det. Leg. N. 1077, 119 NW 433. Where heirs had stipulated for allowance of expenses of executor in attempting to probate will, reasonableness of fees charged by attorneys was for court. In re McNamara's Estate, 154 Mich. 671, 15 Det. Leg. N. 924, 118 NW 598.

6. An executor's right to employ counsel depends upon the right to litigate. In re Riviere's Estate, 8 Cal. App. 773, 98 P 46. Where heirs entitled to nearly all of the estate had employed an attorney to collect a claim against federal government for contingent fee of half, administrator subsequently appointed held not guilty of fraud or improper conduct in employing same attorney on same terms, though attorney was brother of administrator and latter did not give bond immediately on his appointment. Pennebaker v. Williams [Ky.] 120 SW 321. Part owners of claim who permitted decedent in his lifetime to prosecute it as his own held not in position to complain of agreement made by administrator. Id. No attorney's fees should be allowed an administrator who is himself an attorney. Whittemore v. Coleman, 144 Ill. App. 109.

7. Evidence held not to show necessity for employment of counsel or any real services performed, so as to justify allowance. Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388. Attorney voluntarily giving advice to prospective administrator in his individual capacity, which advice merely put administrator on inquiry as to existence of assets, held not entitled to compensation under Code Pub. Gen. Laws, art. 93, § 5, providing for allowance to administrator "for costs and extra expenses (not personal) laid out in recovery of any part of estate," attorney having refused to give any information as to nature or whereabouts of the property. Flater v. Weaver, 108 Md. 668, 71 A 309.

8. Litigation may be considered as necessary when prosecuted not only in good faith but in exercise of reasonable judgment. In re Hoffman, 62 Misc. 600, 115 NYS 984. Administrator not entitled to costs of litigation after third trial in which he was defeated. Id. On issue as to allowance of expenses of administrator in resisting proceedings for his removal, question is whether his conduct reasonably justified such proceedings. Scott v. Smith, 171 Ind. 453, 85 NE 774. Executors of deceased partner held not entitled to allowance for paying part of costs in action brought by surviving partners where judgment therein made costs payable out of partnership assets. In re Harris, 61 Misc. 563, 116 NYS 270.

Will contests: Executor, though proper

A representative who is himself an attorney cannot recover for professional services rendered the estate,[9] except where payment thereof will not diminish the estate.[10] Where an executor is required by statute to deliver over trust funds claimed by different parties, he should be allowed out of such funds attorney's fees and expenses necessarily incurred.[11] Credit cannot be allowed the representative for moneys expended for his personal advantage.[12] In the absence of a contrary testamentary implication, amounts deducted by other states before permitting the transfer of property within their limits for distribution in the state of a testator's domicile must be treated as expenses of administration.[13] Under some statutes expenses of administration may be allowed by the court directly to the claimant.[14]

Funeral expenses, See 11 C. L. 1309 if reasonable,[15] are properly allowed [16] on due proof that the same were paid.[17]

(§ 9) *E. Rights and liabilities of corepresentatives.*[18]—See 9 C. L. 1198—An administrator who actively participates in the sale of property in which he is interested as heir cannot recover damages from his coadministrator for inadequacy of price.[19]

(§ 9) *F. Compensation.*[20]—See 11 C. L. 1310—The compensation of testamentary trustees is treated elsewhere.[21]

Wills often provide for compensation to the executor.[22] In the absence of controlling testamentary directions, the court is usually required to allow to the repre-

party to will contest, must defend will at his own expense where contest occurs before issuance of letters. Pleasants v. McKenney, 109 Md. 277, 71 A 955. Stipulation by certain heirs for allowance out of estate of executor's expenses incurred in proceedings to probate will held binding on heirs signing, though not on others. In re McNamara's Estate, 154 Mich. 671, 15 Det. Leg. N. 924, 118 NW 598. Heirs signing could not question whether expenses had been incurred in good faith. Id. Expense incident to executor's attempt to have will probated and executed should be borne by estate. Succession of Filhiol, 123 La. 497, 49 S 138. Person named as executor held entitled to recover from estate necessary and reasonable expenses incurred by him in good faith in unsuccessful attempt to prove will where probate was denied on ground of insanity. Dodd v. Anderson, 131 App. Div. 224, 115 NYS 688.

9. Ordinary v. Connolly [N. J. Eq.] 72 A 363. Administrator, himself lawyer, and having had services of none other, held not entitled to counsel fees. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228. Held discretionary with court to allow administrator reasonable compensation for necessary and proper legal services. In re Wilson's Estate, 83 Neb. 252, 119 NW 522.

10. As where recovered on bond of former administrator. Ordinary v. Connolly [N. J. Eq.] 72 A 363. See post, § 9G.

11. Code Civ. Proc. § 2606. In re Ingraham, 60 Misc. 44, 112 NYS 763.

12. Executrix not entitled to attorney's fees, incurred in securing and defending her widow's allowance. In re Fletcher's Estate, 83 Neb. 156, 119 NW 232. Expenses incurred by administratrix in litigation for her own benefit as decedent's widow held not allowable. In re Ordway, 131 App. Div. 339, 115 NYS 817.

13. Should not be charged against pecuniary legacies. Kingsbury v. Bazeley [N. H.] 70 A 916.

14. County court held empowered to allow claim for legal services directly to claimant, and order administrator to pay same. Mills' Ann. St. §§ 4780, 4791, 4795, 4807, 4808. United States Fidelity & Guar. Co. v. People, 44 Colo. 557, 98 P 828. Administrator bound to pay though special order was not made. Id.

15. $381.50 for funeral expenses held allowable, though perhaps more than was necessary. In re Meuschke's Estate, 61 Misc. 9, 114 NYS 722. $50 for headstone allowed. Id.

16. In re McDonough's Estate, 132 App. Div. 614, 117 NYS 258. Administrator held entitled to lien, for funeral expenses, on land recovered by heirs as having been bought by representative at his own sale. Baker v. Lane [Ky.] 118 SW 963.

17. $120 for widow's mourning clothes should be disallowed, no vouchers showing payment thereof having been filed. In re Meuschke's Estate, 61 Misc. 9, 114 NYS 722.

18. Search Note: See notes in 11 L. R. A. (N. S.) 296, 343.

See, also, Executors and Administrators, Cent. Dig. §§ 496-530; Dec. Dig. §§ 123-127; 18 Cyc. 1330-1348; 17 A. & E. Enc. L. (2ed.) 620.

19. Moore v. Woodson [Tex. Civ. App.] 116 SW 608. His rights held not enlarged because other heirs had obtained judgment against administrators fixing their liability for the wrongful sale. Id.

20. Search Note: See Executors and Administrators, Cent. Dig. §§ 2069-2148; Dec. Dig. §§ 488-501; 18 Cyc. 1141-1167; 11 A. & E. Enc. L. (2ed.) 1277; 17 Id. 633.

21. See Trusts, § 13.

22. Will and codicil construed and held to give to executors residue, however large, as compensation. Fernald v. Gooch, 202 Mass. 408, 88 NE 763. Where will gave each executor $6,000 "in lieu of all commissions," and one executor died four months after qualification and pending administration, his estate was entitled to the $6,000 in full. In re Sweatman's Estate [Pa.] 72 A 895.

sentative a certain compensation for his services [23] based usually on the amount of money received and disbursed,[24] or the value of the estate,[25] and varying in amount with the different statutes and circumstances.[26] An executor is not entitled to commissions as executor on the principal or income of funds held by his decedent as testamentary trustee.[27] A representative cannot require unnecessary things to be done merely for the purpose of obtaining commissions.[28]

Extra compensation is often allowed for extraordinary services.[29] Double commissions are allowable where an executor is charged with duties as trustee distinct from his executorship [30] but he cannot have commissions in one capacity for doings in the other.[31] Whether an executor who is also legatee is entitled to commissions in addition to the legacy may depend upon the terms of the will.[32] Whether

23. Under statute considered, held duty of orphans' court to fix commissions not only when executor fails to claim them but "in all cases," except where compensation is allowed by will. Code Pub. Gen. Laws 1904, art. 93, § 5, and art. 81, §§ 112, 113. In re Watts' Estate, 108 Md. 696, 71 A 316.

24. Under Code Civ. Proc. § 2730. Executrix held not entitled to commissions on mortgage taken by her on conveyance of realty under judgment for specific performance of testator's contract, she never having received nor paid out any of the money secured and mortgage not having been treated as cash. In re Dill, 60 Misc. 294, 113 NYS 384. Under Ky. St. 1903, § 3883, allowing commissions on all amounts "received and distributed," executor held not entitled to commissions on so much of purchase price of land sold to distributees as was paid by their interest in estate. Anderson's Ex'r v. Prewitt [Ky.] 114 SW 275. Temporary administrator held not entitled to commissions for receiving moneys and securities which had been received by predecessor and as to which latter's estate had been allowed commissions. In re Haskin's Estate, 112 NYS 1008. Entitled to only one-half commissions for paying out or turning over such property. Id.

25. Commissions of executor of a husband's succession are based on entire property of succession, and not on husband's interest alone. Succession of Bertrand, 123 La. 784, 49 S 524. Under Civ. Code, art. 1683, allowing an executor commission on whole amount of inventory if executor had seisin, evidence held to show seisin and administration. Barbin v. Couvillon, 122 La. 407, 47 S 698.

26. Under Ky. St. 1909, § 3883, authorizing allowance to administrator in addition to five per cent on amounts received and disbursed, on proof and notice, evidence in regard to large and unsettled estate held to authorize allowance of $1,000 for services subsequent to former allowance of five per cent. Harding's Adm'r v. Harding [Ky.] 116 SW 305. Where funds of estate did not exceed $500 and debts not much over half that sum, $300 to administrator and $210 for attorney's fees, held excessive and should be reduced to $100 and $50 respectively in absence of showing of extraordinary services or unusual expenses. Nickell v. Nickell [Ky.] 118 SW 966. Under statute allowing administrator five per cent on amounts received and disbursed, administrator held entitled to five per cent on gross amount received for estate on claim against federal government, including interest received thereon pending subsequent litigation. Pennebaker v. Williams [Ky.] 120 SW 321. Court being vested with discretion, will consider nature and extent of labor. In re Watts' Estate, 108 Md. 696, 71 A 316. Discretionary allowance of two per cent on whole estate held not improper, being within statutory limits. Id.

27. In re Ingraham, 60 Misc. 44, 112 NYS 763. Trust fund held not "received" within § 2730, Code Civ. Proc., relative to commissions on moneys received (Id.), nor "paid out" within said section when delivered by executor to new trustee (Id.).

28. Cannot require distributees to pay him money which he would be required immediately to distribute back to them. Anderson's Ex'r v. Prewitt [Ky.] 114 SW 275. Not entitled to commissions on what distributees paid for land where same was covered by their interest in the estate. Id.

29. Amount of extra compensation is for trial court, except where discretion is abused. In re Fischer's Estate [Mich.] 16 Det. Leg. N. 551, 122 NW 257. Not error to refuse jury trial, on appeal, of sole issue as to administrator's right to extra compensation, allowance being discretionary with probate judge under statute. Id. As bearing on administrator's right to extra compensation, it is proper for court in passing on his account to possess itself of all information obtainable as to manner of his administration. Id. Held within discretion of court to allow administrator for collecting rents, paying taxes, etc., if services were extraordinary. In re Wilson's Estate, 83 Neb. 252, 119 NW 522. Compensation for extraordinary trouble in managing estate authorized by Civ. Code 1902, § 2561, can in no case exceed amount allowed as regular commissions by § 2560. Anderson v. Silcox, 82 S. C. 109, 63 SE 128. In action for extra services authorized under § 2561, where parties waived trial by jury, court could pass on question of extra compensation. Id.

30. When apart from his executorial office there is express or implied devise to him of subject-matter of trust. In re Waterman, 60 Misc. 292, 113 NYS 280.

31. Not entitled to executor's commissions from sale of realty devised to him as trustee and never reaching him as executor. In re Waterman, 60 Misc. 292, 113 NYS 280.

32. Where testator names same person as universal legatee and sole executrix, intention is clear that such person shall have the

each of several executors shall receive full commissions must be determined by the value of the estate which they shall have administered.[33] Successive administrators have not necessarily equal rights to compensation.[34]

The right to compensation may be forfeited by neglect or disregard of duty.[35] Though the statute may require the court to fix the compensation of an executor in all cases, the executor need not accept the commissions allowed, but may waive them.[36] Special services for the heirs should be paid for by them and not out of the estate.[37] After full commissions for the services of coadministrators have been fully allowed and paid to one of them after the death of the other the latter's estate must look to the survivor individually for the share of the commissions earned by the deceased representative and cannot enforce the same against the estate of the first decedent.[38] An executor is not entitled to commissions until settlement and allowance thereof.[39] The hearing of testimony as to the value of the services is not ordinarily required.[40] Allowances for extra services, whether made before or at the time of filing of an account in which they appear, are subject to review when the account is settled on exceptions made by interested persons who did not have previous notice.[41]

(§ 9) *G. Rights and liabilities of sureties and actions on bonds.*[42]—See 11 C. L. 1311.—Administrator's bonds are designed to secure creditor's and next of kin against default of fraud of the representative and amount to indemnity to the estate.[43] The liability of the representative necessarily carries with it liability on the part of the sureties,[44] and the latter are entitled to no favors or immunities not accordable

estate including any amount which might otherwise be required for executor's commissions, and fact that intention is defeated as to legacy is not ground for withholding commissions. Succession of Filhiol, 123 La. 497, 49 S 138.

33. Where estate at decedent's death was less than $100,000 but before three executors had received their letters had it increased to more than that sum, each executor was entitled to full commissions. In re Van Pelt, 63 Misc. 616, 118 NYS 655.

34. Estate is administered as an entirety and claim of each must be considered in view of rights of others. In re Leavitt, 8 Cal. App. 756, 97 P 916.

35. Where administrator's conduct in connection with estate showed flagrant disregard of duty in procuring allowance of claims, etc., he was not entitled to compensation. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228, afg. 144 Ill. App. 109. Under Civ. Code, § 2555, administrator failing to make annual accounts forfeits his commissions for managing estate, but he will be allowed commissions for money paid over under decree in suit against him for accounting. Epperson v. Jackson [S. C.] 65 SE 217. Error to disallow commissions on ground of incapacity and failure to perform duties of an administratrix, evidence showing that she had acted by attorney, signed checks, had nominal charge of securities, etc., though she was old and feeble and had no clear appreciation of her duties. In re Ordway, 131 App. Div. 339, 115 NYS 817.

36. Except as to statutory tax thereon. In re Watts' Estate, 108 Md. 696, 71 A 316.

37. Administrator of deceased member of fraternal order preserving for heirs death benefit should be compensated by heirs, and not by estate. Supreme Commandery, U. O. G. C. v. Donaghey [N. H.] 72 A 419. Question whether administrator had done anything to preserve fund and what he should be paid therefor held not for supreme court. Id.

38. Representative of deceased administrator could not prevent discharge of survivor for failure to pay over commissions. Groover v. Ash [Ga.] 64 SE 323.

39. Liable for interest if he takes them before that time. Wyckoff v. O'Neil, 71 N. J. Eq. 729, 71 A 388. Commissions based on amount of estate accounted for held not allowable until settlement of final account. In re Hite's Estate [Cal.] 101 P 448. Commission of five per cent on $2,000,000 estate held not allowable before conversion and accounting as directed by order of court awarding back whole estate to executors for further accounting. In re Sinnott's Estate [Pa.] 73 A 348.

40. Inventories, reports, nature and extent of services, etc., ordinarily sufficient. in re Watts' Estate, 108 Md. 696, 71 A 316.

41. McMahon v. Ambach & Co., 79 Ohio St. 103, 86 NE 512.

42. **Search Note:** See notes in 5 C. L. 1250; 52 L. R. A. 187.

See, also, Executors and Administrators, Cent. Dig. §§ 2355-2581; Dec. Dig. §§ 527-537; 18 Cyc. 1248-1309; 11 A. & E. Enc. L. (2ed.) 879.

43. Ordinary v. Connolly [N. J. Eq.] 72 A 363.

44. Wiseman v. Swain [Tex. Civ. App.] 114 SW 145. Administrator converting property of another in belief it belonged to estate is liable as representative, and his sureties are also liable. Id. Sureties on bond given by executor, under Rev. Laws 1902, c. 149, § 2, to pay debts and legacies, are bound equally

to the representative, as to losses sustained by the latter's default or fraud.[45] The obligation of the sureties is usually to protect the property of the estate in favor of creditors and heirs,[46] regardless of who the creditors may be or in what form their claims may arise,[47] provided the claims are asserted before administration in due course is closed.[48] As a general rule the bond does not cover defaults with reference to property not a part of decedent's estate,[49] but it has also been held that the sureties are responsible for whatever property the administrator receives in his official capacity,[50] though it subsequently develops that such property did not belong to the estate. A surety is not liable for failure of the representative to perform contracts enforcible against the latter only as an individual,[51] although such contracts may be for the benefit of the estate[52] and a judgment against the administrator in terms to be satisfied out of the estate, but based on a contract on which the representative alone is liable,[53] will not estop his surety in an equity suit to charge him with the payment of the judgment.[54] The giving of a new executor's bond does not ordinarily of itself release the old bond,[55] but where the old bond is authoritatively ordered released, liability is primarily on the new bond.[56] Liability may be based on premature distribution of assets,[57] or on refusal to distribute as directed by the court,[58] or on misappropriation of funds,[59] failure to pay debts,[60] or to allow or disallow claims.[61]

with principal on bond. Lothrop v. Parke, 202 Mass. 104, 88 NE 666.

45. Must bear any injurious consequences arising. Ordinary v. Connolly [N. J. Eq.] 72 A 363.

46. Surety of community survivor. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

47. Sureties liable on implied stock subscription of decedent based on his having fraudulently obtained stock. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

48. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

49. Property held by decedent as mere trustee or life beneficiary held no part of his estate. Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382. Sureties are not liable for funds coming into administrator's hands which are not assets of estate, though charged to representative in his report. Id.

50. Wiseman v. Swain [Tex. Civ. App.] 114 SW 145. Sureties held liable to creditor of decedent for conversion of stock by representative regardless of whether stock in fact belonged to estate. Id. Fact that stock had been originally issued to a fictitious person from whom decedent had procured a purported transfer held not to relieve surety. Id.

51. Not liable on contract employing attorneys. Thompson v. Mann, 65 W. Va. 648, 64 SE 920. See ante, § 4B.

52. Thompson v. Mann, 65 W. Va. 648, 64 SE 920.

53. See ante, § 4B.

54. Thompson v. Mann, 65 W. Va. 648, 64 SE 920.

55. Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116.

56. Where a new bond is executed by reason of death of surety on old leaving heirs who are beneficiaries of first estate, and old bond is ordered released and sureties discharged, surety on new bond assumes primary liability, and as to it old bond must be deemed without force. Bankers' Surety Co. v. Wyman [Iowa] 120 NW 116. Immaterial that surety's heirs did not personally appear and make application for new bond. Id. Surety on new bond held bound by record discharging old bond (Id.), and filing of new bond constituted consent to order of discharge of old (Id.). Order of court requiring executor to file new bond because of surety's death and providing that on filing thereof old bond should be released and discharged, held a "proper order" within Code, § 3268, providing that where clerk finds bond insufficient it shall place matter on calendar for the proper order, no objection being made thereto at the time and same having been complied with. Id.

57. Statute does not permit, as due course of administration, final distribution of property in hands of community survivor until one year after filing of bond, and survivor must wait until expiration of such period or he and his sureties will be liable to any injured creditor, though survivor had reason to believe estate clear of debt. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

58. Refusal of administratrix to distribute share of proceeds of realty to distributee as directed by order of court, because distributee had mortgaged his interest and foreclosure had followed, held breach of bond given by administratrix on account of sale. State v. Donahue [Conn.] 73 A 763. Held not breach of general administration bond. Id.

59. Where decedent fraudulently procured stock of a corporation for forged securities and widow as survivor sold stock and misappropriated proceeds by closing estate and making distribution before time allowed by law, survivor and her sureties thereby became liable to corporation as creditor. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149. Corporation not estopped though by diligence it might have ascertained facts in decedent's lifetime. Id.

60. "Debts" in Rev. Laws 1902, c. 149, § 2,

Such proceedings as the statute authorizes[62] must be brought in the proper court[63] within the time prescribed.[64] An action prematurely brought may be discontinued.[65] An order upon the personal representative of a deceased administrator for the payment of a judgment against the representative for money unaccounted for by decedent at the time of his death is not a condition precedent to recovery against the sureties on the bond of the administrator.[66] Where judgment creditors are allowed to sue,[67] they must comply with the conditions imposed.[68] Where the alleged breach consists in failure to pay a judgment, the judgment must be properly pleaded.[69] Sureties are not required to be more specific in their pleadings than the circumstances reasonably permit.[70] In an action on a bond conditioned to pay debts, a judgment previously recovered against the principal defendant as representative conclusively establishes the validity of the claim against the estate.[71] A previous decree of unfaithful administration cannot be collaterally at-

authorizing representative who is residuary legatee to give bond conditioned on payment of all debts and legacies, includes all enforcible claims, including judgment against executor for fraud of testator. Lothrop v. Parke, 202 Mass. 104, 88 NE 666.

61. In action on executor's bond, statutory time for disallowance of claims on newly-discovered evidence, before payment when there is no decree of unfaithful administration, held immaterial, such decree having been entered. Cumberland Probate Ct. v. Fitz-Simon [R. I.] 71 A 641.

62. Successor of a representative who has resigned, died, or who has been removed, has alternative remedies against predecessor and his sureties for defaults of predecessor with respect to accounting for money or other assets (State v. Zorn [Mo. App.] 119 SW 517), one in probate court under Rev. St. § 48 (Ann. St. 1906, p. 352), authorizing successor to move court to compel settlement and enforce judgment against predecessor and sureties (Id.), and the other, under § 54, authorizing suit by successor against former representative and sureties, in any court having jurisdiction of civil actions (Id.). Administrator de bonis non cannot sue estate of predecessor except on bond as authorized by statute. Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382. Act June 14, 1836 (P. L. p. 638), prescribing procedure in action on administrator's bond, and giving all interested persons right to join, is exclusive remedy. Commonwealth v. Magee [Pa.] 73 A 346. Statutory jurisdiction of county court to cite community survivors at instance of creditors is not exclusive and creditor may sue survivor and his sureties in any court having jurisdiction of subject-matter. Wiseman v. Swain [Tex. Civ. App.] 114 SW 145; Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

63. Court in Mississippi can entertain suit on executor's bond by decedent's creditors for concealing assets, though executrix resides in Alabama, administration having been undertaken in Mississippi where executrix resided at decedent's death, where assets had their situs, and where surety resides. Myers v. Martinez [Miss.] 48 S 291.

64. Action by administrator d. b. n. on original administrator's bond and against sureties, authorized by Rev. St. 1899, § 54 (Ann. St. 1906, p. 354), is barred in seven years from revocation of letters, under express provisions of § 55. State v. Zorn [Mo. App.] 119 SW 517. Seven-year limitation held not applicable only to proceedings in probate court, under § 48, to compel accounting. Id. Action not governed by § 276, authorizing actions for waste, etc., nor by § 4272, prescribing ten years for actions on written instruments. Id.

65. Though, ordinarily, use plaintiff, in action on administrator's bond, may not discontinue it, as only one action is permitted, for all parties interested, yet action brought before default is premature, and party suing should be permitted to discontinue and commence de novo. Commonwealth v. Magee [Pa.] 73 A 346.

66. Where judgment was duly allowed and presented as claim against adminstrator's estate but no probate order was made for its payment. Toffler v. Kessinger [Kan.] 102 P 1097.

67. Claim evidenced by final decree in equity is a debt established by "judgment," within Court and Practice Act, § 1027, giving judgment creditors right of action on administration bonds. Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382.

68. Creditor whose debt has been established cannot sue on administration bond without complying with § 104, Code Pub. Gen. Laws 1904, providing that no creditor shall sue on bond for any "debt or damages" due from decedent before a non est on a summons is returned against administrator or fieri facias returned nulla bona, or insolvency of estate of administrator otherwise appears, though § 100 requires administrator to pay each claimant his just proportion of money in his hands. State v. Moore, 108 Md. 636, 71 A 461.

69. Complaint held to sufficiently plead judgment, for failure to pay which action was brought on administrator's bond. United States Fidelity & Guar. Co. v. People, 44 Colo. 557, 98 P 828.

70. Under this rule, affidavit of defense that surety was informed and believed and expected to be able to prove payment by administrator but could not give time, place, etc., because transaction was secret, held sufficient. Commonwealth v. Magee [Pa.] 73 A 347.

71. Claim founded on fraud on part of testator. Lothrop v. Parke, 202 Mass. 104, 88 NE 666.

tacked.[72] The amount recoverable on a bond is an equitable equivalent for the condition broken.[73] It may reach the full penalty of the bond,[74] and in addition to the assets lost should include resulting costs and expenses.[75] An administrator's surety who is not made party to proceedings by the administrator for an accounting may apply to the probate court for an order opening and amending its decree adjudging the estate of decedent insolvent and determining the percentage payable to creditors,[76] and, when a creditor previously paid is cited to appear and show cause, a subsequent decree reducing the percentage first determined is binding on him though he fails to appear.[77]

§ 10. *Actions by and against representatives and costs therein.*[78]—See 11 C. L. 1312—Matters pertaining to the abatement and revival of actions,[79] or peculiar to actions for death by wrongful act,[80] are elsewhere discussed.

Actions by or against decedent which did not abate by his death,[81] or relate to realty in which the representative has no interest as such,[82] are properly continued or defended by his legal representative,[83] and, until heirs have accepted a succession and taken charge of it, they cannot represent it.[84] The administrator is also the proper person to represent the estate in all other personal actions in which it is involved,[85] especially in respect to claims against the estate,[86] though in special cases beneficiaries or heirs may intervene.[87] However, at common law, on the

72. Executor and sureties could not show disallowance of claim on newly-discovered evidence. Cumberland Probate Ct. v. Fitz-Simon [R. I.] 71 A 641.

73. Ordinary v. Connolly [N. J. Eq.] 72 A 363. Liability of a surety to creditors for premature distribution of assets by representative held not to exceed amount of such assets. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149. Where assets were insufficient to pay all claims, proration was necessary, and surety was liable only to amount of claims as prorated. Id.

74. Ordinary is appointed by statute to make good damages resulting from breach of condition of administrator's bond, and he must have whole penalty, if necessary for that purpose. Ordinary v. Connolly [N. J. Eq.] 72 A 363.

75. Administrator and attorney prosecuting suit at law on bond of former administrator is entitled to counsel fees as well as taxed costs to be included as damages in judgment against derelict administrator and sureties. Ordinary v. Connolly [N. J. Eq.] 72 A 363. Costs and counsel fees for removal of derelict administrator properly included. Id.

76, 77. Woodruff v. H. B. Claflin Co., 118 NYS 48.

78. **Search Note:** See notes in 68 L. R. A. 418; 4 L. R. A. (N. S.) 657; 13 Id. 1200; 3 A. S. R. 740; 1 Ann. Cas. 805; 5 Id. 912.

See, also, Executors and Administrators, Cent. Dig. §§ 1660-1970; Dec. Dig. §§ 420-457; 18 Cyc. 874-1102; 8 A. & E. Enc. L. (2ed.) 1091; 11 Id. 944; 19 Id. 1288; 8 A. & E. Enc. P. & P. 650.

79. See Abatement and Revival.

80. See Death by Wrongful Act.

81. See Abatement and Revival.

82. See, also, ante, § 5A. Decedent's will held to create such trust interest in executors in decedent's realty as to authorize their substitution as plaintiffs in action for partition commenced by decedent in his lifetime. Hamilton v. Hamilton, 63 Misc. 533, 118 NYS 588.

83. Legal representatives held to have same right to maintain suit commenced by decedent to enjoin execution of a paving contract as deceased had. Gurley v. New Orleans [La.] 50 S 411. Representative could continue action for trespass to realty. Union Sav. Bank & Trust Co. v. Western Union Tel. Co., 79 Ohio St. 89, 86 NE 478. To authorize issuance of execution in favor of an administrator on a judgment recovered by decedent, clerk must require administrator to file affidavit showing right to execution, a properly certified copy of his appointment by competent tribunal. Civ. Code Prac. § 404. Lee's Adm'rs v. Thompson [Ky.] 116 SW 775. Venditioni exponas issued after death of defendant in execution without notice to personal representative required by Act Feb. 24, 1834 (P. L. p. 70), § 33, held not invalid, it appearing defendant had conveyed her land before her death, and grantee had come into court and opposed issue of the process. Randal v. Gould [Pa.] 73 A 986.

84. Testamentary executor held proper person to represent succession in suit, to enjoin city from entering into paving contract. Gurley v. New Orleans [La.] 50 S 411.

85. Hall v. Rutherford [Ark.] 117 SW 548. Where judgments were recovered by one as administrator, and executions were sued out in his name, he could maintain creditors' bill as administrator regardless of question of whom he should account to in view of fact he had been discharged as administrator. Walker v. Montgomery, 236 Ill. 244, 86 NE 240. The right of action on a contract with the deceased is in the administrator. Marlitt Deutscher Frauen Verein v. Mueller, 140 Ill. App. 621.

86. Hall v. Rutherford [Ark.] 117 SW 548. See ante, § 6B, subd. Contests and Actions on Claims. See, also, ante, § 5B, Collection and Reduction to Possession.

87. Where suit to determine decedent's interest in a partnership had been long pending and final accounting could not be had until termination thereof, held proper to per-

death of co-obligees or judgment creditors, the obligation or judgment must be enforced in the name of the survivor, and the representative of the deceased obligee cannot sue.[88] An action will not lie against an administrator as such where the claim is enforcible against him only as an individual.[89] An executor may in a proper case maintain an action for conversion[90] or he may like any other plaintiff waive the tort and sue on implied contract.[91]

The general rule is that a representative cannot sue or be sued by virtue of foreign letters,[92] but where it is necessary to prevent a failure of justice equity will take jurisdiction of a suit against a foreign administrator, at least so far as the relief relates to property within the jurisdiction of the court,[93] and where an administrator in his representative capacity has recovered a judgment in the jurisdiction of his appointment, he may sue thereon in his own name in another jurisdiction without taking out ancillary letters.[94] Where one has duly qualified as representative and acts as such under letters of the probate court, his capacity to sue for assets cannot be assailed collaterally,[95] and an order of a court of a sister state substituting the public administrator as representative will be given proper effect.[96]

Actions must be instituted within the time allowed by law.[97] Proceedings for or against the estate should be entitled in the name of the representative.[98] In an action against the representative as such, the complaint must show a liability of the estate[99] and that the action is against defendant in his representative capacity.[1]

mit **appellant** to intervene as defendant to protect his interests, though theoretically executors represented her. Schlesinger v. Bear, 128 App. Div. 494, 112 NYS 826.

88. Executor could not maintain notice or scire facias to revive judgment in favor of two persons one of whom had died. Crim v. Rhinehart, 64 W. Va. 441, 63 SE 212. Representative of deceased coholder of a judgment should not be joined in action thereon, surviving judgment creditors being the only proper parties plaintiff. Semon v. Daggett, 62 Misc. 55, 114 NYS 763.

89. Claim for attorney's services. Brown v. Quinton [Kan.] 102 P 242. Petition held to state cause of action against defendant individually though it referred to him as administrator in caption and body, reference being regarded merely as descriptive of person. Id. Bill in equity for infringement of patent in construction of a mausoleum held not maintainable against executors as such, same having been contracted and paid for by them and others individually, and estate not owing it. Tayhtor Granite Co. v. Goetchius, 171 F 108.

90, 91. Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328.

92. Foreign administrator held not entitled to sue for wrongful death. Hall v. Southern R. Co., 149 N. C. 108, 62 SE 899; J. B. & J. M. Cornell Co. v. Ward [C. C. A.] 168 F 51.

93. Bergmann v. Lord, 194 N. Y. 70, 86 NE 828. Where funds in which a nonresident debtor had an interest as remainderman were within jurisdiction of court, and foreign executrix also, held proper for equity court to entertain suit against executrix to subject remainder interest to payment of the debt at instance of resident judgment creditor who had exhausted legal remedies. Id.

94. McCarthy v. Troll [Ark.] 118 SW 416.

95. Connor v. Paul [Mo. App.] 119 SW 1006. Failure to give bond is not such an irregularity as will justify collateral attack (Id.), nor is failure to subscribe to an oath of office (Id.).

96. Order of court of one state substituting the person who was then public administrator as plaintiff in action commenced by his predecessor is conclusive on courts of another state in action by substituted representative on judgment recovered in sister state that such order was made on a proper showing. McCarthy v. Troll [Ark.] 118 SW 416.

97. Where a coplaintiff sued as administrator though he was not such in fact, and error was not discovered until after limitations had run against action, Code Civ. Proc. § 402, authorizing suit by representative within a year after death of one entitled to sue, where death occurs before claim is barred by limitations, was inapplicable. Semon v. Daggett, 62 Misc. 55, 114 NYS 763. Where foreign administrator sues as such though not authorized to do so, and complaint is amended after his qualification as domestic administrator so as to make him plaintiff in latter capacity, action will be held to have been commenced at time of amendment, on the question of limitations. Hall v. Southern R. Co., 149 N. C. 108, 62 SE 899. Action for death by wrongful death held barred where amendment was not made until after a year from death. Id.

98. Where in condemnation a decedent's estate was entitled to damages, proceedings for recovery of same should be in name of executors, and not in name of estate. Mengell's Ex'rs. v. Mohnsville Water Co. [Pa.] 73 A 201.

99. Declaration merely alleging indebtedness contracted by defendant and his promise to pay, and not alleging any act by intestate, held not to state any action against estate but only against defendant personally, though words "administrator of estate of G, deceased" followed defendant's name, and even if these words could be construed as

Where an action is brought against the representative to enforce a contract which matured only on decedent's death, it is unnecessary to allege a breach.[2] An objection that plaintiff is not administrator may be taken by special plea in bar or by plea in abatement.[3] Upon it appearing that one suing as administrator is not in fact such, the action will be dismissed on motion,[4] but the representative capacity of an administrator can only be questioned by special plea.[5] An action by one as administrator is distinct from one as an individual,[6] and one who fails to maintain an action in which he sues as representative cannot, in the same proceeding, recover on the theory that he has a similar cause of action individually.[7]

A judgment which does not seek the assets is not against the estate,[8] and where a personal representative, made codefendant in foreclosure, has no unadministered assets in his hands, no decree need be entered against him.[9] The right to issue execution on a judgment against a representative [10] or to resort to supplementary proceedings [11] will depend on the local practice.

*Costs and counsel fees.*See 11 C. L. 1314—Costs are governed largely by the ordinary rules.[12] Execution for costs in litigation in which an executor is unsuccessful properly issues against him, the amount paid being allowed in his administration account.[13] The representative will be held individually liable for costs in an action in which he is defeated, though he sues as representative, where the action might have been brought by him individually.[14]

§ 11. *Accounting and settlement by representatives. A. Right and duty.*[15]—

meaning executor, which defendant in fact was. Gilbane v. Hawkins [R. I.] 72 A 723. Since judgment recovered was personal on which execution could not issue against estate but only against defendant's personal goods (Id.), beneficiaries, under will of which defendant was executor, had no such interest as to entitle them to except to judgment or petition for new trial (Id.).

1. Mere averment that defendant was "sole executrix of J. B. deceased," no mention being made of will or probate, held insufficient. Brinkerhoff v. Tiernan, 61 Misc. 586, 114 NYS 698. Defendant as administratrix held party to suit against her and others to cancel alleged fraudulent mortgage, though prayer for process did not state her representative character, petition alleging suit was against her as administratrix, and she having expressly waived process, copy process, and service thereof. Emmett & Co. v. Dekle [Ga.] 64 SE 682.

2. Where recovery sought is limited to what is expressly stipulated in contract. Bunting v. Hutchinson, 5 Ga. App. 194, 63 SE 49.

3. Cunningham v. Rodgers [C. C. A.] 171 F 835.

4. Where letters had been cancelled. Wells v. Bushe, 118 NYS 486.

5. Balsewicz v. Chicago, B. & Q. R. Co., 144 Ill. App. 219.

6. Johnson v. Phoenix Bridge Co., 133 App. Div. 807, 118 NYS 88.

7. Error to allow widow suing as administratrix for husband's wrongful death to amend by making herself plaintiff individually and as guardian for children. Johnson v. Phoenix Bridge Co., 133 App. Div. 807, 118 NYS 88.

8. Judgment against one styled as executrix, without recovery to be had from goods and chattels in her hands for administration, is not against estate but against the person so styled individually. Hall v. McGregor, 65 W. Va. 74, 64 SE 736.

9. Where, in bill against living mortgagor and personal representative of deceased comortgagor to foreclose mortgage, it did not appear there was unadministered personalty in representative's hands, no decree need be pronounced against him. Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

10. Execution cannot issue on judgment against representative as such without surrogate's permission. Code Civ. Proc. §§ 1825, 1826. Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46. That claim was for legal services rendered in administration of estate held immaterial. Id.

11. Proceedings supplementary to execution under Code Civ. Proc. §§ 2432-2471, cannot be employed in aid of judgment against administrator in her representative capacity. Sartorelli v. Ezagni, 64 Misc. 115, 118 NYS 46.

12. See Costs, §§ 4, 7. Remaindermen of personalty held properly charged with costs in unsuccessful suit against widow and her coexecutor, for bond or removal on ground of misconduct. In re Knowles' Estate, 148 N. C. 461, 62 SE 549.

13. Comp. Laws, § 9440, did not take from courts statutory discretion as to costs (More v. Luther, 153 Mich. 215, 15 Det. Leg. N. 757, 117 NW 932), and where court makes no special order as to costs in exercise of such discretion, execution issues against executor (Id.).

14. Where cause of action accrued after death of intestate. Lakin v. Sutton, 132 App. Div. 557, 116 NYS 820. Order declaring such liability, though proper, was not necessary. Id.

15. **Search Note:** See Executors and Administrators, Cent. Dig. §§ 1971-1974, 1986-1998; Dec. Dig. §§ 458, 459, 461-467; 18 Cyc.

See 11 C. L. 1314—Unless exempted by will,[16] the representative may be required to file an account,[17] or, if he refuses to do so, those interested may ascertain, so far as they can, the amount of property received by him and state an account for him.[18]

(§ 11) *B. Who may require.*[19]—See 11 C. L. 1314—Persons who clearly have no further interest in the estate cannot reqire the representative to account,[20] but interested persons not previously given an opporunity to be heard may do so.[21] To entitle one to further accounting after discharge of an executor, he must make a prima facie showing that there are assets in the hands of the representative.[22]

(§ 11) *C. Scope and contents of account.*[23]—See 11 C. L. 1314—Questions relating to what are proper credits or charges for or against the representative have been considered in an earlier section.[24] The executor must account for all property that he holds as such.[25] Taxes are chargeable to income or principal according as they are payable by life tenants or remaindermen.[26] A clerical mistake plainly appearing on an executor's annual account is correctable after settlement of the account.[27] Allowance by the court does not protect an administrator in paying a claim if he knows at the time that it is not just.[28]

(§ 11) *D. Procedure.*[29]—See 11 C. L. 1314—Final settlement cannot be made

1104, 1110-1115; 11 A. & E. Enc. L. (2ed.) 1181; 19 A. & E. Enc. P. & P. 1018.

16. Where will directed that executors should not be required to account, executor of one of them could not require executors of other to account, in absence of fraud, on ground assets had been received and converted and income not paid to widow as will directed. In re Keller's Estate [Pa.] 73 A 926.

17. Where executor filed bill in equity for discovery and accounting and on cross bill receiver was appointed in administration suit and it appeared by his report that executor had not accounted for all property that came into his hands, chancellor had power, at instance of distributees, to require executor to file with register statement showing all property received and disposal thereof and to direct reference to hear testimony. Ex parte Hurt [Ala.] 47 S 264. Failure of court to order removal of administration to chancery court held no reason why order should not be granted. Id. Immaterial that executor could be held for contempt for failure to turn over assets to receiver. Id. Decree not void because it might require executor to give evidence against himself on which he might be convicted of crime. Id. Court of common pleas has jurisdiction of suit to require administrator to account, after expiration of administrative year, though failure to make return to probate court pursuant to published notice of application for discharge is due to inability of probate judge to attend to his duties. Epperson v. Jackson [S. C.] 65 SE 217.

18. Stevens v. Ottawa Probate Judge, 156 Mich. 526, 16 Det. Leg. N. 207, 121 NW 477.

19. **Search Note:** See Executors and Administrators, Cent. Dig. §§ 1975-1985; Dec. Dig. § 460; 18 Cyc. 1106-1110; 11 A. & E. Enc. L. (2ed.) 1192; 19 A. & E. Enc. P. & P. 1020.

20. It being shown that heirs and distributees had already received their full shares under agreement between themselves and widow, former are not entitled to further accounting where any balance remaining was less than expenses of administration. Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847.

21. Person interested in estate, but not cited and not appearing in settlement of administrator's account, held entitled to citation requiring administrator to show cause why he should not account. In re Hasselbrook's Estate, 128 App. Div. 874, 113 NYS 97. Citation should bring in all parties cited or appearing on original accounting. Id.

22. Further accounting after executrix's discharge held properly denied where petition failed to allege that further sums came into hands of executrix and she specifically denied having received any further sums. In re Jenkins' Estate, 132 App. Div. 339, 117 NYS 74. Petitioner not entitled to accounting by executrix on account of proceeds of mortgages placed on property of estate received by special guardian and by him accounted for in supreme court. Id.

23. **Search Note:** See Executors and Administrators, Cent. Dig. §§ 2061-2068, 2257-2266; Dec. Dig. §§ 475-487; 18 Cyc. 1136-1139; 11 A. & E. Enc. L. (2ed.) 1197; 19 A. & E. Enc. P. & P. 1031.

24. See ante, § 9.

25. Executor held to hold fund as such and not as agent for beneficiary. Reynolds v. Crawford, 143 Ill. App. 146.

26. Where under will life beneficiaries were entitled to income of testatrix's estate from time of her decease, succession taxes were properly chargeable to principal account and real estate taxes to income account. Bishop v. Bishop, 81 Conn. 509, 71 A 583.

27. On settlement of final account incorrect footings in annual account could be corrected. In re Richmond's Estate, 9 Cal. App. 402, 99 P 554.

28. Whittemore v. Coleman, 144 Ill. App. 109.

29. **Search Note:** See notes in 63 L. R. A. 95; 8 A. S. R. 684.

See, also, Executors and Administrators, Cent. Dig. §§ 2149-2296; Dec. Dig. §§ 502-516; 18 Cyc. 1169-1220; 11 A. & E. Enc. L. (2ed.) 1313; 17 Id. 616; 19 A. & E. Enc. P. & P. 1034.

while claims duly and properly presented are still pending,[30] and accounting proceedings should be stayed where it develops that the right to an accounting depends on the outcome of other proceedings yet undetermined.[31] Interested persons are properly made parties,[32] and necessary parties not cited or appearing will not be concluded.[33] Alien minor next of kin may be represented by the counsel of the foreign country.[34] A statute allowing settlement of final account in ten days notice is valid even as to nonresident claimants.[35] A petition to require an administrator de bonis non to account must state that he received assets or that there remains property undistributed.[36] A mere creditor at large of an heir has no standing to object to an executor's account simply because the heir is receiving her share in cash and not in kind.[37] One whose only claim against the estate has been judicially denied cannot file objections to the allowance of credits for the payment of other claims.[38] Exceptions must be timely.[39] An exception charging nonpayment of an item for which credit is claimed properly raises the question of the legality of the payment.[40] The burden is on him who charges the representative with assets unaccounted for.[41] An amended report filed by the representative, and denied by adverse parties, but not supported by evidence, cannot be considered in favor of the representative.[42] Though

30. Where a claim is filed within one year from appointment of administrator, no final settlement of estate can be made until such claim is disposed of. Burns' Ann. St. 1908, §§ 2906, 2914. Tilson v. Hoosier Tropical Fruit Co. [Ind. App.] 88 NE 524.

31. Where temporary administrator had receipted, but received nothing, for transfer of seat in stock exchange, and pending suit involved question whether seat belonged to decedent. In re Grant, 132 App. Div. 739, 116 NYS 767.

32. Legatee of legatee who died in another state held proper though not necessary party in proceedings by administrator with will annexed and testamentary trustee, for accounting, he having an interest adverse to plaintiff. Sheldon v. Whitehouse, 60 Misc. 161, 112 NYS 1079.

33. Decree on administrator's voluntary accounting, directing payment of specified amount by sureties on bond, held not binding on sureties not cited and not appearing, Code Civ. Proc. § 2728, requiring sureties to be made parties on such accounting. Cookman v. Stoddard, 132 App. Div. 485, 116 NYS 901. Application of such section to bond executed before section was passed held not impairment of contract obligation. Id. Where administrator died after acting as such for three years and his children brought action against administrator d. b. n. for settlement of original estate, it would seem that administration on administrator's estate was necessary and that new administrator should be made party. Rawlings' Guardian v. Rawlings [Ky.] 112 SW 862. Citation for accounting at instance of persons not cited on an original accounting should bring in all parties originally cited or appearing. In re Hasselbrook's Estate, 128 App. Div. 874, 113 NYS 97.

34. Italian consul held entitled to represent alien minor next of kin of Italian subject on settlement of accounts of administrator. In re Bristow, 63 Misc. 637, 118 NYS 686. Appointment of special guardian after appearance of consul by attorney held improvident. Id.

35. Goodrich v. Ferris, 214 U. S. 71, 53 Law. Ed. —.

36. Petition by decedent's grandchildren who were children of deceased administrator, to require administrator de bonis non to settle estate, held insufficient where it did not allege that any estate came into hands of administrator de bonis non or that there was any property undistributed at time of filing petition. Rawlings' Guardian v. Rawlings [Ky.] 112 SW 862.

37. Where an heir has accepted her inheritance and is proceeding to obtain her share in a form satisfactory to herself, mere creditor at large of such heir cannot obstruct settlement of succession by mere objection to executor's account. Succession of Junqua, 123 La. 714, 49 S 482.

38. In re Williams' Estate, 118 NYS 562.

39. Where exceptions to certain items were filed and heard within one month after presentation of final report, and heirs had notified administrator five years before not to make payments involved, exceptions were not barred by laches. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228. It is not laches for heirs to await the filing of the final account before objecting to the acts of an administrator. Whittemore v. Coleman, 144 Ill. App. 109.

40. Woolsey v. Woolsey, 71 N. J. Eq. 609, 71 A 408.

41. Burden on exceptants to show that at her death testatrix owned corporate stock claimed not to have been accounted for. In re Perry, 129 App. Div. 587, 114 NYS 246. Evidence held to show such ownership. Id. Where next of kin make claim to money in hands of administrator and issues are submitted by orphans' court to circuit court for trial, plaintiffs in effect charge administrator with having money in his hands unaccounted for, and burden is on them to establish the charge. Dronenburg v. Harris, 108 Md. 597, 71 A 81.

42. Allegation that certain interest should not be allowed because land had been sold in testator's lifetime. In re Duncanson's Estate [Iowa] 120 NW 88.

there be no objection or exception, the probate court should carefully examine credits claimed by the representative and reject improper ones.[43] A credit allowed in an annual account may be conclusive on the final accounting,[44] but previous allowance to the representative for extraordinary services is reviewable where made without notice.[45] Findings and conclusions must be reasonably full and specific.[46] Exceptions to conclusions of law following findings on hearing of exceptions to an administrator's report admit the correctness of the findings.[47] Costs and expenses are taxable under the ordinary rules.[48] A referee on an administrator's accounting has no power to pass on questions of allowances, costs, and taxable disbursements.[49] Appeals are subsequently treated.[50]

(§ 11) *E. The decree or order.*[51]—See 11 C. L. 1316—The questions raised by the pleadings are properly determined by one decree.[52] The decree on an intermediate account need not charge the representative with all the property of the estate.[53] The conclusiveness of the decree and its immunity from collateral attack are treated in connection with other administration decrees.[54]

§ 12. *Distribution and disposal of funds.*[55]—See 11 C. L. 1316—The jurisdiction of the various courts over proceedings to obtain distribution, and to determine matters incidentally involved therein, has been treated in a previous section,[56] and the construction of testamentary provisions relative to the powers and duties of executors or trustees is treated in other articles.[57]

*Occasion and time for distribution.*See 11 C. L. 1316—The time for distribution is often regulated by statute.[58] An executor may be restrained from making distribu-

43. In re Hite's Estate [Cal.] 101 P 448.

44. Wherein annual account executor was credited with amount of a loan allowance was conclusive, and he could not be charged in final account with deterioration in value of mortgage security. In re Richmond's Estate, 9 Cal. App. 413, 99 P 558.

45. McMahon v. Ambach & Co., 79 Ohio St. 103, 86 NE 512. Exception to allowance held a direct, and not a collateral, attack thereon. Id.

46. Special findings made on hearing of exceptions to administrator's report are sufficient if they set out the items relating to the issues raised, it not being necessary to set out all the items of the report. In re Roberts' Estate [Ind. App.] 88 NE 870. Conclusions of law that administratrix be allowed only $125 for services and expenditures, and one-third of surplus of estate after payment of debts and liabilities, and that certain advancements should be considered, held sufficiently explicit for judgment on the issues raised by exceptions to report of administratrix. Id.

47. In re Roberts' Estate [Ind. App.] 88 NE 870.

48. Guardian ad litem instituting unsuccessful cross action against a legatee in judicial settlement of administrator's account held entitled out of estate to only sum sufficient to cover his services in administrator's proceeding. Hessig v. Hessig's Guardian [Ky.] 115 SW 748. Executors who merely trusted a coexecutrix, who was permitted to handle corpus of estate but did not properly care for it, held not personally liable for costs in accounting proceedings, but same should be paid out of estate. In re Wagner, 132 App. Div. 306, 117 NYS 53.

49. In re McGovern, 118 NYS 378.

50. See post, § 16.

51. **Search Note:** See Executors and Administrators, Cent. Dig. §§ 2192-2198; Dec. Dig. § 508; 18 Cyc. p. 1186; 19 A. & E. Enc. P. & P. 1051.

52. Where legatee's petition and answer thereto involved removal of executor, his liability to account, and an accounting, it was proper for court to take testimony on all these questions and decide them by one decree. Stevens v. Ottawa Probate Judge, 156 Mich. 526, 16 Det. Leg. N. 207, 121 NW 477.

53. While, under Code Civ. Proc. § 1622, an administrator's intermediate account must state all matters necessary to show condition of estate, court is required to scrutinize account only so far as receipts and disbursements of money are concerned, and hence intermediate decree need not charge representative with all the property as disclosed by inventory and appraisement. In re Bottom's Estate [Cal.] 103 P 849.

54. See post, § 15.

55. **Search Note:** See notes in 4 L. R. A. (N. S.) 189, 814; 2 Ann. Cas. 747; 6 Id. 1011.

See, also, Executors and Administrators, Cent. Dig. §§ 1136-1331; Dec. Dig. §§ 288-318; 18 Cyc. 594-673; 11 A. & E. Enc. L. (2ed.) 1160; 19 A. & E. Enc. P. & P. 1079.

56. See ante, § 2.

57. See Wills, § 5D; Trusts, § 8.

58. Where administration has been pending for more than 12 months, heirs are authorized by statute to compel distribution of all the estate that can be distributed. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156. Under Code 1906, § 2137, prohibiting proceedings looking to distribution within one year from grant of letters, proceeding for valuation of estates of widow and deceased husband on former's renunciation of will cannot be brought within one year from

tion pending a will contest.[59] When the estate is ready for distribution, an order for the final disposition thereof should be made.[60]

Persons entitled to receive payment or transfer of share.[See 11 C. L. 1816]—These include devisees and legatees [61] or their representatives,[62] and the statutory heirs and distributees [63] who have not received their portions,[64] including posthumous and pretermitted children,[65] but a prospective heir may preclude himself from sharing as distributee by release for a valuable consideration.[66]

Procedure to obtain order for final distribution.[See 11 C. L. 1817]—Interested persons are entitled to notice.[67] Whether heirship can be determined in a proceeding for partial distribution depends on the statute under which the proceeding is had.[68]

Adjustment and distribution of shares.[See 11 C. L. 1817]—A person entitled to share in realty cannot act as appraiser.[69] The conversion of land into money on foreclosure after decedent's death does not change its character as realty as to any surplus.[70] Where advance payments or loans in the nature of partial distributions to legatees are made before the time for final division of trust funds under the will, interest is properly chargeable thereon.[71] Interest accruing after decedent's death should be equitably divided.[72] Income from the whole estate, accruing pending administration after the statutory period therefor, should be distributed pro rata between the general and the residuary legatees.[73] By acquiescence annuitants may be precluded from insisting on better security than that set apart for them.[74] Where

grant of letters. Jones v. Jones [Miss.] 49 S 115.

59. Aubuchon v. Murphy, 64 Misc. 286, 118 NYS 553.

60. Estate is "ready to be distributed" within Code Civ. Proc. § 2743, when its resources have been gathered and marshalled so that their extent and nature are known, and its expenses and obligations have been ascertained. In re Snedeker, 61 Misc. 216, 114 NYS 936. Not necessary that it should be wholly reduced to money. Id. Decree of distribution, see last subdivision of this section.

61. See Wills.

62. Where testator bequeathed money for division among needy relatives of mother but legatee died before legacy was paid, but his personal representatives were willing to disburse the fund according to testator's purpose, legacy should be paid to executors of deceased legatee. Walter v. Frank, 118 NYS 268.

63. See Descent and Distribution.

64. Evidence insufficient to establish claim of heirs of a son of decedent for money alleged still due son as part of his portion. Succession of Watt, 122 La. 952, 48 S 335.

65. See, also, Wills, § 1. Right of grandson, under Kirby's Dig. § 8020, held not subject to divestiture by sale under power in will or by any act of devisees, though Kirby's Dig. § 8020, merely provides for recovery against devisees and legatees, remedy under said section not being exclusive. Rowe v. Allison, 87 Ark. 206, 112 SW 395.

66. Child who received $1,235 from father for release of his rights as prospective heir or otherwise in father's estate held not entitled to share as distributee. Squires v. Squires, 65 W. Va. 611, 64 SE 911.

67. No order of distribution should be made without notice to all interested persons. In re Manning's Estate, 83 Neb. 417, 119 NW 672.

68. District court in proceedings for partial distribution under Rev. Codes, § 7669, cannot determine whether petitioner is heir or entitled to share in estate, and, if so, amount thereof, Rev. Codes, §§ 7670-7672, providing for determination of rights of persons in estates and distribution thereof, being exclusive, and § 7669, contemplating only heirs, etc., shown of record to be such, and whose right to inherit is not questioned. In re Fleming's Estate, 38 Mont. 57, 98 P 648.

69. Where will confers on certain persons privilege of taking land at appraised value but names no appraisers, executor cannot appraise where he is among those entitled to take. Magin v. Niner, 110 Md. 299, 73 A 12.

70. Surplus must be distributed as realty, and not as personalty. Kitchens v. Jones, 87 Ark. 502, 113 SW 29. Widow held not entitled to allowance therefrom as from personalty. Id.

71. In re Harris' Estate [Vt.] 72 A 912. Legal rate proper in absence of showing that another rate should be taken. Id.

72. Where a will gave certain fixed legacies and other legacies which were subject to abatement if estate should not amount to a certain sum, and also disposed of residue, and interest was allowed on fixed legacies after one year from issuance of letters, but, on legacies which were subject to diminution, interest was allowed only from time amount of such legacies could be determined after ascertainment of debts and testamentary expenses, balance of interest accrued on estate, since testator's death should be divided pro rata between residuary legatees and legatees whose legacies were subject to diminution, where such accrued interest was not included in valuation of estate for purposes of distribution. In re Frankenheimer, 130 App. Div. 454, 114 NYS 975.

73. In re Frankenheimer, 195 N. Y. 346, 88 NE 374.

74. Annuitants acquiescing by attorney in

a legatee or distributee refuses to accept his share, the amount thereof may be deposited in court,[75] or in a bank under statutory regulations.[76] A receipt for a share not received converts the heir's claim into a personal debt against the representative.[77]

Interest on legacies.[78] See 11 C. L. 1318—The legatee is entitled to interest at the legal rate from the time the legacy could be legally demanded.[79] The general rule is that interest commences to accrue one year from testator's death [80] or from the issuance of letters testamentary [81] in the absence of unavoidable delay in making payment,[82] such as litigation,[83] or unless provisions in the will control.[84] The mere fact that by the terms of the will legacies are subject to abatement unless the estate proves to be of a specified value does not render them unliquidated so as to prevent the accrual of interest.[85] No demand is necessary to start the running of interest.[86]

Setting out and retaining funds and precedent interests. See 11 C. L. 1318

Sale or partition of realty. See 11 C. L. 1318—Jurisdictional questions are treated in an earlier section.[87] Where the circumstances are such as to require equitable interposition, a court of equity is the proper forum to petition for a sale or lien,[88]

order setting apart a mortgage as security for them, and accepting income for nearly five years, held barred from complaining that annuities were not charged on whole residuary estate as per will. In re Michener's Estate [Pa.] 73 A 1059.

75. Where successive town councils refused to accept a legacy in trust, held proper to permit executor to deposit same in registry of court of equity in order that he might settle his account and give town counsel opportunity to accept within a reasonable time. Rhode Island Hospital Trust Co. v. Warwick Town Council [R. I.] 71 A 644.

76. Where on refusal of a distributee to take his share, amount thereof was deposited in defendant bank, pursuant to statute, and certificate of deposit was payable to probate judge and provided for notice of discontinuance of interest, notice to distributee and to register of probate held insufficient to stop interest (Cole v. New England Trust Co., 200 Mass. 594, 86 NE 902), register not being agent of judge, and no presumption existing that letter to register in his official capacity only was given to judge (Id.).

77. Where mother gave her son a receipt for her distributive share in estate of another son without receiving such share and merely to enable son to settle his account as administrator of deceased son, her claim was thereby changed to a personal debt. Hessig v. Hessig's Guardian [Ky.] 115 SW 748. Such debt held discharged in bankruptcy so as to bar mother's residuary legatees from any interest therein. Id.

78. Charging of interest on advances to beneficiaries and division of income from estate pending administration, see ante, Adjustment and Distribution of Shares.

79. Generally from end of year after testator's death. Smullin v. Wharton, 83 Neb. 328, 119 NW 773. In view of litigation and other peculiar circumstances, widow held not entitled to interest on sum fixed by court under will, for her maintenance. Id. Interest is compensation allowed by law for deprivation of legacy after it has become payable under will or by statute. Good Samaritan Hospital v. Mississippi Val. Trust Co., 137 Mo. App. 179, 117 SW 637.

80. Ordinarily, in absence of provision in will as to time of payment, pecuniary legacies are payable at end of one year from testator's death without interest (Kingsbury v. Bazeley [N. H.] 70 A 916), but if not then paid they bear interest at legal rate thereafter [Pub. St. 1901, c. 203, § 1] (Id.). That part of money from which pecuniary legacies were payable was derivable from a fund appointed by testatrix under power in husband's will held not to change character of legacies nor time of their payment. Claflin v. Holmes, 202 Mass. 157, 88 NE 664.

81. Fixed general legacy draws interest from end of year after issuance of letters. In re Frankenheimer, 130 App. Div. 454, 114 NYS 975. Rule does not apply where amount of legacies cannot be determined until debts and testamentary expenses are ascertained (Id.), right to interest in such case not arising until after such determination (Id.).

82. Legatee not entitled to interest pending delay incident to realizing testatrix's interest in property necessary for purpose of paying legacy, such interest not being available until after death of a life tenant. In re Rutherfurd, 133 App. Div. 89, 117 NYS 791.

83. Interest not recoverable pending will contest after year from grant of letters, since law and not executor suspends payment. Good Samaritan Hospital v. Mississippi Val. Trust Co., 137 Mo. App. 179, 117 SW 637. That legatee contested will and thereby delayed probate held not to affect her right to interest after one year from testator's death. Claflin v. Holmes, 202 Mass. 157, 88 NE 664.

84. General rule as to interest after death of testator held inapplicable where testator makes interest from a specified time part of legacy. In re Duncanson's Estate [Iowa] 120 NW 88.

85. In re Frankenheimer, 195 N. Y. 346, 88 NE 374. Will preferring residuary legatees held not to authorize allowance of interest to general legatees out of residuary estate, as in ordinary cases. Id.

86. Good Samaritan Hospital v. Mississippi Val. Trust Co., 137 Mo. App. 179, 117 SW 637.

87. See ante, § 2.

88. Administrator de bonis non held without power to petition probate court for

but statutory requirements must be complied with in equity as well as in the probate court.[88] Partition may be had at the instance of devisees though the executor has a discretionary power of sale.[89] An executor or administrator is not a necessary party.[91] Sale is usually authorized where division in kind would work depreciation in value.[92] The proceeds are distributable as realty.[93] On it appearing that an heir is indebted to the estate, an accounting may be ordered.[94] Devisees who assume to accept and retain the fee cannot thereafter profit by asserting that the will created only life tenancies.[95]

Refunds, refunding bonds or other security.[See 11 C. L. 1319]—Where an order of distribution is executed pending an appeal which was insufficient to supersede it, and on such appeal the order is reversed, the court may in its sound discretion permit appellant to enforce restitution from the distributees.[96] Where the evidence shows that money was paid by the representative to the attorney of a legatee, it cannot be recovered as owing by the attorney of the representative.[97]

Suits for payment of shares or settlement.[See 11 C. L. 1319]—Actions must be brought within a reasonable time,[98] or within the time prescribed by statute.[99] Presentation of the claim to the representative should be alleged,[1] and concealed property must be described with reasonable certainty.[2]

sale of realty worth over $10,000 to pay legacy of $1,000 payable on death of former representative 21 years before, it appearing realty was not in his custody or control, but in that of third persons holding under recorded deeds, so that legatee's remedy was in equity. Walker v. Follett's Estate [Me.] 73 A 1092.

89. Only authority for ordering sale of realty for distribution is Code 1896, § 157, et seq., and requirements of these sections must be complied with in chancery as well as in probate court. Roy v. Roy [Ala.] 48 S 793.

90. Where will devised shares in realty absolutely though giving executor discretionary power of sale, devisees could exercise statutory right of partition, since until exercise of power of sale property must be considered as realty. Manley v. Manley, 61 Misc. 183, 112 NYS 771.

91. Stollard v. Nycum, 240 Ill. 472, 88 NE 1003.

92. Under Civ. Code Prac. § 490, authorizing sale of realty owned jointly by two or more persons where division in kind would impair value, mere showing that defendants' interests would be impaired held not sufficient to authorize sale of such interests for division among defendants. Bayne v. Stratton [Ky.] 115 SW 728. That one defendant answered and joined in prayer of petition held immaterial, there being no process on such pleading. Id. Where land cannot be divided without impairing its value, it may be sold, under Civ. Code Prac. § 489, in suit to settle estate. Oldham v. McElroy [Ky.] 121 SW 414. Where will fixed rights and interests of devisees in certain realty and provided for allotment thereof, objection that devisees could take nothing until division of residue after payment of specific bequests held not to bar sale of the land and partition of proceeds on it appearing that land could not be divided in specie. Manley v. Manley, 61 Misc. 183, 112 NYS 771.

93. Proceeds of realty sold for purpose of settlement of estate under Gen. St. 1902, § 353, are distributable as realty. State v. Donahue [Conn.] 73 A 763.

94. In partition at instance of an heir, evidence held not to show he was indebted to estate so as to require accounting. Reese v. Lamore, 156 Mich. 158, 16 Det. Leg. N. 70, 120 NW 569.

95. Persons who under will were life tenants but who took shares in partition as fee owners held estopped to recover from purchaser of copartitioner after latter's death, on theory decedent was only life tenant (Watkins v. Gilmore, 130 Ga. 797, 62 SE 32), especially without proof that decedent left no children, where will gave remainder to children, if any (Id.).

96. In re Jones' Estate, 83 Neb. 841, 120 NW 439.

97. Administratrix held not entitled to recover of her attorney money which her account showed had been paid over by her to her attorney, for a legatee for whom her attorney also acted. In re Mahar, 131 App. Div. 420, 116 NYS 1068.

98. Suit by legatees against estate of administrator for recovery of assets alleged to have been fraudulently concealed by representative, brought fourteen years after death of testator, held barred, where bill failed to allege reliance on false representations and to disclose facts or conditions excusing delay and alleged ignorance of fraud. Burke v. Maguire, 154 Cal. 456, 98 P 21.

99. Claim against estate to recover conditional legacy held not barred until 15 years after claimant became entitled to legacy, Burns' Rev. St. 1908, § 296, providing all actions not covered by any other statute shall be brought within that time. Geisel's Estate v. Landwehr [Ind. App.] 88 NE 105. Action to enforce right under distribution decree and explain latent ambiguity therein held not within limitation statute applying to suits for relief because of mistake. Taylor v. McCowen, 154 Cal. 798, 99 P 351.

1. Complaint of legatee against executrix's administrator for recovery of legacy held defective for failure to allege presentation of

Decree of distribution; its form, enforcement, and effect. See 11 C. L. 1320—The representative will be protected as to acts done by him under regular orders of court.[3] Intention governs as to who may take under a particular designation.[4] A decree of distribution under a valid will vests the devised property in the devisee.[5] A conditional transfer becomes complete on fulfillment of the condition.[6] Distribution to the estate of an heir who died leaving heirs determines the latter's interest in the estate of the first decedent.[7] After distribution, the administrator cannot resume control over the estate.[8] After rendition of a decree transferring corporate stock to executors as trustees under the will, an assessment thereon against the executors as such cannot be enforced by common-law action against them as trustees.[9] Errors cannot be taken advantage of by disinterested persons.[10]

§ 13. *Enforcement of orders and decrees by attachment as for a contempt.*[11]—See 7 C. L. 1473

§ 14. *Discharge of personal representatives.*[12]—See 11 C. L. 1320—Where the statute requires notice, this must be given in order to conclude heirs or creditors not appearing.[13] A partial discharge may be proper.[14] The representative of a deceased coadministrator cannot prevent the discharge of the surviving administrator on the ground that he has failed to pay over to the estate of his corepresentative the proper amount of commissions.[15] The conclusiveness of orders of discharge is treated in the section on other administration orders.[16]

claim against administrator. Burke v. Maguire, 154 Cal. 456, 98 P 21.

2. Bill by legatees against estate of administrator for recovery of alleged concealed assets held uncertain and insufficient as to description of property, especially notes and mortgages. Burke v. Maguire, 154 Cal. 456, 98 P 21.

3. Order for partial distribution held complete protection to executor for whatever he might do by way of disposing of property, within its terms. In re Macky's Estate [Colo.] 102 P 1088. Since order of probate court directing payment of legacies may be appealed from, it is binding on parties not appealing, and protects executor. Strawn v. Jacksonville Female Academy Trustees, 240 Ill. 111, 88 NE 460. Where bond on appeal was insufficient to supersede county court, order of distribution administrator held justified in paying out funds thereunder and could have been compelled to do so had he refused. In re Jones' Estate, 83 Neb. 841, 120 NW 439. Administrator paying out money under order of court cannot be personally charged with reimbursement, in absence of fraud. Weeke v. Wortmann [Neb.] 120 NW 933.

4. Evidence held to support finding that distribution decree in favor of A. M. Taylor intended to designate A. C. Taylor. Taylor v. McCowen, 154 Cal. 798, 99 P 351.

5. Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049.

6. Where distribution to a trustee was made "less" certain bonds "held pending decision of courts as to whether principal or income," bonds were transferred on condition they be not judicially declared income (Bishop v. Bishop, 81 Conn. 509, 71 A 583), and that condition failing transfer was equitably complete, carrying with it right of life beneficiaries to enjoy income thereof since distribution (Id.).

7. Relates back to death of second decedent. Downey v. Moriarty, 81 Conn. 442, 71 A 581. Where first decedent left five parcels of land in which second decedent inherited an interest and then died, and subsequently two parcels were distributed to his estate, interest of his heir was confirmed as to such parcels and destroyed as to the three others. Id.

8. Rotledge v. Elmendorf [Tex. Civ. App.] 116 SW 156.

9. Samuel Hano Co. v. Hano [Pa.] 73 A 341.

10. Where probate of will devising realty was valid and effectual, error in distribution of estate could not be taken advantage of by heirs disinherited, but devisees might have decree amended. Del Campo v. Camarello, 154 Cal. 647, 98 P 1049.

11. **Search Note:** See Executors and Administrators, Cent. Dig. §§ 1311, 2197; Dec. Dig. §§ 315(7), 508(3); 18 Cyc. 659-668, 1186.

12. **Search Note:** See notes in 2 L. R. A. (N. S.) 623.

See, also, Executors and Administrators, Cent. Dig. §§ 186-266; Dec. Dig. §§ 31-36; 18 Cyc. 145-170, 1354; 11 A. & E. Enc. L. (2ed.) 816; 19 A. & E. Enc. P. & P. 1100.

13. Order discharging administrator on final settlement. Fox v. Rhodes [Ind. App.] 88 NE 92. Heirs entitled to fund recovered by administrator for wrongful death of decedent held not concluded. Id. Held entitled to have order approving final acccount and discharging administrator set aside. Id.

14. Where administrator did not question court's authority to discharge him from all liability except as to two claims he was then prosecuting and he was so discharged by consent of all parties interested, he was not entitled to possession of a certain trust fund for distribution, such fund not being included in the excepted claims. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156. On accounting by trustee court properly directed distribution to distributees direct. Id.

15. Liability of survivor is personal. Groover v. Ash [Ga.] 64 SE 323.

16. See post, § 15.

§ 15. *Administration orders and decrees.*[17]—See 11 C. L. 1820—Final judgments, orders, and decrees [18] of probate and other courts of general jurisdiction with respect to the matters involved,[19] if not absolutely void,[20] are binding on the parties cited or appearing,[21] as to matters thereby adjudicated,[22] and until vacated or modified by appeal,[23] or other direct and timely proceeding,[24] based on fraud or other equitable circumstance [25] as distinguished from mere judicial error,[26] are conclusive [27] and

17. **Search Note:** See notes in 5 C. L. 1270; 21 L. R. A. 680; 15 L. R. A. (N. S.) 900.

See, also, Executors and Administrators, Cent. Dig. §§ 100, 101, 257, 843, 907-909, 1298-1314, 1444-1455, 1884, 1928, 2192-2292; Dec. Dig. §§ 20(9), 35(17), 237, 255, 315, 346-349, 453, 454, 508-514; 18 Cyc. 119-127, 159-170, 506, 534, 659-668, 746, 749, 1040-1081, 1186, 1188-1220, 1354.

18. See, also, Judgments.

See, also, ante, § 6B, subd. Judgments in Actions on Claims; § 7C, Order for Sale of Realty to Pay Debts; § 11E, Decree or Order on Accounting; and § 12, subd. Decree of Distribution. Judgment settling final account of executors of will giving property in trust is final, concluding, on distribution at termination of trust, all matters covered thereby. In re Harris' Estate [Vt.] 72 A 912.

19. See ante, § 2, Jurisdiction and Courts Controlling Administration.

20. See, also, ante, § 7C, as to orders for sale of land. Order of probate court appointing administrator, if made without jurisdiction, is void and may be disregarded. Union Sav. Bank & Trust Co. v. Western Union Tel. Co., 79 Ohio St. 89, 86 NE 478. Order appointing administrator without giving next of kin opportunity to accept position, though erroneous, held not void so as to be subject to attack in suit brought by administrator. Cunningham v. Clay's Adm'r [Ky.] 112 SW 852. Appointment of nonresident as administrator is voidable only and cannot be questioned collaterally. Cicerello v. Chesapeake & O. R. Co., 65 W. Va. 439, 64 SE 621. Judgment in proceedings for sale of land held not void, though possibly erroneous, it being presumed all interested parties were before court so that it had jurisdiction. Dennis v. Alves [Ky.] 113 SW 483.

21. See the earlier sections dealing with the necessity for notice or process in the particular proceeding in which the judgment or decree is rendered.

22. Judgment fixing interest of an administrator as heir at a certain amount and directing administrators to pay it held not to adjudicate rights of administrators as between themselves where it provided that it should not affect any equity either administrator might have against the other as such, etc. Moore v. Woodson [Tex. Civ. App.] 116 SW 608. Final accounting decree is not conclusive of administratrix's right to bonds not accounted for where question was not before surrogate for determination, Code Civ. Proc. § 2742, merely making such decrees conclusive of matters passed on in the accounting. In re Peck's Estate, 131 App. Div. 81, 115 NYS 239. Ascertainment of balance for which executor should account to legatees held not to settle question as to previous payments to legatees or distributees. Executor held entitled to credit for whatever legatees or distributees might have received. Woolsey v. Woolsey, 71 N. J. Eq. 609, 71 A 408. Surrogate's decree in proceedings by executor to account directing executor to pay a specified amount found owing to estate held to establish amount due from executor and to whom payable. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435. Where executor lent money of estate on realty security without order of court, but credits on account thereof were allowed in his annual report as advantageous to estate, and mortgages assigned to estate, and twelve years later he renewed the securities without authority, which transaction was not necessary or advantageous, decree settling annual report did not preclude court from disallowing renewals on settling final account. In re Richmond's Estate, 9 Cal. App. 402, 99 P 554.

23. See post, § 16.

24. Heirs held guilty of laches in seeking to impeach distribution decree awarding widow land as community property. Kline v. Galland, 53 Wash. 504, 102 P 440. Mistakes including allowance of fraudulent claims may be corrected in probate court any time before final settlement and discharge of administrator, Code, § 3398 (In re Douglas' Estate [Iowa] 117 NW 982), and thereafter by equitable proceeding (Id.). Order allowing claim of administrator may be set aside in suit therefor within five years after settlement. Id. Where administrator makes no showing of facts in resistance of application to set aside order allowing his claim against estate, court may treat application as true and grant relief. Id. In action to set aside order approving a claim, evidence held to sustain finding that claim was barred by limitations. Bloom v. Oliver [Tex. Civ. App.] 100 SW 1101.

25. Allowance of a claim by probate court after hearing is a judgment of court of competent jurisdiction which can be set aside for fraud only. Davis v. Rhea [Ark.] 119 SW 271. That claimant obtained allowance of full amount of his claim though he was not entitled to so much held not to show fraud in procurement of judgment. Id. Refusal of administrator to appeal at request of heirs held not to show fraud, he having been satisfied in good faith that claim was meritorious. Id. That claim paid by representative had been previously allowed by probate court held not to preclude surcharge for fraud and collusion. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228. Where executor after discharge applied for permission to account for omitted property, general objections to discharge on acccount of unauthorized charges made by him, without showing excuse for failure to object on final settlement, held insufficient to require county court to reopen former proceedings. In re Greenwood's Estate, 83 Neb. 429, 119 NW 671.

not subject to collateral attack.[28] Where a probate court has general jurisdiction,[29]

26. Mere judicial error in decree made and entered with all legal formalities is not ground for modification thereof under Code Civ. Proc. § 2481, sub. 6, authorizing modification or vacation of decrees for fraud, new evidence, etc. In re Peck's Estate, 131 App. Div. 81, 115 NYS 239. Claim that counsel was mistaken as to law applicable to distribution held not to justify opening of decree of distribution under Code Civ. Proc. § 2481. In re Schlosser, 63 Misc. 163, 116 NYS 794.

27. Judgments of probate courts are of same effect and force as those of other courts of record. Reavis v. Reavis, 135 Mo. App. 199, 115 SW 1063. **Order granting widow's allowance** is appealable, and, until modified, is conclusive on all interested parties. In re Fletcher's Estate, 83 Neb. 156, 119 NW 232. Where decedent's daughter applied for **allowance for care of mother** for a year then past "and for all other orders that may seem right to the court," and court directed payment to her of $50 every four months until further orders, and daughter received such sums under the order until mother's death, she could not thereafter claim extra compensation. Reavis v. Reavis, 135 Mo. App. 199, 115 SW 1063. Unnecessary **order permitting administrator to join in conveyances of land** sold for debts, on theory representative was entitled to one-third, held not conclusive as to his interest in the lands. In re Metcalf's Estate [Iowa] 120 NW 104. Certified transcript from orphans' court showing **balance due by representative** as ascertained by that court when filed in court of common pleas and action instituted thereon pursuant to Act Mar. 29, 1832, § 29 (P. L. p. 197) is conclusive as to amount due in absence of subsequent payments. Bernhardt v. Taylor [Pa.] 72 A 620. Cannot be attacked in court of common pleas. Id.

Settlement of account of administratrix held not to preclude creditor from impressing trust on realty purchased with proceeds of land belonging to estate. Farrelly v. Skelly, 130 App. Div. 803, 115 NYS 522. Decree settling accounts of executors who sold realty under will held conclusive as to propriety of sale and sufficiency of consideration, where rendered on due notice, though accounts did not show title had passed to one executor through third person. Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261. Where administrator brought all the funds under court's jurisdiction by his reports, extent of his interest in proceeds of land sold under order of court remained open for settlement until final accounting and was not concluded by erroneous interlocutory orders made on settlement of intermediate accounts. In re Metcalf's Estate [Iowa] 120 NW 104.

Grant of letters dismissory after due publication of citation held conclusive until set aside in proper proceeding barring application to require executor to produce will for probate in solemn form. Thompson v. Chapeau [Ga.] 65 SE 127.

28. Grant of administration: When probate court has assumed jurisdiction of an estate and granted administration, its findings that the necessary facts existed to confer jurisdiction cannot be collaterally attacked. Balsewicz v. Chicago, B. & Q. R. Co., 240 Ill. 238, 88 NE 734. In action for wrongful death, in which release by an administrator appointed in another county was pleaded, held not permissible to show that decedent never lived in that county. Id. Such evidence held not admissible to show person on whose estate administration was granted in such county was not the one on whose estate plaintiff was granted administration. Id. If order appointing executor is made in exercise of jurisdiction over subject-matter and estate, though based on erroneous conclusions of fact or law, it cannot be collaterally attacked. Union Sav. Bank & Trust Co. v. Western Union Tel. Co., 79 Ohio St. 89, 86 NE 478. Defendant in trespass action revived in name of executor of plaintiff held bound thereby. Id.

Decree appointing receiver held not attackable in mandamus proceedings. Ex parte Hurt [Ala.] 47 S 264.

Order to sell assets cannot be attacked collaterally in suit against administrator for violating it. Epperson v. Jackson [S. C.] 65 SE 217. See ante, § 7D, Sale of Land.

Decree transferring stock to executors as trustees under will held not impeachable collaterally in action on stock assessments levied against executors as such, brought against executors as trustees. Samuel Hano Co. v. Hano [Pa.] 73 A 341.

Allowance of claims: Approval of county court of claim against estate conclusively establishes its validity until judgment is set aside by direct proceeding. Bloom v. Oliver [Tex. Civ. App.] 120 SW 1101. Where claim was apparently barred by limitations, it is presumed to have been within exceptions preventing the bar (Id.), and beneficiaries can have order of allowance set aside only by direct showing that claim was barred when allowed (Id.).

Allowance to attorney: Judgment of county court allowing administrator's attorney a specified sum and directing administrator to pay same held not subject to attack in action on administrator's bond. United States Fidelity & Guar. Co. v. People, 44 Colo. 557, 98 P 828.

Partial administration: Administration of only half of community estate on death of a member thereof, though irregular, held not assailable collaterally. Wiley v. Verhaest, 52 Wash. 475, 100 P 1008.

What is collateral attack: Application to set aside order allowing a claim for grounds therein stated is a direct, and not a collateral, attack. In re Douglas' Estate [Iowa] 117 NW 982. Exception to allowance for extraordinary services by administrator, made by interested persons on settlement of an account, held direct, and not collateral, attack, though allowance had been previously made by probate court, but ex parte. McMahon v. Ambach & Co., 79 Ohio St. 103, 86 NE 512. Holding that administrator could not recover personalty, in which by his own showing he had no interest, held not a collateral attack on decision of probate court appointing the administrator. Diem v. Drogmiller [Mich.] 16 Det. Leg. N. 635, 122 NW 637. Evidence as to existence and identity of per-

its findings are entitled to the same intendments in their favor as those of other courts of general jurisdiction.[30]

Under the general powers of probate courts to grant administration for the settlement of the estates of decedents, such courts cannot determine conclusively against a living person that he is dead,[31] though by special and appropriate proceedings they may administer the estates of absentees under statutory authority for such purpose.[32]

The papers on motion to modify a decree must point out the grounds therefor.[33] An objection that an application to set aside an order allowing a claim is insufficient should be raised by demurrer rather than by motion to strike.[34] Statutory provisions authorizing the reopening of the estate must be complied with by persons seeking relief thereunder.[35] The proceeding must be timely [36] and must state sufficient grounds,[37] and all the necessary parties must be called.[38]

§ 16. *Appeals in probate proceedings.*[39]—See 11 C. L. 1322.—This section is confined principally to appeals from courts of probate to intermediate courts of general jurisdiction, appeals to the ordinary reviewing courts being governed by the rules applicable to appeals in general.[40] Review by appeal or other appropriate proceedings [41] is generally allowed [42] from all final orders or decrees [43] at the instance of

son named in will and distribution decree held admissible, and not objectionable, as collateral attack on decree. Taylor v. McCowen, 154 Cal. 798, 99 P 851. Suit to quiet title is collateral attack on administrator's sale. Dane v. Layne [Cal. App.] 101 P 1067. Suit to quiet title against purchaser of land at administration sale, on ground of defects in petition and failure to serve minor heir with notice of probate proceedings, held collateral attack on action of court. Magee v. Big Bend Land Co., 51 Wash. 406, 99 P 16.

29. See ante, § 2.

30. Probate court of Cook county, having general jurisdiction of settlement of decedents' estates, as liberal intendments must be made in favor of its findings in such matters as of those of courts of general jurisdiction. Balsewicz v. Chicago, B. & Q. R. Co., 240 Ill. 238, 88 NE 734. After jurisdiction acquired by proper notice, superior court, though sitting in probate, is court of general jurisdiction in acting on administrator's petition for sale of land, and entitled to same presumptions that attach to its action in other cases on collateral attack. Dane v. Layne [Cal. App.] 101 P 1067.

31. Savings Bank v. Weeks, 110 Md. 78, 72 A 475. All administration proceedings under such general powers depend on fact of death and are void if person is in fact alive. Id.

32. See Absentees.

33. Under Code Civ. Proc. § 2481, sub. 6, authorizing modification or vacation of orders for "fraud, new evidence, clerical error, or other sufficient cause." In re Peck's Estate, 131 App. Div. 81, 115 NYS 239.

34. In re Douglas' Estate [Iowa] 117 NW 982.

35. Burns' Ann. St. 1908, § 2925, providing that any person interested and not appearing at time of settlement may have settlement set aside and estate reopened within three years from settlement. Clark v. Schindler [Ind. App.] 87 NE 44.

36. Too late after three years from approval of final report and discharge of executor. Clark v. Schindler [Ind. App.] 87 NE 44.

37. Under statute authorizing opening of estate and appointment of adm. d. b. n., county auditor's petition based on unpaid taxes held insufficient to authorize appointment of administrator. Clark v. Schindler [Ind. App.] 87 NE 44.

38. Where statute required executor to be made defendant, held not sufficient to make him party merely as heir. Clark v. Schindler [Ind. App.] 87 NE 44.

39. **Search Note:** See Executors and Administrators, Cent. Dig. §§ 102-104, 259, 850-863, 910-919, 1293-1295, 1469-1479, 1929-1940, 2235-2256; Dec. Dig. §§ 20(10), 35(19), 239, 256, 314(12), 358, 455, 510; 18 Cyc. 119-127, 159-170, 511-513, 535-539, 640, 658, 754-756, 1031-1084, 1207-1215, 1354.

40. See Appeal and Review.

41. Remedy of administrator improperly charged with funds as belonging to estate is by appeal from decree settling his final account. In re Hall's Estate, 154 Cal. 527, 98 P 269. Remedy of objectors to confirmation of order appointing an executor is by appeal, and not certiorari and prohibition. Succession of Downing, 122 La. 275, 47 S 604. **Appeal will not lie** from order refusing to appoint intestate's son administrator, **mandamus** being proper remedy. Flick's Estate v. Schenk, 136 Mo. App. 164, 117 SW 93. Order requiring administrator to give additional security is independent of other proceedings and reviewable only by **certiorari.** In re McPhee's Estate [Cal. App.] 101 P 530. **Error and appeal** may be concurrently pursued for purpose of obtaining review of probate court judgment by court of common pleas (Jenney v. Walker, 80 Ohio St. 100, 88 NE 123), and after appeal properly taken and perfected appellant may proceed by error and dismiss his appeal (Id.).

42. Right of appeal in probate matters to district court is purely statutory, and when challenged authority must be found in statutes. In re Coryell's Estate [Idaho] 101 P

interested parties aggrieved.[44] The time for appeal,[45] the various steps required to be taken,[46] the effect of the appeal,[47] and the practice in the appellate court,[48] vary

723. St. 1907, p. 753, c. 410, provides for appeals from probate courts. In re McPhee's Estate, 154 Cal. 385, 97 P 878. Constitutional. Id.

43. See, also, Appeal and Review, § 4.

Orders appealable: Order of probate court appointing or refusing to appoint administrator pending will contest. Steen v. Springfield [Ark.] 120 SW 408. Order refusing to revoke letters. Cuttings' Comp. Laws, § 3041. In re Bailey's Estate [Nev.] 103 P 232. Judgment on hearing of objections to confirmation of administrator's sale. In re Christensen's Estate, 15 Idaho, 692, 99 P 829. Order on administrator's and guardian's supplemental report based on former report held final and appealable and held to carry whole accounting forward into second order regardless of finality of first order. Etmund v. Etmund, 83 Neb. 151, 119 NW 239. Under Code Civ. Proc. § 1616, an attorney may appeal from order denying compensation for services rendered administrator. In re Hite's Estate [Cal.] 101 P 448. Decision of court of ordinary granting administrator's discharge is appealable to superior court though no issue of fact is involved. Maloy v. Maloy, 131 Ga. 579, 62 SE 991.

Orders not appealable: Appeal does not lie from order of probate judge setting aside its prior allowance of a claim. In re Coryell's Estate [Idaho] 101 P 723. While statute authorizes appeal from order settling administrator's account, where only part of account is settled and remainder is continued for future consideration, judgment thus rendered does not settle account as to matter reserved, and is not appealable at instance of those merely interested in matter continued. Id. Where prior order allowing certain claims was vacated and claims continued for future consideration, claimant could not appeal. Id. In view of Code 1904, c. 121, and § 2699, exceptor to executor's account cannot appeal from order of confirmation, only remedy being by suit to surcharge account. Owens v. Owens' Ex'r [Va.] 63 SE 990. Order not final until surcharged by proper suit. Id. Order of probate court denying petition for discovery against administratrix is not appealable where only incidental to petition to compel addition to inventory. Mitchell v. Probate Judge, 155 Mich. 550, 16 Det. Leg. N. 2, 119 NW 916.

44. **Who may appeal:** Purchaser at sale of land for debts in suit to settle estate may appeal from judgment confirming report of sale. Carter v. Crow's Adm'r [Ky.] 112 SW 1098. Assignee of heir at law held within Comp. Laws 1897, § 669, authorizing appeal to circuit court by any person aggrieved, he claiming decedent died intestate as to part of estate. Clifton v. Smith, 154 Mich. 488, 15 Det. Leg. N. 807, 117 NW 1051.

Who may not appeal: Administrator not aggrieved by order of partial distribution and having no interest in property distributed held not entitled to appeal therefrom. In re Macky's Estate [Colo.] 102 P 1088. Husband claiming curtesy held not affected or aggrieved by order of probate court attempting to pass on his right to rents on executor's application for order allowing use of rents to pay debts, court being without jurisdiction to conclude him. Strom's Estate v. Strom, 134 Mo. App. 340, 114 SW 581. Heirs are without right of appeal from judgment of probate court allowing a claim against estate (Hall v. Rutherford [Ark.] 117 SW 548), hence grantee of heirs who had purchased all the property and was not party to record in probate proceedings for allowance of a claim could not appeal (Id.). Administrator is proper party to represent estate by appeal. Id. Heirs not parties to record in probate court held not entitled to appeal from judgment allowing a claim. Davis v. Rhea [Ark.] 119 SW 271.

45. Appeal lies from decree of sale of lands for debts, before or after sale and confirmation. Gartman v. Lightner [Ala.] 49 S 412. Code 1896, § 458, subd. 6, limiting time for appeal on issues as to insolvency, or as to allowance of claims against insolvent estates held not applicable to petition for sale of realty to pay debts. Curtis v. Hunt [Ala.] 48 S 598. Notice of appeal served after 60 days from entry of decree of final distribution held too late, § 1715, Code Civ. Proc. not being affected by Act March 20, 1907, relating to appeals in general and applying to probate proceedings where not inconsistent with statute relating thereto. In re Brewer's Estate [Cal.] 103 P 486. Proceeding for revision of proceedings of county court authorized by Rev. St. 1895, art. 332, within two years after such proceedings were had, need not be commenced before administration is closed, especially where it appears that three of the plaintiffs are minors, and one a feme covert. Bloom v. Oliver [Tex. Civ. App.] 120 SW 1101.

46. Appeal is taken from the probate court under § 8 of the probate court act exactly as from justice court except that bond is filed in and approved by probate rather than circuit court. Haaren v. Miller, 139 Ill. App. 405. One whose application to be appointed administrator was denied may obtain review of adverse order without first procuring vacation of order appointing rival applicant. In re Ellis' Estate [Ind. App.] 88 NE 341.

Notice of appeal: Service of notice of appeal by heirs on attorneys of executor held service on "adverse party" within Rev. Laws 1905, § 3874, executor's attorneys having appeared in support of will. Rong v. Haller, 106 Minn. 454, 119 NW 405.

Bond: Under Comp. Laws, §§ 669, 670, bond must be approved by probate court before filed therein, and bond and notice of appeal filed within 60 days from act appealed from. McNamara v. Kent Probate Judge, 154 Mich. 201, 15 Det. Leg. N. 632, 117 NW 554. Where part of estate by consent of legatees was used in paying debts of one of them, corresponding reduction in amount of bond should be made on appeal in proceedings by legatees for an accounting. Stevens v. Ottawa Probate Judge, 156 Mich. 526, 16 Det. Leg. N. 207, 121 NW 477. Discretion of probate judge in fixing bond held not reviewable by supreme court. Id. Appeal dismissed for failure to file bond within 10 days

with the different statutes. Trial is usually de novo,[49] and confined to the issues presented below[50] of which the initial court had jurisdiction,[51] but, for the purpose of admitting evidence on appeal, the issues framed in the probate court will be liberally construed.[52] The statutory rights of an administrator to appeal as such from an order settling his accounts is not affected by subsequent revocation of his letters.[53] Failure of appellant to offer evidence in the probate court in support of his claim is not ground for dismissing his appeal in the district court.[54]

after decision as required by Burns' Ann. St. 1908, § 2978, and no application for extension of time having been made to appellate court as thereby allowed. W. R. Mumford Co. v. Terry [Ind. App.] 87 NE 253. Appeal bond conditioned only on payment of costs, instead of debts, damages and costs as provided by statute, held not to supersede county court judgment. In re Jones' Estate, 83 Neb. 841, 120 NW 439. Bond on appeal from order discharging administrator held not invalid because obligors in terms bound themselves generally instead of to appellee. Maloy v. Maloy, 131 Ga. 579, 62 SE 991. Not void because parties were bound for "eventual condemnation money in said cause" instead of "such further costs as may accrue on said appeal." Id.

Exceptions and transcript: Devisee claiming in opposition to petitioner for distribution as heir is entitled to bill of exceptions where decree is in favor of petitioner, though he did not appear at hearing of petition. In re Benner's Estate [Cal.] 99 P 715. Usually record on appeal from decree of distribution is sufficient without bill of exceptions, but, when determination depends wholly or in part on facts established by evidence, appellant may embody in bill so much as is pertinent. Id. Record of probate of will not necessary on appeal involving objections to executor's report. Esmond v. Esmond, 142 Ill. App. 233. Where partial transcript was filed in district court within statutory time, held not error for court to allow a portion of transcript in same case formerly filed to be attached and made part thereof. Etmund v. Etmund, 83 Neb. 151, 119 NW 239. Where administrator gave notice of appeal from order diminishing his compensation made at time of approving remainder of his account, and gave bond referring solely to claim for compensation, transcript in district court did not bring up entire account for review. In re Wilson's Estate, 83 Neb. 252, 119 NW 522. Statutory duty of county judge to transmit transcript to district court is ministerial (In re McShane's Estate [Neb.] 120 NW 1018), and if judge is induced by appellant's attorney to delay for over 40 days from date of order appealed from district, court acquires no jurisdiction (Id.).

47. Appeal from order appointing an administrator suspends the order. Zimmer v. Saier, 155 Mich. 388, 15 Det. Leg. N. 177, 119 NW 433. Appeal from judgment of probate court to court of common pleas merely suspends judgment and does not cancel or destroy it. Jenney v. Walker, 80 Ohio St. 100, 88 NE 123. A probate finding of heirship is not effective as evidence in a collateral proceeding while an appeal is pending. Thomas v. Olenick, 140 Ill. App. 385.

48. Under Gen. St. 1902, § 642, **allowing amendment** of a claim against estate on appeal, if cause of action is not changed, amendment of claim based on constructive trust held permissible. In re Fisk, 81 Conn. 433, 71 A 559. Presumed in circuit court that omission in verification of claim was supplied by oral proof, so as to show jurisdiction in probate court and justify amendment in circuit court. Wagoner Undertaking Co. v. Jones, 134 Mo. App. 101, 114 SW 1049. Failure of administratrix to file plea of nonclaim in justice court held not to preclude filing of such plea in circuit court on review by certiorari. Merrett v. Vincent Mercantile Co. [Ala.] 47 S 731. Rev. Laws 1905, §. 3879, authorizes affirmance of order or decree appealed from where either appellant fails to appear and prosecute his appeal, or where such order or decree is sustained on its merits; §§ 3878, 4195, held inapplicable **where appellant fails to appear** when appeal is called for trial. In re Dunn's Estate [Minn.] 119 NW 57. District court not required to hear evidence and determine case on merits. Id.

Jury trial: Where only subject-matter on appeal to district court is compensation of administrator, issue should be tried without a jury. In re Wilson's Estate, 83 Neb. 252, 119 NW 522.

Costs on frivolous appeal by heir who had already received full share under agreement held taxable against appellant, though estate had been inventoried on erroneous theory. Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847. Award of "costs" on appeal in supreme court includes disbursements, except in appeals from orders. In re Perry, 131 App. Div. 284, 115 NYS 744. Judgment modifying surrogate's decree settling account of executrix, with costs to appellant, held not to imply payment of such costs out of estate. Id.

49. In re Christensen's Estate, 15 Idaho, 692, 99 P 829.

50. In re Christensen's Estate, 15 Idaho, 692, 99 P 829; In re Wood's Estate [Mo. App.] 120 SW 635. Appeal by administrator from decree sustaining exceptions to several items in his account and ordering surcharge is separate as to each item, and no other part of account is involved. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228.

51. Where an issue was beyond jurisdiction of probate court, no jurisdiction thereof is acquired by appeal (In re Wood's Estate [Mo. App.] 120 SW 635), as where title to land sought to be sold for debts was involved (Id.). On appeal from order of probate court directing executor to turn over notes as property of estate though he claimed them as his own, district court was without power to determine title to the notes since probate court was without jurisdiction. Hartwig v. Flynn [Kan.] 100 P 642.

52. Fitch v. Martin, 83 Neb. 124, 119 NW 25.

53. In re McPhee's Estate, 154 Cal. 385, 97 P 878.

§ 17. *Rights and liabilities between beneficiaries of estate. A. In general.*[55]—See 11 C. L. 1824—Fair agreements [56] entered into by persons interested in the estate,[57] and designed for the definition and settlement of their rights, are usually held valid and enforcible [58] against the parties thereto [59] in accordance with their proper construction.[60] The mere naming of an heir's husband as grantee in a voluntary partition deed does not give him any greater interest in the land than he would otherwise have taken as husband.[61] Laches or estoppel may bar the right of heirs to assail an oral partition.[62] On the happening of a contingency entailing division of property theretofore enjoyed exclusively by a devisee, the latter's continued possession is as trustee and not as an individual.[63] Rights dependent upon the construction of wills,[64] including the abatement of legacies for the payment of debts and charges,[65] and the general doctrines relating to specific performance,[66] and the statutes of frauds,[67] are elsewhere discussed.

(§ 17) *B. Advancements.*[68]—See 11 C. L. 1825—An advancement is an irrevocable gift in presenti by a parent to a child in anticipation of such child's future share of the parent's estate to the extent of the gift.[69] Whether a gift is an advancement,[70] and, if so, its value at the time of the advancement,[71] are questions to be determined by the facts and circumstances of each case.[72] A voluntary conveyance of land from parent to child is presumed to have been intended as an advancement,[73] and

54. In re Christensen's Estate, 15 Idaho, 692, 99 P 829.

55. **Search Note:** See notes in 7 Ann. Cas. 563; 10 Id. 555.

See, also, Descent and Distribution, Cent. Dig. §§ 206-388; Dec. Dig. §§ 68-92; 14 Cyc. 90-162; 8 A. & E. Enc. L. (2ed.) 1098.

56. Where widow's rights in personalty under will were doubtful, family settlement held not impeachable for alleged inadequacy of consideration as to one of parties, all being of age and transaction being free from fraud. Bell v. White [N. J. Eq.] 73 A 861. Heir over age selling to his relations his interest, against their advice, at price fixed by realty companies, held not entitled to subsequent advance in price, no fraud being shown. In re Frey's Estate [Pa.] 72 A 317.

57. Evidence held to sustain finding that son agreed to pay daughter $150 for latter's interest in father's estate. Bosel v. Barge [Minn.] 121 NW 1133.

58. Agreement between heirs settling differences with regard to their shares held binding. Succession of Watt, 122 La. 952, 48 S 335. Agreement between widow and heirs for distribution as therein provided held binding on heirs, precluding them from requiring widow to account as adminstratrix for that part of estate distributed before her appointment. Fletcher v. Fletcher, 202 Mass. 356, 88 NE 847. Where an heir took title to all of ancestor's land under bond to convey a tract claimed by a brother and a certain number of acres to his sister, and thereafter conveyed to sister tract covered by bond to brother, latter could enforce bond against the heir and also against sister who took with notice. Gilbert v. Gilbert [Ky.] 117 SW 355. Sister could compel heir to set apart to her other land of deceased father's survey to equalize her with the others. Id. Child's written release of his right as **prospective heir** or distributee of father's estate, in consideration of $1,235, held to estop him from asserting any claim to estate. Squires v. Squires, 65 W. Va. 611, 64 SE 911.

59. Agreement among brothers for division of property inherited held not to estop other heirs. Frye v. Gullion [Iowa] 121 NW 563.

60. Agreement between widow and other heirs construed, and held to pass entire property, including widow's third to heirs on widow's death. Warrum v. White, 171 Ind. 574, 86 NE 959. Children's agreement that widow might occupy all of deceased husband's estate for life held not sufficient as waiver of widow's right to distributive share. Hemping v. Hemping [Iowa] 120 NW 111.

61. Title passes to heir not as purchaser but by inheritance. Starr v. Bartz, 219 Mo. 47, 117 SW 1125; Starr v. Kisner, 219 Mo. 64, 117 SW 1129.

62. Heirs and persons claiming through them held estopped after 20 years, during which property had been traded and improvements made. Wooton v. Murrell [Ky.] 119 SW 191.

63. Where executrix was given all of decedent's property by will until remarriage, when it was to be divided between her and heirs, and executrix was discharged after reporting payment of debts, and thereafter sold realty and subsequently remarried, she held proceeds of sale in a representative and not in her individual capacity. Peters v. Snavely-Ashton [Iowa] 120 NW 1048.

64. See Wills, § 5.

65. See Wills, § 5F.

66. See Specific Performance.

67. See Frauds, Statute of.

68. **Search Note:** See Descent and Distribution, Cent. Dig. §§ 389-432; Dec. Dig. 93-118; 14 Cyc. 162-184; 2 A. & E. Enc. L. (2ed.) 156; 8 Id. 1098.

69, 70, 71, 72. Lindsley v. McIver [Fla.] 48 S 628.

73. Sewell v. Everett [Fla.] 49 S 187; Mossestad v. Gunderson [Iowa] 118 NW 374. Deed reciting consideration equal to value of

the burden is on one who claims that it was not.[74] Though a conveyance by deed absolute as an advancement to the grantee's wife or her heirs does not create a trust in favor of the latter,[75] such deed may be shown by parol to be in fact a trust.[76] Wills often contain directions relating to advancements.[77] Aside from such provisions the doctrine of advancements is usually said to apply only in case of intestacy.[78]

Hotchpot. See 11 C. L. 1325—Hotchpot is the bringing into the estate of an intestate an estimate of the value of advancements in order that the whole may be divided in accordance with the statute of descents.[79] Children declining to bring advancements into hotchpot when legally required to do so may in proper proceedings be excluded from participation in the division of the estate.[80]

§ 18. *Rights and liabilities between beneficiaries and third persons.*[81] See 11 C. L. 1326—An heir who sues to recover land sold by his ancestor must show that the deed did not pass perfect title.[82] Where a voluntary conveyance is canceled by mutual consent, and the donor thereafter conveys to a third person the heirs of the donee cannot recover from the purchaser.[83] Pretermitted children may enforce their statutory rights against purchasers from devisees.[84] In Louisiana forced heirs may attack voluntary donations by the ancestor trenching on their legitime.[85]

A judgment creditor of an heir can enforce his lien against only such interest as the heir ultimately takes after payment of claims against the estate of the ancestor.[86] Where realty is sold to pay debts and a surplus results the heirs receive such surplus as land so far a the rights of their creditors are concerned.[87] Devisees charged with supporting and caring for a surviving parent cannot be required by reason thereof to pay money in satisfaction of the debts of such parent.[88]

land raises no presumption of advancement. Stauffer v. Martin [Ind. App.] 88 NE 363. Declarations of alleged donor that conveyances are advancements or gifts are incompetent unless made before, at the time of, or immediately after transaction, and part of res gestae. Id.

74. Sewell v. Everett [Fla.] 49 S 187.

75. Cole v. Thompson, 169 F 729.

76. Evidence held not to establish trust. Cole v. Thompson, 169 F 729.

77. See Wills, § 5D.

78. Rice v. Rice [Iowa] 119 NW 714.

79. Lindsley v. McIver [Fla.] 48 S 628. Shares raised by advancements in case of intestacy must be brought into hotchpot. Montgomery's Trustee v. Brown [Ky.] 121 SW 472.

80. Lindsley v. McIver [Fla.] 48 S 628.

81. **Search Note.** See notes in 21 L. R. A. 39; 4 Ann. Cas. 193.

See, also, Assignments, Cent. Dig. §§ 12-16; Dec. Dig. §§ 7-9; 4 Cyc. 15; Contracts, Cent. Dig. § 509; Descent and Distribution, Cent. Dig. §§ 206-213, 310-317, 322-388, 433-632; Dec. Dig. §§ 68-70; 82-92, 119-157; 14 Cyc. 90, 91, 139-162, 184-225; 8 A. & E. Enc. L. (2ed.) 1098; 19 Id. 1293.

82. Heirs' complaint against third person for land held demurrable where it showed conveyance by ancestor to defendant without showing that deed did not convey perfect title. Buchan v. Williamson, 131 Ga. 509, 62 SE 819.

83. Where donated land was reconveyed by mutual consent of donor and donee, donor could convey good title to a third person (Quirk v. Smith [La.] 49 S 728), heirs not being entitled to complain of rescission of gift (Id.).

84. Kirby's Dig. § 8021, providing for enforcement of rights of pretermitted children or their legal representatives by scire facias in probate court against devisees and legatees, does not furnish the sole remedy for pretermitted children so as to preclude recovery of land in action at law against purchasers. Rowe v. Allison, 87 Ark. 206, 112 SW 395.

85. Father as forced heir has no interest to annul donations by daughter to her husband in a case where law reserves to him a larger share than he would have inherited had donations not been made. Succession of Desina, 123 La. 468, 49 S 23. If there is not sufficient property left in succession to satisfy an heir's legitime, donee is required to supply deficiency out of things donated, or, if alienated, out of his own property. Id. Father as forced heir of daughter could not revendicate stock donated by her to her husband and by him sold in usual course of business after wife's death (Id.), or compel purchaser or his assigns to contribute to payment of his legitime (Id.). **Creditors of forced heir** cannot sue to reduce a donation, at least until they have acquired in some legal manner the rights of the forced heir. Ruddock Orleans Cypress Co. v. De Luppe, 123 La. 831, 49 S 588.

86. Where nothing remained after payment of claims against such estate, judgment lien was extinguished by administrator's sale for debts. Yoder v. Kalance Sav. Bank [Iowa] 119 NW 147.

87. Judgment lien held enforcible against surplus. Kolars v. Brown [Minn.] 121 NW 229.

88. Merchants' Nat. Bank v. Crist [Iowa] 118 NW 394.

An heir who conveys his entire undivided interest in all the land owned by the ancestor at his death is liable on his general warranty for the value of lands subsequently sold for debts of decedent,[89] but not on account of the widow's dower,[90] or an outstanding superior title in a third person to part of the land existing at the time of decedent's death.[91] On failure of title to property sold by the representative, distributees may be required to refund the price to the purchaser.[92]

Estates Tail, see latest topical index.

ESTOPPEL.

The scope of this topic is noted below.[93]

§ 1. In General, 1600.
§ 2. Estoppel by Record, 1600.
§ 3. Estoppel by Deed, 1600.
§ 4. Estoppel in Pais, 1603. Pleading and Proof, 1616.
§ 5. Extent of Operation of Doctrine of Estoppel, 1617.

§ 1. *In general.*[94]—See 11 C. L. 1326—Estoppel may be by record, by deed, or by matter in pais.[95] Mutuality is essential.[96]

§ 2. *Estoppel by record.*[97]—See 11 C. L. 1326—Estoppel by judgment[98] is treated in a separate article, and the conclusiveness of public records in general.[99]

§ 3. *Estoppel by deed.*[1]—See 11 C. L. 1326—Parties and privies are estopped by recitals of fact in instruments under seal,[2] and a mortgagor is estopped to deny the

89, 90, 91. Combs v. Combs [Ky.] 114 SW 334.

92. In action against distributees to recover money paid for a homestead certificate sold by administratrix as property of estate, evidence held to show previous transfer by decedent so that nothing passed to plaintiff. Clark v. Welch, 154 Mich. 537, 15 Det. Leg. N. 816, 118 NW 137.

93. Many applications of the doctrine of estoppel are so closely related to other subject-matters that it is deemed best to treat them elsewhere. Thus, estoppel to assert ultra vires, or want of authority in corporate officers or agents (see Corporations,* §§ 8, 15K), to question the existence or scope of an agent's authority (see Agency,* §§ 1E, 2B), to deny partnership (see Partnership,* § 1), the estoppel of a tenant to deny his landlord's title (see Landlord and Tenant,* § 4B), and questions of estoppel peculiar to insurance (see Insurance,* § 16C), are excluded. Waiver of or election between rights where some of the elements of estoppel are lacking is also treated in a separate article (see Election and Waiver *).

94. Search Note: See Estoppel, Cent. Dig. §§ 82, 121-149; Dec. Dig. §§ 1, 12, 33, 52-61; 16 Cyc. 681, 684-686, 719-728, 730-744, 747, 748; 11 A. & E. Enc. L. (2ed.) 385, 387; 8 A. & E. Enc. P. & P. 5.

95. See post, §§ 2, 3, 4.

96. See, also, post, §§ 4, 5. Butler v. Supreme Ct. I. O. F., 53 Wash. 118, 101 P 481. That beneficiary obtained divorce from absent husband held no estoppel as against insurer of husband precluding her from asserting that husband died before commencement of divorce proceedings. Id. That defendant in action on a note contended that a second note had been purchased by a bank before maturity and derived advantage therefrom against plaintiff held not to estop him to assert against bank, in subsequent action, that it purchased after maturity. First Nat. Bank v. Duncan [Kan.] 101 P 992.

97. Search Note: See note in 15 L. R. A. (N. S.) 423.

See, also, Estoppel, Cent. Dig. §§ 1-17; Dec. Dig. §§ 1-11; 16 Cyc. 681, 684, 685; 11 A. & E. Enc. L. (2ed.) 389; 8 A. & E. Enc. P. & P. 5.

98. See Former Adjudication.

99. See Evidence, § 11.

1. Search Note: See notes in 3 C. L. 1328; 5 Id. 1287; 22 L. R. A. 779; 23 Id. 561; 66 Id. 632; 9 L. R. A. (N. S.) 945; 14 Id. 878; 28 A. S. R. 374; 41 Id. 722.

See, also, Estoppel, Cent. Dig. §§ 18-120; Dec. Dig. §§ 12-51; 16 Cyc. 685-719, 806-810; 11 A. & E. Enc. L. (2ed.) 392; 8 A. & E. Enc. P. & P. 5.

2. Recitals in common muniment of title held binding on both parties to action. Colville v. Colville [Tex. Civ. App.] 118 SW 870. Guarantors held estopped by recital of consideration of $1. Bond v. John V. Farwell Co. [C. C. A.] 172 F 58. One acquiring title to a fourth interest in a lot under deed from prior grantee, whose deed recited that grantor therein reserved a fourth interest, held not estopped by such recital as against execution creditor of first grantor, he not being in privity of estate, and recitals in first deed purporting to set out how parties acquired their titles being admittedly untrue. Lewman v. Owens [Ga.] 64 SE 544. Under rule that **sureties** are estopped to deny facts stated in their obligation, surety of builder, who relies on drawings and specifications as forming part of contract, cannot question identity of drawings and specifica

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* Always begin with the latest article on the subject. Use the latest topical index.

obligation of his mortgage.[3] The grantor under a deed purporting to convey a particular estate in contradistinction to merely the grantor's interest,[4] and especially under a deed of general warranty,[5] is estopped to dispute the title of his grantee,[6] and an after-acquired title[7] will inure to the grantee's benefit.[8] A deed will not,

tions on ground they were not signed by the parties as required by contract. Aetna Indemnity Co. v. Waters, 110 Md. 673, 73 A 712. Sureties reciting in attachment release bond that property had been levied on and thus inducing plaintiff to accept the undertaking held estopped to thereafter assert that no levy was made. Dackich v. Barich, 37 Mont. 490, 97 P 931. Owners conveying lots with **reference to recorded plat** showing an alley held estopped to deny common-law dedication of alley, though plat did not conform to statute. Thomas v. Metz, 236 Ill. 86, 86 NE 184. Privy of grantor who deeded land with reference to map showing nothing between described boundary and a bay held estopped to dispute natural boundary shown on map. Inter-City Realty Co. v. Newman, 128 App. Div. 195, 112 NYS 481.

3. Though it be informal. Spedden v. Sykes, 51 Wash. 267, 98 P 752. On principle that one who signs even as a mere witness an act creating a mortgage on his property is estopped to contest mortgage, husband joining in mortgage on wife's land so described as to include his own cannot contest the mortgage. W. F. Taylor Co. v. Sample, 122 La. 1016, 48 S 439. Estoppel held not to extend to third persons so as to create mortgage on husband's property as to them, instrument professing on its face to relate exclusively to wife's property. Id.

4. Warranty deed purporting to convey land as distinguished from grantor's interest precludes grantor and his heirs from setting up after-acquired title. Stoepler v. Silberberg, 220 Mo. 258, 119 SW 418. Administrator's deed purporting to convey full title to a lot as property of estate held to pass unmentioned life estate owned by administrator, though express covenant of warranty was only to extent representative was "bound to do according to law as such administrator and no further." Millican v. McNeill [Tex.] 114 SW 106. Warranty deed conveying only grantor's interest will not estop his heirs to claim title afterwards acquired by inheritance. Stoepler v. Silberberg, 220 Mo. 258, 119 SW 418. Deed construed as conveying only grantor's interest and not the land itself. Id. Where deed by executors purported to convey only interest of estate in the lands, executor held not estopped to set up title afterward acquired from residuary legatee. In re Richard's Estate, 154 Cal. 478, 98 P 528. Deed to trustee as security for a debt held to pass interest subsequently acquired by grantor by inheritance, it being without words showing intent to merely quit claim. Yourger v. Moore [Cal.] 103 P 221.

5. As general rule mortgagor cannot deny mortgagee's title (Vary v. Smith [Ala.] 50 S 187), but in absence of warranty he may set up after-acquired title (Id.).

6. Deed of land adversely held by third person, though void as to possessor, is good as between grantor and grantee by way of estoppel. Paton v. Robinson, 81 Conn. 547, 71 A 730. Heir of husband held estopped by latter's deed of part of homestead, though wife did not join, wife having abandoned use of property as homestead and consented to partition between heirs of deceased husband and herself. Wooten v. Pennock [Tex. Civ. App.] 114 SW 465. Lot owners held estopped to assert right to have streets and alleys opened, they having purchased after conveyance of abandoned streets to defendant for farming purposes and having been officers of company conveying such streets. State Co. v. Finley, 150 N. C. 726, 64 SE 772. Rule that assignor of a patent when sued for infringement cannot deny validity of patent he has sold does not apply so as to estop a corporation from impeaching a patent merely because person who sold it was a subordinate in its employment. Babcock & Wilcox Co. v. Toledo Boiler Works Co. [C. C. A.] 170 F 81.

7. Where as part of same transaction land was reconveyed without consideration, no title inured to one to whom grantee had previously given mortgage deed of warranty. Haslam v. Jordan, 104 Me. 49, 70 A 1066.

8. Barringer v. Davis [Iowa] 120 NW 65. Warranty deed. Newell v. Burnside Banking Co. [Ky.] 118 SW 267; Swift v. Doe [Ala.] 50 S 123; Frey v. Meyers [Tex. Civ. App.] 113 SW 592; Vary v. Smith [Ala.] 50 S 187.

Held to inure: Where deed purported to convey fee simple to plaintiff before grantor had acquired patent, title subsequently acquired by patent to grantor inured to grantee. Rev. Civ. Code, § 947. Simonson v. Monson [S. D.] 117 NW 133. State's conveyance of part of its swamp lands by deed purporting to pass entire title transfers after-acquired title. Morrow v. Warner Val. Stock Co. [Or.] 101 P 171. Grantor held estopped to deny that land afterwards acquired in partition was covered by his deed of trust. Anderson v. Casey-Swasey Co. [Tex. Civ. App.] 120 SW 918. Where grantor by warranty deed was entitled to fee on having a child, it was immaterial to title in grantee whether child was born before or after deed was given. English v. McCreary [Ala.] 48 S 113. Warranty of title in transfer of land certificate held to estop grantor's heirs inheriting tract received therefor from denying grantor's right to transfer certificate and from setting up title afterward located thereunder. Vann v. Denson [Tex. Civ. App.] 120 SW 1020. Grantor conveying pursuant to decree of court held not entitled to claim that he was not then owner, and to set up title by **adverse possession.** Baumgarten v. Mitchell [Cal. App.] 101 P 43.

Held not to inure: While doctrine of estoppel to assert after-acquired title does not depend on covenant of warranty, it does not apply to one who is neither grantor in a deed nor bound by covenant of warranty contained therein. Cleveland v. Smith [Tex. Civ. App.] 113 SW 547. **Trustee** in deed of trust not being required to defend grantor's title, and not having sold the land under

however, be construed to operate by estoppel beyond the clear meaning of the terms used;[9] and a subsequently acquired title will not inure to the grantee where the first sale or conveyance was prohibited by law.[10]

A grantee, lessee, or bailee, is estopped to dispute the title he recognizes when he becomes such,[11] and hence the rule that adverse parties are precluded from disputing the title of a common grantor.[12] One of two successive grantees of a common grantor may assert against the other a title different from or paramount to that derived from the common grantor.[13] A warranty deed binds the grantor's heirs only to the extent of the property received by them from the grantor's estate.[14]

trust deed, is not estopped to acquire title adverse to that of purchaser at foreclosure. Id. Trustee who merely conveys naked legal title to another who has knowledge of the trust is not estopped to thereafter acquire interest of cestui que trust and assert it against his grantee. Howe v. Howe, 199 Mass. 598, 85 NE 945. Title acquired after **mere quitclaim of interest then owned** does not inure. Vary v. Smith [Ala.] 50 S 187. Mortgage with no express warranty, but merely reciting that mortgagor bargains, sells and conveys the title he may have, does not pass after-acquired title, despite Code 1907, c. 3421, providing that in conveyances in fee words "grant," "bargain" or "sell" must be construed as express covenant. Id. After-acquired title by **adverse possession** does not inure to grantee's benefit. Chatham v. Lansford, 149 N. C. 363, 63 SE 81.

9. Newell v. Burnside Banking Co. [Ky.] 118 SW 267. Mortgage with general warrant construed not to cover all of a certain number of acres of land in which a decedent had only half interest, so as to pass by estoppel an interest afterwards acquired by mortgagor. Id.

10. As where Indian allottee attempted to convey while he still remained in United States, and subsequently acquired patent. Starr v. Long Jim, 52 Wash. 138, 100 P 194.

11. See, also, Landlord and Tenant, § 4B. Licensee of right to construct a boom held estopped to deny owner's riparian rights or rights of any one claiming under him. Coquille Mill & Mercantile Co. v. Johnson, 52 Or. 547, 98 P 132. Licensee who uses a patent is estopped to deny licensor's title. Ferry-Hallock Co. v. Progressive Paper Box Co. [N. J. Eq.] 73 A 230. One whose right to cut certain kinds of timber is derived from another whose rights are derived from the owner of the soil cannot question latter's title to the land when sued for exceeding his contract rights. Smith v. New Bern Lumber Co., 150 N. C. 40, 63 SE 190. One recognizing title to land in another by contracting with him for right to cut timber is not entitled to nonsuit for failure of such owner to otherwise prove title in himself in action for breach of the contract (Sample v. Roper Lumber Co., 150 N. C. 161, 63 SE 731), but defendant sued for violating contract giving right to cut only certain kinds of timber may show a superior title in himself, though he entered under contract with plaintiff, the action not being for recovery of the land (Id.). Acceptance of a deed to settle boundary dispute held not waiver of land grantee already owned on his side of agreed line so as to estop his grantees from asserting that owner on other side never owned it. Loughridge v. Ball [Ky.] 118 SW 321. Husband claiming title under deed to himself and wife as tenants by entireties is not estopped after wife's death from disputing her title under deed from one who had no title. Robertson v. Robinson, 87 Ark. 367, 112 SW 883. Conveyance of a lot bounded by a street shown on a map referred to in the deed does not estop grantee to deny title of grantor to land embraced within limits of street. Ocean City Hotel & Development Co. v. Sooy [N. J. Err. & App.] 73 A 236. Grantee's acceptance of deed reserving water appropriation to grantor, which appropriation did not exist, held not to estop grantee from asserting appropriation subsequently acquired from state. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 P 729. Though vendee in possession under executory contract of sale cannot deny vendor's title, when so far as vendee is concerned contract is executed, he may thereafter set up **adverse possession** against the world, including grantor. Cassin v. Nicholson, 154 Cal. 497, 98 P 190. Estoppel of vendee to deny his vendor's title does not apply where vendee was **already in possession** of land and claimed it as his own. Nashville, etc., R. Co. v. Proctor [Ala.] 49 S 377. Rule that lessee or bailee is estopped to deny title of lessor or bailor does not apply where possession is not taken under the contract because lessee or bailee was already in possession and where he asserts ownership in himself prior to and independently of the contract. H. K. Porter Co. v. Boyd [C. C. A.] 171 F 305.

12. See, also, Real Property, § 8. Watkins v. Northern Coal & Coke Co. [Ky.] 119 SW 225; Sowles v. Minot [Vt.] 73 A 1025. Where in trespass one party claimed under tax title, and the other under deed from person against whom land had been assessed, neither could deny former owner's title. People v. Bain, 60 Misc. 253, 113 NYS 27. Doctrine of estoppel to dispute title of common grantor applies only when both parties claim title to same property. Not where timber licensee is sued by grantee of soil and remaining timber for cutting timber not included in license, though each took from common grantor. Gaskins v. Gray Lumber Co. [Ga. App.] 64 SE 714.

13. One of such grantees could set up paramount title derived directly from state. Philadelphia Brew. Co. v. McOwen, 76 N. J. Law, 636, 73 A 518.

14, 15. Cleveland v. Smith [Tex. Civ. App.] 113 SW 547.

Where this is insolvent they may acquire a title adverse to that conveyed by the ancestor.[15]

§ 4. *Estoppel in pais.*[16] See 11 C. L. 1328—The doctrine of estoppel in pais is that one cannot deny the existence of the state of facts which he, or one in privity with him,[17] with full knowledge of the facts,[18] has by false representations[19] in-

16. Search Note: See notes in 15 L. R. A. 273; 22 Id. 256; 56 Id. 905; 59 Id. 686, 904; 60 Id. 247; 63 Id. 193; 1 L. R. A. (N. S.) 1181; 2 Id. 299; 3 Id. 879, 971; 7 Id. 459, 712, 930; 8 Id. 896; 9 Id. 1117; 13 Id. 576; 14 Id. 336; 15 Id. 503; 16 Id. 672; 10 A. S. R. 22; 15 Id. 219; 27 Id. 344; 51 Id. 856; 56 Id. 351; 57 Id. 169; 87 Id. 856.

See, also, Estoppel, Cent. Dig. §§ 121-310; Dec. Dig. §§ 52-121; 16 Cyc. 719-814; 11 A. & E. Enc. L. (2ed.) 420; 8 A. & E. Enc. P. & P. 5.

17. Evidence held not to connect an infant with representations of alleged partner in business that infant had absconded and abandoned his property, and that partnership existed between them, so as to estop infant from recovering for property sold by alleged partner. Barbieri v. Messner, 106 Minn. 102, 118 NW 258. Boundary agreement made by landowner who subsequently suffered forfeiture of his land to state held not to estop him after purchase from state's subsequent grantee. Runkle v. Smith [Tex. Civ. App.] 114 SW 865. **Executor as such** is not estopped to attack validity of judgment sought to be enforced against property of estate by allegations or admissions made in proceedings previously brought by him individually against judgment creditor. Harris v. Woodard [Ga.] 65 SE 250.

18. Actual or constructive knowledge necessary. Schott v. Linscott [Kan.] 103 P 997; Trimble v. King [Ky.] 114 SW 317; Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. No estoppel where representation or conduct is due to ignorance founded on innocent mistake. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170.

Constructive record notice not sufficient to estop where evidence shows there was no actual knowledge. Starr v. Bartz, 219 Mo. 47, 117 SW 1125; Starr v. Kisner, 219 Mo. 64, 117 SW 1129.

Showing as to knowledge insufficient: Notice to insured who was husband of beneficiary held not notice to her, though insured's business address had been designated as address of both. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. Mere fact that some of a corporation's stockholders might have had notice of facts creating estoppel held not to estop corporation from suing for infringement of a patent. Seeger Refrigerator Co. v. American Car & Foundry Co., 171 F 416.

Want of knowledge held to prevent estoppel: Bystander not knowing that company constructing reservoirs intended to divert more water than it had theretofore diverted held not estopped to restrain **excessive diversion of water** after completion of the works. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502. Rule not applicable where bystander was without knowledge that company constructing the works intended to divert more water than it had theretofore diverted, and where he instituted proceedings soon after he acquired knowledge (Id.), and who gave notice thereof within reasonable time after ascertainment (Zeigler v. Brenneman, 237 Ill. 15, 86 NE 597). Silence during expenditure of large sums on property and demonstration of its great value held not to preclude **assertion of an interest** therein by one who did not, during time of such silence know he had any interest. Id. One whose rights in school lands were forfeited in his absence held not estopped to assert irregularity against subsequent purchaser making improvements, he having been without notice or knowledge. Reitler v. Harris [Kan.] 102 P 249. Affidavit made by a woman as to her interest in certain property held not to estop her, she having been ignorant of the facts and of her rights. Yazoo Lumber Co. v. Clark [Miss.] 48 S 516. Use, cultivation and possession of land up to certain line, under mistaken view by both adjoining owners that such line was true one, held insufficient to estop. Foard v. McAnnelly, 215 Mo. 371, 114 SW 990. One not knowing of sale of land to respondent held not estopped on theory of acquiescence in improvements. Stayton v. Hastain, 221 Mo. 712, 120 SW 763. Evidence insufficient to show that plaintiff knew that her husband had given third person power to mortgage certain cattle so as to estop her from recovering from person claiming under mortgage. Roberts v. Little [N. D.] 120 NW 563. Mortgagors ignorant of invalidity of assignment of mortgage held not estopped by acquiescence in foreclosure proceedings and delivering up possession, though purchaser at foreclosure paid full value without knowing of mortgagor's rights. Kenny v. McKenzie [S. D.] 120 NW 781. Corporation held not estopped to assert its claim against estate of an officer for fraud against it, so as to preclude action against representative and surety for damages for premature distribution of funds, it not having known the facts until after distribution. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149. Mere knowledge of a pledgor that sale of pledged property was invalid for one of two reasons held insufficient to estop him by acquiescence. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. Beneficiary held not estopped to assert invalidity of sale by pledgee of insurance policy without notice, being without information of sale and doing nothing to encourage pledgee to believe she acquiesced in sale. Id. Complainants having no knowledge of powers of attorney under which stock was attempted to be transferred by father to them and defendant, until father's death, acceptance of stock did not estop them to assert father's incapacity, and **undue influence** practiced on him. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170. Corporation's reissue of stock obtained by its officer by fraud held not to estop it where **fraud** was then

tended to deceive,[20] or by silence [21] when under a duty to speak,[22] or by any other ac-

unknown to it, though by reasonable diligence it might have been known. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149. Incompetent woman without knowledge of her rights in trust property held not estopped by acquiescence or conduct relative to **illegal acts of trustee.** Gibney v. Allen, 156 Mich. 301, 16 Det. Leg. N. 159, 120 NW 811. Navigation company selling out to steamship company and subsequently being without notice or knowledge that its name was used on boat and stationery held **not liable for injury** to seaman on doctrine of estoppel. Nelson v. Western Steam Nav. Co., 52 Wash. 177, 100 P 325. Subscriber of funds for erection of a factory held not estopped to defend on ground **contract had been assigned** to another contractor, he having had no knowledge of assignment until alleged completion of work. Johnson v. Vickers, 139 Wis. 145, 120 NW 837.

19. Doctrine of equitable estoppel is based on theory that party estopped had made some representation which has misled the other party and which it would be inequitable to permit him to deny. Falls City Lumber Co. v. Watkins [Or.] 99 P 884. Where a party, by his statements as to facts or as to his intended abandonment of existing rights, designedly induces another to change his conduct or alter his condition in reliance thereon, he cannot thereafter be permitted to deny the truth of his statements or to enforce his rights against his declared intention. Richards v. Shepherd [Ala.] 49 S 251. When a man has done an act or said a thing, and another, who had a right to, has relied on that act or word and shaped his conduct accordingly and will be injured if former can repudiate the act, it shall not be done. Fagan v. Stuttgart Normal Inst. [Ark.] 120 SW 404. Must be language or conduct amounting to a representation or concealment of material facts. Schott v. Linscott [Kan.] 103 P 997. Seller of lots securing increase in price by representing **that adjoining tracts would be opened for street** held estopped to deny dedication for the street. Morse v. Whitcomb [Or.] 102 P 788, rehearing denied, Id. [Or.] 103 P 775. Purchaser of timber may be estopped by representation to seller as to **meaning of term** merchantable title. Hughes v. Adams [Tex. Civ. App.] 119 SW 134.

20. Intention to induce reliance: Representation or concealment must have been made with intention that it should be acted upon by the other party. Schott v. Linscott [Kan.] 103 P 997. Heirs held not estopped by landowner's representation to intending purchaser of part of his land as to boundary, to assert true line as against defendant who was also present but for whom the statement was not intended and who had then no interest but purchased subsequently. Gaffney v. Clark [Tex. Civ. App.] 115 SW 330; Id. [Tex. Civ. App.] 118 SW 606. One may be estopped though he did not intend that others should act on strength of his conduct, if it induced belief his intention was compatible with this conduct. Ashley v. Pick [Or.] 100 P 1103. Under circumstances rendering it both natural and probable that it would be acted upon. Schott v. Linscott [Kan.] 103 P 997.

21. He who is silent when under duty to speak will not be permitted to thereafter assert his rights to the injury of others. In re Saunders, 129 App. Div. 406, 113 NYS 251. To injury of persons acting on faith of his silence. Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857.

Held estopped by silence: An estate in land may be transfered by owner's failure to give notice of his title under circumstances amounting to fraud. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104. Vendor of corn, silent on receipt of confirmation of sale fully stating terms and requiring immediate report as to any errors, held estopped to set up other terms in action for failure to deliver the corn. Teasdale Com. Co. v. Keckler [Neb.] 120 NW 955. Where co-obligor in a bond knew bond had been delivered without happening of contingency authorizing such delivery, but nevertheless took deed of certain land to secure him against liability taking possession of property without notifying obligee bond had been delivered without authority, he could not set up lack of such authority in action on the bond. Manchester Building & Loan Ass'n v. Graham [N. J. Law] 72 A 959. Where one who assisted defendant's agent in selling a safe was told by agent that if defendant was compelled to cut price there would be no commissions for either, but remained silent and thus permitted agent to conclude sale at cut price, he could not thereafter claim commission. Carroll v. Manganese Steel Safe Co. [Md.] 73 A 665. Sureties knowing obligee in a bond was delivering goods in belief an alteration in bond was authorized held estopped to assert that alteration was without authority. Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768, 97 P 919. Vendor retaining interest in property held estopped by acquiescence and failure to object when vendee gave mortgage thereon to secure payment of rent. Garrison v. Latham [Okl.] 103 P. 609. Stock subscriber sued on subscription held estopped to defend by asserting nonfulfillment of condition as to amount of bona fide subscriptions, having participated in organization after consideration of amount of subscriptions, acted as director, etc. McConnaghy v. Monticello Const. Co. [Ky.] 117 SW 372.

Held not estopped: Not only must person estopped have been under duty to give notice, but silence must have amounted to legal fraud misleading other party, ignorant of truth, into doing something he would not otherwise have done. Ashley v. Pick [Or.] 100 P 1103. Cigar manufacturer held not estopped by silence or acquiescence to enjoin fraudulent use of trade name, its brands being on market and it not knowing of fraudulent transactions until they were executed. J. F. Portuonda Cigar Mfg. Co. v. V. P. Portuondo Cigar Mfg. Co., 222 Pa. 116, 70 A 968. Failure of a father to disclose son's indebtedness to him, to creditor inquiring as to son's debts with view of extending further credit, held not to estop father from thereafter asserting his claim,

quiescence,[23] or by conduct calculated to mislead,[24] induced another to act[25] to his

promise of credit having been conditioned on subsequent examination of account books not shown not to contain any record of the claim. In re Saunders, 129 App. Div. 406, 113 NYS 251. That cosurety was silent when maker of note in asking plaintiff to also go surety stated that his insurance and other property was ample for payment of all his debts held not to estop him from claiming under assignment of insurance to secure other debts. Little v. Berry [Ky.] 113 SW 902. Devisee's mere temporary acquiescence in executor's construction of will held not to estop where he speedily asserted his rights on being advised thereof. Deppen's Trustee v. Deppen [Ky.] 117 SW 352.

22. Must be duty to speak. Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857. One in possession of land need not give notice of his claim to others about to buy from one out of possession. Id. Record owner need not look up any one contemplating purchase from others and disclose his title to him, being entitled to rely on record notice. Waits v. Moore [Ark.] 115 SW 931. Silence of up-stream owners with knowledge of negotiations for purchase of down-stream property to which a dam was an inducement held not to estop them to object to maintenance of dam after they had purchased property below it. Ireland v. Bowman [Ky.] 113 SW 56. Remainderman is not obliged to assert title until falling in of life estate. Teague v. Sowder [Tenn.] 114 SW 484. That married woman at one time lived within two miles of property, but most of time five miles therefrom, while it was occupied and improved, and asserted no rights for 25 years, held insufficient to estop her. Id.

23. Estoppel based on acquiescence by silence is based on fraud, actual or constructive. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. One standing by so as to induce another to believe he consents to acts infringing on bystander's rights cannot afterwards complain. Trimble v. King [Ky.] 114 SW 317. Acquiescence in **obstruction of easement** of way held to extinguish same by equitable estoppel. Mason v. Ross [N. J. Eq.] 71 A 141. Knowledge and acquiescence as to all facts relating to a partnership and allowing a wife to continue as **partner** claiming substantial interests held to estop creditor of husband from asserting that husband had any interest in partnership property. McCaskey v. Potts, 65 W. Va. 641, 64 SE 908.

Boundary lines: Conduct and acquiescence fixing boundary lines may estop parties from showing true lines. Curless v. State [Ind.] 87 NE 129.

See, also, Boundaries, § 4.

Permitting use of property: Railway company granting land and for many years acquiescing in grantees' occupancy up to shore of a lake held barred from thereafter asserting title. Barringer v. Davis [Iowa] 120 NW 65. Corporation held estopped to assert it did not execute license for a spur track over its land, though license had been signed by president individually, it having known of long use of track for its benefit and acquiesced therein. Belzoni Oil Co. v. Yazoo & M. V. R. Co. [Miss.] 47 S 468. Where only portion of an alley had been closed up and its obstruction acquiesced in, public and adjoining owners were not estopped to insist on unobstructed portion remaining in use. Thomas v. Metz, 236 Ill. 86, 86 NE 184.

Permitting improvements on property: Property owners consenting to vacation of a street **held estopped** to demand restoration of original condition after other owners had built extensive improvements on vacated street, relying on vacation. D. M. Goodwillie Co. v. Commonwealth Elec. Co., 241 Ill. 42, 89 NE 272. One who for seven months ignores giving out of contract for public work and permits contractor to incur expense and obligate himself under contract cannot thereafter complain. Carver v. Camden [N. J. Law] 73 A 47. Riparian owner standing by while system of waterworks is constructed at great expense is estopped to invoke equity for injunction to restrain diversion of water necessary for the works. Miller v. Madera Canal & Irr. Co. [Cal.] 99 P 502. Party will be refused injunction where he has stood by pending extensive improvements for public use, knowing his interests to be affected. Barton v. Riverside Water Co. [Cal.] 101 P 790. Complainants who for about four years remained inactive, though a company bored additional wells for purpose of supplying a city with water, and such wells immediately affected complainants' wells, could not thereafter restrain use of the wells. Id. Persons knowingly permitting closing up of passageway and expenditure of large sums of money for improvements held estopped to insist on reopening of the way. Trimble v. King [Ky.] 114 SW 317. Bystander aiding and encouraging construction of canal over his land held estopped to deny parol license. Miller v. Kern County Land Co., 154 Cal. 785, 99 P 179. Vendors of portion of homestead, by giving possession and acquiescing in permanent improvements, held estopped to question validity of verbal contract. Engholm v. Ekrem [N. D.] 119 NW 35. Vendor in oral contract to convey on fulfillment of certain terms **held not estopped by** knowingly permitting vendee to take possession and make improvements. Zeuske v. Zeuske [Or.] 103 P 648. State never expressly recognizing an alleged village whose officers incurred expenses for improvements held not guilty of such delay as to estop it from maintaining quo warranto to question incorporation. State v. Gilbert, 107 Minn. 364, 120 NW 528. Failure of landowner to be present and object to laying of pipe lines for gas outside of land condemned held not to estop him from insisting on removal of the pipes. Lovett v. West Virginia Cent. Gas. Co., 65 W. Va. 739, 65 SE 196. Evidence held not to sustain contention that plaintiff had lost title to certain land by acquiescence in improvements made by defendant's predecessors, and with knowledge of such improvements. Parks v. Pennsylvania Clay Co., 222 Pa. 571, 71 A 1083. **Reversioner** is bound to speak by reason of improvements only when he knows of improvements which a reasonable man would say person in possession would not make unless he believed

he owned the fee. Sullivan v. Moore [S. C.] 65 SE 108. Cultivation and about $150 improvements on 90 acres held insufficient. Id.

Permitting conveyance of property: Mortgagee for more than three months failing to notify purchaser from mortgagor of his interest under mortgage, though having knowledge of sale, **held estopped** to assert mortgagor's want of authority to sell, where purchaser could have paid price to mortgagee instead of to mortgagor. Sigel-Campion Live Stock Co. v. Holly, 44 Colo. 580, 101 P 68. Owner standing by and allowing other person to treat goods as his own cannot recover them from third person thus induced to buy them. Ashley v. Pick [Or.] 100 P 1103. Estoppel by failure to assert title to land sold supposes title in silent party. Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857. Where at time of proposed purchase of certain railroad property by one company from another defendant accompanied purchaser's representative on visit to ascertain extent of grantor's property, but made no mention of any interest in himself, he could not thereafter assert such interest. Detroit United R. Co. v. Lau [Mich.] 16 Det. Leg. N. 430, 122 NW 130. Assisting in sale of land, and seeing half of price paid over without objection, held to preclude assertion of title against purchasers ignorant of plaintiff's claim and without convenient means of acquiring knowledge. Nash v. Yellow Poplar Lumber Co. [Va.] 63 SE 14. One who assisted another in obtaining a loan by mortgaging certain cattle and who signed note given as security and received benefit of proceeds in paying off another mortgage held estopped to assert title against mortgagee. Boatmen's Bank v. Trower Bros. Co., 171 F 964. Express or implied consent by timber owner to contemplated sale by another held to entitle purchaser to lien on timber for price paid on sale being enjoined. Chappell v. Chappell [Ky.] 119 SW 218. Widow appearing in proceeding to sell land for debts but making no claim to dower held estopped to thereafter make such claim against purchaser. Oldham v. McElroy [Ky.] 121 SW 414. That stockholder and director of a state bank owned assets inadvertently mingled with assets of bank at time of sale of his stock, and thereafter acquiesced in transformation of bank into a national bank, **held not to estop** him from claiming his assets, there having been no transfer of assets to innocent buyer. People's Nat. Bank v. Kingfisher County Com'rs [Okl.] 103 P 682. Failure of owner of personalty to attend execution sale under void judgment and warn purchasers held not to estop him from asserting title against buyer, especially where he went to justice of peace and attempted to have sale stopped. Schott v. Linscott [Kan.] 103 P 997. Mere fact that **owner of** reversion knew that deeds were being made by life tenant and subsequent grantees and possession changed from time to time held insufficient to estop him, especially where his deed conveying life estate was on record, there being nothing to show that he knew the nature of the subsequent conveyances. Sullivan v. Moore [S. C.] 65 SE 108.

24. Encouraging doing of act: One who has induced another to believe and act in a certain manner will not afterwards be permitted to injure or prejudice such person because of acts or things he did under belief they were consented to. Trimble v. King [Ky.] 114 SW 317. Surety cannot assert that payments made by owner to building contractor at surety's request violated contract and discharged him. Hellman v. Farrelly, 132 App. Div. 151, 116 NYS 809. Partner active in obtaining consent of railroad company to erection of a building by partnership on railroad right of way and releasing company from liability for fire in name of partnership held estopped to claim individual damages on theory he was owner and had given no release. Equitable Fire & Marine Ins. Co. v. St. Louis & S. F. R. Co., 134 Mo. App. 48, 114 SW 546. Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal rights in opposition to such consent if his conduct or acts of encouragement induced other party to change his position so that he will be pecuniarily prejudiced by assertion of adversary claim. Lazear v. Ohio Val. Steel Foundry Co., 65 W. Va. 105, 63 SE 772. Persons encouraging issuance of receiver's certificates to complete plant of insolvent corporation, receiving part of cash proceeds of such certificates, and encouraging investment of part of such proceeds in machinery sold by them to complete the plant, held estopped to assert priority of payment for balance of price of machinery as against holders of certificates declared to be first liens on plant. Id. Where maker of a note declared to intending buyer that note was all right and promised to pay it, he could not thereafter plead set-off based on payee's liability to him growing out of a suretyship, having theretofore been silent on the subject. Harris' Ex'rs v. Walker [Ky.] 115 SW 220. Grantor and those claiming under him held estopped by grantors pointing out boundary line to grantee who bought and made valuable improvements relying thereon. Seberg v. Iowa Trust & Sav. Bank [Iowa] 119 NW 378. Prior mortgagee is estopped to deny payment of his mortgage as against subsequent mortgagee relying on his representation that it was paid. Powell v. Tinsley, 137 Mo. App. 551, 119 SW 47. Borrower of money representing to lender taking mortgage that part of land not actually used by him is not homestead held estopped to claim such land as homestead. Watkins Land Co. v. Temple [Tex. Civ. App.] 119 SW 728. Remainderman who urged taking oil lease from life tenant, encouraged lessee's expenditure of money, and received checks payable to his own order for royalties, held estopped to question validity of lease. McIntosh v. Ropp, 222 Pa. 606, 72 A 230. Holder of outstanding title, who by declarations induces occupant of land to believe that such title will not be asserted, is estopped to deny occupant's claim to value of betterments on ground he had knowledge of adverse title (Richmond v. Ashcraft, 137 Mo. App. 191, 117 SW 689), though he was not estopped by refusal of occupant's previous offer to convey to him if he would give credit for what he was out or because of failure to sue for the land until occupant sought to quiet title (Id.). Judgment creditor held equitably estopped to assert priority of lien over a mortgage, hav-

ing represented by counsel in action to foreclose that he had no defense, and mortgagee having thereupon taken conveyance of the land in settlement. Smith v. Munger [Miss.] 47 S 676. Assignee of judgment for comparatively insignificant consideration, pending foreclosure, held also estopped, property having been sold to innocent purchasers. Id. Mother held estopped to claim as heir of son, having assured son less than four hours before son's death that his wife should have all the property and thus induced son not to make will or deed. McDowell v. McDowell [Iowa] 119 NW 702. Master held estopped to assert want of timely statutory notice to him of injury to servant, if by letter to servant's wife he intended to consent that notice be deferred until extent of injuries were known. Wolven v. Gabler, 132 App. Div. 45, 116 NYS 359. That corporation succeeding to a partnership which was member of a chamber of commerce continued to do business with officers of chamber without complying with rule requiring members to obligate themselves to observe rules and regulations held not to estop chamber from asserting that such corporation was not member and as such entitled to lien on other memberships. McCarthy Bros. Co. v. Chamber of Commerce, 105 Minn. 497, 117 NW 923.

Clothing another with apparent ownership of property: Assignee of contract to purchase land leaving assignor in possession with right to "handle the property" **held estopped** as against assignor's innocent subsequent purchaser. Mills v. Rossiter [Cal.] 103 P 896. Purchasers relying on apparent ownership conferred by true owner will be protected. Sullivan v. Moore [S. C.] 65 SE 108. Allowing another to appear as real owner of property whereby innocent persons are led to deal with him. Mohler v. Grange, 142 Ill. App. 357. Where principal invests agent with apparent authority to dispose of former's property, he cannot recover value from innocent buyer. Wilcox-Rose Const. Co. v. Evans, 9 Cal. App. 118, 98 P 83. Course of conduct which would estop a landlord to assert his lien against purchaser from tenant would be equally effective to estop mortgagee of timber from asserting his lien against innocent purchaser from mortgagor. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176. One who gave deed as mortgage held estopped to claim equitable ownership against purchaser from grantee whom he permitted latter to deal with as owner. Richardson v. Beaber, 62 Misc. 542, 115 NYS 821. Persons concealing their heirship under circumstances charging them with notice that widow administered estate and paid out money on theory she was sole heir held estopped to recover damages from defendant for conveying land to widow in performance of contract with decedent, where but for such concealment widow and grantor could have protected themselves. Lewis v. Jerome, 44 Colo. 459, 99 P 562. Corporation issuing stock certificate to a person thereby holds out that he is owner and has capacity to transfer it. Mundt v. Commercial Nat. Bank [Utah] 99 P 454. Owner putting another's brand on cattle and placing them with him for pasture held estopped to assert title against innocent mortgagee of person in possession. First Nat. Bank v. Kissare [Okl.] 98 P 433. Owner permitting partnership to hold and deal with property as its own is estopped against creditors of firm to claim goods or proceeds. Holder v. Shelby [Tex. Civ. App.] 118 SW 590. Vendor taking negotiable notes and mortgage but placing same in maker's possession with full indicia of ownership to enable him to borrow money held estopped as against innocent lender who took new notes and mortgage on cancellation of the old. Richard v. Charlot, 122 La. 492, 47 S 841. Purchaser of goods who received invoice and left goods with seller as bailee, right to receive purchase price having been assigned to a bank, **held not estopped** to question bailee's pledge for his own benefit, not having invested seller with apparent title or otherwise misled pledgee. Schwab v. Oatman, 129 App. Div. 274, 113 NYS 910. Transferee of stock held not to vest employe of brokers with indicia of title by delivering certificates to him for transfer on corporation's books so as to preclude suit against brokers for conversion of stock in transaction with employe. Kilmer v. Hutton, 131 App. Div. 625, 116 NYS 127.

25. Must be act in reliance on representation or conduct. Burchard-Hulburt Inv. Co. v. Hanson, 143 Ill. App. 97; Schott v. Linscott [Kan.] 103 P 997. Essential element is reliance on representation or concealment inducing conduct of person to whom it is made. Fuelling v. Fuesse [Ind. App.] 87 NE 700. Must be shown that conduct or representations influenced, and were relied on. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170. Representations or acts must be prior to alleged detrimental conduct of other party. Foard v. McAnnelly, 215 Mo. 371, 114 SW 990. That plaintiff in ejectment testified that long before he purchased land from another defendant admitted that he and such other owned the land in common held insufficient as matter of law to show reliance on such statement. Tune v. Beeland, 131 Ga. 528, 62 SE 976. Must appear that purchaser asserting estoppel by reason of owner's conduct inducing purchase as property of another was ignorant of the facts and acted on alleged inducements. Stonecepher v. Kear, 131 Ga. 688, 63 SE 215. Landowner's statement to intending purchaser that he would set back his fence to line recited in his deed must have been a controlling factor relied on by purchaser at time of purchase. Warden v. Addington [Ky.] 115 SW 241. Evidence insufficient to show that it was such. Id. That purchaser of a lot on an alley believed alley was private and later obtained deed from owners of fee of alley held not to estop him from thereafter regarding alley as public. Thomas v. Metz, 236 Ill. 86, 86 NE 184. Statements and admissions as to liability for services rendered and amount thereof held not conclusive on defendant, it not appearing plaintiff did, or refrained from doing, anything in reliance thereon. Conant v. Evans, 202 Mass. 34, 88 NE 438. Heirs held not estopped to claim land where they had no knowledge of sale thereof until after it was made, and evidence did not show they misled purchaser or that he relied on anything they did or said but on contrary relied on records. Starr v. Bartz, 219 Mo. 47, 117 SW 1125; Starr v. Kisner, 219 Mo. 64, 117 SW

prejudice.[26] The attempted act by the person estopped need not amount to actual

1129. Naked promise of owner to waive time clause in building contract not acted upon by contractor held insufficient to estop owner from claiming damages for delay. Jobst v. Hayden Bros. [Neb.] 121 NW 957. Bank held not estopped, by certifying it had set apart money as balance of a depositor's account subject to order of court, from showing depositor had no account, no one having acted or refrained from acting because of representation. Lazarus v. Union Bank of Brooklyn, 116 NYS 710. Assignor for creditors held not estopped by representations to assignee made after assignment, and therefore not influencing it. Falls City Lumber Co. v. Watkins [Or.] 99 P 884. Silence by one who knew nothing of conveyances until after they had been made held insufficient since grantee could not have relied thereon. Sullivan v. Moore [S. C.] 65 SE 108. Admissions estop only where acted upon. Floyd v. Kulp Lumber Co., 222 Pa. 257, 71 A 13. In ejectment, held insufficient to establish estoppel against defendant, to show that in prior ejectment action defendant's predecessors had made certain admissions on issue of whether the land had been assessed as seated as well as unseated land. Id. Estoppel based on boundary agreement held not available to one not relying on failure to receive notice of repudiation thereof. Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857. Plaintiff held not estopped to deny boundary shown by plat, it not appearing plat was any inducement to purchasers. Franklin v. Texas Savings & Real Estate Inv. Ass'n [Tex. Civ. App.] 119 SW 1166. Statements by ejectment plaintiff in derogation of his title held inadmissible to support defense of estoppel, it not appearing defendant claiming under subsequent deed had knowledge of or acted on them. Chase v. Woodruff, 138 Wis. 641, 120 NW 499. That plaintiff dealt with a certain concern as a corporation held not to estop him from denying it was such before filing of articles, defendants not being ignorant of the truth, and not being induced to act in reliance of representations. Harrill v. Davis [C. C. A.] 168 F 187. Sheriff held not estopped to claim reimbursement for expense for water and gas service for jail by telling county court he was going to use "city water and gas if he had to pay for it himself." Harkreader v. Vernon County, 216 Mo. 696, 116 SW 523.

26. Crawford v. Engram [Ala.] 47 S 712; Amundson v. Standard Print. & Mfg. Co. [Iowa] 118 NW 789; Fryer v. Harker [Iowa] 121 NW 526; Schott v. Linscott [Kan.] 103 P 997; Ford Lumber & Mfg. Co. v. Cress [Ky.] 116 SW 710; National Shutter Bar Co. v. Zimmerman & Co., 110 Md. 313, 73 A 19; Falls City Lumber Co. v. Watkins [Or.] 99 P 884; Franklin v. Texas Savings & Real Estate Inv. Ass'n [Tex. Civ. App.] 119 SW 1166; Kopperl v. Standard Distilling Co. [Tex. Civ. App.] 119 SW 1169; Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345; Atlantic Coast Line R. Co. v. Bryan [Va.] 65 SE 30; Butler v. Supreme Court I. O. F., 53 Wash. 118, 101 P 481.

Held prejudiced: One who gave renewal note covering one genuine and one forged note, both of which were surrendered to him and time for payment extended, held estopped to set up forgery eight months later when bank had gone into liquidation. First State Bank v. Williams [Iowa] 121 NW 702. City's acquiescence for over ten years in segregation of part of its territory held to estop it from thereafter questioning method adopted, residents of segregated portion having presumably foregone municipal privileges and made improvements. State v. Willis [N. D.] 118 NW 820.

Held not prejudiced: No estoppel by sworn statement in **claim for lien** that a milling company was a corporation, defendants not being induced to act so that they would be injured by proof of truth. Harrill v. Davis [C. C. A.] 168 F 187. Prior assignees of vendor's lien held not estopped to assert claim to judgment obtained thereon by subsequent assignees from same assignor, they not having been parties to suit to enforce lien and not having caused plaintiffs therein to change their position nor mislead them. Powell v. Powell, 217 Mo. 571, 117 SW 1113. Oral consent by wife to execution of **boundary agreement** by husband held not to estop her, no person having been induced to invest money in her land excluded by the agreement. Lee v. Wheat, 33 Ky. L. R. 724, 111 SW 307. **Executor** held not estopped, by allegations or admissions in previous action by him against a judgment creditor, to attack judgment sought to be enforced against property of estate, where estate derived no benefit and creditor sustained no injury. Harris v. Wooward [Ga.] 65 SE 250. Assent to and procuring execution of **deed of gift** held not to preclude assertion of an interest in the land, donee not having changed position. Westmoreland v. Plant [Ark.] 116 SW 188. **Foiiure to contest will** induced by a promise of sole beneficiary held insufficient to estop him, there being no reasonable grounds for contest. Crawford v. Engram [Ala.] 47 S 712. **Carrier's** letter to shipper claiming lost goods, asking for information and promising that the matter would "receive attention," held insufficient to estop carrier to insist that claim was too late. Atlantic Coast Line R. Co. v. Bryan [Va.] 65 SE 30.

Checks and notes: Bank inadvertently honoring check drawn by one for whom money had been deposited on condition without compliance with condition, and issuing passbook therefor to payee, held not estopped by passbook, having given notice within twenty-four hours after discovery of error and it not appearing payee had changed his position. Republic Life Ins Co. v. Hudson Trust Co., 130 App. Div. 618, 115 NYS 503.

Acts of public corporations: Town council held not estopped to set up invalidity of ordinance extending time set in another ordinance for furnishing gas by complainant company to inhabitants of town, it not appearing complainant was misled to its injury. Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007.

Insurance policies: Act of insurance beneficiary in obtaining divorce from absent husband and thus representing that he was alive held not to estop her as against insurer from thereafter asserting that insured died prior to date of action for divorce, insurer

fraud, constructive fraud being sufficient,[27] and one whose negligence amounts to a representation is estopped as against third persons acting on the faith thereof.[28] The person claiming the estoppel must have been without knowledge, actual [29] or constructive,[30] of the facts.

being in no way prejudiced by divorce action. Butler v. Supreme Ct. I. O. F. 53 Wash. 118, 101 P 481.

Sales: Seller of timber not induced to change position by reason of buyer's letter intimating that wany stock would be accepted could not assert estoppel against buyer. Burton v. Berthold [C. C. A.] 166 F 416. Purchaser of a business held not estopped by notice that he would be responsible for bills against seller, it not appearing plaintiff relied on the notice and changed his position for worse. Kopperl v. Standard Distilling Co. [Tex. Civ. App.] 119 SW 1169. Acceptance of stock by buyer after time for delivery by seller and after refusal of demand therefor held not to estop buyer from recovering damages for depreciation in value of stock. Chapman v. Fowler, 132 App. Div. 250, 116 NYS 962. Vendee's indulgence as to time within which vendor was required to give title held not to estop him from demanding return of his deposit, defendant not having been injured. Garrett v. Cohen, 63 Misc. 450, 117 NYS 129. Grantee of prior grantee of timber chargeable with record notice of time limit for removal by his grantor held not entitled to invoke estoppel against original grantor based on failure to object to cutting of timber after time limit, especially where such grantor was ignorant of his rights. Ford Lumber & Mfg. Co. v. Cress [Ky.] 116 SW 710. Buyer of three tanks for gross sum held not estopped to insist on contract price because he accepted tanks knowing seller claimed that sum named was for each tank. W. E. Caldwell Co. v. Steckel [Iowa] 121 NW 376. Seller retaining title until execution of note and mortgage held not estopped by accepting securities from vendee's assignee from contending title did not pass to original buyer before securities were executed, as against original buyer's landlord claiming lien for rent, it not appearing landlord was in any way misled by any change in the property. Amundson v. Standard Print. Co. [Iowa] 118 NW 789.

27. Engholm v. Ekern [N. D.] 119 NW 35, Must be based on fraud actual or constructive. Franklin v. Texas Savings & Real Estate Inv. Ass'n [Tex. Civ. App.] 119 SW 1166. "Designed fraud" not essential to estoppel. In re Saunders, 129 App. Div. 406, 113 NYS 251.

28. One who intentionally or by culpable negligence induces another to act on his representations is thereafter estopped to deny their truth. Jett v. Crittenden & Co. [Ark.] 116 SW 665. Creditor inducing another to advance money to debtor by negligently misstating amount of debtor's obligations held estopped to assert priority based on any excess. Id. Bank negligently issuing check for amount of a deposit to one representing himself to be depositor held estopped to deny that such person was payee of the check, as against third persons cashing the check. Gallo v. Brooklyn Sav. Bank, 129 App. Div. 698, 114 NYS 78. Bank liable to purchaser of check having been negligent and having had reason to believe check would be used to defraud. Id. Maxim placing loss on negligent innocent sufferer as against one who was not negligent held not applicable to deprive of title one who had recorded his deed where record was thereafter disfigured without his fault. Williams v. Butterfield, 214 Mo. 412, 114 SW 13.

29. Facts must be unknown to the party misled. Schott v. Linscott [Kan.] 103 P 997. Estopped under § 2823, Civ. Code 1895, operates only in favor of an innocent purchaser without notice. Meetze v. Potts [Ga. App.] 64 SE 672. Standing by and failing to disclose title does not work estoppel as against purchaser with notice. Stonecipher v. Kear, 131 Ga. 688, 63 SE 215. Purchaser of land with notice of vendor's defective title held not entitled to invoke estoppel against grantor's grantor holding legal title. Hingtgen v. Thackery [S. D.] 121 NW 839. Assignee of a judgment held not estopped from suing thereon because as amicus curie he procured dismissal of an appeal therefrom by suggesting death of judgment creditor without revealing assignment of judgment to himself, defendant having had notice of assignment when motion to dismiss was made. Hamilton v. New Haven [Conn.] 73 A 1. No estoppel can arise where each party has equal knowledge. Russell v. State, 171 Ind. 623, 87 NE 13.

30. Oral declarations of officers of building and loan association in conflict with written contract afterwards made held not to estop association, stockholder being presumed to know contents of note, certificate of stock and articles of association. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694. Where **means of knowledge** are equal for both parties, silence or acts do not estop. Bader v. Chicago Mill & Lumber Co., 134 Mo. App. 135, 113 SW 1154. Married woman held not estopped to redeem from land as against purchaser from devisee after voluntary nonsuit in prior action by her to redeem, such action being **sufficient to rouse inquiry.** Rich v. Morisey, 149 N. C. 37, 62 SE 762. Where estoppel relates to title to realty, party asserting estoppel must have been ignorant not only of true title but of any convenient means of acquiring knowledge. Stonecipher v. Kear, 131 Ga. 688, 63 SE 215. Statement that a contract in other party's possession was all right and that anything such party sold third person was all right held not to estop person making the statement to insist on true construction of contract. Id. One who buys land in possession of a third person is charged with notice of latter's claim. Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857. See, also, Notice and Record of Title, § 1. **Failure to read an instrument** before signing it does not preclude one from asserting an estoppel as to its contents. Hale v. Hale, 62 W. Va. 609, 59 SE 1056.

Must take notice of law: Erroneous construction of law by city authorities resulting

Likewise, one may not repudiate to another's prejudice what he has voluntarily assented to [81] or accepted,[82] and, accordingly, one is often said to be estopped by his

in city paying for paving which should have been paid for by special assessment held not to estop city from levying special assessment to cover cost of new paving under a subsequent law. Carstens v. Fond du Lac, 137 Wis. 465, 119 NW 117. City held not estopped to deny validity of permit to construct vault under alley issued by commissioner of public works where ordinance, of which licensee must be presumed to know, prohibited granting of such license. J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93. City held not estopped to deny validity of permit issued without any authority, which was not induced by any act of city or any of its officers nor even with their knowledge, even though licensee relying on license has begun work thereunder, has prepared plans, let contracts, etc., and will be put to great expense if license be held invalid. Id.

31. Principal accepting money from surety with which to pay the debt is estopped to assert against him that he paid debt with his own money. Holtzclaw v. Craynor Smith Lumber Co. [Ky.] 114 SW 271. **Attorney** who, in preparing account for administratrix, includes $100 as paid him for procuring her appointment, cannot, after final settlement precluding reimbursement to her, claim lien on money in his hands for any excess over $100. In re Mahar, 131 App. Div. 420, 116 NYS 1068. Where **infants' money was invested** in land by judicial decree on express condition that plaintiff should release a vendor's lien, fraud of another, inducing such release, would not justify subjection of infant's interest to payment of debt secured by lien. Hotfil v. Deweese's Trustee [Ky.] 112 SW 1095.

Title to personalty: Owner of personalty may be estopped by acts and declarations from asserting title against purchaser from one who had no title. Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 SE 887.

Payment by executor: Married daughter consenting to payment by mother's executor of certain sums to third persons pursuant to testatrix's letter accompanying will held estopped thereafter to object to such payment. Nagle v. Von Rosenberg [Tex. Civ. App.] 119 SW 706.

Acts of trustee: Children of age consenting in writing to mortgage of mother's estate by trustee held bound thereby despite irregularity in trustee's application for right to mortgage. Watson v. Equitable Mortgage Co. [Ga.] 63 SE 912. Testamentary beneficiary consenting to division of trust fund among three trustees for management pursuant to will held not estopped to complain of division and management in violation of terms of will. Nagle v. Von Rosenberg [Tex. Civ. App.] 119 SW 706.

Occupation of land: Where railroad company laid tracks under permission and consent of owner of soil and his assurance that satisfactory agreement would later be made, it could not thereafter be ousted by ejectment. Cape Girardeau, etc., R. Co. v. St. Louis & G. R. Co. [Mo.] 121 SW 300.

Performance of contract: Vendor of realty held estopped to assert default of vendee in making cash payments in defense of suit for specific performance, having made separate agreement to receive payment in commissions plaintiff might earn for selling other land under which agreement plaintiff performed services. Lawler v. Densmore-Compton Bldg. Co., 63 Misc. 458, 118 NYS 468. Seller of lumber consenting to buyer's contention as to disputed classification and permitting placing of lumber in condition rendering it impossible to afterwards determine how it should be graded held estopped to deny buyer's classification. Federal Lumber Co. v. Reece [Ky.] 116 SW 783.

Carriage of goods: Carrier issuing bill of lading is estopped to deny receipt of the goods against innocent persons advancing money in reliance thereon. Missouri, K. & T. R. Co. v. Sealy [Kan.] 99 P 230.

No assent shown: Declarations of attorney who was without authority held not admissible to estop plaintiff. Asheville Suppy & Foundry Co. v. Machin, 150 N. C. 738, 64 SE 887.

32. Wards **held not estopped** to reclaim property unfairly obtained by guardian, on theory of ratification or other conduct. Brandau v. Greer [Miss.] 48 S 519.

Acceptance of tender in full settlement: Acceptance and retention of money on check tendered in full held estopped to claim more though payee immediately wrote that amount was insufficient. Knapp & Co. v. Pepsin Syrup Co., 137 Mo. App. 472, 119 SW 38. Though under some circumstances a creditor may estop himself by accepting only portion of his claim (Cole v. Utah Sugar Co. [Utah] 99 P 681), he may receive less than all money or other property belonging to him and thereafter demand remainder in absence of accord and satisfaction (Id.). That owner of a fund received what was left after part of it had been wrongfully paid to another, held not to preclude recovery of amount so paid without right. Id. Divorced wife seeking modification of divorce decree held not estopped by acceptance of provisions under decree and under contract for devision of property rights where decree and contract were obtained by fraud and under influence of husband and under wife's misapprehension of her full legal rights. Holt v. Holt [Okl.] 102 P 187. Attorney's failure for several days to return check for compensation after settlement by client with adverse party held not to estop him from claiming amount actually due, he being entitled to a reasonable time to inquire into facts of settlement. Cain v. Moore [Wash.] 103 P 1130. Deputy sheriff entitled to statutory compensation cannot estop himself from claiming full payment by accepting less as satisfaction in full. Bodenhofer v. Hogan [Iowa] 120 NW 659.

Acceptance of partition or division: Acceptance of share allotted in oral partition held to estop heir from claiming any interest in shares allotted to other heirs. French v. Branger [Ky.] 121 SW 437. Acquiescence in oral partition, transfers, delay, and improvements, held estoppel of heirs and their assigns to claim in contravention thereof. Wooton v. Murrell [Ky.] 119 SW 191. Adults

own agreements,[33] promises,[34] admissions,[35] or recitals.[36] Estoppel cannot ordi-

held estopped to question validity of partition proceedings, having accepted their distributive shares and acquiesced for 15 years. Keel v. Jones [Miss.] 47 S 385. Where will gave land to son for life, remainder to son's daughter, fact that daughter in partition after her father's death accepted portion alloted to him did not estop her to assert that her father took only a life interest. Trustees of Common School Dist. No. 31 v. Isaacs' Guardian [Ky.] 115 SW 724.

33. **Held estopped:** A party to a contract is estopped on grounds of public policy and good faith from refusing to fulfill a promise with respect to such contract which induced others to take an assignment thereof. Galbreath v. Wallrich [Colo.] 102 P 1085. Owners of cotton intrusting prosecution against government for destruction of same to one of their number and permitting him to represent to government that he was sole owner held not entitled to complain that his administrator employed an attorney on contingent basis to enforce claim. Pennebaker v. Williams [Ky.] 120 SW 321. Oral assent of officer of railroad company to assignment of contract to furnish ties to company held to estop company from thereafter denying consent. Galbreath v. Wallrich [Colo.] 102 P 1085. Purchaser of a business refusing to allow seller to assign unexpired lease to him as per agreement, until such assignment was rendered impossible by sale of the premises, held estopped to assert failure to assign, in action for purchase price. Germantown Dairy Co. v. McCallum [Pa.] 72 A 885. Landowner's oral agreement permitting railroad to cross his premises held to estop him from setting up company's failure to file a plan with register of deeds in impeachment of location. United States Peg Wood, Shank & Leather Board Co. v. Bangor & A. R. Co., 104 Me. 472, 72 A 190. Agreement on monuments marking a division of land followed by grantee's possession and improvements in reliance thereon held conclusive. Seberg v. Iowa Trust & Sav. Bank [Iowa] 119 NW 378. Vendor agreeing with vendee to subordinate purchase mortgage to any subsequent building loan mortgages vendee might give, and to make instruments of subordination, held estopped to assert priority of his mortgage over subsequent mortgage taken by a bank in reliance on such agreement, though no further subordination instrument was made by vendor. Londner v. Perlman, 129 App. Div. 93, 113 NYS 420. In action to establish plaintiff's right to a roadway defendant held not estopped to assert uncertainty of judgment awarded, by reason of an agreement set forth in answer, acknowledging existence of a way but not one coinciding with that adjudged. Leverone v. Weakley [Cal.] 101 P 304. Where one representing himself as holder of legal title to land contracted with attorneys to recover it for one-third interest, at instance and request of equitable owner, an quitable interest passed by way of estoppel as against equitable owners though contract was inoperative as against legal owners. Lewright v. Davis [Tex. Civ. App.] 115 SW 599.

Held not estopped: Evidence insufficient to establish estoppel against plaintiff by agreement or conduct relating to boundary line of lot claimed by her. Bell v. Redd [Ga.] 65 SE 90. Agreement by heir threatening to contest will not to do so in consideration of payment of legacy plus a certain sum held not to estop him from claiming an interest in estate on will being set aside at suit of others. Dougherty v. Gaffney, 239 Ill. 640, 88 NE 150. Estoppel cannot be based on oral agreement "to convey," though vendee takes possession and makes payments and improvements with vendor's knowledge. Zeuske v. Zeuske [Or.] 103 P 648. One not under obligation to pay taxes on land nor in privity with any one so liable may obtain tax title thereto and while in possession thereunder may accept a conveyance from former owner without incurring risk of losing his land for failure to pay a mortgage given by such owner and requiring him to pay taxes. Carson v. Fulbright [Kan.] 103 P 139.

34. Seller of railings regaining possession on a distinct promise to return them held estopped to assert right to retain them. Richards v. Shepherd [Ala.] 49 S 251. Promise of owner not to insist on time clause in building contract held to estop him from disallowing claim for extension of time under clause covering delay due to owner's fault, on ground no written claim therefor had been made as required by contract. Jobst v. Hayden Bros. [Neb.] 121 NW 957.

35. Estate of a decedent held not estopped to dispute plaintiff's ownership of land by decedent's memorandum to plaintiff stating such ownership but fairly construable as on condition that he pay for it which plaintiff never did. Stevenson v. Haynes, 220 Mo. 199, 119 SW 346. Plaintiff's retention of note for money furnished and his declarations of uncertainty as to how he stood in relation to the land held inconsistent with claim of ownership. Id. Relationship of mother-in-law and son-in-law held to preclude estoppel of mother-in-law to claim title to land by reason of statements made to son-in-law who lived in same family and was obliged to inform her of her rights. Watkins v. Watkins [Tex. Civ. App.] 119 SW 145.

36. See, also, ante, § 3. In action for stenographer's fees, **bill of costs** by successful to unsuccessful party held not conclusive against party rendering bill as to amount of liability, it not being shown that plaintiff acted on such admission to his detriment. Eckstein v. Schleimer, 62 Misc. 635, 116 NYS 7. Recital in **contract** not amounting to precise affirmation of a fact will not estop denial of the fact. Nashville, etc., R. Co. v. Proctor [Ala.] 49 S 377. Defendant, in action for breach of contract reciting that plaintiff held lease to a mine, and requiring defendant to drain it, held estopped to deny plaintiff's rights under lease. Carter v. Cairo, V. & C. R. Co., 240 Ill. 152, 88 NE 493. Wife held not estopped to assert invalidity of foreclosure sale by **mortgage certificate** annexed to dation en paiement, she not having assumed payment of mortgage, and facts certified or recited relating solely to inscription and nonerasure of mortgage. Pons v. Yazoo & M. V. R. Co., 122 La. 156, 47 S 449. Stockholders giving **bill of sale** of property of corporation reciting that corporation was not indebted to them held es-

narily result from an invalid contract,[37] though it is otherwise where a mere rule of evidence would prevent proof of the contract at law.[38] One who treats an instrument, transaction or proceeding as valid and regular by participating therein,[39] or recognizing and ratifying the same,[40] as by deriving benefits therefrom,[41] is not

topped to claim wages for services rendered to corporation before sale. Argo Mfg. Co. v. Parker, 52 Wash 100, 100 P 188. Marking of **mortgage notes** "paid" when turned over by mortgagee to his assignee held not to estop latter from showing as against mortgagor's grantee assuming mortgage that word "paid" meant only that notes had been taken up in accordance with agreement with mortgagee. Geddis v. Northwestern Trust Co. [S. D.] 122 NW 587. Recitals in **county bonds** held to estop county as to innocent purchaser. County of Presidio v. Noel-Young Bond & Stock Co., 212 U. S. 58, 53 Law. Ed. —.

37. Married woman conveying without her husband's signature is not estopped to assert the invalidity of the deed. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552. In ejectment defendant cannot set up oral agreement of plaintiff to convey the land to defendant on fulfillment of certain terms, as estoppel against plaintiff, though defendant has made payments and valuable improvements thereunder. Zeuske v. Zeuske [Or.] 103 P 648.

38. Where a parol modification of a sealed contract has been executed, party is estopped to deny it. Stoneking v. Long, 142 Ill. App. 203.

39. **Sureties on replevin bond** estopped to deny jurisdiction of court. Janssen v. Duncan, 43 Colo. 286, 95 P 922.

Contract: Administratrix appointed by probate court of wrong county and releasing mortgage held by estate, under order of such court, held estopped by release to assert a personal interest in mortgage against a person relying on the transaction, though proceedings were void. Anderson v. Walter [Kan.] 99 P 270. Continued payments of premiums by insured and beneficiary after unauthorized increase of premiums by company held to work estoppel to sue for breach of contract. Voss v. Northwestern Nat. Life Ins. Co., 137 Wis. 492, 118 NW 212. Bondsmen executing judgment note to cover defalcations of cashier of a bank held estopped in proceedings to open judgment to set up want of consideration. People's Bank v. Stroud [Pa.] 72 A 341. Voluntary surrender of unrecorded deed by grantee to grantor with mutual intention to relinquish title in consideration of other agreements founded thereon estops grantee from asserting further rights under deed. Brown v. Brown [Iowa] 120 NW 724. Father withholding deed from record and inducing grantor to give another deed to son, causing latter deed to be recorded, held estopped to deny son's title, whether his conduct was in consideration of love and affection for son, or because first deed had been lost, or because father desired to defeat efforts of state to collect on a bond on which he was surety. Griffitts v. Griffitts [Ky.] 119 SW 784. One who consents to the destruction of unrecorded deed for honest purpose of revesting title in grantor is estopped to re-establish deed. Thomas v. Scott, 221 Mo. 271, 119 SW 1098. Evidence held to sustain finding deed was not destroyed at grantee's request but to prevent others from getting the land. Id. In action by principal against co-principal to recover excess of commissions paid agent over plaintiff's share, defendant held estopped by statement, relied on by plaintiff, requesting plaintiff to charge him with sales to a certain amount. Cohen v. Levine, 114 NYS 840.

Judicial sale: Second mortgagee held estopped to dispute first mortgagee's title under his mortgage sale, having by his agent participated in the sale. Weber Implement Co. v. Dunard [Mo. App.] 120 SW 608. Equitable owner present and directing sale of land and receiving consideration held estopped as against innocent vendees, despite defective power of attorney. Lewright v. Davis [Tex. Civ. App.] 115 SW 599.

Trial: Participating in trial before disqualified judge and recognizing validity of judgment by moving for new trial on other grounds held estoppel to question authority of judge. Baldwin v. Ragan [Ga. App.] 65 SE 335.

Proceedings before board: Drainage commissioner taking part in proceedings for establishment of drainage district, including assessment of benefits against his own land, is estopped to assert that court was without power to confirm assessment. People v. Seaman, 239 Ill. 611, 88 NE 212.

Dissolution of corporation: Stockholders participating in dissolution proceedings for division of proceeds of assets held precluded in subsequent action against another corporation, which had guaranteed dividends, from showing that dissolution was brought about by fraud of such corporation. Bijur v. Standard Distilling & Distributing Co. [N. J. Eq.] 70 A 934.

40. Purchasers of county land treating option held by another as valid by compromising with him prior to purchase held estopped to deny validity of option in action to enforce compromise agreement. Ellerd v. Cox [Tex. Civ. App.] 114 SW 410. Corporation and stockholders encouraging negotiations whereby director transferred to third person corporate property acquired by director at voidable sale held thereafter estopped to attack director's purchase. Fagan v. Stuttgart Normal Inst. [Ark.] 120 Ill. 404. Where bookkeeper of a firm made overdraft on a bank for individual debt of a partner, at such partner's instance, such partner was estopped to deny bookkeeper's authority as against bank. Morris v. First Nat. Bank [Ala.] 50 S 137.

Corporate affairs: Ratification by corporation of acts and promises of its managers as to its assumption of a certain debt on taking over a business so as to work estoppel to deny liability held for jury. Parsons Mfg. Co. v. Hamilton Ice Mfg. Co. [N. J. Law] 73 A 254. That defendant in breach of promise case had discussed with plaintiff divorces obtained by her from prior husbands, and had examined divorce decrees before engaging to marry plaintiff, held not to estop him from

in a position to assert irregularity, and one is estopped to take advantage of his own wrong.[42] Mere lapse of time is not sufficient to create an estoppel against the as-

setting up invalidity of decrees. Harpold v. Doyle [Idaho] 102 P 158.

41. One who solely by assistance of other creditors succeeded in clearing land of mortgage fraudulent as to such others but good as to him cannot claim land free of all liens and incumbrances as against defrauded creditors. Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754. Paving company paid in full held estopped, in suit by city against it on guaranty contained in contract, to set up irregularity in raising funds to pay for the work. City of Akron v. Barber Asphalt Pav. Co. [C. C. A.] 171 F 29.

Invalid instruments: College receiving and retaining valuable rights and property under agreement made by an officer held not in position to refuse to pay price because officer was without authority. Doolittle v. Keuka College, 129 App. Div. 829, 114 NYS 662. Surety on municipal contractor's **bond** receiving consideration for executing it held estopped to assert its invalidity based on want of authority in city to take it. Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960. The obligor having received the benefits of a bond cannot question its validity. McCormick v. Unity Co., 142 Ill. App. 159. One who executes a bond and thereby obtains and acts upon an injunction is estopped to deny validity of bond. Columbia Amusement Co. v. Pine Beach Inv. Corp. [Va.] 63 SE 1002. One who takes and retains property under a **will** cannot be heard to question its validity. Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049. Lessor accepting benefits of **lease** to a partnership cannot set up incapacity of firm to take title to realty, in action by partnership for specific performance of covenant to renew. Gorder v. Pankonin, 83 Neb. 204, 119 NW 449. One who subscribes for stock after he has acted as director of corporation, and in order to qualify as director is estopped to repudiate **subscription** on ground of variance between it and corporate charter. Keystone Life Ins. Co. v. Von Schlemmer, 122 La. 280, 47 S 606. One who has received benefits of **void judgment** cannot thereafter assail it. Rule not applicable to case where infant gave deed for valuable consideration after rendition of void judgment designed to remove his disability, grantee having had knowledge of the facts. Lake v. Perry [Miss.] 49 S 569.

Invalid sales: One who takes credit for part of proceeds of trustee's sale held estopped to impeach it for irregularity. Grooms v. Mullett, 133 Mo. App. 477, 113 SW 683. Trustee individually, and cobeneficiary, held estopped to question validity of conveyance by trustee from which they derived benefits for 17 years, during which bona fide purchasers made extensive improvements. Doscher v. Wyckoff, 63 Misc. 414, 113 NYS 655. Father by putting son in possession of homestead under deed invalid because not joined in by wife and receiving stipulated payments held estopped to question validity of transaction. Lucy v. Lucy, 107 Minn. 432, 120 NW 754. One who participates in proceeds of sale of property is estopped thereafter to recover on forthcoming bond on theory sale was invalid. Barnes v. Vandiver, 5 Ga. App. 162, 62 SE 994. Owner's ratification of tax sale by acceptance of surplus over amount of taxes held to estop him and subsequent grantee from questioning validity of sale, though owner did not know at time he accepted surplus that sale was void. Proctor v. Nance, 220 Mo. 104, 119 SW 409. Infant who after majority accepted his part of proceeds of land sold at void sale by order of court, allowing deed to be made to purchaser and not asserting title for years or until innocent purchaser acquired it, held estopped. Williamson v. Mann [Ky.] 119 SW 232. Minors whose lands inherited from mother were sold by administrator of father's estate without authority held not estopped to dispute right of purchaser to lien for purchase price, though proceeds were applied in part for their benefit, they not being responsible therefor. Vivion v. Nicholson [Tex. Civ. App.] 116 SW 386. That heirs accepted money for land sold by administrator held not to preclude them from suing in ejectment, purchaser being entitled to set up right to lien. Pearson v. Caldwell [Miss.] 47 S 436. Adult heirs with full knowledge accepting and retaining as part of distributive shares money derived from administrator's sale held not entitled to have sale set aside because land was homestead. Mote v. Kleen, 83 Neb. 585, 119 NW 1125. That heirs received and disposed of balance of estate after invalid administrator's sale held not to estop them from thereafter attacking sale. Wilkin v. Owens [Tex.] 114 SW 104. See Id. [Tex.] 115 SW 1174. See, also, Id. [Tex.] 117 SW 425. Purchaser of patent rights held precluded from setting up invalidity of contract after fifteen months' benefit therefrom and continued payments thereon with full knowledge of the facts. Hein v. Westinghouse Air Brake Co., 172 F 524.

Condemnation proceedings: One who petitions for and receives condemnation damages deposited in court cannot thereafter assail condemnation proceedings. Cape Girardeau, etc., R. Co. v. Southern Illinois & Missouri Bridge Co., 215 Mo. 286, 114 SW 1084.

42. Trustees conveying property in fraud of beneficiaries held not in position to avoid transaction as to their individual interests in trust estate. Jackson v. Thomson, 222 Pa. 232, 70 A 1095. Railroad company operating telegraph business for profit held estopped to set up that it had **no telegraph franchise** in action to recover taxes. Minneapolis, etc., R. Co. v. Oppegard [N. D.] 118 NW 830. Directors of a corporation assenting to terms of sale of land to corporation cannot, after being required to forfeit **secret profits,** compel accounting from person who procured the land and sold it to the corporation. Newcomb v. Thorpe, 156 Mich. 101, 16 Det. Leg. N. 60, 120 NW 623. Tutor held not entitled to recover his own interest in property sold by him on ground of **fraud** in sale due to his own conduct. Gary v. Landry, 122 La. 29, 47 S 124. One making himself party by intervention in receivership proceedings in which pleadings bore evidence of fraud cannot complain of granting of receivership because of such fraud (Dilley v. Jasper Lumber Co. [Tex. Civ. App.] 114 SW

sertion of rights in the absence of the usual elements.[43] One may not shift his claims after another has been induced to rely on previous assertions,[44] and an analagous rule which is frequently termed an estoppel forbids the maintaining of inconsistent positions in litigation [45] or other proceedings.[46]

878), as one countenancing a **collusive and fraudulent proceeding** by making himself party to it cannot be heard to complain of its fraudulent conception because of his failure to profit thereby (Id.). Seller of staves sending agent to assist buyer in inspection held estopped to assert **breach of contract** provision that inspection should be by buyer. Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401. Shipper **obtaining reduced rates by misquoting value** of property is estopped to show greater value in action for damages for injury to the property. Faulk v. Columbia, N. & L. R. Co., 82 S. C. 69, 64 SE 383. Firm held **estopped to plead usury** in loan by bank through officer who was also firm member. Morris v. First Nat. Bank [Ala.] 50 S 137. A stockholder creditor is **not estopped** to share in assets of company by his knowledge that its stock was issued for less than par. S. M. Jones Co. v. Home Oil & Development Co. [La.] 49 S 1009. That one petitioned for appointment as **executor** of person who then spent part of his time abroad, but who resided in state, held not to estop him from asking removal of executor on ground he had changed his residence to sister state, removed assets and failed to account. In re Rice's Estate [Mich.] 16 Det. Leg. N. 528, 122 NW 212.

43. Applied to recovery of land conveyed while plaintiff was minor. Lake v. Perry [Miss.] 49 S 569. Neither lapse of time nor facts of the case held basis for estoppel precluding ejectment defendant from setting up invalidity of tax deed. Finn v. Jones [Kan.] 102 P 479. Mere delay of landowner in asserting his rights to land to which agent acquired tax title and conveyed to others by deed of quitclaim held no estoppel in absence of misleading conduct. Compton v. Johnson, 240 Ill. 621, 88 NE 991.

44. Party giving a reason for his conduct and decision touching anything involved in a controversy cannot, after institution of litigation, mend his hold by changing his ground and putting his conduct upon another and different consideration. Powers v. Bohuslav [Neb.] 120 NW 942. That one held office by attempted appointment under an invalid statute held **not to estop him from claiming office** under an earlier statute, valid and subsisting at time of his appointment. Shutt v. State [Ind.] 89 NE 6.

Inconsistent claims under contract: Where one who as undisclosed principal was entitled to recover on a building contract refused amount due thereunder and demanded entire value of work and materials, and owner thereafter paid contract price to assignee of company he supposed agents represented, undisclosed principal was thereafter estopped to claim contract price. Wilcox-Rose Const. Co. v. Evans, 9 Cal. App. 118, 98 P 83. Partner making conveyances to copartners, representing that he was thereby eliminated from the partnership, and that one of the grantees thereby acquired a majority interest in and control of a lease, held estopped to deny that such were the facts. Loy v. Alston [C. C. A.] 172 F 90. Certain conduct of a bank, including filing of claim against a cattle shipper in insolvency proceedings, held not to estop bank from claiming proceeds of shipment of cattle under assignment from shipper as security for past debts and future advances. Farmers' & Merchants' Bank v. Wood Bros. & Co. [Iowa] 118 NW 282. Owner repeatedly maintaining that building contract was not completed and demanding further work as condition to accepting building held estopped in action to foreclose mechanic's lien to contend that building was in fact completed before additional work was done. Hubbar v. Lee [Cal. App.] 102 P 528. Certain tortious acts of sureties of building contractor as against him, and their request that suit on bond be delayed until they could see about arrangements to go on with work abandoned, held not to estop them to defend action on bond on ground of unauthorized changes in contract. School Dist. of Barfield v. Green, 134 Mo. App. 421, 114 SW 578. Subsequent receipt of wages by injured employe with knowledge that employer claimed that release given by him was full settlement for injury held not to estop him from avoiding release for fraud. Brambell v. Cincinnati, etc., R. Co. [Ky.] 116 SW 742. Mortgagee of timber held not estopped to insist on personal obligation of grantee of land who assumed mortgage by having stated he would look solely to original owner, it appearing grantee had subsequently performed in part. Leiberman v. Bowden [Tenn.] 119 SW 64. One attaching house to existing dividing wall is estopped to thereafter deny that wall thereafter stood as party wall erected by agreement. Bright v. Bacon [Ky.] 116 SW 268. Owner reporting work satisfactory and thus leading contractor to pay off subcontractor held estopped to thereafter assert nonconformity to contract. Pennsylvania Steel Co. v. Susswein, 132 App. Div. 659, 117 NYS 436. Builder dealing with a corporation as owner of the premises and informing subcontractor that such corporation was on building permit held estopped to deny ownership of corporation as against subcontractor, in action to foreclose mechanic's lien. Rieser v. Commean, 129 App. Div. 490, 114 NYS 154. A buyer's absolute refusal on a stated ground to accept goods does not estop him to insist on other grounds thereafter, in absence of conduct misleading or prejudicial to vendor. List & Son Co. v. Chase, 80 Ohio St. 42, 88 NE 120. Stockholder objecting merely to increase of capital stock in exchange for mortgage debenture bonds as being without consideration held not entitled to change position after litigation and set up want of corporate power, parties having proceeded on theory that proposed exchange only was objected to. Pollitz v. Wabash R. Co., 167 F 145.

45. One who has with knowledge of the facts assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the preju-

dice of the adverse party. Brown v. French [Ala.] 49 S 255. Party stating to court to prevent dismissal that deposit was made for certain purpose cannot thereafter assert that it was for a different purpose. Pacific Window Glass Co. v. Smith, 8 Cal. App. 762, 97 P 898. One who assumes a certain position in a legal proceeding and succeeds by judgment or acquiescence of adverse party to his prejudice cannot thereafter assume a contrary position against same adversary as to same subject-matter. Haber-Blum-Bloch Hat Co. v. Friesleben, 5 Ga. App. 123, 62 SE 712. Claim of adverse possession and holding as tenant or licensee are inconsistent and not maintainable at same time. Chaves v. Torlina [N. M.] 99 P 690. One cannot in same action seek enforcement of judgment for damages for fraud inducing execution of a note and defeat collection of note on ground that holder has not clean hands. Loy v. Alston [C. C. A.] 172 F 90. Party introducing shipping receipt and relying on it as part of his case cannot repudiate part of it. Jonasson v. Weir, 130 App. Div. 528, 115 NYS 6. By proceeding to establish a copy of a plea, a party is estopped to deny that such a plea was originally filed. Fletcher v. Bluthenthal [Ga.] 64 SE 558. Taxpayer benefited by statute to extent of recovering taxes wrongfully exacted cannot question constitutionality of statute if it be held not to give him right to interest. Home Sav. Bank v. Morris [Iowa] 120 NW 100. Petitioner in eminent domain cannot contest existence of property rights he sought to condemn. City of Geneva v. Henson, 195 N. Y. 447, 88 NE 1104. One who brings an association into court for purpose of canceling securities held by it is not in position to contend that such association cannot enforce the securities in the same action without order of board of directors. Garlick v. Mutual Loan & Bldg. Ass'n, 236 Ill. 232, 86 NE 236. Replevin defendant justifying taking under a mortgage held estopped to deny taking of the property. Kime v. Bank of Edgemont [S. D.] 119 NW 1003. One whose judgment on a written contract is reversed should not be permitted on new trial to swear to oral agreement differing from written one so as to meet decision on appeal. Scherl v. Flam. 133 App. Div. 274, 117 NYS 654. Where demurrer to petition is sustained and case is dismissed at request of plaintiff, without prejudice, theory of law advanced by defendant's counsel on the argument is not conclusive on defendant in subsequent action on same matter between same parties. First Nat. Bank v. Duncan [Kan.] 101 P 992. Defendant in forcible entry held estopped to deny statements in affidavit on which he got case into circuit court. Brown v. French [Ala.] 49 S 255. Plaintiff held not in position to assert irrelevancy or invalidity of merger contract between defendant and another company on which his right to policy in defendant company was based. Maddox v. Southern Mut. Life Ins. Ass'n [Ga. App.] 65 SE 789. That party to an action asserts his indebtedness to a third person not party is not conclusive on him when thereafter sued by such person. First Nat. Bank v. Duncan [Kan.] 101 P 992. Disclaimer in prior action held not to estop defendant to assert limitations, such disclaimer not covering property covered by his own survey, but only the other property involved in that action. Webb v. Cole [Tex. Civ. App.] 120 SW 945. Railroad company obtaining permission of railroad commissioners to excavate in highway for purpose of running its road across it on condition it construct a bridge over railroad track across excavation "within location of railroad," and excavating to width of about 120 feet, and being required by equity court to bridge the excavation, after full hearing, held estopped in subsequent equity proceeding to compel performance of prior decree to deny it had a legal location as wide as it had right to acquire, though original location filed showed a mere line. Erskine v. Wiscasset & Q. R. Co. [Me.] 72 A 1019.

Assailing decree or order under which benefits have been received: Daughter continuing to receive a certain compensation every four months under probate decree for caring for mother held estopped to claim extra compensation for period covered by the decree. Reavis v. Reavis, 135 Mo. App. 199, 115 SW 1063. Person procuring dismissal decree cannot thereafter object thereto on ground he was not party. McNeil v. McNeil [C. C. A.] 170 F 289. Where order striking certain allegations of answer was affirmed, held that plaintiff's amended and supplemental petition thereafter filed, in which he set up matters contradictory to the stricken allegations, was properly stricken, particularly where he procured stay of proceedings on remaining counts pending appeal on representation that upon affirmance decision would be final, though he acted on advice of counsel, and though judgment of dismissal as to items eliminated was never formally entered. Wapello State Sav. Bank v. Colton [Iowa] 122 NW 149. Litigant held estopped to question power of court to determine a matter decided on his own motion. Feist v. Weingarten Bros., 115 NYS 539.

Suit or defense on theory inconsistent with previous recovery: One who recovered damages for being induced by fraud to make himself liable on a note is estopped to invoke equity maxim requiring complainant to have "clean hands," in subsequent equity suit to collect note. Loy v. Alston [C. C. A.] 172 F 90. Contractor cannot enforce mechanic's lien for work done under express contract and by virtue of notice of lien affirming such contract, and at same time allege that contract was void for fraud. Shackleton v. Baggaley [C. C. A.] 170 F 57. A city defending on plea that assessment was invalid, and prevailing, cannot assert validity of such assessment in subsequent suit. City of Olympia v. Knox, 49 Wash. 537, 95 P 1090. Receiver procuring dismissal of writ of error to review order discharging him, on ground such order was not final, cannot, after setting aside of such order below as interlocutory, and his conviction for contempt for failure to account, contend that such order was final and should have been appealed from. People v. Zimmer, 238 Ill. 607, 87 NE 845. Demurrer to petition in equity, pending administration proceedings, to ascertain interest of a judgment debtor in estate of decedent, held not to estop demurring party, purchaser at administrator's sale, from suing to restrain judgment creditor from levying execution on the land. Yoder v. Kalona Sav. Bank [Iowa] 119 NW 147. One who procures release of a garnishment

Pleading and proof. See 11 C. L. 1842—A party who relies on estoppel must plead it,[47] if he has an opportunity to do so,[48] by setting out with particularity [48] all the

on ground money attached was owing to her only as trustee cannot claim damages on ground money was due her individually. Peters v. Snavely-Ashton [Iowa] 120 NW 1048. Bankrupts successfully contending that a claim was not provable held estopped in subsequent action thereon to interpose defense of discharge in bankruptcy. Haber-Blum-Bloch Hat Co. v. Friesleben, 5 Ga. App. 123, 62 SE 712. Bankruptcy petitioner including in schedule a check as a valid obligation and seeking discharge therefrom held estopped to set up want of consideration in subsequent action thereon. Carr v. Barnes [Mo. App.] 120 SW 705. Mother appearing as next friend for minor in enforcing minor's wages held estopped to deny validity of previous payments by defendant to minor on ground wages were payable to mother. Royal v. Grant, 5 Ga. App. 643, 63 SE 708. Error to exclude evidence of such payments, as neither plaintiff nor mother could assert that payments were void. Id. Where in action to compel settlement a guardian pleaded and testified that he was chargeable with interest for a specified time and induced court's action accordingly, he could not thereafter claim that interest should have been for less period. Willis v. Rice [Ala.] 48 S 397. Plaintiff defending against counterclaim on two notes by showing one was not delivered held estopped to assert as to the other that it had been paid by the first. State v. Allen, 132 Mo. App. 98, 111 SW 622. Estoppel held not to extend beyond plaintiff's pleading, hence not to preclude his denial that partial payments had been made. Id. Action by heirs to establish trusteeship on theory defendant bought land with ancestor's funds held to preclude denial of curtesy to defendant on ground ancestor was never seised of an estate. Donovan v. Griffith, 215 Mo. 149, 114 SW 621.

46. One voluntarily submitting property as liable to assessment, by list to assessor, and thereafter paying the taxes expended by county, held estopped to recover such taxes though property was not taxable in the county. Slimmer v. Chickasaw County [Iowa] 118 NW 779. Could not recover same under Code, § 1417, requiring direction that treasurer refund erroneous or illegal taxes. Id. Where a corporation paid taxes on more land than it claimed, fact that it accepted repayment from owner of land not claimed by it could not estop it from claiming land owned by it, though both owners claimed this land because of uncertainty in locating descriptions. Schlossmacher v. Beacon Place Co., 52 Wash. 588, 100 P 1013. Grantee of wagon road company held estopped to claim all land selected by company as successor of state under act of congress, where after withdrawal of part of such land by secretary of interior company took other land in place thereof. Boe v. Arnold [Or.] 102 P 290. Married woman misstating and suppressing actual facts in procuring authorization of judge to mortgage property is estopped to assert actual facts against innocent persons shaping their course in reliance on her conduct. Kohlman v. Cochrane, 123 La. 219, 48 S 914.

47. Brown v. Wallace [Ky.] 116 SW 763; City of Butte v. Mikosowitz [Mont.] 102 P 593; Holt v. Holt [Okl.] 102 P 187; Cooper v. Flesner [Okl.] 103 P 1016; Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007; Cape Girardeau, etc., R. Co. v. St. Louis & G. R. Co. [Mo.] 121 SW 300; Blakemore v. Johnson [Okl.] 103 P 554. Estoppel of infant to repudiate void deed, by reason of false and fraudulent representations as to age, held not available, not having been pleaded in answer. Blakemore v. Johnson [Okl.] 103 P 554. Estoppel is a defense to be affirmatively pleaded and proved by him who would avail himself of it. In re Stoddard Bros. Lumber Co., 169 F 190. While it was not necessary at common law to plead estoppel in pais (Blair v. Williams [Ala.] 49 S 71), it is necessary under Code (Id.). Defense that plaintiff's attorney with full authority stood by and permitted sale of a horse should have been specially pleaded. Id. Estoppel to enjoin maintenance of a factory held not available as defense not having been pleaded. Scrymser v. Seabright Elec. L. Co. [N. J. Eq.] 70 A 977. Estoppel to take advantage of forfeiture for breach of contract conditions held not available under reply by mere general denial. American Jobbing Ass'n v. James [Okl.] 103 P 670. In action against a principal, evidence of estoppel held inadmissible under pleadings raising only issue of contract vel non. Sterling-Hurd Oil Co. v. Big Four Ice, Light & Cold Storage Co. [Tex. Civ. App.] 116 SW 397. **Rule not applicable** where evidence showing estoppel is furnished by adverse party himself, as in attempt to prove a counterclaim. Gillett v. Young [Colo.] 101 P 766. While it is always safer to plead estoppel specially where relied upon (Lawton v. Racine, 137 Wis. 593, 119 NW 331) it is available as defense without special pleading where the facts showing estoppel are in issue and are part of case made by pleadings, and where the evidence showing estoppel is admissible for any purpose under pleadings (Id.). Estoppel in pais cannot be pleaded, though it may be given in evidence and thus made operative under direction of court. National Shutter Bar Co. v. Zimmerman & Co. 110 Md. 313, 73 A 19.

48. Tieman v. Sachs, 52 Or. 560, 98 P 163. Where in action to recover certain property defendant pleaded title from E before E went into a partnership, plaintiff could not under mere general denial prove estoppel against defendant based on latter's acquiescence in E's contribution of the property as his share of partnership capital, plaintiff having had opportunity to specially plead such estoppel. Id. Plaintiff need not plead estoppel in avoidance of defense set up by answer, replications not being permitted in Louisiana. Keystone Life Ins. Co. v. Von Schlemmer, 122 La. 280, 47 S 606. Where in action to recover mules defendant introduced in evidence a prior mortgage not pleaded by him, plaintiff could show in rebuttal that defendant was estopped to claim under his mortgage though plaintiff had not pleaded estoppel. Powell v. Tinsley, 137 Mo. App. 551, 119 SW 47.

49. Facts constituting estoppel in pais

facts going to establish it,[50] and the proof must conform to the pleading.[51] It must be stated that the party to be barred has been guilty of such conduct as will preclude him from asserting anything to the contrary,[52] and that the pleader was ignorant of the true condition [53] and acted on the implied representations to his prejudice.[54] The burden of proof is on him who alleges the estoppel.[55] The circumstances establishing an estoppel may ordinarily be shown by parol.[56] The existence of facts sufficient to create an estoppel is usually for the jury.[57]

§ 5. *Extent of operation of doctrine of estoppel.*[58]—See 11 C. L. 1343—The doctrine of estoppel is far reaching in its effect,[59] extending to realty as well as to personalty,[60] and to almost every human enterprise.[61] It binds the parties and their privies [62] but not strangers,[63] and operates in favor of assignees and grantees.[64]

must be pleaded particularly. Ashley v. Pick [Or.] 100 P 1103; Cooper v. Flesner [Okl.] 103 P 1016. No intendments indulged. Cooper v. Flesner [Okl.] 103 P 1016; Holt v. Holt [Okl.] 102 P 187.

50. Rule requiring estoppel to be specially pleaded held substantially complied with, answer, though not in terms pleading that plaintiff was estopped by signing a release, asserting that release was effective, so that fact on which estoppel was founded appeared. Anderson v. Walter [Kan.] 99 P 270. Plea of estoppel to assert wrongful delivery of lumber by carrier held insufficient for failure to identify lumber mentioned in plea with that referred to in complaint. Mobile, etc., R. Co. v. Bay Shore Lumber Co. [Ala.] 48 S 377. Held sufficiently definite as to shipper's conduct alleged to have induced delivery of lumber, where it justified delivery to third person holding invoice, pursuant to custom known to shipper. Id. Carrier's plea of estoppel based on shipper's understatement of value for purpose of obtaining low rate held insufficient to prevent recovery of more than value given as damages to goods, it not sufficiently appearing that carrier was ignorant of greater value or was misled. Southern Exp. Co. v. Fox [Ky.] 115 SW 184. Allegation that defendant at time of settlement of controversy over validity of a will induced by a certain promise relied on believed that good grounds for contest existed and that an attorney had so stated held insufficient as allegation that reasonable grounds existed. Crawford v. Engram [Ala.] 47 S 712. Complaint held insufficient to estop town council from relying on invalidity of ordinance extending time within which complainant was required to furnish gas. Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007.

51. Estoppels are not favored and must therefore be proved as pleaded. Alston v. French, 5 Ga. App. 110, 62 SE 713. Allegation that landlord had promised not to furnish supplies to tenant for crop and told another to go ahead and do so held not sustained by proof that landlord had said that tenant was not indebted to him. Id.

52, 53, 54. Ashley v. Pick [Or.] 100 P 1103. Answer held to sufficiently plead estoppel based on acquiescence in wrongful attachment. Id. Must allege that pleader was misled to his injury. Holt v. Holt [Okl.] 102 P 187.

55. Roberts v. Little [N. D.] 120 NW 563. Burden is on him who relies on estoppel to show that he acted on alleged representation in good faith and in ignorance of real facts. Stonecipher v. Kear, 131 Ga. 688, 63 SE 215.

56. That plaintiff had authorized another to use negotiable notes to borrow money on and thus clothed him with apparent ownership. Richard v. Charlot, 122 La. 492, 47 S 841.

57. Court could not deduce inference that plaintiff relied on defendant's statement concerning title to land from mere testimony that such statement was made before plaintiff purchased. Tune v. Beeland, 131 Ga. 528, 62 SE 976.

58. Search Note. See notes in 3 C. L. 1334; 5 Id. 1299, 1301; 11 Id. 1344; 20 L. R. A. 765; 24 Id. 289, 315; 49 Id. 497; 7 L. R. A. (N. S.) 243, 549, 614, 1187; 11 Id. 472; 13 Id. 1118; 14 Id. 1074.

See, also, Estoppel, Cent. Dig. §§ 14-16, 61-82, 84-153, 289-296; Dec. Dig. §§ 8-10, 25-33, 35-50, 52-62, 97-106; 16 Cyc. 686, 689-698, 710-748, 777-784; Municipal Corporations, Cent. Dig. §§ 379, 433, 525-529, 682, 918; 11 A. & E. Enc. L. (2ed.) 387.

59. Trimble v. King [Ky.] 114 SW 317.

60. One may lose title to land by estoppel or the right to an easement. Trimble v. King [Ky.] 114 SW 317. Rights in realty may be obtained and irrevocably fixed by matter in pais. Rhoades v. Barnes [Wash.] 102 P 884. Since bare legal title is substantially defeated by preventing assertion thereof, it is immaterial that title may not strictly be created by estoppel. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104. Null and void attempted conveyance of homestead wherein wife did not join held not to estop husband though he was paid valuable consideration therefor. Clark v. Bird [Ala.] 48 S 359. Court could not require refund of price or fasten lien on property for improvements on theory of owner's acquiescence. Id.

61. Trimble v. King [Ky.] 114 SW 317.

62. Estoppel in pais enforcible against ancestor is enforcible against descendant to bar claim to land. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104. Where father was estopped to set up invalidity of homestead conveyance, son taking deed from father with knowledge of facts held also estopped. Lucy v. Lucy, 107 Minn. 432, 120 NW 754. Where a father was estopped by deed of his land directed by him to be given by his daughter, son in possession under father and by his permission held equally estopped as against grantee. Sparkman v. Jones, 81 S. C. 453, 62 SE 870. Successor of railroad company held estopped to deny legality of location of road in proceedings to compel con-

Infants,[65] married women,[66] and municipalities,[67] may be estopped, and the doctrine

struction of a bridge, predecessor having been estopped. Erskine v. Wiscasset & Q. R. Co. [Me.] 72 A 1019. Whether grantees are bound by grantors' estoppel depends on their notice of facts on which estoppel is based. People v. Seaman, 239 Ill. 611, 88 NE 212. County judge presiding over proceedings for levy and confirmation of assessments for a drainage district, and thereafter purchasing land from one who was estopped to set up want of court's jurisdiction to confirm assessment, held also estopped. Id. One who gives a mortgage on land in which a third person has an interest is not estopped in action by such third person or his successor, to enforce his rights, to testify that he informed mortgagee of the trust. Moultrie v. Wright, 154 Cal. 520, 98 P 257.

63. Only parties and privies are bound. Falls City Lumber Co. v. Watkins [Or.] 99 P 884. Only those intended to be influenced by the representation or conduct, and their privies, can take advantage of it. Not mere privies in estate or strangers to transaction in which estoppel arose, it not being office of estoppel to pass title. Id. Creditor misrepresenting to intending lender of money extent of debtor's obligations held not estopped as against debtor securing the loan. Jett v. Crittenden & Co. [Ark.] 116 SW 665. Estoppel of an heir to claim interest in estate, by reason of agreement with coheir, held not to estop him as to other heirs. Dougherty v. Gaffney, 239 Ill. 640, 88 NE 150. Estoppel of assignor of a patent to set up invalidity of patent does not extend to a corporation sued for infringement merely because assignor is a subordinate in its employment. Babcock & Wilcox Co. v. Toledo Boiler Works Co. [C. C. A.] 170 F 81.

64. Title acquired by estoppel passes to one's grantee. Pierce v. Texas Rice Development Co. [Tex. Civ. App.] 114 SW 857. Assignees of mortgage taken in reliance on statement of prior mortgagee that his debt had been paid held entitled to assert estoppel against first mortgage. Powell v. Tinsley, 137 Mo. App. 551, 119 SW 47. Where no estoppel existed in favor of assignee in insolvency by reason of certain representations by assignor, none could arise in favor of his grantee. Falls City Lumber Co. v. Watkins [Or.] 99 P 884.

65. Minor may be estopped where proof clearly and convincingly shows active willful fraud and misrepresentation, deceiving and misleading other party to his damage. Lake v. Berry [Miss.] 49 S 569. Infant apparently mature cannot deny he was of full age where he obtains benefit of contract induced by fraudulent representation as to his age. Id. Infant conveying land to father who thereafter conveyed to third person held estopped to claim infancy at time he conveyed, having stated at time of father's conveyance that he was of age when he conveyed to father. Sackett v. Asher [Ky.] 112 SW 833. Infant beneficiaries held not estopped by consent or acquiescence in unauthorized disposition of trust estate. Gibney v. Allen, 156 Mich. 301, 16 Det. Leg. N. 159, 120 NW 811.

66. Equitable estoppel applies against married women. Engholm v. Ekren [N. D.] 119 NW 35. Under married woman's statute rendering married women sui juris, doctrine of estoppel with respect to persons other than husband obtains against her same as against other persons. Tennent v. Union Cent. Life Ins. Co., 133 Mo. App. 345, 112 SW 754. Married woman cannot be estopped to claim land unless guilty of positive fraud or concealment. Franklin v. Texas Savings & Real Estate Inv. Ass'n [Tex. Civ. App.] 119 SW 1166. Estoppel of married woman to assert claim to land requires some positive act of fraud or something done on which another might reasonably rely and did rely, to his injury. Rich v. Morisey, 149 N. C. 37, 62 SE 762. That married woman holding equity of redemption entered upon part of it under mortgagee's will held not fraud precluding her from redeeming, as against devisees of other portions of the land having equal knowledge. Id. Incompetent woman held not estopped by word or conduct from asserting rights in trust estate disposed of by trustee. Gibney v. Allen, 156 Mich. 301, 16 Det. Leg. N. 159, 120 NW 811.

67. Though equitable estoppel does not as a rule apply to a municipal corporation representing public rights and interests (Boise City of Wilkinson [Idaho] 102 P 148), there are special and peculiar cases in which municipality will be estopped to assert a state, legal and inequitable claim (Id.). City estopped to claim land unlawfully deeded by mayor after acquiescing for 38 years and recognizing ownership of one who made permanent and valuable improvements (Id.). That tax commissioners refused defendant inspection of record of assessed valuation of property and afterwards informed him that no valuation had been made against him held equitable defense of estoppel to action for collection of taxes within charter, § 934, authorizing dismissal on showing of equitable defense. City of New York v. Halsey, 132 App. Div. 192, 116 NYS 947. That board of commissioners acted in a sense as public officers and not as agents of city held immaterial, city claiming right to enforce the tax by virtue of their action. Id. No estoppel can grow out of dealings with public **officers of limited authority.** County not estopped to deny claim to compensation under invalid tax ferret contract executed in advance of appropriation by fact it received and retained funds by virtue of relator's services performed thereunder. State v. Goldthait [Ind.] 87 NE 133. Drainage district held not estopped to refuse payment for services rendered by commissioner employed by the other commissioners as engineer, such employment being absolutely **prohibited by statute.** Seaman v. Cap-Au-Gris Levee Dist., 219 Mo. 1, 117 SW 1084. Reviewing authorities and stating rules.

In action of officials: Past failure of city to enforce ordinances against obstruction of sidewalks does not estop it from subsequently removing all obstructions. Chapman v. Lincoln [Neb.] 121 NW 596. Inaction of its officers for long time held not to estop city from widening streets, city being without power directly to vacate the streets. City of Paragould v. Lawson [Ark.] 115 SW 379. Mere failure of public to demand open-

is sometimes applied even against the state.[68] So, also, one may be precluded from asserting the statute of frauds,[69] the homestead statute,[70] or the laws of descent and distribution.[71] It must be remembered, however, that the doctrine of estoppel is applied only to promote justice and fair dealing,[72] never to aid a fraudulent purpose.[73] Equitable estoppels are cognizable at law as well as in equity.[74]

ing of street shown on plat of a town before growth of population made such demand reasonably necessary, and permitting fencing in and use of part of street not yet needed for public use held insufficient to estop town or public from opening street when necessary. McClenehan v. Jesup [Iowa] 120 NW 74. Failure of city to oppose unauthorized motion for allowance of interest on condemnation award held not to estop it from insisting that its money be used only as directed by statute. In re Belmont Street, 128 App. Div. 636, 112 NYS 858. Doctrine that nonaction of municipal officers as to governmental matters cannot estop city held inapplicable when city by its council affirmatively attempted to segregate part of its territory and every one treated its action as valid for over ten years and regarded residents of segregated portion as residents of adjoining township with full knowledge and acquiescence of citizens and officers of city. State v. Willis [N. D.] 118 NW 820. Evidence insufficient to show that a town had adopted a bridge as part of public highway so as to estop it from denying that it was a lawful highway, in action for injuries from defects in bridge. Curtiss v. Bovina, 138 Wis. 660, 120 NW 401.

68. State cannot be estopped by negligence or illegal conduct of its officers but only by legislative act or resolution. Booth v. State, 131 Ga. 750, 63 SE 502. Not estopped to claim priority in payment of state deposit by reason of alleged negligence or misconduct of bank examiner. Id. State, under sanction of constitution and laws of which a foreign corporation has entered into business, acquired property and made contracts, is estopped from expelling such corporation either arbitrarily or because of exercise of its lawful right to remove suits to federal courts. Western Union Tel. Co. v. Julian, 169 F 166. State's conveyance by deed purporting to pass full title to swamp lands held to pass after-acquired title. Morrow v. Warner Val. Stock Co. [Or.] 101 P 171. United States cannot be estopped to prosecute for violation of federal statute by reason of any acts of its agents. United States v. Fifty Barrels of Whisky, 165 F 966. Could condemn merchandise misbranded in violation of pure food law, though brand was placed on packages by United States gauger. Id.

69. Engholm v. Ekren [N. D.] 119 NW 35; McDowell v. McDowell [Iowa] 119 NW 702.

70. Neither the statute of frauds nor statutory provisions for the protection of homesteads can do away with the general equity doctrine of estoppel in pais. Engholm v. Ekren [N. D.] 119 NW 35. Husband and wife could be estopped to repudiate verbal sale of part of homestead. Id.

71. Property rights created by estoppel are in general superior to statute of frauds and statutory provisions relating to execution of wills and to transfers of realty or personalty. McDowell v. McDowell [Iowa] 119 NW 702. One may be estopped by declarations or conduct from claiming under statute of descent. Id. Mother, inducing dying son not to will or deed property to his wife by assurances that wife should have all, held estopped to claim as heir or distributee. Id.

72. J. F. Portuondo Cigar Mfg. Co. v. V. P. Portuondo Cigar Mfg. Co., 222 Pa. 116, 70 A 968. Estoppel of stockholders reciting in bill of sale of corporate property that corporation was not indebted to them held not to preclude them from setting off claim for wages against debt due corporation from them. Argo Mfg. Co. v. Parker, 52 Wash. 100, 100 P 188.

73. Attempt to estop cigar manufacturer from enjoining fraudulent simulation of cigar brand. J. F. Portuondo Cigar Mfg. Co. v. V. P. Portuondo Cigar Mfg. Co., 222 Pa. 116, 70 A 968.

74. Monmouth County Elec. Co. v. Eatontown Tp. [N. J. Eq.] 70 A 994; Parsons Mfg. Co. v. Hamilton Ice Mfg. Co. [N. J. Law] 73 A 254; Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232. Traction company constructing interurban railroad track with consent of landowner held entitled to assert estoppel against attempt of landowner thereafter to oust it, as against objection that it was not in position to invoke equity powers of court by reason of its noncompliance with municipal ordinances and want of power to construct the road, and consequent "unclean hands," it not seeking affirmative equitable relief, and estoppel being available at law as well as in equity Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232. Where conduct alleged to constitute estoppel is as capable of investigation by jury as by equity judge, defense is available at law. Monmouth County Elec. Co. v. Eatontown Tp. [N. J. Eq.] 70 A 994. Estoppel in pais is termed equitable merely because it arises from facts making its application just, and fact that defendant's liability on contract is based on its having adopted it and received its benefits does not require resort to equity to recover for breach. Taenzer & Co. v. Chicago, etc., R. Co. [C. C. A.] 170 F 240. Estoppel by conduct is provable in defense of action at law to recover land. Sullivan v. Moore [S. C.] 65 SE 108. In proceedings for recovery of land, matters constituting estoppel in pais may be relied on as equitable counterclaim on which to base prayer for affirmative relief, though it is also a sufficient defense at law in ejectment. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104. Defense of estoppel in pais cannot be set up in ejectment. City of Amboy v. Illinois Cent. R. Co., 236 Ill. 236, 86 NE 238.

EVIDENCE.

The scope of this topic is noted below.[75]

§ 1. Nature of Evidence, and Necessity or Duty of Adducing It, 1620.
- A. In General, 1620.
- B. Judicial Notice, 1620.
- C. Presumptions and Burden of Proof, 1626.

§ 2. Relevancy and Materiality, 1633.
§ 3. Competency or Kind of Evidence in General, 1638.
§ 4. Best and Secondary Evidence, 1639.
§ 5. Parol Evidence to Explain or Vary Writings, 1644.
§ 6. Hearsay, 1658.
- A. General Rules, 1658. Matters of Pedigree and Family History, 1661. Boundaries, 1661. Market Reports, 1662. Census Reports, 1662.
- B. Res Gestae, 1662.
- C. Admissions or Declarations of Parties, 1666. Against Interest, 1666. Silence or Acquiescence, 1670. Admissions and Declarations by an Agent, 1670. Proof of Bona Fide Offers of Compromise, 1673. Ex parte, Self-Serving Declarations, 1673.
- D. Declarations of a Person Since Deceased, 1674.

§ 7. Documentary Evidence, 1675.
- A. In General, 1675. Proof of Handwriting, 1678.
- B. Books of Account and Other Private Records, 1678.
- C. Public and Judicial Records and Documents, 1681.
- D. Proceedings to Procure Production of Documentary Evidence, 1683.

§ 8. Evidence Adduced in Former Proceedings, 1684.
§ 9. Expert and Opinion Evidence, 1685.
- A. Conclusions and Nonexpert Opinions, 1685.
- B. Subjects of Expert Testimony, 1692.
- C. Qualifications of Experts, 1696.
- D. Basis of Expert Testimony and Examination of Experts, 1699.

§ 10. Real or Demonstrative Evidence, 1703.
§ 11. Quantity Required and Probative Effect, 1705.

§ 1. *Nature of evidence, and necessity or duty of adducing it. A. In general.* See 11 C. L. 1346—By "proof" is meant the effect of evidence rather than the medium by which a fact is established.[76, 77] Some authorities define "testimony" and "evidence" as technically different, "evidence" being the more comprehensive; but the terms are commonly used as synonymous, even by the courts.[78] Matters admitted by the pleadings[79] or on the trial need not be proved,[80] nor is it necessary to prove matters of which the court takes judicial notice;[81] but all essential facts, not admitted or judicially noticed, must be alleged and proved,[82] as the jury cannot draw

75. Treats generally of the necessity of adducing evidence and the admissibility and sufficiency theory, without reference, except by way of illustration and example, to evidence upon particular matters or issues (see topics dealing specifically with such matters or issues). Excludes competency, credibility, privilege and compulsory attendance of witnesses (see Witnesses *), rules governing the examination of witnesses (see Examination of Witnesses *), trial rules as to reception and exclusion of evidence and necessity of offering evidence sought to be introduced (see Trial,* § 3), objections to evidence and exceptions to rulings thereon (see Saving Questions for Review *), effect of erroneous rulings on evidence (see Harmless and Prejudicial Error *), province of court and jury with regard to evidence (see Instructions,* §§ 2-13; Questions of Law and Fact *), direction of verdict (see Direction of Verdict and Demurrer to Evidence *), nonsuits for failure of proof (see Discontinuance, Dismissal and Nonsuit,* § 2) and judgments non obstante (see Judgments,* § 2B).

76, 77. Lone Star Brew. Co. v. Willie [Tex. Civ. App.] 114 SW 186.

78. Use of word "testimony" for "evidence" in instructions held not prejudicial. Jones v. Seattle, 51 Wash. 245, 98 P 743.

79. See, generally, Pleading, § 14.

80. Not necessary to prove partnership, where rule of court required denial by affidavit if not admitted, and no affidavit was filed. Stahle v. Poth, 220 Pa. 335, 69 A 864. Admission "for purposes of suit" that city was of fourth class was binding through all stages of trial, including subsequent retrial in another court. York v. Everton, 135 Mo. App. 607, 116 SW 490. Where counsel for one of defendants in action on tax bill claimed that bill was joint obligation, and that plaintiffs could not proceed against one cotenant, was not binding admission of cotenancy, being used in argument. Parker-Washington Co. v. Cole, 137 Mo. App. 530, 120 SW 118. Admission of counsel held to estop defendant from denying that he was not member of certain firm. Bochat v. Knisely, 144 Ill. App. 551.

81. Dickinson v. Oliver, 195 N. Y. 238, 88 NE 44. Judicial notice takes the place of proof and is of equal force. Beardsley v. Irving, 81 Conn. 489, 71 A 580. As to matters of which court will take judicial notice, see post, this section, subsec. B, Judicial Notice.

82. Court, on demurrer to petition, cannot take judicial notice of form or recitals of tax deed not set out in petition. Fitschen v. Olson, 155 Mich. 320, 15 Det. Leg. N. 1010, 119 NW 3. County treasurer is required by Rev. St. 1895, art. 921, to give additional

upon its own knowledge, or beliefs as to facts in issue,[89] though the jury may draw any proper inference from the facts proved.[84]

The admission of a fact by one party will not in all cases preclude the other from introducing evidence to prove it as part of his case.[85]

(§ 1) *B. Judicial notice.*[86]—See 11 C. L. 1348—The doctrine of judicial notice generally applies only to facts,[87] but it does not depend upon actual knowledge or recollection of the judge,[88] and that a matter is judicially noticed means only that it is taken as true without proof,[89] and if the matter is rebutable, evidence should be received to rebut it.[90] Where there is any question as to taking judicial notice of a fact, the doubt should be resolved against judicial knowledge and evidence as to it received.[91]

Courts take judicial notice of former orders and proceedings in the same cause,[92] and in collateral or supplementary proceedings may notice the record in the principal cause,[93] but cannot take judicial notice of records, orders or judgments in other causes,[94] even though the parties are the same.[95] A judgment disbarring an attorney, however, may be noticed.[96] Records of another court will not be noticed.[97]

bond for school fund, in sum double amount of fund, to be approved by county judge. In action on bond, court cannot take judicial notice of amount of bond. Connor v. Zackry [Tex. Civ. App.] 117 SW 177.

83. Instruction erroneous which did not confine jury to evidence, but allowed them to speculate and use their own beliefs or act on caprice. Kerr v. Mangus [Neb.] 120 NW 426.

84. Fact that chafing of rope tends to weaken it, and that wear caused by former use could have been discovered by physical examination. Doherty v. Booth, 200 Mass. 522, 86 NE 945.

85. Party has right to make his proof in his own way. Webster v. Moore, 108 Md. 572, 71 A 466. Evidence to prove allegations of declaration is competent though such allegations are admitted. Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410. That opposing counsel conceded appointment of ancillary trustee did not deprive party of right to prove appointment by decree of court. Jones v. Downs [Conn.] 72 A 589. That defendant, after interposing general denial in action for professional services, admitted, at trial, performance of services and indebtedness for their reasonable value, did not preclude plaintiff from proving written admissions by defendant as to debt and amount. Conant v. Elvans, 202 Mass. 34, 88 NE 438.

86. Search Note: See notes in 11 C. L. 1349; 12 A. S. R. 353; 47 Id. 814; 82 Id. 439; 111 Id. 583; 113 Id. 868; 5 Ann. Cas. 614.

See, also, Evidence, Cent. Dig. §§ 1-72; Dec. Dig. §§ 1-52; 16 Cyc. 849-924; 11 A. & E. Enc. L. (2ed.) 489; 17 Id. 892; 8 A. & E. Enc. P. & P. 71, 134, 135.

87. People v. State Board of Tax Com'rs, 196 N. Y. 39, 89 NE 581.

88. In contempt proceeding, immaterial that court had forgotten decree, as reference could be had to record. Haaren v. Mould [Iowa] 122 NW 921. Appellate court, to uphold lower court's order, may inspect records and see that an assessment has been lawfully made to pay award of damages. In re Decatur St. in New York, 133 App. Div. 321, 117 NYS 855.

89, 90. Timson v. Manufacturers' Coal & Coke Co., 220 Mo. 580, 119 SW 565.

91. Error to exclude evidence on question whether all coal mines generate gas in dangerous quantities. Timson v. Manufacturers' Coal & Coke Co., 220 Mo. 580, 119 SW 565.

92. Court will take notice of prior orders and proceedings in same case without production of record in evidence. Haaren v. Mould [Iowa] 122 NW 921. Court of appeals took notice of fact that claim had been contested and previously passed up by itself. In re Ordway, 196 N. Y. 95, 89 NE 474. Appellate court will take notice of its own opinions and upon second review of case may re-examine former opinion to find grounds upon which judgment was based, and what matters were adjudicated. McKinnon v. Johnson [Fla.] 48 S 910.

93. Court may notice proceedings collateral to main action, such as those to enforce decree in principal case. Haaren v. Mould [Iowa] 122 NW 921. In **garnishment proceedings,** court takes judicial notice of judgment in main case. Id. In **contempt proceeding** to punish violation of decree or order, judicial notice will be taken of such decree or order. Id. In **proceedings for violation of injunction** before court which issued it, court could take judicial notice of injunction decree. Bunting v. Powers [Iowa] 120 NW 679.

94. Haaren v. Mould [Iowa] 122 NW 921.

95. Lownsdale v. Grays Harbor Boom Co. [Wash.] 103 P 833; Pacific Iron & Steel Works v. Goerig [Wash.] 104 P 151. Judicial notice cannot be taken of judgment in another case so as to decide matter res adjudicata; judgment must be pleaded and proved. Pickens v. Coal River Boom & Timber Co. [W. Va.] 65 SE 865. **Appellate court** cannot take judicial notice of records in other causes, though between same parties and in same trial court. Lownsdale v. Grays Harbor Boom Co. [Wash.] 103 P 833; Pacific Iron & Steel Works v. Goerig [Wash.] 104 P 151.

96. Supreme court takes judicial notice of its own decision disbarring an attorney. Danforth v. Egan [S. D.] 119 NW 1021.

An appellate court will judicially notice only such matters as the court of original jurisdiction must notice.[98] It will notice the dates fixed for the beginning of the terms of inferior courts,[99] but not of the ending of such terms.[1] The signature of the judge of an inferior court must be proved.[2]

Federal courts take judicial notice of state laws and statutes [3] and of corporations organized under acts of congress.[4]

State courts take judicial notice of public, domestic laws and statutes,[5] of the record of the state constitutional convention,[6] of the legislative history and practical construction of a statute,[7] of the public policy of the state,[8] of public, federal statutes,[9] of public documents and reports,[10] or regulations [11] and proclamations [12]

97. In independent action in circuit court, record in bankruptcy proceeding in district court cannot be judicially noticed. McDonald v. Clearwater Shortline R. Co., 164 F 1007. A **prior adjudication of the Interstate Commerce Commission** in another case cannot be judicially noticed. Robinson v. Baltimore & O. R. Co., 64 W. Va. 406, 63 SE 323.

98. Lownsdale v. Grays Harbor Boom Co. [Wash.] 103 P 833.

99. Supreme court takes judicial notice that terms of court in certain county are appointed on certain days of certain month. Meadows v. Osterkamp [S. D.] 122 NW 419. Appellate courts take notice of beginning of terms of circuit court. Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 SW 119.

1. Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 SW 119.

2. Proper to allow judge of district court to identify warrant and complaint, and his signature on the warrant, as against objection that superior court would take judicial notice of fact. Williams v. Smith [R. I.] 72 A 1093.

3. Federal courts required to take judicial notice of laws of states, whether statutory or found in judicial opinions, and court will consider all of a statute part of which is pleaded. Bond v. John V. Farwell Co. [C. C. A.] 172 F 58. Public statutes of states and territories, and of amendatory acts. Denver & R. G. R. Co. v. Wagner [C. C. A.] 167 F 75. Laws of all states, including those for creation, organization, and abolition of courts, etc. Bohlander v. Heikes [C. C. A.] 168 F 886.

4. That defendant corporation was incorporated under an act of congress judicially noticed. In re Dunn, 212 U. S. 374, 53 Law. Ed. —.

5. Acts of legislature generally. Cox v. Alabama University Trustees [Ala.] 49 S 814. Provisions of **Factory Act.** Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 SW 1108. **Laws of state.** Peck v. Noee, 154 Cal. 351, 97 P 865. What is and what is not public statutory law of state. State v. Wheeler [Ind.] 89 NE 1. **Statutory authority of city** to levy, assess and collect taxes, and that unpaid taxes on real estate constitute lien thereon. City of Miami v. Miami Realty, Loan & Guar. Co. [Fla.] 49 S 55. **Corporation laws,** such as constitutional and statutory provisions, prohibiting incorporation of churches or religious societies. Lunsford v. Wren, 64 W. Va. 458, 63 SE 308. Notice taken of legal consequences of consolidation of domestic corporations, but not of consequences of consolidation of foreign corporations. Jackson Consol. Trac. Co. v. Jackson Circuit Judge, 155 Mich. 522, 15 Det. Leg. N. 1081, 119 NW 915. **Corporate charter and powers** of street railway company. McArdle v. Chicago City R. Co., 141 Ill. App. 59. Court takes judicial knowledge that corporation having franchise to construct canal and locks in navigable river could acquire title to the fee only by legislative grant. Oregon v. Portland General Elec. Co., 52 Or. 502, 98 P 160. **Auditor's duties** being fixed by constitution and statute, courts take judicial notice that he has no power, as auditor, to collect undefaulted insurance taxes, due the state. Daily v. State, 171 Ind. 646, 87 NE 4. Judicial notice taken of **prohibition statutes** and of counties, towns and cities where they are in force. Badgett v. State [Ala.] 48 S 54. Court takes judicial notice of option **road law,** but not of its adoption in any particular county. Johnson v. Scott, 133 Mo. App. 689, 114 SW 45.

6. Schwartz v. People [Colo.] 104 P 92.

7. State v. Rutland R. Co., 81 Vt. 508, 71 A 197.

8. Courts may take judicial notice of all matters relating to public policy, and inform themselves of any accessible sources of facts concerning the same. Hall v. O'Neil Turpentine Co., 65 Fla. 324, 47 S 609.

9. Louisville & N. R. Co. v. Scott [Ky.] 118 SW 990. Legislation of congress relating to an Indian reservation. United States v. Boss, 160 F 132. State courts judicially notice laws of United States; testimony of revenue officers as to such laws incompetent. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574.

10. Estimated receipts of sales of university lands as shown by report of regents to governor. State v. Candland [Utah] 104 P 285. Statistics reported by state bureau of statistics are public documents of which courts take judicial notice, e. g., statistics as to number and thickness of coal veins, depth, kind of coal, mines, owners, how worked, number men employed, etc. State v. Barrett [Ind.] 87 NE 7.

11. State and federal courts judicially notice laws of United States, and executive regulations. Beck v. Johnson, 169 F 154. Regulations of railroad commission covering amount of free time allowed on storage of freight after arrival at destination and notice to consignee, and rate of charges thereafter. Seaboard Air Line R. Co. v. Shackelford, 5 Ga. App. 395, 63 SE 252.

12. Court must take notice of successive holidays declared by governor after earthquake and fire of April 18, 1906. Poheim v. Meyers, 9 Cal. App. 31, 98 P 65.

of the executive and administrative department of the government, and the nature of their duties,[13] of important public offices and the incumbents,[14] of the system of government surveys,[15] of the location[16] and size of cities,[17] of county seats,[18] and, in general, important or prominent geographical or political facts concerning the state and its subdivisions.[19]

All courts take judicial notice of matters of common knowledge,[20] of general

13. That Interstate Commerce Commission has much to do with regulating freight rates on articles of interstate commerce. Law Reporting Co. v. Elwood Grain Co., 135 Mo. App. 10, 115 SW 475.

14. Supreme court will notice who is mayor of city, of state, and that person before court is not mayor. People v. Hall [Colo.] 100 P 1129. Courts will take judicial notice of all important federal officials and of inferior ones within the limits of the state. Kellogg v. Finn [S. D.] 119 NW 545.

15. General system of government surveys; that lands are surveyed and platted into sections and parts of sections, and fractionals where lands abut on streams or lakes. Little v. Williams [Ark.] 113 SW 340.

16. That certain city was in certain county. Gaddy v. Smith [Tex. Civ. App.] 116 SW 164. That Buford is an incorporated town in Gwinnett county, Georgia. Beaty v. Sears [Ga.] 64 SE 321. That Williamson is in Mingo county. White v. Sohn, 65 W. Va. 409, 64 SE 442. Location of two important cities, distance between them, and approximate length of time required to transport car from one to other. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193, rehearing denied, but on another point. Id., 109 Md. 494, 72 A 458.

17. That Newark is growing city, with expanding population and traffic, and that many trains must be run over streets. Morris & E. R. Co. v. Newark, 76 N. J. Law, 555, 70 A 194. That **population of town** of sixth class does not exceed 1,000. Const. § 156, providing that towns with less than 1,000 shall be towns of sixth class. Schweirman v. Highland Park [Ky.] 113 SW 507.

18. That certain city is not and never has been county seat of certain county. Ladd v. Cralg [Miss.] 47 S 777.

19. Maine courts take notice that there is a Suffolk county in Massachusetts, since it was created by law in force in district from which Maine was carved. Hudson v. Webber, 104 Me. 429, 72 A 184. **Statutory boundaries** and general **topographical conditions.** Brown v. New Jersey Short Line R. Co., 76 N. J. Law, 795, 71 A 271. Judicial notice taken of **territorial distances in municipality,** as that land described as "from 52nd avenue to 48th avenue and from 39th street to the Drainage Canal" is half a mile long and more than a sixth of a mile wide on average. Chrystal v. Level, 144 Ill. App. 533. **When certain county was organized,** and that prior thereto it was part of another county. Sheridan County Com'rs v. Patrick [Wyo.] 104 P 531. **Platting of cities,** as that part of Kansas City, Mo., was platted as "West Kansas." Barber Asphalt Pav. Co. v. Missouri Pac. R. Co., 136 Mo. App. 642, 119 SW 27. **Size of lakes,** as that Skanaeteles Lake has some 13 square miles of surface. Weeks-Thorn Paper Co. v. Glenside Woolen Mills, 64 Misc. 205, 118 NYS 1027. That Arkansas and Poteau **rivers** bound city of Ft. Smith on west. McKenzie v. Newlon [Ark.] 117 SW 553. **Navigable character of stream,** as that Missouri river is navigable stream and public highway which no one has right to obstruct. Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452, 113 SW 730. That certain **railroad** runs through parts of state that are thickly populated, and that there are many cities and towns on it. Minneapolis, etc., R. Co. v. Appegard [N. D.] 118 NW 830. That Oklahoma, prior to admission to union, consisted of **territories** of Oklahoma and Indian Territory, and that territorial laws of two were not the same. Western Union Tel. Co. v. Parsley [Tex. Civ. App.] 121 SW 226. Judicial notice taken that United States was original proprietor of **public lands** granted states; that section 16 in each township was for school purposes; and that in case of fractional townships lien lands for school purposes were granted. Black v. Chicago, B. & Q. R. Co., 237 Ill. 500, 86 NE 1065. That former governor had been employed by state to make **compilation of historical records.** State Historical Ass'n v. Silverman [Ga. App.] 65 SE 293.

20. Judicial notice may be taken of matters of common knowledge, but not of matters as to which reference must be had to books or expert testimony. Timson v. Manufacturers' Coal & Coke Co., 220 Mo. 580, 119 SW 565. Court cannot pretend ignorance of facts concerning strike in large city which practically every intelligent person in community knew of. Connett v. United Hatters of North America [N. J. Eq.] 74 A 188.

Judicial notice taken: That many **trees** annually shed large number of dead limbs. Miller v. Detroit, 156 Mich. 630, 16 Det. Leg. N. 225, 121 NW 490. That **meat** in storage may spoil or become damaged through internal defects or the operation of natural causes. Patterson v. Wenatchee Canning Co., 53 Wash. 155, 101 P 721. Of **deterioration in industrial plants** and their value not made good by ordinary repairs. People v. State Board of Tax Com'rs, 196 N. Y. 39, 89 NE 581. That return of at least 6 per cent, legal **rate of interest,** is necessary to induce persons to invest money. Id. That **cash receipts by railroad company** from its business is not all received at terminal from which it starts its pay car. New York Cent. & H. R. R. C. v. Williams, 64 Misc. 15, 118 NYS 785. That **conflicts between employers and employes** have frequently occurred. Id. That ends of **fingers,** parts of which have been amputated, are very sensitive to touch and cold. Rood v. Seattle Elec. Co. [Wash.] 104 P 249. That **cog-wheels** are not peculiar to oil mills but are used in different kinds of machinery. Brownwood Oil Mill v. Stubblefield [Tex. Civ. App.] 115 SW 626. That **sidewalks,** crosswalks, curbs, and pavements have many irregular and uneven places.

Gastel v. New York, 194 N. Y. 15, 86 NE 833. That **street improvements** of certain kinds are not made during winter. Barber Asphalt Pav. Co. v. Wabash [Ind. App.] 86 NE 1034. That there are no **electric interurban railways** in state not having a terminus in a city. Halladay v. Detroit United R. Co., 155 Mich. 436, 15 Det. Leg. N. 1050, 119 NW 445. Court takes judicial notice of existence in state of **insurance companies** having no stock, composed of members equally interested and paying losses by assessments. Ingle v. Batesville Grocery Co. [Ark.] 117 SW 241. It is matter of common knowledge and experience that there is no telling when or under what circumstances **mules** will or will not kick. Tolin v. Terrell [Ky.] 117 SW 290. That **protection of eyes from dust and cinders** from passing train may be effected by shading or covering eyes or turning away as well as by going some distance from track. Houston & T. C. R. Co. v. Pollock [Tex. Civ. App.] 115 SW 843. That more passengers and licensees frequent **railroad stations** in large cities than in small towns. Cincinnati, etc., R. Co. v. Harrod's Adm'r [Ky.] 115 SW 699. That **schedule time of trains** is not adhered to when passenger train is late. Hoskins v. Northern Pac. R. Co. [Mont.] 102 P 988. Principal office or place of legal residence of **railroad companies** organized under laws of state. White v. Atlanta, B. & A. R. Co., 5 Ga. App. 308, 63 SE 234. That conductor has general **control of train** and authority to eject trespassers. Chicago, etc., R. Co. v. Anderson [C. C. A.] 168 F 901. That **natural gas,** unlike oil, cannot be taken out and stored, but must be used when taken from ground. Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 SE 836. That **"beer,"** when term is used without qualification, means malt liquor containing sufficient alcohol to produce intoxication. State v. City Club [S. C.] 65 SE 730. **Seasons** of year. Barber Asphalt Pav. Co. v. Wabash [Ind. App.] 86 NE 1034. Of seasons and course of agriculture and growth of staple crops. First Nat. Bank v. Rogers [Okl.] 103 P 582. That at certain time of year **crops** have matured and been gathered. McCullough v. Rucker [Tex. Civ. App.] 115 SW 323. That contract to plant, cultivate to maturity and gather crop of cotton is contract for services for longer time than one month. First Nat. Bank v. Rogers [Okl.] 103 P 582. That **wheat, corn and tobacco** have fluctuating value. Lindsey v. Hewitt, 42 Ind. App. 573, 86 NE 446. Courts take same knowledge of matters of **literature** as general public. St. Hubert Guild v. Quinn, 64 Misc. 336, 118 NYS 582. Facts of **current history, of geographical and scientific facts,** and facts generally known. Reineman v. Larkin [Mo.] 121 SW 307. General scope and extent of territory of Oregon and Washington, and of general history and number of inhabitants and general condition so far as these matters are matters of common knowledge. Daly v. Old [Utah] 99 P 460. That **college football "season"** begins in fall and ends with Thanksgiving. Sieberts v. Spangler [Iowa] 118 NW 292. **Time required for delivery of letter** in New York mailed in Baltimore. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Ordinary **abbreviation** of common names; "Jos." for Joseph. Feld v. Loftis, 240 Ill. 105, 88 NE 281. Immaterial that witnesses used abbreviated name to designate railroad. Hunt v. Philadelphia & R. R. Co. [Pa.] 73 A 968. Motion to modify judgment denied. Hunt v. Philadelphia & R. R. Co. [Pa.] 73 A 970. That **X-ray photographs,** properly taken, accurately represent condition of bones of body. Houston & T. C. R. Co. v. Shapard [Tex. Civ. App.] 118 SW 596. That city of Denver had usual **provision for urban life,** comfort and enjoyment, such as markets, railways, newspapers, etc. Town of Fletcher v. Hickman [C. C. A.] 165 F 493. That process of screening or sifting is part of process of **manufacture of tomato catsup.** United States v. Six Hundred & Fifty Cases of Tomato Catsup, 166 F 773. That **electric light wire** so placed that it occasionally comes in contact with telephone wire is dangerously near it. Central Union Tel. Co. v. Conneaut [C. C. A.] 167 F 274. Of who was **incumbent of cabinet office** at certain time. Perovich v. Perry [C. C. A.] 167 F 789. Who is **state excise commissioner.** In re Clement, 132 App. Div. 598, 117 NYS 30. Judicial notice will be taken of **standard mortality tables,** as that Dr. Wigglesworth's tables of life expectancy are standard. Winn v. Cleveland, etc., R. Co., 143 Ill. App. 71.

Not judicially noticed: Surname of member of firm of **attorneys** in town in state. Reineman v. Larkin [Mo.] 121 SW 307. Court may in some instances judicially know what is reasonable fee for certain services by an attorney, but cannot know what a contract between a party and his attorney is. Young v. State Bank [Tex. Civ. App.] 117 SW 476. Different methods or systems of **bookkeeping.** Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114. Whether **turpentining trees** results in substantial damage as necessary or usual result. Jefferson Davis County v. Long [Miss.] 49 S 613. Court cannot know that one who signed warrant as individual merely was **justice of the peace.** Reach v. Quinn [Ala.] 48 S 540. Notice taken of **rotting of wood,** but not that it will rot between October and August following. Newlin v. St. Louis & S. F. R. Co. [Mo.] 121 SW 125. Court cannot judicially know that certain **newspaper** has required circulation, nor where it is published, nor how often, etc. Town of Windfall v. State [Ind.] 88 NE 505. That carpets, napkins, curtains, thread, pins, and various kinds of dry goods may not be useful in furnishing and running **hotels.** P. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641, 15 Det. Leg. N. 926, 118 NW 484. **Meaning of initial letters** "N. E. K. C." or, if an association, what its objects are. Van Heusen v. Argenteau, 194 N. Y. 309, 87 NE 437. Chemical and mechanical composition of **asphalt.** City of Chicago v. Gage, 237 Ill. 328, 86 NE 633. That it is dangerous to pull shipper of **elevator,** when stuck, so as to cause it to descend. Herlihy v. Little, 200 Mass. 284, 86 NE 294. Whether alleys in city have or have not **sidewalks.** J. Burton Co. v. Chicago, 236 Ill. 383, 86 NE 93. Of existence of certain **streets** in a city. Vonkey v. St. Louis, 219 Mo. 37, 117 SW 733. Courts cannot judicially know that all **coal mines** generate gas in quantities dangerous to employes on account of explosions. Timson v. Manufacturers' Coal & Coke Co., 220 Mo. 580, 119 SW 565. Cannot be judicially known that there is another corporation having same **corporate name** as defendant. Mobile Light & R. Co.

customs [21] and business usages,[22] of historical facts of general public interest,[23] of facts shown by an official census [24] or enumeration [25] of facts determinable by reference to the almanac.[26]

Courts will not take judicial notice of the laws or statutes of another state,[27] or of a foreign country,[28] or of Indian Tribal laws,[29] or of private laws,[30] or of municipal ordinances [31] or charters, unless enacted as public statutes,[32] or unless notice thereof is required by statute.[33]

v. Mackay [Ala.] 48 S 509. Court does not know that difference between **value of goods** at Birmingham and Jasper, as that proof of value at one place is not proof of value at other. St. Louis & S. F. R. Co. v. Cash Grain Co. [Ala.] 50 S 81.

21. Court may judicially notice general custom in community of kindling fires with coal oil. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. ——. General custom among farmers to provide, during winter and early spring, wood enough to last rest of year. Prudoehl v. Randall [Minn.] 121 NW 913.

Not judicially noticed: Course of business of express company with reference to transmitting and paying money. Downs v. Pacific Exp. Co., 135 Mo. App. 330, 116 SW 9. Court cannot judicially know whether there is general custom to leave hay chutes in barns open. Moellman v. Gieze-Henselmeier Lumber Co., 134 Mo. App. 485, 114 SW 1023. That "10-10-04" meant Oct. 10, 1904. Southwestern Tel. & T. Co. v. Owens [Tex. Civ. App.] 116 SW 89.

22. That giving of chattel mortgage on entire stock of goods to secure prior indebtedness is out of ordinary course of business. Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95. Courts in commercial city may take notice that lenders of money take assignments of securities, absolute in form, as security, and, on payment, simply hand securities back. Selleck v. Manhattan Fire Alarm Co., 117 NYS 964. Of custom of conveying land, after location, but before issuance of patent by powers of attorney. Sims v. Sealy [Tex. Civ. App.] 116 SW 630. Usual practice of issuing waybills in connection with transportation of freight over long distances. New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 165 F 833. That insurance business is necessarily done through agents. Modern Woodmen of America v. Lawson [Va.] 65 SE 509.

23. Historical and geographical facts of general interest relating to Indian reservation. United States v. Bass, 160 F 132. Matter of history that Wilmington is one of oldest cities in state and that streets have been laid out and used for more than century. Bailliere v. Atlantic Shingle, Cooperage & Veneer Co., 150 N. C. 627, 64 SE 754. That courts of Scott county, Tenn., were not closed during 1861 and 1862. Breckenridge Cannel Coal Co. v. Scott [Tenn.] 114 SW 930.

24. Of last census showing that Kansas City had less than 300,000 population. Russell v. Poor, 133 Mo. App. 723, 119 SW 433. Population of city and approximate rate of increase. Times Print. Co. v. Star Pub. Co., 51 Wash. 667, 99 P 1040. That many cities in state have more than 5,000 population. People v. Earl, 42 Colo. 238, 94 P 294. That four sections of land, constituting area of town of Fletcher, lie contiguous to city of Denver, and that city, according to 1890 census, had 106,000 people. Town of Fletcher v. Hickman [C. C. A.] 165 F 403.

25. Court bound to take judicial notice of population of town after enumeration for local option election, under statute. State v. Mitchell [Mo. App.] 115 SW 1098.

26. Hours of sunrise and sunset. Beardsley v. Irving, 81 Conn. 489, 71 A 580. Almanac may be read at trial to refresh memory of court and jury as to date and days of week, etc. Id. Which of certain days of month was Sunday. Id. Time of and different kinds of tides. Eichelberger v. Mills Land & Water Co., 9 Cal. App. 628, 100 P 117.

27. Laws of another state. Peck v. Noee, 154 Cal. 351, 97 P 865; Beshears v. Nelson Distilling Co. [Kan.] 101 P 1011; Union Cent. Life Ins. Co. v. Dukes [Ky.] 113 SW 454; Mandru v. Ashby, 108 Md. 699, 71 A 312; Electro-Tint Engraving Co. v. American Handkerchief Co., 130 App. Div. 561, 115 NYS 34; Mountain Lake Land Co. v. Blair [Va.] 63 SE 751. Statutes of another state. Mathieson v. St. Louis & S. F. R. Co., 219 Mo. 542, 118 SW 9. Law of sister state must be pleaded and proved as fact. Hayward v. Sencenbaugh, 141 Ill. App. 395. Laws of another state cannot be judicially noticed but must be proved; merely citing case to court is not enough. Missouri, K. & T. R. Co. v. Sealy [Kan.] 99 P 230. Law of another state must be treated as question of fact, except that common law is presumed same as that of forum. Miller v. Aldrich, 202 Mass. 109, 88 NE 441. Law of sister state must be proved like any other fact. Kimball v. Kimball [N. H.] 73 A 408.

28. Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947. Cuba, during military occupation by United States, was foreign country; its laws must be pleaded and proved. Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., 164 F 869.

29. Walker v. Roberson, 21 Okl. 894, 97 P 609.

30. Legislative resolution appropriating money to individual not noticed. Kingman v. Penobscot County Com'rs [Me.] 73 A 1038.

31. Norfolk & P. Trac. Co. v. Forrest's Adm'x [Va.] 64 SE 1034. Existence or contents of municipal ordinances. Tucker v. O'Brien, 117 NYS 1010. Municipal ordinances, not pleaded. State v. Koch, 138 Wis. 27, 119 NW 839.

32. City charter held public law; court takes judicial notice of it. Naylor v. McColloch [Or.] 103 P 68. Charter of Greater New York, enacted by legislature, noticed. Stone v. Auerbach, 133 App. Div. 75, 117 NYS 734. Notice taken that town of Moultrieville was incorporated by statute Dec. 17, 1817, and that charter and all amendatory acts were repealed by 25 Stat. p. 280. Board of Tp. Com'rs v. Buckley, 82 S. C. 352, 64 SE 163. Sanitary Code of New York city having been confirmed by statute and enacted

(§ 1) *C. Presumptions and burden of proof.*[34] *Presumptions.* See 11 C. L. 1350 Only rebuttable presumptions are here treated; presumptions of law, which are conclusive and which are in effect substantive rules of law, being treated in connection with the subject-matter to which they relate.

Ordinarily presumptions of fact are merely inferences from other facts,[35] or rules of evidence based upon the ordinary customs or experience of men, or upon public policy, formulated and established for convenience in the trial of cases.[36] Such inferences must be drawn from or be based upon facts[37] and are not conclusive.[38] Where there are conflicting presumptions, one is not, as a matter of law, stronger nor weaker than another.[39] Presumptions of fact never arise against the well known, usual occurrences or condition of things,[40] the presumption rather being that normal conditions exist,[41] and that things have been done in the usual and customary manner.[42]

into law may be judicially noticed. Cohen v. New York Department of Health, 61 Misc. 124, 113 NYS 88.

Contra: Building Code, though given the force of law, remains merely an ordinance, of which judicial notice cannot be taken. Schnaier & Co. v. Grigsby, 132 App. Div. 854, 117 NYS 455.

33. Hurd's Rev. St. 1908, c. 37, § 317, requiring Chicago municipal court to take judicial notice of general ordinances, requires notice to be taken of ordinance prohibiting railway companies leaving cars on crossings more than five minutes. Houren v. Chicago, etc., R. Co., 236 Ill. 620, 86 NE 611.

34. Search Note: See notes in 5 C. L. 1303; 11 Id. 1354; 4 L. R. A. 34; 25 Id. 449; 11 L. R. A. (N. S.) 616; 14 Id. 261; 6 A. S. R. 792; 11 Id. 758; 17 Id. 288; 18 Id. 879; 20 Id. 490; 30 Id. 736; 31 Id. 681; 36 Id. 682; 86 Id. 129; 89 Id. 198; 90 Id. 550; 104 Id. 198; 1 Ann. Cas. 459; 2 Id. 73; 4 Id. 956; 8 Id. 468; 10 Id. 1096; 11 Id. 887.

See, also, Evidence, Cent. Dig. §§ 73-122; Dec. Dig. §§ 53-98; 16 Cyc. 926-936, 1050-1087; 5 A. & E. Enc. L. (2ed.) 21; 11 Id. 4, 89; 22 Id. 1232; 12 A. & E. Enc. P. & P. 1, 1020.

35. Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and are controlled by the common principles of induction. Dietrich v. Dietrich, 128 App. Div. 564, 112 NYS 968. A presumption means a rule of law that courts and judges shall draw a particular inference from a particular fact or particular evidence, unless and until the truth of such inference is disproved. First Nat. Bank v. Adams, 82 Neb. 801, 118 NW 1055. If knowledge of law could be presumed from official position, presumption would be one of fact which might or might not be drawn by trial court. Vogel v. Brown, 201 Mass. 261, 87 NE 686.

36. Turner v. Williams, 202 Mass. 500, 89 NE 110.

Power of legislature to create presumptions: The legislature has power to declare that certain facts shall raise a presumption of other facts, but it has no power to make such presumption conclusive, since the effect in the latter case would be to deprive one of the parties of his right to a trial. Petersilie v. McLachlin [Kan.] 101 P 1014. Laws 1907, c. 373, § 2, making posting of notice of forfeiture in county clerk's office prima facie evidence of proper service, is valid. Jones v. Hickey [Kan.] 102 P 247; Reitler v. Harris [Kan.] 102 P 249. Laws 1907, p. 540, c. 373, § 3, is invalid, in so far as it attempts to make posting of notice of forfeiture of school lands conclusive evidence of service of such notice. Petersilie v. McLachlin [Kan.] 101 P 1014. The legislature has power to make certain acts or facts prima facie evidence of other facts necessary to be established in a legal proceeding. Intoxicating Liquor Act. Rose v. State, 171 Ind. 662, 87 NE 103.

37. International & G. N. R. Co. v. Vallejo [Tex.] 113 SW 4, opinion modified on another point, Id. [Tex.] 115 SW 25; Ryle v. Davidson [Tex. Civ. App.] 116 SW 823. Inference cannot be based upon another inference but must stand upon some clear, direct evidence. Lamb v. Union R. Co., 195 N. Y. 260, 88 NE 371. Inference, from other facts, as to what workman might be doing on certain day, insufficient to support inference that he did not do an act on another day. Hobbs v. George W. Blanchard & Sons Co. [N. H.] 70 A 1082.

38. Presumptions cannot be indulged when facts are shown. Schaub v. Kansas City So. R. Co., 133 Mo. App. 444, 113 SW 1163. Presumption that no person dies without heirs may be overcome by circumstantial evidence, or long lapse of time without any heir appearing. In re Clarke, 131 App. Div. 688, 116 NYS 101.

39. In such case entire question is to be decided as one of fact. Turner v. Williams, 202 Mass. 500, 98 NE 110.

40. Cannot be presumed that corporation had no officers or stockholders; contrary rather presumed. Richards v. Northwestern Coal & Min. Co., 221 Mo. 149, 119 SW 953. Law will not presume a thing contrary to the custom of men. Bright v. Bacon [Ky.] 116 SW 268.

41. Western Union Tel. Co. v. Hughey [Tex. Civ. App.] 118 SW 1130.

42. Presumption that things are regularly done includes regularity in order of signatures on will. Newell v. White [R. I.] 73 A 798. Presumed that township was full township of 36 sections, in absence of proof that it was fractional. Doddridge v. Patterson [Mo.] 121 SW 72. Presumed that railroad employes operated engines on company's own line, not on another. Hunt v. Philadelphia & R. R. Co. [Pa.] 73 A 968.

Among the commonly recognized presumptions of fact are the following: Presumption of the continued existence, prospectively,[43] of a status or condition once shown to exist;[44] of identity of person from identity of name;[45] of receipt of letter duly addressed, stamped and mailed;[46] that one who has been absent and unheard of for seven years is dead;[47] that the intersection of city streets is in the city;[48] that vendors of land know the boundaries thereof;[49] that a person who executes an instrument knows the contents thereof;[50] that ownership usually accompanies possession;[51] that persons owning claims against others usually enforce them within a reasonable time;[52] that a check is given in payment of a debt and not as a loan.[53]

Motion to modify judgment denied. Id. [Pa.] 73 A 970.

43. Presumptions which arise from proof of a given status or situation operate prospectively and not retrospectively. Western Union Tel. Co. v. Hughey [Tex. Civ. App.] 118 SW 1130. Conditions, once shown, presumed to continue, but do not relate backwards. In re Brigham's Estate [Iowa] 120 NW 1054. Proof of value of property at time of trial not evidence of its value three years before, at time alleged damage accrued. McDougald v. Southern Pac. R. Co., 9 Cal. App. 236, 98 P 685.

44. Condition once shown presumed to continue. Corcoran v. Albuquerque Trac. Co. [N. M.] 103 P 645. Conditions, once established, presumed to continue, at least reasonable time. State v. Grefe, 139 Iowa, 18, 117 NW 13. Proof of existence at particular time of fact of continuous nature gives rise to inference within logical limits of its existence at subsequent time. In re Darrow's Estate, 64 Misc. 224, 118 NYS 1082. Actual **possession,** under color of title, presumed to continue until an abandonment is shown. Buck v. Louisville & N. R. Co. [Ala.] 48 S 699. There is presumption of continuance of **life** and that presumption is not overcome until the lapse of seven years and then only after honest and bona fide efforts to find or hear from the missing person have met with failure. Dietrich v. Dietrich, 128 App. Div. 564, 112 NYS 968. **Meretricious relations** being shown between man and woman, presumption is that such relations continue and not that such persons are subsequently married. Id. Where, in **mortgage** foreclosure case, answer admitted giving of mortgage, its terms and record, presumption arose that condition thus shown to exist continued. Pettus v. Gault, 81 Conn. 415, 71 A 509. Existence of **ordinance** being once shown is presumed to continue. Burke v. City & County Cont. Co., 133 App. Div. 113, 117 NYS 400. Ordinance, once shown, presumed to continue in force; party relying on it need not show it has not been repealed. Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P 1063. Presumption arising from policy of consistency that **rule of legal construction** once adopted will be continued in force does not apply when there has been complete change in judicial system, as where territory had been admitted, with another, as a state. Western Union Tel. Co. v. Parsley [Tex. Civ. App.] 121 SW 226. Will not be presumed that law of Oklahoma Territory, as shown by decision of its highest court, continued to be the law 14 years later after its admission as state. Id.

45. Identity of name is prima facie evidence of identity of person. Des Moines Sav. Bank v. Kennedy [Iowa] 120 NW 742; Pearce v. Haas, 122 La. 376, 47 S 687; Ryle v. Davidson [Tex. Civ. App.] 116 SW 823.

46. The posting of a duly addressed registered letter is sufficient to sustain an inference that it was received. McAuley v. Casualty Co. of America [Mont.] 102 P 586. Mailing of letter, postpaid and properly addressed to person shown to reside in city or town to which letter was addressed, creates no legal presumption, but a presumption of fact, that letter was received. Campbell v. Gowans [Utah] 100 P 397. Proof that message was mailed, properly addressed and stamped, raises presumption that it was received, but denial of receipt raises as strong a presumption that it was not mailed and question is then for jury. Glenn v. Western Union Tel. Co. [S. C.] 65 SE 1024. Mailing of letter, duly addressed and stamped, raises no presumption of law or fact that it was received by addressee, but is circumstance from which receipt of letter in due course may be fairly deduced. Continental Ins. Co. v. Hargrove [Ky.] 116 SW 256. Register of probate not being agent of judge of probate, and having independent official duties, it cannot be presumed that letter addressed to him in his official capacity would be handed to the judge. Cole v. New England Trust Co., 200 Mass. 594, 86 NE 902.

47. Presumption of death may obtain where one has been absent and unheard of for more than seven years but presumption is disputable. Turner v. Williams, 202 Mass. 500, 89 NE 110.

48. Proof that accident occurred at intersection of two city streets in city gives riss to inference that accident occurred in city. Hull v. Thompson Transfer Co., 135 Mo. App. 119, 115 SW 1054.

49. Gaffney v. Clark [Tex. Civ. App.] 118 SW 606.

50. Presumed that one who executed release of lien knew contents of release. Watson v. Vansickle [Tex. Civ. App.] 114 SW 1160.

51. Possession is presumptive evidence of ownership only in absence of actual or direct evidence. First Nat. Bank v. Adams, 82 Neb. 801, 118 NW 1055. One in possession of personal property is presumed to be owner. Gate City Fire Ins. Co. v. Thornton, 5 Ga. App. 585, 63 SE 638.

52. Debt presumed paid after 20 years. Millwee v. Phelps [Tex. Civ. App.] 115 SW 891.

53. This presumption may be overcome by proof to the contrary, as by showing

Failure or refusal of a party to testify to facts within his knowledge,[54] or to produce material evidence within his knowledge or control,[55] or the suppression or attempted suppression of material evidence,[56] warrants the inference that such evidence, if produced, would be unfavorable to the party suppressing it, but such inference does not arise out of any duty of the parties to produce evidence or to testify,[57] and is purely an inference of fact to be drawn by the jury in its discretion as the arbiter of the facts.[58] No such unfavorable inference is to be drawn where the

business relations and transactions. Russell v. Amlot, 132 App. Div. 584, 116 NYS 1080.

54. Where evidence is evenly balanced, and one party has it in his power to make the matter certain and fails to do so, this is a patent circumstance against him. Pullman Co. v. Cox [Tex. Civ. App.] 120 SW 1058. Presumption is that testimony of party would be unfavorable if given, where he declines to testify, knowing facts. York v. Mathis, 103 Me. 67, 68 A 746. That plaintiff failed to take stand to contradict important evidence against her could be considered where, though in custody of sheriff, she was free to take the stand and testify. Kelley v. Boston, 201 Mass. 86, 87 NE 494. Where one party to an interference testified that before date of conception alleged by the other party he disclosed to him the invention, his silence justified conclusion that such disclosure had been made. Rolfe v. Kaisling, 32 App. D. C. 582. Where party is in court and declines to take stand to rebut evidence of facts reflecting upon him, and necessarily within his knowledge, the jury may consider the fact and infer that his testimony would not be favorable to himself. Meyer v. Minsky, 128 App. Div. 589, 112 NYS 860.

55. Rule does not apply to all witnesses, but only to such as are within power of party to produce. Reehil v. Fraas, 129 App. Div. 563, 114 NYS 17. Failure of a party to produce evidence which would conclusively determine the fact in dispute may give rise to a conclusive inference that the fact is not as he claims it to be or as is claimed by the other side. As failure to produce chattel or writing which would indisputably settle question at issue. Id. If party have it in his power to present fact necessary or beneficial to his case, his failure to present it is taken as conclusive of nonexistence of such fact. Despard v. Pearcy, 65 W. Va. 140, 63 SE 871. Where party fails to produce evidence as to facts and conditions within his exclusive knowledge, the presumption is that it would be unfavorable to him. Century Parlor Furniture Co. v. Harty Bros., 141 Ill. App. 17. Where defendant had facts at hand, but failed to show whether car was being used in interstate commerce, presumption was that evidence if produced would be prejudicial. Missouri Pac. R. Co. v. Kennett [Kan.] 99 P 269. Where three city employes made repairs and two of them testified that they did not make certain tie in wire, and third did not testify, inference was that third man tied wire. Hodgins v. Bay City, 156 Mich. 687, 16 Det. Leg. N. 284, 121 NW 274. In suit to recover deposit from bank, failure of bank to call cashier on duty when deposit was alleged to have been made could be considered by jury. Second Nat. Bank v. Gibboney [Ind. App.] 87 NE 1064. Where evidence is introduced against a party tending to create a liability, and his **failure to produce evidence in rebuttal,** though he has power to do so, it is presumed that evidence, if produced, would be adverse. Bone v. Hayes, 154 Cal. 759, 99 P 172; Mulien v. Quinlan & Co., 195 N. Y. 109, 87 NE 1078. Failure to produce **real evidence,** such as coil of wire which it was claimed caused accident because of not being insulated. Hausler v. Commonwealth Elec. Co., 144 Ill. App. 643. Failure of party to produce material testimony within his control warrants the presumption that such evidence, if produced, would be unfavorable to him. **Failure to produce papers** which pertained to transaction in issue and which had been removed from files of court without leaving copy. Hennessey v. Walsh, 142 Ill. App. 237. **Failure to produce books** which would throw light on entries offered in evidence in other books is suspicious circumstance. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906. Proper to argue from **failure to offer letters in evidence,** when letters were in court in their possession, though prior demand to produce had not been made. Hill v. Hauser [Tex. Civ. App.] 115 SW 112.

56. Evidence withheld is presumed to be adverse. Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049; Tetreault v. Connecticut, 81 Conn. 556, 71 A 786. If party fails to produce documents in his possession, material to issues, in response to subpoena duces tecum, law presumes that such documents are as other party claims them to be. Thomas v. Fos, 51 Wash. 250, 98 P 663. Parties disagreed as to classification of lumber sold, and same was laid away for further consideration, but buyer hauled it away without seller's consent. Held any doubt as to classification should be resolved in favor of seller. Federal Lumber Co. v. Reece [Ky.] 116 SW 783.

57. Reehil v. Fraas, 129 App. Div. 563, 114 NYS 17. Error to allow counsel for plaintiff (in case where injury was caused by wagon driven by defendant's servant, who was accompanied by boy, not an employe) to argue that it was defendant's duty to call boy to testify if he wanted truth. Id.

58. Reehil v. Fraas, 129 App. Div. 563, 114 NYS 17. Where party fails to call material witness, jury may take that fact into consideration in weighing all the evidence. Wade v. Mt. Vernon, 133 App. Div. 389, 117 NYS 356. Failure to produce mere oral evidence does not give rise to any presumption but is a fact to be considered by the jury in weighing the evidence produced. Reehil v. Fraas, 129 App. Div. 563, 114 NYS 17. Failure of party, in court, to take stand and testify in rebuttal, when facts are within his

witness or evidence is equally available to both parties,[59] or where the testimony of the witness would be merely cumulative[60] or immaterial,[61] or where the witness is biased or prejudiced,[62] or where he is subsequently called and examined,[63] nor is there any presumption against a defendant for failure to call witnesses or any witness, when plaintiff has failed to make a prima facie case.[64]

It is presumed that public officers perform their duties[65] in the manner required by law[66] and in good faith,[67] without excess of authority[68] or violation of the law,[69] and with due regard to territorial limits upon their authority to act.[70]

Where, therefore, an official act has been done, all the necessary prerequisites and conditions precedent to the validity thereof will be presumed to have been complied with or to have happened,[71] and where an officer or board has refused to act, the

knowledge, does not shift burden of proof, nor is it to be considered as corroborative affirmative evidence for other party. Myer v. Minsky, 128 App. Div. 589, 112 NYS 860.

59. In re Darrow's Estate, 64 Misc. 224, 118 NYS 1082; Jordan v. Austin [Ala.] 50 S 70. Where witness was in court, subpoenaed by plaintiff, and defendant called witness but did not examine him on merits, there was no presumption that he would testify unfavorably to plaintiff, had plaintiff called him, since he was accessible to either party and friendly to neither. Fox v. Valeille, 61 Misc. 619, 114 NYS 5.

60. Jordan v. Austin [Ala.] 50 S 70.

61, 62. Reehil v. Fraas, 129 App. Div. 563, 114 NYS 17.

63. No unfavorable presumption from not calling witness originally, when he was subsequently called, and other party made him his own witness. Fleck v. Cohn, 131 App. Div. 248, 115 NYS 652.

64. Cooper v. Upton, 60 W. Va. 648, 65 W. Va. 401, 64 SE 523; St. Louis & S. F. R. Co. v. Finley [Tenn.] 118 SW 692. Where there was no evidence tending to show negligence on part of defendant, his failure to testify raised no presumption against him. Chicago Mill & Lumber Co. v. Cooper [Ark.] 119 SW 672.

65. Presumed that ordinance requiring city to keep map showing street lines, sewers, gas mains, etc., was observed, and city charged with notice of locations. Manuel v. Cumberland [Md.] 73 A 705. Presumed that judge performed his duty with regard to issue of warrant. Schooler v. Yancey [Ky.] 118 SW 940. Presumed after 12 years from appointment of administrator that he appointed claims commissioners as required by statute. McKillop v. Post [Vt.] 74 A 78. Register of deeds presumed to have properly kept indexes required by Pol. Code, §§ 868-871. Fullerton Lumber Co. v. Tinker [S. D.] 118 NW 700. Presumed that irrigation superintendent performed his duties as required by statute in distributing water. McLean v. Farmers' Highline Canal & Reservoir Co., 44 Colo. 184, 98 P 16.

66. Brunke v. Gruben [Neb.] 122 NW 37. Where return of nulla bona on execution was made and summons in garnishment issued on same day, it was presumed that latter was issued subsequent to return. Id. Presumption that warrant was regularly issued by judge. Schooler v. Yancey [Ky.] 118 SW 940. Presumed that sheriff in making sale under execution followed order of sale issued on judgment. Anderson v. Casey-Swasey Co. [Tex. Civ. App.] 120 SW 918. Presumption that public officials followed the statute applies to **ancient official acts.** Van Pelt v. Parry, 218 Mo. 680, 118 SW 425.

67. Every prima facie presumption favors good faith of executive officer in performance of duties. State v. Rose, 140 Wis. 360, 122 NW 751.

68. Slaughter v. Cooper [Tex. Civ. App.] 121 SW 173. Presumed that notary who took deposition had official character which he assumed and that he had authority to take depositlon. Carpenter v. Gibson [Vt.] 73 A 1030.

69. That board of public officers acted lawfully. Whiting v. Malden & M. R. Co., 202 Mass. 298, 88 NE 907. Presumption is that public officers will obey laws and will not wantonly and criminally violate them. State v. Dahl, 140 Wis. 301, 122 NW 748. Presumed that time to present claims against decedent's estate was not extended beyond statutory period. McKillop v. Rose [Vt.] 74 A 78.

70. Presumed that instrument was officially attested within territorial limits of jurisdiction of attesting officer. Rowe v. Spencer [Ga.] 64 SE 468. Presumed that attesting notary resided and received his appointment at place where he attested contract. Beaty v. Sears [Ga.] 64 SE 321.

71. If officer has power to act only upon happening of contingency, that contingency has happened. Slaughter v. Cooper [Tex. Civ. App.] 121 SW 173. That **ordinance** was recorded in "Book of Ordinances" prima facie evidence of regular publication, under Mills' Ann. St. Colo. 1891, § 4443. Town of Fletcher v. Hickman [C. C. A.] 165 F 403. Presumed that streets and alleys were dedicated to town when **plat of streets** was filed, and that town accepted them when incorporated later. Town of Exira v. Whitted [Iowa] 118 NW 917. **Record of deed** presumed proper. Childers v. Pickenpaugh, 219 Mo. 376, 118 SW 453. Presumed that **person discharged from insane asylum** had become sane. In re Thorp's Will, 150 N. C. 487, 64 SE 379. Presumption is that sworn appraisers viewed land to be appraised, as required by law before making **appraisal.** Arnold v. Watson [Ark.] 121 SW 354. Presumed that plans and specifications for paving were on file with city clerk before **contract** was let, as required by statute. Jones v. Plummer, 137 Mo. App. 337, 118 SW 109. Fact of subscription and issuance of bonds by officer of county charged with the duty raises rebut-

performance of the prerequisites to its jurisdiction to act will not be presumed.[72] Every presumption is indulged in favor of official certificates[73] and records,[74] and, likewise, judicial proceedings of a court of competent jurisdiction are presumed regular and valid.[75]

All men are presumed to know the law,[76] and, as a general rule compliance with the law will be presumed until the contrary is made to appear,[77] and, similarly, the presumption is in favor of innocence, honesty and good faith,[78] and against fraud.[79]

table presumption that county has complied with condition precedent to **issuance of bonds.** Green County v. Quinlan, 211 U. S. 582, 53 Law. Ed. —. Presumed that clerk of supreme court followed steps required by statute as to security for costs before issuing **mandate to lower court.** Gillean v. Witherspoon [Tex. Civ. App.] 121 SW 909. Proper steps **in assessment of property** for taxes presumed to have been taken. Atwater v. O'Reilly, 81 Conn. 367, 71 A 505. Presumed that county auditor kept record of real estate conveyances and corrected county duplicates annually, and that assessors obtained their information from auditor's office. Smith v. Cox [S. C.] 65 SE 222. Presumed that city officials performed duties with reference to **public improvements.** McCaleb v. Dreyfus [Cal.] 103 P 924. Village having statutory authority to improve and widen street presumed to have acted lawfully in so doing. Bekkedahl v. Westby, 140 Wis. 230, 122 NW 727. All reasonable presumptions favor regularity of **election.** Town of Grove v. Haskell [Okl.] 104 P 56. Where town record was silent as to mode of election of overseers of poor, election presumed regular. Inhabitants of Wellington v. Corinna, 104 Me. 252, 71 A 889. Presumption favors regularity and validity of acts of officials in charge of special election in special school district. Thrash v. Transylvania County Com'rs, 150 N. C. 693, 64 SE 772.

72. On mandamus to compel town board to hear petition under Acts 1907, pp. 620, 621, c. 279, §§ 7, 9 (Burns' Ann. St. 1908, §§ 8914, 8916), to disannex land from a city, it would not be presumed that notice was given or that paper in which notice was published had the required circulation. Town of Windfall City v. State [Ind.] 88 NE 505.

73. Certificate of officer that person was sworn presumptively true. Whalen v. Gleeson, 81 Conn. 638, 71 A 908.

74. Where deed and record have stood unchallenged for 70 years, and many transfers have been based thereon, it will be presumed that it was properly acknowledged and recorded, and that magistrate taking acknowledgment had jurisdiction. Hudson v. Webber, 104 Me. 429, 72 A 184. Presumed that acreage in tract as given by government was correct. Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Presumed that all entries or erasures in book of official records were made by proper officer at proper time in absence of contrary evidence. Hudson v. Webber, 104 Me. 429, 72 A 184.

75. Proceeding for commitment of lunatic presumed regular, in action against judge for false imprisonment. Brayman v. Grant, 130 App. Div. 272, 114 NYS 336. Jurisdiction being shown, proceedings of justice court are presumed regular unless irregularity appears on face of record, or unless record omits some fact required by law to be shown. Code, § 4648. Gilman v. Weiser [Iowa] 118 NW 774. Law does not require ground for order of continuance to be made matter of record, hence presumption is that it was based on legal grounds. Id.

Collateral attack: See Judgments, § 7.

Presumptions on appeal: See Appeal and Review, §§ 9D, 13F2.

76. All men presumed to know law governing public body and limiting its powers. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. Person presumed to know law fixing rights under contract to which he is party. Long v. Newman [Cal. App.] 102 P 534. Official sureties of public administrator presumed to know law which requires county court to confide to him estates of decedents and also of infant orphans. Newman v. Flowers' Guardian [Ky.] 121 SW 652. **Upon question as to whether one acts corruptly,** there is no conclusive presumption that one knows the law. Vogel v. Brown, 201 Mass. 261, 87 NE 686.

77. Every person is presumed to obey the law and do his duty and burden is upon one alleging contrary to prove it. Schlitz Brew. Co. v. Shiel [Ind. App.] 88 NE 957. Presumed that **liquors** were kept for disposal in accordance with local option law and not in violation of it. Davis v. Kuehn [Tex. Civ. App.] 119 SW 118. Presumed that "soft drinks" sold were not intoxicants. Id. Strong presumption that residence of person was at place required by law while he was acquiring **homestead.** Des Moines Sav. Bank v. Kennedy [Iowa] 120 NW 742. **Instrument presumed legal** and contrary must be proved by one asserting it. In re Darrow's Estate, 64 Misc. 224, 118 NYS 1082. **Acts of corporation** in acquiring stock and property of another company were presumptively in accordance with St. 1887, p. 1072, c. 413. Whiting v. Malden & M. R. Co., 202 Mass. 298, 88 NE 907. Street railway company presumed to have obtained consent of city to mortgage franchise. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552.

78. General presumption that all men act honestly must be overcome by him who alleges contrary. Gillespie v. Fulton Oil & Gas. Co., 236 Ill. 188, 86 NE 219. Presumption favors honesty rather than fraud. Life Ins. Co. v. Hairston, 108 Va. 832, 62 SE 1057. Courts must always assume that members of the bar always act in good faith with courts. Older v. Superior [Cal. App.] 102 P 829. Law presumes right conduct, as that mortgagor owned mortgaged property. Dierling v. Pettit [Mo. App.] 119 SW 524.

79. Presumed that representation made is true. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Presumed that error in judgment by attorney in agreeing to dis-

Other presumptions of a similar nature are those in favor of sanity[80] and ordinary intelligence,[81] that one intends the natural consequences of his own acts,[82] that persons exercise due care for their own safety,[83] and that injury or death is not self-inflicted.[84] It is presumed that adult persons are sui juris,[85] and that children under a certain age are non sui juris.[86] There is presumption that no person dies without leaving heirs, though there is no presumption in all cases that one leaves heirs capable of inheriting.[87]

Where there is no proof of the law of another state, it will be presumed that the common law prevails there,[88] if such state derived the body of its law from England,[89] and that such law is the same as the common law of the forum.[90] The authorities are not in harmony as to whether this presumption of similarity extends to statutes, the negative being held in some states[91] and the affirmative in others.[92]

miss an appeal was honest and was not in fraud of client. Meisenheimer v. Meisenheimer [Wash.] 104 P 159.

80. Sanity presumed. Dodd v. Anderson, 131 App. Div. 224, 115 NYS 688; Van Norman v. Modern Brotherhood of America [Iowa] 121 NW 1080; City of Covington v. O'Meara [Ky.] 119 SW 187; In re Phillips [Mich.] 16 Det. Leg. N. 623, 122 NW 554; Hopkins v. Wampler, 108 Va. 705, 62 SE 926. See Insane Persons, § 1. Sanity presumed to continue until contrary is shown. In re Brigham's Estate [Iowa] 120 NW 1054. Prior to an inquest, sanity is presumed. Hill-Dodge Banking Co. v. Loomis [Mo. App.] 119 SW 967.

81. Person must be considered to have ordinary intelligence though he has not been long in this country and does not speak English. Fosnes v. Duluth St. R. Co., 140 Wis. 455, 122 NW 1054.

82. Ampersand Hotel Co. v. Home Ins. Co., 131 App. Div. 361, 115 NYS 480.

83. In absence of living witnesses of death of employe, presumption is that he was exercising due care for his own safety. Brown v. West Riverside Coal Co. [Iowa] 120 NW 732. Law presumes that one driving on to street railway crossing, where he could see up the track, looked to see if car was coming, and exercised ordinary care for his own safety. McKenzie v. United R. Co., 216 Mo. 1, 115 SW 13.

84. Presumption is that injury was accidental, not self-inflicted. Beard v. Indemnify Ins. Co., 65 W. Va. 283, 64 SE 119. It is presumed that injuries are not self-inflicted. Wilkinson v. Aetna Life Ins. Co., 144 Ill. App. 38. Presumption is against suicide. Monson v. La France Copper Co. [Mont.] 101 P 243. Presumption is against suicide, in absence of direct proof of manner of death. Van Norman v. Modern Brotherhood of America [Iowa] 121 NW 1080. Presumption is against suicide, and, to overcome it, proof of suicide must establish fact beyond reasonable doubt. Almond v. Modern Woodmen of America, 133 Mo. App. 382, 113 SW 695. Presumption against suicide, where cause of death is in issue under insurance policy. Klumb v. Iowa State Traveling Men's Ass'n [Iowa] 120 NW 81. Proof that the deceased was slightly deranged or ill would not preclude operation of presumption against suicide. Van Norman v. Modern Brotherhood of America [Iowa] 121 NW 1080.

85. Presumption is that persons are sui juris nothing to contrary appearing. Gunter v. Hinson [Ala.] 50 S 86.

86. Children under 12. Grealish v. Brooklyn, etc., R. Co., 130 App. Div. 238, 114 NYS 582. As to **contributory negligence** of children, see Negligence, § 4.

87. In re Clarke, 131 App. Div. 688, 116 NYS 101.

88. Common law presumed to prevail in sister state. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751; Hanson v. Great Northern R. Co. [N. D.] 121 NW 78. See Conflict of Laws, § 8, subd. Presumptions and Judicial Notice and Pleading of Foreign Laws. Law of sister state governing transaction not being proved, common law prevailed. Bank of Laddonia v. Bright-Coy Com. [Mo. App.] 120 SW 648. In action for injury in another state, no statute of which is pleaded, liability will be determined by reference to common law, and procedure of forum will govern. Cobe v. Malloy [Ind.] 88 NE 620.

89. Kimball v. Kimball [N. H.] 73 A 408. Presumption that common law prevails in another state applies only to those states which were carved out of English territory. Mathieson v. St. Louis & S. F. R. Co., 219 Mo. 542, 118 SW 9.

90. Daggett v. Southwest Packing Co. [Cal.] 103 P 204; Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754; Miller v. Aldrich, 202 Mass. 109, 88 NE 441; Green v. Hewett [Tex. Civ. App.] 118 SW 170; Atchison, etc., R. Co. v. Smythe [Tex. Civ. App.] 119 SW 892; Wingo v. Rudder [Tex. Civ. App.] 120 SW 1073; Western Union Tel. Co. v. Parsley [Tex. Civ. App.] 121 SW 226; Mountain Lake Land Co. v. Blair [Va.] 63 SE 751. Laws of New York at certain time presumed same as those of Texas, there being no proof. Kin Kaid v. Lee [Tex. Civ. App.] 119 SW 342. Law as to liability of connecting carrier presumed same as of forum. Schwartz v. Panama R. Co. [Cal.] 103 P 196. In action by servant against master, for injuries received in foreign country (Cuba) on account of alleged negligence in failing to provide reasonably safe machinery, servant may prevail on making case under law of forum, without proof of law of foreign country, which, no statute intervening, will be presumed same as that of forum. Cuba R. Co. v. Crosby [C. C. A.] 170 F 369.

91. Kimball v. Kimball [N. H.] 73 A 408.

92. Presumption that laws of sister state are same as of forum applies, with some exceptions, to statutory law. Elmergreen v. Weimer, 138 Wis. 112, 119 NW 836. In absence of other evidence, presumed that stat-

No presumption of genuineness arises from the admission in evidence of an instrument as an ancient one.[93]

The burden of proof.[See 11 C. L. 1855]—The burden of proof is the duty resting upon a party asserting the affirmative of an issue or proposition to establish it by a preponderance of the evidence.[94] This duty remains with the party holding the affirmative until the end of the trial,[95] that is, the burden of proof does not shift, but the burden of evidence, or duty of adducing evidence to meet a prima facie case, does shift.[96] Accordingly the plaintiff has the burden, throughout the trial, of proving the essential elements of his cause of action,[97] while the defendant has a similar burden as to all matters of affirmative defense.[98] In civil cases, negative

utes of New York are same as those of Wisconsin. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826. Law of another territory presumed same as statutes of Oklahoma as to lawful rate of interest. Schlotterbeck v. Schwinn [Okl.] 103 P 854. In the absence of proof to the contrary, law of a sister state will be presumed to be the same as the statutory law of Texas. Statute making void condition in telegraph contract that claim for damages must be presented within 60 days. Western Union Tel. Co. v. Lannom [Tex. Civ. App.] 119 SW 910. Presumed that Alaska has statute similar to that of Washington, allowing woman over 21 to sue as plaintiff for her own seduction. Murrilla v. Guis, 51 Wash. 93, 98 P 100. Presumed that law of Missouri as to legality of sale of liquor was same as that of forum. Beshears v. Nelson Distilling Co. [Kan.] 101 P 1011. Absence of proof, laws of other state presumed same as those of forum (statutory liability of stockholders). Peck v. Noee, 154 Cal. 351, 97 P 865.

93. West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228.

94. Berger v. St. Louis Storage & Com. Co., 136 Mo. App. 36, 116 SW 444. Burden is on party alleging fact. Heiden v. Atlantic Coast Line R. Co. [S. C.] 65 SE 987. Where burden was on defendant to prove payment, **instruction** that it was necessary for the plaintiff to make out his case by a preponderance of evidence, and if the jury found evidence evently balanced then they should find for defendant, was erroneous. Stephens v. Neilson, 142 Ill. App. 263.

95. Berger v. St. Louis Storage & Com. Co., 136 Mo. App. 36, 116 SW 444.

96. Berger v. St. Louis Storage & Com. Co., 136 Mo. App. 36, 116 SW 444; Ruth v. Krone [Cal. App.] 103 P 960; Toube v. Rubin-Blankfort Co., 63 Misc. 298, 116 NYS 673. In suit to subject to husband's debts property conveyed to wife. Van Ingen v. Peterson, 12 Ohio C. C. (N. S.) 253.

Statements of rule: "Burden of evidence" may shift from plaintiff to defendant, and from defendant to plaintiff again, but "burden of proof" remains throughout the case with plaintiff, he having the affirmative of the issue. Foss v. McRae [Me.] 73 A 827. Burden of establishing cause by preponderance of evidence does not shift, but burden of proceedings with cause and adducing evidence and meeting prima facie case may shift from one side to other. Cox v. Aberdeen & A. R. Co., 149 N. C. 117, 62 SE 884. By shifting of burden of proof is meant the duty of defendant to meet prima facie case made by plaintiff, and the duty of plaintiff then to overcome the showing made by defendant. Long v. McCabe, 52 Wash. 422, 100 P 1016. A prima facie case does not necessarily or usually change the burden of proof, as such case stands only until it is met by evidence opposing evidence. Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793. Burden of proof does not shift, and is not assumed by defendant when he attacks a prima facie case made by plaintiff. Wylie v. Marinofsky, 201 Mass. 583, 88 NE 448. Distinction between burden of proof and weight or preponderance of evidence discussed. "Burden of evidence" shifts; "burden of proof" does not. Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793.

97. Burden is always on plaintiff to prove every essential of his cause of action. Hauser v. Western Union Tel. Co., 150 N. C. 557, 64 SE 503. Where there is no affirmative defense or plea in nature of confession and avoidance, burden is on plaintiff to establish case by preponderance of evidence. Courson v. Pearson [Ga.] 64 SE 997. Plea of general issue merely places burden of proof on plaintiff. Alexander v. Woodmen of the World [Ala.] 49 S 883. In an action to recover money from defendant, alleged to have been obtained by means of fraud while acting in fiduciary capacity for plaintiff, defendant alleged sale to himself; held, this would only rebut proof of fraud; error to instruct that burden was on defendant to prove this defense by preponderance of evidence. Smith v. Brigham, 106 Minn. 91, 118 NW 150. In action on bond payable to bearer, production of bond makes prima facie case, but evidence that it had been taken by fraud met this case, and burden was on plaintiff to show title, and prove allegations of complaint. Parsons v. Utica Cement Co. [Conn.] 73 A 785.

98. Burden of establishing affirmative defense is on party alleging it. Mansfield v. Mallory [Iowa] 118 NW 290. Defendant has burden on new issues presented in his answer, outside issues presented in plaintiff's pleadings. Wylie v. Marinofsky, 201 Mass. 583, 88 NE 448. Burden of proving **that work was done gratuitously** held to rest upon defendant. Ferry v. Henderson, 32 App. D. C. 41. Defendant has burden of proving **payment** as defense to note. Jennings v. Roberts, 130 Mo. App. 493, 109 SW 84. **Claim to a discount** is a substantive affirmative defense which defendant has the burden of proving. Northwestern Fuel Co. v. Western Fuel Co., 144 Ill. App. 92. Burden on defendant to prove **set-off.** Muir v. Kalama-

averments,[99] the subject-matter of which lies peculiarly within the knowledge of the adverse party,[1] are taken as true unless disproved, and, where it is necessary to make a character of proof, which by reason of the circumstances is exclusively within the knowledge of one of the parties, the burden is upon the party having such knowledge to make the required proof.[2] Where the allegation is affirmative in effect, and negative in form merely, the real character of the allegation controls the burden.[3]

The power of the legislature to place the burden of proof has been already considered.[4]

§ 2. *Relevancy and materiality.*[5]—See 11 C. L. 1356—Any fact is relevant which logically tends to prove or disprove a fact in issue,[6] and the former is admissible to prove the latter,[7] unless some other specific rule of law or evidence forbids, and

zoo Corset Co., 155 Mich. 441, 15 Det. Leg N. 1074, 119 NW 589. Burden on defendant to establish plea of **recoupment.** Carolina Portland Cement Co. v. Alabama Const. Co. [Ala.] 50 S 332. In suit for partition, where facts entitling plaintiff thereto were undisputed, and defendants sought affirmative relief by way of **rescission of contract,** burden was on defendants. Hagan v. Taylor [Va.] 65 SE 487. **In action for wrongful** discharge, burden is on defendant to show that plaintiff might have found other employment, but this burden may be met by showing on cross-examination of plaintiff that he had not sought other employment. Pindar v. Jenkins, 128 App. Div. 711, 113 NYS 583. See Master and Servant, § 1, subd. Remedy for Wrongful Discharge. Burden on defendant to prove alleged **contributory negligence** of plaintiff. Allen v. Chicago, B. & Q. R. Co., 82 Neb. 726, 118 NW 655. See Negligence, § 5, subd. Presumptions and Burden of Proof.

99. In civil cases, negative averments are taken as admitted unless disproved by defendant. New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 165 F 833.

1. Where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. Fulwider v. Trenton Gas, L. & P. Co., 216 Mo. 582, 116 SW 508.

2. Burden on carrier to show cause of alleged delay in transportation. Jolliffe v. Northern Pac. R. Co., 52 Wash. 433, 100 P 977.

3. Plaintiff must produce some evidence in support of an allegation of loss of goods by a carrier, notwithstanding its negative character as involving nondelivery. Glazer v. Old Dominion S. S. Co., 113 NYS 979.

4. See ante, this section, subsec. Presumptions, note.

5. Search Note: See notes in 62 L. R. A. 199, 218, 291; 14 L. R. A. (N. S.) 689; 21 A. S. R. 314; 101 Id. 481; 8 Ann. Cas. 1136; 10 Id. 288.

See, also, Evidence, Cent. Dig. §§ 123-437; Dec. Dig. §§ 99-147; 1 Cyc. 295, 296; 16 Cyc. 1110-1144, 1148-1155, 1159-1192, 1241-1261; 1263-1287; 17 Cyc. 274-289; 11 A. & E. Enc. L. (2ed.) 501; 8 A. & E. Enc. P. & P. 98.

6. Test of relevancy is not sufficient to prove fact but whether it legally tends to prove it. Schock v. Solar Gaslight Co., 222 Pa. 271, 71 A 94. Facts are relevant to others when one, taken alone or with others, proves or renders possible the past, present, or future existence or nonexistence of the other. Fishman v. Consumers' Brew. Co. [N. J. Law] 73 A 231. Any circumstance is relevant which tends to make the proposition at issue more or less probable. Summit Wagon Co. v. Lowery [Ga. App.] 64 SE 489. Where proof of several facts is necessary to maintain an issue, any legitimate evidence tending to prove any such fact should be received. Barrish v. Orben [N. J. Law] 73 A 529. Where issue depends upon circumstantial evidence, proof of facts may be received which are themselves immaterial, but are relevant when taken together. Phillips v. Chase, 201 Mass. 444, 87 NE 755. Where evidence upon main issue is not conclusive, competent evidence of collateral facts or circumstances reasonably tending to establish the probability or improbability of the fact in issue is admissible, if not too remote. Fitch v. Martin [Neb.] 122 NW 50.

7. Held admissible upon certain issues: Upon issue as to **contract price,** evidence of the value of the subject-matter is admissible to throw light on issue. Peyser v. Western Dry Goods Co., 53 Wash. 633, 102 P 750. In action for wages, letters by plaintiff asking when he was expected to resume work, and demanding pay, were admissible, though demand for payment was in issue to show **his willingness and readiness to perform** contract. Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 NE 745. Issue being **whether insured had paid premium,** and defendant having shown that insured habitually paid debts by check, and that no check had been given for premium, evidence in behalf of plaintiff that insured habitually carried considerable money and sometimes paid cash was admissible. Security Mut. Life Ins. Co. v. Kleutsch [C. C. A.] 169 F 104. **Quality of coal** being in issue, quality of exactly same kind of coal may be shown. Home Ice Factory v. Howells Min. Co. [Ala.] 48 S 117. On issue of **grade and quality of hay,** one receiving hay from same ricks may testify to quality and grade of that received by him. Dixon v. Watson [Tex. Civ. App.] 115 SW 100. Testimony of witness that he set out certain tree at certain **time,** at certain **distance** and **direction** from fence, was competent to show location of line. Keefe v. Sullivan County R. Co. [N. H.] 71 A 379. Testimony fixing **time of transaction** properly admitted, the fact not having been shown. Williams v. Smith [R. I.] 72 A 1093. Proof that train was late has some tendency to prove that it

provided that the fact in issue is sufficiently identified with that to which the evidentiary fact relates.[8] Evidence of all matters, therefore, which constitute a part of the principal matter involved in the suit, is admissible;[9] but evidence as to collateral matters, not directly in issue,[10] and not related to or connected with the transaction or matters in issue,[11] and furnishing no legal inference as to the truth

was running at high rate of **speed.** St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. Action for damages by fire caused by sparks from defendant's engines, proof that sparks had been seen to come from engines shortly before fire was admissible on issue as to **origin of fire.** Sims v. American Ice Co., 109 Md. 68, 71 A 522. Proof that before building of dam causing stagnant water and mosquitoes there was no malaria, and that thereafter it became prevalent, was proper circumstantial evidence as to **cause of disease.** Towaliga Falls Power Co. v. Sims [Ga. App.] 65 SE 844. Evidence as to appearances of intoxication by witnesses who saw injured man just before and after injury admissible on issue of **intoxication** at time. Beard v. Indemnity Ins. Co., 65 W. Va. 283, 64 SE 119. Issue being whether party to contract was deprived of reason as **effect of intoxication** at time he signed, proof of his acts and declarations just before and after that time was admissible. Hawkins v. Studdard [Ga.] 63 SE 852. Where **financial condition** of resident of county is in issue, exemplification of tax digest, properly certified by clerk of court of ordinary, is admissible. Churchill v. Jackson [Ga.] 64 SE 691. **To rebut claim that suit would have been brought sooner if meritorious,** evidence to show defendant's absence and that he had no property was admissible. Berry v. Doolittle [Vt.] 74 A 97. General, prevailing price for gravel admissible to prove market **value.** Monture v. Regling, 140 Wis. 407, 122 NW 1129. Market price is usually reasonable value, where article is currently sold; cost may be shown only where abnormal trade conditions exist, or where prices have been forced up by unfair methods. Wagoner Undertaking Co. v. Jones, 134 Mo. App. 101, 114 SW 1049. Cost of various parts of caskets not admissible to show reasonable market value of complete casket. Id. Offer to sell is competent if sale is afterwards made in accordance therewith, and time is not too remote. Belka v. Allen [Vt.] 74 A 91. Amount received at auction sale of goods is some evidence of value but is not conclusive, and evidence to show goods had greater value admissible. George v. Lane [Kan.] 102 P 55. Proof of sales of other lands is competent when lands are similar and time of sales sufficiently near to afford aid to jury as means of comparison. American States Security Co. v. Milwaukee Northern R. Co., 139 Wis. 199, 120 NW 844. In quantum meruit for services, testimony as to value of work which witness saw plaintiff doing, and as to giving wages for such work, was proper. Allen v. Urdangen [Iowa] 119 NW 724. Valuation fixed by assessors is not admissible in evidence against owner as evidence of value. Hamilton v. Seaboard Air Line R. Co., 150 N. C. 193, 63 SE 730.

8. Evidence as to inspection of engine held properly excluded when engine referred to had not been identified as one which caused fire. Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166. Testimony of witnesses to result of observation of engine not incompetent, though they admitted that they had not measured engine in question but had measured another like it, similarity of conditions and weight of testimony being for jury. Hines v. Stanley G. I. Elec. Mfg. Co. [Mass.] 89 NE 628. Evidence as to condition of horse properly received, where other evidence in case identified horse as that in suit. McCullough v. Dunn, 83 Neb. 591, 119 NW 1127. That witnesses referred to defendant railroad by its abbreviated name commonly used did not affect admissibility of testimony. Hunt v. Philadelphia & R. R. Co. [Pa.] 73 A 968. Motion to modify judgment denied. Hunt v. Philadelphia & R. R. Co. [Pa.] 73 A 970.

9. Evidence describing course of team and wagon, after it struck plaintiff, held admissible as against objection that it related to matters occurring after accident. Robinson v. Morris & Co. [R. I.] 73 A 611. In action for injuries caused by team running away and wagon striking plaintiff, proof of direction in which team went after accident was competent. Id.

10. Fishman v. Consumer's Brew. Co. [N. J. Law] 73 A 231; Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601.

Reason for rule excluding all proof of collateral facts incapable of affording any reasonable presumption or inference as to the fact in dispute is that such evidence tends to draw jurors' minds from issue and to mislead and prejudice them. Provencher v. Moore [Me.] 72 A 880.

Held inadmissible: Matters not alleged in pleadings. McCormick v. Jordon, 65 W. Va. 86, 63 SE 778. In action to recover profits for certain years, proof of profits for another year. Hatzfeld v. Walsh [Tex. Civ. App.] 120 SW 525. Nature and extent of injuries to other persons hurt at same time as plaintiff. Apker v. Hoquiam, 51 Wash. 567, 99 P 746. Proof of immoral relations between defendants not offered to impeach them as witnesses but only to prejudice jury. Lord v. Calhoun [Ala.] 50 S 402. Payment of city taxes does not show payment of state and county taxes. State v. Quillen [Tex. Civ. App.] 115 SW 660. Where note was alleged to have been given owing to duress of one of maker's sons, character of another child for gentleness, kindness and unselfishness was irrelevant. McKay v. Peterson [Tex. Civ. App.] 113 SW 981.

11. Chicago Art Co. v. Thacker, 65 W. Va. 143, 63 SE 770. Under general denial only such evidence is relevant as tends to disprove allegations of complaint. Heiden v. Atlantic Coast Line R. Co. [S. C.] 65 SE 987. Where there was no claim of acquiescence in fraud, evidence to prove it was properly excluded. Czarnecki v. Derecktor, 81 Conn. 338, 71 A 354. In action to recover on contract for architect's plans, only issue being

or falsity, existence or nonexistence of facts in dispute, is irrelevant and inadmissible.[12] To prove the existence or nature of a particular fact or transaction, or the intention of partics in a particular instance, evidence of wholly independent transactions,[13] such as those between persons not parties to the transaction in issue,[14] is

defendant's liability and extent thereof, proof of his financial condition was immaterial. Hall v. Parry [Tex. Civ. App.] 118 SW 561. Declarations of one long after he had parted with title to land concerning claim to other land than that in issue held irrelevant. Texas & N. O. R. Co. v. Broom [Tex. Civ. App.] 114 SW 655.

12. Clary v. Isom, 56 Fla. 236, 47 S 919. Evidence must correspond with allegations and issues, and collateral facts or those affording no reasonable presumption or inference as to principal facts in issue should be excluded. State v. Dunn [Or.] 100 P 258.

Held inadmissible: Where the cancellation or surrender of certain lease was not made a condition precedent to the performance of defendant of his promise to deliver certain share of stock to plaintiff, the lease was properly excluded. Bordner v. Depler, 142 Ill. App. 526. Proof of ownership of corporate stock has no tendency to prove that owner is engaged in same business as corporation. Biermann v. Guaranty Mut. Life Ins. Co. [Iowa] 120 NW 963. Where wife voluntarily executed deed with knowledge of contents, whether she authorized preliminary contract executed by her husband was immaterial. Czarnecki v. Derecktor, 81 Conn. 338, 71 A 354. Where there was an agreement as to commissions to be paid salesman, but a dispute as to what the agreement was, proof of general custom among wholesalers to allow commissions on goods sold in salesman's territory is inadmissible. Peyer v. Western Dry Goods Co., 53 Wash. 633, 102 P 750. **In action to compel reinstatement of teacher,** certain letters by superintendent of schools held properly excluded. United States v. Hoover, 31 App. D. C. 311. **In action for damages by fire** caused by sparks from engine, proof that engines of different company had emitted spark. Sims v. American Ice Co., 109 Md. 68, 71 A 522. Action for damages by fire caused by spark from defendant's locomotive. Proof that engineers sometimes punched holes in spark arresters inadmissible, when it was not shown that this was done with defendant's locomotives. Hitchner Wall Paper Co. v. Pennsylvania R. Co. [C. C. A.] 168 F 602. **In condemnation proceedings,** what petitioner paid for other property. Oregon R. & Nav. Co. v. Eastlack [Or.] 102 P 1011. Prices paid by railroad company for other lands inadmissible in condemnation proceeding, where conditions under which lands were bought, and apportionment of amounts paid to damages and to price of land taken, were not shown. Brown v. New Jersey Short Line R. Co., 76 N. J. Law, 795, 71 A 271. On issue of value of land being condemned, and suitability for switching privileges, testimony of witness that he had experience with city council and could not obtain switch track permits for similar ground in another part of city was inadmissible. South Park Com'rs v. Ayer, 237 Ill. 211, 86 NE 704. Where, **in action on contract,** the contract price is in issue, proof of custom is inadmissible. Peyser v. Western Dry Goods Co., 53 Wash. 633, 102 P 750. Letter, not showing ratification of contract made by alleged agent, not relevant. Langston v. Postal Tel. Cable Co. [Ga. App.] 65 SE 1094. Where both parties rely on express contract, and only its terms are in issue, it is proper to exclude proof of value of services which form subject-matter of contract, and proof of what others had offered to perform work for. Kelly v. Malone, 5 Ga. App. 618, 63 SE 639. Contract of employment between owner of business and manager before business was incorporated held inadmissible **in action to recover salary or wages** as manager of business after incorporation, it not appearing that plaintiff worked under such contract as manager of corporation. Cox v. Philadelphia City Pottery Co., 38 Pa. Super. Ct. 545. Evidence of settlement by one employe with another who was helper in performing certain services held not admissible in action against employer for amount agreed to be paid for such services. Dixon v. Million, 142 Ill. App. 559. **In action against partners,** evidence to charge one with liability individually was improperly received, as action against him could not be joined with that against firm. Brown v. Williams [Okl.] 103 P 588. **In action for personal injuries,** where it did not appear that plaintiff stayed away from court room in trial of personal injury action because of her nervous condition, or because of physician's opinion, which had not been communicated to her, that it would be harmful, it was not proper for physician to give his opinion as to why she stayed away, and what effect her being present would have on her. Southern R. Co. v. Davis [Ga.] 65 SE 131. Reasons why plaintiff's officer stopped sending lumber immaterial, **in action for damages for delay.** Merchants' Bank v. Acme Lumber & Mfg. Co. [Ala.] 49 S 782. **On issue of negligence,** evidence of repairs on handcar after accident by derailment held inadmissible. Landers v. Quincy, etc., R. Co., 134 Mo. App. 80, 114 SW 543. Proof of subsequent repairs incompetent to prove negligence. Tise v. Thomasville [N. C.] 65 SE 1007. Negligence not to be inferred from fact that bars were put up to protect cellarway after plaintiff had fallen in. Davenport v. Matthews, 130 App. Div. 257, 114 NYS 715. That workmen did not see dynamite on certain day is not entitled to weight as evidence on issue when it was placed there. Hobbs v. George W. Blanchard & Sons Co. [N. H.] 70 A 1082. On issue of negligence and assumption of risk, conflicting orders given to employe by his immediate superior are admissible. Rudquist v. Empire Lumber Co., 104 Minn. 505, 116 NW 1019. **On issue of accuracy of book entries,** the inaccuracy of other entries relating to wholly different matters was inadmissible. Parsons v. Utica Cement Co. [Conn.] 73 A 785.

13. General rule is that where issue is whether person did particular thing or was in particular state, fact that he did similar thing or was in similar state at another time

inadmissible unless a close similarity [15] or some connection is shown,[16] or unless such evidence is offered to show course of business [17] or custom thereof,[18] or to show

is inadmissible. Beard v. Indemnity Ins. Co., 65 W. Va. 283, 64 SE 119. Where right to flow land with dam was based on grant and had not been lost or diminished by adverse user, proof of extent of flowage by prior dams was inadmissible **on issue of right of flowage** by new dam. Haigh v. Lenfesty, 239 Ill. 227, 87 NE 962. **In suit on note,** other notes and an agreement, having no reference to matters in suit, were properly excluded. Barnard v. Bates, 201 Mass. 234, 87 NE 472. Prior agreements between parties inadmissible to aid in **construction of unambiguous bonds** and mortgage. Yazoo & M. V. R. Co. v. Martin [Miss.] 47 S 667. Suggestion of error overruled. Id. [Miss.] 48 S 739. **In suit to recover fees** as officer, proof that previous similar claim had been paid, after suit was brought, was inadmissible when superior did not know of such settlement. Bookman v. New York, 133 App. Div. 242, 117 NYS 197. **On issue of negligence** in setting fire, conditions being different, proof of fire on premises seven years before incompetent to prove negligence as cause of fire. Fishman v. Consumers' Brew. Co. [N. J. Law] 73 A 231. Proof of previous accidents at bridge inadmissible in action for death of brakeman who was knocked off car, issue of notice not being in case. Harrison v. New York Cent. & H. R. R. Co., 195 N. Y. 86, 87 NE 802. That poultry had been successfully kept in refrigerator on previous occasions inadmissible on issue of negligence in taking care of that in question. Baltimore Refrigerating & Heating Co. v. Kreiner, 109 Md. 361, 71 A 1066.

14. Reasonable **value** of gravel not provable by terms of specific contracts with others. Monture v. Regling, 140 Wis. 407, 122 NW 1129. Action for breach of **contract.** Proof of former dealings between plaintiff and others, not parties, inadmissible. Moffat v. Davitt, 200 Mass. 452, 86 NE 929. Since one's conduct necessarily varies with circumstances and one's motives, one's agreement with one person is never a safe criterion for his agreement with another under other circumstances. Provencher v. Moore [Me.] 72 A 880. **In action on lease,** conversations after its execution, with third persons, were irrelevant. Johnson v. Hulett [Tex. Civ. App.] 120 SW 257. **In suit against principal for tort of agent,** transactions between agent and another are res inter alios acta. Rookard v. Atlanta, etc., R. Co. [S. C.] 65 SE 1047. Contracts with other employes irrelevant **on issue of nature of contract** with plaintiff. Puryear v. Ould, 81 S. C. 456, 62 SE 863. **In action for damages from monopolization** of business by defendant, attempts and acts of defendant toward monopoly, prior to plaintiff's entering into business, were res inter alio acta and immaterial. Monarch Tobacco Works v. American Tobacco Co., 165 F 774. **On issue of scope of agency,** a contract between plaintiff and third party, showing plaintiff's agent had limited authority, was inadmissible. Wimpfheimer v. Harris, 62 Misc. 5, 114 NYS 441. **Record in another suit** inadmissible against one not a party thereto. Hinkle v. Smith [Ga.] 65 SE 427. **On issue of negligence** resulting in injury to lineman of light company through alleged negligence of telephone company, proof that other men assumed that telephone company kept its wires properly insulated, was inadmissible. Milne v. Providence Tel. Co. [R. I.] 72 A 716. Where fireman was injured when he got out of cab under direction of engineer, what engineer thought or expected fireman to do was immaterial. Missouri, K. & T. R. Co. v. Gray [Tex. Civ. App.] 120 SW 527. What witness would do under certain circumstances, inadmissible in negligence case. United States Cast Iron Pipe & Foundry Co. v. Granger [Ala.] 50 S 159. In action for damages for wrecking of building by explosion of gas, effect of explosion on other building was inadmissible. Linforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320. In case based on collision between train and vehicle, proof of effect of ballasting of track on other persons' teams and vehicles was inadmissible. Johnson v. Chicago, etc., R. Co. [Kan.] 103 P 90.

15. Ordinarily only the facts of the particular transaction in issue are competent, but facts occurring after or before it may in some cases furnish fair and reasonable presumptions as to those in issue. Baltimore Refrigerating & Heating Co. v. Kreiner, 109 Md. 361, 71 A 1066. Whether agent had made other similar contracts for services, under which defendant had paid commissions relevant on issue whether contract in suit was authorized. Gieger v. Levin, 113 NYS 1016. On issue whether dog attacked and injured sheep on particular occasion, it was competent to show that dog had acquired habit of attacking sheep. Rumbaugh v. McCormick, 80 Ohio St. 211, 88 NE 410.

16. In suit to enjoin use of lots for wagon and feed yard, deeds to neighboring lots, containing restrictive covenants also were admissible to show dedication for residence use only. Lowrence v. Woods [Tex. Civ. App.] 118 SW 551. Subsequent insolvency may be shown as tending to prove insolvency at prior date if conditions are shown to have continued unchanged, but not otherwise. In re Brigham's Estate [Iowa] 120 NW 1054. Other claims made by same person against defendant held properly admitted as preliminary to and explanatory of settlement between parties. Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550. Proof that defendant and another had sold hay, jointly to plaintiff, in previous years, held admissible to show sale in present case. Beasore v. Stevens, 155 Mich. 403, 15 Det. Leg. N. 1063, 119 NW 431. To show agency of husband for wife held proper to prove that he had signed her name to checks on her account with her knowledge and consent. Hawkins v. Windhorst, 77 Kan. 674, 96 P 48. Partnership agreement held relevant as throwing light on matters in issue between other persons. Lee v. Unkefer [S. C.] 65 SE 989. Proof of precautions taken during day to prevent injury held admissible to show care which might be expected to be exercised at night, as guarding approaches to bridge when bridge was open. City of Chicago v. Thomas, 141 Ill. App. 122.

17. Where defense to action on note was

fraudulent intent,[19] notice,[20] or the existence of certain conditions,[21] or to show ownership.[22] Where the condition of a thing at a certain time is in issue, evidence of its prior and subsequent condition is admissible,[23] when it appears that no substantial change has taken place.[24]

If evidence, though relevant, is so remote as to have little or no probative value, it may be excluded,[25] the admission or exclusion of evidence of this character being

that it was illegal because based on gaming transaction, similar transactions with others could be shown, if knowledge thereof by payee was shown. Birmingham Trust & Sav. Co. v. Curry [Ala.] 49 S 319. In action for reasonable compensation for selling real estate, by one not in business regularly, evidence of custom as to compensation was competent. Fleming v. Wells [Colo.] 101 P 66. Proof of previous sale of goods held admissible where parties had referred to it in order in question. Greenbaum v. Greenfield, 114 NYS 832. To account for absence of due bills, proper to prove custom of burning them when goods had been obtained on them and that no record was kept. Ware v. Childs [Vt.] 73 A 994.

18. Proof that there was general custom in trade of doing certain acts, and that it was known that there were no injurious results therefrom, competent. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651.

19. Where there was proof that ticket had been offered for fare by others than owner, in violation of its terms, misuse of other similar tickets may be shown to prove intent of owner or his connivance with such misuse. Harris v. Delaware, L. & W. R. Co. [N. J. Law] 72 A 50. On issue whether deed was given to defraud creditors, other deeds by grantor about same time, to mother and others, were competent. Homewood People's Bank v. Marshall [Pa.] 72 A 627.

20. Action against contractor for injuries caused by sinking of surface of sidewalk; proof of previous slide or cave-in admissible to show nature of soil and degree of care necessary in refilling. Rockwell v. McGovern, 202 Mass. 6, 88 NE 436.

21. Subsequent repairs held admissible to show condition at time. Ferrari v. Beaver Hill Coal Co. [Or.] 102 P 1016. Where city's witnesses testified that hole had been filled before accident occurred, plaintiff could prove that it was filled after the accident. Tise v. Thomasville [N. C.] 65 SE 1007. Issue being whether defective spark arrester had caused fire, proof that it had been patched after the fire was admissible to show there had been a hole in it. Byers v. Baltimore & O. R. Co., 222 Pa. 547, 72 A 245. Where electric wires were not worn bare, but insulation had been cut off, and evidence tended to show purpose was to allow testing of current, proof of retaping of wires, after accident, was competent to show actual condition at time. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. Condition of passageway after accident properly shown to prove that there was passageway there, this being disputed. Gustafson v. West Lumber Co., 51 Wash. 25, 97 P 1094.

22. Subsequent repairs or precautions cannot be shown to prove ownership of property. Ferrari v. Beaver Hill Coal Co. [Or.] 102 P 1016.

23. Condition of car step seven months prior to accident held admissible. Corcoran v. Albuquerque Trac. Co. [N. M.] 103 P 645. Evidence as to condition of track proper and relevant in rebuttal in negligence case. Houston & T. C. R. Co. v. Cheatham [Tex. Civ. App.] 113 SW 777. Condition of electric wires subsequent to time of injury. Annapolis Gas & Elec. L. Co. v. Fredericks, 109 Md. 595, 72 A 534. Proper to show condition of track at time of accident and shortly before, and changes at time of trial, jury having viewed place. Lincoln v. Central Vermont R. Co. [Vt.] 72 A 821. For full treatment of this rule as bearing particularly on issues of negligence, see Negligence, § 5, subd. Admissibility of Evidence.

24. Conditions after accident may be shown when circumstances warrant presumption that they remain unchanged. Corcoran v. Albuquerque Trac. Co. [N. M.] 103 P 645. Proof of conditions at elevator shaft, into which plaintiff walked through open door, after accident, admissible, there being evidence that conditions were unchanged. Larrabee v. McGuinness [C. C. A.] 165 F 169. Where operator of mine showed similarity of conditions in mine before and after explosion, inspector was properly allowed to testify to conditions found by him after explosion. Edwards' Adm'r v. Lam [Ky.] 119 SW 175. Where brakeman was knocked off car by bridge, proof that bridge had been hidden on previous occasions by smoke caused by shutting off steam was inadmissible, where conditions of weather, etc., were not shown to be similar. Harrison v. New York Cent. & H. R. R. Co., 195 N. Y. 86, 87 NE 802.

25. Held too remote: In action for money had and received, claimed to have been embezzled by defendant in 1902, proof of plaintiff's place of residence in 1889 and 1890. Williams v. Smith [R. I.] 72 A 1093. What property brought, in an exchange, 12 or 15 years before. Oregon R. & Nav. Co. v. Eastlack [Or.] 102 P 1011. Where expert testimony has been introduced by both parties on question of rental value of land, proof of rental in prior lease was too remote. Raapke & Katz Co. v. Schmoller & Mueller Piano Co., 82 Neb. 716, 118 NW 652. Admission that stock was valueless at certain time was not evidence that it was valueless one year previous. Wegerer v. Jordan [Cal. App.] 101 P 1066. That insured told agent two or three years before issuance of insurance policy that there were taxes against property, which he intended to pay, was not evidence of condition of title at time. Kennedy v. London & Lancashire Fire Ins. Co. [Mich.] 16 Det. Leg. N. 437, 122 NW 134. Damages for seizure and selling of personalty is value of property at time of seizure; efforts to sell some months later irrelevant. Burgin v. Marx [Ala.] 48 S 348. Value of lot several years after destruction of building inadmissible on issue of depreciation in

largely discretionary with the trial court.[26] The admission or exclusion of merely cumulative evidence is also discretionary.[27] It is the duty of a party offering evidence to show its relevancy, especially when it is objected to.[28]

The character or reputation of a party cannot be inquired into in a civil case unless placed in issue by the nature of the case.[29]

§ 3. *Competency or kind of evidence in general.*[30]—See 11 C. L. 1361—The admission of irrelevant evidence without objection does not usually render other irrelevant evidence admissible,[31] and the admission of a relevant portion of a writing or conversation does not make an irrelevant part admissible,[32] but where one party has introduced evidence of a certain kind or relating to a certain matter, the other party should usually be permitted to introduce similar evidence in rebuttal.[33] Evidence

value of premises caused by loss of building. Kuhn v. Eppstein, 239 Ill. 555, 88 NE 174.

Held admissible: Proof that testatrix had senile dementia in 1899 was proof that she was no better in 1902, this disease being progressive. Mason v. Rodriguez [Tex. Civ. App.] 115 SW 868.

26. Delaney v. Fromingham Gas, Fuel, & Power Co., 202 Mass. 359, 88 NE 773; Goodlett v. Trans-Missouri Mining & Development Co. [Neb.] 121 NW 444. What testimony is relevant rests largely in trial court's discretion. McCrary v. Southern R. Co. [S. C.] 65 SE 3; McClintock v. Charleston & W. C. R. Co. [S. C.] 64 SE 1009; Worcester Loom Co. v. Heald [N. J. Law] 72 A 421; Fitch v. Martin [Neb.] 122 NW 50; McCall v. Alexander [S. C.] 65 SE 1021. Whether testimony too remote on question of testator's capacity held for discretion of court. Jenkins v. Weston, 200 Mass. 488, 86 NE 955. Discretionary ruling excluding or receiving collateral evidence is not reviewable unless there is abuse. Young v. Kinney [Neb.] 122 NW 679.

No abuse of discretion to refuse to exclude proof of defect in throttle of engine existing prior to accident. Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005. Proper exercise of discretion for court to exclude evidence as to weather conditions at places some miles from place of accident and at slightly different time. Ducharme v. Holyoke St. R. Co. [Mass.] 89 NE 561.

27. See Trial, § 3.

28. See Trial, § 3.

29. Character of parties for fair dealing not in issue in suit to set aside conveyance as in fraud of creditors. Black v. Epstein, 221 Mo. 286, 120 SW 754. The character of either party cannot be inquired into in a civil action unless put in issue by the nature of the proceeding, such as in actions of libel, slander, etc. Id. Where defendant was charged with improper conduct toward plaintiff's wife, as reason why plaintiff moved and refused to complete contract for services, proof of defendant's good character for chastity was inadmissible. Porter v Whitlock [Iowa] 120 NW 649.

30. Search Note: See notes in 17 L. R. A. 440; 63 Id. 427; 6 L. R. A. (N. S.) 1180; 8 A. S. R. 921; 29 Id. 411; 69 Id. 571; 2 Ann. Cas. 55.

See, also, Evidence, Cent. Dig. §§ 438-459; Dec. Dig. §§ 148-156; 16 Cyc. 1119; 17 Cyc. 285; 9 A. & E. Enc. L. (2ed.) 5, 877; 11 Id. 541; 8 A. & E. Enc. P. & P. 123.

31. Hall v. Parry [Tex. Civ. App.] 118 SW 561.

32. That relevant part of letter has been admitted does not make competent irrelevant portion. John Breuner Co. v. King, 9 Cal. App. 271, 98 P 1077. Entire conversation on various subjects not competent merely because part of it on some subjects is testified to. Thomas v. Young, 81 Conn. 702, 71 A 1100. That witness testified to what her husband had confessed to her did not make competent rest of conversation between her and her husband, testimony given being part of conversation between witness and another. Lunham v. Lunham, 133 App. Div. 215, 117 NYS 396. Rest of transaction or conversation is competent under B. & C. Comp., § 702, only when material. Mahon v. Rankin [Or.] 102 P 608.

33. Party who offers evidence of certain kind cannot object to similar evidence when offered by the other. Kuhn v. Eppstein, 239 Ill. 555, 88 NE 174. Evidence as to customary mode of taking down scaffold having been received for one party, similar evidence for other should have been received. O'Rourke v. Sproul, 241 Ill. 576, 89 NE 663. Error to exclude evidence in rebuttal which was competent as to matter brought out by adversary. Payson v. Milan, 144 Ill. App. 204. Where **contract** between plaintiff and third person was erroneously received in evidence, plaintiff was properly allowed to show that its provisions had been waived by habitual disregard of them. Crawford v. Kansas City Stockyards Co., 215 Mo. 394, 114 SW 1057. **Letter** by broker to one party having been admitted, another letter from party, referring to broker's letter, should have been admitted. Webster v. Moore, 108 Md. 572, 71 A 466. Where one party was obliged to rely on **parol evidence** to establish right in irrigating ditch, he could not object to competency of such evidence, offered by other. Bates v. Hall, 44 Colo. 360, 98 P 3. Where attorney, suing for services, introduced statement of account on which defendant had written "correct" and signed his name, and then testified that certain services were not included therein, defendant should have been allowed to prove what services were included in it. Pollak v. Gunter [Ala.] 50 S 155. Rule that where part of transaction or **declaration or conversation** is shown by one party the other may show the rest (B. & C. Comp., § 702), not applicable where one party did not show part of transaction. Mahon v. Rankin [Or.] 102 P 608. **Declarations of decedent** as to her health having been admitted for defense, similar evidence was competent in rebuttal. St. Louis & S. F. R. Co. v. Sizemore [Tex.

otherwise competent and material may be admitted though it incidentally discloses matter which is incompetent.[34]

The legislature has power to prescribe or change rules as to competency of evidence.[35]

§ 4. *Best and secondary evidence.*[36]—11 C. L. 1362—The best evidence available must always be produced.[37] What is the best evidence of a fact to be proved depends upon the nature of the fact and the circumstances of the case.[38] Evidence which carries on its face no indication that better evidence exists is not objectionable as secondary,[39] but evidence which shows on its face that better or more original evi-

Civ. App.] 116 SW 403. Defendant having stated part of conversation with plaintiff, latter should be allowed to show all of it **on cross-examination.** Hurst v. Mechlin [Ky.] 119 SW 807.

34. Evidence otherwise competent and material not to be excluded because it involves, collaterally, showing that defendant carried insurance. Randal v. Gould [Pa.] 73 A 986.

35. Downs v. Blount [C. C. A.] 170 F 15.

36. Search Note: See notes in 5 C. L. 1318; 11 Id. 1365; 38 L. R. A. 433; 44 Id. 438; 2 L. R. A. (N. S.) 652; 11 A. S. R. 798; 2 Ann. Cas. 41; 8 Id. 270, 413; 9 Id. 484; 11 Id. 108.

See, also, Evidence, Cent. Dig. §§ 460-675; Dec. Dig. §§ 157-187; 13 Cyc. 305; 17 Id. 465-567; 2 A. & E. Enc. L. (2ed.) 322; 9 Id. 877; 11 Id. 535; 23 Id. 166; 25 Id. 161; 8 A. & E. Enc. P. & P. 129, 131.

37. Fidelity & Deposit Co. v. Champion Ice Manufacturing & Cold Storage Co. [Ky.] 117 SW 393. Best evidence which exists of facts sought to be proved must be produced, unless its absence is satisfactorily accounted for. Civ. Code 1895, § 5162. Compton v. Fender [Ga.] 64 SE 475. Best evidence of which facts are capable must be produced if other party demands it, and this should be self-explanatory, or if not so, evidence to explain it should be introduced. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114.

38. Where passenger ticket referred to **stopover regulations of railroad company** and impliedly made them part of contract, they could be proved by railroad agent, as well as by circular. Leyser v. Chicago, B. & Q. R. Co. [Mo. App.] 119 SW 1068. **Railroad company's rules** with respect to duty of engineer to report condition of engine held best evidence of such rules. Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005. In action against railroad company for destruction of buildings, plaintiff's testimony as to her **ownership** of buildings was competent, possession under claim of title being competent as against stranger. Erhart v. Wabash R. Co., 136 Mo. App. 617, 118 SW 657. **Title to real estate or right to water for irrigation** cannot usually be shown by parol, but such evidence is competent where right was acquired by appropriation, and not by grant, so that there is no record evidence of title. Bates v. Hall, 44 Colo. 360, 98 P 3. **Minutes of corporation meetings** only prima facie evidence; parol evidence competent to show what actually occurred. State v. Guertin, 106 Minn. 248, 119 NW 43. Judgment roll in other action competent to show **existence of exhibit** which had been lost, being best evidence available. Monahan v. Metropolitan Surety Co., 114 NYS 862. **Authority** of one in whose possession notes and mortgage were placed to bring about substitution and new notes could be shown by parol. Richard v. Charlot, 122 La. 492, 47 S 841. Where declaration in action of assumpsit against one who boxed trees for turpentine on land claimed by plaintiff was introduced in action of ejectment as declaration showing claim of title, parol evidence was competent to show **identity of land** described in declaration with land in suit. Godley v. Barnes [Ga.] 64 SE 546. Justice could testify as to **arrest and arraignment** of certain person where no information had been filed and no warrant issued against such person. O'Neil v. Adams [Iowa] 122 NW 976. When no information had been filed, question calling for oral testimony as to what person had been arrested for was not objectionable. Id. Stenographer's notes of **testimony of witness on former trial** was best evidence thereof, and oral testimony was properly excluded. Turner v. Southwest Missouri R. Co. [Mo. App.] 120 SW 128. Oral evidence of **testimony of party** on examination by court held admissible, though such testimony was taken down in shorthand. Mollison v. Rittgers [Iowa] 118 NW 512. On issue as to **reinstatement of member of fraternal order** after forfeiture, an officer of such order could testify, where there was no record on such question. United Order of the Golden Cross v. Hooser [Ala.] 49 S 354. There being no primary or record evidence of **location of public lots** in certain tract of land, words and recitals in deeds of land within the tract, marks on an old plan, statements in a history of the county and in school reports, were competent. In re Ring, 104 Me. 544, 72 A 548. In absence of proper evidence to establish **location of streets and boundaries of blocks,** the best evidence available, use, fences, etc., was properly received. Winchester v. Payne [Cal. App.] 102 P 531. Writing not brought to notice of telegraph company is not admissible as original of **telegram** delivered to it. Mims v. Western Union Tel. Co., 82 S. C. 247, 64 SE 236. Where girl of 15 took down message in book and read it from book to telegraph company's agent, and he did not require her to write it on blank, company had notice that message as written in book was original, and one desired to be sent, and it was admissible. Id. **Plans and specifications,** as bearing upon operation of machine, may be shown by blue print from which the particular machine in question was assembled, production of original drawing not being necessary. Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88, 89 NE 723.

39. The fact that the witness has written a letter about a certain matter does not preclude him from testifying as to such matter

dence exists cannot be introduced without first accounting for the nonproduction of such other evidence.[40] Thus, oral evidence is incompetent to prove facts which the law requires to be reduced to writing,[41] or made a matter of record,[42] or to prove the terms of a written contract,[43] or to show other facts which have been reduced to writing and which are in dispute and are material to the issues.[44] Similarly, copies of writings or records cannot be introduced without first accounting for the originals.[45]

The rule under discussion, however, requires only that the best evidence available

in respects not covered by the letter. Poitevent v. Scarborough [Tex. Civ. App.] 117 SW 443. Oral testimony is admissible to show that **location of railroad tracks** is in certain street of city. International & G. N. R. Co. v. Morin [Tex. Civ. App.] 116 SW 656. Maps and records of city are not best evidence of actual **location of street** on ground. Id. Competent by parol to fit plat to other parts of city to show that street in plat was continuation of existing street. City of Paragould v. Lawson [Ark.] 115 SW 379. No record of **contract** for services between corporation and employe being made, it could be proved orally. Kropp v. Hermann Brew. Co. [Mo. App.] 119 SW 1066. **Marriage** may be proved by the acknowledgments and declarations of the parties, their cohabitation and conduct and by general reputation, without first showing that record evidence or testimony of eyewitnesses is not available. Tyner v. Schoonover [Kan.] 100 P 478.

40. Deed is best evidence of date of acquisition of property; proper to exclude oral testimony on question. Le Croix v. Malone [Ala.] 47 S 725.

41. Deed is best evidence of intention of parties. Crump v. Crump, 32 Ky. L. R. 1041, 107 SW 778; Fitzmaurice v. Turney, 214 Mo. 610, 114 SW 504.

42. Best evidence of **presentation and disallowance of claim against city** is record of proceedings of city council; letter of city clerk not competent. City of Birmingham v. Chestnutt [Ala.] 49 S 813. Oral testimony as to whether witness knew of **cloud on title to land** is not best evidence of existence of cloud. Hanson v. Neal, 215 Mo. 256, 114 SW 1073. General statutory **decree fixing water rights** was required to be spread on judgment book of court. Held decree as entered was best evidence of its contents. Bates v. Hall, 44 Colo. 360, 98 P 3. Where city had provided by ordinance and by arrangement with street railway company for **removal of tracks** from street, **ordinance and records** constituted best evidence of facts; not testimony of employe of company. City of East St. Louis v. Illinois Cent. R. Co., 238 Ill. 296, 87 NE 407. Oral evidence incompetent to show **decision of federal court** on hearing in bankruptcy matter. Galvin v. Tibbs, Hutchins & Co. [N. D.] 119 NW 39. Official record kept by officer in charge of weather bureau is best evidence of **weather conditions** in years past; his testimony properly excluded. City of Garrett v. Winterich [Ind. App.] 87 NE 161, rehearing denied, Id. [Ind. App.] 88 NE 308.

43. Where contract was not collateral, its terms could not be proved orally without accounting for its absence. Atlanta, etc., R. Co. v. Wood [Ala.] 49 S 426. Oral proof of contract incompetent without accounting for original. Gulfport Sash, Door & Blind Mfg. Co. v. Bond [Miss.] 49 S 260.

44. Even party sworn as witness will not be required to answer concerning contents of writing accessible by proper diligence over objection that writing is best evidence. Gate City Fire Ins. Co. v. Thornton, 5 Ga. App. 585, 63 SE 638. **Letters** best evidence of contents. Vaillancant v. Grand Trunk R. Co. [Vt.] 74 A 99. Oral testimony to contents of letter incompetent. Poitevent v. Scarborough [Tex. Civ. App.] 117 SW 443. Letter best proof of contents. Bufford v. Little [Ala.] 48 S 697. Contents of **receipt** cannot be proved orally where receipt is available. Chicago Art Co. v. Thacker, 65 W. Va. 143, 63 SE 770. **Bill rendered** best evidence of whether items were dated. Hoxie v. Walker [N. H.] 74 A 183. **Printed book of rules** best evidence of contents of rules. McCoy v. Atlantic Coast Line R. Co. [S. C.] 65 SE 939. **Written rules** best evidence of contents. Louisville & N. R. Co. v. Pearcy [Ky.] 121 SW 1037. Best evidence of **rule of railroad company** would be rule itself, not testimony of engineer. Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005. In action on account error to allow defendant to testify that plaintiff had made certificate that accounts were "square" at time of defendant's giving bond, that **certificate** was indorsed on bond, and that he had bond. Chicago Art Co. v. Thacker, 65 W. Va. 143, 63 SE 770. If **resolution of corporation's directors** is correctly recorded, minutes constitute best evidence; if correctness of minutes is attacked, they must be introduced for the purpose. Durbrow v. Hackensack Meadows Co. [N. J. Law] 71 A 59. Resolution adopted at meeting of company being unambiguous, it could not be changed by proof of what stockholders who were present said. Lipsett v. Hassard [Mich.] 16 Det. Leg. N. 736, 122 NW 1091.

45. Copy of **telegram** is ordinarily admissible only on proof of loss of original. Mims v. Western Union Tel. Co., 82 S. C. 247, 64 SE 236. Carbon copy of telegram, addressed to defendant's president at certain place, incompetent without proof that original had been delivered to telegraph company for transmission, and had been lost or destroyed, or that message had been delivered to addressee. Skinner Mfg. Co. v. Douville [Fla.] 49 S 125. Copies of **lists of goods** incompetent without accounting for originals. Brent v. Baldwin [Ala.] 49 S 343. **Certified copy of deeds** should not be admitted unless the party offering them made it appear that the original deeds were not within his custody or control. Florida Finance Co. v. Sheffield, 56 Fla. 285, 48 S 42.

shall be produced.[46] Secondary evidence is admissible, therefor, where a proper foundation therefor is laid by proof that the originally best evidence has been lost or destroyed,[47] and that diligent but fruitless search has been made for it[48] in places where it was most likely to be found,[49] or that due effort has been made to produce it,[50] or that it is in the possession of the adverse party, his attorney or agent,[51] who has failed to produce it, after notice to do so,[52] and that the secondary evidence, if

46. Issue being whether course of stream had shifted gradually, before bed was abandoned by an avulsion, testimony of old settlers who had known course of stream for 50 years, showing shifting of stream was competent as best evidence obtainable. Coulthard v. McIntosh [Iowa] 122 NW 233.

47. Parol evidence competent to show making of instrument which has been lost or destroyed. Mahaffy v. Faris [Iowa] 122 NW 934. If **records** are lost or destroyed the contents may be proved by secondary evidence. Act June 16, 1906 (St. 1906, p. 73, c. 55), providing for restoration of records lost by fire, etc., did not change the rule. Hibernia Savings & Loan Soc. v. Boyd [Cal.] 100 P 239. Oral evidence and fragmentary records competent to prove ancient facts and situations, where records, deeds, surveys, etc., were lost. Van Pelt v. Parry, 218 Mo. 680, 118 SW 425. When record proof of railroad location, under statute, has been lost or destroyed, secondary evidence is competent to show compliance with statute. United States Peg Wood, Shank & Leather Board Co. v. Bangor & A. R. Co., 104 Me. 472, 72 A 190. Slips from which **books of account** were made up having been destroyed, contents could be proved by secondary evidence. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766. Loss of **deed** shown; secondary evidence competent. Lee v. McCarty [Ga.] 64 SE 997. Loss of deed shown; execution and contents provable by parol. Poitevent v. Scarborough [Tex. Civ. App.] 117 SW 443. Contents of lost **letter** provable orally. Koch v. Wimbrow Bros. [Md.] 73 A 896. Contents of letter provable by parol, loss being shown, and authenticity not questioned. Floresville Oil & Mfg. Co. v. Texas Refining Co. [Tex. Civ. App.] 118 SW 194. Justice's **summons and complaint** being lost, contents could be shown by parol. Southern R. Co. v. Dickens [Ala.] 50 S 109. Where original **order of sale** issued on judgment was lost, entries in execution docket showing what was done (the return) were competent. Anderson v. Casey-Swasey Co. [Tex. Civ. App.] 120 SW 918. Parol proof of contents of **notice** of disappearance of person, published in newspaper of fraternal order competent, when it was shown that no files of the paper were kept in the state and no copy of it was obtainable. Wehring v. Modern Woodmen of America, 107 Minn. 25, 119 NW 245. Oral contract of husband and wife to make mutual wills, as well as the contents of the lost or destroyed **will** of the wife executed in conformity thereto, may be proved by competent parol testimony. The scrivener who wrote such will, and who was present when such contract was made is a competent witness to prove the same. Crary v. McCrory, 9 Ohio N. P. (N. S.) 1.

48. Loss of instrument and search therefor by each and every custodian thereof should be shown. Huggins v. Southern R. Co. [Ala.] 49 S 299. Where deed had never been recorded, and was presumptively in possession of grantee, who could not be found, proof of contents by parol was competent. Farmers' & Merchants' Bank v. Layson Lumber Co., 87 Ark. 607, 113 SW 793. Where county records were destroyed in 1874, and due search had been made for deed supposed to have been executed in 1840, without finding it, certificate of county clerk that deed corresponding to alleged lost instrument had been recorded on certain date in 1847 was competent. McDonald v. Hanks [Tex. Civ. App.] 113 SW 604. In order to let in secondary evidence of the contents of a written instrument, the person in whose possession it was last traced must be produced, unless shown to be impossible, in which case search among his papers must be proved if that can be done. Hedenberg v. Nash, 144 Ill. App. 252. Evidence held insufficient to show inability to produce original manuscript and thus lay foundation for admission of secondary evidence of contents of published article. Id. Testimony as to execution and contents of deed **incompetent** where evidence showed deed was in existence and that inquiry would have disclosed where it was. Merrill v. Bradley [Tex. Civ. App.] 121 SW 561.

49. Where evidence showed only search among part of company's papers for record, proof by copy was properly excluded. Southwestern Tel. & T. Co. v. Owens [Tex. Civ. App.] 116 SW 89. Where original report of park board was not accounted for, secretary testifying that they were usually given to the printer and not always returned, that he did not know where original in question was, but had made no search, printed copy was properly excluded. City of Chicago v. Mandel, 239 Ill. 559, 88 NE 226.

50. Copy of plan of survey incompetent without showing that original could not be produced. Keefe v. Sullivan County R. Co. [N. H.] 71 A 379. Unsigned carbon copies of letters inadmissible without proving that originals cannot be produced. McDonald v. Hanks [Tex. Civ. App.] 113 SW 604. When it is shown that a writing is in the hands of a party who is outside the jurisdiction, secondary proof of its contents is admissible without further showing. Johnson v. Union Pac. R. Co. [Utah] 100 P 390.

51. Where defendant did not keep copy of letter sent to commercial agency, which was acting as plaintiff's agent, notice to produce was properly given plaintiff, agency not being party. Rheinstein Dry Goods Co. v. McDougall, 149 N. C. 252, 62 SE 1085.

52. Where party having original refuses to produce it after notice, copy is competent. King v. Block Amusement Co., 115 NYS 243. Writing which is or should be in possession of one of parties cannot be said to be **beyond**

a copy, is correct, or duly authenticated.[53] The existence, proper execution and genuineness of a writing must usually be shown before secondary proof of its contents may be received,[54] though this rule has been modified by statute in some states.[55] Original entries and memoranda are the best evidence of their contents, and statements or summaries therefrom and oral evidence thereof are incompetent [56] unless the books themselves are voluminous,[57] or cannot be produced in court,[58] and

the jurisdiction of the court, so as to make secondary evidence competent, until it has been determined by notice to produce, that it is not within power of party to produce it. Cutter-Tower Co. v. Clements, 5 Ga. App. 291, 63 SE 58. Where receipt of **letter** was not denied, and notice to produce was given, and defendant was in court, it was proper to admit secondary evidence. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. Copy of **notice** to carrier of special damages to plaintiff, identified by carrier's agent, held competent when carrier failed to produce original. McMeekin v. Southern R. Co., 82 S. C. 468, 64 SE 413. Where **contract** is presumptively in hands of adverse party, secondary evidence will not be received unless demand is made for its production. Durbrow v. Hackensack Meadows Co. [N. J. Law] 71 A 59. Where agreements were in hands of nonresident president of defendant, and notice to produce was given, and order to produce made in court, which was not obeyed, copies were competent. Cooley v. Gilliam [Kan.] 102 P 1091. Where insurer declined to produce original **application for insurance,** and insured's copy was destroyed by fire, parol evidence was competent to show that insured informed agent that building was on leased ground. Fosmark v. Equitable Fire Ass'n [S. D.] 120 NW 777. Certified copy of chattel **mortgage** competent, where execution of original was shown and was also admitted, and it appeared original was on file with clerk of court, and certified copy had been filed, and notice given, before announcement of ready. Morris v. Moon [Tex. Civ. App.] 120 SW 1063. Copy of chattel mortgage need not be filed with papers and notice given three days before trial, but only before announcement of ready. Sayles' Ann. St. 1897, art. 3330. Id.

53. Where original scale tickets, made by cattle weigher, were beyond jurisdiction, and witness testified that he made originals and carbon copies at same time, and knew both to be correct, copies were **competent.** St. Louis & S. F. R. Co. v. May [Tex. Civ. App.] 115 SW 900. Copy of telephone ticket **incompetent** to show date of call when witness could not identify it as true copy as to date, and figures 10—10—04 were not explained. Southwestern Tel. & T. Co. v. Owens [Tex. Civ. App.] 116 SW 89. Paper not shown to be copy of bill of lading. no foundation being laid for secondary evidence, incompetent. Lieberman v. Baltimore & O. R. Co., 115 NYS 1034.

54. Brown v. Bass [Ga.] 63 SE 788; Durbrow v. Hackensack Meadows Co. [N. J. Law] 71 A 59. To show contents of lost paper by parol, not only must its loss and due search for it be shown, but its due execution must also be proved. Snyder v. Charleston & Southside Bridge Co., 65 W. Va. 1, 63 SE 616. Mere proof that documents are outside jurisdiction not enough; must be proof of existence and some effort to obtain them. Roll v. Everitt [N. J. Err. & App.] 71 A 263. Copy of will incompetent as secondary evidence of contents without proof of existence and execution of original, and its loss or destruction. Pineland Club v. Robert [C. C. A.] 171 F 341. Purported copy of will incompetent without proof of due execution and existence of original and that it had been lost. Id. Certified copies of deeds competent where execution of deeds was admitted and also truth of recitals of price and number of acres. Hahl & Co. v. Southland Immigration Ass'n [Tex. Civ. App.] 116 SW 831. Where order of sale under judgment was lost, sheriff's deed was competent to show title in purchaser without proof that sale was made before return on order of sale, regularity being presumed. Anderson v. Casey-Swasey Co. [Tex. Civ. App.] 120 SW 918.

55. Where a paper is recorded by the clerk upon satisfactory proof, and a duly certified copy is introduced in evidence, it is competent, in the absence of any suggestion that the report was not genuine, under Revisal 1905, § 328 (Code, § 56), providing for restoration of original papers once admitted to record and the record destroyed. Hill v. Lane, 149 N. C. 267, 62 SE 1074.

56. Exhibits taken from partnership books showing receipts by one partner of funds of firm, not competent, books themselves being in evidence. Holden v. Thurber [R. I.] 72 A 720. Failure of defendant to produce books, on notice did not warrant receiving in evidence plaintiff's statements taken therefrom, nor his bare assertions that certain items appeared therein. Pfaelzer v. Gassner, 116 NYS 15.

57. Books held not so voluminous as to make extracts or summaries competent. Pfaelzer v. Gassner, 116 NYS 15. To prove amount of defalcations by employe, in action on bond, summary of losses made up from books of employer would be competent, if books were voluminous, and if statement had been submitted to other side, and opportunity given to examine books. Fidelity & Deposit Co. v. Champion Ice Manufacturing & Cold Storage Co. [Ky.] 117 SW 393.

58. Where books of account were outside jurisdiction, copies of entries made exhibits in depositions were competent. Afflick v. Streeter, 136 Mo. App. 712, 119 SW 28. Contents of books of account provable by oral testimony when they could not be produced. Barclay v. Deyerle [Tex. Civ. App.] 116 SW 123. Copies of account authenticated and shown correct by testimony of corporate officers competent though original books were not produced, they being in another state. Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. [Tex. Civ. App.] 116 SW 153. Memorandum in handwriting of deceased clerk, made by him from books in

even when the books or original entries are unavailable a mere summary of their contents is not admissible.[59] Memoranda are not the best evidence when the person who made them has an independent recollection of the facts [60] or when his absence is not accounted for.[61] Whether reasonable notice to produce has been given,[62] or due search for original evidence has been made,[63] depends upon the circumstances, and presents a preliminary question for the trial court.[64] No notice to produce is necessary where the adverse party denies receipt of a letter sought to be proved.[65] It is usually held that there are no degrees of secondary evidence.[66] A party who offers competent secondary evidence, on which the other party relies, cannot thereafter object and have it withdrawn.[67]

The best evidence rule does not apply to merely collateral facts [68] and does not exclude oral proof of the existence of a writing or record,[69] or evidence to explain

regular course of his duties, under direction of employers, competent, when books were lost. In re Strang, 166 F 779. Mere inconvenience in bringing into court books of account of building and loan association not ground for receiving in evidence statements made from books and testimony of secretary that they were correct. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694.

59. List of goods summarized from books, incompetent even though books were unavailable. Brent v. Baldwin [Ala.] 49 S 343. Where other account books were destroyed, new ledger opened with total balance of each customer's indebtedness, as shown by old ledger, held not admissible as secondary evidence. Scranton Trust Co. v. Hartshorn, 36 Pa. Super. Ct. 208.

60. Where facts had been fully testified to by witness, copy of stock book showing same facts was inadmissible, especially when he had original stock book in his possession. Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410. Not error to allow manager of company to testify to facts known to him independently of books, though books showing items in question were in court. Hatzfeld v. Walsh [Tex. Civ. App.] 120 SW 525.

61. Invoices showing weight of coal not best evidence when weigher was not shown to be dead, and no reason for not taking his deposition appeared. St. Louis S. W. R. Co. v. McLeod [Tex. Civ. App.] 115 SW 85.

62. Reasonable notice to produce papers is necessary before secondary evidence is competent; what is such notice depends upon circumstances. Muir v. Kalamazoo Corset Co., 155 Mich. 624, 15 Det. Leg. N. 1143, 119 NW 1079.

63. Where missing paper is important and its absence is attended with suspicion, search should be more diligent than under ordinary circumstances. Robinson v. Singerly Pulp & Paper Co., 110 Md. 382, 72 A 828.

64. Wehring v. Modern Woodmen of America, 107 Minn. 25, 119 NW 245. Sufficiency of foundation for secondary evidence is addressed largely to trial court's discretion. McDonald v. Hanks [Tex. Civ. App.] 113 SW 604. Preliminary proof necessary for admission of secondary evidence of contents of writings addressed to discretion of court. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. Sufficiency of foundation depends upon importance of document or writing whose contents are sought to be proved, whether it is collateral, or foundation of suit. Wehring v. Modern Woodmen of America, 107 Minn. 25, 119 NW 245. Sufficiency of search for original largely discretionaray with trial court. Robinson v. Singerly Pulp & Paper Co., 110 Md. 382, 72 A 828.

65. Where plaintiff proved that letters were properly addressed and mailed to defendant, and defendant denied having received them, secondary evidence was competent without notice to produce. Jordan v. Austin [Ala.] 50 S 70.

66. Simpson Bank v. Smith [Tex. Civ. App.] 114 SW 445. Where books of account could not be produced, they could be proved as well by oral testimony as by examined copy. Barclay v. Deyerle [Tex. Civ. App.] 116 SW 123. Where deed was lost, its nature and contents could be proved by any kind of secondary evidence. Simpson Bank v. Smith [Tex. Civ. App.] 114 SW 445. Where there is no ground for legal presumption that better secondary evidence exists, any proof may be received which is legally admissible otherwise, unless objecting party can show that better evidence was known and could have been produced. Robinson v. Singerly Pulp & Paper Co., 110 Md. 382, 72 A. 828. Where contents of lost instrument must be proved by parol, it is only necessary to prove the substance of the material facts and verbal precision cannot be insisted on, though proof must be more than vague and indefinite statements. Id.

67. Prejudicial error to withdraw copy of contract. Mullins v. Columbia County Bank, 87 Ark. 554, 113 SW 206.

68. Collateral writings. In re Miller's Estate [Utah] 102 P 996. Letters collateral to main issue. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. Oral proof of payment of money to bank by check is competent, when contents and form of check are collateral. Fort v. First Nat. Bank, 82 S. C. 427, 64 SE 405. Papers, documents, and records being collateral, in action by attorney to recover for services, contents could be probed by parol. Pollak v. Gunter [Ala.] 50 S 155.

69. Testimony that witness had found complete chain of title on examining papers competent to show existence of deed subsequently lost. Kirby v. Blake [Tex. Civ. App.] 115 SW 674.

the writing or record,[70] or to show facts independent of the writing,[71] where the contents of the writing are not sought to be thus established.[72]

In case of duplicates or multiplicates, each is primary evidence.[73]

Rules controlling proof of public records and documents are discussed in a subsequent section.[74]

§ 5. *Parol evidence to explain or vary writings.*[75]—See 11 C. L. 1367—When a written contract purports on its face to be a complete expression of the whole agreement, it is presumed that the parties have introduced therein every item or term,[76] and that all prior negotiations and contemporaneous oral agreements have been merged therein.[77] Hence the well established rule, which has become a substantive

70. Order for seed, and seller's books and letters, not conclusive on question to whom credit was extended but subject to explanation by parol. Saginaw Milling Co. v. Mower, 154 Mich. 620, 15 Det. Leg. N. 889, 118 NW 622. Proper to show that letter in land office was sent unenclosed, and that records showed that it was customary to send letters sealed but not enclosed at time when this letter was sent. Keck v. Woodward [Tex. Civ. App.] 116 SW 75. Testimony by assessors as to what certain items on assessors' lists meant, competent. Warner v. Campbell, 238 Ill. 630, 87 NE 853.

71. Fact of occupancy of land may be proved by parol, though there is written lease. Blunck v. Chicago & N. W. R. Co. [Iowa] 120 NW 737. In action by chattel mortgagee to recover property from purchaser who bought with notice, proof of indebtedness may be made by parol. Van Eps v. Newald, 139 Wis. 129, 120 NW 853.

72. Testimony as to what letters referred to, and not stating contents proper. In re Miller's Estate [Utah] 102 P 996.

73. When a document of title or **obligation** is made in counterpart, each counterpart is regarded as an original. Sarasohn v. Kamaiky, 193 N. Y. 203, 86 NE 20. Where two **notices** to quit possession were contemporary writings, the counterparts of each other, one of which was delivered and the other preserved, they may both be considered as originals and the one preserved may be received in evidence without notice to produce the one which was delivered. Behrens v. Mountz, 37 Pa. Super. Ct. 326. Where notices are executed in duplicate, or otherwise in manifold, and one or more of the copies are served while another is retained, the copy so retained is admissible as primary evidence upon an issue of service of notice, notwithstanding production of copies served has not been called for by notice to produce or otherwise. Savannah Bank & Trust Co. v. Purvis [Ga. App.] 65 SE 35. **Carbon copies** of letters sent defendant admissible though only verbal notice was given defendant to produce originals, copies being practically original. Bond v. Sandford, 134 Mo. App. 477, 114 SW 570. Though **two letters** are **written at same time** and shown to be exact duplicates, yet one sent to addressee is original and other is copy. McDonald v. Hanks [Tex. Civ. App.] 113 SW 604.

74. See post, § 7C.

75. Search Note: See notes in 9 C. L. 1253; 11 Id. 609; 16 L. R. A. 321; 17 Id. 270; 18 Id. 33; 19 Id. 302; 20 Id. 101, 705; 68 Id. 384; 3 L. R. A. (N. S.) 248; 6 Id. 943; 9 Id. 967, 1007; 13 Id. 780, 1203; 16 Id. 1165; 5 A. S. R. 197; 56 Id. 659; 2 Ann. Cas. 146; 3 Id. 64, 560; 6 Id. 169; 7 Id. 1045; 8 Id. 347.

See, also, Evidence, Cent. Dig. §§ 1678-2148; Dec. Dig. §§ 384-469; 17 Cyc. 567-753; 2 A. & E. Enc. L. (2ed.) 287; 11 Id. 548; 21 Id. 1077.

76. Omaha Cooperage Co. v. Armour & Co. [C. C. A.] 170 F 292. Letter previously written held incompetent to add to or vary contract. Pammel v. Pacific Mut. Life Ins. Co. [Mich.] 16 Det. Leg. N. 322, 121 NW 760. Where **act of congress** evidenced a contract the terms of which were therein fully set forth, parol evidence was inadmissible. Cortelyou v. U. S., 32 App. D. C. 20.

77. Wysong v. Sells [Ind. App.] 88 NE 954; Wheless v. Meyer & Schmid Grocer Co. [Mo. App.] 120 SW 708; Commonwealth Trust Co. v. Coveney, 200 Mass. 379, 86 NE 895. Written contract supersedes all preliminary negotiations. Code Civ. Proc. § 1625. Houghton Co. v. Kennedy [Cal.] 102 P 533. Evidence insufficient to show that contract of settlement was not intended as final so that previous oral agreements were merged. Woodward v. Neal, 113 NYS 751.

Merged: Agreement held preliminary to written contract and merged therein, when it contained inconsistent provision. Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065. Prior verbal **agreement between carrier and shipper** merged in bill of lading containing terms of contract. Blackmer & Post Pipe Co. v. Mobile & O. R. Co., 137 Mo. App. 133, 119 SW 13. Parol agreement made before final execution and delivery of bill of sale merged in writing. Schoblasky v. Rayworth, 139 Wis. 115, 120 NW 822. **Oral communications** prior to or at time of making contract cannot be used to vary or contradict it. McCormick v. Jordon, 65 W. Va. 86, 63 SE 778. Oral **negotiations** prior to written contract of sale of land. Ozmore v. Coram [Ga.] 65 SE 448. What was said in oral negotiations for sale of building and loan stock merged in written contract contained in note and mortgage. Iowa Business Men's Building & Loan Ass'n v. Fitch [Iowa] 120 NW 694. If letter containing offer to sell was accepted and intended as final contract, prior negotiations were merged therein. Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88, 89 NE 723. Prior **representations as to time of delivery of goods** sold merged in contract which specified time of delivery. Bruner v. Kansas Moline Plow Co. [C. C. A.] 168 F 218. Oral **agreement as to time of consummation of sale** of land merged in subsequent written contract containing provision as to time. Garrett v. Cohen, 63 Misc. 450, 117 NYS 129.

rule of law as well as a rule of evidence,[78] that evidence of prior or contemporaneous agreements, negotiations or representations,[79] is inadmissible to vary, add to or contradict the terms of a valid written instrument.[80] The rule applies as well to terms

Written **bid for construction work** inadmissible in action on contract when latter was complete and unambiguous. Boston Store v. Schleuter [Ark.] 114 SW 242.

78. Lese v. Lamprecht, 196 N. Y. 32, 86 NE 365.

79. McCormick v. Jordan, 65 W. Va. 86, 63 SE 778.

Held incompetent: Written contract for sale of land being complete and clear on question of extension of time, parol evidence was incompetent to prove prior or contemporaneous agreement that there should be no further extension. Lese v. Lamprecht, 196 N. Y. 32, 89 NE 365. Prior or contemporaneous inconsistent **oral agreements.** Farmers' Mfg. Co. v. Woodworth [Va.] 64 SE 986. **Contemporaneous oral agreement.** Red Snapper Sauce Co. v. Bolling [Miss.] 50 S 401. Written contract of sale held evidence of agreement; contemporaneous parol agreement incompetent. Robinson v. Yetter, 238 Ill. 320, 87 NE 363. Contemporaneous oral agreement not to enforce covenant in lease as to water rent if lessee signed lease, and paid rent. Goerlitz v. Schwartz, 112 NYS 1119. **Representations** prior to or contemporaneous with written contract cannot be shown to vary, change or add to plain terms of contract. McNinch v. Northwest Thresher Co. [Okl.] 100 P 524. Written contract cannot be changed by contemporaneous oral agreement, whether or not latter is based on consideration. Reams v. Thompson, 5 Ga. App. 226, 62 SE 1014. Different **prior oral agreement.** Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Previous oral arrangement. Power v. Turner, 37 Mont. 521, 97 P 950. Oral agreement to deliver more books than subsequent written contract called for. St. Dunstan Soc. v. Picard, 115 NYS 1079. Where there was written contract for shipment of cattle, prior oral agreement to transport in certain time was incompetent. Minnesota & Dakota Cattle Co. v. Chicago & N. W. R. Co. [Minn.] 122 NW 493. Verbal agreement by landlord to make repairs, prior to execution of written lease, incompetent. Erickson v. Propp, 106 Minn. 238, 119 NW 390. **Contemporaneous agreement** cannot be proved to change absolute guaranty into contingent obligation. Lompoc Val. Bank v. Stephenson [Cal.] 104 P 449. Where party signed contract which provided that **oral agreements of agents** could not change written terms, oral agreement previously made was waived. Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059. Since by statute life insurance policy is sole measure of company's liability, neither party can defeat its operation by proving **preliminary contracts** prior to issuance of policy. Provident Sav. Life Assur. Soc. v. Withers [Ky.] 116 SW 350. Prior statements and **negotiations** incompetent in absence of allegation of fraud, mistake or omission. Hartford Mill Co. v. Hartford Tobacco Warehouse Co. [Ky.] 121 SW 477. Prior verbal negotiations are incompetent except so far as declaratory or evidentiary of facts and circumstances in light of which contract was made, and in view of which it is to be construed. Western Lime & Cement Co. v. Copper River Land Co., 138 Wis. 404, 120 NW 277. Prior **conversations.** Beckham v. Collins [Tex. Civ. App.] 117 SW 431. Previous conversations between parties as to character of work incompetent to vary contract for sewer. Gammino v. Dedham [C. C. A.] 164 F 593. Where wife gave husband bill of sale of household goods, on being divorced, proof of previous conversations as to disposal of furniture before validity of bill of sale was attacked was incompetent. Lesster v. Columbia Storage Warehouses, 130 App. Div. 551, 115 NYS 61. Conversations between agent, with power to convey land, and grantee, and between latter and attorney who drew power, incompetent to extend authority thereby given. Welke v. Wackershauser [Iowa] 120 NW 77. **Previous correspondence** incompetent to vary or contradict contract of sale of boiler. Creamery Package Mfg. Co. v. Duncan, 136 Mo. App. 659, 119 SW 33.

80. Hoopes v. Crane, 56 Fla. 395, 47 S 992; Heitman v. Commercial Bank [Ga. App.] 65 SE 590; Percy v. First Nat. Bank [Va.] 65 SE 475; MacKinnon Boiler & Mach. Co. v. Central Michigan Land Co., 156 Mich. 11, 16 Det. Leg. N. 17, 120 NW 26; Reigart v. Manufacturers' Coal & Coke Co., 217 Mo. 142, 117 SW 61; Threlkeld v. Steward [Okl.] 103 P 630; Swope v. Liberty County Bank [Tex. Civ. App.] 113 SW 976; Passow v. Kirkwood Distillery Co. [Wash.] 103 P 34. Where evidence showed conclusively that oral agreement set up in answer was not omitted from written contract by mistake, proof of it was inadmissible, since it tended to vary written contract. Passow v. Kirkwood Distillery Co. [Wash.] 103 P 34. Oral agreement incompetent when writing expressly provided that it included all agreements of parties. Toledo Computing Scale Co. v. Young [Idaho] 101 P 257.

Statements of rule: Clear, unambiguous and complete written contract cannot be varied by parol. First Nat. Bank v. Manser, 104 Me. 70, 71 A 134; Potomac Power Co. v. Burchell [Va.] 64 SE 982. Where contract is clear in its terms and purports to express the entire agreement, it conclusively determines rights of parties and cannot be contradicted, varied or explained. Lese v. Lamprecht, 196 N. Y. 32, 89 NE 365. Parol evidence incompetent to change, qualify, contradict, or explain a plain, unambiguous, written contract, nor can custom or usage be shown to contradict it. Hirsch v. Georgia Iron & Coal Co. [C. C. A.] 169 F 578. Issue of fraud not being raised, proper to exclude proof of oral inducements to enter into contract. Langston v. National China Co. [Fla.] 49 S 155. In an acton at law written contract cannot be changed by oral agreements. Remmers v. Remmers, 217 Mo. 541, 117 SW 1117. Oral agreement cannot be shown to vary written one, unless supplemental or subsequent thereto. Hungerford v. Snow, 129 App. Div. 816, 114 NYS 127. Rule that **intention of parties** to be ascertained as fact from competent evidence does not change rule that

writing cannot be varied by parol. Lancaster & J. Elec. L. Co. v. Jones [N. H.] 71 A 871. Rule that contemporaneous oral agreement cannot be shown to vary or contradict written contract **applies in equity** as well as in law. Commonwealth Trust Co. v. Coveney, 200 Mass. 379, 86 NE 895. **Custom cannot be shown** to change terms of contract and engraft different ones therein. Fowler Utilities Co. v. Chaffin Coal Co. [Ind. App.] 87 NE 689.

ILLUSTRATIONS. Miscellaneous contracts: Oral agreement that defendant should have right at any time to repudiate or rescind contract incompetent. Krbel v. Krbel [Neb.] 120 NW 935. Where contract to publish advertising matter procured by plaintiff did not specify prices to be charged by plaintiff, proof that price per page was not to exceed certain figure was held to vary contract. Patten v. Lynett, 133 App. Div. 746, 118 NYS 185. Where written contract provides that it is executed and delivered in consideration of credit extended by one to third person for price of machinery bought of such party, this forms part of contract and cannot be varied by parol in absence of fraud or mistake. McNinch v. Northwest Thresher Co. [Okl.] 100 P 524. Where contract was complete on its face and offer of oral evidence did not contain any additional agreement, it was properly excluded. Ohl v. Coleman, 113 NYS 492. Where contract referred to map showing depth of lots, party could not show that lots were represented as of different depth. Dowling v. Miller-Kendig Real Estate Co., 115 NYS 154. Where contract and plans specified size of cellar in building, parol evidence was incompetent to show the parties agreed on cellar of different size. Lossing v. Cushman, 195 N. Y. 386, 88 NE 649. Where correspondence purported to contain entire agreement of parties, parol proof to change it was incompetent. Polk Print. Co. v. Smedley, 155 Mich. 242, 15 Det. Leg. N. 988, 118 NW 981. When terms of payment were completely expressed in contract, testimony of witness as to construction of contract was properly excluded. Jones v. Whittier [N. J. Err. & App.] 73 A 497. Written agreement to pay to railroad company certain sum of money in consideration of benefits to be derived from construction of railroad, money to be paid when road is built to certain point, cannot be varied, in absence of fraud, accident or mistake, by proof of condition that depot would be built at certain point. Southard v. Arkansas Val. & W. R. Co. [Okl.] 103 P 750. Communications between one party and his attorney as to effect of instrument incompetent to vary its meaning as against other party. Brown v. Brown [Iowa] 120 NW 724. Where written contract provided that notes were given for sale of business and certain described articles, parol evidence that services were also to be rendered was incompetent. Mccormick v. Kampmann [Tex.] 115 SW 24. In absence of plea of fraud in **antenuptial settlement** or alteration of its terms parol evidence is inadmissible to show that agreement determining rights of both parties in each other's property was intended to determine right of one only. Nesmith v. Platt, 137 Iowa, 292, 114 NW 1053. Where equipment, and other items, were not intelligibly mentioned in **construction contract,** parol proof was incompetent to show that parties intended to include them. Murdock v. Gould, 193 N. Y. 369, 86 NE 12. Proof of customs incompetent to restrict terms used in contract for sewer construction. Gammino v. Dedham [C. C. A.] 164 F 593. Contract complete; parol evidence incompetent to show nature of **settlement.** Reliable Match Co. v. Price [Minn.] 122 NW 461. Contract of settlement or composition being unambiguous, parol evidence was incompetent to show that it was without consideration. Harvey v. Denver & R. G. R. Co., 44 Colo. 258, 99 P 31. Compromise agreement whereby certain land, described by metes and bounds and reference to plat, was to be conveyed, cannot be contradicted by proof of oral agreement to convey less land than shown on plat. Rivenbark v. Teachey, 150 N. C. 289, 63 SE 1036. Where **release** of claim for personal injury recited consideration of $1,000 only, parol evidence that defendant agreed to give plaintiff employment was incompetent. Chaplin v. Gerald, 104 Me. 187, 71 A 712. Release executed by administrator, in settlement of claim of damages for death, held contract, not subject to contradiction by parol. Dronenburg v. Harris, 108 Md. 597, 71 A 81. Where **authority to broker** gave power to sell only, parol evidence was incompetent to prove that parties contemplated an exchange as well. McFadden v. Pyne [Colo.] 104 P 491. Statement of value of property in **redelivery undertaking** in attachment is binding on sureties, they cannot show different value. Jones v. Short [Or.] 101 P 209. **Seaman's contract,** as shown by articles, cannot be varied by parol, in absence of fraud. The Ucayali, 164 F 897. **Contract of employment,** complete and unambiguous, cannot be added to by parol proof of agreement that employe was to act only as foreman. Meyerson v. Hart [C. C. A.] 167 F 965. Written **contract of partnership** to overhaul machinery cannot be varied by proof that one was to teach other a trade. Gross v. Todd [Miss.] 47 S 801. Reversible error to receive parol evidence to vary and contradict terms of **lease under seal.** Campbell v. New York, etc., R. Co., 115 NYS 1114. **Sublease** could not be varied by testimony of witness that it, and transaction connected with it, was considered sale of plaintiff's interest in lease. Burns v. Loftus [Nev.] 104 P 246. Conditions of **fire insurance policy** cannot be varied by proof of prior oral agreement with agent. Athens Mut. Ins. Co. v. Evans [Ga.] 64 SE 993. Oral representations by insurance agent cannot be proved to vary written **applications for insurance** which provided that no oral representations had been made. Miles v. Sledge [Ala.] 47 S 595. Where **accident policy** plainly allowed recovery only for loss of both eyes, parol evidence was incompetent to show an understanding that recovery could be had for loss of one eye. Phillipy v. Homesteaders [Iowa] 118 NW 880. When meaning of words used in **treaty** were not uncertain or ambiguous, extrinsic evidence was inadmissible. Ottawa and Chippewa Indians v. U. S., 42 Ct. Cl. 240.

Notes: Oral agreement changing **terms** of note. Roebuck v. Citizens' Bank [Kan.] 100 P 621. In absence of fraud or mistake, one who signs note as principal cannot set up collateral oral agreement exempting him from liability or limiting **liability.** Ander-

necessarily implied or read into the contract by law as to those expressly stated.[81]

son v. Mitchell, 51 Wash. 265, 98 P 751. In action on note, maker cannot show that he was not to pay unless he could collect certain sums from others. Cline v. Farmers' Oil Mill [S. C.] 65 SE 272. In action on note, proof not only to show condition precedent to liability, but business relations between parties, etc., was incompetent. Ebling Brew. Co. v. Feldman, 114 NYS 910. Oral agreement to pay only certain sum weekly as long as maker of note purchased beer of payee incompetent to vary terms of note. Munch Brewery v. De Matteis, 128 App. Div. 830, 112 NYS 1042. In absence of fraud or mistake, parol agreement which would in effect relieve **surety,** on note of liability could not be proved. Farmers' Bank of Wickliffe v. Wickliffe [Ky.] 116, SW 249. Contract of **accommodation maker** of note to pay it cannot be controlled by oral testimony that it was understood and agreed at time that person for whose accommodation it was made was to pay. Gerli v. National Mill Supply Co. [N. J. Law] 73 A 252. Unambiguous **joint and several notes** cannot be varied by parol. Rumsey v. Fox [Mich.] 16 Det. Leg. N. 598, 122 NW 526. Joint maker of note cannot escape liability by proof that payee told him he would have nothing to do with it, and that it would be paid. Lipsett v. Hassard [Mich.] 16 Det. Leg. N. 736, 122 NW 1091. Parol evidence inadmissible, in action on note, to show agreement between **indorser and indorsee** that former was not to be bound on his indorsement. Wizig v. Beisert [Tex. Civ. App.] 120 SW 954. **Maturity** of note cannot be changed by parol contemporaneous or prior agreement. Jones v. Taylor, 5 Ga. App. 161, 62 SE 992. Where note is payable to bearer, and negotiable by transfer alone, proof of **oral agreement not to negotiate** is incompetent. Benton v. Sikyta [Neb.] 122 NW 61.

Contracts of sale: Parol evidence incompetent to vary terms of sale contract, in absence of allegation of fraud or mistake. Field v. Turley [Ky.] 120 SW 338. Contract of sale of building to be removed from premises held to exclude oral promise made anterior to it to remove debris. Kellerman Cont. Co. v. Chicago House Wrecking Co., 137 Mo. App. 392, 118 SW 99. Contract to buy and sell lamps and attachments in certain exclusive territory held complete and unambiguous. Minnesota Trading Co. v. Penn Oil & Supply Co. [Minn.] 121 NW 907. Where sale contract expressly excluded **conditions** not stated in it, proof of conditions not stated was incompetent. Roll v. Puritan Mfg. Co. [Ala.] 50 S 354. Oral agreement in regard to return of goods held no defense in action to recover balance due on agreement which specifically stated that "this contract covers all agreements between the parties hereto." Toledo Computing Scale Co. v. Young [Idaho] 101 P 257. Sale contract and **warranty.** Mutting v. Watson, Woods Bros. & Kelly Co. [Neb.] 121 NW 582. Where contract of sale of mules expressly excluded any warranty as to their condition, oral warranties that they were sound could not be proved. Boswell v. Johnson, 5 Ga. App. 251, 62 SE 1003. Purchaser of equipment for plant cannot recover damages for breach of oral representation that **amount** of wire sold would be sufficient for plant made before execution of written contract. Varney Elec. Suppply Co. v. Carter [Ky.] 115 SW 763. Petition for rehearing denied. Varney Elec. Supply Co. v. Carter [Ky.] 116 SW 1176. Where written contract bound defendant to cut and deliver 1,000,000 feet of timber in quantities of not less than 40,000 feet per week, oral agreement to accept smaller weekly deliveries if full 40,000 feet could not be delivered could not be proved. Walker v. Cooper, 150 N. C. 128, 63 SE 681. Where **invoice** of goods contained all terms of contract and was received by vendee and kept without objection and goods were shipped and delivered, it became contract which could not be varied by parol. Davis Photo Stock Co. v. Photo Jewelry Mfg. Co. [Colo.] 104 P 389. Where contract by correspondence for 10 cars of coal, provided for **shipment** in any equipment available, parol evidence was incompetent to show that parties intended that ordinary cars, and not hopper bottomed ones, were to be used. Fowler Utilities Co. v. Chaffin Coal Co. [Ind. App.] 87 NE 689.

Contracts for sale of land cannot be changed or added to by proof of oral statements or negotiations. Anthony v. Hudson [Ky.] 114 SW 782. Where written contract showed number of acres to be sold, it could not be altered or controlled by prior oral statements. Travis v. Taylor [Ky.] 118 SW 988. Where contract to convey land is in writing, reservation of growing timber cannot be proved by parol. Alexander v. Herndon [S. C.] 65 SE 1048. Where contract of sale of land acknowledged receipt of partial payment and provided for payment of balance at certain time, parol evidence was incompetent to show that vendor had option to demand payment of balance before stipulated time. Downing Inv. Co. v. Coolidge [Colo.] 104 P 392. When contract for sale of land named price but no terms, it was presumptively payable in cash, and oral proof of terms was incompetent. Ruggerio v. Leuchtenburg, 61 Misc. 298, 113 NYS 615. In action for damages for breach of contract to sell land and furnish water, parol evidence was incompetent to show agreement to furnish less water than that specified in contract. Babcock-Cornish & Co. v. Urquhart, 53 Wash. 168, 101 P 713. Written contract by prospective purchasers, to withhold $1,200 of price as plaintiff's commission, could not be varied by parol proof of understanding between buyer and seller that buyer should pay commission. Cole v. Harvey [Iowa] 120 NW 97. Written contract required vendor to procure certificates showing erection of building on premises in accordance with building laws. Held proof of parol misrepresentations as to construction of building would vary terms of contract. Kreshover v. Berger, 62 Misc. 613, 116 NYS 20.

Leases: Where contract contained stipulations for assignment of lease or extension or right thereto, collateral oral agreement to obtain renewal for three years after expiration of lease could not be proved. Norton v. Abbott, 113 NYS 669.

Parol evidence is, of course, incompetent to supply elements of a contract required by the statute of frauds to be in writing,[82] though evidence is competent which tends only to explain the contract or identify the subject-matter.[83]

Where the written evidence of a contract or a term thereof is ambiguous or uncertain, oral or extrinsic evidence is admissible to explain the ambiguity or clear up the uncertainty, in order that the real intention of the parties may be made to appear.[84] For this purpose evidence of the facts and circumstances leading up to and attending the execution of the writing is admissible,[85] and the conduct of the parties tending to

81. Where written contract does not specify time for performance, law implies that it is to be performed within reasonable time, and this implied term cannot be controlled by parol proof of understanding as to what reasonable time would be. American Bridge Co. v. American Dist. Steam Co., 107 Minn. 140, 119 NW 783. Where no time is specified for acceptance of option, law implies that it must be accepted within reasonable time, and this implied provision cannot be varied by proving an extension of time by parol. Standard Box Co. v. Mutual Biscuit Co. [Cal. App.] 103 P 938.

82. Contracts within statute of frauds cannot be added to by parol. Reigart v. Manufacturers' Coal & Coke Co., 217 Mo. 142, 117 SW 61. Under statute requiring promise to pay broker commission for selling realty to be in writing, parol evidence cannot be received to identify party who is to pay commission. McCrea v. Ogden [Wash.] 103 P 788; overruling former opinion in 50 Wash. 495, 97 P 503. Under Ky. St. § 470, one may by parol show real consideration for contract of sale of realty, or that consideration recited was not paid, but he cannot prove an oral promise to convey other land in lieu. Richardson v. Isaacs [Ky.] 118 SW 1003.

Resulting trust may be established by parol. Baker v. Baker [N. J. Eq.] 72 A 1000.

83. Essential elements in description of land in sale contract cannot be supplied, but parol evidence is competent to identify land described. House v. McMullen, 9 Cal. App. 664, 100 P 344. Parol or extrinsic evidence is competent to apply description in contract for sale of land but is not competent to supply defects in description so as to make contract meet requirements of statute of frauds. Allen v. Kitchen [Idaho] 100 P 1052.

84. Lese v. Lamprecht, 196 N. Y. 32, 89 NE 365; Georgia Iron & Coal Co. v. Ocean Acc. & Guar. Corp. [Ga.] 65 SE 775. When contract is incomplete or ambiguous, parol evidence is admissible only for purpose of correcting ambiguity or supplying deficiency. First Nat. Bank v. Manser, 104 Me. 70, 71 A 134. If terms of contract exclude custom, it cannot be proved; but if parties disagree as to terms, general custom of trade may be shown as bearing on question. Smith & Co. v. Russell Lumber Co. [Conn.] 72 A 577.

Rule applied: Where contract to convey land to be sold provided for application of certain expenses and commission on obligation of one party, oral evidence was competent to show what was meant by commission and its amount. Kvamme v. Barthell [Iowa] 118 NW 766. Contract of casualty **insurance** ambiguous; error to exclude parol evidence. Georgia Iron & Coal Co. v. Ocean Acc. & Guar. Corp. [Ga.] 65 SE 775. Where insurance company, by its agents, issued certificate, with "rider" attached, certifying that policy "No. 7522" had been issued insuring cargo of flour on certain vessel against war risks only, and it appeared no policy was in fact issued, parol evidence was competent to show custom whereby policy became part of contract evidenced by certificate, though not issued. St. Paul Fire & Marine Ins. Co. v. Balfour [C. C. A.] 168 F 212. Ambiguity in **note** may be explained by parol. Bing v. Bank of Kingston, 5 Ga. App. 578, 63 SE 652. Where agreement in letter was at **guaruntee of account,** parol proof was competent to show which account was referred to. Polk Print. Co. v. Smedley, 155 Mich. 249, 15 Det. Leg. N. 1001, 118 NW 984. Contract of **sale** of premises to be used as restaurant held ambiguous as to who should stand expense of putting in equipment, including ventilating system required by Laws 1905, c. 48. Manvell v. Weaver, 53 Wash. 408, 102 P 36. Where contract to **lease** realty is indefinite and uncertain, but not void for indefiniteness, oral proof is competent to show circumstances and identify subject-matter. Spongberg v. First Nat. Bank, 15 Idaho, 671, 99 P 712. Mining lease ambiguous so as to admit parol proof as to liability for expenses of defending by third person who claimed mine. Codman v. Adamson, 130 App. Div. 317, 114 NYS 408. Manner of exercising **option** must be determined by language of contract construed in light of competent parol testimony. Breen v. Mayne [Iowa] 118 NW 441. Where language of **construction contract** was ambiguous as to power house, proof that contractor had seen and considered plans for a proposed power house was competent to aid in understanding intention of parties. Murdock v. Gould, 193 N. Y. 369, 86 NE 12.

85. Facts leading up to execution of written contract. In re Hartman, 166 F 776. In case of ambiguity or conflict in terms, parol evidence is competent to show **circumstances** and facts in light of which parties contracted. Marx v. American Malting Co. [C. C. A.] 169 F 582. Proof of situation and surroundings competent where contract of sale was uncertain whether shipments were to be made regularly or as ordered. Jung Brew. Co. v. Konrad, 137 Wis. 107, 118 NW 548. **Circumstances attending execution of** contract. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766. Prior, contemporaneous, or subsequent **declarations** of parties. Murdock v. Gould, 193 N. Y. 369, 86 NE 12. **Relation and situation of parties** and nature of **subject-matter.** Bowden v. Patterson [Tex. Civ. App.] 111 SW 182. When ambiguous, intent may be shown by circumstances and subject-matter. Wheless v. Meyer & Schmid

show the construction which they themselves have placed on the contract may also be shown.[86] Evidence of the meaning of terms used by the parties is competent,[87] especially when shown to have been used in a special or technical sense;[88] but if the terms of the written contract are clear and unambiguous, the intention of the parties must be found therein and extrinsic evidence is inadmissible.[89] Some courts

Grocer Co. [Mo. App.] 120 SW 708. Situation and circumstances, subject-matter, object, etc. Wood v. Kelsey [Ark.] 119 SW 258. **Facts known to both parties, and conversations** between them, admissible to show what would be reasonable time for performance of contract, and what parties may have contemplated as to damages. American Bridge Co. v. American Dist. Steam Co., 107 Minn. 140, 119 NW 783. **Motive and purpose** of party in executing instrument. Rucker v. Brown Bros. [Ga. App.] 65 SE 55. Purpose in executing written instrument. Stalker v. Hayes, 81 Conn. 711, 71 A 1099. Existing facts and purpose of parties in executing notes and contracts. Taplin v. Marcy, 81 Vt. 428, 71 A 72. Competent to show by parol in suit on note by maker that it was given merely to show that payee had an interest in land purchased jointly. Davis v. Sterns [Neb.] 122 NW 672. When an instrument has been obtained for one purpose and an attempt is made to use it for a different and unfair purpose, parol evidence is admissible to establish the contemporaneous agreement as to the purpose for which it was to be used. Winters v. Schmitz, 36 Pa. Super. Ct. 496.

86. Chamberlain v. Brown [Iowa] 120 NW 334. Conduct of parties at time of and just after execution of deed competent to aid in construction. Bernero v. McFarland Real Estate Co., 134 Mo. App. 290, 114 SW 531. In action for breach of contract to furnish garments for plaintiff to make, which specified no price but provided that goods should be made up at satisfactory price, parol evidence was competent to show that goods had been furnished at satisfactory price, and that defendant had partially performed. Becher v. National Cloak & Suit Co., 128 App. Div. 423, 112 NYS 839.

87. Where meaning to be attributed to certain **words in railroad construction contract** was not clear, parol evidence was competent to show true intent and undertaking of parties. Evans v. Ross Const. Co., 142 Ill. App. 375. Parol evidence competent to explain term "slightly **processed**" used with reference to fruit. Scudders-Gale Grocery Co. v. Gregory Fruit Co., 9 Cal. App. 553, 99 P 978. Meaning of terms "mill **culls**" and "shipping culls" could be shown when used in lumber sale contract, and had technical meaning among mill men. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. Parol evidence competent to show nature and extent of duties of employe designated in written contract as **"local manager."** Walker v. Riley & Co. [Ga. App.] 65 SE 301. Agreement for exchange of lands provided that taxes were to be **"apportioned."** Parol evidence competent to show meaning of this term. Sleeper v. Nicholson, 201 Mass. 110, 87 NE 473. Parol proof of use of land competent to explain word **"easement"** in deed, and show whether intention was to grant affirmative or negative easement. Bernero v. McFarland Real Estate Co., 134 Mo. App. 290, 114 SW 531. Where contract required work of cheese maker to be done **"to the best of his ability,"** proof of statements by him to his employer at the time of his employment was competent to show what parties meant. Wenger v. Marty, 135 Wis. 408, 116 NW 7. Contract for sewers fixed price for **brick "furnished and laid** in sewer" at specified sum per 1,000. Parol proof of custom of trade competent to show how brick were to be measured. City of Richmond v. Barry [Va.] 63 SE 1074. Administrator's sale of claims included **claims "now in hands of administrator."** Held parol evidence competent to explain quoted words and show what claims were in contemplation of parties. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156.

88. Testimony of grain dealer competent to explain trade expression used in order to ship grain, but not to contradict it. Champlin v. Church, 76 N. J. Law, 553, 70 A 138. Parol evidence competent to show meaning of words **"when transit car"** on lumber sale slip. Harlow v. Parson Lumber & Hardware Co., 81 Conn. 572, 71 A 734. Parol evidence competent to show that terms **"floor slab" and "roof slab"** in construction contract were used in technical sense and what they meant. Aetna Indemnity Co. v. Waters, 110 Md. 673, 73 A 712. Evidence competent to show quality of **"Geneva washed furnace coke,"** called for by contract, and that coke furnished was not of that quality. McKeefrey v. Dimmick, 166 F 370. Parol evidence competent to show grade of cotton designated by term **"good cotton"** in sale contract. Ford & Co. v. Lawson [Ga.] 65 SE 444.

89. What one party said when contract was amended held incompetent, contract being unambiguous. Cain v. Moore [Wash.] 103 P 1130. What parties said before signing contract inadmissible to explain word "cellar" used in contract. Lossing v. Cushman, 195 N. Y. 386, 88 NE 649. Not necessary to refer to facts and circumstances out of which **guarantee** arose when it was unambiguous. Manhattan Rolling Mill v. Dellon, 113 NYS 571. Where terms of **broker's contract** were plain and unambiguous, proof of custom was inadmissible. Metz v. Miller, 113 NYS 527. Broker's contract unambiguous. Parol evidence, incompetent to show that right to commission depended on consummation of exchange of lands. Lewis v. Mansfield Grain & Elevator Co. [Tex. Civ. App.] 121 SW 585. **Lease and assignment** held not ambiguous so as to admit of parol explanation. Pollard v. Sayre [Colo.] 98 P 816. Agreement of **sale** held unambiguous, prior and contemporaneous declarations incompetent, and all parol evidence inadmissible, to explain, vary, or contradict it. McCoy v. Ash, 64 W. Va. 655, 63 SE 361. Contract of sale unambiguous as to time of furnishing and examining abstract, and perfecting title; parol evidence incompetent to show

hold that patent ambiguities cannot be explained by parol;[90] others that such explanation is competent whether ambiguity is patent or latent.[91] But a contract cannot be varied or contradicted under the guise of explaining ambiguities.[92]

Extrinsic evidence is competent when necessary to identify or locate the subject-matter of the contract,[93] provided such evidence does not contradict the contract,[94] and under this rule the description of property covered by a deed may be made certain by extrinsic evidence,[95] provided the description in the deed is sufficiently definite to admit of explanation.[96]

understanding that abstract could not be furnished within time specified. Sandstone Brick & Lime Co. v. Lawler, 53 Wash. 10, 101 P 360. Where contract of sale described land as certain quarter quarter section, and named price per acre, parol evidence was incompetent to show that vendor was entitled to pay for 40 acres, where government survey of land described included less. Curtis Land & Loan Co. v. Interior Land Co., 137 Wis. 341, 118 NW 853. Where **building contract** showed on its face what plans and specifications were referred to, resort could not be had to parol evidence to identify them. Hartwell v. Ganahl Lumber Co., 8 Cal. App. 733, 97 P 901.

90. Where the ambiguity is patent, as where words are omitted, or contradict each other, explanatory evidence is inadmissible, and the contract fails. Singer Sewing Mach. Co. v. Omaha Umbrella Mfg. Co., 83 Neb. 619, 119 NW 958. A **patent ambiguity** is one appearing on the face of the instrument and arising from the language used. In such case parol evidence is not competent to add to the language used, it must be construed as written. Teague v. Sowder [Tenn.] 114 SW 484.

91. Parol evidence is competent to explain ambiguities both latent and patent. Civ. Code 1895, §§ 3675(1), 5202. Georgia Iron & Coal Co. v. Ocean Acc. & Guar. Corp. [Ga.] 65 SE 775. A **latent ambiguity** is one which arises from ambiguity of extraneous facts or circumstances and not from language used alone. In such case extraneous evidence is competent to apply and explain language but not to change its meaning or effect. Teague v. Sowder [Tenn.] 114 SW 484.

92. Contract cannot be added to, varied, or contradicted by proof of declarations of parties, under the guise of explaining ambiguities. Murdoch v. Gould, 193 N. Y. 369, 86 NE 12.

93. Parol evidence competent to apply terms to subject-matter and to remove any uncertainty or ambiguity that may arise upon such application. State Historical Ass'n v. Silverman [Ga. App.] 65 SE 293.

Matters held provable by extrinsic evidence: Parol evidence competent to **identify property described** in contract to lease as "side room in our bank." Spongberg v. First Nat. Bank, 15 Idaho, 671, 99 P 712. Identity of property described in mortgage. Dierling v. Pettit [Mo. App.] 119 SW 524. May be shown by parol that note describing engine sold as 13-horse power was secured by mortgage on 16-horse power engines. Weber Implement Co. v. Dunard [Mo. App.] 120 SW 608. Parol evidence competent to identify premises described in contract of sale, and to explain word "about" used therein. Harten v. Loffler, 212 U. S. 397, 53 Law. Ed. —. Oral evidence is competent to apply description in land sale contract to land, when description contains sufficient to enable it to be so applied. Kight v. Kight, 64 W. Va. 519, 63 SE 335. Description locating farm as adjoining farms owned by certain persons, held sufficiently definite to admit parol proof to fit description to land. Grimes v. Bryan, 149 N. C. 248, 63 SE 106. Parol evidence competent to show that vendor owned only certain land to which description in contract of sale would apply. Bateman v. Riley, 72 N. J. Eq. 316, 73 A 1006. Where contract to convey referred to property as "three houses owned by Frances Dodge estate," parol evidence was competent to show whether that estate owned more than three houses in city in question. Harrigan v. Dodge, 200 Mass. 357, 86 NE 780. Parol evidence competent to identify land described in exchange contract as "my farm of 160 acres in Lynn County, Texas." Wilcox v. Sonka, 137 Mo. App. 54, 119 SW 445. Parol testimony to show **location of marks and monuments.** Rozelle v. Lewis, 37 Pa. Super. Ct. 563. **Identity of mortgage** with one mentioned in deed. Hendricks v. Brooks [Kan.] 101 P 622. **Identify debt secured** by mortgage, where description is uncertain and names seem different from that given, in notes secured by it. In re Farmers' Supply Co., 170 F 502. **Matter to which release applied,** as that release was understood by parties to be release of certain person under laws of District of Columbia. Dronenburg v. Harris, 108 Md. 597, 71 A 81.

94. Identity of land conveyed. Light v. Miller, 38 Pa. Super Ct. 408.

95. Parol evidence competent to show that certain tract of land was intended to be included in grant. Grimes v. Bryan, 149 N. C. 248, 63 SE 106. Description in patent being uncertain but not wholly void, evidence to identify land was competent. Tate v. Rose [Utah] 99 P 1003. Parol evidence competent to apply description in deed to land intended to be conveyed. Wetzler v. Nichols, 53 Wash. 285, 101 P 867. Where part of description in deed is inconsistent with intent shown by entire deed, extrinsic evidence may be received to clear it up. Thurman v. Leach [Ky.] 116 SW 300. Where extrinsic evidence shows latent ambiguity in description in deed, evidence of same kind is competent to point out land intended to be conveyed. Wetzler v. Nichols, 53 Wash. 285, 101 P 867. Parol evidence is competent to explain latent ambiguity in description in deed. Getchell v. Atherton, 104 Me. 198, 71 A 767. Extrinsic evidence is competent to explain **calls** of description in deed and thus applying them to subject-matter. Hubbard v. Whitehead, 221

Parol evidence is competent to show the actual and intended relation of the parties named in a writing to the contract evidenced by it.[97] The identity of the parties may also be shown by parol.[98] Thus parol evidence is competent to show that a party signing a contract did so as agent for another,[99] unless the contract is under seal.[1]

Mo. 672, 121 SW 69. If the calls of deed are sufficiently definite to be located by extrinsic evidence, the location cannot be changed by parol evidence, unless agreement was contemporaneous with making of deed. Haddock v. Leary, 148 N. C. 378, 62 SE 426. Ambiguity in description in deed, as to **starting point,** explainable by parol. Raley v. Magendie [Tex. Civ. App.] 116 SW 174. Where description in deed was "my dwelling house and land appurtenant thereto," parol evidence was competent to show **amount of land** included. Crozer v. White, 9 Cal. App. 612, 100 P 130.

96. Description in deed cannot be aided by parol if in itself, or by reference to other deeds, the description is not sufficient. Harriman Land Co. v. Hilton [Tenn.] 120 SW 162. If description in deed is sufficient to make it admissible in evidence, it is competent to apply the description to the subject-matter by parol, as where land is described as bounded by land of another. Glover v. Newsome [Ga.] 65 SE 64.

Description held sufficiently certain to admit parol evidence; deed competent. McCollum v. Buckner's Orphans' Home [Tex. Civ. App.] 117 SW 886; Cleveland v. Shaw [Tex. Civ. App.] 119 SW 883. Description by courses and distances held sufficiently definite to permit of locations of corners by parol. Babb v. Gay Mfg. Co., 150 N. C. 139, 63 SE 609.

97. Where contract provided against seller going into same business, the relation of parties and their professions and business could be shown without modifying terms of contract. Threlkeld v. Steward [Okl.] 103 P 630. Where contract was in form one between corporation and individual on one part and third person on another, and individual signed as president and stockholder, parol evidence was competent to show whether he intended to be bound personally. Lynch v. McDonald [Cal.] 102 P 918. Where agent employed to buy land at certain price, bought it himself at less price and sold to client for greater, and deed to him purported to have been made prior to negotiations with his principal, parol evidence was competent to show it had executed in blank and filled in for plaintiff when she bought. Whitehead v. Linn [Colo.] 102 P 286. **Where indorsement on note recites payment** in full by certain signers, indorsement may be explained by parol to show that note was paid only as to share of such signers. Custard v. Hodges, 155 Mich. 361, 15 Det. Leg. N. 1067, 119 NW 583. **As between parties to note,** parol evidence is competent to show that one is surety. Morehead v. Citizens Deposit Bank [Ky.] 113 SW 501. One signing obligation as joint maker may show by parol that he is surety only. Smith v. First Nat. Bank, 5 Ga. App. 139, 62 SE 826. First signer on note is usually regarded as principal and second as surety, but parol evidence is competent to show that first is surety only. Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331. Where party signed name on back of note which was Michigan contract, he became prima facie a joint maker, but evidence of circumstances would be competent to show mutual agreement that he was indorser or surety only, but proof of mental purpose to be bound as surety only varied contract and was incompetent. Hackley Nat. Bank v. Barry, 139 Wis. 96, 120 NW 275. Parol evidence competent to show that one who apparently signed as principal or surety (due to fraud) really signed only as witness. Barco v. Taylor, 5 Ga. App. 372, 63 SE 224. Plaintiff, who claimed he endorsed note for collection only, properly allowed to state that he did not intend to part with ownership by indorsing it. Nolan v. Nolan [Cal.] 101 P 520. Though note recites that all persons signing or indorsing it do so as principals and not as sureties, yet parol evidence is competent to that person indorsed as surety and not as principal. Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 P 509.

98. Where contract does not clearly show parties intended to be bound but shows intention to bind some particular persons, oral evidence is competent to identify such persons. Van Arsdale-Osborne Brokerage Co. v. Foster [Kan.] 100 P 480. Competent to show that note signed by individual partners was intended as obligation of firm. In re Stoddard Bros. Lumber Co., 169 F 190. Competent to show by parol that word "assigns" in contract meant particular company, and that said company was real party in interest. Farmers' Pawnee Canal Co. v. Henderson [Colo.] 102 P 1063.

99. Pleins v. Wachenheimer [Minn.] 122 NW 166; Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785; Battey v. Lunt, Moss & Co. [R. I.] 73 A 353; Block v. Meridian [C. C. A.] 169 F 516. Competent to show that one who executed contract did so as agent as well as a principal. Eddy v. American Amusement Co., 9 Cal. App. 624, 99 P 1115. Parol evidence is always competent to show party to contract is agent or trustee for another, in order to protect principal or cestui que trust. Klauck v. Federal Ins. Co., 131 App. Div. 519, 115 NYS 1049. Parol proof is competent to show that orders in another's name were in fact taken for certain person as principal. Mayers v. Fogarty [Iowa] 119 NW 159. Agent with authority to make contract of sale of land signed contract in his own name individually. Parol evidence was competent to show that principal was bound. Wharton v. Tolbert [S. C.] 65 SE 1056. In action for rent under lease in which an estate appeared as lessor, plaintiffs could show by parol that they represented the estate and that executor had power to make lease. Grannis v. McLean Automobile Co., 117 NYS 881. Where defendants signed note and added word "trustees" to names, parol evidence was competent to show that they

It is usually held that a simple receipt is only prima facie evidence of the facts recited and is subject to contradiction or explanation by parol,[2] but if the writing constitutes a contract the parol evidence rule applies.[3] The recitals of consideration in a deed or contract being in the nature of a receipt are not conclusive, and oral evidence is always competent to show the real consideration,[4] or to show that there

signed only as agents of corporation. Knippenberg v. Greenwood Mining & Mill. Co. [Mont.] 101 P 159.

1. Parol evidence incompetent to show that party to sealed instrument acted only as agent for another. Peterson v. New York, 194 N. Y. 437, 87 NE 772.

Recital in unsealed assignment of mortgage that it is under seal does not make it sealed instrument so as to exclude proof that it was taken by bank employe for benefit of bank. Slade v. Squier, 133 App. Div. 666, 118 NYS 278.

2. Receipt is open to explanation by parol. Ramapo Foundry & Wheel Works v. Carey, 113 NYS 10; Graham v. Peacock, 131 Ga. 785, 63 SE 348; Dee v. Sears-Nattinger Automobile Co. [Iowa] 118 NW 529. Oral evidence competent to explain or overthrow receipt. Chicago Art Co. v. Thacker, 65 W. Va. 143, 63 SE 770. Recital of filing of receipt, not an agreement or satisfaction of judgment, may be contradicted or explained. Wilson v. Fahnestock [Ind. App.] 86 NE 1037. Where clerk gave receipt in full of claims on receiving check, not knowing of a claim of employer, parol evidence was admissible to show that receipt was not intended to include such claim. San Pedro Lumber Co. v. Schroeter [Cal.] 103 P 888. Bill of lading, in so far as it acknowledges receipt of certain number of articles, is only prima facie evidence thereof; carrier may show it received less number. Atlantic Coast Line R. Co. v. Cohn & Co. [Ga. App.] 65 SE 355.

3. Accepted receipt for goods expressed, limiting carrier's liability to $50 unless different value was stated, cannot be varied by oral agreement with agent as to value. Jonasson v. Weir, 130 App. Div. 528, 115 NYS 6.

4. Pollak v. Gunter [Ala.] 50 S 155. Actual consideration may be shown. Kessler & Co. v. Parelius, 107 Minn. 224, 119 NW 1069; Bing v. Bank of Kingston, 5 Ga. App. 578, 63 SE 652. Additional and full consideration may be proved by parol. Burns v. Loftus [Nev.] 104 P 246. While parol evidence is competent to show consideration in addition to that expressed, yet this must be consistent with recital. Pope v. Taliaferro [Tex. Civ. App.] 115 SW 309. Where contract and deed did not refer to time of possession or name consideration, verbal agreement that grantor should remain in possession up to certain time, as part of consideration, was competent. Morehead v. Hering [Tex. Civ. App.] 116 SW 164. Parol evidence held competent to show that judgment in favor of tax sale purchaser was in nature of **compromise**, and that he agreed to reconvey. Bente v. Sullivan [Tex. Civ. App.] 115 SW 350. Parol evidence competent to show agreement which was consideration for **assignment.** Lee v. Unkefer [S. C.] 65 SE 989. Recital of receipt of consideration for assignment of expectancy not conclusive. In re Baeder's Estate [Pa.] 73 A 915. True consideration for **carrier's contract** to carry freight may be proved. Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 SW 1052. Where **limited liability contract with carrier** recites reduced rate as consideration, parol evidence is competent to show different consideration or want of consideration. Burgher v. Wabash R. Co. [Mo. App.] 120 SW 673. In action on **note,** it was competent to show that consideration was payee's consent to allow adjoining property to be used for saloon purposes, though payee also gave written lease of his own property. O'Connor v. Kleiman [Iowa] 121 NW 1088. **Mortgage** recited that it was to secure mortgagee for any sum he might have to pay on note signed by himself and mortgagor. Parol evidence was competent to show that mortgage was to be, and was in fact, paid in part from loan from third person. Phipps v. Willis [Or.] 99 P 935. In suit for specific performance of **contract to convey,** parol evidence was competent to show that consideration expressed was only part, and to show agreement for services as additional consideration. Pope v. Taliaferro [Tex. Civ. App.] 115 SW 309. Ky. St. § 470, does not require consideration for contract of sale to be in writing, hence recital therein may be contradicted by parol. Stamper v. Cornett [Ky.] 121 SW 623. Consideration for **deed** may be shown. Bashinski v. Swint [Ga.] 65 SE 152; Naylor v. Davis, 130 App. Div. 311, 114 NYS 248; Springman v. Hawkins [Tex. Civ. App.] 113 SW 966. Actual consideration, if any, for conveyance may be shown, notwithstanding recital in deed. Friedman v. Ender, 116 NYS 461. Inadequacy of consideration being alleged as ground for setting aside deed, proof of real consideration is competent. Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149. May be shown that grantor was to receive, besides consideration recited in deed, rents during her life. Tipton v. Tipton [Tex. Civ. App.] 118 SW 842. Real consideration for deed and real ownership of land conveyed may be shown. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. True consideration for deed, how paid, and what became of it, may be shown, when it is disputed. Welch v. Brown [Colo.] 103 P 296 In mortgage foreclosure, held competent to show by parol that when defendant bought premises he assumed payment of mortgage. Grace v. Gill, 136 Mo. App. 186, 116 SW 442. May be shown by parol that agreement to pay notes and mortgage was part of consideration for conveyance of mortgaged premises. Wiltrout v. Showers, 82 Neb. 777, 118 NW 1080. Where deed from decedent to children recited consideration and payment, parol evidence was competent to show that this recital was intended to evidence agreement that land was not to be paid for. Koogle v. Cline, 110 Md. 587, 73 A 672. Where deed did not reserve matured crop of corn on land, parol evidence was competent to show that it was reserved and that grantors agreed to harvest and remove it as part of consideration. Grabow v.

was or was not a consideration, or that the consideration has failed,[5] at least as between the parties;[6] but where a recital of consideration is contractual in its nature, constituting a substantive part of the contract between the parties, it cannot be varied by parol,[7] nor can a recital of consideration be contradicted in any case for the purpose of impairing or defeating the validity or operative effect of the instrument.[8]

Fraud in the inception of the contract, or which induced its execution, may be shown by parol, though the contract is in writing,[9] and, where it is claimed that

McCracken [Okl.] 102 P 84. Consideration may be varied or contradicted by parol for all purposes, except that as between parties there is an estoppel to deny that there was some consideration. Haslam v. Jordan, 104 Me. 49, 70 A 1066. Though recital of consideration in deed may be contradicted, it is prima facie correct, and can be overcome only by clear and convincing evidence. Combs v. Combs [Ky.] 114 SW 334. Parol evidence held admissible to show agreement which was one of the moving considerations of the execution of a **lease,** without which it would not have been executed. McSorley v. Allen, 36 Pa. Super. Ct. 271.

5. Want or failure of consideration may be proved. Lompoc Val. Bank v. Stephenson [Cal.] 104 P 449. Acknowledgment of receipt of consideration is not conclusive, and may be rebutted by parol. Magill Lumber Co. v. Lane-White Lumber Co. [Ark.] 119 SW 822. Though contract recites payment of sum of money, parol evidence is competent to show that money was in fact paid on different contract. Gagnon v. Molden, 15 Idaho, 727, 99 P 965. Recital of consideration, not being contractual in its nature, is not conclusive, and parol evidence competent to show another consideration, or that there was no consideration. Burgher v. Wabash R. Co. [Mo. App.] 120 SW 673. Recital in deed that part of consideration was paid in cash is not conclusive. Rhodes v. Walker [Ky.] 115 SW 257. Parol evidence is competent to show that deed apparently founded on valuable consideration was in fact deed of gift. American Ins. Co. v. Bagley [Ga. App.] 65 SE 787. In suit to restrain foreclosure of trust deed reciting indebtedness of $700, parol evidence is competent to show that only $200 was advanced and that $700 was written in to enable use of trust deed as collateral. Campbell v. Davis [Miss.] 47 S 546. Parol evidence is competent to show that consideration recited in deed or bill of sale was not paid or that other considerations, not named, were agreed to be paid. Magill Lumber Co. v. Lane-White Lumber Co. [Ark.] 119 SW 822. Competent to show that mortgage was given for construction purposes and that full sum named was not advanced, as conditions were not fulfilled. Brouillard v. Stimpson, 201 Mass. 236, 87 NE 493. In action on note, parol evidence was competent to show that parties had previously made oral agreement for purchase of commodity in pursuance of which note was given, and that payee of note was to make loan to maker, and that such loan had not been made. Kessler & Co. v. Parellus, 107 Minn. 224, 119 NW 1069. In action on dishonored draft, brought by payee against drawer, evidence to show circumstances amounting to failure of consideration may be shown, since statute makes this a defense against one not a holder in due course. Preas v. Vollintine, 53 Wash. 137, 101 P 706. Want of consideration for bond may be shown though contract is under **seal.** Reynolds v. Stein, 117 NYS 985.

6. Rule that recital of consideration is not conclusive is usually applied only between parties. Pope v. Tallaferro [Tex. Civ. App.] 115 SW 309. As between original parties, parol evidence is competent to show that note was without consideration, and made for accommodation only. Conrad v. Clarke, 106 Minn. 430, 119 NW 214.

7. Consideration for written contract may be inquired into and established by parol where evidence does not vary or contradict specific consideration actually agreed upon and expressed in writing. Bing v. Bank of Kingston, 5 Ga. App. 578, 63 SE 652. If instrument contains not only recital of receipt of money as consideration for land but also an agreement to execute conveyance to land upon happening of certain contingency, parol evidence is not competent to show a different agreement, as that conveyance should not be made except upon payment of price. Graham v. Peacock, 131 Ga. 785, 63 SE 348.

8. Spence v. Central Acc. Ins. Co., 236 Ill. 444, 86 NE 104; Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. Grantor is estopped by consideration clause, as between parties, to claim that deed is without consideration. Haslam v. Jordan, 104 Me. 49, 70 A 1066. Courts of equity will not receive evidence contradicting recital of receipt of consideration in sealed instrument for purpose of invalidating it. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. Where one by deed conveys to railroad company absolutely and unconditionally a right of way for railroad, it cannot be shown by contemporaneous parol agreement that it was part of consideration that grantor was to have permanent right of way over land conveyed, and that company agreed to maintain permanent crossings. Louisville & N. R. Co. v. Willbanks [Ga.] 65 SE 86.

9. Barco v. Taylor, 5 Ga. App. 372, 63 SE 224. Fraud inducing execution of contract. Scarsdale Pub. Co.-The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731; St. Louis, etc., Co. v. Hambright, 87 Ark. 614, 113 SW 803; White v. Smith [Kan.] 98 P 766; Remmers v. Remmers, 217 Mo. 541, 117 SW 1117; Batura v. McBride [N. J. Err. & App.] 73 A 600; Barclay v. Deyerle [Tex. Civ. App.] 116 SW 123. Fraudulent misrepresentations. Hodgkins v. Dunham [Cal. App.] 103 P 351; Tyson v. Jones, 150 N. C. 181, 63 SE 734. Evidence showing fraudulent misrepresentations as to matters on which contract was silent, competent. Batura v. McBride [N. J. Err. & App.] 73 A 600. Proper to prove that contract was procured by fraudulent misrepresentations, especially where terms of con-

through fraud or mistake the contract as written is not the one actually made, parol evidence is admissible to show the true contract.[10] Parol evidence is also competent to show that no contract in fact resulted,[11] or that delivery was conditional,[12] and that by reason of a breach of a condition precedent the contract never became operative,[13] or that the contract was rescinded pursuant to collateral conditions,[14] or to show that there was in fact no delivery,[15] or that the instrument was not valid when delivered;[16] but, where the writing expressly excludes all conditions except those

tract are not contradicted. State Historical Ass'n v. Silverman [Ga. App.] 65 SE 293. False representations as to safety of devise, plan of which was submitted, may be shown in action for breach of contract. Farmers' Mfg Co. v. Woodworth [Va.] 64 SE 986. Parol evidence is competent to show that purchaser in **sale** contract was misled by sellers as to time of payment of instalments. Gilson v. Boston Realty Co. [Conn.] 73 A 765. Recital of delivery of property in bill of **sale of personalty** is not conclusive, in face of charge of fraud. Donoven v. Travers, 122 La. 458, 47 S 769. Proof that sale of machinery was induced by fraudulent misrepresentations as to engine to be sold, did not violate rule, though engine was described in contract. Rectenbaugh v. Northwestern Port Huron Co. [S. D.] 118 NW 697. Fraudulent misrepresentations resting in parol may be proved notwithstanding execution of contract of **sale of land** and deed. Judd v. Walker, 215 Mo. 312, 114 SW 979. In action for specific performance, parol evidence is admissible to show all circumstances in order that court may know whether there was any element of fraud, mistake or undue advantage. Rudisill v. Whitener, 149 N. C. 439, 63 SE 101. Parol evidence is competent to show agreement to renew **notes** from time to time and allow them to be paid in certain way, though notes provided time of payment, where they were induced by fraudulent misrepresentations. Baker v. Berry Hill Mineral Springs Co. [Va.] 65 SE 656.

Effect of seal: Parol evidence is competent where alleged fraud goes to legal existence of instrument, though it is under seal. Vallancourt v. Grand Trunk R. Co. [Vt.] 74 A 99; Moore v. Putts, 110 Md. 490, 73 A 149.

10. Mistake. Stewart v. Blue Grass Canning Co. [Ky.] 117 SW 401; Stewart v. Blue Grass Canning Co. [Ky.] 120 SW 375. Parol evidence is competent to show mistake, relief being sought in equity on that ground. Edwards v. Trinity & B. V. R. Co. [Tex. Civ. App.] 118 SW 572. In suit to reform contract for fraud or mistake, parol evidence is competent to show real intention. House v. McMullen, 9 Cal. App. 664, 100 P 344. Parol evidence competent to show that covenants in articles of sale, intended to be introduced into deed, as part of consideration, were omitted by mistake. Townsend v. Lacock, 222 Pa. 330, 71 A 187. Proper to show that contract for goods was signed by defendant under agreement that it should be changed in form and substance so as to make it sale by defendant on commission, not sale outright. Main v. Oliver [Ark.] 114 SW 917.

11. Rule does not exclude proof that party did not in fact execute writing, or that he signed in blank which was filled out without authority. Hager v. Sidebottom [Ky.] 113 SW 870. Where writing was signed by parties but indorsed "to be rewritten and left with scrivener for purpose," parol evidence competent to show that this was not real agreement, and to show what real contract was. Wiltse v. Fifield [Iowa] 121 NW 1086. **Seal** only presumptive evidence of regularity; evidence to show no contract was in fact made competent. Israelson v. Wollenberg, 63 Misc. 293, 116 NYS 626.

12. Competent to shew that contract, complete in form, was not to become operative until performance of condition precedent resting in parol. Metropolitan Aluminum Mfg. Co. v. Lau, 61 Misc. 105, 112 NYS 1059. May be shown that **note** was signed and delivered under agreement that it was to be returned unless certain other persons also signed. White v. Smith [Kan.] 98 P 766. Parol proof that, pending negotiations for coal **lease** from life tenant and remaindermen to another, it was agreed that lease was not to be binding until signed by all remaindermen, and until copy had been returned, signed by lessee. Green Ridge Fuel Co. v. Littlejohn [Iowa] 119 NW 698. Competent to show by parel that **contract of sale** of machinery was placed in escrow and was not to become operative unless machinery, on preliminary test, did certain work. Case Threshing Mach. Co. v. Barnes [Ky.] 117 SW 418.

13. Heitman v. Commercial Bank [Ga. App.] 65 SE 590; Floresville Oil & Mfg. Co. v. Texas Refining Co. [Tex. Civ. App.] 118 SW 194. Competent to show that contract was executed on certain conditions, and that they were not complied with, though such conditions are not expressed in writing. Pope v. Taliaferro [Tex. Civ. App.] 115 SW 309. May be shown that **note** was delivered on condition, and that payee had not complied with condition. Great Northern Moulding Co. v. Bonewur, 128 App. Div. 831, 113 NYS 60. In action for rent under **lease,** oral agreement of landlord to make repairs, made as inducement to enter into lease, and proof that repairs were not made and that tenant did not enter upon premises, may be shown. Tribelhorn v. Hanavan, 116 NYS 632.

14. In an action on an agreement, held competent for defendant to show that certain representations were made by agent who secured his signature which induced the execution of the agreement and without which he would not have signed it, and that in pursuance of such representations he subsequently orally rescinded it. Harvey v. Dimon, 36 Pa. Super. Ct. 82.

15. Parol evidence is competent to prove or disprove delivery of deed. Shute v. Shute, 82 S. C. 264, 64 SE 145; Potter v. Barringer, 236 Ill. 224, 86 NE 233.

16. Parol evidence always competent to show that written contract, fair and lawful

mentioned, proof of others is incompetent.[17] Where a deed absolute on its face has been actually delivered, its operative effect cannot be defeated by a parol condition,[18] but it may be shown that a deed absolute on its face, was intended as a mortgage,[19] and, similarly, other writings, apparently passing title to property, may be shown to have been given only as security for a debt.[20]

Parol evidence is admissible to show a contemporaneous, collateral and independent agreement, omitted from the writing, and not inconsistent with its terms,[21]

on its face, is in fact contrary to law, morals, or public policy. Muskogee Land Co. v. Mullins [C. C. A.] 165 F 179. Parol evidence is admissible to show that contract was made in furtherance of objects illegal or contrary to public policy. Farrington v. Stucky [C. C. A.] 165 F 325. Parol evidence competent to show **consideration illegal.** St. Hubert Guild v. Quinn, 64 Misc. 336, 118 NYS 582.

17. Where writing provides that contract shall be operative upon performance of certain condition, and that nothing more shall be required to make it presently operative, proof of an additional condition precedent, not mentioned in writing, violates rule. Heitman v. Commercial Bank [Ga. App.] 65 SE 590. Where writing as agreed upon and signed provided that it should not be operative until signed by certain named persons, and that such persons were only parties thereto, proof that contract was not to become effective until signed by certain other persons was incompetent. Id.

18. Dorr v. Middleburg, 65 W. Va. 778, 65 SE 97. Absolute grant of right of way could not be contradicted by proof of agreement not to interfere with flow of water from spring. Louisville & N. R. Co. v. Holland [Ga.] 63 SE 898. Express terms of deed of trust cannot be contradicted by parol evidence of promise of beneficiary at time of its execution that he would not enforce it. Bradshaw v. Farnsworth, 65 W. Va. 28, 63 SE 755. As between grantor and grantee, parol evidence is incompetent **to establish trust** in grantee in favor of grantor, in contradiction of deed. Baker v. Baker [N. J. Eq.] 72 A 1000. Parol contemporaneous trust cannot be proved to contradict and defeat operation of absolute deed. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028.

19. Mahaffy v. Faris [Iowa] 122 NW 934; Heron v. Weston, 44 Colo. 379, 100 P 1130; Bashinski v. Swint [Ga.] 65 SE 152; Thompson v. Burns, 15 Idaho, 572, 99 P 111; Nagle v. Simmank [Tex. Civ. App.] 116 SW 862; Clambey v. Copland, 52 Wash. 580, 100 P 1031; Shields v. Simonton, 65 W. Va. 179, 63 SE 972. That conveyance was intended as security for sum advanced. Richardson v. Beaber, 62 Misc. 542, 115 NYS 821; Jones v. Gillett [Iowa] 118 NW 314; Rion v. Reeves, 122 La. 650, 48 S 138; Funk v. Harshman, 110 Md. 127, 72 A 665. For a specific discussion of this subject, see Mortgages, § 3; Chattel Mortgages, § 1.

20. Though assignment of life policy is absolute in form, it may be shown by parol that it was made as security only. Protzman's Ex'r v. Joseph, 65 W. Va. 788, 65 SE 461. Proper to show that assignment of stock was for security only. Shattuck & Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 99 P 348. Proof that bill of sale, reciting that it was given in payment of debt, was in fact given as additional security, competent, both under general rules of law, and under Law of Evidence of Porto Rico, § 101. Cabrera v. American Colonial Bank, 29 S. Ct. 623. Deed or advancement, absolute on its face may be shown by parol to be a trust. Cole v. Thompson, 169 F 729.

Proof of pledge or collateral security by parol is treated specifically elsewhere. See Pledges, § 1.

21. Lese v. Lamprecht, 196 N. Y. 32, 89 NE 365. Collateral, independent agreement, not inconsistent with writing, may be shown when writing does not appear to contain entire agreement. Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88, 89 NE 723. One **test** in determining whether agreement is collateral is whether writing refers in any way to its subject-matter. Lese v. Lamprecht, 196 N. Y. 32, 89 NE 365. Parol evidence is not competent to contradict absolute deed, but is competent to show circumstances and agreement under and as part of which it was given. In re Fisk, 81 Conn. 433, 71 A 559.

Collateral agreements held provable: Verbal **agreement of contractors** for work on leased premises to gain possession of premises at their own expense is independent of and collateral to written contract for work, to induce which it was made, and it may be proved as defense to claim for damages for refusal to allow them to proceed with work. Indelli v. Lesster, 130 App. Div. 548, 115 NYS 46. In action for recovery of money paid by plaintiff for defendant, **lease** of mill was merely collateral its existence being disputed, and oral evidence was competent to prove alleged agreement under which money was paid. National Bank of Commerce v. Gougar, 51 Wash. 204, 98 P 607. Plea alleging that premium note was given on **condition** that maker could refuse to take policy, if he so elected and that he did so elect was held good. Gillespie v. Hester [Ala.] 49 S 580. Competent to show by parol that payees of note agreed that if makers suffered loss in certain amount in transaction, they were to be released on note and that such losses had occurred. Faux v. Fitler [Pa.] 72 A 891. Proof of agreement to return notes and mortgage, if machinery sold proved unsatisfactory, held competent. Rectenbaugh v. Northwestern Port Huron Co. [S. D.] 118 NW 697. In suit to subject land to claims of creditors, land having been conveyed by debtor to his mother, proof that he had received land by deed of gift under agreement to build house on it and live near her, and that he would reconvey it if he did not do so, was competent to show good faith on his part, purpose not being to defeat deed but show intent. Paris Grocer Co. v. Burks [Tex. Civ. App.] 120 SW 552. In action on note given for stock, proof of verbal **agree-**

and a violation of such collateral agreement, by reason of which the written contract has become inoperative,[22] or to show an estoppel by reason of collateral representations,[23] also to show a subsequent parol modification of a written contract,[24] or a waiver of its terms,[25] unless written evidence is required by the statute of frauds.[26] Parol evidence is admissible to show formal action of a board of directors to have been in fact taken although no record thereof is found in the minutes of its meetings,[27] or that matters recorded did not actually occur.[28]

The parol evidence rule does not exclude proof of collateral facts having no tendency to vary, add to, or contradict the terms of the writing.[29] Thus, parol evidence is competent to show an entire agreement, a part of which only has been

ment to renew note twice and to accept retransfer of stock in satisfaction of note at maker's election, end of that time, was competent. Paulson v. Boyd, 137 Wis. 241, 118 NW 841.

22. As between original parties, recovery on note may be defeated by proving oral agreement which induced execution of note which has been violated by payee. Faux v. Fitler [Pa.] 72 A 891.

23. Purchasers of land, induced to buy by representations that adjoining strip would be opened as street, could show such representations to work an estoppel, though plat did not show street. Morse v. Whitcomb [Or.] 102 P 788, rehearing denied [Or.] 103 P 775.

24. Red Snapper Sauce Co. v. Bolling [Miss.] 50 S 401; Schoblasky v. Rayworth, 139 Wis. 115, 120 NW 822; American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 NYS 236. Subsequent oral agreement competent **on matter omitted** from written partnership agreement. Kirkwood v. Smith, 132 App. Div. 758, 117 NYS 686. Subsequent oral agreement **to extend time of payment.** Freeman v. Bell, 150 N. C. 146, 63 SE 682. Proper to show by parol agreement, subsequent to execution of mining **lease,** whereby lessees were allowed to make survey for purpose of defending suit by stranger, and to reimburse themselves out of royalties. Codman v. Adamson, 130 App. Div. 317, 114 NYS 408. Parol evidence competent to show subsequent agreement that **lease was not to become effective** until fixtures, etc., were installed. Manvell v. Weaver, 53 Wash. 408, 102 P 36. **Condition arising after execution of lease** properly shown. Phoenix Land & Imp. Co. v. Seidel, 135 Mo. App. 185, 115 SW 1070. **Surrender of lease** may be shown by parol; this does not contradict lease but avoids its operation by subsequent matters. Schwin v. Perkins [N. J. Law] 72 A 454. Competent to show by parol subsequent waiver **or modification of conditions of insurance policy.** Norris v. China Traders' Ins. Co., 52 Wash. 554, 100 P 1025.

25. Waiver of stipulation for liquidated damages may be shown by parol. Rock Island Plow Co. v. Rankin Bros. [Ark.] 115 SW 943. Parol evidence is competent to show waiver, abandonment of subsequent change of written stipulation or contract. Germantown Dairy Co. v. McCallum [Pa.] 72 A 885.

26. Reams v. Thompson, 5 Ga. App. 226, 62 SE 1014. See Frauds, Statute of.

27. Iowa Drug Co. v. Souers, 139 Iowa, 72, 117 NW 300. Parol proof in such case must be so convincing and satisfactory as to leave no doubt that the matter attempted to be interpolated into the records of the proceedings of the corporate body actually occurred. Evidence held sufficient to show acceptance of certain proposition by directors. Id.

28. Where minority stockholders attack truth of records of corporation, parol evidence is competent to show that the transactions recorded did not occur. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381. See Corporations, §§ 14, 15, 16.

29. Oral testimony, not inconsistent with written instrument, is competent. Singer Sewing Mach. Co. v. Omaha Umbrella Mfg. Co., 83 Neb. 619, 119 NW 958.

Matters held provable by parol: Testimony held not to conflict with written contract. Wolfort v. Hochbaum [Ark.] 117 SW 525. Proper to allow witness to deny contemporaneous oral agreement which did not contradict contract, though evidence anticipated defense, being given by deposition. Roquemore v. Vulcan Iron Works Co. [Ala.] 49 S 389. Fact **that contract has been made** may be proved by parol, where its terms are not sought to be thus proved. Wilson v. Jernigan [Fla.] 49 S 44. Evidence tending to show separate and independent **contract between other parties,** referred to in contract, did not tend to vary contract in issue. Burgie v. Bailey [Ark.] 121 SW 266. Date on contract only prima facie evidence of fact and true **date** may be shown. Harden v. Card, 17 Wyo. 210, 97 P 1075. **Character of seisin** of grantor, parol evidence competent to show external circumstances and relation of parties. Haslam v. Jordan, 104 Me. 49, 70 A 1066. Where contract provided that vendor was to make clear title to land, and vendee's deposit was to be forfeited if he did not perform according to its terms, proof **that vendor was to furnish abstract** of title was not objectionable as varying contract. Hunter v. Wallace [Tex. Civ. App.] 121 SW 180. In action for price of supplies sold corporation, under contract, proof of letters, conversations, etc., prior to execution of contract, tending to show plaintiff's **ownership of goods** sold, and not varying contract, competent. Taylor v. Danielsonville Cotton Co. [Conn.] 72 A 1080. Where written contract of sale of farm and other land stated only lump sum, parol evidence was competent to show what **price** was placed upon farm alone. Larson v. Thoma [Iowa] 121 NW 1059. Parol evidence competent to show **terms and conditions of payment** for goods ordered before written contract was made. Passow v. Kirkwood Distillery Co. [Wash.] 103 P 34. Parol evidence rule is not violated, in action on note, by permitting proof of an amount due

reduced to writing,[30] but the written portion cannot be varied or contradicted.[31] All writings referred to in the contract, or executed at the time, and relating to the same transaction, may be shown.[32]

The parol evidence rule applies only as between parties to the written contract [33]

on oral agreement, which was part of consideration of note, as **set-off.** Owensboro Wagon Co. v. Wilson & Co. [Kan.] 101 P 4.

30. Swope v. Liberty County Bank [Tex. Civ. App.] 113 SW 976. If contract is incomplete on its face, omitted parts may be supplied by parol. Reigart v. Manufacturers' Coal & Coke Co., 217 Mo. 142, 117 SW 61. Parol evidence rule inapplicable where contract is verbal and only part is reduced to writing. Indelli v. Lesster, 130 App. Div. 548, 115 NYS 46; Farmers' Mfg. Co. v. Woodworth [Va.] 64 SE 986; Woodson v. Beck [N. C.] 65 SE 751. Written agreement, given in part performance of oral agreement which embraces subject-matter of writing and other matters, does not exclude oral proof of rest of agreement. Rines v. Ferrell, 107 Minn. 251, 119 NW 1055.

Rule applied to particular contracts: Mere receipt or conveyance unilateral in nature, and not attempting to state entire agreement, does not exclude parol evidence of all terms of agreement. Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550. Where parties did not place full specifications in contract for retorts, parol evidence of negotiations and conversations was competent to show their understanding as to what was required. MacKinnon Boiler & Mach. Co. v. Central Michigan Land Co., 156 Mich. 11, 16 Det. Leg. N. 17, 120 NW 26. Where written **contract of shipment** did not specify route, agreement as to route could be shown by parol. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856. Blank in contract of shipment was not filled in so as to show rate, but it expressly provided that rate was less than that for shipments at carrier's risk. Proof of rate would not vary contract. St. Louis, etc., R. Co. v. Furlow [Ark.] 117 SW 517. Intended use of premises may be shown by parol when **lease** does not show it. Chamberlain v. Brown [Iowa] 120 NW 334. In action to recover for repairs on premises, plaintiff alleged an agreement by defendant to have repairs made in consideration of surrender of old lease and execution of new one. Held, entire agreement resting in parol could be shown. Herschmann-Tucker Furniture Co. v. Barth, 64 Misc. 77, 117 NYS 962.

Where **contract of employment** did not state nature or place of performance of duties, parol proof was competent to clear up ambiguity and complete contract. Smith v. Herring-Hall-Marvin Safe Co., 115 NYS 204. Where contract by broker, employing another to sell part of property for share in commission, referred to terms of sale, but did not set them out, parol evidence was competent to show what they were. Casey v. Richards [Cal. App.] 101 P 36. Where written memorandum of contract for services referred to conversation for nature of services, parol evidence was competent to show entire agreement. Sieberts v. Spangler [Iowa] 118 NW 292. Where **release** of claim for injuries did not recite consideration, proof of oral agreement to pay certain sum of money and to care for injured man was competent. Maloney v. Hudson River Water Power Co., 133 App. Div. 499, 117 NYS 601. **Subscription to stock,** signed only by subscriber, not purporting to contain agreement of corporation, was incomplete; corporation's agreement could be shown by parol. Mulford v. Torrey Exploration Co. [Colo.] 100 P 596. **Escrow agreement** was silent as to disposition of any surplus of money deposited after claims had been paid. Parol evidence competent to show agreement to apply surplus on debts owed by depositor. Natella v. Prinstein, 114 NYS 342. Where written **power of attorney** was given as part of agreement between parties, and pursuant thereto, parol evidence was competent to show entire agreement. Babrowsky v. U. S. Grand Lodge of the Order of Brith Abraham, 129 App. Div. 695, 113 NYS 1080. Husband executed **will** and deeded property to wife on her promise to make certain payments to brothers and sisters of husband, which agreement was later reduced to writing. Proof of entire transaction held competent as against objection that it tended to vary will by parol. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819. Where **note** was only part of contract of settlement, oral agreement to allow certain credits was not objectionable. Allen v. Herrick Hardware Co. [Tex. Civ. App.] 118 SW 1157. Where **bond renewals** did not show with whom business was done, parol evidence was competent to show the fact. Title Guaranty & Surety Co. v. Nichols [Ariz.] 100 P 825.

31. Where part of agreement is reduced to writing, it cannot be varied, added to or contradicted by parol, though oral part of agreement may be proved. Woodson v. Beck [N. C.] 65 SE 751. If contract is complete and certain, as to part of transaction, parol evidence is incompetent to change that part of it. Swope v. Liberty County Bank [Tex. Civ. App.] 113 SW 976.

32. Where lease appeared to be substitute for prior lease, proof as to contents of prior lease, and as to application of payments of rent, was competent, not being contradictory of terms of later lease. Erie Crawford Oil Co. v. Jones [Ind. App.] 86 NE 1027. Written agreement for sale of land and manufacturing plant, executed at same time as deed of property, and providing that certain matters were left open for future adjustment, competent in action for damages because plant was not in working condition. Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp. [Va.] 64 SE 56. As between original parties to notes, other writings, showing agreement that notes were payable out of particular fund, were competent. Keller v. Cohen [Pa.] 73 A 918.

33. Parol evidence rule applies only to parties to contract, their representatives and successors. Shattuck & Desmond Warehouse Co. v. Gillelen, 154 Cal. 778, 99 P 348. In action to recover commission, defendant may prove that contract entered into between

and not as between third persons, or a party and a third person,[34] and has no application to the contents of letters and other writings which do not bring the parties into contractual relations,[35] nor does it apply where the written instrument does not purport to contain the agreement of the parties but is only evidence of an act of one.[36] The rule is, however, applied to deeds [37] and to wills,[38] and has been applied to a map or plat,[39] and to written instructions to an agent to whom a deed was delivered.[40]

§ 6. *Hearsay. A. General rules.*[41]—See 11 C. L. 1378—Hearsay is inadmissible as evidence;[42] and hence unsworn statements out of court by persons who are neither parties to the action [43] nor the agents of parties,[44] and not made in the presence or

him and alleged purchaser was only an option which was never closed. Brown v. Wisner, 51 Wash. 509, 99 P 581.

34. One not a party to a contract, in an action against either of the parties thereto, may show the true relationship between them, regardless of the relationship they have assumed in their written contract. Kendall v. Johnson, 51 Wash. 477, 99 P 310. Servant not bound by contract showing that employer is independent contractor, but may contradict it by parol. Mason & Hodge Co. v. Highland [Ky.] 116 SW 320. Parol evidence rule inapplicable where parties objecting to evidence were not parties to notes in question. Jarvis v. Matson [Tex. Civ. App.] 113 SW 326.

35. When letter did not form part of alleged contract sued upon and was introduced by one party to establish admission by the other, evidence of witness explanatory of statement in letter was competent. Cleveland Seed Co. v. Moore, 142 Ill. App. 615. Where contract of employment was oral, fact that letters were offered to show nature and extent of employment did not exclude oral proof. Wintermute v. Standard Furniture Co., 53 Wash. 539, 102 P 443. Oral testimony competent where alleged contract was not signed but parties had expressly declined to sign it. Averett v. Walker, 131 Ga. 611, 62 SE 1046.

36. Where **power of attorney** was executed long after agreement, and not for purpose of embodying it, parol evidence was not objectionable as varying written instrument. Mollison v. Rittgers [Iowa] 118 NW 512. **Bill of sale** of horse "as he is" held not to exclude proof of warranty of horse. Gelb v. Waller, 115 NYS 201.

37. Thornbury v. Bolt [Ky.] 116 SW 1177; Haslam v. Jordan, 104 Me. 49, 70 A 1066; Highland Realty Co. v. Groves [Ky.] 113 SW 420. See Deeds of Conveyance, § 3. Accompanying facts and circumstances may be referred to in construing deed. Darling v. Alexander, 130 App. Div. 85, 114 NYS 334. Oral agreement to make partial releases on sales of lands covered by trust deed could not be proved when deed did not provide therefor. Cotulla v. Barlow [Tex. Civ. App.] 115 SW 294. Recital in deed as to manner of **time of delivery** held ambiguous; parol evidence competent to show circumstances and grantor's intent as to delivery. Maxwell v. Harper, 51 Wash. 351, 98 P 756. Construction of deed as recorded could not, as against subsequent purchasers, be controlled by grantor's previous and contemporaneous declarations of intention to convey only life **estate,** nor by other deeds made by him but never recorded. Teague v. Sowder [Tenn.] 114 SW 484. Oral evidence is incompetent to contradict clear and unambiguous **description** in deed. Foster v. Carlisle [Ala.] 48 S 665. Where deed described course of boundary line, prior oral agreement as to line was inadmissible. Holden v. Alexander, 82 S. C. 441, 62 SE 1108, rehearing denied, Id., 82 S. C. 441, 64 SE 400.

38. See Wills, § 5.

39. Map or plat is written instrument, construction of which is for court unless ambiguity makes extrinsic evidence necessary to aid in construction. City of Atlanta v. Texas & P. R. Co. [Tex. Civ. App.] 120 SW 923.

40. Instructions to agent to whom deed was delivered being in writing, what grantor said to third persons could not be proved to vary them. Moore v. Trott [Cal.] 104 P 578.

41. Search Note: See notes in 5 C. L. 1330; 11 Id. 1380; 41 L. R. A. 449; 11 L. R. A. (N. S.) 1052; 16 Id. 758; 94 A. S. R. 678; 1 Ann. Cas. 802; 9 Id. 170.

See, also, Evidence, Cent. Dig. §§ 1143-1154, 1168-1229; Dec. Dig. §§ 314-324; 13 Cyc. 285-297, 306; 16 Id. 1192-1214, 1223-1234; 11 A. & E. Enc. L. (2ed.) 520; 15 Id. 309.

42. Reasons for excluding hearsay is probability that reports became changed and misrepresented with repetition, and that such statements are not made under circumstances such as would naturally bring out the truth, and persons making them are not subject to cross-examination. Sheppard v. Austin [Ala.] 48 S 696. That party had no notice that he would be called on to meet certain claim does not make hearsay evidence competent in his behalf. Watkins v. Watkins [Mont.] 102 P 860.

43. What was said to witness by person who subpoenaed him. Greener v. Nielhaus [Ind. App.] 89 NE 377. Hearsay evidence as to who shot horse injured by train. Denver & R. G. R. Co. v. Brennaman [Colo.] 100 P 414. What reasons other persons gave for not employing plaintiff. Willner v. Silverman, 109 Md. 341, 71 A 962. In trespass to try title, effect of bond for title being in issue, widow of grantor therein could not testify that he said he still held notes of vendee and would leave them with third person, and that he afterwards said he tried to get them back but failed. Millwee v. Phelps [Tex. Civ. App.] 115 SW 891. Testimony of widow of vendor in bond for deed that her husband would have tried to get land back after timber was cut, but that logged-off land was not considered worth much in those days, was hearsay, where she did not live on land at time. Id. Testimony

hearing of a party,[45] and communications between a third person and a party to the action,[46] are inadmissible, whether oral or in writing.[47] So, also, testimony based

by housskeeper as to demands by husband on wife held competent only to contradict her. Coles v. Coles [Ky.] 113 SW 417. Declarations of physician and neighbors are inadmissible **to prove death** of person. Chambers v. Morris [Ala.] 48 S 687. What two unidentified men said **concerning accident.** Gaebler v. Brooklyn Heights R. Co., 130 App. Div. 881, 114 NYS 585. Action for injury by explosion of piston head heated for purpose of repairs. Proof that fellow-servant of plaintiff, 10 minutes before accident, said that foreman told him not to let plaintiff heat it more than cherry red, etc. Klauder-Weldon Dyeing Mach. Co. v. Gagnon [C. C. A.] 166 F 286. Conversation with roadmaster of defendant repeated to witness. Landers v. Quincy, etc., R. Co., 134 Mo. App. 80, 114 SW 543. **To establish adverse** possession, actual possession by tenants cannot be proved by declarations of tenants, such declarations being hearsay. Dunn v. Taylor [Tex.] 113 SW 265. Declarations of third party **as to ownership of personal property** incompetent against plaintiff. Rankin v. Caldwell, 15 Idaho, 625, 99 P 108. Where depot agent was asked to telephone messags to sending office of telegraph company for transmission by telegraph, parol proof of **substance of telephone message** given agent was hearsay, since he was not agent of telegraph company. Lewis v. Western Union Tel. Co. [S. C.] 65 SE 941. Conversation between telegraph company's agent and third person, not identified nor connected with plaintiff, **as to telegraph message** to be delivered to plaintiff, incompetent against latter. Mims v. Western Union Tel. Co., 82 S. C. 247, 64 SE 236. Testimony of witness as to **what was said at meeting of stockholders** relative to cancellation of certain lease, he not having been present. Bordner v. Depler, 142 Ill. App. 526. Testimony as to what another said the **market price** was on certain day was hearsay. Tully v. Western Union Tel. Co., 141 Ill. App. 312. Where one party claimed land in dispute under deed executed by testatrix to raise money to pay debts of decedent, statements by such executrix **as to existence of debts.** Haring v. Shelton [Tex. Civ. App.] 114 SW 389. **What witness heard physician** say as to recovery of patient. Gulf, etc., R. Co. v. Farmer [Tex.] 115 SW 260. **What decedent said to notary** concerning check latter was preparing for plaintiff. Russell v. Amlot, 132 App. Div. 584, 116 NYS 1080.

44. Declarations of one not an agent. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856. Statements by agent of one party to his principal incompetent against adverse party. Boatmen's Bank v. Trower Bros. Co., 171 F 964. Declarations of vice-president of bank that bank was ready, able and willing to make loan, and that bank had discovered certain fact as to security. Holliday v. Roxbury Distilling Co., 130 App. Div. 654, 115 NYS 383.

45. Instrument executed by wife, without husband's knowledge or consent, and declarations by her not in his presence, inadmissible against him. Mahan v. Schroeder, 236 Ill. 392, 86 NE 97. In suit to enjoin disclosure and use of formulae of remedy to cure drunkenness, statements by discoverer as to his investigations of drunkenness and the cure not in defendant's presence. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132.

46. What her husband told witness, his widow, as to amount of his wages. Louisville & N. R. Co. v. Fitzgerald [Ala.] 49 S 860. Proper to exclude question to plaintiff whether physician had not told him that if he did not stop drinking he would become insane. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. In suit to set aside conveyance as fraudulent, testimony of witness that amount paid by him covered land and crop was not hearsay, but what parties said to others was. Walker v. Montgomery, 236 Ill. 244, 86 NE 240. **Statements** to plaintiff by third person not binding on defendant. Milmo Nat. Bank v. Cobbs [Tex. Civ. App.] 115 SW 345. In suit between two mortgagees, each claiming priority, statements in report of agent of one to his principal were incompetent against the other. Boatmen's Bank v. Trower Bros. Co., 171 F 964. **Conversation** between party and third person not in presence of other party. Jenkins v. Clopton [Mo. App.] 121 SW 759. In action for rent, conversations between defendant and alleged transferree of lease. Johnson v. Hulett [Tex. Civ. App.] 120 SW 257.

47. Offer of **newspaper clippings** in evidence properly refused. Modern Woodmen of America v. Cecil, 108 Md. 357, 70 A 331. **Time tables and atlases,** not published by defendant nor authenticated, incompetent to prove ownership of railroad by defendant. Brandon v. Atchison, etc., R. Co., 134 Mo. App. 89, 114 SW 540. Proper to refuse to allow counsel to read in evidence **opinion of court.** Western Union Tel. Co. v. Bradford [Tex. Civ. App.] 114 SW 686. In action for damage by overflow of sewers, other **complaints** were inadmissible, though facts as to other overflows might be shown to prove extent of storm. City of Richmond v. Wood [Va.] 63 SE 449. As between landlord and third party suing for injuries caused by property being out of repair, **leases** prior to lease in force at time of injury were inadmissible. Foley v. Everett, 142 Ill. App. 250. Depositor's **passbook** incompetent as between him and third person, to show deposit at certain time. Austrian v. Laubheim [N. J. Law] 73 A 226. On issue of patentability of motor, statements in **circulars** and advertisements of other concerns that such motor could not be made, etc., were competent only to show that such statements were made, not of truth of statements. Pieper v. Electro Dental Mfg. Co. [C. C. A.] 160 F 930. In libel action for accusing plaintiff of smuggling, **report of revenue officer** on case was hearsay. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. **Page from scientific book** to show effect of acids on ink. Brown v. Newell, 132 App. Div. 548, 116 NYS 965. **Medical books** are incompetent as independent evidence. MacDonald v. Metropolitan St. R. Co., 219 Mo. 468, 118 SW 78. **Letters** from third persons. Vaughan's Seed Store v. Stringfellow, 56 Fla.

on information derived from third persons,[48] and not purporting to state the personal knowledge of the witness,[49] is incompetent, though testimony apparently based on the personal knowledge of the witness is admissible as to certain matters, if otherwise competent.[50] Declarations, otherwise incompetent, may sometimes be proved to show notice or good faith.[51] Common or general reputation may be proved on questions of public interest.[52] Ex parte affidavits are incompetent.[53]

708, 48 S 410. Letter from third person to plaintiff, stating that writer was friend of defendant's motorman, and that he could arrange for motorman's testimony, incompetent, no collusion on part of motorman, who was witness, being shown. Ducharme v. Holyoke St. R. Co. [Mass.] 89 NE 561.

48. What another told witness. Jones v. Plummer, 137 Mo. App. 337, 118 SW 109. Testimony as to what witness "understood from some of the crowd." Combs v. Combs [Ky.] 114 SW 334. Testimony as to amount of coal in bin when destroyed, based on invoices received from others. St. Louis S. W. R. Co. v. McLeod [Tex. Civ. App.] 115 SW 85. Reports received from others **as to person's intoxicated condition.** Hurley v. Oliver [Ark.] 121 SW 920. Testimony by others to opinion of members of family **as to testatrix's sanity.** Hopkins v. Wampler, 108 Va. 705, 62 SE 926. Vendor's testimony **as to quantity of goods sold,** based wholly on what salesman told him. Brown v. Grossman, 128 App. Div. 496, 112 NYS 827. Permitting witness to state that connecting carrier would not receive shipment of horses because it was marked "bad order" was error, since it permitted hearsay as to **condition of property shipped.** Barr v. Quincy, etc., R. Co. [Mo. App.] 120 SW 111. Testimony of one person **as to result of another's annlysis** of certain pills. Foster-Milburn Co. v. Chinn [Ky.] 120 SW 364. Improper to allow physician to tell what chemist reported as to contents of pus examined by him. United States Health & Acc. Ins. Co. v. Jolly [Ky.] 118 SW 281. **To prove amount of losses through defalcations** of employe, summary made up from information furnished by persons who had paid money to employe. Fidelity & Deposit Co. v. Champion Ice Manufacturing & Cold Storage Co. [Ky.] 117 SW 393.

49. Attorney's testimony that his impression was that parties understood about reservation in deed incompetent, when the source of his impression did not appear. Weaver v. Richards, 156 Mich. 320, 16 Det. Leg. N. 117, 120 NW 818. A witness cannot be asked about the general reputation of a party until it has been shown that the witness is acquainted with the party's reputation and knows it. Black v. Epstein, 221 Mo. 286, 120 SW 754.

50. Where witness said that he knew in whose employ physician was, error to refuse to allow him to state whether he was employed by defendant. Brown v. Minneapolis, etc., R. Co. [Minn.] 121 NW 123. Testimony of bank officer that he knew certain person had purchased certain number of cattle, had seen part of cattle, and checks given in payment, and heard statements concerning it, was not strictly hearsay, he having same personal knowledge. Ettien v. Drum [Mont.] 101 P 151. Testimony that witness remembered fact referred to in mother's statement competent, his recollection of her statement not being called for. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. Proper to allow witness to state **conversation** when his testimony showed that he heard it all. Granger v. Darling, 156 Mich. 31, 16 Det. Leg. N. 22, 120 NW 32. Proper to allow witnesses to testify to conversations, otherwise competent, which they heard. MacKinnon Boiler & Mach. Co. v. Central Michigan Land Co., 156 Mich. 11, 16 Det. Leg. N. 17, 120 NW 26. Witness properly allowed to state **contents of voluminous report** to railway commission. Chicago, etc., R. Co. v. Risley Bros. & Co. [Tex. Civ. App.] 119 SW 897. Where witness was present when cattle were sold, and testified that **accounts of sale** handed him were correct, accounts were not hearsay. St. Louis & S. F. R. Co. v. Lane [Tex. Civ. App.] 118 SW 847. Where surveyor testified that he knew where **boundary line** ran from having made survey after examining records, his testimony as to its location on the ground was not hearsay, though records were best evidence of their contents. St. Louis S. W. R. Co. v. Eccles & Co. [Tex. Civ. App.] 115 SW 648. Proper to allow surveyor to testify to **location and dimensions of streets** where he said he was speaking of his own knowledge. International & G. N. R. Co. v. Morin [Tex. Civ. App.] 116 SW 656.

51. Conversation between plaintiff and his stenographer as to delivery of message which stenographer testified he had received from defendant to be communicated to plaintiff. Carpenter v. Gibson [Vt.] 73 A 1030. Proof of what others said to plaintiff regarding beans bought by him competent to show when he first though he had been defrauded. McNitt v. Henderson, 155 Mich. 214, 15 Det. Leg. N. 987, 118 NW 974. Entry in book kept by company in which motormen were required to enter condition of cars at end of run, that car had "bad handbrake," was admissible to show notice to company, but not to prove defective condition. Brady v. North Jersey St. R. Co., 76 N. J. Law, 744, 71 A 238. Where good faith of grantor is attacked, and intent to defraud creditors, participated in by grantees, was claimed, grantor's declarations, after giving deed, that he still owned property, were competent. Homewood People's Bank v. Marshall [Pa.] 72 A 627.

52. Common or general reputation competent to show fact in which public has an interest or which directly affects mass of people in community. Morse v. Whitcomb [Or.] 102 P 788, rehearing denied [Or.] 103 P 775. Proof that certain strip of land was generally known as "Taggart street," was so called by conductors and in directories, and that name was used in addressing letters to persons living there, competent to show that it was public street. Morse v. Whitcomb [Or.] 102 P 788, rehearing denied [Or.] 103 P 775.

53. Ex parte affidavit of one not called

A party calling a business office over a telephone may testify to the conversation though he cannot positively identify the speaker.[54] One who overhears a telephone conversation through a third instrument connected with the other two may testify thereto,[55] but one who hears only one side of the conversation cannot testify to what the other speaker said, when his knowledge thereof is based on what he was told.[56]

Matters of pedigree and family history See 11 C. L. 1360 are excepted from the hearsay rule [57] and may be established by evidence of general reputation and belief in the community [58] or in the family,[59] or by declarations of a member of the family, since deceased.[60]

Boundaries.[61]—On boundary questions, where better evidence is not available, the general understanding and reputation among persons likely to know may be proved,[62] and declarations of persons since deceased who had means of knowledge, and no motive to misrepresent,[63] are held competent on the question, evidence of

as witness incompetent as independent evidence. Western Union Tel. Co. v. Gillis [Ark.] 117 SW 749. Engineer's report on building in course of construction, not sworn to or authenticated in any way, incompetent; would not be competent even if supported by voluntary affidavit. United Surety Co. v. Summers, 110 Md. 95, 72 A 775.

54. See, also, note, 11 C. L. 1380. Telephone conversation with physician properly admitted, though his voice was not recognized by other speaker, where his office was called, some one answered as the physician, and he responded to call made as he said he would. Miller v. Leib, 109 Md. 414, 72 A 466. Testimony as to telephone conversation with defendant's office not necessarily incompetent though witness could not positively identify other speaker. Collins v. Wells Fargo & Co. Exp. [Iowa] 118 NW 401.

55. Telephone conversation between two persons may be proved by a third who overheard it through an instrument connected with other two, though in different room from speaker, such person recognizing the voices of the speakers. Rimes v. Carpenter, 61 Misc. 614, 114 NYS 96.

56. One who was present when telephone conversation took place could not testify to what was said, based on what person talking repeated to him. Willner v. Silverman, 109 Md. 341, 71 A 962.

57. Relationship and pedigree may be established by hearsay. Sullivan v. Solis [Tex. Civ. App.] 114 SW 456. Person may testify to his own **age.** Koester v. Rochester Candy Works, 194 N. Y. 92, 87 NE 77.

58. Competent to show what was generally understood in community to be relationship of two persons, and that one was generally understood to be widow. Wall v. Lubbock [Tex. Civ. App.] 118 SW 886.

59. Proper to allow witness to state that her grandfather came to Texas in the thirties according to family history. Keck v. Woodward [Tex. Civ. App.] 116 SW 75. Parentage may be proved by reputation and claims of putative parents. Lindsey's Devisee v. Smith [Ky.] 114 SW 779. Letters and cards from one member of family to another announcing death in family competent to prove death. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819. Member of family properly allowed to state relationship of other members and date of death of one though he did not state that those who told him were dead. Wall v. Lubbock [Tex. Civ. App.] 118 SW 886.

60. Declarations of member of family concerning death of another member inadmissible unless declarant is dead. Chambers v. Morris [Ala.] 48 S 687. Testimony as to pedigree based on declarations of a decedent and of his wife, and on family Bible and portrait, properly admitted. Kirby v. Boaz [Tex. Civ. App.] 121 SW 223. Where issue was to which of two persons of same name bounty warrant for land was issued, declaration of decedent as to his ancestor's service in Texas army was competent where there was no motive to falsify, and declarant did not know of ancestor's death. Id. Declaration of deceased that she had nephew of certain name living at certain place competent, Code Civ. Prac. § 1370, subd. 4, making competent declarations of deceased concerning relationship of one related by blood or marriage. Taylor v. McCowen, 154 Cal. 798, 99 P 351.

61. See, also, article on Boundaries.

62. Land boundaries may be shown by proof of reputation. Thurman v. Leach [Ky.] 116 SW 300. General understanding and reputation among owners, neighbors and others, who have been tenants or employes on lands, may be proved on boundary issue. Peters v. Tilghman [Md.] 73 A 726. Reputation and hearsay of deceased persons competent on boundary questions. Collins v. Clough, 222 Pa. 472, 71 A 1077.

63. Cadwalader v. Price [Md.] 73 A 273; Keefe v. Sullivan County R. Co. [N. H.] 71 A 379. See discussion in Collins v. Clough, 222 Pa. 472, 71 A 1077. Declarations of former owner and occupant of land, after conveyance by him excepting landing, before any controversy had arisen, and while pointing out boundaries, competent, after his death. Cadwalader v. Price [Md.] 73 A 273. Declarations of former owner of land, after conveyance which excepted landing, regarding boundaries of land conveyed, not objectionable as impeaching grantee's title. Id. Ancient boundaries may be established by general reputation, by tradition, and by hearsay declarations of persons who had knowledge, before any controversy arose. De Loney v. State [Ark.] 115 SW 138. Declaration of deceased adjoining owner of land as to location of corner or line, to be ad-

this character being the best of which the case is capable.[64] It is not essential that declarant should have been the owner of the land, as means of knowledge may be otherwise shown,[65] and such declarations are not rendered incompetent by the facts that they were made off the land, and the boundary was not pointed out,[66] nor on the ground of interest, because declarant was formerly owner.[67] Some courts, however, admit such declarations only when within the res gestae rule.[68]

Market reports See 11 C. L. 1381 are competent when generally relied on by the trade,[69] but mere private price lists, not so relied on, are not.[70]

Census reports See 9 C. L. 1267 are competent evidence in some jurisdictions.[71]

(§ 6) *B. Res gestae.*[72]—See 11 C. L. 1381—Contemporaneous or nearly contemporaneous acts or declarations growing out of the act, transaction or condition which is in issue, under circumstances excluding the idea of premeditation, and characterizing or explaining such act, transaction or condition, are competent as a part thereof.[73] It is not essential that a declaration should be exactly coincident

missible, must relate to corner or line of his own land in the ascertainment of which he has an interest. State v. King, 64 W. Va. 546, 63 SE 468. If declarations of deceased adjoining owner of land are in other respects unobjectionable, such declaration by tenant or equitable owner is admissible if paper title in landlord or trustee be shown. Id. Declarations as to corners or boundaries competent only when made ante motam litem, by disinterested person, since deceased. Declarations by owner, tending to extend his boundaries, **incompetent.** Table Rock Lumber Co. v. Branch, 150 N. C. 240, 63 SE 948. Guardian of children owning land is interested in boundary, and his declarations regarding it are incompetent after his death. Peters v. Tilghman [Md.] 73 A 726.

64. Keefe v. Sullivan County R. Co. [N. H.] 71 A 379.

65. Declarations of foreman of construction work of railroad company as to boundaries of right of way. Keefe v. Sullivan County R. Co. [N. H.] 71 A 379.

66. Keefe v. Sullivan County R. Co. [N. H.] 71 A 379.

67. Interest goes to weight, not to competency. Keefe v. Sullivan County R. Co. [N. H.] 71 A 379.

68. Thus, declarations of deceased surveyors or owners are held competent only when made on the ground as a part of acts being done. Field notes of deceased surveyor competent; subsequent declarations as to what he did incompetent. Collins v. Clough, 222 Pa. 472. 71 A 1077.

69. In absence of witnesses having personal knowledge of the market price, the market quotations or reports in newspapers of general circulation are admissible to establish it. Tully v. Western Union Tel. Co., 141 Ill. App. 312. Market report in National Live Stock Reporter, showing sales on certain day, competent to show there was a market on the day in question. St. Louis & S. F. R. Co. v. May [Tex. Civ. App.] 115 SW 900.

70. Card published by an individual showing prices of a commodity incompetent when there was no proof that it was generally relied on by dealers. Merchants' Grocery Co. v. Ladoga Canning Co. [Ark.] 117 SW 767.

71. Published official census competent evidence by which to determine which school district of city had largest number of voters, where statute expressly made it competent evidence. State v. Grefe, 139 Iowa, 18, 117 NW 13.

72. **Search Note:** See notes in 19 L. R. A. 733; 16 A. S. R. 407; 44 Id. 848; 109 Id. 741.

See, also, Evidence, Cent. Dig. §§ 297-387; Dec. Dig. §§ 118-128; 1 Cyc. 295, 296; 16 Id. 1148-1155, 1241-1261; 11 A. & E. Enc. L. (2ed.) 523; 24 Id. 660.

73. Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207. Declarations accompanying an act and explanatory thereof competent. Puryear v. Ould, 81 S. C. 456, 62 SE 863. Declarations of injured person, which are natural outgrowth of and tend to illustrate or explain occurrence giving rise to litigation, made so nearly contemporaneous therewith as to be in presence of transaction, and under circumstances excluding idea of deliberation, are competent. Ft. Wayne & W. V. Trac. Co. v. Roudebush [Ind.] 88 NE 676.

Rule appplied to particular matters.

Held part of res gestae: Appearance of woman, and her statements, on arriving at another's house, claiming she had been the victim of an **assault.** Sheibley v. Nelson [Neb.] 121 NW 458. In action against carrier by passenger for assault committed by another passenger, what assailant said to plaintiff and to bystander when he made assault. Bedsole v. Atlantic Coast Line R. Co. [N. C.] 65 SE 925. What was said and done at time of **levy on goods.** Montgomery Moore Mfg. Co. v. Leeth [Ala.] 50 S 210. In action for trespass committed in levying execution, what was said and done by persons who seized goods at the time. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Offer to arbitrate held admissible as part of res gestae of alleged **rescission of contract of sale.** McNitt v. Henderson, 155 Mich. 214, 15 Det. Leg. N. 987, 118 NW 974. Suit to cancel deed on ground of **fraud and undue influence.** Proof that certain persons conferred on question whether land was worth more than services to be performed by grantees, and that their decision was announced to grantor, competent as part of res gestae. Fraley v. Fraley, 150 N. C. 501, 64 SE 381. Action for **delay in delivery of telegram.**

with the act if it arises naturally therefrom and tends to characterize or explain it,[74]

Proof that agent read message to addressee, who was blind, and what agent read to him, before handing him the message, was competent as part of res gestae of delivery. Western Union Tel. Co. v. Benson [Ala.] 48 S 712. Action for **malicious prosecution.** Conversation between defendant's superintendent, who swore out warrant, and an attorney, at the time of swearing it out, competent. Emerson v. Lowe Mfg. Co. [Ala.] 49 S 69. Conversation between broker and intending buyer competent, in action for **broker's commissions.** Jaffe v. Nagel, 114 NYS 905. In action for **conversion** of grain, it was necessary to establish division of grain between lessor and lessee, who raised it. Held conversations between them, wherein lessor directed lessee to divide it, were not objectionable as hearsay. Iverson v. Soo Elevator Co. [S. D.] 119 NW 1006. What was said at time of taking of horses and mules in action for conversion. Boardman v. Woodward [Tex. Civ. App.] 118 SW 550. Reason assigned by manager for **discharge of employe.** Puryear v. Ould, 81 S. C. 456, 62 SE 863. Statement by decedent at time of making **loan** that he was making it in his sister's name to escape taxation, though money was his own. Baker v. Baker [Ind. App.] 86 NE 864. In suit to enjoin disclosure and use of formulae for remedy for cure of drunkenness, statements of discoverer as to his **investigations and discoveries** during the course thereof. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132. Where one party to trade sent his son as his agent to deliver property and receive **deed,** his declarations to the son, when the latter read the deed to him, that he had made no such trade as that there recited, and that he refused the deed. Hudson v. Slate [Tex. Civ. App.] 117 SW 469. Validity of **release** being in issue, declarations of claim agent to injured man illustrating object and character of payment to be made. Vaillancourt v. Grand Trunk R. Co. [Vt.] 74 A 99. In replevin to recover ties, which had been sold twice, proof of statements by vendor at time of first **sale** before delivery of ties to plaintiff. Guion Mercantile Co. v. Campbell [Ark.] 121 SW 164. In action for **wrongful ejectment from train,** evidence that plaintiff exhibited his baggage check to conductor while latter was waiting for him to produce ticket was admissible. Bolles v. Kansas City So. R. Co., 134 Mo. App. 696, 115 SW 459. What decedent said when he took hold of wire, the **electric shock** from which killed him, as to his purpose. Lewis' Adm'r v. Bowling Green Gaslight Co. [Ky.] 117 SW 278. Action for **injuries caused by capsizing** of boat. Proof of number of persons in boat at time, and number drowned, admissible. Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452, 113 SW 730 Declarations of motorman immediately after **street car accident.** Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. Statements by injured man while lying under car. Matthews' Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 459. Declarations of motorman at time and place where man was struck by car, in response to declarations of others, that he saw the man and tried to stop the car but failed. Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207. Statement of fatally injured motorman, while lying amid wreckage, one minute after collision, in response to question how it occurred, that he should have a clear track until certain hour. Ft. Wayne & W. V. Trac. Co. v. Roudebush [Ind.] 88 NE 676. In action for **injury to railroad passenger,** where passenger was injured by falling on defective section of floor of car, what conductor did with defective section just after accident. Plefka v. Detroit United R. Co., 155 Mich. 53, 15 Det. Leg. N. 911, 118 NW 731. Passenger was injured while crossing trestle after car had stopped owing to washout. Conductor's notification to passengers that they could walk across trestle and transfer to another car competent as res gestae though communicated to plaintiff by another passenger. Bugge v. Seattle Elec. Co. [Wash.] 103 P 824. In action for **injury while alighting from car,** having testified that other passengers were getting off, testimony of eyewitness as to what occurred and what other passengers did. Smith v. Detroit United R. Co., 155 Mich. 466, 15 Det. Leg. N. 1055, 119 NW 640. That husband, who had just alighted from car cried out to wife to "hold on," as he saw car start, admissible as part of res gestae, in action for injury. Id. Action for injuries to **railroad employes** caused by moving of engine by hostler. Proof that while plaintiff was lying injured on the ground just after the accident he asked hostler what he had been doing, and that latter said he did not throw the lever in the center notch, that he thought he had the steam off but he did not, was admissible. Douda v. Chicago, etc. R. Co. [Iowa] 119 NW 272. Where employe slipped and was killed while filling tender, evidence that employe was slow, and that engineer told him to hurry, that he was causing delay. Houston & T. C. R. Co. v. Alexander [Tex. Civ. App.] 121 SW 602. Proof that defendant's bookkeeper and assistant engineer had told plaintiff that superintendent had ordered him to assist in work, while doing which he was injured. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76. In action for injuries caused by an **assault on passenger** by conductor, proof of disputes between conductor and plaintiff's husband, which led to scuffle between them. McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223. Where plaintiff was injured as result of scuffle between her husband and conductor, conductor's words to her husband preceding and during the scuffle were competent as part of res gestae. McMahon v. Chicago City R. Co., 143 Ill. App. 608. **Where train struck and killed child,** and ran by 320 feet and then backed up, what engineer said, while she was lying as she fell, about seeing her on the ties, and thinking she would get off. Anderson v. Great Northern R. Co., 15 Idaho, 513, 99 P 91.

Statements by agents: See post, this section, subsection C.

74. Statement must be part of or characterize an act which may itself be proved. Baker v. Baker [Ind. App.] 86 NE 864. To be competent as part of res gestae, fact need not be contemporaneous but may constitute series of occurrences, constituting a transaction, or relevant to fact in issue. Fraley v.

but declarations to be res gestae must be spontaneous and not statements which are deliberate and prepared for a purpose,[75] and must be something more than a mere narrative of past events.[76] Prior instructions to employes as to how a thing should be done are not admissible as a part of the res gestae on the theory that if the instructions had been followed the accident would not have happened.[77] Declarations of a bystander, not connected with the principal transaction, are incompetent,[78] unless the declarations are spontaneous and illustrative of the main fact,[79] and unless they relate to matters of fact and would be competent testimony if the by-

Fraley, 150 N. C. 501, 64 SE 381. Continuousness in time is not sole test of res gestae; verbal acts which illustrate, explain or interpret facts in issue, of which they are a part, are res gestae, though separated somewhat in time from main fact. McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223. Declaration of injured passenger, just after restoration to consciousness, minute or two after accident, competent. Sutton v. Southern R. Co., 82 S. C. 345, 64 SE 401. Action for damages resulting from fire negligently started on defendant's land. Proof that defendant asked neighbor, before starting fire, if it would harm his buildings, and that neighbor, after looking for direction of wind, said no, was competent as res gestae on question of defendant's negligence. Miller v. Neale, 137 Wis. 426, 119 NW 94.

75. In action against city for property alleged to have been destroyed by mob violence, a dispatch prepared by the legal department of the city for the purpose of securing troops and signed by the mayor was not part of res gestae. Pittsburgh, etc., R. Co. v. Chicago, 144 Ill. App. 293.

76. Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207.

Held incompetent: Statements by injured person relating to manner and cause of injury. Roth v. Travelers' Protective Ass'n [Tex.] 115 SW 31. Statement by injured as to manner of receiving injury after he had been removed to hotel. Matthews' Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 459. Declaration of person who fell on stairs, after the fall, as to manner of receiving injury. Moorhead v. Eckert, 61 Misc. 612, 114 NYS 31. Declarations of person injured by fall on sidewalk as soon as she had returned home. Miller v. McConnell [S. D.] 120 NW 888. Statements by one who fell from or was struck by train after witness had run to him. Hill v. Aetna Life Ins. Co., 150 N. C. 1, 63 SE 124. Statements by injured party as to past pain, or of reasons given for a particular course of conduct, or deductions by another as reasons for conduct of the injured person, are incompetent unless part of res gestae. Etzkorn v. Oelwein [Iowa] 120 NW 636. Proper to exclude **declarations of members of train crew** after accident at crossing. Grant v. Oregon R. & Nav. Co. [Wash.] 103 P 1126. Action for injuries to passenger in alighting from car; **what conductor said** to witness after car had started again. Alten v. Metropolitan St. R. Co., 133 Mo. App. 425, 113 SW 691. Action for personal injury. Statement that conductor "said that he caught my foot with his handle raising the lever and pulled me off; that is just what he said," held not part of res gestae though made a minute after accident. Lecklieder v. Chicago City R. Co., 142 Ill. App. 139. In action for death of driver of wagon, in collision with car, **declaration of motorman,** few seconds after collision, that "he bothered me all across the bridge," incompetent, accident having occurred after bridge was crossed. Brauer v. New York City Interborough R. Co., 131 App. Div. 682, 116 NYS 59. **Conductor's admonition to motorman,** after accident, to make no statement until one was called for, inadmissible, since it did not explain main fact. Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207. Where street car passenger was injured while attempting to board car, **conversation between motorman and third person** after accident. Blue Ridge L. & P. Co. v. Price, 108 Va. 652, 62 SE 938. In action to recover reduced liability of company on death of insured by suicide, **letter from insured to wife,** written on day of his death, held not part of res gestae. Life Ins. Co. v. Hairston, 108 Va. 832, 62 SE 1057. In action by husband for alienation of wife's affections, **declarations by wife to husband concerning her improper relations with defendant.** Hanor v. Housel, 128 App. Div. 801, 113 NYS 163. Declarations **by one who deposited money as trustee for another** after the act that he had so deposited it because he already had on deposit as much as bank would allow interest on, and adopted trust to get interest, was incompetent to show intention not to establish trust. Tierney v. Fitzpatrick, 195 N. Y. 433, 88 NE 750.

77. In action for death, statement of superintendent as to manner in which elevator cab should be raised while being repaired. Casey v. Reedy Elevator Mfg. Co., 142 Ill. App. 126.

78. Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207; Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109. In action for wrongful ejection of passenger, proof that person on car with plaintiff told conductor that prior conductor had taken up plaintiff's fare. Wells v. Boston & M. R. Co. [Vt.] 71 A 1103. Declaration of person, not party to action and not interested, just after railroad accident, that it was plaintiff's own fault and no one was to blame but herself. Wheeler v. Oregon R. & Nav. Co. [Idaho] 102 P 347.

79. In cases where injuries are received by passengers in jumping off cars, when in imminent danger, statements or outcries of other passengers are competent to show that there was anticipated danger. Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207.

stander were a witness;[80] and hence mere expressions of opinion by third persons are incompetent.[81]

Complaints or natural expressions of present existing pain or suffering, and other natural expressions of an existing bodily or mental condition, may be shown,[82] when the circumstances are shown to have been such as to exclude the idea of deliberation.[83] Declarations of a sick or injured person concerning his or her condition are competent when made to a physician for the purpose of enabling him to diagnose the disease and treat the patient,[84] but are usually excluded when the physician is called for the purpose of qualifying him as a witness in a coming trial.[85]

Declarations accompanying and characterizing possessions or title of property are competent,[86] both against the declarant[87] and persons claiming

See 11 C. L. 1383

80. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109.

81. Exclamation of another passenger, as person killed stepped off street car, that it "looked like murder." Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109. Where pedestrian was struck by car, declaration of bystander that it was no wonder he was hurt the way the crew were wrestling, incompetent. Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207.

82. Declarations of present pain in the nature of involuntary declarations of existing pain and suffering. Etzkorn v. Oelwein [Iowa] 120 NW 936. Natural and spontaneous expressions of present suffering. Chesapeake & O. R. Co. v. Wiley [Ky.] 121 SW 402.

Declarations and manifestations held admissible: Declaration by injured person indicating present pain and suffering. Mississippi Cent. R. Co. v. Turnage [Miss.] 49 S 840. That error to allow witness, who saw plaintiff fall and roll over, as he tried to alight from train, to testify "I don't remember plaintiff saying anything as he arose except that he was hurt on his shoulder and leg and hip." Atlanta & W. P. R. Co. v. Haralson [Ga.] 65 SE 437. Statement by injured person as to nature and location of pains. South Texas Tel. Co. v. Tabb [Tex. Civ. App.] 114 SW 448. Statement "it hurt my head and made it ache," made while witness held hand to head. Roth v. Travelers' Protective Ass'n [Tex.] 115 SW 31. **Complaints** concerning present pain and suffering from wounds. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83. That plaintiff complained next day after injury and said limbs and back ached. Louisville & N. R. Co. v. Davaner [Ala.] 50 S 276. Complaints of pain and soreness and an impediment in walk. Pecos & N. T. R. Co. v. Coffman [Tex. Civ. App.] 121 SW 218. That plaintiff, after injury, often complained of pain. St. Louis S. W. R. Co. v. Norvell [Tex. Civ. App.] 115 SW 861. That injured person complained that his back, side, etc., hurt him so that he could not turn over. Houston & T. C. R. Co. v. Parnell [Tex. Civ. App.] 120 SW 951. **Shrieks and exclamations of pain** by injured person while confined to bed. Heiberger v. Missouri & Kansas Tel. Co., 133 Mo. App. 452. 113 SW 730. **Expressions of pain** at time of and immediately after receiving an injury. Denver City Tramway Co. v. Martin, 44 Colo. 324, 98 P 836; New Connellsville Coal & Coke Co. v. Kilgore [Ala.] 50 S 205. On issue as to whether adverse report on school teacher by inspector was malicious, proof of his prior **declaration of sorrow,** naturally made, because of the necessity of sending in such a report, held admissible. Barry v. McCollom, 81 Conn. 293, 70 A 1035.

83. Complaints of present pain are competent to prove its existence, and the inclination seems to be to admit such proof though complaints are made after idea of suit has been entertained, as such considerations go to weight, not competency of the evidence. Johnston v. Cedar Rapids & M. C. R. Co. [Iowa] 119 NW 286.

84. Chesapeake & O. R. Co. v. Wiley [Ky.] 121 SW 402.

Held competent: Statements of injured person to physician, while treating her, that she could not sleep. Marshall v. Saginaw Val. Trac. Co. [Mich.] 16 Det. Leg. N. 357, 122 NW 131. Declarations of injured person that he had headaches and nervous spells, and that his memory was impaired, made to physician who was treating him, held competent to explain symptoms. Missouri, K. & T. R. Co. v. Dalton [Tex. Civ. App.] 120 SW 240. Declarations of injured person to physician during treatment, or upon an examination prior to and without reference to the bringing of an action for damages, may be proved. Shaughnessy v. Holt, 236 Ill. 485, 86 NE 256. **Declarations as to symptoms** or nature of injury competent, whether made to physician or another. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Statements and **complaints of pain** by injured person to his physician competent when latter's opinion was based thereon together with other symptoms. De Courey v. Prendergast Const. Co. [Mo. App.] 120 SW 632.

Held incompetent: To allow husband of plaintiff and physician who attended her to testify to declarations concerning state of her health and injuries. Kienninger v. Interurban St. R. Co., 113 NYS 96.

85. Statements by injured person, many months after injury, during examination by physicians with view to testifying, not res gestae. Shaughnessy v. Holt, 236 Ill. 485, 86 NE 256. Where physicians examined plaintiff shortly before trial with view of testifying, their opinions, based on her statements, made under such circumstances, were incompetent, even though she testified that her statements were true. Id.

86. Declarations of one in actual possession and control of property, explanatory of

under him,[88] and in his own favor [89] and in favor of those claiming through him,[90] but self-serving declarations as to rights in or title to property, unconnected with possession or occupancy, are incompetent,[91] and declarations of a vendor or grantor after parting with title are incompetent to impeach the title of one claiming under him.[92]

(§ 6) *C. Admissions or declarations of parties.*[93] *Against interest.* See 11 C. L.

possession, are competent as part of res gestae of possession. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853. Acts and declarations of one in possession of land qualifying and explaining his possession are competent. Smith v. Moore, 149 N. C. 185, 62 SE 892. Acts and declarations of one, while in possession of land, may be shown to prove character and extent of his possession and claim. Hughes Bros. v. Redus [Ark.] 118 SW 414. In suit on note given for patent right, when it is shown that plaintiff and his predecessors in title had knowledge of the consideration for which it was given, defendant may prove by third party **declarations of payee made while in possession of note,** and tending to impeach its validity. Benton v. Sikyta [Neb.] 122 NW 61.

Character of possession necessary to render declarations competent: Declarations showing claims of title during time that declarant was living elsewhere but had authorized another to occupy land for consideration, competent, he being in law in possession. Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550.

87. Declarations of one in possession of land, in disparagement of his own title, are competent against him. Bowman v. Owens [Ga.] 65 SE 156; Hill v. Bean, 150 N. C. 436, 64 SE 212.

88. Declarations of one occupying land under homestead and dower right that he did not claim as owner competent against one claiming the fee through him. Kirby v. Kirby, 236 Ill. 255, 86 NE 259.

89. Declarations of one in possession of land asserting title in himself, competent. Texas & N. O. R. Co. v. Broom [Tex. Civ. App.] 114 SW 655. Declarations of one in possession of land are competent to sustain his claim of adverse possession. Bowman v. Owens [Ga.] 65 SE 156.

90. Where defendant claimed title by adverse possession, by himself and predecessors, he could show acts and declarations of his predecessors characterizing their possession; and, to characterize his possession, could prove that he brought an action against a third person who had boxed trees for turpentine on the land. Godley v. Barnes [Ga.] 64 SE 546.

91. Declarations by one in possession of property, which caused accident, made after accident that it belonged to third persons, inadmissible. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853.

92. Declarations of grantor or vendor, after transfer or sale, not in presence of grantee or vendee, are incompetent to impeach latter's title. Hughes Bros. v. Redus [Ark.] 118 SW 414.

Held incompetent: Declarations of grantor 10 days after giving deed not res gestae. Chappell v. John [Colo.] 99 P 44. Declarations of grantor, not in presence of grantee, are incompetent to invalidate deed. Potter v. Barringer, 236 Ill. 224, 86 NE 233. Declarations of grantor in deed several years after its execution as to his intention. Napier v. Elliott [Ala.] 60 S 148. Declaration of grantor in deed purporting to convey absolute title, after its execution, that deed was given as trust only, and that grantee was trustee, incompetent to establish trust. Bollinger v. Bollinger, 154 Cal. 695, 99 P 196. Act of grantor of two tracts of land (with life estate reserved) in indicating new boundary line, after conveyance by him, could not be proved to affect rights of grantee whose land was thereby lessened. Preston v. Vanhoose [Ky.] 116 SW 279. Proof that grantor, after conveying land to defendants, surrendered possession of it to plaintiff and told him land was his, was incompetent to disparage defendants' title. Pardue v. Whitfield [Tex. Civ. App.] 115 SW 306. **Recital in subsequent deed** of receipt of purchase price inadmissible against grantee in prior deed from same grantor. Ryle v. Davidson [Tex.] 115 SW 28. Where widow sought to enforce dower rights in land conveyed by her husband before his death, **conversation with grantor** after the transfer, not in defendants' presence, was incompetent. Lusse v. Lusse [Mo. App.] 120 SW 114. **Declarations of one who paid part of price of land** and directed its conveyance to another, after such conveyance, held incompetent against grantee. Angermiller v. Ewald, 133 App. Div. 691, 118 NYS 195. **Declarations of donor** that conveyances are advancements or gifts are incompetent unless made before, at the time of, or immediately after, the transaction and as part of the res gestae. Stauffer v. Martin [Ind. App.] 88 NE 363. **Declarations of donor or assignor of personal property,** made after the gift or sale, incompetent and ineffective to defeat claim or title of donee or assignee. Moore v. Fingar, 131 App. Div. 399, 115 NYS 1035. **Letter from creditor** to third person who bought at mortgage sale, written after sale and after creditor had parted with lien, stating that he had been paid before the sale, was incompetent against purchaser. Gowdy v. Gowdy [S. C.] 65 SE 385.

On issue of fraud: Declarations of grantor, in absence of grantee, held not competent to prove fraud on part of grantee, but competent to rebut claim of fraud, when made at or near time of signing deed. McAdams v. McAdams, 80 Ohio St. 232, 88 NE 542.

On issue of adverse possession: Evidence that grantor, after conveying land to defendants, surrendered possession thereof to plaintiff and told him the land was his, the plaintiff's, held competent to show break in possession by defendants and their predecessors, defendants claiming by adverse possession. Pardue v. Whitfield [Tex. Civ. App.] 115 SW 306.

93. Search Note: See notes in 3 C. L. 1362; 11 Id. 1389; 20 L. R. A. 695; 65 Id. 316; 11 L.

[1884]—Upon the presumption that one will not readily speak untruthfully **against** his own interest, admissions and declarations against interest [94] are admissible as

R. A. (N. S.) 92; 13 Id. 349; 6 A. S. R. 242; 2 Ann. Cas. 5; 7 Id. 647; 8 Id. 207; 9 Id. 263; 10 Id. 521, 1063.

See, also, Evidence, Cent. Dig. §§ 684-1134, 1155-1167; Dec. Dig. §§ 200-275, 298-313; 5 Cyc. 1011, 1012; 14 Id. 682; 16 Id. 938-1050, 1146-1192, 1202-1206, 1217-1222, 1235-1241; 9 A. & E. Enc. L. (2ed.) 5; 11 Id. 522.

94. Tendency is to restrict rather than enlarge rule as to competency of admissions, and interest of declarant must be direct and obvious, and pecuniary or proprietary. Life Ins. Co. v. Hairston, 108 Va. 832, 62 SE 1057.

Held admission against interest: In ejectment, declarations by defendant tending to show he did not claim title. Conselyea v. Van Dorn, 129 App. Div. 520, 114 NYS 61. Letter by defendant to his tailor held admission that he should be charged $50 for suit, though he declined to pay for alterations. Rapp v. Platt, 117 NYS 987. Statement by defendant held competent as tending to show the purpose for which defendant held certain stock. Bordner v. Depler, 142 Ill. App. 526. In action for being bitten by defendant's dog, his declaration, after injury, that he did not want dog turned loose because he thought it was mad, was competent, as admission, to prove knowledge of dog's condition. Buck v. Brady, 110 Md. 568, 73 A 277. Where defense to action on note for mining stock was fraudulent representation as to value of stock, proof that maker had visited mines and gave **expression of satisfaction** with them was competent as an admission. Ernest v. McCauley [Cal.] 102 P 924. **Expressions of intention** by deceased to pay for kindness or service rendered were competent as tending to prove legal liability against estate. Bradenkamp v. Rouge, 143 Ill. App. 492. Statement by one party to witness that he intended to pay other party. Tiffany v. Morgan [R. I.] 73 A 465. **Declarations of grantee** held admissible to establish grantee's obligation to pay money to third person. Hoffa v. Hoffa, 38 Pa. Super. Ct. 356. In action for injury to real property caused by improvement by village, **resolution of village** authorizing the improvement and also specification for the work were admissible as declaration against interest. Payson v. Milan, 144 Ill. App. 204. **Offer to sell** may be competent as admission as to value by owner. Belka v. Allen [Vt.] 74 A 91. In action on town treasurer's bond, **books and reports** kept by him were competent evidence to show that he had funds not accounted for to town. Trustees of Schools of Township 23, Range 2, v. Cowden, 240 Ill. 39, 88 NE 285. **Statement of account,** which contains or upon which is endorsed an acknowledgment of indebtedness, is competent either as original or corroborative evidence of indebtedness. Walker v. Rome [Ga. App.] 64 SE 310. Where defendant admitted statement of account was correct, except as to two items, it was competent against him as an admission. Richardson v. Anderson, 109 Md. 641, 72 A 485. **Rules** of defendant company stating effect on train of using emergency brakes competent to prove plaintiff's contention that use of such brakes caused shock in question. Galveston, etc., R. Co. v. Harper [Tex. Civ. App.] 114 SW 1168. **Memorandum of sale** of land made by grantor, not signed by purchaser, competent against grantor but not against his wife. Friedman v. Ender, 116 NYS 461. Where beneficiary in insurance policy made **application for insurance** on life of his mother, application, which was part of contract, and his statements therein as to his mother's age, etc., were competent evidence. Maddox v. Southern Mut. Life Ins. Ass'n [Ga. App.] 65 SE 789. Statement in **application for employe's bond** that salary was to be $15 per week competent as admission (issue being amount of salary) though no bond was issued. Ackerman v. Berriman, 113 NYS 1015. **Proofs of death** are competent as admissions of beneficiary in actions on life policy. Beard v. Royal Neighbors of America [Or.] 99 P 83. **Recital in deed** to purchaser at sale under mortgage that bid was paid is acknowledgment by creditor against his interest, and is presumptive evidence of payment. Gowdy v. Gowdy [S. C.] 65 SE 385. Recital of consideration in a deed is prima facie evidence of amount obtained by grantor. Leeman v. Page [Kan.] 100 P 504. Beneficiary having made **affidavit that answers of physician were true** thereby made such questions and answers competent against her as admission against interest. Coulter v. Travelers' Protective Ass'n, 144 Ill. App. 255.

Held not competent as admission against interest: Proof that party threatened to have witness prosecuted unless he appeared to testify. Garrett v. St. Louis Transit Co., 219 Mo. 65, 118 SW 68. Statement that tenant could hold lands another year at certain rental, under lease, was not an admission as to rental value. Raapke & Katz Co. v. Schmoller & Mueller Piano Co., 82 Neb. 716, 118 NW 652. Testimony of defendant's superintendent that men on building were allowed to give away barrels to poor people was not an admission by defendant that workmen were allowed to throw barrels out from windows to people below. Wallace v. John A. Casey Co., 132 App. Div. 35, 116 NYS 394. Statement of trustee under trust deed or mortgage that "we thought we were getting good title," etc., held not admission of knowledge of prior attachment lien, though he used word "yes" in answer to question as to such knowledge. First Nat. Bank v. Farmers' & Merchants' Nat. Bank, 171 Ind. 323, 86 NE 417. **Declarations of insured** as to his taking opiates not competent, his interest being too remote, under terms of life policy. Life Ins. Co. v. Hairston, 108 Va. 832, 62 SE 1057. Where plaintiff sued for an accounting, a **statement of assets** prepared by him and signed by defendant, for commercial agency, was not an admission for plaintiff. Pfaelzer v. Gassner, 116 NYS 15. Fact that plaintiff in personal injury action made **attempt to suppress fact** that he had received accident insurance was not competent evidence, since it did not amount to an admission of any material fact. Hubbard v. Montgomery County [Iowa] 118 NW 912. In personal injury action, **proof that plaintiff had settled with accident insurance company** two months after accident, on basis of

affirmative evidence against either the party who made them [95] or persons in privity with him,[96] and such admissions are admissible also for the purpose of impeachment.[97] Portions of a document are admissible as an admission against interest, subject, however, to the right of the other party to read in evidence such other parts of the document as qualify or modify such admission.[98] Admissions in judicial proceedings, shown in the record of the cause,[99] or contained in testimony at the trial,[1] or in depositions,[2] or in pleadings,[3] are competent; but such declarations are

less serious injury than that alleged in complaint, which was filed four months after accident, held inadmissible, not being contradictory to allegations of complaint. Puget Sound Elec. R. Co. v. Van Pelt [C. C. A.] 168 F 206.

95. Black v. Epstein, 221 Mo. 286, 120 SW 754; Crowley v. See, 63 Misc. 346, 117 NYS 101. Admissions against interest of party beneficially interested are always competent. Kinnane v. Conroy, 52 Wash. 651, 101 P 223. Admissions of party have evidentiary value aside from force as discrediting party. Brown v. Atlantic Coast Line R. Co. [S. C.] 64 SE 1012. Declarations of signer of note, tending to show nonpayment. Burton v. Phillips [Ala.] 49 S 848. Statement by deceased that he had worked in another mine, not hearsay, issue being amount of his experience in action for his death. Merriweather v. Sayre Min. & Mfg. Co. [Ala.] 49 S 916. Where contract relied on was oral, **letters and telegrams** passing between parties 2½ months thereafter were admissible, not to show terms of contract but as containing admissions as to what the contract was. Mahon v. Rankin [Or.] 103 P 53. Letters containing admissions as to matters in controversy held admissible. Conant v. Evans, 202 Mass. 34, 88 NE 438. **Tax lists** signed by mark, with certificates of authorized official that signer was sworn. Whalen v. Gleeson, 81 Conn. 638, 71 A 908.

Held admissible on certain issues: Evidence tending to show admission of **existence of verbal agreement.** Morehead v. Hering [Tex. Civ. App.] 116 SW 164. Admissions by husband, after marriage, that he had made **antenuptial contract** with wife by which he was not to receive any of her property, competent to prove making of contract and its existence at time. Unger v. Mellinger [Ind. App.] 88 NE 74. Party's admissions as to his **age** competent in behalf of other party. Koester v. Rochester Candy Works, 194 N. Y. 92, 87 NE 77. In determining **ownership** of deposit in bank in joint names of husband and wife, declarations or admissions by either husband or wife, in other's presence, as to who should have money upon death of either, were competent. Moore v. Fingar, 131 App. Div. 399, 115 NYS 1035. In suit to recover money loaned decedent, admission by decedent that plaintiff had taken good care of him and would be well paid held competent on ownership of money. Russell v. Amlot, 132 App. Div. 584, 116 NYS 1080. In action on **account,** it is proper to prove that defendant admitted correctness of items of the account and gave orders on third persons in payment, which orders were not paid. Stadtler v. South Texas Lumber Co. [Tex. Civ. App.] 121 SW 1132.

96. Admissions by assignor before assignment competent against assignee. Kellogg Lumber & Mfg. Co. v. Webster Mfg. Co., 140 Wis. 341, 122 NW 737.

97. Admissions of defendant out of court competent not only to impeach him but also as affirmative evidence. Crowley v. See, 63 Misc. 346, 117 NYS 101. Statement of plaintiff to another not objectionable as hearsay, which tended to show his bias. Hamilton v. Dismukes [Tex. Civ. App.] 115 SW 1181.

98. Party is only required to offer so much of the document as he considers material and pertinent. Coulter v. Travelers' Protective Ass'n, 144 Ill. App. 255.

99. In action of ejectment, record in restitution proceedings, showing admissions by plaintiff that defendant was in possession, was competent. McKinnon v. Johnson [Fla.] 48 S 910. Pleadings, requests for instructions, and assignments of error in prior trial, inconsistent with position taken in latter, are competent as admissions. Floyd v. Kulp Lumber Co., 222 Pa. 257, 71 A 13.

1. Testimony of adverse party on former trial on material fact competent. Williams v. Smith [R. I.] 72 A 1093.

2. Deposition of party competent to prove admissions, where party is present and testifies. Valleroy v. Knights of Columbus, 135 Mo. App. 574, 116 SW 1130. In partition, plaintiff's deposition in another action that he had executed and delivered deed to premises was competent. Nash v. Yellow Poplar Lumber Co. [Va.] 63 SE 14.

3. Where original **complaint** contained declaration against interest, it was competent evidence, and counsel for defendant could inquire about it. Keller v. Morton, 63 Misc. 340, 117 NYS 200. In action against agent for false representations concerning violin bought by plaintiff, **complaint in former action** against owner, stating that buyer relied solely on owner's representations was competent as an admission, but was not conclusive. Dahlstrom v. Gemunder, 133 App. Div. 69, 117 NYS 576. On issue whether certain person was member of firm, petition in another action alleging that he was, and answer containing general denial, not under oath, was not competent as admission, where statute requiring denial on oath did not apply. Slayden & Co. v. Palmo [Tex. Civ. App.] 117 SW 1054. Paragraph of original **answer** which had been withdrawn competent as admission by defendant. Loomis v. Norman Printers' Supply Co., 81 Conn. 343, 71 A 358. Where defendant filed answer and cross petition, which was later dismissed, plaintiff was entitled to read defendant's pleading in evidence if it contained material admissions. Arkansas City v. Payne [Kan.] 102 P 781. **Abandoned or withdrawn pleadings** are admissible. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76. Hudson v. Slate [Tex. Civ. App.] 117 SW 469. Counts withdrawn from

competent only against declarant,[4] unless declarant has authority to bind a party,[5] or unless the relations of declarant and party are such that the latter is bound by the former's declarations,[6] or unless the declarations or acts have been ratified or adopted by the party.[7] An admission should be received in its entirety [8] and the party against whom it is proved should be allowed to explain it.[9]

declaration held competent evidence. Stevenson v. Avery Coal & Min. Co., 143 Ill. App. 397. Where original pleading has been withdrawn and amended one substituted, original is competent as admission. Schoette v. Drake, 139 Wis. 18, 120 NW 393; Willis v. Western Union Tel. Co., 150 N. C. 318, 64 SE 11. **Pleading drawn without client's knowledge or consent** is competent. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552. **Paper purporting to be pleading** of party to suit, but not signed by him or his attorney, incompetent as admission by him in another action. Michel v. Michel [Tex. Civ. App.] 115 SW 358.

Necessity of offer of pleading as evidence: Affidavit of defense, filed under Pennsylvania practice, must be offered in evidence in order to make admissions therein evidence. Crosby v. Hammerling, 170 F 857. See Trial, § 3.

4. Admissions of certain persons not competent against others when no collusion of common purpose to defraud was shown. Chappell v. John [Colo.] 99 P 44. Statements in affidavits or as witnesses in other proceedings not competent except against persons who made them. Id. Since landowner is required only to give description of land to assessor, and latter places valuation on it, this valuation for taxation is not competent against owner on issue of value. Denver & R. G. R. Co. v. Heckman [Colo.] 101 P 976. In suit to set aside will, **statements by one legatee,** since deceased, incompetent against others, no collusion being shown. Helsley v. Moss [Tex. Civ. App.] 113 SW 599. In action to subject property standing in wife's name to debts owed by husband, **admissions by husband,** concerning ownership of property, not made in line of his agency, were incompetent against her. Martin v. Banks [Ark.] 115 SW 928. Deposition of **principal on liquor dealer's bond,** admitting sales to plaintiff's husband, incompetent against sureties, in action on bond, though admissible against principal. Birkman v. Fahrenthald [Tex. Civ. App.] 114 SW 428. **Admissions by assured** not receivable in evidence against beneficiary in life policy. American Central Life Ins. Co. v. Rosenstein [Ind. App.] 88 NE 97. **Declarations of codefendant** competent against himself though incompetent against other defendants. Rosseau v. Deschenes [Mass.] 89 NE 391. In creditor's suit against three defendants, their testimony in prior supplementary proceeding was competent as admission, but testimony of each should be limited in effect as admission against him only. Coldren Land Co. v. Royal [Iowa] 118 NW 426. **Trustee** under trust deed cannot, by admissions as to past transactions, affect rights of principal. First Nat. Bank v. Farmers' & Merchants' Nat. Bank, 171 Ind. 323, 86 NE 417. Naked admissions of trustee in derogation of trust, cannot be received, since he has only technical interest. Id.

5. See post, this section and subsection, subdivision Admissions and Declarations by an Agent.

6. After other proof of existence of **conspiracy,** declarations of a conspirator pending the progress of the plan are competent against all; declarations after the object has been accomplished are competent only against declarant. Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049. Declarations of conspirator are incompetent to prove existence of conspiracy. Id. Evidence held to show that mortgagor and senior mortgagee conspired to make sham sals of property in order to defeat rights of junior mortgagee, so that acts and declarations of one were competent against both. Henderson-Snyder Co. v. Polk, 149 N. C. 104, 62 SE 904. Contractor completed job, on default of subcontractor, and rendered statements of cost according to contract, which subcontractor kept without objection. Held, such statements were competent against **surety,** in action on subcontractor's bond. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Admissions of principal are prima facie evidence against sureties, if made pending the relationship and concerning the transaction to which the suretyship relates. Chicago Portrait Co. v. O'Neal [Ga. App.] 65 SE 161.

7. Letter written by wife, with knowledge and consent of husband, competent against both. Cook v. Newby, 213 Mo. 471, 112 SW 272. Experimental surveys and maps made at instance of landowner, endeavoring to find boundaries of land, are incompetent as admissions against him, unless there is evidence tending to show that he adopted them as correct. State v. King, 64 W. Va. 546, 63 SE 468.

8. Plaintiff may rely on defendant's admissions, but must accept their effect as a whole; court will not reject portions not in favor of plaintiff. Saal v. Fortner [La.] 49 S 997. Part of paragraph of complaint properly excluded where part not offered was necessary to explain that offered. Rushing v. Seaboard Air Line R. Co., 149 N. C. 158, 62 SE 890. An admission, accompanied by explanatory or exculpatory matter, is inadmissible without such explanatory or exculpatory matter; its weight is for jury. Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 SE 1030.

Pleadings introduced as admissions must be submitted as a whole, not cut up and used in parts so as to get a meaning not intended. McCaskill v. Walker, 147 N. C. 195, 61 SE 46. To use a pleading as an admission, the entire admission must be considered. Clifford v. Duffy, 56 Misc. 667, 107 NYS 809. Where complaint in action on fire policy alleged total loss, proper to admit in evidence part of paragraph of answer admitting loss of property, and exclude that part which denied liability. Modlin v. Atlantic Fire Ins. Co. [N. C.] 65 SE 605. Distinct admission of separate fact in part of paragraph of answer

Silence or acquiescence. See 11 C. L. 1800—Failure of a party to deny or object to a statement against his interest made in his hearing,[10] or to object to an account submitted to him,[11] may be proved as an admission against interest, unless the circumstances were such that there was no duty to speak [12] or that failure to speak may be otherwise explained.[13]

Admissions and declarations by an agent See 11 C. L. 1386 against the interest of his principal, accompanying and explaining acts then being done by him, so as to constitute a part of the res gestae,[14] such declarations and acts being within the

admissible without rest of paragraph. Wade v. McLean Cont. Co., 149 N. C. 177, 62 SE 919.

9. Plaintiff should have been allowed to explain book accounts offered as admission by her. Eddy v. Church, 64 Misc. 7, 118 NYS 795. Where affidavit of party was introduced as admission, he should have been allowed to explain circumstances under which it was made. Morgan v. U. S. [C. C. A.] 169 F 242. Where written contract under seal is offered, not as basis of rights claimed but to show an admission, the admission may be explained or even contradicted by parol, but cogent proof is required to overcome its effect. Dudley v. Niswander, 65 W. Va. 461, 64 SE 745. Where letters of plaintiff were offered by defendant, not to prove contract sued on but as admissions against interest, plaintiff was properly allowed to explain them by referring them to another transaction which he thought was pending. Mahon v. Rankin [Or.] 102 P 608. On issue of ownership of money, where admissions against ownership of claimant had been proved, claimant was properly allowed to prove entire conversation and deny making of admissions. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922.

10. In suit to enjoin disclosure and use of formulae for remedy for cure of drunkenness, statements of discoverer as to his investigations and work, in defendant's presence, were competent. Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 NE 132.

11. That statements of account were mailed to defendant, and that she kept them and made no objection, competent. Childress v. Smith-Echols-Burnett Hardware Co. [Ala.] 50 S 322. Statement of account, taken from books, which had been presented to defendant and admitted by him to be correct, competent. Byrd v. Beail [Ala.] 50 S 53. Statement showing articles taken by defendant for which plaintiff was to be paid, made up from memoranda made at time, and presented to defendant, defendant having made no objection thereto, competent with evidence of its presentation. Greenburg v. Childs & Co., 242 Ill. 110, 89 NE 679. Where an account is submitted or demand made, the debtor's conduct, such as failure to make objection within reasonable time, may be considered as prima facie admission of correctness of account. Jones v. De Muth, 137 Wis. 120, 118 NW 542.

12. Statements made by defendant concerning plaintiff might be proved if they had been repeated to defendant and he had then admitted making them, but where there was no proof that they had been repeated to defendant they were incompetent. Sheppard v. Austin [Ala.] 48 S 696. Evidence of sending statement to defendants and retention of it by them too indefinite to establish admission of liability, issue being whether they or an employe bought goods. Stark v. Solomon, 114 NYS 133.

13. Declarations by plaintiff, beneficiary in life policy, as to statements by deceased, not denied by plaintiff, concerning manner in which accident to deceased occurred, were not competent as admissions, since plaintiff had no personal knowledge. Hill v. Aetna Life Ins. Co., 150 N. C. 1, 63 SE 124. Where testator had pleaded guilty to charge of trespass, and his counsel, in a plea for mercy, had stated to court that his client had but recently been discharged from an insane asylum, and was mentally weak and irresponsible, this was not provable as admission against him, in will contest where his mental unsoundness was alleged. In re Thorp's Will, 150 N. C. 487, 64 SE 379. Where broker had no knowledge as to condition of sale agreed on between owner and subagent, statements in his presence referring to condition, not denied, could not be taken as admission by him. Hansen v. Williams [Tex. Civ. App.] 113 SW 312.

14. Case Plow Works v. Pulsifer [Kan.] 98 P 787; Mobile L. & R. Co. v. Baker [Ala.] 48 S 119. As to res gestae rule, generally, see ante, this section, subjection B.

Held competent: Statements by carrier's agent concerning discovery of goods, made in course of duties, while engaged with transaction in issue. Fein v. Weir, 129 App. Div. 299, 114 NYS 426. When shipper was referred by agent to person in apparent charge of yard, what such person said regarding delay in getting train out, at the time, was competent against carrier. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. Declarations of carrier's agent that he placed cattle in quarantine pens, competent, when made at time, agent acting in line of duty and authority. St. Louis, etc., R. Co. v. Adams [Tex. Civ. App.] 118 SW 1155. **Statement of claim agent** that claim had been ordered paid, made while discussing matter with claimant. Tenhet v. Atlantic Coast Line R. Co., 82 S. C. 465, 64 SE 232. Declarations of claim agent for carrier while attempting to adjust claim for delay. Rutland v. Southern R. Co., 81 S. C. 448, 62 SE 865. **Statement, agent of shipper** while in charge of shipment of horses and during transportation about matters then being done, competent against shipper; what he said after arrival of horses at destination, incompetent. Southern Exp. Co. v. Fox [Ky.] 117 SW 270. **Declaration of purchasing agent** while conveying goods to his principal, as to ownership thereof. Montgomery Moore Mfg. Co. v. Leeth [Ala.] 50 S 210. **Where husband was wife's agent in managing her separate**

scope of his authority as agent,[15] are admissible against the principal.[16] There

property, his acts and declarations relating thereto were competent against her. Baker v. Thompson, 214 Mo. 500, 114 SW 497. **Conversation with defendant's manager** concerning employment which resulted therefrom and which was subject-matter of suit. Puryear v. Ould, 81 S. C. 456, 62 SE 863. **Declaration of railroad general superintendent** as to width of right of way of railroad, when he was pointing out location of spur track to plaintiff. People's Oil & Fertilizer Co. v. Charleston & W. C. R. Co. [S. C.] 66 SE 733. **Statement of foreman of repair gang** that he was following instructions in making repairs, competent as admission, in connection with remark made to him that he would cause wreck. Galveston, etc., R. Co. v. Norton [Tex. Civ. App.] 119 SW 702. **Declarations of insurance agent,** who issued insurance on watch, as to loss of watch, competent against insurer. Schmerler v. Barasch, 63 Misc. 267, 116 NYS 624. **Statement of telephone operator,** in answer to call for certain residence, that that telephone was torn up by lightning, was competent against company, being in line of duty, and part **of res gestae.** Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418. **What yard policeman said** as to condition of stock pens when engaged in work of loading and unloading stock. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767. **Declarations of partner** is competent, partnership being shown aliunde. Morris v. Moon [Tex. Civ. App.] 120 SW 1063.

Held incompetent: Declarations of agent, long after tort committed by him. Rookard v. Atlanta, etc., R. Co. [S. C.] 65 SE 1047. Declaration of agent, made at time when he was not engaged in any transaction for principal. Taplin v. Marcy, 81 Vt. 428, 71 A 72. Declarations concerning loading and unloading cattle, after acts in question. St. Louis, etc., R. Co. v. Adams [Tex. Civ. App.] 118 SW 1155. Statement of agent of defendant at preliminary interview looking to settlement, that injured person was not in condition to transact business, incompetent to impeach settlement afterwards made. Wells v. Royer Wheel Co. [Ky.] 114 SW 737. Declarations by agent after transaction by him has been closed are incompetent, except to impeach him. Farmers' Bank v. Wickliffe [Ky.] 116 SW 249. **Declarations of driver of team,** after an accident caused by him, as to ownership of team, inadmissible against such persons. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853. **Admissions by messenger boy** several days after delivering message that it was received some days before an attempt was made to deliver, incompetent against company. Western Union Tel. Co. v. Jackson [Miss.] 49 S 737. Fire started on ranch and burned neighbor's barn. **Statement of ranch manager,** while fire was burning, that he had set it was not competent against ranch owner, being narration of past event, and not such spontaneous exclamation as to be presumed truthful. Johnson v. McLain Inv. Co. [Kan.] 100 P 52. **Statements of general manager** as to cause of accident, day after it, to member of city council. Rapp v. Easton Transit Co. [N. J. Law] 72 A 38. **Declarations of salesman** relating to past transaction. Case Plow Works v. Pulsifer [Kan.] 98 P 787. **Declarations of motorman** after accident, as to how it occurred. Mobile L. & R. Co. v. Baker [Ala.] 48 S 119; Morse v. Consolidated R. Co., 81 Conn. 395, 71 A 553. Declaration of motorman after injury to passenger that he had no right to stop on railway track, etc. Blue Ridge L. & P. Co. v. Price, 108 Va. 652, 62 SE 938. Declaration of motorman shortly after injured child was taken from under car. Morse v. Consolidated R. Co., 81 Conn. 395, 71 A 553. Admissions by motorman descriptive of accident, after its occurrence, incompetent except to impeach him. Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969. **Opinion expressed by workman,** after completion of heating plant, hearsay, and not binding as admission against plaintiff. Nebraska Plumbing Supply Co. v. Payne [Neb.] 121 NW 243. Mere fact that one was **secretary of corporation** did not make his admission of receipt of payment competent against corporation when it was not shown that admission was part of or related to some transaction for corporation then being done by him. Blanchard-Carlisle Co. v. Garritson [Ind. App.] 87 NE 151.

15. Held competent: Declarations and **admissions of one acting under power of attorney,** concerning pending sale. Mulford v. Rowland [Colo.] 100 P 603. Declarations and **admissions by agents of general authority** competent. Pennsylvania R. Co. v. Oren Frult & Produce Co. [Md.] 73 A 571. In summary proceedings to obtain possession of premises, party testified that he was living on them and had charge of hotel and was running it. Held acts and **statements of persons in office and on premises,** in apparent charge, were prima facie chargeable to such party. Pakas v. Hurley, 61 Misc. 228, 114 NYS 142. **Admission of general freight and claim agent** that car of tomatoes had not been re-iced, competent against carrier. Pennsylvania R. Co. v. Orem Fruit & Produce Co. [Md.] 73 A 571. Waybills competent as **admissions by carrier's agent,** and as his acts. New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 165 F 833. Where claim against express company was referred by main office to **superintendent in city,** latter's statements in connection with claim were competent. Hill v. Adams Exp. Co. [N. J. Law] 71 A 683. **Report to railway commission,** in handwriting identified as that of railroad auditor, presumptively made pursuant to statute; hence railroad company could not claim it was not made with authority so as to bind company. Chicago, etc., R. Co. v. Risley Bros. & Co. [Tex. Civ. App.] 119 SW 897. Declarations and **admissions of agent of corporation** are competent against it when they relate to matters as to which he is authorized to give information in the usual course of business. Case Plow Works v. Pulsifer [Kan.] 98 P 787. Admissions concerning sale of coal by president and general manager of corporation. Home Ice Factory v. Howells Min. Co. [Ala.] 48 S 117. See Corporations, § 15N. **Admission by bank cashier,** since deceased, that note had been paid, and that he would bring note to defendant, competent against bank. First Nat.

must, however, be at least a prima facie showing of the existence of the agency before such declarations are admissible,[17] and neither the fact of agency nor the scope of the agent's authority can be shown by his declarations alone,[18] though such declarations may be considered in connection with other proof of agency,[19] and the court

Bank v. Alexander [Ala.] 50 S 45. **Statements of defendant's physician** to plaintiff, the injured man, as to wound, etc., would be competent as admission. Brown v. Minneapolis, etc., R. Co. [Minn.] 121 NW 123. Action for injuries by wires to one engaged in house moving. Proof of **declarations of one who came and took charge of wires,** after request to company to do so, competent on issue of negligence in handling of wires. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223. **Letter of broker,** who testified that he represented both parties, to one of them, competent as admission, in connection with proof of his agency. Webster v. Moore, 108 Md. 572, 71 A 466. **Statement of attorney** for plaintiff, made to attorney for another while prosecuting claim for plaintiff, competent as admission against plaintiff in later suit for personal injuries. James v. Boston El. R. Co., 201 Mass. 263, 87 NE 474. Where party told his attorney to interview another attorney as to what fee he would charge for representing party, it was proper to allow attorneys to testify to result of that interview, which was reported to party. Thomas Bros. Co. v. Price, 56 Fla. 854, 48 S 262. **Letter written by party's attorney** containing admission contrary to party's testimony, competent. Koch v. Wimbrow Bros. [Md.] 73 A 896. Where plaintiff had testified that defendants had told him to go to their attorney and get the money they owed plaintiff, the attorney's declaration, offering plaintiff $100 and stating that, if he did not take it, it would cost him $500 to collect, was not objectionable on the ground that it was not authorized. Neindorf v. Van De Voorde [Iowa] 120 NW 84. **Concessions by attorneys of record** bind clients and may be proved in subsequent action. Floyd v. Kulp Lumber Co., 222 Pa. 257, 71 A 13.

Held incompetent: Statements by agent, not relating to matters within scope of his agency. Central of Georgia R. Co. v. Americus Const. Co. [Ga.] 65 SE 855. Where scope of agency did not extend to certain city declaration as to transaction there incompetent. Yoshimi v. U. S. Exp. Co. [N. J. Law] 73 A 45. Expressions of malice, not made in principal's presence, incompetent to prove his motive. Little v. Rich [Tex. Civ. App.] 118 SW 1077. Where land was in actual possession of tenants, **declarations of agents in charge of renting** that principal claimed only to certain line, and their unauthorized act in moving fence back, could not bind principal. Cameron & Co. v. Blackwell [Tex. Civ. App.] 115 SW 856. **Letter by former officer of corporation** written in personal capacity to president of corporation, concerning past accident, incompetent against corporation. Statler v. Ray Mfg. Co., 195 N. Y. 478, 88 NE 1063. **Letter written by one not party** to action for false imprisonment and not charged as conspirator, inadmissible against defendant, who did not authorize it. Little v. Rich [Tex. Civ. App.] 118 SW 1077. Issue being injuries to cattle from feed, proof that **seller's agent,** after sale and without investigating condition of cattle or feed, told buyer to keep on feeding it, was not competent against seller. Swift & Co. v. Redhead [Iowa] 122 NW 140. **Declaration of agent of initial carrier** as to disposition of goods, delayed in shipment, incompetent against connecting carriers. Missouri, K. & T. R. Co. v. Carpenter [Tex. Civ. App.] 114 SW 900. **Statement by mere employe,** regarding machine on which he was working, inadmissible against employer. Corkran v. Taylor [N. J. Law] 71 A 124. **Declarations of foreman** in charge of tracks and fences for railway company, as to location of boundary of right of way, incompetent against company. Keefe v. Sullivan County R. Co. [N. H.] 71 A 379. Acts and **statements of agent of undisclosed principal** in real estate transaction, competent against principal; but, agency being for negotiation and purchase only, after deed had passed, agent's statements, not made in presence or with consent of principal, were incompetent. Woolsey v. Haynes [C. C. A.] 165 F 391.

16. Rookard v. Atlanta, etc., R. Co. [S. C.] 65 SE 1047; Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767. Where there is independent evidence of agency, declarations of agent, within scope of agency, during its continuance and in regard to transactions which are pending, are competent. Mulford v. Rowland [Colo.] 100 P 603.

17. Admissions and declarations of agent, incompetent without proof of agent's authority. E. C. Fuller Co. v. Pennsylvania R. Co., 61 Misc. 599, 113 NYS 1001. Where scope of agent's authority was not shown, his declaration concerning boundary line was properly excluded. Clark v. Dunn [Ala.] 50 S 93. Tax lists, signed and sworn to by one as agent only not competent against owner without other proof of agency. Whalen v. Gleeson, 81 Conn. 638, 71 A 908. **Wife's declarations,** in absence of husband, incompetent against him, no agency being shown. Hayes v. Funk [Kan.] 99 P 1131. **Letters written by attorney** of one person not competent against another. Stouffer v. Erwin, 81 S. C. 541, 62 SE 843. In action for death of employe, **what agent of one of defendants said** to employe, when hiring him, was incompetent against other defendants, not having been said in their presence, and defendant whose agent made declaration having been dismissed from case. Boehrens v. Brice [Tex. Civ. App.] 113 SW 782.

18. Declarations of agent are incompetent to establish his agency. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223; Yoshimi v. U. S. Exp. Co. [N. J. Law] 73 A 45; Joseph v. Platt, 130 App. Div. 478, 114 NYS 1065; Herrington & Co. v. Shumate Razor Co. [Ga. App.] 65 SE 1064. Rule that agency cannot be proved by declarations of agency is greatly relaxed **in case of corporate agency.** Smith v. Pullman Co. [Mo. App.] 119 SW 1072. See Corporations, § 15N.

19. Childress v. Smith-Echols-Burnett Hardware Co. [Ala.] 50 S 322; Mullen v.

may in its discretion receive declarations in evidence, with the understanding that other proof of agency will be introduced.[20] Testimony of the agent to the fact of agency is, of course, competent.[21] Declarations of an agent are competent to show knowledge by him.[22] When one speaks through an interpreter, the statements of the latter are equivalent to those of the former.[23]

Proof of bona fide offers of compromise See 11 C. L. 1388 is usually excluded on grounds of public policy,[24] but admissions not made with a view of avoiding litigation [25] may be shown, and an independent admission of a fact [26] may be shown, though it accompanies an offer of compromise.[27]

Ex parte, self-serving declarations See 11 C. L. 1389 by a party or one in privity with him are incompetent; [28] and the effect of declarations against interest cannot

Quinlan & Co., 195 N. Y. 109, 87 NE 1078; Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767; Missouri Val. Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93.

20. Declarations of third person may be received provisionally, as part of res gestae, leaving fact of agency to be subsequently established. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223.

21. Clough v. Rockingham County L. & P. Co. [N. H.] 71 A 223; Hill v. Bean, 150 N. C. 436, 64 SE 212.

22. Declaration of agent competent to show he had knowledge of facts though incompetent against principal. Beinert v. Tivoli & Co., 62 Misc. 616, 116 NYS 4.

23. Scrtaut v. Crane Co., 142 Ill. App. 49.

24. Floresville Oil & Mfg. Co. v. Texas Refining Co. [Tex. Civ. App.] 118 SW 194. Admissions which are incompetent because made with "view to compromise" (Civ. Code 1895, § 5194) are those which are made as concessions to bring about compromise. Austin v. Long, 5 Ga. App. 551, 63 SE 640.

Held incompetent: Proper to strike portion of answer relating to **proposition to compromise.** National Bank of Commerce v. Gougar, 51 Wash. 204, 98 P 607. **Offer to settle** for certain amount in order to compromise. St. Louis & S. F. R. Co. v. Cash Grain Co. [Ala.] 50 S 81. **Offer to pay** certain sum in settlement of claim. Germain v. Stanton Union School Dist. [Mich.] 16 Det. Leg. N. 575, 122 NW 524. Proposition to pay claim, in order to settle litigation. Tenhet v. Atlantic Coast Line R. Co., 82 S. C. 465, 64 SE 232. Letter offering to pay certain sum of money in settlement of controversy inadmissible, both under Comp. Laws 1907, § 3217, and under general rules of evidence. McKinney v. Carson [Utah] 99 P 660. **Letter written in effort to compromise** controversy as to attorney's fees. Baldauf v. Peyton, 135 Mo. App. 492, 116 SW 27. Letter offering compromise. Theobald v. Shepard Bros. [N. H.] 71 A 26. Letter showing that offer to settle had been made and declining to increase sum offered. Denver & R. G. R. Co. v. Brennaman [Colo.] 100 P 414. Not competent in condemnation proceeding to prove **what condemnation petitioner paid for other land,** this being in nature of compromise. South Park Com'rs v. Ayer, 237 Ill. 211, 86 NE 704. **That decedent compromised claim** of daughter, who kept importuning him to do so, when he was sued for value of notes assigned by wife to him, could not be proved as admission, in favor of wife's legatees, that he did not own notes. Mahan v. Schroeder, 236 Ill. 392, 86 NE 97. Proof **that lessee road paid claim** for damages inadmissible against lessor, which would also be liable, held incompetent because settlements are favored. Rookard v. Atlanta, etc., R. Co. [S. C.] 65 SE 1047. In action by buyer against seller of goods for breach of contract, proof that buyer made **offer to waive claim for damages,** if seller would deliver (after other goods had been bought), and that seller did not reply, was incompetent, being offer to compromise controversy. Floresville Oil & Mfg. Co. v. Texas Refining Co. [Tex. Civ. App.] 118 SW 194.

25. Statement, made in course of conversation concerning claim for lost goods, that claim had been ordered paid, competent as admission. Tenhet v. Atlantic Coast Line R. Co., 82 S. C. 465, 64 SE 232. Admissions of one party who desires settlement are not to be excluded where opposite party has done nothing to induce statements and did not contemplate a compromise or abatement. Austin v. Long, 5 Ga. App. 551, 63 SE 640. Even if general proposition of compromise has been made, admissions by opposite party may be competent **where no definite terms of compromise have been suggested.** Id. **Offer to settle undisputed claim** is competent. Id.

26. Independent statements of fact, though made while parties are trying to settle, are not necessarily incompetent. Austin v. Long, 5 Ga. App. 551, 63 SE 640. Distinct admission of fact is not to be excluded because made in connection with proposition for compromise, latter being excluded. Rabinowitz v. Silverman [Pa.] 72 A 378.

Held independent admission of fact: In action for injuries caused by dog, held error to refuse the introduction of admissions by defendant as to what he did with dog and the reason why. Domm v. Hollenbeck, 142 Ill. App. 439. **Statement which impliedly acknowledges right** of plaintiff to demand settlement by defendant is admissible against latter. Austin v. Long, 5 Ga. App. 551, 63 SE 640. **Acknowledgment of indebtedness** during conversation is competent. Hudson v. Williams [Del.] 72 A 985.

27. Written communication, otherwise competent, not inadmissible because it contained offer of compromise. Kendall v. Boyer [Iowa] 122 NW 941.

28. Tiffany v. Morgan [R. I.] 73 A 465.

Held incompetent: Statements by one party out of hearing of adverse party. Johnson v. Buchanan [Tex. Civ. App.] 116 SW

be impaired by independent declarations in aid of interest, unless the latter were made in the presence of the adverse party.[29]

(§ 6) *D. Declarations of a person since deceased,*[30]—See 11 C. L. 1391 made in

875. Self-serving statements in letters, after writer had reason to believe controversy was imminent. Woolsey v. Haynes [C. C. A.] 165 F 391. On issue of delay of contractor in completing work, letters from architect, who was owner's agent, making **complaint of delay.** Kann v. Bennett [Pa.] 72 A 342. **Plaintiff's disclaimer of fault** in connection with injury received by him. Ellerman v. Farmer [Ky.] 118 SW 289. Issue being whether G bought horse from plaintiff or defendant, **declaration of ownership** made by plaintiff to G, stating that horse belonged to defendant. McClatchey v. Anderson [Neb.] 122 NW 67. **Declaration of trust** held incompetent. Mahan v. Schroder, 142 Ill. App. 538. Plaintiff's **declaration of promise of marriage** by defendant. Lauer v. Banning [Iowa] 118 NW 446. Broker's letter making demand **of compensation** from defendant and stating contract. Walleston v. Fahnestock, 116 NYS 743. In action for compensation and accounting, plaintiff's **statements and summaries** from books. Pfaelzer v. Gassner, 116 NYS 15. **Defendant's understanding** in action for rent, that he signed lease merely to facilitate transfer without liability. Johnson v. Hulett [Tex. Civ. App.] 120 SW 257. Written **statement showing indebtedness of bankrupt corporation to its president** containing unsworn statements of the corporation's secretary and referring to books and letters not in evidence. In re Coventry Evans Furniture Co., 166 F 516. **Letter by defendant's bookkeeper** sustaining defendant's claim. Kellogg Lumber & Mfg. Co. v. Webster Mfg. Co., 140 Wis. 341, 122 NW 737. Defendant's **conversation with own agent.** Puryear v. Ould, 81 S. C. 456, 62 SE 863. Self-serving **declarations of vendors** denied by vendee. Hudson v. Slate [Tex. Civ. App.] 117 SW 469. **Motorman's report** to company on accident some days after it, stating that it was due to plaintiff's fault. Finkelstein v. Keene Elec. R. Co. [N. H.] 73 A 705. **Declaration by obligee in bond for title** that he had paid note for purchase price incompetent in his favor. Pool v. Anderson, 150 N. C. 624, 64 SE 593. **Affidavit filed to raise issue of forgery** of deed not evidence of forgery. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. Where party claimed under conveyance of headright certificate, **recital in deed** in his chain of title, reciting such conveyance, was self-serving and incompetent except to show that grantor therein claimed under such conveyance. White v. McCullough [Tex. Civ. App.] 120 SW 1093. **Declarations by one claiming money,** tending to show claims by her, incompetent as substantive proof of ownership, though competent to rebut proof of admissions. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922. **Schedules attached to statement of claim** containing plaintiff's statement of account inadmissible as self-serving, though they were attached to pleading, many items being denied by defendant. Kann v. Bennett [Pa.] 72 A 342. In action for price of ice in which defendant claimed ice was of poor quality, **declarations by defendant's agent,** in plaintiff's absence, that plaintiff was robbing defendant, and defendant's declarations to various persons as to poor quality of ice, incompetent. Woodbridge Ice Co. v. Semon Ice Cream Corp., 81 Conn. 479, 71 A 577. Declarations of wife out of presence of husband held incompetent **for purpose of impeaching assignment** of notes and mortgages to husband by wife. Mahan v. Schroeder, 142 Ill. App. 538. **In suit to reform real estate contract** so as to make consideration $55,000 instead of $65,000, proof that vendee said, before any controversy arose, that she paid only $55,000, inadmissible. Kunz v. Mason [N. J. Err. & App.] 73 A 869. Self-serving **statements in letters introduced by adverse party** for another purpose are not admitted by the adverse party nor made competent evidence of the facts stated. American Trust & Sav. Bank v. Zelgler Coal Co. [C. C. A.] 165 F 34. **In suit by executor to recover alleged loan** made by decedent, statement of decedent, not in presence of adverse parties, that money was loan, not gift. Jackson Baptist Church v. Combs' Ex'r [Ky.] 113 SW 119. **In suit to recover securities of decedent,** taken by his sister, proof of declarations by decedent that he made loans with his own money, but took securities in sister's name to escape paying taxes. Baker v. Baker [Ind. App.] 86 NE 864. **In suit against decedent's estate for board and services** by son of deceased, what she said concerning same trouble with him, and what she had done for him, not in his presence, and after time for which he claimed compensation was incompetent. Bettinghouse v. Bettinghouse, 156 Mich. 169, 16 Det. Leg. N. 37, 120 NW 617. **In action on claim against estate,** question calling for self-serving statement of decedent, in claimant's absence, properly excluded. Leimgruber v. Leimgruber [Ind.] 86 NE 73.

29. Where evidence of declarations of deceased was offered to the effect that indebtedness of son to him had been paid, declarations that the son was indebted to him but not made in son's presence were inadmissible against son. Grove's Estate, 38 Pa. Super. Ct. 424.

Held competent: Bankrupt's schedules not self-serving declarations. In re Strang, 166 F 779. **Recital in deed** that land conveyed was same as that conveyed by A to B. Houston Oil Co. v. Kimball [Tex. Civ. App.] 114 SW 662. **Declarations of claimants of homestead** that they intended to return to it held competent, though self-serving. Thigpen v. Russell [Tex. Civ. App.] 118 SW 1080. **In trespass to try title,** where plaintiffs claimed under patentee, testimony of patentee's granddaughter that he had told her father that he had been sick and unable to attend to sale of land while at their home at certain place. Keck v. Woodward [Tex. Civ. App.] 116 SW 75.

30. Search Note: See notes in 56 L. R. A. 353; 3 L. R. A. (N. S.) 749; 7 Id. 684; 15 Id. 190; 94 A. S. R. 672.

See, also, Evidence, Cent. Dig. §§ 1094, 1095, 1114, 1116, 1119, 1129-1234, 1135-1142,

good faith, ante litem motam, are usually held competent.[31] The competency of such declarations as to boundaries [32] and questions of pedigree [33] has already been discussed. Under statutory provisions in most states, declarations of a person since deceased cannot be testified to by a party in interest, or one who was a party to the conversation or contract in question.[34]

§ 7. *Documentary evidence. A. In general.*[35]—See 11 C. L. 1391—Any document or writing is admissible when its contents are relevant and material,[36] and competent,[37] and due and sufficient proof has been made of the authority of the writer or person who executed it,[38] and of the identity and authenticity of the writing,[39]

1150; Dec. Dig. §§ 271(16, 17), 273, 274(7-11), 291; 16 Cyc. 1040, 1166-1174, 1202-1206, 1236; 11 A. & E. Enc. L. (2ed.) 543.

31. In suit to set aside decree of adoption by wife on ground that husband had forced it, declarations of wife were competent, she being deceased, under Rev. Laws, c. 175, §§ 66, 67. Phillips v. Chase, 201 Mass. 444, 87 NE 755. Entries in books kept by decedent, relating to transactions with another, competent, after death, upon proof of his handwriting. Burton v. Phillips [Ala.] 49 S 848. On issue whether note had been given by decedent to his daughter, proof of contents of will, in which she was charged with amount of note as advancement, was competent though will was not probated. Peters v. Schultz, 107 Minn. 29, 119 NW 385.

32. See ante, § 6A, subd. Boundaries.

33. See ante, § 6A, subd. Matters of Pedigree and Family History.

34. See Witnesses, § 3.

35. Search Note: See notes in 5 C. L. 1346; 11 Id. 1394; 35 L. R. A. 321; 40 Id. 553; 42 Id. 771; 44 Id. 142; 51 Id. 754; 62 Id. 817; 64 Id. 303; 65 Id. 151; 12 L. R. A. (N. S.) 343; 9 A. S. R. 302; 110 Id. 742; 1 Ann. Cas. 24, 322; 6 Id. 59, 500; 8 Id. 210, 1038; 9 Id. 451; 11 Id. 182.

See, also, Evidence, Cent. Dig. §§ 1343, 1388-1431, 1444-1539, 1559-1677; Dec. Dig. §§ 350-353, 355-367, 369-383; 1 Cyc. 296; 13 Id. 307; 16 Id. 1266-1268; 17 Id. 363-365, 399-412, 414-442, 463, 464; 2 A. & E. Enc. L. (2ed.) 549; 9 Id. 877; 11 Id. 549; 20 Id. 883.

36. Letters, relating to matters in issue, **held admissible.** Brock v. Wildey [Ga.] 63 SE 794. Letter by defendant to commercial agency, which was plaintiff's agent, competent against plaintiff. Rheinstein Dry Goods Co. v. McDougall, 149 N. C. 252, 62 SE 1085. Letters held relevant to issue of indebtedness for services and competent to corroborate party's testimony. Conger v. Hall [Mich.] 16 Det. Leg. N. 676, 122 NW 1073. Letters showing payment for land and making of improvements held admissible where title was in question. Uihlein v. Caplice Commercial Co. [Mont.] 102 P 564. Letters and other documents, not connected with party against whom offered, who knew nothing about them until offered, **held inadmissible.** Roberts v. Little [N. D.] 120 NW 563.

37. Report on conditions of lights on certain day, not showing any stoppage, inadmissible to prove that light did not go out, being mere inference and not report on fact. Central Union Depot & R. Co. v. Mansfield [C. C. A.] 169 F 614. Where portion of claim was introduced in evidence by one party, other was not entitled to introduce balance of it, when it was not necessary or proper to explain the portion already in evidence. St. Louis & S. F. R. Co. v. May [Tex. Civ. App.] 115 SW 900.

38. Held admissible: Letter dictated to party's agent and written by latter from such dictation. Nebraska Plumbing Supply Co. v. Payne [Neb.] 121 NW 243. Letters competent when shown to have been **written by agents** and received by other party. Johnson v. Hulett [Tex. Civ. App.] 120 SW 257.

Held inadmissible: Check, letter and lease incompetent **against corporation** without proof showing authority of person acting to bind corporation. Smith v. Guarantee Dental Co., 114 NYS 867. Contract of corporation inadmissible without proof of authority of officers to execute it. Brown v. Bass [Ga.] 63 SE 788. **Report as to lights in depot,** made by watchman to witness, latter having no personal knowledge of facts. Central Union Depot & R. Co. v. Mansfield [C. C. A.] 169 F 614.

Held for jury: Whether statements in letters of illiterate person, written by another, were in fact declarations of illiterate person, held for jury, and it was error to exclude letters without submitting this question to jury. Whalen v. Gleeson, 81 Conn. 638, 71 A 908.

39. Copy of paper, itself competent, attached to deposition and duly attested by witness admissible as **exhibit.** Glazer v. Old Dominion S. S. Co., 113 NYS 979. Where **patent to land** was produced in court pursuant to an order of court, it was admissible as against objection that identity of patentee with defendant was not shown, its production being admission in court as to such identity. Des Moines Sav. Bank v. Kennedy [Iowa] 120 NW 742. In absence of evidence to contrary, fact of identity of name of party with name of applicant for land, in application, affidavit and proof, was sufficient to make them admissible in evidence. Id. Paper, purporting to be **constitution of association,** admissible as such on proof that it was kept in archives of association and acted on as its constitution. Tarbell v. Gifford [Vt.] 72 A 921. Constitution of association competent as record of association though not recorded in its books. Id. **Delivery sheet** competent to show time of delivery of telegram, when there was proof of genuineness of signature, though it was contradicted, making question one for jury. Western Union Tel. Co. v. Northcutt [Ala.] 48 S 553. Where genuineness of **letter** is not denied, proof that it was received in due course in answer to one sent, and was acted upon, made it admissible. Helwig v. Aulabaugh, 83 Neb. 542, 120 NW 162. To lay foundation for secondary evi-

and its proper execution.[40] The general rule in some states is that the attesting witness must be called to prove the execution of a written instrument when possible,[41] but if he is dead or beyond the jurisdiction, proof of his handwriting is competent and is prima facie evidence of due execution.[42] Such testimony is not necessary in the case of instruments collateral to the main issue.[43]

Under some of the statutes instruments which have been executed, attested, acknowledged or recorded in a certain way or for a certain length of time, prove themselves.[44]

dence of lost deed, letters to certain persons requesting information as to deed, and letters from them, purporting to be in answer, and purporting to be signed by them, were admissible without proof of signatures of writers. McDonald v. Hanks [Tex. Civ. App.] 113 SW 604. **Letters written by one person for another who is illiterate,** and signed by latter, would be competent on proof that statements therein were in fact declarations of the signer, and this may be proved by testimony of writer and by contents themselves. Whalen v. Gleeson, 81 Conn. 638, 71 A 908. **Certificates of sale** of potatoes, delayed in shipment, by commission man, attached to his deposition, admissible as against objection that they were not shown correct, when facts shown were corroborated by other evidence. Missouri, K. & T. R. Co. v. Hopkins [Tex. Civ. App.] 113 SW 306. **Notation on blue print copy of original plat** of land held incompetent, when there was no proof as to who wrote it, or when made, or whether it was on original. Mahoney v. Southern R. Co., 82 S. C. 215, 64 SE 228.

40. Where affidavit of forgery is filed as to deed, its execution must be proved by evidence as at common law. West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228. Assignment of deed by widow and heirs inadmissible without proof of execution by heirs. Hellard v. Nance [Ky.] 114 SW 277.

Execution held proved: Receipt for goods by consignee's agent, **signed by mark,** valid and admissible though not attested or acknowledged. Louisville & N. R. Co. v. Price [Ala.] 48 S 814. **Bill of sale from corporation** by its president and general manager properly admitted. Burgin v. Marx [Ala.] 48 S 348. **Papers purporting to come from state agent of insurer,** apparently genuine, and having his signature attached by rubber stamp, admissible, when evidence showed his custom to use rubber stamp. Union Cent. Life Ins. Co. v. Washburn [Ala.] 48 S 475. Where contract purporting to be signed by one party was **acted on by both parties,** it was admissible without further proof of execution. Nelson v. Western Steam Nav. Co., 52 Wash. 177, 100 P 325.

Execution held not proved: In suit to quiet title, introduction of transcript of record of quitclaim deed, and copies of letters, made prima facie case for grantee in deed, but other evidence held to have overcome this prima facie case and to show deed was never executed. Young v. Engdahl [N. D.] 119 NW 169.

41. Worman v. Seybert [N. J. Law] 73 A 529.

42. Worman v. Seybert [N. J. Law] 73 A 529. Power of attorney competent when witness testified that he was acquainted with handwriting of person who executed it and of attesting witness, and identified their signatures, and they were nonresidents. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819.

43. Where written transfer of mortgage was only collateral to main issue, proof of its execution by attesting witness was not necessary. Prescott v. Fletcher [Ga.] 65 SE 877.

44. Probate of deed valid under Code 1883, c. 27, § 1250, relating to probate of deeds acknowledged before commissioner in foreign state. Deed admissible. Cozad v. McAden, 150 N. C. 206, 63 SE 944. **Duplicate deed to state land,** issued in lieu of deed which was lost or destroyed, duly authenticated with seal of commissioner of state lands, competent. Thornton v. Smith [Ark.] 115 SW 677. Under Sayles' Ann. Civ. St. 1897, art. 2312, as amended by Gen. Laws 1907, p. 308, c. 165, making **instruments which have been recorded for 10 years** competent though not proved or attested as required by law, bond for deed recorded for 40 years was competent, though not attested by two witnesses. Millwee v. Phelps [Tex. Civ. App.] 115 SW 891. Under Laws Tex. 1907, p. 308, c. 165, an instrument that has been recorded more than 10 years is, under certain circumstances, admissible without proof of execution. Downs v. Blount [C. C. A.] 170 F 15. This act is retroactive and is not invalid on this account. Id. Under Tex. Laws 1907, p. 308, c. 165, that deed recorded more than 10 years shall be competent without proof of execution, though defectively proved or acknowledged, married woman's deed, not properly acknowledged, but otherwise valid, was competent, having been recorded more than 10 years. Id. Under Code Civ. Proc. § 955, **an instrument which had been recorded in the surrogate office of New York city for more than 20 years** was presumptive evidence of the facts recited therein. Lalor v. Tooker, 130 App. Div. 11, 114 NYS 403. Deed inadmissible even in partition suit without proof of its execution, or without **filing for three days.** Merrill v. Bradley [Tex. Civ. App.] 121 SW 561. **Recorded mortgage** presumed to have been acknowledged, and hence competent under Code, § 937, making any acknowledged instrument (except note, bill of exchange, or will) competent. In re Pirie, 133 App. Div. 431, 117 NYS 753. Party, by testimony, held to have denied execution of lease, within meaning of St. 1898, § 4192, that **instrument purporting to be signed and executed by person proves itself,** unless execution of it is specifically denied. Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550. Deed, or assignment of lease, delivered, competent evidence, if **recorded before trial,** though

Alterations or mutilations must be explained by the party offering the evidence, if it is relied on [45] and is a relevant portion of the instrument.[46] Errors may be explained.[47]

Standard mortality tables are competent and admissible [48] when relevant.[49]

An ancient record or document, which comes from a proper custody and is free from any indications of fraud or invalidity, proves itself.[50] In some jurisdictions, however, corroborative evidence, such as proof of possession under or reliance on the instrument, is required.[51] Where there are suspicious circumstances, the corroboration must be at least sufficient to raise a reasonable presumption of gen-

not recorded before commencement of suit. Abbot v. La Point [Vt.] 73 A 166. Office of copy of deed, which is not **acknowledged,** is incompetent. If original is acknowledged, that fact must appear on copy. Hudson v. Webber, 104 Me. 429, 78 A 184. **Deed, not acknowledged or recorded,** is not competent (under Laws 1821, c. 36) except as against grantor and heirs. Id. If **deed** is **recorded on proper probate** it is admissible without further proof of its authenticity, unless adverse party files affidavit of forgery. Leverett v. Tift [Ga. App.] 64 SE 317. Though **deed** more than 30 years old is not, for same reason, admissible as ancient document, yet, if it is **recorded on proper probate,** party against whom it is tendered must file affidavit of forgery before burden of proving authenticity is cast upon party offering it. Id. Where copy of judgment authorizing commissioner to make deed was in evidence, deed made by him, with **approval of court indorsed** thereon, was competent without copy of order of court approving deed. Conley v. Breathitt Coal, Iron & Lumber Co. [Ky.] 113 SW 504. **Omission of revenue stamp** from instruments required to be stamped by Act of Congress of 1898 does not make instrument incompetent unless there was an attempt to evade the tax, and party objecting must prove fraudulent intent. Ohio River Junction R. Co. v. Pennsylvania Co., 222 Pa. 573, 72 A 271. Instrument not stamped as required by federal Revenue Act of 1898 became competent after repeal of act in 1902, since later act did not save right to enforce tax on unstamped instruments nor continue penalties in force. Id.

45. That train reports by conductors had been torn from stubs did not constitute mutilation so as to make them inadmissible. Minnesota & Dakota Cattle Co. v. Chicago & N. W. R. Co. [Minn.] 122 NW 493. Rule that one offering written instrument has burden of satisfactorily accounting for alterations not applicable where, though written assignment of certificate of stock was in evidence, it was not necessary, as delivery alone passed title. In re Darrow's Estate, 64 Misc. 224, 118 NYS 1082.

46. Where part torn from blue print had nothing to do with issues, remainder was competent. Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88, 89 NE 723.

47. Evidence competent to explain error in street railway rule if rule were admissible, in negligence case. Birmingham R., L. & P. Co. v. Morris [Ala.] 50 S 198.

48. Wigglesworth life tables are accepted as standard and are competent. Winn v. Cleveland, etc., R. Co., 239 Ill. 132, 87 NE 954. Standard life tables are admissible to show probable duration of life. Winn v. Cleveland, etc., R. Co., 143 Ill. App. 71.

49. Mortality tables competent to show life expectancy. Pittsburgh, etc., R. Co. v. Rogers [Ind. App.] 87 NE 28; Piper v. Boston & M. R. Co. [N. H.] 72 A 1024. Life tables competent, in connection with evidence of physical condition, habits, etc., of deceased, death being alleged to have been caused by intoxicants. Peterson v. Brackey [Iowa] 119 NW 967. Mortality tables (Carlisle's) competent when it appears that plaintiff's earning power has been permanently impaired by defendant's wrong. Acken v. Tinglehoff, 83 Neb. 296, 119 NW 456.

50. Instrument executed in 1838 is admissible as ancient document without proof of execution. Sims v. Sealy [Tex. Civ. App.] 116 SW 630. If **deed** is more than 30 years old and otherwise entitled to admission as ancient document, it needs no further proof of execution, whether recorded or not, to make it prima facie competent. Leverett v. Tift [Ga. App.] 64 SE 317. Where deed more than 30 years old purported to have been executed by attorney in fact, and possession under deed was shown, execution of power of attorney would be presumed. McDonald v. Hanks [Tex. Civ. App.] 113 SW 604. Affidavits made to correct error in grantee's name in deed, attached to **abstract of title** and handed down from attorney of one of signers to his son, who produced it, admissible as ancient documents, being made in 1855 and received by son in 1890. Coleman v. Bruch, 132 App. Div. 716, 117 NYS 582.

Scope of rule: Rule as to ancient documents and records applies to their admission in evidence, not to their construction when admitted. Salter v. Corbett [Kan.] 102 P 452.

51. To be competent without proof of execution, an ancient instrument must be free from suspicion, come from proper custody, and must have been acted upon so as to afford corroborative evidence of genuineness. Morgan v. Tutt [Tex. Civ. App.] 113 SW 958. Instrument 30 years old, coming from proper custody, and acted upon and thus corroborated, held competent without proof of execution. Millwee v. Phelps [Tex. Civ. App.] 115 SW 891. Document competent as ancient instrument if it is more than 30 years old, if it comes from proper custody, is free from suspicion, and in some jurisdictions, but not in Texas, if possession has been had under it. West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228. Deed held competent. Id.

uineness.[52] The presumption of genuineness is not, of course, conclusive.[53] Recitals in ancient deeds are competent evidence of the facts recited.[54] A written instrument is to be considered as a whole, with indorsements if relevant,[55] but a certificate of recordation on an instrument should be separately offered and identified.[56]

Proof of handwriting.[57]—See 11 C. L. 1394—One familiar with another's signature may identify it,[58] and one who testifies that a signature is not genuine, from having seen the person whose signature is in question write, may, without argument, point out the differences between the genuine and disputed signatures.[59] Where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting therein may be compared with the disputed writing.[60] A standard need not be proved by testimony of the person who saw the signature written,[61] but may be proved by any evidence, direct or circumstantial, except opinions.[62] Where signatures about which there is no dispute and which are not in controversy can be obtained and offered, it is within the court's discretion to exclude signatures which are in dispute;[63] but where it is claimed that a party purposely used different signatures in different transactions, and all the signatures are disputed, proof of admissions of signatures should be received.[64]

(§ 7) *B. Books of account and other private records.*[65]—See 11 C. L. 1395—It is generally held that where books of account or other records are shown to have been regularly kept[66] and are properly identified,[67] original entries therein,[68] made in the

52. Morgan v. Tutt [Tex. Civ. App.] 113 SW 958. Transfer of bond dated 1860 for deed, indorsed on bond, was obscured by paper pasted over it, and predecessors of parties relying on it at trial had never claimed under it, but had occupied land in recognition of transferror's rights. Transfer inadmissible. Id.

53. Unacknowledged ancient instrument, coming from doubtful custody, may be rejected as evidence where credible witness, having knowledge of obligor's handwriting, rejected signature as not genuine. Peterson v. Bauer, 83 Neb. 405, 119 NW 764. Deed offered as ancient document may be attacked as forgery without filing of affidavit, also though it is recorded, but burden is on party attacking it. Leverett v. Tift [Ga. App.] 64 SE 317.

54. Recitals in deed 26 years old competent to show chain of title. McMahon v. McDonald [Tex. Civ. App.] 113 SW 322. Recital in ancient deed referring to execution of another deed to aid description competent proof of execution of such deed. Ryle v. Davidson [Tex. Civ. App.] 116 SW 823. Recitals of sheriff's deed more than 30 years old, regarding sale and issuance of execution, held conclusive. Gillean v. Witherspoon [Tex. Civ. App.] 121 SW 909.

55. When notes were offered in evidence, they carried with them indorsements showing transfer of property for which notes were given, with notes and debts thereby evidenced. Union Iron Works Co. v. Union Naval Stores Co. [Ala.] 47 S 652.

56. Certificate indorsed on instrument pursuant to B. & C. Comp. § 5357, showing time and place of recordation, is not part of "duly acknowledged instrument" under § 5355, making such instrument admissible without proof of execution. Such certificate must be separately identified and offered to make it evidence. Ayre v. Hixson [Or.] 98 P 515.

57. See, also, notes in previous articles.

58. Fitch v. Martin [Neb.] 122 NW 50.

59. Nagle v. Schnadt, 239 Ill. 595, 88 NE 178.

60. Barnes v. U. S. [C. C. A.] 166 F 113. Where paper has been admitted in evidence which tends to support some issue in case upon which an acknowledged signature appears, the jury may compare the admitted signature with a disputed one to determine the genuineness of the disputed signature. Whitaker v. Mastin, 143 Ill. App. 195.

61. Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 87 NE 630.

62. Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 87 NE 630. Proper to admit proof of signatures of person in order to establish standards for comparison with other alleged signatures. Williams v. Smith [R. I.] 72 A 1093.

63, 64. Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 87 NE 630.

65. **Search Note:** See notes in 5 C. L. 1348; 11 Id. 1396; 52 L. R. A. 546, 689, 833; 2 L. R. A. (N. S.) 401; 3 Id. 1190; 6 Id. 325; 2 Ann. Cas. 842.

See, also, Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354; 17 Cyc. 365-398; 9 A. & E. Enc. L. (2ed.) 897.

66. Rule that litigant's books are inadmissible in his own favor is subject to exceptions, and **accounts of public work** shown to be accurate and carefully kept, and not made under any reason to falsify, may be accepted as correct, except as to disputed items. Shea v. Sewerage & Water Board [La.] 50 S 166. **Books showing weights of cotton** before and after picking and removing damaged portions held competent to show amount of damage, when evidence showed that books were correctly kept by weighers and pickers, and frequently audited and balanced. Grenada Cotton Compress Co. v. Atkinson [Miss.] 47 S 644.

usual course of business, at or near the time of the transaction to which they relate,[69] by the person in charge of such books,[70] and shown to be true and correct,[71] are competent evidence of the facts to which they relate, for or against the party to whom the books or records belong.[72] Entries made by one person from information given by others are competent though not strictly original, when shown to have been regularly made in the usual course of business,[73] and when sufficiently authenti-

Books kept by one partner but open to inspection by all are competent evidence as between them and presumptively correct. Donaldson v. Donaldson, 237 Ill. 318, 86 NE 604.

67. Improper to allow items from ledger to be read before ledger was identified and authenticated. Corkran v. Taylor [N. J. Law] 71 A 124.

68. Leaf taken from claimant's book of original entry showing items of account sued on competent. Wagoner Undertaking Co. v. Jones, 134 Mo. App. 101, 114 SW 1049. Original entries in plaintiff's books competent in action on account. Childress v. Smith-Echols-Burnett Hardware Co. [Ala.] 50 S 322. Where entries in book were made from cartage slips or delivery tickets at or about the time they were signed, the book was one of original entries. Philadelphia v. Tradesmen's Trust Co., 38 Pa. Super. Ct. 286.

69. Original entries in books of account made in course of business are competent. Avery v. Tucker, 137 Mo. App. 428, 118 SW 672. Entries held competent where shown to have been made when reports were made of receipt or payment, and no inaccuracies were shown. Lemma v. Blanding, 139 Wis. 156, 120 NW 842. **Bank's books,** showing entries of credits and debits, competent to prove time of transaction when entries were as nearly original as was possible and were shown to have been regularly and accurately made in usual course of business. Reyburn v. Queen City Sav. Bank & Trust Co. [C. C. A.] 171 F 609. Entries in discount book of bank competent to prove time of transactions referred to when accompanied by testimony of clerk who made them that they were correct, made at or near time of transaction in question, in regular course of business. Id. **Conductor's reports of movements of trains,** transcribed from train books, are competent evidence of train movements. Minnesota & Dakota Cattle Co. v. Chicago & N. W. R. Co. [Minn.] 122 NW 493. **Entries in collection register,** showing payments on judgment, identified by party, held competent. Fitch v. Martin [Neb.] 122 NW 50. **"Loading sheet,"** identified by loading clerk who made it and who checked off items of freight as received, in regular course of his duties, competent evidence of receipt of freight, where clerk said he had no recollection of facts and that memory was not refreshed by sheet. Glazer v. Old Dominion S. S. Co., 113 NYS 979. **Entries in testator's books of account** competent to prove advancement to daughter, mentioned in will, by reference to books, were competent, being shown correct, and being made in regular course of business. In re Bresler's Estate, 155 Mich. 567, 15 Det. Leg. N. 1097, 119 NW 1104.

70. Written record of sale, so far as relevant to transaction in issue, competent as memorandum made by agent acting for both parties. Kendall v. Boyer [Iowa] 122 NW 941. Entries made in books by clerk in regular course of business competent, and when clerk had left state and his handwriting had been proved. Sims v. American Ice Co., 109 Md. 68, 71 A 522.

71. Books may be made competent without testimony of disinterested persons that they have settled by them and found them correct, such being effect of removal of incompetency of witnesses based on interest. In re Bresler's Estate, 155 Mich. 567, 15 Det. Leg. N. 1097, 119 NW 1104. Account of sales of cattle held competent so far as shown correct by plaintiff, who was present when sales were made, being incompetent as to item not shown correct. Gulf, etc., R. Co. v. Lampkin [Tex. Civ. App.] 116 SW 128. Heading in account book held competent where bookkeeper testified that she wrote it from her knowledge and under instructions from plaintiffs. Taplin v. Marcy, 81 Vt. 428, 71 A 72. Book entries **held incompetent** where witness testified that some were made by him and some by others and that he did not see the latter made. King v. Western Union Tel. Co. [S. C.] 65 SE 944. Book kept by railway clerk showing time of receipt of car of stock and time when stock was unloaded and reloaded held incompetent where clerk was not produced to testify to mode of keeping book and correctness of entries. Missouri, K. & T. R. Co. v. Davis [Okl.] 104 P 34. Books of weighmaster held incompetent to show weights of lumber shipments when they were not shown to be correct and accurate. Illinois Cent. R. Co. v. Butterfield Lumber Co. [Miss.] 49 S 179. Entries in account books held inadmissible without proof, required by St. 1898, § 4186, that "entries are just to the best of his knowledge and belief." Jones v. De Muth, 137 Wis. 120, 118 NW 542. Where person entered in book lumber received, not knowing where it came from, and there was no evidence tending to show entries made in book were correct, or that person making such entries was dead or insane or beyond jurisdiction of court, it was inadmissible in action on contract for sale of lumber. North Birmingham Lumber Co. v. Sims [Ala.] 48 S 84.

72. Partnership books of account competent for or against parties. Standard Amusement & Mfg. Co. v. Champion, 76 N. J. Law, 771, 72 A 92. Book purporting to contain records of business of association held competent in favor of stranger against association to show its acts. Tarbell v. Gifford [Vt.] 72 A 921. Minutes of directors of corporation competent to show contractual intent of corporation and authority of officers, though not binding on strangers. Fleming v. Reed [N. J. Err. & App.] 72 A 299.

73. Time records in which bookkeeper kept time of men employed competent, though made from reports furnished her by foremen, hers being only permanent record. Wells v. Royer Wheel Co. [Ky.] 114 SW 737.

cated by the entrant and by those having personal knowledge of the facts at the time.[74] Books of secondary entry, such as ledgers, are not competent without the books of original entry,[75] but as between members of a partnership, entries in the ledger, made in regular course of business, are competent,[76] though it is held that such entries must have been made contemporaneously with the transaction recorded.[77] Private self-serving memoranda, not a part of regular accounts,[78] such as private entries showing loans of money,[79] are incompetent. Under some statutes book entries are incompetent to prove payments of more than a certain amount.[80] Parol evidence is competent to explain entries which are uncertain or abbreviated,[81] and other books or entries may be received for this purpose, though incompetent in themselves.[82] The testimony of persons who kept records is competent;[83] books

Where system of time slips was kept on which employes kept account of time and materials and books were also kept, books of account were admissible, either with or without time slips. Corkran v. Taylor [N. J. Law] 71 A 124. Entries in **books of commission house** selling hogs, made from tickets showing weights, competent. Afflick v. Streeter, 136 Mo. App. 712, 119 SW 28. That entries in **books of bank** were made from memoranda furnished by other employes did not make them incompetent. Barclay v. Deyerle [Tex. Civ. App.] 116 SW 123.

74. Books of account made up by bookkeeper from slips turned in by foreman competent, authenticated by foreman, though slips had been destroyed. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766. Hospital records, made by custodian from slips handed her by physician in charge of case, she having no personal knowledge of facts, and it not appearing that physician's testimony could not be obtained, held incompetent. Delaney v. Framingham Gas, Fuel, & P. Co., 202 Mass. 359, 88 NE 773.

75. Schlicher v. Whyte [N. J. Err. & App.] 71 A 337. Where new ledger did not purport to contain copy or substance of entries in book of original entries, which was destroyed, nor was any witness produced who was able to say that lumping charges, either in old ledgers or new ledger, were composed of items known to him to have been furnished to defendant, it was inadmissible. Scranton Trust Co. v. Hartshorn, 36 Pa. Super. Ct. 208. Where ledger of telephone company was not book of original entries but such entries were made from bill which in turn was made from original charges on tickets, it was incompetent to show toll charges. Bell Tel. Co. of Missouri v. Geary, 143 Ill. App. 311.

76. Since each partner acts as agent for other, and bookkeeper is agent of both, and entry against one is in nature of admission. Schlicher v. Whyte [N. J. Err. & App.] 71 A 337.

77. Books of partnership not so kept held inadmissible upon statement of account between partners. Donaldson v. Donaldson, 142 Ill. App. 21.

78. Loose sheets, written by one partner, purporting to show withdrawals of money from firm, not competent, not being part of regular books of account and not having been seen by other partner. Donaldson v. Donaldson, 237 Ill. 318, 86 NE 604. Memoranda of injury to crops by trespassing stock, not made at time, and not otherwise authenticated, incompetent. Atlanta, etc., R. Co. v. Brown [Ala.] 48 S 73. Two parties entered into oral contract for work, and wife of one party under his instructions, entered in a book a memorandum of the contract before any work was done or materials furnished. Held entry was self-serving and incompetent as book account. Deatherage v. Petruschke, 106 Minn. 20, 118 NW 153.

79. Entry in diary of payment on mortgage made by mortgagor's wife, from information furnished by husband, incompetent. Stabler v. Clark, 155 Mich. 26, 15 Det. Leg. N. 834, 118 NW 605. Entries in private pocket memorandum books, owned by maker of note, showing notes which he owed and some payments, and reciting that defendant held insurance policy as security, entries not being dated, incompetent in action by cosurety against defendant to share in assignment of policy. Little v. Berry [Ky.] 113 SW 902. Page from decedent's ledger, containing pencil entry showing payment of $1,000 and $500 due, incompetent, in action for debt due decedent. Carter v. Catchings [Miss.] 48 S 515.

80. Under St. 1898, § 4187, entries in account books are incompetent to prove payments of more than $5 at one time. Kellogg Lumber & Mfg. Co. v. Webster Mfg. Co., 140 Wis. 341, 122 NW 737. Entries of payments and loans of $150 each incompetent under St. 1898, § 4187, which excludes items relating to delivery of money in sums over $5. Dohmen v. Blum's Estate, 137 Wis. 560, 119 NW 349. Item showing giving of order for $150 equivalent to delivery of cash in that amount. Id.

81. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906. Where figures and symbols used in books of account are not self-explanatory, evidence must be introduced to make them intelligible. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114.

82. Note register of bank, being mere memorandum, would be incompetent alone, but would be competent to aid and explain entries in other books. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906. Where, in suit against bank for accounting, defendant pleaded settlement, and showed that checks, pass books, vouchers, etc., had been turned over to plaintiffs, pass books were admissible as part of transaction, though not best evidence of debits of plaintiff's account. Richey v. Farmers' & Merchants' Sav. Bank [Iowa] 121 NW 2.

83. Testimony of persons who made regu-

and memoranda may be used by them to refresh their recollections while testifying.[84] Statements of account, taken from books, are incompetent,[85] but summaries of voluminous accounts are sometimes admitted.[86] The sufficiency of the foundation for book entries is for the trial court.[87] Where the matter is controlled by statute, the foundation laid should conform to the requirements of the statute under which the evidence is offered.[88]

(§ 7) *C. Public and judicial records and documents.*[89]—See 11 C. L. 1307—Public, official documents and records,[90] made or kept by sworn officials, are competent evidence of the facts required by law to be shown therein,[91] when such documents or records have been identified and shown to be authentic.[92] Since it is in many

lar weather observations, and records regularly kept by them, competent to show state of weather. Ducharme v. Holyoke St. R. Co. [Mass.] 89 NE 561.

84. See Examination of Witnesses, § 1.

85. Statements of account between one of defendants and third person not a party incompetent. Augusta Naval Stores Co. v. Forlaw [Ga.] 65 SE 370. A statement from books of account, though shown to be correct according to them, is incompetent without laying a foundation for the books themselves. Richardson v. Anderson, 109 Md. 641, 72 A 485.

86. Where accounts of work done and materials furnished were very voluminous, and examination of details would require vast amount of time and labor, it was proper to receive in evidence summaries made by qualified persons. Shea v. Sewerage & Water Board [La.] 50 S 166.

87. Walker Bros. v. Skliris, 34 Utah, 353, 98 P 114.

88. Where entries were offered as ordinary book accounts, and foundation laid as required by St. 1898, § 4186, they could not be introduced and made competent under § 4189, relating to "entries in book or other permament form other than those mentioned in §§ 4186, 4189b." Dohmen v. Blum's Estate, 137 Wis. 560, 119 NW 349. Hospital records, made prior to enactment of St. 1905, c. 330, requiring hospital records to be kept, and not the kind of records there mentioned, held incompetent. Delaney v. Framingham Gas, Fuel & P. Co., 202 Mass. 359, 88 NE 773.

89. Search Note: See notes in 5 L. R. A. (N. S.) 938; 7 Id. 718; 95 A. S. R. 763; 9 Ann. Cas. 882.

See, also, Evidence, Cent. Dig. §§ 1230-1387; Dec. Dig. §§ 325-349; 17 Cyc. 296-363; 19 Id. 366; 9 A. & E. Enc. L. (2ed.) 880; 8 A. & E. Enc. P. & P. 19.

90. Under Code Civ. Proc. § 2627, **decree of probate court** is presumptive evidence of matter determined by that court relative to a will. Drake v. Cunningham, 127 App. Div. 79, 111 NYS 199. Under Code Civ. Proc. § 955, **records of surrogate** which had been recorded twenty years held admissible to show data of decedent's death in action involving validity of deed. Lalor v. Tooker, 130 App. Div. 11, 114 NYS 403. **Record of patent** from United States competent under Comp. Laws, § 324. Reno Brew. Co. v. Packard [Nev.] 103 P 415. A public **record kept pursuant to law of sister state,** when properly proved, held admissible in evidence in the courts of North Dakota as prima facie proof of facts therein recorded. Miller v. Northern Pac. R. Co [N. D.] 118 NW 344. Judgment roll of another state is admissible when authenticated as prescribed by Rev. St. U. S. § 905 (U. S. Comp. St. 1901, p. 677), although such authentication did not comply with Code Civ. Proc. § 952, which only provides for authentication of copies of records of courts of foreign countries. Skrillow v. Rubonovitz, 113 NYS 835.

91. Under West Virginia statute, **certificate of secretary of state** declaring resolution increasing capital stock of corporation authorized by law is prima facie evidence that notice of meeting of stockholders to increase capital stock was given. Sherwood v. Wallin, 154 Cal. 735, 99 P 191. **Official certificate of register or receiver of federal land office** to any fact or matter of record in his office is competent evidence to prove the fact, under the statute in regard to evidence and depositions. Black v. Chicago, B. & Q. R. Co., 237 Ill. 500, 86 NE 1065. Recitals of facts in **certificate of final entry on public land** are evidence of facts, such as date of settlement. Davis v. Chamberlain, 51 Or. 304, 98 P 154. **Death certificate,** made by physician as required by statute, is public record, and prima facie proof of facts stated. St. 1898, § 4160. State v. Pabst, 139 Wis. 561, 121 NW 351. **Mayor's docket,** properly identified, competent to prove conviction. O'Neil v. Adams [Iowa] 122 NW 976. **Justice's docket entries** are evidence only of facts which he is required to record; recital, tending to show suit was not instituted until after notice of intention to sue in circuit court, was not evidence of the fact. Fabien v. Grabow. 134 Mo. App. 193, 114 SW 80. **Papers of discharge from insane asyium** are not by law authorized to be recorded in Book of Settlements of superior court; copies incompetent. In re Thorp's Will, 150 N. C. 437, 64 SE 379. **Affidavit** of person that he had had in his possession a certain conveyance of a certificate, and that instrument was lost, was not entitled to be recorded in deed book; hence, copy of record incompetent without proof of execution of original. White v. McCullough [Tex. Civ. App.] 120 SW 1093.

92. Tests of identity: As a general rule a record, to be admissible in evidence, must be produced by the one charged with the lawful custody thereof. Harbison & Walker Co., So. Department v. White [Ky.] 114 SW 250. "Emanuel Dasso" held **idem sonans** with "Emanullo Tasso," and, hence, order of commitment was not inadmissible without proof that defendant named in commitment and appellant here were same persons. Napa

cases impracticable to produce the originals in court,[93] public records are almost universely provable by copy or transcript, duly certified or authenticated[94] and

State Hospital v. Dasso, 153 Cal. 698, 96 P 355.

Rule appplied to particular matters: Clerk of circuit court has no authority to authenticate a copy of a paper which legally belongs to the **record of the appellate court.** Royal Ins. Co. v. Texas & G. R. Co. [Tex. Civ. App.] 115 SW 123. **Letter in land office,** which was ancient document was not incompetent because not in proper file, where it was found in proper office. Keck v. Woodward [Tex. Civ. App.] 116 SW 75. **Marriage certificate** by justice of peace in another state does not prove itself. Official character and signature of justice must be proved, and fact that he executed certificate in his official capacity. Holtman v. Holtman [Ky.] 114 SW 1198. Document offered as **certificate of birth** inadmissible without showing that it was contained in some record, or was duly attested copy, or verified transcript, made competent by some statute relating to proof of records. Lee v. Sterling Silk Mfg. Co., 134 App. Div. 123, 118 NYS 852. **Warrant** signed by one as individual only not admissible, as parol evidence was incompetent to show that signer was justice of peace. Reach v. Quinn [Ala.] 48 S 540. **Mutilated records** competent if sufficient is left to identify lands. Ryle v. Davidson [Tex. Civ. App.] 116 SW 823.

93. See, also, ante, § 4, Best and Secondary Evidence.

94. Under Sayles' Ann. Civ. St. 1897, art. 2308, a **copy from records of office of state treasurer** of an account, duly certified by him, showing the payment of principal and interest due the state on certain school land, is admissible as original evidence. Zettlemeyer v. Shuler [Tex. Civ. App.] 115 SW 78. **Transcript of judgment** of Ohio court properly certified, as required by U. S. Rev. St. § 905, under hand and seal of clerk and judge. Bohlander v. Heikes [C. C. A.] 168 F 886. An authenticated copy of a judgment may be introduced in evidence to prove the existence of such judgment. People v. Paul, 143 Ill. App. 566. It is where facts are sought to be proved, an estoppel or the like, that it is necessary to introduce the judgment roll. Id. Upon trial of a garnishment case, to prove the existence of a judgment upon which summons of garnishment was issued, a duly certified copy of such judgment is evidence. Hirsch & Co. v. Lumbermen's Supply & Equipment Co., 130 Ga. 555, 61 SE 225. **Transcript of court proceedings** in another state certified only by judge to effect that transcript was complete, incompetent. Rev. St. U. S. § 905, and Mills' Ann. Code, § 359, require also certificate of clerk. Henry Inv. Co. v. Semonian [Colo.] 100 P 425. That transcript showed some proceedings taken in superior court, and others in court of common pleas, was immaterial, where statute had been passed abolishing superior court and transferring business to common pleas court. Bohlander v. Heikes [C. C. A.] 168 F 886. Certified copy of **record of resurvey** is competent under Rev. St. 1895, art. 2307, requiring such record. Sullivan v. Salis [Tex. Civ. App.] 114 SW 456. Copy of field notes of survey must be certified as correct to make them competent. Id. Certificate of surveyor general to **copy of record of field notes** of government survey makes copy competent without testimony of witnesses to authenticate it, or to prove examination of it as compared with record. Kellogg v. Finn [S. D.] 119 NW 545. Copy of surveyor's notes, as recorded in land office record, properly certified, competent on trend of lines and distances run to determine and locate corner. Id. Certified copy of patent, book of field notes of survey of county, and certified plat from land office, held original evidence; not necessary to file with papers three days before trial, and give notice. Hackbarth v. Gordon [Tex. Civ. App.] 120 SW 591. **Exemplification of books and records of general land office,** certified by recorder, competent evidence of truth of recitals, under general rules of evidence. Black v. Chicago, B. & Q. R. Co., 237 Ill. 500, 86 NE 1065. Copies of archives in general land office competent. Keith v. Guedry [Tex. Civ. App.] 114 SW 392. Certified **copies of application for land as homestead,** and affidavit, and of proof of residence required to perfect title, competent, under Code, § 4635. Des Moines Sav. Bank v. Kennedy [Iowa] 120 NW 742. Certified **copy of record of patent** competent under Utah statutes. Tate v. Rose [Utah] 99 P 1003. Certified **copy of record of deed** which purports to be under corporate seal is competent though record does not contain copy of seal. Kirby's Dig. § 756, provides that no further proof of execution is necessary. Sibly v. England [Ark.] 119 SW 820. **Copies of letters of land commissioner,** preserved in ordinary way, are copies of records, and competent evidence. McKee v. West [Tex. Civ. App.] 118 SW 1135. Under Georgia statutes, certified **copy of will** must be authenticated by certificate signed by clerk of court of ordinary, and if there is no clerk, that fact must appear in certificate. and ordinary must sign as ex officio clerk of court of ordinary. Phillips v. Babcock Bros. Lumber Co., 5 Ga. App. 634, 63 SE 808. Copy of will, unaccompanied by certificate of judge of probate, signed and sealed, is not "exemplified will" so as to be competent under Civ. Code S. C. 1902, § 2994. Pineland Club v. Robert [C. C. A.] 171 F 341. Entry on probate court records of what purported to be copy of will, accompanied by certificate of judge, but not under seal, and not showing admission of will to probate nor order allowing substitution, held not exemplified copy of will nor proper substituted record, and not competent under S. C. Code 1902, § 2994, nor under Act S. C. Dec. 20, 1866, § 7. Id. Copy of will, without certificate of judge of probate, signed and sealed, is not "exemplification of will," under Civ. Code S. C. 1902, § 2994, and not competent. Id. Purported copy of will, with certificate signed by former judge, but not under seal of court, there being no proof of probate of original or registration or substitution of copy for lost original, held not competent under Acts S. C. Dec. 20, 1866, § 7. Id. **Copies of transfer of lease of school lands** certified and attested

such copies sometimes constitute the best evidence as compared with parol testimony.[95] Testimony of one who has examined record is usually competent, however, to prove that a certain fact does not appear therein,[96] and a mutilated record may be aided by parol.[97] So, also, a latent ambiguity in a decree may be explained by parol,[98] and defects in a return of service may sometimes be supplied by parol.[99] The original of a record is competent where the certified copy is waived.[1] The entire record of a cause should be offered when relied upon.[2]

Public statutes, laws and ordinances. See 11 C. L. 1399—Statutes are usually provable by authorized published compilations.[3] Ordinances may be proved by records, when provided for by law,[4] and when the records comply with statutory requirements,[5] or they may be authenticated by the record of the legislative body by which they were enacted.[6] The law of a foreign country may be proved by the introduction in evidence of its statutes and judicial decisions or by testimony of experts learned in the law or by both.[7] Where the question is one of general law, decisions of the federal courts are not evidence of the law of a state where the court sits.[8]

(§ 7) *D. Proceedings to procure production of documentary evidence.*[9]—See 11 C. L. 1399—Courts may compel the production of documentary evidence,[10] and in

as required by statute are prima facie evidence of facts recited, under Sayles' Ann. St. 1897, art. 2306. McKee v. West [Tex. Civ. App.] 118 SW 1135.

95. Testimony as to contents of documents in general land office incompetent; best evidence is copy certified under Rev. St. 1895, art. 2308, or an examined (common law) copy. Lewright v. Walls [Tex. Civ. App.] 119 SW 721. Record of court must be proved by properly certified copy, and cannot be proved by deposition into which parts of record are copied. Letcher's Trustee v. German Nat. Bank [Ky.] 119 SW 236.

96. Best method of proving that no administration was ever had upon a particular estate is to introduce evidence of ordinary, or of another who has examined records in court where letters should have been granted, that no such letters are shown by such records. Compton v. Fender [Ga.] 64 SE 475.

97. Where record of deed has been destroyed or mutilated, as by having line drawn through acknowledgment, fact that deed was duly acknowledged and recorded may be shown by parol evidence and by deed itself. Williams v. Butterfield, 214 Mo. 412, 114 SW 13.

98. A latent ambiguity in a decree may be explained by parol; thus person given erroneous name may be properly identified. Taylor v. McCowen, 154 Cal. 798, 99 P 351.

99. Under Laws 1907, p. 538, c. 373, § 1, testimony of officer who served notice of forfeiture of school lands is competent to supply defects in return of services (as that no one was on land where notice was posted). But such testimony is not conclusive. Petersilie v. McLachlin [Kan.] 101 P 1014.

Return of service of process: See Process § 5.

1. Where parties agreed in open court that original records should be received, they could not afterwards object that certified copies were best evidence. Hinkle v. Smith [Ga.] 65 SE 427. Where a certified copy of a record of a probate court is waived, it was not error to admit the original record. Code 1896, §§ 1816, 1819. North Birmingham Lumber Co. v. Sims [Ala.] 48 S 84.

2. Watkins v. Northern Coal & Coke Co. [Ky.] 119 SW 225.

3. Proper mode of proving statute of another state is by published statutes, as authorized by law (Rev. St. 1895, art. 2304); cannot be proved by decisions of other state. Atchison, etc., R. Co. v. Smythe [Tex. Civ. App.] 119 SW 892.

4. Record of ordinance, in book kept for purpose, is competent to prove ordinance, under Burns' Ann. St. 1908, § 8654, making recordation presumptive evidence of passage. Pittsburgh, etc., R. C.o v. Rogers [Ind. App.] 87 NE 28.

5. Where statute requires publication of an ordinance and provides that a note stating date of publication shall be added to entry in book of ordinances, an ordinance is not admissible without proof of publication where there is no note showing publication in proper place. Atchison, etc., R. Co. v. Baker [Kan.] 98 P 804.

6. Record of village board showing passage of ordinance made ordinance competent. Village of Donovan v. Donovan, 236 Ill. 636, 86 NE 575.

7. Electric Welding Co. v. Prince, 200 Mass. 386, 86 NE 947. See ante, § 1A, Judicial Notice. See, also, Conflict of Laws, § 8. **Printed reports of adjudged cases** are competent to prove construction of laws of sister state. Hayward v. Sencenbaugh, 141 Ill. App. 395; Robinson v. Yetter, 143 Ill. App. 172.

8. Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 89 NE 193.

9. For production of documents in aid of preparation of case, as distinguished from production for evidence, see Discovery and Inspection, § 2.

Search Note: See note in 15 L. R. A. 138. See, also, Evidence, Cent. Dig. §§ 1540-1558; Dec. Dig. § 368; 16 Cyc. 1266-1268; 17 Id. 457-464; 23 A. & E. Enc. L. (2ed.) 166.

10. Order or corporation to produce any books, papers, or documents relating to merits of cause, is not unreasonable search and seizure. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —.

a proper case may issue a subpoena duces tecum.[11] Courts will not ordinarily order the production of public records which are open to inspection and provable by copy.[12] Previous notice to produce is unnecessary when papers are already in court,[13] and papers which are in court may be introduced though they have been obtained by illegal means.[14]

§ 8. *Evidence adduced in former proceedings.*[15]—See 11 C. L. 1399—Testimony of a witness at a former trial, involving the same issues,[16] between the same parties or their privies,[17] is competent when the proper foundation has been laid,[18] as by showing absence of the witness[19] or inability to procure his attendance or deposition,[20] as where the witness is dead[21] or beyond the jurisdiction of the court.[22] Such former testimony may be reproduced orally, if the witness who proposes to do

11. Not restricted by Const. art. 2, § 11 (Ann. St. 1906, p. 133), prohibiting unreasonable searches and seizures. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

12. City of Bluefield v. McClaugherty, 64 W. Va. 536, 63 SE 363.

13. Where letters were in court in possession of attorneys, and could have been produced, prior notice to produce was unnecessary. Hill v. Houser [Tex. Civ. App.] 115 SW 112.

14. Obtained by illegal order of court. New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 165 F 833.

15. Search Note: See notes in 3 C. L. 1370; 11 Id. 1400; 14 L. R. A. (N. S.) 488; 81 A. S. R. 358; 91 Id. 192, 193.

See, also, Evidence, Cent. Dig. §§ 2401-2423; Dec. Dig. §§ 575-582; 16 Cyc. 1088-1101, 1106-1110; 9 A. & E. Enc. L. (2ed.) 877.

16. Issue must be substantially the same in the two cases. Vandewege v. Peter, 83 Neb. 140, 119 NW 226. Testimony of witnesses in will contest incompetent in subsequent contest in which different will was involved. Spiers v. Hendershott [Iowa] 120 NW 1058. In action for false imprisonment, record in habeas corpus proceeding in which plaintiff was discharged was inadmissible, issue there being excess of jurisdiction of magistrate, and, in latter case, want of jurisdiction. Feld v. Loftis, 240 Ill. 105, 88 NE 281.

17. It must appear that the party against whom testimony is to be given, or his privy, was a party on the former trial. Vandewege v. Peter, 83 Neb. 140, 119 NW 226.

18. Sufficiency of predicate is largely discretionary with trial court. St. Louis S. W. R. Co. v. Boyd [Tex. Civ. App.] 119 SW 1154.

19. Testimony of witness on former trial preserved in official report and duly certified competent when witness was not present in court; party offering it need not, under statute, show that witness was not obtainable. Van Norman v. Modern Brotherhood of America [Iowa] 121 NW 1080.

20. When testimony of witness at former trial is offered on ground of **sickness** of witness, court should make finding of facts as to condition of witness, time of sickness, etc., so that facts will appear specifically on appeal. Smith v. Moore, 149 N. C. 185, 62 SE 892. Proper to allow testimony of witnesses on former trial to be read from bill of exceptions, where **absence of witnesses from county** was admitted, and it appeared that plaintiff had no means to procure their attendance or their depositions, and official reporter testified to correctness of transcript. Souchek v. Karr, 83 Neb. 649, 120 NW 210. Where plaintiff was unable to procure deposition of witness **absent from state,** the court was authorized by Ky. St. 1903, § 4643, to allow evidence given by him in a former trial to be introduced. Harbison & Walker Co., So. Department v. White [Ky.] 114 SW 250.

Insufficient showing where witness was in other county and no effort was made to produce him. Vandewege v. Peter, 83 Neb. 140, 119 NW 226. Merely presenting physician's certificate that witness was ill and unable to attend was not sufficient foundation for admitting testimony on former trial. Smith v. Moore, 149 N. C. 185, 62 SE 892. Mere fact that witness is sick and unable to attend is not ground for admitting stenographic notes of testimony at former trial, party should have asked for continuance when case was called. McCrorey v. Garrett [Va.] 64 SE 978. Testimony given at former trial or hearing not competent unless witness is dead, or insane, or beyond jurisdiction or is kept away by other party. McCall v. Alexander [S. C.] 65 SE 1021.

21. Testimony of witness since deceased is competent. Flint v. Atlas Mut. Ins. Co. [Iowa] 120 NW 1031.

22. Absence of witness from jurisdiction held sufficiently shown: Where it was shown that witness was defaulter and had left state, and that diligent efforts to locate him had been unsuccessful. Iowa Life Ins. Co. v. Haughton [Ind. App.] 87 NE 702. Where witness testified that another, who gave testimony in justice court, had left the state permanently, latter's testimony in justice court could be proved. Mette & Kanne Distilling Co. v. Lowrey [Mont.] 101 P 966. Testimony on former trial held competent when it was shown that witness had been absent three years, and no one knew where he was. St. Louis S. W. R. Co. v. Boyd [Tex. Civ. App.] 119 SW 1154. Proper foundation laid for proof of testimony of witness at former trial, where another witness testified that former witness had gone to another state, and letter had been received from him there a week before trial. Wimberly v. State [Ark.] 119 SW 668. Proper to admit proof of testimony on former trial where subpoena had been issued and sheriff had been unable to serve it as witness was out of state, according to information from those who ought to know. Pike v. Hauptman, 83 Neb. 172, 119 NW 231.

so can state it with satisfactory correctness,[23] though stenographic notes, when available, are held better evidence than oral testimony.[24] Such testimony may be proved by a transcript or statement of facts or bill of exceptions, provided such reproductions are properly authenticated.[25] Such testimony should usually be received in its entirety.[26] When a stenographic report of testimony is read, answers not responsive to questions may be excluded.[27]

The modern rule in most jurisdictions is that the record of a coroner's inquisition is not competent as evidence,[28] but the ancient rule to the contrary is still followed in some states,[29] and where such an inquisition is admissible at all it is admissible as a whole.[30]

§ 9. *Expert and opinion evidence. A. Conclusions and nonexpert opinions.*[31] See 11 C. L. 1401—Mere conclusions of the witness,[32] and opinions of nonexperts on

23. Where attorney, who took part in former trial and heard testimony and took some notes, could only reproduce part of witness' testimony, in substance, the testimony was incompetent. Vandewege v. Peter, 83 Neb. 140, 119 NW 226.

24. Oral testimony of witness incompetent to prove testimony of another at former trial, when stenographer's notes of testimony were available. Turner v. Southwest Missouri R. Co. [Mo. App.] 120 SW 128.

25. Held competent: An original bill of testimony on a former trial, approved by the judge and certified by clerk of circuit court and filed in court of appeals, is properly offered in evidence by attorney who took it from such files with consent of clerk. Harbison & Walker Co., So. Department v. White [Ky.] 114 SW 250. Statement of testimony of witness on former trial, taken from statement of facts an appeal, as certified by judge, admissible under Laws 1905, c. 26, when notice was given by serving copy by leaving it on floor of attorney's office, between 6 and 7 p. m., where clerk found it next day, service being good under Pierce's Code, § 345. Spencer v. Arlington [Wash.] 103 P 30.

Held incompetent: Statement in exceptions in another case inadmissible, especially when not shown what, if anything, was admitted thereby. Taplin v. Marcy, 81 Vt. 428, 71 A 72. Transcript of testimony on former trial held incompetent, where not shown to be correct, and shorthand notes were not produced, and witness had no independent recollection of testimony. Combest v. Wall [Tex. Civ. App.] 115 SW 354. Certificates to bill of exceptions having been rejected, it was proper to exclude proof of testimony of witness thereby. Young v. Kinney [Neb.] 122 NW 579.

26. Testimony of party on former trial admissible as whole; proper to refuse to admit only portions. Graham v. Dillon [Iowa] 121 NW 47.

27. Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897.

28. Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109. Report of coroner to auditor on cause of death, required to be made by statute, is not competent to show cause of death in action for damages. Id.

Note: It was formerly held that the record of a coroner's inquest on a dead body was competent, but not conclusive, evidence of the cause of death in all civil actions, because it was the result of an inquiry, made under competent public authority, to ascertain matters of public interest and concern. 1 Greenleaf, § 556. This rule still prevails in a few jurisdictions, but the great weight of modern authority is against it. Memphis & C. R. Co. v. Womack, 84 Ala. 149, 4 S 618; Germania Life Ins. Co. v. Ross-Lewin, 24 Colo. 43, 51 P 488, 65 Am. St. Rep. 215; In re Dolbeer's Estate, 140 Cal. 227, 85 P 695; Central R. Co. v. Moore, 61 Ga. 151; Union Cent. Life Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 NE 277; Aetna Life Ins. Co. v. Kaiser, 115 Ky. 539, 74 SW 203; Wasey v. Travelers' Ins. Co., 126 Mich. 119, 85 NW 459; State v. Cecil Co., 54 Md. 426; Louis v. Connecticut Mut. Life Ins. Co., 58 App. Div. 137, 68 NYS 683; Insurance Co. v. Schmidt, 40 Ohio St. 112; Cox v. Royal Tribe, 42 Or. 365, 71 P 73, 95 Am. St. Rep. 752, 60 L. R. A. 620; Aetna Life Ins. Co. v. Milward, 118 Ky. 716, 82 SW 364, 68 L. R. A. 285; Kane v. Supreme Tent K. of M. of W., 113 Mo. App. 104, 87 SW 547; Boehme v. Sovereign Camp, W. of W., 98 Tex. 376, 84 SW 422; Kinney v. Brotherhood of American Yeomen, 15 N. D. 21, 106 NW 44; Chambers v. Modern Woodmen, 18 S. D. 173, 99 NW 1107; Wigmore on Evidence, 1671.—From Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P 1109.

29. Coroner's inquisition is competent evidence in an action for death by wrongful act. City of Chicago v. Cohen, 139 Ill. App. 244.

30. If any part is outside the province of the jury or not competent evidence as against defendant, the defendant should guard against it by requesting an instruction to the jury to disregard it. City of Chicago v. Cohen, 139 Ill. App. 244.

31. Search Note: See notes in 3 C. L. 1377; 5 Id. 1354; 11 Id. 1405; 36 L. R. A. 64; 38 Id. 721; 39 Id. 310, 328; 7 L. R. A. (N. S.) 557; 11 Id. 539; 13 Id. 373; 14 Id. 289; 15 Id. 583; 30 A. S. R. 38; 3 Ann. Cas. 667; 7 Id. 463.

See, also, Evidence, Cent. Dig. §§ 2149-2307, 2392-2394, 2399, 2400; Dec. Dig. §§ 470-503, 568, 573, 574; 14 Cyc. 683; 17 Id. 25-255, 262; 12 A. & E. Enc. L. (2ed.) 488.

32. Nonexperts should be allowed to state only facts, not conclusions; but the giving of conclusions in evidence is not reversible error when facts are also stated. Bond v. International & G. N. R. Co. [Tex. Civ. App.] 118 SW 867. Questions calling for conclusions on facts, relating to issue of negligence. Pearson v. Alaska Pac. S. S. Co., 51 Wash. 560, 99 P 753. Impressions or opinions of persons not in position to know facts

are of no weight or value on question of business of neighbor or acquaintance. Biermann v. Guaranty Mut. Life Ins. Co. [Iowa] 120 NW 963. Conclusion from conversation heard by witness. San Antonio Light Pub. Co. v. Lewy [Tex. Civ. App.] 113 SW 574. Proof of conversation in which one party states conclusions as to contract is not proof of contract. Red Line Mut. Tel. Co. v. Pharris, 82 Neb. 371, 117 NW 995.

Held mere conclusion and incompetent: Witnesses should not be allowed to state conclusions as to **effect of contract** but should state what was said and done. Burns v. Loftus [Nev.] 104 P 246. That **goods were delivered on a certain contract.** Cleveland Seed Co. v. Moore, 142 Ill. App. 615. Answer, "I think she did," to question **whether injured person made exclamations of pain.** Haney v. Pinckney, 155 Mich. 656, 51 Det. Leg. N. 1130, 119 NW 1099. Testimony of witness, relating to plaintiff, "I judge **he got scared,**" etc. Erie R. Co. v. Schomer [C. C. A.] 171 F 798. **At whose risk** trunk is left at depot. McCoy v. Atlantic Coast Line R. Co. [S. C.] 65 SE 939. Testimony of plaintiff in libel case, "If I had not resented it, it **would have ruined me.**" Ferdon v. Dickens [Ala.] 49 S 888. When another **acquired title** to real estate. LeCroix v. Malone [Ala.] 47 S 725. Witness may not testify that certain person is or is not **owner of land.** Hackbarth v. Gordon [Tex. Civ. App.] 120 SW 591. **Whether another thought** she was in danger. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853. Question to witness **whether plaintiff "knew all about the business."** United States Cast Iron Pipe & Foundry Co. v. Granger [Ala.] 50 S 159. Testimony as to **what another understood** in regard to transaction. Flora v. Mathwig [N. D.] 121 NW 63. **Whether third person had reason to believe** defendant worth certain sum. Austrian v. Laubheim [N. J. Law] 73 A 226. Physician's testimony that answers of applicant for insurance were **true to the best of his knowledge** and belief. Winn v. Modern Woodmen of America [Mo. App.] 119 SW 536. Question whether or not **driver apparently intended** to drive across track. O'Shaugnnessy v. Chicago City R. Co., 144 Ill. App. 174. Testimony that head sawyer **was in full charge** of workmen. Larsen v. Covington Lumber Co., 53 Wash. 146, 101 P 717. Testimony as to **who had general charge** of one's business incompetent, where witness had testified to facts known to him. Kimball Bros. Co. v. Fitzgerald, 82 Neb. 805, 118 NW 1076. Testimony to "understanding" that certain person **was manager** for defendant. Herrington & Co. v. Shumate Razor Co. [Ga. App.] 65 SE 1064. **Why contractor did not pay** pay roll of subcontractor after work was stopped. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Testimony that witness jumped on front of car **in order to avoid tenm.** Thompson v. Keyes-Marshall Bros. Livery Co., 214 Mo. 487, 113 SW 1128. In false imprisonment case, defendant may not testify to **purpose in having plaintiff arrested.** Gray v. Strickland [Ala.] 50 S 152. Plaintiff struck by automobile. Question on cross-examination, "And this **accident happened simply because you were in a real hurry** to get the deliveries made," etc., called for conclusion. Gerhard v. Ford Motor Co., 155 Mich. 618, 15 Det. Leg. N. 1147, 119 NW 904. Husband's testimony that he **did not make gift** to wife. Fanning v. Green [Cal.] 104 P 308. That it **was duty of engine wiper** to warn train crew before going under engine. Southern Kansas R. Co. v. McSwain [Tex. Civ. App.] 118 SW 874. Whether there was **any way in which witness could have prevented injury** to plaintiff. Houston & T. C. R. Co. v. Johnson [Tex. Civ. App.] 118 SW 1150. Declaration of owner that if other owners would commence to measure at certain point they **would find how much they owned.** Lecroix v. Malone [Ala.] 47 S 725. Testimony that **defendant's building encroached** on plaintiff's ground. Hamilton v. Monidah Trust [Mont.] 102 P 335. Testimony that **injured man declined in health,** that he was stupid, that witness thought he was not as well, etc. Roth v. Travelers' Protective Ass'n of America [Tex.] 115 SW 31. **Whether property owner gave additional mortgage** to secure notes, and whether trust deed was additional security. Hanson v. Neal, 215 Mo. 256, 114 SW 1073. Questions to engineer as to **whether he had control of train,** so that he could have stopped it. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. Issue being **whether lease was made with defendant corporation,** plaintiff's mere conclusion that it was, and that check sent in letter, signed by one, described as corporation's president, was from corporation, incompetent. Smith v. Guarantee Dental Co., 114 NYS 867. Testimony of plaintiff in slander case, as to **whether his reputation was not as good as ever.** Smith v. Singles [Del.] 72 A 957. Question to director of corporation **whether company** by vote of directors or otherwise **contemplated going over plaintiff's land** with wires. Majenica Tel. Co. v. Rogers [Ind. App.] 87 NE 165. Testimony of witness that she was **"forced to conclusion"** from what husband told her that firm, composed of husband and herself, was insolvent. Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 P 921. Whether certain person **could exert undue influence** over testator, and whether witness had seen him do so. Larabee v. Larabee, 240 Ill. 576, 88 NE 1037. Testimony of witness who saw injured person coming down in falling elevator that he **looked like a man in possession of his faculties.** Crogg v. Los Angeles Trust Co., 154 Cal. 663, 98 P 1063. Question to non-expert as to **what appearance of track at certain place indicated,** as to manner and cause of accident. Cincinnati, etc., R. Co. v. Cook [Ind. App.] 88 NE 76. Whether plaintiff (suing on quantum meruit for services) **did work of able-bodied man** and whether he was able to do certain work. Allen v. Urdangen [Iowa] 119 NW 724. Where facts are before jury, question calling for **mere computation of distances** improper. Delfs v. Dunshee [Iowa] 122 NW 236. Where horse was frightened by automobile, question **whether there was anything in position of driver** or appearance of horse **to indicate** that driver might have trouble or lose control. Id. Witness, giving substance of conversation may not state that he knew from their statements **that certain subject was burden on minds of speakers.** Leland v. Chamberlin [Tex. Civ. App.] 120 SW 1040.

Held statement of fact, and not mere con-

clusion: Testimony that another said that **agency was to be exclusive.** De Laval Separator Co. v. Sharpless [Iowa] 120 NW 657. That plaintiff's handling of plank was **"usual and customary" manner.** Texas & N. O. R. Co. v. Geiger [Tex. Civ. App.] 118 SW 179. Testimony that train was not stopped at particular place in usual way. Missouri K. & T. R. Co. v. Williams [Tex. Civ. App.] 120 SW 553. Custom of cattle shippers, and appearance of cars. International & G. N. R. Co. v. McCullough [Tex. Civ.. App.] 118 SW 558. Whether witness saw anything, on certain day indicating **that sewer was too small** to carry off water. City of Richmond v. Wood [Va.] 63 SE 449. Testimony that bridges and culverts in railway embankment were **insufficient to carry away waters** in times of flood. Blunck v. Chicago & N. W. R. Co. [Iowa] 120 NW 737. Proper for physician to testify that patient **walked with a limp.** Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. Opinions of witnesses as to whether or not engine shipped as per contract of sale was **same engine as had been shipped before.** Case Threshing Mach. Co. v. Stein, 133 Ill. App. 169. That letter **appeared to have been sent unenclosed.** Keck v. Woodward [Tex. Civ. App.] 116 SW 75. Testimony by plaintiff's wife that he had **difficulty in passing urine.** Houston & T. C. R. Co. v. Johnson [Tex. Civ. App.] 118 SW 1150. Proper to ask engineer in charge of engine alleged to have caused fire **whether he knew how to handle an engine.** Horton v. Louisville & N. R. Co. [Ala.] 49 S 423. **That tracks were in certain street** in city. International & G. N. R. Co. v. Morin [Tex. Civ. App.] 116 SW 656. Testimony that "it **looked like he fell powerful hard** and got hurt." Alabama City G. & A. Ry. Co. v. Bullard [Ala.] 47 S 578. Whether certain person was ever **employed by witness as his agent.** Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410. Question, **"Did you step off** the car, or were you thrown off?" Selma St. & S. R. Co. v. Campbell [Ala.] 48 S 378. Question to coal miner, **whose duty it was** to inspect and prop and keep up roof of mine entry. Sloss-Sheffield Steel & Iron Co. v. Green [Ala.] 49 S 301. Testimony tending to show that insurance company **was member of tariff association.** Firemen's Fund Ins. Co. v. Hellner [Ala.] 49 S 297. Whether plaintiff **showed any evidence of being injured.** Birmingham R., L. & P. Co. v. McLain [Ala.] 50 S 149. **Whether any effort was made** to stop car. Id. **That person was well known** in certain town. Martin v. Western Union Tel. Co., 81 S. C. 432, 62 SE 833. Where party was charged with fraud in representing there was no hard pan under his land, he should have been allowed to state **what he understood by hard pan,** and what term meant in Missouri. Robinson v. Yetter, 238 Ill. 320, 87 NE 363. Testimony that witness **was walking as carefully as she usually walked,** not recklessly at all, was competent, meaning that she was walking in usual manner. Berry v. Greenville [S. C.] 65 SE 1030. Question to plaintiff **whether she owned note** in suit, and to another witness whether she ever owned it proper. Nolan v. Nolan [Cal.] 101 P 520. **Whether plaintiff's husband supported her** during certain time not improper, when followed by examination as to details in which she was deprived of support. Lockard v. Van Alstyne, 155 Mich. 507, 15 Det. Leg. N. 1132, 120 NW 1. Testimony by employe in bridge construction **that there was plenty of time** in which to fasten "traveler" to false work before wind storm came up. Casey v. Kelly-Atkinson Const. Co., 240 Ill. 416, 88 NE 982. Witness properly allowed to testify that certain person **was corporation's manager** at certain place and signed letters and acted as such. Kimball Bros. Co. v. Citizens' Gas & Elec. Co. [Iowa] 118 NW 891. Testimony of plaintiff as to **how much defendant owed him** not objectionable as conclusion, when it was equivalent to stating how much he had delivered to defendant which latter had not paid for. Webster v. Moore, 108 Md. 572, 71 A 466. Plaintiff in slander case could testify **whether people believed defendant's statements** and what they thought of plaintiff as a result. Smith v. Singles [Del.] 72 A 977. Telephone operator's statement, when called, that certain person's **telephone was torn up by lightning** was not mere conclusion, since he was in position to know facts. Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418. In personal injury action, questions to witness and to plaintiff **whether they knew of any other cause for condition shown,** except injury, were proper. Missouri, K. & T. R. Co. v. Davis [Tex. Civ. App.] 116 SW 423. Question "State how she is with reference to remembering and being easily influenced." Answer would have been that she **was easily influenced.** Held this would be statement of fact; question not objectionable because no facts were shown as to whether she was easily influenced. Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149. Testimony that witness had examined papers relating to title and **had found chain of title complete,** except that one deed had not been recorded and that he had had it recorded. Kirby v. Blake [Tex. Civ. App.] 115 SW 674. Injury to miner, taking cars up and down incline; testimony that **signal system was out of repair,** and that cars could be moved by steam power. Ferrari v. Beaver Hill Coal Co. [Or.] 102 P 1016. **That witness was afraid** of a person, and dared not reply to her. In re Miller's Estate [Utah] 102 P 996. Testimony of plaintiff, in personal injury action, whose leg was shortened by injury, that she **believed she was injured for life.** Weatherford, etc., R. Co. v. White [Tex. Civ. App.] 118 SW 799. That tracks and space between them were **used by public a great deal,** and that almost everyone who came in from that side of town used them.. Southern R. Co. v. Brock [Ga.] 64 SE 1083. Proper to allow witnesses who had looked over ground to give judgment as to **number of trees that had been cut,** and whether they had been cut recently or for some time. Bufford v. Little [Ala.] 48 S 697. Officer of fraternal order could testify that he had **no authority** to receive dues after forfeiture, though question was for jury. United Order of the Golden Cross v. Hooser [Ala.] 49 S 354. Testimony that witness knew **decedent owned a cow** and a calf and that he did not know of any other property owned by him. Curtis v. Hunt [Ala.] 48 S 598. Where servant was injured while standing on pipe and doing certain work, question to him **whether he could have stood on ground** and done the work was proper. United States Cast Iron Pipe &

issues which are for the court[33] or jury,[34] or the subject-matter of which requires expert skill or knowledge,[35] are inadmissible. Testimony of this kind is excluded for the reason that deductions of fact are to be made from the evidence by the trial court or jury,[36] when the facts are such that they can be clearly and intelligibly presented, and when the deductions therefrom can as well be made by the trial court or jury as by the witness.[37] The rule does not exclude the statement of a collective fact by the witness,[38] nor the statement of the result of the witness' observation,

Foundry Co. v. Driver [Ala.] 50 S 118. Testimony by defendant's superintendent that he **swore out warrant on his own responsibility** held statement of capacity in which he acted, and not of his motive, and hence admissible. Emerson v. Lowe Mfg. Co. [Ala.] 49 S 69. Proper to allow plaintiff in personal injury action to testify **whether he could do such work after his injury** as he had done before. Chesapeake & O. R. Co. v. Hoffman [Va.] 63 SE 432. Where defendant in personal injury action proved that plaintiff had taken one or two drinks during the evening, plaintiff was properly allowed to testify that he was **not intoxicated.** Ward v. Chicago R. Co., 237 Ill. 633, 86 NE 1111. **Ownership** is fact to which any witness may testify unless the whole issue of the case turns upon it. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. Ownership of property is fact to which witness may testify. Perkins v. Sunset Tel. & T. Co. [Cal.] 103 P 190.

33. Where life policy was, according to its terms, in force when issued and first premium paid during good health of insured, testimony of agent of company, after evidence of facts as to issuance of policy and payment of premium, **that policy was binding on company** when issued, was opinion. Life Ins. Co. v. Hairston, 100 Va. 832, 62 SE 1057.

34. Whether deceased was member, in good standing, of fraternal order. United Order of the Golden Cross v. Hooser [Ala.] 49 S 354. That certain persons are **proper parties to bring up female grandchild;** witness should state facts. Churchill v. Jackson [Ga.] 64 SE 691. **That fire could not have been caused by sparks** from engine. Snow Lumber Co. v. Atlantic Coast Line R. Co. [N. C.] 65 SE 920. **Whether grantee was in confidential relation** with grantor during latter's sickness. Boye v. Andrews [Cal. App.] 102 P 551. Where witness denied knowledge of letter purporting to have come from his office, and testified to routine of office, his opinion as to **whether letter was sent from the office** was properly excluded. Willner v. Silverman, 109 Md. 341, 71 A 962. Issue for jury being whether party to contract was deprived of reason by intoxication at time of signing contract, testimony as to his **inability to reason,** and his incoherent manner of talking when intoxicated, was inadmissible. Hawkins v. Studdard [Ga.] 63 SE 852. Where minor was injured while operating machinery, it was proper for witnesses to testify that machine was simple and easy to operate, and had no hidden dangers, but proper to exclude from answer **"that a person of his age, intelligence, and experience would not see."** Gulf Cooperage Co. v. Abernathy [Tex. Civ. App.] 116 SW 869. Error to allow witness to state opinion that **same one must have kicked iron bar off hand car,** this being act of negligence alleged. Landers v. Quincy, etc., R. Co., 134 Mo. App. 80, 114 SW 543. That foreman's act in trying to kick rocks off track while hand car was moving thereby causing derailment of car, he having fallen under it, **was careless,** incompetent. International & G. N. R. Co. v. Garcia [Tex. Civ. App.] 117 SW 206. Whether or not shipment involved was made within **reasonable time.** Hennigh v. Cleveland, etc., R. Co., 143 Ill. App. 283.

35. Combs v. Lake [Ark.] 120 SW 977. Nonexpert may not testify to **proper way to drive heading in coal mine,** and whether work in particular mine was properly done. Pennsylvania Coal Co. v. Bowen [Ala.] 49 S 305. One not qualified as an expert may not state whether when riding on street car he can tell **when cable is released** without seeing it done. O'Shaugnessy v. Chicago City R. Co., 144 Ill. App. 174. One not qualified as an expert should not be allowed to state that **yellow leaves on cabbage indicate decay.** International & G. N. R. Co. v. Welbourne [Tex. Civ. App.] 113 SW 780. Opinion of nonexpert that it was **not possible to drain certain land** in certain direction incompetent. Hetland v. Bilstad [Iowa] 118 NW 422. **Value of cattle** does not require expert knowledge. Montgomery Moore Mfg. Co. v. Leeth [Ala.] 50 S 210. Where issue is **damage to land** caused by cutting and boxing trees, witness who knows market values may testify to market value of land before trespass and after it. Miller v. Luckey [Ga.] 64 SE 658. Nonexpert of observations as to **how far headlight would give view of track** held properly excluded in discretion of court. Currie v. Consolidated R. Co., 81 Conn. 383, 71 A 356.

36. Inferences from facts are for jury. Hurley v. Oliver [Ark.] 121 SW 920. Surveyor's opinion that line run by him was original line incompetent; he should have stated facts found by him. Goodson v. Fitzgerald [Tex. Civ. App.] 115 SW 50.

37. Where witness testified to facts showing diligence in getting to his father after news of his illness, it was improper to allow him to state that he got there as quickly as he could. Western Union Tel. Co. v. Smith [Tex. Civ. App.] 113 SW 766.

38. Witness may properly be asked **whether he has performed contract** in question, when he is called upon only to give short rendering of facts; but where answer must be based on indefinite and undetermined terms of contract, it would be conclusion. Phillips v. Monomonie Hydraulic-Press Brick Co. [Minn.] 122 NW 874. On application by pharmacist for intoxicating liquor license, court properly received testimony of witnesses as to **necessity for granting license,** witnesses stating facts, which were necessary to advise the court. In re Moore [Iowa] 118 NW 879. Proper for wit-

though such statement involves in some measure an opinion or judgment,[39] provided

ness to state that he planted and cultivated cucumbers in **usual and customary manner,** after stating facts fully. Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410.

39. In an action to recover damages for injuries to land, a witness may base his opinion as to injury done on what he saw and knew, but **not upon what he heard.** Winnett v. Carnegie Natural Gas Co., 37 Pa. Super. Ct. 204. In collision case, testimony of conductor that he saw approaching car an instant before it struck, and that it was going about 10 miles an hour, was competent; that the **slight opportunity for observation** going to weight not competency of testimony. Fuhry v. Chicago City R. Co., 239 Ill. 548, 88 NE 221. Man of ordinary intelligence may testify to such matters as **settling or heaving of ground** or floor, inclination of a post, variation in diameter of growing tree, height and depth, size, shape, speed, force, time, etc. Lincoln v. Central Vermont R. Co. [Vt.] 72 A 821. One need not be expert to testify whether he saw **anything indicating that sewer was too small** to carry off water on certain day. City of Richmond v. Wood [Va.] 63 SE 449. Testimony of witness that he served notice on certain person, the **"duly authorized agent"** of certain company, was not objectionable on account of quoted words, since conclusion was of kind based on observation and commonly known. Markley v. Western Union Tel. Co. [Iowa] 122 NW 136. One who knows facts, by observation, may state **for whom another was working** at certain time. Moyers v. Fogarty [Iowa] 119 NW 159. Testimony that **ordinary and natural result** of shutting off steam of locomotive engine was to cause it to emit smoke was competent as fact of observation which ordinary person would not be likely to observe. Harrison v. New York Cent. & H. R. R. Co., 195 N. Y. 86, 87 NE 802. Man of ordinary intelligence may testify that at point in curve in track where car went off **outer rail was lower than inner** instead of higher. Lincoln v. Central Vermont R. Co. [Vt.] 72 A 821. Where one witness testified that she saw deceased (killed at railroad crossing) successively through three windows of her house, it was proper to allow surveyor, who had made observations and measurements, to testify that **deceased could not have been seen from that place** when 55 feet from crossing. Gray v. Chicago, etc., R. Co. [Iowa] 121 NW 1097. Nonexpert could state for **how far obstruction on track could be seen.** Louisville & N. R. Co. v. Fitzgerald [Ala.] 49 S 860. Nonexpert, who has seen lanterns in question, and who observed weather conditions on day in question, could state **how far lantern could be seen.** New York, P. & N. R. Co. v. Wilson's Adm'r [Va.] 64 SE 1060. **Location of streets** may be proved by any person who knows facts. International & G. N. R. Co. v. Morin [Tex. Civ. App.] 116 SW 656. Where experienced cattle men stated fully the facts regarding delayed shipment of cattle, it was not error to allow them to testify that some **cattle were damaged** more than others, that some were badly damaged, and all had appearance of being somewhat damaged. St. Louis S. W. R. Co. v. Allen [Tex. Civ. App.] 117 SW 923. No qualification as an expert is essential to render competent the testimony of an officer as to the **duties of office** and his observations in the performance of such duties. Kittanning Borough v. Garrets Run Gas Co., 35 Pa. Super. Ct. 167. Opinion of witness as to **value** of stock in question held admissible, it appearing that he had been an officer of the corporation and was familiar with its business at certain time. Bordner v. Depler, 142 Ill. App. 526. Persons, not experts, who have observed another's **physical condition** before and after receiving an injury, may testify in regard thereto. Crosby v. Portland R. Co. [Or.] 100 P 300. Father competent to testify as to condition and disposition of child before and after injury. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. One not an expert may testify that her ribs were broken in an accident. Wise v. Wabash R. Co., 135 Mo. App. 230, 115 SW 452. One who has observed another's condition is qualified to speak concerning his health, the weight of his testimony depending on the time and extent of his observation. Fearon v. Mullins, 38 Mont. 45, 98 P 650. Witnesses who had observed injured man, before and after time of injury, properly allowed to testify to his condition before and after injury. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. Persons who had observed injured party, before and after injury, could testify to her physical condition, and as to whether she appeared to have use of her members. Blue Ridge L. & P. Co. v. Price, 108 Va. 652, 62 SE 938. Nonexperts who knew plaintiff, before and after he was injured, could testify that he could not work after his injury. Houston & T. C. R. Co. v. Parnell [Tex. Civ. App.] 120 SW 951. Proper for witnesses to compare testatrix's appearance and condition at given time as compared with her condition at another time. In re Winslow's Will [Iowa] 122 NW 971. Testimony of witnesses who had seen plaintiff before and after his injury, descriptive of his condition, and that they had seen him try to do certain work and fail to do it. Gulf, etc., R. Co. v. Adams [Tex. Civ. App.] 121 SW 876. Testimony of witnesses to **physical appearance** of injured man, and stating facts indicating change, competent. Rath v. Travelers' Protective Ass'n [Tex.] 115 SW 31. Nonexpert may testify to one's **apparent health,** as that after an injury plaintiff appeared to be suffering from violent shock, and was nervous wreck. Partello v. Missouri Pac. R. Co., 217 Mo. 645, 117 SW 1138. Testimony that plaintiff was well prior to injury and suffered from nothing. Pecos & N. T. R. Co. v. Coffman [Tex. Civ. App.] 121 SW 218. One who had seen plaintiff every day for year after accident properly allowed to state what apparent condition of her health was. Rearden v. St. Louis & S. F. R. Co., 215 Mo. 105, 114 SW 961. Wife properly allowed to testify to husband's **mental condition,** where jury could not observe him. Piper v. Boston & M. R. Co. [N. H.] 72 A 1024. While it is not usually proper for one person to testify directly to the state of mind of another or to the effect of a certain cause upon the mind of another, it is not an invariable rule; such evidence depends upon witness' op-

it is based on facts observed by him personally,[40] and provided also that the facts on which he bases his opinion are fully placed in evidence,[41] unless the facts are

portunity of knowing whereof he speaks. Brakefield v. Shelton, 76 Kan. 451, 92 P 709. Opinion of attesting witness on testatrix' competency properly received. Spiers v. Hendershott [Iowa] 120 NW 1058. Where witness had testified to having seen testator frequently, and observed him, it was proper to elicit his opinion as to testator's mental condition, during such time. McBride v. McBride [Iowa] 120 NW 709. On issue whether one is of sound or unsound mind, lay witness who has had adequate opportunity to observe speech and other conduct of the person may state opinion as to sanity, in addition to testifying to speech and conduct. Turner v. American Security & Trust Co., 213 U. S. 257, 53 Law. Ed. —. Testimony as to mental capacity of testator which embraced observations of witness not objectionable because also involving his opinion, where facts observed could not be adequately or accurately placed before jury. Jenkins v. Weston, 200 Mass. 488, 86 NE 955. Trained nurse who had charge of sick person for three days could give opinion as to his mental capacity, being within Code Civ. Prac. § 1870, subd. 10, permitting an "intimate acquaintance" to give such testimony. In re Budan's Estate [Cal.] 104 P 442. Where witness had testified that certain persons had cursed and used profane language in tones loud enough to be heard by certain ladies, it was not improper to allow him to describe their **conduct** resulting from overhearing such language. James v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 116 SW 642. That testator always manifested greatest **affection** for children and that his demeanor toward them was affectionate. In re Miller's Estate [Utah] 102 P 996. **Demeanor** of one under examination may be proved by those who saw him, where jury did not see him. Piper v. Boston & M. R. Co. [N. H.] 72 A 1024. One's **character** must be testified to from general knowledge of his reputation in neighborhood where he lives. Rutledge v. Rowland [Ala.] 49 S 461. Nonexpert, qualified by observation, may testify to **speed** of car. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. Nonexpert may testify as to speed of street railway car. City & S. R. Co. v. Cooper, 32 App. D. C. 550. Man and wife who lived near railroad and had watched and heard many trains, qualified to state whether particular train was running fast or slow, but not to state rate of speed. Parson v. Syracuse, etc., R. Co., 133 App. Div. 461, 117 NYS 1058. One familiar with grade crossing, and who had seen trains pass frequently, properly allowed to testify that particular train passed at usual rate, though not an expert. Bracken v. Pennsylvania R. Co., 222 Pa. 410, 71 A 926. One, though not an expert, may, if qualified by experience, testify as to rate of speed of string of cars. Reidel v. Chicago, etc., R. Co., 144 Ill. App. 424. Any person of sound mind and judgment who has formed opinion as to speed of train he has seen running may express it. Nichols v. Chicago, B. & Q. R. Co., 44 Colo. 501, 98 P 808. Persons who have observed train may testify to its speed, if of average intelligence. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. Witness who had observed speed of trains, and had his attention called to train in question, qualified to testify to its rate of speed. Johnson v. Chicago, etc., R. Co. [Kan.] 103 P 90. One familiar with trains, and who has observed them running, may testify to speed though not expert. Potter v. St. Louis & S. F. Co., 136 Mo. App. 125, 117 SW 593. Witness who lived near railroad and had frequently watched and timed passing trains, qualified as to speed of train he saw. Louisville & N. R. Co. v. Stewart's Adm'x [Ky.] 115 SW 775. That witness estimated speed of car after it had passed, instead of at time he saw it affected only weight of his testimony. Dalton v. United R. Co. of St. Louis, 134 Mo. App. 392, 114 SW 561. Proper to allow persons who had observed running cars to estimate speed of car in question, though he had only timed one car previously. Slezak v. St. Louis Transit Co. [Mo. App.] 121 SW 1095. Witnesses who saw car in question and who had for years observed cars and noted their speed, competent to testify to speed of car in question. Fleddermann v. St. Louis Transit Co., 134 Mo. App. 199, 113 SW 1143. **Speed of automobile** may be testified to by one having ordinary observation. Johnson v. Coey, 142 Ill. App. 147.

40. Error to allow opinion of nonexpert based not on personal knowledge but what he had heard. Snell v. Weldon, 239 Ill. 279, 87 NE 1022. Nonexperts may give opinions on person's mental condition after stating facts, within their knowledge, on which they are based. Hopkins v. Wampler, 108 Va. 705, 62 SE 926. Nonexpert opinion is receivable on one's mental condition, but must be based on personal observation or acquaintance, and where witness says he does not know condition of another's mind, his opinion is incompetent. Myatt v. Myatt, 149 N. C. 137, 62 SE 887. Where attesting witness had no acquaintance with grantor and observed him only while instrument was being executed and acknowledged, and he gave no reason for his opinion as to grantor's sanity, his opinion was incompetent, under B. & C. Comp. § 718. Bowman v. Wade [Or.] 103 P 72. Where nonexperts stated fully facts within their knowledge concerning an alleged incompetent, and gave their opinions that his mind was sound, it was proper to exclude further questions as to whether, in their judgment, he would be likely to waste his property or dispose of it recklessly. In re Swick [Minn.] 119 NW 791.

41. Nonexperts may give opinions on mental competency, when they state facts on which opinions are based. Snell v. Weldon, 239 Ill. 279, 87 NE 1022. Nonexpert opinion of mental condition must be based strictly upon facts and circumstances which are first detailed by the witness. Spiers v. Hendershott [Iowa] 120 NW 1058. Question to nonexpert as to mental condition of testatrix improper when based not only on facts testified to but on what witness saw. Id. Some latitude must be allowed trial court in determining whether facts testified to are sufficient on which a nonexpert may base an

such that they cannot be clearly and intelligibly presented to the jury so as to reproduce the impressions or observation of the witness,[42] though the facts should be placed in evidence as far as possible.[43] Absolute knowledge is not a test of a witness' qualifications to speak upon a given subject,[44] and limited opportunity for observation goes to the weight of the testimony, and not to its admissibility.[45] He may properly be allowed to state his best recollection [46] or may base his statement on habit or routine,[47] but mere conjecture is incompetent.[48]

On questions of damage, witnesses should be allowed to state only the facts constituting the elements of damage, and not the amount.[49] but where the elements of damage have been fully stated, it is usually held not prejudicial error to allow witness to state the total amount.[50] When the intent of a person in doing an act or

opinion as to sanity. Id. Question to nonexpert calling for his judgment as to whether testatrix was mentally sound or unsound improper when it was not based on facts testified to, but in same form as though put to an expert. Id.

42. Opinions and conclusions of ordinary witnesses on subjects which they are capable of understanding from observation and common experience are receivable when facts and circumstances cannot be intelligibly laid before jury. In re Miller's Estate [Utah] 102 P 996. Action for injuries to bed and banks of stream by floating logs; **whether stream was "floatable."** Hot Springs Lumber & Mfg. Co. v. Revercomb [Va.] 65 SE 557. Witnesses who saw hole in ground properly allowed to state that in their judgment it was **caused by sinking or settling of earth.** Merritt v. Kinloch Tel. Co., 215 Mo. 299, 115 SW 19.

43. Witness testifying to conclusion based on observation, etc., should show his opportunity for observation and should state facts on which it is based so far as he can. In re Miller's Estate [Utah] 102 P 996. Opinion of nonexpert competent when he states facts on which it is based. St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403. Improper to introduce opinion on another's competency, without stating facts. Fawlie's Adm'x v. McDonald Cutler & Co. [Vt.] 72 A 989. And in some states the rule is the same with regard to experts except that the latter may give an opinion based on facts testified to by others as well as by himself. Id.

44. One may testify to result of his observations. Mayers v. Fogarty [Iowa] 119 NW 159.

45. Hopkins v. Wampler, 108 Va. 705, 62 SE 926.

46. Best recollection of witness as to amount of his indebtedness competent. Montgomery Moore Mfg. Co. v. Leeth [Ala.] 50 S 210. When witness cannot recall exact words of conversation, he may give substance of it, and may give impressions of it, though he cannot speak with certainty in regard to it. Leland v. Chamberlin [Tex. Civ. App.] 120 SW 1040.

47. Engineer may testify that locomotive bell was ringing when person was struck, relying on habit of ringing it, though he did not remember this particular time; weight of testimony for jury. Texas & P. R. Co. v. Crump [Tex.] 115 SW 26.

48. Error to permit witness to guess at rate of speed of car, when he said he could not estimate it in miles. McCreery v. United R. Co., 221 Mo. 18, 120 SW 24.

49. Witness may not give his opinion as to amount of damages. Seaboard Air Line R. Co. v. Brown [Ala.] 48 S 48. Witnesses may give facts as to damage to crops by trespassing stock, but not opinions as to amount. Atlanta, etc., R. Co. v. Brown [Ala.] 48 S 73. Witnesses may state value of land before and after alleged injury, and facts concerning it, but quantum of damages is for jury. Tennessee Coal, Iron & R. Co. v. McMillion [Ala.] 49 S 880. Witnesses, as general rule, may only state facts, leaving amount of damages to be found by jury. St. Louis & S. F. R. Co. v. Cash Grain Co. [Ala.] 50 S 81. Witnesses may not state amount of damages plaintiff ought to recover in action for alienation of affections. Adkins v. Kendrick [Ky.] 115 SW 814. Error to allow witness to state in lump sum amount of depreciation in value of cattle caused by delay in getting cars, without showing his knowledge of market value, and without showing facts on which his estimate was based. Chicago, etc., R. Co. v. Kapp [Tex. Civ. App.] 117 SW 904. Where plaintiff in personal injury action had testified fully to his injuries, his vocation as blacksmith, and subsequent incapacity to work, it was not error to allow him to state that he could not do more than half as much work as blacksmith since his injury as he could before. Atlanta & W. P. R. Co. v. Haralson [Ga.] 65 SE 437. Error to allow owner of sheep grazing lands and sheds to state amount of damage caused by infection with disease without stating items. Power v. Turner, 37 Mont. 521, 97 P 950.

50. While witness may not state damages in lump sum, yet, where he has stated items of damage, it is now error to allow him to give total. Neal v. Davis Foundry & Mach. Works, 131 Ga. 701, 63 SE 221. Question of injury not being in case, proper to allow witness to state in bulk, reasonable market value of goods before injury. Koosa & Co. v. Warten [Ala.] 48 S 544. Not error to allow party to testify to amount of damages caused by delay and negligence in transportation, when he had already testified to value before and after alleged negligence. St. Louis & S. F. R. Co. v. Cash Grain Co. [Ala.] 50 S 81. Where details of damage to wagon were given, testimony that damage was easily $50 was not objectionable as opinion. Bilhimer v. Metropolitan St. R. Co., 137 Mo. App. 675, 119 SW 502.

making a declaration becomes material he may testify directly thereto, whether a party or not,[51] though his testimony is not of course conclusive.[52]

(§ 9) *B. Subjects of expert testimony.*[53]—See 11 C. L. 1406—Expert opinion evidence is admissible in regard to matters, adequate knowledge of which requires or presupposes special skill, training, experience or investigation.[54] It is inadmissible

51. Mahon v. Rankin [Or.] 102 P 608. Testimony of claimants of homestead that they intended to return, competent. Thigpen v. Russell [Tex. Civ. App.] 118 SW 1080. Witness may be examined as to intent, when it is material, though testimony is not conclusive. Fleet v. Tichenor [Cal.] 104 P 458. Witness may testify directly to his intent in particular transaction when it is material. Fanning v. Green [Cal.] 104 P 308.

Contra: Where intentions of an interested witness become material, they are to be ascertained from his conduct, and not from his declarations or testimony on the stand. Lewis v. McDonald, 83 Neb. 694, 120 NW 207.

52. Where intent is material, one may testify directly thereto, though of course his testimony would not be conclusive as against inferences from his actions and other circumstances. Larson v. Thoma [Iowa] 121 NW 1059.

53. Search Note: See notes in 39 L. R. A. 305; 10 Ann. Cas. 621.

See. also, Evidence, Cent. Dig. §§ 2308-2342; Dec. Dig. §§ 505-534; 17 Cyc. 64-80, 128, 129, 224-241; 11 A. & E. Enc. L. (2ed.) 548; 12 Id. 458; 15 Id. 252; 20 Id. 883.

54. Persons having technical and peculiar knowledge on certain subjects are allowed to give their opinions when the subject involved is such that jurors are incompetent to draw their own conclusions from the facts without such evidence. Harris v. Consolidation Coal Co. [Md.] 73 A 805. Witness possessed of special training, experience or observation, may give his opinion when it will tend to aid the jury, in matters as to which they are unable to judge for themselves so well as the witness. United States Smelting Co. v. Parry [C. C. A.] 166 F 407. Whether a given subject is one on which an expert may be allowed to express an opinion is a **question of law.** Keefe v. Sullivan County R. Co. [N. H.] 71 A 379.

Held proper subjects of expert testimony: Jury in Missouri would have no independent knowledge of value of **lawyers' services** in California. State v. Seavey, 137 Mo. App. 1, 119 SW 17. Proper to allow witness with nine years experience in **cultivating cucumbers,** who had stated facts concerning growing of particular crop, to state that crop was grown in usual and customary manner in that locality. Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410. Testimony of expert witnesses as to what was **condition of tobacco** at time of alleged delivery held competent. Smith v. Levy, 37 Pa. Super. Ct. 551. **Number of men required to load car wheels** on cars. Meily v. St. Louis & S. F. R. Co., 215 Mo. 567, 114 SW 1013. Where defendant alleged that amount sought to be recovered on building contract was twice the amount of contract price, expert testimony that amount claimed by plaintiff was twice what would be **fair price for work** was admissible as corroboration of defendant's testimony as to price. Winters v. Schmitz, 36 Pa. Super. Ct. 496. Where dust in mill exploded, due to some foreign metallic substance passing through, expert testimony was competent on question of effect of such **substances passing through attrition mill,** and whether this could be prevented. Sticht v. Buffalo Cereal Co., 195 N. Y. 70, 87 NE 801. In actions for injuries by explosion of barrel when heated tar was pumped into it, testimony was properly received on questions as to **liability of naphtha to dry up** and leave small quantities, and conditions of old barrels. Delaney v. Framingham Gas, Fuel & P. Co., 202 Mass. 359, 88 NE 773. Opinion evidence competent on question of **probability of loss of stranded vessel.** Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32. **Insanity and drunkenness** are conditions provable only by opinion testimony either of experts or of those who have had opportunity to observe the person whose condition is in issue. Daniel v. Modern Woodmen of America [Tex. Civ. App.] 118 SW 211. Witness with many years experience in **shipping cattle** properly allowed to state effect of jerks of train on cattle being shipped. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. Experts properly allowed to testify that cattle, unloaded and kept over night in certain pens, were infected with disease there, it being shown that disease appeared in cattle few days later. International & G. N. R. Co. v. McCullough [Tex. Civ. App.] 118 SW 558. **Whether ox team was being properly driven.** Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853. Opinions of experts competent on **reasonableness of rates** fixed by state on intrastate traffic of interstate railroad. Southern Pac. Co. v. Bartine, 170 F 725. Expert opinion competent on question of exact ratio of difference between cost of handling local and through shipments of freight, where issue is reasonableness of rates. Id.

Values: Testimony to value is always opinion evidence. Curtis v. Hunt [Ala.] 48 S 598. Question of values is to great extent matter of opinion. Kelley v. Colorado, etc., R. Co., 123 La. 1088, 49 S 717. Opinions of witnesses having knowledge of subject in question are usually received on values. Combs v. Lake [Ark.] 120 SW 977. What horses would have been worth if they had arrived at destination in proper condition. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 118 SW 759. Opinion evidence as to market value of horses if they arrived at destination in proper condition does not invade province of jury. Id. Proper to allow qualified witnesses to testify to market value of orchard before and after it was damaged by fire. St. Louis & S. F. R. Co. v. Shore [Ark.] 117 SW 515. Where grazing land was injured by herding scabby sheep on it, and water consumed and polluted, property damages having no market value, sheep raiser was properly allowed to testify to reason-

able value of property damaged. Tippett v. Corder [Tex. Civ. App.] 117 SW 186. Opinion of witnesses acquainted with mill premises and rental value receivable on amount of damages caused by failure to maintain dams of other essentials to operation of mill. Hurxthal v. St. Lawrence Boom & Mfg. Co., 65 W. Va. 346, 64 SE 355. Proper to allow testimony as to what per cent of invoice price stock of goods would be worth in condition they were in when purchased. Montgomery Moore Mfg. Co. v. Leeth [Ala.] 50 S 210. Testimony of expert familiar with necessary character and value of services of a building superintendent, which are the subject-matter of controversy, is admissible. Ferry v. Henderson, 32 App. D. C. 41. Opinion evidence competent on **extent of loss in value** and weight of cattle during transportation and cause of loss. Gulf, etc., R. Co. v. Rogers [Tex. Civ. App.] 113 SW 583. Experienced cattle shipper properly allowed to state that shipment had depreciated 50 per cent. St. Louis S. W. R. Co. v. Allen [Tex. Civ. App.] 117 SW 923. Whether property was damaged or benefited, and extent thereof, by construction of county road. Knapheide v. Jackson County, 215 Mo. 516, 114 SW 960. Expert evidence that fixtures had depreciated in value 40 per cent, qualified by statement that all he would pay was 60 per cent of purchase price, was not proper evidence of value. Bernstein v. Feldstein, 113 NYS 729. Expert on realty values may state whether construction of elevated road damaged property. Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 SW 1094.

Mechanics, construction, engineering: Where raising of settled floor was complicated operation, opinion evidence was competent to show that method used was negligent. Williams v. Morris, 237 Ill. 254, 86 NE 729. **Proper method of raising house,** the tools and appliances necessary and proper to be used, and the placing and operation of the same. Morris v. Williams, 143 Ill. App. 140. **Cause of explosion** of hollow piston which was placed in blacksmith's fire. McCabe v. Swift & Co., 143 Ill. App. 404. Opinion evidence as to **what strain or load rope would ordinarily carry** was competent. Doherty v. Booth, 200 Mass. 522, 86 NE 945. Whether **construction of cement house** was reasonably safe for the storage of the quantity of cement contained therein at time it collapsed. Savage v. Hayes Bros. Co., 142 Ill. App. 316. Testimony concerning the **appearance of stone after being b'asted** with dynamite, and as to the effect of such explosions and the ability of experts to discover where some of the charges had failed to explode. Stephen v. Duffy, 142 Ill. App. 219. Whether **hook** like that in issue could "get out of fix at one time," etc. United States Cast Iron, Pipe & Foundry Co. v. Granger [Ala.] 50 S 159. Qualified machinist may testify whether **engine and boiler** were properly set up. Adams Mach. Co. v. Turner [Ala.] 50 S 308. Where issue was cause of sudden automatic starting of **machinery** of certain kind, witness familiar with machinery of that kind was properly allowed to state what condition of machinery might cause it to so start. Cochrell v. Langley Mfg. Co., 5 Ga. App. 317, 63 SE 244. Whether it was dangerous to change gearing of cotton **spinning machine** with belt on loose pulley. Morrisett v. Elizabeth City Cotton Mills [N. C.] 65 SE 514. Whether particular **device for operating circular saw** is reasonably safe. King v. King [Kan.] 100 P 503. That purpose of removing **insulation** from wires was to test current. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A. 651. Expert testimony competent to show that method of **inspection** could have been used which would have disclosed unexploded dynamite charge which exploded and caused death of employe. Stephen v. Duffy, 237 Ill. 549, 86 NE 1082. Opinion evidence competent as to cause of breaking of needle in **sewing machine,** due to defect therein. McClaren v. Weber Bros. Shoe Co. [C. C. A.] 166 F 714. Not error to admit opinion evidence on question of safety of **scaffold** of certain construction. United States Smelting Co. v. Parry [C. C. A.] 166 F 407. Whether particular **sewer** was sufficient to carry off additional drainage turned into it by enlargement of rest of system. City of Garrett v. Winterich [Ind. App.] 87 NE 161. When cause of blowing up of **machine** was not clearly shown, it was proper to allow expert to state his opinion as to what caused it. Wells v. Royer Wheel Co. [Ky.] 114 SW 737. One qualified as expert may testify that **electric wires** giving off flame or light are defective. Prince v. Lowell Elec. L. Corp., 201 Mass. 276, 87 NE 558. Practicability of **safety appliances,** and whether they were sufficient. McCreery v. Union Roofing & Mfg. Co. [Iowa] 119 NW 738. Method of examining **bridge** to determine whether timbers in it were sound. Greenway v. Taylor County [Iowa] 122 NW 943. Not error to allow expert to testify that merely looking at **saw** would suggest kind of **guard** needed. Gustafson v. West Lumber Co., 51 Wash. 25, 97 P 1094. Expert evidence is competent on character and sufficiency of work done in **drilling oil well.** Redd v. Carnahan, 65 W. Va. 330, 64 SE 138.

Mining: Experienced miner who examined shaft day after injury caused by timbers giving way properly allowed to state whether he could tell from his examination whether there had been timbers around the collar of the shaft the day before. Hollingsworth v. Davis-Daly Estates Copper Co., 38 Mont. 143, 99 P 142. Whether inspection would disclose unsafe condition of roof of coal mine entry. Sloss-Sheffield Steel & Iron Co., v. Green [Ala.] 49 S 301.

Railroad construction and operation: Expert testimony explaining working of **engine** competent. Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005. Testimony as to **effect of application of brakes** to cars, effect of reversal of power, and proper manner of operating a car approaching a curve, by witness who had twenty-five years' experience in operating electric cars. McGrew v. Chicago & M. Elec. R. Co., 142 Ill. App. 210. Position which **switchman at crossing** should occupy to avoid accident during train movements. St. Louis S. W. R. Co. v. Boyd [Tex. Civ. App.] 119 SW 1154. Experienced train man properly allowed to state what was necessary to operate certain **coupler,** in its then condition. Wabash R. Co. v. U. S. [C. C. A.] 168 F 1. Proper for expert to state that only way he had found for **inspecting handholds** was to climb ladder and shake it. San Antonio & A. P. R. Co. v. Beauchamp [Tex. Civ. App.] 116 SW 1163. Proper for expert to testify that if screw in

upon matters of common knowledge,[55, 56] or when the facts can be intelligibly presented to the jury and are of such a nature that jurors generally are competent to form opinions and draw conclusions from them.[57] The conclusions of experts are

handhold was so loose that it would pull out, a close inspection would disclose it. Id. Experienced railroad man properly allowed to testify as to customary **signals** in use in operation of trains, and manner of using them. New York, P. & N. R. Co. v. Wilson's Adm'r [Va.] 64 SE 1060. Motorman with 17 years' experience, familiar with car and place and conditions, could state **within what time car could be stopped.** Bladecka v. Bay City Trac. & Elec. Co., 155 Mich. 253, 15 Det. Leg. N. 965, 118 NW 963. Properly qualified witness may testify to distance in which car going at certain speed may be stopped. Randle v. Birmingham R., L. & P. Co. [Ala.] 48 S 114. Experienced railroad man properly allowed to state whether any effort was made to **stop train** at crossing, he having heard train though he could not see it. St. Louis, etc., R. Co. v. Dysart [Ark.] 116 SW 224.

Medical and scientific matters: Physician, who examined plaintiff, could testify to physical facts found by him, and to patient's condition. Lexington R. Co. v. Woodward [Ky.] 118 SW 965. **Competency of testatrix** being in issue, opinion of physician that testatrix when she executed will was not capable of comprehending value of property and obligations to relatives was competent. In re Overpeck's Will [Iowa] 120 NW 1044. Physician properly allowed to testify that **pressure on certain vertebra produced contraction** of certain muscles, and that when continued the pulse beat became higher, though it is improper for physician to repeat statements of patient or acts equivalent to self-serving statements. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. Physician properly allowed to testify to **objective symptoms** observed by him in an examination. Casey v. Chicago City R. Co., 237 Ill. 140, 86 NE 606. **Probable causal connection between accident and injuries.** Resnick v. Joline, 113 NYS 918. Opinions competent on whether injuries were or might have been caused by fall of elevator. Shaughnessy v. Holt, 236 Ill. 485, 86 NE 256. Held proper to ask medical expert what caused the condition described. Fuhry v. Chicago City R. Co., 144 Ill. App. 521. Proper to ask physician if cause, existence of which was alleged, was sufficient to produce condition alleged to exist. Smith v. Detroit United R. Co., 155 Mich. 466, 15 Det. Leg. N. 1055, 119 NW 640. An expert medical witness may state his opinion, based on the evidence, as to the cause of a plaintiff's present physical condition. Crozier v. Minneapolis St. R. Co., 106 Minn. 77, 118 NW 256. Competent for physician to testify that, from what he learned in course of treatment of patient, he attributed her nervous condition to her injury. Fuhry v. Chicago City R. Co., 239 Ill. 548, 88 NE 221. Proper to ask expert how injury affected plaintiff, when question, as shown by prior examination, referred to her physical condition, not her legal rights. Dralle v. Reedsburg, 140 Wis. 319, 122 NW 771. Medical opinion that plaintiff's condition might have been caused by accident competent. De Courcy v. Prendergast Const. Co. [Mo. App.] 120 SW 632. **Probable effects and duration of physical condition shown.** Perkins v. Sunset Tel. & T. Co. [Cal.] 103 P 190. Permissible for physician to give opinion as to condition of injured person's health and probable result of her illness. Pullman Co. v. Hoyle [Tex. Civ. App.] 115 SW 315. Physicians properly allowed to testify to probable future results of injuries and duration of effects. Meily v. St. Louis & S. F. R. Co., 215 Mo. 567, 114 SW 1013. Testimony that blow of certain kind would probably injure sciatic nerve not speculative. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 115 SW 57. Opinion based on facts stated hypothetically that blow would probably injure sciatic nerve not objectionable as invading province of jury. Id. What effect injury to woman would have on her capacity to bear children. Devine v. Brooklyn Heights R. Co., 131 App. Div. 142, 115 NYS 263. Testimony of physician who treated injured person, that such person died same night as **result of injury,** was competent. Lovelady v. Birmingham R., L. & P. Co. [Ala.] 50 S 96. Whether falling into hole could have produced injuries such as those plaintiff complained of. Perkins v. Sunset Tel. & T. Co. [Cal.] 103 P 190. Whether plaintiff's condition could have been caused by blow on side of head. Id. Effect on one eye of injury to other. Ducharme v. Holyoke St. R. Co. [Mass.] 89 NE 561. Question proper which was equivalent to asking whether certain injuries were of such nature as to cause pain. Greenway v. Taylor County [Iowa] 122 NW 943. It is not proper for physician to testify to **possible consequences** of impotency, that it might go on for years, and might possibly terminate in something more serious. Bucher v. Wisconsin Central R. Co., 139 Wis. 597, 120 NW 518.

55, 56. Expert testimony cannot be received either to prove or disprove those things which the law supposes to lie within the common knowledge of all men. Johnston v. Mack Mfg. Co., 65 W. Va. 544, 64 SE 841. Incompetent to prove that boars, domestic animals, become vicious after certain age, common knowledge being to contrary. Id. Whether negligent to strike mule team which on being struck ran down plaintiff. American Bolt Co. v. Fennell [Ala.] 48 S 97.

57. Where trial court or jury can draw proper inferences from facts without special skill or experience or knowledge, facts should be placed in evidence and conclusions left to be drawn by trial court or jury. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651; Pearson v. Alaska Pac. S. S. Co., 51 Wash. 560, 99 P 753; United States Smelting Co. v. Parry [C. C. A.] 166 F 407.

Held not proper subjects for expert testimony: Opinions incompetent on extent of **experienced lineman's knowledge of danger** from wires. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. Engineer, though having expert knowledge of subject and of data as to location and direction of railroad right of way, may not

incompetent upon ultimate issues of fact [58] or upon questions of law,[59] or upon mixed questions of law and fact.[60] Where one party has introduced expert evidence on any subject, the other party should be allowed to do so.[61]

give opinion evidence on **location of the right of way;** data should be placed before jury. Keefe v. Sullivan County R. Co. [N. H.] 71 A 379. Opinion evidence by plaintiff as to damages caused by obstruction and pollution of stream, and by another as to **depreciation in value** of use of premises caused by rock and gravel thrown on land, and by ditch, incompetent. Boyd v. Schreiner [Tex. Civ. App.] 116 SW 100. Defendant's medical expert could not properly be allowed to testify that plaintiff's **nervous condition was due to his having a suit on hand** to recover for injuries; hence could not indirectly introduce such testimony in reply to proper question. Lockwood v. Boston El. R. Co., 200 Mass. 537, 85 NE 934. **Effect in health** on girl of 13, in normal health, of undressing her, and subjecting her to examination by strange physician, not subject for expert opinion. Casey v. Chicago City R. Co., 237 Ill. 140, 86 NE 606. Whether one man at rope was **sufficient to prevent swinging of casting** which was being raised. Bowie v. Coffin Valve Co., 200 Mass. 571, 86 NE 914. In action for injuries, **whether lineman** of ordinary experience **would take bare grounded wire** up a pole to test wires without precautions to prevent contact with other wires. Ambre v. Postal Telegraph-Cable Co. [Ind. App.] 86 NE 871. Opinion evidence that **elevator was place of danger** incompetent where injury resulted not from any hidden danger or defect but from operator placing foot over edge of floor, danger being apparent to anyone. Braasch v. Michigan Stove Co., 153 Mich. 652, 15 Det. Leg. N. 748, 118 NW 366. Whether backfilling with earth was **necessary to support cement walk** with cinder base. People v. Klehm, 238 Ill. 89, 87 NE 119. It is not error to exclude the opinion of an expert witness as to **whether certain cog-wheels were "exposed,"** where the jury viewed the premises and had before them the evidence with reference to said gearing. Laidlaw-Dunn-Gordon Co. v. Miller, 12 Ohio C. C. (N. S.) 246. Estimate of **value of work,** based on conclusion as to what plaintiff should have done. Zide v. Scheinberg, 114 NYS 41. Improper to allow witness, who had testified concerning saw and practicability of guard, to state that in his opinion saw in question was **not safely constructed,** and that accident could have been prevented by use of guard. Schmahl v. Albany Brush Co., 61 Misc. 316, 113 NYS 768. Expert opinion as to nature and results of physical injury is entitled to weight, but opinion evidence as to **how injury was or must have been caused,** is of no value. Van Norman v. Modern Brotherhood of America [Iowa] 121 NW 1080. Improper to allow medical expert to testify that condition of plaintiff's womb was **due to previous inflammation;** he could give opinion, but not conclusion. Sutter v. Kansas City [Mo. App.] 119 SW 1084. Opinion evidence is incompetent on question **whether defect is observable** when facts could be laid before jury fully. Steele v. Andrews [Iowa] 121 NW 17. **Course of changing of deep current of river** not subject for opinion evidence where facts were fully shown and jury were capable of drawing conclusions. Ferdon v. New York, O. & W. R. Co., 131 App. Div. 380, 115 NYS 352. Whether it was **necessary to maintain ditch** or drain into which injured person stepped. Gallagher v. Tipton, 133 Mo. App. 557, 113 SW 674. **Whether hoisting bucket was more liable to jump** out when going fast, whether it was dangerous to stand by skidway when bucket was going up, and whether it would be liable to jump out at certain speed. New Connellsville Coal & Coke Co. v. Kilgore [Ala.] 50 S 205.

58. Fowler v. Delaplain, 79 Ohio St. 279, 87 NE 260. What would be **reasonable time for transportation** of cattle between two points, ordinary care being used. St. Louis & S. F. R. Co. v. May [Tex. Civ. App.] 115 SW 900. Opinion incompetent as to what is "reasonable run" of cattle train between two points. Texas & P. R. Co. v. Goldsmith [Tex. Civ. App.] 118 SW 1146. Witnesses may not give opinion as to **competency of person** as driver of automobile. Pantages v. Seattle Elec. Co. [Wash.] 104 P 629. Error to allow witnesses to give opinions on competency of servant as powder man, where facts as to his conduct and capability could readily be placed before the jury. Johnson v. Caughren [Wash.] 104 P 170. Whether **negligence** to strike mule team which after being struck ran down plaintiff. American Bolt Co. v. Fennell [Ala.] 48 S 97. Action for damages for negligence of city in leaving old wall in waterway after removing dams. Question to expert **whether construction was negligent,** improper. Prime v. Yonkers, 131 App. Div. 110, 115 NYS 305. Physicians may not testify **whether operation was performed with ordinary care.** Sameuls v. Willis [Ky.] 118 SW 339. Witness, though an expert, should not have been permitted to state opinion that **cause of failure** in drilling well was insufficiency of casing, this being very issue to be tried by jury. Augusta Oil, Gas, Mining & Prospecting Co. v. Independence Drilling Co. [Kan.] 101 P 1072. Experts may not state what was **cause of death** in certain case, but may state whether death could reasonably have followed from certain assumed facts. Baehr v. Union Casualty & Surety Co., 133 Mo. App. 541, 113 SW 689. Where inquiry related to **weight and credibility of declarations** of injured person, it was proper to exclude it. Johnston v. Cedar Rapids & M. C. R. Co. [Iowa] 119 NW 286. Improper to ask medical expert **whether accident complained of caused conditions described.** Fitzgerald v. Chicago, 144 Ill. App. 462.

59. Court must determine **what is patent law of United States,** applicable in given case; not subject for expert opinion. Owens v. National Hatchet Co. [Iowa] 121 NW 1076. Testimony that witness had examined **claim of title** of party and communicated his opinion thereon to party, incompetent. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552. Opinion of attorney who examined abstract of title not competent on question whether title is marketable. Reed v. Sefton [Cal. App.] 103 P 1095.

60. Question whether party had **sufficient "mind" to understand** legal effect of deed,

(§ 9) *C. Qualifications of experts.*[62]—See 11 C. L. 1409—Qualification of a witness to give opinion evidence is a preliminary question[63] addressed largely to the discretion of the trial court,[64] there being no fixed rule of law by which the matter may be determined,[65] but is ultimately for the jury.[66] Special familiarity with the subject under investigation, experience, and professional skill and training, are the tests usually applied.[67] Expert capacity is a matter wholly relative to the subject of

improper. Williams v. Livingston [Tex. Civ. App.] 113 SW 786. Whether person had sufficient mental capacity "to transact business," improper. Id. Improper to allow one acquainted with grantor to testify that she did not have sufficient mind to execute a deed or know its effect or value. Id. Plaintiff's opinion that **loss per head in shipment of cattle** was $2 or $2.50, not violation of rule against opinions on questions of law and fact. Texas & P. R. Co. v. Henson [Tex. Civ. App.] 121 SW 1127.

61. Where, in an action to recover damages for death, defendant has introduced expert testimony to show that actions of deceased were negligent, the plaintiff may, by way of rebuttal, prove by experts that deceased was not negligent. Ball v. U. S. Exp. Co., 32 App. D. C. 177.

62. Search Note: See notes in 7 Ann. Cas. 583; 8 Id. 832.

See, also, Evidence, Cent. Dig. §§ 2343-2363, 2383, 2394; Dec. Dig. §§ 535-546, 563; 17 Cyc. 171, 224, 225, 258-261; 12 A. & E. Enc. L. (2ed.) 424, 428.

63. Theobald v. Shepard Bros. [N. H.] 71 A 26. Expert should not be allowed to testify until qualifications have been shown by examination of witness by court, or by other evidence. Harris v. Consolidation Coal Co. [Md.] 73 A 805; White v. Western Allegheny R. Co., 222 Pa. 534, 71 A 1081. Witness should not be allowed to testify as expert unless there is finding by court or admission by adverse party that he is qualified. Snow Lumber Co. v. Atlantic Coast Line R. Co. [N. C.] 65 SE 920. In case party desires to attack qualification or knowledge of witness, he should do so by proper cross-examination. Sloss-Sheffield Steel & Iron Co. v. Green [Ala.] 49 S 301.

64. Harris v. Consolidation Coal Co. [Md.] 73 A 805; Baltimore Refrigerating & Heating Co. v. Kreiner, 109 Md. 361, 71 A 1066; Kinney v. Philadelphia Watch Case Co., 76 N. J. Law, 735, 71 A 269; Crosby v. Portland R. Co. [Or.] 100 P 300; Hot Springs Lumber & Mfg. Co. v. Revercomb [Va.] 65 SE 557. No fixed rule for determining qualifications of expert; matter largely discretionary. Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418. Competency of witness for trial judge; ruling not disturbed unless clearly erroneous or founded on error of law. Fowlie's Adm'x v. McDonald, Cutler & Co. [Vt.] 72 A 989. Decision on qualification of witness not reviewable in absence of abuse of discretion or error at law. Atlantic Coast Line R. Co. v. Dees, 56 Fla. 127, 48 S 28. Within discretion of court to exclude opinion of expert on ground that he had not had sufficient medical experience. Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793. Whether witness qualified to testify as expert in what distance street car could be stopped. Yergy v. Helena L. & R. Co. [Mont.] 102 P 310. Qualification of expert and form of question are largely discretionary. Carter Rice & Co. v. Aubin [C. C. A.] 172 F 916. Qualification of witnesses to value of land is preliminary question addressed to discretion of trial court. Catlin v. Northern Coal & Iron Co. [Pa.] 74 A 56.

65. Question is for trial court. Carscallen v. Coeur D'Alene & St. Joe Transp. Co., 15 Idaho, 444, 98 P 622.

66. If no objection is made, competency and weight of testimony is for jury. Modlin v. Jones & Co. [Neb.] 121 NW 984.

67. Test is experience and knowledge of subject; immaterial how it was gained, whether from study or practically. Crosby v. Portland R. Co. [Or.] 100 P 300. Only qualification necessary for witness to value of land is knowledge of land. Tennessee Coal, Iron & R. Co. v. McMillion [Ala.] 49 S 880. Witnesses to market value of land should have such knowledge of subject-matter as can reasonably be expected in view of circumstances, frequency or infrequency of sales, location, adaptability of land for certain purposes, and such other things as enter into value. Catlin v. Northern Coal & Iron Co. [Pa.] 74 A 56. Witness, whether expert on nonexpert, cannot testify to value or damages, unless he is qualified by showing knowledge of property in question and value. Western Union Tel. Co. v. Coyle [Okl.] 104 P 367. Qualification to testify to land values depends upon whether witness has himself made recent sales or knows of such sales; witnesses held qualified. Brown v. New Jersey Short Line R. Co., 76 N. J. Law, 795, 71 A 271.

Held qualified.

Witness qualified to testify **whether certain river,** on which he had worked, **would float logs.** Hot Springs Lumber & Mfg. Co. v. Revercomb [Va.] 65 SE 557. Witness who had been in same business as deceased, and had known him and had had business with him, qualified to state what his **yearly earning capacity** was. Yergy v. Helena L. & R. Co. [Mont.] 102 P 310. Contractor and builder familiar with use and operation of **circular saws** qualified as to use of guages thereon. L'Hote v. Dibble Lumber Co. [Mass.] 89 NE 532. Former town clerk, who had made special study of old town records, and had deciphered and compiled them, qualified to testify that certain land was included in **ancient division of town.** Shinnecock Hills & Peconic Bay Realty Co. v. Aldrich, 132 App. Div. 118, 116 NYS 532. Witness who lived in neighborhood and well acquainted, and had heard expression that **woman was of "loose character"** applied to many, qualified to testify that it meant that woman was without virtue. Brinsfield v. Howeth, 110 Md. 520, 73 A 289. Witness competent to testify to **quality of certain plaster,** composition of which he knew, though he was not a plasterer and had gained his knowledge from seeing others

make it. Basenberg v. Lawrence [Ala.] 49 S 771. Miner with long experience qualified to state whether roof of entry under certain conditions **could, by inspection, be known** to be loose before it fell. Sloss-Sheffield Steel & Iron Co. v. Green [Ala.] 49 S 301. One who had long used **whiskey** qualified to testify that liquor served him was whiskey, though he could not tell component parts and did not know what "distilled or rectified" spirits were. People v. Marx, 128 App. Div. 828, 112 NYS 1011. One who had handled and observed horses for 20 years qualified to testify concerning their **habits and characteristics.** Delfs v. Dunshee [Iowa] 122 NW 236. One engaged in machinery business many years, and in **packing for transportation** several years, and who had packed many car loads, qualified to testify whether certain machinery was properly packed. E. C. Fuller Co. v. Pennsylvania R. Co., 61 Misc. 599, 113 NYS 1001. Instructor in metallurgy and qualitative analysis qualified to testify to **condition of hammer** made from certain kind of steel. Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201, 16 Det. Leg. N. 82, 120 NW 613. Where witness had had considerable experience as assistant coroner of county, an objection to his testimony as to **how long deceased had been dead,** on the ground that witness was not physician nor expert went to weight, not competency of testimony. Palmer v. Schultz, 138 Wis. 455, 120 NW 348. To establish **damage to trees by fire,** testimony of witness, who was familiar with trees and knew their value, before and after fire, as to such value, was competent. Hart v. Chicago & N. W. R. Co., 83 Neb. 652, 120 NW 176. Practical miners of long experience, who knew quality of coal taken from mine, cost of mining and market price of coal, were qualified to testify **whether mine could be operated at profit.** Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604. One with 22 years of experience as foreman in business of setting poles and stringing wires for electric companies, and 15 years' experience in **setting telephone poles,** may testify as to proper method of setting poles. Barrett v. New England Tel. & T. Co., 201 Mass. 117, 87 NE 565. Nonexperts, with experience in use of **derricks,** and having knowledge of particular derrick and its use, may testify as to its capacity. Romona Oolitic Stone Co. v. Shields [Ind.] 88 NE 595. Civil engineer of 30 years' experience, who had been city's engineer when **sewer** in question was built, qualified to testify whether it was sufficient to carry off additional sewage turned into it by additional ditches added to system. City of Garrett v. Winterich [Ind. App.] 87 NE 161. One familiar with course of business in mill, and with **duties of sawyer's helper,** could testify thereto. Lapointe v. Berlin Mills Co. [N. H.] 73 A 406. Plaintiff, who had lived on farm from which wood was to be hauled, had managed farm herself and knew about hauling and cost, was qualified to testify what it would have **cost to haul wood.** Gibson v. Wheldon [Vt.] 72 A 909. Carpenter who helped saw timbers for **bridge** properly allowed to state whether bridge was safe though he had not inspected it at point where it gave way. Stremme v. Dyer [Pa.] 72 A 274. One who had had charge of **cold storage plant** and had visited many others, qualified to testify that they usually had sewers in cellars and that ice boxes were usually air and water tight. Baltimore Refrigerating & Heating Co. v. Kreiner, 109 Md. 361, 71 A 1066. Electrical expert, who showed considerable experience in the **effect of cletrical shocks** on the human body, held qualified to testify whether person, under certain conditions, was suffering from an electric shock. Crosby v. Portland R. Co. [Or.] 100 P 300. Witness who had lived near railroad all her life and knew meaning of **whistle signals** could testify to meaning of two long blasts. Southern R. Co. v. Forrister [Ala.] 48 S 69. Expert mechanics properly allowed to testify as **elevator** experts. Shaughnessy v. Holt, 236 Ill. 485, 86 NE 256. Where witness said he was not familiar with the effect of changes of grades on leasehold values, but said he knew effect on rental values, it was proper to allow him to testify, in action to assess **damages for change of grade,** to leasehold interest. Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 P 330. The fact that a witness is a dealer in brewers' supplies and technical machinery does not qualify him to testify as an expert as to **whether Columbian spirits are poisonous,** if applied as a compound of shellac in an enclosed area. Herancourt Brew. Co. v. Frank, 11 Ohio C. C. (N. S.) 505.

Values: Owner of **personal property** may testify to its value. Rankin v. Caldwell, 15 Idaho, 625, 99 P 108. Where witness had had experience in buying and pricing precious stones in various cities, had bought stone in question 2½ years before, and had priced similar stones in another place, he was qualified to testify as to stone's value in that place. Sullivan v. Girson [Mont.] 102 P 320. Part owner of stock of goods, interested in it for two years, who had helped take an invoice, qualified to give his opinion as to value of goods. Bolte v. Equitable Fire Ass'n [S. D.] 121 NW 773. One otherwise qualified may testify to value of mules described to him, though he had never seen them. Gulf, etc., R. Co. v. Gillespie [Tex. Civ. App.] 118 SW 628. Farmer engaged in raising crops and live stock qualified to testify as to value of such crops and stock. Anderson v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 1114. Husband and father qualified as to value of family wearing apparel. La Compagnie Generale Transatlantique v. Persaglio [C. C. A.] 165 F 638. Owner of lost household goods qualified to testify to value. Birmingham R., L. & P. Co. v. Hinton [Ala.] 47 S 576. One who had bought, sold, and used similar machinery, competent as to value. Sykes v. Thornton [Pa.] 72 A 1063. Witnesses familiar with value of **land** and injury caused by railroad running through it, qualified to testify to damages. Wolf v. Green Bay, etc., R. Co., 140 Wis. 337, 122 NW 743. Witness qualified as to value of land after fire, where had had experience putting up hay, knew how much land would produce, cost of baling, and value of hay. Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166. Witness qualified to testify to reasonable market value of land before and after fire, who lived in vicinity, knew land values, and knew injury done by fire. Id. Farmer long familiar with land in question, its quality, boundaries, etc., and with condi-

tions, qualified as to value. White v. Western Allegheny R. Co., 222 Pa. 534, 71 A 1081. Farmers living in vicinity, who know character of soil, adaptability for agriculture, and value of land, qualified to express opinions as to value, though they have not bought and sold land and do not know of sales. Schmidt v. Beiseker [N. D.] 120 NW 1096. Farmer who has lived on and cultivated farm many years qualified as to value of land and crops. Anderson v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 1114. One who owned lots and acreage in city and had bought and sold such property, and made inquiries as to its market value, qualified as to market value of land condemned for railway. Pierce v. Chicago & M. Elec. R. Co., 137 Wis. 550, 119 NW 297. One who had long lived in vicinity, managed adjoining property, had been auditor in similar cases, and a judge qualified to testify to effect on value of property of closing of private way by which access was had to public streets. Cutter v. Boston, 200 Mass. 400, 86 NE 798. Millers or manufacturers familiar with mill property in question and market values in vicinity qualified to testify to value of property. Mengell's Ex'rs v. Mohnsville Water Co. [Pa.] 73 A 201. Farmer, engaged in agriculture, who knows particular tract of land, and values of lands in vicinity, qualified as to value of particular tract. Anderson v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 1114. One having knowledge of **services** rendered and their value was qualified as to value. In re McNamara's Estate, 155 Mich. 585, 15 Det. Leg. N. 1116, 119 NW 1074. Witness who had built carriages for 49 years qualified to testify to trimmers' wages, though he had hired trimmers by piece, not by day. Hialey v. Hialey's Estate [Mich.] 16 Det. Leg. N. 244, 121 NW 465.

Operation of railway trains: Railroad men, experienced in operation of trains, and more or less familiar with railroad accidents, qualified to give opinions as to **best way to extricate man** who had fallen under car. Matthews' Adm'r v. Louisville & N. R. Co. [Ky.] 113 SW 459. Witness with many years' experience as railroader, and some years as fireman and engineer on freigh trains, qualified to testify to **distance in which train could be stopped.** Southern R Co. v. Gullatt [Ala.] 48 S 472. Witnesses who had run other trains qualified as to distance within which train in question could be stopped. Chesapeake & O. R. Co. v. Lang's Adm'x [Ky.] 121 SW 993. Railroad man with 25 years of experience as brakeman and conductor, familiar with operation of engines and with type of engines used by defendant, qualified to state within what distance one of its engines could be stopped. Pennsylvania Co. v. Whitney [C. C. A.] 169 F 572. Engineer, who had also observed trains, could properly testify in what distance train on slight up-grade on straight track could stop train. Southern R. Co. v. Forrister [Ala.] 48 S 69. Experienced motorman, who knew car, place, and conditions, qualified to state in what distance car could be stopped. Kinlen v. Metropolitan St. R. Co., 216 Mo. 145, 115 SW 523. Engineer with 17 years' experience competent to testify to **dangers of peculiar coupling** of engine and tender, based on description of it. Texas & N. O. R. Co. v. McCoy [Tex. Civ. App.] 117 SW 446. Experienced railroad men who had done similar work qualified as to **number of men required to load car wheels** on cars, though they had used different kind of skids. Meiley v. St. Louis & S. F. R. Co., 215 Mo. 567, 114 SW 1013. Experienced railroad men, familiar with situation in question, qualified to testify **whether train was stopped in usual way.** Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 120 SW 553. Assistant master mechanic of railroad held qualified to testify as to **condition of engine** and as to what would be effect if its reverse bar was in the center. Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005. Experienced locomotive engineers qualified to state opinion as to how far live **sparks** would carry from locomotive in proper condition. Potter v. Grand Trunk Western R. Co. [Mich.] 16 Det. Leg. N. 313, 121 NW 808.

Transportation and value of live stock: Experienced cattle shipper qualified to testify to average **speed of cattle train.** Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. Cattle salesman at certain point, who had been so engaged 10 years, qualified to state **market value** of cattle there on certain day. Id. Experienced horse shippers who knew market values at certain place could testify thereto. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767. One experienced in breeding, handling, and shipping horses, and who had seen horses in question and knew market value at place of destination, qualified to testify to market value if they arrived in proper condition. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 118 SW 759. Witnesses who saw horses on their arrival and knew market value at destination could testify what they would have been worth had they arrived in good condition. Gulf, etc., R. Co. v. Cunningham [Tex. Civ. App.] 113 SW 767. Cattle dealer qualified by experience as to effect of delay on **salable appearance** of cattle. Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. Stock dealers qualified to give opinions as to **depreciation in value** of stock in course of shipment. Davis Bros. v. Blue Ridge R. Co., 81 S. C. 466, 62 SE 856. Witness qualified by long experience with horses and by knowledge of horses and conditions in question to state effect of long journey on horses shipped in certain stalls. Southern Exp. Co. v. Jacobs [Va.] 63 SE 17. One who was cattle shipper by occupation and knew condition of cars could testify that they had **appearance of having been disinfected.** International & G. N. R. Co. v. McCullough [Tex. Civ. App.] 118 SW 558.

Medicine and surgery: Physician in general practice qualified to give symptoms of one who had been his patient when examined by him after injury. Atlantic Coast Line R. Co. v. Dees, 56 Fla. 127, 48 S 28. Graduate of medical school, who had practiced five years, qualified as medical expert. Annapolis Gas & Elec. L. Co. v. Fredericks, 109 Md. 595, 72 A 534. Graduate of medical college, with years of experience in hospital work and practice, who had attended plaintiff several days and long been her physician, could testify what ultimate effect of her condition on her mind would be. United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606. Physician may testify to patient's mental condition though not an expert allenist. Id. Physician who had himself suffered two

the particular inquiry.[68] Witness' own statement that he is or is not an expert is a mere conclusion and has no weight; whether he is qualified must be determined from facts shown.[69]

(§ 9) *D. Basis of expert testimony, and examination of experts.*[70]—See 11 C. L. 1411—While some courts hold that the opinion of an expert may be based on his personal knowledge of the facts, as disclosed by his testimony [71] or upon the evidence

electric shocks, and had had three patients who had suffered such shocks, qualified to state whether condition in which he found patient might have been caused by such a shock. Id. Graduate physician, with experience, qualified to testify to nervous condition of patient and what causes might have produced it. Lockard v. Van Alstyne, 155 Mich. 507, 15 Det. Leg. N. 1132, 120 NW 1. Abuse of discretion to refuse to allow physician who had observed an examination of patient to give opinion as to whether he was suffering from any spinal disease, where he was general practitioner, and had read on particular subject, though he had had no cases of the kind. Pecos & N. T. R. Co. v. Coffman [Tex. Civ. App.] 121 SW 218. Prima facie any practicing physician who has had experience with malarial fever is qualified as to cause of prevalence of disease. That he disagrees with other physicians does not affect his competency. Towaliga Falls Power Co. v. Sims [Ga. App.] 65 SE 844. **Osteopathic physicians** held to have qualified themselves to testify in personal injury case, it not being shown on cross-examination that they had no knowledge from actual experience in like cases. Bucher v. Wisconsin Cent. R. Co., 139 Wis. 597, 120 NW 518. **Chemist,** if qualified, may testify as to examination of pus taken from sick man. United States Health & Acc. Ins. Co. v. Jolly [Ky.] 118 SW 281.

Held not qualified.

In action for breach of contract to get out special edition of newspaper, and furnish space for advertisements procured by plaintiff, latter's opinion as to **number of pages of advertising matter** there would have been, and how many he could have procured, was incompetent, he having had no previous experience in that city. Patten v. Lynett, 133 App. Div. 746, 118 NYS 185. Witness shown to have only common knowledge regarding subject, not competent to testify concerning **cause of sickness** and death of horses. Pierson v. Northern Pac. R. Co., 52 Wash. 595, 100 P 999. Error to allow physician to testify whether **electric shock** or mere fright caused plaintiff's illness, when he admitted he was not qualified to speak of effect of electric shock. United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606. Proper to refuse to allow one who was expert in locomotive construction and operation to testify how far a spark, coming through a **spark arrester,** would carry on a windy day. Hitchner Wall Paper Co. v. Pennsylvania R. Co. [C. C. A.] 168 F 602. Metal worker of long experience, who knew effect of sulphur water on metal pipes, but who had never worked in mines and did not know mode of inspecting high pressure pipes in mines, not qualified to testify whether maintaining **high pressure pipes in sulphur water** was safe, nor as to proper method of inspection, nor what such inspection would disclose. Harris v. Consolidation Coal Co. [Md.] 73 A 805. Question to medical witness, not qualified as **electric expert,** as to whether shock could have been received under certain conditions improper. United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606. Witness who had no special knowledge of **sheep disease,** by investigation or experience, not competent to state whether certain premises were infected with it. Power v. Turner, 37 Mont. 521, 97 P 950. One who had no knowledge of mules except what another had told him was not qualified as to their **value.** Gulf, etc., R. Co. v. Gillespie [Tex. Civ. App.] 118 SW 628. Testimony as to value of article, based on unidentified and undescribed catalogue, incompetent. Galveston, etc., R. Co. v. Hillman [Tex. Civ. App.] 118 SW 158. Witness not qualified to testify to **market value** of merchandise who had not seen goods and did not know their condition. Crocker v. Steidl, 82 Neb. 850, 118 NW 1082. Testimony as to **value of plow** properly excluded, where witness testified he did not know. Bruner v. Kansas Moline Plow Co. [C. C. A.] 168 F 218. Kansas City, Mo., attorneys not qualified, without special knowledge, to testify to **value of legal services** in California. State v. Seavey, 137 Mo. App. 1, 119 SW 17. One who knew **value of land** before part of it was taken by city could testify thereto though he did not know value after taking. First Presbyterian Church v. Pittsburg [Pa.] 72 A 347. Estimate of sum in which plaintiff was **damaged by fire,** communicated to his timber, competent, though he did not count trees. Miller v. Neale, 137 Wis. 426, 119 NW 94. Opinion of expert as to **cause of accident** caused by engine properly excluded when it did not appear that he saw accident. Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005. Railroad men held not to have had sufficient knowledge of facts and conditions in question to testify how far **spark from locomotive** would carry beyond certain property. Snow Lumber Co. v. Atlantic Coast Line R. Co. [N. C.] 65 SE 920.

68. Baltimore Refrigerating & Heating Co. v. Kreiner, 109 Md. 361, 71 A 1066.

69. Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418.

70. **Search Note:** See note in 39 L. R. A. 313.

See, also, Evidence, Cent. Dig. §§ 2364-2391; Dec. Dig. §§ 547-567; 17 Cyc. 163-183, 242-255, 261, 269.

71. When medical expert has made personal observation, hypothetical question is unnecessary. Crozier v. Minneapolis St. R. Co., 106 Minn. 77, 118 NW 256. Where witness' opinion was limited to facts which he himself had stated in evidence, opinion was not objectionable. Doherty v. Des Moines City R. Co. [Iowa] 121 NW 690. Where physician had examined injured party several times, and gave testimony, by deposition,

in the case heard by or read to him,[72] or partly upon his own knowledge and partly upon other evidence,[73] the better practice is to state in a hypothetical question the facts on which the opinion is to be based, assuming the truth of the facts recited,[74] and to obtain an opinion based solely on such facts.[75] The facts on which the opinion is based must be made to appear in some manner,[76] so that the court, jury, and witness may understand upon what the opinion is based.[77] A hypothetical question need not recite all the facts shown by the evidence,[78] but it should contain all the essential facts necessary as a basis of a relevant opinion[79] in view of the

as to party's condition, based on such examination, his opinion was properly left in evidence, though on cross-examination it appeared that he had also heard another doctor's report and seen a sciograph, which confirmed his own opinion. Seaboard Air Line R. Co. v. Maddox, 131 Ga. 799, 63 SE 344.

72. Where evidence was full as to character of cars and wheels to be loaded and kind of skids used, etc., and witnesses were experienced railroad men, who understood this work, it was proper to ask general question as to proper way to load wheels on cars. Meily v. St. Louis & S. F. R. Co., 215 Mo. 567, 114 SW 1013. Where physician had examined plaintiff, had heard evidence as to her condition and evidence not heard by him had been recited, his opinion as to time required for recovery was properly received. Gillman v. Media, etc., R. Co. [Pa.] 73 A 342. Question to physician as to ultimate effect of patient's condition on her mind proper in form when based on condition as testified to by himself and another. United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606. Where defendants refused to produce ring in question, **proper to base opinion as to value on description** aided by similar ring which was produced. Sullivan v. Girson [Mont.] 102 P 320.

73. Physician's testimony as to injured man's condition competent, based on his own examination and on injured man's testimony. Monaghan v. Northwestern Fuel Co., 140 Wis. 457, 122 NW 1066. Expert, giving opinion as to proper mode of setting telephone poles, may take into consideration the activity, strength, skill and experience of the men engaged in the work, when he has seen them, and heard evidence concerning them. Barrett v. New England Tel. & T. Co., 201 Mass. 117, 87 NE 565. Where several physicians took part in investigation of dog at Pasteur Institute, to determine whether it had rabies, and investigations and experiments were properly made and recorded, the opinion of physician on what experiments showed was not objectionable as being based on hearsay, records being in evidence. Buck v. Brady, 110 Md. 568, 73 A 277. Admission of opinion evidence as to effect of blows on the body not erroneous as not confined to case on trial where court, counsel and jury understood that evidence was confined to the case on trial. Wellman v. Metropolitan St. R. Co., 219 Mo. 126, 118 SW 31. It is competent to repeat to a physician a hypothetical question asked other physicians and add thereto conditions found by him when he examined the patient, the adverse party having had an opportunity to cross-examine him thereon. Washington, etc., R. Co. v. Lukens, 32 App. D. C. 442.

74. Proper practice is to state facts hypothetically, and not to recite them as actual facts. Shaughnessy v. Holt, 236 Ill. 485, 86 NE 256. The better practice is to frame hypothetical question containing statement of evidence which witness is to assume as true, but court may allow witness to base opinion on all the evidence for plaintiff or defendant, if he has heard it. Crozier v. Minneapolis St. R. Co., 106 Minn. 77, 118 NW 256.

75. Opinion as to trouble with sewer inadmissible when facts were not stated to witness but assumed his familiarity with conditions which had not appeared. City of Richmond v. Wood [Va.] 63 SE 449.

76. Facts on which opinion is based must appear, and opinion must be based on testimony of experts or others, or facts assumed and agreed upon by parties, or stated hypothetically in the question. Webb v. Minneapolis St. R. Co., 107 Minn. 282, 119 NW 955. In action for damages to shipment of cattle, testimony of shipper that he had never seen cattle worse handled than this shipment, improper, condition of other shipments which he had seen not being shown. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 114 SW 413. Plaintiff's estimate of value of his services was mere guess, where he did not testify to nature of services and value to constituents. Barnes v. American China Development Co., 131 App. Div. 40, 115 NYS 703. Where books and invoices were not in evidence, it was error in the court to allow an expert to testify to what such books and invoices showed. Cox v. Philadelphia City Pottery Co., 38 Pa. Super. Ct. 545.

77. Facts on which opinion is predicated should be clearly stated so that jury may know basis of opinion. Gillman v. Media, etc., R. Co. [Pa.] 73 A 342. Within court's discretion to exclude chemist's opinion as to relative age of ink entries, when facts determining the time in which entries would fade, such as exposure to light, etc., were not before court. Fitch v. Martin [Neb.] 122 NW 50. Not prejudicial error to ask "what is the depreciation of land," etc., instead of "what is the depreciation, if any" where jurors could not have misunderstood. Krier v. Milwaukee Northern R. Co., 139 Wis. 207, 120 NW 847.

78. Miller v. Leib, 109 Md. 414, 72 A 466. Question need not state all facts shown; examiner may select portion and elicit opinion thereon. Perkins v. Sunset Tel. & T. Co. [Cal.] 103 P 190. Question need not embrace all facts in evidence, but only such as party believes to be proved. Gillman v. Media, etc., R. Co. [Pa.] 73 A 342. Hypothetical question need not recite all facts in evidence; need recite only sufficient to form basis for intelligent opinion on question. Crosby v. Portland R. Co. [Or.] 100 P 300.

79. Hypothetical question improper be-

evidence before the court.[80] It is proper for such a question to embrace the theory of the party proposing it, within the limits of what that party's evidence tends to prove.[81] Questions should not assume facts not in evidence,[82] though facts presumed to be true until contrary appears[83] and facts which the jury are authorized to find[84] may be assumed. Questions which are unfair[85] or argumentative,[86] or

cause omitting fact which was essential element of basis of opinion. De Hoyos v. Galveston, etc., R. Co. [Tex. Civ. App.] 116 SW 75. Though question did not fully give details of evidence, it was proper, where it contained all material facts necessary as basis of opinion sought, and facts assumed were all supported by evidence. Norfolk & W. R. Co. v. Spears [Va.] 65 SE 482. Question to physician as to propriety of treatment of patient improper because omitting reference to patient's tubercular trouble. Miller v. Leib, 109 Md. 414, 72 A 466. Opinion on market value of goods not incompetent because estimate was based on cost, which was less than selling price. O'Brien v. Omaha Water Co., 83 Neb. 71, 118 NW 1110. Where party's own testimony corroborated case made by adversary, hypothetical question should have fairly presented facts so admitted and proved. Landis v. Watts [Neb.] 121 NW 980. Where witness estimated value of land per acre, it was immaterial that he had in mind 100 acres instead of 50. Tennessee Coal, Iron & R. Co. v. McMillion [Ala.] 49 S 880. Jeweler properly allowed to give opinion as to value of ring based on description and comparison with similar one, when party having possession of ring in question refused to produce it at trial. Sullivan v. Girson [Mont.] 102 P 320. Hypothetical question as to probable cost of proposed construction not erroneous when it included substantially all the details of construction, and other facts could have been shown on cross-examination, if desired. Curtley v. Security Sav. Soc., 51 Wash. 242, 98 P 667.

80. In malpractice case, question to plaintiff's expert, embracing plaintiff's theory of defendant's improper treatment, but not indicating intervals of time between different steps in treatment, nor showing treatment after defendant's discharge, was improper. Farrell v. Haze [Mich.] 16 Det. Leg. N. 378, 122 NW 197. Question to engineer how near rear of engine man could be seen if there was street light there, proper, an issue being whether engineer, backing engine, saw man who was struck, and how near he was. Louisville & N. R. Co. v. Johnson [Ala.] 50 S 300.

81. Either party may elicit opinion evidence on facts believed by him to be proved or which jury are warranted in finding, assuming such facts to be true. Gillman v. Media, etc., R. Co. [Pa.] 73 A 342. In allowing hypothetical questions, court must rely on statement of counsel as to what evidence will be. Delaney v. Framingham Gas, Fuel & P. Co., 202 Mass. 359, 88 NE 773. Party may frame hypothetical question on theory contended for by him, provided it is supported by evidence and consistent with it. Questions inconsistent with the case made by him are improper. Landis v. Watts [Neb.] 121 NW 980. Expert may answer hypothetical question relating to matter of fact, though it is decisive of very matter in issue. International & G. N. R. Co. v. McCullough [Tex. Civ. App.] 118 SW 558.

82. Long Distance Tel. & T. Co. v. Schmidt [Ala.] 47 S 731; In re Higgins' Estate [Cal.] 104 P 6; United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606; Missouri Val. Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93; Pecos & N. T. R. Co. v. Coffman [Tex. Civ. App.] 121 SW 218. Hypothetical question which did not correctly recite facts shown by evidence, improper. Bouvier v. Brass [Ariz.] 100 P 799. Question, calling for opinion on value, improper because assuming facts not supported by any evidence. Harten v. Loffler, 212 U. S. 397, 53 Law. Ed. —. Action for injuries to mill by partially filling mill pond with dirt; questions as to extent of depreciation by half filling, or entirely filling, pond with dirt, improper, those conditions not being shown. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426. Proper to refuse to allow trestle expert to state whether he had ever known trestle to give way on account of lateral pressure from accumulated earth, where those conditions were not shown to exist in case at bar. Stremme v. Dyer [Pa.] 72 A 274. Question not objectionable as assuming agency of another when it was **merely preliminary** to principal testimony. Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410.

83. Proper to assume that street car and appliances were in good condition as law required them to be so. Kinlen v. Metropolitan St. R. Co., 216 Mo. 145, 115 SW 523.

84. Hypothetical question held proper as to facts assumed. Drolle v. Reedsburg, 140 Wis. 319, 122 NW 771. Opinions may be based on facts which evidence tends to show and which are assumed as true in question. Meily v. St. Louis & S. F. R. Co., 215 Mo. 567, 114 SW 1013. Facts which jury may find from evidence may be assumed in hypothetical question. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 117 SW 459. Evidence held to support hypothetical question as to value of land. Missouri, K. & T. R. Co. v. Chilton [Tex. Civ. App.] 118 SW 779. Question held to conform to evidence. Crosby v. Portland R. Co. [Or.] 100 P 300. Opinion as to causes which might have produced derailment of car held to be based on facts in evidence and proper. Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793. Hypothetical question proper when there was evidence to support facts assumed. Spiers v. Hendershott [Iowa] 120 NW 1058. Question whether market value of plaintiff's farm had depreciated by reason of taking part of it for electric railway right of way held proper; based on evidence, and not misleading. Pierce v. Chicago & M. Elec. R. Co., 137 Wis. 550, 119 NW 297. Question proper where assumed facts may be found by jury, though evidence to support them is not direct or certain. Miehlke v. Nassau Elec. R. Co., 129 App. Div. 438, 114 NYS 90. Question, if woman died of erysipelas, what re-

which call for speculative opinions[87] or testimony based in part on the opinions of other witness,[88] or on hearsay,[89] or which require the witness to pass on a controverted question of fact,[90] should be excluded. The trial court has, however, large discretion in the matter of hypothetical questions.[91]

The opinions of medical experts may be based on facts stated hypothetically[92] or on published statistics,[93] or upon objective symptoms disclosed by his own observations while treating a patient,[94] and an opinion based on both objective and subjective symptoms is not incompetent,[95] unless the physician has been called by the patient for the purpose of qualifying him as a witness.[96]

lation scratch or abrasion had to her death held proper in view of evidence. McAuley v. Casualty Co. [Mont.] 102 P 586. Not error for court to instruct jury that they were to give opinion evidence such weight as they thought it entitled to if they found the facts substantially as assumed; but that if facts assumed were not found true, substantially, the opinions were not to be considered. Peterson v. Brackey [Iowa] 119 NW 967.

85. Question should refer to essential facts and should not give false coloring to same by suppressing others. Miller v. Leib, 109 Md. 414, 72 A 466.

86. Hypothetical question to physician, assuming that alleged symptoms were not real, improper because argumentative. Houston & T. C. R. Co. v. Johnson [Tex. Civ. App.] 118 SW 1150.

87. Physician's opinions as to one's fitness physically for marriage, based on the person's nervous condition, are too speculative or conjectural. United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606. Experienced railroad man may not state that he thought rate of speed of train must have been from what he saw at wreck. Neesley v. Southern Pac. Co. [Utah] 99 P 1067.

88. The opinions of other witness are not a proper element of the basis of opinion evidence. Crozier v. Minneapolis St. R. Co., 106 Minn. 77, 118 NW 256.

89. Opinion of witness on article in horticultural paper incompetent, being based on hearsay. Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410. Opinion on value, in condemnation proceeding, cannot be based on what witness had heard petitioner had paid for other land. Oregon R. & Nav. Co. v. Eastlack [Or.] 102 P 1011. Proper to allow witness to testify to state of cattle market on certain days and to state that he gained his information from market reports in National Live Stock Reporter. St. Louis & S. F. R. Co. v. Lane [Tex. Civ. App.] 118 SW 847.

90. Opinion cannot be based upon all the evidence in the case when it is conflicting. Gillman v. Media, etc., R. Co. [Pa.] 73 A 342. Opinion may be based on facts admitted or proved by evidence which is not conflicting. Id. Question whether condition of patient might have been caused by electric shock held not to assume that there had been such shock. United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A. 606. Where facts assumed were based on conflicting evidence and witnesses had heard such evidence, opinions were unreliable and uncertain, since it could not be definitely known on what facts they were based. Ferguson v. Truax, 136 Wis. 637, 118 NW 251.

91. Scurlock v. Boone [Iowa] 120 NW 313.

92. Opinion of physician based on hypothetical question, not incompetent because he also testified as attending physician to history of case, his opinion not being based on his own knowledge of the case. Jones v. Springfield Trac. Co., 137 Mo. App. 408, 118 SW 675.

93. Testimony of physician as to traumatic injuries causing multiple sclerosis, based on published statistics and not on personal experience, competent. Piper v. Boston & M. R. Co. [N. H.] 72 A 1024.

94. Testimony of physician that patient suffered consciously competent when it appeared to be based on his own observations. Hines v. Stanley G. I. Elec. Mfg. Co. [Mass.] 89 NE 628.

95. Opinion of physician based on objective symptoms observed by him, and also on subjective symptoms on which he based his diagnosis and treatment, competent. Chesapeake & O. R. Co. v. Wiley [Ky.] 121 SW 402. Opinion of nature of malady or injury may be based in part on what witness has learned in course of his professional examination of the case, and what patient has told him regarding his sufferings and symptoms. Crozier v. Minneapolis St. R. Co., 106 Minn. 77, 118 NW 256. Testimony with respect to plaintiff's vision, physician having made examination before suit was brought, and not for the purpose of preparing a case or being a witness. McCabe v. Swift & Co., 143 Ill. App. 404. As to numbness of fingers, by attending physician. O'Shaugnnessy v. Chicago City R. Co., 144 Ill. App. 174. Proper to allow physician who attended patient to state that he could determine whether she was "tender" at certain point, and sources of information could be inquired into on cross-examination. Marshall v. Saginaw Val. Trac. Co. [Mich.] 16 Det. Leg. N. 357, 122 NW 131. Testimony of physician based upon what he observed and ascertained by application of tests was not incompetent though based in part on subjective symptoms. Fuhry v. Chicago City R. Co., 144 Ill. App. 521.

96. Testimony of physician based on examination of plaintiff and subjective symptoms, examination being made with view of testifying, incompetent. Casey v. Chicago City R. Co., 237 Ill. 140, 86 NE 606. Physician who has examined injured person with view to testifying only must base opinion on objective symptoms only; cannot relate nor take into consideration self-serving statements by injured person. Fuhry v. Chicago City R. Co., 239 Ill. 548, 88 NE 221. Where physician is called for purpose of making examination of plaintiff with view of testifying at trial, his opinion is incompetent so far as based on subjective symp-

Witnesses who have given opinion evidence may be thoroughly cross-examined [97] to show interest, bias or prejudice,[98] and to test the knowledge of the witness and the value of the opinion,[99] the extent of such cross-examination resting largely in the trial court's discretion.[1] There is a conflict of opinion as to whether medical books may be read to a medical expert.[2]

§ 10. *Real or demonstrative evidence.*[3]—See 11 C. L. 1414—Real evidence is admissible when properly identified and shown to be relevant,[4] and such evidence can

toms, either statements of plaintiff or his actions or physical manifestations of pain or physical condition. Chesapeake & O. R. Co. v. Wiley [Ky.] 121 SW 402.

97. Wide range of cross-examination should be permitted in case of nonexperts who give opinions on another's sanity. Snell v. Weldon, 239 Ill. 279, 87 NE 1022. In cross-examination of expert accountant who had submitted report on shortage of county treasurer, it was proper on cross-examination to use books, records and accounts of second term to show inaccuracies in expert's report. King County v. Whittlesey, 52 Wash. 206, 100 P 320.

98. Proper cross-examination to ask physician how much he was to be paid for testifying as expert. Shaughnessy v. Holt, 236 Ill. 485, 86 NE 256. Means of knowledge, bias or inclination, and interest of expert, may be shown. McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223. Proper cross-examination of expert for defendant to inquire how many times he had testified for defendant company, but not to inquire in how many cases he had testified for either side. Id.

99. Error to exclude question on cross-examination of physician designed to qualify his previous answer and impeach him. Fahr v. New York, S. & W. R. Co. [N. J. Law] 72 A 69. Witnesses to value of land properly cross-examined as to value of lands in vicinity. City of Chicago v. Marsh, 238 Ill. 254, 87 NE 319. Where witness had testified as to size of sparks that would pass through a spark arrester in good condition, it was proper to show him an object to show by comparison the size of the sparks. Byers v. Baltimroe & O. R. Co., 222 Pa. 547, 72 A 245. Expert to rental value of property may be cross-examined as to knowledge of rental value of other property in vicinity, but may not give estimate of rental values of such other property, this not being element or basis of such opinion. Raapke & Katz Co. v. Schmoller & Mueller Piano Co., 82 Neb. 716, 118 NW 652. Where medical witness testified to diagnosis of disease, it was proper cross-examination to ask if disease could not exist without objective symptoms. Missouri, K. & T. R. Co. v. Dalton [Tex. Civ. App.] 120 SW 240. Proper cross-examination of medical expert to ask if tuberculosis ever results from a blow or traumatism on the body in the region of the lungs. Id. It may be proper to prove by witness himself that he has made mistakes in past, but other evidence of particular instances in which he has been mistaken should be excluded, or at least such evidence is admissible only in trial court's discretion. Missouri, K. & T. R. Co. v. Bailey [Tex. Civ. App.] 115 SW 601. Where physician testified that plaintiff was permanently paralyzed, it was not proper to prove that he had testified in another action that plaintiff was permanently paralyzed, and that that person had since been seen walking about. Id. Where witness testified that property had not depreciated in value because of erection of electric light plant near, it was proper on cross-examination to show true facts, and ask his opinion based on such facts. Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897.

1. McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223. Proper to exclude question to expert on mental condition of testator whether he would entrust management of $50,000 to him, where liberal cross-examination had already been permitted. In re Higgins' Estate [Cal.] 104 P 6.

2. Proper to cross-examine medical expert by reading extracts from authorities, naming authors and asking expert whether he agreed. Gulf, etc., R. Co. v. Farmer [Tex. 115 SW 260. Reading medical authorities to expert on cross-examination and naming authors does not make extracts read evidence. Id. Medical experts may be cross-examined by reading medical books to them and asking them if they agree with the author's conclusions, provided jury are cautioned that extracts read are not independent evidence. MacDonald v. Metropolitan St. R. Co., 219 Mo. 468, 118 SW 78. **Reversible error** to allow counsel to read from medical book on cross-examination of physician. Foley v. Grand Rapids & I. R. Co. [Mich.] 16 Det. Leg. N. 246, 121 NW 257.

3. Search Note: See notes in 3 C. L. 1380; 5 Id. 1366; 14 L. R. A. 466; 15 Id. 221; 35 Id. 802; 42 Id. 384; 52 Id. 500; 62 Id. 817; 65 Id. 95; 8 L. R. A. (N. S.) 306, 974; 3 A. S. R. 554; 53 Id. 375, 376; 68 Id. 242; 75 Id. 468; 114 Id. 437; 1 Ann. Cas. 161; 6 Id. 560; 7 Id. 216; 8 Id. 435; 10 Id. 285, 663, 962.

See, also, Evidence, Cent. Dig. §§ 439, 676-683; Dec. Dig. §§ 150, 188-199; 17 Cyc. 285, 290-295; 11 A. & E. Enc. L. (2ed.) 536; 12 Id. 398; 22 Id. 772.

4. Any article becoming important by reason of evidence or nature of investigation may be produced for inspection and illustration. Byers v. Baltimore & O. R. Co., 222 Pa. 547, 72 A 245. Proper to use another **ring** to aid in description of ring value of which was sought to be proved. Sullivan v. Girson [Mont.] 102 P 320. In action for damages caused by gas explosion, due to defective meters and couplings, a **gas coupling** found in room admissible. Sinforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320. Where a **hammer** was in issue, another hammer and photographs of cross sections of another piece of steel were competent to illustrate and explain expert testimony concerning steel and microscopic analysis, and condition of hammer in question. Patwin v. West Bay City Shipbuilding Co., 156 Mich. 201, 16 Det. Leg. N. 82, 120 NW 613. **Hitch-**

be introduced only by exhibiting it to the jury.[5] Photographs, plats, maps, and models are competent,[6] when a proper foundation has been laid,[7] and it appears that such evidence will assist the jury [8] and will not confuse them.[9] The authenticity of photographs must be shown as a preliminary to their introduction,[10] and it must also appear that a photograph correctly represents the person, place or condition in question at the time in question.[11] The results of experiments made out of court may be proved when conditions at the time of the experiment and at the time in question were substantially the same.[12] The party offering such evidence has the burden of showing such identity or similarity of conditions.[13]

ing post held admissible in action for personal injury sustained by falling over such hitching post. District of Columbia v. Duryee, 29 App. D. C. 327.

5. Morgantown Mfg. Co. v. Hicks [Ind. App.] 86 NE 856.

6. Photographs competent to explain and apply evidence. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. Photograph of testatrix competent on issue of her physical condition. Spiers v. Hendershott [Iowa] 120 NW 1058. **X-ray photographs,** with expert testimony, competent. Houston & T. C. R. Co. v. Shapard [Tex. Civ. App.] 118 SW 596. Surgeon who performed second operation because of improper previous setting of broken bone properly allowed to state reasons for conclusion that second operation was necessary, and to introduce **radiographs** of bones to show conditions. Wallace v. Pennsylvania R. Co., 222 Pa. 556, 71 A 1086.

Plats showing location of buildings on ground according to contentions of one party competent. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617. Plat of school lands competent to identify and locate lands. Black v. Chicago, B. & Q. R. Co., 237 Ill. 500, 86 NE 1065.

Maps: Proper to allow witness to use map in testifying as to investigation on land on which timber was claimed to have been cut. Clevenger v. Blount [Tex. Civ. App.] 114 SW 868.

7. Sufficiency of foundation for admission of maps, photographs, models, plans, etc., is for trial court. Hassam v. Safford [Vt.] 74 A 197.

8. Maps, models, plans and photographs are competent only when shown to be sufficiently accurate to be of assistance to jury. Hassam v. Safford [Vt.] 74 A 197.

9. Not abuse of discretion to exclude quarter size **model** of machine on ground that it would confuse rather than instruct jury. Republic Iron & Steel Co. v. Yanuszka [C. C. A.] 166 F 684.

10. Authenticity and correctness of photographs **preliminary question** for court, and its decision largely discretionary. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651.

How shown: Photographs need not be authenticated by photographer, may be verified by any witness who knows they correctly represent condition, place or object in question. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Mo. 186, 72 A 651; M. McGirr Sons Co. v. Babbitt, 61 Misc. 291, 113 NYS 753.

Held identified: Photograph admissible when witness testified he saw it taken and that it correctly represented conditions. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651.

Held not identified: Photograph of railroad crossing held incompetent though witness testified that it represented conditions properly, where he did not know who made it, nor when, nor from what position, having received it from a neighbor. Western Maryland R. Co. v. Martin, 110 Md. 554, 73 A 267. Photographs of place of accident, including streets, held inadmissible, where one who made them did not testify, and other testimony did not show that they were accurate representations. Buck v. McKeesport [Pa.] 72 A 514.

11. Photographic results of experiments competent when **conditions** are shown substantially the same as at time of accident. Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969. Photograph of meat chopping **machine** with plaintiff and two boys standing in positions which defendant's evidence showed they occupied at time of injury to plaintiff, properly admitted. Harrison v. Green [Mich.] 16 Det. Leg. N. 486, 122 NW 205. Photograph of **filling material,** as it had been dumped along railway track, after being refused by owner of land to be filled, competent to show nature of material, when owner claimed it consisted of broken furniture, etc. M. McGirr Sons Co. v. Babbitt, 61 Misc. 291, 113 NYS 753. Photograph of **scene of accident,** incompetent, arrangement of objects not being same. Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969. Photographic views of track and derailed cars after wreck, showing broken ties piled up along track, competent. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. Photographs of place of accident inadmissible where it appeared that pile of stones shown in picture was not the pile which was there at time of accident. Buck v. McKeesport [Pa.] 72 A 514. Photograph of cellarway after accident, when bars had been put up which were not there at time of accident, was inadmissible. Davenport v. Matthews, 130 App. Div. 257, 114 NYS 715. In personal injury action, photograph of **plaintiff,** taken two months before injury, competent, when he testified that it was good likeness of himself at time of injury. Galveston, etc., R. Co. v. Harper [Tex. Civ. App.] 114 SW 1168.

12. Where witness placed himself in position of plaintiff when he was injured, he could properly testify to **facts observed** by him. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. Where witness made observations at scene of railroad accident, he could testify as to his ability to see objects on the track, though the form

It is held, though not without conflict,[14] that the court has power to compel a party to submit to a physical examination,[15] and that the exercise of such power rests in the sound discretion of the trial court, and will not be reviewed except for an abuse of discretion.[16] Exhibition of injuries and of their effect is sometimes permitted.[17] The matter of examination to prepare for trial is treated elsewhere,[18] as its also physical examination and inspection of injuries as baring peculiarly on damages.[19]

§ 11. *Quantity required and probative effect.*[20]—See 11 C. L. 1415—The weight or credibility of testimony is to be determined by the trial court[21] or jury,[22] and

of his testimony was that he did not see why engineer could not see. St. Louis, etc., R. Co. v. Flinn [Ark.] 115 SW 142. Issue being how far off in cut train could be heard and smoke and steam seen, proof of tests made by witnesses under similar conditions was competent. Johnson v. Chicago, etc., R. Co. [Kan.] 103 P 90. Error to receive in evidence proof of experiment to see how far red light on truck could be seen at night, where other evidence showed night of accident was dark and cloudy, and night of test was quite stormy, rainy, gloomy, and dark. Green v. Long Island R. Co., 131 App. Div. 277, 115 NYS 590. Results of **test of motor,** to prove it was not defective, properly admitted, conditions being shown same. Kimball Bros. Co. v. Citizens' Gas & Elec. Co. [Iowa] 118 NW 891. **Trial of seeds** could not be proved when identity of seeds and similarity of conditions under which seeds in question were planted and cultivated did not appear. Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410.

13. Correspondence between conditions of accident and of experiment. Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969.

14. See 9 C. L. 1305, n. 73; 11 C. L. 1415, n. 33. Plaintiff in personal injury action may refuse to submit to physical examination. Not error to refuse to require plaintiff to answer whether or not she was willing to be examined, where she desired to consult her father. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83. Willingness to submit to physical examination by physicians, if attorney consente, is not such consent as warrants court in appointing commission to make examination, attorney having agreed to examination by physicians mutually named. San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716. Where plaintiff in personal injury action, exhibits injured parts to jury in course of his testimony, defendant is entitled, on proper request, to an examination by an expert of his own selection, and to his testimony in regard thereto. St. Louis S. W. R. Co. v. Browning [Tex. Civ. App.] 118 SW 245.

15. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Where plaintiff voluntarily exhibited his injured knee, it was in evidence, and court properly required him to submit it to surgical examination. Chicago & N. W. R. Co. v. Kendall [C. C. A.] 167 F 62.

16. Where plaintiff had undergone two previous examinations and offered to allow examination of part of body affected, it was not error to refuse to require him to submit to another examination. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Though court has power to order plaintiff in personal injury action to submit to physical examination, its exercise is largely discretionary, and will be reviewed only where an abuse of discretion appears. Macon & B. R. Co. v. Ross [Ga.] 65 SE 146. Gen. St. 1906, § 3151, makes it discretionary with trial court to order physical examination of plaintiff, and there was no abuse of discretion in denying an application, without prejudice, willingnese to make an order later being shown, in case such examination should appear necessary. Atlantic Coast Line R. Co. v. Dees, 56 Fla. 127, 48 S 28.

17. Plaintiff lost both legs in railroad accident, and testified that he could walk a little on his knees, and could use rolling chair. Not error to allow him to walk before jury and show what use he could make of his legs. Southern R. Co. v. Brock [Ga.] 64 SE 1083.

18. See Discovery and Inspection, § 4.

19. See Damages, § 7B.

20. Scope of section: Only general rules are here treated. Other topics treat of the province of the court and jury (see Questions of Law and Fact*), the propriety of granting a nonsuit (see Discontinuance, Dismissal and Nonsuit,* § 2), or directing verdict (see Directing Verdict and Demurrer to Evidence*), the extent to which appellate courts will review questions of fact (see Appeal and Review,* § 13F2), and the sufficiency of evidence on particular issues (see topics dealing with particular matters, such as Master and Servant; * Negligence; * etc.).

Search Note: See notes in 9 C. L. 1310; 11 Id. 1420; 42 L. R. A. 753; 44 Id. 846; 2 L. R. A. (N. S.) 905; 4 Id. 410; 6 Id. 442, 575; 9 Id. 508; 10 Id. 1051; 11 Id. 893; 15 Id. 416, 1096, 1162; 3 Ann. Cas. 302; 4 Id. 982; 6 Id. 746.

See, also, Evidence, Cent. Dig. §§ 1004-1051, 1162-1167, 1660-1677, 2392-2400, 2424-2459; Dec. Dig. §§ 254-265, 309-313, 383, 568-574, 583-601; 16 Cyc. 1037-1050; 17 Id. 262-273, 464, 753-822; 11 A. & E. Enc. L. (2ed.) 490, 528.

21. Trial judge may disbelieve party's testimony and accept one of two inconsistent statements of adversary. Doon v. Felton [Mass.] 89 NE 539. Where judge tries case, he is sole judge of credibility of witnesses; may disregard testimony of any or all and find facts on all the evidence. Tipton v. Christopher, 135 Mo. App. 619, 116 SW 1125. Court not bound by one party's testimony on issue though preponderance seems to be with him. Steely v. Texas Imp. Co. [Tex Civ. App.] 119 SW 319. Court may admit evidence and afterwards pass on its probative effect. Parker-Washington Co. v. Cole, 137 Mo. App. 530, 120 SW 118.

22. More-Jonas Glass Co. v. West Jersey & S. R. Co., 76 N. J. Law, 708, 72 A 65; Sie-

* Always begin with the latest article on the subject. Use the latest topical index.

the jurors are not restricted to the consideration of the facts directly proved, but may give effect to reasonable inferences therefrom,[23] and may even make use of their common knowledge gained from observation and experience.[24]

No party is absolutely concluded by the testimony of any witness.[25] Furthermore, the jury may believe a witness though he is contradicted,[26] or they may disbelieve a witness though he is not contradicted,[27] or where he is contradicted by circumstantial evidence [28] or by documentary evidence.[29] Testimony cannot, however, be arbitrarily disregarded,[30] and is to be taken as true when not inherently improbable and when it is in no way discredited.[31] In considering testimony, the jury may consider the interest of the witness, or lack of it,[32] but the testimony of a wit-

zak v. St. Louis Transit Co. [Mo. App.] 121 SW 1095; Modlin v. Jones & Co. [Neb.] 121 NW 984. Weight of evidence for jury, however weak and inconclusive. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. Weight of evidence for jury; error for court in instructions, to intimate opinion. Buell v. Adams [Mich.] 16 Det. Leg. N. 309, 121 NW 752.

23, 24. Chicago, etc., R. Co. v. Moore [C. C. A.] 166 F 663.

25. Party is entitled to have it weighed by the jury. Lewis v. Wabash R. Co. [Mo. App.] 121 SW 1090. Fact that party cannot impeach his own witness does not make the testimony of the latter conclusive upon the former in point of verity. Id.

26. Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038. Jury may find for plaintiff though his testimony is directly contradicted by defendant. McIntosh v. McNair [Or.] 99 P 74. Jury had right to disbelieve testimony of engineer and fireman and believe testimony of witness who saw crew or part of it at time. International & G. N. R. Co. v. Tinon [Tex. Civ. App.] 117 SW 936.

27. Ryan v. Fall River Iron Works Co., 200 Mass. 188, 86 NE 310; Sullivan v. Old Colony St. R. Co., 200 Mass. 303, 86 NE 511. Testimony of plaintiff and his witnesses need not be believed in toto even though uncontradicted. Young v. Snell, 200 Mass. 242, 86 NE 282. Evidence must come from credible witness and be credible in itself. Harris v. Barrett [N. J. Eq.] 72 A 956. Testimony need not be believed where inherently improbable. Punsky v. New York, 129 App. Div. 558, 114 NYS 66. Jury has right to disbelieve testimony though not directly contradicted. Strong v. Carver Cotton Gin Co., 202 Mass. 209, 88 NE 582.

28. Witness' estimate of distance between car and person struck, when he stepped on track, not binding on jury, when circumstances showed it to be unreliable. Canerdy v. Port Huron, etc., R. Co., 155 Mich. 211, 16 Det. Leg. N. 85, 120 NW 582. Engineer's testimony that collision occurred at highway held not conclusive though he was only eyewitness; fact may be shown otherwise by circumstantial evidence. Bacus v. Chicago, B. & Q. R. Co. [Iowa] 118 NW 751. Where in negligence case defendant's employes testified in favor of defendant but physical facts warranted finding of negligence, question was for jury. O'Kelly v. Yazoo & M. V. R. Co. [Miss.] 47 S 660. Testimony of witnesses that engine was in good condition not conclusive, though uncontradicted; all circumstances to be considered. St. Louis S. W. R. Co. v. Trotter [Ark.] 116 SW 227. Witness' testimony as to what he thought or felt at certain time does not necessarily outweigh circumstantial evidence tending to show what he felt or thought. Western Union Tel. Co. v. Burton [Tex. Civ. App.] 115 SW 364. Instruction that signed release raised "strong" presumption which could only be overcome by evidence which would convince minds of jury beyond reasonable controversy properly refused. Norfolk & W. R. Co. v. Hazelrigg [C. C. A.] 170 F 551.

29. Where record evidence as to laying out of road conflicted with oral evidence, court had right to rely on records as best evidence. Brack v. Ochs [Kan.] 102 P 479.

30. Positive testimony of unimpeached witnesses cannot be disregarded arbitrarily or capriciously. Steenburgh v. McRorie, 60 Misc. 510, 113 NYS 1118; Brown v. Johnson [Ky.] 116 SW 273; Bolster v. New York City R. Co., 113 NYS 770; O'Donnell v. Caspary, 113 NYS 771; Grand Fraternity v. Melton [Tex.] 117 SW 788. Testimony of defendant and witnesses in support of defense of payment could not be wholly disregarded when not manifestly incredible. Katz v. Friedman, 117 NYS 108. Error to give judgment for plaintiffs for full amount claimed when defendants' testimony in support of counterclaim was uncontradicted. Mann v. Warshawsky, 112 NYS 1062. Where one witness testified that improvements were worth $700 and another that they were worth $1,300, finding that they were worth $400 was contrary to evidence. Palmer v. Abrahams [Wash.] 104 P 648.

31. United States v. Barber Lumber Co., 172 F 948; Wendell v. Leo, 195 N. Y. 76, 87 NE 790; Tiffany v. Morgan [R. I.] 73 A 465.

32. Interest or bias of witness properly considered in weighing his testimony. Gordon v. Kansas City So. R. Co. [Mo.] 121 SW 80. Interest of witnesses to be considered in weighing testimony. In re Palmer's Will, 52 Wash. 644, 101 P 220. Courts need not accept undisputed testimony of interested parties if it is not credible. Brown Mercantile Co. v. Sherrod, 53 Wash. 132, 101 P 481. Court will not give much weight to testimony of one who acts as solicitor, and also furnishes evidence necessary to sustain cause. Grindle v. Grindle, 240 Ill. 143, 88 NE 473. Testimony of interested witness consisting largely of opinions and conclusions, not binding on jury, though undisputed. Texas & P. R. Co. v. Taylor [Tex. Civ. App.] 118 SW 1097. Party not bound by **testimony**

ness cannot be disregarded arbitrarity on this account.[33] The jury may consider also the demeanor of the witness while on the stand,[34] his means of knowledge, apparent intelligence or capacity,[35] the corroboration [36] or impeachment [37] of his testimony, or lack of contradiction when testimony could have been contradicted, if untrue,[38] and its inherent probability or improbability,[39] and the jury may determine the weight and force of all the evidence by their own general knowledge of the subject of inquiry.[40]

of adverse party, called under statute. Greenbaum v. Greenfield, 114 NYS 832. Where one party is called by adverse party as witness, under the statute, party calling him is not bound by his testimony. Anderson v. Middlebrook, 202 Mass. 506, 89 NE 157. **As being testimony of witnesses equally interested,** a statement of lessee entitled to equal weight with that of lessor, where lease is attacked for fraud. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. The supreme **importance of a transaction to one of the persons engaged therein** will as a general rule make his testimony of greater weight, because his memory is more trustworthy than that of adverse party to whom the transaction is of less importance. South Penn Coal Co. v. Male, 65 W. Va. 694, 64 SE 925.

33. Court is bound to give credence to uncontradicted testimony even from interested witnesses when it is substantiated, and is not inconsistent with well known facts, experience and reason. Epremiam v. Ward, 169 F 691. Where plaintiff is not in any way impeached, her testimony is not to be disbelieved merely because she is a party. Giltman v. Brooklyn Heights R. Co., 129 App. Div. 654, 113 NYS 1046.

34. Jury not bound to believe testimony if witnesses were discredited by manner on stand, or if evidence as whole warranted other conclusions. Connelly v. Illinois Cent. R. Co., 133 Mo. App. 310, 113 SW 233.

35. Where plaintiff testified positively to weight of apples, and showed circumstances giving him opportunity to know their weight, his testimony was not to be disregarded merely because another did the weighing. Plumb v. J. W. Hallauer & Sons Co., 130 App. Div. 284, 114 NYS 474. Where witnesses testified that roads were cleared by certain date, contradictory testimony was entitled to little weight when witness said he did not know how much work had been done. Uvalde County v. Oppenheimer [Tex. Civ. App.] 115 SW 904. Positive testimony as to quantity of timber cut and removed from land by witness who had measured stumps and treetops on the ground should control against mere guesses or estimates of one who kept no record. McGee v. Louisiana Lumber Co., 123 La. 696, 49 S 475. Witnesses bearing close family, social or business relations to grantor in deed have most favorable opportunity to observe his mental condition and their testimony is entitled to great weight. Jones v. Thomas, 218 Mo. 508, 117 SW 1177. Where a defendant was intoxicated at the time bottle was thrown from roof garden and could not have known what he was doing, his statement that he threw it was not conclusive, as it must have been based on what others told him. Bruner v. Seelbach Hotel Co. [Ky.] 117 SW 873. Weight of testimony as to values depends not only on credibility of witnesses but also on the basis of their estimates, their knowledge and opportunity therefor, manner of testifying and mode and ability of expressing themselves. Kelley v. Colorado, etc., R. Co., 123 La. 1088, 49 S 717.

36. Court may believe two witnesses equally credible, though they testify differently, and yet find facts as testified to by one, who is corroborated by other evidence. Elzy v. Adams Exp. Co. [Iowa] 119 NW 705. Corroboration of impeached witness by others, unimpeached, does not necessarily destroy impeachment. Olson v. Rice [Iowa] 119 NW 84. Where it is sought to contradict witness by proving declarations out of court, jury may believe him, though uncorroborated. Sibs v. Scheussler [Ga. App.] 64 SE 99.

37. Proper to instruct jury that in weighing testimony they may consider "personal credibility" of witnesses so far as it has appeared at the trial. Western & A. R. Co. v. Henderson [Ga. App.] 65 SE 48. When veracity of party's witnesses is seriously impeached, their testimony may be disregarded. Yalovitz v. Schutz, 115 NYS 1080.

38. Uncontradicted testimony to physical symptoms will not be rejected when, if untrue, it could easily have been contradicted. Louisville & N. R. Co. v. Schroeder [Ky.] 113 SW 874. Where facts testified to could be readily disproved, if not true, and no evidence to disprove was offered, court properly took them as undisputed. Hanson v. Williams [Tex. Civ. App.] 113 SW 312. That testimony of contestant of will could not be contradicted by proponent did not make it conclusive where, in the nature of the case, it could not be contradicted. In re Brown's Will [Iowa] 120 NW 667.

39. Jury may disregard testimony which is inherently unsatisfactory. Norfolk & W. R. Co. v. Holmes' Adm'r [Va.] 64 SE 46. Testimony which conflicts with natural law is not legitimate evidence and not entitled to consideration. Emrich Furniture Co. v. Byrnes [Ind. App.] 87 NE 1042. Court need not believe party's testimony, though it is not directly contradicted, if, on account of other evidence or its inherent improbability, he believes it to be false. Kennard v. Curran, 239 Ill. 122, 87 NE 913. Party whose judgment on written contract has been reversed on appeal should not be allowed to recover on new trial by swearing to oral contract different from written one in respects essential to meet decision of appellate court. Scheri v. Fiam, 133 App. Div. 274, 117 NYS 654. Only in extraordinary cases will sworn testimony be rejected as manifestly impossible and untrue. Bates v. Chicago, etc., R. Co., 140 Wis. 235, 122 NW 745.

40. Are not bound to accept estimate of

A preponderance of the evidence is usually all that is required in civil cases.[41] A preponderance of the evidence means the greater weight of the evidence, and not necessarily the greater number of witnesses,[42] though the number of witnesses necessarily has considerable weight and may in some cases control.[43] There are no degrees of preponderance,[44] and what is necessary to constitute a preponderance of the evidence may vary with the circumstances [45] and the nature of the subject-matter or

value fixed by witnesses. Ferry v. Henderson, 32 App. D. C. 41.

41. Where negligence is alleged and denied, plaintiff must prove it by "preponderance of the whole evidence." Wyatt v. Pacific Elec. R. Co. [Cal.] 103 P 892. To constitute failure of proof, allegations of claim or defense must be unproved, not in some particular or particulars only, but in the general scope and meaning. Cleveland, etc., R. Co. v. Foland [Ind. App.] 88 NE 787. Plaintiff need not make case beyond reasonable doubt; sufficient if circumstances justify reasonable inference of truth of allegations. Brown v. West Riverside Coal Co. [Iowa] 120 NW 732. All that law requires is that jury should find facts from preponderance of evidence; evidence need not "satisfy mind of judicial tribunal." Simpson Bank v. Smith [Tex. Civ. App.] 114 SW 445. Facts relied on by party having burden of proof must be established by preponderance of evidence, that is with reasonable certainty. Sufferling v. Heyl, 139 Wis. 510, 121 NW 251. Where plaintiff makes case warranting refusal to dismiss, he is entitled to some damages, defendant offering no evidence. Lefkowitz v. New York, 116 NYS 683.

Rule stated with reference to particular issues: Burden is on party asserting **change or waiver** to prove it, but preponderance of evidence is enough. Germantown Dairy Co. v. McCallum [Pa.] 72 A 885. Where petition in suit to enjoin sale of majority of stock alleged that **purpose was to stifle competition** and was contrary to public policy, yet proof sufficient to exclude every doubt of the truth of allegations of the bill was not required, no criminal offense being alleged. Dunbar v. American Tel. & T. Co., 238 Ill. 466, 87 NE 621. Plaintiff in **personal injury** action need not make case beyond reasonable doubt; to make prima facie case, he need only make it appear more probable that injury was proximate result of defendant's negligence than from any other cause. Milton's Adm'x v. Norfolk & W. R. Co., 108 Va. 752, 62 SE 960. In action to recover penalty for violation of statute prohibiting **leaving cattle in cars longer than 28 hours,** government is only bound to prove its case by preponderance. New York Cent. & H. R. R. Co. v. U. S. [C. C. A.] 165 F 833. Action for **penalty under safety appliance act** of congress is civil action; government need prove case by preponderance only. United States v. Baltimore & O. R. Co., 170 F 456; United States v. Illinois Cent. R. Co. [C. C. A.] 170 F 542.

Erroneous statements of rule: Error to instruct that plaintiff may show facts by preponderance or "material part of evidence." St. Louis, etc., R. Co. v. Woodruff [Ark.] 115 SW 953. Not proper to instruct jury that facts material to recovery must be established by clear and positive proof; preponderance is all that is required. Simpson Bank v. Smith [Tex. Civ. App.] 114 SW 445. Error to instruct that defendant, having burden of proof, must establish case by preponderance to satisfaction of jury. Terrell Wholesale Grocery Co. v. Christian Peper Tobacco Co. [Tex. Civ. App.] 120 SW 565. It is error to instruct that issue must be sustained "to the satisfaction of the jury" by preponderance of evidence. Cincinnati, H. & D. R. Co. v. Frye, 80 Ohio St. 289, 88 NE 642. Charge erroneous which required plaintiff to establish case to "reasonable satisfaction" of jury by preponderance of evidence. Green v. Kegans [Tex. Civ. App.] 118 SW 173.

Held no preponderance: Evidence insufficient to show authorized employment of plaintiff as stenographer. Parkus v. Credit Clearing House, 115 NYS 98. Where defendant opened case on court's view that he had burden of proof, it was error to give judgment or plaintiff at close of defendant's case, without any evidence to support plaintiff's case. Stamaty v. Pappadamitriu, 51 Wash. 221, 98 P 613. Burden of proving payment not sustained, when defendant's testimony is contradicted by that of disinterested witness. Loyd Mercantile Co. v. Long, 123 La. 777, 49 S 521. Absence of evidence on material fact in case is fatal to one having burden of proof. Steele's Adm'r v. Hillman Land & Iron Co. [Ky.] 114 SW 311.

42. City of Chicago v. Marsh, 238 Ill. 254, 87 NE 319; Williams v. Hennefield [Tex. Civ. App.] 120 SW 667. Under Code Civ. Prac. § 2061, subd. 2, preponderance of evidence does not depend on number of witnesses, but lies with party producing evidence which produces conviction in minds of jurors. James v. Oakland Trac. Co. [Cal. App.] 103 P 1082. Jury not bound to determine preponderance of evidence in accordance with number of witnesses, but may consider appearance of witnesses, their manner of testifying, etc., and all facts and circumstances. Lehane v. Butte Elec. R. Co., 37 Mont. 564, 97 P 1038. From fact that there were only two witnesses and that they contradicted each other directly as to vital facts, it did not necessarily follow that there was not a preponderance of evidence for plaintiff. Gardner v. Ben Steele Weigher Mfg. Co., 142 Ill. App. 348.

43. Verdict resting upon testimony of single witness will not be sustained when contradicted by several credible witnesses. Donahue v. Scott Transfer Co., 141 Ill. App. 174. Where plaintiff's sworn statement is denied by defendant's sworn statement, neither party being corroborated and both being unimpeached, there is not a preponderance of evidence in favor of plaintiff. Brougham v. Paul, 138 Ill. App. 455.

44. If the evidence preponderates at all, however slightly, it is sufficient. Ryan v. Schardt, 12 Ohio C. C. (N. S.) 259.

45. Bingaman v. Bingaman [Neb.] 122 NW 981.

facts to be established.[46] Where a verdict or finding rests on circumstantial as well as direct evidence,[47] the circumstances shown must exclude every reasonable theory not consistent with the finding or verdict,[48] but need not exclude every other possible hypothesis.[49]

As a general rule positive testimony is entitled to greater weight than negative,[50] but negative testimony cannot be disregarded,[51] and the relative weight of the

46. Parol evidence **to show deed was intended as mortgage** must be clear, unequivocal and convincing beyond reasonable doubt. Richardson v. Beaber, 62 Misc. 542, 115 NYS 821. **To overcome written instrument,** signed, attested and acknowledged, evidence must be clear and convincing to constitute preponderance. Bingaman v. Bingaman [Neb.] 122 NW 981. To warrant **reformation of written contract,** proof of mistake must be most clear and satisfactory. Percy v. First Nat. Bank [Va.] 65 SE 475. **Parol contract for services** exceeding $500 may be proved by testimony of one credible witness and corroborative circumstances tending to show contract of employment, performance of valuable services, and promises of remuneration. Civ. Code, art. 2277. O'Niell v. Guyther, 123 La. 100, 48 S 759. **Wrong doing** cannot be proved by mere suspicious circumstances. Succession of Drysdale [La.] 50 S 30. **Where one anticipates the operation of natural laws,** and forestalls the occurrence of an alleged impending fact through their operation, the burden is upon him to show by clear, undisputed and conclusive evidence the existence of every fact essential to the validity of his proposition. Valentine v. Minneapolis, etc., R. Co., 155 Mich. 151, 15 Det. Leg. N. 915, 118 NW 970. **Claims withheld during debtor's life time** and presented after his death must be established **by clear and satisfactory proof.** In re Nelson, 63 Misc. 627, 118 NYS 673.

47. Where oral testimony is in direct conflict, resort may be had to circumstances, the value and weight of which are to be determined by their character and tendency to produce mental conviction rather than by their number. Berry v. Colburn, 65 W. Va. 493, 64 SE 636. Fact may be proved by circumstantial as well as by direct evidence; but in such case the proof of one fact inevitably results or is inferred from other proven facts. Osburn v. Oregon R. & Nav. Co., 15 Idaho, 478, 98 P 627.

48. Jock v. Columbia & P. S. R. Co., 53 Wash. 437, 102 P 405. To warrant the drawing of a conclusion from circumstantial evidence, the facts which the evidence tends to prove must be of such a nature and so related to each other that the conclusion is the only one that can be fairly or reasonably drawn. Klumb v. Iowa State Traveling Men's Ass'n [Iowa] 120 NW 81; Inglese v. New York, etc., R. Co., 133 App. Div. 198, 117 NYS 392; Miller v. Uvalde Asphalt Pav. Co., 134 App. Div. 212, 118 NYS 885. Burden of proof resting on plaintiff not sustained where evidence leaves conjectural the question which of several possible causes produced injury. Smith v. Pullman Co. [Mo. App.] 119 SW 1072. It is not sufficient that the circumstances are consistent with such conclusion, if they are equally consistent with some other conclusion. Klumb v. Iowa State Traveling Men's Ass'n [Iowa] 120 NW 81. **In tort action,** plaintiff cannot recover on evidence which affords mere conjecture that liability exists, and leaves minds of jurors in equipoise and reasonable doubt. Evidence must generate an actual rational belief in the existence of the disputed fact. Moore v. West Virginia Heat & L. Co., 65 W. Va. 552, 64 SE 721. The rule that plaintiff cannot recover in negligence case, where evidence making defendant liable is no stronger than that relieving him from liability, applies only where evidence is circumstantial, not where there is conflict in direct testimony. Louisville R. Co. v. Holmes [Ky.] 117 SW 953. Evidence insufficient to show defendant's negligence as cause of death, where it left question speculative and open to conjecture. Swearingen v. Wabash R. Co., 221 Mo. 644, 120 SW 773. Evidence insufficient to support verdict for injuries where cause of accident was left to conjecture. Lucas v. International Paper Co., 131 App. Div. 368, 115 NYS 814.

49. Miller v. Uvalde Asphalt Pav. Co., 134 App. Div. 212, 118 NYS 885; Inglese v. New York, etc., R. Co., 133 App. Div. 198, 117 NYS 392. Circumstantial evidence sufficient when acts are linked and connected and lead to main fact, and are consistent with it, and inconsistent with any other reasonable hypothesis. Van Norman v. Modern Brotherhood of America [Iowa] 121 NW 1080. If evidence is sufficient to show probability of facts, case is for jury. Patty v. Salem Flouring Mills Co. [Or.] 98 P 521.

50. Fleenor v. Oregon Short Line R. Co. [Idaho] 102 P 897; Lenkemicz v. Wilmington City R. Co. [Del.] 74 A 11. Clear and positive testimony, fortified and corroborated, is entitled to prevail against negative testimony. Miller v. Smith [Va.] 64 SE 956. Negative testimony must give way to positive. Long v. McCabe, 52 Wash. 422, 100 P 1016. Negative testimony is entitled to no weight, where witness is not shown to have had information or opportunities for gaining it. Town of Fletcher v. Hichman [C. C. A.] 165 F 403. Positive testimony of credible witness as to particular matter is entitled to greater weight than negative testimony of equally credible witness to same matter. Anderson v. Horlick's Malted Milk Co., 137 Wis. 569, 119 NW 342. Affirmative testimony that gate existed across road during certain time entitled to more weight than negative testimony that there was no gate there. Lurker v. Ross [Ky.] 121 SW 647. Positive testimony that decedent owned certain property only entitled to prevail over negative testimony tending to show frugal habits, etc. Curtis v. Hunt [Ala.] 48 S 598.

51. Louisville & N. R. Co. v. O'Nan's Adm'r [Ky.] 119 SW 1192; Schon v. Modern Woodmen of America, 51 Wash. 482, 99 P 25. Testimony of witnesses, who were in position to hear car gong had it been rung, that

two kinds of testimony depends upon the circumstances, particularly the situation of the witnesses and their means of knowledge.[52] Hearsay [53] and mere conclusions [54] have little or no weight. Admissions or declarations against interest are not conclusive,[55] and their weight as evidence depends upon the circumstances under which they are made.[56] Mere verbal admissions are entitled to little weight [57] and should

they did not hear it. McCreery v. United R. Co., 221 Mo. 18, 120 SW 24.

52. Russell v. Oregon R. & Nav. Co. [Or.] 102 P 619. While ordinarily jury should attach more weight to positive than to negative testimony, they are not absolutely bound to do so; relative weight is for their determination. Pendergrast v. Greeson [Ga. App.] 64 SE 282. Where witnesses who testify **that a thing did not occur or exist** were so situated that their opportunity to see, hear and know was equal to that of those who testify that it did occur or exist, their testimony is to be considered as positive. Fleenor v. Oregon Short Line R. Co. [Idaho] 102 P 897. Testimony **that bell did not ring,** though negative in form, and though based on recollection, is affirmative in effect. Anderson v. Horlick's Malted Milk Co., 137 Wis. 569, 119 NW 342. Weight of testimony that bell was not being rung depends upon attention witness was giving at time. Hines v. Stanley G. I. Elec. Mfg. Co. [Mass.] 89 NE 628. Whether positive evidence that signals were given outweighs negative evidence **that signals were not heard,** for jury. Louisville & N. R. Co. v. O'Nan's Adm'r [Ky.] 119 SW 1192. Testimony of witnesses, who were paying no special attention to the matter, that they did not hear signals at railroad crossing, is of little weight as compared with testimony of others that they heard signals, especially where they testify to action taken by them on account of such signals. Horandt v. Csntral R. Co. [N. J. Law] 73 A 93. Where witnesses who testified that they did not hear a locomotive bell nor see a headlight were looking and listening for train, and were near the track and had as good an opportunity to see and hear as those who testified that the bell was rung and that light was on, their testimony is entitled to be given same weight as latter Fleenor v. Oregon Short Line R. Co. [Idaho] 102 P 897. Testimony of witness that he did not hear engine bell ring is of no value unless circumstances show that he would likely have heard it had it been rung. If circumstances show attention to matter by him, weight of testimony is for jury. Slattery v. New York, etc., R. Co. [Mass.] 89 NE 622. Where it was duty of railroad inspector to inspect cars, and he states that he did inspect them and **saw no defective appliances,** his testimony is not such negative testimony that it should not be given equal weight with positive, other things being equal. United States v. Baltimore & O. R. Co., 170 F 456. Testimony that witness crossed track in front of train hurriedly, and without looking to see if it had headlight and that he **did not see headlight,** is not of sufficient probative force to prove the fact. Strickland v. Atlantic Coast Line R. Co., 150 N. C. 4, 63 SE 161. Positive testimony that certain persons were nauseated and overcome by odors from rendering plant held not overcome by negative testimony of certain witnesses that they were **not annoyed by odors.** Rausch v. Glazer [N. J. Eq.] 74 A 39.

53. Hearsay has no weight or probative force, though not objected to. Childers v. Pickenpaugh, 219 Mo. 376, 118 SW 453. In equity case hearsay may be disregarded, though admitted without objection. Jones v Plummer, 137 Mo. App. 337, 118 SW 109. Hearsay evidence concerning deed of trust not sufficient to prove outstanding title to land. Swearingin v. Swearingin, 217 Mo. 565, 117 SW 704.

54. Mere conclusions have no probative value unless facts in evidence sustain them. Herrington & Co. v. Shumate Razor Co. [Ga. App.] 65 SE 1064.

55. Conant v. Evans, 202 Mass. 34, 88 NE 438; Boswell v. Thompson [Ala.] 49 S 73. **Declarations of deceased,** after being struck by train, as to manner and cause of accident, competent as admissions in action for death, but not conclusive so as to estop administrator. Louisville & N. R. Co. v. O'Nan's Adm'r [Ky.] 119 SW 1192. **Admissions in affidavit** for adjournment and in separate defenses not conclusive but could be considered. Kroder v. Siegel Hardware Co., 113 NYS 575. **Letter written by lessor,** stating that lease expired on certain date, and requesting vacation of premises at that time, is an admission by lessor, but is not conclusive and may be explained. St. Louis Gunning Advertising Co. v. Baptiste, 135 Mo. App. 503, 116 SW 438. **Admissions in pleadings,** requests for instructions, and assignments of error, are not conclusive against the party making them in a subsequent action. Effect for jury. Floyd v. Kulp Lumber Co., 222 Pa. 257, 71 A 13. Original complaint verified while plaintiff was in the hospital and which was not fully read over to him, inconsistent with the evidence introduced on trial, held insufficient to destroy probative force of lattsr as to how accident happened. McGrath v. Nassau Elec. R. Co., 128 App. Div. 63, 112 NYS 471. **Notice to railroad** company of injury, under Laws 1905, c. 341, and statement to company after injury, held competent as admissions, but not conclusive, so as to bar claim for damages. Atchison, etc., R. Co. v. Hastings [Kan.] 100 P 68. **Failure to inventory land** is not conclusive that it was not claimed by adverse possession. Appel v. Childress [Tex. Civ. App.] 116 SW 129. **Receipt** in full is only prima facie evidence, but will be considered conclusive if not attacked and awarded for fraud or mistake. Kahn v. Metz [Ark.] 114 SW 911.

Instruction that law presumed to be true what plaintiff said against his own interest, but that jury could believe or disregard testimony in his own favor, held erroneous. Quinn v. Metropolitan St. R. Co., 218 Mo. 545, 118 SW 46.

56. Admissions by motorman after accident held not entitled to much weight when witness who testified to them was laboring

be received with caution,[56] especially where the person charged therewith has since died.[59] Formal admissions of facts by an attorney are conclusive.[60] Expert opinion evidence is not conclusive.[61] Its weight depends upon the circumstances [62] and is usually for the jury,[63] but a verdict founded solely on the opinion of experts is not accorded the usual almost conclusive weight,[64] and will be set aside where such basis is manifestly insufficient.[65] The evidentiary value of an opinion depends, also, on whether the facts on which it is based are found true [66] and upon the nature and extent of the knowledge of the witness.[67] The value of experiments as

under great excitement at time of accident. Litolff v. New Orleans R. & L. Co. [La.] 50 S 105. Admission **that defendant had musty whisky in warehouse** held not an admission that whisky it proposed to pledge was musty. Halliday v. Roxbury Distilling Co., 130 App. Div. 654, 115 NYS 383. **Admissions of giving of discounts,** contained in letters, held to outweigh denials at trial. General Tire Repair Co. v. Price, 115 NYS 171. Admissions of party as to **location of building on certain lot** held not binding, since it was based on conclusion of law, location of lot in certain tract depending on description in deed and mortgage, construction of which was for court. Co-operative Bldg. Bank v. Hawkins [R. I.] 73 A 617.

57. Verbal admissions regarded as unreliable. Tousey v. Hastings, 194 N. Y. 79, 88 NE 831.

58. Scurlock v. Boone [Iowa] 120 NW 313. Gould v. Hurley [N. J. Eq.] 73 A 129. Verbal admissions, uncorroborated by other facts, should be weighed with great caution. Freeman v. Peterson [Colo.] 100 P 500.

59. Hoffman v. Condon, 134 App. Div. 205, 118 NYS 899; Powers v. Johnson, 107 Minn. 476, 120 NW 1021; Tompkins v. Leary, 134 App. Div. 114, 118 NYS 810; Collins v. Harrell, 219 Mo. 279, 118 SW 432; Miller v. Hill, 64 Misc. 199, 118 NYS 63. Proof of extrajudicial admissions of dead person is weakest of all testimony, and, usually, scarcely entitled to credit. Succession of Gabisso, 122 La. 824, 48 S 277. Proof that defendant's predecessor had failed to claim land in question, in conversation many years before, he being dead at time of trial, entitled to little weight. Appel v. Childress [Tex. Civ. App.] 116 SW 129.

60. Admissions by attorneys for purposes of suit conclusive as to facts admitted. Frey v. Meyers [Tex. Civ. App.] 113 SW 592. See Stipulations.

61. Not conclusive on jury. In re Thomas' Estate [Cal.] 101 P 798. Testimony of attorneys as to value of legal services not conclusive. Graham v. Dillon [Iowa] 121 NW 47. Not conclusive on court or jury. Spencer v. Collins [Cal.] 104 P 320. Expert opinion is not conclusive, especially on subjects as to which jurors may be presumed to have capacity to exercise intelligent, independent recollection. Fitter v. Iowa Tel. Co. [Iowa] 121 NW 48. In matters as to which the jury are capable of forming conclusions, they are not dependent on opinion evidence, though they would be assisted by it. Chicago, etc., R. Co. v. Moore [C. C. A.] 166 F 663. Expert opinion **as to value** of certain extra work, and concerning alleged defects, advisory only. Spooner v. Kornarens, 113 NYS 483. Where facts regarding services by architect were before jury, expert testimony as to value of such services was not binding on jury; they were at liberty to use their own deliberate judgment in the matter. Davis v. South Omaha School Dist. [Neb.] 122 NW 38. Expert testimony **as cost of restoring wrecked building** not conclusive on jury. Linforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320. Court not obliged to credit testimony or **report of expert accountant** when it was shown to be inaccurate. King County v. Whittlesey, 52 Wash. 206, 100 P 320. **Opinions of physicians** are merely advisory. MacDonald v. Metropolitan St. R. Co., 219 Mo. 468, 118 SW 78.

62. Rule as to reliability of expert testimony under different circumstances stated. Bucher v. Wisconsin Central R. Co., 139 Wis. 597, 120 NW 518.

63. Carter v. Cairo, V. & C. R. Co., 240 Ill. 152, 88 NE 493. Weight of expert testimony is for jury, and if it does not agree with their own convictions or judgment they may disregard it. Carscallen v. Coeur D'Alene & St. Joe Transp. Co., 15 Idaho, 444, 98 P 522. Weight of **conflicting expert testimony** for jury. Burton v. Neill [Iowa] 118 NW 302.

64. On consideration by supreme court, such verdict may be rejected if it appears that reasonable certainty was impossible in case. Bucher v. Wisconsin Central R. Co., 139 Wis. 597, 120 NW 518.

65. Opinions of medical men may be rejected as an insufficient basis for a finding of fact by a jury where the court is convinced that reasonable certainty is outside of the possibilities of the situation. Bucher v. Wisconsin Cent. R. Co., 139 Wis. 597, 120 NW 518. Expert opinion based on insufficient data or nonsense clothed in words of "learned length" may be disregarded by supreme court as basis for supporting a verdict. Id. Testimony of medical experts that injury might have caused condition which they observed merely affirms that the injury in question was in their opinion sufficient to have produced the condition complained of, not that it did produce such condition. Id.

66. Weight to be given opinion evidence depends upon whether assumed facts are found true. Peterson v. Brackey [Iowa] 119 NW 967. Question proper which assumes facts supported by evidence, but jury can give opinion no weight unless they find facts on which it is based to exist. Ryan v. Fall River Iron Works Co., 200 Mass. 188, 86 NE 310. Opinion evidence is of force only so far as based on facts in evidence, and is then advisory merely and cannot supply or set aside evidentiary circumstances. Royal Exch. Assur. v. Graham & Morton Transp. Co. [C. C. A.] 166 F 32.

67. It is not proper to instruct that in comparing writings the opinion of any individual is as likely to be correct as that of an expert. In re Thomas' Estate [Cal.] 101

evidence depends upon their nature and the circumstances under which they were made.[68] The value of book entries depends upon their character and how the books are kept,[69] and is usually for the jury.[70] A certified copy of a record, by a public officer authorized to make it, not only vouches for its own correctness but it proves prima facie the original to have been in the public office when it was made.[71] A judicial record imports verity[72] and cannot be impeached or contradicted except for fraud,[73] but such record is not necessarily conclusive of facts recited when directly attacked.[74] Legislative records are ordinarily conclusive.[75] Corporate records are not conclusive as against minority stockholders.[76]

Incompetent evidence admitted without objection has probative value,[77] but if received over a proper objection it cannot be considered by an appellate court.[78] Proof of previous contradictory statements of a witness, received to impeach him, is not evidence of the facts.[79]

Prima facie evidence means evidence which if unrebutted or unexplained, is sufficient to maintain the proposition and warrant the conclusion to support which it

P 798. Weight of **expert medical testimony** on nervous disorders depends upon nature and extent of general examination of injured person, and particularly the examination as to nervous disorders. Johnson v. Great Northern R. Co., 107 Minn. 285, 119 NW 1061. Testimony of medical men as to mental condition of testatrix, based on what they have observed in course of their treatment, may be given more weight than that of nonexperts, though weight of all opinion evidence is for jury. In re Winslow's Will [Iowa] 122 NW 971. Opinion of expert medical witnesses that death was due to certain disease and not to another, where both diseases had similar external symptoms and were due to germs, the opinions being based merely on observation and not upon postmortem or microscopic examination, held too conjectural and uncertain to support verdict alone. Mageau v. Great Northern R. Co., 106 Minn. 375, 119 NW 200.

68. Experiments as to how far an object could be seen on track not entitled to much weight in action or death of child on track, not on crossing, where engineer at time was thinking of crossing ahead; others might have been thinking of objects they were looking for. Palmer v. Oregon Short Line R. Co., 34 Utah, 466, 98 P 689.

69. While book entries are ordinarily prima facie evidence of truth of charges, yet their weight as evidence depends upon how books are kept, and the explicitness and certainty of the entries. Kossuth County State Bank v. Richardson [Iowa] 118 NW 906. Party not bound by entries in books kept by personal representatives of third person. Rathbone v. Maltz, 155 Mich. 306, 15 Det. Leg. N. 1023, 118 NW 991.

70. Value of entries in account book, of which maker had no independent recollection, for jury. Graham v. Dillon [Iowa] 121 NW 47. Entries in books of sales agent as to purchaser, date, amount, and price of each sale, not conclusive as to date between agent and principal. Oberfelder v. J. G. Mattingly Co. [Ky.] 120 SW 352.

71. Copy of a naturalization record, held good evidence, even though the original could not be found, where it was shown that records were carelessly kept. United States v. Brelin [C. C. A.] 166 F 104.

72. Bank of Meadville v. Hardy [Miss.] 48 S 731.

73. Where an order appointing a receiver showed on its face that the appointment had not been made until after the bill had been filed, in the absence of fraud, it cannot be impeached. Bank of Meadville v. Hardy [Miss.] 48 S 731. When record showed on its face that the order was granted at chambers, it cannot be disproved. Morehead v. Allen, 131 Ga. 807, 63 SE 507. Where judgment and execution show defendants as principals, they cannot show by parol, in garnishment proceedings, that they were only sureties. Warthen v. Melton [Ga.] 63 SE 332.

74. Recital in record that attorney was present when motion was called does not prevent the court in subsequent proceedings from ascertaining the fact. Wallace v. Wallace [Iowa] 119 NW 752.

75. Journals of legislature are sole records of legislative proceedings; they cannot be contradicted or added to by memoranda of clerical officers. State v. Martin [Ala.] 48 S 846. When legislative records show clearly and unambiguously time of adjournment, they are conclusive on question and cannot be contradicted by extraneous evidence. Capito v. Topping, 65 W. Va. 581, 64 SE 845.

76. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381. See Corporations, §§ 14, 15.

77. Hubbard v. Allyn, 200 Mass. 166, 86 NE 356. Evidence received without objection and not thereafter stricken has probative value. Crozier v. Minneapolis St. R. Co., 106 Minn. 77, 118 NW 256. Incompetent evidence, admitted without objection, given weight on appeal. Dashner v. Dashner [Iowa] 120 NW 975. Secondary evidence of contents of patent may be considered if not seasonally objected to. Loew Filter Co. v. German-American Filter Co. [C. C. A.] 164 F 855. Ex parte affidavits and hearsay, admitted without objection, may sustain verdict; weight is for jury. Sheibley v. Nelson [Neb.] 121 NW 458.

78. Appellate term reviewing judgment of municipal court must disregard evidence to which exceptions were well taken. Haas v. Read, 63 Misc. 342, 117 NYS 106.

79. Hobbs v. Blanchard & Sons Co. [N. H.] 70 A 1082. See Witnesses, § 5D.

was introduced.[80] The legislature may declare what shall constitute prima facie evidence,[81] but not that certain evidence shall be conclusive.[82]

Examination before Trial, see latest topical index.

EXAMINATION OF WITNESSES.

The scope of this topic is noted below.[83]

§ 1. General Rules of Examination, 1713. Leading Questions, 1714. Responsiveness, 1715. Refreshing Memory, 1716.
§ 2. Cross-examination, 1716.
§ 3. Redirect Examination, 1723.
§ 4. Recalling Witness for Further Examination, 1723.

§ 1. *General rules of examination.*[84]—See 11 C. L. 1421.—Questions put to witnesses should be clear [85] and specific,[86] should not assume the existence of facts not shown by evidence [87] or which are controverted,[88] and should be so framed as to call for facts,[89] and not conclusions, except in cases where opinion evidence may properly be adduced [90] or argument,[91] though it is proper in some instances to allow a witness to give his best recollection of facts,[92] or to explain his testimony.[93] Neither the question [94] nor the answer [95] should be argumentative. Trial courts are, however, vested with large discretion as to the form of questions [96] and the manner of

80. Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793. See ante, § 1B, Presumptions and Burden of Proof.

81, 82. Petersilie v. McLachlin [Kan.] 101 P 1014.

83. This article treats generally of the examination of witnesses in both civil and criminal cases, except examination of experts, which is treated in the preceding article (see Evidence,* § 9D). Matters pertaining to the impeachment of witnesses, and the privileges of witnesses (see Witnesses,* § 5), and general questions of trial procdure, such as exclusion of witnesses from the court room (see Trial,* § 2), and the proper manner of raising and preserving objections, are elsewhere discussed (see Saving Question for Review*). Unfair conduct of counsel in the course of examination, designed to prejudice the jury is treated in Argument and Conduct of Counsel,* § 4.

84. Search Note: See notes in 17 L. R. A. 813; 39 Id. 305; 57 Id. 875; 6 Ann. Cas. 477; 9 Id. 560.

See, also, Witnesses, Cent. Dig. §§ 788-906; Dec. Dig. §§ 224-265; 17 A. & E. Enc. L. (2ed.) 47; 30 Id. 898.

85. Winn v. Modern Woodmen of America [Mo. App.] 119 SW 536. Proper to exclude question whose meaning was not apparent. Johnson v. Collier [Ala.] 49 S 761. Question misleading which might be taken by witness as calling for information which he personally possessed, though it really called for other matters. Winn v. Modern Woodmen of America [Mo. App.] 119 SW 536. Question as to angle between boundary lines not objectionable as not containing sufficient data, where witness had plat before him, and obvious intention was to refer thereto. Hassam v. Safford [Vt.] 74 A 197.

86. State v. High, 122 La. 521, 47 S 878. Question so general that irrelevant evidence would be responsive to it may be excluded. Phillips v. State [Ala.] 50 S 194.

87. Hanson v. Neal, 215 Mo. 256, 114 SW 1073; Yount v. Strickland, 17 Wyo. 526, 101 P 942.

88. Question, "Tell jury if you saw the pistol balls near the watering tub," erroneous because assuming pistol balls were near tub. Andrews v. State [Ala.] 48 S 858.

89. Party offering witness cannot complain of rejection of testimony if he fails to show that witness can testify to facts rather than opinions. Eames v. New York Life Ins. Co., 134 Mo. App. 331, 114 SW 85.

90. See Evidence, § 9.

91. Herancourt Brew. Co. v. Frank, 11 Ohio C. C. (N. S.) 505.

92. See, also, Evidence, § 9A. Question asking for witness' best judgment as to similarity between deed and copy, proper, when it was such as to call for his best recollection of facts. Clark v. Dunn [Ala.] 50 S 93.

93. See, also, post, § 3. Where witness hesitated and was slow in answering, and his counsel asked him the reason, his answer that his mind was not as accurate as before his injury was not incompetent as self-serving. Houston & T. C. R. Co. v. Shapard [Tex. Civ. App.] 118 SW 596. Though witness testified that she did not have certain telephone conversation, it was proper to allow her to testify that, if she did have it, it did not relate to parties in question. Hoxie v. Walker [N. H.] 74 A 183.

94. Proper to refuse to allow witness to be asked if his memory was any better than it was on preliminary hearing, this being mere argument. Rollings v. State [Ala.] 49 S 329.

95. Answer which is mere argument improper. United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606.

96. Niemeyer v. Chcago, B. & Q. R. Co. [Iowa] 121 NW 522.

examining witnesses, especially where the witness appears to be ignorant or hostile,[97] or where he testifies through an interpreter, and greater latitude is allowed in such cases.[98] Questions tending to degrade the witnesses, and asked only to prejudice a party's case, are improper.[99] The trial judge may himself examine or cross-examine witnesses, so long as he does not intimate an opinion on the facts or the credibility of the witness,[1] though the better practice is to leave the examination to counsel, where the parties are ably represented.[2] It is proper to exclude unnecessary repetition,[3] especially where the matter has already been ruled out.[4] For the purpose of the preliminary examination of a deaf mute and an interpreter to determine whether witness may be examined through the interpreter, neither need be sworn.[5]

Leading questions.[See 11 C. L. 1422]—A leading question is usually held to be one which suggests a desired answer,[6] though other tests are sometimes applied.[7] On direct examination such questions are usually improper, but the matter is one resting largely in the trial court's discretion,[8] the exercise of which is not reviewable except for abuse.[9] Whether a question is leading, or, if leading, is objectionable, depends largely upon the circumstances and the facts sought to be shown.[10] Such

97. See post, § 2.

98. Greater latitude in form of questions is permissible when witness testifies through interpreter. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552.

99. Question insinuating improper conduct by witness, a young girl, improper, when animus of witness could be shown without such reflection, and apparent purpose was only to satisfy client's spite. People v. Wyatt [Cal. App.] 104 P 12.

1. Trial judge may properly ask questions to inform himself as to truth of material matters, provided he does not intimate an opinion in so doing. Caswell v. State, 5 Ga. App. 483, 63 SE 566. Questions asked by court concerning illiteracy of children of defendant was not an abuse of discretion, as tending to discredit them as witnesses. State v. Ballew [S. C.] 63 SE 688. Petition for rehearing dismissed, Id. [S. C.] 64 SE 1019. Judge may in proper case examine witnesses so as to get facts before jury; but where judge conducted examination in such way as to intimate an opinion on importance of testimony and its credibility, there was prejudicial error. City of Flint v. Stockdale's Estate [Mich.] 16 Det. Leg. N. 493, 122 NW 279. Not improper for court to cross-examine witness who testified to release of claim for injuries executed by administrator appointed in another county, where there were indications that court might have been imposed upon. Balsewicz v. Chicago, B. & Q. R. Co., 240 Ill. 238, 88 NE 734.

2. Berwind-White Coal Min. Co. v. Firment [C. C. A.] 170 F 151. Where witness testified that he did not know as to condition of another's mind, further questions as to person's mental condition were properly excluded, being in nature of cross-examination of party's own witness. Myatt v. Myatt, 149 N. C. 137, 62 SE 887.

3. Where witness testified positively that there was one car on certain side track, proper to exclude question whether he would have known it had there been more. Zetsche v. Chicago, etc., R. Co., 238 Ill. 240, 87 NE 412. Where it was apparent that witness had told all he knew about subject, it was proper to exclude further examination along that line. Larabee v. Larabee, 240 Ill. 576, 88 NE 1037. Repetition may be prevented. People v. Mar Gin Suie [Cal. App.] 103 P 951. Allowance or refusal to permit repetition of questions, discretionary. Penry v. Dozier [Ala.] 49 S 909.

4. Proper to exclude matter preliminary to inquiry which had already been ruled out by court. Barnard v. Bates, 201 Mass. 234, 87 NE 472.

5. People v. Weston, 236 Ill. 104, 86 NE 188.

6. Question is leading which suggests to witness real or supposed fact which party desires to have confirmed by witness. Peebles v. O'Gara Coal Co., 239 Ill. 370, 88 NE 166. Question may be leading as suggesting answer desired, though it uses words "whether or not." Id. Questions which neither suggest answer nor indicate desired answer are not leading. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899.

7. Questions held not leading or necessarily suggestive though they could be answered by "yes" or "no." Peebles v. O'Gara Coal Co., 143 Ill. App. 370.

8. Discretionary to allow leading question. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113; Montgomery Moore Mfg. Co. v. Leeth [Ala.] 50 S 210; Falk v. Kimmerle [Fla.] 49 S 504; Peterson v. State [Ga. App.] 65 SE 311; Caswell v. State, 5 Ga. App. 483, 63 SE 566; Peebles v. O'Gara Coal Co., 239 Ill. 370, 88 NE 166; State v. George, 214 Mo. 262, 113 SW 1116; Berry v. Doolittle [Vt.] 74 A 97. No abuse of discretion in allowing leading questions. Birmingham R., L. & P. Co. v. Pritchett [Ala.] 49 S 782.

9. Overruling of alleged leading questions not reviewable. Merriweather v. Sayre Min. & Mfg. Co. [Ala.] 49 S 916.

10. Held leading and objectionable: "Tell jury if you saw pistol balls near watering tub." Andrews v. State [Ala.] 48 S 858. A question which leads a witness to answer by using the same words which a former witness has denied using is incompetent, and permitting such a question to be answered constitutes reversible error. Cincinnati Interurban Co. v. Haines, Adm'r, 12 Ohio C. C. (N. S.) 17. As to whether roof in mine would

questions are permissible when the witness is ignorant or illiterate,[11] hostile or reluctant.[12]

Responsiveness.[See 11 C. L. 1423]—Voluntary statements of the witness, not responsive to the question, may be stricken or excluded on application for such relief.[13]

sound all right in response to tapping with pick and, in a minute or two, fall. Harper v. Black Diamond Coal Co. 142 Ill. App. 594. "They were not marketable, salable, cucumbers?" Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410. Question "What did constable tell you, that it had or had not been done?" Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Whether there was any way in which witness could have prevented injury to plaintiff. Houston & T. C. R. Co. v. Johnson [Tex. Civ. App.] 118 SW 1150. Question, referring to injured man, "Was he sick or stupid," etc., held leading. Roth v. Travelers' Protective Ass'n [Tex.] 115 SW 31. Whether witness had been paid "more than regular fee" objectionable in form, when it did not appear that he knew what regular fee was. Granger v. Darling, 156 Mich. 31, 16 Det. Leg. N. 22, 120 NW 32. Where engineer testified fully as to what he did with his engine when he came in from a run, questions as to the custom of the road with reference to caring for engines, and whether engineers were expected to report their condition were leading. Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005.

Held not objectionable: Questions inquiring only as to one fact, and not suggesting an answer. St. Louis S. W. R. Co. v. Allen [Tex. Civ. App.] 117 SW 923. In suit to rescind sale for breach of warranty, question to plaintiff whether he relied on representations made to him. French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150. Action for injuries by being run over by train in city street. Question, "What's in the street there opposite the place where she fell," held not leading, answer being, "It is very bad." International & G. N. R. Co. v. Morin [Tex. Civ. App.] 116 SW 656. Question not suggesting answer is not leading, "Did C. give you any money?" proper. Williams v. Smith [R. I.] 72 A 1093. Question not leading which did not suggest answer, and which admitted of negative or affirmative answer. Williams v. Smith [R. I.] 72 A 1093.

11. Leading questions allowable when witness cannot otherwise be made to understand. State v. Williams [Nev.] 102 P 974. Not abuse of discretion to allow leading questions to little girl, where subject-matter was of revolting nature. People v. Gregory, 8 Cal. App. 738, 97 P 912. Proper to allow leading question to witness who, by reason of age and ignorance, understood with difficulty. Western Union Tel. Co. v. Teague [Ky.] 121 SW 484. Not error to allow counsel to question witness to ascertain what he meant where it appeared he did not fully understand question. Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166.

12. Hostility or reluctance of witness justifies use of leading questions. State v. Carr, 65 W. Va. 81, 63 SE 766.

13. Part of answer, not responsive, properly stricken. Barnard v. Bates, 201 Mass. 234, 87 NE 472; Vaillancourt v. Grand Trunk R. Co. [Vt.] 74 A 99.

Held not responsive: Matter in answer referring to different time from that mentioned in question held not responsive. Roth v. Travelers' Protective Ass'n [Tex.] 115 SW 31. Question, whether witness noticed person's condition as to whether he was under influence of liquor; answer, that witness thought he was not responsive. Rangenier v. Seattle Elec. C., 52 Wash. 401, 100 P 842. Where physician was asked whether he was able to state whether fright or electric shock caused illness, and he gave his opinion without stating whether he was qualified, his answer should have been stricken. United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606. Question, how M. left certain place; answer that he was afraid of B., afraid B. would shoot him, not responsive. People v. Meert [Mich.] 16 Det. Leg. N. 263, 121 NW 318.

Held responsive: Question, what expenses witness was put to in consequence of injuries; answer "Oh, I suppose in the neighborhood of $500 or $600," held responsive. Kimic v. San Jose-Los Gatos Interurban R. Co. [Cal.] 104 P 312. Question, value of certain legal services, answer, that witness would consider named sum reasonable charge according to current charges was responsive, matter stated being proper element of his opinion. Carpenter v. Gibson [Vt.] 73 A 1030. Error to strike out, in personal injury case, the following answer, "He appeared all right," given in answer to question, "And what was his appearance then." Sertaut v. Crane Co., 142 Ill. App. 49. Question, what caused wreck; answer, "I believe fast running is all I could account for it," held responsive. St. Louis & S. F. R. Co. v. Savage [Ala.] 50 S 113. Answer of locomotive engineer to question concerning type of certain engine, that he did not know what, but that she was an old engine, was fairly responsive, where he had had no technical mechanical training. Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005. Question, "How far was it from the place where you left the car to the place on the track where you were hit;" answer, "I don't know. They dragged me 117 feet," held properly admitted. Piper v. Boston & M. R. Co. [N. H.] 72 A 1024. Where question was what he saw plaintiff doing, his answer that "it looked to" him as though plaintiff was doing certain things, was responsive. Robinson v. Morris & Co. [R. I.] 73 A 611. Where witness had observed another's condition prior to certain date, answer that health "is" good was responsive to question, where it was evident that witness intended to say "was." Fearon v. Mullins, 38 Mont. 45, 98 P 650. Question, how hole in porch through which plaintiff fell was situated with reference to kitchen door; answer, that it was near end of porch, and that one need not go near it in going to ice chest or yard, responsive. Id. Question, in substance, whether witness knew of conditions going to show whether road was of public utility; answer, "It looked like the road would be of public utility," held responsive. Sterling v. Frick, 171 Ind. 710, 86 NE 65.

In this matter, also, the trial court is vested with a large degree of discretion.[14] Only the party asking the question may object that the answer is not responsive, not the opposite party.[15] But there seems to be a conflict on this question.[16]

Refreshing memory. See 11 C. L. 1423—For the purpose of refreshing his memory, a witness may consult any writing, memorandum or record, whether made by himself or another,[17] provided he can then testify from an independent recollection of the facts[18] or is able to verify the memorandum as correct when made.[19] In the latter case, the memorandum also is competent[20] and admissible, if relevant.[21] A witness' memory may also be refreshed by calling his attention to previous testimony,[22] and it has been held proper to allow a witness to testify concerning a place which he has revisited, with the bailiff, to refresh his memory.[23]

§ 2. *Cross-examination.*[24] See 11 C. L. 1424—Cross-examination on matters

14. If answer is otherwise competent, germane to issue, and relevant, it need not be stricken though not strictly responsive. Lewis v. Coupe, 200 Mass. 182, 86 NE 1053.

15. Alabama City, G. & A. R. Co. v. Bullard [Ala.] 47 S 578.

16. See 11 C. L. 1423, n. 12; and 9 C. L. 1315, n. 67.

17. A witness may refresh his present memory by referring to any writing made by himself at the time of the transaction concerning which he testifies, or so soon thereafter that it is likely that the transaction was fresh in his memory. Plaintiff's manager properly allowed to use memorandum of articles destroyed by fire made directly after fire. More-Jonas Glass Co. v. West Jersey & S. R. Co., 76 N. J. Law, 708, 72 A 65. One who made list of tools lost on day following burglary could use it to refresh his recollection of trial. State v. Carpenter, 216 Mo. 442, 115 SW 1008. Proper to allow witness testifying to number of trains which passed his place on certain day to use memorandum made by him at time. Morris v. Oregon Short Line R. Co. [Utah] 102 P 629. Proper to allow mother of prosecutrix to refresh memory as to daughter's age, by referring to leaves from family Bible which she had first identified. Curtis v. State [Ark.] 117 SW 521. In prosecution for falsely counting and reporting ballots at an election, registrars who made recount were properly allowed to use tally sheets to refresh their recollection. Commonwealth v. Edgerton, 200 Mass. 318, 86 NE 768. Partner and his witness, contradicting items of account of other partner, could use exhibits made from books in testifying. Holden v. Thurber [R. I.] 72 A 720. Proper to allow witness to refresh his memory from ledger entries when other books had been burned. Kansas City So. R. Co. v. Rosebrook-Josey Grain Co. [Tex. Civ. App.] 114 SW 436. Where judge who presided at trial stated that he had notes of claims made by counsel on trial, he was properly asked to examine them and state what counsel's claims were. Bishop v. New Haven [Conn.] 72 A 646. In action for damages to stock of goods, witness testifying to items was properly allowed to use bill of particulars filed in the case by order of court, made from inventories and invoices taken by witness and clerks, list being so long that no one could remember all the items. De Palma v. Weinman [N. M.] 108 P 782. One otherwise qualified properly allowed to refresh recollection of prices of goods by referring to price lists promulgated by manufacturers and generally recognized in the trade. More-Jonas Glass Co. v. West Jersey & S. R. Co., 76 N. J. Law, 708, 72 A 65. In suit for accounting between partners, plaintiff could use books to refresh his recollection though they were kept by defendant. Alexander v. Wellington, 44 Colo. 388, 98 P 631. Witness may testify as to checks which have been destroyed, using stubs of such checks to refresh memory. Laughlin v. Brauer, 138 Ill. App. 524.

18. See 11 C. L. 1424, n. 17.

19. Railroad employe may use record made by him at time, and which he knows to be correct, to refresh his memory as to time of arrival of car, and his testimony will be received, though he has no independent recollection of the facts, when he is convinced of truth of record. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 458; Id., 109 Md. 494, 72 A 193. Memorandum not made by witness, not known by him to be correct, could not be used by him. Vichos v. Cuttler, 133 App. Div. 230, 117 NYS 366. Physician properly allowed to refresh recollection from memorandum though not able to say when memorandum was made, he having testified that he made memorandum himself, from his own memory, and at time he made it he had facts in mind. McCabe v. Swift & Co., 143 Ill. App. 404.

20. If a witness can testify that at or about the time a memorandum or entry was made he knew its contents, and knew it to be true, his testimony and the memorandum are both competent evidence, although the witness cannot testify to the facts as a matter of independent recollection, even after his memory has been refreshed. Account book containing entries of payments and loans admissible, with maker's testimony. Graham v. Dillon [Iowa] 121 NW 47.

21. Not error to exclude memorandum used by witness to refresh memory, when it had no bearing on issues and was itself inadmissible. Little v. Rich [Tex. Civ. App.] 118 SW 1077.

22. Proper to refresh recollection of witness by calling attention to testimony before grand jury. Glenn v. State [Ala.] 47 S 1034.

23. Proper to receive testimony of prosecuting witness as to place of robbery after he had gone over scene again with bailiff. State v. De Hart, 38 Mont. 211, 99 P 438.

24. Search Note: See notes in 15 L. R. A. 669; 10 L. R. A. (N. S.) 604.

See, also, Witnesses, Cent. Dig. §§ 907-

either directly in issue or directly relevant to the issue is a matter of right and its exclusion is error,[25] but the extent of cross-examination outside these limits is a matter resting largely in the discretion of the trial court,[26] and the exercise of this discretion is not reviewable unless an abuse thereof appears.[27] The time and order of cross-examination is also discretionary.[28] It is proper to exclude mere repetition.[29] Questions should be clear [30] and specific.[31] Greater latitude is permissible when the witness is reluctant or unfriendly [32] or is a party,[33] but matters which are

1007, 1104-1108, 1135-1149, 1159, 1160, 1192-1199, 1228-1232; Dec. Dig. §§ 266-291, 329-331½, 349, 350, 358, 372, 387; 8 A. & E. Enc. L. (2ed.) 334.

25. Prout v. Bernard's Land & Sand Co. [N. J. Err. & App.] 73 A 486. Party against whom witness is called has right to full and fair cross-examination upon subjects of direct examination. Harrold v. Ter. [C. C. A.] 169 F 47. The discretionary power of the court to control the extent of the cross-examination is subject to the right of one party to cross-examine on subjects of direct examination, and the right of the other to have cross-examination limited to such matters. Id.

26. Brennen v. Chicago & Carterville Coal Co., 241 Ill. 610, 89 NE 756; Niemeyer v. Chicago, B. & Q. R. Co. [Iowa] 121 NW 522; State v. Brown [Iowa] 121 NW 513; Corkran v. Taylor [N. J. Law] 71 A 124; Anderson v. Salt Lake & O. R. Co. [Utah] 101 P 579. Court has wide discretion in regulating and limiting cross-examination. Prout v. Bernard's Land & Sand Co. [N. J. Err. & App.] 73 A 486. Limiting cross-examination discretionary. Van Wyk v. People [Colo.] 99 P 1009. Cross-examination of witness testifying to value of land before and after fire properly limited. Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166. No error where court refused to allow cross-examination, but gave leave to cross-examine later, and such cross-examination was made. Corkran v. Taylor [N. J. Law] 71 A 124. Exclusion of question on cross-examination within court's discretion. Simeoli v. Derby Rubber Co., 81 Conn. 423, 71 A 546. Sufficient latitude allowed in cross-examination of prosecuting witness where he was asked if he had had work done by defendant (unlicensed dentist) with view of prosecution, and answered that he had not. State v. Littooy, 52 Wash. 87, 100 P 170. Proper for court to warn counsel that he was wasting too much time in cross-examination of prosecuting witness and to allow 15 minutes more. People v. Smith, 9 Cal. App. 224, 98 P 546. No abuse of discretion in limiting cross-examination of prosecuting witness in abortion case. State v. Longstreth [N. D.] 121 NW 1114.

27. Horton v. Seattle, 53 Wash. 316, 101 P 1091. Refusal to limit cross-examination of adverse witness not reviewable in absence of abuse of discretion. Rutherford v. Iowa Cent. R. Co. [Iowa] 121 NW 703. Exclusion of question on cross-examination will not be held on abuse of discretion unless it affirmatively appears that it was connected with the subject-matter of the direct examination. Krebs Hop Co. v. Livesley [Or.] 104 P 3.

28. The cross-examination of a witness should ordinarily be completed when entered into, but the order of proof is largely a matter of discretion. Troup v. State [Ala.] 49 S 332. Proper to allow state to continue examination of witness, and to refuse leave to counsel for accused to cross-examine until state had finished. Warren v. State, 54 Tex. Cr. R. 443, 114 SW 380. Where affidavit on which continuance was granted was read as testimony of witnesses, it was proper, when witnesses later came into court, to allow adverse party to cross-examine them on facts stated in affidavit. Elkins' Adm'r v. New Livingston Coal Co. [Ky.] 115 SW 203.

29. Mere repetition properly excluded. Newman v. State [Ala.] 49 S 786. Repetition of same question, great many times, improper. McBride v. McBride [Iowa] 120 NW 709. Proper to exclude further question when ground had been covered. Blackburn v. Boston & N. St. R. Co., 201 Mass. 186, 87 NE 579. Proper to exclude question which had been answered several times. Zetsche v. Chicago, etc., R. Co., 238 Ill. 240, 87 NE 412. Proper to exclude repetition of testimony given on direct examination. Leimgruber v. Leimgruber [Ind.] 86 NE 73.

30. Complicated, hypothetical question properly excluded on cross-examination of witness who testified to custom. Smith & Co. v. Russell Lumber Co. [Conn.] 72 A 577.

31. Question on cross-examination of defendant in malpractice action whether he had conveyed property too general; would be proper to ask if he had conveyed property in order to avoid payment of damages which he considered he had incurred. Gore v. Brockman [Mo. App.] 119 SW 1082.

32. Great liberality should be allowed in cross-examination of reluctant, evasive, or interested witness. People v. Smith, 9 Cal. App. 224, 98 P 546. Liberal cross-examination permissible when witness is hostile or unfriendly. Gordon v. Kansas City So. R. Co. [Mo.] 121 SW 80.

33. Wide latitude should be allowed in cross-examination of parties but proper to exclude immaterial questions. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381. In suit to set aside decree of adoption alleged to have been brought about by defendant's fraud and undue influence exerted over his wife, she being dead at time of trial, wide latitude was properly allowed upon his cross-examination. Phillips v. Chase, 201 Mass. 444, 87 NE 755. Proper to cross-examine parties as to whether in interrogatories taken before trial they had omitted to mention note which they claimed at trial other party was to pay. Hudson v. Slate [Tex. Civ. App.] 117 SW 469. In suit by plaintiff on contract for work, defendant was entitled to cross-examine plaintiff, notwithstanding pendency of another action by him for damages for negligent work. G. E. Walter Co. v. Bradley, 64 Misc. 79, 117 NYS 977.

incompetent as evidence should be excluded.[34] A party has a right to examine an adverse witness irrespective of a statute authorizing cross-examination of a party,[35] and the form of questions in such case is largely discretionary.[36] Where a defendant in a criminal prosecution takes the stand in his own behalf, he may be cross-examined the same as any other witness,[37] and the extent of the examination is governed largely by the general rules limiting cross-examination,[38] but he cannot, in most jurisdictions, be examined as to the commission of other independent offenses.[39] Where a witness has testified from records, counsel should be allowed to use the records in conducting the cross-examination.[40] A document which is used on cross-examination should be shown to the witness.[41]

Cross-examination of adverse party under statute.[See 9 C. L. 1317]—While a defaulting defendant cannot be called for cross-examination by plaintiff, under the statute, in Minnesota,[42] yet the calling of such a party is not prejudicial error where his examination is only such as would be proper had he been called as plaintiff's own witness.[43] When, as provided by statute, an adverse party is called as upon cross-examination, a coparty is not precluded from examining him as to anything legitimately growing out of his cross-examination.[44]

Limitations to scope of direct examination.[See 11 C. L. 1426]—The cross-examination should, in general, be confined to the subject-matter of the examination in

34. Not proper on cross-examination of party to ask him his opinion as to truth or falsity of testimony of witness who contradicted him. Temple v. Duran [Tex. Civ. App.] 121 SW 253. Not error to refuse to compel witness to answer yes or no to question whether she would submit to physical examination, she being plaintiff in personal injury action. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83.

35, 36. Ryan v. Oshkosh Gaslight Co., 138 Wis. 466, 120 NW 264.

37. People v. Klise, 156 Mich. 373, 16 Det. Leg. N. 131, 120 NW 989; Bettis v. State [Ala.] 49 S 781; Jennings v. State, 55 Tex. Cr. R. 147, 115 SW 587.

38. Party testifying in his own behalf is subject to same rules of examination and cross-examination as any other witness. People v. Morrison, 195 N. Y. 116, 88 NE 21. **Extent of cross-examination of accused discretionary** so long as it relates to pertinent matters or tends to impeach or discredit him. People v. Wright, 133 App. Div. 133, 117 NYS 441. Extent to which accused may be cross-examined rests in sound discretion of trial court. State v. Kight, 106 Minn. 371, 119 NW 56. Cross-examination of accused as to **previous inconsistent statement** proper. Noel v. State [Ala.] 49 S 824. May be contradicted by statements out of court. Kelly v. State [Ala.] 49 S 535. Proper to cross-examine accused as to **past life and conduct.** People v. Cosmides, 133 App. Div. 103, 117 NYS 718. Where accused testified to his whole life, cross-examination equally broad was proper. People v. Barry, 132 App. Div. 231, 116 NYS 870. Accused may be cross-examined as to **matters on which he has testified** but not on new matters. People v. Smith, 9 Cal. App. 644, 99 P 1111. Accused may be cross-examined as to matters testified to by him on direct examination. State v. Deal, 52 Or. 568, 98 P 165. Accused, like any other witness, may be cross-examined as to any matter brought out on his examination in chief. Poston v. State, 83 Neb. 240, 119 NW 520. Defendant in murder case having referred in his testimony to what his wife said to him, it was proper cross-examination to ask him if he was in fact married. State v. Myers, 221 Mo. 598, 121 SW 131. Accused having testified to no former conviction except for drunkenness, proper to ask if wife had ever had him arrested. People v. Wright, 133 App. Div. 133, 117 NYS 441. Where accused did not place **character** in issue, state could not on cross-examination inquire as to whether she had previously led virtuous life. People v. Connelly [Mich.] 16 Det. Leg. N. 394, 122 NW 80.

39. State v. La Mont [S. D.] 120 NW 1104; Terrell v. State, 55 Tex. Cr. R. 282, 116 SW 569. Improper in cross-examination of one accused of rape to ask questions concerning similar offenses with other girls. State v. Williams [Utah] 103 P 250.

Contra: Accused properly cross-examined as to commission of other offenses. Commonwealth v. Racco [Pa.] 73 A 1067.

40. Where witness testified from records and reports and could not testify without using them to refresh his memory, counsel was entitled to use records in cross-examining witness. Harman v. Illinois & Eastern Coal Co., 237 Ill. 36, 86 NE 625.

41. Improper on cross-examination of witness to state contents of letter to him and ask if he wrote such letter or letters having like contents; he should be shown letter and asked if he wrote it, and letter should be offered as part of his cross-examination. Kann v. Bennett [Pa.] 72 A 342.

42. Rev. Laws 1905, § 4662. Bernick v. McClure, 107 Minn. 9, 119 NW 247.

43. Bernick v. McClure, 107 Minn. 9, 119 NW 247.

44. Where one defendant was so called it was error, when codefendant proposed to ask him a question, to sustain objection thereto without finding out to what the question related. The Scrantonian v. Brown, 36 Pa. Super. Ct. 170.

chief,[45] but matters pertinent to and growing out of or connected with matters brought out on the direct examination are competent.[46] Where a matter has been

45. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. Party for whom witness is called has right to restrict cross-examination to subjects of direct examination. Harrold v. Ter. [C. C. A.] 169 F 47. Except as to matters affecting credibility, cross-examination must be confined to matters testified to on direct examination. Reeves & Co. v. Brown [Kan.] 102 P 840. Proper to exclude cross-examination to bring out matters not testified to on direct examination. State v. Carr, 65 W. Va. 81, 63 SE 766; Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410; Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651; Rock Creek Steamboat Co. v. Boyd [Md.] 73 A 662; Nagle v. Schnadt, 239 Ill. 595, 88 NE 178; Power v. Turner, 37 Mont. 521, 97 P 950; People v. Whalen, 154 Cal. 472, 98 P 194. Court may properly exclude questions when evident intent of examiner is to go beyond scope of direct examination. Dralle v. Reedsburg, 140 Wis. 319, 122 NW 771. Where expert testified to proper manner of raising derrick and dangers attending manner adopted, question whether dangers were not discoverable by any one was not proper cross-examination. Fraser v. Blanchard [Vt.] 73 A 995. Where witness testified to conversation with plaintiff on certain night, question whether he was present another night when defendant's foreman was trying to settle claim was improper. Id. Error, in cross-examining wife of accused, to show by her additional criminative acts of accused, not testified to by her on direct. Yeiral v. State [Tex. Cr. R.] 119 SW 848. Proper exercise of discretion to exclude on cross-examination of plaintiff what he had alleged in his complaint. Sloss-Sheffield Steel & Iron Co. v. House [Ala.] 47 S 572. Where witness, in prosecution for malicious shooting into railroad car, testified that he was scuffling with another over pistol to prevent his shooting into same train, question as to his reason for thinking that such person intended to shoot into train was not proper cross-examination. Hill v. State [Ala.] 50 S 41. Where heading of page in account book was introduced solely to show relation between defendant and another, it was proper to confine cross-examination to this issue and exclude evidence relating to items appearing below heading. Taplin v. Marcy, 81 Vt. 428, 71 A 72. Improper to cross-examine witness who testified to an assault as to conversation in which prosecuting witness talked of injuring accused's dog. State v. Frazer [S. D.] 121 NW 790. Where plaintiff testified positively that he did not give son authority to sell horse, cross-examination assuming that he had given such authority was error. Warehime v. Schweitzer, 51 Wash. 299, 98 P 747. Accused not permitted to bring out matters of defense on cross-examination of witnesses for state when such matters were not touched on in direct examination. Poston v. State, 83 Neb. 240, 119 NW 520. Where adverse witness was examined solely on question of identity of owner of wagon which caused accident, it was improper to allow full cross-examination on merits of case. Collins v. Wells Fargo & Co. Exp. [Iowa] 118 NW 401. Where witness was examined only as to one transaction with decedent, some months before his death, question as to his mental condition two years before was not proper cross-examination. Larabee v. Larabee, 240 Ill. 576, 88 NE 1037. Where witness testified that he had seen testator's sons at home during last illness, question whether their relations appeared friendly was not proper cross-examination. Id. Cross-examination as to other fires set by defendant's engines improper when direct examination had not covered such matters. Chenoweth v. Southern Pac. Co. [Or.] 99 P 86. Where plaintiff in conversion case testified only to ownership and value of property, proper to refuse to allow cross-examination as to knowledge of attachment proceedings. Shandy v. McDonald, 38 Mont. 393, 100 P 203.

46. Cross-examination of witness for state held within scope of direct, and also proper to lay foundation for contradiction. State v. Hanlon, 38 Mont. 557, 100 P 1035. Cross-examination as to witness' knowledge of alleged rape held within scope of direct examination. Sexton v. State [Ark.] 121 SW 1075. Where defendant in prosecution for illegal sale of liquor testified that he had given liquor to prosecuting witness, who was an officer, it was proper cross-examination to ask how many other officers he had given liquor to and what their names were. Green v. State [Tex. Cr. R.] 120 SW 425. Where police officer testified that he had been detailed to watch trains and search any Chinese, that he had searched accused and had found no weapons on him, it was error to exclude question whether object in searching accused was to find whether he had any weapons. People v. Mar Gin Suie [Cal. App.] 103 P 951. Superintendent of company having testified that company had no agent at certain place, it was proper cross-examination to show by him arrangement with another company for service at that place. Southwestern Tel. & T. Co. v. Owens [Tex. Civ. App.] 116 SW 89. Plaintiff having offered witness as to location of deceased when killed in mine, defendant could examine him as to any new matter as to which he had knowledge. Bruton's Adm'r v. Eddington-Griffiths Const. Co. [Ky.] 118 SW 1001. Where, in forcible entry and detainer, plaintiff testified to his possession under lease and offered lease, it was proper to cross-examine him regarding surrender of lease and consent to landlord's entry. Schwin v. Perkins [N. J. Law] 72 A 454. In action by broker for commission, where defense was that wife of defendant had not signed contract of employment, it was proper on cross-examination of plaintiff to ask if he had not asked defendant's wife to sign. Kinnane v. Conroy, 52 Wash. 651, 101 P 223. Where, in slander case, plaintiff testified that people believed defendant's statements, question who believed them was proper cross-examination. Smith v. Singles [Del.] 72 A 977. Where plaintiff's witness testified as to elevator striking beam, it was error to exclude question as to whether

only partially developed on the direct examination, it may usually be gone into fully on the cross-examination,[47] and matters connected with the subject-matter of the direct examination and which tend to explain, contradict or discredit the testimony in chief, are competent.[48] When the cross-examination goes outside the scope of the direct examination, the examining party makes the witness his own to that extent.[49]

Limitation to issues.[See 11 C. L. 1427]—The cross-examination should, of course, be confined to material issues in the case,[50] though the application of this rule rests

he saw sheave of elevator strike the beam. Sertaut v. Crane Company, 142 Ill. App. 49.

47. Part of conversation being shown on direct, rest could be shown on cross-examination. Koogle v. Cline, 110 Md. App. 587, 73 A 672. Improper to exclude on cross-examination material admissions of party, and all of conversation partly proved in direct. National Park Bank of New York v. West Side Bank, 115 NYS 222. Subject entered into on direct may be further inquired into and exhausted on cross-examination. Schnase v. Goetz [N. D.] 120 NW 553. Error to limit cross-examination of assignor of claim in suit as to whether agreement with debtor testified to by her was in substitution for orignal agreement. Shelp v. Clark, 117 NYS 230. Part of declarations being shown, the rest could be shown. Elliff v. Oregon R. & Nav. Co. [Or.] 99 P 76.

48. Cross-examiner has right to go into matters stated on direct examination, and facts and circumstances connected therewith, and that may modify, explain, contradict, rebut, or make clearer, such matters. Anderson v. Salt Lake & O. R. Co. [Utah] 101 P 579. Proper to allow witness to explain discrepancy between testimony at inquest and trial by stating that he had not dared tell all he knew at inquest. State v. Hunter, 82 S. C. 153, 63 SE 685. Witness having testified that certain payment was made with money supplied by her, proper cross-examination to show that money was furnished for different purpose. Berry v. Doolittle [Vt.] 74 A 97. On issue of fraud in procuring order for goods, defendants called witness who testified that he had been similarly defrauded, had refused goods, and driven plaintiffs away when they came for settlement. Proper cross-examination to show that he had been sued and jury had found against him. Neumeyer v. Hooker, 131 App. Div. 592, 116 NYS 204. Plaintiff in elander case having testified that he had heard defendant's statements reported many times (to show he had been annoyed) could be asked whether he had established good reputation in community in order to show whether he had suffered. Smith v. Singles [Del.] 72 A 977. Where trainmaster, in action by passenger for injuries, testified that no other passenger on train needed a bandage or plaster, it was proper cross-examination to inquire as to how thoroughly he examined them, what authority he had, and whether road had settled with other persons. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. In action for damages by fire caused by sparks from locomotive, where defendant's engineer testified as to proper equipment, construction and operation of engine, and as to size of sparks which would pass through spark arrester, it was proper cross-examination to exhibit piece of cinder or charcoal, and question him as to whether it would go through, etc. Louisville & N. R. Co. v. Smith [Ala.] 50 S 241. Where defendant in homicide called codefendant who had been acquitted of the charge, and witness testified that he and not defendant had committed the deed, it was proper to allow state to show that he had been twice convicted before he was finally acquitted. Early v. State [Tex. Cr. R.] 120 SW 431.

49. Cross-examination must be confined to matters testified to in chief. Party who goes farther makes witness his own. Lambert v. Armentrout, 65 W. Va. 375, 64 SE 260.

50. **Examination held improper:** Cross-examination not within issues properly excluded. Sterling v. Frick, 171 Ind. 710, 87 NE 237. Proper to exclude matters remote and irrelevant on cross-examination of plaintiff. Eastman v. Boston El. R. Co., 200 Mass. 412, 86 NE 793. In detinue for horse, cross-examination concerning ownership of different horse properly excluded. Blair v. Williams [Ala.] 49 S 71. Where witness used memorandum book to fix date of sale of liquor, but book contained other transactions also, court properly refused to order it produced for cross-examination where counsel declined to limit cross-examination to transaction in issue. Morrow v. State [Tex. Cr. R.] 120 SW 491. Proper to exclude cross-examination in regard to contracts when they were not in evidence and there was no proof of their contents. International & G. N. R. Co. v. Biles [Tex. Civ. App.] 120 SW 952. Improper on cross-examination of defendant in malpractice action to ask him if, about the time plaintiff's condition became serious, he did not take out doctor's protective insurance. Gore v. Brockman [Mo. App.] 119 SW 1082. Where state's witness in liquor case testified to getting bottle of liquor from defendant, proper to exclude on cross-examination testimony as to other bottles of whisky obtained by witness about same time. State v. Madison [S. D.] 122 NW 647. Where witness testified that defendant had sold whisky, cross-examination as to whether he himself had not sold whisky was improper. Smith v. State [Ala.] 49 S 1029. In action for fraud, inducing sale of notes secured by mortgage on worthless leasehold, defendant testified to sale of other notes of series. Held proper to limit cross-examination to identification of purchasers, and to exclude inquiry as to trouble with such purchasers. Schwitters v. Springer, 236 Ill. 271, 86 NE 102. Issue being extent of plaintiff's injuries, proof of trouble with her church on account of card playing was not proper cross-examination. McMahon v. Chicago City R. Co., 239 Ill. 334,

largely in the trial court's discretion, especially when the object is to discredit the witness.[51]

Examination to test credibility of witness. See 11 C. L. 1428—The question of the credibility of witnesses, and the manner of testing same, is more fully treated elsewhere.[52] It is always proper on cross-examination to interrogate a witness, within reasonable bounds, as to any matter of fact calculated to affect his credibility or the weight of his testimony,[53] and the extent of the examination for this purpose is necessarily left largely to the discretion of the trial court.[54] Matters tending to

88 NE 223. Improper to show on cross-examination of plaintiff in personal injury action that he tried to conceal fact that he had received accident insurance. Hubbard v. Montgomery County [Iowa] 118 NW 912. Not proper cross-examination of plaintiff to offer original complaint as part thereof; this should be offered as part of defendant's case. Leistikow v. Zuelsdorf [N. D.] 122 NW 340. Where issue was the location of "old coal bank" mentioned in will, it was proper to cross-examine witness as to whether there was another coal bank on land at time will was made. Hunter v. Hunter, 37 Pa. Super. Ct. 311.

Examination held proper: Proper to inquire as to defendant's feeling toward injured person, and another, with whom trouble commenced, in assault case. Phillips v. State [Ala.] 49 S 794. Where engineer testified that his engine could not move at time in question (cause of collision being in issue), proper to show on cross-examination that he had trouble with engine few days before. Keeley v. Great Northern R. Co., 139 Wis. 448, 121 NW 167. Issue being whether lessee of mine was justified in abandoning it, question to lessee's superintendent whether he did anything in certain year toward surrendering equipment was proper cross-examination. Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604. On cross-examination of alleged fraudulent grantee of lands purchased with debtor's funds, creditor may inquire with considerable latitude to ascertain whether or not grantee was controlled by debtor in making purchase. Adams & Burke Co. v. Cook, 82 Neb. 684, 118 NW 662. Where questions were asked witnesses for contestants as to compensation to sisters of testatrix for working for her, it was proper cross-examination to show that they had filed claims against the estate. Drum v. Capps, 240 Ill. 524, 88 NE 1020. Where witness for plaintiff in personal injury action testified that he was first to reach plaintiff after accident, and described what occurred and the place of the injury, it was proper cross-examination to prove by him statements made by plaintiff as part of res gestae. St. Louis & S. F. R. Co. v. Cundieff [C. C. A.] 171 F 319. In personal injury action by servant, proper to ask plaintiff who told him to go to place where he was injured, where an issue in case was whether negligence of superior caused injury. United States Cast Iron Pipe & Foundry Co. v. Driver [Ala.] 50 S 118. Error to exclude cross-examination of defendant to show facts concerning transaction within defendant's knowledge material to issues. Choate v. Bebee, 131 App. Div. 535, 115 NYS 1025.

51. See following paragraph.

52. See Witnesses, § 5.

53. Cross-examination is not confined to a mere categorical review of the matters stated in the direct examination, but is properly directed to test the truth of the testimony. State v. Myers, 221 Mo. 598, 121 SW 131. Where plaintiff in personal injury action testified to an income of from $5,000 to $7,000 per year, defendant was properly allowed to contradict him on cross-examination by showing that he was poor man. Pecos & N. T. R. Co. v. Coffman [Tex. Civ. App.] 121 SW 218. Accused's wife, having testified to facts of killing which she claimed to have seen, was properly cross-examined as to those facts to test her credibility. Dobbs v. State, 54 Tex. Cr. R. 550, 113 SW 923. One plaintiff, in suit to set aside conveyance of roadway, testified that there was no intention to convey it; proper cross-examination to ask if, for months after, the only claim he made was for removal of bar which he believed to be on defendant's land. Czarnecki v. Derecktor, 81 Conn. 338, 71 A 354. Where accused testified that on morning of crime he went to certain city, proper to ask if he had not gone to another city and written letter to certain person. State v. De Hart, 38 Mont. 211, 99 P 438. Where witness had testified that no fire had ever been caused on premises by smoking, and that smoking was prohibited, it was proper cross-examination to ask if there had not been a fire about a year before, and that it was reported to him that it was caused by lighted cigarette. Hitchner Wall Paper Co. v. Pennsylvania R. Co. [C. C. A.] 168 F 602. **Statements inconsistent with testimony** may be brought out on cross-examination. Bridgman v. Winsness, 34 Utah, 383, 98 P 186.

54. Barbieri v. Messner, 106 Minn. 102, 118 NW 258. Extent of cross-examination to show bias. State v. Frazer [S. D.] 121 NW 790. Extent of cross-examination to show bias, prejudice, motive, character, etc. Dotterrer v. State [Ind.] 88 NE 689. Extent of cross-examination whether to show bias, prejudice or interest. Indiana Union Trac. Co. v. Pheanis [Ind. App.] 85 NE 1040. Extent of cross-examination for purpose of impeachment. Eads v. State, 17 Wyo. 490, 101 P 946. Great latitude is allowed in cross-examination to test credibility of witnesses. Holloway v. State, 54 Tex. Cr. R. 465, 113 SW 928. Cross-examination of witnesses simply to show they were prejudiced, without showing cause of prejudice, **improper,** as allowing jury to infer improper motive, though there was proper one. Nagle v. Schnadt, 239 Ill. 595, 88 NE 178. Where state relied on testimony of one who had been convicted as participant in same crime, and defendant had shown that he was convict, had com-

show the interest, bias or hostility of the witness, may be shown,[55] and questions tending to test the fullness and accuracy of a witness' knowledge, observation or recollection,[56] or the value of an opinion given by him,[57] are proper. A witness cannot usually be contradicted or impeached as to collateral matters.[58] Witnesses to character or reputation may be cross-examined to show knowledge inconsistent with their expressed opinions,[59] but it is improper to inquire whether witness would believe a man guilty of certain enumerated crimes, a peaceable law-abiding man.[60] It is also held improper to show on cross-examination of a witness who had impeached another's character that the newspapers had not attacked it.[61]

mitted perjury, etc., it was not error to refuse to allow inquiry as to his true name, though he admitted using an assumed name. State v. Jones, 53 Wash. 142, 101 P 708. Proper to stop cross-examination of witness to show antecedents and recent wanderings when court thought matter had been fully developed. St. Louis, etc., R. Co. v. Pell [Ark.] 115 SW 957.

55. Evidence tending to show interest of witness in event of action proper. Combest v. Wall [Tex. Civ. App.] 115 SW 354; Crook v. International Trust Co., 32 App. D. C. 490. Proper to show that expert (physician) was to be paid out of amount recovered, if any. Indiana Union Trac. Co. v. Pheanis [Ind. App.] 85 NE 1040. Inspector for insurance company testified, as expert, for defendant regarding general use of certain safety appliances in his territory. Proper to cross-examine as to whether insurance company was interested in this case, and to admit his answer that he supposed it was to certain extent. Simmons Mfg. Co. v. Eskridge [C. C. A.] 168 F 675. Where defendant's wife testified that defendant was sick on day on which he was charged with an illegal sale of liquor, and for several days thereafter, it was proper to ask if she did not know that there were eight or ten indictments against him for illegal sales. Morrow v. State [Tex. Cr. R.] 120 SW 491. Witness was asked if he had not been taking an interest in prosecution, and answered, "Well, I have; only telling about who the witnesses were." Held latter part of answer, though not strictly responsive, properly allowed to stand, in explanation of extent of his activity. Lowman v. State [Ala.] 50 S 43.

56. Proper to test memory of witness on cross-examination by asking if contents of letter were truth, he having written letter, and stated that he knew contents. Penry v. Dozier [Ala.] 49 S 909. Error to refuse to allow cross-examination of witness to test her knowledge of facts to which she testified, whether she had seen books or accounts. Cowles v. Cowles' Estate, 81 Vt. 498, 71 A 191. Where witness testified that elevator which caused injuries in suit was used generally by employes, question how often plaintiff used it was proper. Roth v. Buettel Bros. Co. [Iowa] 119 NW 166. Where defendant's inspector testified against plaintiff's contention as to condition of car proper to cross-examine him as to accuracy of record of inspection made by him to which he referred. Gordon v. Kansas City So. R. Co. [Mo.] 121 SW 80. Error to exclude cross-examination of witness to test knowledge, when he has testified that he thought liquor bought by him was whisky. Beaty v. State, 53 Tex. Cr. App. 432, 110 SW 449.

57. Witnesses to value of land properly cross-examined to test knowledge of value of lands in vicinity. City of Chicago v. Marsh, 238 Ill. 254, 87 NE 319. Medical expert may be tested by reading extracts from medical authorities giving authors' names and asking witness if he agrees. Gulf, etc., R. Co. v. Farmer [Tex.] 115 SW 260. Proper cross-examination of witness to damage by fire to ask if he had been instructed by claim agent as to manner of making estimate. Southern R. Co. v. Dickens [Ala.] 49 S 766. Witness who gives opinion that accused is person who committed offense may be cross-examined as to means of knowledge or facts on which he bases opinion. Craig v. State, 171 Ind. 317, 86 NE 397. Witness having testified that pole with wire running down to ground was dangerous, proper cross-examination to ask whether it was dangerous to work on high voltage wires in contact with other wires. Milne v. Providence Tel. Co. [R. I.] 72 A 716. One who gave opinion that defendant was of unsound mind at time of alleged offense was properly cross-examined as to whether he thought defendant had capacity to distinguish between right and wrong, and whether he would know it was wrong to shoot a man, or steal or commit burglary. State v. Crowe [Mont.] 102 P 579. Error to restrict cross-examination of chemist who had testified to analysis of proprietary medicine alleged to have been unlawfully sold. People v. Zito, 141 Ill. App. 534.

58. See, also, Witnesses, § 6. Test in determining whether matter is collateral, or whether it may be shown to impeach witness, is, could cross-examining party prove it in chief. Dotterrer v. State [Ind.] 88 NE 689.

59. Proper to allow witness to good character of accused to testify on cross-examination that he had heard that accused had been on the chain gang. Hunter v. State [Ga.] 65 SE 154. Witness who testifies that applicant for liquor license is man of respectable character and standing in community may be cross-examined as to specific acts of applicant tending to show violation of law or morals. Powell v. Morrill, 83 Neb. 119, 119 NW 9. Character witness properly cross-examined as to number of fights accused had had and whether he was regarded in community as desperate character. Andrews v. State [Ala.] 48 S 858. Character witness may be asked whether person who carried concealed weapon and drinks whisky in barroom on Sunday is considered man of good character. State v. Quick, 150 N. C. 820, 64 SE 168.

60. Rutledge v. Rowland [Ala.] 49 S 461.

61. Berry v. Doolittle [Vt.] 74 A 97.

§ 3. *Redirect examination.*[62]—See 11 C. L. 1429—On redirect, the testimony should, in general, be confined to matters brought out on cross-examination,[63] but the court may, in its discretion, allow matters to be shown which were overlooked in the direct examination.[64] It is proper to more fully develop matters touched on in the cross-examination,[65] and to allow the witness to explain his testimony and correct possible erroneous inferences,[66] and, in some cases, to give reasons,[67] but where witness, on cross-examination, declares that he is unfriendly to one of the parties, it is not proper, on redirect examination, to elicit the reasons for his unfriendliness.[68] The testimony must, of course, be otherwise competent,[69] and relevant to issues in the case.[70]

§ 4. *Recalling witness for further examination.*[71]—See 11 C. L. 1436—Where the issue is left in doubt, permission should be given to recall a witness in order to clear it up,[72] but the matter of recalling witnesses is one resting in the discretion of the trial court,[73] and the recall is not a matter of right.[74] Allowing amplification in rebuttal is also discretionary.[75]

Exceptions and Objections; Exceptions, Bill of, see latest topical index.

62. Search Note: See Witnesses, Cent. Dig. §§ 994-1005; Dec. Dig. §§ 286-290.

63. Where witness, after giving opinion that defendant was of unsound mind, testified on cross-examination that he thought defendant could distinguish between right and wrong, it was proper on redirect to state whether defendant had sufficient mental capacity to do right and avoid wrong. State v. Crowe [Mont.] 102 P 579.

64. Williams v. Smith [R. I.] 72 A 1093.

65. State on redirect may follow up line of inquiry opened by accused on cross-examination. Noel v. State [Ala.] 49 S 824. On redirect, evidence first brought out on cross may be explained and developed. Pardue v. Whitfield [Tex. Civ. App.] 115 SW 306. Part of conversation being shown on cross, state could show remainder, which was relevant, on redirect. Noel v. State [Ala.] 49 S 824. Where witness testified on cross-examination that there were many old elbows in use like that which exploded, it was proper on redirect to ask if he had ever in his experience as steamfitter known of an old elbow being taken from scrap heap, where it had been a year, and placed on steam pipe, to show his knowledge. De Witt v. Floriston Pulp & Paper Co., 7 Cal. App. 774, 96 P 397.

66. Upon redirect examination it is proper to permit the witness to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that arise from matters drawn out on cross-examination, though such facts and circumstances may prejudice the case for defendant. People v. Corey, 8 Cal. App. 720, 97 P 907. Where state's main witness in liquor case was detective employed by law and order league, and accused cross-examined him vigorously to show collusion, perjury, and financial gain, it was proper to allow state to re-examine and show that it made no financial difference to witness whether accused was convicted or acquitted. Morrow v. State [Tex. Cr. R.] 120 SW 491.

67. Proper on redirect to bring out reason for or explanation of matters shown on cross-examination. State v. Rohn [Iowa] 119 NW 88. Where plaintiff (in civil action for damages for unlawfully selling liquor) testified on cross-examination that she had not notified druggist not to sell liquor to her husband, it was proper redirect to ask for her reasons. Lockard v. Van Alstyne, 155 Mich. 507, 15 Det. Leg. N. 1132, 120 NW 1. Where witness on cross-examination testified that he had told sheriff he had not seen pistol in possession of deceased, having testified that he had seen one fall from window as though from decedent's hand as he fell, he should have been allowed on redirect to explain why he had not told sheriff about this. State v. Hanlon, 38 Mont. 557, 100 P 1035.

68. State v. Kight, 106 Minn. 371, 119 NW 56.

69. That plaintiff proved on cross-examination of motorman that he had made report on accident did not make report competent in behalf of company. Finkelstein v. Keene Elec. R. Co. [N. H.] 73 A 705.

70. Issue being whether order for goods, price of which was sought, had been procured by fraud, plaintiff's witness testified on cross-examination that another person had also taken an order from him. Improper to show on redirect that in suit on such other order jury had found verdict against buyer. Neumeyer v. Hooker, 131 App. Div. 592, 116 NYS 204.

71. Search Note: See Witnesses, Cent. Dig. §§ 899-905, 930, 1006, 1007, 1109; Dec. Dig. §§ 262-265, 283, 332.

72. Error to refuse to allow witness to be recalled when issue was left in doubt by evidence. Tager v. Halpern, 134 App. Div. 264, 118 NYS 952.

73. Whether witness who has been fully examined and cross-examined may be recalled in order to contradict him. Bills v. State, 55 Tex. Cr. R. 541, 117 SW 835. Strict rule requires that impeaching questions should be asked witness before he leaves stand after examination in chief, but it is not an abuse of discretion to allow witness to be recalled for such questions, only short time having elapsed, and other party's rights not being prejudiced. Juul v. Kitsap Transp. Co. [Wash.] 104 P 191.

74. Under Pub. St. 1901, c. 225, § 11, and

EXCHANGE OF PROPERTY.[76]

The scope of this topic is noted below.[77]

Where a contract for the exchange of realty calls for a marketable title, it must be furnished,[78] and in the absence of an agreement to the contrary, a marketable title is always presumed to be bargained for.[79] In a contract for the exchange of property, the prices agreed upon are not necessarily conclusive, as they are in case of a sale.[80] Rules applicable to the rescission of a contract of sale are applicable to a contract for an exchange of property, where there has been a completed transfer.[81] Since the transfer is not completed until there has been an acceptance,[82] one may refuse to perform a contract for exchange of property "subject to inspection," if it is not as warranted.[83] The party making a rescission must return the property he received, or its equivalent,[84] and, ordinarily, a party who rescinds an exchange of lands must convey free from incumbrances, the land received; but equitable relief is always adapted to the circumstances.[85] In case of fraud,[86] the party defrauded may rescind or recover damages for such fraud,[87] but a right to rescind a contract for fraud may be lost by laches [88] or subsequent conduct implying a waiver.[89] Where one party refuses to perform, the other may treat the contract

Rule of Court No. 44, after witness has been dismissed from stand he cannot be recalled except by permission of court. Lapointe v. Berlin Mills Co. [N. H.] 73 A 406.

75. Proper exercise of discretion to allow plaintiff, in rebuttal, to amplify testimony given in direct examination, while making his case, in view of defense raised by defendant. Kime v. Bank of Edgemont [S. D.] 119 NW 1003. See, also, Trial, § 3.

76. See 11 C. L. 1430.

Search Note: See notes in 3 C. L. 1396; 94 A. S. R. 227.

See, also, Exchange of Property, Cent. Dig.; Dec. Dig.; 17 Cyc. 829-847; 11 A. & E. Enc. L. (2ed.) 569.

77. It treats only of matters peculiar to contracts for the exchange of property. It **excludes** matters common to all contracts (see Contracts*), reality of assent (see Fraud and Undue Influence;* Incompetency;* Mistake and Accident*), measure of damages for breach (see Damages,* § 4A), and equitable relief (see Cancellation of Instruments,* Reformation of Instruments,* Specific Performance*).

78. Even if plaintiff had received possession of store in exchange for realty, he was not entitled to retain possession after time for performance on his part had passed, unless he had tendered performance by offering deed conveying merchantable title. Robinson v. Yetter, 238 Ill. 320, 87 NE 363.

79. Mutchnick v. Davis, 130 App. Div. 417, 114 NYS 997.

80. Where written contract merely recited that price agreed upon was so much in each case, held not conclusive, and finding was justified that transaction was in fact exchange of properties at value fixed thereon for purpose of ascertaining difference, rather than with view to fixing true value. Robbins v. Selby [Iowa] 121 NW 674.

81. If right is reserved for further examination with right to return property if not satisfactory, transfer is not complete. Stine v. Foster [S. D.] 122 NW 598.

82. Instruction that if either party reserved right to inspection and return property if not satisfied then contract was not completed, and ownership did not pass, held proper. Stine v. Foster [S. D.] 122 NW 598.

83. Subsequent modification indorsed on contract, extending date for taking invoice of goods and adding certain conditions, and stating that otherwise agreement should remain as written, held not to have discharged condition that whole contract was subject to inspection and approval. Slaughter v. Elliott [Mo. App.] 119 SW 481.

84. Baker v. Robertson [Mo. App.] 119 SW 987.

85. Plaintiff, having land subject to incumbrance, agreed to exchange with defendant; plaintiff's creditor transferring incumbrance to land received by plaintiff. Defendants sold land received from plaintiff. Held, on rescission, that plaintiff should have judgment for value of land exchanged, less amount of incumbrance, and defendant entitled to reconveyance of their lands, subject to the incumbrance. Campbell v. Moorehouse [Iowa] 120 NW 79.

86. The right to rescind for fraud in a horse trade exists only when actual fraud has been committed. Sasser v. Pierce [Ga. App.] 64 SE 1100.

87. Slaughter v. Elliott [Mo. App.] 119 SW 481.

88. Defendant's lot had been sold for taxes, and, though knowing of the sale in time, plaintiff did not redeem or offer to rescind at once but waited till its title had been fully extinguished by tax deed. Held right to rescind defeated. Town of Grand River v. Switzer [Iowa] 121 NW 516.

89. Where party became mentally irresponsible after exchange when he realized he had been defrauded, held that acceptance of rent from agent of owner of property re-

as abandoned and sue for his resulting damages[90] or declare a rescission,[91] but where on party refuses to perform and declares a rescission, in which the innocent party acquiesces by silence, the latter is entitled either to rescind or enforce the contract at his election, but cannot do both.[92] In order to sustain a decree for specific performance of a contract for the exchange of property, it must specify with reasonable certainty the rights, duties and obligations of each of the parties, or the terms of the exchange.[93] On breach of the contract, the innocent party may recover his resulting damages.[94] Instructions as to the measure of damages are not erroneous, because of a mistake as to the evidence, where the mistake is so manifest that it corrects itself.[95] A failure to perform cannot be excused on account of a wife's refusal to join in the deed, where the contract does not provide for such joinder.[96] A waiver of any defenses the parties may have for failure to perform the contract may result from their conduct.[97] Where a contract for the exchange of properties is executed, and the money difference has been paid to broker, who deducts his commission from the same, one party is not liable to the other for such deduction.[98]

EXCHANGES AND BOARDS OF TRADE.[99]

The scope of this topic is noted below.[1]

Membership rights and dealings. See 11 C. L. 1431—A board of trade is a combination of men engaged in the same business who have bound themselves by contract and agreement to charge uniform rates for personal services,[2] and such combination is not a monopoly in restraint of trade as defined by statute in Minnesota.[3] A nonmember cannot enjoin the enforcement of a resolution adopted by a stock exchange, although it is illegal because in restraint of trade.[4] Where it is sought to forfeit

ceived did not affirm deal. Fitzgerald v. Frankel [Va.] 64 SE 941.

90. Neglect of defendant to appear at time and place appointed, and subsequent failure to offer any satisfactory explanation of his absence, held equivalent to absolute refusal on his part to perform agreement. Sleeper v. Nicholson, 201 Mass. 110, 87 NE 473.

91. Defendants failed to convey marketable title to plaintiff, as agreed. Held such failure justified cancellation of contract. Mahn v. Chicago & M. Elec. R. Co., 140 Wis. 8, 121 NW 645.

92. Olsen v. Sortedahl [Iowa] 121 NW 559.

93. Where contract merely recited defendant's agreement to convey certain real estate in consideration of complainant's agreement to convey certain other land, and provided for abstracts of title and time to cure any defects, held not specific enough. McCauley v. Schatzley [Ind. App.] 88 NE 972.

94. Not necessary to bring action for breach of warranty where one party does not receive consideration of property conveyed by him to other. Davis v. Carter [Iowa] 120 NW 1039.

95. Court charged price of property fixed in contract of exchange was $6,000, and subsequently mentioned $6,500 as the price; held immaterial, where contract was introduced in evidence. Beck v. Budd [Ind. App.] 88 NE 785.

96. Bird v. Blackwell, 135 Mo. App. 23, 115 SW 487.

97. Failure to appear at time and place agreed on for performance constituted waiver of any objection which defendant might have made that premises were not free from incumbrances. Sleeper v. Nicholson, 201 Mass. 110, 87 NE 473.

98. If there is any claim, it is against broker. O'Meara v. Heer [Kan.] 102 P 478.

99. **Search Note:** See notes in 5 C. L. 1383; 2 L. R. A. (N. S.) 672; 4 Id. 435; 8 Ann. Cas. 761.

See, also, Exchange, Cent. Dig.; Dec. Dig.; 17 Cyc. 848-871; 26 A. & E. Enc. L. (2ed.) 788.

1. Includes matters relating to the organization proceedings and liabilities of such organizations and rights of members therein. **It excludes** matters relating to associations and corporations generally (see Associations and Societies;* Corporations *), rights and liabilities between stockbroker and customer (see Brokers,* § 2), and rights between brokers or associations and telegraph companies as to quotations and ticker service (see Telegraphs and Telephones,* § 5). The validity of option contracts is treated in the topic Gambling Contracts.*

2. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395.

3. Gen. Laws 1899, p. 487, c. 359; Rev. Laws 1905, § 5168. State v. Duluth Board of Trade, 107 Minn. 506, 121 NW 395.

4. Members can disregard it and can seek equitable relief if any action toward sus-

the rights of a member of a trade exchange for an alleged infraction of the by-laws, the latter must be strictly construed, since it is a penal proceeding.[5] The property right pertaining to a seat on a stock exchange, subject to the rules of the exchange board, passes to a receiver or to a trustee in bankruptcy, as the case may be, though the membership is personal to the member.[6] When grain is sold on the floor of a chamber of commerce, the rules whereof, in the absence of a stipulation to the contrary, require payment when the grain is weighed, subsequent purchasers are put upon inquiry as to title, and where payment has not been made the vendor may replevin the property from an innocent subvendee for value.[7]

EXECUTIONS.

The scope of this topic is noted below.[8]

§ 1. **Definition, 1726.**
§ 2. **Right to Have Execution, 1726.**
§ 3. **Stay and How Procured, 1727.**
§ 4. **Procedure to Procure Insurance of Writ, 1728.**
§ 5. **Power to Allow or Issue and to Recall Writ, 1728.**
§ 6. **Form and Contents of Writ, 1728.**
§ 7. **Quashal of Writ, 1729.**
§ 8. **The Levy, 1729.**
A. Leviable Property and Order of Leviability, 1729.
B. Time and Mode of Making Levy, and the Return Thereof, 1730.
C. Authority and Duty to Make Levy, 1731.
D. Extent and Adequacy of Levy, 1731.
E. Execution Lien, 1731. Conflicting Levies and Liens; Priorities, 1731.
F. Relinquishment and Dissolution of Levy, 1732.
G. Release of Property on Receipts of Forthcoming or Delivery Bonds, 1733.
H. Liability of Officer for Loss of Property Levied Upon, 1733.
I. Rights as to Custody of Property Levied on and Incidental to Taking Possession, 1733.
J. Effect of Death of Debtor, 1734.
K. Liability for Wrongful Levy, 1734.
§ 9. **Claims of Third Persons and Trial Thereof, 1734.**
§ 10. **Appraisement, 1735.**
§ 11. **Execution Sales, 1735.**
§ 12. **Return and Confirmation of Sale, 1737.**
§ 13. **Redemption, 1737.**
§ 14. **Title and Rights Acquired in Property Sold, and Evidence Thereof, 1738.**
§ 15. **Legal and Equitable Remedies Against Defective or Improper Levy or Sale, 1739.**
§ 16. **Restitution on Reversal of Judgment, 1743.**

§ 1. *Definition.*[9]—See 9 C. L. 1328

§ 2. *Right to have execution.*[10]—See 11 C. L. 1433—The right to have an execution issue depends upon the existence of a decree for the payment of money,[11] or of

pension or expulsion is attempted as a result. Heim v. New York Stock Exch., 64 Misc. 529, 118 NYS 591. Strangers must seek damages at law. Id. Resolution which prohibits any member from transacting business with or for any member of rival exchange, not adopted through any bad motives but to protect own interests, held not "illegal combination in restraint of trade," in violation of Laws 1899, p. 1514, c. 690. Id.

5. Evidence held not to show refusal of complainant to settle business transaction with fellow member of exchange. Held expulsion not warranted. Albers v. Merchants' Exch. [Mo. App.] 120 SW 139.

6. Wrede v. Gilley, 132 App. Div. 293, 117 NYS 5.

7. Good v. Bender, 11 Ohio C. C. (N. S.) 417.

8. **Includes** only ordinary writ of execution on a money judgment. **Excludes** writs in execution of judgments not for money (see such topics as Detinue;* Forcible Entry and Unlawful Detainer,* § 1B; Foreclosure of Mortgages on Land,* §§ 2, 4; Ejectment [and writ of Entry],* § 6; Quo Warranto,* § 6; Replevin,* § 6), procedure to aid executions (see Civil Arrest;* Creditor's Suit;* Supplementary Proceedings *), exemption from execution (see Exemptions;* Homesteads *), and procedure for collection of judgments against public corporations (see Counties,* § 3; Municipal Corporations,* §§ 15, 16), and against representatives and fiduciaries (see Estates of Decedents;* Guardianship,* §§ 7, 8; Receivers,* §§ 4, 7; Trusts,* §§ 9-16), rights of execution creditor or purchaser as against fraudulent conveyance (see Fraudulent Conveyances *), execution sale for taxes (see Taxes,* § 12), execution for recovery of fines (see Fines *).

9. **Search Note:** See Execution, Cent. Dig. §§ 1, 2, 37-40; Dec. Dig. §§ 1, 2, 15; 17 Cyc. 921, 932; 11 A. & E. Enc. L. (2ed.) 604, 609; 8 A. & E. Enc. P. & P. 311.

10. **Search Note:** See notes in 3 C. L. 1398; 49 L. R. A. 233; 61 Id. 353; 15 L. R. A. (N. S.) 690; 8 Ann. Cas. 311.

See, also, Execution, Cent. Dig. §§ 2-48; Dec. Dig. §§ 2-19; 17 Cyc. 923-933, 936-939; 11 A. & E. Enc. L. (2ed.) 616; 8 A. & E. Enc. P. & P. 312.

11. Under Code 1906, §§ 4141, 4142, execution may issue upon decree for payment of

a regular,[12] final,[13] subsisting judgment,[14] upon which there is a balance due,[15] and which has been properly entered.[16] Such right may vest in the judgment creditor, his assignee, or representative,[17] or in a surety of the debtor who has paid the judgment.[18] An execution in favor of such surety should be for the full amount paid by him with interest thereon.[19] The right to an execution is not necessarily barred by the quashing of a prior execution issued on the same judgment,[20] or by the fact that action on the judgment is barred.[21]

§ 3. *Stay and how procured.*[22]—See 11 C. L. 1434—The court out of which the writ issues may stay its execution for good cause shown [23] upon the filing of a sufficient bond.[24] The extent of such stay is usually regulated by statute,[25] and in some cases a perpetual stay is permissible.[26] The issuance of an execution during the stay is improper.[27] When an execution is issued to another county than that in

money. Hall v. McGregor, 65 W. Va. 74, 64 SE 736. Judgment for **alimony** declaring specific lien on certain land of defendant will authorize issuance of ordinary execution. Maki v. Maki, 106 Minn. 357, 119 NW 51.

12. Execution cannot issue on irregular judgment. Simon v. Underwood, 61 Misc. 369, 115 NYS 65.

13. Execution cannot issue upon judgment not final as to all parties. Rev. St. 1895, art. 2324, construed. Texas Co. v. Beddingfield [Tex. Civ. App.] 114 SW 894.

14. Execution cannot be issued on **dormant judgment.** General Elec. Co. v. Hurd, 171 F 984. Judgment did not become dormant where execution necessary to preserve it had been issued, though officer made no effort to make levy and returned no property found, and although he had no specific directions as to making levy. Gouwens v. Gouwens, 237 Ill. 506, 86 NE 1067. Judgment did not become dormant where executions necessary to keep them alive had been duly issued and evidence did not show directions had been given to officer to not levy executions but to let them expire. Id. Federal decree recovered in Oregon on which no execution had been issued for more than 10 years was dormant under B. & C. Comp. Or. § 241, made applicable to federal court sitting in Oregon by Rev. St. § 721, U. S. Comp. St. 1901, p. 581. General Elec. Co. v. Hurd, 171 F 984.

15. Fact that plaintiff was liable to offset for rents and profits of land wrongfully seized did not prevent him from being entitled to execution for balance due after offset was allowed. Culver v. Lambert [Ga.] 64 SE 82.

16. Execution cannot issue until judgment has been entered on minutes. Hubbart v. Willis State Bank [Tex. Civ. App.] 119 SW 711.

17. Guiterman v. Coutant, 128 App. Div. 452, 112 NYS 900.

18. Patton's Ex'r v. Smith [Ky.] 114 SW 315.

19. Though such full amount exceeds amount of judgment. Ky. St. 1903, § 4666. Patton's Ex'r v. Smith [Ky.] 114 SW 315.

20. Where motion is made to quash execution on several grounds, one of which is sufficient and demurrers thereto overruled, and judgment on appeal must be affirmed, the judgment creditor, after first and only legal ground for quashing execution no longer exists, is not barred by erroneous ruling of court from obtaining new execution. Lee's Adm'rs v. Thompson [Ky.] 116 SW 775.

21. Since issuance of execution is not action, issuance from justice court is not barred by Rev. St. 1908, § 4061, barring actions on judgments in courts not of record. Brown v. Bell [Colo.] 103 P 380.

22. Search Note: See note in 5 Ann. Cas. 786.

See, also, Execution, Cent. Dig. §§ 442-465, 541-542; Dec. Dig. §§ 158, 174, 177; 17 Cyc. 1135-1151; 11 A. & E. Enc. L. (2ed.) 698; 8 A. & E. Enc. P. & P. 320.

23. Under Kirby's Dig. § 3224. Flowers v. U. S. Fidelity & Guar. Co. [Ark.] 117 SW 547. Execution on judgment obtained in favor of owners of land was properly stayed pending the proper adjustment of equities which had grown up in favor of defendant corporation and of rights of public in railroad as public highway. Hay v. Valley Pike Co., 38 Pa. Super. Ct. 145.

24. Under Code Civ. Proc. § 949, on giving undertaking under § 941 on appeal from order allowing execution on old judgment, execution could not be stayed thereby, such bond being inadequate. Weldon v. Rogers, 154 Cal. 632, 98 P 1070. Bond upon which sureties did not justify was not sufficient. Municipal Court Act, § 315. Montrose v. Levenson, 114 NYS 136.

Waiver of insufficiency of bond: Insufficiency in stay bond held not waived by plaintiff's failure to issue execution. Montrose v. Levenson, 114 NYS 136. Conversation with attorney, not of record in case and not shown to represent plaintiff, held not waiver by plaintiff of justification by sureties. Id.

25. Municipal Court Act, § 1, subd. 15, limits stay that can be granted to 5 days unless parties consent to longer time. Heckman v. Stein, 64 Misc. 144, 117 NYS 1026.

26. Perpetual stay of execution may be granted at same time as judgment, under Code Pub. Gen. Laws 1904, art. 26, § 14, providing that court shall give judgment according to very right of cause and matter in law without regarding mere form. Kendrick v. Warren Bros., 110 Md. 47, 72 A 461. Perpetual stay granted where judgment was given against bankrupt after his discharge. Id.

27. Where stay was granted for 10 days and 10th day fell on Sunday, issuance of execution on following Monday was improper. Heckman v. Stein, 64 Misc. 144, 117 NYS 1026.

which the judgment is rendered, the court of the latter county has no power to interfere with the making of the levy.[28]

§ 4. *Procedure to procure issuance of writ.*[29] See 11 C. L. 1434—The time when[30] and within which an execution may issue is fixed by the statute,[31] which usually apply with like effect to a representative of the creditor as to the creditor himself.[32] In some cases leave of the court must be obtained for the issuance of an execution.[33] The requirement of notice before issuance[34] may be waived,[35] and such a waiver can be overcome only by showing a defense on the merits.[36]

§ 5. *Power to allow or issue and to recall writ.*[37] See 11 C. L. 1435—A lower court may issue an execution on a sufficient mandate from an appellate court,[38] and a court of record may issue an execution on a sufficient transcript from a justice court,[39] but the court of one county cannot issue an execution upon the transcript of a judgment rendered in another county.[40]

§ 6. *Form and contents of writ.*[41] See 11 C. L. 1485—The execution should sufficiently identify[42] and conform to the judgment,[43] and should be against all the

28. Such power rests solely in the court out of which writ is issued. Lehigh & N. E. R. Co. v. Hanhauser, 222 Pa. 248, 70 A 1089.

29. **Search Note:** See note in 74 A. S. R. 152.

See, also, Execution, Cent. Dig. §§ 148-172; Dec. Dig. §§ 62-77; 17 Cyc. 987-1000, 1002-1008, 1018, 1019, 1027-1034; 11 A. & E. Enc. L. (2ed.) 610; 8 A. & E. Enc. P. & P. 343, 501.

30. Under Comp. Laws, §§ 860, 861, in justice court, prevailing party has right to immediate issuance of execution after judgment. Pattinson v. Flayer [Mich.] 16 Det. Leg. N. 507, 122 NW 215.

31. Ex parte City of Anderson, 82 S. C. 131, 63 SE 354.

32. Under Code Civ. Proc. §§ 1375-6-7, where judgment has been kept alive by issuance of execution within first five years, execution may issue after such five years at instance of representative of judgment creditor. Guiterman v. Coutant, 128 App. Div. 452, 112 NYS 900.

33. Under Rev. St. § 916 (U. S. Comp. St. 1901, p. 684), and equity rule 8, a law of Oregon prevailing at time of enactment of such statute, which required leave of court to issue execution after lapse of five years without issue of execution, applied to decree of federal court sitting in Oregon. General Elec. Co. v. Hurd, 171 F 984.

34. Revisal 1905, § 620, requires notice before issuance of execution after more than 3 years. McKeithen v. Blue, 149 N. C. 95, 62 SE 769.

35. Waived by judgment defendant appearing in homestead appraisement proceedings and moving to set same aside on ground that he had not been notified of time and place of appraisement and without asserting that execution was defective. McKeithen v. Blue, 149 N. C. 95, 62 SE 769.

36. Especially where life of judgment would otherwise expire. McKeithen v. Blue, 149 N. C. 95, 62 SE 769.

37. **Search Note:** See Execution, Cent. Dig. §§ 145-147; Dec. Dig. §§ 59, 60; 17 Cyc. 985-987; 11 A. & E. Enc. L. (2ed.) 610; 8 A. & E. Enc. P. & P. 364.

38. To authorize circuit court to issue execution for costs awarded by circuit court of appeals on writ of error, mandate from latter court should contain provision directing same. See U. S. Comp. St. 1901, p. 571, made applicable by U. S. Comp. St. 1901, p. 552. American Trust & Sav. Bank v. Zeigler Coal Co., 165 F 512.

39. Transcript which showed copy of execution not containing name of plaintiff was insufficient to warrant issuance of execution by clerk of circuit court. Schmitt v. Weber, 239 Ill. 377, 88 NE 268. Transcript could not be rendered sufficient by evidence or by introducing original executions, which contained name of plaintiff, in evidence. Id.

40. Bramel v. Ratliff [Wash.] 103 P 817. Under St. 1898, §§ 2969, 2971, providing for issuance of execution from court of record and that it may be issued to sheriff of any county wherein judgment is docketed, execution must issue only from county wherein judgment was rendered, though to sheriff of another county. Kissinger v. Zieger, 138 Wis. 368, 120 NW 249.

41. **Search Note:** See notes in 101 A. S. R. 550; 8 Ann. Cas. 169.

See, also, Execution, Cent. Dig. §§ 173-207; Dec. Dig. §§ 78-105; 17 Cyc. 1009, 1011-1018, 1020-1026, 1033-1049; 11 A. & E. Enc. L. (2ed.) 642; 8 A. & E. Enc. P. & P. 384, 387.

42. Execution reciting that "Whereas, on the 13th day of April, 1898, in an action pending before George I. Robonson, a justice of the pease of Elkhorn Township, Lincoln County, State of Kansas, John H. Dugan recovered two judgments against W. P. Harman and Lucy A. Harman for the sum of $338.87 and the further sum of $6.23 as costs of suit, with interest at 10 per cent per annum from the 9th day of April, 1898, and afterwards the said John H. Dugan duly filed his abstract of said judgment in the district court of Lincoln County, Kansas," held to sufficiently identify the judgments. Dugan v. Harman [Kan.] 102 P 465.

43. Execution against two defendants only, where judgment was against three, does not sufficiently conform to judgment. Merrifield v. Western Cottage Piano & Organ Co., 238 Ill. 526, 87 NE 379. Execution issued at instance of surety who has paid judgment may sufficiently conform to judgment though it be for full amount paid by him and interest, and such amount exceeds amount of judgment. Ky. St. 1903, § 4666. Patton's Ex'r v. Smith [Ky.] 114 SW 315.

judgment defendants,[44] but it is not rendered void by a mere irregularity [45] or by a slight variance [46] which may be corrected.[47] Where there is that in the judgment by which to amend,[48] an error in an execution may be corrected by the consent of the plaintiff or by order of the court, but not just merely at the volition of the clerk issuing it.[49]

§ 7. *Quashal of writ.*[50]—See 11 C. L. 1435—The right to set aside or quash an execution voidable and irregularly issued [51] is vested in the court out of which the execution issues,[52] but can be exercised only by direct proceedings,[53] and at the instance of the defendant,[54] who by failing to object in the proper time may waive such right.[55] The court will not quash a writ for the invalidity of a judgment valid on its face unless it appear that the defendant has a good defense to the action.[56]

§ 8. *The levy. A. Leviable property and order of leviability.*[57]—See 11 C. L. 1436—Generally speaking, any tangible property in which the defendant has a valid and transferable interest is subject to levy,[58] unless it be exempt.[59] A judgment is

44. Must appear on its face to be against all although not enforcible against all through death, bankruptcy, or other cause. Merrifield v. Western Cottage Piano & Organ Co., 238 Ill. 526, 87 NE 379. Against all though enforcement be restrained as against one. Merrifield v. Western Cottage Piano & Organ Co., 144 Ill. App. 289.

45. Issuing of one execution on two judgments is irregular and, while execution is voidable, it is not void. Dugan v. Harman [Kan.] 102 P 465. Fact that the indorsements were on separate sheet and that sheets were pinned together, not glued, was not an irregularity making execution invalid. Glover v. Bass [Ala.] 50 S 125. As to irregularity sufficient to warrant dismissal of levy, see post, § 8F.

46. Describing defendant as "B. & O. R. R. Company" instead of "Baltimore & Ohio Railroad Company," as in the judgment, was immaterial variance. Stout v. Baltimore & O. R. Co., 64 W. Va. 502, 63 SE 317.

47. Immaterial variance in execution from name of defendant contained in judgment could be amended on motion before justice. Stout v. Baltimore & O. R. Co., 64 W. Va. 502, 63 SE 317.

48. Right to amend execution depends on sufficiency of judgment. Merrifield v. Western Cottage Piano & Organ Co., 144 Ill. App. 289.

49. Johnson v. Scott [Ky.] 121 SW 695.

50. Search Note: See Execution, Cent. Dig. §§ 466-542; Dec. Dig. §§ 159-177; 17 Cyc. 1146, 1147, 1152-1197; 11 A. & E. Enc. L. (2ed.) 715; 8 A. & E. Enc. P. & P. 459.

51. Fieri facias post annum et diem is not void but voidable. Sylvester v. DeWitt, 34 Pa. Super. Ct. 205. Judgment debtor may move to quash writ irregularly issued. Cable v. Magpie Gold Min. Co. [S. D.] 119 NW 174. Execution was irregularly issued when issued in favor of administrators of estate of judgment creditor without such administrators being required to file any evidence of their authority as required by Civ. Code Prac. § 404. Lee's Adm'rs v. Thompson [Ky.] 116 SW 775. Execution issued after statutory period, though not void, may be set aside as voidable. In re Rebman [C. C. A.] 150 F 759. Execution issued pending stay of execution, though not void, may be set aside as voidable for irregularity. Merrifield v. Western Cottage Piano & Organ Co., 238 Ill. 526, 87 NE 379.

52. Under Kirby's Dig. § 3224. Flowers v. U. S. Fidelity & Guar. Co. [Ark.] 117 SW 547.

53. Cannot be attacked collaterally. In re Rebman [C. C. A.] 150 F 759.

54. Not on application of judgment creditor. Sylvester v. DeWitt, 34 Pa. Super. Ct. 205. Not on application of third party. In re Rebman [C. C. A.] 150 F 759. Claimant cannot move to quash fi. fa. Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604, 63 SE 637.

55. Right waived. In re Rebman [C. C. A.] 150 F 759. Where irregularity occurred and defendant failed to take advantage of defect at earliest opportunity, he was decreed to have waived every advantage arising from it. Sylvester v. DeWitt, 34 Pa. Super. Ct. 205.

56. Flowers v. U. S. Fidelity & Guar. Co. [Ark.] 117 SW 547.

57. Search Note: See notes in 5 C. L. 1387; 23 L. R. A. 642; 46 Id. 481; 14 L. R. A. (N. S.) 1234; 2 A. S. R. 403; 9 Id. 405; 29 Id. 663; 57 Id. 436; 71 Id. 370; 5 Ann. Cas. 512; 6 Id. 655; 8 Id. 475.

See, also, Execution, Cent. Dig. §§ 49-143, 308-310; Dec. Dig. §§ 20-58, 133; 10 Cyc. 373; 17 Id. 940-949 1090-1092; 11 A. & E. Enc. L. (2ed.) 621; 8 A. & E. Enc. P. & P. 511.

58. Any property of defendant is subject to judgment lien. Chamblee v. Atlanta Brewing & Ice Co., 131 Ga. 554, 62 SE 1032.

Held leviable: Debts owing to judgment debtor. Nordstrom v. Corona City Water Co. [Cal.] 100 P 242. **Money** may be levied on as being property. Exchange Nat. Bank v. Stewart [Ala.] 48 S 487. Personal **property fraudulently transferred** to defendant's son for purpose of defrauding creditors. Pruett v. Gunn [Ala.] 48 S 492. **Land** to which debtor holds legal, though not equitable, title, as where he has sold the land and given bond for deed and possession but yet holds the legal title. National Broadway Bank v. Denny [Ga.] 65 SE 412. Land of judgment debtor to which he has obtained title, under Code Civ. Proc. § 1252. Holland v. Grote, 193 N. Y. 262, 86 NE 30. Lands which owner has power to lease, sell and dispose of. Denike v. Santa Clara Val. Agricultural Soc., 9 Cal. App. 228, 98 P 687. Lands of agricultural societies organized un-

not subject to execution except as provided by statute and in strict accordance with the method prescribed.[60] Property not owned by the judgment debtor cannot be legally levied on,[61] except in some few cases provided by statutes.[62]

The defendant has a right to determine the order of leviability [63] where he has not lost such right by transferring his property.[64]

(§ 8) *B. Time and mode of making levy, and the return thereof.*[65]—See 12

der St. 1859. Id. **Land covered by dower interest** is subject to levy, subject to widow's life estate **when necessary** because other available property is insufficient to satisfy judgment. Walker v. Shearer's Adm'x [Ky.] 119 SW 240. **Interest in partnership business,** in case where evidence showed judgment debtor to have leviable interest in partnership cattle breeding business. Shaw v. Roberts [Iowa] 122 NW 932. **Income on trust** created by will prior to passage of Laws 1903, p. 1071, c. 461, as amended by Laws 1905, p. 370, c. 175, amending Code Civ. Proc. § 1391, such laws not being retroactive and not affecting trust created in 1893. Demuth v. Kemp, 130 App. Div. 546, 115 NYS 28.

Held not leviable: Property not subject to legal sale by the officer, as intoxicating liquors which can be sold only by certain persons for restricted purposes. Hines v. Stahl [Kan.] 99 P 273. **Patent right,** since it cannot be sold on execution. Ball v. Coker, 168 F 304. A city **tax** is not subject to execution against city. Hedge v. Des Moines [Iowa] 119 NW 276. **Mere right of occupancy** not intended merely as incident to complete life estate but only as alternative privilege to be exercised by devisee under will at his option. Cashman v. Bangs, 200 Mass. 498, 86 NE 932. **Land deeded as security** to another prior to grantor's being reinvested with title in terms of law. Civ. Code 1895, §§ 5432, 5433, applied. Buchan v. Williamson, 131 Ga. 501, 62 SE 815. **Realty standing in name of plaintiff,** having been deeded to him by defendant as security. Culver v. Lambert [Ga.] 64 SE 82. **Interest of devisee of** realty, where doctrine of equitable conversion applies, since interest passes as personalty to beneficiaries of will. Beaver v. Ross [Iowa] 118 NW 287. As to what constitutes equitable conversion, see Conversion in Equity, §§ 1, 2. Interest of child appointed executor where testator devised realty to his wife for life, and provided that on her death property should be sold, part to be set aside for support of a child and remainder divided among other children, there being an equitable conversion and no reconversion. Id. **Equitable interest** in real estate that is recoverable or enforcible only in court of equity. Tischler v. Robinson, 56 Fla. 699, 48 S 45. Interest of mortgagee in land. Pettus v. Gault, 81 Conn. 415, 71 A 509. **Land transferred** by deed by debtor and his wife to sureties. Shaw v. Roberts [Iowa] 122 NW 932. Land in which defendant has **doubtful interest,** as where it stands in name of another and creditor cannot sustain burden of proving that debtor has some interest therein. Bahnsen v. Qualley [Iowa] 120 NW 625.

59. See Exemptions; Homesteads, § 5.

60. Acme Harvesting Mach. Co. v. Hinkley [S. D.] 122 NW 482. Judgment held not subject to levy where provisions of Rev. Code Civ. Proc. §§ 336, 340, were not strictly complied with. Id. Judgment in favor of taxpayer, though personal property, was intangible and not subject to levy in distress proceedings to recover taxes owing by judgment creditor. Id.

61. Property of wife not subject to execution issued on judgment against husband. Barr v. Simpson [Tex. Civ. App.] 117 SW 1041. There can be no levy on **property of husband** to satisfy judgment against his wife in action wherein he was not defendant. Deardorff v. Pepple, 36 Pa. Super. Ct. 224. Where home but partially paid for stands in name of daughter, and it appears that payments which have been made thereon consisted of small contributions from wages of father who worked as bricklayer, together with savings from ordinary living expenses through many years, due to industry and frugality of mother and daughter, no analogy is presented to case of debtor who makes substantial **gifts and allowances to family beyond reasonable necessities** or daily use, and property will not be subject to payment of old claim against husband; but small sums remaining due on building contracts executed by him and balance remaining in bank in account in name of daughter, but used in connection with building contracts, are subjects to his debts. O'Hara v. Bell, 8 Ohio N. P. (N. S.) 352. Under execution issued on personal judgment, levy can be made only on defendant's personal goods and not on **property** which he may represent. Gilbane v. Hawkins [R. I.] 72 A 723.

62. By reason of a single sale, one is not a trader within meaning of Code 1906, § 4784, relative to levy on **property used in business of agent or trader.** Durham v. Slidell Liquor Co. [Miss.] 49 S 739. Billhead expressly reciting that it was "livery and feed stable" held not to show proprietor to be a trader, especially where there was no evidence to show billhead to have been in use at any specified time. Id. Under Code 1906, § 4784, one doing business as trader, agent, etc., is required to disclose his principal or partner by sign on his place of business, otherwise all property used in the business will be liable to the creditors of such person. Id.

63. Has right to point out property. Chamblee v. Atlanta Brewing & Ice Co., 131 Ga. 554, 62 SE 1032.

64. Where defendant transferred all his property which was subject to judgment lien, court would not interfere with order in which plaintiff chose to levy on property. Chamblee v. Atlanta Brewing & Ice Co., 131 Ga. 554, 62 SE 1032.

65. Search Note: See note in 5 C. L. 1389.

See, also, Execution, Cent. Dig. §§ 282-375; Dec. Dig. §§ 127-144; 17 Cyc. 1082-1116; 11 A. & E. Enc. L. (2ed.) 645; 8 A. & E. Enc. P. & P. 504.

C. L. 1436—The levy must be accompanied by an actual or constructive seizure,[66] and in the case of a levy on money actual possession should be taken.[67] While the return should speak the truth [68] and is void if prematurely made,[69] it is not fatally defective for a mere irregularity [70] for a technical error,[71] or for a remediable [72] lack of a signature.[73] Since it is the officer's duty to make a return showing either a levy made or no property found,[74] in case of his failure to make a return,[75] he is prima facie liable for the amount thereof,[76] unless the plaintiff shall have made a sufficient request for a stay.[77] In the absence of fraud and collusion, a return of no property found is conclusive between the parties.[78]

(§ 8) *C. Authority and duty to make levy.*[79]—See 11 C. L. 1437—An officer interested in the subject-matter of an execution is thereby disqualified to execute it.[80] It is the duty of an officer to make the levy according to the terms of the execution.[81] At common law this duty was not limited,[82] but now the officer may ordinarily, where the circumstances warrant,[83] require the prior giving of an indemnity bond.[84]

(§ 8) *D. Extent and adequacy of levy.*[85]—See 9 C. L. 1831

(§ 8) *E. Execution lien.*[86] *Conflicting levies and liens; priorities.* See 11 C. L. 1437—At common law a lien was created from the issuance of the writ,[87] but now in

66. Where sheriff had levied on and taken possession of property, delivery of execution issued on subsequent judgment to same sheriff operated as a sufficient constructive levy. Wotkyns & Co. v. Dempsey-Gabriels Brick Co., 62 Misc. 65, 116 NYS 265. Mere delivery to judgment debtors of copy of execution and notice of sale, without going upon or even seeing property, and without appointing any one as his agent to keep possession, was not constructive seizure sufficient to constitute a valid levy. Cupples v. Level [Wash.] 103 P 430.

67. Magee v. Solano County Super. Ct. [Cal. App.] 101 P 532.

68. Where sheriff fails to secure actual possession of money attempted to be levied on, he should not make a return showing levy to have been made. Magee v. Solano County Super. Ct. [Cal. App.] 101 P 532.

69. Rogers v. Wilson, 220 Mo. 213, 119 SW 369. Return before time fixed by law held premature. Id. Return in justice court of execution unsatisfied should not be made for 90 days. Id. Where the defendant is notoriously insolvent, the officer may, before the return day, make a return of no property found. Need not wait till return day to see that defendant does not acquire property upon which he may levy. Slingluff v. Collins [Va.] 64 SE 1055.

70. Young v. Germania Sav. Bank [Ga.] 64 SE 552. As to irregularity sufficient to warrant dismissal of levy, see post, § 8F.

71. Return not invalid by reason of omission of word "property" after "personal," word omitted being implied. Skakel v. Cycle Trade Pub. Co., 237 Ill. 482, 86 NE 1058.

72. Proper for court to permit officer to amend return by adding his signature thereto, even though 17 years had elapsed before motion was made to amend, the debtor being insolvent and no rights of third parties having intervened. Slingluff v. Collins [Va.] 64 SE 1055. Court is liberal in permitting such amendments. Id.

73. Not void, since under code signature to return is not considered part of return. Slingluff v. Collins [Va.] 64 SE 1055.

74. Smith v. Geraty, 61 Misc. 101, 112 NYS 1100.

75. Mailing of return to clerk was insufficient where office of clerk was situated in same place where officer received execution. Smith v. Graty, 61 Misc. 101, 112 NYS 1100.

76. Smith v. Geraty, 61 Misc. 101, 112 NYS 1100. He can only relieve himself from such liability by showing that judgment creditor was not injured thereby. Id.

77. Under Ky. St. 1903, § 1713, request is not sufficient unless in writing. Davis v. Gott [Ky.] 113 SW 826.

78. So held in suit in equity, the basis of which was officer's return. Hall v. McGregor, 65 W. Va. 74, 64 SE 736.

79. **Search Note:** See Execution, Cent. Dig. § 278; Dec. Dig. § 123; 17 Cyc. 1079-1081; Sheriffs and Constables, Cent. Dig. § 121; Dec. Dig. § 188; 11 A. & E. Enc. L. (2ed.) 647; 8 A. & E. Enc. P. & P. 485.

80. People v. Loeff, 142 Ill. App. 30.

81. Johnson v. Scott [Ky.] 121 SW 695.

82. He was bound to levy on defendant's property although claimed by third persons, and in case of failure to make levy must show that property was exempt and could not demand indemnity bond. Mayfield Woolen Mills v. Lewis [Ark.] 117 SW 558.

83. Actual claim of property by third party or matters justifying prudent person in apprehending litigation held to be circumstances sufficient to warrant demanding indemnity bond. Mayfield Woolen Mills v. Lewis [Ark.] 117 SW 558.

84. Kirby's Dig. §§ 3246, 3247, authorizes officer to demand indemnity bond, where circumstances cause doubt as to whether property is subject to execution. Mayfield Woolen Mills v. Lewis [Ark.] 117 SW 558.

85. **Search Note:** See note in 55 L. R. A. 280.

See, also, Execution, Cent. Dig. §§ 182-184, 209-225, 359-367, 376-380; Dec. Dig. §§ 87-89, 107-111, 142, 143, 145; 17 Cyc. 1020-1022, 1049-1053, 1112-1114, 1116-1117; 11 A. & E. Enc. L. (2ed.) 667.

86. **Search Note:** See note in 5 C. L. 1389.

See, also, Execution, Cent. Dig. §§ 208-275, 381-397; Dec. Dig. §§ 106-120, 146, 147; 17 Cyc. 1049-1076, 1117-1121.

87. Reardon v. Rock Island Plow Co. [C. C. A.] 168 F 654.

some jurisdictions it dates from the delivery of the writ to the officer,[88] and in others from the time of an actual [89] constructive [90] or equitable levy.[91] Such lien is not affected by the appointment of a receiver of the property.[92] It is superior to all prior transfers of which there was not proper notice,[93] and to all rights subsequently acquired,[94] unless the creditor release his lien as by accepting a transfer of the property.[95] The transferee of property subject to a judgment lien is not entitled to reimbursement by the judgment creditor for disbursements he may make in the payment of liens having priority over the judgment lien.[96]

(§ 8) *F. Relinquishment and dissolution of levy.*[97]—See 11 C. L. 1438—The levy may be attacked at the return term of the writ.[98] Although it ordinarily will not be set aside on account of a mere irregularity,[99] a judgment debtor may move to quash where the officer has proceeded irregularly,[1] but such is not the proper pro-

88. Under Rev. St. Ill. 1874, c. 77, par. 9, no lien attaches against goods and chattels of defendant until execution is delivered to sheriff to be executed. Reardon v. Rock Island Plow Co. [C. C. A.] 168 F 654.

89. Execution lien on debts dates from date of levy. Nordstrom v. Corona City Water Co. [Cal.] 100 P 242.

90. Delivery of writ to sheriff having possession of property seized under prior levy was sufficient constructive levy. Wotkyns & Co. v. Dempsey-Gabriels Brick Co., 62 Misc. 65, 116 NYS 265. Held that **proceeds of sale** should be applied first to payment on actual levy, then to constructive levy, then any surplus to payment of execution in hands of another officer who by reason of subsequent levy was unable to make levy. Id.

91. Under Code, § 4089, lien is created from time of service on defendant holding property of notice and copy of petition in equitable proceedings brought to satisfy judgment in accordance with Code, § 4087, and under Code, § 2906, sale was invalid as against existing creditors when without notice and where vendor retained actual possession and where instrument of conveyance was not acknowledged and filed for record. Ranking v. Schultz [Iowa] 118 NW 383. Party may challenge mortgage and transfer by equitable levy (Code, § 4087, et seq.) rather than by proceeding under statutes relative to levies upon mortgaged property (Code, § 3979, et seq.). Id.

92. Since lien of execution is not within terms of Kirby's Dig. § 4055, authorizing receiver to dissolve all attachments. McGuire & Co. v. Barnhill [Ark.] 115 SW 1144.

93. See post, § 9.

94. Superior to subsequent homestead rights. Watson v. City Nat. Bank [Tex. Civ. App.] 119 SW 915. Lien of judgment creditor is superior to title of purchaser of property subsequent to accrual of judgment lien. Wilkerson v. Sellers & Orum Co. [Ala.] 49 S 874. Conveyance by judgment debtor subsequent to making of valid levy is presumed to be subject to such levy. First Nat. Bank v. Phillpotts, 155 Mich. 331, 15 Det. Leg. N. 1027, 119 NW 1.

95. Party who, having a prior execution lien on property, accepts transfer of property in payment of his debt, accepts it subject to any junior liens properly filed at time of such transfer. Booze v. Neal [Ga. App.] 64 SE 1104.

96. As where prior liens paid are mortgages or taxes, in case at bar, transferee being wife of debtor, and such payments being voluntarily made subsequent to accrual of judgment lien. Gouwens v. Gouwens, 237 Ill. 506, 86 NE 1067.

97. **Search Note:** See Execution, Cent. Dig. §§ 368-375, 381-394, 1064-1090; Dec. Dig. §§ 144, 146, 348-357; 17 Cyc. 1115-1117, 1387-1402; 11 A. & E. Enc. L. (2ed.) 667, 690, 715; 8 A. & E. Enc. P. & P. 574.

98. Irondale Bank v. Terrill, 135 Mo. App. 472, 116 SW 481.

99. Young v. Germania Sav. Bank [Ga.] 64 SE 552. As to sufficiency of execution in general, see ante, § 6.

Held no irregularity sufficient to warrant dismissal of levy: Signing of execution by "Arnold Broyles, Clerk," without stating that he was clerk of proper court, being an immaterial error in view of recitals contained in execution. Young v. Germania Sav. Bank [Ga.] 64 SE 552. Under Acts 1871-72, pp. 57, 59, **issue of execution** from city court of Atlanta "to all and singular the sheriffs of the state and their lawful deputies," it being sufficiently directed to authorize levy on land in Fulton county by deputy sheriff of that county. Id. **Indorsement of two levies** on execution, although first levy was not accounted for, where application was made to dismiss second levy. Id. Execution from city court of Atlanta, commanding levy and sale to be made of goods and chattels, lands and tenements generally of defendant, and especially of certain lot of land, to realize amount of judgment, where application to dismiss was made by person who had interposed claim thereto on ground that there was no **authority of law for city court to issue fi. fi.** as special lien on particular property. Id. **Entry of levy** signed "J. M. Goldsmith, Deputy Sheriff," although such signature does not indicate the county of court, since he will be presumed to be deputy sheriff in county in which he acts. Id. Where description of land in entry of levy was not so uncertain, vague and indefinite as to be insufficient to identify or locate property. Id. Statement in entry of levy, "a deed having been filed and recorded for purpose of levy and sale as required by law" where motion to dismiss was made by claimant of land. Id.

1. Cable v. Magpie Gold Min. Co. [S. D.] 119 NW 174.

cedure to determine whether the property seized is real or personal property.[2] An execution becomes functus officio upon return thereof,[3] and is discharged by a release of one of several joint judgment defendants,[4] or upon the satisfaction of the judgment,[5] but not upon the payment of the debt by a third party who accepts an assignment of the judgment.[6] A rule setting aside a levy as to property improperly levied on does not necessarily set aside the execution generally.[7]

(§ 8) *G. Release of property on receipts of forthcoming or delivery bonds.*[8]—See 11 C. L. 1438—An appeal bond is not necessarily sufficient as a delivery bond.[9]

(§ 8) *H. Liability of officer for loss of property levied upon.*[10]—See 3 C. L. 1402 An officer is liable for damages in the amount of the injury sustained,[11] for the improper surrender of property levied on,[12] regardless of any illegality in the verdict and judgment,[13] or in the levy.[14]

(§ 8) *I. Rights as to custody of property levied on and incidental to taking possession.*[15]—See 9 C. L. 1332—The officer has no right to surrender to a third party claimant the property seized except upon the receipt of a forthcoming bond.[16] He is entitled to the actual possession of money levied on.[17] On wrongfully interfering with property levied on is liable to the officer, but not to the execution creditors,[18] except in accordance with a statute expressly so providing[19] and upon a sufficient complaint.[20]

2. Remedy in such case is by action. Cable v. Magple Gold Min. Co. [S. D.] 119 NW 174.

3. Rogers v. Wilson, 220 Mo. 213 119 SW 369. After return to justice court, execution can be renewed only in manner provided by Rev. St. 1899, § 4038 (Ann. St. 1906, p. 2199). Id.

4. Fi. fa. discharged where plaintiff in fi. fa. or transferee of execution accepts sum from one joint defendant and "agrees to relieve him and does release him" from further liability. Warthen v. Melton [Ga.] 63 SE 832. Acceptance of money from one without its being indorsed on fi. fa. as a payment, as authorized by Civ. Code 1895, § 5376, discharged fi. fi. Warthen v. Melton [Ga.] 63 SE 832.

5. Childers v. Pickenpaugh, 219 Mo. 455, 118 SW 478; Davis v. Gott [Ky.] 113 SW 826. Judgment was satisfied when sufficient amount to satisfy same had been realized in another county on another execution issued thereon. Tonopah Banking Corp. v. McKane Min. Co. [Nev.] 103 P 230. Purchase of property at execution sale by judgment creditor for sum sufficient to satisfy judgment as fully extinguishes whole judgment as though bid were made by third party. Id.

6. Glover v. Newsome [Ga.] 65 SE 64.

7. Setting aside of levy on property of husband improperly levied on under execution against wife does not set aside execution generally. Deardorff v. Pepple, 36 Pa. Super. Ct. 224.

8. Search Note: See note in 4 L. R. A. (N. S.) 1020.

See, also, Execution, Cent. Dig. §§ 402-433; Dec Dig. §§ 150-155; 17 Cyc. 1123-1135; 11 A. & E. Enc. L. (2ed.) 699.

9. Release of levy by court after appeal taken and before determination of appeal was error since bond on appeal was not conditioned to pay judgment in case appeal failed. Loy v. Alston [C. C. A.] 172 F 90.

10. Search Note: See Sheriffs and Constables, Cent. Dig. §§ 195-221; Dec. Dig. §§ 118-121; 11 A. & E. Enc. L. (2ed.) 658, 705.

11. Verdict should be for full amount of execution where it is shown that value of property exceeds such amount. Hightower, Pratt & Co. v. Hodges, 5 Ga. App. 408, 63 SE 541.

12. Surrender to third party claimant without forthcoming bond having been given was improper. Hightower, Pratt & Co. v. Hodges, 5 Ga. App. 408, 63 SE 541. Officer is liable to judgment creditor where he unlawfully delivers property levied on to third party. Cohen v. Sobel, 62 Misc. 306, 114 NYS 774.

13. Verdict and judgment are conclusive on sheriff in suit against him for improper surrender of property to third party. Hightower, Pratt & Co. v. Hodges, 5 Ga. App. 408, 63 SE 541.

14. Neither sheriff or his sureties will be permitted to set up illegality of levy as defense in action for an improper surrender to third party of property levied on. Hightower, Pratt & Co. v. Hodges, 5 Ga. App. 408, 63 SE 541.

15. Search Note: See Execution, Cent. Dig. §§ 376-380, 398-434; Dec. Dig. §§ 145, 148, 149, 156; 17 Cyc. 1116, 1117, 1121; Trover and Conversion, Cent. Dig. §§ 127, 134; 11 A. & E. Enc. L. (2ed.) 658; 8 A. & E. Enc. P. & P. 581.

16. Hightower, Pratt & Co. v. Hodges, 5 Ga. App. 408, 63 SE 541.

17. It was duty of treasurer having money levied on to turn same over to sheriff. Magee v. Solano County Super. Ct. [Cal. App.] 101 P 532.

18. Cohen v. Sobel, 62 Misc. 306, 114 NYS 774.

19. Under Code Civ., Proc. §§ 1418, 1419, where delivery of property to third party by sheriff was lawful, judgment creditor may proceed against third party. Cohen v. Sobel, 62 Misc. 306, 114 NYS 774.

20. Complaint in action by judgment creditor against third party receiving goods

(§ 8) *J. Effect of death of debtor.*[21]—See 9 C. L. 1332

(§ 8) *K. Liability for wrongful levy.*[22]—See 11 C. L. 1438—A liability arises from a wrongful levy [23] warranting exemplary damages in certain cases,[24] as where malice and a want of good faith are [25] shown. The plaintiff is liable for permitting an execution to be levied subsequent to the satisfaction of the judgment.[26] His liability is the same as that of the levying officer where he causes property to be seized under a writ void on its face [27] or ratifies an unlawful levy.[28] An officer may be protected by a writ fair on its face [29] and issued on a judgment which is not void,[30] but he cannot justify under an execution issued on a judgment rendered without jurisdiction.[31] The usual indemnity bond protects him against liability to a claimant as well as to the judgment debtor.[32]

§ 9. *Claims of third persons and trial thereof.*[33]—See 11 C. L. 1438—A third party claimant to the property levied on may usually either file his claim in the pending action as provided by statute,[34] or resort to a separate action in replevin, but not do both.[35] Where a third party claims the land levied on, the burden of proof is upon the execution creditor unless it appear that the debtor was in possession at the time of the levy.[36] When the judgment creditor has made out a prima facie case [37]

levied on held insufficient, which alleges defendant's claim to property to be fraudulent but does not show submission of claim to sheriff's jury as provided by Code Civ. Proc. § 1418, or whether sheriff had deliverd goods voluntarily or upon faith in fraudulent representations. Cohen v. Sobel, 62 Misc. 306, 114 NYS 774.

21. Search Note: See Execution, Cent. Dig. §§ 155-158, 273; Dec. Dig. §§ 69, 118; 17 Cyc. 991-997, 1071-1076; 11 A. & E. Enc. L. (2ed.) 701.

22. See, also, Sheriffs and Constables, 12 C. L. 1851.

Search Note: See Execution, Cent. Dig. §§ 1382-1406; Dec. Dig. §§ 454-474; 17 Cyc. 1570-1579; 11 A. & E. Enc. L. (2ed.) 652.

23. Levy **on goods of bankrupt** after filing of petition is wrongful. Dittemore v. Cable Mill Co. [Idaho] 101 P 593. Officer was liable for levy **on mortgaged corn** without it being made subject to mortgage thereon. Davis v. Gott [Ky.] 113 SW 826. Plaintiff was liable for rents and profits of **land wrongfully levied on** while in his possession. Culver v. Lambert [Ga.] 64 SE 82. Damages may be recovered for levy **on exempt property.** Snow v. West [Utah] 99 P 674; Keenan v. Drew, 144 Ill. App. 388.

Evidence of condition of house early in the night was admissible as bearing on injury done late in afternoon. Stowers Furniture Co. v. Brake [Ala.] 48 S 89.

24. Exemplary damages were allowable in jury's discretion where defendant caused levy under execution void on its face and received and retained goods with knowledge that officer had made assault in making levy. Stowers Furniture Co. v. Brake [Ala.] 48 S 89. Officer may be held liable for exemplary damages for knowingly levying on **exempt property.** Johnson v. Collier [Ala.] 49 S 761.

25. Not allowed where exemptions seized and allegation made that debt upon which execution was based was contracted through false pretenses. Galvin v. Tibbs, Hutchins & Co. [N. D.] 119 NW 39. Evidence to show good faith is not confined to showing full statement of facts to counsel who advised action complained of. Id.

26. Davis v. Gott [Ky.] 113 SW 826. As to extent of liability, see Damages.

27. Stowers Furniture Co. v. Brake [Ala.] 48 S 89.

28. Whether plaintiff ratified acts of levying officer was for jury. Stowers Furniture Co. v. Brake [Ala.] 48 S 89.

29. As where judgment afterwards satisfied before levy was not satisfied at time he received execution. Davis v. Gott [Ky.] 113 SW 826.

30. Johnson v. Scott [Ky.] 121 SW 695.

31. Under P. L. 524, jugment rendered before single justice of the peace in possessory action was void for want of jurisdiction. Behrens v. Mountz, 37 Pa. Super. Ct. 326.

32. Indemnifying bond held to protect sheriff not only against suit by judgment debtor but also against suit by third party laying claim to money levied on. McKnight v. Ballif [Colo.] 100 P 433.

33. Search Note: See note in 28 A. S. R. 120.

See, also, Execution, Cent. Dig. §§ 543-599; Dec. Dig. §§ 178-212; 17 Cyc. 1199-1233; 11 A. & E. Enc. L. (2ed.) 667.

34. Under Rev. St. 1899, § 4043 (Ann. St. 1906, p. 2201) claimant may file affidavit of ownership with levying officer which affidavit must contain the averments required by statute to be available. Kesse v. Wilson [Mo. App.] 119 SW 508.

35. Claimant having elected to resort to statutory remedy (see preceding note) and given required notice to officer cannot later maintain replevin. Kesse v. Wilson [Mo. App.] 119 SW 508; Studebaker Bros. Mfg. Co. v. Davis, 137 Mo. App. 58, 119 SW 532.

36. Under Civ. Code 1895, § 4624, burden was on creditor where husband of claimant and not defendant was in possession. Whitley v. Foster [Ga.] 63 SE 698. Evidence held insufficient to sustain burden resting on creditor where it appeared that claimant was in possession and had been so for a number of years, claiming land as hers, regardless of whether her title was perfect or not, inasmuch as plaintiff in fi. fa. himself not only failed to make out prima facie case but introduced in evidence deed which showed title

by proper [38] and sufficient evidence,[39] the burden is on the claimant to show a better claim or title.[40] The rule that an outstanding title in a third party is not available against an execution lien, unless there be either actual [41] or constructive [42] notice of such title,[43] is applicable whether the execution lien be claimed by the judgment creditor,[44] his assignee,[45] or the purchaser at an execution sale.[46] The claimant can have no right to the money derived from the excution sale [47] and is estopped by bidding thereat.[48] The levy should be dismissed where neither party makes out a case [49] and where fatal defects appear on the face of the fi. fa.[50] or in the entry of levy.[51]

§ 10. *Appraisement.*[52]—See 5 C. L. 1392

§ 11. *Execution sales.*[53] *In general.*See 11 C. L. 1439—The execution creditor may sell any land belonging to the judgment debtor, subject only to existing, valid liens,[54] and may ignore fraudulent mortgages on conveyances.[55] It is essential to

out of defendants in fi. fi. before rendition of judgment. Id.

37. Prima facie case was made out by showing judgment, execution, and levy on personal property in possession of defendant. Strickland & Co. v. Lesesne [Ala.] 49 S 233.

38. In claim case where defendant in fi. fi. and claimant sustain relation of husband and wife and where issue is whether certain property levied on was originally purchased by wife or husband, mortgage given by husband to secure payment of purchase money of property levied on was relevant evidence. Long v. Putnam Oil & Fertilizer Works [Ga.] 63 SE 700.

39. Where third party claiming goods levied on brings replevin against officer, the execution alone is not sufficient evidence of officer's possessory rights without proof of judgment upon which execution was issued. Hoover v. Jones [Neb.] 121 NW 975.

40. Strickland & Co. v. Lesesne [Ala.] 49 S 233. Evidence held not to show that sale by defendant to claimant was bona fide. Causey Lumber Co. v. Connor [Ga. App.] 65 SE 194. **Equitable title** sufficient to entitle claimant to recover. Strickland & Co. v. Lesesne [Ala.] 49 S 233.

41. Actual notice to sheriff prior to levy held to be sufficient notice of transfer of goods. Orr v. Kenworthy [Iowa] 121 NW 539. Actual knowledge of recording of documents evidencing transfer by debtor to third party was notice and means of knowledge equivalent to notice, sufficient to defeat purchaser's title as against such third party. Zenda Mining & Milling Co. v. Tiffin [Cal. App.] 104 P 10.

42. As recording of deed. Feinberg v. Stearns, 56 Fla. 279, 47 S 797. Possession and exercise of complete ownership over land was sufficient constructive notice of unrecorded deed. Brady v. Sloman, 156 Mich. 423, 16 Det. Leg. N. 101, 120 NW 795. Open possession by grantee under unrecorded deed, either personally or by tenant, held sufficient constructive notice to purchaser at execution sale of transfer, though grantee was wife of debtor. McCullars v. Reaves [Ala.] 50 S 313.

43. Unrecorded deed was not notice. Files v. Law [Ark.] 115 SW 373. For lien to be inferior to unrecorded deed, creditor must have had notice in some recognized way. Feinberg v. Stearns, 56 Fla. 279, 47 S 797. The rights of a vendor under a **conditional sale contract** will be protected as against an execution issued against the vendee, where the possession by the vendee has not been such as to mislead creditors. In re Greek Manufacturing & Enterprising Co., 167 F 424. If chattel is delivered to buyer under conditional sale so as to clothe him with apparent ownership, vendor is not entitled to recover against execution creditor of vendor levying on same. Reardon v. Rock Island Plow Co. [C. C. A.] 168 F 654.

44. Brady v. Sloman, 156 Mich. 423, 16 Det. Leg. N. 101, 120 NW 795. Judgment creditors have same protection as subsequent purchasers. Feinberg v. Stearns, 56 Fla. 279, 47 S 797.

45. Feinberg v. Stearns, 56 Fla. 279, 47 S 797.

46. McCullars v. Reaves [Ala.] 50 S 313; Zenda Mining & Milling Co. v. Tiffin [Cal. App.] 104 P 10. Prior unrecorded deed of which purchaser at execution sale had no notice will not avail against such purchaser. Files v. Law [Ark.] 115 SW 373.

47. Since such money is treated as defendant's and distributed for benefit of his creditors. Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604, 63 SE 637.

48. Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604, 63 SE 637.

49. Where plaintiff in fi. fa. fails to make out prima facie case, and claimant introduces no evidence, on motion court should dismiss levy rather than direct verdict for claimant. Stewart v. Mundy, 131 Ga. 586, 62 SE 986.

50. Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604, 63 SE 637.

51. Claimant not entitled to dismissal where entry of levy on realty recited that "defendant in fi. fa. is in possession," although claimant denied such entry and alleged possession in herself for more than 20 years. Young v. Germania Sav. Bank [Ga.] 64 SE 552. As to irregularity insufficient to warrant dismissal see ante, § 8F.

52. Search Note: See Execution, Cent. Dig. §§ 342-358; Dec. Dig. § 141; 17 Cyc. 1102-1111; 11 A. & E. Enc. L. (2ed.) 702.

53. Search Note: See notes in 5 C. L. 1393; 18 L. R. A. 88; 97 A S. R. 563; 111 Id. 97.

See, also, Execution, Cent. Dig. §§ 600-1063; Dec. Dig. §§ 213-347; 17 Cyc. 1233-1386; 11 A. & E. Enc. L. (2ed.) 703.

54. Subject to all valid prior liens thereon, the execution creditor may sell any land then standing in the name of the judgment debtor.

the validity of an execution sale that it be made in the county where the property is located, and by an official of that county,[56] to one having a right to purchase,[57] and that it be based on a valid levy [58] under an execution issued upon a valid [59] subsisting judgment.[60] It is usually essential that notice of the execution sale be given to the defendant,[61] or, in case of his death to his personal representative,[62] but the sale is not necessarily rendered void by a mere irregularity in the notice [63] or by failure to give notice, where the interest of the defendant in the property levied on has been transferred.[64] The execution defendant may sometimes designate the size of the parcels and the order of their sale.[65] The status is not affected by an illegal [66] or inefficient execution sale.[67] An execution sale of chattels held under a prior execution is invalid.[68]

For his negligence or improper refusal to sell the property levied on, an officer may be liable in the amount specified in the execution,[69] or for the actual damages when the party injured properly makes out his case,[70] unless, subsequently and during the life of the execution such officer attempts to make the sale and is prevented therefrom by legal proceedings.[71] He may, without applying for an interpleader,[72]

Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754.

55. Judgment creditors need not sue to set aside fraudulent mortgage or transfer before selling land on execution. Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754. May disregard fraudulent conveyance by debtor as nullity. Jones v. Anderson [Ky.] 116 SW 253; First Nat. Bank v. Phillpotts, 155 Mich. 331, 15 Det. Leg. N. 1027, 119 NW 1.

56. Sale must be made by sheriff of county where the property is located. Sale by sheriff of property located in two counties is valid as to property located in his own county but invalid as to property located in other county. Tonopah Banking Corp. v. McKane Min. Co. [Nev.] 103 P 230.

57. County judge was not permitted to purchase land which he controlled in favor of county. Bell County v. Felts [Tex. Civ. App.] 120 SW 1065.

58. Tischler v. Robinson, 56 Fla. 699, 48 S 45. As to property on which valid levy may be made, see ante, § 8A. Plaintiff is not prevented from selling property properly levied on by fact that some of property levied on was not subject to levy. National Broadway Bank v. Denny [Ga.] 65 SE 412.

59. Sale of personal property made under execution issued on void judgment was invalid. Schott v. Linscott [Kan.] 103 P 997.

60. Sale was void when made under execution issued on judgment which had been satisfied at time of sale. Tonopah Banking Corp. v. McKane Min. Co. [Nev.] 103 P 230. Judgment rendered in 1877 held to be subsisting though execution docket did not show execution which was issued and necessary to prevent judgment becoming dormant (Civ. Code 1895, § 3761, having no application to judgments rendered prior to its passage). Wever v. Parker, 131 Ga. 510, 62 SE 813.

61. Notice required under Rev. St. c. 78, § 32, et seq. Cutting v. Harrington, 104 Me. 96, 71 A 374.

62. Randal v. Gould [Pa.] 73 A 986.

63. Lapse of 9 days or more than one week between date of last publication of notice and day of sale while irregularity did not avoid sale (citing St. 1898, §§ 2993, 2998, 4273, 4276a in respect to notice of sale). Kissinger v. Zieger, 138 Wis. 368, 120 NW 249.

64. Where defendant had conveyed her land to another before her death and grantee had come into court and opposed the process, a venditione exponas issued after death of defendant in execution without notice to her representative as required by P. L. 70 was not invalid, though her transfer was invalid as to her creditors. Randal v. Gould [Pa.] 73 A 986.

65. Under Rev. St. 1895, art. 671. Galvin v. McConnell [Tex. Civ. App.] 117 SW 211. Under such statute, land of corporation defendant could be sold in parcels less than whole without appointment of receiver. Id.

66. Illegal sale invalidated neither plaintiff's judgment nor divested defendant's title. Culver v. Lambert [Ga.] 64 SE 82.

67. Where creditor was denied possession and title to land purchased at execution sale, judgment was not discharged. Sturdivant v. Ward [Ark.] 119 SW 247.

68. Where property was in hands of sheriff under first levy, second levy made by constable under execution issued on another judgment did not authorize a sale thereunder. Wotkyns & Co. v. Dempsey-Gabriels Brick Co., 62 Misc. 65, 116 NYS 265.

69. Kirby's Dig. § 3286, which is highly penal and will not be extended to cases not plainly within its meaning. Mayfield Woolen Mills v. Lewis [Ark.] 117 SW 558.

70. Petition alleging recovery of judgment by plaintiff, issuance of execution, levy by officer (defendant) on debtor's goods, advertisement for sale, neglect to sell goods, that debtor thereafter became insolvent whereby plaintiff lost his debt, held to sufficiently allege cause of action against constable and his sureties. Mayfield Woolen Mills v. Lewis [Ark.] 117 SW 558.

71. Officer was not liable where sale which he subsequently advertised was prevented by seizure of goods in bankruptcy proceedings instituted by judgment debtor. Mayfield Woolen Mills v. Lewis [Ark.] 117 SW 558.

72. Failure of sheriff to apply for interpleader, in accordance with provisions of P. L. 95, did not prevent his defending on ground that property levied on did not belong to debtor. Necker v. Sedgwick, 36 Pa. Super. Ct. 593.

relieve himself from liability for failure to sell the property levied on, by showing that it did not belong to the debtor.[73]

Rights and liabilities of bidder. See 11 C. L. 1440—In the absence of fraud, a bidder is subject to the rule of caveat emptor [74] and is estopped from denying the validity of the execution sale.[75] In some states one failing to comply with his bid is liable to the defendant in execution [76] in an amount dependent upon the value of the property.[77]

Costs. See 9 C. L. 1334—The costs of an execution sale are payable by the party at fault [78] or out of his personal interest in the property sold.[79]

§ 12. *Return and confirmation of sale.*[80] See 11 C. L. 1440—An uncontradicted return of a sale is conclusive as to the facts therein recited.[81]

§ 13. *Redemption.*[82] See 11 C. L. 1441—Redemption cannot be affected by piecemeal.[83] One may redeem from an execution sale by compliance with the statutory requirements in respect thereto,[84] within the prescribed time,[85] without first suing to set aside a fraudulent mortgage or transfer by the debtor.[86] In the proper case equity will compel both parties to discharge the duties imposed by the statute.[87] Since, however, the statute contemplates redemption out of court,[88] a bill to redeem can be maintained only when it has equity,[89] shows a good reason why the aid of equity

73. May show that property belonged to a stranger and plaintiff suffered no injury by his refusal to sell. Necker v. Sedgwick, 36 Pa. Super. Ct. 593.

74. Borden v. Fahey [Tex. Civ. App.] 120 SW 564. Purchaser at sale must stand loss if defendant had no title. Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604, 63 SE 637. Fact that judgment creditor may have intended to have bid in whole property to satisfy judgment, but failed to do so and bid full amount of purchase price erroneously for portion of property, cannot, in absence of fraud, affect legal status of situation nor prevent judgment from being thereby satisfied in full. Tonopah Banking Corp. v. McKane Min. Co. [Nev.] 103 P 230.

75. Third party claimant having bid at sale was estopped from denying validity of sale. Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604, 63 SE 637.

76. Liable to defendant and not to plaintiff in execution. Shanley v. York [Tex. Civ. App.] 118 SW 146.

77. Under Rev. St. 1895, art. 2381, he is liable for 20 per cent. of value of property bid for and for other loss that may appear from result of subsequent sale. Shanley v. York [Tex. Civ. App.] 118 SW 146. Where by reason of incumbrances the property sold is of no value, no penalty attaches to bidder who refuses to comply with his bid made under mistaken idea as to such incumbrances. Borden v. Fahey [Tex. Civ. App.] 120 SW 564.

78. Where enforcement of levy upon property is stayed until final hearing of suit in equity while security of levy is preserved, and at final hearing it is found that judgment debtor must pay some part of amount unpaid on judgment, held that debtor is liable for costs of guarding and holding property levied on during stay. Loy v. Alston [C. C. A.] 172 F 90.

79. Where partnership cattle had been seized for debt of one of the two members and firm was permitted to feed cattle for some time to get them into condition to be sold, firm was entitled to allowance for one-half expense of keeping and one-half expense of sale. Shaw v. Roberts [Iowa] 122 NW 932.

80. **Search Note:** See Execution, Cent. Dig. §§ 669-672, 999-1063; Dec. Dig. §§ 242, 330-347; 17 Cyc. 1265-1267, 1365-1386; 11 A. & E. Enc. L. (2ed.) 703.

81. Where return not contradicted, submission to jury of facts therein set out was error. Gillean v. Witherspoon [Tex. Civ. App.] 121 SW 909.

82. **Search Note:** See notes in 21 A. S. R. 243; 67 Id. 510.

See, also, Execution, Cent. Dig. §§ 829-900; Dec. Dig. §§ 291-302; 17 Cyc. 1324-1339; 17 A. & E. Enc. L. (2ed.) 1034.

83. It must be of entire tract sold, no matter how many subpurchasers of parts thereof. Francis v. White [Ala.] 49 S 334.

84. Judgment creditor who placed in hands of sheriff within proper time sum sufficient to affect redemption sufficiently complied with statute authorizing redemption by judgment creditor (Rev. St. 1908, § 3653), although sheriff failed to pay over sufficient amount, especially where such judgment creditor seasonably tendered the balance necessary to the execution creditor. Brown v. Bell [Colo.] 103 P 380. Code 1907, § 5746, et seq., provides that one seeking to redeem real estate from judicial sale must first deliver possession to purchaser, pay or tender purchase price with 10 per cent per annum thereon and all lawful charges, and pay person in possession the ascertained value of permanent improvements. Francis v. White [Ala.] 49 S 334.

85. Statute confers on court no discretion in regard thereto. Tharp v. Kerr [Iowa] 119 NW 267.

86. Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754.

87. Will aid either to enforce his rights. Francis v. White [Ala.] 49 S 334.

88. Code 1907, § 5746, et seq., contemplates redemption between parties by each doing what statute directs. Francis v. White [Ala.] 49 S 334.

89. Bill is without equity where purchaser

is necessary,[90] and discloses the performance of all conditions precedent to redemption.[91] Equitable relief will not be granted after the expiration of the statutory period of redemption where the complainant alleges merely that the price was inadequate,[92] without alleging that there was an accident or mistake preventing redemption,[93] or that prompt service was had upon the purchaser of a notice of the mistake relied upon and that a sufficient tender was made.[94] A plea is insufficient which assumes to go the equity of the whole bill and yet answers only a part thereof.[95] Subsequent judgment lienholders who fail to make statutory or proper redemption within the time provided therefor lose their right, unless the judgment debtor himself make proper redemption.[96]

§ 14. *Title and rights acquired in property sold, and evidence thereof.*[97]—See 11 C. L. 1441—The purchaser acquires such title as the judgment defendant had [98] and no more,[99] subject to the equities [1] and rights of third parties,[2] and to the defend-

or creditor does not refuse to accept tender and convey nor decline to inform debtor of amount necessary to be tendered when known to him and not to debtor, or when it is not impossible for debtor to conform to statute without aid of equity, and where debtor knows amount which he must pay or tender, or where by exercise of due diligence he may ascertain it without aid of equity. Francis v. White [Ala.] 49 S 334.

90. Francis v. White [Ala.] 49 S 334. Bill held sufficient to show aid of equity to be necessary where it shows that lawful charges cannot be ascertained otherwise by reason of refusal of purchaser to aid or inform complainant, and alleges complainant's willingness to pay proper amounts. Id.

91. Under Code 1907, § 5746 et seq., must show payment or tender or valid excuse for failure therein. Francis v. White [Ala.] 49 S 334.

92. Tharp v. Kerr [Iowa] 119 NW 267.

93. Relief denied where he showed no offer to redeem in respect to two sales in respect to which he alleged mistake and where no mistake was alleged in respect to third sale made. Tharp v. Kerr [Iowa] 119 NW 267. Refusal of clerk to accept money for redemption after issuance of sheriff's deed and when he had no power to accept was not such mistake as entitled debtor to equitable relief against deed on ground of mistake preventing redemption. Id. Party denying application of statute requiring deposit with clerk (Code, § 4057) cannot claim a tender or attempt to comply with its provisions and that failure to comply therewith was due to mistake of clerk. Id.

94. Equity cannot grant relief unless it appear that such notice was given and tender made. Tharp v. Kerr [Iowa] 119 NW 267.

95. Plea that an administrator seeking to redeem decedent's land, denying that administrator had made proper payment or tender, held insufficient where it did not deny that heirs of decedent or decedent himself had paid lawful charges. Francis v. White [Ala.] 49 S 334.

96. Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754.

97. **Search Note:** See notes in 3 C. L. 1406; 15 L. R. A. 68; 20 Id. 737; 21 Id. 33; 28 Id. 161; 79 A. S. R. 947; 110 Id. 81.

See, also, Execution, Cent. Dig. §§ 743-828, 901-948; Dec. Dig. §§ 260-290, 303-321; 17 Cyc. 1287-1324, 1340-1351; 17 A. & E. Enc. L. (2ed.) 1010.

98. Purchaser held to acquire absolute title free from claim of wife or children of judgment defendant, where it did not appear that any separate property of wife had ever been invested in property. Windley v. Swain, 150 N. C. 356, 63 SE 1057.

99. Acquires only such rights as defendant had. Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604, 63 SE 637. Sheriff cannot convey to him a greater title. Cooper v. Ratliff [Ky.] 116 SW 748. Purchaser at execution sale must take notice of fact that nothing is sold but property of defendant. Asheville Supply & Foundry Co. v. Machin, 150 N. C. 738, 64 SE 887.

Purchaser acquired nothing at sale where debtor at time judgment became a lien had no title, legal or equitable, in property and continued without title up to time of execution sale. Witmer v. Shreves [Iowa] 120 NW 86. Purchaser acquired nothing where third party had taken bill of sale to property in good faith, since defendant had no interest in property though it yet remained in his possession. Forbes Piano Co. v. Hennington [Miss.] 48 S 609. Debtor held to be without title where her name had been erased from deed wherein she was grantee and name of third party, who it was agreed should hold title as security for advance made, was inserted as grantee. Witmer v. Shreves [Iowa] 120 NW 86.

Assignee of purchaser's bid acquires only such rights as purchaser had. Martin v. Turner [Ky.] 115 SW 833.

1. Where debtor had, prior to judgment, sold the land and given bond for title and possession, purchaser at execution sale bought subject to equity of vendee. National Broadway Bank v. Denny [Ga.] 65 SE 412.

2. Liens to which execution sale of land is subject are: (1) Where liens are created by last wills and testaments as provisions for wives and children; (2) where from nature of incumbrance it will not really admit of valuation; (3) where it is plain from agreement of parties that incumbrance was intended to run with land. Levengood's Estate, 38 Pa. Super. Ct. 491. Sheriff's sale of land under lien attaching after heirs and devisees had acquired title, and before happening of contingency which determines estate of widow, held not to discharge lien of

ant's right to be relieved from the effect of any fraud by the purchaser.[3] The purchaser's title dates back to the date of the judgment lien [4] and may be good although the land was seized while in the possession of a third party.[5] A mere irregularity in the issuance of the execution is not usually fatal,[6] but an irregularity in a transcript upon which the execution is issued on has a more serious effect.[7] An equitable title vests in the purchaser at the moment of sale,[8] but the sale is not consummated until the issuance of the certificate of purchase.[9] The purchaser of a sheriff's certificate of the sale of land is not a bona fide purchaser.[10] The purchaser's title cannot be prejudiced by the officer's return or by an entire absence of return.[11]

Right to possession of realty. See 9 C. L. 1336—The purchaser may bring a possessory action for the recovery of the property purchased by instituting the proper proceedings [12] and filing the proper pleadings.[13] He may hold the officer responsible for its delivery to him.[14]

The sheriff's deed. See 11 C. L. 1441—The sheriff's deed clothes the purchaser with a title in fee,[15] and, where the proceedings were regular,[16] relates back to the date of the acquisition of the lien.[17] The recitals of such deed are sufficient evidence of the officer's doings in making the sale and of prior advertisement [18] and notice.[19]

§ 15. *Legal and equitable remedies against defective or improper levy or sale.*[20]

principal secured to heirs or legatees or to discharge instalments of interest subsequently becoming payable to widow, although payments payable to widow out of proceeds of sheriff's sale discharged lien to such extent. Id. Where judgment creditors joined with purchaser in suit to cancel **mortgage**, which suit he could not otherwise have maintained, court equitably adjusted rights by allowing judgment creditors benefit of mortgage canceled. Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754. Where premises are sold in parcels, each parcel is liable for that proportion of an existing mortgage which its value bore to the value of the entire premises at the time of the execution sale. Delaware County Trust Co. v. Lukens, 38 Pa. Super. Ct. 509. Purchaser must have become possessor of some real or apparent interest of debtor to be protected against **effect of unrecorded instrument** of which he had no notice. See Code, § 2925. Witmer v. Shreves [Iowa] 120 NW 86.

3. Purchaser held to have acquired no title where the debt was one which he himself should have paid and it appeared that he was attempting to defraud the landowner. Bowling v. Bowling [Ky.] 118 SW 923.

4. Cuts out intervening deed by judgment debtor. White v. Spencer, 217 Mo. 242, 117 SW 20.

5. Fact that claimant lived on land held not to affect title of purchaser at execution sale, since the champerty statute does not apply to judicial sales. Martin v. Turner [Ky.] 115 SW 833.

6. Failure to give notice before issuance of execution as required by Revisal 1905, §§ 619, 620, where execution issues after more than three years, held mere irregularity which did not affect purchaser's title. McKeithen v. Blue, 149 N. C. 95, 62 SE 769.

7. Defects and irregularity in transcript upon which execution was issued and property sold cannot be corrected after execution has been issued, the property levied upon and sold, the time for redemption has expired, and deed has been issued to purchaser. Schmitt v. Weber, 239 Ill. 377, 88 NE 268.

8. Harris v. Mason [Tenn.] 115 SW 1146.

9. Execution sale was not consummated until certificate was issued, although purchaser paid amount of his bid on day of sale. Kissinger v. Zieger, 138 Wis. 368, 120 NW 249.

10. Hays v. Peavey [Wash.] 102 P 889.

11. Cutting v. Harrington, 104 Me. 96, 71 A 374. Return upon execution is not required by statute and is not essential to purchaser's title where levy of executor upon land is made by sale instead of by extent. Id.

12. Procedure should be under P. L. 239, since it repeals P. L. 820, and is not affected by Const. art. 111, § 8, not being local or special bill. Lutz v. Matthews, 37 Pa. Super. Ct. 354.

13. Petition must aver manner in which defendant went into possession or that manner is unknown to petitioner, unless defendant waive the defect of omission by appearing and taking part in trial. Lutz v. Matthews, 37 Pa. Super. Ct. 354.

14. Magee v. Solano County Super. Ct. [Cal. App.] 101 P 532.

15. Harris v. Mason [Tenn.] 115 SW 1146.

16. Regularity of attachment proceedings upon which levy was based will be presumed. San Domingo Gold Min. Co. v. Grand Pac. Gold Min. Co. [Cal. App.] 102 P 548.

17. So held where levy was made on attachment. San Domingo Gold Min. Co. v. Grand Pac. Gold Min. Co. [Cal. App.] 102 P 548.

18. As affecting purchaser's title. Cutting v. Harrington, 104 Me. 96, 71 A 374.

19. Officer's recitals in deed to purchaser held prima facie evidence, at least of giving of notice. Cutting v. Harrington, 104 Me. 96, 71 A 374. Payment of postage was presumed from recital in deed stating that notice had been mailed. Id.

20. Search Note: See notes in 11 C. L. 992; 30 L. R. A. 98; 3 Ann. Cas. 423; 5 Id. 260.

See, also, Execution, Cent. Dig. §§ 484-539, 673-742, 744, 806-814, 819-822; Dec. Dig.

*Injunction against levy or sale.*See 11 C. L. 1442—A preliminary injunction may be allowed against a levy, until the case can be heard on its merits, upon a sufficient showing being made [21] and a bond being filed.[22] A writ of injunction to stay execution should be tried in the court wherein the judgment was rendered.[23] The limitation period as to granting an injunction to stay an execution usually applies only where the defense is a matter connected with the rendition of the judgment [24] and not where it is a matter subsequently arising.[25] Equity will enjoin the enforcement of an execution where the judgment has been satisfied,[26] where the property to be sold does not belong to the judgment debtor,[27] or where the proceedings are without jurisdiction [28] or grossly irregular,[29] tending to deter competition [30] and to bring about insoluble complications;[31] but not for laches short of the limitation period,[32] or for slight error in the notice of sale.[33] Equity may grant relief upon a sufficient petition filed by third party claimants,[34] but will not usually direct the order in which the property shall be levied on [35] merely to suit their convenience.[36] An injunction against the enforcement of an excution against one of several joint defend-

§§ 164-172, 243-259, 280, 283-287; 17 Cyc. 1163-1197, 1267-1287, 1312-1317, 1319-1322; 11 A. & E. Enc. L. (2ed.) 715; 17 Id. 994.

21. Allegation of discharge in bankruptcy of husband after judgment was procured and receipt in full by creditor was sufficient where execution was issued against husband and wife. Ex parte Zeigler [S. C.] 64 SE 513, rehearing denied [S. C.] 64 SE 916.

22. Not allowed until usual injunction undertaking is filed. Ex parte Zeigler [S. C.] 64 SE 513, rehearing denied [S. C.] 64 SE 916.

23. Under Rev. St. 1895, art. 2996, where judgment was rendered in county court, writ should be tried in county court. Wheeler v. Powell [Tex. App.] 114 SW 689. Under Rev. St. 1895, c. 2996. Broocks v. Lee [Tex. Civ. App.] 110 SW 756.

24. See Rev. St. 1895, art. 2991, limiting period within which stay may be granted to one year. Kruegel v. Rawlins [Tex. Civ. App.] 121 SW 216.

25. Does not apply where defense is that judgment creditor no longer owned judgment but had transferred it subsequently to its rendition. Kruegel v. Rawlins [Tex. Civ. App.] 121 SW 216.

26. Judgment was considered satisfied where creditor had received money properly belonging to defendant equal to debt. Shanley v. York [Tex. Civ. App.] 118 SW 146. Penalty recovered from bidder for failure to comply with his bid held to properly belong to defendant. Id.

27. Sale enjoined where complaint alleged land to be separate property of wife while judgment was against husband alone, and where answer failed to deny such allegation or to allege that the debt was of such nature that community property could be held therefor, or to show any reason why wife's separate property should be held. Bramel v. Ratliff [Wash.] 103 P 817. In suit to enjoin sale of realty not standing in name of judgment debtor, **burden** is on creditor to show debtor's interest therein. Bahnsen v. Qualley [Iowa] 120 NW 625. Where land stood in name of debtor's mother and sister, **evidence held insufficient** to show debtor had any interest therein. Id.

28. Court had no jurisdiction to issue execution on transcript of judgment rendered in another county. Bramel v. Ratliff [Wash.] 103 P 817.

29. Sale of land as a whole, a part only of which belongs to debtor, is grossly irregular, since sale in globo cannot be valid for part and null for part. Mullins v. Hanneman, 123 La. 643, 49 S 271.

30. Competition prevented by fact that parties would not bid on land sold as a whole where the title to only a part was in debtor, there being no fixed price for the parts. Mullins v. Hanneman, 123 La. 643, 49 S 271.

31. Insoluble complication would arise where by reason of sale of land as a whole, a part only of which belongs to debtor, defendant would be unable to know how much of his debt has been satisfied by his own property, or if there be a surplus how much of it he should receive, it not being sufficient to say that he is entitled at law to whole surplus. Mullins v. Hanneman, 123 La. 643, 49 S 271.

32. Laches in issuing execution. Ex parte City of Anderson, 82 S. C. 131, 63 SE 354.

33. Error in advertisement of sale whereby it exceeded amount of judgment only 20 cents held trifling. Lee v. Broocks [Tex. Civ. App.] 118 SW 164. Failure of advertisement of sale to state that execution provided for collection of interest was not sufficient grounds. Id.

34. Petition considered and held sufficient as against demurrer of one who had been a defendant in the previous suit, the plaintiff in execution not demurring. Chamblee v. Atlanta Brewing & Ice Co., 131 Ga. 554, 62 SE 1032.

35. Will not compel levy upon the property in the inverse order of its sale by debtor to claimants. Chamblee v. Atlanta Brewing & Ice Co., 131 Ga. 554, 62 SE 1032.

36. Although defendant may have right to point out property, yet, where defendant has transferred all his property which is subject to judgment lien, equity will not delay plaintiff in enforcement of his legal right to levy on some portions of property of debtor for convenience of purchasers thereof, that is in order that such purchasers may adjust among themselves their equities. Chamblee v. Atlanta Brewing & Ice Co., 131 Ga. 554, 62 SE 1032.

ants does not necessarily prevent its being enforced against the other defendants.[37] In an action against a sheriff and a judgment creditor to restrain a threatened sale of realty, the sheriff is a real and not a nominal party.[38]

Affidavit of illegality.[See 11 C. L. 1442]—On an issue raised by an affidavit of illegality to an execution based on a judgment, the court will not investigate the merits of the controversy which eventuated in the judgment,[39] or the validity of a judgment regular on its face.[40] Nor will the affiant be allowed to profit by his own fraud.[41] The burden is usually upon a party filing an affidavit of illegality to show the truth of his allegations.[42] Payment to the levying officer by a mortgagor of chattels of the amount admitted to be due in his affidavit of illegality is not a condition precedent to its acceptance and return into court for trial of the issues therein made.[43]

Setting aside the sale.[See 11 C. L. 1443]—Upon due application [44] an execution sale may be set aside for irregularity.[45] While inadequacy of price will be given great weight in connection with the alleged irregularity,[46] it is not alone sufficient

37. Merrifield v. Western Cottage Piano & Organ Co., 144 Ill. App. 289.

38. Hence he is personally liable for costs. Bender v. Ragan, 53 Wash. 521, 102 P 427.

39. Waters v. Hughes, 131 Ga. 725, 63 SE 214.

40. Could not attack judgment by showing that orders establishing copies of petition and appeal bond were improperly granted on ground that original petition and appeal bond were never transmitted to superior court from county court, especially where defendant on hearing of illegality proposed and took order in superior court establishing a copy of his plea in the case, thus estopping himself from denying that there was such plea on file in that court. Fletcher v. Bluthenthal [Ga.] 64 SE 558. Since court will not investigate such merits as title of property involved, **evidence** showing that prior to levy execution defendant had transferred property to third party was irrelevant and immaterial. Harris v. Woodard [Ga.] 65 SE 250.

41. Affidavit of illegality alleging fraud in which affiant, the defendant, participated, was properly stricken on demurrer. Glover v. Newsome [Ga.] 65 SE 64.

42. Where overseer of road was fined by commissioners for neglect of duty, and he filed affidavit of illegality to execution of fine on ground that he was not notified of his neglect or given opportunity to render excuse, he had burden of proving such allegations. Civ. Code 1895, § 5160. Dockins v. Wilbanks [Ga. App.] 65 SE 689.

43. Civ. Code 1895, § 5661, providing that, when an affidavit of illegality is made on account of partial payment made on execution, defendant at time of making such affidavit must pay amount he admits to be due, or the sheriff shall proceed to raise that amount and accept affidavit for balance, not applying in case of foreclosure of chattel mortgage. Waters v. Hughes, 131 Ga. 725, 63 SE 214.

44. Application to set aside sale may be made at return term of writ. Irondale Bank v. Terrill, 135 Mo. App. 472, 116 SW 481.

45. Rogers v. Wilson, 220 Mo. 213, 119 SW 369. Premature return of execution by constable to justice court was irregularity making voidable the sale. Id. Sale of debtor's property confusedly with that of another was voidable irregularity. Mullins v. Hanneman, 123 La. 643, 49 S 271.

46. Sale for $611.52 of property worth $4,000, considered with lack of notice of sale to execution debtor, irregularities in sale, lapse of nine days between last publication of notice and day of sale, and issuance of deed within 15 months after consummation of sale, held sufficient to authorize court to set aside sale. Kissinger v. Zieger, 138 Wis. 368, 120 NW 249. Sale may be set aside where it was made in violation of an order of the court restraining it, regardless of its validity, especially where it appeared that such order was cause of inadequate price obtained. Van Gieson v. Maile, 213 U. S. 338, 53 Law Ed. —.

NOTE. Inadequacy of price: Gross inadequacy of price is a circumstance of weight, for, though the courts have professed on numberless occasions they would not vacate a sheriff's sale for this reason, the judgments actually pronounced by them show their bark is worse than their bite in these matters. When the inadequacy of the bid was very great, some circumstance of irregularity, mistake, fraud, or injustice, was searched for diligently and usually found, which enabled the court to prevent confiscation. In Rogers & Baldwin Hardware Co. v. Cleveland Bldg. Co., 132 Mo. 442, 34 SW 57, 31 L. R. A. 335, 53 Am. St. Rep. 494, the dissenting opinion declared inadequacy of price was usually no ground for setting aside sheriffs' sales which had become final, but that this was not more than a half truth as applied to the review of such a sale upon motion made before it had become a finality, and that remark expressed what is even more strongly the doctrine of the majority opinion. In Davis v. McCann, 143 Mo. 172, 44 SW 795, a proceeding in the nature of a suit in equity to set aside a sheriff's sale of land, and controlled by the same principles which ought to be applied to the present motion, the supreme court said inadequacy of price alone would not justify setting aside sales of lands under executions unless the price was so low as to shock the moral sense and outrage the conscience; but, if it was, the courts would interfere for justice. In Holdsworth v. Shannon, 113 Mo. 508, 21 SW 85, 35 Am. St. Rep. 719, infra, it was said

ground.[47] The court will generally set aside a sale to prevent gross injustice.[48] The hearing is had upon affidavits, unless the taking of evidence be requested;[49] and, while a determination is had according to legal procedure, equitable principles are applied to the facts.[50] When the sale is set aside, the purchaser will usually be allowed money paid out by him.[51] A judgment creditor, with the consent of the purchaser,[52] may treat an execution sale as void without moving to set aside.[53]

Equity will grant relief by setting aside the sale in a proper case.[54]

Action for recovery of property or damages. See 11 C. L. 1443—The owner of property wrongfully sold under execution for the debt of another may recover his damages,[55] but if the action be based on fraud in connection with the sale, such fraud should be proven by evidence which is not questionable.[56] The officer is liable for damages proximately resulting [57] from the sale of mortgaged property except in conformity with statutory requirements.[58] In such case the mortgagee may have recourse against all parties participating adversely to his interests, though as between the parties the resulting liability may be equitably proportioned.[59]

"inadequacy of price without more, unless so gross as to shock the moral sense," would not suffice as ground to set aside a foreclosure or execution sale.—From State v. Innes, 137 Mo. App. 420, 118 SW 1168.

47. In absence of fraud, mistake, or violation of some duty by officer, valid sale will not be set aside solely because of smallness of price. Sale of property worth $20,000 for $132.04 not alone sufficient ground. Skakel v. Cycle Trade Pub. Co., 237 Ill. 482, 86 NE 1058. Sale not set aside for gross inadequacy of price especially where no evidence as to real value. Irondale Bank v. Terrill, 135 Mo. App. 472, 116 SW 481.

48. Execution sales may be set aside on motion for about the same reasons judicial sales in the strict meaning of the words may be, since the court can control its own process to prevent injustice. State v. Innes, 137 Mo. App. 420, 118 SW 1168. Apparently regular sale under execution valid on its face may be set aside to prevent injustice, as where judgment was satisfied subsequent to issuance of execution but execution was not stayed, and officer did not take bond from purchaser to protect existing mortgage on property. Davis v. Gott [Ky.] 113 SW 826.

Prevention of injustice did not require sale made subject to mortgage to be set aside upon successful termination of suit to cancel mortgage, though suit could not have been maintained by purchaser without judgment creditors joining with him. Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754.

49. Under St. 1898, subd. 3, evidence may be taken and witnesses examined. Kissinger v. Zieger, 138 Wis. 368, 120 NW 249. Party waived right to examination of witness by failing to request same. Id.

50. State v. Innes, 137 Mo. App. 420, 118 SW 1168.

51. Allowed money paid in discharge of sale bond where voidable sale was set aside. Davis v. Gott [Ky.] 113 SW 826.

52. Consent of purchaser is necessary unless he be also judgment creditor. Culver v. Lambert [Ga.] 64 SE 82.

53. Culver v. Lambert [Ga.] 64 SE 82. Defendant could not complain that plaintiff treated as void a sale which law pronounces invalid and proceeds to sell again. Id.

54. Where judgment is void. Buchan v. Williamson, 131 Ga. 501, 62 SE 815. Equity set aside sale where it appears that judgment defendant had no shadow of title or interest. Gay v. Chambers, 37 Pa. Super. Ct. 41.

55. Wife was entitled to recover damages from failure to make sale to another as result of seizure and sale of her property for the debt of her husband. First Nat. Bank v. Thomas [Tex. Civ. App.] 118 SW 221.

56. Indirect evidence of value of property and fact that purchaser (creditor) was man of such power and influence as to frighten or corrupt judges, appraisers and possible purchasers, held questionable evidence. Ubarri y Yramategui v. Laborde, 29 S. Ct. 549; Laborde v. Ubarri, 29 S. Ct. 552.

57. Injury to property by purchaser in taking possession is not proximate, though damages therefor may be recovered from purchaser. Davis v. Gott [Ky.] 113 SW 826. A mortgagee is entitled to recover, against an officer selling mortgaged property under execution, the full amount for which the property sold, without deductions for costs of execution sale. McKenna Bros. v. Brown [R. I.] 71 A 450. Expenses of execution sale is part of "amount due on execution" which, by Court and Practice Act 1905, § 629, is not paid until after payment of mortgage debt. Id.

58. Liable to execution defendant and mortgagee for damages sustained for selling mortgaged corn without requiring purchaser to give bond for payment of bond as required by Ky. St. 1903, § 1709. Davis v. Gott [Ky.] 113 SW 826.

59. Where mortgaged corn was sold by sheriff without his taking bond from purchaser as required, purchaser, execution creditor and sheriff, are all liable to mortgagee, but as between themselves execution creditor is primarily liable for money paid by purchaser, while as to balance of value of corn the order of liability is purchaser, sheriff, and lastly execution creditor. Davis v. Gott [Ky.] 113 SW 826. **Parties defendant** in action mentioned in preceding note should include purchaser at execution sale so that entire controversy may be settled in one action. Id.

§ 16. *Restitution on reversal of judgment.*[60]—See 11 C. L. 1443—When the judgment is reversed, the plaintiff purchaser is compelled to make restitution either by returning the property, if he still has it, or by paying over an equivalent in money.[61] Failure to give notice of an order of restitution does not necessarily make it void.[62]

Executors and Administrators; Exemplary Damages, see latest topical index.

EXEMPTIONS.

The scope of this topic is noted below.[63]

§ 1. The Right to Exemptions Generally, 1743.
§ 2. Persons Who May Claim, 1744.
§ 3. Goods and Other Properties Exempted, 1745.
§ 4. Debts and Liabilities Inferior or Superior to Right of Exemption, 1747.
§ 5. Loss of Exemption Rights, 1747.
§ 6. Selling or Transferring Exempt Property, 1748.
§ 7. How the Right is Claimed and Enforced, 1748.
§ 8. Recovery for Selling Exempt Property or Evading Exemption Laws, 1749.

§ 1. *The right to exemptions generally.*[64]—See 11 C. L. 1444—The right to an exemption is a personal privilege[65] affecting the remedy rather than the right[66] of the creditor, and therefor governed by the law of the forum.[67] The enactment of exemption laws is within the power of the state legislature,[68] and also of congress.[69] Exemptions are sometimes created by special act as well as by general law.[70] They are frequently safeguarded by special provisions restricting garnishment.[71] The bankruptcy act adopts the exemptions created by state statutes,[72] and such provisions prevail over an implication of nonexemption from other sections of the act[73] sub-

60. Search Note: See Appeal and Error, Cent. Dig. §§ 4621-4625, 4701-4709; Dec. Dig. §§ 1179, 1208; 3 Cyc. 462-470; 11 A. & E. Enc. L. (2ed.) 691, 709.

61. Drovers' & Mechanics' Nat. Bank v. Northern Coal & Coke Co. [Ky.] 119 SW 151.

62. Order held not void for want of notice specified in Civ. Code Prac. § 761, subd. 2, where two terms of court had intervened between date of judgment and filing of mandate, where mandate was sent to lower court by complainant's attorney, since complainant should have anticipated issuance of order on mandate. Drovers' & Mechanics' Nat. Bank v. Northern Coal & Coke Co. [Ky.] 119 SW 151.

63. This topic excludes homestead exemptions (see Homesteads *), the allowance of property to the widow and minor children out of the estates of decedents (see Estates of Decedents,* § 5D), liability of persons causing the seizure and sale of exempt property under attachment or execution and of the officer making the levy and sale (see Attachment,* § 17; Executions,* § 8K; Sheriffs and Constables,* § 5E), and the procedure for claiming exemptions in bankruptcy (see Bankruptcy,* § 16).

64. Search Note: See notes in 1 L. R. A. (N. S.) 195; 5 Id. 472; 4 Ann. Cas. 220.

See, also, Exemptions, Cent. Dig. §§ 1-12; Dec. Dig. §§ 1-13; 18 Cyc. 1374-1386; 12 A. & E. Enc. L. (2ed.) 67.

65. State v. U. S. Fidelity & Guar. Co., 135 Mo. App. 160, 115 SW 1081; Parketon v. Pugsley [Mo. App.] 121 SW 789. Not pleadable by garnishee in favor of nonresident defendant. St. Louis S. W. R. Co. v. Vanderberg [Ark.] 120 SW 993.

66. Missouri, K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275. Therefore Code Civ. Proc. § 1391, as amended by Laws 1908, p. 433, c. 148, removing exemption, not unconstitutional, though retroactive. Bayliss v. Ryan, 64 Misc. 146, 117 NYS 1022.

67. Missouri, K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275.

68. Rev. Laws, c. 118, § 73, exempting life insurance for benefit of wife, constitutional, though no limit as to amount of policy. Bailey v. Wood, 202 Mass. 549, 89 NE 147.

69. Rev. St. U. S. § 2296 (U. S. Comp. St. 1901, p. 1398), exempting federal homestead from debts of homesteader before issuance of patent. In re Cohn, 171 F 568.

70. Fund received under benefit certificate of Ancient Order of United Workmen exempt under its charter, and also under Ky. St. 1903, § 671. Merrell Drug Co. v. Dixon [Ky.] 115 SW 179.

71. By c. 62, § 14, a written demand for excess above exemptions must be made on both debtor and employer, before suit may be brought, and filed with justice before summons may issue, and judgment void in absence of such demand. Walker v. O'Gara Coal Co., 140 Ill. App. 279. By Code 1906, § 2346, court must stay proceedings till debtor summoned to assert exemption, in case garnishee shows he is advised defendant will claim disclosed property as exempt. Illinois Cent. R. Co. v. Badley [Miss.] 49 S 114.

72. By § 6 of Act July 1, 1898, c. 541, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3423). In re Cohn, 171 F 568; In re McCrary Bros., 169 F 485.

73. Cash surrender value of insurance pol-

ject to the usual rule that one claiming under a statute exceptional in its character must bring himself clearly within its terms,[74] exemption laws are liberally construed in aid of their purpose,[75] though not to the extent of encouraging fraud,[76] and will not readily be found repealed by implication.[77] Similarly, a statute removing exemptions will not be given retroactive effect,[78] unless its wording shows it to have been so intended,[79] though it is competent for the legislature to give it such an effect.[80]

§ 2. *Persons who may claim.*[81]—See 11 C. L. 1444—Certain classes of property are usually exempted only for the benefit of certain classes of persons, such as heads of families,[82] laborers,[83] or seamen.[84] The requirement of residence within the state is frequently superadded.[85]

icy held exempt under Code 1896, § 2607, notwithstanding § 70 of Bankruptcy Act by which trustee would be entitled thereto, since § 6 adopts state exemption. Chandler v. Traub [Ala.] 49 S 240. By Ky. St. 1903, § 655, surrender value of bankrupt's life insurance policies in favor of wife will go to her as against husband's trustee. In re Pfaffinger, 164 F 626.

74. Under statute exempting work horses, allegation that horse taken was exempt is insufficient in absence of proof that it was a work horse. McLeod v. Noble, 122 La. 714, 48 S 161.

75. U. S. Rev. St. § 4536 (U. S. Comp. St. 1901, p. 3082), protecting seamen's wages from attachment, arrestment, etc., held to exempt them from seizure on execution, though not expressly so worded. Wilder v. Inter-Island Steam Nav. Co., 211 U. S. 239, 63 Law. Ed. 164. Requirement that judgment debtor be head of a family to be entitled to exemption not read into Comp. Laws 1907, § 3245. Snow v. West [Utah] 99 P 674. Requirement under Rev. St. 1899, § 3163 (Ann. St. 1906, p. 1799), that sheriff appraise debtor, before levy, of property exempt under §§ 3158, 3159, 3162, and of his right to hold same, held mandatory, and not cured by notice by creditor. Irondale Bank v. Terrill, 135 Mo. App. 472, 116 SW 481. Requirement to select and demand property to value of $500, to be taken in lieu of homestead, held excused when selection postponed by assignor for benefit of creditors by inducement of assignee. In re Kraus, 79 Ohio St. 314, 87 NE 176.

76. Diamond rings not to be held "wearing apparel" within Ky. St. § 1697 (Russell's St. § 4656), in absence of evidence of purpose of purchase and other surrounding circumstances. In re Leech [C. C. A.] 171 F 622.

77. Rev. St. U. S. § 2296 (U. S. Comp. St. 1901, p. 1398), exempting federal homestead from debts of homesteader incurred before issuance of patent, held not repealed by Bankruptcy Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), providing that the act shall not affect the allowance to bankrupts of exemptions prescribed by state laws. In re Cohn, 171 F 568.

78. Laws 1904, p. 56, c. 16, removing exemptions of wages, held not to apply to wages previously earned. Aultman & Taylor Mach. Co. v. Smith [Ky.] 119 SW 1178. Laws 1908, p. 433, c. 148, allowing execution against wages if $12 a week or more, amending Code Civ. Proc. § 1391, which allowed execution only for necessaries, held inapplicable to judgments recovered before it took effect. Kelly v. Mulcahy, 131 App. Div. 639, 116 NYS 61; Laird v. Carton, 132 App. Div. 176, 116 NYS 851; Osterhoudt v. Stade, 133 App. Div. 83, 117 NYS 809; Rinschler v. Bell, 118 NYS 536.

79. Code Civ. Proc. § 1391, as amended by Laws 1908, p. 433, c. 148, held so intended, holdings being contrary to Kelly v. Mulcahy, and Laird v. Carton, supra. Bayliss v. Ryan, 64 Misc. 146, 117 NYS 1022.

80. Bayliss v. Ryan, 64 Misc. 146, 117 NYS 1022.

81. **Search Note:** See notes in 3 C. L. 1409; 18 L. R. A. 305; 11 L. R. A. (N. S.) 361; 58 A. S. R. 303; 70 Id. 107; 10 Ann. Cas. 500.

See, also, Exemptions, Cent. Dig. §§ 13-34; Dec. Dig. §§ 14-30; 18 Cyc. 1397-1410; 12 A. & E. Enc. L. (2ed.) 84.

82. Widower living alone not head of family within Ky. St. § 1697 (Russell's St. § 4656), exempting household furniture and the like. Jarboe v. Hayden [Ky.] 117 SW 961. Father living on his life estate with son and son's wife, paying no board and receiving no rent, not head of family within Rev. St. 1899, § 3162 (Ann. St. 1906, p. 1797), exempting $300 worth of property in lieu of homestead. Forbes v. Groves, 134 Mo. App. 729, 115 SW 451. Unmarried man living alone, paying sister's tuition at school in same town, and advancing money to parents in another county, not head of family under Const. S. C. art. 3, § 28, exempting $500 personalty. In re McGowan, 170 F 493. By Mo. Ann. St. 1906, § 3435, exempting ninety per cent of last thirty days' wages, if a resident. McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 115 SW 1028. But need not be head of family to be entitled to exemption given by Comp. Laws 1907, § 3245, of "musical instruments in actual use in the family," etc. Snow v. West [Utah] 99 P 674.

NOTE. Who are heads of families: A family is defined as "a collective body of persons who live in one house under one head or manager." Duncan v. Frank, 8 Mo. App. 286. There can be but one head, but he need not be married. It is sufficient if he contribute in part to the support of those who have a moral, though not a legal, claim on him (Wade v. Jones, 20 Mo. 76, 61 Am. Dec. 584; State v. Kane, 42 Mo. App. 253), or if he control, supervise, and manage the affairs about the house (Broyles v. Cox, 153 Mo. 242, 54 SW 488, 77 Am. St. Rep. 714).

§ 3. *Goods and other properties exempted.*[86]—See 11 C. L. 1444—Common among exemptions are those of wearing apparel,[87] and of a limited amount of provisions,[88] household furniture,[89] or other personal property.[90] In some cases, also, books[91] and musical instruments[92] are exempt. The debtor's means of livelihood, such as his domestic animals, if a farmer,[93] or the tools or implements of his trade or pro-

But in the absence of real and final authority, merely being honored as the patriarch of the family is insufficient.—Adapted from Forbes v. Groves, 134 Mo. App. 729, 115 SW 451.

The head of a family need not be a father (Duncan v. Frank, 8 Mo. App. 286; Garaty v. Du Bose, 5 S. C. 499), nor even a husband (Duncan v. Frank, 8 Mo. App. 286; In re Morrison, 110 F 735), but may be a brother (Moyer v. Drummond, 32 S. C. 165, 10 SE 952, 7 L. R. A. 747, 17 Am. St. Rep. 850) or sister (Chamberlain v. Brown, 33 S. C. 597, 11 SE 439) who is supporting a dependent sister, or an adult son who is supporting his widowed mother and her dependent children (Rolstor v. King, 13 Okl. 37, 73 P 291). The family must consist of persons more intimately related to the head than servants or employes (Garaty v. Bu Bose, 5 S. C. 499), and in any case must live together in the same house (Duncan v. Frank, 8 Mo. App. 286), unless temporarily separated (Fant v. Gist, 36 S. C. 576, 15 SE 721), though the head need not be the owner of the house (Moyer v. Drummond, 32 S. C. 165, 10 SE 952, 7 L. R. A. 747, 17 Am. St. Rep. 850). The relation between the head of the family and its members must be permanent (Duncan v. Frank, 8 Mo. App. 286; Calhoun v. Williams, 32 Grat. [Va.] 18, 34 Am. Rep. 759) and of a domestic character (Duncan v. Frank, supra), and such as to impose upon him either a legal or a strong moral obligation to support them (Brokaw v. Ogle, 170 Ill. 115, 48 NE 394; Calhoun v. Williams, 32 Grat. [Va.] 18, 34 Am. Rep. 759; In re Morrison, 110 F 735). He does not necessarily cease to be the head upon the death of part of the members of the family. Fant v. Gist, 36 S. C. 576, 15 SE 721. In Virginia the terms "head of the family" and "householder" are convertible.—Adapted from In re McGowan, 170 F 493.

83. Under Civ. Code 1895, § 4732, exempting wages from garnishment, **stenographer** is a laborer. Empire Inv. Co. v. Sullivan [Ga.] 65 SE 882. Stenographer of assistant manager of manufacturing company, earning $75 per month, payable semi-monthly, is a laborer. Cohen v. Aldrich, 5 Ga. 256, 62 SE 1015. **Night watchman** working twelve hours without police power is a laborer. McAdams v. Ellis, 5 Ga. App. 262, 62 SE 1001. But **conductor** of freight train whose contract of employment makes his work predominatingly intellectual is not a laborer. Robinson v. McWilliams-Rankin Co. [Ga. App.] 64 SE 717.

84. Wages exempt from execution by U. S. Rev. St. § 4536 (U. S. Comp. St. 1901, p. 3082). Wilder v. Inter-Island Steam Nav. Co., 211 U. S. 239, 53 Law. Ed. 164.

85. Residence held equivalent to domicile under Mo. Ann. St. 1906, § 3435, exempting from garnishment ninety per cent of last thirty days' wages of head of family. McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 115 SW 1028. Garnishee cannot plead exemption in favor of nonresident defendant. St. Louis S. W. R. Co. v. Vanderberg [Ark.] 120 SW 993. Convicted criminal who has fled the state to escape punishment not a resident within Const. art. 10, § 1, exempting $500 personalty, though he retain domicile. Cramer v. Self, 149 N. C. 164, 62 SE 885. By Comp. Laws 1907, § 3247. Snow v. West [Utah] 99 P 674.

86. Search Note: See notes in 5 C. L. 1402; 3 L. R. A. (N. S.) 693; 1 A. S. R. 593; 2 Id. 596; 9 Id. 405; 24 Id. 686; 66 Id. 381, 386; 6 Ann. Cas. 779.

See, also, Exemptions, Cent. Dig. §§ 35-87; Dec. Dig. §§ 31-61; 18 Cyc. 1410-1446; 12 A. & E. Enc. L. (2ed.) 111.

87. By Ky. St. § 1697 (Russell's St. § 4656), containing no limitation as to necessity or value, and therefore held to cover diamond rings worth $400 (In re Leech, 171 F 591), but, on appeal, application held to depend on purpose of purchase of rings, and surrounding circumstances (In re Leech [C. C. A.] 171 F 622).

88. Under exemption to cultivator of soil of year's supply of corn for self and family, seventy bushels not excessive for farmer with wife and ten minor children, nor essential that he own land whereon grown. Dejean v. Lee [La.] 50 S 25. By Ky. St. § 1697 (Russell's St. § 4656), sufficient provisions for self and beasts for one year, with substitutes in lieu thereof. Thorp v. Thorp's Trustee [Ky.] 119 SW 814. Under Code Civ. Proc. § 1390, exempting "all necessary meat," etc., "actually provided for family use," held creditor might take excess of potatoes over year's supply. McCarthy v. McCabe, 131 App. Div. 396, 115 NYS 829. Corn to value of $100. Keenan v. Drew, 144 Ill. App. 388.

89. Under Comp. Laws 1907, § 3245, exempting chairs, tables and desks to value of $200, and necessary household table, and kitchen furniture to the value of $300. Snow v. West [Utah] 99 P 674.

90. Under Const. S. C. art. 3, § 28, to value of $500 in favor of every resident head of a family. In re McGowan, 170 F 493. Under Code Civ. Proc. § 521, exempting personalty worth $500 to one having no exempt realty, wages held exempt. Jones v. Union Pac. R. Co. [Neb.] 120 NW 946.

91. By Comp. Laws 1907, § 3245, exempting library of debtor. Snow v. West [Utah] 99 P 674. Library. First Nat. Bank v. Fowler [Wash.] 102 P 1038.

92. By Comp. Laws 1907, § 3245, if in actual use in the family. Snow v. West [Utah] 99 P 674.

93. Two horses exempt to farmer under Const. art. 244, must be work horses. Dejean v. Lee [La.] 50 S 25. Two horses and two cows by Rev. St. 1899, § 3159, subds. 1 and 2. Parketon v. Pugsley [Mo. App.] 121 SW 789.

fession,[94] his wages,[95] within certain limits,[96] and life insurance carried by him in favor of certain persons,[97] are other usual exemptions. By the weight of authority, property purchased with exempt property is also exempt,[98] and, similarly, insurance upon exempt property falls within the exemption,[99] but the exemption does not follow the property into the hands of others.[1] Another class of exemptions includes that of the unpaid salary of a public official [2] and that of property held for public purposes.[3] Partnership property is not ordinarily the subject of exemptions.[4]

94. Automobile not a tool or implement of trade within 1 Civ. Code 1902, § 2631. Eastern Mfg. Co. v. Thomas, 82 S. C. 509, 64 SE 401. Restaurateur's **counters, shelving, safe, furniture, kitchen utensils, etc.,** held exempt as apparatus of a trade. Geise v. Pennsylvania Fire Ins. Co. [Tex. Civ. App.] 107 SW 555. But see contrary decision under Rev. St. 1895, art. 2395, subd. 5. Simmanz v. Pennsylvania Fire Ins. Co. [Tex.] 112 SW 1044.

95. Exemption of personalty to value of $500 held to include wages. Jones v. Union Pac. R. Co. [Neb.] 120 NW 946. Under Pub. St. 1901, c. 245, § 20, exempting wages for labor performed after service of trustee process, held commissions accruing in favor of principal defendant against trustee, after service of process but before disclosure for renewals of policies written by defendant as agent of trustee before such service, not exempt. Steer v. Dow [N. H.] 71 A 217. Authorized advance drawings of $60 per week by salesman to be deducted from his total 7½ per cent commission on sales held "earnings" within Code Civ. Proc. § 1391, because no obligation to repay. Hollender v. Friedenberg, 60 Misc. 566, 112 NYS 467. Under Civ. Code 1895, § 4732, laborer's wages exempt from garnishment. Empire Inv. Co. v. Sullivan [Ga.] 65 SE 882; McAdams v. Ellis, 5 Ga. App. 262, 62 SE 1001; Cohen v. Aldrich, 5 Ga. App. 256, 62 SE 1015; Robinson v. McWilliams-Rankin Co. [Ga. App.] 64 SE 717. Seamen's wages by U. S. Rev. St. § 4536, U. S. Comp. St. 1901, p. 3082. Wilder v. Inter-Island Steam Nav. Co., 211 U. S. 239, 53 Law. Ed. 164.

96. Missouri, K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275. Exempt for limited time. Connor v. McCormick [Iowa] 117 NW 976. Under Mo. Ann. St. 1906, § 3435, all but 10 per cent of last thirty days' wages of resident, head of family. McDowell v. Friedman Bros. Shoe Co., 135 Mo. App. 276, 115 SW 1028. Under Rev. St. 1899, § 3435 (Ann. St. 1906, p. 1974), all but 10 per cent exempt, in case of resident, head of a family. Barnes v. Walthe & Co., 135 Mo. App. 488, 116 SW 7. By Code Civ. Proc. § 1391, prior to Sept. 1, 1908, wages exempt except against claims for necessaries or for service as a domestic (Osterhoudt v. Stade, 133 App. Div. 83, 117 NYS 809), but as amended by Laws 1908, p. 433, c. 148, only 90 per cent are exempt from execution (In re Van Buren, 164 F 883; Laird v. Carton, 132 App. Div. 176, 116 NYS 851), unless the wage is less than $12 per week (Kelly v. Mulcahy, 131 App. Div. 639, 116 NYS 61; Bayliss v. Ryan, 64 Misc. 146, 117 NYS 1022). Prior to March 4, 1904, when repealed by Laws 1904, p. 56, c. 16, exemption of wages not exceeding $50 per month. Aultman & Taylor Mach. Co. v. Smith [Ky.] 119 SW 1178.

97. Benefit certificate in Ancient Order of United Workmen, in favor of wife, exempt both under charter of insurer and under Ky. St. 1903, § 671. Merrell Drug Co. v. Dixon [Ky.] 115 SW 179. Where wife is beneficiary, by Rev. St. 1899, § 7895 (Ann. St. 1906, p. 3749). Webb v. Missouri State Life Ins. Co., 134 Mo. App. 576, 115 SW 481. Where payable to estate of insured, exempt from creditors' claims by Acts 1896-97, p. 1393, § 32 (Act Feb. 18, 1897). Heflin v. Allen [Ala.] 48 S 695. Where for benefit of married woman, exempt except as to premiums paid in fraud of creditors, under Rev. Laws, c. 118, § 73, though a paid-up endowment policy and transferred to wife to defeat creditors, and originally in favor of insured. Bailey v. Wood, 202 Mass. 549, 89 NE 147. Under Ky. St. 1903, § 655, exempting proceeds of policy payable to third person, wife is entitled to surrender value of policy payable to her, as against insured's trustee in bankruptcy claiming under Act July 1, 1898, c. 541, § 70. In re Pfaffinger, 164 F 526. Under Code 1896, § 2607, exempting amount becoming due and payable under terms of application and policy, a wife is entitled to cash surrender value of policy payable to husband and by him assigned to her, as against his trustee in bankruptcy claiming under Act July 1, 1898, c. 541, § 70, which is controlled by § 6 adopting state executions. Chandler v. Traub [Ala.] 49 S 240.

98. Under Code, § 4010, homestead bought with pension money is exempt (Ratliff v. Elwell [Iowa] 119 NW 740), though title is taken in name of wife, if not given to her (Charles City v. Security Trust & Sav. Bank [Iowa] 120 NW 114). Proceeds of exempt horses and pig sold by administrator exempt to widow. Haggard v. Scott [Iowa] 121 NW 375. Real estate. Aultman & Taylor Mach. Co. v. Smith [Ky.] 119 SW 1178.

Contra: Realty purchased with insurance fund exempt under charter of Ancient Order of United Workmen, and under Ky. St. 1903, § 671, held not exempt. Merrell Drug Co. v. Dixon [Ky.] 115 SW 179.

99. Upon apparatus of trade. Geise v. Pennsylvania Fire Ins. Co. [Tex. Civ. App.] 107 SW 555.

1. Exemption of homestead purchased with pension money not claimable by pensioner's donee. Ratliff v. Elwell [Iowa] 119 NW 740.

2. Assistant state factory inspector. Osterhoudt v. Stade, 133 App. Div. 83, 117 NYS 809. Fees earned or to be earned by juror. Brown v. Edinger, 61 Misc. 366, 114 NYS 1116.

3. Land held under express public trust created by Act March 7, 1887, p. 29, c. 34, as amended by St. 1897, p. 263, c. 189, though the parcel in question was not within the public purpose. Tulare Irr. Dist. v. Collins, 154 Cal. 440, 97 P 1124. Land owned by city

§ 4. *Debts and liabilities inferior or superior to right of exemption.*[5] See 11 C. L. 1445—Exemptions ordinarily apply against general debts,[6] except for necessaries [7] or for goods obtained by fraud,[8] but not against specific liens upon the property in question, if antedating the exemption,[9] or if created by the exemptionist,[10] or, in some cases, if created by the husband of the exemptionist.[11] The right of exemption is frequently postponed to judgments for alimony,[12] and in some states to judgments in actions ex delicto.[13] The title of a trustee in bankruptcy under the federal act is subject to the exemptions allowed by the state law.[14]

§ 5. *Loss of exemption rights.*[15] See 11 C. L. 1446—Unless the exemption is absolute,[16] it may be lost by laches [17] or by failure to claim it,[18] and of course if it be for a limited period only, it will terminate by lapse of time.[19] Subject to statutory

City of Indianapolis v. City Bond Co., 42 Ind. App. 470, 84 NE 20. Execution may not be awarded against a city. Wicker v. Alton, 140 Ill. App. 135.

4. Under Code Ala. 1907, § 4166, real estate bought with partnership funds, unless proved not to have been bought for partnership purposes, not exempt against trustee of bankrupt firm. In re McCrary Bros., 169 F 485. Stock of goods owned by firm not exempt against individual creditors. State v. U. S. Fidelity & Guar. Co., 135 Mo. App. 160, 115 SW 1081.

5. **Search Note:** See notes in 18 L. R. A. 305, 586; 24 Id. 812; 54 Id. 566; 2 A. S. R. 596; 102 Id. 81.

See, also, Exemptions, Cent. Dig. §§ 88-104; Dec. Dig. §§ 62-78; 18 Cyc. 1387-1396; 12 A. & E. Enc. L. (2ed.) 164.

6. Insurance for benefit of estate of insured goes to heirs free from claims of creditors, under Acts 1896-97, p. 1393. Heflin v. Allen [Ala.] 48 S 695. Against claim for purchase price of personalty where title passed outright, Code, § 4015, preferring the vendor's claim, not applying against proceeds. Haggard v. Scott [Iowa] 121 NW 375.

7. Under Code Civ. Proc. § 1391. In re Hogan, 64 Misc. 302, 118 NYS 537; Laird v. Carton, 132 App. Div. 176, 116 NYS 851. Judgment for damages for negligence not necessaries. Kelly v. Mulcahy, 131 App. Div. 639, 116 NYS 61.

8. By false financial statements by debtor to mercantile agencies relied upon by creditor, a subscriber, in extending credit. Galvin v. Tibbs, Hutchins & Co. [N. D.] 119 NW 39.

9. Right to foreclose lien of betterment assessment, superior to exemption of public property held for public purpose, where not acquired by city till after assessment. City of Indianapolis v. City Bond Co., 42 Ind. App. 470, 84 NE 20.

10. Chattel mortgage given by husband prevails over his exemption as head of family, and that of wife upon his absconding, given by Rev. St. 1899, §§ 3159, 3164 (Ann. St. 1906, pp. 1795, 1800). Elliott v. Washington, 137 Mo. App. 526, 119 SW 42. Note prevails over exemption of horse mortgaged by maker to secure it. Emerson v. Knapp, 129 App. Div. 827, 114 NYS 794. Note prevails over exemption of private library mortgaged by maker to secure it. First Nat. Bank v. Fowler [Wash.] 102 P 1038.

11. Mortgage of community personalty, executed by husband alone, prevails over wife's exemption therein. First Nat. Bank v. Fowler [Wash.] 102 P 1038. Claim for money borrowed by insured, under policy providing for deduction of debts to company, deductible as against wife, under Rev. St. 1899, § 7895 (Ann. St. 1906, p. 3749), exempting policy from husband's debts where wife is beneficiary. Webb v. Missouri State Life Ins. Co., 134 Mo. App. 576, 115 SW 481.

12. By Rev. St. 1899, § 4327a (Laws 1903, p. 240) (Ann. St. 1906, p. 2376), subjecting all wages, in spite of Rev. St. 1899, § 3162, as amended by Laws 1903, p. 195 (Ann. St. 1906, p. 1797), exempting all but 10 per cent of wages of head of family, etc., which though later did not repeal the former. Anderson v. Nowell-Shapleigh Hardware Co., 134 Mo. App. 188, 113 SW 733.

13. Count to recover money lost and paid on a wager held ex contractu. Johnson v. Collier [Ala.] 49 S 761. Under Code 1896, § 2046, action to recover for removal pending disaffirmance of sale under foreclosure of mortgage of timber from the mortgaged land, by party who subsequently exercised his right of redemption, held not ex delicto. Richardson v. McCreary & Co. [Ala.] 48 S 341.

14. Right of trustee to cash surrender value of bankrupt's insurance under Act July 1, 1898, c. 541, § 70, is inferior by virtue of § 6 adopting state exemption laws, to exemption by Code 1896, § 2607 (Acts 1896-7, p. 1393) (Act Feb. 18, 1897, § 32), of the sum becoming due and payable by the terms of the application and policy of insurance for benefit of his estate, though transferred to benefit of wife subsequently. Chandler v. Traub [Ala.] 49 S 240.

15. **Search Note:** See note in 116 A. S. R. 351.

See, also, Exemptions, Cent. Dig. §§ 112-128; Dec. Dig. §§ 89-104; 18 Cyc. 1449-1461; 12 A. & E. Enc. L. (2ed.) 190.

16. Not lost by failure to claim before execution sale or before execution of bond of indemnity, when absolute. Winstead v. Hicks [Ky.] 121 SW 1018.

17. Claim filed after oral announcement of judgment, though before its formal entry, held too late, where defendant had notice of suit. United States Fidelity & Guar. Co. v. Hollenshead, 51 Wash. 326, 98 P 749.

18. As against trustee in bankruptcy. In re Driggs, 171 F 897. Nonresident defendant can secure exemptions from garnishment only by following statutory method of claiming them. St. Louis S. W. R. Co. v. Vanderberg [Ark.] 120 SW 993.

19. Connor v. McCormick [Iowa] 117 NW 976.

limitations,[20] an exemption may be waived, either expressly[21] or by implication,[22] though a waiver will not be implied unless the intention is plain.[23] Similarly a debtor will not be deprived of his exemptions for fraud unless clearly proved.[24] Allowing one's exempt property to stand in the name of another may not cause the loss of the exemption.[25]

§ 6. *Selling or transferring exempt property.*[26]—See 11 C. L. 1446

§ 7. *How the right is claimed and enforced.*[27]—See 11 C. L. 1446—The right to exemptions, though personal to the debtor, may often, by statute, be asserted in his behalf by a garnishee.[28] Where the exemption is absolute, no claim is necessary to perfect it.[29] The time within which the right must be asserted depends somewhat upon the nature of the proceeding against the debtor.[30] The claim must sufficiently identify the property[31] and show that it is within the exemption,[32] and must be made in the manner prescribed by statute.[33] Conditions precedent must be sub-

20. By Code Georgia 1895, § 2863, waiver must be in writing, and must leave wearing apparel and $300 worth of furniture, etc., exempt. Citizens' Bank v. Hargraves [C. C. A.] 164 F 613. By Const. 1901, § 210, and Code 1907, § 4232 (Code 1896, § 2105), waiver must be in writing executed by exemptionist. Scarbrough v. City Nat. Bank [Ala.] 48 S 62.

21. By insertion of waiver in note and mortgage. Citizens' Bank v. Hargraves [C. C. A.] 164 F 613. By confession of judgment containing a waiver. In re MacKinie, 171 F 259.

22. By electing to take property worth $300 under Rev. St. 1899, § 3162 (Ann. St. 1906, p. 1797), which provides this in lieu of property exempt under § 3159 (p. 1795), subds. 1 and 2. Parketon v. Pugsley [Mo. App.] 121 SW 789. By consent to sale of the $1,600 worth of property set apart to him as exempt, with rest, bankrupt waived right to more than pro rata share of proceeds, though sold for only 66 per cent of value. In re Arnold, 169 F 1000.

23. Where assignor for benefit of creditors excepted exempt property in assignment and later orally demanded the $500 worth of property in lieu of homestead but was put off by assignee, exemption not waived by failure to select specific property. In re Kraus, 79 Ohio St. 314, 87 NE 176. Indorsement of note held not an "execution" within Const. 1901, § 210, or Code 1907, § 4232 (Code 1896, § 2105), of the writing "we each, whether maker or indorser," hereby waive exemptions, upon the face of the note. Scarbrough v. City Nat. Bank [Ala.] 48 S 62.

24. Evidence of gambling and squandering held insufficient to deprive bankrupt of his exemption under Pennsylvania law though unable to account satisfactorily for funds received during four months prior to bankruptcy. In re Berman, 165 F 383. Not fraudulent to omit from required schedule of all property certain claims, where amount included was in excess of exemption plus amount of judgment. Keenan v. Drew, 144 Ill. App. 388. An arrangement between defendant and garnishee for payment of wages in advance cannot be fraudulent against creditor as to exempt property. Barnes v. Walthe & Co., 135 Mo. App. 488, 116 SW 7.

25. As against creditor of both, husband may claim exemption of homestead bought with his pension money, though title taken in name of wife. Ratliff v. Elwell [Iowa] 119 NW 740.

26. Search Note: See Exemptions, Cent. Dig. §§ 105-111; Dec. Dig. §§ 79-88; 18 Cyc. 1446-1448; 12 A. & E. Enc. L. (2ed.) 206.

27. Search Note: See note in 30 L. R. A. 98. See, also, Exemptions, Cent. Dig. §§ 129-181; Dec. Dig. §§ 105-153; 18 Cyc. 1462-1496; 12 A. & E. Enc. L. (2ed.) 223.

28. By Rev. St. 1899, § 3435 (Ann. St. 1906, p. 1974), where exemption from garnishment. Barnes v. Walthe & Co., 135 Mo. App. 488, 116 SW 7. By Code 1906, § 2346, under which court must thereupon stay proceedings till debtor is summoned to appear. Illinois Cent. R. Co. v. Badley [Miss.] 49 S 114.

29. Exemption of work horses and of buggy in lieu of exempt provisions. Winstead v. Hicks [Ky.] 121 SW 1018.

30. Ordinarily not till officer comes to seize the property under writ. State v. U. S. Fidelity & Guar. Co., 135 Mo. App. 160, 115 SW 1081; Winstead v. Hicks [Ky.] 121 SW 1018. But in action begun by attachment under Act of March 17, 1869, P. L. 8, claim made before judgment is not premature. Forst v. Gees, 36 Pa. Super. Ct. 653. And in garnishment proceedings, in which the judgment itself is, as to the property disclosed, virtually equivalent to a sale under execution, a claim filed after oral announcement of judgment, though before its formal entry, is too late, if the defendant had due notice of the proceedings. United States Fidelity & Guar. Co. v. Hollinshead, 51 Wash. 326, 98 P 749.

31. "Thirty acres of growing corn upon which there is a mortgage" held sufficient under the circumstances. Keenan v. Drew, 144 Ill. App. 388.

32. Under Ky. St. § 1697 (Russell's St. § 4656), exempting sufficient provisions for one year, or other property in lieu thereof, not sufficient to negative possession of enough for one year, without showing extent of supply on hand, in order to be entitled to property offered in lieu. Tharp v. Tharp's Trustee [Ky.] 119 SW 814. Where work horses exempt, allegation that horse was exempt insufficient; must prove it was work horse. McLeod v. Noble, 122 La. 714, 48 S 161. Allegations held sufficient after verdict. Winstead v. Hicks [Ky.] 121 SW 1018.

33. St. Louis S. W. R. Co. v. Vanderberg

stantially complied with,[34] unless excused.[35] Equity will enjoin creditors within its jurisdiction from proceedings in evasion of the local exemption laws.[36]

§ 8. *Recovery for selling exempt property or evading exemption laws.*[37]—See 11 C. L. 1447—The liability of persons causing the seizure and sale of exempt property under attachment and execution, and of the officer making the levy and sale, is fully treated elsewhere.[38]

EXHIBITIONS AND SHOWS.[39]

The scope of this topic is noted below.[40]

A theater is a private enterprise, and the proprietor has a right to govern it by such rules as he chooses, and to exclude whomsoever he desires,[41] in the absence of statutory regulation to the contrary.[42] Such business, however, is within the police power and reasonable regulations may be imposed,[43] and equity will not interfere by injunction with the right of the police to supervise and inspect theaters and shows to prevent indecent exhibitions.[44] Whether a particular exhibition or show comes

[Ark.] 120 SW 993. Property to value of $300 claimed as exempt under Rev. St. 1899, § 3162, in lieu of that specifically exempt under § 3159, must be selected, a mere demand upon the constable to set it out being insufficient. Parketon v. Pugsley [Mo. App.] 121 SW 789.

34. Full disclosure required by Ballinger's Ann. Codes & St. § 5255 (Pierce's Code, § 848) must be made, if debtor elects to proceed under that section. United States Fidelity & Guar. Co. v. Hollinshead, 51 Wash. 326, 98 P 749. Requirement of Rev. Codes 1905, § 7119, that one claiming additional exemptions, under § 7117, file schedule of all personalty, not met by list not stated to be complete. Pfeifer v. Hatton [N. D.] 118 NW 19.

35. Requirement of Code 1907, § 4178, that debtor file inventory of all personalty, etc., in case of contest, on penalty of default, excused by affidavit that he has none. Weinstein v. Yielding Bros. & Co. [Ala.] 50 S 126. Selection of property allowed in lieu of homestead, by assignor for benefit of creditors, excused where induced to postpone it by assignee upon whom he seasonably made demand. In re Kraus, 79 Ohio St. 314, 87 NE 176.

36. Suit in Missouri by fictitious assignee of Arkansas creditor to avoid Arkansas wage exemption, enjoined by Arkansas court. Greer v. Strozier [Ark.] 118 SW 400.

37. Search Note: See notes in 36 L. R. A. 582; 95 A. S. R. 118.

See, also, Exemptions, Cent. Dig. §§ 160-181; Dec. Dig. §§ 131-153; 18 Cyc. 1485, 1487-1491, 1493-1496; 12 A. & E. Enc. L. (2ed.) 247.

38. See Attachment, § 17; Execution, § 8K; Sheriffs and Constables, § 5E.

39. See 11 C. L. 1447.

Search Note: See notes in 7 C. L. 1636; 1 L. R. A. (N. S.) 1184, 1188; 3 Id. 1132; 5 Id. 183; 11 Id. 700; 12 Id. 617; 14 Id. 284; 67 A. S. R. 134; 110 Id. 525; 2 Ann. Cas. 201; 5 Id. 346, 351, 926; 8 Id. 529; 9 Id. 749.

See, also, Theaters and Shows, Cent. Dig.; Dec. Dig.; 28 A. & E. Enc. L. (2ed.) 115; 21 A. & E. Enc. P. & P. 646.

40. It includes the regulation of public amusements, and the rights and liabilities of proprietors and ticket holders. It excludes agricultural fairs (see Agriculture,* § 3), regulation of racing (see Racing*), violation of Sunday laws (see Sunday,* § 3), operation of civil rights laws (see Civil Rights*). As to building and fire regulations, see, also, Buildings and Building Restrictions,* § 1.

41. Luxenberg v. Keith & Proctor Amusement Co., 64 Misc. 69, 117 NYS 979.

42. Colored man who was refused admittance to roller skating rink after buying ticket held to have right of action under St. 1898, § 4398c, providing any person denying to another equal enjoyment of public "amusement" shall be liable to person aggrieved. Jones v. Broadway Roller Rink Co., 136 Wis. 595, 118 NW 170. In New York city it is an offense to admit to any theatrical exhibition, held in the evening, any **minor** under age of sixteen years, unless accompanied by some adult person. People v. Jensen, 99 App. Div. 355, 90 NYS 1062. See, also, Civil Rights.

43. Under city ordinance making it unlawful for owner, lessee, or agent of owner or lessee, of any place of entertainment, to knowingly rent same, or permit it to be used for exhibitions tending to corrupt public morals, information must state whether defendant is owner, lessee or agent, and cannot be in alternative. New Castle v. Genkinger, 37 Pa. Super Ct. 21. It is within police power of municipality to pass ordinance regulating moving picture shows by preventing immoral exhibitions. Block v. Chicago, 239 Ill. 251, 87 NE 1011. Moving pictures depicting career of "James Boys" and "Night Riders" held immoral. Id. Ordinance held not unreasonable because it did not cover theaters. Id. Ordinance does not discriminate because not specially prohibiting exhibition of immoral pictures on stereopticon or other stationary pictures. Id.

44. Edwards v. McClellan, 118 NYS 181.

* Always begin with the latest article on the subject. Use the latest topical index.

within a licensing statute or ordinance, is a matter of construction of terms.[45] Certain exhibitions are often prohibited on Sunday.[46] If a place of amusement is conducted in such a manner as to constitute a nuisance, it may be enjoined.[47] Though an ordinance gives a mayor power to revoke a show license, he must not exercise such power arbitrarily,[48] and ordinances granting power to revoke licenses must be rigidly followed.[49] A ticket of admission to a theater is a mere revocable license, and, in an action for breach of contract in refusing admission to such entertainment after the purchase of tickets, recovery must be confined to the actual pecuniary loss sustained;[50] but, where an ejection is accompanied with circumstances of insult and aggravation, punitive damages are allowable.[51] Under the principal of master and servant, theater lessees or owners are liable for the acts of employes committed within the scope of their employment.[52] The owner of a place of entertainment is charged with a positive obligation to know that the premises are safe for the public use,[53] and there is an implied warranty that premises used for public entertainment are reasonably safe for such use.[54] Proprietors of public amusement places must use reasonable care to protect their patrons from injury.[55] The usual rules regarding assumption of risk and negligence apply.[56]

Exhibits; Exoneration; Experiments; Expert Evidence, see latest topical index.

45. Wild West show, portraying actual incidents which occurred in West, and lacking most features usually included in circus, held not within Sayles' Ann. Civ. St. 1897, art. 5049, subd. 23, imposing license on "circuses and other exhibitions" wherein equestrian or acrobatic feats are exhibited. State v. Cody [Tex. Civ. App.] 120 SW 267.

46. Moving picture show held not within Pen. Code, §§ 277 and 1481 of charter (Laws 1897, p. 522, c. 378), prohibiting specified indoor exhibitions on Sunday, such shows not being one of those specified. Fox Amusement Co. v. McClellan, 62 Misc. 100, 114 NYS 594. Moving picture shows given indoors held not within Pen. Code, § 265, prohibiting certain specified "public shows" on Sunday. Edwards v. McClellan, 118 NYS 181.

47. Baseball park held not conducted in manner to constitute nuisance and not injury to private rights. Alexander v. Tebeau [Ky.] 116 SW 356.

48. General order revoking all licenses granted to moving picture shows held arbitrary and unenforcible, in absence of showing which affected all such licensees. Fox Amusement Co. v. McClellan, 62 Misc. 100, 114 NYS 594. Test of right to revoke is whether there is cause having relation to duties of mayor and welfare of people. Id. Evidence held to show mayor did not act unreasonably or arbitrarily because prerequisite of notice to revoke and hearing on same not necessary. McKenzie v. McClellan, 62 Misc. 342, 116 NYS 645.

49. Only way in which license can be revoked for violation of ordinance prohibiting certain exhibitions on Sunday is on obtaining judgment for penalty prescribed. In re City of New York, 131 App. Div. 767, 116 NYS 353.

50. Pecuniary loss is amount paid for ticket and such necessary expenses incurred in order to attend performance. Luxenberg v. Keith & Proctor Amusement Co., 64 Misc. 69, 117 NYS 979.

51. Plaintiff threatened with arrest unless he left theater. He took party of friends to afternoon performance and ticket seller made mistake and gave him tickets for night performance and then refused to exchange same. Weber-Stair Co. v. Fisher [Ky.] 119 SW 195. $250 not excessive under circumstances. Id.

52. Evidence held to show usher wrongfully assaulted plaintiff and that defendant lessees are liable in damages. Epstein v. Gordon, 114 NYS 438.

53. Not exonerated because he has no precise knowledge of defective condition of place to which he has invited public. Lusk v. Peck, 132 App. Div. 426, 116 NYS 1051.

54. Evidence held sufficient to require submission of question of reasonable safety to jury or court. Weiner v. Scherer, 64 Misc. 82, 117 NYS 1008.

55. Proprietor of amusement park held liable for injury caused by baseball thrown by players, where latter were playing at unusual place and plaintiff had not been notified, owing to absence of watchmen. Blakeley v. White Star Line, 154 Mich. 635, 15 Det. Leg. N. 835, 118 NW 482. Manager of theater held liable to patron injured by negligent handling of spot light which fell and struck him, though operator was not employed by him but by performing company. Thomas v. Springer, 118 NYS 475.

56. Passenger of scenic railway who was warned of danger of riding thereon assumed risk of ride caused by usual motion of car and, in absence of proof that accident was caused by something unusual, could not recover. Lumsden v. Thompson Scenic R. Co., 130 App. Div. 209, 114 NYS 421. Defendant not negligent for failing to notify passengers to hold on to car. Id.

EXPLOSIVES AND INFLAMMABLES.[57]

The scope of this topic is noted below.[58]

One in possession of explosives must use the highest degree of care as to third persons.[59] Even though one is using an explosive on his own land,[60] he must exercise such case to prevent injury to persons[61] or property[62] as a prudent man would reasonably foresee might result from an explosion; and in the absence of such care he is liable for injuries, unless the party injured is a trespasser.[63] It is not negligence per se to use explosives for blasting,[64] and blasting is not so intrinsically dangerous as to be ipso facto a nuisance, so that the blaster will be liable for injury caused by it irrespective of his negligence,[65] but if, in blasting, rocks or stones are thrown upon the adjoining lands of another, the party is guilty of trespass and is liable, irrespective of negligence.[66] Under circumstances where the use of explosives constitutes a nuisance, the person using the same is liable for resulting injuries.[67] A manufacturer of goods, which are explosive in character, who fails to notify the public, by proper label or otherwise, of their dangerous character, is liable for resultant injuries[68] unless the person injured is guilty of contributory negligence,[69] and the notice in such cases must be specific and not capable of a reasonable

57. See 11 C. L. 1450.

Search Note: See notes in 3 C. L. 1412, 1413; 17 L. R. A. 220, 729; 29 Id. 718; 38 Id. 306; 3 L. R. A. (N. S.) 330, 759; 5 Id. 260, 261; 10 Id. 376, 397; 12 Id. 389; 14 Id. 586, 913; 15 Id. 535; 16 Id. 621, 691; 5 Ann. Cas. 181, 446, 503, 539, 926; 10 Id. 456.

See, also, Explosives, Cent. Dig.; Dec. Dig.; 19 Cyc. 1-19; 12 A. & E. Enc. L. (2ed.) 499.

58. It includes statutory regulation of the keeping and use of explosives and inflammables, and liability for negligence therein. **It excludes** general rules of negligence (see Negligence *), liability as between master and servant (see Master and Servant *), liability generally for negligent fires (see Fires,* § 1; see, also, Railroads,* § 11J). It excludes, also, rules relative to particular agencies, such as electricity (see Electricity,* § 3) and steam (see Steam *). Conditions in fire insurance policies as to explosives on premises are treated in Insurance,* § 9.

59. Evidence that dynamite was stored in small building, within ten inches of stove used to heat place, and that explosive caps were on floor, held to show negligence and liability for injury to houses owing to explosion. Derry Coal & Coke Co. v. Kerbaugh, 222 Pa. 448, 71 A 915. Evidence held insufficient to show dynamite was so placed that child could come in contact with it after his presence on premises was known. Hobbs v. George W. Blanchard & Sons Co. [N. H.] 70 A 1082.

60. Plaintiff injured while on defendant's land by latter's consent. Birmingham Ore & Min. Co. v. Grover [Ala.] 48 S 682.

61. Persons blasting who know, or by reasonable diligence could know, that injury will result from blast, should protect persons exposed to danger by covering blasts. Birmingham Ore & Min. Co. v. Grover [Ala.] 48 S 682; Sloss-Sheffield Steel & Iron Co. v. Salser [Ala.] 48 S 374. If blasts cannot be covered at reasonable cost, warning must be given so persons can seek place of safety. Sloss-Sheffield Steel & Iron Co. v. Salser [Ala.] 48 S 374.

62. Question for jury whether natural and probable result of blasting was to injure plaintiff's adjoining property. Probst v. Hinesley [Ky.] 117 SW 389.

63. Evidence held to sustain finding that child who exploded dynamite in lumber camp and was killed had implied invitation to visit premises. Hobbs v. George W. Blanchard & Sons Co. [N. H.] 70 A 1082.

64. Charge to jury in action for damages to property from blasting in neighborhood is not erroneous where jury are told that "users of such materials, knowing their explosive power and destructive tendency, are bound to exercise highest degree of care in their use." Armstrong v. Cincinnati, 12 Ohio C. C. (N. S.) 76. Failure of defendant to use **safety fuse** in blasting operations held not negligence, since he blasted by electricity and safety fuses are used when blast is exploded by fire. Baccelli v. North River Stone Co., 133 App. Div. 449, 118 NYS 29. Defendant not bound to anticipate that electric exploders were liable to explode in thunder shower. Id.

65. Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 P 82.

66. Liable where foreman of railroad gang at work near quarry was struck by rock from blast. Sloss-Sheffield Steel & Iron Co. v. Salser [Ala.] 48 S 374. Railroad company bound to know that in blasting to make excavations for roadbed, called for by plans and specifications, rock and earth will necessarily be thrown on adjacent land, separated from right of way by narrow stream. Pine Mountain R. Co. v. Finley [Ky.] 117 SW 413.

67. Blasting rocks in vicinity of another's residence is a nuisance. Green v. Shoemaker & Co. [Md.] 73 A 688.

68. Manufacturer held liable for injuries resulting from ignition of stove polish. Clement v. Crosby & Co. [Mich.] 16 Det. Leg. N. 542, 122 NW 263.

69. Evidence held to show absence of con-

misinterpretation.[70] One furnishing gas for fuel and light is liable for damages resulting from defective installation of appliances for the use[71] or distribution[72] of same. One knowingly[73] or negligently[74] selling a dangerous explosive for a less violent one is liable for resulting injury,[75] though it sustains no contractual relation with the person injured,[76] in the absence of contributory negligence.[77] A shipper of goods of an explosive character must notify the carrier of their nature, and when so notified the carrier assumes the risk incident to their transportaion.[78] A principal is not liable for damage caused by explosives used by an independent contractor,[79] but where the work contracted for will itself constitute a nuisance, the principal as well as a subcontractor becomes liable for damages resulting therefrom.[80] The burden is upon the injured person to establish the negligence charged,[81] and this may be shown by circumstantial evidence.[82] The negligence charged must have been the proximate cause of the injury,[83] and one suing for personal injuries

tributory negligence of deceased in applying supposed stove polish to hot stove. Wolcho v. Rosenbluth & Co., 81 Conn. 358, 71 A 566.

70. Preparation labeled "Stoveline," represented to be "for use on all iron work," and capable of standing high temperature, warranted purchaser in assuming it was intended to be used upon stove, although latter was hot, in absence of notice to contrary. Wolcho v. Rosenbluth & Co., 81 Conn. 358, 71 A 566. Test is not whether it was intended to be used on hot stove, but whether person of ordinary intelligence who read labels had reason to believe it was intended for such purpose. Id.

71. Evidence held not to show negligence in installing lights or in permitting defect, which developed in pipe, to exist. Torrans v. Texarkana Gas & Elec. Co. [Ark.] 115 SW 389.

72. Gas company maintained defective valve in public highway and escaping gas filled box surrounding valve and exploded. Held, should have been so protected as to prevent injuries to public. United States Natural Gas Co. v. Hicks [Ky.] 119 SW 166.

73. Selling of coal oil with which gasoline had become mixed, of which fact defendant had knowledge, held actionable negligence, especially where defendant knew it would be retailed as coal oil. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. —.

74. Gasoline, sold for kerosene, exploded when used in lamp. Kenny v. Kennedy, 9 Cal. App. 350, 99 P 384.

75. Circumstantial evidence held sufficient to show death of plaintiff's wife and children was due to explosion. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. —.

76. Plaintiff's wife and children killed by explosion of mixture of coal oil and gasoline, sold by defendant to plaintiff's vendor, both consumer and retailer being ignorant of its real character. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. —.

77. Plaintiff's evidence held not to show contributory negligence, in action for negligently selling plaintiff gasoline instead of kerosene. Kenny v. Kennedy, 9 Cal. App. 350, 99 P 384. Use of kerosene to start fire held not negligence as matter of law so as to defeat recovery for death caused by more dangerous explosive sold and used as kerosene. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. —.

78. Where evidence showed express notice that shipment of soap contained naphtha and was liable to explode unless allowed plenty of ventilation, held shipper not liable for damages resulting from explosion, although vapor given off by soap was proximate cause. International Mercantile Marine Co. v. Fels, 164 F 337, afd. [C. C. A.] 170 F 275. Burden of proving shipper did not disclose dangerous character of goods is on carrier. International Mercantile Marine Co. v. Fels [C. C. A.] 170 F 275. Although vapor from naphtha soap was proximate cause of explosion in hold of vessel, shipper held not liable, where carrier accepted shipment with full knowledge of character of goods. International Mercantile Marine Co. v. Fels, 164 F 337, afd. [C. C. A.] 170 F 275.

79. Error to exclude oral testimony to show that relation of master and servant existed between defendant and firm which was doing blasting, and that defendant had charge of work, regardless of relations assumed on paper. Kendall v. Johnson, 51 Wash. 477, 99 P 310.

80. Rule held not to apply where nuisance lay in means adopted by contractor for carrying out work and not in work contracted for. Murphy v. New York, 128 App. Div. 463, 112 NYS 807. Nuisance consisted in storing along line of work an inordinate quantity of dynamite and failing to take proper precautions to prevent its explosion. Id.

81. Evidence held sufficient to show negligence of manufacturer in placing on market for common use a stove polish of explosive character without proper notice to buyers. Clement v. Crosby & Co. [Mich.] 16 Det. Leg. N. 542, 122 NW 263. Evidence held insufficient to establish negligence charged. Comes v. Dabney [Kan.] 102 P 488.

82. Walton & Co. v. Burchel [Tenn.] 121 SW 391. Held proper to allow rules of railroad company to be read to jury to show negligence in handling car of dynamite. Southern R. Co. v. Adkins' Adm'r [Ky.] 117 SW 321.

83. Placing of box of **dynamite cartridges in dark place** on beam of barn held not proximate cause of injury of small child, where latter was given cartridge by playmate and it exploded when he tried to drive nail through it. Finkbeiner v. Solomon [Pa.] 74 A 170. Evidence held to show causal connection was broken between original negligent act of defendant in per-

must show facts from which proximate cause can reasonably be inferred.[84] Ordinarily, the question of proximate cause is for the jury;[85] but where the facts are undisputed, and the court can see that the resulting injury was not probable, but remote, it is a question for the court.[86] Questions of fact, such as whether a child non sui juris was guilty of contributory negligence,[87] and whether plaintiff was a trespasser, are for the jury,[88] as is also the question of negligence.[89] The usual rules as to expert testimony,[90] and in regard to pleading, such as variance,[91] sufficiency,[92] and consistency,[93] apply.

The inspection,[94] storage[95] and sale[96] of explosives is subject to police regulation.

mitting dynamite cap to be where it was found, and subsequent injury to boy to whom it was traded, and defendant not liable. Pittsburg Reduction Co. v. Horton, 87 Ark. 576, 113 SW 647. Defendant's negligence in maintaining **leaky valve in gas pipe,** permitting escape of gas, held proximate cause of explosion, and not act of child who threw match into box enclosing valve. United States Natural Gas Co. v. Hicks [Ky.] 119 SW 166. Sale by oil company to retail dealer as coal oil, in violation of statute, of explosive **mixture of coal oil and gasoline,** with expectation that it would be retailed to public for domestic use as coal oil, is proximate cause of accident resulting from its use by consumer in ordinary manner, both consumer and retailer being ignorant of its real character. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. —. Evidence held sufficient to support judgment that explosion resulted from violent **kicking of cars** against one containing dynamite and nitroglycerine. Southern R. Co. v. Adkins' Adm'r [Ky.] 117 SW 321.

84. O'Donovan v. Philadelphia Co. [Pa.] 72 A 527. Day before explosion of natural gas which wrecked plaintiff's house there was a break in main which caused gas to enter plaintiff's house. The break was repaired before accident, but three days after it occurred gas again escaped at point of previous break. Evidence showed repair negligently done and jury found for plaintiff. Id. Evidence held to establish facts justifying inference that premature explosion of dynamite, causing death of servant, was due to foreman's negligence. Walton & Co. v. Burchel [Tenn.] 121 SW 391.

85. Question for jury whether plaintiff's nervous condition was due to fright occasioned by blasting operations near vicinity of residence. Green v. Shoemaker & Co. [Md.] 73 A 688. Fact that stove polish contained naphtha, a highly explosive substance, and that it exploded when applied to warm stove, would authorize jury to infer that temperature of stove was cause of explosion. Cunningham v. Pease House Furnishing Co. [N. H.] 73 A 405.

86. Under facts of case, demurrer to evidence should have been sustained. Comes v. Dabney [Kan.] 102 P 488.

87. Where child eight years old was injured while playing in highway by explosion of gas from defendant's pipe line, and he had been warned to keep away from place where explosion occurred, presumption was he was not negligent. United States Natural Gas Co. v. Hicks [Ky.] 119 SW 166.

88. Hobbs v. George W. Blanchard & Sons Co. [N. H.] 70 A 1082.

89. Evidence held sufficient to warrant submission of case to jury to determine whether damages to plaintiff's house were caused by defendant's negligent blasting operations. Settle v. Southern R. Co., 150 N. C. 643, 64 SE 759. Question for jury whether blasting was done negligently. Sloss-Sheffield Steel & Iron Co. v. Salser [Ala.] 48 S 374. Held not contributory negligence where boy exploded dynamite by blow, not knowing what it was. Hobbs v. George W. Blanchard & Sons Co. [N. H.] 70 A 1082.

90. Not error to admit testimony of experts as to appearance of stone after it was blasted with dynamite, and as to effect of such explosions and ability of experts to discover where some of charges of dynamite had failed to explode. Stephen v. Duffy, 142 Ill. App. 219.

91. Variance between declaration and proof, as to how ignition of stove polish was caused, held not vital to plaintiff's recovery, if she was using it as directed and without negligence. Clement v. Crosby & Co. [Mich.] 16 Det. Leg. N. 542, 122 NW 263.

92. Averments in declaration held sufficient to permit proof that preparation used as stove polish was dangerous, although it did not state in technical terms just what was likely to occur when applied to hot stove. Wolcho v. Rosenbluth & Co., 81 Conn. 358, 71 A 566. Complaint not insufficient for failure to allege that defendant knew of plaintiff's presence, where it alleged defendant negligently failed to give him and men working under him notice that blast was to be set off. Sloss-Sheffield Steel & Iron Co. v. Salser [Ala.] 48 S 374. While it is not necessary to aver that party doing blasting had actual knowledge of proximity of person injured, it is necessary to allege that he either knew, or had reason to believe, or could by reasonable diligence have known, that party injured was in position where missiles from blast would probably reach and injure him. Birmingham Ore & Min. Co. v. Grover [Ala.] 48 S 682.

93. Allegations held not demurrable as being inconsistent and repugnant. Sloss-Sheffield Steel & Iron Co. v. Salser [Ala.] 48 S 374.

94. Possible unconstitutionality of Okl. Laws 1899, p. 186, § 4, making it criminal offense to sell products of petroleum which do not conform to statutory standard, does not affect validity of other sections of that statute which provide for inspection and branding. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. —.

95. Tenement House Act (Laws 1901, p. 900, c. 334), § 40, prohibiting storage of combustible materials in or near tenement houses, held not violated by having films for moving picture show on hand properly

The keeping for sale of illuminating oils below a certain quality is often prohibited.[97]

Ex Post Facto Laws; Express Companies, see latest topical index.

EXTORTION.[98]

The scope of this topic is noted below.[99]

Extortion is the taking, by color of an office, of money or other thing of value that is not due,[1] before it is due,[2] or more than is due.[3] Where a statute requires that the demand and reception of more money for performance of an official duty than is allowed by law must have been made willfully and corruptly, the burden is on plaintiff to show defendant acted willfully and corruptly.[4] There is no such thing as agency in the commission of extortion;[5] if an officer authorizes another to receive property under such circumstances as would constitute extortion if such receiving had been done by the officer himself, then both are guilty of extortion.[6] It is necessary to allege and prove defendant's official capacity.[7]

EXTRADITION.

The scope of this topic is noted below.[9]

§ 1. International, 1754. § 2. Interstate, 1755.

§ 1. *International.*[9]—See 11 C. L. 1452—A circuit court of the United States has power, independently of statute, to admit to bail in a case of foreign extradition pend-

guarded as to fire. Fox v. Butler, 60 Misc. 484, 113 NYS 846.

96. Laws 1907, c. 250, p. 400, restricting sale of black powder to certain size packages, held not in conflict with state constitution, or fourteenth amendment U. S. Const., and not invalid as regulation of interstate commerce. Ex parte Williams [Kan.] 98 P 777.

97. The exclusion from territory by Okl. Laws 1899, p. 186, § 2, of illuminating fluids which have a specific gravity above 46 degrees Baume, is within police power of territory, although some oils may thus be excluded which are as safe for use as those which comply with statutory standard. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. —.

98. See 11 C. L. 1451.

Search Note: See notes in 15 L. R. A. (N. S.) 717; 116 A. S. R. 446; 1 Ann. Cas. 433.

See, also, Extortion, Cent. Dig.; Dec. Dig.; 19 Cyc. 35-48; 12 A. & E. Enc. L. (2ed.) 576, 8 A. & E. Enc. P. & P. 791.

99. It includes the criminal offense of extortion under color of office. Extortion so called by private persons is treated in Blackmail,* and the right to recover back fees illegally exacted in Officers and Public Employes,* § 13. See, also, Implied Contracts,* § 3.

1. State v. Cooper [Tenn.] 113 SW 1048.

2. Under Shannon's Code. §§ 6352, 6353, providing no officer shall demand or receive fees or other compensation for any service further than expressly provided by law, a justice of peace, demanding and receiving fees before due, held guilty of extortion in violation of § 6714, providing it is extortion by officer to knowingly demand or receive of another for performing any service or official duty greater fee than allowed by law. State v. Cooper [Tenn.] 113 SW 1048. Extortion for justice of peace to demand and receive fee for taking bail bond before it had been adjudged upon some disposition of case by final judgment that defendant was liable for it. Id.

3. State v. Cooper [Tenn.] 113 SW 1048. Where justice of peace demanded and received $5 for performing marriage ceremony, statutory fee being $1.25, held not extortion under circumstances of case. Vogel v. Brown, 201 Mass. 261, 87 NE 686.

4. Justice of peace demanded and received $5 for performing marriage ceremony, statutory fee being $1.25. In action brought to enforce statutory forfeiture, held demand not willful and corrupt, where evidence showed defendant went to plaintiff's house to perform ceremony and issued marriage certificate not required by law to be furnished by him. Vogel v. Brown, 201 Mass. 261, 87 NE 686.

5. Defendant falsely represented himself to be agent of county attorney and procured money from third person with promise that latter would not be prosecuted for violating law. Held obtaining money under false pretenses, not extortion. Drake v. State [Okl. Cr. App.] 103 P 878.

6. Where officer did not authorize taking of money, held defendant guilty of taking money under false pretenses. Drake v. State [Okl. Cr. App.] 103 P 878.

7. Indictment defective because it did not charge defendant occupied any official position, so he could not have committed extortion, "under color of his official right." Drake v. State [Okl. Cr. App.] 103 P 878.

8. It includes all matters relative to inter-

* Always begin with the latest article on the subject. Use the latest topical index.

ing examination,[10] but such power should be recognized only under the most pressing circumstances.[11] A certificate of the secretary of state that application for the extradition of the person named has been made by the foreign government is not necessary to the issuance of such warrant, even where a treaty provides for such certificate.[12] Under a treaty providing that a person surrendered on extradition proceedings shall not be subject to arrest or trial for any other offense than that charged in extradition until after a reasonable time for return unmolested to the country from which he was brought,[13] immunity is not granted for an offense committed subsequent to extradition;[14] nor is the person extradicted entitled to a conclusion of the case for which he was extradicted, before he can be tried for a crime subsequently committed.[15]

§ 2. *Interstate.*[16] *Origin and extent of power.*[See 11 C. L. 1453]—The constitutional provision for extradition is in the nature of a treaty between the states to which the executive of each is bound to give effect,[17] when demand and information is regularly made,[18] provided the person accused be a fugitive from justice,[19] charged in another state with treason, felony or other crime;[20] but such constitutional provision has no application to a case where the offender is, at the time, held to answer for an offense against the laws of the state in which he has taken refuge.[21] If the accused was in the state at the time the crime was committed, it is not important what his motive was in leaving such state; he is a fugitive from justice under the federal constitution and statutes.[22] The authorities of the state making the de-

national and interstate extradition. Procedure on habeas corpus in extradition cases is more fully treated in Habeas Corpus.*

9. Search Note: See notes in 5 C. L. 1408, 1410; 25 L. R. A. 593; 46 Id. 711; 10 Ann. Cas. 639.

See, also, Extradition, Cent. Dig. §§ 1-25; Dec. Dig. §§ 1-20; 12 A. & E. Enc. L. (2ed.) 590, 591; 8 A. & E. Enc. P. & P. 800.

10. In re Mitchell, 171 F 289.

11. Where plaintiff, in action involving his whole fortune, was arrested on extradition warrant from Canada day before trial of case was to begin, at instance of adverse party, held hardship is such that court is justified in enlarging him on bail until trial is over. In re Mitchell, 171 F 289.

12. By § 5270, Rev. Stat. (U. S. Comp. St. 1901, p. 3591), warrant of extradition may be issued upon complaint under oath. In re Schlippenbach, 164 F 783.

13. Treaties with Great Britain of August 9, 1842 (8 Stat. 576), and July 12, 1889 (26 Stat. 1508, 1509), or of U. S. Rev. Stat. § 5275, U. S. Comp. Stat. 1901, p. 3596. Collins v. O'Neil, 214 U. S. 113, 53 Law. Ed. —.

14. Conviction on indictment for perjury, committed at trial of charge for which defendant was extradited, held regular. Collins v. O'Neil, 214 U. S. 113, 53 Law. Ed. —.

15. Person was extradited for perjury and jury disagreed at trial. Pending second trial indictment was found charging perjury committed on trial of previous case. Collins v. O'Neil, 214 U. S. 113, 53 Law. Ed. —.

16. Search Note: See notes in 3 C. L. 1415; 5 Id. 1410, 1411; 14 L. R. A. 128; 19 Id. 206; 26 Id. 33; 28 Id. 289, 801; 11 L. R. A. (N. S.) 424; 12 Id. 225; 10 A. S. R. 207; 46 Id. 414; 68 Id. 129; 100 Id. 36, 37; 112 Id. 1031; 3 Ann. Cas. 543, 876; 6 Id. 449; 7 Id. 1056, 1076.

See, also, Extradition, Cent. Dig. §§ 26-54; Dec. Dig. §§ 21-42; 12 A. & E. Enc. L. (2ed.) 598; 8 A. & E. Enc. P. & P. 813.

17. Commonwealth v. Hare, 36 Pa. Super. Ct. 125.

18. In order to satisfy the provision of the federal extradition statutes, relating to the making of an affidavit before a magistrate, it is sufficient if the person before whom the affidavit is made is regarded as a magistrate under the law of the state where the crime was committed. Compton v. Alabama, 214 U. S. 1, 53 Law. Ed. —. Notary public held "magistrate" under laws of Georgia. Id.

19. Commonwealth v. Hare, 36 Pa. Super. Ct. 125.

20. U. S. Const. art. 4, § 2. In re Opinion of the Justices, 201 Mass. 609, 89 NE 174. Words "treason, felony and other crime" in § 2 of art. IV of federal constitution include every offense against laws of demanding state without exception as to nature of crime. Commonwealth v. Hare, 36 Pa. Super. Ct. 125.

21. In re Opinion of the Justices, 201 Mass. 609, 89 NE 174. It is in excess of the power of a governor of a state to grant an extradition demand, where the person demanded is being lawfully held in a penal institution of the state where he took refuge, under an unexpired sentence imposed for violation of its laws. Id. Unless prisoner is relieved from serving sentence by pardoning prerogative. Id.

22. Immaterial whether or not he left state to avoid prosecution. Commonwealth v. Hare, 36 Pa. Super. Ct. 125.

mand must offer some proof that the accused is charged with the commission of a crime and that he is a fugitive from justice.[23] If the requisition is in proper form, the governor of the asylum state has no authority to determine whether the charge is true.[24] The mere transition from territorial to state government does not abolish a crime committed against the territorial law, so as to preclude a state from obtaining the return of a criminal by extradition proceedings.[25] Although not a territory incorporated into the United States, Porto Rico is such a "territory" as is comprised in the extradition laws,[26] and, by virtue of the organic act of the island, the governor of Porto Rico has precisely the same power as that possessed by the governor of any organized territory to issue a requisition for the return of a fugitive criminal.[27]

*Procedure.*See 11 C. L. 1458—By federal statute, a governor is required to certify the authenticity of the complaint on which he demands extradition,[28] and, since the statute does not specify how the governor is to be satisfied that the complaints are authentic, this is a matter for his own determination.[29] A complaint or information, duly sworn to, is such affidavit as is required as the basis of an extradition proceeding, if it is a proper method of charging the commission of the crime in the state where committed,[30] and, if sufficient in form, a court cannot inquire as to the knowledge of the affiants as to the facts.[31] Depositions from a foreign country, which are admissible in evidence upon the hearing of a proceeding in extradition before a commissioner, are also to be admitted for the purpose of vesting jurisdiction in the commissioner to issue the warrant.[32] If extradition proceedings are regular in form, the person attacking them must show he is not a fugitive from justice.[33] When a person, arrested for extradition under an executive warrant, denies that he is the person against whom such warrant is issued, and seeks his discharge in habeas corpus proceedings, the burden of proof to show his identity is on the state seeking his deportation.[34] The accused is entitled to show that he was not in the state of demand at the time of the alleged commission of the offense.[35]

23. Extradition of Mutchler, 8 Ohio N. P. (N. S.) 345.

24. Commonwealth v. Hare, 36 Pa. Super. Ct. 125.

25. Warrant issued by governor of Texas honoring requisition of governor of Oklahoma held not invalid because crime was committed during territorial period and indictment was found after change to state. Ex parte McCarty [Tex. Cr. R.] 119 SW 682. To prevent return, it must appear such offense no longer exists in state. Id.

26. New York v. Bingham, 211 U. S. 468, 53 Law. Ed. 286.

27. Rev. St. § 5278 (U. S. Comp. St. 1901, p. 3597), made applicable by Organic Act of April 12, 1900, putting in force in Porto Rico all federal statutes not locally inapplicable. New York v. Bingham, 211 U. S. 468, 53 Law. Ed. 286.

28. Rev. St. § 5278 (U. S. Comp. St. 1901, p. 3592). Morrison v. Dwyer [Iowa] 121 NW 1064. Certification of copies of complaint by governor demanding extradition held sufficient. Id.

29. Morrison v. Dwyer [Iowa] 121 NW 1064.

30. Complaint charging petitioners with commission of crime in Nebraska was sworn to by county attorney of proper county, and it was made to appear this was proper method in that state of charging persons with crime of which petitioners were accused. Morrison v. Dwyer [Iowa] 121 NW 1064.

31. Where allegations of fact in complaint were sworn to by county attorney without qualification, held not for court to say he swore on information and belief. Morrison v. Dwyer [Iowa] 121 NW 1064.

32. Not necessary to jurisdiction of commissioner that record and depositions from Mexico be fastened to complaint, when they were in custody and keeping of consul, and commissioner was already in possession of information which they contained. Ex parte Yordi, 166 F 921. Under such circumstances, complaint not insufficient for failure of affiant to state sources of his information. Id.

33. Morrison v. Dwyer [Iowa] 121 NW 1064.

34. Evidence held insufficient to establish petitioner was same person named in extradition papers. Barnes v. Nelson [S. D.] 121 NW 89.

35. Under Burns' Ann. St. 1908, § 1899, providing no resident of state shall be surrendered under pretense of being fugitive from justice where it appears such resident was in asylum state at time offense was committed, resident of state is entitled to show restraint is illegal, and that he was not in demanding state when offense was committed, and that it was not possible for him to be real offender. O'Malley v. Quigg [Ind.] 88 NE 611

*Review.*See 11 C. L. 1454—The record must exclude every reasonable presumption in favor of the ruling below.[36]

*Rights of extradited persons.*See 11 C. L. 1454—When a person has been returned to a state on a criminal charge he is not subject to arrest for contempt to enforce a civil right until he has had an opportunity to return to the state from which he was extradited,[37] though he was resident of demanding state at time he absconded and had not since acquired a residence elsewhere,[38] and though the court had, prior to his departure from the demanding state, obtained jurisdiction of the subject-matter of the suit in which judgment was rendered and of his person.[39]

FACTORS.[40]

The scope of this topic is noted below.[41]

*The relation of factor to consignor.*See 11 C. L. 1454—The term "factor" is one of fixed commercial significance,[42] meaning a mercantile agent intrusted with the possession, control, and sale of personal property for a commission for the benefit of his principal.[43] His commission, sometimes called "factorage," [44] though usually a percentage of the receipts,[45] may be made a percentage of the profits.[46] His powers, of course, exceed those of a mere bailee,[47] but he does not acquire title to the goods entrusted to his possession.[48] As to their proceeds, however, his obligation to the principal is that of debtor.[49] Upon the termination of the relationship, he holds as a fiduciary the unsold goods, or their proceeds if sold thereafter.[50] One who lends his credit to another for the purchase of goods does not thereby become the factor of the latter.[51]

*Rights and liabilities inter se and as to third persons.*See 11 C. L. 1455—The rights of the factor, as against his principal, may be modified by express contract,[52] and

36. Where it appears from the papers embodied in a bill of exceptions, that the governor of the state was authorized to grant a warrant of extradition, and the proceedings are in all other respects regular, but the record fails to disclose what action was taken by the governor, it will be presumed that a warrant of extradition was granted and that the prisoner is held by virtue of such warrant, and refusal of a writ of habeas corpus under such circumstances is not erroneous. Craig v. Hamann, 11 Ohio C. C. (N. S.) 457.

37. Defendant extradited on charge of embezzlement and upon release on bail was immediately arrested on attachment for contempt, in presence of court, for failure to obey judgment in civil suit. State v. Boynton, 140 Wis. 89, 121 NW 887.

38, 39. State v. Boynton, 140 Wis. 89, 121 NW 887.

40. Search Note: See notes in 3 C. L. 1416; 5 Id. 1412; 22 L. R. A. 850; 5 L. R. A. (N. S.) 1147; 45 A. S. R. 203; 3 Ann. Cas. 644; 6 Id. 311.

See, also, Factors, Cent. Dig.; Dec. Dig.; 19 Cyc. 109-186; 9 A. & E. Enc. L. (2ed.) 182; 12 Id. 614, 625; 8 A. & E. Enc. P. & P. 828.

41. Matters relating generally to agency (see Agency*), and liability on drafts with bill of lading attached (see Banking and Finance,* § 8), are elsewhere treated. Stock brokers, though sometimes in strictness factors, are treated in the topic Brokers,* § 2.

42. Winslow Bros. & Co. v. Staton, 150 N. C. 264, 63 SE 950.

43. Whigham v. Fountain [Ga.] 63 SE 1115.

44. Winslow Bros. & Co. v. Staton, 150 N. C. 264, 63 SE 950.

45, 46. Mathieu v. Goldberg, 156 F 541.

47. Schwab v. Oatman, 129 App. Div. 274, 113 NYS 910.

48. Kinston Cotton Mills v. Kuhne, 129 App. Div. 250, 113 NYS 779.

49. Dischargeable in bankruptcy. Mathieu v. Goldberg, 156 F 541.

50. Consequently where terminated just prior to factor's bankruptcy, his liability therefor is, under Act July 1, 1898, c. 541, § 17; 30 Stat. 551 (U. S. Comp. St. 1901, p. 3428), not dischargeable in bankruptcy where his refusal to return the same amounted to bad faith. Mathieu v. Goldberg, 156 F 541.

51. One acting as del credere agent of the purchaser in other transactions postponed to purchaser's trustee in bankruptcy as to the goods purchased. In re Sassman, 167 F 419.

52. By provision that commission be paid only on money actually received by principal, under which refusal of principal to fill orders taken by factor, held to entitle factor only to the liquidated damages provided. West Coast Mfrs.' Agency v. Oregon Condensed Milk Co. [Wash.] 103 P 4. Agree-

are sometimes enlarged by a general custom,[53] if not unreasonable,[54] but not by the local custom or usage of a particular trade, unless the principal is chargeable with notice thereof.[55] If the factor choose to collect his commission by suit, he must first pay the proceeds to the principal.[56] Where a factor makes advances to his principal on account of goods consigned, he has a lien therefor,[57] to enforce which, as commonly recognized by statute,[58] he may sell the goods according to the usages of trade for reimbursement,[59] and this right is, of course, not waived by the customary agreement to await a favorable market.[60] The factor will, however, be liable for negligence in selling the property,[61] though not for mere mistakes of judgment.[62] The lien for advances may also be enforced by detention of the goods until the principal discharges the lien [63] or is prevented from so doing by the factor.[64] But thereupon the principal may retake the goods,[65] even though the factor's commission was to have been measured by the profits.[66] Similarly the principal may treat as a conversion the factor's refusal to return unsold goods in accordance with the contract, and may recover their value.[67] The statutory lien of a factor in Louisiana upon a crop for whose cultivation he has made advances, does not cover the seed necessary for the crop of the ensuing year.[68] The factor's lien for advances is superior to the claim of the principal's trustee in bankruptcy.[69] The factor's obligation to account for the proceeds of consignments sold in due course is dischargeable in bankruptcy,[70] but this is not true of his obligation to return goods unsold at the termination of his agency.[71]

A factor has no power to pledge,[72] exchange,[73] or otherwise transfer property contrary to the usage of trade,[74] nor may he accept the cancellation of his own personal indebtedness to the vendee, as payment.[75] But a principal who invests his factor with the indicia of title thereby estops himself from disputing the title of the factor's innocent transferee [76] for value.[77] This latter rule is commonly recognized

ment not to sell for reimbursement for advances without consent of principal and notice to him. Whigham v. Fountain [Ga.] 63 SE 1115.

53. Which will be judicially noticed on demurrer. Poland v. Hollander, 62 Misc. 523, 115 NYS 1042.

54. Reasonableness of alleged custom to allow factor entire excess obtained by him over price fixed by principal questioned. Poland v. Hollander, 62 Misc. 523, 115 NYS 1042.

55. Either because of actual knowledge or because custom is one of long standing. Poland v. Hollander, 62 Misc. 523, 115 NYS 1042.

56. Declaration failing to show actual receipt by principal bad on demurrer. Poland v. Hollander, 62 Misc. 523, 115 NYS 1042.

57. Whigham v. Fountain [Ga.] 63 SE 1115.

58. By-Laws 1874, Act No. 66, p. 114, and Laws 1882, Act No. 44, p. 56. Dreyfuss v. Gumble & Co., 123 La. 344, 48 S 958.

59. Whigham v. Fountain [Ga.] 63 SE 1115.

60. Where no allegation that it was unfavorable at time of sale. Dreyfuss v. Gumble & Co., 123 La. 344, 48 S 958.

61. Where goods sent to distant market in which price was known to be lower than in local market. Webster v. Richardson [Tex. Civ. App.] 119 SW 142.

62. Webster v. Richardson [Tex. Civ. App.] 119 SW 142.

63. Mathieu v. Goldberg, 156 F 541.

64. By factor's refusal to furnish itemized claim where principal has expressed willingness to pay. Mathieu v. Goldberg, 156 F 541.

65, 66. Mathieu v. Goldberg, 156 F 541.

67. Passow v. Kirkwood Distillery Co. [Wash.] 103 P 34.

68. Under Act of 1874, No. 66, p. 114. Dunlap v. Berthelot, 122 La. 531, 47 S 882.

69. Factor may sell goods after principal's bankruptcy to satisfy lien. Dreyfuss v. Gumbie & Co., 123 La. 344, 48 S 958.

70. Mathieu v. Goldberg, 156 F 541.

71. Improper refusal to return such goods or their proceeds held to make this obligation a debt created by his fraud, embezzlement, or misappropriation while acting in a fiduciary capacity, within Act July 1, 1898, c. 541, § 17; 30 Stat. 551 (U. S. Comp. St. 1901, p. 3428). Mathieu v. Goldberg, 156 F 541.

72. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750, rvg. jt. 141 Ill. App. 276.

73. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750.

74. McCarthy v. Crawford, 141 Ill. App. 276.

75. Winslow Bros. & Co. v. Staton, 150 N. C. 264, 63 SE 950; McCarthy v. Crawford, 238 Ill. 38, 86 NE 750.

76. By delivery to broker for sale, a receiver's certificate indorsed in blank, though non-negotiable, and though assignments must, as stated thereon, be registered upon receivers' books, and though transferee knew transferor was a broker, and the receivers refused to register the transfer. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750, rvg. 141 Ill. App. 276.

77. Cancellation of factor's pre-existing, personal debt, held sufficient. McCarthy v. Crawford, 238 Ill. 38, 86 NE 750.

by so-called "factor's acts," [78] which modify the strict common-law rule charging all persons who deal with general factors with knowledge of the nature and limitations of their calling,[79] and which are liberally construed for the protection of such persons.[80] The purpose of such acts is to apply the general common-law rule that, where one of two innocent persons must suffer loss from the act of a third person, such loss shall be borne by him who has placed the third person in the position which enabled him to do the act causing the loss.[81]

Factors' Acts, see latest topical index.

FALSE IMPRISONMENT.

The scope of this topic is noted below.[82]

§ 1. What Constitutes, Persons Liable, and Justification, 1759.
§ 2. The Action to Recover Damages, 1762.

§ 1. *What constitutes, persons liable, and justification.*[83] —See 11 C. L. 1456— False imprisonment is the unlawful violation of the personal liberty of another,[84] either by force or threats.[85] It differs from malicious prosecution in that the latter proceeds from a legal arrest inspired by malice and without probable cause,[86] while in false imprisonment the imprisonment must be unlawful and malice is conclusively imputed therefrom.[87] It may consist of an unauthorzied arrest or incarceration,[88] without legal warrant [89] or probable cause.[90] A voluntary waiver of a war-

78. By Laws 1830, c. 179, p. 293, § 3; 2 Birdseye's Rev. St. (3d ed.), p. 1415, § 1, one advancing money to factor on faith of bills of lading entrusted to factor's possession for delivery of goods need not account to principal for money collected from purchaser of goods after factor's bankruptcy. Kinston Cotton Mills v. Kuhne, 129 App. Div. 250, 113 NYS 779. Laws 1830, c. 179, p. 203, cannot be invoked by pledgee who advanced money to pledgor who had no bill of lading, custom house permit, or warehouse receipt. Schwab v. Oatman, 129 App. Div. 274, 113 NYS 910.

79. Under which an ordinary case of undisclosed principal would therefore not be governed by decision in factor cases, relative to right of agent's vendee to set off against principal claim against agent. Winslow Bros. & Co. v. Staton, 150 N. C. 264, 63 SE 950.

80. Laws 1830, p. 203, c. 179, § 3. Kinston Cotton Mills v. Kuhne, 129 App. Div. 250, 113 NYS 779.

81. Kinston Cotton Mills v. Kuhne, 129 App. Div. 250, 113 NYS 779.

82. Includes liability for the tort and procedure to enforce the same. Excludes the legality of arrests generally (see Arrest and Binding Over,* §§ 1, 2, 5), liability for arrest on valid process with malicious intent (see Malicious Prosecution and Abuse of Process*), and remedies for release from unlawful confinement (see Habeas Corpus [and Replegiando]*). As to the measure of damages, see Damages,* § 5A.

83. Search Note: See notes in 8 C. L. 1417; 5 Id. 1414; 7 Id. 1644; 18 L. R. A. 356; 51 Id. 193; 3 L. R. A. (N. S.) 221; 4 Id. 282, 451; 7 Id. 268, 576; 67 A. S. R. 408, 422; 118 Id. 719; 1 Ann. Cas. 926; 4 Id. 325; 8 Id. 34.

See, also, False Imprisonment, Cent. Dig. §§ 1-79; Dec. Dig. §§ 1-15; 19 Cyc. 319-356; 12 A. & E. Enc. L. (2ed.) 719, 733, 750.

84. Under Pen. Code, § 236, an unlawful arrest or detention of one without warrant or by an illegal warrant, or warrant illegally executed. Donati v. Righetti, 9 Cal. App. 45, 97 P 1128.

85. Wrong may be committed by words alone, or acts alone, or both, and by merely operating on will of individual, by personal violence, or by both. Gold v. Campbell [Tex. Civ. App.] 117 SW 463.

86. Roberts v. Thomas [Ky.] 121 SW 961; Donati v. Righetti, 9 Cal. App. 45, 97 P 1128.

87. Gold v. Campbell [Tex. Civ. App.] 117 SW 463.

88. Defendant held not protected under Code Cr. Proc. § 183, authorizing private person to make arrest under certain circumstances. Johnston v. Bruckheimer, 133 App. Div. 649, 118 NYS 189. Arrest and detention of plaintiff held not authorized by Ordinance No. 561, City of El Paso. Gold v. Campbell [Tex. Civ. App.] 117 SW 463.

89. Fact that warrant was issued to officers of one county did not authorize defendants to arrest plaintiff in another county, since they had no warrant in possession at time of arrest. Little v. Rich [Tex. Civ. App.] 118 SW 1077. Where justice had no jurisdiction to issue commitment, it was void, and did not justify constable in making arrest. Ray v. Dodd, 132 Mo. App. 444, 112 SW 2. Reasonable suspicion or probable cause to believe defendant committed or intended to commit offense described in Penal Code, § 110, not sufficient to justify arrest without warrant, under Code Cr. Proc. § 177. Stearns v. Titus, 193 N. Y. 272, 85 NE 1077.

* Always begin with the latest article on the subject. Use the latest topical index.

rant,[91] or voluntary appearance,[92] bars the right of action. Actual force or visible physical restraint is not essential,[93] but the submission must be to a reasonably apprehended force.[94] All parties participating or assisting in an illegal arrest are trespassers ab initio,[95] but an officer's liability ends when his duty in the premises has been discharged,[96] and a prosecutor's liability ends when a committing magistrate has acted on the case.[97] One at whose instance or request the tort is committed is liable as a party thereto.[98] A master or principal is liable for a false imprisonment by,[99] or at the instance of,[1] a servant or agent, within the scope of the latter's employment or authority. Sureties on the official bond of a public officer are liable for false imprisonment committed by him in his official capacity.[2] An officer is liable for exceeding his authority in committing an execution debtor to jail,[3] as is also an execution creditor who ratifies such unlawful act.[4] Although the court may have erred in his judgment,[5] imprisonment under the legal process of a court having jurisdiction of the subject-matter cannot be made the basis of an action for damages for false imprisonment.[6] A person who is quarantined has no cause of

Arrest of plaintiff by private citizen for committing alleged misdemeanor, not in his presence, held unlawful without warrant. Gearity v. Strasbourger, 133 App. Div. 701, 118 NYS 257. Arrest without warrant held not justified, as plaintiff was not guilty of felony or breach of peace. Schnider v. Montross [Mich.] 16 Det. Leg. N. 557, 122 NW 534.

90. New trial granted where lower court failed to instruct jury on question of probable cause, but stated defendant, common carrier, was liable if servant inflicted wrong on passenger by arresting him or unlawfully removing him from train, "regardless of particular motive of such servant." Atchison, etc., R. Co. v. Woodson [Kan.] 100 P 633. Error to instruct jury that principal question for them to consider was whether defendant acted with probable cause, where he was liable in any event because not protected by §§ 177-183, Code Crim. Proc. Gearity v. Strasbourger, 133 App. Div. 701, 118 NYS 257.

91. Erie R. Co. v. Reigherd [C. C. A.] 166 F 247.

92. Voluntary arrangement by prisoner for discharge and subsequent appearance, pending arrival of magistrate, held equivalent to waiver of any action he might have had against officer for failure to make prompt complaint before magistrate. Venable v. Huddy [N. J. Law] 72 A 110.

93. Plaintiff held technically restrained under void warrant where proceedings were continued from time to time and he had to furnish bail until discharge on appeal. Worden v. Davis, 195 N. Y. 391, 88 NE 745.

94. Mere asserted purpose to forcibly detain one, or fact that one considers himself restrained in purpose, not sufficient. Powell v. Champion Fiber Co., 150 N. C. 12, 63 SE 159. Restraint held voluntary where plaintiff was being ejected from grounds for failure to pay admission fee, but had privilege of remaining upon paying fee. Crossett v. Campbell, 122 La. 659, 48 S 141.

95. Chief of police held liable for detaining plaintiff at station, although not responsible for original arrest. Gold v. Campbell [Tex. Civ. App.] 117 SW 463.

96. Arresting officer's authority over prisoner ceases when latter is turned over to officer in charge of station. Gisske v. Sanders, 9 Cal. App. 13, 98 P 43.

97. Where magistrate decided verified complaint sufficie ly charged plaintiff with crime and committed her in default of bail, held imprisonment from that time on was by due process of law and defendants not liable, though original arrest was illegal. Gearity v. Strasbourger, 133 App. Div. 701, 118 NYS 257.

98. Master of vessel, who procured arrest of seaman without warrant, held liable in absence of showing of legal justification. The Tillie Baker, 168 F 941.

99. Evidence held to show defendant was acting within implied, if not express, authority to make the arrest, conferred by firm he was working for, especially where one member of firm approved of course employe took and was present when latter turned plaintiff over to officer. Gearity v. Strasbourger, 133 App. Div. 701, 118 NYS 257.

1. Evidence held sufficient to warrant submission to jury of question whether arrest, admittedly wrong, was at instance of conductor in defendant's employ. Pullman Co. v. Hunt [C. C. A.] 166 F 833.

2. Gomez v. Scanlan [Cal.] 102 P 12. Ambiguity in earlier instructions held removed by subsequent instructions. Id. Sureties not liable where evidence did not show principal did act constituting offense under claim of right to do it in his official capacity. Gold v. Campbell [Tex. Civ. App.] 117 SW 463.

3. Disclosure commissioner held liable for committing debtor to whom he denied benefit of oath prescribed by Rev. St. 1903, c. 114, § 55. Stuart v. Chapman, 104 Me. 17, 70 A 1069.

4. Paying for support of such debtor while in jail was ratification. Stuart v. Chapman, 104 Me. 17, 70 A 1069.

5. As where he misjudged sufficiency of affidavit filed to secure writ. Feld v. Loftis, 240 Ill. 105, 88 NE 281, afg. 140 Ill. App. 530.

6. Feld v. Loftis, 240 Ill. 105, 88 NE 281. Process, under such circumstances, constitutes full justification, not only of officer who serves process, but of magistrate who issues it and of party at whose suit it was issued. Id. Suitor is not responsible for

action for false imprisonment against the persons vested by law with power to establish the quarantine,[7] unless they exceed their authoritty,[8] and no liability can be predicted where the quarantine is voluntary.[9] A slight misnomer in the name of a person arrested, appearing in a warrant or complaint, does not give a right of action for false imprisonment.[10]

*Justification and excuse.*See 11 C. L. 1458—One is protected where an arrest was lawful,[11] or where he acted under regular legal process,[12] unless he abused such process.[13] Detention for an unreasonable length of time may constitute false imprisonment, though the arrest was legal,[14] and the reasonableness of the detention is for the court, where there is no conflict in the evidence, otherwise it is for the jury.[15] Where the facts are sufficient upon which an action for false arrest is based, the motive prompting the bringing of the action is immaterial,[16] but good motive is a material part of the defense,[17] and an officer may defend on the ground of probable cause.[18] In an action solely for false imprisonment, the termination of the criminal proceedings is immaterial,[19] unless such termination involves the element of the validity of the arrest.[20]

sufficiency of justice's judgment or his failure to comply with the statute (see Hurd's Rev. St. 1908, c. 79, art. 17, § 1, and c. 51, § 17) when he has filed an affidavit, insufficient though it be. Id.

7. Under Code, § 2568, mayor of city had power to declare quarantine on proper notice. Kirby v. Harker [Iowa] 121 NW 1071.

8. Evidence held to show defendant did not act beyond scope of his authority. Kirby v. Harker [Iowa] 121 NW 1071.

9. Where requisite notice of quarantine was not given plaintiff, and he remained indoors by virtue of agreement until same was delivered, held no liability previous to notice. Kirby v. Harker [Iowa] 121 NW 1071.

10. Name of plaintiff as given in warrant was "Florence." She asserted real name was "Florence B." Held immaterial under Rev. Laws Mass. 1902, c. 218, § 19, and Id., § 67. O'Halloran v. McGuirk [C. C. A.] 167 F 493.

11. Arrest without warrant by railroad special policeman, clothed with authority of regular police officer, held justified where plaintiff was intoxicated and acted in disorderly manner on train. Erie R. Co. v. Reigherd [C. C. A.] 166 F 247. Arrest of plaintiff at instance of defendant and his commitment for examination as to his sanity, under Laws 1896, p. 471, c. 545, held justified by plaintiff's conduct. Cahill v. Michaelis [C. C. A.] 170 F 66. Ticket agent protected for directing officer to arrest plaintiff for disturbing peace in agent's presence, as provided by Code Cr. Proc. 1895, art. 247. James v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 116 SW 642. That plaintiff was previously arrested and convicted did not make subsequent arrest and imprisonment on same charge unlawful. Held a matter of defense. Donati v. Righetti, 9 Cal. App. 45, 97 P 1128. Dismissal of prosecution because of previous conviction for same offense did not annul or render unlawful arrest upon legal process. Id. Where defendant knew of previous conviction and again prosecuted plaintiff on same charge, withholding of such knowledge held not to show false imprisonment; tends to establish malicious motives and bad faith. Id. Night watchman held to have had power to arrest fellow watchman, without warrant, if he caught him in act of stealing. Giorgio v. Batterman, 134 App. Div. 139, 118 NYS 828. Petition held to show plaintiff was not arrested without valid authority, since warrant was legally issued by proper officer. Roberts v. Thomas [Ky.] 121 SW 961.

12. Perego v. Lake Shore & M. S. R. Co. [Mich.] 16 Det. Leg. N. 592, 122 NW 535. Warrant held to conform to law and motives which induced its issuance or execution held immaterial. Michael v. Bacon, 5 Ga. App. 331, 63 SE 228. A valid warrant cannot be based upon allegations in affidavit therefor which affirmatively show no criminal offense has been committed. Id. Protected where plaintiff was arrested under warrant, valid on its face, issued by justice of peace having jurisdiction of offense charged upon complaint which sufficiently designated offense. Emerson v. Lowe Mfg. Co. [Ala.] 49 S 69.

13. Not excused where warrant for arrest of plaintiff on criminal charge was used to collect debt and extort additional sum. McClenny v. Inverarity [Kan.] 103 P 82.

14. Venable v. Huddy [N. J. Law] 72 A 10. Where officer makes an arrest without warrant, it is his duty to take person arrested before magistrate without unreasonable delay. Schoette v. Drake, 139 Wis. 18, 120 NW 393. Where plaintiff was arrested between 5 and 6 o'clock p. m., and left in lockup until 9 or 10 a. m., following day, held unreasonable because court was open evenings. Id.

15. Two hours held not unreasonable time where magistrate was not in his office at time officer brought his prisoner there and officer went out to find magistrate. Venable v. Huddy [N. J. Law] 72 A 10.

16. Simper v. Carroll, 12 Ohio C. C. (N. S.) 140.

17. Conductor of passenger train may imprison passenger, without warrant, when he has probable cause for believing passenger has committed felony, and acts in good faith on such belief. Atchison, etc., R. Co. v. Woodson [Kan.] 100 P 633.

18. Officer justified in arresting plaintiff upon refusal to answer questions when circumstances warranted same. Gisske v. Sanders, 9 Cal. App. 13, 98 P 43.

19. Where plaintiff was arrested for misdemeanor not committed in presence of of-

§ 2. *The action to recover damages.*[21] See 11 C. L. 1459—The complaint must connect defendant with the imprisonment [22] and must state the facts showing its unlawfulness [23] and if the cause of action is based on the invalidity of judicial proceedings, every fair inference in their favor must be negatived.[24] Failure to separately state a cause of action for false imprisonment and malicious prosecution is waived by not raising an objection thereto before the trial.[25] Justification by arrest upon view and under warrant and conviction had, when pleaded in an action, do not permit of the replication de injuria.[26] Questions of fact, such as whether plaintiff was, at the time of arrest, violating any law or ordinance, are for the jury.[27] Evidence is admissible which tends to justify or mitigate the unlawful act.[28] Where it is alleged that defendants formed a conspiracy to unlawfully imprison plaintiff, union of purpose must be proved.[29] Facts showing the cause of the arrest and the animus of the defendant are admissible,[30] but hearsay cannot be resorted to.[31] Instructions must be supported by the evidence.[32]

FALSE PERSONATION.[33]

FALSE PRETENSES AND CHEATS.[34]

The scope of this topic is noted below.[35]

Elements of Offense, 1763.
Statutory Cheats, Swindling, etc., 1764.
Defenses, 1764.
Limitations, 1765.
The Indictment, 1765.
Evidence; Admissibility, 1766.
Sufficiency of Proof, 1766.
Instructions and Verdicts, 1767.

ficer who arrested him, contrary to Code Civ. Proc. § 177, held plea of guilty did not affect validity of arrest, and right of action for false imprisonment not barred. Knickerbocker Steamboat Co. v. Cusack [C. C. A.] 172 F 358. Liability of officer for illegal arrest not waived by plea of guilty. Gold v. Campbell [Tex. Civ. App.] 117 SW 463.

20. Where plaintiff, arrested for misdemeanor committed in presence of officer who arrested him, pleaded guilty, held he waived right to deny validity of detention. Erie R. Co. v. Reigherd [C. C. A.] 166 F 247.

21. **Search Note:** See note in 10 L. R. A. (N. S.) 303.

See, also, False Imprisonment, Cent. Dig. §§ 80-121; Dec. Dig. §§ 16-42; 19 Cyc. 356-375; 8 A. & E. Enc. P. & P. 841.

22. Count held insufficient for failure to aver that defendant arrested and imprisoned plaintiff, or caused him to be arrested and imprisoned. Reach v. Quinn [Ala.] 48 S 540.

23. Averment that a judge "without probable cause or any cause" issued warrant for plaintiff's arrest held conclusion of pleader and did not show same was illegally issued. Schooler v. Yancey [Ky.] 118 SW 940. Allegation that defendant, as judge, demanded excessive bail, though plaintiff was not proved guilty, held mere conclusion. Id.

24. In absence of contrary allegations, it is presumed complaint stated facts giving justice of peace jurisdiction. Donati v. Righetti, 9 Cal. App. 45, 97 P 1128. Allegation that defendant refused to permit third persons to sign a bond as bail, and which failed to allege that such third persons authorized any one in writing to sign their names to bond, as required by Ky. St. § 482 (Russell's St. § 1799), held insufficient. Schooler v. Yancey [Ky.] 118 SW 940.

25. Causes not necessarily inconsistent. Gearity v. Strasbourger, 133 App. Div. 701, 118 NYS 257.

26. Taverna v. Churchill [N. J. Law] 72 A 43.

27. Evidence held sufficient to warrant submission to jury for determination. Schoette v. Drake, 139 Wis. 18, 120 NW 393.

28. Where arrest of plaintiff was without complaint or warrant and unjustified under undisputed facts, the complaint, warrant and information of arrest, filed and issued after false imprisonment, should not have been admitted, it being undisputably shown he was not detained after warrant was issued. Gold v. Campbell [Tex. Civ. App.] 117 SW 463.

29. Ray v. Dodd, 132 Mo. App. 444, 112 SW 2.

30. Error to exclude **criminal complaint made against plaintiff,** as it was competent to show credibility of defendant and cause of plaintiff's arrest. Schoette v. Drake, 139 Wis. 18, 120 NW 393. Evidence held admissible regarding **conduct of plaintiff,** for some time prior to arrest, which was connected with his arrest. Id. Evidence showing existence of **custom** of employes in taking coal found in defendant's yard held relevant to illustrate question as to animus furandi of plaintiff and quo animo of defendants in making arrest on larceny charge. Southern R. Co. v. Peek [Ga. App.] 64 SE 308.

31. Letter written by one not party to action, in name of one who is party, held inadmissible to prove guilt of latter. Little v. Rich [Tex. Civ. App.] 118 SW 1077.

32. Where court charged that evidence failed to show plaintiff's client had committed any crime when arrested, held error to charge that if defendants believed plaintiff intended to destroy paper given by him by client at time of arrest, and defendants were assaulted while trying to prevent such destruction, plaintiff's arrest was justifiable. Stearns v. Titus, 193 N. Y. 272, 85 NE 1077.

Elements of offense. See 11 C. L. 1461—It must appear that accused knowingly made a false pretense,[36] expressed or implied,[37] in regard to some existing fact,[38] with intent to defraud,[39] which the party defrauded relied upon,[40] by reason of which he actually did defraud and obtain something of value[41] in which the defrauded person had a general or special property.[42] The mere satisfaction of a debt, by the false representation of the value of the property given in satisfaction is not obtaining money under false pretenses.[43] It is not essential that the defendant personally obtained the property.[44] Statutes in some states, adopt the common-law rule that the false pretense must be accompanied by a writing of some false token.[45]

33. No cases have been found for this subject since the last article. See 5 C. L. 1415.

Search Note: See False Personation, Cent. Dig.; Dec. Dig.; 19 Cyc. 379-383; 12 A. & E. Enc. L. (2ed.) 786; 8 A. & E. Enc. P. & P. 855.

34. Search Note: See notes in 3 C. L. 1419; 5 Id. 1420; 14 L. R. A. 264; 35 Id. 571; 6 L. R. A. (N. S.) 365, 369; 7 Id. 278; 11 Id. 938; 21 A. S. R. 265; 25 Id. 378; 30 Id. 134; 85 Id. 368; 4 Ann. Cas. 368; 7 Id. 32; 8 Id. 1069; 9 Id. 857, 970; 10 Id. 906; 11 Id. 833.

See, also, False Pretenses, Cent. Dig. §§ 1-27, 31-53, 55-61, 64, 65; Dec. Dig. §§ 1-22, 26-38, 41-48, 52, 53; 19 Cyc. 386-421, 423-426, 429, 431-436, 438-443, 445, 447; 12 A. & E. Enc. L. (2ed.) 792; 8 A. & E. Enc. P. & P. 857.

35. It treats of the crime of obtaining money by false pretenses or other cheat, including those offenses denominated larceny by statute in which fraud takes the place of the taking necessary to common-law larceny. As to matters common to all crimes, see Criminal Law* and Indictment and Prosecution.*

36. Not sufficient that claim is false in fact. State v. Hartnett [Del.] 74 A 82. In determining whether defendant made false pretense, proper to consider declarations or acts of defendant, or agents or representatives, if latter acted under defendant's authority. Id.

37. Statement by defendant that he got check from mail, accompanied by other acts of ownership, such as cashing it, when taken together, held to constitute representation that he was owner as completely as though he stated so orally. Martins v. State, 17 Wyo. 319, 98 P 709. What defendant intended by such acts and statements held question for jury. Id. Where a bank represented that "we never speculate in stocks; we loan money on real estate; it is solid rock security; we require income producing property," meaning ascribed by innuendo that bank did not invest its money in stocks and loaned its money only on security of income producing real estate held not to obtain. State v. Gibbs, 7 Ohio N. P. (N. S.) 371.

38. State v. Ferris, 171 Ind. 562, 86 NE 993. False statement by minor that he is of age in order to induce another to enter into contract held existing fact. Commonwealth v. Ferguson [Ky.] 121 SW 967. False pretense cannot be predicated upon performance of future promise. State v. Ferris, 171 Ind. 562, 86 NE 993; Oliver v. State [Ga. App.] 65 SE 843. Postdated check, given in exchange for merchandise, defendant explaining at time of exchange that money in bank not sufficient to meet check, but he intended to deposit difference in couple of days, held not false pretense when he failed to deposit money as agreed; equivalent to promise to pay at future date. State v. Ferris, 171 Ind. 562, 86 NE 993. No false pretense where laborer received provisions and agreed to perform work following week in payment for them, but failed to do so. Oliver v. State [Ga. App.] 65 SE 843. Misrepresentation as to existence of a firm indicated by defendant held sufficient to sustain indictment. State v. Germain [Or.] 103 P 521.

39. State v. Hartnett [Del.] 74 A 82.

40. In prosecution for obtaining money on check, where only misrepresentation was as to defendant's name, which was not relied on by claimant, held it could not have been moving cause of exchange. State v. Bingham, 51 Wash. 616, 99 P 735. Evidence held to warrant finding that prosecutrix relied on defendant's representations that he was officer of United States, in extending credit to him and loaning him money. Littell v. U. S. [C. C. A.] 169 F 620. Where defendant, claiming to have been previously deceived by defendant in horse trade, stood within few feet of horse in question, and after having been told twice that no warranty would be given, and without examining horse, ordered it sent to his stables, on guaranty by defendant that it was sound, held, where defect is patent one, elements of false pretenses not established. State v. Davis, 150 N. C. 851, 64 SE 498.

41. The crime is complete only when the wrongful act operates upon or affects some one. State v. Clark [Iowa] 119 NW 719.

42. Naked possession by agent of principal's property does not vest title of ownership in such agent. Martins v. State, 17 Wyo. 319, 98 P 709. **County treasurer** held within c. 418, p. 474, vol. 11, Laws of Delaware. State v. Hartnett [Del.] 74 A 82.

43. State v. Daniel [S. C.] 65 SE 236.

44. If accused, by means of false pretenses with intent to defraud; induced prosecuting witness to deposit money in bank of which accused was director, the money was "obtained" by accused within meaning of § 7076, notwithstanding it was not received by him personally. State v. Perrin, 9 Ohio N. P. (N. S.) 97. Where indictment charges that by reason of false pretenses on part of defendant money was deposited in bank, it will be held to have been prima facie a general deposit, title to which passed to bank. Id.

45. Under § 1407, vol. 1, B. & C. Comp., not necessary that memorandum contain whole pretense but that it corroborate oral evidence thereof. State v. Germain [Or.] 103 P 521. Where fraudulent representation was

* Always begin with the latest article on the subject. Use the latest topical index.

The offense of obtaining money by falsely pretending to an official capacity is false pretense and not extortion.[46]

Statutory cheats, swindling, etc. See 11 C. L. 1462—Statutes prohibiting the obtaining of money or property by means of any false pretense must be general in character.[47] Among the offenses specifically prohibited by statute are the presentation of fraudulent claims,[48] a conveyance of realty without disclosing prior liens,[49] obtaining money on a mortgage or bill of sale of personal property by false and fraudulent statements as to the existence of liens,[50] fraudulently obtaining the signature of any person to a written instrument,[51] obtaining money by falsely personating an officer of the United States,[52] obtaining money or goods upon a counterfeit writing,[53] the obtaining of money or other property on a contract of hiring with intent to defraud,[54] the working of the so-called "confidence game," [55] and obtaining food or accommodation at a boarding house without paying for same.[56] In some states it is essential that the party defrauded was induced by the false pretenses to part with the title to the property and not the mere possession.[57]

Defenses. See 11 C. L. 1463—An offer to correct a fraudulent claim after it is presented to a public officer is not a defense,[58] nor is it a defense that the money was obtained as a charity, where there was a false representation as to a loss sustained by

in writing, parol evidence of conversation had between prosecutor and defendant at time held admissible to corroborate writing. Id.

46. Where it was alleged defendant falsely represented himself to be acting as agent of county attorney in demanding and receiving "hush" money from third person, held offense is obtaining money under false pretenses and not extortion. Drake v. State [Okl. Cr. R.] 103 P 878.

47. Ordinance providing penalty where employment agent, who, by willful misrepresentation or deceit, obtains money of another, held invalid because it makes obtaining of money by willful misrepresentation, which may be done in any business, criminal only when done by one conducting employment office. City of Spokane v. Macho, 51 Wash. 322, 98 P 755.

48. Sheriff presented fraudulent claim to county auditor for alleged prisoner's board. State v. Hartnett [Del.] 74 A 82. Evidence held insufficient to sustain conviction for presenting false charge for transportation against county. People v. Lanterman, 9 Cal. App. 674, 100 P 720. Comp. Laws 1907, § 4083, is violated if claim is one which upon its face purports to be a charge against the particular political division for which officer or board mentioned in statute acts in allowing or paying it, and mere fact that claim is unauthorized by law, and board or officer cannot legally allow or pay it, held not decisive. Law v. Smith, 34 Utah, 394, 98 P 300. So long as claim, if valid, is one that could or should be allowed, it is within statute, although claim itself may be for matter which law does not authorize or even forbids. Id. Term "genuine," used in statute, refers to real claim, as contradistinguished from mere counterfeit. Id.

49. Not necessary to sustain conviction under Pen. Code 1895, § 669, that prosecutor pay off execution levied on property. French v. State, 4 Ga. App. 462, 61 SE 836.

50. May be offense under Pen. Code 1895, § 668, or § 670, although liens may be recorded. Brown v. State [Ga. App.] 64 SE 1001.

51. Under Penal Code, § 566 (Penal Law, § 932), sufficient if writing becomes "written instrument" when signature is appended. People v. Rouss, 63 Misc. 135, 118 NYS 433. Money or property need not be affected or obtained by such writing; a return to writ of certiorari is "written instrument" within statute. Id.

52. Act April 18, 1884, c. 26, 23 Stat. 11 (U. S. Comp. St. 1901, p. 3679), held not limited to extortion of money from another by assertion of claim for money owing United States, which defendant in pretended capacity represents it is his duty to collect. Littell v. U. S. [C. C. A.] 169 F 620.

53. Indictment being drawn in language of Penal Code 1895, § 247, offense charged could properly be called a felony, because statute declares punishment to be imprisonment and labor in penitentiary. Gray v. State [Ga. App.] 65 SE 191. Statute not void because inhibited acts are not declared to be a crime. Id.

54. Laws Ga. 1903, p. 90. Brawner v. State, 5 Ga. App. 498, 63 SE 514.

55. The confidence game is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler. People v. Depew, 237 Ill. 574, 86 NE 1090. Fact that transaction was made to assume form of legitimate contract is immaterial, if, in fact, it was swindling operation. Id.

56. Complaint, while defectively drawn, held to disclose attempt at charging offense under § 537, Penal Code, although it could not resist force of demurrer, and hence habeas corpus would not lie. Ex parte Avdalas [Cal. App.] 102 P 674.

57. State v. Germain [Or.] 103 P 521. Evidence held to show defendant acquired title and was not bailee of money, although he gave receipt agreeing to return same upon certain conditions. Id.

58. Sheriff presented false claim to county treasurer. State v. Hartnett [Del.] 74 A 82.

defendant.[59] An infant of mature years is placed on the same footing as an adult in regard to liability for false pretense.[60]

*Limitations.*See 7 C. L. 1650—The statute of limitations does not begin to run in favor of the offender until his offense is known to the prosecutor, or to some one interested in the prosecution, or injured by the offense.[61]

The indictment See 11 C. L. 1463 must aver all the essential elements of the offense [62] with precision and certainty,[63] such as the nature of the representations,[64] their falsity,[65] and the false representations that were relied on by the parties defrauded.[66] The names of persons to whom the false representations were made,[67] and the name of the person from whom the property was obtained,[68] must usually be set forth, unless otherwise provided by statute.[69] It is also generally necessary to set forth the description [70] and value [71] of the property. It is sufficient if the offense is charged in the substantial language of the statue.[72] In most states it is not necessary to allege that the person to whom the false pretense was made sustained any loss.[73] Where a partnership is involved, the names of the individuals composing it must be alleged.[74] When the false pretense consist wholly or in part in the use of a written instrument, the writing need not be set out in hæc verba.[75]

59. Since statute makes no exception, act is not without spirit of Ballinger's Ann. Codes and St. § 7165 (Pierce's Code, § 1662). State v. Swan [Wash.] 104 P 145.

60. Ky. St. 1909, § 1208 (Russell's St. § 3474), includes statement by minor that he is of age, if made to induce another to enter into contract, etc. Commonwealth v. Ferguson [Ky.] 121 SW 967.

61. Allegation in indictment for cheating and swindling that offense was unknown to person cheated and defrauded until certain named date held sufficient. Brown v. State [Ga. App.] 64 SE 1001. Proof of allegation presumably fixes date when statute began to run. Id.

62. Indictment held sufficient. People v. Rouss, 63 Misc. 135, 118 NYS 433. Under Oklahoma statute these elements are: First, false representation as to an existing fact; second, reliance on that representation as true; third, it must be moving cause which induced owner to part with his property. Fuller v. Ter. [Okl. Cr. R.] 99 P 1098; Taylor v. Ter. [Okl. Cr. R.] 99 P 628. Indictment held sufficient in action for obtaining **loan on property** not owned by borrower. Fuller v. Ter. [Okl. Cr. R.] 99 P 1098. Where it is alleged bank was induced to **discount note** by false representations, indictment need not allege note was not paid. Medders v. State, 54 Tex. Cr. R. 494, 113 SW 270.

63. Absence of a direct and positive allegation in the description, substance, nature, or manner of offense of false pretense, cannot be supplied by any intendment, argument or implication. Taylor v. Ter. [Okl. Cr. R.] 99 P 628. Ambiguity and uncertainty of language used held fatal defect. Id. Merely describing claim as "a certain false and fraudulent claim" held insufficient in information for presenting fraudulent claims to county commissioners. Du Brul v. State, 80 Ohio St. 52, 87 NE 837.

64. Defendant represented that check had been mailed to him and he expected it that day. Held sufficient to charge that defendant represented same to be his. State v. Ricker, 81 Vt. 456, 70 A 1059.

65. Indictment insufficient for failure to negative representations. Commonwealth v. Caldwell [Ky.] 121 SW 480.

66. Taylor v. Ter. [Okl. Cr. R.] 99 P 628.

67. Allegation that false pretense was made to corporation held sufficient, since Code 1907, § 1, provides word "person" includes corporation. Bailey v. State [Ala.] 48 S 791.

68. Indictment which failed to state name of alleged owner held demurrable. State v. Clark [Iowa] 119 NW 719. Offense is not completed except as property of some other individual is in fact obtained and name of such individual is descriptive of offense. Id. Individual names of persons composing partnership must be alleged. State v. Tatum [Miss.] 50 S 490.

69. Not necessary to mention person defrauded in indictment for violation of Penal Code, § 566 (Penal Law, § 932), since within Penal Code, § 718, subd. 5 (Penal Law, § 3, subd. 7). People v. Rouss, 63 Misc. 135, 118 NYS 433.

70. Allegation that defendant cheated prosecutor by obtaining from him "groceries, consisting of meat and other groceries, of value of $1.10," held insufficient where right to amend exists. Barker v. State [Ga. App.] 65 SE 57.

71. Allegation that defendant obtained $600 in money held sufficient. State v. Tatum [Miss.] 50 S 490. Not necessary to allege check to be of value and that it was to be delivered to prosecutor, he having been cheated by pretense that check had been mailed to defendant. State v. Ricker, 81 Vt. 456, 70 A 1059.

72. Describing complaining witness as "keeper of boarding house" held equivalent to words "proprietor or manager" of an inn, etc., in prosecution under § 537, Penal Code. Ex parte Avdalas [Cal. App.] 102 P 674.

73. Offense described by § 1208, Ky. St. (Russell's St. § 3474), held complete when owner is induced to and actually parts with property by reason of false and fraudulent statement. Commonwealth v. Ferguson [Ky.] 121 SW 967.

74, 75. State v. Tatum [Miss.] 50 S 490.

Evidence; admissibility.[See 11 C. L. 1464]—The intent to defraud may be established either by direct or circumstantial evidence,[76] such as by proof of similar transactions in which accused participated.[77] The accused has the right to state what his intention was in the commission of the act.[78] Evidence showing lack of good faith,[79] and bearing on the falsity of the representations,[80] is admissible, as is evidence to show complainant learned an existing fact, from an apparently authentic source, which influenced his action.[81]

Sufficiency of proof.[See 11 C. L. 1464]—Statutes sometimes regulate the manner in which false pretenses must be proved.[82] The state must establish all the elements of the offense [83] beyond a reasonable doubt.[84] Proof that money was deposited in a bank to the credit of accused is sufficient to show a reception of money.[85] The question of intent is one of fact for the jury where circumstances are relied on which have some tendency to negative fraud.[86] A material variance is fatal,[87] and

76. Jury may consider any statements and acts of defendant, and any other facts and circumstances disclosed by evidence. State v. Hartnett [Del.] 74 A 82.

77. State v. Germain [Or.] 103 P 521. Proper to permit defendant to explain transactions proved by state. Id. Defendant may not prove additional instances, not referred to, in which he had returned money as agreed. Id. Held proper to admit evidence showing that previous to transaction in controversy defendant had made substantially the same representations to others in endeavor to sell them stock in same company. People v. Whalen, 154 Cal. 472, 98 P 194.

78. Lane v. People, 142 Ill. App. 571.

79. Evidence held to show absence of good faith in prosecution for obtaining money by confidence game. People v. Depew, 237 Ill. 574, 86 NE 1090.

80. An uncanceled record of mortgage, without more, is wholly insufficient to disprove truthfulness of representation that property is unincumbered by mortgage liens. State v. Clark [Iowa] 119 NW 719.

81. Evidence of conversation over telephone, whereby complainant was informed of financial statement made by defendant to bank, held admissible to show that knowledge that such statement had been made had been communicated to complainant. People v. Andre [Mich.] 16 Det. Leg. N. 415, 122 NW 98.

82. By statute, if false pretense is expressed in language alone, it must be proved by testimony of two witnesses, or one witness, and corroborating circumstances. Taylor v. Ter. [Okl. Cr. R.] 99 P 628.

83. State v. Hartnett [Del.] 74 A 82. None of pretenses alleged held sufficiently substantiated. Taylor v. Ter. [Okl. Cr. R.] 99 P 628. Burden is on prosecutor to show the false representation and that reasonable reliance on its truth induced plaintiff or prosecutor to part with his money or property. State v. Davis, 150 N. C. 851, 64 SE 498.

84. Not a vague, fanciful, or mere possible doubt, but a doubt growing out of evidence, and such as reasonable, impartial and conscientious men would entertain after careful consideration of all evidence. State v. Hartnett [Del.] 74 A 82. **Evidence sufficient** to sustain conviction for obtaining money by confidence game. People v. Depew, 237 Ill. 574, 86 NE 1090. For larceny of money by false pretenses. Commonwealth v. King, 202 Mass. 379, 88 NE 454. For obtaining loan of money on property not owned by borrower. Fuller v. Ter. [Okl. Cr. R.] 99 P 1098. To sustain conviction for cheating and swindling. King v. State [Ga. App.] 65 SE 318. To show defendant made some of representations which induced bank to loan money and that he was liable as principal. Medders v. State, 54 Tex. Cr. R. 494, 113 SW 270. To justify conviction for fraudulently conveying realty without disclosing prior liens. French v. State, 4 Ga. App. 462, 61 SE 836. **Evidence insufficient** to establish fraudulent intent. Taylor v. Ter. [Okl. Cr. R.] 99 P 628; Roberts v. State [Ga. App.] 65 SE 359. To sustain conviction for obtaining money on check. State v. Bingham, 51 Wash. 616, 99 P 735. To show prosecutors were defrauded. Caswell v. State, 5 Ga. App. 483, 63 SE 566. To prove alleged fraudulent horse trade. State v. Davis, 150 N. C. 851, 64 SE 498. To sustain conviction under Laws 1903, p. 90, for alleged cheating and swindling under labor contract. Walters v. State [Ga. App.] 65 SE 357. To prove false representations induced prosecutor to part with property. Abernathy v. State, 55 Tex. Cr. R. 77, 114 SW 1178. To sustain conviction for fraudulently obtaining check on bank. People v. Shattuck, 194 N. Y. 424, 87 NE 775.

85. Where defendant and another induced bank by false representations to make loan, fact that money was placed in bank to credit of codefendant did not absolve defendant from liability, where he checked same out in codefendant's name. Medders v. State, 54 Tex. Cr. R. 494, 113 SW 270.

86. Whether statement of accused's pecuniary circumstances, filed with a bank, was true, held, under evidence, to be for jury. People v. Andre [Mich.] 16 Det. Leg. N. 415, 122 NW 98. Reversible error for court to charge jury it was not for them to consider whether defendants had right to retain property which they were accused of fraudulently taking. Commonwealth v. Volquarts, 36 Pa. Super. Ct. 199.

87. Held material where proof showed defendant obtained claybank mare in exchange for bay "saddle horse," and indictment alleged he gave prosecutor "a certain sorrel horse." State v. Davis, 150 N. C. 851, 64 SE 498. Indictment, charging obtaining money by false pretenses, held not sustained by proof of obtaining satisfaction of a debt by false representation of value of property

ownership in particular must be proved as alleged.[88] A charge of obtaining money is sustained by proof of obtaining a check and receiving the money thereon.[89] Satisfactory evidence of the fraudulent character of any one of several separate items is sufficient to sustain an indictment.[90]

Instructions and verdicts. See 11 C. L. 1498—The court should instruct on the question of intent,[91] and should define terms used by the parties where it is essential to an understanding of the case.[92]

False Representations; False Swearing; Falsifying Records; Family Settlements; Federal Procedure; Fellow-Servants, see latest topical index.

FENCES.[93]

The scope of this topic is noted below.[94]

Rights, duties and regulations. See 11 C. L. 1496—Until a fence has been established by prescription, by agreement, or by action of fence viewers, the parties remain under their common-law rights and liabilities with reference to trespasses.[95] In some states one must inclose his lands before he may recover for trespass thereon by stock.[96] What constitutes a lawful fence is a matter of local statutory regula-

given in satisfaction. State v. Daniel [S. C.] 65 SE 236. Where in accusation of violation of Acts 1903, p. 90, it was charged defendant fraudulently obtained advance money, etc., from certain individual on labor contract, and proof showed latter made contract as agent. Roberts v. State [Ga. App.] 65 SE 359. Where information alleged defendant described property on which loan was obtained by section, township and range, and proof showed he mentioned only township. Cook v. State [Ala.] 50 S 319. Where charge was that defendant falsely represented he was agent of two individual owners of lot sold to complaining witness, and latter testified defendant had told him he was acting as agent for a bank. People v. Lapique [Cal. App.] 103 P 164. **Held immaterial** where defendant made financial statement of assets to bank and latter informed complainant statement totaled $18,000 over and above debts, while fact was it totaled $18,900. People v. Andre [Mich.] 16 Det. Leg. N. 415, 122 NW 98. Under Laws Ga. 1903, p. 90, question as to who shall pay for laborer's food held not such a material part of contract of employment, considered from standpoint of prosecution for cheating and swindling, as to create variance where no reference is made to it in pleading but it is proved on trial. Brawner v. State, 5 Ga. App. 498, 63 SE 514.

88. When ownership of property constituted false representations made to induce complainant to part with money and was not an element of crime or matter of description, allegation of ownership held not surplusage because property was otherwise sufficiently described, but must be proved as laid. People v. Lapique [Cal. App.] 103 P 164. Verdict held contrary to evidence where person from whom money was obtained was not owner and proof showed ownership in another who was not mentioned in indictment. Martins v. State, 17 Wyo. 319, 98 P 709. Ownership of mule not proved as alleged and variance held fatal to conviction. Caswell v. State, 5 Ga. App. 483, 63 SE 566.

89. Evidence held to show actual payment of money on check. People v. Whalen, 154 Cal. 472, 98 P 194. Where allegation was that defendant received money, while proof showed prosecutor gave him his check, held no variance, since check was mere vehicle for obtaining money and he cashed same. State v. Germain [Or.] 103 P 521.

90. State v. Hartnett [Del.] 74 A 82.

91. Reversible error for failure to so charge. Lane v. People, 142 Ill. App. 571.

92. Instruction held to properly define meaning of term "fully developed mine" according to meaning it must have been intended to have when made to prosecuting witness. People v. Whalen, 154 Cal. 472, 98 P 194.

93. **Search Note:** See notes in 3 C. L. 1422, 1423; 5 Id. 1420, 1421; 20 L. R. A. 479; 22 Id. 55, 105; 39 Id. 662; 40 Id. 177; 3 L. R. A. (N. S.) 733; 7 Id. 49; 54 A. S. R. 513; 81 Id. 446; 8 Ann. Cas. 426; 9 Id. 734, 1095; 11 Id. 199, 430. See, also, Fences, Cent. Dig.; Dec. Dig.; 19 Cyc. 466-489; 12 A. & E. Enc. L. (2ed.) 1035.

94. It includes duty to fence generally and as between adjoining owners and rights under fencing agreements and general matters as to maintenance of fences. It excludes stock fence laws (see Animals,* § 3), duty of railroads to fence their right of way (see Railroads,* § 111), and "spite fences" (see Adjoining Owners*).

95. Where no fence separated plaintiff's and defendant's adjoining lands, defendant was liable for damage caused by his cattle while on plaintiff's land. Harrison v. McClellan, 64 Misc. 430, 118 NYS 573.

96. Territorial statute (chap. 96, p. 208, Laws 1884, as amended by chap. 42, p. 85, Laws 1887) held not invalid as special law in contravention of Act Cong. July 30, 1886,

* Always begin with the latest article on the subject. Use the latest topical index.

tion.[97] Statutes frequently provide for the trimming of hedge fences contiguous to public highways.[98] Statutes also usually provide for fence viewers to determine the rights of the respective occupants in partition fences.[99] The fact that no provision is made for the expense of laying out a fencing district in an act changing its boundaries does not excuse the assessors from apportioning the fencing as required by such prior acts.[1]

Construction, maintenance and cost. See 11 C. L. 1466—Statutes for the construction of partition fences usually provide that, in default of a landowner to construct the same, the work may be done at his expense and a lien created for the amount due,[2] and, in the absence of such provision, a judgment recovered against a landowner for his share of the cost of a partition fence is merely a personal liability;[3] but an owner of lands which are uninclosed and are to remain so, cannot be charged with any part of the cost of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor.[4] The presumption that the owners of property in a fencing district will be benefited by the act continues when the boundary of such district is subsequently changed.[5] Unless provided by statute, the failure of fence viewers to specify the time within which parties should erect their respective shares of a partition fence will not render their action nugatory.[6] Where one has actual notice of the contents of the determination of the fence viewers, he cannot raise the question that it has not been properly recorded as a defense for failure to comply with the same.[7] In Indiana, a complaint to foreclose the lien, given by party fence laws, for the cost of a partition fence, need not set out the contract between the plaintiff and the township trustee under which the fence was built;[8] and in Arkansas, it is necessary only to state the fact of the fencing assessment and the nonpayment thereof as required by law.[9] An assessment levied against a fencing district is not invalid because the board of fencing commissioners personally paid for the original cost of building the fence;[10] but, under the Arkansas statute, such district is not liable for attorney's fees incurred by the commissioners in a suit to enforce the assessment.[11]

Crimes and penalties. See 11 C. L. 1467—In some states it is a criminal offense to

c. 818, 24 Stat. 170, known as "Springer Act," nor has it been repealed by Comp. Laws 1897, § 144, or Laws 1903, c. 73, p. 136. Sears v. Fewson [N. M.] 103 P 268.

97. A fence having two strands of wire stretched, with no plank above the uppermost one, held contrary to Revisal 1905, § 3769. State v. Thomas, 149 N. C. 565, 63 SE 166.

98. Alleged obstruction of highway not proved so as to constitute public nuisance under Code Supp. 1902, § 1570. Jones v. Thie [Iowa] 119 NW 616.

99. Comp. Laws 1897, § 2419, held not unconstitutional. Vincent v. Ackerman, 155 Mich. 614, 15 Det. Leg. N. 1128, 119 NW 1085.

1. Mandamus granted to compel apportionment, although Act April 13, 1907 (Acts 1907, p. 407) made no provision for surveyor's fees. Henderson v. Dearing [Ark.] 117 SW 1066.

2. Burns' Ann. St. 1908, § 7377, held not contrary to United States or state constitutions. Collins v. Wilber [Ind.] 89 NE 372.

3. Fence built in 1907 and Acts 1908, c. 30, creating lien, held not applicable. Jackson v. Holbrook [Ky.] 113 SW 415.

4. Construing Act April 18, 1904 (97 Ohio Laws 138). Alma Coal Co. v. Cozad, 79 Ohio St. 348, 87 NE 172.

5. Presumption that owners of property in district formed by Act of March 11, 1891, will be benefited by change of boundary provided in Act of April 13, 1907. Henderson v. Dearing [Ark.] 117 SW 1066.

6. Duty of each party is to proceed to comply within reasonable time. Vincent v. Ackerman, 155 Mich. 614, 15 Det. Leg. N. 1128, 119 NW 1085.

7. Defendant had personal service. Vincent v. Ackerman, 155 Mich. 614, 15 Det. Leg. N. 1128, 119 NW 1085. Sufficient record shown to satisfy Comp. Laws 1897, § 2419. Id.

8. Proceeding is in rem, founded on Burns' Ann. St. 1908, § 7379, and not on contract. Collins v. Wilber [Ind.] 89 NE 372.

9. Presumption in favor of validity of assessment, as against objection that it was void because made by board of commissioners, and not by county court, as provided by Kirby's Dig. § 1388. Eagle v. Lonoke County Com'rs [Ark.] 121 SW 340.

10. It being duty of board to construct fence, district was liable for cost thereof. Eagle v. Lonoke County Com'rs [Ark.] 121 SW 340.

11. Eagle v. Lonoke County Com'rs [Ark.] 121 SW 340.

willfully destroy,[12] or throw down,[13] the fence of another, without the owner's consent.[14] Such statutes usually also contain a remedial clause.[15] One who erects a fence upon his premises must exercise ordinary care to maintain it reasonably safe for the purpose for which it was intended,[16] and, where one has contracted to maintain a partition fence, he cannot recover for damage done by trespassing animals, caused by his negligence in keeping the fence in repair.[17] Where a fence encroaches on an alleyway, injunctive relief will be granted.[18]

FERRIES.[19]

The scope of this topic is noted below.[20]

A ferry franchise must be acquired by special grant, unless there is a general statute covering such a case.[21] The acceptance of a ferry franchise by a city imposes a duty of operation,[22] which the legislature has power to modify.[23] Such duty may be enforced by mandamus,[24] by one having an interest in the duty of the city;[25] but, in order to compel the owners of a ferry to operate it against their will, it must be shown that they owe a duty to the public in this respect.[26] Statutes punish an infringement of rights of a licensed ferryman.[27] One operating a ferry

12. In prosecution under Pen. Code 1895, § 794, error for court to refuse to charge that if defendant acted in good faith, on advice of counsel, he was not liable. Becker v. State [Tex. Cr. R.] 119 SW 95. Evidence held sufficient to sustain conviction. Id.

13. Rev. St. 1899, § 4573 (Ann. St. 1906, p. 2486), should be strictly construed because penal as well as remedial. Robinson v. Schlitz, 135 Mo. App. 32, 115 SW 472. The phrase "the person owning the adjoining fields" held to include tenant. Id. Fence is "partition fence" though it have gate therein. Id.

14. Evidence held to show lack of consent of owners in prosecution for breaking and injuring fence. Pate v. State, 54 Tex. Cr. R. 491, 113 SW 757. No variance between allegation of ownership in widow and proof that fence belonged to her jointly with children and grandchildren of decedent. Id.

15. Error to instruct jury they must believe defendant guilty beyond reasonable doubt, since action was civil one to recover damages resulting from violation of law; sufficient if evidence preponderates in plaintiff's favor. Robinson v. Schlitz, 135 Mo. App. 32, 115 SW 472.

16. Evidence held to show defendant was negligent in failing to keep fence repaired and liable for resulting damages. Herdt v. Koenig, 137 Mo. App. 589, 119 SW 56.

17. Does not extend to damage caused during time he was not bound to keep fence in repair. Meyer v. English, 83 Neb. 163, 119 NW 255.

18. No relief granted where fence caused no special damage. Fralinger v. Cooke, 108 Md. 682, 71 A 529.

19. See 11 C. L. 1467.

Search Note: See notes in 3 C. L. 1424; 5 Id. 1423; 33 L. R. A. 180; 37 Id. 712; 59 Id. 513; 68 Id. 153; 27 A. S. R. 555; 1 Ann. Cas. 110; 2 Id. 693.

See, also, Ferries, Cent. Dig.; Dec. Dig.; 19 Cyc. 493-513; 12 A. & E. Enc. L. (2ed.) 1086; 8 A. & E. Enc. P. & P. 919.

20. Includes matters relating to the authorization, construction and operation of ferries. Matters relating to carriage by water generally are treated in Shipping and Water Traffic.*

21. Corporation could not acquire ferry franchise by virtue of articles of incorporation. Oregon v. Portland General Elec. Co., 52 Or. 502, 98 P 160.

22. By acceptance of Montgomerie charter, dated Jan. 15, 1730, city of New York could not discontinue ferries at will. In re Wheeler, 62 Misc. 37, 115 NYS 605.

23. Laws 1905, p. 1201, c. 533, amending (Laws 1897, p. 298, c. 378) New York charter, § 826, authorizes city to offer leases of ferries between Brooklyn and Manhattan at public auction. In re Wheeler, 62 Misc. 37, 115 NYS 605.

24. Undisputed facts held to justify granting of writ. In re Wheeler, 62 Misc. 37, 115 NYS 605.

25. Private citizen held to have sufficient interest. In re Wheeler, 62 Misc. 37, 115 NYS 605.

26. Where defendants purchased ferry equipment at foreclosure sale of insolvent lessee, franchise being owned by city, held evidence did not show city had given defendants consent to operate ferry, and as they got no interest in same at sale they owed public no duty. Wurster v. New York, 115 NYS 192. Duty must grow out of some interest which defendants have in ferry franchise or out of some contractual relation with some person through whom plaintiff claims. Id.

27. Under Kirby's Dig. § 3582, unlicensed ferryman must forfeit $5 to every licensed ferryman on same stream for every person carried. Shemwell v. Finley [Ark.] 114 SW 705. Statutes held violated where one ferried without charge certain persons, in con-

* Always begin with the latest article on the subject. Use the latest topical index.

is liable for injury to his patrons, caused by his negligence,[28] if the negligence was the proximate cause of the injury,[29] unless such patron is also negligent.[30]

Fidelity Insurance; Filings; Final Judgments and Orders; Finding Lost Goods; Findings; see latest topical index.

FINES.[a]

The scope of this topic is noted below.[32]

A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor.[33] Whether a fine may be sued for and recovered in a civil or a criminal action is a matter of local statutory regulation.[34] A fine imposed for violation of a state law belongs to the state,[35] so the disposition of fines is a matter of statutory regulation.[36] Under a constitutional provision providing that no appropriation for private or individual purposes shall be made, a statute is invalid which specifies that the money collected must be paid to the party injured.[37] Statutes provide for imprisonment in default of the payment of a fine,[38] such incarceration not constituting imprisonment for debt,[39] and in some states such arrest is mandatory upon the officer charged with the collection of the fine, although the judgment is silent in that respect;[40] but a discharge may be obtained under certain conditions.[41] In some jurisdictions the person fined is permitted to

sideration for work done for him, although they did not pay him money. Id.

28. Liable for injury to passenger caused by lateral movement of gangplank. Peters v. Philadelphia & C. Ferry Co. [N. J. Err. & App.] 72 A 106.

29. Evidence held not to show proximate cause. Tolin v. Terrell [Ky.] 117 SW 290.

30. Evidence held not to show contributory negligence. Peters v. Philadelphia & C. Ferry Co. [N. J. Err. & App.] 72 A 106.

31. See 11 C. L. 1469.

Search Note: See notes in 3 C. L. 1425; 34 L. R. A. 651; 35 Id. 567; 12 A. S. R. 202; 7 Ann. Cas. 899.

See, also, Fines, Cent. Dig.; Dec. Dig.; 19 Cyc. 544-561; 13 A. & E. Enc. L. (2ed.) 52; 8 A. & E. Enc. P. & P. 953.

32. Includes the nature, enforcement and disposition of fines imposed on conviction of crime. It excludes the amount of fine which may be imposed and the determination of excessiveness (see Criminal Law,* § 6), and the procedure for imposition (see Indictment and Prosecution,* § 12).

33. Commonwealth v. French [Ky.] 114 SW 255. Damages awarded on affirmance of judgment for contempt held not a fine within Const. § 77, authorizing governor to remit fines. Id.

34. Civil action may not be maintained under St. 1898, § 3294, to collect fine imposed under Laws 1905, pp. 469, 470, c. 305, §§ 4, 8. State v. Hamley, 137 Wis. 458, 119 NW 114. Word "fine" as used in St. 1898, § 3294, held not to include those forfeitures, sometimes called "fines," imposed by municipal corporations for violating their ordinances. Id.

35. Ex parte Smythe [Tex. Cr. R.] 120 SW 200.

36. Belong to county under Pub. St. 1901, c. 256, § 2, when obtained for violations of automobile speed law. Rockingham County v. Chase [N. H.] 71 A 634. Phrase "offenses against police of towns," as used in Pub. St. 1901, c. 256, § 2, regarding disposition of fines, held to refer to offenses enumerated in Pub. St. 1901, c. 264, on crimes and offenses. Id.

37. Laws 1907, p. 133, c. 62, declaring fine imposed on husband for abandonment shall be for benefit of wife or children, held **unconstitutional** because in conflict with Const. art. 16, § 6. Ex parte Smythe [Tex. Cr. R.] 120 SW 200.

38. Word "jail" in Rev. St. §§ 1042, 5296 (U. S. Comp. St. 1901, pp. 724, 3608), held to include penitentiary, and prisoner in latter not illegally held for failure to pay fine, since he could apply for discharge under same conditions as prisoners retained in "jail" for similar reason. Haddox v. Richardson [C. C. A.] 168 F 635. Under Code Cr. Proc. § 718, providing, in default of payment of fine, defendant may be imprisoned one day for every dollar of fine, imposition of $50 fine, or 100 days in case of default, held in excess of penalty prescribed and modified to $50 or 50 days. People v. Jeratino, 62 Misc. 587, 116 NYS 1121.

39. Such prohibition does not extend to fines or penalties inflicted for violations of penal laws of state, as relation of debtor and creditor does not exist. People v. Zito, 237 Ill. 434, 86 NE 1041.

40. Duty of constable, holding writ of execution for collection of judgment for fine for violation of state law, to commit offender to county jail, in case he fails to pay fine, and there is no property to satisfy judgment. Young v. State, 11 Ohio C. C. (N. S.) 466.

41. Under Rev. St. §§ 1042, 5296 (U. S. Comp. St. 1901, pp. 724, 3608), prisoner unable to pay fine may be discharged on application at end of 30 days, upon taking debtor's oath. Haddox v. Richardson [C. C. A.] 168 F 635.

work out his fine at a specified sum per diem.[42] Execution will issue against the property of one fined, as a means of collecting the fine.[43] The governor of a state is usually authorized to remit fines due the state.[44] Upon reversal of a conviction imposing a fine, a writ of restitution will issue in favor of the person fined.[45]

FIRES.

The scope of this topic is noted below.[46]

§ 1. Rights and Duties Respecting Fires, 1771.
§ 2. Remedies and Procedure, 1772.
§ 3. Fire Districts and Protection, 1773.

§ 1. *Rights and duties respecting fires.*[47]—See 11 C. L. 1470—A man must exercise that prudence in the starting of a fire, and the management of it after it is started, which the rules of ordinary care demand,[48] and is liable for negligence,[49] unless plaintiff's negligence contributed to his loss.[50] Defendant's negligence must be the approximate cause of the damage,[51] and no recovery can be had for losses

42. Under Gen. Acts Ex. Sess. 1907, p. 183, § 13, county convict may work out fine at rate of 40 cents a day. Held error to specify 30 cents a day in sentence of conviction; modified accordingly. Glasscock v. State [Ala.] 48 S 700.

43. Police judge in cities of second class held empowered to issue execution against property of person fined for violating city ordinance. Cleaver v. Jenkins [Neb.] 121 NW 992.

44. Under Const. § 77, governor cannot relieve one from payment of debt or obligation due state, unless it be in satisfaction of fine or forfeiture. Commonwealth v. French [Ky.] 114 SW 255.

45. Each person sharing in fine must return his moiety and must also repay costs of original prosecution collectively. New Jersey Soc. for Prevention of Cruelty to Animals v. Knoll [N. J. Law] 71 A 116.

46. It treats generally of regulations for protection against fires, and liability for negligent fires. It excludes the crime of arson (see Arson *), insurance against fire (see Insurance *), matters peculiar to fires by railroads (see Railroads,* § 11J), liability of persons using or storing inflammable substances (see Explosives and Inflammables *), building regulations designed to prevent fire (see Buildings and Building Restrictions,* § 1), rights and duties of employes of fire departments (see Officers and Public Employes;* Pensions *), public water service (see Waters and Water Supply,* § 16).

47. **Search Note:** See notes in 3 C. L. 1426; 5 Id. 1425; 15 L. R. A. 40; 21 Id. 255; 25 Id. 161; 1 L. R. A. (N. S.) 530; 5 Id. 261; 6 Id. 882, 1094; 12 Id. 382, 446, 526, 624; 15 Id. 819; 30 A. S. R. 501.

See, also, Fires, Cent. Dig.; Dec. Dig.; 19 Cyc. 978-983; Negligence, Cent. Dig. §§ 28-30; Dec. Dig. § 21; 29 Cyc. 460-463; 13 A. & E. Enc. L. (2ed.) 73, 404, 410.

48. Miller v. Neale, 137 Wis. 426, 119 NW 94. Charge sustained which made exercise of ordinary care the test of defendant's liability. Pfeiffer v. Aue [Tex. Civ. App.] 115 SW 300.

49. Running traction engine past farm buildings and stopping within 20 feet of them while taking water held negligence, where there was no spark arrester on smokestack. McFarland v. Sayen, 156 Mich. 426, 16 Det. Leg. N. 105, 120 NW 794. Evidence sufficient to warrant jury in finding that if fire was set out by use of blow-lamp, in removing paint from house, that it resulted from negligent use of same. Nebraska Underwriters' Ins. Co. v. Fouke [Ark.] 119 SW 261. Instruction that it was negligence for railroad company to allow grass and combustible materials to accumulate on land inclosed in its right of way held proper, where it was shown fire originated there and spread to plaintiff's land. Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166. Held negligence where fire was started where there was much inflammable material on ground and wind was strong in direction of neighbor's land. Miller v. Neale, 137 Wis. 426, 119 NW 94.

50. Evidence held not so conclusive as to warrant court in saying rules of ordinary care required plaintiff to do more than he did to prevent fire from spreading to his own lands. Miller v. Neale, 137 Wis. 426, 119 NW 94. Plaintiff guilty of contributory negligence in placing cotton where it would be exposed to sparks from locomotive. Birge-Forbes Co. v. St. Louis & S. F. R. Co. [Tex. Civ. App.] 115 SW 333.

51. Failure to guard and protect smoldering embers held proximate cause of igniting child's clothing. Ross v. Chester Trac. Co. [Pa.] 73 A 188. Evidence held to show proximate cause of fire was some independent agency and not defendant's negligence. Comes v. Dabney [Kan.] 102 P 488. Plaintiff's act of trying to extinguish fire which resulted in her injury held not to be intervening act so as to break causal connection between defendant's original act and injury, where defendant was negligent in operating defective locomotive, contrary to statute. Wilson v. Central of Georgia R. Co. [Ga.] 63 SE 1121. Negligence of servants of railway company in dumping ashes on bank of bayou and igniting oil which covered sur-

which might have been prevented by due diligence on plaintiff's part.[52] Malicious burning of another's property subjects the offender to both civil and criminal liability.[53] A court may issue a mandatory injunction to compel the extinguishment of a fire where legal duties are wantonly neglected;[54] but a corporation can only be compelled to use its corporate assets and funds in an effort to put out a fire of corporate property.[55] The owner of the surface cannot be compelled to extinguish a fire in a burning coal mine for which he is not responsible.[56]

§ 2. *Remedies and procedure.*[57]—See 11 C. L. 1471—The petition in an action for damages must state a cause of action,[58] and plaintiff must prove ownership of the property destroyed.[59] The burden of proving that the fire was caused by defendant's negligence is upon the plaintiff,[60] who must establish his case by a preponderance of the evidence.[61] Ordinarily, the questions of negligence[62] and proximate cause[63] are for the jury. Declarations which are part of the res gestæ are admissible,[64] but declarations as to past transactions are not.[65] Evidence of prior fires may be received[66] if not too remote.[67]

face and resulted in burning bridge held proximate cause of damage. Iberville Police Jury v. Texas & P. R. Co., 122 La. 388, 47 S 692. Defendant's negligence in permitting fire to escape held proximate cause of destruction of plaintiff's property, although fire was first communicated to other structure. St. Louis S. W. R. Co. v. Wilbanks [Tex. Civ. App.] 113 SW 318.

52. Where fire burned for two days and plaintiff made no effort to extinguish it on second day, although he knew it was destroying his property, he could only recover for property destroyed before such knowledge was imparted to him. Aune v. Austin-Williams Timber Co., 52 Wash. 356, 100 P 746.

53. Evidence held sufficient to sustain verdict and judgment in action for deliberately setting fire to two stacks of oats. Brinegar v. State, 82 Neb. 558, 118 NW 475.

54. Where record showed defendant persistently tried to extinguish burning coal mine and had expended large sums without avail, held no neglect of duty and injunction refused. McCabe v. Watt [Pa.] 73 A 453.

55. Mandatory injunction refused where evidence showed it would take $75,000 to extinguish fire in coal mine and defendant was already insolvent from fighting blaze. McCabe v. Watt [Pa.] 73 A 453.

56. Mandatory injunction refused. McCabe v. Watt [Pa.] 73 A 455.

57. Search Note: See notes in 3 C. L. 1427; 36 A. S. R. 823.

See, also, Fires, Cent. Dig. § 5; Dec. Dig. § 7; 19 Cyc. 980-983; Negligence, 29 Cyc. 415-659; 13 A. & E. Enc. L. (2ed.) 410; 9 A. & E. Enc. P. & P. 1.

58. Petition held to state cause of action where plaintiff alleged she sustained injuries while endeavoring to put out fire negligently started by defendant, in order to protect her property, and that she was not negligent in so doing. Wilson v. Central of Georgia R. Co. [Ga.] 63 SE 1121.

59. Defects in paper title held not bar to recovery of damages for burning over of land, there being abundant evidence of possession. Thornton v. Southern R. Co., 150 N. C. 691, 64 SE 776.

60. Negligence sufficiently established where defendant was not properly careful and diligent in preventing fire from spreading to neighbor's property. Robinson v. Cowan [Ala.] 47 S 1018. Finding that defendant carelessly allowed fire to spread from donkey engine which destroyed plaintiff's property held supported by record. Aune v. Austin-Williams Timber Co., 52 Wash. 356, 100 P 746. Evidence sufficient to show defendant's negligence in starting and taking care of fire. Miller v. Neale, 137 Wis. 426, 119 NW 94.

Evidence held insufficient to show defendant was negligent in permitting fire to spread. Bratz v. Stark, 138 Wis. 599, 120 NW 396. To establish defendant was negligent in setting fire to grass on his own land or in permitting it to escape to plaintiff's land. Pfeiffer v. Aue [Tex. Civ. App.] 115 SW 390.

61. Nothing in case to take it out of general rule. Pfeiffer v. Aue [Tex. Civ. App.] 115 SW 390.

62. Evidence that employe of defendant set fire to pile of refuse while high wind was blowing and that flame communicated to clothing of plaintiff's intestate held to authorize submission of defendant's negligence to jury. Ross v. Chester Trac. Co. [Pa.] 73 A 188. Court did not err in refusing to submit question of plaintiff's contributory negligence to jury, since there was no evidence to warrant it. Missouri, K. & T. R. Co. v. Neiser [Tex. Civ. App.] 118 SW 166. Not improper to refuse to submit to jury questions whether or not it constituted negligence to use blow-lamp, instead of employing some other means to remove paint, where there was no evidence on which to base them. Nebraska Underwriters' Ins. Co. v. Fouke [Ark.] 119 SW 261. Evidence sufficient to authorize court to submit to jury question whether train was improperly managed and whether such mismanagement caused fire. Georgia, F. & A. R. Co. v. Summer [Ga.] 65 SE 381.

63. Not for jury where facts are undisputed and court can see resulting injury was remote. Comes v. Dabney [Kan.] 102 P 488. Evidence warranted submission to jury of question of whether fire was caused by defendant's locomotive. Hutto v. Seaboard Air Line R. Co., 81 S. C. 567, 62 SE 835.

64. Declaration made in connection with and throwing light upon main fact in controversy held admissible as part of res

Venue.—An action for the destruction by fire of buildings permanently resting on the soil [68] is an action for injury to realty and must be brought in the county where situated.[69]

§ 3. *Fire districts and protection.*[70]—See 11 C. L. 1471—In the exercise of the police power, states [71] and municipalities [72] may impose reasonable [73] restrictions to protect property from loss by fire.[74] Whether the right of a fire insurance patrol to the streets of a city is equal to that of the fire department depends on local ordinances.[75]

"Fiscal officer" (defined), see 12 C. L. 1135, n. 24.

FISH AND GAME LAWS.

The scope of this topic is noted below.[76]

§ 1. Public Control of Fish and Game, 1773.
§ 2. Offenses; Penalties; Prosecutions, 1775.
§ 3. Private Rights in Fish and Game, 1776.

§ 1. *Public control of fish and game.*[77]—See 11 C. L. 1471—The ownership of wild game is in the people of the state in their collective sovereign capacity,[78] and in the exercise of its police power a state may make reasonable regulations for the preserva-

gestae. Miller v. Neale, 137 Wis. 426, 119 NW 94.

65. Declaration of defendant's manager that he started fire which spread to and destroyed plaintiff's barn held inadmissible, because relating to past transaction, and circumstances did not indicate its truth could be presumed without being sworn to. Johnson v. McLain Inv. Co. [Kan.] 100 P 52.

66. Proper to admit evidence of other fires caused in manner similar to one on which plaintiff's action is based. Illinois Cent. R. Co. v. Hicklin [Ky.] 115 SW 752.

67. Evidence of fire on same premises seven years previous held not admissible to show negligence on defendant's part or to prove proximate cause of fire in question, where testimony showed conditions were different. Fishman v. Consumers' Brew. Co. [N. J. Law] 73 A 231.

68. Though not expressly alleged, presumption is they were permanently resting on soil. Las Animas & San Joaquin Land Co. v. Fatjo, 9 Cal. App. 318, 99 P 393.

69. Under Code Civ. Proc. § 392. Las Animas & San Joaquin Land Co. v. Fatjo, 9 Cal. App. 318, 99 P 393.

70. Search Note: See notes in 14 L. R. A. 474; 2 L. R. A. (N. S.) 483; 81 A. S. R. 480; 9 Ann. Cas. 292.

See, also, Municipal Corporations, Cent. Dig. § 1334; Dec. Dig. § 603; 28 Cyc. 741-743; 13 A. & E. Enc. L. (2ed.) 73, 396.

71. Fire Marshal Law (Acts 1907, p. 1540, c. 460), § 4, authorizing investigation of fires and providing tax on business of insurance companies in state to meet expense, held **constitutional.** Rhinehart v. State [Tenn.] 117 SW 508. Under act insurance commissioner may issue subpoenas to procure attendance of witnesses. Id.

72. Establishing fire limit by prohibiting erection of wooden buildings within same. Red Lake Falls Milling Co. v. Thief River Falls [Minn.] 122 NW 872. Word "erect" construed to include word "move" so as to prohibit moving of already constructed building into district where wooden buildings were prohibited. Id.

73. Sections 15, 65, and 70, of city ordinance, held not unreasonable. O'Bryan v. Highland Apartment Co., 128 Ky. 282, 33 Ky. L. R. 349, 108 SW 257.

74. Under Greater New York Charter, Laws 1901, p. 323, c. 466, § 780, marshal held not confined to inspection of things specifically enumerated therein. Lantry v. Mede, 58 Misc. 221, 108 NYS 1099.

75. Construing Act No. 83, p. 114, of 1894, with Act No. 115, p. 186, of 1902, held, right granted fire department paramount to right granted insurance patrol. Coleman v. Fire Ins. Patrol, 122 La. 626, 48 S 130. Insurance patrol liable for injury to fireman on account of collision caused by former. Id. Plea that it is public corporation and public charity held without foundation. Id.

76. It includes property rights in fish, game, oysters, lobsters, and the like, and regulations for their protection. Matters relating to officers and boards are more fully treated in Officers and Public Employes,* and matters relating generally to licenses in the topic Licenses.*

77. Search Note: See notes in 3 C. L. 1428, 1431; 11 Id. 1472; 13 L. R. A. 804; 39 Id. 581; 1 L. R. A. (N. S.) 752; 6 Id. 247; 10 Id. 1155; 12 Id. 612; 23 A. S. R. 837, 838; 42 Id. 138; 2 Ann. Cas. 229; 4 Id. 356, 935.

See, also, Fish, Cent. Dig. §§ 1-10, 16-21; Dec. Dig. §§ 1-4, 6-12; 19 Cyc. 987, 992-998, 1006, 1014, 1017, 1019, 1020; Game, Cent. Dig. §§ 1-5; Dec. Dig. §§ 1-6; 19 Cyc. 986, 987, 990, 992, 1000-1003, 1006, 1016, 1019, 1020; 13 A. & E. Enc. L. (2ed.) 554, 572; 14 Id. 654.

78. Ex parte Bailey [Cal.] 101 P 441. Gen. Laws 1907, pp. 278, 279, c. 144, §§ 1, 5, declares wild game to belong to people of state. Ex parte Blardone, 55 Tex. Cr. R. 189, 115 SW 838.

tion and protection of fish and game.[79] These statutes, however, must be reasonable,[80] and must observe constitutional requirements [81] as to title,[82] interfering with federal regulation of interstate and foreign commerce,[83] taking of private property without just compensation [84] or due process of law,[85] and denying any person within its jurisdiction equal protection of the laws.[86] Although Oregon and Washington have concurrent jurisdiction over the Columbia river, the former cannot prosecute and punish for a violation of an act prohibiting the use of a purse net for fishing,[87] when committed within the territorial limits of Washington, where it is expressly authorized.[88] Local regulation must conform to statutory limitations.[89] Subject to such valid regulations as may exist, every citizen has a right to fish on the navigable waters of a state,[90] but some states have statutes absolutely excluding nonresidents from hunting and fishing privileges.[91] Written permission to hunt on lands of others [92] is sometimes required.

The fish and game laws of the various states usually contain prohibitions of the pollution of streams,[93] regulation of the methods of capture,[94] and forbidding the

79. Acts 30th Leg. (Gen. Laws 1907), p. 278, c. 144, § 1, held proper exercise of police power. Ex parte Biardone, 55 Tex. Cr. R. 189, 115 SW 838. Prohibition against **possession of game out of season,** made by N. Y. Laws 1900, c. 20, held valid. People v. Hesterberg, 29 S. Ct. 10.

80. Order of commissioner, requiring petitioner to construct **fishway in dam,** as authorized by Forest, Fish and Game Law (Laws 1900, p. 60, c. 20), §§ 208, 209, modified so as to require operation of same only during spawning time. In re Delaware River at Stilesville, 131 App. Div. 403, 115 NYS 745. Ordinance prohibiting **use of fishing nets within 1,000 feet of any wharf** held invalid, as right to take fish was one open to all people in common and ordinance made wharves point of vantage. Ex parte Bailey [Cal.] 101 P 441.

81. Act June 5, 1907, § 21 (Laws 1907, p. 343), providing for fish protection and excluding Lake Michigan from its operation, held void under Const. 1870, art. 4, § 22, prohibiting passage of **local or special laws** for protection of game or fish. People v. Wilcox, 237 Ill. 421, 86 NE 672. Acts 1907, p. 639, c. 185, providing for **method of trial** of violators of game laws of state, held constitutional. State v. Sexton [Tenn.] 114 SW 494.

82. Offense denounced by § 6, c. 169, p. 376, Acts of 1903, "of having in possession, in open air, implements for shooting on first day of week, called Sunday," held embraced within purview of title of said act prohibiting "shooting on Sunday." State v. Sexton [Tenn.] 114 SW 494.

83. Foreign commerce not unconstitutionally regulated by N. Y. Laws 1900, c. 20, although it refers to possession of game coming from without state. People v. Hesterberg, 29 S. Ct. 10.

84. Plaintiff's right to establish **oyster beds** on botton of bed of navigable arm of sea held subject to public use, and government could dredge bottom after giving plaintiff reasonable opportunity to remove property. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 129 App. Div. 574, 114 NYS 313. Enforcing easement relating to fish and requiring petitioner to put in a **fishway in its dam** held not taking property without just compensation. In re Delaware River at Stilesville, 131 App. Div. 403, 115 NYS 745.

85. N. Y. Laws 1900, c. 20, relating to **possession of game out of season,** held not contrary to U. S. Const. 14th amend. People v. Hesterberg, 29 S. Ct. 10. Even though game in question was foreign game, killed during open season, statute applied. Id.

86. Priv. & Sp. Laws 1903, c. 317, p. 489, held not obnoxious to fourteenth amendment U. S. Const., because **restricting taking of clams** on certain shore to certain persons. State v. Leavitt [Me.] 72 A 875.

87. Or. Sess. Laws 1907, p. 154. Nielsen v. State, 212 U. S. 315, 53 Law. Ed. —.

88. Wash. Sess. Laws 1899, p. 194. Nielsen v. State, 212 U. S. 315, 53 Law. Ed. —.

89. Ordinance, making it unlawful for nonresident to kill game in county, held not to include nonresident landowners who could hunt on own lands, under Code 1906, c. 57. State v. Buckingham [Miss.] 47 S 501. Ordinance adopted by police jury regarding shipment of birds, held repugnant to Act No. 277, p. 405, Legislature 1908. State v. Dudley, 123 La. 436, 49 S 12.

90. Lackawaxen creek, being in fact not navigable, although declared a public highway by Act of Mar. 26, 1814, 6 Sm. L. 187, "for passage of rafts, boats and vessels," held not a stream wherein public fishing is permitted by Act May 29, 1901, P. L. 302. Commonwealth v. Foster, 36 Pa. Super Ct. 433.

91. Proviso in Act April 24, 1903 (Acts 1903, p. 309), § 11 (Kirby's Dig. § 3623), exempting Mississippi county from its effect, held repealed by Act April 19, 1905 (Laws 1905, p. 474), §§ 1, 2. Edland v. State [Ark.] 120 SW 994.

92. General Game Law (Laws 1907, p. 94), § 44, held to have repealed local game law for Montgomery and Elmore counties (Laws 1888-89, p. 406). Glenn v. State [Ala.] 48 S 505.

93. Forest, Fish and Game Law (Laws 1900, p. 32, c. 20), § 52, held not to prohibit throwing of sawdust in quantities sufficient to destroy stream as spawning ground. People v. La Pell, 128 App. Div. 709, 113 NYS 675. Evidence held sufficient to go to jury on question whether defendant had thrown sawdust into stream in quantities destruc-

possession,[95] transportation,[96] shipment,[97] and sale, of fish or game under circumstances indicating or promoting illegal capture.[98] It is no defense to a prosecution for using an unlawful device for catching fish that the fish taken were not of the species of game or food fish.[99]

§ 2. *Offenses; penalties; prosecutions.*[1] See 11 C. L. 1474—Fish and game laws, being usually penal in their nature, are strictly construed.[2] Possession of game or fish out of season is presumptively illegal in some states.[3] A game warden, under his general power and authority, has the right to confiscate game from one having it illegally in his possession.[4] On a charge of illegally killing game, an indictment need not allege that it was killed in the state, where this sufficiently appears from other parts of the information,[5] and the act and section upon which a prosecution is based need not be specifically referred to in the information, if it otherwise sufficiently charges a violation of the section.[6] Indictments in prosecutions for violations of fish and game laws are frequently dispensed with by statute.[7]

tive of fish therein. Id. **Injunction** will lie to restrain the pollution of a lake where damage results to fishing privileges. Fischer v. Missouri Pac. R. Co., 135 Mo. App. 37, 115 SW 477.

94. Construing Revisal 1905, § 3474, forbidding **anchoring of float-house** in shoal water for purpose of fishing or hunting wild fowl within certain distance of mainland, word "mainland" held to mean principal land as opposed to island. State v. Barco, 150 N. C. 792, 63 SE 673. Evidence held to show land in question was an island. Id. **Use of dynamite,** or other explosive in killing fish, prohibited in Rev. St. 1899, §§ 7456, 7464 (Ann. St. 1906, pp. 3593, 3595), and Laws 1905, p. 163, § 29 (Ann. St. 1906, § 7500-7529). State v. Hodges, 214 Mo. 376, 113 SW 1072. Acts held not inconsistent. Id. Laws 1907, p. 912, prohibits fishing in waters of state by means of **nets.** Fritz v. State [Ark.] 115 SW 385. Defendant held not within proviso permitting use of nets in waters wholly on premises of persons using same, where he owned land on either side of place where he used net, but other persons owned other land bordering on lake. Id. Substituting wire screen for slats in **eel basket** and having three-fourths of bottom immovable held violation of Act April 27, 1903, P. L. 319. Commonwealth v. Allen, 36 Pa. Super. Ct. 220.

95. Construing Pub. Acts 1899, p. 128, Act No. 38, § 2, held not to allow taking and sale of immature fish caught in open season in legal nets, and found dead or injured **when removed from nets.** People v. Coffey, 155 Mich. 103, 15 Det. Leg. N. 947, 118 NW 732. Construing B. & C. Comp. § 2010, as amended by Laws 1907, p. 342, words "such deer," held to refer to deer killed during closed season, and such section did not prohibit keeping during closed season, for food, flesh **of deer lawfully killed** during open season. State v. Fisher [Or.] 98 P 713. Fact that **game was taken in foreign country** during open season there held immaterial under N. Y. Laws 1900, c. 20. People v. Hesterberg, 29 S. Ct. 10. Laws 1900, p. 23, c. 20, § 4, amended by Laws 1906, p. 1337, c. 478, § 1, forbidding possession of wild deer between certain dates, held to apply to **common carriers.** People v. Fargo, 63 Misc. 381, 118 NYS 454.

96. Forest, Fish and Game Law (Laws 1908, pp. 328, 329, c. 130), § 78, prohibiting transportation of venison during certain season held not to apply to **domesticated deer.** Dieterich v. Fargo, 194 N. Y. 359, 87 NE 518. Transportation of carcass of deer by common carrier, although **killed** and delivered **outside state,** held prohibited by Laws 1900, p. 24, c. 20, § 8. People v. Fargo, 63 Misc. 381, 118 NYS 454.

97. Evidence held sufficient to sustain conviction for violating Kirby's Dig. § 3620, as amended by Act Feb. 14, 1905 (Laws 1905, p. 117), making it unlawful to **export game fish** from state. Fritz v. State [Ark.] 115 SW 385.

98. Forest, Fish and Game Law (Laws 1900, p. 29, c. 20), § 27, as amended by Laws 1905, p. 611, c. 335, held not violated by failure to give bond provided therein, where proof showed grouse were not taken in state. People v. Weinstock, 193 N. Y. 481, 86 NE 547.

99. Illegally constructed eel basket. Commonwealth v. Allen, 36 Pa. Super. Ct. 220.

1. Search Note: See notes in 7 C. L. 1662; 35 L. R. A. 572; 3 L. R. A. (N. S.) 163, 997; 1 Ann. Cas. 950; 2 Id. 229; 3 Id. 15; 6 Id. 356, 935; 8 Id. 902.

See, also, Fish, Cent. Dig. §§ 22-32; Dec. Dig. §§ 13-17; 19 Cyc. 1008-1017, 1022-1030; Game, Cent. Dig. §§ 6-10; Dec. Dig. §§ 7-10; 19 Cyc. 1006, 1019, 1020; 13 A. & E. Enc. L. (2ed.) 584; 9 A. & E. Enc. P. & P. 10, 762.

2. Title of Laws 1908, p. 299, c. 130, indicates it was intended to protect wild animals. Dieterich v. Fargo, 194 N. Y. 359, 87 NE 518. Word "game" ordinarily does not include domesticated animals. Id.

3. B. & C. Comp. § 2045, as amended by Laws 1907, p. 342. State v. Fisher [Or.] 98 P 713. Error to exclude offer of defendant to prove that he killed deer during open season. Id.

4. Action for value of confiscated game dismissed, where **seizure was lawful.** Binkley v. Stephens [Idaho] 102 P 10. Not necessary for court to find plaintiff was not owner of property seized; sufficient if court concludes plaintiff was not entitled to possession of same. Id.

5. Held sufficient where information was headed "The Commonwealth of Penna., County of Chester, s. s." and charged defendant with having in his possession in county of Chester divers parts of a deer, unlawfully killed. Commonwealth v. Clinton, 38 Pa. Super. Ct. 573.

6. Information held sufficient to sustain

§ 3. *Private rights in fish and game.*[8]—See 11 C. L. 1475—In some states a lease of a natural oyster bed is void,[9] and the state is not estopped to require the surrender of the same, though the lease was under color of authority,[10] but the lessee must be given a reasonable opportunity to be heard.[11] By statute, in some states, the owner of the bed of a creek may exclude others from fishing therein.[12] One cannot be convicted of the larceny of fish if he takes them with the owner's consent.[13]

*Fishery rights.*See 11 C. L. 1476—Petitioners for the allotment of oyster ground must comply with the statute regulating such assignment.[14]

FIXTURES.

The scope of this topic is noted below.[15]

§ 1. Definition, 1776.
§ 2. Annexation and Intent, 1776.
§ 3. Title of Third Persons, 1779.

§ 1. *Definition.*[16]—See 7 C. L. 1684

§ 2. *Annexation and intent.*[17]—See 11 C. L. 1477—The question whether a chattel becomes parcel of the realty to which it is annexed is governed by the legal intention of the party making the annexation,[18] as distinguished from his secret intention unmanifested by his acts.[19] Mere intention will not suffice to make the chattel a

conviction for violating § 11 of Fish Law of May 29, 1901, P. L. 302. Commonwealth v. Nichols, 38 Pa. Super. Ct. 504.

7. Acts 1907, p. 640, c. 185, § 3, held not violative of Bill of Rights, § 14. State v. Sexton [Tenn.] 114 SW 494.

8. **Search Note:** See notes in 5 C. L. 1429, 1430; 7 Id. 1664; 11 Id. 111; 40 L. R. A. 393; 41 Id. 268; 60 Id. 481; 64 Id. 198, 982; 3 L. R. A. (N. S.) 205; 4 Id. 879; 12 Id. 869; 13 A. S. R. 416; 3 Ann. Cas. 860.

See, also, Fish, Cent. Dig. §§ 11-15; Dec. Dig. §§ 5, 7; 19 Cyc. 988-990, 995-998, 1000-1003, 1016, 1017; Game, Cent. Dig. § 1; Dec. Dig. § 3; 19 Cyc. 988-990, 1000-1003, 1016; 13 A. & E. Enc. L. (2ed.) 556, 579.

9. Survey of ground made in compliance with Acts 1891-92, p. 816, c. 511, as amended by Acts 1893-94, p. 605, c. 559; Code 1904, § 2130a, held to show conclusively defendant's ground was within **natural oyster bed.** Commission of Fisheries v. Hampton Roads Oyster Packers' Planters' Ass'n [Va.] 64 SE 1041.

10. Fact that lessee complies with Code 1904, § 2137a, held immaterial; refers only to valid leases. Commission of Fisheries v. Hampton Roads Oyster Packers' & Planters' Ass'n [Va.] 64 SE 1041. Act of state oyster inspector in assigning ground held ministerial. Id.

11. Evidence held to show proceedings in action to enjoin board of fisheries of Virginia from requiring complainant from surrendering oyster bed under void lease were conducted according to statute. Commission of Fisheries v. Hampton Roads Oyster Packers' & Planters' Ass'n [Va.] 64 SE 1041.

12. Defendant liable for trespass where complainant had posted creek in compliance with Act April 14, 1905, P. L. 169. Commonwealth v. Foster, 36 Pa. Super. Ct. 433.

13. Evidence, that owner of fish slide told defendant it was open to public and that he had practically abandoned it, entitled defendant to acquittal on charge of larceny of fish taken from slide. State v. Hathaway, 150 N. C. 798, 63 SE 892.

14. Evidence held to show other bona fide applications had been filed previous to petitioner's application. Hundley v. Neale [Va.] 64 SE 947. Mandamus refused to compel oyster inspector to post petitioners' application. Id.

15. This topic excludes the distinction between real and personal property generally (see Property,* § 1), and the doctrine of accession (see Accession and Confusion of Property *). The mutual rights of landlord and tenant are also excluded (see Landlord and Tenant,* § 5F).

16. **Search Note:** See Fixtures, Cent. Dig. § 1; Dec. Dig. § 1; 19 Cyc. 1035, 1036; 13 A. & E. Enc. L. (2ed.) 594, 596; 9 A. & E. Enc. P. & P. 16.

17. **Search Note:** See notes in 3 C. L. 1433; 5 Id. 1432, 1433, 1434; 7 Id. 1666, 1668; 11 Id. 1478; 19 L. R. A. 441; 21 Id. 347; 69 Id. 892; 3 L. R. A. (N. S.) 60; 8 Id. 376; 14 Id. 439; 15 Id. 727; 84 A. S. R. 877; 1 Ann. Cas. 687; 2 Id. 375, 405, 738; 3 Id. 331; 4 Id. 1160; 10 Id. 109.

See, also, Fixtures, Cent. Dig. §§ 2-79; Dec. Dig. §§ 2-35; 19 Cyc. 1040-1054, 1056, 1058-1077; 13 A. & E. Enc. L. (2ed.) 597.

18. Kansas City So. R. Co. v. Anderson [Ark.] 113 SW 1030; Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086; Dame v. Wood [N. H.] 70 A 1081; Williams v. London, 61 Misc. 494, 115 NYS 547; Kinnear v. Scenic R. Co. [Pa.] 72 A 808; Big Beaver Creek Corp. v. Beaver County, 37 Pa. Super. Ct. 250.

19. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086.

fixture, unless accompanied by the act of annexing it,[20] though, where the intention is manifest, a less annexation will suffice.[21]

In the absence of agreement the law will attribute an intention inferred from all the circumstances surrounding the annexation,[22] and such as the relation of the annexer to the land,[23] whether that of owner in fee simple,[24] or holder of a base fee,[25] or tenant,[26] or stranger;[27] and his relation to the article annexed, whether that of owner,[28] conditional vendee,[29] bailee or lessee,[30] or purchaser subject to mortgage back.[31] Similarly the nature of the thing annexed will be considered,[32] though more importance is given to its peculiar adaptation to the place in question,[33] and to custom as to removing articles of its class when once annexed[34] than to its weight and bulk.[35] Sometimes intention is inferred from the character of other articles classed by the annexer with that in question,[36] and, in the case of a tenant, from the rela-

20. Lumber stacked by bridge company near bridge taken by eminent domain does not pass with the bridge merely because it may have been intended for possible future repairs. Big Beaver Creek Corp. v. Beaver County, 37 Pa. Super. Ct. 250.

21. Forty-four ice-boxes placed in apartment house by owner, one in each apartment, held fixtures, though unattached, and therefore subject to mechanics' lien. Williams v. London, 61 Misc. 494, 115 NYS 547.

22, 23. Kansas City So. R. Co. v. Anderson [Ark.] 113 SW 1030.

24. In which case annexation more often permanent, though not conclusive. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086; Williams v. London, 61 Misc. 494, 115 NYS 547.

25. Railroad station annexed to land sold so long as used for railroad purposes held not a fixture. Young v. Oviatt, 35 Pa. Super. Ct. 603.

26. In which case chattel is more likely to remain personalty. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086; Perry v. Acme Oil Co. [Ind. App.] 88 NE 859; Thomas v. Gayle & Co. [Ky.] 120 SW 290; Wright v. La May, 155 Mich. 119, 15 Det. Leg. N. 1020, 118 NW 964; Commercial Tribune Bldg. Co. v. Rapid Electrotype Co., 11 Ohio C. C. (N. S.) 488; Montello Brick Co. v. Trexler [C. C. A.] 167 F 482.

27. Timber used to build **houses and fences** on land of another without his knowledge held to become fixtures at once so that trover would not lie. Bynum v. Gay [Ala.] 49 S 757.

28. Heating system, boiler, radiators and piping, held realty where credit given to house-owner, so that plumber could recover for labor and material on ground of benefit conferred though house destroyed before installation completed. Dawe v. Wood [N. H.] 70 A 1081.

29. In which case the chattel does not become a fixture as between the parties (Monarch Laundry v. Westbrook [Va.] 63 SE 1070; Cox v. New Bern Lighting & Fuel Co. [N. C.] 65 SE 648) until the conditions are fulfilled (Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086).

30. Saloon fixtures loaned or leased by brewing company to tenant of hotel held removable as against landlord, though bulky, weighty, firmly affixed, and made especially for that hotel. Wright v. La May, 155 Mich. 119, 15 Det. Leg. N. 1020, 118 NW 964.

31. Such purchase-money, chattel mortgage being a makeweight against chattels becoming fixture. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086.

32. Kansas City So. R. Co. v. Anderson [Ark.] 113 SW 1030.

33. Pendley Brick Co. v. Hardwick & Co. [Ga. App.] 64 SE 664. **Scenic railway** held fixture in amusement park though annexed by tenant. Kinnear v. Scenic R. Co. [Pa.] 72 A 808. **Ice-boxes** put in each apartment of apartment house by owner held fixtures. Williams v. London, 61 Misc. 494, 115 NYS 547. **Bookcases, exhibition cases, cupboards, lockers, dressers, supply cases and bulletin boards,** furnished for library under contract requiring wood to be same as finish of library, and made to fit into spaces, the wall being left unfinished behind, and fastened with nails, screws, angle-irons and the like, and essential to the running of the library, held permanent improvements to realty such as are subject to mechanics' lien, the question involved being recognized as virtually equivalent to whether these articles were fixtures. Rieser v. Comnicau, 129 App. Div. 490, 114 NYS 154. **Saloon bar** of ordinary stock pattern less likely to become fixture. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086.

34. Fence ordinarily realty. James Leo Co. v. Jersey City Bill Posting Co. [N. J. Law] 73 A 1046. Practice not to move **scenic railway** about tends to show intention that one was annexed to be a fixture. Kinnear v. Scenic R. Co. [Pa.] 72 A 808.

35. Railroad station held not fixture. Young v. Oviatt, 35 Pa. Super. Ct. 603. **Brick-making plant** held not a fixture. Montello Brick Co. v. Trexler [C. C. A.] 167 F 482. Twenty-two foot **bar, rail, work-board and mirrors,** and ice-box, weighing in all 3,000 lbs., installed part on ground floor and part in cellar with seven connecting pipes, held trade-fixture which could be removed. Wright v. La May, 155 Mich. 119, 15 Det. Leg. N. 1020, 118 NW 964. Status of three **bars** over twenty feet in length, one attached with angle-irons and wooden cleats screwed to floor, and having 12 or 15 pipes going through to cellar, held question for jury. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086.

36. Fact that unattached **refrigerator** was included with bar in question in purchase for lump sum, considered. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086.

tive values of the articles and the land to which it is annexed.[37] The mode, also, of the annexation,[38] and the related questions of case of removal,[39] and effect of the removal upon the freehold,[40] will be given due weight in determining the intent, though of more consequence than any of these considerations in the purpose for which the article was affixed, whether permanent[41] or temporary.[42] Of the latter class are fixtures annexed by a tenant for purposes of trade.[43] Where the purpose of the annexation is public, the article usually remains personalty.[44] If, under all the circumstances, there is a reasonable doubt whether the chattel has become a fixture, the question is for the jury.[45]

By agreement or estoppel.[See 11 C. L. 1479]—Where, however, an agreement is made as to the status of the chattel annexed, it will, if clear, be controlling upon the parties,[46] and those affected with notice thereof,[47] though, if ambiguous, it will be construed in the light of the considerations already mentioned,[48] or of the interpretation

37. Plant costing $770,000 not a fixture on land costing $9,000. Montello Brick Co. v. Trexler [C. C. A.] 167 F 482.

38. Fact that supports of **scenic railway** were imbedded in ground below frost line, one reason contributing toward holding it a fixture. Kinnear v. Scenic R. Co. [Pa.] 72 A 808. **Planing mill** built with basement, and machinery securely fastened in basement, held fixtures. Kansas City So. R. Co. v. Anderson [Ark.] 113 SW 1030. Annexation of **saloon bar** by angle-irons and wooden cleats screwed to floor, and by fifteen pipes going into cellar, and connection with city water, together with leaving walls unfinished behind bar, held to leave question for jury. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086. **Partition** wedged at ends and top, and resting at base in grooved cleat nailed to the floor, held not fixture. Commercial Tribune Bldg. Co. v. Rapid Electrotype Co., 11 Ohio C. C. (N. S.) 488. **Ice-boxes** placed in each apartment of apartment house and resting only by weight held fixtures. Williams v. London, 61 Misc. 494, 115 NYS 547. **Back bar and mirrors** weighing 1,500 lbs., and bar weighing 500 lbs. fastened to floor by screws through angle-irons, and connected by seven pipes through holes in floor with ice-box weighing 1,000 lbs., held not fixtures. Wright v. La May, 155 Mich. 119, 15 Det. Leg. N. 1020, 118 NW 964. **Soda-fountain, counters, prescription cases,** etc., unattached, and shelving attached only by wire at top stuck into wall, held removable by tenant. Thomas v. Gayle & Co. [Ky.] 120 SW 290. **Lumber** stacked near bridge by owners of bridge held not a fixture going with bridge. Big Beaver Creek Corp. v. Beaver County, 37 Pa. Super. Ct. 250.

39. Thomas v. Gayle & Co. [Ky.] 120 SW 290. **Saloon bar,** not removable without cutting seven pipes, held chattel. Wright v. La May, 155 Mich. 119, 15 Det. Leg. N. 1020, 118 NW 964.

40. Removability without enlarging doors, important. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086. Removability without injury to freehold, important. Thomas v. Gayle & Co. [Ky.] 120 SW 290. That **boiler** rested on walls separate from those of building and was removable through door without injury to building, that smokestack could be removed without injury to roof, machinery without injury to floor, and concrete foundations for machinery not made to adhere with the concrete of building, held important. Monarch Laundry v. Westbrook [Va.] 63 SE 1070.

41. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086. **Planing mill** built on own land for self and children after him, a fixture. Kansas City So. R. Co. v. Anderson [Ark.] 113 SW 1030. **Ice-boxes** for permanent use in each apartment of apartment house, fixtures. Williams v. London, 61 Misc. 494, 115 NYS 547.

42. Railroad depot, erected on land granted so long as used for railroad, removable after land no longer so used. Young v. Oviatt, 35 Pa. Super. Ct. 603. **Partition** put in, in order to sublet portion of room, not a fixture. Commercial Tribune Bldg. Co. v. Rapid Electrotype Co., 11 Ohio C. C. (N. S.) 488. **Machinery** for drilling for gas and oil on leased land not a fixture. Perry v. Acme Oil Co. [Ind. App.] 88 NE 859.

43. Soda fountain, counters, etc. Thomas v. Gayle & Co. [Ky.] 120 SW 290. **Machinery,** put on leased land for drilling for gas and oil, held not part of freehold. Perry v. Acme Oil Co. [Ind. App.] 88 NE 859.

44. Railroad station. Young v. Oviatt, 35 Pa. Super. Ct. 603.

45. Pendley Brick Co. v. Hardwich & Co. [Ga. App.] 64 SE 664. Where **saloon bar** shown not attached to floor or wall, erroneous to take case from jury on ground that there was no evidence of its being chattel. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086.

46. James Leo Co. v. Jersey City Bill Posting Co. [N. J. Law] 73 A 1046. Agreement in 25-year lease that **buildings** erected by lessee become property if terminated before certain date held binding on lessee's trustee in bankruptcy where terminated for nonpayment of rent. Niagara Falls Hydraulic Power & Mfg. Co. v. Schermerhorn, 132 App. Div. 442, 117 NYS 10. Agreement in oil lease that lessee pay taxes on all **improvements** and have right of removal binds lessor in favor of assignee of lessee. Cherokee Const. Co. v. Bishop, 86 Ark. 489, 112 SW 189. Agreement in oil lease that lessee might remove **machinery** at any time binds lessor. Perry v. Acme Oil Co. [Ind. App.] 88 NE 859.

47. Agreement in lease that lessee may remove improvements binding on grantee of all right, title and interest of lessor. Beauchamp v. Bertig [Ark.] 119 SW 75.

48. Agreement in seven-year lease that

given to it by the parties by their acts done under it.[49] But in any case an agreement that the chattel remain personalty must be made before it has become part of the freehold by annexation.[50]

The right to remove. See 11 C. L. 1480—In view of the strong policy of the law to encourage trade by allowing the timely removal by a tenant of his trade fixtures,[51] he will not be denied this right because of forfeiture of his lease,[52] nor because of covenants in his lease reasonably consistent with its retention,[53] nor, in some states, because of his acceptance of a new lease without reservation thereof.[54] A covenant, however, giving him the right of removal at any time, is good only for a reasonable time.[55]

§ 3. *Title of third persons.*[56] See 11 C. L. 1480—The status of the annexed chattel is often held to be different, where a third person has become interested, from what it is as between the original parties to the annexation.[57] Not only such fixtures as the landowner was entitled to,[58] but also such as he would have owned but for a contrary agreement, pass to his grantee[59] or mortgagee,[60] unless they are affected with notice of the agreement,[61] and sometimes even those which the an-

scenic railway to be erected by lessee go to lessor at end of lease held to show intent, under all the circumstances, that railway become at once part of the freehold, so that lessee could not remove it upon foreclosure of prior mortgage at end of two years. Kinnear v. Scenic R. Co. [Pa.] 72 A 808.

49. Where lessee company was substantially identical with lessor company, and obtained credit by holding out as an asset without objection from lessor, a brick-making plant erected by lessee, held, lessor could not, as against lessee's trustee in bankruptcy, claim the plant as included in covenant to return all additions, improvements, and extensions. Montello Brick Co. v. Trexler [C. C. A.] 167 F 482.

50. Cox v. New Bern Lighting & Fuel Co. [N. C.] 65 SE 648.

51. Montello Brick Co. v. Trexler [C. C. A.] 167 F 482.

52. Perry v. Acme Oil Co. [Ind. App.] 88 NE 859.

53. Agreement that "all improvements, betterments, and changes or alterations, shall" remain as property of lessor at end of term, held to include only alterations to buildings, such as partition and drain, but not fixtures put into saloon, viz., bar, back bar, mirrors, ice-box, chairs, etc., so that bailor of lessee could retake former during term. Wright v. La May, 155 Mich. 119, 15 Det. Leg. N. 1020, 118 NW 964. Covenant to "return * * * all improvements, additions and extensions," held not to include an extensive brick plant newly erected on portion of leased premises disconnected from part on which leased brick-works stood. Montello Brick Co. v. Trexler [C. C. A.] 167 F 482.

54. Thomas v. Gayle & Co. [Ky.] 120 SW 290.

55. Perry v. Acme Oil Co. [Ind. App.] 88 NE 859.

56. Search Note: See notes in 14 L. R. A. (N. S.) 435; 13 A. S. R. 153; 13 Id. 416; 4 Ann. Cas. 1073.

See, also, Fixtures, Cent. Dig. §§ 15-59; Dec. Dig. §§ 9-28; 19 Cyc. 1048-1054, 1056, 1058-1076; 13 A. & E. Enc. L. (2ed.) 619, 627, 637, 662.

57. Pendley Brick Co. v. Hardwich & Co. [Ga. App.] 64 SE 664.

58. Railroad condemning land must pay also for planing mill erected as fixture by owner. Kansas City S. R. Co. v. Anderson [Ark.] 113 SW 1030.

59. Fence erected by licensee of tenant with right to remove passes to purchaser of land without notice of agreement. James Leo Co. v. Jersey City Bill Posting Co. [N. J. Law] 73 A 1046. By Code 1904, § 2462, changing former rule, rights of conditional vendor do not affect subsequent purchaser of land, unless conditional sale recorded. Monarch Laundry v. Westbrook [Va.] 63 SE 1070.

60. Same rule applies between mortgagor and mortgagee as between grantor and grantee. Kinnear v. Scenic R. Co. [Pa.] 72 A 808.

61. Subsequent mortgagee of land takes subject to rights of conditional vendor of chattels previously annexed, when bill of sale recorded. Monarch Laundry v. Westbrook [Va.] 63 SE 1070.

NOTE. Effect of agreements on third persons.

(1) In case of prior annexation: The weight of authority is to the effect that a subsequent purchaser of the land, without notice, is not affected by an agreement between the owner of the land and the owner of the article at the time of annexation that the article shall retain its personal character and be subject to removal at the pleasure of the owner of the article. Hobson v. Gorringe, 66 L. J. Ch. 114, 1 Ch. [1897] 182; McDonald v. Weeks, 8 Grant Ch. (Up. Can.) 297; Porter v. Pittsburg Bessemer Steel Co., 122 U. S. 267, 30 Law. Ed. 1210; Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Joliet First Nat. Bank v. Adam, 138 Ill. 483, 28 NE 955; Binkley v. Forhner, 117 Ind. 176, 19 NE 753, 3 L. R. A. 33; Bringholff v. Munzenmaier, 20 Iowa, 513; Rowand v. Anderson, 33 Kan. 264, 6 P 255, 52 Am. Rep. 529; Ridgeway Stove Co. v. Way, 141 Mass. 557, 6 NE 714; Stevens v. Rose, 69 Mich. 259, 37 NW 205; Climer v. Wallace, 28 Mo. 557, 75 Am. Dec. 135; Arlington Mill & Elevator Co. v. Yates,

nexer could claim from him without agreement,[62] though, as to the latter, the rule varies in different jurisdictions.[63] A real estate mortgage expressly covering after-acquired property will give no better title to chattels subsequently annexed than is acquired by the mortgagor,[64] even though recorded prior to the annexation,[65] unless the chattels were annexed in substitution for property forming part of the security of the mortgage.[66] One purchasing the chattels from the annexer usually stands in the shoes of his vendor.[67]

Folioing Papers, see latest topical index.

FOOD.[68]

The scope of this topic is noted below.[69]

*Civil liability of vendor.*See 11 C. L. 1481—Under a pure food statute, any one selling impure food is liable to those injured for damages resulting proximately [70]

57 Neb. 286, 77 NW 677; Haven v. Emery, 33 N. H. 69; Brennan v. Whitaker, 15 Ohio St. 446, 45 Am. Dec. 585; Muir v. Jones, 23 Or. 332, 31 P 646, 19 L. R. A. 441; Forrest v. Nelson, 108 Pa. 481; McCrillis v. Cole, 25 R. I. 156, 55 A 196, 105 Am. St. Rep. 875; Hutchins v. Masterson, 46 Tex. 551, 26 Am. Rep. 286; Davenport v. Shonts, 43 Vt. 546; Wade v. Donan Brew. Co., 10 Wash. 284, 38 P 1009; Frankland v. Moulton, 5 Wis. 1. But in Alabama and Maine the rule is otherwise. Warren v. Lidell, 110 Ala. 232, 20 S 89; Adams Mach. Co. v. Interstate Building & Loan Ass'n, 119 Ala. 97, 24 S 857; Russell v. Richards, 10 Me. 429, 25 Am. Dec. 254; Hilborne v. Brown, 12 Me. 162; Tapley v. Smith, 18 Me. 12; but see Peaks v. Hutchinson, 96 Me. 530, 53 A 38, 59 L. R. A. 279. The rule in New York is uncertain. The majority rule is based on the reason that "to hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles." Hunt v. Bay State Iron Co., 97 Mass. 279.—Adapted from James Leo Co. v. Jersey City Bill Posting Co. [N. J. Law] 73 A 1046.

(2) In case of subsequent annexation: "One holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore the title of a conditional vendor of such chattels, or of a mortgagee of them, before or at the time they were attached to the realty, is just as good against the mortgagee of the realty as it is against the mortgagor." 19 Cyc. 105; Campbell v. Roddy, 44 N. J. Eq. 244, 14 A 279, 6 Am. St. Rep. 889; Waller v. Bowling, 108 N. C. 289, 12 SE 990, 12 L. R. A. 261; Belvin v. Raleigh Paper Co., 123 N. C. 138, 31 SE 655; Binkley v. Forhner, 117 Ind. 176, 19 NE 753, 3 L. R. A. 33; First National Bank of Waterloo v. Elmore, 52 Iowa, 541, 3 NW 547; Edwards & Bradford Lumber Co. v. Rank, 57 Neb. 323, 77 NW 765, 73 Am. St. Rep. 514; Anderson v. Creamery Package Mfg. Co., 8 Idaho, 200, 67 P 493, 56 L. R. A. 554, 101 Am. St. Rep. 188; Potter v. Cromwell, 40 N. Y. 287, 100 Am. Dec. 485; Eaves v. Estes, 10 Kan. 314, 15 Am. Rep. 345; Teaff v. Hewitt, 1 Ohio St. 511.—From Cox v. New Bern Lighting & Fuel Co. [N. C.] 65 SE 648, quoting Jones on Chattel Mortgages (5th ed.) § 133A.

62. Lessee's claim against landlord is stronger than against landlord's mortgagee or grantee. Kinnear v. Scenic R. Co. [Pa.] 72 A 808.

63. As to previously annexed chattels, held mortgagee of land not entitled to have case taken from jury as against subsequent mortgagee of chattels, Massachusetts rule being stated to be less favorable to grantee of realty than that in Minnesota. Smith v. Bay State Sav. Bank, 202 Mass. 482, 88 NE 1086.

64. Subject in hands of both to rights of conditional vendor. Cox v. New Bern Lighting & Fuel Co. [N. C.] 65 SE 648.

65. Cox v. New Bern Lighting & Fuel Co. [N. C.] 65 SE 648.

66. But not unless total security diminished. Substitution of new apparatus may add sufficient value to remainder of plant to balance value of apparatus destroyed. Cox v. New Bern Lighting & Fuel Co. [N. C.] 65 SE 648.

67. Entitled to remove railroad station purchased after annexation. Young v. Oviatt, 35 Pa. Super. Ct. 603.

68. Search Note: See notes in 21 L. R. A. 139; 38 Id. 335; 1 A. S. R. 644; 10 Id. 423; 85 Id. 400; 2 Ann. Cas. 451, 849; 4 Id. 119, 1124; 5 Id. 911; 6 Id. 238.

See, also, Food, Cent. Dig.; Dec. Dig.; 19 Cyc. 1084-1102; 1 A. & E. Enc. L. (2ed.) 738; 10 A. & E. Enc. P. & P. 4, 6.

69. It includes civil liability of vendors of unwholesome foods, regulation of food products, and powers and duties of boards and officers charged with enforcement of food regulations. **It excludes** matters relating to adulteration (see Adulteration*), regulations as to purity of drugs and medicines (see Medicine and Surgery,* § 5), general health regulations (see Health*), and the general consideration of state and municipal police power (see Constitutional Law,* § 6; Municipal Corporations,* § 10C).

70. Where defendant sold cooking oil to grocer, knowing it would be sold for food, and plaintiff, who bought some and used it,

* Always begin with the latest article on the subject. Use the latest topical index.

from such violation, and it is no defense that the seller did not know of such impurity.[71] Some states have statutes which provide that in every case of a sale of specified articles of food there is an implied contract that the goods are fit for household consumption.[72]

Validity and construction of statutes. See 11 C. L. 1481—In the exercise of the police power,[73] the sale of foods may be prohibited or regulated.[74] Such statutes and ordinances must observe constitutional requirements,[75] must be uniform in their operation,[76] reasonable,[77] and be sufficiently definite to admit of enforcement,[78] and must be such as can be complied with.[79] State laws must not be contrary to federal laws regulating the same subject;[80] and a city ordinance is not invalid because it imposes additional regulations not in conflict with a state law.[81] The sale of milk,[82] and the sanitary condition of bakeries,[83] are usually the subjects of statutory regu-

was made sick because oil was injurious to health, held defendant's violation of pure food statute proximate cause of plaintiff's illness. Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 NW 428.

71. Bound to know article sold for food was wholesome and complied with statute. Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 NW 428.

72. Term "provisions" in Act of May 4, 1889, P. L. 87, held to include eggs. Weiss v. Swift & Co., 36 Pa. Super. Ct. 376.

73. Prohibition by legislature of sale for purpose of food of carcasses of animals which are too immature to produce wholesome **meat,** held within its police power. People v. Dennis, 114 NYS 7. Agricultural Law, § 70c (Laws 1893, p. 671, c. 338), and acts amendatory thereto (Laws 1902, p. 59, c. 30; Laws 1905, p. 364, c. 171), prohibiting sale or exposure for sale of any part of a calf's carcass except hide, unless at least four weeks old when killed, held constitutional exercise of police power. Id. Evidence held to show defendants exposed carcasses for sale, where they were in ice box and prospective purchasers were allowed to inspect contents. Id. Evidence insufficient to show defendant exposed carcass for sale, contrary to statute. People v. Steers, 113 NYS 486.

74. Sale of **"condensed skim milk,"** an article made from skim milk and containing little or no butter fat, held prohibited by Acts 1900, p. 868, c. 532, § 138f (Code Pub. Gen. Laws 1904, art. 27, § 235). Reiter v. State, 109 Md. 235, 71 A 975. Immaterial that such article was not known or manufactured when statute was enacted. Id.

75. Laws 1906, p. 282, c. 48, not unconstitutional, but valid as inspection law. Savage v. Scovell, 171 F 566. Rev. Mun. Code of Chicago, § 1161, held not in conflict with the due process of law provision of 14th Amendment of U. S. Const. North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 Law. Ed. 195. Legislature had constitutional power to enact Pure Food Law (Laws 1905, p. 340, c. 306), § 3, declaring use of sulphur, etc., deleterious and dangerous to health when used in human food, and prohibiting its use. Smith v. Alphin, 150 N. C. 425, 64 SE 210. Act of May 29, 1901, P. L. 327, regulating sale of oleomargarine, held not in conflict with state or federal constitution. Commonwealth v. McDermott, 37 Pa. Super. Ct. 1; Id., 37 Pa. Super. Ct. 19.

76. Regulation which requires that all milk or cream, with certain exceptions, shall be kept and sold in tightly closed and capped bottles, or in other receptacles of similar character which shall be approved by board of health, does not fail of uniform operation because of exceptions contained therein. Klopfer v. Dayton Board of Health, 9 Ohio N. P. (N. S.) 33.

77. Regulation requiring **milk peddlers** to provide special room for storing milk and for cleansing utensils as condition precedent to obtaining milk peddling licenses, held reasonable. People v. Owen, 116 NYS 502. Regulation of May 5, 1908, by commissioner of internal revenue, providing that **imitation whisky** be labeled as such, held reasonable in view of Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928), defining whisky. Woolner & Co. v. Rennick, 170 F 662. Fact that such compounds may have been previously sold under name of liquors they imitate held immaterial. Id. Ordinance prohibiting sale or offering for sale of domestic **fowls** which shall have been in cold storage prior to removal therefrom of entrails, etc., held reasonable. People v. Reicherter, 128 App. Div. 675, 112 NYS 936.

78. Los Angeles Ordinance No. 13171, § 9, fixing standard of milk sold, held not objectionable on ground that it is vague, uncertain and contradictory. Ex parte Hoffman [Cal.] 99 P 517.

79. Agricultural Law (Laws 1893, p. 661, c. 338), as amended by Laws 1901, p. 1380, c. 566, § 22, held invalid because it fails to designate association by which certification of milk is to be made. People v. Briggs, 193 N. Y. 457, 86 NE 522.

80. Kentucky pure food law held not contrary to national food and drugs act. Savage v. Scovell, 171 F 566.

81. No conflict between St. 1907, p. 265, c. 216, regulating sale of milk, and municipal ordinance imposing additional qualifications on sale of milk. Ex parte Hoffman [Cal.] 99 P 517.

82. A board of health has power in Ohio to make such reasonable regulations with reference to its sale as will prevent sale of milk which is possibly, but not certainly, injurious to health. Klopfer v. Dayton Board of Health, 9 Ohio N. P. (N. S.) 33.

83. Plaintiff not entitled to license to operate bakery which did not comply with requirements of Laws 1903, p. 343, c. 230, § 3,

lation. While the sale of oleomargarine as such is lawful,[84] statutes usually prohibit the manufacture and sale of oleomargarine and other products when colored in imitation of butter,[85] regulate the manner of packing the same,[86] and prohibit bakery proprietors from using any substance resembling butter as a substitute for the latter.[87] A statute prohibiting the coloring of oleomargarine in order to make it resemble butter has reference to an intentional imitation of dairy butter and not to a resemblance in qualities inherent in the articles themselves and common to both,[88] and the sale of such article, rather than deceit in the sale of the same, is the gist of the offense.[89] Interstate shipment of misbranded articles of food is prohibited by federal statute,[90] and if so transported they are subject to forfeiture and seizure,[91] not being protected by the "commerce clause" of the federal constitution.[92] An article is deemed misbranded if it be an imitation of or offered for sale under the distinctive name of another law.[93] Whether or not an article of food is within a statute which prohibits the misbranding of articles sold in package form depends upon the interpretation of the work "package." [94] It has been held that a dealer commits no offense in taking small quantities from a properly labeled and ordinary sized package and selling such amounts without a label.[95] Under the federal food and drug act, an article is not deemed misbranded if labeled so as to plainly indicate that it is a com-

although established subsequent thereto and prior to Laws 1907, p. 384, c. 486. State v. Beck, 139 Wis. 37, 119 NW 300.

84. Evidence insufficient to show defendant used deception in selling article for butter, but that it was labeled "oleomargarine" and sold as such. People v. Brien, 117 NYS 246. Nothing to show infringement of Agricultural Law (Laws 1893, p. 663, c. 338), § 26. People v. Schintzius, 61 Misc. 410, 113 NYS 313. Motion to enjoin sale of oleomargarine dismissed for insufficiency of evidence to show violation. Id.

85. Act May 29, 1901 (P. L. 327), held **constitutional.** Commonwealth v. McDermott [Pa.] 73 A 427.

86. Words "every person" in Oleomargarine Act, § 6, held to refer solely to manufacturers and dealers. Morris v. U. S. [C. C. A.] 168 F 682. Indictment insufficient which failed to charge accused was either manufacturer or dealer. Id.

87. Evidence insufficient to show violation of Agricultural Law (Laws 1893, p. 664, c. 338), § 28. People v. Gottfried, 113 NYS 1086.

88. Evidence insufficient to sustain finding that oleomargarine was intentionally colored to resemble dairy butter, where coloring matter was that natural to fats used in manufacture of article. People v. Simpson, Crawford Co., 62 Misc. 240, 114 NYS 945. Cotton seed oil held not foreign substance according to evidence. Id.

89. Evidence held to warrant finding that defendant sold oleomargarine in violation of Laws 1893, p. 663, c. 338 (§ 26, Agricultural Law). People v. Teele, 131 App. Div. 87, 115 NYS 212. Where proof showed article sold had coloring in it, correct to presume that oleomargarine sold for butter was actually colored to imitate butter. Id.

90. Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1907, p. 928). United States v. Six Hundred & Fifty Cases of Tomato Catsup, 166 F 773.

91. Misbranded liquor held to become subject to laws of state when brought within its limits. State v. Intoxicating Liquors, 104 Me. 502, 71 A 758.

92. State v. Intoxicating Liquors, 104 Me. 502, 71 A 758.

93. People v. James Butler, 134 App. Div. 151, 118 NYS 849. Article labeled on one side with words "Peerless Extract of Vanilla," and on reverse side with words "Formula Vanilline Cumerin Spirits Sugar Coloring Water," held misbranded within Agricultural Law (Laws 1893, p. 655, c. 338), §§ 164, 165, as amended by Laws 1903, p. 1191, c. 524, and Laws 1905, p. 140, c. 100. Id. Insufficient to show misbranding of syrup. 10 per cent being maple sugar and 90 per cent white sugar, where label on bottle contained name "Gold Leaf Syrup," with trade mark consisting of gold leaf in form of maple leaf and stalks of sugar cane and words "composed of maple and white sugar." In re Wilson, 168 F 566. Construing all words on labels and boxes together held to convey idea they contained "blended maple syrup" and not misbranding. United States v. Sixty-Eight Cases of Syrup, 172 F 781. Product labeled "wheat middlings and corn" also contained corncob meal, which latter was not mentioned, held misbranded. Small & Co. v. Com. [Ky.] 120 SW 361. Evidence held to show violation of Agricultural Law (Laws 1893, p. 667, c. 338), §§ 50-52, where vinegar containing coloring matter was marked "pure cider vinegar." People v. Albion Cider & Vinegar Co., 118 NYS 15.

94. Held not to include a ham or side of bacon wrapped separately. State v. Swift & Co. [Neb.] 120 NW 1127. Selling such articles without having weight stamped on cover held not violation of c. 63, p. 243, Laws 1907, as it stood prior to amendment of 1909. Id.

95. To justify conviction under Code Supp. 1907, §§ 4999a20-4999a22, it must be shown that article sold may be properly defined as a package. State v. Neslund [Iowa] 120 NW 107. Pound of lard taken from package containing 50 pounds, latter being properly labeled. Id.

pound imitation or blend.[96] Provision for a hearing before seizure and destruction of unwholesome food is not necessary but is a matter of legislative discretion.[97] The fact that a food is also a medicine does not exclude it from the operation of a statute regulating the sale of foods.[98]

Crimes; prosecutions. See 11 C. L. 1483—One holding office by virtue of an invalid law purporting to create the same cannot enforce a statute as such alleged officer.[99] A preliminary examination by the department of agriculture of an alleged adulterated or misbranded food, although provided by statute, is not a condition precedent to the filing of a libel in rem for the condemnation of such product.[1] The complaint must state a cause of action,[2] but a complaint otherwise sufficient need not negative a number of exceptions or provisos contained in the law defining misbranded food when they have no relation to the facts alleged in the complaint as a violation of the law.[3] The federal oleomargarine statute makes separate offenses of a sale and delivery of such article without a prescribed brand,[4] but where the sale and delivery constitute a single transaction, they may be joined in a single count of an indictment.[5] Under a charge of misbranding goods, contrary to the federal pure food statute, it is essential that the libel should set forth the branding and facts inconsistent therewith,[6] and if there is indefiniteness in the statement, it must be removed by proof.[7] Under New York laws, the unlawful sale of oleomargarine can only be enjoined upon proof by affidavit that defendant was guilty of the violation alleged in the complant.[8] In the prosecution for having goods in one's possession of a quality condemned by statute, with intent to sell the same, it is no defense that defendant did nothing to produce the condition complained of;[9] and in a prosecution for misbranding articles of food, it is no defense that the misbranding com-

96. Where syrup, consisting of refined cane sugar flavored with an extract of maple wood, was sold under a label "Western Reserve Ohio Blended Maple Syrup," word "blend" held to indicate article was a mixture and imitation. United States v. Sixty-Eight Cases of Syrup, 172 F 781.

97. Since owner of food or its custodian is amply protected against party seizing food, who must, in subsequent action against him, show as a fact that it was within statute, due process of law held not denied by destruction of unwholesome food without preliminary hearing. North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 Law. Ed. 195. Small value that might remain in said food is mere incident and furnishes no defense to its destruction when it is plainly kept to be sold at some time as food. Id.

98. A "condiment" is a food and not a medicine, and as plaintiff's manufactured article is a condiment, held covered by Laws 1906, p. 282, c. 48. Savage v. Scovell, 171 F 566.

99. Office of dairy and food commissioner held constitutional, and proceedings instituted by him to restrain defendant from selling oleomargarine held valid. Commonwealth v. Hanley, 38 Pa. Super. Ct. 430.

1. United States v. Fifty Barrels of Whisky, 165 F 966; United States v. Sixty-Five Casks Liquid Extracts, 170 F 449.

2. Complaint held to state a cause of action under Ky. St. 1909, § 1905a. Small & Co. v. Com. [Ky.] 120 SW 361.

3. Complaint to recover penalty for misbranding substance and selling same for lard, contrary to Laws 1893, p. 655, c. 338, § 164, as amended by Laws 1903, p. 1191, c. 524. People v. Lewis, 129 App. Div. 912, 115 NYS 909.

4. Section 6 of act approved Aug. 2, 1886, c. 840, 24 Stat. 210 (U. S. Comp. St. 1901, p. 2230). Goll v. U. S. [C. C. A.] 166 F 419. Evidence insufficient to connect plaintiff in error with violation. Id.

5. Indictment held not duplicitous. Goll v. U. S. [C. C. A.] 166 F 419.

6. Libel for condemnation of catsup, alleging it was misbranded because it was made in part from tomato pulp screened from peelings and cores, as the "offal" from tomato canning factories, and not from choice ripe tomatoes, as stated in labels, held not to charge violation of pure food law. United States v. Six Hundred and Fifty Cases of Tomato Catsup, 166 F 773. Words "as the offal of tomato canning factories," being of no exact signification, and word "offal" held not equivalent to charge that tomato pulp was filthy, decomposed, or putrid vegetable substance. Id.

7. No presumption that peelings and cores not used in tomato canning factory were unsuitable for making tomato catsup. United States v. Six Hundred and Fifty Cases of Tomato Catsup, 166 F 773.

8. Certificate of chemist inadmissible under § 10, Agricultural Law (Laws 1893, p. 658, c. 338), sworn statements only being admissible. People v. Schintzius, 61 Misc. 410, 113 NYS 313.

9. Board of Health v. Vandruens [N. J. Law] 72 A 125.

plained of was done by a federal employe.[10] The usual rules in regard to evidence apply.[11] While cumulative penalties are not favored in the law, courts will enforce them if the statute clearly shows an intention that a penalty can be recovered for each offense.[12] The maximum penalty for the violation of a pure food statute should not be imposed where it is clear the act was not willful.[13] The requirement of an oath by the commissioner of internal revenue, in enforcing section 6 of the federal oleomargarine act, does not subject one to liability for perjury if the oath be false.[14]

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

The scope of this topic is noted below.[15]

§ 1. Civil Rights and Remedies, 1784.
A. The Cause of Action, 1784.
B. Procedure, 1786.
§ 2. Criminal Responsibility, 1789.

§ 1. *Civil rights and remedies. A. The cause of action.*[16] See 11 C. L. 1484 Actions of forcible entry and unlawful detainer are summary[17] and in the nature of special proceedings,[18] their purpose being to determine the right of possession only,[19] without adjudicating title,[20] and to enable a party wrongfully deprived of the possession of lands and tenements[21] to regain possession thereof by lawful means,[22] and also to have the damages assessed.[23] The usual essentials to the maintenance of an action of forcible entry and detainer[24] are a forcible entry by the defendant, and a

10. Agent had no authority to do thing forbidden by law. United States v. Fifty Barrels of Whisky, 165 F 966.

11. Admission by accused that he had been fined previously for unlawful sale of oleomargarine held without force to charge complicity in subsequent unlawful sale by another. Goll v. U. S. [C. C. A.] 166 F 419.

12. Cumulative penalties held recoverable under § 53, Agricultural Law (Laws 1893, p. 667, c. 338), imposing penalty for "each" violation, in prosecution for marking as "pure cider vinegar" barrels containing artificial coloring matter. People v. Albion Cider & Vinegar Co., 118 NYS 15.

13. Mitigating circumstances shown and penalty reduced for violating statute relating to oleomargarine. People v. Secor, 113 NYS 487.

14. Under regulations made by commissioner pursuant to Act May 2, 1902, c. 784, § 6, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641), and in force prior to 1907, oath required is to recapitulation only, and not to list of customers contained in return. United States v. Lamson, 165 F 80.

15. Treats generally of ancient civil remedy and common law crime, and of modern statutory modifications thereof. The application and use of the remedy as between parties standing in particular relations to each other and upon particular occasions are more fully treated in other appropriate topics (see Foreclosure of Mortgages on Land,* § 4; Landlord and Tenant,* § 10; Mortgages,* § 7; Tenants in Common and Joint Tenants,* § 2).

16. Search Note: See notes in 3 C. L. 1436; 8 L. R. A. (N. S.) 426; 120 A. S. R. 32; 9 Ann. Cas. 1177.

See, also, Forcible Entry and Detainer, Cent. Dig. §§ 1-77; Dec. Dig. §§ 1-15; 19 Cyc. 1112, 1123-1146, 13 A. & E. Enc. L. (2ed.) 745.

17. Denecke v. Miller [Iowa] 119 NW 380; Perry Naval Stores Co. v. Griffin [Fla.] 49 S 554.

18. Zelig v. Blue Point Oyster Co. [Or.] 104 P 193.

19. Zahn v. Obert [Okl.] 103 P 702.

20. Perry Naval Stores Co. v. Griffin [Fla.] 49 S 554. May try possession, but not title. Richie v. Owsley [Ky.] 121 SW 1015. Hence owner could not intervene to try title. Atkinson v. Stansbery [Ky.] 114 SW 1196. As to admissibility of evidence of title, see post, § 1B, Proof and Evidence. Try right of possession, but not title. Rev. St. 1895, art. 2529. Zuercher v. Startz [Tex. Civ. App.] 115 SW 1175. Title cannot be adjudicated. Sayles' Ann. Civ. St. art. 2529. Francis v. Holmes [Tex. Civ. App.] 118 SW 881. Action cannot settle or adjudicate title. Feder v. Hager, 64 W. Va. 452, 63 SE 285.

But it has been held that proceeding in unlawful detainer may be maintained though legal title to land is only question involved. Feder v. Hager, 64 W. Va. 452, 63 SE 285.

21. House built on land to which owner has no title, but in which he claims and enjoys right of peaceable possession, is tenement as word is used in Wilson's Rev. & Ann. St. 1903. Polson v. Parsons [Okl.] 104 P 336.

22. Thus avoiding incidental disturbances and breaches of peace likely to occur in an effort to regain possession by force. Bell v. Haun, 9 Cal. App. 41, 97 P 1126.

23. Perry Naval Stores Co. v. Griffin [Fla.] 49 S 554. See post, § 1B, Damages.

24. Sayles' Ann. Civ. St. 1897, art. 2519, authorizes action in case of forcible entry. Zuercher v. Startz [Tex. Civ. App.] 115 SW 1175. Forcible entry is any entry without consent of person having actual possession. Sayles' Ann. Civ. St. 1897, art. 2520. Id. En-

prior actual possession of the premises by the plaintiff,[25] within a reasonable recent period,[26] constructive possession being ordinarily insufficient.[27] Under some statutes, the cause of action may exist where the entry has been either unlawful or forcible,[28] or where one entering both lawfully and peaceably wrongfully holds over after the expiration of his right[29] or of the term for which the property was let.[30] It is essential to the maintenance of either class of actions that there be a present right of possession in the plaintiff[31] and an actual wrongful[32] or forcible detention[33] of possession by the defendant at the time of the commencement of the action.[34] One

try and assumption of control of pasture land, controlled by plaintiff and without plaintiff's consent, **held forcible entry.** Id. Entry under invalid consent from tenant held forcible entry. Brown v. French [Ala.] 49 S 255. Peaceable re-entry after default, under default provision of contract, was **not forcible entry** so as to authorize action. Cox v. Eckstrom, 142 Ill. App. 426. Implied force, as peaceable, though unlawful, entry, is not forcible entry under Arkansas laws in force in Indian Ter. prior to statehood. Vickery v. Scott [Okl.] 98 P 941.

25. Possession must be actual, as otherwise plaintiff's remedy is by ejectment. Perry Naval Stores Co. v. Griffin [Fla.] 49 S 554. Only actual adverse physical possession is sufficient as against constructive possession under claim of legal title in another than plaintiff. Richie v. Owsley [Ky.] 121 SW 1015. Possession is indicated either by physical inclosure of whole boundary or by inclosure of part of boundary under claim of title to whole, if no one else is asserting claim to any part of boundary upon which party has so entered. Id. If plaintiff has gone upon boundary under junior patent, which latter is wholly or partly within a senior grant or survey, he will be deemed to have been in actual possession of only so much of land as he actually incloses, if owner of senior grant is then in actual possession of his boundary, or, if owner of senior grant be not in actual possession of boundary in his grant but enters thereon before patentee of junior grant has ripened a title by adverse possession, the latter will ipso facto be restricted to his actual close. Id. Mere survey of premises without putting up any monuments, marks, corners, or other visible signs of occupancy or possession, was **not sufficient** to show possession in plaintiff, especially where it is not shown that fact of survey was brought to knowledge of defendant. Milem v. Freeman, 136 Mo. App. 106, 117 SW 644. Possession of plaintiff could not be established from fact that plaintiff or his predecessor in title was generally considered as in possession. Id. Possession taken by plaintiff after wrongful entry of defendant complained of is not sufficient. Id. Color of title cannot take place of actual possession. Bush v. Thomas [Ala.] 50 S 133. Possession of 4 acres was not sufficient to show possession of remainder of 360 acres tract, especially when land was not fenced and did not show any evidence of being in possession of any one. Perry Naval Stores Co. v. Griffin [Fla.] 49 S 554. Plaintiff's possession **held sufficient,** where he inclosed and used premises though he lived elsewhere and was casually absent when defendant took possession. Zuercher v. Startz [Tex. Civ. App.] 115 SW 1175. Possession, without being under claim of paper title, may be sufficient where plaintiff claimed to a marked boundary. Richie v. Owsley [Ky.] 121 SW 1015. That possession is sufficient which would, if continued a sufficient length of time, ripen into a good title. Id. Plaintiff's possession is sufficient when, if continued for the necessary period, it would vest title in him, otherwise not. Bush v. Thomas [Ala.] 50 S 133.

26. Possession existing some years, antecedent to wrong done is not sufficient. Perry Naval Stores Co. v. Griffin [Fla.] 49 S 554.

27. Constructive possession is not sufficient. Bush v. Thomas [Ala.] 50 S 133. Constructive possession which law infers from title is not sufficient to maintain action. Perry Naval Stores Co. v. Griffin [Fla.] 49 S 554.

Where plaintiff had a clear right to possession and defendant was wrongdoer, actual physical possession was not necessary. Feder v. Hager, 64 W. Va. 452, 63 SE 285.

28. Perry Naval Stores Co. v. Griffin [Fla.] 49 S 554.

29. Perry Naval Stores Co. v. Griffin [Fla.] 49 S 554. One entering on possession of tenant, either with or without consent of tenant, and refusing to vacate on demand of landlord after expiration of tenanacy, is guilty of forcible detainer, under Civ. Code Prac. § 452, subd. 4. Johnson v. Gordon [Ky.] 118 SW 372.

30. Sayles' Ann. Civ. St. 1897, art. 2519, making it forcible detainer to willfully hold over after expiration of term for which property was "let," applies only where relation of landlord and tenant exists, and not where relation is that of vendor and vendee. Francis v. Holmes [Tex. Civ. App.] 118 SW 881.

31. Plaintiff, **landlord,** may have a present right of possession although he has given no **notice of termination of tenancy,** where tenant denies relation of landlord and tenant. Polson v. Parsons [Okl.] 104 P 336. Forty days' notice to tenant held sufficient to terminate his possessory interest under lease and to entitle landlord to possession. Gambill v. Cooper [Ala.] 48 S 691. **Vendor** did not have right to possession, where evidence showed part of purchase price to have been paid, until after he had tendered a deed. Bowling v. Bowling [Miss.] 47 S 802.

32. Issue involved is fact of possession contrary to terms of statute rather than right thereto. Denecke v. Miller [Iowa] 119 NW 380.

33. No forcible detention by landlord where it did not appear that he was holding possession against the tenant (plaintiff) by force, but that he was interested in business conducted on premises. Davis v. Shapiro, 112 NYS 1105.

34. Bell v. Haun, 9 Cal. App. 41, 97 P 1126. Detention by defendant at commencement of

peaceably in possession may maintain forcible entry and detainer against one entitled to possession but who has forcibly dispossessed him.[35]

*Defenses.*See 9 C. L. 1373—Where the defendant makes entry by agreement with the plaintiff, his defense must rest upon such consent alone.[36]

(§ 1) *B. Procedure.*[37]—See 11 C. L. 1485—The procedure is usually controlled by special acts,[38] but the general statutes may apply as to matters for which no special provision is made.[39]

*Notice.*See 11 C. L. 1485—The notice to quit, required to be given within a reasonable time before the commencement of the action,[40] is jurisdictional,[41] and its terms limit the extent of the judgment.[42]

action is real gist of action, whether detainer be forcible as defined by Code Civ. Proc. § 1160, or unlawful within meaning of § 1161, or retention of possession without force and violence by one who has by force and violence entered upon possession of another. Bell v. Haun, 9 Cal. App. 41, 97 P 1126. Action cannot be brought to determine the right of possession after plaintiff has obtained possession. Chicago G. W. R. Co. v. Iowa Cent. R. Co. [Iowa] 119 NW 261.

35. State v. Hammelsy, 52 Or. 156, 96 P 865.

NOTE. Forcible dispossession by one entitled to possession: It is immaterial in what capacity the plaintiff is in possession, if defendant has the right of possession he must resort to an action at law to obtain it irrespective of whether the possession was rightful or wrongful and even though the fee simple title and present right of possession are in the defendant. Therefore the defendant's title or right to possession is incompetent, and it is only necessary to show actual peaceable possession and forcible dispossession in order to sustain the action. Respublica v. Shryber, 1 U. S. (Dall.) 68, 1 Law. Ed. 40; Cunningham v. Green, 3 Ala. 127; Milner v. Wilson, 45 Ala. 478; Logan v. Lee, 53 Ark. 94, 13 SW 422; Mitchell v. Davis, 23 Cal. 381; Voll v. Hollis, 60 Cal. 569; Giddings v. '76 Land & Water Co., 83 Cal. 96, 23 P 196; Lasserot v. Gamble [Cal.] 46 P 917; Greeley v. Spratt, 19 Fla. 644; Shoudy v. School Directors, 32 Ill. 290; Thompson v. Sornberger, 59 Ill. 326; Doty v. Burdick, 83 Ill. 473; Kepley v. Luke, 106 Ill. 395; Phelps v. Randolph, 147 Ill. 335, 35 NE 243; Hammond v. Doty, 184 Ill. 246, 56 NE 371; Roberts v. McEwen, 81 Ill. App. 413; Judy v. Citizen, 101 Ind. 18; Settle v. Henson, Morris (Iowa) 111; Emsley v. Bennett, 37 Iowa, 15; Smith v. Dedman, 7 Ky. (4 Bibb.) 192; Beauchamp v. Morris, 7 Ky. (4 Bibb.) 312; Chiles v. Stephens, 10 Ky. (3 A. K. Marsh.) 345; Young v. Young, 109 Ky. 123, 58 SW 592, 593; Terry v. Terry, 23 Ky. L. R. 2242, 66 SW 1024; Robinson v. Marshall, 25 Ky. L. R. 1785, 78 SW 904; McCormick v. McDowell, 28 Ky. L. R. 854, 90 SW 541 (statutory provision in Missouri); Stone v. Malot, 7 Mo. 158; Beeler v. Cardwell, 29 Mo. 72, 77 Am. Dec. 550; Goerges v. Hufschmidt, 44 Mo. 179; Harris v. Turner, 46 Mo. 438; Dilworth v. Fee, 52 Mo. 130; Hyde v. Fraher, 25 Mo. App. 414; Craig v. Donnelly, 28 Mo. App. 342; Greenleaf v. Weakley, 39 Mo. App. 191; Sitton v. Sapp, supra; Balch v. Myers, 65 Mo. App. 422; Boardman v. Thompson, 3 Mont. 387; Myers v. Koenig, supra; Smith v. Kaiser, 17 Neb. 184, 22 NW 368 (statutory provision in New Jersey); Mercereau v. Bergen, 15 N. J. Law, 244, 29 Am. Dec. 684; Youngs v. Freeman, 15 N. J. Law, 30; People v. Rickert, 8 Cow. (N. Y.) 226; People v. Leonard, 11 Johns. (N. Y.) 504; People v. Nelson, 13 Johns. (N. Y.) 340; People v. Fields (N. Y.) 1 Lans. 233; People v. Godfrey, 1 Hall N. Y.) 240; Carter v. Newbold, 7 How. Pr. (N. Y.) 166; Romero v. Gonzales, 3 N. M. 5, 1 P 171; Chisholm v. Weise, 5 Okl. 217, 47 P 1086; Bennett v. State, Harp. Law (S. C.) 504, 18 Am. Dec. 663; Davidson v. Phillips (17 Tenn.), 9 Yerg. (Tenn.) 93, 30 Am. Dec. 393; Warren v. Kelly, 17 Tex. 544; McRae v. White [Tex. Civ. App.] 42 SW 793; Gore v. Altice, 33 Wash. 335, 74 P 556; Gates v. Winslow, 1 Wis. 650; Pettit v. Black, 13 Neb. 142, 12 NW 841; Voll v. Hollis, supra; McCauley v. Weller, 12 Cal. 500; Gates v. Winslow, supra; State v. Pollok, 26 N. C. (4 Ired. L.) 305, 42 Am. Dec. 140; Logan v. Lee, supra; Mitchell v. Carder, 21 W. Va. 277; Hunt v. Hicks, 3 Ind. T. 275, 54 SW 818; McRae v. White, supra; Beeler v. Cardwell, 33 Mo. 84; Evill v. Conwell, 2 Blackf. (Ind.) 133, 18 Am. Dec. 138; Judy v. Citizen and Young v. Young, supra; Brown v. Feagins, 37 Neb. 256, 55 NW 1048; Hunt v. Wilson, 53 Ky. (14 B. Mon.) 44; Robinson v. Marshall, supra; Brumfield v. Reynolds, 7 Ky. (4 Bibb.) 388; Campbell v. Coonradt, 22 Kan. 704; Crain v. Murry, 76 Mo. App. 548; Davis v. Mayo, 82 Va. 97. See Dustin v. Cowdry, 23 Vt. 631, where Redfield, J., recognizes this doctrine and collects the English cases. See, also, cases collected in note to 8 L. R. A. 537.—Adapted from Wilson v. Campbell, 75 Kan. 159, 88 P 548, 8 L. R. A. (N. S.) 426.

36. Defendant could not show as a defense title in himself or the character of house kept by plaintiff. Brown v. French [Ala.] 49 S 255.

37. Search Note: See notes in 3 C. L. 1436; 30 L. R. A. 129; 120 A. S. R. 45.

See, also, Forcible Entry and Detainer, Cent. Dig. §§ 78-189; Dec. Dig. §§ 16-48; 19 Cyc. 1138-1143, 1146-1168, 1170-1171, 1173-1191; 9 A. & E. Enc. P. & P. 29.

38. Act conferring concurrent jurisdiction on circuit court (B. & C. Comp. § 5746) implied that proceedings therein should be in accordance with the act as to such special proceedings which it amended rather than according to general provisions of statute. Zelig v. Blue Point Oyster Co. [Or.] 104 P 193. Code, § 5748, provides that action in forcible entry and detainer "shall be conducted in all respects as other actions before justices of the peace." Id.

39. Zelig v. Blue Point Oyster Co. [Or.] 104 P 193.

40. Notice given 10 months prior to com-

*Limitations.*See 9 C. L. 1375—Under some statutes the action must be brought within a certain period after the unlawful entry.[43]

*Jurisdiction.*See 11 C. L. 1485—Original jurisdiction does not depend upon the value of the rights involved,[44] and, except where specially extended by statute,[45] rests only in courts lower than courts of record.[46]

*Parties.*See 11 C. L. 1486—The action may be maintained by a party entitled to possession against one entering under an invalid consent[47] or wrongfully holding possession through a third party.[48]

*Pleadings.*See 11 C. L. 1486—The complaint must allege detention of the premises by the defendant at the institution of the action.[49] It will be sufficient if it substantially comply with the statute.[50] The disallowance of a plea may be discretionary.[51]

*Proof and evidence.*See 11 C. L. 1486—Subject to the usual rule that the title cannot be put in issue[52] and can be investigated only incidentally[53] for the purpose of determining the prior possession of the plaintiff,[54] the court may, in actions of forcible entry and detainer and unlawful detainer,[55] entertain any evidence, otherwise admissible and competent,[56] and, upon sufficient proof,[57] determine any question

mencement of action was insufficient, as it would be deemed to have been waived and a fresh notice be necessary. New v. Collins, 21 Okl. 430, 96 P 607.

41. New v. Collins, 21 Okl. 430, 96 P 607. Notice to quit is foundation of proceedings in unlawful detainer. Haurand v. Schorb [N. J. Law] 72 A 107.

42. Where notice demands whole premises, "and in the event of its being found that they were not entitled to the possession of the premises as before set forth" it then demands possession of two-thirds of premies, plaintiffs were not entitled to commence action for recovery of two-thirds of premises until their right to possession of the whole had been adversely adjudicated. Haurand v. Schorb [N. J. Law] 72 A 107.

43. Must be brought within three years. Code 1899, c. 89, § 1 (Code 1906, § 3332). Feder v. Hager, 64 W. Va. 452, 63 SE 285.

44. Walther v. Anderson [Tex. Civ. App.] 114 SW 414.

45. Extended to courts of record by Code, § 4211. Denecke v. Miller [Iowa] 119 NW 380. By B. & C. Comp. § 5746, concurrent jurisdiction is conferred upon circuit court. Zelig v. Blue Point Oyster [Or.] 104 P 193.

46. Only in justice courts and courts exercising like jurisdiction. Magic City Realty Co. v. Scheneckenberger, 82 Neb. 648, 118 NW 567. Jurisdiction in county court but not in district court. Id.

47. May be maintained by tenant against party making entry by consent of defendant, which consent tenant was without authority to give and for that reason was invalid, such being forcible entry. Brown v. French [Ala.] 49 S 255.

48. Party in possession by subtenant held liable as defendant. Agen v. Nelson, 51 Wash. 431, 98 P 1115. Possession by defendant is essential to action, see ante, § 1A.

49. Bell v. Haun, 9 Cal. App. 41, 97 P 1126. Allegation of forcible entry alone is insufficient. Id. Statement in complaint that plaintiff would continue to be damaged in a certain sum for each day possession was withheld by defendant could not be construed as allegation of detention by defendant. Id.

50. Complaint in suit against tenant, each count of which complied substantially with statute, was not demurrable though terms of lease were averred in each count, thus going beyond prescribed statutory form. Gambill v. Cooper [Ala.] 48 S 691.

51. Disallowance of plea which, although sufficient in its averments to constitute a good plea, only went to personal disability of party for whose use suit was brought, arising after suit commenced, and was in nature of plea in abatement, and did not go to merits of case and if allowed could not have prevented continuance of suit, was discretionary, especially where term of court was allowed to pass after disability arose before plea was offered, and then not until after trial was reached, late in another term of court. Gambill v. Cooper [Ala.] 48 S 691.

52. Title cannot be put in issue. Zahn v. Obert [Okl.] 103 P 702. See ante, § 1A. Court has no equity jurisdiction to determine whether deed evidencing title is fraudulent. Brennan v. Shanks [Okl. 103 P 705. Title cannot be inquired into for any purpose. Thomas v. Olenick, 237 Ill. 167, 86 NE 592. Validity of will upon which title rests will not be determined. Id.

Action may turn on proof of title where plaintiff's right to possession depends upon it, and in such cases ownership may be material. Feder v. Hager, 64 W. Va. 452, 63 SE 285.

53. Denecke v. Miller [Iowa] 119 NW 380.

54. Richie v. Owsley [Ky.] 121 SW 1015. Where plaintiff entered under paper title, paper may be looked to as showing extent of his claim and possession. Id. Title deeds cannot be used in evidence to show title but only to show extent of possession or boundary. Perry Naval Stores Co. v. Griffin [Fla.] 49 S 554.

55. Statutory provisions relating to forcible entry and detainer in California are to be construed to include proceedings in "unlawful detainer." Richmond v. Superior Ct., 9 Cal. App. 62, 98 P 57.

56. Civ. Code Proc. § 838. Richmond v. Superior Ct., 9 Cal. App. 62, 98 P 57. Evidence for plaintiff of survey of land including that in dispute made for certain

properly involved in the action.[58] Although a plaintiff is not entitled to recover upon proving mere color of title without prior possession,[59] he has been held to be entitled to recover against a defendant holding without color of title, where he proves fee simple title [60] or an adjudicated right to title.[61] In some states where it is possible under the rules of practice for the issue of title to be raised, the action may be removed to a court of record [62] and the issue of title be properly determined therein.[63]

*The judgment.*See 11 C. L. 1488—The judgment must conform to the notice, complaint [64] and verdict.[65] A final judgment will not be affected by the fact that a writ of restitution may have been wrongfully issued during the pendency of the action.[66]

*Damages.*See 11 C. L. 1485, 1488—The successful plaintiff may recover his damages upon a retainer bond in the main action,[67] or, by filing a sufficient petition,[68] may have such recovery by a separate action.[69] Multiple damages are sometimes allowed,[70] but not usually for unlawful detainer without previous forcible entry.[71] The successful plaintiff may be entitled to judgment on appeal for the rental value

party prior to patent to defendant's lessor, under whom defendant claimed right to enter, held admissible. Richie v. Owsley [Ky.] 121 SW 1015. Evidence to show, in support of plaintiff's claim of possession when defendant entered, that tract covering area in dispute was patented and had been in actual adverse possession of plaintiff's lessor and its vendor for 15 years prior to patent to defendant's lessor, held admissible. Id. Evidence is always admissible upon plea of not guilty to show whether plaintiff was in actual possession as well as whether defendant forcibly entered thereon. Id.

57. Proof to show relation of landlord and tenant must show express letting of lands, or show, impliedly, at least, that defendant occupied as tenant of plaintiff, and this must be something more than mere quasi tenancy. Richmond v. Superior Ct., 9 Cal. App. 62, 98 P 57.

58. May determine whether there has been such a **breach of lease** contract as gives plaintiff right of re-entry, under Rev. St. 1895, art. 2519, giving justice court jurisdiction of action brought by landlord against tenant, whether lease has expired or has been terminated by landlord for breach by tenant. Walther v. Anderson [Tex. Civ. App.] 114 SW 414. May determine existence of essential relation between parties, such as that of landlord and tenant. Richmond v. Superior Ct., 9 Cal. App. 62, 98 P 57. Determination that relation of landlord and tenant exists eliminates question of title since tenant cannot question his landlord's **title.** Id. Where relation of landlord and tenant exists, case need not be transferred to superior court as involving question of title to realty. Id.

59. Hot Springs Lumber & Mfg. Co. v. Sterrett, 108 Va. 710, 62 SE 797. Prior possession essential, see ante, § 1A. Bush v. Thomas [Ala.] 50 S 133.

60. Defendant in possession under quitclaim deed from third party, executed after commencement of forcible entry action, was without color of title. Zahn v. Obert [Okl.] 103 P 702. Defendant holding under contract with alleged agent of alleged owner, but failing to prove such agency, was held to be holding without color of title within purview of Wilson's Rev. & Ann. St. 1903, § 5087. Id.

61. Unsuccessful claimant for public land whose claim had been finally determined by the secretary of the interior was holding without color of title thereafter as against successful claimant. Brennan v. Shanks [Okl.] 103 P 705.

62. Under Code 1896, § 2147, et seq., action may be removed from justice court to circuit court on petition. Clark v. Dunn [Ala.] 50 S 93.

63. Title depending on question as to whom premises had been allotted by partition proceedings was **for jury.** Clark v. Dunn [Ala.] 50 S 93.

64. Judgment for whole of premises was improper where notice and complaint taken together claimed only a two-thirds interest. Haurand v. Schorb [N. J. Law] 72 A 107. Not for greater damages than prayed for. Haumueller v. Ackermann, 130 Mo. App. 387, 109 SW 857.

65. Cannot be for greater damages than warranted by verdict. Haumueller v. Ackermann, 130 Mo. App. 387, 109 SW 857.

66. Columbia & P. S. R. Co. v. Moss, 53 Wash. 512, 102 P 439.

67. United States Fidelity & Guar. Co. v. Ballard [Okl.] 99 P 1017.

68. Petition, which failed to state judgment obtained, and to allege that plaintiff sustained damages, held insufficient. United States Fidelity & Guar. Co. v. Ballard [Okl.] 99 P 1017.

69. Plaintiff may recover his damages in main action, or in separate action; Ind. Ter. Ann. St. 1899, § 2289, giving him right to recover in main action, not being exclusive. United States Fidelity & Guar. Co. v. Ballard [Okl.] 99 P 1017. Where defendant has given bond and retained possession, successful plaintiff may maintain separate action for damages upon bond against principal and surety or against surety separately. Id.

70. Under Rev. St. 1899, § 3340, damages in double the amount assessed and double the rents and profits may be allowed. Haumueller v. Ackermann, 130 Mo. App. 387, 109 SW 857.

71. Rev. Civ. Code, § 2322, providing for triple damages for forcible entry, does not warrant such allowance in case of defendant holding possession under claim of right. Baldwin v. Bohl [S. D.] 122 NW 247.

pending appeal.[72] Under some statutes, damages may be assessed in the action for forcible entry and detainer against an unsuccessful plaintiff and his sureties.[73] The measure of damages recoverable,[74] together with evidence and pleading relating thereto[75] is treated elsewhere.

Appeal. See 11 C. L. 1486—On a traverse of the findings, the circuit court is usually confined to the issues tried in the lower court.[76] It is the duty of the appellant to perfect his appeal, and perform all acts required in connection therewith, within the period fixed by statute.[77] The giving of an additional[78] and special undertaking for rents is usually a condition precedent to the exercise of the right to appeal[79] and, being jurisdictional, cannot later be supplied.[80] The perfecting of an appeal does not always stay the issuance of a writ of ouster by the trial court.[81] When the appeal operates to stay proceedings, such stay is not necessarily dependent upon the payment of costs.[82] On review by certiorari, the proceedings may be quashed for any irregularity.[83]

§ 2. *Criminal responsibility.*[84]—See 11 C. L. 1487

FORECLOSURE OF MORTGAGES ON LAND.

The scope of this topic is noted below.[85]

§ 1. General Rights and Defenses and Remedies Available, 1790.
§ 2. Foreclosure by Scire Facias and by Executory Process, 1792.
§ 3. Sale by Trustee in Deed or Under Power, 1792.
A. Right and Authority to Sell, 1792.
B. Notice, 1793.
C. Sale and Deed, 1794.
D. Costs and Fees, 1794.
§ 4. Entry and Possession or Possessory Action, 1794.
§ 5. Strict Foreclosure, 1795.
§ 6. Foreclosure by Action and Sale, 1795.
A. Right of Action and Nature of Remedy, 1795.
B. Parties and Process, 1796.
C. Pleading, Trial and Evidence, 1798.
D. Decree or Judgment, 1799.
E. Sales, 1800.
F. Receivership in Foreclosure, 1802.
G. Costs, Fees and Expenses, 1802.
H. Effect of Proceedings, 1803.
§ 7. Defective Foreclosures and Their Avoidance, 1804.
§ 8. Title and Rights of Purchasers, 1806. Lis Pendens and Bona Fide Purchasers, 1807. Purchases by Beneficiary, Trustee or the Like, 1807.
§ 9. The Bid and Proceeds of Foreclosure, 1807.
§ 10. Personal Liability and Judgment for Deficiency, 1808.
§ 11. Redemption, 1809.

72. Gambill v. Cooper [Ala.] 48 S 691. Under Code 1896, § 2146, evidence of such rental value was admissible on appeal. Id.

73. Under Ind. Ter. Ann. St. 1899, § 2297, in force in Indian Territory prior to statehood, evidence thereon and such assessment was proper. Lipscomb v. Allen [Okl.] 102 P 86.

74. See Damages, § 5F.

75. See Damages, §§ 7A, B.

76. Atkinson v. Stansberry [Ky.] 114 SW 1196.

77. Where statute makes it his duty to file transcript within 6 days (see Ann. St. 1906, § 3370), it is no excuse for his failure to so file it that clerk of justice neglected to attend to the matter as he expected. Anheuser-Busch Brew. Ass'n v. Southern Bowling Ass'n, 134 Mo. App. 312, 114 SW 90.

78. Special undertaking for rents is in addition to usual appeal bond and does not take its place. Zelig v. Blue Point Oyster Co. [Or.] 104 P 193.

79. B. & C. Comp. § 5754, requiring such special undertaking, applies where original trial is had in circuit court, as well as when had in justice court. Zelig v. Blue Point Oyster Co. [Or.] 104 P 193.

80. B. & C. Comp. § 549, subd. 4, permitting amendments to perfect right of appeal, does not permit amendments to supply matters jurisdictional and essential to exercise of right. Zelig v. Blue Point Oyster Co. [Or.] 104 P 193.

81. No stay under Sess. Laws 1907, p. 497, c. 163, which applies to justice court and county court. Magic City Realty Co. v. Scheneckenberger, 82 Neb. 648, 118 NW 567. No stay, since object of statute (see preceding note) is to oust man against whom judgment has been obtained, leaving him his remedy on the bond, if his possession be finally adjudged to be lawful. Id.

82. Upon giving of undertaking, appeal may become effective to stay proceedings independent of payment of costs, construing St. 1898, § 3368, providing for appeal in unlawful detainer action. Palin v. Probert, 137 Wis. 40, 118 NW 173.

83. Under Pub. Laws 1908, p. 39, c. 1533, § 9, certiorari will issue to remove proceedings to supreme court. Hart v. Superior Ct. [R. I.] 71 A 513. Verdict signed by foreman alone and not by each of the jurors held to be irregular and not in compliance with Pub. Laws, p. 37, c. 1533, § 5. Hart v. Superior Ct. [R. I.] 71 A 1057.

84. **Search Note:** See Forcible Entry and Detainer, Cent. Dig. §§ 190-205; Dec. Dig. §§ 49-59; 19 Cyc. 1113-1123; 9 A. & E. Enc. P. & P. 25.

§ 1. *General rights and defenses and remedies available.*[88] *Rights and defenses in general.*[See 11 C. L. 1487]—An action to foreclose a mortgage is equitable in nature.[87] In Utah, it is considered as being an action in rem.[88] Since the object of the action is to bar the equity of redemption,[89] adverse claims are not cognizable,[90] nor can investigation of the mortgagee's title be made, except where it is incidental to the main object of the action.[91] The cause of action survives to the personal representatives of the mortgagee,[92] and may be enforced against the estate of one personally liable for the mortgage debt.[93] Foreclosure presupposes a valid existing mortgage.[94] The right to foreclose extends only to the debt secured [95] and accrues upon default,[96] the note and mortgage being construed together to determine the time when foreclosure may be had.[97] By the terms of some mortgages, the debt is ipso facto matured by partial default [98] or by breach of covenants.[99] In such case

85. This topic excludes validity of mortgages and rights of the parties thereto (see Mortgages;* Fraud and Undue Influence*), priority of mortgages as dependent upon record and notice (see Notice and Record of Title*), and foreclosure of chattel mortgages (see Chattel Mortgages*).

86. **Search Note:** See notes in 3 C. L. 1436; 8 L. R. A. (N. S.) 426; 120 A. S. R. 32; 9 Ann. Cas. 1177.

87. Election to demand payment of principal sum will not be enforced if unconscionable in character. Bieber v. Goldberg, 133 App. Div. 207, 117 NYS 211. Grantee in deed absolute on its face may foreclose upon showing that it is in fact a mortgage. Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

88. Boucafski v. Jacobsen [Utah] 104 P 117.

89. Pettus v. Gault, 81 Conn. 415, 71 A 509. Where one of several heirs to intestate in five parcels of land mortgaged his interest therein after death of his mother, and three of parcels were set off to intestate's heir, two to his mother's heirs, foreclosure on all five parcels could properly be granted, since equity of redemption would thereby be properly foreclosed as to whatever interest he had. Downey v. Moriarty, 81 Conn. 442, 71 A 581.

90. While defendants in foreclosure asserted paramount title but did not ask to have it adjudicated, but that suit be dismissed as to them, court could not adjudicate such title but was bound to dismiss suit as to such defendants. Gennes v. Peterson [Or.] 103 P 515.

91. Pettus v. Gault, 81 Conn. 415, 71 A 509. Equity has jurisdiction of cross bill to rescind contract of purchase for fraud on purchaser in preventing him from discovering defective title on bill to foreclose. Redrow v. Sparks [N. J. Eq.] 72 A 442. Where mortgage antedates deeds alleged to be fraudulent conveyances which it is sought to have set aside, any litigation affecting latter can only affect equity of redemption, and cannot affect assignee of mortgage. Thrift v. Bannon [Md.] 73 A 660.

92. Where complainant died during pendency of foreclosure proceedings, cause of action survived to his personal representative. Haines v., Kent Circuit Judge, 155 Mich. 417, 15 Det. Leg. N. 1070, 119 NW 439.

93. In foreclosure suit brought against devisee and heirs of deceased purchased of the mortgaged premises, who is personally liable, where it appears that executor who is residuary legatee has received personal property belonging to estate exceeding amount of lien sought to be enforced, such executor may be compelled to pay off mortgage debt. Schade v. Connor [Neb.] 120 NW 1012.

94. Where there was no existing mortgage at time of order of seizure and sale was issued sale thereunder is void. Pons v. Yazoo & M. V. R. Co., 122 La. 156, 47 S 449. Where one conveyed land to grantee who was under a conservator, which fact was unknown to grantor, and received note and mortgage therefor, equity will look upon deed and mortgage as single transaction, and permit holder of mortgage to foreclose subject to grantee's right to redeem. Wiser v. Clinton [Conn.] 72 A 928. In suit to foreclose, where mortgagor claimed that he had not received all his loan, interest being deducted in advance, evidence held to show that mortgagor agreed to pay interest in advance and a certain commission for making loan, and that therefor there was no failure of consideration. National Life Ins. Co. v. Donovan, 238 Ill. 283, 87 NE 356.

95. Oral agreement for valuable consideration could not be enforced for purpose of attaching new debt to that which mortgage was originally given to secure. Hayhurst v. Morin, 104 Me. 169, 71 A 707.

96. Camden Safe Deposit & Trust Co. v. Dialogue [N. J. Err. & App.] 72 A 358. Where mortgage provided that whole debt should mature upon default of interest or any covenant, it was error to enjoin foreclosure where there had been a failure to pay both interest and taxes. Stewart v. McCaddin, 107 Md. 314, 68 A 571. On election of mortgagee to start foreclosure proceedings prior to maturity of principal upon default in interest, cause of action accrued upon such default. Lovell v. Goss [Colo.] 101 P 72.

97. Copper Belle Min. Co. v. Costello [Ariz.] 100 P 807. Provision in mortgage that default in any one of several notes secured thereby all should become due does not mature entire debt. Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 P 509.

98. Where bond provided that upon default whole should become immediately due

the mortgagee must manifest his election to declare the debt due by some affirmative act[1] within a reasonable time,[2] and the debt then becomes as fully matured as one due by expiration of the term fixed for payment.[3] A tender of the amount due before such election,[4] or a payment before commencement of suit, will bar the foreclosure.[5] Equity will relieve from a default brought about by the mortgagee's conduct.[6] Foreclosure may ordinarily be had although the debt is barred by limitations,[7] and although interest has not been paid thereon.[8] The right of action on a default may be lost by waiver,[9] extension of time,[10] or payment.[11] That the mortgagor is the

at option of obligee, judgment might be entered notwithstanding no definite date of payment was mentioned. State Mut. Building & Loan Ass'n v. Batterson [N. J. Law] 71 A 115. Where, by express terms, mortgage provided default as to entire debt should occur upon failure to pay any one of several promissory notes secured, default held to have occurred where one note was extended until maturity of next note, at which time neither was paid. Nelms v. Rogers, 155 Ala. 489, 46 S 453. Where it was provided that whole debt should become due upon a 30 days' default of interest, suit instituted four days after first instalment became due was prematurely brought. Reis v. McDevitt, 219 Pa. 414, 68 A 1012. Where mortgage gives power to sell premises and retain principal and interest upon default in payment of interest, mortgage may be foreclosed and principal and interest recovered, though principal, by terms of note, be not yet due. Copper Belle Min. Co. v. Costello [Ariz.] 100 P 807. Evidence held to show that payments were properly applied by mortgagee to payment of principal whereby default was made on payment of interest in consequence of which mortgagor was entitled to decree of foreclosure. Benson v. Reinshagen [N. J. Eq.] 72 A 954.

09. Judgment refusing to foreclose will not be disturbed where clause authorizing mortgagee to declare default is too indefinite and uncertain to authorize default. Fleming v. Franing [Okl.] 98 P 961. Assignee can foreclose for default in payment of taxes incurred before assignment was made. Gerrity v. Wareham Sav. Bank, 202 Mass. 214, 88 NE 1084. Where mortgage to secure instalments provided that upon removal of any portion of crop debt should become due, and mortgagor, not in default on instalments, sold part of crop, such sale did not constitute removal sufficient to cause default, mortgage being construed to be intended to secure payment of notes as they fall due. Woodard v. Elrod, 154 Ala. 340, 45 S 647.

1. Coman v. Peters, 52 Wash. 574, 100 P 1002. Suit commenced without notice to mortgagor prematurely brought, although default had occurred. Id. **Commencement of suit** is sufficient declaration of election to declare obligation due. Bower v. Steln, 165 F 232.

2. Declaration by cestui que trust that mortgage is due for default of interest is not made within unreasonable time when made within sixty-four days. Lovell v. Goss [Colo.] 101 P 72. Where second mortgagee exercised his right to declare default four days after default on payment of interest on first mortgage, such election is not void as being inequitable and oppressive. Weinstein v. Sinel, 133 App. Div. 441, 117 NYS 346.

3. Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 58, 94 P 900.

4. Tender of instalment and interest within days of grace specified in mortgage, giving holder right to declare principal due on default of payment of instalment, deprives holder of right to elect to demand payment of whole principal, if made before commencement of suit. Bieber v. Goldberg, 133 App. Div. 207, 117 NYS 211.

5. Where mortgagee declared whole amount due in default in payment of taxes as provided for in mortgage, but mortgagor paid such delinquent taxes and penalties before commencement of suit and notified mortgagee thereof, his right of action is barred. Fleming v. Franing [Okl.] 98 P 961.

6. Where mortgage provided that mortgagee might consider whole sum due if instalment not paid within ten days after due, and mortgagor gave check which was dishonored but no notice thereof given mortgagor until after expiration of such ten days, complaint must be dismissed. Cassel v. Regierer, 114 NYS 601.

7. Harper v. Raisin Fertilizer Co. [Ala.] 48 S 589. If note is kept alive by payments made by one of several parties liable thereon, mortgage securing it may be foreclosed as to all the parties, notwithstanding that note is barred as to one of makers. Holroyd v. Millard, 142 Ill. App. 392.

See note 5 C. L. 1448, as collating the authorities pro and con.

8. That no interest has been paid on note for 15 years does not bar foreclosure. Downey v. Moriarty, 81 Conn. 442, 71 A 581.

9. Where deed of trust was given by administratrix to secure heirs against judgments incurred by her, and judgment creditors were made defendants, who during process of foreclosure told complainant that they would make no defense, they were properly held to have waived their rights under judgments. Smith v. Munger [Miss.] 47 S 676. **Default held not** to have been **waived** where time of payment of one of several notes maturing monthly was extended until maturity of next note, where neither was paid at such time. Nelms v. Rogers, 155 Ala. 489, 46 S 453. Evidence held not to show that plaintiff had waived payment on coupons for interest on corporate bonds at maturity and acquiesced in agreement not to present them for payment. Arnot v. Union Salt Co., 133 App. Div. 490, 117 NYS 1105.

10. Evidence held to sustain finding that mortgagee had extended time of payment and that injunction restraining executory

holder of a subsequent mortgage,[12] or that he was able to pay the debt which fact was not communicated to the mortgagee,[13] that the mortgage has been canceled by deed, where mortgagor has repudiated such deed,[14] constitutes no defense to the action. An agreement between the mortgagor and a third person whereby the latter is to act as the mortgagor's agent to procure the assignment of the mortgage for the mortgagor's benefit is within the statute of frauds.[15] Nor will an agreement to convey after obtaining title constitute a defense when no fraud is shown.[16] Where property has been conveyed as security with an agreement to reconvey, a claim for interest may be set off against a claim owing to the grantor.[17]

§ 2. *Foreclosure by scire facias and by executory process.*[18] *Scire facias.* See 11 C. L. 1489—A scire facias surmortgage is founded on the instrument itself, and not upon a record thereof.[19] Co-obligors on a note secured by mortgage, who are not parties to the action thereon, will not be concluded by judgment in defendant's favor.[20]

§ 3. *Sale by trustee in deed or under power. A. Right and authority to sell.*[21]—See 11 C. L. 1400—A power of sale in the mortgage is a prerequisite to a right to foreclose by advertisement,[22] but it will be presumed that a deed of trust contains the usual power of sale.[23] The power can be exercised only in accordance with the terms of the deed[24] or an agreement of the parties[25] after maturity of the debt,[26]

proceedings was properly continued. Millliken v. Sweet Home Co., 123 La. 998, 49 S 669. Where mortgage specifically provided that mortgagee should have right to revoke election to declare principal due, such revocation was effective even against a surety. Philadelphia Sav. Fund Soc. v. Lasher, 144 Ill. App. 653.

11. Evidence held to show payment. Marsh v. Vanness [N. J. Err. & App.] 74 A 47.

12. Plea by defendant in foreclosure that it is the owner of subsequent mortgage upon premises constitutes no defense to action to foreclose a prior mortgage. White v. Gibson, 61 Misc. 436, 118 NYS 983.

13. If mortgagor did not communicate to mortgagee fact that he was ready, willing, and able to pay bond and mortgage, that fact could not affect mortgagee's right to foreclose, and mortgagor upon such showing was not entitled to injunction restraining assignment and foreclosure of such mortgage. Bodenstein v. Saul, 132 App. Div. 628, 117 NYS 349.

14. Where mortgagor had elected to repudiate his deed and to rescind entire contract under which mortgage was to be canceled, and having succeeded in annulling contract and retaining land, he cannot set up such contract to defeat mortgage foreclosure. Montague v. Priester, 82 S. C. 492, 64 SE 393.

15. Parol agreement that mortgagor should act as plaintiff's agent to procure assignment of mortgage for his own benefit, being void under statute of frauds, cannot be set up as a defense in foreclosure by plaintiff in assigned mortgage in his own name. Jenkins v. Bishop, 62 Misc. 87, 115 NYS 1011.

16. Nix v. Thackaberry, 240 Ill. 352, 88 NE 811.

17. Williams v. Pratt [Cal. App.] 103 P 151.

18. **Search Note:** See Mortgages, Cent. Dig. §§ 1153, 1154; Dec. Dig. § 388; 27 Cyc. 1514; 13 A. & E. Enc. L. (2ed.) 781, 782, 837, 851, 860, 875; 9 A. & E. Enc. P. & P. 129.

19. Scire facias upon mortgage being founded upon instrument itself, and not upon record of it, production of mortgage duly executed and acknowledged, having indorsed thereon certificate of recorder showing book and page upon which recorded, followed by proof of mortgagor's default, balance due and unpaid, and terre-tenant's possession, constituted prima facie case against terre-tenant. Prouty v. Marshall, 36 Pa. Super. Ct. 527.

20. Boltz v. Muehlhof, 37 Pa. Super. Ct. 375.

21. **Search Note:** See notes in 73 A. S. R. 559; 92 Id. 573.

See, also, Mortgages, Cent. Dig. §§ 1012-1143; Dec. Dig. §§ 329-379; 27 Cyc. 1449-1511; 13 A. & E. Enc. L. (2ed.) 891; 28 Id. 767; 9 A. & E. Enc. P. & P. 162.

22. Comp. Laws, § 11133. Bryan v. Straus Bros. & Co. [Mich.] 16 Det. Leg. N. 292, 121 NW 301.

23. Huene v. Cribb, 9 Cal. App. 141, 98 P 78.

24. Where trust deed precisely limited occasions and conditions under which power of sale could be exercised, and prescribed essential prerequisites of valid sale, attempted conveyance by trustees, disregarding such conditions, did not pass title. Washington County R. Co. v. Canadian Colored Cotton Mills Co., 104 Me. 527, 72 A 491. Trustee under trust deed cannot execute conveyance which will carry title where deed reserves to grantor right of possession until default, where no default is shown. Bursey v. Lyon, 32 App. D. C. 231.

25. Where creditor under trust deed which was in fact mortgage arbitrarily declared default without notice to one who had purchased property subject to such deed, though creditor had agreed to extend time until trustee should deliver purchaser abstract of title, sale in violation of agreement was void. Huene v. Cribb, 9 Cal. App. 141, 98 P 78.

26. That mortgagor was adjudged bank-

and will convey only the interest which is authorized to be sold thereunder.[27] Trustees under a railroad mortgage must foreclose upon request made by the requisite number of bondholders.[28] In some states sale out of court cannot be had where a lien creditor's suit has been commenced,[29] nor where the trustee is out of possession.[30] Whether a sale shall be ordered prior to a determination of the rights of the parties in interest is within the sound discretion of the court,[31] but in such case, individual bondholders may intervene to protect their interests.[32] Where the rights of the parties are not determined, the plaintiff need not tender the amount due in order to stay the sale.[33] Equity will not enjoin a sale by a substituted trustee on the ground that the original trustee was improperly removed.[34] In Colorado the statute of limitations is no bar to the exercise of a power of sale in a trust deed given as security for debt.[35]

(§ 3) *B. Notice.*[36]—See 11 C. L. 1401—Requirements in the deed as to notice[37] and advertisement of sale must be strictly complied with.[38] Where a sale has been adjourned, proper notice thereof must be given.[39] Recitals in the deed of sale that proper notice has been given are prima facie evidence thereof only where notice has been given by the trustee himself.[40] In Mississippi, the statute requiring three weeks publication of advertisement of sale applies only to instruments executed subsequent to its enactment.[41]

rupt prior to maturity of debt secured does not entitle holder to exercise power of sale, though by provision of bankruptcy law all debts are made due upon adjudication. Martin v. Kirkpatrick, 149 N. C. 400, 63 SE 68.

27. Cannot offer unincumbered title where there are prior mortgages. Brett v. Davenport [N. C.] 65 SE 611.

28. Central Trust Co. v. Cincinnati, H. & D. R. Co., 169 F 466.

29. Where lien creditor's suit has been brought under Code 1906, § 4147, a trustee joined in such action under trust deed cannot thereafter make sale of the property even though he alleges that his lien has priority. Stafford v. Jones, 65 W. Va. 567, 64 SE 723.

30. Trustees had sufficiently met requirement of actual possession before sale, where they are in actual possession and operation of road, whether they are in actual possession of lots mortgaged along with road or not. Washington County R. Co. v. Canadian Colored Cotton Mills Co., 104 Me. 527, 72 A 491.

31. Where it appeared undesirable to continue operation of street railway property under receiver, and where by reservations in decree rights of all parties could be protected, such order was properly made. Bowling Green Trust Co. v. Virginia Passenger & Power Co., 164 F 753. Plan of reorganization proposed by bondholders may be considered in suit to foreclose liens upon street railway property, on question of whether sale should be ordered in advance of determination of rights of parties. Id. Court may order sale under railroad mortgage before final determination of validity and amount of bonds held by each holder. Central Trust Co. v. Cincinnati, H. & D. R. Co., 169 F 466. Where plaintiffs do not controvert debt nor allege payments, and trust deed makes debt certain as to amount and interest, it cannot be claimed that sale was ordered without ascertaining debt. Brown v. Click, 65 W. Va. 459, 64 SE 613.

32. Where trustee asks court to order sale of railway property in advance of ascertainment of liens and settlement of rights of parties, individual bondholders may at their own expense be allowed to intervene to protect their interests. Bowling Green Trust Co. v. Virginia Passenger & Power Co., 164 F 753.

33. In action to enjoin sale under trust deed until amount of notes due could be determined, plaintiff was not required to tender amount due since correct amount could not be ascertained until other questions of facts were determined. Lance v. Rumbough, 150 N. C. 19, 63 SE 357.

34. Brown v. Click, 65 W. Va. 459, 64 SE 613.

35. McClung v. Graham [Colo.] 100 P 411.

36. Search Note: See note in 11 Ann. Cas. 170.

See, also, Mortgages, Cent. Dig. §§ 1050-1069; Dec. Dig. §§ 353-366; 27 Cyc. 1466-1487; 28 A. & E. Enc. L. (2ed.) 788; 9 A. & E. Enc. P. & P. 167.

37. Where three notices of sale under trust deed were required, sale made where trustee posted only one notice, and it was not shown that the others were posted, was null. Meisner v. Taylor [Tex. Civ. App.] 120 SW 1014.

38. Sale by trustee under power, when not properly advertised, as required by mortgage, such requirement being of substance of contract, is invalid. Brett v. Davenport [N. C.] 65 SE 611.

39. Where it appeared that notice of adjournment was given by continuing publication of original notice and inserting below it notice of postponement, such notice of adjournment was sufficient. Brown v. Click, 65 W. Va. 459, 64 SE 613.

40. Will not extend to case where trustee entrusted posting of notices of sale to sheriff. Meisner v. Taylor [Tex. Civ. App.] 120 SW 1024.

41. Code 1906, § 2772. Davis v. O'Connell [Miss.] 47 S 672.

(§ 3) *C. Sale and deed.*[42]—See 11 C. L. 1491—No trustee has the right to name the time and place of sale.[43] Under statutes requiring appraisement before sale, an actual entry on the land is not necessary in order to view it.[44] Under statutes providing for the passage of the title held when the mortgage was recorded, a sale passes such title although the mortgagor had no title at the time of foreclosure.[45] A deed conveying all the grantor's right, title and interest passes title although the number of acres is erroneously stated.[46] It is the duty of the trustee on a sale under a prior mortgage to collect the entire amount of the bid, and, after satisfying his own mortgage, to pay the surplus to those entitled thereto as shown by an accounting.[47] Recitals in the trustee's deed of compliance with the requisites of a valid sale are prima facie evidence thereof.[48] The doctrine of res adjudicata applies to foreclosure under powers of sale,[49] and such proceeding cannot be collaterally attacked.[50] Questions relating to fraud, inadequacy of price or mistake are treated in subsequent sections.

(§ 3) *D. Costs and fees.*[51]—See 11 C. L. 1492—Reasonable solicitor's fees may be allowed.[52] In the absence of bad faith on the part of the trustee, the expenses of a first sale not ratified should be paid out of the proceeds of the second sale.[53] The trustee may be allowed a commission for the collection of rents made for the benefit of all the parties although the sale be not ratified.[54]

§ 4. *Entry and possession or possessory action.*[55]—See 11 C. L. 1492—Actual entry

42. Search Note: See notes in 103 A. S. R. 51; 11 Ann. Cas. 166.

See, also, Mortgages, Cent. Dig. §§ 1045-1049, 1070-1132, 1137-1143; Dec. Dig. §§ 348-351, 357-376, 378, 379; 27 Cyc. 1463, 1475-1500, 1502-1511; 28 A. & E. Enc. L. (2ed.) 802; 9 A. & E. Enc. P. & P. 178.

43. Davis v. O'Connell [Miss.] 47 S 672.

44. Where appraisers met on land and had actual view thereof, if was not necessary to enter upon every parcel. Arnold v. Watson [Ark.] 121 SW 354.

45. Code Pub. Gen. Laws 1904, art. 66, § 11. Felgner's Adm'rs v. Slingluff, 109 Md. 474, 71 A 978.

46. Where sheriff's deed described land as of all right, title and interest of grantor in trust deed in 160 acres, describing same by metes and bounds, such deed conveyed all grantor's interest although land contained 360 acres instead of 160. Anderson v. Casey-Swasey Co. [Tex. Civ. App.] 120 SW 918.

47. Where first trustee sold and property was bid in by trustee, under second trust deed, who declined to pay full amount of bid and wished to pay to first trustee amount of his claim only, sale was void, and first trustee rightfully refused to make deed. McPherson v. Davis [Miss.] 48 S 625. Accounting may be had by owner of premises sold under trust deed where amount for which sold was in excess of amount required to satisfy indebtedness. Huene v. Cribb, 9 Cal. App. 141, 98 P 78.

48. That conditions and terms of sale have been complied with. Washington County R. Co. v. Canadian Colored Cotton Mills Co., 104 Me. 527, 72 A 491. That lands had been duly appraised. Arnold v. Watson [Ark.] 121 SW 354. Where recital in deed given on sale of land under power in mortgage stated payment, presumption is that purchaser made such payment. Gowdy v. Gowdy [S. C.] 65 SE 385.

49. Felgner's Adm'rs v. Slingluff, 109 Md. 474, 71 A 978. In action by grantee of mortgagor to quiet title against mortgagee, setting up that statute had run against mortgage, but there was no evidence that statute was considered, judgment that mortgage lien was paramount was not res adjudicata in action to foreclose as to statute of limitations (Kammann v. Barton [S. D.] 122 NW 416), nor was such judgment res adjudicata as to mortgagor who was not made a party (Id.).

50. Felgner's Adm'rs v. Slingluff, 109 Md. 474, 71 A 978.

51. Search Note: See Mortgages, Cent. Dig. §§ 1133-1136; Dec. Dig. § 377; 27 Cyc. 1500-1502; 28 A. & E. Enc. L. (2ed.) 839.

52. Under evidence, allowance of $7,308 for solicitor's fees not unreasonable. McCormick v. Unity Co., 142 Ill. App. 159.

53. Griffith v. Dale, 109 Md. 697, 72 A 471. Proportionate **stenographer's fees** of one employed in proceedings to ratify first sale were properly deducted from claim of purchaser in second sale who was also unsuccessful party in attempted ratification of first sale, it being presumed that stenographer was employed in behalf of first purchaser as well as others. Id. **Attorney's fee** for unsuccessfully defending first sale against junior mortgagees is not a proper charge on second sale, he not representing junior mortgagees. Id. Fees of **expert witness** on attempted ratification of first sale are not proper charges on second. Id. Where injunction restraining foreclosure of trust deed issued after property was advertised for sale was dissolved, mortgagee was entitled to **printer's fees** for advertisement and to reasonable attorney's fees for procuring dissolution of injunction. Gulfport Land & Imp. Co. v. Augur [Miss.] 48 S 722.

54. Where collection would have been authorized by court if application had been made. Griffith v. Dale, 109 Md. 697, 72 A 471.

55. Search Note: See, also, Mortgages, Cent. Dig. §§ 982-1011; Dec. Dig. §§ 320-328; 27 Cyc. 1439-1448; 13 A. & E. Enc. L. (2ed.) 827; 9 A. & E. Enc. P. & P. 156.

and possession [56] by the mortgagee may be equivalent to a foreclosure. More than one witness to entry for condition broken is unnecessary.[57] In New Hampshire the presumed possession following a mere entry is insufficient to sustain a foreclosure if such possession has been interrupted by the subsequent entry of the mortgagor.[58]

§ 5. *Strict foreclosure.*[59]—See 11 C. L. 1493

§ 6. *Foreclosure by action and sale. A. Right of action and nature of remedy.*[60]—See 11 C. L. 1493—If an intermediate lienor be not made a party to the foreclosure of the prior lien, he may, after offering to redeem from such prior lien, foreclose his own lien.[61] A mortgagee who has assigned the mortgage and indorsed the note may, upon indorsement back to him and cancellation of the assignment before recordation, maintain a writ of entry to foreclose.[62] Personal liability on the part of the mortgagor is not essential.[63] Where a purchaser from the mortgagor has assumed the mortgage, it may be foreclosed as against him.[64] A mortgagee owes no duty to the mortgagor in respect to securing an insurance company's consent to foreclosure,[65] nor need he clear title before the sale.[66]

*Jurisdiction.*See 11 C. L. 1493—In Texas, the county court has no jurisdiction to decree foreclosure of a mortgage on real estate.[67]

*Limitations.*See 11 C. L. 1494—The statute of limitations begins to run upon the default unless stayed by special circumstances.[68] The fact that the mortgagor is absent from the state does not toll the statute of limitations as to a junior claimant.[69] A subsequent claimant may invoke the bar of the statute as against a prior claimant.[70] The Missouri statute, forbidding foreclosure of the mortgage after the debt is barred, does not apply where the debt was not barred at the time of its passage.[71] The statute runs from the date of the mortgage in South Carolina.[72]

56. Where mortgagor was absent and house locked, entry of mortgagee by publicly announcing such fact from porch, although actual entry to house was not made until several days afterwards, was sufficient. Largey v. Taylor [N. H.] 72 A 375.

57. Largey v. Taylor [N. H.] 72 A 375.

58. Largey v. Taylor [N. H.] 72 A 375. Where mortgagee actually made entry, constructive possession of mortgagor based on possession of keys, and fact that household furniture remained on premises, does not, as matter of law, establish that mortgagee's possession was not continued and actual. Id.

59. Search Note: See notes in 5 C. L. 1446; 20 L. R. A. 370.

See, also, Mortgages, Cent. Dig. § 1149; Dec. Dig. § 384; 27 Cyc. 1514; 13 A. & E. Enc. L. (2ed.) 779, 782, 829; 9 A. & E. Enc. P. & P. 122.

60. Search Note: See notes in 5 C. L. 1448; 7 Id. 1689.

See, also, Mortgages, Cent. Dig. §§ 1144-1246, 1262-1267; Dec. Dig. §§ 380-419, 423-425; 27 Cyc. 1511-1515, 1519-1562; 13 A. & E. Enc. L. (2ed.) 779; 9 A. & E. Enc. P. & P. 219.

61. Equitable Land Co. v. Allen [Neb.] 121 NW 600.

62. Mitchell v. Elwell, 103 Me. 164, 68 A 701.

63. Upon bill filed for appointment of receiver and to foreclose, plea to enter bill, setting up that there was no personal liability in mortgagors, but not negativing liability placed upon property, may properly be overruled. Lott v. Barnes & Jessup Co. [Fla.] 48 S 994.

64. Where mortgage on leasehold interest and milling machinery is foreclosed, amount of debt may be charged to property and sale made for nonpayment, purchasers holding property at time of foreclosure having assumed and agreed to pay mortgage. Davis v. Williams, 139 Wis. 8, 120 NW 396.

65. Foreclosure commenced without consent of insurance company carrying insurance on mortgaged premises not a fraud upon orator. Findlay v. Longe, 81 Vt. 523, 71 A 829.

66. Where it does not appear that land was sold at lower figure because of alleged cloud, nor that there were other bidders than actual purchaser at sale, nor that others were deterred from bidding on account of such cloud, it is not duty of mortgagee before foreclosing and selling property to clear it of such cloud. Davis v. Blackiston, 108 Md. 640, 71 A 89.

67. Womble v. Harsey [Tex. Civ. App.] 118 SW 764.

68. Where it appeared that life tenant of trust fund, invested in mortgage executed to chancellor, lived with owner of premises, but that nothing had been paid on such mortgage for 20 years, and where circumstances existed to rebut presumption of payment, statute of limitations did not apply as against purchaser under second mortgage who had notice of such prior mortgage. Chancellor of State v. Seiberlich [N. J. Eq.] 72 A 948.

69, 70. Boucofski v. Jacobson [Utah] 104 P 117.

71. Where notes were not barred at time of passage of Laws 1891, p. 184, forbidding foreclosure of mortgage after note barred, and shortening period of limitations by Rev. St. 1899, § 4277, to two years, mortgage could

Abatement. See 7 C. L. 1692
Leave to sue. See 5 C. L. 1450
Discontinuance. See 11 C. L. 1494

(§ 6) *B. Parties and process.*[73] *Parties plaintiff and defendant.* See 11 C. L. 1494—The holder of a negotiable promissory note containing a mortgage may foreclose in his own name.[74] All those materially interested should be made parties [75] in order to divest them of their rights.[76] In the foreclosure of a mortgage covering a leasehold, the lessors are not proper parties.[77] The owners of a leasehold are not necessary parties to the foreclosure of a mortgage on the leased premises.[78] The wife of the mortgagor is a necessary party to cut off her equity of redemption in the dower interest [79] but not to subject the interest of the husband to the decree.[80] The guarantors of the debt are proper [81] but not necessary parties.[82] A senior mortgagee is a proper [83] though not a necessary party to the foreclosure of a junior mortgage.[84] In suits to foreclose corporation mortgages, the bondholders are represented by the trustee and need not be brought in.[85] The rule that a trustee who

be foreclosed after two years although at time of sale notes were barred. Morrison v. Roehl, 215 Mo. 545, 114 SW 981. Where note was not barred when Rev. St. 1899, §§ 4276, 4277, providing that foreclosure cannot be had when debt is barred, took effect and such act being prospective in effect, deed of trust as security for note was without its provisions. Hower v. Erwin, 221 Mo. 93, 119 SW 951.

72. Twenty-year statute runs from date of mortgage, not from time of mistaken execution of receipt of debt nor from time such mistake was discovered. Montague v. Priester, 82 S. C. 492, 64 SE 393.

73. Search Note: See note in 68 A. S. R. 354.

See, also, Mortgages, Cent. Dig. §§ 1272-1307; Dec. Dig. §§ 426-443; 27 Cyc. 1562-1589; 9 A. & E. Enc. P. & P. 266.

74. If payee of negotiable promissory note, payable to order and containing in its body a mortgage, indorses instrument in blank and transfers it thus, holder may, in his own name, foreclose mortgage. Barnes v. Fleetwood, 5 Ga. App. 296, 63 SE 60.

75. One charged with duty of discharging mortgage may, on application of owner, be made party to foreclosure, and be compelled to pay debt. Schade v. Connor [Neb.] 120 NW 1012. Where judgment, setting aside sale under trust deed to firm whose assets were transferred to trustee, was reversed, **receiver** of such firm was properly made a party to protect firm assets. Duncan v. Home Co-Operative Co., 221 Mo. 315, 120 SW 733. Where a father, the **holder of an unrecorded deed** from his daughter, to land incumbered by a mortgage, had his daughter mortgage premises with proceeds of which first mortgage was paid, and subsequently recognized validity of second mortgage, his title was not adverse to the mortgagor and he was properly made a party to foreclosure of second mortgage. Piot v. Davis, 241 Ill. 434, 89 NE 676. **Grantee subject to mortgage** whose deed is duly recorded is a necessary party to foreclosure. Wilson v. Dahler, 9 Cal. App. 500, 99 P 723. Where answer alleged defendant's interest and that one-third interest was held by another, which interest was chargeable as part of debt, and that administratrix of such person was necessary party, issues were material and failure to find thereon was error. Id. One who purchased with full knowledge of mortgage and assumed mortgage debt is not a "third party" in contemplation of Kirby's Dig. § 5399. Kenney v. Streeter [Ark.] 114 SW 923. **Administrator** need not, under Rev. St. 1899, c. 52, § 4346, be appointed and made party defendant in foreclosure of mortgage executed by decedent husband upon homestead, where there is no estate to be administered, as any surplus would go to widow. Hardy v. Atkinson, 136 Mo. App. 595, 118 SW 516.

76. Sale under instrument, construed as mortgage, made after mortgagor was adjudged a lunatic and to which she was not a party, did not divest her of her interest in property. Jones v. Yantis [Ky.] 113 SW 111. Where defendant, who was served with process, made default after filing demurrer, his lien was extinguished by decree and sale. Baumgarten v. Mitchell [Cal. App.] 101 P 43.

77. Davis v. Taylor, Lowenstein & Co. [Ala.] 47 S 653.

78. Milwaukee Trust Co. v. Van Valkenburgh, 132 Wis. 638, 112 NW 1083.

79. Davis v. Taylor, Lowenstein & Co. [Ala.] 47 S 653.

80. In foreclosure of mortgage on leasehold, wife of lessee who had joined in mortgage is not necessary party to subject property interest of husband. Davis v. Taylor, Lowenstein & Co. [Ala.] 47 S 653.

81. Weinstein v. Sinel, 133 App. Div. 441, 117 NYS 346.

82. While grantors of mortgage debt are not necessary parties to foreclosure, they are proper parties and, if joined, deficiency judgment may be entered against them. Morrison v. Slater, 128 App. Div. 467, 112 NYS 855.

83. Equitable Land Co. v. Allen [Neb.] 121 NW 600.

84. Milwaukee Trust Co. v. Van Valkenburgh, 132 Wis. 638, 112 NW 1083.

85. Illinois Ch. Act, Starr. & C. Ann. St. 1896, c. 22, pars. 7, 43, providing that unknown persons interested may be served by publication, does not apply. Alton Water Co. v. Brown [C. C. A.] 166 F 840. Trustee in railroad mortgage acts for benefit of all bondholders in bringing foreclosure, even

files a bill to foreclose should make the cestuis que trust parties has no application where they are unknown or so numerous as to make it impossible.[86]

*New parties and intervention.*See 9 C. L. 1384—A mere creditor having no interest in the subject-matter has no right to intervene,[87] nor have individual bondholders on foreclosure of a mortgage on corporate property such right, in the absence of dereliction of duty on the part of the trustee.[88] Intervention of a corporation issuing bonds secured by mortgage in process of foreclosure is unnecessary.[89] The purchaser at an execution sale, pending a foreclosure of which he had notice, has no right to be made defendant.[90]

*Process.*See 11 C. L. 1495—Jurisdiction must be acquired by personal service of process [91] in the proper county.[92] Where the property has been brought under control of the court by seizure, substituted service is sufficient,[93] and, where the defendant has been summoned, he need not be again summoned on cross petition to foreclose a second mortgage.[94] Where personal service has been had, the summons need not disclose the nature of the action nor the amount claimed.[95] Where the statute provides for notice by publication, it must be substantially complied with.[96] The affidavit for publication need not describe the premises.[97] The publication notice

though trustee represents certain of bondholders in different capacity. Central Trust Co. v. Cincinnati H. & D. R. Co., 169 F 466. Where general issue as to priority between mortgage and receiver's certificates was presented, but no issue as to any individual bondholder, it was not duty of court to require bondholders to be made parties, nor after entry of judgment to permit them to be brought in. Nowell v. International Trust Co. [C. C. A.] 169 F 497.

86. Bill foreclosing mortgage to secure 188 bonds not demurrable where only 40 holders were parties and remainder unknown. Camden Safe Deposit & Trust Co. v. Dialogue [N. J. Err. & App.] 72 A 358.

87. Under Code Civ. Proc. § 452. Clinton v. South Shore Natural Gas & Fuel Co., 61 Misc. 339, 113 NYS 289.

88. Bowling Green Trust Co. v. Virginia Passenger & Power Co., 164 F 753. Bondholders will not be granted leave to intervene to contest validity of notes to which certain bonds are held as collateral where decree pro confesso had been entered and reference made to ascertain property covered by railroad mortgage, such outstanding bonds and interest being mere matters of computation. Central Trust Co. v. Cincinnati H. & D. R. Co., 169 F 466.

89. Since sale of past due bonds held by trustee as security under street railway mortgage in process of foreclosure would give purchaser no better right than mortgagee has, intervention of corporation issuing such bonds is unnecessary. Morton Trust Co. v. Metropolitan St. R. Co., 168 F 941.

90. Peninsular Naval Stores Co. v. Cox [Fla.] 49 S 191. Purchase of judgment entered subsequent to mortgage, foreclosure of which was pending, after filing of lis pendens, has no right to be substituted as defendant in place of judgment creditor in foreclosure. Id.

91. Judgment of foreclosure made in county court without service of process on defendant is void. Womble v. Harsey [Tex. Civ. App.] 118 SW 764. Order of sale cannot be sustained merely on notice to widow of defendant in foreclosure, where neither she nor personal representative of defendant had been made party and no decree had been taken. Pendleton v. Vigneaux, 166 F 935. Nonresident owner, who had not himself signed note and mortgage, who was sued by initial letters of his name, but not personally served, and notice was by publication not containing words "real name unknown," as required by Code Civ. Proc. § 148, is not divested of his interest in the land. Butler v. Smith [Neb.] 120 NW 1106.

92. Where notice, provided for in Code Prac. art. 735, for executory process to foreclose, was served in L. parish, and property was situated in O. parish, and defendant was resident therein, sale made thereunder was null. Carrere v. Aucoin, 122 La. 258, 47 S 598.

93. Rogers v. Binyon [La.] 49 S 991.

94. Since original summons brings defendant into court for all purposes, a summons on cross petition to foreclose second mortgage is unnecessary, they being bound to take notice thereof. Lawson v. Rush [Kan.] 101 P 1009.

95. Wilson's Rev. & Ann. St. 1903, § 4259, providing that summons shall command sheriff to notify defendant that he has been sued, does not require summons in foreclosure where personal service has been had to advise defendant of nature of action against him, nor need amount claimed be indorsed on writ. Horton v. Haines [Okl.] 102 P 121.

96. Where officers' return on notice reciting that he caused public notice of time and place of sale to be given over 30 days before date of sale by advertisement in the Oklahoma newspaper printed within said county, it is a sufficient compliance with Wilson's Rev. & Ann. St. 1903, § 4648, requiring public notice of place of sale to be given. Price v. Citizens' State Bank [Okl.] 102 P 800.

97. Ennis v. Grimes [Kan.] 102 P 454. Immaterial that affidavit for publication did not describe land, and omitted word "personal" in stating that personal service could not be had. Boyle v. Sayers [Kan.] 102 P 454.

need not specify which of several tracts the several defendants are interested in,[98] nor is it necessary to state who are the prior mortgagors if such information may be inferred from the notice.[99]

(§ 6) *C. Pleading, trial and evidence.*[1] *Bill, complaint or petition.*See 11 C. L. 1496—The petition must set out facts showing plaintiff's right.[2] Failure to allege payment of mortgage recording tax is immaterial.[3]

*Demurrer, plea or answer.*See 11 C. L. 1496—A general denial raises the issue of priorities [4] and of the execution of the mortgage.[5] Where the answer in foreclosure set up defect in title to lands conveyed by the mortgagee but not included in the mortgage and no paramount title, fraud, or eviction is shown, such answer is subject to exceptions.[6]

*Cross bills and supplemental bills.*See 9 C. L. 1385—Leave to file a supplemental bill is within the discretion of the court.[7] A supplemental bill to add to the terms of the decree of foreclosure cannot be filed without notice, at least as to parties adversely affected.[8]

*Trial and hearings.*See 11 C. L. 1496—The guardian ad litem of infant defendants need not be present at the taking of evidence.[9] The reopening of the suit to take further testimony is in the discretion of the trial court.[10] In some jurisdictions the suit may be referred to a master to state the account.[11]

*Proof and evidence.*See 11 C. L. 1496—The burden rests upon the plaintiff to establish the facts essential to a foreclosure,[12] unless admitted.[13] A presentation of the

98. Immaterial that petition and publication notice named several defendants and several tracts of land, but did not indicate that any particular defendant was interested in any particular tract. Boyle v. Sayers [Kan.] 102 P 454.

99. Notice of publication which fails to state who prior mortgagors were is not void, since such information was inferentially stated. Core v. Smith [Okl.] 102 P 114.

1. **Search Note:** See Mortgages, Cent. Dig. §§ 1308-1368, 1387-1401; Dec. Dig. §§ 444-464, 475-482; 27 Cyc. 1590-1621, 1634-1641; 9 A. & E. Enc. P. & P. 367.

2. Allegation that defendant claims some right, title, and interest in premises, but if he has such interest it is inferior to plaintiff's mortgage lien, states facts suffioient to constitute cause of action in foreclosure against a defendant who acquired interest in premises after execution of mortgage. Horton v. Haines [Okl.] 102 P 121.

3. Moore v. Lindsay, 61 Misc. 176, 114 NYS 684.

4. Where complaint alleges that defendant's lien is subsequent to that of plaintiff, which allegation is denied, issue is formed under which evidence as to which lien is prior may be admitted. Citizens' Permanent Savings & Loan Ass'n v. Rampe, 116 NYS 597.

5. General denial is sufficient to require proof of execution of mortgage, where it is alleged or shown by evidence that it is lost or destroyed. Blair v. Breeding [Tex. Civ. App.] 121 SW 869. In action to foreclose corporate trust deed collateral to bonds, where there is proof showing authority to execute and deliver bonds, any other defense cannot be raised by verified plea of non est factum. McCormick v. Unity Co., 239 Ill. 306, 87 NE 924.

6. Putnam v. Morgan [Fla.] 48 S 629.

7. Leave to file supplemental and amended bill showing existence of other liens when bill was filed and seeking to make lienors parties to foreclose and to apply proceeds to such liens was properly refused when two years had elapsed since filing of original bill, and after master's report as to such liens had been filed, and where sale had been directed under first mortgage. Schoolfield v. Cogdell [Tenn.] 113 SW 375.

8. Atwood v. Carmer [N. J. Eq.] 73 A 114.

9. Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

10. It is within discretion of trial court to refuse to reopen foreclosure suit to admit evidence of president of defendant corporation where it appeared that he was absent and that defendant's attorney did not know that he could furnish evidence. Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 P 509.

11. Under the Illinois chancery practice, the suit should be referred to a master to state the account. Hennessey v. Walsh, 142 Ill. App. 237. Account stated by master determining net earnings of line of railway composing part of consolidated system operated for long period, disallowing certain credits and deductions and approximating other items not clearly shown by evidence, affirmed. Wabash R. Co. v. Compton [C. C. A.] 172 F 17.

12. **Proof of execution** of mortgage foreclosed is necessary even as to mortgagor. Blair v. Breeding [Tex. Civ. App.] 121 SW 869. Burden rests upon complainant of proving **ownership of mortgage.** Harris v. Barrett [N. J. Eq.] 72 A 956. Evidence held not to show that assignee was owner of bond and mortgage. Id. In suit to foreclose deed as mortgage, burden is upon receiver of plaintiff bank to show that deed to cashier, with word "trustee" after his name, was made on behalf of bank. Andrews v. Kennon [Iowa] 122 NW 840. Where alle-

note and mortgage, where no issue has been made, entitles the plaintiff to judgment.[14] The burden of proving affirmative defenses rests upon the defendant.[15] Signers of the notes, but not parties to the mortgage, may not testify on defendant's behalf as to what occurred during the lifetime of the mortgagee.[16] The ordinary rules as to variance apply.[17] A copy of the mortgage attached to the petition controls recitals of the petition in variance therewith.[18]

(§ 6) *D. Decree or judgment.*[19]—See 11 C. L. 1497—A valid judgment may be entered in default.[20] The sale of different parcels may be adjudged in a single decree.[21] Under some statutes, judgment for the full amount of the debt due at the time of the rendition of the judgment, may be entered.[22] Where the decree follows the description of the compaint, it is sufficient.[23] Where a judgment misdescribing

gations of petition to foreclose are denied, burden is upon plaintiff to prima facie prove **that no action at law has been instituted** for collection of debt. Beebe v. Bahr [Neb.] 120 NW 1021. Evidence held to warrant finding that **amount** of purchase price of plantation mortgaged was $3,150 and which represented amount of debt. Felder v. Leftwich, 123 La. 931, 49 S 645. Allegation that defendant vendee **purchased with full knowledge** of mortgage and assumed debt is not disproved by agreed statement of fact showing that there was no provision to pay such debt, since it only shows that deed did not mention assumption of mortgage debt. Kenney v. Streeter [Ark.] 114 SW 923. Where cross complaint made out prima facie case of foreclosure and alleged that certain persons claimed interest, and they denied that their **claims were subject to mortgage,** they could not complain of finding against them where they failed to prove priority of their claims. Raggio v. Palmtag [Cal.] 103 P 312.

13. Allegation that defendant vendee purchased with full knowledge of mortgagor, and that its assumption by him was real consideration, and that he assumed in writing payment of debt, not being denied, must be taken as true and need not be proved, under Kirby's Dig. § 6137. Kenney v. Streeter [Ark.] 114 SW 923. Where answer admitted giving of mortgage, its terms and record, and plaintiff proved ownership of note and nonpayment, mortgage could properly be foreclosed although mortgage was not offered in evidence or that it existed at time of assignment. Pettus v. Gault, 81 Conn. 415, 71 A 509. Where answer admits giving of mortgage, its record, and terms, presumption is that condition created thereby continued to exist. Id.

14. Taliver v. Stephenson, 83 Neb. 747, 120 NW 450.

15. Burden is upon corporation in foreclosure of corporate trust deed collateral to bonds to show bad faith on part of plaintiff in purchase of collateral bonds. McCormick v. Unity Co., 239 Ill. 306, 87 NE 924.

16. Signers of joint promissory notes, who are not parties to mortgage given for such notes, are not competent witnesses to testify in defendant's behalf as to matters occurring within lifetime of deceased mortgagee. Boltz v. Muehlhof, 37 Pa. Super. Ct. 375.

17. Where bill alleged existence of absolute debt, execution of note and mortgage and default in payment of interest and proof showed collateral and indirect liability in that mortgage was not given to secure an existing debt but for purpose of protecting mortgagee as surety, such variance was immaterial. Powell v. Huey, 241 Ill. 132, 89 NE 299. Where petition alleged vendor's lien and proof showed contract lien, and answer alleged satisfaction of vendor's lien that note was for borrowed money, and allegation in reply that note was to take place of original vendor's lien note, such pleadings as a whole were sufficient to support judgment. Melton v. Beasley [Tex. Civ. App.] 121 SW 574.

18. Erroneous description in petition. Sharp v. McColm [Kan.] 101 P 659. Sale made under mortgage, execution of which was recited to be by president of corporation pursuant to resolution of directors, which resolution was not attached, could not be supplied by expert's affidavits, and was therefore void. Bank of Leesville v. Wingate, 123 La. 386, 48 S 1005.

19. Search Note: See Mortgages, Cent. Dig. §§ 1402-1486; Dec. Dig. §§ 475-500; 27 Cyc. 1634-1679; 13 A. & E. Enc. L. (2ed.) 823; 9 A. & E. Enc. P. & P. 401.

20. Since defendant is bound to take notice of proceedings, where judgment was entered by default against defendant personally served, and petition was subsequently amended allowing omitted defendant to appear and obtain personal judgment against defendant on second mortgage given by him, judgment entered on such second mortgage against defaulting defendant was valid. Shellabarger v. Sexsmith [Kan.] 103 P 992.

21. Court may render single decree specifying order of sale of different parcels and need not make separate decree as parcels are sold. Nix v. Thackaberry, 240 Ill. 352, 88 NE 811.

22. Rev. Code Civ. Proc. § 656. Russell v. Wright [S. D.] 121 NW 842. Where judgment was entered long subsequent to maturity of instalments due, court properly included full amount of instalments with interest due and unpaid when judgment was entered. Russell v. Wright [S. D.] 121 NW 842.

23. Where decree required mortgaged premises described in complaint be sold, and the court declared that description following was description of property to be sold as in complaint, title of defendant consisting of tenancy in common in contingent remainder passed under sale made in accordance therewith. E. A. Beall Co. v. Weston [S. C.] 65 SE 823.

the land refers to the petition, it will be construed to embrace the land correctly described therein.[24] A decree need not be entered against an administrator sued jointly with the mortgagor, if there remains no personal estate to be administered.[25] The decree may impose liens on the property after the sale.[26] On foreclosure, the extent of the lien of the trust deed should be determined.[27] Under certain circumstances, the mortgagors are entitled to be credited with the value of a portion of the premises released by the mortgagee without their consent.[28] Judgment is a final adjudication as to amount due, including costs and disbursement, but does not determine question of right to redeem.[29]

(§ 6) *E. Sales.*[30]—See 11 C. L. 1497—The statutory notice of sale must be given [31] and appraisement made.[32] Objections to an appraisement must be made before the sale by a motion to vacate.[33] Where no deduction is to be made from the appraised value, the value of the owner's interest need not be separately found.[34] A sale may be ordered before the rights of the parties under several mortgages and other claims have been fully ascertained and determined.[35] The referee to sell may require the judgment creditor to advance the necessary amount for expenses.[36] Unless detrimental to the property,[37] where the mortgage covers different parcels, they must be separately sold,[38] but not where they are held by one owner,[39] and under some stat-

24. Sharp v. McColm [Kan.] 101 P. 659. Default judgment referring to land described in petition, but misdescribing it, will be construed to embrace land correctly described in petition. Id.

25. Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

26. Decree foreclosing mortgage on street railway operated by receivers might properly impose lien for payment of expenses and obligation incurred by receivers, including personal injury claims and balances due on leased lines. Guaranty Trust Co. v. Metropolitan St. R. Co., 166 F 569.

27. Where trust deed was given on flat building divided into two parts, deed included easement in servient estate. Foote v. Yarlott, 238 Ill. 54, 87 NE 62.

28. Where mortgage covered homestead set apart to wife in bankruptcy proceedings and also other property, and mortgagee had released without mortgagor's consent as to such other property, mortgagors, in action to foreclose, were entitled to be credited for value of part so released. Blood v. Munn [Cal.] 100 P 694. Where it was claimed that portion of mortgaged property released by mortgagee without consent of mortgagor should first have been sold, evidence held to show that mortgagee had notice of partition in bankruptcy proceedings whereby homestead was set aside, which homestead constituted part as to which no release was given. Blood v. Munn [Cal.] 100 P 694.

29. Clark v. Levy, 114 NYS 890.

30. Search Note: See note in 49 L. R. A. 233.

See, also, Mortgages, Cent. Dig. §§ 1487-1591; Dec. Dig. §§ 500½-554; 27 Cyc. 1680-1745; 9 A. & E. Enc. P. & P. 501.

31. Notice of sale published **in weekly newspaper** of legal and business information published for many years is sufficient under statute; it need not be in a daily paper. Hoock v. Sloman, 155 Mich. 1, 15 Det. Leg. N. 845, 118 NW 489. Notice of sale held sufficient although **date of sale** was obliterated so that close inspection was required to decipher it. Hanson v. Kitterman [S. D.] 121 NW 389. Affidavit for publication disclosing that action is one of foreclosure establishes basis for publication although **premises are erroneously described.** Sharp v. McColm [Kan.] 101 P 659. Notice of publication is sufficient although premises are erroneously described, if general nature of judgment to be rendered be stated. Id. Advertisement and terms of sale should state that **sale was subject to lease,** and should describe it. Carter v. Builders' Const. Co., 129 App. Div. 318, 113 NYS 816. Advertisement and terms of sale should disclose **judgment invalidating junior mortgage,** foreclosure of which had been held void, and also undetermined appeal thereon. Id.

32. A minute inventory of fuel, repairs, etc., is not necessary on sale of street railway system. Guaranty Trust Co. v. Metropolitan St. R. Co., 168 F 937.

33. Siwooganock Guar. Sav. Bank v. Feltz [Neb.] 121 NW 967.

34. Failure of appraisers to separately find value of interest of owner is without prejudice, since such value is necessarily same as appraised value, where appraisers make no deductions from appraised value. Siwooganock Guar. Sav. Bank v. Feltz [Neb.] 121 NW 967.

35. Morton Trust Co. v. Metropolitan St. R. Co., 165 F 493.

36. Carter v. Builders' Const. Co., 130 App. Div. 609, 115 NYS 339.

37. On foreclosure sale of street railway system including leased lines, court should preserve road as a going concern, and should not authorize sale in parcels. Guaranty Trust Co. v. Metropolitan St. R. Co., 168 F 937.

38. Different parcels must be sold separately, and, out of proceeds, prior mortgage covering part thereof must first be paid. Citizens' Permanent Savings & Loan Ass'n v. Rampe, 116 NYS 597.

39. Where one tenant in common purchases interest of other tenant, division of

utes, the court may determine from the pleadings how they shall be sold.[40] Where the mortgage covers the homestead in addition to other real estate, the court may properly order the sale of the property not embraced in the homestead before selling the homestead proper.[41] Under the Louisiana statute, a writ of seizure and sale is exclusive.[42] In a proper case, the sale may be adjourned pending the determination of an appeal.[43] On a postponement of the sale, the court may order a bond to be given for losses sustained pending the stay.[44] A sheriff's certificate of sale under foreclosure by advertisement is personal property.[45] One who holds the mortgage as a pledge may foreclose it and purchase property thereunder, but takes title as trustee for the pledgor and holds subject to redemption of the debt for which the property was pledged.[46]

*Confirmation.*See 11 C. L. 1408—A sale may be confirmed although the order of sale be returned by the sheriff after the time prescribed therefor,[47] since such irregularity is cured by the order of confirmation.[48] An order of confirmation of a cash sale should not direct the execution of the deed before the purchase price is paid.[49]

Resale.—Upon a resale, where there is more than one mortgage, the court should appoint a commission to ascertain the amounts due, order the property sold and apply the proceeds in the order of priority.[50] As far as the title is concerned, a direction of resale merely adjudges that it is marketable.[51] When property has been sold under a power in a mortgage, and the purchaser fails to comply with the terms

land, before foreclosure of previously executed mortgage, is not necessary. Burge v. Chestnut [Ky.] 121 SW 989.

40. Under Civ. Code Prac. § 694, court may determine from pleadings how several tracts mortgaged shall be sold. Burge v. Chestnut [Ky.] 121 SW 989.

41. Where first mortgage executed by husband and wife covered wife's homestead and also other real estate owned by husband, and second mortgage to another party covered only husband's real estate, it was proper, upon foreclosure of first mortgage, to order mortgagee to exhaust property not embraced in homestead before selling homestead proper, and second mortgagee could not object since marshaling securities is only allowed where common debtor is owner of the several funds out of which payment is to be made. Cooper Wagon & Buggy Co. v. Irvin, 83 Neb. 832, 120 NW 430.

42. Since law does not provide for seizure prior to that made under writ of seizure and sale under mortgage, such provisional writ issued to plaintiff pending injunction restraining foreclosure was properly set aside. Milliken v. Sweet Home Co., 123 La. 998, 49 S 669.

43. Where decree of foreclosure and sale was entered, but mortgagee has delayed prosecution of appeal so that hearing could not be had at current session, sale could not be made until next term of court. Guaranty Trust Co. v. Metropolitan St. R. Co., 170 F 626.

44. Where appellant asked for postponement of sale under foreclosure judgment from which no appeal had been taken, for purpose of getting decision before sale of appeal from order denying motion to bring in defendants, execution of which was not stayed, court could require bond to be given for losses sustained pending stay, and such undertaking was binding though sureties did not justify. Knickerbocker Trust Co. v. Lounsbury, 122 App. Div. 357, 106 NYS 587.

45. Held transferable by executor of deceased mortgagee in whose name issued by assignment under Massachusetts statute. Boschker v. Van Beek [N. D.] 122 NW 338.

46. Union Trust Co. v. Hasseltine, 200 Mass. 414, 86 NE 777.

47. Sale should be confirmed although order of sale to sheriff be returned more than 60 days from its date. Siwooganock Guar. Sav. Bank v. Feltz [Neb.] 121 NW 967.

48. A confirmation cures all defects and irregularities in the conduct of the sale, and every presumption will be indulged of its fairness and regularity. Bank of Pine Bluff v. Levi [Ark.] 118 SW 250. That order of sale returned 62 days after issuance, instead of within 60 days, is an irregularity curable by order of confirmation. Price v. Citizens' State Bank [Okl.] 102 P 800.

49. Where sale is for cash, an order of confirmation directing that deed shall be executed before purchase money is paid to sheriff is erroneous. Price v. Citizens' State Bank [Okl.] 102 P 800.

50. After various attempted sales under senior and junior trust deeds, void because purchaser refused to pay full amount of bid, claiming right to apply part to second deed, court should appoint commission to ascertain amounts due on both deeds, order property sold, and apply proceeds in order of priority. McPherson v. Davis [Miss.] 48 S 625.

51. On motion to direct resale, court does not make a decision that title tendered is perfect or imperfect, all possible parties in interest not being before it; it only decides whether it is marketable. Builders' Mortgage Co. v. Berkowitz, 134 App. Div. 136, 118 NYS 804.

of sale, and resale is ordered and made, the mortgagor may except to such resale, since he retains an interest in the difference of amount of the two sales.[52]

(§ 6) *F. Receivership in foreclosure.*[53]—See 11 C. L. 1498—A court of equity has power to appoint a receiver where the mortgage provides therefor,[54] where necessary to the conservation of the property,[55] or to the preservation of the status quo pending full hearing.[56] A receiver may be appointed to take charge of rents and profits pledged as additional security,[57] where it appears the property is not adequate and that the mortgagor is not responsible.[58] Such appointment is within the discretion of the court, and will not ordinarily be disturbed.[59] Where the property is sufficient to satisfy the mortgage, it is improper to make the appointment.[60] By statute in some states a receiver may be appointed where the property is in danger of being lost or destroyed.[61] The receiver must be a disinterested party.[62] A receiver's certificates for money loaned cannot be made first liens on the property as against claims that have priority in fact.[63] The sureties on a receiver's bond are liable only for claims as set forth in the original complaint.[64]

(§ 6) *G. Costs, fees and expenses.*[65]—See 11 C. L. 1499—It is within the discretion of the court to award costs against the plaintiff.[66] Where attorney's fees are

52. Werner v. Clark, 108 Md. 627, 71 A 305.

53. **Search Note:** See Mortgages, Cent. Dig. §§ 1369-1386; Dec. Dig. §§ 465-474; 27 Cyc. 1621-1633; 13 A. & E. Enc. L. (2ed.) 798; 17 A. & E. Enc. P. & P. 731.

54. No error to appoint receiver where mortgage provides that on foreclosure receiver shall be at once appointed. Horton v. Haines [Okl.] 102 P 121.

55. Appointment of receiver was proper where it appeared that mortgagors had repudiated their obligations and left country, and property consisted of apartment house upon which were unpaid taxes and other expenses. Collins v. Gross, 51 Wash. 516, 99 P 573.

56. Where mortgage given to secure advances for producing naval stores where mortgage provides for appointment of receiver and facts show immediate necessity therefor, such receiver may be appointed for purpose of preserving status quo even though upon full hearing different construction be possible. Graham v. Consolidated Naval Stores Co. [Fla.] 48 S 743. Interference by creditors of railway company not sufficiently imminent to justify appointment of receiver. Farmers' L. & T. Co. v. Central Park, N. & E. R. Co., 165 F 503.

57. Where it is specially stipulated in mortgage in addition to receivership clause that rents and profits are pledged as additional security, plaintiff has a right to have a receiver appointed. Lyng v. Marcus, 118 NYS 1056.

58. Ordinarily usual receivership clause in mortgage is not of itself sufficient to give plaintiff right to receivership of rents pending foreclosure, in absence of proof that property is not worth amount of mortgage, and that mortgagor is not responsible. Lyng v. Marcus, 118 NYS 1056.

59. Where it does not appear that property is in danger of waste if left in hands of mortgagor pending foreclosure, nor that receiver is necessary, receiver should not be appointed, but, as such appointment is within discretion of court, its action will not be disturbed. Lehman v. Trust Co. of America [Fla.] 49 S 502. Not to be exercised unless for special reasons making it necessary for court to preserve property by taking possession. Farmers' L. & T. Co. v. Central Park, N. & E. R. Co., 165 F 503.

60. Where plaintiff fails to show that property is inadequate security for amount due, he is not entitled to have receiver of property appointed. Rabinowitz v. Power, 115 NYS 266.

61. While Ball. Ann. Codes & St. § 5456 (Pierce's Code, § 575), is repealed by Ball. Ann. Codes & St. § 5516 (Pierce's Code, § 1152), in so far as it provides for appointment of receiver where property is insufficient to discharge debt, it remains in force in case where property is in danger of being lost or removed. Collins v. Gross, 51 Wash. 516, 99 P 573.

62. Where receiver appointed was president of mortgagor corporation, and judgment debtor in judgment held by codefendant, priority of which was in issue, he could not be said to be indifferent and his appointment was error. Lehman v. Trust Co. of America [Fla.] 49 S 502.

63. Error to decree that receiver's certificates to be issued for money borrowed by him should be first lien on all of property mortgaged, since, if judgment held by codefendant is in fact prior, court has no authority to create lien prior thereto. Lehman v. Trust Co. of America [Fla.] 49 S 502.

64. Where defendant in foreclosure gave bond with sureties on discharge of receiver appointed to take charge of land, indebtedness of defendant to one of plaintiffs in distinct cause of action introduced in litigation after execution of bond could not be made liability on part of sureties, they only being bound for claim as set forth in original foreclosure complaint. Lacy Bros. v. London [Ark.] 116 SW 207.

65. **Search Note:** See Mortgages, Cent. Dig. §§ 1657-1679; Dec. Dig. §§ 580-582; 27 Cyc. 1775-1787; 13 A. & E. Enc. L. (2ed.) 823.

66. Costs properly awarded against plaintiff where he had committed breach of warranty as to land conveyed. Matheson v. Rogers [S. C.] 65 SE 1054.

provided for in the note, they are part of the debt secured,[67] and may be recovered to the amount stipulated,[68] and no evidence as to their reasonableness is necessary.[69] Stipulations as to attorney's fees are, however, subject to the control of the court[70] and only reasonable fees should be allowed.[71] Attorney's fees may be recovered where foreclosure is necessary to recover the principal of an usurious loan.[72] A judgment including attorney's fees is conclusive as against an alleged prior agreement attorning a smaller amount.[73] Reasonable master's fees may be taxed.[74] The expenses of the sale should be paid from the proceeds of the sale, and, if there is a deficiency, the party at whose instance the sale was made is liable therefor.[75] While the parties may agree as to what items shall be included as expenses,[76] only necessary expenses can ordinarily be taxed.[77]

(§ 6) *H. Effect of proceedings.*[78]—See 11 C. L. 1500—The proceedings are conclusive upon matters submitted and decided threin,[79] but do not affect the rights of

67. Attorney's fees valid under Laws Ga. 1900, p. 53, may be recovered on foreclosure of mortgage securing note although might be recovered in action at law. British & American Mortg. Co. v. Worrill, 168 F 120.

68. Where note provides for counsel fees in event of suit, mortgage includes such fees, but no more than amount stipulated can be taxed. Worth v. Worth [Cal.] 102 P 663.

69. Where note provided for an attorney's fee of ten per cent for collection, such amount should be allowed on foreclosure, and no evidence as to its reasonableness is necessary. Carhart v. Allen, 56 Fla. 763, 48 S 47.

70. Ten per cent attorney's fee, amounting to $1,120, held oppressive, there being no real default by defendant since, if recovery by them against plaintiffs for breach of warranty had been applied to claim, there would have been nothing due, it being plaintiff's own default which brought about situation whereby mortgage could be foreclosed. Matheson v. Rogers [S. C.] 65 SE 1054.

71. Courts should exercise care and caution in decreeing attorney's fees to end that only reasonable fees be allowed. Purvis v. Frink [Fla.] 49 S 1023. Where total amount found by master was $40,407, allowance of $1,000 as attorney's fees was reasonable. Nix v. Thackaberry, 240 Ill. 352, 88 NE 811.

72. Purvis v. Frink [Fla.] 49 S 1023.

73. Where attorney's fees were taxed on basis of several notes and included in judgment and receipted for on sale by attorney in order that purchaser might obtain certificate, purchaser cannot thereafter be heard to claim an agreement whereby fee should be taxed only on one note, she being executor of mortgagee but buying land in individual capacity. Rogers v. Crandall [Iowa] 121 NW 1092.

74. Where amount due was $40,407, allowance of $422 to master was not excessive. Nix v. Thackaberry, 240 Ill. 352, 88 NE 811.

75. Ordinarily expenses incurred upon sale pursuant to judgment are paid from proceeds of sale, and if enough is not realized, party at whose instance sale was made is liable therefor. Carter v. Builders' Const. Co., 130 App. Div. 609, 115 NYS 339.

76. Parties may agree on suspension of sale for limited time, in order to facilitate entry of judgment without trial, that certain sums due for insurance, survey of premises and search for taxes, might be included and such agreement is binding and sale will not be permitted until allowed by such agreement. Mayer v. Jones, 132 App. Div. 106, 116 NYS 300. Mortgagor liable for costs and attorney's fees as stipulated in act of sale where mortgage was foreclosed on 3rd and no extension of time after first of month was shown. Felder v. Leftwich, 123 La. 931, 49 S 645.

77. Reasonable amount expended for search for taxes may be included by referee in expenses of sale. Mayer v. Jones, 132 App. Div. 106, 116 NYS 300. Expenses of survey is not a necessary part of costs of foreclosure nor are expenses incurred in search for taxes. Id.

78. Search Note: See Mortgages, Cent. Dig. §§ 1680-1692; Dec. Dig. §§ 583-590; 27 Cyc. 1788-1798; 13 A. & E. Enc. L. (2ed.) 829.

79. Held res adjudicata: Foreclosure decree is res adjudicata as to claims which mortgagor fails to set up against mortgagee. Findlay v. Longe, 81 Vt. 523, 71 A 829. One who conveyed property mortgaged as collateral security to mortgagee was bound by decision as to what credit should be given for release to another of a separate mortgage in foreclosure of principal mortgage. Miller v. Peter [Mich.] 16 Det. Leg. N. 670, 122 NW 780. Where tenant was made a party to foreclosure suit and judgment barred defendants and all persons claiming under them, and tenant refused to make new lease but left fixtures on premises and retained keys at purchaser's request, lease was canceled by judgment in foreclosure and referee's deed of sale. Ernst v. Zeltner Brew. Co., 117 NYS 922. Where decree and sale has taken place but no deed executed, suit cannot be brought on renewal note, sole consideration for which was original note and mortgage. Gibson v. Gutru, 83 Neb. 718, 120 NW 201.

Held not res adjudicata: Not res adjudicata of subsequent bill by one of mortgagors against mortgagee for accounting under agreement by which mortgagor should have surplus if any. Felgner's Adm'rs v. Slingluff, 109 Md. 474, 71 A 978. Foreclosure judgment did not preclude defense of limitations to bill to set aside fraudulent conveyances filed before such foreclosure judgment. Harper v. Raisin Fertilizer Co. [Ala.] 48 S 589. Foreclosure of mortgage covering

those not parties thereto.[80] Sheriff's deed is no evidence that foreclosure was legal,[81] nor do the recitals in the affidavit of sale estop the plaintiff from showing what defaults actually existed.[82] A judgment of foreclosure conclusively establishes both the debt and the lien.[83] A decree of foreclosure merges the interest of the parties in the decree and vests them in the purchaser at the sale.[84] All liens are divested by a foreclosure sale.[85] One who has accepted the benefits of the sale cannot impeach the proceedings for irregularity.[86] Foreclosure as to part of the land does not estop the mortgagee from maintaining another suit to foreclose the remaining as against persons claiming liens who were not parties to the original suit.[87] That the purchaser under an invalid sale has paid the purchase price does not extinguish the debt.[88]

§ 7. *Defective foreclosures and their avoidance.*[89] *Defects and irregularities.* See 11 C. L. 1500—Invalid foreclosures must be attacked by suit,[90] the remedy being of

only half interest in property and as against defendant who had no defense to foreclosure on that interest, fact that sale covered more than such interest did not place defendant under obligation to protest, such judgment being only binding on defendant to extent of undivided one-half. Mayer v. Burr, 133 App. Div. 604, 118 NYS 203. If senior mortgage was given to secure negotiable promissory notes which were transferred before commencement of foreclosure proceedings by junior mortgagee, transferee will not be precluded from asserting lien in independent action. Equitable Land Co. v. Allen [Neb.] 121 NW 600. Where makers of note executed mortgage to secure sureties thereon which mortgage contained provision that holder could declare debt due for default in payment of interest or taxes, and such mortgage was subsequently assigned to payee of note, such payee, upon default, declared debt due and foreclosed mortgage, such proceedings were not res adjudicata as to his rights under the note, since he could only do what sureties could have done, and did not affect his rights to sue on note after maturity. Hunter v. Porter [Iowa] 120 NW 191. Defendant cannot object to decree of foreclosure because he had not been credited with purchase price of lots conveyed where decree recited that it was without prejudice to his rights, although deed to property covered by trust deed had not been delivered nor purchase price paid. Nix v. Thackaberry, 240 Ill. 352, 88 NE 811.

80. Second mortgagee who is not made party to foreclosure of first mortgage is not affected thereby. Horr v. Herrington [Okl.] 98 P 443. Where former owner is not made party to foreclosure proceedings, his rights in the property are not cut off. Teachout v. Duffus [Iowa] 119 NW 983. Tenant under lease executed subsequent to mortgage was not affected by foreclosure to which he was not a party, he not having attorned to purchaser. Wacht v. Erskine, 61 Misc. 96, 113 NYS 130. Where tenants are not parties to suit, their rights under lease are not affected. Commonwealth Mortg. Co. v. De Waltoff, 62 Misc. 639, 115 NYS 1090. Rights of assignee of junior mortgagee, not a party to foreclosure of prior mortgage, are not affected by foreclosure under such mortgage and subsequent sale by mortgagee to mortgagor. Core v. Smith [Okl.] 102 P 114. Where third possessor of property was not a party to foreclosure, he was not bound thereby. Pons v. Yazoo & M. V. R. Co., 122 La. 156, 47 S 449.

81. Presumption that sheriff did his duty cannot be made basis of authority to sell. Bryan v. Straus Bros. & Co. [Mich.] 16 Det. Leg. N. 292, 121 NW 301.

82. Brouillard v. Stimpson, 201 Mass. 236, 87 NE 493.

83. Blair v. Guaranty Savings, Loan & Inv. Co. [Tex. Civ. App.] 118 SW 608. Decree conclusive in action upon bond for deficiency as to any defense available in foreclosure suit. State Mutual Building & Loan Ass'n v. Batterson [N. J. Law] 71 A 115. Where purchaser was allowed to show amount due on mortgage debt at time of sale, he cannot complain that he was not allowed to contest amount due. Greist v. Gowdy, 81 Conn. 351, 71 A 555.

84. Horr v. Herrington [Okl.] 98 P 443.

85. Sale under Civ. Code 1895, §§ 5463, 5464, divests all liens in property sold, which liens attach to money raised by sale. Cincinnati Cordage & Paper Co. v. Dodson Printers' Supply Co., 131 Ga. 516, 62 SE 810. In absence of legislation preserving municipal liens against property sold at judicial sale on mortgage, such sale, producing fund only sufficient to pay costs, discharged both mortgage and municipal lien filed subsequent to mortgage. Bellevue Borough v. Umstead, 38 Pa. Super. Ct. 116.

86. Where lienor under trust deed took credit for part of proceeds of trustee's sale, he will not be allowed to impeach it for irregularity. Grooms v. Mullett, 133 Mo. App. 477, 113 SW 683.

87. Welch v. Farmers' L. & T. Co. [C. C. A.] 165 F 561.

88. Price paid by purchaser under invalid mortgage sale does not extinguish debt nor affect lien, mortgagor not being deprived of the land. Griffin v. Griffin, 82 S. C. 256, 64 SE 160.

89. Search Note: See notes in 7 C. L. 1702, 1704; 4 Ann. Cas. 848.

See, also, Mortgages, Cent. Dig. §§ 1490-1500, 1535-1548, 1558-1560; Dec. Dig. §§ 504, 528, 529, 537-540; 27 Cyc. 1682-1684, 1710-1720, 1727, 1732, 1733; 13 A. & E. Enc. L. (2ed.) 816; 9 A. & E. Enc. P. & P. 535.

90. After foreclosure and possession taken by mortgagee and those claiming under him, mortgagor and those claiming under

exclusive equitable cognizance.[91] A sale will not be set aside unless for good reason, nor on account of matters which ought to have been attended to by the complaining parties before the sale.[92] Before confirmation, any misconduct or unfairness may be shown, or that the sale was not made in accordance with the decree.[93] Mere inadequacy of price affords no ground for setting aside a sale,[94] unless so gross as to shock the conscience.[95] A sale will not be defeated on the ground of inadequacy of price if the complainant does not offer to increase the bid if a resale is ordered.[96] To avoid a sale made by a person not authorized, the remedy is by appeal from the foreclosure judgment.[97]

Grounds available after confirmation. See 11 C. L. 1591—The validity of a decree of confirmation may be attacked only upon the ground of fraud.[98]

Fraud, accident or mistake. See 11 C. L. 1591—Fraud in the sale vitiates it.[99] Where the purchaser's vendee is not a party, the foreclosure will not be set aside for fraud.[1] Where the mortgage has been fraudulently altered, the proper remedy is by writ of entry.[2] A fraudulent conspiracy to suppress competition among bidders, if shown, will avoid the sale.[3] A mistake as to the title offered necessitates a resale.[4] In the absence of a sufficient excuse, the right to avoid a foreclosure sale must be exercised within a reasonable time, even if the land is still held by the purchaser.[5] Laches [6] and resulting injustice [7] will defeat the right.

him cannot maintain writ of entry, only remedy being in equity if foreclosure is illegal. Brouillard v. Stimpson, 201 Mass. 236, 87 NE 493.

91. Hanson v. Neal, 215 Mo. 256, 114 SW 1073.

92. Bank of Pine Bluff v. Levi [Ark.] 118 SW 250. Where mortgagor submitted to foreclosure, he could not thereafter set up that deed of trust was void as covering homestead. Blair v. Guaranty Savings, Loan & Inv. Co. [Tex. Civ. App.] 118 SW 608.

93. Bank of Pine Bluff v. Levi [Ark.] 118 SW 250. Default judgment in foreclosure property set aside on motion by mortgagor on affidavits showing that 10 per cent attorney's fees were in fact a scheme to obtain usurious interest. British & American Mortg. Co. v. Strait [S. C.] 65 SE 1038.

94. Evidence held not to show appraisal of land at $3,600 to be so grossly inadequate as to warrant setting aside of deed. Arnold v. Watson [Ark.] 121 SW 354. Sale of lands estimated at from $3,800 to $5,000, sold for $3,500, was not at price so inadequate as to justify setting it aside on original hearing of commissioner's report. Bank of Pine Bluff v. Levi [Ark.] 118 SW 250.

95. Where sale under trust deed was at grossly inadequate price and made in collusion between purchasers and trustee, mortgagee was entitled to have sale set aside and lien reinstated, even though mortgagor was not shown to be insolvent. Hanson v. Neal, 215 Mo. 256, 114 SW 1073. Where, after attempted sale by trustee under first trust deed, sale was made under second deed, and property bid in by trustee under such deed for grossly inadequate price and without advertisement, such sale was void. McPherson v. Davis [Miss.] 48 S 625.

96. Hoock v. Sloman, 155 Mich. 1, 15 Det. Leg. N. 845, 118 NW 489.

97. Where court has jurisdiction of person of defendant and of subject-matter, it could order sale under foreclosure by any person, and if it ordered sale to be made by other than those designated by Code Civ. Proc. § 726, remedy of defendant would be by appeal from foreclosure judgment and not by collateral attack. Hibernia Savings & Loan Soc. v. Boyd [Cal.] 100 P 239.

98. Evidence held not to show fraud in conduct of sale by commissioner. Bank of Pine Bluff v. Levi [Ark.] 118 SW 250.

99. Where sheriff acting as trustee made sale for grossly inadequate price at unusual hour in spite of request on mortgagee's part to delay sale until usual hour in order to allow him to be present, such conduct was breach of trust authorizing setting aside of sale. Hanson v. Neal, 215 Mo. 256, 114 SW 1073. In action to set aside sale made under trust deed where it appeared that sale was made before mortgagee's agent arrived, attempt by agent to induce purchaser to have deed made to mortgagee and to pay expenses and $25 bonus was not inequitable conduct on mortgagee's part such as would bar relief. Id.

1, 2. Marvel v. Cobb, 200 Mass. 293, 86 NE 360.

3. Evidence held not to show fraudulent conspiracy to suppress competition among bidders at sale taking place 13 years before suit, which sale was not attacked until those who conducted same were dead. Arnold v. Watson [Ark.] 121 SW 354. Where first trustee after having attempted to make sale, but upon purchaser refusing to pay amount of bid, sold to third party late in afternoon when bidders had dispersed, purchaser having knowledge of all facts, such sale was void. McPherson v. Davis [Miss.] 48 S 625.

4. Where trustee made sale under power in second mortgage, but offered clear title, it is his duty upon discovering mistake to readvertise property. Brett v. Davenport [N. C.] 65 SE 611.

5. Fifteen years and two months held too long to avoid sale for fraud in absence of sufficient excuse. Marvel v. Cobb, 200 Mass. 293, 86 NE 360. Where right belonged to plaintiff as one of heirs, failure to obtain

*Offer of equity.*See 11 C. L. 1502—Upon vacating the sale the complainant must do equity,[8] and the bill for setting the sale aside must make such offer.[9]

§ 8. *Title and rights of purchasers.*[10]—See 11 C. L. 1503—The sale vests in the purchaser the interest of the mortgagor and one more,[11] although no deed be executed,[12] but in Nebraska by statute the purchaser acquires the title of all the parties to the action.[13] A valid assignment of the bid and purchase will be presumed where the deed is made to another than the bidder.[14] The purchaser must advise himself of the title he buys,[15] and only he can complain of injury through defect therein.[16] A purchaser may be entitled to the rents and profits during the period of redemption.[17] The purchaser is presumed to buy with reference to recorded junior mortgages and with knowledge of the rights of the holders of such mortgages to redeem.[18] He also takes subject to covenants running with the land[19] and to existing liens and equities,[20] but is not chargeable with the execution of the mortga-

assignment is no excuse. Id. In absence of instructions that plaintiff was ready to redeem, inaction of his counsel is no excuse. Id. Absence of plaintiff no excuse where he was not ignorant of cause of action. Id.

6. Freehold Const. Co. v. Bernstein, 60 Misc. 363, 113 NYS 368. Where note and mortgage were given in 1896 and mortgagor thereafter removed from state and paid no part of money due, she was barred by laches to have foreclosure decreed in 1902 set aside on ground of fraud or lack of notice, she having taken no steps during that time to redeem. Bower v. Stein, 165 F 232.

7. Trustees of bankrupt who was joined as guarantor and had notice of foreclosure proceedings will not be allowed to vacate judgment where it would result in prejudice to necessary parties and trustees delayed without excuse for several months. Freehold Const. Co. v. Bernstein, 60 Misc. 363, 113 NYS 368.

8. Where sale was set aside on ground that trustee obtained title in himself, decree was properly entered requiring debtor to pay balance of debt in default of which sheriff was authorized to sell property. Duncan v. Home Co-Operative Co., 221 Mo. 315, 120 SW 733. Where sale under trust deed was set aside, purchasers must have price paid and expenses returned to them. Hanson v. Neal, 215 Mo. 256, 114 SW 1073.

9. Bill to set aside foreclosure sale for fraud fatally defective for want of offer to pay what was equitably due on mortgage. Marvel v. Cobb, 200 Mass. 293, 86 NE 360. Action will not lie by grantee of mortgagor to cancel sheriff's certificate without paying mortgage debt, even though statute has run against mortgage. Boschker v. Van Beek [N. D.] 122 NW 338.

10. Search Note: See notes in 7 C. L. 1712, 1713.

See, also, Mortgages, Cent. Dig. §§ 1552-1591; Dec. Dig. §§ 532-554; 27 Cyc. 1711, 1720-1745; 17 A. & E. Enc. L. (2ed.) 1010.

11. Watson v. Equitable Mortg. Co. [Ga.] 63 SE 912. Where after execution of mortgage part of land was condemned for street purposes and damages paid to mortgagor without objection by mortgagee, purchaser at sale who paid mortgage in full could not maintain injunction against opening street. Jackson v. Pittsburg, 36 Pa. Super. Ct. 274. Where after executing mortgage mortgagor abandoned contract of support of vendors under which he held land mortgaged, purchaser could not after 40 years, during which former owners under contract held adversely to mortgagor, claim property as against them. Bishop v. Van Winkle [Ky.] 117 SW 345. Foreclosure of mortgage covering entire fee passes fee to purchaser, including dower, homestead and remainder. Hardy v. Atkinson, 136 Mo. App. 595, 118 SW 516. Code Civ. Proc. § 1632, providing that conveyance upon sale made pursuant to final judgment in action to foreclose vests in purchaser same estate only that would have vested in mortgagee if equity of redemption had been foreclosed, purchaser who subsequently subjected property to different purpose than that contemplated when easement for sewer was granted acquired no right to such easement. Title Guaranty & Trust Co. v. New York Juvenile Asylum, 133 App. Div. 529, 118 NYS 302.

12. Land bought by trustee under power. Morgan v. Kendrick [Ark.] 121 SW 278.

13. Code Civ. Proc. § 853. Kerr v. McCreary [Neb.] 120 NW 1117. Where wife to whom land was deeded subsequent to execution of mortgage was not made party to foreclosure, her equity of redemption was not affected. Id. Where owner of estate by curtesy was made defendant to action to foreclose mortgage given by wife, but son who inherited estate was not brought in, sale only conveyed life estate. Currier v. Teske [Neb.] 120 NW 1015.

14. Where mortgagee purchased at foreclosure through an agent and had sale confirmed and deed was executed to one with whom negotiations were pending, deed reciting that such other person was the purchaser, after lapse of 20 years, mortgagee having made no claim that deed was void, assignment of bid and purchase will be presumed. Currier v. Teske [Neb.] 120 NW 1015.

15. Currier v. Teske [Neb.] 120 NW 1015.

16. Davis v. Blackiston, 108 Md. 640, 71 A 89.

17. Hodgson v. State Finance Co. [N. D.] 122 NW 336.

18. Horr v. Herrington [Okl.] 98 P 443.

19. Munro v. Syracuse, etc., R. Co., 128 App. Div. 388, 112 NYS 938.

20. Mortgagee who had purchased property at tax sale could thereafter sell the property on foreclosure subject to tax lien

gor's personal obligations.[21] Title passes to the purchaser where the validity of the mortgage can only be questioned by the federal government.[22] The possession of the mortgagor is not adverse to the purchaser,[23] and he cannot set up the statute of limitations as against him.[24] While tenants who have not attorned to the purchaser may not be ousted by summary proceedings,[25] if they have been made parties to the foreclosure, the purchaser may have an order in the nature of a writ of assistance to regain possession,[26] or he may resort to equity if the leases are fraudulent.[27] Grantors under a foreclosed trust deed are not entitled to notice to quit before the purchaser is entitled to bring action to recover possession.[28] A mortgagee who becomes the purchaser at a void sale, and enters into occupancy, acquires the rights of a mortgagee in possession.[29]

Lis pendens and bona fide purchasers. See 11 C. L. 1503—Where notice of lis pendens has been filed, a purchaser under an execution subsequent to the mortgage takes subject to such mortgage.[30] No widow of a mortgagor living upon the homestead with minor children has no right upon foreclosure to take title in her own name, and where she does so she will be considered to hold in trust for the minor children.[31]

Purchases by beneficiary, trustee or the like. See 11 C. L. 1503—A trustee cannot purchase at his own sale.[32]

§ 9. *The bid and proceeds of foreclosure.*[33]—See 11 C. L. 1504 *The bid is a contract.* See 9 C. L. 1392—A release of the bidder is equivalent to setting the sale aside,[34] in which case a resale is necessary, particularly where the value of the property has increased during the interim.[35] A purchaser who fails to complete his purchase may be liable in damages to a second mortgagee whose rights have thereby been cut off.[36]

and could hold such lien as against purchaser on foreclosure. Farmer v. Ward [N. J. Eq.] 71 A 401. Equity of mortgagor, under agreement that mortgagor should have surplus if premises sold for more than claim, not destroyed by passage of title to mortgagee. Felgner's Adm'rs v. Slingluff, 109 Md. 474, 71 A 978.

21. Purchaser of railway property under foreclosure need not furnish passes which mortgagor had contracted to give third party. Munro v. Syracuse, etc., R. Co., 128 App. Div. 388, 112 NYS 938. When street railway holding franchise mortgaged all its property and subsequently acquired title to a certain crossing through contract with railway company, purchaser at foreclosure sale was not bound by contract, since street railway company acquired title to crossing by virtue of franchise and not by virtue of contract. Evansville & S. I. Trac. Co. v. Evansville Belt R. Co. [Ind. App.] 87 NE 21.

22. Since validity of acceptance of mortgage on real estate by national bank can only be questioned by federal government, foreclosure of such mortgage passed title to purchaser. Taylor v. Davidson [Tex. Civ. App.] 120 SW 1018.

23, 24. Baumgarten v. Mitchell [Cal. App.] 101 P 43.

25. Where tenant has not attorned to purchaser under foreclosure, summary proceedings will not be to gain possession, there being no privity between purchaser and tenant. Commonwealth Mortg. Co. v. De Waltoff, 62 Misc. 639, 115 NYS 1090.

26, 27. Commonwealth Mortg. Co. v. De Waltoff, 62 Misc. 639, 115 NYS 1090.

28. Runyan v. Snyder [Colo.] 100 P 420.

29. Where mortgagee becomes purchaser at void foreclosure sale and enters into occupancy under deed improperly executed and delivered by commissioner, he is nevertheless a mortgagee in possession, and mortgagor's assignee cannot quiet title without paying mortgage debt. Raggio v. Palmtag [Cal.] 103 P 312. The holder of a sheriff's certificate under an invalid foreclosure by advertisement, in possession with implied consent of mortgagor, is a mortgagee in possession. Boschker v. Van Beek [N. D.] 122 NW 328.

30. Lands being levied upon under execution on judgment entered subsequent to mortgage, foreclosure of which is pending, under lis pendens filed prior to execution sale, purchaser of such land would take subject to mortgage. Peninsular Naval Stores Co. v. Cox [Fla.] 49 S 191.

31. Burel v. Baker [Ark.] 116 SW 181.

32. A sale by the trustee to himself through a third person may be set aside. Duncan v. Home Co-Operative Co., 221 Mo. 315, 120 SW 733.

33. Search Note: See Mortgages, Cent. Dig. §§ 1519-1524, 1622-1646; Dec. Dig. §§ 517-524, 563-569; 27 Cyc. 1699-1705, 1761-1774; 17 A. & E. Enc. L. (2ed.) 977, 1020.

34. Bidder has no rights under bid nor can he confer any by assignment. Ely v. Matthews, 128 App. Div. 513, 112 NYS 788.

35. Where purchaser obtained order releasing him, he could not subsequently assign bid, and, upon property increasing in value, attempt to have release order set aside, since such procedure would amount to private resale not authorized by Code Civ. Proc. § 1678. Ely v. Matthews, 128 App. Div. 513, 112 NYS 788.

36. Where purchaser under foreclosure of

*Bid money on deposit.*See 7 C. L. 1718

*Accumulated rents.*See 9 C. L. 1392—A subsequent mortgagee is not entitled to rents where his trustee did not take possession and the deed of trust did not permit him to collect such rents.[37] Where the value of rents are to be credited on the amount due, the aggregate sum of rents collected and not the reasonable rental value is to be taken.[38]

*Payment and distribution.*See 11 C. L. 1504—A proceeding, after foreclosure, to distribute the surplus, is a special proceeding and is appealable.[39] On foreclosure, after the mortgage debt has been paid, the surplus proceeds may be paid to the holder of the prior lien.[40] On foreclosure of a junior mortgage, the plaintiff is entitled to the surplus arising from a sale under a prior mortgage and to a deficiency judgment for the remainder.[41] A purchaser taking subject to a prior mortgage is entitled to the surplus proceeds realized from a sale under such mortgage.[42] If the property sold be of greater value than the homestead and the mortgage combined, the widow is entitled to the surplus after deduction of the amount of the mortgage.[43] A mortgagor who has made interest payments after assignment of bond and mortgage is, on foreclosure, entitled to be credited with such payments.[44]

§ 10. *Personal liability and judgment for deficiency.*[45]—See 11 C. L. 1505—In Utah where service is constructive merely, no personal judgment for deficiency may be given, the rule being otherwise if service be personal.[46] A personal judgment cannot be rendered where the mortgage provides that liability shall be restricted to the property alone.[47] Where the defendant is not liable for deficiency, rents occurring during the pendency of the foreclosure cannot be applied thereto.[48] Even where there is no absolute right to sue the guarantors of the mortgage debt for a deficiency,[49] they may be adjudged personally liable if joined in the foreclosure suit,[50] although such right may be waived.[51] The holder of a deficiency judgment against an insane person cannot make good his claim against the property of such insane

second mortgage failed to complete purchase and prior mortgage was then foreclosed, cutting off rights of second mortgagee, latter was entitled to have purchaser complete purchase or pay damages for failure to do so. State Bank v. Wilchinsky, 128 App. Div. 486, 112 NYS 1002.

37. Schoolfield v. Cogdell [Tenn.] 113 SW 375.

38. Crittenden v. Chancey [Ala.] 49 S 811.

39. Velleman v. Rohrig, 193 N. Y. 439, 86 NE 476. Proceedings to ascertain bondholders not parties and to distribute fund was a special proceeding under which expenses of trustees were properly charged against fund. House v. Amsdell Brewing & Malting Co., 133 App. Div. 486, 117 NYS 796.

40. Where property was conveyed to raise money thereon with agreement for reconveyance and grantee mortgaged such property, which was sold under foreclosure, first owner was not deprived of right to proceeds after mortgagees were paid. Williams v. Pratt [Cal. App.] 103 P 151. Where property levied on under mortgage fi. fa. is sold under provisions of Civ. Code 1895, §§ 6463, 6464, order for sale having been duly granted upon plaintiff's petition, he cannot complain that in proceeding to distribute funds court awards portion thereof to holder of prior mortgage, though same has not been foreclosed. Cincinnati Cordage & Paper Co. v. Dodson Printers' Supply Co., 131 Ga. 516, 62 SE 810.

41. Lowe v. Weil, 117 NYS 1025.

42. Grooms v. Mullett, 133 Mo. App. 477, 113 SW 683.

43. Hardy v. Atkinson, 136 Mo. App. 595, 118 SW 516.

44. Peoples' Trust Co. v. Gomolka, 129 App. Div. 12, 113 NYS 49.

45. **Search Note:** See Mortgages, Cent. Dig. §§ 1124, 1592-1621; Dec. Dig. §§ 375, 552-562; 27 Cyc. 1500, 1746-1761; 13 A. & E. Enc. L. (2ed.) 826; 9 A. & E. Enc. P. & P. 451.

46. Boucofski v. Jacobsen [Utah] 104 P 117.

47. Rogers v. Binyon [La.] 49 S 991.

48. Where it was stipulated that rents accruing during pendency of foreclosure action should be held to abide event of action, such rents cannot be applied to deficiency where it was decided that defendant was not liable for deficiency. Rutherfurd Realty Co. v. Cook, 130 App. Div. 76, 114 NYS 274.

49. Code Civ. Proc. § 1628, forbidding bringing other suit to recover debt without leave during pendency of foreclosure proceedings, gives no absolute right to sue guarantor separately after foreclosure. Morrison v. Slater, 128 App. Div. 467, 112 NYS 855.

50. Morrison v. Slater, 128 App. Div. 467, 112 NYS 855.

51. Where guarantor in mortgage debt was joined in foreclosure but notice served upon him that he would not be held personally liable, he cannot later be sued in separate action for deficiency. Morrison v. Slater, 128 App. Div. 467, 112 NYS 855.

person.[52] A decree in a creditor's suit to determine the liability in property fraudulently granted will not be construed to operate as a deficiency judgment against such fraudulent grantor in a subsequent foreclosure suit.[53] An extension of the time of payment will release the mortgagor's personal liability to the extent of the difference between the debt and the value of the land when the extension was granted.[54] Under some statutes, the report of the referee is prima facie evidence in an action on the deficiency judgment as to the amount for which the premises were sold.[55] Under statutes which require judgment for a deficiency to be ordered in the original judgment, such deficiency judgment can only be vacated by a reference to the original foreclosure judgment.[56]

§ 11. *Redemption.*[57]—See 11 C. L. 1505—Only one having an interest in the land [58] is entitled to redeem.[59] Redemption may be made although the mortgagee be in possession.[60] Junior mortgagees have a special equity to redeem as against a prior incumbrancer pending sale.[61] A homestead is not subject to redemption by a judgment creditor.[62] The statutory right of redemption entitles the mortgagor to redeem the lands sold, free from the mortgage lien, regardless of whether the sale was made under a power in the mortgage or under foreclosure in chancery.[63] It is within sound discretion of chancellor to fix the time within which the debtor may redeem under a deed of trust.[64] Where no time is fixed, redemption must be made within a

52. Holder of deficiency judgment was permitted to make good his claim against guardian of insane person, but not against property of such insane person himself. Haring v. Murphy, 60 Misc. 374, 113 NYS 452.

53. Alexander v. Munroe [Or.] 103 P 514.

54. Agreement between mortgagee's assignees and mortgagor's successors, extending time of payment, releases mortgagor's personal liability to extent of value of land when extension was granted, but not for deficiency on foreclosure, but for difference between indebtedness and value of land. Cohen v. Hecht, 128 App. Div. 511, 112 NYS 809.

55. Report of referee, acting under Code Civ. Proc. § 726, in place of sheriff on sale of property, being prima facie evidence of facts stated therein under Pol. Code, § 4178, Code Civ. Proc. § 729, was, when admitted in pleading on deficiency judgment, prima facie evidence as to amount for which premises were sold. Hibernia Savings & Loan Soc. v. Boyd [Cal.] 100 P 239.

56. Order vacating judgment for deficiency referring to date of entry of judgment and amount thereof, but not referring to original foreclosure judgment by which personal liability of defendant was determined, did not vacate original judgment, St. 1898, § 3156, requiring judgment for deficiency to be ordered in original judgment. Homestead Land Co. v. Saveland, 139 Wis. 663, 121 NW 892.

57. Search Note: See notes in 7 C. L. 1719; 3 L. R. A. (N. S.) 1068; 4 Id. 1039; 4 Ann. Cas. 807.

See, also, Mortgages, Cent. Dig. §§ 1561-1567, 1693-1888; Dec. Dig. §§ 542-549, 591-624; 27 Cyc. 1728-1730, 1737-1743, 1799-1867; 11 A. & E. Enc. L. (2ed.) 205; 9 A. & E. Enc. P. & P. 204, 409.

58. Assignee under attempted assignment of water privilege which was not severable from estate to which connected, not having thereby acquired an interest in the land, was not entitled to redeem. Whittlesey v. Porter [Conn.] 72 A 593. Under Ky. St. § 2364 (Russell's St. § 80), providing that where land is sold in foreclosure for less than two-thirds of appraised value defendant and his representatives may redeem by paying original purchase money and ten per cent interest, a widow may redeem, she being entitled to dower in surplus proceeds, and representatives being intended to embrace all who have an interest in land. Hiller v. Nelson [Ky.] 118 SW 292.

59. Where widow of mortgagor lived upon homestead with minor children, and upon foreclosure thereof took title in her own name as purchaser, and conveyed half to mortgagee, effect was to redeem land from foreclosure sale. Burel v. Baker [Ark.] 116 SW 181.

60. Under Code Civ. Proc. § 379, providing that action to redeem may be maintained unless mortgagee has for 20 years maintained adverse possession, mortgagee who had been in possession for 25 years, not adversely, might be sued for redemption. Becker v. McCrea, 193 N. Y. 423, 86 NE 463.

61. First mortgagee who elects to take decree against subsequent incumbrancers and to have sale foreclosing their equities of redemption proceeds subject to their right to redeem. Atwood v. Carmer [N. J. Eq.] 73 A 114.

62. Judgment creditor cannot, under Code 1896, § 3510, redeem judgment debtor's homestead from purchaser at mortgage foreclosure thereof, such homestead being exempt. Bass & Co. v. Benson [Ala.] 47 S 1028.

63. Handford v. Edwards [Ark.] 115 SW 1143. Where redemptioner has paid to county clerk full amount of redemption money required by statute, court may require purchaser to accept such amount. Hiller v. Nelson [Ky.] 118 SW 292.

64. Duncan v. Home Co-Operative Co., 221 Mo. 315, 120 SW 733.

reasonable time.[65] The right may be exercisd by application in the suit itself.[66] Where the mortgagee receives the whole or a part of the debt after the time of redemption has expired, the right to redeem is revived.[67] The right of redemption may be barred by statute of limitation,[68] by laches,[69] or by purchase at the sale.[70] Equity will grant relief where the purchaser has by his conduct induced the owner to refrain from redeeming within the period of redemption.[71] Redemption statutes must be substantially complied with.[72] Where no rate of interest is specified by the statute, the rate fixed by the mortgage controls.[73] In some states the payment of principal and legal interest is not a prerequisite to redeem where the debt was usurious.[74] In order to claim the benefit of redemption, those to whom such benefit would inure must contribute pro rata.[75] Where the right of redemption is statutory, the conclusion is presumptive that the price for which the property was sold represents its actual value.[76] The mortgagee may purchase a release of the statutory right of redemption provided he do so fairly and for an adequate consideration.[77] A bill to redeem must set forth facts sufficient to constitute a cause of action.[78]

Title and rights acquired by redemption. See 11 C. L. 1507—The title acquired by redemption is absolute.[79] Payment of the mortgage debt after sale by the mortgagor

65. Redemption should be made within reasonable time, where no time is fixed for redeeming land conveyed as security, and should be within period of limitation from time of conveyance. Mahaffy v. Faris [Iowa] 122 NW 934.

66. Subsequent incumbrancer, becoming such after decree of foreclosure, can pay amount due in first mortgage by application in suit itself. Atwood v. Carmer [N. J. Eq.] 73 A 114.

67. Findlay v. Longe, 81 Vt. 523, 71 A 829.

68. Right held barred where purchaser held possession for more than 10 years. Clapp v. Leavens [C. C. A.] 164 F 318. Fact that mortgagor was financially unable to redeem does not prevent running of statute of limitations against him. Id.

69. Where owner allowed grantee to remain in possession 19 years and grantee had greatly increased its value, without claiming interest therein, cannot maintain action to redeem. Mahaffy v. Faris [Iowa] 122 NW 934.

70. If holder of junior mortgage, who has not been made party to foreclosure of prior mortgage, becomes purchaser, his right to redeem is lost. Horr v. Herrington [Okl.] 98 P 443.

71. Evidence held to show that agreement existed, whereby right to redeem should continue after period of redemption had expired. Ogden v. Stevens, 241 Ill. 556, 89 NE 741. To allow former owner to expend large sums of money on property in reliance on purchaser's representations that right to redeem should continue after period of redemption has expired, and then to refuse such right, constitutes fraud against which equity will grant relief. Ogden v. Stevens, 241 Ill. 556, 89 NE 741.

72. Rev. St. 1899, §§ 4343, 4344 (Ann. St. 1906, pp. 2390, 2391), permitting grantor in deed of trust to redeem within 12 months after foreclosure on giving of security, must be substantially complied with by divorced wife claiming marital rights in husband's lands encumbered by trust deed executed by both. Moss v. Brant, 216 Mo. 641, 116 SW 503.

73. Redemption statute (Gen. St. 1901, § 4932), providing that redemptioner shall pay interest but not specifying rate, where mortgage and judgment provided for rate of 8 per cent, mortgagor could not pay ordinary legal rate of 6 per cent, but was bound to pay 8 per cent, his statutory right to redeem being founded on the mortgage. Clark v. Nichols [Kan.] 100 P 626.

74. Rule requiring mortgagor in action to redeem, where debt was usurious, to pay principal and legal interest before obtaining relief, was abrogated by Act March 4, 1901 (Gen. Acts 1900-01, p. 164; Code 1907, § 4623). First Nat. Bank v. Clark [Ala.], 49 S 807.

75. Where widow was entitled to redeem, and where such redemption would inure to benefit of minor stepchildren, such minors must contribute pro rata in order to claim benefit of redemption. Hiller v. Nelson [Ky.] 118 SW 292.

76. No rule that, for purpose of redemption, statute conclusively presumes that price for which property was sold represents its actual value, applies only to statutory right of redemption. Handford v. Edwards [Ark.] 115 SW 1143.

77. Rodgers v. Burt, 157 Ala. 91, 47 S 226.

78. Complaint alleging that mortgagor offered mortgagee amount due during pendency of suit and that relying on mortgagee's promise to reconvey after sale failed to enforce right to make payment, and that after sale mortgagee refused to convey, will be treated as complaint in action to redeem. Clark v. Levy, 130 App. Div. 389, 114 NYS 890. Where bill to redeem did not allege that pasturing by mortgagee, and harvesting of hay, prevented complainant from meeting payment due, nor that mortgagee was unwilling to have value thereof applied to payment, nor that harvesting was tortious, bill was insufficient. Findlay v. Longe, 81 Vt. 523, 71 A 829.

79. Where holders of mortgage redeemed under foreclosure of prior mortgage and obtained absolute title by sheriff's deed, mortgagor could not maintain action against them for accounting for reason that they

does not give him the title of a purchaser.[80] Upon paying a prior mortgage, a subsequent lienor is entitled to a transfer of whatever lien the prior mortgagee has.[81]

FOREIGN CORPORATIONS.

The scope of this topic is noted below.[82]

§ 1. **Status, Privileges and Regulation, 1811.** Permits, 1816. License, Excise or Franchise Taxes, 1816. Operation and Construction of Regulatory Statutes, 1818. Noncompliance with Statutes; Effect, 1821.
§ 2. **Powers, 1823.**
§ 3. **Actions by and Against, 1824.** Right to Sue, 1824. Liability to Suit; Jurisdiction, 1824. Venue, 1825. Service of Process, 1825. Procedure. Limitations, 1825. Pleading, Evidence, etc., 1825.
§ 4. **Remedies of Stockholders and Creditors, 1826.**

§ 1. *Status, privileges and regulations.*[83]—See 11 C. L. 1508—As a general rule foreign corporations have no right to do business in states other than that in which they were incorporated,[84] and the privilege of transacting intrastate business elsewhere exists only by virtue of comity,[85] which usually finds expression in a statute.[86] Comity in this respect means the assent of the state,[87] and is a mere extension of the right to do business which the corporation is authorized to transact at home.[88]

subsequently sold land at greatly increased figure, title having become absolute in them. Barker v. Moore [N. D.] 118 NW 823.

80. Where widow and heirs of mortgagor paid amount of mortgage debt after foreclosure proceedings had ripened into certificate of sale, with money belonging to estate, receiving back quitclaim deed, such deed amounted merely to release of mortgage. Willhite v. Berry, 232 Ill. 331, 83 NE 852.

81. Is not entitled to have first mortgagee bound as to amount due in mortgage. Boocock v. Wood, 128 App. Div. 645, 113 NYS 46.

82. This article is confined strictly to foreign corporations as such. As to matters relating generally to corporations and not affecting their status in states other than that of their domicile, see Corporations.* As to service of process upon foreign corporations, see Process,* § 4B. As to the venue in actions against foreign corporations, see Venue and Place of Trial,* § 1D. As to the taxation of foreign corporations as distinguished from the imposition of privilege fees, see Taxes,* § 2C. As to attachment against foreign corporations, see Attachment,* § 3. As to regulation of foreign corporations where questions of interstate commerce are involved, see Commerce.* As to foreign corporations engaged in combinations and monopolies, see Combinations and Monopolies.*

83. Search Note: See notes in 3 C. L. 1455, 1457; 5 Id. 1472; 7 Id. 1725; 9 Id. 1899; 11 Id. 1509; 24 L. R. A. 289, 315; 1 L. R. A. (N. S.) 558, 1019, 1041; 2 Id. 127; 4 Id. 688; 9 Id. 1214; 10 Id. 693; 14 Id. 673; 16 Id. 616; 2 Ann. Cas. 63; 4 Id. 814; 6 Id. 639, 744; 7 Id. 219, 224; 9 Id. 981; 11 Id. 320.

See, also, Corporations, Cent. Dig. §§ 2487-2549, 2571-2575; Dec. Dig. §§ 631-653; 10 Cyc. 961; 19 Id. 1203-1208, 1226-1235, 1251-1289, 1312, 1347; Licenses, Cent. Dig. § 47; 13 A. & E. Enc. L. (2ed.) 834, 837, 851, 860, 875.

84. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80. Authority of state is necessary before foreign corporation may transact intrastate business. Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194. Foreign corporation can do business only with consent of state. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341; Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361.

85. Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939; McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80; Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996; St. Louis & S. F. R. Co. v. Cross, 171 F 480; O'Brien v. Big Casino Gold Min. Co., 9 Cal. App. 283, 99 P 209. In absence of statute, a foreign corporation would, under doctrine of comity, be privileged to do business in state. State v. Nichols, 51 Wash. 619, 99 P 876. Comity which exists between several states of union permits corporation organized under laws of one state to pursue its occupation by agents who maintain places of business in another state. Cunningham v. Klamath Lake R. Co. [Or.] 101 P 213.

86. Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939.

87. Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996. Permission to do business is act of comity or grace. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361.

88. Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996. Comity exhibited by several states toward each other secures to corporation created by any one of them almost same use of its chartered powers and privileges in territory of others which it enjoys in one that created it. Patapsco Elec. Co. v. Baltimore, 110 Md. 306, 72 A 1039. Where foreign insurance company authorized to do business in state on assessment plan alone, it is confined to that plan, and in undertaking to do business on another plan it proceeds **without authority** and contracts made by it are nonenforcible. Smoot v. Bankers' Life Ass'n [Mo. App.] 120 SW 719. When corporation organized by one state is authorized by laws of another state to do business in latter, it

* Always begin with the latest article on the subject. Use the latest topical index.

The foreign corporations will not be permitted to exercise powers or carry on business in violation of the laws and regulations of a state,[89] or to do acts forbidden to domestic corporations by the policy of a state.[90] The question of comity is not involved where a foreign corporation attempts to establish a place of business in defiance of statutory restrictions.[91]

The state may admit the foreign companies upon such conditions as it sees fit,[92] burden the license with additional restrictions,[93] revoke its permission,[94] or inhibit the doing of business within its borders absolutely.[95] Important qualifications of

carries with it its charter and law under which it is incorporated, and persons dealing with it, particularly those who are members of association or corporation, are bound to take notice of provisions for control of its affairs and scope of authority of its officers and agents, and especially of business in which it can engage. Id. Though certificate of superintendent of insurance department is not conclusive as to character of business carried on by a company, it is strong evidence of same. Construction placed on business of corporation by executive officers of government in discharge of duties is received by courts as strong and persuasive in interpretation of law. Id. Assessment life insurance companies as they are called for brevity are not subject to provisions of general insurance laws except as mentioned in statute. Life insurance company organized under Code Iowa, § 1784, etc., held assessment company and certificate not subject to nonforfeiture provisions of Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752). Id.

89. Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996. Comity is always extended to foreign corporations by domestic state in such manner as to do no violence to its own policy or injury to its own citizens. Patapsco Elec. Co. v. Baltimore, 110 Md. 306, 72 A 1039. Foreign corporations agree impliedly to transact business in obedience to laws of the state. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Foreign corporation cannot do things which positive laws of state forbid or which are against established public policy of state. Derr v. Fisher [Okl.] 98 P 978. When foreign corporation undertakes to do business in state it must conform to laws. Smoot v. Bankers' Life Ass'n [Mo. App.] 120 SW 719. Foreign insurance corporation cannot withdraw itself from operation of state statutes by inserting clauses in its policies contrary to statute, nor can it avail itself of benefits of state laws without bearing its burdens. Id.

90. Foreign corporation will not be permitted to exercise any powers nor conduct any occupation forbidden to domestic corporation by laws or policy of state. Patapsco Elec. Co. v. Baltimore, 110 Md. 306, 72 A 1039. Rule is incorporated in Acts 1908, c. 240, p. 50, § 66, providing that no foreign corporation shall engage or continue in business, transaction of which is not permitted by domestic corporations. Id. Foreign corporation has no power to make contract with domestic corporations affecting matter of public interest which such domestic corporations had no power to make, such as combination of insurance companies. McCarter v. Firemen's Ins. Co. [N. J. Err. & App.] 73 A 80. A foreign corporation can exercise no power in a state which cannot be exercised lawfully by domestic corporation in same line of business. Attempt to secure control of another corporation to effectuate monopoly. Dunbar v. American Tel. & T. Co., 238 Ill. 456, 87 NE 521. Foreign corporation cannot lawfully become stockholder in another corporation unless power is expressly given or necessarily implied. Foreign corporation had no implied power to purchase stock of domestic telephone company with view of effectuating monopoly. Id.

91. Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939. When in defiance of statutory restrictions a noncomplying corporation attempts to establish a place of business in another state, a remedy by infliction of penalty, if provided by statute, accrues to the state whose laws are thus violated. Id.

92. St. Louis & S. F. R. Co. v. Cross, 171 F 480; Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939; Cunningham v. Klamath Lake R. Co. [Or.] 101 P 213; Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194; New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433; La Moine Lumber & Trading Co. v. Kesterson, 171 F 980; State v. Vandiver [Mo.] 121 SW 45; Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361; Southern R. Co. v. Greene [Ala.] 49 S 404; People v. Glynn, 194 N. Y. 387, 87 NE 434; Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996. State permitting foreign corporation to do business therein may impose such reasonable conditions as it deems proper to protect rights of her citizens. Cunningham v. Klamath Lake R. Co. [Or.] 101 P 1099. State may exact such security for performance of contracts by foreign corporations with state's citizens as will best promote public interest. Herman Bros. Co. v. Nasiacos [Colo.] 103 P 301. Terms and conditions upon which foreign corporation may do business are prescribed by state. State v. Nichols, 51 Wash. 619, 99 P 876.

93. Southern R. Co. v. Greene [Ala.] 49 S 404.

94. St. Louis & S. F. R. Co. v. Cross, 171 F 480. License extended by state to foreign corporation to do business is revocable. State v. Vandiver [Mo.] 121 SW 45; Southern R. Co. v. Greene [Ala.] 49 S 404; State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. State may withdraw its implied assent through comity. Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996.

95. Cyclone Min. Co. v. Baker L. & P. Co. 165 F 996. State may exclude foreign corporations at will. St. Louis & S. F. R. Co. v. Cross, 171 F 480; La Moine Lumber & Trading Co. v. Kesterson, 171 F 980; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —; Southern R. Co. v. Greene [Ala.]

the state's power are, that there must be no interference with the jurisdiction and authority of other states,[96] and that the provisions of the federal constitution must not be violated.[97] Thus the state cannot interfere with the right to engage in interstate commerce,[98] the right to resort to the jurisdiction of the federal courts,[99] the right of an opportunity of defense before condemnation and deprivation of property,[1] or impair contractual rights.[2] Additional limitations are those in regard to the title of enactments[3] and those preventing discrimination,[4] or the granting of greater privileges to foreign than domestic corporations.[5] Constitutional provisions sometimes subject foreign corporations to the same regulations, limitations and liabilities as domestic corporations,[6] and corporation laws may be changed under the reserved power to amend.[7] The state has no power to exclude foreign corporations created by congress and solely within the power of congress,[8] but the facts that a foreign telegraph company complies with the federal laws to aid in the construction of telegraph lines will not affect its standing as a foreign corporation under the state laws.[9] The performance of duties required are sometimes conditions precedent and sometimes conditions subsequent,[10] and the corporations may be admitted to do busi-

49 S 404; Herman Bros. Co. v. Nasiacos [Colo.] 103 P 301; State v. Vandiver [Mo.] 121 SW 45; New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433; Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361.

96. State imposing conditions must not transgress the rules of public policy which secure jurisdiction and preserve authority of each state from encroachment by all others. Cunningham v. Klamath Lake R. Co. [Or.] 101 P 1099.

97. Southern R. Co. v. Greene [Ala.] 49 S 404; Cunningham v. Klamath Lake R. Co. [Or.] 101 P 1099; St. Louis & S. F. R. Co. v. Cross, 171 F 480.

98. Regulatory statutes as to foreign corporations must not be violative of right to engage in interstate commerce. La Moine Lumber & Trading Co. v. Kesterson, 171 F 980. In respect to right to engage in interstate commerce, corporations possess same rights as citizens. Id. Foreign insurance company has constitutional right to enter into contract in foreign state with citizen insuring latter's property, and provisions of insurance law in so far as they interfere with this right are void. Hammond v. International R. Co., 63 Misc. 437, 116 NYS 854. **Local regulations held inapplicable** as to foreign corporation engaged in interstate commerce. Atlas Engine Works v. Parkinson, 161 F 223. State statutes in relation to filing of articles of incorporation and appointing a resident agent. Rex Buggy Co. v. Dinneen [S. D.] 122 NW 433. Statutes prohibiting prosecution of suits by foreign corporations who do not comply with state law. Herman Bros. Co. v. Nasiacos [Colo.] 103 P 301.

99. Right to resort to jurisdiction of federal courts is conferred by federal constitution and laws of congress. St. Louis & S. F. R. Co. v. Cross, 171 F 480.

1. St. Louis & S. F. R. Co. v. Cross, 171 F 480; Cunningham v. Klamath Lake R. Co. [Or.] 101 P 1099.

2. St. Louis & S. F. R. Co. v. Cross, 171 F 480; Ivy v. Western Union Tel. Co., 165 F 371.

3. Tarr v. Western Loan & Sav. Co., 15 Idaho, 741, 99 P 1049. Laws 1903, p. 49, imposing additional conditions upon foreign corporations already doing business in state, is **not unconstitutional** for failure to comply with Const. art. 3, § 15, with reference to reading of will prior to enactment. Id.

4. No greater burdens can be placed on foreign than on domestic corporation. Ivy v. Western Union Tel. Co., 165 F 371. Imposition of additional requirements by Laws 1903, p. 49, where foreign corporation had complied with Rev. St. 1887, § 2653, was proper, since exactions made of foreign corporation were not different from those imposed upon domestic companies. Tarr v. Western Loan & Sav. Co., 15 Idaho, 741, 99 P 1049.

5. Const. art. 15, § 11, prohibiting foreign corporations from exercising greater rights than domestic corporations, is addressed primarily to legislature. Uihlein v. Caplice Commercial Co. [Mont.] 102 P 564. Provision intended to prohibit granting of greater privileges to foreign corporations, and did not plan upon foreign corporations all the burdens placed on domestic corporations. Id.

6. Const. art. 12, §§ 6, 11. Ivy v. Western Union Tel. Co., 165 F 371.

7. Ivy v. Western Union Tel. Co., 165 F 371.

8. Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194. Unless created by congress and engaged in business of federal nature or otherwise solely within power of congress. New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433.

9. The fact that foreign telegraph company has complied with the act of Congress of July 24, 1866, c. 230, 14 Stat. 221 (U. S. Comp. St. 1901, p. 3579), relating to telegraph companies, has no effect upon its standing as a foreign corporation under the state laws. Ivy v. Western Union Tel. Co., 165 F 371. Act Cong. July 24, 1866, c. 230 (14 Stat. 221), to aid in the construction of telegraph lines, is not equivalent to a federal charter to transact business within a state. Act deals with right to use public property, but does not render accepting companies federal agencies not subject to state's power. Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194.

10. Gould Land & Cattle Co. v. Rocky

ness for a limited period of time,[11] or full incorporation in the state may be required.[12] Statutes aimed at the removal of causes to federal courts have been held invalid,[13] but the prohibition of action by foreign corporations until certain statements are filed,[14] the limitation of the compensation of officers of certain foreign companies,[15] the imposition of penalties when foreign corporations are members of a combination,[16] or the change of the common law permitting the recovery of damages against foreign corporations,[17] are proper.

The state may provide for the forfeiture of the privilege of doing business by any prescribed action or nonaction,[18] and forfeiture may arise from the disregard of the

Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939.

11. New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433.

12. Const. art. 9, § 8, requires full incorporation in state of railroad to be built or operated partly in state. Lyles v. McCown, 82 S. C. 127, 63 SE 355. Foreign railroad corporation desiring to extend its line into state must, as condition of incorporation, open books of subscription and take subscriptions to amount of $500, per mile, and do other acts required by Civ. Code 1902, § 1917, et seq. Id.

13. Code Ala. 1907, §§ 3642-3658, providing that a foreign corporation which removes a suit from a state to a federal court shall forfeit its license, is unconstitutional as violating Const. Ala. 1901, § 240, providing that "all corporations shall have the **right to sue,** and shall be subject to be sued in all courts in like cases as natural persons." Western Union Tel. Co. v. Julian, 169 F 166. Code Ala. 1907, §§ 3642-3658, providing for the forfeiture of licenses by foreign corporations which remove suits to federal courts, cannot be sustained under Const. Ala. 1901, § 239, giving any corporation, organized for that purpose, the right to construct and maintain telegraph lines in the state and only leaving power to the legislature to "provide reasonable regulations" for conducting the business. Id. Code Ala. 1907, §§ 3642-3658, providing for the forfeiture of licenses by foreign corporations which remove suits to federal courts, is unconstitutional as **denying equal protection of laws.** Id. Acts Okl. May 26, 1898 (Laws 1908, p. 214, c. 16), providing for forfeiture of right to do business in state when corporation declared its domicile to be in another state, which act was intended to prevent removal of causes to federal court because of diversity of citizenship, held unconstitutional as **impairing contract rights.** St. Louis & S. F. R. Co. v. Cross, 171 F 480. Where railroad had acquired large property rights at time of admission of state and was protected by state constitution as to contract rights. Id. Where railroad had acquired large property rights at time of admission of state, and was protected by state constitution as to contract rights, Acts Okl. May 26, 1898 (Laws 1908, p. 214, c. 16), providing for the forfeiture of right to do business in state upon written declaration by corporation of domicile in another state, and aimed at the removal of causes to federal courts because of diversity of citizenship, was unconstitutional as depriving company of property without **due process of law.** Id. Whether railroad succeeded by transfer to direct grants made to original companies of right to construct and operate their railroads, or accepted and made its investments upon faith of proposals extended generally or specially by statutes conferring same right upon it as purchasing company, is immaterial. Id. Act Okl. May 26, 1908 (Laws 1908, p. 214, c. 16), providing for forfeiture of license to do business in state upon declaration of domicile in another state, if extending to **interstate transactions,** must be void in that respect. Id.

14. Gen. St. 1901, § 1283, prohibiting actions by foreign corporations which do not first file certain statements with the secretary of state, is not repugnant to the commerce clause of the federal constitution. Wilson-Moline Buggy Co. v. Hawkins [Kan.] 101 P 1009. Statute applies to foreign corporations engaged in interstate commerce. Id. Imposes no burden upon interstate commerce but provides that foreign corporations seeking to use state courts must do so upon same terms as other corporate suitors. Id. Statute does not impair obligation of contracts. Denial merely amounts to adjudication that plaintiff cannot maintain action at that time. Id. Statute does not abridge privileges or immunities of citizens of the United States. Id. Make no distinction between foreign and domestic corporations. Id. Statute does not deprive any person of property without due process of law. Id. Statute does not deny to any person within jurisdiction of state equal protection of laws. Id.

15. Laws 1907, p. 315, limiting salaries and compensation of officers of life insurance companies, and providing that licenses to do business should be refused corporations disregarding act, is lawful exercise of state's police power. State v. Vandiver [Mo.] 121 SW 45. Statute applies to all life companies doing business in state as well as those which should thereafter enter. Id.

16. Act Ark. 1905, § 1, imposing penalty where foreign corporation doing business is member of trust, is on its face equally applicable to domestic corporations, wherefore act is not invalid as impairing obligations of contract. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —. Ark. Laws 1905, § 1, held not invalid as taking property without due process of law or as depriving equal protection of laws. Id.

17. Act March 7, 1903 (Acts 1903, p. 123, n. 68; Kirby's Dig. Ark. § 7947), changing common law as to recovery of damages sustained, is not an unconstitutional impairment of contract between foreign telegraph company and state. Ivy v. Western Union Tel. Co., 165 F 371.

18. New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433.

laws of the state.[19] Thus the state may provide for the forfeiture of privileges where an enactment against combinations is violated.[20] The motive for the exercise of the power to exclude is immaterial,[21] and the prohibition against doing business is proper, though the wrongful act was done outside of the state.[22] The license to do business is not a contract,[23] and its issuance does not prevent the passage of statutes in the exercise of the state's police power,[24] nor does the refusal to renew the privilege impair contracts entered into under the former license,[25] neither does forfeiture of the privilege to do intrastate business interfere with interstate commerce.[26] The expenditure of large sums in the state and the resulting heavy losses because of forfeiture will not prevent the revocation of the license to do business,[27] but the revocation of valuable rights and privileges amounting to franchises cannot be accomplished by legislative declaration, in the absence of reserved power,[28] and the sovereign arbitrary right to expel foreigners may be waived and abandoned,[29] as where vested rights are acquired.[30]

19. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

20. Rev. St. 1899, §§ 8971, 8978 (Ann. St. 1906, p. 4153, 4157), construed and held to provide for forfeiture of licenses of foreign corporations which are guilty of misuse of powers by violating anti-trust act. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

Held constitutional: Rev. St. 1899, §§ 8965, 8966, 8967, 8971, 8972, 8978 (Ann. St. 1906, pp. 4150, et seq), providing for forfeiture of license of foreign corporation which violates anti-trust laws, is not violative of Const. art. 1, § 8, as interfering with interstate commerce. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Statute is not violative of U. S. Const. art. 1, § 10, as impairing obligations of contract, since license was procured subject to state laws. Id. Statute does not impose greater punishment on corporations than individuals and thus violate U. S. Const. Amend. 14, § 1. Id. Act is not violative of equal protection of laws. Id. Proceedings to forfeit license of foreign corporation held not to be violative of constitution as taking of property without due process of law, sufficient hearing having been provided. Id. In proceeding to forfeit license of foreign corporation because of violation of anti-trust laws, it is no defense that such corporation engages in interstate commerce and that same would be interfered with. Id.

21. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —.

22. Prohibition against doing business in state, because of fact that foreign corporation entered into combination outside of state, held valid exercise of power. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 53 Law. Ed. —. Fact anti-trust law of Arkansas of 1905 maybe invalid as to individuals does not affect its validity as to corporations. Id.

23. State v. Vandiver [Mo.] 121 SW 45. Legislative enactments as to control of corporations for the benefit of citizens, and licenses issued in pursuance thereof, to do business, are in no sense contracts between the state and such corporations, but are police regulations subject to amendment and repeal. Id.

24. Issuance of license before passage of anti-trust act does not change question since statute was passed in exercise of police power which could not be bargained away. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

25. Refusal of state to renew license authorizing an insurance company to do business within state would not have effect of impairing contracts entered into under former license. Only effect would be to prevent new contracts or business. State v. Vandiver [Mo.] 121 SW 45.

26. License of state confers no authority to foreign corporation to carry on interstate commerce, and revocation of such license does not interfere with interstate commerce. State v. Standard Oil Co., 218 Mo. 1, 116 SW 902.

27. State v. Vandiver [Mo.] 121 SW 45. Officer of state could not grant irrevocable license, and statute did not authorize it. Id. Resulting heavy losses because of ouster were no defense to proceedings to forfeit license of foreign corporation violating anti-trust act. Rev. St. 1899, §§ 8965, 8966, 8971, 8978 (Ann. St. 1906, pp. 4150, et seq.). State v. Standard Oil Co., 218 Mo. 1, 116 SW 902. Foreign corporation because of its long continued business and property within state cannot invoke provisions of 14th amendment to federal constitution, as abridging privileges and immunities of citizens of the several states, to curtail power of state to prescribe conditions upon which such foreign corporation will be permitted to transact local business. Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194. Where foreign corporation exercised power not authorized by law, Const. art. 4, § 22, empowered attorney general to prevent such further action. Id. Penalties prescribed by Act May 16, 1907 (Laws 1907, p. 500, c. 22), imposing fees for permit to do business, are immaterial. Id.

28. St. Louis & S. F. R. Co. v. Cross, 171 F 480. Can be accomplished in no event except upon adequate grounds by judicial proceedings regularly instituted for that purpose, and is not subject of collateral inquiry. Id.

29. Western Union Tel. Co. v. Julian, 169 F 166.

30. Foreign corporation may acquire vested right to do intrastate business protected by federal constitution. Western Union Tel. Co. v. Julian, 169 F 166.

NOTE. Right to do business in state can become vested: A state provides that the

While a state cannot create a corporation and empower it to do business in a sister state,[31] a state may properly grant a franchise to a corporation of another state.[32] The domestication of a foreign company is often dependent upon the facts of the case.[33] Statutory enactments sometimes prevent the appropriation by a foreign corporation of existing corporate names.[34]

Permits. See 7 C. L. 1726

License, excise or franchise taxes. See 11 C. L. 1510—While the power of the state to impose license or privilege taxes,[35] when foreign corporations are doing business in the state,[36] or have their capital stock employed therein,[37] and the power to increase such fees,[38] are subject to constitutional limitations,[39] the charge imposed

bringing of suit by a foreign corporation in the federal court shall ipso facto forfeit its right to do domestic business. A foreign corporation had come into the state at the state's invitation, and had been encouraged to buy up the domestic roads and had invested much money in improvements. Held, that a contract relation existed which the state could not impair, and that the statute was unconstitutional. Seaboard Air Line R. Co. v. Alabama Railroad Com., 155 F 792.

Foreign corporations have generally been held to be doing business in a state by a mere license which the state might revoke or modify at any time. The idea of a license is brought out in Doyle v. Continental Ins. Co., 94 U. S. 535, 24 Law. Ed. 148; Hartford Ins. Co. v. Perkins, 125 F 502; Manchester Fire Ins. Co. v. Heiriott, 91 F 711; Niagara Ins. Co. v. Cornell, 110 F 816; Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 43 Law. Ed. 569; Daggs v. Orient Ins. Co., 136 Mo. 382, 38 SW 85, 58 Am. St. Rep. 638, 35 L. R. A. 237; Sandel v. Atlanta Life Ins. Co., 53 S. C. 241, 31 SE 230; Aetna Iron & Steel Co. v. Taylor, 3 Ohio N. P. 152; State v. Standard Oil Co., 61 Neb. 28, 84 NW 413; 87 Am. St. Rep. 449. Thompson on Corporations, Vol. 6, § 7877, note 3. There is a recent tendency, which the principal case seems to illustrate, of seeing a contract relation between the foreign corporation and the state, and deciding that the right of remaining in the state has become vested and the corporation may not be arbitrarily ousted or have its right impaired. See American Smelting & Refining Co. v. Colorado, 204 U. S. 103, 51 Law. Ed. 393; Commonwealth v. Mobile & O. R. Co., 23 Ky. L. R. 784, 64 SW 451.—From 6 Mich. L. R. 258.

31. New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433. State cannot confer franchise of maintaining corporate existence in another state. MacKay v. New York, etc., R. Co. [Conn.] 72 A 583.

32. MacKay v. New York, etc., R. Co. [Conn.] 72 A 583. May grant franchise to corporations chartered in different states as freely as to natural persons who are citizens of different states. Id. Consolidated company of several states is domestic corporation of each state from which it receives franchise. Id.

33. Facts held to show that certain railroad was foreign corporation, domestic corporation of similar name having been merged with it, and, having lost its identity, whereupon it ceased to exist. Atlantic Coast Line R. Co. v. Dunning [C. C. A.] 166 F 850. Removal of cause. Id.

34. Laws 1903, p. 124, c. 84, § 1, par. 2, places foreign and domestic corporations on terms of equality and prevents appropriation of any existing corporate name. State v. Nichols, 51 Wash. 619, 99 P 876.

35. State may impose tax as condition of doing business. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361.

36. Act approved March 20, 1905 (St. 1905, p. 493, c. 386), as amended June 13, 1906 (St. 1906, p. 22, c. 19), March 19, 1907 (St. 1907, p. 664; c. 347), and March 20, 1907 (St. 1907, p. 745, c. 403), imposes license tax upon foreign corporations doing business in state. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341.

37. Tax Law, § 182 (Laws 1901, p. 1365, c. 558, as amended by Laws 1906, p. 1196, c. 474, § 2), renders corporation liable to franchise tax when doing business or exercising its franchise in state and when capital stock is employed within state during year tax is assessed. People v. Glynn, 194 N. Y. 387, 87 NE 434. Where report of corporation designated its principal place of business as within state, and its capital was "employed" rather than "invested" in state, it was subject to franchise tax imposed by Laws 1901, p. 1365, c. 558, as amended by Laws 1906, p. 1196, c. 474, § 2. Id. Capital stock is "employed" rather than "invested" when applied to uses contemplated when corporation was organized. Id.

38. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361. Act March 7, 1907, p. 418, § 1 (Code 1907, § 2391), imposes an additional privilege tax for exercise of corporate franchises in state. Southern R. Co. v. Greene [Ala.] 49 S 404. Fact that permit was granted to corporation under former law does not preclude state from imposing additional franchise tax where Rev. St. 1895, art. 650, provides that charters and amendments shall be subject to legislative change and foreign corporation is not expressly exempted, either by statute or grant, and Const. art. 8, § 4, prohibits surrender of power to tax corporations by any contract grant to which state is party. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361. Foreign corporation by engaging in business upon payment of certain fee acquires no vested right to any exemption from imposition of further fees. Cudahy Packing Co. v. Denton [Kan.] 99 P 601, denying rehearing [Kan.] 97 P 439. Laws 1907, pp. 237, 239, c. 140, §§ 23, 27, are not repugnant to Const. art. 1, § 10, and Fed. Const. Amend. 14. Id. Provisions of Laws 1907, c. 140, p. 231, fixing fees to be paid by corporation upon increase of its capital stock, apply to foreign corporation, which prior to enactment thereof had been permit-

as a condition of consent to do business is not ordinarily a tax on property,[40] and the rules relating to taxation of property do not usually apply.[41] Thus, an enactment imposing a franchise tax would not be unconstitutional, though not operating uniformly.[42] A consideration of the particular statute is sometimes necessary to determine if the tax imposed is a privilege or property tax.[43] The amount of the fee may be fixed according to the amount of capital stock of the corporation,[44] though the major portion of such capital stock is beyond the state's limits.[45] Concessions are sometimes made where the foreign corporation deposits property in the state.[46] The payment of the privilege tax by a foreign corporation which succeeds a domestic company does not discharge the fee due from the domestic company,[47] and the imposition of fees from both companies in such a case is not double taxation.[48] The voluntary payment of an illegal tax is not recoverable.[49] Forfeiture of the privilege of doing business may be provided because of nonpayment.[50]

ted to engage in business in state, and had increased its capital stock but which failed to present certificate of such increase until after act was passed. Id.

39. Act March 7, 1907, p. 418, § 1 (Code 1907, § 2391), requiring foreign corporations to pay an annual franchise tax for use of state, based on amount of capital employed therein, is not violative of federal constitution as to **impairment of contracts** as to foreign corporations which have theretofore complied with previous laws and paid licenses and other taxes including franchise tax. Southern R. Co. v. Greene [Ala.] 49 S 404. Imposition of additional tax held not impairment of contract. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361. Foreign corporation which has complied with state laws as to service of process and license fees, and has purchased property in state is "within jurisdiction" of state, within federal Const. Amend. 14, forbidding denial of **equal protection of laws.** Southern R. Co. v. Greene [Ala.] 49 S 404. Act March 7, 1907, p. 418, § 1 (Code 1907, § 2391), requiring foreign corporations to pay an annual franchise tax for use of state based on amount of capital employed therein, is not violative of federal constitution as denying equal protection of laws. Id. Act March 7, 1907, p. 418, § 1 (Code 1907, § 2391), requiring foreign corporations to pay an annual franchise tax for use of state based on amount of capital employed therein, is not invalid as interfering with **interstate commerce.** Id. Act May 16, 1907 (Laws 1907, p. 500, c. 22), requiring foreign corporations to pay fee, based upon capital stock, for permit to do business in state, should be construed to apply only to intrastate business and hence is not violative of commerce clause of federal constitution. Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194. License tax law (St. 1905, p. 493, c. 386, as amended) is not violative of Const. art. 12, § 15, requiring taxes to be **uniform,** since tax required of foreign corporations is same as that imposed on domestic corporations. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Acts 1907, p. 421, § 2, providing that, in addition to state franchise tax, foreign corporations shall pay to county one half of that amount, is not invalid as to **title of act** (Const. 1901, § 45). Levy for county purposes is cognate to general subject of revenue for state. Southern R. Co. v. Greene [Ala.] 49 S 404.

40. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. Charge imposed is condition of consent of state and not property tax. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361. License or privilege tax is not property tax, though amount is determined by capital stock of corporation. Id.

41. People v. Glynn, 194 N. Y. 387, 87 NE 434.

42. People v. Glynn, 194 N. Y. 387, 87 NE 434. Tax imposed under Acts 29th Leg. 1905, pp. 22, 100, cc. 19, 72, upon all foreign corporations alike, is not invalid because domestic corporations are not so heavily taxed since foreign corporations may be classed alone for purposes of franchise taxation. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361.

43. Tax imposed by Act May 16, 1907, **held occupation tax** measured by gross receipts of previous year. Kansas City Life Ins. Co. v. Love, 101 Tex. 531, 109 SW 863. Civ. Code 1902, §§ 302, 1808, 1809, construed, and annual tax on gross receipts of foreign insurance corporation **held property tax.** New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433. Not rendered privilege tax by § 1821, providing for forfeiture of right to do business in state. Id. As to property taxes, see Taxes.

44, 45. Western Union Tel. Co. v. State [Tex. Civ. App.] 121 SW 194.

46. Act Laws 1907, p. 483, c. 18, § 8, as to insurance companies. Kansas City Life Ins. Co. v. Love, 101 Tex. 531, 109 SW 863. Reduction of privilege tax contemplated because securities invested were taxed. Id.

47. Foreign corporation which was organized to supersede domestic corporation did not, by payment of its license tax, discharge tax due from such domestic corporation. Lewis v. Curry [Cal.] 103 P 493.

48. Imposition and payment of tax by foreign corporation which was organized to supersede domestic corporation was not double taxation, since in former case tax is imposed for right to do business and in latter case for continuance as corporation. Lewis v. Curry [Cal.] 103 P 493.

49. Franchise tax paid under protest that law under which it was levied was unconstitutional cannot be recovered on ground that corporation was not liable because it did only interstate business. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361.

50. License tax law (Act March 20, 1905, St. 1905, p. 493, c. 386, as amended with for-

Operation and construction of regulatory statutes. See 11 C. L. 1511—Regulations imposed by the state are not to be construed as retroactive,[51] or as applying to foreign corporations engaged solely in interstate commerce.[52] Also, penal statutes are not to be extended by construction.[53] The construction of statutes is frequently involved in determining the conditions to be complied with,[54] whether domestication of the foreign company is required,[55] and the amount of fees required where full incorpora-

feiture provisions, is not unconstitutional as taking of property since charge imposed is mere license for privilege of doing business in state. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341. License tax law (St. 1905, p. 493, c. 386), which when disregarded operates to forfeit right to do business in case of foreign corporations, while charter is forfeited in case of domestic corporations, is not for that reason lacking in uniformity and violative of Const. art. 1, § 11. Id. Forfeiture provisions of license tax law (St. 1905, p. 493, c. 386, as amended) are not violative of constitutional provision as to equal protection of laws. Id. Title of foreign tax law (St. 1905, p. 493, c. 386, as amended) is sufficiently expressive so that act is not violative of Const. art. 4, § 24. Id. **Proceedings** for forfeiture of charter of domestic corporation under St. 1906, c. 19, § 3, which is also applicable to foreign corporations, held to have been carried on with sufficient dispatch. Lewis v. Curry [Cal.] 103 P 493. Secretary of state in listing delinquent corporations under St. 1906, p. 22, c. 19, need not specify which are foreign and which are domestic. Id. Determination of nonpayment of license tax by secretary of state under Act March 20, 1905 (Acts 1905, p. 493, c. 386, as amended), is mere ministerial duty, wherefore act is not violative of Const. art. 3, § 1, prohibiting exercise of powers of one department of government by person charged with duties of another department. Kaiser Land & Fruit Co. v. Curry [Cal.] 103 P 341.

51. Const. Okl. art. 8, §§ 8, 9, as to lease or purchase of parallel railroad lines by foreign corporations and consolidation with domestic corporations, does not apply to past transactions. St. Louis & S. F. R. Co. v. Cross, 171 F 480. Const. Okl. art. 9, § 31, providing that no railroad corporation shall be entitled to benefit of right of eminent domain until it shall become body corporate pursuant to laws of state, refers only to future applications for benefit of right. If retroactive, would be obnoxious to federal constitution as to contracts. Id.

52. Statutes imposing duties and obligations upon foreign corporations will be construed as not applying to corporations engaged solely in interstate commerce. Herman Bros. Co. v. Nasiacos [Colo.] 103 P 301. Statute as to service of process is **not applicable** to corporation engaged in interstate commerce. Toledo Computing Scale Co. v. Young [Idaho] 101 P 257. Only foreign corporations doing business in the state are required to comply with statutes, imposing conditions on which they may sue. Groneweg & Schmoentgen Co. v. Estes [Mo. App.] 119 SW 513. Noncomplying foreign corporation may sue on contracts made for it by traveling salesmen. Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 120 SW 31. Foreign corporation transacting interstate commerce can sue to recover its property in replevin regardless of regulatory statutes (Rev. Civ. Code, §§ 883, 885). Rex Buggy Co. v. Dinneen [S. D.] 122 NW 433. Evidence showing that alleged agent instead of handling goods for alleged foreign corporation bought same outright held to show such corporation to have been engaged in interstate commerce, and hence that there was no violation of St. 1898, § 1770b. Sanitas Co. v. Niezorowski [Wis.] 120 NW 292. Pub. Acts 1901, p. 316, No. 206, § 6, provides that provisions of act shall not be applicable to sales of goods which would be protected by rights of interstate commerce. Fifth Avenue Library Soc. v. Hastie, 155 Mich. 56, 15 Det. Leg. N. 939, 118 NW 727. Contract whereby books were to be delivered by foreign company subsequently held to constitute interstate commerce, though contract was executed and first payment was made in home state. Id. Prohibition of right to sue because of noncompliance with statutes does not apply where transaction constitutes interstate commerce. Id. Where foreign corporation ships goods to resident agent who in turn sells same, last sale and delivery is **not interstate commerce.** Duluth Music Co. v. Clancy, 139 Wis. 189, 120 NW 854. Sale of stock by corporation which did not comply with statute, did not involve question of interstate commerce. Southwestern Slate Co. v. Stephens, 139 Wis. 616, 120 NW 409. Contract providing for installation of new elevator and repair of another elevator for one price held contract for work which was not interstate commerce. Houghton Elevator & Mach. Co. v. Detroit Candy Co., 156 Mich. 25, 16 Det. Leg. N. 13, 120 NW 18. Repairs to buildings and machinery are in no sense interstate commerce, but must be performed wholly in state. Id. In determining whether contract sued upon described a business to be carried on within state, or whether it involved business of interstate commerce, **contract must be construed as whole.** Id.

53. Statutes imposing individual responsibility. Stephenson v. Dodson, 36 Pa. Super. Ct. 343. Statutes penal in character are to be given reasonably strict construction. Atlas Engine Works v. Parkinson, 161 F 223.

54. Act Nov. 30, 1907, Gen. Acts Sp. Sess. 1907, p. 200, is not invalid because its title contains more than does the act, and hence Code 1896, § 1321, as amended by Act Mar. 7, 1907, Acts 1907, p. 422, does not apply to foreign corporations, they being expressly excepted in Act of Nov. 30, 1907. Chattanooga Sav. Bank v. Tanner, 157 Ala. 502, 47 S 790. Requirements of Act Mar. 7, 1907, need not be complied with. Id.

55. Rev. St. 1895, § 745, only places foreign corporation securing permit to do business in state upon same footing as domestic corporations in respect to business, and does

tion into the state, is a condition.[56] A statute preventing the duplication of the names of corporations doing business in the state is to be construed in the light of constitutional provisions as to foreign corporations,[57] and thereby the duty of state officers in permitting the license of a foreign corporation bearing the same name as a domestic company may be determined.[58] The policy of the state in imposing conditions, or excluding foreign corporations when manifested by legislation, will not be defeated by the courts.[59] An enactment prohibiting the licensing of a foreign corporation organized to evade the laws of the state does not apply where the foreign corporation was organized to do business in a third state.[60] The regulations imposed are usually mandatory,[61] and must be substantially complied.[62] The facts of the case are largely determinative as to whether a foreign corporation is doing business in the state.[63] Usually, single or transient transactions are not within the

not fix domicile of such corporation. Coca Cola Co. v. Allison [Tex. Civ. App.] 113 SW 308. Laws Okl. 1908, p. 214, c. 16, § 1, fixing domicile in state of every corporation transacting business in state which complies with its constitution and laws, though it makes such corporations in form domestic, does not thereby render them citizens of state so as to affect jurisdiction of federal courts upon question of diverse citizenship. St. Louis & S. F. R. Co. v. Cross, 171 F 480. Wilson's Rev. & Ann. St. Okl. 1903, §§ 1067 and 1028, construed and held to provide for different transactions, viz., a conveyance of railroad property, franchises, etc., and consolidation of railroad property and formation of new local corporation wherefore domestication of foreign corporation was not effected by virtue of its consolidation with railroad part of its system and formation of new corporation under statutes as contended. Id. Purchase of railroad not merger or consolidation, so as to constitute new domestic corporation separately provided for by § 1028. Id.

56. Amount of fees to be paid by foreign railroad company for its charter is governed by Act Feb. 28, 1899 (33 Stat. 64), which though repealed is re-enacted by Act Feb. 25, 1902 (33 Stat. 1023), § 4 referring thereto. Lyles v. McCown, 82 S. C. 127, 63 SE 355.

57. Statute must be construed with reference to Const. art. 12, § 7, whereby foreign corporations are not to be allowed to transact business on terms which are more favorable than those enjoyed by domestic corporations. State v. Nichols, 51 Wash. 619, 99 P 876.

58. It is not duty of secretary of state to file articles of incorporation of foreign corporation bearing same name as domestic and leave domestic corporation to its equitable remedy, but secretary of state may refuse to file such article or to issue certificate. Laws 1903, c. 84, § 1, p. 124. Construed in light of Const. art. 12, § 7. State v. Nichols, 51 Wash. 619, 99 P 876.

59. Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996. Courts will not interfere where it is intended that relief should be withheld. Id. It is not matter for judicial inquiry whether conditions or burdens imposed are good or bad. New York Life Ins. Co. v. Bradley [S. C.] 65 SE 433. Federal courts are bound by rule. Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996. Legislation depriving unlicensed corporations of privilege of resorting to courts will not be nullified by judicial construction. Bankers Casualty Co. v. Richland County Banking Co., 12 Ohio C. C. (N. S.) 200.

60. Rev. St. 1899, § 1025, as amended by Laws 1903, pp. 122, 123 (Ann. St. 1906, p. 889), prohibiting licensing of foreign corporation organized by residents of state to evade laws of state, etc., does not apply where foreign corporation was organized to do business in third state. Journal Co. v. Nelson, 133 Mo. App. 482, 113 SW 690.

61. Constitutional (Const. art. 11, § 10) and statutory provisions (Rev. St. 1888, § 2653, as amended by Laws 1903, p. 49), with reference to qualification of foreign corporation to do business in state, are mandatory. Tarr v. Western Loan & Sav. Co., 15 Idaho, 741, 99 P 1049. Const. art. 10, § 5, as carried into effect by Rev. St. 1899, § 3058 (Sess. Laws 1890-91, p. 174, c. 42, § 1), requiring foreign corporations to file acceptance of constitution before being permitted to do business, is mandatory. Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939.

62. In order to enable foreign corporation to sue to enforce contracts. Tarr v. Western Loan & Sav. Co., 15 Idaho, 741, 99 P 1049. Foreign corporation that has complied with law prior to its amendment (Rev. St. 1887, § 2653) will be held to have substantially complied with amendment law (Law 1903, p. 49), if subsequent to passage of amendment it performs all additional things required by latter statute not required by former. Tarr v. Western Loan & Sav. Co., 15 Idaho, 741, 99 P 1049. Omission to file certified copy of articles of incorporation with county recorder **held not substantial compliance** with Rev. St. 1887, § 2653, as amended by Laws 1903, p. 49, though other requisites had been effectuated. Id.

63. **Held doing business:** Where representative makes binding contract and merely sends his principal directions to ship goods. Irons v. Rogers, 166 F 781. Business of buying, raising, feeding, selling, and shipping live stock is "business" as contemplated by constitution and statutes. Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939. Foreign corporation with local agency in control of salesmen who sold sewing machines in various counties and reported to such agency which in turn reported to agency in another state (Rev. Code Miss. 1880, § 497, as to taxes).

scope of regulatory statutes,[64] but the rule varies according to the statute involved,[65] as where contracts affecting the personal liability of a foreign corporation[66] are rendered invalid.

Singer Mfg. Co. v. Adams [C. C. A.] 165 F 877. Railroad maintaining offices in state employing agents to solicit business, holding directors' meetings therein at times, disbursing dividends, transferring stock and the like. Sleicher v. Pullman Co., 170 F 365. Foreign corporation whose traveling salesmen solicit and receive orders for intoxicating liquors, which orders when accepted by corporation are filled by shipping liquors f. o. b. cars in foreign state. State v. Lemp Brew. Co. [Kan.] 102 P 504. Contract for construction of railroad entered into outside of state held to show relation of contractor and contractee, though certain limited exemption from liability for acts of subcontractors and servants was conferred upon contractor, and plaintiff constructor was held engaged in corporate functions in state in violation of Code 1907, §§ 3642, 3644, wherefore suit for money due under contract could not be maintained. Alabama Western R. Co. v. Talley Bates Const. Co. [Ala.] 50 S 341. Persons to whom construction of work was let held not independent contractors. Id.

Held not doing business: Foreign corporation selling sewing machines by traveling salesmen who reported to agency outside of state (Rev. Codes Miss. 1880, § 497), as to taxes. Singer Mfg. Co. v. Adams [C. C. A.] 165 F 877. Sale of goods in state or territory by foreign corporation by means of solicitor, delivery of merchandise thereunder, and collection of price. Act Cong. Feb. 18, 1901, c. 379, 31 Stat. 794, 795, applying to Indian Territory and St. Okl. 1893, §§ 1167, 1169. Bruner v. Kansas Moline Plow Co. [C. C. A.] 168 F 218. Railroad maintaining agent to solicit business without authority to contract, sell passenger tickets or to issue bills of lading, and which had no tracks in state. West v. Cincinnati, etc., R. Co., 170 F 349. Joint traffic arrangement whereby cars of foreign railroad corporation are brought into state, but such company does not own or operate railway in state. Slaughter v. Canadian Pac. R. Co., 106 Minn. 263, 119 NW 398. Corporation furnishing and installing furnaces under contract with no office in state. Corporation Law (Laws 1892, p. 1805, c. 687), § 15, requiring certificate. White Furnace Co. v. Miller Transfer Co., 115 NYS 625. Where person solicited railroad business for foreign corporation, routing it over such line, as he did over all other lines connecting with the companies by which he was employed. Arrow Lumber & Shingle Co. v. Union Pac. R. Co., 53 Wash. 629, 102 P 650. Where foreign corporation sold beer to domestic corporation operating distributing agency in state. Uihlein v. Caplice Commercial Co. [Mont.] 102 P 564. Acts of receivers in collecting money, etc., were not doing "business" as word is used in Bankruptcy Act (Act July 1, 1898, c. 541; 30 Stat. 544; U. S. Comp. St. 1901, p. 3418), so that "principal place of business" was in Massachusetts, and federal court therein would not have jurisdiction of involuntary bankruptcy proceedings. In re Perry Aldrich Co., 165 F 249. Foreign corporation securing business by soliciting agents, orders being shipped direct to purchaser from foreign state. Saxony Mills v. Wagner & Co. [Miss.] 47 S 899. Taking applications for advertising space that do not become contracts until accepted by officers of foreign corporation, which contracts are performed by insertion of advertisement in book published in foreign state [Act April 21, 1896 (P. L. p. 307), § 97]. Bell Tel. Co. v. Galen Hall Co. [N. J. Law] 72 A 47. See, also, topic Process, § 4B.

64. Atlas Engine Works v. Parkinson, 161 F 223. Contract of insurance held isolated transaction not amounting to transaction of business in state. Hammond v. International R. Co., 63 Misc. 437, 116 NYS 854. Pleadings and proofs as to single transaction held not to disclose transaction of business in state within meaning of Corporation Act (Act Apr. 21, 1896; P. L. p. 307), § 97. Owen & Co. v. Storms & Co. [N. J. Law] 72 A 441. Under Acts 1901, p. 306, term "doing business" in state implies continuity of conduct in that respect. Simmons Burks Clothing Co. v. Linton [Ark.] 117 SW 775. Act 1801, p. 306, does not preclude foreign corporation from taking note, etc., for goods sold in another state, enforcing same though not complying with law. Id. Conducting litigation, taking a note or mortgage to evidence and secure a debt past due for goods sold by a foreign corporation in another state, these and such like isolated and single acts not connected with any established business in state do not constitute doing business. Id. Contract for sale of paving blocks negotiated largely by correspondence between corporation in state and one without, where deliveries were to extend over number of months, does not show that foreign corporation was continuously and permanently engaged in business, under Laws 1892, p. 1805, c. 687, § 15, requiring that such corporation obtain certificate from secretary of state. Haddam Granite Co. v. Brooklyn Heights R. Co., 131 App. Div. 685, 116 NYS 96. Fact that deliveries were made pending negotiations and that delivery extended over period of ten months did not show "continuous business." Id.

65. Under Code 1907, §§ 3642, 3644, doing of single act of business by a foreign corporation, if it be in exercise of corporate function, is prohibited. Alabama Western R. Co. v. Talley Bates Const. Co. [Ala.] 50 S 341. Foreign corporations who undertake local business even in single transaction are within prohibition of statute. Houghton Elevator & Mach. Co. v. Detroit Candy Co., 156 Mich. 25, 16 Det. Leg. N. 13, 120 NW 18.

66. Contract for sale of stock by foreign corporation affects personal liability of such corporation within meaning of Laws 1905, p. 936, c. 506, § 1, subd. 10 (amending St. 1898, § 1770b), and is invalid. Southwestern Slate Co. v. Stephens, 139 Wis. 616, 120 NW 408. Laws 1905, p. 936, c. 506, § 1, subd. 10, declaring invalid every contract made by foreign corporation not complying with law, applies to single contract, though no others were made. Id. Contracts rendered void

Noncompliance with statutes; effect. See 11 C. L. 1513—Forfeiture of the right to do business frequently results from noncompliance with the statutory conditions imposed,[67] and a foreign corporation wrongfully doing business in the state may be ousted by quo warranto proceedings.[68] Individual responsibility is often imposed where contracts are entered into, without complying with the statute,[69] and the language of the statute may be broad enough to render the members of the corporation liable on implied contracts as well.[70] The effect of noncompliance upon the corporation's right to sue is sometimes expressly declared by statute,[71] and enactments for the protection of property interests may absolutely prohibit suits until the foreign corporation puts itself in a position to be sued in the domestic courts.[72] Depending upon the particular enactment, as interpreted by the courts, noncompliance may render the contracts of a foreign company illegal and unenforcible,[73] or, when the contracts are not rendered absolutely void by statute,[74] the penalty imposed may be merely the deprivation of a resort to the state courts.[75] The

by Laws 1905, c. 506, p. 932, amending St. 1898, § 1770b, § 1, subd. 10, are not limited to those made by corporation doing business in state within meaning of § 2. Id. Laws 1905, c. 506, p. 932, held not intended to amend law as it existed so as to relieve all foreign corporations not having portion of capital invested in state from complying with act if such corporations actually transacted business within state or made contracts therein upon which they assumed personal liability. Id.

67. State's power to declare forfeiture (ante, § 1, subd. Status, Privileges and Regulation) as when corporation fails to pay license fees (see subd. License, Excise and Franchise Taxes) has been referred to.

68. Evidence and findings held to support judgment of ouster of foreign corporation wrongfully doing business in state. State v. Lemp Brew. Co. [Kan.] 102 P 504.

69. Absolute individual responsibility is not imposed upon officers of foreign corporation where a corporate contract is entered into, though such corporation is not registered as required by Act of Assembly, April 22, 1874, P. L. 108. Stephenson v. Dodson, 36 Pa. Super. Ct. 343.

70. Under Rev. Codes 1905, § 4698, rendering officers, agents, and stockholders of nonresident corporations doing business within state without complying with statutes thereof "liable on any and all contracts of such corporation * * * made within the state," such officers, etc., are liable on implied contracts or obligations of such corporations. Chesley v. Soo Lignite Coal Co. [N. D.] 121 NW 73. Language is broad enough to include contracts implied by law. Id. Contention that word "made" rendered statute applicable only to express contracts held untenable. Id.

71. By express terms of St. 1898, § 1770b, as amended by Laws 1899, p. 653, c. 351, § 27; Laws 1901, p. 571, c. 399, § 1, Laws 1901, p. 620, c. 434, and Laws 1905, p. 932, c. 506, § 1, contract by unlicensed corporation is void in its behalf, but is enforcible by other parties thereto. Duluth Music Co. v. Clancy, 139 Wis. 189, 120 NW 854.

72. Alabama Western R. Co. v. Talley Bates Const. Co. [Ala.] 50 S 341. Code 1907, §§ 3642, 3644, imposing conditions on foreign corporations, must be complied with by foreign corporation seeking to perform railroad construction contract in state. Id. Code 1907, §§ 3642, 3644, were passed in aid of Const. 1875, art. 14, § 4; Const. 1901, § 232, and constitute police regulation for property interests of citizens of state. Id. Contract to pay for an act or service promised to be done or performed in violation of statute is illegal and, as long as it is executory, will not be enforced. Id.

73. Foreign corporation operating mine without complying with Act Feb. 16, 1903 (Laws Or. 1903, p. 44), cannot maintain action on contract, made in course of its business. Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996. Foreign corporation failing to comply with statutory requisites (Sess. Laws Or. 1903, pp. 44, 45, § 6) will not be permitted to sue to enforce contracts made with view of transacting business. La Moine Lumber & Trading Co. v. Kesterson, 171 F 980. Contracts by foreign corporation in violation of Rev. St. § 1025 (Ann. St. 1906, p. 888), are **void.** Young v. Gaus, 134 Mo. App. 166, 113 SW 735. Noncomplying foreign corporation cannot maintain any action upon contracts or demands growing out of such business. Amalgamated Zinc & Lead Co. v. Bay State Zinc. Min. Co., 221 Mo. 7, 120 SW 31.

74. Under Rev. St. Idaho 1887, § 2653, as amended by Act March 10, 1903 (Laws 1903, p. 49), providing that agreements of a foreign corporation be not enforcible in courts of state, and providing similar penalties where foreign corporation fails to comply with conditions prerequisite to doing business, such statute did not render such contracts or agreements absolutely void. Colby v. Cleaver, 169 F 206.

75. Under Rev. St. Idaho 1887, § 2653, as amended by Act March 10, 1903 (Laws 1903, p. 49), imposing certain penalties upon foreign corporations failing to comply with certain conditions imposed, such as providing that executory contracts, or agreements made by such corporation while on default cannot "be sued upon or enforced in any court of the state," such statute did not prevent resort to the federal courts. Colby v. Cleaver, 169 F 206. General Corporation Law, § 15 (Laws N. Y. 1904, p. 1250, c. 490), when set up as defense to an action by a foreign corporation, does not make void the contracts of foreign corporations not complying with its provisions, but merely ex-

inhibition of the transaction of business where the statute is not complied with, and where the contracts of the noncomplying corporation are not expressly declared void, is frequently construed as rendering the contracts of the company unenforcible,[76] though some courts will not imply such results.[77] Some statutes prohibiting the maintenance of suits merely operate to suspend the right until the statutes are complied with.[78] A pecuniary penalty is frequently imposed,[79] and some courts construe statutes imposing a penalty for noncompliance as ample to effect the object of the statute, wherefore such statute will not be extended to destroy or invalidate the contracts made by the noncomplying corporation.[80] Usually, noncompliance with the statute is provided as a complete defense to an action by the foreign corporation,[81] and the statute cannot be avoided by an assignment of the contract [82] or cause of action.[83] The contractual relations existing do not estop a person from questioning the foreign corporation's right to sue.[84] While a mortgagor may plead noncomp-

cludes such corporations from state courts and leaves open federal tribunals. New York Breweries Co. v. Johnson, 171 F 582.

76. Contracts are unenforcible when defense of noncompliance is pleaded. Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939. Under Const. art. 10, § 5, providing that foreign corporations do no business in state until it accepts constitution and files such acceptance, as carried into effect by Rev. St. 1899, § 3058 (Sess. Laws 1890-91, p. 174, c. 42, § 1), providing for filing of acceptance with secretary of state, contracts of such foreign corporations who do not comply with such requirements are unenforcible. Id. Const. art. 10, § 5, and Rev. St. 1899, § 3058, go to establishment and transaction of business and do not expressly preclude maintenance of action. Id. Fact that suits may be brought in state courts under rule of comity does not permit foreign corporation to transact business in disregard of statute and then seek aid of courts to enforce its contracts. Id. Policy issued by unlicensed insurance company was not void but could be enforced in state where it was issued. Bankers' Casualty Co. v. Richland County Banking Co., 12 Ohio C. C. (N. S.) 200. Premium might be collected in state where policy was issued if proper jurisdiction could be had. Id. Action by unlicensed insurance company for recovery of premiums held prohibited. Id.

77. Wilson's Rev. & Ann. St. Okl. 1903, § 1225, inhibiting foreign corporation from transacting business until it complies with statute, did not intend to deprive such corporation of right to sue. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785. Under Wilson's Rev. & Ann. St. Okl. §§ 1225, 1227, promissory note of foreign corporation, given in aid of construction of plaintiffs' line of railroad, is not void. Id. Where statute does not render contracts void because of noncompliance, courts should not imply such result. Id. Promissory note of foreign corporation, prohibited from doing business in state, which is not void by statute, is unaffected by Const. art. 9, §§ 43, 44 (Bunn's Ed. §§ 258, 259), contractual rights having accrued prior thereto. Id.

78. Code Pub. Gen. Laws 1904, art. 23, § 140, providing that foreign corporation may not bring suit until it has complied with § 137 thereof, does not operate to end suit otherwise regularly instituted, or to destroy right in other respects validly existing, and greatest effect is to suspend prosecution of such suit until compliance is had with the statute. Kendrick v. Warren Bros. Co., 110 Md. 47, 72 A 461.

79. Code Pub. Gen. Laws 1904, art. 23, §§ 139, 140, imposes penalty by way of fine upon agents or officers of foreign corporation who transact business in state before statute is complied with. Kendrick v. Warren Bros. Co., 110 Md. 47, 72 A 461.

80. See Kendrick v. Warren Bros. Co., 110 Md. 47, 72 A 461. Legislature did not intend that violation of Pub. Gen. Laws 1904, art. 23, §§ 139, 140, should destroy or avoid contracts made by foreign corporations before they complied with law. Id. Intention to invalidate contracts of corporations which do not comply with law should be clearly expressed. Id. Question is set at rest by Acts 1908, p. 52, c. 240, § 69. Id.

81. Under General Corporation Law (Laws 1892, p. 1805, c. 687, § 15, it is complete defense to action brought by foreign corporation that it is doing business in state but has failed to secure certificate required by statute from secretary of state. Steiger Trunk & Bag Co. v. Wharncliffe, 62 Misc. 14, 114 NYS 462.

82. Assignment of domestic contract to foreign corporation actually transacting business in state without complying with the statute as to obtaining license is void. Rev. St. 1899, § 1026. Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 120 SW 31.

83. Assignee of cause of action of noncomplying foreign corporation, which had been adjudged bankrupt, could acquire no greater rights than original corporation. Buck Stove & Range Co. v. Vickers [Kan.] 101 P 668.

84. Persons contracting with foreign corporation are not estopped by reason of contractual relations from questioning authority of foreign corporation to sue, since thereby such corporation would be permitted to take advantage of its own noncompliance with law. Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996. Fact that party to contract with a noncomplying foreign corporation has made numerous payments of interest instalments before being sued does not constitute waiver of right to plead corporation's failure to comply with statute.

liance when the foreign corporation mortgagee seeks to foreclose the mortgage,[85] the mortgagor cannot admit the loan and seek the cancellation of the instrument because of such noncompliance.[86] Disregard of the statutes is not available as a defense to an action by a foreign corporation which is not doing business in the state,[87] where the contract sued on was not made in such state [88] or when the action is in tort.[89] Noncompliance of a foreign corporation contractor is not available to defeat an action by a city to the use of such contractor, to collect an assessment for a public improvement,[90] and noncompliance of a foreign corporation which was a party to the formation of a domestic company will not affect a suit by such domestic company on stock subscription.[91] Officers of a corporation who make and assign a negotiable instrument to an innocent holder for value are estopped to deny the invalidity of such instrument though the contracts of the corporation are void because of noncompliance.[92] A foreign corporation doing business in violation of the statutes is not entitled to show subsequent compliance,[93] or to set aside a penalty imposed upon it because of a defense which was not pleaded.[94]

§ 2. *Powers.*[95]—See 11 C. L. 1515—Foreign corporations cannot exercise powers in a state which are prohibited by the laws or regulations of such state.[96]

Tarr v. Western Loan & Sav. Co., 15 Idaho, 741, 99 P 1049.

85. Tarr v. Western Loan & Sav. Co., 15 Idaho, 741, 99 P 1049.

86. Borrower cannot admit contract of loan with noncomplying foreign corporation and at same time seek cancellation of mortgage given to secure the indebtedness. Tarr v. Western Loan & Sav. Co., 15 Idaho, 741, 99 P 1049.

87. Disregard of Registry Act (Act Apr. 22, 1874; P. L. 108) held no defense in replevin action by foreign corporation, since facts did not disclose anything forbidding action and person who retained property had no contract with plaintiff and could not object that it was doing busines in state. United States Circle Swing Co. v. Reynolds [Pa.] 73 A 982. Suit by trustee for foreign corporation to quiet title to defendant's (a domestic corporation) land was not an attempt to enforce a contract in state by foreign corporation, real party in interest. Uihlein v. Caplice Commercial Co. [Mont.] 102 P 564.

88. General Corporation Law (Law 1892, p. 1805, c. 687), § 15, amended by laws 1901, p. 267, c. 26, § 1, regarding necessity of foreign corporations securing certificates enabling them to do business in state, does not apply to contracts not made within state. Paraffine Paint Co. v. Tarbox, 114 NYS 54. Question of whether foreign corporation was "doing business in state" and was prohibited from suing by Gen. Corp. Law (Laws 1892, p. 1805, c. 687, as amended by Laws 1901, p. 1326, c. 538, § 1), § 15, does not arise where contract sued on was not made in such state. Great Northern Moulding Co. v. Bonewur, 128 App. Div. 831, 113 NYS 60.

89. Foreign corporation may maintain action of tort though it fails to comply with statutes authorizing it to do business in state. Pittsburgh, etc., R. Co. v. German Ins. Co. [Ind. App.] 87 NE 995.

90. Objection that foreign corporation had not amended its original statement as to designating office of county where it performed work (where corporation was registered in compliance with Act Apr. 22, 1874; P. L. p. 108) held not available in action by municipality to use of such corporation, as contractor, to enforce assessment for municipal improvement. Allentown v. Ackerman, 37 Pa. Super. Ct. 363.

91. Disregard of registration act by foreign corporation which was party to contract for formation of domestic corporation held no defense in action by such domestic corporation on stock subscription. Altoona Milk Co. v. Armstrong, 38 Pa. Super. Ct. 350.

92. Although contracts by foreign corporation in violation of Rev. St. § 1025 (Ann. St. 1906, p. 888) are void, officers of corporation who made note and assigned same to innocent holder for value are estopped to deny invalidity of same. Young v. Gaus, 134 Mo. App. 166, 113 SW 735. Estoppel applicable both at common law, and by Laws 1905, p. 250, § 60 (Ann. St. 1906, pp. 463-60), as to negotiable instruments. Id.

93. Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 120 SW 31. Foreign corporation prosecuted for violating Rev. St. 1899, § 1025 (Ann. St. 1906, p. 888), and doing business without depositing copy of charter with secretary of state cannot defend on ground that it complied therewith after violation complained of. State v. S. P. Pond Co., 135 Mo. App. 81, 115 SW 505. Foreign corporation incapacitated at instigation of suit for failure to take out license as required by statute cannot cure incapacity by taking out a license thereafter before trial. Amalgamated Zinc & Lead Co. v. Bay State Zinc. Min. Co., 221 Mo. 7, 120 SW 31.

94. Where foreign corporation was guilty of violation of Rev. St. 1899, § 1025 (Ann. St. 1906, p. 888), which imposes fine for noncompliance with statute, defense that corporation was engaged in interstate commerce, which was not pleaded, could not be availed of to set aside judgment. State v. S. P. Pond Co., 135 Mo. App. 81, 115 SW 505.

95. Search Note: See note in 24 L. R. A. 322.

See, also, Corporations, Cent. Dig. §§ 2536-2546, 2550-2556, 2559-2562, 2576-2587; Dec.

§ 3. *Actions by and against.*[97]—See 11 C. L. 1515 *Right to sue.* See 11 C. L. 1515—A foreign corporation may sue abroad to enforce its contracts under the rule of comity,[98] when such rule is not superseded by statute or other lawful regulation.[99] Thus, an action of mandamus by a foreign corporation against resident officers can be maintained where the foreign company cannot secure jurisdiction of such officers in its own domicile.[1]

Liability to suit; jurisdiction. See 11 C. L. 1515—At the common law, a state court has no jurisdiction over a foreign corporation,[2] and, with the exception of its property which may be attached,[3] voluntary appearance is essential to confer jurisdiction.[4] Personal appearance may be required on such terms as the corporation assents to as a condition precedent to engaging in business,[5] or it may be subjected to service of process as the legislature provides, so long as the method prescribed constitutes due process of law.[6] Where the corporation consents to be sued in the state courts, by doing business therein, the consent is not confined to causes of action arising only within the state.[7] While a court has no jurisdiction to supervise and direct the internal affairs of foreign corporations,[8] it may render a decree determining the status of parties to insurance contract where the insurer is foreign corporation.[9] Statutory provisions frequently permit residents to maintain any cause of action against a foreign corporation,[10] but, where defendant is a foreign corporation and plaintiff is a nonresident, jurisdiction of the court must rest upon fact that cause of action arose within state.[11] The fact that the foreign corporation is engaged in business in the state should appear from the record in order to support a default judgment rendered, where there is no appearance.[12] Long continued acquiescence in a judicial sale after notice to the directors shows ratification if the original authority was lacking.[13]

Dig. §§ 654-660; 19 Cyc. 1211-1218, 1240-1250, 1276-1279, 1288-1314.

96. See ante, § 1.

97. Search Note: See notes in 3 C. L. 1462; 5 Id. 1479; 18 L. R. A. 524; 70 Id. 513, 691; 14 L. R. A. (N. S.) 561; 2 Ann. Cas. 210, 1005; 6 Id. 325.

See, also, Corporations, Cent. Dig. §§ 2534, 2535, 2539, 2543, 2544, 2546, 2563-2655; Dec. Dig. §§ 661-677½; 19 Cyc. 1314-1350.

98. Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996; Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939. Noncomplying foreign corporation may sue in state on contracts made without state. Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 120 SW 31.

99. Cyclone Min. Co. v. Baker L. & P. Co., 165 F 996.

1. Potomac Oil Co. v. Dye [Cal. App.] 102 P 677. Where foreign corporation sought to recover books, papers, etc., of former officer who refused to surrender same. Id.

2. At common law, corporation could only be sued in state which created it. Cunningham v. Klamath Lake R. Co. [Or.] 101 P 213. At the common law state court could not obtain jurisdiction over person of foreign corporation so as to render personal judgment against it. Swarts v. Christie Grain & Stock Co., 166 F 338.

3. In case of attachment, court has jurisdiction only to extent of property attached. Potter v. La Pointe Mach. Tool Co., 201 Mass. 557, 88 NE 418.

4. Courts of state, apart from statute, have no jurisdiction over a foreign corporation, unless it voluntarily appears. Potter v. La Pointe Mach. Tool Co., 201 Mass. 557, 88 NE 418; Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 102 P 1, denying rhg. of [Or.] 99 P 1046. Jurisdiction to render a judgment against a foreign corporation may rest upon the voluntary appearance by its duly appointed attorney which is equivalent to personal service of summons. B. & C. Comp. § 63. Id.

5. Swarts v. Christie Grain & Stock Co., 166 F 338.

6. Swarts v. Christie Grain & Stock Co., 166 F 338. See Process.

7. Cunningham v. Klamath Lake R. Co. [Or.] 101 P 1099. Corporation may be sued upon any transitory cause of action whether on contract or in tort, no matter where it arose. Id.

8, 9. Royal Fraternal Union v. Lundy [Tex. Civ. App.] 113 SW 185.

10. Under Code Civ. Proc. § 1780, resident may maintain any cause of action against foreign corporation. Hubbard v. United Wireless Tel. Co., 62 Misc. 538, 115 NYS 1016. Resident judgment creditor may maintain creditor's action in aid of execution to set aside fraudulent conveyance. Id.

11. Code Civ. Proc. § 1780, subd. 3. Fenkart v. Bodenmann, 64 Misc. 140, 118 NYS 1.

12. Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co. [Or.] 102 P 1, denying rhg. of [Or.] 99 P 1046. As the necessary statement that foreign corporation is engaged in business in state may appear anywhere in record, an averment of that fact in complaint is not indispensable to secure jurisdiction of its person. Id.

13. Underfeed Stoker Co. v. American Ship Windlass Co., 165 F 65.

Venue.[14]—See 7 C. L. 1731

Service of process.[15]—See 7 C. L. 173

Procedure. Limitations. See 11 C. L. 1516—A foreign corporation which fails to prove compliance with the statute as to designating an agent for service of process cannot claim the benefit of the statute of limitations as a defense.[16] The question as to whether local agents were continued is at least partially one of fact.[17]

Pleading, evidence, etc. See 11 C. L. 1516—As a general rule, foreign corporations need not allege compliance with statutory conditions precedent,[18] and the failure to allege such compliance does not render the petition demurrable,[19] but the defense must be pleaded.[20] The matter is governed by statute, however,[21] and in some states compliance with certain statutory conditions must be alleged, in suing upon a contract made in the state,[22] while noncompliance with other statutory requisites is a matter of defense.[23] Usually, a demurrer will lie when the incapacity of plaintiff is apparent from the face of the petition,[24] but otherwise noncompliance may be availed of in the answer,[25] properly pleaded [26] and proved.[27] An amendment of the

14. See Venue and Place of Trial.

15. See Process.

16. O'Brien v. Big Casino Gold Min. Co., 9 Cal. App. 283, 99 P 209. Under Civ. Code, § 406, failure to file designation of some person to receive service of process deprives corporation of right to invoke statute of limitations as defense. Id. Foreign corporations are within provisions of statutes which make saving as to absent debtors, in favor of whom statute of limitations does not run while they are absent from state. Id.

17. Question whether certain companies were local agents of foreign corporation so as to accept service of summons and keep statute of limitations running during alleged period of absence from state held, partially at least, question of fact, and judge erred in deciding same as pure matter of law. Chambliss v. Simmons [C. C. A.] 165 F 419.

18. White Sewing Mach. Co. v. Peterson [Okl.] 100 P 513; Groneweg & Shmoentgen Co. v. Estes [Mo. App.] 119 SW 513.

19. White Sewing Mach. Co. v. Peterson [Okl.] 100 P 513. Demurrer held not to lie since complaint showed cause of action and noncompliance was matter of defense. Groneweg & Shmoentgen Co. v. Estes [Mo. App.] 119 SW 513.

20. Groneweg & Shmoentgen Co. v. Estes [Mo. App.] 119 SW 513; Utah Nursery Co. v. Marsh [Colo.] 103 P 302. Defense that foreign corporation has not complied with statutes is affirmative and must be pleaded to be available. Kelley v. Schwab & Sons Co. [S. D.] 118 NW 696.

21. Allegation of payment of license fees is required. Rothchild Bros. v. Mahoney, 51 Wash. 633, 99 P 1031. Neither foreign corporation nor its assignee can sue on contract made within state, when doing business therein, unless compliance with statute is alleged and proved. Manufacturers' Commercial Co. v. Blitz, 131 App. Div. 17, 115 NYS 402.

22. Complaint, where cause of action is upon contract made in state by foreign corporation doing business therein, which fails to allege compliance with General Corporation Law (Laws 1901, p. 1326, c. 538), § 15, is **demurrable.** Woodward Lumber Co. v. General Supply & Const. Co., 60 Misc. 367, 113 NYS 628. Compliance should be alleged and proved. American Mfg. Co. v. Weintraub, 115 NYS 88; Manufacturers' Commercial Co. v. Blitz, 131 App. Div. 17, 115 NYS 402. Complaint is **not demurrable** where it does not appear that contract sued on was made in state, or that plaintiff was doing business therein. Woodward Lumber Co. v. General Supply & Const. Co., 60 Misc. 367, 113 NYS 628.

23. Noncompliance with Tax Law (Laws 1896, p. 856, c. 908, amended by Laws 1901, p. 1364, c. 538, § 1), § 181, is matter of defense, to be pleaded and proved by defendant. Manufacturers' Commercial Co. v. Blitz, 131 App. Div. 17, 115 NYS 402.

24. If it appears upon face of petition that foreign corporation has established place of business and is actually doing business in state without license as required by statute, petition would be demurrable as disclosing fact that party plaintiff had no right to sue. Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 120 SW 31. Under Ballinger's Ann. Codes & St. (Pierce's Code, § 374), § 4907, defendant may demur when petition upon its face shows that plaintiff corporation has not paid license fee required by Sess. Laws 1907, c. 140, p. 271, § 7, and consequently has no capacity to sue. Rothchild Bros. v. Mahoney, 51 Wash. 633, 99 P 1031.

Demurrer held not to lie: Where complaint nowhere showed that plaintiff was foreign corporation, and demurrer took point that plaintiff had engaged in work in state (building railroad) in centravention of constitution and Code 1907, §§ 3642, 3644. Alabama Western R. Co. v. Talley Bates Const. Co. [Ala.] 50 S 341.

25. Under Ball. Ann. C. & St. § 4909 (Pierce's Code, § 376), incapacity of plaintiff to sue (because Sess. Laws 1907, c. 140, p. 271, § 7, as to license fees is not complied with) may be objected to by answer, when such incapacity is not apparent from face of petition. Rothchild Bros. v. Mahoney, 51 Wash. 633, 99 P 1031.

26. Plea alleging failure on part of corporation to comply with statute as to doing business in state must bring defendant specifically within the statute. Leaman v. U. S. Fidelity & Guar. Co., 137 Ill. App. 258.

Held sufficient: Defense in action of contract denying that transaction constituted

answer so as to allege noncompliance should be granted.[28] The availability of a plea in bar of the right to sue is dependent upon statute,[29] and where merely the plaintiff's status to sue is attacked, the plea should be in abatement.[30] The defense of noncompliance is subject to waiver,[31] and is not available after the rendition of judgment in favor of the foreign corporation.[32] That a foreign corporation is a stock corporation may be presumed from the nature of its business.[33] An objection to the jurisdiction of the court over a foreign corporation is not usually to be raised on a motion to file a supplemental complaint.[34]

§ 4. *Remedies of stockholders and creditors.*[35]—See 11 C. L. 1517—An enactment providing for the inspection of the books of a foreign corporation does not apply where the corporation has ceased to do business in the state.[36] The appointment of a receiver for a corporation which has forfeited its right to do intrastate business is not invalid though the judgment of forfeiture excepts the right to do interstate business, where the court under statute has the power to appoint receivers when a corporation forfeits its rights.[37]

interstate commerce, and alleging noncompliance with statutes. La Moine Lumber & Trading Co. v. Kesterson, 171 F 980.

Held insufficient: Denial in answer that there was at time of commencement of action or trial any such corporation authorized to do business under laws of state held not plea that such corporation was not corporation but was at most denial of corporation's right to do business in state. Pittsburg, etc., R. Co. v. German Ins. Co. [Ind. App.] 87 NE 995. Defense under St. 1898, § 1770b, held not well pleaded where answer denied allegation of complaint that plaintiff was foreign corporation and simply alleged that plaintiff held itself out to be such corporation, since § 1770b does not apply to mere representation. Sanitas Co. v. Niezorawski [Wis.] 120 NW 292.

27. Dismissal of case because of noncompliance with statutes by plaintiff foreign corporation held erroneous, where no evidence taken and nothing in record to ascertain such fact. Utah Nursery Co. v. Marsh [Colo.] 103 P 302. Personal knowledge of judge insufficient to meet requirements. Id.

28. Held error to deny motion to amend answer so as to allege that plaintiff (foreign corporation) had not complied with statute, which answer would have been complete defense. Steiger Trunk & Bag Co. v. Wharncliffe, 62 Misc. 14, 114 NYS 462.

29. Answer setting up plea in bar to suit on promissory note given in aid of construction of plaintiff's line of road, which alleges that at time of note's execution plaintiff was and still is foreign corporation and as such has failed to comply with Wilson's Rev. & Ann. St. Okl. 1903, §§ 1225, 1227, is bad as it was not legislative intent by inhibiting such corporation from doing business in state to deprive it of right to sue in its courts or to render void contracts made by it in state, and demurrer thereto was properly sustained. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785. Contracts of noncomplying foreign corporation which are not expressly declared void by statute are, as against such corporation, voidable by plea in bar, either admitted or supported by extrinsic evidence. Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939.

30. Pittsburgh, etc., R. Co. v. German Ins Co. [Ind. App.] 87 NE 995. Action of tort. Id.

31. Gould Land & Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P 939. Failure to object to plaintiff's incapacity to sue (because license fee required by Sess. Laws 1907, c. 140, p. 271, § 7, was not paid), either by demurrer or answer, is waiver of such objection. Ball. Ann. Codes & St. & 4911 (Pierce's Code, § 378). Rothchild Bros. v. Mahoney, 51 Wash. 633, 99 P 1031.

32. Judgment in favor of foreign corporation is conclusive, and enforcement thereon cannot be restrained because of noncompliance with statutes, since that objection was available in former action. Kelley v. Schwab & Sons Co. [S. D.] 118 NW 696.

33. In absence of contrary proof, foreign corporation organized to buy and sell accounts, make contracts, and purchase outstandings, will be presumed to be stock corporation. Manufacturers' Commercial Co. v. Blitz, 131 App. Div. 17, 115 NYS 402.

34. Johnson v. Victoria Chief Copper Mining & Smelting Co., 60 Misc. 467, 113 NYS 1023.

35. Search Note: See Corporations, Cent. Dig. §§ 826-1186, 2556-2677; Dec. Dig. §§ 215-280, 679-691; 10 Cyc. 293-296; 19 Id. 374, 541-543, 649-736, 1322-1350; 13 A. & E. Enc. L. (2ed.) 905, 908, 909.

36. Stock corporation law, Laws 1892, p. 1840, c. 688, § 53, requiring foreign stock corporations (except moneyed and railroad) having office for transaction of business within state to keep stockbook, containing certain information, open for inspection of stockholders during business hours daily, held not applicable to corporation having no office and transacting no business in state. Fuller v. O'Connor, 61 Misc. 279, 113 NYS 684. Where books were merely deposited in corner of stockbrokerage office. Id.

37. Palmer v. Texas, 212 U. S. 118, 53 Law. Ed. —. Where apointment of receiver was sustained not only under Act April 11, 1907, making special provision for carrying out judgments under anti-trust laws of state and providing for appointment of receiver in such case, but also under Sayles' Civ. St. art. 1465, § 3, giving authority to apply in any court of competent jurisdiction in certain cases among others where corporation has

Proceedings in rem are available to resident or nonresident creditors who have claims against a foreign corporation having property within the domestic jurisdiction,[38] and an action by a creditor against the stockholder of foreign corporation is not an interference with the domestic affairs of foreign corporation.[39] The appointment of a receiver for a foreign corporation is subject to the question of the jurisdiction of the court,[40] and the foreign corporation may avail itself of the nonresidence of the plaintiff to avoid such appointment.[41] Noncompliance with a statute as to service of process will not prevent the appointment of an ancillary receiver at the instance of a creditor.[42] The appointment of a common law receiver of foreign corporation, pendente lite, to prevent the unlawful disposition and waste of property, is radically distinct from the appointment of statutory receiver,[43] and such receiver has no power to institute proceedings to ascertain what property he is entitled to claim from third persons.[44] Usually supplementary proceedings are available to a judgment creditor,[45] and the right of a judgment creditor to examine a foreign corporation in supplementary proceedings is not lost by the appointment of a temporary receiver pendente lite.[46] Officers of a foreign corporation cannot be compelled on supplementary proceedings to convey real estate, when such a conveyance is beyond their power under the articles of incorporation.[47]

FOREIGN JUDGMENTS.

The scope of this topic is noted below.[48]

§ 1. Recognition and Effect, 1828.
§ 2. Matters Adjudicated and Concluded by Foreign Judgment, 1830.
§ 3. Action on Foreign Judgment, 1831.

been dissolved or is insolvent, in immediate danger of insolvency or has forfeited corporate rights particularly where latter statute was in force, permit to do business in state was granted. Id.

38. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751.

39. Over which court has no jurisdiction. Mountain Lake Land Co. v. Blair [Va.] 63 SE 751.

40. Action for appointment of temporary receiver of foreign corporation, which had taken over assets of partnership which was indebted to plaintiff without providing for payment of such indebtedness, held not to be subject to jurisdiction of state court since cause of action arose from taking over assets which occurred in foreign state. Fenkart v. Bodenmann, 64 Misc. 140, 118 NYS 1.

41. Fenkart v. Bodenmann, 64 Misc. 140, 118 NYS 1. Where opposing affidavits state plaintiff is nonresident and fact is not denied by replying affidavits, defense need not be alleged in answer. Id.

42. Where foreign corporation has not complied with St. 1903, p. 443, c. 437, § 58, as to service of process. Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 NE 355. Application was not made by creditor as attorney of insolvent corporation but as creditor, and was in good faith. Id.

43. Howell v. German Theatre, 64 Misc. 110, 117 NYS 1124.

44. Howell v. German Theatre, 64 Misc. 110, 117 NYS 1124. Order of court did not authorize receiver to collect property committed to his charge. Id. Where receiver was not appointed under Corporation Law, art. 12, § 306, subd. 3, § 240, did not apply. Id. Receiver for property of foreign corporation appointed by virtue of general equitable jurisdiction of court has no power to maintain any action or special proceeding for purposes specified by General Corporation Law (2 Consol. Laws, p. 1410), § 104. Id.

45. Under Code Civ. Prac. c. 17, tit. 12, art. 1, § 2432, et seq., and §§ 2444, 2452, supplementary proceedings will lie against a foreign corporation. Meyer v. Consolidated Ice Co., 132 App. Div. 265, 116 NYS 906. At least where sequestration proceedings cannot be brought (Code Civ. Proc. § 1784). Id.

46. Howell v. German Theatre, 64 Misc. 110, 117 NYS 1124. Title to all property and right to recover indebtedness due remains in judgment debtor. Id.

47. Under Code, §§ 4073, 4077-4079, court has no authority in proceeding to satisfy execution to order president and secretary of foreign corporation to execute conveyance of real estate beyond their power under articles of incorporation. Bennett v. Valley Min. Co. [Iowa] 120 NW 654. Court cannot appoint receiver and order **conveyance to receiver** in summary proceedings under Code, §§ 4073, 4077-4079. Id.

48. **Includes** matters peculiar to enforcement of judgments in states other than that where they were rendered. **Excludes** matters relating to judgments generally (see Judgments*) and matters peculiar to particular kinds of foreign judgments (see such titles as Divorce,* § 8; Corporations,* §§ 9, 10; Estates of Decedents,* §§ 2, 15; Insurance,* § 24; Receivers,* § 8). Certain particular effects of foreign judgments (see

§ 1. *Recognition and effect.*[49] See 11 C. L. 1518—A judgment against a nonresident defendant is a foreign judgment as to such defendant.[50]

Full faith and credit is required, by the federal constitution [51] and statutes,[52] to be given, in each state, to final judgments [53] and decrees,[54] rendered in other states [55] and territories,[56] by courts having jurisdiction [57] both of the subject-matter [58] and of the parties in actions in personam,[59] and of the res in proceedings in rem.[60] The

Former Adjudication;* Stare Decisis,* § 4A) are also treated elsewhere.

49. Search Note: See notes in 3 C. L. 1466; 5 Id. 1486; 7 Id. 1735; 27 L. R. A. 101; 47 Id. 469; 48 Id. 130, 632; 12 L. R. A. (N. S.) 941; 94 A. S. R. 532; 103 Id. 304.

See, also, Judgment, Cent. Dig. §§ 1443-1525; Dec. Dig. §§ 813-832; 23 Cyc. 1544-1611; 13 A. & E. Enc. L. (2ed.) 974, 977.

50. United States Life Ins. Co. v. Hellinger, 130 App. Div. 415, 114 NYS 885.

51. Constitution of United States, art. 4, § 1, provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Beauchamp v. Bertig [Ark.] 119 SW 75; Armstrong v. Minkus [Miss.] 47 S 467; Cureton v. Cureton [Ga.] 65 SE 65. Full faith and credit clause applies to decree of **federal court sitting in state.** Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 89 NE 193.

52. Under Rev. St. U. S. § 905 (U. S. Comp. St. 1901, p. 677), "records and proceedings so authenticated (as provided therein) shall have such faith and credit given them in every court of United States as they have by law or usage in courts of state from whence they are taken." Beauchamp v. Bertig [Ark.] 119 SW 75; Cureton v. Cureton [Ga.] 65 SE 65; St. Louis S. W. R. Co. v. Vanderberg [Ark.] 120 SW 993.

53. Full faith and credit provided by federal law must be given to a valid foreign judgment in a garnishment proceeding. Missouri, K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275; St. Louis S. W. R. Co. v. Vanderberg [Ark.] 120 SW 993. **Authenticity** of foreign judgment will be **presumed.** Forsyth v. Barnes, 131 Ill. App. 467. Mere **pendency** in another state of action attacking will held not bar to probate proceedings. In re Sands' Estate, 62 Misc. 146, 116 NYS 426. Indiana judgment of supreme court **remanding case** which was dismissed in lower court by plaintiff was **not res adjudicata** as to subsequent action in Illinois, there being no final judgment rendered. Jones v. Supreme Lodge Knights of Honor, 236 Ill. 113, 86 NE 191.

54. Decree for alimony is final judgment or debt of record when for specified sum payable presently, is entitled to full faith and credit, and can be sued on in foreign court. Cureton v. Cureton [Ga.] 65 SE 65. Decree for alimony requiring the payment of specified sum per annum held to be such final judgment as federal constitution requires to be given full faith and credit. Chamberlain v. Britton, 136 Ill. App. 290. Unconditional final award of alimony held to be final decree or judgment entitled to full faith and credit. Davis v. Davis, 29 App. D. C. 258. Judgment for allmony for specified monthly payments, subject by its own terms to modification or revocation by court rendering same, is not final judgment as to amount, and is not entitled to full faith and credit in foreign state. Cureton v. Cureton [Ga.] 65 SE 65.

55. Full faith and credit clause of U. S. Const. applies only to states. Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. —.

56. Full faith and credit rule was made applicable to territories by act of March 27, 1804 (Rev. St. §§ 905, 906; U. S. Comp. St. 1901, pp. 677, 678). Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 53 Law. Ed. ——.

57. Jurisdiction will be presumed in first instance. Forsyth v. Barnes, 131 Ill. App. 467.

58. Court did not have jurisdiction to adjudicate and change domicile of minor not within its jurisdiction, hence no credit need be given decree. Smidt v. Benenga, 140 Iowa, 399, 118 NW 439. Judgment in attachment against nonresident not appearing or personally served has no effect beyond property seized. Heyl v. Taylor, 64 Misc. 31, 117 NYS 916.

59. Judgment in personam is not valid unless there be personal service or appearance. Ely v. Hartford Life Ins. Co., 128 Ky. 799, 33 Ky. L. R. 272, 110 SW 265. Judgment had in foreign state on unauthorized service by publication entitled to no credit. McNutt v. Bakewell [Pa.] 72 A 639. Indiana court held not to have had jurisdiction of plaintiff to render judgment in divorce suit. O'Dell v. Goff, 153 Mich. 643, 15 Det. Leg. N. 560, 117 NW 59. Illinois court held without jurisdiction to render decree of divorce for husband who had deserted his wife in New York where she remained, constructive service only being had upon her and she having no notice of pendency of action. Halter v. Van Camp, 64 Misc. 366, 118 NYS 545. Admitting of will to probate was not bar to probating in another jurisdiction of another will of same decedent, where parties presenting latter will were not parties to former proceeding. In re Sands' Estate, 62 Misc. 146, 116 NYS 426. Constitution does not require foreign judgment to be given full faith and credit as against strangers to it. Bagley v. General Fire Extinguisher Co., 212 U. S. 477, 53 Law. Ed. —. Judgment removing trustee not entitled to full faith and credit where trust fund was not within court's jurisdiction, and there was no service on or appearance by trustee defendant. Parker v. Kelley, 166 F 968. Foreign judgment held to sufficiently show jurisdiction where it finds service of summons and complaint upon defendant therein, appearance by him through attorney, and default in pleading where there is nothing in record to contradict recital. Chamberlain v. Britton, 136 Ill. App. 290. Jurisdiction was not affected by allegation that defendant, a nonresident, was temporarily against his own volition in the state. Mottu v. Davis [N. C.] 65 SE 969.

60. To entitle judgment in rem to full faith and credit, res must have been at-

* Always begin with the latest article on the subject. Use the latest topical index.

full faith and credit rule is not affected by the fact that the judgment would have been invalid in the state of the forum.[61] It is applicable as a rule of evidence[62] and does not preclude inquiry as to the jurisdiction of the foreign court.[63] The validity of the judgment is determined by the law of the forum where there is no evidence

tached or seized or at least have been within jurisdiction of court. Ely v. Hartford Life Ins. Co., 128 Ky. 799, 33 Ky. L. R. 272, 110 SW 265. Seizure and destruction of liquors **held proceeding in rem** and proceedings entitled to full faith and credit. American Exp. Co. v. Mullins, 212 U. S. 311, 53 Law. Ed. —. Judgment in action by assignee of insurance policy held to be action in rem and conclusive in subsequent action by beneficiary against insurance company. Ely v. Hartford Life Ins. Co., 128 Ky. 799, 33 Ky. L. R. 272, 110 SW 265. Proceedings to attach and apply debt held to be proceeding in rem and judgment therein to be complete bar to subsequent action by nonresident against debtor in whose hands debt is garnished. Id. Judgment in rem is good against nonresident upon whom only **constructive service** is had and also against all parties having notice of proceeding. Id. **Garnishment** being in nature of proceeding in rem, constructive service is sufficient to give jurisdiction of res. Missouri, K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275. In garnishment in Georgia, where no constructive service on defendant was had by publication as required by Code Ga. 1895, § 4975, judgment for plaintiff was void in South Carolina. Rykard v. Seaboard Air Line R. Co., 80 S. C. 52, 61 SE 252. Judgment in foreign state for plaintiff in garnishment must affirmatively show **jurisdiction over nonresident garnishee.** Id. But **divorce** proceeding is **not strictly proceeding in rem,** hence foreign decree is not necessarily binding. Joyner v. Joyner, 131 Ga. 217, 62 SE 182.

61. Virginia judgment for gambling debt, against which court of equity in Virginia would not grant relief, must be upheld in North Carolina. Mottu v. Davis [N. C.] 65 SE 969. Mississippi courts cannot deny full credit to judgment rendered in Missouri because original controversy grew out of transaction in futures in Mississippi, and was not enforcible in Mississippi. Armstrong v. Minkus [Miss.] 47 S 467. Judgment against partnership in partnership name in Iowa, where legal entity of partnerships is recognized, held entitled to full faith and credit in Illinois, and entitled to same effect it would have in Iowa whether such judgment would have been valid in Illinois or not. Wilkinson v. Olin, 136 Ill. App. 527.

62. Does not make foreign judgments domestic judgments to all intents and purposes, but only gives a general validity, faith and credit to them as evidence. Beauchamp v. Bertig [Ark.] 119 SW 75. Purpose of full faith and credit clause of U. S. Const. is not to change jurisdiction of courts of several states but to prescribe weight to be given to foreign judgments. Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 89 NE 193. Const. U. S. art. 4, § 1, only required that evidentiary faith and credit allowed in state where rendered. Mottu v. Davis [N. C.] 65 SE 969.

63. Davis v. Davis, 164 F 281. Full faith and credit clause of federal constitution did not prevent federal court from inquiring into jurisdiction of Massachusetts state court to remove trustee. Parker v. Kelley, 166 F 968. Decree of divorce may be impeached collaterally in courts of another state by proof that court granting it had no jurisdiction because of plaintiff's want of domicile, even when record purports to show such jurisdiction. Sammons v. Pike, 108 Minn. 291, 120 NW 540, adhered to on motion for reargument Id., 108 Minn. 291, 122 NW 168. Judgment of foreign state may be impeached for want of jurisdiction of person or subject-matter. Holcomb v. Kelly, 114 NYS 1048. Jurisdiction to render foreign judgment may be inquired into even though jurisdictional facts are recited in judgment. Mottu v. Davis [N. C.] 65 SE 969. Question was properly raised as to whether personal decree was jurisdictional where defendant had not been personally served or had his day in court. Hanks v. Hanks, 218 Mo. 670, 117 SW 1101. Held that whether foreign court had jurisdiction of person or subject-matter was **question of fact.** Mottu v. Davis [N. C.] 65 SE 969. Defendant in foreign judgment may attack jurisdiction of court rendering judgment, on ground that **appearance by attorney** was unauthorized. United States Life Ins. Co. v. Hellinger, 130 App. Div. 415, 114 NYS 885; White v. Glover, 116 NYS 1059. Evidence held sufficient to show appearance by attorney unauthorized. White v. Glover, 116 NYS 1059. Party may, in suit on foreign judgment, question jurisdiction of foreign court to render judgment by showing that attorney appearing for him has no authority to do so, provided he did not cause such issue to be presented to foreign court. Thomas v. Virden [C. C. A.] 160 F 418.

NOTE. Inquiry as to jurisdiction: For a long time this was a mooted question; but in 1874, in the case of Thompson v. Whitman, 85 U. S. (18 Wall.) 457, 21 Law. Ed. 897, Mr. Justice Bradley, collecting previous authorities, held:

(1) "Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered."

(2) "The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist."

(3) "Want of jurisdiction may be shown, either as to the subject-matter or the person, or, in proceedings in rem, as to the thing."

And this doctrine has been since then uniformly upheld in such cases as Knowles v. Gaslight & Coke Co., 86 U. S. (19 Wall.) 58, 22 Law. Ed. 70; Hill v. Mendenhall, 88 U. S. (21 Wall.) 453, 22 Law. Ed. 616; Hall v. Lanning, 91 U. S. 160, 23 Law. Ed. 271; Pennoyer v. Neff, 95 U. S. 714-730, 24 Law. Ed. 565-571;

that the law of the foreign state is different.[64] Privity of the parties is likewise determined by the law of the forum,[65] and must exist in order for a foreign judgment to constitute a bar to the proceedings.[66]

The rule of comity even where the full faith and credit requirement does not apply, will usually cause courts to give recognition to foreign judgments,[67] other than mere police regulations,[68] where the enforcement of such judgments does not involve anything immoral, contrary to general policy, or violative of the conscience of the state called upon to give them effect.[69] But this rule has no application to a foreign judgment affecting the title of land situated in the state of the forum,[70] unless a deed has been given pursuant to such judgment,[71] nor does it require the enforcement of a statutory liability assessed by the courts of another state, the remedy for which is purely statutory.[72]

§ 2. *Matters adjudicated and concluded by foreign judgment.*[73]—See 11 C. L. 1520—As a general rule foreign judgments are conclusive as to matters clearly stated on the face of such judgments to have been adjudicated,[74] but not as to questions of jurisdiction[75] and fraud,[76] or matters not clearly in issue[77] and adjudicated.[78]

Kilbourn v. Thompson, 103 U. S. 168-198, 26 Law. Ed. 377; Simmons v. Saul, 138 U. S. 439, 34 Law. Ed. 1054; Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. 867.—From Davis v. Davis, 164 F 281.

64. Ohio judgment against citizen of Oklahoma and sued on in Oklahoma held invalid under laws of Oklahoma, laws applicable in Ohio not being shown. Harn v. Cole, 20 Okl. 553, 95 P 415.

65. Whether one is privy to action is determined by law of forum rather than by law of state wherein foreign judgment was rendered. Old Dominion Copper Mining & Smelting Co. v. Bigelow [Mass.] 89 NE 193.

66. Judgment against ancillary administrator in suit by him to enforce lien held not bar to suit in another jurisdiction by ancillary administrator on same cause of action, there being no absolute privity of parties. Ingersoll v. Coram, 211 U. S. 335, 53 Law. Ed. 208.

67. Joyner v. Joyner, 131 Ga. 217, 62 SE 182; Beauchamp v. Bertig [Ark.] 119 SW 75. While law does not require full credit to be given to foreign divorce decree, courts may do so under comity rule. Joyner v. Joyner, 131 Ga. 217, 62 SE 182. Under rule of comity, courts of Washington could recognize Illinois divorce decree although not necessarily bound by it. Douglas v. Teller, 53 Wash. 695, 102 P 761. See Divorce, § 8. Although judgment in state court may not be such as to work an estoppel in action in federal court, it may properly be given consideration as to pertinent matters therein contained. Contra Costa Water Co. v. Oakland, 165 F 518. Orders of sister state appointing receiver and giving him possessory rights in property will be respected under rule of comity. Jenkins v. Purcell, 29 App. D. C. 209. **Regularity presumed** of probate of will as against collateral attack from certified copy of will and transcript of order of probate court of sister state, unless transcript shows on its face that will was not properly admitted to probate. Stull v. Veatch, 236 Ill. 207, 86 NE 227. Proceedings of Mississippi court, having jurisdiction in probating will, will be given full faith and credit in Connecticut when properly presented and authenticated. Murdoch v. Murdoch, 81 Conn. 681, 72 A 290.

68. Rule requiring full faith and credit to be given to foreign judgments has no application to determinations in the nature of a police regulation. In re Neidnig's Estate, 123 App. Div. 894, 108 NYS 478. Alleged "judgment" of Royal Court at Hassfurt held to be nothing more than determination of bastardy proceeding in exercise of police regulation of country. Id.

69. Joyner v. Joyner, 131 Ga. 217, 62 SE 182. Rule of international comity cannot be invoked where enforcement of foreign judgment would contravene some important policy of state of forum. Beauchamp v. Bertig [Ark.] 119 SW 75.

70. Illinois courts are not bound by judgment of courts of sister state in construing wills where construction relates to lands in Illinois. Stull v. Veatch, 236 Ill. 207, 86 NE 227. See Estates of Decedents, § 15. Rule of comity cannot be invoked where question relates to transfer of title to real property in state of forum, since no other state can have jurisdiction over such property. Beauchamp v. Bertig [Ark.] 119 SW 75. Decree of Oklahoma court removing disability of infancy held not, under rule of comity, to estop minor from suing to set aside deed given to land in Arkansas upon ground of his infancy. Id.

71. Deed by trustee pursuant to judgment rendered in foreign state will pass title of land in another state. Steele v. Bryant [Ky.] 116 SW 755.

72. Converse v. Hamilton, 136 Wis. 589, 118 NW 190.

73. **Search Note:** See notes in 5 C. L. 1486; 20 L. R. A. 668; 32 Id. 236; 94 A. S. R. 550.

See, also, Judgment, Cent. Dig. §§ 1492-1500, 1521; Dec. Dig. §§ 821, 822, 831; 23 Cyc. 1549-1556, 1604-1611; 13 A. & E. Enc. L. (2ed.) 977.

74. Nebraska judgment reading "court finds that there was due and legal personal service upon" defendant was conclusive of manner of service although officer's return stated that service was made by leaving copy of writ at usual place of residence, such judgment making a special finding and

A foreign judgment is not subject to a collateral attack based on a mere voidable error,[79] a mistake of law,[80] or a presumption as to the existence of the common law in the foreign state.[81]

§ 3. *Action on foreign judgment.*[82] See 11 C. L. 1520—In an action on a foreign judgment, the limitations of the state where the judgment was rendered generally control,[83] but do not bar the application of the limitations of the forum.[84] A plea of nul til record, being a plea of the general issue, will admit of a special defense.[85] A judgment on a foreign judgment does not partake of the attributes of the original debt.[86] Interest is allowed at the rate fixed by the law of the foreign state.[87]

Defenses. See 11 C. L. 1521—Only such defenses may be made as would have been available in the foreign state.[88] Lack of jurisdiction and fraud in the procurement of the foreign judgment are good defenses.[89]

Proof of foreign judgments. See 11 C. L. 1521—Copies of foreign judgments must be properly certified [90] in accordance with the federal statutes.[91] The action must

contradicting the return and being distinguished from judgment which appears merely to follow the return without making any special finding as to manner of service. Patterson v. Taylor [N. J. Law] 73 A 225. Foreign judgment is conclusive as to all media concludendi. American Exp. Co. v. Mullins, 212 U. S. 311, 53 Law. Ed. —. Finding of foreign court, upon due presentation by complainant, that attorney appearing for him was authorized to do so, was binding in subsequent suit on foreign judgment. Thomas v. Virden [C. C. A.] 160 F 418. Full faith and credit was given to action of California court having jurisdiction in distributing personal property estate of decedent, although New York court later held decedent to have been resident of New York, where such distribution was had prior to the said New York decision. In re Cummings' Estate, 63 Misc. 621, 118 NYS 684.

75. See ante, § 1.

76. Const. U. S. and Acts of Congress does not exclude inquiry as to fraud in obtaining jurisdiction in suit wherein foreign judgment was rendered. March v. Atlantic Coast Line R. Co. [N. C.] 65 SE 911.

77. Foreign judgment adjudging draft sued on to be void for want of authority of drawer to make it does not bar action for recovery of money had and received. Commercial Nat. Bank v. Sloman, 194 N. Y. 506, 87 NE 811.

78. Judgment of Ohio court fixing amount of assessment against policy holders of insolvent mutual insurance company and declaring necessity therefor held not an adjudication of defendant's liability for such assessment. Swing v. Arkadelphia Lumber Co. [Ark.] 119 SW 265. Divorce decree of court of another jurisdiction retaining jurisdiction to make further orders as to custody of children does not deprive court of sister state of right to determine right to custody of children after death of mother to whom they were temporarily awarded, especially where first court refuses to determine question, such matter not having been determined. Clarke v. Lyon, 82 Neb. 625, 118 NW 472.

79. If judgment of foreign court is voidable only, application to avoid it must be made at tribunal of foreign state and it cannot be collaterally attacked in action to enforce it in forum of another state. Forsyth v. Barnes, 131 Ill. App. 467. Judgment in favor of payee of promissory note with power of attorney, signed by both husband and wife, held voidable only in Ohio and hence not subject to collateral attack in Illinois in action to enforce same. Id.

80. Foreign judgment cannot be impeached by showing that it was based upon mistake of law. American Exp. Co. v. Mullins, 212 U. S. 311, 53 Law. Ed. —.

81. Forsyth v. Barnes, 131 Ill. App. 467.

82. Search Note: See notes in 3 C. L. 1467; 5 Id. 1488; 7 Id. 1737.

See, also, Judgment, Cent. Dig. §§ 1755-1786; Dec. Dig. §§ 925-947; 23 Cyc. 1558-1575; 13 A. & E. Enc. L. (2ed.) 1024; 11 A. & E. Enc. P. & P. 1098.

83. Davis v. Davis, 164 F 281. Where a new liability is created by statute, to be enforced only within given period, the time within which suit must be brought operates as limitation of liability and not merely as limitation of remedy, which limitation is operative in any jurisdiction where it is sought to enforce the cause of action. McNutt v. Bakewell [Pa.] 72 A 639.

84. Kirby's Dig. § 5073, providing that "actions on all judgments and decrees" must be commenced within 10 years, applies to foreign judgments. Jordan v. Muse [Ark.] 115 SW 162.

85. Will admit of defense of disabling coverture. Forsyth v. Barnes, 131 Ill. App. 467.

86. South Dakota judgment for alimony could be basis of judgment in New York, not for alimony, but for money due. In re Williams' Estate, 118 NYS 562.

87. Santa Clara Val. Mill & Lumber Co. v. Prescott, 142 Ill. App. 656; Chamberlain v. Britton, 136 Ill. App. 290.

88. Plea of remarriage, being no defense against judgment for alimony in Illinois, is not available in New York in suit on such Illinois judgment. Chamberlain v. Britton, 136 Ill. App. 290.

89. See ante, §§ 1, 2. Mottu v. Davis [N. C.] 65 SE 696.

90. Copy of foreign judgment held properly certified to where it sufficiently appears from certificate that county of certification was county in district, judge signing certificate was judge of court of such district and court handing down decree, clerk

stand or fall upon the record,[92] which as against a plea of nul tiel record should contain not only a certified copy of the judgment but also all the pleadings and proceedings.[93]

Foreign Laws, see latest topical Index.

FORESTRY AND TIMBER.

The scope of this topic is noted below.[94]

§ 1. Protection and Regulation of Forests and Trees, 1832.
§ 2. Logs and Lumbering; Booms and Floatage, 1833. Contracts and Conveyances, 1833. Hauling and Floatage, 1839. Actions, 1839. Liens, 1840.

§ 1. *Protection and regulation of forests and trees.*[95]—See 11 C. L. 1521—The power of the government over timber on the public domain is plenary, except as grants to individuals have been effective [96] or as permission for use has been granted by statute.[97] Forest reserves may accordingly be established and the control thereof delegated to officers or departments,[98] but a statute making criminal violation of regulations thereafter to be passed, is void.[99] Reservation of timber lands excludes public use thereof,[1] except as previously granted.[2] State forest officers have only

in his attestation designating himself as clerk of court of such county, judge in his certificate having certified that attestation by clerk is in due form and by proper officer. Chamberlain v. Britton, 136 Ill. App. 290.

91. Transcript of judgment held properly certified in manner prescribed by Rev. St. U. S. § 905 (U. S. Comp. St. 1901, p. 677), where entitled "Common Pleas Court, Montgomery County, Ohio" signed "John C. Good, Clerk Common Pleas Court, Montgomery County, Ohio," stating under seal of court that definitely described foregoing pages and papers are "as the same appear upon the records of the court" and concluding with "given under my hand and seal of Common Pleas Court of Montgomery County, Ohio, this" giving date, and having attached a proper certificate and attestation of the judge. Bohlander v. Heikes [C. C. A.] 168 F 886. Certificate held insufficient when made by another than the presiding judge, under Rev. St. U. S. § 905 (U. S. Comp. St. 1901, p. 677). Rich v. Cohen, 61 Misc. 148, 114 NYS 672.

92. Held that existence of decree for costs must be determined by inspection of decree alone. Santa Clara Val. Mill & Lumber Co. v. Prescott, 238 Ill. 625, 87 NE 851.

93. To maintain action on foreign judgment against plea of nul tiel record, certified copy of judgment is not sufficient, but all pleadings and proceedings upon which judgment is founded and to which as matter of record it necessarily refers must be produced. McCarthy v. Troll [Ark.] 118 SW 416. Evidence held sufficient to identify judgment as that rendered upon complaint, answer and summons introduced and filed. Id.

94. It includes the regulation and protection of forests, and matters relating to logging and floatage. It excludes regulations designed to prevent fire (see Fires,* § 1), timber rights on the public domain (see Public Lands*), floatage rights as affected by navigability of waters (see Navigable Waters,* § 2), sales of manufactured lumber (see Sales*), effect of manufacture as divesting title in logs (see Accession and Confusion of Property*), matters of conversion (see Conversion as Tort*), trespass (see Trespass*) and waste (see Waste*), and measure of damages for such torts (see Damages,* § 5). Standing timber as an emblement is treated in Emblements and Natural Products.*

95. Search Note: See note in 11 Ann. Cas. 456.

See, also, Woods and Forest, Cent. Dig.; Dec. Dig.; 4 A. & Enc. L. (2ed.) 707; 19 Id. 522; 28 Id. 536; 30 Id. 1191; 13 A. & E. Enc. P. & P. 333; 22 Id. 1358.

96. Rights of **holders of unpatented mining claims** to timber thereon are subject to the paramount title of the government, and matured, dead, or insect infested timber may be sold by forest service, under rules of secretary of agriculture. Lewis v. Garlock, 168 F 153.

97. Under Act June 3, 1878, c. 150, § 1 (20 Stat. 88), **timber for domestic purposes** may be cut from mineral land although the same has not been developed as such. Morgan v. U. S. [C. C. A.] 169 F 242.

98. United States v. Bole. 156 F 687.

99. United States v. Grimaud, 170 F 205.

1. Land held by state under tax title. Defendant may not dispute state's title until he shows that he was owner at time of assessment or has title from such owner. People v. Bain, 60 Misc. 253, 113 NYS 27.

2. The status of a toll road, constructed over public lands under statutory authority, is not changed by the subsequent establishment of a forest reserve embracing such land, although Act June 4, 1897, c. 2, 30 Stat. 35, 36, vests control over highways over such reserves in secretary of interior. Duffield v. Ashurst [Ariz.] 100 P 820.

such authority as is delegated by law.[3] Their permits for the taking of timber are prima facie valid[4] and cover all that is within the fair import of their terms,[5] but statutory formalities must be complied with,[6] and they are not authorized to accept less than the permit price.[7]

Trees on private lands are private property though they overhang public lands,[8] and city officers cannot remove a shade tree from the street to build a sidewalk in an unauthorized place.[9] Under an indictment for "willfully and maliciously and wantonly" injuring a tree, it is not necessary to prove malice.[10]

§ 2. *Logs and lumbering; booms and floatage.*[11] *Contracts and conveyances.* See 11 C. L. 1524—Trees are a part of the realty, and hence a conveyance thereof must have all the formalities of a conveyance of land including attestation[12] and record,[13] and is within the statute of fraud,[14] and is subject to specific enforcement,[15] and is within the Louisiana statute permitting avoidance of sales of immovables for inadequacy of consideration.[16] A sale of standing timber, no time being fixed for removal of the trees, conveys an equitable interest in the land,[17] and, where timber has been sold apart from the land, the land owner has no right to license a trespass on the timber.[18] On the other hand, a contract for sale of standing timber with a mere license to enter the land to take it away,[19] or which is to be severed from the land before title passes, is an executory sale of personal property, and not an interest in the land,[20] and assignment of such contracts need not be by deed,[21] but even if it be

3. The New York state forest commission is **not authorized to represent the state in actions** to deprive it of possession of lands, forest commission act (Laws 1885, p. 482, c. 283), § 7, not conferring such authority. Saranac Land & Timber Co. v. Roberts, 195 N. Y. 303, 88 NE 753. Nor has the attorney general the right to be substituted as attorney for the commission in place of special counsel. People v. Santa Clara Lumber Co., 60 Misc. 150, 113 NYS 70. The forest, fish and game commission is not authorized to **settle and compromise an action** by such commission for trespass on the forest preserve, such action not being a suit or special proceeding which such commission is authorized to settle by Laws 1897, p. 98, c. 220, § 20, as amended by Laws 1898, p. 264, c. 135, § 20. Id.

4. Under the Minnesota timber act, the permit executed on a sale of timber on state land is prima facie evidence of a valid sale of the timber therein described. State v. Akeley Lumber Co., 107 Minn. 54, 119 NW 387.

5. A permit to cut "pine timber" covers dead and down timber and jack pine. State v. Akeley Lumber Co., 107 Minn. 54, 119 NW 387.

6. A failure of the members of the board of timber commissioners to sign a statement that the sale is necessary renders the permit void. State v. Akeley Lumber Co., 107 Minn. 54, 119 NW 387. Other irregularities in the sale proceedings are not jurisdictional. Id.

7. State v. Akeley Lumber Co., 107 Minn. 54, 119 NW 387.

8. A tree warden is not authorized to cut down trees on private lands nor parts of such trees extending over the streets, as Rev. Laws, c. 51, § 16, does not give such authority. Commonwealth v. Byard, 200 Mass. 175, 86 NE 285.

9. Such removal may be enjoined. City of Paola v. Wentz [Kan.] 98 P 775.

10. Tree warden cutting tree without trying to ascertain his rights and duties acts wantonly. Commonwealth v. Byard, 200 Mass. 175, 86 NE 285.

11. Search Note: See notes in 4 Ann. Cas. 1050; 6 Id. 249.

See, also, Logs and Logging, Cent. Dig.; Dec. Dig.; 25 Cyc. 1545-1601; 4 A. & E. Enc. L. (2ed.) 709; 19 Id. 522.

12. Must be attested. Smythe Lumber Co. v. Austin [Ala.] 49 S 875.

13. Assignment of a contract for sale of timber must be recorded. Childers v. Wm. H. Coleman Co. [Tenn.] 118 SW 1018. Extension of time for removing timber must be recorded. Id.

14. Although parol contract of sale may operate as license to enter and cut trees. Ligh v. Jasper Mfg. Co. [Fla.] 49 S 156. Parol contract, followed by branding of trees with recorded brand of purchaser under provisions of Code 1904, § 1906c, subsec. 2, is taken out of statute of frauds. Such act is not unconstitutional. Hurley v. Hurley [Va.] 65 SE 472.

15. Bryant Timber Co. v. Wilson [N. C.] 65 SE 932.

16. Act No. 188, p. 420, of 1894. Smith v. Huie-Hodge Lumber Co., 123 La. 959, 49 S 655.

17. Hence, death of vendor before trees had been measured, counted, and marked as required by contract, does not terminate contract, such rule being applicable merely to sales of personalty. McCoy v. Fraley [Ky.] 113 SW 444.

18. Such license, unknown to purchaser of trees, does not render him liable for malicious prosecution in filing information against licensee. Gates v. Union Sawmill Co., 122 La. 437, 47 S 761.

19. Within meaning of statute of frauds. Goodnough Mercantile & Stock Co. v. Galloway, 171 F 940.

20. Conditional sale reserving title until payment is made from proceeds. Clarke Bros. v. McNatt [Ga.] 64 SE 795. Contract

considered a sale of realty, it may amount to a license to enter land and cut the trees, which if unrevoked before performance is valid though oral.[22] A license to sell timber [23] vests no title in the licensee until it is severed,[24] and a permit to enter upon land and cut timber thereon during a certain time conveys no interest in the standing trees.[25] Like other contracts, a contract relating to timber must be based on an offer and acceptance,[26] involve mutuality of obligation,[27] be certain and definite,[28] and rest upon a consideration,[29] but that contract is not capable of specific enforcement does not render it void.[30]

The usual rules of interpretation of contracts apply.[31] The contract must be

construed and held title to timber other than cordwood on the land remained in grantor, and that there was more than a mere reservation of right to enter, cut, and remove. Western Lime & Cement Co. v. Copper River Land Co., 138 Wis. 404, 120 NW 277.

21. Goodnough Mercantile & Stock Co. v. Galloway, 171 F 940.

22. Bay View Land Co. v. Ferguson, 53 Wash. 323, 101 P 1093. Permit given by landowner in presence of and with consent of his wife, but signed by husband only, held to amount to an oral license to cut wife's share of timber. St. John v. Sinclair, 108 Minn. 274, 122 NW 164. A verbal license by the owner is a good defense to an action for entering on land and cutting timber. Hicks v. Mississippi Lumber Co. [Miss.] 48 S 624.

23. A contract reciting that the grantor has for a certain sum "this day granted, sold, and transferred," all the timber on certain land, is **a sale, and not a mere license.** Smith v. Huie-Hodge Lumber Co., 123 La. 959, 49 S 655.

24. Will giving to devisee the right to sell any timber or wood on testator's land is a mere license to sell. Young v. Young [Va.] 63 SE 748.

25. Licensee has no interest in timber cut by trespasser on such land during such time, hence, cannot maintain trover. Martin v. Johnson [Me.] 73 A 963.

26. Where no time is fixed, **time to be allowed for acceptance** is only such as is necessary to submit offer to vendee for acceptance or rejection. Union Sawmill Co. v. Mitchell, 122 La. 900, 48 S 317. **Death of person making offer,** before acceptance, operates as withdrawal. Id. An offer to sell may be **withdrawn at any time before acceptance.** Riley v. Union Sawmill Co., 122 La. 863, 48 S 304. **Unconditional acceptance of the option** converts it into a binding contract which may be specifically enforced. Bryant Timber Co. v. Wilson [N. C.] 65 SE 932. Contract for sale of timber in praesenti, imposing obligations on vendee to be executed in future, **not binding on vendor unless also signed by vendee.** Riley v. Union Sawmill Co., 122 La. 863, 48 S 304; Union Sawmill Co. v. Arkansas S. E. R. Co., 123 La. 555, 49 S 173.

27. Contract to sell timber on land for certain price per 1,000 feet, and give right to enter to remove it, vendee agreeing to return timber for assessment and pay taxes on it, to pay the agreed price in monthly instalments or pay rent in case timber not cut within stipulated time, not void for want of mutuality. Riley v. Union Sawmill Co., 122 La. 863, 48 S 304. Contract binding owner to make loan to contractor to make improvements, latter to give note and assign improvement and leases as security. Where loan was not made owner cannot insist on assignment. International Paper Co. v. Miles [N. H.] 71 A 626.

28. Timber lease authorizing cutting of timber for one year on "all that tract of land known as lot 162½ acres of lot 169 in the 6th district of Montgomery County, Ga.," held invalid for uncertainty. Clarke Bros. v. Stowe [Ga.] 64 SE 786. Option defining accurately land upon which trees are growing describes timber as that 10 inches in diameter or which may attain that size before cut, and gives 10 years in which to cut and remove it, and fixes price and time of payment. **Held sufficiently definite.** Bryant Timber Co. v. Wilson [N. C.] 65 SE 932. Contract for sale of "all of the timber on our lands situated in southern part of Jasper county, Tex.," sufficient as to description, vendor owning five tracts in extreme southern part of county and no other lands within 25 miles of southern line. Hughes v. Adams [Tex. Civ. App.] 119 SW 134. Contract for sale of all pine timber of certain size on certain land to be paid for when cut, at 50 cents per 1,000 feet, not void for uncertainty as to thing sold or as to price. Kent v. Davis Bros. Lumber Co., 122 La. 1046, 48 S 451. Contract for sale of all "merchantable" pine timber, 10 inches in diameter and over, not void for uncertainty. Lee Lumber Co. v. Hotard, 122 La. 850, 48 S 286. Contract to sell all merchantable timber on certain tract for one dollar per 1,000 feet, in cash or vendor's option of equivalent value, for all timber scaled by the last day of each month, payable on 15th of next month, not void for uncertainty in price. Id.

29. Agreement by purchaser of timber not to take turpentine therefrom void when without consideration. Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 SE 1056.

30. Lee Lumber Co. v. Hotard, 122 La. 850, 48 S 286.

31. Owner of timber with right to remove only before Oct. 12; sale by him of certain timber with right to remove only before May 1; subsequent sale to same person of all the timber excepting that already conveyed. Latter conveyances included right to remove all timber until Oct. 12. Stevens v. Sayers [Vt.] 73 A 817. **Sale of timber,** payment for that cut to be made at end of each month, with minimum payments fixed. Held amount of default at end of month is for all lumber cut. In re Pickens Mfg. Co., 166 F 585. Contract to sell **"all of the timber on our lands"** is contract to sell all timber on all lands of vendor. Hughes v. Adams [Tex. Civ. App.] 119 SW 134. **Contract to furnish to sawmill** all logs on tract of land, subject

construed according to intent of the parties, and all provisions will be retained unless they are irreconcilable.[32, 33] It should be construed according to the intended meaning of a misspelled word rather than its actual meaning.[34] Reservation in a deed, if ambiguous, should be construed in favor of the grantee.[35] A contract for sale of standing timber is to be construed as of the date of contract.[36] A contract silent in some particular may be construed in connection with an established custom.[37]

A contract may provide for termination at the option of one of the parties,[38] and a contract by a landowner to cut and deliver, during a certain season, all the timber on his land, terminates with the end of the season,[39] and payment for the portion delivered without objection because of the breach is not a waiver of such breach.[40] In an option, given without consideration, to purchase standing "at any time within thirty days," time is of the essence,[41] unless by its terms some act must first be performed by the seller.[42] A license to enter land and cut trees may be revoked at any time [43] before the licensee has acted upon it by cutting the timber.[44] Acquiescence in a revocation of a permit may be a waiver of a right of action for breach of the contract.[45] The right to declare a forfeiture for nonpayment of instalments may be waived by failure to exercise it.[46]

The contract is generally assignable,[47] and an assignment though insufficient to convey legal title may be upheld in equity.[48] A contract of conditional sale of logs reserving title until payment is made cannot, as against subsequent purchasers, be

to owner's right to saw them himself, provided he furnished 250,000 feet per month to mill. Held such minimum must be of logs as they run, and not culls. Williams v. Roper Lumber Co. [C. C. A.] 167 F 84. Hence, sale of "timber to cut **12 inches at the stump**" means 12 inches in diameter. Gulf Yellow Pine Lumber Co. v. Mont. [Ga.] 49 S 248.

32, 33. In deed of all standing timber of certain size on land, all not cut within five years to revert, a provision that buyer may not cut over the land a second time held not repugnant. Davis v. Frazier, 150 N. C. 447, 64 SE 200.

34. Deed of land with provision that certain timber is "accepted" construed to mean that such timber is "excepted." Baustic v. Phillips [Ky.] 121 SW 629.

35. Reservation of "the right to use cedar timber off said land" covers merely timber growing at the time, and not that which has since grown up. Jacobs v. Roach [Ala.] 49 S 576.

36. Includes only trees of required size at date of contract, not those of such size at date of cutting, contract reciting sale of all trees of certain diameter "at the stump now standing." Griffin v. Anderson Tully Co. [Ark.] 121 SW 297. Also reservation of trees of certain size, in deed to land, covers only trees of such size at date of deed. Baustic v. Phillips [Ky.] 121 SW 629.

37. Sale of logs without specifying lengths. Evidence of custom that logs were cut in 10, 12, 14, 16, 18 and 20 foot lengths, admissible. Thomas v. Charles [Ky.] 119 SW 752.

38. Contract to erect sawmill on land of another and saw such logs as owner "may desire to have sawed, such timber to be all timber on the tract, contract to continue as long as contractor fully complies with same or unless otherwise terminated." Held, owner may terminate by failing to furnish logs. Ashby v. Cathcart [Ala.] 49 S 75.

39. He is not bound thereby to deliver the next season a part of the timber which he failed to deliver during the time specified. Malueg v. Hatten Lumber Co., 140 Wis. 381, 122 NW 1057.

40. Malueg v. Hatten Lumber Co., 140 Wis. 381, 122 NW 1057.

41. Purchase must be completed by tender of purchase price within that time. Notice of intention to exercise is not sufficient. Hardy v. Ward, 150 N. C. 385, 64 SE 171.

42. Provision requiring seller to make and tender deed, on notice of acceptance, held modified by letter of buyer requesting seller to assist buyer's attorney to make deed. Hardy v. Ward, 150 N. C. 385, 64 SE 171.

43. Is revoked by sale and conveyance of land to another. High v. Jasper Mfg. Co. [Fla.] 49 S 156.

44. Written permit subsequently given to another not a revocation until brought to notice of licensee. St. John v. Sinclair, 108 Minn. 274, 122 NW 164.

45. Revocation with permission for further operations under new restrictions, followed by operation without objection under such restrictions, held to be a waiver. Burnham v. Austin [Me.] 73 A 1089.

46. Waived by suing out specific attachment under Kirby's Dig. § 4966. McComb v. Judsonia State Bank [Ark.] 120 SW 844.

47. Contract reciting that all rights acquired by buyer, "under this sale and contract, shall vest in, and inure to the benefit of, his heirs, successors, and assigns," is not personal to the buyer. Riley v. Union Sawmill Co., 122 La. 863, 48 S 304. Provision giving right to build roads for purpose of removing timber to grantee, "their heirs and assigns," held to make right to cut trees assignable. Rush v. Hilton [S. C.] 65 SE 525.

48. Indorsement on deed, "for value re-

modified by parol,[49] but the contract may be modified by showing that a provision was omitted therefrom by mistake,[50] and where the seller fraudulently omits from the deed a portion of the tract contemplated by the parties, the deed may be reformed.[51]

Contracts for the sale of timber to be removed within a specified time are generally construed as sales of only so many trees as the vendee removes within the specified time,[52] unless an extension of the time is secured,[53] although a state of facts may be presented that would allow a reasonable time after expiration of the contract in which to remove timber,[54] and where timber is excepted or reserved in a deed, and a time specified within which it must be cut, the reservation expires at the expiration of the time,[55] but, on a sale of "standing lumber," a provision that "whatever lumber" remains on the premises at the end of three years shall revert applies only to standing trees.[56] Where a deed conveys legal title to trees, a provision giving the right to enter and remove the trees "free of rental for a period of six years" does not limit the conveyance to such trees as are removed within six years.[57] The purchaser of the land may question the validity of an extension of time to remove timber, granted by his vendor, to a buyer of the timber.[58] Under a conveyance of trees limited to such as are removed within a certain period, a severance of the trees is such a removal and vests title in the buyer, although not taken from the land within the time limited.[59] A contract selling all standing timber on land, all timber not removed within five years, to revert, conveys a qualified fee in the timber,[60] and an instrument reciting that a landowner thereby sells the trees thereon, the purchaser to have six months to remove them, the landowner to have the tops, conveys an estate in the trees.[61] When the contract is silent as to when the timber must be removed, the buyer has a reasonable time in which to remove it,[62]

ceived, we hereby transfer the within contract to H. without recourse," held sufficient to invest assignee with rights of assignor in equity, although insufficient to convey legal title. Rush v. Hilton [S. C.] 65 SE 525.

49. Written agreement that title should remain in seller, proceeds of sales to be turned over to him until purchase price is paid. Subsequent parol agreement that portion of such proceeds should be applied in satisfaction of another debt due seller. Clarke Bros. v. McNatt [Ga.] 64 SE 795.

50. Evidence held to show omission of provision that contract should be void if payment not made by certain date. Rowe v. Charles [Ky.] 121 SW 697.

51. Evidence held to show that a certain tract should have been included in deed. Sommer v. Ross [Ky.] 116 SW 1181.

52. Bretz v. R. Connor Co., 140 Wis. 269, 122 NW 717. That owner, ignorant of his rights, made no objection to a later removal by assignee of purchaser, does not estop him from claiming value of trees cut. Ford Lumber & Mfg. Co. v. Cress [Ky.] 116 SW 710. But purchaser of trees, having no interest in land, with no limitation as to time of removal, who conveys his interest by a deed transferring all the benefits of his deeds from landowners, but limiting time for removal, has no interest in trees removed by his assignees after such time without objection from landowner. Ford Lumber & Mfg. Co. v. Asher [Ky.] 115 SW 790.

53. Contract giving four years to cut and remove timber and providing that, if additional time is required "to remove," extension not exceeding two years is granted "to cut and remove said timber." Held, during such extension, buyer could both cut and remove timber. Norfolk Lumber Co. v. Smith, 150 N. C. 253, 63 SE 954. Right given in contract, for two years' extension, not forfeited by demanding four years' extension. Id.

54. Purchase and payment of timber from Indians to be removed in 15 years. Suit brought by United States, and delay of secretary to approve, delayed purchaser for 5 years in commencing work. United States v. Mason Lumber Co., 172 F 714.

55. Exception of all trees, "with the right for the same to remain for a period of two years from date and not longer." Noyes v. Goding, 104 Me. 453, 72 A 181.

56. Tuttle v. D. W. Pingree Co. [N. H.] 73 A 407.

57. Keystone Co. v. Brooks, 65 W. Va. 512, 64 SE 614.

58. Action by purchaser to quiet his title as against buyer of timber. Childers v. Wm. H. Coleman Co. [Tenn.] 118 SW 1018.

59. Keystone Co. v. Brooks, 65 W. Va. 512, 64 SE 614. He has a reasonable time thereafter in which to remove the logs from the land. Indiana & A. Lumber & Mfg. Co. v. Eldridge [Ark.] 116 SW 1173; Griffin v. Anderson Tully Co. [Ark.] 121 SW 297.

60. Davis v. Frazler, 150 N. C. 447, 64 SE 200.

61. Hence purchaser may maintain action of trover against one who cuts and converts trees. Camp v. Horton, 131 Ga. 793, 63 SE 351.

62. Oates v. Yeargin [Ky.] 115 SW 794. Statement in letter containing proposal to buy, that timber would be worthless unless sawed within two or three months, not an

and failure to remove it within that time works a forfeiture.[63] Under a right given in the deed to remove the timber "any time thereafter," the grantee is entitled to a reasonable time after notice to remove.[64] Where timber is excepted in a grant of land, the grantor is not limited to a reasonable time within which to remove it,[65] and may enter at any time to do so, without doing unnecessary damage.[66] A provision that, at the expiration of a certain time, timber reserved by the vendor, but not removed from the land, should become the property of the vendee, refers only to timber standing or lying on the ground in its natural state.[67]

The contract may provide that title shall not pass until payment is made,[68] and such a reservation of title is good as against a trustee in bankruptcy,[69] but a permit, under which the owner retains title to logs until all conditions are performed, with the right to sell on breach and out of the proceeds satisfy his claims for such breach, is a retention of title merely as security.[70] One who cuts poles under a contract of purchase may recover their value if the seller negligently destroys them, although he has not yet paid for them.[71] On sale of timber to be cut and stacked, title may pass without actual delivery,[72] although where logs are bought to be delivered f. o. b., title does not pass until delivery f. o. b. cars.[73] On sale of timber at a certain price per 1,000 feet, scale measure, title does not pass until it has been cut,[74] but the contract being a promise of sale is valid as against a subsequent purchaser,[75] and under a contract to sell logs to be cut at a certain price per 1,000 feet, to be banked and scaled by a certain person, title does not pass until they are scaled.[76]

A conveyance of standing timber is not binding on a subsequent purchaser of the land without notice,[77] and an agreement by a land owner to cut and haul the timber to a buyer thereof cannot be enforced against a subsequent purchaser of the land.[78] An assignee exercising rights under a contract of sale of timber is estopped to deny the seller's title to the land,[79] but the purchaser may show that he has acquired an

undertaking to remove it within that time. Beauchamp v. Williams [Tex. Civ. App.] 115 SW 130.

63. Sale of 150,000 feet of timber on 500 acre tract, accessible during only small portion of year. Buyer's mill had capacity of 5,000 feet daily. Held that it cannot be said as matter of law that reasonable time expired after three years. Beauchamp v. Williams [Tex. Civ. App.] 115 SW 130.

64. Although reasonable time has already elapsed before notice. St. James v. Erskine, 155 Mich. 606, 15 Det. Leg. N. 1087, 119 NW 897.

65. Provision "reserving the pine and cedar timber now growing thereon, and the right to cut and remove the same," is an exception of timber and not merely a reservation. Bardon v. O'Brien, 140 Wis. 191, 120 NW 827.

66. May also sell such right or give license to another to execute it. Baustic v. Phillips [Ky.] 121 SW 629.

67. Railroad ties manufactured from the trees, but not removed from land within time, still belong to vendor. Butler v. McPherson [Miss.] 49 S 257.

68. Provision that contract shall be void in case payment is not made by certain date. Title does not pass until payment. Rowe v. Charles [Ky.] 121 SW 697.

69. In absence of showing that there are creditors having intervening liens or conveyances. In re Pickens Mfg. Co., 166 F 585.

70. In trover against purchaser from contractor, only amount of such claim, and not full value of logs, can be recovered. Bradley Land & Lumber Co. v. Eastern Mfg. Co., 104 Me. 203, 71 A 710.

71. Not limited to recovery of the value his labor in cutting them. Aune v. Austin-Williams Timber Co., 52 Wash. 356, 100 P 746.

72. Agreement that cutting and stacking shall amount to delivery is valid. Consignees' Favorite Box Co. v. Speer, 5 Ga. App. 156, 62 SE 1000.

73. Not liable to assessment against buyer until such delivery. Gow v. McFarren, 156 Mich. 362, 16 Det. Leg. N. 104, 120 NW 800.

74. Rev. Civ. Code art. 2458, providing that when objects are sold by measure sale is not perfect until measured, but buyer may require either delivery or damages, is applicable. Lee Lumber Co. v. Hotard, 122 La. 850, 48 S 286.

75. Lee Lumber Co. v. Hotard, 122 La. 850, 48 S 286.

76. Owing to seller's delay in banking and subsequent absence of designated person, logs remained unscaled until washed away by flood. Held that loss was seller's. Sempel v. Northern Hardwood Lumber Co. [Iowa] 121 NW 23.

77, 78. Ohio Pail Co. v. Cook, 222 Pa. 487, 71 A 1051.

79. Sale of timber of certain size. Assignee of contract sued for damages for cutting timber of other kinds and dimensions. Smith v. New Bern Lumber Co., 150 N. C. 40, 63 SE 190.

outstanding title superior to that of the seller.[80] A contract for the sale of timber, with a grant of such rights of way and other uses of the land as are necessary in the removal of the timber, is not a lease.[81]

Where a contract is entire, all of its obligations must be performed,[82] and an agreement in a contract for sale of timber, that the buyer should thereafter return the same for taxation, imposes on him the obligation to pay taxes on the timber.[83] The vendee is not in default by failing to take possession when the timber is in the adverse possession of a third person holding under color of title.[84] On breach of a contract to sell and deliver saw logs, the measure of damages is the difference between the contract price and the market value at the time;[85] and a breach is not waived by accepting a weekly delivery of less than the required amount.[86] One to whom trees have been conveyed as security for performance of a contract, by one who held them under a contract containing a forfeiture clause, is bound to protect the title against such forfeiture.[87] A provision in a contract for sale of timber that the buyer should pay the seller $1 for every tree of the specified size, left standing on the land, was one for liquidated damages, and not for a penalty.[88]

A sale of all timber measuring 12 inches in diameter "at the stump where cut" means trees 12 inches at the point where trees are usually cut.[89] A sale by a landowner of all standing timber on his land does not include timber on subsequently acquired land,[90] and a provision authorizing the purchaser to cut other timber to construct tram roads and mills does not authorize the use of such timber to construct roads and buildings on other lands.[91] A sale of standing timber includes the right to remove it in a judicious manner,[92] and a provision giving a purchaser the right of ingress for the purpose of removing the timber or for operating a logging business gives him a right to float logs out upon watercourses.[93] A purchaser of standing timber, without limitation except as to time of cutting, may take the turpentine therefrom,[94] and an agreement by him not to work the timber for turpentine does not make the turpentine the property of the landowner.[95] A warranty of acreage of a tract in a deed conveying all the trees thereon is as to the number of acres of land and not necessarily land covered by timber.[96]

80. Sample v. Roper Lumber Co., 150 N. C. 161, 63 SE 731.

81. Hence owner may maintain suit to restrain licensee of contractor from selling liquors on such land. Paint Creek Co. v. Gallego Coal & Land Co. [C. C. A.] 166 F 62.

82. Contract to sell timber, and rent saw mill, held entire. Purchaser cannot surrender mill and retain right to cut timber. Wood v. Kelsey [Ark.] 119 SW 258.

83. Payment of taxes on contract as an option is not compliance with such agreement. Riley v. Union Sawmill Co., 122 La. 863, 48 S 304.

84. Jefferson Sawmill Co. v. Iowa & Louisiana Land Co., 122 La. 983, 48 S 428.

85. Value of logs in succeeding year immaterial. Malueg v. Hatten Lumber Co., 140 Wis. 381, 122 NW 1057.

86. Walker v. Cooper, 150 N. C. 128, 63 SE 681.

87. Trustee charged with conversion after duty to reconvey cannot defend on ground that plaintiff's interest had been lost by forfeiture. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 169 F 81.

88. Sale of trees of certain size at $3.50 per 1,000 feet on certain tract. Blackwood v. Liebke, 87 Ark. 545, 113 SW 210.

89. Trees 12 inches at that point but less than 12 inches at higher point where actually cut held covered by contract. Cranor Smith Lumber Co. v. Frith [Ky.] 118 SW 307.

90. Ohio Pail Co. v. Cook, 222 Pa. 487, 71 A 1051.

91. Ward Lumber Co. v. Coleman [Ky.] 116 SW 266.

92. Buyer liable for damages resulting from leaving tops and debris on land. Bates v. Burt & Brabb Lumber Co. [Ky.] 113 SW 820; Wilmer Lumber Co. v. Elsely [Ala.] 50 S 225.

93. Also right to build temporary dam in such water course if land owner is not damaged thereby. Sidle v. Michark Mfg. Co. [Ark.] 121 SW 349.

94. Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 SE 1056.

95. Hence on breach of agreement the landowner cannot recover value of turpentine taken. Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 SE 1056.

96. Recital in deed, "it is understood that the sale of this timber is strictly by the acre and not by the tract, and that the purchase price agreed upon is fixed with reference to the number of acres actually contained * * * subject to increase or diminution in accordance with the number of acres which the said tract of timber may

Hauling and floatage.[See 11 C. L. 1529]—In some states provision is made for recording a brand for marking logs and timber,[97] it being a criminal offense to remove the owner's brand from timber,[98] in the prosecution of which the record of the brand may be introduced in evidence.[99]

Right to maintain a sluice dam, flooding lands of others, may be acquired by adverse possession.[1] A charter authorizing a party to demand toll on logs driven over its "dams and improvements" authorizes toll on logs passing over a stream where improvements have been made, although not passing over a dam,[2] but one unlawfully maintaining a boom on the land of another has no right to possession of logs contained therein.[3]

Where complete performance of a logging contract may be demanded in one year and such performance is possible, it is not within the statute of frauds.[4] A contract to remove timber from a tract of land and deliver it in a stream for a certain sum covers the cost of all means and appliances necessary to prosecute the work.[5] Where plaintiff contracted to haul logs and place them on skidways to be furnished by defendant, the latter must keep the former constantly supplied with skidways on which to pile the logs,[6] and plaintiff contracting to haul logs to mill sites to be designated by defendant may recover for profits lost by reason of defendant's failure to designate such sites.[7] Refusal of a party to such a contract to submit to a test scale as stipulated therein is a breach of the contract.[8] Where plaintiff failed to complete his contract to cut and haul logs for defendant and the latter undertook to do the work, he is entitled to credit for the cost thereof including damages paid to riparian owners,[9] cost of banking skidded logs,[10] and cost of driving the logs.[11] In an action for compensation for hauling logs, the usual rules of evidence obtain.[12]

Actions.[See 11 C. L. 1529]—One owning trees but not the land on which they stand may recover their value from one who wrongfully cuts them,[13] and a purchaser of

be ascertained to contain." Perkins Co. v. Wilcox [Ga.] 63 SE 831.

97. Under St. 1909, § 1409, subsec. 7, the instrument to be recorded may be executed by manager of timber dealing company. Bennett v. Com. [Ky.] 118 SW 332.

98. Under St. 1909, § 1409, subsec. 11, making it a crime to "cut out, cancel, obliterate or deface" the brand, it is a crime to saw off end of railroad tie to remove brand. Bennett v. Com. [Ky.] 118 SW 332.

99. Identified by deputy custodian. Bennett v. Com. [Ky.] 118 SW 332.

1. Such right not terminated when dam ceases to be used as sluice dam. Simons v. Munch, 107 Minn. 370, 120 NW 373, but see on rehearing, Id., 107 Minn. 370, 121 NW 878.

2. Greater flow of water, resulting from dam above point where logs entered stream, held not an improvement authorizing tolls. Evidence held insufficient to show any other improvements. Wilson Stream Dam Co. v. Boston Excelsior Co. [Me.] 74 A 115.

3. Hence cannot maintain replevin to recover logs which escaped from such boom, although defendant was responsible for such escape. North Shore Boom & Driving Co. v. Nicomen Boom Co., 52 Wash. 564, 101 P 48.

4. Oral contract to cut and haul all timber on land amounting to 8,000,000 feet to defendant's mill, at rate of 2,000,000 feet per year, and as much more as defendant might require. Herron v. Raupp, 156 Mich. 162, 16 Det. Leg. N. 66, 120 NW 584.

5. Logging road. Gabrielson v. Hague Box & Lumber Co. [Wash.] 104 P 635.

6. Failure to furnish sufficient skidways. Plaintiff piling logs on ground not liable for expense of afterwards placing them on skidways. Ayer & Lord Tie Co. v. Martin [Ark.] 117 SW 1081.

7. Profits not so conjectural and speculative as to prevent recovery. Herron v. Raupp, 156 Mich. 162, 16 Det. Leg. N. 66, 120 NW 584.

8. Provision that either party might demand test scale if dissatisfied with scale made. Demand at time when test scale could have been made, and refusal, evidence as to actual amount of logs cut and banked admissible. Thiel v. Week Lumber Co., 137 Wis. 272, 118 NW 802.

9. Amount paid to riparian owners under stress of threats to prevent drive allowed, although such claims were not legal. Phalen v. Hershey Lumber Co., 136 Wis. 571, 118 NW 219.

10. Allowance of $2,753.24 for banking 1,500,000 feet of skidded logs held excessive. Phalen v. Hershey Lumber Co., 136 Wis. 571, 118 NW 219.

11. Allowance of $3,658.71 for driving logs held excessive. Phalen v. Hershey Lumber Co., 136 Wis. 571, 118 NW 219.

12. Testimony as to provisions usually inserted in such contracts inadmissible to prove contents of parol contract where uncontradicted testimony was that such provisions were not in contract in suit. Dayton Lumber Co. v. Stockdale [Tex. Civ. App.] 118 SW 805.

13. Evidence held sufficient to sustain ver-

standing timber has an interest entitling him to maintain trover against one who cuts and converts it.[14] Although a life tenant cannot recover for timber wrongfully cut on the land, he may recover damages resulting from the cutting up of the land rendering it less accessible.[15] In an action by the owner, under a penal statute, for cutting timber, summons in the ordinary form of an action on contract need not be indorsed as required by such statute.[16] In an action for breach of a contract to furnish a merchantable title to timber, an allegation that plaintiff offered to extend time of performance, and if defects could not be cured would demand a general warranty deed, is proper.[17] A cross complaint, alleging that plaintiff violated his contract by cutting and carrying away trees not covered thereby, sufficiently raises the issue of plaintiff's violation of the contract.[18] General rules as to pleading,[19] evidence,[20] instructions,[21] and damages apply.[22] In an action against a seller for preventing the cutting of the timber, the usual rules as to counterclaim and set-off obtain.[23] Plaintiff suing in trespass for cutting of trees has the burden of establishing his title.[24] In Wisconsin a landowner is entitled to recover the highest market value of cordwood wrongfully cut from his land, and is not limited to the stumpage value.[25] Where the question at issue is the number of acres in the tract and it appears that the surveys made by both parties are inaccurate, the court should appoint a surveyor to resurvey the land and compute the area.[26] What constitutes "timber" is a question of fact for the jury.[27]

Liens.[See 11 C. L. 1531]—One who merely cuts and hauls logs to a sawmill, claiming no title to such logs, has no lien for furnishing supplies to a sawmill,[28] but one in possession of land under bond for title, who furnishes a sawmill with logs, has such a lien.[29] A demand for payment of a logger's lien made before filing notice of the

dict of the amount rendered. Ford Lumber & Mfg. Co. v. Griggs [Ky.] 118 SW 920.

14. Camp v. Horton, 131 Ga. 793, 63 SE 351.

15. Daffin v. Zimmerman Mfg. Co. [Ala.] 48 S 109.

16. But the declaration not being supported by such summons should be stricken out. Ten Eyck v. Mendel [N. J. Law] 72 A 31.

17. Hughes v. Adams [Tex. Civ. App.] 119 SW 134.

18. Griffin v. Anderson Tully Co. [Ark.] 121 SW 297.

19. Action against seller of trees for deficiency in number, answer alleging that buyer unlawfully cut 800 trees not belonging to him, worth $1.50 each, held after verdict to be sufficient as counterclaim. Runyons v. Burchett [Ky.] 121 SW 975.

20. Deed showing conveyance of timber to defendant held admissible. Wilmer Lumber Co. v. Eisely [Ala.] 50 S 225. **Action for balance on sale of timber** at agreed price per acre. Issue as to acreage. Evidence of sales of timber by defendant for lump sum; execution of deed by defendant like that from plaintiff; acceptance of deed from plaintiff by third person calling for certain number of acres,—irrelevant. Bauer Cooperage Co. v. Smith's Adm'x [Ky.] 115 SW 828. **Action for conversion:** Scale book merely showing entries which might refer to other timber, not admissible. Hassam v. Safford [Vt.] 74 A 197. Evidence that logs wrongfully cut were delivered to defendant is admissible to show defendant's connection with the trespass. Daffin v. Zimmerman Mfg. Co. [Ala.] 48 S 109. Witnesses may give their best judgment as to number of trees cut from ground although they did not actually count the stumps. May testify whether stumps were old or recently cut. Bufford v. Little [Ala.] 48 S 697. Evidence as to amount of timber cut under contract held sufficient to sustain finding. Wilson v. Barrett [Ky.] 115 SW 812.

21. Instructions held not to ignore defendant's plea of estoppel based on fact that plaintiff had shown defendant the lines of the land. Clevenger v. Blount [Tex. Civ. App.] 114 SW 868.

22. Evidence as to value of converted lumber when loaded on cars at shipping point, admissible. Hassam v. Safford [Vt.] 74 A 197.

23. Damages for cutting timber not covered by contract, and damage to fences in removing timber, may be counterclaimed. Damages for violation of another similar contract in same manner can be set off but not counterclaimed. Cranor Smith Lumber Co. v. Frith [Ky.] 118 SW 307.

24. Where portion of trees on land were sold to defendant, and afterwards land and remaining trees sold to plaintiff, defendant is not estopped to question plaintiff's title. Gaskins v. Gray Lumber Co. [Ga. App.] 64 SE 714; Warden v. Addington [Ky.] 115 SW 241.

25. Under St. 1898, § 4269. Pettingill v. Goulet, 137 Wis. 285, 118 NW 845.

26. Bauer Cooperage Co. v. Smith's Adm'x [Ky.] 115 SW 828.

27. Wilmer Lumber Co. v. Eisely [Ala.] 50 S 225.

28. Trapp v. Watters [Ga. App.] 65 SE 305.

29. That the mill owner made payment to holder of legal title, retained to secure pur-

lien, is sufficient to entitle the claimant to costs.[30] In an action to foreclose a logger's lien, proof of the filing of the lien notice is unnecessary when it is admitted by the answer,[31] and a claimant, by bidding at a sale under a lien foreclosure is estopped to deny the validity of the sale.[32]

A lien upon land includes growing timber standing thereon,[33] and an unrecorded lien on the manufactured lumber given to secure the purchase price of the logs is valid, so long as the lumber remains on the seller's land, as against a subsequent buyer of the lumber who had knowledge of the sale of the logs,[34] but timber purchased by a bona fide purchaser after a mortgage thereon had been satisfied of record, is not subject thereto.[35] An agreement for a lien on timber, logs, and lumber, to secure advances to enable the carrying out of a logging contract by a bankrupt is effective against all save bona fide purchasers.[36] A seller under a contract of conditional sale loses his right to the proceeds as against a bona fide purchaser by authorizing the buyer to sell.[37] Where a lien is reserved on one-third of the lumber to be manufactured from the logs sold, such portion must be separated from the remainder of the lumber.[38] The holder of a past due note and mortgage given for the purchase price of a part interest in a sawmill, and timber, is not entitled to restrain the operation of the plant where at the time of the sale it was contemplated that the operation should continue.[39] A mortgagor of land, who reserves the right to cut the timber thereon, may convey a good title to such timber or its products.[40]

Forfeitures (defined, see 12 C. L. 1310, n. 16), see latest topical index.

FORGERY.[41]

The scope of this topic is noted below.[42]

Elements of Offense, 1842.
Defenses, 1843.
The Indictment, 1843.
Presumptions, 1844.
Admissibility of Evidence, 1844.
Sufficiency of Evidence, 1844.
Variance, 1845.
Instructions, 1845.
Conviction, 1845.

chase price, who had taken no steps to protect his title, is no defense. Guin v. Hilton & Dodge Lumber Co. [Ga. App.] 65 SE 330.

30. Terms "lien holder" and "lien claimant," in Act March 13, 1899, § 1, requiring such demand, not limited to persons who have filed notices of claims. Sumpter v. Burnham, 51 Wash. 599, 99 P 752.

31. Such proof not necessary where answer alleges a tender "at the time of filing the lien," and alleges want of demand "subsequent to filing of the lien claim," although filing of notice is denied on information and belief. Sumpter v. Burnham, 51 Wash. 599, 99 P 752.

32. Wall Lumber Co. v. Lott-Lewis Co., 5 Ga. App. 604, 63 SE 637.

33. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176.

34. Lien not waived or lost by recovering judgment against buyer of logs for balance of purchase money secured by such lien, and levy on lumber so held. Wiggin v. Mankin, 65 W. Va. 219, 63 SE 1091.

35. Sale of timber and mortgage to secure purchase-money notes. Reconveyance in satisfaction of notes and release of mortgage. Standard Lumber Co. v. Colwell [Ky.] 117 SW 286.

36. Attaches to fund derived from sale in hands of trustee in bankruptcy. Goodnough Mercantile & Stock Co. v. Galloway, 171 F 940.

37. Provision that proceeds of such sale shall be applied in settlement of original purchase price, although contained in recorded contract of conditional sale, will not charge purchaser from buyer with duty of seeing that proceeds are so disposed of. Clarke Bros. v. McNatt [Ga.] 64 SE 795.

38. Where about one-third remained after selling part of the lumber, and such remaining portion was held under the lien, there is sufficient separation. Wiggin v. Mankin, 65 W. Va. 219, 63 SE 1091.

39. Since it would be in contemplation of parties that liens for wages of operators might be created during course of operation. Norwood v. Leeves [Tex. Civ. App.] 115 SW 53.

40. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176.

41. Search Note: See notes in 3 C. L. 1472; 5 Id. 1498; 7 Id. 1746; 22 L. R. A. 686; 24 Id. 33; 31 Id. 831; 36 Id. 470; 41 Id. 652; 54 Id. 794; 61 Id. 819; 1 L. R. A. (N. S.) 730, 1075; 4 Id. 402, 1126; 5 Id. 375; 8 Id. 1175; 8 A. S. R. 466; 119 Id. 317; 1 Ann. Cas. 181, 308; 2 Id. 296; 3 Id. 293; 8 Id. 86; 9 Id. 456, 1111.

See, also, Forgery, Cent. Dig. §§ 1-57, 61-121; Dec. Dig. §§ 1-21, 26-44; 19 Cyc. 1370, 1371, 1373-1390, 1392-1395, 1397-1403, 1405-1425; 13 A. & E. Enc. L. (2ed.) 1081; 9 A. & E. Enc. P. & P. 546.

Elements of offense. See 11 C. L. 1533—Forgery and uttering a forgery are distinct offenses.[43] The attempt to utter a forgery is also a criminal offense.[44] Forgery consists in the false making[45] or alteration[46] of a written instrument,[47] which is apparently valid,[48] or which, if genuine, might injure another,[49] with intent thereby to defraud.[50] It is unnecessary that the writing be such as would have legal validity if genuine,[51] provided it might upon any contingency be used to injure another.[52] The offense is complete without the delivery of the forged instrument.[53] The elements of the offense may of course be varied by statute.[54]

42. See Negotiable Instruments,* §§ 2, 6, for rights of parties to forged paper or transferees by forged indorsements; Banking and Finance,* §§ 6, 8, 9, for liabilities of bank on payment of forged paper; Names, Signatures and Seals,* § 2, for proof of genuineness of signatures in civil proceedings.

43. Commonwealth v. Miller [Ky.] 115 SW 234; Holloway v. State [Ark.] 118 SW 256; State v. Blodgett [Iowa] 121 NW 685.

44. Hall v. State, 55 Tex. Cr. R. 267, 116 SW 808.

45. People v. Collins, 9 Cal. App. 622, 99 P 1109; Holloway v. State [Ark.] 118 SW 256. No forgery where entry is true, though it records a transaction intended to deceive, viz., year, and manipulation of assets by temporary loan to deceive insurance department. People v. Corrigan, 129 App. Div. 75, 113 NYS 513.

46. Holloway v. State [Ark.] 118 SW 256.

47. Subjects of forgery: An order for delivery of goods. Hall v. State, 55 Tex. Cr. R. 267, 116 SW 808. Check. State v. Barrie [N. J. Law] 73 A 248. Vendor's lien notes. Murphree v. State, 55 Tex. Cr. R. 316, 115 SW 1189. Satisfaction of a mortgage. People v. Shanley, 132 App. Div. 831, 117 NYS 845. Deed. Snow v. State, 85 Ark. 203, 107 SW 980. Will. State v. Ready [N. J. Law] 72 A 445.

48. Holloway v. State [Ark.] 118 SW 256; State v. Blodgett [Iowa] 121 NW 685.

49. People v. Collins, 9 Cal. App. 622, 99 P 1109. Duplicate deposit slip given to depositor in absence of passbook. State v. Jackson, 221 Mo. 478, 120 SW 66.

50. Holloway v. State [Ark.] 118 SW 256; People v. Collins, 9 Cal. App. 622, 99 P 1109; State v. Brown [Utah] 102 P 641. Not guilty where acted under authority of apparent maker, either express, under power of attorney (People v. Shanley, 132 App. Div. 821, 117 NYS 845), or implied (Brown v. State, 55 Tex. Cr. R. 9, 114 SW 820).

51. Order on treasurer of school township sufficient, though not showing authority of board to issue it, under Code, § 4853, defining offense. State v. Blodgett [Iowa] 121 NW 685. Void clearing-house certificate sufficient. People v. Collins, 9 Cal. App. 622, 99 P 1109. Affidavits furnishing final proof under timber-culture claim, not made within time allowed by Rev. St. § 2294 (U. S. Comp. St. 1901, p. 1396). Neff v. U. S. [C. C. A.] 165 F 273.

52. Affidavit sufficient to aid in making, but insufficient in itself to make final proof under timber-culture claim. Neff v. U. S. [C. C. A.] 165 F 273.

53. Consequently forged bond to stay judgment need not have been filed with clerk, as required by statute, to complete offense. Holloway v. State [Ark.] 118 SW 256.

54. Under Rev. St. § 5418, the false alteration or presentation of an affidavit for the purpose of defrauding the United States is an offense, though the affidavit be not made within the period allowed by law. Neff v. U. S. [C. C. A.] 165 F 273. Under Code, § 4853, making it forgery "if any person with intent to defraud falsely make * * * any instrument in writing, being or purporting to be the act of another by which any pecuniary demand or obligation * * * is or purports to be created," the offense is committed by forging an order for the payment of money upon the treasurer of a school township, though school officers passed no resolution authorizing its issuance. State v. Blodgett [Iowa] 121 NW 685. Forgery of a check is governed by Ky. St. 1903, § 1189, under which the authority of the drawee bank to do business must be shown, rather than by § 1188 which relates to forgery of written instruments generally. Commonwealth v. Miller [Ky.] 115 SW 234. Under Kirby's Dig. § 1714, punishing forgery of writing to fraudulently obtain another's property or to cause him to be injured in his estate or lawful rights, forgery of a bond to stay judgment is punishable. Holloway v. State [Ark.] 118 SW 256. Forging name of payee on check is an "altering" within White's Ann. Pen. Code, art. 531, providing that one who, without lawful authority and with intent to defraud, alters an instrument, etc., is guilty of forgery. Carter v. State, 55 Tex. Cr. R. 43, 114 SW 839. Under Rev. St. 1899, § 2001 (Ann. St. 1906, p. 1338), making it forgery in second degree to forge an "evidence of debt," etc., issued by any incorporated bank, the raising of a duplicate deposit slip issued to a depositor in absence of his passbook constitutes the offense. State v. Jackson, 221 Mo. 478, 120 SW 66. Under Pen. Code, § 514, providing that an officer of corporation who falsifies, or unlawfully and corruptly alters or destroys, any records or other writing belonging to a corporation or appertaining to its business, is guilty of forgery in the third degree, a treasurer who removed from stockbook a canceled certificate of his old stock, pasted therein, on learning of legal invalidity of new certificate issued to him in lieu thereof, was not guilty. Spiker v.

* Always begin with the latest article on the subject. Use the latest topical index.

The crime of uttering a forged instrument consists in putting in circulation,[55] or offering to another,[56] a forged instrument,[57] or one the making of which, if with fraudulent intent, would constitute forgery,[58] knowing of its falsity[59] and intending thereby to defraud.[60] To complete the offense it is not essential that the attempt to defraud should succeed,[61] or that the instrument be actually passed to another.[62] The name forged may be mispelled,[63] or may be that of a fictitious person,[64] but the instrument uttered must be capable of doing injury, if genuine.[65]

Defenses. See 9 C. L. 1419—Insanity is a defense,[66] but acquittal of the charge of uttering a forged instrument is not a bar to a subsequent prosecution for forging the same.[67]

The indictment. See 11 C. L. 1534—The indictment need not allege an intent to defraud a particular person,[68] nor state the name of the party injured or intended to be injured,[69] nor show how the forgery will defraud, provided the possibility of its defrauding is made apparent.[70] The character of persons uninterested as beneficiaries or otherwise need not set out.[71] If the essential elements of the offense are charged[72] explicitly,[73] the indictment is sufficient. An information may charge forgery and uttering in separate counts, though the warrant for arrest did not separate the charges,[74] and though a prior information, since quashed, charged only the forgery.[75] Under a statute permitting only one offense to be charged in an indictment, an indictment is had for duplicity which includes in one count a charge for uttering a check with knowledge of its forgery, and a charge for forging an indorsement thereon and then uttering it.[76] The statute defining the offense must be

Abrahams, 133 App. Div. 226, 117 NYS 376. Under Pen. Code, § 515, a true entry of a year-end loan made to deceive insurance department is not forgery in the third degree, because not made "with intent to defraud or to conceal any larceny or misappropriation." People v. Corrigan, 195 N. Y. 1, 87 NE 792, afg. 129 App. Div. 75, 113 NYS 513.

55. Holloway v. State [Ark.] 118 SW 256.

56. Holloway v. State [Ark.] 118 SW 256; Maloney v. State [Ark.] 121 SW 728.

57. Holloway v. State [Ark.] 118 SW 256; Maloney v. State [Ark.] 121 SW 728; State v. Blodgett [Iowa] 121 NW 685.

58. Need not prove fraudulent intent in false making to establish an uttering. State v. Blodgett [Iowa] 121 NW 685.

59. Maloney v. State [Ark.] 121 SW 728. Instruction erroneous which intimated that knowledge of facts sufficient to put utterer on inquiry is sufficient. Wells v. Ter., 1 Okl. Cr. R. 469, 98 P 483.

60. Holloway v. State [Ark.] 118 SW 256; Maloney v. State [Ark.] 121 SW 728; State v. Ready [N. J. Law] 72 A 445.

61. Maloney v. State [Ark.] 121 SW 728; State v. Ready [N. J. Law] 72 A 445.

62. Proffer of forged will to a surrogate without jurisdiction to admit it to probate, owing to his prior issue of letters of administration, sufficient, where he had general power to approve such instruments. State v. Ready [N. J. Law] 72 A 445.

63. Mistake in initials immaterial where made through ignorance and clearly shown who was intended. Hall v. State, 55 Tex. Cr. R. 267, 116 SW 808.

64. Maloney v. State [Ark.] 121 SW 728.

65. Sufficient that drawer's name on check was forged, though not indorsed by payee. Maloney v. State [Ark.] 121 SW 728. Sufficient that name of drawer of check forged, though payee's name left blank. People v. Gorham, 9 Cal. App. 341, 99 P 391.

66. Conviction contrary to evidence where insanity clearly proved. State v. Brown [Utah] 102 P 641.

67. Former under Code, § 4854, and latter under § 4853, since one may be guilty of uttering instrument forged by another. State v. Blodgett [Iowa] 121 NW 685.

68. State v. Blodgett [Iowa] 121 NW 685.

69. Carter v. State, 55 Tex. Cr. R. 43, 114 SW 839.

70. Sufficient to allege forgery by X of deed from Y to X of Z's land, since Y may be shown entitled rather than Z. Snow v. State, 85 Ark. 203, 107 SW 980.

71. Upon indictment for forging indorsement to order upon railroad company, need not state whether company is a corporation, partnership, or joint stock company. Carter v. State, 55 Tex. Cr. R. 43, 114 SW 839.

72. Indictment alleging that accused feloniously offered to prosecutor a forged bank check payable to a third person, and not assigned, with intent to obtain possession of the property of prosecutor, and that accused knew that the check was forged, and which sets forth the check, sufficiently charges uttering. Maloney v. State [Ark.] 121 SW 728.

73. Indictment for forging an order signed C. W. Smith, with intent to defraud R. W. Smith, who was meant thereby, defendant being ignorant of initials, held sufficiently explicit as to person whose name was forged or intended to be forged. Hall v. State, 55 Tex. Cr. R. 267, 116 SW 808.

74. State v. Bowman [Kan.] 103 P 84.

75. Not an election. State v. Bowman [Kan.] 103 P 84.

76. Under Code Cr. Proc. § 244 (Wilson's

closely followed by the indictment.[77] In some states the tenor and purport of the forged instrument must be separately stated.[78]

*Presumptions.*See 9 C. L. 1421—One who utters a check whose drawer is fictitious is presumed to have forged it, or to have known it was forged.[79] The place of forgery is presumed, in the absence of proof to the contrary, to have been the place where the instrument was found or offered in its forged condition.[80]

*Admissibility of evidence.*See 11 C. L. 1535—Genuine signatures are often admissible for comparison with one alleged to be forged,[81] as are also photographs of genuine signatures,[82] though enlarged,[83] and though different parts of the name were photographed from different signatures.[84] A statutory provision that only such writings as were made before the controversy arose may be introduced by the writer for comparison, does not bar the state from introducing subsequent writings, either of the defendant,[85] or of the person whose signature is alleged to have been forged.[86] Previous forgeries by the defendant may be proved to discredit his testimony,[87] but not to establish the forgery in question.[88] A chain of forgeries, however, of which that charged is one, may be proved to establish the defendant's criminal intent.[89] A deceased person's declarations of intention to make a will like the one alleged to be forged are properly excluded,[90] as also circumstantial evidence of his declarations.[91] But evidence is not inadmissible merely because circumstantial.[92] As a rule, the guilty knowledge of a defendant charged with uttering a forged instrument is shown by circumstantial evidence.[93] The defendant may be estopped to contend that evidence is inadmissible.[94]

*Sufficiency of evidence.*See 11 C. L. 1536—Either forgery [95] or the uttering of a forgery [96] may be proved by circumstantial evidence. The place where a forgery was committed is prima facie proved to be within the county where the indictment was brought, by proof that the defendant uttered the instrument therein,[97] or had it there in his possession.[98] By statute, in some states, conviction may not be had

Rev. & Ann. St. 1903, § 5360). Wells v. Ter., 1 Okl. Cr. R. 469, 98 P 483.

77. Under Ky. St. 1903, § 1189, making it an offense to knowingly utter forged check on a "bank or company authorized by law," etc., indictment insufficient if it fails to show under what authority bank is doing business. Commonwealth v. Miller [Ky.] 115 SW 234. Under Rev. St. 1899, § 2001 (Ann. St. 1906, p. 1338), an indictment for forgery in second degree, which by § 2024 (p. 1345) is punishable by imprisonment in the penitentiary, must allege that defendant "feloniously" forged an allegation, "with intent feloniously to defraud" being insufficient. State v. Willard, 219 Mo. 721, 119 SW 416.

78. Indictment bad for combining. Forcy v. State, 55 Tex. Cr. R. 545, 117 SW 834.

79. Where uttered by one purporting to be payee. Maloney v. State [Ark.] 121 SW 728.

80. State v. Forbes [N. H.] 73 A 929.

81. Rainer v. State [Tex. Cr. R.] 119 SW 93.

82, 83, 84. State v. Ready [N. J. Law] 72 A 445.

85. Gen. St. 1895, p. 1400. State v. Barrie [N. J. Law] 73 A 248.

86. Subsequent genuine check admitted. State v. Barrie [N. J. Law] 73 A 248.

87, 88. State v. Hart, 140 Iowa, 456, 118 NW 784.

89. Upon indictment for forging deed to self from Y of Z's land, may prove forgery of deed to Y from Z's predecessor in title. Snow v. State, 85 Ark. 203, 107 SW 980.

90. Same beneficiary. State v. Ready [N. J. Law] 72 A 445.

91. Evidence that testator was directed to go to the office of the defendant to have his will drawn, because based on theory that he had expressed desire to make will. State v. Ready [N. J. Law] 72 A 445.

92. Defendant may be connected with forgery proved by circumstantial evidence. Holloway v. State [Ark.] 118 SW 256.

93. Officers of drawee bank may testify that drawer of check uttered by defendant without indorsement had no account at the bank. Maloney v. State [Ark.] 121 SW 728.

94. One indicted for uttering a forged receipt which he has had in his possession, claiming it to be a full discharge of a debt due from him to the apparent maker, cannot object that defendant's name is misspelled and that the receipt fails to show on its face any debt due from defendant. Telfair v. State, 56 Fla. 104, 47 S 863.

95. Instruction to that effect held correct. State v. Ready [N. J. Law] 72 A 445; State v. Jackson, 221 Mo. 478, 120 SW 66.

96. Circumstantial evidence used to connect defendant with the crime. State v. Hart, 140 Iowa, 456, 118 NW 784.

97. State v. Forbes [N. H.] 73 A 929.

98. Vendor's lien notes, where the land

upon comparison of handwriting alone, unless corroborated by other evidence.[99] Where the state has possession of the instrument alleged to have been forged, and fails to produce it, its case will not be deemed established,[1] though ordinarily the sufficiency of the evidence is determined from all the facts.[2]

Variance.[See 11 C. L. 1537]—Upon an indictment for uttering a forged check, it is no variance that the proof showed that the payee's name was left blank.[3] Where more is proved than is charged,[4] or where the proof differs from the charge as to immaterial matter,[5] the variance, if any, is not fatal. If the indictment is for uttering, the party receiving the forgery must be proved as alleged.[6]

Instructions.[See 11 C. L. 1537]—An instruction should not include matter inapplicable to the offense charged.[7] Where the instruction taken as a whole, is not misleading, it is not erroneous.[8]

Conviction.[See 9 C. L. 1422]—A special verdict may be a sufficient conviction, though not describing the offense in the language of the statute.[9]

FORMER ADJUDICATION.

The scope of this topic is noted below.[10]

§ 1. **The Doctrine in General, 1846.** Persons Affected, 1850.
§ 2. **Adjudication as a Bar of Causes of Action or Defense, 1855.**
§ 3. **Adjudication as Estoppel of Facts Litigated, 1861.**
§ 4. **Pleading and Proof, 1862.**

and defendant's home were within the county. Murphree v. State, 55 Tex. Cr. R. 316, 115 SW 1189.

99. Rainer v. State [Tex. Cr. R.] 119 SW 93.

1. Copy being set out without excusing production of original, conviction void. Deal v. State [Miss.] 50 S 495.

2. **Held sufficient:** To entitle defendant to go to jury on question of intent in making instrument. State v. Blodgett [Iowa] 121 NW 685. To constitute uttering of forged will. State v. Ready [N. J. Law] 72 A 445. To sustain conviction for uttering forged check. Rainer v. State [Tex. Cr. R.] 119 SW 93. To sustain conviction under Rev. St. 1899, § 200 (Ann. St. 1906, p. 1338), for raising duplicate deposit slip issued by bank. State v. Jackson, 221 Mo. 478, 120 SW 66. To sustain conviction of forgery of a satisfaction of a mortgage. People v. Shanley, 132 App. Div. 821, 117 NYS 845.

Held insufficient: To show defendant's knowledge of falsity of instrument he attempted to pass. Maloney v. State [Ark.] 121 SW 728. To connect defendant with forgery. Holloway v. State [Ark.] 118 SW 256. To sustain conviction of forgery. Brown v. State, 55 Tex. Cr. R. 9, 114 SW 820. To show intent to defraud, on indictment for forgery. Markowski v. State [Tex. Cr. R.] 120 SW 195.

3. Drawer being fictitious. People v. Gorham, 9 Cal. App. 341, 99 P 391.

4. Under Rev. St. U. S. § 5418, punishing alteration of affidavits for purpose of defrauding United States, proof of interlineations charged and of others not charged. Neff v. U. S. [C. C. A.] 165 F 273.

5. As to whether party injured was corporation or partnership. Wells v. Ter., 1 Okl. Cr. R. 469, 98 P 483. Upon indictment for forging indorsement to check drawn by Y, proof that it was drawn by Y, paymaster, no variance. Carter v. State, 55 Tex. Cr. R. 43, 114 SW 839. Variance between indictment and evidence as to forged deposit slip held immaterial within Rev. St. 1899, § 2534 (Ann. St. 1906, p. 1508), allowing acquittal only for variance material to merits. State v. Jackson, 221 Mo. 478, 120 SW 66.

6. Variance where charged with passing forged order on J, and proof showed it to be on J & Sons. Forey v. State, 55 Tex. Cr. R. 545, 117 SW 834.

7. Proper to refuse portion of requested instruction describing the land sought to be acquired by forgery as "to which he has a good and valid title such as to make him the owner of it." Snow v. State, 85 Ark. 203, 107 SW 980.

8. Where stated that no conviction could be had without proof beyond a reasonable doubt, any uncertainty in preceding statements as to probative force of suspicious circumstances removed. State v. Ready [N. J. Law] 72 A 445.

9. Under White's Pen. Ann. Code, art. 531, declaring that altering a written instrument without lawful authority and with intent to injure is forgery, a special verdict finding defendant "guilty of altering an instrument in writing" held sufficient. Carter v. State, 55 Tex. Cr. R. 43, 114 SW 839.

10. **Treats** of former adjudication, generally, and though many specific and concrete examples of the application of the general principles are of necessity retained as illustrations, a more particular treatment of the effect of judgments in particular proceedings, as former adjudications, will be found in the topics dealing with such proceedings (see such topics as Arbitration and Award,* § 5; Attachment,* § 15C; Attorneys and Counselors,* § 3; Bankruptcy,* §§ 22, 23; Elections,* §§ 10, 11; Eminent Domain,*

§ 1. *The doctrine in general.*[11]—See 11 C. L. 1537—*The doctrine of former adjudication is that whatever matters have been finally*[12] *determined on the merits,*[13]

§ 16; Equity,* § 13; Wills,* § 4G). **Excludes** the doctrines of the law of the case (see Appeal and Review,* §§ 13H, 15F), stare decisis (see Stare Decisis *), and election and waiver (see Election and Walver *). Excludes, also, collateral attack on judgments (see Judgments,* § 7), opening and vacation of judgments (see Judgments,* § 5D), and judgments as evidence (see Evidence,* §§ 1A, 7C). Excludes, also, the effect of foreign judgments as such (see Foreign Judgments *) and of judgments in criminal proceedings (see Criminal Law,* § 5).

11. Search Note: See notes in 3 C. L. 1477, 1478; 5 Id. 1505, 1506; 11 Id. 414; 21 L. R. A. 680; 42 Id. 753; 43 Id. 161; 47 Id. 131; 54 Id. 649; 58 Id. 410; 2 A. S. R. 876; 7 Id. 175; 14 Id. 250; 15 Id. 142; 18 Id. 790; 22 Id. 204; 27 Id. 195; 31 Id. 217; 44 Id. 566; 49 Id. 831; 73 Id. 164; 97 Id. 463, 762; 105 Id. 204; 112 Id. 21; 8 Ann. Cas. 315, 1134.

See, also, Judgment, Cent. Dig. §§ 987-1079, 1138-1233; Dec. Dig. §§ 540-581, 624-712; 23 Cyc. 1106-1115, 1206-1288; 24 A. & E. Enc. L. (2ed.) 704, 709, 792.

12. Lambert v. Rice [Iowa] 120 NW 96.

Held final: Decision in trade mark interference case. In re Herbst, 32 App. D. C. 269. Decree settling final account of executors of will giving property in trust is final. In re Harris Estate [Vt.] 72 A 912. **Interlocutory judgment in partition,** ordering sale of land, is conclusive as to right of plaintiff to have sale. Boylan v. George, 133 App. Div. 514, 117 NYS 573. **Judgment of appellate court,** reversing judgment of justice of the peace, constitutes final ruling on objection to jurisdiction of district court over the appeal. Radil v. Sawyer [Neb.] 120 NW 957. Defendant failing to make defense, and permitting **default judgment,** concluded thereby. Bennett Bros. v. Dempsey [Miss.] 48 S 901.

Held not final: Findings of fact leading to decree. Taylor v. Taylor [Or.] 103 P 524. Determination of tenant's liability for rent, on a plea of abatement to attachment for rent, not res adjudicata on subsequent trial of principal cause. Sessinghaus v. Knoche, 137 Mo. App. 323, 118 SW 104. **Judgment on motion to discharge attachment** because property is exempt. Shelby v. Ziegler [Okl.] 98 P 989. **Refusal of committing magistrate to hold prisoner** for trial or removal. United States v. Haas, 167 F 211. **Decision of commission appointed to determine a prisoner's sanity,** to determine whether he is in a condition to stand trial, not res adjudicata, even as to his condition at that time. People v. Lamb, 118 NYS 389. Where an appeal from adjudication of lunacy was dismissed because of **abatement of judgment by death** of alleged lunatic, the adjudication was not final. Succession of Jones, 120 La. 986, 45 S 965. **Refusal to discharge on habeas corpus** does not bar another similar proceeding. Orey v. Moller [Mo. App.] 121 SW 1102. Judgment for defendant **in ejectment** not a bar where no equitable defenses were pleaded. Stone v. Perkins, 217 Mo. 586, 117 SW 717. Order in ejectment "wherefore it is ordered, considered and adjudged that judgment be entered up for defendant, and that defendant do have and recover her costs," is not final judgment. Dallam v. Sanchez, 56 Fla. 779, 47 S 871. Refusal of **probate** of will, not conclusive on devisee. Dixon v. Cozine, 64 Misc. 602, 114 NYS 615. Judgment of probate court in Missouri, admitting will to probate, not final until expiration of time allowed for action to determine validity of will, as commencement of such action effects vacation of such judgment. In re Sands' Estate, 62 Misc. 146, 116 NYS 426. Finding of probate court that person adjudged insane was without sufficient means for his support, not res adjudicata in action by state to charge his estate with cost of his maintenance. Kaiser v. State [Kan.] 102 P 454. Order reviving a commission on claims is matter of right which may be had **on ex parte application** without notice, and cuts off no valid defense. Bresler v. Durfee, 152 Mich. 167, 15 Det. Leg. N. 78, 115 NW 960. **Judgment of appellate court,** reversing judgment and remanding cause for new trial. Logan v. Atlanta, etc., R. Co., 82 S. C. 518, 64 SE 515. Where the record shows that a demurrer to the petition was sustained by the trial court on the merits of the plaintiff's cause of action, and this judgment was affirmed by the circuit court in the usual form as without error, the finality of the judgment cannot be changed by looking to the opinion of the circuit court judge where it appears that the affirmation was based on technical grounds. Kehm v. German Mut. Ins. Co., 11 Ohio C. C. (N. S.) 1.

13. Judgment on merits is bar to subsequent action on same cause of action. Alexander v. Munroe [Or.] 103 P 514.

Dismissal.

Dismissal in general terms, not res adjudicata. Lewis v. Lewis [Ga.] 63 SE 1114.

Dismissal not on merits: Judgment dismissing complaint at close of plaintiff's evidence, not a bar where judgment roll does not show that it was on merits. Hopedale Elec. Co. v. Electric Storage Battery Co., 132 App. Div. 348, 116 NYS 859.

Dismissal without prejudice, not res adjudicata. Sumner v. Griffin [Ky.] 113 SW 422. Dismissal "without prejudice" not res adjudicata although reciting that testimony was taken which was insufficient to entitle plaintiff to relief. Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 P 1082. Dismissal without prejudice after demurrer is sustained, but before judgment entered, not res adjudicata. Fisk v. Keokuk [Iowa] 122 NW 896. Judgment of circuit court dismissing without prejudice cause appealed from justice court, not res adjudicata, although the judgment of dismissal was erroneous. Holman v. Lueck, 137 Wis. 375, 119 NW 124. Dismissal without prejudice of petition, alleging failure of administrator to inventory property, not a bar to petition for discovery of assets against administrator. Mitchell v.

Bay Probate Judge, 155 Mich. 550, 16 Det. Leg. N. 2, 119 NW 916.

Dismissal for want of jurisdiction, not res adjudicata. Herpolsheimer v. Acme Harvester Co., 83 Neb. 53, 119 NW 30. Judgment dismissing suit by commonwealth to collect costs incurred as prosecution of defendant's intestate, on ground of want of jurisdiction, not a bar to another action in court having jurisdiction. Commonwealth v. McCue's Ex'rs [Va.] 63 SE 1066. Dismissal of bill for specific performance on ground that relief cannot be granted in equity, not bar to action at law for breach of contract. Institution for Sav. v. Puffer, 201 Mass. 41, 87 NE 562. In proceedings to condemn all the water of a stream, lower proprietors in another state were dismissed on the ground that the state's right of eminent domain had no extraterritorial force and their compensation could not be determined. Held, such judgment of dismissal was not conclusive against their right to take water from the stream for public use which was not in issue. West & Co. v. Octoraro Water Co., 159 F 528. Dismissal of writ of **certiorari** for want of notice, not a bar to habeas corpus proceedings. Pundt v. Pendleton, 167 F 987. Denial of writ of certiorari because directed to judge instead of court, not a bar to another proceeding although opinion inadvertently used language appearing to be determination on merits. Richmond v. California Super. Ct., 9 Cal. App. 62, 98 P 57.

Dismissal for insufficiency of pleadings, as where petition fails to state cause of action. Standard Lumber Co. v. Coldwell [Ky.] 118 SW 999. Decree of dismissal on demurrer for failure to allege essential facts, not on merits. Miller v. Margerie [C. C. A.] 170 F 710. Dismissal of petition to annul probate of will, for insufficiency of allegations, not bar to another petition. Merrill Trust Co. v. Hartford, 104 Me. 566, 72 A 745. Dismissal on failure to plead over after motion to strike is sustained is bar to another action based on same facts. Wapello State Sav. Bank v. Colton [Iowa] 122 NW 149.

Dismissal for want of prosecution, not res adjudicata. Ellis & Co. v. Brannen [Ala.] 49 S 1034; Conant v. Boston Chamber of Commerce, 201 Mass. 479, 87 NE 906. Dismissal for want of prosecution after removal to federal court, not bar to subsequent action in state court. Shotwell v. Chesapeake & O. R. Co. [Ky.] 113 SW 512.

Dismissal pursuant to compromise, followed by part payment of amount agreed upon, held res adjudicata although plaintiff did not understand that he was compromising his claim as to one of defendants. Fidelity & Deposit Co. v. Neely, 122 La. 1036, 48 S 446.

Voluntary discontinuance in state court after new trial granted defendant for want of cause of action. New action in federal court not barred. Snare & Triest Co. v. Friedman [C. C. A.] 169 F 1. Dismissal by federal court, of action removed to it on request of plaintiff, pending demurrer to complaint, not a bar to another action in any court. Carr v. Howell, 154 Cal. 372, 97 P 885. Where trial court, **after remand,** sets aside its former judgment, and thereupon plaintiff dismisses his action and brings a new one in another court, the judgment of the appellate court is not res adjudicata in the new action. Jones v. Supreme Lodge K. of H., 236 Ill. 113, 86 NE 191.

Nonsuit.

Judgment of nonsuit is not a bar. Brooks v. Schlernitzauer, 113 NYS 484. Nonsuit, not on the merits, not res adjudicata. Smith v. Globe Home Furniture Mfg. Co. [N. C.] 65 SE 1009. Nonsuit granted at close of plaintiff's testimony, on ground that he was shown thereby to have been guilty of contributory negligence, not an adjudication on the merits. Gratz v. Parker, 137 Wis. 104, 118 NW 637. Judgment reciting that, at close of plaintiff's case, it appeared that his evidence was insufficient to entitle him to verdict, and that court directed entry of judgment for defendant, is final adjudication. McGuire v. Bryant Lumber & Shingle Mill Co., 53 Wash. 425, 102 P 237.

Directed verdict.

Held not on merits: Direction of verdict for defendant because action prematurely brought. Currier v. Teske [Neb.] 120 NW 1015. Decision of the common pleas court holding a petition, insufficient in that it fails to state facts justifying its submission to the jury, and directing a verdict for the defendant. St. Aubin v. Toledo, 11 Ohio C. C. (N. S.) 581.

Held on merits: Where parties rest and submit case, and court directs verdict, case is thus decided on merits, though a motion for a nonsuit might have prevailed if it had been made. Alexander v. Munroe [Or.] 103 P 514. Direction of verdict for executor in action against him on rejected claim, based on issues tendered as defense, after plaintiff has established prima facie case, is on the merits. Clark v. Scovill, 133 App. Div. 821, 118 NYS 235.

Judgment on demurrer.

Judgment on demurrer or motion may be res adjudicata. Spencer v. Watkins [C. C. A.] 159 F 379; Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 NE 193. Judgment overruling demurrer **binding on points of law** necessarily involved. McDuffie v. Ocean S. S. Co., 5 Ga. App. 125, 62 SE 1008.

Held res adjudicata: Judgment sustaining demurrer to the merits is res adjudicata. Marsh v. Atlantic Coast Line R. Co. [N. C.] 65 SE 911. Judgment sustaining demurrer to petition for insufficiency of allegations is bar to another action based on same facts. Pettis v. McLain, 21 Okl. 521, 98 P 927. Judgment sustaining demurrer to petition because transaction as alleged does not constitute cause of action is res adjudicata although facts were not correctly stated. Wolfe v. Georgia R. & Elec. Co. [Ga. App.] 65 SE 62.

Held not res adjudicata: Judgment sustaining general demurrer without reciting on which ground it was sustained, not res adjudicata. Goldsborough v. Hewitt [Okl.] 99 P 907. Judgment overruling demurrer to answer, with leave to file replication, in default of which petition shall stand dismissed, it not being shown that conditions thereof were complied with, is not a final judgment. McKinnon v. Johnson [Fla.] 48 S 910. Overruling of demurrer to complaint, followed by answer, not res adjudicata as to sufficiency of complaint. Fulton County Gas & Elec. Co. v. Hudson River Tel. Co., 130 App. Div. 343, 114 NYS 642. Judgment for defendant upon sustaining general demurrer to bill in equity is not bar to subsequent suit at law, where ground for sustaining

in any action or proceedings,[14] *in a court having jurisdiction,*[15] *or before an officer or board exercising judicial functions,*[16] *are concluded by such adjudication and cannot again be litigated*[17] *between the same parties or their privies,*[18] *either before the*

demurrer is that remedy was at law. Peterson v. Mayer, 142 Ill. App. 257. Decree sustaining demurrer to bill in equity seeking relief against judgment at law and dismissing same for want of equity does not bar relief under Practice Act, 1872, § 66. Luckey v. Yeomen of America, 141 Ill. App. 332. Judgment on demurrer sustained on jurisdictional grounds is not a bar to a suit on the merits. McCarthy v. Crawford, 141 Ill. App. 276.

Judgment on the pleadings.

Judgment for defendant in replevin on sole ground that petition does not state cause of action, not res adjudicata. Pennington County Bank v. Bauman [Neb.] 122 NW 848.

Judgment by confession or consent.

Judgment by confession, conclusive. Farmers' State Bank v. Stephenson [Okl.] 102 P 992. Judgment on merits rendered by consent is conclusive. In re Harris' Estate [Vt.] 72 A 912; Commonwealth v. Churchill [Ky.] 115 SW 189. Consent decree in partition signed by widow individually, and as guardian for her infant children, held bar to subsequent action for dower or by children for partition, though such decree was signed in county other than that in which land was so situated, such signature being equivalent to a hearing in such county by consent, as authorized by Code Civ. Proc. 1902, § 144. Weathersbee v. Weathersbee, 82 S. C. 4, 62 SE 838. A judgment confessed by father to son to defraud creditors is binding on the father and all persons claiming under him. Dillen v. Dillen, 221 Pa. 435, 70 A 806.

14. An adjudication on **certiorari,** setting aside municipal proceedings, concludes the right of the matter as against the respondents, and furnishes record evidence precluding them from setting up the nullified proceedings either against the prosecutor or the state. Specht v. Central Passenger R. Co. [N. J. Law] 68 A 785. **Confirmation of assessment for irrigation** district conclusive as to benefits received in action collaterally attacking assessments. Knowles v. New Sweden Irr. Dist. [Idaho] 101 P 81. **Order authorizing receiver's certificate** of indebtedness is conclusive. Knickerbocker Trust Co. v. Tarrytown, etc., R. Co., 133 App. Div. 285, 117 NYS 871. **Mortgage foreclosure** proceedings under power of sale. Felgner's Adm'rs v. Slingluff, 109 Md. 474, 71 A 978. Order in **proceedings to cancel judgment** on ground of discharge in bankruptcy, conclusive on plea of release in bankruptcy, in action on judgment. Guiterman v. Coutant, 60 Misc. 567, 113 NYS 924. On motion to vacate judgment, order is res adjudicata in suit in equity to vacate. Bunch v. Pierce County, 53 Wash. 298, 101 P 874. Order in **supplementary proceedings** directing judgment debtor to deliver property to receiver, conclusive as to ownership in contempt proceedings for noncompliance. Goldreyer v. Shatz, 114 NYS 339. Degree in **partition proceedings,** conclusive as between the parties to the action. Connor v. McCoy [S. C.] 65 SE 257. Ruling on **motion to retax attorney's fees.** Rogers v. Crandall [Iowa] 121 NW 1092. On **accounting** by trustee, determination as to amount due is conclusive as to right to credit for payments. Bernhardt v. Taylor, 223 Pa. 307, 72 A 620. Confirmation of guardian's settlement is conclusive as to all matters included in account. Nelson v. Cowling [Ark.] 116 SW 890. Decrees construing will, and confirming trustee's accounts, is conclusive on parties as against grantee of trustee. Lewine v. Gerardo, 60 Misc. 261, 112 NYS 192. **Referee's report,** that affidavit that affiant was not served with process, made on motion to open default, was perjured, being confirmed without appeal, conclusive on question of service, on motion to punish affiant for contempt. Dollard v. Koronsky, 61 Misc. 392, 113 NYS 793. Judgment in **probate proceedings** operates as res adjudicata. Reavis v. Reavis, 135 Mo. App. 199, 115 SW 1063. Judgment granting letters dismissory to an executor, conclusive. Thompson v. Chapeau [Ga.] 65 SE 127. Order directing special guardian to convey ward's interest in certain property. Danahy v. Fagan, 63 Misc. 658, 117 NYS 300. Denial of application for appointment of guardian of children on ground that mother of such children was not fit person to act as guardian is res adjudicata as to fitness of mother, except as to facts occurring since such adjudication. In re Snowball's Estate [Cal.] 104 P 444. Decree of surrogate having jurisdiction has same conclusive effect as judgment of any other court. In re Heaney's Estate, 125 App. Div. 619, 110 NYS 80.

15. Decision by court without jurisdiction, not res adjudicata. Dix v. Dix [Ga.] 64 SE 790. In scire facias proceedings on recognizance, judgment against surety, without jurisdiction over him, does not merge the recognizance. Leary v. U. S. [C. C. A.] 170 F 941.

16. Decision of **board of state land commissioners,** acting as board of harbor line commissioners, locating shore line of lake, is res adjudicata. Williams v. Cole [Wash.] 102 P 870. Decision of **secretary of interior** as to whether certain lands are within terms of swamp land grant is conclusive. Little v. Williams [Ark.] 113 SW 340. Determination of **canvassing board** that proposition to levy tax for high school had carried, not conclusive. Humbolt Board of Education v. Klein [Kan.] 99 P 222. Decision of Virginia **corporation commission,** fixing railway passenger rates, not res adjudicata, proceedings to establish rates being legislative and not judicial in character. Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 53 Law. Ed. —.

17. Sandoval v. Albright [N. M.] 93 P 717; Newton v. Hunt, 134 App. Div. 325, 119 NYS 3; Kruegel v. Rawlins [Tex. Civ. App.] 121 SW 216; Hawes & Co. v. Wm. R. Trigg Co. [Va.] 65 SE 538. Where questions sought to be raised had been determined in another cause between the same parties, on the merits by a competent tribunal, the doctrine of res adjudicata applied. Van Alstine v. McAldon, 141 Ill. App. 27. While a judgment stands in full force, it is conclusive, as

same or another tribunal,[19] *until the adjudication has been duly reversed, modified, or otherwise adjudged erroneous.*[20] As to the binding effect of a judgment as an estoppel, pending an appeal therefrom, the courts of the various states are not in harmony,[21] but even if judgment cannot be considered as res adjudicata before the

to the parties thereto, that the material parts of the **evidence** upon which it was based were true. Keithley v. Stevens, 142 Ill. App. 406. Decision as to **right of school district to tax territory** which has been detached therefrom. School Dist. No. 116 of Sedgwick County v. School Dist. No. 41 of Sedgwick County [Kan.] 99 P 620. **Determination that dismissal of prior petition was not on merits,** and hence not res adjudicata, is conclusive. Wood v. Wood [Iowa] 121 NW 1090. **Judgment of conviction** is conclusive against an action for malicious prosecution, though false evidence may have induced such conviction. Keithley v. Stevens, 142 Ill. App. 406. A **sequestration judgment** of the supreme court is conclusive where no defect of parties is apparent. In re New York, W. & B. R. Co., 193 N. Y. 72, 85 NE 1014. Adjudication that deed absolute on face was a mortgage, res adjudicata **as to ownership.** Toole v. Weirick [Mont.] 102 P 590. Action by remaindermen to protect their interest against alleged void mortgage given by trustee and life tenant. Judgment that fee simple title was in remainderman, conclusive. Watson v. Equitable Mortg. Co. [Ga.] 63 SE 912.

18. See post this section, subdivision Persons Affected.

19. Decision on habeas corpus, that arrested Chinese were attempting to enter, and had not already entered, the United States, conclusive in similar proceeding **in different jurisdiction.** Lui Lum v. U. S. [C. C. A.] 166 F 106. Leave to amend a petition by substituting new parties having been granted by a common pleas judge, it appearing that a copy of the amended petition was attached to the motion to amend, the question of the sufficiency of the amended petition as to new parties plaintiff and defendant, and averments necessarily passed upon in granting the motion, will not be considered by **another judge of same court** upon a subsequent hearing upon the amended petition. State v. Kilgour, 8 Ohio N. P. (N. S.) 617. Decision of commissioner of **patents** and court of appeals in interference proceedings, awarding priority, conclusive in subsequent suit under Rev. St. 4915 (U. S. Comp. St. 1901, p. 3392). Richards v. Meissner, 163 F 957. Rule applies in **action for divorce.** Yeager v. Yeager [Ind. App.] 87 NE 144. Questions as to the validity of a will or as to its cancellation or revocation are concluded by the **decision of probate court,** and cannot be considered in a suit in equity to set aside an order of probate. In re Brown's Estate [Iowa] 117 NW 260. Since circuit court and supreme court have **concurrent jurisdiction** in prohibition, a judgment in former is bar to new proceeding in latter on same cause. Chesapeake & O. R. Co. v. McDonald, 65 W. Va. 201, 63 SE 968.

As between federal and state courts: Decision of federal court, conclusive in subsequent action in state court between same parties, involving same issues (Louisville & N. R. Co. v. Central Stock Yards, 212 U. S. 132, 53 Law. Ed. —; Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 NE 193), although prior case may have been erroneously removed to federal court (Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 Law. Ed. —). Judgment in state court given same force in federal courts as is given in court where rendered. Smith v. Mosier, 169 F 430. The effect to be given in a state court to a decree of a federal court is governed by the laws of the state where federal court was sitting, but whether one not a party was a privy to the judgment must be determined by the law of the state where the question is raised. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 NE 193.

20. Rainey v. Kemp [Tex. Civ. App.] 118 SW 630; Disman v. Flippin's Adm'x [Ky.] 116 SW 740. Even if in fact erroneous. Athol Sav. Bank v. Bennett, 203 Mass. 480, 89 NE 632. Although decision is contrary to rules of equity. Tonnele v. Wetmore, 195 N. Y. 436, 88 NE 1068. Judgment, unless directly attacked for perjury in obtaining it, is bar to action for damages for such perjury. Horner v. Schinstock [Kan.] 101 P 996. Divorce decree awarding custody of children, until modified by direct proceedings, conclusive in habeas corpus proceedings. People v. Small, 237 Ill. 169, 86 NE 733. Decree dissolving stock insurance company held conclusive, after time for appeal has expired. Ensworth v. National Life Ass'n, 81 Conn. 592, 71 A 791. Acceptance of amounts awarded by judgment creates **estoppel to question conclusiveness** of such judgment. Reavis v. Reavis, 135 Mo. App. 199, 115 SW 1063. Where a district court had jurisdiction and all parties appeared and judgment was rendered and sale had and confirmed, the parties are estopped to deny the validity of the judgment in the absence of fraud on the face of the proceedings, despite the fact that the judgment is erroneous and would have been reversed on appeal. Parties cannot attack on ground that it was clear from will that property was not to be partitioned. Kazebeer v. Nunemaker, 82 Neb. 732, 118 NW 646.

Where judgment is reversed: Judgment for plaintiff, in prior action, reversed and plaintiff nonsuited, not admissible against defendant. Floyd v. Kulp Lumber Co., 222 Pa. 257, 71 A 13. No bar where decree was reversed on certiorari, and held invalid. Hemmer v. Dunlavey [Iowa] 121 NW 1024. Where judgment is reversed and cause remanded as a whole for further proceedings, plea of res adjudicata must be based on judgment entered in trial court after such remand. Franklin School Tp. v. Wiggins [Iowa] 120 NW 1032.

Where judgment is affirmed: When allowance of motion to quash execution, on erroneous grounds, is not reversible because another ground was sufficient, judgment creditor is not barred by ruling as to insufficient grounds. Lee's Adm'rs v. Thompson [Ky.] 116 SW 775.

21. Federal courts follow rule as laid down by courts of state in which it is sit-

time for appeal had expired another action involving the same issues would nevertheless be barred by the pendency of the former action.[22] It is sometimes held that a former decision may be res adjudicata although the question was purely one of law,[23] but there are decisions to the contrary,[24] and this question is usually referable to the doctrine of stare decisis.[25] It makes no difference that one suit is at law and the other in equity.[26] The judgment is no bar to actions on rights subsequently acquired.[27] It is the judgment, and not the findings of fact, which constitute the former adjudication.[28] In some cases a decision will be followed where the same evidence is involved, although not available as res adjudicata because not between the same parties.[29] The amount paid on a judgment cannot be recovered on the ground that another was jointly liable.[30]

Persons affected. See 11 C. L. 1542—A judgment is binding upon and conclusive between all adversary parties thereto[31] and their privies,[32] and while only parties

ting. Contra Costa Water Co. v. Oakland, 165 F 518.

22. Lumley v. Miller [S. D.] 119 NW 1014.

23. Spencer v. Watkins [C. C. A.] 169 F 379.

24. Decision of circuit court in a criminal case upon constitutionality of a statute held not to deprive court of appeals of right to pass upon constitutionality of such statute in a subsequent civil case to which other persons are parties. Nutwell v. Anne Arundel County Com'rs, 110 Md. 667, 73 A 710.

25. See Stare Decisis.

26. United Oil & Gas Co. v. Ellsworth [Ind. App.] 88 NE 362. Judgment as to construction of contract in action at law, conclusive in suit in equity to restrain enforcement of judgment. Wyandotte Public Schools v. Harding [Mich.] 16 Det. Leg. N. 306, 121 NW 296. In creditor's suit, defense that plaintiff's judgment was obtained by perjury cannot be raised. Champagne Lumber Co. v. Jahn [C. C. A.] 168 F 510.

27. Decree dismissing bill to quiet title, because plaintiff's title was insufficient, not bar to subsequent suit after **title** is perfected. Kenealy v. Glos, 241 Ill. 15, 89 NE 289. Litigation concerning title to land, not binding on party, as to title subsequently acquired from one as to whom there was no adjudication. In re Brigham's Estate [Iowa] 120 NW 1054. Judgment in ejectment against holder of tax title, not res adjudicata as to title acquired by purchase at another subsequent tax sale. Ross v. Kelson [Kan.] 98 P 772. Judgment in replevin not a bar to subsequent action asserting a **right of possession** under changed conditions. Pennington County Bank v. Bauman [Neb.] 122 NW 848. Judgment for garnishee on ground that he has a **lien** on the fund in his hands does not bar subsequent garnishment proceeding to reach fund after termination of lien. Cope v. Shoemate [Mo. App.] 119 SW 503.

28. Where they are inconsistent, the judgment will govern. Moehlenpah v. Mayhew, 139 Wis. 561, 119 NW 826.

29. Decision as to validity of patent followed in subsequent case involving same patent. Crier v. Innes [C. C. A.] 170 F 324. A judgment establishing the relation of debtor and creditor between the parties, and the amount of the indebtdeness, is conclusive as to such facts, against third persons, when collaterally attacked. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. See Judgments, § 7.

30. Stockholder held liable to corporation for misconduct could not thereafter recover part of amount paid by him on such judgment, on ground that another stockholder was jointly liable. Avery v. Central Bank, 221 Mo. 71, 119 SW 1106.

31. Shephard v. Coeur D'Alene Lumber Co. [Idaho] 101 P 591. Decree quieting title to land conveyed by a cestui que trust to complainant by mesne conveyances, the court having jurisdiction to determine the question, held binding upon the parties. McFall v. Kirkpatrick, 236 Ill. 181, 86 NE 139. In suit to settle an estate, where all persons interested were joined, acquiesced in the judgment and accepted its benefits, neither they nor strangers could question it. Baker v. Royal Lead & Spar Co., 32 Ky. L. R. 982, 107 SW 704. In action to construe a will, every party thereto may assert his right, and the judgment is as conclusive on such right as it would be in any other litigation. St. John v. Andrews Inst. for Girls, 192 N. Y. 382, 85 NE 143.

Codefendants: Are **concluded** where their interests are adversary. Kohly v. Fernandez, 133 App. Div. 723, 118 NYS 163. A decree in an action against two persons, restraining one of them from doing an act, is conclusive in an action against the latter, by his codefendant, for failure to perform the act. Fox v. Workman, 155 Cal. 201, 100 P 246. Where there are no cross pleadings or issues between defendants, they are **not concluded** as to each other. City of Owensboro v. Westinghouse, Church, Kerr & Co. [C. C. A.] 165 F 385. Codefendants between whom no issues were framed, not concluded as to each other by judgment rendered, unless plaintiff's claim against each negatived any rights of one defendant as against the other. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826. In action against maker of note and one who assumed its payment, no cross issues being joined, judgment of dismissal, as to latter, not a bar to subsequent action against him by former to recover damages for breach of contract of assumption. Wiltrout v. Showers, 82 Neb. 777, 118 NW 1080. Partition suit against two, cross complaint by one not served on other. Judgment not binding on latter as against cross complainant. Milbourn v. Baugher [Ind. App.] 86 NE 874.

Intervenors: One who intervenes in an action between third parties may dismiss his intervention without prejudice, and, after such dismissal, a judgment entered in the

action will not affect his interest in the matter in litigation. Lincoln Upholstering Co. v. Baker, 82 Neb. 592, 118 NW 321. One who makes application in condemnation proceedings to have damages assessed paid to him instead of to his grantor, the record owner, held estopped thereafter to assert title to the land condemned. Cape Girardeau, etc., R. Co. v. Southern Illinois & Missouri Bridge Co., 215 Mo. 286, 114 SW 1084.

32. City of New York v. New York City R. Co., 193 N. Y. 543, 86 NE 565.

Particular relations considered.

Trustee in a trust deed securing a note, not bound by judgment in suit on note to foreclose the lien, to which he was not a party. Bowden v. Patterson [Tex. Civ. App.] 111 SW 182. Decree quieting title against cestui que trust and trustee held binding on subsequent appointee of cestui que trust by will under a power. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Judgment against a debtor, recovered more than two years after an assignment of specific property to pay creditors, is conclusive, in the absence of fraud, in an action by the judgment creditor against the trustee to enforce payment. Nicholas v. Lord, 195 N. Y. 388, 85 NE 1083.

Principal defendant and garnishee: Judgment against garnishee may be attacked by principal defendant on ground that the judgment against him, on which the later judgment was founded, had been paid prior to the institution of garnishment proceedings. Warthen v. Melton [Ga.] 63 SE 832. Judgment in garnishment proceedings against grantee as garnishee, not binding on grantor as to amount of consideration for the conveyance. Combs v. Combs [Ky.] 114 SW 334.

Stockholders and corporation: Stockholders not parties to suit in which assets of the company were collected and distributed through receiver may attack accounts of receiver. Buist v. Williams, 81 S. C. 495, 62 SE 859.

Association and members: Judgment against unincorporated association, conclusive on liability of those who were members when judgment obtained. Tarbell v. Gifford [Vt.] 72 A 921.

Municipality and citizens: Judgment against city declaring that there is no street at certain place, binding not only on city but on general public. Williams v. Cole [Wash.] 102 P 870. Property owners bound by judgment against city in mandamus proceedings to compel reassessment to pay cost of improvements. Shaw v. Waldron [Wash.] 104 P 272.

Homstead claimant and government: Homestead claimant whose rights had attached prior to those of a railway under congressional grant, not concluded by judgment against government in suit brought by it to cancel patents issued to railroad company. Brandon v. Ard, 211 U. S. 11, 53 Law. Ed. —.

Reversioner and present owner: Rights of reversioners to land acquired by state for canal feeder and afterwards abandoned, not concluded by decree in suit by state to cancel leases thereto, to which they were not parties. People v. Economy L. & P. Co., 241 Ill. 290, 89 NE 760.

Parties primarily and secondarily liable: Judgment in favor of street railway, primarily liable for injury in street, not available on behalf of city, secondarily liable. Sutter v. Kansas City [Mo. App.] 119 SW 1084.

Owner and insurer: Decree in salvage proceedings against owner of vessel binding against insurer. Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co. [C. C. A.] 167 F 119.

Debtor and creditor: Simple creditor of mortgagor concluded by decree of foreclosure from attacking the mortgage for usury. Miller v. Parker [Ga.] 65 SE 410.

Partners: Judgment on account for labor due plaintiff individually, not a bar to action on account for labor by a firm composed of plaintiff and another and assigned to plaintiff. Alabama Const. Co. v. Watson [Ala.] 48 S 506. Adjudication in bankruptcy against partnership, not conclusive as to existence of partnership and title to assets, as against trustee in bankruptcy of individual partner who was not allowed a hearing on that question. Manson v. Williams, 213 U. S. 453, 53 Law. Ed. —.

Grantor and grantee: Buyer entitled to benefit of judgment in favor of his seller in claim and delivery. Lumley v. Miller [S. D.] 119 NW 1014. Decree upholding tax lien, conclusive on subsequent grantee of owner. Anker v. Schreib [Mich.] 16 Det. Leg. N. 617, 122 NW 530. Privity of estate will not bar the privy unless he acquires his interest after judgment. Pickens v. Coal River Boom & Timber Co. [W. Va.] 65 SE 865. Judgment in trespass to try title not binding on one to whom defendant had conveyed prior to commencement of action. Elliott v. Morris [Tex. Civ. App.] 121 SW 209. Judgment in suit to foreclose assessment for benefits, against grantor after conveyance by unrecorded deed, not binding on grantee, the proceeding not being in rem under recital that owner is unknown. Farmers' & Merchants' Bank v. Layson Lumber Co., 87 Ark. 607, 113 SW 793. Decree restraining diversion of water, based on plaintiff's riparian rights, it not appearing that defendant owned any land or as to what land he was restrained, is personal and not available in behalf of plaintiff's successor in interest nor against defendant's successor in interest. Davis v. Chamberlain, 51 Or. 304, 98 P 154. A judgment quieting title in plaintiff to a strip of ground, used as a private way, is not binding against one to whom the plaintiff subsequently conveys other land bounded by such strip and designating it as a street. Petitpierre v. Maguire, 155 Cal. 242, 100 P 690.

Corporation and its successor: Construction of charter of street car company in action by city against company, res adjudicata in subsequent action by city against successor of such company. City of New York v. New York City R. Co., 193 N. Y. 543, 86 NE 565.

Payee and indorsee: Where maker of note offsets claim against payee in suit by indorsee, he cannot thereafter sue payee on such claim. Piotrowski v. Czerwinski, 138 Wis. 396, 120 NW 268.

Assignor and assignee: Assignee of debt not bound by judgment for debtor against assignor on claim due from latter urged as set-off to assigned debt. Webster v. Abbott, 117 NYS 949. Decree foreclosing tax deed, barring a mortgagee, and all claiming under him after filing of lis pendens, does

and their privies are affected,[33] still it is not necessary that one be a party of record,

not conclude one claiming under such mortgagee by unrecorded assignment before the suit, not made a party although assignment was known to plaintiff. Hobe-Peters Land Co. v. Farr, 170 F 644.

Mortgagor and mortgagee: Mortgagee bound by judgment against mortgagor only in such suits as were begun before mortgage was executed. Moody v. Vondereau, 131 Ga. 521, 62 SE 821. Mortgagee not bound by foreclosure of mechanics' lien to which he was not made a party. Curie v. Wright, 140 Iowa, 651, 119 NW 74.

Mortgagor and maker of note secured: In an action on a mortgage, a judgment in the mortgagor's favor is available to the joint makers of the notes, which the mortgage was given to secure, as res judicata upon the trial of an action on such joint notes. Boltz v. Muehlhof, 37 Pa. Super. Ct. 375.

Lessor and lessee: Lessee, not a party to foreclosure of mortgage on leased premises, not bound by decree. Wacht v. Erskine, 61 Misc. 96, 113 NYS 130. Judgment in favor of lessee railroad in action against it by its employer for injuries, not conclusive in action against lessor railroad for same injuries. Logan v. Atlanta, etc., R. Co., 82 S. C. 580, 64 SE 515.

Bailor and bailee: Judgment and order in attachment sustaining attachment and holding that property was subject to attachment, binding on owner and all persons having interest therein, including bailee in whose hands it was attached. Jessup v. Atchison, etc., R. Co. [Kan.] 100 P 472. A pledgee of a note and mortgage holding same to indemnify him against liability as surety of mortgagee, not bound by judgment canceling such note and mortgage rendered in suit to which he was not party. Aetna Indemnity Co. v. Altadena Min. & Inv. Syndicate [Cal. App.] 104 P 470.

Principal and agent: Judgment against an agent for negligence, not conclusive against principal. Rookard v. Atlanta, etc., R. Co. [S. C.] 65 SE 1047.

Government and agents thereof: Under Pub. Acts 1901, p. 245, No. 173, § 13, and Comp. Laws, § 105, the state is real party in interest in suit brought by railroad against auditor general and attorney general to restrain collection of tax. People v. Detroit, etc., R. Co. [Mich.] 16 Det. Leg. N. 328, 121 NW 814. Judgment against state and city denying right to erect or authorize erection of building in dedicated park, conclusive on park commissioners whose only right was derived from city and from legislative acts, and also against person whose only right to erect building was derived from park commissioners. Ward v. Field Museum of Natural History, 241 Ill. 496, 89 NE 731. A judgment for the recovery of land for breach of a condition in a deed to the United States, recovered against an officer occupying such land, does not affect the title of the United States. Fay v. Locke, 201 Mass. 387, 87 NE 753.

Principal and surety: Surety on indemnity bond, bound by judgment against principal as to his misconduct and failure to account. Commonwealth v. Fidelity & Deposit Co., 224 Pa. 95, 73 A 327. Surety on claim bond in garnishment bound by judgment against claimant finding ownership in plaintiff. Jordan v. Thornton, 5 Ga. App. 537, 63 SE 601.

Husband and wife: Wife of one who entered government land not subject to entry, concluded by judgment in ejectment against husband. Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574.

Heirs, legatees, decedent and personal representatives: Heir not claiming property by inheritance, but by purchase from his ancestor, not concluded by proceedings against latter to which he was not party. In re Brigham's Estate [Iowa] 120 NW 1054. Judgment against life tenant and residuary legatees, binding on a legatee afterward born. Newton v. Hunt, 134 App. Div. 325, 119 NYS 3. Judgment in action to construe will, against all residuary legatees, binding on legatee of same class subsequently born (Tonnele v. Wetmore, 195 N. Y. 436, 88 NE 1068), but not against persons subsequently born who do not take by representation, but directly as descendants of testator, and hence do not succeed to any right, title, or interest of the parties to the prior litigation (Schmidt v. Jewett, 195 N. Y. 486, 88 NE 1110). Dismissal of partition suit of one grandchild of testator, brought to establish claim as remainderman, not res adjudicata in suit by another grandchild's grantee to establish a similar claim. Clark v. Kittenplan, 63 Misc. 122, 118 NYS 404. Bodily heirs of life tenant, who are designated as remaindermen, are bound by judgment against life tenant, to effect that the property was required to pay testator's debts. Yarborough v. Moore [N. C.] 65 SE 763. Judgment against ancillary administrator in suit by him to enforce lien on distributive share, not a bar to suit on same cause of action by another ancillary administrator in another jurisdiction. Ingersoll v. Coram, 211 U. S. 335, 53 Law. Ed. 208. Devise to life tenant, remainder to be sold by executor and proceeds paid in part to heir. Suit by life tenant to reform deed to testator, joined in by executor, not res adjudicata as to heir not made party. Smith v. Hunter, 241 Ill. 514, 89 NE 686. Where the owner of a vested estate is before the court, the interest of a contingent remainderman will be bound by the decree, though he is not before the court, the owner representing him. McFall v. Kirkpatrick, 236 Ill. 281, 86 NE 139. Judgment settling account of administrators, one of whom was an heir, fixing amounts due heirs, but reciting that it shall not affect any equity as between administrators, is not res adjudicata as between administrators. Moore v. Woodson [Tex. Civ. App.] 116 SW 608.

33. United Sheet & Tin Plate Co. v. Hess [C. C. A.] 159 F 889; In re Sharp, 15 Idaho, 120, 96 P 563; Cooper v. Ratliff [Ky.] 116 SW 748; Graves v. Jackson, 150 N. C. 383, 64 SE 128; Woods v. Klein, 223 Pa. 256, 72 A 523; Boucofski v. Jacobson [Utah] 104 P 117. One not made a party because presumed, from absence, to be dead, not bound by judgment in partition. Grimes v. Miller, 221 Mo. 636, 121 SW 21. Recitals in chancery proceedings that parties named herein are the parties composing a certain firm are not evidence of such facts as against other parties. Sims v. Mobile, etc., R. Co., 155 Ala. 233, 46 S 494.

In particular proceedings: Persons not

but it is sufficient if he has an interest and participates in the action [84] or has neg-

parties to **ex parte proceeding** in which land was sold, not bound by decree therein. Moore v. Rowland Lumber Co., 150 N. C. 261, 63 SE 953. One not party to **proceeding for appointment of administrator,** not bound thereby. In re Brigham's Estate [Iowa] 120 NW 1054. Judgment of **probate** court in Missouri admitting will to probate, not binding on persons not parties to such proceedings who are seeking probate of different will. In re Sands' Estate, 62 Misc. 146, 116 NYS 426. Judgment entered pursuant to stipulation, admitting will to probate, not binding on proponent of alleged later, lost will, who was not a party thereto. City of Flint v. Stockdale's Estate [Mich.] 16 Det. Leg. N. 493, 122 NW 279. The appearance of an administrator as a party to a cause, and his allegation of probable liability against the estate, does not make the judgment thereafter obtained res judicata as to creditors of the estate who were not parties to the action and who had at the time another action pending to which the estate was a party defendant, and the plea of res judicata cannot stand against the equities of creditors so situated whose action has resulted in a judgment. Fleming v. McGuffey, 8 Ohio N. P. (N. S.) 430. Holder of mortgage constituting prior lien, not bound by **mechanic's lien foreclosure** to which he was not party. Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 P 1082. Adjudication in suit, under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), **to determine title to realty,** that neither plaintiff nor defendant had title, held not to adjudicate title of such parties as against strangers. Richards v. Northwestern Coal & Min. Co., 221 Mo. 149, 119 SW 953. In **trespass to try title,** a judgment against defendant in favor of a third person in an action to which plaintiff was not party, not available to him to establish his title. Connor v. Weik [Tex. Civ. App.] 116 SW 650. **Decree determining priorities of liens** on land sold at judicial sale, not binding on lienors who were not made parties. Kirk v. Oakey [Va.] 65 SE 528. A judgment in **trespass to try title** is not conclusive on one not a party. Slaughter v. Cooper [Tex. Civ. App.] 107 SW 897. **Decree quieting title,** not binding on one whose claim antedates commencement of that action, who was minor at time and not made a party nor represented at trial. Peck v. Ayres [Kan.] 100 P 283. Judgment in **ejectment** by defendant's predecessor in title against a third person, not res adjudicata as to defendant's title as against plaintiff. Godley v. Barnes [Ga.] 64 SE 546. **Judgment on account** not conclusive as to date when debt contracted, as against one not a party thereto, who on execution claims the property by conveyance from the debtor. Hinkle v. Smith [Ga.] 65 SE 427. **Decree determining character of lands conveyed** by board of directors of levee district, rendered in suit to which board was not a party, held not binding on it. Little v. Williams [Ark.] 113 SW 340. **Judgment against county for defect in highway:** Person liable over, but not made party or notified, not bound. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656. **Broker suing for commission** not entitled to benefit of judgment for purchaser against principal. Polak v. Rosenzweig Realty Operating Co., 131 App. Div. 598, 116 NYS 38. **Decree establishing rights of heirs** and devisees under contract as to distribution, not binding on state treasurer as to liability for inheritance tax. Lacy v. State Treasurer [Iowa] 121 NW 179. Mortgage to trustee to secure bonds of corporation. **Suit to establish vendor's lien** on property. Bondholder made party after he had disposed of bonds, trustee not made party. Decree not conclusive as against mortgage. Welch v. Farmers' L. & T. Co. [C. C. A.] 165 F 561. Though in **mortgage foreclosure** the question of adjustment of rights of the parties to the record of an original suit interested in the premises were so involved that further process was not necessary to authorize such adjustment on filing of cross complaints, it does not follow that such persons are parties to the judgment. First Nat. Bank v. Farmers' & Merchants' Nat. Bank, 171 Ind. 323, 86 NE 417. Infants who owned an interest in land but were not made parties to **an action for taxes** are not bound by the judgment. District of Clifton v. Pfirman, 33 Ky. L. R. 529, 110 SW 406.

Necessity of service: Judgment in ejectment not conclusive against one named as defendant, but not served with process, and not appearing. Iguano Land & Min. Co. v. Jones, 65 W. Va. 59, 64 SE 640. Personal judgment against nonresident constructively served, not res adjudicata. Gates v. Tebbetts, 83 Neb. 573, 119 NW 1120.

34. Held bound though not party of record: Grantor who suggests suit by his grantee against adverse claimant to test the title, concluded by judgment therein, when sued for breach of warranty. Landes v. Matthews, 136 Mo. App. 637. 118 SW 1185. Grantor having notice of action of ejectment against grantee, judgment conclusive in action by grantee for breach of warranty. Farwell v. Bean [Vt.] 72 A 731. **Rejected claimant of government homestead,** contributing to expense of and assisting in trial of test case respecting a similar tract of land, held concluded by judgment therein. Ramsey v. Wilson, 52 Wash. 111, 100 P 177. **Contractor** constructing drainage ditch, who though not party to suit against county to restrain assessments to pay therefor conducted the defense, and appealed from judgment holding assessment invalid, which appeal was dismissed on ground that county was not interested, concluded thereby from seeking to enforce warrants against county. Canal Const. Co. v. Woodbury County [Iowa] 121 NW 556. **Manufacturer undertaking defense of infringement suit,** on behalf of customer, under stipulation that he is defending the suit, is a party entitled to the benefit of the bar against a subsequent suit for infringement. Bryant Elec. Co. v. Marshall, 169 F 426.

Held not bound: Mere fact that person employs counsel to assist in defense will not make him a party nor conclude him. Cockins v. Bank of Alma [Neb.] 122 NW 16. Person not party, not bound by judgment, merely by instigating or encouraging an appeal therefrom. State v. King, 64 W. Va. 546, 63 SE 468. That a person paid an attorney to defend a suit against a customer for infringement of a patent, and paid the costs, does not make him a party so as to be con-

ligently failed to become a party.[35] A judgment against one joint tort feasor,[36] or warrantor,[37] or maker of a joint and several note,[38] does not bar actions against the others jointly liable, nor does a judgment in favor of one joint tort feasor where the liability of the other was not in issue.[39] A judgment against one joint obligor determining the validity of the obligation, is binding on the other,[40] and, if they are sued jointly, judgment taken against one only is a bar to a judgment against the other.[41] Priority between two persons jointly liable is destroyed by the death of one,[42] and hence a judgment against the personal representative of the latter is not binding on the former,[43] and, so, also, when an action against joint defendants is continued against a survivor after death of the other, the judgment is not binding on the estate of the latter.[44] An order on a motion of one defendant does not bar a similar motion by another defendant having different interests, who did not join in the prior motion.[45] A party may not procure a judgment against one party, and then procure a judgment for the same matter against another party upon a contradictory state of facts.[46] Judgments are presumptively only conclusive against parties in the character in which they sue or are sued,[47] or to the extent that the issues are made against them.[48] Heirs of an intestate are bound by a judgment against "unknown heirs."[49] Any person as to whom the judgment would be conclusive is

cluded by decree. General Elec. Co. v. Morgan-Gardner Elec. Co. [C. C. A.] 168 F 52. That a **joint tort feasor,** not a party, because not within the jurisdiction, knew of the suit, and through counsel assisted in preparation of briefs, does not render him a privy so as to give him the benefit of the judgment as a bar. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 NE 193. **Grantee** of defendant not bound by reason of facts that one who had previously been his partner assisted at the trial, and that he himself, not knowing of the grant to him, became surety on defendant's appeal bond. Elliott v. Morris [Tex. Civ. App.] 121 SW 209. **Prosecuting witness in criminal prosecution** for assault not concluded by verdict from bringing civil action for same assault. Beckwith v. Phillips [Ga. App.] 65 SE 1075.

35. Notice to husband of owner of notes, of action involving them, is notice to her, where he was her agent in regard thereto. Schroeder v. State Bank [Iowa] 121 NW 505. **Person liable over,** and notified to appear and defend, concluded by judgment as to right of plaintiff to recover amount of verdict, under Civil Code 1895, § 5234. Byne v. Americus [Ga. App.] 64 SE 285. One liable over, notified to appear and defend, is bound by the findings of the judgment. McArthor v. Ogletree, 4 Ga. App. 429, 61 SE 859; Corning v. Spelman, 130 App. Div. 767, 115 NYS 366; Vogemann v. American Dock & Trust Co., 131 App. Div. 216, 115 NYS 741. Judgment is not conclusive of the question whether such person was in fact liable over. McArthor v. Ogletree, 4 Ga. App. 429, 61 SE 859. Grantor called in to defend when grantee was sued in ejectment, and failing to do so, bound by judgment. Leet v. Gratz, 137 Mo. App. 208, 117 SW 642.

36. Although sued jointly, where they answer separately. Tanzer v. Breen, 131 App. Div. 654, 116 NYS 110. Unless the recovery was followed by payment. Squire v. Ordemann, 194 N. Y. 394, 87 NE 435; Cameron v. Kanrich, 201 Mass. 451, 87 NE 605.

37. Partial recovery by compromise, of amount claimed for breach of warranty from seller, not bar to action against agent inducing the sale by false representations. Dahlstrom v. Gemunder, 133 App. Div. 69, 117 NYS 576.

38. Under statutes of Oklahoma, note presumed to be joint and several. McMaster v. City Nat. Bank [Okl.] 101 P 1103.

39. Action against one carrier for injury to passenger, not res adjudicata as to action against another carrier using former's line under contract for same injury, although plaintiff knew he was riding on ticket issued by former on defendant's train. Louisville, etc., Co. v. Linton [Ind. App.] 88 NE 532; Staunton Mut. Tel. Co. v. Buchanan, 108 Va. 810, 62 SE 928; Perrin v. Whipple, 64 Misc. 289, 118 NYS 551. Release or dismissal as to one not a bar to action against the other. Staunton Mut. Tel. Co. v. Buchanan, 108 Va. 810, 62 SE 928.

40. Joint mortgagors. Kohly v. Fernandez, 133 App. Div. 723, 118 NYS 163.

41. Cameron v. Kanrich, 201 Mass. 451, 87 NE 605.

42, 43. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 NE 193.

44. Under St. 1898, §§ 2804, 2805. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826.

45. Motion to cancel lis pendens. Wessel v. Sakmann, 131 App. Div. 99, 115 NYS 245.

46. United Oil & Gas Co. v. Alberson [Ind. App.] 88 NE 359.

47. Copeland v. Bruning [Ind. App.] 87 NE 1000. Where, in an action by a parent to recover for injuries to a minor child while in defendant's employ, issue was taken on a special plea setting out a former recovery by plaintiff as next friend of such child, the defendant had the right to show such recovery. Reaves v. Anniston Knitting Mills, 154 Ala. 565, 45 S 702.

48. One made party after partial reversal by appellate court, not bound by the portion of decree which was affirmed. State v. King, 64 W. Va. 546, 63 SE 468.

49. Heirs must petition under Rev. St. 1899, §§ 777, 780, to have judgment of parti-

entitled to the benefit of such judgment as a prior adjudication.[50] Judgments in proceedings in their nature in rem are binding upon persons who were not parties and who had no right to be made such.[51]

§ 2. *Adjudication as a bar of causes of action or defense.*[52]—See 11 C. L. 1546—*As a general proposition, it is stated that to constitute a prior adjudication a complete bar to a cause of action or defense there must occur identity of parties,*[53] *identity of subject-matter,*[54] *and identity of issues,*[55] *or the cause of action*[56] *as it has been termed.*

tion so entered set aside. Schooler v. Patrick [Mo. App.] 119 SW 1003. An action brought to quiet title to land against J. D. W., if living, and if dead then against the unknown heirs of J. D. W., as defendants, in which action service was made by publication, and a decree rendered quieting the title of plaintiff against such defendants, does not affect the title in the land of heirs of J. D. W. whose names and places of residence in Ohio are known to the plaintiff in such action, and who are not named as parties or served with summons therein, and who have no actual notice of such action, and such known heirs are not barred by the proceedings and decree in such action from asserting their interest in such land. Wilson v. Wilson, 11 Ohio C. C. (N. S.) 450.

50. Kohly v. Fernandez, 133 App. Div. 723, 118 NYS 163.

51. In action on insurance policy, decree in suit by tax sale purchaser of property that such sale was void held conclusive as to title so far as affected by tax sale. Kennedy v. London & Lancashire Fire Ins. Co. [Mich.] 16 Det. Leg. N. 437, 122 NW 134.

52. Search Note: See notes in 3 C. L. 1479; 58 L. R. A. 735; 8 A. S. R. 229; 3 Ann. Cas. 464; 6 Id. 63, 104; 9 Id. 187.

See, also, Judgments, Cent. Dig. §§ 1079-1137, 1234-1310; Dec. Dig. §§ 582-623, 713-751; 23 Cyc. 1155-1205, 1288-1350; 24 A. & E. Enc. L. (2ed.) 724, 765.

53. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 NE 193; Louisville, etc., R. Co. v. Linton [Ind. App.] 88 NE 532. The defense that certain judgments have been fully satisfied, which were obtained against former treasurer on account of interest on such deposits received by them as a personal gratuity, is a bar to the prosecution of actions against the banks for recovery of further sums alleged to be due the county on account of interest on such deposits. State v. Kilgour, 8 Ohio N. P. (N. S.) 81.

54. Kazebeer v. Nunemaker, 82 Neb. 732, 118 NW 646. Decree deciding priority of rights as between certain reservoirs, not conclusive as to other reservoirs. Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co., 44 Colo. 214, 98 P 729. Award of priority in interference proceeding held res adjudicata as to certain counts, and not res adjudicata as to other counts in a subsequent interference involving a reissue application of party so awarded priority and a patent granted to the other party. Nelson v. Felsing, 32 App. D. C. 420.

55. Sessler v. Donchian, 134 App. Div. 312, 118 NYS 1047; In re Essig's Will, 63 Misc. 612, 118 NYS 656; Davis v. Chamberlain, 51 Or. 304, 98 P 154; Johnson v. Seattle, 53 Wash. 564, 102 P 448; Smidt v. Benenga, 140 Iowa, 399, 118 NW 439.

Issues held not identical.

In action for conversion and action for goods sold and delivered: Judgment against plaintiff in action for conversion, question of ownership not being raised, not bar to a subsequent action for goods sold and delivered. Sessler v. Donchian, 134 App. Div. 312, 118 NYS 1047.

In probate proceedings: Denial of probate of one paper as will, not res adjudicata as to admissibility to probate of another paper made within a few minutes of the former. In re Essig's Will, 63 Misc. 612, 118 NYS 656.

In suits involving water rights: Decree restraining diversion of water, based on plaintiff's riparian rights, will not protect his rights based on prior appropriation. Davis v. Chamberlain, 51 Or. 304, 98 P 154.

In actions in different capacities: Recovery by parent as guardian ad litem for minor child for personal injuries to latter, loss of wages during minority, and expenses of parent in treatment of injuries being expressly excluded from consideration, not bar to action by parent for such items. Harris v. Puget Sound Elec. R. Co., 52 Wash. 299, 100 P 841.

In original and reassessment proceedings: Judgment in regard to original assessment not res adjudicata as to reassessment superseding old assessment. Johnson v. Seattle, 53 Wash. 564, 102 P 448.

Proceeding to appoint guardian and proceeding to determine right to custody of child: Issuance of letters of guardianship, not an adjudication as to right to custody of child. Smidt v. Benenga, 140 Iowa, 399, 118 NW 439.

In suit against corporation and suit against stockholders: Decree in suit against insolvent bank, providing that attorney's fees be allowed from fund going to creditors, not res adjudicata as to liability of stockholders' liability therefor. Buist v. Williams, 81 S. C. 495, 62 SE 859.

In actions on express and implied contracts: Judgment on draft drawn by shipmaster on owner, that such draft was void for want of master to make it, not a bar to action for money had and received. Commercial Nat. Bank v. Sloman, 194 N. Y. 506, 87 NE 811.

In actions by husband and wife: Action by wife for **personal injuries,** not bar to action by husband for loss of services resulting from such injuries. Indianapolis & M. Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 NE 1042.

In patent interference and infringement proceedings: Decision in interference proceedings in patent office, not an adjudication

as to patentability and infringement. Elliott-Fisher Co. v. Donning, 171 F 96.

In action and suit for injunction against judgment obtained therein: Action on subscription to underwriting agreement for bonds of corporation; denial of liability. Judgment for plaintiff not res adjudicata of question whether plaintiff had used reasonable diligence in conserving collateral. Warburton v. Trust Co. of America, 169 F 974.

Actions ex contractu and ex delicto: Judgment in action by contractor on quantum meruit, not res adjudicata in suit in nature of action of tort for breach of contract. Farnum v. Kennebec Water Dist. [C. C. A.] 170 F 173.

In action for salary and action for discharge: Judgment for salary up to date of plaintiff's discharge, not bar to action for wrongful discharge. La Haye v. Borated Specialty Co., 61 Misc. 509, 115 NYS 843.

In foreclosure and accounting proceedings: Foreclosure proceedings, not conclusive as to right of mortgagor to accounting under provisions in deed previously given by him to mortgagee. Felgner's Adm'rs v. Slingluff, 109 Md. 474, 71 A 978.

In action by mortgagor and on motion to vacate default foreclosure: Judgment that default foreclosure judgment bars an action by mortgagor against mortgagee for usury does not bar a motion to set aside the default judgment. British & American Mortg. Co. v. Strait [S. C.] 65 SE 1038.

In actions involving title or right of possession: Judgment in forcible entry and detainer, not conclusive in action for damages for wrongful execution of writ. Sanders v. Cline [Okl.] 101 P 267. Judgment for defendant in forcible entry proceedings, not a bar to forcible detainer proceedings. Johnson v. Gordon [Ky.] 118 SW 372. Forcible entry and detainer under Civ. Code Prac. Ky. § 460, not involving title, not bar to ejectment. Weber v. Grand Lodge of Kentucky, F. & A. M. [C. C. A.] 169 F 522. **Ejectment suit** with judgment for defendant on ground that deed of grantor cannot be attacked until he has been judicially declared incompetent, not bar to another ejectment suit based on active fraud. Lewis v. Ryan. 55 Misc. 408, 106 NYS 646.

In divorce proceedings: Decree that husband was not guilty of cruelty sufficient to constitute grounds of divorce, not conclusive that her desertion of him was groundless so as to give him right to divorce. Patrick v. Patrick, 139 Wis. 463, 121 NW 130. Nonsuit in action for divorce, not bar to subsequent action based on acts happening after such nonsuit. In re McNeil's Estate, 155 Cal. 333, 100 P 1086.

In creditor's suit and proceedings to enforce judgment: Dismissal of creditor's suit on ground that, since creditor was indebted to debtor to amount equal to his claim, he was not prejudiced by transfer, not an adjudication that judgment is satisfied. Lashmett v. Prall, 83 Neb. 732, 120 NW 206.

Issues held identical.

In suit to restrain assessment of damages and action for such damages: Judgment in action to restrain proceedings to assess damages for change of grade, holding that defendant was not estopped and that his claim was not barred, is res adjudicata in his action for such damages. Earle v. Greenville [S. C.] 65 SE 1050.

In condemnation proceedings and proceedings to levy assessments: Judgment in **condemnation proceedings,** that property was damaged more than benefited, conclusive on right to levy assessments for benefits. Seattle & Puget Sound Packing Co. v. Seattle, 51 Wash. 49, 97 P 1093; Schuchard v. Seattle, 51 Wash. 41, 97 P 1106.

In probate proceedings: Order admitting will to probate conclusive that testator was of unsound mind when later will and deed, offered as proof of revocation, were executed, proponent alleging such unsoundness. Clapp v. Vetcher, 9 Cal. App. 462, 99 P 549.

In suit for removal of booms and action for recovery of logs: Decree against boom company ordering it to remove booms from defendant's land conclusive, in action to recover logs escaping from such boom, that company was trespasser. North Shore Boom & Driving Co. v. Nicomen Boom Co., 52 Wash. 564, 101 P 48.

In proceeding to remove executor and proceeding to settle account: On petition for removal of executor for misappropriation of bonds, determination that bonds belonged to executor individually conclusive in proceeding to settle executor's account. In re Welch's Will, 61 Misc. 5, 114 NYS 720.

In garnishment and creditor's suit: Judgment in favor of garnishee, binding on him as to liability of garnishee, in creditor's suit brought to recover property in garnishee's hands. W. A. Jordan Co. v. Sperry Bros. [Iowa] 119 NW 692.

In action in which judgment was rendered and suit to enjoin enforcement of judgment: Judgment in favor of foreign corporation is res adjudicata in action to have enforcement thereof enjoined because corporation was not entitled to sue on account of failure to comply with laws of state. Kelley v. R. J. Schwab & Sons Co. [S. D.] 118 NW 696.

In original action and action to recover over: In action to recover over for judgment for damages against plaintiff, contributory negligence of plaintiff in original action cannot be brought in issue. City of Owensboro v. Westinghouse, Church, Kerr & Co. [C. C. A.] 165 F 385.

In action for agreed value and action for reasonable value: Action by broker on express promise to pay agreed commissions. Judgment of dismissal on finding of failure to prove that plaintiff acted as defendant's agent or that there was a contract held bar of action for same commission based on express promise to pay reasonable value of services. Krug v. Hendricks [Wash.] 102 P 1049.

On plea in abatement and on merits: Decision raised by plea in abatement that corporate name and abbreviation thereof were identical, res adjudicata that admission that latter was indebted to plaintiff was admission that former was. Brown v. Mt. Battle Mfg. Co., 104 Me. 456, 72 A 183.

On applications for royalties: Decision as to proper application of royalties received by executrix, conclusive as to application of similar royalties subsequently received. In re Guaranty Trust Co., 131 App. Div. 658, 116 NYS 147.

In actions on original debt and on securi-

Identity of parties.[57]—See 11 C. L. 1548

*Identity of cause of action.*See 11 C. L. 1548—That two causes of action spring out of the same contract does not ipso facto render them identical.[58]

Privies of a party.[59]—See 7 C. L. 1700—Every person is privy to a judgment who claims an interest in an estate, acquired by conveyance from a party to such judgment subsequent to the commencement of the action in which it was rendered.[60]

*Scope of adjudication.*See 11 C. L. 1549—If the parties and issues be identical, the adjudication is binding not only as to all matters actually litigated,[60a] but as to

ties: Judgment against executor on claim founded on fraud of testator, conclusive as to validity of claim, in action on bond given to pay debts of testator. Lothrop v. Parke, 202 Mass. 104, 88 NE 666.

In partition and suit to impress land partitioned with trust: Decree in partition suit between heirs, confirming sale to one of them, made in compliance with order of distribution, and also directing distribution of personalty, is res adjudicata that purchaser and distributee took free from a debt due from him at the time of sale and distribution to one of the other heirs. Ward v. Ward, 130 App. Div. 27, 114 NYS 326.

In original action and action for malicious prosecution: Judgment for plaintiff in forcible detainer, though reversed, is conclusive that probable cause existed so as to preclude action for damages for bringing it. Hegan Mantel Co. v. Alford [Ky.] 114 SW 290.

In ejectment and in action for improvements: Judgment in ejectment that defendants had not established lost will under which they claimed, bar to their claim for improvements under such will as color of title. Munn v. Lynch [Ark.] 115 SW 926.

In suits to quiet title: Decree for defendant in action to set aside stipulation quieting title in him bars a defense in his action to quiet title that the deed to him was in fact a mortgage. Armstrong v. Campbell, 140 Iowa, 564, 118 NW 898.

In suit to quiet title and suit for partition: Decree in suit to quiet title awarding defendant half interest in property, res adjudicata as to latter's interest in partition suit. Snowden v. Anderson, 51 Wash. 234, 98 P 610.

In actions for breach of contract: Judgment in action for breach of contract, res adjudicata as to similar issues in another action for subsequent breach of same contract. Krebs Hop Co. v. Livesley [Or.] 104 P 3.

56. Action of trespass for pipe line laid across plaintiff's land, nominal damages being asked, not a bar to bill to enjoin operation of line. Davis v. Southwest Pennsylvania Pipe Lines, 223 Pa. 56, 72 A 281. Dismissal of action for divorce, not bar to action for separate maintenance on grounds occurring prior to divorce action. Louis v. Louis, 134 Mo. App. 566, 114 SW 1150. Judgment in action for work and labor, unsatisfied, not bar to action for subsequently discovered fraud in inducing the contract. Kahn v. Witkoski, 115 NYS 138. Where actions based on some alleged wrongful expulsion of member of benefit society, different grounds being alleged, judgment in former action was conclusive. Pavelka v. St. Albert Soc. [Conn.] 72 A 725.

57. See ante, § 1.

58. La Haye v. Borated Specialty Co., 61 Misc. 509, 115 NYS 843.

59. See ante, § 1, Persons Affected.

60. Shephard v. Coeur D'Alene Lumber Co. [Idaho] 101 P 591.

60a. Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382; Hermann v. Allen [Tex. Civ. App.] 118 SW 794. Acquittal of prisoner on ground that he was insane when he committed the act is res adjudicata as to his **insanity** at that time. People v. Lamb, 118 NYS 389. Adjudication **that mother of children is not an unfit person** to act as guardian, conclusive except as to facts occurring thereafter. In re Snowball's Estate [Cal.] 104 P 444. Adjudication of **costs** in replevin, conclusive in action on bond. Lindsey v. Hewitt, 42 Ind. App. 573, 86 NE 446. Denial of **counterclaim** on ground that contract under which it was asserted was not as alleged bars subsequent action by defendant hased on same contract. Rothenstein v. Davega, 117 NYS 892. Matter urged as **set-off** in one suit cannot be made basis for subsequent suit. Levenson v. Johnson, 129 App. Div. 30, 113 NYS 32. Judgment against plaintiff **in suit for divorce** for cruelty precludes her from urging the same facts as a defense to her husband's suit for divorce on ground of desertion (Wilkins v. Wilkins [Neb.] 120 NW 907), or at least precludes her from setting up such facts as a counterclaim, although not conclusive that she has left her husband without cause (Patrick v. Patrick, 139 Wis. 463, 121 NW 130).

Presumption: Court being of general jurisdiction, presumed that all matters covered by judgment were in fact litigated. United States v. Sommers [C. C. A.] 171 F 57.

61. Union Pac. R. Co. v. Mason City & F. D. R. Co. [C. C. A.] 165 F 844; Baumgarten v. Mitchell, 10 Cal. App. 48, 101 P 43; Ward v. Field Museum of Natural History, 241 Ill. 496, 89 NE 731; Copeland v. Bruning [Ind. App.] 87 NE 1000, rehearing denied [Ind. App.] 88 NE 877; School Tp. of Franklin v. Wiggins [Iowa] 120 NW 1032; Elswick v. Matney [Ky.] 116 SW 718; Farmers' State Bank v. Stephenson [Okl.] 102 P 992; Kelley v. R. J. Schwab & Sons Co. [S. D.] 118 NW 696; Findlay v. Longe, 81 Vt. 523, 71 A 829; Boring v. Ott, 138 Wis. 260, 119 NW 865.

Matters concluded though not expressly adjudicated: Decree for defendant in suit to cancel contract, conclusive upon every ground known to complainant when suit brought. Hein v. Westinghouse Air Brake Co., 172 F 524. Action for overpayments on note, made in goods and money, bar to action for goods sold and delivered for item included in subject-matter of former suit, such item being dismissed before the case

everything which might have been litigated under the issues as made,[61] or which is necessarily involved in the decision made,[62] and a second action cannot be maintained

went to jury. Roberts v. Neal, 137 Mo. App. 109, 119 SW 461. Judgment in favor of corporation, res adjudicata as to **capacity to sue.** Commercial L. & T. Co. v. Mallers, 242 Ill. 50, 89 NE 661. Note for $200 payable in two equal **instalments.** Judgment for plaintiff in action for first instalment, conclusive against subsequent claim of **payment** of $125 on note as indicated by indorsement thereon. Duprey v. Rhodes, 131 App. Div. 344, 115 NYS 597. Decree on exceptions to executor's account, that a sum claimed to have been paid on an annuity account "was not in fact paid * * * and said item is improperly credited," disallowing such credits, conclusive as to right to credit for such payments in satisfaction of different claim. Woolsey v. Woolsey, 71 N. J. Eq. 609, 71 A 408. Quieting title in United States against railroad company bars **right to select lands as lieu lands** under grants then in force, although not then asserted. United States v. Southern Pac. R. Co. [C. C. A.] 167 F 510. Expelled member of association, recovering judgment for reinstatement on ground of unlawful expulsion, barred from action for **damages for expulsion from association.** Schmidt v. Weyell, 60 Misc. 370, 113 NYS 630. Where **patent** of several claims is made basis of bill to restrain infringement, decree is bar to subsequent bill based on one of such claims not pressed in argument nor mentioned in opinion of court. Bryant Elec. Co. v. Marshall, 169 F 426. Judgment in action by stockholder against director of corporation for mismanagement, ordering **costs** taxed against fund recovered, conclusive against plaintiff's right to recover from same defendant such costs, in action for neglect of duty. Singers-Bigger v. Young [C. C. A.] 166 F 82. In action for rent, defense of **surrender and release** which might have been, but was not, set up in prior action for rent under same lease, involving identical facts, is barred. Harrington v. Huff & Mitchell Co., 155 Mich. 139, 15 Det. Leg. N. 957, 118 NW 924. Judgment on assigned claim conclusive as to amount thereof, and judgment debtor cannot sue assignor to recover amount paid on judgment on ground of **excessiveness of amount of assigned claim.** Finkelstone v. Lanzke, 63 Misc. 330, 117 NYS 183. Partition judgment distributing property among those claiming as tenants in common under will, bar in suit for accounting as to **whether will created a trust.** In re Jenkins' Estate, 132 App. Div. 339, 117 NYS 74. Judgment for value of repairs, that plaintiff had performed his contract, res adjudicata in action for **damages for negligent doing of work.** Bell v. Mutual Mach. Co., 150 N. C. 111, 63 SE 680. Garnishee, after judgment has been rendered against him, cannot attack the **validity of judgment against principal defendant in garnishment proceedings.** Central of Georgia R. Co. v. Wright, 5 Ga. App. 514, 63 SE 639. Judgment for seller in action for purchase price, conclusive on question of **fraud of seller,** known to buyer at time of suit, but inadmissible owing to defective pleading of defendant. Greenwood Drug Co. v. Bromonia Co., 81 S. C. 516, 62 SE 840. Defect in **signature or attestation of tax bills,** or that they were barred by limitations, are matters of defense which must be urged in suit on such bills. Robinson v. Levy, 217 Mo. 498, 117 SW 577. Complaint showing liability of one or the other of two defendants, for work and labor, with prayer for personal judgment and foreclosure of mechanics' lien. Answer of one denying liability, or employment. Judgment for latter was bar to subsequent **claim for work and labor.** United Oil & Gas Co. v. Alberson [Ind. App.] 88 NE 359; United Oil & Gas Co. v. Ellsworth [Ind. App.] 88 NE 362. Decree enjoining diversion of waters conclusive on question **whether waters were public and open to appropriation.** Spokane Valley Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 P 515. Tax sale of lot as **ground for rescission of contract** for exchange, such sale and certificate being patent on records at time of prior action in which question might have been raised. Town of Grand River v. Switzer [Iowa] 121 NW 516. Judgment against trust company for taxes due for certain years from estates in its hands, no particular estates being designated, bar to subsequent action against such company for **taxes** due from particular estate in its hands. Commonwealth v. Churchill [Ky.] 115 SW 189. Foreclosure decree conclusive as to **right of mortgagee to allowance for taxes** previously paid by him, and as to effect of his previous release of portion of mortgaged property. Miller v. Peter [Mich.] 16 Det. Leg. N. 670, 122 NW 780. Under Ballinger's Ann. Codes and St. § 5880, authorizing **deficiency judgment** in foreclosure suit, decree of foreclosure denying deficiency judgment bars an independent action therefor. Bradley Engineering & Mach. Co. v. Muzzy [Wash.] 103 P 37. Decree on mortgage foreclosure, conclusive in action for deficiency as to any defense available in foreclosure suit. State Mut. Building & Loan Ass'n v. Batterson [N. J. Law] 71 A 115. **Cruelty as ground of divorce** held concluded by denial of divorce asked for on such ground. Stay v. Stay, 53 Wash. 534, 102 P 420. Judgment against insolvent, not **set off** by way of counterclaim in action by assignee in insolvency to set aside conveyance, cannot be set off in action on judgment rendered in that action. Knight v. Rothschild, 132 App. Div. 274, 117 NYS 26.

62. Leet v. Gratz, 137 Mo. App. 208, 117 SW 642; Weels v. Boston & M. R. Co. [Vt.] 71 A 1103.

Scope of particular decisions: Decree ordering partition sale of mill dam precludes party from rebuilding dam after partial destruction, and compelling contribution for cost. Cooper v. Brown [Iowa] 122 NW 144. **Judgment on trial of title** to certain property, it being necessary to define boundaries thereof, conclusive as to such boundaries. Vincent v. Blanton [Ky.] 121 SW 466. **Approval of bond,** adjudication that conditions precedent to its filing have been complied with. Bland v. Tipton Water Co., 222 Pa. 285, 71 A 101. **Determination of domicile** of minor giving probate court jurisdiction to appoint a curator. Smith v. Young, 136 Mo. App. 65, 117 SW 628. Action to construe husband's will, executors of subse-

by including additional matters which furnish no ground for relief [63] but this rule does not extend to cases where the trial of the disputed issue rests in the discretion of the trial judge,[64] or to matters which might have been litigated under issues formed by additional pleading,[65] and an issue made by the pleadings, not essential to the determination of the main issue and relating to a separate matter, and which is left undetermined, though it might have been adjudicated, is not concluded.[66] An adjudication does not include an affirmative cause or set-off which might have been but was not put in litigation,[67] or a counterclaim which could not be set up [68] or collateral matters incidentally cognizable,[69] or matters determined without being in issue,[70] or which were not material to the issue,[71] or which were in issue without being passed upon,[72] or which were not in issue and were not determined,[73] but a

quent will of wife made parties. Heirs of wife, who would inherit if his will were void, intervened. Held that **dismissal of heirs' intervention** on ground that wife's will was valid, and that heirs were not interested in husband's will, was conclusive as to right of heirs to attack wife's will. Spencer v. Watkins [C. C. A.] 169 F 379. **Decree settling accounts of executor** conclusive as to propriety of sale of real estate shown thereby, and adequacy of consideration received therefor, although it did not show that such sale was made indirectly to the executor. Weintraub v. Siegel, 133 App. Div. 677, 118 NYS 261. **In suit for separation** on ground of abandonment, a decree for defendant conclusive that abandonment was justified. Baurens v. Giroux, 123 La. 879, 49 S 605.

63. Stay v. Stay, 53 Wash. 534, 102 P 420.

64. Institution for Sav. v. Puffer, 201 Mass. 41, 87 NE 562.

65. United Oil & Gas Co. v. Ellsworth [Ind. App.] 88 NE 362.

66. Adjudication between conflicting mineral leases, holding plaintiff's void, not res adjudicata as to his right to damages for conversion of personal property after he was ousted. Brennan v. American Sulphur & Min. Co., 45 Colo. 248, 100 P 412.

67. Farmers' State Bank v. Stephenson [Okl.] 102 P 992. Claim for goods sold, not set off in action for breach of contract for services, not barred, although jury improperly considered it in allowing damages in prior action. Kerr v. Blair [Tex. Civ. App.] 118 SW 791. Failure to interpose defense of breach of warranty in action by assignee of non-negotiable purchase-money note, not bar to action against vendor for breach of warranty. Delaney v. Great Bend Implement Co. [Kan.] 98 P 781.

68. American Ice Co. v. Pocono Spring Water Ice Co., 165 F 714.

69. Neither at common law nor under P. S. 1656, is a judgment that passenger recover fare alleged to have been paid under compulsion, after ticket had been taken by conductor, an adjudication that plaintiff was rightfully on train, in action for damages for ejection. Wells v. Boston & M. R. Co. [Vt.] 71 A 1103.

70. Order in summary proceedings by landlord to recover possession, not res adjudicata as to amount of rent due. Gross v. Salzman, 61 Misc. 630, 114 NYS 411. Claim and delivery for property sold by plaintiff to defendant. Admission of amount due on purchase price not within issues, and finding thereunder not binding on plaintiff. Kaufman v. Cooper [Mont.] 101 P 969. Findings of fact, not material to the issues, not conclusive in subsequent action. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826.

71. Judgment giving plaintiff title and possession, not conclusive as to defendants' right under purchase-money note reserving lien (Manning v. Green [Tex. Civ. App.] 121 SW 721), nor is an expression of an opinion by the court, on a matter not material to the issues. Millie Iron Min. Co. v. McKinney [C. C. A.] 172 F 42. Bill of interpleader properly dismissed, not conclusive as to claim between plaintiff and one of the defendants, although court stated in opinion that such claim could not be made. Smith v. Mosier, 169 F 430.

72. Damages for wrongful injunction, not considered in decree perpetuating injunction, afterwards reversed. Hermann v. Allen [Tex. Civ. App.] 118 SW 794.

73. Hinsdale Elec. Co. v. Ogle, 45 Colo. 454, 101 P 786; Ferry-Hallock Co. v. Progressive Paper Box Co. [N. J. Eq.] 73 A 230; Morton Trust Co. v. Sands, 195 N. Y. 28, 87 NE 783; Pawtucket Probate Ct. v. Williams [R. I.] 73 A 382.

Held not adjudicated: Decree in suit to protect pledge as security for one debt, not res adjudicata as to **right to hold collateral as security** for another debt not before in issue. Athol Sav. Bank v. Bennett, 203 Mass. 480, 89 NE 632. **Counterclaim** in amount beyond jurisdiction of court, and hence not adjudicated. Dixon v. Watson [Tex. Civ. App.] 115 SW 100. Decree against executrix ordering payment of judgment not bar to suit to impress trust on property alleged to have been purchased by executrix in name of third person with proceeds of property conveyed in **fraud** of the estate. Farrelly v. Skelly, 130 App. Div. 803, 115 NYS 522. Decree of orphans' court determining ownership to rents for distribution, not res adjudicata as to **title to land.** In re Metzger's Estate, 222 Pa. 276, 71 A 96. Where the validity of a certain deed was the sole question tried in an action quia timet, a decree that title be forever quieted in plaintiff will not bar defendants from asserting right to possession of title acquired by virtue of other contracts. Wetherell v. Adams, 80 Neb. 584, 116 NW 861. Judgment for defendant in ejectment for failure of plaintiff to prove title, not res adjudicata as to defendants' title. Harris v. Mason [Tenn.] 115 SW 1146. Decree in statutory proceeding to determine water rights in water dis-

matter unsuccessfully relied on as a defense cannot be made the basis of an independent cause of action.[74] One cannot split his cause of action and have successive recoveries,[75] but separate causes of action may be sued on separately, though they

trict, not res adjudicata as between several claimants to **ownership of irrigation ditch.** Rollins v. Fearnley, 45 Colo. 319, 101 P 345; Park v. Park, 45 Colo. 347, 101 P 403. **Right to fund** produced from operation of oil wells pending action to forfeit lease of wells, not determined by judgment in such action. In re St. Louis & Kansas Oil & Gas Co., 168 F 934. Note containing no provision for maturity on default of payment of interest. Mortgage containing such provision, given by maker to indemnify surety and assigned by latter to payee. Foreclosure of mortgage for default in payment of interest, without prayer for personal judgment, held not bar to subsequent action on note for **deficiency after foreclosure sale.** Hunter v. Porter [Iowa] 120 NW 101. Joint action by owners of separate tracts of land to abate nuisance, not a bar to separate actions by such owners to recover **damages for nuisance.** Nahate v. Hansen, 106 Minn. 365, 119 NW 55. Judgment in proceeding to establish lost deed, record of which is also destroyed, is not conclusive as to **boundaries,** where the original deed was not sufficient to create an estoppel. McNeeley v. Laxton, 149 N. C. 327, 63 SE 278. Judgment in tax cases, not res adjudicata as to **taxes** assessed for other and subsequent years. State v. Enloe [Tenn.] 117 SW 223. Judgment in contest of election to remove county seat, not bar to suit to enjoin issuance of bonds on ground of **invalidity of election** for irregularities occurring prior to day of election. Kilgore v. Jackson [Tex. Civ. App.] 118 SW 819. A foreclosure decree rendered pending a creditor's bill does not preclude the defense that the debt was barred by the statute of **limitations** when the bill was filed, since there may be a foreclosure, though debt is barred. Harper v. Raisin Fertilizer Co. [Ala.] 48 S 589. Where **value of property** not adjudicated in replevin, such value may be litigated in action on bond on refusal to return property. Lindsey v. Hewitt, 42 Ind. App. 573, 86 NE 446. Judgment in action to determine **adverse claims to mineral claim,** conclusive only as to rights in discovered veins. Keely v. Ophir Hill Consol. Min. Co. [C. C. A.] 169 F 601. Judgment in probate proceedings, against estate for such **instalments of annuity** as had not been barred by limitations, not a bar to suit to establish the prior instalments as a lien on land charged with its payment. Stringer v. Gamble, 155 Mich. 295, 15 Det. Leg. N. 1030, 118 NW 979. Judgment for **rent** in action brought before abandonment, not res adjudicata in action for subsequent instalment, on question of eviction. Fischman v. Mayhew, 117 NYS 986. Judgment in **trespass** for defendant who denied trespass and plaintiff's title, not a bar as to whether defendant's grantee subsequently committed trespass as against plaintiff's grantee. Thurman v. Leach [Ky.] 116 SW 300. Decree foreclosing judgment lien against interest of mortgagee, not conclusive against mortgagee's **right to foreclose mortgage.** Pettus v. Gault, 81 Conn. 415, 71 A 509. Decree foreclosing mortgage, not conclusive as to **right of mortgagor to redeem** or to relief under an agreement of mortgagee to reconvey on repayment of purchase price. Clark v. Levy, 130 App. Div. 389, 114 NYS 890. Objections to **discharge in bankruptcy** withdrawn, discharge not bar to action against bankrupt on debt created by fraudulent representations. Standard Sewing Mach. Co. v. Kattell, 132 App. Div. 539, 117 NYS 32. Allowance of **trustee's account** not bar to action by successor to recover amount received from sale of property in another state with which he failed to charge himself in his account. Jones v. Downs [Conn.] 72 A 589.

Matters expressly reserved by judgment are not concluded. Martin v. Turner [Ky.] 115 SW 833.

74. Breach of warranty as defense to action for purchase price. Drevet Mfg. Co. v. Moore Bros. Glass Co. [C. C. A.] 168 F 246.

75. Expenses incurred, not asserted in **action for damages,** cannot be subject of subsequent action. Peacock v. Coltrane [Tex. Civ. App.] 116 SW 389. All grounds for attacking **validity of franchise or charter** must be urged in one suit. People v. Detroit, etc., R. Co. [Mich.] 16 Det. Leg. N. 328, 121 NW 814. Bill for **injunction** presenting part of facts entitling to relief, bars subsequent bill based on other facts known at time of prior application. Guardian Trust Co. v. Kansas City So. R. Co. [C. C. A.] 171 F 43. **Foreclosure of mortgage** as to part of land covered, in suit by judgment lienor making mortgagee party, providing that it is without prejudice to mortgage as to remaining lands, not a bar to suit to foreclose as to remaining lands. Welch v. Farmers' L. & T. Co. [C. C. A.] 165 F 561. Landlord bringing **action on lease** for rent and for advances and supplies furnished tenant must join therein claim for breach of covenant to properly cultivate, or same will be barred. Dixon v. Watson [Tex. Civ. App.] 115 SW 100. Action for damages suffered by tenant by failure of landlord to deliver possession at beginning of term. Judgment covering any part of term bars action for balance. Sloan v. Hart, 150 N. C. 269, 63 SE 1037. Judgment for rent due for one year of holding over not bar to **action for rent** for subsequent year. Kennedy v. New York, 196 N. Y. 19, 89 NE 360. Action by seller for **breach of contract of sale** on refusal of buyer to accept part of goods bought for future delivery, bar to action for refusal to accept another portion deliverable at a different time. De Graff v. Mayper, 63 Misc. 568, 118 NYS 571. Judgment in action for tort, even though for only a part thereof, bars a subsequent action. Puckett v. National Annuity Ass'n, 134 Mo. App. 601, 114 SW 1039. Separate action will not lie on republication by same party of **libel,** where republication was made prior to action on original article. Jones & Co. v. Smith [Tex. Civ. App.] 109 SW 1111. Judgment in action for **breach of contract of employment** held bar to subsequent action for breach of same

arise out of the same transaction [76] and separate actions may be brought on separate contracts between the same parties relating to the same subject-matter,[77] and so, also, where damages are occasional and recurring,[78] or a trespass is continuing,[79] or the injury is not permanent,[80] a party may sue as often as he suffers injury therefrom.

Allied to the rule against splitting causes of actions is the doctrine that the cause of action is merged in the judgment.[81]

§ 3. *Adjudication as estoppel of facts litigated.*[82] See 11 C. L. 1551.—*Though there be no identity of issues or cause of action and subject-matter,*[83] *an adjudication is conclusive in all suits between the parties and their privies as to all matters in issue* [84] *and decided* [85] *or necessarily involved in the decision made,*[86] *but not as to*

contract. Rauh v. Wolf, 62 Misc. 621, 116 NYS 13.

Error of court in striking out part of cause of action will not prevent judgment from being res adjudicata as to such part. Peacock v. Coltrane [Tex. Civ. App.] 116 SW 389.

76. Puckett v. National Annuity Ass'n, 134 Mo. App. 501, 114 SW 1039. Judgment in action for salary, even though construed as action for breach of **contract of employment,** held not bar to action for salary for subsequent months, contract being held severable. Canada-Atlantic & Plant S. S. Co. v. Flanders [C. C. A.] 165 F 321. Judgment in action for price of portion of goods bought and accepted but not paid for, not bar to subsequent action for damages for refusal to accept another portion of goods covered by same **contract of sale.** Rusch v. Klausner, 117 NYS 1074. Work on principal **construction contract** and extra work held to give rise to separate causes of action for compensation. Sheinart v. Ritchie, 115 NYS 117. Where money is payable in **instalments,** recovery of instalments due will not bar recovery of instalments subsequently becoming due. Puckett v. National Annuity Ass'n, 134 Mo. App. 501, 114 SW 1039; Ikonograph Co. v. John Newton Porter Co., 113 NYS 537.

77. Peacock v. Coltrane [Tex. Civ. App.] 116 SW 389.

78. Occasional flooding of land by permanent structure. Owner may elect to recover all damages in single action barring recovery for future injuries, or may treat it as temporary and bring successive actions for each occasion. Hughes v. Chicago, B. & Q. R. Co. [Iowa] 119 NW 924. Occasional injury to crops from ditch maintained by railroad company. International & G. N. R. Co. v. Slusher [Tex. Civ. App.] 115 SW 673. Judgment by abutting owner against railroad company for failure to keep street in repair, not bar to subsequent suit by his grantee to recover for similar injuries. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733.

79. Projection of building on plaintiff's adjoining premises is continuing trespass for which successive actions will lie. Curtis Mfg. Co. v. Spencer Wire Co., 203 Mass. 448, 89 NE 534. Actions for injuries from deposit of sand in stream caused by maintenance of boom may be brought from time to time as damage and loss occur. Pickens v. Coal River Boom & Timber Co. [W. Va.] 65 SE 865.

80. Breach of grantee to maintain structures for benefit of grantor's other land authorizes recovery only to time of action, future recoveries being permissible for future breaches. Illinois Cent. R. Co. v. Davidson [Ky.] 115 SW 770.

81. Amount claimed on open account becomes merged in judgment so that items of interest cannot be added thereto. Warren v. Sheehan, 156 Mich. 432, 16 Det. Leg. N. 157, 120 NW 810.

82. Search Note: See notes in 5 Ann. Cas. 78; 6 Id. 496.

See, also, Judgment, Cent. Dig. §§ 1234-1310; Dec. Dig. §§ 713-751; 23 Cyc. 1288-1350; 24 A. & E. Enc. L. (2ed.) 724, 765.

83. Construction of will, question at issue being identical, judgment is bar although different property is subject-matter of litigation. Messinger v. Anderson [C. C. A.] 171 F 785. In action by purchaser at execution sale to protect one parcel of land purchased thereat, judgment for defendant on ground that judgment under which sale was had was void is conclusive as to title of purchaser, in action to protect another tract bought at such sale. Moss v. Brant, 216 Mo. 641, 116 SW 503.

84. Judgment reforming deed at suit of grantor, conclusive against him and his subsequent grantees that he had parted with title thereby. Lucy v. Lucy, 107 Minn. 432, 120 NW 754. Adjudication on defense of failure of consideration as to one of three notes, conclusive in action on the other notes where defendant admitted that defense was identical to three notes. Gross v. Todd [Miss.] 47 S 801. Action for damages accruing between certain periods for breach of contract. Defense of fraud inducing contract, and rescission thereof, and denial of breach. General verdict for defendant bars subsequent action for damages afterwards accruing from such breach. National Surety Co. v. Coates [Ark.] 117 SW 555.

85. United States v. Sommers [C. C. A.] 171 F 57. Question whether note was barred by statute of **limitations.** Morgan v. Kendrick [Ark.] 121 SW 278. Judgment in tax lien foreclosure against "unknown owners, and M," reciting that they "own or claim some right" to land, estops purchaser to question M's heirs' **right to redeem** as owners. Jackson v. Maddox [Tex. Civ. App.] 117 SW 185. Judgment in forcible entry and detainer to effect **that defendant took actual possession** is conclusive of that fact in subsequent action of ejectment. Haden v. Goodwin, 217 Mo. 662, 117 SW 1129. Where **usefulness of**

matters not in controversy and not heard and determined,[87] or matters merely collaterally involved.[88] An adjudication, furthermore, extends only to facts as they existed at the time thereof.[89] Parties to a judgment will be held, in a subsequent action, to the theory of the case upon which the former action was determined.[90]

§ 4. *Pleading and proof.*[91]—See 11 C. L. 1555—Ordinarily the defense of res adjudicata must be presented by the pleadings,[92] but a judgment in one suit, not finally determined until after a submission of another, is available in the latter without being pleaded.[93] The bar may be pleaded in connection with matters of defense to the merits.[94] The plea must allege a judgment of record,[95] and must state facts showing the identity of parties and subject-matter, and that the adjudication was upon the merits,[96] and that the matter decided was necessarily in issue.[97] A plea of former

patented device has been established in a patent contest, such question will not be reexamined in a subsequent contest upon the same or merely cumulative evidence. Consolidated Rubber Tire Co. v. Diamond Rubber Co. [C. C. A.] 162 F 892. Decree of foreclosure of mortgage fixes, as between parties and privies, the **time and method of foreclosing right of redemption.** Atwood v. Carmer [N. J. Eq.] 73 A 114. Held decided that bank had **right to apply proceeds of collateral to debt** secured. Jefferson v. Century Sav. Bank [Iowa] 120 NW 308.

86. Decision on claim for damages in eminent domain proceedings, res adjudicata as to title to land taken, and bars action by claimant based on assertion of title in himself. Robinson v. Sea View R. Co., 169 F 319.

87. Decree of injunction without prejudice to defendant's right "to object to levy" under which plaintiff claimed title does not estop defendant from asserting title. Bunker v. Manchester Real Estate & Mfg. Co. [N. H.] 71 A 866. Where purchaser at mortgage foreclosure purchased under a trust obligation to refund to the mortgagor what he had invested in the premises, the judgment of foreclosure did not estop mortgagor from recovering such sum, since the agreement to repay went back of the foreclosure. Carr v. Craig, 138 Iowa, 526, 116 NW 720. Where the question as to the interest of devisee did not arise and was not presented in an action to construe a will, an evident inaccuracy in the decree as to the interest of one of such devisees held not binding. Rackemann v. Tilton, 236 Ill. 49, 86 NE 168.

88. In ejectment, defendant who pleaded adverse possession could show possession under a written instrument though testimony would tend to show fraud of his grantor, which fraud the court had determined did not exist. Cassin v. Nicholson, 154 Cal. 497, 98 P 190. Collateral matters which did not properly enter into final account of guardian are not concluded by judgment thereon. Kazebeer v. Nunemaker, 82 Neb. 732, 118 NW 646.

89. Determination in habeas corpus proceeding to procure release of prisoner, not res adjudicata as to sanity at time of subsequent proceedings. People v. Lamb, 118 NYS 389.

90. Wright v. Dudgeon, 138 Iowa, 510, 116 NW 698. Where parties treated prior suit as an equitable action to redeem from mortgage foreclosure sale, though there was a paragraph in the usual form to quiet title to which no answer was filed, they are bound to such theory. Hanley v. Mason, 42 Ind. App. 312, 85 NE 381.

91. **Search Note:** See notes in 3 C. L. 1489; 5 Id. 1515; 44 A. S. R. 562; 2 Ann. Cas. 655; 9 Id. 344.

See, also, Judgment, Cent. Dig. §§ 1787-1829; Dec. Dig. §§ 948-958; 23 Cyc. 1523-1543; 24 A. & E. Enc. L. (2ed.) 813; 9 A. & E. Enc. P. & P. 611.

92. In re McNeil's Estate, 155 Cal. 333, 100 P 1086; Davis v. Chamberlain, 51 Or. 304, 98 P 154; Pickens v. Coal River Boom & Timber Co. [W. Va.] 65 SE 865. That former adjudication is in case as evidence introduced by other party does not change rule. Wells v. Boston & M. R. Co. [Vt.] 71 A 1103.

93. Keely v. Ophir Hill Consol. Min. Co. [C. C. A.] 169 F 601.

94. Mound City Co. v. Castleman, 171 F 520.

95. Plea that on a certain date upon a suit in Great Britain, between same parties for same cause of action, "said plaintiffs had settled the same by the payment of the money for which this cause of action is instituted to recover," held insufficient. Fenwick Shipping Co. v. Clarke Bros. [Ga.] 65 SE 140.

96. Lange v. Hammer, 157 Ala. 322, 47 S 724; Fenwick Shipping Co. v. Clarke Bros. [Ga.] 65 SE 140. Plea must set out so much of the record as is necessary to show identity of issues and determination on merits. Sumner v. Griffin [Ky.] 113 SW 422. Must set forth commencement of former suit, its character, object, and relief prayed, and aver facts showing identity of subject-matter. Mound City Co. v. Castleman, 171 F 520. Plea not showing that former was prosecuted to judgment does not raise question of res adjudicata. Holland v. Western Bank & Trust Co. [Tex. Civ. App.] 118 SW 218. Mere statement of conclusion insufficient, but plea that lands in suit were a part of the "Hancock Place" and embraced in that description in a prior judgment is sufficient, former bill having described land as "Hancock Place" followed by more particular description and former decree having allotted land described as "Hancock Place." Sumner v. Hill, 157 Ala. 230, 47 S 565. Pleading alleging that same titles were arrayed against each other, but not alleging that the same land was involved, insufficient. Adams v. Mineral Development Co. [Ky.] 116 SW 246.

97. Smith v. Mosier, 169 F 430.

adjudication must, furthermore, answer the whole of the plaintiff's cause of action,[98] and plea of estoppel by judgment must allege the defendant's reliance upon such adjudication as an estoppel.[99] Plaintiff may by replication plead facts showing that the decree was not in fact on the merits.[1] Whether a former adjudication is available by way of counterclaim or set-off depends upon the terms of the statutes in this regard.[2]

With a few exceptions,[3] judicial notice will not be taken of a judgment as res adjudicata.[4] The burden is on the party setting up the plea to prove it,[5] and in absence of proof the judgment will be held conclusive only as to such facts, without the existence of which it could not have been rendered,[6] but the mere production of the record is sufficient, if the identity of the issues appears on its face.[7] It must be established that the person sought to be bound was a party to the former suit.[8] In an action by a judgment debtor against one liable over, the plaintiff seeking to avail himself of the judgment as conclusive evidence must show that the issues are the same, where it might have been rendered upon either of two theories.[9] Parol evidence is not admissible to prove that a matter within the scope of a former judgment was not [10] in fact determined thereby, but recitals in the judgment are not conclusive as to the issues involved,[11] and it may be shown by extrinsic evidence whether a particular matter, within the issues, was really litigated and decided upon the trial,[12] that the cause of action formerly sued on is identical with the one at issue,[13] and whether the judgment was rendered on the merits,[14] and where the former suit might have been determined on a ground which would, or on another which would not, be a bar, the plaintiff may show the precise ground upon which it went.[15] Where the prior judgment is ambiguous, the opinion of the court may be examined to determine the point actually decided.[16] Whether a particular adjudication is a

98. Plea answering only a portion of a count is insufficient. Cook v. Marseilles, 139 Ill. App. 536.

99. Otherwise the plea will be informal. Cook v. Marseilles, 139 Ill. App. 536.

1. Decree of dismissal not disclosing grounds therefor. Stratton v. Essex County Park Com., 164 F 901.

2. Where claim has been merged in judgment, it cannot be set up as counterclaim under Municipal Court Act, § 151, subd. 2. Rosenfeld & Co. v. Solomon, 61 Misc. 238, 113 NYS 723. See Set-off and Counterclaim, § 2.

3. The supreme court will take judicial notice of its own decision disbarring an attorney. Danforth v. Egan [S. D.] 119 NW 1021.

4. Pickens v. Coal River Boom & Timber Co. [W. Va.] 65 SE 865.

5. Must show the decision involved the issues sought to be barred. Hinsdale Elec. Co. v. Ogle, 45 Colo. 454, 101 P 786. Introduction of judgment, without pleadings, insufficient to prove identity of causes of action. Sumner v. Griffin [Ky.] 113 SW 422. Not proved by merely proving opinion of appellate court. Lambert v. Rice [Iowa] 120 NW 96. One claiming the benefit of a judgment in trespass to try title between his predecessor in title and another must show that his predecessor recovered the title of the other party. Hamman v. Presswood [Tex. Civ. App.] 120 SW 1052.

6. Action to quiet title against mortgagee. Allegation that statute of limitations had run against mortgage, but no showing that such statute was considered. Judgment upholding mortgage, not conclusive on question of limitations. Kammann v. Barton [S. D.] 122 NW 416.

7. Harris v. Mason [Tenn.] 115 SW 1146.

8. Evidence held to show that wife was party to proceeding to foreclose mortgage executed by herself and her husband. Peddie v. Owings [Ark.] 119 SW 658.

9. Judgment against innkeeper by owner of team given to another guest by mistake, form of action being either for liability as innkeeper or for negligence. Reynolds v. Alderman, 130 App. Div. 286, 114 NYS 463.

10. To show that certain issues were not in fact determined. Commonwealth v. Churchill [Ky.] 115 SW 189.

11. Kammann v. Barton [S. D.] 122 NW 416. Proof of death of one before judgment tends to prove that question was not litigated in former action in which parties or their privies were codefendants. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826.

12. Iguano Land & Min. Co. v. Jones, 65 W. Va. 59, 64 SE 640; Dix v. Dix [Ga.] 64 SE 790. In action for rent for portion of term included in former action, evidence that recovery was not allowed for such portion because premature held admissible. Martin v. Stranger [R. I.] 72 A 534.

13. Reitman v. Shapiro, 62 Misc. 255, 114 NYS 887.

14. Iguano Land & Min. Co. v. Jones, 65 W. Va. 59, 64 SE 640.

15. Institution for Sav. v. Puffer, 201 Mass. 41, 87 NE 562.

16. Taylor v. Taylor [Or.] 103 P 524; Millie Iron Min. Co. v. McKinney [C. C. A.] 172 F 42.

bar to a subsequent action is a question to be determined always in such subsequent action.[17] A judgment, although not res adjudicata as between the parties, may properly be admitted in evidence on issues not affecting such party, and hence such admission is not inconsistent with the finding that the judgment is not res adjudicata.[18]

Former Conviction or Acquittal, see latest topical Index.

FORMS OF ACTION.[19]

The scope of this topic is noted below.[20]

The character of the action is determined from the express averments of the petition.[21] Actions are divided into two general classes, civil[22] and criminal.[23] Some actions are civil in nature[24] and criminal in effect.[25] A criminal action is one prosecuted by the state against a person charged with a public offense committed in violation of the public law.[26] Civil actions[27] embrace actions at law[28]

17. Such determination is conclusive. Wood v. Wood [Iowa] 121 NW 1090.

18. Decree canceling mortgage not res adjudicata as to pledgee not made a party, but admissible in foreclosure proceeding to sustain decree directing payment of surplus to mortgagor after satisfying pledgee's claim. Aetna Indemnity Co. v. Altadena Min. & Inv. Syndicate [Cal. App.] 104 P 470.

19. See 11 C. L. 1556.

Search Note: See, also, Action, Cent. Dig. §§ 85-319; Dec. Dig. §§ 16-37; 1 Cyc. 700-739; 13 A. & E. Enc. L. (2ed.) 1115; 1 A. & E. Enc. P. & P. 142.

20. Treats of the distinctions as to the nature and form of actions. As to grounds of action, see Causes of Action and Defenses.* As to actions generally without reference to form, see Actions.* As to matters of practice dependent upon form, see such titles as Costs,* § 7; Dockets;* Calendars and Trial Lists;* Jury,* § 1; Jurisdiction,* § 7. As to venue of actions, see Venue and Place of Trial,* § 1. As to election between forms of action, see Election and Waiver.* As to joinder of actions, see Pleadings,* §§ 5, 7, 10. For a more exhaustive treatment of particular forms or kinds of actions, see such titles as Assumpsit,* § 1; Detinue;* Trespass,* § 2; Penalties and Forfeitures,* § 3; Mandamus,* § 1. As to special proceedings see Bastards,* § 3; Intoxicating Liquors,* §§ 5-8; Attorneys and Counselors,* § 3; etc.

21. Kellerman Cont. Co. v. Chicago House Wrecking Co., 137 Mo. App. 392, 118 SW 99.

22. Action for **violation of city ordinance** whether instituted by summons or warrant for arrest is civil, not criminal action. Lloyd v. Canon City [Colo.] 103 P 288. Prosecution for violation of ordinance of incorporated town in Indian Territory prior to statehood was civil, not criminal proceeding. Everts v. Bixby [Okl.] 103 P 621. Action for recovery under municipal ordinances of cities of more than 1,000 and less than 5,000 is civil proceeding. Cleaver v. Jenkins [Neb.] 121 NW 992. Proceedings for **seizure and condemnation of liquors** held civil, and not criminal, within constitutional provision giving jury trial in criminal prosecutions. State v. Intoxicating Liquors [Vt.] 73 A 586. Action **to recover penalty** under Code Iowa 1897, § 2382, et seq., forbidding sale of liquors in state, held to be civil, and not criminal. United Breweries Co. v. Colby, 170 F 1008. Action by commonwealth to recover penalty imposed by statute for violation of law prohibiting sale of liquors on Sunday. James v. Helm, 33 Ky. L. R. 871, 111 SW 335.

23. Remedy **to recover fine** imposed by statutes of state (Laws 1905, pp. 469, 470, §§ 4, 8, providing penalty for automobile driver failing to stop on signal of driver of horse), is by criminal action, and not by civil action. State v. Hamley, 137 Wis. 458, 119 NW 114.

24. Action **to recover penalties under Safety Appliance Act** (27 Stat. 532; U. S. Comp. St. 1901, p. 3175) held civil in nature, and not criminal. United States v. Illinois Cent. R. Co. [C. C. A.] 170 F 542; Chicago, B. & Q. R. Co. v. U. S. [C. C. A.] 170 F 556; United States v. Southern R. Co., 170 F 1014.

25. Action to recover **penalty under Safety Appliance Act,** while civil in form, is in effect a criminal prosecution. Atchison, etc., R. Co. v. U. S. [C. C. A.] 172 F 194.

26. State v. Hamley, 137 Wis. 458, 119 NW 114.

27. "Civil actions" includes actions for legal or equitable relief or both, as term is used in practice act. Ludington v. Merrill, 81 Conn. 400, 71 A 504.

As to what are actions as distinguished from special proceedings, see Actions.

28. Ludington v. Merrill, 81 Conn. 400, 71 A 504.

Held action at law: Action by principal to recover money paid to agent in reliance on agent's false representations, and defended by denial of material allegations of complaint. Jones v. Lewis [Ark.] 117 SW 561. Action by surety on note for contribution under bill filed. Burrus v. Cook, 215 Mo. 496, 114 SW 1065. Action on bond of U. S. Consul General. Cunningham v. Rodgers [C. C. A.] 171 F 835. Action for recovery on express assumpsit for work done,

* Always begin with the latest article on the subject. Use the latest topical index.

and in equity,[29] which two forms include all exercise of judicial and quasi judicial power of courts, whether conferred by statute, common law, or equitable rules.[30] An action at law may by amendment be converted into an equitable proceeding,[31] but an action is changed from one at law to one in equity by the pleading of an equitable defense only when such defense as pleaded entitles defendant to equitable relief.[32] In some states the distinction between actions at law and in equity and between the forms of such actions have been abolished.[33] Civil actions and proceedings are either in personam,[34] affecting only the parties and those in privy with them,[35] or in rem,[36] against or upon the subject-matter or thing itself whose state or condition is to be determined[37] and binding on all the world.[38] Actions quasi in rem differ

though it subsequently appears that issue is whether parties agreed to modification of contract. John King Co. v. Louisville & N. R. Co. [Ky.] 114 SW 308. Action on note against maker and sureties, though estoppel is pleaded as defense. Security Sav. Bank v. Smith [Iowa] 119 NW 726. Action for money judgment for defendant's fraud in secretly retaining part of purchase price of partnership property, not being for partnership settlement or accounting. Baum v. Stephenson, 133 Mo. App. 187, 113 SW 225. Where answer in replevin presented no matter of purely equitable cognizance, and issue presented by pleadings was ownership and right to possession of ties, title to land as raised being only incidental and a matter which could be shown at law. Ayer-Lord Tie Co. v. Greer, 87 Ark. 543, 113 SW 209. Action on debt for which plaintiff had given receipt in full, though annulment of receipt was also sought. Ross v. McCaldin, 195 N. Y. 210, 88 NE 50. Action for services under contract for certain per cent as pay, though an accounting may be necessary to determine profits. Lindner v. Starin, 128 App. Div. 664, 113 NYS 201.

29. Ludington v. Merrill, 81 Conn. 400, 71 A 504.

Held equitable: Action on benefit certificate where insurance company tenders money into court and show beneficiary has been changed and new beneficiary interpleads and takes affirmative of issue. Blood v. Sovereign Camp, W. O. W. [Mo. App.] 120 SW 700. Action for damages on contract, abrogation of contract, possession of premises, and for injunction and such other relief as court might deem proper. Hickson Lumber Co. v. Stallings [S. C.] 64 SE 1015. Suit to impress trust on notes payable to defendant and delivered to plaintiff, in which defendant filed counterclaim setting up ownership and right of possession. Irwin v. Deming [Iowa] 120 NW 645. Issue upon cancellation of instrument changing beneficiary in insurance policy. Hintz v. Wald, 138 Wis. 41, 119 NW 821. Action by assignee of written instrument for payment of money on oral promise of maker to pay same, made to payee after assignment, where it is not alleged that defendant at time of making promise knew of promise or intended it for benefit of assignee. Manufacturers' Commercial Co. v. Klots Throwing Co. [C. C. A.] 170 F 311. Suit involving recognition and marshaling of privileges. Iberville Planting & Mfg. Co. v. Monongahela Coal Co. [C. C. A.] 168 F 12. Action on petition alleging that plaintiff was induced to accept $2,500 in divorce settlement when defendant, acting for husband, had received $5,000 with which to make such settlement. Dickinson v. Stevenson [Iowa] 120 NW 324. Action on petition stating balance due and asking adjudication thereof and that it be declared a lien on property. Gigray v. Mumper [Iowa] 118 NW 393. Action under Rev. Codes, § 6870, to quiet title. Larson v. Peppard, 38 Mont. 128, 99 P 136. Where cause of action was alleged equitable right of creditors of insolvent bank through receiver to have accounting by defendant, a stockholder, as to fund withdrawn by him from assets of bank and necessary to satisfy their claim against it. Fitzpatrick v. McGregor [Ga.] 65 SE 859.

30. Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 NW 857.

31. Fitzpatrick v. McGregor [Ga.] 65 SE 859.

32. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104.

33. But one form of action is recognized under Code Civ. Proc. § 2. Kazebeen v. Nunemaker, 82 Neb. 732, 118 NW 646. Forms of action have been abolished. Jones v. Winsor [S. D.] 118 NW 716.

Effect of such statutes on equitable jurisdiction, see Equity, § 1.

34. Statutory proceeding to remove trustee appointed under written instrument is proceeding in personam, and not in rem. Parker v. Kelley, 166 F 968.

35. Gassert v. Strong, 38 Mont. 18, 98 P 497. Proceeding in personam is one in form as well as in substance between parties claiming right. Gassert v. Strong, 38 Mont. 18, 98 P 497.

See Former Adjudication.

36. Garnishment is proceeding in rem. United States Fidelity & Guar. Co. v. Hollenshead, 51 Wash. 326, 98 P 749. Guardianship proceedings are in nature of proceedings in rem. Nelson v. Cowling [Ark.] 116 SW 890. Proceeding to settle estate of decedent is in nature of action in rem. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

37. Gassert v. Strong, 38 Mont. 18, 98 P 497. Action in rem is one to determine state or condition of thing itself; it is term applied to proceeding taken directly against property, having for its object the disposition of property without reference to title of individual claimants but being applied to actions between parties where direct object is to reach and dispose of property owned by them or of some interest therein. Holcomb v. Kelly, 114 NYS 1048.

38. Gassert v. Strong, 38 Mont. 18, 93 P 497.

from actions strictly in rem in that the interest of the defendant alone is sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties.[39] In respect to venue, actions are local or transitory.[40] As regards their basic grounds and dependent in each case upon a consideration of the petition in its entirety with special reference to prominent and leading allegations,[41] actions are distinguished as ex contractu [42] and ex delicto.[43] A petition may set forth a breach of contract without being open to the criticism that it contains a joinder or causes of action ex contractu and ex delicto.[44] Some actions may be brought either in tort or on contract,[45] where either form of action will lie and the

See Former Adjudication.

39. Gassert v. Strong, 38 Mont. 18, 98 P 497. Actions quasi in rem, though brought against persons, seek only to subject certain property of those persons to discharge of claims asserted; such as actions in which property of nonresidents is attached and actions for enforcement of liens, and all actions having for their object the sale and disposition of property of defendant to satisfy demands of plaintiff. Id.

40. Action in assumpsit for cutting and removing timber is transitory. Asher v. Cornett [Ky.] 113 SW 131.

See Venue and Place of Trial, § 1B.

41. Delaney v. Great Bend Implement Co. [Kan.] 98 P 781.

42. Rusch v. Klausner, 117 NYS 1074.

Held ex contractu: Action for price of goods sold and delivered. Rusch v. Klausner, 117 NYS 1074. Action wherein complaint is sufficient to charge under Code Civ. Proc. § 549, subd. 4, providing that defendant may be arrested in action on contract where disposition of property with intent to defraud creditors is alleged. Taylor v. Klein, 130 App. Div. 615, 115 NYS 445. Action by shipper for injury to cattle wherein he set up contract of shipment, failure of carrier to deliver cattle in good condition as agreed, and alleged damages resulting therefrom. Southern R. Co. v. Forrest [Ga.] 65 SE 93. Action for removal, pending disaffirmance of mortgage sale and redemption thereunder, of timber from mortgaged premises by purchaser. Richardson v. McCreary & Co. [Ala.] 48 S 341. Action against common carrier either for failure to deliver or for failure to deliver within reasonable time. McNeill v. Atlantic Coast Line R. Co. [Ala.] 49 S 797. Action for damages on attachment bond though commission of tort is required to constitute breach of contract. State v. U. S. Fidelity & Guar. Co., 135 Mo. App. 160, 115 SW 1081. Actions against telegraph companies for failure to correctly transmit and promptly deliver messages. El Paso & N. E. R. Co. v. Sawyer [Tex. Civ. App.] 119 SW 110. Where judgment had been recovered against city for death of boy due to negligence of contractor, action of city against contractor who had agreed to construct electric light plant causing such death in a safe manner. City of Owensboro v. Westinghouse, Church, Kerr & Co. [C. C. A.] 165 F 385. Where complaint contains two counts, one for money had and received, another for money lost and paid on wager. Johnson v. Collier [Ala.] 49 S 761. Where plaintiff voluntarily waived tort and sued in assumpsit on implied promise to pay for wrongfully cutting and removing timber. Asher v. Cornett [Ky.] 113 SW 131.

43. Holland v. Hummell [Ind. App.] 87 NE 662.

Held ex delicto or in tort: Action on complaint showing defendant had willfully, wrongfully and without authority, entered on land and cut timber, and praying treble damages therefor. Ballinger's Ann. Codes and St. §§ 5656, 5657 (Pierce's Code, §§ 1257, 1258). Northern Pac. R. Co. v. Myers-Parr Mill Co. [Wash.] 103 P 453. Action for wrongfully and by stealth taking mule away from owner and to recover damages caused thereby. Malone & Grant Co. v. Hammond [Ga. App.] 64 SE 666. Action to recover for infringement of patent not being action for breach of implied contract. Avery v. McClure [Miss.] 47 S 901. Action to recover penalty for injury to fruit trees brought under Code 1907, § 6037, though technically an action for debt. Wright v. Sample [Ala.] 50 S 268. Action wherein wrongful eviction from caboose attached to freight train was alleged, where no allegation was made of contract to carry plaintiff as passenger or of any breach thereof, although plaintiff alleged purchase and possession of ticket and of freight permit. Reed v. Chicago, B. & Q. R. Co. [Neb.] 120 NW 442. Action stated in complaint against telegraph company alleging negligence in transcribing message, since action stated was one growing out of breach of duty growing out of contract, or for breach of duty imposed by law. Western Union Tel. Co. v. Louisell [Ala.] 50 S 87. Complaint of landlord against tenant charging defendant with wrongfully withholding premises without payment of rent and demanding damages for such wrongful occupancy. Holland v. Hummell [Ind. App.] 87 NE 662. Where declaration seeks damages only for injury resulting from diversion and pollution of water, alleged to have been caused by defendant unlawfully and without excuse or justification, and does not seek to recover value of any property alleged to have been taken by defendant corporation in the exercise of any of its corporate powers. Lyle v. National Home for Disabled Volunteer Soldiers, 170 F 842. Liability of bonding company, after placing agent in charge of work of grading, for failure to comply with contract for appropriating dirt. Michaud v. Erickson, 108 Minn. 356, 122 NW 324.

44. Chattanooga S. R. Co. v. Thompson [Ga.] 65 SE 285.

See, also, Pleading, § 1.

45. Action to recover for loss or injury to freight may be either upon contract or in tort. Kansas City So. R. Co. v. Rosebrook-Josey Grain Co. [Tex. Civ. App.] 114 SW 436. Shipper may sue carrier either in tort on obligation raised by law or on contract of

pleadings are ambiguous, the courts are not agreed as to whether the action will be construed as one ex contractu or ex delicto.[46] In some states the distinctions as to procedure have been abolished between different actions arising ex delicto,[47] and also between different actions arising ex contractu,[48] but statutes intended merely to simplify pleading must not be construed as abolishing the forms of action.[49] An action cannot be maintained upon a count in a complaint stating an action both on ex contractu and in tort.[50] Actions are further distinguished as principal and auxiliary.[51]

FORNICATION.[52]

The scope of this topic is noted below.[53]

At common law, fornication was the unlawful sexual intercourse between a man, either married or single, and an unmarried woman,[54] but it was not per se a criminal offense.[55] Where punishable by statute, the offense is usually made to include some additional element such as cohabitation.[56] The consent of the woman is essential.[57] The requirement that she be unmarried is met where her marriage to

carriage, regardless of fact that contract limits obligations of carrier. Libby v. St. Louis, etc., R. Co., 137 Mo. App. 276, 117 SW 659. Hirer of livery horse who is injured by the animal which proves unruly may sue for either, for breach of implied warranty or by action in tort for negligence. Conn v. Hunsberger, 224 Pa. 154, 73 A 324. Employer was entitled to sue insurer under an employer's liability act policy either for breach of its implied contract or in tort for negligence, where such insurer after being notified failed to properly defend suit brought against employer. Attleboro Mfg. Co. v. Frankfort Marine Accident & Plate Glass Ins. Co., 171 F 495. Judgment in municipal court in form an action on contract may be upheld as a judgment in an action of tort, forms of actions being abolished in such court. Edgerton v. Chicago, etc., R. Co., 240 Ill. 311, 88 NE 808. Action against telegraph company for delay in delivering message is not necessarily ex contractu but may be ex delicto for breach of duty, since injury in such case is more often result of breach of duty imposed by law or breach of duty growing out of contract than mere breach of contract. Western Union Tel. Co. v. Hill [Ala.] 50 S 248.

As to right to waive tort and sue in assumpsit, see Election and Waiver, § 2A.

46. Ambiguous pleadings will be construed as claiming damages in tort in a case wherein either form of action will lie. Kansas City So. R. Co. v. Rosebrook-Josey Grain Co., [Tex. Civ. App.] 114 SW 436. Where possible, averments of doubtful petition will be construed in favor on action being one ex contractu rather than ex delicto. Delaney v. Great Bend Implement Co. [Kan.] 98 P 781.

47. Pennsylvania statute (P. L. 271) abolishes, as to procedure, distinctions between different actions arising ex delicto, and calls them all actions in trespass. Pennsylvania R. Co. v. Hummel [C. C. A.] 167 F 89.

48. Pennsylvania statute (P. L. 271) abolishes, as to procedure, distinctions between different actions arising ex contractu and calls them actions in assumpsit. Pennsylvania R. Co. v. Hummel [C. C. A.] 167 F 89.

49. Forms of action are not affected by action of code in simplifying pleading. Smith v. Woman's Medical College, 110 Md. 441, 72 A 1107.

50. Complaint stating cause of action ex contractu for money had and received and in tort for conversion thereof cannot be maintained. Jones v. Winsor [S. D.] 118 NW 716.

51. Garnishment proceedings are not independent but auxiliary. Bristol v. Brent [Utah] 99 P 1000.

See Attachment, Garnishment, Injunction, and the like, as to auxiliary remedies.

52. See 11 C. L. 1560.

Search Note: See note in 35 L. R. A. 572.

See, also, Fornication, Cent. Dig.; Dec. Dig.; 19 Cyc. 1433-1443; 13 A. & E. Enc. L. (2ed.) 1118; 9 A. & E. Enc. P. & P. 642.

53. Matters common to all crimes are treated in Criminal Law,* and Indictment and Prosecution.* Related crimes are treated in the topics Adultery,* and Indecency, Lewdness and Obscenity * (lascivious cohabitation).

54, 55. Richey v. State [Ind.] 87 NE 1032.

56. Under Burns' Ann. St. 1908, § 2353, prohibiting cohabitation in a state of fornication, a married man is not guilty who has sexual intercourse with an unmarried servant living with him and his wife. Richey v. State [Ind.] 87 NE 1032. Under Cr. Code 1896, § 5906 (Cr. Code 1907, § 7421), making it an offense for a man and woman to live in adultery or fornication, a single act of sexual intercourse, if accompanied with the intention of future repetition, held sufficient proof of condition of cohabitation. Jones v. State, 156 Ala. 175, 47 S 100. By Revisal 1905, § 3350, making it a misdemeanor for a man and woman, not being married to each other, to lewdly and lasciviously associate, bed and cohabit together. State v. Britt, 150 N. C. 811, 63 SE 1056.

57. Otherwise man guilty of different offense. Nephew v. State, 5 Ga. App. 841, 63 SE 930.

the defendant is void.[56] An indictment charging the essential elements of the offense is sufficient, though omitting part of the statutory description.[59]

Forthcoming and Delivery Bonds; Forwarders, see latest topical index.

FRANCHISES.

The scope of this topic is noted below.[60]

§ 1. Definition and Elements, 1868.
§ 2. Grant of Franchise and Regulation of Its Exercise, 1868.
§ 3. Powers and Duties Under Franchises, 1871.
§ 4. Duration and Extension of Term, 1873.
§ 5. Transfer of Franchises and Effect Thereof, 1873.
§ 6. Revocation and Forfeiture, 1873.

§ 1. *Definition and elements.*[61]—See 11 C. L. 1560—A franchise is a special privilege conferred by the government on individuals [62] to use public property for public use but with private profit,[63] and is to be distinguished from the right of the corporation to exist as such.[64] A franchise constitutes property [65] while a license is a mere personal privilege.[66] A franchise grant when accepted and acted upon becomes a contract,[67] but is subject to police regulations.[68]

§ 2. *Grant of franchise and regulation of its exercise.*[69]—See 11 C. L. 1561—No franchise can be acquired except by grant from the sovereign power,[70] municipalities

58. Marriage to white not void unless her negro blood proved. Bartelle v. U. S. [Okl. Cr. App.] 100 P 45.

59. Under Revisal 1905, § 3350, providing "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together," etc., omission of words "lewdly and lasciviously" not fatal. State v. Britt, 150 N. C. 811, 63 SE 1056.

60. Treats of public privileges, more or less in nature of licenses, to conduct certain enterprises, furnish public service in a particular place, or make certain use of public places, etc., as distinguished from corporate franchises proper (see Corporations *). See, also, topics treating of particular franchises, such as Electricity,* § 1; Gas,* § 1; Railroads,* § 2; Street Railroads,* § 1; Telegraphs and Telephones,* § 1. As to Taxation of Franchises, see Taxes,* § 2C.

61. **Search Note:** See notes in 3 C. L. 1495; 11 Id. 1560.

See, also, Franchises, Cent. Dig. § 1; Dec. Dig. § 1; 19 Cyc. 1451, 1455-1459; 14 A. & E. Enc. L. (2ed.) 4, 5.

62. Southern R. Co. v. Greene [Ala.] 49 S 404.

63. "Special franchise" is right granted by public to use public property for public use but with private profit. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. Right to place **gas pipes** in streets is a franchise. Elizabeth City v. Banks, 150 N. C. 407, 64 SE 189. Under General Tax Law (Laws 1896, p. 796, c. 908), art. 1, § 2, subd. 3, as amended by Laws 1899, p. 1589, c. 712, § 1, rights and privileges of **telegraph company** to construct and operate lines in and between cities of the state constitutes a "special franchise." People v. Woodbury, 63 Misc. 1, 116 NYS 209.

64. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 NE 443. "Franchise" means, in addition to right of corporation to exist as such, the right to carry on a particular enterprise, which right is property. Blackrock Copper Mining & Milling Co. v. Tingey, 34 Utah, 369, 98 P 180.

65. Gas franchise is property, a vested right protected by constitution. Elizabeth City v. Banks, 150 N. C. 407, 64 SE 189. Grant of use of streets in connection with lighting plant is a valuable property right of which grantee cannot be deprived unless forfeited, or unless plant becomes a nuisance. Wakefield v. Theresa, 125 App. Div. 38, 109 NYS 414.

66. Elizabeth City v. Banks, 150 N. C. 407, 64 SE 189. Municipal grants or consents to lay and maintain **gas pipe lines in streets** are not "franchises" within meaning of Code Civ. Proc. § 1948, providing that attorney general may maintain action for unlawfully exercising franchise. People v. Consolidated Gas Co., 130 App. Div. 626, 115 NYS 393.

67. City of New York v. New York City R. Co., 117 NYS 919. Grant of franchise for public utility is a contract. Louisville Home Tel. Co. v. Louisville [Ky.] 113 SW 855. Ordinance granting franchise to company to furnish heat and light is a contract. Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007. When ordinance granting street railway franchise is accepted, it constitutes a contract between the parties. Indianapolis & E. R. Co. v. New Castle [Ind. App.] 87 NE 1067.

68. See post, § 2.

69. **Search Note:** See Franchises, Cent. Dig. §§ 2, 3; Dec. Dig. §§ 2, 4; 19 Cyc. 1459, 1460, 1463; Municipal Corporations, Cent. Dig. §§ 1459-1466, 1471-1476, 1479-1486; Dec. Dig. §§ 680, 683-689; 28 Cyc. 866-888; 14 A. & E. Enc. L. (2ed.) 5.

70. McCarter v. Vineland L. & P. Co. [N. J. Err. & App.] 70 A 177. A ferry franchise

having no power except as it is delegated.[71] The power of municipalities to grant franchises or to assent to their use must be exercised in the manner prescribed by statute,[72] but such power is often restricted with respect to perpetual or exclusive franchises.[73] Unless the grant is a general, continuing one,[74] the franchise exends

can only be acquired by special grant of the state. State v. Portland General Elec. Co., 52 Or. 502, 98 P 160.

71. In absence of statute, a city cannot grant franchise for construction of gas plant and of pipes therefor. Elizabeth City v. Banks, 150 N. C. 407, 64 SE 189. Elizabeth City Charter (Priv. Laws 1905, p. 45, c. 15), § 19, held not to authorize granting of gas franchise. Id. Primary power to grant franchises resides in state but may be delegated to municipality. Village of Phoenix v. Gannon, 195 N. Y. 471, 88 NE 1066.

72. Held that there was no express statutory prohibition upon a town to grant a **50-year water and light franchise.** Hester v. Greenwood [Ind.] 88 NE 498. Where city charter provided that every **application for franchise should be published** for three days and awarded to highest bidder on terms including annual payment of 2½ per cent of gross income derived by grantee, prescribed manner for exercise of municipal power to grant franchise for street railway was mandatory. Gill v. Lake Charles, 122 La. 1019, 48 S 440. Under Rev. Laws 1902, c. 25, § 54, and c. 26, §§ 2, 6; and c. 122, § 2, as amended by St. 1906, p. 79, c. 117, authorizing board of aldermen of a city to permit telephone and telegraph lines to be laid under any way and square, regulate same, and providing, for petition, notice to landowners, and hearing, and order by the board of aldermen, without such **notice, petition and hearing,** granting telephone company right to locate above and below all present and future streets, all structures necessary for transmission of sound, signals, and intelligence, is void. Metropolitan Home Tel. Co. v. Emerson, 202 Mass. 402, 88 NE 670. Under Comp. Laws 1907, § 313x, grant of street for railway purposes cannot be made without **submitting question to qualified electors.** Knight v. Thomas [Utah] 101 P 383. **Consent of abutting property owners** not required to street railway franchise under Laws 1903, p. 285, notwithstanding City and Village Act (Hurd's Rev. St. 1905, c. 24), § 62. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266.

Ordinances and resolution of consent: Where city charter provides that all grants of franchises shall be by ordinance, filing of extension of route with secretary of state gave no right to use such extended line in absence of grant from city by ordinance, such extension being an amendment of original articles of incorporation. In re New York Independent Tel. Co., 133 App. Div. 635, 118 NYS 290. While creation of franchise for operation of toll road is legislative, Laws 1907, p. 72, c. 55, providing for extension of franchise with consent of board of supervisors, such consent is not exercise of legislative power, it being merely an act making franchise available to holder. Duffield v. Ashurst [Ariz.] 100 P 820. Where Code Pub. Gen. Laws 1904, art. 23, § 366, provides that all companies incorporated under § 28 must obtain a special grant from general assembly of Maryland and assent of mayor and common council of Baltimore befor exercising franchise, a foreign electric light company without such grant is not entitled to maintain poles or wires in public streets of Baltimore. Patapsco Elec. Co. v. Baltimore, 110 Md. 306, 72 A. 1039. Where city charter provides that city's right in streets are inalienable, that all franchises must be by ordinance, and for not longer than 25 years, incorporation of telephone company did not give it right to construct and operate lines in street in absence of grant from city by ordinance. In re New York Independent Tel. Co., 133 App. Div. 635, 118 NYS 290. Articles of incorporation obtained under general law authorizing corporation to engage in public service in municipality do not ipso facto authorize corporation to use privileges and franchises that may be conferred by municipality to render public service therein. State v. Tampa Waterworks Co., 65 Fla. 858, 47 S 358. Burglar alarm company, having power to use telegraph wires, had no authority to use streets of city where it had not obtained consent of board of aldermen, city charter providing that all grants shall be by ordinance. In re New York Independent Tel. Co., 133 App. Div. 635, 118 NYS 290. Stipulation fixing maximum rate at which light and water shall be furnished constitutes a sufficient compliance with Acts 1905, p. 395, c. 129, § 253, providing that ordinance shall **prescribe terms and conditions** upon which town may obtain service. Hester v. Greenwood [Ind.] 88 NE 498.

73. City could not, under charter (Acts 1894, p. 164, No. 165), § 55, authorizing council to make ordinances, regulations, and by-laws to provide for water supply, grant perpetual water franchise. City of Barre v. Perry [Vt.] 73 A 574. Exclusive right to railway company to occupy street, not authorized by Comp. Laws 1907, § 206, subd. 32, authorizing city councils to grant railroad franchises in streets. Knight v. Thomas [Utah] 101 P 383. Provision in gas franchise by which company agrees to pay to city $300 annually, and that such payments are to continue only so long as gas company enjoys franchise without competition, is not contrary to public policy. Richardson Gas & Oil Co. v. Altoona [Kan.] 100 P 50. Where water power lease provided that lessee should perpetually keep towpath on canal bordering his dam in repair, word "perpetually" construed not to mean "forever" but for 20 years, as such would, under powers of canal commissions, make lease valid. People v. Economy L. & P. Co., 241 Ill. 290, 89 NE 760.

74. Where gas franchise authorizes company to lay pipes throughout the city and any addition thereto and as the boundaries are or may hereafter be, the grant is a general continuing one, expanding with the city, and not limited to district within city limits when franchise was granted. Seattle Lighting Co. v. Seattle [Wash.] 102 P 767.

only to the limits of the municipality as existing when the grant was made.[75] The grant may be made to individuals as well as to corporations.[76] Acceptance by the grantee is necessary,[77] and where the grant provides that work must be commenced within a prescribed time, such requirement must be complied with.[78] If no time is prescribed, the franchise must be exercised within a reasonable time.[79] Under some circumstances the ordinance granting a franchise may subsequently be amended [80] and grants void when made may later be confirmed to the extent that the franchise has been exercised.[81] Compensation for the use of the public street may properly be required.[82] While franchises are granted subject to the police power,[83] and the right to regulate traffic,[84] contract rights arising from the grant cannot be impaired by subsequent regulation,[85] except as the right is reserved in the franchise

75. Incorporation as village of territory comprising two towns, in one of which waterworks company had franchise, did not extend its right to supply entire village. In re Beauty Spring Water Co., 134 App. Div. 17, 118 NYS 659.

76. Franchise to operate and construct railroad may be granted to individuals. City of New York v. Bryan, 196 N. Y. 158, 89 NE 467. Municipality may, under Railroad Law (Laws 1890, p. 1082, c. 565), grant a franchise for construction of street railway, to an individual as well as to a corporation, to act as a conduit to regularly formed corporation. Village of Phoenix v. Gannon, 195 N. Y. 471, 88 NE 1066.

77. **Use of franchise** constitutes an acceptance and creates contractual obligations. City of Superior v. Douglas County Tel. Co. [Wis.] 122 NW 1023. Acceptance of street railway franchise by board of directors is **binding upon stockholders,** charter providing that all corporate powers shall be exercised by board of directors. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266.

78. Where franchise required work of construction of street railway system to be commenced within 60 days, testimony as to impossibility of getting rails within such time, and that it was not intention of parties that physical work should be done on ground within such time, was inadmissible in action for damages resulting from forfeiture. Spencer v. Palestine [Tex. Civ. App.] 116 SW 857. Evidence held insufficient to show that such things were done as would constitute commencement of work of building railway within time prescribed by franchise. Id.

79. City of New York v. Bryan, 196 N. Y. 158, 89 NE 467.

80. Amendatory ordinance granting street railway franchise, giving to board of trustees right to designate what kind of poles were to be used, and imposed burdens on company not mentioned in original ordinance, there was sufficient consideration for amendment. Indianapolis & E. R. Co. v. New Castle [Ind. App.] 87 NE 1067. Under Ballinger's Ann. Codes & St. § 1010 (Pierce's Code, § 3522), providing that no ordinance granting a franchise shall be passed by council on day of its introduction, nor within five days thereafter where ordinance to lay spur track was amended at regular meeting more than five days after its introduction by changing name of grantee lumber company to name of railroad, purpose of amendment being identical with original ordinance, such change in name did not make it in substance a new ordinance, and its adoption was legal. State v. Hughes, 53 Wash. 651, 102 P 758.

81. Where persons owning waterworks system had such system in operation, and charter was amended by Acts 1896, p. 108, No. 145, providing that all persons having water pipes in streets should file with city clerk survey of location, such persons were within its provision, and provision was legislative recognition of their right of occupancy. City of Barre v. McFarland [Vt.] 73 A 577. Laws 1905, p. 210, c. 106, providing that all franchises granted by board of county commissioners of any county to lay water or gas pipes in public roads outside limits of incorporated cities and towns, thereby confirmed certain franchises held to be ultra vires and declared to be valid to extent that such roads had been, prior to passage of act, actually occupied by such pipe lines and validated grants made as of its date. Spring Water Co. v. Monroe [Wash.] 104 P 202.

82. City may exact compensation from street railway company for occupation of streets. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266. May require payment of 10 per cent of net profits derived from use of canal and locks constructed by corporation under Laws 1870, p. 14, for improvement of Willamette River. Slate v. Portland General Elec. Co., 52 Or. 502, 98 P 160.

83. In electing to extend route and accepting franchise to operate stage line under Laws 1900, p. 1437, c. 657, § 23, company must be deemed to have acquired its right to operate subject to paramount right of municipality to reasonably regulate traffic. Could not operate motor omnibus over 10 feet in height where park ordinance prohibited it. People v. Shellenberg, 133 App. Div. 79, 117 NYS 820.

84. When a steam road has been granted right to occupy public street, it takes right subject to power of city to authorize construction of a street car line over same, and, when it is proposed by proper means to cross such tracks on street with track of a new street car company, which has been duly granted a franchise, steam road has no right to object to crossing being made. Evansville & S. I. Trac. Co. v. Evansville Belt R. Co. [Ind. App.] 87 NE 21.

85. Where franchise imposed annual license tax for greatest number of street cars in daily use at busiest season of year, ordinance imposing penalty for failure to dis-

itself,[86] nor can the grantee, having accepted the conditions of the franchise, set up want of authority in the grantor to impose them.[87]

§ 3. *Powers and duties under franchises.*[88]—See 11 C. L. 1563—Grants of franchise are to be strictly construed in favor of the public,[89] and no right will pass by implication unless it is of such a character as to be without question,[90] but regard should be had as to the intent of the parties and their situation at the time of the making of the contract.[91] The grantee of a franchise to use a public street may as a public user of such street maintain an action to restrain a nuisance therein.[92] Where an independent contractor is exercising none of the franchises of the company, the company cannot be held liable for torts committed by him.[93] If the fran-

play in each car a certificate of payment of license fee impairs company's contract rights under franchise. City of New York v. New York City R. Co., 117 NYS 921. Where telephone company was operating in city under ordinance containing no provision fixing maximum rates or reserving to city power to fix such rates, city could not pass or enforce an ordinance subsequent thereto fixing such rates, although charter empowered mayor and city council to pass all ordinances necessary for health, convenience, or safety of citizens. City of Jacksonville v. Southern Bell Tel. & T. Co. [Fla.] 49 S 509. Laws 1891, p. 89, c. 4052 (Gen. St. 1906, § 1024), conferring upon municipalities power to forfeit franchises for failure to comply with reasonable provisions regulating use of streets, does not confer implied power upon municipality to fix maximum telephone rates, there being no reservation of such power in franchise. City of Jacksonville v. Southern Bell Tel. & T. Co. [Fla.] 49 S 509. Where franchise requires street railway company to maintain certain lines crossing each other and to give transfers reserving in city right to make reasonable regulations as to running cars, the city cannot require establishment of additional route compelling cars to be run with unnecessary frequency and depriving company of right to collect second fares. People v. Detroit United R. Co., 156 Mich. 659, 16 Det. Leg. N. 223, 121 NW 321.

86. Where franchise provided that cars shall be annually licensed by mayor, and there shall be paid annually for such license such sum as common council may hereafter determine, and license was fixed at $50 for each car, such provision must be read into grant and a subsequent amendment fixing license at $50 for "each day" every car should be run, not being part of grant, does not infringe any right under contract. City of New York v. New York City R. Co., 117 NYS 919.

87. Where telephone company voluntarily enters into contract with city conferring rights in streets, and in consideration thereof fixing maximum rates, it may not repudiate such agreement on gound that city is not authorized to make it. Buffalo Merchants' Delivery Co. v. Frontier Tel. Co., 112 NYS 862.

88. Search Note: See Franchises, Dec. Dig. § 3; 19 Cyc. 1459; Municipal Corporations, Cent. Dig. §§ 1467-1470, 1481, 1482; Dec. Dig. §§ 682, 684, 685; 28 Cyc. 870-874, 882-888; 14 A. & E. Enc. L. (2ed.) 8.

89. Ordinance granting street railway franchise must be strictly construed. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552. Franchise to furnish heat and light will be strictly construed against grantee. Town of Sapulpa v. Sapulpa Oil & Gas Co. [Okl.] 97 P 1007. Grant of right to construct and operate street railway must be construed most favorably to public. City of New York v. New York City R. Co., 126 App. Div 36, 110 NYS 720. Where franchise provided that portion of street between tracks and outside thereof to limit of two feet should be kept in as good condition and repair, considering nature of use, as other parts of streets are kept, where street was paved, street railway company was under ordinance compelled to pave its portion also, although street was merely graveled when ordinance was enacted. Columbus St. R. & L. Co. v. Columbus [Ind. App.] 86 NE 83.

90. Central Trust Co. v. Municipal Trac. Co., 169 F 308. Where franchise gave right to lay single track along street, such franchise could not be construed to carry right to lay additional track. Henry v. Mason City & Ft. D. R. Co., 140 Iowa, 201, 118 NW 310.

91. Where at time water company agreed to supply village with water, residences were small and only needed small supply pipes, company could not later be compelled to furnish water through pipes several times larger to supply large residences since erected at same rate. Condon v. New Rochelle Water Co., 116 NYS 142. Grant to transmit electricity through streets of city for general electric lighting purposes held not to include right to transmit electricity for all purposes. Omaha Elec. L. & P. Co. v. Omaha, 172 F 494. Laws 1870, p. 14, § 2, providing it should be duty of grantee to construct canal and should not charge greater rate than 50 cents a ton for use thereof, was equivalent to authority to charge such rate. Oregon v. Portland General Elec. Co., 52 Or. 502, 98 P 160.

92. Where light company has under franchise right of public user of street, it may maintain action to restrain nuisance consisting of wire of another company passing near its wires, with which if it should come in contact would endanger use of street by light company. Wettengel v. Allegheny County Light Co., 223 Pa. 79, 72 A 265.

93. Where contractor engaged in construction of railway caused damage to land by scattering rock thereon, company was not liable, the work not yet having been turned over to it. Stephenville, etc., R. Co. v. Couch [Tex. Civ. App.] 121 SW 189.

chise be void, the municipality cannot enforce covenants therein.[94] The state alone can bring suit to determine whether the grantee is exceeding the rights granted.[95] Acceptance of the franchise imposes upon the grantee the obligation to perform the service for which the franchise was granted[96] in its entirety,[97] and to comply with the conditions thereof,[98] and while such duties may subsequently be extinguished by amendments,[99] the obligations of the grantee cannot be released except in accordance with statute.[1] While the grantee is bound to comply with the general law,[2] it cannot, as a rule, be obliged to perform service not provided for in the grant.[3]

94. Elizabeth City v. Banks, 150 N. C. 407, 64 SE 189.

95. Bland v. Tipton Water Co., 222 Pa. 285, 71 A 101. Where a riparian owner of land bordering upon a stream from which a water company obtained its supply of water brought suit to restrain company from supplying water to railway company on ground that it was taken from township by company, bill would not lie, since it was brought to inquire into conduct of water company under the charter, and not as to rights conferred thereby. Id. Conduct by railway company in exercising franchise by running trains in one direction only, past a certain station, can be questioned only by state in suit for that purpose. People v. Illinois Cent. R. Co., 143 Ill. App. 337.

96. City, grantee of ferry franchise under Montgomerie charter of city of New York of Jan. 15, 1730, held to be under obligation by acceptance of same to operate ferries for public service, according to method prescribed by legislature. In re Wheeler, 62 Misc. 37, 115 NYS 605. Franchise granted to telephone company organized under transportation corporation law, authorizing it to construct lines over public streets and in, over, and under squares, parks and public places and to replace and enlarge such system, conferred greater rights than it had under transportation corporation law, and was sufficient consideration for its covenant not to charge more than $48 per year for each instrument. Rochester Tel. Co. v. Ross, 195 N. Y. 429, 88 NE 793.

97. Where street railway company's predecessor obtained franchise for extension of its lines on certain conditions, the company could not build only part of such extension and not remainder. State v. New York, etc., R. Co., 81 Conn. 645, 71 A 942.

98. Street railway company bound by terms of franchise to keep tracks and space of two feet on each side thereof in permanent repair was bound to make such repairs including new paving when necessity therefor is determined by municipal authorities, although it may do the work itself. City of New York v. Metropolitan St. R. Co., 130 App. Div. 842, 115 NYS 878.

99. Where original franchise of street railway company providing that company should keep portion of street lying between ends of ties in good repair was subsequently amended by ordinance covering all portions of original franchise but which amendment did not contain agreement that company was to pay for improvement of portion of street between ties, amending ordinance extinguished company's obligation to keep such portion of street in repair. Indianapolis & E. R. Co. v. New Castle [Ind. App.] 87 NE 1067.

1. Where contract as to street improvements between street railway company and city provided that, in consideration of payment of a certain sum by company, it should be discharged of all obligations for street paving, such contract is in conflict with Code 1904, § 1033f, cl. 5, forbidding release of holder of any franchise from any duty imposed upon him without 10 days' notice by advertisement, such obligation for street paving being a continuing one. McKennie v. Charlottesville & A. R. Co. [Va.] 65 SE 503. Where, by terms of street railway, franchise company was required to keep space outside rails in repair, and question as to amount company was required to pay for street improvements having been submitted to arbitrators, award that, upon payment of a certain amount, company should be released from liability for keeping space outside rails in repair for five years was under terms of arbitration properly stricken. Id.

2. Where street railway company had accepted franchise and continued to operate its road, it became liable for conditions imposed by Railroad Law (Laws 1890, p. 1112, c. 565), § 98, requiring it to maintain pavement for roadbed. City of New York v. Broadway & S. A. R. Co., 130 App. Div. 834, 115 NYS 872. Where railway company was by franchise confirmed by Laws, 1860, p. 715, c. 411, and under Railroad Law (Laws 1890, p. 1112, c. 565), § 98, required to keep space between rails and for two feet on each side paved and repaired, company acting under such franchise was liable to city for cost of repavement. City of New York v. Ninth Ave. R. Co., 130 App. Div. 839, 115 NYS 876.

3. Agreement of street railway company to keep street between tracks repaired is not an agreement to pay for improvement of street, there being no express stipulation in franchise to that effect. Indianapolis & E. R. Co. v. New Castle [Ind. App.] 87 NE 1067. Where contract between street railway company and city provided that present rates of fare might be changed with consent of both parties, company did not violate contract by refusing to issue transfers on tickets sold at rate of six for 25 cents. Philadelphia v. Philadelphia Rapid Transit Co., 224 Pa. 544, 73 A 923. Where ordinances granting franchises to street railway company imposed no obligation upon company to stop trains at certain points, where an ordinance provided that lessees of company should be bound by all the conditions of franchise, such ordinances construed together did not impose upon company duty to stop trains at points named in petition for mandamus. People v. Aurora, E. & C. R. Co., 141 Ill. App. 82.

§ 4. *Duration and extension of term.*[4] See 11 C. L. 1563—Where the franchise fixes no time limit, the grant is for a reasonable time,[5] but is not necessarily limited in duration to the corporate life of the grantee,[6] and the status of such a franchise can only be determined in a suit by the state for that purpose.[7] Where the grantee derives its franchise from the state, a limitation in a municipal ordinance consenting to the franchise does not limit it to that period.[8] In the absence of express provision therefor, the consolidation of street railway lines operated under franchises expiring at different times does not operate to extend the franchise of any one of them beyond the original term,[9] although the public acquire additional advantages from such consolidation.[10]

§ 5. *Transfer of franchises and effect thereof.*[11] See 11 C. L. 1563—While it has been held that a corporation may alienate its franchises in the absence of statutory restrictions,[12] as a general rule statutory authority is necessary therefor,[13] but a restriction as to alienation may not affect the power to mortgage.[14] A transfer invalid for want of legislative authorization when made may be ratified by subsequent legislation.[15]

§ 6. *Revocation and forfeiture.*[16] See 11 C. L. 1564—A franchise one granted can-

4. Search Note: See Franchises, Dec. Dig. § 11; Municipal Corporations, Cent. Dig. §§ 1467-1470; Dec. Dig. § 682; 28 Cyc. 870-874; 14 A. & E. Enc. L. (2ed.) 4.

5. Where grant to maintain waterworks system fixes no time limit, grant is for a reasonable time. City of Barre v. Perry [Vt.] 73 A 574.

6. Franchise of electric company to use streets. Omaha Elec. L. & P. Co. v. Omaha, 172 F 494. Where street railway corporation has accepted franchise to build lines, expended large sums of money but has not completed road before expiration of statutory time, such franchise on termination of corporate existence does not cease but passes to directors as trustees of creditors like other corporate property. City of New York v. Bryan, 130 App. Div. 658, 115 NYS 551.

7. Status of franchise of railway company that has ceased to exist cannot be determined in action by city which has granted franchise against directors who have become trustees for creditors but can only be determined in action by people of state against directors. City of New York v. Bryan, 196 N. Y. 158, 89 NE 467.

8. Although consent of city is essential to construction and operation of telephone system, such consent is not within meaning of word "franchise" as used in ordinance limiting duration of such franchise. Dakota Central Tel. Co. v. Huron, 165 F 226.

9. Central Trust Co. v. Municipal Trust Co., 169 F 308.

10. Although, by consolidation, passengers acquired right to free transfers from one line to another, consolidation did not have effect of extending franchise of any line beyond original term. Central Trust Co. v. Municipal Trac. Co., 169 F 308.

11. Search Note: See notes in 5 C. L. 1522; 35 A. S. R. 390.

See, also, Franchises, Cent. Dig. § 5; Dec. Dig. §§ 7-10; 14 A. & E. Enc. L. (2ed.) 4.

12. In absence of constitutional or statutory restrictions, a corporation may sell its "secondary franchises," or its right to occupy and use streets and public places, for the operation of its works. Cooper v. Utah L. & R. Co. [Utah] 102 P 202.

13. Statutory authority is necessary for a corporation to alienate franchise for construction of street railway. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552. Lease of gas franchise held invalid. McCarter v. Vineland L. & P. Co. [N. J. Err. & App.] 70 A 177. Street railway company may mortgage its franchise under Rev. St. 1879, § 706, providing that corporation may mortgage or otherwise convey such real and personal estate as purposes of corporation may require. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552. Street railway company cannot mortgage its franchise without first obtaining consent of city, under Rev. St. 1879, § 706, construed in connection with Const. 1875, art. 12, § 20 (Ann. St. 1906, p. 309), prohibiting legislature from granting right to operate street railway without requiring consent of local authorities, and that such franchise shall not be transferred without similar assents. Id. Provision of Const. art. 12, § 7, that no corporation shall lease or alienate any franchise so as to relieve it from liability of lessor or grantor, includes secondary franchises. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Corporation using streets for operation of electric light and power plant, and street railway under franchise granted by city, could not convey such franchise so as to relieve property used in connection therewith from liability on a judgment for personal injuries. Id.

14. Russell's Adm'r v. Frankfort & S. R. Co. [Ky.] 116 SW 289.

15. Where franchise to operate toll road was not transferable when attempted transfer was made, statute making such franchises transferable from beginning was valid in so far as to validate such attempted transfer. Duffield v. Ashurst [Ariz.] 100 P 820.

16. Search Note: See notes in 4 L. R. A. (N. S.) 321; 5 A. S. R. 803.

See, also, Franchises, Cent. Dig. § 6; Dec.

not be arbitrarily recalled unless that power is reserved in the grant,[17] but it is subject to forfeiture for failure to exercise it or for nonuser.[18] Although a forfeiture will in general not be enforced except for abuse of such a nature as to injuriously affect the public welfare or as to violate the law or contract obligations contained in the grant.[19] Under some statutes forfeiture of a corporate charter works forfeiture of the franchises also.[20] In the absence of a forfeiture clause in the grant, a forfeiture can be declared only in a suit for that purpose,[21] and the district attorney may by mandamus be compelled to institute such proceedings.[22]

FRATERNAL MUTUAL BENEFIT ASSOCIATIONS.

The scope of this topic is noted below.[23]

§ 1. Nature, Organization and Powers, 1875.
§ 2. Foreign Associations, 1876.
§ 3. Officers, Agents, Organizers, Physicians, etc., 1876.
§ 4. Members and Discipline, 1877.
§ 5. The Contract of Insurance, 1877.
A. General Nature, Requisites and Formation, 1877.
B. General Rules of Construction, 1878.
C. Risk Assumed and Benefit Promised, 1878.
D. Conditions, Warranties and Representations, 1879.
E. Dues and Assessments, 1880.
F. Modification and Alteration of Contract or Its Terms, 1881.
G. Rescission, Forfeiture, Cancellation and Avoidance, 1882.
H. Waiver, Estoppel and Reinstatement, 1883.
§ 6. The Beneficiary, 1884.
§ 7. Maturity and Accrual of Benefits, 1887.
§ 8. Notice and Proofs of Death or Disability, 1887.
§ 9. Payment of Benefits and Discharge of Liability, 1888.
§ 10. Procedure to Enforce Right to Benefits, etc., 1888.

Dig. §§ 13-16; Municipal Corporations, Cent. Dig. § 1490; Dec. Dig. § 690; 28 Cyc. 889-892; 14 A. & E. Enc. L. (2ed.) 4.

17. City of New York v. Bryan, 196 N. Y. 158, 89 NE 467. Where permit to maintain waterworks system contained no limitation as to time or territory, permit could be revoked by city at any time so far as new territory was concerned, where such new territory was not required for reasonable use of existing system. City of Barre v. Perry [Vt.] 73 A 574. Under grant to street railway company by Act Feb. 6, 1865 (Laws 1865, p. 597), amending Act Feb. 14, 1859 (Laws 1859, p. 530), providing that council may with written consent of other parties to contract amend or annul same, agreement by ordinance adopted Feb. 11, 1907, whereby company surrendered rights in streets and accepted right to operate street railway for 20 years on certain conditions, is not ultra vires as to city. Venner v. Chicago City R. Co., 236 Ill. 349, 86 NE 266.

18. A franchise is subject to defeasance or forfeiture by failure to exercise it or by nonuser. City of New York v. Bryan, 196 N. Y. 158, 89 NE 467.

19. State v. Tampa Waterworks Co. [Fla.] 48 S 639. That ordinance amending street railway franchise is injudicious furnishes no ground for setting it aside in absence of fraud. Indianapolis & E. R. Co. v. New Castle [Ind. App.] 87 NE 1067.

20. Where corporate existence of railway company, incorporated under Railroad Law 1850, as amended by Laws 1867, p. 1903, c. 775, providing that on failure of company to finish its road within 10 years, is forfeited under such act, its franchises are forfeited also. City of New York v. Bryan, 196 N. Y. 158, 89 NE 467.

21. City may invoke aid of equity to restrain by injunction unlawful continuance by electric light and power company of its use of streets and highways. Patapsco Elec. Co. v. Baltimore, 110 Md. 306, 72 A 1039. Forfeiture of street railway franchise can only be taken advantage of by quo warranto. Kavanaugh v. St. Louis, 220 Mo. 496, 119 SW 552. In absence of forfeiture clause by city in ordinances granting franchise for street railway system, where rights had become vested, they could only be forfeited in suit for that purpose. Spencer v. Palestine [Tex. Civ. App.] 116 SW 857. Acts 1896, p. 108, No. 145, providing for filing with city clerk survey of location of water pipes, is a legislative recognition of rights of individual owning pipes for supply of water to citizens, and city cannot question such permit but leaves future relations of parties to be determined by terms of grant. City of Barre v. Perry [Vt.] 73 A 574. Order of city by resolution that street railway company remove its tracks, and directing city solicitor to enforce order, contemplates suit by him and not forcible removal of track. City of Des Moines v. Des Moines City R. Co., 29 S. Ct. 553.

22. Under Civ. Code 1901, par. 3794, where undisputed facts presented to district attorney show as a matter of law that a franchise is unlawfully being exercised, refusal by district attorney to institute quo warranto proceedings is a violation of his duty, and he may be compelled to institute such proceedings by mandamus. Duffield v. Ashurst [Ariz.] 100 P 820.

23. Except as to matters relating to the insurance contract, this article deals with only the law peculiar to fraternal mutual benefit associations. Matters relating gen-

§ 1. *Nature, organization and powers.*[24]—See 11 C. L. 1884—Acts providing for incorporation of fraternal societies are not within the constitutional provision relating to special acts.[25] General insurance statutes do not as a rule apply to beneficial associations.[26] Whether an association is conducting a life insurance business or not is a question of fact,[27] and the association must be organized under an act giving it such power if it would engage in insurance business.[28] Statutes providing for the filing of the constitution and by-laws of the association must be substantially complied with.[29] In the absence of statute, one fraternal benefit association cannot merge with another,[30] but where it is allowed to do so its contracts made before the merger are binding.[31] The charter and by-laws control as to the powers of the association relative to its corporate acts.[32] As a rule the individuals composing the organization are not liable for its obligations,[33] but suit

erally to corporations (see Corporations;* Foreign Corporations *), or association (see Associations and Societies *), are excluded. All matters relating to insurance by fraternal organizations are retained, but as general rules of insurance law are in many reepects applicable, the topic Insurance * should also be consulted.

24. Search Note: See notes in 7 L. R. A. (N. S.) 380; 13 Id. 314; 15 Id. 336; 52 A. S. R. 543.

See, also, Beneficial Associations, Cent. Dig. §§ 1-7, 36-41, 49, 50, 57-59; Dec. Dig. §§ 1-5, 15, 17, 19, 21, 22; Insurance, Cent. Dig. §§ 1824-1847; Dec. Dig. §§ 687-710; 29 Cyc. 7-58; 3 A. & E. Enc. L. (2ed.) 1041, 1045, 1046; 14 Id. 533.

25. Pub. Acts 1893, p. 68, No. 68 (Comp. Laws 7607-7617 inc.), providing for incorporation of fraternal society composed of grand and subordinate lodges, is not a special act for creation of corporation within meaning of Const. 1850, art. 15, § 1. People v. Wilson [Mich.] 16 Det. Leg. N. 506, 122 NW 297.

26. Acts 1907, p. 243, No. 180, relating to provisions in life insurance policies, has no application to fraternal beneficiary associations, such associations being governed by Acts 1893, p. 186, No. 119. Knights of the Modern Maccabees v. Commissioner of Insurance, 155 Mich. 693, 15 Det. Leg. N. 854, 118 NW 585.

27. Name of association is not controlling as to whether it is conducting life insurance business or not. City of Trenton v. Humel, 134 Mo. App. 595, 114 SW 1131. Association conducted to confer old age, funeral and death benefits on members on payment of stipulated sums, and referring to its business as life insurance, was within ordinance requiring agents of life insurance companies to be licensed. Id.

28. A beneficial society organized under Gen. Inc. Act Sept. 6, 1892, for "religious and social purposes," and not under Act June 23, 1883, has no authority to contract to pay life insurance on death of member. Society of St. Stephen v. Sikorski, 141 Ill. App. 1.

29. Under statute requiring each amendment to be certified and filed in office of auditor of state, filing of original constitution and by-laws in printed form, divided into chapters and sections and indexed so as to be easy of reference, and after each biennial meeting filing of copies of same as amended, constituted a substantial compliance with statute. Crites v. Modern Woodmen of America [Neb.] 121 NW 591. Under Cobbey's Ann. St. 1907, § 6656, providing that society shall file with auditor of public accounts a copy of constitution and by-laws duly certified to by secretary, certificate must be under hand of secretary as well as under seal of order. Hart v. Knights of Maccabees of the World, 83 Neb. 423, 119 NW 679.

30. Knapp v. Supreme Commandery, U. O. G. C. [Tenn.] 118 SW 390. Acts Gen. Assem. 1887, p. 329, c. 198, providing that one corporation shall have power to lease and enjoy property and franchises of another, does not authorize a domestic fraternal benefit association to consolidate with a foreign fraternal benefit association, such statutes applying only to corporations having capital stock and stockholders, and carrying on business for individual profit of stockholder. Id.

31. Where benefit association amalgamates with another, dues to be paid according to the contract with the association which member originally joined, liability to be measured by its own laws, it cannot as against beneficiary assert that it had no authority to make the contract. Campbell v. Order of Washington, 53 Wash. 398, 102 P 410.

32. Policemen's beneficial association held to have power to contract with an amusement company to furnish grounds and license and to collect tickets for circus to be conducted by company and to divide proceeds with it. Brindze v. Atlantic City Policemen's Beneficial Ass'n [N. J. Eq.] 72 A 435. By-law of lodge of beneficial order requiring four-fifths vote for appropriations exceeding $50 does not apply to contracts for purchase of real estate to be paid for by other real estate and by note and mortgage. Kelley v. Sullivan, 201 Mass. 84, 87 NE 72.

33. In Pennsylvania, since Act April 28, 1876 (P. L. p. 53), members of an unincorporated beneficial association are individually exempt from liability for payment of obligations of the organization. Maisch v. Order of Americus, 223 Pa. 199, 72 A 528. Where association was incorporated for the

may be brought in equity against some of the members of an unincorporated association as representing themselves and all others having the same interest.[34] An association wherein the officers and committeemen have the right to vote has a representative body.[35] Courts will not interfere with the internal operations of such associations nor assume to review their failure to conduct their business affairs according to laws and rules of order, except for purpose of protecting some civil or property right of party complaining.[36]

Status of local lodges and their relation to supreme body. See 11 C. L. 1565—A subordinate lodge is the agent of the supreme lodge.[37] The property of a subordinate lodge cannot be forfeited by the state council where such subordinate lodge retained its allegiance to the national council.[38]

§ 2. *Foreign associations.*[39] See 11 C. L. 1566—A foreign association that has filed its charter as required by statute has a right to do business until enjoined by state action.[40]

§ 3. *Officers, agents, organizers, physicians, etc.*[41] See 11 C. L. 1566—Where the by-laws restrict the authority of the officers, their powers are limited to that extent.[42] The officers are liable to the association for the misappropriation of its funds.[43]

purpose of conducting a convention of a fraternal order, such association alone was liable for debts incurred and not the lodges or members composing it. Palmer v. Grand Lodge, K. of P. [Ky.] 121 SW 678.

34. Maisch v. Order of Americus, 223 Pa. 199, 72 A 528.

35. Officers and committeemen, having right to vote, constituted representative body, regardless of whether they refrained from voting or not and as such could change by-laws. Briggs v. Royal Highlanders [Neb.] 122 NW 69.

36. Will not decide contested election of officers. Gaines v. Farmer [Tex. Civ. App.] 119 SW 874. Voluntary associations may adopt such methods of selecting officers as they see fit, and they may do so without requiring successful contestant to receive greatest number of legal votes. Id. Decision by the proper tribunal of the association as to election of national grand master is binding upon courts, unless it appears that result was accomplished through proceeding violative of rules of order and that an unsuccessful contestant was deprived of civil or property rights to which entitled under rules of order. Id. Courts will not supervise or direct internal affairs of a foreign benefit association. Royal Fraternal Union v. Lundy [Tex. Civ. App.] 113 SW 181. Where state council revoked charter of local lodge, and it appeared that there was no irregularity in proceedings, nor exercise of excess of power, court will not vacate such order of revocation in direct attack, an appeal to state council being necessary before member of local lodge could apply to court. Lincoln Council, No. 1. J. O. U. A. M. v. State Council, J. O. U. A. M. [N. J. Law] 73 A 245.

37. As such may waive forfeitures. Jones v. Supreme Lodge, K. of H., 236 Ill. 113, 86 NE 191.

38. Where dues were paid to subordinate council and small part only paid to state council, part of which was for expenses of national council, and scheme of organization provided that upon dissolution of subordinate council its property should be forfeited, and subordinate lodge after severance of relations between state and national councils retained allegiance to national council, state council could not by its own act work forfeiture of its property. State Council of J. O. U. A. M. v. Enterprise Council, No. 6 [N. J. Err. & App.] 72 A 19. Followed, although subordinate council was an unincorporated association. State Council of J. O. U. A. M. v. Hollywood Council [N. J. Err. & App.] 72 A 24.

39. Search Note: See Insurance, Cent. Dig. §§ 1825-1831; Dec. Dig. §§ 688-691; 29 Cyc. 11-13; 13 A. & E. Enc. L. (2ed.) 834.

40. Where a fraternal benefit association has filed its charter with secretary of state as required by Laws 1899, § 14, it has the right to begin business and continue to do business until enjoined by suit of attorney general, and certificate allowing association to do the business for which it was organized and chartered is unnecessary. Trinity Life & Annuity Soc. v. Love [Tex.] 116 SW 1139.

41. Search Note: See Beneficial Associations, Cent. Dig. §§ 27-31; Dec. Dig. § 14; Insurance, Cent. Dig. § 1836, 1838; Dec. Dig. §§ 695, 697; 29 Cyc. 23-35, 40-45; 3 A. & E. Enc. L. (2ed.) 1068.

42. Where by-laws restrict authority of deputies to duty of obtaining applications and to organize lodges, they have **no authority to suspend by-laws** in regard to completing contract of membership between member and lodge. Louden v. Modern Brotherhood of America, 107 Minn. 12, 119 NW 425.

43. Where officers committed fraud by abstracting funds from insurance department of association for purpose of investment for their own use and benefit, falsely making transaction appear as loans, decree for accounting, judgment for funds misappropriated and order for sale of land purchased, was authorized. Supreme Lodge, K. of P. v. Hinsey, 241 Ill. 384, 89 NE 728.

§ 4. *Members and discipline.*[44] See 11 C. L. 1567—Expulsions and suspensions as affecting the right to benefits are treated in the next section.[45] A member cannot be expelled except for cause.[46] Notice and hearing is essential.[47] Where the expulsion is wrongful,[48] where the by-laws do not provide a remedy,[49] or where there is no decision from which to appeal, the member need not exhaust his remedies within the order before bringing suit.[50] On trial of a member for violating the laws of the order, a finding by the trial tribunal, if made in good faith and fairness, is conclusive,[51] and the question as to whether the trial was so had is one of fact.[52] A member entitled to damages for wrongful expulsion, against those causing such expulsion, may recover actual damages.[53]

§ 5. *The contract of insurance. A. General nature, requisites and formation.*[54] See 11 C. L. 1568—Since the association may impose terms and conditions for membership,[55] the charter and by-laws in force when the contract was made,[56] together with the application,[57] are elements of the contract of insurance,[58] though not referred to in the policy,[59] and members are chargeable with knowledge

44. Search Note: See notes in 49 L. R. A. 371; 59 A. S. R. 198; 6 Ann. Cas. 698.

See, also, Beneficial Associations, Cent. Dig. §§ 8-21; Dec. Dig. §§ 7-12; Insurance, Cent. Dig. §§ 1889-1894, 1987, 1988; Dec. Dig. §§ 744-748, 804, 805; 29 Cyc. 31-33, 45-47, 167-169, 210, 211; 3 A. & E. Enc. L. (2ed.) 1059, 1078.

45. See post, §§ 5E, 5G, 5H.

46. Charge that member had gone on witness stand and testified against railway company did not furnish ground for expulsion, even if by-laws had provided for such a case. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144. Member could not be lawfully expelled on ground of obtaining money from association for sick benefits which was not justly due him, where action for such benefits had been brought before justice of the peace and judgment in member's favor had been rendered to him. Spier v. Douglas Mut. Ben. Soc., 144 Ill. App. 195.

47. Under by-laws providing that sick or disabled member cannot be disbarred from receiving sick benefits on account of nonpayment of assessments, such member, having by reason of his membership valuable rights in the organization, cannot be removed without giving him an opportunity to be heard, hence member removed for nonpayment of dues while sick was entitled to reinstatement. Horgan v. Metropolitan Mut. Aid Ass'n, 202 Mass. 524, 88 NE 890.

48. Right to bring suit exists in favor of all citizens and cannot be abridged except by consent. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144.

49. Where by-laws give no right of appeal or other remedy fitting the case, court may give relief without requiring member to exhaust his remedy within the order. Horgan v. Metropolitan Mut. Aid Ass'n, 202 Mass. 524, 88 NE 890.

50. When society provided method of procedure for trial and expulsion and for appeal, member who was attempted to be expelled by merely making entry thereof in books without trial was not compelled to appeal, there being no decision from which appeal might be taken. Gill v. Ladies' Catholic Benev. Ass'n, 36 Pa. Super. Ct. 458.

51. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144.

52. Whether or not trial of member for violation of rules of order was held in fairness and good faith is a question for the jury. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144.

53. St. Louis & S. W. R. Co. v. Thompson [Tex.] 113 SW 144.

54. Search Note: See note in 52 A. S. R. 543.

See, also, Beneficial Associations, Cent. Dig. §§ 8-26, 41-56; Insurance, Cent. Dig. §§ 1848-1927, 1956, 1977, 1978; Dec. Dig. §§ 711-765, 788; 29 Cyc. 31-40, 62-104, 167-198; 3 A. & E. Enc. L. (2ed.) 1078.

55. Where approval of application by supreme medical director was under laws of order a condition precedent to membership, applicant who had taken preliminary examination which had been forwarded to supreme medical director, but who died before such report had been approved, had not become a member and beneficiary was not entitled to recover. Patterson v. Supreme Commandery, U. O. G. C., 104 Me. 355, 71 A 1016.

56. Suicide clause in by-laws part of contract. Schack v. Supreme Lodge of F. B., 9 Cal. App. 584, 99 P 989.

57. Where the application for insurance is made a part of the contract both by its own terms and by the constitution of the order, it is reversible error to charge the jury that the contract of insurance is embodied in the constitution and the cetificate. Grand Lodge of Brotherhood of R. T. v. Daly, 11 Ohio C. C. (N. S.) 464.

58. Gaines v. Farmer [Tex. Civ. App.] 119 SW 874. Since the contract between the member and the association controls, a complaint seeking an accounting as to certain funds accumulated as a trust fund is demurrable where it does not state the terms of the contract. Ryan v. Knights of Columbus [Conn.] 72 A 574. By-laws, rules and regulations of a mutual benefit society are elements which form part of insurance contracts. Farra v. Braman, 171 Ind. 529, 86 NE 843.

59. United Order of G. C. v. Hooser [Ala.] 49 S 354.

thereof.[60] The certificate is in the nature of a life insurance policy.[61] It must be duly executed [62] and be delivered to a duly initiated member [63] during his life.[64] Statutes in some states require the application to be attached to the certificate and if not so attached it will not be considered part of the contract.[65] A certificate confers a vested right upon the beneficiary, and upon the member a property right.[66]

(§ 5) *B. General rules of construction.*[67]—See 11 C. L. 1568—The law of the state of the association's domicile determines as to the effect to be given to the contract.[68] Where a by-law is susceptible of two constructions, it must be given that most favorable to the beneficiary.[69]

(§ 5) *C. Risk assumed and benefit promised.*[70]—See 11 C. L. 1569—Benefits are usually promised in case of illness,[71] total and permanent disability,[72] or death through accidental means.[73] They are often denied if the member be convicted of

60. Grand Lodge, A. O. U. W. v. Crandall [Kan.] 102 P 843.

61. Smith v. Bankers' Union of Chicago, 144 Ill. App. 384.

62. Benefit certificate impressed with seal of subordinate lodge but not countersigned by protector and secretary is not completely executed. Caywood v. Supreme Lodge, K. & L. of H., 171 Ind. 410, 86 NE 482.

63. Where by-laws provide than no certificate shall become binding until applicant has become a member, and certificate attested by local officers and delivered to applicant, in good health, final act of membership is not completed until member is initiated and has received the obligation. Louden v. Modern Brotherhood of America, 107 Minn. 12, 119 NW 425. Rescission by company of resolution electing plaintiff to membership, before certificate of membership was issued, does not justify plaintiff in suing for breach of contract. Dunn v. Knights of Gideon Mut. Aid Soc. [N. C.] 65 SE 761.

64. Policy not delivered until four days after death of insured is void. Alexander v. Woodmen of the World [Ala.] 49 S 883.

65. Ky. St. § 679 (Russell's St. § 4400), requiring application to be attached to policy in order to be considered, does not provide a mere rule of evidence but is a provision as to what shall be the contract between the parties. Sovereign Camp, Woodmen of the World v. Salmon [Ky.] 120 SW 358. Where application was not so attached, society could not rely on fact that it contained false answers, though insured had waived its attachment to policy. Id.

66. Sautter v. Supreme Conclave, I. O. of H., 76 N. J. Law, 763, 71 A 232.

67. Search Note: See note in 3 L. R. A. (N. S.) 334.

See, also, Insurance, Cent. Dig. §§ 1870-1872; Dec. Dig. §§ 726, 726½; 29 Cyc. 66, 67; 3 A. & E. Enc. L. (2ed.) 1080.

68. Valleroy v. Knights of Columbus, 135 Mo. App. 574, 116 SW 1130.

69. Roth v. Travelers' Protective Ass'n [Tex.] 115 SW 31; Graves v. Knights of Maccabees of the World, 128 App. Div. 660, 112 NYS 948. Word "engage," as used in by-law providing that no person shall be admitted as beneficial member who is **engaged in extrahazardous occupations or in manufacture and sale of intoxicating liquors,** construed not to include one merely financially interested in saloon business. Graves v. Knights of Maccabees of the World, 128 App. Div. 660, 112 NYS 948.

70. Search Note: See Beneficial Associations, Cent. Dig. §§ 41-50; Dec. Dig. § 18; Insurance, Cent. Dig. §§ 1955-1962; Dec. Dig. §§ 787, 788, 790, 791; 29 Cyc. 144-148; 3 A. & E. Enc. L. (2ed.) 1082.

71. Within the meaning of a by-law allowing sick benefits where insured is so ill that he **"must remain constantly in the house,"** it is not necessary that he remain perpetually within the four walls of the house; he may make short visits to physicians, but his condition must be such that he is unable to attend to ordinary affairs of life. Breil v. Claus Groth Plattsdutschen Vereen [Neb.] 120 NW 905. Where certificate required absolute, necessary, continuous confinement to house for not less than 14 days, one who was totally incapacitated from performing labor but who walked quarter of mile to barber shop was not entitled to recover. Sawyer v. Masonic Protective Ass'n [N. H.] 73 A 168. Member **bitten by dog,** so that he could not work at occupation as tailor, but was not confined to bed or otherwise ill, held not to come within provision of by-laws relating to benefits in case of sickness. Villone v. Perticara, 62 Misc. 257, 114 NYS 801.

72. Disability only, and not death, is contemplated by provision in certificate that association shall not be liable in case of disability when caused wholly or in part by any bodily or mental infirmity or disease, duelling, fighting, wrestling, war or riots. Roth v. Travelers' Protective Ass'n [Tex.] 115 SW 31. Where certificate provides for payment of whole amount of certificate for total permanent disability, and one-half amount for **loss of sight of both eyes,** no recovery can be had where sight of one eye only is lost. Phillipy v. Homesteaders, 140 Iowa, 562, 118 NW 880.

73. Where policy limited recovery to death through accidental means, death of one who climbed long flight of stairs in rarified atmosphere, carrying heavy traveling bags, and died from heart failure produced thereby, was not covered by policy. Schmid v. Indiana Travelers' Acc. Ass'n, 42 Ind. App. 483, 85 NE 1032. Where constitution provided that benefits shall be paid in case of death by accident, but if member be injured while suspended no benefits shall be paid, and that beneficiaries shall receive nothing should he be "killed" during delinquency, such provision refers to the result of the

crime,[74] contracts habits dangerous to health,[75] or commits suicide,[76] unless insane.[77] Where the certificate is avoided by suicide, sane or insane, the question of insanity is properly put before the jury as of aid in determining whether the deceased committed suicide.[78] In the absence of direct proof, if the circumstances leave room for doubt, the law presumes that death was accidental or from natural causes, and not suicidal.[79]

(§ 5) *D. Conditions, warranties and representations.*[80] See 11 C. L. 1570 While statements concerning matters of fact within the knowledge of the applicant are treated as warranties,[81] answers as to matters not within the applicant's personal knowledge will be deemed warranties only as to the bona fide belief and opinion of the applicant.[82] Where the language used is susceptible of two constructions, that which makes a representation rather than a warranty is favored.[83] Answers written into the application by the agent, after signature by the member, are not warranties.[84] The certificate is usually void if the member makes false statements as to past medical treatment,[85] disease,[86] or habits.[87] The truth or falsity of war-

accident, and not to the injury from which death ensues. Beneficiary of member injured while delinquent but who was in good standing when death resulted was entitled to benefits. Roth v. Travelers' Protective Ass'n [Tex.] 115 SW 31. Evidence held not sufficient to show that insured, who was found dead with what appeared to be a bullet hole in his shirt, had died by violent external and accidental means within terms of certificate. Klumb v. Iowa State Traveling Men's Ass'n [Iowa] 120 NW 81.

74. Where certificate would become forfeited if member was convicted of a crime or felony, a member who was charged with murder, convicted and died pending appeal, was not a convict within meaning of provision, the prosecution abating upon death. Baker v. Modern Woodmen of America [Mo. App.] 121 SW 794.

75. Evidence held to show that deceased member was addicted to morphine habit within provision avoiding certificate therefor. Conley v. Supreme Court, I. O. F. [Mich.] 16 Det. Leg. N. 595, 122 NW 567. Evidence held not to show that insured drank intoxicating liquors to extent that it impaired his health, policy providing that it should become void if he did so. Sovereign Camp of W. O. W. v. Salmon [Ky.] 120 SW 358.

76. Evidence held to show that member committed suicide and that certificate was thereby avoided. American Home Circle v. Mastinsek, 143 Ill. App. 177. Evidence held not to show suicide. Sovereign Camp of W. of W. v. Salmon [Ky.] 120 SW 358.

77. Where by-laws provided that suicide should avoid certificate unless insured was of unsound mind, known to be such, and supreme secretary notified thereof, and that burden of proving such facts should be upon beneficiaries, such provision was part of contract and upon failure of beneficiary to bring case within exception there was no liability. Schack v. Supreme Lodge of F. B., 9 Cal. App. 584, 99 P 989. Provisions of by-laws that death of member "by his own hand whether sane or insane, whether act be voluntary or involuntary," exempts association for liability, for involuntary suicide from causes other than those proceeding from act of an insane mind. Campbell v. Order of Washington, 53 Wash. 398, 102 P 410.

78, 79. Van Norman v. Modern Brotherhood of America [Iowa] 121 NW 1080.

80. **Search Note:** See Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723; 29 Cyc. 86-91; 16 A. & E. Enc. L. (2ed.) 919, 932.

81, 82. Collins v. Catholic Order of Foresters [Ind. App.] 88 NE 87.

83. Eminent Household of C. W. v. Prater [Okl.] 103 P 558.

84. Maloney v. North American Union, 143 Ill. App. 615.

85. Truth of answers in application being made condition precedent to validity of certificate, negative answers as to whether insured had consulted physician and had had la grippe, when untrue, avoid certificate, although la grippe may have been very mild and have had no connection with consumption which was cause of death. Beard v. Royal Neighbors of America [Or.] 99 P 83. Where question propounded to applicant required her to give information as to the last serious illness, an illness that is temporary in duration and is not attended by permanent or material impairment of health is not to be regarded as a serious illness. Eminent Household of C. W. v. Prater [Okl.] 103 P 558.

Evidence held insufficient to show that answers made by applicant as to whether he had consulted a physician were untrue. Winn v. Modern Woodmen of America [Mo. App.] 119 SW 536. That husband of insured met physician on street and told him insured was ill, whereupon physician went to house and prescribed for her, is a consultation within meaning of interrogatories in application regarding consultation with physician as to personal ailment. Beard v. Royal Neighbors of America [Or.] 99 P 83.

86. Where parties, by contract expressly stipulated that member's answers to physician should be warranties, a false answer as to whether applicant had ever had spitting or coughing of blood avoided policy. Eminent Household of C. W. v. Prater [Or.] 103 P 558.

Evidence held not sufficient to show that warranted statements in application as to past diseases were untrue. Maloney v. North American Union, 143 Ill. App. 615.

ranties is a question for the jury.[88] A statutory provision that misrepresentations shall not be deemed material unless made with actual intent to deceive or unless the matter misrepresented increased the risk of loss includes statements made in warranties.[89] A statutory provision that the falsity of representations cannot be shown unless the application is attached to the certificate cannot be waived by the insured.[90]

(§ 5) *E. Dues and assessments.*[91]—See 11 C. L. 1571—A promise to pay assessments must be express.[92] A by-law providing that notice of assessments may be given by publication is valid,[93] but the affidavit of the publisher as to the mailing of such notice is only prima facie evidence of receipt, although the by-laws provide that it shall be conclusive evidence thereof.[94] Failure to pay dues or assessments is usually ground for suspension of the member and forfeiture of his insurance.[95] While dues must be tendered during the life of the member,[96] they need not be tendered where the association has refused to accept them.[97] That the insured is

Evidence held to show that statements made by applicant relating to condition of health and injuries sustained were not untrue. Collins v. Catholic Order of Foresters [Ind. App.] 88 NE 87. Where member stated that he had no injury or disease which would tend to shorten life and was then in good health, being a representation of a present condition was not a warranty against past injuries or diseases. Maloney v. North American Union, 143 Ill. App. 615.

87. Where evidence does not show that death was the result of use of intoxicants, nor that member had ever been insane, ruling holding that falsity of statements made by applicant that he had never been intoxicated, and that his maternal grandmother was never afflicted with insanity, were misrepresentations of facts which under warranty clause rendered policy void, was error requiring reversal. Daniel v. Modern Woodmen of America [Tex. Civ. App.] 118 SW 211. A confirmation, made upon change of beneficiary, of the previous application when member was admitted, to effect that insured did not use intoxicating liquors to excess, was not a warranty that, at time such application for change of beneficiary was made, insured did not use intoxicating liquor to excess, such confirmation applying to first application, which referred to present and not to future. Supreme Lodge, K. of P. v. Davis [Ark.] 119 SW 257.

88. As to whether applicant in making representations and warranties in his application believed he was telling the truth is for the jury. Collins v. Catholic Order of Foresters [Ind. App.] 88 NE 87. Instruction that misrepresentations are not material or sufficient to avoid policy unless shown that matters misrepresented actually contributed to produce death of insured held error requiring case to be remanded. Valleroy v. Knights of Columbus, 135 Mo. App. 574, 116 SW 1130.

89. Rev. Codes 1905, § 5934. Soules v. Brotherhood of American Yeomen [N. D.] 120 NW 760.

90. Code, § 1826. Mullen v. Woodmen of World [Iowa] 122 NW 903.

91. **Search Note:** See notes in 1 Ann. Cas. 390, 403.

See. also, Beneficial Associations, Cent. Dig. §§ 22-26; Dec. Dig. § 13; Insurance, Cent. Dig. §§ 1878-1888; Dec. Dig. §§ 731-743; 29 Cyc. 98-104; 3 A. & E. Enc. L. (2ed.) 1093.

92. A promise to pay assessments will not be implied where act under which lodge was organized imposed no obligation upon members to pay, and where member had not expressly promised to pay, contract providing for forfeiture of assessment not paid within one month. Faurot v. Swan, 155 Mich. 284, 15 Det. Leg. N. 1013, 118 NW 955.

93. Provision of by-laws that notice of assessment shall be given by publication in official paper is not unreasonable, and is binding upon member. Underwood v. Modern Woodmen of America [Iowa] 119 NW 610.

94. Provision in by-laws, making affidavit of publisher, attached to mailing list of official paper containing notice of assessment, conclusive evidence of mailing and receipt of notice, while unreasonable as making such affidavit conclusive, must be given force of prima facie showing that directorate has done its duty and that notice of assessment has been duly given. Underwood v. Modern Woodmen of America [Iowa] 119 NW 610.

95. Where application for membership as well as certificate issued expressly recognizes the right of company to increase assessments, and where constitution and by-laws authorize supreme council to change such assessments, beneficiary of member who for several years has failed to pay either original assessment or increased assessment cannot collect benefit. United Benev. Ass'n v. Cass [Tex. Civ. App.] 119 SW 123.

96. Where by-laws provided for forfeiture if assessment was not paid on or before last of month, where such assessment was not paid during month and not tendered until after member's death, rights under certificate were forfeited. Grand Lodge A. O. U. W. v. Taylor, 44 Colo. 373, 99 P 570.

97. Where lodge without right refuses to accept dues and repudiates membership rights, member need not thereafter tender further dues. Barrett v. Grand Lodge A. O. U. W., 63 Misc. 429, 117 NYS 125. Where dues were tendered by member wrongfully expelled, failure to pay such dues did not work forfeiture of certificate. Gill v. Ladies' Catholic Benev. Ass'n, 36 Pa. Super. Ct. 458.

sick furnishes no excuse for failure to accept his dues,[98] nor can the lodge declare a forfeiture when the cause of the delinquency is the fault of its officers.[99] Where it has been the custom of the lodge to accept assessments after the time when they are due, the failure to pay within the prescribed time does not work a forfeiture.[1] While advance assessments must be applied to defaults, such assessments must be sufficient to meet the default in order to prevent forfeiture.[2] Where the lodge accepts dues knowing that the member has forfeited his insurance, such dues will be presumed to be accepted in payment of the privileges still open to the member.[3] Dues paid by a beneficiary improperly designated cannot be recovered by him.[4]

(§ 5) *F. Modification and alteration of contract or its terms.*[5]—See 11 C. L. 1571—A member who agrees to be bound by all subsequent by-laws and amendments is generally held bound by all such regulations as are reasonable,[6] if they do not change the contract of insurance.[7] Vested rights cannot be impaired.[8] Unless

98. Melsenbach v. Supreme Tent, K. of M. [Mo. App.] 119 SW 514.

99. Failure of financier to call for registered letter containing dues, until time of payment thereof had expired, cannot be taken advantage of by the association as a forfeiture. Dague v. Grand Lodge Brotherhood of R. T. [Md.] 73 A 735.

1. Burke v. Grand Lodge, A. O. U. W., 136 Mo. App. 450, 118 SW 493. Although laws of order provide that written application for reinstatement must be made and health certificate obtained, where lodge by its course of conduct induced delinquent member to believe that assessments would be received after time specified by by-laws, lodge was estopped from asserting forfeiture for failure to pay assessments on time. Triple Tie Ben. Ass'n v. Wood [Kan.] 98 P 219.

2. Grand Lodge, A. O. U. W. v. Crandell [Kan.] 102 P 843. Evidence held not to show that deceased was reinstated and paid arrearages at such a time as would credit him with an extra assessment which could have been applied on a subsequent delinquency. Ogden v. Sovereign Camp of Woodmen of the World [Neb.] 121 NW 973. A mere allegation that the company has money belonging to the member in its possession and that it is its duty to apply it to assessments not paid is insufficient in absence of a showing of facts from which such duty arises. Caywood v. Supreme Lodge, K. & L. of H., 171 Ind. 410, 86 NE 482. Where nonpayment of assessments worked suspension, and member had paid an advance assessment upon entering lodge, in absence of showing that such assessment had been applied previously for member's benefit, it will be applied to an unpaid assessment. Wait v. Mystic Workers of World, 140 Iowa, 648, 119 NW 72.

3. Where the by-laws provided that no liability should accrue if insured came to his death through being engaged in a prohibited occupation, and where there was also a social feature connected with the society, acceptance of dues where local lodge has knowledge that insured is engaged in such prohibited occupation will be presumed to be payment for social benefits still open to insured. Showalter v. Modern Woodmen of America, 156 Mich. 390, 16 Det. Leg. N. 137, 120 NW 994.

4. Beneficiary having no vested interest in fund during lifetime of member, dues paid by one improperly designated as beneficiary cannot be recovered by him. Supreme Lodge, N. E. O. of P. v. Hine [Conn.] 73 A 791.

5. Search Note: See notes in 7 C. L. 1791; 11 Id. 1572; 8 L. R. A. (N. S.) 521; 83 A. S. R. 706; 1 Ann. Cas. 717; 7 Id. 780; 10 Id. 625.

See, also, Insurance, Cent. Dig. §§ 1855, 1869; Dec. Dig. §§ 719, 735; 29 Cyc. 72-85; 3 A. & E. Enc. L. (2ed.) 1080.

6. A member who agrees to be bound by rules and by-laws subsequently adopted is bound by any reasonable amendment of the by-laws made after he becomes a member. Sautter v. Supreme Conclave, I. O. H., 76 N. J. Law, 763, 71 A 232. Certificate binding insured to strictly comply with constitution, laws and rules thereof now in force, or to be hereafter enacted, amended or adopted, and application containing agreement that laws subsequently enacted should become part of contract, can be construed to mean only that such rules and regulations might be adopted as were best suited in judgment of society to maintain and effectuate vested rights of member. Small v. Court of Honor, 136 Mo. App. 434, 117 SW 116. Where certificate expressly reserves right to change laws, the association may do so. Supreme Council of R. A. v. McKnight, 238 Ill. 349, 87 NE 299. Where a fraternal beneficiary association reserves the right to amend its by-laws, a by-law providing that no death losses shall be paid where the only evidence of death is the presumption arising from disappearance for seven years, not against public policy, and is binding upon the beneficiary of a member, notwithstanding its adoption but fifteen days before the legal presumption of the member's death would be established and notwithstanding the receipt of dues and assessments from the beneficiary up to date of the amendment. McGovern v. Brotherhood of Locomotive Firemen & Engineers, 12 Ohio C. C. (N. S.) 137.

7. Where certificate contained stipulation that insured agreed to comply with constitution, laws, rules, and regulations of the order in force or that may be in force thereafter, and application contained a like provision, agreement is not affected by subsequent change in by-laws relating to suicide, suicide by-law, as in force when certificate was issued, forming part of contract. Wilcox v. Court of Honor, 134 Mo. App. 547,

the association has a representative government, it cannot change its by-laws.[9] The officers cannot vary the contract so as to make it binding contrary to the rules of the association.[10]

(§ 5) *G. Rescission, forfeiture, cancellation and avoidance.*[11] See 11 C. L. 1578—While provisions for forfeiture for nonpayment of dues are reasonable and will be enforced,[12] there is no presumption in favor of forfeiture and the burden of proving it rests upon the association.[13] Where the contract so provides the certificate may ipso facto be forfeited for failure to pay dues.[14] A member is charge-

114 SW 1155. Where by-laws provided, as amended, for reduced amount recoverable in case of suicide committed in delirium, amount was to be determined by laws in force when contract was executed, and not according to amended by-laws. Smail v. Court of Honor, 136 Mo. App. 434, 117 SW 116. Mere substitution of one certificate for another, in order to change beneficiary, does not constitute such certificate a new contract so as to come within changes in by-laws enacted subsequent to issuance of first certificate and prior to second. Briggs v. Royal Highlanders [Neb.] 122 NW 69.

8. Member has a property right in the insurance conferred by his contract which cannot be destroyed or abridged without his consent. Smail v. Court of Honor, 136 Mo. App. 434, 117 SW 116. Where Laws 1903, p. 1052, c. 450, § 1, recognizing right of beneficiary order to provide for **payment of money to member on expiration of fixed period of time**, remained in force when member reached age of 70 at which time by terms of certificate he was entitled to a certain sum, his rights became vested and could not be impaired by subsequent legislation. People v. Chapter General of America K. of St. J. M., 132 App. Div. 410, 116 NYS 985. Where prior to attempted change in by-laws, certificate provided that, on death of member, **amount due on certificate should be ascertained by deducting** from face value monthly assessments from death of member to expiration of life expectancy of such member at time of entry, with 4 per cent interest thereon and such attempted change increased monthly assessments and decreased rate of interest, but such increased assessments were not collected from old members, society had the right in settling with beneficiary to deduct from certificate difference between rate of monthly assessment in force when certificate was issued and increased rate provided by amendment computed from time when new rate went into effect, up to death of member, but not for balance of life expectancy. Johnson v. Bankers' Union of W., 83 Neb. 48, 118 NW 1104. Amendment providing that **women members** should not be entitled to sick benefits could not deprive them of such right which they had originally in common with male members. Feldblum v. Congregation Bikur Cholim, 131 App. Div. 854, 116 NYS 289. Where, subsequent to joining order, by-laws were enacted prohibiting members from engaging in **liquor business**, a member's vested rights under certificate could not thereby be impaired. Barrett v. Grand Lodge, A. O. U. W., 63 Misc. 429, 117 NYS 125. Subsequent change providing that suicide, sane or insane, should avoid certificate, did not affect contractual rights in effect prior thereto. Schack v. Supreme Lodge of F. B., 9 Cal. App. 584, 99 P 989. Amendment that no benefits shall be paid if member commits suicide could not be given retroactive effect, even though member had agreed to be bound by all subsequent by-laws. Sautter v. Supreme Conclave, I. O. H., 76 N. J. Law, 763, 71 A 232. Subsequently enacted laws, where merely **changing procedure or remedy**, do not deprive a member, who has become such prior to such legislation, of any vested rights. Monger v. New Era Ass'n, 156 Mich. 645, 16 Det. Leg. N. 261, 121 NW 823.

9. Where governing board was an arbitrary self-perpetuating body, not representative in form, and not authorized by association to enact edicts. Briggs v. Royal Highlanders [Neb.] 122 NW 69. Where a fraternal benefit association has not complied with Acts 1897, p. 266, c. 47, § 1, and adopted a representative form of government, its governing body is without power to adopt by-law changing terms and obligations of mutual benefit certificate theretofore issued to one of its members. Johnson v. Bankers' Union of the World, 83 Neb. 48, 118 NW 1104. Where Cobbey's Ann. St. 1907, § 6656, required amendments to be duly certified to and filed with auditor of public accounts before becoming effective, and a change in by-laws giving a representative government attempted to be made, where such by-laws were not certified to and filed until after convention had adjourned, and where such convention was not, prior to that time, a representative body, any amendment regarding benefits to be paid in case of suicide made by it was void. Briggs v. Royal Highlanders [Neb.] 122 NW 69.

10. Where initiation is necessary to membership, deputies could not vary contract by delivering certificate to member so as to make it binding in advance of organization of lodge, nor could they direct that she be accepted as member for purpose of receiving certificate, while she was absent from initiation. Louden v. Modern Brotherhood of America, 107 Minn. 12, 119 NW 425.

11. **Search Note:** See Beneficial Associations, Cent. Dig. §§ 12-17, 20; Dec. Dig. § 10; Insurance, Cent. Dig. §§ 1877, 1889-1927; Dec. Dig. §§ 730, 744-765; 29 Cyc. 31-40, 92, 167-198; 3 A. & E. Enc. L. (2ed.) 1086.

12. Burke v. Grand Lodge, A. O. U. W., 136 Mo. App. 450, 118 SW 493.

13. Hart v. Knights of Maccabees of W., 83 Neb. 423, 119 NW 679.

14. No ruling adjudging forfeiture is necessary where certificate and by-laws provide that certificate shall ipso facto be avoided by failure to pay dues within specified time. United Order of G. C. v. Hooser [Ala.] 49 S 354.

able with knowledge that failure to pay dues works a suspension,[15] unless such dues have been tendered and wrongfully refused.[16] Injunction will not lie to prevent a threatened cancellation unless such cancellation would substantially injure the petitioner.[17] Where the insurer threatens to forfeit the certificate the insured may tender the premiums when due and bring suit when policy matures, or treat the policy as terminated and bring action for damages, or he may institute proceedings in equity to determine whether the policy has in fact been forfeited.[18] Where forfeiture is shown, the burden is upon the plaintiff to show waiver.[19]

(§ 5) *H. Waiver, estoppel and reinstatement.*[20]—See 11 C. L. 1575—To establish waiver it must be shown that the society with knowledge of the facts[21] dispensed with the observance of the condition in question.[22] Receipt of dues or assessments,[23] with knowledge of the facts,[24] from one entitled to pay them,[25] usually constitutes a waiver. Forfeitures may be waived by subordinate lodges or their ministerial officers who are the agents of the supreme commandery, acting within the scope of their authority, regardless of the methods provided by the by-laws for restoration of members to good standing,[26] but where the contract was made directly with the supreme lodge, the waiver must be made by it.[27] The association cannot waive

15. If member fails to pay assessment it will be presumed he knew it worked suspension and he is bound to seek reinstatement. Meisenbach v. Supreme Tent, K. of M. of W. [Mo. App.] 119 SW 514.

16. If member tenders assessment and it is wrongfully refused, it cannot be presumed he knew his membership was forfeited, because it would not result according to the by-laws, and he would not therefore be bound to seek reinstatement. Meisenbach v. Supreme Tent, K. of M. of W. [Mo. App.] 119 SW 514.

17, 18. Royal Fraternal Union v. Lundy [Tex. Civ. App.] 113 SW 185.

19. United Order of G. C. v. Hooser [Ala.] 49 S 354.

20. Search Note: See Beneficial Associations, Cent. Dig. §§ 17-21; Dec. Dig. §§ 10-12; Insurance, Cent. Dig. §§ 1866-1868, 1907-1916, 1920-1927; Dec. Dig. §§ 274, 755, 758-765; 29 Cyc. 38-40, 77, 78, 183-198; 3 A. & E. Enc. L. (2ed.) 1086.

21. Where secretary certified that his wife was a member, when in fact she had not been initiated, head officers were justified in accepting his representations as true and in receiving money for dues, and their doing so constituted no waiver. Louden v. Modern Brotherhood of America, 107 Minn. 12, 119 NW 425. Mere possession of certificate does not raise presumption that company waived requisites as to countersignature by officers of subordinate lodge. Caywood v. Supreme Lodge, K. & L. of H., 171 Ind. 410, 86 NE 482.

22. A wrongful **refusal to accept dues** and a repudiation of obligation to member constitutes a waiver of right to demand formal proofs of death. Barrett v. Grand Lodge, A. O. U. W., 63 Misc. 429, 117 NYS 125. Where association **made an adjustment** with beneficiary to pay full face value of policy, if policy be delivered to it, by accepting and retaining policy it waived all defenses which it might have had on account of anything which had occurred prior thereto. Bergeron v. Modern Brotherhood of America, 83 Neb. 419, 119 NW 681. A mere **furnishing of death proof blanks** does not constitute a waiver where liability is denied. Showalter v. Modern Woodmen of America, 156 Mich. 390, 16 Det. Leg. N. 137, 120 NW 994.

23. Receipt of assessments was a waiver of objection to new designation of beneficiary. Tolson v. National Provident Union, 60 Misc. 460, 113 NYS 534. Where by-laws provided that no one could be member of any society not approved by Roman Catholic Church, and society accepted dues from member knowing him to be member of Polish American Alliance, society waived provision of by-laws. Dorff v. St. Adelbert's Aid Soc. [Mich.] 16 Det. Leg. N. 359, 122 NW 82. Crediting an assessment when overdue is a waiver of forfeiture. Jones v. Supreme Lodge, K. of H., 236 Ill. 113, 86 NE 191. Where by-laws provided that failure to pay assessments when due should work forfeiture of certificate, fact that lodge held money tendered for payment of overdue assessment for three days did not constitute a waiver, by-laws providing that vote of lodge shall be necessary for reinstatement. Grand Lodge, A. O. U. W. v. Crandall [Kan.] 102 P 843.

24. Receipt of dues when insured was ill without knowledge thereof by agent of insurer constitutes no waiver, such illness being a material fact. United Order of G. C. v. Hooser [Ala.] 49 S 354. Receipt by association of overdue assessment from son of deceased member after, but without knowledge of death does not waive a forfeiture. Gifford v. Workmen's Ben. Ass'n [Me.], 72 A 680.

25. Acceptance of assessments by association from one not designated as beneficiary did not constitute a waiver of its rights to pay to beneficiary designated only. Beth Mashav Z'Keinim v. Grand Lodge, I. W. S. O., 141 Ill. App. 305.

26. United Order of G. C. v. Hooser [Ala.] 49 S 354.

27. Where the contract was made with the Great Camp, a waiver of exemption from liability must be made by it and it was not sufficient to constitute a waiver that the lo-

statutory requirements as to who shall be a beneficiary.[28] A member does not waive his rights under the certificate by acts done without knowledge of the facts.[29] The association is estopped to declare a forfeiture on the ground of false answers in the application, where such answers were written by the agent with knowledge of the facts.[30] The society is estopped to plead ultra vires where it has received the benefits of the contract.[31]

*Reinstatement.*See 11 C. L. 1577—The right of reinstatement is a purely personal right which does not survive or pass to the representative of the member or to the beneficiary;[32] hence provisions for reinstatement are not available after the member's death.[33] While conditions prerequisite to reinstatement must be complied with,[34] reinstatement will not be vitiated by failure to do so if such failure has been caused through the fault of the officers of the lodge.[35] A member illegally expelled need not apply for reinstatement in order to entitle the beneficiary to recover.[36]

§ 6. *The beneficiary.*[37]—See 11 C. L. 1577—The beneficiary must be a person authorized to take by the laws of the order[38] and must belong to the classes enumer-

cal lodge received dues. Showalter v. Modern Woodmen of America, 156 Mich. 390, 16 Det. Leg. N. 137, 120 NW 994.

28. Acceptance by clerk of local camp of dues with knowledge that designated beneficiary was not among classes enumerated by statute constituted no waiver. Modern Woodmen of America v. Comeaux [Kan.] 101 P 1.

29. Where member was ignorant that his expulsion on account of failure to pay dues on time was illegal, he could not be held to have waived his right by filling out new application blank. Dague v. Grand Lodge, Brotherhood of R. T. [Md.] 73 A 735.

30. Where defendant's agent acting within scope of authority wrote answers in application to effect that applicant did not use intoxicating liquors, his knowledge that such statements were false estopped society from claiming forfeiture. Modern Woodmen of America v. Lawson [Va.] 65 SE 509. Where applicant in answer to question as to whether he had been rejected by any other order answered "yes," and agent wrote "no" in application. Higgens v. Supreme Castle of H. N., 83 Neb. 504, 120 NW 137.

31. Where society had accepted dues and received benefits of contract, it is estopped from claiming that beneficiary is not among those permitted by statute. Ancient Order of Pyramids v. Dixon, 45 Colo. 95, 100 P 427.

32. Payment of overdue assessment by son after member's death, although within time in which suspension for nonpayment of dues could be removed, could not in itself effect reinstatement. Gifford v. Workmen's Ben. Ass'n [Me.] 72 A 680.

33. Where by the laws of the association failure to pay assessment before last day of month ipso facto suspended member, upon his death payment by another could not reinstate him. Gifford v. Workmen's Ben. Ass'n [Me.] 72 A 680.

34. Where member seeking reinstatement failed to pay a rate for current month, such failure did not prevent reinstatement where member had whole month in which to pay. Lounsbury v. Knights of Maccabees of W., 128 App. Div. 394, 112 NYS 921. Where rules required application for reinstatement to be in writing, and it appeared that no blanks were obtainable, whereupon deceased made oral application, question as to whether such rule had been abrogated should have been submitted to jury. Id. A by-law providing that any delinquent member who pays up arrears shall not be entitled to benefits until six months have elapsed from date of such payment contemplates that the delinquent shall continue to be a member for six months to entitle him to death benefit and is not unreasonable, hence, where member in arrears paid and died twelve days later, no liability to pay death benefit accrued. Stanton v. Eccentric Ass'n of Firemen, 130 App. Div. 129, 114 NYS 480.

35. Reinstatement not vitiated by fact that local record keeper failed to report reinstatement to society and kept arrearages paid, record keeper being society's agent. Lounsbury v. Knights of Maccabees of W., 128 App. Div. 394, 112 NYS 921.

36. Barrett v. Grand Lodge, A. O. U. W., 63 Misc. 429, 117 NYS 125.

37. Search Note: See notes in 87 A. S. R. 514; 2 Ann. Cas. 663; 5 Id. 458; 7 Id. 358.

See, also, Beneficial Associations, Cent. Dig. §§ 41-50; Insurance, Cent. Dig. §§ 1928-1985; Dec. Dig. §§ 766-801; 29 Cyc. 105-198; 3 A. & E. Enc. L. (2ed.) 923, 1108.

38. Where member stipulated that marriage shall ipso facto have effect to substitute wife in place of beneficiary named, death benefit was properly payable to wife, although beneficiary named was a woman designated as wife by member after marriage with first wife and member could not by designation of mistress as wife divert fund from beneficiary required by association. Baltimore & O. R. Co. v. Veltri, 37 Pa. Super. Ct. 399. Where by-laws in force when certificate was issued provided that benefit might be made payable to nieces or nephews and member changed beneficiary to niece, a subsequent amendment of by-laws providing that benefit might be made payable to member's wife, and to nieces and nephews of the whole and half blood, and that member thereafter died leaving a wife, niece was not entitled to benefit as against wife, niece being rendered ineligible by such amendment. Supreme Council of R. A. v. McKnight, 238 Ill. 349, 87 NE 299. Where beneficiary was designated out of class prohibited by rules, and such designation was

ated by the statute.[39] Among those who are allowed to be designated are relatives [40] and dependents, but they must be dependent upon the member in a material degree for support and the member must be under obligation to furnish it.[41] If the designation as made is improper, the contract is not thereby rendered void, but the fund will be distributed as if no beneficiary had been designated.[42] A mistaken description of a person who may properly be designated does not prevent recovery.[43] The beneficiary must have an insurable interest.[44] Prior to the death of the members, the beneficiary has no vested interest in the certificate [45] but only a mere expectancy.[46] The payment of dues by the beneficiary gives no equity to the fund,[47] nor under some statutes can the certificate be charged with liens therefor.[48] The

made by local secretary without notice to lodge, lodge was not estopped to deny liability by reason of having been accepted as member. Meyer v. Grand Lodge of O. of S. H., 108 Minn. 25, 121 NW 235. Where under rules and regulations of a railway relief association the beneficiary must be designated by the insured, and that person designated remain such beneficiary at death of insured, and provisions as to beneficiary not otherwise regulated, divorce of wife designated as beneficiary did not render her ineligible. Farra v. Braman, 171 Ind. 529, 86 NE 843.

39. The beneficiary designated must be limited to classes enumerated by 1 Gen. St. p. 153, § 24. Ryan v. Firemen's Mut. Benev. Ass'n [N. J. Law] 72 A 53. Where beneficiary is not within any of classes designated by law, she cannot recover. Mullen v. Woodmen of the World [Iowa] 122 NW 903. One designated as beneficiary who is not among classes provided for by statute and rules of order has no claim against order upon member's death. Modern Woodmen of America v. Comeaux [Kan.] 101 P 1. Where certificate was made payable to wife of member, fact that such certificate was assigned to a home for the aged did not authorize association to pay to it, such home not being among classes, as it is not within classes specified in statute. Beth Moshav Z'Keinim v. Grand Lodge, I. W. S. O., 141 Ill. App. 305.

40. Word "relative" is broad enough, as used in by-law, to cover persons connected by affinity, as one who married sister of member's wife. Tolson v. National Provident Union, 60 Misc. 460, 113 NYS 534. Under Rev. Laws Mass. 1902, c. 119, § 6, providing that death benefits shall be payable, among other classes enumerated, to relatives, only blood relations are intended, and a son-in-law is not a relative within meaning of statute. Supreme Lodge, N. E. O. P. v. Hine [Conn.] 73 A 791.

41. Hotel keeper, designated by member as "dependent" for purpose of securing for member a home, was not a dependent within meaning of statute and rules of order. Modern Woodmen of America v. Comeaux [Kan.] 101 P 1.

42. Where certificate in which wife was designated was afterwards changed so as to designate son-in-law, which designation was void, widow remains beneficiary. Supreme Lodge, N. E. O. P. v. Hine [Conn.] 73 A 791.

43. Where affianced wife is among classes of beneficiaries provided for, fact that one who was in fact member's affianced wife was designated as "cousin" does not prevent recovery. Farrenkoph v. Holm, 142 Ill. App. 336; Id., 237 Ill. 94, 86 NE 702.

44. By Burns' Ann. St. 1908, § 4713, the taking or receiving of an application for insurance in favor of one who has not a bona fide insurable interest in the life of the insured is forbidden. State v. Willett, 171 Ind. 296, 86 NE 68. Where by-laws of mutual burial association provided that profits should go to official undertaker, such undertaker was the sole beneficiary and as such had no insurable interest in the life of the member. Id. Appointment of beneficiary, valid in its inception, remains valid, although insurable interest for relationship of beneficiary has ceased or terminated, unless otherwise provided for by insurance contracts. Farra v. Braman, 171 Ind. 529, 86 NE 843. Under Laws 1895, p. 440, c. 86, § 1, providing that payment of death benefits shall be to families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon member, one with whom member lived, but who was not dependent upon him nor a member of family, had no insurable interest. Supreme Commandery, U. O. G. C. v. Donaghey [N. H.] 72 A 419. Principle that an insurable interest must be present does not apply when insured takes out a policy on his own life and pays premium on his own account. Pollock v. Household of Ruth, 150 N. C. 211, 63 SE 940.

45. Ables v. Ackley, 133 Mo. App. 594, 113 SW 698. Policy of insurance issued by mutual benefit association creates no vested rights in beneficiary. Farra v. Braman, 171 Ind. 529, 86 NE 843.

46. Pollock v. Household of Ruth, 150 N. C. 211, 63 SE 940. The interest of a beneficiary in a certificate is a mere expectancy which becomes vested only on death of assured. Coulter v. Travelers' Protective Ass'n, 144 Ill. App. 255. Beneficiary under policy issued by mutual benefit association has an interest therein, subject to right of assured to substitute another according to mode prescribed by contract. Farra v. Braman, 171 Ind. 529, 86 NE 843. Beneficiary cannot object to substitution of another in his place. Noble v. Police Beneficiary Ass'n, 224 Pa. 298, 73 A 336.

47. Supreme Tent, K. of M. W. v. Altmann, 134 Mo. App. 363, 114 SW 1107. Mere payment of part of dues by original beneficiaries does not raise such an equity as will entitle them to claim fund. Pollock v. Household of Ruth, 150 N. C. 211, 63 SE 940.

48. Rev. St. 1889, § 1417 (Ann. St. 1906, p. 1116), providing that no contract between insured and beneficiary that latter

beneficiaries take by contract, not by descent.[49] Since the beneficiary has no vested rights in the certificate, the insured may change the beneficiary[50] by complying substantially with the rules of the order,[51] but noncompliance with such rules cannot be raised by the beneficiary,[52] nor can one who could not have originally been designated as beneficiary claim the benefits[53] or enforce an assignment thereof.[54] A member mentally incapacitated cannot give his consent to a change of beneficiaries.[55] Benefits may be made payable to the member's estate and subject to disposition by will although the devisees could not originally have been designated as beneficiaries.[56] Where an absolute right to designate a new beneficiary exists, the change is valid although the new certificate is not delivered before the death of the member.[57] Equity will carry out an attempted change where the member has done all he can to comply with the requirements of the order.[58]

shall pay assessments shall give beneficiary vested interest in certificate or deprive member's right to change beneficiary, does not allow certificate to be charged with liens for dues paid by beneficiary pursuant to such agreement. Supreme Council of R. A. v. Heitzman [Mo. App.] 120 SW 628.

49. Proceeds of benefit certificates form no part of member's estate. Finn v. Walsh [N. D.] 121 NW 766.

50. Agreement between insured and beneficiary whereby latter was to pay dues could not operate to prevent insured from changing beneficiary. Supreme Council of R. A. v. Heitzman [Mo. App.] 120 SW 628. Evidence held to sustain finding that former beneficiary had no vested rights in certificate at time member changed beneficiary therein. Kiolbassa v. Polish Roman Catholic Union, 141 Ill. App. 297.

51. Beneficiary in railway relief association not changed where member merely applied orally to local agent to change beneficiary, agent neglecting to make such substitution, where rules required such substituted beneficiary to be designated in writing with approval of superintendent. Farra v. Braman, 171 Ind. 529, 86 NE 843. Where rules required that no change of beneficiaries should be effective until surrender of old certificate and issuance of new one, a delivery of certificate to new beneficiary and request to society's head clerk that change be made without surrender of certificate was not a substantial compliance with requirements. Ables v. Ackley, 132 Mo. App. 594, 113 SW 698. Where by-laws required a certain procedure to change beneficiaries, a letter from deceased member to plaintiff, indicating that decedent intended that plaintiff should have share of one of deceased beneficiaries, was not admissible. Wooden v. Wooden [Tex. Civ. App.] 116 SW 627. Under by-laws providing that where certificate is lost or destroyed, or where former beneficiary refuses to surrender it, member may change beneficiary upon making affidavit to that effect, and by complying with requisites for issuance of new certificate where beneficiary who was member's wife was in possession of certificate, affidavit by member that beneficiary refused to surrender it was a sufficient compliance with by-laws, although beneficiary was never asked to surrender certificate, it being fair inference that such request would have been refused. Supreme Tent, K. of M. of W. v. Altmann, 134 Mo. App. 363, 114 SW 1107. Where member desiring to change beneficiary made affidavit of loss of original certificate and had new certificate issued upon complying with requirements of order, such change of beneficiary was effective as against beneficiary under first certificate, regardless of fact that member was mistaken in believing that first certificate was lost, it having been concealed by beneficiary therein. Raschke v. Haderer, 138 Wis. 129, 119 NW 812. Where regulations required substituted beneficiary to be designated in writing with approval of superintendent, delivery to member of certificate and attached book of rules with information that insurance was property of such other person did not effect change in beneficiary. Farra v. Braman, 171 Ind. 529, 86 NE 843. Provision that certificate may be transferred on consent in writing of the beneficiaries not violated by surrender of certificate to association and issuance of a new one with a different beneficiary. Noble v. Police Beneficiary Ass'n, 224 Pa. 298, 73 A 336.

52. Noble v. Police Beneficiary Ass'n, 224 Pa. 298, 73 A 336.

53. Designation of new beneficiary in violation of constitution is void. Meyer v. Grand Lodge of O. of S. of H., 108 Minn. 26, 121 NW 236.

54. Assignment by member of benefit to one not enumerated by 1 Gen. St. p. 153, § 24, cannot be enforced by assignee. Ryan v. Firemen's Mut. Benev. Ass'n [N. J. Law] 72 A 53.

55. Hazard v. Western Commercial Travelers' Ass'n [Tex. Civ. App.] 116 SW 625. Evidence held to support finding that change of beneficiary from wife to brother was made while member was non compos mentis and under undue influence. Blood v. Sovereign Camp, Woodmen of World [Mo. App.] 120 SW 700. Evidence held to show that member changed beneficiary as authorized by laws of association, and that he did so without fraud or undue influence. Kiolbassa v. Polish Roman Catholic Union, 141 Ill. App. 297.

56. Middlesladt v. Grand Lodge of O. of S. H., 107 Minn. 228, 120 NW 37, followed, Meyer v. Grand Lodge of O. of S. H., 108 Minn. 25, 121 NW 235.

57. Tolson v. National Provident Union, 60 Misc. 460, 113 NYS 534.

58. Will award fund to new beneficiary though association has neglected or refused

Exemption of benefits from liability for debts. See 11 C. L. 1586—Benefits exempt from execution under the charter ceases to be exempt when invested in real estate,[59] but mouey in the hands of the association payable unconditionally can be reached in equity by the creditors of the beneficiaries.[60]

§ 7. *Maturity and accrual of benefits.*[61] See 9 C. L. 1469—Members have no property right to the indemnity.[62] The right to a payment of benefits may be made unconditional.[63] It is only where the contract has been repudiated by the association that suit can be brought for instalments to become due.[64] The adjudication of a claim by the duly authorized trustees of a fraternal organization with delivery of the order establishes a lien on the funds of the organization, which a court of equity will recognize as against a subsequently appointed receiver or assignee of the organization.[65]

§ 8. *Notice and proofs of death or disability.*[66] See 11 C. L. 1581—Provisions as to the manner of furnishing proofs of death must be complied with,[67] unless waived,[68] or unless the local lodge has actual notice thereof.[69] If it is provided that the proofs of death must be satisfactory to the directors, it is sufficient if the proofs are such that reasonable men should be satisfied,[70] this being a question for the jury.[71] Additional proofs may be called for by the directors.[72] Defects in the proof of

to issue new certificate. Supreme Tent, K. of M. W. v. Aitmann, 134 Mo. App. 363, 114 SW 1107.

59. Merrell Drug Co. v. Dixon [Ky.] 115 SW 179.

60. Conant v. Boston Chamber of Commerce, 201 Mass. 479, 87 NE 906.

61. **Search Note:** See note in 55 L. R. A. 605.

See, also, Beneficial Associations, Cent. Dig. §§ 41-50; Dec. Dig. § 18; Insurance, Cent. Dig. §§ 1955-1957; Dec. Dig. §§ 787, 788; 3 A. & E. Enc. L. (2ed.) 1108; 2 Id. 567.

62. Ables v. Ackley, 133 Mo. App. 594, 113 SW 698.

63. Where by-laws provide that upon death of participating member an assessment shall be levied upon the survivors of the class to raise a gratuity fund for benefit of member's family which fund is nonassignable and nonchargeable with payment of debts, its payment to those entitled thereto is nonconditional. Conant v. Boston Chamber of Commerce, 201 Mass. 479, 87 NE 906.

64. Where under certificate benefits were payable in quarterly instalments, and one instalment had been paid, member could not sue for all instalments due and to become due under entire contract, such contract not having been repudiated by defendant. Puckett v. National Annuity Ass'n, 134 Mo. App. 501, 114 SW 1039. Where association paid one instalment under benefit certificate and failed to pay subsequent ones on ground that it had been misinformed as to nature of injury for which benefit was paid, such failure did not amount to repudiation of entire contract which would entitle member to sue for all instalments to become due. Id.

65. State v. Grand Lodge, A. O. U. W., 11 Ohio C. C. (N. S.) 438.

66. **Search Note:** See Beneficial Associations, Cent. Dig. § 43; Dec. Dig. § 18(3); Insurance, Cent. Dig. §§ 1963-1965; Dec. Dig. § 789; 29 Cyc. 148-150; 3 A. & E. Enc. L. (2ed.) 1103; 16 Id. 830.

67. Where contract stipulated that payment should be made within 90 days from receipt by board of directors of proof satisfactory to it of death of assured, and that death was caused wholly and entirely by external, violent and accidental means, liability did not arise until presentation of such proof. Traiser v. Commercial Travelers' Eastern Acc. Ass'n, 202 Mass. 292, 88 NE 901. Where certificate provided that if insured should die from intemperate use of intoxicating liquors certificate should become void, death certificate, stating cause of death to be due to alcoholism, was admissible as part of proofs of death. Schon v. Modern Woodmen of America, 51 Wash. 482, 99 P 25.

68. Where society refused to furnish blank proofs of death, where claim of death was based upon presumption from seven years' absence, it waived its right to insist upon proofs as condition precedent to beginning of suit. Miller v. Sovereign Camp, Woodmen of the World, 140 Wis. 505, 122 NW 1126. Where local lodge made proof of death and stated therein on information and belief that insured had committed suicide, such proof, not being made by plaintiff, was not binding upon her, and when retained by defendant constituted a waiver of defects. Soules v. Brotherhood of American Yeomen [N. D.] 120 NW 760.

69. Where local lodge had notice of death of member, fact that beneficiary failed to comply with by-laws as to giving notice did not deprive her of right to payment. Supreme Tent, K. of M. W. v. Ethridge [Ind. App.] 87 NE 1049.

70. Traiser v. Commercial Travelers' Eastern Acc. Ass'n, 202 Mass. 292, 88 NE 901.

71. As to whether death was due to accidental means. Traiser v. Commercial Travelers' Eastern Acc. Ass'n, 202 Mass. 292, 88 NE 901.

72. Where contract provided that proofs of death and manner thereof were to be satisfactory to board of directors, directors might, if in their opinion further proof was needed, call for such further proof. Traiser v. Commercial Travelers' Eastern Acc. Ass'n, 202 Mass. 292, 88 NE 901. Where proofs are required to be satisfactory to board of di-

death are immaterial if the association denies liability on other grounds.[73] Unless there is an equitable estoppel, statements in the proof of loss may be contradicted in an action on the policy.[74]

§ 9. *Payment of benefits and discharge of liability.*[75] See 11 C. L. 1581—No trust results in favor of the member's estate where he dies without leaving a beneficiary,[76] although in such case the by-laws may provide that the fund shall be paid to the heirs or administrator of the member,[77] but ordinarily the proceeds of the certificate forms no part of the member's estate.[78] A power given by the beneficiary to collect benefits survives the death of the beneficiary.[79] The liability for the payment of benefits passes to the successor of the association issuing the certificate,[80] and funds set apart for such purpose may be impressed with a trust for its payment.[81] A payment of indemnity for accidents furnishes no consideration for a release of death benefits under the same certificate.[82]

§ 10. *Procedure to enforce right to benefits, etc.*[83] *Submission of disputes to arbitration or to tribunals within the order.* See 11 C. L. 1581—In the absence of provisions to the contrary,[84] or where the association denies liability absolutely,[85] suit

rectors and the board calls for further proof, such further proof when funished must be considered as being part of preliminary proof furnished in accordance with requirements of policy. Id.

73. Where association denies liability on ground that member was suspended before his death, defects in proof of loss through failure to file until two years after death are immaterial. Meisenbach v. Supreme Tent, K. of M. W. [Mo. App.] 119 SW 514.

74. Hart v. Knights of Maccabees of W., 83 Neb. 423, 119 NW 679.

75. Search Note: See Beneficial Associations, Cent. Dig. §§ 49, 50; Dec. Dig. § 18(7, 8); Insurance, Cent. Dig. §§ 1959-1985; Dec. Dig. §§ 790-801; 29 Cyc. 144-148, 152-155, 161-167, 256; 3 A. & E. Enc. L. (2ed.) 1108.

76. Where beneficiary has died before member, who has failed to name any other beneficiary who could properly be named except by consent of defendant, and where there is no express provision in the laws of the society as to what shall be done with the trust fund, there is no resulting trust in favor of the member or his estate, such trust being inconsistent with purpose for which fund was created. Cook v. Supreme Conclave, I. O. H., 202 Mass. 85, 88 NE 584.

77. Where by-laws provided that, upon error in designation, benefit should be paid to legal heirs on failure of other designated classes, a certificate payable to one whom insured considered his wife but who was not so in fact was properly payable, as to her share, to parents of insured. Severa v. Beranak, 138 Wis. 144, 119 NW 814; Mullen v. Woodmen of the World [Iowa] 122 NW 903. Where by-laws provided that, if on member's death the dependency of the beneficiary has ceased, the fund shall be paid to the heirs of the member, child of member by wife originally designated as beneficiary but later divorced, no other beneficiary being designated, was entitled to benefit as against divorced wife and member's widow. Royal League v. Kasey, 144 Ill. App. 1.

78. Proceeds of certificates being no part of member's estate, county court is without authority, under Rev. Codes 1905, § 8083, to inventory and distribute such proceeds. Finn v. Walsh [N. D.] 121 NW 766.

79. Where beneficiary gave power of attorney to collect fund due upon death of member as security for money, it amounted to an assignment, and the power, being one coupled with an interest in fund itself, survived death of beneficiary. Barrowsky v. U. S. Grand Lodge of O. B. A., 129 App. Div. 695, 113 NYS 1080.

80. Where benefit certificate is treated by successor of lodge issuing it as though issued by such successor, and holders treated as members of new association, successor is liable to same extent that association issuing certificate would have been liable. Cooley v. Gilliam [Kan.] 102 P 1091.

81. Where amount reserved for payment of death claims was transferred to successor of society issuing certificates on agreement of successor that it should pay such claims, which payment was not made, fund so set apart by orlginal society was impressed with trust for payment of claims, and officer parting with it and society receiving it are liable for amount due on certificate. Cooley v. Gilliam [Kan.] 102 P 1091.

82. Where certificate has dual nature under by-laws in providing for indemnity to member for accidents during his lifetime and death benefits to beneficiary after death of member caused by accident, a payment of indemnity to member during lifetime of what was then due him furnished no consideration for a release of death benefits. Coulter v. Travelers' Protective Ass'n, 144 Ill. App. 255.

83. Search Note: See notes in 49 L. R. A. 355; 3 Ann. Cas. 211.

See, also, Beneficial Associations, Cent. Dig. §§ 45-48, 51-56; Dec. Dig. § 18(5, 6); Insurance, Cent. Dig. §§ 1986-2016; Dec. Dig. §§ 806-834; 29 Cyc. 212-220, 222-257; 11 A. & E. Enc. P. & P. 375.

84. Where there are no provisions to the contrary, suit may be brought for benefits without previously having appealed to the district council or general assembly. Dickstein v. Campbell, 117 NYS 158.

85. Where grand master denied existence of insured. Potievska v. Independent Western Star Order, 134 Mo. App. 471, 114 SW 572. Where certificate provided that in case of disagreement as to amount payable on

may be brought without a previous appeal within the order,[86] but where the by-laws provide that the plaintiff must exhaust his remedy within the order,[87] or provide tribunals therefor,[88] suit cannot be brought until such provisions have been complied with.

Remedies and procedure in general. See 11 C. L. 1582

Parties. See 11 C. L. 1582—Where the certificate promises to pay the beneficiary upon death or disability of the member, the beneficiary, and not the member, is the proper party plaintiff.[89] The surviving beneficiaries may bring action on the certificate without joining the administrator of deceased beneficiary.[90]

Limitations. See 11 C. L. 1582—A provision in an insurance policy limiting time in which suit may be brought thereon to a period less than that fixed by statute of limitations is binding,[91] unless it contravenes a statute,[92] though such provision may be waived by the association.[93] The statute of limitations of the place of making the contract controls.[94]

Pleading. See 11 C. L. 1582—The complaint must state facts sufficient to constitute a cause of action,[95] and, if the complaint purports to set forth the contract, it must

valid claim amount should be determined by arbitration, claim need not lie so submitted where its validity was disputed, and holder may sue thereon without so submitting it. Robinson v. National Fraternal League, 81 Conn. 707, 71 A 1096.

86. Dickstein v. Campbell, 117 NYS 158.

87. Where by-laws provide that member or beneficiary shall forfeit his rights if he brings suit before exhausting his remedies in the order, beneficiary could not sue on claim. Conley v. Supreme Court, I. O. F. [Mich.] 16 Det. Leg. N. 595, 122 NW 567.

88. Where the order provides for tribunals, a claim must be submitted to such tribunals before suit can be brought in the civil courts, although such tribunals were established after insured became a member. Monger v. New Era Ass'n, 156 Mich. 645, 16 Det. Leg. N. 261, 121 NW 823.

89. Luckey v. Yeomen of America, 141 Ill. App. 332.

90. Jones v. Supreme Lodge, K. of H., 236 Ill. 113, 86 NE 191.

91. Caywood v. Supreme Lodge, K. & L. of H., 171 Ind. 410, 86 NE 482.

92. Under Rev. St. 1899, § 899 (Ann. St. 1906, p. 832), making void all parts of contract limiting time within which action may be instituted, a plea in defense that action was not instituted on certificate within one year, as provided for therein, was properly stricken. Roberts v. Modern Woodmen of America, 133 Mo. App. 207, 113 SW 726.

93. Caywood v. Supreme Lodge, K. & L. of H., 171 Ind. 410, 86 NE 482.

94. Where association and insured were both residents of Illinois when application was made and certificate issued, such contract, being an Illinois contract, could not be sued on after one year since it contained provision, valid under Illinois statute, that no suit could be maintained thereon after one year. Roberts v. Modern Woodmen of America, 133 Mo. App. 207, 113 SW 726.

95. Complaint, alleging in one count that plaintiff claims a certain sum on policy issued Sept. 10, 1902, whereby defendant insured P for term of his natural life, who died April 10, 1905, of which defendant had notice, and in another count that plaintiff claims a certain other sum due on policy whereby defendant insured life of P, on Sept. 10, 1903, and agreed and promised in case of death of P during third year of policy to pay said sum, that P died April 10, 1905, of which defendant had notice, states a good cause of action. Patterson v. Grand Lodge, K. of P. [Ala.] 50 S 377. Complaint alleging that plaintiff claims certain sum for that defendant is a fraternal or benevolent association issuing policies on lives of members, that it issued a policy on Sept. 10, 1902, on life of P, who was at that time a member, wherein it agreed to pay widow, heirs or legal representatives of P said sum in case of death of P during third year of membership or thereafter, that P died April 10, 1905, of which defendant had notice, that plaintiff is the son of P and that P left surviving him no other children, nor descendants of deceased's children, that he left no will, and no administration has ever been granted on his estate, that he left no widow surviving him, states a good cause of action. Id. Complaint, alleging that plaintiff claims a certain sum due on a policy whereby defendant on Jan. 1, 1902, insured for one year life of P, who died April 10, 1905, of which defendant had notice, policy being property of plaintiff, is demurrable for not showing that insured died within term for which life was insured, that policy was in force at death, that policy was payable to plaintiff, that plaintiff had an insurable interest, what relation plaintiff bears to insured, nor how policy is property of plaintiff. Id. P. L. 1898, p. 425, § 9, providing that benevolent associations may contract with members to pay death benefits to husband, wife, father, mother, son, daughter, brother sister, or legal representative of deceased, declaration in action to obtain benefit which failed to state to what class deceased member belonged, that plaintiff came within that class and was the sole beneficiary, held bad on demurrer. Pine v. Supreme Circle B. of U. [N. J. Law] 71 A 1130. Declaration held good in action on certificate issued by one company and transferred to another. Smith v. Bankers' Union of Chicago, 144 Ill. App. 384.

set it forth in its entirety,[96] unless a portion thereof is in the possession of the defendant.[97] Noncompliance by the plaintiff of essential conditions upon which liability depends must be specially pleaded in the answer,[98] unless the association is estopped to do so.[99]

Evidence. Presumptions and burden of proof. See 11 C. L. 1583—Refusal of the association to pay a claim raises the presumption that the board of directors has passed adversely upon it.[1] The burden is upon the defendant to show that answers made by the applicant were false in a material particular, that they were intentionally made, and that the insurer relied thereon,[2] and as to other matters of defense.[3] The burden is upon the defendant to prove suicide.[4] Instructions must conform to the evidence.[5] Forfeiture may be a question of fact.[5a]

96. If petition in action upon benefit certificate purports to set out a full copy of the instrument, and recitals of copied portion show that whole contract is not contained in petition, motion to require plaintiff to set forth whole contract is properly sustained. Higgens v. Supreme Castle of H. N., 83 Neb. 504, 120 NW 137.

97. Where recitals of petition show that whole contract is not set out and that missing portion is in possession of association, and where association relies upon such portion, motion to require plaintiff to set out such portion may properly be overruled. Application in defendant's possession. Higgens v. Supreme Castle of H. N., 83 Neb. 504, 120 NW 137.

98. Where the association relies on noncompliance by the plaintiff with some necessary or essential condition upon which its liability depends, it must specially plead it and burden is upon it to prove it. Grand Lodge, A. O. U. W. v. Taylor, 44 Colo. 373, 99 P 570. That beneficiary is not among classes permitted by statute cannot be set up unless pleaded. Ancient Order of Pyramids v. Dixon, 45 Colo. 95, 100 P 427.

99. Where an association is sued as an insurance corporation only, which is not denied, it cannot set up that it is a benefit association, and as such entitled to set up certain defenses peculiar to such associations. Schoenberg v. Provident Benev. Ass'n, 37 Pa. Super. Ct. 468. Where applicant had paid dues to subordinate commandery but had not complied with condition making him full member, failure of subordinate commandery to pay back dues does not estop order from setting up defense of nonmembership. Patterson v. Supreme Commandery, U. O. G. C., 104 Me. 355, 71 A 1016. Where complaint sets forth policy which in terms refers to constitution and by-laws then in force, defendant is not precluded from relying on by-laws because answer specially pleads by-laws as amended, particularly where plaintiff puts original by-laws in evidence. Schack v. Supreme Lodge of F. B., 9 Cal. App. 584, 99 P 989.

1. Refusal to pay death claim for more than a year raises presumption that board of directors has passed upon claim, that being prerequisite to suit by beneficiary. Winn v. Modern Woodmen of America [Mo. App.] 119 SW 536.

2. Higgens v. Supreme Castle of H. N., 83 Neb. 504, 120 NW 137. Insurer has burden of proving that representations and warranties made in application were false. Collins v. Catholic Order of Foresters [Ind. App.] 88 NE 87.

3. Allegation in petition that all conditions of contract were fulfilled by assured, even when denied by the answer, does not impose on plaintiff burden of proving that each condition was fulfilled, but, when breach of any particular condition is relied on as a defense, the burden of proving it is upon society. Hart v. Knights of Maccabees of W., 83 Neb. 423, 119 NW 679. In an action on a policy of life insurance, where the burden of proof is placed on the defendant fraternal order by the issues joined and also by § 3625, relating to false answers in an application for insurance, the order will not be permitted after trial and verdict to claim the exemptions provided by § 3631-14. Grand Lodge of Brotherhood of R. T. v. Daly, 11 Ohio C. C. (N. S.) 464.

4. Almond v. Modern Woodmen of America, 133 Mo. App. 382, 113 SW 695. Where plaintiff makes a prima facie case by proving the death of member, burden is upon defendant society to show intentional suicide. Grand Fraternity v. Melton [Tex.] 117 SW 788. Instructions held not to place burden upon plaintiff of proving that assured did not commit suicide. Mittelstadt v. Modern Woodmen of America [Iowa] 121 NW 803. Where certificate provided that order would not pay benefits when members committed suicide unless in delirium from illness, instruction that unless jury found that member committed suicide while not in delirium they should find for plaintiff properly submitted issue. Wilcox v. Court of Honor, 134 Mo. App. 547, 114 SW 1155. Evidence held to require directed verdict in favor of society that death was due to intentional suicide by shooting. Grand Fraternity v. Melton [Tex.] 117 SW 788. Evidence that member committed suicide by morphine poisoning held not sufficient to justify directed verdict for defendant in action on certificate. Almond v. Modern Woodmen of America, 133 Mo. App. 382, 113 SW 695. Evidence of suicide held not so conclusive as to establish defense as a matter of law. Van Norman v. Modern Brotherhood of America [Iowa] 121 NW 1080.

5. Where death was due to accidental drinking of wood alcohol, instruction that death was caused by intemperate use of intoxicating liquor was not sustained by evidence. Modern Woodmen of America v. Lawson [Va.] 65 SE 509. Instruction that insured was not intemperate in use of intoxicating liquors within meaning of word

Admissibility. See 11 C. L. 1588—Where the statute requires that the by-laws shall be filed with the auditor of state, they are not admissible if not so filed.[6] The wife of a deceased member is competent to testify as to facts learned by her during the continuance of marital relation from observation.[7] Parol evidence of notice in official lodge publication is admissible on the issue of death presumed from long continued absence.[8]

Fraternities, see latest topical index.

FRAUD AND UNDUE INFLUENCE.

The scope of this topic is noted below.[9]

§ 1. Actual Fraud, 1891.
§ 2. Inferences from Circumstances and Conditions of Parties or from Intrinsic Nature of Transaction, 1902.
§ 3. Remedies, 1906. Pleading, 1911. Evidence, 1913. Instructions, 1918.

§ 1. *Actual fraud.*[10] See 11 C. L. 1584—Fraud consists of any deception, artifice, trick or cunning, used to circumvent, cheat, or deceive,[11] and includes all acts, omissions or concealments which involve a breach of duty, trust or confidence.[12]

in benefit certificate, even though he drank alcoholic liquors to excess upon exceptional occasions, unless he was addicted to periodical and excessive indulgences in use of intoxicating liquors which became habitual, held correct. Schon v. Modern Woodmen of America, 51 Wash. 482, 99 P 25.

5a. It is a question for the jury to determine whether a member who is alleged to have forfeited membership before death by nonpayment of dues was in good standing at his death. United Order of G. C. v. Hooser [Ala.] 49 S 354.

6. Hart v. Knights of Maccabees of W., 83 Neb. 423, 119 NW 679.

7. As to health of insured. Clover v. Modern Woodmen of America, 142 Ill. App. 276.

8. Wehring v. Modern Woodmen of America, 107 Minn. 25, 119 NW 245.

9. Fraud and undue influence as affecting the validity of wills (see Wills,* § 2B), fraud in its criminal aspect (see False Pretenses and Cheats;* Conspiracy,* § 2; Forgery*), conveyances in fraud of creditors (see Fraudulent Conveyances*), fraud as a ground for opening judgments (see Judgments,* § 5C; Defaults,* § 3), limitation of actions (see Limitations of Actions*), and fraud as affecting the rights of bona fide purchasers (see Notice and Record of Title,* § 1; Negotiable Instruments,* § 5B), are fully treated elsewhere, and have been entirely excluded. Fraud growing out of the rights and duties of and incident to particular relations (see Agency,* § 4A; Attorneys and Counselors,* § 5; Trusts,* §§ 8C, 11, and like topics) is more fully treated in the topics dealing with such relations. Remedies for fraud are herein considered in a general way only, and reference should be had to the particular topics specifically devoted thereto (see Cancellation of Instruments;* Deceit;* Reformation of Instruments*). The substantive rights arising in case of fraud are treated in contracts,* § 8B, and Sales,* §§ 10, 11.

10. Search Note: See notes in 3 C. L. 1523; 5 Id. 1542; 28 L. R. A. 104; 1 A. S. R. 88; 3 Id. 824; 18 Id. 555; 29 Id. 360; 31 Id. 670; 1 Ann. Cas. 980; 8 Id. 1062.

See, also, Bills and Notes, Cent. Dig. §§ 233-240, 242-247; Dec. Dig. §§ 103-105; Bonds, Cent. Dig. §§ 43-45; Dec. Dig. §§ 39, 40; 5 Cyc. 744, 745; Chattel Mortgages, Cent. Dig. §§ 142, 143; Dec. Dig. § 72; 6 Cyc. 1099-1104; Contracts, Cent. Dig. §§ 420-430, 441; Dec. Dig. §§ 94, 96; 9 Cyc. 408-453; Deeds, Cent. Dig. §§ 165-182, 109-199; Dec. Dig. §§ 70, 72; 13 Cyc. 578-590; Marriage, Cent. Dig. § 20; Dec. Dig. § 34; 26 Cyc. 866, 905; Mortgages, Cent. Dig. §§ 177-181, 186, 187; Dec. Dig. §§ 78, 80; 27 Cyc. 1120-1123, 1126; Release, Cent. Dig. §§ 32, 33; Dec. Dig. §§ 17, 19; Sales, Cent. Dig. §§ 65-100; Dec. Dig. §§ 35, 37-47; Vendor and Purchaser, Cent. Dig. §§ 38-65; Dec. Dig. §§ 33-38; Wills, Cent. Dig. §§ 371-387; Dec. Dig. §§ 153-161; 14 A. & E. Enc. L. (2ed.) 12, 19; 29 Id. 107.

11. Deception "deliberately" practiced upon one to obtain unfair advantage. McCaskey Register Co. v. Keena, 81 Conn. 656, 71 A 898. All **surprises, trick, cunning, dissembling** and other unfair way that is used to cheat, is fraud. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785.

Held fraud: Lien on property of illiterate negro woman held procured by fraud. Morris v. Shepard [Tex. Civ. App.] 120 SW 571.

Held not to constitute fraud: That **option is taken for purpose of speculation** is not fraud toward persons to whom owner of option sells. Saxby v. Southern Land Co. [Va.] 63 SE 423. That one contracting to convey land **knows that he has no title** is not such fraud as to authorize recovery by purchaser of excess in purchase money paid. Dobson v. Zimmerman [Tex. Civ. App.] 118 SW 236.

12. See post, § 2. Wadsworth v. Livingston County Sup'rs, 115 NYS 8. "Fraud" in equity. Dickinson v. Stevenson [Iowa] 120 NW 324. Fraud is willful, malevolent act

* Always begin with the latest article on the subject. Use the latest topical index.

The elements are falsity, knowledge, deception and injury.[13] It may be accomplished by false representation [14] or concealment of a fact one is bound to disclose.[15]

directed to perpetrating wrong to rights of another. Judd v. Walker, 215 Mo. 312, 114 SW 979.

Held not fraud: Complaint held not to state cause of action where it alleged that **absolute assignment** of securities had been obtained **instead of assignment as security,** and it appeared that obligation had not been paid. Doherty v. Wing, 140 Wis. 227, 122 NW 716. Where one authorized his agent to sell stock owned by both but agent compelled buyer to pay **prices in excess of what was agreed,** his conduct was not legal fraud upon buyers. Merrill v. Sax [Iowa] 118 NW 434.

13. Mussiller v. Rice, 116 NYS 1028. Representations must be false, to the speaker's knowledge, made with intent to deceive, must deceive, and injury must result. Remmers v. Remmers, 217 Mo. 541, 117 SW 1117. Must be false, known to be false, and made to induce action by another who relies upon it. Security Sav. Bank v. Smith [Iowa] 122 NW 825. Statement must have been false, must have been made with actual or constructive knowledge of its falsity, and must have mislead. Southern Exp. Co. v. Fox [Ky.] 115 SW 184. Misstatement, knowingly made, with intent to influence another into entering into contract, will, if believed and relied on by that other, afford complete ground for rescission. Davis v. Butler, 154 Cal. 623, 98 P 1047. False representations by vendor as to material facts made with knowledge of their falsity and present intention that they should be acted upon, and acted upon. Judd v. Walker, 215 Mo. 312, 114 SW 979. Complaint for false representations as to solvency of corporation that they were false, known to be false, and relied upon to damage of plaintiff, held sufficient. Simons v. Cissna, 52 Wash. 115, 100 P 200. Representation must have been false in fact, person making it must have known it to be false or have been culpably ignorant; it must have been made with intent that it should be acted upon and it must have been acted upon. Whitehurst v. Life Ins. Co., 149 N. C. 273, 62 SE 1067. Misrepresentation must be statement of material fact made to induce other part to act; it must be untrue, party making it must know or believe it to be untrue, and it must be relied upon. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. Must be of existing fact made with intent to deceive and must be relied upon. Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731. Held not fraud where seller made no representations as to value of stock and did not then know that it was worthless because of cashier's defalcations and seller did not rely on statement that stock was selling for $175 per share on market. Field v. Turley [Ky.] 120 SW 338.

14. **Held false representations:** Allegations that **one was induced to become surety** on note by representations that it was secured by first mortgage on chattels, etc., held to state defense. Hoover v. Horn, 45 Colo. 288, 101 P 55. Where third person employed by husband, who was seeking divorce, to adjust property rights, **falsely represented to wife that husband would pay nothing** and procured her agreement to pay him one-half of what he could get from him, he was guilty of fraud. Dickinson v. Stevenson [Iowa] 120 NW 324. Complaint showing that one was induced by false representations to accept $2,500 from one to whom her husband had given $5,000 in settlement of property rights in divorce held to state cause of action. Id. To justify rescission of contract for purchase of property, it is enough that buyer was **induced by false representations to buy property** which would, if representations had been true, have been worth more than it actually was worth. Davis v. Butler, 154 Cal. 623, 98 P 1047. **Sale of corporate bonds** secured by mortgage on lands which corporation represented it owned in fee held fraud on purchasers of bonds. Slater Trust Co. v. Randolph-Macon Coal Co., 166 F 171. Value of assets of corporation is evidence of value of its stock so that **fraudulent representations as to assets** made to induce purchase of stock constitutes false representation as to stock. Harlow v. Haines, 63 Misc. 98, 116 NYS 449. False representation that corporation owned certain patents and that all of certain stock was in its treasury was ground for cancellation of stock subscriptions. Hamilton v. American Hulled Bean Co., 156 Mich. 609, 16 Det. Leg. N. 273, 121 NW 731. Allegation that plaintiff made purchase of stock of defendant company, that he paid and company received cash for same, that defendant R was officer of company owning and controlling interest, and that he and company's officers and representatives managed corporate affairs and property and as such fraudulently misrepresented its actual financial condition, and finally through fraud secured title and possession of all company's property and assets, held sufficient. Heckendom v. Romadka, 138 Wis. 416, 120 NW 257. Where receiver of defunct bank wrote to preferred creditor making positive erroneous statements as to estate at time when his agent was negotiating to purchase creditor's claim. State v. Merchants' Bank, 81 Neb. 704, 120 NW 157. Evidence held not to show that directors of corporation fraudulently issued statement of condition of company for purpose of **inducing owners of stock to sell** to them. Stewart v. Joyce, 201 Mass. 301, 87 NE 613. Complaint by one who purchased corporate stock upon representations that **corporation was not indebted** on any notes held to state cause of action. Mills v. Knudson [Wash.] 103 P 1123. Where one procured deeds of property by false representations **that he was owner of land under an unpublished will.** Roberts v. Tompkins [N. J. Err. & App.] 73 A 505. False representations **that typesetting machines would not break type.** Walker, Evans & Cogswell Co. v. Ayer, 80 S. C. 292, 61 SE 557. Representation **that house sold was not under lease** but was occupied by tenant at will. Bridges v. Pafford [Ga. App.] 65 SE 700. Purchaser of lots held entitled to recover for fraud in **misrepresentations as to location of lots,** though new plat had been filed

Fraud by false representation is accomplished by misrepresentation of a material,[16]

when permanent contract was made, where he was misled into signing contract and did not know that the stakes had been changed. Nelson v. Title Trust Co., 52 Wash. 258, 100 P 730. Plea alleging **procurement of release** by fraudulent representations as to its contents. Cotulla v. Barlow [Tex. Civ. App.] 115 SW 294. Representations that maker of note would not have to accept insurance policy for which it was given if he did not want it and if he did not accept it **note would be void.** Gillespie v. Hester [Ala.] 49 S 580. Evidence held to support verdict that plaintiff's agent **induced defendant to sign order for goods** by falsely representing that it was to be memorandum to show where goods were placed, that transaction was not to be sale, but that defendant was to sell goods on commission. El Dorado Jewelry Co. v. Hartung, 36 Pa. Super. Ct. 463. **Partnership contract** held procured by fraudulent representation. Fouse v. Shelly, 64 W. Va. 425, 63 SE 208. Evidence held sufficient to warrant finding that statements of defendant that **value of certain leasehold** represented as being worth $100,000 and transferred for unsecured notes made by irresponsible parties amounting to $75,000 was fraudulent. Springer v. Schwitters, 137 Ill. App. 103. Complaint alleging that debtor gave check on account, and relying upon his statement **that check was good** creditor extended him further credit, and that check was dishonored because of insufficient funds, held to state cause of action. Mussiller v. Rice, 116 NYS 1028. Allegation that defendants took **lease in name of agent** on representation that they would be bound thereby and that it would be disadvantageous to have it known that they were taking such lease and that defendants now deny that lessee was their agent and that they are bound by lease held not allegation of any fraud. Zinsser v. Ruppel, 63 Misc. 575, 118 NYS 627. Held misrepresentation where railroad represented **that unless bonus of $50,000 in form of notes be raised road would be diverted** to some other point, where in fact it had definitely decided and concluded to extend road to point in question and had signed contract for its construction thereto prior to making such representations. Cooper v. Ft. Smith & W. R. Co. [Okl.] 99 P 785. **Misstatement of lease and rental** of property made by party to contract with knowledge of their falsity. Clark v. Evans, 138 Ill. App. 56.

Held not misrepresentation: Evidence held not to sustain verdict that **release** of liability for personal injury was induced by fraudulent representations. Nason v. Chicago, etc., R. Co., 140 Iowa, 533, 118 NW 751. Facts held to show that there was no fraud involved in **procurement of insurance** contract where policies were in exact accordance with agreement, and fact that agents agreed to give discount which was personal did not alter case. Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co. [N. J. Err. & App.] 73 A 228. **Untruthful reason for retaining mineral right** does not constitute fraudulent misrepresentation. Reynolds v. Craft, 38 Pa. Super. Ct. 46. Evidence held insufficient to show fraudulent misrepresentations as to **where railroad would be run** to induce deed to right of way. Woods v. Pine Mountain R. Co. [Ky.] 113 SW 94.

Representation construed: Representation that corporation was solvent and would pay 100 cents on dollar means that it would meet its obligations in due course of business. Simons v. Cessna, 52 Wash. 115, 100 P 200.

15. Fraudulent concealment is intentional concealment of some fact known to be material, concealment of fact one is bound to disclose being equivalent to false representation. Power v. Turner, 37 Mont. 521, 97 P 950. Under certain circumstances concealment is equivalent to misrepresentation. Deceit which avoids contract need not be by means of misrepresentation in words. It exists where party who obtains consent does so by means of concealing or omitting to state material facts, with intent to deceive, by reason of which omission or concealment other party was induced to give consent which he would not otherwise have given. Strong v. Repide, 213 U. S. 419, 53 Law. Ed. —. It is based upon proposition that, under all circumstances of case, it was duty of party obtaining consent, acting in good faith, to have disclosed facts which he concealed. Id. Where one was director of corporation, and owned three-fourths of shares of its stock and was at time of purchase of stock from plaintiff administrator general of company, with large powers, and engaged in negotiations which finally led to sale of company's lands to government at price which greatly enhanced value of stock, and his **identity as purchaser was concealed** by buying stock through agent, purchase was fraudulent. Id. Fact that **purchase of stock** was procured from plaintiff's agent did not alter case. Id. In suit to set aside sale of remainder for fraud, evidence that **purchaser knew of death of life tenant** and concealed fact held admissible. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826. **Vendor of cattle** who sells them as sound when he knows that they are infected with Texas fever ticks, which are not easily detectable, is guilty of fraudulent concealment. Puls v. Hornbeck [Okl.] 103 P 665. He must have such knowledge prior to sale. Id. Where one, agent of express company, was notified that trunk was worth $400 but he did not bill it and another agent stated that he did not know what it was worth and receipt was issued stating that value was asked and not given, held there was **no fraudulent concealment.** Southern Exp. Co. v. Keeler [Va.] 64 SE 38.

16. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219; McLennon v. Siebel, 135 Mo. App. 261, 115 SW 484. Must relate to material fact and to subject-matter which taken as true would add to value or promise of that subject-matter. Crooker v. White [Ala.] 50 S 227. In order to sustain action where one purchasing goods for another misrepresented that he was such other, it must appear that misrepresentation was material and was relied upon. Turchin Sheffield Plate & Sterling Silver Co. v. Baugh, 117 NYS 137.

Held material: Representation by seller **that piano had mandolin attachment.** Ross-Armstrong Co. v. Shaw [Tex. Civ. App.] 113 SW 558. Misrepresentation by agent as to

past or existing[17] fact,[18] as distinguished from a promise[19] or opinion;[20] it must

who his principal is. New York Brokerage Co. v. Wharton [Iowa] 119 NW 969. Misrepresentations by sublessor as to **restrictions on use of leased premises.** Humphreys v. Roberts, 61 Misc. 284, 113 NYS 792. Representation by seller of agency to vend rights to use clothes wringer and washer as to **number of rights others had sold and profits made.** Crooker v. White [Ala.] 50 S 227. False representations **by vendor** as to material facts. Judd v. Walker, 215 Mo. 312, 114 SW 979. Representations **that land sold was free from incumbrance** held fraud, though vendor subsequently offered to pay off mortgage. Paulsrud v. Peterson [Minn.] 122 NW 874, rvg. [Minn.] 121 NW 898. **Indebtedness of corporation** misrepresented to purchaser of stock was material misrepresentation justifying rescission. Davis v. Butler, 154 Cal. 623, 98 P 1047.

Held immaterial: Representations **by lender of money that it was his own,** when he had gotten it from his wife. Nevius v. Moore, 221 Mo. 330, 120 SW 43. False statement **by lessor of oil lands that lessee was producer** of oil. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. Representation **by vendor that money lender had accepted loan** of $70,000 on premises held immaterial where terms of contract showed that it was contemplated that so large a loan might not be obtained. Kreshover v. Berger, 62 Misc. 613, 116 NYS 20. Contract for sale of land providing that premises shall be taken subject to tenancies and leases, etc., renders **terms of leases** immaterial. Id. Representation **by one having option on land that he is owner** of it. Saxby v. Southern Land Co. [Va.] 63 SE 423.

17. Belka v. Allen [Vt.] 74 A 91. Existing fact. Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731. To justify setting aside of contract, misrepresentation must be of some existing condition or present fact. Kelty v. McPeake [Iowa] 121 NW 529. Must be as to existing fact and not mere expression of opinion. Saxby v. Southern Land Co. [Va.] 63 SE 423.

18. In law it is false affirmation of fact and not mere promise or matter of intention. Miller v. Sutliff, 241 Ill. 521, 89 NE 651.

Held representations of fact: Statement made by holder of note **that money could be had on note at any time** is more than mere opinion and might be understood to mean that maker could pay at any time. Corey v. Boynton [Vt.] 72 A 987. False representation by landlord to prospective tenant **that basement was dry.** Blumenfeld v. Wagner, 63 Misc. 69, 116 NYS 500. Representation as to **solvency of third person.** Simons v. Cissna, 52 Wash. 115, 100 P 200. Statement by vendor that he had **good title.** Buchanan v. Burnett [Tex.] 119 SW 1141. Unqualified representation by vendor that he has title. Buchanan v. Burnett [Tex. Civ. App.] 114 SW 406. Positive statement by landowner that tract contained certain **number of acres cleared.** Vincent v. Corbitt [Miss.] 47 S 641. Representation **that horse is sure foal getter.** Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351. Representation by vendor of **amount of mineral in place** as disclosed by report of expert. Johnson v. Withers, 9 Cal. App. 52, 98 P 42. Representations by **vendor of lots** to intending purchaser that they were but few minutes' walk from station, that they had some improvements, and that cement walks, gas and water were in. Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731. False representations by agent of vendor of outlying lots as to improvements which would be made and as to contracts for improvements let. Sicklick v. Interurban Home Co., 116 NYS 553. Representation **that mortgages sold were as good as money** in the bank when they were not first mortgages. Rollins v. Quimby, 200 Mass. 162, 86 NE 350. Representations that one "could and would" procure charges another paid for electric current to be cut in half and **"could and would" obtain rebates** for him. Boettger Silk Finishing Co. v. Electrical Audit & Rebate Co., 115 NYS 1102. Representations **by vendor that he intended to erect dwellings** on lots purchased when he intended to erect garage. Adams v. Gillig, 131 App. Div. 494, 115 NYS 999. Representations **that tax deed had extinguished record owner's title** held of fact and not of law where owner's predecessor in title had had possession which prevented tax deed having such effect. Katton v. Comstock, 140 Wis. 427, 122 NW 1044. Representations as to **value of land sold.** Hetland v. Bilstad, 140 Iowa, 411, 118 NW 422. Representation **that books sold were special, limited, illustrated edition,** is not mere trade, talk, opinion, or representation as to value, quality, etc., bringing it within the rule of caveat emptor. Schultheis v. Sellers, 223 Pa. 513, 72 A 887.

19. Kelty v. McPeake [Iowa] 121 NW 529; Adams v. Gillig, 131 App. Div. 494, 115 NYS 999.

Held promissory: Representation by vendor **that third persons would lend certain sum** on property. Kreshover v. Berger, 62 Misc. 613, 116 NYS 20. Though building contractor was misled into doing extra work without written order by **promise of owner's manager that he would accept proposal,** damages cannot be recovered in action for extra compensation. Walsh v. Howard, 61 Misc. 328, 113 NYS 499. Defense of fraud to action for insurance premium is not sustained by proof **that policy issued and accepted is less favorable** to insured than agent represented. State Life Ins. Co. v. Bolton, 82 Neb. 622, 118 NW 122. Where representations as to property of corporation were true at time notes were given for stock, and if any false statements were made they were as to **manner in which payee of notes would conduct business** and of his intentions, such representations do not constitute fraud. Lowry Nat. Bank v. Hazard, 223 Pa. 520, 72 A 889. Promise on behalf of partner that if firm would execute mortgage to secure his individual debt **he would advance more money** to firm. Conaway v. Newman Mill & Lumber Co. [Ark.] 121 SW 353. Deed of minerals induced by **promises of what grantee would do** in future. Miller v. Sutliff, 241 Ill. 521, 89 NE 651. Mere promise is not fraud but **may be considered** in connection with other evidence. State Bank v. Brown [Iowa] 119 NW 81.

20. Saxby v. Southern Land Co. [Va.] 63

be false in fact [21] or calculated to mislead; [22] it must be known to be false either actually,[23] or constructively,[24] or be made negligently or with a reckless disregard for the truth; [25] and be made with actual [26] or presumptive intent to deceive; [27] it must

SE 423; Miller v. Sutliff, 241 Ill. 521, 89 NE 651; Grojean v. Darby, 135 Mo. App. 586, 116 SW 1062; Hetland v. Bilstad, 140 Iowa, 411, 118 NW 422; Saxby v. Southern Land Co. [Va.] 63 SE 423. Ordinarily mere expression of opinion is not such fraud as will justify rescission of contract. Kelty v. McPeake [Iowa] 121 NW 529. To justify conclusion of fraud, something more must be shown than that opinion or representation has been proved incorrect. Mere expression of incorrect opinion by physician of party liable not sufficient to show fraudulent procurement of release of liability for personal injury. Nason v. Chicago, etc., R. Co., 140 Iowa, 533, 118 NW 751.

Held to be expression of opinion: Representation **by patentee that certain thing is covered** by his patent, made in good faith, is not representation of fact upon which prospective licensee may rely. Ferry-Hallock Co. v. Progressive Paper Box Co. [N. J. Eq.] 73 A 230. Representation of claim agent in obtaining release for personal injuries **that injured person would recover in three weeks.** Douda v. Chicago, etc., R. Co. [Iowa] 119 NW 272. As general rule representations **as to value** are not fraud except where parties occupy fiduciary relations. State Bank v. Brown [Iowa] 119 NW 81. Representations by carbide and gas machine company holding patent on furnace for manufacturing carbide as to **value of stock.** Romaine v. Excelsior Carbide & Gas Mach. Co. [Wash.] 103 P 32. Representations that mining stock **would pay immense dividends,** etc. Wegerer v. Jordan, 10 Cal. App. 362, 101 P 1066. Representations as to amount of **future commissions one might expect to earn.** Central Life Assur. Soc. v. Mulford, 45 Colo. 240, 100 P 423. Representation **that books are fine reading** fit for anybody. St. Hubert Guild v. Quinn, 64 Misc. 336, 118 NYS 582. Statement **by adjuster for life insurance company** that he was of opinion and was convinced that deceased person committed suicide and company was not liable on his policy. Sovereign Camp, Woodmen of the World v. Bridges [C. C. A.] 165 F 342. Statement as to **quantity of timber** on tract. Beka v. Allen [Vt.] 74 A 91. So-called misrepresentations as to **capacity of tug** held more in nature of opinion and insufficient to prevent judgment in action to recover commission for securing option on tug. Stetson v. Sun Co., 36 Pa. Super. Ct. 390. Representations **of promoters of corporation** held not of such character as to justify subscriber to rely or act upon them, and being inconsistent with well known legal effect and purposes of contract entered into, they must be regarded as mere expressions of opinion. Gough Milling & Gin Co. v. Loomey [Tex. Civ. App.] 112 SW 782. Statement by attorney **that indorser of note would not be bound** thereby. Wizig v. Beisert [Tex. Civ. App.] 120 SW 954. Representation **that execution of lease would not affect appeal** in pending cause is of law. Elwert v. Marley [Or.] 99 P 887. Statement of mere opinion or estimate or in regard to **matter not susceptible of accurate knowledge** from its nature. McCormick v. Jordan, 65 W. Va. 86, 63 SE 778. Representations **by vendor of land** that cordwood that could be cut thereon would sell readily at $4 per cord, and that land was specially adapted for growing of potatoes and would produce 100 bushels per acre. Saxby v. Southern Land Co. [Va.] 63 SE 423. Broker who procured listing by representations that he **thought he could get buyer** held not guilty of fraud though he had buyer at time. Larson v. Thoma [Iowa] 121 NW 1059.

21. Whitehurst v. Life Ins. Co., 149 N. C. 273, 62 SE 1067. Complaint failing to allege falsity of alleged misrepresentation held demurrable. Zinsser v. Ruppel, 63 Misc. 575, 118 NYS 627. **Not false:** If one has option on land, his statement that it cannot be purchased for less than certain price. Saxby v. Southern Land Co. [Va.] 63 SE 423.

22. If statements, however literally true, were calculated to mislead, they are as fraudulent as if they were false. Jones v. Commercial Travelers' Mut. Acc. Ass'n, 114 NYS 589.

23. Evidence insufficient to show that retiring partner had knowledge that statements concerning condition of mine transferred to his partner in consideration of his assumption of partnership debts were false. Mueller Lumber Co. v. McCaffrey [Iowa] 118 NW 903.

24. In an equitable action it is not necessary to prove that the party making the representations knew they were false. False representation of lessee as to his existing indebtedness. Kelty v. McPeake [Iowa] 121 NW 529. Misrepresentation is fraud though made innocently and with honest belief in its truth, if made by one who ought to have known truth. Whitehurst v. Life Ins. Co., 149 N. C. 273, 62 SE 1067. It is no defense to representation that tax deed had extinguished record owner's title, that party making them believed them to be true, since he was bound to know whereof he spoke. Kathan v. Comstock, 140 Wis. 427, 122 NW 1044. Where seller by false representation of material fact effects sale, it is immaterial that he may have been ignorant of its falsity. Ross-Armstrong Co. v. Shaw [Tex. Civ. App.] 113 SW 558. That **vendor believed he had good title** when he so represented is no defense to vendee's right to rescind if he relied upon representations. Buchanan v. Burnett [Tex.] 119 SW 1141. False statement by vendor as to title upon which his vendee has right to and does rely is fraud, whether or not vendor knew of its falsity. Buchanan v. Burnett [Tex. Civ. App.] 114 SW 406.

25. Culpably ignorant. Whitehurst v. Life Ins. Co., 149 N. C. 273, 62 SE 1067. Representation must have been made with knowledge of its falsity, or recklessly and without regard to its truth or falsity. Vincent v. Corbitt [Miss.] 47 S 641. One may be liable for fraud for false representations he has good reason to believe are false,

be sufficiently definite to induce reliance,[28] and must be relied and acted upon[29] though he does not know to certainty that they are. Miller v. Rankin, 136 Mo. App. 426, 117 SW 641. Representation by one who has no knowledge as to whether it is false or true. Id. Statements made by one as of his own knowledge when he knows he has no such knowledge but is stating only what he believes. Corey v. Boynton [Vt.] 72 A 987. In action for deceit, while scienter must be alleged and proved, it is sufficient to show that representations were made as of defendant's knowledge, when in fact he had no such knowledge or should have known of their falsity. Vincent v. Corbitt [Miss.] 47 S 641. One who is negotiating trade must not recklessly or innocently assert as true that which is false. Prestwood v. Carlton [Ala.] 50 S 254. Statement of fact made positively and recklessly by person consciously ignorant of whether it is true or false. Whitehurst v. Life Ins. Co., 149 N. C. 273, 62 SE 1067. Definite assertion as fact of that which is untrue, concerning which party has no knowledge, is tantamount to assertion of something which party knows is false. Howe v. Martin [Okl.] 102 P 128. If vendor knows that there are not number of acres represented, or if he does not know any thing about it and stated as fact within his personal knowledge. Mabardy v. McHugh, 202 Mass. 148, 88 NE 894. Civ. Code 1895, § 3814, declares that knowledge of falsity is essential, and reference in that section to representation of fraudulent or reckless statements represented as true which party may not know to be false is intended to declare what may amount to knowledge. Camp v. Caruthers [Ga. App.] 65 SE 583. Doctrine that it is fraud for one to make statements which he knows or ought to know to be false is based on theory one who makes representations **to induce another to enter into contractual relations** with him is bound to know whereof he speaks. Kathan v. Comstock, 140 Wis. 427, 122 NW 1044. Where one recklessly makes to another false representation **that certain person had good title** to particular lands, when he knew nothing about such title, for fraudulent purpose of inducing party to whom such representation was made to rely thereon, and such representations were in fact relied upon, action will lie for damages. Richter v. Whitson, 143 Ill. App. 659.

26. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351; Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731; Stewart v. Joyce, 201 Mass. 301, 87 NE 613. Held no fraud where, when seller represented land to be unincumbered, he informed purchaser that he had executed mortgage to be negotiated but would get same back, and after finding mortgage had been negotiated and funds misappropriated so informed purchaser and offered to pay same off. Paulsrud v. Peterson [Minn.] 121 NW 898.

27. False representations by a seller of bank stock that books of bank showed its true financial status held fraud, though seller did not intend to represent and relied upon statements of defaulting officer. Barclay v. Deyerle [Tex. Civ. App.] 116 SW 123. Material misrepresentation may be ground for rescission though not fraudulently made. McLennon v. Siebel, 135 Mo. App. 261, 115 SW 484. Where **vendor misrepresented location** of land, vendee need not show, in order to rescind, that representations were made with fraudulent intent. Stevenson v. Cauble [Tex. Civ. App.] 118 SW 811. Contract for sale of land may be rescinded for **misrepresentation as to quantity** without proof that representation was fraudulent, as equity will not permit one to profit by unintended misstatement. Tryon v. Lyon, 133 App. Div. 798, 118 NYS 5. Where vendee, more familiar with boundaries of vendor's land than latter, misrepresents them to him and induces him to execute deed to 200 acres instead of to 50 acres, deed will be set aside though there is no actual fraud. Allen v. Luckett [Miss.] 48 S 186. Where **buyer of stock** who was treasurer of company knew that statement sent out by company was false, that seller was ignorant of falsehood and of actual state of affairs, and that seller relied on statement, was sufficient proof of his intention that representations should be acted upon. Stewart v. Joyce, 201 Mass. 301, 87 NE 613. Where **grantor's subsequent conveyance of same premises** defeats his prior grantee, law will impute fraudulent intent. Madden v. Caldwell Land Co. [Idaho] 100 P 358. Where owner of land conveys it by warranty deed and thereafter executes second deed to same premises, and grantee in subsequent deed gets it of record, first acts of grantor amount to constructive fraud, though he entertained no fraudulent intent. Id.

28. Representation that mining stock is of "great value" **is too indefinite.** Wegerer v. Jordan, 10 Cal. App. 362, 101 P 1066.

29. Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731; Turchin Sheffield Plate & Sterling Silver Co. v. Baugh, 117 NYS 137; McLennon v. Siebel, 135 Mo. App. 261, 115 SW 484; Andrews v. Brace, 154 Mich. 126, 15 Det. Leg. N. 692, 117 NW 586. Charge is erroneous which authorizes rescission, regardless of reliance on alleged misrepresentations. Jesse French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150. Equity will not cancel oil lease where there is no proof that lessee relied on false statement. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. One cannot evade liability for earned premiums on insurance policy for fraud unless he was deceived or misled thereby. Fidelity & Casualty Co. v. Dierks Lumber & Coal Co., 133 Mo. App. 637, 114 SW 55.

Misrepresentations held not relied upon: Evidence sufficient to show that sellers of goods did not rely upon financial statements submitted and were not entitled to rescind sale for fraud. In re Sweeney [C. C. A.] 168 F 612. Where one **submitted facts to his attorney,** it is shown that he did not rely upon representations. Eppley v. Kennedy, 131 App. Div. 1, 115 NYS 360. Purchaser of mine cannot rescind for fraud where three months before the deal was closed he **sent experts to examine** the property. Mitchell Min. Co. v. Hammons [Ariz.] 100 P 795. Purchaser held not to have relied on statement **that stock was selling for $175** per share on market when he refused to pur-

by one with whom some privity exists,[80] and who has a right to do so [81] to his dam-

chase it at that price, offered $140 and finally paid $160. Field v. Turley [Ky.] 120 SW 338. In action for false representations by vendor of machine, charge that if plaintiff on inspecting machine could have understood its condition, etc., vendor was not liable was erroneous, since they were liable only so far as purchaser's inability to understand machine was due to their acts or omission of duty owed to him. Wimple v. Patterson [Tex. Civ. App.] 117 SW 1034. **Evidence insufficient** to show that one who purchased stock of timber company held by bank as collateral relied on officers of bank for information as to property and affairs of timber company. Sather v. Home Security Sav. Bank, 49 Wash. 672, 96 P 229.

30. Creditor of insolvent corporation may not rely on statements in articles of incorporation, as they were not made to him to procure credit but to state. McKee v. Rudd [Mo.] 121 SW 312. Officers and promoters of corporation who made false representations in prospectus to induce sale of stock are not liable to **one who purchased stock** at less than par from another stockholder, though he relied on representations. Cheney v. Dickinson [C. C. A.] 172 F 109. Fraudulent **representations of third person** will not authorize vendee to rescind in absence of proof that they were authorized by vendor. Travis v. Taylor [Ky.] 118 SW 988.

31. Representation believed on reasonable grounds. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351.

Held entitled to rely upon representations: It is no defense that defrauded person had opportunity to inform himself in premises unless he made independent investigation. Stevenson v. Cauble [Tex. Civ. App.] 118 SW 811. One not knowing facts may reasonably rely upon representations by another who desires to enter into contractual relations with him as to **conditions not presently observable.** Kathan v. Comstock, 140 Wis. 427, 122 NW 1044. Vendee may rely on **representations of vendor** where property is at distance of where for any other reason the falsity of his representation is not readily ascertainable. Wooddy v. Benton Water Co. [Wash.] 102 P 1054. Where map shown purchaser of land did not correctly describe land nor show facts indicating that vendor's representations were untrue, nor show facts which would indicate to prudent man that land was not as represented, purchaser could rely on representations Eichelberger v. Mills Land & W. Co., 9 Cal. App. 628, 100 P 117. Vendee held entitled to rely upon **representations of vendor as to title** though vendor produced abstract, but vendee because of his ignorance was unable to determine from it sufficiency of title. Buchanan v. Burnett [Tex. Civ. App.] 114 SW 406. False representation of fact affecting value of contract which is **peculiarly within knowledge of person making** it, and in respect to which other has not equal opportunity to know the truth, is fraudulent. Whitehurst v. Life Ins. Co., 149 N. C. 273, 62 SE 1067. Actionable deceit present in deliberate misrepresentation of facts peculiarly within knowledge of buyer, upon which seller relied, and had right to rely, made by treasurer of company, by which he was induced to sell to him his stock for less than market value. Stewart v. Joyce, 201 Mass. 301, 87 NE 613. Representation by vendor that he had been offered $70,000 for property when in fact he had been offered but $55,000 held of fact. Isman v. Loring, 130 App. Div. 845, 115 NYS 933. Representations as to past profits by owner of business to prospective purchaser may be relied upon. Del Vecchio v. Savelli, 10 Cal. App. 79, 101 P 32. Proof of positive statement by owner of land to vendee that it contained certain number of acres of cleared land, when it did not, establishes prima facie case though vendee testifies that he believed owner made statement in good faith. Vincent v. Corbitt [Miss.] 47 S 641. Vendee of land held entitled to rely upon representation by vendor **that mortgage debt thereon had been paid.** Scott v. Moore [Ark.] 116 SW 660. Purchaser of **mortgages represented to be first mortgages** held not negligent as matter of law in failing to ascertain that they were not first mortgages. Rollins v. Quinby, 200 Mass. 162, 86 NE 350. False representations **as to title** of property exchanged held fraud, where one was guilty of mere lack of prudence in preliminary investigation and relied on warranty. Howerton v. Augustine [Iowa] 121 NW 373. Positive representation by vendor **as to acreage** of tract sold may be relied on by vendee, and due diligence does not require him to suspect that it is false. Judd v. Walker, 215 Mo. 312, 114 SW 979. Purchaser may rely on representations by owner as to area and dimensions of land, though shown land and having opportunity to measure same. Eichelberger v. Mills Land & W. Co., 9 Cal. App. 628, 100 P 117. Purchaser may rely upon representations by owner **as to area and dimensions of land.** Id. Where representation **as to solvency of corporation** was made under such circumstances as to justify its belief by reasonably prudent man, one ignorant of its falsity could rely upon it though by exercise of diligence he could have ascertained that it was false. Simons v. Cissna, 52 Wash. 115, 100 P 200. Representation by seller **that piano had mandolin attachment** is of such nature as would likely deceive person of ordinary prudence. Ross-Armstrong Co. v. Shaw [Tex. Civ. App.] 113 SW 558. Equity will not withhold relief to one who relies on false representations made to induce him to act on ground that there are **circumstances calculated to arouse suspicion** and cause investigation which might have disclosed the fraud. Eichelberger v. Mills Land & W. Co., 9 Cal. App. 628, 100 P 117. **Doctrine of caveat emptor** does not apply to sale of goods by description without opportunity for inspection. Baer & Co. v. Mobile Cooperage & Box Mfg. Co. [Ala.] 49 S 92. **Failure to read instrument** represented to contain prior negotiations. Togni v. Taminelli [Cal. App.] 103 P 899. If grantee obtains grantor's signature to instrument by misrepresentations as to its contents. Prestwood v. Carlton [Ala.] 50 S 254. Where one was induced to sign release by representations that it applied to certain thing only, he will not be bound by it where it included other things. Johnson v. Taylor [R. I.] 73 A 307.

age.[82] The rule just stated is however, subject to the qualification that a promise or

Exception to rule that one is bound to know what he signs is where one party procures another to execute writing by representations that it embodies prior stipulations and induces him to sign without reading. Tanton v. Martin [Kan.] 101 P 461. Rule that one who can read cannot set up fraud, as against contract he signs without reading does not preclude defense to one induced by trick to sign in one capacity when he thinks he is signing in another. Barco v. Taylor, 5 Ga. App. 372, 63 SE 224. Doctrine that one is conclusively presumed to know contents of instrument signed by him does not obtain against fraud. Vaillancourt v. Grand Trunk R. Co. [Vt.] 74 A 99. Where illiterate person signs contract in ignorance of its character, in reliance upon representations of other party to its contents, and in whose good faith he has reason to rely, he is not bound. Grimsley v. Singletary [Ga.] 65 SE 92. Though injured person can read, she is not estopped to deny validity of **release for injuries** represented by claim agent to be merely receipt, and so folded that she could not see what she was signing. Roberty v. Colorado Springs & I. R. Co., 45 Colo. 188, 101 P 59. One who **signs lease through fraudulent representations that it provided for monthly hiring** could defend on such ground, though he could read. Walker v. Freedman, 114 NYS 51. One who **took mortgages upon representations that they were first mortgages,** when they were inexperienced and did not know the records could be examined. Rollins v. Quimby, 200 Mass. 162, 86 NE 350. Where **illiterate person who can read writing only with difficulty,** and who, by reason of physical condition resulting from injury and of effect of opiates, is unable to read at the time, is induced to sign instrument, he may have it reformed to speak agreement he understood it to contain. Dannelly v. Cuthbert Oil Co., 131 Ga. 694, 63 SE 257.

Not entitled to rely upon representation: One purchasing goods who has notice that they are not of certain grade may not rely on representations that they are. Moore v. Day Rubber Co., 137 Mo. App. 679, 119 SW 454. Where person **has investigated for himself,** or where means of ascertaining falsity of representations were at hand. Power v. Turner, 37 Mont. 521, 97 P 950. One who investigates for himself cannot claim to have relied upon representations. Dooley v. Burlington Gold Min. Co. [Ariz.] 100 P 797. Purchaser is not entitled to rely on representations as to quantity and kind of timber on land, and as to its value and productiveness, where he availed himself of abundant opportunity to inspect the land. Wright v. Boltz, 87 Ark. 567, 113 SW 201. Release for personal injuries held not procured by fraud where injured person had at time **advice of his physician.** Douds v. Chicago, etc., R. Co. [Iowa] 119 NW 272. In absence of fraud on part of buyer or inability of seller to read, seller cannot assert **that bill contains article which he did not know of.** Rose v. Lewis, 157 Ala. 521, 48 S 105. One cannot set up fraud where he **carelessly signs written instrument without reading it** though he has ability and opportunity to know what he is signing. United Breeders Co. v. Wright, 134 Mo. App. 717, 115 SW 470. Business man of experience may not escape his undertaking by saying that he signed contract without reading it. Howell v. Bloom, 117 NYS 893. Failure of party to read deed or have same read to him held to constitute such negligence as to place him beyond legal or equitable relief. Golle v. State Bank, 52 Wash. 437, 100 P 984. Where grantee had opportunity to examine deed before acceptance, it could not be said that insertion of building restriction in deed before delivery by grantor was fraud upon grantee. Coppes v. Keystone Paint & Filler Co., 36 Pa. Super. Ct. 38. That one signing subscription for corporate stock failed to read it is no defense. Chicago Bldg. & Mfg. Co. v. Peterson [Ky.] 118 SW 384. Merely falsely representing to man in possession of his faculties and able to read that written contract embodies oral understanding is not fraud. McNinch v. Northwest Thresher Co. [Okl.] 100 P 524. Person who can read but who nevertheless through inexcusable neglect signs instrument without reading it is bound though taker made false statements as to its contents. Tracy & Co. v. Harris [Ga. App.] 63 SE 233. One who is able to read and write and signs contract without reading it is bound by it and cannot set up that it was represented to contain stipulations contrary to those it does contain. Boswell v. Johnson, 5 Ga. App. 251, 62 SE 1003. Where lease was brought to lessee to sign and he was very busy and contents were misrepresented to him and he signed without reading, held he could avoid it. Schroeter v. Bowdon [Tex. Civ. App.] 115 SW 331. Complaint alleging that one did not read contract before signing because he did not have time to get attorney held not to state cause of action. Potts v. Riddle, 5 Ga. App. 378, 63 SE 253.

32. What constitutes damage: In an action for false representations inducing one to buy corporate stock, question is whether stock was worth what it was represented and not whether it was worth what was paid for it. Harlow v. Haines, 63 Misc. 98, 116 NYS 449. Where agent fraudulently induced his principal to pay excessive price for land whereby agent received an increased commission, that land was worth all he paid for it is no defense to agent. Clinkscales v. Clark, 137 Mo. App. 12, 118 SW 1182. In action for fraud of agent in representing to principal that he was selling land to her at price he paid for it, agency and value of property are immaterial. Jameson v. Kempton, 52 Wash. 106, 100 P 186.

Held not damaged: Vendors of land held not damaged by deception practiced upon them by attorney who drew deeds and powers of attorney. United States v. Conklin, 169 F 177. Corporation is not injured by false statement in its charter that entire amount of stock had been subscribed and would be paid by subscribers by deeding mining property to it, where subscribers subsequently acquired locations and conveyed them to corporation. Turner v. Markham, 155 Cal. 562, 102 P 272. **To warrant rescission** it must be accompanied by some appreciable loss or damage. Eichelberger v. Mills Land & W. Co., 9 Cal. App. 628, 100

opinion is fraud if made with knowledge of its falsity or with intent to deceive,[33] or the parties are not dealing on equal terms,[34] or it is made with a present intention to disregard it.[35] So, also, the broad statement that the knowledge may be either actual or constructive is subject to the limitation that in case affirmative relief is sought the knowledge must be actual.[36] The misrepresentation may consist of a single material misstatement as well as many.[37] In some states it is required by statute that representations relative to certain facts be in writing.[38]

The fraud must have been the inducing cause of the transaction,[39] but it is not essential that it be the sole cause.[40] As a general rule where persons deal with each other at arm's length, one is under no obligation to disclose to the other all he knows [41] where the means of knowledge are equally open to such other,[42] unless from

P 117. United States may not set aside patent for lien land for fraud where it shows no damage. United States v. Conklin, 169 F 177.

33. Rule that opinion does not constitute fraud applies only when opinion stands by itself as distinct thing and is not given with knowledge of its falsity and with intent to deceive. Hetland v. Bilstad, 140 Iowa, 411, 118 NW 422. Expert opinion knowingly misstated is fraud. Johnson v. Withers, 9 Cal. App. 52, 98 P 42. In action for fraud relative to building loan mortgage, statement of company's agent that payment of certain sum per month for certain period would pay mortgage though not more than opinion held admissible. American Building & Loan Ass'n v. Fowler [Ind. App.] 88 NE 118.

34. Matter of opinion may amount to false representation where parties are not dealing on equal terms and one of them has or is presumed to have means of information not open to other. Fitzgerald v. Frankel [Va.] 64 SE 941.

35. General rule that promise to do some act is not fraud is subject to exception that promise made with intent to disregard it is fraud. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945. In order that promise may constitute fraud, it must be made with secret intention of not conforming to it. Instruction approved. Cerny v. Paxton & Gallagher Co., 83 Neb. 88, 119 NW 14. Where defendant secured conveyance through promise which he did not intend to carry out. Ten Mile Coal & Coke Co. v. Burt, 170 F 332. Under Civ. Code, § 1572, promise made without intent to perform is species of fraud, and conveyance in consideration of promise held procured by fraud where subsequent developments indicated intention not to perform. Martin v. Lawrence [Cal.] 103 P 913.

36. Civ. Code 1895, § 4026, is statutory definition of fraud, and that part of it which relates to fraud done by mistake or innocently is not applicable to action for deceit, where scienter is essential. Camp v. Carithers [Ga. App.] 65 SE 583. Only actual fraud authorizes ex parte rescission of horse trade. Sasser v. Pierce [Ga. App.] 64 SE 1100.

Held not ground for affirmative relief: Representations made through mistake, ignorance, want of caution, if made honestly. Moran v. Brown, 113 NYS 1038. Guaranty by seller of unsound horse that it was sound would not be fraud unless seller knew it to be unsound. Jordan v. Austin [Ala.] 50 S 70. Evidence insufficient to show intentional misrepresentation so as to make out case of fraud. Moran v. Brown, 113 NYS 1038.

37. Single material misstatement affords as complete ground for relief as multitude. Del Vecchio v. Savelli, 10 Cal. App. 79, 101 P 32; Davis v. Butler, 154 Cal. 623, 98 P 1047.

38. Fraudulent representations as to business made to induce one to invest money in it held not within Comp. Law 1897, § 9518, requiring representations as to credit, etc., to be in writing. Massey v. Luce [Mich.] 16 Det. Leg. N. 572, 122 NW 514. Ann. St. 1906, p. 1965, requiring representations as to character, conduct, credit, etc., to be in writing, applies to representations of incorporators, made to one extending corporation credit. McKee v. Rudd [Mo.] 121 SW 312.

39. Where false representations are not inducing cause of contract, they constitute no defense to action thereon. Southard v. Arkansas Val. & W. R. Co. [Okl.] 103 P 750. Failure of mortgagor to pay interest on mortgage debt held not induced by third person's conduct. Nearing v. Hathaway, 128 App. Div. 745, 113 NYS 318.

40. It is not essential that false representations be sole cause of executing deed if it would not have been executed but for such representations. Stoker v. Fugitt [Tex. Civ. App.] 113 SW 310. Sufficient if they were one of inducements. Kelty v. McPeake [Iowa] 121 NW 529. It is not essential that vendee relied "solely" upon false representations as to title; it is sufficient if he would not have purchased but for representations. Buchanan v. Burnett [Tex.] 119 SW 1141. It is proper to refuse to charge that defrauded person must have relied solely upon false representations, since it is immaterial that truth of such representations was fortified by other circumtances. Buchanan v. Burnett [Tex. Civ. App.] 114 SW 406.

41. Jones v. Commercial Travelers' Mut. Acc. Ass'n, 114 NYS 589. Where parties deal with each other at arm's length, equity will not relieve against improvident contracts induced by arts and tricks of trade. Storthz v. Crusoe [Ark.] 113 SW 1015. Where seller of goods by mistake drew on purchaser for less than price, failure of purchaser to notify him of his mistake did not constitute legal fraud. Evert v. Tower, 51 Wash. 514, 99 P 580.

42. Where persons are dealing at arm's length and there is no fiduciary relation between them, neither is required to disclose facts equally within means of knowledge of other. Cherry v. Brizzolara [Ark.] 116 SW

the circumstances it is the former's duty to make disclosure.[43] A mere breach of contract is not fraud.[44]

The misrepresentation may be made by a party or his agent,[45] and a principal is liable for the fraud of his agent [46] providing the agent was acting in his behalf at the time.[47] The agent is also jointly liable.[48] A principal can assert no rights under a contract obtained by fraud.[49] A corporation is not liable in damages for fraud of its officers or agents unless it authorized the making of the representations.[50]

If one of two innocent persons must suffer, the burden will fall upon the one who places in another the apparent power to commit a fraud.[51]

Whether a representation is a statement of fact or of opinion depends upon the situation of the parties, their general intelligence and experience,[52] and whether one is entitled to rely upon a representation may depend on the character of the representation,[53] the circumstances surrounding the transaction,[54] the relative

668. That seller did not inform buyer that powders for use with fumigating apparatus contained sulphur, use of which was forbidden by law as fruit preservative, is not. Smith v. Alphin, 150 N. C. 425, 64 SE 210.

43. Shipper who tenders to carrier for transportation article of unusual value not apparent from casual inspection is in duty bound to disclose its nature and failure to do so is fraud, regardless of dishonest intent. Southern Exp. Co. v. Pope, 5 Ga. App. 689, 63 SE 809.

44. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028.

45. False representations by agent of vendor as to acreage of tract sold are not merged in deed. Judd v. Walker, 215 Mo. 312, 114 SW 979.

46. See Agency, § 2. Principal is liable for false representations of his agent if agent was authorized to make them or if they were made in course of his employment whether they believed representations to be false or true. Wimple v. Patterson [Tex. Civ. App.] 117 SW 1034. Fraud of authorized agent will invalidate contract though principal had no notice of it. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945. Principal is responsible for representations made by his agent in scope of his authority. Howe v. Martin [Okl.] 102 P 128. Vendor of land is liable for false representations of his salesman though his is merely **subagent.** Nelson v. Title Trust Co., 52 Wash. 258, 100 P 730. Principal is liable in **punitive damages** for fraud of his agent though he had no notice of it or opportunity to repudiate it. Brown v. American Tel. & T. Co., 82 S. C. 173, 63 SE 744. Wife held accountable for **fraud of husband** while acting as her agent. Enslen v. Allen [Ala.] 49 S 430.

47. Where officer of bank was not acting in his official capacity at time he made false representations, bank was not liable. Simons v. Cissna, 52 Wash. 115, 100 P 200. If deed was procured by fraud or undue influence of one acting as agent of grantee, or if grantee was a volunteer, or bought with notice of the wrong done the grantor, or of facts sufficient to put a man of average business prudence on inquiry that would lead to knowledge, in either event, the grantor would be entitled to adequate and proper relief. Beeson v. Smith, 149 N. C. 142, 62 SE 888.

48. Agent and principal are jointly liable for false representation made by agent in prosecution of his principal's business. Willard v. Key, 83 Neb. 850, 120 NW 419. Agent inducing sale of his principal's property by false representations is liable in tort. Wimple v. Patterson [Tex. Civ. App.] 117 SW 1034.

49. Innocent principal cannot assert any rights or retain any benefit upon contract procured by fraud of his agent. Reitman v. Fiorillo, 76 N. J. Law, 815, 72 A 74.

50. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945.

51. Campbell v. Huffines [N. C.] 65 SE 1000. Director and president of corporation held liable for bringing about condition of affairs by which persons buying bonds of corporation were defrauded. Lynch v. Southern Mining Land & Lumber Co., 135 Mo. App. 672, 117 SW 624.

52. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351.

53. Where the buyer of mortgages was **inclined to consult lawyer but was told it was not necessary** by seller, held he was not precluded from recovering because he did not consult lawyer, as seller's conduct might have been intended to divert him from sources of information. Rollins v. Quimby, 200 Mass. 162, 86 NE 350.

54. Right of one to rely on representation of another depends upon circumstances; thus, person is entitled to rely on statements of another regarding his property and amount of his debt. Lessor not bound to search record to ascertain if lessee's property was incumbered. Kelty v. McPeake [Iowa] 121 NW 529. In action for fraud, question is impression made upon mind of person alleged to have been deceived by representations, and not impression made on mind of disinterested bystander. Britton v. Poore [Fla.] 49 S 507. Where **agent** represents to principal that he is selling her land for what he paid for it, she had right to rely upon such statement. Jameson v. Kempton, 52 Wash. 106, 100 P 186.

Held not fraud: Indian lease of oil land held not void for fraud where it had been approved by secretary of interior; consideration not inequitable, though lessor at time

knowledge of the parties with respect to the subject-matter,[55] or opportunity or duty to investigate.[56] Whether a statement is one of fact or of opinion,[57] or whether one is entitled to rely upon it,[58] or whether a transaction was the result of fraud [59] may be a question of fact.

was confined in penitentiary and did not know all facts. Moore v. Sawyer, 167 F 826. Where **majority stockholder of corporation who controlled its affairs closed down mine** when it was being operated at profit for purpose of securing stock of manager whom he had caused to be discharged, and made representations to such manager, held that in view of fact that manager must have been as familiar with affairs of corporation as majority stockholder, he could not set aside sale of his stock for fraud. Steinfeld v. Nielsen [Ariz.] 100 P 1094.

55. Where person 25 years of age, against advice of his relatives, sells to them his interest in land at price fixed by appraisers, he may not recover where vendee subsequently sold it for double such price. In re Frey's Estate, 223 Pa. 61, 72 A 317. On question of whether one had opportunity to know truth, his intelligence and confidence reposed by him in other are to be considered. Jacobsen v. Whitely, 138 Wis. 434, 120 NW 285. Buyers of horses are chargeable with knowledge of only such physical defects as are obvious to them in view of their capability to observe and opportunities accorded them. Swanke v. Herdeman, 138 Wis. 654, 120 NW 414.

56. Rule that opportunity to know truth will preclude recovery means that one may not act blindly in disregard of knowledge of falsity or with such opportunity that by reasonable observation he could have known; and he may not close his eyes to what is obvious. Jacobsen v. Whitely, 138 Wis. 434, 120 NW 285. Rule that means of knowledge is equivalent to knowledge applies to determination of whether one has been guilty of laches in discovering fraud and not to his right to cancel contract for fraud. Eichelberger v. Mills Land & W. Co., 9 Cal. App. 628, 100 P 117.

Duty to investigate: That vendee of land did not procure information concerning it which ordinary prudence would have dictated is insufficient to bar him relief. Hetland v. Bilstad, 140 Iowa, 411, 118 NW 422, Representations by broker to intending purchaser that owner would not take less than certain price for land is not fraud in absence of confidential relation between broker and buyer, or fraud to prevent inquiry. Ripy v. Cronan [Ky.] 115 SW 791. False representations as to area of land sold is not, where vendor points out true boundaries and does not dissuade full examination and area is not so great as to be incapable of estimate and there is no relation of trust. Mabardy v. McHugh, 202 Mass. 148, 88 NE 894.

Entitled to rely: Vendee who has abstract in his possession is under no duty to investigate truth or falsity of statements made by vendor in regard to title. Buchanan v. Burnett [Tex.] 119 SW 1141. Misrepresentations by vendor as to value did not charge purchaser to inquire further as to title. Homan v. Wayer, 9 Cal. App. 123, 98 P 80.

57. Statement as to how many cows could be kept on farm is susceptible of construction making it applicable to present as well as future, and its meaning is for jury. Beika v. Allen [Vt.] 74 A 91. Generally, whether representation is of fact or opinion is a question for jury. Id. Whether representation by life insurance agent that company would pay back premiums at end of certain period, made to person who was blind and to whom agent read and explained policy was intended and accepted as statement of fact, held for jury. Whitehurst v. Life Ins. Co., 149 N. C. 273, 62 SE 1067. Where there is doubt as to whether representations were intended as statements of fact or mere expressions of opinion. Id. Whether representations that land was free from weeds and lay so that water drained from it mere statements of opinion or of facts. Hetland v. Bilstad, 140 Iowa, 411, 118 NW 422.

58. Whether one should have known of falsity of representations. Jacobsen v. Whitely, 138 Wis. 434, 120 NW 285. Whether vendee of land in relying on representations of vendor as to susceptibility of land to irrigation acted with that degree of care required of prudent man. Woodby v. Benton Water Co. [Wash.] 102 P 1054. Evidence held to raise issue as to whether subscription for corporate stock was given in **reliance upon false representations by officer** of corporation as to condition of corporation. Cherry v. First Texas Chemical Mfg. Co. [Tex. Civ. App.] 115 SW 81. Whether purchaser of typesetting machines has such **opportunity to examine** them, or whether he relied upon representations concerning them, held for jury. Walker, Evans & Cogswell Co. v. Ayer, 80 S. C. 292, 61 SE 557. Question **of negligence in signing instrument without reading** it held for the jury. First State Bank v. Borchers, 83 Neb. 530, 120 NW 142.

59. Held questions for jury: Where court cannot say as matter of law that there is no evidence of fraud. Jones v. Life Ins. Co. [N. C.] 65 SE 602 Whether **release** was procured by fraud. Larsson v. Metropolitan Stock Exch., 200 Mass. 367, 86 NE 940. Whether persons fraudulently conspired **to procure another to invest money** in business. Massey v. Luce [Mich.] 16 Det. Leg. N. 572, 122 NW 514. Whether **note** was procured by fraud. Ireland v. Scharpenberg [Wash.] 103 P 801. Whether **indorsement on note** was procured by fraud. Roessle v. Lancaster, 130 App. Div. 1, 114 NYS 387. Question of fraud in action for **specific performance.** Combes v. Adams, 150 N. C. 64, 63 SE 186. Whether **execution of contract** was induced by fraud. Acme Food Co. v. Barber [Mo. App.] 119 SW 989. Where owner of accounts sold them to another and then made false representations as to them to third person who purchased them from their buyer, **whether their buyer acted as their agent.** Fitzpatrick v. Manheimer [Mich.] 16 Det. Leg. N. 457, 122 NW 83.

§ 2. *Inferences from circumstances and conditions of parties or from intrinsic nature of transaction.*[60]—See 11 C. L. 1598—While the inference of fraud is most commonly drawn in case of confidential or fiduciary relationship between the parties,[61] it often arises from circumstances of inequality or unfairness in the situation of the parties,[62] or from the palpable unfairness of the transaction itself,[63] a most common

60. Search Note: See notes in 3 C. L. 1524; 9 Id. 1483; 21 A. S. R. 94; 7 Ann. Cas. 894; 9 Id. 783.

See, also, Attorney and Client, Cent. Dig. § 228; Dec. Dig. § 114; 4 Cyc. p. 936; Bills and Notes, Cent. Dig. §§ 233-240, 242-247; Dec. Dig. §§ 103-105; Bonds, Cent. Dig. §§ 43-45; Dec. Dig. §§ 39, 40; 5 Cyc. 744, 745; Brokers, Cent. Dig. § 26; Dec. Dig. § 34; 19 Cyc. 205-208; Chattel Mortgages, Cent. Dig. §§ 142, 143; Dec. Dig. § 72; 6 Cyc. 1099-1104; Contracts, Cent. Dig. §§ 420-430, 441; Dec. Dig. §§ 94, 96; 9 Cyc. 408-453; Deeds, Cent. Dig. §§ 165-182, 190-199; Dec. Dig. §§ 70, 72; 13 Cyc. 578-590; Guardian and Ward, Cent. Dig. § 107; Dec. Dig. § 63; Insurance, Cent. Dig. §§ 498-1087; Dec. Dig. §§ 226-401; 1 Cyc. 247, 248; 19 Id. 636, 637, 642-655, 677-776, 778-826; 25 Id. 783-873, 1519; 26 Id. 610, 611, 613-650; 29 Id. 613-650; Mortgages, Cent. Dig. §§ 177-181, 186, 187; Dec. Dig. §§ 78, 80; 27 Cyc. 1120-1123, 1126; Principal and Agent, Cent. Dig. § 147; Dec. Dig. § 71; Principal and Surety, Cent. Dig. §§ 78-96; Dec. Dig. §§ 39-43; Release, Cent. Dig. §§ 32, 33; Dec. Dig. §§ 17, 19; Sales, Cent. Dig. §§ 64-100; Dec. Dig. §§ 35, 37-47; Vendor and Purchaser, Cent. Dig. §§ 38-65; Dec. Dig. §§ 33-38; Wills, Cent. Dig. §§ 371-387; Dec. Dig. §§ 153-161; 14 A. & E. Enc. L. (2ed.) 19; 29 Id. 101.

61. See post, this section.

"Fiduciary relation" exists when confidence is reposed on one side and there is resulting superiority and influence on other, and relation need not be legal but may be moral, social, domestic or personal. Hensan v. Cooksey, 237 Ill. 620, 86 NE 1107. Where two persons stand in such relationship that trust and confidence is necessarily reposed in one by other, and such trust is abused and unfair advantage obtained by deed, it will not be permitted to stand. McCord v. Bright [Ind. App.] 87 NE 654. If one acts as **confidential advisor** and because of this confidence is reposed in him, and other party is influenced thereby, recovery may be had for fraud. Hetland v. Bilstad, 140 Iowa, 411, 118 NW 422.

Evidence held sufficient: Where **niece by threats of suicide induced her aunt,** elderly and ignorant lady, to promise to execute deed reserving life estate, but by deceit procured her to execute absolute deed, it will be set aside. Light v. Light, 221 Pa. 136, 70 A 553. **Gift by aged and ignorant person** of almost her entire estate will be closely scrutinized, and unless donor acted without undue influence will not be upheld. Simpson v. League, 110 Md. 286, 72 A 1109. **Evidence insufficient** to show that grantor lived in **illicit relations** with grantee within rule that influence so procured is undue. Semper v. Englehart, 140 Iowa, 286, 118 NW 318. Where grantor had no legitimate children and was under moral obligation to support grantees, his illegitimate children, fact that he had illicit relations with their mother, held not sufficient to create presumption of undue influence. Best v. House [Ky.] 113 SW 849. To show that one who **changed beneficiary** in life policy from his affianced to his relatives shortly before his death was influenced by fraud and undue influence. Hintz v. Wald, 138 Wis. 41, 119 NW 821. It is not prima facie fraudulent for one person to **contract to convey property of another** without provision for payment of consideration to owner, though relation between them is fiduciary. Pickthall v. Steinfeld [Ariz.] 100 P 779. Transactions between persons occupying fiduciary relations in which stronger obtains advantage over weaker will not be upheld. Peterson v. Budge [Utah] 102 P 211.

62. Held procured by undue influence: Mortgage on homestead held the result of undue influence where signature was procured by **intimation of criminal prosecution,** and mortgagor was in ill health, nervous and excitable. Nebraska Cent. Building & Loan Ass'n v. McCandless, 83 Neb. 536, 120 NW 134. Where it appears that grantor was eighty-three years of age and was suffering from **senile dementia** to an extent which incapacitated him for transaction of business in part if not altogether, that price agreed upon for farm which he sold was not fully adequate and no money was paid down and purchase-money notes were extended over period of fifteen years at rate of interest as low as four per cent, that farm constituted all of grantor's property and in selling it he acted without independent advice and contrary to his intention as expressed but short time previous, that there were opportunities for undue influence and some testimony tending to show its exercise, that no security for payment of purchase-money notes was given except mortgage on farm sold and that if sale was abrogated no loss would result to grantee unless he got property for less than its real value, decree granting petition of heirs to set deed aside will be granted. Wallace v. Timberman, 8 Ohio N. P. (N. S.) 601.

Evidence insufficient to show that **deed** was result of undue influence. Balam v. Rouleau, 52 Wash. 389, 100 P 833. To show that deed was procured by undue influence **of one with whom grantor had illicit relations.** Semper v. Englehart, 140 Iowa, 286, 118 NW 318.

Evidence sufficient to show no fraud: To show that **deed without consideration** was result of no undue influence on part of donee. McDonnell v. McDonnell, 10 Cal. App. 62, 101 P 40. Any burden resting on grantee to show freedom of grantor from undue influence held sustained where her testimony, sustained by that of other witnesses, **showed no immoral conduct** between them, but that grantor boarded with her and paid his board. Whitlock v. Dixon, 150 N. C. 616, 64 SE 504.

63. Where **illiterate colored person was persuaded** by one whom he trusted, and who was in employ of opposite party to transaction, to exchange property worth $1,100 for property not worth $800, it will be set

application being to releases obtained from persons suffering from personal injury.[64] To constitute undue influence it is not necessary that moral turpitude or undue influence exist.[65] The degree of influence which will be undue is relative and dependent upon the circumstances.[66, 67] While such fiduciary relationship will sometimes,[68] but not always, be presumed to exist from the mere relationship of the parties,[69] yet where the relationship is shown to exist [70] a presumption of undue influence [71] render-

aside as fraudulent. Carter v. Eastman Gardner & Co. [Miss.] 48 S 615. Held fraud where one did not understand nature of a contract executed and **was overreached.** Witham v. Walsh, 156 Mich. 582, 16 Det. Leg. N. 190, 121 NW 309.

64. Plaintiff's weakened physical condition, his state of mind, his anxiety to return to work, unwillingness to believe he was permamently injured, inequality of parties to transaction, manner and words of claim agent, were evidence which tended to sustain plaintiff's claim that settlement for injuries obtained by imposition. Illinois Cent. R. Co. v. Vaughn, 33 Ky. L. R. 906, 111 SW 707. Court will be slow to enforce release for injuries obtained from ignorant negro at time when he was lying in hospital with fractured skull, broken leg and other injuries. Keller & Brady Co. v. Berry [Ky.] 121 SW 1009. Release obtained while injured party was in hospital, negotiation being made through interpreter, was sufficient to raise doubt as to bona fides of transaction. Savage v. Chicago & J. R. Co., 142 Ill. App. 342. Mere **incapacity to understand** act of executing release does not of itself establish contention of fraud in procurement. Litchfield & M. R. Co. v. Shuler, 134 Ill. App. 615. Weakened mental condition of plaintiff resulting from **habitual intemperance contributed to by defendants** furnishing him liquor, his ignorance of value of property in question, and knowledge on part of defendants as to value of such property, held evidence of fraud in securing transfer of interest in mortgaged property. Gassert v. Strong, 38 Mont. 18, 98 P 497. **Hurried settlements** are not favored in case of injury to employe. Brambell v. Cincinnati, etc., R. Co. [Ky.] 116 SW 742. Haste and other circumstances under which contract of settlement of claim for damages was presented and insignificance of amount paid held evidence of its unfairness. Atchison, etc., R. Co. v. Peck [Kan.] 100 P 54. Situation of plaintiff who signed release held to be such as to relax rule that party who **signs contract without reading** it will not be heard to say that it does not express his intention. Illinois Cent. R. Co. v. Vaughn, 33 Ky. L. R. 906, 111 SW 707. **Infancy of plaintiff, his ignorance of English language,** and circumstances under which release for injuries was procured, were sufficient reasons for setting it aside. Simeoli v. Derby Rubber Co., 81 Conn. 423, 71 A 546. Where there is **gross inadequacy of compensation,** it requires but slight additional evidence of fraud to overturn settlement for injuries. Illinois Cent. R. Co. v. Vaughn, 33 Ky. L. R. 906, 111 SW 707. Where claim agent and physician visited injured person shortly after her injury and while she was still suffering, and by false representations as to extent of her injuries induced her to sign release for grossly inadequate consideration. St. Louis & S. F. R. Co. v. Richards [Okl.] 108 P 92. Railroad company which induces injured person to sign release for personal injuries when he is in weak mental and physical condition, and prevails upon him to execute it for grossly inadequate consideration, is guilty of fraud. Louisville & N. R. Co. v. Huffstutler [Ala.] 50 S 146.

65. If one who has obtained dominant influence over another induces him to do act materially affecting his rights, act is fraudulent. Myatt v. Myatt, 149 N. C. 137, 62 SE 887. Charge that undue influence is fraudulent influence controlling mind of person induced to act by which his will is perverted from its free exercise and submitting issues of fraud and undue influence held not to lay too much stress on element of fraud. Id. Influence secured through affection of parent for child is not wrongful. Fitzgerald v. Allen, 240 Ill. 80, 88 NE 240. Deed knowingly executed cannot be set aside on ground of undue influence. Kosturska v. Bartkiewicz, 241 Ill. 604, 89 NE 657.

66, 67. If grantor is old and his mind weakened by disease, slight influence may be sufficient to overcome his power of resisting importunities of those about him and thereby become undue, though under other conditions it could not be so regarded. Taphorn v. Taphorn, 12 Ohio C. C. (N. S.) 180. Notwithstanding some doubt by the court as to the weight of the evidence, deeds will not be set aside on the ground of undue influence and lack of mental capacity, where they accomplish substantially the same result achieved by the grantor by the execution of a will six years before when no doubt existed as to his mental condition or freedom of action. Id.

68. Relations of trust and confidence are presumed to exist between **husband and wife.** Massey v. Rae [N. D.] 121 NW 75. Conveyance from wife to husband will be closely scrutinized. Mathy v. Mathy [Ark.] 113 SW 1012. **Parishioner and priest:** Gift causa mortis from parishioner to priest is prima facie void. Gilmore v. Lee, 237 Ill. 402, 86 NE 568. **Promoter and corporation:** Occupy fiduciary relation. Chaffee v. Berkley [Iowa] 118 NW 267. Fiduciary relation between promoter and corporation continues until promoter has completely established corporation according to his plan. Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 NE 193. One who is neither officer nor director of corporation but who controls its affairs as **majority stockholder sustains** fiduciary relation to the corporation and stockholders. Steinfeld v. Nielson [Ariz.] 100 P 1094.

69. Held no presumption in law that conveyance from **parent to child** is result of undue influence. Hudson v. Hudson, 237 Ill. 9, 86 NE 661; Fitzgerald v. Allen, 240 Ill. 80, 88 NE 240. Relation of parent and child raises **no presumption** of undue influence in

ing the transaction prima facie voidable at the election of the injured party sometimes arises.[72] This rule, requiring one who stands in a fiduciary relation to another to show that transactions between them are fair, applies to transactions between parent and child,[73] brother and sister,[74] parishioner and priest,[75] husband and wife,[76] close friends,[77] corporate officers and stockholders,[79] physician and patient [79] principal

deed from parent to child but is circumstance to be weighed in connection with other facts. Pember v. Burton [Vt.] 71 A 812. No presumption of undue influence attaches to deed from aged father of failing mind to son to whom he is under obligation and from whom he receives adequate consideration. West v. West [Neb.] 120 NW 925. In order to vacate gift between parent and child, court must be satisfied that it was not voluntary act of donor. Rader v. Rader, 108 Minn. 139, 121 NW 393. Heirs seeking to set aside deed from father to daughter have burden to show undue influence. Burrow v. Hicks [Iowa] 120 NW 727. No fiduciary relation presumed between **grandparent and grandchild.** Kosturska v. Bartkiewicz, 241 Ill. 604, 89 NE 657. Deed from grandparent to grandchild held not result of undue influence. Id. In deeds of gift from parent and child, undue influence will not be presumed because of relationship as it is sometimes in deeds of gift from child to parent but must be proved like other facts. Taphorn v. Taphorn, 12 Ohio C. C. (N. S.) 180. Due execution and delivery of deeds having been established, burden did not rest on defendants to show that transaction was fair and free from undue influence; but on contrary burden was cast on plaintiff to establish by clear and convincing proof one of grounds relied upon. Id.

70. Evidence held sufficient to show that grantee and grantor had been **close friends** and that grantee had great influence over grantor. Peterson v. Budge [Utah] 102 P 211. Fiduciary held to exist between **mother and son** where she was old and feeble and he managed all of her affairs. Hensan v. Cooksey, 237 Ill. 620, 86 NE 1107. Evidence held to show that fiduciary relation of **physician and patient** existed between grantor and grantee. Peterson v. Budge [Utah] 102 P 211. Evidence held for jury as to existence of confidential relations **between one and alleged agent** and of fraudulent breach of duties of that relation. Clinkscales v. Clark, 137 Mo. App. 12, 118 SW 1182.

71. Equity will not permit one occupying fiduciary and confidential relation to accept from **aged** and infirm person of enfeebled mind conveyance of valuable property, unless grantee clearly shows that transaction was entirely fair and free from any improper influence. Fish v. Fish, 235 Ill. 396, 85 NE 662. Existence of confidential relation creates presumption of influence, which may be rebutted by proof that parties dealt as strangers, at arm's length, that no unfairness was used, and that facts in knowledge of one in position of influence, affecting matter, were communicated to other. Paralytic aunt and nephew with power of attorney to manage all former's affairs. Fish v. Fish, 235 Ill. 396, 85 NE 662 **Undue influence presumed:** Contract between persons in confidential relations by which one obtains advantage will be presumed fraudulent until such presumption is rebutted by clear evidence. Tindal v. Sublett, 82 S. C. 199, 63 SE 960. Where confidential relation exists between grantor and grantee, grantee has burden to prove that deed was free act of grantor. Jones v. Thomas, 218 Mo. 508, 117 SW 1177. Where wealthy and influential **white man had acted as advisor and rendered assistance to ignorant negro** for years, evidence held to show fiduciary relation casting on white man burden to show that transactions between them were fair. Harrison v. Rogers [Ala.] 50 S 364. **Conveyances to nephew by aunt,** who was aged, infirm, incompetent and paralytic, under power of attorney to nephew to do all things necessary to manage aunt's property, held voidable. Fish v. Fish, 235 Ill. 396, 85 NE 662. Where grantor alleges fraud in deed in that contents thereof were fraudulently misstated and concealed, and it appears that **grantee is son of grantor** and attorney and was intrusted with drafting of instrument, presumption of trust and confidence is raised. McAdams v. McAdams, 80 Ohio St. 232, 88 NE 542. Evidence sufficient to show that deed from **grandparent to grandchild** was result of undue influence. Bellamy v. Andrews [N. C.] 65 SE 963.

72. Transaction is prima facie voidable at option of grantor upon grounds of public policy. Fish v. Fish, 235 Ill. 396, 85 NE 662. Deed procured by grantee's influence over grantor by virtue of his position may be set aside though no actual fraud or moral turpitude be shown. Bellamy v. Andrews [N. C.] 65 SE 963.

73. Undue influence is inferred where **parent makes conveyance** to his daughter at time he is so infirm and mentally weak as to be peculiarly susceptible to undue influence. Hattle v. Potter [Wash.] 102 P 1023. Stepdaughther and son to whom transfer was made have burden to show that it was not done through their influence. Groff v. Stitzer [N. J. Eq.] 72 A 970. Where aged parent conveyed property to son, the burden of establishinhg its perfect fairness was thrown upon the son. Reck v. Reck, 110 Md. 497, 73 A 144. Where aged parent conveyed property to son, it was not necessary to prove the actual exercise of overweening influence, misrepresentation, or fraud, aliunde the act complained of. Id. Where person enfeebled in mind is so placed as likely to be subject to influence of another, and makes **voluntary disposition** of property in favor of such person, there is presumption against validity of gift. Groff v. Stitzer [N. J. Eq.] 72 A 970. Where **child deeds property to parent,** law casts upon parent burden of showing good faith. McLaughlin v. McLaughlin, 241 Ill. 366, 89 NE 645. **Evidence sufficient** to show that **deed** from aged and infirm parent to daughter and her husband was result of undue influence. Hattle v. Potter [Wash.] 102 P 1023. To show that voluntary transfer from old, enfeebled person to her children was induced by undue

and agent,[80] guardian and ward,[81] and life tenant and remainderman.[82] In transac-

influence. Groff v. Stitzer [N. J. Eq.] 72 A 970. Deed from aged father to son held procured by undue influence. Jesse v. Brown, 83 Neb. 311, 119 NW 512; Reck v. Reck, 110 Md. 497, 73 A 144. Complaint alleging that parents in reliance on confidence existing between them and their sons executed to them deed upon their oral promise to hold property in trust for all heirs, which they refused to carry out, held to state cause of action for declaring deed to be in trust. Hanson v. Svarnerud [N. D.] 120 NW 550. Mental condition which causes forgetfulness of ties of blood as result of real or fancied wrongs, although not amounting technically to unsoundness of mind, should be taken into consideration in determining whether making of deed or will was free and voluntary act; and where by misrepresentation or concealment of facts unnatural and unwarranted resentment toward members of family is increased, undue influence is thereby exerted to detriment of those against whom it is felt, however unimportant may be same course of conduct under other circumstances. Beyer v. Beyer, 9 Ohio N. P. (N. S.) 88. Where it appears that such resentment was felt by father against two of his sons and their wives, and that this feeling was fanned and excited by conduct, both active and passive, of third son to whom father conveyed all of his property without susbtantial consideration or understanding full force and effect of instrument which he was signing, court will set deed aside. Id. Evidence held to show that **mother unduly prevailed on her daughter** to execute deed of trust. Lockhart v. Buckner, 33 Ky. L. R. 678, 110 SW 850. Where child takes advantage of parent and obtains **conveyance on promise to support** and then repudiates promise. Williams v. Langwill, 241 Ill. 441, 89 NE 642. **Evidence insufficient:** Transaction between aged mother and son whereby he procured deed of all her property in consideration of oral promise to support her held void, Hensan v. Cooksey, 237 Ill. 620, 86 NE 1107. To show that **deed from parent** to child was result of undue influence though confidential relation existed between them. Huffman v. Huffman, 217 Mo. 182, 117 SW 1; Altig v. Altig, 137 Iowa, 420, 114 NW 1056; Jones v. Thomas, 218 Mo. 508, 117 SW 1177; Baker v. Baker, 239 Ill. 82, 87 NE 868; Ames v. Moore [Or.] 101 P 769; Schley v. Horan, 82 Neb. 704, 118 NW 659; Burrow v. Hicks [Iowa] 120 NW 727; Hudson v. Hudson, 237 Ill. 9, 86 NE 661. Where parent alleges fraud in deed to his son but it appears that deed is in accordance with previous declarations of grantor and subsequent declarations, as to what he had done, and that he could read and had opportunity to read deed before signing, presumption of undue advantage is rebutted. McAdams v. McAdams, 80 Ohio St. 232, 88 NE 542. **Gift from parent** to child. Rader v. Rader, 108 Minn. 139, 121 NW 393. To show undue influence in deed from parent to child in **consideration of future support.** Kemp v. Kemp, 82 Neb. 794, 118 NW 1069. Where aged parent of her own volition transferred all her property to her daughter in consideration of future support, evidence insufficient to show undue influence, daughter having complied with her agreement. Latta v. Coffeen, 140 Iowa, 515, 118 NW 881.

74. Contract relative to estate between brother and sister whereby one obtained great advantage held void for fraud and undue influence. Bowen v. Kutzner [C. C. A.] 167 F 281. Contracts between brother and sister whereby one secures great advantage over other are closely scrutinized. Id. Conveyance between brother and sister will not be vacated where it appears that no relation of confidence existed between them. Creamer v. Bivert, 214 Mo. 473, 113 SW 1118.

Evidence sufficient to show that **change of beneficiary** in life policy was procured by undue influence. Blood v. Sovereign Camp Woodmen of World [Mo. App.] 120 SW 700. **Abandonment of contract to support for life** as consideration for deed raises presumption of fraudulent intent at inception of contract. Spangler v. Yarborough [Okl.] 101 P 1107.

75. Evidence sufficient to show that gift causa mortis to spiritual advisor was induced by undue influence. Gilmore v. Lee, 237 Ill. 402, 86 NE 568.

76. Burden held to rest on husband: Husband who takes **deed** from his wife has burden to show that transaction was fair. McCord v. Bright [Ind. App.] 87 NE 654. Evidence held sufficient to show that deed from wife to husband was executed under such circumstances that required him to show that no imposition or undue influence was exercised. Massey v. Rae [N. D.] 121 NW 75. There is no presumption that deed from wife to husband is not valid, but where fraud, mistake or undue influence is shown, and it appears that at time wife was ill, husband has burden to show that transaction was fair. Id.

Evidence held to show undue influence or fraud: Where husband fraudulently **induced his wife to sign deed to their homestead** and thereafter had it reconveyed to himself, held fraud on her marital rights. Colegrove v. Colegrove [Ark.] 116 SW 190. If **husband takes advantage of failing health of his wife** and obtains deed from her on oral promise to hold title for benefit of their children, and afterwards repudiates his obligation, he is guilty of constructive fraud. In re Fisk, 81 Conn. 433, 71 A 559. Evidence sufficient to show that **deed from woman to her divorced husband** was procured by fraudulent promises to remarry and undue influence. Maki v. Maki, 106 Minn. 357, 119 NW 51. To show that signature to **bill of sale** had been obtained surreptitiously by one from his divorced wife. Lesster v. Columbia Storage Warehouses, 130 App. Div. 551, 115 NYS 61.

Evidence held not to show undue influence: To show that **assignment of notes and mortgage** was not procured from wife to husband by fraud and undue influence. Mahan v. Schroeder, 236 Ill. 392, 86 NE 97.

77. Consideration for **transfer of equity of redemption** between life-long friends held not so inadequate as to show an undue advantage taken. Scholl v. Hopper [Ky.] 119 SW 770.

78. Officer or director of corporation who seeks to purchase stock from stockholder must disclose to him facts which have come to him by virtue of his relation to corpora-

tions between parent and child the parent is presumed to be the dominant party,[83] and to cast on the child the burden to show that the transaction was fair it must appear that he had control over the parent or his affairs.[84] This same rule also applies to transactions between husband and wife.[85] No presumption of undue influence arises from the fact that an ancestor makes an unequal distribution of his property among his heirs.[86]

§ 3. *Remedies.*[87]—See 11 C. L. 1800—Only general rules are here treated. The election between remedies afforded the parties in particular transactions,[88] the right of action for deceit,[89] and the various equitable remedies [90] are all more specifically treated elsewhere. Fraud vitiates the transaction as to the person chargeable with fraud.[91] If a contract has been obtained fraudulently, the taint attaches to and

tion which affect value of stock. Steinfeld v. Nielsen [Ariz.] 100 P 1094.

79. In actions growing out of transactions between people in confidential relations, stranger has burden to show perfect fairness and adequacy of consideration. Peterson v. Budge [Utah] 102 P 211. Evidence insufficient in suit between physician and patient. Id. Physician is bound to act in utmost good faith toward his patient and may not take advantage of confidence growing out of relation. Id. In suit to cancel **deed from patient** to physician, evidence held to show that deed was accepted with knowledge that its execution had been induced by false representations. Id.

80. Where general agent has entire management of his principal's affairs and is **in effect his guardian,** presumption of fraud arises from conveyance from principal to agent for agent's benefit. Smith v. Moore, 149 N. C. 185, 62 SE 892.

Evidence held to show fraud: Where **one employed another to purchase mine** for sum not to exceed $150,000, and agent obtained it for $90,000 and caused it to be conveyed to confederate, and by representing that he had purchased it for $150,000 induced purchaser to enter into contract with confederate at that price, held fraud. Great Western Gold Co. v. Chambers, 155 Cal. 364, 101 P 6. **Agent for purchaser of land made secret agreement** with vendor contrary to his principal's interests. Egan v. De Jonge, 113 NYS 737.

Evidence held not to show fraud: Agent who foreclosed mortgage held not guilty of fraud in **taking title in his own name** where he offered to deed to his principal if he would do equity. Shup v. Moon [Kan.] 103 P 1001.

81. Guardian who acquires property of his ward under circumstances raising strong suspicion of unfairness will not be permitted to retain it. Brandau v. Greer [Miss.] 48 S 519.

82. Held to constitute fraud: Collusive arrangement by which **life tenant obtained tax title** to estate depriving remainderman of his interest. Boon v. Root, 137 Wis. 451, 119 NW 121. See Real Property, § 6.

83. Where deed is from parent to child, one who assails it has burden to prove undue influence as parent is presumed dominant party. Stanfill v. Johnson [Ala.] 49 S 223.

84. In case of deed from parent to child, presumption of undue influence does not arise until it appears that natural dominion of parent over child has ceased to exist and that by reason of weakness will of parent has been overcome. McLaughlin v. McLaughlin, 241 Ill. 366, 89 NE 645. To prove confidential relations between father and son so as to require son to show that transactions between them were fair, it must appear that son had control of father, administered to his health or attended to his business, or that trust was reposed in him. Jones v. Thomas, 218 Mo. 508, 117 SW 1177. Such confidential relation between parent and child as casts on child burden of showing that conveyance to him was not free will of parent does not arise merely from fact that parent is old and is under care of his child. Huffman v. Huffman, 217 Mo. 182, 117 SW 1.

85. One is not dominant over his wife as matter of law so as to create presumption that gift from her to him is result of undue influence. Mahan v. Schroeder, 236 Ill. 392, 86 NE 97.

86. Unreasonable disposition among children held not of itself to authorize inference of undue influence. Blodgett v. Yocum [Kan.] 103 P 128.

87. Search Note: See notes in 9 C. L. 1491, 1493; 5 L. R. A. (N. S.) 906; 8 Id. 582; 3 A. S. R. 727; 32 Id. 384; 1 Ann. Cas. 446, 809; 3 Id. 611; 5 Id. 608.

See, also, Bills and Notes, Cent. Dig. §§ 222-224, 1524, 1525, 1558, 1683, 1717, 1718, 1813, 1832, 1836, 1837, 1901; Dec. Dig. §§ 111-115, 477, 497, 505, 520; 7 Cyc. 747-750; 8 Id. 164, 165, 233-238, 252, 261; Bonds, Cent. Dig. §§ 45, 141, 186, 236; Dec. Dig. §§ 40, 120, 125, 132; 5 Cyc. 744, 745, 816-819, 829-834, 847, 848; Cancellation of Instruments, Cent. Dig. §§ 66-99; Dec. Dig. §§ 37-43; 6 Cyc. 282-345; Contracts, Cent. Dig. §§ 450, 451, 1160-1167, 1169, 1195, 1196, 1692; Dec. Dig. §§ 99, 259, 338; 6 Cyc. 96, 97, 109; 9 Id. 731-744; 14 Id. 1106; Deeds, Cent. Dig. §§ 209-213, 559, 587-593, 605, 608, 609, 641, 642, 644, 645; Dec. Dig. §§ 77, 188, 196, 203, 211; 13 Cyc. 592, 736-738, 741-743, 751-755; Mortgages, Cent. Dig. §§ 193-197; Dec. Dig. §§ 84-87; 27 Cyc. 1131, 1132; Release, Cent. Dig. §§ 32, 33, 85-93; Dec. Dig. §§ 17, 19, 43-53; Sales, Cent. Dig. §§ 109-117, 123, 129-135, 140-144, 261-329; Dec. Dig. §§ 50-52, 95-134; Vendor and Purchaser, Cent. Dig. §§ 67-76, 148-233; Dec. Dig. §§ 41-44, 88-127; Wills, Cent. Dig. §§ 388-437, 640; Dec. Dig. §§ 163-182, 282; 14 A. & E. Enc. L. (2ed.) 148, 152, 156, 177, 190, 205; 29 Id. 109, 119; 8 A. & E. Enc. P. & P. 883; 8 Id. 675.

88. See Contracts, § 8B; Sales, §§ 10, 11.

89. See Deceit.

90. See Cancellation of Instruments; Reformation of Instruments.

91. Deed procured by undue influence will be vacated unconditionally if there was no consideration and will be permitted to stand only as security for inadequate considera-

effects all its stipulations alike,[92] and, subject to the rights of innocent third persons [93] and to the doctrine of estoppel,[94] renders the transaction voidable at the election of the defrauded party.[95] But such election must be exercised promptly [96] or the fraud will be deemed waived.[97] One who has been defrauded, may elect be-

tion. Bellamy v. Andrews [N. C.] 65 SE 963. Certificate of notary public to deed signature of which is procured by fraud and forger of deed produces before notary another than grantor to make fraudulent acknowledgment is not conclusive against owner. Smith v. Markland, 223 Pa. 605, 72 A 1047. Where acceptance of lease is induced by fraud of lessor, lessee is not estopped to deny his title. Thomas v. Young, 81 Conn. 702, 71 A 1100. Where telephone company obtained right of way by fraud, owner of land was not estopped to sue for damages because of entry on land. Brown v. American Tel. & T. Co., 82 S. C. 173, 63 SE 744. A grant so obtained did not give a right of entry. Id. If shipper practices fraud on carrier by causing package of great value to be shipped as if it were of small value and loss occurs, shipper cannot recover even small value. Southern Exp. Co. v. Pope, 5 Ga. App. 689, 63 SE 809. Law will not save persons from consequences of their own negligence, but it looks with less favor upon fraud. Rollins v. Quimby, 200 Mass. 162, 86 NE 350.

92. Cox v. Cline, 139 Iowa, 128, 117 NW 48. It is defense to action for breach of contract to furnish lumber for government building that lumber was not of grade required by specifications, but inferior grade which contractor intended to substitute in fraud of government, which fact seller did not know at time of sale. Foley Mfg. Co. v. Sierra Nevada Lumber Co. [C. C. A.] 172 F 197. Any trace of fraud renders **specific performance** unavailable. New York Brokerage Co. v. Wharton [Iowa] 119 NW 969.

93. See Notice and Record of Title. See Negotiable Instruments, § 5. Decree modified to protect rights of bona fide purchaser and cancellation of deed rather than reformation permitted if warranted by evidence. Morgan v. Combs, 33 Ky. L. R. 817, 111 SW 294, modifying decree of 32 Ky. L. R. 1205, 108 SW 272.

94. See Estoppel, § 4.

95. A defrauded party may resume possession of his property upon returning what he has parted with. Duy v. Higdon [Ala.] 50 S 378. May have a contract induced by fraud annulled and canceled. Jesse French Piano & Organ Co. v. Costley [Tex. Civ. App.] 116 SW 135. One who in reliance upon false representations signs a **release** believing it to be only a receipt can avoid it. Larsson v. Metropolitan Stock Exch., 200 Mass. 367, 86 NE 940. Where a **forfeiture** of a lease is the result of fraud, equity may set it aside. Powers Shoe Co. v. Odd Fellows Hall Co., 133 Mo. App. 229, 113 SW 253. **Quitclaim** deed of property worth $25,000 procured by fraud for $125 properly vacated. Moore v. Sawyer, 167 F 826. **Deeds** procured by undue influence, or fraud in the treaty or bargain, are voidable and not necessarily void. Beeson v. Smith, 149 N. C. 142, 62 SE 888. A **transfer in fraud of creditors** may be vacated at the suit of the grantor if induced by fraud on the part of the grantee. Sloan v. Macartney, 58 Misc. 75, 108 NYS 840.

96. One who elects to rescind must do so within a **reasonable time.** Central Life Assur. Soc. v. Mulford, 45 Colo. 240, 100 P 423; State Bank v. Brown [Iowa] 119 NW 81. Right to rescission held waived by unreasonable delay. Id. Whether one delayed an unreasonable time before rescinding after learning of the fraud **held for the jury.** McNitt v. Henderson, 155 Mich. 214, 15 Det. Leg. N. 987, 118 NW 974. Whether defrauded party has acted promptly as required by Civ. Code, § 1691, is question of fact. Davis v. Butler, 154 Cal. 623, 98 P 1047. Must be exercised **promptly** upon discovery of the fraud. Arnold v. Dowd [Neb.] 122 NW 680. Where a vendee of a mine did not promptly rescind upon discovery of false representations as to title, he waives his right to do so. Brown v. Gordon-Tiger Co., 44 Colo. 311, 97 P 1042. If after learning of the fraud he **accepts benefits** under the transaction, he cannot repudiate it. Minter v. Hawkins [Tex. Civ. App.] 117 SW 172.

Right to rescind held waived: Where persons were induced by false representations to purchase stock in a corporation, and afterwards became officers of the corporation, they could not after 11 years have relief on the ground of fraud. Thompson v. McKee [Ky.] 119 SW 229. An experienced attorney who traded land for corporate stock held guilty of laches in waiting more than a year after learning of the fraud before suing for rescission. Romaine v. Excelsior Carbide & Gas Mach. Co. [Wash.] 103 P 32. Unexplained delay of 7 years after discovery of fraud precludes rescission. Finch v. Garrett [Va.] 63 SE 417. Defense of fraud held barred by laches where not asserted for 2 years. Fidelity & Casualty Co. v. Dierks Lumber & Coal Co., 133 Mo. App. 637, 114 SW 55. Lessee of railroad cars held precluded from rescinding where, without attempting to do so, he made arrangements for subleasing the cars. Knickerbocker Trust Co. v. O'Rourke Engineering Const. Co., 124 App. Div. 210, 108 NYS 707. One held precluded from rescinding a contract for exchange of properties because of outstanding tax title where he waited until title had been fully extinguished by the tax deed. Town of Grand River v. Switzer [Iowa] 121 NW 516. Where stockholders of a corporation after knowledge that they had been induced by fraud to subscribe for stock took no steps for nearly a year to cancel their subscription, they could not set up such defense to an action by a receiver for unpaid calls. Brown v. Allebach, 166 F 488.

Held not waived: Where mining stock was purchased October 16th and fraud was discovered December 15th but no offer made to rescind until after action brought February 3rd, held not such delay as to bar the defense of fraud. Archibald v. Hahn, 53 Wash. 602, 102 P 656. Evidence held to support finding that plaintiff did not delay an unreasonable time in electing to rescind contract for purchase of corporate stock after discovery of fraud. Davis v. Butler, 154 Cal. 623, 98 P 1047.

97. Where a seller of staves failed to

tween several remedies.[98] He may affirm the transaction and maintain an action for damages,[99] or he may sue in equity for rescission,[1] or he may rescind by his own act and maintain an action to recover what he parted with by reason of the fraud,[2] but he cannot retain the benefits of the transaction and avoid its liabilities [3] or he may repudiate the transaction and, when sued by the other party, set up the fraud as a defense [4] or recoup in damages;[5] but fraud as a defense to a contract can be as-

notify the buyer that he intended to rely upon a fraudulent inspection of the staves as a breach of contract, he was held to have waived the fraud. Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401. Purchasers of personalty who never attempt to rescind cannot set up fraud when sued for the purchase price. Rumsey v. Fox [Mich.] 16 Det. Leg. N. 598, 122 NW 526.

98. May **sue for damages or repudiate** and recover what he has parted with. Cheney v. Dickinson [C. C. A.] 172 F 109; Louisville Dry Goods Co. v. Lanman [Ky.] 121 SW 1042; Burne v. Lee [Cal.] 104 P 438; Baker v. Robertson [Mo. App.] 119 SW 987. Where an agent to sell land misrepresents the number of acres. West v. Carter [Wash.] 103 P 21. Where one was induced by fraud to purchase corporate stock. Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257. In discovering fraud, a buyer of corporate stock may rescind and be released from his obligation to pay or he may pay for the stock and recover damages. Rosenberg v. McKinney, 138 Wis. 381, 120 NW 230. Evidence held to show that he had elected to affirm. Id. May **rescind** and recover what he has parted with, affirm and sue for damages, or, if he has not parted with any thing, repudiate the transaction and when sued set up fraud as a defense. Jordan v. Annex Corp. [Va.] 64 SE 1050. Conveyance induced by fraud may be set aside upon return of the consideration or an action will lie for damages. Marvel v. Cobb, 200 Mass. 293, 86 NE 360. Defense of fraud **may be set up in ejectment.** Cassin v. Nicholson, 154 Cal. 497, 98 P 190. Fraudulent representations by which one is induced to enter into a contract **is ground for relief at law or in equity** though the contract is in writing and the representations are oral. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351.

99. See Deceit. Shopbell v. Boyd, 9 Cal App. 136, 98 P 69; Howe v. Martin [Okl.] 102 P 128. A defrauded person is not bound to rescind. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351. A purchaser induced to purchase by false representations as to acreage need not sue on his covenants nor rescind. Judd v. Walker, 215 Mo. 312, 114 SW 979. One who purchased an article may retain it and recover the difference between its actual value and its value had it been as represented. Jacobsen v. Whitely, 138 Wis. 434, 120 NW 285. Where a buyer elects to sue for damages, he need not restore anything. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351.

1. Howe v. Martin [Okl.] 102 P 128. Where the assent of a party to a contract has been procured by means of fraud, such party acting promptly upon obtaining knowledge thereof, and in the absence of any act constituting waiver of such fraud, may rescind. Under Civ. Code, § 1689, party may rescind though insolvency of defendant is not alleged. Shopbell v. Boyd, 9 Cal. App. 136, 98 P 69. Representing property with lien against it as unincumbered was ground for rescission. Id. A vendee who relies upon false representations as to title is entitled to be restored to his former state upon surrendering what he has received. Buchanan v. Burnett [Tex.] 119 SW 1141. Where a stockholder was induced by fraudulent representations of the officers to sell his stock to the corporation for much less than its true value, equity will direct a reassignment on repayment of the price. Pellio v. Bulls Head Coal Co., 224 Pa. 379, 73 A 451. The right to rescind for fraud depends on the existence of fraud and not upon the accuracy of the party's knowledge of it when he exercised his right. Cunningham v. Pettigrew [C. C. A.] 169 F 335.

2. Howe v. Martin [Okl.] 102 P 128. One may rescind a life insurance policy for false representations of the agent. Central Life Assur. Soc. v. Mulford, 45 Colo. 240, 100 P 423. An action for money received will lie where it has been obtained by deceit. Leonard v. State [Tex. Cr. R.] 120 SW 183. A fraudulent warranty is ground for rescinding a sale. Baker v. Robbins, 51 Wash. 467, 99 P 1. If the party defrauded acts with reasonable promptitude when the fraud is discovered, a rescission of the contract will be effected by a bona fide offer to return the consideration received and holding it in readiness to be delivered if the offer to return be refused. Cox v. Cline, 139 Iowa, 128, 117 NW 48. Where note which was given for price of horse was fraudulently obtained in order to effect rescission, it was not necessary to ship horse to seller. Id.

3. A licensee under a patent, who has the right to repudiate it for fraud, cannot repudiate in part and claim under it in part. Ferry-Hallock Co. v. Progressive Paper Box Co. [N. J. Eq.] 73 A 230. A party to a settlement cannot avoid it for fraud and at the same time retain moneys received. Cook v. Fidelity & Deposit Co. [C. C. A.] 167 F 95. On rescission of a contract for the exchange of properties, for fraud, the parties should be placed in statu quo. Campbell v. Moorehouse [Iowa] 120 NW 79. One cannot sue on a contract and at the same time allege that because of fraud it is void. Statham v. Southern States Life Ins. Co., 5 Ga. App. 357, 63 SE 250. Where an injured person claimed that a release had been procured by fraud, a return of the consideration was essential. Wells v. Royer Wheel Co. [Ky.] 114 SW 737. An **infant** who by false representations as to his age induces another to accept a deed from him and pay him the purchase price may not avoid such deed without returning the consideration. International Land Co. v. Marshall [Okl.] 98 P 951. A disaffirmance of a contract by an agent of the defrauded person is sufficient upon which to maintain an action for what he parted with, without any writing or ceremonious denunciation of the fraud. Caplan v. Moness, 64 Misc. 99, 117 NYS 941.

4. It is a good defense to an action on a

serted only by the injured persons.[6] A party who seeks to rescind must first restore or offer to restore what he has received by virtue of the transaction,[7] unless it is worthless [8] or he is entitled to retain it in any event.[9] If the parties cannot be placed in statu quo, the transaction may not be rescinded [10] unless the restoration has been rendered impossible by its wrongdoer.[11] The necessity of restoration on avoidance of a release is specifically treated in another topic.[12]

If a defrauded party affirms the contract, he loses his right to rescind [13] and is bound by the terms of the contract,[14] but the fact that he loses his right to rescind does not preclude recovery of damages.[15] The right to rescind is waived by accept-

contract that it was procured by fraud of the plaintiff's assignor. Sand v. Kenney Mfg. Co., 113 NYS 972. Fraud in procuring a life policy is a complete defense to an action upon the policy. Biermann v. Guaranty Mut. Life Ins. Co. [Iowa] 120 NW 963. Misrepresentations as to earning capacity of a hotel made by a seller of furniture to induce an indorsement of notes given for the furniture held a good defense. Roessle v. Lancaster, 130 App. Div. 1, 114 NYS 387.

5. Where an insurance company was induced by fraud to issue a policy which it thereafter canceled, it could offset damages sustained against the premium received. Mincho v. Bankers' Life Ins. Co., 129 App. Div. 332, 113 NYS 346.

6. Is not assignable. Schmidt v. Gaukler, 156 Mich. 243, 16 Det. Leg. N. 97, 120 NW 746.

7. Central Life Assur. Soc. v. Mulford, 45 Colo. 240, 100 P 423; Rice v. Sharp, 82 Neb. 132, 117 NW 96; Staiger v. Klitz, 129 App. Div. 703, 114 NYS 486; Howe v. Martin [Okl.] 102 P 128. Under Civ. Code, § 1691. Martin v. Lawrence [Cal.] 103 P 913. Where a buyer elects to rescind. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351. Tenants who rescind a lease. Ciletti v. Acierno, 114 NYS 4. An insurer electing to rescind a policy. American Cent. Life Ins. Co. v. Rosenstein [Ind. App.] 88 NE 97. One who seeks to recover the purchase price paid for land after rescission. Youngman v. Smadbeck, 64 Misc. 60, 117 NYS 1030. Before suing for purchase money paid a vendee must rescind and offer to return the contracts. McGrew v. Smith, 136 Mo. App. 343, 116 SW 1117. Instruments obtained by misrepresentations will be set aside only upon payment of amount equitably due from one executing them. Garlick v. Mutual Loan & Bldg. Ass'n, 236 Ill. 232, 86 NE 236. A purchaser of an oil lease is not precluded from rescinding because of the fact that he has used some of the oil taken from the premises, as he may be granted relief upon payment of its value. Bayse v. Paola Refining Co. [Kan.] 101 P 658. A tender back of money received in release of liability for personal injuries is prerequisite to repudiation of the contract of release, and notwithstanding the release may have been obtained by the grossest fraud, the defendant must be put in statu quo before an action for damages for the injuries sustained can be brought. Conrad v. Keller Brick Co., 8 Ohio N. P. (N. S.) 537.

8. One who seeks to rescind a release for personal injuries must restore or offer to restore what she received, or show that it is worthless or that an offer to restore it would be futile. Rabitte v. Alabama G. So. R. Co. [Ala.] 47 S 573.

9. Douglass v. Scott, 130 App. Div. 322, 114 NYS 470. If in private settlement of partnership accounts fraud is perpetuated by one, the other may have relief in equity without restoring to the former what he received in settlement. Daniel v. Gillespie, 65 W. Va. 366, 64 SE 254. Plaintiff seeking to set aside release for injuries should tender back the amount received, unless, as pleaded, it was paid for lost time alone. Illinois Cent. R. Co. v. Vaughn, 23 Ky. L. R. 906, 111 SW 707. Under circumstances plaintiff who had assigned claim at 50 per cent of face value was not compelled to return money before bringing action to rescind assignment. Id.

10. Where parties cannot be placed in statu quo, a subscription for corporate stock cannot be rescinded for fraud of the promotor in secretly taking the profits to himself, but the remedy of the stockholder is recovery by the corporation from the promoter. Jordan v. Annex Corp. [Va.] 64 SE 1050.

11. Where a defrauded party with due diligence restores or offers to restore what he has received, it is no defense that the wrongdoer has made full restoration on his part impossible. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616.

12. See Releases, § 4.

13. One who sues for damages waives his right to rescission. Smith v. Gray, 52 Wash. 255, 100 P 339. Evidence sufficient to show that a vendor after discovery of fraud treated the contract as a continuing one and so lost his right to rescind. Minter v. Hawkins [Tex. Civ. App.] 117 SW 172. One induced by fraud to purchase an interest in a company is **not precluded from rescinding** because he continued to hold the office of treasurer where he was not required to give it any attention and received no compensation. O'Shea v. Vaughn, 201 Mass. 412, 87 NE 616.

14. Where the defrauded person sues for damages, he ratifies the contract and waives the fraud. In re Ennis, 171 F 755. Where a defrauded person elects to affirm the contract and sue for his damages, he is bound by the terms of the contract. Rosenberg v. McKinney, 138 Wis. 381, 120 NW 230.

15. That a defrauded person remains silent after discovery of the fraud and thereby waives his right to rescind does not preclude him from suing for damages. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351. A purchaser of an interest in a business upon discovering that he has been defrauded may rescind or sue for damages, and the fact that he gave notice of rescission but did not adopt that remedy does not preclude suit for damages. Del Vecchio v. Savelli, 10 Cal. App. 79, 101 P 32. Where one did not rescind a contract for the pur-

ing the benefits of the contract after discovery of the fraud.[16] One, who after discovery of fraud assents to a new contract covering the subject-matter, thereby waives his claim of damages because of the fraud.[17] A party who rescinds is precluded from recovering damages, but not from recovering all he parted with because of the fraud.[18] A confirmation of a transaction after discovery of fraud must be a solemn and deliberate act and can only be shown by the clearest evidence.[19]

As a general rule, courts of law and courts of equity have concurrent jurisdiction,[20] but equity is reluctant to exercise jurisdiction where an adequate remedy exists at law,[21] and, in the federal courts, existence of a legal remedy precludes resort to equity.[22]

An action must be brought within the period of limitations prescribed,[23] but the operation of such statutes is generally suspended until the fraud is or should have been discovered,[24] and where a cause is apparently barred, a party seeking relief must show that it was not discovered within the statutory period.[25]

chase of an interest in the business after being satisfied that he had been defrauded, he did not waive the fraud by merely remaining in the business. Id.

16. Finch v. Garrett [Va.] 63 SE 417.

17. Burne v. Lee [Cal.] 104 P 438. Contract for purchase of capital stock of a corporation, induced by fraud, held superseded by a subsequent contract and the fraud waived. Id. A buyer of an article waives fraud in failure to disclose the ingredients where with full knowledge of all facts he makes a subsequent deal with reference to the article. Smith v. Alphin, 150 N. C. 425, 64 SE 210.

18. Rescission of a contract for the purchase of land precludes recovery by the grantee of damages sustained, but not from the recovery of money expended in attempting to utilize the land before discovering the fraud. Holland v. Western Bank & Trust Co. [Tex. Civ. App.] 118 SW 218 Tenants by rescinding a lease for fraud do not waive their right to money deposited as security for compliance with the lease. Cillettl v. Acierno, 114 NYS 4.

19. Acceptances of rent out of what the party defrauded received held not an affirmation where he was incompetent. Fitzgerald v. Frankel [Va.] 64 SE 941.

20. For fraud and deceit perpetrated in affecting a settlement of partnership accounts. Daniel v. Gillespie, 65 W. Va. 366, 64 SE 254. Release procured by fraud may be avoided at law where the fraud goes to the existence of the instrument as a valid contract. De Lamar v. Herdeley [C. C. A.] 167 F 530. Equity will rescind partnership contract at instance of party who has been induced to enter into it by fraudulent representations. Fouse v. Shelby, 64 W. Va. 425, 63 SE 208.

21. Biermann v. Guaranty Mut. Life Ins. Co. [Iowa] 120 NW 963. Courts of law as well as courts of equity have jurisdiction and to warrant the granting of a temporary injunction on the ground of fraud it must appear that it is of such a complex nature as to require intervention by a court of equity. Builders' Supply Co. v. Acton, 36 Fla. 756, 47 S 822. As a general rule equity will decline to exercise its concurrent jurisdiction where an adequate remedy at law exists (Dickinson v. Stevenson [Iowa] 120 NW 324), but it will often grant relief against an unconscionable advantage gained by one for which the law affords no remedy (Id.), but in the case of simple contract, the rule is otherwise (Robinson v. Yetter, 238 Ill. 320, 87 NE 363). Where the instrument is under seal, it is necessary to resort to equity in case of fraud in the consideration. Id. Not error in action at law to allow defendant to avoid effect of his contract by showing fraudulent representations as to the nature and value of land. Id.

22. Under Rev. St. § 723, where a defrauded person has an adequate remedy at law, there is no concurrent remedy in equity in federal courts. Griesa v. Mutual Life Ins. Co. [C. C. A.] 169 F 509. Equity does not take jurisdiction in case of fraud where the relief properly obtainable on that ground can be obtained in a court of law. U. S. Rev. St. § 724; U. S. Comp. St. 1901, p. 583. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 Law. Ed. ——.

23. See, also, Limitations of Actions. The right to sue for damages is lost by no lapse of time short of the period of limitations. Jacobsen v. Whitely, 138 Wis. 434, 120 NW 285. Action for fraud is barred in six years by Rev. Laws 1902, c. 202, §§ 2, 10. Marvel v. Cobb, 200 Mass. 293, 86 NE 360. Right to recover held barred by 4-year statute. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023. Failure to discover fraud not excused. Id. Shannon's Code, § 4455, suspending limitations while defendant is without the state, does not apply to a suit to set aside a deed for fraud where relief can be obtained by service by publication. Boro v. Hidell [Tenn.] 120 SW 961.

24. Limitations run from discovery of the fraud. American Nat. Bank v. Fidelity & Deposit Co., 131 Ga. 854, 63 SE 622; Chaffee v. Berkley [Iowa] 118 NW 267; Morgan v. Combs, 32 Ky. L. R. 1205, 108 SW 272; Boro v. Hidell [Tenn.] 120 SW 961; Isman v. Loring, 130 App. Div. 845, 115 NYS 933; Boon v. Root, 137 Wis. 451, 119 NW 121. The phrase **"until discovery of the fraud"** in limitation statutes does not mean actual notice, but constructive notice is sufficient. Where means of discovery lie in public records, such records are constructive notice. Garfield County Com'rs v. Renshaw [Okl.] 99 P 638. A principal is bound by knowl-

The gist of the action at law is the damage which has been wrongfully done.[26] The action is transitory,[27] except where the venue is prescribed by statute.[28] The general rules apply as to who are necessary or proper parties.[29]

Pleading. See 11 C. L. 1605—To be available as a defense fraud must be specially pleaded,[30] unless the plaintiff's case is based on a violation of some statute or of some rule of public policy or public morals,[31] though in Georgia a reply is not necessary in some cases to admit evidence to avoid an instrument set up in defense.[32] Where fraud is relied upon either as a defense or as ground for affirmative relief, the facts constituting it,[33] as distinguished from mere conclusions,[34] must be alleged, but mere

edge of fraud in his agent. Boro v. Hidell [Tenn.] 120 SW 961. Subpoena in foreclosure proceedings on land which one had contract to convey clear title of to another held admissible in action by latter in determining whether she had knowledge of his inability to comply with his contract so as to start limitations. Comfort v. Robinson, 155 Mich. 143, 15 Det. Leg. N. 951, 118 NW 943. Silence by promoters of a corporation as to price paid by them for land afterwards sold to the corporation is a fraudulent concealment and will be deemed to avoid the statute of limitations. Chaffee v. Berkley [Iowa] 118 NW 267. Want of diligence in discovering the fraud of co-owner induced by fraud to execute a deed of his interest held no defense. Lewis v. Jacobs, 153 Mich. 664, 15 Det. Leg. N. 553, 117 NW 325. Bill to vacate an election under a will held not barred, as the statute did not commence to run against the cause of action until the fraud was discovered. Eddy v. Eddy [C. C. A.] 168 F 590. An action for fraudulent representations that no broker was concerned in the transaction accrues when the defrauded party learns of such fact, and not when the broker is paid his commission. Brackett v. Perry, 201 Mass. 502, 87 NE 903. Such right of action became complete as soon as the vendor conveyed to the purchaser. Id. An action against a receiver after his discharge for fraud in procuring the assignment of a creditor's claim held not controlled by Code Civ. Proc. §§ 602, 609, limiting time for vacating judgments. State v. Merchants' Bank, 81 Neb. 704, 120 NW 157. Where no fraud is shown, neither the ignorance of a person of his right to bring an action nor the mere silence of one liable to the action prevents running of the statute of limitations. Coe v. Sloan [Idaho] 100 P 354. In order to suspend the running of the statute of limitations, a party cannot close his eyes to what is of record. Id. Evidence sufficient to show notice of fraud more than five years prior to action brought and that the suit was barred. Day's Committee v. Exchange Bank [Ky.] 116 SW 259.

25. One who seeks relief where a cause is long since barred must prove by satisfactory evidence that he did not discover the fraud until within the statutory period. Del Campo v. Camarillo, 154 Cal. 647, 98 P 1049. Evidence insufficient. Id. Under Code Civ. Proc. § 338, requiring action to be brought within 3 years, complaint by heir 14 years after death of testator, which did not show that fraud had not been discovered until within the period, held barred. Burke v. Maguire, 154 Cal. 456, 98 P 21.

26. Brackett v. Perry, 201 Mass. 502, 87 NE 903.

27. An action for fraud in the sale of personal property is transitory. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351.

28. Under Sayles' Ann. Civ. St. 1897, art. 1194, subd. 7, an action for fraud may be brought in the county where the false representations were made. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023.

29. See Parties, §§ 2, 3. In an action against stockholders of a corporation for fraudulent representations inducing one to purchase stock, the corporation need not be made a party though the complaint showed a cause of action against it. Harlow v. Haines, 63 Misc. 98, 116 NYS 449. Where a corporation and its controlling officer made fraudulent representations by which one was induced to purchase stock which was thereafter rendered worthless by manipulation of the corporation's assets, the corporation was a proper party. Heckendorn v. Romadka, 138 Wis. 416, 120 NW 257. Where a corporation and its managing officer so fraudulently manipulated its funds as to deprive a stockholder of his interest, the stockholder was not bound to pursue the corporation and its managing officer separately, as each was liable. Id. Where one has been defrauded into exchanging his property for property which embraced the assets of a corporation, the corporation was a necessary party to an action to rescind under Code 1897, § 3459. Stewart v. Hall [Iowa] 122 NW 609.

30. Rule 66 of circuit court in common-law actions. Skinner Mfg. Co. v. Douville [Fla.] 49 S 125. Where pleadings do not state a cause of action or defense, evidence of fraud should be excluded. Power v. Turner, 37 Mont. 521, 97 P 950. Where fraud is not pleaded, evidence thereof is properly excluded. Langston v. National China Co. [Fla.] 49 S 155.

31. Skinner Mfg. Co. v. Douville [Fla.] 49 S 125.

32. Under Civ. Code 1895, §§ 4995, 5063, 5067, where in an action for personal injuries a release is pleaded as a defense, evidence that it was procured by fraud is admissible though not pleaded, unless the court requires a reply. Central of Georgia R. Co. v. Tankersley [Ga.] 65 SE 367.

33. Chapman v. Meyers [Neb.] 121 NW 245; Schiefer v. Freygang, 125 App. Div. 498, 109 NYS 848; Hageman v. Brown [N. J. Eq.] 73 A 862. Plea of fraud failing to state facts held insufficient. Callen v. Evans [Tex. Civ. App.] 120 SW 543. Allegation of fraud set up as defense to promissory note held not to state sufficient facts to enable court to

general allegations may be sufficient in the absence of special exception or objection.[35] The pleading must set forth all of the elements of the tort,[36] such as knowledge,[37]

say whether there was or was not fraud in the transaction. Central Typesetting Co. v. Ober, 36 Pa. Super. Ct. 291. Complaint held to state cause of action for rescission of assignment of plaintiff's claim against estate to defendant. Cox v. Stillman, 132 App. Div. 433, 116 NYS 931. Taken as a whole petition held not to set out such case of incapacity to contract or fraud as would authorize setting aside contract of settlement for personal injuries. Smith v. Georgia Railroad & Banking Co., 131 Ga. 470, 62 SE 673.

34. Allegation of fraud without stating the facts constituting it is a conclusion. Davis v. Simpson Coal Co. [Ala.] 50 S 368. Complaint alleging fraud in procuring an assignment of a mortgage held not to comply with Code Pub. Gen. Laws 1904, art. 66, § 16, requiring facts to be particularly stated. Thrift v. Bannon [Md.] 73 A 660. Allegations that one represented stocks to be valid and valuable when they were void and worthless are mere conclusions. Eppley v. Kennedy, 131 App. Div. 1, 115 NYS 360. In mandamus to compel commissioners to construct a tile drain, allegations that two of the commissioners, from selfish motives and in fraud of plaintiff's rights, refused to construct such drain, is insufficient. People v. Henry, 236 Ill. 124, 86 NE 195. A general allegation of fraud is insufficient, even upon demurrer, if the facts and circumstances relied upon to support the allegation do not constitute fraud. Sherman v. Delaware & Atlantic Tel. & T. Co., 36 Pa. Super. Ct. 487.

35. General allegation held sufficient to authorize the admission of evidence thereof in the absence of special exception to the complaint. Mutual Reserve Life Ins. Co. v. Seidel [Tex. Civ. App.] 113 SW 945. General allegations held sufficient in absence of a motion to make more definite and certain. Johnson v. Carter [Iowa] 120 NW 320.

36. Held sufficient: Complaint for false representations in sale of a boiler. Williams v. Roper Lumber Co. [C. C. A.] 167 F 84. Complaint stating the elements. Isman v. Loring, 130 App. Div. 845, 115 NYS 933. Complaint to rescind the purchase of an automatic piano for false representations as to its qualities. Jesse French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150. In an action to rescind a sale of land for false representations as to title. Lee v. Hall [Tex. Civ. App.] 114 SW 403. Complaint setting forth the elements of fraud as defined by Civ. Code 1895, § 3814. Camp v. Carithers [Ga. App.] 65 SE 583. Complaint for misrepresentations as to value of corporate stock. Newstrom v. Turnblad, 108 Minn. 58, 121 NW 236. Complaint for fraud relative to statements of physician that he could cure a person afflicted with rheumatism. Haarstad v. Gates, 107 Minn. 565, 119 NW 390. Allegations of representations as to value of corporate stock and property owned by the corporation held to charge such representations as of fact and not of opinion. Reisel v. Winsor [Mo. App.] 120 SW 1186. Complaint for inducing one to purchase corporate stock. Ford v. Freeman, 138 Wis. 503, 120 NW 234. Complaint that because of false representations one delivered stocks to another which he appropriated and intended to appropriate when he made the false representations. Maxwell v. Martin, 130 App. Div. 80, 114 NYS 349. Held to sufficiently charge that false representations in sale of a horse were made with intent to deceive. Civ. Code §§ 1572, 1709. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351. It is unnecessary to allege that false representations were made through an agent. Harlow v. Haines, 63 Misc. 98, 116 NYS 449. Bill to cancel a deed for fraud held not multifarious because of joinder of subsequent grantees of parts of the tract who had knowledge of the fraud. United States v. Rea-Read Mill & Elevator Co., 171 F 501. Complaint against stockholders of a corporation for fraud in inducing one to purchase stock held not to show a cause of action against the corporation so as to render the complaint defective for not joining it. Harlow v. Haines, 63 Misc. 98, 116 NYS 449. One induced to purchase corporate stock by false representations that the corporation was not indebted need not allege the value of the stock, since his damage consisted of the amount of depreciation in value because of indebtedness, regardless of total value of the stock. Mills v. Knudson, [Wash.] 103 P 1123. Nor was it necessary to allege that the stock was of less value because of outstanding indebtedness, as that was a conclusion from facts alleged. Id. Complaint against real estate brokers for false representations as to value of the land and that the owners had furnished an abstract held to state a cause of action for the value of an abstract and the difference between the value of the land and the purchase price. Gordon v. Rhodes [Tex. Civ. App.] 117 SW 1023. **Indictment** for conspiracy to defraud by use of the mails held to sufficiently allege fraud and the evidence to prove it as alleged. Marrin v. U. S. [C. C. A.] 167 F 951. A **cross bill** in an action by an insurance company to cancel a policy. Phoenix Ins. Co. v. Smith [Miss.] 48 S 1020. **Defense** of false representations. Providence Jewelry Co. v. Crowe, 108 Minn. 84, 121 NW 415.

Held insufficient: Complaint by lessee of sheep that lessor knew that sheep were infected with a contagious disease and he did not, and that lessor led him to believe the sheep were healthy and that the sheep infected his lands and corrals, held not to state a cause of action. Power v. Turner, 37 Mont. 521, 97 P 950. Additional count making such allegations a part of it by reference also held insufficient. Id. Rule, as to what a complaint for such cause should allege, stated. Id. Where it did not allege facts showing the elements of fraud. Graves v. Horton [Ga.] 65 SE 112. A complaint by one induced by fraud to purchase an interest in a business which alleges that the bill of sale was made to his daughter held demurrable for failure to state a cause of action in his favor; facts should be alleged which would preclude a subsequent action by the daughter. Lane v. Williams [Cal.] 104 P 301. Complaint for fraudulent repre-

reliance [38] and damage,[39] and if the cause is apparently barred facts suspending the statute of limitations must be alleged.[40] A pleading which prays for equitable relief must show a right thereto.[41] It is not necessary to allege that representations were fraudulently made where facts pleaded show constructive fraud,[42] and the use of "fraud" in a complaint does not enlarge the meaning of facts pleaded.[43] One who alleges fraud in general terms may not object that an answer alleging facts showing good faith is impertinent.[44] A general denial is not robbed of its efficacy because of the fact that another distinct defense is pleaded,[45] and a cause well pleaded is not affected by the fact that a distinct cause joined therewith is not.[46]

Evidence.[See 11 C. L. 1607]—Except by way of inference from circumstances,[47] fraud is never presumed [48] even from suspicious circumstances,[49] but on the contrary the law presumes that men act in good faith in business affairs,[50] and one who alleges fraud has the burden to prove it [51] as alleged.[52]

sentations as to value, etc., by which one heir was induced by others to convey to them his interest in the estate. Swift v. Swift [Ga.] 64 SE 559. In an action by a lessor of sheep against the lessee, an answer setting up fraud relative to the fact that sheep were diseased. Power v. Turner, 37 Mont. 521, 97 P 950.

37. Complaint must allege that representations were made with knowledge of their falsity, or facts sufficient to impute such knowledge. Vincent v. Corbitt [Miss.] 47 S 641.

38. Must allege that the defrauded person parted with his money in reliance on the false representation. Garbutt Lumber Co. v. Walker [Ga. App.] 64 SE 698.

39. Complaint held insufficient where it did not show damage. Rowell v. Haines, 68 Misc. 102, 116 NYS 446.

40. Allegations that plaintiff did not have notice of or have means of discovering the fraud until within the statutory period before action brought are too general. Denike v. Santa Clara Val. Agricultural Soc., 9 Cal. App. 228, 98 P 687. It must be alleged that fraud was concealed, and also how the facts were brought to his knowledge. Id. Complaint held to show that the exercise of due diligence would have resulted in discovery of fraud long prior to when it was alleged that discovery was made, and that the cause was barred. Garbutt Lumber Co. v. Walker [Ga. App.] 64 SE 698.

41. Complaint to set aside a compromise of a claim under an insurance policy must allege that the beneficiary tendered back the amount received under the compromise. Western & Southern Life Ins. Co. v. Quinn [Ky.] 113 SW 456.

42. It is not necessary to allege that representations were fraudulently made where facts showed constructive fraud. Jesse French Piano & Organ Co. v. Garza & Co. [Tex. Civ. App.] 116 SW 150.

43. Evert v. Tower, 51 Wash. 514, 99 P 580.

44. Where a complaint charged fraud in general terms, complainant could not object that an answer alleging facts showing good faith was impertinent. Mound City Co. v. Castleman, 171 F 520.

45. Defendants in action for fraudulent representations made to secure credit for a corporation held not deprived of the benefit of their general denial by pleading the statute requiring such representations to be in writing. McKee v. Rudd [Mo.] 121 SW 312.

46. In actions for false representations by which one was induced to purchase stock in and make advancements to a corporation, that the advancements were not sufficiently pleaded did not affect the right of action as to the stock. Harlow v. Haines, 63 Misc. 98, 116 NYS 449.

47. See ante, § 2.

48. Central Typesetting Co. v. Ober, 36 Pa. Super. Ct. 291; Heckscher v. Edenborn, 131 App. Div. 253, 115 NYS 673; Watkins & Co. v. Kobiela [Neb.] 121 NW 448; Stoker v. Fugitt [Tex. Civ. App.] 113 SW 310; Carter v. Eastman Gardner & Co. [Miss.] 48 S 615; In re Whitmer's Estate, 224 Pa. 413, 73 A 551.

49. Barr v. Sofranski, 130 App. Div. 783, 115 NYS 533; Fitzgerald v. Frankel [Va.] 64 SE 941.

50. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. Where motives of one charged with fraud can be traced to an honest as well as to a corrupt source, the former is presumed. McKennan v. Mickelberry, 242 Ill. 117, 89 NE 717.

51. Crooker v. White [Ala.] 50 S 227; Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219; Southern R. Co. v. Arnold [Ala.] 50 S 293; Abrahams v. King [Md.] 73 A 694; Eppley v. Kennedy, 131 App. Div. 1, 115 NYS 360; Thomas v. Scott, 221 Mo. 271, 119 SW 1098. An heir who sued to set aside deed of his ancestor, on ground of fraud and undue influence. Schumacher v. Draeger, 137 Wis. 618, 119 NW 305. One assailing a deed from parent to child on the ground of undue influence. Pember v. Burton [Vt.] 71 A 812. Where a deed is attacked for fraud and the grantee pleads that he is a bona fide purchaser, the burden of proof is on him. Brooks v. Garner [Okl.] 97 P 995. One who alleges fraud in an action on a written **contract** has the burden to prove it by clear and convincing proof. Strout v. Lewis, 104 Me. 65, 71 A 137. A principal who sets up **fraud on the part of his agent**. Oberfelder v. J. G. Mattingly Co. [Ky.] 120 SW 352. An injured person has the burden to show that a **certificate** by a physician that he was able to work was falsely or fraudulently made, the master having agreed to pay a stipulated per diem until issuance of such certificate. Camden

The proof must establish all of the elements.[53] To entitle one to equitable relief, the proof must be clear and satisfactory,[54] but, where relief is sought at law,

Interstate R. Co. v. Lester [Ky.] 118 SW 268. Evidence as to the extent of his injuries and as to his condition when the certificate issued held admissible on such question. Id.

52. Recovery cannot be had upon proof of facts which might justify recovery upon some other theory. Moran v. Brown, 113 NYS 1038. Allegations of false representations that property mortgaged was free from incumbrances are not sustained by a proof of sale of the property and diversion of the proceeds. Brandom v. McCausland [C. C. A.] 171 F 402. Proof that representations were made by a vendor's agent is a variance from an allegation that they were made by the vendor. Stevenson v. Cauble [Tex. Civ. App.] 118 SW 811. An injured person alleging that a release for injuries was procured by fraud need prove only so much of what is alleged to show fraud. Vaillancourt v. Grand Trunk R. Co. [Vt.] 74 A 99.

53. Crooker v. White [Ala.] 50 S 227. A purchaser seeking to rescind must show that he was induced to purchase by fraud, that he relied thereon and had a right to do so. Wright v. Boltz, 87 Ark. 567, 113 SW 201. The plaintiff must prove fraud and the amount of damages sustained. Brandom v. McCausland [C. C. A.] 171 F 402. One who purchases an interest in a business and sues for damages because of false representations as to profits, and bases his cause on negative averments that profits since his purchase have not equalled representations, has the burden to show that averments are prima facie true. Del Vecchio v. Savelli, 10 Cal. App 79, 101 P 32. Evidence that for no week since the purchase have profits equalled representations held sufficient to support an inference that representations were false. Id.

54. De Lamar v. Herdeley [C. C. A.] 167 F 530. To set aside a deed. Bingaman v. Bingaman [Neb.] 122 NW 981. To vacate a contract. Johnson v. Gallatin Val. Milling Co., 38 Mont. 83, 98 P 883. To vacate a purchase. Coleman v. Kiernan [Ala.] 49 S 230. To cancel a deed. Woolsey v. Haynes [C. C. A.] 165 F 391. Evidence insufficient. Id. To vacate a deed long acquiesced in. Betts v. Howard [Iowa] 118 NW 281. Relief will not be granted on loose, equivocal or contradictory testimony, or which in its texture is open to doubt or opposing presumptions. Strout v. Lewis, 104 Me. 65, 71 A 137. It must appear with reasonable certainty that the representation was made with intent that it should be relied upon, that it was false, that it was believed, acted upon, and that damage resulted. Power v. Turner, 37 Mont. 521, 97 P 950. If a purchaser has not equal means of information with a vendor in a case in which he has a right to rely upon a representation, the evidence that he did rely thereon must be clear and satisfactory. Fitzgerald v. Frankel [Va.] 64 SE 941. To impeach formal written release. Schiefelbein v. Fidelity & Casualty Co., 139 Wis. 612, 120 NW 398. To warrant rescission of deed for fraud, the proof must be clear, unequivocal, and convincing. Golle v. State Bank, 52 Wash. 437, 100 P 984.

Evidence held insufficient: To show that contract for sale of land was the result of fraud of the purchaser or broker. Carr v. Howell, 154 Cal. 372, 97 P 885. To show that a wife had been deceived and misled by her husband as to an antenuptial contract. Settles v. Settles [Ky.] 114 SW 303. Findings as to representations and promises held insufficient upon which to base an inference of fraud. Evener Mfg. Co. v. Fink [Minn.] 122 NW 160. To show that a deed was obtained by fraud of a grantee and her husband. Coleman v. Simms [Ky.] 113 SW 819. To show that conveyance by a mother of property in which her minor child had an interest constituted a fraud against the child. Pickthall v. Steinfeld [Ariz.] 100 P 779. To show that a deed was obtained by fraud. Allen v. Bryant, 155 Cal. 256, 100 P 704. To show fraud where deed was executed in consideration of future support. Watson v. Clark [Iowa] 122 NW 913. To show that assignment and discharges of mortgages were procured by fraud. Watrous v. Kenyon, 156 Mich. 404, 16 Det. Leg. N. 134, 120 NW 980. To show fraud in transfer of land by an incompetent prior to appointment of a guardian. Gutru v. McVicker, 83 Neb. 555, 120 NW 132. To show that release of liability for personal injury was procured by fraud. Zdancewicz v. Burlington County Trac. Co. [N. J. Law] 71 A 123. The clear and convincing proof, required by 75th Ohio St. 291, of undue influence in procuring the execution of a deed, is not afforded in the case of aged and infirm persons, who conveyed their property in consideration of care and support, by the mere fact that the grantees, who were giving the grantors all needful attention and support in consideration for the conveyance, did not permit friends of the old people to see them alone. Foster v. Long, 8 Ohio N. P. (N. S.) 75. Fraud in connection with **purchases of land at tax and execution sales** is not shown by questionable evidence as to value of estate and fact that purchaser was man of great power and influence and bought land at much less than value set by plaintiff. Ubarri v. Yramategui v. Laborde, 29 S. Ct. 549; Laborde v. Ubarri, 29 S. Ct. 552. Evidence held not to show fraud as would invalidate **contract for sale of cattle.** Ervin v. Hays, 135 Ill. App. 429. **Evidence held to show** that one acted in good faith in the purchase and sale of property and not as agent for another. Kunz v. Mason [N. J. Err. & App.] 73 A 869. In action by purchaser to set aside his purchase, evidence held insufficient, where it preponderated in his favor as to number of witneses but was contradictory. Coleman v. Kiernan [Ala.] 49 S 230.

Evidence held sufficient: Finding that if assignment of a mortgage was ever delivered it was induced by fraud held justified. Mussey v. Dempsey, 60 Misc. 317, 113 NYS 271. To show that a conveyance was procured by fraud. Coppedge v. Weaver [Ark.] 119 SW 678. To show fraud justifying cancellation of a deed. Storthz v. Crusoe [Ark.] 113 SW 1015. To show that a release of damages for personal injuries was obtained by fraud. St. Louis, etc., R. Co. v. Hambright, 87 Ark. 614, 113 SW 803. To show

only a preponderance of evidence is required,[55] and the latter degree of proof is held

that a deed was procured by fraud. Morgan v. Combs, 32 Ky. L. R. 1205, 108 SW 272. To warrant an inference of fraud where a conveyance in fraud of creditors was questioned. Schock v. Solar Gaslight Co., 222 Pa. 271, 71 A 94. To show that a deed from an old and feeble person was procured by fraud. Baker v. Baker, 9 Cal. App. 737, 100 P 892.

55. Such a preponderance as overcomes the presumption of honesty and all opposing evidence and leads a reasonable man to believe that fraud exists. Tanton v. Martin [Kan.] 101 P 461. A judgment by confession will not be opened upon statements in an affidavit which constitute merely belief from hearsay. Moyses v. Schendorf, 238 Ill. 232, 87 NE 401.

Evidence held insufficient: To show fraud in purchase of stock. Frey v. Stipp, 224 Pa. 390, 73 A 460. To show fraud in the sale of a printing plant. Coppedge v. Weaver [Ark.] 119 SW 678. To show that executors had been induced by fraudulent representations to delay payment of a legacy. Feldman v. Kiefer, 137 Mo. App. 609, 119 SW 44. To show fraud and conspiracy in a sale of timber land. Deering v. Terry's Ex'rs [Ky.] 114 SW 759. To show that a compromise of a claim under a life policy was obtained by fraud. Western & So. Life Ins. Co. v. Quinn [Ky.] 113 SW 456. To show fraud by a vendor of land. Duy v. Higdon [Ala.] 50 S 378. To show fraud in the sale of a right to sell a patent right. Crooker v. White [Ala.] 50 S 227. To show fraud in sale of corporate stock. Romaine v. Excelsior Carbide & Gas Mach. Co. [Wash.] 103 P 32. To show that representations as to value of mining stock were false. Wegerer v. Jordan, 10 Cal. App. 362, 101 P 1066. To show that a bank was guilty of fraud in misrepresenting or concealing the affairs of a timber company in selling stock of such company deposited with it as collateral. Sather v. Home Security Sav. Bank, 49 Wash. 672, 96 P 229. To show fraud in transfer of land. Sloan v. Macartney, 58 Misc. 75, 108 NYS 840. Held not to show that persons were induced by fraud to become sureties on a note. Security Sav. Bank v. Smith [Iowa] 122 NW 825. Where one was induced to execute a contract, the contents of which she did not understand. Witham v. Walsh, 156 Mich. 582, 16 Det. Leg. N. 190, 121 NW 309. To show fraud. Chapman v. Meyers [Neb.] 121 NW 245. To show that agent of vendor of land by fraudulent concealment had prevented the purchaser from carrying out his contract. Armstrong v. Campbell, 140 Iowa, 564, 118 NW 898. To show fraud in taking a chattel mortgage on property. Kelly v. Ryan, 140 Iowa, 530, 118 NW 901. To show fraudulent collusion in contract for exchange of properties. McKennen v. Mickelberry, 242 Ill. 117, 89 NE 717. To show that an oil lease was obtained by fraud. Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 NE 219. To show fraud in sale of land. Beaty v. Hood, 229 Ill. 562, 82 NE 350. To show fraud in the omission of certain provisions from a contract. Abrahams v. King [Md.] 73 A 694. Held not to show that issue of stock was a fraud on the corporation. Waters v. Horace Waters & Co., 130 App. Div. 678, 115 NYS 432. In action for rent, the defense of fraudulent representations as to sanitary conditions made to induce the lease and subsequent rescission held not sustained where the tenant remained 8 months before asserting his claim and where the unsanitary conditions were caused by a leak in the plumbing which might have occurred long after the representations were made. La Roche v. Mulhall, 112 NYS 1115. That a seller of staves subsequently sold staves culled by the buyer held not to show that inspection by the buyer was fraudulent. Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401. An allegation for fraud in a vendor in representing that he owned the land in fee simple is not sustained by testimony that in reply to a question whether he could give good title he replied that he could where he owned the equitable title and controlled the legal title. Britton v. Poore [Fla.] 49 S 507. Release for personal injuries held not obtained by fraud where injured person was educated and was not suffering from her injuries at the time. Atchison, etc., R. Co. v. Coltrane [Kan.] 102 P 835.

Evidence held to show no fraud: To show that a seller did not represent goods sold as the best grade on the market. Moore v. Day Rubber Co., 137 Mo. App. 679, 119 SW 454. To show no fraud on part of an infant precluding him from asserting his minority as a defense on a contract. Barbieri v. Messner, 106 Minn. 102, 118 NW 258. To show that mistake in the description of a deed was the result of carelessness of the grantor and did not result from the grantee's fraud. Cherry v. Brizzolar [Ark.] 116 SW 668. To show that there were no false representations as to value of a printing plant or as to its earnings. Rathfon v. Gaines [Ky.] 118 SW 937.

Evidence held sufficient: To show that misrepresentations were made. Adams v. Gillig, 131 App. Div. 494, 115 NYS 999. To show that incorporators pointed to the charter of the corporation and made its representations their own. McKee v. Rudd [Mo.] 121 SW 312. To show that a vendor of goods changed the cost marks and represented that as changed they stated the cost correctly. Mason v. Gates [Ark.] 119 SW 246. To show that one partner fraudulently withheld from his copartners a portion of lands he agreed to purchase for the firm with partnership money. Azbill v. Wathen [Ky.] 115 SW 756. To show fraud in procuring an exchange of properties. Fitzgerald v. Frankel [Va.] 64 SE 941. To show that representations that a horse was a sure foal getter were made with intent that they should be relied upon and that they were relied upon in ignorance of their falsity. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351. To show that a seller of a horse had no reasonable grounds to believe that his representations that the horse was a sure foal getter were true. Id. To show that representation that a horse was a sure foal getter was made to induce its purchase for breeding purposes. Id. To show that a receipt in full for all services upon payment of only a portion due was obtained by fraud. Heery v. Reed [Kan.] 102 P 846. To show

sufficient to warrant cancellation of an instrument.[56] A negative allegation of fraud does not require the same degree of proof to sustain it as an affirmative allegation.[57] Fraud is generally proved by inferences from facts and circumstances and not by direct proof.[58] A liberal range of investigation is permitted.[59] Gross

fraud in false representations as to the solvency of a corporation. Simons v. Cissna, 52 Wash. 115, 100 P 200. To show that contract of sale of land by broker was procured by false representations. Kurinsky v. Lynch, 201 Mass. 28, 87 NE 70. To show that promoters of a limited partnership were guilty of fraud in inducing one to purchase stock. Nichols v. Buell [Mich.] 16 Det. Leg. N. 463, 122 NW 217. To show that contract for the purchase of land was induced by false representations. Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731. In action for false representations by a seller that he was owner of the building sold, thereby inducing plaintiff to purchase it from him, defended on the ground that defendant acted only as broker and did not represent himself as owner, evidence held not to support judgment for defendant. Klotz v. Gordon, 117 NYS 240.

56. In a suit to cancel a deed for fraud and undue influence, a preponderance of evidence is all that is required. Clear and convincing proof not necessary. Fraley v. Fraley, 150 N. C. 501, 64 SE 381.

57. Del Vecchio v. Savello, 10 Cal. App. 79, 101 P 32.

58. Del Vecchio v. Savelli, 10 Cal. App. 79, 101 P 32. May be proved by any circumstance from which it might follow as a legitimate inference. Phipps v. Willis [Or.] 99 P 935. Fraud is never presumed, but courts cannot ignore clear indicia of bad faith nor refuse to draw inferences of fraud where circumstances point irresistibly to it. Johnson v. Carter [Iowa] 120 NW 320. Fraud in procuring a release may be proved by acts and conduct of the parties. Larsson v. Metropolitan Stock Exch., 200 Mass. 367, 86 NE 940. A transaction may of itself furnish the most satisfactory proof of fraud so conclusive as to outweigh the answer of one accused or testimony of witnesses, and circumstances attending a transaction are often such as to leave no shadow of doubt as to the object or motive of the parties engaged. Fitzgerald v. Frankel [Va.] 64 SE 941.

59. The test by which the admissibility of evidence is determined is not whether it would be sufficient to warrant an inference of fraud, but a wide latitude is allowed, the true limit of which is fair connection with the transaction involved. Schock v. Solar Gaslight Co., 222 Pa. 271, 71 A 94.

Evidence held admissible: Testimony that a grantor, since deceased, was in bed at the time she executed a deed. Smith v. Moore, 149 N. C. 185, 62 SE 892. In a **suit to cancel a deed** for undue influence, any fact in the transaction leading to the deed and tending to effect the decedent's mind. Fraley v. Fraley, 150 N. C. 501, 64 SE 381. In an **action for inducing one to enter into a contract** to run a branch agency and purchase goods by misrepresentations as to quality of goods, etc., letters written by plaintiff containing inquiries and representations by defendant as to the size of his business, etc. Ward v. Cook [Mich.] 16 Det. Leg. N. 655, 122 NW 735. Plaintiff's testimony describing the office fitted up as well as the manner in which goods sent were packed held admissible. Id. Where grantors in a **deed** claimed to have learned a day or two after its execution that it conveyed a right of way, the fact that they acquiesced in it for months without making claim held admissible to rebut their subsequent claim of fraud. Czarnecki v. Derecktor, 81 Conn. 338, 71 A 354. On the question whether a **release for personal injuries** was obtained by fraud, that the agent who obtained it subsequently attempted to conceal the transaction from the injured person's wife, assuring her that it had no relation to the wrongdoer, is admissible. Piper v. Boston & M. R. Co. [N. H.] 72 A 1024. The injured person's testimony that he did not understand that the claim agent represented the wrongdoer was admissible. Id. As tending to show that one who **represented a note to be collectible** knew that it was not evidence that he had taken it in satisfaction of a judgment is admissible. Corey v. Boynton [Vt.] 72 A 987. Where it was claimed that a negotiable bond was procured by fraud from the owner, a corporation, a **memorandum** found among the corporations stating that it was taken by the holder's husband to sell on behalf of the corporation held admissible. Parsons v. Utica Cement Co. [Conn.] 73 A 785. Evidence as to false representations as to **rental value and income** of property sold. Batura v. McBride [N. J. Err. & App.] 73 A 600. Evidence as to amount of timber on land sold held admissible on **question of value.** Belka v. Allen [Vt.] 74 A 91. On question whether a **release for personal injuries** was procured by fraud, evidence that servant relied on false representations that it was only a receipt held within the issues. Vaillancourt v. Grand Trunk R. Co. [Vt.] 74 A 99. As bearing on the question whether a release for personal injuries was procured by fraud, evidence that the injured person had been advised that he had a good cause of action prior to execution of the release for a nominal sum. Id. In action for fraud inducing one to purchase a series of notes secured by a mortgage on a worthless leasehold, one who had charge of the property could testify as to the income and that it was but partially rented and was in litigation. Schwitters v. Springer, 236 Ill. 271, 86 NE 102. In action for fraudulent representations **as to land** exchanged for goods, evidence that goods were worth but from 5 to 15 per cent of their invoice price held admissible on the question whether false representations were made and relied upon. Vaupel v. Mulhall [Iowa] 118 NW 272. In action for false representations by vendor that water did not run onto the land, it was held competent in asking witness as to its value to describe it as where no water could get onto it. Hetland v. Bilstad, 140 Iowa, 411, 118 NW 422. **Hearsay evidence** held ad-

inadequacy of consideration is evidence of fraud,[60] and gross exaggeration of price by the seller is a badge of fraud.[61] False representations resting in parol may be proven by parol, notwithstanding a subsequent written contract,[62] and it may be shown by parol that the execution of a written contract was induced by fraud.[63]

missible to show when defrauded person learned of the fraud. McNitt v. Henderson, 155 Mich. 214, 15 Det. Leg. N. 987, 118 NW 974. Evidence that one who signed a **release for personal injuries** could not read English held admissible. Douda v. Chicago, etc., R. Co. [Iowa] 119 NW 272. **Form of contract** for exchange of land for a stock of goods. New York Brokerage Co. v. Wharton [Iowa] 119 NW 969. On an issue as to whether a **deed from ancestor to heir** was the result of undue influence, evidence of declarations of the grantor as to his intent to give the grantee the land. Jones v. Thomas, 218 Mo. 508, 117 SW 1177. Evidence **that a vendee of land was uneducated** and could not read held admissible in support of an allegation to the same effect. Hudson v. Slate [Tex. Civ. App.] 117 SW 469. In an action on a note given for a stallion where fraud was set up, **business cards and printed matter** circulated by the plaintiff at the time of the sale. Ireland v. Scharpenberg [Wash.] 103 P 801. **Delay in recording a deed** may excite a suspicion of fraud. Morgan v. Combs, 32 Ky. L. R. 1205, 108 SW 272. On an issue as to **whether a sale of a mine was induced by false representations,** evidence that the purchaser had visited the mine and examined it and stated that he was satisfied was admissible as an admission against interest. Ernest v. McCauley, 155 Cal. 739, 102 P 924. That a **deed was without consideration** is to be considered on the question of fraud and undue influence. McDonnell v. McDonell, 10 Cal. App. 62, 101 P 40. Evidence of the **poverty and necessitous condition of an injured** person's family held admissible on the question of fraud in the procuring of a release for the injuries. Treadway v. Union-Buffalo Mills Co. [S. C.] 65 SE 934. Evidence that a **parent was on amicable terms with her children** at the time she executed a deed to her son is pertinent on the question whether she would have signed it but for the persuasions and representations of her son and his attorney. Baker v. Baker, 9 Cal. App. 737, 100 P 892. Use of "it" and "its" instead of "he" and "his" in contract induced by fraud held admissible to show that the **purpose of using such terms** was to misrepresent the character and importance of the business. Ward v. Cook [Mich.] 16 Det. Leg. N. 655, 122 NW 785. In issue of undue influence in procuring a deed, the grantor's **mental capacity** is material but not controlling. Burrow v. Hicks [Iowa] 120 NW 727. In an action for false representations by which one was induced to enter into a contract to establish a branch agency, it was competent to show that 30 **other persons were induced by the same means to enter into such contract.** Ward v. Cook [Mich.] 16 Det. Leg. N. 655, 122 NW 785.

Held inadmissible: Financial statement held not admissible where party charged with fraud was not shown to have been connected with it. Jacobsen v. Whitely, 138 Wis. 434, 120 NW 285. In a **suit to set aside transfers of corporate stock** for undue influence, evidence of transactions with a deceased grantor many years prior. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170. In a suit by one heir **to set aside a deed** of his ancestor to another heir, evidence of declarations by the grantor as to improper acts by the grantee and members of his family. Jones v. Thomas, 218 Mo. 508, 117 SW 1177. In action to **set aside an assignment of securities** from mother to son, evidence as to what a third person said to the mother on a certain occasion. McKay v. Peterson [Tex. Civ. App.] 113 SW 981. **Representations in a prospectus** issued to assist in selling mining stock were immaterial in the absence of evidence that they were false and induced a purchase of the stock. Wegerer v. Jordan, 10 Cal. App. 362, 101 P 1066. In an action for false representations as to the solvency of a corporation on a certain date, where there was evidence as to its insolvency on such date, evidence as to its condition subsequently. Simons v. Cissna, 52 Wash. 115, 100 P 200. In an action to foreclose a chattel mortgage where mortgagor set up false representations by the mortgagee as to the amount of business done by the house, it was held inadmissible to show that the mortgagor procured money from outside sources in order to prove that the house was run at a loss. John Breuner Co. v. King, 9 Cal. App. 271, 98 P 1077. On allegations of false representations that sheep were not infected with foot and lip ulcerations, evidence that they were afflicted with tapeworms is inadmissible in absence of evidence that tapeworms are a symptom of a disease alleged. Power v. Turner, 37 Mont. 521, 97 P 950. Evidence of **fraud in connection with a different transaction.** Hoag v. Nanstad, 139 Wis. 455, 121 NW 125. On issue of undue influence in execution of a deed, the fact that two deeds were procured instead of one held of no significance. Burrow v. Hicks [Iowa] 120 NW 727.

60. Gross inadequacy of price is a badge of fraud to be considered in connection with other facts. Belka v. Allen [Vt.] 74 A 91. Inadequacy of price, misinformation as to value of the land, etc., held sufficient to warrant cancellation of a deed for fraud. Moore v. Sawyer, 167 F 826. Inadequacy of consideration in order to be conclusive of fraud must be so gross as to furnish a strong presumption that undue advantage was taken of ignorance, distress or weakness of the seller. Steinfeld v. Nielson [Ariz.] 100 P 1094. Evidence that property sold for $400 was worth $3,000 held admissible. Moehlenpah v. Mayhew, 138 Wis. 561, 119 NW 826.

61. Belka v. Allen [Vt.] 74 A 91. In buyer's action for fraud, evidence that seller offered to resell to him for one-half the former price is admissible. Id. Such evidence was not too remote, though offer was made two years later. Id.

62. Judd v. Walker, 215 Mo. 312, 114 SW 979.

63. It may be shown by parol that a sig-

The existence of fraud or misrepresentation is ordinarily a question for the jury.[64]

Instructions See 11 C. L. 1609 should conform to the pleadings [65] and evidence.[66] They should be consistent [67] and correctly state the burden of proof [68] and submit the issues.[69] Failure to define terms employed is generally held to be harmless error.[70]

The measure of damages is treated elsewhere.[71]

FRAUDS, STATUTE OF.

The scope of this topic is noted below.[72]

§ 1. Agreements Not to be Performed Within One Year, 1918.
§ 2. Promise to Answer for Debt or Default of Another, or to Indemnify or Insure, 1919.
§ 3. Agreements in Consideration of Marriage, 1921.
§ 4. Representations as to Character or Credit of Another, 1921.
§ 5. Agreements with Executors and Administrators, 1921.
§ 6. Agreements with Real Estate Brokers, 1921.
§ 7. Agreements Respecting Real Property or an Estate or Interest Therein, 1922.
§ 8. Sale of Goods, 1924.
§ 9. Trusts, 1924.
§ 10. What Will Satisfy the Statute, 1925.
A. Writing, 1925.
B. Delivery and Acceptance, 1927.
C. Part Payment and Earnest Money, 1928.
D. Part Performance, 1928.
§ 11. Operation and Effect of Statute, 1929.
§ 12. Pleading and Proof, 1931.

§ 1. *Agreements not to be performed within one year.*[73] See 11 C. L. 1610

A

nature to a contract as principal was procured by fraud or artifice from one who believed he was signing as a witness. Barco v. Taylor, 5 Ga. App. 372, 63 SE 224. It may be shown by parol that a written contract was procured by fraudulent representations, especially where the misrepresentations are not contrary to the terms of the contract. State Historical Ass'n v. Silverman [Ga. App.] 65 SE 293. Where alleged fraud goes to the legal existence of an instrument, parol evidence is admissible though the instrument is under seal. Vaillancourt v. Grand Trunk R. Co. [Vt.] 74 A 99.

64. Whether release from liability for injuries was obtained by fraud and misrepresentation. Cohen v. Schreiber, 60 Misc. 114, 111 NYS 702

65. Under a complaint that the representations made were false and known to be false and were made for the purpose of deceiving, where issue is joined on such allegations it is not error to fail to charge specifically as to representations made by mistake or innocently. Camp v. Carithers [Ga. App.] 65 SE 583.

66. To justify a charge that a defrauded person was negligent in not ascertaining the falsity of the statements and did not promptly rescind, the facts must appear conclusively. Swanke v. Hardemann, 138 Wis. 654, 120 NW 414. Where evidence presented a question whether representations were of fact or mere expressions of opinion, the court should instruct on that issue. Lee v. Hail [Tex. Civ. App.] 114 SW 403.

67. Instructions in action for false representations relative to land sold, which was irregular in shape, held not inconsistent. Vaupel v. Mulhall [Iowa] 118 NW 272.

68. Instructions stating rule as to burden of proof of fraud held erroneous. Smith v. Brigham, 106 Minn. 91, 118 NW 150.

69. Special issue held to sufficiently submit the question of fraud in obtaining a deed as to whether the grantor understood the true nature of the instrument she was signing. Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149. Special issue held based on the pleadings. Id.

70. Where one advertised for general sales agents and stated that experience was unnecessary, it was proper to charge that the language might be construed as a false representation though it did not define "necessary." Ward v. Cook [Mich.] 16 Det. Leg. N. 655, 122 NW 785. Failure to define "fraud" and "undue influence" is not reversible where no request for such definition is made. Pye v. Pye [Ga.] 65 SE 424.

71. See Damages, § 5A.

72. Includes the operation and effect of all statutes modeled after the ancient, English Statute of Frauds and Perjuries. **Excludes,** except as retained for illustrative purposes, all concrete applications of the statute to conceptions narrower than those constituting the basis of the statutory classification of contracts covered by the statute (see such topics as Building and Construction Contracts,* § 1; Boundaries,* § 3; Forestry and Timber,* § 2; Negotiable Instruments,* § 2; Landlord and Tenant,* § 2). Excludes also the necessity of writing as a prerequisite to statutory liens (see Liens,* § 2C; Mechanics' Liens,* § 4; Agriculture,* § 2), specific performance of parol contracts (see Specific Performance,* § 3E), the sufficiency of writing to avoid the bar of limitations (see Limitation of Actions, §§ 6F, 6G), and the parol evidence rule (see Evidence,* § 5).

73. Search Note: See notes in 14 L. R. A. 860; 35 Id. 512; 15 L. R. A. (N. S.) 313; 4 Ann.

contract which by its terms [74] is not to be performed within one year [75] from the time it is made [76] is within the statute, but in some jurisdictions this rule does not apply to verbal leases for one year from a future date.[77] It is generally held that a contract which may be or might have been terminated in the year is not within the statute,[78] although it has been actually in force for a longer period;[79] but this rule is not universal.[80] The clause relating to contracts not to be performed within a year does not relate to realty contracts where the latter are specifically provided for elsewhere in the statute.[81]

§ 2. *Promise to answer for debt or default of another, or to indemnify or insure.*[82]—See 11 C. L. 1610—A collateral promise to answer for the debt on default of another is within the statute [83] regardless of the fact that the promisee may have relied thereon,[84] and though there is a consideration moving to the promisor;[85] but the statute does not apply to original undertakings to answer for the debts or defaults of others,[86] and promises are quite generally held to be original when based upon some consideration [87] of benefit accruing to the promisor [88] or destriment to

Cas. 174; 5 Id. 330, 829.

See, also, Frauds, Statute of, Cent. Dig. §§ 65-81; Dec. Dig. §§ 43-54; 20 Cyc. 198-208; 29 A. & E. Enc. L. (2ed.) 795, 941.

74. Agreement between tenants in common not to graze sheep on land is from its nature not to be performed within one year. Long v. Cramer Meat & Packing Co., 155 Cal. 402, 101 P 297.

75. Extension of time to remove standing timber. Childers v. Wm. H. Coleman Co. [Tenn.] 118 SW 1018. Contract for services for four years is within St. 1909, § 470, subsec. 7. Garnes v. Frazier [Ky.] 118 SW 998.

76. Contract for employment for one year commencing day after it was made. Jonap v. Preger, 59 Misc. 187, 110 NYS 483. Contract of employment for one year made before beginning of year. Summerfield v. Sullivan, 113 NYS 552. Contract for services for a year made within the year is outside statute. Singer v. Meyer, 117 NYS 134.

77. Gay v. Peak, 5 Ga. App. 583, 63 SE 650; Turner v. Trail [Okl.] 103 P 575.

78. Where performance possible and might have been demanded. Herron v. Raupp, 156 Mich. 162, 16 Det. Leg. N. 66, 120 NW 584.

Not within statute: Time indefinite. Hatzfeld v. Walsh [Tex. Civ. App.] 120 SW 525. Sales agency for less than one year. De Laval Separator Co. v. Sharpless [Iowa] 120 NW 657. Contract to divide proceeds of sale of land. Sullivan v. Winters [Ark.] 120 SW 843. Contract of insurance which might and did terminate within year. Carter v. Bankers' Life Ins. Co., 83 Neb. 810, 120 NW 455. Contract to pay portion of crops to grantor for life. Tipton v. Tipton [Tex. Civ. App.] 118 SW 842. Retainer for fixed sum per annum extending over five years. Mellon v. Fulton [Okl.] 98 P 911. Contract to serve master for his life in consideration of his estate which services continued 22 years. Heery v. Reed [Kan.] 102 P 846.

79. Heery v. Reed [Kan.] 102 P 846.

80. Held within statute: Transfer of stock on consideration of services to donee for life. Groff v. Stitzer [N. J. Eq.] 72 A 970. Services for three years or so long as employe can give results. Wagniere v. Dunnell [R. I.] 73 A 309. Three-year contract which may be terminated at option of either party. Id.

81. Ind. T. Ann. St 1899, subd. 6, § 2305, has no application to realty, as otherwise subd. 5 would be unnecessary. Turner v. Trail [Okl.] 103 P 575. Contract to bore well held not within statute. Hall v. Cook [Tex. Civ. App.] 117 SW 449.

82. Search Note: See notes in 3 L. R. A. 359, 378; 25 Id. 264; 9 L. R. A. (N. S.) 54; 15 Id. 214, 1087; 42 A. S. R. 186; 2 Ann. Cas. 506; 5 Id. 844; 6 Id. 671.

See, also, Frauds, Statute of, Cent. Dig. §§ 13-58; Dec. Dig. §§ 13-36; 20 Cyc. 160-195; 29 A. & E. Enc. L. (2ed.) 905.

83. Greenwich Bank v. Oppenheim, 133 App. Div. 586, 118 NYS 297. Where parol evidence is necessary to supply all terms of contract, no contract exists. Johnson v. Rycroft, 4 Ga. App. 547, 61 SE 1052.

Contracts within statute: Signature as **"surety"** to a building contract. Mead v. White, 53 Wash. 638, 102 P 753. **To repay advances** made to another. Hughes v. Kershow, 42 Colo. 210, 93 P 1116. **To indorse note** providing a certain party would discount. Greenwich Bank v. Oppenheim, 133 App. Div. 586, 118 NYS 297. Promise by one corporation **to pay for services** to another. Clark v. National Steel & Wire Co. [Conn.] 72 A 930. **Stockholder's promise** to make good debts of corporation for which he was not personally liable. Winne v. Mehrbach, 130 App. Div. 329, 114 NYS 618.

84. See under Code, § 4625. Regan v. Kirk, 140 Iowa, 302, 118 NW 317.

85. Promise directly to creditor to pay debt of another must both be in writing and rest upon consideration. Southern Indiana Loan & Sav. Inst. v. Roberts, 42 Ind. App. 653, 86 NE 490.

86. Agreement by vendor of stock of merchandise to make good losses of his original vendee upon sale to subsequent vendee, held original undertaking and not within statute, although there existed written contracts which made first vendee the vendor in the second transaction and made the ultimate vendee liable to original vendor for such losses. Burgie v. Bailey [Ark.] 121 SW 266. See Evidence, § 5.

87. Johnson v. J. F. Stapleton Co. [Ga.] 63

the promisee.[89] Where credit is given in view of a promise, the statute applies if any portion of the credit is given to another than the promisor,[90] but where the credit is wholly to the promisor the promise need not be in writing.[91] The party from whom payment is demanded or to whom the debt was charged is prima facie the one who received credit[92] but not conclusively so.[93] Whether the claim sought to be enforced against one person is the debt of another often depends upon the construction of a contract.[94] An owner's oral promise to pay a subcontractor in consideration of the completion of the job is usually held to be an original promise,[95] but otherwise if such a promise induces the subcontractor to give credit to the contractor[96] or if the job is already finished.[97] Nor does the statute apply to the assumption of a mortgage debt by a subsequent grantee or part of the purchase price[98] or in consideration of the mortgagor's consent to the sale.[99] Partnership debts are not "the debts of another" as regards one who holds himself out as a partner.[1] Whether an oral promise was made is a question of fact,[2] and so, also, ordinarily, the question of whether the promise was original or collateral.[3] A contract of

SE 827. Question of consideration may be for jury. Naylor v. Davis, 130 App. Div. 311, 114 NYS 248.

88. Howell v. Harvey, 65 W. Va. 310, 64 SE 249; Johnson v. J. F. Stapleton Co. [Ga.] 63 SE 827.

Held original as of primary benefit to promisor: Landlord's **promise to pay for seed for tenant.** Saginaw Milling Co. v. Mower, 154 Mich. 620, 15 Det. Leg. N. 889, 118 NW 622. Agreement by person guaranteed **to hold guarantor harmless.** Hyde v. Equitable Life Assur. Soc., 61 Misc. 518, 116 NYS 219. **Promise to pay debts of another** on consideration of assignment of mortgages which were liens on promisor's lands. Lee v. Unkefer [S. C.] 65 SE 989. **Subcontractor's agreement to reimburse contractor** should work prove defective. Oliver v. Noel Const. Co., 109 Md. 465, 71 A 959. **Promise by vendee's successor to pay balance due** if vendor would permit her to retain goods. Barth v. Sanders, 113 NYS 651. **Agreement to pay plaintiff salary to continue in services of corporation** in which defendant was interested. Conrad v. Clarke, 106 Minn. 430, 119 NW 214. **Creditor's promise to pay rent** if landlord could not disturb debtor-tenant till crop could be gathered. Marrow v. White [N. C.] 65 SE 746.

89. Where defendant, pursuant to deal with plaintiff's debtor, requested plaintiff to credit such debtor with certain amount and to charge same to defendant, which was done. Daniel Sons & Palmer Co. v. Dickey [Ga. App.] 65 SE 301. Where original debt is canceled and the promisor's promise is accepted in lieu thereof. Rev. St. Idaho, 1887, § 6010, subd. 3. McCallum v. McClarren, 15 Idaho, 374, 98 P 200. Where plaintiff, in consideration of defendant's promise, agreed to pay a debt owed by another to defendant and gave defendant credit for amount of such debt. Johnson v. J. F. Stapleton Co. [Ga.] 63 SE 827.

Not original: Promise to pay on consideration of mere forbearance to sue debtor. Byrd v. Hickman [Ala.] 48 S 669.

90. Credit to person other than debtor. Miller v. Adams [Iowa] 119 NW 593. Credit wholly or partly to one other than promisor. Wood v. Dodge [S. D.] 120 NW 774. Where vendor first demanded security but afterward gave credit. Swaboda v. Throgmorton-Bruce Co. [Ark.] 115 SW 380.

91. Miller v. Adams [Iowa] 119 NW 593; Shay v. Cruxton, 116 NYS 1123; Lord v. Calhoun [Ala.] 50 S 402. Refused credit until promise was made. Tuttle v. Welty [Colo.] 102 P 1069. Credit must be wholly to promisor. Wood v. Dodge [S. D.] 120 NW 774.

Instructions approved. Saginaw Milling Co. v. Mower, 154 Mich. 620, 15 Det. Leg. N. 889, 118 NW 622.

92. Shay v. Cruxton, 116 NYS 1123; Wood v. Dodge [S. D.] 121 NW 774.

93. Shay v. Cruxton, 116 NYS 1123; Miller v. Adams [Iowa] 119 NW 593; Conrad v. Clarke, 106 Minn. 430, 119 NW 214. Material but not conclusive. Wood v. Dodge [S. D.] 120 NW 774.

94. Notes made by officers of a bank and sent to another do not fall within an agreement to rediscount the former bank's paper. State Bank v. People's Nat. Bank, 118 NYS 641.

95. Howell v. Harvey, 65 W. Va. 310, 64 SE 249, disapproving Noye'e Ex'x v. Humphreys, 11 Grat. [Va.] 636. Promise by one directly interested and who in addition was substantially the contractor, though contractor was in reality a corporation. Schwoerer v. Stare, 130 App. Div. 796, 115 NYS 440.

96. Miles v. Driscoll, 201 Mass. 318, 87 NE 579; Mossburg v. United Oil & Gas Co. [Ind. App.] 87 NE 992.

97. Ky. St. 1909, § 470. Sealey v. Combs [Ky.] 118 SW 972.

98. Southern Indiana Loan & Sav. Inst. v. Roberts, 42 Ind. App. 653, 86 NE 490; Scott v. Moore [Ark.] 116 SW 660.

99. Gay v. Schaefer, 52 Wash. 269, 100 P 334.

1. P. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641, 15 Det. Leg. N. 926, 118 NW 484. See Partnership, § 4A.

2. Lee v. Unkefer [S. C.] 65 SE 989.

3. Owensboro Wagon Co. v. Wilson & Co. [Kan.] 101 P 4; Conrad v. Clarke, 106 Minn. 430, 119 NW 214; Trombley & Carrier Co. v. Seligman, 133 App. Div. 625, 117 NYS 1063. Consideration is for jury. Naylor v. Davis, 130 App. Div. 311, 114 NYS 248.

Promise held original: Owensboro Wagon Co. v. Wilson & Co. [Kan.] 101 P 4. Though

guaranty [4] or suretyship,[5] unless resting upon consideration,[6] must be in writing and cannot be modified by parol.[7] An original guaranty may arise from a ratification of a past transaction.[8] In Wisconsin a contract of guaranty must express the consideration.[9] The lex loci contractus controls as to whether a guaranty is within the statute of frauds.[10] The validity of oral contracts of insurance [11] and oral acceptances of bills of exchange [12] is treated elsewhere.

§ 3. *Agreements in consideration of marriage.*[13]—See 9 C. L. 1497

§ 4. *Representations as to character or credit of another.*[14]—See 9 C. L. 1497—Representations by incorporators as to the credit of their corporation are within the statute.[15]

§ 5. *Agreements with executors and administrators.*[16]—See 7 C. L. 1329

§ 6. *Agreements with real estate brokers.*[17]—See 11 C. L. 1611—A broker's authority to "sell" land is, by usage, merely authority to find a buyer,[18] and not to make a contract which will bind his principal,[19] unless the terms of the contract disclose a different intent.[20] Whether a writing is necessary to a valid authority to find a purchaser [21] or to make a binding contract for sale of realty [22] depends upon

charge was made agalnst another. Miller v. Adams [Iowa] 119 NW 593. To pay costs of appeal if appeal were unsuccessful. Wilkie v. Marshall [N. J. Law] 72 A 30. Agreement of bank to discount notes of stockholders of corporation and carry the loans until the bank's president, who was also the company promoter, should take them up from proceeds of sale of stock. Baker v. Berry Hill Mineral Springs Co. [Va.] 65 SE 656.

4. McFarlane v. Wadhams, 165 F 987; Tuttle v. Welty [Colo.] 102 P 1069. Guaranty subsequent to discount of notes. State Bank v. People's Nat. Bank, 118 NYS 641.

5. Willis v. Fields [Ga.] 63 SE 828. Owner's suretyship for contractor to materialmen. Vicksburg Mfg. & Supply Co. v. Jaffray Const. Co. [Miss.] 49 S 116.

6. Guaranty by owner of notes at time of discounting same held not within the statute. State Bank v. People's Nat. Bank, 118 NYS 641.

7. Willis v. Fields [Ga.] 63 SE 828.

8. Where buyer represented that third person would stand for the price, whereupon the seller, in sole reliance upon such third person's credit, sold the goods to the buyer, such third person's subsequent failure to repudiate the transaction when it was called to his attention amounted to an original undertaking on his part. Tuttle v. Welty [Colo.] 102 P 1069.

9. McFarlane v. Wadhams, 165 F 987.

10. McFarlane v. Wadhams, 165 F 987. Where guaranty of debt of Colorado corporation was executed and deposited in post office in Wisconsin for transmission to Colorado, Wisconsin was the locus contractus. Id.

11. See Insurance, § 7.

12. See Negotiable Instruments, § 2B.

13. **Search Note:** See Frauds, Statute of, Cent. Dig. §§ 1-6; Dec. Dig. §§ 1-6; 20 Cyc. 156-158; 29 A. & E. Enc. L. (2ed.) 939.

14. **Search Note:** See notes in 1 Ann. Cas. 690.

See, also, Frauds, Statute of, Cent. Dig. §§ 59-64; Dec. Dig. §§ 37-42; 20 Cyc. 195-197; 29 A. & E. Enc. L. (2ed.) 937.

15. McKee v. Rudd [Mo.] 121 SW 312. Representations held not taken out of statute by reason of fact that parties who made them were officers and stockholders and had not paid their subscriptions. Id.

16. **Search Note:** See note in 3 C. L. 1529.

See, also, Frauds, Statute of, Cent. Dig. §§ 7-12; Dec. Dig. §§ 7-12; 20 Cyc. 158, 159; 29 A. & E. Enc. L. (2ed.) 903.

17. **Search Note:** See notes in 102 A. S. R. 230.

See, also, Brokers, Cent. Dig. § 44; Dec. Dig. § 43; 19 Cyc. 219; Frauds, Statute of, Cent. Dig. §§ 251-260; Dec. Dig. § 116; 20 Cyc. 275-277; 29 A. & E. Enc. L. (2ed.) 875.

18. Bacon v. Davis, 9 Cal. App. 83, 98 P 71; Watters v. Dancey [S. D.] 122 NW 430; Lichty v. Daggett [S. D.] 121 NW 862.

19. Letter stating terms owner is willing to accept is not authority to sell. Ross v. Craven [Neb.] 121 NW 451.

20. Must look to terms of contract. Bacon v. Davis, 9 Cal. App. 83, 98 P 71.

Held authority to bind: To "negotiate sale." Combes v. Adams, 150 N. C. 64, 63 SE 186. "To sell for me and in my name." Bacon v. Davis, 9 Cal. App. 83, 98 P 71. Authority to sell and agreement to execute conveyance. Wharton v. Talbert [S. C.] 65 SE 1056.

21. Writing **necessary.** Price v. Walker [Ind. App.] 88 NE 78. Writing **unnecessary.** Forrester-Duncan Land Co. v. Evatt [Ark.] 119 SW 282. Writing unnecessary and acts of agent when ratified are binding on owner. Flegee v. Dowling [Or.] 102 P 178.

22. **Writing necessary.** Thomas v. Rogers, 108 Minn. 132, 121 NW 630; Schaeffer v. Mutual Ben. Life Ins. Co., 38 Mont. 459, 100 P 225; Ross v. Craven [Neb.] 121 NW 451. Must be by deed. Kempher v. Gans, 87 Ark. 221, 111 SW 1123. Verbal authority to accept offer is insufficient. Thomas v. Rogers, 108 Minn. 132, 121 NW 630. Must be written and specific. Civ. Code, § 1741. Bacon v. Davis, 9 Cal. App. 83, 98 P 71. Under Revision 1877, p. 1064. Ryer v. Winter [N. J. Law] 72 A 84. Rev. Civ. Code, § 1238, subd. 5, § 1311. Lichty v. Daggett [S. D.] 121 NW 862.

Writing unnecessary: Authority may be shown by parol. Lawson v. Williams [Ky.] 115 SW 730. Verbally authorized agent may make sufficient memorandum. Id. "Law-

the local statute, as do the rights and liabilities of an undisclosed principal,[28] but a void oral authority may be ratified by the owner.[24] Parol authority is in general sufficient to fix a broker's right to a commission [25] except in states where all agreements for broker's commissions must be in writing.[26] Under such statutes, it has been held that the broker cannot recover under a verbal agreement,[27] or even upon quantum meruit,[28] and full performance on his part will not take the agreement out of the statute.[29] The authority of an agent to sell or lease land must be a complete contract [30] and must be strictly followed.[31] The contract executed by the agent with a third person must be in writing.[32]

§ 7. *Agreements respecting real property or an estate or interest therein.*[33]—See 11 C. L. 1612—A specific provision with regard to contracts respecting realty usually excludes the application of the provision with respect to contracts not to be performed within a year.[34] Parol executory contracts for the transfer of land,[35] or any interest therein,[36] or for a lease of land for a term of more than one year,[37] are

fully authorized" in par. 2696, Civ. Code 1901, does not mean authorized in writing so that a lease executed by a verbally authorized agent though void as a lease under paragraphs 721, 725, is nevertheless valid as a contract to lease under par. 732, providing that a conveyance which fails to effect its purpose may nevertheless be regarded as an agreement to convey. Murphey v. Brown [Ariz.] 100 P 801.

23. Cannot enforce the contract. Thompson v. Burns, 15 Idaho, 572, 99 P 111. May be charged under Rev. St. Ohio, 1906, § 4199. Walker v. Hafer [C. C. A.] 170 F 37.

24. Flegel v. Dowling [Or.] 102 P 178.

25. Hutto v. Stough, 157 Ala. 566, 47 S 1031; Kempher v. Gans, 87 Ark. 221, 111 SW 1123; Flegel v. Dowling [Or.] 102 P 178.

26. Civ. Code, § 1624. Aldis v. Schleicher, 9 Cal. App. 372, 99 P 526. Laws 1897, c. 57, p. 304. Mohr v. Rickgauer, 82 Neb. 398, 117 NW 950. Laws 1905, p. 110, c. 58. Broderius v. Anderson [Wash.] 103 P 837; McCrea v. Ogden [Wash.] 103 P 788, overruling 50 Wash. 495, 97 P 503.

27. McCrea v. Ogden [Wash.] 103 P 788, overruling 50 Wash. 495, 97 P 503. Under Revision 1877, p. 1064. Ryer v. Winter [N. J. Law] 72 A 84. Pretermitting the validity of a verbal agreement for commissions between brokers, there must first be shown a written agreement between principal and broker under § 1624, sub. 6, Civil Code. Aldis v. Schleicher, 9 Cal. App. 372, 99 P 526. In New Jersey the statute of frauds requires that no broker or real estate agent shall be entitled to commission unless his authority be in writing signed by owner or his agent, which writing shall state the rate of commission. Adams v. Grady [N. J. Law] 72 A 55. Contract between grantor and grantee, whereby latter was to reconvey or sell and to receive a commission for his services, held within Burns' Ann. St. 1908, § 7463, requiring contract for payment of commission for procuring purchaser of realty to be in writing. Wysong v. Sells [Ind. App.] 88 NE 954.

28. Under Cobbey's St. 1907, § 10856. Nelson v. Webster, 83 Neb. 169, 119 NW 256.

29. Burns' Ann. St. 1908, § 7463. Price v. Walker [Ind. App.] 88 NE 78.

30. Sale after receiving authority is acceptance thereof. Baird v. Loescher, 9 Cal. App. 65, 98 P 49.

31. Schaeffer v. Mutual Ben. Life Ins. Co., 38 Mont. 459, 100 P 225. A complete contract of sale negotiated by broker and signed by vendor, but differing from the original authority of the broker, is not effective to enforce a broker's commissions under the original contract or any verbal agreement between the parties, under Laws 1905, p. 110, c. 58, § 1. Forland v. Boyum, 53 Wash. 421, 102 P 34.

32. Although authority is written. Fletcher v. Underwood, 240 Ill. 554, 88 NE 1030.

33. **Search Note:** See notes in 15 L. R. A. 754; 16 Id. 745; 19 Id. 721; 23 Id. 449; 26 Id. 799; 3 L. R. A. (N. S.) 147; 5 Id. 112; 8 Id. 1137; 5 Ann. Cas. 495; 6 Id. 46; 7 Id. 1142; 8 Id. 83; 9 Id. 192; 10 Id. 99.

See, also, Frauds, Statute of, Cent Dig. §§ 82-139; Dec. Dig. §§ 55-80; 20 Cyc. 209-238; 29 A. & E. Enc. L. (2ed.) 875.

34. Ind. T. Ann. St. 1899, § 2305, subd. 6, does not apply to contracts with respect to realty, as otherwise subd. 5 would be unnecessary. Turner v. Trail [Okl.] 103 P 575.

35. Ford v. Stroud, 150 N. C. 362, 64 SE 1; Reams v. Thompson, 5 Ga. App. 226, 62 SE 1014; Reynolds v. Craft, 38 Pa. Super. Ct. 46; Malken v. Hemming Bros. [Conn.] 73 A 752; Betcher v. Rinehart, 106 Minn. 380, 118 NW 1026; Phelan v. Neary [S. D.] 117 NW 142. Cannot be enforced by either party. Sizemore v. Bowling's Adm'r [Ky.] 115 SW 737.

Held invalid: Contract to convey land in consideration of personal services. Flowers v. Poorman [Ind. App.] 87 NE 1107. **Contract for sale of land and personalty.** Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731. **Signed by husband alone,** wife's oral assent void. Schwoerdfeger v. Kelly, 223 Pa. 631, 72 A 1056. Contract signed by husbands only, wives not signing, binds nobody. Mullarky v. Young, 9 Cal. App. 686, 100 P 709. Co-obligors on a written agreement to convey land made **oral agreement to compensate owner** for making conveyance. Held within statute. Birch v. Baker [N. J. Law] 74 A 151.

Held not contract for sale: Contract by citizens of a town to pay railroad for extending its line is not an agreement for sale of land. Texas & G. R. Co. v. Whiteside [Tex. Civ. App.] 119 SW 126.

36. 2 Gen. St. 1895, p. 1603, § 5. Birch v. Baker [N. J. Law] 74 A 151. Rev. St. 1887,

within the statute, as are also modifications,[38] revocations,[38] or assignments[40] of

§ 6007. Thompson v. Burns, 15 Idaho, 572, 99 P 111.

Held contract to transfer interest in realty: Under Ky. St. 1909, § 458, any interest other than a chattel interest is an interest in real estate. Hampton v. Glass [Ky.] 116 SW 243. **Agreement for letting** of premises. Miles v. Janvrin, 200 Mass. 514, 86 NE 785. Contract to care for owner **in consideration of use of land.** Hampton v. Glass [Ky.] 116 SW 243. A promise to give a real estate **mortgage** which is not in writing cannot, on failure to execute the mortgage, be enforced in equity in the absence of some act taking the promise out of the statute. Edwards v. Scruggs, 155 Ala. 568, 46 S 850.

Easements and licenses.

Writing necessary to creation of easement in land. Childers v. Wm. H. Coleman Co. [Tenn.] 118 SW 1018; Oliver v. Burnett, 10 Cal. App. 403, 102 P 223; Yeager v. Tuning, 79 Ohio St. 121, 86 NE 657. Rev. St. 1895, art. 624. Menczer v. Poage [Tex. Civ. App.] 118 SW 863. Parol easement amounts merely to revocable license. Streator Independent Tel. Co. v. Interstate Independent Tel. Co., 142 Ill. App. 183; Yeager v. Tuning, 79 Ohio St. 121, 86 NE 657. Parol easement not binding on grantee of servient estate. Long v. Cramer Meat & Packing Co., 155 Cal. 402, 101 P 297. Licensee gains no rights by making **improvements.** Streator Independent Tel. Co. v. Interstate Independent Tel. Co., 142 Ill. App. 183; Yeager v. Tuning, 79 Ohio St. 121, 86 NE 657. **Extinguishment of easement** cannot be accomplished by parol. Fogal v. Swart, 37 Pa. Super. Ct. 217.

Writing not necessary to validity of parol license leased on consideration. Ruthven v. Farmers' Co-Op. Creamery Co., 140 Iowa, 570, 118 NW 915.

Partition.

Writing necessary to executory partition. Smith v. Smith [Ga.] 65 SE 414. Paid partition between remaindermen cannot be executed during life of life tenant. Id.

Writing unnecessary. See Garrick v. Garrick [Ind. App.] 88 NE 104. An agreement among heirs whereby widow takes for life and children to have the entire reversion held not an agreement for partition by apportionment in severalty but an agreement for an exchange of interests in land and within the statute. Garrick v. Garrick [Ind. App.] 87 NE 696.

Standing timber.

Cannot be conveyed orally. Childers v. Wm. H. Coleman Co. [Tenn.] 118 SW 1018. Parol **reservation** of timber is invalid. Alexander v. Herndon [S. C.] 65 SE 1048. Oral conveyance may act as a **license to enter and cut** and is good until revoked. Bay View Land Co. v. Ferguson, 53 Wash. 323, 101 P 1093; High v. Jasper Mfg. Co. [Fla.] 49 S 156; St. John v. Sinclair, 108 Minn. 274, 122 NW 164. Parol conveyance prima facie invalid unless title is not to pass until cut. Hurley v. Hurley [Va.] 65 SE 472. Timber to be cut immediately is reduced to personalty and oral conveyance is good. Goodnough Mercantile & Stock Co. v. Galloway, 171 F 940. Deed unnecessary to assign title to timber to be cut immediately. Id.

Growing crops.

Reservation as part of purchase price may be shown by parol. Conflict noted. Grabow v. McCracken [Okl.] 102 P 84.

NOTE: Reservation of crops by parol (supplementary to note in 5 C. L. 1096): Weight of authority supports the rule that a matured crop of grain standing ungathered upon a tract of land may be specifically reserved by parol in the sale of the land as a part of the contract price or consideration of the deed. Grabow v. McCracken [Okl.] 102 P 84; Harvey v. Million, 67 Ind. 93; Austin v. Sawyer, 9 Cow. [N. Y.] 39; Harbold v. Kuster, 44 Pa. 392; Neill v. Chessen, 15 Ill. App. 266; Phillips v. Keysaw, 7 Okl. 674, 56 P 695; Aull Sav. Bank v. Aull, 80 Mo. 199; Champion v. Munday, 85 Ky. 31, 2 SW 546; Richardson v. Traver, 112 U. S. 423, 28 Law. Ed. 804; McCrea v. Purmont, 16 Wend. [N. Y.] 460, 30 Am. Dec. 103; Hersey v. Verrell, 39 Me. 721; Quimby v. Stebbins, 55 N. H. 420; Steed v. Hinson, 76 Ala. 298; Fraley v. Bentley, 1 Dak. 25, 46 NW 506; Mobile, etc., R. Co. v. Wilkinson, 72 Ala. 286, 47 Am. Rep. 408; McMahan v. Stewart, 23 Ind. 590; Frey v. Vanderhoof, 15 Wis. 397; Drury v. Tremont & Implement Co., 13 Allen [Mass.] 168; McDill v. Gunn, 43 Ind. 315. But see **contra** Winn v. Murehead, 52 Iowa, 64, 2 NW 949; Stewart v. McArthur, 77 Iowa, 162, 41 NW 604; Adams v. Watkins, 103 Mich. 431, 61 NW 774; Taylor v. Southerland, 7 Ind. Ter. 666, 104 SW 874; Chapman v. Veach, 32 Kan. 167 P 100.—Adapted from opinion of Williams, J., in Grabow v. McCracken [Okl.] 102 P 84.

37. Garnes v. Frazier [Ky.] 118 SW 998; Travers v. Barrett, 30 Nev. 402, 97 P 126. Under Code 1896, § 2152, must be in writing, unless accompanied by part payment or actual possession. Elliott v. Bankston [Ala.] 49 S 76.

38. Modification of contract to sell. Malken v. Hemming Bros. [Conn.] 73 A 752. Burns' Ann. St. 1908, § 7462. Modification of lease for three yars. Burgett v. Loeb [Ind. App.] 88 NE 346. Where holder of written contract for sale of land orally agrees to convey to another, in which agreement owner assents orally, there is an oral contract to convey, void under statute, rather than release of vendor's lien. Under Code, § 2840. Hoover v. Baugh, 108 Va. 695, 62 SE 968. But there having been entry under a written contract, a verbal agreement to take and pay for less land than originally contracted is not within the statute, there being no modification. Sizemore v. Bowling's Adm'r [Ky.] 115 SW 737.

39. There being no active abandonment and recovery. Friar v. Baldridge [Ark.] 120 SW 989. Can only be surrendered by operation of law or by conveyance. Rogge v. Levinson, 113 NYS 525. Must be reletting to constitute surrender of lease by operation of law. Id. Statute appplies to executory revocation only. Aaron v. Holmes [Utah] 99 P 450. Where there is actual surrender and reletting, statute is not applicable. Id. Laws 1896, p. 592, c. 547, does not apply where there is actual surrender and acceptance. Baldwin v. Cohen, 132 App. Div. 87, 116 NYS 510.

40. An interest in an estate extending for

such contracts, nor can a defunct written contract within the statute be revived by parol.[41] An agreement fixing boundaries between adjoining landowners is not within the statute,[42] unless it is in effect a transfer of interests.[43]

§ 8. *Sale of goods.*[44]—See 11 C. L. 1618—The statute applies to agreements for the sale of goods for the price of fifty dollars or more,[45] but does not apply to qualified and revocable sales[46] or to mere options.[47] Corporate shares are sometimes held to be "goods" within the meaning of the statute,[48] but there seems to be a conflict on this point.[49] Partnership agreements are not within this provision of the statute.[50] An assignment of a claim need not ordinarily be in writing, though the amount involved is over fifty dollars.[51]

§ 9. *Trusts.*[52]—See 11 C. L. 1613—An express trust in land is usually held to be within the statute in writing,[53] but this rule does not obtain in North Carolina.[54] A resulting trust, however, may rest in parol.[55] So, also, a parol trust to hold for

more than five years cannot ordinarily be assigned except by deed or will. Comley v. Ford, 65 W. Va. 429, 64 SE 447. Assignment of five-year lease. Moskowitz v. Eastern Brew. Co., 117 NYS 1017. Since a contract of sale creates an equity in the land in favor of vendee, an assignment thereof is a grant of an interest in real estate and must be in writing under Civ. Code 1895, § 2185, subd. 5. Flinner v. McVay, 37 Mont. 306, 96 P 340.

41. Parol extension of time cannot revive contract forfeited by its terms. Thompson v. Robinson, 65 W. Va. 506, 64 SE 718.

42. Rozelle v. Lewis, 37 Pa. Super. Ct. 563. Executed on consideration and followed by possession. Warden v. Addington [Ky.] 115 SW 241.

43. Fuelling v. Fuesse [Ind. App.] 87 NE 700.

44. **Search Note:** See notes in 14 L. R. A. 230; 2 L. R. A. (N. S.) 804; 7 Id. 418; 16 Id. 381; 7 Ann. Cas. 930, 1071; 10 Id. 309, 11 Id. 1000.

See, also, Frauds, Statute of, Cent. Dig. §§ 140-186; Dec. Dig. §§ 81-96; 20 Cyc. 238-252; 29 A. & E. Enc. L. (2ed.) 953.

45. Waxelbaum v. Schloss, 131 App. Div. 826, 116 NYS 42; Travers v. Barrett, 30 Nev. 402, 97 P 126. Gen. St. 1902, § 1090. Harlow v. Parsons Lumber & Hardware Co., 81 Conn. 572, 71 A 734.

Held within statute: Agreement for future delivery of lumber. Harlow v. Parsons Lumber & Hardware Co., 81 Conn. 572, 71 A 734. Contract for sale of 1,000 piles at $1.71 each. Miller v. Smith [Ga. App.] 65 SE 292. Oral agreement to execute a specified contract for sale of goods. Sarkisian v. Teele, 201 Mass. 596, 88 NE 333. For sale of stock of merchandise and transfer of leasehold. Id.

Held not within statute: A contract for improvement of realty is not within the statute though it involves contractor furnishing materials in excess of $50, unless the real intent of the parties is the sale of materials, the labor being merely incidental. Campbell & Co. v. Mion Bros. [Ga. App.] 64 SE 571.

46. Mulford v. Torrey Exploration Co., 45 Colo. 81, 100 P 596. Rev. Laws 1902, c. 74, § 5, does not apply to qualified and revocable sale of stock. Schaefer v. Strieder, 203 Mass. 467, 89 NE 618. Qualified sale is an entire contract and the agreement to restore statu quo is not separable and void under Mills' Ann. St. § 2025, subd. 4. Mulford v. Torrey Exploration Co., 45 Colo. 81, 100 P 596.

47. Owner agrees to sell goods within certain time at fixed price and each party deposits with a third party $100 to be paid to the other in case either one fails to abide the bargain. Held an option, not a sale. Nagel v. Cohen, 112 NYS 1066.

48. Corporate shares are "goods" within Comp. Laws, § 9516. Sprague v. Hosie, 155 Mich. 30, 15 Det. Leg. N. 847, 118 NW 497.

49. See Sprague v. Hosie, 155 Mich. 30, 15 Det. Leg. N. 847, 118 NW 497, citing authorities pro and con.

50. New member admitted to firm by agreement of all parties acquires an interest by operation of law not affected by the statute. Gorder v. Pankonin, 83 Neb. 204, 119 NW 449.

51. Selleck v. Manhattan Fire Alarm Co., 117 NYS 964.

52. **Search Note:** See Trusts, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18; 28 A. & E. Enc. L. (2ed.) 870, 871.

53. Lancaster v. Springer, 239 Ill. 472, 88 NE 272; O'Briant v. O'Briant [Ala.] 49 S 317. Rev. St. 1899, §§ 3416, 3417. Bosch v. Miller, 136 Mo. App. 482, 118 SW 506. Ballinger's Ann. Codes & St. § 4517. Spaulding v. Collins, 51 Wash. 488, 99 P 306. No defense to foreclosure of mortgage by one who had agreed to secure assignment for benefit of mortgagor. Jenkins v. Bishop, 62 Misc. 87, 115 NYS 1011. Verbal trust unenforcible where the only **bad faith** charged is refusal to perform. Henderson v. Murray, 108 Minn. 76, 121 NW 214.

54. The seventh section of the English statute never having been adopted in North Carolina, a parol trust is valid. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028.

55. Equity will enforce parol trust to prevent actual or constructive fraud. Hanson v. Svarverud [N. D.] 120 NW 550. Resulting trust arises by implication of law and is not within the statute. Pittock v. Pittock, 15 Idaho, 426, 98 P 719. Equity will impress and enforce a trust ex malificio. Henderson v. Murray, 108 Minn. 76, 121 NW 214.

Resulting trusts: Purchase of real estate in own name but for another with funds of such other. Havlick v. Davidson, 15 Idaho, 787, 100 P 91; Stevenson v. Haynes, 220 Mo. 199, 119 SW 346. Title taken by one of contributors to purchase price. Baker v. Ba-

the benefit of a third party will be enforced in equity.[56] But a contemporaneous parol trust cannot be sustained where in direct conflict with the express terms of a written deed.[57] There is nothing in the statute of frauds which requires any writing when a new trustee is selected to administer a pre-existing trust of which trustee had notice when he accepted the same.[58]

§ 10. *What will satisfy the statute. A. Writing.*[59] *Contracts not performable within a year.*[See 11 C. L. 1618]—The writing must contain all the material elements of the contract so that parol evidence is unnecessary to supply its terms [60] or make it definite.[61]

To answer for the debt of another or to indemnify or insure.[See 11 C. L. 1615]—A memorandum sufficient to support a collateral promise must express the whole contract [62] and expressly or by fair inference, show the consideration.[63]

The authority of an agent.[See 11 C. L. 1615]—Where written authority is required,[64] it must be in clear and unequivocal terms.[65] An agreement for broker's commissions, if required to be written, must clearly express the contract.[66]

Contracts for the sale of land.[See 11 C. L. 1614]—The memorandum must clearly,[67] either in direct terms or by reference to other writings,[68] express all the material

ker [N. J. Eq.] 72 A 1000. Husband's procurement of deed from wife under promise to hold for children. In re Fisk, 81 Conn. 433, 71 A 559. Joint mining venture where parties share labor and expense but one takes record title. Hendrichs v. Morgan [C. C. A.] 167 F 106. Purchase of property for lodge by member thereof. Payne v. McClure Lodge No. 539 [Ky.] 115 SW 764.

56. Criss v. Criss, 65 W. Va. 683, 64 SE 905.

57. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028.

58. Howe v. Howe, 199 Mass. 598, 85 NE 945. Trustee held to have had notice of trust. Id.

59. **Search Note:** See notes in 22 L. R. A. 273; 15 Id. 240; 8 L. R. A. (N. S.) 733; 56 A. S. R. 659; 60 Id. 532; 2 Ann. Cas. 293; 3 Id. 404, 656, 1036; 4 Id. 893; 6 Id. 191, 298; 7 Id. 671, 1101; 9 Id. 774, 1060.

See, also, Frauds, Statute of, Cent. Dig. §§ 162-351; Dec. Dig. §§ 87-144; 20 Cyc. 245-308; 29 A. & E. Enc. L. (2ed.) 848.

60. Wagniere v. Dunnell [R. I.] 73 A 309. Cannot be eked out by oral proof. Leach v. Weil, 129 App. Div. 688, 114 NYS 234.

61. Contract for three years or so long as employe can produce results not sufficiently definite as to standard of ability demanded. Wagniere v. Dunnell [R. I.] 73 A 309. Letter held not sufficient memorandum. Leach v. Weil, 129 App. Div. 688, 114 NYS 234.

62. Winne v. Mehrbach, 130 App. Div. 329, 114 NYS 618.

Held insufficient: Signatures as "sureties" on a building contract. Mead v. White, 53 Wash. 638, 102 P 753. Cablegram "will indorse ten thousand." Greenwich Bank v. Oppenheim, 133 App. Div. 586, 118 NYS 297. Letter from borrower requesting indorsement, and cablegram to lender "will indorse ten thousand," disclosed no contract between lender and indorser. Id.

63. Winne v. Mehrbach, 130 App. Div. 329, 114 NYS 618; Stone v. Stolts, 112 NYS 1045. Consideration not shown. Winne v. Mehrbach, 130 App. Div. 329, 114 NYS 618.

64. See § 6, supra.

65. Under Civ. Code, § 1624, subd. 6, written authority of broker need not necessarily recite terms of sale. Baird v. Loescher, 9 Cal. App. 65, 98 P 49. Under Civ. Code, § 1624, subd. 6, letter held sufficient authority to broker to sell. Id. Letter to sell after receiving contract blank was express acceptance thereof. Id. Letter stating terms willing to accept is not authority to sell. Ross v. Craven [Neb.] 121 NW 451. Under Code 1904, § 2840, an indorsement of "acceptance" by the landowner upon a letter authorizing agents to buy property is not a contract or memorandum thereof sufficient to bind principals. Jordan v. Mahoney [Va.] 63 SE 467.

66. Under Laws 1905, p. 110, c. 58, memorandum regarding commissions following signature of vendor on contract for sale held insufficient under the statute since nothing has been said about who shall pay. McCrea v. Ogden [Wash.] 103 P 788, overruling 50 Wash. 495, 97 P 503. Formal compact unnecessary under Civ. Code, § 1624, signed memorandum sufficient. Letter held sufficient memorandum. Sanchez v. Yorba, 8 Cal. App. 490, 97 P 205.

67. Must relieve the court of the necessity of resorting to parol to ascertain the contract. Campbell v. Preece [Ky.] 118 SW 373; Thompson v. Burns, 15 Idaho, 572, 99 P 111; Menczer v. Poage [Tex. Civ. App.] 118 SW 863.

68. Elwell v. Hicks, 238 Ill. 170, 87 NE 316; Menczer v. Poage [Tex. Civ. App.] 118 SW 863; Alabama Cent. R. Co. v. Long [Ala.] 48 S 363. May be several writings. Campbell v. Preece [Ky.] 118 SW 373; Flegel v. Dowling [Or.] 102 P 178. Correspondence and abstract referred to therein can be read together. Heenan v. Parmele, 80 Neb. 509, 118 NW 324.

Held sufficient: A borrower executed a warranty deed for land on security, taking back a bond for deed contingent upon payment of loan. He later secured an additional loan, made new note and by interlineation altered the bond for deed. By inadvertence the original sum was not altered in the bond. Held that the new contract

elements [69] of the contract as made [70] so far as it is executory,[71] such as parties,[72] consideration,[73] and subject-matter,[74] and must be signed by the party to be charged [75] or his authorized agent,[76] but the signature of both parties is not necessary to bind one,[77] nor is a witness [78] or a seal necessary.[79] The memoranda need

was not wholly verbal and within the statute and that the equity of the lendor was superior to that of another creditor with notice. In re Burns, 171 F 1008. Grantor's contract to repurchase, signed by his agent, is binding when delivered with deed, since both documents must be read together and constituted sufficient memorandum, though agent was without authority. Van Name v. Queens Land & Title Co., 130 App. Div. 857, 115 NYS 905. **Answer to bill for specific performance** which substantially admits contract is sufficient memorandum. Krali v. Wassmer [N. J. Eq.] 71 A 404. **Letters and telegrams** held sufficient memoranda. Lindsay v. Humbrecht, 162 F 548. **Memorandum of unilateral contract** becomes bilateral immediately on other party's suing for specific performance. Krall v. Wassmer [N. J. Eq.] 71 A 404.

69. Ruggerio v. Leuchtenburg, 61 Misc. 298, 113 NYS 615; Allen v. Kitchen [Idaho] 100 P 1052. **Date** is not necessarily material to assignment of contract. Hickman v. Chaney, 155 Mich. 217, 15 Det. Leg. N. 1003, 118 NW 993. A **check** is not a sufficient memorandum though given in consideration of an easement. Allen v. Stailey [Ky.] 119 SW 755.

70. Deed tendered as compromise is not memorandum of oral contract in dispute. Richardson v. Issacs [Ky.] 118 SW 1003. Vendors signed memorandum inconclusive on vendee who admits a different agreement. Clever v. Clever, 38 Pa. Super. Ct. 66.

71. See, also, § 10D. Ruggerio v. Leuchtenburg, 113 NYS 615.

72. Elwell v. Hicks, 238 Ill. 170, 87 NE 316; Flegel v. Dowling [Or.] 102 P 178; Menczer v. Poage [Tex. Civ. App.] 118 SW 863.

73. Elwell v. Hicks, 238 Ill. 170, 87 NE 316; Flegel v. Dowling [Or.] 102 P 178; Menczer v. Poage [Tex. Civ. App.] 118 SW 863; Alabama Cent. R. Co. v. Long [Ala.] 48 S 363.

Consideration not shown. Phelan v. Neary [S. D.] 117 NW 142. Receipt for abstract not sufficient writing though containing the words "on exchange note for deed." Elwell v. Hicks, 238 Ill. 170, 87 NE 316.

Where assignment is indorsed on contract for sale of land, the consideration of such assignment need not be expressed. Hickman v. Chaney, 155 Mich. 217, 15 Det. Leg. N. 1003, 118 NW 993.

74. Elwell v. Hicks, 238 Ill. 170, 87 NE 316; Menczer v. Poage [Tex. Civ. App.] 118 SW 863; Flegel v. Dowling [Or.] 102 P 178; Alabama Cent. R. Co. v. Long [Ala.] 48 S 363. Parol evidence cannot supply essential description. Allen v. Kitchen [Idaho] 100 P 1052.

Held sufficient: Receipts describing the land. Campbell v. Preece [Ky.] 118 SW 373. Abstract referred to in correspondence. Heenan v. Parmele, 80 Neb. 509, 118 NW 324. "My farm of 160 acres in Lynn Co. Tex." Wilcox v. Sonka, 137 Mo. App. 54, 119 SW 445. Though county and state were not mentioned but were supplied by date line of memorandum. Flegel v. Dowling [Or.] 102 P 178. Any description which will enable a competent surveyor to locate. Id. "Lands actually used and occupied by railroad" over designated property becomes definite description on completion of railroad. Alabama Cent. R. Co. v. Long [Ala.] 48 S 363. "Three houses belonging to D. estate" is sufficient memorandum to charge the grantee only in case estate owns but three houses. Harrigan v. Dodge, 200 Mass. 357, 86 NE 780.

Held insufficient: North (blank) feet of specified lot. McCarn v. London, 83 Neb. 201, 119 NW 251. "22,000 acres in Franklin and Jefferson counties." Scherck v. Moryse [Miss.] 48 S 513. Agreement to "redeed to the old lines as they are at present." Armstrong v. Henderson [Idaho] 102 P 361. Municipality, county and state omitted. Allen v. Kitchen [Idaho] 100 P 1052.

75. Flegel v. Dowling [Or.] 102 P 178; Campbell v. Preece [Ky.] 118 SW 373; Harper v. Goldschmidt [Cal.] 104 P 451. By party against whom the contract is sought to be enforced. Harper v. Goldschmidt [Cal.] 104 P 451. Under Code Civ. Proc. § 1973, and Civ. Code, §§ 1624, 1741, vendee's signature is essential to charge him in the absence of part performance. Id.

Signature held insufficient: Signature of the "Colonial Press" not binding on "Scarsdale Pub. Co.—The Colonial Press." Scarsdale Pub. Co.—The Colonial Press v. Carter, 63 Misc. 271, 116 NYS 731.

76. Principal's attempted repudiation is of no avail. Lawson v. Williams [Ky.] 115 SW 730. **Undisclosed principal** is bound by signature of his agent. Combes v. Adams, 150 N. C. 64, 63 SE 186; Walker v. Hafer [C. C. A.] 170 F 37; Wharton v. Tolbert [S. C.] 65 SE 1056. Under Idaho statute, which requires authority of agent to be in writing, principal cannot enforce a contract where parol evidence is necessary to connect him therewith. Thompson v. Burns, 15 Idaho, 572, 99 P 111.

Authority of agent: Must be authorized. Fogal v. Swart, 37 Pa. Super. Ct. 217. Unauthorized agent's contract of no avail. Thomas v. Rogers, 108 Minn. 132, 121 NW 630. Receipts signed by orally authorized broker sufficient memorandum when **ratified** by owner. Flegel v. Dowling [Or.] 102 P 178; Van Name v. Queens Land & Title Co., 130 App. Div. 857, 115 NYS 905. A **commission broker** being by usage the agent of both parties, his signed memorandum may bind both. Ankeny v. Young Bros., 52 Wash. 235, 100 P 736. Signed entry on broker's sales book of seller, buyer, date, commodity, quality, price and terms, is sufficient memorandum. Id.

77. Wharton v. Tolbert [S. C.] 65 SE 1056. Signature of one party is sufficient to charge him when other party accepts. Cotulla v. Barlow [Tex. Civ. App.] 115 SW 294. Signature by vendor will support action by vendee. Wharton v. Tolbert [S. C.] 65 SE

not necessarily be contemporaneous with the agreement[80] but it is essential that there should have been an agreement,[81] and, where separate writings are relied upon, they must of themselves clearly show their connection with the contract and with each other.[82]

Contracts for sale of goods.[See 11 C. L. 1613]—The contract need not be formally written,[83] but any writing[84] or series of writings,[85] definitely[86] setting forth all its material elements[87] and signed by the party to be charged[88] or his authorized agent,[89] is sufficient memorandum to satisfy the statute. An erroneous memorandum is of no effect.[90]

Trusts.[See 11 C. L. 1615]

(§ 10) *B. Delivery and acceptance.*[91]—[See 11 C. L. 1616]—Actual[92] delivery and acceptance[93] of any part of the goods,[94] at the time of or subsequent to the contract of sale,[95] to the vendor or his authorized agent,[96] will satisfy the statute, but the goods delivered must be those contemplated by the contract.[97] Delivery is a question of fact,[98] and, where the goods are already on the premises of the purchaser, an act of possession is essential.[99]

1056. Oral acceptance of written **option** will bind vendor. Green v. Mayne [Iowa] 118 NW 441.

78, 79. Wharton v. Tolbert [S. C.] 65 SE 1056.

80. May be ratification. Campbell v. Preece [Ky.] 118 SW 373.

81. Allen v. Stailey [Ky.] 119 SW 755. Check tendered for easement and not accepted held no contract. Id.

82. Jordan v. Mahoney [Va.] 63 SE 467. Cannot be connected by parol. Id. Letter stating that alleged vendee would examine title held not sufficiently connected with other documents to prove contract. Id.

83. Statute does not require written contract but written evidence thereof. Capital City Brick Co. v. Atlanta Ice & Coal Co., 5 Ga. App. 436, 63 SE 562.

84. Letter repudiating contract sufficient to take it out of statute where otherwise a sufficient memorandum thereof. Capital City Brick Co. v. Atlanta Ice & Coal Co., 5 Ga. App. 436, 63 SE 562.

85. May be a series of writings. Waxelbaum v. Schloss, 131 App. Div. 826, 116 NYS 42. Letter of acceptance need not repeat terms but must be read with the offer. Jennings v. Shertz [Ind. App.] 88 NE 729. Letter acknowledging receipt of contract and promising return thereof when one point has been made more definite, sufficient memorandum when read with the contract. Dyrenforth v. Palmer Pneumatic Tire Co., 240 Ill. 25, 88 NE 290.

86. "The goods you selected" held too indefinite. Waxelbaum v. Schloss, 131 App. Div. 826, 116 NYS 42. Sale of specified barrels of vinegar held sufficiently definite. Wheless v. Meyer & Schmidt Grocer Co. [Mo. App.] 120 SW 708.

87. Must be intelligible without parol. Capital City Brick Co. v. Atlanta Ice & Coal Co., 5 Ga. App. 436, 63 SE 562. Must leave nothing to further negotiations. Jennings v. Shertz [Ind. App.] 88 NE 729. Sufficient if from inspection court can determine entire contract. Hartwell v. Ganahe Lumber Co., 8 Cal. App. 733, 97 P 901.

Incomplete: Where a signed order is taken "subject to acceptance by the firm," it is, by its terms, an incomplete memorandum. Waxelbaum v. Schloss, 131 App. Div. 826, 116 NYS 42. Memorandum failing to express date of delivery is insufficient. Harlow v. Parsons Lumber & Hardware Co., 81 Conn. 572, 71 A 734.

88. Written memorandum by buyer and part delivery by seller sufficient to charge buyer. Thedford v. Herbert, 195 N. Y. 63, 87 NE 798.

89. Agent to transmit orders for acceptance cannot make binding contract of sale. Metzler v. Harry Kaufman Co., 32 App. D. C. 434.

90. Though time of delivery is not usually an essential stipulation when incorrectly stated it becomes material and renders the memorandum void. Crosby v. Bouchard [Vt.] 71 A 835.

91. Search Note: See notes in 22 L. R. A. 426; 70 Id. 321; 10 L. R. A. (N. S.) 638; 11 Id. 1136; 96 A. S. R. 215; 2 Ann. Cas. 545; 4 Id. 187; 9 Id. 1169.

See, also, Frauds, Statute of, Cent. Dig. §§ 162-179; Dec. Dig. §§ 87-91; 20 Cyc. 245-251; 29 A. & E. Enc. L. (2ed.) 812, 845, 855.

92. Mere tender is insufficient. Miller v. Smith [Ga. App.] 65 SE 292. Must be physical transfer placing goods out of control of vendor and within control of vendee. Id.

93. Vendee signed order and accepted goods. Gilfoil v. Western Mfg. Co., 108 Minn. 193, 121 NW 904. Receipt of goods and payment of price. Moreland v. Newberger Cotton Co. [Miss.] 48 S 187.

94. Delivery of a pitcher sufficient to take sale of sodawater fountain, pitchers and paraphernalia out of statute. L. A. Becker Co. v. Davis Drug Co. [Miss.] 47 S 468.

95. Part delivery subsequent to sale. Thedford v. Herbert, 195 N. Y. 63, 87 NE 798.

96. Delivery to carrier sufficient. Fruit Dispatch Co. v. Gilinski [Neb.] 122 NW 45.

97. Delivery of goods not contemplated by contract will not bind sale of stock of merchandise. Sarkisian v. Teele, 201 Mass. 596, 88 NE 333.

98. Moreland v. Newberger Cotton Co. [Miss.] 48 S 187.

99. Charlotte Harbor & N. R. Co. v. Burwell, 56 Fla. 217, 48 S 213. No proof of

(§ 10) *C. Part payment and earnest money.*[1] See 11 C. L. 1616

(§ 10) *D. Part performance.*[2] *Contracts for the sale of land.* See 11 C. L. 1616

An oral contract for the transfer of land is taken out of the statute by complete performance [3] or by part performance of a substantial nature,[4] with the knowledge and acquiescence of the other party,[5] and the statute cannot thereafter be raised by a party,[6] but such performance must be unequivocal and referable to the contract alone.[7] Payment alone,[8] or the making of slight improvements,[9] may not satisfy the statute, and it has been held that unless the improvements are substantial, a part payment and possession are insufficient to that end,[10] but a party who has performed cannot repudiate the contract so long as the other party is not in default.[11] Mere

acceptance of rock stored on vendee's premises. Gulfport Cotton Oil, Fertilizer & Mfg. Co. v. Reneau [Miss.] 48 S 292.

1. Search Note: See note in 15 L. R. A. (N. S.) 654.

See, also, Frauds, Statute of, Cent. Dig. §§ 180-186; Dec. Dig. §§ 92-96; 20 Cyc. 251, 252; 29 A. & E. Enc. L. (2ed.) 812, 845.

2. Search Note: See notes in 3 L. R. A. (N. S.) 790, 852; 4 Ann. Cas. 463; 7 Id. 1041; 8 Id. 80; 9 Id. 135.

See, also, Fraud, Statute of, Cent. Dig. §§ 265-351; Dec. Dig. §§ 119-144; 20 Cyc. 279-308; 29 A. & E. Enc. L. (2ed.) 812, 845.

3. Sullivan v. Winters [Ark.] 120 SW 843; James v. Manning [Kan.] 101 P 628. Estate in land may be transferred by verbal sale accompanied by actual possession. Hubbard v. Slavens, 218 Mo. 598, 117 SW 1104. Disposition of the proceeds does not affect execution of contract for sale of land. Sullivan v. Winters [Ark.] 120 SW 843.

Held not within statute: Easement taken out of statute by performance. Ruthven v. Farmers Co-Op. Creamery Co., 140 Iowa, 570, 118 NW 915. Contract executed by payment and possession. Bentley v. Barnes [Ala.] 50 S 361. Fact that one of four school land certificates assigned at the same time was not signed by assignor is immaterial where there had been complete delivery and occupancy by assignee for over three years. James v. Manning [Kan.] 101 P 628. Where the husband executes an oral contract by executing his last will and testament in conformity thereto and dies, leaving said will in effect, the devisees of the wife will not be permitted to interpose the defense of the statute of frauds. The performance by the husband will be held to take the case out of the operation of the statute in such cases. Crary v. McCrory, 9 Ohio N. P. (N. S.) 1.

4. Park v. Park, 45 Colo. 347, 101 P 403. Must be substantial and of such a nature that injustice would follow failure to enforce contract. Thomas v. Rogers, 108 Minn. 132, 121 NW 630.

Held sufficient: Execution and delivery of deed. Friedman v. Ender, 116 NYS 461. Payment and possession. Lambert v. St. Louis & G. R. Co., 212 Mo. 692, 111 SW 550; Collins v. Leary [N. J. Eq.] 74 A 42. Possession and valuable improvements. Reichardt v. Howe [Ark.] 121 SW 347; Boeck v. Milke [Iowa] 118 NW 874; In re Trustees of Village of White Plains, 124 App. Div. 1, 108 NYS 596; Eisenberger v. Eisenberger, 38 Pa. Super. Ct. 569. Payment, possession and valuable improvements. Lee v. Foushee [Ark.] 120 SW 160. Part payment, possession and improvements. Morgan v. Morgan [Wash.] 103 P 478; Babcock v. Lewis [Tex. Civ. App.] 113 SW 584. Buying material and commencing valuable improvements. Robinson v. Luther, 140 Iowa, 723, 119 NW 146. Possession as exclusive as the terms of the contract will permit. Holding farm subject to support of parents. Taylor v. Taylor [Kan.] 99 P 814. Where upon suggestion of purchaser of lots owned in severalty vendors executed memorandum binding them, and one executed deed to the other and latter executed deed to purchaser and placed same in escrow, held sufficient part performance. Lindsey v. Humbrecht, 162 F 548. **Brauding timber** under Code 1904, § 1906c, subsecs. 2, 6, is an act of possession sufficient to take oral contract out of statute. Hurley v. Hurley [Va.] 65 SE 472.

Held insufficient: Possession by vendor. Garrick v. Garrick [Ind. App.] 88 NE 104.

5. Parol easement enforced where acted upon with knowledge of grantor. Title Guarantee & Trust Co. v. New York Juvenile Asylum, 133 App. Div. 529, 118 NYS 302. Vendee must show possession delivered to him by vendor pursuant to the contract. Garrick v. Garrick [Ind. App.] 88 NE 104.

6. Rasch v. Jensen [Iowa] 120 NW 662.

7. Collins v. Harrell, 219 Mo. 279, 118 SW 432. Must result from agreement. Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 108 Va. 862, 62 SE 954. Must be pursuant to the contract. Garrick v. Garrick [Ind. App.] 88 NE 104; Reed v. Reed, 108 Va. 790, 62 SE 792. Care of decedent held to have been in consideration of parol contract to convey land. Reed v. Reed, 108 Va. 790, 62 SE 792.

8. Garrick v. Garrick [Ind. App.] 87 NE 696. Under Code Civ. Proc. § 1973, and Civ. Code, §§ 1624, 1741, payment of small sum is not sufficient performance. Harper v. Goldschmidt [Cal.] 104 P 451.

9. Since party making same may be adequately compensated in damages. Crane's Nest Coal & Coke Co. v. Virginia Iron Coal & Coke Co., 108 Va. 862, 62 SE 954.

10. Conflict of authorities noted. Friedman v. Ender, 116 NYS 461.

11. Where vendor stands ready to deliver deed, vendee cannot recover back money paid on contract. Lang v. Murphy, 137 Mo. App. 217, 117 SW 665. In absence of default, vendor who has placed vendee in possession cannot eject. Demps v. Hogan [Fla.] 48 S 998.

nonaction is not part performance although the agreement contemplated the same.[12] Where performance follows as soon as may be, the rights of the parties relate back to the time of the oral contract.[13] Upon the tenancy created by actual occupancy, there is no question of the statute,[14] nor does it apply to the termination of a lease by operation of law.[15] A lease, void under the statute may nevertheless create a tenancy at will.[16]

Parol gifts of land See 11 C. L. 1617 are invalid, unless by substantial improvement the donee has taken the matter out of the statute.[17]

Contracts not performable within a year See 11 C. L. 1618 may be taken out of the statute by performance by one [18] or both [19] parties.

Contracts for sale of goods [20]—See 9 C. L. 1506 may be taken out of the statute by substantial [20a] part performance.[21]

Trusts.—Performance by the cestui que trust takes a resulting trust out of the statute,[22] and such performance is complete when the cestui que trust furnishes money wherewith the trustee acquires title,[23] but the cestui que trust must have some claim by reason of an interest in the estate or the purchase money [24] coeval with the acquisition of title by the trustee.[25]

§ 11. *Operation and effect of statute.*[26]—See 11 C. L. 1618—The statute relates to evidence, and rendering a contract invalid in effect merely because it cannot be established,[27] and the situation assumed by the parties may give rise to rights and liabilities independent of the contract,[28] and the unenforcible oral promise is a suf-

12. Forbearance to collect balance. Hawkins v. Studdard [Ga.] 63 SE 852.

13. Lien of judgment acquired in meantime will not attach. Randolph v. Wilhite [Kan.] 96 P 492.

14. Although entry was under a void oral agreement. Miles v. Janvrin, 200 Mass. 514, 86 NE 785. Lessee put in possession by authorized agent. Elliott v. Bankston [Ala.] 49 S 76.

15. Actual surrender and acceptance. Baldwin v. Cohen, 132 App. Div. 87, 116 NYS 510. Surrender and reletting. Aaron v. Holmes [Utah] 99 P 450. To constitute surrender by operation of law, there must be a reletting either in writing or orally for a term of one year or less. Rogge v. Levinson, 113 NYS 525.

16. See post, § 11.

17. Elam v. Carter [Tex. Civ. App.] 119 SW 914. Purchase of a few fruit trees and a few days labor insufficient. Id.

18. Complete performance by plaintiff who made loan under agreement that it should be for three years and secured by mortgage. Bowman v. Wade [Or.] 103 P 72.

19. Where sales agent under parol authority incurred expenses, secured orders and orders were shipped. De Laval Separator Co. v. Sharpless [Iowa] 120 NW 657. Parol compromise agreement fixing attorney's fees. Dyrenforth v. Palmer Pneumatic Tire Co., 240 Ill. 25, 88 NE 290.

20. See, also, § 10B, Delivery and Acceptance, and § 10C, Part Payment.

20a. Expenses incurred by vendor in changing his business not substantial part performance of contract to sell store. Sarkisian v. Teele, 201 Mass. 596, 88 NE 333.

21. Shipping goods in reply to offer is sufficient acceptance and part performance. Teasdale Com. Co. v. Keckler [Neb.] 120 NW 955. Payment of $265 in monthly instalments of $5 sufficient. Cayouette v. Raddant Brew. Co., 136 Wis. 634, 118 NW 204.

22. Havlick v. Davidson, 15 Idaho, 787, 100 P 91.

23. Havlick v. Davidson, 15 Idaho, 787, 100 P 91.

24. Lancaster Trust Co. v. Long, 220 Pa. 499, 69 A 993.

25. Stevenson v. Haynes, 220 Mo. 199, 119 SW 346.

26. Search Note: See notes in 3 C. L. 1533; 18 L. R. A. 142; 64 Id. 119; 5 L. R. A. (N. S.) 112, 123; 6 A. S. R. 495; 1 Ann. Cas. 728; 3 Id. 781; 8 Id. 963; 10 Id. 509.

See, also, Frauds, Statute of, Cent. Dig. §§ 265-351; Dec. Dig. §§ 119-144; 20 Cyc. 279-308; 29 A. & E. Enc. L. (2ed.) 811, 812.

27. Johnston v. Jickling [Iowa] 119 NW 746; Campbell v. Preece [Ky.] 118 SW 373. Oral guaranty, though within statute of frauds, may be valid, the statute going to evidence or proof of contract rather than to its validity. Huttig Mfg. Co. v. Edwards [C. C. A.] 160 F 619.

28. Recovery of **purchase price and value of improvements** may be had. Ford v. Stroud, 150 N. C. 362, 64 SE 1. **Value of services** rendered on void contract for conveyance of land therefor may be recovered. Flowers v. Poorman [Ind. App.] 87 NE 1107. **Money loaned** can be recovered, with legal interest. Bowman v. Wade [Or.] 103 P 72. **Damages** for loss of broker's commissions may be recovered. Bird v. Blackwell, 135 Mo. App. 23, 115 SW 487. A parol **lease,** void under the statute, is nevertheless good as a tenancy at will (Fink v. Standard Bread Co., 61 Misc. 626, 113 NYS 1036), and the same is true of an oral assignment of a written lease (Abbot v. La Point [Vt.] 73 A 166), and the tenant is not estopped to assert his right of possession as against third parties (Id.).

ficient consideration for a subsequent, written promise,[29] or execution or partial performance may place the contract without the statute.[30] The statute is for the prevention of fraud, and equity will, therefore, enforce performance when refusal to do so would be clearly an injustice [31] or perpetuate fraud,[32] provided the evidence is clear and cogent,[33] but a decree is prerequisite to relief in such cases.[34] The parol evidence rule [35] is entirely distinct from the rule under the statute requiring certain contracts to be in writing, and as such is treated elsewhere, but the effect of the statute of frauds is sometimes analogous to the effect of the parol evidence rule, in that it excludes parol evidence of any essential element of a contract which is required to be in writing,[36] or to modify such a contract,[37] but does not exclude parol evidence to enable the court to get at the real intention of the parties as expressed in their writings,[38] or to show consideration,[39] or to prove that a deed absolute on its face is in fact a mortgage [40] or that a promise to answer for the debt of another was an original obligation,[41] or to establish a resulting trust.[42] Parol evidence of part performance is not excluded by reason of its tendency to prove also a parol contract,[43] but parol authority to lease land, void under the statute, cannot be shown in support of the lease.[44] Where the applicability of the statute depends upon the term of the duration of the contract, parol evidence is admissible to show the agreement of the parties on this point.[45] Upon an oral contract for the sale of goods within the statute, the vendor retains title until actual delivery.[46] The lex loci

29. Promise to pay commissions is sufficient consideration to support note therefor. Mohr v. Rickgauer, 82 Neb. 398, 117 NW 950.

30. See ante, §§ 10B, 10C, 10D.

31. See Specific Performance. Against one who by void verbal modification gained an unfair advantage. Gilson v. Boston Realty Co. [Conn.] 73 A 765. Will not terminate a void verbal lease where such a course would be inequitable. Northcraft v. Blumauer, 53 Wash. 243, 101 P 871.

32. Equity will not validate the void contract but will prevent the statute from becoming the means of working a fraud. Engholm v. Ekrem [N. D.] 119 NW 35. Where parties cannot be placed in statu quo. Hover v. Baugh, 108 Va. 695, 62 SE 968. Where refusal to enforce would work fraud. Crane's Nest Coal & Coke Co. v. Virginia Iron Coal & Coke Co., 108 Va. 862, 62 SE 954; Reed v. Reed, 108 Va. 790, 62 SE 792; Thomas v. Rogers, 108 Minn. 132, 121 NW 630. Served master for 22 years under contract to serve for his life in consideration of his estate. Fact of discharge a few years before death of master and receipt for small sum in full for services which was fraudulently obtained does not affect rights of plaintiff under the oral contract. Heery v. Reed [Kan.] 102 P 846.

33. See post, § 12.

34. Contract must be established in equity. Zeuske v. Zeuske [Or.] 103 P 648. Party cannot, in action at law, have contract reduced to writing and recover damages thereon. Garnes v. Frazier [Ky.] 118 SW 998.

35. See Evidence, § 5.

36. Armstrong v. Henderson [Idaho] 102 P 361; Scherck v. Moyse [Miss.] 48 S 513; Phelan v. Neary [S. D.] 117 NW 142; Mead v. White, 53 Wash. 638, 102 P 753. Cannot rest partly in parol. Elwell v. Hicks, 238 Ill. 170, 87 NE 316. Unilateral option cannot be rendered mutual by simultaneous parol contract void under the statute. Reigart v. Manufacturers' Coal & Coke Co., 217 Mo. 142, 117 SW 61. Evidence of act of plaintiff as result of correspondence not admissible to supply element of contract. Phelan v. Neary [S. D.] 117 NW 142.

37. Written contract for sale of land. Hawkins v. Studdard [Ga.] 63 SE 852; Malken v. Hemming Bros. [Conn.] 73 A 752. Conveyance on consideration of uses declared in the grantor cannot be attacked by parol. Lake v. Weaver [N. J. Eq.] 73 A 62. Fire policy. Athens Mut. Ins. Co. v. Evans [Ga.] 64 SE 993. Sale of goods to amount of $50 or more. Miller v. Smith [Ga. App.] 65 SE 292; Willis v. Fields [Ga.] 63 SE 828.

38. Harrigan v. Dodge, 200 Mass. 357, 86 NE 780; Elwell v. Hicks, 238 Ill. 170, 87 NE 316.

39. To show consideration even in contradiction of the writing. Campbell v. Preece [Ky.] 118 SW 373.

40. Heron v. Weston, 44 Colo. 379, 100 P 1130.

41. Although weakened by admissions. Miller v. Adams [Iowa] 119 NW 593.

42. Pittock v. Pittock, 15 Idaho, 426, 98 P 719; In re Fisk, 81 Conn. 433, 71 A 559.

43. Havlick v. Davidson, 15 Idaho, 787, 100 P 91.

44. Prestwood v. Carlton [Ala.] 50 S 254.

45. It being settled law of this state that verbal lease for term not exceeding three years, when accompanied by possession, is taken out of the statute of frauds, it follows that duration and terms of a parol lease may be shown by evidence of verbal agreement between the parties. Dominick v. Kane, 4 Ohio N. P. (N. S.) 583.

46. Since title does not pass till delivery, an agreement to deliver f. o. b. cars upon which none of the purchase price has been paid is within the statute. Peacock Mill Co. v. Honeycutt [Wash.] 103 P 1112. A consignor of goods of the value of $50 and

contractus usually governs the application of the statute,[47] and the local construction thereof will be followed by foreign counts.[48] A contract not required to be in writing may be by parol or may be modified orally.[49]

§ 12. *Pleading and proof.*[50]—See 11 C. L. 1619—Since part performance will satisfy the statute, a general allegation of the contract may be good,[51] but, on the other hand, it is held that in order to establish equities under a contract prima facie within the statute facts sufficient[52] to satisfy the statute must be alleged. The statute must usually be pleaded in order to be available as a defense,[53] but failure to allege a writing is not fatal to an affirmative defense which only incidentally raises the question of a contract prima facie within the statute.[54] In some jurisdictions a plea of non assumpsit is sufficient[55] or a general denial, when the statute is the turning point of the case,[56] and, where the invalidity of the agreement appears upon the face of the complaint, demurrer[57] or plea of the general issue[58] may be sufficient to raise the question. Whether failure to allege a writing[59] is demurrable under this rule depends on local practice. The right to raise the objection is a personal privilege[60] and may be waived,[61] but failure to urge the objection after it has been overruled by the court will not be deemed a waiver,[62] nor will a waiver follow from the failure to specify the statute as ground for repudiation of a broker's contract when the principal did not know at the time that the contract was oral.[63] The question having been raised, the burden is on the opposing party to take the contract out of

upward, pursuant to an oral contract of sale void under the statute, retains ownership until delivery to the consignee and is the proper party to sue the carrier in case of loss or damage. Fein v. Weir, 129 App. Div. 299, 114 NYS 426.

47. McFarlane v. Wadhams, 165 F 987. A contract to be performed wholly in one jurisdiction is regulated by the laws of such jurisdiction although made elsewhere. Garnes v. Frazier [Ky.] 118 SW 998.

48. Fruit Disptach Co. v. Gilinsky [Neb.] 122 NW 45. Will be followed by the **federal courts.** Walker v. Hafer [C. C. A.] 170 F 37.

49. John King Co. v. Louisville & N. R. Co. [Ky.] 114 SW 308. Where a written contract is complete on its face, it cannot be varied by parol, but if not within the statute and apparently incomplete, such evidence will be received. Reigart v. Manufacturers' Coal & Coke Co., 217 Mo. 142, 117 SW 61.

50. **Search Note:** See notes in 76 A. S. R. 644; 78 Id. 650; 105 Id. 793; 9 Ann. Cas. 895. See, also, Frauds, Statute of, Cent. Dig. §§ 352-381; Dec. Dig. 145-162; 20 Cyc. 308-322; 29 A. & E. Enc. L. (2ed.) 804, 806, 807; 9 A. & E. Enc. P. & P. 699.

51. Sprague v. Hosie, 155 Mich. 30, 15 Det. Leg. N. 847, 118 NW 497. It need not be alleged that a contract is in writing which the statute of frauds provides shall be written to be valid, as this will be presumed. Smith v. Alexander, 128 Ill. App. 507.

52. To charge the grantee with mortgage on land conveyed. Southern Indiana Loan & Sav. Inst. v. Roberts, 42 Ind. App. 653, 86 NE 490. Vendor's **knowledge of and consent to vendee's acts of possession** must be alleged. Robinson v. Luther, 140 Iowa, 723, 119 NW 146. **Improvements** relied upon must be clearly alleged. Fuelling v. Fuesse [Ind. App.] 87 NE 200. Allegation that plaintiff "commenced to make valuable improvements," too vague. Reynolds v. Craft, 38 Pa. Super. Ct. 46. If **memoranda** are insufficient on their face. Harrigan v. Dodge, 200 Mass. 357, 86 NE 780. Allegation of memoranda, attached to complaint, sufficiently alleges such memoranda. Price v. Stipek [Mont.] 104 P 195. Only necessary to allege that there was an antecedent obligation the cancellation of which was **consideration** for new promise, under § 6010, subd. 3, Rev. St. 1887. McCallum v. McClarren, 15 Idaho, 374, 98 P 200.

53. Nugent v. New York, 58 Misc. 453, 111 NYS 438; Mitchell v. Henderson, 37 Mont. 515, 97 P 942. Under Rev. Laws 1902, c. 173, § 27. Darrow v. Braman, 201 Mass. 469, 88 NE 5. Where statute is not pleaded, the memorandum though insufficient will be treated as the contract. Ruggerio v. Leuchtenburg, 61 Misc. 298, 113 NYS 615.

54. Valley Lumber Co. v. McGilvery [Idaho] 101 P 94.

55. Conflict noted. Howell v. Harvey, 65 W. Va. 310, 64 SE 249.

56. Ross v. Craven [Neb.] 121 NW 451.

57. Harper v. Goldschmidt [Cal.] 104 P 451.

58. Sprague v. Hosie, 155 Mich. 30, 15 Det. Leg. N. 847, 118 NW 497.

59. Not demurrable. Freeman v. Matthews [Ga. App.] 64 SE 716; Hanson v. Svarverud [N. D.] 120 NW 550. Held demurrable. Breckenridge County Fiscal Ct. v. Hardinsburg Board of Trustees [Ky.] 118 SW 298; Southern Indiana Loan & Sav. Inst. v. Roberts, 42 Ind. App. 653, 86 NE 490.

60. Miller v. Smith [Ga. App.] 65 SE 292. Cannot be raised by third parties. Miller v. Wroten, 82 S. C. 97, 63 SE 449.

61. Unless raised below is deemed waived. Miller v. Smith [Ga. App.] 65 SE 292.

62. McKee v. Rudd [Mo.] 121 SW 312.

63. Fletcher v. Underwood, 240 Ill. 554, 88 NE 1030.

the statute.[64] Where equities are asserted under an oral contract, the proof must be clear and conclusive.[65] The admissibility of evidence involves the substantive consideration of the statute[66] and its general effect,[67] both of which have already been considered.

FRAUDULENT CONVEYANCES.

The scope of this topic is noted below.[68]

§ 1. The Fraud and Its Elements, 1932. In General, 1932. Bulk Sales, 1934. Consideration, 1935. Retention of Possession or Apparent Title, 1935. Reservation of Benefits and Resulting Trusts, 1937. Fraudulent Intent and Evidence of Fraud, 1937. Fraud in the Grantee and Notice to Him of the Fraud, 1939. Relationship of the Parties, 1939. Preference to Creditors, 1941.
§ 2. Validity and Effect, 1941.
§ 3. Who May Attack, 1942.
§ 4. Rights and Liabilities of Persons Claiming under a Fraudulent Grantee, 1943.
§ 5. Extent of Grantee's Liability, 1943.
§ 6. Remedies of Creditors, 1943.
§ 7. Crimes, 1946.

§ 1. *The fraud and its elements.*[69] *In general.*[See 11 C. L. 1626]—A fraudulent conveyance is one made with intent to hinder, delay or defraud creditors of the grantor.[70] Conveyances in fraud of an unrecorded mortgage come within this

64. Lord v. Calhoun [Ala.] 50 S 402.

65. Contract must be clearly proved. Crane's Nest Coal & Coke Co. v. Virginia Iron Coal & Coke Co., 108 Va. 862, 62 SE 954. There must be clear and satisfactory proof. Woodell v. Albrecht [Kan.] 104 P 559. Contract must be clear in terms. Crane's Nest Coal & Coke Co. v. Virginia Iron Coal & Coke Co., 108 Va. 862, 62 SE 954. Contract must be definite. Collins v. Harrell, 219 Mo. 279, 118 SW 432; Reed v. Reed, 108 Va. 790, 62 SE 792. Contract must be clear, certain, and definite. Hoover v. Baugh, 108 Va. 695, 62 SE 968. Agreement to give all property except specified bonds on certain consideration **held sufficiently definite.** Reed v. Reed, 108 Va. 790, 62 SE 792. Price and description held sufficiently shown. Lambert v. St. Louis & G. R. Co., 212 Mo. 692, 111 SW 550. Contract to give child "plenty" **held too indefinite.** Collins v. Harrell, 219 Mo. 279, 118 SW 432.

Resulting trust: Evidence must be clear, unequivocal, and beyond reasonable doubt. Geter v. Simmons [Fla.] 49 S 131.

66. See ante, §§ 1-9.

67. See ante, § 11.

68. **Includes** all transfers in fraud of creditor. **Excludes** fraud as between the parties (see Fraud and Undue Influence*), the doctrines of bona fide purchasers and notice and record of title (see Notice and Record of Title*), fraudulent transfers as ground for attachment (see Attachment,* § 3), transfers fraudulent under the Bankruptcy Act (see Bankruptcy,* § 3), the respective rights of partnership and individual creditors (see Partnership,* § 4), rights of stockholders as to fraudulent transfers by the corporation (see Corporations,* §§ 14, 15), the rights of creditors by execution generally (see Executions,* § 8A) and proceedings supplementary thereto (see Supplementary Proceedings;* Creditor's Suit*). Excludes, also, liability of corporation taking over assets of another corporation (see Corporations,* § 13), rights of trustee in bankruptcy (see Bankruptcy,* §§ 10, 11) and of assignees for creditors (see Assignments for Benefit of Creditors,* §§ 7, 9), validity of conditional sales as against creditors of buyer (see Sales,* § 14), transfer by insolvent as constituting a general assignment (see Assignments for Benefit of Creditors,* § 1), fraud upon heirs (see Descent and Distribution,* § 3) and upon marital rights (see Husband and Wife,* §§ 2, 3, 4; Alimony,* § 7).

69. **Search Note:** See notes in 3 C. L. 1540, 1541; 7 Id. 1842, 1844; 9 Id. 1519; 12 L. R. A. 369; 31 Id. 609; 32 Id. 33; 36 Id. 335; 56 Id. 817; 2 L. R. A. (N. S.) 331; 5 Id. 395; 12 Id. 174, 178; 11 A. S. R. 757; 14 Id. 739; 19 Id. 657; 20 Id. 632, 715; 34 Id. 395; 90 Id. 497; 119 Id. 556; 1 Ann. Cas. 1, 557, 561; 3 Id. 274; 4 Id. 973; 5 Id. 370, 800; 6 Id. 973; 8 Id. 457, 1068; 9 Id. 234, 252, 332; 11 Id. 440.

See, also, Fraudulent Conveyances, Cent. Dig. §§ 1-522, 796-908; Dec. Dig. §§ 1-171, 270-302; 20 Cyc. 341-417, 439-654, 750-801; Husband and Wife, Cent. Dig. § 17; Dec. Dig. § 6(3); 21 Cyc. 1154-1156; 14 A. & E. Enc. L. (2ed.) 213, 251, 582; 28 Id. 442.

70. **Conveyances held fraudulent:** Conveyance by **father to son** of all his property without consideration and without knowledge of grantee. Washington Nat. Bank v. Beatty [N. J. Eq.] 72 A 428. Conveyance by father of stock of goods to son on condition that from proceeds he pay debts of father to amount of invoice price, no particular debts being designated. Hall v. Feeney [S. D.] 118 NW 1038. Conveyance by insolvent **son to mother,** of all his property worth $15,000 for purported prior advances of $6,000, made pending suit against son. Riker v. Gwynne, 129 App. Div. 112, 113 NYS 404. Purchase by insolvent husband, and **conveyance taken in name of wife.** Dickenson v. Patton [Va.] 65 SE 529. Insolvent debtor conveying property **to his wife** in payment of debt, amount of which not shown, held to be merely mortgage to secure whatever debt may be proven. Cramer v. Cale,

rule,[71] and so, also, are conveyances in fraud of marital rights[72] or of the grantor's heirs.[73] The conveyance must have been made with intent to defraud[74] or hinder and delay[75] creditors, unless it is voluntary,[76] and must have resulted in prejudice to creditors[77] holding claims at the time of the conveyance,[78] unless made with in-

72 N. J. Eq. 210, 73 A 813. **Assignment by puppet corporation** to company which was using it as shield. Nixon v. Joshua Hendy Mach. Works, 51 Wash. 419, 99 P 11. Conveyance of property of **corporation to new corporation** in exchange for capital stock in latter issue to stockholders of former. J. I. Kelley Co. v. Pollock [Fla.] 49 S 934. Conveyance **of property of corporation, proceeds to be distributed among stockholders,** fraudulent as to creditors of company. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Fake **execution sale** of land to defeat dower right of nonresident wife of owner. McKelvey v. McKelvey [Kan.] 99 P 238. Where one was in possession of property before mortgage was foreclosed and at time of levy of attachment writ, and **chattel mortgage sale** was conducted without giving any notice thereof, property was mortgaged for $2,000, there was due on mortgage $1,600 and was sold to mortgagee company for $1,000, who sold to its president, practically no consideration passing from president to corporation, etc., held sufficient to warrant finding of jury as to fraud in conveyance. McLeroth & Co. v. Magerstadt, 136 Ill. App. 361. **Forfeiture of mining claims** by insolvent claimant for alleged failure to do assessment work, and relocation by stockholder of claimant, who had done such work but asserted that it was not on behalf of claimant. Wailes v. Davies [C. C. A.] 164 F 397. **Chattel mortgage** is void, at least as against creditors without actual notice, where it purports to assign, to secure a specified debt, all the future earnings of a threshing machine therein described and of any other threshing machine operated by mortgagor, and of crew, including men and teams, operating them, which may accrue for threshing during the then ensuing two years within designated township. Dyer v. Schneider, 106 Minn. 271, 118 NW 1011. **Alteration of deacription in deed** so that deed was made to convey a different piece of land than it was originally given for and deed was refiled for registration. Childers v. Pickenpaugh, 219 Mo. 376, 118 SW 453.

Conveyance held not fraudulent: Conveyance by **debtor to wife** in repayment for loan. First Nat. Bank v. Hoard [Iowa] 121 NW 508. **Use of debtor's earnings to support his family,** instead of using wife's property for that purpose, does not render latter liable for his debts. Martin v. Banks [Ark.] 115 SW 928. Joinder by insolvent husband, holding life estate, in **conveyance by wife** holding remainder, wife acting in good faith. National Exch. Bank v. Nims, 131 App. Div. 552, 115 NYS 562. Where husband after transferring incumbered property so as to enable him to redeem it failed to do so, a conveyance **by husband's grantee to former's wife** for fair price was not in fraud of creditors. Montgomery v. Gardner [R. I.] 71 A 67. **Assignment by bank** of its pledged securities to pledgee in settlement of debt secured by such pledge. Merced Bank v. Price, 9 Cal. App. 177, 98 P 383. **Pignorative contract** to secure commissions and advances. Thompson v. Southern Sawmill Co., 123 La. 127, 48 S 769.

71. Conveyance with fraudulent intent void as to mortgage where record ceased to be effective by reason of apparent bar by statute of limitations. Morgan v. Kendrick [Ark.] 121 SW 278.

72. See 11 C. L. 1621. See, also, Husband and Wife, §§ 3, 4; Curtesy; Dower, § 3.

73. See 11 C. L. 1621. See, also, Descent and Distribution, § 3, and § 6, as to husband or wife as heir.

74. Clark v. Lewis, 215 Mo. 173, 114 SW 604.

75. Not necessary that intent be to entirely escape payment. Halfpenny v. Tate, 65 W. Va. 296, 64 SE 28.

76. Commercial Bank v. Vollrath, 135 Mo. App. 63, 115 SW 510; Jones v. Hogan, 135 Mo. App. 347, 116 SW 21. Advances by insolvent father to daughter, without fraudulent intent, void under Ky. St. § 1907; such statute applies to both real and personal property. Patton v. Walker's Trustees [Ky.] 118 SW 312.

77. Fraudulent intent will not invalidate unless creditors were in fact defrauded. Veeder v. Veeder [Iowa] 120 NW 61. Gifts to wives by partners in large and prospereus business who had always paid obligations promptly, while conditions were such that they might reasonably expect continuance of favorable conditions, are not void against subsequent creditors. Eckhart v. Burrell Mfg. Co., 236 Ill. 124, 86 NE 199. **Plaintiff in an action for tort** committed independently of contract may attack a conveyance made to hinder or defeat him, he being "creditor" within meaning of Wilson's Rev. & Ann. St. 1903, § 906. Shelby v. Ziegler [Okl.] 98 P 989. Conveyance in trust to avoid **imaginary claims,** based on forged papers which grantor feared were in existence, but which really did not exist, there being in fact no creditors at all, held valid. Criss v. Criss, 65 W. Va. 683, 64 SE 905. Under Code 1899, c. 74, § 9, a **surety on forfeited bail bond,** against whom execution has issued, is a creditor of one who gave him a bond of indemnity. Carr v. Davis, 64 W. Va. 522, 63 SE 326.

78. Eckhart v. Burrell Mfg. Co., 236 Ill. 134, 86 NE 199; Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 SE 1030. Prior as well as subsequent creditors are protected against fraudulent dispositions, and mortgages by Rev. St. 1899, §§ 3404, 3410 (Ann. St. 1906, p. 1940). Grand Ave. Bank v. St. Louis Union Trust Co., 135 Mo. App. 366, 115 SW 1071.

Conveyances held not fraudulent as to subsequent creditors: Voluntary gift **by husband to wife.** Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 SE 1030. Conveyance by husband to wife held good as against creditor whose claim was not shown to have existed at time of conveyance. Miller v. Smith, 137 Ill. App. 467. If the equity of the wife is first in time, first in right and is first con-

tent to defraud future creditors as well.[79] It is not necessary that the intent should have been to defraud the particular creditor attacking the conveyance,[80] nor is actual insolvency at the time of the conveyance essential to render it fraudulent.[81] The question of fraud must be determined by the status of affairs at the time of the conveyance by the debtor.[82] Money or checks may be fraudulently conveyed.[83] Conveyances of exempt property are not fraudulent,[84] although such exemption must be pleaded,[85] nor is a conveyance by a trustee in execution of the trust.[86] The rights of creditors as against the beneficiary of an insurance policy on the life of the debtor is treated elsewhere.[87] The mere fact that a debtor is aware that his creditor is indebted, even largely, or that judgments have been obtained against him, will not affect the good faith of payments on his own indebtedness to the creditor,[88] unless, at least, such payments are made for the purpose of defeating some right of the creditor's creditors to the particular claim thus paid and of which right the debtor has notice.[89]

Bulk sales.[See 11 C. L. 1822]—The courts of the various states are not in harmony in their holdings upon the constitutionality of the bulk sale laws of their respective states.[90] These statutes render bulk sales of stocks of merchandise presumptively fraudulent,[91] but a bulk sale in violation of statute is voidable only and not absolutely void.[92]

summated by a conveyance vesting her with the legal title, the conveyance will not be set aside at the instance of creditors who have not extended credit upon the faith of the husband's ownership of the land, and under this rule a conveyance to husband and wife made 10 years after judgment in question was rendered and thereafter conveyed through third person to wife and which was originally intended to be conveyed to wife only will not be set aside although so conveyed in order to be free from husband's debts. Harrison v. Longbrake, 134 Ill. App. 338.

Held not existing creditor: One arrested on warrant procured by grantor and bound over but not indicted at time of conveyance, but who subsequently brought action and recovered judgment for malicious prosecution, not an existing creditor. Rosen v. Levy [Tenn.] 113 SW 1042. Evidence held not to show that claimants were creditors at time gifts were made. Eckhart v. Burrell Mfg. Co., 236 Ill. 134, 86 NE 199.

Held existing creditor: Where **surety on appeal bond** prays judgment upon affirmance thereof, he is subrogated to rights of judgment creditor and his claim dates back to the accrual of the original debt sued on. Fortune v. Cassidy, 140 Ill. App. 580. **Obligee in contract** already entered into but upon which no demand has yet accrued. Kennard v. Curran, 239 Ill. 122, 87 NE 913. **One having right of action** for slander is creditor as to whom a conveyance made with intent to defeat his claim is fraudulent. Robertson v. Hefley [Tex. Civ. App.] 118 SW 1159.

79. Allen v. Lyness, 81 Conn. 626, 71 A 936; Gilbert v. Peppers, 65 W. Va. 355, 64 SE 361. Subsequent judgment creditor in order to attack a prior conveyance of debtor must show that conveyance was made with intent to defraud future creditor. Allen v. Lyness, 81 Conn. 626, 71 A 936. Subsequent creditor must prove actual fraudulent intent; and though there were existing creditors who might have set conveyance aside but who were afterwards paid, subsequent creditor cannot be subrogated to their rights. Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 SE 1030. Conveyance held not invalid as to debt contracted ten years after conveyance. Washington Nat. Bank v. Beatty [N. J. Eq.] 72 A 428. Transfer in 1907 held not fraudulent as to obligations incurred in 1909. Edwards v. Sorrell, 150 N. C. 712, 64 SE 898.

80. Scott v. Lumaghi, 236 Ill. 564, 86 NE 384.

81. Conveyance by one largely indebted who shortly thereafter becomes insolvent may be fraudulent. Kennard v. Curran, 239 Ill. 122, 87 NE 913.

82. Conveyance by debtor to third person, who conveyed to debtor's wife. Rathbone v. Maltz, 155 Mich. 306, 15 Det. Leg. N. 1023, 118 NW 991.

83. Exchange Nat. Bank v. Stewart [Ala.] 48 S 487.

84. Barnes v. William Waltke & Co., 135 Mo. App. 488, 116 SW 7; Hughes v. Jackson [Ky.] 121 SW 644. Assignment of proceeds of homestead to wife as consideration for her signing deed thereto. Kershaw v. Willey [Okl.] 98 P 908.

85. See § 6, post.

86. Cannot be attacked by creditors of trustee. Fraser v. Churchman [Ind. App.] 86 NE 1029.

87. See Insurance, § 22.

88, 89. Hubbard v. J. P. Lewis Co., 128 App. Div. 416, 112 NYS 1050.

90. Gen. Laws Conn. §§ 4868, 4869, held **not unconstitutional** as denial of due process of law, nor equal protection of law. Lemieux v. Young, 211 U. S. 489, 53 Law. Ed. 295. Laws 1905, p. 284, held **unconstitutional.** Pogue v. Rowe, 236 Ill. 157, 86 NE 207.

91. Act of March, 1905, P. L. 62. Schmucker v. Lawler, 38 Pa. Super. Ct. 578. Proof that a stock of goods has been sold in violation of the provisions of the Bulk Sales Act of 1905 establishes a prima facie case that sale

Consideration.[See 11 C. L. 1623]—A valuable consideration is ordinarily necessary to sustain a conveyance or transfer of property as against existing creditors,[93] but a voluntary conveyance is not necessarily fraudulent if the grant is free from fraudulent intent and there are no existing creditors.[94] A nominal consideration is the same as no consideration,[95] and inadequacy of consideration may, in connection with other circumstances, show fraud,[96] but mere inadequacy of consideration raises no presumption of fraud.[97] The burden of proving the sufficiency of the consideration is upon the grantee when the grantor was insolvent[98] or where the grantee had actual or constructive notice of the existence of other debts,[99] or where the relation of the parties is such as to cast a suspicion upon the transaction.[1]

Retention of possession or apparent title.[See 11 C. L. 1524]—In some states chattel mortgages and sales of personalty are conclusively presumed to be fraudulent when not accompanied by change of possession,[2] but in other states the presumption of fraud is only prima facie [3] and may be rebutted,[4] or may depend upon lack of notice

is fraudulent and void as to creditors injured thereby, but it is not a conclusive presumption. Baumeister v. Fink, 141 Ill. App. 372.

92. Although statute recites that such sale shall be "void." Dickinson v. Harbison [N. J. Law] 72 A 941.

93. First Nat. Bank v. Thomas [Tex. Civ. App.] 118 SW 221; Childers v. Picksnpaugh, 219 Mo. 376, 118 SW 453.

Sufficiency of consideration: Consideration **need not be cash.** Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Assignment of note by wife, **as security for debt of husband,** not voluntary. Commercial Bank v. Vollrath, 135 Mo. App. 63, 115 SW 510. Conveyance in consideration of **services as attorney to be performed** in defending prosecution of grantor for crime. Zeut v. Gilson, 52 Wash. 319, 100 P 739. **Assumption of incumbrance and payment of debts** of grantor, and agreement to support grantor. Byrd v. Pierce [La.] 50 S 452. Sale of lumber not fraudulent because it stipulates that labor liens shall become part of purchase price. McComb v. Judsonia Sav. Bank [Ark.] 120 SW 844. Trust deed to secure **advances made and to be made,** for purchase of the property covered, is valid. Lawrence Lumber Co. v. Lyon & Co. [Miss.] 47 S 849. Mortgage to cover future advances is valid. State Mut. Building & Loan Ass'n v. Millville Imp. Co. [N. J. Eq.] 70 A 300; Du Bois v. First Nat. Bank, 43 Colo. 400, 96 P 169. Mortgage to secure future advances need not state on its face that such is its purpose, but may be silent as to that feature or it may specify a fixed sum for which the security is given, and advances within that limit are protected. Du Bois v. First Nat. Bank, 43 Colo. 400, 96 P 169. **Issue of corporate stock** to insolvent debtor for money invested in corporation is good consideration. Byrne & Hammer Dry Goods Co. v. Willis Dunn Co. [S. D.] 121 NW 620. **Property furnished by wife to husband** without agreement to repay held insufficient as consideration for subsequent conveyance by him to her. Carr v. Way [Iowa] 119 NW 700. Gift by mother to son on condition that he live on land conveyed, otherwise to reconvey. Obligation sufficient **consideration for reconveyance.** Paris Grocer Co. v. Burks [Tex. Civ. App.] 120 SW 552.

94. Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 SE 1030; Rosen v. Levy [Tenn.] 113 SW 1042; Jones v. Hogan, 135 Mo. App. 347, 116 SW 21.

95. Consideration of $2 for land worth $1,500 is merely nominal, and the conveyance is voluntary. York v. Leverett [Ala.] 48 S 684.

Judicial notice will be taken that a recited consideration of $2 is merely nominal. York v. Leverett [Ala.] 48 S 684.

96. Conveyance for a consideration which was much less than land was worth and made at a time suit by creditor was pending against grantor. Walker v. Montgomery, 143 Ill. App. 216.

97. Finding that property was worth $250 more than consideration paid not equivalent to finding that conveyance was fraudulent. Bunker v. Manchester Real Estate & Mfg. Co. [N. H.] 71 A 866. Fact that **collateral pledged as security** for a loan exceeds the amount of the loan does not render the transaction such a trust as is prohibited by Civ. Code 1895, § 2695, par. 1. Booth v. Atlanta Clearing House Ass'n [Ga.] 63 SE 907. Where there is consideration, no matter how inadequate, conveyance is not presumptively fraudulent. Commercial Bank v. Vollrath, 135 Mo. App. 63, 115 SW 510.

98. Conveyance by insolvent son to his mother of all his property pending suit against him. Burden of showing adequacy of consideration, on defendants. Riker v. Gwynne, 129 App. Div. 112, 113 NYS 404.

99. Montgomery Moore Mfg. Co. v. Leith [Ala.] 50 S 210.

1. See post, this section, subd. Relationship of the Parties.

2. Sale of hogs which had not been delivered held void as against attaching creditor, under § 2775, Wilson's Rev. & Ann. St. Okl. 1903, requiring actual and continued change of possession. Love v. Hill, 21 Okl. 347, 96 P 623. Statute makes sales without change of possession conclusively fraudulent. Comp. Laws, § 2703. Hoffman v. Owens [Nev.] 104 P 241.

3. Sale of personalty, possession thereof remaining in vendor, is, under § 3496, Rev. Laws 1905, presumptively fraudulent and void as against creditors of vendor and subsequent purchasers in good faith. Wilson v. Walrath, 103 Minn. 412, 115 NW 203.

to creditors,[5] or failure to record written evidence of the transfer.[6] The necessity and effect of recording otherwise than as a substitute for transfer of possession is treated elsewhere.[7] Some of the statutes provide that a sale is void unless followed by transfer within reasonable time,[8] and it is held that what is a reasonable time is a question of law.[9] The statutes have no application where actual possession passes,[10] and a transfer of possession subsequently to the arrangement for the sale and pursuant thereto is sufficient.[11] What constitutes a sufficient change of possession in a particular case to take it out of the operation of the statute depends upon the circumstances of such case,[12] as, for example, the nature of the property with reference to its size, bulk etc.,[13] and the question is usually for the jury.[14] When a sale is rescinded, not on the ground of fraud, the transaction must be considered as a resale so far as the original buyer's creditors are concerned.[15] In Louisiana the presumption arising from retention of possession is extended to transfer of realty.[16] Inde-

Where facts are such as to make applicable this provision of the statute, the general principle of law, that where one of two innocent persons must suffer the loss should fall on him whose acts or omissions have made the loss possible, does not apply. Id. A chattel mortgage, given, not accompanied by immediate change of possession, is, under Rev. St. p. 136, pt. 2, c. 7, tit. 2, § 5, presumed fraudulent unless shown by party claiming under it to have been made in good faith. Briggs v. Gelm, 122 App. Div. 102, 106 NYS 693. Under Personal Property Law, Laws 1897, p. 511, c. 417, § 25, this presumption will become conclusive, unless the person claiming the property affirmatively shows that sale was made in good faith and not to defraud creditors. Tuttle v. Hayes, 107 NYS 22.

4. This presumption is rebutted when those claiming under such sale make it appear that the sale was made in good faith and without fraudulent intent. Wilson v. Walrath, 103 Minn. 412, 115 NW 203. Presumption of fraud raised by Rev. St. 1898, § 2310, is overcome by showing payment of actual and adequate consideration, and cancellation of debt may be such payment. Hoeffler v. Carew, 135 Wis. 605, 116 NW 241.

5. Under Code, § 2906, the creditor must acquire a lien on the property before notice. Orr v. Kenworthy [Iowa] 121 NW 539. Verdict and judgment for execution creditor of vendor, on ground that notice of change of ownership of job printing establishment was not sufficient, sustained. Reyer v. Rice, 36 Pa. Super. Ct. 178.

6. By statute in Idaho. In re Hickerson, 162 F 345. Withholding from record pursuant to agreement is evidence of fraud. Id. Failure to record chattel mortgage for a year, and until five days before petition in bankruptcy, held fatal to validity. Id. Under the Statutes of Idaho and Ballinger's Ann. Codes & St. § 4578, requiring such transactions to be recorded as against existing creditors, a sale made prior to creation of indebtedness was held valid. Greenwood v. Corbin, 48 Wash. 357, 93 P 433.

7. See Notice and Record of Title, § 3.

8. Rev. St. 1899, § 2410 (Ann. St. 1906, p. 1940). Tuttle v. Bracey-Howard Const. Co., 136 Mo. App. 309, 117 SW 86.

9. Tuttle v. Bracey-Howard Const. Co., 136 Mo. App. 309, 117 SW 86.

10. Orr v. Kenworthy [Iowa] 121 NW 539.

11. Sufficient where arrangement for sale was made on Sunday and transfer was made on Monday. Orr v. Kenworthy [Iowa] 121 NW 539.

12. Hoffman v. Owens [Nev.] 104 P 241. What constitutes an immediate delivery and actual and continued change of possession of chattels must be determined upon evidence in each case. Rosenberg Bros. & Co. v. Ross, 6 Cal. App. 755, 93 P 284.

Change of possession held sufficient: Where saloon was sold to brother of debtor, and former took charge, employed debtor in and about saloon, and notified creditors and customers of sale. Hoffman v. Owens [Nev.] 104 P 241. Surrender of control of pasture in which horses were held sufficient transfer of possession of horses. Leader v. Farmers' L. & T. Co. [Iowa] 122 NW 833. Growing crops are not in possession of vendor within meaning of statute requiring immediate delivery of possession, hence evidence held to show that vendee took immediate possession as soon as crops severed from land, under Civ. Code, § 3440. Rosenberg Bros. & Co. v. Ross, 6 Cal. App. 755, 93 P 284.

Change of possession held insufficient: Evidence held insufficient to show change of possession. Kastein v. Rothschild, 111 NYS 26. Sale of cattle to owner of adjoining ranch, cattle remaining on ranch of owner, who left and removed therefrom horses and tools used in his business as railroad contractor, held insufficient delivery of possession under Mills' Ann. St. § 2027, requiring such possession to be open, notorious, exclusive and unequivocal. Israel v. Day, 41 Colo. 52, 92 P 698.

13. Transfer might be sufficient where property is bulky, etc., when it would not be sufficient when property is small and susceptible to actual, manual change of possession. Hoffman v. Owens [Nev.] 104 P 241.

14. Whether under the circumstances the change of possession of job printing establishment was all that could reasonably have been expected by the vendees, taking into consideration the character and situation of the property, was for the jury. Reyer v. Rice, 36 Pa. Super. Ct. 178.

15. Tuttle v. Bracey-Howard Const. Co., 136 Mo. App. 309, 117 SW 86.

16. Under Rev. Civ. Code, art. 2480, a sale of realty is prima facie simulated where

pendently of statute retention of possession is generally held to be prima facie evidence of fraud,[17] but not as to creditors who were not deceived thereby.[18] Where the facts are undisputed, the question whether possession was taken within a reasonable time is for the court.[19]

Reservation of benefits and resulting trusts.[See 11 C. L. 1624]—A conveyance with a secret trust in favor of the grantee,[20] or a reservation of the power of disposal of mortgaged chattels and the application of the proceeds thereof by the mortgagor,[21] is fraudulent, but if such trust had ceased to exist before the rights of a creditor attached, the conveyance will be upheld.[22] A reservation of the surplus after paying the debt secured is only prima facie fraudulent.[23] Conveyances on a consideration of future support are generally held to be prima facie fraudulent as to existing creditors,[24] unless the grantor remains solvent after the conveyance,[25] or there was adequate consideration in addition thereto.[26]

Fraudulent intent and evidence of fraud.[See 11 C. L. 1625]—Fraudulent intent may be proved by circumstantial evidence,[27] and in ascertaining such intent a wide range of investigation is permitted.[28] The existence of fraud will not, however, be

seller remains in possession by virtue of a reservation of right of occupancy for life. Radovich v. Jenkins, 123 La. 355, 48 S 988.

17. Where a **sale** of hotel furniture was made on Saturday, possession taken on Monday was too late as against attaching creditor. W. P. Chamberlain Co. v. Tuttle [N. H.] 71 A 865. Conditional sale of flour to baker. Scherl v. Flam, 129 App. Div. 561, 114 NYS 86. **Pledge** of books to secure debt. Retention of possession by debtor as sole agent of pledgee with power to sell and apply proceeds on debt. In re Gebbie & Co., 167 F 609. Pledge of portion of wheat of milling company by issuing certificates in form of warehouse receipts. Fourth St. Nat. Bank v. Millbourne Mills Co.'s Trustee [C. C. A.] 172 F 177.

18. Retention of title by conditional seller good as against creditor aware of the facts. In re Glek Manufacturing & Enterprising Co., 167 F 424.

19. Burke v. Sharp [Ark.] 115 SW 145.

20. Agreement by grantee to recovery on repayment of borrowed money, with permission to grantor's father to cut firewood from land, is secret trust. Bunker v. Manchester Real Estate & Mfg. Co. [N. H.] 71 A 866.

21. Mortgage on stock of merchandise constantly depleted and renewed. Edwards v. Snow Hill Supply Co., 150 N. C. 171, 63 SE 742. Mortgage of stock of goods with permission for mortgagors to continue business and dispose of goods. Gillespie v. McCleskey [Ala.] 49 S 362. Deeds of trust on stocks of merchandise allowing grantor to retain possession and make sales are void per se, although given for purchase money. Gilbert v. Peppers, 65 W. Va. 355, 64 SE 361.

22. Whether trust had terminated by grantee's agreement to retain land in payment of debt is for jury. Bunker v. Manchester Real Estate & Mfg. Co. [N. H.] 71 A 866.

23. While assignment of cause of action in pending suit by debtor to certain of his creditors in which it was agreed that overplus should go to debtor was on its face presumptively fraudulent, such presumption was rebuttable, for under D. C. Code, § 1120 (31 Stat. 1368, c. 854), intent to defraud is made a question of fact and not of law. Merillat v. Hensey, 32 App. D. C. 64. Where honest debt existed, no actual fraud or deceit being shown, fact that insolvent debtor assigned his cause of action in pending suit to certain creditors under agreement that overplus should be paid to him, such assignment could not be set aside at instance of other creditors. Id.

24. Lovejoy v. Chapin, 115 NYS 947; Shelby v. Ziegler [Okl.] 98 P 989.

25. Grantor owing $2,000 held solvent where he received $3,000 as consideration for the conveyance. Snyder v. Snyder, 115 NYS 993.

26. Burnell v. Olmsted [Colo.] 102 P 515; Byrd v. Pierce [La.] 50 S 452.

27. Adams v. Hamilton [Tex. Civ. App.] 116 SW 1169. Notwithstanding the debtor's denial of fraudulent intent. In re Larkin, 168 F 100; Kennard v. Curran, 239 Ill. 122, 87 NE 913.

28. Schock v. Solar Gaslight Co., 222 Pa. 271, 71 A 94; Montgomery Moore Mfg. Co. v. Leeth [Ala.] 50 S 210. To ascertain whether grantee in investing property transferred was controlled by grantor. Adams & Burke Co. v. Cook, 82 Neb. 684, 118 NW 662.

Evidence admissible: Conveyance by husband to wife purporting to be for money loaned. Testimony of wife that since marriage she received $9,000 from an estate held admissible. Morehead v. Allen, 131 Ga. 807, 63 SE 507. Insolvency of grantor three months after execution of deed reciting consideration of $9,000. In re Brigham's Estate [Iowa] 120 NW 1054. Evidence of **other conveyances** to other persons, about same time, admissible to show intent. Also subsequent declarations of grantor that he still owned the property. Homewood People's Bank v. Marshall, 223 Pa. 289, 72 A 627.

Evidence inadmissible: Evidence as to whether purchaser at execution sale was aware of the record of alleged fraudulent conveyance is immaterial. Bunker v. Manchester Real Estate & Mfg. Co. [N. H.] 71 A 866. Evidence that purchase at bankrupt sale was collusive and in trust for bankrupt. Preston v. Newcomb, 149 Mich. 512, 14 Det. Leg. N. 501, 113 NW 29. That grantor had

presumed,[29] and must be proved by a preponderance of evidence,[30] the question usually being for the jury.[31] A fraudulent intent, however, may be inferred from the existence of facts proved,[32] such as that the conveyance was voluntary,[33] or that the grantor was insolvent at the time of the conveyance, or that he made himself insolvent thereby,[34] and the burden of showing that the grantor retained sufficient property to pay his debts is on the grantee, after a prima facie showing of fraud.[35] A subsequent creditor must prove actual fraudulent intent.[36] The burden of proof is upon the party alleging the fraud,[37] except where the transaction is presumptively fraudulent.[38]

killed a man, that he was placed in jail the night before deed was executed, that widow of slain man was living, inadmissible in absence of evidence that such killing occurred before execution of deed. Hinkle v. Smith [Ga.] 55 SE 427. Letters written by grantor's attorney in bankruptcy, offering to compromise claims, and pleadings in judgment creditor's action against grantee, subsequent to assignment, and original schedules in bankruptcy signed a year after assignment. Barr v. Sofranski, 130 App. Div. 783, 115 NYS 533.

29. Beaver v. Ross, 140 Iowa, 154, 118 NW 287; Black v. Epstein, 221 Mo. 286, 120 SW 754; In re Brigham's Estate [Iowa] 120 NW 1054; McCaskey v. Potts, 65 W. Va. 641, 64 SE 908; Hughes v. Jackson [Ky.] 121 SW 644.

30. Halfpenny v. Tate, 65 W. Va. 296, 64 SE 28.

Evidence held sufficient: To show that conveyance was voluntary and with fraudulent intent. Black v. Epstein, 221 Mo. 286, 120 SW 754. **Conveyance pending litigation** and failure to account for proceeds. Childers v. Pickenpaugh, 219 Mo. 376, 118 SW 453; Id., 219 Mo. 455, 118 SW 478. **Conveyance by father to son** of property covered by unrecorded mortgage. Morgan v. Kendrick [Ark.] 121 SW 278. Insolvency of father at time of conveyance to child and intent to evade payment of debts. Proof of solvency for years after conveyance does not prove solvency at time of conveyance. Martin v. Gwynn [Ark.] 117 SW 754. Conveyance of stock of goods **by mortgagor to mortgagee** (his father) in pretended satisfaction of mortgage before it was due, when suit for damages was pending against grantor. Rankin v. Schultz [Iowa] 118 NW 383. **Conveyance to brother** in preference, with payment of balance to debtor. First Nat. Bank v. Fry, 216 Mo. 24, 115 SW 439. **Conveyance to wife** upon alleged payment by husband. Evidence insufficient to show means of payment by wife. Treadway v. Hogg [Ky.] 119 SW 742. **Purchase by one who was aware of suits against grantor** for inadequate consideration which was paid to third person held sufficient to establish participation by grantee. Walker v. Montgomery, 236 Ill. 244, 86 NE 240. **Purchase by debtor,** and title taken in name of corporation to conceal from creditors. Schock v. Solar Gaslight Co., 222 Pa. 271, 71 A 94. **Conveyance by corporation** of its assets to defeat creditors. Scott v. Lumaghi, 236 Ill. 564, 86 NE 384.

Evidence held insufficient: To show participation of grantee in fraud. Motz v. Sheets [Iowa] 122 NW 904. Failure of grantee to remember exactly when or how payments were made not sufficient to discredit his testimony that such payments were made. Broughton's Adm'x v. Barclay [Ky.] 116 SW 320. **Conveyance by husband to wife** in restitution of money furnished by wife. Simonton v. Scott, 123 La. 413, 49 S 4. To show that conveyance of land by husband to wife in compliance with alleged contract was without consideration. Jewell v. Kelley, 155 Mich. 301, 15 Det. Leg. N 1018, 118 NW 987. Conveyance by husband to wife by investment in partnership not shown to be without consideration and not shown to have been with intent to defraud creditors. McCaskey v. Potts, 65 W. Va. 641, 64 SE 908. Evidence insufficient to show that consideration of **conveyance to debtor's** wife was paid by him. Miller v. Ferguson [Va.] 65 SE 564. **Conveyance by third person to daughter of debtor.** Evidence sufficient to prove that consideration was paid by debtor. Howell v. Union Grocery Co. [Ky.] 113 SW 912. **Conveyance by father to children** in alleged fraud of wife's dower right. Lusse v. Lusse [Mo. App.] 120 SW 114. **Assignment of purchase money mortgage** by mortgagee subsequently becoming bankrupt to his wife on alleged consideration of joining in deed. Barr v. Sofranski, 130 App. Div. 783, 115 NYS 533. **Reconveyance** shortly after conveyance held not proved fraudulent, though grantor was insolvent three months after conveyance reciting consideration of $9,000. In re Brigham's Estate [Iowa] 120 NW 1054. **Attachment suit** under which property was sold not shown to be collusive. Cowan, McClung & Co. v. Wilder [Ky.] 119 SW 194. **Forfeiture of contract** for purchase of land held not fraudulent as to creditor of grantee. Johnson v. Sekor, 53 Wash. 205, 101 P 829.

31. Whether sale of job printing establishment was in good faith or colorable was for the jury. Reyer v. Rice, 36 Pa. Super. Ct. 178.

32. Where legal effect of conveyance is to hinder creditors, intent will be presumed, regardless of actual motives. J. I. Kelley Co. v. Pollock [Fla.] 49 S 934.

33. Martin v. Gwynn [Ark.] 117 SW 754.

34. Clark v. Lewis, 215 Mo. 173, 114 SW 604. Return of execution unsatisfied; prima facie proof of insolvency. Adams v. Wingard, 53 Wash. 560, 102 P 426.

35. Adams v. Wingard, 53 Wash. 560, 102 P 426. Burden on grantee to show that grantor had other property sufficient to pay his debts. Carr v. Way [Iowa] 119 NW 700.

36. Washington Nat. Bank v. Beatty [N. J. Eq.] 72 A 428.

37. On judgment creditor to show that conveyance was fraudulent as to creditors.

Fraud in the grantee and notice to him of the fraud.[See 11 C. L. 1627]—The grantee must have notice, either actual or constructive, of the fraud,[39] but where such notice is shown he will not be protected,[40] even though the conveyance was made for a valuable consideration.[41] The burden is upon the party seeking relief to establish notice[42] unless the relationship of the parties is such as to charge the transferee with notice.[43] The doctrine of notice and record of title generally is treated elsewhere.[44]

Relationship of the parties.[See 11 C. L. 1628]—While transfers between near relatives will be carefully scrutinized,[45] the mere existence of the relationship is not sufficient to stamp the transaction with fraud,[46] especially where a consideration is shown,[47] but one will not be allowed to cover up his own transactions by using the

Allen v. Lyness, 81 Conn. 626, 71 A 936. On defendants where purchaser sues for the property. Everitt v. Farmers' & Merchants' Bank, 82 Neb. 191, 117 NW 401, remand modified on rehearing 82 Neb. 191, 118 NW 869. The burden of proof is on one seeking to prove a mortgage fraudulent. Curie v. Wright, 140 Iowa, 651, 119 NW 74.

38. See the other subdivisions of this section.

39. Motz v. Sheets [Iowa] 122 NW 904. Purchaser for value without notice of grantor's intent not chargeable with fraud, though grantor insolvent. Kopperl v. Standard Distilling Co. [Tex. Civ. App.] 119 SW 1169. Mere pendency of suit for damages against grantor, known to grantee, not sufficient to render sale of his property void. Broughton's Adm'x v. Barclay [Ky.] 116 SW 320.

Evidence of insolvency of seller of corporate stock at time of payment to his mother held such as to require remand to be general so as to allow introduction of further evidence. Everitt v. Farmers' & Merchants' Bank, 82 Neb. 191, 118 NW 869.

40. Carr v. Way [Iowa] 119 NW 700. One who, with knowledge of the insolvency of another and his contemplated general assignment for the benefit of creditors, receives from the insolvent a large sum of money and gives due bills therefor, holds the money in trust for the creditors and cannot absolve himself from liability therefor to the creditors by returning the money to the insolvent personally after the assignment has been made, especially where there was no disclosure to the assignee of such restoration. Friedman v. Mitz, 12 Ohio C. C. (N. S.) 41.

Grantee held charged with notice: Difference between price paid by grantee and actual value of land was too great not to arouse suspicion of grantee as to motive prompting the sale and was sufficient notice to put him upon inquiry. Walker v. Montgomery, 143 Ill. App. 216. Son receiving grant from father held to have had notice of prior grant by father. Cawood v. Howard [Ky.] 113 SW 109. Conveyance to son without his knowledge, by father, of all latter's property without consideration, with no change of possession, held to charge grantee with knowledge of facts. Washington Nat. Bank v. Beatty [N. J. Eq.] 72 A 428. Conveyance by library association to city, knowledge of city officers as to judgment against association. Wescott v. Sioux City

41. Montgomery Moore Mfg. Co. v. Leeth [Iowa] 119 NW 749.

[Ala.] 50 S 210. Transfer of property to preferred creditor and payment of balance by creditor to debtor. First Nat. Bank v. Fry, 216 Mo. 24, 115 SW 439. If grantee knew of grantor's intent to defraud creditors and entered into transaction, not only to secure debt due to himself but also to aid grantor in the execution of his purpose, the conveyance is void as to other creditors. Dumas v. Clayton, 32 App. D. C. 566. Where grantee in deed of trust alleged that $3,000 was loaned by him to debtor for which the security was in part given, but it appeared that such sum was not paid over without recall, the conveyance was void. Id.

42. Motz v. Sheets [Iowa] 122 NW 904.

43. In conveyance by husband to wife, husband held to have acted as agent for wife so as to charge her with notice of his fraudulent intent. Miller v. Wroton, 82 S. C. 97, 63 SE 62.

44. See Notice and Record of Title.

45. Davis v. Vandiver & Co. [Ala.] 49 S 318; Jones v. Hogan, 135 Mo. App. 347, 116 SW 21. Conveyance creating preference in favor of wife of grantor. Cramer v. Cale, 72 N. J. Eq. 210, 73 A 813. Conveyance of all his property by insolvent son to his mother. Riker v. Gwynne, 129 App. Div. 112, 113 NYS 404. Conveyance to brother in preference with payment of balance to debtor. First Nat. Bank v. Fry, 216 Mo. 24, 115 SW 439.

46. Miller v. Ferguson [Va.] 65 SE 564; Black v. Epstein, 221 Mo. 286, 120 SW 754.

Conveyances held valid: Conveyance by **husband to wife.** Carr v. Way [Iowa] 119 NW 700. Trust deed by insolvent husband to wife to secure debt due her, no benefit being reserved to grantor. Godfrey Frank & Co. v. Doughty [Miss.] 47 S 643. Conveyance by debtor to wife in repayment of loan. First Nat. Bank v. Hoane [Iowa] 121 NW 508. No presumption of fraudulent intent in voluntary conveyance by husband to wife. Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 SE 1030. Conveyance by **mother to daughter.** Yeiser v. Broadwell, 83 Neb. 302, 119 NW 473.

47. Texas Brew. Co. v. Bisso [Tex. Civ. App.] 109 SW 270. An insolvent husband may expend money in making improvements or payments on a home owned by his wife in lieu of rent. Jones v. Hogan, 135 Mo. App. 347, 116 SW 21.

Evidence: Error under Rev. St. c. 68, § 8, to admit evidence that wife's work for husband in full was taken into consideration in conveyance by husband to her. Miller v. Smith, 137 Ill. App. 467. Evidence held not to justify finding that certain money claimed by creditors of husband was paid to wife pursuant to any definite promise in considera-

name of his relatives,[48] and the absence of consideration is a potent circumstance in this connection.[49] When such conveyances are attacked as fraudulent, however, the weight of authority seems to be that the burden is upon the grantee to show good faith [50] and the payment of a consideration [51] by a preponderance of the evidence,[52] but it is held in some states that the relationship of the parties affects merely the quantum of proof necessary to prove fraud.[53] The mere fact of subsequent acts indicative of ownership by the grantor is not conclusive against the bona fides of the transaction.[54]

The rules as to conveyances between near relations apply to a greater or less extent to conveyances between all persons occupying confidential or intimate relations towards each other.[55]

tion of marriage. Coldren Land Co. v. Royal, 140 Iowa, 381, 118 NW 426. Evidence held sufficient to show consideration passing from wife to husband sufficient to support bill of sale and delivery in good faith. Miller v. Smith, 137 Ill. App. 467.

48. Kennard v. Curran, 141 Ill. App. 621. As against creditors, transactions between husband and wife are viewed with suspicion where there is evidence tending to show that husband was merely using wife's name to cover up his own transactions. Id. A woman cannot hold property in trust for her husband or for his use as against his creditors. Adams & Burke Co. v. Cook [Iowa] 115 NW 478.

Held fraudulent: Conveyance from father to son held fraudulent as against father's prior grantee. Cawood v. Howard [Ky.] 113 SW 109. Conveyance by wife to husband of land for which wife held bond for title on eve of latter's bankruptcy. Fouche v. Shearer, 172 F 592.

49. Gift of $1,000 by judgment debtor to wife when he was in debt and had no other property held disproportionate to circumstances and should be set aside. Coldren Land Co. v. Royal, 140 Iowa, 381, 118 NW 426. Where not shown that relation of debtor and creditor existed between husband and wife, transfer of stock in firm to wife putting her separate property into firm cannot be sustained on ground that husband was indebted to her. Story & Clark Piano Co. v. Kropsch, 231 Ill. 419, 83 NE 190.

Evidence held to tend to show property to have been bought with proceeds given her by husband while he was yet solvent. Texas Brew. Co. v. Bisso [Tex. Civ. App.] 109 SW 270.

50. Carr v. Way [Iowa] 119 NW 700; Adams & Burke Co. v. Cook, 82 Neb. 684, 118 NW 662. Under 1 Ballinger's Ann. Codes & St. § 4580. Corbett v. Sloan, 52 Wash. 1, 99 P 1025.

Rule applied to particular conveyances: Conveyance **by husband to wife.** Kennard v. Curran, 239 Ill. 122, 87 NE 913. Burden on wife to show that property invested for her by husband was not furnished by him. Martin v. Banks [Ark.] 115 SW 928. Where there is evidence that husband merely used wife's name to cover up his own transactions, the burden is upon the wife when claiming title to real estate to establish her ownership by a preponderance of evidence. Kennard v. Curran, 141 Ill. App. 621. Money saved by a wife from money allowed her by her husband for household expenses amounted to a gift from the husband to the wife as against the creditors, and as against them the wife has the burden of showing that the husband was solvent when the gift was made. Zuckerman v. Munz [Tex. Civ. App.] 107 SW 78. Conveyance by husband and wife conveyed **to wife's parents.** Davis v. Vandiver & Co. [Ala.] 49 S 318.

51. Statutes enabling married woman to carry on business and making her earnings separate estate does not relieve her from burden of proving consideration for conveyance from her husband. Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 SE 1030. Wife seeking to sustain conveyance from husband as security for debt has burden of showing amount of debt. Cramer v. Cale, 72 N. J. Eq. 210, 73 A 813.

52. Where expenditure of money by debtor in improving his wife's property is admitted, their uncorroborated oral testimony of repayment by wife is not sufficient. Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 SE 1030. Burden not met by testimony of grantee that conveyance by her husband for love and affection was not collusive, where made at time of conveyance of all his other property and just prior to institution of suit against him. Adams v. Wingard, 53 Wash. 560, 102 P 426.

53. The rule that the burden of proof rests upon the plaintiff, and does not shift to the defendant by reason of presumptions in his favor, applies to an action to subject to a husband's debts property conveyed to his wife; but on account of the relation of husband and wife less evidence is required to raise a presumption in favor of the plaintiff in such an action, and where circumstances do raise a presumption that the property was paid for from the husband's means, the fact that the wife remained silent during the trial when proof that her money was used in the purchase might easily have been produced if in existence, together with inconsistent statements previously made by her, is a sufficient basis for a decree against her. Van Ingen v. Peterson, 12 Ohio C. C. (N. S.) 253.

54. In an attack upon a husband's bill of sale, as against his wife, it is not competent to show that the wife after the conveyance permitted her husband to mortgage the property so transferred, unless her act was such as to work an estoppel against her. Miller v. Smith, 137 Ill. App. 467.

55. Not presumed from assignment by insolvent to attorney to pay for legal services rendered or to be rendered. Yeiser v.

Preference to creditors. See 11 C. L. 1628—In the absence of statutory provisions to the contrary, a debtor may prefer one creditor, though other creditors are thereby defeated in the collection of their claims,[56] so long as the grantee is actuated solely by a desire to secure his claim and does not participate in the fraud,[57] or does not pay a balance to the debtor,[58] and provided that the value of the property is not materially greater than the amount of his debt,[59] and the preference was not made in contemplation of a general assignment for benefit of creditors,[60] but he cannot assign his property to a third person, without consideration, to apply the proceeds to the payment of such of the grantor's debts as the grantee might select.[61] This rule applies to conveyances to relatives,[62] and it is even held that the law looks with favor upon the efforts of an insolvent husband to make restitution to his wife and to secure her honest claims against him.[63] The rule does not, however, apply to preferential transfers by insolvent corporations to their officers to secure pre-existing debts.[64]

§ 2. *Validity and effect.*[65] See 11 C. L. 1629—A conveyance fraudulent as to creditors is valid and binding as between the parties thereto [66] and those in privity to the grantor.[67] This rule, in its application to fraudulent conveyances as distinguished from conveyances that are merely voluntary but not fraudulent,[68] is more properly a rule of nonaction on the part of the courts according to which no affirmative relief will be granted to the grantor,[69] and where the grantee participates in or

Broadwell, 83 Neb. 302, 119 NW 473. Conveyance by husband to one boarding at his house and employed by bankrupt firm of which the grantor's wife was a member, of land for which wife had held bond for title and which had been conveyed to her husband on eve of her bankruptcy, held fraudulent as against her creditors. Fouche v. Shearer, 172 F 592.

56. Fawcett's Assignee v. Mitchell, Finch & Co. [Ky.] 117 SW 956; First Nat. Bank v. Fry, 216 Mo. 24, 115 SW 439; Black v. Epstein, 221 Mo. 286, 120 SW 754; Allen v. Gray, 63 Misc. 219, 115 NYS 928; Zent v. Gilson, 52 Wash. 319, 100 P 739; Merillat v. Hensey, 32 App. D. C. 64.

57. Allen v. Gray, 63 Misc. 219, 115 NYS 928; Griswold v. Szwanek, 82 Neb. 761, 118 NW 1073. When not induced by motives which amount to a fraud. Crane Co. v. Dryer, 9 Cal. App. 290, 98 P 1072. Athough grantee knew of grantor's purpose to defeat other creditors, instruction ignoring this right held erroneous. Stone v. Stitt [Tex. Civ. App.] 121 SW 187. Letter by bank stating that bearer has done business with it and been prompt in meeting obligations, used by bearer in obtaining credit on purchases, does not render fraudulent a mortgage subsequently given to bank on property so purchased. Kelly v. Ryan, 140 Iowa, 580, 118 NW 901.

58. First Nat. Bank v. Fry, 216 Mo. 24, 115 SW 439.

59. If, without fraudulent intent, grantee receives property in excess of amount of his claim, he will be liable to other creditors only for amount of excess. Griswold v. Szwanek, 82 Neb. 761, 118 NW 1073.

60. Lauterbach v. New York Inv. Co., 62 Misc. 561, 117 NYS 152.

61. Hall v. Feeney [S. D.] 118 NW 1038.

62. Husband may give **preference to wife.** Eck v. Haydon, 134 Ill. App. 352. Conveyance by insolvent husband to wife in compliance with contract previously made. Jewell v. Kelley, 155 Mich. 301, 15 Det. Leg. N. 1018, 118 NW 987. Mother may give **preference to daughter.** Burnell v. Olmsted [Colo.] 102 P 515.

63. Simonton v. Scott, 123 La. 413, 49 S 4.

64. Edwards v. Snow Hill Supply Co., 150 N. C. 171, 63 SE 742.

65. Search Note: See notes in 5 C. L. 1567; 13 L. R. (N. S.) 1118; 1 Ann. Cas. 154; 3 Id. 942; 6 Id. 887.

See, also, Fraudulent Conveyances, Cent. Dig. §§ 523-604; Dec. Dig. §§ 172-192; 20 Cyc. 608-645; 14 A. & E. Enc. L. (2ed.) 272, 283, 298, 384.

66. Creamer v. Bivert, 214 Mo. 473, 113 SW 1118; Hubbard v. United Wireless Tel. Co., 62 Misc. 538, 115 NYS 1016. **Sale of goods in bulk** may be good as between the parties, though void as to creditors, under Act March 28, 1905, P. L. 62. Schmucker v. Lawler, 38 Pa. Super. Ct. 578.

67. Robertson v. Hefley [Tex. Civ. App.] 118 SW 1159. **Heirs** at law of grantor stand in no better position than grantor. Sloan v. Macartney, 58 Misc. 75, 108 NYS 840.

68. Evidence held to show that conveyance was made with intent to defraud plaintiff's creditors. Geroso v. De Maio [N. J. Eq.] 72 A 432. Allegation of grantor that he conveyed the property under agreement that as soon as he paid debt due third person it should be reconveyed construed as allegation of conveyance to defraud creditors. Tune v. Beeland, 131 Ga. 528, 62 SE 976.

69. Though conveyance is made with the understanding that it should be merely in trust for grantor. Leland v. Chamberlin [Tex. Civ. App.] 120 SW 1040. Where debtor assigns claim to secured creditor to defeat unsecured creditors, he cannot complain of assignee's refusal to account for proceeds. Monarch v. First Nat. Bank of Greenville [Ky.] 115 SW 186. Grantor cannot have property applied in discharge of his debt to third person subsequently transferred to grantee. Glover v. Newsome [Ga.] 65 SE 64.

is charged with the grantor's fraud, the former acquires no affirmative rights [70] and will not be granted any affirmative relief,[71] but where the grantee did not participate in the fraud, he is entitled to the property as against one who procured a conveyance from him in an alleged attempt to perpetuate the fraud.[72] A trust created to defeat imaginary claims,[73] and that a person conducts his business in the name of another to prevent embarrassment at the hands of his creditors, will not preclude his maintaining a suit to establish his right to the business.[74]

As to creditors, the conveyance is invalid [75] to the extent that they are prejudiced thereby,[76] but a creditor may be estopped to attack it.[77]

§ 3. *Who may attack.*[78]—See 11 C. L. 1630—A fraudulent conveyance may be attacked by creditors who are prejudiced thereby [79] and whose claims are not barred by limitations,[80] or by their assignees,[81] or by the debtor's assignee [82] or receiver,[83] but not by persons who have neither claims against the grantor nor interest in the property conveyed.[84] The parties to the transactions cannot attack it.[85] Creditors of the grantor cannot attack a conveyance by the grantee on the ground that it was in fraud of the latter's creditors.[86]

Grantor, conveying property to wife to defraud credtiors, not entitled to reconveyance on divorce. Lankford v. Lankford [Ky.] 117 SW 962. Where husband fraudulently has property purchased by him conveyed to his wife, he cannot compel conveyance by her to him. Satterly v. Dewick, 129 App. Div. 701, 114 NYS 354.

70. Where grantee has recognized the trust by reconveying, his wife cannot claim dower on the ground that the trust was fraudulent. Johnston v. Jickling [Iowa] 119 NW 746. Deposit of money by husband in wife's name without giving her any control over it. On her death, husband entitled to deposit, although he had fraudulent intent in making deposit. Leimgruber v. Leimgruber [Ind.] 88 NE 593. Where father conveyed to daugher in fraud of creditors, and latter, at former's request, conveyed to third person, who after the father's death conveyed to the latter's brother in trust for decedent's estate, the daughter could not maintain a claim to the property on ground that to allow the estate to receive it would amount to the enforcement of the fraudulent transfers of the benefit of the original grantor, since the rule of nonaction on the part of the courts required the title to remain where it was found. Gould v. Hurley [N. J. Eq.] 73 A 129.

71. Creamer v. Bivert, 214 Mo. 473, 113 SW 1118. Equity will not enforce contract at instance of fraudulent grantee. Gaylord v. Gaylord, 150 N. C. 222, 63 SE 1028.

72. Greason v. Holcomb, 131 App. Div. 868, 116 NYS 336.

73. Trust created to defeat claims based on forged papers which beneficiary feared were in existence but which really did not exist. Criss v. Criss, 65 W. Va. 683, 64 SE 905.

74. Where he had made assignment for benefit of his creditors before starting new business. Lord v. Smith, 109 Md. 42, 71 A 430.

75. Fact that his action is derived from grantor does not prevent him from maintaining action. Hubbard v. United Wireless Tel. Co., 62 Misc. 538, 115 NYS 1016.

76. Execution creditor cannot attack mortgage if value of equity is sufficient to satisfy his judgment. Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754.

77. One who became creditor of husband with knowledge that he had invested money in partnership on behalf of wife. McCaskey v. Potts, 65 W. Va. 641, 64 SE 908.

78. **Search Note:** See notes in 5 C. L. 1568; 67 L. R. A. 590; 1 L. R. A. (N. S.) 1007; 10 Id. 305; 12 Id. 825; 110 A. S. R. 81; 1 Ann. Cas. 66.

See, also, Execution, Cent. Dig. § 765; Fraudulent Conveyanves, Cent. Dig. §§ 624-657; Dec. Dig. §§ 205-225; 20 Cyc. 419-439; Mortgages, Cent. Dig. §§ 772-780; 14 A. & E. Enc. L. (2ed.) 332.

79. See ante, § 1, subd. In General.

80. Creditor whose debt is barred by limitations cannot attack conveyance. Harper v. Raisin Fertilizer Co. [Ala.] 48 S 589.

81. Ewald v. Ortnysky [N. J. Eq.] 71 A 179.

82. Rev. St. 1899, § 365 (Ann. St. 1906, p. 472), gives assignee same rights as to prosecution of suits as trustee in deed of trust or an attachment or execution creditor has. Grand Ave. Bank v. St. Louis Union Trust Co., 135 Mo. App. 366, 115 SW 1071.

83. A receiver may have set aside an assignment of claims made by an insolvent concern to be applied to payment of the indebtedness between such concern and the assignee. Farmers' & Mechanics' Bank v. Strahorn, 49 Wash. 227, 94 P 1090.

84. Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 P 236. One insuring property as that of grantee cannot defend action on policy on ground that he was not owner because conveyance to him was fraudulent. Groce v. Phoenix Ins. Co. [Miss.] 48 S 298. One neither creditor nor subsequent purchaser cannot attack sale on ground that there was no change of possession. Graves v. Davenport, 45 Colo. 270, 100 P 429.

85. See ante, § 2.

86. In re Brigham's Estate [Iowa] 120 NW 1054.

§ 4. *Rights and liabilities of persons claiming under a fraudulent grantee.*[87]—See 11 C. L. 1630—A fraudulent grantee can convey good title to an innocent purchaser,[88] but the burden is upon the latter to prove that he is an innocent purchaser for value,[89] but he cannot be charged with constructive notice merely because he had grounds for reasonable suspicion.[90] The rights of persons claiming under the grantee, in so far as they are dependent upon the rights acquired by the grantee, are treated in another section.[91]

§ 5. *Extent of grantee's liability.*[92]—See 11 C. L. 1630—A bona fide grantee is entitled to repayment of the amount paid by him, as a condition precedent to cancellation of the conveyance,[93] and a preferred creditor in good faith receiving a conveyance of property in excess of his claim, is liable to other creditors only for such excess,[94] but the conveyance will be set aside to the extent of the excess in value of the property over and above the grantee's claim against the grantor.[95] A grantee who acted in good faith is entitled to be subrogated to securities held by creditors whose claims he has paid,[96] and is entitled to be credited with the amount of a lien against the property paid by him after the transfer.[97] Property purchased by the grantee with funds procured by a mortgage on that fraudulently conveyed, may be subjected to the grantor's debts.[98] A grantee after transfer to a third person is not liable to the grantor's creditor in an action of contract for the amount of his claim,[99] nor can an action of tort be maintained against him by one who has sold personalty to the grantor but who has no lien.[1] The grantee cannot be sued for the grantor's debts where he has not assumed them as a part of the consideration.[2]

§ 6. *Remedies of creditors.*[3]—See 11 C. L. 1631—The proper remedy to set aside a fraudulent conveyance is generally by a suit or proceeding in equity,[4] provided the remedy at law is inadequate.[5] A creditor whose judgment constitutes a lien, having an adequate remedy at law,[6] but neglecting to enforce the judgment during the time it was a lien, is not deprived of the right to afterwards maintain a suit to set the

87. Search Note: See Fraudulent Conveyances, Cent. Dig. §§ 605-623; Dec. Dig. §§ 193-204; 20 Cyc. 645-654; 14 A. & E. Enc. L. (2ed.) 283, 460.

88. The grantee, who conveyed to a third person at request of grantor, cannot avoid latter conveyance on ground that minds of his grantor and such person had never met. Gould v. Hurley [N. J. Eq.] 73 A 129.

89. Beinert v. Tivoli & Co., 62 Misc. 616, 116 NYS 4.

90. Under Civ. Code, 1895, §§ 2695, 2696. Hinkle v. Smith [Ga.] 65 SE 427.

91. See ante, § 2, Validity and Effect.

92. Search Note: See Fraudulent Conveyances, Cent. Dig. §§ 523-623; Dec. Dig. §§ 172-204; 20 Cyc. 608-654; 14 A. & E. Enc. L. (2ed.) 310, 481.

93. Rathbone v. Moltz, 155 Mich. 306, 15 Det. Leg. N. 1023, 118 NW 991.

94. Griswold v. Szwanek, 82 Neb. 761, 118 NW 1073. Debtor's receiver cannot recover of assignee amounts actually recovered under it and applied to the existing indebtedness. Farmers' & Mechanics' Bank v. Strahorn, 49 Wash. 227, 94 P 1090.

95. Where city conveyed lot to library association under agreement whereby latter was to build thereon and then to reconvey to former on demand and payment of cost of building, the city, upon such reconveyance, was a purchaser to extent of such cost. Westcott v. Sioux City [Iowa] 119 NW 749.

96. Sale of merchandise in bulk. Adams v. Young, 200 Mass. 588, 86 NE 942.

97. Dickenson v. Patton [Va.] 65 SE 529.

98. Jewell v. Kelley, 155 Mich. 301, 15 Det. Leg. N. 1018, 118 NW 987.

99, 1. Graves v. Horton [Ga.] 65 SE 112.

2. Transfer of stock of goods with agreement that grantee would apply proceeds as far as available to debts of grantor, no particular debts being specified. Hall v. Feeney [S. D.] 118 NW 1038.

3. Search Note: See notes in 21 L. R. A. 623; 47 Id. 433; 15 L. R. A. (N. S.) 484; 7 A. S. R. 587; 1 Ann. Cas. 629; 3 Id. 787; 5 Id. 618.

See, also, Fraudulent Conveyances, Cent. Dig. §§ 658-1003; Dec. Dig. §§ 226-328; 20 Cyc. 656-669, 672-835; 14 A. & E. Enc. L. (2ed.) 310, 481, 485; 2 A. & E. Enc. P. & P. 879.

4. To clear away fraudulent conveyance. Solenberger v. Strickler's Adm'r [Va.] 65 SE 566.

5. Bixler v. Fry [Mich.] 16 Det. Leg. N. 411, 122 NW 119. Where conveyance must first be vacated, creditor has no adequate remedy at law. Whitman v. United Surety Co., 110 Md. 421, 72 A 1042. No objection to bill, that creditor might have action at law for money had and received. Exchange Nat. Bank v. Stewart [Ala.] 48 S 487.

6. Hence suit to set aside conveyance will not lie. After such lien has expired his

conveyance aside.[7] Usually the creditor must first reduce his claim to judgment,[8] and in some states he is also required to have had execution returned unsatisfied,[9] but in still other states the suit may be maintained by a general creditor,[10] and, after jurisdiction is acquired, the court may make provision even for debts not yet due.[11] A creditor cannot in one bill seek to have the sale set aside under one statute, and to have it declared a general assignment under another,[12] and a gift back by the grantor to the grantee of the consideration paid by the latter for the conveyance cannot be recovered in the action to set aside the conveyance,[13] nor can the question whether a conveyance by a divorced husband was made to defeat a judgment for alimony be determined in proceedings against him for contempt in failing to comply with such judgment.[14] The suit may be barred by laches,[15] or the statute of limitations.[16] The general rule is that all persons interested are necessary parties,[17] and that persons not interested are not necessary parties.[18] Under this rule it is held that the grantor is a necesssary party,[19] but it is also held that the grantor is precluded by his own conveyance and hence is not a necessary party, though he is a proper party.[20]

remedy at law is inadequate. Holland v. Grote, 193 N. Y. 262, 86 NE 30.

7. Holland v. Grote, 193 N. Y. 262, 86 NE 30.

8. Beginning of action and levy of attachment against resident debtor insufficient. Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 P 236. Suit to set aside bulk sale. Bixler v. Fry [Mich.] 16 Det. Leg. N. 411, 122 NW 119. Where debtor corporation has transferred or is about to transfer its assets to new corporation to defeat creditors, latter should sue at law and recover damages, and then in equity to prevent dissipation and concealment of property. American Creosote Works v. Lembcke & Co., 165 F 809.

9. Action to set aside sale of goods in bulk. Rubinsky v. Spiro, 60 Misc. 582, 113 NYS 852. **Where judgment is against two defendants** residing in different counties, execution issued to only one county is not sufficient. Lovejoy v. Chapin, 115 NYS 947. Allegation that debtor had no property subject to execution, made on information and belief, not a sufficient **substitute.** Kraemer v. Willams, 131 App. Div. 236, 115 NYS 721. Complaint by attachment creditor, not alleging danger from transfer of attached property, nor any outstanding prior process, does not show an **exception** to general rule. Hart v. Clarke & Co., 194 N. Y. 403, 87 NE 808. A trustee in bankruptcy not required to have execution returned. Riker v. Gwynne, 116 NYS 10.

10. Gilbert v. Peppers, 65 W. Va. 355, 64 SE 361. Exhaustion of assets by execution or otherwise not necessary. Halfpenny v. Tate, 65 W. Va. 296, 64 SE 28.

11. Where one claim is of a nature to give the court jurisdiction, it can also make provision for debts not due and payable. Gilbert v. Peppers, 65 W. Va. 355, 64 SE 361.

12. Green v. Wright [Ala.] 49 S 320.

13. Snyder v. Snyder, 115 NYS 993.

14. Ex parte Kinsolving, 135 Mo. App. 631, 116 SW 1068.

15. Lapse of five years after maturity of debt conveyance to wife jointly with husband instead of husband alone as agreed held to bar action. Stieff Co. v. Ullrich, 110 Md. 629, 73 A 874. Permitting grantee to treat property as his own for 13 years held laches. Montgomery v. Gardner [R. I.] 71 A 67. Record of deed from third person to debtor's children, not constructive notice to his creditor, so as to charge him with laches in delaying suit to subject land on ground that debtor was beneficial owner. Delay of 10 years held not laches. Foote v. Harrison, 137 Wis. 588, 119 NW 291.

16. Where conveyance was recorded and no concealment of it made. Stieff Co. v. Ullrich, 110 Md. 629, 73 A 874. An allegation that execution was issued and returned unsatisfied a few days before filing the complaint is not conclusive as against demurrer that the cause of action on which it was based is not barred. Holland v. Grote, 193 N. Y. 262, 86 NE 30.

Cause of action accrues at time of conveyance regardless of whether grantee goes into adverse possession. If conveyance is recorded creditor cannot rely on lack of actual knowledge. Van Ingen v. Duffin [Ala.] 48 S 507. The statute of limitations does not begin to run against a judgment creditor's action to enforce a judgment against property conveyed by the judgment debtor, with intent to defraud, until the time the action occurs, which is at the time the judgment creditor discovers that such conveyance has been made. Plaintiff could maintain action though ten years had elapsed since entry of judgment, he having brought the action soon after being apprised of the alleged fraudulent conveyance. Foote v. Harrison, 137 Wis. 588, 119 NW 291. Grantee may make **defense that plaintiff's original debt is barred,** and pendency of proceeding to foreclose mortgage securing debt is not evidence that debt is not barred. Harper v. Raisin Fertilizer Co. [Ala.] 48 S 589.

17. Action to set aside assignment of debt evidenced by contract. Person owing the debt, or having in his possession money for its payment, is necessary party. Whitman v. United Surety Co., 110 Md. 421, 72 A 1042.

18. Person who conveyed property to wife of debtor, in fraud of creditors of such debtor, not necessary party to suit to subject it to husband's debt. Kirby v. Steele, 65 W. Va. 719, 64 SE 919.

19. Seller is a necessary party to suit to set aside a bulk sale. Bixler v. Fry [Mich.] 16 Det. Leg. N. 411, 122 NW 119.

20. Westcott v. Sioux City [Iowa] 119 NW 749.

Two or more grantees in different transactions may be joined as defendants.[21] A suit by a creditor in his own name is not premature for failure to give the grantor's administrator time to sue, where it appears that the administrator did not intent to sue.[22] The complaint must allege fraud,[23] and want of consideration,[24] that the transfer complained of has been made,[25] and that the plaintiff has been prejudiced thereby.[26] The complaint must also show that the complainant is a creditor,[27] and when the claim originated,[28] so as to bring the complainant clearly within the class entitled to attack the conveyance.[29] Proceedings to set aside several conveyances of different property, to several persons by several debtors, cannot be joined in one bill,[30] but a bill for a discovery, account, and payment into court of a debt, and for cancellation of an assignment thereof, is not multifarious.[31] An allegation as to the value of the property is proper.[32] When a particular statute is relied upon, facts bringing the case within the statute must be set forth.[33] The defendant must answer fully and specifically all material averments of the bill.[34] Under the general rule applicable to homestead rights, such a right must be specially pleaded in order to be available as a defense,[35] but it is held, on the contrary, that this general rule does not apply to suits to set aside conveyances as fraudulent.[36] The answer may be amended to conform to the proof as to the consideration.[37] The creditor who first

21. Exchange Nat. Bank v. Stewart [Ala.] 48 S 487.

22. Mette v. Mette, 154 Mich. 662, 15 Det. Leg. N. 901, 118 NW 588.

23. Byrne & Hammer Dry Goods Co. v. Willis-Dunn Co. [S. D.] 121 NW 620.

Allegations held sufficient: Averment as to stripping of corporation of its assets to avoid payment of plaintiff's claim against it. Ewald v. Ortnysky [N. J. Eq.] 71 A 179. Allegation of facts and transactions amounting to fraud without specific allegation of fraud. Cooper v. Utah L. & R. Co. [Utah] 102 P 202. Allegation that mortgagor was insolvent, that property was worth $2,500, that mortgage was made with intent to hinder, delay and defraud creditors, and that sums recited therein were fictitious and never paid. Lamar & Rankin v. Jones, 155 Ala. 474, 46 S 763. Allegation of acts from which court may determine fraud, as that debtor corporation, while insolvent, transferred its assets to defendant corporation. Barrie v. United R. Co. [Mo. App.] 119 SW 1020.

Allegations held insufficient: Allegation that sale was made for some consideration unknown to plaintiff, that he believes sale was to hinder or defraud creditors, and not made in good faith and for adequate consideration, insufficient. Lamar & Rankin Drug Co. v. Jones, 155 Ala. 474, 46 S 763.

24. Allegation that conveyance was made to defraud creditors of grantor "and without legal and adequate valuable consideration to said" grantor, held sufficient. Exchange Nat. Bank v. Stewart [Ala.] 48 S 487. Allegation that advances made by father to child were "free of charge as advancements" is sufficient. Patton v. Walter's Trustees [Ky.] 118 SW 312.

25. Allegation that defendant claims to be owner is insufficient. Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 P 236. Complaint which shows that fraudulent intent has not been consummated is insufficient. Holland v. Grote, 193 N. Y. 262, 86 NE 30.

26. Must show hindrance or delay to creditor. Holland v. Grote, 193 N. Y. 262, 86 NE 30. Allegation that defendant did not have sufficient property "after the time" of the transfer, sufficient. Kelley v. Bell [Ind.] 88 NE 58. Allegation may be made **on information and belief.** Kraemer v. Williams, 131 App. Div. 236, 115 NYS 721.

27. Mere showing of commencement of action to recover such alleged debt, insufficient. Lyden v. Spohn-Patrick Co., 155 Cal. 177, 100 P 236.

28. Assignee of several claims must show where each claim originated. Allegation that claims arose between certain dates, insufficient. Ewald v. Ortnysky [N. J. Eq.], 71 A 179.

29. Allegation that claims accrued in 1909 and "during many months preceding," held insufficient to show right to attack conveyance made in 1907. Edwards v. Torrell, 150 N. C. 712, 64 SE 898.

30. Although the judgments were entered in same case. Hobbs Mfg. Co. v. Gooding, 166 F 933.

31. Whitman v. United Surety Co., 110 Md. 421, 72 A 1042.

32. Ewald v. Ortnysky [N. J. Eq.] 71 A 179.

33. Allegation that execution issued to county where grantor "resides" is sufficient. Kelley v. Bell [Ind.] 88 NE 58.

34. Although bill is not for discovery and contains no interrogatories. Manner in which fraud is alleged to have been accomplished was material part of bill. Hageman v. Brown [N. J. Eq.] 73 A 862.

35. General rule applied. Miller v. Wroton, 82 S. C. 97, 63 SE 449.

36. Homestead may be shown under general issue. Childers v. Pickenpaugh, 219 Mo. 455, 118 SW 478.

37. Proof that promise to support, alleged as additional consideration, was not made until after conveyance. Burnell v. Olmsted [Colo.] 102 P 515.

attacks the conveyance obtains a lien and priorities among creditors are determined by the dates of the commencement of their suits.[38] The general rules as to instructions apply.[39] When necessary to protect the interests of plaintiff, a receiver for the property may be appointed.[40] A judgment directing a sale of the land, after setting aside a portion as dower of the grantor's widow, need not order a sale of such portion if the balance does not sell for enough to satisfy the judgment.[41]

In many states the creditor has, in addition to his equitable remedy,[42] the right to levy on the property as though it has not been transferred,[43] or may attack the conveyance in garnishment proceedings,[44] but the purchaser at the execution sale cannot have a prior mortgage set aside without showing that the relief demanded could have been obtained by the judgment creditor in an original suit for that purpose,[45] and such a purchaser may be estopped to deny the rights of other creditors, to the interest represented by the mortgage.[46] A levy on the property constitutes a proceeding to invalidate the sale,[47] and where the creditor files an equitable petition in aid of the issue raised by his execution and a claim filed by a third person, and an issue is thus raised as to a fraudulent transfer of the property levied on, the case becomes essentially a proceeding to subject property fraudulently conveyed and must be dealt with as such.[48] The issue of fraud upon creditors by conveyance of property cannot be raised in insolvency proceedings where the debtor files a true schedule of all his property rights and interests.[49]

§ 7. *Crimes.*[50]—See 11 C. L. 1633—The removal or disposal of property with intent to defraud creditors has been made a criminal offense in some states.[51] The usual rules as to sufficiency of evidence apply.[52]

Freemasons; Friendly Suits; Friend of the Court; Funds and Deposits in Court; Future Estates, see latest topical index.

38. Gilbert v. Peppers, 65 W Va. 355, 64 SE 361.

39. Instruction considered as whole held not to put burden of proof as to good faith on grantee. Adams v. Hamilton [Tex. Civ. App.] 116 SW 1169. An instruction that if the conveyance was not bona fide the grantor's creditors could seize the land to satisfy their claims ignores the distinction between prior and subsequent creditors. Allen v. Lyness, 81 Conn. 626, 71 A 936.

40. Rankin v. Schultz [Iowa] 118 NW 383.

41. Walker v. Shearer's Adm'x [Ky.] 119 SW 240.

42. Remedy by levy of execution, provided by Code, § 3979, being merely cumulative. Rankin v. Schultz [Iowa] 118 NW 383.

43. Execution. Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754; Jones v. Anderson [Ky.] 116 SW 253. Goods sold in bulk in violation of provision of Act of March 28, 1905, P. L. 62, may be seized under an ordinary fi. fa., but there is no remedy against vendee by attachment execution. Schmucker v. Lawler, 38 Pa. Super. Ct. 578.

Attachment: As to fraudulent conveyances as grounds for attachment, see Attachment, § 3.

44. Remedy by attachment and execution provided by Code, § 3979, not exclusive. Worley v. Sheppard [Iowa] 121 NW 567. Action cannot be maintained against wife as garnishee by creditor of husband under Kirby's Dig. Ark. § 379, to recover personal judgment against her or for proceeds of property given her by husband in fraud of creditors which she held when garnisheed but subsequently returned to him. Allen West Com. Co. v. Grumbles, 161 F 461.

See Garnishment, § 3.

45. Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754.

46. By joining with them in suit to set it aside. Kingman Plow Co. v. Knowlton [Iowa] 119 NW 754.

47. Under statute providing that no proceeding at law shall be brought against purchaser at sale in bulk, after 90 days from consummation thereof. Dickinson v. Harbison [N. J. Law] 72 A 941.

48. Stewart v. Mundy, 131 Ga. 586, 62 SE 986 Shoud be submitted to the jury where the evidence does not peremptorily require a direction of a verdict. Id.

49. Where debtor filed schedule pursuant to Revisal 1905, § 1920, et seq., he was entitled to his discharge, and fraud in a previous transaction wherein property paid for by him was conveyed to him and his wife could not, under § 1934, be suggested by the creditor, the creditor's remedy in this regard being by an action by a trustee appointed pursuant to the statute, to which the wife would be a necessary party. Edwards v. Torrell, 150 N. C. 112, 64 SE 898.

50. **Search Note:** See Fraudulent Conveyances, Cent. Dig. §§ 1016-1024; Dec. Dig. §§ 329-331.

51. Steele v. State [Ala.] 48 S 673. Must be an intent to defraud. Ennis v. Tucker [Kan.] 96 P 140. The execution and delivery of a second mortgage before the recording of the first and not mentioning it, with the intent to defraud, does not violate § 2092,

GAMBLING CONTRACTS.

The scope of this topic is noted below.[53]

§ 1. What Constitutes a Wagering Contract, 1947.
§ 2. Rights and Remedies of Parties and Their Privies, 1948.
§ 3. Effect of Illegality on Substituted or Collateral Contracts or Securities, 1948.

§ 1. *What constitutes a wagering contract.*[54]—See 11 C. L. 1633—An agreement for the purchase of a commodity for future delivery,[55] though upon a margin,[56] is not illegal, if the parties, or either of them,[57] contemplated its actual delivery; but if neither party contemplated its delivery, the contract is void, both at common law,[58] and, in some states, by statute.[59] Given the intention to deliver, however, it is not fatal to the validity of the contract that one of the parties is given an option as to the amount to be delivered,[60] or that no delivery is in fact made.[61] Whether,

Gen. St. 1901 of Kansas, relating to the fraudulent conveyance or assurance of lands. State v. Rhodes, 77 Kan. 202, 93 P 610.

52. Evidence held insufficient to sustain conviction for secreting property with intent to defraud creditors. People v. Schmulowitz, 133 App. Div. 697, 118 NYS 183.

53. The crime of gambling and the right to recover money lost thereat is elsewhere treated (see Betting and Gaming,* § 3), as are the rights and liabilities between stockbrokers and their principals (see Brokers,* § 2).

54. Search Note: See notes in 7 C. L. 1859; 11 Id. 1634; 18 L. R. A. 859; 64 Id. 160; 10 A. S. R. 33; 37 Id. 697; 1 Ann. Cas. 48; 2 Id. 302; 3 Id. 882; 5 Id. 686; 6 Id. 450.

See, also, Gaming, Cent Dig. §§ 1-48; Dec. Dig. §§ 1-21; 20 Cyc. 921-940; 14 A. & Enc. L. (2ed.) 576.

55. Western Union Tel. Co. v. Bradford [Tex. Civ. App.] 114 SW 686. Contract for future delivery, made under stock exchange rules which require actual delivery, is valid. Haven v. James, 172 F 250.

56. Richter v. Poe, 109 Md. 20, 71 A 420.

57. Valid where illegal intent not mutual. Berg v. Flickinger, 38 Pa. Super. Ct. 433; Pelouze v. Slaughter, 241 Ill. 215, 89 NE 259.

NOTE. Differentia of valid marginal transactions: "There is a broad and well recognized distinction between a gambling contract and a speculative contract for the purchase and sale of stocks on margin. Such transactions are valid. The true relations which exist between the broker and the customer in such cases, in the absence of some special agreement, where the stock is purchased on margin for speculative account, are these: **The broker undertakes** and agrees: (1) At once to buy for the customer the stocks indicated. (2) To advance all the money required for the purchase beyond the per cent furnished by the customer. (3) To carry or hold the stock for the benefit of the customer so long as the margin agreed upon is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stock is the gain of the customer, and not of the broker. (4) At all times to have, in his name and under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock. (5) To deliver such shares to the customer when required by him, upon the receipt of the advances, commissions, and interest due to the broker; or (6) to sell such shares, upon the order of the customer upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract **the customer undertakes:** (1) To pay the margin agreed upon on the current market value of the stock. (2) To keep good such margin according to the fluctuations of the market. (3) To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount due the broker. Markham v. Jandon, 41 N. Y. 235; Richardson v. Shaw, 209 U. S. 365, 52 Law. Ed. 835."—From Richter v. Poe, 109 Md. 20, 71 A 420, loc. cit. 422.

58. Where contained speculative "put and call" provision under which some settlements had been made without delivery, not provable by broker in bankruptcy. In re Aetna Cotton Mills, 171 F 994. Where stock transaction to be adjusted according to the difference in market values at times of pretended purchase and sale. Ives v. Boyce [Neb.] 123 NW 318; Richter v. Poe, 109 Md. 20, 71 A 420. It must appear that neither party intended an actual purchase and sale but that both contemplated a settlement on difference in price. Pelouze v. Slaughter, 241 Ill. 215, 89 NE 259.

59. Under Shannon's Code, Tennessee, §§ 3159, 3166. Williamson v. Majors [C. C. A.] 169 F 754. Under Civ. Code 1907, vol. 2, § 3338 (Code 1896, § 2163). Birmingham Trust & Sav. Co. v. Curry [Ala.] 49 S 319. Under Ann. Code 1892, § 2117. Gray v. Robinson [Miss.] 48 S 226; Williamson v. Majors [C. C. A.] 169 F 754. Under Criminal Code, §§ 130, 132, marginal option deals in grain are void. Scott v. Baker, 143 Ill. App. 151. Power of legislature plenary. Pelouze v. Slaughter, 241 Ill. 215, 89 NE 259.

60. Agreement to deliver coal for one year at fixed rates, in such quantities, within limits, as the vendee should choose. Standard Distilling & Distributing Co. v. Springfield Coal Mining & Tile Co., 146 Ill. App. 144.

61. Western Union Tel. Co. v. Bradford

in a given case, there was an intention to deliver, must, of course, be determined from all the evidence,[62] and the fact that the memorandum confirming the transaction recites the contemplation of delivery is not controlling.[63] If the transaction is in reality a gambling contract, it will not be redeemed by the legality of its form.[64] An assignment of a life insurance policy to one having no insurable interest in the life is void as a wagering contract.[65]

§ 2. *Rights and remedies of parties and their privies.*[66]—See 11 C. L. 1635—A wagering contract, being void, will not be specifically enforced.[67] At common law a party to a wagering contract could not recover what he lost thereby,[68] but such recovery is now frequently permitted by statute,[69] and such a statute has been construed to permit recovery from the broker though he received only his commission.[70] One who alleges that an agreement is a gambling contract, either as a defense to its enforcement [71] or as a basis for recovery of his losses thereunder,[72] must sustain the burden of proving his allegation; and, of course, one seeking to recover losses by virtue of a statute must bring himself within its terms.[73]

§ 3. *Effect of illegality on substituted or collateral contracts or securities.*[74]—See 11 C. L. 1636—One who loans money with knowledge that the borrower intends to use it in gambling cannot recover it,[75] though a negotiable instrument is taken as an evidence of the debt.[76] The knowledge of the lender is a question for the jury,[77] though, under some statutes, it is, in effect, conclusively presumed when the loan is made during gaming to one actually engaged therein.[78] A transfer of property either as payment [79] or as security [80] for the payment of losses in gambling transac-

[Tex. Civ. App.] 114 SW 686. That a contract for future delivery was closed by being set off against other transactions held not to make it illegal. Haven v. James, 172 F 250.

62. Held to show such intention. Western Union Tel. Co. v. Bradford [Tex. Civ. App.] 114 SW 686. Held not to show such intention. Farmers' Co-Op. Shipping Ass'n v. Adams Grain Co. [Neb.] 122 NW 55. Evidence held insufficient to show that continued dealings of considerable magnitude were intended as gambling transactions. Pelouze v. Slaughter, 241 Ill. 215, 89 NE 259.

63. Gray v. Robinson [Miss.] 48 S 226.

64. Richter v. Poe, 109 Md. 20, 71 A 420.

65. Not enforcible by beneficiary against assignee. Smith v. Agnew [Ky.] 122 SW 231.

66. **Search Note:** See notes in 3 C. L. 1549; 15 L. R. A. 836; 3 L. R. A. (N. S.) 153; 119 A. S. R. 172.

See, also, Gaming, Cent. Dig. §§ 1-48; Dec. Dig. §§ 1-21; 20 Cyc. 921-940; 14 A. & E. Enc. L. (2ed.) 576.

67. Void assignment of life insurance policy not enforcible by beneficiary against assignee. Smith v. Agnew [Ky.] 122 SW 231.

68. Ives v. Boyce [Neb.] 123 NW 318.

69. By Rev. Laws, c. 99, § 4, under which "money had and received" will lie, irrespective of the source of plaintiff's title to the money lost. Welch v. Corey, 201 Mass. 165, 87 NE 477. By Ann. Code Mississippi 1892, § 2116. Losses in bucket shop transactions recoverable prior to 1887 under Gen. St. 1873, c. 58, as amended by Laws 1875, p. 11, § 25, but not under Criminal Code, § 214, in force since 1887. Ives v. Boyce [Neb.] 123 NW 318.

70. Where in a stock transaction it is understood that the settlement is to be on the basis of difference in price, the broker is to be considered a "winner" within Criminal Code, § 132, though he received nothing except his commissions. Pelouze v. Slaughter, 241 Ill. 215, 89 NE 259.

71. Berg v. Flickinger, 38 Pa. Super. Ct. 433.

72. Richter v. Poe, 109 Md. 20, 71 A 420; Pelouze v. Slaughter, 241 Ill. 215, 89 NE 259.

73. Under Rev. Laws, c. 99, § 4, permitting recovery of any payments made, or of the value of anything delivered on account of a false purchase on margin, if the other party has reasonable cause to believe in the falsity, one seeking to recover money placed with broker must show it was in payment of actual losses and not merely a deposit not looking to an actual loss. Welch v. Corey, 201 Mass. 165, 87 NE 477.

74. **Search Note:** See note in 1 A. S. R. 302.

See, also, Gaming, Cent. Dig. §§ 29-48; Dec. Dig. §§ 17-21; 20 Cyc. 934-940; 14 A. & E. Enc. L. (2ed.) 644.

75. Scott v. Baker, 143 Ill. App. 151.

76. Comas Prairie State Bank v. Newman, 15 Idaho, 719, 99 P 833. Certificate of deposit not enforcible by lender against borrower. Burke v. Buck [Nev.] 99 P 1078.

77. Comas Prairie State Bank v. Newman, 15 Idaho, 719, 99 P 833.

78. Under Stat. 9 Anne c. 14, § 1, 4 Bac. Abr. p. 456, which is a part of the common law of the United States, a loan so made is void without proof of knowledge of borrower's purpose. Burke v. Buck [Nev.] 99 P 1078. And the same is true under Ky. St. 1903, § 1955. McDevitt v. Thomas [Ky.] 114 SW 273.

79. Pierce v. Shay, 145 Ill. App. 612; Gray v. Robinson [Miss.] 48 S 226; Birmingham Trust & Sav. Co. v. Curry [Ala.] 49 S 319.

tions is void, even as against a bona fide purchaser for value of a negotiable instrument so transferred,[81] and it is immaterial that such losses constituted only a part of the consideration for the transfer.[82] Furthermore, the transferor may have such security canceled.[83] Where the security so given is a real estate mortgage, the rights of the parties are governed by the law of the situs of the land.[84]

Game and Game Laws; Gaming; Gaming Houses, see latest topical index.

GARNISHMENT.

The scope of this topic is noted below.[85]

§ 1. Definition and Nature of Remedy in General, 1949.
§ 2. Grounds for Garnishment and Choses and Properties Subject, 1950.
§ 3. Persons Liable to Garnishment, 1952.
§ 4. Rights, Defenses, and Liabilities Between Plaintiff and Garnishee, 1952.
§ 5. Rights, Defenses and Liabilities Between Defendant and Garnishee, 1953.
§ 6. Duties of a Garnished Agent to His Principal, 1953.
§ 7. Conflicting and Hostile Claims and Liens, 1953.
§ 8. Jurisdiction and Venue, 1953.
§ 9. Procedure to Obtain Writ; Bond, 1954.
§ 10. The Writ and Service Thereof; Return; Notice to Defendant, 1955.
§ 11. Answer or Disclosure and Later Pleadings or Traverse, 1956.
§ 12. Claims or Interventions, 1956.
§ 13. Dissolution of Writ, 1957.
§ 14. Effect of Other Proceedings; Stay, etc., 1957.
§ 15. Trial, Verdict and Judgments, Costs and Execution, 1958.
§ 16. Appellate Review, 1959.

§ 1. *Definition and nature of remedy in general.*[86] See 11 C. L. 1887—Garnishment had no existence at common law,[87] and is a statutory[88] auxiliary proceeding[89] in the nature of a proceeding in rem.[90] The immediate[91] effect of a garnishment is to give the plaintiff certain peculiar rights in the thing garnished[92] in conformity

80. Pledgee of stock to secure note may not retain it. Menardi v. Wacker [Nev.] 105 P 287.

81. Gray v. Robinson [Miss.] 48 S 226. Under Code 1907, § 3338 (Code 1896, § 2163). Birmingham Trust & Sav. Co. v. Curry [Ala.] 49 S 319.

82. Right of foreclosure denied where part of consideration for the mortgage was the surrender of a note given in payment of a gambling loss. Pierce v. Shay, 145 Ill. App. 612.

83. Mortgage. Williamson v. Majors [C. C. A.] 169 F 754.

84. Williamson v. Majors [C. C. A.] 169 F 754.

85. It includes all ancillary process to attach credits of the defendant, whether known as garnishment, trustee process, factorizing process, or the like. It excludes Attachment,* final process (see Executions*); exemption from process to attach credits (see Exemptions*); writs of sequestration (see Sequestration*), and rights and procedure in equitable garnishment (see Creditors' Suit,* etc.).

86. Search Note: See note in 77 A. S. R. 542.

See, also, Garnishment, Cent. Dig. §§ 1-20; Dec. Dig. §§ 1-12; 20 Cyc. 978-983; 14 A. & E. Enc. L. (2ed.) 731, 739, 741.

87. Fowler v. Dickson [Del.] 74 A 601.

88. Byers v. Illinois Trust & Sav. Bank, 146 Ill. App. 592; Pine Tree Lumber Co. v. Central Stock & Grain Exch., 140 Ill. App. 462. Right of garnishment is purely statutory. Eagleson v. Rubin [Idaho] 100 P 765; Wilson Hardware Co. v. Duff [Tex. Civ. App.] 117 SW 440.

89. Not independent but merely in aid of main action. Bristol v. Brent [Utah] 99 P 1000.

90. St. Louis S. W. R. Co. v. Vanderberg [Ark.] 120 SW 993; Missouri, K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275; United States Fidelity & Guar. Co. v. Hollenshead, 51 Wash. 326, 98 P 749. As to constructive service in proceeding in rem, see Process, § 5.

91. Garnishment takes effect immediately upon service. Cox v. Cronan [Conn.] 72 A 927.

92. Effect of garnishment is to hold money in hands of garnishee so that he cannot safely pay it over to either pending continuance of suit. Cox v. Cronan [Conn.] 72 A 927. Garnishment does not, prior to judgment against garnishee, operate as compulsory assignment, but only to effect a lien. Longley Bros. v. McCann [Ark.] 119 SW 268. A lien within meaning of bankruptcy act is acquired by garnishment. Id. Creates lien in plaintiff's favor on money due from garnishee to defendant. St. Louis S. W. R. Co. v. Vanderberg [Ark.] 120 SW 993. Writ of garnishment gives creditor lien on debt so far as it restrains garnishee from paying it over to original debtor. See Sayles' Ann. Civ. St. 1897, art. 225. Wilson Hardware Co. v. Duff [Tex. Civ. App.] 117 SW 440. Effect in Georgia, under Laws Ga. 1901, p. 55, is to give lien. In re Maher, 169 F 997.

NOTE. Effect and nature of garnishment: Service of a writ of garnishment only gives

with its purpose, which is to seize and hold property pending litigation in the action out of which the writ issues.[93] Where jurisdiction attaches,[94] garnishment statutes will be given a liberal construction.[95] Equitable proceedings may in some cases constitute an equitable garnishment.[96]

§ 2. *Grounds for garnishment and choses and properties subject.*[97] —See 11 C. L. 1637.—The credits usually subject to garnishment include any demand upon which the defendant could maintain debt or indebitatus assumpsit against the garnishee,[98] the defendant's interest in a chose in action,[99] a debt due to a nonresident,[1] a debt due from a nonresident corporation lawfully doing business within the state,[2] trust estate,[3] property of a bankrupt not belonging to the trustee,[4] a bank deposit credited to the defendant,[5] and defendant's property which may come into the garnishee's

the plaintiff, at least before judgment be rendered against the garnishee, a special right, which is in the nature of a lien, to have his claim satisfied out of funds or property in the hands of the garnishee. Martin v. Foreman, 18 Ark. 249; Smith v. Butler, 72 Ark. 350, 80 SW 580; Davis v. Choctaw O. & G. R. Co., 73 Ark. 120, 83 SW 318. "Garnishment," says Judge Drake, "is an effectual attachment of the effects of the defendant in the garnishee's hands, differing in no essential respect from attachment by levy, except that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession, but only such a lien as gives him the right to hold the garnishee personally liable for it or its value, and to restrain the garnishee from paying his debt to the defendant. * * * From the time of the garnishment, the effects in the garnishee's possession are considered as in custodia legis, and the garnishee is bound to keep them in safety." Drake on Attachment (7th ed.), § 453. "By the weight of authority, the service of the garnishment summons places the property in the garnishee's hands substantially in custodia legis, whereby the garnishee acquires special rights as agent of the court, and is entitled to hold the property until the question of his liability is determined, not only against the defendant and those claiming under him, but even against the real owner, who is a stranger to the garnishment suit." Rood on Garnishment, § 194. Longley Bros. v. McCann [Ark.] 119 SW 268. Garnishment is admonition judicially given by attachment defendant's debtor or holder of property, warning him against payment or restoration to defendant and bidding him to hold property or credit subject to order of court. It is process by which garnishee is brought into court, and also by which defendant's credit or property is attached in garnishee's hands. Its service is constructive seizure by notice. It is attachment in hands of a third person. Eagleson v. Rubin [Idaho] 100 P 765.

93. Bristol v. Brent [Utah] 99 P 1000.

94. Court cannot in construing statute disregard jurisdictional defect. Cole v. Utah Sugar Co. [Utah] 99 P 681.

95. Will be construed with view of effecting their purpose. Cole v. Utah Sugar Co. [Utah] 99 P 681.

96. Every equitable proceeding wherein a remedy is devised to apply debt of third person to extinguishment of plaintiff's demand against his debtor is an equitable garnishment. Plummer v. Mavianna School Dist. [Ark.] 118 SW 1011. See Creditors' Suit, and other equitable procedures.

97. **Search Note:** See notes in 5 C. L. 1576; 19 L. R. A. 475; 26 Id. 216; 59 Id. 353, 355, 359; 67 Id. 209; 3 L. R. A. (N. S.) 608; 4 Id. 624; 13 Id. 757; 14 Id. 1121; 16 Id. 1026; 19 A. S. R. 145; 69 Id. 113; 96 Id. 443; 2 Ann. Cas. 349; 3 Id. 803; 7 Id. 755; 9 Id. 440; 11 Id. 910.

See, also, Garnishment, Cent. Dig. §§ 15-132; Dec. Dig. §§ 10-63; 20 Cyc. 982-1031; 14 A. & E. Enc. L. (2ed.) 750, 757.

98. Under Code 1907, § 2940. Planters' Chemical & Oil Co. v. Waller & Co. [Ala.] 49 S 89. Sum in hands of garnishee, due defendant on contract made with him, held to be demand upon which defendant could maintain debt. Planters' Chemical & Oil Co. v. Waller & Co. [Ala.] 49 S 89.

99. Check payable to trustee and defendant, held by trustee and not indorsed to him for collection, held to be chose in action. Musgrove v. Goss [N. H.] 72 A 371. Plaintiff was entitled to secure by trustee process defendant's interest in check when proceeds were distributed by receiver, the trustee's interest and receivership costs being first paid. Id.

1. Under Code 1896, § 325, and Code 1907, § 2940. Planters' Chemical & Oil Co. v. Waller & Co. [Ala.] 49 S 89. Money due nonresident on contract made in state with resident corporation may be garnished in hands of corporation. Id. Balance due on account from resident trustee to nonresident defendant. Cavanaugh Bros. v. Chicago, etc., R. Co. [N. H.] 72 A 694. Under Pub. St. 1901, c. 245, § 19, resident railroad company as trustee is chargeable with moneys, credits, or receipts in its possession when items of debit and credit between two companies can be ascertained by inspection of trustee's books, nor is fact that accounts were wrongful or complex any ground for refusing to charge trustee. Id.

2. Rule in Pennsylvania. Gundry v. Reakirt, 173 F 167.

3. Kutz v. Nolan, 224 Pa. 262, 73 A 555.

4. Hence, fact that debt of plaintiff will be discharged by discharge in bankruptcy did not warrant injunction against such property being made subject to garnishment process. In re Driggs, 171 F 897. But cannot garnishee property of bankrupt belonging to trustee. Id.

5. Bank deposit credited to defendant was subject to garnishment regardless of his indebtedness to bank of its assignees where

hands after service of the writ and before judgment.[6] Credits not subject to garnishment may be enumerated as, effects of the defendant not held by the garnishee,[7] debts settled prior to the time of service,[8] money exempt from garnishment,[9] money which the garnishee has merely agreed to loan the defendant,[10] property [11] or claims assigned by the defendant before the commencement of the action,[12] wages required to be paid in advance [13] or unearned at the date of service,[14] money in which the defendant's interest is contingent and upon which the garnishee has a specific lien,[15] a stockholder's interest in a corporation in the absence of an express statute,[16] funds not belonging to the defendant though subsequently assigned for his benefit,[17] a debt due from the garnishee to the defendant in a representative capacity,[18] money or a debt belonging to the defendant but properly payable only to a third party,[19] and a credit which is not both legally and equitably due to the defendant [20] unless the plaintiff has been induced to part with his property in faith of the surface appearance being the true condition.[21]

Trustee process cannot be grounded upon an action for libel.[22]

no application to such indebtedness has been made or pleaded, it being duty of assignees to make such application and to plead their rights in such respect. Wallace v. Estill County Deposit Bank [Ky.] 116 SW 351.

6. Somerset Coal Co. v. Diamond State Steel Co., 224 Pa. 217, 73 A 442.

7. Garnishment cannot go beyond reaching effects of defendant in garnishee's hands. Wilson Hardware Co. v. Duff [Tex. Civ. App.] 117 SW 440. Money deposited in bank for credit of master in limited amount when master should give check therefor was not subject to garnishment by service upon master when he had not drawn on bank for same. Feore v. Mississippi Transp. Co. [Ala.] 49 S 871.

8. Held that no debt was owing from garnishee to defendant firm where obligation had been settled by note and acceptance with individual member of firm, and garnishee sustained burden of proving that such settlement was in reality with such individual member for and on behalf of firm. Progressive Lumber Co. v. Rogers [Tex. Civ. App.] 120 SW 260. Not garnishee money already, at time of service, paid by garnishee to attorney of defendant. Wilson Hardware Co. v. Duff [Tex. Civ. App.] 117 SW 440.

9. Somerset Coal Co. v. Diamond State Steel Co., 224 Pa. 217, 73 A 442. As to what exempt, see Exemptions.

10. Not subject to garnishment even though at time of service garnishee had procured and had in his possession a draft payable to defendant, since it was not a debt due defendant. Maury v. McDonald [Tex. Civ. App.] 118 SW 812.

11. Evidence held to show property had been assigned in good faith to secure valid indebtedness prior to service of writ. Wheatman v. Kane [Wash.] 104 P 258.

12. Nixon v. Joshua Hendy Mach. Works, 51 Wash. 419, 99 P 11.

13. Where contract for payment in advance was not made in fraud of creditors. Scholz v. Scholz, 135 Mo. App. 71, 115 SW 509. Especially where it appeared that defendant would not work for garnishee unless his wages were paid in advance. Id.

14. Not being property in esse. Humphrey v. Midkiff, 122 La. 939, 48 S 331.

15. As money received by garnishee as indemnity for going on defendant's injunction bond and where the injunction suit is yet pending. Cope v. Shoemate [Mo. App.] 119 SW 503.

16. Since corporation is not debtor to stockholder in amount of stock liability. Gundry v. Reakirt, 173 F 167. Stock held by corporation is not subject to garnishment for stockholder's debt, not being property due stockholder. Fowler v. Dickson [Del.] 74 A 601.

17. Nor does garnishment prevent such assignment. State Bank v. Swinney, 135 Mo. App. 1, 115 SW 494.

18. Must be a debt due defendant in his individual capacity, not as trustee or executor. Peters v. Snavely-Ashton [Iowa] 120 NW 1048.

19. As debt belonging to defendant which garnishee has obligated himself to pay to third party, since service of garnishment writ will not revoke such obligation. Cockins v. Bank of Alma [Neb.] 122 NW 16; Thebideau v. Cairns, 171 F 233. As indebtedness which garnishee has obligated himself to defendant to pay to third party, and which defendant would not have been entitled to recover, especially where, by reason of forfeiture clause in obligation, payment of money to creditor instead of to such third party would have caused garnishees to lose not only their bargain but also $15,000 paid. Maury v. McDonald [Tex. Civ. App.] 118 SW 812. As money deposited with state treasurer under Acts 1903, p. 168, c. 109, § 5, and under § 9, held by him for the benefit of policy holders after forfeiture. Graham v. Sparks [Tex. Civ. App.] 121 SW 597.

20. Since garnisher can acquire no greater rights against garnishee than existed in favor of debtor at time of garnishment. Wheless v. Meyer & Schmid Grocer Co. [Mo. App.] 120 SW 708. Evidence held to show wife of judgment debtor to be real owner. Byers v. Illinois Trust & Sav. Bank, 146 Ill. App. 592.

21. Byers v. Illinois Trust & Sav. Bank, 146 Ill. App. 592.

22. Trustee process cannot issue, in action for libel, the words of the statute (Rev. St. 1903, c. 88, § 1) prohibiting such process in suits for "slander by writing or speaking" comprehending libel. Macurda v. Globe Newspaper Co., 165 F 104.

§ 3. *Persons liable to garnishment.*[23]—See 11 C. L. 1639—Where funds belonging to a defendant are in the hands of an agent of a third party, the agent [24] and his principal [25] may, either or both, be garnished. The purchaser of fully paid up corporation stock is not liable to garnishment for a debt of the corporation.[26] The liability of a municipal corporation to garnishment process is generally governed by statute.[27]

§ 4. *Rights, defenses, and liabilities between plaintiff and garnishee.*[28]—See 11 C. L. 1639—Unless he waive his right of defense,[29] the garnishee may interpose as a defense to any liability to the plaintiff the fact that the debt is not owing to the defendant in his individual capacity,[30] or is exempt,[31] that the defendant has given a sufficient bond [32] releasing him,[33] or that the garnishment proceedings are irregular.[34] He may set off any demand available against the debtor at the time of garnishment,[35] but not an unliquidated claim for damages,[36] a claim based on a payment made to the defendant or any one else after service of the garnishment process,[37] or any claim which is not certain, fixed in amount, and clearly and specifically pleaded.[38] Since final judgment against the garnishee must be predicated upon jurisdiction over the defendant [39] obtained by a sufficient service [40] and upon a prior judgment against

23. Search Note: See notes in 3 C. L. 1552; 5 Id. 1576, 1577; 7 Id. 1864; 19 L. R. A. 577; 28 Id. 600; 36 Id. 561; 37 Id. 207; 47 Id. 345; 55 Id. 353; 5 L. R. A. (N. S.) 1072; 11 Id. 706; 50 A. S. R. 465; 51 Id. 114; 69 Id. 125; 2 Ann. Cas. 921; 3 Id. 180, 1088; 10 Id. 500.

See, also, Garnishment, Cent. Dig. §§ 25-132; Dec. Dig. §§ 14-63; 20 Cyc. 986-994, 996-1024, 1027-1031; 12 A. & E. Enc. L. (2ed.) 808.

24. Agent holding check for funds of defendant may be garnished. Mignona v. Chiaffarelli, 135 Mo. App. 68, 115 SW 508. Agent of claimant may be garnished since rule that possession of principal is possession of agent does not apply where object is to seize and detain the res. Shelton v. Cooksey [Mo. App.] 122 SW 331.

25. Principal may be garnished though money owing to defendant is in hands of his agent, since possession of agent in such case is possession of principal. Mignona v. Chiaffarelli, 135 Mo. App. 68, 115 SW 508.

26. Not liable regardless of what he may have paid original holder for stock. Trotter Bros. v. Blount [Ala.] 50 S 130.

27. Permitted under Laws 1849, p. 157, No. 137, § 25, as amended by Pub. Acts, 1899, p. 414, No. 257, where defendant is officer or employe of municipality which statute is valid. Dunkley v. McCarthy [Mich.] 16 Det. Leg. N. 403, 122 NW 126.

28. Search Note: See notes in 3 C. L. 1552, 1553.

See, also, Garnishment, Cent. Dig. §§ 428-454; Dec. Dig. §§ 227-238; 20 Cyc. 1139-1149; 14 A. & E. Enc. L. (2ed.) 850.

29. Defense that debt was exempt to defendant not waived by failure of garnishee to interpose it in his answer. Barnes v. Waltke & Co., 135 Mo. App. 488, 116 SW 7. As to what exempt, see Exemptions. By answer alleging appeal and praying stay, garnishee was held to have waived defense that judgment debtor under judgment entered in one court is not subject to garnishment by process issuing out of another court. Heaton v. Lee [Iowa] 119 NW 697.

30. As where it is owing to her as trustee or executrix. Peters v. Snavely-Ashton [Iowa] 120 NW 1048.

31. Under Code 1906, § 2346. Illinois Cent. R. Co. v. Badley [Miss.] 49 S 114.

32. Replevin bond given by defendant for $500 held sufficient, though 30 or 40 cents less than double the amount, the principle of de minimis non curat lex applying. Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. [Tex. Civ. App.] 116 SW 154.

33. Replevin bond given by defendant released garnishee. Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. [Tex. Civ. App.] 116 SW 154. Error to render judgment against garnishee who had been released by bond. Id.

34. As failure of plaintiff to comply with statute. Eagleson v. Rubin [Idaho] 100 P 765.

35. Cannot set off judgment against debtor on claim arising after garnishment. Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P 242.

36. Contract offered in evidence held not to show claim for damages had been liquidated. Monroe Grocer Co. v. Perdue & Co., 123 La. 375, 48 S 1002.

37. Wilson Hardware Co. v. Duff [Tex. Civ. App.] 117 SW 440.

38. Monroe Grocer Co. v. Perdue & Co., 123 La. 375, 48 S 1002.

39. Jurisdiction over defendant is indispensible requisite to support judgment against garnishee, since no intendments are to be indulged in favor of jurisdiction of domestic court over resident of sister state. Jackson & Co. v. Republic Iron & Steel Co., 141 Ill. App. 453. Suit may be commenced and jurisdiction of defendant obtained wherever property, rights, or effects of defendant may be garnished. Hurd's Rev. St. 1905, c. 1. Paterson Const. Co. v. First State Bank, 133 Ill. App. 75.

40. But publication notice provided for by Hurd's Rev. St. 1905, c. 11, § 22, was not defective in that it failed to state that attachment was secured through service of garnishment writ. Pine Tree Lumber Co. v. Central Stock & Grain Exch., 238 Ill. 449, 87 NE 539.

the defendant,[41] he may, before judgment is rendered against himself,[42] attack the prior judgment on the ground that it is void.[43] He cannot, however, object to a mere irregularity in such prior judgment which is not prejudicial to him.[44] The garnishee is not ordinarily entitled to notice of a motion to correct an error in the entry of a judgment rendered against the principal defendant.[45]

§ 5. *Rights, defenses and liabilities between defendant and garnishee.*[46]—See 11 C. L. 1641—Judgment may be rendered for the defendant against the garnishee only when the judgment of the plaintiff against the defendant has been satisfied.[47] The garnishee may be liable for his full indebtedness unless he interplead the garnishers.[48]

§ 6. *Duties of a garnished agent to his principal.*[49]—See 8 C. L. 1578

§ 7. *Conflicting and hostile claims and liens.*[50]—See 9 C. L. 1528—The right of the plaintiff to recover from the garnishee is superior to any claim subsequently accruing,[51] but not to a prior assignment [52] or a prior lien of which he has notice.[53]

§ 8. *Jurisdiction and venue.*[54]—See 11 C. L. 1841—The jurisdiction and venue of an action to garnishee a debt is any place where the garnishee may be found [55] and

41. Judgment against defendant in main suit is indispensible prerequisite to rendition of judgment against garnishee. Central of Georgia R. Co. v. Wright, 5 Ga. App. 514, 63 SE 639. Rev. Codes, § 4310c, does not mean that final judgment may be rendered against a garnishee who has failed to answer, prior to rendition of judgment against defendant, but merely that he may be adjudged to be in default of appearing or answering. Eagleson v. Rubin [Idaho] 100 P 765. Cannot be rendered until judgment against defendant in main action. St. Louis, etc., R. Co. v. McDermitt [Ark.] 120 SW 831. Although verdict may properly be found against defaulting jury by same jury as finds against defendant, final judgment cannot be rendered against him until judgment has been rendered against defendant. Pine Tree Lumber Co. v. Central Stock & Grain Exch., 140 Ill. App. 462.

42. He cannot, after judgment against himself in a trial wherein he did not object to original judgment, go behind later judgment by affidavit of illegality and say that court did not have sufficient evidence to authorize its rendition by reason of original judgment introduced without objection being void. Central of Georgia R. Co. v. Wright, 5 Ga. App. 514, 63 SE 639. Cannot neglect to set up invalidity of judgment as a defense and then later by certiorari attack its validity, even though it was inoperative in that it was against minor and no answer was served by guardian ad litem. St. Louis, etc., R. Co. v. McDermitt [Ark.] 120 SW 831.

43. May attack it by objecting to its use as evidence. Central of Georgia R. Co. v. Wright, 5 Ga. App. 514, 63 SE 639. May show **upon trial de novo** in court of appeal that such judgment was obtained by default against unrepresented minor. Johnson v. Murphy [La.] 49 S 1007.

44. Cannot object that judgment against defendant is too large where it is less than amount due from him to defendant. Pine Tree Lumber Co. v. Central Stock & Grain Exch., 238 Ill. 449, 87 NE 539. Can attack judgment against defendant only when it is so defective that garnishee would not be protected thereby for paying money garnished to plaintiff. Id. However, judgment on constructive service after default by defendant is **not irregular** because it exceeds amount stated in affidavit where such excess is interest accruing between filing of affidavit and judgment against garnishee, the affidavit stating the amount due "with interest, damages, and costs." Id.

45. Especially where from his answer it appeared that garnishee was proceeding upon theory that such judgment had been properly entered. Taber v. Wayne Circuit Judge, 156 Mich. 652, 16 Det. Leg. N. 300, 121 NW 481.

46. **Search Note:** See notes in 19 L. R. A. 577; 5 Ann. Cas. 169; 9 Id. 478.

See, also, Garnishment, Cent. Dig. §§ 428-454; Dec. Dig. §§ 227-238; 20 Cyc. 1139-1149; 14 A. & E. Enc. L. (2ed.) 833, 850, 855.

47. Applying Code 1907, § 4327. Johnson v. Scoggins [Ala.] 49 S 785.

48. Neither lower court nor appellate court can protect him unless he interplead garnishers. North State Fire Ins. Co. v. Dillard [Ark.] 115 SW 154.

49. **Search Note:** See Banker and Banking, Dec. Dig. § 33; 5 Cyc. 490; Principal and Agent, Dec. Dig. § 79; 14 A. & E. Enc. L. (2ed.) 855.

50. **Search Note:** See note in 23 L. R. A. 33.

See, also, Garnishment, Cent. Dig. §§ 214-237; Dec. Dig. §§ 105-116; 20 Cyc. 1058-1069; 14 A. & E. Enc. L. (2ed.) 867, 872, 833, 845.

51. Superior to subsequently accruing claim of garnishee against debtor. Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P 242.

52. Wilson Hardware Co. v. Duff [Tex. Civ. App.] 117 SW 440. Does not give lien on money already paid by garnishee to attorney of defendant Id.

53. Gardner v. Planters' Nat. Bank [Tex. Civ. App.] 118 SW 1146.

54. **Search Note:** See notes in 7 C. L. 1868; 42 L. R. A. 455; 3 Ann. Cas. 660.

See, also, Garnishment, Cent. Dig. §§ 137-149; Dec. Dig. §§ 66-84; 20 Cyc. 1032-1039; 9 A. & E. Enc. P. & P. 803.

55. Venue is in state of which trustee is

is legally served,[56] but in the case of garnishment of tangible effects it may depend also upon the situs of such effects.[57] Jurisdiction is not affected by a nonjurisdictional error even though it constitute an abuse of the garnishment process.[58] The venue of garnishment proceedings after judgment is in the court out of which execution issues.[59]

§ 9. *Procedure to obtain writ; bond.*[60]—See 11 C. L. 1641.—A demand prior to

resident though debt is payable in another jurisdiction. Cavanaugh Bros. v. Chicago, etc., R. Co. [N. H.] 72 A 694.

56. Shuttleworth & Co. v. Marx & Co. [Ala.] 49 S 83; Bristol v. Brent [Utah] 103 P 1076. As to what constitutes sufficient service, see post, § 10. Venue is wherever garnishee may be served if thing garnished is chose in action. Wiener v. American Ins. Co., 224 Pa. 292, 73 A 443. Situs of debt for purpose of garnishment is wherever garnishee may be served. St. Louis S. W. R. Co. v. Vanderberg [Ark.] 120 SW 993. Railroad operating in two states could be served in either. Id. Situs of debt for purpose of garnishment is where debtor is found and served, and does not depend on character of garnishee or extent of his stay. Missouri K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275.

NOTE. Jurisdiction and venue: "We do not see how the question of jurisdiction vel non can properly be made to depend upon the so-called situs of the debt or upon the character of the stay of the garnishee whether temporary or permanent, in the state where the attachment is issued. Blackstone v. Miller, 188 U. S. 189, 47 Law. Ed. 439. If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the situs of the debt was originally. We do not see the materiality of the expression 'situs of the debt,' when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be inferred at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign state, when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defense in such suit for the debtor to plead that he was only in the foreign state casually or temporarily. His obligation to pay would be the same, whether he was there in that way or with an intention to remain. It is nothing but the obligation to pay which is garnisheed or attached. This obligation can be enforced by the courts of the foreign state after personal service of process therein, just as well as by the courts of the domicile of the debtor. * * * We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that state and its law permitted the attachment. There can be no doubt that Balk, as a citizen of the state of North Carolina, had the right to sue Harris in Maryland to recover the debt which Harris owed him. Being a citizen of North Carolina, he was entitled to all the privileges and immunities of citizens of the several states, one of which is the right to institute actions in the courts of another state. * * * The case (having reference to the Sturm Case, 19 S. Ct. 797) recognizes the right of the creditor to sue in the state where the debtor may be found, even if but temporarily there, and upon that right is built the further right of the creditor to attach the debt owing by the garnishee to his creditor. The importance of the fact of the right of the original creditor to sue his debtor in a foreign state, as affecting the right of the creditor of that creditor to sue the debtor or garnishee, lies in the nature of the attachment proceeding. The plaintiff, in such proceeding in the foreign state, is able to sue out the attachment and attach the debt from the garnishee to his (the garnishee's) creditor, because of the fact that the plaintiff is really in such proceeding a representative of the creditor of the garnishee, and therefore, if such creditor himself had the right to commence suit to recover the debt in the foreign state, his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the state where the attachment was sued out permits it."—Quoted from Harris v. Balk, 198 U. S. 215, 49 Law. Ed. 1023, in Shuttleworth & Co. v. Marx & Co. [Ala.] 49 S 83.

57. Court cannot garnishee tangible assets not within its jurisdiction. Wiener v. American Ins. Co., 224 Pa. 292, 73 A 443.

One indebted to nonresident cannot place money on deposit in bank, in defiance of his creditor's wishes, for purpose of conferring jurisdiction in garnishment upon court where the bank is located. Saxony Mills v. Wagner & Co. [Miss.] 47 S 899.

58. Malicious abuse or illegal use of legal process is not such proceeding in excess of jurisdiction as to warrant issuance of writ of prohibition against garnishment. Presbyterian Church Home Missions v. Maughan [Utah] 101 P 581. Not affected by use of proceedings to gain information for use in another action, though appeal gives no redress. Id. Not affected by fact that proceedings were instituted collusively. Id. Not affected by such error though it be not reviewable. Id.

59. Hence change of venue was improper in justice court. State v. Hughes, 135 Mo. App. 131, 115 SW 1069.

60. Search Note: See Garnishment, Cent. Dig, §§ 133-169, 454-469; Dec. Dig. §§ 64-89, 239-247; 20 Cyc. 1032-1044, 1150, 1151; 9 A. & E. Enc. P. & P. 813.

garnishment is not essential in the case of a nonresident defendant.[61] Although the affidavit should conform to the statutory requirements,[62] uncertainty as to amount may be aided by the allegations of the petition.[63]

Bond. See 11 C. L. 1642

§ 10. *The writ and service thereof; return; notice to defendant.*[64] See 11 C. L. 1642—Garnishment of debts or credits may be had with different effect as a mere adjunct to an attachment[65] with service of notice and a copy of the attachment process upon the person owing the debt,[66] or as a separate auxiliary proceeding by the issuance and service of a writ in garnishment.[67] The writ or notice to the garnishee must comply with the statute in form and substance,[68] identify the main action,[69] be properly addressed to the garnishee,[70] not issue[71] until after the affidavit has been filed,[72] and be properly served[73] as provided by statute.[74] Such service is usually the same as in the case of a summons.[75] While a garnishee can waive such defects in the service as affect him personally,[76] he cannot waive jurisdictional defects[77] affecting the rights of the defendant.[78] The giving of a release bond does not waive a jurisdictional defect as to a trustee process.[79] The defendant may waive, so far as it affects his rights, the service of notice upon the garnishee.[80] It is es-

61. The provisions of garnishee statute in reference to demand (see Rev. St., c. 32, § 11) having no application in such case. Jackson & Co. v. Republic Iron & Steel Co., 141 Ill. App. 453.

62. Rev. St. 1895, art. 219, requires that if garnishee is corporation, copartnership, or joint stock company, affidavit shall so state, but does not require such statement in respect to defendant, even though he take place of defendant by means of replevy bond. Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. [Tex. Civ. App.] 116 SW 154.

63. Affidavit held sufficient which stated certain amount due with interest but gave no interest, where interest at statutory rate could be determined by aid of petition showing time from which interest should run. Modern Dairy & Creamery Co. v. Blanke & Hauk Supply Co. [Tex. Civ. App.] 116 SW 154.

64. Search Note: See Garnishment, Cent. Dig. §§ 170-213; Dec. Dig. §§ 90-140; 20 Cyc. 1044-1057; 14 A. & E. Enc. L. (2ed.) 753; 9 A. & E. Enc. P. & P. 821.

65. Effect is merely to prevent person who owes debt or is in possession of property from disposing of it or from surrendering possession thereof. Bristol v. Brent [Utah] 103 P 1076.

66. Under Comp. Laws 1907, § 3073, subd. 6. Bristol v. Brent [Utah] 103 P 1076.

67. Under Comp. Laws, 1907, § 3090, subd. 6. Bristol v. Brent [Utah] 103 P 1076. Effect is to require garnishee to answer and to place debt in custody of law. Id.

68. Copy of execution was not sufficient as writ under provisions of Comp. Laws 1907, § 3112, relating to garnishment after judgment. Cole v. Utah Sugar Co. [Utah] 99 P 681.

69. Notice issued under fi. fa. bearing different title and number from main action and containing recital "by virtue of a writ of fi. fa. to me directed in the above entitled suit" was ineffective. Bank of Monroe v. Ouachita Val. Bank [La.] 50 S 718.

70. Citation addressed to officer without giving name of corporation was not effective against corporation though served upon such officer. Bank of Monroe v. Ouachita Val. Bank [La.] 50 S 718.

71. Writ which was mailed to officer held not issued until it was received by officer. Webster Mfg. Co. v. Penrod, 103 Minn. 69, 114 NW 257.

72. Webster Mfg. Co. v. Penrod, 103 Minn. 69, 114 NW 257.

73. Service on party as "manager" without designating of what he was manager would not be sufficient to bind as garnishee the company of which he was manager. Cole v. Utah Sugar Co. [Utah] 99 P 681.

74. Must serve those officers of corporation garnishee which statute provides. Fowler v. Dickson [Del.] 74 A 601.

75. Same under provisions of Comp. Laws 1907, § 3093. Bristol v. Brent [Utah] 103 P 1076. As to service of summons, see Process, § 4, et seq.

76. Waived by voluntary appearance. Bristol v. Brent [Utah] 103 P 1076. May waive by appearance. Cole v. Utah Sugar Co. [Utah] 99 P 681. Held waived by garnishee's appearance and motion for relief from his default. Jordan v. Jordan [Minn.] 123 NW 825. By his appearance garnishee was estopped from reclaiming money paid in, after judgment had been obtained and such money applied on it. Bristol v. Brent [Utah] 103 P 1076. By appearance he waived right to object that person served as his agent was not proper person for service. Id.

77. Failure to serve any writ was jurisdictional. Cole v. Utah Sugar Co. [Utah] 99 P 681.

78. Cannot waive defects affecting debt Bristol v. Brent [Utah] 103 P 1076. By voluntarily appearing without proper service, he did not waive right to reclaim, after appearance and before judgment, money paid in. Id.

79. As where process issued in suit for libel. Macurda v. Globe Newspaper Co., 165 F 104.

80. Waived by stipulation reciting that attachment was levied and providing for re-

sential that the return show, originally or as amended,[81] due service upon the garnishee,[82] and that it be indorsed on or annexed to the writ.[83]

§ 11. *Answer or disclosure and later pleadings or traverse.*[84]—See 11 C. L. 1642— An answer is necessitated by the service upon the garnishee of a writ,[85] but not usually by the service of a copy of the attachment order and a notice.[86] The court may extend the time for answering as in other cases.[87] Answer after judgment must be made to the court whence execution issues.[88] The answer should make a complete disclosure [89] showing the indebtedness up to the return day of the writ,[90] and should state any facts relied on as a defense.[91] The garnishee is estopped by his answer from objecting to a judgment entered in accordance therewith.[92] It is the plaintiff's duty to except to an insufficient answer, for if the exception be sustained the garnishee has a right to amend.[93] The defendant cannot object to the answer as admitting an indebtedness too low where the amount admitted is sufficient to meet the amount claimed by the plaintiff,[94] although under certain conditions the defendants,[95] and also a claimant,[96] may contest such answer. Unless required by statute, the traverse need not be verified nor need the garnishee be given notice of the filing thereof.[97]

§ 12. *Claims or interventions.*[98]—See 9 C. L. 1528—A claimant cannot secure the dissolution of a garnishment when he is not a party to the proceedings,[99] or after it has gone to final judgment.[1] Where the garnishee has answered acknowledging his indebtedness to the defendant, the burden is upon the intervenor to establish his claim,[2] and it is essential that he file a traverse.[3] Although notice to a claimant is

lease of part of money garnished. Goldfield Mohawk Min. Co. v. Frances-Mohawk Mining & Leasing Co. [Nev.] 102 P 963.

81. Failure to show delivery of copy is defect which may be amended, especially where there are no intervening rights to be affected. Bristol v. Brent [Utah] 103 P 1076.

82. Otherwise proceedings are void. Bristol v. Brent [Utah] 103 P 1076. Essential since there is no presumption of proper service. Id.

83. Bristol v. Brent [Utah] 103 P 1076.

84. **Search Note:** See Garnishment, Cent. Dig. §§ 238-379; Dec. Dig. §§ 117-191; 20 Cyc. 1070-1125; 14 A. & E. Enc. L. (2ed.) 845, 850; 9 A. & E. Enc. P. & P. 829.

85. Required when writ served as required by Laws 1907, §§ 3090, 3093. Bristol v. Brent [Utah] 103 P 1076.

86. Not required when served with copy of attachment and notice as provided by Laws 1907, § 3073. Bristol v. Brent [Utah] 103 P 1076.

87. May extend time before default is entered or for good cause may open default and permit answer. Eagleson v. Rubin [Idaho] 100 P 765.

88. State v. Hughes, 135 Mo. App. 131, 115 SW 1069.

89. Disclosure of trustee, resident railroad company, held incomplete which failed to clearly show whether its traffic balances were so commingled with those of nonresident defendant that they could not be separated. Cavanaugh Bros. v. Chicago, etc., R. Co. [N. H.] 72 A 694.

90. Answer prematurely returned and not showing indebtedness to return day was insufficient if objected to. Davis v. West Texas Bank & Trust Co. [Tex. Civ. App.] 116 SW 393.

91. Answer which demanded investigation, but did not state facts showing alleged invalidity of judgment and execution, was insufficient to protect garnished trustee from liability to owners of trust estate. Kutz v. Nolan, 224 Pa. 262, 73 A 555.

92. Cannot object though his liability to defendant arose from a tort, the damages of which have been litigated. Atlanta & W. P. R. Co. v. Farmers' Exch. [Ga. App.] 65 SE 165.

93. Davis v. West Texas Bank & Trust Co. [Tex. Civ. App.] 116 SW 393.

94. Combs v. Combs [Ky.] 114 SW 334.

95. By statute. Johnson v. Scoggins [Ala.] 49 S 785.

96. See post, § 12.

97. Not required by statute. Pine Tree Lumber Co. v. Central Stock & Grain Exch., 140 Ill. App. 462.

98. **Search Note:** See Garnishment, Cent. Dig. §§ 393-422; Dec. Dig. §§ 200-226; 20 Cyc. 1130-1139; 14 A. & E. Enc. L. (2ed.) 867, 872, 875; 9 A. & E. Enc. P. & P. 838.

99. Garnishment based on an attachment cannot be quashed on motion of claimant not a party to proceedings, his remedy being to move to quash levy if for any reason attachment is defective. Rossiter, MacGovern & Co. v. Carrollton Elec. L. Co., 5 Ga. App. 393, 63 SE 233.

1. Since there is then no garnishment to be dissolved. Booth v. Brooke & Co. [Ga. App.] 64 SE 1103. Since judgment against garnishee is conclusive of every defense which actually was, or might have been, made. Id.

2. Brunke v. Gruben [Neb.] 122 NW 37.

3. Where the garnishee has answered admitting indebtedness to the defendant, the claimant cannot obtain a judgment in his

not essential to the validity of a judgment against the garnishee,[4] a garnishee failing to comply with his duty to give notice [5] to a third party, known to him to be the owner of the property garnished,[6] will be liable, to such party for money paid out under the garnishment,[7] and, in some cases, for interest thereon.[8]

A separate action by a claimant against the garnishee will be stayed pending the determination of garnishment proceeding for the same debt.[9] A voluntary payment into court by a garnishee upon whom no writ has been served is not available as a defense in such action.[10]

§ 13. *Dissolution of writ.*[11]—See 11 C. L. 1643—Garnishment proceedings based on a judgment will not be dissolved because of any irregularity in the fi. fa.[12] The defendant may secure a discharge of the writ by giving a bond.[13] A discharge of the garnishment proceedings discharges the garnishment lien,[14] and where constructive service is had on the defendant it terminates the main action.[15]

§ 14. *Effect of other proceedings; stay, etc.*[16]—See 11 C. L. 1643—The garnishment proceeding should be stayed pending the determination of whether the debt is exempt to the defendant,[17] and also until the validity of an offset, apparently claimed in good faith, is determined in the proper action.[18] The effect of taking judgment in the main action and of issuing execution thereon is to waive further proceedings under trustee process.[19] A garnishment lien will be dissolved by an adjudication in bankruptcy of the defendant.[20]

favor without filing a traverse. Under Civ. Code 1895, § 4720. Booth v. Brooke & Co. [Ga. App.] 64 SE 1103.

4. Ann. St. 1906, p. 1985, providing therefor, being directory only, notice is not essential, especially when not requested by either party. Shelton v. Cooksey [Mo. App.] 122 SW 331.

5. Notice to third party claimant should be given as required by St. 1898, § 3723b. Holman v. Lueck, 137 Wis. 375, 119 NW 124.

6. Garnishee held to have knowledge where depositions filed disclosed claim of third party. Holman v. Lueck, 137 Wis. 375, 119 NW 124.

7. Payment to garnisher held no defense by garnishee in suit against him by claimant. Holman v. Lueck, 137 Wis. 375, 119 NW 124.

8. Liable for interest to claimant when he knew that debt was not property of defendant at time of service of factoring process but had been assigned to claimant prior thereto. Cox v. Cronan [Conn.] 72 A 927. Liable for interest where he retains money not as stakeholder pending litigation but that he may litigate for his own benefit, the title of owner to it, nor in such case is he entitled to any presumption that he did not use money for his own benefit. Id. Liable for interest where he mingled money garnished with his own and made use of it. Id. Liable for interest where he refuses to pay over money to claimant not through any doubt as to the factoring process proceedings but through doubt as to validity of assignment of debt to claimant. Id. Garnishee is **not liable** for interest where garnishment actually attaches, where he is not under contract to pay interest, makes no use of money pending litigation, and holds it in absolute good faith. Id.

9. Only conditional judgment may be rendered in separate action. Shull v. Missouri Pac. R. Co., 221 Mo. 140, 119 SW 1086.

10. Cole v. Utah Sugar Co. [Utah] 99 P 681.

11. **Search Note:** See note in 6 Ann. Cas. 752.

See, also, Garnishment, Cent. Dig. §§ 380-392; Dec. Dig. §§ 192-199; 20 Cyc. 1125-1129; 14 A. & E. Enc. L. (2ed.) 889.

12. When garnishment is issued upon judgment under Civ. Code 1895, § 4705, defect in execution in not being backed will not affect validity of garnishment. Atlanta & W. P. R. Co. v. Farmers' Exch. [Ga. App.] 65 SE 165.

13. Under Comp. Laws, §§ 227, 3234. Goldfield Mohawk Min. Co. v. Frances-Mohawk Mining & Leasing Co. [Nev.] 102 P 963.

14. Bristol v. Brent [Utah] 99 P 1000.

15. Bristol v. Brent [Utah] 99 P 1000. Court refused to terminate main action for want of jurisdiction prior to determining whether garnishment should be dissolved on account of claim of third party to property garnished. Rossiter, MacGovern & Co. v. Carrolton Elec. L. Co., 5 Ga. App. 393, 63 SE 233. But where defendant is personally served or appears, judgment in main action is not dependent on garnishment. Bristol v. Brent [Utah] 99 P 1000.

16. **Search Note:** See Appeal and Error, Cent. Dig. §§ 2206, 2275; Dec. Dig. §§ 446, 487; Garnishment, Cent. Dig. § 251; Dec. Dig. § 126; 20 Cyc. 1075; 14 A. & E. Enc. L. (2ed.) 872; 9 A. & E. Enc. P. & P. 854.

17. Under Code 1906, § 2346, stayed until summons issues to defendant requiring him to assert exemption and exemption is determined. Illinois Cent. R. Co. v. Badley [Miss.] 49 S 114.

18. It was duty of court to stay proceedings and require settlement of controversy in proper action. Board of Home Missions of Presbyterian Church v. Maughan [Utah] 101 P 581.

19. Further proceedings under trustee process waived by taking judgment in main

§ 15. *Trial, verdict and judgments, costs and execution.*[21] See 11 C. L. 1643 Rules of an equitable nature apply in arriving at a conclusion upon which a decision in garnishment rests.[22] The court may determine therein the validity of a mortgage held by the garnishee on the garnished property.[23] The garnishee is given full opportunity to litigate and contest his rights,[24] and the debtor may properly assist the creditor and do what he might lawfully do in a proceeding in his own name against the garnishee.[25] When a traverse is filed to the answer, the issue is whether the garnishee was indebted to the defendant either at the time of the service of the writ or at the time of the answer.[26] The burden of proof is on the creditor to show the debt of the garnishee to the defendant [27] and the connection between the garnishment proceedings and the main case.[28] A default judgment cannot be rendered against a garnishee unless the issues have been made up thereon,[29] nor by reason of insufficiency of an answer which is not objected to.[30] The opening of a default is discretionary [31] and the usual rules apply.[32] Where the garnishee complies with the writ,[33] he is entitled to costs [34] not incurred in unsuccessfully resisting plaintiff's demand.[35] When the defendant files a counterclaim upon the bond, for a wrongful garnishment,[36] the judgment depends upon the terms of such bond [37] and upon

action and issuing execution. Rockland Sav. Bank v. Alden, 104 Me. 416, 72 A 159.

20. Under U. S. Comp. St. 1901, p. 3450. Longley Bros. v. McCann [Ark.] 119 SW 268.

21. Search Note: See notes in 30 L. R. A. 360; 47 Id. 131; 10 L. R. A. (N. S.) 983.

See, also, Garnishment, Cent. Dig. §§ 238-379; Dec. Dig. §§ 117-191; 20 Cyc. 1070-1125; 9 A. & E. Enc. P. & P. 846.

22. Since garnishment proceeding though brought on law side of court is in its nature equitable. Byers v. Illinois Trust & Sav. Bank, 146 Ill. App. 592.

23. Worley v. Sheppard [Iowa] 121 NW 567. Since Code, § 3988, as amended by Acts 27th Gen. Assem. 1898, p. 57, c. 104, provides that § 3979, et seq., for attachment and execution on mortgaged property, is not exclusive. Id.

24. Given every right granted to a defendant in ordinary actions. Eagleson v. Rubin [Idaho] 100 P 765.

25. May legally assist creditor in securing payment of debt from garnishee, since he is presumed to be interested in having same paid, but cannot abuse the garnishment process. Board of Home Missions of Presbyterian Church v. Maughan [Utah] 101 P 581.

26. Hence when defendant first admitted indebtedness in his answer but afterwards withdrew it and denied indebtedness, but in his evidence denied indebtedness only at time of answer making no reference to time of service of writ, order discharging garnishee was erroneous. Jenkins v. McGeever [Ala.] 50 S 142.

27. Where it was sought to garnishee amount unpaid on stock, burden was on creditor to show stock not fully paid for. Trotter Bros. v. Blount [Ala.] 50 S 130. Evidence held insufficient to sustain burden. Id. Evidence held sufficient to sustain burden of proof. Edward Thompson Co. v. Durand [La.] 50 S 407. Evidence held to sustain the traverse and impeach the answer. Humphrey v. Midkiff, 122 La. 939, 48 S 331.

28. Held sufficiently evidenced in case of garnishee living in another county, where certified copy of bond and affidavit, required under Civ. Code 1895, § 4716, were before judgment transmitted to court in which original judgment was obtained. Atlanta & W. P. R. Co. v. Farmers' Exch. [Ga. App.] 65 SE 165.

29. Under Code 1907, § 4325. Sun Ins. Co. v. Aberdeen Clothing Co., 157 Ala. 526, 47 S 722. Cannot be entered where defendant files answer denying indebtedness and plaintiff files affidavit stating that he believes answer to be untrue, and also files interrogatories which garnishee does not answer, where no further pleadings are filed (Code 1907, § 4055, having no application). Id.

30. Davis v. West Texas Bank & Trust Co. [Tex. Civ. App.] 116 SW 393.

31. Refusal to open default was not abuse of discretion where it appeared that the garnishee was dilatory and acted so as to assist defendant in avoiding his obligation. Jordan v. Jordan [Minn.] 123 NW 825.

32. See Circuit Court rule 12 providing that no default shall be set aside unless application be made therefor within 6 months. Caille Bros. Co. v. Saginaw Circuit Judge, 155 Mich. 480, 15 Det. Leg. N. 1123, 120 NW 6. Garnishee has right to move for new trial within five days after default under general provisions of statute (Rev. St. 1895, art. 1654). Davis v. West Texas Bank & Trust Co. [Tex. Civ. App.] 116 SW 393.

33. Return under Gen. St. § 882, reciting that garnishee "failed to disclose that it was indebted to defendant," did not show that garnishee failed to make any disclosure so as to make judgment for garnishee's costs against unsuccessful plaintiff improper. Kelley v. Torrington, 81 Conn. 615, 71 A 939.

34. Under provisions of Rev. St. 1899, et seq. (Ann. St. 1906, p. 1984). Cope v. Shoemate [Mo. App.] 119 SW 503.

35. Cope v. Shoemate [Mo. App.] 119 SW 503.

36. Garnishment was wrongful where evidence showed that plaintiff did not have reasonable ground to believe that the grounds upon which the garnishment was sought were true. Peters v. Snavely-Ashton [Iowa] 120 NW 1048.

37. Liability on bond given to protect de-

the statute controlling,[38] subject to the rules of estoppel.[39] The court may, where only constructive service is had upon the defendant, ascertain the amount due from the garnishee to the defendant and subject such money to the satisfaction of the plaintiff's claim.[40] A judgment against a garnishee who appears is not void for a defect in the service of notice thereof on the defendant [41] but may be set aside on motion of the defendant specially appearing.[42] A judgment for the garnishee will discharge the garnishment unless an appeal be taken within the prescribed time,[43] but is not necessarily a bar to a subsequent garnishment of the same debt,[44] nor is it conclusive between the defendant and the garnishee as to the amount of the indebtedness,[45] nor conclusive as to the liability of the principal debtor to the plaintiff.[46] The appointment of a receiver to enforce the collection of securities taken under trustee process is authorized.[47] Although judgment may usually be entered against the garnishee in the original action as above noted,[48] and an assessment of damages may be made by the same jury,[49] and in some states the exclusive remedy [50] is by resort to a separate action [51] in the same or in another court.[52]

§ 16. *Appellate review.*[53]—See 11 C. L. 1645—The appellate court will review a refusal of court to grant a new trial on motion after rendering of a default judgment,[54] and an order, dismissing garnishment proceedings, having an effect to terminate the main action,[55] but will not review a case presented by an insufficient transcript,[56] an error not objected to below,[57] a finding reasonably supported by the

fendant sued in her individual capacity does not extend to cover damages sustained in representative capacity. Peters v. Snavely-Ashton [Iowa] 120 NW 1048.

38. Code, § 3887, authorizes recovery of attorney fees by defendant on counterclaim for wrongful garnishment when action is on bond, but not otherwise. Peters v. Snavely-Ashton [Iowa] 120 NW 1048.

39. Defendant by securing release garnishment on ground that property belonged to her in a representative capacity was estopped from securing personal judgment for damages for such garnishment. Peters v. Snavely-Ashton [Iowa] 120 NW 1048.

40. St. Louis S. W. R. Co. v. Vanderberg [Ark.] 120 SW 993. Judgment against garnishee is binding on nonresident defendant served only by publication. Missouri, K. & T. R. Co. v. Swartz [Tex. Civ. App.] 115 SW 275. Where garnishee answers indebtedness and nonresident defendant is served by publication, judgment may be rendered against debt due in garnishee's hands. Planters' Chemical & Oil Co. v. Waller & Co. [Ala.] 49 S 89. Judgment where nonresident defendant is served by publication can go no further than a condemnation of garnished debt to satisfaction of plaintiff's demand. Id.

41. As failure to serve copy of garnishment summons on defendant. Webster Mfg. Co. v. Penrod, 103 Minn. 69, 114 NW 257.

42. Webster Mfg. Co. v. Penrod, 103 Minn. 69, 114 NW 257.

43. Code, § 3931, specifying that attachment shall be discharged unless appeal be perfected within 2 days applies to garnishments. Conkling v. Young [Iowa] 120 NW 353.

44. Not bar where debt contingent at time of first garnishment subsequently becomes an actual liability. Cope v. Shoemate [Mo. App.] 119 SW 503.

45. Not conclusive where defendant and garnishee were not adversaries in garnishment proceeding. Combs v. Combs [Ky.] 114 SW 334.

46. Judgment against garnishee by transferee of execution did not prevent principal debtor from proving payment of debt prior to institution of garnishment proceedings. Warthen v. Melton [Ga.] 63 SE 832.

47. See Pub. St. 1901, c. 245, §§ 28, 29, 30, 31, 32. Musgrove v. Goss [N. H.] 72 A 371. Propriety of appointing receiver was not affected by question of whether courts would permit receiver to sue, where receiver had already at time of objection collected security. Id.

48. Brandenstein v. Helvetia Swiss Fire Ins. Co., 159 F 589.

49. Made where garnishee defaults. Pine Tree Lumber Co. v. Central Stock & Grain Exch., 140 Ill. App. 462.

50. Statutory provision (N. Y. Code Civ. Proc. § 1391) for action against garnishee is exclusive and does not permit of enforcing payment from garnishee by contempt. Kahn v. Coles, 115 NYS 885.

51. Required in New York Code Civ. Proc. § 1391. Kahn v. Coles, 115 NYS 885.

52. Such is procedure in California and New York. Brandenstein v. Helvetia Swiss Fire Ins. Co., 159 F 589.

53. **Search Note:** See Appeal and Error, Cent. Dig.; Dec. Dig.; 2 Cyc. 474-1093; 3 Id. 1-499; Certiorari, Cent. Dig.; Dec. Dig.; 6 Cyc. 730-843; 14 A. & E. Enc. L. (2ed.) 901; 9 A. & E. Enc. P. & P. 866.

54. Refusal was by justice court. Davis v. West Texas Bank & Trust Co. [Tex. Civ. App.] 116 SW 393.

55. As in case of nonresident defendant not personally served or appearing. Bristol v. Brent [Utah] 99 P 1000.

56. Transcript was not sufficient to warrant review of garnishment proceedings where it did not contain record of attachment suit upon which such proceedings

evidence as to the claims of the garnishee to the property garnished,[58] or, where the garnishee is not a party to the appeal, a mere irregularity directly involving the rights and interests of the garnishee alone.[59] Where the issue is strictly between the plaintiff and the garnishee, no notice of appeal need be served upon the judgment defendant.[60]

GAS.

The scope of this topic is noted below.[61]

§ 1. Gas Franchises; Powers and Duties of Corporations Exercising Them, 1960. The Obligation to Supply Consumers, 1961.
§ 2. Public Regulation, 1961.
§ 3. Torts and Crimes, 1963.

§ 1. *Gas franchises; powers and duties of corporations exercising them.*[62]—See 11 C. L. 1645—A gas franchise[63] can only be granted by the state or by a municipality acting under legislative authority.[64] It may be granted in consideration of an agreement to pay the municipality granting the same a stipulated sum annually.[65] Franchises usually require streets and highways to be left in as good condition[66] as before the laying of the mains. A franchise authorizing the laying of mains in a city generally authorizes the laying of mains in streets which were not within the city when the franchise was granted.[67] Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual,[68] therefore the company may voluntarily forfeit its right to

were based. Caldwell Banking & Trust Co. v. Porter, 52 Or. 318, 97 P 541.

57. Order dissolving garnishment made on motion to dissolve attachment was not reviewable where no objection was made. Theo. Ascher Co. v. Jack, 134 Mo. App. 511, 114 SW 1111.

58. Finding that garnishee's mortgage was fraudulent was not reviewed. Worley v. Sheppard [Iowa] 121 NW 567.

59. Fact that judgment was rendered against garnishee only for amount due from defendant to plaintiff, instead of full amount due from garnishee to defendant, held to be such irregularity. Paterson Const. Co. v. First State Bank, 133 Ill. App. 75.

60. Notice unnecessary where appeal was from judgment in favor of garnishee on issue of possession of control of debtor's property or effects. Iverson v. Bradrick [Wash.] 104 P 130.

61. It includes the powers, duties and liabilities of persons manufacturing and furnishing illuminating and fuel gas. It excludes gas wells and leases for their operation (see Mines and Minerals*), general matter relating to franchises (see Franchises*), corporations (see Corporations*), and some questions relating to occupation of streets (see Highways and Streets,* § 11), and the police power of municipal corporations (see Municipal Corporations,* § 10). Gas as an explosive is also treated under separate head (see Explosives and Inflammables*), though many such questions will be found treated in this topic.

62. Search Note: See notes in 3 C. L. 1557; 14 L. R. A. 669; 31 Id. 673; 34 Id. 62; 10 Ann. Cas. 668.

See, also, Gas, Cent. Dig., §§ 1-11; Dec. Dig. §§ 1-14; 20 Cyc. 1154-1168, 1172; 14 A. & E. Enc. L. (2ed.) 915, 916; 21 Id. 417.

63. Right to place gas pipes and mains in public streets of a city for the distribution of gas for public and private use is a franchise. Elizabeth City v. Banks, 150 N. C. 407, 64 SE 189.

64. Elizabeth City v. Banks, 150 N. C. 407, 64 SE 189. Where ordinance granting gas franchise was ultra vires and void, the one to whom the franchise was granted received nothing, and the city could not therefore recover damages for breach of covenants made by him in relation thereto. Id.

65. Surrender of valuable rights by the city is a consideration for such promise to pay. Richardson Gas & Oil Co. v. Altoona [Kan.] 100 P 50. Such contract is **not contrary to public policy** as tending to destroy competition and create a monopoly because of provision therein that such payments are to continue only so long as the gas company enjoys its franchise without competition. Id.

66. 13 Sp. Laws, p. 53. Robbins v. Hartford City Gaslight Co. [Conn.] 74 A 113. **Trees** which have been planted upon highways for shade or ornament are included in the term "highways." Id.

67. Where franchise as amended provided that pipes might be laid "throughout the city of Seattle and throughout any addition thereto," and "as the boundaries thereof are or may hereafter be," as soon as new territory was taken into the city the grant immediately attached. Seattle Lighting Co. v. Seattle [Wash.] 102 P 767.

68. Duration thereof is simply indeterminate, existing so long as the parties mutually agree thereto. East Ohio Gas Co. v. Akron [Ohio] 90 NE 40.

exercise its privileges within such municipality and wholly withdraw therefrom.[69] Ordinances sometimes provide that it shall be unlawful to construct any building for a gas reservoir without the written consent of a majority of the property owners, according to frontage.[70] A municipality may impose a reasonable charge for a permit to open a highway for the extension of a gas main, such charge being for the purpose of reimbursing it for probable expense of inspection and supervision.[71]

The obligation to supply consumers See 11 C. L. 1646 is sometimes determined by the charter.[72] Where the acts of a gas company and a municipality constituted a contract to furnish gas to consumers, the rights of the parties thereunder are determined by the contract itself.[73] A contract to furnish gas at a certain rate, which is indefinite as to time, may be terminated by the gas company on reasonable notice.[74]

Gas corporations may adopt such rules and regulations as are reasonable and as do not impose an undue burden on the consumer.[75]

§ 2. *Public regulation.*[76]—See 11 C. L. 1646—A state may by appropriate legislation regulate gas rates,[77] but such rates must not be unreasonable.[78] Whether the rates are reasonable is to be determined by the value of the property[79] and the rate of

69. East Ohio Gas Co. v. Akron [Ohio] 90 NE 40. Such abandonment of its franchise **does not constitute unlawful discrimination,** though under its charter it has the power and does operate in several surrounding towns. Id. **Without due process of law** the municipality has no right to prevent the company from removing its property, nor to take possession of and make use of the same, nor to grant the right to use the same to another company. Id.

70. Word "on" in phrase "on any street or alley" held to mean fronting on or next to any street or alley, and that proposed reservoir was to be located "on" 64th street in city of Chicago. Peoples Gas Light & Coke Co. v. Chicago, 145 Ill. App. 307.

71. Chambersburg Borough v. Chambersburg Gas Co., 38 Pa. Super. Ct. 311. $5 per 100 feet for an extension and fifty cents for the introduction of service pipes held not unreasonable. Id.

72. Where a corporation is formed "for the purpose of producing, purchasing and acquiring natural gas," and of piping and transporting natural gas from place or places where it is produced, purchased or acquired" to certain named towns and cities and "to other cities and villages," it is not one of the charter obligations of such corporation to furnish natural gas to consumers in all such cities, towns and villages. East Ohio Gas Co. v. Akron [Ohio] 90 NE 40.

73. Where municipal corporation by ordinance gives its consent that natural gas company may enter municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by ordinance, which are accepted in writing by said company, such action by both parties constitutes contract. East Ohio Gas Co. v. Akron [Ohio] 90 NE 40.

74. Contract to furnish gas at certain rate to one in consideration of right of way. McCullough-Dalzell Co. v. Philadelphia Co., 223 Pa. 336, 72 A 633. Contract held not to prevent gas company from discontinuing service and removing its mains and pipes. East Ohio Gas Co. v. Akron [Ohio] 90 NE 40.

75. Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966. Company may establish rule exacting **payment in advance** or the deposit of security. Id. Penalty of three per cent **if bill is not paid** within five days is valid. Bower v. United Gas Imp. Co., 37 Pa. Super. Ct. 113. Regulation that if bill is not paid within ten days the **supply may be stopped** is valid. Id.

76. Search Note: See notes in 3 C. L. 1559; 15 L. R. A. 322; 33 Id. 181; 15 L. R. A. (N. S.) 763; 11 Ann. Cas. 748.

See, also, Gas, Dec. Dig. §§ 2, 10, 11; 20 Cyc. 1156, 1157, 1172; 14 A. & E. Enc. L. (2ed.) 918, 927.

77. The fixing of rates is a **legislative function;** the court's duty ends when it has found that the rates are not so low as clearly to be confiscatory. Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966. Act of municipality in fixing gas rates by virtue of legislative authority is **presumptively valid;** for this reason the rate established by the ordinance can only be declared void upon finding that its adoption will operate as a confiscation of the gas company's property. Id. Ordinance fixing a **level rate** cannot be attacked on the ground that because of absence of discount a greater expense will be entailed in the collection of bills, as it cannot be presumed in advance that consumers will not comply with reasonable rules of the company or that unusual expense will be incurred in the collection of such bills. Id.

78. Discrimination between city and consumers individually in provisions of Laws N. Y. 1905, p. 2091, c. 736; Laws 1906, p. 235, c. 125, fixing gas rates in New York City, held not material as to reasonableness of such rates. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —, rvg. Consolidated Gas Co. v. New York, 157 F 849, on other grounds. Where the total value of the corporation's property is a matter of speculation to a great extent and **where the margin between possible confiscation and valid regulation is narrow,** the enforcement of the rates should not be enjoined before a practical test has been made to ascertain their sufficiency. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —.

79. A gas corporation ought not to be excluded from the advantage of the prudence and foresight in its development, nor should

compensation [80] thereon. Commercially impossible regulations [81] and excessive penalties [82] render a statute wholly void, unless these invalid provisions are clearly separable from the enactments [83] as to rates. If illegal rates are charged, relief may be granted by injunction [84] and refund of the excess may be compelled.[85]

they be relieved of the consequences of mistakes and error of judgment. Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966.

Value of property: To determine the reasonableness of rates, the original cost of construction, the amount expended in permanent improvements, etc., must be considered. Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966. Value of property is to be determined as of the **time when the inquiry is made** regarding the rates. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —, rvg. Consolidated Gas Co. v. New York, 157 F 849, on other grounds. In estimating the value of the **mains and pipes,** the cost of the pipes, the price at which they are ordinarily sold, in connection with present prices and depreciation by decay, should be considered. Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966. Where mains and pipes were **laid before streets were paved,** their value is not to be estimated by what it would cost because of the pavement to replace them. Id. **Land beyond high water mark** held adversely to the state may be considered. Id. **Property occupied by tenants** and not required for immediate expansion should not be considered, nor should discarded property. Id. Nothing can be allowed for the **promotion and organization** of the company. Id.

Franchises: Gas franchises are property. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —, rvg. Consolidated Gas Co. v. New York, 157 F 849, on other grounds. Value of a franchise is not determined by its assessed value for taxation. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —. Valuation of franchises of gas companies fixed and agreed upon on consolidation under Laws N. Y. 1884, p. 448, c. 367, must be accepted as conclusive of the value of the franchises at the time of consolidation. Id. Increase since consolidation of amount of gas supplied and increase in value of tangible property is not any reason for attributing a like proportional increase in the value of the franchise. Id. **Good will** should not be considered in estimating value of property where gas company has monopoly in fact. Id.; Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966.

80. Rate of compensation: There is **no particular rate** of compensation to which, in all cases and in all parts of the country, a corporation is entitled without legislative interference. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —, rvg. Consolidated Gas Co. v. New York, 157 F 849, on other grounds. Gas company is **entitled to a fair return** upon value of its property. Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966. A gas corporation is entitled to earn enough not only to meet the expenses of current repairs but also **to provide means for replacing the parts of the plant** when they can no longer be used. Id. Where gas corporation monopolized the gas service of New York City, gas rates yielding **6 per cent.** on the fair value of its property are **not confiscatory.** Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —, rvg. Consolidated Gas Co. v. New York, 157 F 849, on other grounds. The court cannot say that the income above all expenses, including taxes, on property devoted to public service, must necessarily exceed **5 per cent.** to avoid the charge of being confiscatory. Cedar Rapids Gaslight Co. v. Cedar Rapids [Iowa] 120 NW 966. What compensation will be reasonable is a **question of fact** to be determined in the light of the evidence in each particular case. Id. **Evidence** held not to show that rates fixed by ordinance pursuant to legislative authority were so low as to deny the gas company a fair return upon its property. Id.

81. Requirements as to gas pressure made by New York Laws 1905, c. 736; Laws 1906, p. 235, c. 125, are void, for the reason that, before compliance with its provision would be safe, the gas company would have to strengthen its mains and pipes throughout their whole extent, at an expenditure of many millions of dollars from which no return could be obtained at the rates provided in the acts. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —, rvg. Consolidated Gas Co. v. New York, 57 F 849, on other grounds.

82. Provisions as to penalties in Laws N. Y. 1905, p. 2091, c. 736; Laws 1906, p. 235, c. 125, though void within principle decided in Ex parte Young, 209 U. S. 123, because so enormous in their amount, do not invalidate the provisions as to rates. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —, rvg. Consolidated Gas Co. v. New York, 157 F 849, on other grounds.

83. New York Laws 1905, c. 736; Laws 1906, c. 125, regulating gas rates in New York City, though invalid as to those provisions as to gas pressure and penalties, are not invalid as to those provisions respecting rates. Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 Law. Ed. —, rvg. Consolidated Gas Co. v. New York, 157 F 849, on other grounds.

84. The case must be a clear one before the court will enjoin state legislation regulating gas rates, especially before there has been any actual experience of the practical result of such rates. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —, rvg. Consolidated Gas Co. v. New York, 157 F 849, on other grounds. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 Law. Ed. —. A preliminary **injunction will be vacated** where no prosecution to enforce unconstitutional penalties need be apprehended. Central Trust Co. v. New Amster-

§ 3. *Torts and crimes.*[86]—See 11 C. L. 1648—It is the duty of corporations and persons engaged in the manufacture and distribution of gas to see that the pipes are properly laid and kept in repair.[87] They are liable for damages resulting from negligence,[88] but there can be no recovery if the party injured was guilty of contributory negligence.[89] Evidence of the effect of an explosion of gas on other buildings is admissible,[90] as is also a statement made by an employe which is part of the res gestae.[91] Instructions must not invade the province of the jury.[92]

General Average; General Issue, see latest topical index.

GIFTS.

The scope of this topic is noted below.[93]

§ 1. Definition and Distinctions, 1964.
§ 2. Validity and Requisites, 1964. It is Essential to a Donation Inter Vivos, 1965. A Gift Causa Mortis, 1968.
§ 3. Fraud, Undue Influence, Mistake and Incapacity, 1968.

dam Gas Co., 167 F 144. Supreme court having held that provisions of Laws N. Y. 1906, p. 235, c. 125, as to pressures and penalties, were in violation of federal constitution, injunction restraining prosecution under same should be vacated. Id.

85. The court **may require the gas company to pay into court any excess above the ordinance rate** upon a temporary restraining order being issued. San Francisco Gas & Elec. Co. v. San Francisco, 164 F 884. **Distribution of excess payments.** Northern Union Gas Co. v. Mayer, 173 F 628. Where a portion of the amount paid into court remains unclaimed, it may be returned to the company on the giving of a bond requiring gas company to make payment to persons entitled on their subsequent appearance. Northern Union Gas Co. v. Mayer, 171 F 602.

86. Search Note: See notes in 29 L. R. A. 337; 10 L. R. A. (N. S.) 890; 15 Id. 537, 957; 6 Ann. Cas. 739.

See, also, Gas. Cent. Dig. §§ 12-19; Dec. Dig. §§ 14½-23; 20 Cyc. 1170-1180; 14 A. & E. Enc. L. (2ed.) 928; 9 A. & E. Enc. P. & P. 878.

87. Duty of company to see that pipe was laid in ground at suitable depth so as not to be effected by cold weather and that it was done in a suitable manner and kept in proper repair. Thompson v. Cambridge Gaslight Co., 201 Mass. 77, 87 NE 486.

88. Evidence held to sustain finding that **explosion** was occasioned by gas furnished to plaintiff's building by defendant and by it being negligently permitted to escape. Linforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320. Gas company held liable for injury to workman caused by explosion where company's watchman had notice that gas was escaping but failed to report to the company. Diehle v. United Gas Imp. Co. [Pa.] 74 A 349. Evidence held to support finding that employe of gas **company removed cap** to make test and negligently failed to replace it, authorizing a recovery for personal injuries. Kenny v. South Shore Natural Gas & Fuel Co., 134 App. Div. 859, 119 NYS 363. Though fire may have been caused by **defect in pipe** or pilot of arc lamp, the gas company was not liable, the evidence not showing that they were negligent in causing or permitting such defect to exist. Torrans v. Texarkana Gas & Elec. Co. [Ark.] 115 SW 389. Whether defendant **so negligently laid pipe** that it would be liable to crack held for the jury. Thompson v. Cambridge Gaslight Co., 201 Mass. 77, 87 NE 486. Where day before explosion which injured plaintiff's house a **break in the main** was discovered which caused gas to enter his house, and three days after break was discovered and repaired gas again was discovered escaping from the pipes at a point where the break had occurred before, question of gas company's negligence was for the jury. O'Donovan v. Philadelphia Co., 223 Pa. 234, 72 A 527. Whether plaintiff's **trees were injured** by escaping gas from defendant's mains and whether defendant was negligent, held, under the evidence, for jury. Robbins v. Hartford City Gaslight Co. [Conn.] 74 A 113. **Evidence held insufficient** to show that fire in house was caused by gas company turning off and again turning on the gas. Moore v. West Virginia Heat & L. Co., 65 W. Va. 552, 64 SE 721. Evidence held not to show that fire was caused by escaping gas. Torrans v. Texarkana Gas & Elec. Co. [Ark.] 115 SW 389.

89. Where in action for personal injuries caused by gas escaping from mains the evidence showed that plaintiff did not know that odor in house was caused by illuminating gas, she was not negligent as matter of law in failing to notify defendant of escape of gas. Thompson v. Cambridge Gaslight Co., 201 Mass. 77, 87 NE 486.

90. Linforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320.

91. In action for injuries from explosion of gas which escaped from uncapped pipe, statement made by employe of gas company to plumbers before explosion that he was going to make test was admissible as part of res gestae. Kenney v. South Shore Natural Gas & Fuel Co., 134 App. Div. 859, 119 NYS 363. But statement after explosion as to such test was not admissible as part of res gestae. Id.

92. Instruction that if defendant's pipes, meters, and their connections were free from any leak a week before explosion, the presumption is that they were in that condition at time of accident, held properly refused. Linforth v. San Francisco Gas & Elec. Co. [Cal.] 103 P 320.

93. The doctrine of charitable gifts is

§ 1. *Definition and distinctions.*[94]—See 11 C. L. 1649—A gift is a contract executed,[95] and, as the act of execution is delivery,[96] it is of the essence of the title.[97] In a gift inter vivos the change in the title is irrevocable and indefeasible,[98] while in the case of a gift causa mortis the change is revocable and defeasible upon certain conditions.[99] Whether a particular transaction is a gift or a sale,[1] or intended as compensation for services,[2] or whether it is charged with a trust in favor of donor or another, are questions of fact.[3] What is clearly intended as a gift but is imperfect as such cannot be treated as a trust.[4]

§ 2. *Validity and requisites.*[5]—See 11 C. L. 1650—A gift may be made of land,[6] of the check, of a third person,[7] or of a policy of insurance payable to the representatives of the insured,[8] and, under certain circumstances, a promissory note of the donor may be effective as a gift.[9] A gift of the promissory note payable to the order of the donor or of a certificate of deposit, or of any such chose in action, may be made and executed by mere delivery without indorsement thereon.[10] Evidence of

treated elsewhere (see Charitable Gifts*), as is the validity as to third persons of voluntary conveyances (see Fraudulent Conveyances,*), and the validity of gifts as between husband and wife is more specifically treated in Husband and Wife,* § 2 B.

94. Search Note: See notes in 2 L. R. A. (N. S.) 285; 65 A. S. R. 798; 99 Id. 890, 891.

See, also, Gifts, Cent. Dig. §§ 1-27, 104, 119-121; Dec. Dig. §§ 1-5, 53-55; 20 Cyc. 1192, 1193, 1214, 1215, 1230; 14 A. & E. Enc. L. (2ed.) 1006, 1008, 1009.

95. Burchett v. Fink [Mo. App.] 123 SW 74.

96. Delivery is the consummation of a contract which without it would be no more than a mere contract to give, and without efficacy for want of consideration. Burchett v. Fink [Mo. App.] 123 SW 74. The gift may be perfected when the donor places in the hands of the donee the means of obtaining possession of the contemplated gift, accompanied by acts and declarations clearly showing an intention to give and divest himself of all dominion over the property. Candee v. Connecticut Sav. Bank, 81 Conn. 372, 71 A 551.

97. Burchett v. Fink [Mo. App.] 123 SW 74.

98, 99. Nelson v. Peterson, 202 Mass. 369, 88 NE 916.

See post, § 2.

1. Evidence held to show that property passed to wife by donation from her husband and not by purchase. Stewart v. Crump, 123 La. 983, 49 S 663. Evidence held to sustain finding that transaction was gift of household furniture and not a loan. Langlois v. Langlois, 142 Ill. App. 303.

2. Evidence held to support finding that note was intended as compensation for services and not as gift. Fenton v. Mansfield [Conn.] 73 A 770.

3. One cannot make or cause to be made a deed by way of gift today and recall it tomorrow by simply saying that he intended it as a deed in trust for his own benefit. Derry v. Fielder, 216 Mo. 176, 115 SW 412. Where a deed is made to a child or a grandchild, the presumption of law is that it was a gift or advancement rather than a trust. Id. Where husband pays purchase money and causes conveyance to be made to his wife, the transaction, in absence of evidence tending to show a resulting trust, is presumed a gift. Stonecipher v. Kear, 131 Ga. 688, 63 SE 215. An absolute gift will not be cut down by implication into a trust merely because the donor, at the time he made the gift, hoped and believed that the donee would permit him to participate in the beneficial interest of the property. Vickers v. Vickers [Ga.] 65 SE 885. Where a husband purchases land and procures the deed to be made to his wife, the presumption is that he intended it as a gift and not as a trust. Poole v. Oliver [Ark.] 117 SW 747. Husband's use and occupancy of land so conveyed is consistent with such presumption. Id.

4. In re Ashman's Estate, 223 Pa. 543, 72 A 899. Where delivery to third person was not enforcible as gift because of death of donor, it could not be enforced as declaration of a trust. Trubey v. Pease, 240 Ill. 513, 88 NE 1005, afg. 146 Ill. App. 507.

5. Search Note: See notes in 18 L. R. A. 170, 855; 19 Id. 700; 21 Id. 693; 26 Id. 305; 67 Id. 461; 1 L. R. A. (N. S.) 790; 2 Id. 806; 7 Id. 156; 9 Id. 508; 11 Id. 554; 12 Id. 355; 16 Id. 1087; 2 Ann. Cas. 1003; 3 Id. 865; 6 Id. 432; 10 Id. 475.

See, also, Gifts, Cent. Dig.; Dec. Dig.; 20 Cyc. 1192-1249; 14 A. & E. Enc. L. (2ed.) 1009 et seq.

6. Fitzgerald v. Tvedt [Iowa] 120 NW 465. Evidence held not to show that conveyance of land by father to son was intended as gift. Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328.

7. Indorsement and delivery by donor of check payable to order constitutes a valid donation of the fund represented by such check. Succession of Desina, 123 La. 468, 49 S 23.

8. Metropolitan Ins. Co. v. Clanton [N. J. Eq.] 73 A 1052.

9. By directing donee to sell note in donor's lifetime and to retain proceeds of such sale, which was accordingly done. Armstrong v. Armstrong, 142 Ill. App. 507.

10. Delivery of certificate of deposit held valid gift though there was no indorsement thereon. Rinard v. Lasley, 143 Ill. App. 450.

strained relations between the donor and the donee is admissible as tending to disprove alleged gift.[11] A gift may not be set aside because it is considered undeserved.[12]

It is essential to a donation inter vivos[13]—See 11 C. L. 1650 that there be an absolute delivery,[14] actual or symbolical,[15] with intent express[16] or implied,[17] on

Indorsement of a certificate of deposit not necessary for a gift causa mortis, though by its terms it was only payable when "properly indorsed." Callahan v. Forest, 118 NYS 541.

11. Evidence tending to show strained relations between father and son as bearing upon question whether the father had given certain notes to son. Lord v. Rumrill, 130 App. Div. 279, 114 NYS 488.

12. Neither heirs nor jury are entitled to set aside gift to wayward child as being undeserved. Borchers v. Barckers [Mo. App.] 122 SW 357.

13. Where one entitled to property approved of payment of money to certain parties by executors as requested in letter left with will, it was equivalent to an executed gift by her. Nagle v. Von Rosenberg [Tex. Civ. App.] 119 SW 706. Where son deeded property to mother, and the mother asserted no rights under such deed, the evidence practically showed that whatever her rights were she made a gift to son's children of the land in question. Lake v. Weaver [N. J. Eq.] 73 A 62.

14. Bowen v. Kutzner [C. C. A.] 167 F 281; In re Miller, 119 NYS 52. Must be consummated by delivery, either actual or constructive. Campbell v. Sech, 165 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922. Gift of bonds incomplete because they were never delivered. In re Ashman's Estate, 223 Pa. 543, 72 A 899. Where payee had indorsed notes but there was no delivery to donee during payee's lifetime, there was no gift. Burchett v. Fink [Mo. App.] 123 SW 74. Where donor wrote donee to transfer to his personal account certain bonds which were contained in box to which donor and donee both had access, and donee thereupon removed them, the gift was completed. Muir v. Gregory [C. C. A.] 168 F 641. Evidence held to show gift and delivery of personal property by mother to her son. Simmonds v. Simmonds' Adm'r [Ky.] 118 SW 304. Statement by depositor that bank account standing in his name, represented by a book remaining in his possession, is the property of another, does not tend to show previous delivery or assignment of subject of alleged gift. In re Miller, 119 NYS 52. Unless the facts are clearly proved and uncontradicted, so as to point to an uncontroverted conclusion, the question of delivery is for the jury. Tompkins v. Leary, 134 App. Div. 114, 118 NYS 810. Where husband purchased a note and mortgage with his own money and had them assigned to his wife and himself jointly, he retaining possession of and collecting interest, wife not having knowledge of the transaction until after his death, the delivery by the assignor to complete the assignment was sufficient delivery. Abegg v. Hirst [Iowa] 122 NW 838. **Delivery prevented** of notes by refusal of one, who had them in her possession, to deliver them to donor so that donor could deliver them to donee, prevents such a one from claiming that there was no delivery. Simmonds v. Simmonds' Adm'r [Ky.] 118 SW 304.

Savings bank deposit: There may be a valid gift of money on deposit in a savings bank in donor's name, although the donor retains possession of the book. Candee v. Connecticut Sav. Bank, 81 Conn. 372, 71 A 551. Where depositor, who had lost bank book, with intent to make a gift signed an order directing bank to pay donee the entire deposit and the bank recognized and accepted it for the purpose for which it was made, the gift was complete. Id. Delivery of book of deposit which had entry thereon, "in case of death subject to order of donee" did not constitute delivery of the money. Jones v. Crisp, 109 Md. 30, 71 A 515. Letter from husband to wife that bespeaks either an intention that savings bank account shall belong to wife or an assurance that it already belonged to her cannot be taken to evidence or effectuate a delivery. In re Miller, 119 NYS 52. No executed gift of certificate of deposit where it never left depositor's possession and the deposit had been withdrawn by him as his own. Lattin v. Lattin's Estate, 156 Mich. 223, 16 Det. Leg. N. 90, 120 NW 609.

15. Giving of key of safe in vault, coupled with other circumstances, constituted gift of bonds. Herrick v. Dennett, 203 Mass. 17, 89 NE 141. Though there may be under certain circumstances a symbolical delivery by the delivery of a key to a receptacle of the gift, yet, where donor gave donee key to desk in the house where securities in question were kept and no good reason appeared why alleged donor could not have had securites brought to him and then and there made actual delivery, symbolical delivery was not sufficient. Tompkins v. Leary, 134 App. Div. 114, 118 NYS 810.

16. In re Ashman's Estate, 223 Pa. 543, 72 A 899. There can be no executed gift in the absence of any intention to give. Fanning v. Green [Cal.] 104 P 308. Intention to make gift must be clear. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922. Where, after decedent had made various wills and codicils, she changed bank account so that the deposit stood in her name and the name of one of her daughters, this act considered with circumstances held to show intent to give daughter joint interest in deposit. Kelly v. Beers, 194 N. Y. 49, 86 NE 980. Fact that one child may receive a greater share of parent's estate than another child cannot be considered in determining intent of parent to make gift where acts are not of doubtful or uncertain character. Id. A deposit of money in the name of the owner and the name of another is not sufficient in itself to establish the intent of the person making it to create a trust in favor of the other or to give to such other joint interest in or ownership of the deposit. Id. Where a father had a note and

the part of the donor to presently [18] divest himself of all title and dominion over the thing given,[19] and an acceptance by donee [20] or by a third party as agent [21] or trustee for him; [22] and the donor may have himself constituted trustee of the property for the donee.[23] Until the gift is thus made perfect, the owner may make any other disposition of the property that he may think proper.[24] It is immaterial that there is a postponement of the time of enjoyment of the property until after the donor's death.[25] A reservation by the donor of certain proprietary rights in the subject of the gift, such as the use [26] and enjoyment thereof, is not necessarily inconsistent with the absolute character of the gift.[27] A mere unexecuted intent to make a gift is not enforcible.[28] A completed gift is irrevocable; [29] but in Louisiana

mortgage executed in his son's name and had same recorded, but never gave or intended to give them to his son, and the son never knew of the execution thereof and never accepted them, there was no gift. Tobin v. Tobin, 139 Wis. 494, 121 NW 144. Mere fact that depositor in savings bank assumed by wills to accomplish same purpose in giving deposit to her daughter, which had already been accomplished by form of deposit, did not itself contradict her intent in making deposit. Kelly v. Beers, 194 N. Y. 60, 86 NE 985. Evidence held to show that consideration expressed in deed by father to children was not to be paid. Koogle v. Cline, 110 Md. 587, 73 A 672.

17. Facts and circumstances of a transaction may be such as to practically compel conclusion that gift was intended, and to render worthless any subsequent statement to the contrary on the part of the donor. Fanning v. Green [Cal.] 104 P 308.

18. Gift must transfer property at once. Jones v. Crisp, 109 Md. 30, 71 A 515. The intention to make a gift in praesenti must affirmatively appear. McFerrin v. Templeman [Tex.] 120 SW 167. Vendee of land agreed to pay vendor's heirs on her death a certain sum, vendor retaining a vendor's lien to secure all payments. Held not to show an intention to make a gift in praesenti. Id.

19. In re Ashman's Estate, 223 Pa. 543, 72 A 899. Property must be placed beyond control of donor. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922. Gift of bonds incomplete because they never passed from dominion and control of donor to that of donee. In re Ashman's Estate, 223 Pa. 543, 72 A 899. "F. C. in case of death payable to E. U." entered by request of F. C. on book of deposit of savings bank did not constitute valid gift. Jones v. Crisp, 109 Md. 30, 71 A 515. Where something remains to be done in carrying out the donor's intent, no matter how unequivocal the intent may be, the gift is not complete, for so long as the completed action is not taken, it is to be presumed that the donor intended to retain the title. Abegg v. Hirst [Iowa] 122 NW 838.

20. Jones v. Crisp, 109 Md. 30, 71 A 515. A gift is perfected by delivery and acceptance, and it is immaterial whether delivery precedes or follows or is contemporaneous with the acceptance. In re Harris' Estate [Vt.] 72 A 912. Under certain circumstances an acceptance will be presumed. Id. It will be taken that an absolute gift from father to child is beneficial to the child and is accepted by him unless the contrary is shown, and this though child may be ignorant of the transaction. Id.

21. Jones v. Crisp, 109 Md. 30, 71 A 515. Certificates of deposits, delivered by donor to her father to give to her sisters, held to establish gift. Nelson v. Olson, 108 Minn. 109, 121 NW 609.

22. Trubey v. Pease, 240 Ill. 513, 88 NE 1005, afg. 146 Ill. App. 507. Knowledge of a gift made to a trustee for the benefit of the donee need not have been brought home to the donee during the life of the donor. Abegg v. Hirst [Iowa] 122 NW 838. When a trust has been perfectly created for the delivery of property to the donee, it is not revocable by the death or will of the donor. Trubey v. Pease, 240 Ill. 513, 88 NE 1005, afg. 146 Ill. App. 507. Whether third person holds property as trustee for donee must be established by clear and explicit proof. Id. Evidence held to show that person to whom property was delivered was **donor's agent** and death of donor revoked the agency. Id. Third person held to be not trustee for donee but donor's agent to deliver property. Id.

23. Abegg v. Hirst [Iowa] 122 NW 838.

24. Jones v. Crisp, 109 Md. 30, 71 A 515.

25. Not necessary that gift made to trustee for donee need be known to donee during donor's life. Abegg v. Hirst [Iowa] 122 NW 838. If it was the intention of the donor to immediately vest the title to the property in the donee at the time of the delivery to the third person, the gift will not fail, though actual delivery is not made until after the death of the donor. Nelson v. Olson, 108 Minn. 109, 121 NW 609.

26. Gift of fund subject to the use of the donor during her lifetime did not make the gift conditional or uncertain but was a reservation of the income or profits of the money. Candee v. Connecticut Sav. Bank, 81 Conn. 372, 71 A 551.

27. Candee v. Connecticut Sav. Bank, 81 Conn. 372, 71 A 551.

28. Mere promise to remit rent not enforcible. Kaye v. Hoage, 63 Misc. 332, 117 NYS 122.

29. Where depositor in savings bank changed deposit so that it stood in name of herself and daughter, a will made by such depositor subsequent thereto did not destroy daughter's rights. Kelly v. Beers, 194 N. Y. 60, 86 NE 985. The donor cannot reclaim property the title to which he has unconditionally placed in another merely because he had a quarrel with the donee. Vickers v. Vickers [Ga.] 65 SE 885.

it is provided that a gift may be revoked on account of the nonperformance of the conditions [30] imposed upon the donee.[31] With one exception [32] the revocation of donations for cause of ingratitude under the Louisiana statute is considered as personal to the donor.[33] The collateral heirs of the donor cannot attack the donation on account of relative nullities.[34] A donation may be rescinded or modified at any time by the mutual consent of the parties.[35] A gift is not usually presumed,[36] but must be established by clear and convincing evidence;[37] however, there is no rule requiring that it all be direct and positive.[38] Evidence of declarations [39] and admissions [40] of the donor is not sufficient to establish the gift, but are only admissible as corroborative of other testimony.[41] Gift of land may be by parol where donee takes possession and makes valuable improvements thereon,[42] but such gift must be established by clear and unequivocal evidence.[43]

30. The word "conditions" as used in Civ. Code, art. 1559, is synonymous with the word "charges," and when a donation contains charges it is considered as made under condition that it may be dissolved or revoked if they are not executed. Voinche v. Marksville [La.] 50 S 662.

31. Donee is bound to execute the charges or obligations imposed upon him by the act of donation in the same manner and to the same extent as the debtor in any ordinary contract. Voinche v. Marksville [La.] 50 S 662.

32. Provision permitting heirs of donor to sue donee when donor dies within year the act of ingratitude was committed. Rev. Code, art. 1561. Grandchampt v. Administrator of Succession of Billis [La.] 49 S 998.

33. Where the donee murdered the donor and then committed suicide, an action will not lie by the heirs of the donor against the heirs of the donee to revoke or dissolve the donation for cause of ingratitude. Rev. Civ. Code, art. 1561. Grandchampt v. Administrator of Succession of Billis [La.] 49 S 998.

34. Such as the minority of the donor. Succession of Desina, 123 La. 468, 49 S 23.

35. Donation of real estate from father to daughter. Quirk v. Smith [La.] 49 S 728. Return of the property cancels the donation, and presumptive forced heirs of the parties have no standng to complain of the retrocession of the property. Id.

36. Lynch v. Lyons, 131 App. Div. 120, 115 NYS 227; Tompkins v. Leary, 134 App. Div. 114, 118 NYS 810. Gift of certificates of stock with blank assignment on back signed by testatrix and witnessed by executrix and in latter's possession is not to be presumed to have been made by former to latter. In re Perry, 129 App. Div. 587, 114 NYS 246. Where one, whether child or stranger, is intrusted with funds of another to deposit in his own name, or in their joint names, and the funds have been thus treated, no presumption of gift arises from fact that funds are deposited in name of party other than alleged donor. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922. Presumption of gift from **husband to wife** arises if husband pays for land and takes deed in wife's name, but such presumption is rebuttable. Jackson v. Williams, 129 Ga. 716, 59 SE 776.

37. Tompkins v. Leary, 134 App. Div. 114, 118 NYS 810. Evidence held to show that land conveyed to decedent was purchased with money given by him to his sister. Boyle v. Boyle [Or] 99 P 658 Very slight evidence is required to establish a **gift from father to child** where there is no suggestion of fraud or undue influence. See, also, post § 3. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922.

Evidence held insufficient: To show gift of securities. Tompkins v. Leary, 134 App. Div. 114, 118 NYS 810. To establish gift of certain lots by father to daughter. Gould v. Hurley [N. J. Eq.] 73 A 129. To show gift of policy of insurance. Metropolitan Ins. Co. v. Clanton [N. J. Eq.] 73 A 1052. To show gift of bonds and note. Merchants L. & T. Co. v. Egan, 143 Ill. App. 572. To establish gift of money from father to child. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922. To sustain validity of transfer of stock claimed as gift from father to son. Bowen v. Kutzner [C. C. A.] 167 F 281. To establish agreement to give premises in consideration of donee paying taxes and insurance. Satterly v. Dewick, 129 App. Div. 701, 114 NYS 354. Verdict that there was no gift of promissory note by father to daughter held sustained by the evidence. Peters v. Schultz, 107 Minn. 29, 119 NW 385.

38. Miller v. McLean, 11 Ohio C. C. (N. S.) 489.

39. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922. Declarations of mere intent and purpose are not sufficient to establish a gift. Frye v. Gullion [Iowa] 121 NW 563.

40. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922. Where alleged donor had executed a will bequeathing his daughter $800, and it was claimed by such daughter that he had also made a gift to her of $800, his admissions that he had given his daughter $800 was as consistent with the idea of a will as of a previous gift. Id.

41. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922.

42. Where pursuant to parol gift of land for life of donee and then to her children donee moved on such land and made valuable improvements, the equitable title vested in donee for life and on her death would vest in her children. Combest v. Wall [Tex. Civ. App.] 115 SW 354. Evidence held not to show complete gift of land from father to son, it not appearing that any deed was executed or that son parted with any consideration on faith of proposed gift or

A gift of causa mortis [44]—See 11 C. L. 1654 is established by delivery,[45] expected and impending death,[46] an intention to pass title then and there,[47] and no revocation of the gift before death.[48] Delivery may be actual or symbolical,[49] it may be made to a third person for the donee,[50] and if, after the death of the donor, such person delivers the subject of the gift to the donee, who accepts it, it is a sufficient delivery.[51] The gift fails if the donor survives the peril which he had in contemplation at the time of making the gift.[52]

§ 3. *Fraud, undue influence, mistake and incapacity.*[53]—See 11 C. L. 1656—A gift procured by fraud or undue influence is void.[54] Where a confidential relation [55] exists, if a gift is made to the person in whom the confidence is reposed by reason of the relation, it is prima facie void.[56] In such case the burden of proof rests upon the donee to show that the gift was the free and voluntary act of the donor.[57] Gifts made by aged and ignorant persons,[58] and gifts from parent to child,[59] are closely scrutinized.

had built valuable improvements. Manning v. Berry [Iowa] 120 NW 483. $100 expended in improvements on section of land worth $13 or $14 per acre held insufficient to support parol gift of land. Atchley v. Perry [Tex. Civ. App.] 120 SW 1105.

43. Parol gift of land from parent to child. Cook v. Cook [S. D.] 123 NW 693. Parol gift of land in consideration of care to be given donor during his life, to take effect at his death, must be so established. Frye v. Gullion [Iowa] 121 NW 563. Evidence insufficient. Id. Evidence held to sustain finding that transaction between father and son did not constitute a parol gift of land in question. Cook v. Cook [S. D.] 123 NW 693. Where son purchased land from his father and held bond for title made by the father to him, there was no presumption of gift from father to son under Civ. Code 1895, § 3571. Graham v. Peacock, 131 Ga. 785, 63 SE 348.

44. Gifts causa mortis, being donations not made in conformity to the statute of wills, but made without the safeguards cast around the executions of wills, are not favored in the law. Gilmore v. Lee, 237 Ill. 402, 86 NE 568.

45. In re Miller, 119 NYS 52. Evidence held sufficient to warrant a finding that transaction constituted valid delivery of draft. Cronin v. Chelsea Sav. Bank, 201 Mass. 146, 87 NE 484. Evidence held insufficient to show sufficient delivery of wearing apparel and money. Nelson v. Peterson, 202 Mass. 369, 88 NE 916.

46. Cronin v. Chelsea Sav. Bank, 201 Mass. 146, 87 NE 484; Callahan v. Forest, 118 NYS 541.

47. Cronin v. Chelsea Sav. Bank, 201 Mass. 146, 87 NE 484. There must be change of possession made for the purpose of passing title in presenti. Nelson v. Peterson, 202 Mass. 369, 88 NE 916.

48. Cronin v. Chelsea Sav. Bank, 201 Mass. 146, 87 NE 484.

49. Gift of receipt given by bank for draft received for collection held to pass title to draft and proceeds. Cronin v. Chelsea Sav. Bank, 201 Mass. 146, 87 NE 484. Delivery of purse containing certificates of deposit made with expectation of death which followed one hour later held gift causa mortis of such certificates and the proceeds it represented. Callahan v. Forest, 118 NYS 541.

50, 51. Nelson v. Peterson, 202 Mass. 369, 88 NE 916.

52. Donor's safe return from yatching trip. In re Miller, 119 NYS 52.

53. Search Note: See notes in 34 L. R. A. 297; 3 L. R. A. (N. S.) 769, 774; 6 Id. 785.

See, also, Gifts, Cent. Dig. §§ 11, 12, 72-74, 113; Dec. Dig. §§ 6, 13, 14, 36-39, 71, 72; 20 Cyc. 1193, 1194; 14 A. & E. Enc. L. (2ed.) 1011.

54. Evidence held sufficient to show that gift by parishioner to spiritual adviser was procured by undue influence. Gilmore v. Lee, 237 Ill. 402, 86 NE 568.

55. Relation of priest or spiritual adviser and parishioner is confidential one. Gilmore v. Lee, 237 Ill. 402, 86 NE 568.

56. Gilmore v. Lee, 237 Ill. 402, 86 NE 568.

57. Simpson v. League, 110 Md. 286, 72 A 1109. Evidence held to show that conveyance from aged parent to child was not procured by undue influence. Post v. Hagen [N. J. Eq.] 72 A 384. Finding that gift of farm by mother to son was secured by his undue influence held sustained by evidence. Naeseth v. Hommedal [Minn.] 123 NW 287. Where gift is claimed to have been made to spiritual adviser by a person in extremis, the burden of proof to show good faith of transaction rests upon donee. McPherson v. Byrne, 155 Mich. 338, 15 Det. Leg. N. 1025, 118 NW 985. Burden on spiritual adviser to prove that gift causa mortis by parishioner was made upon competent and independent advice, or that he acted in good faith and that there was absence of undue influence. Gilmore v. Lee, 237 Ill. 402, 86 NE 568. Evidence held insufficient. Id. Rule that very slight evidence is required to establish gift from father to child does not apply where child stands in a fiduciary relation to the parent and has access to and control over his property. Campbell v. Sech, 155 Mich. 634, 15 Det. Leg. N. 1105, 119 NW 922.

58. Gift made by aged and ignorant person of what constituted almost her entire estate. Simpson v. League, 110 Md. 286, 72 A 1109. Unless clearly shown that such donor possessed the requisite legal capacity, and acted freely and without undue influence on constraint, it will not be upheld. Id.

GOOD WILL.[60]

The scope of this topic is noted below.[61]

Good will is the probability that old customers will resort to the old place for the purpose of trade.[62] There cannot be a good will, strictly so called, of a business which depends for its existence upon the professional qualities of the person who carries it on.[63] Good will is recognized in law as a thing of value [64] which may be sold.[65] After it has been transferred, the grantor cannot derogate from his grant by engaging in a competing business of the same kind.[66] Whether a business set up subsequent to grant of good will derogates from the same depends upon the extent of the old business.[67] There is no inflexible rule for ascertaining the value of a good will based on earnings.[68] Further violations may be enjoined.[69]

Governor, see latest topical index.

GRAND JURY.[70]

The scope of this topic is noted below.[71]

Constitution of Juries; Qualifications of Jurors, 1970.
Jury Lists; Summoning and Impaneling of Jury, 1970.
Powers and Procedure, 1971.
Effect of Illegality in Constitution or Proceedings, 1972.
Objections and Waiver Thereof; Estoppel to Urge, 1973.
Secrecy of Deliberations, 1973.

Court in determining validity of such gift will take into consideration donor's previous life, habits, etc. Id.

59. Naeseth v. Hommedal [Minn.] 123 NW 287. Presumption is, however, in favor of its validity. Id.

60. See 11 C. L. 1657.

Search Note: See notes in 15 L. R. A. 462; 58 Id. 566; 5 L. R. A. (N. S.) 1077; 10 Id. 1200; 16 Id. 240; 95 A. S. R. 293; 96 Id. 610; 11 Ann. Cas. 573.

See, also, Good Will, Cent. Dig.; Dec. Dig.; 20 Cyc. 1275-1283; 14 A. & E. Enc. L. (2ed.) 1085.

61. Partnership good will (see Partnership,* § 2), and the validity of contracts not to engage in competing business (see Contracts,* § 3), are elsewhere treated.

62. Bloom v. Home Ins. Agency [Ark.] 121 SW 293.

63. Masters v. Brooks, 132 App. Div. 874, 117 NYS 585.

64. Newspaper routes. Harlow v. Oregonian Pub. Co. [Or.] 100 P 7. Good will of partnership after death of one of the partners. Ott v. Boring, 139 Wis. 403, 121 NW 126. Good will of a firm engaged in mercantile business is a species of property which will be taken into consideration in valuing the business of a going concern. Didlake v. Roden Grocery Co. [Ala.] 49 S 384.

65. Bloom v. Home Ins. Agency [Ark.] 121 SW 293. Contract and newspaper notice published by defendant **held to show sale** of good will of pharmacy business and of his medical practice. Brown v. Edsall [S. D.] 122 NW 658.

66. No competing business can be set up if it derogates from the grant of the good will of old business. Marshall Engine Co. v. New Marshall Engine Co., 203 Mass. 410, 89 NE 548. Where defendant sold good will of business of selling engines to reduce pulp to paper, a like business subsequently set up by him held under the evidence a competing business. Id. Advancing money to start others in a competing business and assisting and advising them held breach of agreement. C. H. Barrett Co. v. Ainsworth, 156 Mich. 351, 16 Det. Leg. N. 152, 120 NW 797. Where corporation was engaged in insurance business, and its large stockholder and the corporation entered into agreement selling business and good will to consolidated agency, **stockholder was personally bound by** agreement not to solicit insurance for five years in county. Bloom v. Home Ins. Agency [Ark.] 121 SW 293. Stockholder who sold shares and good will held prohibited from engaging in competing business. Buckhout v. Witwer [Mich.] 16 Det. Leg. N. 417, 122 NW 184.

67. Marshall Engine Co. v. New Marshall Engine Co., 203 Mass. 410, 89 NE 548.

68. Three times the annual net profits held, under the circumstances, a conservative estimate in determining value of good will for purpose of transfer tax. In re Keahon's Estate, 60 Misc. 508, 113 NYS 926.

69. Where seller of business and good will engaged in same business as a partner in a firm, he could be enjoined, but it was erroneous to enjoin the firm. Bloom v. Home Ins. Agency [Ark.] 121 SW 293.

70. Search Note: See notes in 7 C. L. 1885; 27 L. R. A. 776, 846; 28 Id. 33, 195, 318, 367; 38 Id. 214; 12 A. S. R. 900; 1 Ann. Cas. 649, 842; 4 Id. 226, 873, 1055; 6 Id. 606; 10 Id. 964.

See, also, Criminal Law, Cent. Dig. §§ 647, 868, 1431, 2448, 2449, 2625, 2745, 3017; Dec. Dig. §§ 280(2), 627½, 970(2, 3), 1031(3), 1086(7), 1088(3), 1144(2); 12 Cyc. 356, 760-765, 808-811, 842-845; Grand Jury, Cent. Dig. §§ 1-90; Dec. Dig. §§ 1-44; 20 Cyc. 1294-1357;

* Always begin with the latest article on the subject. Use the latest topical index.

Constitution of juries; qualifications of jurors. See 11 C. L. 1658—The number necessary to constitute a grand jury is regulated by statute,[72] the law in force at the time of the commission of the offense governing.[73] Statutes forbid discrimination in the selection of grand jurors,[74] and exclude from service as a grand juror any person who shall directly or indirectly seek such service.[75] The North Carolina statute, excluding as grand jurors those who did not pay their taxes the preceding year, does not exclude one against whom no taxes were assessed.[76]

Jury lists; summoning and impaneling of jury. See 11 C. L. 1659—The drawing of grand juries is regulated by statute.[77] Statutes prescribing the time for selecting a grand jury,[78] and the manner of drawing the same,[79] are often regarded as directory only, and in such case they need not be followed with technical nicety,[80] par-

Indictment and Information, Cent. Dig. §§ 50-61, 456, 457, 481, 482, 630, 631, 642, 643; Dec. Dig. §§ 10, 133(3), 137(2, 3), 196, 202; 22 Cyc. 204-210, 410, 416-425, 483-488; 17 A. & E. Enc. L. (2ed.) 1262; 10 A. & E. Enc. P. & P. 353.

71. **Includes** the drawing, powers and proceedings of grand juries. It excludes the binding over of persons to await the action of the grand jury (see Arrest and Binding Over,* § 6), signing and return of Indictments (see Indictment and Prosecutions,* § 4B), and objections and motions to quash the same (see Indictment and Prosecution,* § 4E). It also excludes matters relating to qualification, drawing and challenging which are common to grand and petit juries (see Jury*).

72. Act June 14, 1898 (P. L. p. 869), § 11, requires sheriff to summon 24 men, but does not require entire number shall serve. State v. Zeller [N. J. Err. & App.] 73 A 498. Where indictment was found by 23 men, held sufficient under existing practice. Id. Following California construction of statute adopted from that state, twelve held sufficient. State v. Weber [Nev.] 103 P 411. Rev. St. § 808 (U. S. Comp. St. 1901, p. 626) held limited to federal district and circuit courts, and not to apply to courts in territories. United States v. Haskell, 169 F 449.

73. Indictment held not open to objection because record failed to show it was not found by required number of jurors. Reed v. State [Okl. Cr. R.] 103 P 1042. Indictment for offense committed in Indian Territory before admission as state held governed by Mansf. Dig. § 3991, providing grand jury shall consist of 16 persons. United States v. Haskell, 169 F 449.

74. **Discrimination against negroes** not shown to justify court to quash indictment. McIntosh v. State [Tex. Cr. R.] 120 SW 455. Fact that grand jury which indicted negro did not contain member of his race held not to afford ground for complaint in absence of proof that discrimination because of race was exercised. Grace v. Ter. [Ariz.] 94 P 1108.

75. Under Code Supp. 1902, § 337, fact that grand juror requested his name to be returned is ground for challenge for cause. State v. Anderson, 140 Iowa, 445, 118 NW 772. Where members of election board returned their own names as qualified grand jurors, and two were drawn who had been returned against their express wish, held, under circumstances, indictment valid. Id.

76. Evidence held to show juror in question did not own property above amount exempt from taxation. United States v. Breese, 172 F 761.

77. Laws 1909, p. 133, c. 73, § 5, held to refer only to matter of drawing grand jurors from jury list and not to **time for appearance in court** and impaneling of jury as provided in preceding section. State v. Gilliam [Wash.] 104 P 1131. Time for impaneling jury held within discretion of court. Id. Code 1907, § 7261, providing for drawing of juries for **adjourned or special terms** by jury commission, when ordered prior to convening thereof, and § 3249, providing for drawing of juries by judge or court during special or adjourned term, when order therefor is made during, and not before, such special or adjourned term, held not in conflict. Holland v. State [Ala.] 50 S 215. Where judge made no order for grand jury at time he ordered adjourned term, but ordered same after term had convened, held properly drawn under § 3249. Id. Statute p. 10, c. 12, 32 Gen. Assem., should be **so construed as to carry out its intent** without giving technical meaning to words "found or determined." State v. Carter [Iowa] 121 NW 801. Acts 32d Gen. Assem. p. 10, c. 12 (Code, Supp. 1907, §§ 337 (a-d) held not objectionable as **ex post facto.** State v. Pell, 140 Iowa, 655, 119 NW 154. Not invalidated by Code, § 339. Id. Laws 1905, p. 270, c. 146, **held repealed** by Laws 1909, p. 131, c. 73, each being complete in itself. State v. Gilliam [Wash.] 104 P 1131. Error for court to quash venire of grand jurors drawn in compliance with Local Acts 1907, p. 279, and requiring organization under Gen'l Acts 1907, p. 542, amendatory of § 11 of former act, since **amendment was not passed in accordance with § 106 of constitution** and was void. Sellers v. State [Ala.] 50 S 340.

78. Not error to select grand jury after commencement of term of court, instead of before, as provided by Act Congress Feb. 9, 1906, c. 155, 34 Stat. 11. Price v. Ter., 1 Okl. Cr. R. 508, 99 P 157.

79. Acts required to be performed by clerk of district court, under § 1, Act of Congress of Feb. 9, 1906, 34 Stat. 11, c. 155, held not judicial duties and valid when performed by deputy clerk. Reed v. Ter., 1 Okl. Cr. R. 481, 98 P 583. Not necessary to have full venire present before required number are selected. State v. Williams [Nev.] 102 P 974. Comp. Laws, § 3869, held directory. Id.

80. That jury list was signed in blank by jury commissioners and later filled out under their direction will not invalidate proceed-

ticularly with regard to regulations for which the reason has failed.[81] A substantial compliance with a statute prescribing the manner of selecting jurors is sufficient.[82] The presumption is that grand jury lists were properly made [83] and that the drawing and summoning of grand jurors was regular,[84] and the burden of proof is upon the person asserting the contrary.[85] A grand jury list is not irregular because the names of persons are excluded who are exempt from jury duty.[86] The common-law method of summoning a grand jury by means of an open venire may be restored to when the statutory provision is adequate.[87] By federal statute, jurors in the federal courts must be drawn or selected as nearly as practicable, in accordance with the practice in the state courts.[88] A court has inherent power to call a grand jury,[89] so that if a crime be committed during the sitting of the court after the discharge of the grand jury the court may in its discretion summon another grand jury.[90] It is proper for the court, before the grand jury acts, to receive information tending to show that certain of the grand jurors would likely be biased.[91]

Powers and procedure. See 11 C. L. 1890—The presumption is in favor of the legality and regularity of grand jury proceedings.[92] While grand juries are not held to the same technical rules of evidence as petit juries, an indictment must be based on legal evidence.[93] Public officers, charged with malpractice in office, are entitled to a copy of an indictment before the same is laid before the grand jury, and have the right to appear and be heard in their own defense before the indictment is acted upon.[94] A presentment of a grand jury regarding a matter vested by law in another

lings. Commonwealth v. Tilly, 33 Pa. Super. Ct. 35. Slight deviations from statutory methods of selecting grand jury involve no material error. State v. Clark [Iowa] 119 NW 719. Indictment not illegal because grand jury list from which panel was drawn contained 73 names instead of 75. Id.

81. Provision that jury wheel shall be locked and sealed is to preserve it from interference of unauthorized persons, and when grand jury is to be drawn at once it is unnecessary to go through formality of locking and sealing wheel and at once reopening it. Commonwealth v. Tilley, 33 Pa. Super. Ct. 35.

82. Where grand jury lists were returned to auditor without being certified, as required by Code Supp. 1907, § 337, but were certified after being recorded, held sufficient compliance. State v. Carter [Iowa] 121 NW 801.

83. Fact that three persons on panel had served upon election boards which had returned names for grand jury list, under Code Supp. 1907, § 337, held no proof that names were returned by request, no two being members of same board. State v. Clark [Iowa] 119 NW 719.

84. All presumptions in favor of validity of action of jury commissioners and sheriff. Commonwealth v. Tilley, 33 Pa. Super. Ct. 35.

85. Burden is upon objector to show fact of solicitation or seeking service as grand juror in order to disqualify him under Code Supp. 1907, § 337. State v. Clark [Iowa] 119 NW 719.

86. List being made up of persons competent to serve, defendant held not prejudiced. State v. Pell, 140 Iowa, 655, 119 NW 154.

87. Where names were exhausted from regular jury box of county when defendant's case was reached, held not necessary to summon jurors under statutes. Cavett v. Ter., 1 Okl. Cr. R. 493, 98 P 890. Adhered to on rehearing in Id., 1 Okl. Cr. R. 493, 102 P 646.

88. Construing Rev. St. § 800 (U. S. Comp. St. 1901, p. 623), and p. 627, providing when grand juries shall be summoned, held that venire of jurors may be drawn and summoned for term without designating them as grand or petit jurors, and where such is practice in state courts, jury may be selected therefrom. United States v. Breese, 172 F 765.

89. Not necessary to take evidence as to propriety of calling grand jury. Williams v. People [Colo.] 103 P 298. Discretionary power to call grand jury not affected by constitutional amendment of June 1, 1908. State v. Finch [Or.] 103 P 505.

90. Requirement of § 227, Code Cr. Proc. as to number of days jury shall be drawn, prior to holding of term for which drawn, held inapplicable to drawing of "another grand jury" provided for by § 235. People v. Farmer, 194 N. Y. 251, 87 NE 457.

91. Hall v. State [Ga. App.] 66 SE 390.

92. Presumption cannot be rebutted by dubious construction placed by defendant's counsel upon certain language used by district attorney in oral argument, on a motion to quash subpoenas on ground that grand jury was exceeding power conferred by law in issuing same. In re Osborne, 62 Misc. 575, 117 NYS 169.

93. State v. Clark, 64 W. Va. 625, 63 SE 402. Dying declaration may be received in evidence before grand jury under same conditions as it might be admitted upon trial of accused. Id. Admission of some incompetent evidence will not invalidate indictment, if legal evidence is sufficient to support it. Id.

94. Reversed for failure to give notice and

body is of no effect.[95] It is sufficient if a subpoena requiring attendance before a grand jury substantially complies with the statute prescribing the form of the same.[96] The oath of the witnesses sworn before the grand jury must substantially comply with the oath prescribed by statute.[97] A constitutional provision that no person shall be compelled to testify against himself in a criminal cause applies to the investigation of a crime before a grand jury.[98] It is the duty of the district attorney, as legal adviser of the grand jury, to call their attention to the insufficiency of an indictment and have a new one presented.[99] A statute requiring the grand jury to appoint one of their members as clerk, who must preserve minutes of their proceedings, does not require that evidence before that body be preserved,[1] and such statute does not authorize the appointment of a stenographer, not a member of the grand jury, to take the evidence of witnesses,[2] but if such stenographer is an attorney, duly appointed and qualified as a special assistant to the prosecutor, his presence is authorized.[3] The mere introduction of incompetent testimony before a grand jury,[4] or an inadvertent misstatement of the law by a prosecuting officer to a grand jury,[5] is not ground for quashing indictment. An indictment is not invalidated because the other jurors do not accompany the foreman into the courtroom when it was presented to the judge.[6] Proceedings of a grand jury after an adjournment of court[7] or without the concurrence of the requisite number of jurors are void.[8]

Effect of illegality in constitution or proceedings.[See 11 C. L. 1661]—Some states have statutes under which an indictment cannot be attacked for irregularity in the drawing of a grand jury.[9] Improper presence of counsel before the grand jury may vitiate the indictment,[10] but the burden is on accused to show such unauthorized presence.[11]

allow hearing. Dyer v. State [Ga. App.] 65 SE 1089.

95. Presentment that office in county building assigned to county auditor was unsuitable held without effect on board of county commissioners to require auditor to occupy such room. Werts v. Feagle [S. C.] 65 SE 226.

96. Complied with if fictitious name is used to designate accused, if his real name is not known, even though person subpoenaed is not informed thereby of the subject about which he will be called upon to testify. In re Osborne, 62 Misc. 575, 117 NYS 169. Code Cr. Proc. § 612, prescribing form of subpoena, held constitutional. Id.

97. Under § 834, Penal Code 1895, witness must be sworn on a bill or presentment charging a specific offense against the party charged. Switzer v. State [Ga. App.] 65 SE 1079.

98. Not necessary that evidence should be direct admission of crime; sufficient if same might tend to convictien. State v. Naughton, 221 Mo. 398, 120 SW 53. Prisoner discharged on habeas corpus where imprisonment resulted from refusal to answer incriminating questions while testifying before grand jury. Ex parte Gauss [Mo.] 122 SW 741; Ex parte Eichel [Mo.] 122 SW 743.

99. Under such circumstances it rests in discretion of jury whether or not to hear testimony before returning new bill. Choloe v. State, 54 Tex. Cr. R. 517, 114 SW 132.

1. Wilson's Rev. & Ann. St. 1903, § 5333, held to refer to minutes of the evidence, meaning merely a memorandum, and under it oral evidence is permissible. Pilgrim v. State [Okl. Cr. R.] 104 P 383.

2. Reversible error to allow stenographer to take notes and read same to jury, she being witness in case. State v. Salmon, 216 Mo. 466, 115 SW 1106.

3. Fact that assistant merely stenographically reported testimony did not infringe defendant's rights. United States v. Haskell, 169 F 449.

4, 5. United States v. Haskell, 169 F 449.

6. United States v. Haskell, 169 F 449.

7. Where presiding judge left county and held court at other place but attempted to keep court open in former place, held during judges absence court was not organized and indictment declared void. People v. Rotole, 61 Misc. 579, 115 NYS 854. Indictment returned by grand jury organized by court, which had by operation of law become adjourned, held void. Stephens v. State [Ala.] 50 S 42.

8. Under Wilson's Rev. and Ann. St. 1903, § 5349, finding by less body than 12 jurors held nullity. Hayes v. State [Okl. Cr. R.] 103 P 1061. Where one of twelve jurors was not present at first finding, but subsequently he did concur in second finding against defendant but latter was not permitted to take testimony in her behalf at latter finding, held void. Id.

9. Code 1907, § 7572. Gaston v. State [Ala.] 49 S 876; Holland v. State [Ala.] 50 S 215. Writ of prohibition to stay trial denied. In re Hatch, 9 Cal. App. 333, 99 P 398.

10. Agreed statement of facts negatived idea of improper presence while jury was deliberating upon accusation against defend-

*Objections and waiver thereof; estoppel to urge.*See 11 C. L. 1662—Instructions given by a court to a grand jury are not reviewable at the instance of a prosecuting attorney, unless it is specifically shown they unlawfully interfered with the performance of his duties.[12] Objection to the constitution or proceedings of the grand jury must precede any plea upon the merits,[13] and should be in the nature of a plea in abatement.[14] The mere presence of the prosecuting attorney or his assistant in the same room with the grand jury while the grand jurors are deliberating or casting their votes,[15] or the alleged disqualification of grand juror's proper affectum, are not valid grounds for pleas in abatement to an indictment.[16] Statutes frequently specify the causes of challenge to the panel of a grand jury.[17] A motion to quash must be supported by sufficient proof of the facts it states.[18] Exemption from jury duty is a personal privilege and cannot be raised as a disqualication by challenge.[19]

*Secrecy of deliberations.*See 11 C. L. 1662—While proceedings before a grand jury are generally regarded as secret, the court may remove the secrecy and require the proceedings to be disclosed in order to satisfy public justice.[20] By statute, a court may require a member of a grand jury to disclose the testimony of a witness examined before it in order to impeach his testimony at a subsequent trial of the case.[21] The person who administered an oath to a witness before a grand jury in a particular case is not excused from testifying as to the form of oath he administered on the ground that his testimony is privileged.[22] The accused is not entitled to be confronted with the witnesses against him in a proceeding before a grand jury.[23] In some states the district attorney is required to keep the original minutes of a grand jury in his custody, and neither the minutes or a copy thereof are permitted to be taken from his office.[24] Statutes usually preclude any one from being present save the grand jury, when they vote on a bill.[25] The presence before a grand jury of

ant. Moody v. State [Tex. Cr. R.] 121 SW 1117.

11. Moody v. State [Tex. Cr. R.] 121 SW 1117.

12. Writ of certiorari denied. State v. Spokane County Super. Ct., 52 Wash. 484, 100 P 978.

13. Plea of not guilty. State v. Banner, 149 N. C. 519, 63 SE 84; State v. Sartino, 216 Mo. 408, 115 SW 1015.

14. No merit to plea in abatement that key to jury box was not deposited with county treasurer. Simmons v. State [Ala.] 48 S 606.

15. Proof must show misconduct on part of these officers which resulted in prejudice toward accused, or in finding of indictment which would not otherwise have been found. State v. Stichtenoth, 8 Ohio N. P. (N. S.) 297.

16. Hall v. State [Ga. App.] 66 SE 390.

17. Causes specified in Cr. Prac. Act. of 1661 (Laws 1861, p. 452, c. 104), § 179, held not to apply to changed method of drawing grand jurors, according to Comp. Laws, § 3869. State v. Williams [Nev.] 102 P 974. Where challenge was to array, and neither of two grounds allowed by § 2487 and § 2488, Rev. St. 1899 (Ann. St. 1906, pp. 1493, 1495), was alleged, motion to quash properly overruled. State v. Sartino, 216 Mo. 408, 115 SW 1015.

18. Objection that names of 20 unqualified persons were placed on grand jury list in violation of Acts 32, Gen. Assem. p. 11, c. 12, § 4, held properly overruled, where not supported by affidavit or other proof. State v. Pell, 140 Iowa, 655, 119 NW 154.

19. Under § 3763, Rev. St. 1899 (Ann. St. 1906, p. 2095), persons serving as petit jurors are exempted from grand jury duty within year from such service, but are not disqualified from serving as grand jurors if they choose. State v. Sartino, 216 Mo. 408, 115 SW 1015. Such provision held to be directory only. Id.

20. Defendant entitled to show character of investigation before grand jury in order to establish truth of alleged slanderous charges made against that body and prosecuting attorney. State v. Putnam [Or.] 100 P 2.

21. In prosecution of witness for perjury, oral testimony of grand juror held competent under § 5347, Wilson's Rev. & Ann. St. 1903. Pilgrim v. State [Okl. Cr. R.] 104 P 383.

22. Solicitor general not excused. Switzer v. State [Ga. App.] 65 SE 1079.

23. Article 6 and amendments of U. S. Const., regarding right of accused to confront witnesses, held not violated. Harper v. State, 131 Ga. 771, 63 SE 339.

24. Laws 1907, p. 1338, c. 587, § 5, held not to apply where attorney general or his deputy supersedes district attorney under executive law. In re Osborne, 62 Misc. 575, 117 NYS 169. Trespass to enter office of deputy attorney general and make copy of minutes while in his possession. Id.

25. District attorney not present when vote was taken. Choice v. State, 54 Tex. Cr. R. 517, 114 SW 132. Prosecuting attorney has no right to remain in room while jurors

special counsel for the state will not invalidate an indictment if his testimony related to another indictment.[26]

Ground Rents, see latest topical index.

GUARANTY.

The scope of this topic is noted below.[27]

§ 1. **What Constitutes, 1974.**
§ 2. **Form and Requisites of the Contract, 1974.**
§ 3. **Operation and Effect, 1976.** Interpretation in General, 1976. Fixing Default and Liability, 1977. **Defenses and Discharge, 1978.**
§ 4. **Rights and Remedies Between Guarantor and Principal Debtor, 1979.**
§ 5. **Actions, 1979.**

§ 1. *What constitutes.*[28]—See 11 C. L. 1663—As distinguished from suretyship, guaranty is a secondary obligation[29] in the nature of an undertaking to perform upon default by the primary obligor.[30] It follows that there must be a principal debtor other than the guarantor.[31] The obligation being contractual, the guarantor cannot be charged beyond the terms of his assent.[32] The inaccurate use of the word "guaranty," as for instance to signify "warranty,"[33] or "indemnity,"[34] or "undertakings,"[35] results occasionally in the confusion of the nature of these obligations. Thus the liability of one really a guarantor has been held primary,[36] and absolute.[37] Where the obligation of the promisor, upon default in the principal obligation, is different from the latter, the agreement is in the nature of a guaranty.[38]

§ 2. *Form and requisites of the contract.*[39]—See 11 C. L. 1663—Contracts of guaranty are governed by the same rules relative to the necessity[40] and sufficiency[41] of

are expressing their views or casting their votes upon any matter before them. State v. Stichtenoth, 8 Ohio N. P. (N. S.) 297.

26. People v. Nall, 242 Ill. 284, 89 NE 1012.

27. It excludes contracts of suretyship (see Suretyship*) and indemnity (see Indemnity*) and the requirements that contracts of guaranty be in writing (see Frauds, Statute of,* § 2). It likewise excludes powers of corporations to guarantee the obligations of third persons (see Corporations,* § 7; Banking and Finance,*), the power of a partner to bind the firm by a guaranty (see Partnership,* § 4A), and the liabilities of guarantors of negotiable instruments by indorsement thereon (see Negotiable Instruments,* § 3). It also excludes general principles of contract (see Contracts*) and grounds of invalidity common to all contracts (see Frauds and Undue Influence;* Incompetency;* Mistake and Accident*).

28. Search Note: See notes in 1 L. R. S. (N. S.) 305; 15 Id. 1115; 64 A. S. R. 393; 4 Ann. Cas. 822.

See, also, Guaranty, Cent. Dig. §§ 1-6; Dec. Dig. §§ 1-4; 20 Cyc. 1397-1403; 14 A. & E. Enc. L. (2ed.) 1127, 1128, 1129.

29. Sheffield v. Whitfield [Ga. App.] 65 SE 807.

30. Promise to pay if debtor does not. Sheffield v. Whitfield [Ga. App.] 65 SE 807; Stewart v. Ticonic Nat. Bank, 104 Me. 578, 72 A 741.

31. Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 P 856. Agreement to purchase at cost upon request, if made within certain time, is not a guaranty. Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 NE 63. No longer guaranty where guarantor has become principal debtor by novation. General Lithographing & Print. Co. v. Washington Rubber Co. [Wash.] 104 P 650.

32. Cannot be enlarged by subsequent agreement between debtor and creditor. Witt Shoe Co. v. Peacock, 150 N. C. 545, 64 SE 437. Creditor cannot change guarantor into principal debtor without his consent. Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 P 856.

33. Where used of chattel by its vendor Gaar, Scott & Co. v. Meyer, 156 Mich 522, 16 Det. Leg. N. 200, 121 NW 263.

34. "Guaranty" of money to be invested. Norris v. Reynolds, 131 App. Div. 818, 116 NYS 106. "Guaranty" of protection from loss. National Bank v. Roundtree [Tex. Civ. App.] 115 SW 639.

35. "Guaranty" to maintain pavement laid by "guarantor." City of Akron v. Barber Asphalt Pav. Co. [C. C. A.] 171 F 29.

36. Tilt-Kenney Shoe Co. v. Haggarty, 43 Tex. Civ. App. 335, 114 SW 386.

37. Jacocks v. Dessar, 129 App. Div. 286, 113 NYS 324.

38. Agreement by promoters of corporation to cancel stock subscription and return money, if the corporation did not erect a plant within a year. Broadus v. Russell [Ala.] 49 S 327.

39. Search Note: See notes in 3 C. L. 1565; 20 L. R. A. 257; 16 L. R. A. (N. S.) 353, 775; 105 A. S. R. 502.

See, also, Guaranty, Cent. Dig. §§ 7-27, 102-106; Dec. Dig. §§ 5-26; 20 Cyc. 1404-1422, 1479; 14 A. & E. Enc. L. (2ed.) 1131, 1145.

40. Consideration essential. Brown v. Spiegel, 156 Mich. 138, 16 Det. Leg. N. 43, 120 NW 579; Jones v. Britt [C. C. A.] 168 F 852.

41. May be **nominal.** Emerson Mfg. Co. v.

* Always begin with the latest article on the subject. Use the latest topical index.

consideration, and relative to offer and acceptance,[42] as apply to ordinary contracts. In some states, however, the statute of frauds is not satisfied unless the consideration is recited in the guaranty,[43] or may fairly be inferred therefrom.[44] The guarantor may be estopped to deny an offer of guaranty,[45] or its acceptance,[46] or the existence of consideration therefor.[47] The contract may be parol,[48] unless within the local statute of frauds,[49] and may be for a limited amount.[50] Whether a given communication amounts to an offer of guaranty or an acceptance thereof must be determined from all the circumstances of the case.[51] The validity of such a contract is governed by the law of the place of performance.[52] A rate of interest allowed by statute only for money "due and owing" may be validly fixed, in a continuing guaranty, to take effect after maturity, though no debt is incurred by the principal till after the guaranty is given.[53]

Rustad [N. D.] 120 NW 1094; Bond v. John V. Farwell Co. [C. C. A.] 172 F 58. But **past consideration** is insufficient. State Bank v. People's Nat. Bank, 118 NYS 641. Consequently, though a guaranty of an account, wholly or partly future, has sufficient consideration (Polk Print. Co. v. Smedley, 155 Mich. 249, 15 Det. Leg. N. 1001, 118 NW 984), a guaranty of a past debt must be supported by some other consideration (Id.), such as delivery to guarantor for security (Birge v. Armour, 87 Pa. Super. Ct. 470). May consist in an **advantage to the guarantor** (Jones v. Britt [C. C. A.] 168 F 852), **or to the principal debtor** (Id.), such as a loan (Sompoc Val. Bank v. Stephenson [Cal.] 104 P 449), or in a **disadvantage to the creditor** (Jones v. Britt [C. C. A.] 168 F 852), such as an agreement to forbear, or an extension or renewal of credit (Id.).

42. Where guaranty is given at solicitation of guarantee, it completes the contract (Tilt-Kenney Shoe Co. v. Haggarty, 43 Tex. Civ. App. 335, 114 SW 386; First Nat. Bank v. Nigro & Co. [Tex. Civ. App.] 110 SW 536; Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 P 856; Acorn Brass Mfg. Co. v. Gilmore, 142 Ill. App. 567), when it is mailed (McFarlane v. Wadhams, 165 F 987), so that no further notice of acceptance is necessary (Tilt-Kenney Shoe Co. v. Haggarty, 43 Tex. Civ. App. 335, 114 SW 386), provided, however, that it is responsive to the request (Bond v. John V. Farwell Co. [C. C. A.] 172 F 58). If the guarantee did not request the guaranty of the guarantor, the latter's offer must be accepted (Brown v. Spiegel, 156 Mich. 138, 16 Det. Leg. N. 43, 120 NW 579) even though guarantee requested debtor to furnish someone's guaranty (Detroit Free Press v. Pattengill, 155 Mich. 272, 15 Det. Leg. N. 955, 118 NW 927), and of course the acceptance must not vary the guaranty (McFarlane v. Wadhams, 165 F 987). Where, however, the offer of guaranty, by its terms, plainly contemplates acceptance by extension of credit, it need not be otherwise accepted. Sheffield v Whitfield [Ga. App.] 65 SE 807.

43. McFarlane v. Wadhams, 165 F 987.

44. "I hereby guarantee * * * the accounts between W. and I. Co. for ice, whatever the company will be short." Held to apply to future ice, and therefore sufficient consideration. Winne v. Mehrbach, 130 App. Div. 329, 114 NYS 618.

45. By silence after receipt of letter treating his communication as an offer of guaranty and purporting to accept it. Kellogg-Mackay-Cameron Co. v. Havre Hotel Co. [C. C. A.] 173 F 249.

46. By recital therein of receipt from the guarantee of a nominal consideration. Emerson Mfg. Co. v. Rustad [N. D.] 120 NW 1094.

47. By recital of consideration therein, after guarantee has acted thereon. Bond v. John V. Farwell Co. [C. C. A.] 172 F 58.

48. None the less so because of execution of note and mortgage as security. Finnucan v. Feigenspan, 81 Conn. 378, 71 A 497.

49. Oral guaranty of note, known to guarantee to be owned by another, void. As to notes believed by guarantee to be owned by guarantor, and for him rediscounted, guaranty really an original undertaking. State Bank v. People's Nat. Bank, 118 NYS 641.

See Frauds, Statute of, § 2.

50. Finnucan v. Feigenspan, 81 Conn. 378, 71 A 497.

51. Where creditor signed and accepted delivery of a duplicate copy of an instrument submitted by the guarantor, being in form a proposal to creditor for an agreement to grant such extension on notes as the debtor might desire, and being signed by guarantor, held to constitute complete contract of guaranty. Jones v. Britt [C. C. A.] 168 F 852. "We are prepared to meet these terms with B, so that you will be perfectly safe in shipping him the material," followed by this reply—"Your communication guaranteeing the account of Mr. B received. The same is satisfatcory to us." Held to constitute contract of guaranty. Kellogg-Mackay-Cameron Co. v. Havre Hotel Co. [C. C. A.] 173 F 249. "I will be responsible for $500 for S," written in answer to creditor's request, held either to complete the contract, or to be an offer accepted by the creditor's reply—"We acknowledge the receipt of your favor guaranteeing the account of S for $500." Acorn Brass Mfg. Co. v. Gilmore, 142 Ill. App. 567. Where company, bound to pay royalties on brake-beam made under an assigned patent, assigned the patent over, it was not chargeable as guarantor of payment of royalties by its assignee, in absence of evidence that the manufacture could be carried on with reasonable profit, or that any fixed number of beams were to be made. Barnes v. American Brake-Beam Co., 238 Ill. 582, 87 NE 291.

52. Bond v. John V. Farwell Co. [C. C. A.] 172 F 58.

53. Under 2 Starr & C. Ann. St. Ill. 1896,

§ 3. *Operation and effect.*[54] *Interpretation in general.* See 11 C. L. 1664.—The interpretation of a contract of guaranty is for the court,[55] and is governed by the law of the place when the contract was made.[56] In general, however, the ordinary rule prevails, that the construction will aim to effectuate what may fairly be presumed to have been the intention of the parties,[57] upon consideration of the whole instrument,[58] in the light of its subject-matter,[59] the situation of the parties,[60] and the circumstances surrounding the transaction.[61] The construction will be in furtherance of the purpose of the contract to promote commercial intercourse,[62] and in cases of ambiguity will favor the creditor,[63] but the guarantor's liability will never be extended by strained construction beyond the fair import of the language of the instrument[64] and, where there is no ambiguity, he may insist upon its precise terms.[65] As a guaranty is more often given to cover future debts, it will not be construed to apply to past debts unless such was the clear intention.[66] Except where the point is expressly covered by the terms of the guaranty,[67] the question whether it is continuing,[68] or not,[68a] must be ascertained by construction, and for this purpose parol evidence is admissible in doubtful cases.[69] A guaranty may be continuing, though for a limited amount.[70] Similarly the court must determine from the peculiar facts of each case whether the guaranty is absolute[71] or collateral,[72] or con-

c. 74, par. 6, allowing 7 per cent in such cases. Bond v. John V. Farwell Co. [C. C. A.] 172 F 58.

54. **Search Note:** See notes in 21 L. R. A. 409; 23 Id. 707; 14 L. R. A. (N. S.) 1231; 63 A. S. R. 327; 4 Ann. Cas. 884.

See, also, Guaranty, Cent. Dig. §§ 28-84; Dec. Dig. §§ 27-74; 20 Cyc. 1423-1481; 14 A. & E. Enc. L. (2ed.) 1138, 1143, 1145, 1157.

55. Error to leave construction to jury. Perlman v. Ehrlich, 119 NYS 663.

56. McFarlane v. Wadhams, 165 F 987.

57. Newcombe v. Kloeblen [N. J. Err. & App.] 74 A 511; Finnucan v. Feigenspan, 81 Conn. 378, 71 A 497.

58. Manhattan Rolling Mill v. Dillon, 119 NYS 571; Morris & Co. v. Sucker [Mich.] 16 Det. Leg. N. 723, 123 NW 21.

59. Morris & Co. v. Sucker [Mich.] 16 Det. Leg. N. 723, 123 NW 21.

60. Finnucan v. Feigenspan, 81 Conn. 378, 71 A 497.

61. Finnucan v. Feigenspan, 81 Conn 378, 71 A 497; Newcomb v. Kloeblen [N. J. Err. & App.] 74 A 511.

62. Acorn Brass Mfg. Co. v. Gilmore, 142 Ill. App. 567.

63. Whitall-Tatum Co. v. Manix, 61 Misc. 615, 113 NYS 1010; Newcomb v. Kloeblen [N. J. Err. & App.] 74 A 511.

64. Whitall-Tatum Co. v. Manix, 61 Misc. 615, 113 NYS 1010; Finnucan v. Feigenspan, 81 Conn. 378, 71 A 497; Witt Shoe Co. v. Peacock, 150 N. C. 545, 64 SE 437.

65. Where signed printed guaranty to Nelson Morris & Co. after that firm had been succeeded by Morris & Co., which acquired its printed forms, and inadvertently failed to blot out "Nelson" in this case, parol evidence of the above could not be introduced by Morris & Co. to show intention to guarantee them. Morris & Co. v. Sucker [Mich.] 16 Det. Leg. N. 723, 123 NW 21.

66. Manhattan Rolling Mill v. Dellon, 113 NYS 571.

67. "Shall be a continuing guaranty, and apply * * * until written notice" to the contrary. Spitz v. Morse, 104 Me. 447, 72 A 178. "Shall continue until notice of its discontinuance * * * in writing." Bond v. John V. Farwell Co. [C. C. A.] 172 F 58. "To remain in force until withdrawn in writing." Whitall-Tatum Co. v. Manix, 61 Misc. 615, 113 NYS 1010.

68. "I will be responsible for any bill that my son James shall make" held continuing. Newcomb v. Kloeblen [N. J. Err. & App.] 74 A 511. "I herewith guarantee payment of account of X to Y, to the extent of $1,800." Held, that though given at the time of an order for $1,800, jury might find it a continuing guaranty covering later orders. Rosenberg v. Klopfer, 117 NYS 102. Guaranty of difference between $2,430 (amount of debt), and $1,430 (value of security), held to be a guaranty of the part uncollectible out of the security, up to $1,000, and therefore not discharged by the collection of $1,000. Foster County State Bank v. Hester [N. D.] 119 NW 1044.

68a. Guaranty of payment for goods to be furnished and of repayment of a loan of $450 to be made, "not exceeding $750," held, not continuing; therefore payments by principal were in reduction of guaranty. Finnucan v. Feigenspan, 81 Conn. 378, 71 A 497. Where principal and another joined in a joint and several note for $1,000, to be applied to all claims against principal, and stated to be for purpose of guaranteeing same to extent of $1,000, held, that payments by the principal should be in reduction of other's liability though balance due was more than $1,000. Witt Shoe Co. v. Peacock, 150 N. C. 545, 64 SE 437.

69. Parol evidence held to show it not continuing. Perlman v. Ehrlich, 119 NYS 663.

70. Whitall-Tatum Co. v. Manix, 61 Misc. 615, 113 NYS 1010.

71. Guaranty of performance or payment in case of default held absolute. Jacocks v. Dessar, 129 App. Div. 286, 113 NYS 324. "I will be responsible for the amount of $500 for S," given at creditor's request, held abso-

ditional,[78] and, if conditional, whether the condition has been fulfilled;[74] as also the scope of the guaranty both as to the obligations it covers,[75] and as to the persons entitled to enforce it,[76] its nature,[77] and its period of duration.[78]

Fixing default and liability. See 11 C. L. 1885—The liability of the guarantor does not arise until default by the principal debtor,[79] but upon such default it becomes fixed.[80] Where the obligation of the guarantor is regarded as absolute or primary, it is held that he is not entitled to notice of the principal's default,[81] and that the guarantee need use no diligence to fix his liability,[82] or to enforce that of the principal debtor.[83] But generally the guarantee is required to notify the guarantor of the principal's default within a reasonable time,[84] unless such notice is waived by the guarantor.[85] Performance by the creditor of the condition upon which the guaranty is given may be excused.[86] What constitutes default in a given case depends, of course, on the nature of the obligation guaranteed,[87] and the guarantor is not concluded by a decision that default has occurred, rendered in proceeding between the principal and the guarantee to which he was not a party.[88]

lute. Acorn Brass Mfg. Co. v. Gilmore, 142 Ill. App. 567.

72. Authorization to plaintiff to furnish papers to principal and agreement to become responsible for payment of all bills therefor to $500, held collateral, and guarantor therefore liable for balance due though gross sales in excess of $500 (balance being less than $500). Detroit Free Press v. Pattengill, 155 Mich. 272, 15 Det. Leg. N. 955, 118 NW 927.

73. Guaranty given for such extensions by creditor as debtor might desire not conditional upon debtor's desiring an extension. Jones v. Britt [C. C. A.] 168 F 852.

74. Guaranty to apply in case of sale, not enforcible when goods sent on approval were returned. Pope v. Fairchild, 117 NYS 575. Where given in consideration of furnishing goods on 30 days' credit, guaranty does not cover goods manufactured to fill order, but not delivered. Whitall-Tatum Co. v. Manix, 61 Misc. 615, 113 NYS 1010. Guaranty of rent, while lessee is "in occupation," enforcible though lessee had only legal as distinguished from physical possession. Woods v. Broder, 129 App. Div. 122, 113 NYS 335. Under guaranty given to manufacture "In consideration of delivery to X" of goods, guarantor liable for goods which manufacturer had made to fill the order and stood ready to deliver. Cross, Austin & Ireland Lumber Co. v. Goodwin, 131 App. Div. 865, 116 NYS 315.

75. Guaranty by officers of hotel company, of payment for "car of fresh meat" ordered by company (the order being for a carload of hotel supplies, largely fresh meat) covered whole shipment. Armour & Co. v. Bluthenthal [Ga. App.] 65 SE 803. Where bank honored a draft purporting to be for a car of oranges, on faith of telegram guaranteeing payment of draft for "car of oranges," guarantor held liable for full amount, though draft included other shipments. First Nat. Bank v. Nigro & Co. [Tex. Civ. App.] 110 SW 536.

76. Guaranty of "all bills contracted at your house by W," given to a partnership, not enforcible for goods bought after members of partnership became a corporation. Jordan Marsh Co. v. Beals, 201 Mass. 163, 87 NE 471.

77. Bond conditioned on return of securities is not security for payment of money, though dischargeable thereby both in law and by express agreement. Therefore not illegal for company to issue. Baglin v. Title Guaranty & Surety Co., 166 F 356.

78. Where vendor of stock agreed to repurchase at price paid, one year from date of sale, and guaranteed to pay "dividends amounting to not less than eight per cent per annum" thereon, held guaranty expired at end of one year, though vendee did not elect to resell. Tilton v. Whittemore, 202 Mass. 39, 88 NE 329.

79. Insufficient to produce unreceipted bill without disproving subsequent payment by debtor. Burrows v. New York Breweries Co., 119 NYS 196.

80. Not affected by subsequent dealings of guarantee with third person with reference to related matters. Baglin v. Title Guaranty & Surety Co., 166 F 356.

81. Tilt-Kinney Shoe Co. v. Haggarty, 43 Tex. Civ. App. 335, 114 SW 386; Newcomb v. Kloeblen [N. J. Err. & App.] 74 A. 511.

82. Tilt-Kenney Shoe Co. v. Haggarty, 43 Tex. Civ. App. 335, 114 SW 386.

83. Jacocks v. Dessar, 129 App. Div. 286, 113 NYS 324.

84. Sheffield v. Whitfield [Ga. App.] 65 SE 807.

85. Expressly waived in guaranty. Sheffield v. Whitfield [Ga. App.] 65 SE 807.

86. Where on condition that guarantee sell before July 1, but required to hold for instructions from guarantor, and latter failed to give instruction before July 1. Putnam v. Live Oak Mercantile Co., 122 La. 507, 47 S 846.

87. Guarantor of obligation to produce warehouse receipt to perfect title of guarantee liable after guarantee obliged to pay holder of receipts. National Bank v. Roundtree [Tex. Civ. App.] 115 SW 639. Agreement to guarantee debt in consideration of such extension as debtor should desire enforcible after maturity, though debtor asked no extensions. Jones v. Britt [C. C. A.] 168 F 852.

88. Where promoters of corporation guaranteed repayment of subscriptions on condition, a decision in a suit by the corporation to collect subscription balance, that the con-

Defenses and discharge. See 11 C. L. 1666—Failure of the guarantee to disclose immaterial facts when the guaranty was given does not discharge the guarantor,[89] but failure of consideration,[90] or the alteration of the obligation guaranteed, without the consent of the guarantor,[91] even though the alteration be immaterial,[92] or without injurious effect,[93] or the substitution of a different principal obligor without the guarantor's consent,[94] is a defense. The rule that the guarantor is discharged where the creditor grants the principal an extension of time, without his knowledge or consent,[95] is recognized in some states by statute,[96] but of course the extension must be of the principal obligation,[97] and, where the guaranty expressly covers renewals, the rule does not apply.[98] Whether the fact that the guarantee failed to exercise ordinary care and diligence to protect the guarantor is a defense, is often made to depend upon the form of the guaranty; where it guarantees performance by the principal, the defense is frequently allowed,[99] but not when it is an unqualified promise to pay.[1] Even ordinary diligence, however, does not require the rescission of the contract guaranteed, for the guarantor's protection.[2] The taking by the guarantee of additional security, as such, does not, of course, discharge the guarantor.[3] Part payments are a defense pro tanto [4] provided they were made on account of the obligation guaranteed.[5] But acceptance by the guarantee of the principal's note for the full amount of the debt will not be deemed to be in payment thereof.[6] Under some circumstances, also, the guarantor may remain liable after the discharge of the principal,[7] as, for example, where he has been discharged in bankruptcy,[8] even though the guarantee proved his claim in the bankruptcy proceedings.[9]

dition for repayment had happened, not binding on guarantors, as privies of principal, in suit by subscriber to recover instalments paid. Broadus v. Russell [Ala.] 49 S 327.

89. Concealment of subsequent agreement with principal whereby obligation might be discharged in a different way, where such alternative existed as matter of law without the agreement. Baglin v. Title Guaranty & Surety Co., 166 F 356.

90. Promised to guarantor for guaranty of pre-existing debt. Birge v. Armour, 37 Pa. Super. Ct. 470. Failure of vendee of land to which a guaranteed lease was appurtenant, to pay purchase price according to terms, may prevent his recovery on the vendor's guaranty. Williamson v. Davey [Tex. Civ. App.] 114 SW 195. But where promoters of corporation guaranteed repayment of subscription upon a condition which happened, they could not set up failure to pay certain instalments, against guarantee suing to recover instalments paid. Broadus v. Russell [Ala.] 49 S 327.

91, 92, 93. Weiss v. Leichter, 113 NYS 999.

94. Guarantee's permitting lessee to assign to third person without consent of guarantor of lease, and looking to assignee thereafter for performance. Williamson v. Davey [Tex. Civ. App.] 114 SW 195.

95. By accepting debtor's subsequently due note for full amount of debt. Rosenberg v. Klopfer, 117 NYS 102.

96. By Rev. Code 1905, § 6092. Not extended by acceptance of subsequently due notes, expressly as collateral security. Foster County State Bank v. Hester [N. D.] 119 NW 1044.

97. Immaterial that obligation was extended to meet which principal obligation was given. Baglin v. Title Guaranty & Surety Co., 166 F 356.

98. Spitz v. Morse, 104 Me. 447, 72 A 178.

99. Guaranty of performance by lessees of oil lease contract. Williamson v. Davey [Tex. Civ. App.] 114 SW 195. Guaranty of collection. Merritt v. Haas, 106 Minn. 275, 118 NW 1023.

1. Under such a guaranty no defense that premiums were not kept up on insurance policy deposited as collateral, or that no attempt was made to collect note. Merritt v. Haas, 106 Minn. 275, 118 NW 1023.

2. No defense that conditional vendor failed to exercise his option to retake the goods, for protection of guarantor of performance by vendor. Vitte v. Merrell Drug Co., 137 Mo. App. 229, 117 SW 666.

3. Where guarantor had given a mortgage to secure debt. Cabrera v. American Colonial Bank, 29 S. Ct. 623.

4. By principal. Finnucan v. Feigenspan, 81 Conn. 378, 71 A 497.

5. Payments must be shown not simply to have been made since guaranty was given, but also to be for goods furnished since the guaranty. Dimock & Fink Co. v. Mitchell, 117 NYS 1029.

6. Presumption that creditor did not intend to surrender better security for poorer. Spitz v. Morse, 104 Me. 447, 72 A 178.

7. Where guaranty covered notes of principal, guarantor not discharged from liability on principal's note accepted in discharge of debt. Spitz v. Morse, 104 Me. 447, 72 A 178.

8, 9. Vette v. Merrill Drug Co., 137 Mo. App. 229, 117 SW 666.

§ 4. *Rights and remedies between guarantor and principal debtor.*[10]—See 11 C. L. 1667—Payment of the debt by a guarantor for the account of the principal is presumed to be at the principal's request,[11] and raises an implied promise of reimbursement by the principal.[12] It also entitles the guarantor to subrogation to whatever rights the guarantee may have against the principal,[13] including the right to property deposited with the guarantee by the principal, to be held as collateral security[14] or to be forfeited upon default.[15] But, of course, the guarantor is not subrogated to the guarantee's rights against the debtor of the principal debtor.[16]

§ 5. *Actions.*[17]—See 11 C. L. 1667—One claiming under a guaranty must prove its existence,[18] the default of the principal,[19] and the amount of the guarantor's liability,[20] though, where the obligation is regarded as primary and absolute, neither the default of the principal,[21] nor the exhaustion of the remedy against him need be proved.[22] To prevent irreparable mischief equity will enjoin a suit against the guarantor primarily,[23] and will order the principal to pay the debt, if he be able.[24] Some statutes, however, are held broad enough to permit the guarantee to join the guarantor with the principal, as defendants.[25] The assignee of a guaranteed obligation may, in some states, enforce the guaranty, though the obligation is not strictly negotiable.[26] In a suit upon a guaranty of a single item in a running account, the guarantor is entitled to have payments on the account credited in the order of the creation of the items of debt.[27]

GUARDIANS AD LITEM AND NEXT FRIENDS.

The scope of this topic is noted below.[28]

§ 1. Necessity or Occasion for a Guardian ad Litem or Next Friend, 1979.
§ 2. Qualification and Appointment, 1981.
§ 3. Powers, Duties, Rights and Liabilities, 1981.
§ 4. Procedure by or Against Guardian ad Litem or Next Friend, 1983.

§ 1. *Necessity or occasion for a guardian ad litem or next friend.*[29]—See 11 C. L. 1888—In proceedings in rem, it is essential that all interested parties who are in-

10. Search Note: See Guaranty, Cent. Dig. §§ 112-114; Dec. Dig. §§ 99-102; 20 Cyc. 1495; 14 A. & E. Enc. L. (2ed.) 1161, 1162.

11, 12. Blanchard v. Blanchard, 61 Misc. 497, 113 NYS 882.

13. Stewart v. Ticonic Nat. Bank, 104 Me. 578, 72 A 741; Rockefeller v. Ringle, 77 Kan. 515, 94 P 810.

14. Entitled to take up pledged stock certificates upon paying debt with principal's consent. McKee v. Bernheim, 130 App. Div. 424, 114 NYS 1080.

15. Guarantor may enforce check so deposited. Carr v. Barnes [Mo. App.] 120 SW 705.

16. Where principal indorsed note to guarantee, and guarantor (of general debts) paid same, latter cannot enforce note against maker. Rockefeller v. Ringle, 77 Kan. 515, 94 P 810.

17. Search Note: See Guaranty, Cent. Dig. §§ 85-110; Dec. Dig. §§ 75-96; 20 Cyc. 1482-1494; 16 A. & E. Enc. P. & P. 939.

18. Not established where no evidence to contradict testimony of subscribing witness that the words constituting it were not in the instrument when executed. Foss v. McRae [Me.] 73 A 827.

19. Insufficient to produce unreceipted bill. Burrows v. New York Breweries Co., 119 NYS 196.

20. Must show how much uncollected from debtor. Foster County State Bank v. Hester [N. D.] 119 NW 1044.

21. Tilt-Kenney Shoe Co. v. Haggarty, 43 Tex. Civ. App. 335, 114 SW 386.

22. Declaration sufficient without such allegation. Jacocks v. Dessar, 129 App. Div. 286, 113 NYS 324.

23, 24. Hyde v. Equitable Life Assur. Soc., 61 Misc. 518, 116 NYS 219.

25. Code Civ. Proc. § 90, permitting joining of persons severally liable for the same debt. Senn v. Connelly [S. D.] 120 NW 1097.

26. Guaranty of signature of indorser of non-negotiable stock certificate. Bassett v. Perkins, 65 Misc. 103, 119 NYS 354.

27. Polk Printing Co. v. Smedley, 155 Mich 249, 15 Det. Leg. N. 1001, 118 NW 984.

28. Treats of persons specially appointed or selected to represent others in judicial proceedings in which the latter are incompetent to appear in their own proper persons. As to general guardians, see Guardianship.* As to the rights and privileges of infants with respect to suits, see Infants,* § 8. As to the rights of insane persons in the same respect, see Insane Persons,* § 9. As to

* Always begin with the latest article on the subject. Use the latest topical index.

competent should be represented by a guardian ad litem,[30] and, in general, an incompetent defendant cannot appear except by a guardian.[31] Statutes commonly require the appointment of a guardian ad litem for an incompetent person, not only in proceedings in rem [32] but also in proceedings in personam,[33] and both where the incompetent is defendant [34] and where he is plaintiff,[35] though under some statutes an incompetent plaintiff must be represented by a next friend.[36] Statutes do not, however, ordinarily provide for a guardian ad litem for an incompetent who already has a general guardian,[37] unless the latter refuses to act [38] or is adversely interested in the case,[39] and where the general guardian actually appears in defense of his ward, the failure to appoint the guardian ad litem required by statute is merely an irregularity [40] which will not render the judgment void, even though the general guardian was a foreign guardian without actual authority outside of the jurisdiction of his appointment.[41] Under some statutes the appointment of a guardian ad litem is left to the discretion of the court,[42] but such discretion will not be construed as absolute where such is not the plain intention of the statute.[43] Where the necessity for a next friend is denied by the person for whom another has volunteered to bring suit, as such, the court must have the question of competency decided by a jury before allowing the action to proceed.[44] No guardian ad litem need be appointed to secure an order which the court has authority to make upon its own motion.[45] Failure to appoint a guardian ad litem is not a jurisdictional defect,[46] even though the statute requiring his appointment is mandatory [47] except where substituted service upon the representative is prescribed by statute,[48] and in some states it is provided that it shall not constitute reversible error where the judgment is in favor of the ward.[49]

the rights of married women in the same respect, see Husband and Wife,* § 10. As to costs in suits by guardians ad litem and next friends, see Costs,* § 4.

29. Search Note: See note in 97 A. S. R. 995 See, also, Infants, Cent. Dig. §§ 192-209, 248, 250-252; Dec. Dig. §§ 77-79, 87; 22 Cyc. 634-646; 15 A. & E. Enc. L. (2ed.) 2, 3; 14 A. & E. Enc. P. & P. 997.

30. Infants not bound unless so represented in settlement of estate. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

31 Anderson v. McClellan [Or.] 102 P 1015. Under Code Civ. Proc. § 38. Schade v. Connor [Neb.] 120 NW 1012.

32. In partition proceedings by Civ. Code, 1895, § 4987. Douglas v. Johnson, 130 Ga. 472, 60 SE 1041.

33. By Rev. Code, § 6481. State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291. Under Code 1907, § 2476 (Code 1896, § 17). Hays v. Bowden [Ala.] 49 S 122.

34. Under Code Civ. Proc. § 38. Schade v. Connor [Neb.] 120 NW 1012. Under Civ. Code Practice, § 52, where those who might be served for infant are all plaintiffs. Cornell v. Cornell [Ky.] 115 SW 795.

35. By Rev. Codes, § 6481. State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291.

36. Under Code 1907, § 2476 (Code 1896, § 17). Hays v. Bowden [Ala.] 49 S 122.

37. Code 1907, § 2476 (Code 1896, § 17) applies only to those without general guardians. Hays v. Bowden [Ala.] 49 S 122.

38. By Rev. Codes, § 6481. State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291.

39. Under Civil Code of Practice, § 38, subsec. 2, as interpreted by § 499, subsec. 2. Adams v. De Dominguez [Ky.] 122 SW 663.

40. Under Kirby's Dig. § 6023, providing for appointment of guardian ad litem. Martin v. Gwynn [Ark.] 117 SW 754.

41. Personal service having been had upon the ward. Martin v. Gwynn [Ark.] 117 SW 745.

42. Under Code Civ. Proc. § 372, may appoint "in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant." In re Snowball's Estate [Cal.] 104 P 446. Under Rev. Codes, § 6481. State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291.

43. Under Rev. Codes, § 6481, use of word "may" held not to permit court to refuse to appoint guardian ad litem for insane person to review granting of divorce without personal service. State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291.

44. Snowden v. Smith [Ky.] 119 SW 785.

45. Family allowance (under Code Civ. Proc. §§ 1465, 1466). In re Snowball's Estate [Cal.] 104 P 446.

46. Judgment obtained by one assuming to act as such not void, and no proof of appointment essential. Skinner v. Knickrehm, 10 Cal. App. 596, 102 P 947.

47. Under Wilson's Rev. & Ann. St. 1903, § 4937, providing "the appointment must be made before the summons issues." Hill v. Reed [Okl.] 103 P 855.

48. Judgment recovered against infant void where no service on infant nor any guardian appointed to be served under Civil Code of Practice, §§ 38, 52. Roy v. Allen's Adm'r [Ky.] 118 SW 981.

49. By Rev. St. 1899, § 672 (Ann. St. 1906, p. 686). Harviston v. United R. Co. [Mo. App.] 119 SW 481.

One who has become of age may continue in his own name an action which he improperly instituted while an infant, without a next friend,[50] and the original defect cannot thereafter be raised by plea,[51] though while the infancy continues it is customary to dismiss an action so brought, upon motion by the defendant.[52] In Louisiana the court has no authority to appoint a tutor ad hoc to a minor at the request of the former, for the purpose of bringing a suit as plaintiff.[53]

§ 2. *Qualification and appointment.*[54]—See 11 C. L. 1669.—A guardian ad litem must be an attorney,[55] competent to protect the rights of the ward,[56] and competent to respond in damages for negligence or misconduct in the discharge of his duties.[57] One is not disqualified from acting as such because of being a client of opposing counsel,[58] unless with reference to the same subject-matter,[59] nor by being a party to the same suit, where his interest is not antagonistic to that of the ward.[60] The method of securing the appointment is commonly provided for by statute.[61] Where the incompetent is a defendant, personal service upon him is usually made a condition precedent to the appointment,[62] though by some statutes substituted service is allowed in particular cases.[63] On similar reasoning, the appointment of a curator ad hoc to represent an absentee defendant is ineffectual where the action is in personam,[64] though valid in a proceeding in rem.[65] The appointment need not be formal or express.[66] It is also usual to require that the guardian accept the appointment, either expressly[67] or by acting thereon.[68] A next friend may be brought into a suit under some statutes, by amendment, before verdict[69] or upon appeal,[70] and in some states such amendments are allowed in equity proceedings without express statutory provision.[71] The appointment of a tutor ad hoc is not a judgment, but may be vacated by the court.[72]

§ 3. *Powers, duties, rights and liabilities.*[73]—See 11 C. L. 1670.—There is little difference in function between a guardian ad litem and a next friend.[74] Under a

50. Moore v. Moore [N. J. Eq.] 70 A 684.

51. Plea must allege that plaintiff is still an infant. Moore v. Moore [N. J. Eq.] 70 A 684.

52. Moore v. Moore [N. J. Eq.] 70 A 684.

53. Not within Rev. St. § 2342. Lamkin v. Succession of Filhiol, 123 La. 181, 48 S 881.

54. **Search Note:** See Infants, Cent. Dig. §§ 208-230; Dec. Dig. §§ 79-82; 22 Cyc. 646, 649-658; 15 A. & E. Enc. L. (2ed.) 3; 14 A. & E. Enc. P. & P. 1002.

55, 56, 57. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

58, 59. Anderson v. McClellan [Or.] 102 P 1015.

60. Lindly v. Lindly [Tex. Civ. App.] 109 SW 467.

61. Under Rev. Codes, § 6482, application should be made by a relative or friend, when the incompetent is plaintiff. State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291.

62. By Rev. Codes, § 6519, subdivisions 5 and 7. State v. Gallatin County Dist. Ct., 38 Mont. 166, 99 P 291. By Civil Code Practice, § 38, unless defendant under 14 years of age. Roy v. Allen's Adm'r [Ky.] 118 SW 981.

63. Where infant under 14 years of age, by Civil Code of Practice, § 52. Roy v. Allen's Adm'r [Ky.] 118 SW 981.

64. Money judgment obtained against absentee so represented, void. Andrews v. Sheeby, 122 La. 464, 47 S 771.

65. In partition proceedings, though absentee dead. Tell v. Senac, 122 La. 1040, 48 S 448.

66. Allowing one to sue as next friend and recognizing him as suitable representative all through suit held tantamount to appointing him guardian ad litem. Lindly v. Lindly [Tex. Civ. App.] 109 SW 467.

67. By Civ. Code 1895, § 4937. Douglas v. Johnson, 130 Ga. 472, 60 SE 1041.

68. Under Rev. St. 1899, §§ 558-560 (Ann. St. 1906, pp. 589, 590), reversible error where no acceptance and judgment went against ward. Reineman v. Larkin [Mo.] 121 SW 307.

69. Under Civ. Code 1895, § 4947. Royal v. Grant, 5 Ga. App. 643, 63 SE 708.

70. Under Wilson's Rev. & Ann. St. 1903, § 4343, authorizing amendments generally in furtherance of justice, before or after judgment. Hill v. Reed [Okl.] 103 P 855.

71. In face of defendant's motion to dismiss bill for defect of parties. Moore v. Moore [N. J. Eq.] 70 A 684.

72. Lamkin v. Succession of Filhiol, 123 La. 181, 48 S 881.

73. **Search Note:** See notes in 3 C. L. 1568; 5 Id. 1602; 16 L. R. A. 507; 32 Id. 683; 7 Ann. Cas. 607.

See, also, Infants, Cent. Dig. §§ 232-252; Dec. Dig. §§ 83-87; 22 Cyc. 641, 659, 661-668; 15 A. & E. Enc. L. (2ed.) 11.

74. Schade v. Connor [Neb.] 120 NW 1012. Court's allowing one to act as next friend held equivalent to apointing him guardian

statute authorizing them to bring suit for an infant, a guardian ad litem may both file a general denial and also bring a cross action, if necessary to protect his ward's interests.[75] Ordinarily a guardian ad litem may question witnesses[76] and raise objection to evidence,[77] but he has no authority to enter into a stipulation fixing the amount of attorney's fees.[78] Neither has a guardian ad litem or next friend any power to bind the infant by a compromise affecting his substantial rights,[79] though he may negotiate for a fair adjustment of the controversy,[80] which will become binding upon the ward when approved by the court after proper investigation.[81] Powers conferred by order of court are, of course, invalid where the court was without jurisdiction.[82] But a valid authorization to bring suit for specific injuries is not exhausted by a nonsuit as to the original defendant and the substitution of a new one.[83] A guardian ad litem or next friend does not become functus officio upon rendition of a judgment or decree in the case for which he was appointed, but may continue to act for the ward upon appeal by either party.[84] It is his duty to require strict proof of everything affecting the interests of his ward,[85] but in some states this does not involve the necessity that his answer contain a general denial,[86] nor that he be present at the taking of evidence, if he has filed an answer.[87] As a rule he is required by statute to give security before receiving property of the ward.[88]

ad litem. Lindly v. Lindly [Tex. Civ. App.] 109 SW 467.

75. Under Code Civ. Proc. § 36. Schade v. Connor [Neb.] 120 NW 1012.

76, 77. Holroyd v. Millard, 142 Ill. App. 392.

78. In re Manning's Estate, 83 Neb. 417, 119 NW 672.

79, 80. Missouri Pac. R. Co. v. Lasca [Kan.] 99 P 616.

81. Not binding where court approved merely upon consent of next friends (though parents), without any investigation of the facts. Missouri Pac. R. Co. v. Lasca [Kan.] 99 P 616.

82. Dixon v. Cozine, 64 Misc. 602, 114 NYS 614.

83. Skinner v. Knickrehm, 10 Cal. App. 596, 102 P 947.

84. Fisher v. Bell, 65 W. Va. 10, 63 SE 620.

NOTE. **Authority of attorney to collect and satisfy infant's judgment:** In State v. Ballinger, 41 Wash. 23, 82 P 1018, 3 L. R. A. (N. S.) 72, it was held that the attorney appointed by a guardian ad litem to prosecute a suit for a minor has authority to satisfy the judgment. There is very little authority upon this precise point although such power, where the infant is without general guardian, has been maintained in Baltimore & O. R. Co. v. Fitzpatrick, 36 Md. 619, and Stroyd v. Pittsburgh Trac. Co., 15 Pa. Super. Ct. 245, but is denied generaly in Glass v. Glass, 76 Ala. 368, and in Wileman v. Metropolitan St. R. Co., 80 App. Div. 53, 80 NYS 233, it is held that a guardian ad litem having no such power, his attorney is likewise without authority to collect and satisfy the judgment. The case of Collins v. Brook, 4 Hurlst. & N. 280, 5 Hurlst. & N. 700, sometimes cited as authority for the attorney of a guardian ad litem to collect the infant's judgment goes no farther than to hold that the infant may bring action against such attorney for moneys so collected.

By weight of authority in the United States, a guardian ad litem or next friend is without power, in the absence of statue, to receive payment of and satisfy a judgment recovered on behalf of an infant (Glass v. Glass, 76 Ala. 368; Barbee v. Williams, 51 Tenn. [4 Heisk.] 522; Miles v. Kaigler, 10 Yerg. [Tenn.] 10, 30 Am. Dec. 425; Benton v. Pope, 24 Tenn. [5 Humph.] 391; Cody v. Roane Iron Co., 105 Tenn. 515, 58 SW 850; American Lead Pencil Co. v. Davis, 108 Tenn. 251, 66 SW 1129), even although the latter has no general guardian (Smith v. Redus, 9 Ala. 99, 44 Am. Dec. 429), it being held that the duties of the guardian ad litem or next friend end with the recovery of the judgment (Fletcher v. Parker, 53 W. Va. 422, 44 SE 422, 97 Am. St. Rep. 991). Such was formerly the rule in Texas (Gulf, etc., R. Co. v. Styron, 66 Tex. 421, 1 SW 161; Austin v. Colgate [Tex. Civ. App.] 27 SW 896; Galveston City R. Co. v. Hewitt, 67 Tex. 473, 3 SW 705, 60 Am. Rep. 32), but by statute a next friend of an infant who is without guardian may now, upon giving bond, receive amounts not exceeding $500 due to the infant upon a judgment (Gulf, etc., R. Co. v. Younger, 19 Tex. Civ. App. 242, 45 SW 1030). The court in Bernard v. Merrill, 91 Me. 358, 40 A 136, expressed a doubt whether a father, or next friend, can discharge a judgment, but in O'Donnell v. Broad, 6 Kulp. 460, 2 Pa. Dist. R. 84, it was held, upon authority of Baltimore & O. R. Co. v. Fitzpatrick, 36 Md. 619, that a next friend in the absence of a general guardian may receive payment and satisfy the judgment, but cannot compromise the same.—Adapted from 3 L. R. A. (N. S.) 72.

85. In re Manning's Estate, 83 Neb. 417, 119 NW 672.

86. Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 SE 873.

87. Answer regarded as putting ward under protection of chancellor, Code 1906, § 3231, requiring presence at taking of deposition not applying to hearing before commissioner. Shields v. Simmonton, 65 W. Va. 179, 63 SE 972.

88. By Code Civil Proc. § 474. In re Hart, 131 App. Div. 661, 116 NYS 193.

It is an obligation incident to the legal profession to accept an appointment as guardian ad litem [89] and to discharge the duties thereof without regard to compensation.[90] A guardian ad litem is, however, entitled to reasonable compensation for his services,[91] but this must be paid primarily out of the property of the ward [92] in the absence of statutory provision,[93] and where he is unsuccessful, he is, by the weight of authority, obliged to look solely to such property.[94] The right, however, to look secondarily to a fund in court, the title to which can be legally determined only by his appearance,[95] may be extended within reasonable limits by statute, even to an unsuccessful guardian ad litem.[96] But such statutes are commonly construed to leave the court a broad discretion as to the amount to be allowed.[97] In general the standard of compensation is the amount ordinarily paid for official services of a similar character,[98] as distinguished from the amount paid by a client to his attorney, and where the payment is to be made out of a fund in court in which the ward has no interest. the allowance must approximate the taxable costs,[99] unless otherwise provided by statute.[1] Reimbursement for necessary expenditures is commonly permitted by statute.[2] It is not essential, however, that the allowance for expenditures should be taxed in precisely the manner of taxing statutory costs.[3] Whether an allowance is excessive depends upon all the circumstances of the case.[4] Where the compensation is to be allowed out of a trust fund, it cannot be fixed by agreement of the attorneys of the respective parties.[5]

A guardian ad litem is not liable for the payment of a judgment recovered against his ward.[6]

§ 4. *Procedure by or against guardian ad litem or next friend.*[7]—See 11 C. L. 1670 At common law, infants were required to sue by a guardian ad litem,[8] but the statute of Westminster authorized the alternative method of suit by next friend.[9] This option is conferred in some states by statute,[10] but in others the rule varies.[11] The ward is the real party in interest,[12] and jurisdiction is not required without service upon him,[13] except where substituted service is authorized by statute.[14] Ap-

89, 90, 91, 92. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

93. Under Laws 1907, c. 267, p. 909, cannot require payment primarily out of any property of infant except that out of which court can direct payment. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

94. In re McNaughton's Will, 138 Wis. 179, 118 NW 997. Where unsuccessful in cross action, allowance out of fund in court only for services in main action. Hessig v. Hessig's Guardian [Ky.] 115 SW 748.

95. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

96. By Laws 1907, c. 267, p. 909, "if infant has no available property out of which payment can be directed by the court." In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

97. Laws 1907, c. 267, p. 909, so construed in light of common law; it being further held that the words, "to be fixed by the court in which the proceedings or litigation is had," prevented trial court from allowing for services on appeal. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

98. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

99. In re McNaughton's Will, 138 Wis. 179, 118 NW 997; Walbridge v. Walbridge, 132 App. Div. 33, 116 NYS 239.

1. Certain additional allowance under Code Civ. Proc. § 3253. Walbridge v. Walbridge, 132 App. Div. 33, 116 NYS 239.

2. By Laws 1907, c. 267, p. 909, but payment of judgment against ward, unnecessary. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

3. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

4. 8 per cent of $40,000 estate held excessive where no novel questions involved, and no need of employing attorney retained. Cut to $500. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

5, 6. In re McNaughton's Will, 138 Wis. 179, 118 NW 997.

7. Search Note: See, Infants, Cent. Dig. §§ 253-336; Dec. Dig. §§ 88-116; 22 Cyc. 671-711; 14 A. & E. Enc. P. & P. 1035.

8, 9. Schade v. Connor [Neb.] 120 NW 1012.

10. By Wilson's Rev. & Ann. St. 1903, § 4229 (Gen. Code Civ. Proc. § 31). Hill v. Reed [Okl.] 103 P 855.

11. Schade v. Connor [Neb.] 120 NW 1012.

12. Instruction erroneous based on theory that amendment by substitution of next friend as plaintiff, in suit begun by infant, made the former the real plaintiff. Royal v. Grant, 5 Ga. App. 643, 63 SE 708.

13. Where no substituted service either. Roy v. Allen's Adm'r [Ky.] 118 SW 981

14. By Civ. Code Prac. § 52, in case of infant under 14 years, court may appoint

pearance by the ward is, of course, waiver of service.[15] The question of the validity of the appointment of the next friend must be raised by special plea.[16] Evidence may be taken [17] and a decree executed,[18] in the absence of the guardian ad litem, where the proceeding is regular and the guardian ad litem has filed his answer, but in some states no default [19] or admission [20] on the part of the guardian ad litem will be permitted by the court to prejudice the rights of the ward. By statute in certain jurisdictions, judgment cannot be rendered against an infant until the guardian has filed his answer or report.[21] The judgment will not be reversed because the guardian ad litem acted as attorney for the opposing party, if his ward was not prejudiced thereby.[22]

GUARDIANSHIP.

The scope of this topic is noted below.[23]

§ 1. The Occasion for Guardianship, 1984.
§ 2. The Person of the Guardian; His Appointment, Qualification and Tenure, 1984.
§ 3. General Powers, Duties and Liabilities, 1987.
§ 4. Custody, Support and Education of the Ward, 1987.
§ 5. The Ward's Property and Administration Thereof, 1988.
§ 6. Presentment and Allowance of Claims, 1990.
§ 7. Judicial Proceedings to Sell Property of Ward, 1990.
§ 8. Actions and Legal Proceedings By and Against Guardians, 1993.
§ 9. Accounting and Settlement, 1993.
§ 10. Rights and Liabilities Between Guardian and Ward, 1997.
§ 11. Compensation of Guardian, 1997.
§ 12. Guardianship Bonds, 1998.

§ 1. *The occasion for guardianship.*[24]—See 11 C. L. 1671—The occasion for the appointment of a guardian for a person is the latter's incompetency to manage his own affairs.[25]

§ 2. *The person of the guardian; his appointment, qualification and tenure.*[26] See 11 C. L. 1671—A surviving parent,[27] competent to transact his own business [28]

guardian ad litem to be served, where general guardian is plaintiff. Cornell v. Cornell [Ky.] 115 SW 795.

15. Judgment reciting that plaintiffs and intervener appeared by attorney, in suit by next friend of infant plaintiff, not attachable for want of service on intervener's pleadings. Hart v. Hunter [Tex. Civ. App.] 114 SW 882.

16. General denial insufficient, though petition alleged its validity. Berry v. St. Louis, etc., R. Co., 214 Mo. 693, 114 SW 27.

17. Code 1906, § 3231, requiring guardian's presence at taking of deposition, not applying to hearing before commissioner. Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

18. Shields v. Simonton, 65 W. Va. 179, 63 SE 972.

19. Failure to appeal or take exception not permitted to diminish ward's rights on appeal by another party. Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 SE 873.

20. In answer. Glade Coal Min. Co. v. Harris, 65 W. Va. 152, 63 SE 873.

21. Under Civil Code of Prac. § 36, subsec. 3. Adams v. De Dominguez [Ky.] 112 NW 663.

22. Holroyd v. Millard, 142 Ill. App. 392.

23. Includes all matters applicable to guardianship in general, and all matters pertaining to guardianship of minors except those relating to natural guardians (see Parent and Child*), and guardians ad litem (see Guardians ad Litem*). Excludes rights and liabilities of persons under particular disabilities, aside from questions of guardianship (see Insane Persons,* §§ 1, 5-9; Infants,* §§ 1, 4-8; Incompetency,* 2, 3; Indians;* Husband and Wife*), and matters of guardianship of persons, other than minors, under particular disabilities (see Insane Persons,* § 3; Indians*).

24. Search Note: See notes in 5 C. L. 1604; 15 L. R. A. 593.

See, also, Guardian and Ward, Cent. Dig. §§ 1-9, 13-18, 556-575; Dec. Dig. §§ 1-8, 166-172; 21 Cyc. 12-20, 23-26, 263-272; 13 A. & E. Enc. L. (2ed.) 965; 15 Id. 16, 20, 22; 26 Id. 137; 9 A. & E. Enc. P. & P. 890.

25. Under Revisal 1905, § 1890, authorizing appointment of guardians for persons "incompetent from want of understanding to manage their own affairs by reason of exeessive use of intoxicating drinks or other cause, the appointment of a guardian is not restricted to cases of incompetency caused by drinking, but extends to cases due to "other causes." In re Denny, 150 N. C. 423, 64 SE 187.

Insanity as occasion for guardianship is treated elsewhere. See Insane Persons, § 3.

26. Search Note: See notes in 3 C. L. 1570; 13 L. R. A. (N. S.) 288.

See, also, Guardian and Ward, Cent. Dig. §§ 9-98; Dec. Dig. §§ 18-27; 21 Cyc. 20-61; 9 A. & E. Enc. P. & P. 890.

27. Under Code Civ. Proc. § 1751, the mother has primary right to be appointed in

and not otherwise unsuitable,[29] is entitled to the guardianship of his minor children, and an attempted appointment of another without the consent of such parent is invalid.[30] The parent's right may be waived,[31] but it will not be forfeited by a mere temporary absence or neglect of parental duty.[32] The statutory power to appoint a testamentary guardian[33] may be exercised by the wife to whom a decree of divorce has granted the exclusive custody of a child.[34] Whether a testamentary guardianship includes both person and property is a matter of construction of the will.[35] The Indiana statute establishing county boards of guardians to care for dependent children has been held to be constitutional.[36]

Jurisdiction and procedure.[See 11 C. L. 1672]—Probate courts are usually possessed of original and exclusive jurisdiction with respect to the matter of guardians and curators of minors.[37] Territorial jurisdiction is fixed by the domicile of the minor,[38] and the court's finding as to such jurisdictional fact is conclusive,[39] in the absence of fraud or mistake.[40] A court has no jurisdiction of a purely personal action to appoint a guardian for a nonresident of the state and cannot appoint a guardian of the person of a nonresident,[41] and where, therefore, a statute authorizes the appointment of a guardian for such property as an incompetent nonresident may have in the state, the court, of necessity, has jurisdiction to determine the status of such nonresident and to appoint the property guardian in the same proceedings.[42] Where the statute does not require notice,[43] a guardian may be appointed for the property of a nonresident on ex parte application.[44] A ward who has been released from guardianship cannot, in proceedings based on the guardianship, attack such proceedings for lack of notice.[45] Evidence as to the financial condition of the applicant is admissible,[46] as is also testimony to the effect that the mother "gave" the child to a certain person,[47] but a witness will not be permitted to testify that the applicant is a proper party to raise and bring up a female grandchild, this being a

absence of proof that she is not fit to act. In re Snowball's Estate [Cal.] 104 P 444.

28. Rev. Code, § 5774. In re Crocheron's Estate [Idaho] 101 P 741. Held that under facts shown the father was competent person. Id.

29. Rev. Codes, § 5774. In re Crocheron's Estate [Idaho] 101 P 741 A finding that a father is a man of **intemperate habits and lacking in "integrity"** is not sufficient to deprive him of guardianship of his minor child under Rev. Codes, § 5774. Id.

30. Jordan v. Smith, 5 Ga. App. 559, 63 SE 595. Civ. Code, § 241. In re Snowball's Estate [Cal.] 104 P 444.

31. Consent to adoption either prior to or at time of filing petition has effect of transferring parental right under Civ. Code 1895, § 2502. Jordan v. Smith, 5 Ga. App. 559, 63 SE 595. Under Civ. Code, § 241, the mother's consent to a testamentary appointment by the father may be as effectually given after father's death as before. In re Baker, 153 Cal. 537, 96 P 12.

32. In re Snowball's Estate [Cal.] 104 P 444.

33. Power conferred by statute. People v. Small, 237 Ill. 169, 86 NE 733.

34. People v. Small, 237 Ill. 169, 86 NE 733.

35. Item of will in following language "I hereby appoint my father, C. M. Churchill, guardian of my child, to hold, control and manage the property given her during her minority; and he shall not be required to give bond or security for the performance of such trust"—held to have effect of appointing a guardian of property only and not of person. Churchill v. Jackson [Ga.] 64 SE 691.

36. Egoff v. Madison County Board of Children's Guardians, 170 Ind. 238, 84 NE 151.

37, 38. Smith v. Young, 136 Mo. App. 65, 117 SW 628.

Evidence: An exemplification of the record in a previous habeas corpus proceeding, instituted to recover custody of the child will be admitted in evidence as to the domicile of the child. Churchill v. Jackson [Ga.] 64 SE 691.

39. In re Baker, 153 Cal. 537, 96 P 12; Smith v. Young, 136 Mo. App. 65, 117 SW 628.

40. In re Baker, 153 Cal. 537, 96 P 12.

41. Wallace v. Tinney [Iowa] 122 NW 936.

42. Code, §§ 225, 3202. Wallace v. Tinney [Iowa] 122 NW 936.

43. No notice required by Code, §§ 225, 3202, of proceedings for appointment of guardian of property of nonresident. Wallace v. Tinney [Iowa] 122 NW 936.

44. Wallace v. Tinney [Iowa] 122 NW 936.

45. Where adjudged lunatic is released as cured, and, instead of avoiding lunacy proceedings, takes steps attacking his committee's accounts, he is estopped from attacking in same proceeding validity of order adjudging him lunatic on ground of insufficient notice and of order appointing committee for want of any notice. Logue v. Fenning, 29 App. D. C. 519.

46, 47, 48. Churchill v. Jackson [Ga.] 64 SE 691.

matter of opinion.[48] In Louisiana wherever the homologation of the deliberations of a family meeting is demanded, the judge may refuse or grant the homologation, but he cannot modify the decision of the family meeting.[49] In entering the order of appointment of a public administrator and guardian, the fact that the clerk only styled him "public administrator" did not relieve him of the duties of public guardian.[50] Where the statute designates incompetency, in general terms, as grounds for the appointment of a guardian, a general finding of incompetency is sufficient.[51] Costs will be taxed against one failing in an attempt to defeat a guardianship appointment.[52] The adjudication upon an application for guardianship is res adjudicata,[53] and cannot be assailed collaterally,[54] but an application for letters of guardianship will not prevent the court of another county from modifying a decree of divorce as affecting custody of a child.[55] An appeal from an order appointing a guardian and awarding custody of the ward is merely to suspend the operation of the order pending the appeal,[56] but the trial court has no jurisdiction, pending the appeal to enforce a prior order which was changed by the order appealed from.[57] The course of appeal is entirely statutory.[58]

Termination of relation. See 11 C. L. 1672—Guardianship is terminated by the death of the ward,[59] or the court having jurisdiction in the premises may terminate the relation [60] on account of changed conditions,[61] for irregularities in the appointment,[62] or for failure to properly discharge the duties of guardianship,[63] and where the parties are before it the court will, on its own motion, remove a guardian for gross misconduct.[64] In Ohio a liberal practice is indulged in the matter of who may

49. Hence, if recommendations be inconsistent or contradictory, or contain unlawful conditions, the court should refuse to homologate and relegate the matter to another family meeting. In re Supple Minors for Family Meeting, 123 La. 939, 49 S 648.

50. Newman v. Flowers' Guardian [Ky.] 121 SW 652.

51. Under Rev. 1905, § 1890, authorizing appointment of guardian for person incompetent from drinking "or other cause," general finding of incompetency, without specifying cause, is sufficient. In re Denny, 150 N. C. 423, 64 SE 187.

52. Hefley v. Hugen [Tex. Civ. App.] 120 SW 956.

53. Ascertainment of the father's consent being a matter for determination by the judge of the superior court, his finding as to that fact is not subject to collateral attack. Jordan v. Smith, 5 Ga. App. 559, 63 SE 595. A denial of a petition for letters of guardianship is res adjudicata as to the question of the fitness of the applicant. In re Snowball's Estate [Cal.] 104 P 444.

54. Sufficiency of the showing on an application for the appointment of a guardian cannot be questioned on collateral attack upon the order of appointment. Wallace v. Tinney [Iowa] 122 NW 936.

55. Evans v. Evans, 154 Cal. 644, 98 P 1044

56, 57. Steele v. Hohendel, 141 Ill. App. 201

58. Course of appeal from order of county court appointing a guardian is to circuit court and not to appellate court. People v. Johnson, 145 Ill. App. 446. Proceeding to appoint guardian is not a suit or proceeding at law or in chancery within meaning of Appellate Court Act, § 8. Id.

59. Whittemore v. Coleman, 239 Ill. 450, 88 NE 228.

60. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153. Court with power to appoint has power to vacate. Id.

61. Court of equity has ample authority to change guardians of infants where the circumstances demand such a change. Steele v. Hohendel, 141 Ill. App. 201.

62. In re Cameron's Estate [Mich.] 16 Det. Leg. N. 423, 122 NW 278.

63. Hawley v. Watkins [Va.] 63 SE 560. As to whether an encroachment on the corpus of estate justifies removal, see post, § 5.

64. When on hearing exceptions to the inventory and exceptions to the account of a guardian of an imbecile, it is shown to the court by the evidence educed that said guardian in the mangement of said estate has mixed and mingled the funds of said estate with his own personal funds, has paid claims for services legal and otherwise without question or investigation, has converted his ward's funds to his own use by buying real estate with his ward's money and taking the title in his own name, and has claimed enormous fees for alleged services, and has actually appropriated the amount claimed, such person will be considered not fit, suitable or competent to represent an estate in a fiduciary capacity, and such conduct constitutes sufficient grounds for his removal; and the court, on hearing of such exceptions to inventory and to the account, though there be no proper petition for the removal of such guardian before the court, will for said conduct, on its own motion, remove such guardian and cancel and annul his letters of authority. In re Guardianship of Paul Oliver, 9 Ohio N. P (N. S.) 178.

petition for a guardian's removal.[65] As in other proceedings, the allegata and probata must correspond in a proceeding to remove a guardian,[66] and the petition cannot be amended on appeal so as to bring in any matter not a proper basis for proceedings in the lower court.[67] An appeal usually lies from either the vacation of a guardianship or a refusal to vacate.[68]

§ 3. *General powers, duties and liabilities.*[69]—See 11 C. L. 1673—Guardianship is a trust which, in its most comprehensive scope, is dual in its nature, involving two distinct and separable functions, to wit, the control of the person of the ward, and the management of his estate,[70] but a general guardian, as such, is not entitled to the services or society of his ward, and cannot, by virtue of his office bind the ward's person, unless expressly authorized by statute.[71] In Louisiana the existence of a conventional agency between the tutor and an undertutor will not be recognized.[72] A de facto guardian will be held subject to all the duties and liabilities of a legal guardian.[73]

§ 4. *Custody, support and education of the ward.*[74]—See 11 C. L. 1673—It is the duty of a guardian to take proper care of his ward, furnishing a suitable home, board, and clothing and other necessaries,[75] but the controlling consideration in the matter of the care and custody of the ward's person is the welfare of the ward,[76] and even where the guardian has the legal right of custody such right will be subordinated by a court of equity to the welfare of the ward[77] as distinguished from the welfare of his property,[78] and the guardian's unfitness may be set up as a defense to habeas corpus proceedings instituted by the guardian.[79] In some states it is held that the welfare of the ward as it appears to the court is so exclusively controlling upon the

65. Any person interested, though a stranger and neither a creditor nor relative, has large capacity, as next friend of an imbecile, to prosecute proceedings for removal of such imbecile's guardian. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178.

66. On hearing a petition for removal, the petitioner will not be permitted to prove that the guardian has failed to return an inventory the petition not having so alleged. Hopkins v. Richmond [R. I.] 73 A 308.

67. On appeal to superior court from probate court. Hopkins v. Richmond [R. I.] 73 A 308.

68. Under Civ. Code 1895, § 4454, appeal lies to superior court from decision of court of ordinary in proceedings to revoke letters of guardianship. Teasley v. Campbell [Ga.] 66 SE 273. Appeal may be taken by the guardian of an imbecile in the interest of the trust from an order of the probate court, made upon application of the alleged imbecile himself, terminating the guardianship. In re Guardianship of George A. Kraner, 8 Ohio N. P. (N. S.) 217. An appeal is allowable from a judgment of a probate court refusing to vacate the appointment of a curator. Smith v. Young, 136 Mo. App. 65, 117 SW 628.

69. **Search Note:** See notes in 5 C. L. 1607; 5 L. R. A. (N. S.) 575; 15 Id. 1034; 89 A. S. R. 257.

See, also, Guardian and Ward, Cent. Dig. §§ 99-324; Dec. Dig. §§ 28-74; 21 Cyc. 62-119, 272-274; 15 A. & E. Enc. L. (2ed) 50; 9 A. & E. Enc. P. & P. 918.

70. United States v. Hall, 171 F 214, passing upon the relation between United States government and Indians.

71. Action to enforce contract for theatrical services of infant. Aborn v. Janis, 62 Misc. 95, 113 NYS 309.

72. If undertutor undertakes to administer affairs of a succession under a power of attorney from tutor, he will, as between himself and minors, be held to obligation of a "negotiorum gestor" and direct liability for his acts. Eby v. McLain, 123 La. 138, 48 S 772.

73. Smith v. Cameron [Mich.] 16 Det. Leg. N. 563, 122 NW 564. See post, § 9, Accounting and Settlement.

74. As to custody of insane persons, see Insane Persons, § 3. As to custody, etc., of infants generally, see Infants, § 2. As to custody, etc., of infants as dependent upon the parental relation, see Parent and Child, § 1. As to matters pertaining to schools and school districts, see Schools and Education.

Search Note: See note in 58 L. R. A. 931.

See, also, Guardian and Ward, Cent. Dig. §§ 109-135; Dec. Dig. §§ 29, 30; 21 Cyc. 62-71; 15 A. & E. Enc. L. (2ed.) 50, 73.

75. Taylor v. Taylor [Ind. App.] 87 NE 25.

76. Shoaf v. Livengood [Ind.] 88 NE 598; Steele v. Hohenadel, 141 Ill. App. 201.

77. Mandatory provision of Burn's Ann. St. 1908, § 3065, that guardian shall have custody of minor ward, held not to deprive equity of power to award custody of minor according to considerations of his welfare. Shoaf v. Livengood [Ind.] 88 NE 598.

78. Guardian may, in some cases, be well fitted and competent to have charge of and manage the estate of his ward, and yet be not a fit or suitable person, to have his custody, care and education. Shoaf v. Livengood [Ind.] 88 NE 598.

79. Shoaf v. Livengood [Ind.] 88 NE 598.

award of his custody, that not only is the guardian's consent not necessary to an order of adoption of an infant ward, but that the guardian is not even a proper party to the adoption proceedings.[80]

§ 5. *The ward's property and administration thereof.*[81]—See 11 C. L. 1873.—A general guardian is entitled to the exclusive possession, care and management of the estate,[82] and in a proper case he may exercise this authority through the agency of a third person,[83] but he has no inherent authority to dispose of the ward's property,[84] or to disburse[85] or lend[86] the ward's funds, or to release claims due the ward,[87] or to pay any claims against the ward other than those which are legally enforcible.[88] A guardian cannot ratify a voidable encumbrance which his ward has placed upon his property and for which the ward has recevied no consideration,[89] but, on the contrary, it is the guardian's duty to disaffirm such encumbrance.[90] The fact, therefore, that property has been delivered to the ward by direction of his guardian, does not give the ward the right to sell it, and the guardian will not be estopped from having the sale set aside without refunding the purchase price,[91] and it is immaterial whether the ward consents to such suit or not.[92] The rule of caveat emptor applies to sales by a guardian of his ward's property,[93] and a void sale thereof may be avoided by the ward on his becoming of age,[94] or by a subsequent guardian,[95] without reimbursing the purchaser for the amount received by the guardian, in the absence of evidence that purchase money came into possession of the estate.[96] Nor will care, maintenance and education of the ward operate to estop him from denying validity of the sale,[97] but, where a lease is of such character that the court would have authorized it upon proper application, the tenant will be allowed the value of improvements upon repudiation by the guardian.[98] Any person receiving the money of a ward with knowledge that it is paid without lawful authority, will be liable therefor.[99] Property belonging to a minor and existing in kind at his majority, found in the possession of a third person, can be recovered by the ward, with fruits and revenues,[1] but a lease made by order of court is valid, although it is to continue

80. Leonard v. Honisfager [Ind. App.] 88 NE 91. See Adoption of Children, § 1.

81. **Search Note:** See notes in 3 C. L. 1572; 15 L. R. A. (N. S.) 1159.

See, also, Guardian and Ward, Cent. Dig. §§ 136-324; Dec. Dig. §§ 31-74; 21 Cyc. 71-73, 76-95, 97-117, 119, 272-274; 15 A. & E. Enc. L. (2ed.) 50, 73.

82. In re Bolin's Estate [Okl.] 98 P 934, holding that where, on annual settlement, court found amount due a minor and ordered same to be paid by guardian to clerk of court, that part of order to make such payment was void.

83. A guardian of the person and estate of his ward may authorize a third person to find and take possession of the ward's property and such person when so authorized is not a trespasser in so doing. Cohoe v. State, 79 Neb. 811, 114 NW 286.

84. A guardian's deed made without any order or authority from any court is a nullity. Palmer v. Abrahams [Wash.] 104 P 648. Nor is a power to sell land, signed by a guardian for his ward, binding upon the ward, the guardian having no authority to do so, unless ratified after attaining his majority; and such ratification is not affected by an instrument reciting the execution of the power but expressly revoking it. Merrill v. Bradley [Tex. Civ. App.] 121 SW 561.

85. Has no right to disburse ward's funds to ward's prospective heirs. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178.

86. Has no right to lend ward's money to ward's prospective heirs without mortgage security required by statute. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178. Loan of ward's money without strict compliance with statutory requirements as to such loan is at guardian's peril. American Bonding Co. v. People [Colo.] 104 P 81.

87. Release by guardian of his ward's interest as heir not authorized by court, and without consideration is absolutely void, in so far as it can affect rights of ward. Dealy v. Shepherd [Tex. Civ. App.] 116 SW 638.

88. Has no authority to pay claims barred by limitations. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178.

89, 90. Bowman v. Wade [Or.] 103 P 72.

91, 92. Hughes v. Murphy, 5 Ga. App. 328, 63 SE 231.

93, 94. Manternach v. Studt, 240 Ill. 464, 88 NE 1000.

95, 96. Gentry v. Bearss, 82 Neb. 737, 118 NW 1077.

97. Manternach v. Studt, 240 Ill. 464, 88 NE 1000.

98. Muskogee Development Co. v. Green [Okl.] 97 P 619.

99. Mauldin v. Southern Shorthand & Business University, 3 Ga. App. 800, 60 SE 358.

1. Eby v. McLain, 123 La. 138, 48 S 722.

beyond the minority of the ward.[2] Money deposited to one's credit as guardian becomes the property of the ward's estate and the bank can only disburse it on the guardian's order and only for the uses of the estate,[3] and the fact that the certificates of deposit are placed in the hands of guardian's bondsmen to be held so long as they continue on the bond does not affect the title of the ward's estate thereto.[4] A guardian will not be held liable for loss, occasioned by the subsequent insolvency of the bank, of the ward's funds, deposited in good faith under directions from the probate judge.[5] In the absence of an express trust the title to a ward's land is in the ward [6] and cannot be disturbed in a proceeding to which he is not a party.[7] A curator will be held liable where he invests funds of his ward in land and takes title thereto in his own name,[8] although the investment may have been made at the solicitation of the ward's mother.[9] A guardian must cause proper legal proceedings to be instituted to recover debts due the estate,[10] but he has no authority to employ counsel to conduct fomented litigation,[11] and the courts will not enforce against the estate an improvident contract of the guardian as to attorney's fees,[12] or for fees for procuring the appointment and bond of the guardian or for payment, or other fees not approved by the court, unreasonable, or contracted for without proper diligence.[13] But the estate will be liable for reasonable attorney's fees, the services having been for the manifest benefit of the ward, in a case wherein interests of guardian are hostile to ward, though he may have employed counsel other than the one engaged by ward's relatives.[14]

Unless authorized by deed or will under which the estate is derived,[15] it requires the approval of the court to legalize any encroachment upon the corpus of the estate,[16] and, to obtain such sanction, it is incumbent on the guardian to show some emergency or expediency justifying the encroachment.[17] Ordinarily the courts' sanction should be obtained previously to the expenditure,[18] though, in a proper case, the court will ratify such an expenditure made without its sanction.[19] On the other hand, an encroachment cannot be made under cover of legal proceedings, where otherwise unauthorized.[20] In the absence of bad faith, and unless

2. Beauchamp v. Bertig [Ark.] 119 SW 75, construing Kirby's Dig. §§ 3789, 3790, 3801.

3. Bank cannot apply money to payment of debt due by guardian to bank or anyone else. Moore v. Hanscom, 101 Tex. 293, 20 Tex. Ct. Rep. 438, 106 SW 876. Where bank knew that check, payable to guardian and ward jointly and indorsed by ward to guardian, was ward's property, but nevertheless applied it to debt due to it from guardian, it was liable to ward for amount thereof. First Nat. Bank v. Greene [Ky.] 114 SW 322.

4. Moore v. Hanscom, 101 Tex. 293, 20 Tex. Ct. Rep. 438, 106 SW 876. Where a guardian deposits money in a bank in his own name as guardian and turns the certificates of deposit over to his bondsmen, the county court has authority to direct the disposition of it by the guardian, but the guardian has no legal authority to make any loan or investment of the money except by the direction of the county court. Rev. St. 1895, arts, 2640-2644. Id.

5. Nelson v. Cowling [Ark.] 116 SW 890.

6, 7. Sellert v. McAnally [Mo.] 122 SW 1064.

8, 9. State v. Smith [Mo. App.] 120 SW 614.

10. Roush v. Griffith, 65 W. Va. 752, 65 SE 168. A guardian has power to recover the interest of his ward in property surrendered by executors of the estate without authority, where the power to recover is not restricted to such executors. Dealy v. Shepherd [Tex. Civ. App.] 116 SW 638.

11. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178.

12. Wheeler v. James [Ky.] 120 SW 350.

13. In re Kitchen [Ind. App.] 89 NE 375.

14. Greenlee v. Rowland, 85 Ark. 101, 107 SW 193.

15. Baker v. Lane [Ky.] 118 SW 963, construing Ky. St. 1909, § 2034 (Russell's St. § 4151).

16. Civ. Code 1895, § 2541. Mauldin v. Southern Shorthand & Business University, 3 Ga. App. 800, 60 SE 358; Anderson v. Silcox, 82 S. C. 109, 63 SE 128; France v. Shockey [Ark.] 121 SW 1056. St. 1893, §§ 1530, 1535, 1536. Gentry v. Bearss, 82 Neb. 787, 118 NW 1077. Where the finding of court that the annual interest of the estate exceeded the amount annually spent for maintenance and education is supported by evidence, the same will not be disturbed on appeal. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153.

17. Anderson v. Silcox, 82 S. C. 109, 63 SE 128.

18. Anderson v. Silcox, 82 S. C. 109, 63 SE 128; Muskogee Development Co. v. Green [Okl.] 97 P 619.

19. Anderson v. Silcox, 82 S. C. 109, 63 SE 128.

20. Encroachment cannot be made by

there be wanton, excessive and wasteful invasion of the corpus of an estate, the encroachment is not ground for removal of a trustee.[21] In the absence of a request or direction by the guardian, or some showing that it was necessary to protect the ward from want, no one will be permitted to charge his estate with money expended in his behalf.[22]

The guardian is required to use such care as a reasonably prudent man would use in managing his own affairs.[23] The burden of proof to show due care is upon the guardian,[24] and, in the absence of proof showing the damage to have been nominal, it will be presumed to be the value of the property lost.[25] A guardian has no right to make any contract on behalf of the ward which is against public policy.[26] A guardian cannot represent several wards in a transaction wherein the interests of the several wards are necessarily antagonistic.[27]

§ 6. *Presentment and allowance of claims.*[28]—See 11 C. L. 1676.—Where the presentation and allowance of claims against a ward's estate are specifically provided for by statute, such proceedings are special and are governed exclusively by the statutes specifically applicable thereto,[29] without regard to general statutory provisions in conflict therewith.[30] Accordingly, it is held in Texas that no formal proceedings are necessary in such proceedings, whether original or appellate,[31] and that the account sued on may be read in evidence on an appeal from the county to the district court,[32] though the transcript does not contain a certified copy thereof.[33]

§ 7. *Judicial proceedings to sell property of ward.*[34]—See 11 C. L. 1676.—Special provision is usually made for proceedings to sell a ward's land for the purpose of reinvestment,[35] and when necessary for the support, maintenance, and education of the ward, the court may usually authorize the sale[36] of the ward's real estate,[37]

parent or guardian confessing judgment in proceedings against estate, whereby it may be sequestered by execution. Funk's Guardian v. Funk [Ky.] 113 SW 419.

21. Pfefferle v. Herr [N. J. Eq.] 71 A 689.

22. Burton's Adm'r v. Selph [Ky.] 118 SW 286. Thus where the ward was able to earn his own living, in absence of authority from guardian, it was held no one had a right to furnish him education or maintenance. Id.

23. Alcon v. Koons [Ind. App.] 84 NE 1104, wherein it was held that the guardian failed to exercise due care.

24, 25. Alcon v. Koons [Ind. App.] 84 NE 1104.

26. Griffin v. Chriswisser [Neb.] 120 NW 909. It is no defense to a note given in settlement of bastardy proceedings brought by an infant that the mother and the guardian of such infant made an unlawful agreement not to prosecute the putative father for statutory rape unless infant knowingly participated in the unlawful agreement. Id.

27. Could not at partition sale of wards' lands, though purchase was for one of the wards, since duty to one of wards was to purchase as cheaply as possible while duty to other ward was to see that land brought highest price possible. Kazebeer v. Nunemaker, 82 Neb. 732, 118 NW 646.

28. Search Note: See Guardian and Ward, Cent. Dig. §§ 300-304; Dec. Dig. § 67; 21 Cyc. 117; 15 A. & E. Enc. L. (2ed.) 50, 73.

29. By Rev. St. 1895, arts. 2704, 2789, 2790, 2791, 2798. Bradshaw v. Lyles [Tex. Civ. App.] 119 SW 918.

30. Bradshaw v. Lyles [Tex. Civ. App.] 119 SW 918.

31. Notwithstanding Rev. St. 1895, arts. 1181, 1182, 1183, requiring pleadings in civil proceedings in district and county courts. Bradshaw v. Lyles [Tex. Civ. App.] 119 SW 918.

32. Bradshaw v. Lyles [Tex. Civ. App.] 119 SW 918. A written statement filed at the request of the county judge, giving a detailed account of services rendered, forming the basis of a claim, is in the nature of a pleading and may be read to the court and jury trying the case. Id.

33. Seems that transcript need not contain such copy, but in any event the lack thereof was harmless when it was particularly described in the transcript. Bradshaw v. Lyles [Tex. Civ. App.] 119 SW 918.

34. Search Note: See notes in 3 C. L. 1573; 8 L. R. A. (N. S.) 1215; 120 A. S. R. 148.

See, also, Guardian and Ward, Cent. Dig. §§ 325-406; Dec. Dig. §§ 75-115; 21 Cyc. 119-150; 15 A. & E. Enc. L. (2ed.) 50.

35. In Kentucky special statutory provision is made whereby the vested estate of a ward may be sold for reinvestment in an action against the infant by his guardian. Code Prac. 489, subsec. 5. Cornell v. Cornell [Ky.] 115 SW 795.

36. The orphans' court may order a guardian to sell so much of the ward's lands as may be adequate for his maintenance and education, and this applies to testamentary as well as statutory guardians. Pfefferle v. Herr [N. J. Eq.] 71 A 689.

37. Minor's homestead right in deceased father's land is "real estate," within Rev. St. 1899, § 3504 (Ann. St. 1906, p. 2000), and Rev. St. 1899, § 3510 (Ann. St. 1906, p. 2002), giving

and where the court's power to authorize the sale is unrestricted by any reference to exemptions, the court cannot import any exemptions into the authorizing statute, even where the property is of such a character as would otherwise come within the exemption statutes.[38] A private sale is sometimes authorized.[39] Where no notice of the proceedings to sell is required,[40] a premature order of sale is, at most, a mere irregularity, which will not invalidate the sale.[41] Some of the statutes provide for the joinder of the ward as a petitioner [42] or for service upon him as a defendant.[43] A proceeding by the guardian to sell is not, however, of such a character as necessarily to require the appointment of a guardian ad litem.[44] Slight irregularities in a required notice will not invalidate the sale.[45] Where the court has jurisdiction, the question of the sufficiency of the petition is within the discretion of the trial court.[46] A sale under order of court will be void unless the statutory bond required to be given by guardians be executed,[47] but the omission to state in the original record the order for and the giving of bond, which is supplied by amendment pending appeal, will not render the decree void.[48] The bond must be taken by an order of court, and it cannot be presumed that the proper bond was given.[49] A statute requiring special bond to be given where lands of an infant are sold for reinvestment does not apply to sales made for the education and maintenance of the

probate court jurisdiction to order sale of "real estate" of a minor when necessary for his maintenance or of a ward when for his benefit. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

38. Homestead rights may be authorized to be sold under Rev. St. 1899, §§ 3504, 3510 (Ann. St. 1906, pp. 2000, 2002). Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

39. Under Comp. Laws 1897, c. 244, § 9166, as amended by Pub. Acts 1905, p. 381, Act No. 261, private sales by guardians under license of probate court are authorized without regard to value of property sold, and Pub. Acts 1909, Act. No. 209, requiring proceedings thereunder to be in accordance with Comp. Laws 1897, cc. 243, 244, refers to such laws as amended. Klatt v. Durfee [Mich.] 16 Det. Leg. N. 772, 123 NW 542.

Constitutionality of act: Pub. Acts 1909, p. 374, Act No. 209, § 4, validating prior sales by guardians under license of probate court, held unconstitutional as not being within title of act, "An act to provide for the sale of real estate * * * under license of the probate court by * * * guardians." Klatt v. Durfee [Mich.] 16 Det. Leg. N. 772, 123 NW 542. Section 3 of such act, authorizing such sales in future, held complete without reference to § 4, and hence not affected by invalidity of latter section. Id.

40. No notice is required of guardian's application, under Rev. St. 1899, § 3505 (Ann. St. 1906, p. 2000), to sell minor's real estate for his maintenance and education. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

41. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709. Rev. St. 1899, § 148 (Ann. St. 1906, p. 386), applies only to administrators' sales and not to guardians' sales, and hence fact that sale was ordered on same day that application therefor was made was, at most, a mere irregularity. Id.

42. Under the laws of New York, it is essential that infants fourteen years old or upwards must join in a petition by whomsoever made to sell their land, and a failure to do so vitiates the sale. Code Civ. Proc. § 2349. Rosenfeld v. Miller, 131 App. Div. 282, 115 NYS 692, holding that the infant must join in.

43. An infant defendant is properly before the court where it appears from the record that he was made a party defendant and process was served on his mother in her own right and also as statutory guardian. Civ. Code Prac. § 52. Palmer v. Husbands [Ky.] 119 SW 762.

44. There is no presumption that guardian is so personally interested as to require appointment of guardian ad litem. Presumption is in favor of good faith. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

45. That notice of application for sale contained a slight variation in a name from that contained in letters of guardianship or that notice of sale was not posted for the full length of time required. Lomax v. Comstock [Tex. Civ. App.] 110 SW 762. That notice was given in only one of two methods provided by statute held not to invalidate sale. Harper v. Smith [Ark.] 116 SW 674.

46. In absence of fraud, action of probate court in approving petition is not reviewable. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

Lack of verification of petition held matter of sufficiency within above rule. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

47. Civ. Code Prac. § 493. Cornell v. Cornell [Ky.] 115 SW 795; Hughes v. Saffell [Ky.] 119 SW 804; Watkins v. Northern Coal & Coke Co. [Ky.] 116 SW 1192. Defect in such bond does not affect **validity of sale as to life estate of father** of ward. Hughes v. Saffell [Ky.] 119 SW 804.

48. Appeal of Dunn, 81 Conn. 127, 70 A 703.

49. If there is no order of court taking bond and approving it, the bond has not been taken or approved by the court. Watkins v. Northern Coal & Coke Co. [Ky.] 116 SW 1192; Hughes v. Saffell [Ky.] 119 SW 804.

infant.[50] The sale is invalidated by the guardian's failure to take and subscribe a required oath before fixing upon the time and place of sale,[51] but an unauthorized extension of credit is not necessarily fatal.[52] An order empowering a guardian to file a petition to lease property and referring petition to a master does not empower the guardian to sell or lease such property, and a sale thereof by him vests no rights in a purchaser.[53] The guardian's certificate of appraisal is not necessarily overcome by the mere fact that the persons designated therein as appraisers cannot, after many years, remember that they appraised the property.[54] A confirmation of a guardian's sale is necessary to pass the title,[55] although the court may have ordered sale under an application stating the price and terms of sale and the necessity therefor.[56] Where a conditional order of discharge of the guardian, which has not become final by performance of the condition, is ignored by the court by a subsequent order authorizing the guardian to sell, the order of discharge cannot be invoked to invalidate the sale.[57] Where minor wards have received the consideration of the sale, they cannot attack it on the ground of incapacity of the purchaser,[58] but acceptance of the proceeds, even with full knowledge, cannot operate as a ratification where the effect would be to nullify a positive provision of the law relative to capacity to convey.[59] The sale will be set aside where the interests of the ward have been prejudiced by prior agreements of the guardian with prospective purchasers,[60] and a second sale may be ordered on account of a mistake as to the title which the guardian could convey.[61] A suit for specific performance of a contract for the sale of infant's interest made by their special guardian, pursuant to an order of the court, will not lie against the infants after the death of such special guardian,[62] the proper proceeding in such case being to apply for the appointment of a new guardian to carry out the order for conveyance.[63] Purchasers at the sale are not bound to see to the application of the proceeds, and failure on the part of the guardian to account for the same does not render the sale invalid.[64] Where one has purchased from a former guardian who had no authority to sell, the guardian has the right of election as to whether he will recover the property or sue on the former guardian's bond, and it is not for the defendant to dictate.[65]

50. Kirby's Dig. § 3803. Harper v. Smith [Ark.] 116 SW 674. A sale for the purpose of raising funds to discharge incumbrance on other land owned by infant is not a sale for investment. The use of the words "Education and maintenance," in Kirby's Dig. § 3803, construed to have been used in an enlarged sense sufficient to authorize sale to raise funds for protection of ward's estate. Id.

51. Oath required by Comp. St. 1907, c. 23, § 55. Card v. Deans [Neb.] 120 NW 440.

52. Failure to comply with statute as to granting credit on sale of improved land will not justify setting sale aside, where property has increased in value and deferred payments are safely secured. Lomax v. Comstock [Tex. Civ. App.] 110 SW 762.

53. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co. [C. C. A.] 165 F 162.

54. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

55, 56. Gillean v. Witherspoon [Tex. Civ. App.] 121 SW 909.

57. Where discharge was conditioned upon payment of costs, and before performance of such condition the court, on guardian's application, authorized sale by him. Gillean v. Witherspoon [Tex. Civ. App.] 121 SW 909.

58. Lack of corporate power of corporation to purchase and hold property in question. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

59. A married woman can confirm a deed made by guardian only by written instrument acknowledged in conformity with statute regulating conveyances by married women. Gillean v. Witherspoon [Tex. Civ. App.] 121 SW 909.

60. Where a guardian prior to sale has entered into negotiation with a party who agrees to take the property when the sale is completed, although made in good faith, the sale should be set aside if it should appear that a better sale would have been affected but for such arrangement. Lomax v. Comstock [Tex. Civ. App.] 110 SW 762.

61. Where first was made under mistaken belief of all parties that guardian could give absolute estate to purchaser. McCaffrey v. Gibney, 223 Pa. 368, 72 A 632.

62. Danahy v. Fagan, 63 Misc. 658, 117 NYS 300. So long as order directing performance by special guardian remains in force, the matter must be regarded as res adjudicata. Id.

63. Danahy v. Fagan, 63 Misc. 658, 117 NYS 300.

64. Harper v. Smith [Ark.] 116 SW 674.

On an issue as to whether the property was sold for a fair price, the evidence may be reviewed on appeal,[66] but where the evidence is largely oral, great deference will be accorded the finding of the trial court,[67] and such finding will not be disturbed unless manifestly erroneous.[68] The same considerations apply to questions of fraud in the sale.[69]

Partition proceedings as such are treated elsewhere.[70]

§ 8. *Actions and legal proceedings by and against guardians.*[71]—See 11 C. L. 1679 A ward cannot sue in either his own name[72] or that of his guardian.[73] The suit must be brought by the guardian in the name of the ward.[74] In Louisiana a husband as survivor of the community cannot continue a suit commenced by a partnership, consisting of his wife and his son, without qualifying as the son's tutor.[75] A guardian cannot sue in the courts of a state other than that of his appointment unless by statutory authority of such other state,[76] and where he desires to sue in such other state he should obtain ancillary letters from a court of such state.[77] An action to recover a balance due the ward may be barred by limitations.[78] A statute requiring guardians to give supersedeas bonds on appeal from "orders against them as such" does not apply where the judgment is against a guardian individually,[79] but if the bond is given in such case it is not necessarily invalid.[80]

§ 9. *Accounting and settlement.*[81]—See 11 C. L. 1680—Jurisdiction of guardianship accountings is usually vested in the probate courts.[82] The fact that the ward has reached majority does not deprive such court of its jurisdiction of a suit to compel an accounting.[83]

Accounting is the process of returning a detailed statement of the accounts of the fiduciary relation, showing the balance of receipts and disbursements of the estate in possession,[84] and the duty of accounting is a continuing one which devolves

65. Gentry v. Bearss, 82 Neb. 787, 118 NW 1077.

66, 67. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

68. Evidence held sufficient to sustain approval of sale as being for fair price. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

69. Ancell v. Southern Illinois & M. Bridge Co. [Mo.] 122 SW 709.

70. See Partition.

71. **Search Note:** See notes in 4 Ann. Cas. 1068; 11 Id. 1092.

See, also, Guardian and Ward, Cent. Dig. §§ 407-460; Dec. Dig. §§ 117-136; 21 Cyc. 186-220; 15 A. & E. Enc. L. (2ed.) 50, 73; 9 A. & E. Enc. P. & P. 929.

72. Taylor v. Superior Ct. [R. I.] 74 A 482.

73. Taylor v. Superior Ct. [R. I.] 74 A 482. Where suit was brought in by ward in own name, an amendment in his behalf, the guardian not appearing, changing the suit to one by the guardian in the name of the ward, was improper. Id. But see Wallace v. Tinney [Iowa] 122 NW 936, where guardian of intervener was substituted for intervenor.

74. Taylor v. Superior Ct. [R. I.] 74 A 482.

75. Sanders v. Schilling, 123 La. 1009, 49 S 689.

76. Gentry v. Bearss, 82 Neb. 787, 118 NW 1077.

77. Where nonresident guardians seek to obtain possession of moneys in the registry of court, they should produce ancillary letters, issued by a local court where the property is situated. Ex parte Huffman, 167 F 422.

78. It was sought to recover from administrator two years after appointment, and ward had died eleven years before death of guardian. Lowder v. Hatchcock, 150 N. C. 438, 64 SE 194.

79. Hand v. Haughland, 87 Ark. 105, 112 SW 184.

80. No defense to liability thereon that guardian could have appealed without giving it, or that he was held in custody for contempt until he gave the bond, which the court had power to do where the money was shown to be in the hands of the guardian when ordered to be paid or distributed. Hand v. Haughland, 87 Ark. 105, 112 SW 184

81. **Search Note:** See note in 8 A. S. R. 684.

See, also, Guardian and Ward, Cent. Dig. §§ 461-555; Dec. Dig. §§ 137-165; 21 Cyc. 150-185; 15 A. & E. Enc. L. (2ed.) 87; 9 A. & E. Enc. P. & P. 949.

82. Under Comp. Laws 1897, c. 234, §§ 8697-8747, probate court has exclusive jurisdiction of settlement of estates of persons under guardianship, except where its remedies are inadequate, in which latter case courts of equity have jurisdiction under Comp. Laws 1897, § 651. Nolan v. Garrison, 156 Mich. 397, 16 Det. Leg. N. 121, 120 NW 977.

83. Rev. St. art. 2766. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153.

84. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153. A guardian of an imbecile must list and value in his inventory of his ward's estate every item of personal prop-

upon the guardian's administrator.[85] A de facto guardian may be called upon for an accounting without admitting the regularity of the appointment.[86]

In some states a liberal practice is indulged with regard to who may file exceptions to a guardian's account,[87] and a decree may sometimes be entered after the death of the ward.[88] In a suit for reaudit, all persons interested must be brought in.[89] The general statutes of limitations do not usually apply to proceedings to compel accountings or to exceptions to accounts,[90] but a suit to falsify and surcharge settlements may be barred by laches.[91] Allegations of a guardian's fraud in making final settlement brings the case within statutes relating to time for bringing actions for relief against fraud.[92]

On the hearing of exceptions to a final account,[93] or in an action to set aside a settlement,[94] the burden of proof is on the guardian. On the hearing of an exception to a final report and account in which issue is raised as to two items of credit claimed in the account challenged, all other items, both of charges and credits, stand as they appear in the account,[95] and the special finding of facts must be read in connection with the account.[96] The proper judgment in such case is that the guardian restate the account in conformity with the finding and judgment of the court.[97] The guardian is not entitled to an absolute discharge of his trust by the court until he has submitted his final account or settlement,[98] and periodical or partial settlements are at most, after approval of the court, but prima facie evidence of their correctness and may be rectified or rebutted in final accounting,[99] but confirmation of annual settlements are conclusive except against direct attack,[1] and a final settlement is an adjudication binding upon all interested persons who had notice of the proceedings.[2] The decree of the court in respect thereto operates as an ac-

erty, including doubtful judgments, claims, notes and accounts, and each parcel of real estate belonging to his said ward, and anything less is subject to exception. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178.

85. Nelson v. Cowling [Ark.] 116 SW 890.

86. In re Cameron's Estate [Mich.] 16 Det. Leg. N. 423, 122 NW 278.

87. Under Ohio statutes, any person interested, though a stranger and neither a creditor or relative, has large capacity, on proper grounds, as next friend of an imbecile under guardianship in the probate court, to bring and prosecute an action for the removal of such guardian, or to file and maintain exceptions to an inventory and an account made or rendered by such guardian in the probate court, and especially so when the imbecile has no next of kin resident of the state or none willing or sufficiently interested in his person or estate to undertake such action, a bond for costs being a sufficient safeguard against meddling or usurpation. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178.

88. Where a court has heard exceptions to an inventory and to an account of the guardian of an imbecile, and has received evidence on grounds for removal of the guardian, and the presentation of evidence on the three matters consolidated has fully closed after three days of hearing, and the imbecile ward dies within a few days thereafter and before the opinion of the court was announced or a judgment ordered, there is no necessity of the revival of the action in the name of the representatives of the deceased imbecile, and the trial court thereafter can render judgment as of the date when the evidence was closed as a sort of a nunc pro tunc order. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178, following, In re Estate of Jarrett, 42 O. S. 199.

89. In a suit by infant heirs against a guardian and his bondsmen for a reauditing and restatement of the accounts, and for decrees for balances for which they are respectively liable, other heirs interested in said accounting are necessary and proper parties thereto. Talbot v. Curtis, 65 W. Va. 132, 63 SE 877.

90. Neither the four nor the two-year statute of limitations of Texas includes proceedings to compel a guardian to render a final account or exceptions filed thereto, such proceedings not being an "action" within the statute. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153, construing Rev. St. arts. 3358, 2766, 2770, 3357.

91. Plant v. Fittro, 65 W. Va. 147, 63 SE 768.

92. Code 1896, § 2813. Willis v. Rice, 157 Ala. 252, 48 S 397.

93. In re Kitchen [Ind. App.] 89 NE 375.

94. Willis v. Rice, 157 Ala. 252, 48 S 397.

95, 96, 97. In re Kitchen [Ind. App.] 89 NE 375.

98. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153.

99. American Bonding Co. v. People [Colo.] 104 P 81.

1. France v. Shockey [Ark.] 121 SW 1056.

2. In re Cowen, 130 App. Div. 356, 114 NYS 797.

count stated between guardian and ward as well as the formal release from the trust upon such account,[3] and a judgment of confirmation is conclusive of all matters embraced in the settlement.[4] Where judgment of final accounting is admitted without objection, it is presumed that the county court acted correctly and with due authority,[5] but not as to matters omitted from the account, for they may be surcharged in subsequent settlements.[6] A conditional order of discharge does not become final until the condition is performed.[7] A statement of accounts attached to an answer in an action to compel a settlement is conclusive upon the guardian.[8]

The confirmation of an account is usually appealable,[9] provided there has been a complete settlement.[10] No exception to the allowance of improper items is necessary to save the point for review,[11] but the action of the lower court in allowing a credit will not be disturbed where the ward has failed to abstract the testimony of the witnesses of the guardian,[12] and a finding supported by the evidence will not be disturbed.[13]

A guardian will be credited with expenditures for running expenses of the property, repairs and necessary improvements.[14] He will likewise be allowed compensation for the support and maintenance of the ward,[15] also fees properly paid by him for the ward's benefit.[16] He will not be allowed fees improperly paid,[17] nor

3. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153.

4. Nelson v. Cowling [Ark.] 116 SW 890; France v. Shockey [Ark.] 121 SW 1056.

5. American Bonding Co. v. People [Colo.] 104 P 81. A settlement made under § 4728, Mill's Ann. St., constitutes judgment conclusive unless impeached in court in which it was rendered, by proof of fraud or such other defects as would invalidate judgments of other courts. Id.

6. Nelson v. Cowling [Ark.] 116 SW 890.

7. An order discharging a guardian on payment of court costs, and directing execution to issue against him and his sureties therefor is not an absolute and final discharge without it being made to appear that the costs were paid. Gillean v. Witherspoon [Tex. Civ. App.] 121 SW 909.

8. Willis v. Rice, 157 Ala. 252, 48 S 397.

9. France v. Shockey [Ark.] 121 SW 1056. **Limitation as to time of appeal:** The matter of confirming accounts not being a civil action but a special proceeding, the Arkansas statute extending limitation for persons under disability does not apply. Nelson v. Cowling [Ark.] 116 SW 890.

10. Inasmuch as the probate court has exclusive jurisdiction to settle accounts of guardians. the common pleas can acquire no jurisdiction on appeal so long as any item of such an account remains undetermined. Gregg v. Klein, 12 Ohio C. C. (N. S.) 264.

11. Nelson v. Cowling [Ark.] 116 SW 890.

12. France v. Shockey [Ark.] 121 SW 1056, where it was urged that in final settlement guardian should be charged with rent of homestead, but in final settlement there was a charge made on an item of rent without specifically setting forth of what property it was the rent.

13. It is within the power of the probate court to inquire into and determine whether the account as rendered is fair, just, and correct, and a finding supported by evidence will not be disturbed on appeal. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153.

14. Smith v. Cameron [Mich.] 16 Det. Leg. N. 563, 122 NW 564. The value of improvements will be allowed out of the rents in an accounting when the legal guardian repudiates his contracts made as natural guardian. Muskogee Development Co. v. Green [Okl.] 97 P 619.

De facto guardian is entitled to an equitable credit for expenditures which were made for the ward and which would have been allowed had the guardian been a legal one. Smith v. Cameron [Mich.] 16 Det. Leg. N. 563, 122 NW 564. Where de facto guardian insured a barn for more than interest of the life tenant, and upon total loss the guardian collected insurance and expended it in rebuilding the barn, which went to the benefit of both ward and remaindermen. Id.

15. It being the duty of a guardian to take proper care of his ward, furnishing a suitable home, board and clothing and other necessaries, the value of such supplies is a proper charge against the estate. Taylor v. Taylor [Ind. App.] 87 NE 25. A reasonable expenditure for a suitable trousseau would constitute a proper charge. Anderson v. Silcox, 82 S. C. 109, 63 SE 128.

Where parent is guardian: Where a parent is financially able to maintain his child, the court may in its discretion allow a smaller charge than it would were the guardian a person other than the parent, but some allowance should be made. In re Putney, 61 Misc. 1, 114 NYS 556.

Competency of guardian as witness: A guardian of an imbecile in an accounting before the probate court is an incompetent witness to prove an alleged claim for services rendered by said guardian to and for said ward prior to the date of his appointment as guardian. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178.

16. In re Kitchen [Ind. App.] 89 NE 375. Will be allowed reasonable compensation for fees paid to counsel in legal proceedings to collect and preserve the property. Brooke's Estate (No. 1), 36 Pa. Super. Ct. 327.

will he be given credit for any other illegal disbursements,[18] though made in good faith.[19] He will, furthermore, be held liable on final accounting, not only for such money and property as actually came into his hands,[20] but also for such additional money or property, lost by his negligence or failure of duty, as would have been received by him if he had exercised proper care in the management of the estate;[21] and where a good debt due the estate at the date of the guardian's appointment is not accounted for,[22] the burden is on the guardian to show that its loss was not due to his negligence or failure of duty,[23] but he will not be surcharged with losses incurred in the management of the estate where he has been guilty of no negligence or bad faith.[24] The guardian will be charged with the value of land sold without due authority,[25] unless under such circumstances as would have moved the court to order the sale had application therefor been made.[26] A guardian will be charged with simple interest on all funds held in his hands after settlement.[27] He is held liable for the highest legal rate of interest where he has converted the estate to his own use or neglected to invest his ward's money,[28] but a high rate of interest will

Burden of proof: When a guardian comes before the court claiming credit for fees, the burden is upon him to show that the services rendered were necessary, the fees reasonable and the contract a fair one made after due diligence. In re Kitchen [Ind. App.] 89 NE 375.

17. Will not be allowed fees paid counsel to prevent his own removal. Brooke's Estate (No. 1), 36 Pa. Super. Ct. 327. The guardian of an imbecile has no lawful right to pay a fee to an attorney for what the evidence shows to have been fomented litigation relative to the assets of his ward's estate, or to pay any claim for attorney fees against his ward barred by the statute of limitations; any and all such amounts so paid by said guardian are not proper credits, and should and will be charged against the guardian on accounting to the probate court. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178. Under Cobbey's Ann. St. 1907, § 9554, prohibiting prosecuting attorney from being concerned in any civil action dependent upon same facts upon which a criminal prosecution, commenced or prosecuted, depends, guardian of insane woman could not be allowed fees paid county attorney for representing the ward in filiation proceedings, the act upon which such proceedings depended being a felony. In re Moegenberg [Neb.] 120 NW 1132.

18. A guardian of an imbecile has no lawful right to make disbursements of the funds of his ward to prospective heirs of the ward, nor to make loans of the funds of his ward to said prospective heirs without mortgage security on real estate as provided by statute, and all such amounts so disbursed or loaned to said prospective heirs will be charged against such guardian on his accounting to the probate court as so much cash on hand with its appropriate interest. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178.

19. In re Moegenberg [Neb.] 120 NW 1132.

20, 21. Roush v. Griffith, 65 W. Va. 752, 65 SE 168.

22. Settlement of accounts of administrator of ward's father, who had given sufficient bond, showing indebtedness to the ward, held sufficient to charge guardian with amount of such debt in absence of showing of either collection or loss without guardian's fault, it appearing that sufficient time had elapsed to raise presumption of payment by administrator and to establish prima facie the loss of the debt. Roush v. Griffith, 65 W. Va. 752, 65 SE 168. Recitals in administrator's settlement of payments to guardian are admissible as evidence of indebtedness of administrator to ward but are not sufficient to prove payment to guardian. Id.

23. Roush v. Griffith, 65 W. Va. 752, 65 SE 168.

24. Brooke's Estate (No. 3), 36 Pa. Super. Ct. 334. Accountant would not be surcharged for failure to rent house for $20 instead of $18, or for rental while house was vacant, or for loss of rent due from tenant, where it appeared that he exercised due diligence and good faith with respect to such several matters. Id.

25. A guardian of an imbecile appointed by an Ohio court, who sells real estate of his ward located in the state of Arkansas, without the order of the probate court of Ohio to whom such guardian must in law account, and without proceedings and an order of sale of the proper court of the state in which such real estate is situated, will be charged on accounting in the probate court of Ohio with what the evidence shows to be the fair market value of said lands at the time of sale, even if said amount so found by the court be more or greater than the amount received by the guardian, and no subsequent, irregular, defective or invalid proceedings and order by the laws of the foreign state, approving said sale, will cure said unauthorized sale or prevent such charge on accounting of such guardian in the probate court of Ohio. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178.

26. Sale for support. Anderson v. Silcox, 82 S. C. 109, 63 SE 128; Muskogee Development Co. v. Green [Okl.] 97 P 619.

27. Willis v. Rice, 157 Ala. 252, 48 S 397.

28. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153, construing art. 2369, Rev. St. 1895. When it is shown by the evidence that the guardian of an imbecile treated the property of his ward as his own, placed the funds of

not be charged where the guardian's credits are reasonable, although he has delayed in obtaining confirmation.[29] If he fails to settle his accounts after removal and appointment of a successor and interferes with his successor in the discharge of his duties, it constitutes such a gross neglect of duty that interest on a balance due him will be disallowed.[30] The guardian must properly account for all indebtedness due from him to the estate.[31]

The propriety of the costs allowed for auditing depends upon the amount and character of the work involved.[32] Such costs will not be imposed upon the accountant where he has not been guilty of any negligence or bad faith.[33]

§ 10. *Rights and liabilities between guardian and ward.*[34] See 11 C. L. 1681 With regard to transactions between guardian and ward, the guardian carries the burden of proving absolute fair dealing, and in the absence of the most abundant good faith the transaction will not stand.[35] The guardian is liable to his ward in an action for damages resulting from improper management.[36] Whether the ward is barred by laches from maintaining a suit to recover his estate from his former guardian depends upon the circumstances of each case.[37]

§ 11. *Compensation of guardian.*[38] See 11 C. L. 1681 Compensation for care of ward may be fixed in advance, but where it is not so fixed by the court the amount will be subject to its approval.[39] Compensation may be allowed on final settlement when none was allowed in any of the annual settlements.[40] Where the ward is physically deficient, the guardian should be allowed a reasonable charge for attending to him.[41] Where the guardian lives with and works for the ward, he should be allowed his board and lodging.[42] Compensation for maintenance of ward

the ward in bank in his individual name, paid his own debts with said funds and used them in speculation in land, taking the title thereof in his own name, and keeping no account of the trust property as trust property, such guardian will, on accounting in the probate court, be charged with the lawful rate of interest on all the funds which came in his hands from the date of the reception of such funds by said guardian to the date of his accounting. In re Guardianship of Paul Oliver, 9 Ohio N. P. (N. S.) 178.

Computation: The guardian is chargeable with interest from the beginning of the year succeeding that in which he received his appointment, and all funds received during the current year are to be regarded as unproductive until the end thereof, and all expenditures made during the course of the year should be regarded as made before the balance is struck, and interest is chargeable upon the annual balance so struck. Anderson v. Silcox, 82 S. C. 109, 63 SE 128.

29. France v. Shockey [Ark.] 121 SW 1056.

30. Nelson v. Cowling [Ark.] 116 SW 890.

31. Where the indebtedness of a guardian to the estate is fixed by judgment, it devolves upon him to either turn into the court cash to that amount, or show that he has loaned the same under authority of court, and to surrender the evidence of and security for such loan. American Bonding Co. v. People [Colo.] 104 P 81.

32. $15 per day held not excessive allowance to auditor in passing upon exceptions to account of lunatic's committee, where 422 printed pages of testimony were taken and forty days were consumed in taking same and in making report. Brooke's Estate (No. 1), 36 Pa. Super. Ct. 327.

33. Brooke's Estate (No. 1), 36 Pa. Super. Ct. 327; Id. (No. 2), 36 Pa. Super. Ct. 332.

34. **Search Note:** See notes in 58 L. R. A. 82; 11 Ann. Cas. 54.

See, also, Guardian and Ward, Cent. Dig. §§ 105, 107, 108, 206-218, 264-299, 305-324; Dec. Dig. §§ 61-66, 68-74; 21 Cyc. 73, 101-114, 119, 272-274; 15 A. & E. Enc. L. (2ed.) 73.

35. Willis v. Rice, 157 Ala. 252, 48 S 397.

36. A ward has a right of action for damages against a conservator, who has sold the property for an inadequate consideration, but the ward being the only person injured, the right of action survives only in favor of his executor, not to the residuary legatees. Appeal of Dunn, 81 Conn. 127, 70 A 703.

37. Ward held not barred by delay of 14 yeare after reaching majority where it did not appear that any evidence had been lost, or the trust disavowed or a settlement claimed, nor was the ward barred by delay in prosecution of suit after institution thereof for period of 10 years where guardian was alive at institution thereof and for several years thereafter and asserted no defense. Roush v. Griffith, 65 W. Va. 752, 65 SE 168.

38. **Search Note:** See Guardian and Ward, Cent. Dig. §§ 498-507; Dec. Dig. §§ 150-152; 21 Cyc. 173-176; 15 A. & E. Enc. L. (2ed.) 109.

39. Taylor v. Taylor [Ind. App.] 87 NE 25.

40. France v. Shockey [Ark.] 121 SW 1056.

41. Smith v. Cameron [Mich.] 16 Det. Leg. N. 563, 122 NW 564.

42. Guardian and her husband who were both working for a ward held entitled to

will not be allowed for periods of time when the ward is cared for by others than the guardian.[43] For good reason shown extra compensation may be allowed, provided this allowance does not exceed the sum of the commissions provided by law to the guardian.[44] Compensation will not be denied on account of insignificant mistakes in the management of the estate where there has been no fraud or lack of good faith.[45] A de facto guardian stands upon the same plane as a de jure guardian as regards compensation.[46]

§ 12. *Guardianship bonds.*[47]—See 11 C. L. 1681.—In New York a guardian's surety is entitled to be discharged as a matter of right on mere notice to the principal,[48] and upon application for discharge the court cannot impose as a condition that premiums paid by the guardian to a surety company shall be repaid, no written demand having been given.[49] Misappropriation of the ward's funds,[50] or a loan improper in amount and terms,[51] constitutes a breach of the guardian's bond. The record in a suit in partition between a ward and his curator is inadmissible as evidence where it may have embraced other expenses.[52] A decree is conclusive against sureties who have made themselves parties without citation and have defended the account of the guardian, and costs will be properly taxed against them.[53] Sureties of a public administrator and guardian will be presumed to know the provisions of statutes under which their principal is appointed.[54]

HABEAS CORPUS (AND REPLEGIANDO).

The scope of this topic is noted below.[55]

§ 1. Nature, Occasion and Propriety, 1998.
§ 2. Jurisdiction to Issue, 2002.
§ 3. The Petition, 2002.
§ 4. Hearing on Petition and Issuance of Writ, 2002.
§ 5. The Writ; Service Thereof; Effect of Writ, 2003.
§ 6. Certiorari in Aid of Habeas Corpus, 2003.
§ 7. Return and Hearing on the Writ; Judgment, 2003.
§ 8. Review, 2004.

§ 1. *Nature, occasion and propriety.*[56]—See 11 C. L. 1663.—While the writ is now commonly used to determine custody of infants,[57] validity of extradition proceedings,[58] to secure release from an insane asylum,[59] and to admit to bail,[60] when invoked

board and lodging out of the ward's estate, but not so as to their children. Smith v. Cameron [Mich.] 16 Det. Leg. N. 563, 122 NW 664.

43. Taylor v. Taylor [Ind. App.] 87 NE 25.

44. Anderson v. Silcox, 82 S. C. 109, 63 SE 128.

45. Brooke's Estate (No. 1), 36 Pa. Super. Ct. 327.

46. Smith v. Cameron [Mich.] 16 Det. Leg. N. 563, 122 NW 564.

47. **Search Note:** See notes in 33 L. R. A. 759; 4 Ann. Cas. 345.

See, also, Guardian and Ward, Cent. Dig. §§ 56-64, 576-663; Dec. Dig. §§ 15, 173-182; 21 Cyc. 45-48, 221-262; 15 A. & E. Enc. L. (2ed.) 116; 9 A. & E. Enc. P. & P. 975.

48. Code Civ. Prac. § 4812, as amended. In re American Surety Co., 61 Misc. 542, 115 NYS 860.

49. In re American Surety Co., 61 Misc. 542, 115 NYS 860.

50. State v. Smith [Mo. App.] 120 SW 614.

51. American Bonding Co. v. People [Colo.] 104 P 81.

52. State v. Smith [Mo. App.] 120 SW 614.

53. Whitfield v. Burrell [Tex. Civ. App.] 118 SW 153.

54. Newman v. Flower's Guardian [Ky.] 121 SW 652.

55. The right to the remedy and the extent of review allowed thereon is retained, but questions of substantive law determined on habeas corpus are treated in the topics to which they relate (see such topics as Arrest and Binding Over;* Bail, Criminal;* Infants,* § 2; Indictment and Prosecution;* Military and Naval Law,* and the like).

56. **Search Note:** See notes in 3 C. L. 1577; 39 L. R. A. 449; 45 Id. 136, 832; 1 L. R. A. (N. S.) 1142; 9 Id. 1173; 12 Id. 225, 13 Id. 518; 15 Id. 227; 22 A. S. R. 422; 23 Id. 108; 55 Id. 267; 85 Id. 202; 87 Id. 167; 100 Id. 29; 4 Ann. Cas. 723; 5 Id. 552; 7 Id. 1020; 11 Id. 1051.

See, also, Habeas Corpus, Cent. Dig. §§ 1-33, 122-124; Dec. Dig. §§ 1-39, 121-123; 21 Cyc. 282-307, 352, 353; 15 A. & E. Enc. L. (2ed.) 125, 154, 160; 9 A. & E. Enc. P. & P. 998.

57. **Decree of divorce held conclusive** between parties and their representatives and court will not consider modification of decree. People v. Small, 237 Ill. 169, 86 NE 733.

58. Barnes v. Nelson [S. D.] 121 NW 89. Objection that extradition requisition contains clause that demanding state will not

* Always begin with the latest article on the subject. Use the latest topical index.

to relieve from restraint under legal process, such process must be void,[61] either for an excess of jurisdiction on the face of the proceedings,[62] or for want of jurisdiction;[63] and while in some cases evidence outside of the record may be heard to show want of jurisdiction,[64] parol evidence is not ordinarily admissible for such purpose.[65] The writ is not available to test the sufficiency of a criminal complaint[66] or war-

be responsible for expense attending arrest and delivery of alleged fugitive held not available to accused on habeas corpus to inquire into legality of proceedings. Marbles v. Creecy, 30 S. Ct. 32.

59. Person committed to insane asylum entitled to release when **restored to reason.** In re Hannah [N. J. Eq.] 73 A 849. Commitment under Code Cr. Proc. § 454, lasts only so long as accused is insane, and he may at any time under the law have his sanity determined on habeas corpus. People v. Chanler, 133 App. Div. 159, 117 NYS 322. Dangerously insane person **not entitled to release,** though held under illegal commitment. Ex parte Allen [Vt.] 73 A 1078. Where person was committed to insane asylum on his acquittal of murder on ground of insanity, court will assume, in habeas corpus to determine his present sanity, that verdict declared the truth. People v. Chanler, 116 NYS 62, afd. 117 NYS 322.

60. Criminal court of appeals will not allow writ of habeas corpus to determine whether or not action of clerk of district court in refusing to approve bail bond is unreasonable; such grievance should be presented to trial court. Ex parte Tyler [Okl. Cr. R.] 102 P 716.

61. The function of a writ of habeas corpus is to determine the legality of one's detention by an inquiry into the question of jurisdiction and the validity of the process upon its face, and whether anything has transpired since it was issued to render it invalid. In re Leonardino, 9 Cal. App. 690, 100 P 708. **Commitment for contempt** by justice of witness who refused to be sworn and testify in proceeding held regular, and writ denied. In re Hammond, 83 Neb. 636, 120 NW 203. Order of commitment to hold for trial before district court is void unless sustained by **competent evidence.** Ex parte Turner [Okl. Cr. R.] 104 P 1071; Ex parte Johnson, 1 Okl. Cr. R. 414, 98 P 461; In re Leonardino, 9 Cal. App. 690, 100 P 708. Evidence held sufficient to warrant detention of petitioner on charge of murder. Ex parte Johnson, 1 Okl. Cr. R. 414, 98 P 461. Writ sustained where officers of newspaper corporation were arrested for criminal libel and evidence did not show such officers were in actual management of paper at time such libel was printed. People v. Warden of City Prison, 118 NYS 487. Insufficient evidence to hold to grand jury. People v. Harrison, 63 Misc. 18, 117 NYS 477. Habeas corpus will lie to relieve one convicted **without legal warrant.** Keith v. Santa Ana Recorder's Ct., 9 Cal. App. 380, 99 P 416. Where person arrested for violation of ordinance refused to plead and justice found him guilty **without hearing** any evidence to support complaint, judgment held void. Ex parte Walton [Okl. Cr. R.] 101 P 1034.

62. Sneed v. State, 157 Ala. 8, 47 S 1028. Discharge granted where record of commitment showed **no deposition was taken** and filed by magistrate, as required by Pen. Code, § 702, and failed to show anything warranting commitment. Ex parte Watts, 9 Cal. App. 311, 101 P 419. Commitment for contempt held void where order of **adjudication failed to state facts** which showed prisoner guilty, as provided by §§ 1619 and 3576, Rev. St. 1899 (Ann. St. 1906, pp. 1199, 2023), In re Shull, 221 Mo. 623, 121 SW 10.

63. Court must not only have jurisdiction over person and subject-matter, but authority to render the particular judgment. Ex parte Gudenoge [Okl. Cr. R.] 100 P 39. Justice of peace held not to have acted beyond power conferred upon him by art. 7, § 18, State Constitution, in issuing warrant and commitment. Ex parte Johnson, 1 Okl. Cr. R. 414, 98 P. 461. Relief accorded where imprisonment was by court which had no authority to render judgment. Ex parte Justus [Okl. Cr. R.] 104 P 933. Attack on order directing payment of alimony, costs, etc., held collateral to divorce action and not proper in action to obtain release from imprisonment for contempt in disobeying the order. Ex parte Joutsen, 154 Cal. 540, 98 P 391. Criminal court of appeals will interfere where it clearly appears action of lower court was without authority of law and absolutely void, because such court had no jurisdiction of subject-matter of party, or was wholly without power to issue order of commitment. Ex parte Fowler [Okl. Cr. R.] 105 P 180. Criminal court of appeals will not look beyond judgment in habeas corpus proceedings except when question of power or want of jurisdiction is raised. Ex parte Mingle [Okl. Cr. R.] 104 P 68. Can but inquire into jurisdiction of court which pronounced judgment to ascertain whether latter is in accord with § 2032, Code Civ. Proc. People v. Frost, 133 App. Div. 179, 117 NYS 524.

64. Where a justice of peace has committed to jail a parent charged with nonsupport of his child to await action of grand jury, on habeas corpus by such parent evidence de hors the record may be heard to show want of jurisdiction in said justice to make such order. Ex parte Wyant, 8 Ohio N. P. (N. S.) 207. Where surviving partner was imprisoned for failure to obey court's order, held proper to show he had complied with order, under B. & C. Comp. § 640. Harrington v. Jones [Or.] 99 P 935.

65. Prisoner convicted of larceny of watch held not entitled to show by parol evidence that value of watch exceeded amount of which justice had jurisdiction. Sneed v. State, 157 Ala. 8, 47 S 1028. Parol evidence incompetent to impeach justice's record in collateral proceeding. Ex parte Walton [Okl. Cr. App.] 101 P 1034.

66. Prosecution for violating ordinance establishing fire limits. Ex parte Cain [Tex. Cr. R.] 120 SW 999.

rant,[67] except in criminal proceedings before an inferior court,[68] and it cannot be used to test the validity of an indictment unless it is void.[69] It cannot be used to review the merits[70] or mere irregularities of procedure,[71] and ordinarily will not issue when there is a remedy by writ of error or appeal,[72] and hence will not lie to review the final determination of a court of general[73] or competent jurisdiction[74] for either errors of fact or law,[75] nor can it be made too serve the office of a demurrer[76] or certiorari,[77] but may be available where no other mode of review is open.[78] The writ should be limited to cases where the judgment and sentence of

67. Sufficiency of warrant issued by a court of competent jurisdiction will not be inquired into. In re Milecke, 52 Wash. 312, 100 P 743.

68. Keith v. Santa Ana Recorder's Ct., 9 Cal. App. 380, 99 P 416. Sufficiency of criminal complaint in courts of limited or inferior jurisdiction may be determined by supreme court on habeas corpus for discharge of one held under such a complaint. In re Morganstern [Cal.] 104 P 448.

69. Ex parte Wolf, 55 Tex. Cr. R. 231, 115 SW 1192. Discharge granted for **insufficiency of indictment** in failing to state offense over which court had jurisdiction. Ex parte Rickley [Nev.] 100 P 134.

70. Not a writ of review to look into legality or justice of judgment. People v. Frost, 133 App. Div. 179, 117 NYS 524. Not designed to retry issues of fact or to answer purpose of appeal. In re Leonardino, 9 Cal. App. 690, 100 P 708. Insufficiency of evidence to sustain verdict and judgment is not question to be reviewed. Ex parte Caveness [Okl. Cr. R.] 105 P 184. Injunction properly granted must be obeyed, no matter what irregularities attended granting of same, or however erroneous court may have acted in granting it. Ex parte Fowler [Okl. Cr. R.] 105 P 180.

71. Court of criminal appeals will not look beyond judgment and sentence of any court of competent jurisdiction as to mere irregularities of procedure or errors in law on questions over which court had jurisdiction. Ex parte Justus [Okl. Cr. R.] 104 P 933. Errors of the trial court cannot be brought before reviewing court. In re Bachtel, 11 Ohio C. C. (N. S.) 537. Adverse ruling by lower court on question of failure to accord accused **preliminary examination** held reviewable on appeal or writ of error. Buckley v. Hall, 215 Mo. 93, 114 SW 954. Manner and method of **selecting trial jury** is not question for review. In re McNaught, 1 Okl. Cr. R. 528, 99 P 241. Will not inquire into **legality of jury** which convicted petitioner; remedy is by new trial. Ex parte Jackman [Nev.] 100 P 769. **Sufficiency of an appeal bond,** under which lower court assumed jurisdiction and affirmed conviction, cannot be inquired into. Ex parte Drake, 55 Tex. Cr. R. 233, 116 SW 49. Where appeal was taken to county court from conviction in corporation court, held, even if appeal bond was defective, conviction of corporation court would be binding. Id.

72. Ex parte Peterson, 166 F 536; Ex parte Cranford [Okl. Cr. R.] 105 P 367. Writ denied to person under arrest for offense against federal statute, under which he could raise every question sought to be raised in habeas corpus proceedings and to a review of judgment therein by appellate court. Hooper v. Remmel [C. C. A.] 165 F 336. Except in rare cases, where facts before court cannot be materially changed, qualified, or explained, the determination of important issues ought not to be made in habeas corpus proceeding. People v. McLaughlin, 194 N. Y. 556, 86 NE 1119. Appeal is remedy where alleged information on which petitioner was convicted was not predicted upon sworn proof. Ex parte Flowers [Okl. Cr. R.] 101 P 860. Indian convicted in federal court of murdering member of tribe on Indian reservation, alleged court was without jurisdiction because he was citizen of United States, and place of crime had ceased to be part of reservation. Writ denied. Toy Toy v. Hopkins, 212 U. S. 542, 53 Law. Ed. — . Where defendant's plea of **former jeopardy** is disregarded by the jury, it is error to be corrected on appeal. Ex parte King, 10 Cal. App. 282, 101 P 810. **Punishment** will not be reviewed on ground that it is excessive, since remedy is by appeal. In re McNaught, 1 Okl. Cr. R. 528, 99 P 241. Only mode of reviewing decision of justice in a peace proceeding on facts is by appeal, as authorized by Code 1907, § 7532. Cox v. State, 157 Ala. 1, 47 S 1025.

73. Courts of Sessions are superior courts of general jurisdiction of crimes. People v. Frost, 116 NYS 946.

74. Application for writ denied to review commitment on judgment of conviction for adultery. Ex parte Cranford [Okl. Cr. R.] 105 P 367. Where petitioner was sentenced for felony by district court under proper jurisdiction, held no other court in state had jurisdiction to inquire into validity of commitment. In re Hornung, 81 Kan. 180, 105 P 23. Where authority for holding defendant was certified copy of entry of judgment of conviction, application for writ denied. People v. Foster, 132 App. Div. 116, 116 NYS 530. By Code Civ. Proc. § 2016, subd. 2. People v. Frost, 129 App. Div. 498, 114 NYS 209. Order of commitment to hold for trial, after examination on felony charge, and finding that there is sufficient cause to believe defendant guilty, held **not final judgment** within § 4867, Wilson's Rev. and Ann. St. 1903. Ex parte Turner [Okl. Cr. R.] 104 P 1071.

75. Harrington v. Jones [Or.] 99 P 935.

76. Complaint held defectively drawn but attack must be by demurrer. In re Avdalas, 10 Cal. App. 507, 102 P 674.

77. Where petitioner attacked conviction by commissioners of roads on ground that such body adjudged him guilty of being road defaulter, without hearing evidence from him or against him, held to be corrected by certiorari. Davis v. Smith [Ga. App.] 66 SE 401.

78. Habeas corpus is proceeding to test validity of commitment for criminal con-

the court attacked is clearly void,[79] and the validity of a judgment cannot be tested unless some effort is being made to enforce it.[80] The validity of an ordinance under which petitioner was arrested may be tested on habeas corpus,[81] even though the court had jurisdiction under the ordinance and the process is regular on its face,[82] but the legality of corporate existence of a city and the election of its officers cannot be attacked in habeas corpus to test the validity of an ordinance.[83] A judgment which recites all necessary jurisdictional facts cannot be impeached collaterally on habeas corpus,[84] and some courts hold that the judgment of a court of general jurisdiction cannot be considered as void, notwithstanding its alleged irregularities when collaterally attacked.[85] The proceedings of a military court cannot be reviewed collaterally upon habeas corpus where the court had jurisdiction of the offense and the person charged.[86] A minor, illegally enlisted in the United States navy, cannot by habeas corpus upon that ground secure release from custody, imposed by reason of having committed a military offense.[87] The operation of a statute of limitations is not ground for the release of a prisoner on habeas corpus.[88] The validity of an election cannot be inquired into on habeas corpus where the statute prescribes another remedy.[89] One illegally arrested does not waive his right to a discharge on habeas corpus by consenting to an adjournment of his examination.[90] A court cannot enjoin a proceeding in habeas corpus.[91] A writ of "habeas corpus ad testificandum" is not the high prerogative writ of habeas corpus but is merely the ancient

tempt, if proceeding and order adjudging defendant guilty were regular and sustained by the evidence. People v. Platzek, 133 App. Div. 25, 117 NYS 852. Adjudication held not sustained by evidence. Id.

79. Ex parte Justus [Okl. Cr. R.] 104 P 933. Cannot be invoked to question judgment merely erroneous and not absolutely void. Ex parte Cassens [Tex. Cr. R.] 122 SW 888. Habeas corpus by witness committed to jail for refusing to testify held collateral attack upon order of commitment and plaintiff must show latter is void. McGorray v. Sutter, 80 Ohio St. 400, 89 NE 10. A judgment by a court of competent jurisdiction, valid on its face, is an unanswerable return to a writ of habeas corpus issued for the relief of one imprisoned by virtue of such judgment. In re McNaught, 1 Okl. Cr. R. 528, 99 P 241. Judgment held not invalid because founded on information and not on indictment, since evident intent of framers of state constitution was that remedies should be concurrent. Id.

80. Where defendant was at liberty on bond, held no restraint of liberty; in constructive custody of bondsmen. Ex parte Messall [Okl. Cr. R.] 103 P 1040.

81. Ordinance imposing $100 license tax on express companies held not in violation of laws and constitution of United States. Hardee v. Brown, 56 Fla. 377, 47 S 834. Habeas corpus will lie to discharge petitioner restrained by virtue of conviction based upon void odinance. In re Unger, 1 Okl. Cr. R. 222, 98 P 999.

82. Ordinance held void because adopted for revenue and not for regulation only, and petitioner discharged. In re McCoy, 10 Cal. App. 116, 101 P 419.

83. Attack must be by quo warranto under Rev. St. 1895, art. 4343. Ex parte Keeling, 54 Tex. Cr. R. 118, 121 SW 605.

84. Where judgment recited: "And it appearing that all persons interested have due notice, it is ordered and adjudged that she be committed," etc., held judgment could not be attacked by guardian of ward committed to state training school. State v. Whittier, 108 Minn. 447, 122 NW 319.

85. Alleged that record of judgment was insufficient to support commitment. Held though record was somewhat informal, nevertheless sufficient. Ex parte Howard [Okl. Cr. R.] 103 P 663.

86. Relator was soldier of national guard. Pleaded guilty to military offense before summary courtmartial, which sentenced him to 15 days in county jail. Held court had jurisdiction under Rev. St. §§ 3057, 3058, 3064. McGorray v. Murphy, 80 Ohio St. 413, 88 NE 881.

87. Although enlisted in violation of statute, enlistment not void and minor subject to punishment for desertion. Ex parte Rock, 171 F 240.

88. Statute is a mere matter of defense to be pleaded. Ex parte Blake, 155 Cal. 586, 102 P 269.

89. Validity of local option elections should be inquired into by contest before district court, by Laws 1907, p. 447, c. 8. Ex parte Thulmeyer [Tex. Civ. App.] 119 SW 1146.

90. Affidavit of police officer held insufficient to confer jurisdiction on magistrate to commit prisoner for further examination. People v. Flynn, 64 Misc. 278, 118 NYS 532.

91. Husband sought to enjoin wife and court from proceeding on habeas corpus to obtain children from him, on ground that divorce action instituted by him was pending, and if wife obtained custody of children she might remove them beyond jurisdiction of court before termination of divorce action. Hood v. Hood [Ga.] 64 SE 1074.

common-law precept to bring a prisoner into court to testify,[92] and is the process of the court from which it is issued, though it emanates from a judge in chambers.[93]

§ 2. *Jurisdiction to issue.*[94]—See 11 C. L. 1686 *Federal courts.*See 11 C. L. 1667—Federal courts have jurisdiction upon habeas corpus to inquire into the cause of the restraint of one held under process of a state court and to discharge him if held in violation of the constitution or laws of the United States,[95] but ordinarily such prisoner will not be discharged in advance of his trial in such state court,[96] unless special circumstances warrant it.[97] They will also inquire into the fact whether the executive officers have exceeded their jurisdiction in excluding or deporting aliens[98] without due process of law.[99]

State appellate courts even where they have original jurisdiction concurrent with the trial courts they will not ordinarily entertain an original application,[1] especially where there is a right of appeal.[2, 3]

Inferior state courts are sometimes given power to issue the writ[4] within their territorial jurisdiction.[5]

§ 3. *The petition.*[6]—See 11 C. L. 1688

§ 4. *Hearing on petition and issuance of writ.*[7]—See 11 C. L. 1688—Habeas corpus is a summary proceeding, generally requiring prompt action, but it is not to be expected that all delays incident to legal proceedings will be eliminated.[8] If the lower

92. Order quashing writ held proper exercise of discretion where person mentioned in writ was inmate of insane asylum. In re Thaw [C. C. A.] 166 F 71.

93. Motion to quash writ not required to be made before judge who issued it, but could be properly heard before judge of court. In re Thaw [C. C. A.] 166 F 71.

94. Search Note: See Habeas Corpus, Cent. Dig. §§ 34-46; Dec. Dig. §§ 40-49; 21 Cyc. 307-311; 15 A. & E. Enc. L. (2ed.) 132; 9 A. & Enc. P. & P. 1003.

95. Indictment held to show offense against state and writ denied. Ex parte Roach, 166 F 344. Where an act, made basis of a criminal charge under state law, is not alleged to have been done as an agent of national government, nor pursuant to authority conferred by it, nor in exercise of a right given by it, the federal courts cannot properly acquire jurisdiction by writ of habeas corpus to adjudicate question whether accused is guilty or not guilty, whether the disputed question is one of fact or law. Ex parte Crowder, 171 F 250.

96. Ex parte Roach, 166 F 344.

97. Teamster in employ of quartermaster's department of army discharged, since he could not serve government if required to perform duties for lack of performance of which he was arrested. Pundt v. Pendleton, 167 F 997.

98. Finding by executive officers under Chinese exclusion and immigration laws is final and conclusive, in absence of showing that there was abuse of discretion. In re Tang Tum [C. C. A.] 168 F 488. Where finding was that applicant was not born in United States, court would not direct new evidence to determine question of citizenship. Id. Where right to enter United States, claimed on ground of citizenship, is denied by immigration officers, and depends wholly on question of law, such question will be reviewed by courts on habeas corpus. United States v. Williams, 173 F 626. Federal courts have jurisdiction to grant relief by habeas corpus to a party aggrieved by any action of department officials in deporting an alien, when evidence on which they assume to act is wholly uncontradicted and establishes that case is not within statute. Ex parte Petterson, 166 F 536. Writ discharged and prisoner held for deportation, since case was within statute. Id.

99. Denial of fair hearing on appeal from order of immigration officers in denying applicant right of entry, under Chinese exclusion acts, held to entitle him to maintain habeas corpus in which he had right to have hearing on right to be discharged. In re Can Pon [C. C. A.] 168 F 479

1. Supreme court may refer application to court of original jurisdiction in order that facts may be taken down and decision rendered. Ex parte Ryan [La.] 50 S 161.

2, 3. Ex parte Ryan [La.] 50 S 161.

See post, § 8, as to existence of such right.

4. Surrogate court held to have had same powers as county judge to entertain habeas corpus proceedings, under § 2, Laws 1883, p. 464, c. 309. Lowman v. Billington, 119 NYS 825.

5. County courts held not empowered to issue writs to be served in adjoining county for purpose of bringing infants before court to determine whether custodian of child shall be divested thereof. Johnson v. Terry [Neb.] 122 NW 984.

6. Search Note: See Habeas Corpus, Cent. Dig. §§ 50-53; Dec. Dig. §§ 53-57; 21 Cyc. 312, 313; 15 A. & E. Enc. L. (2ed.) 192; 9 A. & E. Enc. P. & P. 1015.

7. Search Note: See Habeas Corpus, Cent. Dig. §§ 55-57; Dec. Dig. §§ 58-64; 21 Cyc. 314; 15 A. & E. Enc. L. (2ed.) 198; 9 A. & E. Enc. P. & P. 1022.

8. Evidence held not to show that trial court purposely delayed hearing. Ex parte Ryan [La.] 50 S 385. Not entitled to re-

court deliberately delays habeas corpus proceedings, mandamus will lie to compel action.[9] The only parties entitled to be heard are the applicant for the writ and the officer having him in custody, unless it be the state.[10] The sufficiency of the evidence must be determined by the court,[11] and reasonable grounds must exist for awarding the writ.[12] The principle of res adjudicata, where not otherwise provided by statute, has no application in habeas corpus.[13] Pending the outcome of habeas corpus proceedings, some courts are vested with discretion to place a prisoner in the custody of his counsel.[14]

§ 5. *The writ; service thereof; effect of writ.*[15]—See 2 C. L. 153

§ 6. *Certiorari in aid of habeas corpus.*[16]—See 11 C. L. 1688

§ 7. *Return and hearing on the writ; judgment.*[17]—See 11 C. L. 1689—Where the return is not traversed, issues of law only are raised,[18] but the judge may permit the return to be traversed at the hearing in order to raise issues of fact.[19] In an action of habeas corpus by a guardian to obtain possession of a ward, the return to the writ may set up such guardian's unfitness.[20] Under a statute providing a prisoner may bring habeas corpus to traverse the return by alleging facts to show his detention is unlawful, the traverse must be tested by the ordinary rules of pleading.[21] One making a return cannot contradict the same for the first time on final hearing on the ground that it is a moot case.[22] The burden of proof is on petitioner to show

lease under Code Cr. Proc. art. 629, providing that person detained in custody shall be dismissed if indictment or information be not presented against him at next term of court after commitment, where there was no showing that grand jury had met after arrest and had failed to indict, or that district court at its next term had been adjourned. Ex parte Oakley, 54 Tex. Cr. R. 608, 114 SW 131.

9. Even if lower court does delay hearing, supreme court will not grant writ under its original jurisdiction. Ex parte Ryan [La.] 50 S 385.

10. Proceeding to obtain release from imprisonment for contempt in refusing to produce ballots in election contest. Ex parte Boles [Ark.] 114 SW 918. Contestant for office, having no interest entitling him to be made party to habeas corpus proceedings, cannot maintain certiorari to review decision discharging prisoner. Id.

11. Pen. Code, § 1484, authorizes court to do everything necessary to a full hearing and under it court must determine sufficiency of evidence. In re McCoy, 10 Cal. App. 116, 101 P 419. Evidence held **insufficient** to warrant detention of accused on charge of having committed capital offense and discharge granted on giving bail. Ex parte Nathan [Fla.] 50 S 38. Under Code Civ. Proc. § 2031, it is duty of court to discharge prisoner brought before him on writ of habeas corpus, if it appears that depositions upon which warrant of arrest was issued do not tend to establish commission of a crime. People v. Corrigan, 129 App. Div. 62, 113 NYS 504. The court will not examine record to determine whether testimony warranted commitment, but to see if reasonable probablity of gullt could be inferred therefrom. In re Driggs, 10 Cal. App. 445, 102 P 542. Under Pen. Code, § 1484, court may take and consider evidence on disputed questions of fact. In re McCoy, 10 Cal. App. 116, 101 P 419.

12. Evidence held not to show petitioner was arrested without want of probable cause. Lee v. Van Pelt [Fla.] 48 S 632.

13. Judgments of supreme court of Kansas and of supreme court of Oklahoma territory held not to preclude Oklahoma court of appeals from inquiring into validity of imprisonment. Ex parte Justus [Okl. Cr. R.] 104 P 933.

14. Surrogate court has authority under Code Civ. Proc. § 2037. Lowman v. Billington, 119 NYS 825.

15. Search Note: See Habeas Corpus, Cent. Dig. §§ 58-64; Dec. Dig. §§ 65-72; 21 Cyc. 314-317; 15 A. & E. Enc. L. (2ed.) 194, 214-216; 9 A. & E. Enc. P. & P. 1025.

16. Search Note: See Habeas Corpus, Cent. Dig. § 60; Dec. Dig. § 66; 21 Cyc. 315; 9 A. & E. Enc. P. & P. 1084.

17. Search Note: See notes in 5 C. L. 1618; 22 L. R. A. 678; 1 Ann. Cas. 260; 3 Id. 581; 5 Id. 591; 11 Id. 129.

See, also, Habeas Corpus, Cent. Dig. §§ 65-101, 118-121; Dec. Dig. §§ 73-112; 116-120; 21 Cyc. 317-334, 348-351; 15 A. & E. Enc. L. (2ed.) 198; 9 A. & E. Enc. P. & P. 1031.

18. Haas v. Henkel, 166 F 621.

19. Under Rev. St. § 760 (U. S. Comp. St. 1901, p. 594). Haas v. Henkel, 166 F 621.

20. Person attempting to withhold custody of ward held not confined to remedy allowed by § 3071, Burns' Ann. St. 1908. Shoaf v. Livengood [Ind.] 88 NE 598.

21. Traverse charging that court trying prisoner was partial and conspired with prosecuting officers to arbitrarily convict him, but alleging no facts to show fraud or conspiracy, held bad under Code Civ. Proc. § 2039. People v. Frost, 133 App. Div. 179, 117 NYS 524.

22. Sheriff estopped to deny good faith of proceeding. In re McCoy, 10 Cal. App. 116, 101 P 419.

that he is illegally restrained of his liberty.[23] Where petitioner in habeas corpus challenges the power of the court to render the judgment and issue a body execution thereon, he has a right to inquire into the proceedings to see whether the execution was properly issued.[24] The proof should ordinarily be by deposition or oral testimony though the court may receive affidavits.[25] Judgment in habeas corpus is a final judgment, although entered by the court in vacation,[26] but changed circumstances are, of course, available on a second application.[27] A prisoner erroneously discharged on habeas corpus can be reincarcerated until lawfully discharged upon reversal of such order.[28]

§ 8. *Review.*[29]—See 11 C. L. 1689—In some states habeas corpus even to release one held on a criminal charge is not regarded as criminal, and appeal is allowed from an order for release,[30] while in others it is given by statute,[31] but in most jurisdictions the state cannot appeal from an order in habeas corpus proceedings discharging a prisoner convicted of crime.[32] Upon an appeal in a habeas corpus proceeding in a federal court, all questions of fact upon the evidence are open to consideration,[33] but, usually findings of fact are conclusive on appeal if supported by any evidence.[34] Failure to award relators a jury trial cannot be urged on appeal

23. Application for bail in a capital case. Ex parte Smith [Ok]. Cr. R.] 99 P 893.

24. Lowman v. Billington, 119 NYS 825.

25. Where writ is used to determine custody of child, better practice requires evidence from stand or depositions or interrogatories, but court has discretionary power to admit affidavits under circumstances of particular case. Robertson v. Heath [Ga.] 64 SE 73.

26. That judgment dismissing writ to obtain custody of infant, entered in vacation, was not appealable, did not make it less final. Ex parte Fuller [Tex. Civ. App.] 123 SW 204.

27. Second application proper if facts and circumstances change. Ex parte Fuller [Tex. Civ. App.] 123 SW 204. In subsequent proceeding between same parties, under art. 2, c. 20, Comp. St. 1909, court should only consider evidence concerning facts that have occurred since execution of former judgment. Johnson v. Terry [Neb.] 122 NW 984. Denial of a prior writ on ground that petitioner was then insane held not **res adjudicata** on issue of his sanity on subsequent hearing of new writ for similar relief. People v. Lamb, 118 NYS 389.

28. Prisoner discharged because it was supposed he could not be detained for failure to pay fine imposed in criminal proceeding, after having served imprisonment part of sentence. Held error. Haddox v. Richardson [C. C. A.] 168 F 635.

29. **Search Note:** See note in 2 L. R. A. (N. S.) 244.

See, also, Habeas Corpus, Cent. Dig. §§ 102-117; Dec. Dig. §§ 113-115; 21 Cyc. 335-347; 9 A. & E. Enc. P. & P. 1072.

30. Davis v. Smith [Ga. App.] 66 SE 401.

31. State given right to appeal by Code 1907, § 6245. State v. Lacy [Ala.] 48 S 343. Code 1907, § 6245, provides any "party aggrieved" by judgment in habeas corpus may appeal. Held, where writ was granted, city was "party aggrieved." City of Bessemer v. Eidge [Ala.] 50 S 270. Order discharging prisoner reversed on ground that prima facie case made by mittimus issued by justice of peace on preliminary hearing was not rebutted by testimony of accused on hearing for writ. State v. Stracener [Ala.] 49 S 301.

32. Where pardon of governor had been delivered to prisoner's attorney, held delivery had same binding effect as delivery of deed and was irrevocable. In re Williams, 149 N. C. 436, 63 SE 108. Order of district court discharging prisoner for want of of probable cause to hold him for trial, when committed by examining magistrate, held not reviewable in supreme court. State v. Ray, 81 Kan. 159, 105 P 46.

33. Findings of court below not conclusive but should not be set aside unless record shows error. In re Can Pon [C. C. A.] 168 F 479.

34. Extradition proceedings. Morrison v. Dwyer [Iowa] 121 NW 1064. Application for bail. Ex parte King [Tex. Cr. R.] 118 SW 1032. Appeal is in effect a certiorari in which appellate court is restricted to examination of the record. Evidence introduced and rulings of court thereon held not properly for upper court. Commonwealth v. Hare, 36 Pa. Super. Ct. 125. Where record in habeas corpus proceedings shows conflict in evidence, the findings and judgment of lower court will not be disturbed on appeal. O'Malley v. Quigg [Ind.] 88 NE 611. Where evidence is conflicting, such findings will only be disturbed when contrary to great weight of evidence. State v. Lacy [Ala.] 48 S 343. On a writ of error to review habeas corpus proceedings, the court cannot weigh the evidence. Lundstrum v. State, 140 Wis. 141, 121 NW 883. Court can only examine evidence sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. Id. Habeas corpus is a proceeding on law side of court and findings of fact by circuit court held not reviewable in supreme court. Ex parte Canova [S. C.] 65 SE 625. Supreme court will only consider whether exceptions show error of law or abuse of discretion in judgment reviewed. Id.

where a jury was not demanded.[35] The right being personal, death abates an appeal from a denial of the writ.[36]

HABITUAL DRUNKARDS.[37]

HABITUAL OFFENDERS.[38]

Hand-writing, Proof of; Harbor Masters, see latest topical index.

HARMLESS AND PREJUDICIAL ERROR.

The scope of this topic is noted below.[39]

§ 1. The General Doctrine, 2005.
§ 2. Triviality Constituting Harmlessness, 2009.
§ 3. Errors Cured or Made Harmless by Other Matters, 2033.

§ 1. *The general doctrine.*[40]—See 11 C. L. 1690—*Generally speaking, a judgment will not be reversed or a verdict set aside or other proceeding overthrown because of error of which it can be said that no harm resulted to the complaining party,*[41]

35. Ex parte Fuller [Tex. Civ. App.] 123 SW 204.

36. Johnson v. State, 29 S. Ct. 651.

37. No cases have been found for this subject since the last article. See 11 C. L. 1690. It excludes general rules of guardianship (see Guardianship *) and the offense of drunkenness (see Intoxicating Liquors,* § 11).

Search Note: See 15 A. & E. Enc. L. (2ed.) 231; 11 A. & E. Enc. P. & P. 559.

38. No cases have been found during the period covered by Current Law for this subject, which includes only the crime of being an habitual offender against law. See Criminal Law,* § 6, as to increased punishment on second or subsequent conviction.

Search Note: See 8 A. & E. Enc. L. (2ed.) 493.

39. Includes all general rules as to the harmlessness of error in civil cases by reason of its trivial character, or by reason of subsequent proceedings whereby its effect is obviated. The harmlessness or cure of misconduct of counsel (see Argument and Conduct of Counsel* §§ 3-7), and the construction of a charge of the court as a whole and effect of statements therein to cure omissions or errors in other parts (see Instructions,* § 17) have been excluded. The doctrine of harmless error as applied in criminal cases is treated in the topic Indictment and Prosecution,* § 15.

40. **Search Note:** See Appeal and Error, Cent. Dig. §§ 4020-4252; Dec. Dig. §§ 1025-1079; 3 Cyc. 383-389; 8 A. & E. Enc. L. (2ed.) 828.

41. Tutwiler v. Burns [Ala.] 49 S 455; Pike v. Tallahassee Falls Mfg. Co. [Ala.] 49 S 857; Penry v. Dozier [Ala.] 49 S 909; Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960; People R. Co. v. Baldwin [Del.] 72 A 979; Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922; Meeks v. Carter, 5 Ga. App. 421, 63 SE 517; Fletcher v. Bluthenthal [Ga.] 64 SE 558; Southern R. Co. v. Wright [Ga. App.] 64 SE 703; Walker v. Riley & Co. [Ga. App.] 65 SE 301; Casey v. Chicago City R. Co., 237 Ill. 140, 86 NE 606; Reed v. Ziemans, 145 Ill. App. 425; Robichaud v. Maheux, 104 Me. 524, 72 A 334; Granger v. Darling, 156 Mich. 31, 16 Det. Leg. N. 22, 120 NW 32; Cumberland Tel. & T. Co. v. Jackson [Miss.] 48 S 614; Kimmerly v. McMichael, 83 Neb. 789, 120 NW 487; Post v. Brooklyn Heights R. Co., 195 N. Y. 62, 87 NE 771; Wade v. Mt. Vernon, 133 App. Div. 389, 117 NYS 356; Greenlee v. Steelsmith, 64 W. Va. 553, 62 SE 459. Unless judgment was result of errors assigned. Chicago City R. Co. v. Grossheim, 141 Ill. App. 77. Where right result has been reached. Malone Co. v. Hammond [Ga. App.] 64 SE 666; Dudley v. Dr. Shoop Family Medicine Co. [Ga. App.] 64 SE 670; Kries v. Fuller E. Callaway Co., 5 Ga. App. 849, 63 SE 1124; Charles v. Valdosta Foundry & Mach. Co., 4 Ga. App. 733, 62 SE 493; A. N. Chamberlain Medicine Co. v. H. A. Chamberlain Medicine Co. [Ind. App.] 86 NE 1025; Inland Steel Co. v. Yedinak [Ind.] 87 NE 229; Broderick v. Andrews, 135 Mo. App. 57, 115 SW 519; Ross v. Saylor [Mont.] 104 P 864; Wright v. Hooker [Tex. Civ. App.] 118 SW 765; Hoffman v. Buchanan [Tex. Civ. App.] 123 SW 168. Where in action for libel truth of alleged libelous statements was indisputably established by evidence so that no other judgment than one rendered for defendant would have been proper, alleged errors committed at trial. Wheless v. Davis [Tex. Civ. App.] 122 SW 929. Where undisputed evidence required the verdict rendered. Lee v. McCarty [Ga.] 64 SE 997. Where substantial justice has been done. Runyan v. Synder, 45 Colo. 156, 100 P 420; Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922; Towner v. Towner, 65 W. Va. 476, 64 SE 732. This rule can, however, have no application where, owing to fact that there is no bill of exceptions, appellate court cannot consider whole case. Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922. Justice means that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts. Meeks v. Carter, 5 Ga. App. 421, 63 SE 517. Errors with reference to immaterial issues. Curtis v. Hunt [Ala.] 48 S 598. Rulings with respect to other questions, where cause was fairly submitted to jury on single issue. Burgin v. Marx [Ala.] 48 S 348. Errors against party not entitled to succeed in any event. Peters v. Peters [Cal.] 103 P

219; City of Flint v. Stockdale's Estate [Mich.] 16 Det. Leg. N. 493, 122 NW 279; Ziehme v. Miller [Tex. Civ. App.] 117 SW 1010. After three trials and two verdicts in favor of same party, new trial will not be granted on account of slight error. Albany & N. R. Co. v. Wheeler [Ga. App.] 64 SE 1114. Want of jurisdiction over person of appellant, where judgment not prejudicial to him. In re Buerstetta's Estate, 83 Neb. 287, 119 NW 469. Rulings in reference to item included in petition but which was not submitted to jury. Peacock v. Coltrane [Tex. Civ. App.] 116 SW 389. Uncertainty in notice of mechanic's lien sought to be foreclosed. Lucas v. Rea, 10 Cal. App. 641, 102 P 822, on rehearing modifying [Cal. App.] 101 P 537. Holding void tax deed not sufficient color of title to support adverse possession, where claimant had not held possession entire statutory period. Yellow Poplar Lumber Co. v. Thompson's Heirs, 108 Va. 612, 62 SE 358. Allowing notary to amend certificate of protest, where formal protest admitted by failure to raise question. Demelman v. Brazier, 198 Mass. 458, 84 NE 856. On delinquent tax foreclosure, defendant cannot urge that lot against which foreclosure entered had no existence. Sound Inv. Co. v. Bellingham Bay Land Co., 53 Wash. 470, 102 P 234.

Prejudicial: Failure to show jurisdiction of justice on appeal to circuit court. Fabien v. Grabow, 134 Mo. App. 193, 114 SW 80. Where it is impossible to say that erroneous theory of judge and rulings based thereon did not influence jury, reversal necessarily results. Hartje v. Keeler, 133 Ill. App. 461.

So provided by statute: Burns' Ann. St. 1908, § 350. Berkemeier v. State [Ind. App.] 88 NE 634. Where merits of cause have been fairly tried and determined. Burns' Ann. St. 1908, § 700. Pittsburg, etc., R. Co. v. Sudhoff [Ind. App.] 88 NE 702; Ziehm v. Pittsburg, etc., R. Co. [Ind. App.] 88 NE 707. Judgment manifestly for right party should be affirmed. Rev. St. 1899, § 865 (Ann. St. 1906, p. 812). Strauss v. American Chewing Gum Co., 134 Mo. App. 110, 114 SW 73. Errors not materially affecting merits. Rev. St. 1899, § 865 (Ann. St. 1906, p. 812). Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27; Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 SW 1087; Mann v. Doerr [Mo.] 121 SW 86; Shamp v. Lambert [Mo. App.] 121 SW 770; Cox v. Polk [Mo. App.] 123 SW 102. Code Civ. Proc. § 3063. Lyon v. Sheldon, 63 Misc. 20, 117 NYS 318. Errors not affecting substantial rights. Code Civ. Proc. § 475. Preston v. Central California Water & Irr. Co. [Cal. App.] 104 P 462; Baird v. Riverside Tp. Justice's Ct. [Cal. App.] 105 P 259. Rev. St. 1887, § 4231. Harpold v. Doyle [Idaho] 102 P 158. Burns' Ann. St. 1908, § 407. Berkemeier v. State [Ind. App.] 88 NE 634. Code Civ. Proc. § 140 (Gen. St. 1901, § 4574). Taylor v. Taylor [Kan.] 99 P 814; Heery v. Reed [Kan.] 102 P 846. Civ. Code, § 145. Jobst v. Hayden Bros. [Neb.] 121 NW 957. Wilson's Rev. & Ann. St. 1903, § 4344. Muller v. Thaxton [Okl.] 104 P 359. Comp. Laws 1907, § 3008. Merrie v. Salt Lake City [Utah] 101 P 373. St. 1898, § 2829. Palmer v. Schultz, 138 Wis. 455, 120 NW 348; Sufferling v. Heyl, 139 Wis. 510, 121 NW 251; Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328; Tilton v. Gates Land Co., 140 Wis. 197, 121 NW 331. Code 1906, § 808, providing that judgment by default shall not be reversed for any omission or fault which would not have been ground for reversal had there been a verdict on issue joined, held to have no application where declaration wholly fails to show right to recover. Pennsylvania Mut. Life Ins. Co. v. Keeton [Miss.] 49 S 736.

Right ruling or decision for wrong reason. Pelouze v. Slaughter, 241 Ill. 215, 89 NE 259, afg. 142 Ill. App. 657; State v. Johnson [Ind.] 89 NE 393; Lewis v. Brennan [Iowa] 120 NW 332; Crawford v. Kansas City Stockyards Co., 215 Mo. 394, 114 SW 1057; Fulwider v. Trenton Gas, L. & P. Co., 216 Mo. 582, 116 SW 508; Waymire v. Shipley, 52 Or. 464, 97 P 807. Rulings of law in trial by court without jury do not afford basis of writ of error except so far as they relate to admission or rejection of evidence, or otherwise concern progress of case. Gilbane v. Fidelity & Casualty Co. [C. C. A.] 163 F 673. On demurrer. Murrell v. Peterson [Fla.] 49 S 31; Hertig v. Seattle, 53 Wash. 432, 102 P 408. As to admissibility of evidence. Hoopes v. Crane, 56 Fla. 395, 47 S 992; Gray v. Good [Ind. App.] 89 NE 498. Granting nonsuit. Kane v. Dawson, 52 Wash. 411, 100 P 837. Ruling on motion for new trial. Cox v. Grady [Ga.] 64 SE 262; Green v. Terminal R. Ass'n, 211 Mo. 18, 109 SW 715; Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 SW 249; Chandler v. Gloyd, 217 Mo. 394, 116 SW 1073; Napier v. Spielmann, 127 App. Div. 711, 111 NYS 1009; Trimmier v. Atlanta, etc., R. Co., 81 S. C. 203, 62 SE 209. Judgment. State v. Burke [Ala.] 48 S 1035; Waldrep v. Canon [Ga.] 64 SE 473; Lucy v. Lucy, 107 Minn. 432, 120 NW 754; Specht v. Central Passenger R. Co., 76 N. J. Law, 631, 72 A 356; In re Johnston's Estate, 222 Pa. 514, 71 A 1053; Depue v. Miller, 65 W. Va. 120, 64 SE 740; Sanitas Co. v. Niezorawski [Wis.] 120 NW 292. Where appellant obtained by judgment all that he was entitled to, held immaterial as to how his title was deraigned. Poluckie v. Wegenke, 137 Wis. 433, 119 NW 188. Denial of application to open judgment. Kingsley v. Steiger [Wis.] 123 NW 635. **Rule does not apply** where appears that wrong reason was result of misconception of law which caused him to reach wrong conclusion under the testimony. Fleming v. Wells, 45 Colo. 255, 101 P 66. Demurrer to evidence was improperly sustained on ground that injury for which recovery was sought was due to negligence of fellow-servant. On appeal it was contended that only question on demurrer was whether there was variance between complaint and evidence. Held that, while assigning untenable reason is not ground for reversing decision which can be sustained upon other considerations, it would be manifestly unfair to nonsuit plantiff for variance without giving him opportunity to amend, and hence ruling would be reversed though there was a variance, particularly where variance was of little importance. Brice-Nash v. Barton Salt Co. [Kan.] 98 P 768. Held that order granting new trial for single specified reason of error in instructions would not be sustained on ground of misconduct of juror, proved by only single affidavit which might, as far as appeared, have been discredited by judge. Clack v. Kansas City

even though he has properly saved his objection and excepted to the ruling,[42] and has regularly preserved it in the "record."[43] The party must affirmatively show error apparent on the "record."[44] It must harm him rather than a coparty,[45] and must be one which he has not invited,[46] and which he can assail without inconsistency to his contentions made on the trial.[47]

The majority of courts presume prejudice from error, once it is shown to exist,[48] and require the party defending against errors to show that no harm resulted.[49]

Elec. Wire Subway Co. [Mo. App.] 119 SW 1014. Where it appears that wrong reason adopted by trial court precluded defeated party from taking proper steps to preserve his rights, and they relate to question of practice which might have been complied with had attention been directed to it, error should be corrected. Brennan v. American Sulphur & Min. Co., 45 Colo. 248, 100 P 412.

42. See Saving Questions for Review.

43. See Appeal and Review, § 9.

44. Error must be affirmatively shown. Wilkes v. Sievers, 8 Cal. App. 659, 97 P 677. Appellant must show that he was injured by admission of illegal evidence. Galveston, etc., R. Co. v. F. A. Piper Co. [Tex. Civ. App.] 115 SW 107. Where no facts were stated in bill of exceptions from which conclusion could be drawn that appellant suffered any injury from admission of improper evidence, presumed that he did not. Temple v. Duran [Tex. Civ. App.] 121 SW 253. Defendant held not in position to take advantage of alleged erroneous instruction as to credibility of witnesses where he did not show that it applied to any of his witnesses. Granger v. Darling, 156 Mich. 31, 16 Det. Leg. N. 22, 120 NW 32. Where evidence was not in record, held that appellate court could not say that giving of instructions was reversible error. Cleveland, etc., R. Co. v. Rudy [Ind. App.] 87 NE 555.

45. Error affecting intervenors not to be urged by defendant. McLane v. Kirby [Tex. Civ. App.] 116 SW 118. Fact that one codefendant was improperly permitted to introduce testimony against other will not justify reversal as against innocent plaintiff who did not cross-examine. Schmidt v. Chicago City R. Co., 239 Ill. 494, 88 NE 275. One against whom there was no decree as to a mechanic's lien held not entitled to complain as to decree or rulings on that question. Keily v. Smith [Ala.] 50 S 145. Where verdict is rendered in favor of one defendant and against others, failure of judgment to mention defendant in whose favor verdict finds, does not prejudice other defendants. Olmstead v. Noll, 82 Neb. 147, 117 NW 102. Plaintiff held not entitled to claim that judgment should not have been rendered in favor of one of defendants, where certain of defendants were entitled to all the property in dispute, and other defendants were not complaining. Le Clair v. Hawley [Wyo.] 102 P 853. Where action against two defendants was dismissed as to one, other held not entitled to complain that in rendering judgment against plaintiff for costs of successful defendant court ordered execution therefor to issue against him instead of directing that they be paid in due course of administration. Nordhaus v. Vandalia R. Co., 242 Ill. 166, 89 NE 974. Where judgment recited that sum allowed on counterclaim was whole debt due, and neither party applied for modification of it, plaintiff could not complain thereof. Walker v. Ludwig, 55 Misc. 272, 105 NYS 157. In action to set aside fraudulent conveyance by plaintiff's agent to other defendants, finding that agent was fraudulent purchaser, when he was only agent who had sold property in breach of trust, cannot affect liability of other defendants. Foster v. Winstanley [Mont.] 102 P 574. Appellant with no interest in trust fund cannot object to improper division of same. Routledge v. Elmendorf [Tex. Civ. App.] 116 SW 156. Where trustees named in will did not object to apointment of substituted trustees, held that beneficiary could not do so on ground that there was no showing that original trustees had resigned or refused to serve. Mason v. Bloomington Library Ass'n, 143 Ill. App. 39. Defendant appealing from judgment establishing private road across his land held not entitled to urge that damages awarded certain other persons had not been paid, for purpose of depriving court of jurisdiction. Fitzmaurice v. Turney, 214 Mo. 610, 114 SW 504. Setting aside of judgment against administrator of one of sureties on bond sued on, who had died pendente lite, because claim had not been properly presented to them for judgment, held not to have harmed principal, plaintiff alone being entitled to complain that judgment to which he was entitled had been set aside. Bogard v. Planters' Bank & Trust Co. [Ky.] 112 SW 872.

46. See Saving Questions for Review, § 1.

47. See Saving Questions for Review, § 2.

48. Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922; Kuhnis v. Lewis River Boom & Logging Co., 51 Wash. 196, 98 P 655. Incompetent evidence. St. Louis, etc., R. Co. v. Walker [Ark.] 117 SW 534. Exclusion of evidence. Kern v. Des Moines City R. Co. [Iowa] 118 NW 451. Erroneous instructions. Pelham Mfg. Co. v. Powell [Ga. App.] 64 SE 1116; Hovey v. Aaron, 133 Mo. App. 573, 113 SW 718; Miller v. McConnell [S. D.] 120 NW 888. Where evidence erroneously excluded was not in record, held that appellate court could not say that no prejudice resulted from its rejection, since, though result might have been same, there was no legal rule whereby court could so determine. Archbold v. Joline, 114 NYS 169.

49. St. Louis, etc., R. Co. v. Walker [Ark.] 117 SW 534; Kern v. Des Moines City R. Co. [Iowa] 118 NW 451; Smith v. Kunert [N. D.] 115 NW 76. Burden on respondent to show that ruling is justified for some reason other than wrong one given. Crawford v. Kansas City Stockyards Co., 215 Mo. 394, 114 SW 1057.

Errors which favor the party objecting are of course not ground for reversal,[50] nor are such as may be corrected without resort to a new trial.[51]

50. Harper v. Raisin Fertilizer Co. [Ala.] 48 S 589; Penry v. Dozier [Ala.] 49 S 909; Blood v. Munn, 155 Cal. 228, 100 P 694; Hanie v. Taylor, 4 Ga. App. 545, 61 SE 1054; Freeman v. Matthews [Ga. App.] 64 SE 716; Kime v. Vetter [Ind.] 88 NE 497; McDermott v. Mahoney [Iowa] 116 NW 788; United R. & Elec. Co. v. Carneal, 110 Md. 211, 72 A 771; Dalm v. Bryant Paper Co. [Mich.] 16 Det. Leg. N. 525, 122 NW 257; Weatherford, etc., R. Co. v. White [Tex. Civ. App.] 118 SW 799; Snarski v. Washington State Colonization Co., 53 Wash. 221, 101 P 839. Rulings on demurrer. Fidelity & Deposit Co. v. Walker [Ala.] 48 S 600. Imposing burden of proof on adverse party. Bull v. Atlanta, etc., R. Co., 149 N. C. 427, 63 SE 126. Act of adverse party in assuming burden of proof. Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 121 NW 938. Remarks of court. Sufferling v. Heyl, 139 Wis. 510, 121 NW 251. Action of court in action of detinue in permitting plaintiff to introduce evidence as to value of property after cause was submitted and argued, there being already evidence in case that it was of greater value than that fixed by judgment. Cefalu v. Dearborn [Ala.] 49 S 1030. Withdrawal of issue. Wall Rice Milling Co. v. Continental Supply Co. [Utah] 103 P 242. Transfer of case to equity after verdict for adverse party. Stewart v. Blue Grass Canning Co. [Ky.] 117 SW 401, rehearing denied Id. [Ky.] 120 SW 375. That remittitur by adverse party was ordered below as condition to overruling motion for new trial instead of by appellate court. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 115 SW 57. Order relieving him of half costs of unsuccessful equity suit. Thomas's Estate, 36 Pa. Super. Ct. 186.

Instructions: Instructions favorable to himself. Thunborg v. Pueblo, 45 Colo. 337, 101 P 399; Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270; Atlantic Coast Line R. Co. v. Odum, 5 Ga. App. 780, 63 SE 1126; M. D. & H. L. Smith Co. v. Strickland Cotton Mills [Ga. App.] 65 SE 320; Van Norman v. Modern Brotherhood of America [Iowa] 121 NW 1080; Cumberland Tel. & T. Co. v. Quigley [Ky.] 112 SW 897; Southern R. Co. v. Adkins' Adm'r [Ky.] 117 SW 321, rehearing denied [Ky.] 119 SW 820; Valentine v. Minneapolis, etc., R. Co., 155 Mich. 151, 15 Det. Leg. N. 915, 118 NW 970; Potter v. St. Louis & S. F. R. Co., 136 Mo. App. 125, 117 SW 1593; Joyce v. Metropolitan St. R. Co., 219 Mo. 344, 118 SW 21; Russell v. Close's Estate, 83 Neb. 232, 119 NW 515; Smith v. Chicago, B. & Q. R. Co., 83 Neb. 387, 119 NW 669; Bloomfield v. Pinn [Neb.] 121 NW 716; Texas & P. R. Co. v. Crawford [Tex. Civ. App.] 117 SW 193; Rainey v. Kemp [Tex. Civ. App.] 118 SW 630; Texas & P. R. Co. v. Endsley [Tex. Civ. App.] 119 SW 1150; Benson v. Tacoma R. & P. Co., 51 Wash. 216, 98 P 605; Enyart v. Inman-Poulsen Logging Co. [Wash.] 102 P 1050; Maxwell v. Wellington, 138 Wis. 607, 120 NW 505; Haines v. Spencer [C. C. A.] 167 F 266. Harmful only to adverse party. Atkinson v. New York Transfer Co., 76 N. J. Law, 608, 71 A 1278. Another instruction on same subject less favorable to opposing party. Clague v. Tri-State Land Co. [Neb.] 121 NW 570. Erroneously assuming fact in his favor. Mahon v. Reinkin [Or.] 102 P 608, rehearing denied [Or.] 103 P 53. That issues presented by opposing party's evidence were not presented. Affick v. Streeter, 136 Mo. App. 712, 119 SW 28. Failure to submit defense interposed by adverse party. Haralson v. San Antonio Trac. Co. [Tex. Civ. App.] 115 SW 876; Bryant v. Northern Texas Trac. Co. [Tex. Civ. App.] 115 SW 1880. Adoption of wrong measure of damages, where recovery was less than it would have been under correct one. Hebron Mfg. Co. v. Powell Knitting Co. [C. C. A.] 171 F 817; Western Union Tel. Co. v. Bradford [Tex. App.] 114 SW 686; Mitchell v. Boyce [Tex. Civ. App.] 120 SW 1067. Instructions more favorable than he is entitled to. American Ins. Co. v. Dannehower [Ark.] 115 SW 950; Allen v. Lyness, 81 Conn. 626, 71 A 936; Florida R. Co. v. Sturkey, 56 Fla. 196, 48 S 34; Clostanaula & C. R. Steamboat Co. v. Hampton [Ga. App.] 65 SE 303; Patchin v. Crossland, 145 Ill. App. 589; Register Newspaper Co. v. Worten, 33 Ky. L. R. 840, 111 SW 693; Cincinnati, etc., R. Co. v. Ashcraft [Ky.] 116 SW 295; Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27; Sufferling v. Heyl, 139 Wis. 510, 121 NW 251. Instruction that party could only recover nominal damages, where not even entitled to them under evidence. Pickthall v. Steinfeld [Ariz.] 100 P 779. That correct instruction was in conflict with another instruction which was an erroneous statement of law in its favor. Smith v. San Pedro, etc., R. Co. [Utah] 100 P 673. Held that if certain instruction was correct defendant was not prejudiced by giving of another instruction in conflict therewith which stated a rule more favorable to defendant than it was entitled to have, but that if first was incorrect judgment must be reversed, since it was impossible to say on which instruction jury acted in reaching its verdict. Colorado & S. R. Co. v. McGeorge [Colo.] 102 P 747. More favorable than one requested. McCrorey v. Thomas [Va.] 63 SE 1011. More favorable than has reason to expect. Crosby v. Portland R. Co. [Or.] 101 P 204. For former opinion see [Or.] 100 P 300. Imposing greater burden on other party than he is required to sustain. Blumenthal & Co. v. Bridges [Ark.] 120 SW 974; Ford v. Hine Bros. Co., 237 Ill. 463, 86 NE 1051; Olson v. Rice, 140 Iowa, 630, 119 NW 84; Wilson v. Chicago, etc., R. Co. [Iowa] 121 NW 1102; Broadway Coal Min. Co. v. Davis [Ky.] 122 SW 228; Nordhaus v. Vandalia R. Co., 242 Ill. 166, 89 NE 974; Richardson v. St. Louis & H. R. Co. [Mo.] 123 SW 22; Jones v. Monson, 137 Wis. 478, 119 NW 179. Defendant not entitled to complain of failure to give federal employer's liability act in charge in so far as it related to comparative negligence and fellow-servant, since result was to increase burdens on plaintiff and accord defendant a defense denied by that act. Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 116 SW 852. Inconsistent rulings in giving and refusing instructions harmless to defendant, where error consisted in denial of plaintiff's right

§ 2. *Triviality constituting harmlessness.*[52]—See 11 C. L. 1695—*An error is harmless if too trivial in its nature or consequences to have substantially influenced the result.*[53] The weight or strength of the evidence may affect the importance of

to punitive damages. Stockham v. Malcolm [Md.] 74 A 569.

Rulings on evidence: Admission of evidence favorable to himself. Baltimore Refrigerating & Heating Co. v. Kreiner, 109 Md. 361, 71 A 1066; Buck v. Brady, 110 Md. 568, 73 A 277; Dreeland v. Pascoe [Mont.] 102 P 331; Mahon v. Rankin [Or.] 102 P 608, rehearing denied Id. [Or.] 103 P 53; Galveston, etc., R. Co. v. F. A. Piper Co. [Tex. Civ. App.] 115 SW 107; Ware v. Childs [Vt.] 73 A 994; White v. White, 140 Wis. 538, 122 NW 1051. Where it was part of defendant's case to prove certain conveyance, which he failed to do, permitting plaintiff to do so by secondary evidence. Moore v. Kirby [Tex. Civ. App.] 115 SW 632. Failure to take into account certain condition in putting hypothetical question to expert in personal injury case not prejudicial to defendant, where its only tendency could have been to show necessity of greater diligence on defendant's part. Pennsylvania Co. v. Whitney [C. C. A.] 169 F 572. Plaintiff's testimony as to matter of defense not harmful to defendant. Quick v. Swing [Or.] 99 P 418. Defendant not harmed by proof of allegations of declaration in harmony with his own contention. Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410. Exclusion of evidence that would have strengthened other party's case. Ingalls v. Orange Lumber Co. [Tex. Civ. App.] 122 SW 53.

Verdict and judgment: Decree in his own favor. Dunbar v. Bell [Ark.] 119 SW 670; Crowley v. McCambridge, 239 Ill. 222, 86 NE 725; Bones v. Chicago, etc., R. Co. [Iowa] 120 NW 717. Findings in his own favor. Foster v. Winstanley [Mont.] 102 P 574. Verdict more favorable to him than entitled to demand. Samples v. Wever [Tex. Civ. App.] 121 SW 1129. Verdict in his favor as large as evidence justified. Cutter-Tower Co. v. Clements, 5 Ga. App. 291, 63 SE 58. That verdict for adverse party is too small. Stiewel v. Lally [Ark.] 115 SW 1134; H. P. Smith Co. v. Suttich, 10 Cal. App. 540, 102 P 683; Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270. Verdict against him for sum less than jury might properly have returned. Meador v. Northwestern Gas & Elec. Co. [Wash.] 103 P 1107. Adverse judgment smaller than would have been warranted. Texas & P. R. Co. v. Andrews, Reynolds & Co. [Tex. Civ. App.] 118 SW 1101. Where liability is clearly shown, delivering carrier cannot complain that judgment was against it for but half damages nor can connecting carrier complain of judgment for remainder since under interstate commerce act each is equally liable for whole. St. Louis, etc., R. Co. v. Fenley [Tex. Civ. App.] 118 SW 845. Plaintiff sued on two causes of action for breach of contract was no dispute as to amount he was entitled to recover under each or both causes of action, if entitled to recover at all. Verdict for plaintiff was for amount less than sum of amounts claimed in both, and not for amount claimed in either. Held that, since it could not be said from the evidence that plaintiff's cause of action was established without question, judgment could not be affirmed on theory that defendant could not complain because plaintiff did not recover full amount to which he was entitled. Burns-Moore Mining & Tunnel Co. v. Watson, 45 Colo. 91, 101 P 335. Allowance of compound interest, where rate so reduced that resulted to his benefit. Nix v. Thackaberry, 240 Ill. 352, 88 NE 811. Disregard of instruction. Compressed Air Mach. Co. v. West San Pablo Land & W. Co., 9 Cal. App. 361, 99 P 531. Informality in verdict. Seger v. Abington, 217 Mo. 568, 117 SW 704. Failure to give judgment in alternative for value of goods replevined is without prejudice to party from whom replevined. Bilby v. Foohs [Ark.] 119 SW 286. Adoption of wrong measure of damages, where amount of recovery not any more, and probably less, than would otherwise have been. Missouri, K. & T. R. Co. v. McLean [Tex. Civ. App.] 118 SW 161. Allowance of recovery as for permanent damages in trespass held not prejudicial to defendant where court only allowed recovery to extent of damages actually inflicted, since effect would be to justify repetition of act without further complaint. Spence v. Lake Drummond Canal Co., 150 N. C. 160, 63 SE 729. Defendant not entitled to complain that verdict was contrary to law because evidence showed that plaintiff was contending for wrong measure of damages, where verdict was smaller than evidence would have authorized. M. D. & H. L. Smith Co. v. Strickland Cotton Mills [Ga. App.] 65 SE 320. Plaintiff not entitled to complain that she was awarded only certain sum for taxes paid by her and interest thereon, where there was no evidence that she had expended anything for taxes. Eaches v. Johnston [Colo.] 104 P 940.

51. See Appeal and Review, § 15C. See, also, post, § 3.

52. **Search Note:** See notes in 8 C. L. 13; 17 L. R. A. 484; 26 Id. 384; 45 Id. 150; 46 Id. 641; 47 Id. 33; 7 L. R. A. (N. S.) 359.

See, also, Appeal and Error, Cent. Dig. §§ 4063-4068, 4540-4545; Dec. Dig. §§ 1034, 1170; 3 Cyc. 386, 443-447.

53. Failure to allow plaintiff small amount to which he was entitled. Kelly v. Adams Exp. Co. [Ky.] 119 SW 747. Failure to assess nominal damages. New York, etc., R. Co. v. Rhodes, 171 Ind. 521, 86 NE 840. Error as to costs. Sound Inv. Co. v. Bellingham Bay Land Co., 53 Wash. 470, 102 P 234. Only two-fifths of an acre involved. Sloan v. Chitwood, 217 Mo. 462, 116 SW 1086. Appeal cannot be dismissed or judgment affirmed by application of maxim "de minimis," since parties have right to appeal on ground of error in action at law regardless of amount involved. Monture v. Regling, 140 Wis. 407, 122 NW 1129. Erroneous admission and exclusion of evidence held to require reversal though only $17 involved, where vitally affected whole amount in controversy. Id.

error.[54] Cases applying these principles to errors or irregularities in process or appearance,[55] parties,[56] pleadings and formation of issues,[57] provisional and interlocu-

54. Fact that evidence strongly preponderates in favor of verdict held of weight in determining whether jury was misled by submission of alleged erroneous theory of negligence. Houston & T. C. R. Co. v. Shapard [Tex. Civ. App.] 118 SW 596.

Conflicting evidence: Erroneous admission of expert evidence directed to question concerning which evidence was quite evenly balanced held prejudicial. Ferdon v. New York, O. & W. R. Co., 131 App. Div. 380, 115 NYS 352. Exclusion of original complaint as evidence in action tried on amended complaint held prejudicial in view of conflicting evidence. Keller v. Morton, 63 Misc. 340, 117 NYS 200. Instruction introducing issue not raised by pleadings held ground for reversal where evidence was conflicting and right of recovery questionable. Buyken v. Lewis Const. Co., 51 Wash. 627, 99 P 1007. Admission of improper evidence prejudicial in view of conflicting evidence. Meyers v. San Pedro, etc., R. Co. [Utah] 104 P 736.

55. Mailing copy of original summons to defendant instead of copy of alias summons, where both were the same. Harpold v. Doyle [Idaho] 102 P 158.

56. Allowing judgment debtor and claimants of fund to be made parties to garnishment proceeding in county court on appeal from justice's court, though they were not parties below. Davis v. West Texas Bank & Trust Co. [Tex. Civ. App.] 116 SW 393. Joinder of superfluous plaintiff held not prejudicial to defendant. Balfour Quarry Co. v. West Const. Co. [N. C.] 66 SE 217. Overruling demurrer for misjoinder of parties, after trial on merits. Allen v. Globe Grain & Milling Co. [Cal.] 104 P 305. Joinder of wife as plaintiff in action by husband for injuries to her. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118. Fact that party who should have been made plaintiff was made defendant. Jobst v. Hayden Bros. [Neb.] 121 NW 957. Misjoinder of parties defendant, particularly where error waived by pleading to merits. Mann v. Doerr [Mo.] 121 SW 86. Misjonder of parties defendant, where there was no objection and court might have consolidated actions had they been sued separately. American Fire Ins. Co. v. Haynie [Ark.] 120 SW 825. Misjoinder of parties harmless to defendant, where verdict and judgment went in favor of his codefendant and judgment relieved him of all costs. Pullman Company v. Cox [Tex. Civ. App.] 120 SW 1058. Improper joinder of third party as codefendant where defendant was solely liable to plaintiff on facts found. Allen v. Globe Grain & Milling Co. [Cal.] 104 P 305. In proceedings for appointment of receiver for partnership, partner held not injured by refusal to allow receiver in bankruptcy to intervene. Southwell v. Church [Tex. Civ. App.] 111 SW 969. Provision of municipal court act, § 286 (Hurd's Rev. St. 1908, p. 675), that on appeal from municipal court supreme or appellate court shall decide case on merits, etc., held not applicable to question of proper parties. Edgerton v. Chicago, etc., R. Co., 240 Ill. 311, 88 NE 808. **Prejudicial:** Decree in favor of trustee reversed for failure to make cestui que trustent parties where objection made by demurrer below. Beckwith v. Laing [W. Va.] 66 SE 354.

57. Special finding may be looked to to ascertain whether errors in rulings on pleadings are harmless. Bowen v. Eaton & Co. [Ind. App.] 89 NE 961. In action by firm of attorneys, which was entitled to emoluments received by each of its members, to recover for services rendered by one of its members, failure to allege employment of such member and interest of firm in emoluments. Thorp v. Ramsey, 51 Wash. 530, 99 P 584. Omission of allegation of demand for payment and tender of checks in action by drawer to recover amount from drawee, where evidence showed plaintiff willing to tender, and formal demand would be useless. Lieber v. Fourth Nat. Bank, 137 Mo. App. 158, 117 SW 672. Failure to attach bond sued on to amended complaint where it was filed with original and referred to in both as "exhibit A," and was read in evidence without objection. Burns' Ann. St. 1908, §§ 350, 407, 700. Berkemeier v. State [Ind. App.] 88 NE 634. Failure of answer of guardian ad litem to specifically deny all the material allegations of the complaint, where all such allegations were proved and decree was not based on failure of answer to contain such denials. Cannon v. Lunsford [Ark.] 115 SW 940. Failure to sufficiently itemize counterclaim, where evidence admitted without objection appraised plaintiff of every claim that defendant presented against him. Horn v. Bates [Ky.] 114 SW 763. Considering defense not pleaded but fully litigated. Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328. Held unnecessary to pass on sufficiency of counts filed in justice's court, where case was appealed to circuit court and tried on practically new complaint filed therein. Central of Georgia R. Co. v. Williams [Ala.] 50 S 328. Ruling as to sufficiency of complaint, where court had jurisdiction by reason of allegations thereof, and whole matter was completely determined by issues raised on cross complaint as effectually as it could have been by those raised by the complaint. Kaufman v. Marshall [Ark.] 115 SW 680. Waiver by paintiff of recovery of any sum in excess of specified amount held not prejudicial to defendant even if regarded as withdrawal of other causes of action, where remaining cause of action was sufficient foundation for judgment rendered. Great Western Gold Co. v. Chambers, 155 Cal. 364, 101 P 6. Advantage may be taken of failure to set forth in petition jurisdiction of court both by demurrer and by motion to dismiss, and fact that both remedies were allowed is not error of which plaintiff can complain. White v. Atlanta, B. & A. R. Co., 5 Ga. App. 308, 63 SE 234. That some pleas were traversed on immaterial issues, where defendant's liability was perfectly clear, and whole course of trial showed that no other result could have been reached. Evans v. Lilly & Co. [Miss.] 48 S 612. Misjoinder of causes of action harmless to defendant, where verdict and judgment went against his codefendant and judgment relieved him of all costs.

Pullman Co. v. Cox [Tex. Civ. App.] 120 SW 1058. Overruling motion to make petition more definite and certain, in view of failure to object to ruling as to burden of proof. Chicago, etc., R. Co. v. Logan Snow & Co. [Okl.] 105 P 343. Overruling motion to require plaintiff to set forth whole contract sued on in action on insurance policy, though petition purported to set out policy in full but recitals of copied portion showed that it did not, where it appeared that missing portion was in possession of defendant, and that it relied on matter contained therein as defense. Higgens v. Supreme Castle of Highland Nobles, 83 Neb. 504, 120 NW 137. Refusal to require defendants in ejectment to file their grounds of defense. Knight v. Grim [Va.] 66 SE 42. Refusal to require plaintiff to separately state and number causes of action, where same conclusion would result on retrial under facts admitted in record. Kuchler v. Weaver [Okl.] 100 P 915. Overruling motion to require plaintiff to separately state and number alleged distinct causes of action, where no recovery was allowed as to one of them. Kirkpatrick v. Kirkpatrick, 83 Neb. 578, 119 NW 1118. Failure to file replication, where depositions taken and case tried as though it had been filed. Towner v. Towner, 65 W. Va. 476, 64 SE 732. That certain fact was alleged by amendment of petition instead of in reply, where issue was made in respect thereto and parties were allowed to present the evidence bearing on it at the trial. Continental Ins. Co. v. Hargrove [Ky.] 116 SW 256. Prematurity in striking plea of limitations held harmless to defendant, since under New Jersey practice the action of court in striking such plea at all was reviewable, no matter at what stage of proceedings such action was taken. Snare & Triest Co. v. Friedman [C. C. A.] 169 F 1.

Sustaining demurrer held harmless. Where subject to motion to strike, though latter proper remedy. Poppell v. Culpepper, 56 Fla. 515, 47 S 351; Ray v. Pollock, 56 Fla. 530, 47 S 940; McKinnon v. Johnson [Fla.] 48 S 910; Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922; Dickerson v. Finley [Ala.] 48 S 548. To paragraph of complaint, where all evidence admissible thereunder would have been competent under another paragraph. Conklin v. Dougherty [Ind. App.] 89 NE 893. To one count of complaint, where demurrers to other counts substantially same were overruled. Penry v. Dozier [Ala.] 49 S 909. Where one count to which demurrer was properly overruled was sufficient to support judgment, rulings on demurrers to other counts. Miller v. Abrahamson, 9 Cal. App. 396, 99 P 534. To paragraph of complaint, where other paragraphs required no other or different evidence to support them by reason thereof. Miedreich v. Lauenstein [Ind.] 87 NE 1029. To original complaint, where plaintiff had to prove the very averment complained of in demurrer in order to make out prima facie case, which he did without dispute. McDaniel v. Cain [Ala.] 48 S 52. To original count, where its legal effect was not changed by amendment made thereafter. Green v. Bessemer Coal, Iron & Land Co. [Ala.] 50 S 289. To so much of complaint as sought to recover counsel fees, where court properly held that plaintff was not entitled to recover at all. McDaniel v. Cain [Ala.] 48 S 52. To plea, where matters therein alleged are provable under another plea. Selma St. & S. R. Co. v. Campbell [Ala.] 48 S 378; Tallahassee Falls Mfg. Co. v. Moore [Ala.] 48 S 593; Central of Georgia R. Co. v. Williams [Ala.] 50 S 328; Stewart v. Southern R. Co. [C. C. A.] 168 F 685. To pleas or defenses provable under general denial. Alabama Chemical Co. v. Niles, 156 Ala. 298, 47 S 239; Stowers Furniture Co. v. Brake [Ala.] 48 S 89; Selma St. & S. R. Co. v. Campbell [Ala.] 48 S 378; Miller v. Sanitary Dist. of Chicago, 242 Ill. 321, 90 NE 1; Woolner v. Distilling Co. v. Peoria & E. R. Co., 136 Ill. App. 479; American Home Circle v. Eggers, 137 Ill. App. 595; Tokheim Mfg. Co. v. Stoyles, 142 Ill. App. 198; Southern Indiana R. Co. v. Railroad Com. [Ind.] 87 NE 966; Cleveland, etc., R. Co. v. Hollowell [Ind.] 88 NE 680. To plea, where defendant thereafter filed another plea setting up same defense more fully and explicitly, and issue was joined and trial had thereon. Clary v. Isom, 56 Fla. 236, 47 S 919. To pleas, where all parties were examined fully, and even had they been allowed there would have still been a failure of proof. Western Union Tel. Co. v. Louisell [Ala.] 50 S 87. To plea, where defendants were accorded benefit of defense sought to be interposed thereby. Trustees of Schools v. Cowden, 146 Ill. App. 20. To plea of nul tiel corporation, where pleadings show that corporation actually has a legal existence. Henssler v. Wiese Drug Co., 133 Ill. App. 539. To paragraph of answer, where all matters therein alleged were brought out fully in the evidence. Louisville & N. R. Co. v. Beeler [Ky.] 123 SW 254. To affirmative answer, where defendant was permitted to make amendment which substantially tendered same defense, and to introduce evidence in support thereof which was considered by court. Richardson v. Cooper, 51 Wash. 507, 99 P 577. Requiring defendant on demurrer to amend pleas by setting out contract sued on in full, where demurrers were then overruled. Providence Sav. Life Ins. Soc. v. Pruett, 157 Ala. 540, 47 S 1019. Informality of demurrer to complaint for failure to state cause of action, since judgment sustaining it would be affirmed if complaint insufficient. Fox v. Rhodes [Ind. App.] 88 NE 92. Where judgment that complaint was insufficient was right, held immaterial that particular objection thereto, manifest on face of record, was not distinctly made by demurrer. Hoxie v. New York, etc., R. Co. [Conn.] 73 A 754. Sustaining insufficient demurrer to bad plea, where it plainly appeared that such plea could not be amended so as to make it good without departing entirely from defense therein sought to be set up. Sunflower Lumber Co. v. Turner Supply Co. [Ala.] 48 S 510.

Overruling demurrer held harmless. Lucas v. Rea, 10 Cal. App. 641, 102 P 822, on rehearing, modifying [Cal. App.] 101 P 537; Nelson Bennett Co. v. Twin Falls Land & W. Co., 14 Idaho, 5, 93 P 789; Priest v. Dodsworth, 143 Ill. App. 225; Berkemeier v. State [Ind. App.] 88 NE 634; Mullen v. Thaxton [Okl.] 104 P 359; Virginia Cedar Works v. Dalea [Va.] 64 SE 41. Where right result was reached. Parker Land & Imp. Co. v. Ayers [Ind. App.] 87 NE 1062. To complaint where plaintiff was entitled to recover on agreed statement and such statement was

substantially same as complaint. Caffarelli v. Landino [Conn.] 72 A 564. To whole declaration and each count thereof, where trial was had on case made by good count, though other counts were bad. Virginia Cedar Works v. Dalea [Va.] 64 SE 41. For failure to allege matter which was only pleaded as conclusion of law, where fact was proved. State v. Spokane County Super. Ct. [Wash.] 104 P 200. To complaint for ambiguity, where defendant's denial of indebtedness sued on was negative pregnant and he made no effort to disprove claims. Preston v. Central California Water & Irr. Co. [Cal. App.] 104 P 462. To complaint, where defendant answered and case tried and decided as though facts omitted from complaint were in issue. Garten v. Trobridge [Kan.] 104 P 1067. To complaint for ambiguity and uncertainty, where defendant answered and went to trial on merits, nothing appeared to indicate that he was misled as to issues, and cause was fairly tried on merits. Irrgang v. Ott, 9 Cal. App. 440, 99 P 528. Ruling that petition stated only cause of action for breach of contract even if it also included one in tort, where it was not denied that it stated cause of action for breach of contract, which was only one submitted to jury. Hill v. Houser [Tex. Civ. App.] 115 SW 112. Ruling on sufficiency of allegations of petition for divorce as to abandonment, where another ground alleged and supported by evidence resulting in plaintiff's favor. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. To original complaint, where it is subsequently amended. Havlick v. Davidson, 15 Idaho, 787, 100 P 91. Where there is one good defense, admitted by plaintiff and sufficient to defeat his recovery, rulings on demurrers to other defenses. Slafter v. Concordia Fire Ins. Co. [Iowa] 120 NW 706. To paragraph of answer, where other two paragraphs were sufficient and admitted by demurrer. State v. Hall [Ind.] 89 NE 855. To plea, where plaintiff was not entitled under any phase of evidence to recover more than amount awarded him. Montgomery v. Amsler [Tex. Civ. App.] 122 SW 307. To plea, where defendant entitled to verdict on another plea. Horan v. Gray & Dudley Hardware Co. [Ala.] 48 S 1029. To unverified answer to verified amendment to petition in equity based on failure to verify, where answer merely denied allegations of amendment and set up no independent affirmative facts. Greer v. Andrew [Ga.] 65 SE 416. To plea of contributory negligence, where plaintiff did not show case of negligent liability. Lipscomb v. Bessemer [Ala.] 49 S 872. To affirmative answer or reply, where no proof is offered in support of the affirmative pleading. Ferrandini v. Bankers' Life Ass'n, 51 Wash. 442, 99 P 6. To allegations of answer, where matters therein alleged were not submitted to jury. Michael v. Rabe [Tex. Civ. App.] 120 SW 565. To answers, where complaint was insufficient to sustain a judgment against defendants. Southern Indiana Loan & Sav. Inst. v. Roberts, 42 Ind. App. 653, 86 NE 490. To bad answer if complaint is bad. City of Delphi v. Hamling [Ind.] 89 NE 308. To paragraph of answer to writ of mandamus, where facts stated in writ were insufficient to constitute cause of action. State v. Indiana State Board of Medical Registration & Examination [Ind.] 87 NE 139. To replication, where no testimony was introduced to sustain its allegations. Louisville & N. R. Co. v. Huffstutler [Ala.] 50 S 146. To other paragraphs of answer, where special finding of facts disclosed that judgment was predicated on general denial and cross complaint. Warner v. Jennings [Ind. App.] 89 NE 908. To replication to plea, where undisputed evidence showed that defendant was entitled to nothing under such plea. Poull & Co. v. Foy-Hays Const. Co. [Ala.] 48 S 785. To special replication to plea which passed out on demurrer. Davis v. Simpson Coal Co. [Ala.] 50 S 368. Where judgment was rendered for plaintiff against intervenor, overruling his exceptions to her petition in intervention. Michael v. Rabe [Tex. Civ. App.] 120 SW 565. To cross complaint, where all parties were before court, each was fully heard, and no evidence was introduced which could not have been introduced had it been sustained. Burns' Ann. St. 1908, § 350. Bowen v. Eaton & Co. [Ind. App.] 89 NE 961. Overruling of demurrer to defective count **prejudicial.** Newport News & Old Point R. & Elec. Co. v. Nicolopoolos [Va.] 63 SE 443. Error in overruling demurrer to certain paragraphs of answer held not rendered harmless by reason of fact that all matters therein alleged were provable under general denial. Hill v. Kerstetter [Ind. App.] 86 NE 858. Error in overruling demurrer to complaint for want of facts is not cured by Burns' Ann. St. 1908, § 700. Thomas Madden Son & Co. v. Wilcox [Ind. App.] 89 NE 955, rehearing denied, former opinion [Ind. App.] 88 NE 871.

Rulings on motion to strike: Striking certain words from complaint where they were insufficient as allegation of separate breach of contract sued on, and were immaterial viewed in connection with entire count in which they appeared. Dickerson v. Finley [Ala.] 48 S 548. Striking allegations shown to be immaterial by evidence. Anderson v. Union Stockyards Co. [Neb.] 120 NW 1124. Striking defense of statute of limitations not applicable to cause of action pleaded in complaint. Ross v. Saylor [Mont.] 104 P 864. Striking out special defense, which in no way prejudiced defendant's right to prove facts therein alleged. Robinson v. National Fraternal League, 81 Conn. 707, 71 A 1096. May constitute reversible error to strike plea apparently containing meritorious defense, though same is indefinitely pleaded. Southern Home Ins. Co. v. Putnal [Fla.] 49 S 922. Striking such a plea is harmless, where it clearly and affirmatively appears that party was not injured in any way and not prevented from submitting his case to jury under such a state of pleadings as to give him all the benefit he would otherwise have had. Id.; McCaleb v. Dreyfus [Cal.] 103 P 924; Butt v. Iffert, 171 Ind. 554, 86 NE 961; Smith v. Hicks [N. M.] 98 P 138; Leistikow v. Zuelsdorf [N. D.] 122 NW 340; McCandless v. Mobley, 81 S. C. 303, 62 SE 260. Refusing to strike allegations of complaint essential to cause of action, substantially repeated elsewhere. Alabama G. S. R. Co. v. Godfrey, 156 Ala. 202, 47 S 185. Failure to strike from petition allegation that defendant owed certain duties to plaintiff and other employes, no question concerning other em-

tory proceedings,[58] the procedure,[59] continuances, adjournments, dismissal before trial, and the like,[60] trial and course and conduct of the same,[61] formation and selec-

ployes having been submitted to jury. Houston & T. C. R. Co. v. Ravanelli [Tex. Civ. App.] 123 SW 208. Refusal to strike unnecessary amendment to petition made after close of evidence. Jackson v. Grinnell [Iowa] 122 NW 911. Failure to strike out plea of homestead, where note sued on was barred by limitations. Kalteyer v. Mitchell [Tex.] 117 SW 792. Refusal to strike special pleas equivalent to general issue. Norfolk & W. R. Co. v. Mundy [Va.] 66 SE 61. Refusal to strike evidentiary matter, where proof of such matter would have been proper. Cook v. Whiting [Iowa] 122 NW 835. Refusal to strike clause of answer, where issue raised thereby not submitted to jury. Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149. Refusal to strike portion of reply on ground that it constituted departure, where no issue raised in portion objected to was submitted to jury. St. Louis & S. F. R. Co. v. Lieurance [Kan.] 102 P 842. Refusal to strike division of answer alleging affirmative defenses elsewhere properly pleaded held **prejudicial,** where court improperly dismissed count of petition to which such division was directed. McKay v. McCarthy [Iowa] 123 NW 755.

Amendments. Western Union Tel. Co. v. Louisell [Ala.] 60 S 87. Allowance of unnecessary amendment. Malloy v. Kelly-Atkinson Const. Co., 240 Ill. 102, 88 NE 234; Johnson v. Carter [Iowa] 120 NW 320; Diuguid v. Roberts [Ky.] 121 SW 464; Ryder-Gougar Co. v. Garretson, 53 Wash. 71, 101 P 498. Inserting new cause of action in complaint where relief granted was based solely on original cause of action. Worth v. Worth, 155 Cal. 599, 102 P 663. Allowance of plea in abatement filed too late, where it was not relied on and no evidence was offered in support of it. Hightower, Pratt & Co. v. Hodges, 5 Ga. App. 408, 63 SE 541. First allowing amendment upon payment of costs and then disregarding and rejecting it later during same term. Boswell v. Johnson, 6 Ga. App. 251, 62 SE 1003. Refusal to permit filing of amended answer, where defendants got full benefit of defense sought to be set up therein. Keeney v. Waters [Ky.] 122 SW 837. Refusal to allow amendment, where different result would not have been reached had it been allowed. Jones v. Poole, 5 Ga. App. 113, 62 SE 711. Refusal of amendment on remand held **prejudicial.** Ball v. Rankin [Okl.] 101 P 1105.

Variance held harmless. See, also, Pleading, § 14. Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P 242; Caley v. Mills [Kan.] 100 P 69; Baltimore, etc., R. Co. v. Wood & Co. [Ky.] 114 SW 734; McCullough v. Dunn, 83 Neb. 591, 119 NW 1127; Tilton v. Gates Land Co., 140 Wis. 197, 121 NW 331. As to room in which accident occurred, where evidence sufficiently identified it. Mississippi Cotton Oil Co. v. Smith [Miss.] 48 S 735. Discrepancy between pleadings and notice of lien, where disregarded on trial and case tried upon correct theory. Lucas v. Rea [Cal. App.] 101 P 537.

58. See 11 C. L. 1697, n. 25.

59. See, also, note 27, post. Commencing independent proceeding to compel defendant to contribute to support of children awarded to plaintiff by decree of divorce, instead of applying for change or modification of decree in divorce suit. Kirkpatrick v. Kirkpatrick, 83 Neb. 578, 119 NW 1118. Placing case on short cause calendar, where was not shown that objecting party was thereby foreclosed of any of his rights. People v. Ackermann, 146 Ill. App. 301. Erroneous transfer of case from equity to law docket, where plaintiff is not entitled to relief in equity. Dickinson v. Stevenson [Iowa] 120 NW 324. Held that case would not be reversed because improperly transferred from equity to law docket, where it was tried by court without a jury, and all evidence offered was received without objection, and was all contained in abstract on which appeal was submitted, unless supreme court, upon de novo consideration of issues and evidence, found that different result should have been reached. Irwin v. Deming [Iowa] 120 NW 645.

60. Dismissal: In action against two joint wrongdoers judgment was rendered against one of them alone. Held immaterial, in so far as latter was concerned, whether action against his codefendant was dismissed or not, since if liable at all he was liable for full amount of damage. Berry v. St. Louis, etc., R. Co., 214 Mo. 593, 114 SW 27. Initial carrier cannot complain of dismissal of connecting carrier as joint defendant since initial carrier's liabilities are fixed by Act Cong. June 29, 1906, amending Interstate Commerce Act. Shidlovsky v. Mallory S. S. Co., 60 Misc. 67, 111 NYS 778. Denial of motion to dismiss appeal from justice court. Leeper v. Carter, 137 Mo. App. 617, 119 SW 463. Where complainant in creditor's suit against corporation and stockholders was not entitled to dismiss same as matter of right, held that stockholders were not prejudiced by order striking stipulation for dismissal from files. Deane v. Kent Circuit Judge, 155 Mich. 644, 16 Det. Leg. N. 1084, 119 NW 1093. Since Municipal Court Act, § 248, sub. 2, permits dismissal of action in default of plaintiff, permitting defendant to introduce testimony before dismissal is harmless. Anderson v. Thorps, 113 NYS 730. Where court has no jurisdiction of person of garnishee nor of property sought to be held, any errors in proceedings leading up to discharge of garnishee are not prejudicial to plaintiff. Bristol v. Brent [Utah] 103 P 1076.

Continuance: Adjournments rendering inspection of scene of accident by jurors possible, in absence of showing that jurors did so misconduct themselves. Gould v. Merrill R. & L. Co., 139 Wis. 433, 121 NW 161. Granting continuance in equity case, which merely enabled opposite party to get his case before court on merits, where reversal would not lead to any change in result. Tisdale v. Ennis [Iowa] 122 NW 969. Denial of motion on allowance of amendment to complaint. Chicago, etc., R. Co. v. Clements [Tex. Civ. App.] 115 SW 664. Refusal to grant continuance for absence of witness whose testimony would not have changed result. Reclamation Dist. No. 70 v. Sherman [Cal. App.] 105 P 277; Weatherford,

tion of the jury,[62] and rulings on demurrers to evidence and motions for directed

etc., R. Co. v. White [Tex. Civ. App.] 118 SW 799.

61. Permitting foreign **guardian** of nonresident infant defendant to defend action against him instead of appointing one for that purpose. Martin v. Gwynn [Ark.] 117 SW 754. Failure to prove appointment of **next friend** by whom infant plaintiff sued, where there was no issue raised thereon, and judgment was for plaintiff. Rev. St. 1899, § 672 (Ann. St. 1906, p. 686). Harviston v. United R. Co. [Mo. App.] 119 SW 481. **Nonobservance of rules** by court. Steele v. Wynn, 139 Ill. App. 428. Denial of motion to strike cause from calendar for reasons affecting validity and regularity of **notice of trial** and note of issue, where there was nothing in record to indicate that defendant's ability to make full defense upon merits was prejudiced thereby. Killackey v. Killackey, 156 Mich. 127, 16 Det. Leg. N. 73, 120 NW 680. Mere error or irregularity in **setting case for trial** before issues were made up, where parties were given full opportunity to present cause of action or defense. Ball. Ann. Codes & St. § 6535 (Pierce's Code, § 1083). Ferrandini v. Bankers' Life Ass'n, 51 Wash. 442, 99 P 6. Refusal to grant **jury trial,** where no other or different judgment could have been rendered. Worrall Grain Co. v. Johnson, 83 Neb. 349, 119 NW 668. Though amended reply, which was unnecessary, was filed for purpose of preventing case from going to jury, held that case would not be reversed for jury trial on issue which it was apparent from record played no part in the case. Buchanan v. Boyd's Ex'r [Ky.] 121 SW 981. Denial of jury trial is prejudicial even though appellate court may think that party denied had not a substantial case. John King Co. v. Louisville & N. R. Co. [Ky.] 114 SW 308. Denial of jury trial held not rendered harmless by reason of fact that court would have been justified in directing verdict for defendant on evidence before him, since it could not be assumed that evidence would have been in all respects same had case been tried before jury. Cleveland v. Smith [Tex.] 119 SW 843. Refusal to allow counsel longer time for **examination of witnesses.** Stephenville, etc., R. Co. v. Moore [Tex. Civ. App.] 121 SW 882. Refusal to permit witness who had violated rule to testify, where his testimony would merely have tended to impeach complainant as to mere corroborating circumstance and as to matter in regard to which she had already been impeached. Johnson v. Dahle [Neb.] 123 NW 437. Ruling **limiting number of witnesses,** where defendant tendered no evidence and no witness that was excluded under it. Felver v. Central Elec. R. Co., 216 Mo. 195, 115 SW 980. Refusal to require **physical examination** of plaintiff in personal injury action. Shamp v. Lambert [Mo. App.] 121 SW 770. **Fining of attorney** for contempt. Stewart v. Beggs, 56 Fla. 565, 47 S 932. **Compelling party** against his will **to accept** his adversary's **concession of bare fact** sought to be proved in lieu of evidence by which it was proposed to be established, where prejudice was not shown. Webster v. Moore, 108 Md. 572, 71 A 466. Reserving ruling on evidence properly admitted and **failing to dispose of objection.** Casey v. Richards, 10 Cal. App. 57, 101 P 36. Where proper result has been reached in equity case, alleged erroneous **rulings on exceptions to master's report.** Kelly v. Fahrney, 242 Ill. 240, 89 NE 984. Refusal to allow **argument** along certain lines. Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401. Refusal to hear argument, where decision was right. In re Ayers' Estate [Neb.] 120 NW 491.

Misconduct of jury. Kimic v. San Jose-Los Gatos Interurban R. Co. [Cal.] 104 P 986. Permitting stenographer to read part only of certain evidence to jury in jury room, where counsel agreed that all of it might be read, jury refused to hear more than part of it, and it did not appear that jury knew of agreement. Quinn v. Metropolitan St. R. Co., 218 Mo. 545, 118 SW 46. Taking exhibit to jury room by mistake, where it was shown that it was not used to influence minds of jurors and did not influence them. Morris v. Miller, 83 Neb. 218, 119 NW 458. Taking of instrument, containing excluded evidence, to jury room, where not read. West v. Houston Oil Co. [Tex. Civ. App.] 120 SW 228. Refusal to allow jury in condemnation proceedings to take with them on retiring the award made by appraisers, only question submitted to them being amount of damages. Muncie & P. Trac. Co. v. Hall [Ind.] 89 NE 484. Admitting affidavits of jurors to show no prejudice from newspaper reports. Spreckels v. Brown, 212 U. S. 208, 53 Law. Ed. —. Denial of **stay** pending determination of another action, where latter was not bar, and judgment was proper on facts in evidence. Sowden & Co. v. Murray, 114 NYS 164. Refusal to stay process for enforcement of decree rendered on constructive service until retrial on merits where on final hearing court properly refused to set aside decree. West v. Burks [Ark.] 118 SW 397. **Vacating default** judgment and permitting amendment of complaint. Lemon v. Hubbard, 10 Cal. App. 471, 102 P 554. Insertion of certain immaterial documents in **bill of exceptions.** In re Hite's Estate, 155 Cal. 448, 101 P 448. That bill of exceptions was improperly filed when first left with clerk before it was allowed, where it was afterwards allowed and signed and could have been refiled with or without an order to that effect if it had been reduced to writing and presented for allowance within the time granted. Hawley v. Le Clair [Wyo.] 102 P 850. Refusal to consider motion to correct statement of facts, where, considering corrections as made, no different judgment could have been rendered under the evidence. Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602.

62. See, also, Jury, § 8. Compelling defendant to examine and pass upon second panel of four jurors before same were examined and accepted by plaintiff. Collison v. Illinois Cent. R. Co., 239 Ill. 532, 88 NE 251. Asking jurors whether any of them were interested in certain insurance company, in view of small verdict, which was abundantly sustained by evidence. Anderson v. Standard Plunger Elevator Co., 113 NYS 593. That jury was not properly chosen where not ground for challenge to

verdicts, dismissals and nonsuits,[63] and new trials,[64] are cited below. The admission [65] or exclusion [66] of evidence which cannot have been efficient to the result is

array and not made basis of challenge to jurors individually, and no claim of injury. Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 116 SW 365. Disqualification of juror unless it is clear that jury was not impartial one and that in consequence defeated party has not had fair trial. Sansouver v. Glenlyon Dye Works, 28 R. I. 539, 68 A 545. Sustaining challenge to juror, where fair and impartial jury was afterwards secured. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Sustaining challenges, where record does not affirmatlvely show that complaining party had exhausted all his peremptory challenges. Johnson v. Waterloo, 140 Iowa, 670, 119 NW 70. Allowing challenge to juror after acceptance, where it appeared that he had been employed by and expected to work for defendant. Western Steel Car & Foundry Co. v. Cunningham [Ala.] 48 S 109. Presence of incompetent juror, where ten competent jurors concurred in verdict and statute provides that nine are sufficient. Knight v. Kansas City [Mo. App.] 119 SW 990. Permitting attorney to appear in case after jury had been sworn whereby opposite party was deprived of right to challenge jurors on ground that they were clients of his or there was some relationship between them, where it appeared that such was not the case. In re Winslow's Will [Iowa] 122 NW 971. Error in refusing proper questions in examining juror is **ground for reversal** in absence of showing that it was harmless, although no actual disqualification is shown. Goff v. Kokomo Brass Works [Ind. App.] 88 NE 312. Case reversed for error in sustaining challenge to juror for cause, in view of other errors, though it alone might not have been ground for reversal. Joyce v. Metropolitan St. R. Co., 219 Mo. 344, 118 SW 21. Anything rendering statutory right of peremptory challenge materially less valuable is injury to party within meaning of Rev. Laws, c. 176, § 32. Searle v. Roman Catholic Bishop, 203 Mass. 493, 89 NE 809. In case where defendant was Catholic bishop, excluding at plaintiff's request all persons of that faith, held prejudicial as making plaintiff's right of peremptory challenge relatively more valuable and defendant's relatively less valuable, it appearing that two of such persons were excluded. Id.

63. Demurrer to evidence: Refusal to allow amendment to demurrer so as to assign additional ground therefor, where defendant had right to, and did, make point sought to be made under amendment under original grounds. Virginia Iron, Coal & Coke Co. v. Munsey [Va.] 65 SE 478.

Direction of verdict. Hoopes v. Crane, 56 Fla. 395, 47 S 992. Failure to direct verdict for nominal damages. Storseth v. Folsom, 50 Wash. 456, 97 P 492. Direction of verdict for part of damages sued for will not be reversed on plaintiff's appeal, where court should have granted nonsuit for failure to prove essential elements of cause of action. Jones v. City Council of Augusta, 130 Ga. 716, 61 SE 599. Direction of verdict after receiving additional evidence without renewal of motion. Dring v. St. Lawrence Tp. [S. D.] 122 NW 664. Failure to require formal verdict in writing. American Soda Fountain Co. v. Hogue [N. D.] 116 NW 339. Calculation of interest on amount admitted to be due, by court instead of submitting calculation to jury, it not being contended that calculation was erroneous. Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 SW 1087.

Dismissal: Action of magistrate in dismissing case because of facts disclosed by testimony before plaintiff had closed his case and while he still proposed to introduce additional testimony, it appearing that plaintiff had no cause of action, and that result was only correct one which could have been reached. Orr v. McLeay [Ga. App.] 65 SE 164.

Nonsuit: Failing to rule on motion which was without merit. Reclamation Dist. No. 535 v. Clark, 155 Cal. 345, 100 P 1091. Denial of motion for nonsuit at close of plaintiff's case though he may not have then offered sufficient proof to entitle him to go to jury, where omission is thereafter supplied. Crosby v. Portland R. Co. [Or.] 100 P 300, rehearing denied [Or.] 101 P 204.

64. Denial of plaintiff's motion, where complaint was insufficient to sustain judgmen in his favor. Southern Indiana Loan & Sav. Inst. v. Roberts, 42 Ind. App. 653, 86 NE 490. Refusal to grant new trial for newly-discovered evidence which could not change result. Savage v. Cowan [Tex. Civ. App.] 113 SW 319. Denial of motion on ground of newly-discovered evidence, where such evidence was immaterial in view of holding of supreme court on question to which it related. Jaenicke v. Fountain City Drill Co., 106 Minn. 442, 119 NW 60. Granting of new trial by justice of peace in absence of plaintiff's counsel, where counsel heard on subsequent motion to set aside order which was denied. National Cash Register Co. v. Richards [Mich.] 16 Det. Leg. N. 841, 123 NW 587. Refusal to allow filing of amended motion, where it should have been overruled if it had been filed. Carwile v. Cameron & Co. [Tex. Civ. App.] 116 SW 611. Granting new trial without assigning any reason therefor as required by statute. McKinley v. Lawrence County Water Co. [Mo. App.] 123 SW 77. Failure of judge to file specific finding on denying motion, where no prejudicial error committed at trial. Board of Education v. Brown [Mich.] 16 Det. Leg. N. 778, 123 NW 562.

65. Southern R. Co. v. Gullatt [Ala.] 48 S 472; Birmingham R. L. & P. Co. v. Morris [Ala.] 50 S 198; Louisville & N. R. Co. v. Davaner [Ala.] 50 S 276; Maddox v. Dunklin [Ala.] 50 S 277; Lowe v. San Francisco & N. W. R. Co., 154 Cal. 573, 98 P 678; Taylor v. McCowen, 151 Cal. 798, 99 P 351; Petitpierre v. Maguire, 155 Cal. 242, 100 P 690; Aggler, Morrison, Hansen Co. v. Dauphiny & Co. [Cal. App.] 104 P 702; Thomas v. Walden [Fla.] 48 S 746; Central of Georgia R. Co. v. Mote, 131 Ga. 166, 62 SE 164; Fain v. Ennis, 4 Ga. App. 716, 62 SE 466; South Georgia R. Co. v. Niles, 131 Ga. 599, 62 SE 1042; Burns v. Vereen [Ga.] 64 SE 113; Bell v. Redd [Ga.] 65 SE 90; Kehoe v. Henry [Ca. App.] 65 S.

361; Stevens v. Flowers Lumber Co. [Ga.] 65 SE 400; McClain v. Lewiston Interstate Fair & Racing Ass'n [Idaho] 104 P 1015; Zetsche v. Chicago, etc., R. Co., 238 Ill. 240, 87 NE 412; Lee v. Republic Iron & Steel Co., 241 Ill. 372, 89 NE 655; Chicago City Ry. Co. v. Phillips, 138 Ill. App. 438; Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757; Majenica Tel. Co. v. Rogers [Ind. App.] 87 NE 165; Cree v. Bradley's Bank [Iowa] 119 NW 614; Porter v. Whitlock [Iowa] 120 NW 649; Flint v. Atlas Mut. Ins. Co. [Iowa] 120 NW 1031; Egan v. Smith [Iowa] 121 NW 1028; Louisville R. Co. v. Johnson's Adm'r [Ky.] 115 SW 207; Ellerman v. Farmer [Ky.] 118 SW 289; Farmers' Bank v. Wickliffe [Ky.] 121 SW 498; Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656; Bladecka v. Bay City Trac. & Elec. Co., 155 Mich. 253, 15 Det. Leg. N. 965, 118 NW 963; Lockard v. Van Alstyne, 155 Mich. 507, 15 Det. Leg. N. 1132, 120 NW 1; Dalm v. Bryant Paper Co. [Mich.] 16 Det. Leg. N. 525, 122 NW 257; Beattie v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 618, 122 NW 557; Meilke v. Schabble [Mich.] 16 Det. Leg. N. 775, 123 NW 552; Burch v. Bernard, 107 Minn. 210, 120 NW 33; Stoakes v. Larson, 108 Minn. 234, 121 NW 1112; McKenzie v. United R. Co., 216 Mo. 1, 115 SW 12; Phelps v. Conqueror Zinc Co., 218 Mo. 572, 117 SW 705; Quarles v. Kansas City [Mo. App.] 119 SW 1019; Armstrong v. Auburn [Neb.] 122 NW 43; Reno Brew. Co. v. Packard [Nev.] 104 P 801; Hoxie v. Walker [N. H.] 74 A 183; Post v. Brooklyn Heights R. Co., 195 N. Y. 62, 87 NE 771; In re Croton River Dam & Reservoir, 129 App. Div. 707, 114 NYS 75; Thorne v. Barth, 114 NYS 900; Brown v. Newell, 132 App. Div. 548, 116 NYS 965; O'Connor v. Miller, 134 App. Div. 315, 118 NYS 842; Miller v. Uvalde Asphalt Pav. Co., 134 App. Div. 212, 118 NYS 885; Smith v. Moore, 149 N. C. 185, 62 SE 892; Anderson v. Minneapolis, etc., R. Co. [N. D.] 123 NW 281; City of Cincinnati v. Roettinger, 11 Ohio C. C. (N. S.) 501; Westwater v. Scioto Val. Pool Co., 12 Ohio C. C. (N. S.) 382; Chicago, etc., R. Co. v. Mashore, 21 Okl. 275, 96 P 630; Mullen v. Thaxton [Okl.] 104 P 359; White v. Western Allegheny R. Co., 222 Pa. 534, 71 A 1081; Toye v. Exeter Borough School Dist. [Pa.] 74 A 60; Tindal v. Sublett, 82 S. C. 199, 63 SE 960; Crossland v. Graham [S. C.] 65 SE 232; Keck v. Woodward [Tex. Civ. App.] 116 SW 75; Beall v. Chatham [Tex. Civ. App.] 117 SW 492; Watkins v. Watkins [Tex. Civ. App.] 119 SW 145; Chalkey v. Cooper [Tex. Civ. App.] 120 SW 273; Durham v. Breathwit [Tex. Civ. App.] 121 SW 890; International & G. N. R. Co. v. Sandlin [Tex. Civ. App.] 122 SW 60; Merriman v. Blalack [Tex. Civ. App.] 122 SW 403; Elwood v. Stallcup [Tex. Civ. App.] 122 SW 906; Stark Grain Co. v. Harry Bros. Co. [Tex. Civ. App.] 122 SW 947; Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 P 330; Hoseth v. Preston Mill Co. [Wash.] 104 P 612; Miller v. Neale, 137 Wis. 426, 119 NW 94; Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102; Monture v. Regling, 140 Wis. 407, 122 NW 1129; Schmid v. Dohan [C. C. A.] 167 F 804; Bruner v. Kansas Moline Plow Co. [C. C. A.] 168 F 218. Where complaining party did not show himself entitled to recover at all. Franklin v. Louisville & N. R. Co. [Ky.] 116 SW 765. On issue not submitted to jury. Girard v. Grosvenordale Co. [Conn.] 73 A 747; Ward v. Cook [Mich.] 16 Det. Leg. N. 655, 122 NW 785; Kennedy v. Laclede Gaslight Co., 215 Mo. 688, 115 SW 407; Humphries v. Union & G. S. R. Co. [S. C.] 65 SE 1051; Boardman v. Woodward [Tex. Civ. App.] 118 SW 550; Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232; Stephenville Oil Mill v. McNeill [Tex. Civ. App.] 122 SW 911. As to corner in certain boundary line, where location of such line depended entirely on location of certain other grant, and case was submitted to jury solely on beginning corner of such grant. Caldwell Land & Lumber Co. v. Globe Lumber Co. [N. C.] 66 SE 210. Where court would have been justified in giving peremptory instruction for successful party. Glass v. Chicago Union Trac. Co., 144 Ill. App. 116. Where admittedly competent evidence justified action of court in directing verdict. Bailey v. O'Neal [Ark.] 122 SW 503. Where answer of witness was a fact equally well known to jury. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426. Evidence upon which party offering it made no claim and which he did not misuse. Carver v. Sykes [Vt.] 71 A 1112. Reception of proper evidence in improper way where no motion to strike. Gaffney v. Mentele [S. D.] 119 NW 1030. Fact that record introduced in evidence was produced by attorney instead of its lawful custodian, where party was entitled to evidence and verity of record was not attacked. Harbison & Walker Co. v. White [Ky.] 114 SW 250. Allowing opposing counsel to be called as witness and then permitting impeachment. Logan v. Lenawee County Agriculture Soc., 156 Mich. 537, 16 Det. Leg. N. 192, 121 NW 485. Of testimony given by a party in another litigation only on condition that entire testimony on subject be read. Graham v. Dillon [Iowa] 121 NW 47. Part of answer to question which was not responsive. Ware v. Childs [Vt.] 73 A 994. Allowing leading question. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. As to conversations with decedent offered merely to show his mental condition. McBride v. McBride [Iowa] 120 NW 709. As to collateral matter. Dunkin v. Hoquiam [Wash.] 105 P 149. Custom to give other than statutory notice when complaint alleged statutory notice also. Collins Coal Co. v. DePugh [Ind. App.] 88 NE 317. Of certain city ordinances, though not as applicable to situation as statute, of which court would take judicial notice. Robinson v. Morris & Co. [R. I.] 73 A 611. Permitting witness to testify that she hoped she was religious held not prejudicial as creating improper bias in her favor in minds of jurors. Perkins v. Sunset Tel. & T. Co., 155 Cal. 712, 103 P 190. Of parol evidence to explain unambiguous contract where it was in line with plain meaning of such contract. Scudders-Gale Grocery Co. v. Gregory Fruit Co., 9 Cal. App. 553, 99 P 978. Permitting oral evidence of contents of written lease where it did not appear that such evidence was not strictly in accordance with lease. Smith v. Kunert [N. D.] 115 NW 76. Evidence going only to construction of contract where under proper construction thereof verdict was properly rendersd for defendant. Smith v. Fears [Tex. Civ. App.] 122 SW 433. Admission of letter of one not shown to be

plaintiff's agent, which merely placed writer's construction on option contract, which construction, if correct, deprived defendant of no rights thereunder, held not prejudicial to plaintiff. Pearson v. Millard, 150 N. C. 363, 63 SE 1053. As to manner of disposing of sewage from system to be constructed, where evidence established beyond question that system was connected with a natural drainage. Hildreth v. Longmont [Colo.] 105 P 107. In support of one defense where case was decided on question raised by different defense. Harlow v. Parsons Lumber & Hardware Co., 81 Conn. 572, 71 A 734. Relating to damages where judgment for defendant affirmed. Smith & Co. v. Russell Lumber Co. [Conn.] 72 A 577. As to damages where undisputed evidence sustained verdict as to damages measured by proper rule given to jury. Kirby Lumber Co. v. Cummings & Co. [Tex. Civ. App.] 122 SW 273. As to certain issue suggesting cause of damage too remote, where other uncontradicted evidence was plenary of complaining party's negligence, and such evidence could not have influenced finding of jury as to other issues. Farris v. Southern R. Co. [N. C.] 66 SE 457. In regard to claim which court refused to allow. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766.

Immaterial evidence. Skinner v. Knickrehm, 10 Cal. App. 596, 102 P 947; Lowndes v. City Nat. Bank [Conn.] 72 A 150; Chandler v. Mutual Life & Industrial Ass'n, 131 Ga. 82, 61 SE 1036; Carter v. Cairo, V. & C. R. Co., 240 Ill. 152, 88 NE 493; Tebow v. Wiggins Ferry Co., 241 Ill. 582, 89 NE 658; Hill v. Kerstetter [Ind. App.] 86 NE 997, rehearing denied [Ind. App.] 87 NE 695; Moneyweight Scale Co. v. McCormick, 109 Md. 170, 72 A 537; Modlin v. Jones & Co. [Neb.] 121 NW 984; Nilson v. Chicago, B. & Q. R. Co. [Neb.] 121 NW 1128; Tobler v. Union Stockyards Co. [Neb.] 123 NW 461; Bunker v. Manchester Real Estate & Mfg. Co. [N. H.] 71 A 866; Perry v. Maryland Casualty Co. [N. H.] 72 A 369; Maldonado & Co. v. Espen, 195 N. Y. 541, 88 NE 14; Smith v. Moore, 149 N. C. 185, 62 SE 892; Cordell v. Western Union Tel. Co., 149 N. C. 402, 63 SE 71; Freeman v. Brown [N. C.] 65 SE 743; Smith v. Kunert [N. D.] 115 NW 76; Grant v. Powers Dry Goods Co. [S. D.] 121 NW 95; Missouri Val. Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93; Rainey v. Kemp [Tex. Civ. App.] 118 SW 630; Houston & T. C. R. Co. v. Alexander [Tex. Civ. App.] 121 SW 602; Hoseth v. Preston Mill Co. [Wash.] 104 P 612; Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550. Held no presumption that admission of certain immaterial evidence influenced verdict. Bunker v. Manchester Real Estate & Mfg. Co. [N. H.] 71 A 866.

Irrelevant evidence. Casavan v. Sage, 201 Mass. 547, 87 NE 893; Hoskovec v. Omaha St. Ry. Co. [Neb.] 123 NW 305; Wilmot v. Vannah [N. H.] 72 A 207; Proctor v. Blanchard [N. H.] 72 A 210; Aker v. Brooklyn Daily Eagle, 130 App. Div. 412, 114 NYS 968; Delafield v. J. K. Armsby Co., 131 App. Div. 572, 116 NYS 71; Barksdale v. Charleston & W. C. R. Co. [S. C.] 64 SE 1013; Humphries v. Union & G. S. R. Co. [S. C.] 65 SE 1051; Adams v. Gary Lumber Co. [Tex. Civ. App.] 117 SW 1017; Lathrop v. Levarn [Vt.] 74 A 331. As to matter not in issue. Mageau v. Great Northern R. Co., 103 Minn. 290, 115 NW 651.

66. Birmingham R., L. & P. Co. v. Lavender [Ala.] 47 S 1026; Crone & Co. v. Long [Ala.] 49 S 227; Montgomery Moore Mfg. Co. v. Leeth [Ala.] 50 S 210; Western Coal & Min. Co. v. Buchanan [Ark.] 114 SW 694; City of Los Angeles v. McCollum [Cal.] 103 P 914; In re Higgins' Estate [Cal.] 104 P 6; Jones v. Downs [Conn.] 72 A 589; Crook v. International Trust Co., 32 App. D. C. 490; Vaughan's Seed Store v. Stringfellow, 56 Fla. 703, 48 S 410; Stewart v. Savannah Elec. Co. [Ga.] 65 SE 110; Weeks v. Hosch Lumber Co. [Ga.] 66 SE 168; Spongberg v. First Nat. Bank, 15 Idaho, 671, 99 P 712; Hensan v. Cooksey, 237 Ill. 620, 86 NE 1107; O'Rourke v. Sproul, 241 Ill. 576, 89 NE 663; Indianapolis Trac. & T. Co. v. Rowe [Ind. App.] 87 NE 653; Behler v. Ackley [Ind.] 89 NE 877; Kuhl v. Chamberlain, 140 Iowa, 546, 118 NW 776; Allen v. Urdangen [Iowa] 119 NW 724; Taylor v. Taylor, 79 Kan. 161, 99 P 814; Pitcher v. Webber, 104 Me. 401, 71 A 1031; In re McNamara's Estate, 155 Mich. 585, 15 Det. Leg. N. 1116, 119 NW 1074; Dahn v. Bryant Paper Co. [Mich.] 16 Det. Leg. N. 525, 122 NW 257; Minnesota & Dakota Cattle Co. v. Chicago & N. W. R. Co., 108 Minn. 470, 122 NW 493; Bowling v. Bowling [Miss.] 47 S 802; Jones v. Thomas, 218 Mo. 508, 117 SW 1177; Wilhite v. Billings & Eastern Montana Power Co. [Mont.] 101 P 168; Brian v. Oregon Short Line R. Co. [Mont.] 105 P 489; Fitch v. Martin [Neb.] 122 NW 50; Braun v. New York Cent. & H. R. R. Co., 116 NYS 668; Hopedale Elec. Co. v. Electric Storage Battery Co., 132 App. Div. 348, 116 NYS 859; Lambert Hoisting Engine Co. v. Paschall [N. C.] 65 SE 523; City of Cincinnati v. Roettinger, 11 Ohio C. C. (N. S.) 501; Mullen v. Thaxton [Okl.] 104 P 359; Germantown Dairy Co. v. McCallum, 223 Pa. 554, 72 A 885; Milne v. Providence Tel. Co. [R. I.] 72 A 716; Holden v. Thurber [R. I.] 72 A 720; Millwee v. Phelps [Tex. Civ. App.] 115 SW 891; Southwestern Tel. & T. Co. v. Owens [Tex. Civ. App.] 116 SW 89; Lynchburg Milling Co. v. National Exch. Bank [Va.] 64 SE 980; Schon v. Modern Woodmen of America, 51 Wash. 482, 99 P 25; Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 P 330; State Bank v. Spokane-Columbia River R. & Nav. Co., 53 Wash. 528, 102 P 414; Anderson v. Horlick's Malted Milk Co., 137 Wis. 569, 119 NW 342; Monture v. Regling, 140 Wis. 407, 122 NW 1129; Halwas v. American Granite Co. [Wis.] 123 NW 789; Reavis v. Fianza, 30 S. Ct. 1; Crucible Steel Co. v. Moen [C. C. A.] 167 F 956. Test whether sustaining of objection to question is ground for reversal is whether answer would have aided complaining party, and hence whether he was prejudiced. Sayre v. Woodyard [W. Va.] 66 SE 320. Were complaining party not entitled to recover as a matter of law. Clemons v. Chicago, etc., R. Co., 137 Wis. 387, 119 NW 102. Where competent evidence authorized direction of verdict. Bailey v. O'Neal [Ark.] 122 SW 503. Question which is merely preliminary. Czarnecki v. Derecktor, 81 Conn. 338, 71 A 354. Not bearing on only real issue in case. Bowman v. Poovy [N. C.] 66 SE 311. On issue not presented to jury. Steele v. Andrews [Iowa] 121 NW 17. Refusal to permit witness to testify of matter concerning which he has no knowledge. Bruner v. Kansas Moline Plow Co. [C. C. A.] 168 F 218. Sustaining objection to question as leading

harmless. For example, evidence which tended to prove a fact not necessary to the party's case,[67] or one conclusively disproved by other evidence,[68] or evidence erroneously admitted tending to prove a fact admitted or sufficiently proved by other competent evidence.[69] Likewise, the rejection of evidence of facts otherwise estab-

and as assuming something not shown by record, since counsel might have changed form of question. Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604. Evidence to show that defendant's president had no authority to employ plaintiff, where plaintiff was properly employed by defendant after president had attempted to employ him. Lawson v. Black Diamond Coal Min. Co., 53 Wash. 614, 102 P 759. Of evidence which was insufficient as matter of law to establish fact thereby sought to be proved. In re Snowball's Estate [Cal.] 104 P 444. Of bargain made by widow of decedent killed by negligence to sue only one company, where nothing to show other company was joint wrongdoer. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651. Of defendant's negligence where plaintiff failed to offer any proof that deceased was in exercise of due care when he was killed. French v. Sabin, 202 Mass. 240, 88 NE 845. As to sick benefits in personal injury case, since in view of testimony of necessity for plaintiff to remain in bed it cannot be assumed that he remained to receive benefits. Pearson v. H. M. Potter Co., 10 Cal. App. 245, 101 P 681. Questions intended to show witness' testimony as to rental value of premises burned over by previous fires, where no damages for rental value of pasturage were claimed in case at bar. Southern R. Co. v. Dickens [Ala.] 49 S 766. In action for burning of house alleged to have been caused by sparks from locomotive, exclusion of evidence as to whether house had ever caught fire from trains before, it being self-evident fact, and therefore presumably known to jury, that it is within range of possibility for sparks from locomotive to set on fire house near track. McClintock v. Charleston & W. C. R. Co. [S. C.] 64 SE 1009. As to item of damages where plaintiff not entitled to recover at all under the evidence. Kulpinsky v. Sampsell, 145 Ill. App. 242. Erroneous ruling as to measure of damages on offer of evidence where witnesses reached same result as would have had court ruled correctly and error was invited. Wilson v. Chicago, etc., R. Co. [Iowa] 121 NW 1102.

67. Admission in action of trespass to try title of administrator's report of sale of land in absence of order of probate court authorizing it held not ground for reversing judgment for defendant, since, proceeds of sale having been used to pay decedent's debts, purchaser was subrogated to rights of creditors, and entitled to possession until reimbursed. Millwee v. Phelps [Tex. Civ. App.] 115 SW 891. Admission of statement of one not shown to have been officer of defendant railway company that plaintiff's cattle would be delivered in time for certain market, where defendant had already contracted to so deliver them. Gulf, etc., R. Co. v. Looney [Tex. Civ. App.] 115 SW 268. In action against city for flooding of lot due to alleged faulty grading of street, admission of evidence as to cost of filling in lot to level of pavement as raised by city, it being so obvious that such a course was unnecessary that it woud be unreasonable to impute to jury conclusion that expense of filling in lot should be charged to defendant. Mayrant v. Columbia, 82 S. C. 273, 64 SE 416. In action on insurance policy by mortgagee to whom loss was payable as his interest, might appear, admission of letters written by insured to company notifying it of loss, and of formal proofs of loss, though no showing of notice or proofs was required in view of issues tendered. Flint v. Atlas Mut. Ins. Co. [Iowa] 120 NW 1031. In action for value of trees sold to defendant, admission of deed to plaintiff from person other than one under whom it was agreed he claimed, it being sufficient for him to show possession. Hurricane Lumber Co. v. Lowe [Va.] 66 SE 66. Exclusion of evidence where proof of fact was not material to defendant's case. Hudson v. Slate [Tex. Civ. App.] 117 SW 469.

68. On certiorari to review proceedings in justice's court, reception of evidence outside return on question of justice's jurisdiction, where affidavit for writ was insufficient to authorize issuance of writ, and it should have been dismissed. Griffiths v. Logan City Justice's Ct. [Utah] 100 P 1064. Exclusion of evidence that sewer system to be constructed was not connected with a natural drainage of any kind, where evidence established beyond question that it was so connected. Hildreth v. Longmont [Colo.] 105 P 107.

69. As to facts otherwise proved. St. Louis, etc., R. Co. v. Caldwell [Ark.] 116 SW 210; St. Louis, etc., R. Co. v. Sanders [Ark.] 121 SW 327; Payne v. Neuval, 155 Cal. 46, 99 P 476; Perkins v. Sunset Tel. & T. Co., 155 Cal. 712, 103 P 190; Fanning v. Green [Cal.] 104 P 308; Fleet v. Tichenor [Cal.] 104 P 458; Alexander v. Wellington, 44 Colo. 388, 98 P 631; Fearnley v. Fearnley, 44 Colo. 417, 98 P 819; Guldman v. Wilder, 45 Colo. 551, 101 P 759; Carscallen v. Coeur D'Alene & St. Joe Transp. Co., 15 Idaho, 444, 98 P 622; McClain v. Lewiston Interstate Fair & Racing Ass'n [Idaho] 104 P 1015; Hoffner v. Custer, 237 Ill. 64, 86 NE 737; State Nat. Bank v. U. S. Life Ins. Co., 238 Ill. 148, 87 NE 396; Fuhry v. Chicago City R. Co., 239 Ill. 548, 88 NE 221; Laughlin v. Ledgerwood, 240 Ill. 118, 88 NE 463; Pittsburg, etc., R. Co. v. Chicago, 242 Ill. 178, 89 NE 1022, afg. 144 Ill. App. 293; Laughlin v. Brauer, 138 Ill. App. 524; Quandt v. Ernst, 143 Ill. App. 299; State Bank of Chicago v. Wheeler, 146 Ill. App. 568; In re Brown's Will [Iowa] 120 NW 667; Heery v. Reed [Kan.] 102 P 846; Wells v. Royer Wheel Co. [Ky.] 114 SW 737; Matthews v. Joannes Bros. Co., 156 Mich. 663, 16 Det. Leg. N. 241, 121 NW 272; Kennedy v. London & Lancashire Fire Ins. Co. [Mich.] 16 Det. Leg. N. 437, 122 NW 134; Board of Education of Grand Rapids v. Brown [Mich.] 16 Det. Leg. N. 778, 123 NW 562; Hill-Dodge Banking Co. v. Loomis [Mo. App.] 119 SW 967; Yergy v. Helena L. & R. Co. [Mont.] 102 P 310; McAu'ey v. Casualty Co. of America [Mont.] 102 P 586;

Continental Lumber Co. v. Mushaw & Co., 82 Neb. 783, 118 NW 1057; In re Thorp's Will, 150 N. C. 487, 65 SE 379; Hilliboe v. Warner [N. D.] 118 NW 1047; Marthinson v. McCutcheon [S. C.] 66 SE 120; Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co. [S. C.] 66 SE 194; Texas & G. R. Co. v. First Nat. Bank, 47 Tex. Civ. App. 283, 112 SW 589; Sullivan v. Solis [Tex. Civ. App.] 114 SW 456; Chicago, etc., R. Co. v. Clements [Tex. Civ. App.] 115 SW 664; Missouri Val. Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93; Southern Tel. & T. Co. v. Evans [Tex. Civ. App.] 116 SW 418; Hudson v. Slate [Tex. Civ. App.] 117 SW 469; McKee v. West [Tex. Civ. App.] 118 SW 1135; St. Louis, etc., R. Co. v. Adams [Tex. Civ. App.] 118 SW 1155; O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899; Kirby v. Boaz [Tex. Civ. App.] 121 SW 223; Merriman v. Bialack [Tex. Civ. App.] 121 SW 552; Montgomery v. Amsler [Tex. Civ. App.] 122 SW 307; Houston & T. C. R. Co. v. Ravanelli [Tex. Civ. App.] 123 SW 208; Carlisle v. Gibbs [Tex. Civ. App.] 123 SW 216; Neesley v. Soutern Pac. Co. [Utah] 99 P 1067; New York, P. & N. R. Co. v. Wilson's Adm'r [Va.] 64 SE 1060; Dennis v. Gary [Wash.] 105 P 172; Lord v. Henderson, 65 W. Va. 321, 64 SE 134; Stumm v. Western Union Tel. Co., 140 Wis. 528, 122 NW 1032; Woldson v. Larson [C. C. A.] 164 F 548. Particularly in trial by court. Merriman v. Blalack [Tex. Civ. App.] 122 SW 403. Where complaining party testified to almost identically same facts. Miller v. McConnell [S. D.] 120 NW 888. Admission of record book, where witness testified as to facts of his own knowledge after refreshing his memory from book. Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193, rehearing denied, 109 Md. 494, 72 A 458. Allowing officer to testify what he did under warrant, where it and return thereon were in case, and there was nothing in testimony tending to vary or contradict return. State v. Intoxicating Liquor [Vt.] 73 A 586. Statement by plaintiff that she had had transaction with decedent, in view of other testimony in relation thereto. Gaffney v. Mentele [S. D.] 119 NW 1030. Admitting declarations of commissioner of land office that purchaser of public land had forfeited his title for nonoccupancy, where subsequent award to third party was properly admitted, since such award was conclusive as to nonoccupancy in absence of other evidence to overcome it. Slaughter v. Cooper [Tex. Civ. App.] 121 SW 173. Evidence as to weight of cattle, in view of fact that other evidence furnished basis for estimating loss by depreciation in weight, which was question at issue. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 115 SW 882. To establish fact presumed to exist without proof. Golden v. Northern Pac. R. Co. [Mont.] 104 P 549. Testimony asserting a duty, which the court was authorized to find existed as a matter of law. Sloss-Sheffield Steel & Iron Co. v. Green [Ala.] 49 S 301. Photograph of place where railroad wreck occurred taken after some of the broken ties had been piled beside track, in view of evidence that track was torn up and ties broken and bunched by wreck. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. As to changes made in sidewalk after plaintiff was injured, where dangerous character of place at time of accident was clearly established by other evidence and was not controverted. City of Madisonville v. Stewart [Ky.] 121 SW 421. Where similar evidence admitted without objection. See, also, post, § 3, cure by evidence. Rutledge v. Rowland [Ala.] 49 S 461; Napier v. Elliott [Ala.] 50 S 148; New Connellsville Coal & Coke Co. v. Kilgore [Ala.] 50 S 205; Fitzgerald v. Hartford, 81 Conn. 723, 71 A 779; Atlanta & W. P. R. Co. v. Haralson [Ga.] 65 SE 437; Quandt v. Ernst, 143 Ill. App. 299; Sims v. American Ice Co., 109 Md. 68, 71 A 522; Robinson v. Omaha [Neb.] 121 NW 969; Menardi v. Wacker [Nev.] 105 P 287; Smith v. Moore, 149 N. C. 185, 62 SE 892; Brown v. Southern R. Co. [S. C.] 64 SE 961; Laughlin v. Southern Public Service Corp. [S. C.] 64 SE 1010; Bailey v. Walton [S. D.] 123 NW 701; White v. Desmukes Com. Co. [Tex. Civ. App.] 114 SW 852; St. Louis S. W. R. Co. v. Alexander Eccles & Co. [Tex. Civ. App.] 115 SW 648; Keck v. Woodward [Tex. Civ. App.] 116 SW 75; St. Louis & S. F. R. Co. v. Sizemore [Tex. Civ. App.] 116 SW 403; Texas & N. O. R. Co. v. McCoy [Tex. Civ. App.] 117 SW 446; Missouri, K. & T. R. Co. v. Williams [Tex. Civ. App.] 117 SW 1043; International & G. N. R. Co. v. McCullough [Tex. Civ. App.] 118 SW 558; Houston & T. C. R. Co. v. Malloy [Tex. Civ. App.] 118 SW 721; Galveston, etc., R. Co. v. Norton [Tex. Civ. App.] 119 SW 702; Hatzfeld v. Walsh [Tex. Civ. App.] 120 SW 525; Vann v. Denson [Tex. Civ. App.] 120 SW 1020; Missouri, K. & T. R. Co. v. Mitcham [Tex. Civ. App.] 121 SW 871; Myers v. Moody [Tex. Civ. App.] 122 SW 920; Stark Grain Co. v. Harry Bros. Co. [Tex. Civ. App.] 122 SW 947; Johnson v. Union Pac. R. Co. [Utah] 100 P 390. Admission of agreement to pay attorney's fees on conditional sale, where no objection was made to proof of reasonable fees. Williams v. Hampton [Fla.] 49 S 506. Admission of letter written by defendant with reference to written claim made by plaintiff for loss of stock, where plaintiff had previously testified without objection that he had made such claim. Wallace v. Oregon Short Line R. Co. [Idaho] 100 P 904. Admission of work book showing items of work made from hearsay memoranda held **prejudicial** though there was other evidence in record showing that certain work was done, but not amount thereof. San Francisco Teaming Co. v. Gray [Cal. App.] 104 P 999.

As to admitted or uncontroverted facts. St. Louis, etc., R. Co. v. Clark [Ark.] 119 SW 825; Franklin County Lumber Co. v. Grady County [Ga.] 66 SE 264; Demelman v. Brazier, 198 Mass. 458, 84 NE 856; McNitt v. Henderson, 155 Mich. 214, 15 Det. Leg. N. 987, 118 NW 974; Murphy v. Southern Pac. Co. [Nev.] 101 P 322; Goldman v. Hadley [Tex. Civ. App.] 122 SW 282; City of Victoria v. Victoria County [Tex. Civ. App.] 115 SW 67; Wilder's Ex'x v. Wilder [Vt.] 72 A 203; Hendrickson v. Wisconsin Cent. R. Co. [Wis.] 122 NW 758. Where, in action for libel, defendant admits sending libelous letter, admission of copy thereof in connection with other evidence of publication. Briggs v. Brown, 55 Fla. 417, 46 S 325. Deed to party conceded to be common source of title. Robertson v. Heiley [Tex. Civ. App.] 118 SW 1159. Cannot complain of admission of evidence which he corroborated. Williams v. Smith [R. I.] 72 A 1093. As to plaintiff's custom in particular regard, where there

lished,[70] unless prejudice plainly appears.[71] Error in evidence is innocuous in a trial of facts by the court where it may be supposed that the decision was founded solely on proper proofs.[72] Likewise, where the case is tried de novo on appeal.[73]

was evidence as to his conduct in that regard on the particular occasion. Bourassa v. Grand Trunk R. Co. [N. H.] 74 A 690.

70. Western Union Tel. Co. v. Gillis [Ark.] 117 SW 749; In re Higgins' Estate [Cal.] 104 P 6; Fidelity & Deposit Co. v. Colorado Ice & Storage Co., 45 Colo. 443, 103 P 383; Central of Georgia R. Co. v. Mote, 131 Ga. 166, 62 SE 164; MacKenzie v. Minis [Ga.] 63 SE 900; Bickerle v. Brandon, 133 Ill. App. 114; Van Norman v. Modern Brotherhood of America [Iowa] 121 NW 1080; City of Covington v. Gates [Ky.] 117 SW 342; Peters v. Tilghman [Md.] 73 A 726; McGaw v. Acker, Merrall & Condit Co. [Md.] 73 A 731; Hawley v. Minneapolis St. R. Co., 108 Minn. 136, 121 NW 627; Turner v. Southwest Missouri R. Co. [Mo. App.] 120 SW 128; Young v. Kinney [Neb.] 122 NW 679; Muntz v. Cottage Hill Land Co., 222 Pa. 621, 72 A 247; Talbert v. Western Union Tel. Co. [S. C.] 64 SE 862; Iowa Nat. Bank v. Sherman [S. D.] 119 NW 1010; Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897; Modern Dairy & Creamery Co. v. Blanke & Hauk S. Co. [Tex. Civ. App.] 116 SW 153; Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149; Pierce v. Chicago & M. Elec. R. Co., 137 Wis. 550, 119 NW 297; First Nat. Bank v. Abbott [C. C. A.] 165 F 852; Standard Marine Ins. Co. v. Nome Beach Letherage & Transp. Co. [C. C. A.] 167 F 119. As to conceded fact. Wyatt v. Pacific Elec. R. Co. [Cal.] 103 P 892. To prove fact not in dispute. Little v. Rich [Tex. Civ. App.] 118 SW 1077. Where witness had previously answered identical question. Penry v. Dazier [Ala.] 49 S 909; United States Cast Iron, Pipe & Foundry Co. v. Granger [Ala.] 50 S 159. Where similar evidence admitted without objection. Hays v. Lemoine, 156 Ala. 465, 47 S 97; Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410; Central of Georgia R. Co. v. Simons [Ala.] 50 S 50. As to when grantee acquired property, where deed introduced in evidence. Lecroix v. Malone, 157 Ala. 434, 47 S 725. Of stenographic notes, where stenographer gave evidence using notes to refresh memory. Roanoke R. & Elec. Co. v. Young, 108 Va. 783, 62 SE 961. As to what witness understood by word hardpan, in view of his testimony as to his knowledge on subject, etc. Robinson v. Yetter, 238 Ill. 320, 87 NE 363. That plaintiff was intoxicated before and when he entered defendant's train, where was clearly shown by other evidence that he was intoxicated while on train and guilty of conduct justifying his removal. Norfolk & W. R. Co. v. Brame [Va.] 63 SE 1018. As to custom of filing papers in land office offered to show letter not in proper file, where letter referred to land in controversy, was before jury as ancient document, and other evidence showing same not on proper file. Keck v. Woodward [Tex. Civ. App.] 116 SW 75. Where plaintiff exhibited injured parts of his body to jury, refusal to permit defendant's physician to examine injuries before jury and testify in regard thereto, where said physician had previously examined him and testified fully at the trial. St. Louis S. W. R. Co. v. Browning [Tex. Civ. App.] 118 SW 245. Of testimony that plaintiff was intoxicated offered to discredit his testimony as to what occurred at certain time and place, where his testimony in that regard was not substantially different from that of defendant's witness. El Paso & N. E. R. Co. v. Lumbley [Tex. Civ. App.] 120 SW 1050. In action to restore lost deed, defendant's evidence that when she handed deed to her husband she instructed him not to deliver it to grantee but to third person, in view of evidence that deed was delivered and was treated by her as operative conveyance, and her testimony that she knew that he intended to deliver it to grantee and that he had done so but did not complain, and of fact that she was subsequently allowed to testify that she never authorized him to deliver it. Thomas v. Scott, 221 Mo. 271, 119 SW 1098. Exclusion of part of original petition setting out injuries complained of, where injuries set out in amended petition on which case was tried were substantially the same. Missouri, K. & T. R. Co. v. Mitcham [Tex. Civ. App.] 121 SW 871.

71. Exclusion of evidence by mother who saw child killed by being jerked from train prejudicial, though other witnesses testified to same fact. Miles v. St. Louis, etc., R. Co. [Ark.] 119 SW 837. Exclusion of certified copy of government surveyor's field notes held not cured by secondary evidence of what such notes contained. Kellogg v. Finn [S. D.] 119 NW 545.

72. Stewart v. Douglass, 9 Cal. App. 712, 100 P 711; Guldman v. Wilder, 45 Colo. 551, 101 P 759; Kenealy v. Glos, 241 Ill. 15, 89 NE 289; Chicago Wire Chair Co. v. Kennedy & Wright Co., 141 Ill. App. 196; City of Earlville v. Radley, 141 Ill. App. 359; In re Wilson, 79 Kan. 674, 100 P 635; Bernick v. McClure, 107 Minn. 9, 119 NW 247; Sanzenbacher v. Santhuff, 220 Mo. 274, 119 SW 395; United States Commercial Co. v. Joachimstahl [N. J. Law] 72 A 46; Prime v. Yonkers, 131 App. Div. 110, 115 NYS 305; Wooden v. Wooden [Tex. Civ. App.] 116 SW 627; Morris v. Moon [Tex. Civ. App.] 120 SW 1063; Carney v. Vogel, 52 Wash. 571, 100 P 1027; Springfield Shingle Co. v. Edgecomb Mill Co., 52 Wash. 620, 101 P 233; Hastie v. Jenkins, 53 Wash. 21, 101 P 495; In re Jacobs' Will, 139 Wis. 457, 121 NW 126; In re Cleary's Estate, 139 Wis. 600, 121 NW 146; Stark v. Duhring, 140 Wis. 521, 122 NW 1131; Yount v. Strickland, 17 Wyo. 526, 101 P 942; Ajax Forge Co. v. Morden Frog & Crossing Works [C. C. A.] 164 F 843. Erroneous admission of evidence where sufficient competent evidence to support findings. Union Cent. Life Ins. Co. v. Washburn [Ala.] 48 S 475; Freeman v. Peterson, 45 Colo. 102, 100 P 600; Tuttle v. Welty [Colo.] 102 P 1069; Ray v. Pollock, 56 Fla. 530, 47 S 940; Kennard v. Curran, 239 Ill. 122, 87 NE 913; Bauman v. Stoller, 139 Ill. App. 393; City of Earlville v. Radley, 141 Ill. App. 359; Holroyd v. Millard, 142 Ill. App. 392; Griffith v. Anchor Fire Ins. Co. [Iowa] 120 NW 90; Fischer v. Missouri Pac. R. Co., 135 Mo. App. 37, 115 SW 477; Sullivan v. Solis [Tex. Civ. App.] 114 SW

An improper mode of questioning or an erroneous ruling on a proper question may be harmless because of the answer given [74] or the lack of an answer.[75] Application

456; Savage v. Umphries [Tex. Civ. App.] 118 SW 893; Gainesville Water Co. v. Gainesville [Tex. Civ. App.] 122 SW 959; Schumacher v. Draeger, 137 Wis. 618, 119 NW 305. Where result would be same without it. Hoffner v. Custer, 237 Ill. 64, 86 NE 737. Where no other judgment could properly have been rendered. Merriman v. Blalack [Tex. Civ. App.] 122 SW 403. Where could have had no influence over conclusion reached. Bowen v. Eaton & Co. [Ind. App.] 89 NE 961; Merriman v. Blalack [Tex. Civ. App.] 121 SW 552. If competent and relevant evidence is sufficient to support findings, and is no reasonable ground for inferring from nature of improper evidence that it was or might have been material factor in court's determination of facts. American Bridge Co. v. American Dist. Steam Co., 107 Minn. 140, 119 NW 783. Unless it can be said that his findings indicate that he was influenced thereby, or there was not sufficient competent evidence to support his findings. Edwards v. White [Tex. Civ. App.] 120 SW 914. Admission of evidence as to damages, where findings and conclusions showed damages were estimated on proper basis. Missouri, K. & T. R. Co. v. McLean [Tex. Civ. App.] 118 SW 161. Admission of evidence in will contest, where record showed that it was received merely de bene esse, and not that it was considered by court. In re Hyde's Will, 141 Wis. 41, 122 NW 774. Excluding evidence as to irregularities in election contest, where was no specific allegation of such irregularities. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. In condemnation proceedings, where award of commissioners supported by evidence. In re City of New York, 129 App. Div. 711, 114 NYS 68.

Prejudicial: Where it affirmatively appeared that chancellor or judge excluded competent evidence, held that it could not be said that error was harmless, though chancellor recited in his opinion that judgment or decree would and should have been same had such evidence been admitted. Blount v. Blount [Ala.] 48 S 581. Judgment reversed where improper evidence was repeatedly introduced over objection, and it was not clear that judgment was right. Baker v. Baker [Ind. App.] 86 NE 864.

73. Exclusion or admission of evidence is rarely reversible error in equity case, since appellate court may consider competent proof offered and excluded, or reject incompetent proof received over objection. Hanson v. Neal, 215 Mo. 256, 114 SW 1073. Admission of oral evidence where case could be determined on appeal on documentary evidence without reference to oral evidence. Davis v. Lee, 52 Wash. 330, 100 P 752. Admission of incompetent evidence, since supreme court will ignore it and affirm judgment only if sustained by preponderance of competent evidence. Smith v. Scott, 51 Wash. 330, 98 P 763. Refusal to strike analysis of evidence filed by commissioner in equity case with his report and which was prepared by agent of one of the parties. Where evidence was all in record and could be examined without aid of such analysis. Mountain Lake Land Co v. Blair [Va.] 63 SE 751.

74. Ludins v. Metropolitan Life Ins. Co., 117 NYS 156. Error in form of question as to plaintiff's habits of sobriety and industry. Louisville & N. R. Co. v. Daniel [Ky.] 115 SW 804. Irresponsive answers to questions allowed over objection. Payne v. Neuval, 155 Cal. 46, 99 P 476. Question asked expert, in view of indefinite answer. Perkins v. Sunset Tel. & T. Co., 155 Cal. 712, 103 P 190. Overruling objections to defective hypothetical questions, where answers do not tend to injure objecting party. Miller v. Leib, 109 Md. 414, 72 A 466. Overruling of objection to question where witness answered that he did not know. Title Guaranty & Surety Co. v. Nichols [Ariz.] 100 P 825. Overruling objection to question where answer did not materially add to effect of evidence previously admitted without objection. Kimic v. San Jose-Los Gatos Interurban R. Co. [Cal.] 104 P 986. Permitting cross-examination of medical expert for purpose of showing that he always testified for defendant corporations, where his answers showed the contrary. McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223. Asking witness whose duty it was to do certain acts where he alleged and testified that it was his duty. Cook v. Pittock & Leadbetter Lumber Co., 51 Wash. 316, 98 P 1130. Sustaining objection to question as leading where ruling was followed by recital of what was said and done, and question was objectionable on another ground. Dugane v. Hvezda Pokroku No. 4 [Iowa] 119 NW 141. Asking leading questions where it was apparent from answers that they were in no way affected by form of question. United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 P 901. Ruling requiring witness to answer questions as to certain payments, evidence as to which was neither material nor relevant, where he denied that any payments were made. Kaufman v. Cooper, 38 Mont. 6, 98 P 504, rehearing denied, 38 Mont. 6, 98 P 1135. Overruling objection to question calling for conclusion of witness, where answer stated fact. Miller v. McConnell [S. D.] 120 NW 888. Refusal to allow witness to answer question where bill of exceptions showed that answer which he was expected to give was not responsive. De Hoyos v. Galveston, etc., R. Co. [Tex. Civ. App.] 115 SW 75. Permitting plaintiff to interrogate defendant as to land transaction between plaintiff and third person, where his answers fully exonerated himself from any culpability in connection therewith. Holland v. Riggs [Tex. Civ. App.] 116 SW 167.

75. Overruling objections to questions which were not answered. Stowers Furniture Co. v. Brake [Ala.] 48 S 89; Birmingham R., L. & P. Co. v. Baker [Ala.] 49 S 755; St. Louis, etc., R. Co. v. Freeman [Ark.] 116 SW 678; Moneyweight Scale Co. v. McCormick, 109 Md. 170, 72 A 537. Form in which questions were asked where objections thereto were sustained. Meddock v. Williams [Ark.] 120 SW 842.

of these doctrines to dirct,[76] redirect,[77] and cross-examination,[78] and to the order of taking proof,[79] the burden of proof,[80] the reception of affidavits and depositions,[61]

76. See 11 C. L. 1703.

77. Sustaining objection to question where counsel did not question witness further on subject, which he might have done notwithstanding ruling. Allen v. Urdangen [Iowa] 119 NW 724.

78. Held harmless: Unimportant matters elicited. United States Oil & Land Co. v. Bell, 153 Cal. 781, 96 P 901. Sustaining objection to question. In re Higgins' Estate [Cal.] 104 P 6; Kimic v. San Jose-Los Gatos Interurban R. Co. [Cal.] 104 P 986; McClain v. Lewiston Interstate Fair & Racing Ass'n [Idaho] 104 P 1015; Leistikow v. Zuelsdorf [N. D.] 122 NW 340; Halwers v. American Granite Co. [Wis.] 123 NW 789. Sustaining objections to immaterial questions. Just v. Idaho Canal & Imp. Co. [Idaho] 102 P 381. Exclusion of questions for purpose of impeachment, in view of other evidence. Devine v. Chicago City R. Co., 237 Ill. 278, 86 NE 689. Excluding question going to value of plaintiff's business, direct testimony on subject being very full. Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co. [S. C.] 66 SE 194. Refusal to allow question as to how often plaintiff used elevator, where no time was fixed, since, to charge plaintiff with notice, use would have had to have been after existence of alleged defects. Roth v. Buettel Bros. Co. [Iowa] 119 NW 166. Allowing question in view of statement of counsel and instruction as to its purpose. St. Louis, etc., R. Co. v. Dysart [Ark.] 116 SW 224. Admission of letter of witness where he had previously testified to substantially same effect. Weaver v. Richards, 156 Mich. 320, 16 Det. Leg. N. 117, 120 NW 818. Excluding questions which merely call for repetition of testimony. McCherry v. Snare & Triest Co., 130 App. Div. 241, 114 NYS 674. Improper cross-examination when facts fully proved by other evidence. Turley v. Thomas [Nev.] 101 P 568. Permitting cross-examination of carrier's witness as to settlements with others injured in same accident, where defendant admitted plaintiff's injury, and that he was entitled to recover something. Murphy v. Southern Pac. Co. [Nev.] 101 P 322. Limiting scope, where witness fully examined by defendant. St. Louis, etc., R. Co. v. Raines [Ark.] 119 SW 665. Alleged improper limiting, where witness was afterwards called and fully examined as witness for complaining party, was not an adverse or unwilling witness, and complaining party had full opportunity to examine him as to all matters as to which he desired to cross-examine him. Miller v. Neale, 137 Wis. 426, 119 NW 94. Where for purpose of impeachment defendant was erroneously permitted to show that plaintiff had been confined in jail for an offense, held not reversible error to permit plaintiff's counsel on recross-examination to show that he was not guilty of the charge and had been wrongfully convicted. Missouri, K. & T. R. Co. v. Adams, 42 Tex. Civ. App. 274, 114 SW 453. Permitting plaintiff to call defaulting defendant for cross-examination under the statute, where testimony and manner of eliciting it were not materially different than they would have been had he been called as plaintiff's witness. Bernick v. McClure, 107 Minn. 9, 119 NW 247.

79. Hoffbaur v. Morgan [Ind.] 88 NE 337; In re Winslow's Will [Iowa] 122 NW 971; Worsley v. Ayres [Iowa] 123 NW 353; Himmelberger-Harrison Lumber Co. v. Deneen, 220 Mo. 184, 119 SW 365; Cox v. Polk [Mo. App.] 123 SW 102; Hoskovec v. Omaha Street R. Co. [Neb.] 123 NW 305. Admission of evidence in chief which was properly admissible only in rebuttal. Midland Val. R. Co. v. Hoffman Coal Co. [Ark.] 120 SW 380; Camden Interstate R. Co. v. Lester [Ky.] 118 SW 268. Mere admission in rebuttal of evidence necessary to plaintiff's case in chief. City of Omaha v. Omaha Water Co. [C. C. A.] 171 F 647. Refusal to permit introduction of evidence out of turn, where evidence on same subject was admitted at later stage of trial. Reclamation Dist. v. Clark, 155 Cal. 345, 100 P 1091. Refusal to permit defendant to reopen his case in chief after plaintiff had testified in rebuttal, where was virtually permitted to do so by his testimony in rebuttal. Wolfort v. Hochbaum [Ark.] 117 SW 525.

80. Ruling as to burden of proof in trial by court. Dreeland v. Pascoe [Mont.] 102 P 331. Where evidence conclusively proved fact, instruction erroneously imposing excessive burden of proof on negative. Watkins v. Watkins [Tex. Civ. App.] 119 SW 145.

81. Admission of depositions containing unanswered questions propounded to defendant, defendant appeared at trial and testified. Adams v. Hamilton [Tex. Civ. App.] 116 SW 1169. Admission of evidence that plaintiff had not consulted his attorney as to certain answers, where deposition with questions was not introduced. San Antonio & A. P. R. Co. v. Spencer [Tex. Civ. App.] 119 SW 716. Allowing question and answer in deposition to stand where they were rendered meaningless by exclusion of part of said depositon. Vaillancourt v. Grand Trunk R. Co. [Vt.] 74 A 99. Striking out interrogatories which called only for opinion of witness, he having testified as to whole history of transaction in question. O'Neill v. Edson Keith & Co. [Or.] 104 P 725. Exclusion of statement in deposition offered to contradict witness where it did not contradict his evidence as to any material fact but merely showed uncertainty of his recollection, which he admitted. Fitzgerald v. Hartford, 81 Conn. 723, 71 A 779. Exclusion of portion of plaintiff's deposition giving terms of contract, and affidavit and certificate of stenographer and notary that contract was offered in evidence and filed as exhibit, but had been lost, where duplicate of contract held by defendants was admitted in evidence at plaintiff's instance. Koch v. Wimbrow Bros. [Md.] 73 A 896. Where entire deposition was introduced in evidence, defendants not prejudiced by court's action, on their objection, in limiting its use to the fact sought to be shown by plaintiff thereby. Hodgkins v. Dunham, 10 Cal. App. 690, 103 P 351. Suppression of deposition where

opinion [82] and expert testimony,[83] admission of secondary evidence,[84] and rulings

previous deposition of witness was used and the two were not shown to differ in any material respect. First Nat. Bank v. Thomas [Tex. Civ. App.] 118 SW 221.

82. Williams v. Morris, 237 Ill. 254, 86 NE 729; Worsley v. Ayres [Iowa] 123 NW 353; Roberts v. Virginia-Carolina Chemical Co. [S. C.] 66 SE 298. Question as to distance lanterns could be seen in fog. New York, P. & N. R. Co. v. Wilson's Adm'r [Va.] 64 SE 1060. Statement by witness as to her opinion of her legal rights. Walker v. Walker [N. C.] 65 SE 923. Permitting witness to state his opinion where he testifies as to facts on which it is based. Combs v. Lake [Ark.] 120 SW 977; McReynolds v. Smith [Ind.] 86 NE 1009; Midgette v. Branning Mfg. Co., 150 N. C. 333, 64 SE 5; Bond v. International & G. N. R. Co. [Tex. Civ. App.] 118 SW 867; Johnson v. Union Pac. R. Co. [Utah] 100 P 390; In re Miller's Estate [Utah] 102 P 996. Mere fact that surveyor in testifying to result of survey made by him states his conclusion in respect to effect of his survey. Andrews v. Wheeler, 10 Cal. App. 614, 103 P 144. While in action for damages to number of different articles of personalty witness will not be allowed, over objection, to give general estimate in one sum of amount owner has been damaged, yet where gives details of damage to each with amount thereof, mere adding up of such amounts and stating total furnishes no ground for new trial. Neal v. Davis Foundry & Mach. Works, 131 Ga. 701, 63 SE 221. Permitting witness to state his supposition as to a proved and admitted fact. Casey v. Kelly-Atkinson Const. Co., 240 Ill. 416, 88 NE 982. Conclusion of witness sustained by circumstantial proof. Suchomel v. Maxwell, 240 Ill. 231, 88 NE 558. Admission of opinion evidence, where fact sought to be established was proved by other uncontradicted evidence to which same objection did not exist, and concerning which no error was assigned. Neeley v. Roberts [S. D.] 122 NW 655. Admission of opinion evidence as to length of time deceased had been dead when witness saw him, where allegations of complaint as to time and manner of his death were not denied by answer. Palmer v. Schultz, 138 Wis. 455, 120 NW 348. Permitting witness to testify as to reasonable attorney's fee, where reasonableness of fee allowed was not questioned. Beach v. Huntsman, 42 Ind. App. 205, 85 NE 523, former opinion [Ind. App.] 83 NE 1033. Permitting nonexpert to testify as to speed of train, where there was no substantial conflict of evidence on question. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. Admission of nonexpert testimony, where result must be same if it was disregarded. Hedderich v. Hedderich [N. D.] 123 NW 276. Permitting witness to give opinion, in view of absolute uncertainty of his objectionable testimony and presumption that verdict was supported by evidence of probative force. Haney v. Pinckney, 155 Mich. 656, 15 Det. Leg. N. 1130, 119 NW 1099. Admission of opinion evidence, where similar evidence admitted without objection. Johnson v. Union Pac. R. Co. [Utah] 100 P 390. Exclusion of certain nonexpert opinion evidence relative to appellant's mental conditon in view of testimony which they were permitted to give. In re Swick [Minn.] 119 NW 791. Exclusion of opinion of witness as to possibility of driving over certain part of highway, where jury had before it facts in regard to such highway. Dralle v. Reedsburg, 140 Wis. 319, 122 NW 771.

83. Admission of testimony to prove undisputed fact of common knowledge. Ryan v. Oakland Gas, Light & Heat Co., 10 Cal App. 484, 102 P 558. Admission of testimony, where jury, upon undisputed evidence, must have reached same conclusion as expert or where such evidence is on point on which jury are entirely competent to decide in accordance with the general experience. Puget Sound Elec. R. Co. v. Van Pelt [C. C. A.] 168 F 206. In personal injury action permitting expert to testify that if plaintiff's nervous condition was not cured it might result in insanity, particularly in view of evidence, properly admitted, that as result of injuries plaintiff was a mental wreck. Rapid Transit R. Co. v. Allen [Tex. Civ. App.] 117 SW 486. Testimony that certain act would not be exercise of ordinary care, skill and attention, where it was not contention that such act would not be negligence, but only question was whether such act was done by defendant. Ruth v. Johnson [C. C. A.] 172 F 191. Admission of testimony of expert whose examination was made with view of testifying in case, where defendant's liability was undisputed and in view of other evidence. Casey v. Chicago City R. Co., 237 Ill. 140, 86 NE 606. Omission of facts in hypothetical question is not necessarily prejudicial, particularly where they are clearly brought out in subsequent examination of the witness. Crosby v. Portland R. Co. [Or.] 100 P 300, rehearing denied [Or.] 101 P 204. Assumption of fact not proved in hypothetical question, where it was apparent from answer that witness was not misled. Id. Overruling objection to hypothetical questions on ground that not enough facts were brought out in evidence or stated in question to enable experts to form or express intelligent opinion. Curtley v. Security Sav. Soc., 51 Wash. 242, 98 P 667. Exclusion of opinions as to whether manner in which logs were loaded was proper and reasonably safe, where complaining party's witnesses were permitted to testify fully as to manner in which they were loaded and usual manner of loading them. Hogg v. Standard Lumber Co., 52 Wash. 8, 100 P 151.

84. Admission of copy of will, where original in evidence. Larabee v. Larabee, 240 Ill. 576, 88 NE 1037. Admission of copies of books, where originals were received without objection. Bartlett v. Illinois Surety Co. [Iowa] 119 NW 729. Allowing copies of letters to be introduced, where originals where in possession of complaining party who testified that copies were correct. Penry v. Dozier [Ala.] 49 S 909. Permitting plaintiff to testify that deed was recorded, where deed itself, bearing indorsements of filing and record, was introduced in evidence. Napier v. Elliott [Ala.] 50 S 148. A copy of deed being admitted by agreement, introducing page of deed record without having

on motions to strike evidence,[85] are cited below. A few illustrative cases wherein errors respecting evidence have been held prejudicial are collected.[86] Improper

first proved loss of original deed. Kin Kaid v. Lee [Tex. Civ. App.] 119 SW 342. Permitting witness to refresh his memory by reading from exhibits instead of from books which they were copied, where books were in evidence, and it was not claimed that exhibits were not accurate copies. Alexander v. Wellington, 44 Colo. 388, 98 P 631.

85. Striking out irresponsive portion of answer to question, where part allowed to remain constituted complete answer. Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P 1063. Striking out evidence, where other uncontradicted evidence to same effect in record. Metzger v. Manlove, 241 Ill. 113, 89 NE 249. Striking out portion of answer, where evidence of same facts was afterwards admitted without objection. Fearon v. Mullins, 38 Mont. 45, 98 P 650. Striking out testimony as to custom, where witness denied that such custom existed. Miller v. Neale, 137 Wis. 426, 119 NW 94. Refusal to strike answer as not responsive where another witness subsequently testified to same facts. Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005. Refusal to strike out testimony, where substantially same fact was proven by testimony of another witness without objection. Edwards v. White [Tex. Civ. App.] 120 SW 914. Refusal to strike hearsay testimony, in view of subsequent proper testimony as to same matter. Gaffney v. Mentele [N. D.] 119 NW 1030. Refusal to strike ordinance introduced by plaintiff, where defendant had introduced complaint containing copy of ordinance, and motion did not include evidence so introduced by defendant. Denver City Tramway Co. v. Martin, 44 Colo. 324, 98 P 836. Refusal to strike hearsay evidence, which was of no special importance. Collins v. Hazel Lumber Co. [Wash.] 103 P 798. Refusal to strike answers tending to show that defendant had not examined certain person before selecting him as conductor, where it was practically admitted that it had not done so. Lowe v. San Francisco & N. W. R. Co., 154 Cal. 573, 98 P 678. Refusal to strike answer as conclusion. O'Shaugnnessy v. Chicago City R. Co., 144 Ill. App. 174; Boesen v. Omaha St. R. Co., 83 Neb. 378, 119 NW 771. Refusal to strike answer as not responsive, where verdict was abundantly supported by other evidence. Clague v. Tri-State Land Co. [Neb.] 121 NW 570.

86. **Admission.** McCown v. Wilson [Ark.] 122 SW 478; Briggs v. Brown, 55 Fla. 417, 46 S 325; Town of Pelham v. Pelham Tel. Co., 131 Ga. 325, 62 SE 186; Odell v. Story, 81 Neb. 437, 118 NW 1103; Finkelstein v. Keene Elec. R. Co. [N. H.] 73 A 705. Incompetent or irrelevant testimony on behalf of either party, where record showed that controversy must be determined largely on testimony of plaintiff and defendant alone. McIntosh v. McNair [Or.] 99 P 74. Immaterial evidence where it is closely connected with subject-matter of controversy, and is of a kind calculated to impress minds of jury that rights of one of parties is materially affected thereby, and nothing is said by court concerning its materiality or application, unless it appears, from consideration of whole case, that it did not have that result. Cincinnati Punch & Shear Co. v. Thompson [Kan.] 102 P 848. Fact that evidence erroneously admitted was of special value to party at whose instance it was received for purpose other than that for which it was received held to show that error was not harmless. Klauder-Weldon Dyeing Mach. Co. v. Gagnon [C. C. A.] 166 F 286. Evidence held not merely cumulative so as to render its erroneous admission harmless. Wall's Ex'r v. Dimmitt [Ky.] 117 SW 299. Irrelevant testimony tending to prejudice jury against plaintiff and obtain their sympathy for defendant. Woodbridge Ice Co. v. Semon Ice Cream Corp., 81 Conn. 479, 71 A 577. Testimony of surveyor that in his opinion certain line was true boundary. Goodson v. Fitzgerald [Tex. Civ. App.] 115 SW 50. Opinion of nonexpert, where he failed to give facts on which it was based. Fowlies' Adm'x v. McDonald Cutler & Co. [Vt.] 72 A 989. Opinions of experts based on hearsay. Chesapeake & O. R. Co. v. Wiley [Ky.] 121 SW 402. Impeaching testimony where no foundation laid. Murphy v. St. Louis, etc., R. Co. [Ark.] 122 SW 636. Impeaching evidence to show that witness testified falsely as to having been engaged in unlawful business. Schnase v. Goetz [N. D.] 120 NW 553. Improper corroborating evidence, in view of fact that all witnesses were interested. Haas v. Bonwit, Teller & Co., 119 NYS 202. That defendant's employe, who had arrested plaintiff, had made other arrests, though similar evidence was afterwards admitted. Philadelphia, R. & W. R. Co. v. Green, 110 Md. 32, 71 A 986. Documentary evidence tending to induce jury to believe that certain person possessed authority to represent defendant, which he did not. Curry v. Congress Hall Hotel Co., 75 N. J. Law, 735, 73 A 124. Declarations of defendant's servant. Meyers v. San Pedro, etc., R. Co. [Utah] 104 P 736. Admissions of decedent to show that next of kin suffered no pecuniary loss by his death. Murphy v. St. Louis, etc. R. Co. [Ark.] 122 SW 636. Ex parte statements of decedent made after date of rendition of services for which recovery was sought. Bettinghouse v. Bettinghouse, 156 Mich. 169, 16 Det. Leg. N. 37, 120 NW 617. Photographs. Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969. Photograph of place of accident showing changes made after it occurred. Davenport v. Matthews, 130 App. Div. 257, 114 NYS 715. Permitting street commissioner to testify that he repaired walk after accident. Woods v. Poplar Bluff, 136 Mo. App. 155, 116 SW 1109. Not within issues. Pennington v. Thompson Bros. Lumber Co. [Tex. Civ. App.] 122 SW 923. Evidence of negligent act other than that relied on for recovery. Louisville & N. R. Co. v. Payne [Ky.] 118 SW 352. In action against railroad company for damages resulting from fire alleged to have been set by engine, evidence to show previous fires on lands of different persons along defendant's right of way as showing that lands were "subject to fires" and hence that defendant violated statute in

argument,[87] or conduct of counsel,[88] or party,[89] or interference with the right to open and close,[90] may be disregarded if without material effect on the result. The same is true of remarks by the court.[91] Error in instructing the jury or refusing to do so is ground for reversal when the jury has been misled or it was efficient to the result declared in the verdict,[92] and not otherwise.[93] The verdict and findings

not clearing right of way every six months, there being nothing to show that such fires were caused by defendant. Higgins v. Long Island R. Co., 129 App. Div. 415, 114 NYS 262. Paper purporting to be copy of bill of lading in action against carrier to recover demurrage paid under protest, in view of issue as to where notice of arrival of car was to be sent. Lieberman v. Baltimore & O. R. Co., 115 NYS 1034. Incompetent evidence as to damages. Statler v. George A. Ray Mfg. Co., 195 N. Y. 478, 88 NE 1063. Evidence outside of issues as foundation for recovery of special damages. Fass v. Western Union Tel. Co., 82 S. C. 461, 64 SE 235. As to item of damages not pleaded, where it could not be said that it did not increase amount of verdict. Gordan v. Northern Pac. R. Co. [Mont.] 104 P 679. Injecting element of damage not supported by petition. Barr v. Quincy, etc., R. Co. [Mo. App.] 120 SW 111.

Exclusion. Hays v. Lemoine, 156 Ala. 465, 47 S 97. Where it did not appear whether case was decided for defendant upon the conflict of evidence, or because, without excluded evidence, plaintiff had failed to make out case entitling him to recover. Steele v. Lippman, 115 NYS 1099. Exclusion cannot be said to be harmless where court cannot say that, had it been admitted, there would not have been sufficient evidence to authorize jury to infer actionable negligence authorizing recovery. Lovelady v. Birmingham R., L. & P. Co. [Ala.] 50 S 96. Of competent evidence on crucial question upon which evidence was in direct conflict. Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 SW 249. Memorandum in view of fact that oral testimony to same effect was stricken out. Edwards v. Cedar Rapids, 138 Iowa, 421, 116 NW 323. Exclusion of depositions held not harmless on ground that testimony was immaterial or merely cumulative. Epstein v. Pennsylvania R. Co. [Mo. App.] 122 SW 366. Exclusion of evidence which in effect put plaintiff out of court held not rendered harmless because of variance between pleadings and proof as to description of premises, involved. Prince v. Prince [Ala.] 49 S 873. Doctrine of error without prejudice has no application to ruling which in effect puts party against whom it is made out of court. Id.

87. See Argument and Conduct of Counsel.

88. See Argument and Conduct of Counsel. Handing exhibit to jury when they retired without first asking permission of court. Wilson v. Faxon, 63 Misc. 561, 117 NYS 361. Reading of supplemental petition to jury, as part of pleadings, though original complaint amended after it was filed. Hicks v. Stewart [Tex. Civ. App.] 118 SW 206.

89. See 9 C. L. 1575.

90. Denial of right. Kirkwood v. Summit County School Dist., 45 Colo. 368, 101 P 343; Oexner v. Loehr, 133 Mo. App. 211, 113 SW 727. Holding plea which cast on defendant burden of proof, sufficient, and giving him right to open and close, where he was entitled to that right under another plea. Wright v. Johnson [Ga. App.] 65 SE 60.

91. See, also, Trial, § 2. American Standard Jewelry Co. v. Hill [Ark.] 117 SW 781; O'Shaugnnessy v. Chicago City R. Co., 144 Ill. App. 174; Logan v. Lenawee County Agricultural Soc., 156 Mich. 537, 16 Det. Leg. N. 192, 121 NW 485; Lyles v. Western Union Tel. Co. [S. C.] 65 SE 832. In case tried by court, where judgment for right party. Stephens v. Philadelphia Fire Ass'n [Mo. App.] 123 SW 63. Remarks inconsistent with ruling, where ruling was correct on the merits. Miles v. Miles, 137 Mo. App. 38, 119 SW 456. Remarks bearing only on admissibility of evidence, in view of state of evidence on issue as to which it related. Houston & T. C. R. Co. v. Shapard [Tex. Civ. App.] 118 SW 596. Comment as to excluded evidence. Corrigan v. Wilkes-Barre & W. V. Trac. [Pa.] 74 A 420. Remark as to what constituted a hoisting plant, which was one of articles alleged to have been converted, where, judging from size of verdict, jury might have made no allowance therefor, and there was no showing that they did. Central Consol. Mines Corp. v. Mills, 45 Colo. 283, 100 P 410. Remark that upon principle witness was not competent to testify to certain fact, but that in deference to former opinion of supreme court he would overrule objection, where such fact was established without dispute by witnesses for both sides. Souchek v. Karr, 83 Neb. 649, 120 NW 210. Remark after giving requested instructions that now he would come back to his own instructions. Maxwell v. Wellington, 138 Wis. 607, 120 NW 505. Conversation between court and counsel in regard to certain elements of damage, in view of further remarks of court later on, and of fact that matter was not followed up in submitting issues to jury. Lathrop v. Quincy, etc., R. Co., 135 Mo. App. 16, 115 SW 493. Remark in action against city and its councilmen for personal injuries due to defective sidewalk to effect that charter provision exempting city from liability was unconstitutional held not prejudicial as being tantamount to instruction to find for councilmen where complaint was insufficient to authorize recovery against latter in any event. Batdorff v. Oregon City [Or.] 100 P 937.

Held prejudicial: Questions of judge directed to plaintiff as witness of such nature as to indicate opinion. Bryant v. Anderson, 5 Ga. App. 517, 63 SE 638.

92. Lord v. New York Evening Journal Pub. Co., 130 App. Div. 105, 114 NYS 299; Carpenter v. Trinity & B. V. R. Co. [Tex. Civ. App.] 119 SW 335; Goggan v. Garner [Tex. Civ. App.] 119 SW 341. Where it clearly appeared that verdict must be referred to issue thereby erroneously submitted. Hall v. Parry [Tex. Civ. App.] 118 SW 561. Where impossible to say that jury were not influenced thereby. Conklin v. Central New

York Tel. & T. Co., 130 App. Div. 308, 114 NYS 190; Lesster v. Columbia Storage Warehouses, 130 App. Div. 551, 115 NYS 61; Peterson v. Conlan [N. D.] 119 NW 367; Brown v. Edsall [S. D.] 122 NW 658; Texas & P. R. Co. v. Corn [Tex.] 114 SW 103; Beauchamp v. Williams [Tex. Civ. App.] 115 SW 130; El Paso & N. E. R. Co. v. Sawyer [Tex. Civ. App.] 119 SW 107; St. Louis, B. & M. R. Co. v. Yznaga [Tex. Civ. App.] 122 SW 267. Where instructions are inconsistent and contradictory and it is impossible to tell which instruction jury followed in reaching their verdict. Ryan v. Oakland Gas, Light & Heat Co., 10 Cal. App. 484, 102 P 558; Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co. [Va.] 66 SE 73. Submitting case on wrong theory. Lessler v. Bernstein, 65 Misc. 58, 119 NYS 197. On issue not raised by pleadings and unsupported by evidence. Ord Hardware Co. v. Case Threshing Mach. Co., 83 Neb. 353, 119 NW 682. Not warranted by evidence. Huddleston v. St. Louis, etc., R. Co. [Ark.] 115 SW 381; Ayer & Lord Tie Co. v. Young [Ark.] 117 SW 1080; Hanson v. Owens [Ga.] 64 SE 800; Leach v. St. Louis & S. F. R. Co., 137 Mo. App. 300, 118 SW 510; Caldwell v. Lander [Tex. Civ. App.] 117 SW 198. Refusal of requested charge that punitive damages were not recoverable where no evidence of wantonness or willfulness. Trimmier v. Atlanta, etc., R. Co., 81 S. C. 203, 62 SE 209. Inapplicable. Sparta Oil Mill v. Russell [Ga. App.] 65 SE 37. Instruction based on ordinance, where count sounding thereon had been abandoned, though such ordinance was merely declaratory of the common law. Reynolds v. United R. Co. [Mo. App.] 121 SW 1093. Expression of opinion. Mitchell v. Masury [Ga.] 64 SE 275; Shieder v. Southern R. Co. [S. C.] 65 SE 631. Instruction in suit to set aside deed for fraud, where trust relation between parties was shown, that burden was on defendant to prove adequacy of consideration, evidence as to adequacy being conflicting. Koppe v. Koppe [Tex. Civ. App.] 122 SW 68. That preponderance of evidence depended on number of witnesses under certain circumstances. Warren Const. Co. v. Powell [Ind.] 89 NE 857. As to credibility of witnesses and effect of conflicts in their testimony. Wall v. Crown Cotton Mills [Ga. App.] 65 SE 788. Instruction as to credibility of witnesses, though defendant was plaintiff's witness and could not suffer by exclusion of testimony, where it was not limited to evidence given by defendant as witness for plaintiff. Tucker v. Dudley, 127 App. Div. 403, 111 NYS 700. That failure to examine witness subpoenaed raised presumption that his testimony would be against party subpoenaing him, where evidence was conflicting and witness was in court and equally accessible to both sides. Fox v. Valeille, 61 Misc. 619, 114 NYS 5. As to law in libel case notwithstanding constitutional right of jury in such cases to determine law as well as facts under direction of court. Rood v. Dutcher [S. D.] 120 NW 772. Failure to limit evidence as to statements made by defendant's agent to purposes of impeachment. Fireman's Fund Ins. v. Kelley [Ky.] 116 SW 790. Erroneous instruction as to one of codefendants prejudicial to others. Gaetjens v. New York, 132 App. Div. 394, 116 NYS 759. Instruction in action for personal injuries imposing too high degree of care on defendant held not rendered harmless on theory that defendant, by interposing general denial and plea of contributory negligence, confessed its negligence, it having right to plead in the alternative. Sutter v. Kansas City [Mo. App.] 119 SW 1084. In action for damages resulting from fall from street into open cellarway on defendant's premises, refusal to charge that erection of bars along sides of cellarway after accident did not impute negligence in not having them before, where cellarway could not be said to be nuisance or negligent as matter of law. Davenport v. Matthews, 130 App. Div. 257, 114 NYS 715. Where was more than one count on distinct causes of action, held that general verdict should be set aside for erroneous instruction as to measure of damages recoverable under one of them. Mattis v. St. Louis & S. F. R. Co. [Mo. App.] 119 SW 998. Refusal of proper request which was last thing heard by jury on subject, regardless of what was previously charged in relation thereto. Riera v. Salo Art Metal Co., 134 App. Div. 497, 119 NYS 323.

93. Emmett v. Hooper, 157 Ala. 586, 47 S 1006; North Birmingham Lumber Co. v. Sims, 157 Ala. 595, 48 S 84; Suell v. Derricott [Ala.] 49 S 895; Ames Shovel & Tool Co. v. Anderson [Ark.] 118 SW 1013; Chicago, etc., R. Co. v. Pfeifer [Ark.] 119 SW 642; Compressed Air Mach. Co. v. West San Pablo Land & Water Co., 9 Cal. App. 361, 99 P 531; Seyfried v. Knoblauch, 44 Colo. 86, 96 P 993; Graham v. Gill, 56 Fla. 316, 47 S 917; Fain v. Ennis, 4 Ga. App. 716, 62 SE 466; Neal v. Davis Foundry & Mach. Works, 131 Ga. 701, 63 SE 221; Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 SE 270; Atlantic Coast Line R. Co. v. Jones [Ga.] 63 SE 834; Burns v. Vereen [Ga.] 64 SE 113; McGee v. Young [Ga.] 64 SE 689; Reiter v. Standard Scale & Supply Co., 237 Ill. 374, 86 NE 745; Zetsche v. Chicago, etc., R. Co., 238 Ill. 240, 87 NE 412; Illinois Steel Co. v. Brenshall, 141 Ill. App. 36; Dahl v. Macdonald Engineering Co., 141 Ill. App. 187; Becker v. Erickson, 142 Ill. App. 133; Brunhild v. Chicago Union Trac. Co., 144 Ill. App. 198; Apperson v. Lazro [Ind. App.] 88 NE 99; Beck v. Budd [Ind. App.] 88 NE 785; Flower v. Continental Casualty Co., 140 Iowa, 510, 118 NW 761; Porter v. Whitlock [Iowa] 120 NW 649; McBride v. McBride [Iowa] 120 NW 709; O'Mara v. Jensma [Iowa] 121 NW 518; Gray v. Chicago, etc., R. Co. [Iowa] 121 NW 1097; Chesapeake & O. R. Co. v. Grigsby [Ky.] 115 SW 237; Eilerman v. Farmer [Ky.] 118 SW 289; Town of Belleview v. England [Ky.] 118 SW 994; Young v. Chandler, 104 Me. 184, 71 A 652; Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 1193, rehearing denied, 109 Md. 494, 72 A 458; Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201, 16 Det. Leg. N. 82, 120 NW 613; Matthews v. Johannes Bros. Co., 156 Mich. 663, 16 Det. Leg. N. 241, 121 NW 272; Kennedy v. London & Lancashire Fire Ins. Co. [Mich.] 16 Det. Leg. N. 437, 122 NW 134; Waligora v. St. Paul Foundry Co., 107 Minn. 554, 119 NW 395; Harmon v. Chicago & N. W. R. Co., 107 Minn. 479, 120 NW 1022; Sapp v. Hunter, 134 Mo. App. 685, 115 SW 463; Felver v. Central Elec. R. Co., 216 Mo. 195, 115 SW 980; Vaughn v. Springfield Trac. Co. [Mo. App.] 120 SW

683; Ettien v. Drum [Mont.] 101 P 151; Reed v. Syracuse, 83 Neb. 713, 120 NW 180; Montgomery v. Miller, 83 Neb. 625, 120 NW 197; Goos v. Chicago, B. & Q. R. Co. [Neb.] 121 NW 963; Barnes v. Buffalo, 128 App. Div. 916, 113 NYS 1124; Gorman v. Brooklyn Heights R. Co., 131 App. Div. 207, 115 NYS 662; Caldwell Land & Lumber Co. v. Globe Lumber Co. [N. C.] 66 SE 310; St. Paul Fire & Marine Ins. Co. v. Mittendorf [Okl.] 104 P 354; Ferrari v. Beaver Hill Coal Co. [Or.] 102 P 1016; Clio Gin Co. v. Western Union Tel. Co., 82 S. C. 405, 64 SE 426; Jenkins v. Jenkins [S. C.] 65 SE 736; Roberts v. Virginia-Carolina Chemical Co. [S. C.] 66 SE 298; Griffith v. Reagan [Tex. Civ. App.] 114 SW 1167; St. Louis S. W. R. Co. v. Shelton [Tex. Civ. App.] 115 SW 377; Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62; Southwestern Tel. & T. Co. v. Owens [Tex. Civ. App.] 116 SW 89; Swift & Co. v. Martine [Tex. Civ. App.] 117 SW 209; Scott v. St. Louis S. W. R. Co. [Tex. Civ. App.] 117 SW 890; Suderman-Dolson Co. v. Hope [Tex. Civ. App.] 118 SW 216; Vann v. Denson [Tex. Civ. App.] 120 SW 1020; Knowles v. Northern Texas Trac. Co. [Tex. Civ. App.] 121 SW 232; Northern Pac. R. Co. v. Myers-Parr Mill Co. [Wash.] 103 P 453; Averbuch v. Great Northern R. Co. [Wash.] 104 P 1103; Neale v. State, 138 Wis. 484, 120 NW 345; Maxwell v. Wellington, 133 Wis. 607, 120 NW 505; Sufferling v. Heyl, 139 Wis. 510, 121 NW 251. As to issue tried to court without a jury. Stone v. Perkins, 217 Mo. 586, 117 SW 717. As to collateral matters. S. S. McClure Co. v. Philipp [C. C. A.] 170 F 910. In stating issues. Canfield v. Chicago, etc., R. Co. [Iowa] 121 NW 186; Bradford v. Chicago, etc., R. Co., 136 Mo. App. 705, 119 SW 32. Stating issues by copying pleadings in instructions. Tobler v. Union Stockyards Co. [Neb.] 123 NW 461. Argumentative and giving undue prominence to evidence. City of Farmington v. Wallace, 134 Ill. App. 366. Incomplete. Kaufman v. Boismier [Okl.] 105 P 326. Misleading. Montgomery Moore Mfg. Co. v. Leeth [Ala.] 50 S 210; Frazier v. Garrison, 143 Ill. App. 474. Refusal to instruct that there was no evidence of fact, where such was the case. Western Union Tel. Co. v. Lewis [Ark.] 116 SW 894. Refusal to instruct that there could be no recovery under particular count. Chicago City R. Co. v. Phillips, 138 Ill. App. 438. Refusal to withdraw counts, where one good count remains on which judgment may be sustained. Olson v. Kelly Coal Co., 143 Ill. App. 269. Refusing to withdraw first count of declaration from jury and instructing in relation thereto, where evidence warranted verdict on second. Bingaman v. Toledo, etc., R. Co., 145 Ill. App. 442. Failure to specifically withdraw from consideration of jury allegation of negligence as to which there was no evidence, where it was not specifically submitted, and other allegations of negligence were supported by evidence. Clark v. Johnson County Tel. Co. [Iowa] 123 NW 327. Where evidence warrants recovery under one count of declaration, refusal to instruct to find for defendant on counts not supported by evidence. Powers v. Chicago, R. Co., 142 Ill. App. 515. Refusal to charge that plaintiff had failed to prove first paragraph of complaint and that therefore it was withdrawn, where counsel stipulated that facts were as alleged in second paragraph and not as alleged in first, it being assumed that jury were controlled by stipulation. Winona Technical Inst. v. Stolte [Ind.] 89 NE 393. Submitting case on alleged erroneous theory. Houston & T. C. R. Co. v. Shapard [Tex. Civ. App.] 118 SW 596. Submission of particular question, where judgment must be based on finding on another question. Irvin v. Johnson [Tex. Civ. App.] 120 SW 1085. As to burden of proof, in view of fact that there was no conflict in evidence as to salient facts on which defendant's liability was predicated. St. Louis, etc., R. Co. v. Woodruff [Ark.] 115 SW 953. On burden of proof where findings did not affect judgment. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. Giving or refusing instructions containing words "burden of proof" or "preponderance of evidence" unexplained. Berger v. St. Louis Storage & Com. Co., 136 Mo. App. 36, 116 SW 444. Failure to define "successfully impeached." Metzger v. Manlove, 241 Ill. 113, 89 NE 249. Permitting determination issue from consideration of defendant's evidence alone, where there was no evidence thereon in plaintiff's case. McKay v. Anderson Steamboat Co., 51 Wash. 679, 99 P 1030. As to credibility of evidence. Quinn v. Metropolitan St. R. Co., 218 Mo. 545, 118 SW 46. That jury should disregard evidence of witness unless they found that horse he referred to was one in controversy. McCullough v Dunn, 83 Neb. 591, 119 NW 1127. Authorizing recovery of value of use of land instead of rental value, there being practically no difference. Williams v. Haile Gold Min. Co. [S. C.] 66 SE 117. Permitting recovery of value of goods at destination instead of place of shipment, where only element of value added at destination was freight charges paid by consignee, stipulation in bill of lading that amount of carrier's liability should be computed at value of property at place of shipment being construed so as to include freight to destination. Kelly v. Southern R. Co. [S. C.] 66 SE 198. Plaintiff, not prejudiced by instructions given and requested as to rights of defendants among themselves. Beave v. St. Louis Transit Co., 212 Mo. 331, 111 SW 52. Authorizing joint judgment against two corporate defendants, where it was alleged in complaint and not denied in answer that both were owned by same parties and under same management. Pealer v. Grays Harbor Boom Co. [Wash.] 103 P 451. Error in instructing that jury might answer "not sufficient evidence" to interrogatories, where had interrogatory so answered been properly answered in defendant's favor, it would not have so antagonized general verdict for plaintiff as to have entitled defendant to judgment on answers to interrogatories. Union Trac. Co. v. Howard [Ind. App.] 87 NE 1103. Where party requests more than one charge on same subject, and court gives one, he cannot complain of refusal of others. Texas & N. O. R. Co. v. Jackson [Tex. Civ. App.] 113 SW 628. Length and number of instructions. Owensboro Brick & Sewer Pipe Co. v. Glenn, 32 Ky. L. R. 803, 106 SW 1195. Statement that interrogatories were submitted at defendant's request. Terre Haute Trac. & L. Co. v. Payne [Ind. App.] 89 NE 413. Telling

jury that an affirmative answer to question would favor plaintiff. Wankowski v. Crivitz Pulp & Paper Co., 137 Wis. 123, 118 NW 643. Referring to instructions following as "some observations." Greenway v. Taylor County [Iowa] 122 NW 943. Verbal request after charging jury that they bring verdict as speedily as consistent with due deliberation. Hermann v. Allen [Tex. Civ. App.] 118 SW 794.

Formal defects held harmless. Failure to mark instructions not given when refused. Leman v. U. S. Fidelity & Guar. Co., 137 Ill. App. 258. Where court indorsed word "given" at bottom of sheet containing two instructions, failure to mark each one "given." Hart v. Wabash S. R. Co., 238 Ill. 336, 87 NE 367.

Conflicting instructions held harmless. National Bank of Commerce v. Southern R. Co., 135 Mo. App. 74, 115 SW 517; Thorp v. Ramsey, 51 Wash. 530, 99 P 584.

Technical inaccuracies held harmless. In re Higgins' Estate [Cal.] 104 P 6; Lee v. McCarty [Ga.] 64 SE 997; Ozmore v. Coram [Ga.] 65 SE 448; Chesapeake & O. R. Co. v. Meyer [Ky.] 119 SW 183; Louisville & N. R. Co. v. Smith [Ky.] 122 SW 806; Cumberland Tel. & T. Co. v. Jackson [Miss.] 48 S 614. Crude and inexact. Wade v. Mt. Vernon, 133 App. Div. 389, 117 NYS 356. Inaccurate definition of ordinary care. Palmer v. Schultz, 138 Wis. 455, 120 NW 348. Grammatical error. Gould v. Merrill R. & L. Co., 139 Wis. 433, 121 NW 161. Verbal inaccuracy. Brown v. West Riverside Coal Co. [Iowa] 120 NW 732; In re Winslow's Will [Iowa] 122 NW 971. Inadvertent expression. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 88 NE 1080. Omission of word "if," which was palpably clerical mistake and did not materially affect meaning, and could not have misled jury. Madrey v. Meyers, 140 Ill. App. 218. Use of word "defendant" instead of "plaintiff" and word "they" in referring to plaintiff. McCollum v. Buckner's Orphans' Home [Tex. Civ. App.] 117 SW 886. Referring to testator by wrong Christian name. McBride v. McBride [Iowa] 120 NW 709. Inadvertently writing word "guilty" instead of word "given" on margin of instruction given jury. Prussner v. Brady, 136 Ill. App. 395. Statement as to testimony of witness. Hull v. Detroit United R. Co. [Mich.] 16 Det. Leg. N. 776, 123 NW 571.

Abstract instructions held harmless. Central of Georgia R. Co. v. Dothan Mule Co. [Ala.] 49 S 243; Gillespie v. Hester [Ala.] 49 S 580; Suell v. Derricott [Ala.] 49 S 895; Elgin, J. & E. R. Co. v. Lawlor, 132 Ill. App. 280; City of Farmington v. Wallace, 134 Ill. App. 366; O'Shaugnessy v. Chicago City R. Co., 144 Ill. App. 174; Doherty v. Des Moines City R. Co. [Iowa] 121 NW 690; Broadway Coal Min. Co. v. Davis [Ky.] 122 SW 228; Teel v. Coal & Coke R. Co. [W. Va.] 66 SE 470.

Matters not in issue or in evidence. Security Sav. Bank v. Smith [Iowa] 122 NW 825, withdrawing former opinion [Iowa] 119 NW 726; Hill v. Houser [Tex. Civ. App.] 115 SW 112; Southworth v. Pecos & N. T. R. Co. [Tex. Civ. App.] 118 SW 861. Inapplicable. Kenyon v. Chicago, 135 Ill. App. 227; Cincinnati, etc., R. Co. v. Cook [Ind. App.] 88 NE 76; Ross v. Saylor [Mont.] 104 P 864. Not relating to only question to be determined by jury. Mann Lumber Co. v. Bailey Iron Works Co., 156 Ala. 598, 47 S 325. As to issue not specifically raised by pleadings. St. Louis, etc., R. Co. v. Holman [Ark.] 120 SW 146. Error in preliminary statement of pleadings not made in charging part of instructions. Drewery v. El Paso Elec. R. Co. [Tex. Civ. App.] 120 SW 1061. Submission of issue not raised by pleadings, in view of fact that judgment must be predicated on finding of jury on another issue. Irvin v. Johnson [Tex. Civ. App.] 120 SW 1085. Instruction authorizing jury to allow defendant for any expenses incurred for medical treatment though petition only claimed $150 on that account, where evidence clearly showed that such expenses amounted to $108. De Courcy v. Prendergast Const. Co. [Mo. App.] 120 SW 632. Submitting question of rents though plaintiff was not seeking to recover them, where there was no evidence relating thereto. Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co. [S. C.] 66 SE 194. Refusal to charge defense ruled out on demurrer. Alabama G. S. R. Co. v. Hanbury [Ala.] 49 S 467. Not in conformity to evidence. Miller v. Kelly Coal Co., 239 Ill. 626, 88 NE 196. Where defendant asked charge not applicable to issues, burden was on him to show that he was prejudiced by modification thereof. Gorman v. Brooklyn Heights R. Co., 131 App. Div. 207, 115 NYS 662.

Assumption of facts and invading province of jury. Village of Odin v. Nichols, 133 Ill. App. 306. Assuming facts proven by uncontradicted evidence. Missouri, K. & T. R. Co. v. Farris [Tex. Civ. App.] 120 SW 535. Where no evidence contradicting assumption. Newport News & O. P. R. & Elec. Co. v. Nicolopoolos [Va.] 63 SE 443. Instruction on contributory negligence which invaded province of jury, where, if facts were as instruction assumed them to be, there could have been no such negligence. Indiana Union Trac. Co. v. Ohne [Ind. App.] 89 NE 507. Instruction on the facts. McCall v. Alexander [S. C.] 65 SE 1021. Intimating opinion. Jones v. Springfield Trac. Co., 137 Mo. App. 408, 118 SW 675. Reference to contention as "real contention." Western & A. R. Co. v. Cotter [Ga.] 64 SE 474. Instruction as to weight of evidence consisting of mere repetition of oral statements, it not appearing that there was any evidence in case to which it might have been applied. In re Budan's Estate [Cal.] 104 P 442.

Unnecessary instructions held harmless. Atlanta Terra Cotta Co. v. Georgia R. & Elec. Co. [Ga.] 84 SE 563; Sulter v. Chicago, etc., R. Co. [Neb.] 121 NW 113; Bloomfield v. Pinn [Neb.] 121 NW 716; Sanders v. Cline [Okl.] 101 P 267.

As to immaterial matters. O'Mara v. Jensma [Iowa] 121 NW 518. As to burden of proof on an immaterial question. Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 NW 550.

Ambiguous, confused, and uncertain instructions held harmless. Harris v. Basden [Ala.] 50 S 321; Hair v. Chicago, B. & Q. R. Co. [Neb.] 121 NW 439; Homestead Fire Ins. Co. v. Ison [Va.] 65 SE 463; Waukowski v. Crivitz Pulp & Paper Co., 137 Wis. 123, 118 NW 643. Unintelligible. Drewery v. E'

Paso Elec. R. Co. [Tex. Civ. App.] 120 SW 1061. Not as clear as it might have been. Maxwell v. Wellington, 138 Wis. 607, 120 NW 505. Confusing defenses, where both depended on same facts. Burgess v. Humphrey Bookcase Co., 156 Mich. 345, 16 Det. Leg. N. 112, 120 NW 790.

Submitting questions of law held harmless. Golden v. Northern Pac. R. Co. [Mont.] 104 P 549. Construction of contract, where not in controversy and not open to question. American Home Circle v. Eggers, 137 Ill. App. 595. Construction of contract, where proper construction adverse to contention of complaining party. Capital City Brick Co. v. Atlanta Ice & Coal Co., 5 Ga. App. 436, 63 SE 562. Foreman's authority and duty in premises. Burkard v. Lesehen & Sons Rope Co., 217 Mo. 466, 117 SW 35. Reasonableness of direction. Deragon v. Sero, 137 Wis. 276, 118 NW 839.

Matters admitted or shown by undisputed evidence: No dispute as to question to which it related. Madrey v. Meyers, 140 Ill. App. 218. As to measure of recovery, where there was no controversy on that question. Stoakes v. Larson, 108 Minn. 234, 121 NW 1112. Where under undisputed proof plaintiff was not entitled to recover, and judgment was rendered for defendant, errors in submission of issues as to measure of damages and to the contracts in question. Blackburn v. Chicago, etc., R. Co. [Tex. Civ. App.] 115 SW 874. As to duty of city, where there was no question as to its negligence. Scurlock v. Boone [Iowa] 121 NW 369. Neglect to charge on issue of fact denied by one party and not asserted by the other. Forrester-Duncan Land Co. v. Evatt [Ark.] 119 SW 282. Instruction on facts, where such facts were shown by undisputed evidence. St. Louis, etc., R. Co. v. Burrow & Co. [Ark.] 116 SW 198. Instruction on weight of evidence, where evidence was practically undisputed on the subject. Ft. Worth & D. C. R. Co. v. Suter [Tex. Civ. App.] 118 SW 215. Instruction that plaintiff under facts stated had right to be on defendant's track, where evidence showed that he was not a trespasser. Goodwin v. Atlantic Coast Line R. Co., 82 S. C. 321, 64 SE 242. Requiring notice to be given to some officer of plaintiff authorized to act, even if notice to agent was sufficient, where undisputed evidence showed that notice was given to plaintiff's manager who had authority to act. Lanier & Co. v. Little Rock Cooperage Co. [Ark.] 115 SW 401. That in order to defeat plaintiff's recovery on ground of an outstanding title defendant must connect himself with such title, in view of undisputed evidence showing that plaintiff purchased for value without notice of such title. Ingalls v. Orange Lumber Co. [Tex. Civ. App.] 122 SW 53. Omission to instruct in regard to matter as to which evidence was practically undisputed. Louisville & N. R. Co. v. Moore [Ky.] 121 SW 666. Failure to submit question conclusively established by uncontradicted evidence. Probst v. Hinesley [Ky.] 117 SW 389. Refusal of instruction that certificate of inspection was prima facie evidence that mill was in reasonably safe condition, where issuance and posting of certificate was not disputed and inspector and other witnesses testified that machinery was guarded. Benner v. Wallace Lumber & Mfg. Co. [Wash.] 105 P 145. Submission of question of which court should have taken judicial notice. Davis v. Kuehn [Tex. Civ. App.] 119 SW 118. Existence of custom where custom was so universal that court would have been justified in taking judicial notice of its existence and instructing jury accordingly. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 Law. Ed. ——.

Where right result reached. St. Louis S. W. R. Co. v. Grayson [Ark.] 115 SW 933; Kansas City S. R. Co. v. Carl [Ark.] 121 SW 932; Fearnley v. Fearnley, 44 Colo. 417, 98 P 819; Thomas v. Walden [Fla.] 48 S 746; Kenyon v. Chicago, 135 Ill. App. 227; Nichols v. Central Trust Co. [Ind. App.] 86 NE 878; Apperson v. Lazro [Ind. App.] 87 NE 97; Pascagoula St. R. & P. Co. v. Brondum [Miss.] 50 S 97; Quinn & Metropolitan St. R. Co., 218 Mo. 545, 118 SW 46; Revis v. Raleigh, 150 N. C. 348, 63 SE 1049; City of Cincinnati v. Roettinger, 11 Ohio C. C. (N. S.) 501; Shawnee Nat. Bank v. Wootten [Okl.] 103 P 714; McCullough v. Rucker [Tex. Civ. App.] 115 SW 323; Caldwell v. Houston & T. C. R. Co. [Tex. Civ. App.] 117 SW 488; Western Union Tel. Co. v. Cobb [Tex. Civ. App.] 118 SW 717; Beaumont, etc., R. Co. v. Olmstead [Tex. Civ. App.] 120 SW 596; Aris v. Mutual Life Ins. Co. [Wash.] 103 P 50; Spreckels v. Brown, 212 U. S. 208, 53 Law. Ed. ——. Authorizing recovery if jury found certain facts not shown by evidence, where defendant was equally liable in either case. Grant v. Tomlinson [Mo. App.] 119 SW 1079. Where complaining party not entitled to succeed. Phelps v. Erie R. Co., 134 App. Div. 729, 119 NYS 141; Kime v. Bank of Edgemont [S. D.] 119 NW 1003; Keith v. Guedry [Tex. Civ. App.] 114 SW 392. Where not entitled to recover at all under the declaration. Kulpinsky v. Sampsell, 145 Ill. App. 242. Where evidence conclusive against complaining party. Evansville & T. H. R. Co. v. Berndt [Ind.] 88 NE 612; Sessinghaus v. Knoche, 137 Mo. App. 323, 118 SW 104; Houston & T. C. R. Co. v. Parnell [Tex. Civ. App.] 120 SW 951; Chase v. Woodruff, 138 Wis. 641, 120 NW 499. Inaccuracy of statement as to contention of losing party, where no evidence authorizing jury to find in favor of it. Prescott v. Fletcher [Ga.] 65 SE 877. Failure to present plaintiff's theory where evidence would not have sustained verdict in his favor. Grant v. Armstrong [Wash.] 104 P 632. That plea of set-off confessed debt sued on, where plaintiff's demand was proved by undisputed evidence. Poull & Co. v. Foy-Hays Const. Co. [Ala.] 48 S 785. Omission of reference to effect of plaintiff's contributory negligence, where it clearly appeared that he was not negligent. Indianapolis Trac. & T. Co. v. Menze [Ind.] 88 NE 929. Inaccurate instruction as to issue not supported by any evidence, and which should not have been submitted to jury. Roseberry v. American Benev. Ass'n [Mo. App.] 121 SW 785. Where opposite party entitled to directed verdict. Glass v. Chicago Union Trac. Co., 144 Ill. App. 116; Field v. Turley [Ky.] 120 SW 338; Gessner v. Metropolitan St. R. Co., 137 Mo. App. 47, 119 SW 528; McConnell v. Holderman [Okl.] 103 P 593. As to item in counterclaim, where there was nothing to go to jury on that item, and court would have been justi-

may indicate whether an erroneous instruction was effective.[94] If, as in equitable issues, the verdict is merely advisory, such error is presumptively harmless.[95] Defects and irregularities in the verdict, findings, and conclusions of law are not ground for reversal where no harm results,[96] and the same is true as to the judgment and

fied in withdrawing it from their consideration. Neindorf v. Van De Voorde [Iowa] 120 NW 84. Held that contention that court might have properly taken issue from jury was without merit. Girard v. Grosvenordale Co. [Conn.] 73 A 747. Refusal to submit certain issue though there was no request to that effect by defendant, where evidence was so conclusive in his favor that court would have been bound to set aside verdict on that issue in favor of other party. In re Higgins' Estate [Cal.] 104 P 6. Error in defining conversion, where defendant's acts, proven beyond controversy, necessarily showed a conversion. Crawford v. Thomason [Tex. Civ. App.] 117 SW 181. As to issue on which there was failure of proof. Ramsey v. Morrow [Ky.] 118 SW 296. Refusal to instruct as to matter as to which there was no evidence. Goidstein's Adm'r v. Louisville R. Co. [Ky.] 115 SW 194. Submission of issue of probable cause, where court would have been justified in instructing that there was no probable cause. Spilker v. Abrahams, 133 App. Div. 226, 117 NYS 376. Refusal of instructions not prejudicial to plaintiff where he recovered judgment for full amount to which he was entitled under undisputed evidence. Montgomery v. Amsler [Tex. Civ. App.] 122 SW 307.

94. See post, § 3, Cure by Verdict. Verdict held to show that instruction was harmless. St. Louis, etc., R. Co. v. Puckett [Ark.] 114 SW 224; People's R. Co. v. Baldwin [Del.] 72 A 979; Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238; Flower v. Continental Casualty Co., 140 Iowa, 510, 118 NW 761; Bloomfield v. Pinn [Neb.] 121 NW 716; Black v. Atlantic Coast Line R. Co., 82 S. C. 478, 64 SE 418. Allowing jury to find for defendant for damages not claimed in answer held shown to be harmful by amount of verdict. Woodbridge Ice Co. v. Semon Ice Cream Corp., 81 Conn. 479, 71 A 577. Submission of issue not warranted by pleadings and evidence held prejudicial to defendant, where jury disallowed his entire claim. Sabin v. Cameron, 82 Neb. 106, 117 NW 95.

95. Errors in instructions submitting issues of fact, equitable in their nature, to jury are not usually reviewable or deemed ground for reversal unless they indicate that decision was brought about by applying erroneous legal principles. Heron v. Weston, 44 Colo. 379, 100 P 1130. Whether declarations of law were proper or whether requested declarations were improperly refused is immaterial in so far as relating to equity counts in petition. Nevius v. Moore, 221 Mo. 330, 120 SW 43.

96. Holding a proposition which included a finding of fact, where proposition of law contained in it was correct as applied to facts found. Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88, 89 NE 723, afg. 146 Ill. App. 350. Erroneous finding, where decree was sustained by other correct findings. Farmers' Nat. Bank v. Union Reservoir Co. [Colo.] 104 P 943. Where defendant in suit to foreclose deed of trust was not prevented from making any defense that he had against complainant's husband, defendant was not prejudiced by finding that complainant was owner of notes secured by deed. Nix v. Thackaberry, 240 Ill. 352, 88 NE 811. Ruling of master that plaintiff was entitled to no relief, though he was not authorized to do more than find facts, where he reported all facts and only question was plaintiff's right to recover on such facts. Adams v. Young, 200 Mass. 588, 86 NE 942. Approval of finding of law of master that claims for patent defects in building not mentioned in notice specifying defects could not be relied on, where it did not appear from brief and argument that there were patent defects not covered by such notice. Manowsky v. Stephan, 233 Ill. 409, 84 NE 365. Held that excessive valuation of property of which it was held that plaintiff was entitled to possession would not harm defendant if he did not oppose return of property, he being merely a janitor and not claiming rights of ownership or possession. Rosenthal v. Forman, 115 NYS 282. Where in will contest there was no special finding of want of capacity, held that it could not be inferred that finding for contestants was based on evidence of want of capacity, which was properly submitted to jury, rather than on issue as to undue influence, of which there was no evidence to support finding for contestant. In re Overpeck's Will [Iowa] 120 NW 1044. Verdict sustaining attachment for rent on each of several grounds alleged held improperly set aside, though error interposed as to one ground, where there was none as to others, which were properly submitted. Sessinghaus v. Knoche, 137 Mo. App. 323, 118 SW 104. Fact that findings of fact merely evidencing ultimate facts found were not supported by evidence is not ground for reversal where there is sufficient evidence to support the ultimate essential findings. Millwee v. Phelps [Tex. Civ. App.] 115 SW 891. Finding that defendant had not proven any damages in his cross action, where court also found that he was not entitled to recover in such action. Duncan v. Watkins Music Co. [Tex. Civ. App.] 115 SW 78. Holding as to extent of complainant's title immaterial, where bill was properly dismissed because there was no real controversy. Lonergan v. Goodman, 241 Ill. 200, 89 NE 349. Refusal to make findings of fact on appeal from probate court, where there was but single question of fact which was correctly decided. In re Swick [Minn.] 119 NW 791. Failure of referee to find on certain issue, where judgment against defendant did not include any award under such issue, and he claimed nothing affirmatively thereunder. Alexander v. Wellington, 44 Colo. 388, 98 P 631. Failure to make finding which could

record.[97] Thus, a wrong decision when no substantial right exists,[98] or when substantially equivalent to a right decision,[99] is harmless.

not have affected the result. Ward v. Sherman, 155 Cal. 287, 100 P 864; Campbell v. Tinker, 137 Mo. App. 436, 118 SW 660. Failure to find on all allegations of complaint, where findings embraced all facts necessary to constitute particular cause of action therein alleged. Great Western Gold Co. v. Chambers, 155 Cal. 364, 101 P 6. Immaterial findings. West Lumber Co. v. Lyon [Tex. Civ. App.] 116 SW 652; Risdon v. Steyner, 9 Cal. App. 344, 99 P 377. Erroneous finding on immaterial issue. De Gottardi v. Donati, 155 Cal. 109, 99 P 492; McDonnell v. McDonnell, 10 Cal. App. 62, 101 P 40; Merriman v. Blalack [Tex. Civ. App.] 122 SW 403. Finding that admission in answer as to complainant's title was conclusive, where evidence supported latter's claim. McElroy v. McCarville [R. I.] 71 A 646. Where certain findings wholly disposed of intervener's case, and necessitated judgment against them regardless of other issues made by pleadings, held immaterial whether other findings were supported by evidence, whether there were findings upon other issues, and whether findings on some other issues were conflicting and unintelligible. Black v. Harrison Home Co., 155 Cal. 121, 99 P 494. Finding by court not sustained by evidence, where it did not affect other findings which were sustained by evidence and supported judgment. St. Louis S. W. R. Co. v. Alsup [Tex. Civ. App.] 118 SW 194. Defendant cannot complain of manner in which verdict is apportioned among plaintiffs, where he does not contend that verdict as whole is excessive. Houston & T. C. R. Co. v. Alexander [Tex. Civ. App.] 121 SW 602. In action by one tenant against another for damages due to overflow of water, error in finding that there was no express contract on part of landlord, who was impleaded, to repair, held immaterial to defendant where neither he nor plaintiff asked for judgment against landlord. Burkett v. Dillon [Tex. Civ. App.] 117 SW 917.

Signing and filing findings: Court's action in filing conclusions of fact and law in divorce case without first having been requested to do so by parties. Ryan v. Ryan [Tex. Civ. App.] 114 SW 464. Failure to notify appellants of time when findings were signed and filed. Gould v. Austin, 52 Wash. 457, 100 P 1029.

Correction of verdict or findings: Reassembling jury after its discharge and having them correct verdict as to amount, where there was no dispute as to amount. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819. Refusal to amend finding by striking out reasons for rulings excluding documentary evidence, where finding in so far as it stated such reasons was immaterial because reasons were not given when ruling was made. Whalen v. Gleeson, 81 Conn. 638, 71 A 908. Refusal to amend findings to conform to facts admitted is error, unless finding as made could not have been prejudicial to party requesting modification. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 98 P 509. Failure to file additional conclusions of fact and law on request. Hoffman v. Buchanan [Tex. Civ. App.] 123 SW 168.

Special verdicts and interrogatories: No reversal except for error affecting substantial rights (St. 1898, § 2898) applies to rulings under special verdict law (§ 2898). Sufferling v. Heyl, 139 Wis. 510, 121 NW 251. Refusal to submit certain questions for special verdict where under instructions verdict necessarily covered specific issues of fact embraced in such questions. Steber v. Chicago & N. W. R. Co., 139 Wis. 10, 120 NW 502. Refusal to submit interrogatory which became immaterial in view of answers to those submitted. Irrgang v. Ott, 9 Cal. App. 440, 99 P 528. Refusal of special issue, when however decided it would not affect general verdict. Ruppel v. United R. Co., 10 Cal. App. 319, 101 P 803. Submission of issue which was not answered, case being determined by answer to another issue. Walker v. Walker [N. C.] 65 SE 923. Submission of special issue, where judgment supported by other properly submitted issues. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. Where jury returned improper answer to interrogatory and, upon being required to reanswer it, answered that evidence was not sufficient to warrant an answer, refusal to require them to again reanswer it, though evidence did warrant answer. South Shore Gas & Elec. Co. v. Ambre [Ind. App.] 87 NE 246.

Disregarding instructions: Defendant held not prejudiced by failure of jury to follow instructions to disregard certain counts of complaint, where such counts were sufficient and such instructions were therefore erroneous. Dickinson v. George B. Swift Co., 238 Ill. 62, 87 NE 59.

97. Unnecessary order declaring liability which clearly existed independent thereof. Lakin v. Sutton, 132 App. Div. 557, 116 NYS 820. Unnecessary order incorporating granted request for findings into decision. Gennert v. Butterick Pub. Co., 133 App. Div. 86, 117 NYS 801. Allowance of commissions admittedly due before trial but after commencement of suit. Tilton v. Gates Land Co., 140 Wis. 197, 121 NW 331. Correct judgment in partition not reversed because action prematurely brought, where plaintiff was entitled to partition at time of trial. Buhrmeister v. Buhrmeister, 10 Cal. App. 392, 102 P 221. Cancellation of conveyance in action to set aside, where evidence showed contrary to finding that defendant knew of relation and wished to profit by plaintiff's agent's breach of trust. Foster v. Winstanley [Mont.] 102 P 574. Disregard of Rev. St. 1895, art. 3611, as amended by Act Apr. 7, 1905 (Laws 1905, p. 95, c. 68), requiring determination of whether property is subject to partition. Fagan v. Fagan [Tex. Civ. App.] 120 SW 550. Division between defendants in partition proceeding when not prayed for. Id. Cancellation of mortgage not mentioned in petition, where mortgagor testified that debt secured was canceled, and mortgagee claimed no interest thereunder, and mortgage was void. Kimmerley v. McMichael, 83 Neb. 789, 120 NW

487. Adjudication as to homestead not within issues, where adjudication as to matters within issues precluded defendants from any advantage of homestead estate as effectually as would direct finding and decree on that subject. Gillespie v. Fulton Oil & Gas Co., 239 Ill. 326, 88 NE 192. Failure to limit amount of judgment against stockholder, on return of execution against corporation unsatisfied, to amount of his unpaid subscription, where latter amount was largely in excess of amount of judgment against corporation. Frogge v. Big Joe Mining & Milling Co., 136 Mo. App. 431, 117 SW 1194. Judgment rendered against individual instead of partnership when on trial individual admitted he was sole owner of business. Hartkemeyer & Co. v. Griffith [Iowa] 121 NW 372. Where, in action against corporation and its receiver for injuries occurring prior to receivership, judgment for damages was rendered against corporation alone, further judgment against both for costs, since costs adjudged against receiver were payable out of corporation's property in course of the receivership. International & G. N. R. Co. v. Ormond [Tex. Civ. App.] 121 SW 899. In action by subcontractor, personal judgment was rendered against contractor and foreclosure of mechanic's lien adjudged against building. Owner's motion for vacation of judgment was granted but personal judgment against contractor was not formally set aside. No defense was made by contractor, and case was tried as if entire judgment had been set aside, and owner allowed to contest amount due and extent of lien to be adjudged. Held that though court should have set aside judgment against contractor it was not prejudicial error to try question of amount due subcontractor. Wichita Sash & Door Co. v. Weil [Kan.] 103 P 1003. Judgment against one of two defendants held to have amounted to dismissal as to other under B. & C. Comp. §§ 180, 181, and to have in no way prejudiced defendant against whom it was rendered. Ferrari v. Beaver Hill Coal Co. [Or.] 102 P 1016. Persons not entitled to any portion of decedent's estate except under particular bequest not harmed by refusal to hold it void though they were not entitled to anything under such bequest because married. In re Bacon's Estate, 140 Wis. 589, 123 NW 262. Where one of defendants admitted that he owed certain sum to other defendant, held that he had no reason to complain of decree ordering him to pay same to plaintiff. Coldren Land Co. v. Royal, 140 Iowa, 381, 118 NW 426. Unauthorized provision in judgment that if it was not paid within stated time judgment debtor would be cited for contempt. Hutchinson Wholesale Grocer Co. v. Brand, 79 Kan. 340, 99 P 592. Rendition of judgment for certain sum and interest, though unnecessary to render judgment for interest, since statute provides for payment of interest on judgment. Trousil v. Bayer [Neb.] 123 NW 445. Error of clerk in computing interest on verdict from first day of term instead of from date of its rendition not ground for reversal, since matter could be corrected by motion below. Tobler v. Union Stockyards Co. [Neb.] 123 NW 461. Fact that judgment did not fix date from which interest might be calculated. Oliver v. Noel Const. Co., 109 Md. 465, 71 A 959. Fact that judgment was indefinite and uncertain not prejudicial to judgment defendant. Frederick v. Buckminster, 83 Neb. 135, 119 NW 228. Error in judgment awarding dower in failing to take into consideration life interest of one dying before judgment, her interest being infinitesimal. Rector v. Rector [Ky.] 122 SW 518. Error in proceedings for dower in that judgment should have been special and execution responsive thereto, where point was waived by counsel. Reineman v. Larkin [Mo.] 121 SW 307. Entry of judgment by default before disposing of motion, where motion on its face appears to be frivolous or it clearly appears that it could not have been granted, or that its determination either way could not defeat plaintiff's right to proceed with the cause. Rice v. Simmons [Ark.] 116 SW 673. Entry of judgment before disposing of motion to require plaintiff to attach copies of notes sued on to complaint as exhibit, where motion could not have been granted. Id. Party cannot complain of irregularity in **entry of judgment,** where it does not appear that such irregularity in any way affected his substantial rights. St. 1898, § 2829. Wolf v. Green Bay, etc., R. Co., 140 Wis. 337, 122 NW 743. Failure of judgment entry to show disposition of demurrer, where from oral charge copied in bill of exceptions it appeared that jury were instructed that certain count had been stricken on demurrer. Birmingham R., L. & P. Co. v. Harden, 156 Ala. 244, 47 S 327.

Prejudicial: Where it could not be said how far finding not supported by evidence influenced judgment, held that same would be reversed. Texas & N. O. R. Co. v. La Maire [Tex. Civ. App.] 114 SW 862.

98. Though evidence was insufficient to support verdict for defendant, held that such verdict was harmless where plaintiff had no right to maintain the action at all. Peters v. Peters [Cal.] 103 P 219. Where judgment was properly entered against appellants on merits absolutely barring them from maintaining another action against respondent for same cause of action, held that they were not prejudiced by further judgment quieting title in respondent. Gould v. Austin, 52 Wash. 457, 100 P 1029. Judgment vacating order which was void on its face. Baird v. Riverside Tp. Justice's Ct. [Cal. App.] 105 P 259.

99. See, also, ante, § 1. Right ruling for wrong reason. Affirming decision instead of dismissing appeal. Corcoran v. Kostrometinoff [C. C. A.] 164 F 685. Affirming judgment where appeal should have been dismissed. Drainage Dist. No. 4 v. Wabash R. Co., 216 Mo. 709, 116 SW 549. Judgment on nonsuit. Gillespie v. John W. Ferguson Co. [N. J. Err. & App.] 74 A 460. Error in holding that plaintiff's lien was purchase-money lien instead of equitable lien arising from agreement, there being no material difference in legal effect of the two liens. Poole v. Tannis, 137 Wis. 363, 118 NW 864.

§ 3. *Errors cured or made harmless by other matters.*[1]—See 11 C. L. 1712—Error is also harmless if some subsequent condition has rectified it or has averted its prejudicial effect.[2] This may be done by allowing the injured party to obviate the effect of the error [3] by considering excluded evidence as having been admitted on appeal,[4] by withdrawal or abandonment of issues,[5] by pleadings and rulings thereon,[6] by the admission of evidence,[7] by striking out or excluding evidence,[8] by reinstating

1. Search Note: See note in 2 L. R. A. (N. S.) 721.

See, also, Appeal and Error, Cent. Dig. §§ 4029-4252; Dec. Dig. §§ 1025-1074; 3 Cyc. 383-387; Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.

2. Casey v. Chicago City R. Co., 237 Ill. 140, 86 NE 606. Overruling **challenge to juror** for cause, where he was challenged peremptorily. Blevins v. Erwin Cotton Mills, 150 N. C. 493, 64 SE 428; Burch v. Southern Pac. Co. [Nev.] 104 P 225. Error in **refusing continuance** for absence of witnesses by appearance of witnesses before closing of testimony. Weatherford, etc., R. Co. v. White [Tex. Civ. App.] 118 SW 799. Requiring plaintiff to **amend petition,** where he did so, and whole matter was placed in issue and trial was had on merits of whole case. Ratliff v. Daniel's Ex'r [Ky.] 121 SW 1034. Where, in suit by vendor of land against vendee to quiet title, latter tendered into court amount due, **admission of testimony** that his previous default was due to financial panic. McCullough v. Rucker [Tex. Civ. App.] 115 SW 323. Refusal to allow **appeal** from first decree claimed to be final, where matters involved were reviewed on appeal from second decree. McCullough v. McCullough, 238 Ill. 50, 87 NE 69.

3. Exclusion of evidence, where other evidence of same character was admitted without objection, and at close of evidence court offered to permit its introduction and there was no showing that plaintiff had then discharged his witnesses. Nail v. Brown, 150 N. C. 533, 64 SE 434.

4. Error in refusing to admit evidence, in case tried by judge, harmless, where evidence was returned for consideration of supreme court. Dietrich v. Pederson, 57 Wash. 191, 98 P 611.

5. Overruling demurrers to pleas afterwards abandoned by defendants. Pabst Brew. Co. v. Erdreich Bros. [Ala.] 48 S 396. Denial of motion to require plaintiff to elect between inconsistent defenses to defendant's counterclaim, where one of them was practically abandoned during trial and only the other relied on. Lankford v. Lankford [Ky.] 117 SW 962. Refusal to compel election as between causes of action, where plaintiff, at close of affirmative case, discontinued as to one and informed defendant that he stood on other. Richey v. Union Cent. Life Ins. Co., 140 Wis. 486, 122 NW 1030. Exclusion of evidence as to negligence, where allegations of negligence were withdrawn and plaintiff relied solely on breach of statutory duty. McClintock v. Charleston & W. C. R. Co. [S. C.] 64 SE 1009. Where court has erroneously excluded evidence without which plaintiff cannot recover, plaintiff's failure to go on and prove other essential facts will not cure the error and justify a judgment of nonsuit. Georgia Iron & Coal Co. v. Ocean Acc. & Guar. Corp. [Ga.] 65 SE 775.

6. Striking of plea, where defendant allowed to make issue by counter affidavit and jury properly instructed as to law. Mitchell v. Masury [Ga.] 64 SE 275. Sustaining demurrers to original complaint, where same evidence admissible under amended complaint. City of Bessemer v. Southern R. Co., 157 Ala. 428, 48 S 103. Overruling demurrer ore tenus to part of complaint, by subsequently sustaining it, excluding evidence received in support of it, and instructing jury to disregard it. Bedsole v. Atlantic Coast Line R. Co. [N. C.] 65 SE 925. Defendant not prejudiced by overruling demurrer to complaint for failure to allege place where injury occurred, where he thereafter pleaded as defense facts arising by reason of law of place where injury occurred. McClain v. Lewiston Interstate Fair & Racing Ass'n [Idaho] 104 P 1015. Rulings on demurrers to amended complaint, where demurrers to each of counts thereof as finally amended were subsequently overruled. Penry v. Dozier [Ala.] 49 S 909. Rulings on demurrers not cured by final judgment entry overruling demurrers to each count as finally amended held reviewable, and demurrers to such counts which were sustained prior to their final amendment reviewed. Id.

7. Ruling that plaintiff need not prove indorsement of note sued on, where it was proved by plaintiff's testimony later in case when called by defendant as his witness, and was nothing to show that defendant was prejudiced. Lowell v. Bickford, 201 Mass. 543, 88 NE 1.

Rulings on pleadings cured. For proposition that sustaining demurrers to allegations provable under other allegations is harmless, see ante, § 2, rulings on pleadings. Sustaining demurrer to paragraph of answer, where certificate therein relied on was introduced by plaintiff. Supreme Tent, K. of M. W. v. Ethridge [Ind. App.] 87 NE 1049. Striking allegations, by receiving evidence in support of them. Pierce v. Pierce, 52 Wash. 679, 101 P 358; Hurley v. Oliver [Ark.] 121 SW 920. Striking notice of special matter of defense accompanying general issue, where evidence rendered such defense immaterial. Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 NE 642. Allowing answer to be amended at trial so as to set up new defense, where hearing was postponed so as to give plaintiffs chance to procure evidence in rebuttal, which they subsequently introduced. Low v. Wilson, 77 Kan. 852, 95 P 1135. Sustaining demurrer to, and striking portions of, answer **prejudicial** though defendant permitted to go into matters therein alleged at trial, where record did not clearly show that defendant had prepared itself upon and fully covered such matters as alleged. Rocky Mountain News Print. Co. v. Fridborn [Colo.] 104 P 956.

Admission of evidence cured. See, also, § 2, ante, facts otherwise established. Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410; Roth v. Buettel Bros. Co. [Iowa] 119 NW 166; Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651; Miller v. McConnell [S. D.] 120 NW 888. By cross-examination. United R. & Elec. Co v. Corbin, 109 Md. 442, 72 A 606. Where complaining party reproduces, in effect, same testimony through cross-examination. Birkman v. Fahrenthold [Tex. Civ. App.] 114 SW 428. Where similar evidence subsequently admitted without objection. Hutto v. Stough, 157 Ala. 566, 47 S 1031; United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606; Ludins v. Metropolitan Life Ins. Co., 117 NYS 156; Anderson v. Minneapolis, etc., R. Co. [N. D.] 123 NW 281; Merck v. Merck [S. C.] 65 SE 347; Hudson v. Slate [Tex. Civ. App.] 117 SW 469; Missouri, K. & T. R. Co. v. Pettit [Tex. Civ. App.] 117 SW 894. Speculative answer to hypothetical question by subsequent answer. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 115 SW 57. Admitting evidence of an admission, where person alleged to have made it, when subsequently called as witness, practically admitted entire statement attributed to him and testified to truth of facts therein related. Monahan v. National Realty Co., 4 Ga. App. 680, 62 SE 127. In action under civil damage act for selling intoxicants to plaintiff's husband, testimony of physician as to miscarriage suffered by plaintiff, where witness stated that he was unable to say what caused it. Lockard v. Van Alstyne, 155 Mich. 507, 15 Det. Leg. N. 1132, 120 NW 1. Admission of incompetent evidence subsequently made competent. Neumeyer v. Hooker, 131 App. Div. 592, 116 NYS 204. Admission of certified copy of deed, where its execution, and circumstances attending it, were shown by evidence of objecting party. Holland v. Riggs [Tex. Civ. App.] 116 SW 167. Permitting physician to testify as to contents of written report without introducing same in evidence, where it was afterwards so introduced. St. Louis S. W. R. Co. v. Marshall [Tex. Civ. App.] 120 SW 512. Failure to lay foundation for impeachment of witness, where he was recalled and given opportunity to explain alleged inconsistent statement or to reconcile it with his testimony. Rabinowitz v. Silverman, 223 Pa. 139, 72 A 378. Permitting interrogatories not answered to be read and taken as confessed, where party to whom they were propounded was permitted to testify fully in regard to matters inquired about. Clevenger v. Blount [Tex.] 122 SW 529. In action to recover for lumber sold to defendant in which defendant sought to recoup damages for delay in delivery, error in allowing witness to testify as to why he stopped sending lumber to defendant held **not cured** by introduction of letter which did not say anything about ceasing to send lumber. Merchants' Bank v. Acme Lumber & Mfg. Co. [Ala.] 49 S 782.

Exclusion of evidence cured. See, also, ante, § 2, facts otherwise established. By subsequently admitting it. Elgin, J. & E. R. Co. v. Lawlor, 132 Ill. App. 280; Blossi v. Chicago & N. W. R. Co. [Iowa] 123 NW 360; Pope v. Whitridge, 110 Md. 468, 73 A 281; McNetton v. Herb [Mich.] 16 Det. Leg. N. 679, 123 NW 17; O'Connor v. Witte [Neb.] 121 NW 244; Funk v. Hendricks [Okl.] 105 P 352; Halwas v. American Granite Co. [Wis.] 123 NW 789. By afterwards permitting it to go to jury. Cinkovitch v. Thistle Coal Co. [Iowa] 121 NW 1036. Where admitted in another form. Kinlen v. Metropolitan St. R. Co., 216 Mo. 145, 115 SW 523. Refusal to allow question on cross-examination as to how often plaintiff had used elevator, where witness afterward testified that he did not know of his using it. Roth v. Buettel Bros. Co. [Iowa] 119 NW 166. As to facts subsequently otherwise established. Larabee v. Larabee, 240 Ill. 576, 88 NE 1037; Foreman v. Western Union Tel. Co. [Iowa] 116 NW 724; Shockley v. Pennsylvania R. Co., 109 Md. 123, 71 A 437; Sligh & Co. v. Kuehne Com. Co., 135 Mo. App. 206, 115 SW 1065; McNeely v. Laxton, 149 N. C. 327, 63 SE 278; Talbert v. Western Union Tel. Co. [S. C.] 64 SE 862, rehearing denied [S. C.] 64 SE 916; Schon v. Modern Woodmen of America, 51 Wash. 482, 99 P 25; Lord v. Henderson, 65 W. Va. 321, 64 SE 134; Hoagland v. Canfield, 160 F 146. Refusal to permit proof by stenographic notes of admissions made by witness at former trial, where witness was subsequently called and examined orally in regard thereto. O'Dwyer v. Northern Market Co., 30 App. D. C. 244. Sustaining objection to question afterwards answered. Penry v. Dozier [Ala.] 49 S 909; United States Cast Iron, Pipe & Foundry Co. v. Granger [Ala.] 50 S 159; John Breuner Co. v. King, 9 Cal. App. 271, 98 P 1077; Vaughan's Seed Store v. Stringfellow, 56 Fla. 708, 48 S 410; O'Shaugnessy v. Chicago City R. Co., 144 Ill. App. 174; Ellison v. Flint [Ind. App.] 87 NE 38. Sustaining objection to question, by subsequently allowing witness to testify to same effect. Birmingham R., L. & P. Co. v. Morris [Ala.] 50 S 198; Ward v. Sherman, 155 Cal. 287, 100 P 864; Baker v. Baker, 9 Cal. App 737, 100 P 892; Simeoli v. Derby Rubber Co., 81 Conn. 423, 71 A 546; Peebles v. O'Gara Coal Co., 239 Ill. 370, 88 NE 166; Casey v. Kelly-Atkinson Const. Co., 240 Ill. 416, 88 NE 982; Dugane v. Hvezda Pokroku No. 4 [Iowa] 119 NW 141; Wilson v. Big Joe Block Coal Co. [Iowa] 119 NW 604; Allen v. Urdangen [Iowa] 119 NW 724; United R. & Elec. Co. v. Corbin, 109 Md. 442, 72 A 606; Comeau v. Hurley [S. D.] 123 NW 714; Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 116 SW 365; Williamson v. Chicago, etc., R. Co. [Tex. Civ. App.] 122 SW 897; Jones v. Seattle, 51 Wash. 245, 98 P 743. Where witness subsequently permitted to testify to same effect without objection. Scurlock v. Boone [Iowa] 120 NW 313; International Harvester Co. v. Iowa Hardware Co. [Iowa] 122 NW 951; Maryland, D. & V. R. Co. v. Brown, 109 Md. 304, 71 A 1005; Austrian v. Laubheim [N. J. Law] 73 A 226; Chesapeake & O. R. Co. v. Greaver [Va.] 66 SE 59; Gould v. Merrill R. & L. Co., 139 Wis. 433, 121 NW 161. Striking out evidence, by subsequent testimony to same effect by same witness. Cotton v. Center Coal Min. Co. [Iowa] 123 NW 381. Striking out answer, where witness was immediately afterwards allowed to make more definite answer. Johnston v. Cedar Rapids & M. C. R. Co. [Iowa] 119 NW 286. Exclusion of evidence held not rendered harmless by fact that certain only of the facts thereby sought to be proved were afterwards proved with-

case after dismissal,[9] by withdrawal of objections,[10] by proceeding with trial of issues of fact that after overruling of demurrer to evidence,[11] by instructions,[12] by verdict or findings,[13] by judgment,[14] by remittitur of damages,[15] or by statute.[16]

Hawkers and Peddlers, see latest topical index.

out dispute. Wilmer Lumber Co. v. Eisley [Ala.] 50 S 225.

8. Ruling on **pleas** founded on certificate which was excluded when offered in evidence. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Admission of **evidence** cured by subsequently excluding or striking it out. Stowers Furniture Co. v. Brake [Ala.] 48 S 89; Birmingham R., L. & P. Co. v. Morris [Ala.] 50 S 198; Gascoigne v. Metropolitan, etc., R. Co., 239 Ill. 18, 87 NE 883; Farley v. Byers, 106 Minn. 260, 118 NW 1023; Burch v. Bernard, 107 Minn. 210, 120 NW 33; Mitchell v. Edeburn, 37 Pa. Super. Ct. 223. Action of court held to have amounted to exclusion of evidence and instruction to disregard it. Stubbs v. Marshall [Tex. Civ. App.] 117 SW 1030. Admission of incompetent evidence cured by sustaining motion to strike out counterclaim to which it was directed, and directing jury to return verdict for plaintiff which was equivalent to striking it out. Bean v. Missoula Lumber Co. [Mont.] 104 P 869. Admission of evidence cured, where court expressly withdrew it and instructed jury not to consider it. Quinn v. Review Pub. Co. [Wash.] 104 P 181. Impeachment of witness whose evidence was withdrawn from jury. Lindsay v. Bates [Mo.] 122 SW 682. In order to counteract effect of admission of improper evidence by afterwards striking it out, jury must be clearly and distinctly informed just what evidence is to be disregarded. Raisler v. Benjamin, 133 App. Div. 721, 118 NYS 223. Erroneous admission of evidence not cured by attempt to strike it out after giving of charge based thereon. Rubenstein v. Radt, 133 App. Div. 57, 117 NYS 893. Error in reading extract from medical book to expert witness held not cured by sustaining objection to question whether he had ever read it. Etzkorn v. Oelwein [Iowa] 120 NW 636. **Instruction** in action on written instrument for payment of money under seal, where all material evidence by defendant on issue of delivery was rejected. Junkins v. Sullivan, 110 Md. 539, 73 A 264.

9. See 9 C. L. 1581.

10. Permitting plaintiff's counsel to read to jury ex parte interrogatories which had been propounded to defendant and to state to jury that answers thereto were taken as confessed, where plaintiff subsequently withdrew all objections to his testifying fully in regard to matters covered thereby and he did so, and court submitted case without reference to said interrogatories, and charged that jury were judges of credibility of witnesses and weight of evidence. Clevenger v. Blount [Tex. Civ. App.] 114 SW 868.

11. See, also, Discontinuance, Dismissal and Nonsuit. Error in refusing nonsuit at close of plaintiff's case for want of proof cured where such proof afterwards supplied during trial. Van Ness v. North Jersey St. R. Co. [N. J. Err. & App.] 73 A 509; Yergy v. Helena L. & R. Co. [Mont.] 102 P 310; Jennings v. Trummer, 52 Or. 149, 96 P 874.

12. The cure of misconduct of counsel by instructions (see Argument and Conduct of Counsel, § 7), and of instructions given by other instructions (see Instructions, § 17), are fully treated in separate articles. Denial of motion to withdraw from jury question of loss of earing capacity, by instruction not to consider loss of earning capacity. Montague v. Hanson, 38 Mont. 376, 99 P 1063. Errors committed at trial, where court properly gave general affirmative charge for defendant. Flowers v. Smith Lumber Co., 159 Ala. 505, 47 S 1022. Fact that under doctrine of fellow-servant plaintiff was not entitled to recover becauee of certain acts of negligence alleged in petition held immaterial, where no iesue as to such acts submitted. Eastern Kentucky Home Tel. Co. v. Mellon [Ky.] 116 SW 709. Misconduct of juror not cured. McKahan v. Baltimore & O. R. Co., 223 Pa. 1, 72 A 251.

Remarks by court cured: Intimation of opinion. Prescott v. Fletcher [Ga.] 65 SE 877. Indicating lack of confidence in expert testimony, by instruction that jury was sole judge of credibility. Herndon v. Springfield, 137 Mo. App. 518, 119 SW 467. Commenting on evidence, by instruction that jury were exclusive judges of all questions of fact. Peyser v. Western Dry Goods Co., 53 Wash. 633, 102 P 750.

Rulings on pleadings and defects therein cured: Overruling motion to make petition more specific. German Ins. Bank v. Martin [Ky.] 114 SW 319. Ruling on demurrer rendered nugatory by instruotions. Atlanta & B. Air Line R. Co. v. Wood [Ala.] 49 S 426. Overruling demurrer to complaint imposing excessive duty by instruotion properly limiting liability. Western Union Tel. Co. v. Panley, 157 Ala. 615, 47 S 654. Overruling demurrer to complaint in action for failure to deliver telegram because of variance between allegations as to breach of duty and duty as shown by telegram as set out in complaint, where defendant was given benefit of construction contended for by it in charge. Western Union Tel. Co. v. Walker [Ala.] 48 S 102. Overruling special exceptions to that part of petition alleging improper grounds for allowance of exemplary damages, where correctly charged basis on which such damages might be allowed. Temple v. Duran [Tex. Civ. App.] 121 SW 253. Overruling demurrer to petition, where court directed verdict in favor of demurring party. Young v. State Bank [Tex. Civ. App.] 117 SW 476. Denial of motion to strike argumentative allegations in replication, where instructions submitted only issues raised by complaint and denials of answer. Shandy v. McDonald, 38 Mont. 393, 100 P 203. Instructions, requiring proof of essential element omitted from complaint, cure defect. Duffy v. Jacobson, 135 Ill. App. 472.

Admission of evidence cured. Stevenson v. Whatley [Ala.] 50 S 41; Kimic v. San Jose-Los Gatos Interurban R. Co. [Cal.] 104 P 312; Thunborg v. Pueblo, 45 Colo. 337, 101 P 399; Illinois Cent. R. Co. v. Smith [Ky.] 118 SW 933; Buck v. Brady, 110 Md. 568, 73 A 277;

Comstock v. Taggart, 156 Mich. 47, 16 Det. Leg. N. 14, 120 NW 29; International & G. N. R. Co. v. Duncan [Tex. Civ. App.] 121 SW 362; Apker v. Hoquian, 51 Wash. 567, 99 P 746; Sipes v. Puget Sound Elec. R. Co. [Wash.] 102 P 1057; Hoseth v. Preston Mill Co. [Wash.] 104 P 612; Turner v. American Security & Trust Co., 213 U. S. 257, 53 Law. Ed. —. By instruction to disregard it. Sameuls v. Willis [Ky.] 118 SW 339; Moffatt v. Davitt, 200 Mass. 452, 86 NE 929; Smith v. Detroit United R. Co., 155 Mich. 466, 15 Det. Leg. N. 1055, 119 NW 640; Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201, 16 Det. Leg. N. 82, 120 NW 613; Connecticut River Power Co. v. Dickinson [N. H.] 74 A 585; Lyles v. Western Union Tel. Co. [S. C.] 65 SE 832; Galveston, etc., R. Co. v. Harper [Tex. Civ. App.] 114 SW 1168; Missouri Val. Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93; Producers' Oil Co. v. Barnes [Tex. Civ. App.] 120 SW 1023. By instruction to disregard similar evidence. Potvin v. West Bay City Shipbuilding Co., 156 Mich. 201, 16 Det. Leg. N. 82, 120 NW 613. By instruction in effect withdrawing it from jury. Canaday v. United R. Co., 134 Mo. App. 282, 114 SW 88; Steele v. Bryant [Ky.] 116 SW 755. By direction of verdict. Ketterman v. Ida Grove [Iowa] 120 NW 641; Williams Typewriter Co. v. Cleaver, 38 Pa. Super. Ct. 376. As to damages, by correct instruction as to measure of damages. Louisville & N. R. Co. v. Stiles [Ky.] 119 SW 786; United R. & Elec. Co. v. Riley, 109 Md. 327, 71 A 970; Gaffey v. United Shoe Mach. Co., 202 Mass. 48, 88 NE 330; Shandy v. McDonald, 38 Mont. 393, 100 P 203; Ferrari v. Beaver Hill Coal Co. [Or.] 102 P 1016; Mayrant v. Columbia, 82 S. C. 273, 64 SE 416; McCormick v. Tappendorf, 51 Wash. 312, 99 P 2; American States Security Co. v. Milwaukee Northern R. Co., 139 Wis. 199, 120 NW 844. Refusal to exclude evidence shown to be incompetent on cross-examination, in view of repeated statements of court to jury as to incompetency of such evidence and smallness of verdict. City of Covington v. Gates [Ky.] 117 SW 842.

Admission of evidence not cured. Fidelity Mut. Life Ins. Co. v. Satterfield [Ala.] 60 S 132. Irrelevant evidence to support irrelevant allegations of pleadings. Young v. State Bank [Tex. Civ. App.] 117 SW 476. As to measure of damages, by instructions on that subject. Grays Harbor Boom Co. v. Lownsdale [Wash.] 102 P 1041. Of memoranda by instruction that they were not conclusive evidence. Atlanta & B. Air Line R. v. Brown [Ala.] 48 S 73. Improper evidence which tends to prejudice minds of jurors, by instruction to disregard it or withdrawing it from their consideration. Hamory v. Pennsylvania, M. & S. R. Co., 222 Pa. 631, 72 A 227. Improper evidence which would naturally tend to prejudice defendant by fact that in his charge court dwelt on such evidence as indicating doubtful character of plaintiff's testimony. Meyer v. Gans, 130 App. Div. 236, 114 NYS 584.

Exclusion of evidence cured: Directing jury not to consider certain evidence. Porter v. Whitlock [Iowa] 120 NW 649. Withdrawing evidence as to defendant's good character, where there was no evidence to contrary, and court directed jury to consider that, for purposes of case, his reputation in particular regard was good. Id. As to damages. Manitou & P. P. R. Co. v. Harris, 45 Colo. 185, 101 P 61.

13. Errors in reference to certain issue, where verdict not based upon any finding in reference thereto. De Hoyos v. Galveston, etc., R. Co. [Tex. Civ. App.] 115 SW 75. Error as to issues found in favor of complaining party. Stephens v. Middlebrooks [Ala.] 49 S 321. Errors harmless where evidence is such as to authorize peremptory instruction for plaintiff, and jury finds for him. Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602. Any errors relating to other issues, where verdict on an issue properly submitted was sufficient to support judgment. Macafee v. Higgins, 31 App. D. C. 355; Bull v. Atlanta & C. Air Line R. Co., 149 N. C. 427, 63 SE 126. Errors relating to quantum meruit, where jury found that plaintiff was entitled to recover on express contract. Suderman-Dolson Co. v. Hope [Tex. Civ. App.] 118 SW 217. Errors as to subsidiary propositions, when there has been an errorless and authorized finding of jury against main proposition upon existence of which subsidiary propositions are necessarily dependent. Western & A. R. Co v. Henderson [Ga. App.] 65 SE 48. Finding, by further finding. Kiger v. McCarthy Co., 10 Cal. App. 308, 101 P 928. Rulings in action against two defendants jointly whereby plaintiff was deprived of right to recover against one of them held **prejudicial** though he recovered full amount to which he was entitled against other, who was financially responsible. Lawrence v. Herald Pub. Co. [Mich.] 16 Det. Leg. N. 713, 122 NW 1084

Rulings as to pleadings cured: Overruling demurrer to paragraphs of complaint, where answers to interrogatories show that verdict was based on other sufficient paragraphs. Vandalia R. Co. v. McAninch [Ind. App.] 86 NE 1031; Kelley v. Bell [Ind.] 88 NE 58; United States Cement Co. v. Cooper [Ind.] 88 NE 69; Shank v. Trustees of McCordsville Lodge No. 338, I. O. O. F. [Ind. App.] 88 NE 85; Pittsburg, etc., R. Co. v. Sudhoff [Ind. App.] 88 NE 702. Fact that jury also found for plaintiff on insufficient paragraph held not to effect efficacy of verdict on sufficient paragraph. Pittsburg, etc., R. Co. v. Sudhoff [Ind. App.] 88 NE 702. Overruling exception to allegations of petition as to exemplary damages, where none were recovered. Temple v. Duran [Tex. Civ. App.] 121 SW 253. Overruling demurrer to complaint, where decree was based upon intervening petition, and judgment was required to be affirmed in so far as said petition was concerned. Celtic Savings & Loan Ass'n v. Curtis [Ind. App.] 87 NE 660. In action for personal injuries against city, refusal to strike from complaint averment of damages in excess of sum named in claim filed with city clerk, where verdict was less than latter sum. Dunkin v. Hoquiam [Wash.] 105 P 149. Allowing amendment to replication after trial to conform to proof, where court found in complaining party's favor an issue raised thereby. Chaves v. Torlina [N. M.] 99 P 690. Overruling demurrer to plea. Wabash Realty & Loan Co. v. Krabbie, 145 Ill. App. 462. Overruling demurrer to counterclaim, where decision thereon was in plaintiff's favor. State v. Spencer, 42 Ind.

App. 650, 86 NE 492. Overruling exceptions to cross bill where defendant recovered nothing in cross action. Beaumont Rice Mills v. Campbell [Tex. Civ. App.] 113 SW 971.

Admission of evidence cured. Kimic v. San Jose-Los Gatos Interurban R. Co. [Cal.] 104 P 986; Wabash Realty & Loan Co. v. Krabble, 145 Ill. App. 462. On issue as to which successful party did not prevail. Petitpierre v. Maguire, 155 Cal. 242, 100 P 690. On issues eliminated as immaterial by special verdict. Hedderich v. Hedderich [N. D.] 123 NW 276. As to question on which jury found in favor of complaining party. Lehman v. Chicago, etc., R. Co., 140 Wis. 497, 122 NW 1059; Steele v. Andrews [Iowa] 121 NW 17. Admission of testimony of defendant's secretary that she knew nothing of certain order, where court held that defendant was charged with notice of plaintiff's claim. Dugane v. Hvezda Pokroku No. 4 [Iowa] 119 NW 141. Admission of judgments in another action, where court found that they were not bar to present one. Petitpierre v. Maguire, 155 Cal. 242, 100 P 690. Where elector is found qualified regardless of father's citizenship, admission of testimony as to father's intentions. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. Admission of evidence that certain items were necessary to construction of a modern office building, and as to time when lessee contracted for same, where lease was properly construed as not permitting deduction of cost of such items from gross income in determining amount on which rent was to be figured. Grosse v. Barman, 9 Cal. App. 650, 100 P 348. As to damages. Consolidated Gas, Elec. L. & P. Co. v. State, 109 Md. 186, 72 A 651; Moneyweight Scale Co. v. McCormick, 109 Md. 170, 72 A 537; Davis v. Bouton Motor Co., 132 App. Div. 64, 116 NYS 508. As to damages, where verdict for defendant. Ducharme v. Holyoke St. R. Co., 203 Mass. 384, 89 NE 561; Pfeiffer v. Aue [Tex. Civ. App.] 115 SW 300. As to certain item of damage, where verdict did not include any such damages. Nicket v. St. Louis M. & S. R. Co., 135 Mo. App. 661, 116 SW 477. As to damages, where verdict not excessive. Leine v. Kellerman Cont. Co., 134 Mo. App. 557, 114 SW 1147. Admission of testimony as to damages and instruction, where verdict was not excessive. Wilson v. Chicago, B. & Q. R. Co. [Neb.] 121 NW 1128. Admission of evidence bearing on amount of damages, where it was not contended that verdict was excessive. St. Louis S. W. R. Co. v. Norvell [Tex. Civ. App.] 115 SW 861. Admission of proof of reasonable charge for selling land, where verdict was for amount of commissions fixed by contract under which services were rendered. Hutto v. Stough, 157 Ala. 566, 47 S 1031. Admission of evidence to show estoppel to contend that partition sale was void, where it was held valid. Menard v. MacDonald [Tex. Civ. App.] 115 SW 63. Evidence of value in excess of verdict harmless. Roquemore v. Vulcan Iron Works Co. [Ala.] 49 S 389. Evidence that members of board were dilatory and could have completed work in 12 days or less, where they were entitled to pay for 12 days only under ordinance and it was found that petitioner was entitled to pay for 12 days. White v. Mitchell [Cal. App.] 104 P 333.

Exclusion of evidence cured: To show fact found. Welcho v. Rosenbluth, 81 Conn. 358, 71 A 566; Jones v. Downs [Conn.] 72 A 589. On issues eliminated as immaterial by special verdict. Hedderich v. Hedderich [N. D.] 123 NW 276. On issue of fact determined in favor of excepting party, unless it appears that such evidence might have affected result more favorable to him. Pitcher v. Webber, 104 Me. 401, 71 A 1031. As to exemplary damages, where verdict awarded actual damages only. Temple v. Duran [Tex. Civ. App.] 121 SW 253. As to damages, where jury found that there was no liability. Carroll v. Boston El. R. Co., 200 Mass. 527, 86 NE 793; Lapointe v. Berlin Mills Co. [N. H.] 73 A 406. As to counterclaim, where verdict and judgment were against defendant thereon. Bailey v. Dennis, 135 Mo. App. 93, 115 SW 506. Where voter was found disqualified and vote excluded, excluding his testimony as to how he voted, and that he intended to vote in proper precinct. Savage v. Umphries [Tex. Civ. App.] 118 SW 893. As to what effect libelous articles had on plaintiff personally, where court instructed that articles were libelous per se and jury found that plea of justification was established. O'Neil v. Adams [Iowa] 122 NW 976.

Argument and conduct of counsel cured: See, also, Argument and Conduct of Counsel. Giving defendant right to open and close, where, under instructions, only advantage therein related to amount of damages, and jury found for defendant. O'Neil v. Adams [Iowa] 122 NW 976.

Errors in instructions cured. Southern R. Co. v. Forrest [Ga.] 65 SE 93; Smith v. Alphin, 150 N. C. 425, 64 SE 210. Not specific. Chicago, R. & Q. R. Co. v. Bowland, 79 Kan. 859, 100 P 1134. Error in construing telegrams, where jury correctly construed them. Postal Telegraph-Cable Co. v. Sunset Const. Co. [Tex.] 114 SW 98, rehearing denied Id. [Tex.] 116 SW 797. Authorizing recovery though injury might be insignificant, in view of pleadings and evidence as to amount of damages, and fact that jury awarded substantial damages. Sherman Gas & Elec. Co. v. Belden [Tex. Civ. App.] 115 SW 897. That plaintiff could not recover on his possession of land alone, where special verdict found that he had title by prescription. Hassam v. Safford [Vt.] 74 A 197. Charging that there could be no recovery of statutory penalty for cutting trees on plaintiff's land, by finding that cutting was with plaintiff's consent. Hicks v. Mississippi Lumber Co. [Miss.] 48 S 624. Where two counts of petition were inconsistent, and establishment of one necessarily negatived other, and jury found in plaintiff's favor on count submitted to them, withdrawal of other count from their consideration. Graham v. Chicago & N. W. R. Co. [Iowa] 122 NW 573, former opinion [Iowa] 119 NW 708. As to question rendered of no importance by verdict. Capital Fire Ins. Co. v. Kaufman [Ark.] 121 SW 289. Where affirmatively appeared from answers to interrogatories that facts upon which plaintiff based his right of action did not exist. Burns' Ann. St. 1908, § 700. Ziehm v. Pittsburgh, etc., R. Co. [Ind. App.]

88 NE 707. Where verdict more favorable to complaining party than evidence authorizes. Capital City Brick Co. v. Atlanta Ice & Coal Co., 5 Ga. App. 436, 63 SE 562. By verdict which necessarily involved adoption of defendant's theory in regard to the matter covered thereby. Nichols & Shepard & Co. v. Steinkraus, 83 Neb. 1, 119 NW 23. As to how jury should return verdict in view of conclusions that might be reached by them as to plaintiff's claim and defendant's counterclaim, where jury could not have returned verdict for defendant on counterclaim in view of their answers to special interrogatories. Larson v. Thoma [Iowa] 121 NW 1059. As to act of negligence as to which no issue was presented by pleadings, where special findings negatived any such negligence. Reeves v. Chicago, etc., R. Co. [S. D.] 123 NW 498. Authorizing recovery on insufficient count, by finding for plaintiff both on that count and another sufficient one, in both of which he sought recovery for same injuries. Peebles v. O'Gara Coal Co., 143 Ill. App. 370. Submission of issues not supported by evidence, where verdict based on other issues sufficiently supported. St. Louis, etc., R. Co. v. Ledford [Ark.] 119 SW 1123; Corcoran v. Albuquerque Trac. Co. [N. M.] 103 P 645. Submitting issues of law to jury harmless where decided correctly. Cordell v. Western Union Tel. Co., 149 N. C. 402, 63 SE 71; Hardy v. Ward, 150 N. C. 385, 64 SE 171; Stanton v. Erie R. Co., 131 App. Div. 879, 116 NYS 375; Mitchell v. Rushing [Tex. Civ App.] 118 SW 582. By finding in favor of complaining party. Ft. Wayne & W. V. Trac. Co. v. Roudebush [Ind.] 88 NE 676; Netter's Adm'r v. Louisville R. Co. [Ky.] 121 SW 636; Young v. Rohrbough [Neb.] 121 NW 585; Beaumont Rice Mills v. Campbell [Tex. Civ. App.] 113 SW 971; Lehman v. Chicago, etc., R. Co., 140 Wis. 497, 122 NW 1059. By finding that complaining party was not entitled to recover. Griswold v. Macon R. & L. Co. [Ga. App.] 63 SE 1132. Submission of unnecessary issue answered by verdict on first issue which put an end to plaintiff's case. Rudisill v. Whitener, 149 N. C. 439, 63 SE 101. Instruction as to damages held harmless in view of verdict. St. Louis, etc., R. Co. v. Furlow [Ark.] 117 SW 517; McKenzie v. Gray [Iowa] 120 NW 71; Aken v. Clark [Iowa] 123 NW 379; Moss Tie Co. v. Myers [Ky.] 116 SW 255; Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 494, 72 A 193, rehearing denied, 109 Md. 494, 72 A 458; Rock Creek Steamboat Co. v. Boyd [Md.] 73 A 662; McKenzie v. United R. Co., 216 Mo. 1, 115 SW 13. Abstract instruction as to measure of damages for partial destruction of crop, where evidence showed total destruction only and jury necessarily based verdict on total destruction. Jonesboro, etc., R. Co. v. Cable [Ark.] 117 SW 550. Cannot be presumed that jury might have disregarded instruction as to a measure of damages on which there was undisputed evidence, and followed one on which there was no evidence. Id. Instructions as to damages held harmless where verdict not excessive. Suttle v. Brown, 137 Ill. App. 438; Pittsburgh, etc., R. Co. v. Sudhoff [Ind. App.] 88 NE 702; Cleveland, etc., R. Co. v. Foland [Ind. App.] 88 NE 787; Robichaud v. Maheux, 104 Me. 524, 72 A 334. As to damages, where none allowed. Suell v. Derricott [Ala.] 49 S 895; Atlantic Coast Line R. Co. v. Odum, 5 Ga. App. 780, 63 SE 1126; Security Sav. Bank v. Smith [Iowa] 122 NW 825, withdrawing former opinion [Iowa] 119 NW 726; Young v. Chandler, 104 Me. 184, 71 A 652; Fairfield v. Louisville & N. R. Co. [Miss.] 48 S 513; Cumberland Tel. & T. Co. v. Jackson [Miss.] 48 S 614; Herndon v. Springfield, 137 Md. App. 513, 119 SW 467; Hill v. Houser [Tex. Civ. App.] 115 SW 112; Hancock v. Stacy [Tex. Civ. App.] 116 SW 177; Rainey v. Kemp [Tex. Civ. App.] 118 SW 630; Temple v. Duran [Tex. Civ. App.] 121 SW 253; French v. Miller [Vt.] 71 A 1047; Jones v. Monson, 137 Wis. 478, 119 NW 179. As to measure of damages, where jury followed correct rule. Isaacs v. Terry & Tench Co., 113 NYS 731; Rhyne v. Rhyne [N. C.] 66 SE 348. As to measure of damages, where verdict did not exceed true measure. Texas & Pacific Coal Co. v. Kowsikowski [Tex. Civ. App.] 118 SW 829; Comerford v. Morrison, 145 Ill. App. 615. Submitting improper elements of damage, where proper items, which were proven by competent evidence, exceeded amount of verdict. DeWitt Allen Auto Co. v. Canavan, 113 NYS 1002. Not providing for certain allowance to defendant, by verdict making such allowance. Webster v. Moore, 108 Md. 572, 71 A 466. As to form of verdict in case exemplary damages were awarded where none were allowed. Philadelphia & W. C. Trac. Co. v. Kordiyak [C. C. A.] 171 F 315. A charge of negligence in permitting oil and grease to accumulate on the floor where plaintiff was obliged to stand while at work is eliminated from the case by a finding by the jury that the accident was due to exposed gearing, and the judgment will not be reversed because of refusal to give special charges relating to either assumption of risk or the slippery condition of the floor. Laidlaw-Dunn-Gordon Co. v. Miller, 12 Ohio C. C. (N. S.) 246. An instruction mistakenly stating the degree of care required in a certain matter is harmless where the findings negatived any negligence in that particular. McCarthy v. Fell [S. D.] 123 NW 497.

Instructions held not cured: Authorizing double damages. Keystone Mills Co. v. Chambers [Tex. Civ. App.] 118 SW 178. Held that it could not be said that jury assessed damages at only value of one-third of crop, so as to render harmless instruction that they were to consider value of whole crop, because verdict was much less than damages fixed by majority of witnesses. Atlanta & B. Air Line R. Co. v. Brown [Ala.] 48 S 73.

Failure or refusal to charge cured. Jordan v. Austin [Ala.] 50 S 70; Fee v. Chicago, B. & Q. R. Co., 83 Neb. 307, 119 NW 447. Refusal to give special requests, in view of special verdict. Rheinheimer v. Aetna Life Ins. Co., 77 Ohio St. 360, 83 NE 491. As to certain issue, where verdict against complaining party on issues submitted necessarily includes finding against him on omitted issue. Laughman v. Sun Pipe Line Co. [Tex. Civ. App.] 114 SW 451. As to defendant's theory of contract, where manifest from verdict that jury were convinced from evidence that contract was exactly as claimed by plaintiff. Bauer Cooperage Co. v. Shelton [Ky.] 114 SW 257. That it was not negligent for defendant not to examine conductor as to competency if he was recommended by former

HEALTH.

The scope of this topic is noted below.[17]

§ 1. Validity and Construction of Health Regulations, 2040.
§ 2. Health Boards and Officers, 2041.
§ 3. Care and Control of Sanitation and Disease, 2042.

employer, where jury found that he was not so recommended. Lowe v. San Francisco & N. W. R. Co., 154 Cal. 573, 98 P 678. That it was unnecessary to instruct conductor as to rules if he had proved by his conduct that he was competent, where jury found that he was not competent. Id. Failure to submit issue of estoppel, where, under findings, verdict would necessarily have been same had it been submitted. Clevenger v. Blount [Tex.] 122 SW 529. Failure to submit issues made by pleas of five and ten years' limitation, where jury found against pleas of three years' limitation and character of possession required under both was same. Houston Oil Co. v. Kimball [Tex.] 122 SW 533. As to limit of damages, where verdict did not exceed it. People's R. Co. v. Baldwin [Del.] 72 A 979. That verdict should not exceed amount claimed in petition, where it did not. Porter v. Whitlock [Iowa] 120 NW 649. As to measure of damages under state of facts which jury found on sufficient evidence did not exist. Hughes v. Chicago B. & Q. R. Co. [Iowa] 119 NW 924. As to punitive damages, where verdict found no negligence. McColman v. Atlantic Coast Line R. Co., 150 N. C. 707, 64 SE 781. As to exemplary damages for wrongful suing out of attachment, where answers to special interrogatories expressly negatived wrongful or malicious suing out of said attachment. Larson v. Thoma [Iowa] 121 NW 1059. As to items as basis for counterclaim, where it was evident from verdict that jury allowed defendant something by reason of said items. Porter v. Whitlock [Iowa] 120 NW 649. Where jury found for plaintiff on both counts, refusal to direct verdict for defendant on one count because of insufficiency of evidence as to it. Mueller v. Jordan Shoe Co., 143 Ill. App. 332.

Special interrogatories: Withdrawing interrogatory from consideration of jury, where it was to be submitted only in case they answered another interrogatory no and they answered it yes. Warren v. Shealy [S. C.] 65 SE 1. Refusal to submit interrogatory which, by its terms, jury would not have been required to answer because of its answer to another one. Muncie & P. Trac. Co. v. Hall [Ind.] 89 NE 484. Technical error in submission of issue, in view of finding thereon. Young v. Brooks Mfg. Co. [N. C.] 65 SE 1005.

14. Fact that some of conclusions of law are not correct immaterial, where judgment is right upon the facts found. Missouri Pac. R. Co. v. Kennett, 79 Kan. 232, 99 P 269. Where evidence justifies judgment, statute requires its affirmance though findings are incomplete and inconsistent. Blair v. Wilkeson Coal & Coke Co. [Wash.] 103 P 18. Finding that defendant did not establish title under statute of limitations, where his title in fee was established. Mulford v. Rowland, 45 Colo. 172, 100 P 603. Ruling as to method of determining population of city for purpose of determining necessity of persons exempt from poll tax obtaining certificate of exemption before they could vote, in view of subsequent holding that law requiring such certificates was unconstitutional. McCormick v. Jester [Tex. Civ. App.] 115 SW 278. Where attachment has been sued out and defendant both denies the grounds of attachment and pleads to merits, and plaintiff takes only a general judgment, and not any special judgment against the property, alleged errors in rulings with reference to issues raised concerning grounds of attachment are wholly immaterial. Henderson v. Phillips [Ga. App.] 65 SE 40. No error requiring reversal, where judgment was entered in accordance with agreement signed by attorneys and filed with papers, defendants having appeared and answered, and court having jurisdiction of parties and subject-matter. Forty Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. [Tex. Civ. App.] 111 SW 417. Instruction to find against defendant on injunction sued out, where injunction previously issued was dissolved. Briggs v. New South Lumber Co. [Tex. Civ. App.] 117 SW 885. Permitting amendment of petition in proceedings for location of new highway and vacation of old one so as to describe more definitely part of old highway to be vacated harmless to remonstrators where judgment was against such vacation. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871. Giving and refusing instructions on issue as to which verdict and judgment were in favor of complaining party. Id.

15. For cure by remittitur in supreme court, see Appeal and Review, § 15C. Admission of evidence as to damages. McMahon v. Chicago City R. Co., 239 Ill. 334, 88 NE 223; Weatherford, etc., R. Co. v. White [Tex. Civ. App.] 118 SW 799. Refusal to instruct. Brown & Co. v. McKnight [Ark.] 118 SW 409. Submitting improper item of damages. International & G. N. R. Co. v. Williams [Tex. Civ. App.] 118 SW 758. Charge as to measure of damages. Texas Cent. R. Co. v. Wheeler [Tex. Civ. App.] 116 SW 83. Argument of counsel. Producers' Oil Co. v. Barnes [Tex. Civ. App.] 120 SW 1023. Improper assessment of damages. Kime v. Bank of Edgemont [S. D.] 119 NW 1003. Allowance of interest. Seaboard Air Line R. Co. v. Bishop [Ga.] 63 SE 1103. Error in verdict. St. Louis S. W. R. Co. v. Allen [Tex. Civ. App.] 117 SW 923. Verdict in excess of amount claimed. Lewter v. Lindley [Tex. Civ. App.] 121 SW 178. Where evidence was insufficient to authorize portion of verdict. Miller v. Smith [Ga. App.] 65 SE 292. Allowing claim of set-off. Holden v. Collier [Ga. App.] 63 SE 586.

Held not cured. Eiden v. Chicago, etc., R. Co., 144 Ill. App. 320. Admission of evidence in action for wrongful death as to number, ages, and sex of decedent's grandchildren, and that he had supported them, etc. Cook

§ 1. *Validity and construction of health regulations.*[18]—See 11 C. L. 1717—Reasonable regulations of uniform operation [19] for the purpose of preventing what is possibly injurious to health [20] are upheld. As a result all rules and resolutions of boards of health within the scope of their authority have the force of legislative enactments,[21] and, in all judicial inquiries, every intendment is to be allowed in favor of the validity of the statute and the lawfulness of the measures taken under it;[22] therefore, though such regulations and proceedings are subject to judicial review,[23] they will not be interfered with except in clear cases.[24] Among those matters often specifically regulated by sanitary measures may be mentioned the examination of barber shops to determine the sanitary condition thereof,[25] the isolation of infected persons,[26] the ventilation of factories,[27] the removal of manure from cities,[28] the regulation of slaughter houses,[29] and the discharge of sewage.[30] Regulations requiring vaccination as a condition precedent to admission to the public schools are generally held to be valid,[31] and a statute so providing is not void be-

v. Cleveland, etc., R. Co., 143 Ill. App. 109. Refusal of instruction as to damages. Foringer v. New Kensington Stone Co., 223 Pa. 425, 72 A 797. Submitting question outside of issues. Elliott v. Hodgson [Ga.] 65 SE 405. Verdict which is the result of passion and prejudice. Sackheim v. Miller, 136 Ill. App. 132.

16. See 8 C. L. 29.

17. It includes the validity and enforcement of health regulation and the powers and duties of officers charged with their enforcement. It excludes general matters as to the police power of the state (see Constitutional Law,* § 6) and of municipalities (see Municipal Corporations,* § 10C) and regulations pertaining to food (see Adulteration; * Food *) and drugs (see Medicine and Surgery*).

18. Search Note: See notes in 5 C. L. 1642; 11 Id. 1718; 25 L. R. A. 152; 26 Id. 484, 727, 728; 32 Id. 116; 38 Id. 311; 6 L. R. A. (N. S.) 143; 25 A. S. R. 888; 47 Id. 533, 536; 1 Ann. Cas. 336, 345, 442; 2 Id. 342, 496; 3 Id. 773; 7 Id. 17; 10 Id. 882.

See, also, Health, Cent. Dig. §§ 24-38; Dec. Dig. §§ 20-43; 21 Cyc. 387, 393-396; 22 A. & E. Enc. L. (2ed.) 922; 23 Id. 535; 10 A. & E. Enc. P. & P. 4.

19. A regulation which requires that all milk or cream, with certain exceptions, shall be kept and sold in tightly closed and capped bottles, or in other receptacles of a similar character which shall be approved by the board of health, does not fail of uniform operation because of the exceptions contained thereln. Klopfer v. Dayton Board of Health, 9 Ohio N. P. (N. S.) 33.

20. Regulations with reference to sale of milk. Klopfer v. Dayton Board of Health, 9 Ohio N. P. (N. S.) 33.

21. Kirk v. Wyman [S. C.] 65 SE 387.

22. Kirk v. Wyman [S. C.] 65 SE 387; Dreyfus v. Boone [Ark.] 114 SW 718.

23. Klrk v. Wyman [S. C.] 65 SE 387. In exercising the jurisdiction to review the regulations and actions of boards of health by injunction or other proceedings, the court cannot invade the province of the legislative branch of government. Id.

24. Though city had a power to grant the exclusive right to one to remove deposlts from unsewered privies, yet a grant requlring one having privilege to pay certain sum annually to the city was invalid. Dreyfus v. Boone [Ark.] 114 SW 718.

25. Pub. Laws 1903, p. 26, c. 1100, so providing is within police power. State v. Armeno [R. I.] 72 A 216.

26. When necessary for protection of public health, are not unconstitutional. Kirk v. Wyman [S. C.] 65 SE 387.

27. Labor Law (Laws 1897, p. 482, c. 415), art. 6, § 86, as amended by Laws 1907, p. 1049, c. 490, requiring owners and tenants of factories to provide sufficient ventilation, is valid exercise of police power. People v. Eno, 119 NYS 600. Where ventilation of factory ls not sufficient, owner is liable though tenant may also be liable. Id.

28. Removal of manure from city held proper subject of regulations. Landberg v. Chicago, 237 Ill. 112, 86 NE 638. Ordinance granting exclusive privilege to remove manure from city held invalid. Id.

29. Wilson's Rev. & Ann. St. 1903, prohibiting the maintenance of a slaughter house within one-half mile of the corporate limits of a city of the first class, etc., is a legitimate exercise of the police power. Kuchler v. Weaver [Okl.] 100 P 915.

30. Acts 1907, p. 477, c. 177, § 8 (Rev. Codes, § 1566), authorizing state board of health to make an investigation as to pollution of streams by discharge of sewage and to make an order prohibiting its continuance if public health so requlred, **does not contemplate a public trial** but rather an ex parte investigation. Miles City v. Board of Health [Mont.] 102 P 696. But, under § 10, any party aggrieved by the order may appeal. Id. Order of board of health, **prohibiting city from discharging sewage** lnto stream until purified, held valid though city could acquire prescriptive right to discharge its sewage into such stream. Id. Under Rev. Codes, § 1566, an order of state board of health prohibiting city from discharging sewage into stream was valid though water supply of certain city was not polluted as the statute applies to any pollution of waters at any place within state. Id. **Burden of proof** on clty to show that order of board of health prohibiting such city from discharging sewage into stream was unauthorized. Id.

31. Vaccination of school children: Legislature can requlre all minors to be vacci-

cause it makes no allowance for those physically incapable of vaccination.[32] Regulations must not, however, unreasonably interfere with individual rights,[33] and the mere assertion that the subject relates, though but in a remote degree, to the public health, does not render an enactment on the subject valid.[34]

§ 2. *Health boards and officers.*[35]—See 11 C. L. 1719—Who may exercise the powers of a board of health,[36] the manner in which its membership may be increased,[37] the right to appoint health officers,[38] the extent of their powers [39] and duties,[40] their

nated before attending public schools. State v. Shorrock [Wash.] 104 P 214. Laws 1897, p. 392, § 92, as amended by Laws 1905, p. 263, c. 142, § 3, making vaccination a condition of school membership, is not repealed by Laws 1907, p. 569, c. 231, providing for compulsory education of children. Id. Rev. St. 1899, § 9765 (Ann. St. 1906, p. 4479), which in effect prohibits a child from attending school who is actually diseased or has been exposed to a contagious disease, does not prevent board of school directors from excluding nonvaccinated children during threatened or existing smallpox epidemic. State v. Cole, 220 Mo. 697, 119 SW 424. Laws 1897, p. 392, § 92, as amended by Laws 1905, p. 263, c. 142, § 3, requiring **"successful vaccination,"** is not too indefinite to be capable of enforcement. State v. Shorrock [Wash.] 104 P 214. School board held to have power to enforce order excluding school children from school who had not been **externally vaccinated** in the event of a smallpox epidemic, or a threatened smallpox epidemic. State v. Cole, 220 Mo. 697, 119 SW 424.

Compulsory school law held not to prevent board of school directors from excluding children from school who had not been externally vaccinated in the event of threatened or existing smallpox epidemic. State v. Cole, 220 Mo. 697, 119 SW 424. **Parent not guilty** of violating compulsory school act in not having his child vaccinated externally as required by order of board of school directors as condition precedent to child's right to attend school during threatened or existing epidemic. Id. A parent who sends his child to a public school and is willing to continue to do so, but the child is excluded for failure to comply with a rule of the board of education requiring vaccination, is not liable to conviction under the compulsory education act. State v. Turney, 12 Ohio C. C. (N. S.) 33.

32. It will be presumed that the legislature did not intend to require the vaccination of a child whose condition of health is such that the operation would endanger its life. State v. Shorrock [Wash.] 104 P 214.

33. Landberg v. Chicago, 237 Ill. 112, 86 NE 638. Rule adopted by board of registration in **embalming,** providing that no permit for burial shall be issued to any person who is not a registered embalmer, cannot be sustained on theory that the regulation promotes the public health. Wyeth v. Cambridge City Board of Health, 200 Mass. 474, 86 NE 925. St. 1894, p. 92, c. 119, authorizing board of health to **compel owner of private way to pave same,** is invalid as authorizing unreasonable restriction upon the rights of the citizen in ownership and use of real property. Durgin v. Minot, 203 Mass. 26, 89 NE 144.

34. Requiring all undertakers to be licensed embalmers. Wyeth v. Cambridge City Board of Health, 200 Mass. 474, 86 NE 925.

35. Search Note: See notes in 2 C. L. 176; 3 Id. 1591; 36 L. R. A. 603; 5 L. R. A. (N. S.) 635; 80 A. S. R. 212; 4 Ann. Cas. 474; 9 Id. 814. See, also, Health, Cent. Dig. §§ 1-23; Dec. Dig. §§ 1-19; 21 Cyc. 383-406; 4 A. & E. Enc. L. (2ed.) 596.

36. Act of April 11, 1899, P. L. 38, empowering school districts of the several townships of the commonwealth to exercise powers of board of health in each township, is not unconstitutional. Nether Providence School Dist. v. Montgomery, 38 Pa. Super. Ct. 483.

37. Members of local health board are local officers within Const. art. 10, § 2, and must be appointed by the local authorities, therefore provision of statute authorizing state commissioner to appoint local health officers is void. Towne v. Porter, 128 App. Div. 717, 113 NYS 758. Under Public Health Law (Laws 1893, p. 1501, c. 661), § 20, as amended by Laws 1907, p. 427, c. 225, village board of trustees could increase membership of board of health by any act showing their intention to increase same. Id.

38. Act Aug. 13, 1907 (Gen. Acts 1907, p. 864), § 142, conferring on municipalities power to adopt ordinances to guard against contagious disease, etc., held not repealed by Gen. Acts 1903, p. 499, amended by Act Aug. 15, 1907 (Gen. Acts 1907, p. 893), therefore ordinance providing for **city bacteriologist** was valid. State v. Duncan [Ala.] 50 S 265.

39. The performance of the duties of a health officer involves expense, and the power to care for persons having infectious diseases implies the **authority to contract** for medical attendance and nursing in an emergency which requires immediate action. Hawthorne v. Cherokee County Com'rs, 79 Kan. 295, 99 P 598. Under Greater New York Charter (Laws 1901, p. 500, c. 466), § 1174, board has power to authorize commissioner of health to act for it in making a contract with an architect for plans for an addition to hospital, therefore it was error to dismiss complaint which alleged contract with defendant, acting by its department of health and the president of the board of health, it appearing that contract was made by president of board of health, who was the commissioner of health. Bernstein v. New York, 134 App. Div. 226, 118 NYS 903.

40. A health officer having knowledge of any infectious or contagious disease is required to immediately exercise and maintain supervision of such case, seeing that it is properly cared for and isolated. Hawthorne

relation to other governmental agencies,[41] and the compensation of health officers,[42] are matters which are usually provided for by statute or constitution.[43] Members of a board of health are not personally liable provided they are acting in performance of their public duty in good faith.[44] Statutes forbidding suits [45] against health boards, their officers or agents, are upheld unless they contravene constitutional limitations.[46]

§ 3. *Care and control of sanitation and disease.*[47]—See 11 C. L. 1719—A board of health may not deprive any person of his property or liberty except as is reasonably necessary to the public health,[48] and such inquiry must include notice and an opportunity to be heard unless the emergency appears to be so great that such notice and hearing could be had only at the peril of the public safety.[49] Quarantine may be established against all infectious or contagious diseases dangerous to the public,[50] but the manner of isolation must not be beyond what is necessary,[51] otherwise the court will enjoin it as arbitrary,[52] it appearing that an action for damages against the board of health as individuals would not afford an adequate remedy.[53] The court will enforce a valid order [54] of a board of health, sufficient notice having been

v. Cherokee County Com'rs, 79 Kan. 295, 99 P 598.

41. A local board of health in the state of New Jersey is not subordinated to any municipal authority. Borden's Condensed Milk Co. v. Baker, 168 F 111. Its powers are derived directly from the state. Id. Mere fact that the boundaries of the town and that of the sanitary district are identical does not make the local board the agent of the town, or the town responsible for what the local board does. Id.

42. Compensation for services of city health officer in disinfecting houses held provided for in Comp. Laws, § 4462 (Pub. Acts 1883, p. 143, No. 137, § 3), and therefore he was not entitled to compensation from county under provisions of § 4424. Tabor v. Berrien County Sup'rs, 156 Mich. 176, 16 Det. Leg. N. 56, 120 NW 588.

43. In South Carolina the municipal boards of health derive their authority to isolate persons afflicted with contagious diseases from the constitution. Const. art. 8, § 10, and from Civ. Code 1902, § 1099, passed pursuant thereto. Kirk v. Wyman [S. C.] 65 SE 387.

44. Not personally liable for damages arising out of their acts in establishing quarantine, even where disease does not actually exist. Valentine v. Englewood, 76 N. J. Law, 509, 71 A 344.

45. Section 15 of the Board of Health Act (Gen. St. 1895, p. 1638), in effect gives an action against the board upon proof of the facts therein set forth, but in such suits the question of reasonable and probable cause is for the court. Valentine v. Englewood, 76 N. J. Law, 509, 71 A 344.

46. Section 15 of the Board of Health Act (Gen. St. 1895, p. 1638), forbidding suits unless upon proof that the board acted without reasonable and probable cause to believe that the alleged cause of disease was in fact prejudicial and hazardous to the public, does not infringe constitutional provisions protecting private property and individual liberty. Valentine v. Englewood, 76 N. J. Law, 509, 71 A 344.

47. **Search Note:** See notes in 3 C. L. 1593; 14 L. R. A. 476; 6 L. R. A. (N. S.) 977, 1009; 12 Id. 638; 13 Id. 1190; 47 A. S. R. 536, 546; 80 Id. 230; 93 Id. 840; 5 Ann. Cas. 233.

See, also, Health, Cent. Dig.; Dec. Dig.; 21 Cyc. 382-407; 22 A. & E. Enc. L. (2ed.) 922; 23 Id. 535.

48. Kirk v. Wyman [S. C.] 65 SE 387. An ordinance directing the destruction of a building infected with disease is valid, it being the only effective means in preventing the spread of the disease. Sings v. Joliet, 237 Ill. 300, 86 NE 663.

49. Kirk v. Wyman [S. C.] 65 SE 387. Owner of building is not necessarily entitled to day in court before property is actually destroyed. Sings v. Joliet, 237 Ill. 300, 86 NE 663.

50. Under Code, § 2568, a local board of health had power to quarantine against smallpox in case where disease was reported as smallpox by health physician. Kirby v. Harker [Iowa] 121 NW 1071.

51. Kirk v. Wyman [S. C.] 65 SE 387. Proper to keep sick person's family secluded from the public. Kirby v. Harker [Iowa] 121 NW 1071. Though board of health had right to isolate complainant, a lady of culture, who was afflicted with anaesthetic leprosy, yet her condition was not such as to justify her immediate removal to pesthouse in which smallpox patients had been kept and which was situated near dumping ground, while board of health was building cottage for her outside city limits. Kirk v. Wyman [S. C.] 65 SE 387.

52. Temporary injunction allowed, restraining board of health from removing complainant afflicted with leprosy to pesthouse while cottage was being constructed for her. Kirk v. Wyman [S. C.] 65 SE 387.

53. Kirk v. Wyman [S. C.] 65 SE 387.

54. Order of state board of health against village and others **prohibiting use of water from certain stream** is not open to objection that it cannot be enforced if valid, for, if the court thinks it ought to be enforced, an order of its own will supervene upon it, and be of such a character as to enforce the

given.[55] The manner of bringing actions for the enforcement of health regulations[56] and the sufficiency of the judgment therein[57] are largely matters of local law.

*Liability and expense.*See 11 C. L. 1719—A municipality is not liable as a general rule for the value of property destroyed in the interest of public health.[58] A nuisance injurious to the public health may be removed at the owner's or occupant's expense on the owner or occupant failing to comply with the order for its removal.[59] An allowance of an account by a local board of health may be conclusive upon the board of supervisors of the county,[60] and upon the county to which the patient belongs.[61] A county is liable for the expense of nursing smallpox patients, the employment by the board itself not being a condition precedent.[62]

Hearing; Hearsay; Heirs, Devisees, Next of Kin and Legatees; Herd Laws, see latest topical index.
"High rate of speed" (defined), see 12 C. L. 972, n. 53.

HIGHWAYS AND STREETS.

The scope of this topic is noted below.[63]

§ 1. Definitions and Classifications, 2044.
§ 2. Establishment, 2045.
A. In General, 2045.
B. Prescription or User, 2045.
C. Statutory Proceedings, 2047. Occasion or Necessity for Road, 2048. Application or Petition, 2048. Jurisdiction, Notice and Hearing, 2049. Viewing, Locating and Assessing, and Recovery of Damages, 2050. Order Locating the Road, 2052. Amendment, Discontinuance and Dismissal, 2053. Appeal and Review, 2053. Injunction and Other Relief, 2054.
§ 3. Boundaries and Extent of Way, Ascertainment and Resurvey, 2055.
§ 4. Alterations and Extensions of Way, 2056.
§ 5. Change of Grade, 2057.
§ 6. Improvement and Repair, 2061.
§ 7. Abandonment and Diminution, 2067.
§ 8. Vacation, 2068.
§ 9. Street and Highway Officers and Districts, 2073.
§ 10. Fiscal Affairs, 2074.
§ 11. Control by Public and Public Regulations, 2077.
§ 12. Rights of Public Use; Law of the Road, 2080.
§ 13. Rights of Abutters, 2087. Ownership of Fee, 2089.
§ 14. Defective or Unsafe Streets or Highways, 2089.
A. Liability of Municipalities in General, 2089.
B. Notice of Defect, 2094.
C. Sidewalks, 2096.
D. Barriers, Railings and Signals, 2097.
E. Snow and Ice, 2098.
F. Defects Created or Permitted by Abutting Owners and Otherwise, 2099.
G. Persons Entitled to Protection, 2102.

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order of the board. State Board of Health v. St. Johnsbury [Vt.] 73 A 581.

55. Notice of order of state board of health, prohibiting use of village water for domestic purposes, served upon village trustees, was notice to the village. State Board of Health v. St. Johnsbury [Vt.] 73 A 581.

56. Under P. S. 5496, giving board of health general oversight and care of waters, etc., and authorizing such board to prohibit any village from using water whenever in the board's opinion the same was so contaminated as to endanger the public health, a bill against a village and others to enforce order of board may be brought by the board. State Board of Health v. St. Johnsbury [Vt.] 73 A 581.

57. Where a statute prescribes the form of a judgment to be entered, a judgment following the words of the statute is sufficient with setting forth the particular acts which is alleged constitutes a violation. Board of Health of Ashbury Park v. Hayes [N. J. Law] 74 A 339.

58. There being no statute allowing recovery, a county is not liable for value of property destroyed by local board of health. Louisa County v. Yancey's Trustee [Va.] 63 SE 452.

59. Nuisance existing on private way. Durgin v. Minot, 203 Mass. 26, 89 NE 144.

60. Arenac County Sup'rs v. Iosco County Sup'rs [Mich.] 16 Det. Leg. N. 637, 122 NW 629.

61. Under Comp. Laws 1897, § 4424, allowance of account for providing person quarantined with supplies and a nurse was conclusive. Arenac County Sup'rs v. Iosco County Sup'rs [Mich.] 16 Det. Leg. N. 637, 122 NW 629. Where under § 4424 a county has paid a bill for supplies and nurse furnished person belonging to another county, the former county is not bound to exhaust its remedies against other parties made liable to pay by the statute before suing the latter county. Id.

62. Where health officer employed person to nurse persons having smallpox, it was not under the circumstances a condition precedent to the liability of the county for the expense that there should have been a previous employment by the board itself. Hawthorne v. Cherokee County Com'rs, 79 Kan. 295, 99 P 598.

H. Remote and Proximate Cause of Injury, 2102.
I. Contributory Negligence of Person Injured, 2103.
§ 15. Actions for Injuries, 2105.
A. Notice of Claim for Injury and Intent to Sue, 2105.
B. Pleading, 2108.
C. Evidence, 2111.
D. Questions for the Jury, 2114.
E. Instructions, 2114.
§ 16. Injury to, Obstructions of, or Encroachment on, Street or Highway, 2118.
Criminal Liability, 2124.

§ 1. *Definitions and classifications.*[64] See 11 C. L. 1721—Public highways are for the exclusive use of the public,[65] and the term "public highway" in the broad popular sense includes any way over which the public have a right to travel,[66] though in a strict legal sense it is restricted to roads which are wholly public.[67] Streets[68] and alleys are public ways,[69] and the term "public highway" in the general sense includes toll roads.[70] A sidewalk is a part of the highway.[71] A public highway is an

63. This article treats generally of the law applicable to public highways and streets. As to the establishment of purely private ways and the principles controlling easements generally, see Easements,* § 1. As to the establishment of streets and highways by dedication, see Dedication.* As to adverse possession of highways and streets, see Adverse Possession,* § 2. As to highways and streets as boundaries, see Boundaries,* § 1. As to the principles controlling bridges, their establishment and maintenance and the like, see Bridges.* As to measure of damages occasioned in personal injury actions, due to negligent use, construction, or maintenance of streets, and evidence of such damages, see topic Damages.* As to the general principles of eminent domain, see Eminent Domain.* As to the grant of public privileges in the nature of licenses, to use streets, see Franchises.* As to the general criminal procedure when applied to crimes committed on public highways, see Indictment and Prosecution.* As to the grant of licenses for the use of highways, see Franchises.* As to the general rules regarding the validity and construction of ordinances regulating the use of streets, see Municipal Corporations,* § 8F. As to the general rules regarding public officers, see Officers and Public Employes,* § 11. As to matters relating peculiarly to parks and other public places, see Parks and Public Grounds.* As to the erection and maintenance of pipe lines and subways in public streets, see Pipe Lines and Subways.* As to the general principles regarding improvements by municipalities, see Public Works and Improvements;* Public Contracts.* As to levy, collection and payment of local assessments which are imposed for highway improvements, see Public Works and Improvements,* § 9. As to the acquirement of rights in public highways for certain purposes, see Railroads,* § 4; Street Railways,* § 1; Telegraphs and Telephones,* § 1; Gas,* § 1; Electricity,* § 1. As to the acquirement of a railroad right of way over or through highways, see Eminent Domain,* § 4; Railroads,* § 4. As to the duties of railroads in connection with the maintenance and repair of highway crossings and the like, see Railroads,* § 8. As to the duty of street railways in the construction of the portion or crossing of a street used by them, see Street Railways,* § 5. As to injuries by street railways to travelers on highways, see Street Railways,* §§ 8B, 8C, 8D. As to the construction, maintenance and repair of sewers and drains, see Sewers and Drains.* As to the law peculiarly applicable to toll roads, see Toll Roads and Bridges.* As to the duty of care in respect to appliances commonly established on public highways, see Telegraphs and Telephones,* § 2; Electricity.* § 3; Gas.* § 3.

64. Search Note: See notes in 57 A. S. R. 744; 67 Id. 745.

See, also, Highways, Cent. Dig. §§ 1-3, 25-29; Dec. Dig. §§ 1-3, 18, 19; Municipal Corporations, Cent. Dig. §§ 1419-1423; Dec. Dig. §§ 646-649; 28 Cyc. 834-837; 1 A. & E. Enc. L. (2ed.) 224; 4 Id. 15; 15 Id. 343, 350, 352; 18 Id. 577; 27 Id. 99, 102.

65. Tolman & Co. v. Chicago, 145 Ill. App. 234. Case reversed by 240 Ill. 268, 88 NE 488.

66. Term includes every common way for travel by person on foot or with vehicles rightfully used on highways, which public have right to use either conditonally or unconditionally. Weirich v. State, 140 Wis. 98, 121 NW 652.

67. Weirich v. State, 140 Wis. 98, 121 NW 652.

68. Public street is public highway. Illinois Cent. R. Co. v. Smith [Ky.] 118 SW 933; City of Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403. Under Sayles' Ann. Civ. St. 1897, art. 549c, as to duty of railroads to repair public crossings, "public street" is one laid out and established by municipality, or one in which public has acquired an easement by methods known to law. City of Atlanta v. Texas & P. R. Co. [Tex. Civ. App.] 120 SW 923.

69. Kansas City S. R. Co. v. Boles [Ark.] 115 SW 375. Term alley when used without explanation held to mean public alley. Talbert v. Mason, 136 Iowa, 373, 113 NW 918.

70. Weirich v. State, 140 Wis. 98, 121 NW 652. Turnpike road is highway in ordinary acceptation of work, being created to afford safe and convenient ways for public travel. Patapsco Elec. Co. v. Baltimore, 110 Md. 306, 72 A 1039. In limited sense, toll road is not public highway. Weirich v. State, 140 Wis. 98, 121 NW 652.

71. City of Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403.

easement [72] and streets or highways are public property.[73] In some states, public highways are only such as come within the statute declaring them to be such.[74] A "paper street" is one that appears on a recorded plat but has never been opened or used as a street.[75] When a street is accepted as dedicated and recorded on a map, such street is legally named as designated by such map [76] and the subsequent designation of the same street by a different name when another map is filed and the street extended does not change the original name.[77]

§ 2. *Establishment.* *A. In general.*[78]—See 11 C. L. 1721—The right to a public street may usually be established by compliance with the statutory provisions relative thereto,[79] or by conveyance, dedication, or prescription.[80] The legislature may provide for the appropriation of turnpikes for the public use to be maintained by the various municipalities.[81]

(§ 2) *B. Prescription or user.*[82]—See 11 C. L. 1722—In most states, public highways may be established by prescription,[83] when all the elements of adverse possession are present.[84] The user, in order to ripen into title, must be adverse,[85] actual,[86]

72. Public highway is an easement tending to increase value of land and is not an incumbrance which will furnish cause for breach of contract to convey land. Killen v. Funk, 83 Neb. 622, 120 NW 189. Public has perpetual easement in highway, and that easement is **freehold.** People v. Magruder, 237 Ill. 340, 86 NE 615; Town of Scott v. Artman, 237 Ill. 394, 86 NE 595.

73. Sullivan Advertising Co. v. New York, 61 Misc. 425, 113 NYS 893.

74. Roads established without authority of law for convenience of individuals are without any legal status as public highways. Tucson Consol. Copper Co. v. Reese [Ariz.] 100 P 777.

75. Raiolo v. Northern Pac. R. Co., 108 Minn. 431, 122 NW 489.

76. Peck v. Stassforth [Cal.] 103 P 918.

77. Where street was legally named "Otto" street on map filed, filing of another addition continuing subdivisions in first map to adjoining land but designating "Otto" as "Davin" street did not operate to change name. Peck v. Stassforth [Cal.] 103 P 918.

78. Search Note: See notes in 18 L. R. A. 510; 9 L. R. A. (N. S.) 1223.

See, also, Highways, Cent. Dig. §§ 1-233; Dec. Dig. §§ 1-68; Municipal Corporations, Cent. Dig. §§ 1419-1428; Dec. Dig. §§ 646-654; 28 Cyc. 834-839, 843-845; 15 A. & E. Enc. L. (2ed.) 353; 27 Id. 103; 20 A. & E. Enc. P. & P. 889.

79. City of Princeton v. Gustavson, 241 Ill. 566, 89 NE 653. City of fourth class may acquire streets by condemnation. Ky. St. § 3561 (Russell's St. § 1583). Hall v. Leeper [Ky.] 121 SW 683.

80. City of fourth class may acquire streets by conveyance or dedication. Ky. St. § 3561 (Russell's St. § 1583). Hall v. Leeper [Ky.] 121 SW 683. Where part of military reservation wae relinquished to city of San Francisco and dedicated for that purpose **by Congress** (Act Cong. May 9, 1876, c. 93, 19 Stat. 52), it could not be alienated and city might open same for travel. Rudolph Herman Co. v. San Francisco, 154 Cal. 688, 99 P 169. As to establishment of highways by prescription see post, § 2B; by statutory proceedings, see post, § 2C. See, also, scope note.

81. Act April 20, 1905, P. L. 237, and Act April 25, 1907, P. L. 104, as to appropriation of turnpikes for public use free of tolls and maintenance thereof by various municipalities, are constitutional. Clarion County v. Clarion Tp., 36 Pa. Super. Ct. 302.

82. Search Note: See notes in 7 L. R. A. (N. S.) 639; 57 A. S. R. 744; 2 Ann. Cas. 973; 3 Id. 142.

See, also, Highways, Cent. Dig. §§ 1-24; Dec. Dig. §§ 1-17; Municipal Corporations, Cent. Dig. §§ 1419-1422; Dec. Dig. §§ 646-648; 28 Cyc. 834, 835, 837; 15 A. & E. Enc. L. (2ed.) 353; 27 Id. 104.

83. City of Princeton v. Gustavson, 241 Ill. 566, 89 NE 653; Siddall v. Philadelphia [Pa.] 73 A 1013; Scheller v. Pierce County [Wash.] 104 P 277. Under statutes, public road **may not be established** by adverse user or prescription. Tucson Consol. Copper Co. v. Reese [Ariz.] 100 P 777.

84. Scheller v. Pierce County [Wash.] 104 P 277. Highway arising by prescription, directly, involves question of adverse use. Pitser v. McCreery [Ind.] 88 NE 303.

85. City of Chicago v. Wildman, 240 Ill. 215, 88 NE 559; City of Princeton v. Gustavson, 241 Ill. 566, 89 NE 653; Siddall v. Philadelphia [Pa.] 73 A 1013; Sheridan County Com'rs v. Patrick [Wyo.] 104 P 531; Scheller v. Pierce County [Wash.] 104 P 277. Under Code, § 3004, mere use of way by public, however long continued, cannot be construed as adverse to owner of title. O'Malley v. Dillenbeck Lumber Co. [Iowa] 119 NW 601.

Permissive use is insufficient to establish way. Sheridan County Com'rs v. Patrick [Wyo.] 104 P 531. Highway is not established by prescription where original use is permissive and nothing occurs to render such use adverse. Scheller v. Pierce County [Wash.] 104 P 277. Right to use of alley is not acquired by prescription where use is only permissive and at intervals in recognition of owner's rights. Cochran v. Purser [Ala.] 49 S 353. Use of strip of land as way of egress and ingress to school is not such adverse possession as would give owner notice of claim to fee of land. City of Houston v. Bammel [Tex. Civ. App.] 115 SW 661. Where land is unimproved and uninclosed, use will be **deemed permissive.** Sheridan

open and notorious,[87] exclusive,[88] continuous,[89] and under claim of right [90] for the full common-law or statutory period.[91] It is also essential that a certain well-defined line of travel be shown.[92] A private way cannot be converted into a public way by the mere use thereof.[93] The right to establish a road by prescription does not apply when the title to land is in the United States.[94] The only title which a city acquires to a street by the use thereof is the title to the easement as such,[95] and a municipality seeking to prove the establishment of a road by prescription has the burden of proof.[96] Whether an obstruction is sufficient to intercept the adverse user of a street is often a jury question.[97] The extent of the established highway is treated subsequently.[98] In some states a statutory way is created by user for a certain period,[99] the establishment of such a road being analagous to establishment by

County Com'rs v. Patrick [Wyo.] 104 P 531. Evidence held insufficient to establish public way by prescription, use thereof being entirely consistent with view that it was permissive. City of Princeton v. Gustavson, 241 Ill. 566, 89 NE 653.

86. User must be actual as opposed to constructive. Sheridan County Com'rs v. Patrick [Wyo.] 104 P 531.

87. Scheller v. Pierce County [Wash.] 104 P 277. User must be with **knowledge of owner** of estate. City of Chicago v. Wildman, 240 Ill. 215, 88 NE 559; City of Princeton v. Gustavson, 241 Ill. 566, 89 NE 653.

88. City of Princeton v. Gustavson, 241 Ill. 566, 89 NE 653.

89. City of Chicago v. Wildman, 240 Ill. 215, 88 NE 559; City of Princeton v. Gustavson, 241 Ill. 566, 89 NE 653; Scheller v. Pierce County [Wash.] 104 P 277. Occasional travel over way is insufficient. City of Chicago v. Wildman, 240 Ill. 215, 88 NE 559.

90. City of Chicago v. Wildman, 240 Ill. 215, 88 NE 559; City of Princeton v. Gustavson, 241 Ill. 566, 89 NE 653; Siddall v. Philadelphia [Pa.] 73 A 1013; Sheridan County Com'rs v. Patrick [Wyo.] 104 P 531. **Assumption of control** and jurisdiction by board of county commissioners for period of limitation should be shown. Sheridan County Com'rs v. Patrick [Wyo.] 104 P 531. Title by prescription was not established where only record of control by public related to work performed within ten years prior to time when owner moved his fence and stopped running of statue. Id. Rev. St. 1899, § 9472 (Ann. St. 1906, p. 4347), providing that lapse of time shall not divest title of owner to land unless public money is expended on road, applies to establishment of roads by prescription, but not by dedication. State v. Muir, 136 Mo. App. 118, 117 SW 620.

91. To gain way by prescription, user must be uninterrupted for 20 years or more. Pitser v. McCreery [Ind.] 89 NE 317, denying rehearing [Ind.] 88 NE 303. User of about five years is not sufficient to establish highway by prescription. Sullivan v. Mefford [Iowa] 121 NW 569. Street is not established by prescription where plaintiff's usage only continued few months, and that of public not exceeding two years. Hall v. Leeper [Ky.] 121 SW 683.

Highway not established: Evidence held insufficient to show user and established street by prescription. People v. Johnson, 237 Ill. 237, 86 NE 676. Use of way for school children, abandonment of such way when school was removed, and other facts, held to show no acquirement of way for street uses. City of Houston v. Bammel [Tex. Civ. App.] 115 SW 661. Use of public road diverted from its original course over wild land belonging to an individual does not establish title by prescription. Sheridan County Com'rs v. Patrick [Wyo.] 104 P 531. Where landowner and tenants merely traveled road going to different parts of their own premises, no prescriptive right to highway was established. Sullivan v. Mefford [Iowa] 121 NW 569. Proof of application by owner of land to put lane across way which application was refused held **incompetent evidence** to establish highway by prescription, since such evidence would lead jury to believe that owner recognized establishment of way. People v. Johnson, 237 Ill. 237, 86 NE 676 Prosecution for obstruction of street. Id.

92. People v. Lake Forest, 238 Ill. 305, 87 NE 328. Public cannot acquire prescriptive right to pass over land generally. Id. Evidence held not to show acquirement of title to land by prescription where owner would not permit teams thereon and only permitted public so far as there was no interference with his own rights. Id. **Deviations** of 20 feet from line of public travel, to avoid mud, pools, or obstructions, will not prevent establishment of highway by prescription. Kendall-Smith Co. v. Lancaster County [Neb.] 121 NW 960.

93. City of Princeton v. Gustavson, 241 Ill. 566, 89 NE 653. Where strip is originally set apart as private way, use thereof will be presumed to be in accordance with intent of parties. City of Princeton v. Gustavson, 241 Ill. 566, 89 NE 653.

94. State v. Blakely, 135 Mo. App. 290, 115 SW 483.

95. City of Houston v. Bammel [Tex. Civ. App.] 115 SW 661.

96. Sheridan County Com'rs v. Patrick [Wyo.] 104 P 531.

97. Beard v. Hicks [Ala.] 50 S 232.

98. See post, § 3.

99. If road bas been used as highway for 20 years, its status as highway is fixed (Burns' Ann. St. 1908, § 7663). Pitser v. McCreery [Ind.] 88 NE 303. Highway created by user for 20 years (Burns' Ann. St. 1908, § 7663) is created by statute. Id.; Pitser v. McCreery [Ind.] 89 NE 317, denying rehearing [Ind.] 88 NE 303.

prescription.[1] The interruption of the public user of such highways in order to prevent their establishment must be an interruption of the right of use.[2]

(§ 2) *C. Statutory proceedings.*[3]—See 11 C. L. 1723—Since a statutory proceeding involves the taking of private property for public use,[3a] the statute, strictly construed,[4] must clearly confer the power[5] though it is not necessary that the statute should specifically mention streets or alleys, in order to authorize condemnation.[6] Statutes as to the establishment of roads must also conform to constitutional limitations.[7] When condemnation is authorized, the power may be exercised not only upon private property but upon property devoted to a public use.[8] A change in the method of procedure for the condemnation of public streets does not authorize a property owner to object thereto.[9] Statutory or charter provisions are determinative of the power of park commissioners to permit the establishment of a street across a park way.[10] As to a person who has entered unsurveyed lands as a bona fide settler, a highway can only be established across such lands pursuant to statute,[11] and, where the establishment of highways is wholly statutory,[12] an act of congress granting a right of way over the public domain is not to be construed as granting such right contrary to the statutes of the state.[13]

1. Establishment of road under Burns' Ann. St. 1908, § 7663, by user for 20 years, does not involve question of dedication or prescription though analogous to latter. Pitser v. McCreery [Ind.] 88 NE 303; Id. [Ind.] 89 NE 317, denying rehearing [Ind.] 88 NE 303. Where way has been used for 20 years and becomes highway under Burns' Ann. St. 1908, § 7663, it is immaterial whether use was with **consent of landowner.** Pitser v. McCreery [Ind.] 88 NE 303. Burns' Ann. St. 1908, § 7663, is not to be construed with statute as to acquisition of easements (§ 6178), since latter statute refers to adverse use, which is not contemplated by highway statute. Pitser v. McCreery [Ind.] 89 NE 317, denying rehearing [Ind.] 88 NE 303. Under Burns' Ann. St. 1908, § 7663, as to establishment of highway by 20 years' "use as a highway," such use means that highway **must be public road** over which every citizen may travel. Pitser v. McCreery [Ind.] 88 NE 303. Where highway is established, under Burns' Ann. St. 1908, § 7663, by 20 years' user, use must be under **claim of right.** Id. Twenty years' user of road under Burns' Ann. St. 1908, § 7663, does not mean that road must be kept in **repair.** Id.

2. Pitser v. McCreery [Ind.] 88 NE 303. Placing of obstructions in way was an interruption of use of road, but not of right. Pitser v. McCreery [Ind.] 89 NE 317, denying rehearing [Ind.] 88 NE 303. Public right to use highway was not interrupted though obstructions were placed in highway, where public asserted its use by removing such obstructions when necessary. Pitser v. McCreery [Ind.] 88 NE 303; Id. [Ind.] 89 NE 317, denying rehearing [Ind.] 88 NE 303.

3. **Search Note:** See Highways, Cent. Dig. §§ 25-233; Dec. Dig. §§ 13-68; Municipal Corporations, Cent. Dig. §§ 1423-1428; Dec. Dig. §§ 649-654; 28 Cyc. 836-839, 842-845.

3a. Use of property for public street is public use. City of Seattle v. Byers [Wash.] 103 P 791. Taking was for public use when city council passed ordinance authorizing condemnation for street. Id.

4. Fay v. Macfarland, 32 App. D. C. 295.

5. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

6. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743. Ky. St. 1903, §§ 2831, 2852, authorizes city to condemn land for streets and highways, though that purpose is not specifically mentioned therein. Id.

7. Acts 1905, p. 551, c. 167, § 63 (Burns' Ann. St. 1908, § 7712), as amended by Acts 1907, p. 137, c. 96, as to laying out highways, held unconstitutional as violating Const. art. 4, § 23, in that classification of towns was arbitrary, unequal and not uniform. Smith v. Hamilton County Com'rs [Ind.] 89 NE 867. Act is violative of Const. art. 4, § 22, as special act. Id. Acts 1905, p. 551, c. 167, is unconstitutional as to §§ 62 to 82 inclusive, excepting § 81, they being dependent upon and mutually connected with § 63. Id.

8. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743. Especially where both uses may be enjoyed without unreasonable impairment of either. Id. Fact that condemnation of right of way would entail more care and expense in protecting highway is not sufficient to deny right of city to establish highway. Id.

9. City of St. Louis v. Calhoun [Mo.] 120 SW 1152.

10. Park commissioner's authority to lay out streets is not so limited by Buffalo City Charter (Laws 1891, p. 204, c. 105), § 310, requiring consent to intersection of street with parkway, as to prevent permission to establish street across parkway. In re Smith, 118 NYS 95. Under Buffalo City Charter (Laws 1891, p. 204, c. 105), § 394, park commissioners may not withdraw their consent to establishment of highway across parkway, at will. Id.

11. McAllister v. Okanogan County, 51 Wash. 647, 100 P 146.

12. Under Civ. Code 1901, § 3956, only such roads as may be located and recorded by authority of board of superivisors have status of public highway. Tucson Consol. Copper Co. v. Reese [Ariz.] 100 P 777.

13. Act of Congress (Rev. St. § 2477; U. S. Comp. St. 1901, p. 1567). Tucson Consol. Copper Co. v. Reese [Ariz.] 100 P 777. Where

Occasion or necessity for road.[See 11 C. L. 1724]—The right to establish highways is based upon the need of the public at large.[14] The determination of whether a road is to be established is usually committed to the discretion of county boards and similar legislative agencies,[15] and the question of what influences caused the municipal authorities to act is not usually material,[16] though offers of aid to establish a road which are of such a character as to swerve the municipal officers from their duty, are against public policy and vitiate the official action.[17] Ordinarily courts will not inquire into the question as to whether a street which is ordered to be opened is for the public use [18] though the opening of a street will be denied when it is for the exclusive advantage of an individual.[19] A township which has the duty of opening a road cannot evade such duty because of lack of funds when the inhabitants may be called upon to do the necessary work,[20] nor will the failure of freeholders to perform a duty to build bridges, in such a case, excuse the township.[21]

Application or petition.[See 11 C. L. 1724]—The petition must usually be signed by a designated number of freeholders,[22] it being frequently required that the petitioner have record title to the land affected,[23] though actual possession is often sufficient.[24] Under some statutes the petition itself need not contain the names,[25] and the court has jurisdiction to find that the petition is accompanied by the required list of names.[26] It is not always necessary to allege the signing by the required freeholders,[27] and a petition which is in fact sufficient may be amended so as to show the jurisdictional requisites.[28] An order of revivor following the death of a petitioner

Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567) grants right of way over unsurveyed public lands for highway, and Laws 1903, p. 155, c. 103 (Wash.) excepts same, **grant remains in abeyance** until highway is established under public laws authorizing it. McAllister v. Okanogan County, 51 Wash. 647, 100 P 146.

14. Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969.

15. Stone v. Nebraska City [Neb.] 122 NW 63. Opening of street to full width platted is matter within discretion of municipal authorities. White v. Philadelphia, 223 Pa. 563, 72 A 856.

16. Question is immaterial when such authorities are vested with discretion to open and grade streets. Barnett v. Yeadon Borough, 37 Pa. Super. Ct. 97.

17. Sharpe v. Hasey [Wis.] 123 NW 647. Offer of aid held to be so trifling and inconsequential that town board could in no sense have been influenced thereby, wherefore official action was not affected. Id.

18. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

19. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743. Where opening of streets was of distinct public benefit, city's right to condemn would not be denied, though individual is deeply benefited thereby. Id.

20. Reger v. Madison Tp. [N. J. Law] 71 A 1115.

21. Failure of freeholders to perform duty to build bridges, if such duty arises before road is opened, will not excuse township's duty to open road. Reger v. Madison Tp. [N. J. Law] 71 A 1115.

22. Petition must show that ten of petitioners are freeholders. Johnson v. West [Ark.] 117 SW 770. Petition under Ky. St. § 4289 (Russell's St. § 5421), containing signatures of five landowners of county and other facts required by that section, is sufficient. Story v. Little [Ky.] 121 SW 1023. In proceeding to establish highway, petition should be signed by 12 freeholders of county, 6 of whom reside in immediate locality of proposed highway (Burns' Ann. St. 1908, § 7649). Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871.

Petition is sufficient: Where it does not show that it does not contain names of all owners, occupants or agents through land of which proposed highway is to pass. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871. Petiton held sufficient in form and substance. Stevens v. Sandnes, 108 Minn. 271, 121 NW 902.

23. Highway Law (Laws 1890, p. 1193, c. 568), § 82. In re Riddell, 116 NYS 261. Petitioner held not qualified where record title was in wife though land was assessed to him. Id. Evidence held to show that assessable title to land was in wife. Id. If petitioner had unrecorded deed or other equitable title, same should have been given in evidence. Id.

24. Evidence of actual possession of land through which proposed road would pass was prima facie evidence of ownership of fee in absence of showing of adverse superior title. Stevens v. Sandnes, 108 Minn. 271, 121 NW 902. Petition held sufficient. Id.

25. Under Rev. St. 1899, § 9414 (Ann. St. 1906, p. 4327), petition itself need not contain names of resident owners of land through which proposed road would run. Halter v. Leonard [Mo.] 122 SW 706.

26. Halter v. Leonard [Mo.] 122 SW 706.

27. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871.

28. Where in fact over ten of petitioners were freeholders, petition could be amended so as to show jurisdiction of county court. Johnson v. West [Ark.] 117 SW 770.

is unnecessary where a sufficient number of landowner petitioners remained.[29] That the petitioners were resident freeholders must be presumed when the petition is an ancient document.[30] A plaintiff seeking to have the real property of another subjected to the use of a public or private way must describe such property with certainty,[31] and it is usually necessary that petitions for public highways describe the location of the road.[32] A highway cannot be presumed to have been established by statutory proceedings where it does not correspond to the location of the petition.[33] A petition should not be dismissed because of the failure to indicate the width of the proposed road, when such width is fixed in the order establishing the road.[34]

Jurisdiction, notice and hearing. See 11 C. L. 1725—Jurisdiction over the subject of laying out and establishing roads is frequently conferred upon boards of commissioners[35] or the county court.[36] The extent of jurisdiction is determined by statutory provisions,[37] and the findings and judgment of the county court are generally not open to collateral attack.[38] The filling in of a mere jog or spur does not constitute an encroachment on tidal waters.[39] Notice to the owners of the land over which the proposed highway is to pass is usually essential,[40] and such notice must comply with the statutes,[41] and be properly served[42] or posted.[43] The fact that

29. Story v. Little [Ky.] 121 SW 1023.

30. Where road was established in 1847. Olwell v. Travis, 140 Wis. 547, 123 NW 111.

31. Leverone v. Weakley, 155 Cal. 395, 101 P 304. Complaint which does not enable one to definitely locate on particular strip, claimed to constitute highway, is uncertain as to description. Id.

32. Application to highway commissioners to lay out road must describe proposed highway (Laws 1890, p. 1193, c. 568, § 82). In re Wagstaff, 129 App. Div. 591, 114 NYS 226. Petition to county court for appointment of commissioners to determine necessity, etc., of highway must describe same. Id. Petition under Ky. St. § 4289 (Russell's St. § 3421), need not state that proposed road is necessary for traveling to one of places specified in § 4288. Story v. Little [Ky.] 121 SW 1023. If omission to state in petition that new road was necessary for traveling to one of places specified in Ky. St. § 428 was fatal, **defect should be attacked by demurrer.** Id. Description of proposed highway **held sufficient,** being definite. Boire v. Yamhill County [Or.] 98 P 520. Starting point of highway held to be fixed with precision when surplusage in petition was disregarded. In re Wagstaff, 129 App. Div. 591, 114 NYS 226. Description of line of proposed highway which is sufficiently definite to enable surveyor to locate same is sufficient. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871.

33. Highway cannot be presumed to have been established by statutory proceedings at certain point where it begins at point half mile from corner designated in petition. Lucas v. Payne [Iowa] 120 NW 59.

34. Story v. Little [Ky.] 121 SW 1023.

35. McKaiz v. Jordan [Ind.] 87 NE 974.

36. County court has exclusive jurisdiction of proceedings for laying out and opening roads. Halter v. Leonard [Mo.] 122 SW 706.

37. Jurisdiction of county court in laying out highways in cities is statutory. Alexander v. Montpelier, 81 Vt. 549, 71 A 720. County court has no jurisdiction on appeal from determination of city council to compel city to move retaining wall on resurvey. Id.

38. Halter v. Leonard [Mo.] 122 SW 706.

39. When village street is laid out along tidal creek to width of 50 feet and crosses jog or spur, it is not necessary to grant permission to fill up such jog since bridging or filling of such trifling break in bank would be no encroachment on creek. In re Chew, 134 App. Div. 161, 118 NYS 935.

40. Notice to landowner required by Road Law, § 4 (Gen. St. 1901, § 6019), is necessary to authorize board of county commissioners to establish highway over such land. Bourbon County Com'rs v. Ralston, 79 Kan. 432, 100 P 288. In proceeding to open street under Act May 16, 1891, P. L. 75, as amended, law only requires notice to owners of land condemned. Jackson v. Pittsburg, 36 Pa. Super. Ct. 274. Mortgagee is **not entitled to notice** since he is not owner of land. Id. Mortgage executed after passage of Act May 16, 1891, P. L. 75, as amended, as to opening of streets, is subject to that act. Id.

41. Notice in proceeding to condemn property for public alley which gives block, constituting benefit district, and also boundaries thereof, is **sufficient.** City of St. Louis v. Calhoun [Mo.] 120 SW 1152. Under Comp. Laws, § 4038, as to service of notice of application, omission of word "public" before word "highway" in such notice was not fatal, there having been personal service and nobody having been misled. Gorham v. Johnson [Mich.] 16 Det. Leg. N. 387, 122 NW 181.

42. Petitioner for location of public road over his own land is **not entitled to notice of** pendency of petition. Taylor v. Austin, 83 Neb. 581, 119 NW 1123. Record held to show **proof of service** where copy of notice and proof of service by affidavit sufficiently appeared. Gorham v. Johnson [Mich.] 16 Det. Leg. N. 387, 122 NW 181. Proof of service upon each of occupants of land through which road described in notice passes, by leaving copy of notice, held sufficient. Stevens v. Sandnes, 108 Minn. 271, 121 NW 902.

notice was had must also affirmatively appear in the record,[44] and such fact cannot be shown by parol evidence,[45] nor will it be presumed, on appeal.[46] An appearance of a landowner at a subsequent hearing on the question of damages does not show waiver of notice of hearing on the question of necessity.[47]

Objections to jurisdiction because of facts not apparent from the record must usually be taken at the earliest opportunity,[48] by appearing before the statutory board.[49] Lack of jurisdiction may arise where the petitioners are not qualified to institute the proceedings,[50] and provisions are generally made for attack when the proceedings are void because of lack of jurisdiction.[51] That a road is identical with one which was previously found not to be a public utility should be established by some interested party,[52] and such fact cannot be judicially noticed.[53] Remonstrances must usually be filed by freeholders,[54] and, where remonstrants answer to the merits by filing the remonstrance, they cannot thereafter be heard upon an answer in abatement.[55] The fact that a highway terminates in the center of a creek [56] or that a highway may be converted into a turnpike [57] will not prevent its establishment.

Viewing, locating and assessing, and recovery of damages. See 11 C. L. 1726—The statutes often provide for the appointment of reviewers where the report of viewers is objected to,[58] and a court cannot approve a report of viewers nisi as of a former term and thus deprive interested persons of the right to file exceptions thereto.[59] A report of a county surveyor as to a road is not invalid because made by his deputy in

In proceedings to establish **private way** under Rev. St. 1899, § 9460 (Ann. St. 1906, p. 4345), notice to agent of foreign railroad corporation, which complied with § 570 (p. 597) as to process, was sufficient, railroad being resident of county. Fitzmaurice v. Turney, 214 Mo. 610, 114 SW 504.

43. Under Comp. Laws, § 4038, as to service of notice of application, posting of copies was **not necessary** where personal service was had. Gorham v. Johnson [Mich.] 16 Det. Leg. N. 387, 122 NW 131.

44. Mere recital of "due hearing" in record of proceedings for establishment of highway is insufficient to show notice to landowner. Barber v. Vinton [Vt.] 73 A 881.

45. That notice of hearing on question of necessity of laying out road has been had cannot be shown by parol evidence. Barber v. Vinton [Vt.] 73 A 881.

46, 47. Barber v. Vinton [Vt.] 73 A 881.

48. Party desiring to challenge jurisdiction because of facts not apparent from record must do so at earliest opportunity. McKaig v. Jordan [Ind.] 87 NE 974.

49. Objections to facts upon which jurisdiction of board depends, and which are not apparent on face of record, can only be taken by appearing before board of commissioners when petition is presented and before viewers are appointed. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871.

50. Commissioners held to be without jurisdiction to determine that proposed highway was necessary, where petitioner was not qualified to institute proceedings. In re Ridell, 116 NYS 261.

51. Where proceedings to establish road are void because of lack of jurisdiction, person objecting may make herself party and show lack of jurisdiction. Johnson v. West [Ark.] 117 SW 770.

52. Identity of two routes should ordinarily be brought forward by some interested party to stay pending proceeding since fact must be shown by evidence de hors the record. McKaig v. Jordan [Ind.] 87 NE 974.

53. McKaig v. Jordan [Ind.] 87 NE 974.

54. Under charter of city of Yonkers (Laws 1895, p. 1372, c. 635), tit. 7, § 4, as to opening of streets, remonstrance cannot be signed by remainderman, though life estate is subject to sale by executors at life tenant's election. In re Glenwood Ave., in Yonkers, 131 App. Div. 204, 115 NYS 654. Foreign corporation which was not "freeholder of and residing in such county" had no right, under Burns' Ann. St. § 7657, to file remonstrance raising question of public utility. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871.

55. Plea in abatement on **ground of failure to file cost bond** required by Acts 1879, p. 148, c. 57 (Burns' Ann. St. 1901, § 6753), was properly denied. McKaig v. Jordan [Ind.] 87 NE 974. Acts 1879, p. 148, c. 57, is for purpose of preventing annoyance of repeated petitions and does not prevent action by commissioners though cost bond was not filed. Id. Cost bond may be filed subsequently. Id.

56. In re Wagstaff, 129 App. Div. 591, 114 NYS 226.

57. Remonstrant cannot object to conversion of proposed road into turnpike, there being no increase or decrease of damages thereby. Story v. Little [Ky.] 121 SW 1023.

58. Fowler v. Newsom [Ind.] 90 NE 9.

59. In proceedings under Act June 13, 1836, P. L. 551, § 4, court cannot fix breadth of public road and approve report of viewers nisi as of former term, and thus deprive interested persons of right to file exceptions after breadth has been fixed and approval nisi entered. Croyle Tp. Road, 37 Pa. Super. Ct. 57.

the name of the principal.[60] The meetings of commissioners are usually quite informal.[61] The statutes often require the report of commissioners to show the date when the petition was received,[62] but commissioners appointed to determine the necessity of a highway need not file a map or description of the road with their certificate.[63] The statutes often permit the report of road commissioners to be amended,[64] and a report is not to be quashed though showing intimacy with the petitioners, where there is no undue influence.[65] A board is not deprived of jurisdiction because of the failure to show that a report of viewers was made,[66] where such fact may be presumed.[67] The record and return must usually be signed pursuant to statute,[68] and filed,[69] and it must also appear that damages are properly assessed.[70] Where condemnation is obviated because of a settlement, commissioners are not deprived of jurisdiction because the record fails to show such settlement,[71] and the abutters cannot claim such loss of jurisdiction.[72]

Land is usually acquired under eminent domain proceedings,[73] and constitutional or statutory provisions provide for due compensation therefor [74] to the owner,[75] as well as the assessment of benefits.[76] Substantial damages which are occasioned

60. Halter v. Leonard [Mo.] 122 SW 706.

61. Where commissioners assembled discussed proposed highway and then dispersed, statute was complied with. Gorham v. Johnson [Mich.] 16 Det. Leg. N. 387, 122 NW 181.

62. Date when petition was received by commissioner held to sufficiently appear from its own date, recitals and notice which accompanied record. Gorham v. Johnson [Mich.] 16 Det. Leg. N. 387, 122 NW 181.

63. Under Highway Law (Laws 1890, p. 1193, c. 568), § 84, commissioners appointed to determine necessity of highway need not file map thereof with certificate of decision. In re Wagstaff, 129 App. Div. 591, 114 NYS 226. Commissioners appointed to determine necessity of highway need not incorporate description thereof in their certificate. Id.

64. Right as permitted under present statutes. Story v. Little [Ky.] 121 SW 1023.

65. Commissioners' report is not to be quashed because it was written in office of petitioners' attorneys, there being no evidence or fraud or undue influence. Story v. Little [Ky.] 121 SW 1023. Commissioners' report is not to be quashed because of fact that commissioners took luncheon with petitioners, there being no evidence of undue influence. Id.

66. Failure of board to show in its proceedings that report of viewers was made did not deprive board of jurisdiction or make its subsequent acts void. Fowler v. Newsom [Ind.] 90 NE 9.

67. Since, under statute, reviewers are appointed where report of viewers is objected to, appointment of reviewers which was apparent from record would warrant presumption that report of viewers was made. Fowler v. Newsom [Ind.] 90 NE 9.

68. Signature to record and return by commissioner is all that is required by statute, and though report did not show that fact, map and survey were part of return and should be treated as signed. Gorham v. Johnson [Mich.] 16 Det. Leg. N. 387, 122 NW 181.

69. Where record and return was filed on 18th day of month and dated on that day, it being required that same should be filed in five days, there is no necessary inference that determination was not made on that date (the 17th), especially since return showed such act by commissioner on 17th. Gorham v. Johnson [Mich.] 16 Det. Leg. N. 387, 122 NW 181.

70. Record and return of commissioner held sufficient as showing that damages were assessed at value of land taken for farming purposes. Gorham v. Johnson [Mich.] 16 Det. Leg. N. 387, 122 NW 181.

71. Where settlement is in fact made within ten days of date of order laying out new road, and condemnation of such land is obviated, commissioners are not ousted of jurisdiction of subject-matter because record fails to show such settlement (Hurd's R. S. 1905, c. 121, § 41). Bennett v. Millard, 142 Ill. App. 282.

72. Where road is ordered opened and abutters are paid damages agreed upon, they are estopped to claim that commissioners lost jurisdiction because record failed to show settlement within ten days of order opening road. Bennett v. Millard, 142 Ill. App. 282.

73. Code 1906, § 3337, giving municipality power to lay out streets, requires procedure to be under provisions of eminent domain act and "not otherwise" (§ 1854). Illinois Cent. R. Co. v. State [Miss.] 48 S 561.

74. Municipality cannot deprive person of property for public use unless due compensation is made. Const. 1906, art. 3, § 17. Illinois Cent. R. Co. v. State [Miss.] 48 S 561. Under Const. § 242, city cannot condemn property for street until compensation is paid. Condemnation of railroad right of way. Louisville & N. R. Co. v. Louisville [Ky.] 114 SW 743.

75. Word "owner" as used in Revised Statutes (1 Rev. St. [1st Ed.] pt. 1, c. 16, tit. 1, § 64), providing that no highway shall be opened without release by owner, or assessment of damages, means person entitled to legal estate. In re Riddell, 116 NYS 261.

76. St. Louis Charter art. 6, § 5 (Ann. St. 1906, p. 4850), fixes benefit district in cases of alleys and such "benefit district" includes

must be petitioned for[77] and proved by competent evidence,[78] and the question of damages and benefits should be considered by the jury under appropriate instructions.[79] The naked fee of a street is presumed to have only a nominal value,[80] as well as the easements of an abutting owner,[81] and, where substantial damages are erroneously awarded to an owner of a fee, they should be divided with the abutting owner.[82] The award of supervisors should specify the land which is damaged,[83] and a remedy by appeal is usually provided when the allowance is insufficient.[84] An award which is grossly inadequate may be set aside.[85] No additional compensation is recoverable where a street is extended by accretion.[86]

Order locating the road. See 9 C. L. 1593—The order laying out a road must conform to the statute as to signing,[87] filing map of the proposed road,[88] recording[89] and stating when the work would be completed,[90] and the order must usually con-

all property abutting on alley. City of St. Louis v. Calhoun [Mo.] 120 SW 1152.

77. Remonstrant to highway under Burns' Ann. St. 1908, § 7653, is not entitled to recover damages for injuries to drains where no such claim for damages is set forth in remonstrance. Sterling v. Frick, 171 Ind. 710, 87 NE 237.

78. Opinion evidence of qualified witnesses as to whether defendants' property was damaged or benefited, and extent of such damage, was proper. Knapheide v. Jackson County, 215 Mo. 516, 114 SW 960. Evidence showing that filling up of property was useless expenditure of money held proper where plaintiff made extravagant claims as to damages suffered. Barnett v. Yeadon Borough, 37 Pa. Super. Ct. 97. Admission of plan of lots and streets laid out by plaintiff's predecessor in title, and proof of sale of lots according to such plan, held proper. Id.

79. Instruction that jury should consider benefits of road as making communication practicable held misleading under facts, which were directly reverse of such benefit. Barnett v. Yeadon Borough, 37 Pa. Super. Ct. 97.

80. In re Decatur St. in New York, 133 App. Div. 321, 117 NYS 855. On opening street dedicated to public, owner of fee of street strip which has become disconnected from abutting lot is only entitled to nominal compensation therefor, it being only of nominal value. Beverly Road in New York, 131 App. Div. 147, 115 NYS 208. If, in exceptional case, fee is of substantial value to owner, he has burden of showing it. In re Decatur St. in New York, 133 App. Div. 321, 117 NYS 855.

81. In proceedings for taking fee strip under Laws 1852, p. 437, c. 296, easements of abutting owner are only of nominal value. In re Decatur St. in New York, 133 App. Div. 321, 117 NYS 855.

82. Where city acquired fee of street by condemnation and made award to "unknown owners," such award was properly divisible between fee owner and abutting owner. In re Decatur St. in New York, 133 App. Div. 321, 117 NYS 855. Awards for taking fee of street is properly divided by giving fee owner nominal sum and giving remainder to abutting owner. Id. Where substantial damages were erroneously awarded to owner of fee on opening of street dedicated to public, such damages were properly divided by giving nominal sum of $1 to owner of fee and balance to abutting lot owner. Beverly Road in New York, 131 App. Div. 147, 115 NYS 208.

83. It is not necessary to specify adjacent land which is not damaged, or with regard to which benefits equal damages. Olson v. Curran, 137 Wis. 380, 119 NW 101.

84. For any error of supervisors within their jurisdiction which results in insufficient allowance, remedy is by appeal, under St. 1898, § 1285. Olson v. Curran, 137 Wis. 380, 119 NW 101.

85. Damages for property condemned for public alley held not to be so grossly inadequate as to warrant disturbance of judgment rendered upon report of commissioners. City of St. Louis v. Calhoun [Mo.] 120 SW 1152.

86. Since compensation was fully awarded when street was laid out, no additional compensation is recoverable by fact that street is extended by accretion, but public easement is also extended. State v. Yates, 104 Me. 360, 71 A 1018. Not deprivation of property without due process of law. Id.

87. Statute (St. 1898, § 1269) does not, in terms, require order laying out roadway to be signed at board meeting. Sharpe v. Hasey [Wis.] 123 NW 647.

88. Requirement as to filing map of proposed highway is imposed upon commissioners of highways in making and filing order laying out road (Laws 1890, p. 1193, c. 568, § 81). In re Wagstaff, 129 App. Div. 591, 114 NYS 226.

89. Highway was not established where public road as laid out was not recorded. Tucson Consol. Copper Co. v. Reese [Ariz.] 100 P 777. Where board of supervisors declared map official, but it was not recorded, such map did not render road public highway. Id.

90. Rev. St. 1903, c. 23, § 4, requiring commissioners to state in their return when work of building road shall be done, is mandatory. Kingman v. Penobscot County Com'rs [Me.] 73 A 1038. Record of doings of county commissioners failing to state when work shall be done (required by Rev. St. 1903, c. 23, § 4) forms no legal basis for proceedings under Rev. St. c. 23, § 39, to cause work to be done by agent. Id. Omission of any statement in return of commissioners showing when portion of road in adjoining plantation was to be completed held to be in disregard of Rev. St. 1903, c. 23, § 4 (where road was located partly in town and partly in plantation). Id.

form to the petition[91] or report of viewers.[92] A judgment establishing a highway must describe the location with certainty.[93] The establishment of a road may be proved by the record of proceedings,[94] that being the best evidence of the commissioners' acts.[95] That the order was sufficient will be presumed in the case of a long established way.[96]

Amendment, discontinuance and dismissal. See 11 C. L. 1727

Appeal and review. See 11 C. L. 1727—Statutory provisions frequently authorize appeals to circuit or county courts,[97] where the case is triable de novo,[98] and statutes containing such provisions cannot be objected to as not providing for an appeal.[99] The notice of appeal should conform to statute [1] and be filed in proper time.[2] An appeal bond is generally required,[3] and objections thereto should be made in the circuit court.[4] When such bond is lost, a substituted or new appeal bond may be filed,[5] and when there is no statute prescribing the kind or character of evidence necessary to establish the filing and approval of appeal bond, it may be established by affidavit.[6] The substituted appeal bond need not be signed by the same persons who signed the prior bond.[7] The action of a circuit court in granting leave to file a substituted bond and approving the same is finding that first bond was properly filed.[8] On the trial de novo, the petition is subject to amendment,[9] and when the

91. Highway was not established where resolution of board of supervisors was not taken pursuant to petition. Civ. Code 1901, par. 3972. Tucson Consol. Copper Co. v. Reese [Ariz.] 100 P 777.

92. Although intermediate calls of order laying out road did not coincide with those of report of jury of view, there was no such variance as would defeat establishment of road. Cator v. Hays [Tex. Civ. App.] 122 SW 953. Intention was clear. Id.

93. Judgment held insufficient as establishing highway, since it could not be readily located and width was not clear. Leverone v. Weakley, 155 Cal. 395, 101 P 304.

94. Record showing petition for road, appointment of viewers, and the like, held to show establishment of highway, though part of road was later resurveyed and changed. Atchison, etc., R. Co. v. Hayes, 79 Kan. 542, 99 P 1131.

95. Where oral evidence conflicts with official record of proceedings of highway commissioners, court might rely upon full and accurate record as best evidence of what was intended. Brack v. Ochs [Kan.] 102 P 479.

96. Where road was established in 1847, it must be presumed that survey was sufficient order for laying out. Olwell v. Travis, 140 Wis. 547, 123 NW 111.

97. Petitoners have right to appeal to circuit court from order of board of commissioners dismissing their petition upon return of adverse report of viewers in pursuance of Burns' Ann. St. 1908, § 7658 (Acts 1905, p. 524, c. 167, § 10). Gangloff v. Lawler, 171 Ind. 726, 87 NE 131.

98. Under Acts 1905, p. 579, c. 167, § 123, appeals to circuit court are triable de novo. McKaig v. Jordan [Ind.] 87 NE 974; Sterling v. Frick, 171 Ind. 710, 87 NE 237.

99. Where statute authorizes dissatisfied landowner to apply by petition to county court and have rehearing of questions involved, it cannot be objected to as not providing for an appeal. Barber v. Vinton [Vt.] 73 A 881.

1. Notice of appeal though irregular in that it did not directly state that petitioners appealed from order refusing to lay out road, but which fairly advised adverse party of appeal, was sufficient to confer jurisdiction upon district court. Stevens v. Sandnes, 108 Minn. 271, 121 NW 902.

2. Notice of appeal, which was delivered to town clerk and by him placed with other documents in time allowed by statute, was "filed" within Rev. Laws 1905, § 1188, though no certificate of filing was indorsed thereon. Burkleo v. Baytown, 108 Minn. 224, 121 NW 874.

3. Burns' Ann. St. 1908, § 7793 (Acts 1905, p. 579, c. 167, § 123). Fowler v. Newsom [Ind.] 90 NE 9.

4. Objection to appeal bond should be made in circuit court and such objection is too late when raised in supreme court. Fowler v. Newsom [Ind.] 90 NE 9.

5. Fowler v. Newsom [Ind.] 90 NE 9.

6. Fowler v. Newsom [Ind.] 90 NE 9. Statute does not require that record of proceedings before board of commissioners or transcript filed by auditor in circuit court shall show that appeal was taken or that appeal bond shall be incorporated or mentioned in transcript. Burns' Ann. St. 1908, § 6023. Id.

7. Law does not require that substituted appeal bond should be signed by same persons who signed bond approved by auditor, and there is no presumption that it was so signed. Fowler v. Newsom [Ind.] 90 NE 9.

8. Fowler v. Newsom [Ind.] 90 NE 9.

9. Circuit court may properly permit amendment of petition in highway cases pending on appeal in that court, even to changing route or as to jurisdictional matter. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871. Amendment of petition as to location of new highway and vacation of old highway so as to more definitely describe part sought to be vacated held proper. Id.

statute provides that the reports of viewers shall be considered as evidence,[10] a formal introduction of such report is unnecessary.[11] In addition, such reports may be taken to the jury room during deliberation,[12] or instructions as to finding of the reviewers may be given.[13] The statutes, also, frequently render the order laying out the road presumptive evidence of the facts therein stated.[14] Remonstrators cannot complain of instructions as to questions to which they are not parties.[15] The trial on appeal should be confined to issues raised before the board of commissioners,[16] though want of jurisdiction when apparent on the face of the record may be first raised on appeal.[17] Appeals can only be taken from final orders,[18] and the revisory power on appeal is limited [19] frequently to questions of law.[20] Questions of fact will ordinarily not be interfered with,[21] and determinations as to the establishment of roads are usually not reviewable.[22] The merits of a case will not be considered where proceedings are vacated because of jurisdictional defects.[23] Proceedings in reference to laying out of highways are of class which may be reviewed by certiorari at the suit of the public.[24] Ownership of land acquired after the laying out and vacation of a road is not sufficient to entitle a person to writ of certiorari to review such proceedings.[25] The writ of certiorari should be refused where the building of a public road will be unnecessarily postponed.[26] On certiorari, one landowner cannot complain of an irregularity which concerns the land of another.[27] A remonstrant who refused to accept the damages allowed by commissioners, and failed to recover as much, either in the county or circuit court, is not entitled to costs on appeal.[28]

Injunction and other relief. See 9 C. L. 1594—Injunction is available where a

10. Acts 1905, p. 579, c. 167, § 123. Sterling v. Frick, 171 Ind. 710, 87 NE 237.

11. Under Acts 1905, p. 579, c. 167, § 123 (Burns' Ann. St. 1908, § 7793), viewer's report is in evidence whether formally introduced or not. Fowler v. Newsom [Ind.] 90 NE 9; Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871.

12. Under Highway Act 1905 (Laws 1905, p. 579, c. 167), § 123, rendering reports of viewer's evidence. McKaig v. Jordan [Ind.] 87 NE 974.

13. On trial de novo upon appeal, an instruction that reviewers found in favor of highway was proper. Acts 1905, p. 579, c. 167, § 123. Sterling v. Frick, 171 Ind. 710, 87 NE 237.

14. Since St. 1898, § 1298, makes order laying out road presumptive evidence of facts stated therein, signing of such order by majority of supervisors may be presumed. Sharpe v. Hasey [Wis.] 123 NW 647.

15. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871.

16. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871. Act 1905, p. 579, c. 167, § 123 (Burns' Ann. St. 1908, § 7793), providing that appeals must be tried de novo and may be had as to any issue (tried) or which "might have been tried before county board," only authorizes trial of such issues on appeal as might have been tried under issues made before board. Id.

17. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871.

18. Action of lower court in setting aside report of viewers because information of previous award had been acquired by such viewers will not be reviewed by appellate court, since it is not final. Perry Tp. Road, 36 Pa. Super. Ct. 131.

19. Revisory power on appeal in road case is limited because evidence is not part of record, and though printed in paper book cannot be considered. Perry Tp. Road, 36 Pa. Super. Ct. 131.

20. Under Ky. St. § 4303 (Russell's St. § 5435), court of appeals only considers questions of law arising on record on appeal from opening of highway. Story v. Little [Ky.] 121 SW 1023.

21. Trial court must determine whether viewers misbehaved themselves and similar questions depending on evidence, and such determination will ordinarily not be interfered with. Perry Tp. Road, 36 Pa. Super. Ct. 131. Verdict that highway should be laid out held supported by evidence. Stevens v. Sandnes, 108 Minn. 271, 121 NW 902.

22. Opening of street to full width being discretionary with municipal authorities. White v. Philadelphia, 223 Pa. 563, 72 A 856; Stone v. Nebraska City [Neb.] 122 NW 63. Under Laws 1890, p. 1194, c. 568, § 89, order establishing highway is not reviewable in respect to necessity of highway or amount of damages. In re Wagstaff, 129 App. Div. 591, 114 NYS 226.

23. In re Riddell, 116 NYS 261.

24. People v. Johnson Highway Com'rs, 240 Ill. 399, 88 NE 977.

25. Bennett v. Millard, 142 Ill. App. 282.

26. Johnson v. West [Ark.] 117 SW 770. Writ of certiorari to review order establishing road denied where petitioner delayed in raising objection as to jurisdiction of court. Id.

27. Bennett v. Millard, 142 Ill. App. 282.

28. Story v. Little [Ky.] 121 SW 1023.

requisite such as notice to the landowner is not given,[29] but such remedy is improper where an insufficient award is given but the statute provides an adequate remedy by appeal from such allowance.[30] In seeking to restrain the establishment of a highway, matters of fact not contained in the record, if relied upon by plaintiff, should be pleaded.[31] A duty to open a public road may be enforced by mandamus,[32] and where such duty rests upon the commissioners as a body, changes in membership of the body do not affect the remedy.[33] In an action of mandamus to compel the payment of damages awarded for the laying out of a road, highway commissioners who acted in laying out such road cannot question irregularities therein.[34]

§ 3. *Boundaries and extent of way, ascertainment and resurvey.*[35]—See 11 C. L. 1728—Ordinarily, the width of a public highway is determined by statute,[36] and a public way regularly established takes in the land to the full statutory width [37] even though the width was not mentioned in the statutory proceedings.[38] Thus, the width may be shown by the record of establishment [39] or other competent evidence.[40] Since the use of a road necessarily involves space for the passage of vehicles,[41] the rights of the public are not limited to the beaten tracks when a highway is established by prescription,[42] but include the use of such adjacent lands as are needed for repairs and improvements,[43] and frequently a highway whose origin is in user is presumed to be the "usual width" of roads in the same locality.[44] The width of statutory ways which are established in some states by user is the width the statute fixes when such way is entered of record.[45] The fact that a road was only traveled on

29. Finding of no notice to landowner as required by statute (Gen. St. 1901, § 6019; Road Law, § 4) will warrant injunction to prevent opening of road. Bourbon County Com'rs v. Ralston, 79 Kan. 432, 100 P 288. **Injunction will not lie** where city condemns property for street which is covered by mortgage, paying damages to mortgagor without objection of mortgagee, and purchaser at sheriff's sale attempts to enjoin proceedings on ground that personal notice of street opening was not given mortgagee. Jackson v. Pittsburg, 36 Pa. Super. Ct. 274.

30. Olson v. Curran, 137 Wis. 380, 119 NW 101.

31. Contention that route was materially different from that petitioned for in that it was on north rather than south side of stream, etc., did not appear in record. Boire v. Yamhill County [Or.] 98 P 520.

32. Mandamus is proper to compel highway commissioners to open public road where propriety of such road has been finally established by supreme court. Ross v. People, 143 Ill. App. 82.

33. Town of Scott v. Artman, 237 Ill. 394, 86 NE 595.

34. Scott Highway Com'rs v. Sangamon Highway Com'rs, 142 Ill. App. 489.

35. **Search Note:** See note in 46 A. S. R. 495.

See, also, Highways, Cent. Dig. §§ 19-23, 137-154, 222-225; Dec. Dig. §§ 12-15, 44-51, 66, 67; 15 A. & E. Enc. L. (2ed.) 353; 27 Id. 103.

36. First class road is not less than forty nor more than sixty feet wide. Craighead v. State, 55 Tex. Cr. R. 386, 117 SW 128. Under Rev. Codes, § 1339, highways are generally 60 feet wide. City of Butte v. Mikosowitz [Mont.] 102 P 593.

37. Public highway regularly established under Rev. St. 1866, c. 47, § 19, takes in land to full width required by statute in defining width of roads. Taylor v. Austin, 83 Neb. 581, 119 NW 1123.

38. Fact that petition and order in proceedings establishing highway, under Rev. St. 1866, c. 47, § 19, do not mention width of road, is immaterial. Taylor v. Austin, 83 Neb. 581, 119 NW 1123.

39. Illinois Cent. R. Co. v. Smith [Ky.] 118 SW 933.

40. Illinois Cent. R. Co. v. Smith [Ky.] 118 SW 933. Where public records are destroyed, width of highway may be proved by evidence of witnesses, and by evidence as to extent of traveled road. Id. Where road was established in 1847, survey of same sufficiently established its width, which was established by statute relative thereto (Laws 1840, p. 33, No. 24, § 5). Olwell v. Travis, 140 Wis. 547, 123 NW 111. Where road had been established 40 years, survey of same must be regarded as **ancient document** and proceedings up to such survey must be presumed regular. Id.

41. Borough of South Amboy v. Pennsylvania R. Co. [N. J. Eq.] 73 A 852.

42. Kendall-Smith Co. v. Lancaster County [Neb.] 121 NW 960; Neale v. State, 138 Wis. 484, 120 NW 345. Beaten track does not indicate extent of user in case of old country roads, often called **"drift roads,"** which run through open and rough lands. Borough of South Amboy v. Pennsylvania R. Co. [N. J. Eq.] 73 A 852.

43, 44. Borough of South Amboy v. Pennsylvania R. Co. [N. J. Eq.] 73 A 852.

45. Way established by 20 years' user pursuant to Burns' Ann. St. 1908, § 7663. Pitser v. McCreery [Ind.] 88 NE 303; Id. [Ind.] 89 NE 317, denying rehearing [Ind.] 88 NE 303.

one side would not operate to change its limits as originally laid out.[46] Passive acquiescence in the maintenance of fences at irregular distances from the center of a road does not operate to permit the acquirement by user of land outside the limits of a highway.[47] It must be presumed that a highway of the width established by local custom is intended, when congress grants a way over public lands.[48] A statute providing that roads established by user shall be deemed to be of certain width cannot be construed to apply to roads which were established at the time the act took effect,[49] and such a statute would not warrant widening of a road where the width would not be continuous.[50] As a general rule, streets leading to navigable waters keep pace with the extension of the land.[51]

§ 4. *Alterations and extensions of way.*[52] See 11 C. L. 1728—Statutory provisions are determinative of the procedure available by municipalities for the alteration of streets,[53] and an established public road can be changed only when the statutory procedure relative thereto is complied with.[54] A city's authority to change the lines of streets is usually limited to those streets which are properly laid out.[55] Ordinarily the notices must be signed by the proper petitioners,[56] and served as required by statute[57] in order that jurisdiction may be properly acquired.[58] Roads are discontinued and other ways substituted therefor by a proper order,[59] and the fact that an

46, 47. Olwell v. Travis, 140 Wis. 547, 123 NW 111.

48. City of Butte v. Mikosowitz [Mont.] 102 P 593.

49. Laws 1899, p. 155, c. 152, providing that when road has been used and repaired continuously as public highway for six years it shall be deemed dedicated to public to width of two rods on each side of center of road, has no application to highways established by user prior to such act. Gilbert v. White Bear, 107 Minn. 239, 119 NW 1063. To apply act to established roads would operate to deprive owners of land without compensation. Id.

50. Widening of road to width of two rods where road is established by user under Laws 1899, p. 155, c. 152, does not warrant destruction of trees belonging to abutting owners, where widening would result in no useful purpose, there being no authority for making improvement continuous along line of road. West v. White Bear, 107 Minn. 237, 119 NW 1064.

51. Whether change in land is due to natural causes or voluntary act of owner of land. Frater v. Baylen Street Wharf Co. [Fla.] 49 S 188. Where high-water mark changes and street is extended by accretion, public easement therein is extended by operation of law, and continues at "high-water mark." State v. Yates, 104 Me. 360, 71 A 1018. City may extend streets to harbor area (when established pursuant to Const. art. 15, § 1) over tide lands though limits of city extend only to high-tide line. Const. art. 15, § 3. City of Tacoma v. Titlow, 53 Wash. 217, 101 P 827.

52. Search Note: See note in 15 L. R. A. (N. S.) 1170.

See, also, Highways, Cent. Dig. §§ 234-253; Dec. Dig. §§ 70-72; Municipal Corporations, Dec. Dig. § 655; 28 Cyc. 838; 15 A. & E. Enc. L. (2ed.) 353, 392; 27 Id. 118; 20 A. & E. Enc. P. & P. 889.

53. Procedure of Code 1906, § 4400, as to laying out and alteration of highways, is inapplicable to cities. Illinois Cent. R. Co. v. State [Miss.] 48 S 561. Applies to county highways only. Id.

54. Under Rev. St. 1899, § 9414 (Ann. St. 1906, p. 4327), et seq., established public road may be vacated or changed only by order of county court, in proceeding complying with requirements prescribed. Williams v. Beatty [Mo. App.] 122 SW 323. Private person has no right to change road without formal permission of duly constituted officers, though road was placed in its present condition without authority. Id.

55. Charter of Passaic, § 57 (Act April 2, 1873; P. L. pp. 484, 507), authorizes alteration of street lines only when street is one already laid out. Erie R. Co. v. Passaic [N. J. Law] 74 A 338. Street delineated on map pursuant to Charter of Passaic, as amended, § 23 (Act March 21, 1871; P. L. pp. 619, 638), authorizing location of streets and sewers, is not street "laid out" within meaning of § 57. Id. Ordinance operating to alter street lines held to have no support in city charter. Id.

56. Notice of application to alter and relocate road must be signed by petitioners. Jensen v. Curry County [Or.] 105 P 96. Finding of county court in order appointing viewers stating that petitioners are freeholders is equivalent to finding that persons who subscribed notice were residents of vicinity of proposed alteration. Id.

57. Code 1899, c. 43, § 30 (Code 1906, § 1419), as now amended, does not require **notice by publication** for three weeks of proposed alteration of county road. Mason County Ct. v. Thornburg, 65 W. Va. 185, 63 SE 975.

58. Proper road notices and required publication and proof thereof are conditions precedent to securing jurisdiction to establish highway. Jensen v. Curry County [Or.] 105 P 96. Where record failed to show such facts, county court was powerless to make valid order in premises. Id.

59. Order of county commissioners discon-

order does not show the acceptance in terms of the new road as changed is immaterial where the payment of damages is shown.[60] An independent easement of way is not extinguished when a street is vacated under proceedings for the substitution of streets.[61] Appeals from orders changing the location of roads are frequently governed by the rules applying to appeals from justices' courts.[62] It is usually essential that the appeal be taken in proper time [63] and be properly docketed in the superior court,[64] and an appeal bond is usually required.[65] Informalities in a record will be corrected on certiorari where jurisdiction was questioned at the trial, though the defects were not challenged in a formal way.[66] An alteration of a way which is clearly established and has long been acquiesced in will not be disturbed.[67] The unauthorized act of a private person in changing a road may be enjoined at the instance of an abutting owner specially injured thereby,[68] and injunction will lie to restrain the taking of land to widen a highway where the title to land sought to be taken is disputed.[69]

§ 5. *Change of grade.*[70]—See 11 C. L. 1720—The recovery of damages for injuries occasioned by the establishment of a grade depends upon statutory or constitutional provisions.[71] Municipalities usually have power to change the grade of streets or highways when necessary for their improvement,[72] and such power usually applies

tinuing certain roads and substituting others therefor **held not conditional,** in sense that it was not to be effective until new routes were cleared, wherefore street in question was abandoned. Uvalde County v. Oppenheimer [Tex. Civ. App.] 115 SW 904. Proceedings for the substitution of streets are largely involved in the vacation of highways. See post, § 8.

60. Pine Mountain R. Co. v. Finley [Ky.] 117 SW 413.

61. Independent easement of way acquired under partition deed is not extinguished where old street is discontinued for new one under Laws 1895, c. 1006. Johnson & Co. v. Cox, 196 N. Y. 110, 89 NE 454.

62. Sutphin v. Sparger, 150 N. C. 517, 64 SE 367.

63. In proceedings to change location of road, appeal from county commissioners must be taken at term at which report of road commissioners is confirmed. Sutphin v. Sparger, 150 N. C. 517, 64 SE 367.

64. Appeals from county commissioners must be docketed at first ensuing term of superior court. Sutphin v. Sparger, 150 N. C. 517, 64 SE 367.

65. On appeal from county commissioners, appeal bond required by Rev. 1905, § 2690, must be given. Sutphin v. Sparger, 150 N. C. 517, 64 SE 367.

66. Jensen v. Curry County [Or.] 105 P 96. Cause remanded with directions to set aside attempted relocation. Id.

67. Where commonwealth platted certain land and then conveyed 100 feet of property abutting on 200 foot street, before any of lots were sold, it was clearly apparent that an alteration of the original dedication was contemplated, and after lapse of century, such alteration would not be disturbed. Willock v. Beaver Val. R. Co., 222 Pa. 590, 72 A 237.

68. Williams v. Beatty [Mo. App.] 122 SW 323. Act of defendant in obstructing drainage ditch and threatening to change highway whereby surface water would be precipitated on plaintiff's land was unauthorized exercise of power of eminent domain. Id. Right of plaintiff to injunction to restrain change of road held not prevented by license to construct drainage ditch given to defendant by plaintiff's grantor, such license being for establishment of ditch. Id. License was revocable, also. Id.

69. Brunson v. Somerset County Freeholders [N. J. Eq.] 74 A 449. To withhold remedy would destroy complainant's possession and work irreparable injury. Id.

70. Search Note: See notes in 19 L. R. A. 510; 1 L. R. A. (N. S.) 129; 4 A. S. R. 401; 30 Id. 835; 10 Ann. Cas. 849.

See, also, Eminent Domain, Cent. Dig.; Dec. Dig.; 15 Cyc. 543-1029; Highways, Cent. Dig. §§ 234-253; Dec. Dig. §§ 70-73; Municipal Corporations, Cent. Dig. §§ 711-1307; Dec. Dig. §§ 265-588, 656; 28 Cyc. 939, 941-1256; 1 A. & E. Enc. L. (2ed.) 224; 15 Id. 392; 27 Id. 118, 168; 20 A. & E. Enc. P. & P. 909.

71. Damages are recoverable where property is injured by establishment of grade. Const. § 17. City of Jackson v. Williams [Miss.] 46 S 551. Abutting owner **held not entitled to damages** under greater New York Charter (Laws 1897, p. 337), amended by Laws 1901, p. 400, for original establishment of street grade which had been adopted as county road under Laws 1900, p. 979, but never improved as such. Triest v. New York, 193 N. Y. 525, 86 NE 549. Greater New York Charter (Laws 1897, p. 337), amended by Laws 1901, p. 400, providing that on changing grade notice shall be given to owners injured who shall present their claims, does not apply to a proceeding for original establishment of grade of a street. Id.

72. Authority is conferred by statute. Walters v. Marshalltown [Iowa] 120 NW 1046. Under statutes, city may establish grades and make walks conform thereto subject only to action for damages on certain grounds. Morris v. Salt Lake City [Utah] 101 P 373. Borough has power to ordain grading of street without petition having been presented by majority of abut-

to streets in common use as well as those properly established.[73] A contract which involves the change of a grade is not thereby rendered void ab initio, since it can be performed with the consent of the city and the adjoining owners.[74] Usually the change of a grade as well as its establishment should be by ordinance,[75] and a lawful contract between a city and a street railway company, which necessarily results in a change of grade, must be construed as an ordinance providing for such change.[76] A city should not establish a grade whereby an abutting owner's right to use the street is unreasonably interfered with.[77] A city cannot be deprived of its legislative power to change grades by contract.[78] Frequently, separate proceedings are necessary as to each street where the grades of several streets are changed.[79]

As a general rule, no liability attaches because of a change of grade[80] either to the municipality or its officers,[81] where there is no actual taking of property.[82] In some states constitutional and statutory provisions require payment for the damages occasioned,[83] and under such statutes, if the damages are not first ascertained and

ting property owners. Marcoz v. Wilmerding Borough, 37 Pa. Super. Ct. 185. Power is not abrogated by subsequent enactments (P. L. 75; P. L. 106; P. L. 79). Id.

73. Term "grade" in statute as to change of grade in case of railroads refers to grades of highways and streets in common use as well as those duly established by engineers and municipalities. City of Detroit v. Snyder, 156 Mich. 511, 16 Det. Leg. N. 220, 121 NW 258. Means change from existing levels in allowing damages. Id.

74. Bigham v. Wabash-Pittsburg Terminal R. Co., 223 Pa. 106, 72 A 318. Failure to secure consent is matter of defense. Id.

75. Resolution for change of grade is not sufficient. Powell v. Excelsior Springs [Mo. App.] 120 SW 106.

76. Marcoz v. Wilmerding Borough, 37 Pa. Super. Ct. 185.

77. Ordinance establishing grade whereby retaining wall was built and permitted to obstruct portion of street held void as an unreasonable interference with abutting owner's right to use of street. Powell v. Excelsior Springs [Mo. App.] 120 SW 106. Judgment, holding void an ordinance which established grade so as to unlawfully interfere with abutting owner's right to use street, should not be construed so as to affect rights of city in exercise of lawful jurisdiction over streets. Id.

78. Agreement of city engineer that sidewalk should not be cut down entire distance to established grade would not deprive city of power to grade its walks, since city cannot by contract deprive itself of legislative powers. City of Marshall v. Allen [Tex. Civ. App.] 115 SW 849.

79. Comp. Laws, §§ 4229-4260, providing for separate grades where railroads intersect streets, requires separate proceedings as to each street where grades of several streets in same city are changed. City of Detroit v. Dailey, 156 Mich. 9, 16 Det. Leg. N. 11, 120 NW 25.

80. District of Columbia v. Atchison, 31 App. D. C. 250. Abutting owner is not at common law entitled to recover damages for change of grade. Johns v. Salamanca, 129 App. Div. 717, 114 NYS 707. Abutting owner cannot secure damages for change of grade where there is no encroachment on such land. Wilkes v. U. S., 43 Ct. of Cl. 152. Damage suffered because lot is not brought to grade of street when it is established is damnum absque injuria. Walters v. Marshalltown [Iowa] 120 NW 1046; Warner v. State, 132 App. Div. 611, 117 NYS 108. Damage occasioned by raising grade of highway to meet grade of bridge under lawful authority is not taking of private property. Warner v. State, 132 App. Div. 611, 117 NYS 108.

81. Act of municipal officers in changing grade of street is not unlawful, and they are not liable for damages incurred by abutting owner. Wilkes v. U. S., 43 Ct. of Cl. 152.

82. Trespass will not lie against a borough for injuries to abutting property caused by change of grade where there has been no actual taking. Deer v. Sheraden Borough, 220 Pa. 307, 69 A 814.

83. Under constitution, abutting owner is entitled to compensation for damages occasioned by change of grade. Sievers v. Root, 10 Cal. App. 337, 101 P 925. Const. § 242. Cassell v. Nicholasville Board of Councilmen [Ky.] 119 SW 788. Const. § 17. City of Jackson v. Williams [Miss.] 46 S 551; Slaughter v. Meridian L. & R. Co. [Miss.] 48 S 6. Right to damages exists under constitution though there has been taking of private property for street use. Slaughter v. Meridian L. & R. Co. [Miss.] 48 S 6. Change in grade is municipal improvement which renders borough liable in damages for injuries to abutting property. Marcoz v. Wilmerding Borough, 37 Pa. Super. Ct. 185. Damages for change of grade are purely statutory, being based on moral obligation. People v. Stillings, 134 App. Div. 480, 119 NYS 298. Right to compensation is based upon constitutional provision against taking private property for public use without just compensation. Thirteenth St., 38 Pa. Super. Ct. 265. Where grade of street was established prior to adoption of Greater New York Charter, § 951, right of abutting owner to damages for change was governed by county and village law. Mayer v. New York, 193 N. Y. 535, 86 NE 553. Canal Law (Laws 1894, p. 629, c. 338), § 37, held not to confer right on abutting owner to recover damages from state for change of grade of highway incident to construction of bridge

paid, the grade cannot be changed except on the petition of property owners who waive the claim to damages.[84] Provisions permitting recovery for a change of grade will not apply where no change is effected but a grade is established.[85] The statutes often contemplate recovery of only the permanent injuries to the property from the time the work is completed and thereafter,[86] and sometimes the damages are limited to the injury resulting to buildings only.[87] The jurisdiction of a grade damage commission is determined by the statutes relative thereto.[88] Usually the person entitled to damages is the owner of the abutting property which is injured[89] at the time actual work is begun,[90] and a statute permitting awards to a subsequent owner is violative of constitutional provisions as making a gift of a city's funds.[91] Under some statutes the person damaged, who is not a party to the original proceedings, is required to file a statement of his interest in the land.[92] Notice of the claim for

over canal, there being no negligence in such construction. Warner v. State, 132 App. Div. 611, 117 NYS 108.

84. Under Rev. St. 1899, § 5665, amended by Ann. St. 1906, p. 2888, where damages for change of grade of street in city of second class are not first ascertained and paid, no grade can be changed except on petition of property owners who waive claim for damages, and, where one merely signs a petition for change of grade without waiving claim for damages, the city is without authority to provide for the change and is not liable for acts of the contractor. McQuarter v. St. Joseph, 134 Mo. App. 640, 114 SW 1140. Whether or not an ordinance providing that street be graded to a subgrade according to plans and specifications contemplated change of grade, the work done by the contractor was unauthorized, and the city was not liable. Id.

85. Under statute (Greater N. Y. Charter; Laws 1897, p. 337, c. 378, § 951, as amended by Laws 1901, p. 400, c. 466), plaintiff held not to be entitled to damages for change of grade, there being no recovery under statute for original grade, and under facts plaintiff had never improved his property up to grade, before changed in reliance on such grade. Triest v. New York, 193 N. Y. 525, 86 NE 549.

86. Laws 1883, p. 100, c. 113, as to change of grade, does not provide for allowance of loss in rental value from time work is commenced until report of commissioners is made. Johns v. Salamanca, 129 App. Div. 717, 114 NYS 707.

87. Under Act 1889 (P. L. p. 378), an assessment for damages to the owner of a building standing or erected upon any street, the grade of which has been changed by municipal action, must be limited to such damages as result to the buildings. Delaware, L. & W. R. Co. v. Summit [N. J. Law] 72 A 83. Award based on damages resulting to entire property of petitioner held erroneous. Id.

88. Under Laws 1894, p. 1307, c. 567, amending Laws 1893, p. 1156, c. 537, providing for change of grade commission, when considered in connection with other statutes, change of grade shown on map filed by street commissioner under Laws 1890, p. 965, c. 545, was not within jurisdiction of grade commission. People v. Stillings, 131 App. Div. 647, 116 NYS 138. Contention that map filed by street commissioner was filed under Act of 1887 (Laws 1887, p. 937, c. 721) held not sustainable. Id. **City is not relieved of liability** for change of grade occasioned by street railway in first instance by fact that borough graded and paved portion of street which street railway under contract was not required to pave. Marcoz v. Wilmerding Borough, 37 Pa. Super. Ct. 185.

89. Thirteenth St., 38 Pa. Super. Ct. 265. When real property is damaged by change of grade, owner of same is person damaged and entitled to compensation. People v. Stillings, 134 App. Div. 480, 119 NYS 298. Where statute as to change of grade allows damages only to those whose lands abut on street, no damages are recoverable as to property abutting on railroad rights of way. City of Detroit v. Michigan Cent. R. Co., 156 Mich. 121, 16 Det. Leg. N. 53, 120 NW 592. Considering all portions of statute (Comp. Laws, §§ 4229-4261), as to change of grade for railways, it does not permit an award for elevation of tracks, but only for damages to abutting owner caused by change of grade of street. City of Detroit v. Detroit United R. Co., 156 Mich. 106, 16 Det. Leg. N. 48, 120 NW 600.

90. Injury which property suffers is consequential. Thirteenth St., 38 Pa. Super. Ct. 265. Rule applies though viewers have been appointed at instigation of prior owner. Id. Act May 16, 1891, P. L. 75, has not changed rule. Id. Though § 4 (P. L. 75), authorizes appointment of viewers before entry, taking or injury to property. Id. Proceedings between appointment of viewers (under Act May 16, 1891, P. L. 75) and beginning of actual work are tentative only. Liability becomes fixed when municipality takes property or enters upon actual work. Id. Although viewers may be appointed (under Act May 16, 1891, P. L. 75, § 4) to ascertain damages of grading street, they cannot make report until costs and expenses have been ascertained. Id.

91. Statute (Laws 1905, p. 2116, c. 747), permitting award for change of grade which operates to grant compensation to subsequent owner of property damaged is unconstitutional. People v. Stillings, 134 App. Div. 480, 119 NYS 298.

92. Under Laws 1905, p. 84, et seq., c. 55, it is only person who owns interest in property damaged and who is not party to original proceedings that is required to file statement of interest in land, in respect to which

damages is frequently necessary.[93] Injunction will lie when an abutting owner is not compensated,[94] and the damages occasioned may be recovered in an action of law after they have been inflicted.[95] The granting of a separate jury to assess damages is usually discretionary with the court,[96] and, ordinarily, the jury is impaneled to try out the entire issue.[97] The measure of damages is the difference in value of the abutting property before and after the change,[98] and includes such a sum as is necessary to adjust the property to the new street.[99] Damages are not recoverable where there is no physical injury to an abutting owner's property,[1] or where trees are removed in changing the grade.[2] Proper elements to be considered are the obstruction of access to private property,[3] loss of rental value,[4] and the cost of changing the grade of a sidewalk.[5] Special benefits may usually be set off against the damages.[6] The amount of damages is sometimes affected by requirements that compensation be awarded in gross before the improvement is begun,[7] but ordinarily payment is not

he claims compensation. Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 P 330.

93. Under city charter of Spokane, claim for damages for removal of lateral support by change of grade must be filed with city council as condition to action therefor. Smith v. Spokane [Wash.] 102 P 1036.

94. Abutting owner may enjoin change of grade, when he is not compensated for injury which will result. Sievers v. Root, 10 Cal. App. 337, 101 P 925. Ordinance making change of grade is of no effect until compensation is made. Id.

95. Sievers v. Root, 10 Cal. App. 337, 101 P 925.

96. Under Laws 1905, p. 87, c. 55, § 7, as to compensation for change of grade in streets, granting of separate jury to single defendant is discretionary with court. Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 P 330. Refusal to grant special jury held not abuse of discretion, though evidence would sustain larger verdict, since trial court thought verdict was not disproportionate. Id.

97. Under Laws 1905, p. 84, et seq., c. 55, as to compensation for change of grades, jury is impaneled to try out entire issue. Juror does not become disqualified from trying one issue by fact that he has heard another. Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 P 330.

98. There is no damage within meaning of statute where property does not depreciate in value. City of Detroit v. Detroit United R. Co., 156 Mich. 106, 16 Det. Leg. N. 48, 120 NW 600. Exclusion of **evidence** of effect of other changes of grades upon property in immediate vicinity held proper. Id. Exclusion of evidence of fact that on other streets slope of street exceeded that of street changed held proper. Id.

99. In action for damages for change of grade held the court correctly charged that the owner was entitled to recover at least the necessary expense to adjust his property to the new street. Olson v. Albert Lea, 107 Minn. 127, 119 NW 794.

1. Rule prevails whether fee is in abutting owner or in public. Foster Lumber Co. v. Arkansas Val. & W. R. Co. [Okl.] 100 P 1110, afg. on rehearing 20 Okl. 583, 95 P 224.

2. Morris v. Salt Lake City [Utah] 101 P 373. City is not liable to abutting owner for loss of trees growing in public highway, since their existence is merely permissive. Cassell v. Nicholasville Board of Councilmen [Ky.] 119 SW 788.

3. Any change of grade whereby access to private property is obstructed is damage to such property, for which owner, under constitution, is entitled to compensation. Shrader v. Cleveland, etc., R. Co., 242 Ill. 227, 89 NE 997. Owners of land having access to public streets only by means of private way are entitled to damages where grade of public way is changed. Cutter v. Boston, 200 Mass. 400, 86 NE 798. Change of grade under authority of law is **not continuing trespass** upon easement of access to abutting property, for which abutting owner is entitled to damage. Johns v. Salamanca, 129 App. Div. 717, 114 NYS 707.

4. While ultimate question may be difference in value of leasehold interest, before and after change of grade, increase or loss in rental value is proper element to be considered. Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 P 330. Exclusion of **evidence** as to whether tenants would stay in buildings while same were raised to grade of street held not prejudicial, being remote evidence, and, moreover, fact was substantially proved by other evidence. Id. Evidence of damage, considering loss of tenants, effect on property injured, and like, was proper, being alleged in complaint Mayrant v. Columbia, 82 S. C. 273, 64 SE 416.

5. City held liable to abutting owner where change of grade rendered change of sidewalk necessary and such change of sidewalk was effected pursuant to resolution of city. Cassell v. Nicholasville Board of Councilmen [Ky.] 119 SW 788. Where grade was changed, it was immaterial to city whether owner performed work of making sidewalk conform to grade herself or had same performed by city or others. Id.

6. In action for damages for change of grade, evidence held insufficient to show that special benefits conferred, equaled, or exceeded cost of restoring property to its former condition. Olson v. Albert Lea, 107 Minn. 127, 119 NW 794.

7. Damages for injury to business carried on by abutting owner or tenant is not recoverable, as determination of such amount would be speculation, it being required that compensation shall be awarded in gross before improvement is begun. City of Detroit

required before the work is undertaken.[8] Whether a certain sum is received in full payment of the damages sustained is often to be determined from the facts.[9] Appeals from an assessment of damages must be perfected in time.[10]

Liability is nearly always incurred where a city negligently performs the work of changing a grade.[11]

§ 6. *Improvement and repair.*[12]—See 11 C. L. 1731—The discretionary power to construct improvements is usually vested in the municipal authorities,[13] and a city may be authorized to care for streets though such streets have not been formally dedicated to the public.[14] The acquirement of a plank road by a city, while it im-

v. Detroit United R. Co., 156 Mich. 106, 16 Det. Leg. N. 48, 120 NW 600.

8. Under Const. art. 1, § 17, city is not required to pay damages before proceeding to cut down grade of sidewalk to that of street. City of Marshall v. Allen [Tex. Civ. App.] 115 SW 849.

9. Evidence held to show that acceptance of a certain sum had reference only to particular items and was not in satisfaction of full damages for change of grade. City of Rawlins v. Jungquist, 16 Wyo. 403, 96 P 144, denying rehearing, 16 Wyo. 403, 94 P 464.

10. Under Law Mo. 1903, p. 150, § 9 (Ann. St. 1906, § 9548—1), as to appeals, supreme court had no jurisdiction of appeal from an assessment of damages where road was graded, where statute was not complied with in that appeal was not perfected in 30 days. In re Bledsoe Hill [Mo.] 120 SW 1184.

11. Walters v. Marshalltown [Iowa] 120 NW 1046; Wilkes v. U. S., 43 Ct. of Cl. 152. City is liable for injuries occasioned by negligence. District of Columbia v. Atchison, 31 App. D. C. 250. Municipal corporation is not liable for injuries resulting from grading of streets where work is done in careful and skillful manner. Town of North Judson v. Lightcap, 41 Ind. App. 565, 84 NE 519. In action for damages suffered by change of grade, under Civ. Code 1902, § 2023, plaintiff must show that defect from which injury resulted was caused by negligence of city. Mayrant v. Columbia, 82 S. C. 273, 64 SE 416. Instruction held to sufficiently charge that plaintiff could recover only for defect caused by negligence of city. Id. Jury held to have been properly instructed that plaintiff was not entitled to damages which she contributed to by her negligence. Id. Abutting owner has no legal cause for complaint where trees are injured in change of grade, provided work is done with reasonable care. Morris v. Salt Lake City [Utah] 101 P 373. Request of property owner that city use dirt from alley to make same conform with street was **not waiver of city's negligence** as to placing dirt or leaving street unfinishd. District of Columbia v. Atchison, 31 App. D. C. 250. **No recovery** is allowed in action for damages for destruction of business by change of grade and building of viaduct where no negligence is alleged, and plaintiff had previously received proper award from viewers. Porter v. Scranton City, 36 Pa. Super. Ct. 218. Where property owner requested municipality to use dirt from alley for street and work progressed as rapidly as conditions would permit, he was **estopped** from claiming damages suffered during that period. District of Columbia v. Atchison, 31 App. D. C. 250. In such case, property owner was chargeable with notice of unforeseen delay. Id. Property owner is not entitled to damages where work is delayed for lack of an appropriation, since he must inform himself of such fact before making request. Id.

Failure to provide culverts or other waterways for passage of overflow water from creek raises question as to whether such act was one in which city was guilty of want of ordinary skill and prudence in grading street. Instruction disapproved. Walters v. Marshalltown [Iowa] 120 NW 1046. Instructions in action for damages because of establishment of grade held to clearly state, when read together, that volume of water cast upon plaintiff's land by creek had been "materially" increased by improvement and city's failure to provide culverts. Id. "Unduly" as used in instruction was synonymous with "materially." Id. Damages occasioned by altering surface drains, raising sidewalks and the like, are peculiarly within province of jury. Mayrant v. Columbia, 82 S. C. 273, 64 SE 416. **City cannot affect general increased value** of property in an action for injuries due to defective pavement grade and insufficient drains. Id. **Evidence** of cost of filling in lot so that surface waters would flow into street held not competent, since it was expensive and since throwing up edges of lot next to street would be just as effective. Id.

12. **Search Note:** See notes in 3 C. L. 1603; 21 L. R. A. 563; 74 A. S. R. 667.

See, also, Highways, Cent. Dig. §§ 323-378; Dec. Dig. §§ 98-120; Municipal Corporations, Cent. Dig. §§ 711-1307; Dec. Dig. §§ 265-588; 28 Cyc. 941-1256; 15 A. & E. Enc. L. (2ed.) 408; 27 Id. 118; 20 A. & E. Enc. P. & P. 909.

As to the general treatment of public improvements, see Public Contracts; Public Works and Improvements.

13. Barnett v. Minersville Borough, 38 Pa. Super. Ct. 76. Powers of city to open, grade, and pave streets are discretionary. Thillman v. Baltimore [Md.] 73 A 722. Whether city should improve water system and put in sewerage system before paving street was discretionary with council. Swan v. Indianola [Iowa] 121 NW 547. Determination of material for paving by council pursuant to Code, § 810, is purely discretionary. Id.

14. Laws 1907, p. 126, c. 93, amending Village Law (Laws 1897, p. 366, c. 414), § 170, whereby village may care for and light streets less than 14 feet wide without same being dedicated does not violate Const. art. 8, § 10, as to lending public aid for private purposes. Smith v. Smythe, 132 App.

poses the duty of repairing such road,[15] does not render it a city street.[16] Statutes as to the improvement of roads must comply with constitutional limitations,[17] and provisions which are for the protection of taxpayers are usually mandatory.[18] The construction of statutes is frequently involved in order to determine if provisions for the improvement of highways have been repealed.[19] The power of local officials to order improvements,[20] and whether a city has been deprived of the power to improve a certain street,[21] or the power to determine the character of a pavement,[22] may be determined by statutory provisions. A statute authorizing the repair of roads by macadamized stone or other good material, will authorize repaving by vitrified brick.[23] A city is bound by the unauthorized act of a board of local improvements in improving a street which is acquiesced in.[24] Statutes often confer discretionary power upon a city to order sewer pipes to be laid in the street at the expense of the abutting owner before a street is paved.[25] The duty of officials to construct improvements is often limited by provisions as to the cost of the work.[26] While municipali-

Div. 71, 116 NYS 1071. Act is not violative of Const. art. 3, § 18, as local act. Id.

15. Philadelphia v. Hafer, 38 Pa. Super. Ct. 382.

16. Philadelphia v. Hafer, 38 Pa. Super. Ct. 382. City authorities are sole judges of when road is to be changed into street. Id. Entire absence of formal municipal action is strong presumptive evidence of lack of intent to adopt road as street. Id.

17. Act 1908, p. 359, c. 654, as to construction and regulation of roads in Anne Arundel County, is not invalid as to title of act (Const. art. 3, § 29). Anne Arundel County Com'rs v. United R. & Elec. Co., 109 Md. 377, 72 A 542. Acts 1908, p. 359, c. 654, though technically local act affecting only Anne Arundel County, is general in nature, providing complete system for construction, regulation and control of public roads, by county commissioners. Id.

18. Acts 1904, p. 388, c. 225, regulating exercise of power of county commissioners in repairing public roads, are not merely directory, since provisions are for protection of state and county taxpayers. Anne Arundel County Com'rs v. United R. & Elec. Co., 109 Md. 377, 72 A 542.

19. Since Acts 1908, p. 359, c. 654, as to construction of roads in Anne Arundel County is not inconsistent with Acts 1890, p. 557, c. 505, as to placing of tracks by street railway with space for use of vehicles, latter act is not impliedly repealed. Anne Arundel County Com'rs v. United R. & Elec. Co., 109 Md. 377, 72 A 542.

20. Under charter (Laws 1897, p. 139, c. 378), § 383, borough president is proper local authority to determine when and how and under what circumstances street shall be paved, subject to control of board of estimate. City of New York v. New York City R. Co., 132 App. Div. 156, 116 NYS 939. It is within jurisdiction of borough president to provide for repaving, when board of estimate grants sum for such purpose. Id. Commissioner has no power to reconstruct walk except pursuant to resolution of city council, after notice to property owner and hearing. Buffalo City Charter, § 288 (Laws 1891, p. 200, c, 105, as amended by Laws 1901, p. 661, c. 228, § 8). Konowalski v. Buffalo, 131 App. Div. 465, 150 NYS 467. Buffalo City Charter, § 288, considered in connection with § 393 (Laws 1891, p. 221, c. 105), dividing street into carriageways and sidewalks, and ordinance of city laying or relaying of concrete walk when commissioner of public works failed to repair plank walk was not "repair" of walk within charter, but (c. 4, pars. 8, 9), as to grading sidewalk between street line and curb line, and held that no authority to repair to extent claimed was vested in commissioner was reconstruction. Id. Under statute board of improvement, district must form plans for improvement which are submitted to city council. Boles v. Kelley [Ark.] 117 SW 1073. Pavement of streets is to be determined by board. Id.

21. Supplemental park act of April 16, 1869 (1 Priv. Laws 1869, p. 367), did not divest city of Chicago of power to improve street (59 St.) and vest such power in South Park commissioners. City of Chicago v. Mandel, 239 Ill. 559, 88 NE 226. Acts of park board held not to be assumption of jurisdiction over street, wherefore city was not deprived of power to improve same.

22. Pub. Acts 1899, p. 191, No. 136, amending Comp. Laws, §§ 3180, 3181, 3195, 3194, 3196, did not withdraw authority of council when improvement was petitioned for, and vest such authority in petitioners. Irish v. Mt. Clemens Common Council, 156 Mich. 588, 16 Det. Leg. N. 202, 121 NW 316.

23. Acts 1904, p. 388, c. 225. Anne Arundel County Com'rs v. United R. & Elec. Co., 109 Md. 377, 72 A 542.

24. City is bound by act of board of local improvements in improving street, which act, though unauthorized, is acquiesced in. City of Chicago v. Mandel, 239 Ill. 559, 88 NE 226.

25. St. 1898, c. 40a, subd. 20, § 925—223, providing that when city orders paving or repaving of street "they may also by resolution" require service pipes and house drains to be first laid to curb line at expense of abutting owner, is, by word "may," permissive and discretionary and not mandatory. Barber Asphalt Pav. Co. v. Oshkosh, 140 Wis. 58, 121 NW 603. Final proviso of St. 1898, c. 40a, subd. 20, § 925—223, means that when city council requires service pipes to be laid at expense of abutting owner paving shall not be done until such pipes are laid. Id.

26. Under Code Pub. Gen. Laws 1904, art. 91, §§ 38, 42, county commissioners are

ties may order improvements without the petition of property owners,[27] such improvements are frequently initiated by a petition,[28] which must be properly signed[29] by the requisite number of petitioners.[30] Signatures may be withdrawn before the petition is acted upon.[31] A determination of a municipal board that a petition is sufficient is usually conclusive in the absence of fraud.[32] Statutory provisions as to meetings of the boards of local improvements,[33] and requirements as to making estimates of the cost[34] must be substantially complied with. Notice to the property owners is often required in regard to street improvements,[35] and such notices must conform to the statutes as to publication.[36] A requirement as to laying out a sewer district does not apply when sewer pipe is laid to drain the surface of a street which is to be paved.[37] Requirements as to contracting for street improvements must usually be substantially complied with.[38] The authority of public boards to contract is determined by statute,[39] and ordinarily the work must be let at competitive bidding,[40] to the lowest bidder.[41] Also, adequate specifications of the improvement

not required to advertise for bids where cost of road exceeds 25 per cent of tax levy. Frederick County Com'rs v. Fout, 110 Md. 165, 72 A 765. Code Pub. Gen. Laws 1904, art. 91, § 38, construed, and proviso therein limiting work to 25 per cent of tax levy held to refer to entire cost of work, not county's share. Id.

27. Under Milwaukee Charter, c. 7, § 2, as amended by Laws 1893, p. 516, c. 310, § 6 (St. 1898, § 959—35), board of public works and city council proceeding regularly have authority to order street paved without petition of property owners. Loewenbach v. Milwaukee, 139 Wis. 49, 119 NW 888. Word "paving" in Milwaukee Charter, c. 7, § 2, is not restricted in its meaning and applies to second paving. Id.

28. Comp. Laws, §§ 3180, 3181, 3194, 3195, and 3196, as amended by Pub. Acts 1899, p. 191, No. 136, construed and purpose of amendment held to be to set council of city of fourth class in motion by petition in matter of improving street. Irish v. Mt. Clemens Common Council, 156 Mich. 588, 16 Det. Leg. N. 202, 121 NW 316.

29. Where charter of Buffalo (Laws 1891, pp. 221, 222, c. 105, §§ 398, 399, as amended by Laws 1900, p. 1538, c. 707), did not in express terms require petition to be signed, physically, by resident owner desiring improvement of street, signing might be by authorized agent. People v. Board of Assessors, 193 N. Y. 248, 86 NE 466.

30. Name of petitioner cannot be counted in determining whether two-thirds of property owner's petition for paving, where word "conditionally" is added to signature. Newton v. Emporium [Pa.] 73 A 984. Condition invalidates signature. Id. Petition for pavement must be signed by all tenants in common who own piece of abutting property, before it may be counted as requisite frontage to authorize the improvement. Id. Objection to petition as being signed under misrepresentation was not available when number of petitioners as reduced still constituted majority. Boles v. Kelley [Ark.] 117 SW 1073.

31. Newton v. Emporium [Pa.] 73 A 984. Where pavement has been authorized, petitioner cannot withdraw his signature. Id.

32. Certificate of assessors as to petition for improvement is under statute conclusive as to facts therein stated, there being no charge of fraud or bad faith. People v. Buffalo Board of Assessors, 193 N. Y. 248, 86 NE 466.

33. Meeting held to be in substantial compliance with statute where board of local improvements adjourned to larger room from that advertised. City of Carbondale v. Walker, 240 Ill. 18, 88 NE 296.

34. Estimate of cost of improvement held to substantially comply with statute, there being no difficulty in determining what work or material was covered by each item. City of Carbondale v. Walker, 240 Ill. 18, 88 NE 296.

35. Hurd's Rev. St. 1908, c. 24, § 540, providing for notifying property owner, is for purpose of giving opportunity to construct and renew sidewalk, and does not apply to street improvement. City of Carbondale v. Walker, 240 Ill. 18, 88 NE 296.

36. Publication of notices of street improvement pursuant to ordinance in two newspapers, one of which was German, held insufficient. Wannenwetsch v. Baltimore [Md.] 73 A 701.

37. Hurd's Rev. St. 1908, c. 24, § 545, providing that, when improvement is sewer, officer shall fix and report boundaries of sewer district, does not apply when sewer pipe is to be laid to drain surface of street to be paved. City of Carbondale v. Walker, 240 Ill. 18, 88 NE 296.

38. Provisions of Pub. Acts 1905, p. 432, c. 232, as to contracting for improvements is not subject to **waiver.** Kelley v. Torrington, 81 Conn. 615, 71 A 939. Refusal to submit question of waiver of statutory provision to jury held proper. Id. Town is not liable for work not contracted for as required by statute. Id.

39. Under Acts 1900, p. 153, c. 119, § 1, board of supervisors may classify highways into classes and divide them into links to be worked by contract. Quin v. Pike County [Miss.] 48 S 235. Acceptance of contract for improvement of two links was not violative of statute. Id.

40. Ky. St. 1894, § 4315, as amended by Acts 1906, p. 431, c. 118, and Act March 24, 1908, p. 107, c. 42, as to letting work at competitive bidding construed, and proviso that supervisor might except "certain roads or parts of roads" held not to include all roads

must usually be filed.[42] The acceptance of a bid for a street improvement need not be by ordinance when it is not so required by the city charter.[43] Extension of the time for the completion of a street improvement before the time limit has expired is proper,[44] but the acceptance of a pavement where there is a substantial departure from the terms of the contract may well be regarded as fraudulent.[45] Sureties of a paving contractor may be relieved from liability where there is a material departure from the contract,[46] but a city's failure to keep a street clean whereby a pavement is impaired is immaterial when the city did not contract to keep such street clean.[47] The paving of a street is work of a public character,[48] and the state may prescribe the conditions upon which such work shall be done.[49] While legislative proceedings of a city council in respect to street improvements cannot be attacked in equity,[50] and the fact that a city is indebted to its constitutional limit will not authorize an injunction,[51] the courts will interfere when the discretion of city authorities is exercised unreasonably or fraudulently.[52] A street railway cannot restrain the pavement of a street because such pavement will increase the difficulty of operating cars when the weather is bad.[53] Compliance with statutes as to competitive bidding may be enforced by taxpayers.[54] A pctition for mandamus to compel an improvement may be successfully defended by showing that no duty to improve existed, since the funds are inadequate.[55]

A particular plan of improvement which is adopted by a municipality must be

since thereby complete departure from scheme of competitive bidding would prevail. Gay v. Haggard [Ky.] 118 SW 299.

41. Award of two paving contracts to highest bidders for reasons personal to township committee held an abuse of discretion, though no statute required award to lowest bidder. Dunigan v. Woodbridge Tp. [N. J. Law] 73 A 477.

42. Failure of specifications filed with clerk to state grade of street did not render them inadequate since grade was establishd by ordinance which was also on file at clerk's office. McCoy v. Randall [Mo.] 121 SW 31.

43. Acceptance by viva voce vote held proper. McCoy v. Randall [Mo.] 121 SW 31.

44. McCoy v. Randall [Mo.] 121 SW 31. Tax bills were not invalid because work was not completed in time. Id.

45. Robertson v. Des Moines [Iowa] 123 NW 331.

46. Evidence held not to show departure from contract for laying asphalt pavement at certain heat, whereby sureties would be discharged. Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960. Sureties of municipal paving contractors held not to be relieved by change of pavement required of street car company, that not being matter affecting performance of contract. Id.

47. Aetna Indemnity Co. v. Little Rock [Ark.] 115 SW 960.

48. Whether done by state directly or by one of its municipalities. Byars v. State [Okl.] 102 P 804.

49. Eight-hour statute. Byars v. State [Okl.] 102 P 804.

50. Resolution as to passage of resolution of necessity and proceedings down to letting of contract being purely legislative in character could not be attacked in equity. Swan v. Indianola [Iowa] 121 NW 547.

51. Swan v. Indianola [Iowa] 121 NW 547.

52. Courts cannot ordinarily review actions of city authorities in their determinaton of how improvement shall be executed. Morris v. Salt Lake City [Utah] 101 P 373. Where proposed improvement will widen street, and will cost less than building of retaining wall for same purpose, taxpayer is not justified in interfering with discretion of city council in improvement. Patterson v. Burlington [Iowa] 119 NW 593. Objection that council had no right to construct retaining wall on property to which it had no title held not sustainable since statute contemplates acquisition of such land. Code, § 784. Id. Certificate of assessors as to petition for improvement of street under charter of Buffalo held not reviewable on certiorari, there being **no fraud** charged. People v. Buffalo Board of Assessors, 193 N. Y. 248, 86 NE 466. Proof of fact that city council took junket at expense of agent of successful bidder did not establish fraud, there being no monopoly on part of such bidder, and that being lowest bid. Swan v. Indianola [Iowa] 121 NW 547. Since council had express authority to select material for pavement (Code, § 810) and acted before alleged improper influences were brought to bear upon them, their action was **not arbitrary** or unreasonable. Id.

53. Mahanoy City, etc., R. Co. v. Ashland Borough, 224 Pa. 375, 73 A 338.

54. Failure of supervisor of roads to comply with statute as to letting work on public roads at competitive bidding may be enforced by mandamus at instance of taxpayer. Gay v. Haggard [Ky.] 118 SW 299.

55. Under statute as to mandamus forbidding new defense on second petition, defense that estimate exceeded levy was proper inasmuch as under circumstances such defense did not exist on first application for mandamus. Frederick County Com'rs v. Fout, 110 Md. 165, 72 A 765.

reasonable,[56] and, upon the adoption of such a plan, its manner of execution becomes, as respects the rights of citizens, a mere ministerial duty.[57] Liability is imposed where a street improvement is accomplished in a negligent manner,[58] and an improvement cannot be so made as to unnecessarily divert surface water upon private land,[59] but a municipality is not usually liable for the negligence of an independent contractor,[60] unless control over the work is retained,[61] the work is inherently dangerous,[62] a duty is imposed by law upon the municipality,[63] or the city has regained control over the street.[64] No liability is incurred by the closing of a street as incidental to an improvement,[65] or by reason of temporary obstructions in a road.[66] A

56, 57. Thillman v. Baltimore [Md.] 73 A 722.

58. Municipality is responsible for negligence in improving street whereby injury is inflicted upon private rights. Thillman v. Baltimore [Md.] 73 A 722; Tewksbury v. Lincoln [Neb.] 121 NW 994. City in constructing sidewalk is not liable for injuries to trees, if work is done with reasonable care. Morris v. Salt Lake City [Utah] 101 P 373. Where cutting and removal of roots of trees in laying sidewalk is necessary, abutting owner cannot complain. Id. Where city cut roots of trees in laying sidewalk rendering trees dangerous, it was liable for injury occasioned by such trees falling on abutting owner's house. Id. Where contracts for sidewalk cut roots of trees rendering them dangerous obstructions in highway, both contractor and city were liable to abutting owner for injury caused by falling of such trees. Id. Action will not lie to recover damages which did not result from direct action of municipality but occurred as **consequential injury** incident to discharge of its duty and lawful powers. Salzman v. New Haven, 81 Conn. 389, 71 A 500.

59. Municipal corporation in construction of grade of streets and alleys may not obstruct natural flow of surface water and cast same upon property of citizen to his injury. Lunger v. Chrisman, 145 Ill. App. 543. Municipality is liable for failure to provide for egress of water in grading street, such work being negligent and unskillful. Town of North Judson v. Lightcap, 41 Ind. App. 565, 84 NE 519. Relief properly granted where proposed improvement would result in throwing surface water on plaintiff's land which would not otherwise flow thereon. Dilly v. Henderson [Iowa] 118 NW 750. **City is not liable** for increased flow of surface water over property arising from changes in character of surface produced by opening streets and other improvements, in regular course of expansion of city. Barrett v. Minersville Borough, 38 Pa. Super. Ct. 76. Borough which properly constructs paved gutter to borough limits is not liable in trespass for injuries to property in adjoining township caused by natural flow of surface water, where there is no provision for disposal of water. Id. City held not liable for failure to establish drains where there was no interference with natural course of surface water, and no control over street was exercised. Jung v. New York, 132 App. Div. 18, 116 NYS 368. No action will lie to recover for **negligent repair** of public highway whereby surface water passed in and upon abutter's premises, causing damage. Salzman v. New Haven, 81 Conn. 389, 71 A 500.

Gen. St. 1902, § 2020, rendering city liable for defects in highway does not give right of action. Id.

60. Seattle Lighting Co. v. Hawley [Wash.] 103 P 6. If cutting roots of trees in laying sidewalk was unnecessary, work was performed by independent contractor wherefore city was not liable. Morris v. Salt Lake City [Utah] 101 P 373. If road was closed it was by "contractors" within meaning of statute (Laws 1898, p. 218, c. 115, § 11a, as amended by Laws 1904, p. 653, c. 298, § 1), for which county was not liable. Herbert v. Rockland County, 64 Misc. 352, 118 NYS 358.

61. City held not to be relieved from liability for injury where work was done by independent contractor, when control of work was retained. Thillman v. Baltimore [Md.] 73 A 722.

62. Seattle Lighting Co. v. Hawley [Wash.] 103 P 6. In absence of showing that use of dynamite or other explosive was contemplated, or was customary, grading and improving of street is not inherently dangerous to gas pipes located in street. Id.

63. County cannot escape liability for duty imposed upon it by law by letting out work to independent contractor. Herbert v. Rockland County, 64 Misc. 352, 118 NYS 358. Rule is inapplicable where county is merely repairing road and is under no duty to keep same open while repairs are made. Id.

64. City is liable for injuries sustained by plaintiff where it has control over street, after same has been repaired by independent contractor. Thillman v. Baltimore [Md.] 73 A 722.

65. Failure of contractor to keep highway open until ordered closed was but incidental to work, wherefore county was not liable. Herbert v. Rockland County, 64 Misc. 352, 118 NYS 358. State might close street during construction of public improvement such as canal. Coolidge v. State, 61 Misc. 138, 114 NYS 553.

66. Lefkovitz v. Chicago, 238 Ill. 23, 87 NE 58. In absence of statute, county may repair highway without incurring liability to adjacent property owners by reason of obstructions temporarily in road. Herbert v. Rockland County, 64 Misc. 352, 118 NYS 358. Road held not actually closed or abutting owner's rights interfered with prior to making and filing of certificate of state engineer as required by statute. Id. No recovery can be had for loss of rents arising through an obstructon to access to or egress from building adjoining public improvement, during progress of work. Lefkovitz v. Chicago, 142 Ill. App. 27. Building tunnel. Id. Under rule that city is not liable for temporary obstruction of street

statutory remedy is often provided for injuries caused by a street improvement,[67] and trespass is the proper remedy for injury due to the negligent performance of work.[68]

Various systems are provided in the several states whereby roads are repaired by the work of citizens.[69]

Cost and expense of improvement. See 11 C. L. 1734—Statutory enactments frequently provide for state, or county aid in the construction and improvement of highways by municipalities,[70] where the statute as to such improvements is complied with.[71] Such enactments must not violate constitutional limitations.[72] An agreement by a city and railroad to apportion the expense of an improvement is proper.[73] Costs of street improvements are frequently defrayed by special assessments.[74] It is sometimes provided that abutting owners may be exempted from liability for subsequent improvements when the first pavement has been laid,[75] but a charter provision limiting the amount of assessments will not prevent the laying of a more expensive pavement when the abutting owners defray the increased cost.[76] An abutting owner's liability for the construction of a sidewalk is sometimes implied,[77]

where improvement is made, word "temporary" means period of time commensurate with reasonable prosecution of work carried on. Lefkovitz v. Chicago, 238 Ill. 23, 87 NE 58. **Complaint** held not to state facts showing liability for unlawful obstruction of street by city, there being no averment of undertaking engaged in or of facts showing unreasonable delay in completion. Id. Averment that obstructions were placed in street wrongfully and maintained therein for unreasonable length of time was mere conclusion. Id. In action by abutting owner for damages because street was obstructed for unreasonable length of time, **presumption is in favor of reasonable dispatch** in finishing improvement. Id. Where there was no averment as to character of work engaged in. Id.

67. Act May 16, 1891, P. L. 75, as amended by Act June 12, 1893, P. L. 459, provides proceeding before viewers which is proper remedy for injuries caused by street improvement. Barrett v. Minersville Borough, 38 Pa. Super. Ct. 76. Under Civ. Code 1902, § 1347, authorizing recovery for damage sustained through defect or negligent repair of highway, there can be no recovery unless it is alleged and proved that defect which caused damage or injury was occasioned by neglect or mismanagement on part of county. Scott v. Richland County [S. C.] 65 SE 729. Complaint held defective but subject to amendment on motion to make more certain. Id.

68. Barrett v. Minersville Borough, 38 Pa. Super. Ct. 76.

69. See post, § 10.

70. Road and Bridge Act, §§ 13, 14, 19, construed and held to provide that town might demand county aid when it has levied 40 cents of 60 cents, which § 13 authorizes upon each $100. Walker v. Vermillion County, 143 Ill. App. 235. Where road is improved under Acts 1904, p. 388, c. 225, state must pay one-half of cost of paving where vitrified brick is selected as material. Anne Arundel County Com'rs v. United R. & Elec. Co., 109 Md. 377, 72 A 542. Under statute, vitrified brick may be selected and state's liability for expense is not to be computed on basis of what macadam road would cost. Id.

71. Pub. Acts 1905, p. 432, c. 232, as to improvements of highways, is for protection of state which pays large part of improvements. Kelley v. Torrington, 81 Conn. 615, 71 A 939.

72. Laws 1909, pp. 82, 638, c. 91, 505, appropriating money out of general revenue fund of state for building and repairing roads and bridges are unconstitutional as violating Const art. 9, § 5, forbidding state to be party to carrying on "works of internal improvement." Cooke v. Iverson, 108 Minn. 388, 122 NW 251. Act is violative of Const. art. 9, § 16, prescribing manner and limiting extent of state aid in construction of highways and bridges. Id.

73. Does not affect state. Kelley v. Torrington, 81 Conn. 615, 71 A 939.

74. See Public Works and Improvements, § 9.

75. First pavement, in legal sense, which exempts abutting owner for liability for any subsequent improvement, is one laid, adopted, or acquiesced in by municipal authority, with intent of changing road to street, material is mere matter of evidence. Philadelphia v. Hafer, 38 Pa. Super. Ct. 382. Intent and purpose are controlling, not materials. Id. Action of city which will exempt owner from assessments for future improvement must involve recognition of road as paved street. Id. Recognition as highway is insufficient. Id. Facts held insufficient to show recognition of road as public street. Id.

76. Milwaukee Charter, c. 7, §§ 2, 6, and Laws 1893, p. 516, c. 310, § 6 (St. 1898, § 959—35), construed, and while abutting owners were no longer liable to special assessment after $3 limit prescribed was reached, they could procure more expensive pavement than city proposed to construct by defraying increased cost. Loewenbach v. Milwaukee, 139 Wis. 49, 119 NW 888.

77. Abutting owner held under facts to be liable to contractor for sidewalk built on implied contract. Blake v. Scott [Ark.] 121 SW 1054.

and such an owner cannot avoid his liability because the city ordered such construction, when the order was acquiesced in.[78]

§ 7. *Abandonment and diminution.*[79]—See 11 C. L. 1736—Public rights are not ordinarily divested by adverse possession[80] or by nonuser,[81] and as a general rule a city is not authorized to abandon or sell dedicated streets.[82] When authorized,[83] official action is necessary to divest the public's right to use a way,[84] and a city's rights cannot be prejudiced by the acts of subordinate officers.[85] Persons claiming abandonment have the burden of proving same by clear and satisfactory evidence.[86] It is necessary to show an actual nonuser and circumstances clearly indicating an intention to abandon.[87] The owner of the fee has the right to possession of his

78. Where abutting owner did not object to ordinance requiring constuction of sidewalks and contracted for same, his liability would not be affected by any act of city. Blake v. Scott [Ark.] 121 SW 1054. City is not party to action on such contract. Id.

79. Search Note: See notes in 11 C. L. 42; 18 L. R. A. 146; 26 Id. 449, 659; 14 A. S. R. 278; 76 Id. 492; 87 Id. 775.

See, also, Highways, Cent. Dig. §§ 279-287; Dec. Dig. § 79; Municipal Corporations, Cent. Dig. § 1429; Dec. Dig. § 657; 28 Cyc. 840, 841; 15 A. & E. Enc. L. (2ed.) 396, 404, 408; 27 Id. 113, 117.

80. Title by prescription cannot be obtained to public highway. Taylor v. Austin, 83 Neb. 581, 119 NW 1123. Under P. S. 4045, 4046, no right or interest within limits of highway can be acquired by possession or occupation. Town of Bristol v. Palmer [Vt.] 74 A 332. Adverse possession held not to affect city's right to open street dedicated to it. City of Lexington v. Hoskins [Miss.] 50 S 561. Under Const. 1890, § 104, statute of limitations does not run against state or subdivision or municipal corporation thereof. Id. Constitution is declaratory of common law. Id.

Adverse possession will lie: Where there is no actual or implied acceptance of dedication. Scott v. Donora S. R. Co., 222 Pa. 634, 72 A 282. Occupation of land for 21 years adverse to and inconsistent with right of way bars right. Jessop v. Kittanning [Pa.] 74 A 554. User of alley by owner of lumber yard held not to be adverse possession there being no adverse holding. Weber v. Detroit [Mich.] 16 Det. Leg. N. 832, 123 NW 540. No **notice** to public of adverse claim. Id. Right to maintain pipes in street was not acquired by adverse possession where no written notice of adverse possession is required by statute (Ky. St. § 2546; Russell's St. § 221) was given. Kevil v. Princeton [Ky.] 118 SW 363.

81. McGuire v. Wilkes Barre, 36 Pa. Super. Ct. 418. Title not to be lost by nonuser. Public roads are not to be destroyed by long continued encroachments or trespass. Id. Character of highway and right of public cannot be lost by nonuser. Willock v. Beaver Val. R. Co., 222 Pa. 590, 72 A 237. Rule applies after rights of public in general or of individual property owners in particular have attached. Id. Use of portion of street 50 feet wide when dedicated would not affect right of public to use of entire street. Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602.

82. As to dedicated streets and alleys, city has duty to preserve and keep same for use intended, but no authority is implied to abandon or sell such property to prejudice of beneficiaries. East Chicago Co. v. East Chicago, 171 Ind. 654, 87 NE 17.

83. Legally established highway may be abandoned. Lucas v. Payne [Iowa] 120 NW 59.

84. Public's right to use of highway can only be divested by official action of board of county commissioners. Verbal consent of individual members is insufficient. Sheridan County Com'rs v. Patrick [Wyo.] 104 P 531.

85. Issuance of building permits. City of Butte v. Mikosowitz [Mont.] 102 P 593. Verbal consent of individual county commissioners is insufficient to divest city's title. Sheridan County Com'rs v. Patrick [Wyo.] 104 P 531.

86. Lanesville Highway Com'rs v. Kinahan, 240 Ill. 593, 88 NE 1044.

87. Lanesville Highway Com'rs v. Kinahan, 240 Ill. 593, 88 NE 1044.

Presumption of abandonment is warranted where public has ceased to travel over road and has acquired another which accomodates public travel. Lanesville Highway Com'rs v. Kinahan, 240 Ill. 593, 88 NE 1044.

Evidence held to show abandonment where part of highway had been obstructed by buildings. Lanesville Highway Com'rs v. Kinahan, 240 Ill. 593, 88 NE 1044. Evidence held to show abandonment of street twenty years before suit to restrain opening. De Nefe v. Agency City [Iowa] 121 NW 1049. Town could not be compelled to open streets where dedicated land was never used but was sold as farm and rights of city were quitclaimed. State Co. v. Finley, 150 N. C. 726, 64 SE 772. Action commenced over ten years after sale. Id. **Evidence insufficient** to show abandonment of highway. Lucas v. Payne [Iowa] 120 NW 59. Obstruction of street by park board held not to constitute an abandonment. In re Smith, 118 NYS 95. Fact that there had been passive acquiescence in maintenance of fences at irregular distances from center of road for 20 years did not operate as abandonment of portion of highway laid out Olwell v. Travis, 140 Wis. 547, 123 NW 111. The city of Cleveland by its incorporating Act in 1836, having been given authority to mark the boundaries of its streets; by Act of 1837 (35 O. L. 65), a way to vacate its public places and streets; and by special Act in 1844 (43 O. L. 3), having obtained express power to utilize a lake front strip, dedicated as a street, for other purposes, does not abandon

property when the public easement is abandoned,[88] but title does not revert or pass to the abutting owners when such title is owned by a city.[89]

§ 8. *Vacation.*[90]—See 11 C. L. 1737—The power to vacate streets and highways is vested in the legislature [91] and may be delegated to municipalities.[92] In the absence of authority, vacation cannot be accomplished by a city indirectly through inaction on the part of city officers,[93] and the fact that a city is relieved of its duty to exercise the police power does not justify the leasing of a part of a public street to private parties.[94] The unauthorized act of a city in vacating a street may be ratified [95] if no contract or property rights are involved,[96] provided that the statute ratifying such act is constitutional.[97] The determination of the necessity of vacating public roads is usually committed exclusively to county boards and other like legislative and governmental agencies,[98] and their decision is final [99] being judicial in character.[1] The question of whether a highway proposed to be vacated is of public utility governs in proceedings to vacate,[2] and the power to discontinue is sometimes affected by the nature of the way in question.[3] A construction of statutes is sometimes necessary

the strip by such diversion of its uses so as to give railway companies occupying part thereof with tracks, etc., title by abandonment, especially since, instead of permitting such railway companies to appropriate rights therein, the city entered into a contract granting the use of such lands for railway purposes, but reserving some control thereof. Cleveland v. Cleveland, etc., R. Co., 8 Ohio N. P. (N. S.) 457.

88. City of Houston v. Bammel [Tex. Civ. App.] 115 SW 661.

89. Pooler v. Sammet, 130 App. Div. 650, 115 NYS 578.

90. **Search Note:** See notes in 26 L. R. A. 821; 2 L. R. A. (N. S.) 269; 11 Id. 589; 46 A. S. R. 493; 2 Ann. Cas. 87.

See, also, Highways, Cent. Dig. §§ 254-278; Dec. Dig. §§ 75-78; Municipal Corporations, Cent. Dig. § 1429; Dec. Dig. § 657; 28 Cyc. 840, 841; 15 A. & E. Enc. L. (2ed.) 396; 27 Id. 113; 20 A. & E. Enc. P. & P. 889.

91. Brazell v. Seattle [Wash.] 104 P 155; Hall v. Atlanta, B. & A. R. Co. [Ala.] 48 S 365; State v. Louisville & N. R. Co. [Ala.] 48 S 391. Legislature held to have power to discontinue highway so that water commissioners might acquire shore of lake (Laws 1895, p. 2067, c. 1018). City of Rochester v. Gray, 123 App. Div. 852, 117 NYS 1091. Lake remained as highway and access to it is not cut off. Id. Legislature of territory has **no power to vacate** streets or alleys in city which have been dedicated to public by city council. Boise City v. Wilkinson [Idaho] 102 P 148. Under statute as to disposal of lands in Boise City (Act Terr. Leg. Jan. 6, 1871; Sess. Laws, p. 29), mayor-trustee could not convey any portion of public streets or alleys. Deed held executed without authority. Id.

92. Brazell v. Seattle [Wash.] 104 P 155. Legislature may vacate either directly or by authorizing municipal authorities to do so. Hall v. Atlanta, B. & A. R. Co. [Ala.] 48 S 365. There is no inherent power in city council to vacate streets. Brazell v. Seattle [Wash.] 104 P 155; City of Paragould v. Lawson [Ark.] 115 SW 379. City may vacate streets and alleys and divert them to other uses. Tomlin v. Cedar Rapids & I. C. R. & L. Co. [Iowa] 120 NW 93. In absence of special authority, city could not permit erection of depot upon street. State v. Louisville & N. R. Co. [Ala.] 48 S 391.

93. City of Paragould v. Lawson [Ark.] 115 SW 379.

94. Lease to boat club. Clarke v. Evansville Boat Club [Ind. App.] 88 NE 100.

95. Though act of municipality in vacating street is void as in excess of power it could be ratified by legislature. State v. Louisville & N. R. Co. [Ala.] 48 S 391.

96. Erection of depot on street. State v. Louisville & N. R. Co. [Ala.] 48 S 391. Laws 1900-01, p. 239, ratifies act of city in vacating street and authorizing erection of depot thereon. Id.

97. Laws 1900-01, p. 239, ratifying act of municipality in vacating street and permitting erection of depot thereon, is not unconstitutional as to title of act. State v. Louisville & N. R. Co. [Ala.] 48 S 391.

98. Stone v. Nebraska City [Neb.] 122 NW 63. Under Laws 1880 p. 1192, c. 568, § 80, as amended by Laws 1904, p. 985, c. 387, **commissioners of highways** have authority to determine on due application whether highway is useless, provided town board has also so determined and evidenced such determination by written consent to discontinuance. People v. Newell, 131 App. Div. 555, 115 NYS 399.

99. Under Highway Act (Laws 1180, p. 1192, c. 568, § 80, as amended by Laws 1904, p. 985, § 387), order of commissioners discontinuing highway is final. People v. Newell, 131 App. Div. 555, 115 NYS 399.

1. Function exercised by commissioners of highways in determining whether highway should be vacated was judicial in character. People v. Johnson Com'rs of Highways, 240 Ill. 399, 88 NE 977.

2. Butt v. Iffert, 171 Ind. 554, 86 NE 961. **Evidence held to justify vacation** of highway, where road though established for 15 years had never been worked, was hilly, covered with weeds and brush, etc. Thompson v. Beatty, 171 Ind. 579, 86 NE 961.

3. Roads not acquired under Revised Statutes may be discontinued by county commissioners. Uvalde County v. Oppenheimer [Tex. Civ. App.] 115 SW 904.

to determine who has power to vacate,[4] or which laws are applicable.[5] An enactment declaring county roads which remain unopened a certain number of years to be vacated does not apply to streets dedicated to the public in additions to a city when such plats are outside the corporate limits.[6] The general policy of the law is to leave the vacation of city streets to the municipal authorities,[7] though the procedure therefore which is provided by statute must be strictly followed.[8] Thus, under some statutes, city councils are only authorized to reject or approve the identical plat which is presented,[9] and ordinances which fail to substantially comply with the statute [10] and which fail to provide for the ascertainment of damages [11] are invalid. When a city is vested with full power to vacate, an ordinance is not void because the abutting owner's rights have not been condemned.[12] Under special statutory proceedings for vacation, the petition must be signed by the requisite number of freeholders,[13] though allegations of signing are not always required,[14] and remonstrances must be filed within a specified time and upon the specified grounds.[15] The petition for vacation must usually be accompanied by proof of notice, posted for the required period of time.[16] An order of discontinuance will not be vacated because of some slight inconvenience which is occasioned thereby,[17] but the personal interest of officers who effect a vacation will invalidate such act.[18]

4. Act March 10, 1871 (Laws 1870-71, p. 125), as to vacating streets insofar as such act confers power to vacate streets in incorporated villages upon county boards, is repealed by Act March 1, 1879 (Laws 1879, p. 193). Van Buren v. Elmwood, 83 Neb. 596, 119 NW 959.

5. Under Highway Act 1905, § 123 (Acts 1905, p. 579, c. 167), proceedings to vacate highway commenced prior to enactment of said statute, are governed by laws then in force. Butt v. Iffert, 171 Ind. 554, 86 NE 961.

6. Gen. St. 1901, § 6058. Kiehl v. Jamison, 79 Kan. 788, 101 P 632. Failure of county authorities to open streets in addition to city which is outside corporate limits does not render them vacated. Id.

7. In re Hayes, 139 Wis. 163, 120 NW 834. St. 1898, §§ 2265, 3266, as to vacation of plats, held not to authorize vacation of streets in city of Superior, the common council of that city being authorized by Laws 1891, p. 791, c. 124, § 35, to vacate. Id.

8. Brazell v. Seattle [Wash.] 104 P 155.

9. Under Sess. Laws 1903, p. 139, c. 92, petition and notice for vacation only confers upon city councils authority to approve or reject identical plat presented. Brazell v. Seattle [Wash.] 104 P 155. Sess. Laws 1903, p. 139, c. 92, § 4, authorizing assessment of damages and benefits and using words "make such order in premises as justice and public welfare requires, refers to assessment, and does not authorize city council to modify proposed replat and then adopt same. Id.

10. Ordinance which fails to substantially comply with Laws 1901, p. 175, c. 84, as to mode of exercise in vacating street, is invalid. Smith v. Centralia [Idaho] 104 P 797.

11. Failure of ordinance to provide for ascertainment of damages when street is vacated renders it void as violative of Const. art. 1, § 16, providing that an owner must not be deprived of property without compensation. Smith v. Centralia [Wash.] 104 P 797.

12. Ordinance vacating highway over land conveyed for highway purposes only is not void because right of abutting owner to use street vacated has not been condemned. Steenerson v. Fontaine, 106 Minn. 225, 119 NW 400.

13. In proceedings to vacate highway, petition should be signed by 12 freeholders, 6 of whom reside in immediate neighborhood of highway to be vacated Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871.

14. Allegations of signing by required freeholders are not necessary in petition to vacate. Aetna Life Ins. Co. v. Jones [Ind.] 89 NE 871.

15. Burns' Ann. St. 1908, § 8910 (Acts 1910, p. 618, c. 279), as to vacation of street, is special statutory proceeding to which right to remonstrate within specified time and upon specified grounds is given. City of Peru v. Cox. [Ind.] 90 NE 7. Under Burns' Ann. St. 1908, § 8910, court may reject remonstrance filed after statutory period though court permitted filing at first Id.

16. Under Laws Or. 1903, p. 264, § 8, requiring petition for vacation of highway to be accompanied by proof of 30 days' posted notice, court did not acquire jurisdiction where notices were only posted 29 days. Rynearson v. Union County [Or.] 102 P 785.

17. In proceedings under Highway Law (Laws 1890, p. 1192, c. 568), § 80, as amended by Laws 1897, p. 86, c. 204, § 1, and Laws 1904, p. 985, c. 387, § 1, order discontinuing highway will not be vacated simply because discontinuance changes route from abutting owner's place of residence to his lands and requires slight additional distance to be traversed thereto. People v. Belden, 132 App. Div. 558, 116 NYS 929.

18. Commissioners who are petitioners for vacation of highway are not competent to pass upon such petition. People v. Johnson Com'rs of Highways, 240 Ill. 399, 88 NE 977. Vacation quashed. Id. In proceedings under Highway Law (Laws 1890, p. 1192, c. 568), § 80, as amended by Laws 1897, p. 86, c. 204, § 1, and Laws 1904, p. 985, c. 387, § 1, order discontinuing highway will be vacated

Enactments closing highways are subject to the usual constitutional limitations,[19] and the power to vacate is especially subject to the limitation that an abutting owner cannot be deprived of his property without compensation,[20] and other property owners along the street shall not be deprived of a convenient outlet to neighboring thoroughfares.[21] The statutes usually limit recovery of damages to such persons,[22] and provide for the ascertainment of compensation and the enforcement of payment of the amount awarded.[23] The right of a property owner to damages where his property is not deprived of all access, depends upon statute,[24] and damages are frequently authorized for the closing of a street whereby the remainder is made a cul-de-sac.[25] The just compensation to which each owner is entitled is the depreciation in value of his parcel of land occasioned by the legal closing of the street.[26] Ordinarily the statutes provide for the destruction of both the public and private easements in the streets vacated,[27] and the abutting owner is entitled to compensation for the loss of his private easement,[28] while a claimant for damages, who is the owner of the fee, is entitled to damages for the extinguishment of the public easement only.[29] When a city is the owner in fee of the lands over which a high-

where one of three commissioners owning land on each side of highway who would acquire title to discontinued highway applied for and took part in procuring such discontinuance. People v. Belden, 132 App. Div. 558, 116 NYS 929. **Ordinance held invalid** when deciding vote was cast by petitioner for such ordinance who would profit by vacation. Smith v. Centralia [Wash.] 104 P 797.

19. Laws 1895, p. 2067, c. 1018, providing for closing of highway so that highway commissioners might acquire shore of lake, is not violative of Const. art. 1, § 6, as being deprivation of property without **due process of law.** City of Rochester v. Gray, 133 App. Div. 852, 117 NYS 1091. Act is not violative of Const. art. 3, § 18, as **local act.** Id. Act is not violative of Const. art. 3, § 16, as to **title of act.** Id. Acts 1907, p. 617, c. 279, as to vacation of municipal territory and streets, is not invalid as to title of act (Const. art. 4, § 19). City of Peru v. Cox [Ind.] 90 NE 7.

20. Owner of lots cannot be deprived of use of street without compensation. Const. art. 1, § 16. Brazell v. Seattle [Wash.] 104 P 155. Property owner is not entitled to protection of Const. 1901, § 235, unless he is an "abutting owner." Hall v. Atlanta B. & A. R. Co. [Ala.] 48 S 365. An abutting owner has right which entitles him to have public street kept open and continued as public street for benefit of his abutting property. Gillender v. New York, 127 App. Div. 612, 111 NYS 1051. Abutter on other side of street is **not entitled to damages** for vacation of portion of street on one side of right of way, where there was street across right of way and mere permissive crossing. Siddall v. Philadelphia [Pa.] 73 A 1013. There was no evidence that vacated portion of road joined well-defined road corresponding with other portion of street on other side of right of way. Id.

21. Beyond abutting owner, only limitation upon power of legislature to abolish street is that property owners along street shall not be deprived of convenient outlet to neighboring thoroughfares. Hall v. Atlanta B. & A. R. Co. [Ala.] 48 S 365. Bill which does not claim that property owners have been deprived of reasonable outlet, but only that end of alley is obstructed does not show violation of Const. 1901, § 235. Id. Where effect of closing street is to close only passageway to main highway which property owner has, such owner may challenge proceedings though he is not abutting owner. Smith v. Centralia [Wash.] 104 P 797.

22. Under Laws 1880, p. 1192, c. 568, § 80, as amended by Laws 1904, p. 985, c. 387, as to discontinuance of highway, only owners entitled to damages are those who own lands adjacent or through which highway runs. People v. Newell, 131 App. Div. 555, 115 NYS 399. Person whose land did not adjoin highway was not entitled to damages under statute. Id.

23. Street Closing Act (Laws 1895, p. 2037, c. 1006) provides complete scheme for ascertaining just compensation of property taken and provides adequately for enforcing payment of amount awarded. Gillender v. New York, 127 App. Div. 612, 111 NYS 1051.

24. City of Newark v. Hatt [N. J. Law] 71 A 330. Under Act March 28, 1862, P. L. 333 (Supp. to Charter of Newark), property owners are not entitled to damages for vacation of street when property is not deprived of all access. Id.

25. Laws 1895, p. 2037, c. 1006, as to discontinuance of streets. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471.

26. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471.

27. Laws 1895, p. 2037, c. 1006, as to discontinuance of streets provides for destruction of both public and private easements in such streets. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471; Schonleben v. Swain, 130 App. Div. 521, 115 NYS 23.

28. Under Laws 1895, p. 1006, c. 2037, abutting owner is compensated for loss of his private easement. Schonleben v. Swain, 130 App. Div. 521, 115 NYS 23.

29. Laws 1895, p. 2037, c. 1006. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471.

way passes, no one is entitled to damage for the discontinuance of such way.[30] A town is not entitled to damages for the discontinuance of highway when it has no interest as a town either in the highway or the land over which it passes.[31] Usually the right to damages accrues when a street is legally closed,[32] and the physical closing is postponed until other means of access are provided or the damages are ascertained and paid.[33] When a street does not become closed until the confirmation of a report of commissioners, an abutting owner may prevent the appropriation of such street until such time.[34] The jurisdiction of commissioners in making awards is determined by statute.[35] An award for the vacation of a street should not be affected by the amount of compensation which the damaged property owners have received for the opening of other streets.[36] The person seeking damages is the moving party and must show title to the property and the damage sustained.[37] It is not fatal to the validity of a claim that the amount of damages should be stated accurately.[38] A specific objection to an award on the erroneous theory that a certain street was closed is not a waiver of the general objection that a claimant is not legally entitled to an award.[39] Claims for damages are usually subject to limitation statutes.[40] Where a street is closed and damages awarded, a city is not entitled to re-establish such street and avoid the payment of damages.[41]

Proceedings for the vacation of public highways affect the public and may be

30, 31. City of Rochester v. Gray, 133 App. Div. 852, 117 NYS 1091.

32. Right to damages accrues when street is legally closed by adoption of resolutions by board of estimate, filing of map and appointment of appraisers (Laws 1895, p. 2037, c. 1006). In re West 151st St. in New York, 132 App. Div. 867, 117 NYS 841. Under Laws 1895, p. 2037, c. 1006, as to discontinuance of streets, right to compensation accrues when street is legally closed. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471. In proceedings for discontinuance of streets under Laws 1895, p. 2037, c. 1006, and laying out of new streets, filing of map operated to permanently close streets in certain new block, and owners were entitled to damages as against date of such filing, not when street was actually opened. Id.

33. In re West 151st St. in New York, 132 App. Div. 867, 117 NYS 841. Under Laws 1895, c. 1006, relating to substitution of one system of public highways for another, old road cannot be closed or fenced in until new road contiguous thereto is physically opened. Johnson & Co. v. Cox, 196 N. Y. 110, 89 NE 454. Injunction granted. Id. Laws 1895, c. 1006, by use of word "opened" meant actual physical opening of street Id. Streets are not discontinued under Laws 1895, p. 2037, c. 1006, until title vests in city to one of new streets bounding block in part. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471. Since Laws 1895, p. 2037, c. 1006, as to vacation of streets, does not fix time when title shall vest or when city shall enter upon easements taken, title would not vest until confirmation of report of commissioners, and interest would only run from date of report as provided in Street Opening Act (Laws 1901, p. 419, c. 466). Gillender v. New York, 127 App. Div. 612, 111 NYS 1051.

34. Since otherwise private property would be appropriated for public use without compensation. Gillender v. New York, 127 App. Div. 612, 111 NYS 1051.

35. Under Laws 1895, p. 2037, c. 1006, only jurisdiction which commissioners have to make award is by order pursuant to § 14, and by such orders they are limited to making awards to petitioners. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471. Award held without jurisdiction. Id.

36. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471.

37. Under Laws 1895, p. 2037, c. 1006, as to discontinuance of streets. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471.

38. Under Laws 1895, p. 2037, c. 1006, as to discontinuance of streets. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471.

39. In re Walton Ave. in New York, 131 App. Div. 696, 116 NYS 471.

40. Laws 1895, c. 1006, § 5, places two-year limitation upon claims for damages caused by closing of street, where prior intention to close same street has been indicated by filing of maps at period before act took effect. In re Spuyten Duyvil Road, 116 NYS 857. Otherwise limitation is six years. Id. Maps held not to be notice of intention to close street whereby two-year limitation might apply. Id. Limitation of Laws 1895, c. 1006, § 5, applies to proceedings under § 14 allowing claimants when street is closed to move for hearing as to opening of "contiguous" streets. Id. Claimants cannot increase claims filed before limitation of Laws 1895, c. 1006, § 5, took effect. Id.

41. Where street was closed under Laws 1895, p. 2037, § 1006, and substantial damages awarded, city was not entitled to amend proceedings under New York Charter, § 442 (Laws 1901, p. 199, c. 466), so as to re-establish street and deprive plaintiff of her dam-

reviewed on certiorari,[42] on the relation of resident taxpayers,[43] when the final order of vacation is entered.[44] Certiorari is not however available to a person who is not specially injured by vacation.[45] The writ brings up the record of commissioners only for the purpose of determining whether the action was authorized.[46] An order of vacation is properly set aside where there is lack of jurisdiction in the proceedings, though such jurisdiction is not formally challenged.[47] A statutory right of appeal is often provided when a petition for appointment of viewers to assess damages is quashed,[48] and such remedy by the party injured is usually exclusive.[49] Decisions as to the necessity of closing highways are not generally subject to judicial review,[50] and the sole remedy for a party injured because of contractual rights or otherwise, is an action for damages.[51] In some states, an abutting owner who suffers special injury may challenge or enjoin the vacation of a street.[52]

Upon the vacation of a highway, the title to land therein reverts to the owner of the fee,[53] or the abutting owner.[54] Municipalities are sometimes authorized to convey the state's interest in vacated streets.[55] Since the rights of the public are divested and a street becomes private property, upon its vacation,[56] an abutting owner

ages. In re West 151st St. in New York, 132 App. Div. 867, 117 NYS 841.

42. People v. Johnson Highway Com'rs, 240 Ill. 399, 88 NE 977.

43. On certiorari to review proceedings for vacation of highway, resident taxpayers may be relators, they being representatives of injured public. People v. Johnson Highway Com'rs, 240 Ill. 399, 88 NE 977.

44. Certiorari will not lie to review proceedings of highway commissioners in vacating road until final order of vacation is entered. Roberts v. Romick, 146 Ill. App. 16.

45. Person who was not entitled to damages for discontinuance of highway could not maintain certiorari to review proceedings discontinuing highway. People v. Newell, 131 App. Div. 555, 115 NYS 399. Fact that owner of property near discontinued highway might have used same more frequently than others did not render his injury special. Id.

46. Writ of certiorari to review final order of commissioners brings up record only for purpose of determining if commissioner acted within his authority in making order. People v. Newell, 131 App. Div. 555, 115 NYS 399.

47. Order vacating road was properly set aside on writ of review where county court had no jurisdiction to vacate, though jurisdiction was not formally challenged. Rynearson v. Union County [Or.] 102 P 785.

48. Pulaski Ave., 38 Pa. Super. Ct. 299.

49. Petitioners cannot again petition for viewers, 13 years later, on ground that by decision of supreme court the quashal was erroneous. Pulaski Ave., 38 Pa. Super. Ct. 299.

50. Stone v. Nebraska City [Neb.] 122 NW 63. Authority to vacate is legislative and cannot be set aside by courts. Steenerson v. Fontaine, 106 Minn. 225, 119 NW 400.

51. Steenerson v. Fontaine, 106 Minn. 225, 119 NW 400.

Injunction will not lie to restrain improvement and use of vacated street by one who had acquired title thereto by quitclaim deed from original owner. Steenerson v. Fontaine, 106 Minn. 225, 119 NW 400.

52. Abutting owner on street which is vacated so that access to his lot is shut off suffers special injury whereby he may challenge proceeding. Smith v. Centralia [Wash.] 104 P 797. Owners of lots abutting street which is vacated are specially injured and may enjoin such vacation. Brazell v. Seattle [Wash.] 104 P 155. Where complaint of abutting owners does not show special injury different from that sustained by public in general, injunction will not lie. Id. Complaint held to state cause of action entitling petitioner to injunction restraining partial vacation of street. Id.

53. Steenerson v. Fontaine, 106 Minn. 225, 119 NW 400; Knight v. Thomas [Utah] 101 P 383.

54. If street or highway is vacated, land reverts to abutting owner. Brown v. Oregon Short Line R. Co. [Utah] 102 P 740. Abutting owner of fee secures title when highway is vacated. Steenerson v. Fontaine, 106 Minn. 225, 119 NW 400. Where fee is in public for street uses abutting owner is entitled to property on vacation of street. Foster Lumber Co. v. Arkansas Val. & W. R. Co. [Okl.] 100 P 1110, afg. on rehearing 20 Okl. 583, 95 P 224. Upon vacation of alley, land became property of abutting owners. 1 Ball. Ann. Codes & St. § 1269 (Pierce's Code, § 3563). Norton v. Gross, 52 Wash. 341, 100 P 734.

55. Laws 1853, p. 529, construed, and act held to authorize city to convey interest which state would otherwise have in vacated streets laid out by canal commissioners. People v. Chicago & N. W. R. Co., 239 Ill. 42, 87 NE 946. Under Laws 1853, p. 529, no order or decree of court was essential to passage of title so far as state was concerned. Id. Laws 1851, p. 112, held to authorize city to convey **fee simple title** to vacated streets, trust interest having been extinguished. Id. Laws 1851, p. 112, authorizing city to convey interest in vacated street to abutting owners, is **constitutional** as authorizing city to convey right of reverter when possessed by state. Id. Purpose of congress in granting lands to state of Illinois for canal purposes (Act Cong. March 2, 1827, c. 51, 4 Stat. 234), held to have been given effect, and lands abutting on canal might be conveyed. Id.

56. Tomlin v. Cedar Rapids & Iowa City R. & L. Co. [Iowa] 120 NW 93.

is not entitled to damages because of the location of a railroad thereon.[57] An alley which remains after the partial closing of a public street is subject to the control of city as other streets or alleys.[58]

§ 9. *Street and highway officers and districts.*[59]—See 11 C. L. 1740—The statutes sometimes authorize the trustee of a township to appoint a road supervisor in cases of a failure to elect such officer as well in cases of vacancy.[60] A board of improvement for a road district may be appointed by a city council by the same resolution as another board is selected.[61] A road surveyor whose tenure of office is fixed by statute is not removable at the will of a county court,[62] but a judicial inquiry is necessary.[63] The care and maintenance of roads is usually imposed upon county commissioners,[64] township officers,[65] and the like, and their duties are governed by the statutes relative thereto.[66] Officers elected under the provisions of city charters to perform the duties of such an officer as a surveyor of highways occupy such office in legal contemplation, regardless of their designation.[67] When no duty is imposed upon township trustees as to compelling the trimming of hedges along a highway, and such duty rests upon road supervisors,[68] unless a certain system is adopted, trustees seeking to enforce such duty must plead the adoption of such a system.[69] Highway officers are in general liable for their torts,[70] and for negligence in the performance

57. Street railway. Tomlin v. Cedar Rapids & Iowa City R. & L. Co. [Iowa] 120 NW 93.

58. No intention to create private alley. Fralinger v. Cooke, 108 Md. 682, 71 A 529.

59. **Search Note:** See notes in 22 L. R. A. 824; 13 L. R. A. (N. S.) 233.

See, also, Highways, Cent. Dig. §§ 301-322; Dec. Dig. §§ 90-97; Municipal Corporations, Cent. Dig. §§ 648-656; Dec. Dig. § 203; 28 Cyc. 556-565; 15 A. & E. Enc. L. (2ed.) 410; 27 Id. 103; 20 A. & E. Enc. P. & P. 907.

60. Acts 1905, p. 569, c. 167, § 93 (Burns' Ann. St. 1908, § 7762). State v. Hall [Ind.] 89 NE 855. Under statute, appointment of road supervisor by trustee was proper where election resulted in tie. Id. Appointment of road supervisor pursuant to Acts 1905, p. 569, c. 167, § 93 (Burns' Ann. St. 1908, § 7762), held valid under constitution. Id. Act March 9, 1907 (Acts 1907, p. 371, c. 210), purports only to amend Acts 1905, p. 569, c. 16, §§ 92, 94, and in no way affects § 93. Id. Const. art. 15, § 3 (Burns' Ann. St. 1908, § 225), is not made for benefit of incumbent officers but is to prevent vacancies, and office of road supervisor may be filled as legislature prescribes (Const. art. 6, § 3; Burns' Ann. St. 1908, § 163). Id.

61. Boles v. Kelley [Ark.] 117 SW 1073.

62. County court cannot remove road surveyor from office, his tenure being fixed by Code 1906, § 1392. Helmick v. Tucker County Ct., 65 W. Va. 231, 64 SE 17.

63. Road surveyor appointed by county court can be removed only by circuit court under Code 1906 § 183, after judicial inquiry. Helmick v. Tucker County Ct., 65 W. Va. 231, 64 SE 17.

64. Board of supervisors have control of county roads. Code 1904, § 944—a(1). Norfolk & W. R. Co. v. Carroll County Sup'rs [Va.] 65 SE 531. Under Code Pub. Gen. Laws 1904, art. 25, §§ 1, 2, county commissioners are charged with duty of keeping roads in safe condition. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656. Duty applies to approaches to bridges as well as elsewhere. Id. Acts 1905, p. 574, c. 167, § 7778 (Burns' Ann. St. 1908), imposes duty upon boards of commissioners of repairing bridges and culverts forming part of public highway. State v. Collier, 171 Ind. 606, 86 NE 1015. Duty is not imposed on township trustee. Id.

65. In counties under township organization, care and maintenance of public highways devolves upon township and road officers. Boyd v. Gallaway Flour Mill & Elevator Co. [Neb.] 123 NW 93.

66. Under Code 1906, § 4468, member of board of supervisors is only charged with duty to inspect road and bridges and report repairs which are necessary. Lee v. Styles [Miss.] 49 S 259. Where public road has been established 18 years and circumstances demand such action, township officers may remove culverts and prevent flow of water whereby grade might be destroyed. Boyd v. Gallaway Flour Mill & Elevator Co. [Neb.] 123 NW 93.

67. Where no provision to contrary is made by city ordinance, superintendents of highways elected under charter of Gloucester (St. 1873, p. 675, c. 246, § 13) exercise same duties and are same as surveyor of highways. Smith v. Gloucester, 201 Mass. 329, 87 NE 626.

68. Duty of enforcing provisions of Code Supp. 1902, § 1570, as to trimming osage orange hedges abutting on highway, rests primarily upon road supervisors. Jones v. Thie [Iowa] 119 NW 616. Township trustees as such cannot maintain action for mandatory injunction to compel trimming of hedges under Code Supp. 1902, § 1570. Id.

69. Since no duty is imposed upon township trustees as to compelling trimming of hedges along highway (Code Supp. § 1570), unless one district system is adopted, trustees seeking to enforce such duty must plead adoption of such system. Jones v. Thie [Iowa] 119 NW 616.

70. Superintendent of highways in laying line of pipe from catch basin in street across plaintiff's land committed tort for which he

of their duties.[71] Liability for malfeasance is imposed though the official has no adequate means of repair,[72] but when the injury is sustained in consequence of nonfeasance, want of available funds exonerates the officer.[73] In some states, officials charged with such duty may be punished for the failure to repair roads used by rural mail carriers.[74] The records of highway commissioners cannot be varied by parol.[75] When a roadmaster is not authorized to hire a team for road work,[76] the voluntary act of a person in providing a team imposes no liability on the township.[77] The purchase of materials for road work cannot be restrained when in compliance with the law.[78] The statutes may authorize a board of supervisors to compel a railroad to build a new highway in place of one which has been appropriated.[79] Road overseers and members of a county court are not state officers within the meaning of a constitutional provision as to the jurisdiction of appeals.[80]

§ 10. *Fiscal affairs.*[81]—See 11 C. L. 1741—The general principles of taxation[82] and fiscal affairs relating to public improvements generally[83] are elsewhere treated. The expense of maintaining streets is usually considered a necessary expense which does not require the consent of the people before it is incurred.[84] A charter require-

was liable. Smith v. Gloucester, 201 Mass. 329, 87 NE 626.

71. Batdorff v. Oregon City [Or.] 100 P 937. Board was not negligent in not applying for funds to **repair street** where from facts demand would have been refused. Taylor v. Manson, 9 Cal. App. 382, 99 P 410. San Francisco Charter, art. 3, c. 1, § 1, requiring estimate by boards, is as to time directory, and board is not negligent because application is not made before certain time, when sufficient time is given for consideration of estimate. Id. Board held not negligent in failing to compel corner owner to repair triangular piece of sidewalk at corner, since City Charter, c. 2, art. 6, § 16, only required owner to repair sidewalk in front of his property. Id. Board of public works is not negligent in failing to induce board of supervisors to pass ordinance whereby fines for failure to repair walks would be paid into special fund for repairing. Id. Under Code 1906, § 4468, member of board of supervisors is not liable for failure to keep bridge in repair, there being no duty imposed. Lee v. Styles [Miss.] 49 S 259. County officers are **not liable** to persons injured on highway by reason of defect therein. Blue Grass Trac. Co. v. Grover [Ky.] 123 SW 264.

72. Where officer by malfeasance so carelessly performs obligations imposed upon him to keep highways in suitable condition that injury is sustained, he is responsible without showing that he had adequate means to repair. Batdorff v. Oregon City [Or.] 100 P 937. Duty of officers to **repair city street** does not exist where there are no funds with which to make them, and no legal means for procuring such funds. Taylor v. Manson, 9 Cal. App. 382, 99 P 410.

73. Batdorff v. Oregon City [Or.] 100 P 937. Under Charter of San Francisco, art. 1, § 5, rendering officers liable for damages where street is not repaired, does not apply when officers had no funds for repair. Taylor v. Manson, 9 Cal. App. 382, 99 P 410.

74. Under statutes, it was not duty of township trustee to repair roads, wherefore he could not be guilty of violating Acts 1903, p. 223, c. 124, as amended by Laws 1907, p. 298, c. 180 (Burns' Ann. St. 1908, § 7779). State v. Collier, 171 Ind. 606, 86 NE 1015. In action for refusal to repair road used by rural mail carrier in violation of Act March 9, 1903 (Acts 1903, p. 223, c. 124, as amended by Laws 1907, p. 298, c. 180; Burns' Ann. St. 1908, § 7779), **affidavit held insufficient** in that there was no direct averment that defendant was township trustee and had received notice of condition of highway. Id. Recitals would not suffice for positive averments. Id. Averment that rural mail route is "maintained" over highway does bring such way within Acts 1903, p. 223, c. 124, as amended by Laws 1907, p. 298, c. 180 (Burns' Ann. St. 1908, § 7779), punishing failure to repair roads where rural mail routes are established and maintained. Id.

75. Seass v. Monroe, 146 Ill. App. 56.

76. Act April 12, 1905 (P. L. 142), § 3, defining duties of roadmaster, does not authorize hiring of team to use on road work. Andrus v. Shippen Tp., 36 Pa. Super. Ct. 22.

77. Where supervisors did not authorize use of team. Andrus v. Shippen Tp., 36 Pa. Super. Ct. 22.

78. Where purchase and record was in compliance with law. Seass v. Monroe, 146 Ill. App. 56. Under Code 1904, § 825, granting power to sue, and § 944—a(1), as to control over roads. Norfolk & W. R. Co. v. Carroll County Sup'rs [Va.] 65 SE 531.

79. Commissioners of highways acting for the public have such an interest as owners of the land that they may petition for the formation of a drainage district. Under Hurd's Rev. St. 1905, c. 42, § 151. People v. Magruder, 237 Ill. 340, 86 NE 615.

80. Appeals to supreme court. Hill v. Hopson, 221 Mo. 103, 120 SW 29.

81. Search Note: See Highways, Cent. Dig. §§ 379-416; Dec. Dig. §§ 121-151; Municipal Corporations, Cent. Dig. §§ 100-1307, 1452, 1453; Dec. Dig. §§ 405-588, 672; 28 Cyc. 1102-1256; 15 A. & E. Enc. L. (2ed.) 352; 27 Id. 103.

82. See topic Taxes.

83. See such topics as Municipal Bonds; Municipal Corporations; Public Works and Improvements, and Bridges.

84. Expense of maintenance of streets is "necessary expense" which is not within prohibition of Const. art. 7, § 7, which forbids incurring of debts except necessary

ment that a board shall specify in detail the amount which will be required to repair defects does not require a specification of every defective sidewalk in a city.[85] Penalties prescribed by a board for the failure to repair sidewalks are payable into the general fund in the absence of contrary provisions.[86] Enactments providing for the apportionment of road taxes must not be violative of constitutional restrictions.[87] A grant of authority to apportion county and township taxes [88] does not conflict with the grant of authority to a township board to levy a road tax.[89] A road tax which fails to conform to a statute applicable to emergencies when a county changes its plan of organization is void.[90] Highway commissioners are frequently authorized to levy taxes for the ordinary expenses of maintenance of roads, without the consent of other officials [91] and without the consent of town electors.[92] The amount of road taxes must usually be properly certified,[93] and the tax must be levied upon a proper basis [94] or it may be enjoined.[95] A tax for the construction of a road, which is authorized at an election, for three years, may, under some statutes, be included in one levy and certificate.[96]

expenses without vote of people. Town of Hendersonville v. Jordan, 150 N. C. 35, 63 SE 167.

85. San Francisco Charter, c. 1, art. 3, § 1. Taylor v. Manson, 9 Cal. App. 382, 99 P 410.

86. Penalties prescribed by board of supervisors for failure to repair sidewalk under San Francisco Charter, c. 2, art. 6, § 18, would go into general fund in absence of contrary provision, rather than into special fund for street repairs. Taylor v. Manson, 9 Cal. App. 382, 99 P 410.

87. Under Nyssa City Charter (Sp. L. 1903, c. 4), § 16, city may demand from county that portion of road taxes collected by the county within corporate limits of city. Act is not in violation of Const. art. 4, § 23, prohibiting **local acts** in connection with highways and assessments therefor. City of Nyssa v. Malheur County [Or.] 103 P 61. Municipal Corporations Act (Laws 1907, p. 847), § 120, providing for payment of one-half of money collected on taxes in city where there is road and bridge tax levied, by county board of revenue, which fund shall be used to maintain streets, is void as not included in **title of act.** Const. 1901, § 45. State v. Miller [Ala.] 48 S 496. Fact that act was embodied in Code did not render it valid, such act being adopted after Code was adopted. Id.

88. Under statutes county court had power to apportion tax levy giving 20 per cent to township board to be administered in building roads and reserving remainder for general county purposes. State v. Piper, 214 Mo. 439, 114 SW 1.

89. Under Rev. St. 1899, § 9284 (Ann. St. 1906, p. 4265), authorizing county court to apportion tax, for county and township purposes, township would not be deprived of right to levy tax for road purposes. State v. Piper, 214 Mo. 439, 114 SW 1. Rev. St. 1899, § 9284 (Ann. St. 1906, p. 4265), as to apportionment of taxes, is not in conflict and repealed by § 10324 (p. 4666), authorizing township board to levy road tax. Id. Power of township board to levy road taxes (Rev. St. 1899, § 10324; Ann. St. 1906, p. 4666) is subordinate to power of county court to make apportionment required by § 9284 (p. 4265). Id.

90. Where road tax by county that had adopted township organization wherefore assessment could not be made in time did not conform to Acts 1907, pp. 447, 448, which was applicable to such cases, it was void. State v. Piper, 214 Mo. 439, 114 SW 1.

91. Highway commissioners may levy tax for ordinary maintenance of roads without consent of town auditor and assessors. Spring Creek Drainage Dist. v. Joliet Com'rs of Highways, 238 Ill. 521, 87 NE 394.

92. Statutes construed and Road and Bridge Act (Hurd's Rev. St. 1908, c. 121, p. 1833), §§ 13, 14, held to give authority to highway commissioners to levy taxes without sanction of electors in town meeting. Robinson v. McKenney, 239 Ill. 343, 88 NE 264. Township Organization Act (Hurd's Rev. St. 1908, p. 2146, c. 139, § 39), art. 4, § 3, par. 3, does not give authority to voters to direct levy of taxes under Road and Bridge Act (Hurd's Rev. St. 1908, c. 121, p. 1833), §§ 13, 14, 88, 119. Id.

93. Under Hurd's St. 1905, c. 121, § 16, requiring commissioners of highways to certify amount of their levy to town clerk who shall keep certificate on file and certify levy to county clerk, where certificates were in duplicate, town clerk might keep one copy as original and use other copy for certifying. People v. Kankakee & S. W. R. Co., 237 Ill. 362, 86 NE 742. Certificate for road and bridge tax under Hurd's St. 1905, c. 121, § 14, held insufficient when reciting levy as necessary in view of "contingency" of destruction of certain bridges. Id.

94. Act (Act April 12, 1905, P. L. 142), providing for levy of road tax on basis of "last adjusted valuation for county purposes," requires that assessor's return be corrected and opportunity be given to object to same, before levy is effected. Frick Coke Co. v. Mt. Pleasant Tp., 222 Pa. 451, 71 A 930.

95. Remedy provided by law (Act April 15, 1834, P. L. 509) is not so adequate as to exclude jurisdiction of equity to enjoin levy of road tax on an improper basis. Frick Coke Co. v. Mt. Pleasant Tp., 222 Pa. 451, 71 A 930.

96. Where tax for construction of hard road was authorized at election, for three years, under Hurd's Rev. St. 1905, c. 121, § 247, entire tax might be included in one

Road districts are based upon the theory that the property therein is increased in value to the amount of the expenditures incurred,[97] and such districts should not extend beyond the limits of the benefits of the improvements made in pursuance of the objects of organization.[98] Enactments authorizing the organization of road districts must not be violative of constitutional provisions as to the jurisdiction of county courts,[99] and assessments must be properly imposed.[1] A statute which fails to provide for the assessment of lands to be benefited is inoperative.[2]

Enactments as to road labor must conform to constitutional requirements.[3] Such statutes are frequently subject to adoption by the various counties,[4] and in some states the particular system desired becomes operative upon the recommendation of the grand jury.[5] An express grant of power is necessary to enable a city to compel persons to work on streets,[6] and, when a statute authorizing street labor is repealed, general grants of power will not readily be construed as implying such power.[7] When full power to impose road work is delegated,[8] the city may enforce

tax levy and certificate. People v. Illinois Cent. R. Co., 237 Ill. 154, 86 NE 720.

97, 98. Road Imp. Dist. No. 1 v. Glover [Ark.] 117 SW 544.

99. Acts 1907, p. 568, No. 247, as to formation of road improvement districts, is not violative of Const. art. 7, § 28, defining jurisdiction of county courts. Parkview Land Co. v. Road Imp. Dist. No. 1 [Ark.] 122 SW 241. Act was passed to aid county court. Id. County cannot be organized into road district without usurping exclusive jurisdiction of roads vested in county court by constitution. Road Imp. Dist. No. 1 v. Glover [Ark.] 117 SW 544. Legislature cannot authorize organization of road district to lay out new roads and impose upon county court duty to maintain them as provided by Acts 1907, p. 340, § 9. Id. Legislature may authorize organization of part of county into road district for improvement and repair. Id. Acts 1907, p. 568, No. 247, as to formation of road improvement districts though invalid in authorizing formation of county into one district, is valid as authorizing formation of district from parts of county. Parkview Land Co. v. Road Imp. Dist. No. 1 [Ark.] 122 SW 241.

1. Kirby's Dig. § 5665, as to formation of improvement districts, is not unconstitutional in that amendment of 1905 (Laws 1905, p. 300), imposes assessments upon "owners" of property rather than "resident owners." Boles v. Kelley [Ark.] 117 SW 1073. Const. art. 19, § 27, expressly provides for assessments based on consent of majority in value of property owners owning property adjoining locality to be affected. Id.

2. Acts 1907, p. 340, as to road improvement districts, is inoperative since it fails to provide how assessment of land shall be made upon which tax is to be levied. Road Imp. Dist. No. 1 v. Glover [Ark.] 117 SW 544.

3. Sp. Laws 1897, p. 150, c. 110, and amendment thereto, Sp. Laws 1905, p. 262, c. 30, as to road labor, are not invalid as contravening Const. art. 1, § 28, in that power of suspending law is vested in commissioner's court. Bluitt v. State [Tex. Cr. R.] 121 SW 168. Act is not invalid and inhibited by Const. art. 16, § 40, in that act seeks to create and impose on county commissioner another civil office of emolument. Id. Act as affected by Sayles' Ann. Civ. St. 1897, art. 5048, is not contrary to Const. art. 8, § 1, in that burden of working road is to be construed as taxation and is not equal and uniform. Id. Wilson's Rev. & Ann. St. 1903, § 6090, requiring work on road for four days each year or payment of $1 in lieu thereof, is not violative of Burns' Const. of Okl. § 284. State v. Rayburn [Okl. Cr. R.] 101 P 1029. The imposition of compulsory road work is **not poll-tax.** Id.

4. Laws 1901, p. 239, § 9691i, et seq. (Ann. St. 1906, p. 4425), as to road taxes, is option law which only becomes operative by adoption by county court. Johnson v. Scott, 133 Mo. App. 689, 114 SW 45.

5. Pol. Code 1895, §§ 516-519 (Acts 1890-91, p. 134), on subject of public road register, does not become operative in any county until grand jury so recommends. Herndon v. Colquitt County [Ga.] 64 SE 60. Pol. Code 1896, §§ 573-583 (Acts 1890-91, p. 135), known as "alternative road law," does not become effective in any county until grand jury so recommends. Id. "Public road register law" and "alternative road law" are separate laws. Id. Adoption of "alternative road law" does not ipso facto put "public road register law" into effect. Id. Adoption of "alternative road law" does not render it unlawful to work roads of county unless they are shown on public road register (Pol. Code 1895, § 516). Id.

6. Town of Winnfield v. Long, 122 La. 697, 48 S 155. Acts 1898, p. 224, No. 136, does not grant power to municipalities to compel persons to work on public streets. Id. Ordinance No. 28, as to compelling street labor, held void. Id.

7. Heath v. Iola, 81 Kan. 177, 105 P 32. Amendment of Gen. St. 1901, § 6031, rendering cities of third class road districts (Laws 1907, p. 466, c. 295, § 1), indicated legislative intention to withdraw cities of first and second class from operation of that provision. Id. Laws 1909, p. 499, c. 198, § 8, rendering male citizens amenable to road tax, being re-enactment of old law, does not indicate change of legislative intention. Id.

8. Under Rev. St. 1895, art. 419, as amended by Acts 1895, p. 160, c. 102 (Rev. St. 1895, art. 4730a), full power is delegated to cities and towns to enforce labor of citizens on roads. Ex parte Drake, 55 Tex. Cr. R. 233, 116 SW 49.

such work by penalties.[9] A statutory provision requiring the initiation of criminal proceedings within ten days after the failure to appear for road work has been construed to be directory.[10] The complaint must substantially comply with the statute,[11] and a failure to state for what year accused was liable to work upon the roads is fatal.[12] Courts of equity will not restrain trials by commissioners of roads and revenues, of persons charged with failure to pay commutation taxes or to appear for road work,[13] and, upon a petition for injunction, a court of equity will not inquire if the system in question was properly adopted.[14] A statutory duty to list persons liable for a poll tax is waived where the person not listed seeks exemption from work.[15] A person who obtains a certificate of exemption which is annulled is liable to a road tax.[16] The fact that roads have not been properly worked does not authorize citizens to select and work such roads which are not under supervision of county authorities,[17] and the voluntary work upon unrepaired roads not under the county supervision does not excuse a road tax.[18] A person who has paid a street tax in one city in a state for a certain year cannot be compelled to pay the same tax during the same year in another city of the state.[19]

§ 11. *Control by public and public regulations.*[20]—See 11 C. L. 1744—Highways and streets are primarily under the control of the state,[21] though such control may be delegated to municipalities.[22] A city which has no title to the streets dedicated

9. Under Rev. St. 1895, art. 419, as amended by Acts 1895, p. 160, c. 102 (Rev. St. 1895, art. 4730a), city may impose penalties for enforcement of road work without regard to state laws, subject to limitation of punishment as fixed by jurisdiction of local city courts. Ex parte Drake, 55 Tex. Cr. R. 233, 116 SW 49.

10. Wilson's Rev. & Ann. St. 1903, § 6109, stating duty of road overseer to file complaint against person violating § 6090 as to road work, is directory only. State v. Rayburn [Okl. Cr. R.] 101 P 1029.

11. Complaint for failure to perform highway work held fatally insufficient since it did not follow Pen. Code 1895, art. 491, and was unintelligible. Goodrich v. State [Tex. Cr. R.] 118 SW 1042.

12. Complaint and information held insufficient where it did not state for what year accused was liable to work upon roads and in order to sustain conviction it should have been alleged that he was liable for and in default of payment of tax for year and time within period of limitation as provided by statute. Bluitt v. State [Tex. Cr. R.] 121 SW 168. Levy of poll tax is not to be assumed from admission of nonpayment of same. Id.

13. Trial by commissioners in enforcement of alternative road law (Laws 1890-91, p. 135). Rowland v. Johnson County Com'rs of Roads & Revenues [Ga.] 65 SE 404.

14. Upon petition for injunction to restrain trial of person who did not appear for road work or pay commutation tax, court will not inquire if recommendation of grand jury was sufficient to render alternative road law (Laws 1890-91, p. 135) in force in county. Rowland v. Johnson County Com'rs of Roads & Revenues [Ga.] 65 SE 404.

15. Johnson v. Scott, 133 Mo. App. 689, 114 SW 45.

16. Under Laws 1901, p. 239, § 96961 (Ann. St. 1906, p. 4425), et seq., where person liable to road tax obtained certificate of exemption which was annulled, he was therefore liable to road tax. Johnson v. Scott, 133 Mo. App. 689, 114 SW 45.

17. Herndon v. Colquitt County [Ga.] 64 SE 60.

18. Road tax. Herndon v. Colquitt County [Ga.] 64 SE 60.

19. Whitt v. Gadsden [Ala.] 49 S 682. Under Code 1907, § 5779, no person is liable to work more than ten days in one year on street duty. Id.

20. Search Note: See notes in 16 L. R. A. 715; 24 Id. 412, 584; 36 Id. 305, 413; 47 Id. 290, 301; 9 L. R. A. (N. S.) 455, 1045; 11 Id. 1080; 14 Id. 654; 1 Ann. Cas. 114, 785; 3 Id. 495; 6 Id. 982; 7 Id. 551; 8 Id. 437; 10 Id. 1100; 11 Id. 295, 639, 728.

See, also, Highways, Cent. Dig. §§ 456-477; Dec. Dig. §§ 165-186; Municipal Corporations, Cent. Dig. §§ 1431-1437, 1459-1491; Dec. Dig. §§ 661, 662, 680-690; 28 Cyc. 848-850, 866-892; 27 A. & E. Enc. L. (2ed.) 148.

21. Legislature primarily has control over streets as well as other public highways. Grand Trunk & W. R. Co. v. South Bend [Ind.] 89 NE 885. Highways whether urban or rural belong primarily to public and absolute dominion over them is lodged in legislature. White Oak Coal Co. v. Manchester [Va.] 64 SE 944; McCrorey v. Garrett [Va.] 64 SE 978. Legislature has control over all public highways. Norfolk & W. R. Co. v. Carroll County Sup'rs [Va.] 65 SE 531. State holds highway in trust for people. City of Rochester v. Gray, 133 App. Div. 852, 117 NYS 1091. State, as trustee for citizens, is ultimate holder and owner of paramount authority to govern and regulate use and occupancy of public highways. Texarkana Gas & Elec. Co. v. Texarkana [Tex. Civ. App.] 123 SW 213. Grant of right to lay pipes in highway by owner of fee subject to state's power of reasonable regulation. Kansas Natural Gas Co. v. Haskell, 172 F 545.

22. Grand Trunk & W. R. Co. v. South Bend [Ind.] 89 NE 885. Control is frequently delegated to municipalities. White

to it exercises only legislative and supervisory control over such property,[23] while a city having title to the city streets [24] is not a private owner [25] but holds the title in trust for public purposes.[26] There is no material difference in the extent of the rights of the public in a city street whether the fee is in the public or an abutting owner.[27] A city is frequently deprived of control over certain streets when the same is assumed by a park board.[28] The powers as to controlling streets which are conferred upon cities are legislative in character [29] and are usually plenary,[30] with the exception that such power must not be exercised unreasonably.[31] Common regulations are those relative to telegraph and telephone lines,[32] gas pipes,[33] billboards,[34] advertising wagons,[35] and the like.[36] Statutes imposing license taxes on vehicles must not be violative of constitutional provisions.[37] A city may be authorized to impose a license tax on vehicles operated by persons carrying on business within the city,[38] and a park board may adopt regulations prohibiting certain vehicles on parkways.[39] The moving of buildings along a street is permissible under proper restric-

Oak Coal Co. v. Manchester [Va.] 64 SE 944; Texarkana Gas & Elec. Co. v. Texarkana [Tex. Civ. App.] 123 SW 213. Control of streets is vested exclusively in city. Code, § 753. Lacey v. Oskaloosa [Iowa] 121 NW 542. Alleys being public ways are under control of municipal authorities. Kansas City S. R. Co. v. Boles [Ark.] 115 SW 375.

23. Existing or subsequently established municipality acquires no title to streets or alleys and grounds dedicated as such by proprietor in platting addition thereto. East Chicago Co. v. East Chicago, 171 Ind. 654, 87 NE 17.

24. Old Harlem road having been laid out by Dutch during occupation of Manhattan island, title thereto, and not merely easements, vested in Dutch government and passed to British crown and thence to city of New York by Dongan Charter. Pooler v. Sammet, 130 App. Div. 650, 115 NYS 578.

25. City of New York v. Bryan, 196 N. Y. 158, 89 NE 467. Interest of city in street is not of private character and in no sense partakes of nature of ownership as understood when applied to private persons. City is not lessee of street. Martin v. St. Joseph, 136 Mo. App. 316, 117 SW 94.

26. Title of city to streets is in trust for public purpose. City of New York v. Bryan, 196 N. Y. 158, 89 NE 467. When fee is in city, it is in trust for purposes of street. Kellogg v. Cincinnati Trac. Co., 80 Ohio St. 331, 88 NE 882.

27. Kellogg v. Cincinnati Trac. Co., 80 Ohio St. 331, 88 NE 882.

28. City has no possession or control of street where same is assumed by park commissioners. City of Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403.

29. Power conferred by Code, §§ 717, 751, 753. Lacey v. Oskaloosa [Iowa] 121 NW 542.

30. Powers conferred by statute (Code, §§ 717, 751, 753), as to controlling streets, are plenary within limits prescribed. Lacey v. Oskaloosa [Iowa] 121 NW 542.

31. Only limitation of powers conferred as to control of streets are that they must not be exercised unreasonably. Lacey v. Oskaloosa [Iowa] 121 NW 542.

32. City in exercise of police power may require permits to be issued for replacing of telephone poles. Merritt v. Kinlock Tel. Co., 215 Mo. 299, 115 SW 19. Operation of telephone line along street is not original or primary use of street, but is permissible under proper restrictions and with due regard to rights of others. Clyde Tel. Co. v. Parmenter, 8 Ohio N. P. (N. S.) 147.

33. Borough has right in exercise of police power to regulate, inspect, and supervise introduction and maintenance of gas pipes. Chambersburg Borough v. Chambersburg Gas Co., 38 Pa. Super. Ct. 311. Borough may impose reasonable charge for expense of supervising introduction and maintenance of gas pipes. Id.

34. City may prevent erection of insecure billboards or other structures along edge of public street so near as to be menace to travelers. State v. Whitlock, 149 N. C. 542, 63 SE 123. Ordinance held unreasonable. Id.

35. Ordinance prohibiting advertising wagons held valid and reasonable. Fifth Ave. Coach Co. v. New York, 194 N. Y. 19. 86 NE 824, afg. 126 App. Div. 657, 110 NYS 1037, afg. 58 Misc. 401, 111 NYS 759. A wagon is defined to be a wheeled carriage—a vehicle on four wheels. Id. Ordinance prohibiting advertising wagons applies to wagons propelled by motors. Id. Ordinance prohibits general advertising for hire on vehicles, but business notices on wagons are excepted. Id.

36. See, also, scope note.

37. Acts 1908, p. 364, c. 672, imposing license tax on vehicles, held invalid because of misleading title (Const. art. 3, § 29). Nutwell v. Anne Arundel County Com'rs, 110 Md. 667, 73 A 710. Valid and invalid portions held inseparable. Id.

38. Sporadic hauling of coal over streets of city to outside customer was not carrying on business within city such as would subject coal company to license tax on vehicles. White Oak Coal Co. v. Manchester [Va.] 64 SE 944. City ordinance imposing license tax on vehicles **held unreasonable** and invalid as imposing tax on nonresidents, such as farmers who come to city for business purposes or pleasure. Pegg v. Columbus, 80 Ohio St. 367, 89 NE 14.

39. Park board has power to adopt regulation prohibiting operation of vehicles over ten feet high on parkway (New York Charter [Laws 1901, pp. 257, 259, c. 466], §§ 612, 616, as amended by Laws 1908, c. 135, pp. 385, 386, §§ 1, 3). People v. Shellenberg, 133 App. Div. 79, 117 NYS 820. Regulation of

tions.[40] The permission of a borough president to move buildings and the permission of a superintendent of buildings to make alterations are independent.[41] The doctrine of lateral support which is applicable to highways and adjacent property [42] does not require municipalities to preserve lateral support to adjacent land.[43] A person maintaining pipes in a street under a license cannot recover damages for the revocation of such license.[44] City officials may not remove shade trees without authority,[45] and if their power is discretionary it must not be exercised in an arbitrary or unreasonable manner.[46]

The use of automobiles on public highways is subject to regulation by the legislature [47] in order to protect the public.[48] The legislature may require the designation of agents upon whom process may be served in actions growing out of the use of registered machines,[49] and it is frequently provided that the automobile shall be licensed after having been used in the state a certain period of time.[50] A construction of statutes is sometimes necessary to determine which rules apply to automobiles.[51] Usually statutes as to motor vehicles are applicable to all the highways in a state [52] and are applicable to motor cycles.[53] An enactment which is construed to regulate the speed of automobiles in all business districts of cities [54] is not unreasonable and indefinite.[55] Municipal ordinance as to motor vehicles are usually abrogated when state regulations relative thereto are adopted.[56] The power to

park board excluding vehicles over ten feet high is presumed reasonable. Id. Franchise to coach company (Laws 1900, p. 1437, c. 657, § 23) does not authorize operation of vehicles over 10 feet high in violation of regulation of park board. Id.

40. Clyde Tel. Co. v. Parmenter, 8 Ohio N. P. (N. S.) 147.

41. Granting of one does not affect granting of other. Hurwitz v. Moore, 132 App. Div. 29, 116 NYS 248.

42. See post, § 16.

43. Common-law doctrine of lateral supports is limited to lands under private ownership except that, while private owner is required to preserve lateral support to public highway, municipality owning highway is not required to preserve lateral support to adjacent land. New York Steam Co. v. Foundation Co., 195 N. Y. 43, 87 NE 765.

44. Kevil v. Princeton [Ky.] 118 SW 363.

45. Officers of city may not remove shade tree against objection of abutting owner, where city officers have no authority to place sidewalk where trees stand. City of Paola v. Wentz, 79 Kan 148, 98 P 775.

46. City of Paola v. Wentz, 79 Kan. 148, 98 P 775.

47. Dudley v. Northampton St. R. Co., 202 Mass. 443, 89 NE 25.

48. Legislature by statute (St. 1903, p. 507, c. 473; St. 1905, p. 227, c. 311) intended to create duty to other travelers in respect to automobiles. Dudley v. Northampton St. R. Co., 202 Mass. 443, 89 NE 25. Motor Vehicle Law (Laws 1907, p. 510) is regulatory statute passed in exercise of police power. Ayres v. Chicago, 239 Ill. 237, 87 NE 1073.

49. Imposition as to nonresident owners of automobile (P. L. 1908, p. 613, § 4), requiring designation of agent in state upon whom process may be served in actions growing out of use of registered machine, is constitutional. Cleary v. Johnston [N. J. Law] 74 A 538. As to imposition of license fees upon automobiles, see Licenses.

50. Automobile held to have been operated in excess of 15 days which statute permits, without license. St. 1903, p. 507, c. 473; St. 1905, p. 227, c. 311, § 2. Dudley v. Northampton St. R. Co., 202 Mass. 443, 89 NE 25.

51. Laws 1905, p. 498, c. 86, limiting speed of automobiles and providing penalty for exceeding such limit, held to repeal Pub. St. 1901, c. 264, § 18, being inconsistent. Rockingham County v. Chase [N. H.] 71 A 634.

52. General law regulating operation of automobiles on public highways suggests use of term "public highway" in general, rather than particular, sense, since danger to travelers is quite as important in either case. Weirich v. State, 140 Wis. 98, 121 NW 652.

53. Pub. Acts 1905, p. 287, No. 196, as to registration and identification of motor vehicles, is applicable to motor cycles. People v. Smith, 156 Mich. 173, 16 Det. Leg. N. 27, 120 NW 581. Motor cycle is vehicle. Id. Pub. Acts 1905, p. 287, No. 196, § 1, defines motor vehicles as "all vehicles propelled by power other than muscular power, except traction engines and motor vehicles as run upon rails or tracks." Id.

54. Pub. Acts 1905, p. 290, No. 196, § 12, regulating speed of motor cars in cities, construed and held that regulation as to speed in business districts applied to all business districts if there were more than one. People v. Dow, 155 Mich. 115, 15 Det. Leg. N. 949, 118 NW 745.

55. Pub. Acts 1905, p. 290, No. 196, § 12, when construed as to apply and regulate speed of automobiles in all "business districts," is not unreasonable and indefinite though difficulty might be experienced in determining what constituted a business district. People v. Dow, 155 Mich. 115, 15 Det. Leg. N. 949, 118 NW 745.

56. Motor Vehicle Law (Laws 1907, p. 510), abrogates all municipal ordinances designed to regulate use of such vehicles. Ayres v. Chicago, 239 Ill. 237, 87 NE 1073. Ordinance as to licensing of vehicles in so far as it applies to motor vehicles is annulled by Act April 2, 1906 (98 O. L. 320). Frisbie v. Co-

grant consent to the use of highways for speed contests is often vested in local authorities,[57] and such consent cannot be affected by state officials.[58]

§ 12. *Rights of public use; law of the road.*[59]—See 11 C. L. 1747.—The public easement in a street includes the use of land below the surface as well as the use of the surface,[60] and such easement includes every kind of travel and communication which is reasonable in the use of a public street.[61] Municipalities are usually authorized to grant the use of streets for public purposes,[62] though the consent of abutting owners is often necessary,[63] but a municipality has no power to devote a public street or sidewalk to a merely private use.[64] Consent, when necessary to the use of a street by a public service corporation,[65] may be express or implied.[66] The grant of the right to use streets may be conditional.[67] Uses which are not in the nature of franchises, but which are recognized as permissible by an abutter may be authorized by a city license or permit.[68] A city, having lawfully granted a franchise for a quasi public purpose, cannot derogate from that grant by making another grant for a merely private purpose.[69] The doctrine of lateral support does not apply to underground occupants of a street under license from municipal authorities.[70]

lumbus, 80 Ohio St. 686, 89 NE 92. Ordinance as to motor vehicles was not revived by repeal of Act April 2, 1906 (98 O. L. 320) by Act May 9, 1908 (99 O. L. 538). Id. Wheel Tax Ordinance, § 4, requiring metal plate upon vehicle designating class to which it belongs, held **not applicable** to automobiles. Ayres v. Chicago, 239 Ill. 237, 87 NE 1073. Wheel Tax Ordinance of city of Chicago held not to be violative of Motor Vehicle Law (Laws 1907, p. 510). Id.

57. Under Motor Vehicle Law (Laws 1904, p. 1314, c. 538), § 3, subd. 1, 2, 6, as to speed of vehicles, and Laws 1898, p. 221, c. 115, § 12, as amended by Laws 1907, p. 1666, c. 717. Morrell v. Skene, 64 Misc. 185, 119 NYS 28.

58. State engineer. Morrell v. Skene, 64 Misc. 185, 119 NYS 28. Where consent of local authorities was unconditional, state engineer could not promulgate new rules for such contest. Id.

59. Search Note: See notes in 16 L. R. A. 148; 19 Id. 632; 47 Id. 289, 292, 295; 1 L. R. A. (N. S.) 215; 9 A. S. R. 878; 16 Id. 314; 48 Id. 366, 377; 108 Id. 212; 1 Ann. Cas. 550; 4 Id. 398, 1001; 5 Id. 148; 6 Id. 658; 8 Id. 1092.

See, also, Highways, Cent. Dig. §§ 456-477; Dec. Dig. §§ 165-186; Municipal Corporations, Cent. Dig. §§ 1509-1519; Dec. Dig. §§ 701-707; 28 Cyc. 35, 36, 907-917; 15 A. & E. Enc. L. (2ed.) 594; 27 Id. 148.

60. Fifty Associates v. Boston, 201 Mass. 585, 88 NE 427. Tunnel is street use. Id.

61. Lentell v. Boston & W. St. R. Co., 202 Mass. 115, 88 NE 765. Uses which may be made in public interest under taking for street are limited to those which are reasonable. Id. In determining what is reasonable use that may be made of public street, rights of abutters are to be considered in addition to rights of public. Id. Use of street which would constitute grave private nuisance is not contemplated where highway is acquired. Id.

62. Under delegated power, city may grant to private parties privilege to use and occupy streets for carrying on business or furnishing some public service. Texarkana Gas & Elec. Co. v. Texarkana [Tex. Civ. App.] 123 SW 213. Cities which own streets in fee may grant their uses for public or municipal purposes not inconsistent with public easement. Fifth Ave. Coach Co. v. New York. 194 N. Y. 19, 86 NE 824, afg. 126 App. Div. 657, 110 NYS 1037, afg. 58 Misc. 401, 111 NYS 759. City owning fee of streets can grant rights therein other than for street purposes, provided public easement is not impaired. Id. Construction of telephone line upon public county road with approval of county authorities is not an additional burden upon public road and does not exceed uses to which easement in public can be put by approval of public authority. Southern Bell Tel. & T. Co. v. Nalley, 165 F 263.

63. See post, § 13.

64. Ryan v. Allen, 138 Ill. App. 52. Comp. St. Neb. 1907 (§§ 1081-1273), c. 13, art. 1, giving mayor and council control of highways of city, does not authorize them to enact ordinances for leasing space in front of business houses on sidewalks to other dealers. Chapman v. Lincoln [Neb.] 121 NW 596.

65. Consent of city is necessary to occupation of street by telephone company. In re New York Independent Tel. Co., 133 App. Div. 635, 118 NYS 290. Incorporation of telephone company only entitled such company to use streets of city in accordance with Greater New York Charter (Laws 1901, p. 36, c. 466), §§ 71, 72, 73, 88. Id. Under Laws 1881, p. 656, c. 483, which was not repealed until Laws 1909, c. 219 (Consol. Laws, p. 4613, c. 63), burglar alarm corporation could not use streets of city for its wires without consent of aldermen. Id.

66. Consent to construction of telephone line by city may be express or implied. Dakota Cent. Tel. Co. v. Huron, 165 F 226. City's acquiescence in construction of telephone system coupled with ordinance relative thereto held to show consent clearly, though no express words were used. Id.

67. Texarkana Gas & Elec. Co. v. Texarkana [Tex. Civ. App.] 123 SW 213.

68. Kellogg v. Cincinnati Trac. Co., 80 Ohio St. 331, 88 NE 882.

69, 70. New York Steam Co. v. Foundation Co., 195 N. Y. 43, 87 NE 765.

When highways are not restricted by dedication or statute to some particular mode of use, they are open to all suitable methods of travel [71] and should be used for ordinary purposes in an ordinary manner.[72] The public use of a private way is merely that of a licensee.[73] A use of the land adjoining a highway arises from necessity where an abutting owner obstructs the way,[74] but such use is restricted to the land which is necessary in order to pass around the obstruction.[75] Statutes are determinative of the right of way granted fire departments and a fire insurance patrol.[76] In the absence of statute, there is no duty imposed upon operators of traction engines to send assistants in advance of such machine to prevent accidents,[77] and statutes requiring such precautions are strictly construed,[78] being inapplicable where an engine is taken across the commons between streets.[79]

The public has at all times the right to the use of its highways,[80] provided reasonable care is exercised.[81] Thus, pedestrians are entitled to use all parts of a street,[82] and, while they must exercise due care,[83] they need not anticipate negligence on the part of others, whereby injuries will be inflicted.[84] Ordinarily, a person may stop at any point of a street where he chooses provided he does not obstruct the way,[85] though the right to stop at times is dependent upon the question of what an ordinarily prudent man would do,[86] and a person who does stop must exercise care corresponding to the exigencies of the situation.[87] Likewise, a person crossing a street must use reasonable care to avoid dangers which are to be anticipated,[88] but he need only anticipate ordinary conditions.[89] The strict law of road that travelers

71. Molway v. Chicago, 239 Ill. 486, 88 NE 485.

72. Pool v. Van, 38 Pa. Super. Ct. 402. Racing of wild and unbroken horses upon street where crowd is gathered is **dangerous and illegal use** of street for which persons conducting such race are liable when traveler is injured. Marth v. Kingfisher [Okl.] 98 P 436.

Question for jury: Whether occupation of street at intersection with another street by theatrical band was extraordinary use of street. Pool v. Van, 38 Pa. Super. Ct. 402.

73. Bowler v. Pacific Mills, 200 Mass. 364, 86 NE 767. Duty toward public who use private way is merely to restrain from intentional injury and from wantonly or recklessly exposing licensee to danger. Id. Extensive use of street by public held to be merely permissive, where street was laid out by manufacturing concern, and though it was impracticable to exclude public entirely, notices of nature of way were posted. Id.

74. When abutting owner places obstruction in highway, traveler of necessity has right to leave highway and drive around such obstruction on property of such abutting owner. Trenton Water Power Co. v. Donnelly [N. J. Err. & App.] 73 A 597.

75. Traveler may not cross abutter's land. Trenton Water Power Co. v. Donnelly [N. J. Err. & App.] 73 A 597.

76. Statutes construed and, while Acts 1902, p. 186, No. 115, grants right of way to fire insurance patrol, right of way granted to fire department by Acts 1894, p. 114, No. 83, is paramount to and wholly unaffected by grant to patrol. Coleman v. Fire Ins. Patrol, 122 La. 626, 48 S 130.

77. Burke v. Mally [Iowa] 120 NW 305.

78. Code, § 1571, as to precautions required in operation of traction engine along street, is penal in character to be strictly construed. Burke v. Mally [Iowa] 120 NW 305.

79. Code, § 1571, requiring operator of traction engine to keep man 100 yards in advance of such machine to prevent injuries and assist in emergencies, does not apply where engine is being taken across commons between streets. Burke v. Mally [Iowa] 120 NW 305.

80. Crosby v. Portland R. Co. [Or.] 100 P 300.

81. The duty to look and to exercise care and vigilance rests at all times upon every one in use of streets. Kauffman v. Nelson [Pa.] 73 A 1105.

82. Pedestrian may use all parts of street consistent with legal uses to which it is at time devoted. Trigg v. Water, Light & Transit Co., 215 Mo. 521, 114 SW 972. Person walking beside street car track while going to work is not trespasser. Burningham R., L. & P. Co. v. Williams [Ala.] 48 S 93. Street railroad has no exclusive right to use street. Id. Public highway may be used by pedestrians as well as vehicles. Apperson v. Lazro [Ind. App.] 87 NE 97.

83. Pedestrian using street must act with degree of care exercised by an ordinarily prudent person. Shamp v. Lambert [Mo. App.] 121 SW 770.

84. Shamp v. Lambert [Mo. App.] 121 SW 770.

85. Delfs v. Dunshee [Iowa] 122 NW 236.

86. In an emergency involving safety of person and property right to stop in street depends upon question as to what an ordinarily prudent man would do. Delfs v. Dunshee [Iowa] 122 NW 236.

87. Person who places himself in roadway of street assumes position fraught with danger. Boker v. Koehler & Co., 116 NYS 540.

88. Tiffany & Co. v. Drummond [C. C. A.] 168 F 47.

89. Gallagher v. Kahn, 223 Pa. 541, 72 A

in vehicles must turn to right on meeting does not apply to pedestrians.[90] A person who is rightfully employed in repairing a highway is entitled to the same rights therein as a traveler.[91] Drivers of vehicles are required to exercise such care as the circumstances demand,[92] but they are not insurers against accidents,[93] and the rights of pedestrians and drivers of vehicles using a public highway are equal.[94] The driver of horse which is well broken may drive it anywhere he chooses in the street,[95] and he may rely on the presumption that those approaching from the rear will exercise ordinary care.[96] The speed at which a vehicle can be driven over a highway at night must be determined partly in view of distance ahead at which travelers upon or approaching same highway became visible.[97] Negligence is presumed in the case of collisions,[98] but a driver cannot be said to be negligent when a collision occurs under unusual circumstances, which are not to be anticipated.[99] A driver is not relieved from exercising every care to avoid a collision by the fact that a pedestrian is not in the exercise of due care.[1] Due care must be used by persons having charge of animals upon the public streets,[2] and liability is imposed because of the negligence in leaving teams unhitched and unattended,[3] such duty

854. Rule applying to steam railroad crossings to effect that person must "stop, look and listen" before crossing tracks does not apply to city street crossing. Tiffany & Co. v. Drummond [C. C. A.] 168 F 47. Pedestrian crossing street diagonally instead of using crosswalk, and seeing team about 15 feet away, need not anticipate that he will be run down. McDonald v. Bowditch, 201 Mass. 339, 87 NE 585. Person traveling on public street may assume that horses on such street are under control of drivers. Corona Coal & Iron Co. v. White [Ala.] 48 S 362.

90. Apperson v. Lazro [Ind. App.] 87 NE 97.

91. Stone v. Forest City Exp. Co. [Me.] 74 A 23.

92. Apperson v. Lazro [Ind. App.] 87 NE 97. Drivers are required to exercise care commensurate with danger to be apprehended. Apperson v. Lazro [Ind. App.] 88 NE 99. Drivers of vehicles are bound to keep same under control so as not to injure pedestrians. American Bolt Co. v. Fennell [Ala.] 48 S 97. Driver of vehicle has duty of exercising ordinary care to prevent **injuries to children.** Skinner v. Knickrehm, 10 Cal. App. 596, 102 P 947.

93. Person traveling upon public highway using ordinary care in management of vehicle is not insurer against accident. Skinner v. Knickrehm, 10 Cal. App. 596, 102 P 947.

94. Apperson v. Lazro [Ind. App.] 87 NE 97; American Bolt Co. v. Fennell [Ala.] 48 S 97; Apperson v. Lazro [Ind. App.] 88 NE 99. Pedestrian and driver of vehicle in concurrent use of public way are each required to exercise reasonable care to avoid injury to other. McDonald v. Bowditch, 201 Mass. 339, 87 NE 585; Brewster v. Barker, 129 App. Div. 724, 113 NYS 1026. Vehicles do not have right of way over pedestrians in streets. Robinson v. Morris & Co. [R. I.] 73 A 611.

95. Delfs v. Dunshee [Iowa] 122 NW 236. **Use of car track** by driver of vehicle is not negligence as matter of law. Baldie v. Tacoma R. & P. Co., 52 Wash. 75, 100 P 162. Person in control of wagon on street is charged with knowledge that street cars are liable to pass on railway tracks, and in permitting wagon to stand near tracks must so place it that collision will be avoided. Monumental Brew. Co. v. Larrimore, 109 Md. 682, 72 A 596. Fact that person is driving on **left side of a street** when he should be on right does not render him guilty of contributory negligence. Karstendick v. Jackson Brew. Co., 123 La. 346, 48 S 958.

96. Need not look back. Delfs v. Dunshee [Iowa] 122 NW 236.

97. Currie v. Consolidated R. Co., 81 Conn. 383, 71 A 356.

98. Stone v. Forest City Exp. Co. [Me.] 74 A 23. Doctrine of res ipsa loquitur does not apply to collisions of passers on highways. Id.

99. Eastburn v. U. S. Exp. Co. [Pa.] 73 A 977. Driver cannot be charged with negligence in driving fast where sled with boys coasting down hill collides with front of wagon at crossing of street. Id.

1. Stone v. Forest City Exp. Co. [Me.] 74 A 23.

2. Persons having charge of animals must use due care to prevent them from committing injury. Karstendiek v. Jackson Brew. Co., 123 La. 346, 48 S 958.

3. Horses left in public highway must be properly weighted or hitched, or there must be some one in immediate attendance to secure such horse in case of danger. Robinson v. Morris & Co. [R. I.] 73 A 611. Driver of team cannot be said to be guilty of **negligence per se** because he was not holding bridle or lines of team when it started. Southern Hardware & Supply Co. v. Standard Equipment Co. [Ala.] 48 S 357. Act of owner of horse in leaving team unhitched and unattended on public street **held negligent.** Corona Coal & Iron Co. v. White [Ala.] 48 S 362. Under Civ. Code, § 2321, owner is liable where unhitched horse ran away and collided with street car, injuring plaintiff. Trenchard v. New Orleans R. & L. Co., 123 La. 36, 48 S 575. Evidence held insufficient to establish that team of mules was sufficiently checked or placed under control to avoid possible accident. Karstendiek v. Jackson Brew. Co., 123 La. 346, 48 S 958. Leaving nervous team unfastened in crowded public street from three to five minutes is negligence. Robinson v. Morris & Co. [R. I.] 73 A 611. Motion to direct verdict where plaintiff sued for injuries sustained by run-

being frequently imposed by ordinances.[4] A bicycle is such a vehicle that it may be properly used upon highways.[5] Street railways using public streets are also bound by the general rules governing other vehicles.[6] Automobiles are usually considered lawful vehicles [7] and may be operated upon any part of street,[8] subject to the general rules governing ordinary vehicles, except as modified by statute or ordinances.[9] The failure to register an automobile as required by statute renders it a trespasser on the streets.[10] The general duty imposed upon drivers of automobiles is that reasonable care must be exercised [11] and what is reasonable care is determined by the circumstances of each case.[12] The use of a street car track by the driver of

away due to defendant's negligence in failing to hitch team properly refused. Id.

4. Under ordinance preventing "leaving" horse unattended in street, word "leaving" means to desert, abandon or forsake. Southern Hardware & Supply Co. v. Standard Equipment Co. [Ala.] 48 S 357. Under ordinance forbidding driver from leaving team unattended, fact that driver was not actually holding team would not be violation. Id. Whether team was left unattended in street in violation of ordinance was **question for jury.** Id.

5. Molway v. Chicago, 239 Ill. 486, 88 NE 485, afg. 144 Ill. App. 509. Bicycle being vehicle must be used properly upon street and not sidewalk. Molway v. Chicago, 239 Ill. 486, 88 NE 485.

6. Driver of vehicle and driver of street car are bound by duties which are in sense reciprocal. Baldie v. Tacoma R. & P. Co., 52 Wash. 75, 100 P 162.

For full treatment of **liability of railroads and street railways** see topics Railroads; Street Railways.

7. Under principles and rules of common law, automobiles are lawful vehicles. Sapp v. Hunter, 134 Mo. App. 685, 115 SW 463. Laws 1903, pp. 162, 163, §§ 1, 2 (Ann. St. 1906, §§ 5028—1, 5028—2), does not render automobiles unlawful. Id.

8. Person using automobile has right to drive it upon any part of street. McDonald v. Yoder [Kan.] 101 P 468. Question of which side of road was used by automobile before accident held immaterial in action for injuries to pedestrian. Apperson v. Lazro [Ind. App.] 87 NE 97.

9. General rules governing movement of automobiles, except as modified by statute, are same as those which by long usage have been formulated for government of simpler vehicles such as wagons. Mark v. Fritsch, 195 N. Y. 282, 88 NE 380. Statute as to **rights of passage** as to motor vehicles should be reasonably construed not to permit of frightening slow going machine out of way nor to permit aggravating conduct on part of such machine when another car seeks passage. Id. **When two automobiles meet,** it is duty of each so far as practicable to yield to other space and opportunity necessary for safe and convenient passage. Id. Where two **automobiles are traveling in same direction,** front one may maintain its position in center of road if there is sufficient space on left to enable approaching car to safely pass. Laws 1904, p. 1315, c. 538, § 4, subd. 1. Id. Where two automobiles are traveling in same direction, forward car must upon request permit rear car to pass when convenient. Id. Reasonable respect for rights of others may in certain cases require one automobile to stop and permit passage of second car traveling in same direction. Id. Statutes (Pub. Acts 1905, p. 412, c. 216, pp. 426, 427, c. 230, §§ 10, 11, 14) make it duty of driver of automobile **on meeting bicyclist** to slacken speed and to turn to right so as to give bicyclist one-half of traveled path if practicable, and fair opportunity to pass. Irwin v. Judge, 81 Conn. 492, 71 A 572. Instruction approved. Id. Acts 30th Gen. Assem. 1904, p. 47, c. 53, §§ 8, 9 (Code Supp. 1907, §§ 1571h, 1571i), define duty to stopping when requested by traveler of **frightened horse.** Delfs v. Dunshee [Iowa] 122 NW 236. Instruction exacting knowledge that horse would be frightened by defendant's automobile in passing held under circumstances of case to be more favorable to defendant than was warranted. Id.

10. Where automobile was not registered as required by statute (St. 1903, p. 507, c. 473; St. 1905, p. 227, c. 311). Dudley v. Northampton St. R. Co., 202 Mass. 443, 89 NE 25.

11. Johnson v. Coey, 237 Ill. 88, 86 NE 678; Mark v. Fritsch, 195 N. Y. 282, 88 NE 380. Automobile properly constructed may be used on highways in lawful manner and consistent with safety to travelers. Arrowsmith v. Barker, 135 Ill. App. 412. While under certain restrictions automobiles are entitled to use of streets as other vehicles, drivers must exercise care and caution commensurate with danger. Grant v. Armstrong [Wash.] 104 P 632. Acts 30th Gen. Assem. 1904, p. 47, c. 53, §§ 8, 9 (Code Supp. 1907, §§ 1571h, 1571i), does not relieve automobile driver of duty to exercise reasonable care in using streets. Delfs v. Dunshee [Iowa] 122 NW 236.

12. Mark v. Fritsch, 195 N. Y. 282, 88 NE 380. Care exacted of driver of motor vehicle depends on rate of speed, size, appearance, noise, and the like, of vehicle, as well as means of locomotion of others on highway. Delfs v. Dunshee [Iowa] 122 NW 236. Responsibility imposed upon users of automobiles is measured by character of machine, place where used, and dangers attending their use. Ingraham v. Stockamore, 63 Misc. 114, 118 NYS 399. An automobile **is dangerous machine.** Id. Greater care is imposed upon driver of automobile using street from its dangerous nature. Weil v. Kreutzer [Ky.] 121 SW 471. Being dangerous machine, owner of automobile is responsible for injuries due to negligence of one whom he permits to operate it. Ingraham v. Stockamore, 63 Misc. 114, 118 NYS 399. Person driving motor car on public street is **not an insurer** of safety of occupants of vehicle drawn by horses. Sapp

an automobile while it imposes greater care does not impose the duty to continually look back for oncoming vehicles.[13] A chauffeur who properly operates an automobile is not liable for the acts of third persons which cause the machine to do damage.[14] Statutory provisions often render the reckless driving of automobiles,[15] or

v. Hunter, 134 Mo. App. 685, 115 SW 463. While operation of motor vehicle is attendant with dangers not common to ordinary vehicles, it is **not subject to rules governing daogerous instrumentalities.** Vincent v. Crandall & Godley Co., 131 App. Div. 200, 115 NYS 600. As general rule, owner or operator of automobile is bound to anticipate meeting persons at any point in public street, and he **must keep proper lookout** for them and so control machine as to avoid collisions. Johnson v. Coey, 142 Ill. App. 147. Driver of automobile is bound to look ahead and observe persons and horses in his line of vision. McDonald v. Yoder [Kan.] 101 P 468. Driver of automobile is bound to anticipate meeting other vehicles and must keep machine under control to **avoid collisions.** Johnson v. Coey, 237 Ill. 88, 86 NE 678. Driver of automobile is liable to passenger for negligence in approaching street intersection at high rate of speed, though breaking of brake rod caused collision with street car. Id. Where automobile struck wagon in street lighted so that defendant might see 150 feet, fact that wagon carried no lights would be immaterial. Decou v. Dexhelmer [N. J. Law] 73 A 49. Where pedestrian was confused in seeking to avoid automobile, chauffeur had no right to continue zigzagging in street at imminent hazard of **colliding with pedestrian.** Weil v. Kreutzer [Ky.] 121 SW 471. Running an automobile at high rate of speed directly toward person and so close as to excite him and compel him to flee is an unreasonable abridgment of right to use of road, regardless of side of road used by such automobile. Apperson v. Lazro [Ind. App.] 87 NE 97. Under evidence showing that driver of automobile was beginner, and was intent upon execution of "reverse curve" and failed to see pedestrian whereby injury was occasioned, juridical cause of injury was chauffeur's lack of attention to what was ahead of him combined with his **inexperience in operating cars.** Navailles v. Dielmann [La.] 50 S 449. Evidence held to show that juridical cause of injury to pedestrian was negligence of automobile driver in venturing upon street without knowing how to make emergency stop. Id. Automobile driver operating machine through crowded street cannot secure immunity from liability by merely sounding his automobile horn, but he must run car at such **rate of speed** as will enable him to stop and avoid collisions. Irwin v. Judge, 81 Conn. 492, 71 A 572. High rate of speed is unreasonable one, considering time and place, and one which prevents control of automobile though it is less than statutory rate. Id. Statute fixing maximum rate of speed does not establish rate which is lawful under all circumstances. Id. Operation of automobile at rate of speed exceeding 10 miles an hour is negligent, being **violation of statute** (Code Supp. 1907, §§ 1571h, 1571i). Delfs v. Dunshee [Iowa] 122 NW 236. Driver of automobile in **passing street car** must exercise very great care in passing it to avoid injuring persons going to and from such street car. Kauffman v. Nelson [Pa.] 73 A 1105. Person driving automobile on street must use reasonable care to prevent **frightening horses** and to insure safety of persons riding or driving same. McDonald v. Yoder [Kan.] 101 P 468. Driver of motor car on meeting or passing vehicle drawn by horses must not run at excessive speed; must keep vigilant watch, and if necessary stop his car, or even his motor. Sapp v. Hunter, 134 Mo. App. 685, 115 SW 463. Chauffeur is not bound to stop motor of automobile in all situations where horses exhibit signs of fright thereby, neither at common law nor by statute. Id. Instruction as to negligence of automobile driver in failing to stop automobile so as to prevent frightening horses held proper. Id. Instruction submitting issue of negligence in passing horse at high rate of speed, and moving automobile so close to horse as to frighten it, approved. Delfs v. Dunshee [Iowa] 122 NW 236. Whether signal of blowing horn by automobile driver is in exercise of due care depends upon circumstances. Id. Omission to blow horn of automobile or to give other signal, coupled with proximity of automobile to horse and speed of former in passing, were proper to be considered on issue of negligence. Id. Driver of automobile **held not negligent** in view of evidence of careful operation of machine where horse which was "automobile shy" became uncontrollable though in care of three men. Baugher v. Harman [Va.] 66 SE 86.

Held negligent: Operation of automobile at rate of six or seven miles an hour while passing street car which has stopped to permit passengers to alight. Brewster v. Barker, 129 App. Div. 724, 113 NYS 1026. Driving auomobile at rate of 25 miles an hour through crowded street. Grant v. Armstrong [Wash.] 104 P 632. Driving automobile at high rate of speed through crowded street, etc. Irwin v. Judge, 81 Conn. 492, 71 A 572. Operation of heavy automobile going at rate of 25 miles an hour, so as to pass buggy within few inches. People v. Scanlon, 132 App. Div. 528, 117 NYS 57. Act of chauffeur in moving automobile backward with great force, without warning and without looking for safety of passengers at street crossing. Shamp v. Lambert [Mo. App.] 121 SW 770. Driver of automobile who turned sharply to left on entering street from intersecting street. Irwin v. Judge, 81 Conn. 492, 71 A 572. Operation of automobile at night without lights so that driver could not see objects ahead of him in time to avoid them. Lauson v. Fond du Lac, 141 Wis. 57, 123 NW 629. **Disregard of ordinance** as to having lights on automobiles constitutes negligence. Fenn v. Clark [Cal. App.] 103 P 944.

13. Chauffeur has right to rely on red light in rear of automobile, whereby oncoming cars or vehicles will notify him of approach when they seek right of way. Baldie v. Tacoma R. & P. Co., 52 Wash. 75, 100 P 162.

14. Where chauffeur disconnected power

the failure of a driver of an automobile to give information when an accident occurs,[16] criminal offenses.

Since liability is based upon negligence, defendant's wrongful act must be the proximate cause of the injury,[17] and the plaintiff must be free from contributory negligence.[18] The question of negligence is usually for the jury.[19]

from automobile and set brakes while delivering goods, defendant was not liable for acts of boys which caused machine to do damage. Vincent v. Crandall & Godley Co., 131 App. Div. 200, 115 NYS 600.

15. Count in **indictment** held to sufficiently charge statutory offense (Pub. Laws 1908, p. 286, c. 1592, §§ 11, 12) of operating motor vehicle on public highway. State v. Welford [R. I.] 72 A 396. Words "unlawfully" and "recklessly" were descriptive of manner of operating machine and negatived any inference of accident. Id. **Evidence** of blowing of horn on automobile was proper where defendant was charged with reckless driving (under Pub. Laws 1908, p. 286, c. 1592) as component part of history of collision. Id. Evidence of speed of auto preceding collision held proper where defendant was charged with reckless driving (under Pub. Laws 1908, p. 286, c. 1592). Id. On charge of reckless driving (Pub. St. 1908, p. 286, c. 1592) complainant's testimony as to how fast defendant drove after accident was proper, though exact speed would not be material. Id. **Verdict** of conviction for violation of Pub. Laws 1908, p. 279, c. 1592, as to operation of motor vehicles, held sustained by evidence. Id.

16. Pub. Laws, p. 287, c. 1592, § 12, requires driver of motor vehicle, after accident or collision, to return to scene of accident and give information if required. State v. Smith [R. I.] 72 A 710. **Complaint** under Pub. Laws, p. 287, c. 1592, § 12, charging that defendant (driver of motor vehicle) inflicted injury and did not bring motor car to full stop "or" return to scene of accident, is not bad for duplicity. Id. Complaint under Pub. Laws, p. 287, c. 1592, § 12, held not objectionable for failure to charge that defendant did not give information, since defendant drove away and did not return to scene of accident. Id.

17. Where driver left horses unsecured and carbonic acid gas tank on wagon exploded, causing horses to run away and inflict injuries, negligent act of driver in leaving horses unsecured was proximate cause of injuries. Hull v. Thomson Transfer Co, 135 Mo. App. 119, 115 SW 1054. Wrongful act of boys was proximate cause of injury occasioned by automobile which was properly stopped by chauffeur, and started in his absence by boys. Vincent v. Crandall & Godley Co., 131 App. Div. 200, 115 NYS 600. Wrongful act of bicyclist in riding into pedestrian on footpath next to road in outskirts of city held proximate cause of injury. Andrews v. Elmira, 128 App. Div. 699, 113 NYS 711. Whether playing of band on street was proximate cause of injury to horse held **question for jury.** Pool v. Van, 38 Pa. Super. Ct. 402. **Evidence held insufficient to show** that negligence of driver of team was sole cause of collision with street car. Bohlen v. Chicago City R. Co., 141 Ill. App. 261. **Evidence held to show** that negligence of driver of vehicle where horses were frightened by automobile was not proximate cause of injury to occupant of vehicle. Grant v. Armstrong [Wash.] 104 P 632.

18. There can be no recovery where negligence of injured party proximately contributed to injury. Apperson v. Lazro [Ind. App.] 87 NE 97. Driver of horse using street which is frequented by automobiles does not assume risk that horse will be frightened. Delfs v. Dunshee [Iowa] 122 NW 236. Traveler who drove past horses of town which were feeding when street was being repaired assumed risk of injury from such horses. Philbrick v. West Gardiner [Me.] 73 A 1002. Failure to stop and ascertain if horses on street are under control of drivers is not contributory negligence. Corona Coal & Iron Co. v. White [Ala.] 48 S 362. Pedestrian using city streets is not required to continuously look and listen for approaching auto cars, under penalty that he will otherwise be held contributorily negligent. Gerhard v. Ford Motor Co., 155 Mich. 618, 15 Det. Leg. N. 1147, 119 NW 904. Passenger who alights from street car and starts to cross street without looking for passing vehicle is not free from contributory negligence. Kauffman v. Nelson [Pa.] 73 A 1105. **Person placed in situation of impending peril** who does not adopt safest course to avoid injury but acts as ordinary person might is not contributorily negligent. Hull v. Thomson Transfer Co., 135 Mo. App. 119, 115 SW 1054; Citizens' Motor Car Co. v. Hamilton, 12 Ohio C. C. (N. S.) 381. Acts of pedestrian resulting from terror at seeing herself in front of approaching automobile were involuntary and did not constitute negligence. Navailles v. Dielmann [La.] 50 S 449. Driver of automobile was liable for injury to pedestrian under "last chance" doctrine where pedestrian ran in front of automobile because of terror and driver might have stopped machine. Id. Instruction that plaintiff could not be held guilty of contributory negligence where she was placed in perilous position from approaching automobile whereby she acted wildly or negligently held proper. Hainlin v. Budge, 56 Fla. 342, 47 S 825. Contributory **negligence of driver** is not to be imputed to passenger in vehicle. Bohlen v. Chicago City R. Co., 141 Ill. App. 261. In action by passenger in vehicle against street car company for injuries, question of contributory negligence of driver of vehicle was immaterial unless he was sole cause of injury. Id. Fact that **person under disability** such as blind man was traveling along highway unattended does not constitute negligence. Apperson v. Lazro [Ind. App.] 87 NE 97. Blind man walking upon highway should use ordinary care only. Id. Infant whether sui juris or non sui juris must exercise such reasonable care in avoiding injury as can be expected from child of his age, training and like. Ardolino v. Reinhardt, 130 App. Div. 119, 114 NYS 508. Child aged nine who was not

permitted to testify because of failure to understand nature of oath could not be held to same degree of care in using highway as grown person. Gross v. Foster, 134 App. Div. 243, 118 NYS 889. Negligence of parent in allowing two-year old child to play in street is imputable to such child preventing recovery for injuries from passing vehicle. Manion v. Richmond Ice Co., 133 App. Div. 254, 117 NYS 353. Inspector standing on running board of trolley car was **not negligent as matter of law** even if he had seen concrete mixer of defendant in street, since he need not have anticipated obstructions, and he might have relied upon fact that defendant would not dangerously obstruct passage of cars. Swanton v. Hastings Pavement Co., 129 App. Div. 553, 114 NYS 443. It is not negligence per se to cross in front of a street car without first ascertaining whether an automobile or other vehicle, proceeding in the same direction as the car and concealed by it, is running at a great and unlawful rate of speed. Citizens' Motor Car Co. v. Hamilton, 12 Ohio C. C. (N. S.) 381.

Negligence for jury: Contributory negligence of **child** aged nine years who was injured by automobile. Gross v. Foster, 134 App. Div. 243, 118 NYS 889. Contributory negligence of girl aged 14 years in crossing street. Castor v. Schaefer, 224 Pa. 208, 73 A 329. Jury may consider blindness and other infirmities together with circumstances of case in determining if **blind man** exercised reasonable care. Apperson v. Lazro [Ind. App.] 87 NE 97. Question of due care exercised by **pedestrian crossing street.** McDonald v. Bowditch, 201 Mass. 339, 87 NE 585. Where pedestrian was injured by cab in crossing street. Gallagher v. Kahn, 223 Pa. 541, 72 A 854. Whether pedestrian was struck by automobile in crossing street. Weil v. Kreutzer [Ky.] 121 SW 471; Tiffany & Co. v. Drummond [C. C. A.] 168 F 47. Whether pedestrian was struck by automobile backing suddenly. Shamp v. Lambert [Mo. App.] 121 SW 770. Negligence of plaintiff, a **delivery boy,** who was struck by automobile while delivering packages. Gerhard v. Ford Motor Co., 155 Mich. 618, 15 Det. Leg. N. 1147, 119 NW 904. Contributory negligence of **passenger of street car** who alighted and was struck by automobile in crossing street. Kauffman v. Nelson [Pa.] 73 A 1105. Contributory negligence of person boarding street car in not avoiding automobile. Arseneau v. Sweet, 106 Minn. 257, 119 NW 46. Where conductor of street car was injured in collision due to negligence of driver of vehicle. Ford v. Hine Bros. Co., 237 Ill. 463, 86 NE 1051. Contributory negligence of **bicycle rider** colliding with runaway horse which had been left unhitched. Jordan v. Le Messurier [Mich.] 15 Det. Leg. N. 1007, 118 NW 952. Negligence of **driver of team** in remaining in wagon when automobile approached. Arrowsmith v. Barker, 135 Ill. App. 412. Driver of horse passing automobile. Reed v. Snyder, 38 Pa. Super. Ct. 421. Where person hearing cries of "runaway" avoided two teams which he supposed were running away and then proceeded on way and was injured by runaway team of defendant, his contributory negligence at most was jury question. Hull v. Thomson Transfer Co., 135 Mo. App. 119, 115 SW 1054. Question whether **driver of automobile** was guilty of lack of care in not slackening speed where injuries were sustained from street car. Johnson v. Coey, 237 Ill. 88, 86 NE 678. Contributory negligence of driver of automobile in running into rear of defendant's automobile which stopped suddenly when about six feet away. Earle v. Pardington, 116 NYS 675. Whether chauffeur was guilty of contributory negligence in driving automobile along track under circumstances. Baldie v. Tacoma R. & P. Co., 52 Wash. 75, 100 P 162.

Held negligent: Assumption of risk held to bar recovery where plaintiff was injured in undertaking to pass in rear of horses which were feeding in public road. Philbrick v. West Gardiner [Me.] 73 A 1002. Person killed by automobile held under facts to have been guilty of contributory negligence. Jordan v. American Sight Seeing Coach Co., 129 App. Div. 313, 113 NYS 786. Where plaintiff about to alight from street car saw approaching automobile 20 feet away, and then dismounted, he was guilty of contributory negligence. Vlicki v. New York Transp. Co., 65 Misc. 43, 119 NYS 220. Walking in front of moving team would be contributory negligence. Corona Coal & Iron Co. v. White [Ala.] 48 S 362. Nonsuit in favor of street railway and directed verdict in favor of driver of team held properly granted where pedestrian walking on car tracks became excited and was injured by car. Rose v. Alcott [N. J. Err. & App.] 72 A 67.

Held not negligent: Evidence held to show that driver of team was not negligent. Rose v. Alcott [N. J. Err. & App.] 72 A 67. Evidence held to warrant finding that passenger of street car who alighted from car and started for sidewalk without looking to ascertain if automobile was approaching was not guilty of contributory negligence. Brewster v. Barker, 129 App. Div. 724, 113 NYS 1026. Evidence held to show that plaintiff was not guilty of contributory negligence in driving in front of team which ran away and injured plaintiff. Paine v. Ward [Cal.] 105 P 132. Evidence held to support finding that driver of automobile did not contribute to causing injury to automobile which collided with express wagon. Lawson v. Wells Fargo & Co., 113 NYS 647. Contention that driver of vehicle was guilty of contributory negligence in not turning in certain direction to avoid street car held not to be sustained by evidence. Bohlen v. Chicago City R. Co., 141 Ill. App. 261.

19. Negligence for jury: Negligence on part of street cleaner opening hydrant when horse and wagon were 25 feet or more therefrom. Crouter v. New York, 130 App. Div. 873, 114 NYS 353. Whether **driver of vehicle** was negligent in running down pedestrian. McDonald v. Bowditch, 201 Mass. 339, 87 NE 585. Negligence in driving cab. Gallagher v. Kahn, 223 Pa. 541, 72 A 854. Determination of where negligence lay when child was run over by team. Hallett v. Liebmann's Sons Brew. Co., 129 App. Div. 617, 114 NYS 232. Whether defendant was guilty of negligence in managing wagon in street whereby collision with car was effected. Monumental Brew. Co. v. Larrimore, 109 Md. 682, 72 A 596. Evidence held to support finding that injury to plaintiff's automobile was caused

§ 13. *Rights of abutters.*[20]—See 11 C. L. 1752—Besides his rights as one of the general public,[21] an abutting owner has an easement of light, air and access,[22] and such easement is usually considered property,[23] of which he cannot be deprived without just compensation.[24] Thus an abutting owner is entitled to damages on the vacation of a street,[25] or when an additional servitude is imposed thereon,[26] though other

by negligence of driver of express wagon. Lawson v. Wells Fargo & Co., 113 NYS 647. Negligence of **driver of automobile** in approaching frightened horse. McDonald v. Yoder [Kan.] 101 P 468. Question at what rate of speed automobile was running. Johnson v. Coey, 237 Ill. 88, 86 NE 678. Negligence of driver of automobile in driving at high rate of speed in street and blowing horn whereby horse was frightened. Grant v. Armstrong [Wash.] 104 P 632. Whether operating automobile so as to pass close to horse of defendant was negligent act. Delfs v. Dunshee [Iowa] 122 NW 236. Question of whether defendant was negligent in stopping automobile after frightening plaintiff's horse. Id. Question of whether failure to stop motor on automobile where horse was frightened, was negligent. Sapp v. Hunter, 134 Mo. App. 685, 115 SW 463. Whether driver of automobile which collided with pedestrian was negligent. Weil v. Kreutzer [Ky.] 121 SW 471. Whether operation of automobile approaching street car was negligent. Brewster v. Barker, 129 App. Div. 724, 113 NYS 1026. Question of whether it was negligence to approach street intersection in automobile at certain rate of speed. Johnson v. Coey, 237 Ill. 80, 86 NE 678; Johnson v. Coey, 142 Ill. App. 147. Question of whether defendant was negligent in seeking to drive past car from which plaintiff was about to alight. Sanacrainte v. Bullymore, 119 NYS 44. Negligence of driver of automobile who injured person attempting to board street car. Arseneau v. Sweet, 106 Minn. 257, 119 NW 46.

Finding of negligence sustained: Where negligence of defendant's servant in driving team caused runaway whereby plaintiff was injured. Paine v. Ward [Cal.] 105 P 132. Where automobile was negligently operated when approaching crossing at rapid speed without warning. Goss v. Foster, 134 App. Div. 243, 118 NYS 889. Where bicyclist was injured in collision with an automobile. McGee v. Young [Ga.] 64 SE 689. Driver of automobile who collided with vehicle in turning into street was negligent. Schoening v. Young [Wash.] 104 P 132. In action by girl for injuries sustained by being run down by team, evidence of negligence by driver of team was sufficient to render direction of nonsuit erroneous. Castor v. Schaefer, 224 Pa. 208, 73 A 329. Determination that automobile passed vehicle in negligent manner, whereby runaway was occasioned and plaintiff was injured, rested on conflicting evidence and would not be disturbed. Erks v. Ewers [Iowa] 119 NW 603.

Finding of due care sustained: Evidence held to warrant finding that street car conductor was not negligent where collision occurred with driver of vehicle. Ford v. Hino Bros. Co., 237 Ill. 463, 86 NE 1051. Operation of automobile which caused death of plaintiff held not negligent. Jordan v. American Sight Seeing Coach Co., 129 App. Div. 818, 113 NYS 786.

20. Search Note: See notes in 3 C. L. 1614; 15 L. R. A. 553; 22 Id. 536; 23 Id. 658; 2 L. R. A. (N. S.) 598; 3 Id. 323; 4 Id. 202; 5 Id. 486; 7 Id. 87, 506; 9 Id. 496; 12 Id. 918, 1125; 13 Id. 253, 904, 1110, 1113; 16 Id. 1038; 20 A. S. R. 537; 41 Id. 323; 101 Id. 102; 2 Ann. Cas. 366, 596, 642; 11 Id. 445.

See, also, Highways, Cent. Dig. §§ 288-300; Dec. Dig. §§ 80-89; Municipal Corporations, Cent. Dig. §§ 1438-1450; Dec. Dig. §§ 663-671; 28 Cyc. 856-859, 861-863; 1 A. & E. Enc. L. (2ed.) 224.

21. Abutting owner has same right to use of street that public have. Williams v. Beatty [Mo. App.] 122 SW 323.

22. Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 SW 1094. Owners of abutting lots have rights in streets in addition to those enjoyed by general public. Pickrell v. Carlisle [Ky.] 121 SW 1029. Owner of city lot adjoining street is entitled to use street to its full width. Brazell v. Seattle [Wash.] 104 P 155. Abutting owner has right in addition to public to use street as means of ingress and egress. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733; Williams v. Beatty [Mo. App.] 122 SW 323. Abutting owner has particular easement of egress and ingress in street which may be enjoyed though interfering with public use. Pickrell v. Carlisle [Ky.] 121 SW 1029. Right of access of owner of livery barn located on public street extends not only to himself, but to patrons who desire to do business with him, and includes right of such patrons to stop in street for brief periods. Longenecker v. Wichita R. & L. Co. [Kan.] 102 P 492. Purchaser of lot according to plan is entitled to free and unobstructed use of all streets and alleys marked on plan. Jessop v. Kittanning [Pa.] 74 A 554. Though plaintiff or his predecessor in title has closed and is responsible for encroachment upon alley. Jessop v. Kittanning [Pa.] 74 A 554.

23. Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 SW 1094; Brazell v. Seattle [Wash.] 104 P 155; Kellogg v. Cincinnati Trac. Co., 80 Ohio St. 331, 88 NE 882. Right of abutting owner in continuance of street constitutes easement which is private property. Gillender v. New York, 127 App. Div. 612, 111 NYS 1051. Right of egress and ingress is property right which abutter may protect. Williams v. Beatty [Mo. App.] 122 SW 323.

24. Rourke v. Holmes St. R. Co., 221 Mo. 46, 119 SW 1094; Brazell v. Seattle [Wash.] 104 P 155. Right of abutting owner in continuance of street constitutes an easement of which owner cannot be deprived without compensation. Gillender v. New York, 127 App. Div. 612, 111 NYS 1051.

25. See ante, § 8. See, also, §§ 5, 6, for other injuries to abutters.

26. Abutting owner is entitled to damages occasioned by operation of commercial rail-

means of access exist,[27] and statutes often provide for the determination of compensation due when a subway is erected.[28] The abutting owner's remedy in such cases is by an action for damages, not by injunction,[29] but injunction is proper where street railway tracks are laid on one side of a street in disregard of the permit to lay same in the center of the street.[30] An abutter may plant trees in the street in front of his premises and may acquire interest in them which the law will protect,[31] though the rights in such trees are subject to rights of public.[32] Also, abutters are entitled to use streets to a large extent, and they may prevent obstructions therein.[33] Usually an abutting owner cannot prevent the occupation of a street for uses of a semi-public character which are authorized by municipalities,[34] though the abutter's consent is necessary when he is the owner of the fee in the street.[35] When a public service corporation has the lawful right to use a street, such use cannot be interfered with by an abutter.[36] Upon securing a proper permit, an abutting owner may con-

road in street in front of his property. Morris v. Oregon Short Line R. Co. [Utah] 102 P 629. Abutting owner is entitled to damages, since street railway imposes additional servitude on street under Const. 1890, § 17, requiring compensation when private property is taken for public use. Slaughter v. Meridian L. & R. Co. [Miss.] 48 S 6. Right to damages exists though there has been taking of private property for street use and compensation therefor. Id. Under Const. art. 16, § 8, there must be an actual taking or positive visible injury to property of abutting owner on street before there can be recovery of damages for construction of railroad on such street. Willock v. Beaver Val. R. Co., 222 Pa. 590, 72 A 237. Abutting owner deprived of means of access by building of railway in street may recover damages therefor. Foster Lumber Co. v. Arkansas, V. & W. R. Co., 20 Okl. 583, 95 P 224. Laying of street car track on one side of street directly in front of livery stable inflicts peculiar injury to such owner. Longenecker v. Wichita R. & L. Co. [Kan.] 102 P 492. **Erection of trestle** by street railway held to be unreasonable use of street, constituting taking of abutter's property by right of eminent domain. Lentell v. Boston & W. St. R. Co., 202 Mass. 115, 88 NE 765. Fact that damage was not permanent would not affect abutter's right to have damages assessed under St. 1903, p. 124, c. 163, for injury incurred. Id. **Viaduct over street** held not to deny to abutting owners right of access to property. Crofford v. Atlanta B. & A. R. Co. [Ala.] 48 S 366. Viaduct did not operate to injure property without providing compensation. Const. 1901, § 235. Id.

27. Fact that abutting owner has access on another street will not justify deprivation of access to one street. Foster Lumber Co. v. Arkansas, V. & W. R. Co., 20 Okl. 583, 95 P 224. Fact that livery stable owner has other means of access to his building does not excuse obstruction in street depriving him of access to such street. Longenecker v Wichita R. & L. Co. [Kan.] 102 P 492.

28. Statutes such as St. 1894, p. 772, c. 548, § 34, as amended by St. 1895, p. 486, c. 440, § 1, as to tunnels in street, are to be construed to give compensation for all injuries, special and peculiar, and are not limited to violations of common-law rights protected by constitution. Fifty Associates v. Boston, 201 Mass. 585, 88 NE 427. Legislature may authorize building of tunnel without making compensation for bringing to an end use which owner of fee has theretofore made of land under street. Id. Question of damage done and benefits which can be set off where injuries result from construction of tunnel under St. 1895, p. 486, c. 440, § 1, is same as that arising where action is taken under Highway Act (Rev. Laws, c. 48, § 16) and not under Betterment Act (Rev. Laws, c. 50). Id. Under St. 1895, p. 486, c. 440, abutting property owner is entitled to compensation when city removes bulkhead causing an injury to such owner. Id.

29. Impositon of additional servitude. Griffin v. Southern R. Co., 150 N. C. 312, 64 SE 16.

30. Abutting owner who would suffer special damage may object to laying of street car tracks on one side of street, where license requires and it is practicable to lay same in center of street. Longenecker v. Wichita R. & L. Co. [Kan.] 102 P 492. Injunction is proper remedy. Id.

31. Morris v. Salt Lake City [Utah] 101 P 373. **Injunction** will lie because of unauthorized act of city officers in removing shade trees. City of Paola v. Wentz, 79 Kan. 148, 98 P 775.

32. Morris v. Salt Lake City [Utah] 101 P 373.

33. See post, § 16. As to obstructions by a city in repairing a street, see ante, § 6.

34. Abutting landowner cannot prevent establishment of telephone line upon county road, that being one of uses to which easement of public can be put with approval of county authorites. Southern Bell Tel. & T. Co. v. Nalley, 165 F 263.

35. See post, subsec. Ownership of Fee.

36. Where electric light company has charter privilege to maintain wires, any interference with safe use of such wires is encroachment upon public right that is paramount to right in abutting owners. Wettengel v. Allegheny County Light Co., 223 Pa. 79, 72 A 265. **Injunction will lie** by electric light company having right to maintain wires by municipal consent when maintenance of wires by abutting owners interferes with and endangers such right. Id.

struct a vault under the sidewalk,[37] but such a permit does not authorize an injury to a lawful occupant of the street under a franchise.[38] Where a railroad having a right to occupy a street fails to keep same in repair, an abutter may recover damages.[39]

Ownership of fee. See 11 C. L. 1753—In most states, the abutter owns the fee to the center of the street,[40] such fee being subject to the easement of the street.[41] Such an owner may maintain ejectment when such property is wrongfully seized and appropriated,[42] though the suit would not lie against a city or other public authority occupying the street as of right,[43] and a judgment rendered is necessarily subject to such public easement if it exists.[44] When an abutter owns the fee of a highway, the easement of public does not comprehend any interest in the soil,[45] and rights therein must be acquired from the abutter.[46]

§ 14. *Defective or unsafe streets or highways. A. Liability of municipalities in general.*[47] See 11 C. L. 1754—In some states the liability of a city for defective ways is implied from the authority and resources given,[48] while in others the liability is

37. New York Steam Co. v. Foundation Co., 195 N. Y. 43, 87 NE 765.

38. New York Steam Co. v. Foundation Co., 195 N. Y. 43, 87 NE 765. Permit to construct vault under sidewalk with wall even with curb line authorizes placing of piles outside curb line. Id. Implication is reasonable, and permit to construct vault under sidewalk, though implying placing of piles outside curb line, does not authorize injury to structures already in street by lawful permission. Id. No liability is imposed by violation of Building Code, which applies to adjacent property under private ownership, and not to excavations in public street. Id.

39. Abutting owners may sue for damages for violation of condition of grant to railroad, which was made for their benefit. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733.

40. In absence of statute, or reservation in grant, general rule is that abutting owner owns fee to center of street. Gifford v. Horton [Wash.] 103 P 988. At common law, fee of highways is vested in abutting owners. Kansas Natural Gas Co. v. Haskell, 172 F 545. Soil and appurtenances within limits of road belong to owner in fee. West v. White Bear, 107 Minn. 237, 119 NW 1064; Scott v. Donora S. R. Co., 222 Pa. 634, 72 A 282. Fee of soil of highway is presumed to belong to abutting owner, and person owning land bounded on highway is prima facie owner to center thereof. Woolf v. Woolf, 131 App. Div. 751, 116 NYS 104. Fee to land comprising rural highways in Oklahoma, in portion which was formerly Indian Territory, is vested in abutting owners. Kansas Natural Gas Co. v. Haskell, 172 F 545.

41. West v. White Bear, 107 Minn. 237, 119 NW 1064; Kellogg v. Cincinnati Trac. Co., 80 Ohio St. 331, 88 NE 882; Gifford v. Horton [Wash.] 103 P 988.

42. Where state took possession of street for penitentiary. Weyler v. Gibson, 110 Md. 636, 73 A 261. Fact that property was held by state for state uses would not preclude suit. Id.

43, 44. Weyler v. Gibson, 110 Md. 636, 73 A 261.

45. Kansas Natural Gas Co. v. Haskell, 172 F 545.

46. Where title of abutting owners extends to center of highway, easement of public therein does not include any grantable right for maintenance of telegraph line. Western Union Tel. Co. v. Polhemus, 167 F 231. Where fee of highway is vested in abutting owners, natural gas company seeking right of way for transportation of gas from within to without state is at liberty to procure such right by private contract from such owners, and right is not to be obtained from state. Kansas Natural Gas Co. v. Haskell, 172 F 546.

47. **Search Note:** See notes in 15 L. R. A. 365; 27 Id. 728; 39 Id. 33; 67 Id. 253; 2 L. R. A. (N. S.) 159; 6 Id. 1090, 1094; 9 Id. 146, 1266; 10 Id. 785; 12 Id. 721, 949; 13 Id. 1166, 1219; 17 A. S. R. 735; 103 Id. 257; 108 Id. 136; 1 Ann. Cas. 960, 968; 2 Id. 180; 5 Id. 737; 9 Id. 828, 1156; 10 Id. 538, 679; 11 Id. 512, 943.

See, also, Highways, Cent. Dig. §§ 478-542; Dec. Dig. §§ 187-216; Municipal Corporations, Cent. Dig. §§ 1587-1771; Dec. Dig. §§ 755-826; 28 Cyc. 342, 945, 946, 1340-1413; 15 A. & E. Enc. L. (2ed.) 420, 426; 27 Id. 148.

48. Ruth v. Omaha, 82 Neb. 846, 118 NW 1084. Cities and towns are liable for negligence in maintenance of public ways. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. As trustee of streets for benefit of public, city is charged with primary duty of keeping them free from defects and obstructions. Benton v. St. Louis, 217 Mo. 687, 118 SW 418. City which maintains street and gutter in faulty condition or neglects to repair must respond in damages to abutting owner. Edwards v. Williamsport, 36 Pa. Super. Ct. 43. Duty imposed by charter. Acts 1892-93, p. 368. Montgomery City Council v. Bradley [Ala.] 48 S 809. City invested with exclusive control over streets has **common-law duty** to public arising by implication of law to keep streets reasonably safe for travel. Batdorff v. Oregon City [Or.] 100 P 937. Under B. & C. Comp. § 360, city is liable for act or omission in failing to maintain streets in reasonably safe condition. Id. Where charter of city restricts recovery to gross negligence and limits recovery to officers of city (Oregon

purely statutory,[49] and the statutes are held to create a liability in derogation of the common law, wherefore they must be strictly construed.[50] Quasi-municipal corporations are frequently held to be not liable for defects in highways,[51] though counties are sometimes held liable for negligence in the maintenance of approaches to county bridges.[52] The legislature may relieve a municipality from liability as to streets[53] or impose the liability upon conditions.[54] In some states the legislature may attach any conditions that it chooses,[55] while in others it is necessary that the conditions imposed be reasonable.[56] Since conditions as to liability for defective streets are a matter belonging properly to government by municipalities, such conditions may be determined and regulated by home rule charter.[57]

As a general rule, municipalities are charged with the duty of keeping the streets in a reasonably safe condition,[58] and are liable only for negligence.[59] They

City Charter, § 128), it practically denies remedy to person injured and thereby is **violative of constitution,** art. 1, § 10. Id.

49. Spear v. Westbrook, 104 Me. 496, 72 A 811; Huntington v. Calais [Me.] 73 A 829; Hitchcock v. Boston, 201 Mass. 299, 87 NE 470; Moulter v. Grand Rapids, 155 Mich. 165, 15 Det. Leg. N. 970, 118 NW 919. **At common law,** no action would lie for injury caused by failure to repair highway. Taylor v. Manson, 9 Cal. App. 382, 99 P 410. In absence of special exemption from liability, and of any liability specially created, liability of city is governed by St. 1898, § 1339. Block v. Fond du Lac [Wis.] 123 NW 654.

50. Miller v. Detroit, 166 Mich. 630, 16 Det. Leg. N. 225, 121 NW 490. Gen. St. 1902, § 2020, creating liability for injury to person or property by means of any defect or want of repair in highway, imposes limited liability which is not to be extended beyond protecting persons from injury while traveling on highway. Salzman v. New Haven, 81 Conn. 389, 71 A 500.

51. County is not responsible to traveler on highway who is injured by defect in it. Blue Grass Trac. Co. v. Grover [Ky.] 123 SW 264. **County commissioners are liable** for injuries caused by their negligence, being required to keep public roads in good repair and safe condition. Anne Arundel County Com'rs v. Carr [Md.] 73 A 668. Local Act for Anne Arundel County (Act 1908, p. 359, c. 654) is evidently not intended to relieve county commissioners of liability for condition of public roads. Id.

52. Where county was only liable for negligence in maintaining county bridges and "approaches" thereto, the construction necessary to enable persons using bridge to pass to roadway is an approach, regardless of material it is composed of. Hubbard v. Montgomery County, 140 Iowa, 520, 118 NW 912. Evidence held to show that construction was approach and not part of highway. Id.

53. Schigley v. Waseca, 106 Minn. 94, 118 NW 259; Ruth v. Omaha, 82 Neb. 846, 118 NW 1084.

54. Schigley v. Waseca, 106 Minn. 94, 118 NW 259; Walters v. Ottawa, 240 Ill. 259, 88 NE 651. Legislature may qualify city's implied liability for defective streets. Ruth v. Omaha, 82 Neb. 846, 118 NW 1084. Right of action matter of legislative favor and may be granted absolutely or conditionally. Schighley v. Waseca, 106 Minn. 94, 118 NW 259.

55. Moulter v. Grand Rapids, 155 Mich. 165, 15 Det. Leg. N. 970, 118 NW 919. Whether limitations imposed upon right to recover from municipalities are reasonable is question for legislature, not courts. Id.

56. Hase v. Seattle, 51 Wash. 174, 98 P 370. See post, § 15A, Notice.

57. Schigley v. Waseca, 106 Minn. 94, 118 NW 259.

58. Municipal corporations are charged with ordinary care to keep roads and streets in reasonably safe condition. City of Winona v. Botzet [C. C. A.] 169 F 321; City of Baltimore v. Maryland [C. C. A.] 166 F 641. Must exercise reasonable care to keep street in safe condition. McLemore v. West End [Ala.] 48 S 663. Municipality is required to exercise vigilance in keeping sidewalk in reasonably safe condition for public travel. Taylor v. Manson, 9 Cal. App. 382, 99 P 410. Must exercise reasonable care to keep streets in safe condition. Thunborg v. Pueblo, 45 Colo. 337, 101 P 399. City having control of streets is bound to exercise reasonable care to maintain same in safe condition. Schelich v. Wilmington [Del.] 74 A 367; District of Columbia v. Blackman, 32 App. D. C. 32. Must keep streets reasonably safe. Miller v. Mullan [Idaho] 104 P 660. Held error for court to give requested instruction after modifying same by striking "reasonably." Id. City must use reasonable care to keep street reasonably safe for ordinary travel. Molway v. Chicago, 239 Ill. 486, 88 NE 485; Van Cleef v. Chicago, 144 Ill. App. 488, afd. 240 Ill. 318, 88 NE 815; City of Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403. Cities and towns have duty of keeping streets, sidewalks and bridges within corporate limits in reasonably safe condition. City of Lafayette v. West [Ind. App.] 87 NE 550; Dondono v. Indianapolis [Ind. App.] 89 NE 421; City of Laporte v. Osborn [Ind. App.] 86 NE 995. City must exercise reasonable care in keeping sidewalk safe along thoroughfares which are used as such. Dunn v. Oelwein, 140 Iowa, 423, 118 NW 764. Must keep streets in reasonably safe condition. City of Owensboro v. Williams [Ky.] 116 SW 280; Grider v. Jefferson Realty Co. [Ky.] 116 SW 691; Elam v. Mt. Sterling [Ky.] 117 SW 260; City of Latonia v. Ebenschweiger [Ky.] 118 SW 946; Town of Belleview v. England [Ky.] 118 SW 994; City of Burnside

are not insurers,[60] and need not protect travelers against extraordinary conditions.[61] The defect or want of repair for which a city is liable is either an obstruction in the highway, or a structural defect,[62] and a statute imposing liability for defects does not apply where a dead limb falls from a tree and inflicts injuries.[63] No responsibility is imposed for defects so slight that injury could not reasonably be anticipated.[64]

v. Smith [Ky.] 119 SW 744; City of Covington v. Bollwinkle [Ky.] 121 SW 664; City of Louisville v. Tompkins [Ky.] 122 SW 174; City of Mayfield v. Hughley [Ky.] 122 SW 838; City of Covington v. Belser [Ky.] 123 SW 249. Instruction approved. City of Covington v. Gates [Ky.] 117 SW 342. County commissioners are required to keep public roads in good repair and safe condition. Anne Arundel County Com'rs v. Carr [Md.] 73 A 668. City must maintain street in reasonably safe condition for use of travelers. Winship v. Boston, 201 Mass. 273, 87 NE 600. City must keep street in reasonably safe condition. Turner v. Southwest Missouri R. Co. [Mo. App.] 120 SW 128; Sutter v. Kansas City [Mo. App.] 119 SW 1084. Statute imposes duty to keep highways in reasonably good and safe condition. Miller v. Detroit, 156 Mich. 630, 16 Det. Leg. N. 225, 121 NW 490. City must keep streets and sidewalks in repair and safe for public use. Tewksbury v. Lincoln [Neb.] 121 NW 994. Municipality has duty to maintain its streets in reasonably safe condition for public travel. Andrews v. Elmira, 128 App. Div. 699, 113 NYS 711; Kosters v. National Bank, 62 Misc. 419, 116 NYS 647; Wallace v. Canandaigua, 117 NYS 912; Wade v. Worcester, 134 App. Div. 51, 118 NYS 657. City is at all times responsible for safe condition of its streets. McManus v. New York, 115 NYS 150. Must keep streets reasonably safe for travel. Batdorff v. Oregon City [Or.] 100 P 937. Municipal corporation having exclusive care and control of streets has duty of seeing that they are kept in safe condition. Fleming v. Wilmerding Borough, 223 Pa. 295, 72 A 624. Instruction that city must use ordinary care to keep defects out of street held correct, the word "neglect" in statute being same as negligence. Berry v. Greenville [S. C.] 65 SE 1030. City must construct its walks so that they will be reasonably safe. Smith v. Yankton [S. D.] 121 NW 848. Term "reasonably safe" is to be considered in view of circumstances. Id. City must exercise reasonable care to keep streets safe. Morris v. Salt Lake City [Utah] 101 P 373; Bedford City v. Sitwell [Va.] 65 SE 471; City of Richmond v. Mason [Va.] 65 SE 8; Dunkin v. Hoquiam [Wash.] 105 P 149. Statute creating liability of town declares town shall be liable if damage shall happen by reason of insufficiency or want of repair of highway. Maxwell v. Wellington, 138 Wis. 607, 120 NW 505.

59. Miller v. Mulian [Idaho] 104 P 660; City of Lafayette v. West [Ind. App.] 87 NE 550; City of Covington v. Bollwinkle [Ky.] 121 SW 664; Fleming v. Wilmerding Borough, 223 Pa. 295, 72 A 624; Bedford City v. Sitwell [Va.] 65 SE 471; Dunkin v. Hoquiam [Wash.] 105 P 149. Failure of city to exercise reasonable care to keep its streets in reasonably safe conditon is act of negligence. Dondono v. Indianapolis [Ind. App.] 89 NE 421.

60. Municipality is not an insurer of safety of ways. District of Columbia v. Blackman, 32 App. D. C. 32; Taylor v. Manson, 9 Cal. App. 382, 99 P 410; Miller v. Mulian [Idaho] 104 P 660; Molway v. Chicago, 239 Ill. 486, 88 NE 485; Elam v. Mt. Sterling [Ky.] 117 SW 250; City of Covington v. Belser [Ky.] 123 SW 249; Bedford City v. Sitwell [Va.] 65 SE 471; City of Richmond v. Mason [Va.] 65 SE 8. City may anticipate that street will be used by all vehicles in common use, but are not required to consider injuries to machines which cannot reasonably be foreseen. Molway v. Chicago, 239 Ill. 486, 88 NE 485. Town does not assume to make its highways absolutely safe and to guarantee against accident. Wade v. Worcester, 134 App. Div. 51, 118 NYS 657. County commissioners are not insurers of safety of public road. Anne Arundel County Com'rs v. Carr [Md.] 73 A 668. Instruction as to duty of city in caring for sidewalk where children had been throwing brick thereon held erroneous by using word "liable" in regard to possibility of children's acts, since thereby city was rendered in effect an insurer. Sutter v. Kansas City [Mo. App.] 119 SW 1084.

61. Smith v. City of Yankton [S. D.] 121 NW 848. Municipality is not liable on account of dangerous places forming through some storm. Id.

62. Marth v. Kingfisher [Okl.] 98 P 436. Large loose stone is an unlawful obstruction in street, though readily movable. Orser v. New York, 193 N. Y. 537, 86 NE 523. Horse race upon street is not defect or want of repair in highway, or dangerous condition for which city is liable to traveler upon such street. Marth v. Kingfisher [Okl.] 98 P 436.

63. Miller v. Detroit, 156 Mich. 630, 16 Det. Leg. N. 225, 121 NW 490. Presence of dead limb of tree within limits or overhanging on highway is not defect. Id.

64. As to trivial and ordinary defect in sidewalk, principal of damnum absque injuria is applicable. Gastel v. New York, 194 N. Y. 15, 86 NE 833, rvg. 126 App. Div. 936, 110 NYS 1129. Recovery will not be allowed though witnesses testify to prior accidents. Id. Negligence of city is not question for jury where defect or obstruction is very slight. City of Covington v. Belser [Ky.] 123 SW 249; Dondono v. Indianapolis [Ind. App.] 89 NE 421. Depression of one-fourth of an inch in sidewalk, otherwise sound and in good condition, will not carry question of negligence to jury. Beck v. Germantown Cricket Club, 37 Pa. Super Ct. 521. City held not liable where pedestrian stumbled on brick which projected upward from walk about three-quarters of an inch. City of Covington v. Belser [Ky.] 123 SW 249. Flagstone projecting but 2½ inches above other stones in sidewalk 6 feet wide is not an "obviously dangerous" defect which would render city liable for person stumbling thereby.

No inference of negligence arises from permitting structures in the public street, which are necessary and customary, and which are properly guarded,[65] but reasonable care should be exercised when materials for repairing a street are placed thereon,[66] and liability may be incurred where a city fails to guard or repair a defect within a reasonable time after notice of such defect,[67] or where a horse swerves suddenly when the vehicle comes in contact with an obstruction which is negligently maintained.[68] No liability is imposed because of a city's failure to exercise governmental functions, such as establishing street lights[69] or failing to remove a dangerous awning extending over a street but not attached or resting upon such street,[70] but a municipality is liable where a plan for the public improvement of street is palpably unsafe to travelers,[71] or where the work is so negligently performed as to render the street dangerous for use.[72] The city's duty extends to obstructions brought about by persons other than agents of the city,[73] and when a city permits an excavation in a street, it is bound to see that the licensee performs his duty in protecting same.[74]

Davidson v. New York, 133 App. Div. 352, 117 NYS 185. Damages are not recoverable where pedestrian falls into depression two by three feet at its edges and sloping to depth of about two inches. Hough v. New York, 116 NYS 658. Fact that defect is of such trifling character that it could have been repaired by placing few bushels of earth in hole **does not excuse city.** City of Richmond v. Mason [Va.] 65 SE 8.

65. Edwards v. Raleigh, 150 N. C. 276, 63 SE 1040. City held not negligent in permitting basement stairway, which was properly guarded and lighted and had existed for nearly forty years. Id. Where plaintiff with defective vision fell into such stairway. Id.

66. Town authorities have right to place material in highway at convenient places for purpose of repair. Berg v. Auburn, 140 Wis. 492, 122 NW 1041. City in repairing street and placing needed material therein should exercise care. Elam v. Mt. Sterling [Ky.] 117 SW 250. Town authorities have no right to place material for repairing highway in street so as to render same dangerous to traveling public, and permit same to remain in such position an unreasonable length of time. Berg v. Auburn, 140 Wis. 492, 122 NW 1041. If material of an unusual character is necessary in repairing public street, city must exercise reasonable care to prevent injuries growing out of fright of horses in using street. Elam v. Mt. Sterling [Ky.] 117 SW 250. Fact that pile of stones in street frightened horses would not warrant recovery unless horse so frightened was ordinarily gentle and stones were calculated to frighten such horse. Id. Municipality is not liable in damages as matter of law because of injuries sustained by fright of ordinarily gentle horse at objects not of an unusual character for repairing street which are placed at side of road and permitted to remain there for an unnecessarily long time before being used Id. Evidence held to justify finding that culvert pipe placed in street was maintained there for an unreasonable length of time, and that same was of character to frighten horses, wherefore city was negligent. Berg v. Auburn, 140 Wis. 492, 122 NW 1041.

67. See post, § 14B, as to notice.

68. See, also, post, subsec. H. Injury to driver of reasonably safe horse where vehicle comes in contact with obstruction, causing sudden shying of horse, is actionable. Rucker v. Huntington [W. Va.] 66 SE 91.

69. In establishing street lights, municipality exercises quasi judicial or governmental function. Andrews v. Elmira, 128 App. Div. 699, 113 NYS 711. Error in exercise of governmental function of establishing street lights is not negligence. Id.

70. Failure to perform act which city is empowered to do as governing agency. Hanrahan v. Chicago, 145 Ill. App. 38.

71. City of Covington v. Bollwinkle [Ky.] 121 SW 664.

72. City of Covington v. Bollwinkle [Ky.] 121 SW 664. Municipality is liable for wrongful or negligent acts of agents in making, repairing, or improving streets. Tewksbury v. Lincoln [Neb.] 121 NW 994. As to injuries to property, see ante, §§ 6, 5, 4.

73. City of Mayfield v. Hughley [Ky.] 122 SW 838. City held to be liable for continuing acts of children in scattering brick about pavement. Sutter v. Kansas City [Mo. App.] 119 SW 1084.

74. Municipality which issues permit is chargeable with knowledge of prosecution of work by building contractor. District of Columbia v. Blackman, 32 App. D. C. 32. City cannot escape liability because of unprotected sewer trench on plea that it is not liable for acts of licensed plumber. Bonneville v. Alpena [Mich.] 16 Det. Leg. N. 627, 122 NW 618. City which permits **abutting owners** to use streets in construction or repair of buildings is not released from duty to keep streets in reasonably safe condition. Grider v. Jefferson Realty Co. [Ky.] 116 SW 691. Permit for construction of bridge while sidewalk is being excavated. City of New York v. Corn, 133 App. Div. 1, 117 NYS 514. City cannot grant permission to maintain coal holes in sidewalk upon condition that same shall be kept in repair and city relieved from such duty. Arkansas City v. Payne [Kan.] 102 P 781. Under Rev. St. § 845, **county commissioners are not liable** for defect caused by traction company laying pipes along way by permission. Yunker v. Sandusky County Com'rs, 11 Ohio C. C. (N. S.) 527.

The question of whether a street is in a reasonably safe condition is dependent upon circumstances, and is ordinarily for the jury.[75] The city's liability extends to streets over which it exercises control and which are open to the public,[76] even

75. Question of whether street is in reasonably safe condition is ordinarily for jury. Dondono v. Indianapolis [Ind. App.] 89 NE 421; Scurlock v. Boone [Iowa] 120 NW 313; City of Covington v. Belser [Ky.] 123 SW 249; City of Latonia v. Ebenschweiger [Ky.] 118 SW 946; City of Owensboro v. Williams [Ky.] 116 SW 280. Question of whether city was negligent depends upon circumstances, being mixed question of law and fact. City of Richmond v. Mason [Va.] 65 SE 8. Degree of care required of city in keeping its walks reasonably safe depends upon circumstances. Miller v. Mullan [Idaho] 104 P 660. Care expended on walks in remote part of town would not generally amount to care required as to walk in center of town. Id. In determining if walk is reasonably safe, jury should not only consider climatic conditions but also topography of place. Smith v. Yankton [S. D.] 121 NW 848. Question of frequency of inspections necessary to determine defects in walks and crossings is one of fact. Miller v. Mullan [Idaho] 104 P 660; Revis v. Raleigh, 150 N. C. 348, 63 SE 1049. Court cannot say as matter of law that failure to inspect street for week was negligence. Revis v. Raleigh, 150 N. C. 348, 63 SE 1049. Question of unsafe condition of walk caused by age and decay is purely question of fact. Miller v. Mullan [Idaho] 104 P 660. Question of notice that street light was out of repair is mixed question of law and fact, which it is not proper to submit to jury directly. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757.

Negligence for jury: Question whether object in street is one calculated to frighten ordinarily gentle horse. Elam v. Mt. Sterling [Ky.] 117 SW 250. Whether obstruction on sidewalk was dangerous to children, too young to be negligent. City of Chicago v. Reid, 144 Ill. App. 514. Whether sidewalk was defective. Fleming v. Wilmerding Borough, 223 Pa. 295, 72 A 624. Whether holes render approach to bridge unsafe. Hubbard v. Montgomery County, 140 Iowa, 520, 118 NW 912. Whether street with hole in roadway, twelve or fifteen inches deep with sloping sides, was in reasonably safe condition. Molway v. Chicago, 144 Ill. App. 509. Negligence of city in permitting hole in portion of street used by public while same was being repaired. Norbeck v. Philadelphia, 224 Pa. 30, 73 A 179. Whether city was negligent in filling trench in street. Schelich v. Wilmington [Del.] 74 A 367. Negligence of city in permitting fire hydrant to be covered by weeds. Thumborg v. Pueblo, 45 Colo. 337, 101 P 399. Negligence of construction company acting under permission of city, in placing boards in public alley. Mehan v. St. Louis, 217 Mo. 35, 116 SW 514. Whether defect by which pedestrian caught toe and stumbled was negligence. Dondono v. Indianapolis [Ind. App.] 89 NE 421. Whether village board was negligent in permitting placing and maintenance of large boulder in street to commemorate historical incident. Wallace v. Canandaigua, 117 NYS 912. Evidence held to warrant submission of question of negligence as to defective street. Kelley v. New York, 129 App. Div. 658, 114 NYS 178.

Held negligent: Negligence in permitting hole in or near edge of sidewalk. City of Madisonville v. Stewart [Ky.] 121 SW 421. Where defective sidewalk had existed for long time, and infant child by reason thereof fell into hole adjacent to sidewalk and was drowned. Benton v. St. Louis, 217 Mo. 687, 118 SW 418. Negligence of city in maintaining catch basin and gutter which was menace to travelers, especially children. City of Covington v. Bollwinkle [Ky.] 121 SW 664. Where wooden sidewalk was defective and dangerous. Bayard v. Franklin [Neb.] 120 NW 914.

76. City having assumed duty of keeping sidewalk in repair and having treated same as public sidewalk is liable for failure to keep same in safe condition. Wikel v. Decatur, 146 Ill. App. 51; Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757; Norbeck v. Philadelphia, 224 Pa. 30, 73 A 179. Question of city's liability is not affected by fact that title to street has not been legally acquired where control is exercised. Wikel v. Decatur, 146 Ill. App. 51. Duty of city exists where highway is used though there has been no formal dedication. Dunn v. Oelwein, 140 Iowa, 423, 118 NW 764. City which uses wall belonging to an abutting owner as pavement and gutter and maintains same in negligent manner is liable for damage occasioned thereby. Edwards v. Williamsport, 36 Pa. Super. Ct. 43. Where city directs street to be open while repairs are made and injury results from defect in street, municipality is not relieved from liability by giving notice to one who is prima facie liable, as between him and municipality. Norbeck v. Philadelphia, 224 Pa. 30, 73 A 179. Statutory liability of city remained where surface of street was changed under St. 1897, p. 550, c. 519, there being no order formally closing street to public travel. Hurley v. Boston, 202 Mass. 68, 88 NE 686. **City is estopped** from denying that bridge was part of highway, where evidence shows adoption as highway. Curtiss v. Bovina, 138 Wis. 660, 120 NW 401. Fact that only sidewalk on street was defective one in question, which was open for public use, coupled with other facts, tended to estop city from denying that same was public street. Benton v. St. Louis, 217 Mo. 687, 118 SW 418. **City is not liable** for defective condition of alley which was dedicated to public but was never used or treated as public highway. Lipscomb v. Bessemer [Ala.] 49 S 872. Road laid out by park commissioners as part of public park is not way "opened and dedicated to public use" under Rev. Laws, c. 48, §§ 98, 99. Jones v. Boston, 201 Mass. 267, 87 NE 589. Rev. Laws, c. 48, §§ 98, 99, was not passed to enlarge liability of cities but to restrict it. Id. Whether culvert with its surroundings was such as to invite people to travel thereon held **question for jury.** Graham v. Rockford,

though such streets are not improved [77] or are improved at private expense.[78] As a general rule, the duty of a city or county, extends only to the "traveled path" of a highway,[79] though a county which invites the public to use a way cannot escape liability because the defect in question is not within the limits of the road to which it holds legal title.[80] The duty to care for streets is ordinarily said to extend to the whole width of the thoroughfare.[81] When territory is annexed to a city, it has a reasonable time to render the streets therein reasonably safe for travel,[82] and failure to repair streets in a portion of a city annexed after the levy of taxes would not excuse a city when the cost of improvement might be levied against abutting owners.[83] A municipality which authorizes a street fair authorizes the creation of a public nuisance and is liable to persons injured thereby.[84] Cities are not liable for defective conditions of a street caused by act of God,[85] and cities are frequently excused where the injury in question is occasioned by an independent contractor,[86] though it is also held that the duty to keep streets in a reasonably safe condition cannot be evaded by placing an independent contractor in charge thereof,[87] and a contractor for a public improvement cannot relieve himself of his duty by an assignment of his contract.[88] A city is not liable for the tortious acts of a contractor's servants resulting in injury to a vehicle using a street.[89] Usually municipalities are entitled to recover over against a person primarily at fault, whose negligence caused the defect.[90]

(§ 14) *B. Notice of defect.*[91]—See 11 C. L. 1758—Actual or constructive notice

142 Ill. App. 306, afd. 238 Ill. 214, 87 NE 361. Question of whether thoroughfare was in general use by public is one of fact. Dunn v. Oelwein, 140 Iowa, 423, 118 NW 764.

77. Absence of sewer, water mains, curb line, paving, guttering, etc., does not affect city's liability for defects. Benton v. St. Louis, 217 Mo. 687, 118 SW 418.

78. City is not relieved of liability for defects in public street by fact that same was improved and repaired at private expense. Benton v. St. Louis, 217 Mo. 687, 118 SW 418.

79, 80. Neel v. King County, 53 Wash. 490, 102 P 396.

81. McLemore v. West End [Ala.] 48 S 663; Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757.

82. City of Richmond v. Mason [Va.] 65 SE 8.

83. City of Mayfield v. Hughley [Ky.] 122 SW 838.

84. Van Cleef v. Chicago, 144 Ill. App. 488, afd. 240 Ill. 318, 88 NE 815. Patron of street fair may assume that structures erected with consent of city are reasonably safe. Van Cleef v. Chicago, 240 Ill. 318, 88 NE 815, afg. 144 Ill. App. 488. Municipality is liable to person injured by falling or being pushed from steps leading from platform in tent to open street. Van Cleef v. Chicago, 144 Ill. App. 488, afd. 240 Ill. 318, 88 NE 815.

85. Extraordinary rainfall. Schelich v. Wilmington [Del.] 74 A 367.

86. City held not liable for injury occasioned by independent contractor. Cox v. Philadelphia, 165 F 559.

State held not liable for negligence of independent contractor who while constructing canal had duty of keeping temporary road in repair. Coolidge v. State, 61 Misc. 38, 114 NYS 553. Fact that city maintained inspector to warn people where work was being done by independent contractor did not render city liable, there being no exercise of control over work. Cox v. Philadelphia, 165 F 559.

87. Seattle Lighting Co. v. Hawley [Wash.] 103 P 6. City is liable where roots of trees are cut and trees thereby become dangerous obstruction in highway and inflict injury, though work is done by independent contractor. Morris v. Salt Lake City [Utah] 101 P 373. Duty owing to public is different from duty owing gas company when improvement is made. Seattle Lighting Co. v. Hawley [Wash.] 103 P 6. See, also, ante, § 6.

88. Seattle Lighting Co. v. Hawley [Wash.] 103 P 6.

89. McManus v. New York, 115 NYS 150.

90. Corporation rendered liable by defective highway has remedy over against party primarily at fault, unless it is also wrongdoer. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656. Where county commissioners were held liable for damages because of injury caused by defective approach to bridge, they could recover over against railroad company which primarily caused defect. Id. Principle of in pari delicto did not defeat recovery. Id. Where city granted permit to builder of large building to construct excavation under sidewalk and maintain bridge in place of sidewalk, which bridge later collapsed, city was **not joint tort feasor.** City of New York v. Corn, 133 App. Div. 1, 117 NYS 514. Evidence held to warrant finding that sidewalk contractors were responsible for injury for which city was held liable. City of Seattle v. Regan & Co., 52 Wash. 262, 100 P 731.

91. **Search Note:** See note in 11 L. R. A. (N. S.) 391.

See, also, Highways, Cent. Dig. §§ 487-490; Dec. Dig. § 193; Municipal Corporations, Cent. Dig. §§ 1641-1652; Dec. Dig. §§ 788-792;

of the defect is usually essential in order to render a city liable for negligence,[92] and the rule is especially applicable where the obstruction or defect is caused by persons who are not agents of the city.[93] It is often held that no notice is essential when the obstruction complained of is caused by the city's own agents.[94] Actual notice to certain municipal officers is frequently required by charter or statutory provisions.[95] Actual notice is effected where an agent of the city is notified,[96] and a city is usually chargeable with notice when it grants permission for an act to be done in a street.[97] Constructive notice will be implied from lapse of time,[98] and is

13 Cyc. 1384-1386, 1388, 1394-1399; 15 A. & E. Enc. L. (2ed.) 475; 27 Id. 148.

92. City of Burnside v. Smith [Ky.] 119 SW 744; Miller v. Mullan [Idaho] 104 P 660. City is liable in damages for negligently permitting street to remain defective where city has actual or constructive notice of defect. Edwards v. Williamsport, 36 Pa. Super. Ct. 43; City of Portsmouth v. Houseman [Va.] 65 SE 11. Where dangerous place forms through storm and city permits it to remain in dangerous condition after notice. Smith v. Yankton [S. D.] 121 NW 848. In absence of actual knowledge, constructive notice by lapse of time must be established. Orser v. New York, 193 N. Y. 537, 86 NE 523; Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. City which permitted obstruction of sidewalk for building purposes held not liable for injury occasioned thereby, there being no evidence of notice of defect. Friedman v. New York, 63 Misc. 310, 116 NYS 750.

93. When third person causes dangerous condition to exist in highway, city is not liable unless it has actual or constructive notice of such act. Sutter v. Kansas City [Mo. App.] 119 SW 1084; City of Mayfield v. Hughley [Ky.] 122 SW 838; Schelich v. Wilmington [Del.] 74 A 367.

94. Schelich v. Wilmington [Del.] 74 A 367.

95. Under charter of Saginaw (Loc. Acts 1905, p. 751, No. 566, tit. 24, § 24) as to notice, and Comp. Laws, §§ 3441-3445, imposing liability, there is no liability when no written notice of defective condition of sidewalk is given to board of public works. Forsyth v. Saginaw [Mich.] 16 Det. Leg. N. 588, 122 NW 523. Charter limits liability under general law. Id. Under Rev. St. c. 23, § 76, it is essential to city's liability that one of city officers named must receive 24 hours actual notice of defect which caused injury. Abbott v. Rockland [Me.] 73 A 865. Determination that city had required statutory notice of defect held supported by evidence. Hignett v. Norridgewock [Me.] 73 A 1086. Statutory requirements as to notice should be **liberally construed** so that persons having meritorious claims may not be deprived of compensation because of technicalities as to form. Ruth v. Omaha, 82 Neb. 846, 118 NW 1084. City Charter, § 110 (Comp. St. 1907, c. 13, art. 1, § 110), requiring five days' notice of dangerous condition of walk before accident takes place, **held inapplicable** where sidewalk is rendered temporarily dangerous by positive negligent act of city. Tewksbury v. Lincoln [Neb.] 121 NW 994. Notice of defect in sidewalk given over 5 days before injury was occasioned calling attention to certain walk and danger of injuries by its condition **held sufficient** (Cobbey's St. 1907, § 7711). Ruth v. City of Omaha, 82 Neb. 846, 118 NW 1084.

96. Notice to city's agent in charge of electric light plant that hole for telephone pole remained open and unguarded in street was notice to city. Central Union Tel. Co. v. Conneaut [C. C. A.] 167 F 274. Where policeman discovered hole in footwalk or bridge during day, and plaintiff was injured thereby at night, city had actual notice of defect. City of Covington v. Gates [Ky.] 117 SW 342.

97. Where city grants permission for an act to be done in a street, law charges it with notice of everything which is done in pursuance to that notice. Mehan v. St. Louis, 217 Mo. 35, 116 SW 514. Issuance of permit to telephone company to replace pole brought home to city knowledge that work was to be done at certain time and place. Merritt v. Kinloch Tel. Co., 215 Mo. 299, 115 SW 19. City which permits obstruction of sidewalk for building purposes is not liable for placing of boards, that being **temporory obstruction** of which city had no notice. Friedman v. New York, 63 Misc. 310, 116 NYS 750. Municipality is **not liable** where permit is issued to building contractor and excavation is completed, and pedestrian falls into such excavation within short time after it is left unguarded. District of Columbia v. Blackman, 32 App. D. C. 32.

98. Notice of defect in sidewalk will be implied from lapse of time. Graham v. Rockford, 142 Ill. App. 306, afd. 238 Ill. 214, 87 NE 361. When sidewalk has rotted away so that it is dangerous, no other notice is necessary to render city liable. City of Louisville v. Lambert [Ky.] 116 SW 261. Where excavation in sidewalk had existed for three months, city had plenty of time for repair. City of Mayfield v. Hughley [Ky.] 122 SW 838. Notice of defect will be imputed where it has remained for 30 days. Apker v. Hoquiam, 51 Wash. 567, 99 P 746. City held to have constructive notice where roots of trees were cut by contractor building sidewalk and such trees remained without support for five or six days before they blew down and caused damage. Morris v. Salt Lake City [Utah] 101 P 373. Constructive notice could be implied from evidence if street was defective. Winship v. Boston, 201 Mass. 273, 87 NE 600. Evidence that loose stone had been seen in vicinity about week before accident **held insufficient** to establish constructive notice of unlawful obstruction. Orser v. New York, 193 N. Y. 537, 86 NE 523. Nine hours is not sufficient length of time whereby constructive notice

ordinarily a question of fact.[99] After notice, the city is entitled to a reasonable time in which to repair the defect.[1]

(§ 14) *C. Sidewalks.*[2]—See 11 C. L. 1759—The general principles of liability in the case of sidewalks are not materially different from those pertaining to the care of streets generally,[3] and a city owes the same duty in repairing a crosswalk as it does in respect to sidewalks or streets.[4] Sidewalks should be maintained in reasonably safe condition.[5] Under statutory provisions, abutting owners are frequently liable for defects in walks in front of their premises, while the city's liability is that of guarantor.[6] When injury results from the negligence of a city, it is not excused because the owner of a sidewalk was notified to repair.[7]

to city may be imputed. City of Portsmouth v. Houseman [Va.] 65 SE 11.

99. Notice for jury: Whether city had notice of excavation caused by replacing of telephone pole. Merritt v. Kinloch Tel. Co., 215 Mo. 299, 115 SW 19. Whether city in exercise of reasonable care should have known of obstruction in street caused by excavation for sewer. Dunkin v. Hoquiam [Wash.] 105 P 149. Whether city had constructive notice of defect in sidewalk. Fleming v. Wilmerding Borough, 223 Pa. 295, 72 A 624. Whether defect in sidewalk existed for such length of time as to imply notice to city. Graham v. Rockford, 142 Ill. App. 306; afd. 238 Ill. 214, 87 NE 361; Walters v. Ottawa, 144 Ill. App. 379. Whether city had notice of defective or dangerous condition of bridge or foot walk because of lapse of time. City of Covington v. Gates [Ky.] 117 SW 342. Question of whether city should have discovered and repaired defect. Krisinger v. Creston [Iowa] 119 NW 526. Evidence of condition of walk was sufficient to carry question of notice to jury, though plaintiff had walked over defect in question twice a day for some time prior to accident. Id.

Held to have notice: Defective wooden sidewalk. Bayard v. Franklin [Neb.] 120 NW 914. Hole existing in or near edge of sidewalk. City of Madisonville v. Stewart [Ky.] 121 SW 421. Mud hole in street nearly 24 inches deep. Marlow v. Fond du Lac [Wis.] 123 NW 627. Depression caused by replacing of telephone pole which had existed for such length of time that it might have been repaired. Merritt v. Kinloch Tel. Co., 215 Mo. 299, 115 SW 19. Defective sewer drop where frame was rotten and defect might have been discovered by proper inspection. Tilton v. Haverhill, 203 Mass. 580, 89 NE 1040. Fact that stone was moved about street for two weeks would justify finding of constructive notice of such defect. Moriarty v. New York, 132 App. Div. 10, 116 NYS 323. Phrase "general locality" and word "neighborhood" implies a considerable territory within rule that city must have notice of precise location of defect. Id. Finding of jury as to length of time obstruction had existed so that notice would be imputed to city held supported by evidence and would not be disturbed. City of Chicago v. Reid, 141 Ill. App. 514.

Held not to give notice: Municipality cannot be charged with notice of time when sidewalk becomes defective because of age and decay, where no patent defect is apparent. Miller v. Mullan [Idaho] 104 P 660. Where city had never used or treated dedicated alley as public highway, its agents could not have been conscious that embankment at entrance of such alley caused by grading street was dangerous to traveling public. Lipscomb v. Bessemer [Ala.] 49 S 872.

1. Hitchings v. Maryville, 134 Mo. App. 712, 115 SW 473. Failure of city to remove defects or dangers in streets within reasonable time after notice of same is negligence. Revis v. Raleigh, 150 N. C. 348, 63 SE 1049. Where telephone company pursuant to agreement dug hole in order that city might place pole therein, city was liable for injuries occasioned to traveler after lapse of reasonable time to place such pole. Central Union Tel. Co. v. Conneaut [C. C. A.] 167 F 274. Whether a reasonable time has elapsed between origin of defect and time for remedying same is **question for jury.** Revis v. Raleigh, 150 N. C. 348, 63 SE 1049; City of Covington v. Gates [Ky.] 117 SW 342. What is reasonable time is mixed question of law and fact. City of Portsmouth v. Houseman [Va.] 65 SE 11.

2. **Search Note:** See notes in 3 C. L. 1619; 3 L. R. A. (N. S.) 84; 7 Id. 424; 11 Id. 993; 2 Ann. Cas. 671.

See, also, Municipal Corporations, Cent. Dig. §§ 1588-1640; Dec. Dig. §§ 755-786; 28 Cyc. 342, 945, 946, 1340, 1343, 1346-1413; 27 A. & E. Enc. L. (2ed.) 168.

3. See ante, § 14A.

4. Graham v. Rockford, 238 Ill. 214, 87 NE 361, afg. 142 Ill. App. 306.

5. Beck v. Germantown Cricket Club, 37 Pa. Super. Ct. 621. In order to render city liable for sidewalk which is aged and decayed, but is not apparently defective, it must appear that condition of walk was such that reasonably prudent person would have apprehended danger and guarded defect. Miller v. Mullan [Idaho] 104 P 660. Doctrine of res ipsa loquitur is applicable where sidewalk caved in because of failure to properly fill excavation and relay brick. Rockwell v. McGovern, 202 Mass. 6, 88 NE 436.

6. Laws 1883, p. 435, c. 152, subc. 18, §§ 1, 2. Block v. Fond du Lac [Wis.] 123 NW 654. Adoption of St. 1898, §§ 925—201, to 925—207, as to sidewalks, did not supersede any part of special charter of city not within same subject-matter nor dependent upon expressly displaced provisions. Id.

7. Municipalities' liability to person injured by defective sidewalk is not excused because owner of sidewalk was notified to repair. Fleming v. Wilmerding Borough, 223 Pa. 295, 72 A 624.

(§ 14) *D. Barriers, railings and signals.*[8]—See 11 C. L. 1759—Ordinarily, barriers need not be maintained to mark the boundaries of a highway,[9] unless such way is rendered substantially unsafe by reason of the condition of the adjoining premises,[10] but municipalities are bound to safeguard excavations, obstructions or other defects [11] by means of barriers, lights or other means, reasonably sufficient.[12] The questions whether guards are needed at a particular place to render a way reasonably safe,[13] whether guards were erected,[14] or whether the guards erected were sufficient to warn the public,[15] are usually for the jury. A city cannot escape liability by claiming that the failure to erect guards was due to the negligence of its servants,[16] or an independent contractor,[17] or because the defect was created by trespassers who erected guards and removed them without the city's consent.[18] Neither will the fact

8. Search Note: See, Highways, Cent. Dig. § 486; Dec. Dig. § 194; Municipal Corporations, Cent. Dig. §§ 1653-1659; Dec. Dig. §§ 794-799; 28 Cyc. 1401-1407; 15 A. & E. Enc. L. (2ed.) 420; 27 Id. 148, 168.

9. Municipality is not as a general rule bound to guard against travelers' wandering onto adjoining grounds along highway. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757.

10. When way is rendered substantially unsafe by reason of condition of adjoining premises, and public authorities may reasonably protect travelers from danger, it is their duty to do so. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Accidents of travel are within contingencies which municipality must consider in determining whether excavation need not be guarded. Id. Where street and sidewalk run so near unguarded retaining wall as to create impression that wall is within line of sidewalk, municipality is liable for injuries sustained by pedestrian who fell over the wall. Cavey v. Cincinnati, 12 Ohio C. C. (N. S.) 285.

11. Where excavation is made, city assumes duty of safeguarding same so as to be reasonably safe. City of Baltimore v. Maryland [C. C. A.] 166 F 641. City creating dangerous pitfall in street must guard same. Armstrong v. Auburn [Neb.] 122 NW 43; Montgomery City Council v. Bradley [Ala.] 48 S 809. City having notice of defect in sidewalk must provide barriers or other protection. Revis v. Raleigh, 150 N. C. 348, 63 SE 1049. City undertaking to repair sidewalk is bound to warn travelers either by barriers or notices that portion being repaired is withdrawn from use of public. Winship v. Boston, 201 Mass. 273, 87 NE 600. Failure to erect barriers or to place lights at certain places if necessary to maintain streets in reasonably safe condition for public travel is negligence. Andrews v. Elmira, 128 App. Div. 699, 113 NYS 711. City is negligent where sidewalk is allowed to terminate three feet above ground without barriers or railings whereby traveler is injured in dark. Dunn v. Oelwein, 140 Iowa, 423, 118 NW 764.

12. Grider v. Jefferson Realty Co. [Ky.] 116 SW 691. Generally speaking, barriers in the daytime and lights at night are sufficient to warn travelers of condition of street. Id. Test of sufficiency is not whether barriers or lights are used but whether means of warning employed are reasonably sufficient. Id. Instruction limiting duty to giving warning by "barriers and lights" held erroneous. Id.

13. Necessity of guards for jury: Whether under all circumstances city should have left excavation without barriers. Parker v. Bedford, 139 Iowa, 545, 117 NW 955. Whether city was negligent in failing to light highway at certain point. McManus v. New York, 115 NYS 150. Whether sidewalk constructed at some distance above ground is defective because of failure to provide guard rails. City of Chicago v. Reid, 141 Ill. App. 514. Excavation adjoining sidewalk. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Proof of user by public without accident was not conclusive but only evidentiary on question of due care. Id. Failure to supply lights and barriers in outskirts of city on gravel roadway having narrow foot path of ashes **held not negligence.** Andrews v. Elmira, 128 App. Div. 699, 113 NYS 711. Failure to maintain barrier at certain road, where it could not have been reasonably anticipated that team would back over bank and injure plaintiff. Wade v. Worcester, 134 App. Div. 51, 118 NYS 657. Facts of case would warrant finding that city in repairing public way left same open without warning of dangerous condition, wherefore it was **negligent.** Winship v. Boston, 201 Mass. 273, 87 NE 600.

14. In action for injuries caused by falling into excavation in sidewalk, evidence held to sustain finding that same was not guarded by abutting owner or his contractor until after accident. Anderson v. Feutsch [Nev.] 103 P 1013.

15. Question of whether city sufficiently safeguarded excavation by placing lights thereabout held for jury. City of Baltimore v. Maryland [C. C. A.] 166 F 641. Question of exercise of due care in erection of barriers to guard excavation. Hurley v. Boston, 202 Mass. 68, 88 NE 586. Whether defective street was sufficiently guarded. Knight v. Kansas City [Mo. App.] 119 SW 990. Temporary barriers around excavation for sewer **held sufficient** as matter of law to guard such excavation. Tagge v. Roslyn, 51 Wash. 258, 98 P 668.

16, 17. Armstrong v. Auburn [Neb.] 122 NW 43.

18. City cannot evade liability for failure to repair defect in connecting walk on ground that temporary barriers were erected by trespassers who tore up sidewalk and replaced it with cement and then removed such

that barriers are insufficient to guard a certain excavation be an excuse, since other means of warning may be employed,[19] and the fact that a street is lighted does not excuse a city's negligence when it appears that such lights are in fact insufficient.[20] The duty to guard defects is frequently imposed upon abutting owners and other occupants of streets.[21]

(§ 14) *E. Snow and ice.*[22]—See 11 C. L. 1760—A city should keep its sidewalks reasonably free from snow and ice,[23] and its presence does not show negligence on the part of a city,[24] since no liability is imposed because of temporary accumulations,[25] or when snow and slush freezes suddenly,[26] but if a city negligently allows snow and ice to accumulate until it becomes a permanent and dangerous obstruction, it is liable.[27] The question of whether a city is negligent in removing snow and ice is usually for the jury.[28] It is, of course, essential that the city have notice of such dangerous condition,[29] and charter or statutory provisions frequently require actual notice.[30] The right of action because of injuries due to accumulations of snow and ice is usually against the municipality,[31] and at common law there is no obligation on the part of abutting owners to keep sidewalks free from snow and ice [32] unless such abutting owner actually causes the accumulation.[33] Municipal liability is largely restricted in some states by statute.[34]

temporary barriers without city's consent. Robinson v. Omaha [Neb.] 121 NW 969.

19. Proximity of excavation to street car track does not excuse neglect since other means of warning should be employed. Grider v. Jefferson Realty Co. [Ky.] 116 SW 691.

20. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757.

21. See post, subsec. F.

22. Search Note: See notes in 21 L. R. A. 263; 58 Id. 321; 6 L. R. A. (N. S.) 616; 7 Id. 933; 9 Id. 598; 13 Id. 1105, 1246.

See, also, Municipal Corporations, Cent. Dig. §§ 1626-1629; Dec. Dig. §§ 770-773; 28 Cyc. 1372, 1373; 15 A. & E. Enc. L. (2ed.) 447; 27 Id. 168.

23. Kortlang v. Mt. Vernon, 129 App. Div. 535, 114 NYS 252.

24. Brennan v. New York, 130 App. Div. 267, 114 NYS 578.

25. Law does not impose impossible duty on municipality. Winckler v. New York, 129 App. Div. 45, 113 NYS 412. No duty rests upon property owners or municipality to remove snow or ice until it ceases falling. Kortlang v. Mt. Vernon, 129 App. Div. 535, 114 NYS 252. **City held not liable** for person injured by fall on mound of snow and ice, which accumulated after succession of snowstorms, near curb. Winckler v. New York, 129 App. Div. 45, 113 NYS 412. Snow and ice which was accumulation of recent snowstorm succeeded by thawing and freezing. Brennan v. New York, 130 App. Div. 267, 114 NYS 578. Where snow on adjoining vacant lot melted and caused icy condition of sidewalk which only existed for three or four days during which time temperature caused both thawing and freezing every day. Kortlang v. Mt. Vernon, 129 App. Div. 535, 114 NYS 252.

26. City is not liable where slushy condition of walks exists in general over entire city, and such walks become dangerous by sudden freezing. Vonkey v. St. Louis, 219 Mo. 37, 117 SW 733; Quarles v. Kansas City [Mo. App.] 119 SW 1019.

27. Brennan v. New York, 130 App. Div. 267, 114 NYS 578. **City is liable** where it permits ice upon surface of city to become uneven or rough so as to become dangerous obstruction to travel by pedestrians. Quarles v. Kansas City [Mo. App.] 119 SW 1019. Evidence held to show that city permitted ice to form and remain in uneven state causing dangerous obstruction to pedestrians. Id. Permitting **discharge of water from drains** and the like to cause ice on sidewalk is negligence. Kortlang v. Mt. Vernon, 129 App. Div. 535, 114 NYS 252. Where city negligently allows water to escape from broken main whereby ice is formed in street. Town of Belleview v. England [Ky.] 118 SW 994.

28. Kortlang v. Mt. Vernon, 129 App. Div. 535, 114 NYS 252.

29. Town of Belleview v. England [Ky.] 118 SW 994; Kortlang v. Mt. Vernon, 129 App. Div. 535, 114 NYS 252. Held that if snow and ice constituted dangerous obstruction, it had not existed for such length of time that city had notice thereof. Brennan v. New York, 130 App. Div. 267, 114 NYS 578.

30. Under Rochester charter, § 255, city is not liable for injury caused by snow and ice unless written notice of defective condition was given to commissioner of public works reasonable time before accident. Sayfaus v. Rochester, 113 NYS 840.

31. Kosters v. National Bank, 62 Misc. 419, 116 NYS 647.

32. Kosters v. National Bank, 62 Misc. 419, 116 NYS 647. Where local statute does not in terms make abutting owner liable to party injured, there is no liability for injury due to accumulation of snow and ice which results wholly from natural causes. Id.

33. Landowner who collects water into definite channel by spout or otherwise and pours it upon public way whereby ice forms is efficient cause in creation of nuisance and is liable for damage resulting as probable consequence. Drake v. Taylor, 203 Mass. 528, 89 NE 1035. Slipping and injury of traveler using due care is probable conse-

(§ 14) *F. Defects created or permitted by abutting owners and otherwise.*[35]—See 11 C. L. 1761—The duty to repair public streets does not generally rest upon abutting owners,[36] and statutory provisions are determinative of whether such duty is imposed.[37] Abutters[38] are usually bound to exercise due care to see that gratings which form part of the sidewalk are in repair[39] or that uncovered coal holes or other permanent excavations are properly guarded.[40] The duty to guard excavations in streets is often imposed by statute.[41] While abutting owners are entitled to place obstructions in the highway for their own convenience,[42] due care must usually be exercised to render the highway safe,[43] and the rule applies though the obstruction is authorized.[44] Reasonable care must be exercised so that injuries will not be oc-

quence of landowner's act in collecting and discharging water on public way whereby ice forms. Id. Whether ice by which plaintiff was injured was formed from water discharged by defendant on public way was **question for jury.** Id. **Landlord is liable** where ice forms on sidewalk through failure to repair gutter on his building. Smith v. Preston, 104 Me. 156, 71 A 653. Failure of tenant to remove ice does not relieve landlord from liability where such ice formed through landlord's failure to repair gutter. Id. Instruction to effect that landlord who negligently permitted ice to form on sidewalk by failure to repair gutter was not liable unless he had notice of defect held properly refused. Id. Evidence held to support finding that sidewalk was obstructed by ice because of defendant's failure to repair defective gutter. Id.

34. Rev. Laws, c. 51, § 19, relieving city from liability for injuries caused by snow and ice, is very broad and applies to every case where dangerous condition of street is caused entirely by snow or ice. Hitchcock v. Boston, 201 Mass. 299, 87 NE 470. City held not liable where snow and ice was put in dangerous form by hands of man, as where traveler collided with Eskimo house and fort. Id.

35. Search Note: See notes in 5 C. L. 1678; 61 L. R. A. 583; 3 L. R. A. (N. S.) 386, 759; 12 Id. 721; 1 A. S. R. 840; 115 Id. 993; 1 Ann. Cas. 945; 2 Id. 503; 4 Id. 238; 6 Id. 32; 10 Id. 718, 918.

See, also, Highways, Cent. Dig. § 508; Dec. Dig. § 199; Municipal Corporations, Cent. Dig. §§ 1605-1611, 1626-1640, 1684-1694; Dec. Dig. §§ 762, 769-786, 808, 809; 28 Cyc. 1366, 1372-1384, 1434-1446; 1 A. & E. Enc. L. (2ed.) 224; 15 Id. 420; 27 Id. 148, 168.

36. Abutting owner is not obliged to keep public street in front of his property in repair. Burke v. Tricalli [La.] 50 S 710.

37. Where charter of Fond du Lac (P. & L. Laws 1883, p. 435, c. 152, subc. 18, § 1), requiring abutting owners to repair walks, was repealed by adoption of St. 1898, §§ 925—201 to 925—207, which was amended by Laws 1905, c. 159, no right of action because of injury sustained by defective sidewalk existed against abutting owner. Willmer v. Goebel, 137 Wis. 419, 119 NW 115.

38. Landlord is liable for defective obstruction repaired by tenant where duty to repair rests on such landlord. Byne v. Americus [Ga. App.] 64 SE 285. Where landlord had duty of repairing defective grating. Id. Landlord who is liable for obstruction created through failure to repair gutter is not relieved from liability by fact that tenants did not remove obstruction. Smith v. Preston, 104 Me. 156, 71 A 653. Lessee having control of premises is liable for defective condition of coal hole. Murphy v. Herold Co., 137 Wis. 609, 119 NW 294. Contention that cemetery company was by its objects immune from damage caused to users of adjacent highway by its negligence held untenable. Harrison v. New York Bay Cemetery [N. J. Err. & App.] 73 A 546. Contention that cemetery association by its sale of property to lot holders was immune from damages to users of adjacent highway caused by its negligence held untenable. Id.

39. Gelof v. Morgenroth, 130 App. Div. 17, 114 NYS 293; Tucker v. O'Brien, 117 NYS 1010; Gelof v. Morgenroth, 130 App. Div. 17, 114 NYS 293. Coal hole with defective cover is nuisance. Zelzer v. Cook, 62 Misc. 471, 115 NYS 173.

40. Abutting owner who maintains coal hole in sidewalk in front of his property is liable to passerby who is injured by reason of its uncovered condition. Scott v. Curtis, 195 N. Y. 424, 88 NE 794. Abutter is liable for negligence of third person delivering paper who leaves hatchway open and unguarded. Murphy v. Herold Co., 137 Wis. 609, 119 NW 294. Unguarded coal hole is nuisance. Zelzer v. Cook, 62 Misc. 471, 115 NYS 173. Person permitting continuance of nuisance such as unguarded coal hole, or in any way responsible for it, are liable to any person who may be injured thereby while going on the sidewalk. Id.

41. Under Comp. Laws, § 271, person making excavations in street and failing to guard same is liable to person injured thereby. Anderson v. Feutsch [Nev.] 105 P 99. Act does not apply solely to mining excavations. Anderson v. Feutsch [Nev.] 105 P 99, denying rehearing [Nev.] 103 P 1013.

42. See post, § 16.

43. Hitching post. Harrison v. New York Bay Cemetery [N. J. Err. & App.] 73 A 546. Petition alleging that defendant built drain across sidewalk negligently wherefore he was liable was not sustained by proof since it was shown that drain existed in same condition when defendant bought property. Burke v. Tricalli [La.] 50 S 710. Defendant **held liable** for placing cordwood in public highway, though not in traveled portion, whereby it fell over and caused runaway, injuring plaintiff. Taylor v. Winsor [R. I.] 73 A 388.

44. When obstruction is erected on sidewalk by consent of city whereby pedestrian is injured, law of negligence, and not law

casioned by buildings or parts thereof which are adjacent to the highway,[45] and liability is imposed when an abutter places a defective obstruction such as an awning over the sidewalk.[46] The fact that such an awning has been examined by a policeman after being repaired would not excuse an abutter from liability.[47] The failure of abutters to exercise reasonable care is usually a jury question.[48] While abutting owners are not liable for the injuries occasioned by independent contractors,[49] liability because of the failure to guard excavations cannot usually be avoided,[50] and abutters are liable for obstructions created by an independent contractor who is under their supervision.[51] An abutting owner who obstructs a highway and then constructs a way around such obstruction is liable to invitees injured by such new way.[52] An abutting owner's liability is not affected by the fact that others are also liable for the defect in question,[53] and such liability does not relieve the actual wrongdoer.[54]

Contractors engaged in the repair and improvement of highways must perform

of nuisance, applies. Friedman v. New York, 63 Misc. 310, 116 NYS 750. Abutting owner who erects temporary bridge under permit of city while excavating under sidewalk must use due care to provide safe bridge. City of New York v. Corn, 133 App. Div. 1, 117 NYS 514.

45. Sinkovitz v. Peters Land Co., 5 Ga. App. 788, 64 SE 93. Owners of buildings abutting on highways are **not insurers** of safety of travelers. Id. Res ipsa loquitur held applicable where traveler showed that pane of glass fell without any apparent cause from defendant's building and injured plaintiff. Id. Abutting owner **held not liable** by reason of edging of brick along sidewalk nearly 10 feet wide and line of stakes and wire 3 inches back from line on his own land, over one of which stakes plaintiff fell. Mead v. Strauss, 202 Mass. 399, 88 NE 889. Unanticipated accident and no encroachment. Id.

46. Byne v. Americus [Ga. App.] 64 SE 285. Unless justified by legislative authority, owner of awning erected and maintained over public streets is an **insurer** as to persons using such street. McCrorey v. Gerrett [Va.] 64 SE 978. Abutting owner erecting and maintaining awning over sidewalk must exercise ordinary care to see that it will withstand not only ordinary weather but force of wind which occurs in that locality. McCrorey v. Thomas [Va.] 63 SE 1011.

Presumption of negligence arises where pedestrian traveling along highway is injured by fall of awning attached to building. McCrorey v. Thomas [Va.] 63 SE 1016. Instruction as to duty of defendant to raise awning when high wind was blowing approved as correctly charging law. Id.

47. Byne v. Americus [Ga. App.] 64 SE 285.

48. Negligence for jury: Negligence in failing to repair grating in sidewalk. Gelof v. Morgenroth, 130 App. Div. 17, 114 NYS 293. Question of whether owner of building was negligent in caring for pane of glass which fell on plaintiff. Sinkovitz v. Peters Land Co., 5 Ga. App. 788, 64 SE 93. Negligence of abutting property owner in failing to restore highway to property condition after removal of hitching post. Harrison v. New York Bay Cemetery [N. J. Err. & App.] 73 A 546. Evidence held to warrant submission to jury of whether persons who were building and had permit to place material on sidewalk kept same reasonably free from obstructions. Friedman v. New York, 63 Misc. 310, 116 NYS 750.

49. Abutting owner is not liable for negligence of servant of independent contractor engaged in removing sign from building, whereby employe falls from ladder upon traveler in street. Press v. Penny, 134 Mo. App. 121, 114 SW 74. Pedestrian injured by employe falling from ladder while removing sign cannot maintain action against abutting owner on theory that placing of ladder was erection of nuisance in public street. Id.

50. Excavation in sidewalk in well-traveled street is inherently dangerous, and person responsible for same cannot shift duty to guard same to independent contractor. Anderson v. Feutsch [Nev.] 103 P 1013. Owner of house for whose benefit work is performed cannot avoid liability where excavation in street is made by contractor and left unguarded, whereby pedestrian is injured. District of Columbia v. Blackman, 32 App. D. C. 32.

51. Owners of building could not avoid liability for failure to keep sidewalk reasonably free from obstructions by fact that work was carried on by independent contractor, who was more or less under their supervision. Friedman v. New York, 63 Misc. 310, 116 NYS 750.

52. Fact that defendant was trespasser on adjoining land is immaterial. Collins v. Hazel Lumber Co. [Wash.] 103 P 798.

53. Fact that city is liable for permitting abutting owner to maintain defective obstruction over sidewalk does not excuse abutting owner. Byne v. Americus [Ga. App.] 64 SE 285. Abutting owner's liability to person injured by falling into unguarded coal hole remains though persons primarily liable are those who omitted to properly guard such hole when delivering coal. Scott v. Curtis, 195 N. Y. 424, 88 NE 794.

54. Scott v. Curtis, 195 N. Y. 424, 88 NE 794. Liability is joint. Failure of defendant's servant to properly replace cover of coal hole after making delivery whereby injury was caused would render defendant responsible for such negligence. Gillis v. Cambridge Gaslight Co., 202 Mass. 222, 88 NE 779.

and conduct such work in a careful manner,[55] and their obligations cannot usually be evaded by the employment of independent contractors.[56] Public service corporations occupying streets must exercise due care not to endanger the public,[57] being independently liable for injuries caused by negligence.[58] Liability may be occasioned by the failure to erect barriers,[59] though such duty does not ordinarily exist in regard to defects created by a city or its contractors,[60] unless assumed.[61] A city cannot authorize the maintenance of dangerous obstructions in a street,[62] but no

55. Jacobs v. Smith Cont. Co., 113 NYS 531. Person excavating street must take precautions that travelers will not be injured. Id. Contractor who constructs sewer and excavates public highway for private purposes is bound to restore street to its previous safe condition. Ames v. Gannon [N. J. Law] 72 A 27. Where earth settled after rain, contractor had duty of guarding or repairing defect. Id.

Negligence for jury: Whether contractor was guilty of negligence in excavating street and throwing stone whereby injury was occasioned. Jacobs v. Smith Cont. Co., 113 NYS 531.

Contractor held negligent: Where paving contractor negligently placed plank which injured plaintiff when alighting from car. Hoyt v. Independent Asphalt Pav. Co., 52 Wash. 672, 101 P 367. Where contractor cut roots of trees in constructing sidewalk, whereby such trees fell and inflicted injury. Morris v. Salt Lake City [Utah] 101 P 373.

Held not negligent: Contractor who installed hydrant gate box was not liable for injury to horse who stepped in such box, there being no evidence that cover was thrown off through any defect in construction or that contractor was otherwise liable for removal of cover. Boston Excelsior Co. v. Continental Asphalt Pav. Co., 114 NYS 825.

56. Contractor paving street under permit who caused street to be obstructed was bound to see that nuisance was not created. Luce v. Holloway [Cal.] 103 P 886. Where paving contractor let work of grading street to independent contractors, such paving contractor was liable for injuries to locomotive engineer caused by derailing of engine due to loose dirt being thrown on tracks. Id. Danger that might have been anticipated. Id.

57. Telephone company is liable if defective poles injure travelers. Burton v. Cumberland Tel. & T. Co. [Ky.] 118 SW 287. Telephone company is liable for maintaining wires in highway so as to endanger travelers. Snee v. Clear Lake Tel. Co. [S. D.] 123 NW 729. Whether telephone company was ngligent in permitting wires to remain in highway after knowledge of dangerous condition was **question for jury.** Id. Question of negligence in leaving cable suspended across sidewalk whereby pedestrian stumbled was for jury. Miller v. McConnell [S. D.] 120 NW 888. Where electric company did not attempt to explain reason why it permitted wire to sag in street two weeks, court could determine if negligence was such as to entitle that feature to be taken to jury. Crosby v. Portland R. Co. [Or.] 101 P 204.

Railroad company legally occupying public street must keep its structure in such condition of repair that it will be safe for travel. City of New York v. Bleecker, etc., R. Co., 130 App. Div. 830, 115 NYS 592. Street railway laying tracks whereby pavement is torn up must prevent as far as possible paving bricks from being scattered on sidewalk so as to impede travel. Sutter v. Kansas City [Mo. App.] 119 SW 1084. If railroad knew and acquiesced in **use of passageway by public,** it was bound to use ordinary care to keep same in repair. Galveston, etc., R. Co. v. Schuessler [Tex. Civ. App.] 120 SW 1147. Evidence held to show that plaintiff in using passageway built by railroad was not trespasser. Id. Intention of railroad that passageway should only be used by employes would not make other people trespassers thereon, unless such intention was made known to public in some proper way. Id. Evidence held to raise issue of implied invitation on part of railroad for use by public of passageway, insecurity of which caused plaintiff's injuries. Id. Railroad is liable for injuries occasioned where part of highway is acquired and **new road** is opened in place thereof. Hall v. Houston & T. C. R. Co. [Tex. Civ. App.] 114 SW 891. If railroad company acts under agreement by which it is permitted to withdraw from public use portion of highway in consideration of furnishing equivalent therefor, it is liable to any member of public who is injured by breach of such contract Id. Obligation of railroad to construct road as required by statute could not be avoided by proving acceptance of road by county authorities. Id.

58. Liability of city and street railway using street to keep same free from obstructions while repairing are both independent and primary. Sutter v. Kansas City [Mo. App.] 119 SW 1084.

59. Where most convenient way of guarding defect was by barriers, and street railway agreed to guard defect to avoid delay in its traffic by erection of guards, such street railway was liable for injuries occasioned by its negligence. Phinney v. Boston El. R. Co., 201 Mass. 286, 87 NE 490.

60. Street railway is not under duty to guard sewer trench made by contractors for city or to remove and replace barriers across its tracks to enable cars to pass. Dix v. Old Colony St. R. Co., 202 Mass. 518, 89 NE 109.

61. Street railway which removes barrier protecting trench being constructed by city and fails to replace it is liable for injuries resulting to traveler. Dix v. Old Colony St. R. Co., 202 Mass. 518, 89 NE 109. Evidence held to warrant finding that removal of barrier by street railway was cause of bicyclist's riding into excavation. Id.

62. Since city had no power to erect water plug in street so that it would be dangerous obstruction, it could not delegate such power

liability is incurred where new appliances lawfully placed upon a street frighten horses.[63]

(§ 14) *G. Persons entitled to protection.*[64]—See 11 C. L. 1762—The duty of municipalities in regard to streets is a general duty owing to all who use such streets or highways for travel [65] by day or by night.[66] Public service corporations are not liable where defective appliances cause injuries to a person who is not using the highway as a traveler.[67]

(§ 14) *H. Remote and proximate cause of injury.*[68]—See 11 C. L. 1763—In order to recover for injuries sustained because of defective streets, the negligence complained of must be the proximate cause of the injury.[69]

to water company. Decatur Waterworks Co. v. Foster [Ala.] 49 S 759.

63. Reel of telegraph company. Simonds v. Maine Tel. & T. Co., 104 Me. 440, 72 A 175. Owners of horses must accustom their horses to new appliances lawfully placed on street. Id.

64. Search Note: See notes in 22 L. R. A. 561; 47 Id. 298; 2 L. R. A. (N. S.) 481; 6 Id. 905; 14 Id. 816; 4 Ann. Cas. 250.

See, also, Municipal Corporations, Cent. Dig. §§ 1660-1665; Dec. Dig. § 801; 15 A. & E. Enc. L. (2ed.) 420; 27 Id. 148.

65. Molway v. Chicago, 144 Ill. App. 509; Van Cleef v. Chicago, 144 Ill. App. 488, afd. 240 Ill. 318, 88 NE 815. Liability of city extends to persons stopping to converse on street and stopping to see procession pass, and there are liabilities to abutting owners and to children. Van Cleef v. Chicago, 240 Ill. 318, 88 NE 815, afg. 144 Ill. App. 488. Liability of city applies to children as well as adults. City of Covington v. Bollwinkle [Ky.] 121 SW 664. General rule as to liability of city is applicable to bicycles. Molway v. Chicago, 237 Ill. 486, 88 NE 485. Rider of bicycle in public street uses same for travel in ordinary mode. Molway v. Chicago, 144 Ill. App. 509. Cities are liable to one who is rightfully upon street and who is injured by coming in contact with some defect while **fleeing from danger.** Dondono v. Indianapolis [Ind. App.] 89 NE 421.

66. City must keep highways in such condition as not to be dangerous to travelers by day or night. City of Baltimore v. Maryland [C. C. A.] 166 F 641.

67. Telephone company was not liable as to person who climbed defective pole in order to remove wires so that house might be moved. Morris v. Rounsaville Bros. [Ga.] 64 SE 473.

68. Search Note: See notes in 18 L. R. A. 100; 8 L. R. A. (N. S.) 77; 9 Id. 548; 14 Id. 956.

See, also, Highways, Cent. Dig. §§ 494-497; Dec. Dig. § 196; Municipal Corporations, Cent. Dig. §§ 1666-1671; Dec. Dig. § 800; 28 Cyc. 1407-1413; 15 A. & E. Enc. L. (2ed.) 420; 27 Id. 148, 168.

69. Shaw v. Macon [Ga. App.] 64 SE 1102. Plaintiff is entitled to recover where injuries are caused by defect in street though injury is partly result of accident. Turner v. Southwest Missouri R. Co. [Mo. App.] 120 SW 128; Smith v. Yankton [S. D.] 121 NW 848; McLemore v. West End [Ala.] 48 S 663. City cannot excuse culpability by saying that injury might not have occurred but for concurring cause such as frightened horse. McLemore v. West End [Ala.] 48 S 663. Person whose negligence in leaving large blocks of stone in highway caused runaway is not excused by fact that viciousness of plaintiff's horse of which plaintiff had no knowledge concurred with defendant's act in causing injury. Stedman v. O'Neil [Conn.] 72 A 923. City is liable for injuries sustained at street fair though negligent construction of show tent is concurrent and independent cause of injury. Van Cleef v. Chicago, 144 Ill. App. 488, afd. 240 Ill. 318, 88 NE 815.

Proximate cause held for jury: Negligence of city in maintaining sidewalk with pronounced slope caused by its defective condition. Snickles v. St. Joseph [Mo. App.] 122 SW 1122. Where no intervening cause appeared to explain displacement of coal hole cover, jury might have inferred that it gave way from failure to remove particles of coke in rabbet, when defendant's servant delivered coke. Gillis v. Cambridge Gaslight Co., 202 Mass. 222, 88 NE 779. Verdict of jury that negligence of city in permitting water to escape from hydrant whereby ice was formed was proximate cause of plaintiff's injury was supported by evidence. Town of Belleview v. England [Ky.] 118 SW 994. Finding of jury that defective sidewalk was proximate cause of injury will not be disturbed. Keane v. Seattle [Wash.] 104 P 819. Determination of jury that plaintiff's injuries were caused by defective road held to be sustained by evidence. Hignett v. Morridgewood [Me.] 73 A 1086. Evidence held to warrant finding that plaintiff's fall was from defect complained of. Town of New Castle v. Mullen [Ind. App.] 87 NE 146. Evidence held to show that death was proximate result of injuries sustained by driving into hole in street. Mooney v. Chicago, 144 Ill. App. 472.

Held proximate cause: Negligence of city in failing to light approach to bridge held by jury to have been proximate cause of injury. City of Chicago v. Thomas, 141 Ill. App. 122. Where plaintiff was assisting her father along sidewalk and bicycle struck father who fell against plaintiff who in turn stepped into hole in sidewalk sustaining injuries, such hole was efficient cause of injury. Keane v. Seattle [Wash.] 104 P 819. Where driver has momentary loss of control of horse, and obstruction is encountered in street whereby an injury is occasioned, obstruction is legally proximate cause of injury. Rucker v. Huntington [W. Va.] 66 SE 91. Where horse was frightened by railroad car standing partly in street, and ran into unguarded ditch in street which ditch had been dug by defendant, proximate cause of

(§ 14) *I. Contributory negligence of person injured.*[70]—See 11 C. L. 1768—Travelers using public streets must exercise ordinary care to avoid injuries,[71] though they may assume that such street is in a reasonably safe condition.[72] The duty to exercise due care is not avoided when a traveler is intoxicated,[73] but persons non sui juris cannot be charged with contributory negligence.[74] Knowledge of the defective condition of a street does not generally render a person contributorily negligent,[75]

injury was negligence of defendant in leaving car and failing to guard ditch. Missouri, K. & T. R. Co. v. Davis [Tex. Civ. App.] 116 SW 423. Negligence of city in permitting maintenance of defective sidewalk was proximate cause of death of child who slipped or was compelled to step off walk into hole filled with water. Benton v. St. Louis, 217 Mo. 687, 118 SW 418. In action for injuries sustained by shying horse pulling buggy against fire plug located about three feet from curb in street, action of horse was not proximate cause of injury sustained. Decatur Waterworks Co. v. Foster [Ala.] 49 S 759. Defect in street was cause. Id. Windstorm held to be proximate cause of injury occasioned by traveler in running into telephone poles which had fallen on highway. Burton v. Cumberland Tel. & T. Co. [Ky.] 118 SW 287.

Held not proximate cause: City's failure to supply lights was not proximate cause of injury sustained by pedestrian where bicyclist collided with him. Andrews v. Elmira, 128 App. Div. 699, 113 NYS 711. City held not liable where small boy running along sidewalk tripped over hinge of adjacent cellar door and fell into areaway and thence into cellar. Quinn v. Philadelphia, 224 Pa. 176, 73 A 318.

70. Search Note: See notes in 17 L. R. A. 124; 3 L. R. A. (N. S.) 345; 11 Id. 1114; 14 Id. 643; 16 Id. 459.

See, also, Highways, Cent. Dig. §§ 491-493, 498-503; Municipal Corporations, Cent. Dig. §§ 1672-1683; Dec. Dig. §§ 802-807; 28 Cyc. 1418-1434; 15 A. & E. Enc. L. (2ed.) 465; 27 Id. 168.

71. Town of Belleview v. England [Ky.] 118 SW 994; City of Burnside v. Smith [Ky.] 119 SW 744; Riggs v. Metropolitan St. R. Co., 216 Mo. 304, 115 SW 969; Turner v. Southwest Missouri R. Co. [Mo. App.] 120 SW 128; McClay v. Philadelphia, 224 Pa. 174, 73 A 188; Bedford City v. Sitwell [Va.] 65 SE 471. Person driving over street car track must use ordinary care. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62. Slight want of care will not deprive plaintiff of recovery. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Mere abstraction or lack of attention to condition of sidewalk does not render traveler guilty of contributory negligence. Perkins v. Sunset Tel. & T. Co., 155 Cal. 712, 103 P 190. Traveler in city streets must use reasonable care, proportionate to **danger to be anticipated.** Schelich v. Wilmington [Del.] 74 A 367; Combs v. Kirksville, 134 Mo. App. 645, 114 SW 1153; Esleeck v. Capwell [R. I.] 72 A 819. Since existence of drains across sidewalk is recognized necessity, passengers upon streets must use ordinary care at least in guarding against danger from such gutters and drains. Burke v. Tricalli [La.] 50 S 710. When footman is injured by defect in sidewalk which he has forgotten, controlling question is whether he was making such use of senses as ordinary person in like circumstances would make. Chase v. Atchison, etc., R. Co., 134 Mo. App. 655, 114 SW 1141.

72. Montgomery City Council v. Bradley [Ala.] 48 S 809; White v. People's R. Co. [Del.] 72 A 1059; Schelich v. Wilmington [Del.] 74 A 367; Bedford City v. Sitwell [Va.] 65 SE 471; City of Portsmouth v. Houseman [Va.] 65 SE 11. Pedestrian exercising ordinary care is not required to anticipate dangers. City of Portsmouth v. Houseman [Va.] 65 SE 11; Montgomery City Council v. Bradley [Ala.] 48 S 809; St. Louis S. W. R. Co. v. Samuel [Tex. Civ. App.] 116 SW 133; White v. People's R. Co. [Del.] 72 A 1059. Is not as matter of law required to be on lookout for defects. Bedford City v. Sitwell [Va.] 65 SE 471. Persons walking along sidewalks of street in nighttime may assume street to be safe. De Courcy v. Prendergast Const. Co. [Mo. App.] 120 SW 632. Person using street may assume that same would not be obstructed, or if obstructed that warning of condition would be given. Knight v. Kansas City [Mo. App.] 119 SW 990. Pedestrian has right to presume that hatchway in walk will be properly guarded when open. Murphy v. Herold Co., 137 Wis. 609, 119 NW 294. Pedestrian using sidewalk is not chargeable with defects of which he has not notice. Id. Person traveling on horseback and leading several mules attached to halter was under no duty to look ahead, but circumstances rather demanded looking backward to mules. Montgomery City Council v. Bradley [Ala.] 48 S 809.

73. Instruction approved. City of Madisonville v. Stewart [Ky.] 121 SW 421.

74. Child of 20 months who fell into gutter and catchbasin. City of Covington v. Bollwinkle [Ky.] 121 SW 664.

75. Cochran v. Shirley [Ind. App.] 87 NE 993; Town of New Castle v. Mullen [Ind. App.] 87 NE 146; Scurlock v. Boone [Iowa] 121 NW 369; Winship v. Boston, 201 Mass. 273, 87 NE 600; Snee v. Clear Lake Tel. Co. [S. D.] 123 NW 729. Knowledge of existence of defect and failure to avoid same does not as matter of law preclude recovery. Gillis v. Cambridge Gaslight Co., 202 Mass. 222, 88 NE 779. Pedestrian who knows that walk is defective is under no duty to select another route, provided that he believes walk in question to be safe. Jackson v. Grinnell [Iowa] 122 NW 911; Smith v. Yankton [S. D.] 121 NW 848. Pedestrians have right to use walks which are most convenient for approaching their destination. Smith v. Yankton [S. D.] 121 NW 848. When streets are open and unbarricaded, there is an implied invitation for their use and persons using them are not guilty of contributory negligence unless they are aware of danger inci-

and the rule requiring a person to choose another way can only be applied where the defect is so obvious that person of ordinary prudence would consider the way in question dangerous.[76] The due care required of drivers of vehicles is not the same as that imposed upon pedestrians,[77] and the negligence of the driver of vehicle is not to be imputed to a passenger.[78] Ordinarily, the question of negligence is for the jury.[79, 80]

dent to proper use. Scurlock v. Boone [Iowa] 121 NW 369. Fact that person is aware of dangerous condition of walk constructed along bulkhead without guards would not bar recovery, there being an implied invitation to use such walk. Stock v. Tacoma, 53 Wash. 226, 101 P 830. Traveler who uses public street with knowledge that same is defective **must use care commensurate with danger** to be apprehended. Cochran v. Shirley [Ind. App.] 87 NE 993; Town of Belleview v. England [Ky.] 118 SW 994; Knight v. Kansas City [Mo. App.] 119 SW 990; Bedford City v. Sitwell [Va.] 65 SE 471; Town of New Castle v. Mullen [Ind. App.] 87 NE 146. Where evidence showed knowledge of defect, but exercise of care commensurate with danger, it was error to render judgment for plaintiff. Notwithstanding verdict for plaintiff. Cochran v. Shirley [Ind. App.] 87 NE 993. If there is sufficient safe space on sidewalk to avoid defect, person should use such route. Instruction approved. City of Portsmouth v. Houseman [Va.] 65 SE 11.

Recovery is precluded when a person knows of a defect and voluntarily undertakes to test it when it could be avoided. Swanwick v. Monongahela City, 36 Pa. Super. Ct. 628. Where person voluntarily assumes risk of injury from nuisance consisting of defective coal hole, he is precluded from recovery. McGinnis v. Hyman, 63 Misc. 316, 117 NYS 202. Pedestrian knowing existence of latent danger in street and who attempts to cross assumes all risk of such conduct. White v. People's R. Co. [Del.] 72 A 1059. If facts in charge showing that plaintiff chose dangerous pathway with full knowledge of its condition, in preference to safe road, were true, plaintiff could not recover. St. Louis S. W. R. Co. v. Samuels [Tex.] 123 SW 121.

76. Galveston, etc., R. Co. v. Schuessler [Tex. Civ. App.] 120 SW 1147. Pedestrian using sidewalk is not required to go outside and around defect unless danger is so great that person of ordinary prudence would have changed his course. Combs v. Kirksville, 134 Mo. App. 645, 114 SW 1153.

77. While duty of vigilance is obligatory on user of city streets, driver compelled to carefully manage his team cannot be held to be negligent in not failing to see defects in street which would have been obvious to pedestrian. McClay v. Philadelphia, 224 Pa. 174, 73 A 188.

78. City of Winona v. Botzet [C. C. A.] 169 F 321. Contributory negligence of driver of automobile is not to be imputed to passenger unless he also was negligent. City of Baltimore v. Maryland [C. C. A.] 166 F 641.

79, 80. Dondono v. Indianapolis [Ind. App.] 89 NE 421; Swanwick v. Monongahela City, 36 Pa. Super. Ct. 628; Snee v. Clear Lake Tel. Co. [S. D.] 123 NW 729; Marlow v. Fond du Lac [Wis.] 123 NW 627. Question of contributory negligence is one of fact and not as settled by answers to interrogatories. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Where traveler has knowledge of defect, question of exercise of due care is for jury. Gillis v. Cambridge Gaslight Co., 202 Mass. 222, 88 NE 779. Contributory negligence of pedestrian is to be determined by jury in view of condition of sidewalk, plaintiff's knowledge of defect, darkness of night, and like circumstances. Jackson v. Grinnell [Iowa] 122 NW 911. In determining contributory negligence, jury may consider time of accident and physical infirmities of traveler. Dunkin v. Hoquiam [Wash.] 105 P 149. Fact that traveler forgets defect in sidewalk and is injured thereby is circumstance to be considered by jury. Chase v. Atchison, etc., R. Co., 134 Mo. App. 655, 114 SW 1141.

Negligence held for jury: Whether admitted **physical infirmities** of plaintiff, including fact that his bicycle was without lantern, rendered him guilty of contributory negligence. Dunkin v. Hoquiam [Wash.] 105 P 149. Whether plaintiff, aged 87 years, was free from negligence. Friedman v. New York, 63 Misc. 310, 116 NYS 750. Intoxication of pedestrian who fell into sewer excavation. Tagge v. Roslyn, 51 Wash. 258, 98 P 668. Intoxicated pedestrian who fell into hole in sidewalk. City of Madisonville v. Stewart [Ky.] 121 SW 421. **Pedestrian** who fell into sewer excavation. Tagge v. Roslyn, 51 Wash. 258, 98 P 668. Negligence of pedestrian who stopped to watch construction of house and stepped backward into unguarded excavation. District of Columbia v. Blackman, 32 App. D. C. 32. Whether plaintiff should have seen hole and avoided it. Mooney v. Chicago, 144 Ill. App. 472. Where injuries were sustained by falling in hole at side of public road. Mountz v. North Versailles Tp., 223 Pa. 163, 72 A 345. Lack of due care of plaintiff who fell into unguarded coal hole. Picquett v. Wellington-Wild Coal Co., 200 Mass. 470, 86 NE 899. Lack of due care on part of traveler who fell into excavation. Hurley v. Boston, 202 Mass. 68, 88 NE 586; Smith v. Preston, 104 Me. 156, 71 A 653. Defective sidewalk. Snickles v. St. Joseph [Mo. App.] 122 SW 1122. Pedestrian walking into hole in sidewalk at night. City of Latonia v. Ebenschweiger [Ky.] 118 SW 946. Whether traveler was negligent in walking off end of sidewalk on dark night and falling to ground three feet below. Dunn v. Oelwein, 140 Iowa, 423, 118 NW 764. Negligence of pedestrian who did not change his course to avoid defect in sidewalk. Combs v. Kirksville, 134 Mo. App. 645, 114 SW 1153. Negligence of using dangerous pathway. Galveston, etc., R. Co. v. Schuessler [Tex. Civ. App.] 120 SW 1147. Plaintiff injured by falling over edge of plank placed between sidewalk and concrete pavement. City of Owensboro v. Williams [Ky.] 116 SW 280.

§ 15. *Actions for injuries. A. Notice of claim for injury and intent to sue.* See 11 C. L. 1766—The legislative power to impose conditions upon the maintenance of actions against municipalities for injuries received by defective streets [81] will au-

Where plaintiff used same street in morning and should have seen obstruction which caused injury in evening. Apker v. Hoquiam, 51 Wash. 567, 99 P 746. Exercise of due care in crossing culvert. City of Lafayette v. West [Ind. App.] 87 NE 550. Care used in going upon culvert to take car. Graham v. Rockford, 142 Ill. App. 306, afd. 238 Ill. 214, 87 NE 361. Negligence of passenger who was knocked from running board of street car by obstruction in street. Miller v. Uvalde Asphalt Pav. Co., 134 App. Div. 212, 118 NYS 835. Negligence of pedestrian in proceeding along sidewalk and passing under framework of machinery, there being no warning of danger in so doing. De Courcy v. Prendergast Const. Co. [Mo. App.] 120 SW 632. Negligence of **driver of wagon** in crowded street in not avoiding hole. McClay v. Philadelphia, 224 Pa. 174, 73 A 188. Traveler who drove into mud hole in street. Marlow v. Fond du Lac [Wis.] 123 NW 627. Negligence of driver of cab in driving near excavation whereby he collided with stone thrown out by laborers. Jacobs v. Smith Cont. Co., 113 NYS 531. Complaint erroneously dismissed. Id. Negligence of occupant of vehicle who was thrown therefrom when wagon came in contact with obstruction in street. City of Louisville v. Tompkins [Ky.] 122 SW 174. **Bicyclist** riding between rails of street car way into excavation. Dix v. Old Colony St. R. Co., 202 Mass. 518, 89 NE 109.

Held negligent: Where person knew of defect in street and walked carelessly into it in daylight when there is nothing to prevent him seeing hole. City of Latonia v. Ebenschweiger [Ky.] 118 SW 946. Where pedestrian stepped on cover of coal hole after noticing that it was not in place over opening, there being plenty of space to pass around such hole. McGinnis v. Hyman, 63 Misc. 316, 117 NYS 202. Where person stepped upon sidewalk from vehicle with full knowledge of defective condition. Bedford City v. Sitwell [Va.] 65 SE 471. Where want of due care of plaintiff was responsible for collision with fire hydrant. Thunborg v. Pueblo, 45 Colo. 337, 101 P 399. Failure of driver of automobile to provide lights so that he might avoid obstacles. Lauson v. Fond du Lac, 141 Wis. 57, 123 NW 629. Where automobile was private conveyance and its driver failed to exercise ordinary care which failure contributed to injury complained of. Lauson v. Fond du Lac, 141 Wis. 57, 123 NW 629. Driver of automobile who on dark rainy night travels over strange country road at such speed that he is unable to stop within distance that is within clear range of vision. Id. Held by equally divided court that plaintiff who, with full knowledge of dangerous condition, chose to walk on defective sidewalk was contributorily **negligent as matter of law.** Sargeant v. Detroit, 156 Mich. 291, 16 Det. Leg. N. 108, 120 NW 792. Court may so determine when uncontradicted facts disclose negligence of plaintiff, who was injured by electric wire hanging in street. Crosby v. Portland R. Co. [Or.] 101 P 204. Verdict for defendant held properly directed where plaintiff in traveling over new highway was guilty of contributory negligence. Esleeck v. Capwell [R. I.] 72 A 819.

Held not negligent: Verdict that plaintiff who fell into excavation was not guilty of contributory negligence was conclusive. Shores v. St. Joseph, 134 Mo. App. 9, 114 SW 548. Where plaintiff exercised due care in walking along sidewalk. Smith v. Preston, 104 Me. 156, 71 A 653. Traveler on highway. Rockwell v. McGovern, 202 Mass. 6, 88 NE 436. Use of passageway built by railroad, which way was defective. Galveston, etc., R. Co. v. Schuessler [Tex. Civ. App.] 120 SW 1147. Where injuries were sustained because of hole in road. Hignett v. Norridgewock [Me.] 73 A 1086. Where plaintiff was thrown out of wagon and injured because of defective road rather than being intoxicated. Collins v. Hazel Lumber Co. [Wash.] 103 P 798. Pedestrian who slipped on slanting wooden crosswalk. Smith v. Yankton [S. D.] 121 NW 848. Where plaintiff fell into hole at edge of sidewalk which was unguarded and unlighted on dark night. City of Madisonville v. Stewart [Ky.] 121 SW 421. Negligence of plaintiff in alighting from street car upon boards forming an improvised platform, constructed by paving contractor. Hoyt v. Independent Asphalt Pav. Co., 52 Wash. 672, 101 P 867. Evidence held not to show knowledge of defect or that plaintiff was otherwise contributorily negligent. Murphy v. Chicago, 146 Ill. App. 457. Pedestrian injured by stepping on defective cover of sewer. Burd v. Philadelphia, 223 Pa. 654, 73 A 6. Findings of fact that traveler fell into excavation while stepping aside to let woman pass, though knowing of excavation and that there were no barriers, do not establish contributory negligence. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Plaintiff was **not negligent, as matter of law,** where horse driven by plaintiff became frightened at railroad car and ran into unguarded ditch in street. Missouri, K. & T. R. Co. v. Davis [Tex. Civ. App.] 116 SW 423. Negligence of plaintiff in stepping on icy sidewalk and bridge. Tewksbury v. Lincoln [Neb.] 121 NW 994. Where pedestrian walked into open hatchway in sidewalk while paper was being delivered, after 6 p. m., though he had seen paper delivered in daytime. Murphy v. Herold Co., 137 Wis. 609, 119 NW 294. Where plaintiff seated in wagon during severe rainstorm failed to observe rock which came in contact with wagon wheel. City of Louisville v. Tompkins [Ky.] 122 SW 174. Where plaintiff was running in fright from men engaged in combat. Dondono v. Indianapolis [Ind. App.] 89 NE 421. Where reasonably safe horse swerves suddenly because of contact of vehicle with obstruction, driver is not guilty of contributory negligence. Rucker v. Huntington [W. Va.] 66 SE 91.

81. See ante, § 14A. As to notice when

thorize a requirement of notice prior to accident.[82] In many states, it is essential that requirements as to notice be reasonable.[83] The construction of statutes is frequently involved to determine if provisions as to notice have been repealed,[84] and provisions relative to "claims" against municipalities are usually held inapplicable to personal injury actions.[85] Usually, the requirement as to notice applies only to municipalities [86] but in some states the person causing the damage complained of must be notified.[87] A statutory provision requiring notice for injuries sustained by "defective" streets applies where a person is injured by a dangerous accumulation of snow and ice.[88] Statutes as to notice, are usually prospective in operation [89] and the requirements imposed are mandatory,[90] constituting a condition precedent to the maintenance of actions.[91] The primary purpose of such requirements is notice,[92] and the conditions imposed should be construed reasonably.[93] Ordinarily, the notice should state the time,[94] place and circumstances of the injury, with reasonable cer-

injuries are sustained by the improvement of streets, see ante, §§ 3, 4, 5, 6, etc.

82. Legislature may legally provide for 10 days' written notice to city, prior to accident of existence of defect in street. Schigley v. Waseca, 106 Minn. 94, 118 NW 259.

83. Provisions as to notice are to be upheld only when reasonable and in aid of justice. Hase v. Seattle, 51 Wash. 174, 98 P 370. Provision requiring claimant to give residence for one year past held unreasonable. Id.; Jones v. Seattle, 51 Wash. 245, 98 P 743; Wurster v. Seattle, 51 Wash. 654, 100 P 143; Scherrer v. Seattle, 52 Wash. 4, 100 P 144. Especially in view of requirement as to prohibition of action sixty days from date of presentation of claim. Hase v. Seattle, 51 Wash. 174, 98 P 370.

84. Thirty-day notice of injuries pursuant to city charter (Laws 1883, c. 435, p. 904, § 4), § 6b, is sufficient, that portion of charter not having been repealed by adoption of St. 1898, §§ 925—201 to 925—207, as to sidewalks. Block v. Fond du Lac [Wis.] 123 NW 654. Provisions of Bay City Charter (Loc. Acts 1903, p. 727, No. 514), § 204, as to claims, are not repealed by Loc. Acts 1907, p. 862, No. 636, so as to remove all obligations as to notice. Boughner v. Bay City, 156 Mich. 193, 16 Det. Leg. N. 79, 120 NW 597.

85. Rev. Codes, § 2263, as to itemized "claim" against city, do not apply to action of tort for personal injury sustained by defective sidewalk. Miller v. Mullan [Idaho] 104 P 660.

86. Rev. Laws, c. 51, §§ 18, 20, as to notice to city or person by law obliged to repair streets, does not apply to injuries occasioned by defect in street which street railway had agreed to guard. Phinney v. Boston El. R. Co., 201 Mass. 286, 87 NE 490.

87. Under St. 1898, § 4222, subd. 5, requiring notices to persons or corporations causing damage complained of, notice designating city as causing damage is insufficient in action against corporation defendant. Uhlenberg v. Milwaukee Gaslight Co., 138 Wis. 148, 119 NW 810.

88. Comp. St. 1905, c. 13, art. 2, § 107, exempting city from liability unless notice of accident is filed with city clerk within 20 days. McCollum v. South Omaha [Neb.] 121 NW 438.

89. Laws 1907, p. 138, c. 90, as to notice which became effective July 1, 1907, is prospective in effect and does not apply to an accident happening after statute was approved but before it became effective. Baldwin v. Aberdeen [S. D.] 123 NW 80. Amendment (Loc. Acts 1907, p. 862, No. 636) to Bay City Charter (Loc. Acts 1903, p. 729, No. 514), § 204, which was given immediate effect is not to be construed as retroactive. Boughner v. Bay City, 156 Mich. 193, 16 Det. Leg. N. 79, 120 NW 597.

90. Lucas v. Pontiac, 142 Ill. App. 470. Rev. St. c. 70, §§ 7, 8, as to filing notice of claim because of injury is mandatory. Smith v. Chicago Heights, 141 Ill. App. 588. Rev. St. c. 23, § 76, as to notice is mandatory. Huntington v. Calais [Me.] 73 A 829.

91. Notice of defect prior to accident is condition precedent to liability. Schigley v. Waseca, 106 Minn. 94, 118 NW 259. Notice is condition essential to avoid bar of statute. Sollenbarger v. Lineville [Iowa] 119 NW 618. Rev. St. c. 23, § 76, imposes absolute condition to remedy. Huntington v. Calais [Me.] 73 A 829. Notice required by Rev. St. c. 70, §§ 7, 8, is condition precedent to action. Smith v. Chicago Heights, 141 Ill. App. 588. Hurd's Rev. St. 1908, p. 1186, c. 70, expressly declares that suit is barred where no notice of defect is given. Walters v. Ottawa, 240 Ill. 259, 88 NE 651.

92. King v. Spokane, 52 Wash. 601, 100 P 997. Object of ordinances as to notice is to enable city to prepare for trial of claim is not settled. Hase v. Seattle, 51 Wash. 174, 98 P 370. Object of notice is to apprise authorities of location of defect, time, and circumstances of injury, so that same may be investigated. Sollenbarger v. Lineville [Iowa] 119 NW 618. Object of notice required by Code, § 3447, par. 1, is that authorities may investigate city's liability while facts are fresh. Harrison v. Albia [Iowa] 122 NW 816. Object of Rev. St. 1899, § 5724 (Ann. St. 1906, p. 2909), is to require notice so as to protect city from fraudulent or stale demands. Snickles v. St. Joseph [Mo. App.] 122 SW 1122.

93. Statute should be construed reasonably. Snickles v. St. Joseph [Mo. App.] 122 SW 1122; Sollenbarger v. Lineville [Iowa] 119 NW 618. Claims for injuries must be construed with all liberality of pleadings. Hase v. Seattle, 51 Wash. 174, 98 P 370.

94. Notice under Rev. St. 1899, § 5724 (Ann. St. 1906, p. 2909), must inform city of

tainty,[95] and the extent of the injuries sustained,[96] and the name of the attending physician,[97] is also frequently required. In some states two notices are necessary,[98] and the claim for injuries must be verified.[99] Generally, the notice must be written[1] and signed by the claimant,[2] but the notice is not a pleading and it need not

time of injury so that it may be investigated. Snickles v. St. Joseph [Mo. App.] 122 SW 1122. Act of 1905, § 2, is not sufficiently complied with where notice recites time of accident as "some time ago." Lucas v. Pontiac, 142 Ill. App. 470. Where charter required filing of notice within one month after injury, notice filed Jan. 25, 1905, and referring to injury of Dec. 27, 1905, was **manifest error** which could not have misled city, 1904 being intended. King v. Spokane, 52 Wash. 601, 100 P 997.

95. Notice under Rev. St. 1899, § 5724 (Ann. St. 1906, p. 2909), must inform city of place and circumstances of injury so that officers may investigate circumstances of claim. Snickles v. St. Joseph [Mo. App.] 122 SW 1122. Notice under Laws 1886, p. 801, c. 572, § 1, must identify place of accident so that it may be ascertained by municipal authorities. Purdy v. New York, 193 N. Y. 521, 86 NE 560. Notice required by Code, § 3447, par. 1, should state place and circumstances of injury with reasonable certainty. Harrison v. Albia [Iowa] 122 NW 816. Notice must be sufficiently definite to enable person of ordinary capacity in exercise of reasonable diligence to locate place of injury. Sollenbarger v. Lineville [Iowa] 119 NW 618; Horton v. Seattle, 53 Wash. 316, 101 P 1091. Must enable municipal authorities to ascertain place of accident by exercise of reasonable diligence. Wikel v. Decatur, 146 Ill. App. 51. Description of place of accident in notice may be by reference to particular buildings, another street or natural objects. Id.

Held sufficient: Notice which was not misleading though exact spot where injury was received was not stated. Snickles v. St. Joseph [Mo. App.] 122 SW 1122. Notice describing hole and stating that claimant fell into hole clearly referred to hole described and was sufficient. Horton v. Seattle, 53 Wash. 316, 101 P 1091. Notice of injuries received because of defective sidewalk held to direct attention of officers with reasonable certainty to place of accident. Hase v. Seattle, 51 Wash. 174, 98 P 370. Notice that claimant fell through sidewalk is sufficient to warrant conclusion that there was hole or aperture in such walk. Id. Notice pursuant to Code, § 3447, par. 1, which fixed place of accident something like 210 feet from where it actually occurred, was sufficient, where entire sidewalk between streets named in notice was defective and in dangerous condition. Harrison v. Albia [Iowa] 122 NW 816. Variance in distance was not such as to amount to no notice or to mislead authorities. Id.

Held insufficient: Notice reciting place of accident as "on the sidewalk on North Hazel street." Act of 1905, § 2. Lucas v. Pontiac, 142 Ill. App. 470. Notice referring to Milford street which was mile long. Laws 1886, p. 801, c. 572, § 1. Purdy v. New York, 193 N. Y. 521, 86 NE 560. Reference to gully or opening on M. street where ascertainment of gully would be mere matter of conjecture. Laws 1886, p. 801, c. 572, § 1. Id. Notice of accident "on West Third Street," a street three-fourths of mile long. Sollenbarger v. Lineville [Iowa] 119 NW 618. Fact that evidence did not show any other defects in street did not render notice sufficient, since officials are not required to search street three-fourths of mile long for defects. Id. Defective **notice cured by supplemental statement** in reply to request for further particulars (notice required by Rev. Laws, c. 51, § 20). Winship v. Boston, 201 Mass. 273, 87 NE 600. Jury was warranted in finding that there was no intention to mislead. Id.

96. Rev. St. c. 23, § 76, as to notice, requires injured party to give specifically all information he possesses as to injuries for which he claims damages but plaintiff need not specify anticipated results. Spear v. Westbrook, 104 Me. 496, 72 A 311. Element of damage for defective eyesight was improperly submitted to jury when not mentioned in claim. Horton v. Seattle, 53 Wash. 316, 101 P 1091. Under statute, it was not necessary to state nature of claim and in detail amount of each item making amount claimed. Boughner v. Bay City, 156 Mich. 193, 16 Det. Leg. N. 79, 120 NW 597. Notice stating claim for injuries sustained through fall caused by loose plank and hole in defective sidewalk, describing place, **held sufficient**. Id. Notice under Comp. Laws, § 2775, as amended by Pub. Acts 1899, p. 346, No. 223, where all damages were itemized except those for permanent injuries, held sufficient, it being impossible to ascertain amount of damages from permanent injuries with certainty. Haney v. Pinckney, 155 Mich. 656, 15 Det. Leg. N. 1130, 119 NW 1099. Under Rev. St. c. 23, § 76, as to notice, statement that plaintiff received severe bodily injuries, but failing to give specification of injuries, **held insufficient.** Spear v. Westbrook, 104 Me. 496, 72 A 311.

97. Notice giving name and address of attending physician held to comply with law, though another physician called and treated plaintiff for other illnesses. Graham v. Rockford, 142 Ill. App. 306, afd. 238 Ill. 214, 87 NE 361.

98. Charter of City of Grand Rapids, §§ 485, 486, construed and held to provide for two notices in case of injuries from defective sidewalks, etc., one designed as "preliminary notice" to state briefly location of defect and its general character and other designed as "specific notice" to specify plaintiff's claim in detail. Moulter v. Grand Rapids, 155 Mich. 165, 15 Det. Leg. N. 919, 118 NW 919.

99. Plaintiff who served claim upon city council within sixty days limited by statute, referring to her previous notice, and itemizing her damages as far as possible, which claim was duly verified complied with statute. Comp. Laws 1897, §§ 2754, 2757. Hawley v. Saranac [Mich.] 16 Det. Leg. N. 239, 121 NW 303.

1. Sollenbarger v. Lineville [Iowa] 119 NW 618.

2. Claim of married woman need not be

charge negligence on the part of the city.[3] Such notice must usually be given within a certain period of time,[4] and properly served upon the city,[5] or given to certain municipal officers.[6] The sufficiency of a notice is ordinarily a question of law for the court.[7] The failure to return a defective notice is not a waiver of the defects therein,[8] and waiver of notice by a city is not fatal to an action for indemnity.[9] Ordinarily the statutory notice cannot be waived.[10, 11]

(§ 15) *B. Pleading.*[See 11 C. L. 1768]—Complaints in actions for negligence in the use of public ways must state a cause of action,[12] alleging specifically the negligence complained of,[13] and that such negligence was the proximate cause of the injury sustained.[14] Amendments are properly granted in the interests of justice,[15] but departures should be avoided.[16] Contributory negligence is usually a matter of defense.[17] The failure to deny allegations charging two defendants with being in

signed by husband. Horton v. Seattle, 53 Wash. 316, 101 P 1091.

3. Knudsen v. Muskegon [Mich.] 16 Det. Leg. N. 610, 122 NW 519.

4. Under Rev. St. 1903, c. 23, § 76, notice must be given within 14 days to one of municipal officers. Huntington v. Calais [Me.] 73 A 829. Failure to file notice is **not excused** by fact that person was deprived of consciousness by injury until 20 days for filing notice had elapsed. McCollum v. South Omaha [Neb.] 121 NW 438.

5. Evidence held to warrant finding that notice was properly served upon city when handed to clerk at city clerk's office. Janse v. Boston, 201 Mass. 348, 87 NE 633.

6. Mayor and aldermen constitute "municipal officers" (Rev. St. c. 1, § 6, par. 25). Notice to city clerk held insufficient. Huntington v. Calais [Me.] 73 A 829. There is no presumption either of law or fact that notice to city clerk would be notice to mayor and aldermen. Id. To notify is to "make it known, to inform by notice." Id.

7. Wikel v. Decatur, 146 Ill. App. 51; Sollenbarger v. Lineville [Iowa] 119 NW 618. When notice in connection with proof of situation, and surroundings of locality in connection with description raises an issue as to whether place is pointed out with reasonable certainty is **jury question.** Id.

8. Purdy v. New York, 193 N. Y. 521, 86 NE 560. Reference of claim to committee, and negotiations for settlement do not constitute waiver of notice, if it could be waived. Lucas v. Pontiac, 142 Ill. App. 470.

9. Waiver of notice by city held not fatal to maintenance of action for indemnity against sidewalk contractor. City of Seattle v. Regan & Co., 52 Wash. 262, 100 P 731.

10, 11. Walters v. Ottawa, 240 Ill. 259, 88 NE 651; Lucas v. Pontiac, 142 Ill. App. 470.

12. Petition in action by person who was struck by street car while standing on track held to state cause of action as to negligence of street railway in manipulating car at high speed, failing to give warning, etc. Cordray v. Savannah Elec. Co., 5 Ga. App. 625, 63 SE 710. Complaint held to state cause of action in that vehicle attractive to children was propelled through streets unguarded and unattended. Skinner v. Knickrehm, 10 Cal. App. 596, 102 P 947.

13. Petition alleging among other things that defendant was running automobile in careless manner and neglected to stop same whereby plaintiff was injured held sufficiently specific. Navailles v. Dielmann [La.] 50 S 449. General allegation that pedestrian while using sidewalk was injured by negligence of defendent in driving team is sufficient. American Bolt Co. v. Fennell [Ala.] 48 S 97. Negligence of driver of vehicle in failing to turn to right, and knocking down and running over plaintiff held to be sufficiently alleged. Apperson v. Lazro [Ind. App.] 88 NE 99. Use of word "right" was not for purpose of securing protection of statute. Id. Allegations charging manipulation of automobile at reckless rate of speed on edge of highway knocking down plaintiff, charge actionable negligence. Id. Where passenger of street car was injured by collision with truck and both were sued, allegation that car was running at high and dangerous rate of speed was proper as showing negligence of servants of both defendants. Tetreault v. Connecticut Co., 81 Conn. 556, 71 A 786. Complaint alleging that plaintiff was walking along sidewalk when he was struck by defendant's team held to show **violation of duty,** plaintiff being entitled to uninterrupted use of sidewalk. American Bolt Co. v. Fennell [Ala.] 48 S 97. Complaint need not allege that sidewalk is for use of pedestrians alone, that being duty affixed by law. Id.

14. Complaint construed and held to charge that negligent high rate of speed of defendant's automobile was proximate cause of frightening horses as well as negligent blowing of whistle. Grant v. Armstrong [Wash.] 104 P 632. Allegations of count showing negligence of driver of mules which struck plaintiff held to sufficiently show casual connection between negligence and injury. American Bolt Co. v. Fennell [Ala.] 48 S 97.

15. Petition for damages sustained by runaway team held to state cause of action in indefinite manner, being vague, but interests of justice demanded that amendment to same should have been granted. Scruggs v. Endom, 123 La. 887, 49 S 630.

16. Where complaint alleged that city negligently allowed wire fence in road and that plaintiff was injured because his horse became "unmanageable" and ran into such fence, amendment substituting word "frightened" for "unmanageable" was not departure. McLemore v. West End [Ala.] 48 S 663.

17. American Bolt Co. v. Fennell [Ala.] 48 S 97.

the control and possession of an automobile will preclude the recovery of judgment by one of such defendants on answers to special interrogatories.[18]

In actions against municipalities because of defective streets or other injuries, the complaint must state a cause of action [19] showing the duty owing to plaintiff as a traveler [20] and the breach of such duty and resulting injury.[21] Thus the complaint must properly set forth facts showing negligence in failing to maintain barriers about an excavation,[22] and such negligence must be directly averred.[23] Conclusions should be avoided,[24] and general allegations of negligence may be made more specific on motion.[25] A demurrer will usually lie where the complaint shows that the negligence complained of was not the proximate cause of plaintiff's injury.[26] The fact that an obstruction was of a nature to frighten an ordinarily gentle horse must be pleaded in such an action.[27] Usually, it is not essential to allege the particular officer whose neglect caused the injury.[28] Absence of contributory negligence need not be shown by plaintiff [29] but must be properly pleaded by defendant.[30] Notice

18. Apperson v. Lazro [Ind. App.] 87 NE 97.

19. Petition held to state cause of action for injuries sustained by infant in falling into gutter and catch-basin in street. City of Covington v. Bollwinkle [Ky.] 121 SW 664. Complaint held to sufficiently allege cause of action for injuries caused by driving into dangerous hole in street. McLees v. Anderson, 82 S. C. 566, 64 SE 750. Complaint held sufficient to permit of proof and to withstand motion to arrest judgment. City of Lafayette v. West [Ind. App.] 87 NE 660. Complaint for injuries sustained by obstruction in alley, which obstruction was placed there by construction company with city's consent, held to state good cause of action at common law. Mehan v. St. Louis, 217 Mo. 35, 116 SW 514. Complaint alleging unnecessary cutting of roots of trees by contractor, and permitting trees to remain without support, wherefore such trees fell against plaintiff's house and caused damage, states cause of action. Morris v. Salt Lake City [Utah] 101 P 373.

20. Complaint held to plainly and directly aver that place where plaintiff was injured was public street and that plaintiff was traveler thereon, wherefore duty owing to plaintiff is shown. City of Laporte v. Osborn [Ind. App.] 86 NE 995.

21. To sustain action for negligence against city, it must appear from facts pleaded that city was under some duty to plaintiff, failure to perform such duty, and resulting injury. City of Lafayette v. West [Ind. App.] 87 NE 550. Count held not to charge negligence of city under statute, since conditions permitted in public highway were but incidents of location, and condition and count as whole did not charge omission of duty. Knudsen v. Muskegon [Mich.] 16 Det. Leg. N. 610, 122 NW 519.

22. Complaint held to fairly show that guard was necessary to render sidewalk ordinarily safe and that by reason of its absence plaintiff suffered injuries. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Complaint for injuries caused by falling into excavation, which discloses no contributory negligence, and charges injuries as due to failure to guard excavation, shows by exclusion that injury was not caused by third person, but by negligence of defendant city. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Where complaint charges negligence in failing to maintain barrier, whereby plaintiff fell into excavation, defendant is not in position to urge that defect in sidewalk caused injury. Id.

23. In complaint that city placed large quantities of building material in street "without placing around it" barriers or lights, term "without" is direct averment that no guards or lights were placed thereabout, and not mere recital. City of Laporte v. Osborn [Ind. App.] 86 NE 995. Allegations that plaintiff drove along street "without" knowledge of obstruction and "not being" able to see it, wherefore horses ran against same are direct averments, and not mere recitals. Id.

24. Allegations that city placed sidewalk in unsafe, dangerous, and defective condition and permitted it to remain in such condition held mere conclusion wherefore petition was insufficient. Pullen v. Butte, 38 Mont. 194, 99 P 290.

25. Where complaint alleged generally that negligence of defendant was cause of injury, defendant was entitled to have same made more specific and certain. City of La Junta v. Burns [Colo.] 104 P 941. Allegation of negligence of city in general terms is sufficient in absence of motion to make more certain. Mehan v. St. Louis, 217 Mo. 35, 116 SW 514.

26. Allegations of petition held to show that negligence of defendant city was not proximate cause of plaintiff's injury, but that same was due to driver of buggy, wherefore demurrer was properly sustained. Shaw v. Macon [Ga. App.] 64 SE 1102.

27. Complaint held insufficient in not alleging that stones in street were of nature to frighten ordinarily gentle horse. Elam v. Mt. Sterling [Ky.] 117 SW 250.

28. In action against city for injuries caused by defective street, complaint need not allege particular officer whose neglect caused injury. Dunkin v. Hoquiam [Wash.] 105 P 149.

29. Unless complaint alleges facts which overthrow presumption of noncontributory negligence on part of plaintiff, pleading will be good even as against demurrer. City of Lafayette v. West [Ind. App.] 87 NE 550. Pleading which showed knowledge of defect held not faulty as overthrowing presumption of noncontributory negligence. Id. Com-

of the defect by a city must usually be pleaded and proved,[31] as well as the giving of the required statutory notice.[32] The petition may usually be amended to show additional damages [33] incurred after the required statutory notice is given,[34] and other amendments are permissible where the cause of action is not changed.[35] An error in refusing to strike damages claimed in excess of those claimed in the statutory notice is cured where the verdict rendered is not excessive.[36] Negligence of abutters or other occupants of streets must also be properly averred,[37] and defects may arise where a city is not joined as defendant in an action for injuries occasioned by snow and ice [38] or where the statute under which the action is brought is not referred

plaint alleging that "plaintiffs did not in any way bring about such injuries by their own negligent act" was proper, such allegation being material allegations of fact constituting part of plaintiff's cause of action. McLees v. Anderson, 82 S. C. 565, 64 SE 750.

30. Plea of contributory negligence held not to sufficiently aver that plaintiff had control of horse, whereby he might with reasonable diligence avert striking fire plug which constituted obstruction on street. Decatur Waterworks Co. v. Foster [Ala.] 49 S 759.

31. City of La Junta v. Burns [Colo.] 104 P 941. Allegation of notice to city of obstruction is **not essential** when such notice is imputed from fact that city granted right to place obstructions in street to construction company. Mehan v. St. Louis, 217 Mo. 35, 116 SW 514. Allegation of defective condition of street closing with "of all of which defendant had actual knowledge and due notice" referred both to street and absence of light, wherefore complaint was not demurrable as failing to allege notice of obstruction. Apker v. Hoquiam, 51 Wash. 567, 99 P 746. Defect of petition in alleging that defect in sidewalk was known to defendant "and in exercise of ordinary care might have been known to defendant in time to have repaired same" was not fatal. Hitchings v. Maryville, 134 Mo. App. 712, 115 SW 473. Such petition was subject to objection only by demurrer or motion. Id.

32. Declaration for injuries held defective for failing to aver giving of required statutory notice. Smith v. Chicago Heights, 141 Ill. App. 588; Walters v. Ottawa, 144 Ill. App. 379. Giving of notice is essential part of cause of action and must be averred or complaint fails to state cause of action. Walters v. Ottawa, 240 Ill. 259, 88 NE 651, rvg. 144 Ill. App. 379. Amended declaration states new cause of action where it differs from original only in respect to containing notice. Id. Complaint failing to state that written notice of defect due to snow and ice was given city (Rochester Charter, § 255) does not state facts sufficient to constitute cause of action. Sayfaus v. Rochester, 113 NYS 840.

33. In action begun three months after accident as required by Code, § 3447, par. 1, petition may properly be amended by alleging additional damages arising out of the tort. Benson v. Ottumwa [Iowa] 121 NW 1065.

34. Where notice under Detroit City Charter 1904, § 279, showed fall and severe shaking up, whereby plaintiff suffered injury to nervous system, an amendment of such nervous shock would be proper. Lyle v. Detroit [Mich.] 16 Det. Leg. N. 460, 122 NW 108.

35. In action begun three months after accident as required by Code, § 3447, par. 1, petition of infant may be amended by alleging emancipation, there being no addition to cause of action thereby. Benson v. Ottumwa [Iowa] 121 NW 1065. In action begun 3 months after accident as required by Code, § 3447, par. 1, petition may properly be amended so as to allege parent's assignment to infant plaintiff, who had reached majority, of any claim which such parent had. Id. Incidental fact. Id. In action against two towns for injuries received from obstruction, an amendment accurately describing defect as located in north and south highway at point where east and west highway intersected such road, which amendment did not change location of defect, was proper. Maxwell v. Wellington, 138 Wis. 607, 120 NW 505.

36. Where plaintiff demanded $10,000 for injuries sustained in claim filed pursuant to Laws 1907, p. 644, c. 241, § 36, and verdict for $7,500 was rendered, error in refusing to strike damages claimed in complaint in excess of $10,000 was harmless. Dunkin v. Hoquiam [Wash.] 105 P 149.

37. Complaint held to state cause of action against railroad, though averring that cause of injury was act of defendant in obstructing old road and failing to restore it to its former condition, when cause of injury was failure to remove stumps from new road. Hall v. Houston & T. C. R. Co. [Tex. Civ. App.] 114 SW 891. Count in declaration charging that defendant removed dirt between cross ties of track and failed to properly guard and light same, whereby plaintiff stumbled and was run over by street car, held to state cause of action. Smith v. Gulfport & Mississippi Coast Trac. Co. [Miss.] 48 S 295. Count alleging that defendant removed dirt between cross ties of track in part of town used generally by public, that plaintiff by reason of unguarded ties fell on such track and motorman negligently ran over plaintiff, states cause of action. Id. Count in declaration held to state cause of action though demurred to as not describing crossing, or alleging sufficiently in what manner brakes were defective. Id. Count alleging negligence of defendant in failing to guard tracks where dirt had been removed, which negligence was proximate cause of plaintiff's death, held to state cause of action. Id.

38. Complaint in action against abutting owner for injury resulting from accumulation of snow and ice was defective for failure to join city as defendant, it being primarily liable. Kosters v. National Bank, 62 Misc. 419, 116 NYS 647.

to.[39] An allegation of a wrongful continuous act is essential to charge nuisance in the maintenance of an insecurely fastened coal hole cover.[40]

(§ 15) *C. Evidence.*[41]—See 11 C. L. 1760—In actions for negligence in the use of highways, plaintiff has the burden of proving such negligence[42] as alleged,[43] that the negligence was the proximate cause of the injuries complained of,[44] and that plaintiff himself was free from negligence.[45] Usually the defendant has the burden of proving contributory negligence,[46] by proper evidence.[47] Negligence whereby injuries are occasioned by operating automobiles at excessive speed,[48] whereby horses are frightened by automobiles,[49] whereby runaway horses inflict injuries,[50] or horses collide with other animals,[51] must be proved by proper evidence. The unexplained

39. Complaint in action for injuries occasioned by snow and ice held defective as failing to specifically refer to act under which action was brought. Kosters v. National Bank, 62 Misc. 419, 116 NYS 647.

40. McGinnis v. Hyman, 63 Misc. 316, 117 NYS 202.

41. Search Note: See note in 16 L. R. A. 554.

See, also, Highways, Cent. Dig. §§ 510-542; Dec. Dig. §§ 201-216; Municipal Corporations, Cent. Dig. §§ 1695-1771; Dec. Dig. §§ 811-826; 28 Cyc. 1446-1463, 1465-1522, 1524-1526, 1530-1532; 15 A. & E. Enc. L. (2ed.) 420; 27 Id. 118, 148, 168; 20 A. & E. Enc. P. & P. 949.

42. Young v. Sibley, Lindsay & Curr Co., 119 NYS 446. Negligence of driver of team must be proved. Stone v. Forest City Exp. Co. [Me.] 74 A 23. Plaintiff must show negligence of defendant in driving automobile so as to injure her. Hainlin v. Budge, 56 Fla. 342, 47 S 825. Horse frightened by automobile. Baugher v. Harman [Va.] 66 SE 86. Where there was no evidence that electric truck came in contact with plaintiff's horse, but horse jumped and was found to be injured, defendant's **negligence was not established.** Young v. Sibley, Lindsay & Curr Co., 119 NYS 446.

43. Particular act of negligence which is alleged must be proved as laid. Merklinger v. Lambert, 76 N. J. Law, 806, 72 A 119.

44. Person injured by runaway resulting from horses becoming frightened by automobile must plead and prove that act of negligence in operation of machine was proximate cause of injury. Sapp v. Hunter, 134 Mo. App. 685, 115 SW 463.

45. Burden is upon infant seeking to recover damages because of negligence as well as upon adult to show that he used care to avoid injury. Ardolino v. Reinhardt, 130 App. Div. 119, 114 NYS 508. Burden varies in degree depending upon natural capacity, development, training, etc. Id.

46. Defendant has burden of proving contributory negligence of plaintiff who was injured by automobile. Hainlin v. Budge, 56 Fla. 342, 47 S 825.

47. Circumstance that blind man was walking along edge of highway instead of center is competent circumstance of exercise of due care. Apperson v. Lazro [Ind. App.] 87 NE 97.

48. Opinion evidence of motorman of some twelve years' experience as to speed of an automobile was competent. Hough v. St. Louis Car Co. [Mo. App.] 123 SW 83.

49. Held admissible: Evidence of characteristics of horses. Delfs v. Dunshee [Iowa] 122 NW 236.

Held inadmissible: Witness' statement as to whether driver was acting so that he might lose control of horse held properly excluded as calling for conclusion. Delfs v. Dunshee [Iowa] 122 NW 236. Question properly excluded as calling for computation, where width of street was shown and distance between street car rails and curbs, and question asked sought information as to distance remaining for automobile in passing wagon of plaintiff. Id. Evidence of prior convictions because of exceeding speed ordinances held incompetent where injury of plaintiff was caused by driving automobile in close proximity to rear of wagon occupied by plaintiff, after warning to stay back and thereby frightening horses and causing catastrophe. See v. Wormser, 129 App. Div. 596, 113 NYS 1093. Such evidence was not competent as tending to impeach defendant by showing bad character. Id.

50. One not an expert may testify as to **speed of vehicles** and state opinion as to such speed. Johnson v. Coey, 142 Ill. App. 147. Evidence of driver's action in **hitching team** after runaway was stopped was admissible as showing negligence in failing to hitch. Robinson v. Morris & Co. [R. I.] 73 A 611. Evidence that driver employed person to hold team prior to runaway was admissible to show no negligence. Id. **Admission of ordinance** as to duty in controlling teams was harmless since statute governed matter. Id. Failure to prove that injuries by reason of runaway team were inflicted within city was **immaterial** where locality was sufficiently described. Hull v. Thomson Transfer Co., 135 Mo. App. 119, 115 SW 1054. Evidence of way horses went after injuring plaintiff while running away was part of **res gestae.** Robinson v. Morris & Co. [R. I.] 73 A 611. Evidence of injury to plaintiff by runaway team including statements of speed of horses after accident, picking up plaintiff and the like, did not relate to time after accident. Id. Declaration of injured party after return home is incompetent under rule of res gestae. Miller v. McConnell [S. D.] 120 NW 888.

51. In action for injuries caused by collision of horse and team of oxen, evidence that driver of horse "was so anxious that she got impression on her part that she was in danger" was **irrelevant.** Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853. Also witness could not testify to mental condition of driver. Id. In action for injuries sustained where horse and team of oxen collided, **evidence by expert** as to whether oxen were properly driven was proper. Id.

presence of a runaway team on a public highway usually raises a presumption of negligence.[52]

In actions for injuries sustained by defective or unsafe streets, or highways, plaintiff has the burden of proving the negligence as alleged,[53] that plaintiff was injured by reason of, or as a result of such negligence[54] and that plaintiff was in exercise of due care at the time of accident.[55] When the defendant is a municipality, plaintiff has the burden of showing notice of the defect.[56] The defendant is sometimes obliged to disprove negligence by the application of the maxim res ipsa loquitur,[57] and the defendant usually has the burden of proving contributory negligence.[58] The admissibility of evidence depends upon the pleadings and the notice of injury and claim for damages.[59] Proper evidence should be introduced to show the defective condition of a street,[60] notice of such defect,[61] and that plaintiff

52. Francois v. Hanff [N. J. Law] 71 A 1128. Proof of vicious disposition of horse is not necessary where runaway team causes damage, and reason for runaway is unexplained. Id. Fact that team runs away **does not imply negligence** of itself. Coller v. Knox, 222 Pa. 362, 71 A 539. Nonsuit was properly granted where affirmative evidence merely showed that when plaintiff last saw team, before being run over by them about 200 feet away, man was holding them. Id.

53. Mooney v. Chicago, 144 Ill. App. 472; Parker v. Bedford, 139 Iowa, 545, 117 NW 955. A general denial of negligence in failing to maintain its streets in a reasonably safe condition by the city places burden upon plaintiff. Parker v. Bedford, 139 Iowa, 545, 117 NW 955.

54. Mooney v. Chicago, 144 Ill. App. 472. Plaintiff seeking to recover for injuries sustained has burden of proving that such injuries were caused by dangerous defect in sidewalk. Taylor v. Manson, 9 Cal. App. 382, 99 P 410. Plaintiff suing to recover for injuries sustained by falling in coal hole, which defendant negligently failed to properly recover, has burden of proving case. Gillis v. Cambridge Gaslight Co., 202 Mass. 222, 88 NE 779.

Evidence held insufficient to establish negligence of borough where it was not shown what caused plaintiff to fall, though plaintiff was injured by an obstruction after she did fall. Knepper v. Tamaqua Borough, 36 Pa. Super. Ct. 183. Action held not to be sustainable where there was no direct proof of death of person incurred by fall on sidewalk. City of Chicago v. Carlin, 141 Ill. App. 118. Presumption of fall and presumption that fall caused death is presumption based upon presumption which law does not tolerate. Id. Where opposing evidence showed death by heart failure. Id. Cause of death held to be mere conjecture. Id. Evidence of negligence of electric light company in maintenance of its conduit where explosion occurred and traveler was injured **held sufficient** to present question for jury. St. Clair v. Edison Elec. L. Co., 38 Pa. Super. Ct. 228. Evidence held sufficient to support allegations and take case to jury in action for injuries sustained by falling over loose boards in public alley. Mehan v. St. Louis, 217 Mo. 35, 116 SW 514. Evidence held to justify finding that defendant was responsible for presence of curbstones in street near car rail whereby passenger was injured. Miller v. Ulvalde Asphalt Pav. Co., 139 App. Div. 212, 118 NYS 885. Evidence held to justify finding that passenger of car about to alight therefrom was struck by curbing stones piled near street car track. Id. Plaintiff suing to recover for injuries sustained by falling in coal hole, which defendant was alleged to have failed to recover, need not exclude every theory which might have caused accident, where it could be directly attributed to defendant's fault. Gillis v. Cambridge Gaslight Co., 202 Mass. 222, 88 NE 779.

55. Mooney v. Chicago, 144 Ill. App. 472. Proof of absence of contributory negligence is necessary where plaintiff is injured by defective coal hole which did not constitute nuisance. McGinnis v. Hyman, 63 Misc. 316, 117 NYS 202.

56. Burden of proving actual notice of defect (Rev. St. c. 23, § 76) is upon plaintiff. Abbott v. Rockland [Me.] 73 A 865. Constructive notice of city must be alleged and proved. Fact that city's patrolman did not testify will not warrant presumption of knowledge. City of Portsmouth v. Houseman [Va.] 65 SE 11.

57. Where electric light company so exercises its franchises that explosion occurs injuring traveler on streets, maxim res ipsa loquitur is applicable. St. Clair v. Edison Elec. L. Co., 38 Pa. Super. Ct. 228. Happening of accident alone does not establish negligence in maintenance of sidewalk. Beck v. Germantown Cricket Club, 37 Pa. Super. Ct. 521.

58. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Under Burns' Ann. St. 1908, § 362, burden of showing contributory negligence is on defendant. City of Lafayette v. West [Ind. App.] 87 NE 550. Burden of establishing contributory negligence is ordinarily upon party who asserts that defense. Swanwick v. Monogahela City, 36 Pa. Super. Ct. 628. Defendant is relieved from proving contributory negligence when it is disclosed by plaintiff's own evidence. Id.

59. Dralle v. Reedsburg, 140 Wis. 319, 122 NW 771. Three papers presented as pleading must be construed together and tested with rules relative to sufficiency of pleadings. Id.

60. Beck v. Germantown Cricket Club, 37 Pa. Super. Ct. 521. Municipality cannot be held liable for defect in sidewalk where plaintiff fails to present evidence pointing out character and nature of defect which produced injury, so that it cannot be deter-

was not contributorily negligent.[62] As a general rule, evidence of subsequent re-

mined if defendant could have anticipated and prevented injury by exercise of reasonable care. Carson v. Dresden, 129 App. Div. 728, 113 NYS 959. New trial granted. City of Toledo v. Strasel, 12 Ohio C. C. (N. S.) 212.

Held admissible: Evidence to show condition and extent of **streets in annexed territory** held admissible on question as to whether city was negligent in failing to repair such streets within reasonable time after annexation. City of Richmond v. Mason [Va.] 65 SE 8. Evidence of precautions of city in guarding approach to bridge in the daytime were proper to show **negligence in guarding streets** at night when such precautions were omitted. City of Chicago v. Thomas, 141 Ill. App. 122. Evidence of **condition of sidewalk** early in morning after accident occurring about midnight so closely followed accident as to be admissible. Jones v. Seattle, 51 Wash. 245, 98 P 743. Evidence of **other defective places** in sidewalk is competent where injury is alleged as due to general decayed condition of walk. Miller v. Mullan [Idaho] 104 P 660. Evidence of **prior accidents** is admissible to prove dangerous condition of sidewalk when alleged defect is of such character that it may be made basis of action for negligence. Gastel v. New York, 194 N. Y. 15, 86 NE 833, rvg. 126 App. Div. 936, 110 NYS 1129. Evidence of other people having fallen because of obstructions on sidewalk is material, upon issue of negligence. Friedman v. New York, 63 Misc. 310, 116 NYS 750. Evidence of cave-in before accident happened is properly admissible to show care which should have been exercised in refilling excavation in sidewalk. Rockwell v. McGovern, 202 Mass. 6, 88 NE 436. Evidence of witnesses who had seen depression, that same was caused by telephone pole, was proper as descriptive of hole. Merritt v. Kinlock Tel. Co., 215 Mo. 299, 115 SW 19. Testimony disclosing plaintiff's **opinion** and tests as to cause of accident may be considered by jury when admitted without objection. Robinson v. Omaha [Neb.] 121 NW 969.

Held inadmissible: Evidence tending to establish city's liability for original construction of temporary walk was inadmissible under pleadings. Jones v. Seattle, 51 Wash. 245, 98 P 743. Evidence of necessity of tearing up original sidewalk in action for injuries occasioned from temporary sidewalk was inadmissible as question not in issue. Id. In action for damages because of slipping on crosswalk, evidence did not show adoption of any general plan of constructing walks, and that walk in question did not conform to such plan wherefore such issue was not involved. Smith v. Yankton [S. D.] 121 NW 848. Evidence of **other defective places** in sidewalk in vicinity of one which caused injury is inadmissible where there is dispute as to defect which caused injury. Miller v. Mullan [Idaho] 104 P 660. Where city granted permission to abutting owner to place obstructions in street, such as gravel for building, it was **immaterial** in action for injuries occasioned thereby whether gravel in question had remained in such position two weeks, or had been removed and replaced daily. Apker v. Hoquiam, 51 Wash. 567, 99 P 746. Evidence of injuries to other occupants of carriage, in same accident, is **irrelevant.** Id. **Admission of ordinances** requiring railroads to keep street in repair and rendering them liable therefore was erroneous in action against city. Horton v. Seattle, 53 Wash. 316, 101 P 1091. Inasmuch as an ordinance providing that street cars shall stop on further cross walk is requirement which applies to the street car company, and in no way controls passengers in boarding or alighting from cars, it is not error to exclude such an ordinance in an action against a municipality for damages on account of injuries to the plaintiff from stepping into a hole in the street after alighting from a car. City of Toledo v. McNamara, 12 Ohio C. C. (N. S.) 204. Evidence of subsequent changes of walk though incompetent was **harmless** where dangerous character of walk was established and not controverted. City of Madisonville v. Stewart [Ky.] 121 SW 421. Where city admitted existence of hole, evidence of person who had noticed same was not erroneous. Berry v. Greenville [S. C.] 65 SE 1030.

61. Conclusion of fact that city had 24 hours actual notice of defect (required by Rev. St. c. 23, § 76, as condition to recovery for injuries) may be established by all grades of competent evidence. Abbott v. Rockland [Me.] 73 A 865. Evidence of rotten condition of stringers under sidewalk is proper as bearing on condition of walk at time of accident, and fact that city had notice of defect. Jackson v. Grinnell [Iowa] 122 NW 911. Evidence of notice to police, where no direct proof of notice to road commissioner, held insufficient to establish actual notice of defect (Rev. St. c. 23, § 76). Abbott v. Rockland [Me.] 73 A 865. There was no duty on part of police to notify road commissioner of defect and notice would not be presumed. Id.

62. Due care of driver approaching bridge may be inferred from circumstances and need not be established by direct and positive evidence. City of Chicago v. Thomas, 141 Ill. App. 122.

Held admissible: Testimony that plaintiff was walking carefully, meaning that she was not walking in any unusual way, held competent. Berry v. Greenville [S. C.] 65 SE 1030. Previous **knowledge of defect.** Winship v. Boston, 201 Mass. 273, 87 NE 600. **Evidence of sobriety** of deceased in action for death caused by city's negligence to guard approach to bridge held proper. City of Chicago v. Thomas, 141 Ill. App. 122. Evidence of **other accidents** because of obstruction is material upon issue of contributory negligence. Friedman v. New York, 63 Misc. 310, 116 NYS 750.

Held inadmissible: Testimony as to whether there was any beaten path leading onto or off sidewalk in question at either end of it and testimony as to whether certain street or sidewalk in question was usual way to travel to certain place held properly excluded as having no bearing on plaintiff's due care whether immediately before and at time of accident. Fitzgerald v. Chicago, 144 Ill. App. 462. Evidence showing that companions of plaintiff had been drinking liquor

pairs is not an admission of previous culpable negligence.[63] The fact that plaintiff's claim has been presented to a city should also be established by competent evidence,[64] and evidence of injuries sustained is inadmissible when damages are not claimed therefor in the statutory notice.[65] A statutory notice of a claim for injuries is admissible in some states, though failing to comply with the statute, when the provisions relative thereto are unreasonable.[66] The fact that a plaintiff does not take the stand to contradict important evidence showing that her claim is unfounded may be considered by the jury.[67] A variance arises only where there is a clear discrepancy between the averment and proof.[68]

(§ 15) *D. Questions for the jury.*[69]—See 11 C. L. 1772—All questions of fact such as whether the defect in question caused the plaintiff's injuries[70] are primarily for the jury.[71]

(§ 15) *E. Instructions.*[72]—See 11 C. L. 1772—Instructions in actions for negli-

was properly excluded. Jones v. Seattle, 51 Wash. 245, 98 P 743. Evidence of **habit of drunkenness** held incompetent in action for injuries sustained by falling into sidewalk. City of Madisonville v. Stewart [Ky.] 121 SW 421. Error of introduction of evidence that horse, driven by plaintiff who was injured by collision with fire hydrant, was running away was cured by instruction calling attention to rule that if true such fact should not be considered as want of due care. Thunborg v. Pueblo, 45 Colo. 337, 101 P 399.

63. Tise v. Thomasville [N. C.] 65 SE 1007. Where walk was in reasonably safe condition, admission of incompetent evidence regarding subsequent repairs was prejudicial. Woods v. Poplar Bluff, 136 Mo. App. 155, 116 SW 1109. Evidence of repair of defect about 20 days after accident **held admissible.** Kelley v. Boston, 201 Mass. 86, 87 NE 494. Evidence of subsequent repairs held competent as showing recognition of public street, a point in issue. Benton v. St. Louis, 217 Mo. 687, 118 SW 418. Evidence as to condition of manhole subsequent to time plaintiff fell on it was proper to show condition at time of accident. Clack v. Kansas City Elec. Wire Subway Co. [Mo. App.] 119 SW 1014. Evidence of subsequent repair of hole held admissible as corroborative of existence of defect at time of injury. Tise v. Thomasville [N. C.] 65 SE 1007. Where city proved that hole causing injury had been filled up before such injury, plaintiff might prove subsequent filling up to contradict defendant's witnesses. Id.

64. Evidence of member at meeting of village council held competent to show that claim had been presented. Comp. Laws, § 2754. Haney v. Pinckney, 155 Mich. 656, 15 Det. Leg. N. 1130, 119 NW 1099. Evidence of how notice was given to clerk in city clerk's office was competent to show service of such notice. Janse v. Boston, 201 Mass. 348, 87 NE 633.

65. Under Detroit City Charter 1904, § 279, requiring notice of injuries, evidence of physical wound or hurt not stated in notice was inadmissible. Lyle v. Detroit [Mich.] 16 Det. Leg. N. 460, 122 NW 108. Where notice of injury was limited to right knee, proof of injury to left knee and that she became sick, etc., was inadmissible. Id.

66. See ante, § A. Rejection of notice of injuries held erroneous though such notice did not contain residence of claimant for past year, such requirement being unreasonable. Hase v. Seattle, 51 Wash. 174, 98 P 370. Notice which partially complied with unreasonable requirement as to stating length of residence in city for past year was properly admissible. Jones v. Seattle, 51 Wash. 245, 98 P 743.

67. Kelley v. Boston, 201 Mass. 86, 87 NE 494.

68. Held to be no variance where averment as to location of sidewalk was indefinite and difference between averment and proof was not clear. Karczenska v. Chicago, 144 Ill. App. 516. Declaration construed as alleging that defendant had been engaged in filling excavation and had negligently performed work wherefore there was no variance in proof. Rockwell v. McGovern, 202 Mass. 6, 88 NE 436. No variance where proof showed accident to be 700 feet from W. avenue and allegations stated place as "near" W. avenue, word "near" being relative term to be considered in view of circumstances. Karczenska v. Chicago, 239 Ill. 483, 88 NE 188. In personal injury action against paving contractor, evidence of contract of defendant to keep street in safe condition, etc., held not to be variance with facts alleged. Hoyt v. Independent Asphalt Pav. Co., 52 Wash. 672, 101 P 367.

69. Search Note: See Highways, Cent. Dig §§ 510-542; Dec. Dig. §§ 201-216; Municipal Corporations, Cent. Dig. §§ 1695-1771; Dec. Dig. §§ 811-826; 28 Cyc. 1446-1463, 1465-1522, 1524-1526, 1530-1532; 15 A. & E. Enc. L. (2ed.) 420; 27 Id. 118, 148, 168; 20 A. & E. Enc. P. & P. 949.

70. Whether plaintiff's injuries were caused by defect described in written notice to town after accident was question of fact for jury. Hignett v. Norridgewock [Me.] 73 A 1086. Whether defect caused injuries complained of was question for jury. Graham v. Rockford, 142 Ill. App. 306.

71. Questions of fact such as negligence in the use of streets (see ante, § 12), negligence of municipalities (see ante, § 14A) and the like, have been referred to.

72. Search Note: See Highways, Cent. Dig. §§ 510-542; Dec. Dig. §§ 201-216; Municipal Corporations, Cent. Dig. §§ 1695-1771; Dec. Dig. §§ 811-826; 28 Cyc. 1446-1463, 1465-1522, 1524-1526, 1530-1532; 15 A. & E. Enc. L. (2ed.) 420; 27 Id. 118, 148, 168; 20 A. & E. Enc. P. & P. 949.

gence must conform to the usual rules in defining the law[73] and submitting the issues involved.[74] They must conform to the evidence[75] and pleadings[76] and must

73. Instruction to effect that plaintiff must prove negligence as alleged held proper. Merklinger v. Lambert, 76 N. J. Law, 806, 72 A 119. Instruction held to sufficiently state burden of plaintiff in establishing negligence and negativing contributory negligence. Stedman v. O'Neil [Conn.] 72 A 923. Runaway caused by defendant leaving large blocks of granite in highway. Id. Instruction as to **duty of driver of vehicle** to have foreseen particular injury which happened was harmless to defendant since it imposed greater duty than law required. Ford v. Hine Bros. Co., 237 Ill. 463, 86 NE 1051. Instructions as to duty in hitching horse approved. Robinson v. Morris & Co. [R. I.] 73 A 611. Instruction as to **duty of driver of oxen,** which ran into plaintiff's buggy, held bad by use of disjunctive "or," since thereby defendant would have been entitled to verdict though he used no preventive measures immediately prior to collision. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853. Instruction in action where team of oxen collided with plaintiff's buggy held erroneous as limiting preventive efforts to time of accident. Id. Instructions as to **duty of driver of automobile** confined to position of parties at time of accident held not objectionable as stating rule that defendant might not lawfully travel on left-hand side of road. Irwin v. Judge, 81 Conn. 492, 71 A 572. Instruction in action for injuries occasioned by automobile held not objectionable as rendering defendant liable to plaintiff for disregard of ordinance, wholly irrespective of whether the omission contributed to injury. Fenn v. Clark [Cal. App.] 103 P 944. Instruction as to rate of speed of automobile must be considered in view of evidence. Irwin v. Judge, 81 Conn. 492, 71 A 572. Instruction held to properly charge law as to **duty of municipality in respect to streets** and not render defendant an insurer. Neel v. King County, 53 Wash. 490, 102 P 396. Instruction as to duty of city when permission is given to maintain holes in sidewalk held proper. Arkansas City v. Payne [Kan.] 102 P 781. Instruction as to duty of care in repairing crossing held not open to objection in that words "streets and walks" were included, there being no contention that same degree of care was not required for place in hand. Graham v. Rockford, 238 Ill. 214, 87 NE 361, afg. 142 Ill. App. 306. Instruction held not open to objection that it was calculated to suggest that city was guilty of negligence in selecting wood instead of cement or other material for crossing over culvert. Id. Instruction charging city with duty to keep highway safe from curb to curb if it imposed too great duty was not prejudicial to plaintiff. Thunborg v. Pueblo, 45 Colo. 337, 101 P 399. Where material question was whether hole in sidewalk was properly guarded so that its dangerous character might be observed, instruction was proper without reciting evidentiary facts of case. Palmer v. Schultz, 138 Wis. 455, 120 NW 348. Instruction held defective as failing to state measure of city's duty with reference to maintenance of sidewalks. Scurlock v. Boone [Iowa] 120 NW 313. Under consideration of all instructions, charge as to **abutter's duty** in respect to keeping manhole cover in safe condition was sufficient. Clack v. Kansas City Elec. Wire Subway Co. [Mo. App.] 119 SW 1014. Principle that **question of contributory negligence** was for jury held to be applied properly in instruction. Merklinger v. Lambert, 76 N. J. Law, 806, 72 A 119. Accepted definition of ordinary care, though it applies to class rather than to particular individual, is not unfair to plaintiff. City of Toledo v. McNamara, 12 Ohio C. C. (N. S.) 204. Instruction as to ordinary care approved. Arkansas City v. Payne [Kan.] 102 P 781. Where contributory negligence is specifically alleged, city is entitled to definite charge. Toledo v. Strasel, 12 Ohio C. C. (N. S.) 212. Instruction denying right of recovery if plaintiff was guilty of any contributory negligence disapproved, since plaintiff may be guilty of slight negligence. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Instruction as to contributory negligence held not prejudicial to defendant, when using words "intensely dark," the degree of darkness was fact to be considered by jury. Stock v. Tacoma, 53 Wash. 226, 101 P 830. Criticism of instruction as to ordinary care in that words "under the same or similar circumstances" should have been used rather than "under circumstances like those disclosed by the testimony in this case" held unsubstantial. Palmer v. Schultz, 138 Wis. 455, 120 NW 348. Omission of word "ordinarily" in instruction defining due care held harmless. Id. Defendant is entitled to have all facts constituting contributory negligence, and which are urged as defense, submitted to jury in proper charge. St. Louis S. W. R. Co. v. Samuels [Tex.] 123 SW 121. Instruction as to contributory negligence held erroneous as excluding facts which might have been considered in deciding question. Id. Instruction held not improper as singling plaintiff out as object of special care but rule was applied properly to facts. Erks v. Ewers [Iowa] 119 NW 603. Defect in instruction as confining plaintiff's due care to defective conditions of which he had knowledge held cured by other instructions. Van Cleef v. Chicago, 240 Ill. 318, 88 NE 815, afg. 144 Ill. App. 488.

74. Instruction in action for injuries from defective sidewalk held to fairly present case to jury. York v. Everton, 135 Mo. App. 607, 116 SW 490. Instructions held to properly present issue as to whether street at place where personal injuries were sustained was reasonably safe for public travel. City of Louisville v. Tompkins [Ky.] 122 SW 174. Instruction in action where horse was frightened by street car and swerved against pile of dirt in street whereby plaintiff was injured held to comprehend and call attention to all matters necessary to entitle plaintiff to recover. Turner v. Southwest Missouri R. Co. [Mo. App.] 120 SW 128.

75. Charge embracing abstractly correct legal principle as to side of road occupied by party to collision held not erroneous as inapplicable to evidence. McGee v. Young [Ga.] 64 SE 689. In action for injuries sus-

not give undue prominence to certain evidence,[77] be misleading,[78] assume disputed facts as proven,[79] or invade the province of the jury.[80] In determining whether instructions are erroneous, the charge must be considered as a whole.[81] Error may

tained by pedestrian who was struck by automobile, instruction as to violation of speed ordinance was applicable to evidence. Hough v. St. Louis Car Co. [Mo. App.] 123 SW 83. In action for injuries sustained by pedestrian who was struck by automobile, instruction as to due care of plaintiff held erroneous as being not only unsupported by evidence but as presumption against evidence. Id. Evidence considered and instruction defining **liability of city,** if lights and barriers about excavation were removed, held not objectionable as being inapplicable to evidence. City of Richmond v. Poore [Va.] 63 SE 1014. Instruction submitting question of whether highway at place of injury was sufficient for public use held to fairly present issuable facts though two highways were involved. Maxwell v. Wellington, 138 Wis. 607, 120 NW 505. Instruction as to topography of place of accident in determining whether city exercised reasonable care should not be given when there was no evidence that walk should have been at different grade. Smith v. Yankton [S. D.] 121 NW 848. Submission of question whether there was depression or washout in highway which extended into beaten path held not justified by evidence, being clear misunderstanding of same. Collins v. Watervliet, 130 App. Div. 291, 114 NYS 346.

76. Instruction requiring jury to consider amount of labor and money to be expended in repairing road was not applicable to action for injuries caused by defect. Dralle v. Reedsburg, 140 Wis. 319, 122 NW 771. Instruction as to contributory negligence of plaintiff in assuming to walk along edge of excavation, when plaintiff had defective vision and knew of defect in street, was properly submitted in action where defendant pleaded contributory negligence generally. St. Louis S. W. R. Co. v. Samuel [Tex. Civ. App.] 116 SW 133. Instructions held not to refer to law of road wherefore they were proper, there being no attempt to work out case on different theory from that set out in complaint. Apperson v. Lazro [Ind. App.] 88 NE 99. Instruction denying recovery for loss of time was properly refused, there being no claim or proof of such damages. Dralle v. Reedsburg, 140 Wis. 319, 122 NW 771.

77. Instruction as to duty of city in guarding sidewalk held proper, facts pointed out being merely mentioned as calling attention of jury thereto in considering negligence. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Illustration by court in charging as to contributory negligence held not to be charge upon facts prohibited by Rev. Laws, c. 173, § 80. Picquett v. Wellington-Wild Coal Co., 200 Mass. 470, 86 NE 899. **Comments by judge** on testimony are proper where facts are left for jury's determination. Merklinger v. Lambert, 76 N. J. Law, 806, 72 A 119.

78. Held misleading: Instruction as to burden of proof and contributory negligence. Hainlin v. Budge, 56 Fla. 342, 47 S 825. Instructions as to duty of municipality as to **defective streets** held not conflicting and therefore misleading. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Instructions setting forth injury held properly refused as taking no account of question whether plaintiff was injured thereby. Id. Charge that water company might lay mains in street, that it was public utility, were abstractly correct but were properly refused in action for negligent maintenance of fire plug in street whereby injuries were occasioned. Decatur Waterworks Co. v. Foster [Ala.] 49 S 759.

Held not misleading: Use of word "injured" without stating that death was caused thereby held not misleading. Mooney v. Chicago, 144 Ill. App. 472. Instruction as to duty of city in respect to repairing crosswalk in referring to "streets and walks," duty being same in both instances. Graham v. Rockford, 238 Ill. 214, 87 NE 361, afg. 142 Ill. App. 306. Instruction held not to be inconsistent as explaining that unlawful speed of car alone did not warrant verdict. Delfs v. Dunshee [Iowa] 122 NW 236. Addition of another ground of negligence for which city would be liable, in that fire hydrant was maintained at improper place, which instruction apparently contradicted instruction as to negligence in permitting hydrant to become covered by weeds **held harmless.** Thunborg v. Pueblo, 45 Colo. 337, 101 P 399.

79. Instruction as to notice to city, where walk is not repaired for long time held not to be open to objection that it assumed disputed fact as proven. Graham v. Rockford, 238 Ill. 214, 87 NE 361, afg. 142 Ill. App. 306. Instruction in action for injuries sustained by driver of buggy which was run into by team of oxen held erroneous in that it pretermitted competency of driver of oxen. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853. Instructions held erroneous as assuming an absence of fault on part of driver in "sudden fright" of his oxen, who ran into plaintiff's buggy. Id.

80. Instruction held erroneous as invading province of jury when assuming that leaving wagon unattended was violation of ordinance and in effect negligent act, that being jury question. Southern Hardware & Supply Co. v. Standard Equipment Co. [Ala.] 48 S 357. In action for injuries by falling into excavation adjoining sidewalk, instruction that if plaintiff knew of condition of sidewalk and assumed risk was properly refused as invading province of jury. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Instruction that, if mother sent child into street in care of guardian and defendant maintained defective railing about excavation in negligent manner, plaintiff should recover, held erroneous as taking question of contributory negligence from jury. Cronjaeger v. City & Suburban Homes Co., 119 NYS 131.

81. Instructions as a whole in action for injuries sustained by falling into excavation held not erroneous. Shores v. St. Joseph, 134 Mo. App. 9, 114 SW 548. Held that jury sufficiently understood from whole

arise from the refusal to give requested instructions,[82] but requested instructions are properly denied when violative of the general rules,[83] or when substantially included in the charges given.[84]

of charge that they were to determine facts as to necessity of wagon's being on left of street and whether driver used reasonable care in avoiding collision with plaintiff's automobile. Lawson v. Wells Fargo & Co., 113 NYS 647. Where negligence had been correctly defined in one instruction, another charge could not be objected to as not indicating care defendant must exercise. Delfs v. Dunshee [Iowa] 122 NW 236. Charge as to contributory negligence when considered as whole, approved. Robinson v. Morris & Co. [R. I.] 73 A 611. Instruction **held not misleading** as stating question whether guard was necessary since negligence in relation to guards was correctly charged. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. In action for injuries sustained by bicyclist colliding with automobile, instruction as to contributory negligence held not misleading when considered as a whole. Merklinger v. Lambert, 76 N. J. Law, 806, 72 A 119. Where instructions as a whole clearly limited city's liability to defect in sidewalk at place of accident, jury were not misled. Robinson v. Omaha [Neb.] 121 NW 969. Instruction as to notice and time for repairing defective sidewalk when considered as whole held not misleading. Revis v. Raleigh, 150 N. C. 348, 63 SE 1049.

82. Refusal of requested instruction as to duty of board of public works in repairing sidewalks held error under facts. Taylor v. Manson, 9 Cal. App. 382, 99 P 410. Instruction to find for defendant if jury believed evidence and facts hypothesized, which were relied upon in pleadings, was correct and should have been given. Southern Hardware & Supply Co. v. Standard Equipment Co. [Ala.] 48 S 357.

83. Requested instruction to effect that plaintiff's right to recover was not defeated in spite of his negligence held properly refused as not embodying **correct proposition of law** pertinent to case. Merklinger v. Lambert, 76 N. J. Law, 806, 72 A 119. Requested instruction as to contributory negligence of operators of car in attempting to pass wagon held properly refused since question was whether reasonable care was exercised, not whether operators believed they exercised due care. Monumental Brew. Co. v. Larrimore, 109 Md. 682, 72 A 596. Refusal to submit special question as to whether plaintiff was under influence of liquor at time of accident held proper, such state being merely evidence bearing upon defense of contributory negligence. Palmer v. Schultz, 138 Wis. 455, 120 NW 348. Requested charge held erroneous as failing to hypothesize notice of plaintiff's of dirt about excavation. Montgomery City Council v. Bradley [Ala.] 48 S 809. Instructions as to duty of prudent man in fastening team were properly refused where statue (Gen. Laws 1896, c. 74, § 4) defined such duty. Robinson v. Morris & Co. [R. I.] 73 A 611.

Held inapplicable: Requested instruction dealing with knowledge of **defective sidewalk** held properly refused as unsupported by evidence. Scurlock v. Boone [Iowa] 121 NW 369. Requested instruction that defendant was not liable if plaintiff was not injured by defective sidewalk should have been given, there being evidence of fall from curb. Taylor v. Manson, 9 Cal. App. 382, 99 P 410. Instruction as to failure to use reasonable precautions held properly refused as inapplicable where issue made by pleadings was failure to place barriers about excavation. Montgomery City Council v. Bradley [Ala.] 48 S 809. Where evidence of existence of defects in street for long period of time was uncontradicted, court was warranted in treating such fact as admitted. Refusal of instruction as to reasonable time for repairs was harmless. Board of City of Frankfort Councilmen v. Downey [Ky.] 118 SW 284. Where runaway was caused by act of defendant in leaving large blocks of granite in highway, requested instructions as to ascertaining horse's nature were properly refused as inapplicable to evidence. Stedman v. O'Neil [Conn.] 72 A 923. Requested instruction to effect that **negligence of plaintiff** must have contributed to occurrence of injury rather than its aggravation held properly refused as inapplicable. Merklinger v. Lambert, 76 N. J. Law, 806, 72 A 119. Requested instruction as to plaintiff's forgetfulness of condition of street was properly refused, there being no evidence justifying such charge. Knight v. Kansas City [Mo. App.] 119 SW 990. Instruction as to plaintiff's duty to observe instructions and defects held properly refused where accident occurred at night, and obstructions did not cause injury. Town of New Castle v. Grubbs, 171 Ind. 482, 86 NE 757. Instruction as to **use of road** requiring first of two automobiles moving in same direction to stop and permit passage of second car held inapplicable. Mark v. Fritsch, 195 N. Y. 282, 88 NE 380. Requested instruction based upon conjecture that street car drew open gate of wagon by suction in passing, whereby conductor was injured. Monumental Brew. Co. v. Larrimore, 109 Md. 682, 72 A 596. Instruction submitting question of whether oxen which collided with plaintiff's buggy were property of defendant refused where no evidence on such point. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853.

Held misleading: Instruction as to notice of defect in sidewalk properly refused. Fleming v. Wilmerding Borough, 223 Pa. 295, 72 A 624. Requested instruction as to intoxication of plaintiff was properly refused as covering vague condition of evidence, and such charge would tend to confuse issues. Dunkin v. Hoquiam [Wash.] 105 P 149.

Held argumentative: Charge that roads were as much for use of steers as horses was properly refused as argumentative. Cohn & Goldberg Lumber Co. v. Robbins [Ala.] 48 S 853. Action for injuries where oxen collided with buggy. Id. Requested charge as to ordinary highways and ordinary experiences properly refused as argumentative. Where runaway was caused by defendant leaving large blocks of granite in

§ 16. *Injury to, obstructions of, or encroachment on, street or highway.*[85]—See 11 C. L. 1774—Since public highways are for the exclusive use of the public,[86] they should be kept free from obstructions,[87] to their full width [88] and depth,[89] and private encroachments thereon are unlawful.[90] Such private encroachments cannot be authorized by municipalities [91] or by city officials unless legislative authority is delegated.[92] At common law, persons who cut into or across a highway are required to restore such highway to its former condition,[93] and, where the cut across such highway requires a bridge, one making such cut has the duty of constructing such bridge [94] and also of keeping the same in repair.[95] The rule preventing encroach-

highway. Stedman v. O'Neil [Conn.] 72 A 923.

Submitting question of law: Instruction held properly refused as submitting question of law to jury as to what constituted reasonable precaution in guarding excavation. Montgomery City Council v. Bradley [Ala.] 48 S 809.

Assuming disputed facts as proved: Requested charges held faulty as assuming that there were "circumstances surrounding hole into which plaintiff's mule fell" when "circumstances" in question was the dirt taken from excavation, and evidence as to this was in conflict. Montgomery City Council v. Bradley [Ala.] 48 S 809.

84. Refusal of requested instruction as to duty in caring for sidewalk held not erroneous where substance thereof was included in another instruction which had been given. Karczenska v. Chicago, 144 Ill. App. 516; Palmer v. Schultz, 138 Wis. 455, 120 NW 348. Instructions held to sufficiently submit rules of city's liability wherefore refusal of requested instruction was not erroneous. City of Burnside v. Smith [Ky.] 119 SW 744. Instruction as to reasonable care of streets was proper, wherefore requested instruction not adding words "by night as well as by day" was properly refused. Thunborg v. Pueblo, 45 Colo. 337, 101 P 399. Instruction held to properly charge as to slipperiness of sidewalk as well as defective condition, wherefore requested instruction was properly refused. Smith v. Yankton [S. D.] 121 NW 848. Refusal of instruction that city would not be liable for particular defect described was not erroneous where jury had been properly instructed as to liability for dangers which were not apprehended. Kelly v. New York, 129 App. Div. 658, 114 NYS 178. Refusal of requested instruction as to ordinary care and its exercise held proper since such instruction was included in those given. Bohlen v. Chicago City R. Co., 141 Ill. App. 261; Karczenska v. Chicago, 239 Ill. 483, 88 NE 188. Requested instruction properly refused when court had charged that "plaintiff could not recover if accident would not have happened except because of joint negligence of plaintiff and chauffeur." Merklinger v. Lambert, 76 N. J. Law, 806, 72 A 119.

85. **Search Note:** See notes in 12 L. R. A. 115; 14 Id. 556; 18 Id. 154; 19 Id. 643; 26 Id. 340; 39 Id. 662; 42 Id. 814; 1 L. R. A. (N. S.) 127; 4 Id. 571; 7 Id. 58, 72, 243; 8 Id. 227; 12 Id. 1152, 1164; 15 Id. 1269; 1 A. S. R. 840; 14 Id. 435.

See, also, Highways, Cent. Dig. §§ 417-455; Dec. Dig. §§ 153-164; Municipal Corporations, Cent. Dig. §§ 1492-1508; Dec. Dig. §§ 691-700; 28 Cyc. 892-906; 15 A. & E. Enc. L. (2ed.) 491, 507; 27 Id. 148, 168; 20 A. & E. Enc. P. & P. 908, 922, 946.

86. See ante, § 1.

87. Public streets and sidewalks are presumed to be free from obstructions. Record v. Pennsylvania R. Co., 76 N. J. Law, 800, 72 A 62. Predominant interest in highway is free and unobstructed use thereof by general public. City of Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403.

88. Record v. Pennsylvania R. Co., 76 N. J. Law, 800, 72 A 62. City streets are for use of public "from side to side and from end to end." Caldwell v. George [Miss.] 50 S 631; Chapman v. Lincoln [Neb.] 121 NW 596; Sullivan Advertising Co. v. City of New York, 61 Misc. 245, 113 NYS 893; Lacey v. Oskaloosa [Iowa] 121 NW 542; Pickrell v. Carlisle [Ky.] 121 SW 1029. Public is not confined solely to graded portion of road. South Texas Tel. Co. v. Tabb [Tex. Civ. App.] 114 SW 448. At common law, duty or obligation in respect to traveling public is not limited to area upon highway within lines of its right of way. City of Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403. Rule preventing encroachments is not confined to beaten track used by travelers, but it embraces all parts of highway. Sweet v. Perkins, 196 N. Y. 482, 90 NE 50. Public has paramount right to use of streets in all its parts. Tolman & Co. v. Chicago, 240 Ill. 268, 88 NE 488, rvg. decision 145 Ill. App. 234.

89. Dominion of public is not confined to obstruction on surface of street, but extends with equal emphasis to encroachments either above or below surface of street. McCrorey v. Garrett [Va.] 64 SE 978.

90. Private encroachments on public ways regardless of source from which they emanate, are unlawful. Tolman & Co. v. Chicago, 145 Ill. App. 234, rvd. 240 Ill. 268, 88 NE 488. No private person has right to place or cause obstruction which interferes with right to use of highway. Taylor v. Winsor [R. I.] 73 A 388. Private use which in any degree detracts from, hinders or prevents its free use to its full extent is obstruction or incumbrance. Lacey v. Oskaloosa [Iowa] 121 NW 542. Private individual has no right to appropriate portion of public street or sidewalk. Ryan v. Allen, 138 Ill. App. 52.

91. Lacey v. Oskaloosa [Iowa] 121 NW 542.

92. In absence of legislative authority, city officials cannot permit permanent obstruction of street. Caldwell v. George [Miss.] 50 S 631.

93, 94. City of Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403.

95. City of Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403. Railroad at common

ments is applicable though such encroachment is gradual.[96] The right of the public is not, however, an absolute right,[97] since it is subject to such incidental and temporary obstructions as necessity may require,[98] and ordinarily the question as to whether a particular use involves an improper obstruction is for the jury.[99] Abutting owners, though not entitled to obstruct the public way,[1] are entitled to make such temporary uses of a highway as are reasonable and necessary,[2] and the extent of such use depends upon circumstances.[3] Such obstructions are usually deemed

law has duty of constructing and maintaining crossings, including viaducts and approaches, when interfering with established highway. Id.

96. City of Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403.

97. Tolman & Co. v. Chicago, 240 Ill. 268, 88 NE 488.

98. Tolman & Co. v. Chicago, 240 Ill. 268, 88 NE 488. Extent of right to interfere with public use depends upon necessity of case so far as individual is concerned and reasonableness of use. Id.

99. In action for injuries caused by wire located in public road, question of whether it was so located as to incommode public was for jury. South Texas Tel. Co. v. Tabb [Tex. Civ. App.] 114 SW 448. Grant to use of road by telephone company was upon condition that public be not incommoded. Sayles' Ann. Civ. St. 1897, art. 698. Id.

1. Abutting owners cannot obstruct the public way. Smith v. Preston, 104 Me. 156, 71 A 653. Abutting owners cannot obstruct or encroach upon public rights or endanger safety of travelers. Sweet v. Perkins, 196 N. Y. 482, 90 NE 50. Proprietor of land may maintain structure thereon up to line of public way, but he cannot unreasonably obstruct such way with impunity. Smith v. Preston, 104 Me. 156, 71 A 653. Owner of land may not collect and **discharge surface waters** so as to cause an obstruction. Id. One may not use his land so as to injure neighbors' person while rightfully traveling upon public way. Id.

2. Sweet v. Perkins, 196 N. Y. 482, 90 NE 50. Abutting owner has right to use street in reasonable manner in improving property. Button v. Louisville [Ky.] 118 SW 977. Abutting owner has right to use portion of public highway for certain purposes for temporary period and in reasonable manner. Right may be exercised in derogation of rights of public. Davis v. Thompson, 134 Mo. App. 13, 114 SW 550. Abutting owner has right to exclusive occupation of limited portion of street in front of property, for such temporary purposes incidental to proper use and enjoyment of his premises, as necessity may require. Longenecker v. Wichita R. & L. Co. [Kan.] 102 P 492. Necessity justifying temporary encroachment on highway need not be absolute. It is sufficient if it is reasonable according to usages of reasonable men, with due regard for public convenience. Id. Abutting owner may make any use of property that is subject to easement of street, that does not impair its use for any purpose while it may be used as street. Kellogg v. Cincinnati Trac. Co., 80 Ohio St. 331, 88 NE 882. May place temporary obstruction in highway. Davis v. Thompson, 134 Mo. App. 13, 114 SW 550. Obstructions placed in highway by abutting owner for temporary purpose must be removed within reasonable time. Id. Dominant idea of common law in use of street by abutter is reasonableness. Pickrell v. Carlisle [Ky.] 121 SW 1029. The public will not be heard in equity to complain of an abutting owner's act which does not unreasonably interfere with the use of the street. Id.

3. Judgment of municipal authorities and universal custom may be considered in determining whether obstruction of street is unreasonable. Button v. Louisville [Ky.] 118 SW 977. Extent of use which abutting owner may make of street in improving property depends upon circumstances. Id. Question of what constitutes reasonable time in which abutting owner may remove temporary obstruction is **question of law and fact.** Davis v. Thompson, 134 Mo. App. 13, 114 SW 550. Whether use of skids to convey merchandise to and from building is obstruction which is reasonable is question of fact. Tolman & Co. v. Chicago, 240 Ill. 268, 88 NE 488, rvg. 145 Ill. App. 234. Whether use of highway by abutting owner which caused obstruction by which plaintiff was injured was necessary held for jury. Sweet v. Perkins, 196 N. Y. 482, 90 NE 50. **Placing fence wire in highway** was not negligence though same was of nature to frighten horses. Davis v. Tompson, 139 Mo. App. 13, 114 SW 550. Abutting owner did not leave fence wire removed from fence in highway an unreasonable length of time, where it was only permitted to remain while laborers obtained their dinner. Id. Not liable for injury where horse became frightened. Id. **Owner of livery barn** located on public street has no right to keep horses habitually lodged in street, to use street for storage of vehicles or like uses. Longenecker v. Wichita R. & L. Co. [Kan.] 102 P 492. In certain cases temporary use of street for such purposes may be reasonable. Id. Use of **barrier platform and skids** held reasonable. Tolman & Co. v. Chicago, 240 Ill. 268, 88 NE 488, rvg. 145 Ill. App. 234.

NOTE. Loading, unloading and depositing goods on sidewalk: Merchants, tradesmen and others may lawfully obstruct the sidewalk in front of their premises, temporarily and to a reasonable extent, in loading, unloading, or transferring their wares to and from their premises; and in receiving or sending out goods they may have vehicles standing in the street for a reasonable time (Kohlhof v. Chicago, 192 Ill. 249, 61 NE 446, 85 Am. St. Rep. 335; Brauer v. Baltimore Refrigerating & Heating Co., 99 Md. 367, 58 A 21, 105 Am. St. Rep. 304, 66 L. R. A. 403; State v. Edens, 85 N. C. 522; Attorney General v. Morris, etc., R. Co., 19 N. J. Eq. 386;

reasonable when not prohibited by the city.[4] The rule of lateral support binds abutting owners,[5] and a city charged with the control of streets may enjoin excavations whereby lateral support will be removed and the highway destroyed.[6] Whether an excavation is so close as to endanger a highway and be a nuisance is a question of fact.[7] An abutter's right to maintain encroachments which are reasonable will be protected by injunction.[8] Municipalities may usually regulate obstructions, encroachments, or prohibit them entirely,[9] by ordinances which are reasonable in application.[10] An ordinance forbidding the maintenance of doorsteps encroaching on a highway does not apply to a theoretical street line but to the street as opened.[11] Municipal grants to individuals authorizing encroachments are mere revocable licenses.[12] Municipal consent to the maintenance of a grating in a sidewalk may be

Stahle v. Poth, 220 Pa. 355, 69 A 864). Merchants may place a skid temporarily across the sidewalk for the purpose of moving goods from their store to a truck or delivery wagon (Welsh v. Wilson, 101 N. Y. 254, 54 Am. Rep. 698, 4 NE 633; Gates & Son Co. v. Richmond, 103 Vt. 702, 49 SE 965).

But the right to so obstruct streets and sidewalks must be exercised only when necessary and then with a due regard to the rights of adjoining proprietors to enjoy their premises, and also with due regard to the right of the public to use the thoroughfare for purposes of travel (Brooks v. Atlanta, 1 Ga. App. 678, 57 SE 1081; McCormack v. Boston El. R. Co., 188 Mass. 342, 74 NE 599; Flynn v. Taylor, 127 N. Y. 596, 28 NE 418, 14 L. R. A. 556; People v. Cunningham, 1 Denio [N. Y.] 524, 43 Am. Dec. 709; Kurlanchick v. Sklamberg, 56 Misc. 473, 107 NYS 117; Vallo v. U. S. Exp. Co., 147 Pa. 404, 23 A 594, 14 L. R. A. 743, 30 Am. St. Rep. 741; Hobart v. Milwaukee City R. Co., 27 Wis. 194, 9 Am. Rep. 461; Attorney General v. Brighton & H. Co-op. Supply Ass'n, 1 Ch. Div. 276). The maintenance of a bridge across a sidewalk for hours during each business day, over which goods are conveyed to and from a store, is a public nuisance (Callanan v. Gilman, 107 N. Y. 360, 14 NE 264, 1 Am. St. Rep. 831, 10 L. R. A. 490). The maintenance of a platform three and a half feet in height, four feet wide and over fifty feet long, on a sidewalk for the purpose of loading ice from a factory several hours each day on wagons standing at right angles to the platform and across the sidewalk, may be enjoined at the instance of the adjacent property owners (Brauer v. Baltimore Refrigerator & Heating Co., 99 Md. 367, 58 A 21, 105 Am. St. Rep. 304, 66 L. R. A. 403). And keeping or storing a delivery wagon in a public street habitually or perpetually is a nuisance which the city cannot authorize (Cohen v. New York, 113 N. Y. 532, 21 NE 700, 4 L. R. A. 406, 10 Am. St. Rep. 506). Bales of cotton in a business center obstructing the street and liable to be fired by passing engines are a nuisance (Marine Ins. Co. v. St. Louis, etc., R. Co., 41 F 643).

The right of the public to employ the streets for the purpose of travel and transportation is the paramount one, and that of the abutter to occupy them for other purposes is a permissive and subordinate one. The extent of the right of an abutting owner to obstruct a sidewalk in front of his establishment is not to be determined by the necessity of his business, but by the public convenience and the reasonable enjoyment by adjacent owners of their property. Brauer v. Baltimore Refrigerating & Heating Co., 99 Md. 367, 105 Am. St. Rep. 304, 58 A 21, 66 L. R. A. 403.—From 125 Am. St. Rep. 338.

4. Where city does not prohibit obstructions in streets, their presence is deemed usual, provided it is not an unreasonable use. Pickrell v. Carlisle [Ky.] 121 SW 1029. Abutting owner may not make obstruction in street which municipal authorities forbid. Button v. Louisville [Ky.] 118 SW 977.

5. Adlin v. Excelsior Brick Co., 129 App. Div. 713, 113 NYS 1017. Abutting owner has no right to excavate premises so as to destroy lateral support of street. Village of Haverstraw v. Eckerson, 124 App. Div. 18, 108 NYS 506. Abutting owner is liable for damage caused by excavation so close as to cause highway to cave in. Adlin v. Excelsior Brick Co., 129 App. Div. 713, 113 NYS 1017.

6. City is charged with control and supervision of streets (Laws 1897, p. 414, c. 414, § 140). Village of Haverstraw v. Eckerson, 124 App. Div. 18, 108 NYS 506.

7. Adlin v. Excelsior Brick Co., 129 App. Div. 713, 113 NYS 1017. In determining whether excavation threatens to endanger safety of highway, jury may consider closeness of crest to street, perpendicular depth of excavation, length of slope, base of section, nature of earth and like. Id.

8. Use of skids to convey merchandise held to be necessary and reasonable entitling plaintiff to injunction against interference with such use. Tolman & Co. v. Chicago, 240 Ill. 268, 88 NE 488, rvg. 145 Ill. App. 234.

9. Pickrell v. Carlisle [Ky.] 121 SW 1029.

10. White v. Philadelphia, 223 Pa. 563, 72 A 856.

11. Ordinance forbidding maintenance of doorsteps encroaching on highway. White v. Philadelphia, 223 Pa. 563, 72 A 856. Ordinance was intended to define limit of encroachment. Id. Maintenance of doorsteps encroaching on sidewalk held not to be violative of ordinance, and nonsuit granted as to person injured in stumbling thereon. Id.

12. Resolution authorizing erection of hitching posts along lines of public square is mere license subject to revocation. Lacey v. Oskaloosa [Iowa] 121 NW 542. Granting right to maintain structures on sidewalk is merely permissory subject to revocation. Chapman v. Lincoln [Neb.] 121 NW 596.

presumed from lapse of time.[13] A permit authorizing the erection of a shed over a sidewalk during repair of a building does not authorize the erection of billboards on such shed.[14] Encroachments upon buildings should not interfere with adjoining owner's easements,[15] and charter provisions, authorizing permits for encroachments, frequently provide for notice to the adjoining owners.[16] The improper obstruction of a highway is generally recognized to be a nuisance [17] and may be abated by a court of equity [18] at the instance of the public [19] or a private person suffering special in-

13. Existence of gratings in good condition in sidewalk for period of five yeare raises presumption of official acquiescence and consent. Tucker v. O'Brien, 117 NYS 1010.

14. Either expressly or by implication. Sullivan Advertising Co. v. New York, 61 Misc. 425, 113 NYS 893.

15. Abutting owner may construct overhead bridge for purpose of transporting freight over street, under city license, where there is no interference with light and air of adjoining owners and supports are not in street. Kellogg v. Cincinnati Trac. Co., 80 Ohio St. 331, 88 NE 882. Erection of fire escape by hotel owner which prevented free and unobstructed use of alley held to be violation of adjoining owner's easement. Fact that building of fire escape was pursuant to order of factory inspector of state held immaterial. Gebhart v. Graves, 36 Pa. Super. Ct. 228.

16. Under Baltimore City Charter (Laws 1898, p. 241, c. 123, as amended by Laws 1900, p. 117, c. 109), § 37, requiring notice of application for permit to maintain encroachments, such notice must be served upon "adjoining" property owner. Frallnger v. Cooke, 108 Md. 682, 71 A 529. Notice need not be served upon owner of property on other side of alley which intervened, where encroachment on alley was sought to be maintained. Id. Under Baltimore City Charter (Laws 1898, p. 241, c. 123, as amended by Laws 1900, p. 117, c. 109), § 37, as to encroachments, requirement of notice to adjoining property owners of filing of application for permit is not merely directory. Id. Appearance of property owner by attorney after application has been acted upon is not equivalent to notice under statute. Id.

17. McGuire v. Wilkes-Barre, 36 Pa. Super. Ct. 418. Obstruction upon street or highway is public nuisance. Stoutemeyer v. Sharp [Ark.] 116 SW 189. An unauthorized obstruction which unnecessarily impedes or incommodes lawfulness of highway is nuisance at common law. McCrorey v. Garrett [Va.] 64 SE 978. Any permanent structure which materially encroaches on public street and impedes travel is nuisance per se. Chapman v. Lincoln [Neb.] 121 NW 596; Pickrell v. Carlisle [Ky.] 121 SW 1029. An obstruction placed within public way is nuisance at common law as well as by statute, Rev. St. c. 22, § 5. Smith v. Preston, 104 Me. 156, 71 A 653. Obstruction upon public highways is nuisance. Rev. St. c. 38, div. 5, § 221. Tolman & Co. v. Chicago, 145 Ill. App. 234, case rvd. 240 Ill. 268, 88 NE 488. Under Rev. Codes, § 3656, any unlawful obstruction of clear passage of highway is nuisance. Stricker v. Hillis, 15 Idaho, 709, 99 P 831. Occupation of entire public street to exclusion of others is public nuisance. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733. If abutting owner by use of highway causes obstruction or endangers public right of user, such use is nuisance. Sweet v. Perkins, 196 N. Y. 482, 90 NE 50. Many uses or encroachments upon street are not nuisances, where they serve useful purpose and do not inconvenience public. Kellogg v. Cincinnati Trac. Co., 80 Ohio St. 331, 88 NE 882.

Held nuisance: Railroad. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733. Fence obstructing alley. Beard v. Hicks [Ala.] 50 S 232. Occupation of public streets by maintenance of houses. Nerio v. Maestretti, 154 Cal. 580, 98 P 860. Obstruction or encumbering of public roads by buildings, fences, or otherwise. Lacey v. Oskaloosa [Iowa] 121 NW 542. Placing pile of wood on highway though not encroaching on traveled portion. Taylor v. Winsor [R. I.] 73 A 388. Booths and privileges on sidewalk for vending fruits, shining shoes, etc., held nuisances per se. Chapman v. Lincoln [Neb.] 121 NW 596. Lunch stand erected and maintained by private person is permanent encroachment upon public sidewalk for private use. Ryan v. Allen, 138 Ill. App. 52. Obstruction to traffic of general public upon highway through crossings by private persons. City of Chicago v. Pittsburg, etc., R. Co., 146 Ill. App. 403.

Held not nuisance: Barrier platform and skids. Tolman & Co. v. Chicago, 240 Ill. 268, 88 NE 488, rvg. 145 Ill. App. 234. Viaduct over street constructed as authorized by law. Crofford v. Atlanta, B. & A. R. Co. [Ala.] 48 S 366. Reel three feet by four feet in size, used for telegraph wires and placed in street, is not nuisance though horse might be frightened thereby. Simonds v. Maine Tel. & T. Co., 104 Me. 440, 72 A 175. Evidence held to warrant finding that hedge fence was not obstruction within meaning of nuisance statute. Jones v. Thie [Iowa] 119 NW 616. Where city had never used or treated dedicated alley as public highway, embankment at entrance to such highway caused by grading of street was not nuisance. Lipscomb v. Bessemer [Ala.] 49 S 872. **Erection of suitable monument by municipal corporation** in public place so situated as not to interfere with free and reasonable use of highway by public is not purpresture or unlawful invasion of public highway. Wallace v. Canandaigua, 117 NYS 912. Passage of Gen. Sullivan and Continental Army is historical incident which may be commemorated by monument in street. Wallace v. Canandaigua, 117 NYS 912.

18. Court of equity will abate public nuisance created by presence of buildings and fences within limits of streets. Rudolph v. Elyton [Ala.] 50 S 80.

19. May be abated by pubic. McGuire v.

jury.[20] The power of municipalities to remove obstructions may usually be exercised whether the obstruction constitutes a nuisance or not,[21] and municipalities may frequently order the removal of an obstruction such as a sidewalk which does not conform to an established grade.[22] The right to maintain obstructions is not usually acquired by application of the doctrine of estoppel [23] or by lapse of time.[24] It is no excuse for unlawful obstructions that other people are also obstructing a sidewalk,[25] that abutting owners have consented to the maintenance of an obstruction,[26] that the obstruction is a public benefit,[27] or that there is ample room for traffic not-

Wilkes-Barre, 36 Pa. Super. Ct. 418. Public may maintain prosecution for nuisance where right to use street is appropriated. Stein v. Chesapeake & O. R. Co. [Ky.] 116 SW 733. Nuisance in public streets may be abated at instance of municipality. Pickrell v. Carlisle [Ky.] 121 SW 1029; Beard v. Hicks [Ala.] 50 S 232. Rev. St. c. 24, art. 5, § 62, par. 75, vests in city dual authority to abate nuisances and penalize parties responsible for existence. Tolman & Co. v. Chicago, 145 Ill. App. 234, case rvd. 240 Ill. 268, 88 NE 488. Under Code, § 5078, **city has duty of removing** nuisances. Lacey v. Oskaloosa [Iowa] 121 NW 542. Mayor and city council are bound to keep streets free from nuisances. Chapman v. Lincoln [Neb.] 121 NW 596. Where occupation of streets by buildings is public nuisance, which owner will not remove, board of public works may act. Nerio v. Maestretti, 154 Cal. 580, 98 P 860. Where injury of individual is common with that suffered by public, only remedy is by indictment or other public prosecution to abate the nuisance. Eaton v. Locke, 202 Mass. 324, 88 NE 838. If highway was obstructed, highway commissioner was proper person to cause renewal of such obstruction (Laws 1890, p 1198, c. 568, § 105). Steenburgh v. McRorie, 60 Misc. 510, 113 NYS 1118.

20. Closing or obstruction of public road once opened may be abated by private citizen. McGuire v. Wilkes-Barre, 36 Pa. Super. Ct. 418. Plaintiffs suffering special injury may seek abatement of nuisance in street. Atterbury v. West [Mo. App.] 122 SW 1106; Morse v. Whitcomb [Or.] 103 P 775, denying rehearing [Or.] 102 P 788; Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238. Under Rev. Code, § 3665, private person may maintain action for public nuisance if it is specially injurious to himself, but not otherwise. Stricker v. Hillis, 15 Idaho, 709, 99 P 831. It is essential to right of individual to relief against public nuisance that he is specially injured thereby. Stoutemeyer v. Sharp [Ark.] 116 SW 139; Eaton v. Locke, 202 Mass. 324, 88 NE 838. Where property owners suffer peculiar damage different from that sustained by general public, they **may enjoin obstruction** of street. Caldwell v. George [Miss.] 50 S 631. Plaintiff **held not specially injured** where his obstruction did not abut his premises, though it inconvenienced him in taking stock to river for water. Stoutemeyer v. Sharp [Ark.] 116 SW 139.

21. City council ordering removal of hitching posts which constitute obstruction in street is not required to determine that such posts constitute nuisance before ordering removal Lacey v. Oskaloosa [Iowa] 121 NW 542.

22. Under Laws 1905, p. 183, c. 115; St. 1898, § 893, subd. 11. Blanke v. Genoa Junction, 140 Wis. 211, 121 NW 132.

23. Municipality is not estopped from proceeding to abate an encroachment constituting nuisance by lapse of time. Tolman & Co. v. Chicago, 145 Ill. App. 234, case rvd. 240 Ill. 268, 88 NE 488. Failure to enforce ordinances against obstructions does not estop city from ordering their removal. Chapman v. Lincoln [Neb.] 121 NW 596. Doctrine of estoppel held inapplicable to prevent city's proceeding to remove obstructions of street since thereby city might indirectly vacate street, an act which it was not authorized to do directly. City of Paragould v. Lawson [Ark.] 115 SW 379.

24. Abutting owners acquire no permanent rights by erection of structures for their own use and benefit. Weber v. Detroit [Mich.] 16 Det. Leg. N. 832, 123 NW 540. Equitable **doctrine of laches** held inapplicable to defeat proceeding for removal of obstructions in street. Such proceeding by city was not for equitable relief. City of Paragould v. Lawson [Ark.] 115 SW 379. Under Kirby's Dig. § 5593, **statute of limitations** cannot be pleaded against city of second class in proceeding to remove obstructions in streets dedicated to public use. Id. Lapse of time cannot legalize public nuisance amounting to obstruction of public rights. Code Civ. Proc. § 3490. Nerio v. Maestretti, 154 Cal. 580, 98 P 860.

Adverse possession will lie: Right to maintain building encroaching on public street may be obtained as against other property owners on street by 20 years of adverse user. 556 & 558 Fifth Ave. Co. v. Lotus Club, 129 App. Div. 339, 113 NYS 886. Where owner of lot maintained similar obstruction for 15 years, present owner had easement to continue house steps which extended on to sidewalk. Pickrell v. Carlisle [Ky.] 121 SW 1029. Lot owner may obtain an exclusive right to occupy public street with building on partial obstructions by operation of statutes of limitation. Id. See, also, ante, § 7, and topic Adverse Possession.

25. Chapman v. Lincoln [Neb.] 121 NW 596.

26. Chapman v. Lincoln [Neb.] 121 NW 596. Abutting owners cannot appropriate public property to private uses. Sullivan Advertising Co. v. New York, 61 Misc. 425, 113 NYS 893. Erection of bill boards encroaching on public property. Id. Contract with abutting owner would not permit erection of signs which encroach upon public property. Id.

27, 28. Lacey v. Oskaloosa [Iowa] 121 NW 542.

withstanding the obstruction,[28] and the consent of municipal authorities will not legalize an unlawful obstruction.[29] A contention that the obstruction is in a public park does not apply when the city has control over public grounds.[30] In actions to prevent or abate an obstruction, it is usually essential to show plaintiff's right to sue[31] and that the obstruction is maintained in a public highway.[32] When the road is alleged to be a public highway by prescription, the defendant under a general denial may show that the use was permissive.[33] Equitable relief will not be granted where the injury is trivial,[34] or where the plaintiff is guilty of laches.[35] An action for damages is usually maintainable for the creation and maintenance of nuisances,[36]

29. Button v. Louisville [Ky.] 118 SW 977. Neither city nor its officers have power to grant right to place structures upon the highway so as to interfere with enjoyment of abutting owners. Merchants' Mut. Tel. Co. v. Hirschman [Ind. App.] 87 NE 238.

30. City council is not prevented from removing hitching posts which surround public park by fact that posts were not in street but on dividing line between street and park, since Code, §§ 751, 753, gives control over public grounds also. Lacey v. Oskaloosa [Iowa] 121 NW 542.

31. Under evidence of adverse possession to lot and by virtue of naked possession alone, plaintiff was entitled to maintain action for abatement of obstruction in front of such lot Brunner Fire Co. v. Payne [Tex. Civ. App.] 118 SW 602. Complaint held to state special injuries which public would not sustain. Stricker v. Hillis, 15 Idaho, 709, 99 P 831. As to right of municipalities to sue see Municipal Corporations, § 16.

32. Obstruction in alley dedicated to public use may be enjoined. Alexander v. Tebeau [Ky.] 116 SW 356. Complaint in action for abatement of obstruction, alleging simply public highway, is not demurrable for uncertainty because it fails to show whether same was "laid out, described or opened by" any legally constituted authority. Leverone v Weakley, 155 Cal. 395, 101 P 304. In action for abatement of obstruction, complaint need not state manner in which land became public highway. Id. Petition for removal of obstructions in street which failed to allege dedication of street or its use by prescription, whereby existence of street at place of obstruction was shown, held fatally defective. Hall v. Leeper [Ky.] 121 SW 683. In action to abate nuisance, averment that road had been used continuously for over 20 years as public highway was sufficient. Demurrer did not point out defect of absence of allegation that road had been used "adversely." Rudolph v. Elyton [Ala.] 50 S 80.

33. Dennis v. Gary [Wash.] 105 P 172.

34. Injunction is not available for trivial injury such as encroachment of fence on alley 1½ to 3 inches. Fralinger v. Cooke, 108 Md. 682, 71 A 529.

35. Under facts showing that plaintiff had acquiesced in siding laid and operated by brick company for 18 years, bill for injunction held to be barred by laches. Good v. Queen's Run Fire Brick Co., 224 Pa. 496, 73 A 906.

36. **Person suffering special injury** from obstruction in public way which is nuisance may recover damages from person creating it. Rev. St. c. 22, § 13. Smith v. Preston, 104 Me. 156, 71 A 653. Plaintiff cannot recover damages for obstruction of highway which was discontinued before such obstruction occurred. Pine Mountain R. Co. v. Finley [Ky.] 117 SW 413. Where erection of fence deprived no one of use of alley but deprived plaintiff of egress and ingress to his home, such plaintiff suffered injury different from public generally and has right of action for injury sustained. Beard v. Hicks [Ala.] 50 S 232. Where embankment on street constitutes nuisance, it is **immaterial** whether city exercised due care to keep it in proper condition, except as affecting extent of damages by lessening overflow of land. Martin v. St. Joseph, 136 Mo. App. 316, 117 SW 94. Where embankment was within city limits and constituted dam without sufficient outlet to prevent overflow of plaintiff's land, it was immaterial that outlet of culvert was without city limits. Id. **Party** such as owner of life estate in property who is in possession may maintain action for interference with his easement right to alley. Beard v. Hicks [Ala.] 50 S 232. **Complaint** alleging ownership of lot fronting alley and right to use such alley for ingress and egress is sufficient. Id. Compaint alleging negligent raising of embankment by railway company, that culvert was insufficient to carry off water, and that plaintiff's premises were flooded, held sufficient to allege nuisance entitling plaintiff to damages. Martin v. St. Joseph, 136 Mo. App. 316, 117 SW 94. **Evidence** of purchase of strip of land claimed by another for an alley was not inconsistent with claim of establishment of alley which was obstructed, by dedication or prescription. Beard v. Hicks [Ala.] 50 S 232. In action for wrongful obstruction of alley, plaintiff might show use of alley, its repair and inspection. Id. Plaintiff might show that such alley was his only means of egress and ingress to his home. Id. Where petition alleged obstruction of public highway, evidence of obstruction of public street was **not material variance.** Illinois Cent. R. Co. v. Smith [Ky.] 118 SW 933. Petition might be amended if defendant claimed surprise. Id. **Instruction** as to what constitutes public highway is not necessary where existence of highway is not put in issue by answer. Id. In action for obstruction of alley, charge which predicates finding for plaintiff only if alley was public for its entire distance was properly refused since alley may have been public only where obstruction was located. Beard v. Hicks [Ala.] 50 S 232. Charge which predicates recovery upon faot that fence was willfully and maliciously built but ignores count which did not charge "malicious" misconduct was properly re-

or when nuisances are permitted by municipalities[37] after notice and request to abate.[38] Injuries resulting from the erection of encroachments pursuant to lawful permit are damnum absque injuria,[39] and no recovery can be had for obstructions incidental to public improvements.[40]

Criminal liability. See 11 C. L. 1777—The interference with or obstruction of highways is often punishable under statutes as to nuisances,[41] though more specific provisions are frequently enacted.[42] Such statutes apply to present existing obstructions,[43] and criminal intent is usually essential.[44] It is also essential that the obstruction be in a public highway,[45] but a defendant cannot object to a prosecution on the ground that a highway properly opened was not opened to the proper width.[46] The placing of one obstruction does not authorize the placing of another.[47] When an obstruction is caused by the overflow of a dam, it is no excuse that such dam is necessary for the maintenance of a public utility,[48] and, if such an overflow is caused

fused. Id. Charge which limited plaintiff's recovery to actual damage was erroneous there being evidence warranting punitive damages. Id.

37. City which exercises dominion over street, and permits railroad to use it, is responsible for nuisance though it did not originally construct such street. Martin v. St. Joseph, 136 Mo. App. 316, 117 SW 94.

38. City which does not create nuisance cannot be held liable for its maintenance until after notice and request to abate. Martin v. St. Joseph, 136 Mo. App. 316, 117 SW 94; Gleason v. Kirksville, 136 Mo. App. 521, 118 SW 180. City is not liable for erection and construction of work in street where no ordinance for work is alleged and shown. Gleason v. Kirksville, 136 Mo. App. 521, 118 SW 120. Whether city had notice of request to abate nuisance held under conflicting evidence to be **jury question.** Martin v. St. Joseph, 136 Mo. App. 316, 117 SW 94.

39. Fralinger v. Cooke, 108 Md. 682, 71 A 529.

40. See ante, § 6.

41. Pen. Code, § 385, renders it criminal offense to interfere, obstruct or render streets dangerous for passage. People v. Eckerson, 133 App. Div. 220, 117 NYS 418. **Statute does not apply** to excavation 200 feet from highway. Id. "Interference" conveys idea of actual disturbance. Pen. Code, § 385, as to nuisance. Id. Word "obstruction" in Pen. Code, § 385, as to nuisance means placing of obstacles or impediments in highway so as to prevent free passage. Id. Evidence of excavation 200 feet from highway was wholly insufficient to establish nuisance under Pen. Code, § 385. Id.

42. Ky. St. § 4335 (Russell's St. § 3618), making it an offense to obstruct public road etc., does not prevent commonwealth from proceeding by indictment as for common nuisance. Commonwealth v. Beals [Ky.] 119 SW 813.

43. Corpus delicti in prosecution for rendering highway dangerous is present dangerous condition. People v. Eckerson, 133 App. Div. 220, 117 NYS 418.

44. Where road was laid out by commissioner's court and accused procured county surveyor to survey his land and show line of road, facts did not show that erection of fence was willful obstruction of road. Hubbard v. State [Tex. Cr. R.] 119 SW 310. Where person accused of willfully obstructing public road built fence under instructions of his father believing that his father had right to so build, and was not guilty of criminal intent, he should be acquitted. Craighead v. State, 55 Tex. Cr. R. 339, 116 SW 579. Refusal of **instructions** presenting contention of accused that he placed fence in road under permission, or that fence in question was not obstruction, held error in trial for willful obstruction of road. Craighead v. State, 55 Tex. Cr. R. 360, 117 SW 816. In trial for willful obstruction of public road, **evidence** of permission to accused's father to erect fence, accused being in employ of father at time, was proper as showing lack of willfulness or criminal intent. Craighead v. State, 55 Tex. Cr. R. 339, 116 SW 579. Evidence held not to establish any criminal intent in prosecution for maintenance of nuisance. Pen. Code, § 485. People v. Eckerson, 133 App. Div. 220, 117 NYS 418.

45. Conviction for common nuisance may be had where highway has been established by prescription. Commonwealth v. Beals [Ky.] 119 SW 813. Defendant held not guilty of obstructing public road where public road was not laid out at point of obstruction. Farr v. State, 55 Tex. Cr. R. 271, 116 SW 570. Use at point of obstruction was permissive. Id. Post which is placed three feet **away from beaten tracks** of highway may be an obstruction within St. 1898, § 1326. Neale v. State, 138 Wis. 484, 120 NW 345. Is not an encroachment. Id.

46. Curless v. State [Ind.] 87 NE 129. Person wishing to question opening of highway as not being upon proper line should do so in lawful manner not by obstructions. Id. **Evidence of survey** to show that highway was not on proper line, when such survey did not conform to statute (Burns' Ann. St. 1901, §§ 8024, 8025), was properly excluded on trial for obstructing such highway. Id.

47. Obstruction in violation of St. 1898, § 1326, may exist though post is placed between two large stones which were formerly there. Neale v. State, 138 Wis. 484, 120 NW 345.

48. Fact that mill is public utility which can only be operated by dam does not excuse fact that dam may be so maintained that waters overflow on public road and cause public nuisance. Commonwealth v. Beals [Ky.] 119 SW 813.

by unusual conditions, such a defense must be pleaded and proved.[49] County authorities may often be indicted if a defect in a highway is a public nuisance.[50] The information or indictment must properly state the offense[51] in a specific manner,[52] and contain the necessary allegations that the road was a public road,[53] and that obstructions therein were not removed after notice.[54] Questions for the jury[55] should be submitted under proper instructions.[56] Statutory provisions are determinative of solicitor's fees which are allowable in prosecutions for obstructions.[57]

HOLIDAYS.[1]

The scope of this topic is noted below.[2]

In the absence of a statutory prohibition, a ministerial act is not generally held void if performed on a legal holiday.[3] Laws may be promulgated on all days * except Sundays.[5] Service of a summons, returnable to a day which happens to be a

49. Where waters from milldam overflow and cause common nuisance, fact that such overflow was caused by unusual freshets is matter of defense to be pleaded and proved. Commonwealth v. Beals [Ky.] 119 SW 813. Not to be relied upon on demurrer. Id.

50. Blue Grass Trac. Co. v. Grover [Ky.] 123 SW 264.

51. Information under Rev. St. 1899, § 9454 (Ann. St. 1906, p. 4342), for willfully obstructing public road, **held insufficient.** State v. Blakely, 135 Mo. App. 290, 115 SW 483. Indictment as to **passing trains** over highway whereby same was obstructed and rendered dangerous does not charge crime. Commonwealth v. Baltimore & O. R. Co., 223 Pa. 23, 72 A 278. If railroad exercised franchise so as to commit public nuisance, facts of improper exercise of franchise must be fully set forth as substantive offense. Id.

52. Indictment charging maintenance of milldam and that waters therefrom overflowed public road held sufficiently specific as charging public offense. Cr. Code Pr. §§ 122-124. Commonwealth v. Beals [Ky.] 119 SW 813. Information under Rev. St. 1899, § 9454 (Ann. St. 1906, p. 4342), for willfully obstructing public road, held subject to criticism for indefiniteness as being doubtful whether it charged offense of willfully obstructing road or refusing to remove obstruction. State v. Blakely, 135 Mo. App. 290, 115 SW 483.

53. Allegation in indictment for maintenance of common nuisance which alleged that road in question is public road is sufficient, without setting forth manner in which it became such. Commonwealth v. Beals [Ky.] 119 SW 813.

54. Information under Rev. St. 1899, § 9454 (Ann. St. 1906, p. 4342), which charges refusal to remove obstruction after notice, should charge by whom notice was given. State v. Blakely, 135 Mo. App. 290, 115 SW 483.

55. Question whether posts constituted obstruction held, under evidence, for jury. Neale v. State, 138 Wis. 484, 120 NW 345. Where defendant was on leased premises while excavation was being made, conducting work, etc., **evidence was sufficient** to go to jury on question as to whether he was principal to crime of committing nuisance within meaning of Pen. Code, § 29. People v. Eckerson, 133 App. Div. 220, 117 NYS 418.

56. Charge held erroneous as to **reasonable doubt** and as not being in accord with defense. Jacobs v. State, 55 Tex. Cr. R. 149, 115 SW 581. Instruction which excused defendant for placing obstruction in highway on ground that right to maintain same by adverse possession had been acquired was properly refused as **inapplicable** to evidence. Neale v. State, 138 Wis. 484, 120 NW 345. Instructions as to user or prescription having no application to case should not be given. People v. Johnson, 237 Ill. 237, 86 NE 676. Charge as to location of fence claimed by state to be obstruction held not required by evidence, and **misleading.** Jacobs v. State, 55 Tex. Cr. R. 149, 115 SW 581. Though instruction as to setting posts in highway was somewhat ambiguous, jury could not have been misled when instruction was considered as a whole. Neale v. State, 138 Wis. 484, 120 NW 345.

57. Where Code 1896, § 5388, fixes no penalty for misdemeanor involving obstruction of public road, solicitor's fee under § 4561 is one not otherwise provided for by statute which is $7.50. Solicitor's fee taxed against defendant is portion of penalty. Birmingham Waterworks Co. v. State [Ala.] 48 S 658.

1. See 11 C. L. 1779.

Search Note: See notes in 3 C. L. 1630; 19 L. R. A. 316; 10 L. R. A. (N. S.) 791; 5 Ann. Cas. 919; 11 Id. 559.

See, also, Holidays, Cent. Dig.; Dec. Dig.; 21 Cyc. 440-445; 27 A. & E. Enc. L. (2ed.) 386; 20 A. & E. Enc. P. & P. 1189.

2. It excludes the computation of time in general (see Time *) and Sunday as dies non juridicus (see Sunday *).

3. Sale of land sold to state for taxes by tax collector. Young v. Patterson, 9 Cal. App. 469, 99 P 552.

4. Holidays not being excluded by the constitution, it was not illegal to publish law on the 4th of July. State v. Bertrand, 122 La. 856, 48 S 302.

5. See Sunday.

* Always begin with the latest article on the subject. Use the latest topical index.

legal holiday, may be made on the next succeeding secular day.[6] A proclamation of a governor of a state proclaiming certain days as special holidays may be sufficient to excuse delay in entering into a public contract.[7] In California, Saturdays after twelve o'clock noon are legal holidays.[8]

HOMESTEADS.

The scope of this topic is noted below.[9]

§ 1. The Right to the Homestead in General, 2126.
§ 2. Persons Entitled, 2127.
§ 3. Properties and Estates in Which Homestead May be Claimed, 2127. As Dependent on Nature, Character and Use of Premises, 2127. Amount Exempt, 2128.
§ 4. Claiming, Selecting, and Setting Apart of Homesteads, 2129.
§ 5. Liabilities Superior or Inferior to Homestead, 2130.
§ 6. Alienation and Incumbrance, 2131.
§ 7. Loss or Relinquishment, 2133.
§ 8. Rights of Surviving Spouse, Children, Heirs, or Dependents of Homestead Tenant, 2136. Election, 2136. Partition and Assignment Out of Decedent's Estate, 2137. Nature of Homestead Estate, 2137. Loss of Rights, 2138. Rights of Divorced Parties, 2138.
§ 9. Exemption of Proceeds of Homestead or of Substituted Properties, 2138.
§ 10. Remedies of and Procedure by Creditors, 2139. Remedies by Suit or Action, 2139. Remedies of Creditors Against Excess, 2140.

§ 1. *The right to the homestead in general.*[10]—See 11 C. L. 1780.—This section deals only with the most general principles and statutes relating to homestead and excludes everything which can be properly treated elsewhere in the following sections. By homestead is meant that tract of land which being within the statutory limitations both as to quantity and value is held, occupied and claimed as a homestead.[11] It is an interest in land[12] generally spoken of as an estate.[13] It is not a new or additional title to the land but merely the establishment of certain privileges or immunities therein.[14] The right thereto is purely the creation of statutes,[15] which will be liberally construed[16] and which have no extraterritorial effect.[17]

6. Prichard v. McGraw Oil & Gas Co. [W. Va.] 66 SE 366.

7. Proclamation that the 19th day of April, 1906, and each and every other day thereafter, up to and including June 2, 1906, be legal holidays, held to excuse delay on part of contractor in entering into contract for street improvements. Ralph Rogers Co. v. Workman, 10 Cal. App. 612, 103 P 154.

8. Under the present state of legislation in California, it is suggested to trial courts that it would be safer to treat Saturday afternoon as a legal holiday. People v. Heacock, 10 Cal. App. 450, 102 P 543.

9. This topic treats of dedication of property as a homestead for the owner and his family or dependents as distinguished from homesteads on public lands (see Public Lands *). General matters of exemptions not peculiar to homesteads (see Exemptions *), devises of homesteads (see Wills,* § 5D; Estates of Decedents,* § 5D), bankruptcy (see Bankruptcy *), insolvency (see Insolvency *), and assignments for creditors (see Assignments for Benefit of Creditors *), are treated elsewhere, as is the widow's quarantine (see Descent and Distribution,* § 6). The general rights and duties of husband and wife (see Husband and Wife*) with reference to community property as distinct from the homestead proper (see Husband and Wife,* § 4), the effect of ante and post nuptial contracts and conveyances between husband and wife (see Husband and Wife,* § 2B), the general right of the election of the survivor (see Election and Waiver,* §§ 2B, 3, 6; Dower,* §§ 1, 5), and fraudulent conveyances in general (see Fraudulent Conveyances *), are treated in appropriate topics.

10. **Search Note:** See note in 3 C. L. 1631. See, also, Homestead, Cent. Dig. §§ 1-16; Dec. Dig. §§ 1-15; 21 Cyc. 458-465; 15 A. & E. Enc. L. (2ed.) 516, 525.

11. White v. Spencer, 217 Mo. 242, 117 SW 20.

12. Barbo v. Jeru, 155 Mich. 353, 15 Det. Leg. N. 1064, 119 NW 580.

13. Homestead to surviving spouse is created as estate for life. Cherokee Const. Co. v. Harris [Ark.] 122 SW 485.

14. Smith v. Bangham [Cal.] 104 P 689.

15. Cherokee Const. Co. v. Harris [Ark.] 122 SW 485.

16. Jaenicke v. Fountain City Drill Co., 106 Minn. 442, 119 NW 60. Homestead law should be liberally construed with view to promoting its beneficent purposes. First Nat. Bank v. McClanahan, 83 Neb. 706, 120 NW 185.

17. Cherokee Const. Co. v. Harris [Ark.] 122 SW 485. Compare Conflict of Laws, § 1.

§ 2. *Persons entitled.*[18]—See 11 C. L. 1781—A homestead may ordinarily be claimed by a head of a family.[19] While one's status as head of a family has been held not to be affected by the institution of divorce proceedings,[20] actual divorce will sometimes,[21] but not ordinarily, affect such status.[22] Desertion of the wife by the husband entitles her to claim the homestead exemption existing in him at the time of the desertion.[23]

§ 3. *Properties and estates in which homestead may be claimed.*[24]—See 11 C. L. 1782—This section is to be distinguished from the subsequent section dealing with properties in which the surviving spouse and children may claim a homestead.[25] A fee is not necessary to support a homestead,[26] any possessory interest in land,[27] such as one's rights under a contract of purchase, being sufficient.[28] A homestead in either spouse may ordinarily attach to an estate in land in which both [29] or either have any interest,[30] though the other may have previously owned and disposed of the same land and a prior homestead therein,[31] but one spouse may not have a homestead in lands to which neither have ever had legal or equitable title.[32]

*As dependent on nature, character and use of premises.*See 11 C. L. 1783—One is permitted to have only one homestead [33] and a constitutional provision for a home-

18. Search Note: See notes in 4 L. R. A. (N. S.) 366; 16 Id. 111; 70 A. S. R. 107.

See, also, Homestead, Cent. Dig. §§ 17-36; Dec. Dig. §§ 16-28; 21 Cyc. 466-470; 15 A. & E. Enc. L. (2ed.) 535.

19. Evidence held insufficient to show that party who executed renewal notes, which were lien upon land involved in suit, was head of family at time of their execution. Melton v. Beasley [Tex. Civ. App.] 121 SW 574. Pleading not alleging that one was **bona fide housekeeper** or that she and her husband resided on land held insufficient to show homestead right under Ky. St. § 1702 (Russell's St. § 4661). Eversole v. First Nat. Bank [Ky.] 118 SW 961. Under Ky. St. 1909, § 1702, to entitle one to homestead, claimant must be actual bona fide housekeeper with family resident in state. **One living alone after death of wife** and devise of homestead to him by her held not entitled to homestead. Jarboe v. Hayden [Ky.] 117 SW 961.

20. Husband held entitled to homestead notwithstanding pendency of divorce action against wife for abandonment for more than three years and subsequent decree in his favor where he was married man, head of family consisting of wife and one or more minor children. Dinwiddie v. Sims [Tex. Civ. App.] 114 SW 400. See Divorce, § 7.

21. Divorced husband, who by decree of divorce had been deprived of custody of his minor children and is required to pay stated sum for their support which is made lien upon the real property theretofore used as homestead, is not "head of a family" entitled to homestead exemption. Holcomb v. Holcomb [N. D.] 120 NW 547.

22. Where upon divorce wife was given one-half of homestead absolutely and use of other half during children's minority, fact that wife had been awarded children did not relieve husband of duty to support them, therefore he could not be deprived of homestead right in latter half of homestead. Speer v. Sykes [Tex.] 119 SW 86. Where wife, in divorce proceedings, was awarded use of homestead during minority of children, husband's homestead right still continued to exist and when she abandoned it he had right to take possession. Id.

23. First Nat. Bank v. McClanahan, 83 Neb. 706, 120 NW 185.

24. Search Note: See notes in 3 C. L. 1631, 1632, 1633; 12 L. R. A. 477; 13 L. R. A. (N. S.) 170.

See, also, Homestead, Cent. Dig. §§ 39-56, 86-127; Dec. Dig. §§ 32-37, 58-89; 21 Cyc. 471-478, 488-509; 15 A. & E. Enc. L. (2ed.) 574.

25. See post, § 8.

26. Glover v. Bass [Ala.] 50 S 125.

27. Glover v. Bass [Ala.] 50 S 125. See Real Property, §§ 1, 2, for what constitutes possessory interest.

28. In re Maxson, 170 F 356; Lamb Lumber Co. v. Roberts [S. D.] 121 NW 93. See Vendors and Purchasers, § 9.

29. Homestead in husband may attach to estate in land held by husband and wife where they both own interest therein. Kimberlin v. Gordon [Mo. App.] 122 SW 1144. Land held by husband and wife may be impressed with homestead at instance of wife. Swan v. Walden [Cal.] 103 P 931. Deed of husband alone, made after declaration of such homestead, held void. Id. Undivided half interest of husband in lands owned by himself and wife **as cotenants** is subject to homestead exemption. First Nat. Bank v. McClanahan, 83 Neb. 706, 120 NW 185. See Tenants in Common and Joint Tenants.

30. Husband may have homestead interest in **lands of his wife** as against his creditors. Glover v. Bass [Ala.] 50 S 125. Husband held entitled to homestead interest in lands belonging to him and used in connection with adjoining lands occupied by him as homestead though he had **conveyed one-third interest in adjoining lands to wife** 10 years before. Id.

31. Release and waiver by husband through conveyance does not prevent revival in him of homestead estate **when fee became subsequently vested in wife.** Powell v. Powell, 240 Ill. 442, 88 NE 993.

32. Elam v. Carter [Tex. Civ. App.] 119 SW 914.

33. One cannot have homestead in two

stead consisting of both residence and business properties has been held not to violate this rule.[34] In some states a homestead may be claimed in only one piece of property[35] which may however, usually consist of several contiguous tracts,[36] while in others it may be claimed in separate, disconnected properties.[37] Lots used as a home have been held to include those so used as to contribute to the enjoyment of the home,[38] but this rule has been held not to apply in case of business homesteads.[39]

One cannot claim a homestead in land unless he resides thereon.[40]

Amount exempt.[See 11 C. L. 1784]—One cannot claim a homestead in lands whose value exceeds a certain sum[41] without deducting incumbrances.[42] The value of the homestead is to be determined as of the time of the original designation thereof,[43] or, in case of its segregation from property agreed to be conveyed, at the time of the agreement to convey.[44] In determining the value of the homestead, the value of the interest of other persons in the property must be excluded.[45]

counties at once. Irondale Bank v. Terrill, 135 Mo. App. 472, 116 SW 481.

34. Const. art. 16, § 51, regarding homesteads in city, town or village, embracing both residence and place of business, does not provide for two homesteads but only one, consisting of both residence and place of business, connected or disconnected. Rock Island Plow Co. v. Alten [Tex.] 116 SW 1144.

35. Fact that homestead property claimed is of less value than maximum value allowed does not entitle one to claim homestead in other property to make up value. Bennett Bros. v. Dempsey [Miss.] 48 S 901.

36. Party owning several tracts of land may select amount allowed as homestead out of all tracts considered as one. Watkins Land Co. v. Temple [Tex. Civ. App.] 119 SW 728. Words "one town or city lot" in Laws 1852, p. 9, means "lot or piece of ground on which head of family has house, with appurtenances which he uses as home no matter whether it contains more or less than one lot according to plat or survey of town or city." Owens v. Jabine [Ark.] 115 SW 383. One or more lots may be devoted to business of head of family, but it must constitute "place to exercise calling or business of head of family" and must consist of one place at which business is transacted. It may consist of more than one lot if so used as to make them place for transacting business. Rock Island Plow Co. v. Alten [Tex.] 116 SW 1144.

37. Lots used as family homestead may be disconnected. Rock Island Plow Co. v. Alten [Tex.] 116 SW 1144. Land in country owned and lived on by husband and wife amounting to 70 or 80 acres in one body purchased in comparatively small lots though part of it was across road from remainder held homestead. Marble v. Marble [Tex. Civ. App.] 114 SW 871.

38. Rock Island Plow Co. v. Alten [Tex.] 116 SW 1144. Lots intended for convenience of family, graded up to prevent water from standing on same, to be used as lawn and grazing lot, held part of homestead together with two adjoining lots on which house was to be built. Houston Ice & Brew. Co. v. Sharp & Co. [Tex. Civ. App.] 114 SW 180.

39. Provision regarding business homestead does not include lots used "for purposes" of business or in aid thereof but only lots on which place of business rests. Rock Island Plow Co. v. Alten [Tex.] 116 SW 1144.

40. Only limitation to designation of homestead is that it must be such as to include place of residence. Morris v. Pratt [Tex. Civ. App.] 116 SW 646. One cannot claim homestead in property on which neither he nor his family reside. Irondale Bank v. Terrill, 135 Mo. App. 472, 116 SW 481. Homestead necessarily includes idea of house for residence or mansion house. Dwelling may be splendid mansion, cabin or tent. If there be any, it is under protection of law; but there must be home residence before it and land on which it is situated can be claimed as homestead. Flowers v. U. S. Fidelity & Guar. Co. [Ark.] 117 SW 547. Devisee, under will bequeathing one-third of strip of land to him and one acre near buildings in portion bequeathed in severalty to sister, living with sister in such buildings, could claim no homestead in portion bequeathed to him. Barbo v. Jeru, 155 Mich. 353, 15 Det. Leg. N. 1064, 119 NW 58. Pleading praying for setting aside of homestead to married woman, which did not allege that she was bona fide housekeeper or that she and her husband resided upon land, was not sufficient to show right to homestead under Ky. St. § 1702 (Russell's St. § 4661). Eversole v. First Nat. Bank [Ky.] 118 SW 961.

41. Lots constituting homestead under Const. art. 16, § 51, regarding homesteads in city, town or village, cannot exceed $5,000 in valuation. Rock Island Plow Co. v. Alten [Tex.] 116 SW 1144.

42. Fact that mortgage on land cuts down net value of same does not authorize claim of greater quantity of land than could otherwise be claimed if there were no mortgage. Bennett Bros. v. Dempsey [Miss.] 48 S 901. That one's net interest in two places, after payment of mortgages, amounts to less than homestead value allowed by statute, does not entitle one to exemption of both or one not actually occupied. Id.

43. Where homestead is sold for taxes but redeemed prior to expiration of period of redemption, homestead designation is to be determined as of time of original selection and not as of time of redemption and hence lots worth less than $5,000 at time of original designation but worth $12,000 at time of redemption are nevertheless homestead. Bente v. Sullivan [Tex. Civ. App.] 115 SW 350.

44. Where a contract to convey is void as to the homestead but valid as to other prop-

§ 4. *Claiming, selecting and setting apart of homesteads.*[46] See 11 C. L. 1784 This section deals only with the voluntary selection and claiming of the homestead by the homesteader, the involuntary setting apart and appraisal of the same in actions by creditors and the necessity of claiming the homestead exemption as distinguished from the physical homestead being treated in a subsequent section,[47] as is also the right of the homesteader to the proceeds of the homestead,[48] and the claiming and setting aside of the homestead to the survivors.[49] Mere occupancy is not sufficient to establish a homestead,[50] but, when occupancy is coupled with residence, citizenship and the status of being the head of a family, the right is perfect.[51] Intention to occupy property as a homestead after proceeding with reasonable diligence to render the premises habitable is sometimes sufficient to establish a homestead therein,[52] the burden of proof in such case, however, being on the claimant.[53]

While a homestead may sometimes be selected by the execution of a trust deed [54] or conveyance of the unclaimed surplus,[55] some states require the execution and filing of a declaration covering the property claimed.[56]

erty included, the homestead will be appraised and ascertained as of the date of the contract. Teske v. Dittberner, 83 Neb. 701, 120 NW 198.

45. Wife's undivided half interest in land set off as homestead could not be considered part of the homestead. First Nat. Bank v. McClanahan, 83 Neb. 706, 120 NW 185.

46. Search Note: See Homestead, Cent. Dig. §§ 37-85; Dec. Dig. §§ 29-57½; 21 Cyc. 470-487; 15 A. & E. Enc. L. (2ed.) 574; 10 A. & E. Enc. P. & P. 63.

47. See post, § 10.

48. See post, § 9.

49. See post, § 8.

50. Roberts v. Thomas [Miss.] 48 S 408.

51. Fact **children, intending to join father as soon as school was over,** remained at school in another state on father's removal therefrom, held not to prevent father from acquiring homestead. Roberts v. Thomas [Miss.] 48 S 408. Where one with his family is in **possession under contract to purchase,** it will be presumed that it was his homestead in absence of proof that he had or claimed another homestead at that time. Lamb Lumber Co. v. Roberts [S. D.] 121 NW 93. **Evidence held to support finding** that intestate had with plaintiff his wife lived upon certain real estate with intention of claiming it as homestead and had not permanently abandoned same. Melcher v. Super [Tex. Civ. App.] 120 SW 569.

52. Where there has been no previous actual occupancy, there should be at least bona fide intention to use property as homestead coupled with such acts of preparation and subsequent early use as homestead as would reasonably amount to notice otherwise given by actual occupancy. Dinwiddie v. Tims [Tex. Civ. App.] 114 SW 400.

Evidence held sufficient to show intention: Purchase of two lots for express purpose and with intention of building residence thereon and occupying same as home for himself and family, and making of permanent improvements thereon directed to that end with reasonable diligence, held to manifest unmistakable intention to select and appropriate two lots as homestead. Houston Ice & Brew. Co. v. Sharp & Co. [Tex. Civ. App.] 114 SW 180.

Evidence held insufficient to show intention: Evidence that material was furnished and house built on only land owned, that land was one piece and that after completion thereof owner moved into house with his family, held insufficient to show intention to claim same as homestead at time material was furnished. Dinwiddie v. Tims [Tex. Civ. App.] 114 SW 400. Mere intention to occupy land as homestead some time in indefinite future when he should become able to build home or house thereon is insufficient to impress house with homestead character. Flowers v. U. S. Fidelity & Guar. Co. [Ark.] 117 SW 547.

53. Where defendant after buying lot and materials for house left county with family, burden is upon him to show that he had established homestead as against materialman's lien. Rockwell Bros. & Co. v. Hudgens [Tex Civ. App.] 123 SW 185.

54. Husband's execution of trust deed on unimproved excess of his rural land above 200 acres allowed as homestead held sufficient designation of same under Rev. St. 1895, arts. 2403, 2404, 2405. Morris v. Pratt [Tex. Civ. App.] 116 SW 646. Purpose of statute is to provide means whereby homestead right in definite part of large tract may be fixed as against husband's creditors and cannot be construed as limitation upon power of husband to otherwise designate homestead. Id.

55. Where debtor transferred excess real estate above homestead after judgment, both he and purchaser of excess were bound by selection. White v. Spencer, 217 Mo. 242, 117 SW 20.

56. Under Mills' Ann. St. §§ 2132, 2137, to entitle householder to benefit of homestead exemption, he is required to cause word "homestead" to be entered of record in margin of his recorded title. Runyan v. Snyder, 45 Colo. 156, 100 P 420. Where homesteader did not have word "homestead" so entered of record, mortgage executed by him alone in advance of patent was valid. Id. Under Ball. Ann. Codes & St. § 5243 (Pierce's Code, § 5485), mere occupancy by head of family is not sufficient to create homestead but declaration of homestead must be exe-

One may be estopped from claiming a homestead [57] but he is not prevented from doing so by the institution of bankruptcy proceedings if he proceeds to do so properly,[58] nor by the fact that the entire premises are not used or required by the claimant.[59]

§ 5. *Liabilities superior or inferior to homestead.*[60]—See 11 C. L. 1786—This section should be distinguished from the section immediately following which deals with the creation and requisites of conveyances and incumbrances valid as against the homestead.

The object of the homestead exemption is to secure to the debtor not only a place to live in but the means of obtaining a livelihood.[61] Accordingly the homestead is superior to practically all general liens,[62] fees and costs in divorce,[63] or incumbrances not executed in compliance with statute,[64] and inferior to taxes,[65] purchase money incumbrance,[66] liens or claims existing at the time of the homestead declaration,[67] properly perfected liens for money advanced for improvements,[68] and

cuted and acknowledged and filed for record. Hookway v. Thompson [Wash.] 105 P 153.

57. If borrower owns more than one tract, and part of it is not in actual use of owner as a home, and mortgagee is not put upon inquiry, representations by owner that it is not homestead will estop him from claiming it as such. Watkins Land Co. v. Temple [Tex. Civ. App.] 119 SW 728. See, also, Estoppel, §§ 3, 4.

58. Qualification of trustee in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), does not deprive bankrupt of his right to perfect homestead exemption, provided he claims designated piece of realty as homestead in schedules, and proceeds without delay. In re Culwell, 165 F 828. Bankrupt partners are not entitled to exemption in real estate bought with partnership funds and used as partnership store and in part dwelling by one of them where no claim was made prior to bankruptcy, Code Ala. 1907, § 4166, providing that partnership property shall be subject to homestead. In re McCrary Bros., 169 F 485. See Bankruptcy, § 10.

59. Fact that part of premises claimed as homestead was leased to other parties for farming did not defeat right to claim the whole as a homestead. Green v. Richardson, 122 La. 361, 47 S 682.

60. **Search Note:** See notes in 3 C. L. 1636; 24 L. R. A. 789; 62 Id. 375; 16 L. R. A. (N. S.) 947; 34 A. S. R. 496; 38 Id. 247; 45 Id. 383; 86 Id. 174.

See, also, Homestead, Cent. Dig. §§ 128-175; Dec. Dig. §§ 90-109; 21 Cyc. 509-527; 15 A. & E. Enc. L. (2ed.) 609, 638, 662.

61. Green v. Richardson, 122 La. 361, 47 S 682.

62. Volker-Scowcroft Lumber Co. v. Vance [Utah] 103 P 970. No lien attaches to homestead proper. White v. Spencer, 217 Mo. 242, 117 SW 20. There is no such thing as **dormant lien** against homestead. Id. **Lien on land for sums expended by administrator** held subject to homestead right of infant child of decedent. Baker v. Lane [Ky.] 118 SW 963. No **judgment lien** attaches to homestead. White v. Spencer, 217 Mo. 242, 117 SW 20. See Judgments, § 8. **Sale under execution** is absolutely void, and conveys no title to purchaser. Speer v. Sykes [Tex.] 119 SW 86. Homestead is exempt **in hands of purchaser** for debts incurred by his grantor subsequent to acquisition of homestead. Kimberlin v. Gordon [Mo. App.] 122 SW 1144.

63. Under Ky. St. § 1702 (Russell's St. § 4661), homestead of husband cannot be subjected to judgment for attorney's fees and costs in suit by his wife for divorce. Nunn v. Page [Ky.] 121 SW 442. See Allmony, § 7.

64. Under Const. 1901, § 205, homestead is exempt from any debt except mortgage or other alienation with voluntary assent and signature of wife. Clark v. Bird [Ala.] 48 S 359. Property claimed as homestead before and after mortgage is not subject to mortgage or attachment for debt owing by partnership secured by mortgage executed by partner. Houston Ice & Brew. Co. v. Sharp & Co. [Tex. Civ. App.] 114 SW 180.

65. Homestead is not exempt from taxation or tax sales. Robinson v. Levy, 217 Mo. 498, 117 SW 577. See Taxes, § 9.

66. Homestead exemption not allowed as against judgment for balance due on purchase-money note. Billings v. Joines [N. C.] 66 SE 307.

67. Whatever liberality should be given construction of homestead exemption laws, they ought not to be so construed as to give debtor power by his own acts to deprive others of rights previously obtained in his property. Volker-Scowcroft Lumber Co. v. Vance [Utah] 103 P 970. Declaration of homestead made by wife with knowledge that her husband had previously given **option to purchase** to plaintiff was subject to his right to demand conveyance of land. Smith v. Bangham [Cal.] 104 P 689. Homestead is not exempt from **indebtedness against both husband and wife** antedating acquisition of homestead, nor would it be exempt to wife under judgment as against her although purchased with husband's pension money if she was in fact owner, but rule is otherwise if wife held legal title only, equitable title being in husband. Ratliff v. Elwell [Iowa] 119 NW 740. Homestead exemption cannot be invoked as against **judicial mortgage** which had already attached at time property became homestead. Ellis v. Freyhan & Co. [La.] 49 S 975. Under Rev. St. 1899, § 3622 (Ann. St. 1906, p. 2043), providing that time of filing of homestead

sometimes,[69] but not always, to mechanic's liens.[70] The homestead exemption does not apply to the surplus of the property over and above the homestead.[71]

The federal bankruptcy courts will allow the state exemption and will ordinarily make the allowance and leave the determination of the allowance in a particular case to the state courts.[72]

§ 6. *Alienation and incumbrance.*[73]—See 11 C. L. 1788—Liens or other incumbrances against, and conveyances of, the homestead can be created only as provided by constitution or statute,[74] of which persons dealing with the homestead must take notice.[75] Hence, ordinarily, the homestead can be conveyed,[76] contracted to be con-

deed shall be time of acquiring homestead with respect to liability for causes of action existing at such time, defendant who had promised to marry plaintiff before filing deed of homestead was not entitled to exemption of such homestead although time fixed for marriage was subsequent to such filing, **cause of action on contract** being considered to have accrued at time promise of marriage was made rather than on its breach. Sperry v. Cook [Mo. App.] 120 SW 654. Contract by which one was to have part of proceeds of sale of certain land, which was made before wife acquired any homestead right therein, was superior to claim of homestead. Parriss v. Jewell [Tex. Civ. App.] 122 SW 399. Homestead rights subsequently acquired are inferior to **lien created by levy of execution** prior thereto. Watson v. City Nat. Bank [Tex. Civ. App.] 119 SW 915. **Trust deed** upon property induced by disclaimer of homestead right creates lien superior to homestead right though land be subsequently actually occupied as homestead. Watson v. City Nat. Bank [Tex. Civ. App.] 119 SW 915. See Mortgages, § 8. **Mechanics' lien** held not to attach to certain lots claimed as homestead unless when material was furnished owner owned other land separate from such lots which at that time was her homestead and equaled value of her homestead exemption. Volker-Scowcroft Lumber Co. v. Vance [Utah] 103 P 970. Under Ballinger's Ann. Codes & St. § 5246, providing that "from and after time" declaration of homestead is filed for record premises described therein constitute homestead, lien of mortgage on such premises cannot be defeated by filing of declaration subsequent to execution and filing of mortgage. Hookway v. Thompson [Wash.] 105 P 153. Under Ballinger's Ann. Codes & St. § 5243, et seq. (Pierce's Code, § 5485), executing, acknowledging, and recording declaration of homestead, subsequent to filing and recording of statutory notice of mechanic's lien, was not effective as against latter. Olson v. Goodsell [Wash.] 105 P 463. See Mechanics' Liens, § 6. Debt or liability sued on must not have existed prior to acquisition of homestead. **Debt held contracted prior to acquisition** of homestead. Jarboe v. Hayden [Ky.] 117 SW 961.

68. Lender of money to be used in improvement of homestead and actually so used is entitled to lien. Murphy v. Williams [Tex. Civ. App.] 116 SW 412.

69. Only exception to exemption of homestead from any debt is Const. § 207, in favor of laborer's and mechanic's liens. Clark v. Bird [Ala.] 48 S 359.

70. Under Code Civ. Proc. § 345, homestead is not subject to mechanics' lien law. Lamb Lumber Co. v. Roberts [S. D.] 121 NW 93.

71. Under Rev. St. 1899, § 3751 (Ann. St. 1906, p. 2090), regarding judgment liens, and §§ 3616, 3617 (Ann. St. 1906, p. 2034), regarding homesteads, judgment against one holding greater tract than exempt as homestead is lien on excess prior to execution, and purchaser of excess takes subject to lien. White v. Spencer, 217 Mo. 242, 117 SW 20. Judgment lien attaches to surplus in quantity of land over and above homestead from rendition of judgment. Childers v. Pickenpaugh, 219 Mo. 455, 118 SW 478.

72. In re McCrary Bros., 169 F 485. Fact that homestead may be liable for debts contracted prior to its acquisition does not destroy its character as general exempt property within meaning of bankruptcy act. In re Maxson, 170 F 356. Homestead should have been set apart at time of filing of petition in bankruptcy, regardless of fact that it might be liable for debts previously contracted under state law. Id. Homestead may be allowed and set apart in bankruptcy although bankrupt had waived homestead right in favor of certain creditors. In re Batten, 170 F 688. Failure, through oversight in preparing schedules, to therein make claim of homestead exemption, will not deprive bankrupt of exemption allowed by state laws when timely application is otherwise made. Filing of claim of exemption with referee was sufficient, although no claim made in schedule. In re Maxson, 170 F 356. See Bankruptcy, § 16, and Exemptions.

73. Search Note: See notes in 8 C. L. 98, 100; 69 L. R. A. 379; 4 L. R. A. (N. S.) 799; 8 Id. 565, 748; 12 A. S. R. 683; 95 Id. 909; 9 Ann. Cas. 3, 934.

See, also, Homestead, Cent. Dig. §§ 176-244; Dec. Dig. §§ 110-133; 21 Cyc. 527-560; 15 A. & E. Enc. L. (2ed.) 662.

74. To require **refunding of purchase money** paid under void contract of purchase as condition precedent to recovery of homestead is improper as fastening lien thereon in manner prohibited by constitution. Clark v. Bird [Ala.] 48 S 359.

75. Under constitution prohibiting mortgaging of homestead, parties dealing with homestead are chargeable with notice of conditions that impress it with its character. Watkins Land Co. v. Temple [Tex. Civ. App.] 119 SW 728.

76. Conveyance held valid: Deed executed and acknowledged by husband and wife as provided by St. 1862, p. 519, c. 396, was sufficient **to pass easement** in private way which was part of homestead, where such deed

veyed,[77] assigned,[78] willed,[79] leased,[80] partitioned,[81] incumbered,[82] or waived only with the consent of both husband and wife;[83] which consent, however, need not be joint.[84] There is a difference of opinion as to whether incumbrances on conveyance of a homestead may arise by estoppel,[85] but it has been held that where the spouses have properly consented to a lien in favor of another they may estop themselves from defending against the lien in the hands of such other's assignee.[86] The conveyance of the homestead by the husband must be signed[87] and properly acknowledged by the wife[88] and supported by a sufficient consideration as to her.[89]

described land conveyed as bounded by such private way. Petitpierre v. Maguire, 155 Cal. 242, 100 P 690.

Conveyance held invalid: Conveyance of homestead which does not conform to Code 1907, § 4161, does not operate as estoppel against husband, notwithstanding he has been paid valuable consideration. It is simply void—nullity to all intents and purposes. Clark v. Bird [Ala.] 48 S 359. Where tract of land is constitutional homestead of head of family, deed executed by him alone does not convey any right, title, or interest in homestead real estate. High v. Jasper Mfg. Co. [Fla.] 49 S 156. Deed not joined in by wife is nullity. Yazoo Lumber Co. v. Clark [Miss.] 48 S 516. Separate deed of married man, head of family, to homestead, is void. Goldsborough v. Hewitt [Okl.] 99 P 907. Conveyance of homestead in which wife refused to join held invalid even as to husband's community property therein. Marble v. Marble [Tex. Civ. App.] 114 SW 891. Under St. 1898, § 3074, conveyance of husband's homestead without wife's consent, evidenced by her joining in deed, was absolutely void, at least as conveyance of legal title. Wilburn v. Land, 138 Wis. 36, 119 NW 803.

77. Contract to sell and convey homestead, signed by husband only, is void. Lawrence v. Vinkemulder [Mich.] 16 Det. Leg. N. 397, 122 NW 88 (affirmed by divided court). Cannot be made basis of action for damages for nonperformance. Id.

78. Assignment of land contract of premises which was homestead, by husband, wife not joining, was void. Bovine v. Selden, 155 Mich. 556, 15 Det. Leg. N. 1088, 119 NW 1090.

79. Homestead may be willed subject to widow's election. Jarboe v. Hayden [Ky.] 117 SW 961.

80. Under constitution, lease of homestead not signed by wife held instrument of alienation and void. Mailhot v. Turner [Mich.] 16 Det. Leg. N. 326, 121 NW 804.

81. So long as homestead is occupied by husband and wife or survivor, it cannot be partitioned. Allen v. Campbell [Tex. Civ. App.] 115 SW 360.

82. Homestead is subject to mortgage and other alienation with voluntary assent and signature of wife. Clark v. Bird [Ala.] 48 S 359. Mortgage on homestead worth less than $2,000 when executed by husband, neither signed nor acknowledged by wife, is void. Kimmerly v. McMichael, 83 Neb. 789, 120 NW 487. Where first mortgage contained no waiver of homestead, mortgagee acquired lien on property only above homestead value, and where second mortgage, signed by both husband and wife, waived homestead, second mortgagee acquired right to sell and have proceeds of homestead applied on his debt, taking priority over first mortgage as to homestead. Glenn v. Bresnan, 123 La. 1014, 49 S 690.

83. That bankrupt has waived her right to homestead exempt under Iowa Code 1897, § 2972, does not prevent husband from claiming such exemption by intervening petition in bankruptcy proceeding. In re Maxson, 170 F 356. Under Iowa statute, homestead right of the husband or wife in property occupied by either as home cannot be defeated by any act of other in whose name legal title may be held. Husband's right not defeated by waiver of right by wife in bankruptcy proceedings. Id.

84. When husband and wife consented that gas company lay its pipe line across their homestead, in action to enjoin them from injuring completed line, question of whether their consent was given jointly or not is immaterial. Ralston v. Wichita Natural Gas Co. [Kan.] 105 P 430. Where both spouses signed deed to homestead in furtherance of intention to which there was common and contemporaneous assent, deed was valid though wife did not sign it until eight months after husband did. Howell v. Hill [Miss.] 48 S 177.

85. **Held not to arise:** Lien on homestead for improvements made by one under void conveyance thereof cannot be created by equitable estoppel or otherwise except as provided by constitution. Clark v. Bird [Ala.] 48 S 359.

Held to arise: Doctrine of estoppel in pais is not affected by statute of frauds or various homestead statutes. Engholm v. Ekrem [N. D.] 119 NW 35. Where verbal agreement for sale of land was entered into and followed by delivery of possession to grantee, who with knowledge of grantor's wife made valuable improvements, grantors were by their conduct estopped to claim homestead therein. Id. See Estoppel, §§ 3, 4.

86. Where contract called for improvement of homestead and contractor transferred notes and lien for price to another and abandoned work, transferee had no greater rights to lien than contractor did. Murphy v. Williams [Tex. Civ. App.] 116 SW 412. Where contractor took notes and express lien on homestead to cover cost of improvements and contract showed on its face intention that same be transferred to one who could furnish money, and notes and lien were so transferred, money lender was entitled to lien though contractor subsequently abandoned contract. Id.

87. Clark v. Bird [Ala.] 48 S 359.

88. Separately acknowledged. Clark v. Bird [Ala.] 48 S 359. See Acknowledgments, § 3.

Though the wife's name does not appear in the granting clause, her intent to consent may appear in the subsequent portions of the deed.[90] In some states the husband's deed is void only as to the wife [91] only so long as the property continues to be impressed with its homestead character [92] and only as to the homestead where nonhomestead property is conveyed by the same instrument.[93] In Kentucky a homestead may be conveyed without the wife's consent.[94] In Mississippi a deed of trust given to secure the purchase money of a homestead or homestead improvements is valid without the signature of the wife.[95] In Texas a husband may convey a right of way or easement without his wife's consent unless it interferes with her use or enjoyment of the homestead.[96] In this latter state, also, limitations will run against the wife's interest in the community homestead or in the homestead which is the husband's separate property,[97] and a lien against the homestead, otherwise valid, is not invalid because the wife had no notice thereof.[98]

At any time prior to her abandonment of the homestead, the wife may sue and recover the same after its conveyance by a deed not consented to by her,[99] or where her consent has been induced by fraud.[1]

§ 7. *Loss or relinquishment.*[2]—See 11 C. L. 1790—This section should be distin-

89. Husband's pre-existing indebtedness and forbearance on note extended to him was a sufficient consideration for wife's release of homestead by joining in execution of mortgage. First Nat. Bank v. Davis, 146 Ill. App. 462. See Contracts, § 2.

90. Fact that wife's name does not appear in granting clause does not avoid mortgage of homestead where she expressly relinquishes dower and homestead and executes same. Kirby's Dig. § 3901. Gantt v. Hildreth [Ark.] 118 SW 255. Where wife's name did not appear in body of mortgage of homestead, but she signed it and acknowledged its execution, and it contained no relinquishment of dower, it was sufficient to create lien. Ward v. Stark Bros. [Ark.] 121 SW 382. See Deeds of Conveyance, § 1.

91. Deed to homestead not joined in by wife is void and inoperative as to wife so long as property was part of her homestead. Wooten v. Pennock [Tex. Civ. App.] 114 SW 465. Any attempted conveyance by husband of fee in any part of homestead without being joined by wife is void as to her and she can recover title thus attempted to be conveyed by husband. City of Houston v. Bammel [Tex. Civ. App.] 115 SW 661. Conveyance of homestead in which wife did not join held void as to wife, but because of covenants contained therein it was as to husband's interest operative against his heirs. Vickers v. Peddy [Tex. Civ. App.] 118 SW 1110.

92. When property ceases to be part of homestead by wife's abandonment of its use as such and her agreement to and acquiescence in partition of entire homestead tract between heirs of deceased husband and herself, deed from husband, though not joined in by wife, became effective by estoppel against heirs. Wooten v. Pennock [Tex. Civ. App.] 114 SW 465. Where community homestead is sold by husband alone and thereafter homestead is abandoned by husband and wife and new one acquired, no fraud against wife's rights being shown, deed becomes effective to transfer title. Kirby v. Blake [Tex. Civ. App.] 115 SW 674. Evidence held to show such situation. Id.; Robertson v. Hefley [Tex. Civ. App.] 118 SW 1159. Facts of case held not to come within rule where no new homestead was acquired and land in question continued homestead of husband and wife until his death, and since then has continued to be wife's homestead. Marble v. Marble [Tex. Civ. App.] 114 SW 871.

93. Deed executed by husband alone, which conveys homestead and other property, is void only as to homestead estate. Wilson v. Wilson, 83 Neb. 562, 120 NW 147; Id. [Neb.] 122 NW 856.

94. Ky. St. § 1706 (Russell's St. § 4665) creates exemption of homestead from debts of owner and imposes no restraint upon husband's general right to voluntarily sell land for value or otherwise contract as to it. Meadows v. Bryant [Ky.] 118 SW 306. Sale by husband alone held valid. Id.

95. Jarvis v. Armstrong [Miss.] 48 S 1. Deed of trust given to secure money advanced to pay for land and build house thereon which was converted into homestead is valid without wife's signature. Id.

96, 97. City of Houston v. Bammel [Tex. Civ. App.] 115 SW 661.

98. Rule applied to lien for purchase money. Munroe v. Munroe [Tex. Civ. App.] 116 SW 878.

99. Wooten v. Pennock [Tex. Civ. App.] 114 SW 465; City of Houston v. Bammel [Tex. Civ. App.] 115 SW 661. **Divorced woman** may bring suit to cancel void deed executed in violation of her homestead rights for purpose of subjecting it to her lien for alimony. Kimmerly v. McMichael, 83 Neb. 789, 120 NW 487. Pleadings and proof held to warrant such relief. Id.

1. Conveyance of homestead joined in by wife who was induced to do so by fraud may be set aside by her. Colegrove v. Colgrove [Ark.] 116 SW 190. See Fraud and Undue Influence, §§ 2, 3.

2. **Search Note:** See notes in 5 C. L. 1697, 1698; 9 Id. 1633; 3 L. R. A. (N. S.) 515; 13 Id. 430; 18 A. S. R. 113; 102 Id. 388; 8 Ann. Cas. 681; 11 Id. 423.

See, also, Homestead, Cent. Dig. §§ 307-353;

guished from the preceding section which deals with loss or relinquishment of the homestead by voluntary deed or incumbrance. The loss of the right to the homestead exemption by failure to set it up is treated in a subsequent section,[3] as is the loss or abandonment of the homestead allowed by law to the survivors.[4]

The loss or relinquishment of a homestead is not favored,[5] and consequently the homestead will be presumed to continue until the contrary is shown.[6] The homestead may, however, be lost by abandonment thereof [7] or of the intention to claim the property as a homestead,[8] with a clear affirmative intention not to return,[9] but not by a temporary absence with an intention to return.[10] It may also be lost as the

Dec. Dig. §§ 154-181½; 21 Cyc. 597-621; 15 A. & E. Enc. L. (2ed.) 638.

3. See post, § 10.

4. See post, § 8.

5. Jones v. Kepford, 17 Wyo. 468, 100 P 923.

6. Seilert v. McAnally [Mo.] 122 SW 1064. Burden is upon party asserting that homestead has been lost to show such fact. Id. It appearing that premises have been occupied as homestead, burden rests upon him alleging abandonment to overcome presumption that premises continued to be homestead. Jones v. Kepford, 17 Wyo. 468, 100 P 923.

7. Code of 1906, § 2146, exempts only land and buildings owned and occupied as residence, and when occupation ceases property, if still owned by debtor, becomes liable to creditor. Bennett Bros. v. Dempsey [Miss.] 48 S 901. There is no abandonment of portion of building as homestead where such portion cannot be separated, divided, or partitioned from remainder. Bente v. Sullivan [Tex. Civ. App.] 115 SW 350.

8. Exemption created by intention to claim land as homestead, when such intention is abandoned and not accompanied by occupancy, is thereby terminated. Watson v. City Nat. Bank [Tex. Civ. App.] 119 SW 915.

9. Whether removal from homestead constitutes abandonment of same depends upon intention of parties. Thigpen v. Russell [Tex. Civ. App.] 118 SW 1080. Abandonment of homestead never ought to be found unless removal and accompanying facts clearly show that party in removing never intended to return to homestead and use it as home. Armstrong v. Neville [Tex. Civ. App.] 117 SW 1010. To establish such fixed intention not to return, it must be undeniably clear and beyond almost shadow at least of all reasonable ground of dispute that there has been total abandonment with intention not to return and claim exemption. Id. Physical act of removing from homestead is not sufficient to constitute abandonment, unless attended or followed by intention to actually abandon it. Jones v. Kepford, 17 Wyo. 468, 100 P 923. Removal from homestead abandons same as homestead if at time of removal or at any time during absence intention not to return is formed. Lynch v. McGowan [Tex. Civ. App.] 117 SW 884. Though parties **received deed to other property and lived thereon,** yet, if they intended to return and reoccupy homestead, which they had left, it did constitute abandonment. Thigpen v. Russell [Tex. Civ. App.] 118 SW 1080. Where parties **rented tract of land in same inclosure as homestead** though not adjoining it, and wife being postmistress moved into house on such rented land taking part of furniture with her, and they lived in house on rented premises over two years, but never sold or rented homestead, clear unequivocal intention to abandon homestead was not shown. Jones v. Kepford, 17 Wyo. 468, 100 P 923. Leaving homestead does not accomplish abandonment when there is no intention never to return. Bankrupt held not to have abandoned homestead when he **leased home to daughter for use as boarding house,** he and his wife moving out without acquiring any other home, and with expressed intention of returning on expiration of lease. In re Presnall, 167 F 406. Where surviving wife executed **deed under oral agreement that she could still use** place as home as long as she wished to, agreement did not of itself constitute absolute substitute for homestead user, especially where circumstances showed that she had left place with no intention of returning. Vickers v. Peddy [Tex. Civ. App.] 118 SW 1110. One having **intention to return only in case of failure to pay for property purchased subsequent** to removal therefrom abandons same. Bennett Bros. v. Dempsey [Miss.] 48 S 901. Where husband **traded homestead for farm** to which family moved, there having been abandonment of homestead, wife could not, after other party had made valuable improvements and placed liens upon premises, assert her homestead rights. Bovine v. Selden, 155 Mich. 556, 15 Det. Leg. N. 1088, 119 NW 1090.

10. Agreed facts held to show removal for temporary purpose. Shattuck v. Weaver [Kan.] 101 P 649. Code 1906, § 2157, makes homestead liable for debts whenever debtor shall cease to reside on his homestead, unless removal be temporary by reason of some casualty or necessity and with purpose of speedily reoccupying same. Bennett Bros. v. Dempsey [Miss.] 48 S 901. Tract owned and occupied as homestead for 20 years except for short absences and one short lease, after which deceased returned and occupied same as before, held not abandoned though prior to death he was prevented from occupying same by **accident** to thigh, he having manifested intention to return when able and maintain home as such. Tyrrell v. Shannon [Iowa] 123 NW 325. Temporary absence of owner from homestead, leaving his house and substantially everything therein to care of another for him, for purposes of **business or pleasure,** not amounting to change of actual residence, does not constitute ceasing to occupy homestead within meaning of Rev. Laws 1905, § 3458. Jaenicke v. Fountain City Drill Co., 106 Minn. 442, 119 NW 60. Re-

result of divorce proceedings [11] or the abandonment of one spouse by the other,[12] but not where the abandonment is compelled by the other spouse.[13] It has been held, also, that a wife is bound by the determination of husband to abandon the homestead.[14]

Abandonment is a question of fact to be found like any other fact,[15] from a consideration of the real intention of the parties and all the surrounding circumstances.[16] In this connection, however, certain circumstances, such as a lease of the homestead during temporary absence,[17] or a lease with the owner remaining in possession of a portion thereof,[18] the lease of the homestead by the husband to his wife,[19] making entry on government land,[20] voting in another state,[21] or offering to sell the homestead, are not alone sufficient evidence of an intention to abandon the same,[22] but an absolute disposal of the homestead has been held sufficient to show abandonment.[23] Neither will any particular duration of absence constitute an abandonment,[24] unless continued for so long and under such circumstances as to authorize the conclusion that no intention to return and occupy the homestead existed,[25] though in some states a declaration of homestead must be filed if the absence is continued for more than a specified time.[26] Declarations and testimony of the parties as to their intention are admissible.[27]

moval from homestead with **intent to return only if necessary** on account of financial reverses, coupled with intention to reside elsewhere temporarily if he could sell homestead, held not to constitute abandonment. Armstrong v. Neville [Tex. Civ. App.] 117 SW 1010.

11. Where decree of divorce makes no disposition of homestead, it remains to husband discharged of all homestead rights or claims of wife. Goldsborough v. Hewitt [Okl.] 99 P 907.

12. Wife forfeits her homestead rights by voluntarily abandoning her husband without cause and husband may thereafter incumber and convey same alone. Mabry v. Kennedy [Tex. Civ. App.] 108 SW 176.

13. Husband cannot deprive his wife of her homestead rights in his residence by compelling her against her will to live apart from him. Blankenship v. Hall, 233 Ill. 116, 84 NE 192.

14. Rockwell Bros. & Co. v. Hudgens [Tex. Civ. App.] 123 SW 185.

15. Armstrong v. Neville [Tex. Civ. App.] 117 SW 1010.

16. Bovine v. Selden, 155 Mich. 556, 15 Det. Leg. N. 1088, 119 NW 1090. Facts that homestead claimant had not paid for land or received deed therefor are proper elements for consideration of jury on question of abandonment. Rockwell Bros. & Co. v. Hudgens [Tex. Civ. App.] 123 SW 185.

17. Shattuck v. Weaver [Kan.] 101 P 649.

18. Renting of homestead, owner at time residing on other portion thereof, did not operate as abandonment or effect its character as homestead. Clark v. Bird [Ala.] 48 S 359. Homestead not lost by leasing premises verbally for use as boarding house, bankrupt retaining room for himself and wife. In re Presnall, 167 F 406. One occupying property consisting of three tracts as homestead, one being community property of himself and deceased wife and other two being separate property of deceased wife, does not abandon same by leasing same and removing to house elsewhere where he and children were supported by proceeds of leased land, where he so removes without intention not to return and reoccupying at expiration of lease. Allen v. Campbell [Tex. Civ. App.] 115 SW 360.

19. On contrary, it discloses intent not to abandon. Jones v. Kepford, 17 Wyo. 468, 100 P 923.

20. Kimberlin v. Gordon [Mo. App.] 122 SW 1144.

21. That one has voted in another state than one in which homestead is situated does not conclusively establish abandonment of such homestead. Osage Mercantile Co. v. Blanc, 79 Kan. 356, 99 P 601. Gen. St. 1901, § 2572, subd. 6, providing that if person shall exercise right of suffrage in another state he shall be considered to have lost his residence, does not prescribe test for determining residence of claimant of homestead. Id.

22. Offer to sell homestead not necessarily inconsistent with intention to return to it and reoccupy it as home, sale not having been made. Thigpen v. Russell [Tex. Civ. App.] 118 SW 1080.

23. Subsequent conveyance by widow of homestead which she redeemed from foreclosure operates as abandonment of her further homestead rights therein. Burel v. Baker [Ark.] 116 SW 181. **Moving from homestead to farm traded** to husband for homestead held to show intention to abandon homestead. Bovine v. Selden, 155 Mich. 556, 15 Det. Leg. N. 1088, 119 NW 1090.

24, 25. One month is insufficient. Armstrong v. Neville [Tex. Civ. App.] 117 SW 1010.

26. Under Rev. Laws 1905, § 3458, providing that if a party ceases to occupy homestead for more than six consecutive months without having filed notice of homestead claim, in computing six months period, first day of absence must be excluded and last day included. Jaenicke v. Fountain City Drill Co., 106 Minn. 442, 119 NW 60. One who left homestead on Nov. 10th and re-

§ 8. *Rights of surviving spouse, children, heirs, or dependents of homestead tenant.*[28]—See 11 C. L. 1793—Upon the death of either spouse, such homestead rights as the decedent possessed, if any,[29] usually inure to the survivor[30] and the children.[31] The mere fact that a wife has separated from her husband does not necessarily deprive her of her homestead rights as survivor.[32] In North Carolina, the surviving widow is not entitled to a homestead unless there are no children.[33] In Texas a homestead is not allowed to decedent's unlawful widow and children[34] nor to decedent's unmarried adult daughter.[35]

Election.[36]—See 11 C. L. 1797—In some states the survivor may by timely[37] and

turned May 10th held not to have lost homestead rights under Rev. Laws 1905, § 3458, providing that homestead claim must be filed if claimant is absent more than 6 months. Id.

27. Declarations of parties are admissible upon question as to whether they intended to return to homestead, though they may seem self-serving. Thigpen v. Russell [Tex. Civ. App.] 118 SW 1080. Testimony of claimants of homestead that it was their intentions to return is admissible. Id. See Evidence, § 6.

28. **Search Note:** See notes in 3 C. L. 1642; 5 Id. 1700; 23 L. R. A. 239; 44 Id. 400; 56 Id. 33; 4 L. R. A. (N. S.) 544; 10 Id. 787, 1206; 16 Id. 728.

See, also, Homestead, Cent. Dig. §§ 245-306, 310; Dec. Dig. §§ 134-153; 21 Cyc. 561-597; 15 A. & E. Enc. L. (2ed.) 693.

29. Under Rev. Codes 1905, § 5071, no homestead estate survives to persons mentioned therein if decedent was not entitled to homestead right. Holcomb v. Holcomb [N. D.] 120 NW 547. Under St. 1898, § 2771, where **husband died leaving homestead to which he had equitable title,** widow had legal right to full equitable title of homestead for life or during period of her widowhood, which was defense to ejectment brought by holder of legal title. Harley v. Harley, 140 Wis. 282, 122 NW 761. Surviving wife or children are not entitled to homestead in property in which husband, if he were alive, would not have been. Where, by provisions of Const. 1902, § 191 (Code 1904, p. ccixxi), and Pollard's Code 1904, § 3630, cl. 7, householder would not have been entitled to homestead in property in question because of **fraudulent conveyance,** his surviving wife or children were not entitled to homestead therein. Dickenson v. Patton [Va.] 65 SE 529.

30. Smith v. Scott [Ark.] 122 SW 501; Raggio v. Palmtag, 155 Cal. 797, 103 P 312. Const. art. 9, § 6. Cherokee Const. Co. v. Harris [Ark.] 122 SW 485. Comp. Laws 1907, §§ 2829, 2830. Christiansen v. Robinson [Utah] 99 P 458. Decree in partition should provide for setting off husband's homestead under Partition Act, § 22 (Hurd's Rev. St. 1908, c. 106). Richardson v. Trubey, 240 Ill. 476, 88 NE 1008.

31. Chief purpose of Const. art. 9, § 6, was to secure to widow and minor children fixed home during life of widow and minority of children. It protects occupant in possession of land and holds it together as place of residence and home preserved against sale or partition. Cherokee Const. Co. v. Harris [Ark.] 122 SW 485. Under Const. art. 9, §§ 6, 10, minors acquire homestead rights on death of father. Smith v. Scott [Ark.] 122 SW 501. During minority of children, widow and mother may share homestead equally with children. Id. Right to share homestead equally and to one-half of rents and profits thereon became vested interest in children upon death of their father. Id. In Utah, children of intestate who had arrived at age of majority at time of his death or at time of setting homestead apart have no interest in homestead. Under Comp. Laws 1907, §§ 2829, 2830, homestead "belongs" to surviving spouse and "minor children" and if surviving spouse marries or when minor children arrive at full age homestead may be partitioned; held that "belong" expressed ownership and that children who were of age at time of intestate's death had no interest in homestead and could not require partition. Christiansen v. Robinson [Utah] 99 P 458. Minor children are entitled to hold homestead until they arrive at twenty-one years of age and rights of older children and dower rights of widow yield to rights of infant. Purchase of rights of older children and widow does not affect this. Burel v. Baker [Ark.] 116 SW 181.

32. Wife who lived separate from husband for two years prior to decease, there being no dissolution of marital relations, is nevertheless entitled to homestead exemption under Code 1907, § 4197. Coker v. Coker [Ala.] 49 S 684.

33. Under Const. art. 10, § 5, if owner of homestead dies, leaving widow "but no children," rents and profits shall inure to her benefit during her widowhood unless she be owner of homestead in her own right. Held that there being children living by former wife of deceased owner of homestead, widow was not entitled to homestead. Simmons v. Respass [N. C.] 65 SE 516.

34. Rev. Statutes, art. 2046, providing for setting apart of exempt property to widow, minor children and unmarried daughter remaining with family, applies only to lawful surviving wife and legitimate issue. Hayworth v. Williams [Tex.] 116 SW 43. But see Id. [Tex. Civ. App.] 117 SW 1197, where there seems to be intimation of opinion to contrary.

35. Const. art. 16, § 52, does not secure to unmarried daughter of deceased any right to occupy homestead after deceased's death. Hayworth v. Williams [Tex.] 116 SW 43. But see Id. [Tex. Civ. App.] 117 SW 1197, where there seems to be intimation of opinion contrary to above.

36. See, also, Election and Waiver, § 2B.

properly indicated [38] election decide to take a homestead,[39] distributive share,[40] dower,[41] or under the will; [42] in the latter case, there must be something which may be taken under the will or the election fails for want of consideration.[43] In Missouri the widow is entitled to the homestead first and to dower from the residue diminished by the amount of her interest in the homestead.[44]

Partition and assignment out of decedent's estate.[See 11 C. L. 1796]—Where the homestead does not exceed the value or dimensions which the law gives the widow, there is no occasion to have the same admeasured and set off to her.[45] The petition for setting apart the homestead must contain the statutory requisites.[46] Homestead may properly be assigned to minors in action to construe will.[47]

Nature of homestead estate.[See 11 C. L. 1794]—The survivor usually takes a life

37. What is **reasonable time** within which widow must be required to elect between her homestead right and her right to distributive share depends on circumstances. Stoddard v. Kendall, 140 Iowa, 688, 119 NW 138. Circumstances held to show that occupancy of homestead by widow for 2½ years after husband's death without administration upon his estate, and without written notice by heirs requiring her to elect between homestead rights and distributive share and without written election by her, constituted election by her to take homestead rights. Id.

38. Code, § 3376, authorizing election by widow between homestead rights and distributive share, **does not require written election.** Stoddard v. Kendall, 140 Iowa, 688, 119 NW 138.

39. Continued possession of homestead by widow is evidence tending to show election to take homestead rights instead of statutory share but it is not conclusive, and, if testimony as whole makes it reasonably clear that while remaining in possession she is always asserting interest in title as distinguished from mere right of life occupancy and use, presumption or inference derived from fact of continued possession is overcome. This is especially true where homestead is all property left by deceased and heirs at no time demand partition or accounting for rents and profits. Gray v. Wright [Iowa] 119 NW 612. Evidence held to show election to take homestead. White v. Holder [Ky.] 118 SW 995. Where widow and children entered into agreement whereby children released to widow all their rights in deceased father's premises for her support during life and she occupied homestead and property under such agreement, she will not be held to have elected to take homestead rights but she will be held to hold under agreement. Hemping v. Hemping [Iowa] 120 NW 111.

40. Evidence that surviving spouse willed undivided one-third to daughter several years before death held evidence tending to show claim of distributive share rather than homstead. Gray v. Wright [Iowa] 119 NW 612.

41. Widow is entitled to either dower or homestead in lands of her deceased husband, at her election (White v. Holder [Ky.] 118 SW 995), and, having elected to take either homestead or dower, she may not thereafter change her mind and take other (Id.). See Dower, § 1.

42. See Estate of Decedents, § 5D. Husband's right to homestead is not affected by provision in wife's will that husband take his interest in real property of testatrix. Richardson v. Trubey, 240 Ill. 476, 88 NE 1008. Under Ky. St. 1708 (Russell's St. § 4667), regarding rights of survivor, one taking under will loses homestead rights. Jarboe v. Hayden [Ky.] 117 SW 961. Where husband devises property to his wife greater in amount than that to which she would be entitled by law as his widow, and she accepts same, she cannot insist upon her homestead right, if it is repugnant to terms of will. Stoepler v. Silberberg, 220 Mo. 258, 119 SW 418. Where evidence showed that widow continually asserted that she had life estate only in premises in question, that she caused will to be probated, and qualified as executrix therof, it showed that she elected to take under will. Id.

43. See Contracts, § 2. If there is no property on which will of husband will operate as against widow's absolute statutory right of homestead, there would be no consideration for election by her, and reason on which doctrine of election rests would fail. Stoepler v. Silberberg, 220 Mo. 258, 119 SW 418. No formal renunciation of will would be necessary in such case to confirm her title to property which law itself gave her. Id.

44. Hardy v. Atkinson, 136 Mo. App. 595, 118 SW 516.

45. Not required under Gen. St. 1865, c. 111. Stoepler v. Silberberg, 220 Mo. 258, 119 SW 418.

46. Under Code 1896, § 2097, petition for setting apart real estate as exempt must set out that real and personal property owned by decedent at time of death does not exceed amount and value of exemptions allowed; that no administration was granted on his estate within 60 days after death and that he resided in county in which application is made at time of death. Singo v. McGehee [Ala.] 49 S 290. Petition nowhere averring deceased's residence in county at time of decease nor that all his property did not exceed value exempt but only that he owned certain property value of which was less than amount exempted held sufficient to confer jurisdiction, petition being held to negative ownership of other property and allegation of residence being nonjurisdictional fact. Id.

47. See Wills, § 5G. Cox v. Johnson, 242 Ill. 159, 89 NE 697.

estate [48] liable and entitled to the usual incidents of life estates,[49] except that it is exempt from sale [50] or partition,[51] and subject to any mortgage by one in which the other joined.[52] After the cessation of the homestead, it becomes liable for decedent's debts,[53] unless the survivor takes absolute title thereto.[54]

Loss of rights. See 11 C. L. 1796—The rights of minors in the homestead cannot be abandoned or lost by any acts of themselves [55] or mother.[56]

Rights of divorced parties. See 11 C. L. 1797—A husband cannot hold as against a claim for alimony land under the pretense that he is entitled to it as a homestead.[57]

§ 9. *Exemption of proceeds of homestead or of substituted properties.*[58]—See 11 C. L. 1797—The proceeds of the homestead are sometimes entitled to the same exemption as the homestead itself,[59] but to be so exempt the property must have retained

48. In re Fletcher's Estate, 83 Neb. 156, 119 NW 232. As affecting rights of heirs, homestead estate is one for life or years. Cherokee Const. Co. v. Harris [Ark.] 122 SW 485. Homestead law does not create any estate greater or any right more enlarged than that of occupancy of land and right to enjoyment of rents and profits therefrom during life of widow or minority of children. Id.

49. See Real Property, § 6. It **cannot be sold or alienated** by widow. Cherokee Const. Co. v. Harris [Ark.] 122 SW 485. **Cannot commit waste** by opening mines. Id. Since widow upon her husband's death becomes seized of life estate in homestead, she **need not account for use** thereof, or for rents accruing subsequent to husband's death. In re Fletcher's Estate, 83 Neb. 156, 119 NW 232. Where widow's right of dower is extinguished by reason of preponderance in value of her homestead right and she conveys to remaindermen, **entire fee merges** in them. Hardy v. Atkinson, 136 Mo. App. 595, 118 SW 516. **Devisee who took and retained possession** thereof including land in which testator's minor children had homestead is accountable for rent thereof to such minors. Cox v. Johnson, 242 Ill. 159, 89 NE 697.

50. Cherokee Const. Co. v. Harris [Ark.] 122 SW 485. See, also, ante, § 5.

51. To secure this object it was made exempt from sale so that it cannot be partitioned either in kind or for sale. Cherokee Const. Co. v. Harris [Ark.] 122 SW 485. Where surviving wife occupies as home homestead of her deceased husband, such homestead is not liable to partition at suit of adult heir. Miller v. Hassman [Okl.] 103 P 577. Under Code 1906, § 1659, homestead is not subject to partition during widowhood of surviving wife, and, under § 2146, quantity of land in such homestead shall not exceed 160 acres nor value thereof sum of $3,000. Held that provision as to value was for benefit of creditors and that heirs could not have partition though value of land was more than $3,000. Dickerson v. Leslie [Miss.] 47 S 659.

52. Raggio v. Palmtag, 155 Cal. 797, 103 P 812. See ante, § 6.

53. Decree awarding homestead to minor children during minority does not affect right of purchaser of rights of older children and widow thereto after expiration of such minority. Burei v. Baker [Ark.] 116 SW 181. After estate of homestead has terminated by death of widow and majority of minor children, land is still liable for debts of parents. Cherokee Const. Co. v. Harris [Ark.] 122 SW 485. Surviving spouse having died heirs have not, under Code Civ. Proc. § 1485, right to have property other than homestead first applied to payment of debt secured by mortgage. Raggio v. Palmtag, 155 Cal. 797, 103 P 812.

54. Sayles' Ann. St. 1897, art. 2055, which attempts, in case where estate proves insolvent, to make title to surviving wife and other constituents of family to whom homestead has been set apart absolute, is unconstitutional in so far as it interferes with rights of other heirs. Dorman v. Grace [Tex. Civ. App.] 122 SW 401.

55. Baker v. Lane [Ky.] 118 SW 963.

56. **Abandonment by widow** of interest acquired by her on husband's death in no manner affects rights of minors. Smith v. Scott [Ark.] 122 SW 501. Under Const. art. 9, §§ 6, 10, widow cannot deprive minors of homestead rights by **establishing another home and selling one occupied by father** and husband at time of his death. Id. Where mother abandons homestead in lands of deceased husband and establishes home elsewhere, children having no interest in such other home until her death (Const. art. 9, § 10) are not claiming inconsistent homesteads. Id. Where widow has **elected to take dower and sold same,** infant and vendee are entitled to use and benefit of property in proportion that value of one-third set aside to vendee of widow bears to value of portion set aside to infant to make whole worth $1,000 if any. Phillips v. Williams [Ky.] 116 SW 688. Portion set aside to them should include dwelling house if it can be done without materially injurying premises of others. Id. Widow's acts in **purchasing mortgaged homestead at foreclosure** sale and conveying portion of same to mortgagee in payment of debt held in effect mere redemption of portion of homestead not conveyed which she takes as trustee for minor children where she takes title herself. Burel v. Baker [Ark.] 116 SW 181.

57. Nunn v. Page [Ky.] 121 SW 442.

58. **Search Note:** See notes in 45 A. S. R. 237

See, also, Homestead, Cent. Dig. §§ 109-113; Dec. Dig. §§ 76-80; 21 Cyc. 497-501; 15 A. & E. Enc. L. (2ed.) 556, 574, 609; 10 A. & E. Enc. P. & P. 66, 92, 101.

59. Proceeds of sale of defendant's homestead are not subject to **garnishment.** Kimberlin v. Gordon [Mo. App.] 122 SW 1144.

its homestead character until the time of sale.[60] The products of a homestead are, however, sometimes subject to attachment to enforce payment of obligations contracted in the production of the same.[61]

§ 10. *Remedies of and procedure by creditors.*[62] *Remedies by suit or action.*[See 11 C. L. 1799]—The remedy of a creditor whose claim for purchase money is superior to the homestead exemption is in equity, where because of bankruptcy proceedings he cannot proceed at law.[63] While as a general rule to be available a homestead right must be pleaded,[64] by the homestead claimant or one who stands properly in his stead,[65] yet in those cases where the gravamen of the petition is fraud, a general denial is sufficient to authorize proof of a previously assigned homestead as disproving the charge of fraud.[66] By the weight of authority, a debtor who has mortgaged an existing homestead will be heard, upon a marshaling of securities, to insist that recourse shall last be had to the homestead property,[67] even though by so doing the security of certain creditors upon other lands is impaired or destroyed,[68] but the equity of an after-declared homestead will not displace the equity of a prior lien.[69]

Proceeds of homestead belong to wife where, in consideration of execution of deed of homestead by her, it is agreed that proceeds shall be transferred to her, and in such case **property in which proceeds are invested** not subject to demands of creditors of husband. Kershaw v. Willey [Okl.] 98 P 908.

Held not exempt: Code 1906, § 2158, exempting property disposed of by owner does not apply to mortgage of exempt property since mortgage is not disposal. Bennett Bros. v. Dempsey [Miss.] 48 S 901.

60. Held not exempt as homestead where two lots were purchased with pension money and presented to wife together with house thereon, which constituted their homestead, and after death of wife and quitclaim by adoptive heir was sold and proceeds deposited in bank and garnished. Charles City v. Security Trust & Sav. Bank [Iowa] 120 NW 114.

61. Under Civ. Code 1902, vol. 1, § 2633, court issuing process therefor should certify thereon that same is issued for said purpose and no other, but, where order appointing receiver of crop was not certified as having been issued to enforce debt contracted in production of crop, proper certificate could be made by succeeding circuit judge. Holladay v. Hodge [S. C.] 65 SE 1019.

62. Search Note: See notes in 30 L. R. A. 100; 77 A. S. R. 804.

See, also, Homestead, Cent. Dig. 223, 354-405; Dec. Dig. §§ 125, 182-218; 21 Cyc. 551, 622-644; 15 A. & E. Enc. L. (2ed.) 718; 10 A. & E. Enc. P. & P. 78.

63. Brooks v. Britt-Carson Shoe Co. [Ga.] 65 SE 411. May have bankrupt enjoined from taking possession of goods and have receiver appointed. Id.

64. Childers v. Pickenpaugh, 219 Mo. 455, 118 SW 478. Maker of note and lien may waive homestead rights. Zeno v. Adoue [Tex. Civ. App.] 117 SW 1039. Homestead character of mortgaged property cannot be set up after submitting to judgment foreclosing lien. Blair v. Guaranty Savings, Loan & Inv. Co. [Tex. Civ. App.] 118 SW 608.

65. Const. art. 246, declaring that homestead waiver shall have effect from time of recording, held intended to mean that special waiver in favor of particular creditor shall give his claim priority over other creditors having no previous enforcible claims against homestead and hence contention that homestead exemption being personal is waived by debtor's voluntary dismissal of his opposition is not well founded since homestead mortgagee may assert same. Glen v. Bresnan, 123 La. 1014, 49 S 690.

66. General denial in case setting up fraudulent conveyance held to admit of proof that property conveyed was homestead. Childers v. Pickenpough, 219 Mo. 455, 118 SW 478.

67. Nolan v. Nolan, 155 Cal. 476, 101 P 520. See Marshalling Assets and Securities. Homestead claimant may have his homestead protected and preserved so far as possible when it is covered by mortgage which also includes other property by requiring other property to be sold and applied upon debt before sale of homestead. Where property has been mortgaged as one tract and is later segregated into homestead and nonhomestead property, homestead claimants in respect to enforcement of lien stand in same situation as surety for payment of debt and are entitled to demand that nonhomestead tract be first sold and applied on debt. If creditor without debtor's consent releases property so first chargeable, claimant is entitled to credit of value of same. Blood v. Munn, 155 Cal. 228, 100 P 694. Where mortgagee released nonhomestead tract where mortgage included both homestead and nonhomestead tract and nonhomestead tract was sold in bankruptcy and mortgagee received proceeds of sale, mortgagors were entitled to credit for entire value of nonhomestead tract but not for both value and amount received from sale. Id. Husband held not estopped by bankruptcy proceedings, judgments or decrees in wife's bankruptcy proceedings, from asserting such right. Id.

68. Nolan v. Nolan, 155 Cal. 476, 101 P 520.

69. Where one held vendor's lien on N. place which was subordinated to claims of subsequent mortgage on N. place which mortgage also covered K. place, after-declared homestead upon K. place did not entitle debtor to have N. place first sold to

A creditor cannot redeem homestead property[70] nor inquire into the good faith of the husband in deeding a homestead to his wife where the property is exempt as to him.[71]

Remedies of creditors against excess. See 11 C. L. 1798—In proceedings by execution creditors to have the debtor's homestead ascertained and set off, the procedure is sometimes within the discretion of the court.[72] Some statutes require notice to be served on the homestead claimant.[73] Judgment debtor can relieve himself of the preliminary act of the appraisers in meting to him a homestead out of his property by going to the court issuing the process and complain, and upon a showing have the report of the appraisers set aside,[74] or by paying off the judgment.[75] If exceptions of debtor are overruled and the report of the appraisers confirmed, the homestead limits become fixed at least until there is a reassignment by reason of increased value.[76]

HOMICIDE.

The scope of this topic is noted below.[77]

§ 1. Elements of Crime in General and Parties Thereto, 2140.
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§ 4. Assault With Intent to Kill or do Great Bodily Harm, 2145.
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A. Presumptions and Burden of Proof, 2150.
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D. Punishment, 2169.

§ 1. *Elements of crime in general and parties thereto.*[78] See 11 C. L. 1800—It is homicide if the death of a human being[79] is caused[80] by another.[81] Criminal

satisfy mortgage, but equity of vendor's lien being prior to equity of after-declared homestead on K. place, vendor was entitled to have K. place first sold to satisfy mortgage. Nolan v. Nolan, 155 Cal. 476, 101 P 520.

70. Under Code 1896, § 3510, permitting judgment creditors to redeem land of debtor sold at mortgage sale, judgment creditor may not redeem judgment debtor's homestead which under law is exempt from levy and sale on execution in favor of judgment creditor. Bass & Co. v. Benson [Ala.] 47 S 1028. See Foreclosure of Mortgages on Land, § 11.

71. Kershaw v. Willey [Okl.] 98 P 908. See Fraudulent Conveyances, §§ 3, 6.

72. Where wife of judgment debtor filed answer in which she set forth that judgment debtor had deserted his family and also alleged that she and her husband each owned undivided one-half interest in prsmises levied upon, and claimed homestead exemption out of husband's undivided interest, it was abuse of discretion to strike such answer from files. First Nat. Bank v. McClanahan, 83 Neb. 716, 120 NW 185. That homestead claims set up in answer wers different from that contained in notice to officer making levy was immaterial. Id.

73. Civ. Code, § 1248, requires notice of time and of hearing in proceedings for appraisement and segregation of homestead from other property to be served on claimant at least two days before hearing. Blood v. Munn, 155 Cal. 228, 100 P 694.

74. If report is set aside, judgment debtor is left just where he was before preliminary act of appraisers. Childers v. Pickenpaugh, 219 Mo. 455, 118 SW 478. If judgment debtor fails to except to appraiser's act in setting aside homestead or pay debt, homestead so set aside becomes complete and its metes and bounds fixed. Id. Where debtor took no steps to thwart action of appraisers in setting off and appraising homestead, he cannot collateraly attach such action. Id.

75. Judgment debtor may relieve his lands of all preliminary acts and consequences of acts of appraisers appointed to set out homestead after issuance of execution by paying judgment, and his property is then left as if no execution ever issued. Childers v. Pickenpaugh, 219 Mo. 455, 118 SW 478.

76. Childers v. Pickenpaugh, 219 Mo. 455, 118 SW 478. Effect of segregation under Civ. Code, § 1248, of homestead from other property in bankruptcy proceedings is to divest segregated property of homestead character and render sams liable for debts. Blood v. Munn, 155 Cal. 228, 100 P 694.

77. Matters of substantive law (see Criminal Law*) and procedure (see Arrest and

homicide exists where the death is caused by a culpable act or omission.[82] Intent, actual [83] or implied,[84] is essential,[85] but motive is immaterial [86] except as evidence of intent.[87] The degrees of homicide are merely grades of one common offense.[88] General rules govern the relation of principal and accessory [89] and the responsibility of conspirators.[90] At common law it is murder to aid or abet a suicide,[91] but it is manslaughter by some statutes.[92]

§ 2. *Murder* [93]—See 11 C. L. 1801 is the unlawful [94] killing of a human being

Binding Over;* Indictment and Prosecution*), common to all crimes, are elsewhere treated.

78. Search Note: See notes in 67 L. R. A. 426; 2 L. R. A. (N. S.) 897; 3 Id. 1153; 5 Id. 821; 7 Id. 1056; 15 Id. 988; 16 Id. 327; 3 Ann. Cas. 936; 4 Id. 958.

See, also, Homicide, Cent. Dig. §§ 1-11, 47-61, 108, 109, 130, 191; Dec. Dig. §§ 1-6, 29, 30, 82, 83, 100, 126; 21 Cyc. 661-663, 668-702, 788, 832; 26 A. & E. Enc. L. (2ed.) 256; 10 Id. 359; 21 Id. 83, 92.

79. Under B. & C. Comp. § 1748, denouncing as manslaughter criminal abortion upon a woman "pregnant with child," which results in the death of either mother or child, it is immaterial if the foetus was killed before or after quickening. State v. Atwood [Or.] 102 P 295.

80. Owner of **automobile** not guilty where not in immediate control of driver and no previous notice of recklessness. People v. Scanlon, 132 App. Div. 528, 117 NYS 57.

Not necessarily sole cause: Contributing cause sufficient if injury was dangerous. Huckabee v. State [Ala.] 48 S 796. Blows causing decedent to fall under wheels and be killed. Gilmore v. State [Ark.] 122 SW 493. Where beating contributed to death though previous injury might have been fatal. Duque v. State [Tex. Cr. R.] 119 SW 687. Improper medical treatment no defense for party who inflicted fatal wound. Allen v. State [Ga.] 65 SE 431. Bad driving of buggy no excuse for automobile driver whose negligence was proximate cause of death of occupant. People v. Scanlon, 132 App. Div. 528, 117 NYS 57. The causal connection between wounds and death being clearly shown, the diseased condition of decedent as contributing to the result cannot be shown to interrupt the causation. Dumas v. State [Ala.] 49 S 224.

81. Corporation not "another person" within Pen. Code, § 179. People v. Rochester R. & L. Co., 195 N. Y. 102, 88 NE 22, afg. 129 App. Div. 843, 114 NYS 755.

82. Intent or gross negligence. Harrell v. State [Ala.] 49 S 805. Accidental homicide not culpable. Crow v. State, 55 Tex. Cr. R. 200, 116 SW 52. Accidental homicide may be done by blow in self-defense without intent to kill. Id.

83. Where two shots were fired with murderous intent, the third and fatal shot, fired in struggle for possession of weapon, was not accident. Kennison v. State, 83 Neb. 391, 119 NW 768.

84. Negligence may supply intent. People v. Price, 9 Cal. App. 218, 98 P 597. May be implied from nature of weapon. McDowell v. State, 55 Tex. Cr. R. 596, 117 SW 831.

85. With intent or by willful act greatly dangerous to human life. Fowler v. State [Ala.] 49 S 788. "Murder in second degree is devoid of element of intent," held error. State v. Mellillo [N. J. Err. & App.] 71 A 671.

86. House v. State [Miss.] 48 S 3; State v. Bobbitt, 215 Mo. 10, 114 SW 511; People v. Farmer, 194 N. Y. 251, 87 NE 457; People v. Sanducci, 195 N. Y. 361, 88 NE 385. Not an extenuating circumstance. People v. Hampantjoomian, 196 N. Y. 77, 89 NE 451.

87. Of great evidential value, especially where evidence is wholly circumstantial. State v. Hembru [Or.] 103 P 1008. Admissibility, see § 7B, post; Sufficiency, see § 7D, post.

88. Murder and manslaughter are but different degrees of felonious homicide. Rhea v. Ter. [Okl. Cr. R.] 105 P 314.

89. One who, knowing the crime has been committed, shelters, receives, relieves, comforts or assists the felon, is an accessory. State v. Jones [Ark.] 120 SW 154. One assisting in concealing the body is not a principal but an accessory after the fact. People v. Farmer, 196 N. Y. 65, 89 NE 462. Those participating as agressors in a fatal fight are accessories. Presence alone may be regarded as encouraging. State v. Cloninger, 149 N. C. 567, 63 SE 154. Mere presence, without knowledge of intent, is not criminal. Choice v. State, 54 Tex. Cr. R. 617, 114 SW 132. Where principal commits manslaughter, accessories are guilty of no higher degree. People v. Sidelinger, 9 Cal. App. 298, 99 P 390. Conviction or proof of guilt of principals not essential prerequisite to conviction of accomplice. Beard v. State [Tex. Cr. R.] 123 SW 147. Aider and abettor may be convicted though principal is acquitted. Steely v. Com. [Ky.] 116 SW 714.

90. Conspirator guilty though absent. State v. Bobbitt, 215 Mo. 10, 114 SW 511. Responsible for act of co-conspirator in furtherance of common purpose. Van Wyk v. People, 45 Colo. 1, 99 P 1009; State v. Hayes, 38 Mont. 219, 99 P 434. Guilty though ignorant of intent to kill. State v. Darling, 216 Mo. 450, 115 SW 1002. One who conspires to commit mutual suicide is not bound by refusal of other to repent therefrom. State v. Webb, 216 Mo. 378, 115 SW 998.

91. State v. Webb, 216 Mo. 378, 115 SW 998. The survivor of two who mutually agree to suicide is guilty of murder. Id.

92. Assisting in suicide. State v. Webb, 216 Mo. 378, 115 SW 998.

93. Search Note: See notes in 25 L. R. A. 434; 29 Id. 154; 60 Id. 801; 61 Id. 277; 63 Id. 353, 375, 391, 660, 902; 66 Id. 304; 68 Id. 193; 1 L. R. A. (N. S.) 991; 6 Id. 1154; 12 Id. 889; 14 Id. 346; 4 Ann. Cas. 800; 8 Id. 973.

See, also, Homicide, Cent. Dig. §§ 12-51;

* Always begin with the latest article on the subject. Use the latest topical index.

with malice aforethought.[95] Malice [96] and premeditation [97] are essential. Express malice is a deliberate intent to kill [98] a particular person.[99] Malice may be implied from the nature of the act [1] or the use of a deadly weapon [2] or from other circumstances.[3] To constitute premeditation, the intent to kill must precede the act [4] by an appreciable,[5] but not by any particular,[6] space of time.

Degrees.[See 11 C. L. 1892]—The subdivision of the offense into degrees is statutory and creates no new offense.[7] First degree murder, as usually defined, is murder with premeditation and delibration [8] or with express malice either actual [9] or in-

Dec. Dig. §§ 7-30; 21 Cyc. 663-694, 703-733, 776-778; 21 A. & E. Enc. L. (2ed.) 131.

Defined: The unlawful killing of a human being with malice aforethought. Eytinge v. Ter. [Ariz.] 100 P 443. The unlawful, willful and felonious killing of another with malice aforethought not in necessity or apparent necessity of self-defense. Commonwealth v. Mosser [Ky.] 118 SW 915.

94. Intentional killing always unlawful except in self-defense or justified of law. Puryear v. State [Tex. Cr. R.] 118 SW 1042. "Murder by poison" is not synonymous with "killing by poison." Eytinge v. Ter. [Ariz.] 100 P 443.

95. Where malice and killing exist, the crime of murder is complete. State v. Lee [Del.] 74 A 4. Malice aforethought is the gist. Deliberation and premeditation are matters of proof. State v. Nielson, 38 Mont. 451, 100 P 229. Homicide by lying in wait cannot be less than murder. Wheeler v. State [Tex. Cr. R.] 121 SW 166. Intentional shooting into a house with design to kill an inmate cannot be less than murder if killing results. Holland v. State, 55 Tex. Cr. R. 27, 115 SW 48.

Malice aforethought: Deliberate and premeditated design. People v. Morse, 196 N. Y. 306, 89 NE 816. Sedate deliberate mind and formed design to kill. State v. Miele [Del.] 74 A 8.

96. Malice essential. Andrews v. State [Ala.] 48 S 858; Eytinge v. Ter. [Ariz.] 100 P 443; State v. Miele [Del.] 74 A 8; Miles v. State [Ga.] 65 SE 368. Malice may be **express or implied.** Eytinge v. Ter. [Ariz.] 100 P 443.

Defined: Malice is unlawful intention to kill without justification or mitigation. Leonard v. State [Ga.] 66 SE 251. Legal malice is intent to take human life in cases where law neither justifies or mitigates killing. Tucker v. State [Ga.] 66 SE 250.

97. "Malicious" not sufficient charge, must be "malice aforethought." Brett v. State [Miss.] 47 S 781.

98. Eytinge v. Ter. [Ariz.] 100 P 443.

99. General intent to kill one of a crowd not express malice. Gentry v. State [Miss.] 45 S 721.

1. Where no considerable provocation or where circumstances show an abandoned and malignant heart. Eytinge v. Ter. [Ariz.] 100 P 443. Malice may be inferred from an unlawful act denoting a wicked heart fatally bent on mischief or a reckless disregard of human life. State v. Lee [Del.] 74 A 4; State v. Miele [Del.] 74 A 8. A cruel act done voluntarily is done maliciously no matter how sudden the act may be. State v. Lee [Del.] 74 A 4; State v. Miele [Del.] 74 A 8. "Act greatly dangerous to the lives of others indicating a depraved mind regardless of human life" **does not include** shooting with intent to kill a specific individual, where no universal malice is shown. Longinotti v. People [Colo.] 102 P 165.

2. Selection and use of deadly weapon raises issue of first degree murder. State v. Baker [Iowa] 121 NW 1028.

Deadly weapon: Manner of use may determine deadliness of weapon. State v. Dunn, 221 Mo. 630, 120 SW 1179. Club 22 inches long and 3½ by ¾ inches is deadly weapon where used as a bludgeon. Id. See, also, § 6, infra.

3. Resisting lawful arrest. State v. Pritchett, 219 Mo. 696, 119 SW 386. Quarrel deliberately provoked. Bice v. State, 55 Tex. Cr. R. 529, 117 SW 163. Quarrel provoked with intent to kill. Gray v. Phillips [Tex. Civ. App.] 117 SW 870. Unlawful killing without extenuating circumstances. Potts v. State [Tex. Cr. R.] 118 SW 535. Where fatal shot was fired in struggle for revolver, intent will be referred back to that with which previous shots were fired. Kennison v. State, 83 Neb. 391, 119 NW 768.

4. Barnhill v. State, 56 Fla. 16, 48 S 251; State v. Roberson, 150 N. C. 837, 64 SE 182. Intent alone insufficient. Barnhill v. State, 56 Fla. 16, 48 S 251. Prior intent necessary. Ferguson v. State [Ark.] 122 SW 236. However short a time. Freeman v. Com. [Ky.] 118 SW 917. "Preconceived" is not synonymous with "premeditated." State v. Mellillo [N. J. Err. & App.] 71 A 671. "Instantly" in its legal sense means "forthwith," but in its logical sense "at the same time." In this sense it cannot be correctly used as describing necessary time for premeditation. State v. Mangano [N. J. Err. & App.] 72 A 366. **Cannot be inferred** from killing. Ferguson v. State [Ark.] 122 SW 236.

5. Barnhill v. State, 56 Fla. 16, 48 S 251; State v. Arata [Wash.] 105 P 227. Premeditation takes time. State v. Mangano [N. J. Err. & App.] 72 A 366. Long enough to form definite purpose. Barnhill v. State, 56 Fla. 16, 48 S 251. Where defendant stopped and chose position from which to fire on officer, premeditation is shown. People v. Governale, 193 N. Y. 581, 86 NE 554.

6. Ferguson v. State [Ark.] 122 SW 236; State v. Baker [Iowa] 121 NW 1028; State v. Roberson, 150 N. C. 837, 64 SE 182; State v. Arata [Wash.] 105 P 227. Malice need not have existed for any particular time. Miles v. State [Ga.] 65 SE 368.

7. Classification rather than definition, so that crime must be common-law murder to come within either degree. State v. Bobbitt, 215 Mo. 10, 114 SW 511.

8. Malice aforethought. State v. McKay, 150 N. C. 813, 63 SE 1059. Deliberation and

evitably inferred from the manner of the killing[10] or murder committed in the perpetration of a felony.[11] Murder in the second degree is variously defined in the different states, the usual intention being to include all murder not denounced as of the first degree.[12] Thus murder lacking in the deliberate premeditation essential to the first degree,[13] as in the case of killing in a sudden fury [14] without adequate cause for such passion,[15] or murder in which malice is implied of law,[16] are usually held to be of the second degree, but the mere existence of passion at the time of the killing will not mitigate the degree if deliberation is shown.[17] The degree is usually a question of fact.[18]

§ 3. *Manslaughter*[19]—See 11 C. L. 1803 embraces all forms of criminal homicide less than murder.[20] Thus unlawful homicide which is done without malice,[21] or is done in a sudden quarrel or mutual combat,[22] or in the heat of passion [23] induced by

premeditation. State v. Mangano [N. J. Err. & App.] 72 A 366; People v. Sanducci, 195 N. Y. 361, 88 NE 385; People v. Jackson, 196 N. Y. 357, 89 NE 924. Willful premeditation and determination. State v. McKay, 150 N. C. 813, 63 SE 1059. Unprovoked killing without justification or excuse. Crawford v. State [Tex. Cr. R.] 119 SW 690. Murder by poison or premeditation or in perpetration of enumerated felonies. Eytinge v. Ter. [Ariz.] 100 P 443. With deliberate design. Dillon v. State, 137 Wis. 655, 119 NW 352. "Design" means intent. Id. "Deliberate" and "premeditated" are interchangeable words. Id "Deliberately formed intention" is not equivalent to "premeditated design." Weisenbach v. State, 138 Wis. 152, 119 NW 843. First degree cannot be predicated upon existence of intent merely at time of killing. It must precede. State v. Mangano [N. J. Err. & App.] 72 A 366. Time for premeditation may be fraction of a second. People v. Jackson, 196 N. Y. 357, 89 NE 924.

9. Express malice. McMeans v. State, 55 Tex. Cr. R. 69, 114 SW 837. Express malice aforethought. State v. Miele [Del.] 74 A 8. Willfully and maliciously. Levering v. Com. [Ky.] 117 SW 253.

10. By poison. Eytinge v. Ter. [Ariz.] 100 P 443; Levering v. Com. [Ky.] 117 SW 253.

11. Turpitude of the act supplies the element of premeditation. Pumphrey v. State [Neb.] 122 NW 19. Felony. Eytinge v. Ter. [Ariz.] 100 P 443. Robbery. Pumphrey v. State [Neb.] 122 NW 19. Arson. State v. Bobbitt, 215 Mo. 10, 114 SW 511. Homicide in the commission of arson is not a distinct offense but merely a method of first degree murder. Id.

12. All murder except first degree. Eytinge v. Ter. [Ariz.] 100 P 443; State v. Mellillo [N. J. Err. & App.] 71 A 671; McDowell v. State, 55 Tex. Cr. R. 596, 117 SW 831; Puryear v. State [Tex. Cr. R.] 118 SW 1042. Intent to kill another than the one killed. Holland v. State, 55 Tex. Cr. R. 27, 115 SW 48. Homicide in perpetration of abortion. State v. Gibbons [Iowa] 120 NW 474.

13. Potts v. State [Tex. Cr. R.] 118 SW 535; State v. Bobbitt, 215 Mo. 10, 114 SW 511.

14. Sudden transport of passion. People v. Jackson, 196 N. Y. 357, 89 NE 924. Sudden passion without adequate cause. Gallagher v. State, 55 Tex. Cr. R. 50, 115 SW 46; Puryear v. State [Tex. Cr. R.] 118 SW 1042. With deadly weapon in sudden passion without adequate cause. Clark v. State [Tex. Cr. R.] 120 SW 179. Assault out of proportion to provocation. State v. Wooley, 215 Mo. 620, 115 SW 417.

15. Adequate Cause, see § 3, infra.

16. With malice implied. State v. Miele [Del.] 74 A 8; McMeans v. State, 55 Tex. Cr. R. 69, 114 SW 837. "Malice aforethought" within Code, § 4727, defining second degree murder, does not necessarily mean intent to kill but may be inferred from intent to commit a felony. State v. Gibbons [Iowa] 120 NW 474.

17. Mere agitation no mitigation. Cordono v. State [Tex. Cr. R.] 120 SW 471. Hatred and anger no mitigation. Id. Premeditation determines the degree regardless of sudden passion. Id. Previous threats on malicious intention of deceased will not mitigate deliberate assassination. Thompson v. State [Ark.] 114 SW 1184.

18. Degree for jury. People v. Turpin, 10 Cal. App. 526, 102 P 680. Degree for jury unless premeditation is clearly shown. People v. Governale, 193 N. Y. 581, 86 NE 554. Existence of premeditation is for jury. Barnhill v. State, 56 Fla. 16, 48 S 251. Where corpus delicti is admitted and no justification established, the only question remaining is that of deliberation and premeditation. People v. Sanducci, 195 N. Y. 361, 88 NE 385. Whether iron pipe was a deadly weapon. Carter v. Com. [Ky.] 114 SW 1186.

19. Search Note: See notes in 6 L. R. A. (N. S.) 685; 90 A. S. R. 571; 1 Ann. Cas. 34; 9 Id. 929; 11 Id. 1026.

See, also, Homicide, Cent. Dig. §§ 52-109; Dec. Dig. §§ 31-83; 21 Cyc. 663-694, 734-776; 21 A. & E. Enc. L. (2ed.) 171.

20. The unlawful killing of another without malice upon a sudden heat or inadvertently in the commission of some unlawful act. Boche v. State [Neb.] 122 NW 72. The unlawful killing of a human being without malice in sudden heat of passion or on a legal provocation. State v. Hunter, 82 S. C. 153, 63 SE 685.

21. Turner v. State [Ala.] 49 S 304; Clark v. State [Ga. App.] 65 SE 694; State v. Lance, 149 N. C. 551, 63 SE 198. Malice not an element. Seawright v. State [Ala.] 49 S 325; Bluitt v. State [Ala.] 49 S 854; State v. Lee [Del.] 74 A 4. Where malice is also present, passion is not a mitigating circumstance. Brewer v. State [Ala.] 49 S 336; Arnwine v. State, 54 Tex. Cr. R. 213, 114 SW 796.

22. Sudden quarrel. State v. Quick, 150 N. C. 820, 64 SE 168. Mutual combat. State v. Goldsby, 215 Mo. 48, 114 SW 500.

23. Heat of passion. Pierce v. State [Ga.]

legally adequate cause [24] and before the lapse of a reasonable cooling time,[25] is usually regarded as manslaughter, and the same is true of homicide unintentionally done in the commission of a crime less than felony [26] or through culpable negligence [27] or recklessness.[28] Homicide through the use of unnecessary force in self-defense is manslaughter.[29] Generally, the offense is divided into voluntary [30] and involuntary [31] manslaughter or into two or more degrees.[32]

63 SE 792; State v. Goldsby, 215 Mo. 48, 114 SW 500. Passion without malice. Brewer v. State [Ala.] 49 S 336; Tyner v. U. S. [Okl. Cr. R.] 103 P 1057. Heat of passion without design to kill. Dillon v. State, 137 Wis. 655, 119 NW 352; Atchison v. State [Okl. Cr. R.] 105 P 387. Willfully in heat of passion. Smith v. Com. [Ky.] 118 SW 368. Willfully in heat of passion without previous malice. Commonwealth v. Mosser [Ky.] 118 SW 915. Passion without malice or premeditation. State v. Sebastian, 215 Mo. 58, 114 SW 522. Unpremeditated and unreflecting passion. State v. Miele [Del.] 74 A 8. Where malice is also present, passion is not a mitigating circumstance. Brewer v. State [Ala.] 49 S 336; Arnwine v. State, 54 Tex. Cr. R. 213, 114 SW 796.

24. Must be adequate provocation. Williams v. State [Ala.] 50 S 59; State v. Goldsby, 215 Mo. 48, 114 SW 500; Potts v. State [Tex. Cr. R.] 118 SW 535; State v. Crawford [W. Va.] 66 SE 110. Anger alone no mitigation. Atchison v. State [Okl. Cr. R.] 105 P 387; Arnwine v. State, 54 Tex. Cr. R. 213, 114 SW 796. Present not previous provocation, but preceding circumstances may be considered to determine state of mind of accused at time of killing. McHenry v. State, 54 Tex. Cr. R. 477, 114 SW 115. What will constitute adequate provocation is for court. Williams v. State [Ala.] 50 S 59.

Held adequate: Blow given or threatened. Williams v. State [Ala.] 50 S 59. Assault and battery. Gallagher v. State, 55 Tex. Cr. R. 50, 115 SW 46. Assault causing pain. Craft v. State [Tex. Cr. R.] 122 SW 547. Assault or personal violence. State v. Heath, 221 Mo. 565, 121 SW 149. Assault or other equivalent circumstances. Battle v. State [Ga.] 65 SE 382. "Other equivalent circumstances" defined. Id. Unjustified assault by police officer. People v. Tansey [Cal. App.] 104 P 582. Pulling accused off his horse. Arnwine v. State, 54 Tex. Cr. R. 213, 114 SW 796. Insults to wife of accused. Hobbs v. State, 55 Tex. Cr. R. 299, 117 SW 811. Belief that decedent had insulted wife of accused. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635.

Held inadequate: Words alone. State v. Goldsby, 215 Mo. 48, 114 SW 500; State v. Myers, 221 Mo. 598, 121 SW 131; Atchison v. State [Okl. Cr. R.] 105 P 387. Words unaccompanied by acts of menace. State v. Crawford [W. Va.] 66 SE 110. Conditional threat. State v. Goldsby, 215 Mo. 48, 114 SW 500. Words not amounting to a threat no matter how insulting. State v. Heath, 221 Mo. 565, 121 SW 149. Insulting conduct toward wife of accused. Hobbs v. State, 55 Tex. Cr. R. 299, 117 SW 811. Shooting toward a house in which was wife of accused. Buckner v. State, 55 Tex. Cr. R. 511, 117 SW 802. Filing a criminal complaint against accused. McMeans v. State, 55 Tex. Cr. R. 69, 114 SW 837.

25. Quarrel no justification if cooling time has elapsed. Barnhill v. State, 56 Fla. 16, 48 S 251. Usually a question of law. Brewer v. State [Ala.] 49 S 336. Cooling time amply shown by evidence. Id. In order to have been a cooling time there must first have been an adequate provocation. Jay v. State [Tex. Cr. R.] 120 SW 449.

26. Tyner v. U. S. [Okl. Cr. R.] 103 P 1057; Dillon v. State, 137 Wis. 655, 119 NW 352. Speeding automobile. People v. Scanlon, 132 App. Div. 528, 117 NYS 57. Assault without intent to kill. Bice v. State, 55 Tex. Cr. R. 529, 117 SW 163; Gray v. Phillips [Tex. Civ. App.] 117 SW 870. Where homicide would otherwise be murder it may be reduced to manslaughter by fact that it was committed in perpetration of an offense less than felony. State v. Bassnett [Kan.] 102 P 461. The offense less than felony which will render homicide committed in its perpetration first degree manslaughter need not be an independent offense but may be the very assault, without intent to kill, which caused the homicide. Id.

27. Manslaughter by willfully neglecting to provide medical attendance to a minor child must involve gross negligence as distinguished from the ordinary negligence which forms the basis of civil liability. State v. Watson [N. J. Law] 71 A 1113. Manslaughter by failing to provide medical attendance to a minor child must, under Act March 22, 1901, be "willful." Question is for jury. Id.

28. Automobile. State v. Watson, 216 Mo. 420, 115 SW 1011; People v. Scanlon, 132 App. Div. 528, 117 NYS 57. Reckless shooting. State v. Lance, 149 N. C. 551, 63 SE 196. Pointing pistol. Leonard v. State [Ga.] 66 SE 251. Unintentional shooting of one who was attempting to disarm accused who was quarreling with another. Smith v. Com. [Ky.] 118 SW 368.

29. State v. Quick, 150 N. C. 820, 64 SE 168.

30. Voluntary manslaughter is homicide in the heat of passion, etc. Tyner v. U. S. [Okl. Cr. R.] 103 P 1057. Heat of passion or sudden quarrel. Pierce v. State [Ga.] 63 SE 792; Clark v. State [Ga. App.] 65 SE 694; Commonwealth v. Mosser [Ky.] 118 SW 915. On provocation or in mutual combat. State v. Goldsby, 215 Mo. 48, 114 SW 500. Heat of passion or willful negligence. Smith v. Com. [Ky.] 118 SW 368. Must be intent to kill decedent or inflict great bodily harm. Fowler v. State [Ala.] 49 S 788.

Held voluntary: Homicide resulting from intentionally pointing pistol regardless of motive. Leonard v. State [Ga.] 66 SE 251. Unintentional shooting of one who was attempting to disarm accused who was attempting to shoot another. Smith v. Com. [Ky.] 118 SW 368.

31. Unintentionally in performance of unlawful act or lawful act in an unlawful manner. Commonwealth v. Mosser [Ky.] 118 SW 915; Tyner v. U. S. [Okl. Cr. R.] 103 P 1057.

32. First degree: Unintentionally in per-

§ 4. *Assault with intent to kill or do great bodily harm.*[33]—See 11 C. L. 1806—Intent is the gist of the offense [34] but intent must be coupled with an overt act [35] and with apparent ability to consummate the crime.[36] It is held that the intent must be specific,[37] but such an intent may be inferred from the nature of the act,[38] and, in some jurisdictions, general malice or recklessness may supply specific intent.[39] Statutes very generally subdivide the offense according to the degree of homicide attempted, and to that end all of the incidents of the major crime are at issue,[40] but, broadly speaking, attempt to commit any degree of homicide will constitute the crime.[41] The statutory divisions are usually considered degrees of a common crime,[42] but closely allied offenses have been held to be separate crimes.[43] In order to constitute assault with intent to murder, all of the elements of murder except the actual killing must be present.[44] As in the case of murder, malice may be inferred from the nature of the weapon used [45] or the manner of its use.[46]

§ 5. *Justification and excuse.*[47]—See 11 C. L. 1807—Homicide in self-defense is

petration of a crime less than felony. Dillon v. State, 137 Wis. 655, 119 NW 352. **Fourth degree:** All common-law manslaughter not otherwise defined by statute. State v. Goldsby, 215 Mo. 48, 114 SW 500; State v. Sebastian, 215 Mo. 58, 114 SW 522; State v. Watson, 216 Mo. 420, 115 SW 1011.

33. Search Note: See note in 8 Ann. Cas. 789.

See, also, Homicide, Cent. Dig. §§ 110-130; Dec. Dig. §§ 84-100; 21 Cyc. 778-793; 2 A. & E. Enc. L. (2ed.) 952; 21 Id. 91.

34. Essential. State v. Lee [Del.] 74 A 4; Martin v. State [Tex. Cr. R.] 122 SW 558. May be implied. State v. Lee [Del.] 74 A 4. Must be alleged and proved. State v. Rodriquez [Nev.] 102 P 863. Intent is for jury. Fallon v. State, 5 Ga. App. 659, 63 SE 806. Failure to follow up and complete the murder is not conclusive of lack of original intent. Duncan v. State, 55 Tex. Cr. R. 168, 115 SW 837.

35. State v. Rodriquez [Nev.] 102 P 863. Pointing a revolver. Ryan v. Ter. [Ariz.] 100 P 770.

36. Shooting out of range is no attempt. Jackson v. State, 54 Tex. Cr. R. 605, 114 SW 136. "Struck at" charges no crime since defendant must have been within striking distance. Jones v. State [Ark.] 116 SW 230.

37. Chowning v. State [Ark.] 121 SW 735. General intent insufficient. Gentry v. State [Miss.] 45 S 721.

38. Promiscuous shooting is intent to kill each person in range. Phillips v. U. S. [Okl. Cr. R.] 103 P 861. Natural and probable consequences of reckless shooting. Tyner v U. S. [Okl. Cr. R.] 103 P 1057.

39. Specific intent unnecessary. Phillips v. U. S. [Okl. Cr. R.] 103 P 861; Tyner v. U. S. [Okl. Cr. R.] 103 P 1057 Fact that injuries would not have ordinarily produced death will not reduce to simple assault Grant v. State [Tex. Cr. R.] 120 SW 481.

40. Breach of peace is unlawful act rendering shooting **assault with intent to kill.** Tyner v. U. S. [Okl. Cr. R.] 103 P 1057.

Shooting at another: Offense complete if, had homicide resulted, crime would be manslaughter. Fallon v. State, 5 Ga. App. 659, 63 SE 806. **"Assault and battery with a deadly weapon"** Wilson's Revised and Ann. St. 1903, § 2206. Stewart v. Ter. [Okl. Cr. R.] 100 P 47. **Malice,** see infra, this section, assault with intent to murder. **Passion** may reduce the degree. Jackson v. State, 54 Tex. Cr. R. 605, 114 SW 136; Vinson v. State, 55 Tex. Cr. R. 490, 117 SW 846. **Provocation** must be adequate to render passion a mitigating circumstance. Duncan v. State, 55 Tex. Cr. R. 168, 115 SW 837. Rash or inconsiderate impulse is not per se a mitigation. Id. Opprobrious words insufficient. Crawley v. State [Ga. App.] 66 SE 273. Vile language and approach of victim's brother with arms held insufficient. Snell v. State [Tex. Cr. R.] 119 SW 859. Assault causing pain or bloodshed sufficient. Gilford v. State, 54 Tex. Cr. R. 510, 114 SW 138. Insults to wife sufficient. Akin v. State [Tex. Cr. R.] 119 SW 863. Admission of insults to wife is a new provocation. Id. Belief of wife's disclosure of insults is sufficient. Id. Provocation need not be coincident with assault. Insults to wife sufficient provocation for assault at next meeting. Id.

41. Tyner v. U. S. [Okl. Cr. R.] 103 P 1057. Degree of murder which would have resulted had victim died is not material. State v. Lee [Del.] 74 A 4.

42. Sess. laws 1901, p. 108, c. 13, art. I, embraces several species of offense all punishable alike yet differing in description and degree as in some there may be conviction for a lesser degree while in others there are no lesser degrees. Brown v. State [Okl. Cr. R.] 104 P 78.

43. "Willfully shooting at" and "assault with intent to murder" are different crimes and jeopardy as to one does not bar charge of other. State v. Hill, 122 La. 711, 48 S 160.

44. State v. Lee [Del.] 74 A 4. **Malice** essential. State v. Gam [Del.] 74 A 7. May be express or implied. Jackson v. State, 54 Tex. Cr. R. 605, 114 SW 136.

45. Not necessarily deadly: Ordinary pocket knife. Brown v. State [Okl. Cr. R.] 104 P 78; Henderson v. State, 55 Tex. Cr. R. 170, 115 SW 588. Baseball bat. Crow v. State, 55 Tex. Cr. R. 200, 116 SW 52. Stick one inch in diameter and about three feet long. Renow v. State [Tex. Cr. R.] 120 SW 174.

46. Crow v. State, 55 Tex. Cr. R. 200, 116 SW 52. Intent is the gist, weapon immaterial. State v. De Long [Ark.] 117 SW 524.

47. Search Note: See notes in 5 C. L. 1707; 36 L. R. A. 470; 45 Id. 687; 66 Id. 353; 67 Id. 292, 529, 541; 2 L. R. A. (N. S.) 49, 719; 3 Id. 535; 4 Id. 154, 576; 5 Id. 809, 825, 1016; 13 Id.

justifiable,[48] where the accused, not being the agressor [49] or without having engaged in mutual combat [50] or, after having instituted or voluntarily participated in the difficulty in good faith, withdraws therefrom,[51] is assaulted without justification [52] in such a manner [53] that he honestly believes [54] upon reasonable ground [55] as the

1024; 15 Id. 1013; 92 A. S. R. 214; 109 Id. 804; 1 Ann. Cas. 136; 3 Id. 1028; 4 Id. 760, 844; 9 Id. 1134.

See, also, Homicide, Cent. Dig. §§ 131-191; Dec. Dig. §§ 101-126; 21 Cyc. 793-832; 21 A. & E. Enc. L. (2ed.) 201; 25 Id. 256.

48. Monteith v. State [Ala.] 49 S 777; Williams v. State [Ala.] 50 S 59; State v. Miele [Del.] 74 A 8; Pierce v. State [Ga.] 63 SE 792; State v. Stockman, 82 S. C. 388, 64 SE 595; Smith v. State, 55 Tex. Cr. R. 628, 118 SW 145; Hightower v. State [Tex. Cr. R.] 119 SW 691. Rule stated at length. Miller v. State, 139 Wis. 57, 119 NW 850. Intent to kill is justified. Vinson v. State, 55 Tex. Cr. R. 490, 117 SW 846. Where blow struck in self-defense was without intent to kill, homicide may be regarded as accidental. Crow v. State, 55 Tex. Cr. R. 200, 116 SW 52.

49. Simmons v. State [Ala.] 48 S 606; Brewer v. State [Ala.] 49 S 336; Monteith v. State [Ala.] 49 S 777; Bluitt v. State [Ala.] 49 S 854; Gaston v. State [Ala.] 49 S 876; Montgomery v. State [Ala.] 49 S 902; Mcgowan v. Com. [Ky.] 117 SW 387; State v. Sebastian, 215 Mo. 58, 114 SW 522; State v. Dunn, 221 Mo. 530, 120 SW 1179; Territory v. Clark [N. M.] 99 P 697; Reed v. State [Okl. Cr. R.] 103 P 1042; State v. Stockman, 82 S. C. 388, 64 SE 595; Arnwine v. State, 54 Tex. Cr. R. 213, 114 SW 796. Duty is to avoid danger. Turner v. State [Ala.] 49 S 828. Cannot arm, return, and renew difficulty and then plead self-defense. Puryear v. State [Tex. Cr. R.] 118 SW 1042. Self-defense not available by one who, by language calculated to provoke a fight, actually brings it on. State v. Hunter, 82 S. C. 153, 63 SE 685. If defendant fired two shots with murderous intent, he is not entitled to claim self-defense for third and fatal shot fired in struggle for possession of weapon. Kennison v. State, 83 Neb. 391, 119 NW 768. Provoking remark with hand on pistol does not necessarily render speaker the aggressor. Tate v. State [Miss.] 48 S 13. Unless accused was actually aggressor, his illegal motive in going to scene of homicide will not bar self-defense. Gant v. State, 55 Tex. Cr. R. 284, 116 SW 801.

50. Mutual combat bars the defense. State v. Dunlap, 149 N. C. 550, 63 SE 164; Havard v. State, 55 Tex. Cr. R. 213, 115 SW 1185.

51. May defend if pursued. State v. Miele [Del.] 74 A 8; State v. Sebastian, 215 Mo. 58, 114 SW 522; State v. Heath, 221 Mo. 565, 121 SW 149. Where party previously assaulted returns and becomes aggressor, the original aggressor may act in self-defense. Miller v. State, 139 Wis. 57, 119 NW 850.

52. Mere words no justification for assault by decedent. Crawley v. State [Ga. App.] 66 SE 273; Griffin v. State [Tex. Cr. R.] 122 SW 553. Armed trespasser cannot claim self-defense. Reed v. State [Okl. Cr. R.] 103 P 1042.

53. That decedent was not alone in the assault must be considered. Gant v. State, 55 Tex. Cr. R. 284, 116 SW 801. That defendant after being beaten about the head was unable to discern who attacking parties were and stabbed wrong man may be considered. State v. Miele [Del.] 74 A 8.

54. Belief must be honest. McCain v. State [Ala.] 49 S 361; Monteith v. State [Ala.] 49 S 777; Turner v. State [Ala.] 49 S 828; Gaston v. State [Ala.] 49 S 876; Montgomery v. State [Ala.] 49 S 902; Gilmore v. State [Ark.] 122 SW 493; Cavett v. Ter., 1 Okl. Cr. R. 493, 98 P 890; State v. Churchill, 52 Wash. 210, 100 P 309. Regardless of the ultimate facts. Vinson v. State, 55 Tex. Cr. R. 490, 117 SW 846. Law of self-defense is available only to one who acts honestly and in good faith, and cannot be employed to shield a murderer. Duncan v. State, 171 Ind. 444, 86 NE 641.

55. May act upon reasonable belief. Suell v. Derricott [Ala.] 49 S 895; People v. Ross [Cal. App.] 104 P 709; Griffin v. State [Tex. Cr. R.] 122 SW 553. Actual assault not necessary to raise reasonable belief of danger. Fallon v. State, 5 Ga. App. 659, 63 SE 806. May act on reasonable appearances and belief regardless of whether danger was actual. McCain v. State [Ala.] 49 S 361; Bluitt v. State [Ala.] 49 S 854; Gaston v. State [Ala.] 49 S 876; Pickett v. State [Ark.] 121 SW 732; Kelly v. Com. [Ky.] 119 SW 809; Wilson v. Com. [Ky.] 121 SW 430; State v. Linn [Mo.] 122 SW 679; People v. Governale, 193 N. Y. 581, 86 NE 554; Roe v. State, 55 Tex. Cr. R. 128, 115 SW 593; Buckner v. State, 55 Tex. Cr. R. 511, 117 SW 802; Miller v. State, 139 Wis. 57, 119 NW 850. Belief must be based upon reasonable grounds. State v. Miele [Del.] 74 A 8; People v. Governale, 193 N. Y. 581, 86 NE 554; Reed v. State [Okl. Cr. R.] 103 P 1042. May not act from unfounded fear or cowardice. Reed v. State [Okl. Cr. R.] 103 P 1042. Reasonable belief is such as the circumstances would induce in the mind of a person of ordinary intelligence and firmness. Barnhill v. State, 56 Fla. 16, 48 S 251. Fear. People v. Williams, 240 Ill. 633, 88 NE 1053; State v. Finch [Or.] 103 P 505; State v. Stockman, 82 S. C. 388, 64 SE 595. Intelligence and experience of defendant is not the test. People v. Williams, 240 Ill. 633, 88 NE 1053.

Held reasonable grounds: Communicated threats. Buckner v. State, 55 Tex. Cr. R. 511, 117 SW 802. Belief in threats regardless of fact. Hightower v. State [Tex. Cr. R.] 119 SW 691. Knowledge of conspiracy. State v. Hanlon, 38 Mont. 557, 100 P 1035. Knowledge of violent disposition of adversary and his advantage of youth and strength. State v. Lee [Del.] 74 A 4. Aimed gun is actual, not merely reasonable, appearance of danger. Simmons v. State, 55 Tex. Cr. R. 441, 117 SW 141.

Not reasonable grounds: Mere threats and menaces. Fallon v. State, 5 Ga. App. 659, 63 SE 806; Rhea v. Ter. [Okl. Cr. R.] 105 P 314. Uncommunicated threats. Washington v. State [Tex. Cr. R.] 119 SW 689. That deceased ran into his house does not warrant assumption he went for arms. Reed v. State [Okl. Cr. R.] 103 P 1042.

facts appear from his viewpoint [56] that he is in imminent danger [57] of death or great bodily harm,[58] and that resistance to that extent [59] is reasonably [60] necessary [61] as the only means of securing his safety.[62] The fact that one is engaged in ejecting a trespasser does not affect the right.[63] In Texas the right of self-defense is available to one who initiated the difficulty with intent merely to commit assault and battery,[64] or to one who provokes assault by demanding explanation for insults offered to his wife.[65] The defense is absolute and cannot be considered as a mitigation.[66] It is usually a question of fact.[67] In some jurisdictions it must be pleaded in order to be available.[68] Subject to the same limitations, one is justified in killing in defense of domicle,[69] of family,[70] of relatives,[71] or of any other person,[72] or in resistance to un-

56. Must look from viewpoint of accused. Selfridge v. People, 45 Colo. 275, 100 P 591; Green v. U. S. [Okl. Cr. R.] 101 P 112, rvg. 7 Ind. T. 733, 104 SW 1159; McHenry v. State, 54 Tex. Cr. R. 477, 114 SW 115.

57. Danger must be imminent. Andrews v. State [Ala.] 48 S 858; Reaves v. State [Ala.] 48 S 373; Barnhill v. State, 56 Fla. 16, 48 S 251; Pressley v. State [Ga.] 63 SE 784; Hargis v. Com. [Ky.] 123 SW 239; State v. Stockman, 82 S. C. 388, 64 SE 595. Future danger not sufficient. Sergent v. Com. [Ky.] 117 SW 362; Arnwine v. State, 54 Tex. Cr. R. 213, 114 SW 796; Snell v. State [Tex. Cr. R.] 119 SW 859. Cannot kill after danger is passed. State v. Stockman, 82 S. C. 388, 64 SE 595; Hart v. State [Tex. Cr. R.] 121 SW 507. May continue to shoot as long as apparently necessary. Clark v. State [Tex. Cr. R.] 120 SW 179. Apparent retreat of adversary does not necessarily terminate the danger. Derden v. State [Tex. Cr. R.] 120 SW 485.

58. Must be reasonable apprehension of death or great bodily harm. Miller v. State, 139 Wis. 57, 119 NW 850. May defend from serious bodily harm as if from death. McDowell v. State, 55 Tex. Cr. R. 596, 117 SW 831. Apprehension must be of serious harm. State v. Mellillo [N. J. Err. & App.] 71 A 671. Not justified by slight danger. Miller v. State, 139 Wis. 57, 119 NW 850. Simple assault will not warrant homicide in self-defense; assault must be felonious. State v. Churchill, 52 Wash. 210, 100 P 309. Not such blows as may be inflicted with the hands or feet unless the deceased was greatly superior to accused in strength. Hill v. State [Miss.] 49 S 145. Attack with deadly weapon warrants apprehension of death. Ringo v. State, 54 Tex. Cr. R. 561, 114 SW 119; Duke v. State [Tex. Cr. R.] 120 SW 894.

59. Only such force as is necessary. Knight v. State [Ala.] 49 S 764; State v. Lee [Del.] 74 A 4; State v. Miele [Del.] 74 A 8; State v. Quick, 150 N. C. 820, 64 SE 168. May resist force with force. Crawley v. State [Ga. App.] 66 SE 273. Force sufficient to offset apparent danger. State v. Churchill, 52 Wash. 210, 100 P 309. May use deadly weapon where necessary. State v. Lee [Del.] 74 A 4. Need not nicely gauge force to be used but may use what appears reasonably necessary. State v. Linn [Mo.] 122 SW 679.

60. Reasonably appears necessary. State v. Mellilleo [N. J. Err. & App.] 71 A 671. Reasonableness for jury. State v. Quick, 150 N. C. 820, 64 SE 168.

61. Must believe in necessity. Barnhill v. State, 56 Fla. 16, 48 S 251; Boyer v. State [Neb.] 121 NW 445. One kills in self-defense at his peril and must show justification. Barnhill v. State, 56 Fla. 16, 48 S 251. That decedent kicked accused not a real or apparent necessity for killing. Dillon v. State, 137 Wis. 655, 119 NW 352.

62. Must be no other reasonabe escape. State v. Miele [Del.] 74 A 8. May strike the first blow when danger is imminent. State v. Lee [Del.] 74 A 4.

63. Right to eject trespasser and right of self-defense are independent. Dickinson v. State [Okl. Cr. R.] 104 P 923.

64. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635. Intent for jury. Id.

65. Hobbs v. State, 55 Tex. Cr. R. 299, 117 SW 811. One whose wife has been insulted may demand an explanation and has a right to arm himself for his own protection. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635. Aggressor, justified in demanding explanations for insult to wife, is not justified in killing retreating opponent though armed. Gray v. Phillips [Tex. Cr. App.] 117 SW 87.

66. Freeman v. State, 5 Ga. App. 490, 63 SE 530. While menaces and threats may create such apparent danger as to justify homicide, they cannot reduce the degree from murder to manslaughter. Brantley v. State, 5 Ga. App. 458, 63 SE 519.

67. Self-defense for jury. People v. Connelly [Mich.] 116 Det Leg. N. 394, 122 NW 80; People v. Governale, 193 N. Y. 581, 86 NE 554.

68. State v. Raice [S. D.] 123 NW 708.

69. French v. State, 55 Tex. Cr. R. 538, 117 SW 848. Domicile or place of business. Suell v. Derricott [Ala.] 49 S 895. Guest may defend or owner may summon his neighbors. Id. If he leaves shelter of domicile, owner has no superior rights of defense. Montgomery v. State [Ala.] 49 S 902; Brewer v. State [Ala.] 49 S 336. The common-law doctrine of right to eject a trespasser cannot be available to proprietor of pool hall who murderously assaults an officer inspecting the same in the course of his legal duty. People v. McKeehan [Cal. App.] 105 P 273.

70. May defend brother on reasonable appearances. Griffin v. State [Tex. Cr. R.] 122 SW 553. May defend mother. State v. Walsworth [Or.] 103 P 516. Reasonable belief that his mother was in house upon which deceased was firing justifies accused in returning fire. Id.

71. Son-in-law. Lowe v. State [Ga.] 63 SE 1114.

72. Potts v. State [Tex. Cr. R.] 118 SW 535.

lawful arrest,[73] but homicide is not justified in defense of right of way in a public highway.[74] At common law and in some states it is the duty of the victim of a felonious assault to retreat as far as he may with safety before homicide in self-defense will be justified,[75] but this rule is repudiated in many jurisdictions.[76] At common law and generally one assaulted within his own premises may stand his ground and oppose force with force,[77] but this rule does not apply between tenants in common.[78] An officer or a private citizen [78] is justified in taking life to prevent a felony [80] or to prevent the escape of a felon,[81] providing such a course is necessary,[82] but homicide in arresting for a misdemeanor is not justified [83] except in necessary self-defense.[84] One making a legal arrest is under no duty to retreat even within the domicile of the person arrested,[85] but a warrant cannot justify a wanton murder.[86]

Insanity See 11 C. L. 1811 is an absolute defense [87] where it renders the mind incapable of realizing the nature of the act or of distinguishing between right and wrong,[88] but a lesser degree of insanity or mental derangement will afford no justification.[89] Subject to the same limitations [90] uncontrollable impulse [91] is recognized in some states as a defense, but repudiated elsewhere.[92] Sanity is presumed of law [93] and must be rebutted by evidence.[94]

Providing such person is without blame. Wheat v. Com. [Ky.] 118 SW 264.

73. May use proportionate force. Perdue v. State, 5 Ga. App. 821, 63 SE 922. Not an available defense where officer made no hostile demonstration. People v. Price, 9 Cal. App. 218, 98 P 547. Reasonable belief, etc. State v. Clark, 64 W. Va. 625, 63 SE 402. Fleeing felon cannot set up belief that pursuing crowd is bent on illegal arrest or that he did not know their lawful intent. State v. Bertchey [N. J. Err. & App.] 73 A 524. Knowledge of particular crime not essential to legal arrest by citizen upon hue and cry. Id. A general call by an officer for assistance should be responded to by all who hear, and such a call justifies attempted arrest by a citizen. Id.

74. Gallagher v. State, 55 Tex. Cr. R. 50, 115 SW 46.

75. Andrews v. State [Ala.] 48 S 858; McCain v. State [Ala.] 49 S 361; Montgomery v. State [Ala.] 49 S 902; State v. Crawford [W. Va.] 66 SE 110. If it can be done safely. Brewer v. State [Ala.] 49 S 336; State v. Miele [Del.] 74 A 8. As far as can be safely done. State v. Lee [Del.] 74 A 4. No duty to retreat from sudden and violent attack. Suell v. Derricott [Ala.] 49 S 895; State v. Lee [Del.] 74 A 4.

76. People v. Baldocchi, 10 Cal. App. 42, 101 P 28; State v. Page [Kan.] 102 P 780; State v. Powers [Mont.] 102 P 583; State v. Stockman, 82 S. C. 388, 64 SE 595; Roe v. State, 55 Tex. Cr. R. 128, 115 SW 593; Ringo v. State, 54 Tex. Cr. R. 561, 114 SW 119. "Flight" rule specifically disapproved. Miller v. State, 139 Wis. 57, 119 NW 850.

Note. See annotation collating cases on this rule 5 C. L. 1707.

77. Domicile. Suell v. Derricott [Ala.] 49 S 895; State v. Crawford [W. Va.] 66 SE 110. Domicile or place of business. Andrews v. State [Ala.] 48 S 858; Suell v. Derricott [Ala.] 49 S 895.

78. Phillips v. State [Ala.] 49 S 794.

79. Citizen's rights same as officer's. Suell v. Derricott [Ala.] 49 S 895.

80. Robbery. Welch v. State [Tex. Cr. R.] 122 SW 880. Violent or atrocious crime. Suell v. Derricott [Ala.] 49 S 895.

81. Suell v. Derricott [Ala.] 49 S 895; Holland v. State [Ala.] 50 S 215.

82. Only necessary force. Suell v. Derricott [Ala.] 49 S 895. Use of unnecessary force results in manslaughter. Id. Mere escape not justification for killing. Roe v. State, 55 Tex. Cr. R. 128, 115 SW 593. Must use reasonable care to avoid killing. Green v. State [Ark.] 121 SW 727. Necessity is for jury. Id.

83. Suell v. Derricott [Ala.] 49 S 895; Commonwealth v. Marcum [Ky.] 122 SW 215.

84. Holland v. State [Ala.] 50 S 215. Acts importing immediate purpose to resist may warrant force. Id.

85. Holland v. State [Ala.] 50 S 215. Even when warned. Id.

86. Holland v. State [Ala.] 50 S 215; Roe v. State, 55 Tex. Cr. R. 128, 115 SW 593.

87. Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600. Cannot reduce the degree. State v. Maioni [N. J. Err. & App.] 74 A 526.

88. Smith v. State [Miss.] 49 S 945; State v. Cloninger, 149 N. C. 567, 63 SE 154; Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600.

89. People v. Farmer, 194 N. Y. 251, 87 NE 457; Commonwealth v. Hallowell, 223 Pa. 494, 72 A 845.

90. Irresistible impulse subject to same test as other insanity. Smith v. State [Miss.] 49 S 945.

91. The power to distinguish between right and wrong is not always the test of responsibility since this power may exist without the power of self-control. Commonwealth v. DeMarzo, 223 Pa. 573, 72 A 893.

92. Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600.

93. See § 7A, infra.

94. Question of fact. People v. Hill, 195 N. Y. 16, 87 NE 813.

Intoxication See 11 C. L. 1911 was no defense at common law [95] but is now generally recognized as a mitigation,[96] providing it is of such an extent as to negative design or intent [97] and was not deliberately induced with a view of homicide.[98]

Motive [99] or previous grievance cannot be considered as a defense or mitigation.[1]

§ 6. *Indictment or information.*[2]—See 11 C. L. 1811—The indictment should be founded on proper evidence [3] and should set forth the crime [4] in all its essentials [5] with certainty,[6] and sufficiently designate the accused [7] and the victim,[8] but amendment will be permitted under proper circumstances.[9] The language of the statute is a sufficient charge [10] but a statutory form is insufficient if it does not embody all

95. Commonwealth v. Nazarko, 224 Pa. 204, 73 A 210.

96. Not a complete defense; can only mitigate degree. State v. Pell, 140 Iowa, 655, 119 NW 154; State v. Rumble [Kan.] 105 P 1; Commonwealth v. Nazarko, 224 Pa. 204, 73 A 210.

97. Must have been sufficient to preclude intent. Chowning v. State [Ark.] 121 SW 735; State v. Rumble [Kan.] 105 P 1; State v. Mangano [N. J. Err. & App.] 72 A 366; Morris v. Ter., 1 Okl. Cr. R. 617, 99 P 760; Commonwealth v. Snyder, 224 Pa. 526, 73 A 910.

98. Morris v. Ter., 1 Okl. Cr. R. 617, 99 P 760.

99. House v. State [Miss.] 48 S 3; State v. Bobbitt, 215 Mo. 10, 114 SW 511; People v. Farmer, 194 N. Y. 251, 87 NE 457; People v. Sanducci, 195 N. Y. 361, 88 NE 385; People v. Hampartjoomian, 196 N. Y. 77, 89 NE 451.

1. Past wrongs. Pride v. State [Ga.] 66 SE 259. Previous drunken row. State v. Pell, 140 Iowa, 655, 119 NW 154. Maternal neglect is no excuse for matricide, and evidence thereof is not germain to plea of insanity. People v. Carlin, 194 N. Y. 448, 87 NE 805. That father taught son lawless and disreputable habits is no justification for patricide. Hargis v. Com. [Ky.] 123 SW 239.

2. **Search Note:** See notes in 3 L. R. A. (N. S.) 1019; 7 Id. 630; 3 A. S. R. 379; 44 Id. 79; 11 Ann. Cas. 996.

See, also, Homicide, Cent. Dig. §§ 192-259; Dec. Dig. §§ 127-142; 21 Cyc. 833-874; 21 A. & E. Enc. L. (2ed.) 235; 10 A. & E. Enc. P. & P. 114.

3. Dying declaration sufficient though proper predicate does not affirmatively appear. State v. Clark, 64 W. Va. 625, 63 SE 402.

4. Must charge either in words of statute or their equivalent State v. Gibbons [Iowa] 120 NW 474. Direct charge without setting forth the means sufficient under Pen. Code 1895, §§ 1832, 1834. State v. Hayes, 38 Mont. 219, 99 P 434. Facts constituting crime sufficient. State v. Peek [Miss.] 48 S 819. Charge of homicide held sufficient State v. Wooley, 215 Mo. 620, 115 SW 417.

5. Must charge facts and circumstances to make the offense. Commonwealth v. Mosser [Ky.] 118 SW 915. Showed negative justification. Lanier v. State, 5 Ga. App. 472, 63 SE 536. Intent must be alleged and proved for felonious assault. State v. Rodriquez [Nev.] 102 P 863. Where shooting was promiscuous intent to kill some one or more, and actual wounding of one should be charged. Gentry v. State [Miss.] 45 S 721. Intent to kill not essential allegation for voluntary manslaughter. State v. Whitney [Or.] 102 P 288. Malice not an essential allegation for involuntary manslaughter. Id. Indictment for involuntary manslaughter, under B. & C. Comp. § 1746, must allege homicide in the commission of an unlawful act or a lawful act without due caution. State v. Whitney [Or.] 102 P 288.

Held sufficient: "At a specified place did in a manner unknown strike, beat, etc.," is a sufficient allegation of method. State v. Squires, 15 Idaho, 545, 98 P 413. To charge joint defendants with murder with an axe "which they in their hands held." State v. Shelton [Mo.] 122 SW 732. Death by reason of assault. State v. Linn [Mo.] 122 SW 679. "Of deliberate premeditated malice aforethought" sufficiently charges murder in the first degree, malice aforethought being of the essence, and deliberation and premeditation being matters of proof. State v. Nielson, 38 Mont. 451, 100 P 229. Sufficient to charge second degree murder. State v. Nielson, 38 Mont. 451, 100 P 229. Indictment faulty but sufficient. Cavett v. Ter., 1 Okl. Cr. R. 493, 98 P 890. "Deadly weapon" is sufficient to charge that force used was likely to cause death. Stewart v. Ter. [Okl. Cr. R.] 100 P 47.

Insufficient to charge any degree of criminal homicide. Commonwealth v. Mosser [Ky.] 118 SW 915. To charge any degree of manslaughter. State v. Whitney [Or.] 102 P 288. Held insufficient to charge voluntary manslaughter under Crim. Code of Prac. §§ 122, 124. Commonwealth v. Mosser [Ky.] 118 SW 915.

6. Must allege means whereby life was taken if known. People v. Lukoszus, 242 Ill. 101, 89 NE 749. Conviction cannot be had for killing by another means than that specified. Huckabee v. State [Ala.] 48 S 796. Under Ballinger's Ann. Code & St. § 6850, subd. 6, providing that indictment is sufficient if it clearly sets forth the offense, an indictment for murder in the commission of burglary and robbery need not define the latter crimes which have a clearly defined legal meaning. State v. Fillpot, 51 Wash. 223, 98 P 659. Indictment charging death by reason of attempt at criminal abortion and that thereby, etc., sufficiently charges second degree murder. State v. Gibbons [Iowa] 120 NW 474.

7. John Doe held sufficient. State v. Sartino, 216 Mo. 408, 115 SW 1015.

8. "An unnamed infant, the child of A," sufficient designation. State v. Peek [Miss.] 48 S 819.

9. May be amended as to name of deceased before trial and in presence of defendant. State v. Moore, 79 Kan. 688, 100 P 629.

10. State v. Martin [Or.] 103 P 512; Ringo

the elements of the offense.[11] Matters of proof [12] or matters clearly inferred need not be expressly alleged.[13] Surplusage is not necessarily fatal [14] nor need it be proved.[15] Immaterial variance in language [16] or date is not fatal,[17] and mere clerical errors will not vitiate the indictment.[18] The rule of liberal construction is adopted in some states.[19] Lesser degrees are included in a charge of the higher,[20] and where the indictment was sufficient to charge the degree found, it is immaterial that the higher degree was defectively charged,[21] nor will failure to prove all degrees charged warrant an acquittal.[22] An irregularity in filing cannot be challenged after conviction.[23]

§ 7. *Evidence. A. Presumptions and burden of proof.*[24]—See 11 C. L. 1812—The burden is upon the state to prove beyond a reasonable doubt [25] every essential ele-

v. State, 54 Tex. Cr. R. 561, 114 SW 119. "Deliberately" and "premeditated" not necessary to charge murder under Rev. Laws 1902, c. 218, §§ 38-67. Commonwealth v. Min Sing, 202 Mass. 121, 88 NE 918.

11. Form prepared by code commissioners is faulty charge of involuntary manslaughter. Commonwealth v. Mosser [Ky.] 118 SW 915.

12. Evidence. State v. Peek [Miss.] 48 S 819. Details of negligence. State v. Watson, 216 Mo. 420, 115 SW 1011. Means of killing. State v. Nielson, 38 Mont. 451, 100 P 229. Weapon or manner of use. State v. De Long [Ark.] 117 SW 524. Indictment need not specify particular weapon and such specification merely limits the range of proof. People v. Weir, 10 Cal. App. 460, 102 P 539.

13. Intent need not be specifically alleged where it is inferentially so. Livingston v. State [Ga. App.] 64 SE 709. Statutory exceptions need not be explicitly negatived where they are impliedly so by language of the charge. Id. Charge that mortal wound was inflicted on a certain date about four months previous to indictment, and that death had followed, sufficiently charges death within a year and a day. State v. Williams [Nev.] 102 P 974. Need not charge that named decedent was a reasonable creature in being. Ringo v. State, 54 Tex. Cr. R. 561, 114 SW 119.

14. Code provision for enhanced punishment on successive convictions is not applicable where charge is a capital crime, and previous convictions should not be alleged, but such surplusage is not fatal error. Wright v. Com. [Va.] 65 SE 19. Ballinger's Ann. Codes & St. § 7035, defining murder in the first degree as homicide done with deliberate and premeditated malice, or in the commission of burglary, etc., describes but a single crime, and pleading covering entire definition is not bad for duplicity. State v. Fillpot, 51 Wash. 223, 98 P 659.

15. Hand in which fatal instrument was held is a usual, but not necessary, allegation and need not be proved. People v. Lukoszus, 242 Ill. 101, 89 NE 749.

16. Sufficient if the material elements can be gathered therefrom. Cavett v. Ter., 1 Okl. Cr. R. 493, 98 P 890. Where act charged is necessarily murder, the language is immaterial. State v. Gibbons [Iowa] 120 NW 474. Use of "murder" instead of "kill." Gilford v. State, 54 Tex. Cr. R. 510, 114 SW 138. "Under his oath of office he says" equivalent to "upon his oath does say," since oath of office is the only one required of prosecuting attorney. State v. Sassaman, 214 Mo. 695, 114 SW 590. The word "did" in an allegation "did kill, etc.," does not sever the preceding adverbs "purposely, etc.," from the verb kill. State v. Arata [Wash.] 105 P 227.

17. Allegation of murder on the day of assault, whereas death occurred several days later, not fatal variance. State v. Powers [Mont.] 102 P 583.

18. Gum instead of "gun." Simmons v. State [Ala.] 48 S 606.

19. Liberally construed in Idaho. State v. Squires, 15 Idaho, 545, 98 P 413.

20. Williams v. State [Ala.] 50 S 59. State may waive the degree and proceed with trial for lessor. State v. Bobbitt, 215 Mo. 10, 114 SW 511. Charge of first degree murder includes all unlawful homicide. Id.; State v. Heath, 221 Mo. 565, 121 SW 149. Charge of first degree supports conviction for second degree. Commonwealth v. Min Sing, 202 Mass. 121, 88 NE 918. Charge of murder will support conviction of manslaughter. Rhea v. Ter. [Okl. Cr. R.] 105 P 314. Charge of assault to murder by aiming a gun includes offense of pointing a gun. Livingston v. State [Ga. App.] 64 SE 709.

21. Accused convicted of manslaughter cannot complain that indictment failed to charge first degree murder. State v. Nielson, 38 Mont. 451, 100 P 229; State v. Martin [Or.] 103 P 512.

22. Seawright v. State [Ala.] 49 S 325.

23. Filing information before preliminary examination, contrary to statute, will not vitiate conviction. State v. Pritchett, 219 Mo. 696, 119 SW 386.

24 Search Note: See notes in 34 L. R. A. 851; 4 L. R. A. (N. S.) 934; 11 Ann. Cas. 309.

See, also, Homicide, Cent. Dig. §§ 260-283; Dec. Dig. §§ 143-152; 21 Cyc. 874-884; 10 A. & E. Enc. L. (2ed.) 359; 21 Id. 211, 229.

25. State v. Lee [Del.] 74 A 4; Turner v. State, 131 Ga. 761, 63 SE 294; Raysor v. State [Ga.] 63 SE 786; Gordon v. State [Miss.] 49 S 609; Grant v. State [Tex. Cr. R.] 120 SW 481; Spick v. State, 140 Wis. 104, 121 NW 664.

Reasonable doubt: Such a doubt as in view of the evidence leads to reasonable uncertainty of guilt. Simmons v. State [Ala.] 48 S 606. Not a mere possible doubt. Knight v. State [Ala.] 49 S 764. Reasonable substantial doubt remaining in mind of jury after careful consideration. State v. Lee [Del.] 74 A 4; State v. Gam [Del.] 74 A 7; State v. Miele [Del.] 74 A 8. "Moral certainty" is too great a burden of proof. Montgomery v. State [Ala.] 49 S 902; Williams v. State [Ala.] 50 S 59.

ment of the crime,[26] and the presumption of innocence continues until such proof is adduced.[27] The state must disprove the defensive theories [28] but need not necessarily disprove each element thereof beyond a reasonable doubt.[29] The accused has the burden to prove all affirmative defenses [30] and to negative all legal presumptions [31] by a preponderance of the evidence [32] sufficient to raise a reasonable doubt,[33] but he is entitled to the benefit of all evidence however shown,[34] and, where the evidence is evenly balanced, acquittal should follow.[35] Where a homicide is proved, the presumption is that it is murder in the second degree.[36] Sanity is presumed,[37] and malice and intent may be presumed from homicide [38] or from the manner of

26. Every element of guilt. State v. Webb, 216 Mo. 378, 115 SW 998. Must show corpus delicti beyond reasonable doubt. Levering v. Com. [Ky.] 117 SW 253. Must connect accused with crime beyond reasonable doubt. Pickett v. State [Ark.] 121 SW 732; Wilson v. Com. [Ky.] 121 SW 430; Sprouse v. Com. [Ky.] 122 SW 134. Must show intent beyond reasonable doubt. Derrick v. State [Ark.] 122 SW 506; Harrell v. State [Ala.] 49 S 805; Levering v. Com. [Ky.] 117 SW 253; Gentry v. State [Miss.] 45 S 721; Crow v. State, 55 Tex. Cr. R. 200, 116 SW 52. Where charge is murder, malice must be shown. Andrews v. State [Ala.] 48 S 858. Where first degree murder is charged, willful and deliberate premeditation must be shown. Ferguson v. State [Ark.] 122 SW 236; State v. McKay, 150 N. C. 813, 63 SE 1059; State v. Roberson, 150 N. C. 837, 64 SE 182; People v. Sanducci, 195 N. Y. 361, 88 NE 385. All essential allegations of the indictment must be proved. People v. Lukoszus, 242 Ill. 101, 89 NE 749; Brown v. State [Okl. Cr. R.] 104 P 78. Where defense is accident, state must negative the defense beyond reasonable doubt. State v. Matheson [Iowa] 120 NW 1036. Nonessential allegations need not be proved. People v. Lukoszus, 242 Ill. 101, 89 NE 749. On trial for homicide in resisting lawful arrest. Under Crimes Act June 14, 1898, § 106, state must prove that person sought to be arrested was a criminal, that decedent was seeking to arrest him, that defendant knew decedent's purposes. State v. Bertchey [N. J. Err. & App.] 73 A 524.

27. State v. Lee [Del.] 74 A 4; Frazier v. Com. [Ky.] 114 SW 268; State v. Hanlon, 38 Mont. 557, 100 P 1035; Spick v. State, 140 Wis. 104, 121 NW 664.

Presumption is rebuttable. People v. Le Doux, 155 Cal. 535, 102 P 517; Elliott v. State [Ga.] 64 SE 1090. **Evidence of good character** strengthens the presumption of innocence. People v. Baldocchi, 10 Cal. App. 42, 101 P 28.

28. Must prove accused aggressor. Andrews v. State [Ala.] 48 S 858.

29. Need not prove accused aggressor beyond reasonable doubt. Gaston v. State [Ala.] 49 S 876.

30. State v. Lee [Del.] 74 A 4. Corpus delicti having been established. Bryant v. Ter. [Ariz.] 100 P 455; State v. Lee [Del.] 74 A 4; State v. Skinner [Nev.] 104 P 223.

Self-defense. State v. Miele [Del.] 74 A 8; State v. Lindsay, 82 S. C. 486, 63 SE 1064; State v. Stockman, 82 S. C. 388, 64 SE 595.

Intoxication. State v. Mangano [N. J. Err. & App.] 72 A 366.

Provocation. State v. Heath, 221 Mo. 565, 121 SW 149.

31. Malice. Monteith v. State [Ala.] 49 S 777; Branch v. State, 5 Ga. App. 651, 63 SE 714.

Sanity. State v. Barker, 216 Mo. App. 532, 115 SW 1102; State v. Cloninger, 149 N. C. 567, 63 SE 154; State v. Maioni [N. J. Err. & App.] 74 A 526; Commonwealth v. Hallowell, 223 Pa. 494, 72 A 845; Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600.

32. By weight of evidence. State v. Mangano [N. J. Err. & App.] 72 A 366; State v. Maioni [N. J. Err. & App.] 74 A 526. Sufficient to reasonably satisfy the jury. State v. Barker, 216 Mo. 532, 115 SW 1102. Not beyond reasonable doubt. State v. Skinner [Nev.] 104 P 223. "Clearly establish" is too great a burden. State v. Lindsay, 82 S. C. 486, 63 SE 1064.

33. Reasonable doubt sufficient. Raysor v. State [Ga.] 63 SE 786; Price v. State, 1 Okl. Cr. R. 358, 98 P 447; Arnwine v. State, 54 Tex. Cr. R. 213, 114 SW 796. Reasonable doubt of guilt, not of which party did the killing. Hunter v. State [Ga.] 65 SE 154. Reasonable doubt, not any doubt. Brantley v. State [Ga.] 65 SE 426. Must be real and substantial doubt. Monteith v. State [Ala.] 49 S 777. Not doubt of one juror but whole jury. Turner v. State [Ala.] 49 S 828. Jury must not go outside the evidence to search for doubts. Van Wyk v. People, 45 Colo. 1, 99 P 1009. Reasonable doubt does not mean doubt for which the jury can give a reason. Price v. State, 1 Okl. Cr. R. 358, 98 P 447. Character evidence alone is insufficient to raise a reasonable doubt. Phillips v. State [Ala.] 49 S 794.

34. State's own evidence may rebut presumption of malice. Branch v. State, 5 Ga. App. 651, 63 SE 714. State's evidence may prove self-defense. Monteith v. State [Ala.] 49 S 777. Absence of satisfying evidence may raise reasonable doubt. Gaston v. State [Ala.] 49 S 876.

35. Bilton v. Ter., 1 Okl. Cr. R. 566, 99 P 163.

36. Ferguson v. State [Ark.] 122 SW 236.

37. State v. Barker, 216 Mo. 532, 115 SW 1102; State v. Cloninger, 149 N. C. 567, 63 SE 154; State v. Maioni [N. J. Err. & App.] 74 A 526; Commonwealth v. Hallowell, 223 Pa. 494, 72 A 845; Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600.

38. Branch v. State, 5 Ga. App. 651, 63 SE 714; Pressley v. State [Ga.] 63 SE 784; State v. Dillingham [Iowa] 121 NW 1074; Puryear v. State [Tex. Cr. R.] 118 SW 1042.

the killing[39] especially where done with a deadly weapon,[40] and in some states no presumption arises unless death results from the act.[41] The presumption of malice arising from the use of a deadly weapon is available to the accused on the issue of self-defense.[42]

(§ 7) *B. Admissibility in general.*[43]—See 11 C. L. 1614—Evidence bearing upon any material fact or issue is admissible unless too remote.[44] Thus it is proper to introduce evidence bearing upon motive,[45] intent,[46] incriminating circumstances,[47]

39. Killing by violence. Fowler v. State [Ala.] 49 S 788. Act greatly dangerous to lives of others. Fowler v. State [Ala.] 49 S 788. Acts or words. Barr v. State [Tex. Cr. R.] 120 SW 422.

40. Monteith v. State [Ala.] 49 S 777; State v. Miele [Del.] 74 A 8; Scott v. State [Ga.] 64 SE 272; State v. Roberson, 150 N. C. 837, 64 SE 182; State v. Lance, 149 N. C. 551, 63 SE 198; State v. McKay, 150 N. C. 813, 63 SE 1059; State v. Quick, 150 N. C. 820, 64 SE 168; Tyner v. U. S. [Okl. Cr. R.] 103 P 1057; State v. Jancigaj [Or.] 103 P 54; State v. Stover, 64 W. Va. 668, 63 SE 315; State v. Medley [W. Va.] 66 SE 358.

Deadly weapon: Such as is likely to produce death when used by one person upon another. State v. Miele [Del.] 74 A 8.

41. No presumption unless death results. Fallon v. State, 5 Ga. App. 659, 63 SE 806. Intent to injure rather than to kill may be inferred from shooting. State v. Frazer [S. D.] 121 NW 790. **Contra.** State v. Harvey, 214 Mo. 403, 114 SW 19. Presumed to intend natural and probable consequences of his act. Weisenbach v. State, 138 Wis. 152, 119 NW 843. That the natural and probable consequences did not occur does not weaken the presumption. Id.

42. Use of deadly weapon by decedent. Clark v. State [Tex. Cr. R.] 120 SW 179.

43. **Search Note:** See notes in 3 C. L. 1654; 17 L. R. A. 654; 20 Id. 609; 70 Id. 33; 2 L. R. A. (N. S.) 102; 3 Id. 352, 523; 12 Id. 238; 14 Id. 708; 89 A. S. R. 691; 4 Ann. Cas. 338; 8 Id. 357; 11 Id. 229, 1189.

See, also, Homicide, Cent. Dig. §§ 284-424, 465-470; Dec. Dig. §§ 153-199, 222-227; 21 Cyc. 885-973, 994-996; 21 A. & E. Enc. L. (2ed.) 211.

44. Evidence of the business of the Planters' Protective Association too remote on prosecution for killing night riders, an allied organization. Gardner v. State [Tenn.] 120 SW 816.

45. People v. Botkin, 9 Cal. App. 244, 98 P 861; Daniels v. State [Fla.] 48 S 747; Territory v. Clark [N. M.] 99 P 697; People v. Bowser, 196 N. Y. 296, 89 NE 818. Admissible though inconclusive. People v. Muhly [Cal. App.] 104 P 466. Enmity. Sergent v. Com. [Ky.] 117 SW 362; People v. Bowser, 196 N. Y. 296, 89 NE 818. Ill will and ill treatment. Van Wyk v. People, 45 Colo. 1, 99 P 1009. Quarrel with deceased's employe and threats against deceased just previous to homicide. People v. Smith, 9 Cal. App. 644, 99 P 1111. That deceased usually had money, to show motive robbery. State v. Shelton [Mo.] 122 SW 732. Possession of money by decedent though not traced to accused. Fouse v. State, 83 Neb. 258, 119 NW 478. Pregnancy of decedent by defendant. Copeland v. State [Fla.] 50 S 621. Belief by accused that he was chargeable with support of bastard child about to be born to decedent. Id. Conversation showing jealousy. Reyes v. State, 55 Tex. Cr. R. 422, 117 SW 152. Relations of accused to other parties. Id. Letter written by defendant showing motive. Phillips v. State [Ala.] 50 S 194. Letters written by one accused of uxoricide to his paramour. Davis v. State, 54 Tex. Cr. R. 236, 114 SW 366. Unhappy relations between husband and wife whom he killed. Combs v. State, 55 Tex. Cr. R. 334, 116 SW 584. Evidence that, immediately after killing, defendant robbed and raped decedent's widow. People v. Barabuto, 196 N. Y. 293, 89 NE 837. Evidence that accused had secured insurance on the life of decedent in excess of his probable ability to pay premiums. Van Wyk v. People, 45 Colo. 1, 99 P 1009. Letters showing affection for another admissible against wife charged with murdering husband. People v. Le Doux, 155 Cal. 535, 102 P 617. Belief of accused that she was married to decedent may be shown by evidence incompetent to prove the marriage, motive being alleged fear of bigamy prosecution. Id. Character of wife of accused as showing motive may only be proved by direct evidence. Rollings v. State [Ala.] 49 S. 329. Upon theory that accused and his wife planned murder to obtain insurance, testimony that when accused and wife applied for policies on decedent's life the wife misrepresented in order to obtain insurance admissible. Van Wyk v. People, 45 Colo. 1, 99 P 1009. Where state claimed love for another as motive for killing husband, wife may show that he lived upon her earnings as a prostitute. People v. Le Doux, 155 Cal. 535, 102 P 517.

46. Conduct indicating intent. Maddox v. State [Ala.] 48 S 689. Securing weapon as preparation. Rollings v. State [Ala.] 49 S 329. Previous statements indicating intent. People v. Hayes, 9 Cal. App. 301, 99 P 386. Rifle practice following communication of insults to wife. Lowman v. State [Ala.] 50 S 43. Statements indicating purpose though not specific. Jay v. State [Tex. Cr. R.] 120 SW 449. Intent may be inferred from circumstances or be testified to directly by accused. Ryan v. Ter. [Ariz.] 100 P 770.

47. Flight. People v. Mar Gin Suie [Cal. App.] 103 P 951. Flight and circumstances thereof. Caberra v. State [Tex. Cr. R.] 118 SW 1054. Flight and subsequent conduct. Rollings v. State [Ala.] 49 S 329. Conduct at about time of homicide. Maddox v. State [Ala.] 48 S 689. That defendant and his companions scattered and ran immediately after shooting. People v. Hayes, 9 Cal. App. 301, 99 P 386. That one of defendant's companions was seen to run from scene of shooting unloading a revolver. Id. Circumstances of arrest. People v. Mar Gin Suie [Cal. App.] 103 P 951. Resistance to arrest.

or tending to prove corpus delicti, [48] or to connect accused with the crime,[49] but irrelevant,[50] incompetent,[51] or hearsay [52] evidence is properly excluded, and the exclusion of merely cumulative evidence is harmless [53] as is the erroneous exclusion [54] or

Weisenbach v. State, 138 Wis. 152, 119 NW 843. Testimony as to presence of a man near scene of crime admissible though not connected with accused. State v. Kammel [S. D.] 122 NW 420. Silence of accused when charged with crime. Davis v. State, 54 Tex. Cr. R. 236, 114 SW 366; Crowell v. State [Tex. Cr. R.] 120 SW 897. Independent fact discovered in consequence of incriminating statement. Goolsby v. State [Ga.] 66 SE 159. Flight of third party not admissible. Ott v. State [Ala.] 49 S 810.

48. Bones of deceased. Sprouse v. Com. [Ky.] 116 SW 344. Testimony of one who tasted poisoned candy. People v. Botkin, 9 Cal. App. 244, 98 P 861. Testimony of candy maker that candy left factory without poison. Id. Marks on scene of homicide though not connected with accused. Hill v. State, 54 Tex. Cr. R. 646, 114 SW 117. Color of victim's hair and similar hair found on overshoe of accused. State v. Nordall, 38 Mont. 327, 99 P 960. All surroundings of burned dwelling and that five unidentified bodies were found. Id.

49. Disposition of fruits of murder and burglary. Wright v. State [Tex. Cr. R.] 120 SW 458. Disposal of ammunition similar to that identified with the crime. Id. That alleged accomplice carried pistol of caliber of shells found on scene of homicide. Garner v. State [Ga. App.] 65 SE 842. That defendant carried previous to homicide a pistol of the caliber of bullet found in body. Id. Hair similar to that of decedent found glued by blood to overshoe of accused. State v. Nordall, 38 Mont. 327, 99 P 960. Carvings of defendant's name on barn door with fresh whittlings admissible to connect accused with the crime as was evidence of other carvings to show defendant's habit to so carve and to identify the carving as his handiwork. State v. Kent [Vt.] 74 A 389. Evidence of actions of bloodhounds in trailing murderer admissible in corroboration of other evidence where the training of the dogs has been properly shown. State v. Spivey [N. C.] 65 SE 995. Admissibility of actions of bloodhounds discussed. Sprouse v. Com. [Ky.] 116 SW 344.

50. Not prima facie relevant properly excluded. Phillips v. State [Ala.] 50 S 194. Res inter alios acta. Groszochmigen v. State [Tex. Cr. R.] 121 SW 1113. Chastity of decedent. Hall v. State [Ark.] 117 SW 753. Number of children of deceased. Allen v. Com. [Ky.] 119 SW 795. Ownership of disputed property. Knight v. State, 55 Tex. Cr. R. 243, 116 SW 56. Ill will to third parties. Ringo v. State, 54 Tex. Cr. R. 561, 114 SW 119. Other contributing causes of death. State v. Pell, 140 Iowa, 655, 119 NW 154. Objectionable communications by defendant to victim's wife. Waldrop v. State [Miss.] 48 S 609. Assault on third party. Holland v. State [Ala.] 50 S 215. That accused surrendered himself. Jones v. State [Ga.] 63 SE 1114. That decedent scorned accused. State v. Stockman, 82 S. C. 388, 64 SE 595. Domestic infelicity of decedent. Jackson v. State [Ga.] 64 SE 656. Conversation of decedent in absence of accused. Holland v. State [Ala.] 50 S 215. Error to admit irrelevant statements by decedent before homicide. Gant v. State, 55 Tex. Cr. R. 284, 116 SW 801. Method is immaterial where murder is admitted. People v. Tansey [Cal. App.] 104 P 582. Where there is no defense of passion, provocation is not pertinent. State v. Smith [Kan.] 102 P 1098. Where defense is accident, other defenses are not pertinent. State v. Nielson, 38 Mont. 451, 100 P 229. Fear of deceased where self-defense is not pleaded. State v. Raice [S. D.] 123 NW 708. Grievances not pertinent to plea of insanity. People v. Carlin, 194 N. Y. 448, 87 NE 805. Maternal neglect not pertinent to insanity plea. Id. That defendant had been reared in public institutions not relevant to insanity plea. Id. Abuse of daughter before marriage not material to trial for her murder by shot intended by husband for her father. State v. Casasanta [R. I.] 73 A 312. Evidence of father-in-law's general opinion of women properly excluded on trial for killing wife, which shot intended for father-in-law. Id. Nature of wound when self-defense was clearly shown. State v. Gardner [S. C.] 65 SE 630. Chastity of defendant before marriage not admissible on trial for killing husband where not raised by defense. People v. Connelly [Mich.] 16 Det. Leg. N. 394, 122 NW 80. Testimony of quarrel over defendant's refusal to do act of prostitution, which quarrel lead to her killing of husband, does not raise question of her chastity before marriage. Id. Threats by state's witness against victim inadmissible as tending to incriminate witness. Story v. State [Ala.] 49 S 753. Nothing is pertinent but the res gestae where homicide does not result from felonious assault. State v. Kimbrell [N. C.] 66 SE 208. Testimony of why witness advised accused to go to another state. Simmons v. State [Ala.] 48 S 606.

51. Fowler v. State [Miss.] 49 S 625. Declarations by third parties of their intent to go elsewhere as tending to show they were not present. Hoffman v. Com. [Ky.] 121 SW 690. Uncommunicated intentions of accused. Pate v. State [Ala.] 50 S 357. Statement of decedent before homicide of his opinion as to intentions of accused. Holland v. State [Ala.] 50 S 215. Statements by others in decedent's presence before his death as to circumstances of shooting. State v. Lindsay, 82 S. C. 486, 63 SE 1064. Competency of circumstantial evidence is for the court. Spick v. State, 140 Wis. 104, 121 NW 664. Exclusion of evidence rebutting motive immaterial where crime is clearly proved otherwise. People v. Farmer, 194 N. Y. 251, 87 NE 457.

52. Hearsay evidence of threats. Wilson v. Com. [Ky.] 121 SW 430. Offer to show factional warfare, threats, etc., on self-defense theory, rejected as a whole since it included hearsay. State v. Hanlon, 38 Mont. 557, 100 P 1035. Evidence of decedent's statement of intent of accused in the absence of accused and before homicide held hearsay. Holland v. State [Ala.] 50 S 215.

53. Spencer v. Com. [Ky.] 122 SW 800. Fully proved otherwise. Magan v. Com.

admission of evidence without prejudice to the accused.[55] Acts of the parties immediately preceding the homicide are admissible as bearing upon motive and intent,[56] as are facts and circumstances tending to explain the nature of the crime.[57] The entire res gestae,[58] including facts leading up to[59] or constituting a part of the transaction,[60] may be shown, but subsequent acts or declarations[61] are inadmissible as such unless so closely allied in time and place as to constitute a part of the res gestae.[62] Self-serving acts or declarations of the accused are not admissible[63]

[Ky.] 119 SW 734; Knight v. State, 55 Tex. Cr. R. 243, 116 SW 56; Cabrera v. State [Tex. Cr. R.] 118 SW 1054. Rendered harmless by other testimony. Hoffman v. Com. [Ky.] 121 SW 690.

54. Where from state of evidence at close of trial exclusion is seen to be correct. Spick v. State, 140 Wis. 104, 121 NW 664. Evidence that another committed the homicide properly rejected where from other evidence it is manifestly impossible that he could have done so. Id.

55. Dumas v. State [Ala.] 49 S 224; Rollings v. State [Ala.] 49 S 329; Day v. State [Ga.] 66 SE 250. In view of verdict. Hobbs v. State, 55 Tex. Cr. R. 299, 117 SW 811; Hart v. State [Tex. Cr. R.] 121 SW 508. Evidence of decedent's immaterial statements harmless. Arnwine v. State, 54 Tex. Cr. R. 213, 114 SW 796. Evidence of fight between parties harmless, it being shown that deceased was aggressor. State v. Churchill, 52 Wash. 210, 100 P 309. Admission of vague threats harmless where specific threats were proved. Selfridge v. People, 45 Colo. 275, 100 P 591. Where both wounds were fatal, evidence as to which was first inflicted cannot be prejudicial. State v. Jackman [Nev.] 104 P 13. Where killing is admitted, confession of another is not prejudicial to plea of self-defense. Johnson v. State [Ark.] 115 SW 930. Answer to improper hypothetical question not prejudicial when so worded as not to deceive jury. Van Wyk v. People, 45 Colo. 1, 99 P 1009. Where inconclusive experiments have been testified to, there is no prejudicial error in refusing to admit the exhibits or in the remark of the court that in the absence of further showing the experiments are valueless. State v. Nordall, 38 Mont. 327, 99 P 960. Error in admission of testimony that prior to murderous assault upon officer said officer had found liquor illegally in defendant's possession not prejudicial where invited by accused. People v. McKeehan [Cal. App.] 105 P 273. Error in admitting fact that defendant habitually carried arms harmless in view of evidence that he used such arms upon deceased. Brantley v. State [Ga.] 65 SE 426.

56. Time and method of obtaining arms. Rollings v. State [Ala.] 49 S 329. That accused fired random shots on way to scene of homicide. Holland v. State, 55 Tex. Cr. R. 27, 115 SW 48. Cause of difficulty out of which homicide arose. Wheat v. Com. [Ky.] 118 SW 264. Recurring periods of peace and enmity between parties. Brown v. State [Tex. Cr. R.] 120 SW 444. Evidence of quarrel between deceased and another regarding accused immediately preceding homicide. Allen v. Com. [Ky.] 119 SW 795. That accused and another were in armed defiance of the law and fined in pursuance of such intent. Welsenbach v. State, 138 Wis. 152, 119 NW 843. Where defense is lawful resistance to an organized conspiracy to terrorize the country, the facts of such a conspiracy, the fear of the inhabitants and the circumstances leading to the encounter, are admissible. Gardner v. State [Tenn.] 120 SW 816. Upon a defense of lawful resistance to an unlawful conspiracy to riot and murder, the details of the alleged unlawful organization are admissible only so far as is necessary to develop its nature and purpose. Id.

57. Extent of wound. Phillips v. State [Ala.] 49 S 794. Extent of prosecuting witness' injuries. Newman v. State [Ala.] 49 S 786. Nature of wound and that blood was gushing therefrom. Mitchell v. State, 55 Tex. Cr. R. 62, 114 SW 830. Intoxication, to show recklessness. State v. Lance, 149 N. C. 551, 63 SE 198. Evidence of appearance of place where body was concealed. Ott v. State [Ala.] 49 S 810. Position of body as seen by witness when it had not been materially disturbed. Welch v. State [Tex. Cr. R.] 122 SW 880. Municipal ordinance properly admitted to show that deceased officer was killed in performance of his duty. Kelly v. State [Ala.] 49 S 535.

58. Res gestae properly admitted. Price v. State, 1 Okl. Cr. R. 358, 98 P 447.

59. Statements and acts of accused immediately before killing. Holland v. State [Ala.] 50 S 215. Everything seen and heard by eyewitness from time parties met to the killing. Id.

60. Simultaneous with and springing out of the transaction. State v. Gardner [S. C.] 65 SE 630. Nature of assault. Phillips v. State [Ala.] 49 S 794. Profanity used by accused at time of homicide. Glenn v. State, 157 Ala. 12, 47 S 1034. Exclamations of deceased and of witness during combat. State v. Hinson, 150 N. C. 827, 64 SE 124. Actions of all parties to a general fight. Newman v. State [Ala.] 49 S 786. Where several were killed at the same time, whole transaction admissible. State v. Blount [La.] 50 S 12. Remarks of bystander held not res gestae. Mitchum v. State, 56 Fla. 71, 47 S 815.

61. Remarks made by decedent some time later. Tucker v. State [Ga.] 66 SE 250. Statement made by decedent at his home fifty yards from scene of wounding. Jones v. State [Ark.] 115 SW 166. Statement by accused after riding two miles from scene of homicide. State v. Hunter, 82 S. C. 153, 63 SE 685. Physician's opinion from examining wounds. State v. Gardner [S. C.] 65 SE 630. Admissions of fault by decedent three hours after wounding. McGowan v. Com. [Ky.] 117 SW 387.

62. Declarations which spring out of the act, are voluntary and spontaneous, and are made at a time so near as to preclude the

but admissions against interest [64] and confessions,[65] obtained in a lawful manner,[66] may be received. Proof of prior difficulty between the parties is admissible,[67] but not the details thereof.[68] Threats by the accused against the deceased [69] may be

idea of deliberation and fabrication, are admissible though not precisely coincident with the fact. Price v. State, 1 Okl. Cr. R. 358, 98 P 447.

Held res gestae: Declarations of victim immediately after shooting. State v. Spivey [N. C.] 65 SE 995. Exclamation of decedent immediately after being stabbed. Fleming v. State, 54 Tex. Cr. R. 339, 114 SW 383. Statement by decedent immediately after assault. Puryear v. State [Tex. Cr. R.] 118 SW 1042. Statement by decedent as he was carried away. Havard v. State, 55 Tex. Cr. R. 213, 115 SW 1185. Decedent's answers to questions immediately upon recovering consciousness after assault. Hobbs v. State, 55 Tex. Cr. R. 299, 117 SW 811. Declarations of decedent immediately after assault admissible, regardless of competency as a witness. Hunter v. State, 54 Tex. Cr. R. 224, 114 SW 124. Statement by accused soon after homicide. Holland v. State [Ala.] 50 S 215. Threats to kill witness immediately after homicide. Roma v. State, 55 Tex. Cr. R. 344, 116 SW 598. Excited statements and admissions of accused two or three minutes after homicide. Douglass v. State, 54 Tex. Cr. R. 639, 114 SW 808. Statements of accused and resistance to arrest immediately following homicide. Knight v. State, 55 Tex. Cr. R. 243, 116 SW 56. Statement of accused five minutes after and forty yards from scene of homicide. Clark v. State [Tex. Cr. R.] 120 SW 179. Statements by accused within six or seven minutes after homicide. Brown v. State [Tex. Cr. R.] 120 SW 444. Conversation between parties while both were seeking a doctor for their injuries. Derden v. State [Tex. Cr. R.] 120 SW 485. Statement by brother of deceased, participant in the fight, immediately thereafter. Havard v. State, 55 Tex. Cr. R. 213, 115 SW 1185. Acts of companion of decedent some time later. Magan v. Com. [Ky.] 119 SW 734. Marks of conflict on scene of shooting shortly thereafter. Phillips v. State [Ala.] 49 S 794.

63. Turner v. State [Ala.] 49 S 828; Lee v. State [Tenn.] 116 SW 881.

64. Admissible as substantive evidence, not confined to rebuttal. Collett v. Com. [Ky.] 121 SW 426. Admissions before arrest. Stapleton v. State [Tex. Cr. R.] 120 SW 866. Admission of guilt one hour after homicide. Harp v. Com. [Ky.] 119 SW 1191. Admissions not in the nature of confession. Andrews v. State [Ala.] 48 S 858. Admissions of accused not res gestae nevertheless admissible. Holland v. State [Ala.] 50 S 215. Statements and admissions of accused immediately following reckless shooting. State v. Lance, 149 N. C. 551, 63 SE 198. Statement of accused while in jail that he did not regret what he had done although not specifically mentioning crime. Wright v. Com. [Va.] 65 SE 19. A statement of incriminating facts is not a confession and rules as to admissibility of confessions do not apply. Daniels v. State [Fla.] 48 S 747.

65. A confession is an admission of guilt. A statement of incriminating facts is not a confession. Daniels v. State [Fla.] 48 S 747.

66. Admissible where voluntary. Bettis v. State [Ala.] 49 S 781; Daniels v. State [Fla.] 48 S 747. After caution. State v. Bennett [Iowa] 121 NW 1021; Commonwealth v. Snyder, 224 Pa. 526, 73 A 910. After caution and without solicitation. Commonwealth v. Willis, 223 Pa. 576, 72 A 857. Not induced by fear or threats. People v. Randazzio, 194 N. Y. 147, 87 NE 112. Voluntarily and without inducement or duress. Tyner v. U. S. [Okl. Cr. R.] 103 P 1057. Voluntary and without improper influences. State v. Wilson [Mo.] 122 SW 671. Unless made to officers of the law under improper influences. State v. Brooks, 220 Mo. 74, 119 SW 353. Voluntary statement upon giving himself into custody. Grant v. State [Tex. Cr. R.] 120 SW 481. Where voluntarily made to officer though prisoner was handcuffed. Fouse v. State, 83 Neb. 258, 119 NW 478. Confession in custody where not improperly influenced. State v. Wooley, 215 Mo. 620, 115 SW 417. Arrest is not per se duress sufficient to bar confession. State v. Brooks, 220 Mo. 74, 119 SW 353. Admonition to speak truth is not a threat rendering confession inadmissible. Id. Deception which induced confession not necessarily an improper influence. People v. Scott, 195 N. Y. 224, 88 NE 35. Confession through interpreter admissible. People v. Randazzio, 194 N. Y. 147, 87 NE 112. Stenographer's testimony as to confession admissible. Id. **Inadmissible** when induced by promises of benefits. State v. Berberick, 38 Mont. 423, 100 P 209. **Predicate** may be question of fact. Id. Voluntary nature of confession held for jury. State v. Bennett [Iowa] 121 NW 1021. Warning shown as sufficient predicate. Knight v. State, 55 Tex. Cr. R. 243, 116 SW 56.

67. Brown v. State [Tex. Cr. R.] 120 SW 444. To show malice. Holland v. State [Ala.] 50 S 215; Waters v. State, 54 Tex. Cr. R. 322, 114 SW 628; State v. Churchill, 52 Wash. 210, 100 P 309. To show intent. Stapleton v. State [Tex. Cr. R.] 120 SW 866. On self-defense theory to show which party was probable aggressor. McGowan v. Com. [Ky.] 117 SW 387.

68. Holland v. State [Ala.] 50 S 215; Hargis v. Com. [Ky.] 123 SW 239; Hart v. State [Tex. Cr. R.] 121 SW 508. Merits of fatal quarrel not admissible. Gilbert v. State [Fla.] 50 S 535.

69. Admissible. Selfridge v. People, 45 Colo. 275, 100 P 591; Blocker v. State, 55 Tex. Cr. R. 30, 114 SW 814; Holland v. State [Tex. Cr. R.] 120 SW 470. To show motive. Copeland v. State [Fla.] 50 S 621. To show intent. Id. To show malice. Knight v. State [Ala.] 49 S 764. To show state of mind. State v. Demming, 79 Kan. 526, 100 P 285. Threats during previous quarrel. Brown v. State [Tex. Cr. R.] 120 SW 444. Providing they refer to deceased. Knight v. State [Ala.] 49 S 764. To indicate probable aggressor. Turner v. State [Ala.] 49 S 828. Threats against faction if not too general. Montgomery v. State [Ala.] 49 S 902. That accused was armed when he made threats. Williams v. State [Ala.] 50 S 59. That ac-

shown, but threats against others or of a general nature are inadmissible.[70] Where there was co-operation in the homicide, the declarations of codefendants are admissible against each other,[71] but not otherwise,[72] and confessions in the absence of the other are not admissible against him.[73] An accomplice may be a competent witness.[74] Demonstrative evidence such as maps,[75] photographs,[76] objects connected with the crime,[77] experiments,[78] weapons,[79] clothing,[80] or remains of deceased,[81] however gruesome,[82] is admissible under proper restrictions,[83] but remotely relevant evidence tending to prejudice and inflame the minds of the jury should be excluded.[84] The actions of blood hounds used in trailing the accused are admissible only after sufficient predicate has been laid.[85] Other crimes are not admissible[86] unless a part of[87] or explanatory of[88] the crime charged or unless introduced solely

cused was armed for another when he threatened a faction. Montgomery v. State [Ala.] 49 S 902.

70. General threat to kill. Knight v. State [Ala.] 49 S 764. Not including deceased. Holland v. State, 55 Tex. Cr. R. 27, 115 SW 48. Not connected with deceased. Brown v. State [Tex. Cr. R.] 120 SW 444. Threats against a fictitious person. Holland v. State, 55 Tex. Cr. R. 27, 115 SW 48.

71. Declaration of codefendant showing animus. Hunter v. State, 54 Tex. Cr. R. 224, 114 SW 124. Threats of codefendant. Roma v. State, 55 Tex. Cr. R. 344, 116 SW 598. Threats by member of faction to which accused belonged, he being present. Magan v. Com. [Ky.] 119 SW 734. Threat by wife in presence of accused and just before homicide. Hoffman v. Com. [Ky.] 121 SW 690. Acts and declarations of conspirators in furtherance of common design. Van Wyk v. People, 45 Colo. 1, 99 P 1009; State v. Hanlon, 38 Mont. 557, 100 P 1035; Cabrera v. State [Tex. Cr. R.] 118 SW 1054.

72. Statement of principal as to motive not admissible against coconspirators. People v. Sidelingen, 9 Cal. App. 298, 99 P 390. Where killing was on sudden affray, threats by one defendant are inadmissible against a codefendant who had no knowledge thereof. State v. Walsworth [Or.] 103 P 516.

73. Confession of codefendant not admissible against defendant not present. Daniels v. State [Fla.] 48 S 747. Declaration by codefendant in presence of accused who was badly wounded and did not reply held inadmissible. Tate v. State [Miss.] 48 S 13.

74. State v. Sassaman, 214 Mo. 695, 114 SW 590. Where tried separately. State v. Shelton [Mo.] 122 SW 732.

75. Proper predicate being laid. Noll v. State [Ala.] 49 S 824.

76. Photograph of scene with persons placed to represent position of parties if predicated upon evidence of accuracy. Sellers v. State [Ark.] 120 SW 840.

77. Things found on scene though not connected with accused. Pemberton v. State, 55 Tex. Cr. R. 464, 117 SW 837. Rope which strangled deceased. State v. Wilson [Mo.] 122 SW 671. Pistol shell found on scene. Noll v. State [Ala.] 49 S 824. Gun case found on scene though not fully identified with accused. Knight v. State, 55 Tex. Cr. R. 243, 116 SW 56.

78. To show whence shots were fired. Cabrera v. State [Tex Cr. R.] 118 SW 1054.

79. Andrews v. State [Ala.] 48 S 858. Weapons left by accused where arrested. People v. Morse, 196 N. Y. 306, 89 NE 816.

80. Clothing of deceased. Andrews v. State [Ala.] 48 S 858; Rollings v. State [Ala.] 49 S 329; State v. Moore [Kan.] 102 P 475; State v. Churchill, 52 Wash. 210, 100 P 309. Although identifying witness had not been in continuous custody. Bennefield v. U. S. [Okl. Cr. R.] 100 P 34, rehearing denied [Okl. Cr. R.] 102 P 647. Clothing of accused. State v. Rubaka [Conn.] 72 A 566.

81. Bones. Sprouse v. Com. [Ky.] 116 SW 344.

82. Bones of deceased admissible though unnecessary to prove death, and notwithstanding their grewsome nature. Sprouse v. Com. [Ky.] 116 SW 344. Spectacular displays should be suppressed but legitimate evidence cannot be excluded because it may tend to move the jury. State v. Moore [Kan.] 102 P 475.

83. Must be connected with the accused. People v. Muhly [Cal. App.] 104 P 466. Clothing of deceased admissible only to illustrate an issue, not promiscuously to inflame jury. Rollings v. State [Ala.] 49 S 329.

84. Physician's account of treatment tending to excite sympathy. Phillips v. State [Ala.] 49 S 794.

85. Predicate sufficient. State v. Spivey [N. C.] 65 SE 995. Predicate insufficient. Sprouse v. Com. [Ky.] 116 SW 344.

86. Jones v. State [Ark.] 115 SW 166; Watson v. Com. [Ky.] 116 SW 287; People v. Kilse, 156 Mich. 373, 16 Det. Leg. N. 131, 120 NW 989.

87. Attempted robbery and murder being so closely connected as to be inseparable, evidence of robbery is admissible to show malice. State v. Anderson [Or.] 101 P 198. Burglary from scene of which defendant was fugitive properly shown in trial for killing pursuing officer. People v. Blake [Mich.] 16 Det. Leg. N. 363, 122 NW 113; People v. Morse, 196 N. Y. 306, 89 NE 816. Evidence of crime from scene of which defendant was fugitive admissible to show his knowledge of intention of officers in pursuit. People v. Governale, 193 N. Y. 581, 86 NE 554. Under Crimes Act June 14, 1898, § 106, denouncing as murder the killing of a citizen who is endeavoring to arrest a criminal, evidence of the crime for which the arrest is attempted is admissible. State v. Bertchey [N. J. Err. & App.] 73 A 524.

88. Connected crime admissible to show motive. State v. Hembree [Or.] 103 P 1008. Where crime was committed in a peculiar

to impeach defendant's testimony.[89] Evidence taken at the inquest is not admissible under all circumstances.[90] Opinion evidence may be introduced in proper cases.[91] All evidence bearing upon any theory of defense [92] or mitigation [93] is admissible if pertinent to the issue,[94] as is evidence tending to rebut the same.[95] The

manner, evidence of other crimes of an almost identical nature by defendant shortly previous to the crime charged admissible to connect accused. State v. La Rose [Or.] 104 P 299. Evidence bearing upon the case is admissible though showing another crime. State v. Sassaman, 214 Mo. 695, 114 SW 590; Holland v. State, 55 Tex. Cr. R. 27, 115 SW 48; Wright v. State [Tex. Cr. R.] 120 SW 458. Evidence of prosecution of accused by deceased admissible as showing motive though showing other offenses by accused. State v. Finch [Or.] 103 P 505. Where prosecution for other offenses is alleged as motive, the truth of such other charges is not in issue. State v. Finch [Or.] 103 P 505.

89. Rollings v. State [Ala.] 49 S 329.

90. Statement of accused at inquest admissible only if he had been warned. Daniels v. State [Fla.] 48 S 747. Testimony of wife of accused at inquest not admissible, she being present to testify in person. People v. Heaoock, 10 Cal. App. 450, 102 P 543. Testimony of accused at inquest not admissible on questions which he could himself take the stand to explain. Id. Depositions taken at inquest are as a general rule inadmissible at trial. State v. Squires, 16 Idaho, 545, 98 P 413.

91. Expert testimony is subject to usual rules. State v. Kammel [S. D.] 122 NW 420; Davis v. State, 54 Tex. Cr. R. 236, 114 SW 366. Expert opinion must be founded on proved facts. State v. Maioni [N. J. Err. & App.] 74 A 526. The question of cause of death, where evidence is wholly circumstantial, is for jury, and a subject of expert testimony. People v. Heacock, 10 Cal. App. 450, 102 P 543.

Admissible: Nonexpert testimony as to size of bullet. Garner v. State [Ga. App.] 65 SE 842. Nonexpert opinion as to intoxication. State v. Stockman, 82 S. C. 388, 64 SE 595. Opinion of nonexpert as to when death occurred. State v. Carr, 65 W. Va. 81, 63 SE 766. Intimates may testify as to sanity. State v. Rumble [Kan.] 105 P 1; State v. Barberick, 38 Mont. 423, 100 P 209. Testimony of insanity expert founded on examination. People v. Hill, 195 N. Y. 16, 87 NE 813. Qualified witness may testify as to whether sound of shots was from shotgun or rifle. Hunter v. State, 54 Tex. Cr. R. 224, 114 SW 124.

Inadmissible: Opinion evidence as to provocation of quarrel. Williams v. State, 54 Tex. Cr. R. 642, 114 SW 802. Opinion as to which of combatants was in greatest peril. State v. Hamilton [La.] 49 S 1004. Error to admit opinion of physician as to position of person when receiving wound where based wholly on range of bullet. Price v. U. S. [Okl. Cr. R.] 101 P 1036.

92. May show guilt of another. Wheeler v. State [Tex. Cr. R.] 121 SW 166. Confession of guilt by another may be shown. Blocker v. State, 55 Tex. Cr. R. 30, 114 SW 814. May explain motive for drawing revolver. Ryan v. Ter. [Ariz.] 100 P 770. May show threats as reason for carrying weapon, but not details thereof. State v. Heath, 221 Mo. 565, 121 SW 149. May show peaceable motive for going to scene. State v. Labry [La.] 50 S 700. May explain presence at scene of homicide as rebutting state's theory. Jackson v. State, 55 Tex. Cr. R. 79, 115 SW 262. Evidence that deceased was mentally defective as tending to prove suicide theory. Ott v. State [Ala.] 49 S 810. Where alibi is relied upon, much latitude should be allowed to defendant in explaining his movements. People v. Mar Gin Suie [Cal. App.] 103 P 351. Where arresting officer is charged with murder, he may show request to deceased to come peaceably. Holland v. State [Ala.] 40 S 215.

93. Intoxication. Montgomery v. State [Ala.] 49 S 902. Drunkenness as negativing intent. Chowning v. State [Ark.] 121 SW 735. Insults to female relative. Stapleton v. State [Tex. Cr. R.] 120 SW 866. Communication of insults by wife of accused, but not details. Hobbs v. State, 55 Tex. Cr. R. 299, 117 SW 811.

94. Where defense is insanity, every act of defendant's life is relevant to the issue. Smith v. State [Miss.] 49 S 945.

Inadmissible: Insanity of relatives where no defense of insanity is offered. Commonwealth v. Snyder, 224 Pa. 526, 73 A 910. Uncontrollable impulse where defense denies the homicide. Id. Mere offer to show intoxication without offer to show degree thereof. Id. Explanation of presence which threw no light on intent. State v. Roberson, 150 N. C. 837, 64 SE 182.

95. That accused who claims self-defense saw decedent disarmed. Jay v. State [Tex. Cr. R.] 120 SW 449. Evidence in rebuttal of alibi may show movements inconsistent with statement of accused. People v. Mar Gin Suie [Cal. App.] 103 P 951. May show that accused was not in his own home to rebut defense of domicile. Day v. State [Ga.] 66 SE 250. Alibi of third party alleged by defendant to be the guilty one may be shown. Goolsby v. State [Ga.] 66 SE 159. Where testimony was introduced to show that deceased was about to draw a revolver, proper to allow his wife to testify that he owned no such weapon. State v. Churchill, 52 Wash. 210, 100 P 309. Where defense was that deceased was trying to use pistol, his wife may testify that it was in his trunk. Simmons v. State [Ala.] 48 S 606. That wound claimed by defendant to have been inflicted on him by decedent was in fact received later. Roma v. State, 55 Tex. Cr. R. 344, 116 SW 598. Where defendant seeks to mitigate the offense by testimony that assault was committed under a sense of wounded honor, it is proper impeachment to show that he had exposed his wife to such insults. Caples v. State [Okl. Cr. R.] 104 P 493. It is proper on cross-examination of accused to require him to actually demonstrate the acts of deceased which he relies upon to establish self-defense. State v. Hunter, 82 S. C. 153, 63 SE 685.

character of accused cannot be introduced except by the defense [96] or as impeachment of his testimony.[97] The usual rules as to the competency of character evidence prevail.[98] The accused as a witness is subject to the usual rules as to competency [99] and cross-examination.[1]

Justification.[See 11 C. L. 1821]—Upon the issue of self-defense, threats by the deceased [2] or his associates in a common design [3] directed toward the accused [4] may be shown as indicating intent [5] or actual danger of accused,[6] or as tending to prove which party was the aggressor,[7] and communicated threats [8] or the fact of such communication [9] may be shown as tending to prove reasonable apprehension upon the part of the accused, but uncommunicated threats are not admissible for such purpose,[10] nor are threats which were not seriously regarded by the accused.[11] Some jurisdictions accept such testimony only in case of actual homicide,[12] but this rule is not universal.[13] The character of the deceased [14] or of his associates in a common design,[15] his intent,[16] motive,[17] or his ill will toward the defendant,[18] may be shown by proper evidence [19] as tending to prove, or to disprove,[20] a theory of self-defense, but such evidence is not admissible generally [21] or where immaterial to the

96. Can be raised by accused. State v. Miele [Del.] 74 A 8; Allen v. Com. [Ky.] 119 SW 795; State v. Cloninger, 149 N. C. 567, 63 SE 154. Admissible to strengthen presumption of innocence. People v. Baldocchi, 10 Cal. App. 42, 101 P 28. Cannot be raised by state. People v. Smith, 9 Cal. App. 644, 99 P 1111.

97. Proper impeachment. State v. Priest, 215 Mo. 1, 114 SW 949; State v. Cloninger, 149 N. C. 567, 63 SE 154.

98. Cannot be shown by specific instances. Noel v. State [Ala.] 49 S 824; Boche v. State [Neb.] 122 NW 72. Cannot be shown by subsequent acts. Allen v. Com. [Ky.] 119 SW 795. Cannot be shown by reputation in another community from domicile. Pate v. State [Ala.] 50 S 357. That defendant habitually carried arms inadmissible to rebut character evidence. Brantley v. State [Ga.] 65 SE 426. Contrary statements of character witness may be shown. State v. Fisher, 149 N. C. 557, 63 SE 153. Character witness may be cross-examined on his conception or good character. State v. Quick, 150 N. C. 820, 64 SE 168. Character witness may be examined on particular acts tending to rebut his testimony. Andrews v. State [Ala.] 48 S 858; Hunter v. State [Ga.] 65 SE 154.

99. Previous perjury may bar testimony. Hinton v. Com. [Ky.] 121 SW 434.

1. Bettis v. State [Ala.] 49 S 781; People v. Smith, 9 Cal. App. 644, 99 P 1111; People v. Klise, 156 Mich. 373, 16 Det. Leg. N. 131, 120 NW 989. Where defense was mental incapacity, state may cross-examine defendant thereon. State v. Raice [S. D.] 123 NW 708.

2. Admissible. Green v. U. S. [Okl. Cr. R.] 101 P 112, rvg. 7 Ind. T. 733, 104 SW 1159. Admissibility extensively discussed. Morris v. Ter., 1 Okl. Cr. R. 617, 99 P 760. Where threats are relied upon as establishing self-defense, any evidence as to the nature thereof is admissible. Price v. State, 1 Okl. Cr. R. 358, 98 P 447.

3. Communicated threats by companion of deceased where shooting was general. Magan v. Com. [Ky.] 119 SW 734. Threats by persons unconnected with deceased are inadmissible. Morris v. Ter., 1 Okl. Cr. R. 617, 99 P 760.

4. Inadmissible where not directed toward accused. Pressley v. State [Ga.] 63 SE 784.

5. Hargis v. Com. [Ky.] 123 SW 239.

6. Turner v. State [Ala.] 49 S 828.

7. Turner v. State [Ala.] 49 S 828; State v. Lindsay, 122 La. 375, 47 S 687; State v. Barksdale, 122 La. 788, 48 S 264; State v. Stockman, 82 S. C. 338, 64 SE 595. Should be restricted to that purpose cannot be admitted to show character of accused. State v. Davis, 123 La. 133, 48 S 771.

8. Turner v. State [Ala.] 49 S 828; Magan v. Com. [Ky.] 119 SW 734; State v. Hanlon, 38 Mont. 557, 100 P 1035.

9. State v. Hanlon, 38 Mont. 557, 100 P 1035. Regardless of the fact. Morris v. Ter., 1 Okl. Cr. R. 617, 99 P 760.

10. Pride v. State [Ga.] 66 SE 259.

11. No showing that accused was influenced. Duncan v. State, 171 Ind. 144, 86 NE 641. Where accused was aggressor and was not intimidated. Reed v. State [Okl. Cr. R.] 103 P 1042.

12. State v. Kimbrell [N. C.] 66 SE 208.

13. Smith v. State, 55 Tex. Cr. R. 628, 118 SW 145.

14. Character as a dangerous man. Pate v. State [Ala.] 50 S 357.

15. Character of companion of deceased where shooting was general. Magan v. Com. [Ky.] 119 SW 734.

16. Stated purpose. Arnwine v. State, 54 Tex. Cr. R. 213, 114 SW 796. Securing arms. Id.

17. Motive for killing accused. Price v. State, 1 Okl. Cr. R. 358, 98 P 447.

18. State v. Hanlon, 38 Mont. 557, 100 P 1035.

19. Not by hypothetical questions. Hunter v. State, 54 Tex. Cr. R. 224, 114 SW 124.

20. Habits of deceased as rebutting self-defense admissible. Rollings v. State [Ala.] 49 S 329. Where defendant sets up character of victim to support self-defense theory, evidence of good character is proper rebuttal. People v. Meert [Mich.] 16 Det. Leg. N. 263, 121 NW 318.

21. Inadmissible except on theory of self-

issue.[22] Specific instances of violence are not admissible to prove bad character of the decedent [23] unless to show knowledge of accused of such character,[24] nor can bad character be shown as an hereditary trait.[25]

(§ 7) *C. Dying declarations* [26]—See 11 C. L. 1822 are admissible only when a predicate has been laid [27] by the introduction of proper evidence [28] that the declarant was under a sense of impending death [29] and without hope of recovery,[30] but, if these conditions exist, it is immaterial that death did not occur as soon as declarant expected.[31] The sufficiency of the predicate is usually a question of law [32] but on conflicting evidence may be an issue of fact.[33] The declarations need not be in writing,[34] and the fact that they are partly in writing does not exclude parol proof.[35] A reduction of the declaration to writing by a hearer must be approved by the declarant to be admissible,[36] but, if so approved, it is immaterial that the exact words of declarant were not used,[37] and one testifying to the declaration may use a written memorandum thereof to refresh his memory.[38] A written declaration which has been lost may be introduced when found though secondary proof of the declaration has been

defense. State v. Fisher, 149 N. C. 557, 63 SE 153; State v. Dunlap, 149 N. C. 550, 63 SE 164; State v. Raice [S. D.] 123 NW 708. Although accused explained his presence at scene of homicide by fact that deceased was interfering with his laborers, evidence that deceased did not interfere with laborers of another is inadmissible. Turner v. State, 131 Ga. 761, 63 SE 294.

22. Uncommunicated statement of lawful intent of deceased not material to self-defense theory. Clark v. State [Tex. Cr. R.] 120 SW 179. Where danger was real rather than apparent, character of deceased is immaterial. Williams v. State, 54 Tex. Cr. R. 642, 114 SW 802.

23. Montgomery v. State [Ala.] 49 S 902; Hardgraves v. State [Ark.] 114 SW 216. Fights and quarrels between deceased and third parties not admissible unless it is shown that accused knew therof. State v. Churchill, 52 Wash. 210, 100 P 309.

24. **Admissible:** Previous violence to accused. State v. Hanlon, 38 Mont. 557, 100 P 1035. Series of acts of intimidation. Id. Previous violent acts of which accused had knowledge. Id. Other acts admissible to corroborate defendant's story of his knowledge. Id.

25. Family habits. State v. Hamilton [La.] 49 S 1004.

26. **Search Note:** See notes in 11 C. L. 1823, 1825; 56 L. R. A. 353; 6 Ann. Cas. 60; 7 Id. 885; 8 Id. 539.

See, also, Homicide, Cent. Dig. §§ 425-464; Dec. Dig. §§ 200-221; 21 Cyc. 973-994; 10 A. & E. Enc. L. (2ed.) 359; 21 Id. 213.

27. Proper predicate necessary. House v. State [Miss.] 48 S 3; Dumas v. State [Ala.] 49 S 224. Predicate held sufficient. House v. State [Miss.] 48 S 3; Hunter v. State, 54 Tex. Cr. R. 224, 114 SW 124; Kelly v. Com. [Ky.] 119 SW 809. Predicate held insufficient. McGowan v. Com. [Ky.] 117 SW 387.

28. Circumstantial proof may be sufficient. Copeland v. State [Fla.] 50 S 621; State v. Clark, 64 W. Va. 625, 63 SE 402. That it is not clear whether the statements constituting the predicate were made before the declaration is not necessarily fatal. State v. Quick, 150 N. C. 820, 64 SE 168.

29. Sense of impending death must be shown. People v. Hayes, 9 Cal. App. 301, 99 P 386; House v. State [Miss.] 48 S 3; Hunter v. State, 54 Tex. Cr. R. 224, 114 SW 124; People v. Cipolla, 155 Cal. 224, 100 P 252.

30. People v. Hayes, 9 Cal. App. 301, 99 P 386; Copeland v. State [Fla.] 50 S 621; Kelly v. Com. [Ky.] 119 SW 809. Declaration held erroneously admitted as failing to show sense of impending death without hope of recovery. Bilton v. Ter., 1 Okl. Cr. R. 566, 99 P 163. Declarant must not only be in articulo mortis but under the sense of impending death without hope of recovery. Id. Contradictory statements as to sense of impending death may bar the admission. Id. No presumption that declarant felt sense of impending death. Id. Statement "no use sending for a doctor" held sufficient. Copeland v. State [Fla.] 50 S 621.

31. Did not die until two days after declaration. Kelly v. Com. [Ky.] 119 SW 809.

32. State v. Clark, 64 W. Va. 625, 63 SE 402; Copeland v. State [Fla.] 50 S 621; State v. Davis, 123 La. 133, 48 S 771. Where evidence shows prima facie that declarant who soon thereafter died was under sense of approaching death, later evidence tending to negative his realization of his condit'on cannot render previous admission erroneous. Lowe v. State [Ga.] 63 SE 1114. For the court to determine if declarant was in extremis and had lost all hope of recovery before submitted to jury to determine credibility. Bilton v. Ter., 1 Okl. Cr. R. 566, 99 P 163. Judgment of trial court not reversed unless manifestly wrong. Jones v. State [Ark.] 115 SW 166.

33. Jackson v. State, 55 Tex. Cr. R. 79, 115 SW 262.

34. People v. Governale, 193 N. Y. 581, 86 NE 554.

35. Allen v. Com. [Ky.] 119 SW 795.

36. Sailsberry v. Com., 32 Ky. L. R. 1085, 107 SW 774.

37. That exact words of dying declaration were not set down is immaterial where read to and ratified by declarant. State v. Clark, 64 W. Va. 625, 63 SE 402.

38. Sailsberry v. Com., 32 Ky. L. R. 1085, 107 SW 774.

made.[39] The declaration must be voluntary.[40] The declarant must have been competent as a witness,[41] and the declarations are confined to such matters as he might testify to if living,[42] and are subject to the same impeachment or rebuttal.[43] The credibility of such declarations rests on the situation of the declarant and not on an oath,[44] but it may be shown that the declaration was made under oath.[45]

(§ 7) *D. Sufficiency.*[46]—See 11 C. L. 1826—Circumstantial evidence[47] or the testimony of a single witness[48] or the evidence introduced by the defense[49] may be sufficient to sustain a conviction. Cases dealing with the sufficiency of evidence to show deliberation,[50] motive,[51] intent,[52] or responsibility,[53] to establish corpus delicti,[54] to connect the defendant with the crime,[55] to support a finding of sanity,[56] to

39. State v. Clark, 64 W. Va. 625, 63 SE 402.

40. Whether refusal of physician to give relief unless woman dying of abortion named the guilty party constituted duress held for jury. Jackson v. State, 55 Tex. Cr. R. 79, 115 SW 262.

41. State v. Blount, [La.] 50 S 12. Sufficient intelligence shown to render competent dying declaration of 10-year-old boy. Hunter v. State, 54 Tex. Cr. R. 224, 114 SW 124. Competency for court. Allen v. Com. [Ky.] 119 SW 795.

42. Only competent portion for jury's consideration though other parts admissible to show competency. Allen v. Com. [Ky.] 119 SW 795. Admissible as a whole though some of the statements were inadmissible in standing alone. State v. Blount [La.] 50 S 12. That accused was not justified is not conclusive. House v. State [Miss.] 48 S 3. Dying declaration that decedent knew of no motive but his refusal to rent land to accused is admissible. Wright v. Com. [Va.] 65 SE 19. Direct observation admissible but not conclusive from collateral facts. House v. State [Miss.] 48 S 3. That accused had no cause admissible. Craft v. State [Tex. Cr. R.] 122 SW 547. May cover all **res gestae.** People v. Cipolia, 155 Cal. 224, 100 P 252. Decedent's dying declaration as to actions of himself and accused immediately after shooting admissible as res gestae. Id.

43. Wright v. Com. [Va.] 65 SE 19; State v. Smith [Kan.] 102 P 1098; O'Neal v. State [Miss.] 48 S 225. Inconsistent statements may be shown as impeachment. Allen v. Com. [Ky.] 119 SW 795.

44. Improper for court to discredit dying declaration because not made under oath. State v. Clark, 64 W. Va. 625, 63 SE 402.

45. State v. Clark, 64 W. Va. 625, 63 SE 402.

46. **Search Note:** See notes in 68 L. R. A. 35, 46, 53, 57; 3 L. R. A. (N. S.) 1161; 7 Id. 181. See, also, Homicide, Cent. Dig. §§ 471-552; Dec. Dig. §§ 228-257; 21 Cyc. 996-1021; 21 A. & E. Enc. L. (2ed.) 229.

47. People v. Mar Gin Suie [Cal. App.] 103 P 951; State v. McKay, 150 N. C. 813, 63 SE 1059; Brown v. State, 55 Tex. Cr. R. 160, 115 SW 580. Where evidence is wholly circumstantial, it must exclude every other hypothesis save that of guilt. Ott v. State [Ala.] 49 S 810; People v. Campagna, 240 Ill. 378, 88 NE 797. Weight for jury. Spick v. State, 140 Wis. 104, 121 NW 664. May be sufficient to establish **corpus delicti.** People v. Mar Gin Suie [Cal. App.] 103 P 951; People v. Campagna, 240 Ill. 378, 88 NE 797.

48. Watson v. Com. [Ky.] 116 SW 287; State v. Blount [La.] 50 S 12. May conflict on uncorroborated testimony of accomplice. State v. Sassaman, 214 Mo. 695, 114 SW 590. **Insufficient** testimony of seven-year-old and very ignorant negro boy. Matthews v. State [Miss.] 50 S 561. Admissions to a single witness. State v. Anderson [Or.] 101 P 198.

49. Halfacre v. State [Ark.] 115 SW 386.

50. **Sufficient** to show deliberation. People v. Turpin, 10 Cal. App. 526, 102 P 680; People v. Sanducci, 195 N. Y. 361, 88 NE 385; People v. Jackson, 196 N. Y. 357, 89 NE 924; State v. Anderson [Or.] 101 P 198. Repeated acts of violence are evidence of deliberation. People v. Sanducci, 195 N. Y. 361, 88 NE 385. Deliberate design shown by purchase of revolver before robbery and by selecting range wherefrom to shoot pursuing officer. People v. Morse, 196 N. Y. 306, 89 NE 816.

51. Motive not essential but circumstantially is of weight as a fact tending to prove guilt. Spick v. State, 140 Wis. 104, 121 NW 664. Threats long past, the reason for which has ceased, while admissible on motive, have little evidentiary weight. Sprouse v. Com. [Ky.] 116 SW 344. Where state's theory was that accused poisoned her husband to escape consequences of bigamous marriage, it is sufficient to show that she believed she was legally married to deceased. People v. Le Doux, 155 Cal. 535, 102 P 517. Held **insufficient** to show motive. People v. Campagna, 240 Ill. 378, 88 NE 797; State v. Hembree [Or.] 103 P 1008.

52. Evidence held to show defendant shot to kill. People v. Governale, 193 N. Y. 581, 86 NE 554. Intent not sufficiently shown. Martin v. State [Tex. Cr. R.] 122 SW 558.

53. Evidence negatives incompetency by reason of intoxication. Phillips v. U. S. [Okl. Cr. R.] 103 P 861.

54. Under Rev. Code, § 8298, providing that death of victim and killing by accused must be established as independent acts, the former by direct proof and the latter beyond reasonable doubt, it is unnecessary to prove by direct evidence that death was by criminal means. State v. Nordall, 38 Mont. 327, 99 P 960. **Sufficient** to establish corpus delicti. People v. Mar Gin Suie [Cal. App.] 103 P 951. To take corpus delicti to jury. State v. Wooley, 215 Mo. 620, 115 SW 417. Where deceased died two days after shot, suffering great agony meanwhile, and no other cause is suggested for death, proof of death from wound is sufficient. Bellamy v. State, 56 Fla. 43, 47 S 868.

55. Held **sufficient** to connect accused.

corroborate an accomplice,[57] to convict an accessory,[58] or to sustain convictions of unlawful homicide,[59] murder,[60] manslaughter,[61] or felonious assaults,[62] or to show matters of justification [63] or defense,[64] or to rebut the same,[65] are cited below.

Pickett v. State [Ark.] 121 SW 732; People v. Jackson, 196 N. Y. 357, 89 NE 924. To show that decedent's vehicle was struck by accused's automobile. People v. Scanlon, 132 App. Div. 528, 117 NYS 57. To show that accused gave poison to wife. Levering v. Com. [Ky.] 117 SW 253. To show accused did shooting. Reyes v. State, 55 Tex. Cr. R. 422, 117 SW 152. Where corpus delicti is also proved, extra judicial confession may support conviction. State v. Wooley, 215 Mo. 620, 115 SW 417. Evidence held **insufficient** to connect accused with the crime. Sprouse v. Com. [Ky.] 122 SW 134; Miller v. State, 139 Wis. 57, 119 NW 850. Actions of untrained dogs. Sprouse v. Com. [Ky.] 116 SW 344.

56. Sufficient to support finding of sanity. State v. Barker, 216 Mo. 532, 115 SW 1102; People v. Jones, 194 N. Y. 83, 86 NE 810; People v. Farmer, 194 N. Y. 251, 87 NE 457; People v. Hill, 195 N. Y. 16, 87 NE 813; People v. Scott, 195 N. Y. 224, 88 NE 35; People v. Hampartjoomian, 196 N. Y. 77, 89 NE 451; People v. Jones, 115 NYS 800.

57. Corroborative evidence held sufficient. McDaniels v. State [Ala.] 50 S 324.

58. Held insufficient to convict. Harp v. Com. [Ky.] 119 SW 1191; People v. Farmer, 196 N. Y. 65, 89 NE 462, rvg. 194 N. Y. 251, 87 NE 457.

59. Sufficient to establish unlawful homicide. Pressley v. State [Ga.] 63 SE 784; Jones v. State [Ga.] 63 SE 1114; Hunter v. State [Ga.] 65 SE 154; Brantley v. State [Ga.] 65 SE 426; Tucker v. State [Ga.] 66 SE 250.

60. Sufficient to show murder. Brewer v. State [Ala.] 49 S 336; Taylor v. State [Ga.] 63 SE 1116; Elliott v. State [Ga.] 64 SE 1090; Morman v. State [Ga.] 65 SE 146; Goolsby v. State [Ga.] 66 SE 159; Day v. State [Ga.] 66 SE 250; Leonard v. State [Ga.] 66 SE 251; Pride v. State [Ga.] 66 SE 259; People v. Anderson, 239 Ill. 168, 87 NE 917; State v. Dillingham [Iowa] 121 NW 1074; Freeman v. Com. [Ky.] 118 SW 917; Fowler v. State [Miss.] 49 S 625; Smith v. State [Miss.] 49 S 945; State v. Brooks, 220 Mo. 74, 119 SW 353; Monmouth v. State, 54 Tex. Cr. R. 407, 114 SW 114; Brown v. State, 55 Tex. Cr. R. 160, 115 SW 580; Jackson v. State [Tex. Cr. R.] 117 SW 990; Duque v. State [Tex. Cr. R.] 119 SW 687. To show murder in county of venue. Halfacre v. State [Ark.] 115 SW 386.

Held **insufficient** to show murder. Sprouse v. Com. [Ky.] 116 SW 344; Southern v. State [Tex. Cr. R.] 122 SW 259. Insufficient to show that child born on passenger car was murdered by mother. Brown v. State [Miss.] 49 S 146. Proof of motive not sufficient to show conspiracy to murder. People v. Farmer, 196 N. Y. 65, 89 NE 462, rvg. 194 N. Y. 251, 87 NE 457.

First degree murder: Evidence held **sufficient** to support verdict of first degree murder. Ferguson v. State [Ark.] 122 SW 236; People v. Mar Gin Suie [Cal. App.] 103 P 951; Van Wyk v. People, 45 Colo. 1, 99 P 1009; Selfridge v. People, 45 Colo. 275, 100 P 591; Barnhill v. State, 56 Fla. 16, 48 S 251; Smith v. State [Fla.] 48 S 744; Pickens v. State [Ga.] 63 SE 783; Burge v. State [Ga.] 66 SE 243; People v. Williams, 240 Ill. 633, 88 NE 1053; State v. Bennett [Iowa] 121 NW 1021; Hoffman v. Com. [Ky.] 121 SW 690; State v. Wooley, 215 Mo. 620, 115 SW 417; State v. Barker, 216 Mo. 532, 115 SW 1102; State v. Wilson [Mo.] 122 SW 671; State v. Shelton [Mo.] 122 SW 732; State v. Sassaman, 214 Mo. 695, 114 SW 590; People v. Governale, 193 N. Y. 581, 86 NE 554; People v. Jones, 194 N. Y. 83, 86 NE 810; People v. Randazzio, 194 N. Y. 147, 87 NE 112; People v. Farmer, 194 N. Y. 251, 87 NE 457; People v. Carlin, 194 N. Y. 448, 87 NE 805; People v. Hill, 195 N. Y. 16, 87 NE 813; People v. Bowser, 196 N. Y. 296, 89 NE 818; People v. Barobuto, 196 N. Y. 293, 89 NE 837; People v. Huebscher, 129 App. Div. 627, 114 NYS 192; Wilkins v. Ter. [Okl. Cr. R.] 103 P 656; Armstrong v. State [Okl. Cr. R.] 103 P 658; Commonwealth v. Willis, 223 Pa. 576, 72 A 857; Lee v. State [Tenn.] 116 SW 881; Shelton v. State, 54 Tex. Cr. R. 588, 114 SW 122; Caberra v. State [Tex. Cr. R.] 118 SW 1054; Janca v. State [Tex. Cr. R.] 119 SW 99; Crawford v. State [Tex. Cr. R.] 119 SW 690; McIntosh v. State [Tex. Cr. R.] 120 SW 455; Wright v. State [Tex. Cr. R.] 120 SW 458; King v. State [Tex. Cr. R.] 123 SW 135; State v. Medley [W. Va.] 66 SE 358. Sufficient to go to jury. State v. Roberson, 150 N. C. 837, 64 SE 182. Malice shown sufficiently to constitute murder. Sergent v. Com. [Ky.] 117 SW 362. Evidence shows murder in the commission of arson. State v. Bobbitt, 215 Mo. 10, 114 SW 511.

Second degree murder: Evidence held **sufficient** to support verdict of second degree murder. Adams v. State, 56 Fla. 1, 48 S 219; State v. Reed, 79 Kan. 508, 100 P 66; State v. Demming, 79 Kan. 526, 100 P 285; State v. Pritchett, 219 Mo. 696, 119 SW 386; State v. La Rose [Or.] 104 P 299; Ringo v. State, 54 Tex. Cr. R. 561, 114 SW 119; Waters v. State, 54 Tex. Cr. R. 322, 114 SW 628; McMeans v. State, 55 Tex. Cr. R. 69, 114 SW 837; Combs v. State, 55 Tex. Cr. R. 334, 116 SW 584; Potts v. State [Tex. Cr. R.] 118 SW 535; Kirkpatrick v. State [Tex. Cr. R.] 121 SW 511; Welch v. State [Tex. Cr. R.] 122 SW 880. Sufficient to go to jury. State v. Hinson, 150 N. C. 827, 64 SE 124.

Fourth degree murder: Evidence held **sufficient** to support verdict of fourth degree murder. Nelson v. State [Tex. Cr. R.] 123 SW 132.

61. Evidence **sufficient** to support verdict of manslaughter. Jones v. State [Ark.] 115 SW 166; Bellamy v. State, 56 Fla. 43, 47 S 868; State v. Dillingham [Iowa] 121 NW 1074; Boche v. State [Neb.] 122 NW 72; Cavett v. Ter., 1 Okl. Cr. R. 493, 98 P 890; Douglas v. Ter., 1 Okl. Cr. R. 583, 98 P 1023; Bennefield v. U. S. [Okl. Cr. R.] 100 P 34, rehearing denied [Okl. Cr. R.] 102 P 647; Byers v. Ter., 1 Okl. Cr. R. 677, 100 P 261, rehearing denied 1 Okl. Cr. R. 677, 103 P 532; State v. Suber, 82 S. C. 159, 63 SE 684. Verdict of manslaughter sustained by evidence that defendant killed wife with shot intended for father-in-law. State v. Casasanta [R. I.] 73 A 312. Sufficient to go to jury. Turner v.

§ 8. *Trial and punishment. A. Conduct of trial in general.*[66]—See 11 C. L. 1827—In general all questions of fact are for the jury [67] but there are exceptions to this rule.[68] The degree of homicide is usually for the jury [69] unless the evidence indicates but a single degree,[70] and on total failure of proof acquittal should be directed.[71] The court has the power, it its discretion, to order an autopsy.[72]

(§ 8) *B. Instructions.*[73]—See 11 C. L. 1829—Instructions should not be argumentative,[74] confusing,[75] misleading,[76] abstract,[77] or inconsistent.[78] They should

State, 131 Ga. 761, 63 SE 294; Jackson v. State [Ga.] 64 SE 656.

Insufficient to show manslaughter. State v. Squires, 15 Idaho, 545, 98 P 413; O'Neal v. State [Miss.] 48 S 225.

Voluntary manslaughter: Evidence held **sufficient** to support verdict of voluntary manslaughter. Austin v. State [Ga. App.] 65 SE 358; Garner v. State [Ga. App.] 65 SE 842; Cain v. State [Ga. App.] 65 SE 1069; Wheat v. Com. [Ky.] 118 SW 264; Cox v. Com. [Ky.] 118 SW 282; Gipson v. Com. [Ky.] 118 SW 334; Harp v. Com. [Ky.] 119 SW 1191. Sufficient to go to jury. Taylor v. State, 131 Ga. 765, 63 SE 296. **Insufficient** to show voluntary manslaughter. Brantley v. State, 5 Ga. App. 458, 63 SE 519.

Fourth degree manslaughter: Evidence of speeding automobile held **sufficient** to sustain conviction. State v. Watson, 216 Mo. 420, 115 SW 1011.

62. **Assault with intent** to kill or murder. Evidence held **sufficient** to support verdict. Austin v. State [Ga. App.] 64 SE 670; Gaines v. State [Ga. App.] 65 SE 302; State v. Harvey, 214 Mo. 403, 114 SW 19; Phillips v. U. S. [Okl. Cr. R.] 103 P 861; Jackson v. State, 54 Tex. Cr. R. 605, 114 SW 136; Gilford v. State, 54 Tex. Cr. R. 510, 114 SW 138; Williams v. State, 54 Tex. Cr. R. 642, 114 SW 802; De Leon v. State, 55 Tex. Cr. R. 39, 114 SW 828; Veas v. State, 55 Tex. Cr. R. 125, 114 SW 830; Pemberton v. State, 55 Tex. Cr. R. 464, 117 SW 837; Williams v. State [Tex. Cr. R.] 120 SW 421; Neeley v. State [Tex. Cr. R.] 120 SW 875; Weisenbach v. State, 138 Wis. 152, 119 NW 843. Evidence supports conviction for **assault with deadly weapon.** Stewart v. Ter. [Okl. Cr. R.] 100 P 47. Evidence supports conviction for **"shooting at another."** Justice v. State [Ga. App.] 64 SE 1004. **Insufficient** in absence of showing of present ability. Jones v. State [Ark.] 116 SW 230.

63. **Held insufficient** to support self-defense theory. People v. Meert [Mich.] 16 Det. Leg. N. 263, 121 NW 318; Cavett v. Ter., 1 Okl. Cr. R. 493, 98 P 890. Autopsy **not conclusive** as to whether wounds were inflicted from front or rear. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635. To raise reasonable doubt of alibi. People v. Mar Gin Suie [Cal. App.] 103 P 951.

64. **Held sufficient:** Evidence that another was guilty. Wheeler v. State [Tex. Cr. R.] 121 SW 166. To repel the inference of gross negligence arising from accidental shooting. Harrell v. State [Ala.] 49 S 805.

Insufficient: Want of motive does not necessarily raise a reasonable doubt. Weisenbach v. State, 138 Wis. 152, 119 NW 843.

65. **Sufficient** to negative self-defense. Brewer v. State [Ala.] 49 S 336.

Insufficient to show that quarrel was provoked with intent to kill and so bar right of self-defense. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635. To show accused was aggressor. Parks v. Com. [Va.] 63 SE 462.

66. **Search Note:** See, also, Homicide, Cent. Dig. §§ 553-575; Dec. Dig. §§ 258-282½; 21 Cyc. 1023-1030; 10 A. & E. Enc. P. & P. 163.

67. Carter v. Com. [Ky.] 114 SW 1186; Gipson v. Com. [Ky.] 118 SW 334; State v. Carr, 65 W. Va. 81, 63 SE 766. Accident. Harrell v. State [Ala.] 49 S 805. Malice. Roberson v. State [Ala.] 50 S 345. Threats. Taylor v. State, 131 Ga. 765, 63 SE 296. Corpus delicti. Leverlng v. Com. [Ky.] 117 SW 253. Credibility. State v. Sassaman, 214 Mo. 695, 114 SW 590. Guilt. State v. Wooley, 215 Mo. 620, 115 SW 417. Sanity. State v. Barker, 216 Mo. 532, 115 SW 1102. Weight of character evidence. Cannon v. Ter., 1 Okl. Cr. R. 600, 99 P 622. Self-defense. Turner v. State [Ala.] 49 S 828; Green v. Com. [Ky.] 115 SW 233. Passion as negativing intent. Hightower v. State [Tex. Cr. R.] 119 SW 691.

68. Adequacy of provocation for court. Hightower v. State [Tex. Cr. R.] 119 SW 691.

69. Roberson v. State [Ala.] 50 S 345; People v. Turpin, 10 Cal. App. 526, 102 P 680.

70. State v. Spivey [N. C.] 65 SE 995. Duty of court to decide as matter of law if there is any evidence to warrant submission of manslaughter. Atchison v. State [Okl. Cr. R.] 105 P 387. Although by statute the jury is to find the degree of murder, an instruction that verdict must be first degree or acquittal may be warranted by the evidence. State v. Zeller [N. J. Err. & App.] 73 A 498. When in any state of the evidence the crime, if committed, would be first degree murder, it is proper to confine the jury to a consideration of that degree. State v. Spivey [N. C.] 65 SE 995.

71. Failure to prove corpus delicti. Levering v. Com. [Ky.] 117 SW 253. Failure to connect accused. Wilson v. Com. [Ky.] 121 SW 430.

72. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635; Gray v. Phillips [Tex. Civ. App.] 117 SW 870. Accused entitled to autopsy if shown to be material. Gray v. State, 55 Tex. Cr. R. 90, 114 SW 635. The right of possession of a dead body must yield to public good where autopsy is required. Id.

73. **Search Note:** See notes in 69 L. R. A. 193, 205; 3 Ann. Cas. 139.

See, also, Homicide, Cent. Dig. §§ 576-663; Dec. Dig. §§ 283-311; 21 Cyc. 1031-1081; 10 A. & E. Enc. P. & P. 164.

74. Argumentative instructions properly refused. Carter v. State, 156 Ala. 72, 47 S 191; Andrews v. State [Ala.] 48 S 858; Anderson v. State [Ala.] 49 S 460; Gaston v. State [Ala.] 49 S 876; Montgomery v. State [Ala.] 49 S 902; Turner v. State [Ala.] 49 S 828; Phillips v. State [Ala.] 50 S 194; Roberson v. State [Ala.] 50 S 345; State v. Se-

correctly define the crime[79] and the elements thereof,[80] and the degrees indicated in any way by the evidence,[81] correctly defining each element of such degrees,[82] and

bastian, 215 Mo. 58, 114 SW 522; State v. Heath, 221 Mo. 565, 121 SW 149.

75. Montgomery v. State [Ala.] 49 S 902. Not advisable to charge in metaphor or epigram. Leonard v. State [Ga.] 66 SE 251. A proper instruction given in a confusing manner is error. Hall v. State [Ga.] 65 SE 400.

Held confusing: Correct charge on **malice** but subject to misconception by jury. Miles v. State [Ga.] 65 SE 368. Charge on a **degree** not warranted by the case. Freeman v. State, 5 Ga. App. 490, 63 SE 530. **Mixing** self-defense and law of manslaughter. Miles v. State [Ga.] 65 SE 368. Mixing reasonable doubt with self-defense. Gaston v. State [Ala.] 49 S 876.

76. Andrews v. State [Ala.] 48 S 858; Turner v. State [Ala.] 49 S 304. Instruction that defendant must "establish" a **reasonable cause for his apprehension** of death, etc., not misleading where self-defense was correctly and fully charged aliunde. State v. Powers [Mont.] 102 P 583.

Held misleading ignoring testimony. Williams v. State [Ala.] 50 S 59. "Proved as charged" misleading where lesser degree was proved. Id. Correct instruction on **duty of officer** but misleading in tendency. Holland v. State [Ala.] 50 S 215. **Misstatement** of defense. Freeman v. State, 5 Ga. App. 490, 63 SE 530. **Previous conduct of parties** as bearing on motive held error since accused is not bound by conduct of the other. Roquemore v. State, 54 Tex. Cr. R. 592, 114 SW 140. Where accused provoked difficulty, charge that he had a **right to act** as he had done when quarrel arose is misleading. Phillips v. State [Ala.] 49 S 794. Where accused provoked difficulty, charge that a man **may arm himself** for his own protection is misleading. Id. Proper to refuse instructions that defendant had a right to be in a public alley and that assault by deceased was **unprovoked** when it appears that deceased was lurking after nightfall in the rear of deceased's premises, armed with a deadly weapon and with intent to debauch the wife of deceased. Duncan v. State, 171 Ind. 444, 86 NE 641.

77. Montgomery v. State [Ala.] 49 S 902.

78. Conflicting instructions do not cure each other. Price v. State, 1 Okl. Cr. R. 358, 98 P 447. Held not inconsistent. Jones v. State [Ark.] 116 SW 230; Taylor v. State, 131 Ga. 765, 63 SE 296. Instruction on manslaughter and on self-defense not necessarily inconsistent. State v. Crawford [W. Va.] 66 SE 110.

79. Use of the words homicide and crime interchangeably in a charge on alibi not prejudicial as assuming that homicide is a crime. People v. Mar Gin Suie [Cal. App.] 103 P 951. **Language of statute** sufficient. Gilmore v. State [Ark.] 122 SW 493; McDonald v. State, 55 Tex. Cr. R. 208, 116 SW 47. In instructing degree in statutory language, it should be given verbatim with necessary explanation and definition. Dillon v. State, 137 Wis. 655, 119 NW 352. **Merely reading the statute** is not sufficient where by appropriate and timely request the court was asked to apply the abstract law to the issues of the case. Hall v. State [Ga.] 65 SE 400.

Charge approved: Second degree murder. Puryear v. State [Tex. Cr. R.] 118 SW 1042; Clark v. State [Tex. Cr. R.] 120 SW 179; State v. Myers, 221 Mo. 698, 121 SW 131. Fourth degree murder. Barr v. State [Tex. Cr. R.] 120 SW 422, overruling Bagley v. State [Tex. Cr. R.] 19 Tex. Ct. Rep. 282, 103 SW 874; Evans v. State [Tex. Cr. R.] 120 SW 434. Murder and manslaughter. Atchison v. State [Okl. Cr. R.] 105 P 387; Benson v. State [Tex. Cr. R.] 118 SW 1049. Involuntary manslaughter. Gilmore v. State [Ark.] 122 SW 493. Assault with intent. McDonald v. State, 55 Tex. Cr. R. 208, 116 SW 47.

Charge disapproved: Voluntary manslaughter. Hall v. State [Ga.] 65 SE 400.

80. **Intent** should be charged. Crow v. State, 55 Tex. Cr. R. 200, 116 SW 52. Express **malice** should be defined. Cordono v. State [Tex. Cr. R.] 120 SW 471. Whether failure to supply medical attendance to minor child was "willful" under Act March 22, 1901. State v. Watson [N. J. Law] 71 A 1113.

Instructions approved: Malice. Leonard v. State [Ga.] 66 SE 251. Express malice. Cabrera v. State [Tex. Cr. R.] 118 SW 1054. Malice aforethought. Barr v. State [Tex. Cr. R.] 120 SW 422. "Heat of passion" presupposes lack of malice and renders more specific instruction on that point unnecessary. State v. Crawford [W. Va.] 66 SE 110. Intent. Bice v. State, 55 Tex. Cr. R. 629, 117 SW 163. Intent of codefendant. Choice v. State, 54 Tex. Cr. R. 517, 114 SW 132. Instruction that the "intent" alleged in the indictment may be proved by facts and circumstances is good although the word "malice" was the one used in the indictment. People v. Anderson, 239 Ill. 168, 87 NE 917. To "aim" a pistol is to point intentionally. Livingston v. State [Ga. App.] 65 SE 812. "The fatal blow" sufficiently designates the consequences of the act as well as the act itself. Boyer v. State [Neb.] 121 NW 445. Offense for which officer was attempting arrest is properly charged in the language of the statute. People v. Price, 9 Cal. App. 218, 98 P 647.

Not approved: That defendant "struck at" prosecuting witness with a deadly weapon charges no crime since he must have been within striking distance. Jones v. State [Ark.] 116 SW 230. Prejudicial to charge that premeditation and killing can occur "instantly." State v. Mangano [N. J. Err. & App.] 72 A 366. Error to charge that premeditation takes "no appreciable time." State v. Arata [Wash.] 105 P 227. Error to define malice aforethought as if it meant conscious intent since it eliminates defense of self-defense. Green v. U. S. [Okl. Cr. R.] 101 P 112, rvg. 7 Ind. T. 733, 104 SW 1159. "Maliciously" not equivalent to "malice aforethought." Brett v. State [Miss.] 47 S 781.

81. All degrees indicated must be charged. Gillum v. Com. [Ky.] 121 SW 445; State v. Heath, 221 Mo. 565, 121 SW 149; Cannon v. Ter., 1 Okl. Cr. R. 600, 99 P 622; Atchison v. State [Okl. Cr. R.] 105 P 387. All degrees shown by testimony of either party. State

must fully define the elements of any defense that is urged.[83] It is only, however,

v. Heath, 221 Mo. 565, 121 SW 149. May charge lesser degree though it is not strictly proved. Stone v. State [Fla.] 48 S 996. Should instruct on punishment accompanying each degree. Magan v. Com. [Ky.] 119 SW 734. Not necessary to instruct on a degree not indicated by evidence. Dillon v. State, 137 Wis. 655, 119 NW 352. Should charge that, in case of doubt, conviction must be of the lower degree. Sergent v. Com. [Ky.] 117 SW 362. Where the issue is either murder or justifiable homicide, charge on manslaughter is unnecessary. Shelton v. State, 54 Tex. Cr. R. 588, 114 SW 122.

Charge required by evidence. Lower degree than the one charged. Pickett v. State [Ark.] 121 SW 732; Jackson v. State [Ga.] 64 SE 656; Heath v. State [Tex. Cr. R.] 121 SW 862. Manslaughter. Pickett v. State [Ark.] 121 SW 732; People v. Hayes, 9 Cal. App. 301, 99 P 386. Fourth degree manslaughter. State v. Sebastian, 215 Mo. 58, 114 SW 522. Voluntary manslaughter. Taylor v. State, 131 Ga. 765, 63 SE 296; Jackson v. State [Ga.] 64 SE 656; Strickland v. State [Ga.] 65 SE 148. Aggravated assault. Heath v. State [Tex. Cr. R.] 121 SW 862.

Charge warranted by evidence. Lower degree than charged. Pickett v. State [Ark.] 121 SW 732; Livingston v. State [Ga. App.] 65 SE 812; Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600. Second degree murder should usually be charged on trial for first. Crowell v. State [Tex. Cr. R.] 120 SW 897. First degree murder. State v. Baker [Iowa] 121 NW 1028; Crawford v. State [Tex. Cr. R.] 119 SW 690. Second degree murder. State v. Hinson, 150 N. C. 827, 64 SE 124; Tubb v. State, 55 Tex. Cr. R. 606, 117 SW 858. Manslaughter. People v. Tansey [Cal. App.] 104 P 582. Voluntary manslaughter. Pierce v. State [Ga.] 63 SE 792; Clark v. State [Ga. App.] 65 SE 694; Cain v. State [Ga. App.] 65 SE 1069. Involuntary manslaughter. Green v. State [Ark.] 121 SW 727. Second degree manslaughter. Ringo v. State, 54 Tex. Cr. R. 561, 114 SW 119. Fourth degree manslaughter. Housley v. State, 55 Tex. Cr. R. 372, 116 SW 816. Aggravated assault. Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600. "Pointing a pistol." Livingston v. State [Ga. App.] 65 SE 812.

Charge not warranted by evidence. Voluntary manslaughter. Freeman v. State, 5 Ga. App. 490, 63 SE 530; Branch v. State, 5 Ga. App. 651, 63 SE 714.

Charge not required in view of the evidence. First degree murder. Potts v. State [Tex. Cr. R.] 118 SW 535. Second degree murder. State v. Sassaman, 214 Mo. 695, 114 SW 590; State v. Wooley, 215 Mo. 620, 115 SW 417; Monmouth v. State, 54 Tex. Cr. R. 407, 114 SW 114; Holland v. State, 55 Tex. Cr. R. 27, 115 SW 48; King v. State [Tex. Cr. R.] 123 SW 135. Third degree murder. Territory v. Clark [N. M.] 99 P 697. Manslaughter. Potts v. State [Tex. Cr. R.] 118 SW 535. Voluntary manslaughter. Jones v. State [Ga.] 63 SE 1102; Lowe v. State [Ga.] 63 SE 1114. Assault. State v. Dillingham [Iowa] 121 NW 1074.

Properly refused in view of the evidence. Lower degree. State v. Casasanta [R. I.] 73 A 312; Weisenbach v. State, 138 Wis. 152, 119 NW 843. Second degree murder. Thompson v. State [Ark.] 114 SW 1184; State v. Sartino, 216 Mo. 408, 115 SW 1015. Fourth degree murder. State v. Goldsby, 215 Mo. 48, 114 SW 500. Manslaughter. Allen v. State [Ga.] 65 SE 431; State v. Sassaman, 214 Mo. 695, 114 SW 590; State v. Barker, 216 Mo. 532, 115 SW 1102; State v. McKay, 150 N. C. 813, 63 SE 1059. Voluntary manslaughter. Moore v. State [Ga.] 64 SE 264. Fourth degree manslaughter. State v. Moore, 79 Kan. 688, 100 P 629; State v. Myers, 221 Mo. 598, 121 SW 131.

82. **Charge approved:** Passion. Jackson v. State, 54 Tex. Cr. R. 605, 114 SW 136; Fleming v. State, 54 Tex. Cr. R. 339, 114 SW 383; Waters v. State, 54 Tex. Cr. R. 322, 114 SW 628; Jay v. State [Tex. Cr. R.] 120 SW 449. "Transport of passion" synonymous with "sudden transport of passion." Waters v. State, 54 Tex. Cr. R. 322, 114 SW 628. Provocation. Roquemore v. State, 54 Tex. Cr. R. 592, 114 SW 140; McDonald v. State, 55 Tex. Cr. R. 208, 116 SW 47. Aggression. Bice v. State, 55 Tex. Cr. R. 529, 117 SW 163.

Charge disapproved: Passion. Cordono v. State [Tex. Cr. R.] 120 SW 471. Provocation. McHenry v. State, 54 Tex. Cr. R. 477, 114 SW 115; Akin v. State [Tex. Cr. R.] 119 SW 863.

83. **Charge approved:** Self-defense. Simmons v. State [Ala.] 48 S 606; Bryant v. Ter. [Ariz.] 100 P 455; People v. Baldocchi, 10 Cal. App. 42, 101 P 28; People v. Ross [Cal. App.] 104 P 709; Selfridge v. People, 45 Colo. 275, 100 P 591; Pressley v. State [Ga.] 63 SE 784; People v. Williams, 240 Ill. 633, 88 NE 1053; State v. Demming, 79 Kan. 526, 100 P 285; McGowan v. Com. [Ky.] 117 SW 387; Wilson v. Com. [Ky.] 121 SW 430; Hargis v. Com. [Ky.] 123 SW 239; State v. Sebastian, 215 Mo. 58, 114 SW 522; State v. Priest, 215 Mo. 1, 114 SW 949; State v. Dunn, 221 Mo. 530, 120 SW 1179; Kennison v. State, 83 Neb. 391, 119 NW 768; Territory v. Clark [N. M.] 99 P 697; State v. Finch [Or.] 103 P 505; McHenry v. State, 54 Tex. Cr. R. 477, 114 SW 115; Ringo v. State, 54 Tex. Cr. R. 561, 114 SW 119; Shelton v. State, 54 Tex. Cr. R. 588, 114 SW 122; Simmons v. State, 55 Tex. Cr. R. 441, 117 SW 141; Puryear v. State [Tex. Cr. R.] 118 SW 1042; Crawford v. State [Tex. Cr. R.] 119 SW 690; Hightower v. State [Tex. Cr. R.] 119 SW 691; Clark v. State [Tex. Cr. R.] 120 SW 179; Baggerly v. State [Tex. Cr. R.] 120 SW 192; Jay v. State [Tex. Cr. R.] 120 SW 449; State v. Churchill, 52 Wash. 210, 100 P 309. Defense of brother. Garner v. State [Ga. App.] 65 SE 842. Defense of another. Potts v. State [Tex. Cr. R.] 118 SW 535. Right of domicile. Knight v. State, 55 Tex. Cr. R. 243, 116 SW 56. That past wrong is no justification. Pride v. State [Ga.] 66 SE 259. Instruction on duty of officer to make arrest which ignores state's theory that officer participated in a private quarrel is error. Newman v. State [Ala.] 49 S 786. Insanity. Commonwealth v. Hallowell, 223 Pa. 494, 72 A 845. Accident. State v. Foley, 220 Mo. 86, 119 SW 397; Neeley v. State [Tex. Cr. R.] 120 SW 875; Groszoehmigen v. State [Tex. Cr. R.] 121 SW 1113. Prevention of felony. Welch v. State [Tex. Cr. R.] 122 SW 880. Officer in arresting for misdemeanor. Com-

if there is evidence to support it [84] that there need be an instruction on an issue,[85] theory,[86] defense,[87] or mitigating circumstance.[88] Charges from which an essen-

monwealth v. Marcum [Ky.] 122 SW 215. Right to demand explanation for insults to wife. Hobbs v. State, 55 Tex. Cr. R. 299, 117 SW 811. Proper to instruct that self-defense cannot be used to shield a murderer. Duncan v. State, 171 Ind. 444, 86 NE 641. Limiting effect of previous acts of deceased to the question of danger of defendant at time of homicide. Hargis v. Com. [Ky.] 123 SW 239. Instruction that deceased had the right under the law to protect by reasonable means the sanctity of his home from one seeking to debauch his wife. Duncan v. State, 171 Ind. 444, 86 NE 641.

Charge disapproved: Self-defense. Bluitt v. State [Ala.] 49 S 854; Gaston v. State [Ala.] 49 S 876; Magan v. Com. [Ky.] 119 SW 734; Green v. U. S. [Okl. Cr. R.] 101 P 112, rvg. 7 Ind. T. 733, 104 SW 1159; Reed v. State [Okl. Cr. R.] 103 P 1042; Gant v. State, 55 Tex. Cr. R. 248, 116 SW 801; Buckner v. State, 55 Tex. Cr. R. 511, 117 SW 802; Vinson v. State, 55 Tex. Cr. R. 490, 117 SW 846; Hightower v. State [Tex. Cr. R.] 119 SW 691. Retreat of adversary. Derden v. State [Tex. Cr. R.] 120 SW 485. Reasonable grounds for apprehension. Pickett v. State [Ark.] 121 SW 732. Alibi. Raysor v. State [Ga.] 63 SE 786. Duty of officer. Commonwealth v. Marcum [Ky.] 122 SW 215. Resistance to illegal arrest. Perdue v. State, 5 Ga. App. 821, 63 SE 922.

84. Proper if any evidence. Allen v. State [Ga.] 65 SE 431. Must be on issues raised by evidence. Blocker v. State, 55 Tex. Cr. R. 30, 114 SW 814; Leary v. State, 55 Tex. Cr. R. 547, 117 SW 822. Charge not warranted by evidence is error. Montgomery v. State [Ala.] 49 S 902; State v. Hinson 150 N. C. 827, 64 SE 124. Proper to omit charges not supported by evidence. Leonard v. State [Ga.] 66 SE 251; Davis v. State, 54 Tex. Cr. R. 236, 114 SW 366. Proper to refuse charges not supported by evidence. Bennett v. State [Ala.] 49 S 296; Montgomery v. State [Ala.] 49 S 902; Van Wyk v. People, 45 Colo. 1, 99 P 1009.

85. Issues properly covered. Day v. State [Ga.] 66 SE 250.

Charge warranted by the evidence.

Law of **principals.** Morman v. State [Ga.] 65 SE 146.

Cause of death: No error to charge for conviction though manner of delivering death wound was unknown. King v. State [Tex. Cr. R.] 123 SW 135. Where there were several wounds by different weapons, error to refuse instruction that victim must have died from knife wound specified in indictment in order to warrant conviction. Huckabee v. State [Ala.] 48 S 796. Nature of weapon as bearing on intent. McDowell v. State, 55 Tex. Cr. R. 596, 117 SW 831; Vinson v. State, 55 Tex. Cr R. 490, 117 SW 846; Hightower v. State [Tex. Cr. R.] 119 SW 691. Right to demand apology. McCleary v. State [Tex. Cr. R.] 122 SW 26.

Not warranted by evidence.

Law of **principals.** Coffman v. State [Tex. Cr. R.] 119 SW 1148.

86. All theories warranted by evidence. Garner v. State [Ga. App.] 65 SE 842. Error to charge on theories not suggested by the evidence. Branch v. State, 5 Ga. App. 651, 63 SE 714. Where testimony clearly shows murder, an instruction ignoring the hypothesis of **suicide** is not erroneous. Van Wyk v. People, 45 Colo. 1, 99 P 1009.

87. All defenses. Knight v. State, 55 Tex. Cr. R. 243, 116 SW 56; Benson v. State [Tex. Cr. R.] 118 SW 1049. Defenses warranted by evidence. State v. Heath, 221 Mo. 565, 121 SW 149. Ralsed by case of either. Jackson v. State, 55 Tex. Cr. R. 79, 115 SW 262. Should be charged however raised. Stapleton v. State [Tex. Cr. R.] 120 SW 866. If raised by state's testimony. Frazier v. Com. [Ky.] 114 SW 268. Although defense offered no testimony. Id. Substantive defenses must be affirmatively charged. Wheeler v. State [Tex. Cr. R.] 121 SW 166. Only those facts of self-defense pertinent to the evidence. Duncan v. State, 171 Ind. 444, 86 NE 641. Effect of threats and reasonable appearance of danger should be clearly and affirmatively charged. Price v. State, 1 Okl. Cr. R. 358, 98 P 447.

Required by evidence. Self-defense. Andrews v. State [Ala.] 48 S 858; Frazier v. Com. [Ky.] 114 SW 268; Tate v. State [Miss.] 48 S 13; Waldrop v. State [Miss.] 48 S 609; Hill v. State [Miss.] 49 S 145; Clark v. State [Tex. Cr. R.] 120 SW 179; McDowell v. State, 55 Tex. Cr. R. 596, 117 SW 831. Defense of domicile. French v. State, 55 Tex. Cr. R. 538, 117 SW 848. Defense of family. State v. Walsworth [Or.] 103 P 616. Defense of another. Potts v. State [Tex. Cr. R.] 118 SW 535. Resistance to illegal arrest. Perdue v. State, 5 Ga. App. 821, 63 SE 922. Duty of officer. Holland v. State [Ala.] 50 S 215. Rights of officer. Id. Justifiable homicide. Hall v. State [Ga.] 65 SE 400. Threats by decedent. Buckner v. State, 55 Tex. Cr. R. 511, 117 SW 802.

Not required by evidence. Self-defense. Daniels v. State [Fla.] 48 S 747; McDonald v. State, 55 Tex. Cr. R. 208, 116 SW 47; Rome v. State, 55 Tex. Cr. R. 344, 116 SW 598; Dillon v. State, 137 Wis. 655, 119 NW 352. Self-defense on theory not warranted by evidence. Williams v. State [Ala.] 50 S 59. Where the facts show assault with a deadly weapon by decedent, it is unnecessary to charge law of self-defense as to simple assaults. State v. Sommers [N. J. Law] 73 A 49. Where danger is apparent and real court need not instruct on "reasonable" danger. Byers v. Ter., 1 Okl. Cr. R. 677, 100 P 261, rehearing denied, 1 Okl. Cr. R. 677, 103 P 532. Instruction on self-defense, resting on theory of actual attempt to commit a felony by deceased, properly refused where evidence on this point was doubtful. State v. Powers [Mont.] 102 P 583. Where accused, testifying for himself, fails to state apprehension of death or serious injury, it is unnecessary to charge self-defense with great particularity. Boyer v. State [Neb.] 121 NW 445. Where evidence shows that in fight mutually agreed upon accused killed deceased after repeated warning that it was unnecessary, instruction negativing self-defense is proper.

tial element is omitted,[89] or which assert no proposition of law,[90] or which misstate the law,[91] should be refused. Presumptions,[92] burden of proof,[93] and legal effect of

State v. Dunlap, 149 N. C. 550, 63 SE 164. Defense of domicile. Knight v. State, 55 Tex. Cr. R. 243, 116 SW 56. Instructions on self-defense in his own dwelling are inapplicable where deceased and accused occupied the premises jointly. State v. Crawford [W. Va.] 66 SE 110. Alibi. State v. Brooks, 220 Mo. 74, 119 SW 353. Lucid intervals. State v. Barker, 216 Mo. 532, 115 SW 1102. Instruction on maniacal outburst properly refused where there was no evidence thereof or of such a tendency on part of defendant. Commonwealth v. De Marzo, 223 Pa. 573, 72 A 893.

Warranted by evidence. Self-defense. State v. Dillingham [Iowa] 121 NW 1074; State v. Sebastian, 215 Mo. 58, 114 SW 522; Roe v. State, 55 Tex. Cr. R. 128, 115 SW 593. Aggression as barring self-defense. State v. Priest, 215 Mo. 1, 114 SW 949. Defense of family. Watson v. Com. [Ky.] 116 SW 287.

Not warranted by evidence. Alibi. Jackson v. State, 55 Tex. Cr. R. 79, 115 SW 262. Threats. Washington v. State [Tex. Cr. R.] 119 SW 689. Defense of domicile. Phillips v. State [Ala.] 49 S 794; Montgomery v. State [Ala.] 49 S 902. Right to demand explanation. Washington v. State [Tex. Cr. R.] 119 SW 689. Qualification of self-defense instruction on theory that accused was aggressor. Parks v. Com. [Va.] 63 SE 462.

88. **Warranted** by evidence. Passion. Cordono v. State [Tex. Cr. R.] 120 SW 471; Craft v. State [Tex. Cr. R.] 122 SW 547. Provocation. Hightower v. State [Tex. Cr. R.] 119 SW 691; Renow v. State [Tex. Cr. R.] 120 SW 174. Mutual combat. Taylor v. State, 131 Ga. 765, 63 SE 296; Miles v. State [Ga.] 65 SE 368; Hall v. State [Ga.] 65 SE 400; Garner v. State [Ga. App.] 65 SE 842. Intoxication. Chowning v. State [Ark.] 121 SW 735.

Not warranted by evidence. Passion. Gallagher v. State, 55 Tex. Cr. R. 50, 115 SW 46. Intoxication. State v. Pell, 140 Iowa, 655, 119 NW 154. Mutual combat. Warnack v. State, 5 Ga. App. 816, 63 SE 935; Havard v. State, 55 Tex. Cr. R. 213, 115 SW 1185; Coffman v. State [Tex. Cr. R.] 119 SW 1148. Right of accused to bear arms. State v. Casasanta [R. I.] 73 A 312.

89. Instruction on **self-defense** which praetermits aggression. Simmons v. State [Ala.] 48 S 606; Monteith v. State [Ala.] 49 S 777; Turner v. State [Ala.] 49 S 828; Bluitt v. State [Ala.] 49 S 854; Gaston v. State [Ala.] 49 S 876; Montgomery v. State [Ala.] 49 S 902. Instruction on self-defense omitting element of honest belief. McCain v. State [Ala.] 49 S 361; Monteith v. State [Ala.] 49 S 777; Turner v State [Ala.] 49 S 828; Gaston v. State [Ala.] 49 S 876; Montgomery v. State [Ala.] 49 S 902. Instruction on self-defense omitting element of necessity. Barnhill v. State, 56 Fla. 16, 48 S 251; Knight v. State [Ala.] 49 S 764. Instruction on self-defense praetermitting duty to retreat. McCain v. State [Ala.] 49 S 361. Instruction on self-defense ignoring element of imminent peril. Reaves v. State [Ala.] 48 S 373; Barnhill v. State, 56 Fla. 16, 48 S 251. Proper to refuse to instruct self-defense justifiable "under the circumstances to which accused testified," the proper form being "under the facts as they appear." People v. Meert [Mich.] 16 Det. Leg. N. 263, 121 NW 318. **Defense of domicile,** ignoring fact that parties were tenants in common. Phillips v. State [Ala.] 49 S 794. Instruction on **threats** praetermitting effect on accused. Rhea v. Ter. [Okl. Cr. R.] 105 P 314. Necessity for actual **intent,** ignoring implied intent. People v. Price, 9 Cal. App. 218, 98 P 647. Charge on **intoxication** as palliation which fails to specify test of mental condition. State v. Wilson [La.] 49 S 986. **Proper to modify** a requested instruction to add an essential element. State v. Stockman, 82 S. C. 388, 64 SE 595.

90. Properly refused. Anderson v. State [Ala.] 49 S 460; Knight v. State [Ala.] 49 S 764; Montgomery v. State [Ala.] 49 S 902; State v. Blount [La.] 50 S 12.

91. Misstatement of law of **self-defense.** Anderson v. State [Ala.] 49 S 460. Instruction that jury was to consider if deceased was a dangerous man when proper test was whether accused believed himself in danger. State v. Churchill, 52 Wash. 210, 100 P 309. Self-defense on reasonable grounds "under circumstances to which accused testified." People v. Meert [Mich.] 16 Det. Leg. N. 263, 121 NW 318. **Corroboration** of accomplice. State v. Sassaman, 214 Mo. 695, 114 SW 590. "Threats or menaces" when proper form was "threats and menaces." State v. Crawford [W. Va.] 66 SE 110.

92. Should charge presumption from use of **deadly weapon** by deceased. Clark v. State [Tex. Cr. R.] 120 SW 179; Renow v. State [Tex. Cr. R.] 120 SW 174; Duke v. State [Tex. Cr. R.] 120 SW 894. Should not enlarge statutory element of presumption arising from nature of weapon by adding "and surrounding circumstances." Grant v. State [Tex. Cr. R.] 120 SW 481.

Approved: Malice. Pressley v. State [Ga.] 63 SE 784; Leonard v. State [Ga.] 66 SE 251. Malice from use of deadly weapon. State v. Roberson, 150 N. C. 837, 64 SE 182; State v. Medley [W. Va.] 66 SE 358. There was no error in charging that, where homicide is proved and no mitigating circumstances shown, the presumption of innocence is removed. Elliott v. State [Ga.] 64 SE 1090. "Deliberate" means to weigh the consequences and a charge that the law presumes malice from deliberate use of deadly weapon sufficiently protects accused in his defense of insanity. State v. Jancigaj [Or.] 103 P 54.

Disapproved: Malice. Branch v. State, 5 Ga. App. 651, 63 SE 714. Presumption of lack of intent to kill from mere wounding. State v. Harvey, 214 Mo. 403, 114 SW 19. Instruction that shooting, if done by one capable of forming an intent, may be presumed to have been with intent to kill, held error since there may have been merely intent to injure. State v. Frazer [S. D.] 121 NW 790.

93. Reasonable doubt must be charged. Gordon v. State [Miss.] 49 S 609. Reasonable doubt must be charged affirmatively. Seawright v. State [Ala.] 49 S 325; State v. Berberict, 38 Mont. 423, 100 P 209; Gaston v.

evidence,[94] should be stated with accuracy, and technical words should be defined where necessary to enlighten the jury.[95] Where evidence is charged, it should be done with accuracy [96] and fairly.[97] Obvious matters need not be noted.[98]

State [Ala.] 49 S 876. Need not charge reasonable doubt as connnected with doctrine of reasonable fear. Strickland v. State [Ga.] 65 SE 148. Reasonable doubt sufficiently charged upon the whole case, not necessary to charge on each phase thereof. Pressley v. State [Ga.] 63 SE 784. Accused having put his good character in evidence, it is error to instruct that, if other evidence is evenly balanced, character evidence is sufficient to turn the scale in his favor, since if evidence is equally balanced he should be acquitted. Bilton v. Ter., 1 Okl. Cr. R. 566, 99 P 163. Where much evidence as to motive is introduced, defendant is entitled to particular instructions on application of presumption of innocence in case of conflicting presumptions. People v. LeDoux, 155 Cal. 525, 102 P 517.

Charge approved: Reasonable doubt. Simmons v. State [Ala.] 48 S 606; People v. Botkin, 9 Cal. App. 244, 98 P 861; People v. Anderson, 239 Ill. 168, 87 NE 917; State v. Baker [Iowa] 121 NW 1028; Cannon v. Ter., 1 Okl. Cr. R. 600, 99 P 622; State v. Tedder [S. C.] 65 SE 499; State v. Raice [S. D.] 123 NW 708; Blocker v. State, 55 Tex. Cr. R. 30, 114 SW 814; Mitchell v. State, 55 Tex. Cr. R. 62, 114 SW 830; State v. Medley [W. Va.] 66 SE 358. Instruction that the jury is not to go beyond the evidence to search for doubts is correct. Van Wyk v. People, 45 Colo. 1, 99 P 1009. "To a moral and reasonable certainty" held equivalent to "beyond a reasonable doubt." Austin v. State [Ga. App.] 64 SE 670. Burden of proof. People v. Anderson, 239 Ill. 168, 87 NE 917; State v. Tedder [S. C.] 65 SE 449. Burden to prove affirmative defenses. Bryant v. Ter. [Ariz.] 100 P 455. Instruction that insanity must be proved by preponderance of evidence. Commonwealth v. Hallowell, 223 Pa. 494, 72 A 845. The use of the words "passion" and "excitement" does not render an instruction on "anger" too burdensome. Morris v. Ter., 1 Okl. Cr. R. 617, 99 P 760. To "convince" by a preponderance of the testimony held proper instruction on defendant's burden of proof. State v. Maioni [N. J. Err. & App.] 74 A 526. To convince is to satisfy the mind by evidence. Id.

Charge disapproved: Burden of proof. Branch v. State, 5 Ga. App. 651, 63 SE 714. Requiring too high a degree of proof. Montgomery v. State [Ala.] 49 S 902. Degree of proof too high. Phillips v. State [Ala.] 50 S 194. Reasonable doubt. Letcher v. State [Ala.] 48 S 805; Kelly v. State [Ala.] 49 S 535; Raysor v. State [Ga.] 63 SE 786; State v. Matheson [Iowa] 120 NW 1036; Price v. State, 1 Okl. Cr. R. 358, 98 P 447. "Moral certainty" too strong. Montgomery v. State [Ala.] 49 S 902; Williams v. State [Ala.] 50 S 59. The doubt of one juror. Turner v. State [Ala.] 49 S 828. States burden on affirmative defenses. Gaston v. State [Ala.] 49 S 876. Burden of accused on affirmative defenses. State v. Skinner [Nev.] 104 P 223. Instruction that jury must be "convinced" that intoxication was to such an extent, etc. State v. Mangano [N. J. Err. & App.] 72 A 366. Singling out the issue of self-defense and charging that it must be "clearly established" held error. State v. Lindsay, 82 S. C. 486, 63 SE 1064. Charge that "if jury believed," etc., properly refused, failing to specify belief as founded on the evidence. Commonwealth v. Nazarko, 224 Pa. 204, 73 A 210. It is contended by the defendant that the only evidence jury can rely upon to find verdict is from his voluntary statement. Turner v. State, 131 Ga. 761, 63 SE 294.

Circumstantial evidence: Should be charged where case rests wholly thereon. State v. Wooley, 215 Mo. 620, 115 SW 417. May be charged although there is other evidence. Spick v. State, 140 Wis. 104, 121 NW 664. Charge is wholly discretionary where there is other evidence. Day v. State [Ga.] 66 SE 250; Potts v. State [Tex. Cr. R.] 118 SW 535; Caberra v. State [Tex. Cr. R.] 118 SW 1054. Charge approved. State v. Shelton [Mo.] 122 SW 732; State v. Tedder [S. C.] 65 SE 449.

94. That threats by companion are competent only if accused consented thereto. Magan v. Com. [Ky.] 119 SW 734. Instructions on character evidence are within court's discretion. Morris v. Ter., 1 Okl. Cr. R. 617, 99 P 760; Fouse v. State, 83 Neb. 258, 119 NW 478; McDaniels v. State [Ala.] 50 S 324.

95. Sufficient if substantially like statute. Dillon v. State, 137 Wis. 655, 119 NW 352. Explanation of statutory definition approved. Leonard v. State [Ga.] 66 SE 251.

Definition approved: "Corroboration." State v. Sassaman, 214 Mo. 695, 114 SW 590. "Obscurement of reason" held to correctly define heat of passion and not to be synonymous with "dethronement of reason" which is disapproved. Dillon v. State, 137 Wis. 655, 119 NW 352.

Necessary: To define self-defense. Gaston v. State [Ala.] 49 S 876. To define adequate cause. Gallagher v. State, 55 Tex. Cr. R. 50, 115 SW 46.

Unnecessary: Need not define "intoxication." State v. Pell, 140 Iowa, 655, 119 NW 154. Need not define "reasonable doubt." Jackson v. State [Ga.] 64 SE 656. Need not define "prima facie." State v. Stover, 64 W. Va. 668, 63 SE 315. Need not define "serious bodily injury." Thomas v. State, 55 Tex. Cr. R. 293, 116 SW 600. Unnecessary to define "legal evidence." People v. Anderson, 239 Ill. 168, 87 NE 917. "Beyond a reasonable doubt" is not a technical term requiring explanation. Douglas v. Ter., 1 Okl. Cr. R. 583, 98 P 1023. "Felony" should be defined but failure to do so is not fatal error. Pickens v. State [Ga.] 63 SE 783; Pressley v. State [Ga.] 63 SE 784; Miles v. State [Ga.] 65 SE 368; Hall v. State [Ga.] 65 SE 400. Definition of "deadly weapon" need not be repeated in each charge. Wheeler v. State [Tex. Cr. R.] 121 SW 166. Where "heat of passion" is clearly defined, it is not error to refuse to give further illustrative definition. Dillon v. State, 137 Wis. 655, 119 NW 352. An instruction that certain facts are "prima facie" second degree murder is not binding upon the jury to find that degree. State v. Stover, 64 W. Va. 668, 63 SE 315.

Harmless error.[See 11 C. L. 1885]—Error not prejudicial to the accused is harmless,[99] as is error in instructions on a higher degree than that for which accused is convicted,[1] nor can accused complain that the count failed to charge on a higher degree which was clearly shown.[2] An erroneous instruction on a lower degree than that found by the jury may be harmless,[3] but it may be prejudicial error to instruct upon a lower degree than that indicated by the proof, where such an instruction tends to conflict with the theory of defense.[4] Errors in instructions may be rendered harmless by other instructions [5] by the state of the evidence [6] or by the verdict.[7] The accused cannot complain of invited error.[8]

96. Where facts are charged, must be fully charged. Error to charge mutual combat where in fact accused was mobbed. Gant v. State, 55 Tex. Cr. R. 284, 116 SW 801. "Kicking and stamping" held appropriate statement of evidence. Grant v. State [Tex. Cr. R.] 120 SW 481. Charge held erroneous. Ott v. State [Ala.] 49 S 810; Andrews v. State [Ala.] 48 S 853.

97. Without undue prominence to particular parts. Gordon v. State [Miss.] 49 S 609.

98. Need not instruct on effect of physical strength of the parties, the jury being in a position to judge. State v. Powers [Mont.] 102 P 583.

99. Tucker v. State [Ga.] 66 SE 250; Warnack v. State [Ga. App.] 66 SE 393; Williams v. State [Miss.] 49 S 513.

Held harmless: Superfluous instructions. Crawford v. State [Tex. Cr. R.] 119 SW 690. Submitting defense not warranted by the evidence. Brewer v. State [Ala.] 49 S 336. Erroneous instruction as to a defense not sustainable under the evidence. Miller v. State, 139 Wis. 57, 119 NW 850. Too broad definition of the right of self-defense is prejudicial to state alone. State v. Mellillo [N. J. Err. & App.] 71 A 671.

1. Warnack v. State [Ga. App.] 66 SE 393; State v. Webb, 216 Mo. 378, 115 SW 998; State v. Fisher, 149 N. C. 557, 63 SE 153; Jackson v. State, 55 Tex. Cr. R. 79, 115 SW 262; Potts v. State [Tex. Cr. R.] 118 SW 535. Failure to charge that killing must be preceded by, "and result of," intent, harmless where verdict was second degree murder. State v. Jackman [Nev.] 104 P 13.

2. State v. Bobbitt, 215 Mo. 10, 114 SW 511.

3. People v. Cipolla, 155 Cal. 224, 100 P 252; State v. Sebastian, 215 Mo. 58, 114 SW 522; State v. Barker, 216 Mo. 532, 115 SW 1102; State v. Linn [Mo.] 122 SW 679; State v. Quick, 150 N. C. 820, 64 SE 168; McDonald v. State, 55 Tex. Cr. R. 208, 116 SW 47; Bice v. State, 55 Tex. Cr. R. 529, 117 SW 163; Tubb v. State, 55 Tex. Cr. R. 606, 117 SW 858; Wheeler v. State [Tex. Cr. R.] 121 SW 166.

4. Instruction on self-defense prejudicial error where defense was alibi. Mattison v. State, 54 Tex. Cr. R. 514, 114 SW 824. Degree not warranted by case held confusing. Freeman v. Com. [Ky.] 118 SW 917.

5. Error in placing burden of proving alibi on defendant cured by other instructions. Van Wyk v. People, 45 Colo. 1, 99 P 1009. Failure to instruct right to defend brother harmless where danger was joint and was otherwise properly instructed. State v. Baker [Iowa] 121 NW 1028. Instructions too favorable to the defendant giving too narrow definition of second degree where elsewhere instructed practically that verdict must be first degree or aquittal. State v. Mellillo [N. J. Err. & App.] 71 A 671. Use of the word "preconceived" in place of "premeditated" harmless where by repeated previous use of the proper word the jury was well informed of the statutory essential. Id. Where the court charges in what purports to be language of the statute, it should be given verbatim, but an omission is cured by subsequent charges fully bringing out the essential omitted. Boyer v. State [Neb.] 121 NW 445.

6. The evidence leaving no doubt of guilt, instruction failing to limit effect of confessions of accomplices is harmless. People v. Anderson, 239 Ill. 168, 87 NE 917. Where evidence of premeditated and unjustifiable assault was clear, error in negativing self-defense is harmless. King v. State [Miss.] 48 S 228. Charge on deliberation as an essential of first degree murder, not prejudicially erroneous in view of the evidence. People v. Mar Gin Suie [Cal. App.] 103 P 951. Charge that threats and menaces are in no case justification for homicide, while erroneous, was harmless under circumstances of the case. Garner v. State [Ga. App.] 65 SE 842. Failure to charge that victim must have died as a result of the assault not prejudicial when facts in evidence made clear that he did so die. People v. Williams, 240 Ill. 633, 88 NE 1053. Failure to charge self-defense as justification when in reasonable fear of death, etc., harmless when from state of evidence, decided by jury against defendant, the alleged assault must necessarily have excited such fear if it was made. State v. Mellillio [N. J. Err. & App.] 71 A 671. Instruction that intent is presumed from homicide with a deadly weapon, if nothing else is shown, held harmless though inapplicable since circumstances of mitigation were shown in the evidence. State v. Maioni [N. J. Err. & App.] 74 A 526.

7. Failure to designate punishment when jury brought in correct verdict. State v. Shelton [Mo.] 122 SW 732. Error in failing to instruct punishment cured where jury finds lowest possible punishment. Magan v. Com. [Ky.] 119 SW 734. Where of two jointly charged one is convicted and another acquitted, an instruction that if no conspiracy was shown the jury should convict the guilty and acquit the innocent party was without prejudicial error. Van Wyk v. People, 45 Colo. 1, 99 P 1009.

8. Error invited by appellant's requested instructions will not be considered. Duncan v. State, 171 Ind. 444, 86 NE 641.

(§ 8) *C. Verdict.*[9]—See 11 C. L. 1887—The verdict must conform to the proof[10] and be responsive to the charge,[11] but a verdict for a lesser degree than that warranted by the evidence will not be disturbed.[12] Where it is doubtful as to which of two degrees are warranted by the evidence, conviction should be for the lesser.[13] A verdict must be definite,[14] but it is sufficient if the meaning of the jury can be clearly understood,[15] and mere surplusage may be disregarded.[16] The court may require the jury to amend an irregular verdict.[17] Even in capital cases a verdict is subject to review only to ascertain if there was any evidence in its support.[18]

(§ 8) *D. Punishment.*[19]—See 11 C. L. 1887—Punishment is usually within the discretion of the trial court.[20] Where punishment is fixed in error, the prisoner may be remanded for a new sentence.[21] Capital punishment is very generally held to be constitutional.[22] Time for execution is fixed by local law or practice.[23] Appeal acts as a stay of execution of capital punishment.[24] One may not appeal as from capital punishment merely because such a sentence might have been given under the indictment.[25] A maximum and minimum statute does not necessarily apply to a life sentence.[26] Where the jury is required to assess punishment, it is error to decide by lot even after degree has been fixed.[27]

Horse Racing; Horses; Hospitals; Houses of Refuge and Reformatories, see latest topical index.

9. Search Note: See note in 12 L. R. A. (N. S.) 935.

See, also, Homicide, Cent. Dig. §§ 664-683; Dec. Dig. §§ 312-315; 21 Cyc. 1082-1087; 10 A. & E. Enc. P. & P. 178.

10. Where facts show murder or excusable homicide, verdict of voluntary manslaughter is not authorized. Brantley v. State, 5 Ga. App. 458, 63 SE 519. Statute requiring the jury to find the degree of murder does not leave them free to find second degree where the evidence warrants only first degree or acquittal. State v. Zeller [N. J. Err. & App.] 73 A 498.

11. That court cannot set aside a verdict of acquittal though if in disregard of instructions it may punish jury for contempt. Brewer v. State [Ala.] 49 S 336.

12. Stone v. State [Fla.] 48 S 996; State v. Bobbitt, 215 Mo. 10, 114 SW 511; State v. Sebastian, 215 Mo. 58, 114 SW 522; Fleming v. State, 54 Tex. Cr. R. 339, 114 SW 383.

13. Spick v. State, 140 Wis. 104, 121 NW 664. Where criminal homicide was committed by an act manifestly indicative of depravity of mind and disregard of human life, a verdict of second degree murder is correct, though there may be doubt as to whether first degree murder was not actually committed. Id.

14. "Guilty as charged" insufficient under Comp. Laws 1897, § 11472, requiring jury to find degree. People v. Clark, 155 Mich. 647, 15 Det. Leg. N. 1125, 119 NW 1094.

15. Mere informality is not prejudicial. Gillum v. Com. [Ky.] 121 SW 445. Sufficient where punishment found clearly indicates degree. Id. Verdict of guilty as charged and fixing the punishment as death not objectionable as uncertain, since there can be no doubt of the intention of the jury. State v. Hayes [S. D.] 122 NW 652. Assault with "attempt" to murder, for "intent" to murder, is sufficient. Bunch v. State [Fla.] 50 S 534.

16. Recommendation of mercy does not vitiate or weaken verdict. State v. McKay, 150 N. C. 813, 63 SE 1059; State v. Arata [Wash.] 105 P 227.

17. State v. Sartino, 216 Mo. 408, 115 SW 1015.

18. People v. Sanducci, 195 N. Y. 361, 88 NE 385.

19. Search Note: See note in 35 L. R. A. 575.

See, also, Homicide, Cent. Dig. §§ 727-731; Dec. Dig. §§ 350-354; 21 Cyc. 1099, 1100; 21 A. & E. Enc. L. (2ed.) 235; 10 A. & E. Enc. P. & P. 188.

20. Nine years for manslaughter by reckless shooting is not "cruel and unusual punishment." State v. Lance, 149 N. C. 551, 63 SE 198. Twenty-five years not excessive for murderous blow struck after apparent termination of drunken row. State v. Pell, 140 Iowa, 655, 119 NW 154.

21. State v. Demming, 79 Kan. 526, 100 P. 285.

22. Constitution, art. 1, § 15, when construed with art. 5, § 14, does not impliedly forbid capital punishment. State v. Finch [Or.] 103 P 505.

23. Where for any reason a sentence of death has not been executed and remains in force, the trial court shall make inquiry in defendant's presence and no reason to the contrary appearing shall fix time and order execution. Armstrong v. State [Okl. Cr. R.] 103 P 658.

24. Appeal from a judgment of capital punishment acts as a supersedeas of the execution of such sentence until final determination of the appeal. Gen. St. § 1522, amended Public Acts 1905, c. 70, p. 295. State v. Rubaka [Conn.] 72 A 566.

25. Where sentence is imprisonment, no appeal lies as from conviction for capital crime under 26 Stat. 828, as amended 29 Stat. 492, although death could have been inflicted under the indictment. Rakes v. U. S., 212 U. S. 55, 53 Law. Ed. —.

26. Not necessary to fix maximum and

HUSBAND AND WIFE.

The scope of this topic is noted below.[28]

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§ 1. *Disabilities of coverture in general; statutory relaxations.*[29] See 11 C. L. 1838

At common law, the legal existence of a woman at the date of her marriage was merged in that of her husband,[30] but the contractual disability incident to such merger has been removed or greatly modified by statute in most of the states,[31] and

minimum. People v. Blake [Mich.] 16 Det. Leg. N. 363, 122 NW 113.

27. Walker v. State [Ark.] 121 SW 925.

28. This topic is confined to the treatment of the rights, powers and liabilities of husband and wife, as such, at common law and under various statutes. It excludes consideration of all marriage contracts (see Frauds, Statute of,* § 3; Breach of Marriage Promise*) as distinguished from marital contracts, except antenuptial contracts (see this topic, § 2), the nature and validity of marriage and annulment (see Marriage*) and dissolution thereof (see Divorce*), offenses against the marital relation (see Adultery;* Bigamy*), except in so far as the rights or liabilities of the parties are affected thereby (see this topic, §§ 4, 11, 12), rights and liabilities after dissolution of the marriage by death (see Descent and Distribution,* § 6; Estates of Decedents,* §§ 3, 5D; Dower;* Curtesy*) or by divorce (see Alimony;* Divorce*) or by annulment (see Marriage,* § 4), except under the community property system (see this topic, § 4) and except such as may be incidently involved in the treatment of the subjects herein considered. Excludes, also, the domicile of the parties (see Domicile*), the relation of parent and child (see Parent and Child*), matters relating to infants generally (see Infants*), the guardianship thereof (see Guardianship*), their adoption (see Adoption of Children), and their legitimacy (see Bastards*), testamentary capacity of married women and questions arising under wills (see Wills,* §§ 1, 5D). Excludes, also, the general competency of husband and wife as witness (see Witnesses,* § 4C, and Fraud and Undue Influence*). Excludes, also, acknowledgments by married women (see Acknowledgments*).

29. **Search Note:** See notes in 8 C. L. 123; 34 L. R. A. 223; 1 L. R. A. (N. S.) 321; 5 Id. 611; 11 Id. 273; 46 A. S. R. 446; 84 Id. 437; 85 Id. 552.

See, also, Husband and Wife, Cent. Dig. §§ 272-289; Dec. Dig. §§ 55-67; 21 Cyc. 1304-1309, 1343-1350; 1 A. & E. Enc. L. (2ed.) 162; 6 Id. 293; 8 Id. 260; 15 Id. 785, 790; 19 Id. 1224; 25 Id. 331, 451.

30. Hall v. Johns [Idaho] 105 P 71.

31. See post, § 7B.

in some states the statute operates to remove the disability of nonage in certain cases.[32]

§ 2. *Mutual duties, obligations, and privileges. A. Inherent in the relationship.*[33]—See 11 C. L. 1833—It is the duty of a husband to provide for and support his wife [34] and family,[35] though he be an infant,[36] unless the wife has forfeited her right to such support,[37] and such duty is a public and moral one as well as one imposed by the marriage contract.[38] The wife has the right to the society of her husband,[39] and she owes to him the same full performance of marital duties that he owes to her,[40] though they both be infants,[41] and that she has ceased to love him gives her no right to abandon him.[42]

(§ 2) *B. Contracts or other dealings.*[43]—See 11 C. L. 1839—At common law, any contract entered into between husband and wife, without the intervention of a trustee, was void,[44] unless they were living apart,[45] and this rule is declared by statute in some states,[46] but, since the enactment of the married women's acts a married woman may, in most states, deal with her husband as with a stranger,[47] and in some states such contracts are enforcible in equity.[48] Such contracts must be predicated

32. Under Code 1907, § 4499, marriage in Alabama of women between the ages of 18 and 21 removes the disabilities of nonage, and her subsequent removal to another state where marriage does not have that effect does not incapacitate her to sue in Alabama. Hays v. Bowden [Ala.] 49 S 122.

33. Search Note: See notes in 5 C. L. 1732; 11 Id. 1113; 12 L. R. A. (N. S.) 848.

See, also, Husband and Wife, Cent. Dig. §§ 1-10; Dec. Dig. §§ 1-4; 21 Cyc. 1143-1152; 15 A. & E. Enc. L. (2ed.) 811.

34. Hall v. Johns [Idaho] 105 P 71. The husband's rights are active; the wife's rights are passive. Id.

35. It is the duty of a husband and father to support his children even after the wife has obtained a divorce. Brown v. Brown [Ga.] 64 SE 1092. The wife is under no duty to maintain the family out of her separate property except as provided by Rev. Codes, § 2688. Hall v. Johns [Idaho] 105 P 71.

36. Wife is entitled to support by her infant husband. Cochran v. Cochran, 196 N. Y. 86, 89 NE 470.

37. Obligation of husband to support wife is modified by law to extent that it obtains only while she properly demeans herself as a wife and companion. Rutledge v. Rutledge [Mo. App.] 119 SW 489. Where there is admittedly no relation that legally imposes duty of wife's maintenance upon husband, the law gives no power to make him maintain her, as where there has been a divorce from bed and board without provision for support. Chapman v. Parsons [W. Va.] 66 SE 461. See Divorce, § 7. Under ecclesiastical law of England loss to wife of right to support because of her adultry was not prevented because of a similar fault by her husband. Hawkins v. Hawkins, 193 N. Y. 409, 86 NE 468.

38. Clisby v. Clisby [Ala.] 49 S 445.

39. Wife has right to society of infant husband though in derogation of parental right to custody. Cochran v. Cochran, 196 N. Y. 86, 89 NE 470.

40. Richardson v. Richardson, 114 NYS 912. Husband is entitled to benefit of wife's domestic services. Vose v. Myott [Iowa] 120 NW 58.

41. Husband is entitled to society and services of his wife though both are minors and neither of her parents consented to marriage. In re Hollopeter, 52 Wash. 41, 100 P 159.

42. Richardson v. Richardson, 114 NYS 912.

43. Search Note: See notes in 5 C. L. 1732; 15 L. R. A. 215; 16 Id. 526; 20 Id. 702; 69 Id. 353; 3 L. R. A. (N. S.) 769, 774; 6 Id. 785; 9 Id. 953; 11 Id. 593; 12 Id. 1184; 15 Id. 491; 9 A. S. R. 323; 18 Id. 113; 31 Id. 935; 58 Id. 492; 73 Id. 898; 83 Id. 859; 106 Id. 725; 1 Ann. Cas. 860; 4 Id. 804, 868.

See, also, Husband and Wife, Cent. Dig. §§ 155-269, 882-885, 1046-1060; Dec. Dig. §§ 26-52, 278-280; 21 Cyc. 1241-1302, 1592-1598; 15 A. & E. Enc. L. (2ed.) 852; 19 Id. 1224; 25 Id. 451.

44. Common law does not recognize contracts between husband and wife. Kimball v. Kimball [N. H.] 73 A 408. Prior to July, 1878, husband and wife were without power to contract with each other and post nuptial contracts between them were void. Wilson v. Mullins [Ky.] 119 SW 1180.

45. Contract between husband and wife without the intervention of a trustee, made while they are living apart, is valid. Barnes v. Klug, 129 App. Div. 192, 113 NYS 325.

46. Revised Laws 1902, c. 153, expressly provides that a husband and wife cannot contract with each other, and a partnership between them is void. Voss v. Sylvester, 203 Mass. 233, 89 NE 241.

47. Wife can purchase notes of her husband or make a valid obligation in settlement of them if they were purchased to protect property to which she has title or interest. Sims v. Scheussler [Ga. App.] 64 SE 99. Where husband with consent of wife takes sheep belonging to her and uses them on his farm while they are living together, the inference is that profits and increase were shared jointly. Featherngill v. Dougherty [Ind. App.] 89 NE 521.

48. Relief will be given in equity on a contract between husband and wife if it be just and fair and ought equitably to be enforced. Kimball v. Kimball [N. H.] 73 A 408.

upon a sufficient consideration the same as other contracts,[49] and the general rules of construction apply.[50]

Gifts. See 11 C. L. 1830—Except as against creditors,[51] one spouse may give property to the other.[52] A gift is presumed where one spouse pays for property and conveyance is made to the other,[53] or where one places money in a bank payable to either self or other spouse, or the survivor,[54] but such presumption is rebuttable [55] by proof of a trust.[58] In the absence, however, of such rebutting evidence, the presumption of a gift becomes conclusive.[57] In New Jersey where a husband purchases property and takes title in his wife's name, a settlement or advancement is presumed,[58] and a trust can be proved only by facts antecedent to or contemporaneous with the purchase,[59] and so convincing in their probative force as to leave no reasonable doubt of the intent.[60] That a husband directs his wife to deposit the pro-

49. A wife's agreement to discontinue divorce proceedings is sufficient consideration for her husband's agreement to deed land to her on breaking an agreement not to renew adulterous relation. Darcey v. Darcey [R. I.] 71 A 595.

50. Contract between husband and wife in settlement of property rights pending action for divorce construed and held that a deed made by wife to husband and by him surrendered to her left no rights in him. Brown v. Brown [Iowa] 120 NW 724. Interpretation of a contract between husband and wife by her attorney, unknown to the husband, was ineffective to fix its meaning or effect. Stokes v Stokes, 240 Ill. 330, 88 NE 829.

51. See post, § 7E.

52. Husband may make gift of his property to his wife. Corbett v. Sloan, 52 Wash. 1, 99 P 1025. Husband may confer full title to personalty on his wife by gift, notwithstanding P. L. 3040 excepting such gifts. Walston v. Allen [Vt.] 74 A 225.

Evidence: Where a wife has full knowledge that her husband is using her property as his own, investing part of it in real estate, taking title in his own name, selling part and re-investing the proceeds without in any way recognizing her as a creditor or beneficiary, her assent thereto during more than thirty years of harmonious and affectionate married life is clearly corroborative of declarations that a gift was intended. Miller v. McLean, 11 Ohio C. C. (N. S.) 489.

53. Denny v. Schwabacker [Wash.] 104 P 137; Reed v. Reed, 109 Md. 690, 72 A 414. Civ. Code 1895, § 3160. Vickers v. Vickers [Ga.] 65 SE 885. Where husband pays for land which is deeded to wife. Poole v. Oliver [Ark.] 117 SW 747; Stonecipher v. Kear, 131 Ga. 688, 63 SE 215. Where a husband with his own money purchased a note and mortgage and had them assigned to himself and his wife jointly and retained possession of the assignment during his life and collected the interest, held to show a gift to his wife of one-half the note and mortgage. Abegg v. Hirst [Iowa] 122 NW 838. In a suit by the testatrix of a child of a second marriage against the testatrix of a child of a first marriage claiming that the first wife had not purchased certain property but that it had been purchased by the husband, held that if the first wife had not purchased the property it had passed to her by donation to the extent of a one-half interest. Stewart v. Crump, 123 La. 983, 49 S 663.

54. Where a husband deposits his money in a savings bank in the names of himself and wife "payable to either or the survivor," it imports a gift to her and she has an equal right to draw it during their joint lives and it vests in her absolutely on his death. Moore v. Fingar, 131 App. Div. 399, 115 NYS 1035.

55. Under Code Civ. Proc. § 1961, providing that a presumption may be controverted, and Civ. Code, § 164, providing that a deed to husband and wife is presumed to them in common, the presumption of gift where property is paid for from community funds and deeded to the wife held rebuttable as between husband and wife. Fanning v. Green [Cal.] 104 P 308.

Evidence: Where husband purchased property with community funds and had the deed made to his wife, evidence held to show that no gift to her was intended, and the status of the property was not change. Fanning v. Green [Cal.] 104 P 308. The fact that in purchasing property with community funds the husband directed the deed to be made to himself and wife did not compel the conclusion that he intended a gift to his wife but the circumstances might indicate another reason. Id.

56. Proof of an agreement by which the wife was to hold it in trust for him. Poole v. Oliver [Ark.] 117 SW 747. Under Civ. Code 1895, § 3160, a resulting trust may be shown. Vickers v. Vickers [Ga.] 65 SE 885.

57. Vickers v. Vickers [Ga.] 65 SE 885. The rule that where a husband has purchased land in the name of the wife on faith of a void agreement between them that, if she should die first he should have all the property, he is entitled to reimbursement for the price, does not include a case where the agreement is not clearly established. Wilson v. Mullins [Ky.] 119 SW 1180.

58. Herbert v. Alvord [N. J. Eq.] 72 A 946.

59. Herbert v. Alvord [N. J. Eq.] 72 A 946. Evidence of a conversation between the husband and his solicitor in the wife's presence that she should never sell the property unless he joined in the deed and should never drive him from the home is admissible to show that a settlement was not intended Id.

60. Herbert v. Alvord [N. J. Eq.] 72 A 946. Evidence insufficient to show that it was not intended as a settlement though

ceeds of a sale of his property in her name is not conclusive of a gift,[61] and the mere use by the husband of his wife's name to carry his bank deposit does not give her any right to the deposit.[62] Any claim of gift is negatived where a husband purchases property in the joint names of himself and wife.[63] If a gift be the result of fraud or undue influence, it will be set aside.[64] In Louisiana gifts cannot exceed two-thirds of the donor's estate if he leaves a surviving parent,[65] but the parent has no interest to annul such a gift where the law reserves to him a larger share than he would have received had the gift not been made.[66]

Antenuptial contracts.[See 11 C. L. 1640]—A contract entered into by the parties prior to marriage is not rendered void by the subsequent marriage,[67] and antenupital contracts, made in view of marriage, are usually held valid,[68] and, while the highest degree of good faith is required, fraud is not presumed,[69] and the party asserting fraud has the burden of proving it.[70] The contract need not be in writing.[71] The intended marriage is a sufficient consideration.[72] Marriage settlements may be made which contain agreements as to matters growing out of the relation other than "rights" in the estate of one or the other.[73] Antenuptial contracts are enforcible either in equity[74] or at law.[75] The contract is to be construed and given effect ac-

the property represented all of the husband's savings during his life. Id.

61. Direction by husband to wife to take proceeds of a sale of his property and deposit it in her name, as she had worked hard for it, is not a declaration of gift but is consistent with a desire on his part that she should be custodian. Monoghan v. Collins [N. J. Eq.] 71 A 617. If such statements when standing alone are sufficient evidence of a gift, they cannot be held sufficient where he made other statements showing no gift but an intention to retain control of his money. Id.

62. That a husband had a dishonest purpose in changing the style of his bank account from his own name to that of his wife without intending to give his wife any interest therein did not create a right in the wife to the account and on her death the husband could establish his claim against her estate. Leimgruber v. Leimgruber [Ind.] 88 NE 593.

63. Where a husband purchases property in the joint names of himself and wife out of the proceeds of a sale of his own property, it negatives a claim of the wife that he made a gift to her of such proceede. Monoghan v. Collins [N. J. Eq.] 71 A 617.

64. Gift by husband to wife of his property will be set aside unless he had independent advice where his mind was weak and he was in a position of dependency on his wife. Monoghan v. Collins [N. J. Eq.] 71 A 617.

65. Succession of Desina, 123 La. 468, 49 S 23.

66. The father as forced heir of his daughter has no interest to annul gifts of his daughter to her husband in such case. Succession of Desina, 123 La. 468, 49 S 23.

67. Note given by a man to a woman whom he subsequently marries is not extinguished or rendered void by their marriage, though they are incompetent to contract with each other. MacKeown v. Lacey, 200 Mass. 437, 86 NE 799.

68. Antenuptial contracts providing for control and disposition of property of the respective parties during their marriage, and in case of death are generally held valid. Becker v. Becker, 241 Ill. 423, 89 NE 737. The contingent interest in the property of either spouse cast upon them by law may be controlled or eliminated by a marriage settlement or antenuptial agreement. Unger v. Mellinger [Ind. App.] 88 NE 74.

69. An antenuptial contract calls for the highest degree of good faith but fraud is not presumed. In re Whitmer's Estate, 224 Pa. 413, 73 A 551.

70. Evidence insufficient to show that a wife was misled and deceived by her husband as to an antenuptial contract. Settles v. Settles [Ky.] 114 SW 303.

71. Parol antenuptial contract by which the husband agreed to make his wife beneficiary in a life policy and his wife was to make a will devising her property to him is valid. Andrews v. Lavery [Mich.] 16 Det. Leg. N. 820, 123 NW 543. Evidence sufficient to show that a man entered into an antenuptial agreement by which he agreed that he should have no interest in his wife's estate. Unger v. Mellinger [Ind. App.] 88 NE 74.

72. Long v. Barton, 142 Ill. App. 606. The intended marriage is a sufficient consideration for an antenuptial contract whereby the wife relinquished all her rights to her husband's estate and he relinquished all rights to hers. Settles v. Settles [Ky.] 114 SW 303.

73. Bright v. Chapman [Me.] 72 A 750. Rev. St. § 6, c. 63, providing that a husband and wife may by marriage settlement determine what rights each shall have in the estate of the other, and may bar each other of all rights in their respective estates, is restricted to rights which either party may have in the estate of the other. Id.

74. Equity will enforce antenuptial settlements, and especially is this true in the case of a widow's claim for an allowance inasmuch as an antenuptial agreement is no defense in a probate court to her petition for an allowance. Bright v. Chapman [Me.] 72 A 750.

cording to the import of the language employed[76] and intent of the parties,[77] and where one of the parties thereto fails to comply with obligations assumed, he may not enforce the contract as against the other.[78] The agreement cannot be abrogated by a subsequent void contract.[79] An antenuptial contract is not wholly executory,[80] but the mere execution of an agreement to accept, after the husband's death, a certain sum in lieu of marital rights in the husband's property does not of itself constitute a release of such rights,[81] nor does it constitute an absolute liability against the husband or his estate,[82] and, hence, it is extinguished by the wife's acceptance of a gross sum awarded in a divorce suit as alimony and as in full of the wife's interest in the husband's property.[83]

Postnuptial contracts.[See 11 C. L. 1843]—As a general rule, postnuptial contracts by which the rights of each in the other's property is determined are valid,[84] though the parties are living apart,[85] if entered into and executed in the manner prescribed by law.[86] Such a contract is not abrogated by the resumption of marriage relations by the parties.[87] The contract must be fair and free from fraud,[88] and, if so, the fact that it did not constitute an equitable settlement is no ground for vacating it.[89] If the existence of the contract is denied, it must be established,[90] and in de-

75. After dissolution of the marriage by death, the settlement provided for by the statute is cognizable in the courts of common law. Bright v. Chapman [Me.] 72 A 750.

76. An antenuptial agreement, whereby a wife agreed to accept a certain sum as all that she should "receive of the estate" of her husband, did not preclude her from receiving a widow's allowance for support for a year, under Code, § 3314. In re Miller's Estate [Iowa] 121 NW 700. Marriage settlement by which the wife was to have the proceeds of a life policy in full satisfaction of all claims against her husband's estate held broad enough to bar her petition for an allowance. Bright v. Chapman [Me.] 72 A 750. Where a man 80 years of age entered into an antenuptial contract with a woman 53 years of age, under which they renounced all rights in each other's estate, except that the woman was to receive a small sum from the man's, she cannot after his death renounce the agreement. In re Whitmer's Estate, 224 Pa. 413, 73 A 551.

77. An agreement by which the wife agreed to accept certain property in full of all claims against her husband held not to show an intent that her right to support was included. Kelly v. Kelly, 61 Misc. 480, 115 NYS 587.

78. Where by antenuptial contract it was agreed that the husband should have the wife's land if he survived her in consideration of covenants to be performed by him, one of which required him to keep in force a policy on his life, the proceeds of which were to go to the wife if she survived him, held, the husband not having performed his covenants was not entitled to the land as against the wife's heirs. Becker v. Becker, 241 Ill. 423, 89 NE 737.

79. Where an antenuptial contract provided that a wife should receive $2,000 in full for her share of her husband's estate, and thereafter while they were not living together she agreed to take a less sum, such latter agreement, if void, would not entitle her to a widow's share in his estate, but would at most revive the antenuptial contract. Stokes v. Stokes, 240 Ill. 330, 88 NE 829.

80. An antenuptial contract by which a wife agrees to take a specified sum if she survives her husband in lieu of dower, etc., is not wholly executory and may be enforced against the estate of the husband, though he kills his wife and then commits suicide. Logan v. Whitley, 129 App. Div. 666, 114 NYS 255.

81. Long v. Barton, 142 Ill. App. 606.

82. Would be extinguished by anything that would extinguish the marital rights. Long v. Barton, 142 Ill. App. 606.

83. Long v. Barton, 142 Ill. App. 606.

84. Husband and wife may enter into a contract relative to their property whereby one may release to the other all their interest, present or prospective. Perkins v. Sunset Tel. & T. Co., 155 Cal. 712, 103 P 190.

85. A wife by written contract with her husband may release to him her rights in his property and estate and thereby extinguish all her rights as widow including dower though they are living apart. Stokes v. Stokes, 240 Ill. 330, 88 NE 829.

86. An agreement between husband and wife that on the death of either the survivor take all of his or her property, if made after the passage of the Arissinger Act, is void as to an adopted child, where it is not in writing and property recorded. Wilson v. Mullins [Ky.] 119 SW 1180.

87. A contract between husband and wife, by which she relinquished all her rights in his property and containing no illusion to their separation, was not avoided upon their resuming marital relations. Stokes v. Stokes, 240 Ill. 330, 88 NE 829.

88. Division of property agreement and decree in divorce based thereon held the result of fraud. Holt v. Holt [Okl.] 102 P 187.

89. Where a wife was represented by attorneys when she signed a contract releasing all interest in her husband's estate while they were not living together, and she signed the contract after it had been fully explained to her and there was no fraud, it could not be invalidated because the pro-

termining whether such a contract was executed the court may consider the conduct of the parties.[91] Waiver of legal grounds for separation constitutes a valid consideration for a postnuptial contract.[92]

Agreements for separation and for separate support. See 11 C. L. 1844—It is quite generally held that separation agreements are valid where the parties are about to separate or have already separated,[93] and such an agreement is not necessarily annulled by a subsequent decree of divorce.[94] In New York, however, a separation agreement entered into without the intervention of a trustee is void,[95] but where husband and wife are living apart he may voluntarily contract to continue to support her after his death,[96] and such a contract is binding on his personal representatives,[97] and suit may be brought thereon in equity where adequate relief cannot be had at law.[98] A wife may sue on a separation agreement without joining the trustee.[99] On an application by the trustee, however, the court cannot arbitrarily allow the amounts agreed upon,[1] nor can it allow counsel fees.[2] A contract right to support under a separation agreement is assignable.[3] A deed of separation is to be construed according to the law of their domicile.[4] Where the surety upon a bond given pursuant to a separation agreement does not obligate himself to make the designated monthly payments, but merely to pay a penalty upon the default of his principal, he can be held only for the penal sum.[5] The parties cannot, by a separation agreement, determine the custody of their children.[6]

Conveyances, mortgages and contracts concerning real estate. See 11 C. L. 1845—There is a wide variance as to the effect of deeds between husband and wife, such deeds being void in some states[7] and valid in others,[8] in the latter case vesting title

visions did not constitute an equitable settlement. Stokes v. Stokes, 240 Ill. 330, 88 NE 829.

90. Evidence insufficient to establish an agreement between husband and wife that on the death of either the survivor should have all of the property of deceased. Wilson v. Mullins [Ky.] 119 SW 1180.

91. Courts will resort to circumstantial evidence furnished by conduct of the parties in determining the existence of a contract whereby one released to the other all interests in their property, and the exact terms of which have escaped their memory. Perkins v. Sunset Tel. & T. Co., 155 Cal. 712, 103 P 190.

92. Husband gave wife note for $1,000, in order to persuade her not to leave him when she had good cause to do so. Christie's Estate, 36 Pa. Super. Ct. 506.

93. Pryor v. Pryor [Ark.] 114 SW 700. Contract between husband and wife whereby he agrees to pay her a certain sum for support pending suit for divorce is not contrary to public policy. Id. A consummated division of property in contemplation of separation which immediately follows will not be disturbed. McComb v. McComb, 141 Ill. App. 160.

94. Pryor v. Pryor [Ark.] 114 SW 700.

95. Agreement executed by husband and wife to live separate and apart, made without intervention of a trustee, is void as against public policy Boyd v. Boyd, 130 App. Div. 161, 114 NYS 361. Where such agreement recites that they have agreed to live apart and binds the husband to pay her a specified sum per year, it is void and a subsequent mortgage by the husband to secure his performance is also void. Id.

96. Barnes v. Klug, 129 App. Div. 192, 113 NYS 325.

97. Where a separation agreement provided that the husband should pay the wife for her support a certain weekly sum for life, such contract was binding on his personal representatives, though not so stated. Barnes v. Klug, 129 App. Div. 192, 113 NYS 325.

98. While a wife could sue at law for each payment as it matured under a separation agreement with her husband, such action would not prevent distribution of his estate by the surrogate's court, and she could sue in equity. Barnes v. Klug, 129 App. Div. 192, 113 NYS 325.

99. Spence v. Woods, 134 App. Div. 182, 118 NYS 807.

1, 2. Phillips v. Peacock, 63 Misc. 520, 117 NYS 625.

3. Spence v. Woods, 134 App. Div. 182, 118 NYS 807. In action by an assignee of a separation agreement for payments due thereunder, allegations that when the assignment was made there was due thereunder the amount sought to be recovered, and that the wife had performed all of the conditions on her part, were sufficient. Id.

4. Coe v. Hill, 201 Mass. 15, 86 NE 949.

5. Foster v. Passerieus, 37 Pa. Super. Ct. 307.

6. Contract between husband and wife by which they agree to live apart and which disposes of the custody of the children will not be enforced. Knepper v. Knepper [Mo. App.] 122 SW 1117.

7. Deed from wife directly to her husband is void. McCord v. Bright [Ind. App.] 87 NE 654. Conveyance by married woman direct to her husband and daughter is void as to

in the wife as her separate estate.[9] In Mississippi such deed must be filed and recorded.[10] In Georgia a deed from the wife to the husband is void unless allowed by order of court,[11] except where it is a deed of gift,[12] but though void it will serve as color of title.[13] Relations of trust and confidence are presumed to exist between husband and wife,[14] and where a husband has superior knowledge of the rights of the parties he has the burden to show good faith.[15] Where a husband executes a warranty deed to his wife, he has the burden of proving that it was upon condition subsequent.[16]

§ 3. *Property rights inter se. A. In general.*[17]—See 8 C. L. 128.

(§ 3) *B. Rights of husband in wife's property.*[18]—See 11 C. L. 1845—In most states the rights of a husband in his wife's property are prescribed by statute.[19]

the husband, and the child takes entire legal title. Id. Deed from wife to her husband is void. Kelley v. Dearman, 65 W. Va. 49, 63 SE 693. If a husband convey land directly to his wife and she, in turn, attempts to convey directly to him, and after her death he conveys to a third person, and then die, the equitable title is in the heirs of the wife by descent, and the legal title in such third person. Depue v. Miller, 65 W. Va. 120, 64 SE 740.

8. Wife may convey her land directly to her husband. Glascock v. Glascock, 217 Mo. 362, 117 SW 67. A deed directly from husband to wife creates in her an equitable estate which she may convey. Rutledge v Rutledge [Mo. App.] 119 SW 489. Deed direct from husband to wife without the intervention of a trustee, made in good faith and not in fraud of creditors, is valid both in law and in equity. Currier v. Teske [Neb.] 120 NW 1015. Under Gen. Laws 1896, c. 194, amended by Pub. Laws 1896, c. 335, authorizing a married woman to contract the same as if she were single, a husband can contract to convey land to his wife on breaking an agreement not to renew adulterous relations in consideration of the wife's condoning past offenses. Darcey v. Darcey [R. I.] 71 A 595.

9. Deed from husband directly to wife vests title thereto in her as her separate estate. Kin Kaid v. Lee [Tex. Civ. App.] 119 SW 342. Agreement whereby husband released to his wife all interest in community property held sufficient to transmute community property into separate property. Perkins v. Sunset Tel. & T. Co., 155 Cal. 712, 103 P 190.

10. Laws 1900, p. 130, providing that a deed from husband to wife shall not be valid as to third persons unless recorded, etc., does not apply to insurance company when a wife deeded to a husband and he insured the property. Grece v. Phoenix Ins. Co. [Miss.] 48 S 298.

11. A sale by wife to husband is void when made without being allowed by an order of the superior court of her domicile. Stonecipher v. Kear, 131 Ga. 688, 63 SE 215.

12. Deed of gift from wife to husband does not require the approval of the superior court in order to pass title. It may be shown to be a gift though apparently founded upon a valuable consideration. American Ins. Co. v. Bagley [Ga. App.] 65 SE 787.

13. A deed from wife to husband though void because not made on order of the superior court will serve as color of title and may be admissible in an action between the husband and third parties in which rights of the wife are not involved. Atlantic Coast Line R. Co. v. Williams, 5 Ga. App. 647, 63 SE 671.

14. There is no presumption that a deed from wife to her husband is not valid, but upon a showing of fraud he has the burden to show that the transaction was fair. Massey v. Rae [N. D.] 121 NW 75.

15. In a deed between husband and wife, the husband who has superior knowledge of the rights of the parties has the burden to show that the transaction was fair. McCord v. Bright [Ind. App.] 87 NE 654. On an issue as to whether a wife was advised when she signed a deed as to its purpose, evidence that she held the property in trust for her husband was admissible as bearing on the question of allowing her husband to dispose of it for her or their joint benefit. Welch v. Brown [Colo.] 103 P 296.

16. Husband conveying property to his wife by warranty deed without condition or reservation has the burden to show that it was to become effective only in case of his death from present illness, and if he recovered the deed should be considered void. McComb v. McComb, 241 Ill. 453, 89 NE 714.

17. Search Note: See notes in 11 L. R. A. (N. S.) 389; 12 A. S. R. 82; 96 Id. 916.

See, also, Husband and Wife, Cent. Dig. §§ 11, 12, 71-120; Dec. Dig. §§ 5, 14-18; 21 Cyc. 1153, 1195-1215; 15 A. & E. Enc. L. (2ed.) 89.

18. Search Note: See notes in 3 C. L. 1673; 104 A. S. R. 988; 10 Ann. Cas. 1053.

See, also, Husband and Wife, Cent. Dig. §§ 19-70; Dec. Dig. §§ 81-83; 21 Cyc. 1157-1195; 15 A. & E. Enc. L. (2ed.) 817.

19. Under Gen. St. 1902, § 4541, providing that personal property of a woman, married prior to 1877, vests in her husband in trust, a note and mortgage assigned to such a married woman vests legal title in her husband and the equitable title in her, and on her husband's death the trust terminates vesting legal title in her. Pettus v. Gault, 81 Conn. 415, 71 A 509. Where she assigned such note and mortgage prior to her husband's death and he did not join, she could ratify the assignment after her husband's death. Id. Where the assignee brought suit to foreclose and made her a party and she acquiesced in his title, held, the owner of the equity could not attack the validity of her transfer on the ground that the husband did not join. Id. Prior to the Code of 1883, the marital rights of a husband did not attach to property owned by the wife or ac-

Where a husband by antenuptial agreement releases all rights in his wife's property, all incidents attached by statute are destroyed.[20] The right of a husband to personal property of his wife on her decease does not depend upon his conversion or reduction of the same to his own use and possession.[21] Evidence that the husband had possession of a check and notes, transferrable by delivery and given in payment for property of his wife, does not sustain the burden of proof required in an action for money had and received, in the absence of testimony that he realized the cash or its equivalent by using the check and notes.[22]

(§ 3) *C. Rights of wife in husband's property.*[23]—See 10 C. L. 6—A wife who deposits her husband's funds in her own name will be held a trustee.[24] The fact that a husband abandons his wife and family in poverty does not authorize them to sell property thereafter devised to him,[25] and by leaving the state he does not estop himself from recovering such property,[26] less the value of improvements,[27] but he cannot recover rental from the purchaser.[28] The wife's inchoate rights do not render her a necessary party to a proceeding to condemn her husband's land.[29] A woman in possession of and claiming land as the wife of a man to whom title was conveyed does not hold adversely to him.[30]

For a valid consideration, a wife may release her marital rights in her husband's property.[31] A conveyance in fraud of the rights of an existing wife will not be enforced at the instance of the husband,[32] and likewise a conveyance by a man pending a treaty of marriage, in fraud of his intended wife, will not be permitted to stand,[33] but she has the burden of proving that such conveyance was in fraud of her

quired by her during coverture, unless she was in possession of it or reduced it to possession during coverture. Doane v. Black [Ga.] 64 SE 646. A husband having died before his wife acquired possession of a vested remainder by death of the life tenant, such remainder held not subject to his debts. Id. Notwithstanding Married Woman's Act, Ann. St. 1906, p. 2382, a husband is not accountable to heirs of his wife for rents of her separate lands where he was entitled to them as tenant by curtesy, and prior to her death they lived together and there is not evidence that he denied her control of the property. Donovan v. Griffith, 215 Mo. 149, 114 SW 621.

20. She could deed such property to him. Whittaker v. Van Hoose, 157 Ala. 286, 47 S 741.

21. Choses of action left by a wife pass to her administrator in trust for her husband if he be living or for his representative if he be dead. In re Degnan [N. J. Eq.] 71 A 668.

22. Miller v. McLean, 11 Ohio C. C. (N. S.) 489.

23. **Search Note:** See notes in 5 C. L. 1736; 24 A. S. 490; 103 Id. 418; 6 Ann. Cas. 475.

See, also, Husband and Wife, Cent. Dig. §§ 13-18; Dec. Dig. § 6; 21 Cyc. 1154-1156; 15 A. & E. Enc. L. (2ed.) 817.

24. Where a wife having no separate property and acquiring none takes all of her husband's savings and invests them in her own name, a trust is created. Devoe v. Lutz, 133 App. Div. 356, 117 NYS 339.

25. That a husband abandoned his wife and family in poverty did not authorize their sale of property thereafter devised to him for their support especially where the children did not sell their interest until after they attained majority. Hollowell v. Adams [Ky.] 119 SW 1179.

26. Husband by abandoning family and leaving the state and thus placing it in their power to impose upon another by selling such land was not guilty of such laches as to preclude his recovery of the land. Hollowell v. Adams [Ky.] 119 SW 1179.

27. Before he can recover such land he should be required to pay his portion of taxes and debts left by his devisor, and the increase in value of the land because of improvements by the purchaser. Hollowell v. Adams [Ky.] 119 SW 1179.

28. The husband could not recover rent on the land prior to suit brought since the family had the right to use it for their maintenance during his absence, and use of money paid by the purchaser was in reality use of the land. Hollowell v. Adams [Ky.] 119 SW 1179.

29. Right of dower. Justis v. Georgia Industrial Realty Co. [Va.] 63 SE 1084.

30. Hayworth v. Williams [Tex.] 116 SW 43; Hayworth v. Williams [Tex. Civ. App.] 117 SW 1197.

31. The allegation that the consideration upon which a wife released her rights in her husband's property has wholly failed, and if the deeds are permitted to stand she will receive no part of the consideration which it was intended both by her husband and herself that she should receive, is not ground for setting the deeds aside, in the absence of the allegation that the consideration was wholly inadequate at the time the deeds were executed. Klein v. Gregg, 11 Ohio C. C. (N. S.) 470.

32. Agreement whereby a husband places property in name of one wife to avoid claims of another wife is not enforcible in equity. Satterly v. Dewick, 129 App. Div. 701, 114 NYS 354.

33. If a person pending a treaty of marriage without the knowledge of his intended

rights,[34] and where she has, by antenuptial contract, released her marital rights, she has no standing to attack a conveyance by the husband.[35]

(§ 3) *D. Estates in common, jointly, and by the entireties.*[36]—See 11 C. L. 1847— Estates by the entirety still exist in some states [37] but have been abolished in others.[38] A deed to a certain person "and his wife" creates an estate by the entirety,[39] but it may be held otherwise in equity where the circumstances make such an estate inequitable.[40] Where husband and wife hold land as tenants by the entirety, each is seised of the whole estate with the right of survivorship,[41] and, where property is purchased with the manifest intent to pay for it out of the proceeds of other property sold, the survivor is entitled to have such intent carried out.[42] The interest of a husband as tenant by entirety is subject to sale on execution [43] and may be mortgaged without his wife's consent and sold on foreclosure.[44] He may, furthermore, make a valid transfer thereof to her,[45] but no independent right of alienation of the whole estate exists in favor of either spouse.[46] A deed to husband and wife "as joint tenants" creates a joint tenancy.[46a]

(§ 3) *E. Wife's separate property.*[47]—See 11 C. L. 1848—It may be stated as a general rule that a married woman's separate property consists of property owned

wife conveys his property, upon her prospective rights in which she relied as an inducement to the marriage, the conveyances would be fraudulent as to her. Bell v. Dufur [Iowa] 121 NW 500.

34. The burden is upon her to prove her want of knowledge of the conveyance at the time of marriage and reliance on the prospective rights in the property to be acquired by the marriage. Bell v. Dufur [Iowa] 121 NW 500. Evidence insufficient to satisfy such burden. Id. Evidence sufficient to show that transfer of personalty from father to son was in good faith for an adequate consideration and not in fraud of the wife's rights. Lusse v. Lusse [Mo. App.] 120 SW 114.

35. Lefebure v. Lefebure [Iowa] 121 NW 1025.

36. Search Note: See notes in 19 L. R. A. 233; 22 Id. 594; 30 Id. 305, 317; 66 Id. 632; 38 A. S. R. 435; 4 Ann. Cas. 1101; 6 Id. 361; 7 Id. 650; 11 Id. 907.

See, also, Husband and Wife, Cent. Dig. §§ 71-89; Dec. Dig. § 14; 21 Cyc. 1195-1201; 15 A. & E. Enc. L. (2ed.) 846.

37. Still exist in New York. Mardt v. Scharmach, 65 Misc. 124, 119 NYS 449.

38. The common law of tenancy by the entirety is not recognized by Civ. Code, § 164, declaring that in case of conveyance to husband and wife it is presumed that they take in common, and § 682 providing that ownership in several is joint common, community, etc. Swan v. Walden [Cal.] 103 P 931.

39. Where a deed is to a grantee "and his wife," she takes as tenant by the entirety. McArthur v. Weaver, 129 App. Div. 743, 113 NYS 1095. The interest of a wife in a contract by which she and her husband agreed to purchase lots is not personalty. Comfort v. Robinson, 155 Mich. 143, 15 Det. Leg. N. 951, 118 NW 943.

40. In equity an estate conveyed jointly to husband and wife without her consent will not be held an estate by the entirety where purchased with her separate funds. Donovan v. Griffith, 216 Mo. 149, 114 SW 621.

41. Mardt v. Scharnach, 65 Misc. 124, 119 NYS 449; McArthur v. Weaver, 129 App. Div. 743, 113 NYS 1095; Comfort v. Robinson, 155 Mich. 143, 15 Det. Leg. N. 951, 118 NW 943. Where land was conveyed to husband and wife jointly as tenants by entirety, title to entire property vested in the wife subject to be divested in favor of the husband if he survived her. Stieff Co. v. Ullrich, 110 Md. 629, 73 A 874. Under a conveyance of land to husband and wife, they take by entireties with right of survivorship, and the interest of the husband during their joint lives is subject to a judgment against lien. Hood v. Mercer, 150 N. C. 699, 64 SE 897.

42. Where husband intended to purchase property free from encumbrance and to pay for same with proceeds of saloon business which he had sold, but, by reason of delay in receiving such proceeds, he was compelled to assume mortgage on property purchased, his wife, as survivor, was entitled to have mortgage paid off out of proceeds of sale of saloon business, though she had claimed such proceeds as a gift and had failed in such claim; and this, whether her status as survivor be deemed to give her a better standing than a mere heir or not. Monoghan v. Collins [N. J. Eq.] 72 A 109.

43, 44. Mardt v. Scharmach, 65 Misc. 124 119 NYS 449.

45. Conveyance by husband to wife of his interest in land as tenant by the entirety is valid. Mardt v. Scharmach, 65 Misc. 124, 119 NYS 449.

46. A deed of one conveys no title. Mardt v. Scharmach, 65 Misc. 124, 119 NYS 449.

46a. Deed to husband and wife "as joint tenants with fee to the survivor," etc., creates a joint tenancy and not a tenancy by the entirety. Swan v. Walden [Cal.] 103 P 931. Still exists in New York. Mardt v. Scharmach, 65 Misc. 124, 119 NYS 449.

47. Search Note: See notes in 23 L. R. A. 622; 4 Ann. Cas. 586.

See, also, Husband and Wife, Cent. Dig. §§ 393-560; Dec. Dig. §§ 110-146; 21 Cyc. 1357-1434; 15 A. & E. Enc. L. (2ed.) 817; 25 Id. 231.

by her at the time of her marriage,[48] or property purchased with the proceeds of a sale thereof,[49] or property acquired by inheritance subsequently to marriage.[50] That the title to property rests in the wife's name creates a presumption of ownership in her,[51] and she has a separate equitable estate in lands purchased in her husband's name with her separate funds,[52] but she will not be permitted to claim all increase of her separate estate due to the efforts of her husband.[53] Where the character of the property is denied, it must be established,[54] and, on such an issue, the fact that a purchase-money mortgage was executed by the husband and wife is admissible.[55] In Indiana [56] and in Pennsylvania [57] the husband must join in a deed of a wife's separate property. In Louisiana [58] and Georgia [59] a married woman must have judicial authority to dispose of her separate property, and the scope of the authority granted in such case depends on the intent of the petitioner,[60] but the legal capacity of a mar-

48. Where a married woman put her separate funds into her husband's business, the money being raised by a mortgage on her property which was paid off from proceeds of a life policy in which she was beneficiary, she was entitled to recover the amount from her husband's estate. In re Levi's Estate, 224 Pa. 233, 73 A 334.

49. Deed to husband and wife construed and held that the wife had paid for the land from her separate funds and while they had joint use of it for life on their death it passed to the wife's heirs. Hudson's Heirs v. Hudson's Adm'r [Ky.] 121 SW 973.

Evidence held sufficient to show that land standing in the name of the wife was acquired from property derived from her father's estate and profits gained therefrom and was not liable for her husband's debts. Martin v. Banks [Ark.] 115 SW 928. In a suit by a wife of a surviving partner to establish a trust in land the legal title to which was in the deceased partner and her husband, evidence sufficient to show that one-third of the money invested was hers and that the partnership held one-third of the property in trust for her. Keuper v. Mette's Unknown Heirs, 239 Ill. 586, 88 NE 218.

50. A husband who executed a note to his wife for money received by her as heir of her mother thereby made the note her separate property and deprived himself of any right to or interest in the note or money and that the note did not recite that it was for the wife's separate use was immaterial. Bennett v. Bennett's Adm'r [Ky.] 120 SW 372. A husband of an heir takes no greater interest because joined with his wife as grantee in a voluntary partition deed than he would if not named since title passed to the wife by inheritance and not by the deed. Starr v. Bartz, 219 Mo. 47, 117 SW 1125; Starr v. Kisner, 219 Mo. 64, 117 SW 1129.

51. That a grocery store was conducted in the name of a wife and bank account so kept was sufficient to create a presumption of ownership in her. Johnson v. Johnson's Adm'x [Ky.] 120 SW 303

52. Donovan v. Griffith, 215 Mo. 149, 114 SW 621.

53. Where a husband, as agent for his wife with her consent invested her money in his own name in a partnership, the wife could not, after he had carried on the partnership successfully and accumulated large profits, many times the capital invested, claim from his estate all his interests but was limited to the amount invested. Gormly v. Smith, 118 NYS 1069.

54. In suit to compel transfer of land which vendee claimed the vendor purchased as his agent, evidence held insufficient to show that property was purchaser for the vendor's wife with her separate funds and title taken in his name instead of in her name. Haupt v. Unger, 222 Pa. 439, 71 A 843. In an action to compel a husband to account for property in his wife's name, evidence held to show that he acquired the property with his own money and did not intend to give it to his wife though he put it in her name. Carroll v. Carroll [Ark.] 121 SW 947. Title to paraphernal property claimed by the widow held not proved where property consisted of rental which fell into the community and was administered by husband. Barbin v. Convillon, 122 La. 407, 47 S 698. In action by husband as administrator to recover loss to estate of prospective earnings of wife, a former suit by him individually to recover for permanent loss of his wife's services is conclusive evidence that he had not emancipated her. Walker v. Lansing & S. Trac. Co., 156 Mich. 514, 16 Det. Leg. N. 187, 121 NW 271.

55. On an issue as to whether property belonged to husband or wife, a purchase-money mortgage executed by the husband is admissible. Long v. Putnam Oil & Fertilizer Works [Ga.] 63 SE 700.

56. A finding that a contract had been executed by a married woman held to mean that her husband had joined therein. Smallwood v. Dunham, 42 Ind. App. 612, 86 NE 489.

57. A married woman cannot make a valid conveyance of her separate property by deed to her husband which she alone signs. Wicker v. Durr [Pa.] 74 A 64. She cannot convey real estate unless her husband joins under Act Feb. 24, 1770, and this rule is not changed by Act April 11, 1848, nor Act June 8, 1893. Id.

58. Where a married woman is authorized by the court after examination to mortgage her property and one acquires the mortgage note in good faith before maturity, he is entitled to full protection. Josephson v. Powers, 123 La. 5, 48 S 564.

59. Where a wife takes a deed from her husband to secure payment of a debt, and on the debt being paid reconveys, such a transaction is not a sale of the wife's separate property which under Civ. Code 1895, § 2490, must be allowed by order of court. Turner v. Woodward [Ga.] 66 SE 160.

60. Petition by married woman for authority to mortgage her plantation was so de-

ried woman to create debts and mortgage her separate property is not dependent upon authorization of the district court to create the debts and execute the mortgage.[61] In Florida she is not bound by the covenants in her deed.[62] In some states a husband has no interest in the separate property of his wife.[63] The wife's separate property is not liable for her husband's debts,[64] but increase in value due to his labor and management may be.[65] A husband who contracts for labor on property standing in his wife's name is liable therefor.[66] A husband cannot acquire and hold an adverse interest in his wife's land.[67]

§ 4. *Property rights under the community system. A. What law governs.*[68]—See 11 C. L. 1849.

(§ 4) *B. What property is community, and what separate.*[69]—See 11 C. L. 1849—Under the statutes of some of the states the property of a husband and wife is divided into separate and community property.[70]

*In California.*See 11 C. L. 1849—Property owned by either spouse at the time of the marriage,[71] or property purchased with the proceeds of a sale thereof is separate property,[72] and property conveyed to a married woman is presumed to be her separate property,[73] but such presumption may be rebutted.[74] Formerly in this state such a

scribed as to include her husband's land. Held that participation by the husband in the mortgage was solely to give his authorization and there was no intent that the wife should mortgage other property than her own. W. F. Taylor Co. v. Sample, 122 La. 1016, 48 S 439.

61. Where a married woman having recourse to proceedings taken under Civ. Code, §§ 126, 127, fails to avail herself of the protection afforded but makes use of these proceedings either designedly or ignorantly and misleads the public, she is not released. Kohlman v. Cochrane, 123 La. 219, 48 S 914.

62. Gen. St. 1906, § 2472, is a legislative declaration that a wife may covenant in a deed joined in by her husband against incumbrances, etc., but the covenants do not bind her personally. This statute applies to covenants in a deed of her separate property. Couch v. Palmer [Fla.] 48 S 995.

63. Under Revisal 1905, § 2097, providing that lands belonging to the wife at the time of her marriage shall not be sold or leased without her consent, a husband has no interest in separate property of his wife. Richardson v. Richardson, 150 N. C. 549, 64 SE 510.

64. The wife's property is not liable to the husband's creditors for augmentation of rents or enhancement of value by reasonable contribution of the husband's time and skill in management. Martin v. Banks [Ark.] 115 SW 928. Since land of a wife is not subject to her husband's debts, rent received therefrom is not so liable. Patton's Ex'r v. Smith [Ky.] 114 SW 315. In the absence of evidence that a mortgagee authorized her husband's debts to the mortgagor to be credited on the mortgage debt, such debts cannot be treated as payment thereon. Niccloy v. Treasure, 115 NYS 1030.

65. Increase in value of land and property of the wife which is represented by labor and management of her husband is subject to his debts. Patton's Ex'r v. Smith [Ky.] 114 SW 315.

66. Though wife holds title to farm on which labor is expended, the husband on receiving such labor is liable. Winebremer v. Eberhardt, 137 Mo. App. 659, 119 SW 530.

67. Purchase of outstanding title held for benefit of his wife. Kohle v. Hobson, 215 Mo. 213, 114 SW 952. Husband's possession of land by reason of marital relation is not adverse to his wife. Watkins v. Watkins [Tex. Civ. App.] 119 SW 145.

68. Search Note: See notes in 3 C. L. 1876; 15 L. R. A. 717; 65 Id. 529; 3 L. R. A. (N. S.) 145.

See, also, Husband and Wife, Cent. Dig. §§ 878-1045; Dec. Dig. §§ 246-276; 6 A. & E. Enc. L. (2ed.) 351.

69. Search Note: See notes in 5 C. L. 1738; 96 A. S. R. 916.

See, also, Husband and Wife, Cent. Dig. §§ 879-916; Dec. Dig. §§ 247-264; 6 A. & E. Enc. L. (2ed.) 297, 300, 307, 325.

70. So divided in Idaho. Hall v. Johns [Idaho] 105 P 71.

71. Where husband at time of his marriage had money invested in his business, it was his separate property and profits due to capital invested were separate property under Civ. Code, § 63. Pereira v. Pereira [Cal.] 103 P 488.

72. Evidence sufficient to show that land was purchased with money which was originally the wife's separate property. De Gottardi v. Donati, 155 Cal. 109, 99 P 492. Where a married woman purchased state land, her declaration that in making the application to purchase she desired to purchase for "our own benefit" meaning that she expected to permit her husband to graze sheep on the land did not show that she did not desire to purchase for her sole use and benefit. Dean v. Dunn, 9 Cal. App. 352, 99 P 380.

73. Under Code, § 164, amended by St. 1889, p. 328, providing that property conveyed to a married woman is presumed her separate property, the law regards such property as her separate estate though consideration was paid out of community funds, and the husband has the burden to show that it was not a gift. Killian v. Killian, 10 Cal. App. 312, 101 P 806. St. 1889, c. 328, amending Civ. Code, § 164, providing that property conveyed to a woman after her marriage is

conveyance created a presumption that it was community property.[75] That a husband bestows labor and money on his wife's separate property does not change its character.[76]

*In Louisiana.*See 11 C. L. 1849—Gifts from one spouse to the other constitute separate property.[77]

*In Washington.*See 11 C. L. 1850—Property acquired by either spouse by gift, devise, or descent, is their separate property,[78] but property conveyed to a member of the community is presumed to be community property,[79] and a claim by a member of the community for personal injuries is community property.[80] No community interest results to spouses because of a settlement on public land,[81] but where a husband as entryman acquired a patent, it became community property.[82]

*In Texas.*See 11 C. L. 1849—All property [83] or rights acquired [84] during the exist-

conclusively presumed her separate property, was not retroactive. Booker v. Castillo, 154 Cal. 672, 98 P 1067. Where title to property acquired during coverture is at the husband's request taken in the name of the wife, he has the burden to overcome the presumption created by Civ. Code, § 164, amended by St. 1889, p. 328, which is not done by proof of undisclosed intention but by acts and declarations at the time. Killian v. Killian, 10 Cal. App. 312, 101 P 806.

74. Community estate may be vested in either spouse and whether property so vested is community or separate is to be determined from the nature of the transaction in which it was acquired. Any evidence is admissible to overcome the presumption pronounced by Civ. Code, § 164, amended by St. 1889, p. 328. Killian v. Killian, 10 Cal. App. 312, 101 P 806. Where a husband purchased property with community funds and directed that deed be made to his wife with intent to make it her separate property, the deed vested it as her separate property but the intent to make it such was essential. Fanning v. Green [Cal.] 104 P 308.

75. Under Civ. Code, § 164, before amendment by St. 1889, p. 328, it was presumed that property conveyed to husband or wife after marriage was community property, which presumption could be overcome only by showing that it was acquired by gift, devise, or descent. Booker v. Castillo, 154 Cal. 672, 98 P 1067. Such presumption was not changed by limitation statutes, St. 1893, p. 71, c. 62, and St. 1899, p. 63, c. 72. Id.

76. In an action for divorce, evidence that the husband had performed labor in erecting a house on land of the wife, and gave her money to pay off a mortgage thereon, held not to make it community property. Carlson v. Carlson, 10 Cal. App. 300, 101 P 923. In action for divorce, a finding that property is community property was not of fact but a conclusion of law reviewable on appeal. Id.

77. Donations of checks and money by wife to husband, if not revoked during marriage, become separate property of the husband. Succession of Desina, 123 La. 468, 49 S 23. Where A donated lands to B propter nuptias, and, after marriage, B, the wife, donated the same property to A, the husband, held the land was not community property. Grandchampt v. Administrator of Succession of Billis [La.] 49 S 998.

78. Under Ball. Ann. Codes & St. §§ 4488, 4489, property acquired by either spouse after marriage by gift, etc., is separate property. Corbett v. Sloan, 52 Wash. 1, 99 P 1025. Where a husband gave his wife the proceeds of a personal injury action prosecuted in his behalf and invested the money in land and took title in her name, held her separate property, though he paid interest on a mortgage thereon and the deed was not recorded for two years. Id.

79. Property conveyed to a married man. Palmer v. Abrahams [Wash.] 104 P 648. Property acquired by purchase during marriage is presumed to be community and the spouse asserting the contrary has the burden to prove it by clear proof. Denny v. Schwabacher [Wash.] 104 P 137.

80. Claim by a married woman. Maynard v. Jefferson County [Wash.] 103 P 418.

81. Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574. Under the rule that the community is an entity and the rights of the wife cannot be disassociated from those of her husband, where a husband acquired no interest in land entered as a homestead because it was within a railroad grant, the wife acquired no community interest by settlement with her husband. Delacey v. Commercial Trust Co., 51 Wash. 542, 99 P 574.

82. Where a husband as entryman under the homestead laws acquired a patent during existence of the community, it became community property. Krieg v. Lewis [Wash.] 105 P 483.

83. Where a purchaser of a tract of land agreed with his married son that he should have a portion of the tract if he would pay a specified portion of the price, which he did, held community property notwithstanding defective execution of deeds. Colville v. Colville [Tex. Civ. App.] 118 SW 870. A pretended sale by a husband of a stock of merchandise to his wife, the purchase by the wife being made with money borrowed on the faith of her separate property as security, was ineffectual, as it is not the separate property of the wife, but community property. Dawson v. Baldridge [Tex. Civ. App.] 118 SW 593. Under Act Jan. 20, 1840, § 4, providing that all property brought into the marriage shall be common, etc., where a **land certificate** was issued to a single man who married before location was made thereunder, the land was community property. Phillips v. Palmer [Tex. Civ. App.] 120 SW 911. **Land** purchased by a husband

ence of the community is community property, or is presumed such,[85] unless purchased and paid for with separate funds of one,[86] and land reciprocally possessed by husband and wife is presumed to be community property.[87] The husband is held to more specific proof of his separate estate in property than is his wife.[88]

(§ 4) *C. Rights and powers as to, and liability of, community property.*[89]—See 11 C. L. 1850.—*In Texas.* See 11 C. L. 1851—The husband during marriage has the sole management[90] and right of disposition of community property[91] so long as it is not done for the purpose of defrauding his wife,[92] and his right to maintain action

during marriage. Edwards v. White [Tex. Civ. App.] 120 SW 914. **Property purchased on credit** and afterwards paid for with the wife's money is not separate property. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. **Increase of cattle** given to a married woman is community property. Barr v. Simpson [Tex. Civ. App.] 117 SW 1041. **Money earned by married woman** by teaching school is community property in the absence of an agreement between husband and wife that it shall be her separate property. Barr v. Simpson [Tex. Civ. App.] 117 SW 1041.

84. Rights acquired by a husband under a tax deed. Callen v. Collins [Tex. Civ. App.] 120 SW 546. Chose in action accruing to either spouse by reason of injury to person. Ft. Worth & R. G. R. Co. v. Robertson [Tex. Civ. App.] 121 SW 202. A contract for purchase of school lands in Texas is a community obligation though the wife is not named as purchaser, and she is a "purchaser" within Rev. St. 1895, art. 4218L, providing that if a purchaser dies his heirs shall have one year within which to make payment. Leaverton v. Robison [Tex.] 120 SW 169. Where an insurance policy was payable to two brothers on the death of one of them, one-half the proceeds on the insured's death became community property of himself and wife. Wooden v. Wooden [Tex. Civ. App.] 116 SW 627.

85. All property conveyed to husband or wife during the existence of the marriage relation. Kin Kaid v. Lee [Tex. Civ. App.] 119 SW 342; O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899.

Proof to rebut presumption that property acquired during marriage is community property must be clear and satisfactory. Watkins v. Watkins [Tex. Civ. App.] 119 SW 145.

86. Property purchased and paid for with a wife's own money is her separate property. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899. Where a deed to a married woman recited that she had $500 in her own right and the grantor agreed to sell her the land for the $500, she took it as her separate estate though the language of the deed did not convey it to her as such. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552. Land paid for with the wife's funds are her separate estate, notwithstanding **taking of title in husband's name.** Ligon v. Wharton [Tex. Civ. App.] 120 SW 930. Where a wife who has money of her own directs her husband to purchase land with it, which she does and takes title in his own name, the land becomes the wife's separate property and is not subject to a trust deed executed by the husband of which the wife had no notice. Levy & Co. v. Mitchell [Tex. Civ. App.] 114 SW 172. **When wife's separate funds are used by husband to pay for land,** the equitable title to the extent of the amount of her funds is vested in her, and she is entitled to have resulting trust to that extent established therein. Heintz v. Heintz [Tex. Civ. App.] 120 SW 941. **Where married woman pays part of the purchase price out of her separate funds** and she and her husband gave a note and trust deed for the balance, held separate property as to purchase money paid and community property as to balance. Barr v. Simpson [Tex. Civ. App.] 117 SW 1041. **Land acquired during a second marriage** by the exchange of land which constituted community property of a first marriage does not become community property of the second marriage Haring v. Shelton [Tex. Civ. App.] 114 SW 389. **Public land pre-empted** by a husband as a homestead under Acts 1870, p. 68, c. 53, after his wife's death, held separate property. Simpson v. Oats [Tex.] 114 SW 105.

87. Where land was reciprocally possessed by husband and wife at his death, it is presumed community under Rev. St. 1895, art. 2969, until the contrary is proved. Phillips v. Palmer [Tex. Civ. App.] 120 SW 911. Evidence insufficient to rebut such presumption. Id.

88. It is sufficient for a wife to prove that property was purchased with her funds in order to claim it as her separate estate, but the husband by reason of his control of the community property and his wife's separate estate, and her lack of knowledge of such facts, must be more specific in his proof. O'Farrell v. O'Farrell [Tex. Civ. App.] 119 SW 899.

89. Search Note: See notes in 3 C. L. 1677, 1678.

See, also, Husband and Wife, Cent. Dig. §§ 917-988; Dec. Dig. §§ 265-270; 6 A. & E. Enc. L. (2ed.) 331, 338.

90. Where boundary between community property and adjacent land is in dispute, an agreement between the husband alone and the adjacent owner fixing the boundary is valid. Moreno v. Salazar [Tex. Civ. App.] 116 SW 391.

91. The wife after the husband's death cannot follow and recover community property disposed of by him for purposes other than for the benefit of the community. Rowlett v. Mitchell [Tex. Civ. App.] 114 SW 845. Could not recover premiums paid on a life policy in favor of children by a former marriage. Id.

92. Under Sayles' Ann. Civ. St. 1897, art. 2968, a husband has the absolute right of disposition of community during coverture so long as it is not for the purpose of de-

therefor can be defeated only by proof that it is his wife's separate property,[93] but he cannot by gift to himself convert community into separate property,[94] and his absolute right to dispose of community property ends with the termination of the marriage relation.[95] The surviving husband has the right to sell community property to pay community debts.[96] A husband who makes improvements upon the estate of his wife's relatives cannot claim reimbursement out of community property.[97]

In California. See 10 C. L. 10—Community property may be subject to gift from husband to wife,[98] and prior to the statute of 1891 the husband had power to convey community property without his wife's consent.[99] An exception to the rule that the husband has control of community property is that the wife is necessary party to an action for injuries to her.[1] Failure of a husband to take title to community property in the name of the wife is not a fraud upon her.[2]

In Idaho. See 3 C. L. 1678—Title to community property is in the husband, and during marriage the wife's interest is a mere expectancy,[3] and she cannot bind community property for contracts made for the benefit of her separate estate.[4]

In Washington. See 11 C. L. 1852—The management and control of community property is vested in the husband,[5] and it is bound by contracts made by him for the benefit of the community,[6] but where a husband knowingly permits a wife to deal in

frauding his wife. Rowlett v. Mitchell [Tex. Civ. App.] 114 SW 845. Evidence sufficient to show that use by a husband of community funds of his second marriage to pay premiums on a life policy in favor of children of a prior marriage was not with intent to defraud his wife. Id.

93. A husband's right to sue for money claimed to be community property may be defeated by proof that it was his wife's separate property by virtue of an agreement between them. Michael v. Rabe [Tex. Civ. App.] 120 SW 565.

94. Rowlett v. Mitchell [Tex. Civ. App.] 114 SW 845.

95. Cannot dispose of it by will. Rowlett v. Mitchell [Tex. Civ. App.] 114 SW 845. A husband cannot, by will, partition undivided community property of his first marriage nor devise his deceased wife's share so as to bind her heirs. Perry v. Rogers [Tex. Civ. App.] 114 SW 897.

96. Surviving husband has power as such to sell community property to pay community debts, and this right is not restricted by his failure to qualify as administrator, nor to personal property rather than real, though it be the homestead. Davis v. Carter [Tex. Civ. App.] 119 SW 724.

97. Husband and wife lived with the wife's mother as one family, he managing the farm and improving it. The farm was the mother's homestead and she knew of the improvements but did not know that he was paying for them with his own money. Held that he could not claim reimbursement from his wife out of the community estate. Watkins v. Watkins [Tex. Civ. App.] 119 SW 145. Nor could he recover from his wife for improvements made and paid for with profits from the farm. Id.

98. Killian v. Killian, 10 Cal. App. 312, 101 P 806. Complaint by surviving husband for community real estate standing in the name of the deceased wife, alleging that she took title for the benefit of the community, held to negative any presumption of gift and to render evidence controverting such prima facie fact admissible. Id. Under such allegations, the court must find on the issue of gift. Id.

99. Prior to amendment of Civ. Code, § 172, by St. 1891, c. 220, providing that a husband cannot make a gift of community property nor transfer the same without his wife's consent, the husband could convey community property without his wife's written consent, and the amendment is not retroactive and does not deprive him of his power to dispose of, without his wife's consent, community property acquired prior to such date. Clavo v. Clavo, 10 Cal. App. 447, 102 P 556.

1. A right of action for false imprisonment of the wife is community property, but the wife is a necessary party. Gomez v. Scanlan, 155 Cal. 528, 102 P 12.

2. Failure of a husband to take title to community property in the name of his wife in accordance with his promise to do so is not a fraud on the wife unless done with fraudulent intent. Clavo v. Clavo, 10 Cal. App. 447, 102 P 556.

3. Hall v. Johns [Idaho] 105 P 71.

4. A wife cannot bind the community property for contracts made for the benefit of her separate property. Hall v. Johns [Idaho] 105 P 71. Community is not bound for payment of post nuptial contracts of the wife made for the benefit of her own separate property. Id.

5. In Washington, the management and control of community property is vested in the husband, and the wife cannot, without his consent, contract with reference thereto except for necessaries. Bowers v. Good, 52 Wash. 384, 100 P 848.

6. Where a loan contracted by a husband was a community debt, the wife was bound not only for the debt but also for a broker's commission for procuring the loan, though she did not sign the application nor was she a party. Philips & Co. v. Langlow [Wash.] 104 P 610. Where a married man contracted as principal for the purchase of property, the community property of himself and wife was liable on the contract though he was

community property, he impliedly consents to her acts unless he repudiates the entire contract.[7] Ordinarily the husband may mortgage community property without his wife's joinder,[8] but both husband and wife are necessary parties to a proceeding to foreclose a lien against community property.[9]

*In Louisiana.*See 3 C. L. 1678—The husband can make no conveyance inter vivos of community property by gratuitous title, except for the establishment of children.[10]

(§ 4) *D. Rights and powers as to, and liability of, separate property.*[11] *In Idaho.*See 11 C. L. 1852—A married woman may contract relative to her separate property.[12]

In Utah.—A wife's separate property is not liable for her husband's debts.[13]

*In Washington.*See 10 C. L. 11—The wife's separate property is not liable for her husband's debts.[14] A wife may ratify a contract made by her husband relative to her separate property.[15]

*In Texas.*See 11 C. L. 1853—A married woman may contract for the benefit of her separate property.[16] The husband must join in a deed of his wife's separate property,[17] and he cannot convey it without her consent,[18] and though he has the management of it he is liable to her if he converts it.[19] The extent of title conveyed by a deed must be found in its terms.[20]

acting for an undisclosed principal. Lawler v. Armstrong, 53 Wash. 664, 102 P 775.

7. He cannot ratify a part and repudiate the rest so that where she purchased land he cannot deny her authority to relinquish rights she acquired under the contract. Bowers v. Good, 52 Wash. 384, 100 P 848.

8. Where the possession of community personal property is lodged in the husband, he may ordinarily mortgage the same without his wife joining in the mortgage. First Nat. Bank v. Fowler [Wash.] 102 P 1038.

9. French v. Taylor [Wash.] 104 P 125.

10. Rev. Civ. Code, art. 2404. Radovich v. Jenkins, 123 La. 355, 48 S 988. A pretended purchaser in a sham sale has no standing to urge that the judgment of nullity should be restricted to the one-half interest of the wife, where the administrator of the husband's succession joined in demand of nullity. Id.

11. **Search Note:** See Husband and Wife, Cent. Dig. §§ 917-988; Dec. Dig. §§ 265-270; 6 A. & E. Enc. L. (2ed.) 300, 331, 338; 25 Id. 331.

12. Hall v. Johns [Idaho] 105 P 71.

13. Where a wife had at the time of her marriage and while that relation subsisted continued to have separate means and a separate estate, the court will protect her property against her husband's creditors. Burnham v. Stoutt [Utah] 99 P 1070.

14. In an action to enjoin sale under execution of land claimed by plaintiff to be her separate property, and the judgment under which the sale was sought to be made was against her husband alone, an answer which did not deny that it was her separate property and did not show that the judgment was for a claim for which separate property could be held did not state a defense. Bramel v. Ratliff [Wash.] 103 P 817.

15. Where two wives join in conveyances of their separate property pursuant to contract of exchange made by their husbands, it amounts to ratification thereof. Coonrod v. Studebaker, 53 Wash. 32, 101 P 489.

16. To hold a married woman on a contract, under Rev. St. 1895, art. 2970, providing that a wife may contract debts for the benefit of her separate estate, it must be shown that some improvement was made on her separate property. Stroter v. Brackenridge [Tex. Civ. App.] 118 SW 632. Evidence sufficient to show that money loaned to husband and wife was not used to improve the wife's separate property. Stroter v. Brackenridge [Tex. Civ. App.] 118 SW 632. To render a wife personally liable for money lent under such statute, she must have herself contracted the debt, and her husband as such cannot bind her personally for debts contracted by him, though for the benefit of her separate estate. Stroter v. Brackenridge [Tex.] 118 SW 634.

17. Where a wife's deed to separate property was void because not joined in by the husband, it was not cured by recitals in subsequent deeds executed after she became sole. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552. Deed by married woman of her separate estate in which her husband did not join was void, and was not cured by statements in other deeds by the husband. Id.

18. Under Sayles' Ann. Civ. St. 1897, art. 635, providing that husband and wife shall join, is sale of wife's separate real estate, and art. 2967, providing that all property of the wife owned by her before marriage shall be her separate property, the husband cannot convey the wife's separate property without her consent. Ligon v. Wharton [Tex. Civ. App.] 120 SW 930.

19. Rev. St. 1895, art. 2967, gives the husband the management of his wife's estate, but it does not authorize him to convert it, and if he does his wife is entitled to judgment therefor. Heintz v. Heintz [Tex. Civ. App.] 120 SW 941. In action by wife for her separate property and one-half the community property, where it appeared that an inventory of community property had been made and that the wife had selected and taken possession of certain property, and the husband subsequently took it, a charge to debit the wife with property taken by her

(§ 4) *E. Succession to and administration of the community.*[21] See 11 C. L. 1854.

In Idaho.—Where a husband dies intestate, one-half of his property descends to his wife and the other one-half to his children.[22]

In Louisiana. See 11 C. L. 1854—A surviving husband has the administration of paraphernal property of his wife,[23] and a wife's interest in community property passes to the administrator of her husband's succession and is to be regarded as to its administration as his property.[24] The surviving husband as usufructuary of the community property does not become owner of his deceased wife's half interest in bank shares acquired during marriage but is entitled to all dividends accruing therefrom.[25] A community debt may be enforced against the husband after death of the wife,[26] and on foreclosure of mortgage on community property after death of the wife, the surviving husband or heirs of the wife may purchase.[27] The commissions of an administrator of community are to be fixed to the full extent of that property, and not upon the deceased member's interest.[28]

In Texas. See 11 C. L. 1854—Upon the death of either spouse, the interest of such spouse descends to the heirs, burdened with the debts of the ancestor[29] and to the homestead rights of the survivor.[30] The survivor and their children have joint right of administration,[31] and the survivor, whether husband or wife, has the same control over the community estate as if he or she qualified as survivor,[32] and the

and charge the husband with the value of such property converted by him and with the value of community property converted held proper. Watkins v. Watkins [Tex. Civ. App.] 119 SW 145.

20. Deed executed by a wife by virtue of her husband's power of attorney and in her individual capacity conveyed all interest of both, though the land was the wife's separate property. Kin Kaid v. Lee [Tex. Civ. App.] 119 SW 342. Whether title to land conveyed was in the husband by virtue of deed to him or in his wife by inheritance held immaterial. Id.

21. **Search Note:** See notes in 5 C. L. 1740; 92 A. S. R. 695.

See, also, Husband and Wife, Cent. Dig. §§ 1032-1045; Dec. Dig. § 276; 6 A. & E. Enc. L. (2ed.) 341, 346, 347.

22. 8 Terr. Sess. Laws, p. 636. Coe v. Sloan [Idaho] 100 P 354.

23. Can stand in judgment in a suit for damages growing out of diminution in the value of the property. Lewis v. Colorado, etc., R. Co., 122 La. 572, 47 S 906.

24. Succession of Bertrand, 123 La. 784, 49 S 524.

25. Leury v. Mayer, 122 La. 486, 47 S 839.

Private sale by surviving husband of half interest of his minor son in bank stock made without order of court on advice of a family meeting is void, and the purchaser who knows that the property was acquired during marriage and that the wife was dead is bound to know that it was community property and belonged to the husband and heirs of wife. Leury v. Mayer, 122 La. 486, 47 S 839.

26. The payment of a note representing a debt of the community and secured by mortgage importing a confession of judgment on community property may be enforced after death of the wife in a proceeding against her husband. Schlieder v. Boulet [La.] 50 S 617.

27. Schlieder v. Boulet [La.] 50 S 617. Where property brings more than enough to pay the debt and the surviving husband is adjudicated and retains the surplus, and subsequently sells the property, the transferee takes it free from any claim of the heirs of the wife. Id.

28. Succession of Bertrand, 123 La. 784, 49 S 524.

29. Under Rev. St. 1895, art. 1869, vesting property of an intestate in his heirs burdened with his debts, his estate upon his death descends to his heirs burdened with his debts. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176. Whether property was the separate estate of the wife or was conveyed to her in trust for her eldest child, the husband would take some interest in it upon her death and the death of five of their six children. Irvin v. Johnson [Tex. Civ. App.] 120 SW 1085. Where a husband dies leaving widow and daughter, and the daughter's husband takes charge of timber land and cuts timber and mortgages the lumber, and thereafter the widow transfers to him the community property, the **mortgage** attaches to all the lumber. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176. A foreclosure of such mortgage vests in the purchaser whatever title the mortgagor had. Id.

30. On death of wife her children inherit her community interest in property subject to homestead interest of husband. Massie v. Massie [Tex. Civ. App.] 118 SW 219.

31. Upon death of a husband leaving a surviving wife and daughter, the community property descends one-half to the widow and one-half to the daughter, who have joint right to administer subject to the rights of creditors to have administration. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 114 SW 176.

32. Qualification merely prevents the estate from being taken out of survivor's hands. Wiseman v. Swain [Tex. Civ. App.] 114 SW 145.

survivor of may be sued in courts having jurisdiction before or after taking out letters of survivorship.[33] Final distribution of property in the hands of a community survivor cannot be made until one year after filing of the bond,[34] and, if it is distributed prior to such time, the administrator is liable on his bond.[35] The obligation of a surety of a community survivor is to protect the property of the estate in favor of creditors and heirs whoever they may be.[36] Existence of valid claims against the community estate does not bar recovery by the heirs on a bond given by the deceased husband as administrator,[37] and it is no defense to liability on such bond that the succeeding administrator received one-half the property in kind belonging to the estate when decedent qualified.[38] Where one spouse devises a life estate to the other in the former's interest, adverse possession may thereafter run against the latter's interest,[39] and will continue to run notwithstanding the subsequent death of the survivor.[40]

In Washington.—See 11 C. L. 1855—On the death of a member of the community, the entire community estate is subject to administration,[41] but the administration of the undivided one-half of the community estate upon the death of a member, though irregular, is not subject to collateral attack.[42] Letters of general administration will not be granted to the survivor after appointment of an executor under the will of the deceased.[43] A proceeding to vacate an adjudication that certain property is community property may be barred by laches.[44]

(§ 4) *F. Dissolution of community.*[45]—See 11 C. L. 1855—In Washington upon dissolution, the court must treat the separate property as remaining separate and the

33. Wiseman v. Swain [Tex. Civ. App.] 114 SW 145. The jurisdiction given by Sayles' Ann. Civ. St. 1907, arts. 2176, 2178, to probate courts to cite the survivor of a community at the instance of a creditor, is not exclusive and the creditor may sue the survivor in any court having jurisdiction. Id. The statutory proceeding in the county court which is allowed a creditor one year after filing inventory and bond does not interfere with the right of a creditor to sue the survivor on his claim in a court having jurisdiction. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

34. If the survivor does not abide such period, he is liable on his bond to an injured creditor though he had reason to believe the estate clear of debt. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

35. Where assets of a decedent were insufficient to satisfy all claims and the survivor was guilty of maladministration by distributing the estate within a year, the claims must be prorated, and the surety was liable to the amount of the claims as prorated. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149.

36. It is immaterial to the surety who the creditors are or in what form their claims may arise. Houston Fire & Marine Ins. Co. v. Swain [Tex. Civ. App.] 114 SW 149. Where a widow qualified as survivor and returned an inventory which included shares of corporate stock in possession of her husband at the time of his death which she had new stock issued for and sold and used the proceeds to pay debts, and no one contested her right to the stock, held her surety was not relieved from liability to a creditor of her husband by the fact that the stock was originally issued to a fictitious person. Wiseman v. Swain [Tex. Civ. App.] 114 SW 145.

37. Belt v. Cetti [Tex. Civ. App.] 118 SW 241. In an action on an administrator's bond, evidence of three releases of vendor's lien notes made to him reciting payment of a blank sum to them, which bore date after the death of the wife, is sufficient to show that he paid sums for the releases. Id.

38. Belt v. Cetti [Tex. Civ. App.] 118 SW 241.

39, 40. Appel v. Childress [Tex. Civ. App.] 116 SW 129.

41. Wiley v. Verhaest, 52 Wash. 475, 100 P 1008. Not merely the interest of the decedent. Magee v. Big Bend Land Co., 51 Wash. 406, 99 P 16.

42. Wiley v. Berhaest, 52 Wash. 475, 100 P 1008.

43. Under Ball. Ann. Codes & St. §§ 4490, 4621, providing that one-half the community property is subject to disposition by each spouse, and §§ 6141, 6142, authorizing granting of administration on estates of intestate's letter of general administration of community, cannot be granted a surviving wife after appointment of an executor under a will by which the husband devised one-half of his property. In re Guye's Estate [Wash.] 103 P 25.

44. Where a probate court adjudged certain land to be community property, and persons to whom it had been devised lived in the vicinity many years, they were held barred by laches from attacking the decree and suing to vacate their deed of their interests therein. Kline v. Galland, 53 Wash. 504, 102 P 440.

45. **Search Note:** See notes in 3 C. L. 1679. See, also, Husband and Wife, Cent. Dig. §§ 989-1031; Dec. Dig. §§ 271-275; 6 A. & E. Enc. L. (2ed.) 341.

community property and debts as becoming joint.[46] In Louisiana a community contract can be enforced after dissolution.[47]

§ 5. *Liability for necessaries.*[48]—See 11 C. L. 1856.—Necessaries furnished a wife are prima facie furnished upon the credit of her husband,[49] and whether the purchase was upon the wife's credit is a question of fact for the jury,[50] upon which question matters indicating her financial status and management of the household finances are admissible,[51] but not conclusive.[52] The presumption does not obtain, however, where the husband and wife are living separate and apart and he has given notice that he will not be bound,[53] nor can it be invoked where he has supplied her with necessaries.[54] In an action against a husband based on the theory that goods supplied his wife were necessaries, recovery cannot be had on the theory that the husband authorized the contracts.[55] Attorney's fees necessarily incurred by a wife in protecting herself or her character are necessaries.[56] In some states both husband and wife are liable for family expenses,[57] but this rule does not make the wife, liable for her husband's support,[58] and a widow is not liable for the expense of her

46. In determining property interests of a divorced couple, the court must treat their separate property as remaining separate, community property as becoming common, and community debts as becoming joint. James v. James, 51 Wash. 60, 98 P 1115.

47. A promise of sale made by the head and master of the community and accepted by the promisee before the community was dissolved may be enforced after the dissolution. Provenzano v. Glaesser, 122 La. 378, 47 S 688.

48. Search Note: See notes in 5 C. L. 1742; 24 L. R. A. 629; 13 L. R. A. (N. S.) 244; 98 A S. R. 627; 1 Ann. Cas. 172; 4 Id. 787; 5 Id. 832.

See, also, Divorce, Cent. Dig. §§ 582, 584; Husband and Wife, Cent. Dig. §§ 121-138, 325, 582-595; Dec. Dig. §§ 19, 83, 151; 21 Cyc. 1215-1233, 1315, 1444-1449; 15 A. & E. Enc. L. (2ed.) 875.

49. Nathan v. Morgenthau, 114 NYS 796. Where husband alone is present when household necessities are purchased, prima facie presumption is that the purchase is upon his credit alone. Brouse v. Oliger, 36 Pa. Super. Ct. 399.

50. Brouse v. Oliger, 36 Pa. Super. Ct. 399. In an action against a married woman for the price of a dress, a charge that if it was satisfactory recovery could be had was erroneous as taking from the jury the question of her personal liability. Nathan v. Morganthau, 114 NYS 796. In an action against a married woman for groceries, where it appears that groceries had been furnished her while she was married to a former husband and during widowhood, but that these groceries were furnished after she married her present husband, whether they were supplied on her own credit or as agent for her husband held for the jury. Blendermann v. Mann Wray, 62 Misc. 606, 115 NYS 1081.

51. Wife's ownership of the premises where she and her husband live is admissible. Brouse v. Oliger, 36 Pa. Super. Ct. 399. In an action against a wife for groceries, a pass book in her possession is admissible to show to whom credit was given and whether she was acting for herself or as agent for her husband. Blendermann v. Mann Wray, 62 Misc. 606, 115 NYS 1081.

52. That wife owned premises where she and husband lived held not conclusive. Brouse v. Oliger, 36 Pa. Super. Ct. 399.

53. Nathan v. Morgenthau, 114 NYS 796.

54. Nathan v. Morgenthau, 114 NYS 796. In action against a husband for rent of rooms let to his wife and price of rugs, etc., sold her, **evidence** held insufficient to show that he had failed to provide for her. Fields v. Florence [Tex. Civ. App.] 123 SW 187.

55. Where complaint in action against husband for a debt contracted by his wife was based on the theory that it was for necessaries furnished her, recovery could not be had on the theory that the husband authorized the contracts. Fields v. Florence [Tex. Civ. App.] 123 SW 187. In an action against a husband for rent of room let to his wife and for furniture sold her, where it was not alleged that the rooms were let and goods sold with his permission, etc., evidence of such fact was not admissible. Id.

56. A husband is liable for attorney's fees for his wife in her suit for separation upon proof that the suit was for her protection and prosecuted for just cause given by him. Hendrick v. Silver, 115 NYS 1093. Protection of a wife's character in a suit against her by employing counsel is as much a necessary as food, etc., within the rule requiring a husband to provide his wife with necessaries. Hamilton v. Salisbury, 133 Mo. App. 718, 114 SW 563. Facts held not to show that attorneys had probable cause to believe that an action for separation was reasonable and proper for the wife's protection. Hendrick v. Silver, 115 NYS 1093.

57. Heating stove, wringer, coal oil and can, and buggy and carriage kept for use of the family, are "family expenses" within Code, § 3165, making such expenses chargeable against the property of husband or wife or either. McDaniels v. McClure [Iowa] 120 NW 1031. Both husband and wife are liable for **attorney's fees** for prosecuting a wife's action for divorce on the ground that such action was necessary for her protection. Hicks v. Stewart [Tex. Civ. App.] 118 SW 206.

58. At common law the wife is not liable for the husband's support, and Code, § 3165, making family expense chargeable against

husband's burial.[59] In some states a wife may make a valid contract for necessaries.[60] In Idaho if a husband abandons his family his wife may make contracts for necessaries binding on the community.[61]

§ 6. *Contract rights and liabilities of husband as to third persons. In general.*[62]—See 11 C. L. 1857—Except as to necessaries,[63] the husband is not liable upon the wife's contracts[64] unless they are authorized by him.[65]

*Agency of wife for husband.*See 11 C. L. 1857—Must be established as in other cases.[66]

§ 7. *Contract and property rights of wife as to third persons. A. Agency of husband for wife.*[67]—See 11 C. L. 1857—The agency of the husband with respect to the management of the wife's separate property under the community system is treated in a previous section.[68] The husband is not presumed to be the agent of the wife,[69] and, in the absence of authorization by her, he cannot bind her by his acts as her agent,[70] but she may appoint him as her agent,[71] and after such appointment she is

both or either, does not render the wife liable for board furnished her husband. Vose v. Myott [Iowa] 120 NW 58.

59. Compton v. Lancaster [Ky.] 114 SW 260.

60. In order that articles purchased by a wife may be classed as necessaries under Rev. St. 1895, arts. 2970, 2971, providing that a wife may contract for necessaries, such articles must be reasonable and proper under the conditions and circumstances. Desmond v. Dockery [Tex. Civ. App.] 116 SW 114. Money borrowed by a wife with which to purchase a piano and furniture for a rooming house so as to support herself held for necessaries. Id. A wife having power to contract for necessaries under Ky. St. 1903, § 2128, and being liable for debts contracted after marriage under § 2127, her liability was not affected by the fact that § 2130 imposes on the husband the primary obligation to pay for necessaries furnished her. Hardiman's Adm'r v. Crick [Ky.] 115 SW 236.

61. Especially with regard to support for herself and family. Hall v. Johns [Idaho] 105 P 71.

62. **Search Note:** See notes in 98 A. S. R. 627; 9 Ann. Cas. 1067; 22 L. R. A. 779; 53 Id. 366; 62 Id. 374; 3 L. R. A. (N. S.) 307; 4 Id. 547; 7 Id. 1053.

See, also, Husband and Wife, Cent. Dig. §§ 90-99, 139-147, 496-560; Dec. Dig. §§ 15, 21-23¾, 134-146; 21 Cyc. 1203-1207, 1234-1238, 1411-1434; 15 A. & E. Enc. L. (2ed.) 858.

63. See ante, § 5.

64. A husband is not liable for apartment decorations furnished his wife, in the absence of proof that they were necessaries, or that she had been authorized to purchase them or that he held her out as his agent. Proctor v. Woodruff, 119 NYS 232. Before recovery can be had against a husband for money advanced to his wife after notice that the husband would not be responsible for her debts, he must show the husband's financial condition, his failure to provide for the wife and that the money was advanced for necessaries. Klopfer v. Mittenthal, 117 NYS 93.

65. Where apartment decorations were furnished a wife for an apartment in which both resided, that the husband had given his wife money to pay for them shows that she was authorized to purchase as his agent. Proctor v. Woodruff, 119 NYS 232.

66. Where one made a contract, for the performance of certain work, with a married woman, that her husband said while the work was progressing that his wife was boss, etc., held not to show a ratification of a contract made by her as his agent. Syring v. Zelenski [N. J. Law] 71 A 1119.

67. **Search Note:** See notes in 22 L. R. A. 460; 30 Id. 521; 8 L. R. A. (N. S.) 656; 14 Id. 1003.

See, also, Husband and Wife, Cent. Dig. §§ 148-154, 290-376, 393-737; Dec. Dig. §§ 25, 68-100, 110-202; 21 Cyc. 1238-1241, 1310-1342, 1357-1511; 15 A. & E. Enc. L. (2ed.) 897.

68. See ante, § 4D.

69. Henderson v. State, 55 Tex. Cr. R. 640, 117 SW 825.

70. Mere relation of husband and wife does not make him her agent. Garber v. Spivak, 114 NYS 762. Ordinarily the acts and words of a husband regarding his wife's property are not binding on her. Baker v. Thompson, 214 Mo. 500, 114 SW 497.

Wife held not liable: Where one contracted with a husband **for construction of house on property owned by wife** and also contracted for collateral security for the entire contract price. Fritschel v. Grosshauser [S. D.] 123 NW 698. Held, also, as there was no contract with her the contractor had no lien on the house. Id. **For unauthorized alteration of joint contract** for exchange of land for merchandise. Slaughter v. Elliott [Mo. App.] 119 SW 481. **For hauling husband's trunk,** though it contained some of her effects. Bigelow v. Woolverton, 65 Misc. 178, 119 NYS 630. A wife who owns land is not bound by an agreement, signed by her husband, **to abide by a survey** to be made by township trustees, where she did not authorize him to sign, and repudiated the agreement by notice to the surveyor. Marshall v. Benetti [Iowa] 118 NW 918. Where a husband signs a contract with a **partnership signature,** all parties understanding that his wife is to be bound as a partner, the husband but not the wife will be bound. Voss v. Sylvester, 203 Mass. 233, 89 NE 241. A married woman will not be compelled to specifically perform a contract of her husband **for the sale of land** where she did not sign, though she was present when a portion of the purchase money was

liable for his acts within the scope of his agency,[72] but her property is not thereby rendered liable for his debts.[73] Whether he was authorized to act[74] and the extent of his authority is usually a question of fact,[75] which may be shown by inference from other transactions,[76] such as her acquiescence in his acts;[77] but she is not bound by reason of failure to object where she has no notice of his assumption to act for her[78] or of his excess of authority,[79] nor when she has no opportunity to object.[80] The husband's agency, furthermore, does not depend upon notice or knowledge of the condition,[81] and she is not bound merely because he knows or has reason to believe that she is interested in the transaction[82] or even that it is for her benefit.[83]

(§ 7) *B. Contracts in general.*[84]—See 11 C. L. 1858—A wife's right to contract with respect to her separate property under the community system is treated in a previous section.[85] A married woman is incapable of making any contract in the absence of statutory authorization,[86] but the married woman's statutes have gen-

paid. Schwoerdfeger v. Kelly, 223 Pa. 631, 72 A 1056.

71. Henderson v. State, 55 Tex. Cr. R. 640, 117 SW 825; Chamberlain v. Brown [Iowa] 120 NW 334; Baker v. Thompson, 214 Mo. 500, 114 SW 497. Wife held accountable to one who joined her in a joint adventure for acts of her husband as her agent. Enslen v. Allen [Ala.] 49 S 430.

72. A married woman who through her husband sells a lot is bound by his fraud in inducing the purchaser to accept a deed conveying only part of the lot. Bell v. Jones [N. C.] 65 SE 646.

73. A wife acting in good faith may make her husband her agent to manage her property without rendering it liable for his debts. Kennard v. Curran, 239 Ill. 122, 87 NE 913.

74. Evidence held for the jury as to whether a wife authorized her husband to contract for the exchange of a stock of goods owned by her for land. Grasinger v. Lucas [S. D.] 123 NW 77. Evidence sufficient to show that the husband was agent for his wife in placing her property with one who embezzled it. Henderson v. State, 55 Tex. Cr. R. 640, 117 SW 825.

75. Evidence sufficient to show that a husband with authority to collect rents for his wife and use them for household purposes had authority to use them for other purposes. Latham v. First Nat. Bank [Ark.] 122 SW 992. Evidence sufficient to show that a wife constituted her husband her agent to deliver a note and accept a check in payment thereof. Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331.

76. A husband's agency for his wife may be inferred from facts fairly indicating that his acts have been done with her knowledge and acquiescence. Chamberlain v. Brown [Iowa] 120 NW 334. Evidence sufficient to show that he was her agent in leasing their joint property. Id.

77. Where a husband with the knowledge and acquiescence of his wife enters into a contract for the erection of a building upon a lot which is her separate property, such property is liable for the contract price. McGill v. Art Stone Const. Co. [Fla.] 49 S 539.

78. The authority of a husband to sign notes as agent for his wife cannot be shown by evidence of transactions of which she had no notice. Newton Centre Trust Co. v. Stuart, 201 Mass. 288, 87 NE 630. Evidence of such transactions held inadmissible. Id.

79. Evidence sufficient to show that a wife knew that her husband had exceeded his authority as her agent by assigning her contract of lease to secure his note. Latham v. First Nat. Bank [Ark.] 122 SW 992.

80. Where a husband without the consent of his wife and against her protest purchases material to paint a house on her premises and she, not knowing where he made the purchases, did not give notice of her objections, held the materialman acquired no lien under Rev. Codes 1905, § 6287. Christianson v. Hughes [N. D.] 122 NW 384.

81. The personal liability of a wife for material and labor furnished in improving her lands placed there by her husband's order does not depend on whether the creditor knew of the husband's agency but upon whether such agency existed. Colt v. Lawrenceburg Lumber Co. [Ind. App.] 88 NE 720.

82. That one did work on an order of a husband and that the wife was present when the order was given and was consulted was insufficient to show that he acted as her agent. Kissinger v. Jacobs, 113 NYS 819.

83. Evidence that a husband in buying an automobile told the seller that he intended to give it to his wife and the receipted statement of sale stated that the wife was the debtor and the wife knew of the transaction. did not show a sale to the wife through the husband as her agent. Gero v. Abbott [Mich.] 16 Det. Leg. N. 530, 122 NW 307.

84. **Search Note:** See notes in 87 A. S. R. 503; 11 Ann. Cas. 385.

See, also, Husband and Wife, Cent. Dig. §§ 315-376, 596-659; Dec. Dig. §§ 78-100, 152-167; 21 Cyc. 1310-1327, 1450-1475; 15 A. & E. Enc. L. (2ed.) 897.

85. See ante, § 4D.

86. Mercantile Nat. Bank v. Benbow, 150 N. C. 781, 64 SE 891. At common law, the rights and privileges of married woman so far as making contracts was concerned were merged in the husband. Hall v. Johns [Idaho] 105 P 71. In order for a married woman's contract to be enforcible against her personal estate, it must be executed with the written consent of her husband and must specifically create a charge against her

erally authorized her to contract to the same extent as a feme sole,[87] but of course it must be shown that the contract was made with her and not with her husband.[88] Whether a husband who signs a note with his wife is principal or a surety is to be determined from the nature of the transaction.[89] In North Carolina in order that a contract may be enforcible against a married woman's separate estate, it must charge such estate.[90] A party to a contract cannot invoke the coverture of the other party as ground for avoiding the contract.[91]

(§ 7) *C. Contracts of suretyship; payment of husband's debts.*[92]—See 11 C. L. 1859.—As a general rule, even under the statutes, a married woman cannot become surety for her husband,[93] and, where she is allowed to become such a surety, the transaction is usually guarded with statutory restrictions,[94] but prohibition against becoming a surety is merely a preservation of the wife's prior disability,[95] and is usually confined to technical contracts of suretyship,[96] and does not prohibit the wife from paying the husband's debts with her own obligations as principal,[97] or even prevent her from mortgaging her realty or assigning her personalty to secure her husband's debts,[98] in which case she is sometimes held to become a principal[99] and sometimes to be a mere surety.[1] In Georgia the wife is absolutely prohibited from

personalty. Mercantile Nat. Bank v. Benbow, 150 N. C. 781, 64 SE 891. A married woman cannot bind herself for debts by ordinary contract except as authorized by Rev. St. 1895, art. 2970, which confers on her power to contract for necessaries and for the benefit of her separate property. Billingsly v. Swenson Land Co. [Tex. Civ. App.] 123 SW 194. A married woman's **notes,** under the constitution and laws of Florida, are void. Virginia-Carolina Chemical Co. v. Fisher [Fla.] 50 S 504. In Florida a married woman cannot be a member of a **partnership** so as to make herself personally liable for its debts. Id.

87. Rev. Codes, c. 3, relative to rights of married women, is in the nature of a grant or an enlargement of the powers of a married woman to contract. Hall v. Johns [Idaho] 105 P 71. Under Code 1906, § 2517, a married woman may bind herself and her estate by contract the same as if unmarried, and where sued on such contract in another state the lex loci contractus governs. First Nat. Bank v. Hinton, 123 La. 1018, 49 S 692. Under Kirby's Dig. § 5214, providing that a married woman may carry on trade, sell her separate property, etc., her contracts respecting her separate business are valid, and where she is president of a mercantile corporation she is liable on a note signed by her in her individual capacity as surety and given by the corporation for money used in the business. Alphin v. Wade [Ark.] 116 SW 667.

Negligence in execution of instrument: A married woman is guilty of negligence where she signs an instrument without reading it, no confidential relations existing. Tracy & Co. v. Harris [Ga. App.] 63 SE 233.

88. In an action against a wife for board for her and her family in a sawmill owned by her, evidence held to warrant judgment against her though she testified that she had leased the mill to her husband. The supplies had been billed to her and some of the men had been paid off by her check. Morgan v. Heckman [Colo.] 103 P 293.

For necessaries: See ante, § 5.

89. Where land was conveyed to a wife and she and her husband executed a mortgage thereon to secure their note, and the husband thereafter indorsed a waiver of limitations on the note, held he was a surety and not a principal debtor. Wilder's Ex'x v. Wilder [Vt.] 72 A 203.

90. Where a married woman owned and conducted a store and purchased goods through her husband and signed notes alone in payment thereof, with the written consent of her husband, but the notes did not charge her separate estate, held the notes were not enforcible against her. Mercantile Nat. Bank v. Benbow, 150 N. C. 781, 64 SE 891. A married woman, to bind her real estate, must execute either a formal conveyance or some writing which in equity may be charged on her separate property, accompanied by the written consent of her husband and her privy examination. Id.

91. Frazier v. Lambert [Tex. Civ. App.] 115 SW 1174.

92. **Search Note:** See note in 5 Ann. Cas. 643.

See, also, Husband and Wife, Cent. Dig. §§ 346-353, 623-630; Dec. Dig. §§ 87, 158, 159; 21 Cyc. 1320-1322.

93. Kinney v. Heuring [Ind. App.] 87 NE 1053. A married woman cannot bind herself as surety for her husband on an appeal bond. Rev. Civ. Code, arts. 1790, 2398. Succession of Maloney [La.] 50 S 647.

94. Under Const. 1885, § 1, art. 11, two witnesses are essential to a mortgage by a married woman of her separate estate made for the purpose of securing a debt of her husband. Cobb v. Bear [Fla.] 49 S 29.

95, 96, 97. Kile v. Kilner, 37 Pa. Super. Ct. 90.

98. Jones v. Edeman [Mo.] 122 SW 1047; Kile v. Kilner, 37 Pa. Super. Ct. 90.

99. Philadelphia Sav. Fund Soc. v. Lasher, 144 Ill. App. 653.

1. Jones v. Edeman [Mo.] 122 SW 1047. Wife's mortgage on her lands to secure her husband's debts is not released by taking of judgment against him. Id.

paying her husband's debts,[2] and an attempted payment by her is a nullity.[3] The real character of the transaction and not its superficial appearance will govern its validity.[4] Land purchased by the husband with money deposited to his credit is liable for his pre-existing debts, though the money originally belonged to the wife, where it became his when reduced to possession.[5]

(§ 7) *D. Conveyances, mortgages, contracts to convey, powers.*[6]—See 11 C. L. 1861—Conveyances between husband and wife are treated in a subsequent section,[7] as are also conveyances under the community system.[8] Formerly a privy examination of a married woman was essential to the validity of a conveyance by her,[9] and, in some states, a married woman still cannot convey or mortgage her property unless her husband joins therein,[10] but in others she may now convey without his joinder,[11] or may mortgage for the benefit of her separate estate.[12] The general rule that a minor is incapable of making a valid contract cannot be applied so as to render ineffective the protection given the wife of a minor husband by the statutory requirement that her husband must join her in conveyance of her estate.[13] Where a married woman contracts, through her husband as agent, she contracts with his consent.[14] A married woman's deed that is defective because not properly acknowledged is not void,[15] and may constitute color of title.[16] A bond executed by

2. Macon & B. R. Co. v. Lane [Ga. App.] 65 SE 360; Bond v. Sullivan [Ga.] 65 SE 376.

3. She may recover back amount paid. Macon & B. R. Co. v. Lane [Ga. App.] 65 SE 360. In an action to recover money so paid it is admissible to show notice in the creditor of the character of the money to show that he had notice that the husband had no money. Id. Where a wife executes a deed of her separate property, partially to pay an incumbrance thereon and partially in payment of her husband's debts, the amount of the incumbrance remains a lien but the deed is void as the legal could not be separated from the illegal consideration. Bond v. Sullivan [Ga.] 65 SE 376. Where a wife executes a deed of her property for the purpose of paying her husband's debts, pursuant to a plan or scheme participated in by the grantee, such deed is void. Id. If the purchaser be not the actual creditor but one who participates with him in the scheme, the deed is equally void. Id. In an action on a note of a married woman, evidence held insufficient to show that it was given for a debt of her husband. Merchants' & Farmers' Bank v. McMullen [Ga.] 64 SE 657.

4. Where a wife joined her husband in a mortgage on her separate property to secure the husband's debt, the wife and her property were but sureties whether the husband signed the note or no, so that on the wife's death his interest in the property as between him and the children was chargeable therewith. Kinney v. Heuring [Ind. App.] 87 NE 1053. Where the husband was the sole beneficiary of a loan, the wife merely signing as surety, the statute making the wife's estate not liable for her husband's debts could not be avoided by placing her name first on the note. Farmers' Bank v. Beck [Ky.] 114 SW 1189. Where a bank refused to loan a husband money but offered to loan it on his wife's note, and the husband procured the wife to sign the note above his signature but he received the money, held a loan to him. Id.

5. Alford v. Guffy [Ky.] 115 SW 216.

6. **Search Note:** See notes in 5 A. S. R. 531; 84 Id. 437, 761.

See, also, Husband and Wife, Cent. Dig. §§ 290-314, 711-737; Dec. Dig. §§ 68-76, 179-202; 21 Cyc. 1327-1333, 1496-1511; 15 A. & E. Enc. L. (2ed.) 897.

7. See ante, § 2B.

8. See ante, §§ 4C and 4D.

9. Deed of married woman made to a trustee in 1881 for the use of a religious sect, held invalid for want of privy examination. Deepwater R. Co. v. Honaker [W. Va.] 66 SE 104.

10. Ky. St. 1909, §§ 2127, 2128, providing that a husband must join in a sale of his wife's land, and that her estate cannot be subjected to the debt of another unless set apart for that purpose, etc., does not prevent a married woman from borrowing money and giving her note therefor, and such note is enforcible against her separate property. Swearingen's Executor & Trustee v. Tyler [Ky.] 116 SW 331.

11. A wife may, without her husband joining, convey land, the title to which resides in her. Rutledge v. Rutledge [Mo. App.] 119 SW 489.

12. A mortgage by a married woman is for the benefit of her separate property within Gen. St. 1882, § 2037, where she borrows the money for herself and used part of it to pay off a prior incumbrance and the balance to furnish supplies to manage her property. American Mortg. Co. v. Woodward [S. C.] 65 SE 739.

13. Zimpleman v. Portwood [Tex. Civ. App.] 20 Tex. Ct. Rep. 531, 107 SW 584.

14. Bell v. Jones [N. C.] 65 SE 646.

15. A married woman's deed defectively acknowledged is not void. Downs v. Blount [C. C. A.] 170 F 15. Held admissible under Texas Laws 1907, p. 308. Id.

16. Married woman's deed, though not properly acknowledged, may be color of title, and where so relied upon it may be shown that it was in fact properly acknowledged

a married woman may be valid though a mortgage by which it is secured is void because not joined in by the husband.[17] The purpose and effect of a married woman's joinder in a deed involve the construction of the particular deed,[18] and the rights of the parties under a mortgage covering the wife's separate property is governed by the same rules as other like contracts.[19]

A contract by a husband for the sale of his wife's land is void,[20] unless authorized [21] or ratified [22] by her, and she must ratify or repudiate such a contract in its entirety.[23]

(§ 7) *E. Rights of creditors.*[24] *Of wife.*See 11 C. L. 1862.

*Of husband.*See 11 C. L. 1882.

Fraudulent conveyances.[25]—See 11 C. L. 1862—The intimate relation between husband and wife affords a cloak for fraud, and dealings between them to the prejudice of third persons are closely scrutinized,[26] and it is often held that the burden is generally cast upon them to show good faith [27] and a consideration,[28] though it is

and that the defect was only in the certificate. Veeder v. Gilmer [Tex. Civ. App.] 120 SW 584.

17. Randal v. Gould [Pa.] 73 A 986.

18. Where a grantor's wife was not named in the deed and the testimonium clause merely recited that she relinquished her dower right, and the clerk's certificates recited that she signed of her own free will for that purpose, she conveyed none of her interest in the land. Kidd v. Bell [Ky.] 122 SW 232. Where married woman joined in granting clause of a mortgage and acknowledged the instrument as her voluntary act before an officer in her husband's absence, held sufficiently acknowledged to convey her separate property. Cazort & Megehee Co. v. Dunbar [Ark.] 121 SW 270.

19. Where a wife mortgaged her separate property to get money to improve it, the fact that the husband signed the note and mortgage was no reason why the mortgage should not be discharged when paid or if void. Tice v. Moore [Conn.] 73 A 133.

20. An agreement by a husband to enter into a contract at a future time for the sale of his wife's land is void. Betcher v. Rinehart, 106 Minn. 380, 118 NW 1026. A husband and tenant in common with his wife has no authority to bind his wife by a contract to sell or lease her separate interest in the property. Chamberlain v. Brown [Iowa] 120 NW 334.

21. Evidence insufficient to show that a wife had authorized her husband to contract to exchange her land for other property. Davidson v. Slack [Iowa] 120 NW 109. In an action to enforce a contract by which a husband contracted to dispose of his wife's property, the vendee has the **burden of showing authority** to make such a contract. Id.

22. Where a husband acting as agent for his wife enters into a contract in her name for the sale of her land and she thereafter confirms the contract and tenders performance, the vendee cannot assert that the contract is void under the statutes because made by her husband as her agent. Stromme v. Rieck, 107 Minn. 177, 119 NW 948. Where a wife voluntarily executed a deed conveying her property, with full knowledge of its contents, it is immaterial whether she authorized her husband to make the contract consummated by the deed. Czarnecki v. Derecktor, 81 Conn. 338, 71 A 354.

23. Where a husband leased his and his wife's joint property and the wife received the benefits of the lease for several years, she could not thereafter ratify one part of it and repudiate the obligations imposed by the other part. Chamberlain v. Brown [Iowa] 120 NW 334.

24. Search Note: See notes in 77 A. S. R. 92; 83 Id. 517; 90 Id. 497.

See, also, Fraudulent Conveyances, Cent. Dig.; Dec. Dig.; 20 Cyc. 323-840; Husband and Wife, Cent. Dig. §§ 68-70, 85, 561-710; Dec. Dig. §§ 13, 14(11), 146½-178; 21 Cyc. 1161, 1165, 1195-1201, 1434-1496; 15 A. & E. Enc. L. (2ed.) 897.

25. As to fraudulent conveyances in general, see Fraudulent Conveyances.

26. Kennard v. Curran, 141 Ill. App. 621. Conveyances by an insolvent husband to his wife are closely scrutinized. Jones v. Hogan, 135 Mo. App. 347, 116 SW 21.

27. Where the circumstances tend to show that the husband is using his wife's name merely to cover up his own transactions, she has the burden of showing good faith. Kennard v. Curran, 141 Ill. App. 621. Where a debtor makes a voluntary conveyance to his wife, he has the burden to prove no fraud as to pre-existing creditors. Kennard v. Curran, 239 Ill. 122, 87 NE 913. Where a wife claims property acquired during coverture against her husband's creditors, she must show that it is her separate property by gift, devise, etc., or was acquired with her own money. Heiges v. Pifer, 224 Pa. 628, 73 A 950. Under Ball. Ann. Codes & St. § 4580, where a wife claims property by gift from her husband as against his creditors, she has the burden to show the good faith of the transaction. Corbett v. Sloan, 52 Wash. 1, 99 P 1025.

Evidence held for the jury where it appeared that the wife had written to her brother-in-law for money, and he had sent her a check which was applied on the purchase price. Heiges v. Pifer, 224 Pa. 628, 73 A 950. Evidence held insufficient to sustain the burden of proof cast by Ball. Ann. Codes & St. § 4580, declaring that where any question arises as to the good faith of transactions between husband and wife, the party asserting good faith has the burden of proof. Adams v. Wingard, 53 Wash. 560, 102 P 426. Evidence held sufficient to sustain finding against claim that deed to wife

also held that the burden does not shift in such cases but is merely easier to sustain because of the inferences which naturally arise from the very relation of the parties,[29] and this would seem to be more in keeping with the general rule as to the burden of proof in general [30] and as applied to fraudulent conveyances in general.[31] Where the wife knows of the husband's fraudulent purpose, a sale to her will be set aside at the instance of his creditors.[32] The law, however, favors restitution to the wife and looks with favor upon efforts of the husband, although insolvent, to secure her just claims against him,[33] and creditors cannot usually assail a bona fide transaction between them,[34] but in some states the wife is required to record notice of her claims.[35]

(§ 7) *F. Estoppel.*[36]—See 11 C. L. 1862—The doctrine of estoppel by conduct applies as against married women the same as against all persons sui juris,[37] but a married woman cannot be estopped to assert rights in property unless she has been guilty of some positive fraud in act of concealment,[38] and she is not estopped by anything contained in a contract which she has no power to make.[39]

in consideration of money previously received by husband from wife was in fraud of creditors. Morehead v. Allen, 131 Ga. 807, 63 SE 507.

28. The statute enabling a married woman to carry on business in her own name and freeing her separate property from the control of her husband does not destroy the presumption that his conveyance to her is, as to his creditors, voluntary. Edwards Mfg. Co. v. Carr, 65 W. Va. 673, 64 SE 1030.

Evidence: Where deed from husband to wife recited that it was in consideration of money previously received by husband from wife, testimony of wife, in suit by one claiming under husband's creditors, that she had previously given her husband a certain sum of money to invest in land for her, was relevant and admissible. Morehead v. Allen, 131 Ga. 807, 63 SE 507.

29. The rule that the burden of proof rests upon the plaintiff, and does not shift to the defendant by reason of presumptions in his favor, applies to an action to subject to a husband's debts property conveyed to his wife, but on account of the relation of husband and wife less evidence is required to raise a presumption in favor of the plaintiff in such an action, and where circumstances do raise a presumption that the property was paid for from the husband's means, the fact that the wife remained silent during the trial when proof that her money was used in the purchase might easily have been produced if in existence, together with inconsistent statements previously made by her, is a sufficient basis for a decree against her. Van Ingen v. Peterson, 12 Ohio C. C. (N. S.) 253.

30. See Evidence, § 1B.

31. See Fraudulent Conveyances, § 1.

32. First Nat. Bank v. Thomas [Tex. Civ. App.] 118 SW 221.

33. Simonton v. Scott, 123 La. 413, 49 S 4. An insolvent husband may render services to his wife in managing her business or give time and labor to the improvement of her property without his creditors acquiring any rights against it. Jones v. Hogan, 135 Mo. App. 347, 116 SW 21. Where a husband was indebted to his wife prior to becoming indebted to others, and while he had ample property to pay, a transfer to her thereafter in payment of his debt held not fraudulent. McCaskey v. Potts, 65 W. Va. 641, 64 SE 908. Where a wife, after obtaining a bond for a deed from her husband, rented the land and collected the rents and obtained a deed which was not recorded until after levy of execution against her, her husband, a purchaser at execution sale, was charged with notice of her rights. McCullars v. Reaves [Ala.] 50 S 313.

34. Where a debtor owned a life estate in land and his wife owned the remainder and she contracted to sell the entire estate, paid her husband a fair price, and both executed the deed and she was guilty of no fraud whatever toward his creditors, held not fraudulent. National Exch. Bank v. Nims, 131 App. Div. 552, 115 NYS 562. Conveyance from husband to wife to secure money loaned by her to him held not fraudulent as to his creditors. First Nat. Bank v. Hoard [Iowa] 121 NW 508. Conveyance to one and his wife held not fraudulent as to the husband's creditors. Edwards v. Sorrell, 150 N. C. 712, 64 SE 898.

35. Code 1860, §§ 2499, 2500, requiring a wife to file notice of any claim she has against her husband as to any of her property under his control and have the same recorded as a mortgage, relates solely to personal property and not to real estate, and does not affect the validity of a deed from him to her. First Nat. Bank v. Hoard [Iowa] 121 NW 508.

36. Search Note: See note in 57 A. S. R. 169.

See, also, Husband and Wife, Cent. Dig. §§ 282-284, 468-470, 733; Dec. Dig. §§ 62, 129, 198; 21 Cyc. 1343-1350, 1398-1402, 1507; 15 A. & E. Enc. L. (2ed.) 799, 897.

37. Engholm v. Ekrem [N. D.] 119 NW 35.

38. Gillean v. Witherspoon [Tex. Civ. App.] 121 SW 909; Franklin v. Texas Savings & Real Estate Inv. Ass'n [Tex. Civ. App.] 119 SW 1166.

39. Sherwin v. Sternberg [N. J. Err. & App.] 74 A 510. Where a married woman's deed was void because not joined in by her husband, neither she nor her subsequent grantees could be estopped to deny its validity where they did not claim under it. Merriman v. Blalack [Tex. Civ. App.] 121 SW 552.

§ 8. *Torts by husband or wife or both.*[40]—See 11 C. L. 1863—In some states a married woman is liable for her torts the same as though she were single,[41] in others she is liable jointly with her husband,[42] and in still others she is not liable at all for a tort committed in the company of her husband and by his command,[43] but the doctrine of presumed coercion in relation to a wrongful act by the wife in the presence of her husband relates to a mere rebuttable presumption.[44] Both are liable for an executed conspiracy to commit a wrong, where the gist of the action is the damage and not the conspiracy.[45] The husband's property is not liable to execution upon judgment against his wife for a tort, where he was not a party to the action,[46] but where such an execution is levied on the husband's property, it should not be set aside generally, but only as to the husband's property.[47]

§ 9. *Torts against husband or wife or both. A. Wrongs to the person.*[48]—See 11 C. L. 1865—Damage for personal injuries as community property is treated in a prior section.[49]

In some states an action for injuries to a married woman must, as a general rule, be brought by her husband,[50] and it is held that the wife is not a necessary party[51] or that she is not even a proper party,[52] but that she may sue in her own name where she has been abandoned by her husband.[53] Again, it is held that even though the emancipating statutes has not abrogated the rule that a married woman's earnings belong to her husband, she may sue in her own right for injuries which have impaired her earning capacity in a separate employment[54] in which she was employed at the time.[55] In some states she may sue jointly with her husband in

40. Search Note: See notes in 3 L. R. A. (N. S.)470; 4 Id. 643; 6 Id. 191; 9 Id. 322; 14 Id. 749; 16 Id. 674, 742; 92 A. S. R. 164; 9 Ann. Cas. 1225.

See, also, Husband and Wife, Cent. Dig. §§ 270, 377-383, 694-700, 791-794; Dec. Dig. §§ 53, 101-105, 174, 214; 21 Cyc. 1302, 1303, 1350-1352, 1491, 1492, 1544, 1545; 15 A. & E. Enc. L. (2ed.) 894, 899.

41. Under Act June 8, 1893 (P. L. 344), permitting a married woman to be sued as if single, she, and not her husband, is liable for her torts. Gustine v. Westenberger, 224 Pa. 455, 73 A 913. Judgment cannot be given for a plaintiff in mortgage foreclosure proceedings against the husband's property, where the mortgage was forged by the wife upon the theory that the husband is liable for torts of his wife. Id.

42. Under Revisal 1905, § 2105, providing that a husband is jointly liable for her torts, if a wife is liable for the tort of her 12-year-old son, her husband is jointly liable. Brittingham v. Stadiem [N. C.] 66 SE 128.

43. But she is liable for tort committed in his absence, whether with or without his knowledge and direction, and for one committed in his presence by her own volition and where she is free from coercion. Mahoney v. Roberts, 86 Ark. 130, 110 SW 225.

44. Is not a disability. Jones v. Monson, 137 Wis. 478, 119 NW 179.

45. Jones v. Monson, 137 Wis. 478, 119 NW 179. The common-law doctrine that a husband and wife cannot be guilty of a criminal offense when the gist thereof is conspiracy does not exempt the wife from liability for criminal acts in the execution of a conspiracy jointly with her husband, which are of themselves subject to criminal prosecution, the conspiracy not being the gist of the offense. Id.

46, 47. Deardorff v. Pepple, 36 Pa. Super. Ct. 224.

48. Search Note: See notes in 25 L. R. A. 178; 14 L. R. A. (N. S.) 646; 4 Ann. Cas. 205; 6 Id. 163, 412.

See, also, Husband and Wife, Cent. Dig. §§ 270, 766-773, 1117-1137; Dec. Dig. §§ 53, 209, 322-354; 21 Cyc. 1302, 1303, 1544, 1545, 1617-1633; 15 A. & E. Enc. L. (2ed.) 790, 858.

49. See ante, § 4.

50. Maynard v. Jefferson County [Wash.] 103 P 418; International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118.

51. Action by married woman for personal injuries must be brought in name of husband, and wife is a proper, but not necessary, party. Maynard v. Jefferson County [Wash.] 103 P 418.

52. It is improper to join a wife as party plaintiff in action by husband for injuries to her, but such joinder is not reversible error. International & G. N. R. Co. v. Doolan [Tex. Civ. App.] 120 SW 1118.

53. Under Ball. Ann. Codes & St. § 4826, providing that a married woman living separate and apart from her husband may sue in her own name for personal injuries. Horton v. Seattle, 53 Wash. 316, 101 P 1091. Where wife had been separated from her husband for four years and did not know where he was, during which time he had not assisted her, and she had made living for self and child. Missouri, K. & T. R. Co. v. Allen [Tex. Civ. App.] 115 SW 1179.

54. Niemeyer v. Chicago, B. & Q. R. Co. [Iowa] 121 NW 521.

55. Where woman engaged in employment as music teacher was injured while returning from her wedding trip, and but for which injury she would have resumed her

actions ex delicto.[56] Under a statute requiring notice of claim against municipalities for injuries, a notice of a claim for injuries to a married woman is not invalid because signed by her alone,[57] especially in a case where she is authorized to sue alone.[58] In Washington a married woman is properly joined in an action for injuries to her husband,[59] and in Ohio a wife may maintain an action for the loss of the society and companionship of her husband occasioned by the wrongful acts of a druggist who, against her protest, wantonly or maliciously furnished her husband, an opium habitue, with morphine in such quantities as to incapacitate him.[60]

The rule that contributory negligence of the husband is a defense to an action for injuries to the wife does not apply where the husband perished in the accident.[61]

The wife in her suit is entitled to recover for money paid out by her for medical expense [62] and for injury to her ability to perform labor beyond that pertaining to the care of her household,[63] providing such earning ability is proven,[64] but where the husband has recovered full compensation for his injuries, damages suffered by the wife from loss of consortium are too remote to sustain a separate action by her,[65] nor can she recover on account of suffering or anxiety which she sustained by reason of her husband's injury or because she was obliged to assume heavy and arduous duties.[66] In an action for injury to the wife, the husband may recover for loss of her services [67] for loss of consortium,[68] and for medical expenses,[69] but his damages must be determined on a financial basis.[70] The defendant has the burden to prove facts mitigating damages.[71]

employment, it was held that she might recover in her own right. Niemeyer v. Chicago, B. & Q. R. Co. [Iowa] 121 NW 521.

56. Act of 1906 (P. L. 525) does not supersede § 21 (P. L. 1903, 540), and it is still permissible for a married woman to sue jointly with her husband in actions ex delicto, and to add claims by the husband in his own right. Davis v. Public Service Corp. [N. J. Law] 72 A 82.

57, 58. Horton v. Seattle, 53 Wash. 816, 101 P 1091.

59. Under Ball. Ann. Codes & St. § 4827, wife is properly joined as coplaintiff. Apper v. Hoguiam, 51 Wash. 567, 99 P 746.

60. Flandermeyer v. Cooper, 12 Ohio C. C. (N. S.) 369.

61. Horandt v. Central R. Co. [N. J. Law] 73 A 93.

62. Ordinarily a husband is entitled to reimbursement for moneys expended for medicines and medical attendance but where the wife has paid them from her separate funds she can recover them. Krisinger v. Creston [Iowa] 119 NW 526.

63. The marriage of a woman who has been a music teacher and intended to continue such employment does not affect her right to recover for personal injuries received during her absence from such employment on her wedding tour. Niemeyer v. Chicago, B. & Q. R. Co. [Iowa] 121 NW 521. In action for injuries to wife, a charge that the jury might consider loss of earning capacity which she might have sustained held harmless error in view of the evidence and Comp. St. 1907, c. 53, providing that earnings from her labor shall be her sole property. Montgomery v. Miller, 83 Neb. 625, 120 NW 197.

64. Where a married woman had been a nurse prior to marriage and engaged in nursing from time to time thereafter but had not done so for a year prior to her injury, held she could not recover for injury to her separate business and individual earnings. Skow v. Green Bay & W. R. Co., 141 Wis. 21, 123 NW 138.

65, 66. Feneff v. New York Cent. & H. R. R. Co., 203 Mass. 278, 89 NE 436.

67. A husband suing for injuries to his wife may not split the elements of damage as to value of her assistance in his business, services in his household, society and companionship, and his testimony that services of which he was deprived were worth a certain amount per week will be deemed to cover his entire loss. Indianapolis Trac. & T. Co. v. Menze [Ind.] 89 NE 370. "Services" within the rule allowing a husband to sue for injuries to his wife include any pecuniary injury suffered from the loss of aid, society and companionship. Indianapolis Trac. & T. Co. v. Menze [Ind.] 88 NE 929.

68. Lagergren v. National Coke & Coal Co., 117 NYS 92.

Right of "consortium" is a right growing out of the marital relation which husband and wife have respectively to enjoy the society and companionship of each other. Feneff v. New York Cent. & H. R. R. Co., 203 Mass. 278, 89 NE 436.

Pleading: A husband seeking to recover for injuries to his wife is ordinarily entitled to recover without special plea for loss of aid, society, and companionship, but extraordinary services must be pleaded. Indianapolis Trac. & T. Co. v. Menze [Ind.] 89 NE 370.

69. Lagergren v. National Coke & Coal Co., 117 NYS 92.

70. Where a husband seeks recovery for injury to his wife, his damages must be determined on a financial basis, and no allowance made for the wife's suffering. Indianapolis Trac. & T. Co. v. Menze [Ind.] 89 NE 370.

71. In action by husband for injuries to

A married man who fraudulently induces a woman to marry him is liable to her in damages.[72]

(§ 9) *B. Criminal conversation and alienation of affections.*[73]—See 11 C. L. 1868 A wife had no right of action for alienation of affection at common law,[74] and such a right of action is not conferred by the statutes conferring general capacity to sue,[75] but the rule that now obtains quite generally is that each spouse has a right to the love, consortium, and companionship of the other,[76] and one who wrongfully entices one spouse away from the other is liable in damages to such other.[77] The gist of the action for alienation of affections is the loss of consortium,[78] and the issue is whether the defendant by wrongful acts caused the separation of husband and wife.[79] Where, therefore, a wife leaves her husband of her own accord without anything being said or done to induce her to go, there is no cause of action.[80] A parent cannot be held liable for alienation of a wife's affections unless acting from improper motives [81] and with malice.[82]

*Defenses.*See 11 C. L. 1869—The husband's adultery is no bar to his action for criminal conversation.[83]

*Parties.*See 11 C. L. 1869—In an action by a wife for alienation of her husband's affections, the husband is not a necessary party.[84]

his wife, defendant has the burden to prove that the husband could have, by proper care and attention, avoided the damages sustained by reason of the injury. International & G. N. R. Co. v. Sandlin [Tex. Civ. App.] 122 SW 60.

72. Where a married man entered into a marriage contract with an unmarried woman and she nursed him through a sickness, she had a cause of action against him for marrying her while his wife was living. Colt v. O'Connor, 59 Misc. 83, 109 NYS 689.

73. Search Note: See notes in 5 C. L. 1751; 8 Id. 148; 10 Id. 21; 28 A. S. R. 217; 44 Id. 845; 46 Id. 472; 5 Ann. Cas. 867; 6 Id. 661; 7 Id. 689; 8 Id. 674, 813; 9 Id. 960; 10 Id. 62.

See, also, Husband and Wife, Cent. Dig §§ 1117-1137; Dec. Dig. §§ 322-354; 21 Cyc. 1617-1633; 1 A. & E. Enc. L. (2ed.) 162; 8 Id. 260; 15 Id. 862, 864; 5 A. & E. Enc. P. & P. 616.

74. Sims v. Sims [N. J. Law] 72 A 424.

75. Not given by Act May 17, 1906 (P. L. p. 525). Sims v. Sims [N. J. Law] 72 A 424.

76. A wife has a right of action against one who maliciously entices her husband away from her and deprives her of his comfort and society. Messervy v. Messervy, 82 S. C. 559, 64 SE 753.

77. One who alienates a wife's affections from her husband. Boland v. Stanley [Ark.] 115 SW 163.

78. McGregor v. McGregor [Ky.] 115 SW 802.

79. McGregor v. McGregor [Ky.] 115 SW 802. In an action by a father against his son for alienation of his wife's affections, evidence that the son had been refused a loan by his father held insufficient to show a motive of revenge. Id.

80. Boland v. Stanley [Ark.] 115 SW 163. Son held not liable for alienation of his mother's affections from his father, though he was not as considerate as he might have been, where his parents were ill mated and quarreled and the wife had voluntarily left her home. McGregor v. McGregor [Ky.] 115 SW 802.

81. Boland v. Stanley [Ark.] 115 SW 163. Parents who are actuated with reasonable parental regard for their daughter's welfare may advise her to desert her husband without becoming liable for alienation of affections. Jones v. Monson, 137 Wis. 478, 119 NW 179. In determining whether parents maliciously conspired to alienate their son's affections for his wife, the evidence should be considered in view of their rights and obligations respecting his welfare. White v. White, 140 Wis. 538, 122 NW 1051.

Instructions: A charge that, if parents who have "knowledge of their daughter's actual situation" act in honest belief that separation from her husband advised by them is for her welfare, their acts cannot be deemed malicious, held harmless as to them. Jones v. Monson, 137 Wis. 478, 119 NW 179. In action against a parent for alienation of a husband's affections, a charge that it is presumed that acts and influences of a parent relative to a child are in good faith and with sufficient cause, but if shown otherwise the parent would be liable, was erroneous, the mental attitude, design, or intention being eliminated. Kelso v. Kelso [Ind. App.] 86 NE 1001.

82. In an action for alienation of a husband's affections, malice is a question of fact. Kelso v. Kelso [Ind. App.] 86 NE 1001. "Malice" in an action for alienation of affections does not necessarily mean revengeful, spiteful, etc., but if the conduct was unjustifiable malice in law will be implied. Boland v. Stanley [Ark.] 115 SW 163.

Instructions: In an action for alienation of a husband's affections, a charge that malice is an act done intentionally and wrongfully, etc., held erroneous. Kelso v. Kelso [Ind. App.] 86 NE 1001.

83. Purdy v. Robinson, 133 App. Div. 155, 117 NYS 295. The bringing of an action for divorce by the wife on the ground of adultry is no bar to an action by the husband for criminal conversation occurring prior to the time of such action commenced or before final decree. Id.

84. Messervy v. Messervy, 82 S. C. 559, 64 SE 753. Under St. 1898, amended by Laws

Pleading and evidence.[See 11 C. L. 1869]—In an action by one spouse for the alienation of the affections of the other, reference in the declaration to a named person as the spouse of the plaintiff is a sufficient averment of the existence of the marriage relation between the plaintiff and such person,[85] and, likewise, it is sufficient to allege generally that at the time of the alleged alienation the plaintiff had the affections of the spouse whose affections are alleged to have been alienated,[86] nor is it necessary to allege specifically the acts by which the alienation was accomplished.[87] In an action for criminal conversation, it is not necessary to allege alienation of affections.[88]

The plaintiff has the burden of connecting the defendant with acts of others.[89]

A stranger in blood inducing a wife to leave her husband or taking her away and encouraging her to remain away has the burden of showing good cause and good faith.[90]

The competency of the plaintiff's spouse as a witness is largely a matter of statutory construction.[91] Where improper conduct between the plaintiff's spouse and the defendant prior to the separation is proved, the subsequent conduct of such parties towards each other is admissible as throwing light on their prior conduct,[92] and an objection that acts of the defendant indicative of innocence of the charge occurred after the bringing of the action, goes to the weight rather than the admissibility of the evidence.[93] Hearsay is generally excluded,[94] and under this rule the declarations of the alienated spouse made after suit brought are usually inadmissible,[95] but the declarations of the plaintiff's spouse as to offers made by the defendant to induce an abandonment of the plaintiff have been held admissible.[96] Acts of the defendant expressive of indignation at the charge upon which the suit is based are not necessarily inadmissible as self-serving.[97]

An action should not be dismissed where there is evidence from which an inference of guilt may be drawn.[97a]

1905, p. 35, c. 17, authorizing a wife to sue for alienation of her husband's affections, her husband is not a proper party defendant. White v. White, 140 Wis. 538, 122 NW 1051.

85, 86. Reavely v. Harris, 145 Ill. App. 545.

87. Allegation of ultimate fact of alienation is sufficient. Reavely v. Harris, 145 Ill. App. 545.

88. Keath v. Shiffer, 37 Pa. Super. Ct. 573.

89. Boland v. Stanley [Ark.] 115 SW 103. **Instruction** in action for alienation of wife's affections held misleading as to burden of proof as to connecting defendant with acts of others. Boland v. Stanley [Ark.] 115 SW 163.

90. Boland v. Stanley [Ark.] 115 SW 163.

91. Under Act May 8, 1907, P. L. 184, wife is competent to testify in rebuttal of attack on her character or conduct, but she is not competent for any other purpose. Keath v. Shiffer, 37 Pa. Super. Ct. 573.

92. Keath v. Shiffer, 37 Pa. Super. Ct. 573.

93. In an action for alienation of a husband's affections, evidence for defendant that her servant had once ejected the husband from her premises is admissible against the objection that at the time of such ejection action had been brought. Hoxie v. Walker [N. H.] 74 A 183.

94. In action by wife against her mother-in-law for alienation of her husband's affections, evidence that her husband had stated that it was defendant's wish that her husband send her to a sanitarium held hearsay. Magers v. Magers [Iowa] 123 NW 330. Testimony that her husband had told her that his mother had asked him to put plaintiff in a sanitarium held hearsay. Id. In an action against parents for alienation of their son's affections from his wife, statements of the husband as to the hostile attitude and disposition of his parents made in their absence are inadmissible. Cochran v. Cochran, 196 N. Y. 86, 89 NE 470.

95. In an action for alienation of a wife's affections, brought against her parent and another joint tort feasor, declarations of the wife after returning to her parent's home as to why she had done so were not admissible. Boland v. Stanley [Ark.] 115 SW 163. In action by a husband for alienation of his wife's affections, her declarations made out of court after the alleged wrongful acts of defendants are not evidence against the husband. Jones v. Monson, 137 Wis. 478, 119 NW 179.

96. In an action by a wife for alienation of her husband's affections, she may testify to declarations by her husband as to offers to him by defendants to induce him to abandon her. White v. White, 140 Wis. 538, 122 NW 1051.

97. The fact that when one sued for alienation of affections heard of rumors that her house was watched appeared indignant held admissible against the objection that it was a self-serving declaration. Hoxie v. Walker [N. H.] 74 A 183.

97a. In an action for alienation of a wife's

Damages.[98]—See 10 C. L. 23—Compensatory [99] and punitive damages may be recovered.[1] The jury may consider the social status of parties in estimating damages,[2] and also the prior, apparent affection of the parties for each other.[3]

§ 10. *Remedies and procedure generally as affected by coverture.*[4]—See 11 C. L. 1871—The right of action for wrongs to the person,[5] and alienation of affections,[6] and involving community property,[7] are treated in previous sections.

Right of action; parties. See 11 C. L. 1871—As a general rule no action can be maintained by one spouse against the other during the existence of the marriage relation,[8] but in some states the wife may, under certain circumstances, bring against her husband a suit though it involves mere property rights,[9] especially where the parties are living separate and apart,[10] and, where she may sue him during marriage, she may continue after marriage a suit commenced against him before marriage,[11] and he has no right, by reason of his marriage to discontinue the suit.[12]

In some states a married woman can maintain an action respecting her separate property,[13] or she and her husband may maintain a joint action upon a joint obligation.[14] In Texas, upon the marriage of a feme sole defendant, her husband must be made a party.[15] The husband is not a necessary party to a suit by the wife against one holding, as stakeholder, money payable to her upon the obtaining of a divorce by her.[16] A wife is a necessary party to a suit by her husband to enforce

affections where there was evidence of many acts from which an inference of alienation might be drawn, it was error to dismiss the action. Merrill v. Leisenring [Mich.] 16 Det. Leg. N. 348, 121 NW 820.

98. See 13 C. L. 1173.

99. $5,000 compensatory, and $1,500 punitive, damages for alienation of a husband's affections held not excessive. White v. White, 140 Wis. 538, 122 NW 1051. For alienation of affections the jury may consider on the question of damages not only loss of affections but also mental anguish and humiliation. Adkins v. Kendrick [Ky.] 115 SW 814.

1. Punitive damages may be awarded for alienation of a husband's affections. White v. White, 140 Wis. 538, 122 NW 1051.

2, 3. Keath v. Shiffer, 37 Pa. Super. Ct. 573.

4. Search Note: See notes in 5 C. L. 1753; 60 A. S. R. 656; 73 Id. 268; 77 Id. 228; 3 Ann. Cas. 145, 915; 6 Id. 1032; 9 Id. 1116; 10 Id. 714.

See, also, Husband and Wife, Cent. Dig. §§ 701-710, 738-877; Dec. Dig. §§ 176-178, 203-244; 21 Cyc. 1492-1496, 1512-1592; 10 A. & E. Enc. P. & P. 191.

5. See ante, § 9A.

6. See ante, § 9B.

7. See ante, § 4C.

8. Under Pol. Code, § 4468, the common-law rule that husband and wife are one person and that no action can be maintained by one against the other is in force in California except as modified by statutes. Peters v. Peters [Cal.] 103 P 219. Under Civ. Code, §§ 155, 158, 159, 325, 1093, 1094, 1187, and Civ. Code Proc. § 370, neither husband nor wife can sue the other for personal wrongs inflicted during the marriage. Id.

9. May sue for personal debt or to cancel conveyance fraudulently obtained by him from her. Holland v. Riggs [Tex. Civ. App.] 116 SW 167.

10. A wife may sue her husband for her separate property and the court may grant her power to manage and control it where there has been a permanent separation, though they are living in the same house. Heintz v. Heintz [Tex. Civ. App.] 120 SW 941. Independently of a wife's suit for divorce and custody of the children, she can sue her husband to recover money belonging to her separate estate wrongfully converted by him and also have a resulting trust declared in land held by him in his name but paid for in whole or part from her separate funds. Id.

11. Holland v. Riggs [Tex. Civ. App.] 116 SW 167. May continue suit to cancel conveyance fraudulently obtained by him from her. Id.

12. Holland v. Riggs [Tex. Civ. App.] 116 SW 167.

13. Under Revisal 1905, § 408, permitting a married woman to sue alone respecting her separate property, she is properly permitted to sue alone for injury to her land. Villis v. White & Co., 150 N. C. 199, 63 SE 942. Under Code, § 3164, authorizing a married woman to contract and incur liabilities, she may keep boarders as an independent occupation and may recover for services rendered in caring for a boarder. Bartholomew v. Adams [Iowa] 121 NW 1026. Revisal 1905, § 408, expressly provides that where a wife sues to recover her separate property her husband need not join. Ricks v. Wilson [N. C.] 65 SE 614. A married woman who owns land is the only necessary party defendant to a suit to recover back taxes on the land. Sanzenbacher v. Santhuff, 220 Mo. 274, 119 SW 395.

14. Where services are jointly rendered by husband, it is proper for them to join as parties plaintiff in an action therefor. Brinton v. Thomas [Mo. App.] 119 SW 1016.

15. Sayle's Ann. Civ. St. 1897, art. 1253. Balfour v. Tuck [Tex. Civ. App.] 115 SW 841.

Return of service upon nonresident who married feme sole defendant held sufficient, though not in statutory form, the nonresident defendant having accepted service and acknowledged receipt of notice. Balfour v. Tuck [Tex. Civ. App.] 115 SW 841.

16. Levine v. Klein, 58 Misc. 339, 111 NYS 174.

specific performance of a contract for the sale of land, title to which is in her name.[17] A complaint against a married woman must show that it is on an obligation for which she can be held liable.[18] In Louisiana a husband without having qualified to represent the succession cannot continue a suit instituted by his deceased wife.[19]

The right of an infant husband to sue is treated elsewhere.[20]

§ 11. *Proceedings to compel support of wife.*[21]—See 11 C. L. 1872—The husband's duty to support his wife as distinct from the enforcement of such right has been treated in previous sections.[22] Where the wife is living separate and apart from her husband,[23] and the separation is due to the fault of the husband,[24] the wife may generally sue for separate support and maintenance,[25] but she is not entitled to such relief if she is at fault.[26] In Missouri there must be both abandonment and nonsupport in order to sustain the statutory action.[27]

*Procedure.*See 11 C. L. 1873—As a rule, the plaintiff need not, as in a divorce suit, have lived in the state for a certain length of time,[28] and, under some of the stat-

17. Muldon v. Brawner [Fla.] 49 S 124.

18. Where a complaint on a note and mortgage shows that the defendant is a married woman, it must show that the note and mortgage evidence a contract which she is competent to make. Barnhill v. Polk [Ark.] 115 SW 937. Where complaint against husband and wife contained the ordinary allegations of an action to recover land and a general denial was entered, facts indicating an equity in the wife would not be considered. Windley v. Swain, 150 N. C. 356, 63 SE 1057.

19. Sanders v. Schilling, 123 La. 1009, 49 S 689. The husband's authorization of his wife to institute suit must appear of record. Id.

20. See Infants, § 8.

21. **Search Note:** See notes in 8 C. L. 152; 61 L. R. A. 292; 64 A. S. R. 861.

See, also, Husband and Wife, Cent. Dig. §§ 1100-1116; Dec. Dig. §§ 302-321; 21 Cyc. 1611-1617; 15 A. & E. Enc. L. (2ed.) 811, 858; 25 Id. 451.

22. See ante, §§ 2A, 5.

23. Where a husband fails to support his wife, she does not lose her right of action under Ann. St. 1906, § 2375, for support by continuing to live in the same house with him, but apart from him, as refusal to support amounts to abandonment. Polster v. Polster [Mo. App.] 123 SW 81.

24. Under Act May 7, 1907 (P. L. p. 482) the only "justifiable cause" for abandoning or separating from and refusing to support a wife is a matrimonial offense on her part which would entitle the husband to a divorce. Bradbury v. Bradbury [N. J. Eq.] 74 A 150. Such cause must be pleaded and proved. Id. Where a husband's conduct is such as to render it impossible for his wife to live with him, she may leave the home without forfeiting her right to bring action for support under Ann. St. 1906, p. 2375. Polster v. Polster [Mo. App.] 123 SW 81.

25. Duty to support may be enforced by legal proceedings where wife, without her fault, is living separate and apart from husband. Rev. St. c. 68. Reifschneider v. Reifschneider, 144 Ill. App. 119.

Evidence insufficient to warrant a decree compelling a husband to support a wife while she was voluntarily absent from his home where the charges were that he acted rudely at home and at times called her a liar, but she often quarreled with him and was of jealous disposition. Righter v. Righter [Ky.] 114 SW 786. Evidence sufficient to sustain a judgment for support of a wife and child on the ground of abandonment. Polster v. Polster [Mo. App.] 123 SW 81. Evidence sufficient to show that a wife was abandoned by her husband without good cause. Louis v. Louis, 134 Mo. App. 566, 114 SW 1150.

26. Evidence sufficient to show that a wife was at fault and not entitled to separate maintenance. Gorbrandt v. Gorbrandt [Ky.] 115 SW 210. Code Civ. Proc. §§ 1762, 1765, providing for separate support and defenses thereto held to authorize a husband to refuse to separately support an adulterous wife though he had himself been guilty of adultery. Hawkins v. Hawkins, 193 N. Y. 409, 86 NE 468. That the court had refused the husband a divorce because of his adultery did not continue in force his obligation to support her so that he could not set up her misconduct as a defense as provided by Code Civ. Proc. § 1765. Id. The fact that the wife's right of dower and of administration on her husband's estate was not annulled would not preclude such defense. Id.

27. To authorize action against a husband under Ann. St. 1906, p. 2375, for support of his wife and children, there must be both abandonment and failure to support. Polster v. Polster [Mo. App.] 123 SW 81.

28. Under Hurd's Rev. St. 1908, c. 69, § 23, providing that the suit may be brought in the county where the husband resides, it may be brought there though the wife resides in another state. Reifschneider v. Reifschneider, 241 Ill. 92, 89 NE 255, afg. 144 Ill. App. 119. Where one of the parties is actually, legally and bona fide domiciled in the state as a citizen thereof, the chancery courts have jurisdiction to enforce the duty of maintenance and support due from the husband to the wife by awarding alimony particularly where personal service is made upon the husband within the state. Wood v. Wood, 56 Fla. 882, 47 S 560. Ball. Ann. Codes & St. § 5718, requiring one year's residence in order to maintain an action for divorce does not apply to an equitable suit for separate maintenance. State v. King County Super. Ct. [Wash.] 104 P 771.

utes, the suit may be maintained by a resident wife against a nonresident husband,[29] and the proceedings are not necessarily precluded by the pendency of a divorce suit between the parties in another state.[30] In Alabama, courts of chancery have original jurisdiction to award alimony independently of a bill for divorce,[31] and the same practice prevails in Florida[32] and Georgia.[33]

The suit may be brought in the wife's own name.[34] The petition is usually held sufficient where it follows the statute,[35] and objections to its sufficiency in most respects are waived by appearance and defense to the merits.[36] An amendment alleging that the plaintiff and defendant were living in a voluntary state of separation when suit was filed does not bring the case within the Georgia statute where an allegation of the original petition that when suit was brought the parties were living together remains unstricken.[37] The proceeding is special, and other claims cannot be engrafted upon it,[38] but objections to a cross bill for divorce are waived by replying.[39] The marriage relation between the parties should in general be made to appear at least prima facie by proof or admission before a reference to a master is made for the purpose of taking testimony as to alimony suit, money and counsel fees, since, if the marital relation does not exist, the defendant is not liable,[40] but, when the bill alleges the marriage and is sworn to, the defendant will be held to waive objection to failure to prove the marriage where he does not seasonably present questions in regard thereto.[41] In Georgia an order granting temporary alimony in such proceedings may be made at chambers.[42]

29. Under Rev. St. c 68, § 22, providing that complainant may have her remedy in equity, and c. 22, § 3, providing that suits in equity may be maintained in any county, and Rev. St. c. 40, §§ 5, 6, providing that proceedings under divorce act shall be same as in cases in chancery, except as otherwise provided, the court had jurisdiction of suit for separate maintenance against a nonresident where complainant, under prayer for general relief, was entitled to divorce. MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848, afg. 141 Ill. App. 126.

Waiver of objection: Nonresident defendant in a suit for separate maintenance who made a defense to an order to show cause held to have waived want of jurisdiction over his person. MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848, afg. 141 Ill. App. 126.

Venue: Hurd's Rev. St. 1908, c. 68, §§ 22, 23, relative to venue of actions for separate maintenance, determines the venue where the husband resides in the state, and Hurd's Rev. St. 1908, § 22, controls where he is a nonresident. MacKenzie v. MacKenzie, 238 Ill. 616, 87 NE 848, afg. 141 Ill. App. 126.

30. Wood v. Wood, 56 Fla. 882, 47 S 560.

31. To an abandoned wife. Clisby v. Clisby [Ala.] 49 S 445.

32. Wood v. Wood, 56 Fla. 882, 47 S 560.

33. Hughes v. Hughes [Ga.] 65 SE 404.

34. Wood v. Wood, 56 Fla. 882, 47 S 560.

35. Bill alleging that defendant willfully and without reasonable cause deserted plaintiff and their child at Chicago, Illinois, leaving them without means of support, that such desertion has been continuous, etc., held sufficient, though it did not in terms allege that plaintiff, without her fault, was living separate and apart from defendant. MacKenzie v. MacKenzie, 141 Ill. App. 126.

36. Objection to bill as one for separate maintenance under Rev. St. c. 68, §§ 22, 23, held waived by appearance and defense on merits to claim for alimony. MacKenzie v. MacKenzie, 141 Ill. App. 126.

37. Branch v. Branch [Ga.] 66 SE 243.

38. Proceedings under Ann. St. 1906, pp. 2375-2388, relative to wife abandonment and maintenance, are special, and the courts or parties cannot by consent or otherwise engraft upon it any other claim or action by way of counterclaim or otherwise. Sharpe v. Sharpe, 134 Mo. App. 278, 114 SW 584. In a proceeding under such statute, the only questions are whether the husband has abandoned the wife without cause or neglects or refuses to support her, and a cross action for divorce is improper. Id.

39. In a suit for separate maintenance a wife waives every objection to her husband's cross bill for divorce by replying to it, except the question of the jurisdiction of the court to decree a divorce on the cross bill. Sharpe v. Sharpe, 134 Mo. App. 278, 114 SW 584.

40. Wood v. Wood, 56 Fla. 882, 47 S 560.

41. In proceedings for temporary alimony and suit money, justice demands some degree of expedition, and, where the defendant is notified of an application for the taking of testimony as to temporary alimony and suit money, he should seasonably present questions as to the existence of the marriage relation between himself and the complainant where that relation prima facie appears. Wood v. Wood, 56 Fla. 882, 47 S 560. In a suit for alimony where the bill alleging the marriage is sworn to and the defendant is notified of and is heard by counsel upon the application for a reference to a master to take testimony as to temporary alimony and counsel fees, and the defendant testifies before the master without calling in question the existence of the marriage relation, he cannot complain of the reference to a master before demurrer or

*Relief obtainable.*See 11 C. L. 1875—The object and purpose of a bill for separate support is not to sever the ties of matrimony but to provide for the wife during separation.[48] The amount of the allowance rests largely in the discretion of the court,[44] but is usually measured by the husband's means and the position of the parties,[45] and a prospective inheritance by the husband may be considered,[46] and so also amount which the husband has, in a separation agreement, undertaken to pay.[47] The allowance, however, ought not to be fixed or permanent, but should always be left open to be increased or diminished in case of change of condition or necessities.[48] Attorney's fees [49] and temporary alimony [50] may be awarded within the discretion of the court,[51] provided the marriage relationship is not in issue.[52] Costs are within the court's discretion.[53]

*Form, effect and enforcement of the decree.*See 11 C. L. 1875—An order requiring a husband to pay an allowance for his wife's separate support may be suspended where the circumstances require it.[54] In New York a judgment by consent cannot be rendered in such proceedings.[55]

*Right of appeal.*See 11 C. L. 1878

§ 12. *Crimes and criminal responsibility.*[56]—See 11 C. L. 1876—The state has power to make wife desertion a crime,[57] and the crime so created is extraditable.[58]

answer filed since the marriage prima facie appears. Id.

42. Where, pending suit for permanent alimony, an application is made for temporary alimony under Civ. Code 1895, § 2467, the judge at chambers in a county in which defendant does not reside has jurisdiction to grant the petition, where defendant has been given proper notice. Hughes v. Hughes [Ga.] 65 SE 404.

43. The parties still remain husband and wife with the same rights and disabilities. Clisby v. Clisby [Ala.] 49 S 445. Where a wife on separation from her husband by agreement sues for alimony, the court cannot take property of one spouse and give it to the other. The only duty it can enforce is that of support. Id.

44. On a hearing of an application for temporary alimony and counsel fees, the court may allow such sum as in its discretion appears proper. Hughes v. Hughes [Ga.] 65 SE 404. A decree fixing an allowance will not be disturbed on appeal except where there is a decided difference of opinion between the lower and the reviewing court. Wand v. Wand, 142 Ill. App. 247.

45. Clisby v. Clisby [Ala.] 49 S 445.

46. Reifschneider v. Reifschneider, 241 Ill. 92, 89 NE 225, afg. 144 Ill. App. 119.

47. Monthly allowances agreed upon should be allowed from time of failure to pay same, less amounts paid as temporary alimony. Clisby v. Clisby [Ala.] 49 S 445.

48. Clisby v. Clisby [Ala.] 49 S 445. Where husband's conduct showed lack of affection for his wife and a desire to get rid of her, the court on awarding alimony properly ordered that, if the parties unconditionally consented to live together, the suit would be dismissed. Louis v. Louis, 134 Mo. App. 566, 114 SW 1150.

49. Where on separation the husband fails to make payments for support as agreed, the wife should be awarded necessary attorney's fees. Clisby v. Clisby [Ala.] 49 S 445.

50. In an action for separate maintenance where the marriage ceremony is admitted or proved and only its legality is questioned, the court may allow the wife temporary alimony. Reifschneider v. Reifschneider, 241 Ill. 92, 89 NE 255, afg. 144 Ill. App. 119; Hughes v. Hughes [Ga.] 65 SE 404; Wood v. Wood, 56 Fla. 882, 47 S 560.

51. Whether a temporary allowance shall be made the wife and the amount thereof rests in the discretion of the court. Reifschneider v. Reifschneider, 241 Ill. 92, 89 NE 255. Evidence sufficient to justify weekly allowance of $7.50 and $100 attorney's fees. Id.

52. In a suit for separate maintenance, where the question of marriage is put in issue, the court cannot award suit money and alimony pending final hearing. State v. King County Super. Ct. [Wash.] 104 P 771.

53. Award of costs in suit by a wife for separate maintenance and division of community property is in the discretion of the court. Loeper v. Loeper, 51 Wash. 682, 99 P 1029.

54. Where a husband was denied the privilege of personal intercourse with his wife or the privilege of calling on her for the purpose of endeavoring to affect a reconciliation and he had at no time been guilty of conduct that would deny him the status of a husband, held he was entitled to suspension of an order requiring him to pay for her separate maintenance. Lamsback v. Lamsback [N. J. Eq.] 71 A 387.

55. Under General Rules of Practice No. 76, providing that no order for a separation shall be made of course by default or by consent, a judgment by consent is void. Boyer v. Boyer, 129 App. Div. 647, 114 NYS 15.

56. Search Note: See notes in 3 C. L. 1689; 33 A. S. R. 89; 2 Ann. Cas. 37.

See, also, Husband and Wife, Cent. Dig. §§ 271, 384-391; Dec. Dig. §§ 54, 107, 108; 21 Cyc. 1303, 1353-1355; 4 A. & E. Enc. L. (2ed.) 596; 15 Id. 901.

57, 58. Commonwealth v. Hare, 36 Pa. Super. Ct. 125.

The statutes in this regard must, of course, conform to the ordinary constitutional limitations,[59] and accordingly in Texas the fine imposed cannot be made payable to the wife,[60] but the rule seems to be otherwise in Maine.[61] In Texas, furthermore, it is held that a provision, authorizing the court to suspend the trial or the sentence after trial upon the giving of a recognizance by the husband conditioned upon the payment of an allowance to the wife, is void as authorizing a judicial suspension of the laws [62] but in Michigan a similar provision has been sustained [63] and so also in Louisiana.[64] The offense as ordinarily defined consists of the willful desertion by the husband [65] of his wife and family [66] without just cause,[67] and without making adequate provision for them,[68] thus leaving them in destitute circumstances.[69]

59. Pub. Acts 1907, p. 182, No. 144, making it a felony for a husband to desert his wife, held not void because expressing more than one subject in its **title.** People v. Stickle, 156 Mich. 557, 16 Det. Leg. N. 204, 121 NW 497. Such statute does not contain **distinct legislative objects.** Id. Laws 1907, p. 133, c. 62, punishing wife desertion, held void as depriving accused of his constitutional **right to a jury trial.** Ex parte Smythe [Tex. Cr. R.] 120 SW 200. Laws 1907, c. 42, providing for fine and imprisonment of a husband who deserts his wife, held not unconstitutional on the ground that he is deprived of a jury trial, since defendant has right of appeal and right to jury trial on the appeal. Sprague v. Androscoggin County, 104 Me. 352, 71 A 1090.

60. Laws 1907, p. 133, c. 62, providing for punishment of wife desertion by fine which shall be paid to the wife, is void as in conflict with Const. art. 16, § 6, providing that no appropriation shall be made for private purposes, and fines are state funds which cannot be so appropriated. Ex parte Smythe [Tex. Cr. R.] 120 SW 200.

61. See Sprague v. Androscoggin County, 104 Me. 352, 71 A 1090, where Laws 1907, p. 36, c. 42, providing for the proceeds of the husband's labor while in jail shall be paid to the wife, was sustained as against an attack on grounds not involving the disposition of the fine, etc.

62. Contrary to Const. art. 1, § 28. Ex parte Smythe [Tex. Cr. R.] 120 SW 200; Burch v. State [Tex. Cr. R.] 120 SW 206; Phillips v. State [Tex. Cr. R.] 120 SW 207; Waller v. State [Tex. Cr. R.] 120 SW 207; Schneider v. State [Tex. Cr. R.] 120 SW 207; King v. State [Tex. Cr. R.] 120 SW 1198.

63. Such statute is not void as invading the pardoning power because it authorizes the court to suspend sentence upon the husband's giving bond. People v. Stickle, 156 Mich. 557, 16 Det. Leg. N. 204, 121 NW 497. Such statute is not void as interfering with the power of the court to impose sentence. Id.

64. See State v. Gersdorf [La.] 50 S 528.

65. Conviction under Code Cr. Proc. § 899, for neglect of a husband to provide for his wife, is not sustainable where she left him without adequate cause. People v. De Wolf, 118 NYS 75. Abandonment or desertion of a wife within Pub. Acts 1907, p. 182, No. 144, separate wrongfully, without intention of making wife desertion a felony, means to again resuming marital relations. People v. Stickle, 156 Mich. 557, 16 Det. Leg. N. 204, 121 NW 497.

66. Where a husband was charged with abandonment of wife and child under Code 1907, § 7843, the proof must show abandonment of both. Carnley v. State [Ala.] 50 S 362. Where one is charged with abandonment of wife and child, **proof of marriage and paternity** of child was essential. Id. In prosecution for abandonment of a wife and child where accused denied paternity of the child, testimony of one that he had had intercourse with the woman within the period of gestation was admissible, the husband and wife being separated. Id.

67. Code 1907, § 7843, defining a vagrant as an ablebodied man who abandons his wife without just cause, does not make it an offense for one to abandon a wife where he was fraudulently induced to marry her under the belief that he was the father of her child. Carnley v. State [Ala.] 50 S 362. A quarrel or series of quarrels for which the wife was responsible is not just cause for a husband to desert her within Code 1904, § 3795c. Burton v. Com. [Va.] 63 SE 464.

Evidence: That a husband abandoned his wife without good cause may be shown by circumstantial evidence. State v. Williams, 136 Mo. App. 304, 116 SW 1128. Evidence sufficient to show abandonment "without good cause" which means such cause as will authorize a decree of divorce in favor of the husband. Id. A husband who maintained his wife at his father's home and who induced her to leave there under pretext of making a visit to the home of her father, and who then clandestinely deserted her at a nearby town leaving her without money, is guilty of abandonment. Id.

68. Where one married a woman he had seduced and arranged for her to stay with her parents until after her accouchment, and thereafter rented a place which his wife declared she would not live in and which he gave up. He paid a portion of her doctor bill and she was living with her parents but he did not visit her. Held he was not guilty of willfully refusing to provide for her. State v. Fuller [Iowa] 121 NW 3.

69. In order to convict a husband of neglect to support his wife under Code Cr. Proc. § 899, it is essential that the wife, because of such neglect, is likely to become a public charge. People v. De Wolf, 118 NYS 75. Evidence insufficient to show that a wife was in destitute or necessitous circumstances within the meaning of Code 1904, § 3759c. Burton v. Com. [Va.] 63 SE 464. A charge in a prosecution for wife desertion under Code 1904, § 3795c, that if the husband left money for his wife a part of which she still had and that, if she had jewels and land, she was not destitute, was

The crime is considered to occur at the moment of the desertion or at any moment during the continuance thereof.[70] Under the Michigan statute, the wife may be the complaining witness,[71] and in Alabama she is a competent witness against him.[72] The offense being a crime, an order requiring the defendant to pay a certain sum to his wife, no fine or punishment being imposed, is not a final judgment.[73]

In Kansas a husband may be guilty of arson as against his wife,[74] and in North Carolina he may be convicted of criminal slander.[75]

Ice; Illegal Contracts; Immigration; Impairing Obligation of Contract; Impeachment, see latest topical index.

IMPLIED CONTRACTS.

The scope of this topic is noted below.[76]

§ 1. Definitions and Distinctions, 2203.
§ 2. Work and Labor or Services and Material Furnished, 2204. Services and Materials Furnished by Member of Family, 2205. Right to Recover for Improvements Made on Lands of Another, 2206.
§ 3. Moneys Had and Received and Money Paid, 2200.
§ 4. Use and Occupation, 2210.
§ 5. Tort as Basis of Implied Contract, 2210.
§ 6. Remedies and Procedure, 2210.

§ 1. *Definitions and distinctions.*[77]—See 11 C. L. 1878—The term "implied contract" is often used to include both contracts implied in fact and contracts implied in law.[78] The former are such as are found to exist as a matter of fact,[79] whereas

properly refused as there is no fixed standard as to what constitutes destitute circumstances. Id.

In Michigan, it is the desertion of the wife and children without making provision for their support which is the essence of the crime and not the liability of the family to become a public burden. People v. Stickle, 156 Mich. 557, 16 Det. Leg. N. 204, 121 NW 497. Husband's inability to provide for family, and fact that they are not destitute and are in no danger of becoming so, held no defense. Id.

70. Under Code 1904, § 3795c. Burton v. Com. [Va.] 63 SE 464.

71. Under Pub. Acts 1907, p. 182, No. 144, punishing wife desertion and authorizing the wife to testify against her husband, she may be the complaining witness. People v. Stickle, 156 Mich. 557, 16 Det. Leg. N. 204, 121 NW 497.

72. Carnley v. State [Ala.] 50 S 362. In a prosecution for abandonment of wife and child, testimony of the wife that accused was the father of the child was competent. Id.

73. State v. Gersdorf [La.] 50 S 528. Hence is not appealable. Id.

74. Under the laws of Kansas, the legal identity of husband and wife does not prevent him from being guilty of arson for burning his wife's house. State v. Shaw, 79 Kan. 396, 100 P 78. Gen. St. 1901, § 2046. Id.

75. Under Revisal 1905, § 3640, making it an offense to slander another, a husband may be convicted of slandering his wife. State v. Fulton, 149 N. C. 485, 63 SE 145.

76. Treats of contracts implied in law as distinguished from contracts implied in fact, the latter being treated in another topic. See Contracts,* § 1B. Practice in the action of assumpsit (see Assumpsit*), implied terms in express contracts (see Contracts,* § 4A), and duties and obligations implied in particular relations (see Bailment,* §§ 2, 3; Banking and Finance,* §§ 6, 8, 9; Attorneys and Counselors,* § 5; Master and Servant,* § 2, and like topics), are treated elsewhere. As to the right to recover upon a quantum meruit or quantum valebat upon breach of express contracts, see such titles as Brokers,* § 4; Contracts,* § 9; Sales,* § 10E. As to election between tort and implied contract, see Election and Waiver,* § 2A, but the question as to what torts give rise to implied contracts is considered herein. So, also, duress, fraud and mistake as a basis of implied contracts are retained, but the consideration of what constitutes duress, fraud or mistake is relegated to topics dealing with these matters (see Duress;* Fraud and Undue Influence;* Mistake and Accident*) except in so far as such matters may relate peculiarly to the subject in hand.

77. Search Note: See notes in 2 C. L. 285; 16 L. R. A. 1004.

See, also, Contracts, Cent. Dig. §§ 4-6, 121-132; Dec. Dig. §§ 4, 27; 9 Cyc. 242, 258; Money Lent, Cent. Dig.; Dec. Dig.; 27 Cyc. 826-831; Money Paid, Cent. Dig.; Dec. Dig.; 27 Cyc. 833-846; Money Received, Cent. Dig.; Dec. Dig.; 27 Cyc. 849-886; Use and Occupation, Cent. Dig.; Dec. Dig.; Work and Labor, Cent. Dig.; Dec. Dig.; 15 A. & E. Enc. L. (2ed.) 1076, 1077.

78. Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 NE 1085.

79, 80. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461.

the latter, to which this article is confined, are imposed by law where the minds of the parties never met.[80] As such, they are sometimes termed "quasi," or "constructive" contracts.[81] Since they are imposed from considerations of reason and justice,[82] they are often created not only without the assent of the party bound [83] but even in spite of his express dissent.[84] The law will not imply a contract where there is an actual contract, either express [85] or implied,[86] even though in its absence the circumstances would have justified such implication,[87] but it may supply terms omitted from an actual contract [88] or imply a promise to pay for services rendered under an unenforcible contract.[89] A corporation may be bound by an implied contract just as a natural person,[90] but its promise cannot be implied from noncorporate action.[91] Certain obligations created by statute are treated as quasi contractual.[92] An act in excess of one's legal duty will not give rise to the implication of a promise to continue such acts.[93]

§ 2. *Work and labor or services and material furnished.*[94] See 11 C. L. 1877. The law implies a promise to pay for services, where such would be the reasonable expectation of the parties themselves, in view of the character of the services and the circumstances under which they were performed.[95] Facts unknown to the person rendering the service will not prevent such an implication.[96] It is usually sufficient to show that the work was done at the defendant's request,[97] provided, of course, that it was beneficial,[98] and it is not necessary that the defendant be the person bene-

81. Leonard v. State [Tex. Cr. R.] 120 SW 183.

82. Leonard v. State [Tex. Cr. R.] 120 SW 183; Wagner v. Edison Elec. Illuminating Co. [Mo. App.] 121 SW 329; Marvin v. Rogers [Tex. Civ. App.] 115 SW 863; Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 NE 1085.

83. Implied contract of bailment, where one obtains the personalty of another by fraud, misrepresentation or deceit. Leonard v. State [Tex. Cr. R.] 120 SW 183; Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 NE 1085.

84. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461; Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 NE 1085.

85. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461; Brougham v. Paul, 138 Ill. App. 455. Where defendant agreed to pay another's debt to plaintiff in consideration of the debtor's transfer to defendant of certain notes and mortgages, action for money had and received will not lie. McCormick-Ormond Co. v. Nofziger Bros. Lumber Co., 10 Cal. App. 241, 101 P 688.

86. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461. Mutual intention of charge and payment. Wagner v. Edison Elec. Illuminating Co. [Mo. App.] 121 SW 329.

87. Where infant living with strangers accepted his necessaries and $100 in full payment for his services. Robinson v. Van Vleet [Ark.] 121 NW 288.

88. Implication of reasonable compensation, where compensation not covered. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, 116 SW 461.

89. Oral agreement within statue of fraud. Flowers v. Poorman [Ind. App.] 87 NE 1107.

90. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766.

91. Agreement of majority of stockholders to employ plaintiff gives rise to no implied promise of corporation to pay therefor, corporation not being party to the agreement. Clark v. National Steel & Wire Co. [Conn.] 72 A 930.

92. Duty of school district under Laws 1903, p. 148, c. 132, to pay local pupil's tuition at neighboring school in grades not provided by local school. Yankton Board of Education v. School Dist. No. 19 [S. D.] 122 NW 411. Right of subcontractor to enforce lien against owner and contractor jointly under § 28, Lien Act (Laws 1903, p. 241; Hurd's Rev. St. 1908, c. 82, § 42), held to be an implied promise of contractor, within meaning of Hurd's Rev. St. 1908, c. 37, § 265, allowing municipal court of Chicago jurisdiction of "all actions on contracts, express or implied," etc. Harty Bros. & Harty Co. v. Polakow, 237 Ill. 559, 86 NE 1085.

93. Payment by owner to contractor for certain injuries caused by co-contractors, though expressly excused from such liability by contract, is no ground for claim for other similar injuries. Bannan v. Jackson [Tenn.] 117 SW 504.

94. **Search Note:** See notes in 2 C. L. 287; 1 L. R. A. (N. S.) 819; 8 Ann. Cas. 203.

See, also, Work and Labor, Cent. Dig. §§ 11½-22; Dec. Dig. § 7; 15 A. & E. Enc. L. (2ed.) 1079, 1111.

95. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766. Instruction ignoring such implication erroneous. Wagner v. Edison Elec. Illuminating Co. [Mo. App.] 121 SW 329.

96. Implied promise of both parties to reference to pay stenographer, not negatived by fact that term of order charged the expense to defeated party, unless stenographer knew of these terms before rendition of service. Eckstein v. Schleimer, 62 Misc. 635, 116 NYS 7.

97. Pacific Iron & Steel Works v. Goerig [Wash.] 104 P 151.

98. No promise implied if no benefit conferred. Clark v. National Steel & Wire Co.

fited,[99] or the defendant may be charged by proof that the service was rendered with his knowledge and acquiescence,[1] or that he has accepted it.[2] But no promise is implied to pay for labor or materials furnished by a volunteer,[3] or by one who knows that no valid contract exists.[4] Moreover, where the relationship of the parties is such as to raise a presumption that the service was gratuitous, special circumstances must be shown to rebut that presumption.[5] In any case the amount recoverable upon an implied contract for work and materials [6] or for services [7] is their reasonable value.

*Services and materials furnished by member of family.*See 11 C. L. 1879—Where services are rendered between persons living together as a family,[8] the presumption is that they are gratuitous, even though the person rendering them be not related by blood to the person receiving them,[9] and though the service be rendered outside the home.[10] This presumption is, however, one of fact,[11] which may be overcome by proof of an agreement for compensation, either express [12] or implied.[13] The burden

[Conn.] 72 A 930. No recovery for time and estimates furnished at defendant's request with view to securing award of contract from defendant, and in reliance on promise of award, where award given to another, the services being then of no value to defendant, and no intent to charge had the contract been awarded to plaintiff. Li Greci v. Hanover Realty & Const. Co., 115 NYS 1086.

99. Implied promise where defendant requested repairs of property of third person. Pacific Iron & Steel Works v. Goerig [Wash.] 104 P 151.

1. Where plaintiff performed statutory duty of shoring up defendant's building on land adjoining excavation after defendant failed to do so. Ceffarelli v. Landino [Conn.] 72 A 564. Real estate brokers securing purchaser for defendant's land on terms accepted by defendant. Annabil v. Traverse Land Co., 108 Minn. 37, 121 NW 233.

2. Mahoney v. Hartford Inv. Corp. [Conn.] 73 A 766; Wagner v. Edison Elec. Illuminating Co. [Mo. App.] 121 SW 329; Jackson v. Buice, 132 Ga. 51, 63 SE 823. Stenographer's services. Parties to reference held to joint and several promise to pay therefor. Eckstein v. Schleimer, 62 Misc. 635, 116 NYS 7.

3. Where plaintiff bought farm on which was pastured horse of defendant which latter had ordered grantor to kill, plaintiff never having gotten notice to defendant of intent to charge. Williams v. Patterson, 38 Pa. Super. Ct. 322. Where plaintiff, having lived 22 years with family of defendant's father, remained, though ordered out by defendant, for two years after father's death, no recovery for service during the two years. Ploger v. Bright, 119 NYS 628.

4. Where plaintiff delivered gravel to officer of defendant under agreement of officer for compensation, with constructive notice that officer was powerless to bind defendant thereby, though gravel had been used on defendant's streets. Bartlett v. Lowell, 201 Mass. 151, 87 NE 195.

5. Where plaintiff served on joint committee of several corporations, being in employ of one of them, and defendant furnishing a member, held only such service as were beyond duty as member of committee could be charged to defendant and others. Wagner v. Edison Elec. Illuminating Co. [Mo. App.] 121 SW 329.

See post, this section, as to services by members of family.

6. Repairs done at request without fixing compensation except upper limit. Russell v. Wylly, 119 NYS 155.

7. Stenographer cannot recover 25 cents per folio for transcribing evidence unless service proved worth that, and a custom to allow that is unreasonable. Eckstein v. Schleimer, 62 Misc. 635, 116 NYS 7.

8. By mother to deceased daughter. Rose v. Mayes [Mo. App.] 122 SW 769. By ward of sister. Pearre v. Smith, 110 Md. 531, 73 A 141. By son to father. Cotter v. Cotter [Conn.] 73 A 903; Lowe v. Lowe [Md.] 73 A 878. By son-in-law to father-in-law. Jackson v. Buice, 132 Ga. 51, 63 SE 823. By son to father. Millis v. Thayer, 139 Wis. 480, 121 NW 124. By stepson to stepmother. Satterly v. Dewick, 129 App. Div. 701, 114 NYS 354. By son to mother. More v. Shepard, 133 App. Div. 471, 117 NYS 1095. By child to parent. Weessies v. Hock [Mich.] 16 Det. Leg. N. 852, 123 NW 608; Stone v. Troll, 134 Mo. App. 308, 114 SW 82.

9. Where minor was a member of family of strangers. Robinson v. Van Vleet [Ark.] 121 SW 288.

10. By son in father's factory. Hialey v. Hialey's Estate [Mich.] 16 Det. Leg. N. 244, 121 NW 465.

11. Stone v. Troll, 134 Mo. App. 308, 114 SW 82.

12. Robinson v. Van Vleet [Ark.] 121 SW 288; Cotter v. Cotter [Conn.] 73 A 903; Lowe v. Lowe [Md.] 73 A 878; Rose v. Mayes [Mo. App.] 122 SW 769; Millis v. Thayer, 139 Wis. 480, 121 NW 124.

13. Cotter v. Cotter [Conn.] 73 A 903. By showing mutual intention for payment. Jackson v. Buice, 132 Ga. 51, 63 SE 823. Evidence held insufficient to show contract where son cared for father during declining years. Lowe v. Lowe [Md.] 73 A 878. Held, no contract where mother cared for daughter 14 years, latter furnishing house. Rose v. Mayes [Mo. App.] 122 SW 769. Recovery allowed where son, a wage-earner with 10 children renting 5 room tenement, cared for father for 2 years, and latter told others he would give son all he had. Stone v. Troll, 134 Mo. App. 308, 114 SW 82. Where decedent lived in house he built on land of son-in-law, whose wife carried meals to him

of proving such an agreement is upon the claimant,[14] and when the service in question were rendered to a person now deceased, the proof must be especially clear and convincing,[15] from disinterested and unbiased witnesses.[16] If established, it may of course be made the basis of recovery, whether express[17] or implied.[18] Where the parties did not live together as a family,[19] or their relationship was not close, a promise of payment will be implied.[20]

Right to recover for improvements made on lands of another.[21]—See 10 C. L. 82— A life tenant who has made permanent improvements in the belief that he was the owner in fee may recover from the remainderman the enhanced value due to such improvements.[22]

§ 3. *Moneys had and received and money paid.*[23]—See 11 C. L. 1880—An action for money had and received lies whenever one person has money which in equity and good conscience should be paid over to another.[24] It is immaterial whether the defendant be a natural or artificial person,[25] or how the money came into his possession,[26] whether rightfully or wrongfully,[27] nor is it essential that there be any privity of contract[28] or express promise upon the part of the defendant to pay,[29] for the law under these circumstances implies a promise to pay.[30] The action lies to recover money which the agent of plaintiff's debtor improperly fails to pay over as directed,[31] and to recover money withheld by plaintiff's agent for collection[32] or

from home next door, held no presumption of gratuity. Weessies v. Hock [Mich.] 16 Det. Leg. N. 852, 123 NW 608.

14. Held, not sustained. Lowe v. Lowe [Md.] 73 A 878.

15. Cotter v. Cotter [Conn.] 73 A 903; Bartholomew v. Adams [Iowa] 121 NW 1026; Hoffman v. Condon, 134 App. Div. 205, 118 NYS 899. Not to be inferred by part payment by mother to son. More v. Shepard, 133 App. Div. 471, 117 NYS 1095. Evidence of mutual intention for payment sufficient, where rendered to mother by daughter and son-in-law. Brinton v. Thomas [Mo. App.] 119 SW 1016. Not sufficient where evidence of valuable gifts to one rendering service. Dueser v. Meyer, 129 App. Div. 598, 114 NYS 64.

16. Dueser v. Meyer, 129 App. Div. 598, 114 NYS 64.

17. Flowers v. Poorman [Ind. App.] 87 NE 1107.

18. Jackson v. Buice, 132 Ga. 51, 63 SE 823; Heber v. Heber's Estate, 139 Wis. 472, 121 NW 328.

19. Stepson living elsewhere allowed to recover for harvesting crops at decedent's request. Saddler v. Pichard [Iowa] 121 NW 374.

20. Where niece provided for aunt who came to live with her and performed exacting services during last two years of aunt's life. In re Enos' Estate, 61 Misc. 594, 115 NYS 863.

21. See Accession and Confusion of Property; Ejectment (and Writ of Entry), § 9.

22. Clearing land and straightening creek. Sires v. Clark, 132 Mo. App. 537, 112 SW 526.

23. **Search Note:** See notes in 2 C. L. 292; 3 Id. 1693, 1694; 5 Id. 1769; 8 Id. 162, 164; 96 A. S. R. 81; 3 Ann. Cas. 107.

See, also, Money Lent, Cent. Dig.; Dec. Dig.; 27 Cyc. 826-831; Money Paid, Cent. Dig.; Dec. Dig.; 27 Cyc. 833-846; Money Received, Cent. Dig.; Dec. Dig.; 27 Cyc. 849-886; 15 A. & E. Enc. L. (2ed.) 1096.

24. Hoyt v. Paw Paw Grape Juice Co. [Mich.] 16 Det. Leg. N. 764, 123 NW 529; Stoakes v. Larson, 108 Minn. 234, 121 NW 1112; Jenkins v. Clopton [Mo. App.] 121 SW 759; Montgomery v. Wise [Mo. App.] 120 SW 100; Roberts v. Neale, 134 Mo. App. 612, 114 SW 1120; Davenport v. Walker, 132 App. Div. 96, 116 NYS 411. Money received from plaintiff's testatrix by defendant, neither for value nor by way of gift, so recoverable on all the evidence. Devlin v. Houghton, 202 Mass. 75, 88 NE 580. Where plaintiff bank discounted draft drawn on defendant for shipment of cattle, relying on defendant's agreement to pay the draft made with drawer, held, upon its dishonor by defendant, money had and received maintainable for proceeds of shipment. Bank of Laddonia v. Bright-Coy Com. Co. [Mo. App.] 120 SW 648. But no recovery where defendant deposited in his own name to the use of plaintiff's debtor a certificate of deposit belonging to latter, found by defendant marked in part payment of plaintiff's claim. Jones v. Jones [Wash.] 104 P 786.

25. Hoyt v. Paw Paw Grape Juice Co. [Mich.] 16 Det. Leg. N. 764, 123 NW 529.

26. Stoakes v. Larson, 108 Minn. 234, 121 NW 1112; Montgomery v. Wise [Mo. App.] 120 SW 100.

27. Roberts v. Neale, 134 Mo. App. 612, 114 SW 1120.

28. Stoakes v. Larson, 108 Minn. 234, 121 NW 1112; Hoyt v. Paw Paw Grape Juice Co. [Mich] 16 Det. Leg. N. 764, 123 NW 529.

29. Hoyt v. Paw Paw Grape Juice Co. [Mich.] 16 Det. Leg. N. 764, 123 NW 529.

30. Stoakes v. Larson, 108 Minn. 234, 121 NW 1112; Montgomery v. Wise [Mo. App.] 120 SW 100.

31. Baker v. Hughes, 5 Ga. App. 586, 63 SE 587.

32. Money collected by defendant bank on draft, unless defendant authorized by plaintiff to apply same to payment of plaintiff's note held by bank. Shener v. Enterprise

proceeds in the hands of his agent for sale and collection.[33] Similarly, money may be recovered which has been advanced in good faith under a void contract,[34] or under a contract which the defendant unjustifiably refuses to perform.[35] A prior assignee may maintain the action against one subsequently receiving the money, if the latter is chargeable with notice of his claim,[36] and a prior lienholder may thereby recover from one foreclosing a subsequent lien.[37]

Where the money has been wrongfully received, as by embezzlement,[38] or by usurpation of another's rights,[39] or in excess of the amount due,[40] the law implies a promise to pay it over to the one entitled, and, where property so acquired has been sold to one having notice of the facts, the true owners may either recover it from the purchaser,[41] or recover the proceeds from the vendor.[42] It is not essential that the property received should have been money, if it was reduced to money before the institution of the action.[43] The scope of the action for money had and received is sometimes affected by statute.[44]

An action for money paid is likewise independent of any agreement by the defendant to refund.[45] As a general rule money which has been voluntarily paid with full knowledge of all material facts cannot be recovered,[46] though there was no legal liability to pay,[47] or though the liability was that of the defendant,[48] unless the lat-

Banking Co. [Ala.] 49 S 779. Money collected by attorney, minus only reasonable fee. Jenkins v. Clopton [Mo. App.] 121 SW 759. Money collected on interest coupons at request of bailee of plaintiff's bonds. Young v. Kimber, 44 Colo. 448, 98 P 1132.

33. Defendant's check in payment for cattle sold for plaintiff having been dishonored. Stoakes v. Larson, 108 Minn. 234, 121 NW 1112.

34. Purchase of stock as part consideration for contract of employment invalidly executed. Hoyt v. Paw Paw Grape Juice Co. [Mich.] 16 Det. Leg. N. 764, 123 NW 529.

35. For purchase of land. Thiele v. Carey [Neb.] 123 NW 442; Montgomery v. Wise [Mo. App.] 120 SW 100.

36. From receiver of depositor, where deposit paid to receiver by bank after notice to bank of assignment to plaintiff, though receiver had no actual notice thereof. Hochberger v. Ludvigh, 63 Misc. 313, 116 NYS 696.

37. Holder of seed lien from later chattel mortgagee of wheat. Hyde v. Thompson [N. D.] 120 NW 1095.

38. Williams v. Smith [R. I.] 72 A 1093. Money taken by cashier of plaintiff bank and spent for bonds. Obligation to return bonds. Davenport v. Walker, 132 App. Div. 96, 116 NYS 411.

39. Where statute gave cause of action to execution debtor against bidder failing to carry out his bid, for difference on resale, and execution creditor was wrongly allowed to recover said difference, held to have recovered it for debtor, consequently enjoined from further execution, the execution being satisfied. Shanley v. York [Tex. Civ. App.] 118 SW 146.

40. Where lessee deposited security to be applied in payment of last two months' rent and then forgot and paid said rent. Bodner v. Creceo, 119 NYS 223. But no recovery where first payment was made to defendant's cashier out of hours, and cashier never paid it over to defendant. Keazer v. Colebrook Nat. Bank [N. H.] 73 A 170. Overpayment on note recoverable. Roberts v. Neale, 134 Mo. App. 612, 114 SW 1120.

41. From one taking money known to belong to plaintiff in payment for bonds bought by third person. Davenport v. Walker, 132 App. Div. 96, 116 NYS 411.

42. Bonds bought with plaintiff's money. Davenport v. Walker, 132 App. Div. 96, 116 NYS 411.

43. Devlin v. Houghton, 202 Mass. 75, 88 NE 530.

44. Under Gen. Laws 1896, c. 233, § 16, it may be brought to recover money lost by commission of a crime, provided prosecution first instituted for crime, unless so liable at common law. Williams v. Smith [R. I.] 72 A 1093.

45. Instruction requiring such agreement or admission of liability, erroneous. Fidelity Sav. Bank v. Reeder [Iowa] 120 NW 1029.

46. Kansas City S. R. Co. v. Albers Com. Co., 79 Kan. 59, 99 P 819; Kienle v. Gretsch Realty Co., 133 App. Div. 391, 117 NYS 500; Simms v. Vick [N. C.] 65 SE 621; Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361. Payment by treasurer of society, upon demand, of interest on funds in his possession for a period during which he knew he received no interest. Torretto v. Mutual Aid Soc., 116 NYS 740. Payment by plaintiff of freight on shipment to defendant far in excess of amount authorized by defendant. Wright v. Anderson, 117 NYS 209. Payment on note of more than was due, where plaintiff knew amount due at time of payment. Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 P 1039. Money paid by debtor to secured creditor to defeat unsecured creditors, where morally but not legally bound to make such payment. Monarch v. First Nat. Bank [Ky.] 115 SW 186.

47. Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 P 1039; Torretto v. Mutual Aid Soc., 116 NYS 740; Simms v. Vick [N. C.] 65 SE 621; Garr, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361.

48. Owen Creek Presbyterian Church v. Taggart [Ind. App.] 89 NE 406; Sterling v.

ter requested the payment either expressly [49] or by implication.[50] A fortiori there can be no recovery for the payment of another's debt against the debtor's express direction.[51] Where, however, the debtor ratifies the payment, it may be recovered.[52]

A mistake of law upon the part of the plaintiff in making a voluntary payment does not entitle him to recover where he is morally bound to pay,[53] or where the equities between the parties are equal,[54] but, where he is in equity entitled to recover, he may maintain his action,[55] especially if the payment was made to an officer of the court.[56] By exception, however, on grounds of public policy, a tax voluntarily paid cannot be recovered though illegally collected.[57]

Money paid under a mistake of fact is ordinarily recoverable,[58] even though the person making the mistake had the means of knowing the truth,[59] or made the mistake negligently,[60] unless the defendant has so changed his position in reliance upon the payment that it would be inequitable to require him to refund.[61] But a deliberate payment by one choosing not to investigate the facts is not recoverable.[62] By exception to the general rule, a bank cannot recover money paid on a negotiable instrument drawn upon it by a depositor through a mistake as to the available funds

Chelsea Marble Works, 62 Misc. 626, 115 NYS 1096. Money paid by city to repair sidewalk over which it had no authority (being under control of park commission) not recoverable by city from railroad which ought to have repaired it. City of Chicago v. Pittsburg, etc., R. Co., 242 Ill. 30, 89 NE 648. No recovery by drawee of forged check for innocent payment thereof to payee who was creditor of defendant. Title Guarantee & Trust Co. v. Haven, 196 N. Y. 487, 89 NE 1082.

49. Request by executor of debtor. Owen Creek Presbyterian Church v. Taggart [Ind. App.] 89 NE 406.

50. Implied request to plaintiff to pay premiums required upon policies of insurance which he was the agent of defendants to procure. Sterling v. Chelsea Marble Works, 62 Misc. 626, 115 NYS 1096. Where secured from plaintiff for defendant's benefit by agent of defendant within scope of his authority, by payment of draft drawn on defendant by master of their vessel for outfitting expenses. Commercial Nat. Bank v. Sloman, 194 N. Y. 506, 87 NE 811.

51. Wright v. Anderson, 117 NYS 209.

52. Where lessee sued his partial assignee for rent for portion of premises not assigned, latter entitled to set off payment by him to lessor of rent for said unassigned portion. Johnson v. Zufeldt [Wash.] 104 P 1132.

53. Carpenter v. Southworth [C. C. A.] 165 F 428.

54. Where drawee of draft with forged bill of lading was repaid by bank that collected it, after bank had turned collection over to drawer, bank believing itself liable to drawee, bank cannot compel drawee to refund. Monroe Nat. Bank v. Catlin [Conn.] 73 A 3.

55. Carpenter v. Southworth [C. C. A.] 165 F 428. Proportion of money paid for liquor license, which later proved beyond power of defendant to issue, recoverable for part of year not exercised. Scott v. New Castle Board of Trustees [Ky.] 116 SW 788. But where money was paid for a license required by an illegal ordinance for dancing school, no recovery was allowed in absence of duress. Conley v. Buffalo, 65 Misc. 100, 119 NYS 87.

56. To trustee in bankruptcy, court's duty to set example of fair dealing. Carpenter v. Southworth [C. C. A.] 165 F 428.

57. Owing to prior opportunity to object to assessment, liquor license fee held not a tax. Scott v. New Castle Board of Trustees [Ky.] 116 SW 788.

58. Citizens' Bank v. Schwarzschild & Sulzberger Co. [Va.] 64 SE 954; Monroe Nat. Bank v. Catlin [Conn.] 73 A 3. Real estate broker's commission paid on misrepresentation as to prevailing rate. Moran v. Brown, 113 NYS 1038. Where amount per unit fixed by contract and mistake made by payor in computation. Payne v. Witherbee, Sherman & Co., 132 App. Div. 579, 117 NYS 15. Overpayment on note by one who could not read and had forgotten amount previously paid. Simms v. Vick [N. C.] 65 SE 621. Whole remitted after a part payment which was expected to be returned. Kaliski v. Kaukman, 62 Misc. 274, 114 NYS 811. Where grantee of land paid, as part of consideration, a mortgage, which he later learned to have been previously paid, he may recover, though thereby getting the land at lower price. Priddy v. Miners' & Merchants' Bank, 132 Mo. App. 279, 111 SW 865. May recover premium paid on insurance policy, by one believing self to be beneficiary, from the real beneficiary who allowed payments to be made with full knowledge of facts, and has collected the policy. Monast v. Marchant [R. I.] 72 A 820.

59. Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811. Excess payment by bank to depositor withdrawing his balance. Fidelity Sav. Bank v. Reeder [Iowa] 120 NW 1029. Where one who could not read paid claim for which he had receipt. Simms v. Vick [N. C.] 65 SE 621.

60. Moran v. Brown, 113 NYS 1038; Kaliski v. Kaufman, 62 Misc. 274, 114 NYS 811; Payne v. Witherbee, Sherman & Co., 132 App. Div. 579, 117 NYS 15.

61. Moran v. Brown, 113 NYS 1038; Payne v. Witherbee, Sherman & Co., 132 App. Div. 579, 117 NYS 15.

62. Simms v. Vick [N. C.] 65 SE 631.

of the latter [63] except from the depositor himself.[64] It is generally held that mutuality of the mistake is not essential to recovery,[65] but in some states, if the mistake be not mutual, it must have been induced by the fraud of the defendant.[66] Where a payment is secured by fraud, it may be recovered from the person perpetrating the fraud,[67] but not from an innocent third party between whom and the payor the equities are equal.[68]

Failure of the consideration upon which a payment is made is ground for its recovery, as where the defendant,[69] or his principal,[70] refuses to carry out the contract under which it was advanced, or where the performance of the contract by the defendant has become impossible,[71] or proves not to be what was bargained for.[72] But where the contract is unjustifiably rescinded by the payor,[73] or where he has received precisely what he bargained for,[74] he cannot recover what he has paid. Money advanced under an illegal contract may be recovered as long as the contract remains executory,[75] but not after it has become executed.[76]

The question whether a payment is voluntary does not depend altogether upon the intent of the payor. Thus a payment prohibited by law,[77] or a payment of overcharges to a railroad [78] is deemed involuntary, whereas a payment otherwise voluntary is not deemed involuntary merely because it is accompanied by a written protest.[79] Payments made under duress are recoverable upon an implied promise,[80] but where

63. Where "bearer" paper was honored by new clerk after all drawer's funds on deposit had been garnished. Citizens' Bank v. Schwarzschild & Sulzberger Co. [Va.] 64 SE 954.

64. Citizens' Bank v. Schwarzschild & Sulzberger Co. [Va.] 64 SE 954.

65. Moran v. Brown, 113 NYS 1038.

66. Where plaintiff agreed to pay at same rate as third person for pottery, and, relying on defendant's statement as to what that rate was, paid an amount in excess of rate paid by such other person, held no fraud nor mutual mistake entitling plaintiff to recovery. Miller v. Missouri Fire Brick Co. [Mo. App.] 119 SW 976.

67. Miller v. Missouri Fire Brick Co. [Mo. App.] 119 SW 976.

68. Where X, having option on defendant's timber for $250, got plaintiff to agree to pay $1,000 for a more valuable tract, and plaintiff, upon tender of deed of defendant's timber, supposing it to be of the other tract, paid defendant $1,000, of which defendant retained $250 and paid balance to X, being ignorant of the fraud, no recovery is allowable. Deering v. Terry's Ex'rs [Ky.] 114 SW 759. Where teller of bank, purporting to act as agent of depositor, paid funds of bank to defendant as margins, defendant receiving them bona fide, no recovery by bank. First Nat. Bank v. Gibert, 123 La. 845, 49 S 593.

69. Upon refusal to include stipulated covenant in assignment, the stipulation not being waived by insisting upon the return of the assignment as executed. Collins v. Pearsall, 134 App. Div. 820, 119 NYS 203.

70. Implied promise of agent to refund advances still in his possession. Simmonds v. Long [Kan.] 101 P 1070.

71. Instalments paid on purchase of land recoverable after defendant sold it to another, though not paid on time and though contract gave defendant right to claim forfeiture upon delay, and prohibited defense of oral variations, the delay being due to oral permission of defendant who failed to exercise his right to forfeiture. Gilson v. Boston Realty Co. [Conn.] 73 A 765. Subscription to stock in corporation to be formed is recoverable after formation becomes impossible. Watson v. Donald, 142 Ill. App. 110.

72. Commissions paid by vendor of land to broker, recoverable when sale avoided by infant vendee. Volker v. Fisk [N. J. Eq.] 72 A 1011.

73. On ground of unreal defect of title. Scharrath v. Dermody, 117 NYS 968.

74. Where contingency of invalidity of an oral lease, for the assignment of which the money was paid, was expressly provided for, fact it proved invalid is no ground for recovery. Jacobs v. Sire, 133 App. Div. 617, 118 NYS 274. Where plaintiff paid defendant to bring back fugitive from justice, no obligation to refund upon being paid by state for same service. Bynum v. Dalton [Miss.] 48 S 1019.

75. Before deed given, illegality consisting in agreement to procure grantee appointment as postmaster. McCall v. Whaley [Tex. Civ. App.] 115 SW 658.

76. No recovery of property conveyed in satisfaction of an embezzlement. Jourdan v. Burstow [N. J. Eq.] 74 A 124.

77. Allowance by county board to county treasurer beyond limit fixed by constitution, recoverable as involuntary. People v. McCord, 143 Ill. App. 28.

78. Partly in ignorance or overcharge, and partly under agreement for adjustment of accounts. Theory that parties do not deal on footing of equality. Kansas City S. R. Co. v. Albers Com. Co., 79 Kan. 59, 99 P 819.

79. Gaar, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361.

80. To stop legal proceedings on a groundless claim at a time when detention by suit would have cost more than amount paid. Fenwick Shipping Co. v. Clarke Bros. [Ga.] 65 SE 140. Payment of excessive license fee under protest when chief of police refused

the payment exacted is of an amount in excess of that fixed by express contract, recovery must be had in an action for breach of the contract.[81] Money paid under compulsion of judicial process is not recoverable on the ground of duress,[82] though, if a judgment is erroneously computed, proceedings may be had after payment, for correction and recovery of the excess,[83] and, where one has been obliged, either by judicial process[84] or otherwise,[85] to pay money which should in fairness be paid by another, he is entitled to reimbursement from the latter. The law will not, however, imply a promise by one of two joint tort-feasors to indemnify the other.[86] In view of the constitutional requirement of just compensation for private property taken for public use, the government is held to an implied promise to pay for property so appropriated.[87] The law implies a promise to repay money lent, within a reasonable time where no time is fixed.[88]

§ 4. *Use and occupation.*[89]—See 11 C. L. 1883—One who is entitled to the possession of land may maintain an action for use and occupation against one wrongfully occupying it.[90] This right is conferred in some states by statutes,[91] which commonly fix the amount recoverable.[92]

§ 5. *Tort as basis of implied contract.*[93]—See 11 C. L. 1883—The law will imply a promise to repay money obtained by deceit.[94]

§ 6. *Remedies and procedure.*[95]—See 11 C. L. 1883—An implied contract is en-

to allow circus parade, which was just ready to start, unless paid. Gentry Bros. v. Lincoln, 146 Ill. App. 60. But not duress where paid for license for dancing school after policeman told plaintiff to get one, and that he must have one, no statement being made as to consequences of failing to get one. Conley v. Buffalo, 65 Misc. 100, 119 NYS 87. Nor where franchise tax for intrastate business was paid upon the demand of the secretary of state by a company doing only an interstate business. Garr, Scott & Co. v. Shannon [Tex. Civ. App.] 115 SW 361. Nor where paid under orders of third person. Taylor v. Kelleher, 43 Colo. 424, 97 P 253.

81. Contract for sale of ice at fixed rate repudiated by defendant, plaintiff paying extra price under protest and insisting upon contract, but unable to buy for less elsewhere. Secor v. Ardsley Ice Co., 133 App. Div. 136, 117 NYS 414. Payment for excess power at contract rates—dispute as to whether excess used, under threat of shutting off power. Kienle v. Gretsch Realty Co., 133 App. Div. 391, 117 NYS 500.

82. Payment of rent under an order in summary proceedings awarding possession to landlord. Lawrence v. Edwin A. Denham Co., 65 Misc. 189, 119 NYS 725. Where defendant assigned to X a claim against plaintiff greater than was due, and plaintiff paid X judgment for full amount, plaintiff cannot recover excess from defendant. Finkelstone v. Tanzke, 63 Misc. 330, 117 NYS 183.

83. Where too much interest allowed, payor allowed to recover excess on rule to show cause after payment. Hill v. Hill, 121 La. 578, 46 S 657.

84. Where vendor of land had to refund to disaffirming infant vendee commissions paid by latter to defendant broker, vendor entitled to recover same from defendant. Volker v. Fisk [N. J. Eq.] 72 A 1011. Where defendant caused defect in highway which resulted in injuries which plaintiff was obliged to pay damages for, recovery allowed, though plaintiffs had for three years after the defect was created neglected its duty to remedy the highway, because not equally at fault. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656.

85. Accommodation indorser who has paid note may recover from maker. Blanchard v. Blanchard, 61 Misc. 497, 113 NYS 882.

86. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656.

87. U. S. Const. 5th Am. Bethlehem Steel Co. v. U. S., 42 Ct. of Cl. 365.

88. One year held reasonable, though lender told borrower to take his time and pay when convenient. Samuels v. Larrimore [Cal. App.] 104 P 1001.

89. **Search Note:** See notes in 11 L. R. A. (N. S.) 873.

See, also, Use and Occupation, Cent. Dig.; Dec. Dig.; 15 A. & E. Enc. L. (2ed.) 1111.

90. Owner against vendee of lumber for failure to remove piles of lumber from yard. Coles & Sons Co. v. Standard Lumber Co., 150 N. C. 183, 63 SE 736.

91. By Rev. St. c. 80, §§ 1, 14 (latter allowing lessee to sue). Walsh & Co. v. Taylor, 142 Ill. App. 46.

92. Under Rev. Civ. Code, § 2313, may recover the value of the use for the period of wrongful occupation, which by custom is one-fourth the value of the crops. Baldwin v. Bohl [S. D.] 122 NW 247. Under Rev. Codes, § 6069, may recover value of use of property during wrongful occupation plus costs of recovery. Subject to limit of five years before suit. Leyson v. Davenport, 38 Mont. 62, 98 P 641.

93. **Search Note:** See Action, Cent. Dig. §§ 160-215; Dec. Dig. §§ 27, 28; 15 A. & E. Enc. L. (2ed.) 1111.

94. Williams v. Smith [R. I.] 72 A 1093.

95. **Search Note:** See Assumpsit, Action of, Cent. Dig.; Dec. Dig.; 4 Cyc. 317-360; Money Lent, Cent. Dig. §§ 7-16; Dec. Dig. §§ 5-8; 27 Cyc. 827-829, 831; Money Paid, Cent. Dig. §§ 21-31; Dec. Dig. §§ 6-10; 27

forcible by an action ex contractu though strictly no contract exists.[96] Under a code not recognizing the common-law action for money had and received, a civil action in the nature of an action for money had and received is maintainable.[97] Money had and received will not lie to recover purchase money advanced under a contract, until the contract is terminated.[98] An administrator may maintain an action for money had and received to the use of the decedent.[99] The father is the proper party plaintiff in an action against a third person for services rendered by his child, while a minor,[1] even though the child is now of age,[2] unless emancipated before the services were rendered.[3] An action may be maintained against the sureties on the bond of one who is liable for moneys had and received.[4] A prior demand is not a condition precedent to a right of action for money had and received [5] or money lent,[6] and consequently need not be alleged,[7] but where an action is brought upon an implied promise to pay the value of goods withheld by a warehouseman, there must be proof that the storage charges were tendered.[8] The right to recover upon an implied contract being equitable in its nature, it has been held that the value of labor and materials may be recovered in an equitable proceeding to foreclose a mechanic's lien, upon failure to establish the lien.[9] To recover money paid under a mistake of law, the plaintiff must allege the materiality of the mistake and show his title to the money.[10] Under a code provision requiring the plaintiff to state the facts constituting his cause of action, a count for money had and received in the common form has been held sufficiently explicit.[11] Pleadings which substantially state the cause of action are sufficient.[12] There is no variance where the complaint alleges an express promise, and recovery is sought upon an implied promise.[13] Certain defenses fall within statutory requirements of special pleas.[14] A judgment against the plaintiff for the damages for whose payment he seeks reimbursement is admissible in evidence,[15] but is not conclusive as to the defendant's liability if the latter was not a party to the action in which it was rendered.[16] The burden of proving a defense is upon the defendant who alleges it.[17] It is a defense that the defend-

Cyc. 841-846; Money Received, Cent. Dig. §§ 44-80; Dec. Dig. §§ 15-19; 27 Cyc. 870, 876-886; Use and Occupation, Cent. Dig. §§ 19-27; Dec. Dig. §§ 6-11; Work and Labor, Cent. Dig. §§ 34-65; Dec. Dig. §§ 18-30; 15 A. & E. Enc. L. (2ed.) 1111; 22 A. & E. Enc. P. & P. 1360.

96. Leonard v. State [Tex. Cr. R.] 120 SW 183.

97. Thiele v. Carey [Neb.] 123 NW 442.

98. Thiele v. Carey [Neb.] 123 NW 442.

99. Devlin v. Houghton, 202 Mass. 75, 88 NE 580.

1, 2, 3. Winebremer v. Eberhardt, 137 Mo. App. 659, 119 SW 530.

4. County treasurer. People v. McCord, 143 Ill. App. 28.

5. Young v. Kimber, 44 Colo. 448, 98 P 1132.

6, 7. Samuels v. Larrimore [Cal. App.] 104 P 1001.

8. Union Nat. Bank v. Griswold, 141 Ill. App. 464.

9. Pacific Iron & Steel Works v. Goerig [Wash.] 104 P 151.

10. Allegation that money rightfully belongs to plaintiff merely states conclusion of law. Carpenter v. Southworth [C. C. A.] 165 F 428.

11. "That defendant is indebted to plaintiff in the sum of — for money had and received by the defendant to the use of plaintiff." Miller v. Abrahamson, 9 Cal. App. 396, 99 P 534.

12. Under allegation that defendant received cashier's check with notice and knowledge that funds belonged to plaintiff, may show either actual or constructive notice, not limited to form of check as notice. Davenport v. Walker, 132 App. Div. 96, 116 NYS 411. "No part of said indebtedness has been paid" sufficiently denies nonpayment. Samuels v. Larrimore [Cal. App.] 104 P 1001.

13. Jackson v. Buice, 132 Ga. 51, 63 SE 823.

14. Under Code, § 3340, providing that special defenses must be pleaded, and § 3629, providing that any defense, showing excuse, discharge, or release, or which seeks to avoid the legal effect of facts alleged, must be specially pleaded, the fact that stepson intended services to be gratuitous is inadmissible under a general denial. Saddler v. Pickard [Iowa] 121 NW 374.

15. Where defendant ultimately liable. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656.

16. Not cited to appear therein. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656.

17. That defendant has paid money, advanced by plaintiff under contract, to his principal, where rescinded. Simmonds v. Long [Kan.] 101 P 1070. That defendant has changed his position by virtue of plain-

ant has applied the money in question to a debt owed to him by the plaintiff, at the request of the latter,[18] but not in the absence of such an authorization.[19] The statute of limitations does not begin to run against an action upon an implied contract till the right of action accrues.[20] An instruction as to the defendant's liability upon an implied contract must be based upon some material evidence.[21] The recovery of interest upon such claim is sometimes regulated by statute.[22]

Implied Trusts; Implied Warranties; Impounding; Imprisonment for Debt; Improvements, see latest topical index.

INCEST.[23]

The scope of this topic is noted below.[24]

The offense consists of carnal intercourse,[24a] howsoever induced,[25] between persons related within the prohibited degree.[26] Incest is a statutory offense, and an indictment which follows the statute is sufficient,[27] and an indictment is not double because it avers in the conjunctive acts which the statute disjunctively prohibits.[28] While, in prosecutions for incest, it is competent to show criminal intercourse between the prosecutrix and defendant anterior to the act for which he is being tried,[29] declarations of the prosecutrix, made in defendant's absence, cannot be received to corroborate her testimony concerning a fact which in itself merely tended to prove defendant's adulterous disposition toward her.[30] Previous or subsequent acts of familiar association and opportunities for incestuous relations may be received.[31] In the absence of statute, evidence corroborating the testimony of prosecutrix is not

tiff's payment sought to be recovered on ground of mistake. Payne v. Witherbee, Sherman & Co., 132 App. Div. 519, 117 NYS 15.

18, 19. Sherrer v. Enterprise Banking Co. [Ala.] 49 S 779.

20. Not against surety's right to reimbursement until he has paid the debt. Blanchard v. Blanchard, 61 Misc. 497, 113 NYS 882. Nor against right to recover advances made on a contract until contract is rescinded. Thiele v. Carey [Neb.] 123 NW 442.

21. Where no material evidence that complainant rendered services to defendant personally, court erred in instructing as to conditions of defendant's liability. Pearre v. Smith, 110 Md. 531, 73 A 141.

22. Under Mills' Ann. St. § 2252, no interest recoverable on money withheld by agent for collection, where withheld with knowledge of owner. Young v. Kimber, 44 Colo. 448, 98 P 1132.

23. See 11 C. L. 1884.

Search Note: See notes in 3 C. L. 1695; 11 Id. 1885; 14 L. R. A. (N. S.) 725; 111 A. S. R. 19; 2 Ann. Cas. 936; 4 Id. 569; 5 Id. 67; 8 Id. 910; 10 Id. 656; 11 Id. 93.

See, also, Incest, Cent. Dig.; Dec. Dig.; 22 Cyc. 42-60; 16 A. & E. Enc. L. (2ed.) 134; 10 A. & E. Enc. P. & P. 334.

24. It includes the criminal offense only. Incestuous rape is treated in Rape,* and the degrees of consanguinity within which marriage permitted are more fully treated in Marriage,* § 1.

24a. Evidence held to show defendant had sexual intercourse as stated in indictment. Nephew v. State, 5 Ga. App. 841, 63 SE 930. Evidence held to show defendant had carnal intercourse with stepdaughter. Baker v. State [Tex. Cr. R.] 118 SW 542.

25. The guilt or innocence of the accused is not affected by the consent of the prosecutrix, or by the means used by the accused in committing the offense. State v. Aker [Wash.] 103 P 420.

26. Under the Levitical rule, adopted by Pen. Code, § 380, carnal intercourse between father and an unmarried stepdaughter is incestous adultery and fornication. Nephew v. State, 5 Ga. App. 841, 63 SE 930.

27. Need not allege that prosecutrix and defendant were not legally married or that defendant had knowledge, at time of incestuous intercourse, of such relation. Barrett v. State, 55 Tex. Cr. R. 182, 115 SW 1187.

28. Indictment held not void for duplicity where word "and" was employed where statute has "or," and that under Sess. Laws 1891, p. 128 (3 Mills' Ann. St. § 1321), information thereon might allege in single count that defendant did as many things as pleader chose. Kingsbury v. People, 44 Colo. 403, 99 P 61.

29. Peterson v. State [Neb.] 120 NW 1110.

30. Error to admit testimony of witness to effect that prosecutrix had informed her some years preceding commission of offense for which defendant was convicted that her father had been criminally intimate with her in another county. Peterson v. State [Neb.] 120 NW 1110.

31. Not error to admit evidence that on one occasion appellant accompanied his niece on journey and that they returned alone that night. Barrett v. State, 55 Tex. Cr. R. 182, 115 SW 1187.

essential to a conviction.[32] The fact of the birth of a child is admissible to corroborate the accomplice.[33]

INCOMPETENCY.

The scope of this topic is noted below.[34]

§ 1. Mental Weakness Sufficient to Constitute Incapacity, 2213.
§ 2. Effect of Incompetency on Contracts, 2215.
§ 3. Remedies and Procedure, 2215.

§ 1. *Mental weakness sufficient to constitute incapacity.*[35] See 11 C. L. 1886. Must be such as to render the person whose act is brought into question wholly incapable, at the time of the act in question, of understanding the nature and effect of the business being transacted.[36] That is, the incompetency must amount to an in-

32. Instructions given held proper and not error to refuse to give requested instructions which were to effect that corroboration was necessary. State v. Aker [Wash.] 103 P 420. Evidence held sufficient to sustain conviction. Id.

33. Barrett v. State, 55 Tex. Cr. R. 182, 115 SW 1187.

34. Includes questions as to competency to contract or convey. **Excludes** competency to make a will (see Wills,* § 2), competency as bearing upon questions of negligence (see Negligence,* §§ 2, 4) or of criminal responsibility (see Criminal Law,* § 3), matters peculiar to infants (see Infants*), insane persons (see Insane Persons*) and married women (see Husband and Wife*). Excludes, also, impaired capacity as an element of fraud or undue influence (see Fraud and Undue Influence,* § 2), and proceedings to cancel instruments on the ground of the incompetency of the maker (see Cancellation of Instruments*).

35. Search Note: See notes in 5 C. L. 1775; 63 A. S. R. 80; 107 Id. 536; 8 Ann. Cas. 254.

See, also, Bills and Notes, Cent. Dig. § 214; Dec. Dig. § 101; 7 Cyc. 678, 679; Chattel Mortgages, Cent. Dig. § 141; Dec. Dig. § 70; Contracts, Cent. Dig. §§ 42-44, 411-414; Dec. Dig. §§ 11, 92; 9 Cyc. 372; 14 Id. 1103-1106; Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68; 13 Cyc. 573-576; Insane Persons, Cent. Dig. §§ 1-14, 91-141; Dec. Dig. §§ 1-6, 59-79; 22 Cyc. 1109-1119, 1169-1194; Marriage, Cent. Dig. § 25; Dec. Dig. § 7; 26 Cyc. 843; Mortgages, Cent. Dig. §§ 174, 175; Dec. Dig. § 76; 27 Cyc. 1119; Release, Cent. Dig. § 30; Dec. Dig. § 15; Sales, Cent. Dig. §§ 62, 64; Dec. Dig. § 35; Vendor and Purchaser, Cent. Dig. § 34; Dec. Dig. § 30; Wills, Cent. Dig. §§ 48-161; Dec. Dig. §§ 21-55; 16 A. & E. Enc. L. (2cd.) 153; 17 Id. 103.

36. If there is a mental deficiency so marked as that the conclusion is justified that no deliberate judgment was exercised, the transaction should be held void. Welke v. Wackershauser [Iowa] 120 NW 77. If the grantor has sufficient mind and memory to comprehend the nature and effect of the transaction and to protect his interest, his deed cannot be set aside for want of capacity. Baker v. Baker, 239 Ill. 82, 87 NE 868.

The test whether a person is competent to make a deed: Is whether the grantor is capable of understanding in a reasonable manner the nature and effect of the act in which he is engaged and of comprehending and protecting his own interest in ordinary business affairs. Fitzgerald v. Allen, 240 Ill. 80, 88 NE 240. Where a grantor understands fully and intelligently the nature and extent of his estate and the nature of the business he is engaged in when making a deed and recollects the object of his bounty, he is capable of making a conveyance. Fitzgerald v. Tvedt [Iowa] 120 NW 465. To set aside deed on ground of want of mental capacity of grantor, it must be established that the mind of the grantor was so weak and unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport of what he was then doing. West v. West [Neb.] 120 NW 925. Test of capacity to make deed. Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149. One has mental capacity to execute a deed to a child **in consideration of love and affection** when he has sufficient understanding and intelligence to understand his ordinary business and what disposition he is making of his property, but, where the deed is **for a valuable consideration,** one must possess sufficient mental strength to judge of values and successfully oppose fraud, deceit, and undue influence whenever brought to bear upon him in the negotiation of the contract. Jones v. Thomas, 218 Mo. 508, 117 SW 1177.

To avoid a contract on the ground of intoxication: To render deed invalid because of intoxication of the grantor, he must have been so intoxicated that he did not know what he was doing. Dalhmann v. Gaugente, 238 Ill. 224, 87 NE 287. The intoxication must be of such a nature as to drown memory, reason, and judgment. Id. Before deed or other contract will be set aside, evidence must show that grantor was in such degree of intoxication at the time as to render him entirely incapable of understanding nature and effect of transaction. Power v. King [N. D.] 120 NW 543. A person is not relieved of his contract made while he was under the influence of voluntary drunkenness brought about in no wise by the instigation of the other party, unless the intoxication was so great as to deprive him of the use of his reasoning faculties, and the other party had notice of his condition.

capacity to understand the business being transacted, as distinguished from mere weakness [37] or mere peevishness and excitability of disposition.[38] The law ordi-

Bing v. Bank of Kingston, 5 Ga. App. 578, 63 SE 652. Equity will relieve one from a contract made by him while intoxicated, though his reason may not have been wholly overthrown, where the intoxication has been brought about by the other party or fraudulent advantage has been taken. Miller v. Sterringer [W. Va.] 66 SE 228. Evidence held to show that plaintiff was not rendered incompetent by reason of intoxication. Power v. King [N. D.] 120 NW 543. Evidence held to show intoxication at time of making deed and to require cancellation of same. Dalhmann v. Gangente, 238 Ill. 224, 87 NE 287.

Evidence held to establish mental incapacity: Of a mother who executed a deed to her son. Naeseth v. Hommedal [Minn.] 123 NW 287. **Of aged woman** to execute valid conveyance. Holland v. Riggs [Tex. Civ. App.] 116 SW 167. Of aged woman who executed certain note to a representative of a sect of faith curists, evidence showing that she was suffering from nervous prostration and had attempted suicide. In re Killen's Estate, 223 Pa. 201, 72 A 521. Of grantor, a weak old man 88 years of age, suffering from **senile dementia** and possessed of delusions that his son and others were trying to poison him and in connection agreed to sell property worth $3,000 for $1,250. Castle v. Dole [Wash.] 103 P 828. Of grantor who was **at point of death.** Givens v. Ott [Mo.] 121 SW 23. **Of one signing release for personal injuries.** Savage v. Chicago & Joliet R. Co., 142 Ill. App. 342. Evidence held to support finding that plaintiff was of unsound mind on the day release of a claim for personal injuries was executed, though not entirely without understanding. Perkins v. Sunset Tel. & T. Co., 155 Cal. 712, 103 P 190. Of one **enfeebled by disease** who transferred corporate stock without independent advice. Groff v. Stitzer [N. J. Eq.] 72 A 970. Evidence held to show that vendor at time of execution of deed was incompetent by reason of **serious nervous trouble.** Peterson v. Budge [Utah] 102 P 211. Of one giving assent to unauthorized sale of land by her agent, it appearing that she was very ill and **under the influence of morphine.** Welke v. Wackershauser [Iowa] 120 NW 77. Of **Indian allottee** conveying premises for inadequate consideration. Alfrey v. Colbert [C. C. A.] 168 F 231.

Evidence held to show capacity: Testimony held not to prove permanent or continuing mental infirmity. McGregor v. McGregor's Estate, 156 Mich. 487, 16 Det. Leg. N. 179, 120 NW 1071. That parent gave principal part of real estate to his sons to the exclusion of his daughters was not evidence of incapacity. McLaughlin v. McLaughlin, 241 Ill. 366, 89 NE 645. **To make deed.** Stanfill v. Johnson [Ala.] 49 S 223; Baker v. Baker, 239 Ill. 82, 87 NE 868; Beadle v. Anderson [Mich.] 16 Det. Leg. N. 737, 123 NW 8; Culbertson v. Polley [Ky.] 116 SW 703; Huffman v. Huffman, 217 Mo. 182, 117 SW 1. That grantor was 72 years old, and was engaged to grantee, with whom he boarded, was not evidence of incompetency. Whitlock v. Dixon, 150 N. C. 616, 64 SE 504. Evidence held insufficient to show that grantor was mentally incapacitated under rule settled by supreme court of Georgia that there must be entire loss of understanding. British & American Mortg. Co. v. Worrill, 168 F 120. Evidence held to show that grantor was competent though old, with a natural enfeeblement of physical and mental powers. Ames v. Moore [Or.] 101 P 769. Lack of mental capacity to enter into a contract and make a deed is not shown, where the grantors evidently understood the transaction they were entering into, and explained their reasons for so doing, and designated as the trustee to hold the deed in escrow an old and trusted friend and agent, and in other respects behaved in a rational manner, and were without children or direct heirs. Foster v. Long, 8 Ohio N. P. (N. S.) 75. Of corporate officer **to make corporate contract.** Gilmore & Co. v. Samuels & Co. [Ky.] 123 SW 271. **To execute assignment** of policy of insurance. Andrews v. Lavery [Mich.] 16 Det. Leg. N. 820, 123 NW 543. Of parent **to convey to child.** Fitzgerald v. Allen, 240 Ill. 80, 88 NE 240; McLaughlin v. McLaughlin, 241 Ill. 366, 89 NE 645; Powell v. Powell, 240 Ill. 442, 88 NE 993; O'Banion's Committee v. Tolbert [Ky.] 119 SW 740. Of grantor who executed deed of gifts to child. Jones v. Thomas, 218 Mo. 508, 117 SW 1177. In action by guardian of an alleged incompetent person to set aside **ward's conveyance** of real estate, made before appointment of such guardian, evidence held sufficient to uphold validity of conveyance. Gutru v. McVicker, 83 Neb. 555, 120 NW 132. Evidence held insufficient to warrant special finding of jury that plaintiff did not have sufficient mental capacity to comprehend questions involved in negotiations for **settlement of personal injury claim.** Barrett v. Lewiston, etc., R. Co., 104 Me. 479, 72 A 308.

Evidence held to justify submission of mental incapacity to jury: In action to recover back money paid upon contract for sale of land. Goldberg v. West End Homestead Co. [N. J. Law] 73 A 128. Mental capacity of one at time he executed certain powers of attorney authorizing transfer of corporate stock. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170. Mental capacity of one signing release for personal injuries. Genest v. Odell Mfg. Co. [N. H.] 74 A 593.

37. In order to avoid a conveyance. Stanfill v. Johnson [Ala.] 49 S 223. Where grantor had sufficient mental capacity to comprehend naturally transactions in which he was engaged at time he executed certain deeds, fact that he was advanced in years and somewhat enfeebled in mind by sickness was not sufficient to make him incompetent. McLaughlin v. McLaughlin, 241 Ill. 366, 89 NE 645. Mere mental weakness not sufficient to avoid deed if such weakness does not amount to inability to comprehend the contract, and is unaccompanied by evidence of undue influence or imposition. West v. West [Neb.] 120 NW 925. Though grantor's old age was accompanied by natural en-

narily requires a higher degree of mentality to execute a deed than it does to make a will.[39]

§ 2. *Effect of incompetency on contracts.*[40]—See 11 C. L. 1888—The contracts of incompetent persons are generally held merely voidable,[41] though there are authorities which treat them as absolutely void,[42] especially in case of a conveyance without consideration.[43] The contract will generally be sustained where the other party had no notice [44] of the incompetency, and derived no inequitable advantage from it,[45] and, where a conveyance accomplishes substantially the same result achieved by the grantor by the execution of a will a number of years previous when no doubt existed as to his mental conditions, it will be upheld.[46] Where one party to a contract has performed his part of the agreement before becoming mentally incapacitated, the other party cannot avoid a contract executed pursuant to such agreement but subsequently to the time when the first party became incapacitated.[47] A comparatively slight degree of mental incapacity on the part of a party thereto will justify a court of equity in setting aside a contract for which such party has received no valuable consideration,[48] but, where the contract is beneficial to the grantor, the question of mental capacity is not allowed the same weight as it would have if the consideration was inadequate.[49]

§ 3. *Remedies and procedure.*[50]—See 11 C. L. 1888—As a general rule a contract

feeblement of physical and mental powers, it was not sufficient to set aside deed. Ames v. Moore [Or.] 101 P 769. Old age, eccentricity, even partial impairment of mental faculties, are not sufficient grounds for setting aside a deed. Baker v. Baker, 239 Ill. 82, 87 NE 868. Mere mental weakness will not authorize court of equity to set aside deed if it does not amount to inability to comprehend effect and nature of the transaction, and is not accompanied by evidence of imposition or undue influence. Clarke v. Hartt, 56 Fla. 775, 47 S 819.

Instruction on question of lack of capacity, approved. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170.

38. Do not of themselves constitute proof of intellectual degeneracy. Ames v. Moore [Or.] 101 P 769.

39. Jones v. Thomas, 218 Mo. 508, 117 SW 1177.

40. Search Note: See notes in 5 C. L. 1776; 3 L. R. A. (N. S.) 174; 8 Id. 436; 107 A. S. R. 536.

See, also, Bills and Notes, Cent. Dig. § 214; Dec. Dig. § 101; 7 Cyc. 678, 679; Chattel Mortgages, Cent. Dig. § 141; Dec. Dig. § 70; Contracts, Cent. Dig. §§ 42-44, 411-414; Dec. Dig. §§ 11, 92; 9 Cyc. 372; 14 Id. 1103-1106; Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68; 13 Cyc. 573-576; Insane Persons, Cent. Dig. §§ 1-14, 91-141; Dec. Dig. §§ 1-6, 59-79; 22 Cyc. 1109-1119, 1169-1194; Marriage, Cent. Dig. § 25; Dec. Dig. § 7; 26 Cyc. 843; Mortgages, Cent. Dig. §§ 174, 175; Dec. Dig. § 76; 27 Cyc. 1119; Release, Cent. Dig. § 30; Dec. Dig. § 15; Sales, Cent. Dig. §§ 62, 64; Dec. Dig. § 35; Vendor and Purchaser, Cent. Dig. § 34; Dec. Dig. § 30; Wills, Cent. Dig. §§ 48-161; Dec. Dig. §§ 21-55; 17 A. & E. Enc. L. (2ed.) 403.

41. Fact that party to a contract is of unsound mind, if he has not been found to be a lunatic by judicial proceedings, makes the contract only voidable. West v. Seaboard Air Line R. Co. [N. C.] 65 SE 979. Where incompetency is only temporary, such as that produced by intoxication or by the administration of drugs or opiates, the contract is voidable. Birmingham R., L. & P. Co. v. Hinton [Ala.] 48 S 546. Where other party did not know of the mental infirmity, contract is only voidable on equitable terms. Hill-Dodge Banking Co. v. Loomis [Mo. App.] 119 SW 967.

42. Deed of person non compos mentis. Bowman v. Wade [Or.] 103 P 72.

43. Mortgage by incompetent person held void and not merely voidable. Bowman v. Wade [Or.] 103 P 72.

44. Certain letters written by party who signed release held not to put other party on notice that he was incompetent but rather to forbid such inference. West v. Seaboard Air Line R. Co. [N. C.] 65 SE 979.

45. West v. Seaboard Air Line R. Co. [N. C.] 65 SE 979.

46. Taphorn v. Taphorn, 12 Ohio C. C. (N. S.) 180.

47. Where husband was capable of contracting at time he transferred his property to his wife in consideration of her verbal promise to make certain payments to husband's relatives after his death, the wife was bound by written contract embodying such promise, though at time husband was unconscious and mentally incapable of contracting. Fearnley v. Fearnley, 44 Colo. 417, 98 P 819.

48. Weeke v. Wortmann [Neb.] 120 NW 933.

49. Snowden v. Smith [Ky.] 119 SW 785.

50. Search Note: See note in 4 Ann. Cas. 888.

See, also, Bills and Notes, Cent. Dig. §§ 223, 224; Dec. Dig. §§ 113-115; Cancellation of Instruments, Cent. Dig.; Dec. Dig.; 6 Cyc. 282-345; Deeds, Cent. Dig. §§ 203-209, 648; Dec. Dig. §§ 74-178; 13 Cyc. 591, 592; Insane Persons, Cent. Dig. §§ 100-105, 138, 141; Dec. Dig. §§ 66, 67, 79; 22 Cyc. 1209-1211; Marriage, Cent. Dig. § 117; Mortgages, Cent. Dig. §§ 192-197; Dec. Dig. §§ 83-88; 27 Cyc. 1131,

can be avoided on the ground of incompetency only by prompt repudiation [51] and by placing or offering to place the other party in statu quo,[52] but this rule is not entirely without exception.[53] Incompetency as a defense must be pleaded.[54] Competency is presumed until the contrary appears,[55] and the burden of proving incapacity is generally on him who alleges it.[56] This rule applies where a deed is made by a parent to a child, whether natural or adopted, the burden resting upon the party assailing it to prove incapacity, as the parent is presumed to be the dominant party,[57] but, where a confidential relation existed between the grantor and grantee, the burden of proving that the grantor was competent to make the deed rests upon the grantee.[58] Though the issue of mental capacity is to be determined as of the time when it is material,[59] the evidence must of necessity take a wide range, and cannot be confined to the immediate dates upon which the transactions took place,[60] and any evidence tending to establish lack of capacity to execute the instrument is competent.[61] Subsequent acts and conduct of the party whose competency is in question are proper evidence,[62] but a judgment subsequent to the making of a conveyance declaring the party to be incompetent at a later time is not,[63] nor is the fact that the party was at times lacking in mentality sufficient to prove incapacity to

1132; Release, Cent. Dig. §§ 37-46, 85-117; Dec. Dig. §§ 21-24, 43-61; Sales, Cent. Dig. §§ 109-151, 261-329; Dec. Dig. §§ 50-53, 89-134; Vendor and Purchaser, Cent. Dig. §§ 67-78, 148-233; Dec. Dig. §§ 41-45, 88-127.

51. Promissory note signed while maker is intoxicated if promptly repudiated is voidable at his election in hands of payee or indorsee who is not innocent holder. Benton v. Sikyta [Neb.] 122 NW 61.

52. Release. Mahr v. Union Pac. R. Co. [C. C. A.] 170 F 699. Contract made while under influence of opiates being merely voidable, the consideration must be returned upon disaffirmance. Birmingham R., L. & P. Co. v. Hinton [Ala.] 48 S 546. Where there is no element of fraud, consideration must be returned. West v. Seaboard Air Line R. Co. [N. C.] 65 SE 979.

53. Where, by reason of incompetency at the time of execution of release of damages for injuries, plaintiff in personal injury action had no recollection, at time of bringing such action, of execution of release or receipt of consideration therefor, the release when set up by defendant could be met by defense of plaintiff's incompetency at time of its execution, notwithstanding plaintiff's failure to repudiate and to offer to place defendant in statu quo prior to bringing the damage suit, and the consideration received by plaintiff would be deducted from the damages awarded. McKittrick v. Greenville Trac. Co. [S. C.] 66 SE 289.

54. Defense of incompetency of maker of note. Hill-Dodge Banking Co. v. Loomis [Mo. App.] 119 SW 967. Intoxication. Camas Prairie State Bank v. Newman, 15 Idaho, 719, 99 P 833.

Sufficiency of pleading: In injury case, where defense was settlement with plaintiff, a replication alleging "that at the time said settlement was made, relied on in said plea, plaintiff did not have the mental capacity to make said settlement," sufficiently stated incapacity to make binding contract. Louisville & N. R. Co. v. Huffstutler [Ala.] 50 S 146.

55. In re Brigham's Estate [Iowa] 120 NW 1054; Stanfill v. Johnson [Ala.] 49 S 223. Law presumes soundness of mind at time of making deed. Jones v. Thomas, 218 Mo. 508, 117 SW 1177. Prior to inquest, sanity is presumed. Hill-Dodge Banking Co. v. Loomis [Mo. App.] 119 SW 967.

56. Jones v. Thomas, 218 Mo. 508, 117 SW 1177; Fitzgerald v. Tvedt [Iowa] 120 NW 465. Burden of proving insanity rests on party asserting it. Hill-Dodge Banking Co. v. Loomis [Mo. App.] 119 SW 967. On bill to cancel deed because of intoxication of one of the grantors at the time of its execution, the burden of proof was on complainants. Proof insufficient. Boggs v. Holloway [Ala.] 47 S 1017.

Sufficiency of evidence: Evidence held insufficient to establish incompetency of grantor. Fitzgerald v. Tvedt [Iowa] 120 NW 465.

57. Stanfill v. Johnson [Ala.] 49 S 223.

58. Jones v. Thomas, 218 Mo. 508, 117 SW 1177.

59. Competency of party to vacate action by next friend. Holland v. Riggs [Tex. Civ. App.] 116 SW 167.

60. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170.

61. Bannon v. Bannon Sewer Pipe Co. [Ky.] 119 SW 1170. The **acts and sayings** of a party immediately before and after signing a writing are admissible on question whether or not he was deprived of reason on account of being intoxicated. Hawkins v. Studdard, 132 Ga. 265, 63 SE 852. In a contest between heirs, declarations of the ancestor showing improper acts on the part of one of the heirs and of members of his family are admissible to show the mental condition of the ancestor. Jones v. Thomas, 218 Mo. 508, 117 SW 1177.

62. Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149.

63. Judgment declaring person to be of unsound mind a year after she executed deed is not admissible to show incompetency at time of executing such deed. Uecker v. Zuercher [Tex. Civ. App.] 118 SW 149.

enter iuto a transaction at certain time.[64] Evidence as to the general effect of intoxication on his mind is inadmissible.[65] As bearing upon the mental capacity of a party to a transaction, the testimony of those having close family, social, or business relations to him, is usually entitled to great weight.[66] The findings of a commission as to the condition of the mind of a person are prima facie only.[67]

INDECENCY, LEWDNESS AND OBSCENITY.[68]

The scope of this topic is noted below.[69]

*Prostitution.*See 10 C. L. 42—The regulation of prostitution is reserved to the various states by reason of their police power.[69a] Where the statute makes it an offense to entice a female into certain designated places, "or any other place," for immoral purposes, the place entered must be one of the places specifically designated or a place of like character,[70] and hence no offense is charged where the place entered is designated solely by its street address.[71] Intent, furthermore, is an essential element of an offense under such a statute,[72] even though the statute makes the mere entry into any one of the designated places with a female prima facie evidence of an immoral purpose.[73] A witness who has seen the female may give his opinion of her age, provided he also describes her.[74]

*Obscene words or publications.*See 11 C. L. 1890—No contract for the sale of a book can be declared illegal because of the character of the book, unless its sale or publication violates the criminal law.[75] Whether or not a certain publication comes within the purview of a statute prohibiting the circulation of obscene publications may be a matter for the jury to determine,[76] but where the matter appears to be entirely free from the vice the statute was designed to suppress, the court should either direct a verdict of acquittal or sustain a demurrer to the indictment,[77] and in such case the court will take the same knowledge as the community at large of

64. Showing that party was, by use of drugs, disease, or from other cause, at times lacking in mentality, is not enough as the evidence of the defectiye mind must relate immediately to the time when the transaction complained of was being entered into. Gilmore & Co. v. Samuels & Co. [Ky.] 123 SW 271.

65. Hawkins v. Studdard, 132 Ga. 265, 63 SE 852.

66. Jones v. Thomas, 218 Mo. 508, 117 SW 1177.

67. Golderberg v. West End Homestead Co. [N. J. Law] 73 A 128.

68. **Search Note:** See notes in 11 C. L. 1891; 7 Ann. Cas. 255; 9 Id. 47; 11 Id. 306.

See, also, Lewdness, Cent. Dig.; Dec. Dig.; 25 Cyc. 210-217; Obscenity, Cent. Dig.; Dec. Dig.; 29 Cyc. 1315-1323; 12 A. & E. Enc. L. (2ed.) 536; 18 Id. 841; 21 Id. 759; 13 A. & E. Enc. P. & P. 18; 14 Id. 1151; 16 Id. 339.

69. It includes miscellaneous offenses against public decency and morality. It excludes matters common to all crimes (see Criminal Law;* Indictment and Prosecution*) and many specific offenses against decency (see Abduction;* Disorderly Houses;* Fornication;* Profanity and Blasphemy,* and the like).

69a. Act of Feb. 20, 1907 (34 Stat. 898, c. 1134), § 3, passed by congress, which purported to punish persons keeping, maintaining or harboring a female alien for the purpose of prostitution, held unconstitutional. Keller v. U. S., 213 U. S. 138, 53 Law. Ed. —.

70. Wiggins v. State [Ind.] 87 NE 718.

71. Affidavit that defendant enticed female under 18 into a house of certain number on certain street charged no offense under Burns' Ann. St. 1908, § 2356. Wiggins v. State [Ind.] 87 NE 718.

72, 73. Wiggins v. State [Ind.] 87 NE 718.

74. On prosecution for harboring in house of prostitution a female under certain age. People v. Davidson, 240 Ill. 191, 88 NE 565.

75. Voltaire's "The Philosophical Dictionary" and "The Maid of Orleans" held not within Pen. Code, § 317, prohibiting sale or publication of obscene literature. St. Hubert Guild v. Quinn, 64 Misc. 336, 118 NYS 582.

76. In prosecution for selling book entitled "Three Weeks," under Rev. Laws, c. 212, § 20, held for jury to determine whether language used "tended to corrupt morals of youth." Commonwealth v. Buckley, 200 Mass. 346, 86 NE 910.

77. Letter on which prosecution was based held not within Ky. St. § 1352. Kinnaird v. Com. [Ky.] 121 SW 489.

matters of literature.[78] The Kentucky statute against distribution of obscene matter is not violated by the transmission of a letter by one person to another.[79] The indictment must describe the offense,[80] and when based upon a writing must set out the writing,[81] unless there is a sufficient excuse for the failure to do so,[82] but on a prosecution for using vulgar and obscene language, proof of the substance of the unlawful language alleged in the indictment will authorize conviction.[83] On a prosecution under an ordinance making it unlawful for the owner of a building to knowingly rent the same to be used for shows or exhibitions tending to corrupt the public morals, such knowledge must be proved.[84] On a prosecution for circulating obscene matter, letters written by the accused after the indictment was returned are not admissible against him, when he admits the authorship and the sending of the letter upon which the indictment is based.[85]

*Lascivious conduct.*See 11 C. L. 1891—Blanket statutes in many states make criminal indecent acts not covered by other statutes,[86] and offenses thereunder must be distinguished from other offenses for which specific provision is made.[87] An indictment for taking indecent liberties with a child is sufficient if it substantially follows the statute.[88] The child's consent does not excuse the acts.[89] Lewd and lascivious acts which tend to arouse the sexual desires of any child under a certain age are within a statute making it a misdemeanor for any person to do an act which tends toward making such child a "delinquent."[90] The affidavit on which a prosecution is based should state what act or acts committed by the defendant are claimed to constitute indecent conduct,[91] but it is not necessary in an indictment for assault upon a female, aggravated by fondling her in an indecent manner, to allege intent to injure.[92] The consent of the female is a defense to a charge of taking indecent liberties,[93] and complaints made by the female long after the alleged commission of the acts charged are inadmissible.[94] In order to convict of "lewd and lascivious as-

78. St. Hubert Guild v. Quinn, 64 Misc. 336, 118 NYS 582.

79. Ky. St. § 1352 (Russell's St. § 3670) held enacted to prohibit printing and distribution of obscene literature intended for general or public use and reading. Kinnaird v. Com. [Ky.] 121 SW 489.

80. Indictment held not to comply with Cr. Code Prac. § 122, so as to charge violation of Ky. St. § 1352 (Russell's St. § 3670). Kinnaird v. Com. [Ky.] 121 SW 489.

81. Indictment charging offense, under Ky. St. § 1352 (Russell's St. § 3670), of circulating obscene matter. Kinnalrd v. Com. [Ky.] 121 SW 489.

82. Statement that "grand jury is not now in possession of said instrument, and for that reason it cannot be filed herewith," held not sufficient excuse, and demurrer ought to have been sustained. Kinnaird v. Com. [Ky.] 121 SW 489.

83. Not necesary to allege in indictment identical language used. Morris v. State [Ga. App.] 65 SE 58. Words imputed to defendant held vulgar and obscene when considered in connection with explanatory innuendo contained in indictment. Id.

84. Conviction illegal in absence of finding of such knowledge. New Castle v. Genkinger, 37 Pa. Super. Ct. 21.

85. Kinnaird v. Com. [Ky.] 121 SW 489.

86. Under Pen. Code, § 228, it is a felony to commit lewd or lascivious act upon or with the body, or any part or member thereof, of a child under 14 years. People v. Grinnell, 9 Cal. App. 238, 98 P 681.

87. Indictment under Pen. Code, § 228, held defective for failure to specify that act was not one of those specified in part 2 of Penal Code. People v. Grinnell, 9 Cal. App. 238, 98 P 681.

88. Indictment substantially in language of Hurd's Rev. St. 1908, c. 38, § 42ha, held sufficient. People v. Scattura, 238 Ill. 313, 87 NE 332.

89. Laws 1905, p. 181, c. 94, § 1, held not void because acts constituting offense were not defined. Dekelt v. People, 44 Colo. 525, 99 P 330.

90. Exposing person of girl 14 years old and soliciting her to have sexual intercourse, held within Laws 1907, p. 121, § 1. State v. Dunn [Or.] 99 P 278. Not necessary for information to allege that child had in fact become a delinquent. Id.

91. King v. New London, 8 Ohio N. P. (N. S.) 34.

92. Saye v. State, 54 Tex. Cr. R. 430, 114 SW 804.

93. Saye v. State, 54 Tex. Cr. R. 430, 114 SW 804.

Instruction held not to present such defense adequately. Id.

94. Complaints or communications two weeks afterwards held inadmissible. Saye v. State, 54 Tex. Cr. R. 430, 114 SW 804.

sociation and cohabitation together" it is necessary to prove that the defendants lived together as husband and wife.[95]

INDEMNITY.

The scope of this topic is noted below.[98]

§ 1. Definition and Distinctions, 2219.
§ 2. The Contract, 2219.
§ 3. Interpretation and Effect of Contract, 2220.
§ 4. Actions on Contract, 2222.
§ 5. Defenses, 2224.
§ 6. Measure of Recovery, 2226.

§ 1. *Definition and distinctions.*[97]—See 11 C. L. 1892—An agreement to indemnify is in the nature of insurance.[98] The essence of such an agreement is the promise of the indemnitor to save indemnitee harmless from loss by reason of some particular thing,[99] and where such is the nature of an agreement, it will be held to be one of indemnity,[1] though called by some other name.[2] But a promise to pay an obligation to a third person is more than an agreement to indemnify.[3] An agreement to pay attorney's fees for enforcing an obligation is one of indemnity as to that obligation.[4] A release by prospective heirs of their interest in claims owing to their ancestor cannot be construed as an agreement to indemnify the debtor from suit by the administrator.[5]

§ 2. *The contract.*[6]—See 11 C. L. 1892—A contract of indemnity must be supported by a consideration,[7] and where it is entered into subsequently to the incurring

95. Evidence held insufficient to establish offense under § 4358, Code 1906. State v. White [W. Va.] 66 SE 20.

96. **Includes** contract for indemnification generally, including fidelity bonds to secure faithful performance by a specified servant, as distinguished from indemnity against loss by defalcation generally (see Insurance *). **Excludes** contracts of guaranty (see Guaranty *) and of insurance (see Insurance *), security for debts in general (see Chattel Mortgages; * Mortgages; * Pledges *), matters common to bonds in general (see Bonds *) and suretyship in general (see Suretyship *), bail and indemnity of bail (see Bail, Civil;* Bail, Criminal*), official bonds (see Officers and Public Employes,* § 12), indemnity of officers executing writs (see Attachment,* § 9; Executions,* §§ 8C, 8K, 9; and see, also, other topics dealing with particular writs). Excludes, also, bond of fiduciaries (see Estates of Decedents,* §§ 3C, 9G; Guardianship,* § 12; Trusts,* § 10; Foreclosure of Mortgages on Land,* § 3; Assignments for Benefit of Creditors,* § 8), bonds given in the course of legal proceedings to indemnify the adverse party in case of failure of the party giving the bond to establish his claim (see Appeal and Review,* §§ 6G, 17; Attachment,* § 7; Costs,* § 3; Garnishment,* § 9; Replevin,* §§ 5, 14; Injunction,* § 4B), and forthcoming bonds (see Attachment,* § 12; Executions,* § 8G; Replevin,* § 17). Excludes, also, the doctrines of contribution and exonerations (see Contribution *) and subrogation (see Subrogation *).

97. **Search Note:** See note in 100 A. S. R. 775.

See, also, Indemnity, Cent. Dig. § 1; Dec. Dig. § 1; 22 Cyc. 79, 80; 13 A. & E. Enc. L. (2ed.) 8; 16 Id. 167, 168.

98. Bond for faithful performance of building contract held a contract of insurance. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

99. Ordinary v. Connolly [N. J. Eq.] 72 A 363. Promise to save landlord harmless from claims of tenant. Zbarazer Realty Co. v. Brandstein, 61 Misc. 623, 113 NYS 1078.

1. Where plaintiff sold land to defendant on condition that defendant respect right of plaintiff's tenant to harvest crop thereon, held agreement to indemnify plaintiff from tenant's claim, so that where, upon breach by defendant, plaintiff was obliged to pay judgment recovered by tenant, he may recover over from defendant. Beck v. McLane, 129 App. Div. 745, 114 NYS 44.

2. "I will guarantee your money, principal, and interest, for whatever amount you invest," held indemnity. Norris v. Reynolds, 131 App. Div. 818, 116 NYS 106. Guaranty to protect from loss by reason of nonproduction of warehouse receipts. National Bank of Denison v. Roundtree [Tex. Civ. App.] 115 SW 639.

3. Assumption of mortgage by grantee makes him primarily liable, so that grantor may sue him without having paid. Perry v. Ward [Vt.] 71 A 721.

4. Included in note. First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887; Young v. State Bank [Tex. Civ. App.] 117 SW 476.

5. Whitney v. Bullock, 145 Ill. App. 269.

6. **Search Note:** See notes in 3 C. L. 1698; 10 L. R. A. (N. S.) 323; 11 Id. 1028; 42 A. S. R. 186; 100 Id. 774; 8 Ann. Cas. 608.

See, also, Indemnity, Cent. Dig. §§ 2-35; Dec. Dig. §§ 2-13; 22 Cyc. 80-100; 16 A. & E. Enc. L. (2ed.) 168.

7. Wright v. Howes [Ky.] 121 SW 611.

of the principal obligation, it must be supported by an independent consideration.[8] The mailing of an indemnity bond is acceptance of an application therefor and completes the contract.[9] The contract need not be in writing,[10] nor is it necessary that the obligation to indemnify be formally expressed.[11] The contract of indemnity may be included in a franchise.[12] A renewal of a bond of indemnity is ordinarily a new and distinct contract,[13] and the application therefor constitutes a part thereof,[14] though an indemnity bond may be so worded that it will constitute, with its renewals, one continuous contract.[15] A written contract of indemnity may be reformed so as to include a limitation omitted by mistake.[16] Where a bond is required by statute, it is sufficient if it complies with the statutory provision.[17] A common carrier cannot, as such, validly contract for indemnity from losses arising from its own negligence,[18] but when not contracting in its capacity as a common carrier, it may validly secure such indemnity.[19] The validity of fidelity bonds is frequently governed by statutes regulating insurance.[20] In general, a bond worded by the indemnitor will not be deemed invalid by reason of an irregularity not stipulated to avoid it.[21]

§ 3. *Interpretation and effect of contract.*[22]—See 11 C. L. 1892—The rule of strict construction of surety contracts applies in favor of an uncompensated indemnitor,[23] but the liability of the indemnitor will not be affected by immaterial departures from the terms of the agreement.[24] An indemnitor whose business it is to indem-

8. In such case the principal obligation is not a consideration for the subsequent indemnity. Wright v. Howes [Ky.] 121 SW 611.

9. Unnecessary to prove its arrival. Title Guaranty & Surety Co. v. Bank of Fulton [Ark.] 117 SW 537.

10. Beck v. McLane, 129 App. Div. 745, 114 NYS 44.

11. Similarly, where defendant which installed electric plant for plaintiff provided by agreement that it might require plaintiff to appeal from any judgment obtained against it in certain suits for injuries due to defective construction of the plant, held implied agreement to indemnify plaintiff against losses so sustained. City of Owensboro v. Westinghouse, Church, Kerr & Co. [C. C. A.] 165 F 385.

12. Where city franchise to street railroad company required company to keep part of street in repair and provided that company should indemnify city if latter was compelled to respond in damages for injury caused by company's failure to perform such condition. Citizens' R. & L. Co. v. Johns [Tex. Civ. App.] 116 SW 62.

13. Not covering losses under the original bond. United States Fidelity & Guar. Co. v. Williams [Miss.] 49 S 742.

14. Admissible in evidence in suit for loss occurring under renewal. Danvers Sav. Bank v. National Surety Co. [C. C. A.] 166 F 671.

15. Where promise "during the term, or any subsequent renewal of such term," to reimburse and make good losses "during the continuance of said term, or any renewal thereof, and discovered during said continuance or renewal thereof or within six months thereafter," held to cover loss occurring during continuance of original term but not discovered till after six months from renewal. Cutts v. Spear, 8 Ohio N. P. (N. S.) 445.

16. Bindsell v. Federal Union Surety Co., 130 App. Div. 775, 115 NYS 447.

17. Under Civil Code, § 3137, requiring holder of lost or destroyed instrument to give bond executed by himself and two sureties to indemnify party sued against any lawful claim thereon, it is not necessary that any penal sum be fixed, or that original payee give bond, if not now the holder. Stone v. Gray, 10 Cal. App. 609, 103 P 155.

18. Southern R. Co. v. Blunt, 165 F 258.

19. Where permitted defendant to build a platform beside track in consideration of indemnity from loss however caused, and was obliged to pay for cotton burned thereon by its own negligence, may recover from defendant. Southern R. Co. v. Blunt, 165 F 258.

20. Under Insurance Law (Laws 1892, p. 1941, c. 690), § 24, as amended by Laws 1906, p. 768, c. 326, § 7, providing that guaranty companies take no single risk in excess of ten per cent of capital and surplus, a risk of more than ten per cent is not void, since the law also provides that the portion reinsured shall not be counted in computing the ten per cent, and could reinsure excess. Therefore liable for refusal to furnish such bond, as agreed. Mosier v. U. S. Fidelity & Guar. Co., 134 App. Div. 849, 119 NYS 157.

21. In bond insuring fidelity of employe, failure of latter to sign counter indemnity in favor of bonding company held not to invalidate the main contract. Title Guaranty & Surety Co. v. Bank of Fulton [Ark.] 117 SW 537.

22. **Search Note:** See notes in 3 C. L. 1699; 7 L. R. A. (N. S.) 459; 11 Id. 1173; 12 Id. 247; 13 Id. 793; 14 Id. 457; 10 Ann. Cas. 593, 674; 11 Id. 1031.

See, also, Indemnity, Cent. Dig. §§ 7-85; Dec. Dig. §§ 5-13; 22 Cyc. 84-100; 16 A. & E. Enc. L. (2ed.) 173.

23. Rodgers Shoe Co. v. Coon [Mich.] 16 Det. Leg. N. 454, 122 NW 133; Title Guaranty & Trust Co. v. Murphy, 52 Wash. 190, 100 P 315.

24. Where indemnity was that agent would turn over all moneys to principal, it was

nify for profit, as by the issue of fidelity bonds in consideration of a premium, and who words his contract, is an insurer [25] whose contract is governed by the ordinary rule that construction should favor the insured.[26] Thus the indemnitee will not only be given the benefit of a doubt [27] but the statements in his application will ordinarily be deemed to be representations only rather than warranties,[28] unless expressly so made,[29] even though they are recited as part of the consideration for the bond.[30] Such a bond will be construed in the light of the circumstances surrounding its execution and of its purpose,[31] and in determining the scope of its condition its recitals may be considered.[32] The question whether the condition of the bond has been broken is ordinarily governed by the law of the place of contract,[33] but the federal statutes furnish the definition of embezzlement to be read into a bond insuring the fidelity of a federal official.[34] The renewal of a bond of indemnity does not cover losses occurring outside the period of renewal,[35] unless expressly so worded,[36] and even in the latter case, an express limitation of the total liability to the amount of the bond, will, of course, preclude recovery of the full amount for each period of renewal.[37] Whether a contract of indemnity creates joint or several rights,[38] whether it indemnifies against liability [39] or only against loss,[40] whether the risk has been guilty of the conduct indemnified against,[41] and what claims the contract cov-

not affected by act of principal in allowing him to deduct office rent, etc., and to account once a year. Rodgers Shoe Co. v. Coon [Mich.] 16 Det. Leg. N. 454, 122 NW 133.

25. Title Guaranty & Surety Co. v. Bank of Fulton [Ark.] 117 SW 537; Fidelity & Deposit Co. v. Colorado Ice & Storage Co., 45 Colo. 443, 103 P 383; Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738; Crystal Ice Co. v. United Surety Co. [Mich.] 16 Det. Leg. N. 809, 123 NW 619.

26. United States Fidelity & Guar. Co. v. Bank of Batesville, 87 Ark. 348, 112 SW 957; Title Guaranty & Surety Co. v. Bank of Fulton [Ark.] 117 SW 537; Fidelity & Deposit Co. v. Colorado Ice & Storage Co., 45 Colo. 443, 103 P 383; Sunderland Roofing & Supply Co. v. U. S. Fidelity & Guar. Co. [Neb.] 122 NW 25; Griffin v. Zuber [Tex. Civ. App.] 113 SW 961.

27. Title Guaranty & Surety Co. v. Bank of Fulton [Ark.] 117 SW 537.

28. Title Guaranty & Surety Co. v. Bank of Fulton [Ark.] 117 SW 537. As to duties of employe in question held, not warranties that duties would remain same where applications for renewals showed extension of duties. Fidelity & Deposit Co. v. Colorado Ice & Storage Co., 45 Colo. 443, 103 P 383.

29. Title Guaranty & Surety Co. v. Bank of Fulton [Ark.] 117 SW 537; Fidelity & Deposit Co. v. Colorado Ice & Storage Co., 45 Colo. 443, 103 P 383.

30. Therefore no forfeiture, if honest, though incorrect. Title Guaranty & Surety Co. v. Bank of Fulton [Ark.] 117 SW 537.

31. City of New York v. Mechanics' & Traders' Bank, 130 App. Div. 748, 115 NYS 769.

32. Union Safe Deposit Bank v. Nichter, 224 Pa. 227, 73 A 558.

33. Under Penal Code, §§ 528, 540, held that larceny insured against was committed by agent who retained part of collections on groundless claim. Matthews & Co. v. Employer's Liability Ass'n Corp., 127 App. Div. 195, 111 NYS 76.

34. No criminal intent necessary in taking money-order and stamp funds under U. S. Comp. St. 1901, §§ 4046, 4053, defining embezzlement by postmasters. Griffin v. Zuber [Tex. Civ. App.] 113 SW 961.

35. Declaration upon renewal demurrable for not showing that loss occurred under renewal. United States Fidelity & Guar. Co. v. Williams [Miss.] 49 S 742.

36. "Shall remain liable for any act * * * between the original date of this bond and the time to which it shall have been continued." Allowed to recover for loss occurring under original bond. Fidelity & Deposit Co. v. Champion Ice Manufacturing & Cold Storage Co. [Ky.] 117 SW 393.

37. Fidelity & Deposit Co. v. Champion Ice Manufacturing & Cold Storage Co. [Ky.] 117 SW 393.

38. Held one obligee could sue on bond covenanting to pay obligees certain damages that might be awarded to the obligees or "to any one or more of them jointly or severally." International Hotel Co. v. Flynn, 141 Ill. App. 532.

39. Bond and mortgage executed to surety on mortgagor's supersedeas bond, conditioned upon latter's "satisfying the judgment," indemnifies against liability, and entitles indemnitee to foreclose the mortgage as soon as judgment given against the indemnitor. Cazort & McGehee Co. v. Dunbar [Ark.] 121 SW 270.

40. Agreement of defendant to furnish funds to enable plaintiff to discharge a claim held to create an indemnity fund against loss, but not against liability. Maxey v. Rideout, 173 F 172.

41. Where there was no evidence of intentional wrongdoing on part of agent unable to explain discrepancy in his accounts, held not larceny or embezzlement within bond, but only carelessness. United States Fidelity & Guar. Co. v. Bank of Batesville, 87 Ark. 348, 112 SW 957. Failure of agent to pay for goods bought by him from indemnitee, not covered by indemnity against failure to pay over moneys received. Sanitas Co. v. Nizorawski [Wis.] 120 NW 292.

ers, with reference to the conduct of the indemnitee,[42] the extent of the claim,[43] by whom it is preferred,[44] and the time at which it accrued,[45] are, of course, questions to be determined by construction of the particular contract involved in each case. "Fraud or dishonesty amounting to embezzlement or larceny," within the meaning of a fidelity bond, is not confined to such misappropriations as would constitute the technical offenses mentioned and sustain a conviction thereof,[46] but does not cover a case of mere negligence.[47] The effect of a contract of indemnity is sometimes to be ascertained with reference to a statute.[48]

§ 4. *Actions on contract.*[49]—See 11 C. L. 1894—Under an agreement to indemnify against liability, an action may be maintained by the indemnitee as soon as his liability accrues,[50] though he has not yet discharged it,[51] but where the indemnity is only against loss, no action is maintainable until the loss has been actually suffered by the indemnitee.[52] A judgment or award of execution against the indemnitee is,

Bond conditioned upon faithful accounting by treasurer of money of indemnitee violated by his loaning its funds to himself on bad security. Catholic University v. Morse, 32 App. D. C. 195. Indemnity against loss by dishonesty of employe, only within direct scope of his stated duties, held to cover embezzlement of moneys collected by employe described as a "salesman," but not of money received by him for goods he stole from indemnitee, it being proved that the possession of goods was not within the scope of his employment. Granger v. Empire State Surety Co., 132 App. Div. 437, 116 NYS 973.

42. Injury to passenger of indemnitee by stepping into an excavation made by indemnitor, under contract to restore tracks of indemnitee and indemnify latter "from all suits and actions which may be brought against the said company and from and against all claims of any kind for damages done or caused in the course of the construction of the work provided for by this contract, or in consequence thereof," held not covered, where really due to negligence of indemnitee in setting passenger down there. North American R. Const. Co. v. Cincinnati Trac. Co. [C. C. A.] 172 F 214. Where state, required by Laws 1894, pp. 621, 630-633, 643, c. 338, §§ 23, 50-53, 111, to keep canal bridges safe for public, granted defendant right to run tracks and cars thereon with duty to pay all damages therefrom resulting, and later, in accordance with Laws 1894, p. 629, c. 338, § 37, and Laws 1899, p. 621, c. 280, § 1, state paid judgment for injuries to passenger of defendant by reason of falling of bridge, held, not covered by indemnity because due to state's neglect of its duty to keep bridge safe. People v. Syracuse Rapid Transit R. Co., 129 App. Div. 800, 114 NYS 776.

43. Interest on mortgage debt from time of award to mortgagee of full amount by mortgagor's referee in bankruptcy to time of distribution held not indemnified against by bond conditioned against loss "by reason of said mortgage debt, interest and costs not being paid in full * * * by the referee," and in the alternative that the indemnitor pay the difference between the award and the amount of the mortgage debt with interest till paid. Union Safe Deposit Bank v. Vichter, 224 Pa. 227, 73 A 558. Where plaintiff undertook to insure the mortgagees and purchasers of sixty-two houses to be built by X, and defendant gave bond indemnifying plaintiff from loss on all claims, etc., "including all such sums of money as may be advanced and paid by said company for materials and labor for the construction and completion of said buildings," held that bond covered expenditures on all sixty-two houses including cost of completion upon default of X, though policies had been issued on only 41. Equitable Trust Co. v. Aetna Indemnity Co., 168 F 433.

44. Bond indemnifying sheriff from all damages, etc., because of a certain levy, is not limited to actions against the sheriff by the execution defendant, but covers action by true owner of property levied on. McKnight v. Ballif, 45 Colo. 138, 100 P 433.

45. Bond indemnifying against claims arising "at any time hereafter" does not cover a claim for prior services. Burlington County R. Co. v. New Jersey Rapid Transit Co. [N. J. Err. & App.] 73 A 504.

46. Cutts v. Spear, 8 Ohio N. P. (N. S.) 445.

47. United States Fidelity & Guar. Co. v. Bank of Batesville, 87 Ark. 348, 112 SW 957.

48. In view of Civil Code, § 2778, allowing recovery upon an indemnity against liability, upon the indemnitees "becoming liable," recovery is allowable only where **legal** liability has accrued. United States Fidelity & Guar. Co. v. More, 155 Cal. 415, 101 P 302. A deposit given to indemnitee as security is not within Rev. Codes, § 5140, providing that a depository is not bound to deliver a thing deposited without demand, but is a pledge within § 5774, and the indemnitor is entitled to interest earned thereon as owner, under § 4472. Leggat v. Palmer [Mont.] 102 P 327.

49. **Search Note:** See notes in 3 C. L. 1700; 15 L. R. A. (N. S.) 164; 1 Ann. Cas. 733; 3 Id. 480, 965.

See, also, Indemnity, Cent Dig. §§ 32, 36-48; Dec. Dig. §§ 14-16; 22 Cyc. 100-106; 16 A. & E. Enc. L. (2ed.) 176, 181, 182.

50. Bond and mortgage conditioned on satisfaction of judgment. Cazort & McGehee Co. v. Dunbar [Ark.] 121 SW 270. Rule recognized by Civil Code, § 2778. United States Fidelity & Guar. Co. v. More, 155 Cal. 415, 101 P 302.

51. Cazort & McGehee Co. v. Dunbar [Ark.] 121 SW 270.

52. Unsatisfied judgment against indemnitee not sufficient. Maxey v. Rideout, 173 F 172. No loss to plaintiff in subscribing to stock of corporation, where it later trans-

however, sufficient to entitle him to equitable relief.[53] Of course, in any case, the loss suffered by the indemnitee must be that against which he was indemnified.[54] An indemnity against the claims of a third person does not confer upon the latter a right of action against the indemnitor,[55] neither is such indemnitor a proper or necessary party defendant in a suit against the indemnitee upon the principal obligation.[56] The rights of the indemnitee against the indemnitor cannot be adjudicated in a suit upon the principal obligation, in which the indemnitee did not seek the enforcement thereof.[57] It is not necessary to set out each breach of an indemnity bond in a separate count,[58] but the assignment of each breach must be perfect in itself, and not assisted by reference to other assignments.[59] The declaration is demurrable if it fails to allege the fulfillment of all conditions precedent,[60] or if the facts unnecessarily set out in support of its averments fail to substantiate them.[61] In all cases of conditions to indemnify and save harmless the proper plea is non damnificatus,[62] and the plaintiff must set up his damage in reply,[63] but the rule is different where the condition is to discharge and acquit from a particular thing,[64] though a condition to acquit from damage from a particular thing amounts to a condition to indemnify or save harmless, to which the plea of non damnificatus is proper.[65] A breach of condition of a fidelity bond is sufficiently pleaded by alleging the falsity of a material representation inducing its issue,[66] no allegation of fraud or mistake being essential.[67] A contract of indemnity may be enforced by set-off.[68]

The loss sustained by the indemnitee must be established by legal evidence, and [69] a judgment against the indemnitee is admissible for this purpose,[70] but it will not be conclusive against the indemnitor if the latter was neither a party[71] nor a

ferred its property to others for certificates of indebtedness and dissolved, plaintiff refusing to accept certificate in place of his stock and to take dividends. Norris v. Reynolds, 131 App. Div. 818, 116 NYS 106.

53. May maintain bill to set aside fraudulent conveyance by indemnitor. Carr v. Davis, 64 W. Va. 522, 63 SE 326.

54. Where grantor of land, relative to which an action was pending, gave not only a warranty deed but also a bond, on which plaintiff was surety, against any loss due to the judgment in such action, and defendant gave plaintiff an indemnity bond against loss on the first bond, and before action was ended grantee sold land to X, who got judgment against grantee on ground of unmarketable title which plaintiff paid, plaintiff is not entitled to recover on the indemnity bond against defendant. Utah Savings & Trust Co. v. Stoutt [Utah] 102 P 865. Cashier allowing his partner to check against uncollected drafts not sufficient to show "fraud or dishonesty amounting to larceny or embezzlement" indemnified against, in absence of evidence of fraudulent intent. Farmers' State Bank v. Title Guaranty & Trust Co., 133 Mo. App. 705, 113 SW 1147.

55. Tenant not allowed to enforce his claims against his landlord against person indemnifying latter therefrom. Zbarazer Realty Co. v. Brandstein, 61 Misc. 623, 113 NYS 1078.

56. Where collateral indemnity to maker of negotiable note, error to allow holder to join indemnitor as defendant. Young v. State Bank [Tex. Civ. App.] 117 SW 476.

57. Where indemnitee pleaded liability of indemnitor in defense but did not ask recovery over against him, it was error to enter judgment in favor of indemnitor as well as in favor of plaintiff. Burkett v. Dillon [Tex. Civ. App.] 117 SW 917.

58. Canton Nat. Bank v. American Bonding & Trust Co. [Md.] 73 A 684.

59. Where insufficient except by reference, demurrable. Canton Nat. Bank v. American Bonding & Trust Co. [Md.] 73 A 684.

60. Failed to aver that defalcation was discovered within three months after term of bond expired, as stipulated. Canton Nat. Bank v. American Bonding & Trust Co. [Md.] 73 A 684.

61. Insufficient to show cashier guilty of the larceny alleged, and indemnified against. Canton Nat. Bank v. American Bonding & Trust Co. [Md.] 73 A 684.

62, 63. Perry v. Ward [Vt.] 71 A 721.

64. Here defendant must set forth affirmatively the special manner of performance. Perry v. Ward [Vt.] 71 A 721.

65. Perry v. Ward [Vt.] 71 A 721.

66, 67. Stapleton Nat. Bank v. U. S. Fidelity & Guar. Co., 131 App. Div. 157, 115 NYS 372.

68. Murphy v. Yonkers, 131 App. Div. 199, 115 NYS 591.

69. Letters sent to bank from another bank claiming to have shipped currency to first bank, incompetent to prove it was sent, as against indemnitor of fidelity of first bank's cashier. Title Guaranty & Surety Co. v. Bank of Fulton [Ark.] 117 SW 537.

70. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656.

71. Baltimore & O. R. Co. v. Howard County Com'rs [Md.] 73 A 656; Barasch v. Kramer, 62 Misc. 475, 115 NYS 176.

privy[72] to the suit in which it was rendered, nor was summoned in to defend the same,[73] nor unless the same question was at issue in the former suit;[74] but, if the indemnitor was called in to defend the former's suit, the judgment therein will be conclusive upon him as to the right of action of the plaintiff in that suit,[75] and as to his freedom from contributory negligence,[76] and the amount of the damages,[77] but it will not fix the ultimate liability as between the indemnitor and the indemnitee.[78] It must be shown, however, that such judgment was entered by order of the court,[79] but this being done, then by proving the further fact that the indemnitor was the responsible cause of the loss for which such judgment has been given against the indemnitee, the latter completes its case.[80] Where an indemnitor is thus notified to come in and defend a suit against his indemnitee, he is not entitled to dictate what defenses shall be interposed unless he comes into the action.[81] The admissibility of evidence depends largely upon the nature of the contract in question.[82] The larceny or embezzlement against which indemnity is given by a fidelity bond need not be established beyond a reasonable doubt, but merely by a preponderance of the evidence.[83] It is sufficient if the evidence shows substantial conformity by the indemnitee to the statement in his application for indemnity.[84] The effect of a compromise by the indemnitee of a defalcation by the employe in question must be submitted to the jury under a sufficient explicit instruction.[85] Equity will not give an indemnitor a preference because of money deposited as indemnity, which has been mingled with the general assets of the insolvent indemnitee.[86]

§ 5. *Defenses.*[87] —See 11 C. L. 1885.— The misrepresentation by the insured of a material fact inducing the contract is a defense,[88] irrespective of an intent to mis-

72, 73. Barasch v. Kramer, 62 Misc. 475, 116 NYS 176.

74. Where not shown upon which of two alternative grounds former judgment was based, not to be presumed that it was on the one which would give basis for present action. Reynolds v. Alderman, 130 App. Div. 286, 114 NYS 463.

75. City of New York v. Corn, 133 App. Div. 1, 117 NYS 614; City of Seattle v. Regan & Co., 52 Wash. 262, 100 P 731.

76. City of New York v. Corn, 133 App. Div. 1, 117 NYS 514; Scott v. Curtis, 195 N. Y. 424, 88 NE 794; City of Seattle v. Regan & Co., 52 Wash. 262, 100 P 731.

77. City of New York v. Corn, 133 App. Div. 1, 117 NYS 614; Scott v. Curtis, 195 N. Y. 424, 88 NE 794; City of Seattle v. Regan & Co., 52 Wash. 262, 100 P 731.

78. Scott v. Curtis, 195 N. Y. 424, 88 NE 794; City of Seattle v. Regan & Co., 52 Wash. 262, 100 P 731.

79. Insufficient where copy of judgment merely recited findings and rendition of judgment against the indemnitee, without stating that the court directed the judgment. Fidelity & Deposit Co. v. Colorado Ice & Storage Co., 45 Colo. 433, 103 P 383.

80, 81. City of Seattle v. Regan & Co., 52 Wash. 262, 100 P 731.

82. Proper to exclude evidence of indemnitee's knowledge of gambling of employe in question, where not shown to have been acquired before making last certificate to indemnitor for fidelity bond. Fidelity & Deposit Co. v. Colorado Ice & Storage Co., 45 Colo 443, 103 P 383. Evidence admissible of what indemnitee did to complete contract upon default of contractor, in order to show necessity of loss equal to full penalty of bond, as alleged. Atlantic Trust & Deposit Co. v. Laurinburg [C. C. A.] 163 F 690. Representations by one indemnified against nonperformance of contract to indemnitor as to responsibility of other bidders is inadmissible to show indemnitor thereby influenced to indemnify. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738. Where indemnitor seeks to recover interest collected by indemnitee on deposit by way of security made by debtor of indemnitor, evidence admissible that debtor claims none. Leggat v. Palmer [Mont.] 102 P 327.

83. Instruction to that effect correct. Fidelity & Deposit Co. v. Colorado Ice & Storage Co., 45 Colo. 443, 103 P 383.

84. Where stated that employe in question would account daily, and evidence showed he sometimes handed in money in tin box without having it counted till next day. Fidelity & Deposit Co. v. Colorado Ice & Storage Co., 45 Colo. 443, 103 P 383.

85. Where employe's default discovered after his death, was paid by his wife, to avoid publicity, and she recovered back what she paid upon indemnitee's later informing indemnitor of other defaults subsequently discovered, an instruction merely submitting whether the transaction amounted to an accord and satisfaction held not sufficiently specific. Danvers Sav. Bank v. National Surety Co. [C. C. A.] 166 F 671.

86. Commonwealth v. Union Surety & Guar. Co., 37 Pa. Super. Ct. 179.

87. **Search Note:** See Indemnity, Cent. Dig. § 139; Dec. Dig. § 15(4); 22 Cyc. 100-106; 16 A. & E. Enc. L. (2ed.) 182.

88. As to scope of duties of employe, date

represent,[89] and, where expressly so provided, such a misrepresentation in the original application for a bond will avoid a renewal thereof,[90] but a qualified representation limited to the knowledge of the affiant will not vitiate the contract if its falsity was due to an honest mistake of fact.[91] The insurer is entitled to rely upon a certificate inducing the issue of a fidelity bond, although executed by the employe against whose default it was given, if in so doing he acted as agent of the insured.[92] Recovery upon a contract of indemnity will be barred by the breach of one of its material conditions,[93] unless proved harmless,[94] or by a material alteration of the principal obligation,[95] but, where the condition is not broken,[96] or the contract is not altered,[97] or the alteration is favorable to the indemnitor,[98] or is made by the person against whose default the indemnity is given,[99] the indemnitee may recover. It is no defense that the indemnitee subsequently took additional security,[1] or that, having taken it, he has failed to enforce it.[2] Nor is it necessarily a defense that the indemnitee failed to perform his part of the contract with the bonded contractor,[3] or that, when sued, he failed to interpose some technical defense,[4] if he acted in good faith.[5] The indemnitor is discharged, however, where the indemnitee waives the breach,[6] or deprives the indemnitor of substantial rights.[7] The indemnitor will

of last examination of his accounts, and their correctness, where termed warranties on bond, and made basis of contract. Sunderland Roofing & Supply Co. v. U. S. Fidelity & Guar. Co. [Neb.] 122 NW 25.

89. Mere allegation of falsity sufficient, there being an implied condition of truthfulness. Stapleton Nat. Bank v. U. S. Fidelity & Guar. Co., 131 App. Div. 157, 115 NYS 372. Certificate of correctness of employe's account honestly made without proper investigation which would have revealed facts. National Bank v. Equitable Trust Co., 223 Pa. 28, 72 A 794.

90. Sunderland Roofing & Supply Co v. U. S. Fidelity & Guar. Co. [Neb.] 122 NW 25.

91. Certificate of employe's faithfulness "so far as known" made by officers believing his allowance of overdrafts, of which they were aware, to be due to error of judgment rather than to dishonesty. Aetna Indemnity Co. v. Farmers' Nat. Bank [C. C. A.] 169 F 737.

92. Answer alleging issue "on faith of a statement in writing signed by the bank, its officers, or agent, one G. (the cashier), who was the duly authorized agent of said plaintiff, and duly authorized to sign the same, and that his authority to sign the same was obtained as a part of the duties and responsibilities imposed upon him as cashier," not demurrable as showing he signed as individual and not as agent of bank. Stapleton Nat. Bank v. U. S. Fidelity & Guar. Co., 131 App. Div. 157, 115 NYS 372.

93. Failure to require employe to make the promised accounting, whereby the loss became possible. United States Fidelity & Guar. Co. v. Bank of Batesville, 87 Ark. 348, 112 SW 957. Failure to notify of employe's omission to pay over collections when due, bond providing for nonliability if suspicious facts not reported. National Union Fire Ins. Co. v. Empire State Surety Co. [N. J. Law.] 73 A 233. Nine months' delay in giving written notice of loss required by elevator liability policy to be immediate. Aronson v. Frankfurt Accident & Plate Glass Ins. Co., 9 Cal. App. 473, 99 P 537.

94. Instruction correct that extension of duties of bonded employe no defense if did not lead to his defalcation. Fidelity & Deposit Co. v. Colorado Ice & Storage Co., 45 Colo. 443, 103 P 383.

95. Rodgers Shoe Co. v. Coon [Mich.] 16 Det. Leg. N. 454, 122 NW 133.

96. Employe allowed to retain out of collections money for rent of office, commissions and expenses, condition being, "shall pay to (plaintiff) any and all moneys received by him while in the employ of (plaintiff) belonging to said (plff.)." Rogers Shoe Co. v. Coon [Mich.] 16 Det. Leg. N. 454, 122 NW 133. Required notice of defalcation given to general agent of indemnitor. Crystal Ice Co. v. United Surety Co. [Mich.] 16 Det. Leg. N. 809, 123 NW 619.

97. By indemnitee's employing new contractor to complete work upon default of original contractor, as provided for in contract, against loss as surety for the performance of which he was indemnified. Title Guaranty & Trust Co. v. Murphy, 52 Wash. 190, 100 P 315. By indemnitee's merely demanding less than is due from debtor, without releasing liability for whole. Vanderbeck v. Tierney-Connelly Const. Co. [N. J. Err. & App.] 73 A 480.

98. Atlantic Trust & Deposit Co. v. Laurinburg [C. C. A.] 163 F 690.

99, 1, 2. Equitable Trust Co. v. Aetna Indemnity Co., 168 F 433.

3. Failure to pay instalments according to contract held no defense where contractor abandoned work. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

4. That action was prematurely brought. City of Seattle v. Regan & Co., 52 Wash. 262, 100 P 731.

5. Summoned indemnitor to defend. City of Seattle v. Regan & Co., 52 Wash. 262, 100 P 731.

6. Where after loan by its bonded treasurer on improper security, in violation of condition of bond, indemnitee demanded and

not be discharged by the conduct of the person who is the subject of the contract.[8] In general, the fact that the indemnitee as well as the indemnitor is at fault as toward a third person will not be a defense if he is not pari delicto.[9] Nor will justifiable conduct of the indemnitee discharge the indemnitor, although it interferes with the discharge of the principal obligation.[10] It is a defense that the indemnitee has been paid in full by another insurer,[11] or that the question has been previously adjudicated in favor of the indemnitor,[12] but the indemnitor cannot plead res adjudicata because of a judgment against the indemnitee bond on the latter's negligence.[13] The indemnitor is estopped to plead the invalidity of an assignment, the assignor's liability under which is the subject of the indemnity,[14] nor can he set up a defense which he has waived,[15] but an indemnitor will not be held to have waived a defense with the assertion of which his conduct is consistent.[16]

§ 6. *Measure of recovery.*[17]—See 11 C. L. 1896—A bond of indemnity in a fixed sum entitles the indemnitee to recover only such loss as he has suffered, up to the amount of the bond,[18] but where no penal sum is fixed the amount of his recovery is limited only by the extent of his loss.[19] He may also recover such costs as he has been obliged to pay,[20] including costs in an appeal from a judgment against him, where the indemnitor is given notice of all proceedings and makes no objection thereto.[21] Under an agreement in a note to pay a certain percentage of the amount of the note as attorney's fees, the indemnitee may recover only such attorney's fees as he has obligated himself to pay,[22] or, in case he has made no agreement, only a reasonable amount,[23] but if he has agreed to pay the full amount stipulated in the note, he may recover it.[24]

received such security as its own and postponed its claim for a fixed time, during which employe became bankrupt. Catholic University v. Morse, 32 App. D. C. 195.

7. Where, pending appeal taken by both from judgment, indemnitee compromised the judgment and discharged the appeal, bond being against all claim "compelled to pay." City of New York v. Mechanics' & Traders' Bank, 130 App. Div. 748, 115 NYS 769.

8. Debtor of indemnitee. Vanderbeck v. Tierney-Connelly Const. Co. [N. J. Err. & App.] 73 A 480.

9. City may recover from owner of home who allowed defect in sidewalk, city's consent to build the defective bridge having contemplated only a safe one. City of New York v. Corn, 133 App. Div. 1, 117 NYS 514.

10. Where indemnitee, obliged to reserve 5 per cent of price from bonded subcontractor, wrote creditors of latter, he could advance no more, when most of the price had been paid and only 60 per cent of work done. Aetna Indemnity Co. v. George A. Fuller Co. [Md.] 73 A 738.

11. Southern R. Co. v. Blunt, 165 F 258.

12. In suit by party injured, who later obtained judgment against indemnitee, who failed to plead the former judgment in bar as requested by indemnitor, former judgment given by federal court. City of Seattle v. Northern Pac. R. Co., 47 Wash. 552, 92 P 411.

13. In favor of injured party. Southern R. Co. v. Blunt, 165 F 258.

14. Jacobs v. Sire, 133 App. Div. 617, 118 NYS 274.

15. Waiver by accepting proof of claim without objecting for a month. Crystal Ice Co. v. United Surety Co. [Mich.] 16 Det. Leg. N. 809, 123 NW 619. Waiver of written notice of default under fidelity bond by acting on oral notice. United States Fidelity & Guar. Co. v. Paxton, 32 Ky. L. R. 707, 106 SW 841.

16. Requirement of immediate written notice not waived where insurer, on being informed of loss by a disinterested third party acting as a volunteer, said he would attend to it, neither the policy or name of insured or notice or waiver being mentioned. Aronson v. Frankfurt Accident & Plate Glass Ins. Co., 9 Cal. App. 473, 99 P 537.

17. See Penalties and Forfeitures; Damages, §§ 1, 2, 4A.

Search Note: See note in 22 A. S. A. 204. See, also, Indemnity, Cent. Dig. § 32; Dec. Dig § 13(3); 22 Cyc. 95-100; 16 A. & E. Enc. L. (2ed.) 181.

18. Ordinary v. Connolly [N. J. Eq.] 72 A 363.

19. Stone v. Gray, 10 Cal. App. 609, 103 P 155.

20. Ordinary v. Connolly [N. J. Eq.] 72 A 363.

21. Suit against city by one injured by contractor's negligence. Murphy v. Yonkers, 131 App. Div. 199, 115 NYS 591.

22. First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887. Instruction to allow full 10 per cent stipulated in note erroneous, in absence of evidence as to how much indemnitee agreed to pay his attorney. Young v. State Bank [Tex. Civ. App.] 117 SW 476.

23, 24. First Nat. Bank v. J. I. Campbell Co. [Tex. Civ. App.] 114 SW 887.

INDEPENDENT CONTRACTORS.[25]

The scope of this topic is noted below.[26]

Definition and requisites of the relation. See 11 C. L. 1888—An independent contractor is one who renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished.[27] The right of control is usually held the chief consideration which determines the relation,[28] the relation of independent con-

25. Search Note: See notes in 3 C. L. 1703; 5 Id. 1782, 1783; 76 A. S. R. 382; 4 Ann. Cas. 228.

See, also, Master and Servant, Cent. Dig. §§ 1241-1266; Dec. Dig. §§ 315-324; 26 Cyc. 1552-1556; Municipal Corporations, Cent. Dig. §§ 1508-1532; Dec. Dig. § 751; 28 Cyc. 1280, 1281; Negligence, Cent. Dig. § 68; Dec. Dig. § 55; 29 Cyc. 477, 478; 16 A. & E. Enc. L. (2ed.) 186, 187, 192; 16 A. & E. Enc. P. & P. 893.

26. Includes general consideration of relation of employer and independent contractor, and the liability of the former for the negligence of the latter. **Excludes** all consideration of contracts in general (see Contracts*) and of building and construction contracts as such (see Building and Construction Contracts*). Excludes, also, all consideration of what constitutes negligence (see Negligence*, §§ 1, 2) and of the general principles of agency (see Agency*) and of master and servant (see Master and Servant*). Excludes, also, all consideration of mechanics' liens (see Mechanics' Lien*).

27. Caldwell v. Atlanta, B. & A. R. Co. [Ala.] 49 S 674; Kipp v. Oyster, 133 Mo. App. 711, 114 SW 538; McGrath v. St. Louis, 215 Mo. 191, 114 SW 611; O'Hara v. Laclede Gaslight Co., 131 Mo. App. 428, 110 SW 642.

Held independent contractor: One who contracts with state to build section of **barge canal,** and who hired his men and controlled the work, though canal commissioners had supervisory authority. Coolidge v. State, 61 Misc. 38, 114 NYS 553. Person who was employed to do **carpenter work** for lump sum, to control, discharge, and pay employes and was responsible only to defendant for result of work, and not manner of doing it. Kipp v. Oyster, 133 Mo. App. 711, 114 SW 538. Relationship not changed though contractor rendered certain services without remuneration, or that employer on one occasion referred to contractor as his "foreman." Id. Company having contract **to erect and remove signs** in defendant's building with right to select its own time, tools and servants. Press v. Penny, 134 Mo. App. 121, 114 SW 74. Where mine owner gave another a **contract to mine** and reserved no rights to interfere with details of work, but only required work to be done to conform to contract and mining rules. Merriweather v. Sayre Min. & Mfg. Co. [Ala.] 49 S 916. Requested instruction that if mine owner had "right to dismiss or otherwise control deceased," relationship of master and servant existed between them, held properly refused, since words "otherwise control" might embrace authority not necessarily inhering in such relation Id. Where contractor had written contract to do **masonry work** for two years for railroad company at stipulated prices, held railroad company not liable for death of employe of contractor, killed while excavating for new culvert, though company had put in false work to support track during construction of culvert and kept man on hand to see track was not obstructed. Louisville & N. R. Co. v. Smith's Adm'r [Ky.] 119 SW 241. Where contractor was to employ hands, pay them, **cut timber** in his own way free from control of defendant, and receive $3.50 per 1,000 feet. Young v. Fosburg Lumber Co., 147 N. C. 26, 60 SE 654. One who contracted with city to **remove garbage** and refuse from school buildings, and who received monthly sum for such removal, furnished his own men and teams. Figone v. Repetti [Cal. App.] 104 P 583. Art. 16, § 2, Charter of San Francisco, providing all employes of city must be citizens of U. S., held not to apply, defendant not being employe. Id. **Street cleaning** contractors. Frank v. Rome, 125 App. Div. 141, 109 NYS 247.

Held not independent contractor: Employe of box factory held to have been under direction of foreman, although paid according to amount of work he did and though he had right to hire assistant, and employer liable for injury to assistant. Messmer v. Bell & Coggeshall Co. [Ky.] 117 SW 346. Where defendant's superintendent engaged carpenter and directed him to get an assistant, and latter two submitted themselves to control of defendants in all details of work, the latter also furnishing materials and general plans. Poor v. Madison River Power Co., 38 Mont. 341, 99 P 947. Where plaintiff was employed to shovel gumbo upon cars and was paid for amount of work he did and had no control over cars which were controlled by defendant, and latter also owned gumbo plant and managed same. Missouri K. & T. R. Co. v. Romans [Tex. Civ. App.] 114 SW 157. Where contract of employer with contractor provided that, in case of subletting, original contractor should remain liable to employer and subcontractor should be considered contractor's agent, held that contractor had more than pecuniary interest in work and **subcontractors** were not independent. Alabama Western R. Co. v. Talley-Bates Const. Co. [Ala.] 50 S 341. Person employed, together with his **saw mill** and a fireman, at stipulated sum a month. Keen's Adm'r v. Keystone Crescent Lumber Co. [Ky.] 118 SW 355.

28. De Palma v. Weinman [N. M.] 103 P 782. Powers of control is matter of construction of contract. Id.

Evidence held to show contractor **was**

tractor being held to exist where the employer has released control over the work,[29] but not where he retains such control,[30] and some states have adopted this as a statutory test.[31] The interpretation of a written contract in this connection is for the court,[32] but the necessity of inferring the relation from facts makes the question one for the jury,[33] unless the facts upon which the relationship depends are undisputed.[34] Mere supervision of the work to see that it is done according to specifications is not such control as to make the employer liable.[35] The mode of payment is a circumstance to be considered.[36]

Employer's liability for contractor's acts. See 11 C. L. 1896—Generally, an employer is not liable for the negligence of an independent contractor,[37] but to this rule there

under supervision of defendants. Friedman v. New York, 63 Misc. 310, 116 NYS 750. Evidence held to show head porter employed by defendant was under supervision and control of defendant. Pearson v. M. M. Petter Co., 10 Cal. App. 245, 101 P 681. Evidence held not to show such a surrender of control on part of owner of vessel to charterer as to relieve owner from liability for injuries to seaman by negligence of mate. Nelson v. Western Steam Nav. Co., 52 Wash. 177, 100 P 325.

29. Work not subject to employer's control except as to results to be obtained. Seattle Lighting Co. Hawley [Wash.] 103 P 6. Where plantiff was injured by stepping in hole in street made by independent contractor engaged in doing work for street railway company, city held not liable since it did not exercise control over work, although it employed inspector to watch progress of work and suggest, but not direct, what he considered dangerous places in street. Cox v. Philadelphia, 165 F 559. Contractor held independent so far as bringing together of working crew was concerned. Burke v. City & County Contract Co., 133 App. Div. 113, 117 NYS 400.

30. City held responsible for damage done to property due to negligent manner in which alley was filled and repaved where evidence showed it retained control. Thillman v. Baltimore [Md.] 73 A 722. Employer liable where by terms of contract employer's chief engineer determined number of men to be employed, the place where they were to work, the materials to be purchased, and the wages due. Burke v. City & County Contract Co., 133 App. Div. 113, 117 NYS 400. Where owner's agent had full control of work, subject to plans and specifications, contractor was mere servant of owner. De Palma v. Weinman [N. M.] 103 P 782.

31. Independence of control is test applied by Civ. Code 1895, § 3818. Lampton v. Cedarton Co. [Ga. App.] 64 SE 495.

32. Relation of independent contractor not changed by clause in agreement providing "the said party of second part agree to carry on the work as directed by Cramp & & Co.," and defendant not liable. Morning v. Cramp & Co., 170 F 364. Language being free from ambiguity. Young v. Fosburg Lumber Co., 147 N. C. 26, 60 SE 654. Not error for court to refuse to submit interpretation of written contract to jury. Pearson v. M. M. Potter Co., 10 Cal. App. 245, 101 P 681. Error to submit question of relationship to jury where embodied in written contract. Frank v. Rome, 125 App. Div. 141, 109 NYS 247.

Contract construed: Written contract held to establish relation of employer and independent contractor. Kendall v. Johnson, 51 Wash. 477, 99 P 310.

33. Bain v. Petroleum Iron Works Co., 223 Pa. 96, 72 A 279. Held error to disregard verdict of jury finding that plaintiff was employe of defendant company and not of independent contractor. Jones v. New York Cent. & H. R. R. Co., 134 App. Div. 39, 117 NYS 1113. Evidence of contract between two defendants held sufficient to show that only one was liable, since relation of independent contractor existed. Genovesia v. Pelham Operating Co., 130 App. Div. 200, 114 NYS 646.

34. In such case court may declare as matter of law whether one is independent contractor or servant. Kipp v. Oyster, 133 Mo. App. 711, 114 SW 538. Where undisputed evidence shows relation of independent contractor, under written contract, held reversible error to submit to jury question whether oral testimony showed such contractor was mere agent of defendant. McElroy v. Glenn Kline Lumber Co., 37 Pa. Super. Ct. 393.

35. Owners not liable for falling of cornice, since they merely saw that it was completed in accordance with plans. Chute v. Moeser, 77 Kan. 706, 95 P 398. Employer may give work general supervision, either in person or through engineers of his selection, to see that it is done according to contract, without destroying relation. Mason & Hodge Co. v. Highland [Ky.] 116 SW 320. Fact that owner of building furnished material to contractor or stipulates in contract that work shall be performed according to plans and specifications of architect and to satisfaction of engineer of owner held not to make owner liable for injury resulting proximately from negligent act of contractor. Lampton v. Cedartown Co. [Ga. App.] 64 SE 495.

36. Exemption of owners no less extensive because they paid upon estimates as work progressed according to agreed price per cubic foot. Chute v. Moeser, 77 Kan. 706, 95 P 398. Where employer advanced funds to pay contractor's employes because latter had no money, and such advances were charged against contractor, held question of fact to determine relation. Bain v. Petroleum Iron Works Co., 223 Pa. 96, 72 A 279.

37. Luce v. Holloway [Cal.] 103 P 886;

are certain well established exceptions, such as where the injury results from the act contracted for,[38] where the work itself constitutes a nuisance,[39] or is inherently dangerous,[40] or where the employer interferes with the contractor in the performance

Caldwell v. Atlanta, B. & A. R. Co. [Ala.] 49 S 674; Alabama Western R. Co. v. Talley-Bates Const. Co. [Ala.] 50 S 841; Missouri Val. Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93; Baker v. Atlanta, B. & A. R. Co. [Ala.] 49 S 751. An independent contractor, who is proprietor of business he is conducting, is alone responsible for the care in doing it. Carey v. Baxter, 201 Mass. 522, 87 NE 901. Owner of machinery is not necessarily liable for injury to servant through defects therein, where owner has engaged competent expert to repair machine and is told that it is all right. McClaren v. Weber Bros. Shoe Co. [C. C. A.] 166 F 714.

Under contract to repair: Employer not liable for injury to servants of independent contractor, especially where employment is for purpose of making repairs, when work is obviously dangerous. Johnson v. Western & A. R. Co., 4 Ga. App. 131, 60 SE 1023.

As between contractor and subcontractor: Empoye of subcontractor cannot recover from contractor for injuries caused by employer's negligence, when contractor has no control of work. Winnicott v. Orman [Mont.] 102 P 570. Contractor held not liable where contract was let to subcontractor. City of New York v. Corn, 133 App. Div. 1, 117 NYS 514.

Street construction contract: A municipality is not liable for the negligence of an independent contractor while engaged in the construction of a street over which he has exclusive control, but the contractor must have such exclusive control of street as to authorize him to prohibit use of it by public. Norbeck v. Philadelphia, 224 Pa. 30, 73 A 179. Where it was stipulated in agreement that contractor was to keep part of street open for use of public, and city employed inspector whose duty it was to see that proper material was used and that holes were filled up, held city retained control over street. Id.

38. Baker v. Atlanta, B. & A. R. Co. [Ala.] 49 S 751. If contractor has followed plans and directions of his empoyer and injury has resulted, employer is liable. Bell v. Kidd, 5 Ga. App. 518, 63 SE 607. Contractor held not liable where injury resulted because repair plans were inadequate. Id.

Acts not called for by contract: Placing of ladder on sidewalk in manner and at time of day described held not to be an act called for by contract with company to remove signs from building, as swinging ladders might have been used. Press v. Penny, 134 Mo. App. 121, 114 SW 74. Where a building is constructed according to contract, and collapses, an owner cannot shield himself from liability behind an independent contractor. Brent v. Baldwin [Ala.] 49 S 343. Plaintiffs held not to have brought their case within the exception since there was nothing in contract which required trespass on plaintiff's property, and city inspector had no right to alter same. McGrath v. St. Louis, 215 Mo. 191, 114 SW 611.

39. Act of subcontractor in keeping large quantity of dynamite on hand held not contracted for. Nuisance consisted in means adopted for carrying out work. Murphy v. New York, 128 App. Div. 463, 112 NYS 807.

40. Anderson v. Feutsch [Nev.] 103 P 1013.

Statement of rule: No right of action accrues if work required can be done without injury to third persons by reasonably careful person. McGrath v. St. Louis, 215 Mo. 191, 114 SW 611. Mere fact that probable negligence or want of skill of workman employed to do certain work might result in injury to third persons held not to render owner liable for such injuries. Davis v. Whiting & Son. Co., 201 Mass. 91, 87 NE 199.

Particular matters considered with reference to inherent danger: Accident sued on held not caused by nature of work itself, but by manner of its performance. Dorn v. Snare & Triest Co., 62 Misc. 269, 114 NYS 820. Liability of employer to third person for injuries from **use of dynamite or other explosives** in conduct of work undertaken is ordinarily question for jury, although under some circumstances court may hold, as matter of law, that employer is liable. Pine Mountain R. Co. v. Finley [Ky.] 117 SW 413. Although evidence in case does not measure up to requirements of rule justifying court in taking question from jury, appellants held not prejudiced thereby. Id. Blasting may or may not fall within exceptions to general rule that employer is not liable for negligence of independent contractor, depending on circumstances of particular case. Kendall v. Johnson, 51 Wash. 477, 99 P 310. Where employer sublet contract for construction of railroad grade in Cascade mountains, far from human habitation, general rule of nonliability held to apply. Id. **Sinking caissons** and constructing piers held such work as could be done without probable injury to anyone except in event of negligence in manner of doing it. Missouri Val. Bridge & Iron Co. v. Ballard [Tex. Civ. App.] 116 SW 93. Plans for **excavation** of alley held not intrinsically dangerous to plaintiffs' property, and mere fact that wall cracked and fell out in alley held not sufficient to allow recovery. McGrath v. St. Louis, 215 Mo. 191, 114 SW 611. Excavation in sidewalk of well-traveled street held inherently dangerous. Anderson v. Feutsch [Nev.] 103 P 1013. **Cutting trees in forest** held not essentially dangerous to persons passing along footpath near trees, although those engaged in cutting same must keep reasonably careful lookout for persons. Young v. Fosbury Lumber Co., 147 N. C. 26, 60 SE 654. **Construction of sewer** is not inherently dangerous. Fields v. Johnston City, 143 Ill. App. 485. **Construction of culvert** under railroad track was not so hazardous that injury might have been expected therefrom. Louisville & N. R. Co. v. Smith's Adm'r [Ky.] 119 SW 241. Placing **ladders on sidewalk** for purpose of removing sign from building was not inherently dangerous. Press v. Penny, 134 Mo. App. 121, 114 SW 74. **Grading** street held not inherently dangerous to gas pipes

of the work.[41] An independent contract is not available to shield the employer from liability for the nonperformance of an inalienable duty owed to his own servants,[42] or those of an independent contractor,[43] or to a particular class of persons,[44] or to the public;[45] nor can such a contract be invoked to escape responsibility for the im-

located within street so as to make contractor liable for negligence of assignee in use of dynamite, where it was not shown use of such explosive was contemplated. Seattle Lighting Co. v. Hawley [Wash.] 103 P 6.

41. Johnson v. Western & A. R. Co. [Ga. App.] 60 SE 1023; Taylor v. Winsor [R. I.] 73 A 388.

Allegations of petition held sufficient to withstand demurrer, since they charged defendants assumed control over plantiffs intestate, employed by independent contractor, and if true they would be liable. Johnson v. Western & A. R. Co., 4 Ga. App. 131, 60 SE 1023.

Evidence held to show owner of wood piled in street by another knew of its dangerous condition and assumed practical control over it. Taylor v. Winsor [R. I.] 73 A 388. Exclusion of evidence offered by owners to show that they had nothing to do with mixing mortar held error, where accident resulted from defective mixture, this being material. Silverman v. Binder, 130 App. Div. 581, 115 NYS 54.

Employer held not liable: Owner not responsible to employe of contractor engaged in one portion of work for negligence of employes engaged in another portion thereof, unless owner interfered with prosecution of work and was guilty of some active negligence. Silverman v. Binder, 130 App. Div. 581, 115 NYS 54. Employer held not liable for collapse of wall caused by excavation on adjoining lot, where work was done by independent contractor and employer was not present and did not consent to removal of shoring which held wall in place. Paltry v. Egan, 132 App. Div. 254, 116 NYS 889.

42. Railroads owe positive duty to provide servants with a reasonably safe place to work, and such duty cannot be transferred. Vickers v. Kanawha & W. V. R. Co., 64 W. Va. 474, 63 SE 367. Contractor who had independent employment to build abutments, and permission of defendant to stretch guy ropes across its tracks, held not to make him independent with regard to operation of road so as to relieve defendant of liability for his negligence. Id. Immaterial that railroad company had no actual notice of such negligence in time to have avoided injury. Id.

43. Though defendant was independent contractor, its employer owed defendant's employes the duty to use reasonable care to avoid injuring them while working in elevator shaft. Schwartz v. Onward Const. Co., 130 App. Div. 588, 115 NYS 380. Apart from contract, **duty of shipowner** toward stevedore lawfully at work upon vessel is same as that of employer respecting apparatus and permanent constructions with and upon which laborer is expected to work, even though such laborer is employed by independent contractor. Grimmins v. Booth, 202 Mass 17, 88 NE 449. Defendant liable for injury to employe of independent contractor caused by defendant's failure to provide safe place in vessel where work of unloading could be carried on. Pioneer S. S. Co. v. McCann [C. C. A.] 170 F 873. It is **duty of railroad company** to exercise such reasonable provisions and precautions as will reasonably avoid injury to persons employed on its right of way by independent contractor. Cicerello v. Chesapeake & O. R. Co., 65 W. Va. 439, 64 SE 621.

44. Landlord owes **tenants** of building duty to see that elevator is properly operated and is liable for injuries caused by negligence of operator, though latter was employed by company which had contract with landlord to operate same. Sciolaro v. Asch, 129 App. Div. 86, 113 NYS 446. Railroad company owed plaintiff absolute duty to **adjoining property owners** to provide sufficient drain through its roadbed to avoid impounding water on their land. Willis v. White & Co., 150 N. C. 199, 63 SE 942. Owner held liable for injury to adjoining property which resulted from excavating on his land. Hedstrom v. Union Trust Co., 7 Cal. App. 278, 94 P 386.

45. The **duty to maintain streets in safe condition** cannot be delegated by city to independent contractor. Prowell v. Waterloo [Iowa] 123 NW 346. Erection of barriers in **sidewalk,** involving danger to passers at night, unless warning lights are put out, held not necessarily incident to reasonable and proper performance of work of constructing cement sidewalk, and is not a purely collateral matter for which city may rely on independent contractor, and city held liable. Id. Gas company, though given permission to obstruct street with pipes, owed positive duty to so guard them as to avoid injury, and immaterial whether or not company, which contracted to distribute pipes, bore relation of independent contractor to gas company; duty could not be delegated. O'Hara v. Laclede Gaslight Co., 131 Mo. App. 428, 110 SW 642.

Not liable for negligence in carrying on work, if such negligence consists in some fault or omission wholly collateral to performance of work to be done and not necessarily involved in doing it. Prowell v. Waterloo [Iowa] 123 NW 346. City not liable for negligence of street cleaning contractors in failing promptly to turn off hydrant, water from which damaged adjoining property, injury not being result of dangerous condition of public street. Frank v. Rome, 125 App. Div. 141, 109 NYS 247. Municipality not under inalienable duty to construct sewer and not liable for negligence of contractor. Fields v. Johnston City, 143 Ill. App. 485. Rule that county may not escape duty imposed by law by letting work out to independent contractor held not to apply where county was not obliged to keep highway open while necessary repair

proper use of a franchise,[46] or to escape liability for the nonperformance of a duty imposed by an ordinance,[47] or to avoid liability for the value of property which he himself has converted.[48] Where the completed work is turned over to the employer and accepted, the responsibility for injuries thereafter arising is shifted to him,[49] even though the injury result from the contractor's failure to properly perform his contract.[50] A transfer of an employe to an independent contractor does not absolve the employer from liability for injury to the employe unless the latter understood and consented to such transfer,[51] nor does the mere fact that an employee is partly under the control of an independent contractor absolve the employer from liability for the negligence of such employe.[52]

The burden of establishing the liability of the employer rests upon the plaintiff.[53]

Contractor's liability. See 11 C. L. 1893—The contractual relation between a contractor and his employer cannot be made the predicate of a liability to third persons,[54] but the contractor is nevertheless bound to exercise reasonable care, in the conduct and performance of his work, not to injure third persons,[55] as, for example, the employes of another independent contractor in the employ of the same employer,[56] but, in any case, the injury complained of must, of course, have resulted from some act or neglect of the contractor or his employes.[57] If an independent

work was in progress. Herbert v. Rockland County, 64 Misc. 352, 118 NYS 358.

46. Where independent contractor in his work must exercise a franchise granted by the legislature to his employer, the latter must answer for his torts, because it is bound to see to correct execution of powers conferred upon it. Stephanville, etc., R. Co. v. Couch [Tex. Civ. App.] 121 SW 189. Principle inapplicable where independent contractor was not exercising railroad's franchise, but merely constructing road. Id.

47. Contractor liable for plaintiff's injuries caused by derailment of engine resulting from negligence of independent subcontractor in not using proper care to prevent earth from being thrown on track, where city ordinance imposed such responsibility on contractor. Luce v. Holloway [Cal.] 103 P 886.

48. An employer is liable for the value of lumber sawed from timber unlawfully cut by his independent contractor, from the land of a third person though he did not know of or authorize the contractor's unlawful acts. Crossland v. Graham [S. C.] 65 SE 233. See generally Conversion as Tort, §§ 1, 3.

49. Defendant liable for deposit of debris in plaintiff's dam caused by construction of bridges above dam. Sipe v. Pennsylvania R. Co., 222 Pa. 400, 71 A 847.

50. Defendant liable for damages for fall of awning accepted by him more than year previous. McCrorey v. Thomas [Va.] 63 SE 1011.

51. Question of fact for jury. Bowie v. Coffin Valve Co., 200 Mass. 571, 86 NE 914. Plaintiff's relation to defendant could not be affected by secret provision in contract between his general employer and third party, whereby latter agreed that, while in contractor's service, train crew should be considered as their employes, and defendant held liable for injuries sustained by plaintiff while assisting contractor. Jones v. New York Cent. & H. R. R. Co., 134 App. Div. 39, 117 NYS 1113.

52. Winchman in general employ of shipper held to remain latter's employe so as to make shipper liable for injuries inflicted through winchman's negligence on longshoreman employed by master stevedore who had no control over winchman except that latter's hour of labor necessarily conformed to those of longshoremen and that while vessel was being loaded he obeyed signals of gangman who represented stevedore. Standard Oil Co. v. Anderson, 212 U. S. 215, 53 Law. Ed. —.

53. Administrator suing for death of intestate must show latter was employed by defendant and not by independent contractor. Midgete v. Branning Mfg. Co., 150 N. C. 333, 64 SE 5. Evidence held to present question for jury. Id.

54. Lessor of machinery held not liable to employe of lessee for injury caused by defect in machine though it had voluntarily, without consideration, assumed obligation of keeping such machine in repair. McClaren v. United Shoe Mach. Co. [C. C. A.] 166 F 712. Where one contracted with owner of building to underpin it, no liability of former to occupants of building for injuries caused by its collapse could be predicated upon delay in undertaking the work. Kennedy v. Hawkins [Or.] 102 P 733.

55. Where underpinning of building was essentially dangerous to its occupants, workmen undertaking the work for the owner were bound to exercise reasonable care in doing it. Kennedy v. Hawkins, [Or.] 102 P 733.

56. Where employes of another contractor were working below place where defendant was doing concrete work, and a piece of iron fell on one of them, O'Rourke v. Guy B. Waite Co., 125 App. Div. 825, 110 NYS 170. It was for jury to decide whether the iron belonged to defendant. Id.

57. Contractor for construction of bridge held not liable for injury caused by hole in street where such hole was not in part of

contractor performs an act dependent upon his personal care, and an injury results by reason of lack of such care, such contractor is liable to the owner if the latter is required to pay the damages arising from such negligence.[58]

INDIANS.

The scope of this topic is noted below.[59]

§ 1. Who Are Indians and What Is Their Legal Status, 2232.
§ 2. Federal and State Government of Indians and Their Habitat, 2233.
§ 3. Tribal Government Subject to Federal Dominion, 2233.
§ 4. Indian Lands and Properties, 2234. Nature of Title, 2236. Allotments, 2237. Descent and Testamentary Disposition, 2239. Leases, 2240. Actions Against Intruders, 2241.
§ 5. Rights and Liabilities of Others in Indian Country Dealing with Indians, 2242.
§ 6. Crimes and Offenses by and Relating to Indians, 2242.
§ 7. Indian Depredations, 2242.

§ 1. *Who are Indians and what is their legal status.*[60] See 11 C. L. 1898—Indians invested with the dignity of citizenship,[61] are entitled to all the rights, privileges. and immunities of other citizens,[62] and may sue in both federal and state courts.[63] The government, however, may emancipate the Indian from personal control, and still retain the function of managing and conserving his property,[64] and the fact that an allottee holds land, all or a part of which is inalienable, for a fixed period does not affect his civil or political status,[65] but as the relationship of guardian and ward existing between the United States and the Indians was not established by an express provision, neither is such a provision necessary to its termination.[66] The members of the Five Civilized Tribes are citizens of the United States,[67] and though their tribal existence was continued for certain purposes, their status as wards of the government no longer exists.[68] The Indians of New York do not possess the rights of citizenship,[69] but are regarded as wards of the state,[70] and their tribes, though not treated as independent foreign nations, are not subject to the jurisdiction of the state to the same extent as its citizens.[71] Accordingly it is held that neither the Seneca Nation nor its individual members can, without special authority, sue to re-

street where contractor worked and contractor was not responsible therefor. Presky v. Degnon-McLean Cont. Co., 125 App. Div. 381, 109 NYS 883.

58. Defendant's employes covered coal hole in sidewalk and third person fell through and sued owner who paid. Held plaintiff must give evidence to show accident occurred by negligence for which defendant was primarily liable. Scott v. Curtis, 195 N. Y. 424, 88 NE 794. See generally Contribution, § 1, subd. Recovery Over Against Person Primarily Liable.

Indemnity: The liability of a contractor upon an indemnifying undertaking given to the employer is treated elsewhere. See Indemnity.

59. Includes all matters relating peculiarly to Indians. **Excludes** general matters relative to public lands (see Public Lands *), officers (see Officers and Public Employes *), and contracts (see Public Contracts *). Excludes, also, jurisdiction of court of claims (see United States,* § 4).

60. Search Note: See Indians, Cent. Dig. §§ 1-14, 16, 19, 24; Dec. Dig. §§ 1-8, 24, 27-31; 22 Cyc. 109-156; 16 A. & E. Enc. L. (2ed.) 212, 213, 217.

61. Allotted Indians are citizens. United States v. Sutton, 165 F 253.

62. United States v. Sutton, 165 F 253.

63. Frazee v. Piper, 51 Wash. 278, 98 P 760. Indian patentee of public land held in trust for him by the United States for period of 25 years, being entitled to possession, could maintain ejectment **in state court** without joining the United States. Id.

64. United States v. Hall, 171 F 214.

65, 66, 67. United States v. Allen, 171 F 907.

68. United States occupies no such relationship of trust or guardianship toward them as entitled it in its own name to bring suit to cancel conveyance of allotted lands made by them. United States v. Allen, 171 F 907.

69. Hatch v. Luckman, 64 Misc. 508, 118 NYS 689. They are not citizens of the state. Seneca Nation of Indians v. Appleby, 196 N. Y. 318, 89 NE 835, rvg. 127 App. Div. 770, 112 NYS 177.

70. Hatch v. Luckman, 64 Misc. 508, 118 NYS 689.

71. Seneca Nation of Indians v. Appleby, 196 N. Y. 318, 89 NE 835, rvg. 127 App. Div. 770, 112 NYS 177.

cover the property of the tribe,[72] but it is held, on the other hand, that such nation, being a corporation, may sue to restrain a person from usurping the office of president of the nation.[73] The Peacemakers' Court of the Tonawanda reservation has only a limited jurisdiction.[74]

§ 2. *Federal and state government of Indians and their habitat.*[75]—See 11 C. L. 1898—Land allotted in severalty to Indians, coupled with citizenship of the allottee, is no longer Indian country,[76] and therefore the state has jurisdiction thereof and the police power of the United States is excluded therefrom[77] to the extent that it can enforce only such regulations as it is entitled to invoke for the protection of its own property.[78] The laws of the state of Wisconsin for the peace and good order of the people within its boundaries extend over Indian reservations,[79] and apply to infractions of such laws whether by persons of Indian blood or others.[80]

§ 3. *Tribal government subject to federal dominion.*[81]—See 11 C. L. 1899—There being no law, rule, or regulation defining what conduct of Indians shall be reprehensible and subject them to correction, it does not rest in executive discretion to administer corrective punishment,[82] and the fact that they are but wards of the government does not alter the case.[83] While congress by its legislation may disregard treaties, the executive branch of the government may not do so.[84] The Creek Nation is exempt from civil suit to compel performance of its contracts or to recover damages for their violation,[85] and therefore a mere contract[86] cannot be made the basis such nation's treasury and turn them over to the court to be applied in discharge

72. Seneca Nation of Indians v. Appleby, 196 N. Y. 318, 89 NE 835, rvg. 127 App. Div. 770, 112 NYS 177. Indian Law (Laws 1892, p. 1588, c. 679), § 55, as amended by Laws 1893, p. 423, c. 229, § 1, is to enable the Seneca Nation of Indians to protect the occupancy and possession of its lands and to recover indemnity from persons who violate that right, and does not, where they enjoy the possession and right to occupy the land as long as the tribe exists, give them the right to sue to determine claim based on right of pre-emption under grants of the state of Massachusetts. Id.

73. Seneca Nation may maintain injunction to restrain one from usurping office of president of the nation, though § 74 of the Indian Law provides for the appointment of an attorney for such nation who shall, with the consent of the council, prosecute such actions as he may deem proper, etc. Seneca Nation of Indians v. Jimeson, 62 Misc. 91, 114 NYS 401.

74. Peacemakers' Court of the Tonawanda reservation has no equity powers, and its jurisdiction is confined to cases in which the money judgment which can be awarded does not exceed $100, and therefore it has no jurisdiction of an action relating to the title to lands of a decedent. Hatch v. Luckman, 64 Misc. 508, 118 NYS 689.

75. Search Note: See Indians, Cent. Dig. §§ 5-14, 56-62; Dec. Dig. §§ 3, 4, 6-8, 32-35, 37, 39; 16 A. & E. Enc. L. (2ed.) 221.

76. United States v. Sutton, 165 F 253.

77. United States v. Sutton, 165 F 253. Treaty with Yakima Indians that annuities of Indians bringing liquor into the reservation may be withheld did not have effect of reserving to the United States the police power over lands allotted in severalty to members of such tribe. Id.

78. Mere fact that title to allotted lands during the period for which they are held in trust being in the United States, it does not follow that it has power to exclude liquor from such lands. United States v. Sutton, 165 F 253.

79. Deragon v. Sero, 137 Wis. 276, 118 NW 839.

80. Deragon v. Sero, 137 Wis. 276, 118 NW 839. Indian policeman committing an assault while not in the lawful execution of a rule of the federal government was amenable to the laws of the state. Id.

81. Search Note: See Indians, Cent. Dig. §§ 2-4; Dec. Dig. § 2; 16 A. & Enc. L. (2ed.) 213.

82. Rev. St. U. S. § 2149, authorizing the commissioner of Indian affairs to remove troublesome persons from a reservation, does not imply authority to detain Indians in confinement after such removal. Ex parte Bi-a-lil-le [Ariz.] 100 P 450.

83. Ex parte Bi-a-lil-le [Ariz.] 100 P 450.

84. Ex parte Bi-a-lil-le [Ariz.] 100 P 450. Though comprehensive authority is conferred upon the president by Rev. St. U. S. §§ 463, 465 (U. S. Comp. St. 1901, pp. 262-264), to control the conduct of Indian affairs by his regulations, there not being a general rule promulgated applicable to the case, and the tribe having a treaty with the United States that bad Indians should not be punished except pursuant to law, confining Indians at hard labor without trial does not rest in executive discretion. Id.

85. Adams v. Murphy [C. C. A.] 165 F 304, rvg. Porter v. Murphy, 7 Ind. T. 395, 104 SW 658. Curtis Act of June 28, 1898, c. 517, § 2, 30 Stat. 495, providing that when in any civil suit pending in any district in the Indian Territory it should appear that the property of any tribe was affected by the issues being heard such tribe should be made a party, did not have the effect of

of a suit in equity against the principal chief to compel him to take funds from thereof.[87] Congress may provide that the professional services of an attorney shall be compensated by the tribe or nation for whom the service was rendered.[88] The political sovereignty of the state of New York attaches to the whole Tonawanda reservation,[89] and, hence the Tonawanda Indians have no sovereignty of their own superior to that of the state by reason of their peculiar customs or tribal existence from immemorial times.[90] Tribal relations in the case of the Indians on the Tonawanda reservation should be determined by the rule of the common law, by which the lineage of the child follows that of the father,[91] as the reason for the recognition and enforcement of the old custom by which a child was deemed to take its clan and tribal relation from the mother no longer exists.[92]

§ 4. *Indian lands and properties.*[93]—See 11 C. L. 1899.—Originally the test of the right of individual Indians to share in tribal lands and other tribal property was existing membership in the tribe,[94] but this rule has been broadened by statute [95] so as to place individual Indians who have abandoned tribal relations, once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing in respect of this right as though they had maintained their tribal relations.[96] All exclusive rights of the Puyallup Indians as original occupiers of land in the Oregon country were terminated by the "Oregon Donation Law," [97] and were also relinquished by the treaty of 1854.[98] The agreement,[99] whereby a portion of the Sioux Reservation was re-ceded to the United States, is governed by the principle applicable to treaties in general.[1] The date of the proclamation of the president, making public announcement of the ratification of the Act of June 30 by the Creek National Council, was the date when the provision thereof became binding upon the United States, the Creek Nation, and all persons affected thereby.[2] By act

abolishing exemption of the tribe from civil suit. Adams v. Murphy [C. C. A.] 165 F 304.

86. Agreement between principal chief of Creek Nation and attorney to represent the nation entered into pursuant to act of such nation held to constitute contract of employment and not to make such attorney an officer of the nation. Adams v. Murphy [C. C. A.] 165 F 304, rvg. Porter v. Murphy, 7 Ind. T. 395, 104 SW 658.

87. Adams v. Murphy [C. C. A.] 165 F 304, rvg. Porter v. Murphy, 7 Ind. T. 395, 104 SW 658.

88. Under Act March 3, 1903 (32 Stat. p. 1010), contract between Indian tribe and attorney being ultra vires, it not having been sanctioned by the secretary of the interior, such attorney's right of recovery was restricted to the jurisdictional Act June 21, 1906, 34 Stat. 366. Bailey v. U. S., 43 Ct. Cl. 353. Intent of jurisdictional act held to be that the attorneys should be compensated in quantum meruit irrespective of express agreements, therefore not controlled by prior statute (Rev. St. § 2103) requiring contract with Indians to be executed in a certain way. Butler v. U. S., 43 Ct. Cl. 497. Where Indian tribe contracted with two attorneys to prosecute a claim, the liability of the Indians would not be increased because such attorneys brought in other attorneys. Id. Attorneys not employed by Indians will be awarded nothing out of the fund, their services not being material. Id.

89. Hatch v. Luckman, 64 Misc. 508, 118 NYS 689. See post, § 4, as to title of such reservation.

90, 91, 92. Hatch v. Luckman, 64 Misc. 508, 118 NYS 689.

93. Search Note: See notes in 5 C. L. 1788; 8 Id. 183.

See, also, Indians, Cent. Dig. §§ 15, 25-56; Dec. Dig. §§ 9-23; 16 A. & E. Enc. L. (2ed.) 229.

94. Oakes v. U. S. [C. C. A.] 172 F 305.

95. Act March 3, 1875, c. 131, § 15, 18 Stat. 420 (U. S. Comp. St. 1901, p. 1419), and Act Feb. 8, 1887, c. 119, § 6, 24 Stat. 390, and other acts. Oakes v. U. S. [C. C. A.] 172 F 305. Act Jan. 14, 1889, c. 24, 25 Stat. 642, relating to the Chippewa reservations in Minnesota and to the allotments in severalty of the remainder, does not expressly or by necessary implication displace the saving provisions of the acts of 1875 and 1877, above named. Id.

96. Oakes v. U. S. [C. C. A.] 172 F 305.

97. Act Sept. 27, 1950, c. 76, 9 Stat. 496. United States v. Ashton, 170 F 509.

98. United States v. Ashton, 170 F 509.

99. Agreement became binding Feb. 28, 1877 (19 Stat. 254, 257). Beam v. U. S., 43 Ct. Cl. 61.

1. Beam v. U. S., 43 Ct. Cl. 61. Sioux Indians retained the right of exclusive occupation until the acceptance of the agreement, Feb. 28, 1877. Id.

2. Proclamation of the President, Aug. 8, 1902, fixed the date on which Act June 30, 1902, 32 Stat. 500, c. 1323, commonly known

of congress the secretary of the interior is authorized to bring suit in the name of the United States for the use of any of the Five Civilized Tribes, either before or after the dissolution of the tribal government, for the collection of any moneys or recovery of any lands claimed by any of such tribes,[3] but the United States has no such title to lands allotted to such tribes as will support an action in its own name in respect to such lands.[4] Nor has it such right by virtue of any trust or guardianship toward them.[5] It is held, however, that the United States has such supervision over the Eastern band of Cherokees as will authorize it to maintain a suit for the protection of such lands.[6] Lands within an Indian reservation are not subject to the general land laws.[7] The private sale of the excess lands of the Umatilla Indian

as "Creek Supplemental Agreement," became binding. Baker v. Hammett [Okl.] 100 P 1114. "Approve" and "ratify" as used in the above act are interchangeable. Id.

3. Under Act April 26, 1906, c. 1876, § 18, 34 Stat. 144, the United States could bring suit in its own name for the use of the Creek Nation to cancel certain patents or deeds to certain town lots in several towns in the Creek Nation, on the ground of fraud in procuring the same. United States v. Rea-Read Mill & Elevator Co., 171 F 501. Under such act the secretary may employ private counsel to conduct such suits and the defendant cannot object. Id.

4, 5. United States v. Allen, 171 F 907.

6. Eastern Band of Cherokee Indians. United States v. Mason Lumber Co., 172 F 714.

7. Indian lands in New York within a reservation are not subject to the state laws respecting real estate so long as the Indian title is not extinguished and the Indians maintain their tribal relations or remain under the protection and control of the state. Terrance v. Crowley, 62 Misc. 138, 116 NYS 417. Lands of the St. Regis being unpartitioned and in a reservation still belong to the state of New York. Id.

NOTE. Location of mining claims on Indian reservations: The mineral laws do not subject Indian lands to exploration or entry for the purpose of acquiring mining claims (In re Acme Cement & Plaster Co., 31 Land Dec. 125), nor to prevent the president from withdrawing public lands from entry for the purpose of establishing a reservation ([U. S. Rev. St. § 2319 has no such effect] Gibson v. Anderson, 65 C. C. A. 277, 131 F 39). The effect of a treaty setting apart lands for an Indian reservation is to withdraw the same from mineral entry (Kendall v. San Juan Silver Min. Co., 9 Colo. 349, 12 P 198, afd. 144 U. S. 658, 36 Law. Ed. 583), and no rights are acquired by locating thereon (Caledonia Gold Min. Co. v. Noonan, 3 Dak. 189, 14 NW 426; Uhlig v. Garrison, 2 Dak. 71, 2 NW 253; French v. Lancaster, 2 Dak. 346, 47 NW 395; Golden Terra Min. Co. v. Smith, 2 Dak. 377, 11 NW 98; Kendall v. San Juan Silver Min. Co., supra) which can avail against a subsequent locator after the land has been opened for settlement (Kendall v. San Juan Silver Min. Co., supra). However, one in actual possession of a mining claim, properly marked and improved, within an Indian reservation at the time of its relinquishment as such, may hold the claim by making proper record, dating his rights from that day (Noonan v. Caledonia Min. Co., 121 U. S. 393, 30 Law. Ed. 1061, afg. 3 Dak. 189, 14 NW 126; Kendall v. San Juan Silver Min. Co., supra), against another attempting to assert a previous adverse claim (Golden Terra Min. Co. v. Smith, 2 Dak. 374, 11 NW 97), and evidence of discovery and improvement previous to the opening of the reservation is not prejudicial as against such adverse claimant (Golden Terra Min. Co. v. Smith, 2 Dak. 377, 11 NW 98), nor is the admission of immaterial evidence with regard to matters previous to the opening ground for reversal where the case was tried by the court and the findings distinctly discriminated between acts done before and after that date (Caledonia Gold Min. Co. v. Noonan, 3 Dak. 189, 14 NW 426), but otherwise where the case is tried by jury (French v. Lancaster, 2 Dak. 276, 9 NW 716, supra). One entering a mining claim previous to the opening of a reservation has been held to have sufficient right thereto to make a grant of land thereon for highway purposes binding upon his grantees after the land was opened for settlement and patent issued. Deadwood v. Whittaker, 12 S. D. 515, 81 NW 908. Acts of congress restoring Indian lands to the public domain, subject to private entry after a certain date or when declared open by proclamation, confer no right to locate mineral claims previous to the formal opening. McFadden v. Mountain View Mining & Milling Co., 38 C. C. A. 354, 97 F 670, reversed on other grounds 180 U. S. 533, 45 Law. Ed. 656; Bay v. Oklahoma So. Gas, Oil & Min. Co., 13 Okl. 425, 73 P 936; Gibson v. Anderson, supra. The right to locate mining claims in Indian reservations has been granted in certain instances (Oklahoma ceded lands, Act June 6, 1900. In re Acme Cement & Plaster Co., 31 Land Dec. 125. Colville res. Washington, Act July 1, 1898. United States v. Four Bottles Sour Mash Whiskey, 90 F 720), but subject to the principles applicable to the administration of public lands generally (United States v. Four Bottles Sour Whiskey, supra; In re Mining Claim, 31 Land Dec. 154; In re Acme Cement & Plaster Co., supra), and subject to exception in the case of lands reserved for townsite or school purposes (In re School Sections, 32 Land Dec. 95) unless otherwise provided (In re School Sections, supra). Where upon opening of a reservation the Indians retain the right to take allotments of agricultural land, lands valuable for minerals are not subject to such selection (Collins v. Bubb, 73 F 735), and where whites have been granted the right to enter mineral claims upon a reservation, the

reservation was subject to the same terms and conditions as were imposed by a former act providing for the public sale thereof.[8] In a suit on the behalf of Indians to enjoin the issue of patents to land ceded to the United States by treaty with the Indians, such treaty cannot, in the absence of any claim in the pleadings to such effect, be attacked as irregularly or fraudulently procured,[9] nor will the question as to whether such treaty was abrogated by a subsequent treaty be determined where a state which has acquired title to a part of the ceded lands is not a party to the suit.[10]

A tribe of Indians who are still living in tribal relationship and whose property ownership is communal may be the beneficiary of a trust.[11]

Nature of title. See 11 C. L. 1900—The aboriginal inhabitants of this country were not seised of titles to real estate,[12] but they have the right to occupy the country inhabited by them to the exclusion of the white people, until their rights shall have been relinquished by them or terminated by laws enacted by congress.[13] The old Indian title and right of possession of the Tonawanda Indians to their reservation having been extinguished, they now hold title by virtue of deeds of conveyance.[14] The grant to the Choctaw Nation of a tract of land in fee simple, to them and their descendants, to inure to them while they should exist as a nation and live on it, did not create a trust in favor of the then existing members of the tribe and their descendants.[15] A member of the Choctaw tribe of Indians holding more land in his possession than allowed by law has nothing in such land which he could convey to another member of the same tribe.[16] Statutes have been enacted extending the privileges of the homestead laws to Indians who have abandoned their tribal relations, subject, however, to restrictions on alienation within a specified period,[17] and an attempted sale within such period is void.[18] Where a patent was issued to a Puyallup Indian allottee as head of the family, the entire interest vested in him, though the other members of the family were named in the patent.[19] The executive order of President Pierce in 1857, designating the tract of land on Commencement Bay to be held by the Puyallup Indians as a reservation, did not grant any title to shore

claims so entered must be shown to be valuable for that purpose (Durant v. Corbin, 94 F 382).—Adapted from 7 L. R. A. (N. S.) 787.

8. Private sale authorized by Act Cong. July 1, 1902 (32 Stat. 730, c. 1380), subject to same terms and conditions as public sale authorized by Act Cong. March 3, 1885 (23 Stat. 340, c. 319). United States v. Raley, 178 F 159.

9. Beaulieu v. Garfield, 32 App. D. C. 398.

10. Whether treaty of Feb. 22, 1855, between United States and Chippewas, was abrogated by treaty of March 11, 1863, would not be determined where state of Minnesota was not a party to the suit. Beaulieu v. Garfield, 32 App. D. C. 398.

11. Under rule recognizing trusts in favor of voluntary, unincorporated associations. Ruddick v. Albertson, 154 Cal. 640, 98 P 1045.

12, 13. United States v. Ashton, 170 F 509.

14. By treaty with the United States (7 Stat. 550), the Indians released certain lands which included the Tonawanda reservation. In 1857 the Tonawanda Indians purchased a portion of the reservation. Hatch v. Luckman, 64 Misc. 508, 118 NYS 689.

15. Letters patent of March 23, 1842, reciting article 2 of the Choctaw treaty of Sept. 27, 1830 (7 Stat. 333), did not create such a trust. Fleming v. McCurtain, 30 S. Ct. 16.

16. Combs v. Miller [Okl.] 103 P 590. Note given for possession of land so illegally held is void for want of consideration. Id.

17. Where Indian entered upon public land under Act Cong. March 3, 1875, c. 131, 18 Stat. 402, 3 Fed. St. Ann. p. 490, prohibiting alienation until five years after patent is issued, and Act Cong. July 4, 1884, c. 180, § 1, 23 Stat. 96 (U. S. Comp. St. 1901, p. 1420), 3 Fed. St. Ann. p. 491, was enacted before he was entitled to make final proof, the patent was issuable under the latter act which extended the prohibition of alienation to 25 years. Frazee v. Piper, 51 Wash. 278, 98 P 760.

18. Attempted sale within 25-year period held void. Frazee v. Piper, 51 Wash. 278, 98 P 760.

19. Meeker v. Kaelin, 173 F 216. Such construction of Puyallups Indian patents is regarded as a rule of property. Id. Ruling of interior department and Indian bureau that patents issued to Puyallup Indian allottees granted the lands to all persons named therein, minors as well as adults, as tenants in common, was erroneous and not binding on the courts. Id.

lands,[20] nor did the provision of the constitution of Washington disclaiming all right and title to all lands owned or held by any Indian or Indian tribes operate as a grant or conveyance of title of such shore land to the Puyallup Indians,[21] as such disclaimer [22] applied only to lands within the boundaries of Indian reservations to which the primary right of occupancy of the Indians had not been extinguished.[23]

Allotments. See 11 C. L. 1901—The jurisdiction of the interior department over the allotment of Indian lands,[24] and the segregation of townsites and the laying out and platting the same, and determining to whom the lots should be scheduled,[25] is exclusive, subject to the right, after the title has been vested out of the Indian tribe, to have the same reviewed in a proper action by the courts. The general allotment act vests a continuing power in the president which is not exhausted by the making of one order,[26] and therefore he may provide from time to time for allotments in favor of those born upon a reservation subsequent to a prior order dealing with the subject.[27] Those claiming original allotments were not obliged to defer the choosing of their allotments until the time fixed for making allotments under the Steenerson act,[28] but where an application was made for an additional allotment under such act, before the preliminary work necessary for making the allotment had been completed, it was ineffectual to create any interest in the land selected or any right thereto.[29] Members of the Walla Walla tribe of Indians were entitled to an allotment of land on the Umatilla reservation though at the time of the passage of the act providing for the allotment they were not on the reservation or within the country theretofore ceded to the United States.[30] The children of a marriage between a white man and an Indian woman who is recognized by her tribe as one of its members are entitled to allotments in the distribution of the tribal property.[31] Such a woman is the head of a family within the meaning of an act which provides for an allotment to each head of a family,[32] and therefore the children of such marriage are entitled to allotments of the land selected and improved by her,[33] and, such selection having been made, the children acquire an estate of inheritance though

20. Power to grant shore lands being in congress alone. United States v. Ashton, 170 F 509.

21. Const. Wash. art. 26. United States v. Ashton, 170 F 509.

22. Const. Wash. art. 26, provides that the people disclaim all title to all lands lying within the limits of the state owned or held by any Indian or Indian tribes. Corrigan v. Brown, 169 F 477.

23. Corrigan v. Brown, 169 F 477. Where prior to the admission of Washington as a state the Squaxon Indians under a treaty used and occupied Squaxon Island including the beach and shore as a reservation, the aforesaid provision of the constitution of Washington divested the state of all right to convey any of the shore lands surrounding such island. United States v. O'Brien, 170 F 508. Where the Swinomish Indian reservation as established by treaty and the president's order included all land above low-water mark, under the disclaimer in the constitution of Washington, said state had no right to the shore land. Corrigan v. Brown, 169 F 477.

24, 25. Brennan v. Shanks [Okl.] 103 P 705.

26. Under act of 1887 (Act Feb. 8, 1887, c. 119, 24 Stat. 338), president had power to make allotments from time to time. United States v. Fairbanks [C. C. A.] 171 F 337.

27. Indian children born subsequent to the date when act of 1887 (Act Feb. 8, 1887, c. 119, 24 Stat. 338), or Nelson act (Act Jan. 14, 1889, c. 24, 25 Stat. 642), was passed, are not excluded from right to allotment. United States v. Fairbanks [C. C. A.] 171 F 337.

28. United States v. Fairbanks [C. C. A.] 171 F 337. Steenerson Act (Act April 28, 1904, c. 1786, 33 Stat. 539) abrogated limitation as to timber land, and as soon as it took effect any Indian who had not received his original allotment was entitled to select the same. Id.

29. Woodbury v. U. S. [C. C. A.] 170 F 302. Party having premature application having died before notice was given that applications might be filed, he had no vested right in the land selected which could pass to his heirs or legal representatives. Id.

30. Allotment under Act March 3, 1885, c. 319, 23 Stat. 340, was not dependent on residence on the reservation. Bonifer v. Smith [C. C. A.] 166 F 846.

31. Act June 7, 1897, c. 3, 30 Stat. 62, relating to rights of children of white man and an Indian woman in tribal property, does not embrace the children of a mother who was living at the time of its passage and was not then recognized by the tribe as one of its members. Oakes v. U. S. [C. C. A.] 172 F 305.

32. Head of family under Act March 3, 1885, c. 319, 23 Stat. 340. Bonifer v. Smith [C. C. A.] 166 F 846.

33. Bonifer v. Smith [C. C. A.] 166 F 846.

their right to such allotments is not established until after their death because of an erroneous award of the land to others by the interior department.[34] An allotment of land on the St. Regis reservation pursuant to Indian law is not a partition within that law.[35] Where there are conflicting rights between different applicants for allotment of the same land, the court has jurisdiction to determine their respective rights.[36]

The government holds in trust the legal title to lands allotted to Indians until after patent,[37] and a conveyance of lands so held in trust is absolutely void,[38] but the purchaser may recover taxes paid by him,[39] and may also recover for legal services which constituted part of the consideration, though barred by limitation.[40] And so also, where a sale of an allotment is void, the grantee may, if he has a contract with the grantor so providing, recover the purchase price and amount expended for improvements less a reasonable allowance for rent.[41] Allotments in severalty are generally inalienable for a period of twenty-five years,[42] but as to some cases it is five years.[43] Under the general policy of the government with reference to Indian lands, conveyances made by heirs of deceased Indians to whom a trust or other patent containing restrictions upon alienation has been issued must be approved by the secretary of the interior,[44] and, prior to April 26, 1906, such policy extended to the Five Civilized Tribes,[45] but such restriction was removed as to such heirs by the Act of April 26, 1906.[46] The Act of 1904 removed all restrictions as to aliena-

34. Equity will dispose of the rights of the parties as if the allotments had been allowed when the selections were made. Bonifer v. Smith [C. C. A.] 166 F 846.

35. Allotment pursuant to Indian Law (1 Heydecker's Gen. Laws, p. 279, c. 5, § 102) is not a partition within § 7. Terrance v. Crowley, 62 Misc. 138, 116 NYS 417. Individuals of St. Regis tribe, therefore, do not own title in fee simple, and the only interest in lands alloted to them is the right of occupancy and use, and probably the ownership of improvements. Id.

36. In an action brought by one against the United States to determine the right to an allotment brought under Act Feb. 6, 1901, c. 217, 31 Stat. 760, the court has jurisdiction not only to determine whether the plaintiff is entitled to any allotment but also to determine rights between different applicants for allotment of the same land. United States v. Fairbanks [C. C. A.] 171 F 337.

37. Agreement of 1883 between United States and Chief Moses and other Indians of the Columbia and Colville reservations, ratified by Act Cong. July 4, 1884, c. 180, 23 Stat. 79, whereby lands were allotted in severalty, gave Indians mere right to use and possession. Starr v. Long Jim, 52 Wash. 138, 100 P 194.

38. Conveyance of such land before issuance of patent absolutely void, and a patent subsequently acquired by the Indian making such conveyance did not inure to the benefit of the purchaser. Starr v. Long Jim, 52 Wash. 138, 100 P 194.

39. May recover taxes levied after the land became legally subject to taxation. Starr v. Long Jim, 52 Wash. 138, 100 P 194.

40. Starr v. Long Jim, 52 Wash. 138, 100 P 194.

41. Where allottee conveyed land inalienable under Act Cong. March 1, 1901, 31 Stat. 863, c. 676, § 7, with contract to repay price and amount expended for improvements less reasonable rental, if he should become dissatisfied, he having exercised option, the grantee was entitled to recover the price and for improvements. Tate v. Gaines [Okl.] 105 P 193.

42. In the provisions of § 5 of the act of Congress approved Feb. 8, 1887 (24 Stat. 389, c. 119; 1 Supp. Rev. St. p. 535; 3 Fed. St. Ann. p. 494), a white person is not excepted from the term "heirs" of such allottee, and therefore a conveyance of an allotment before the expiration of the 25 year period made by an heir of a white person who was a member of an Indian tribe was void. Reed v. Clinton [Okl.] 101 P 1055.

43. Deed of allotted land executed by a citizen of the Creek Nation on Aug. 8, 1907, conveyed good title, as at that time five-year limitation on alienation had expired. Baker v. Hammett [Okl.] 100 P 1114. See ante, this section, Indian Lands and Properties, as to the time "Creek Supplemental Agreement" became effective.

44. Act March 2, 1889, c. 888, § 7, 32 Stat. 275. United States v. Leslie, 167 F 670. Such statute requires approval by secretary of interior even when alienation is made by an adult. Id.

45. A conveyance made by an allottee of the Creek Tribe of Indians before the expiration of five years from the date of approval of the supplemental agreement with such tribe was void, unless the secretary of the interior approves of the same. Alfrey v. Colbert [C. C. A.] 168 F 231. Held that it was the intention of congress that no conveyance forbidden by any of the terms of the 16th section of Act June 30, 1902, c. 1323, 32 Stat. 500, should be susceptible of ratification or be made good by estoppel, therefore conveyance by allottee not of age though not of Indian blood was absolutely void and not susceptible of ratification. Id.

46. Act Apr. 26, 1906, c. 1876, § 22, 34 Stat.

tion by adults of such tribes, except as to homesteads,[47] but such act did not remove the restriction as to the alienation of the lands of minors.[48] Where Indian land was subject to the provision of a statute that it should not be transferred until after full title had been acquired by the allottee and should not be liable for prior contract obligations,[49] a contract to convey entered into by an Indian while such statute was in force did not fasten upon the property any such vested rights as would prevent congress from making its provisions more effectual or from imposing other restrictions.[50] A deed of a Creek Indian not of Indian blood, to a portion of his allotment made, executed, and delivered in January, 1905, prior to the date on which the deed of the principal chief was executed and delivered to him, was valid.[51] Lands allotted in the name of a deceased member of the Choctaw tribe of Indians are alienable by his heirs after lawful selection.[52] Where the law gives an allottee the right to alienate his allotment, it, by implication, gives him power to incumber the same.[53] Under the Indian Laws of New York, a deed possessing all the formal requisites sufficient to convey title between citizens is sufficient to pass title to an allotment from one Indian to another.[54]

Descent and testamentary disposition. See 11 C. L. 1902—Lands within a reservation, belonging to Indians who are members of an organized tribe, descend according to the laws and customs of the tribe, and not according to the laws of the state in which the lands lie,[55] but lands which have been allotted in severalty to Indians, who have acquired title thereof in fee simple, descend according to the laws of the state.[56] A child of a male Tonawanda Indian is entitled to inherit lands as his heir though the child's mother is a member of another tribe,[57] and an illegitimate child of a male Indian allottee is entitled, under the federal statute, to inherit and share in the real

145. Shulthis v. McDougal [C. C. A.] 170 F 529.

What are inherited lands: Lands to which heirs of a child entitled to enrollment under Act June 30, 1902, c. 1323 (32 Stat. 501), are "inherited" within meaning of Act April 26, 1906, c. 1876, § 22. Shulthis v. McDougal [C. C. A.] 170 F 529.

47. Act April 21, 1904, 33 Stat. 204, c. 1402. Blakemore v. Johnson [Okl.] 103 P 554.

48. Act April 21, 1904, 33 Stat. 204, c. 1402, left the provisions of section 16, Act June, 1902, 32 Stat. 503, c. 1323, relative to minors, in full force, therefore deed of conveyance, executed by a minor Creek freedman on April 25, 1904, whereby she attempted to convey her surplus allotment, was absolutely void. Blakemore v. Johnson [Okl.] 103 P 554.

49. Act June 28, 1898, c. 517, 30 Stat. 507. Harris v. Hardridge [C. C. A.] 166 F 109.

50. Act Cong. June 30, 1902, c. 1323, 32 Stat. 503, applied to such a contract and made it absolutely void and incapable of ratification. Harris v. Hardridge [C. C. A.] 166 F 109. Subsequent **removal of restrictions** as existed upon the sale of allotted lands by those not of Indian blood did not give such a contract, made by one not of Indian blood, vitality so that it might be enforced. Id.

51. Subsequent acquired legal title passed immediately on receipt to such allottee's grantee. McWilliams Inv. Co. v. Livingston [Okl.] 98 P 914.

52. Lands allotted, homestead and surplus, of deceased member of Choctaw Tribe of Indians, are under the "supplemental treaty" July 1, 1902, 32 Stat. 641, c. 1362, § 22, alienable by his heirs after selection, prior to lapse of one, three, or five years, and prior to issuance of certificate or patent. Hancock v. Mutual Trust Co. [Okl.] 103 P 566.

53. Mortgage by allottee of her lands, exclusive of her homestead, in the Cherokee Nation, executed before the expiration of five years from date of ratification of Act Cong. July 1, 1902, c. 1375, § 14, 32 Stat. 717, but subsequent to Act Cong. April 21, 1904, c. 1402, § 1, 33 Stat. 204, is valid. Landrum v. Graham [Okl.] 98 P 432.

54. Under Indian Laws (Laws 1892, c. 679), §§ 9-90, a native Indian is authorized "to take, hold and convey real property the same as a citizen" (section 2). Hatch v. Luckman, 64 Misc. 508, 118 NYS 689.

55. Terrance v. Crowley, 62 Misc. 138, 116 NYS 417. So long as the tribal relations of the Puyallup Indians were maintained, the rules of descent would be governed by their customs, if any such customs existed, subject, however, to treaty provisions. Meeker v. Kaelin, 173 F 216. State law governing the descent of community property has no application to lands of an Indian reservation patented to Puyallup Indian allottee who was the head of a family. Id. Where wife of a Puyallup Indian allottee died before approval of allotment list by the commissioner on Indian affairs, the secretary of the interior, and the president, nothing passed to her or her heirs under the allotment list or the patent to her husband. Id.

56. Terrance v. Crowley, 62 Misc. 138, 116 NYS 417.

57. Common law applies and not the old Indian custom. Hatch v. Luckman, 64 Misc. 508, 118 NYS 689.

estate of his father the same as though he were legitimate.[58] The law of descent of the Creek Nation [59] has been superseded by Mansfield's Digest,[60] and, where a Creek citizen dies before receiving his allotment, it descends [61] to his heirs as designated by such statute.[62] The statute relative to the descent of public lands where the patentee dies before the date of the patent does not apply to lands in an Indian reservation.[63] Jurisdiction to determine a question of heirship with reference to an allotment may be conferred upon a state court by the consent of the parties,[64] but the federal government as trustee may refuse to recognize the judgment of the state court as conclusive or even prima facie correct.[65]

The words "alienable" and "inalienable" used to restrict the disposition of lands in the Supplemental Agreement with the Chickasaws and Choctaws include disposition by will.[66] The equity of an enrolled member of the Chickasaw nation of Indians who died testate in 1903 before receiving an allotment was not devisable.[67] In New York the surrogate's court has authority to grant letters of administration on the estate of a Tonawanda Indian and not the peacemaker's court of the Tonawanda reservation,[68] nor has the Tenth Day or Indian Dead Feast, a custom of the Tonawandas any sanction for its existence as an Indian probate court.[69]. A judgment of a probate court of the Chickasaws which had jurisdiction to probate a will is impervious to collateral attack,[70] and, furthermore on considerations of public policy, a judgment of such court rendered after the Atoka Agreement will not be disturbed.[71]

Leases.[See 11 C. L. 1903]—A lease is an "alienation of lands" within the meaning of a later statute removing restrictions upon the alienation thereof.[72, 73] The secretary

58. Act Cong. Feb. 28, 1891, 26 Stat. 794, c. 383, § 5. Smith v. Smith, 140 Wis. 599, 123 NW 146.

59. Land allotted to dead minor Creek freedman, who was living on the 1st day of April, 1899, and who died without issue, descended to his mother as his nearest relation, according to the law of descent and distribution of the Creek Nation. Irving v. Diamond [Okl.] 100 P 557.

60. On the death of a Creek Indian mother intestate, on September 26, 1902, leaving a husband, her real property under Mansf. Dig. §§ 2522-2545 (Ind. T. Ann. St. §§ 1820-1843) descended to her children to the exclusion of her husband. Irving v. Diamond [Okl.] 100 P 557.

61. Supplemental agreement entered into between the Commission to the Five Civilized Tribes and Commissioners of the Creek Nation, section 7 (Act June 30, 1902, c. 1323, 32 Stat. 501). Shulthis v. McDougal [C. C. A.] 170 F 529. Word "descend" as used in section 7 means that the land should pass to the same persons and in the same proportions as it would have passed if the person had died seised of it. Id. Though Arkansas statute did not exactly apply to situation, it would be applied by analogy and the lands of the child would be treated as an inheritance from his parents as members of the tribe. Id.

62. Heirs who take under such provision and what estate they shall take are determined by Mansf. Dig. Ark. c. 49. Shulthis v. McDougal [C. C. A.] 170 F 529. Where a child whose father was a member of the Creek Nation, but whose mother was not, and who was entitled to enrollment but died before receiving allotment, his father being the only parent through whom he derived his right succeeded to the entire estate of such child. Id.

63. Lands in Indian reservation held not "public lands" and that allotments and patents to such lands issued to Pullayup Indians were not patents issued in pursuance of a law of the United States within Rev. St. § 2448 (U. S. Comp. St. 1901, p. 1512), providing that where a patentee dies before date of patent the title shall vest in his heirs. Meeker v. Kaelin, 173 F 216.

64. Smith v. Smith, 140 Wis. 599, 123 NW 146.

65. Act Cong. Feb. 8, 1887, 24 Stat. 388, as amended by Act Cong. Feb. 28, 1891, 26 Stat. 794, c. 383. Smith v. Smith, 140 Wis. 599, 123 NW 146.

66. Act July 1, 1902, c. 1362, 32 Stat. 642, 643, §§ 12, 15, 16. Hayes v. Barringer [C. C. A.] 168 F 221.

67. Hayes v. Barringer [C. C. A.] 168 F 221. Title to the lands subsequently derived was not effected by the will. Id.

68. Hatch v. Luckman, 64 Misc. 508, 118 NYS 689.

69. Not sanctioned either by the constitution or legislation of the state of New York. Hatch v. Luckman, 64 Misc. 508, 118 NYS 689.

70. Wills probated prior to March 4, 1906. Hayes v. Barringer [C. C. A.] 168 F 221.

71. Important property rights having attached because of the jurisdiction exercised by such court after the Atoka agreement without being questioned and in view of the fact that such court as well as the territorial courts of that jurisdiction are at an end. Elliott v. Garvin [C. C. A.] 166 F 278.

72, 73. Is "alienation of lands" within Act April 21, 1904, 33 Stat. 204, c. 1402, which removes restrictions upon alienation of lands of allottees of either of Five Civilized Tribes of Indians who are not of Indian blood, except, etc. Eldred v. Okmulgee L. & T. Co. [Okl.] 98 P 929. Oil, gas, and mineral lease

of the interior may delegate the authority to approve leases of Indian lands.[74] The fact that a lease has not been approved does not obviate the necessity of recording it in order that it may prevail as against a subsequent purchaser.[75] The period for which Indian lands may be leased, and the validity of such a lease, depend upon the terms of the statute authorizing it.[76] Where it does not appear that at the time a lease was executed its terms were inequitable or the consideration inadequate, and it has been approved by the secretary of the interior, it is valid.[77] Freedom to lease their allotments, except their homesteads, without restriction has been given to adult allottees of the Five Civilized Tribes not of Indian blood.[78] Where the lease expressly provides the manner in which a sublease or assignment may be made, an assignment cannot be made except as provided.[79] Where leased land is segregated and set apart as coal land, the lessor does not forfeit his right to improvements thereon belonging to him by properly selecting his quota elsewhere.[80] White men who have obtained temporary possession of townsite lots or land in the Indian Territory from Indians by means of leases cannot make use of the possession so acquired to secure a fee-simple title to the exclusion of the Indian lessors.[81] A denial by the lessee of the right of the lessor in the Indian lands leased is such a termination of the lease as to entitle the lessor to sue for possession.[82]

Actions against intruders. See 11 C. L. 1908—The United States Indian agent of the Indian Territory is not authorized to evict, at the instance of an heir of a deceased allottee, persons in peaceable possession, under claim of right to a tract of land allotted by and to such decedent prior to his death.[83] Ejectment will not lie

is an "alienation" within meaning of the above act, and therefore did not require approval of secretary of interior. Sharp v. Lancaster [Okl.] 100 P 573.

74. Under Rev. St. § 439 (U. S. Comp. St. 1901, p. 249), secretary of the interior may delegate authority to assistant secretary to approve leases. Turner v. Seep, 167 F 646.

75. Under Mansf. Dig. Ark. c. 27, extended to Indian Territory by Act Feb. 19, 1903, c. 707, 32 Stat. 841, it was necessary to record lease, though not yet approved by secretary of the interior, in order to be effective against subsequent purchaser. Shulthis v. McDougal [C. C. A.] 170 F 529. Filing copy of oil lease at Indian agency not sufficient. Id.

76. Under Act June 30, 1902, c. 1323, § 17, 32 Stat. 504, Creek citizens may rent their allotments one year **for grazing purposes** and five years for agricultural purposes, but any lease violative of such statute is absolutely void and not susceptible of ratification. Held that lease which appeared to be for agricultural purposes was in fact one for grazing purposes and, being for two years, it was void and lessee was not estopped from denying its validity. Muskogee Land Co. v. Mullins [C. C. A.] 165 F 179. Under the provisions of section 17 of the Creek Supplemental Treaty (Act June 30, 1902, c. 1323, 32 Stat. 504), a Creek citizen has right to lease his allotment **for agricultural purposes** for period of five years. Williams v. Williams [Okl.] 98 P 909. Such lease contract for a period of five years is not rendered void by a lease contract executed one year subsequent to the execution of the first contract upon an independent consideration by the same citizen to the assignee of the first contract, leasing the same allotment for a period of one year beginning upon the expiration of the first contract, it not appearing that it was done to avoid provisions of the Creek Supplemental Treaty. Id. Lease for farm purposes for a term of three years, which was approved by Indian agent and the secretary of the interior, was valid lease. Gannon v. Worth [Neb.] 120 NW 906.

77. Oil lease obtained from Indian while in penitentiary, without knowledge on his part that valuable oil wells had been drilled near his property, held valid, it appearing that the secretary of the interior approved lease upon report of agents who visited and examined the land. Moore v. Sawyer, 167 F 826.

78. Act April 21, 1904, c. 1402, 33 Stat. 204. Moore v. Sawyer, 167 F 826.

79. Where oil lease provided that assignment could not be made except by written consent of lessor and secretary of the interior, attempted assignment without lessor's consent was void, though subsequent regulation of department contained no requirement of lessor's consent. Turner v. Seep, 167 F 646.

80. Is entitled to regain possession to remove such improvements. Fisk v. Arnold [C. C. A.] 166 F 744.

81. Whitney Lumber & Grain Co. v. Crabtree [C. C. A.] 166 F 738. Where defendants who acquired possession of leased Indian lands from lessees knew their vendors did not and could not have title until the right to purchase had been investigated and awarded by the duly constituted authorities and the tribal ownership extinguished, and this they knew had not been done, they did not have such color of title as to entitle them to invoke the betterment act, Mansf. Dig. §§ 2644, 2645 (Ind. T. Ann. St. 1899, §§ 1928, 1929). Id.

82. Fisk v. Arnold [C. C. A.] 166 F 744.

83. Section 19 of the Creek Supplemental

against an adverse claimant to a town lot in the Cherokee Nation while a contest between the same parties involving the title to such lot, before the townsite commission, remains undetermined.[84]

§ 5. *Rights and liabilities of others in Indian country dealing with Indians.*[85] See 8 C. L. 1788

§ 6. *Crimes and offenses by and relating to Indians.*[86] See 11 C. L. 1903 The act prohibiting the introduction of intoxicating liquors into the Indian country being a police regulation, it is not applicable where the jurisdiction of the state courts is complete,[87] but some states prohibit the sale of liquors to Indians who are not wards of the United States.[88] The unauthorized cutting of timber on unallotted lands in an Indian reservation in a state is a crime of which the federal courts have jurisdiction.[89] The state court has no power to inflict the death penalty for the crime of rape committed within the limits of an Indian reservation by an Indian.[90] One convicted in federal court under an indictment, charging the murder of one Indian by another, cannot collaterally attack the decision of such court on the ground that it was without jurisdiction because the accused was a citizen of the state.[91]

§ 7. *Indian depredations.*[92] See 11 C. L. 1904 Under the Indian Depredation Act of March 3, 1891, the Sioux Indians were not liable as a tribe for depredations committed by individual Indians upon property of intruders in the Black Hills country in 1877, prior to the 28th of February.[93]

Treaty (Act June 30, 1902, 32 Stat. 504, c. 1323) does not give such authority. Indian Land & Trust Co. v. Fears [Okl.] 98 P 904.

84. Tynon v. Hall [Okl.] 98 P 895.

85. **Search Note:** See Indians, Cent. Dig. §§ 57-62; Dec. Dig. §§ 27, 32-35; 16 A. & E. Enc. L. (2ed.) 219, 236.

86. **Search Note:** See notes in 3 C. L. 1709; 21 L. R. A. 169.

See, also, Indians, Cent. Dig. §§ 22, 63-66; Dec. Dig. §§ 26, 36, 38; 16 A. & E. Enc. L. (2ed.) 223; 16 A. & E. Enc. P. & P. 341.

87. Act Jan. 30, 1897, c. 109, 29 Stat. 506, which makes it a criminal offense to introduce liquor into the Indian country, is not applicable to allotted lands held by Indians who are citizens. United States v. Sutton, 165 F 253. Not applicable where Indian reservation has been broken up and Indian allottees have become citizens of the state. United States v. Hall, 171 F 214.

88. Evidence held sufficient to show that person to whom sale was made was an Indian, not a ward of the United States. State v. Niblett [Nev.] 102 P 229. Indictment held to sufficiently allege that Indian to whom liquor was sold was within the state at time of said sale. Id.

89. Federal government has not relinquished its jurisdiction over such land in Wisconsin. United States v. Kempf, 171 F 1021.

90. Evidence should affirmatively show that the defendant is not an Indian before question of death penalty can be submitted to the jury. Vickers v. U. S., 1 Okl. Cr. R. 452, 98 P 467.

91. Writ of error being the proper procedure, habeas corpus would not lie. Toy Toy v. Hopkins, 212 U. S. 542, 53 Law. Ed. ——.

92. **Search Note:** See Indians, Cent. Dig. § 18; Dec. Dig. § 25; United States, Cent. Dig. § 90; Dec. Dig. § 106; 16 A. & E. Enc. L. (2ed.) 237.

93. Beam v. U. S., 43 Ct. Cl. 61.